MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

There are two ways to do this class. One way is for me to read the class notes to you and give you some color commentary. This is too boring for me. So we will do it the second way. I will assume that you will follow the reading guidance and study the materials independently, and I will conduct the class as a simulated client meeting without slides. You will act as legal advisors in a meeting with a CEO (played by me) navigating his first strategic deal. You will explain the merger review process to the client, identify potential concerns that a reviewing agency may investigate, and share any initial strategies for defending the transaction. Homework assignment #2 gives the background. The class will be very interactive, so be prepared!

Class 4 (September 7): The DOJ/FTC Merger Review Process (Unit 4)

On Thursday, we will turn to Unit 4 and inquiry risk by examining the DOJ/FTC merger review process under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). For reasons we will discuss, state and private merger antitrust challenges are rare, so almost all challenges result from DOJ and FTC merger reviews. The upshot is that, in most situations, only the DOJ and FTC present significant inquiry risk.

The HSR Act requires that the parties to sufficiently large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must:

(1) file a *notification report form* with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission before closing their transaction, and

(2) observe a statutory-prescribed postnotification *waiting period* before they can close their transaction (usually 30 calendar days for a preliminary review and multiple months for an in-depth review).

The HSR Act provides the institutional context in which the DOJ and FTC conduct the vast bulk of merger investigations. The class notes (slides 3-5) give a basic summary of the HSR Act. The class notes also provide a more detailed schematic of the DOJ/FTC merger review process under the HSR Act, which you should study very closely (slides 6-9). Next, read the FTC's explanation of the process (pp. 5-7). I could ask you to read the text of the HSR Act, but it is long, complicated, and tedious. For our purposes, the reading materials and the class notes will do just fine. But if you want to read the statute, I have included the HSR Act in the reading materials (pp. 8-14).

I think about the merger review process in three stages:

1. *Prefiling/filing*. Prefiling work includes the preliminary antitrust risk analysis for the client, the negotiation of the merger agreement with the other side in friendly deals or the preparation for a hostile takeover, and the prefiling preparation of the antitrust defense.

Because this work requires anticipating what will happen not only in the merger review process but also in possible litigation or settlement, we will postpone our discussion of the prefiling work until Class 8.

After the prefiling work is completed, it is time to make the merger control filing. First, it is necessary to ascertain whether the transaction is *reportable*, that is, whether the HSR Act and its implementing regulations require the parties to submit a merger control filing to the DOJ and FTC. This assessment involves two steps: (a) determining whether the transaction meets the statutory threshold size tests and so is *prima facie reportable*, and (b) determining whether an exemption applies. The rules here are quite involved, but I have summarized the most important ones in the class notes (slides 10-16). If a transaction is prima facie reportable and no exemption applies, the transaction is *reportable* if it crosses a notification threshold (slide 17). The thresholds in the HSR Act for prima facie reportability and the statutory exemptions are inflation-adjusted annually in the Federal Register. In 2024, the most important number is $119.5 million, which is the value of voting securities and assets of the acquired person that the acquiring person must *hold* as a result of the acquisition (the value of any existing holdings plus the value of the voting securities or assets to be acquired in the transaction in question) as the first prerequisite of reportability.[1]

If the transaction is reportable, then each party must make its own filing on a prescribed form. Technically, this is the Notification and Report Form, but everyone simply calls it the "HSR filing," "HSR report," or "HSR form." I have included the current form in the reading materials (pp. 17-28), which you will find surprisingly uninformative. You only need to skim it. I also have described the form in the class notes (slide 19), which is worth somewhat more attention.

In most cases, the most important parts of the form are the documents submitted in response to Items 4(c) and 4(d). You should pay careful attention to the note on these documents (pp. p. 29-33) and the class notes (slide 20). The class notes also have the current schedule of filing fees, payable by the acquiring party, as well as a new fee schedule that was enacted in 2022 (slide 21), as well as a graph on the number of filings the DOJ and FTC receive each year (slide 22).

> *Important*: On June 27, 2023, the FTC, with the concurrence of the DOJ, proposed major changes to the HSR form and its associated instructions, including new requirements for documents and information.[2] The public comment period for the proposed rules expired on August 28, 2023. The agencies now must respond to these comments and, if they so elect, publish a final rule. The agencies will likely promulgate a final rule with most, if not all, of the proposed changes before the end of the year. We will return to these proposed changes at the end of this memorandum.

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[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 89 Fed. Reg. 7708 (Feb. 5, 2024) (effective Mar. 6, 2023) (pp. 15-16). Be sure to note that the threshold applies to the value of the voting securities and assets the acquiring will hold as a result of the qacquisition, *not* the value of the voting securities and assets the acquisiting will acquire in the transaction. Under the holding threshold, an acquisition in principle could be reportable even if it involved the purchase of one share of voting stock or $1.00 of assets. Be sure you understand why.

[2] *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking (Premerger Notification), 88 Fed. Reg. 42178 (June 29, 2023) (to be codified at 16 C.F.R. Pts. 801-803).

In addition to filing the required HSR reports, the parties to a reportable transaction must observe a specified statutory waiting period before closing their transaction (slide 23). The *initial waiting period* is usually 30 calendar days (15 calendar days for all-cash tender offers) after all required HSR reports have been filed. In negotiated transactions, where the buyer will acquire stock of a subsidiary or assets directly from the seller, both the buyer and the seller must file their respective HSR reports before the waiting period begins to run. In open market transactions, where the buyer acquires the target's stock on the open market (including through a tender offer), the waiting period starts to run after the buyer has filed its HSR form. (This prevents the target in a hostile transaction from defeating the acquisition simply by not filing its HSR form.) The initial waiting period will be extended if the investigating agency issues a second request (discussed below). The investigating agency may grant early termination of a waiting period at any time, including during an extended second request period. A long-established policy was to grant early termination in the initial waiting period when neither the DOJ nor FTC indicated they wanted to review the transaction. Unfortunately, the Biden administration has ceased this practice. According to the FTC, the last early termination in the initial waiting period was granted on July 21, 2021.[3]

For HSR-reportable transactions, the HSR Act prohibits the acquiring firm from acquiring a *beneficial interest*—a critical but undefined term—in the acquiring firm until the required HSR reports have been filed and the applicable HSR waiting period has ended. The merging parties can violate this requirement in several ways:

(a) the parties can simply fail to file;

(b) the parties can invoke an inapplicable exemption (usually in the investment exemption) and not file when a filing was required;

(c) the parties file, but one of their filings is incomplete (usually because the party failed to include all of its 4(c) and 4(d) documents); or

(d) the parties make their proper filings, but during the waiting period, the acquiring firm exercises control or influence over the acquired firm in a manner that indicates that it has already "acquired" a beneficial interest in the target (often by influencing the target firm's bidding or contracting during the waiting period).

The first three types of violations are *failures to file*; the last type of violation is commonly called *gun-jumping*. In 2024, the HSR Act provides for civil penalties of up to $51,744 per day for every day of the violation, or about $18.9 million per year, as well as injunctive relief. The class notes cover HSR Act violations (slides 24-28). The *ValueAct*, *Flakeboard*, and *Nautilis* materials in the reading materials (pp. 35-82) provide three examples of HSR Act violations. Read the press releases to get a basic understanding of each case. If you do not have time to read the complaints in their entirety, try to read the introduction and fact sections. To date, only one action for an HSR Act violation has been litigated on the merits, and it was decided against the FTC on immunity grounds; all other alleged violations have been settled by consent decree.[4]

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[3] *See* Fed. Trade Comm'n, Legal Library: Early Termination Notices (accessed July 18, 2024).

[4] In 2023, the FTC alleged that the Louisiana Children's Medical Center's acquisition of three New Orleans area hospitals from HCA Healthcare, Inc. violated the HSR Act. Although the acquisitions satisfied the thresholds for

2. *Initial waiting period investigation*. The next stage in the merger process after filing the HSR form is the *initial waiting period investigation* (slides 29-40). As noted above, the initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers). This waiting period is intended to provide the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the "clearance process" (see slide 31)—and permit the investigating agency to conduct a preliminary substantive review. The average number of preliminary investigations per year from FY 2010 to FY 2022 was 246, although the number of investigations as a percentage of the reportable transaction has steadily declined since 2009 (slides 32-33).

   If one of the agencies opens an initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves and ask the parties to voluntarily submit some additional information (slide 34). This request will likely be memorialized in a so-called "voluntary access letter." I have included the Biden DOJ model form in the reading materials (pp. 99-101). The Biden FTC has not released a model letter, but its website provides guidance on the likely nature of a voluntary request (p. 102). In the initial telephone call, the staff will also invite the parties to give a presentation, if they would like to do so, on why the transaction does not present an antitrust problem. For reasons we will discuss in class, the parties should always take advantage of this invitation (see slides 35-36).

   During the initial waiting period investigation, the staff will also interview (usually by telephone) customers and competitors in the industry. The slides give some more detail (slide 37).

   The investigating agency has three options at the end of the initial waiting period:

   (a) close the investigation, terminate the waiting period, or allow it to expire, and permit the parties to close their transaction without further interference;

   (b) begin a "second request investigation" by issuing a "second request"; or

   (c) convince the merging parties to "pull and refile" their HSR forms to restart a new initial waiting period (slides 38-40).

   It is important to note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement. Accordingly, the parties cannot voluntarily "extend" the initial waiting period to give the agency more time to investigate (although they can commit by a contractual "timing agreement" outside of the HSR Act not

reportability, LCMC claimed that the acquisitions were exempt from the HSR Act's reporting and waiting period requirements because they had received a Certificate of Public Advantage ("COPA") from Lousiana, making these acquisitions exempt from the antitrust laws under the state action doctrine. Both sides filed cross-motions for summary judgment. On September 27, 2023, the district court granted LCMC's motion and dismissed the FTC's claims with prejudice. Louisiana Children's Med. Ctr. v. Attorney General, No. 2:23-cv-01305-LMA-MBN (E.D. La. Sept. 27, 2023).

to close the transaction until sometime after the HSR waiting period has expired). We will examine timing agreements after we introduce second request investigations.[5]

Finally, in assessing the antitrust risks and preparing to defend a possible merger investigation and perhaps litigation, the merging parties may wish to share their analysis with one another and negotiate a joint defense strategy. (Indeed, it would be foolish not to do so.) However, sharing an attorney's analysis of the transaction and defense strategy with a third party—here, the merger partner—normally violates confidentiality and waives the attorney-client privilege. However, the common interest privilege provides an exception that permits the sharing of otherwise protected communications with another party if the sharing facilitates a "common legal interest" between the parties. The practice of the DOJ and FTC has been to recognize that the merging parties have a common legal interest in the defense of the transaction. As a result, the agencies have not attempted to pierce the so-called "common interest privilege."[6]

The law of privilege is fundamental to the practice of both litigators and transactional lawyers. You should start your law practice without a good grounding in privilege law. The class notes provide a quick review of the attorney-client privilege, the work product doctrine, and the common interest privilege (slides 41-46). The reading materials provide two important applications in practice.

The first document deals with the situation where a buyer has asked its investment bank to analyze the possible sale of certain businesses that the buyer—on the advice of counsel—anticipates will have to be divested as a result of a consent settlement. The commercial consequences of a possible divestiture sale are critical for the buyer to know when negotiating the purchase price and other merger agreement terms. In response to its second request specification requiring the disclosure of all documents related to the transaction, the buyer claimed attorney-client and work product protection over all communications between the buyer and the investment bank concerning the divestiture analysis. The DOJ rejected the privilege claims and demanded that all documents to and from the investment bank be produced. The reading materials contain an anonymized letter sent to the DOJ in defense of the privilege claims (pp. 84-89). Upon receiving the letter, the DOJ dropped its demands that the disputed documents be produced. Although the letter was written over twenty years ago, the analysis and supporting case citations could be used today to make the same defense.

The second document deals with whether communications between a merging party and its customers about the deal under the particular circumstances in the transaction are protected under the work product doctrine. As you know from the class notes, the antitrust agencies have relied heavily on customer reactions to a transaction. Accordingly, the merging party needs to learn, as best it can, how its customers are reacting to the deal. Moreover, when

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[5] There is an advantage to the merging parties of this inability to extend the waiting period: they cannot violate the HSR Act through "gun-jumping" after the expiration of the HSR Act waiting period.

[6] An attorney's analysis of the legal implications of the transaction and defense strategy should be protected by the attorney opinion work product doctrine. Unlike attorney-client privilege, disclosure of work product materials to a merger partner should not automatically waive this protection. However, courts have held that work product protection can be waived if disclosure increases the likelihood of the information reaching an adversary. Sharing work product materials with a merger partner should not increase this risk, so the protection should remain intact. Additionally, such sharing should be protected under the common interest doctrine.

customers have concerns, companies may be able to mitigate those concerns, perhaps by clearing up a misunderstanding about the deal or the combined company's future strategy or extending a contract to give the customer confidence that its prices will not be adversely affected by the transaction. It is also important for the company's antitrust counsel to know about the customer reactions to give the client legal advice about the possible risks the transaction presents and to fashion the defense. Typically, communications between a merging party and its customers are not shielded from the government, and the investigating agency is entitled to discovery on these communications through a second request, a CID, or testimony under oath in a deposition. In this case, however, before any contact with the customers about the deal, antitrust counsel "instructed" the client to call the customers, ask specific questions to ascertain the customer reactions, and report back to counsel on the responses, which counsel would use to inform his antitrust analysis and defense strategy. In an investigational hearing (what the FTC calls a pretrial complaint deposition), the FTC attorney asked the testifying company official whether he had spoken to customers about the transaction. Antitrust counsel objected on the grounds that any communications with customers were protected by the work product doctrine and instructed the witness not to answer. The objection ultimately was elevated to the Commission on a motion to quash. The reading material contains the Commission's order recognizing the privilege (pp. 90-97).

3. *Second request investigations*. Before the initial waiting period ends, if the reviewing agency decides that an in-depth investigation is warranted, it will issue a Request for Additional Information and Documentary Material (more fondly known as a "second request"). Second requests are somewhat like precomplaint subpoenas, although they are not compulsory process. The parties do not have to respond to a second request as they would a subpoena or a civil investigative demand (CID) but, as explained below, the issuance of a second request extends the HSR Act waiting period for a statutorily prescribed time (usually 30 calendar days) after all parties have properly responded to their respective second requests. The upshot is that if the parties do not respond to their second requests, the waiting period never expires and they cannot close their deal.

   The slides give a brief overview of second request investigations (slides 47-53). I have included the Biden FTC model second request in the reading materials (pp. 103-31). As painful as it might be, read the FTC's model second request with some care.[7] Second requests are a preliminary element in any sophisticated merger antitrust practice.

If the reviewing agency issues a second request before the end of the initial waiting period, the HSR Act extends the waiting period for the period of time that it takes for the merging parties to comply with their respective second requests plus an additional 30 calendar days (10 days for an all-cash tender offer) (see slide 54).

[7] Although the FTC's model second request still appears on the FTC's website, the link has a mark after it. Although the mark is not explained, I suspect that it indicates that the linked model second request is no longer operative. The DOJ's model second request no longer appears on the ATD's website. Perhaps it has been withdrawn, presumably to revise it. Over the summer, I sent an FOIA request and received a copy of model second request with a date of April 2022. I have no idea whether it is currently effective or not. I suspect that it is not. The removal of documents from the FTC and ATD websites—especially model documents—without replacing them with current versions is a disturbing practice of both agencies in the Biden administration.

Substantial compliance. Given the amount of documents and data demanded in a second request, an important question is how complete compliance must be to start the running of the final waiting period. The standard in the HSR Act is "substantial compliance," but the term is not defined in the act or its implementing regulations. The agencies at times in the past have taken the position that "substantial compliance" means full compliance except for insignificant deficiencies, regardless of the probative value of the missing documents or information on whether the agency should challenge the transaction or the burden on the reporting party of compliance to this extent. The Biden agencies almost surely take this view, although I am unaware of anything in the public record that confirms this. The courts have not been called to address the question since the investigating agency and the merging parties almost always find it in their mutual interest to compromise any dispute outside of court. The closest a court has come to addressing the issue was the FTC's 2005 challenge to Blockbuster Video's compliance with its second request in connection with Blockbuster's contested hostile takeover of Hollywood Video. The transaction involved an extremely time-sensitive contested hostile takeover bid, and it was in Blockbuster's interest to accelerate matters by forcing the FTC into court. The FTC quickly comprised the dispute with a short extension of the waiting period acceptable under Blockbuster's timetable but not before Blockbuster filed its brief in opposition. Look at the class notes (slides 55-57) and, if you want to have a fun read of a party going after an agency, read the Blockbuster brief.[8]

Timing agreements. The agencies believe, with some justification, that the statutory time periods in the HSR Act provide too little time (1) for the staff to complete the review of the second request submissions and prepare its recommendation and (2) for the ultimate decision-makers within the agency to consider the staff recommendations and decide on the outcome of the investigation. As a result, the investigating agency in second request investigations almost always asks the merging parties to enter into a "timing agreement" that commits the parties not to close their transaction until some specified time after the statutory waiting period expires. The investigating agency can ask for an excessive amount of additional time, but the parties can usually get the agency to accept 60 or even 30 days after the waiting period expires. If the parties do not agree to an extension, the agency typically goes into "litigation mode" and threatens to cease talking to the parties about the merits or a possible settlement. So unless the parties believe that further interaction with the investigating agency is likely futile, the parties almost always agree to extend the time for the investigation through a timing agreement (slides 58-60).[9]

Merger review outcomes. After the evidence is gathered, the parties will have the opportunity to make a presentation—actually, a series of presentations—to various levels of the agency as to why the transaction should not be challenged (slide 61). After that, the agency will make its decision.

There are four possible traditional outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree (which typically will require the divestiture of assets or businesses), (3) the agency

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[8] *See* Memorandum of Points and Authorities by Defendant in Opposition to Plaintiff's Motion for Order Pursuant to Section 7A(g)(2) of the Clayton Act (Mar. 7, 2005). In the interests of full disclosure, I was the lead counsel for Blockbuster and the author of the brief. Other documents in the case (including the FTC's complaint) are in the supplemental materials.

[9] As noted above, the FTC Premerger Notification Office takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement, so technically a timing agreement does not extend the HSR Act's statutory bar to closing. This is actually beneficial to the parties, since an HSR Act gun-jumping violation cannot occur after the end of the waiting period even if the parties have contractually agreed not to close the transaction for some additional time.

commences litigation to block the transaction, or (4) the parties voluntarily terminate the transaction. The class notes summarize these outcomes (slides 62-64). The class notes contain some historical statistics about the distribution of the agency investigation outcomes and discuss some trends (slides 65-66). The distribution has significantly shifted in the Biden administration, with the agencies *much* less willing to accept consent decrees, resulting in more litigations and more voluntary terminations.

The Biden administration has introduced two notable changes in the menu of possible investigation outcomes. You should know about them, although their practical significance may not be significant.

First, although historically both the DOJ and the FTC finished their investigations by the end of the HSR waiting period—or, if there was one, the timing agreement—the Biden antitrust agencies, in a number of their early investigations, have allowed the deal to close while "continuing" the investigation and "reserving" the right to challenge the transaction postclosing. I have included the FTC's sample preclosing warning letter in the reading materials (p. 133). I use the scare quotes because the agencies always had the right to challenge a merger postclosing when it does not take enforcement action, so this is nothing new. What is new is the warning letter itself, which seems designed only to scare the merging parties. Sophisticated counsel and their clients give the warning letter little thought, especially since neither agency appears to have actually continued to investigate any of these transactions, much less taken enforcement action against them. (For that reason, the warning letter is sometimes derisively called a "bedbug letter" by some defense counsel.) The practice of sending these warning letters has received almost no publicity over the last two years, indicating either that the agencies have stopped sending the letters or that firms are giving them little attention.

Second, the Biden agencies' reluctance to accept consent decrees is giving the "fix it first" solution some traction (slide 63).[10] A "fix it first" implements a curative divestiture *before* the main transaction closes. (By contrast, a divestiture consent decree permits divestiture to close *after* the main transaction closes, although sometimes only a matter of days separate the two). The merging parties usually put "fix it first" solutions in place early in the investigation, if not before the parties file their HSR notifications and the investigation starts. However, there are instances where the parties and the agency have agreed to a "fix-it-first" solution during or even at the end of an investigation.[11]

In a typical "fix it first" solution, the merging parties would divest an overlapping business so that they could present a nonproblematic, "clean" deal to the agencies for review. The following hypothetical illustrates the general idea. Suppose two supermarket chains proposed to merge. The chains overlap only in Chattanooga (but the overlap is significant), and the transaction otherwise

[10] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MERGER REMEDIES MANUAL 17-18 (rev. Sept. 2020) (describing "fix it first" solutions).

[11] The "agency" here really means the DOJ. As we will discuss in the next class, the Antitrust Division under AAG Kanter does not negotiate consent decrees to resolve concerns emerging from an investigation—the DOJ's view is that the parties should either voluntarily terminate their transaction and walk away from the deal or litigate the merits in court. In some cases, however, it is readily apparent that a divestiture is the right solution. Rather than negotiate a divestiture consent decree—with all of its monitoring and enforcement advantages for the government—the DOJ will tell the parties that if they implement the divestiture under a "fix-it-first," the agency will take no enforcement action against the restructured transaction. The DOJ does not publicly discuss these "late in the game" fix-it-first solutions, so there is no public record of which deals are affected.

presents no antitrust problems. The merging parties recognize that they almost surely will have to divest either the buyer's or the seller's Chattanooga business to resolve the FTC's concerns at the end of an investigation of their deal. In earlier administrations, the parties would file their HSR notifications on the original transaction and proceed with confidence that they could resolve any FTC concerns with a divestiture consent decree at the end of the investigation. In the Biden administration, however, the agencies are expressly less interested in accepting consent decrees. Given the uncertainty that the FTC would accept a consent decree—or simply to avoid the costs and hassles of a significant merger investigation—the parties may decide to sell the overlapping business to a third party without a consent decree before filing their HSR reports. The divestiture sale would have a condition precedent that the merging parties would be able to close their restructured transaction. Now, with the Chattanooga overlap eliminated, the parties would file their HSR notifications on the restructured "clean" transaction. If the divestiture sale was HSR reportable, the divestiture seller and buyer also would file their respective HSR notifications. The FTC would then review both transactions simultaneously. Assuming that the divestiture sale did not present any antitrust problem and would preserve competition in Chattanooga, the FTC should close both reviews without taking enforcement action. The divestiture sale would have to close *before* the main transaction because the merging parties' HSR filings did not cover a transfer of the divestiture seller's Chattanooga business, but no consent decree would be necessary.

Three more observations on "fix it first" solutions. First, the divestiture sale agreement can be conditioned on the termination of the HSR waiting period for the main transaction without enforcement action, so the divestiture seller would not have to sell unless the FTC had "cleared" the restructured transaction. Second, the FTC will have to be convinced that the divestiture sale will preserve competition in Chattanooga after the closing of the main transaction, so the FTC will vet the divestiture agreement and the divestiture buyer just as it would in a consent decree exercise.[12] Third, if the merging parties file on the original transaction and later decide to pursue a "fix it first" solution, they can withdraw their original HSR notifications and refile on a restructured transaction.[13]

Interestingly, unlike the European Commission, neither the DOJ nor the FTC has the authority on its own to block a pending transaction (although the FTC can challenge a consummated transaction administratively and order appropriate relief, including divestiture). Instead, to block a pending transaction, both the DOJ and the FTC must obtain a preliminary injunction from a federal district court. We will examine this procedure in Unit 6.

Update: New proposed HSR notification changes. On June 27, 2023, the FTC announced that it, with the DOJ's concurrence, would be publishing a Notice of Proposed Rulemaking (NPRM) to amend the rules governing the HSR notification process.[14] Read the FTC's press release and the

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[12] Since the main transaction and the divestiture sale are related, the FTC will take the position that the merging parties' failure to implement a curative divestiture that preserves competition in Chattanooga is an anticompetitive effect of the main transaction.

[13] There is an open question of how far the merging parties can proceed into a merger review of the original transaction and still be able to change course to pursue a "fix it first" solution. The Divison's Merger Remedies Manual states that a "fix it first" solution "may be inappropriate if it is presented to the Division after the Division has determined that it has a substantial basis for filing a complaint challenging the transaction." MERGER REMEDIES MANUAL, *supra* note 4, at 18.

[14] *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023). The NPRM was published on June 29. Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (to be codified at

joint statement of the three FTC commissioners (pp. 135-41) to see what the FTC is saying. These materials are not very informative, so I have also included a good summary and critique from Axinn Veltrop (pp. 142-47). Finally, the class notes give a good overview (slides 68-75) and discuss some possible problems and legal challenges the proposed rule might face if they are finalized in anything like its current form (slides 76-79)

In effect, the proposed rules would require all reporting parties to supply in their initial HSR filing much of the information the investigating staff would get postfiling in a preliminary investigation. The problem is that in FY 2022, 3029 transactions were reported, but the agencies sought clearance to open preliminary investigations in only 291 of them.[15] If the proposed rules had been in effect in FY 2022, the burden of the additional reporting requirements would have been imposed on 2738 reportable transactions where neither the DOJ nor the FTC had sufficient concern to request clearance to open a preliminary investigation after considering the information provided on the current form, any review of publicly available trade press reports or materials on the Internet, the agencies knowledge of the industry from prior investigations, and any complaints submitted to the agencies from customers or competitors. If final rules are promulgated and they look anything like the proposed rules, I expect business groups to challenge them in court as arbitrary and capricious under the Administrative Procedure Act.[16]

Since these are only proposed rules at this point, I do not plan on spending any time in class on them, but press me if you want to discuss them.

As always, if you have any questions or comments, send me an e-mail. See you in class.

16 C.F.R. Pts. 801-803) (“HSR NPRM”); [2] 15 U.S.C. § 18a(d)(1).

[15] Fed. Trade Comm’n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2022, at Ex. A, Table I. The HSR Report for FY2022 was released on December 21, 2023, and is the most recent report available.

[16] Section 706 of the APA instructs the courts to “set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act § 706(2)(A), 5 U.S.C. § 706(2)(A).