Unit 4.
The DOJ/FTC Merger Review Process

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Topics

- The HSR Act
- Overview of the HSR merger review process
- Premerger notification
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes
- Update: New proposed HSR notification changes

The HSR Act

HSR Act

- Hart-Scott-Rodino Act[1]
  - Enacted in 1976 and implemented in 1978
  - Applies to large mergers, acquisitions and joint ventures
  - Imposes reporting and waiting period requirements on the merging parties
    1. Preclosing reporting to both DOJ and FTC by each transacting party
    2. Post-filing waiting period before parties can consummate transaction
  - Authorizes the investigating agency to obtain additional information and documents from parties during the waiting period through a "second request"
  - Designed to alert the DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
    - *Idea*: Much more effective and efficient to block or fix an anticompetitive deal prior to closing than to try to remediate it after closing
  - Not jurisdictional: Agencies can review and challenge transactions—
    - Falling below reporting thresholds
    - Exempt from HSR reporting requirements
    - "Cleared" in an HSR merger review—no immunity attaches to a transaction that has successfully gone through an HSR merger review without an agency challenge

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

HSR Act

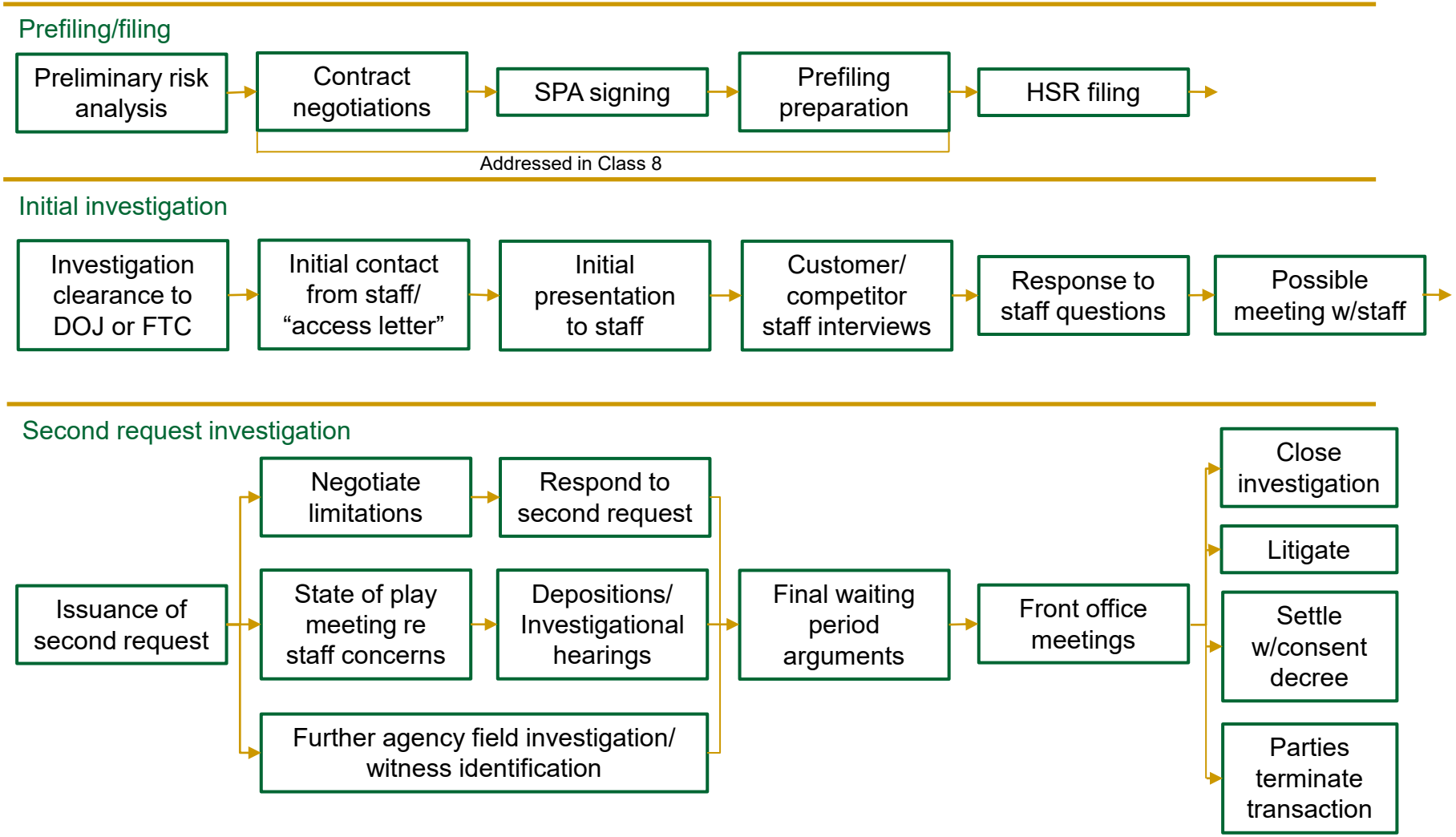
- Basic materials
  - The HSR Act, 15 U.S.C. § 18a (also known as Section 7A of the Clayton Act)
  - The HSR Act implementing regulations[1]
  - Formal FTC interpretations of the implementing regulations
  - Informal staff interpretations of the implementing regulations
  - The HSR reporting form and instructions
- Administration
  - The FTC Premerger Notification Office (PNO) is responsible for the procedural administration of the premerger notification program under the HSR Act
  - There is a "clearance process" to allocate substantive merger reviews under the HSR Act between the DOJ and FTC[2]
  - Once a transaction has been "cleared" to an agency for review, the matter is sent to the appropriate investigating section for review, investigation, and possible challenge

[1] 16 C.F.R. pts 801-803. The C.F.R. is the Code of Federal Regulations. It is an annually updated codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government. The departments and agencies usually promulgate these rules and regulations pursuant a congressional delegation of power and have the force of law. The rulemaking process is governed by the Administrative Procedure Act, 5 U.S.C. §§ 551–559 (APA).

[2] Discussed below.

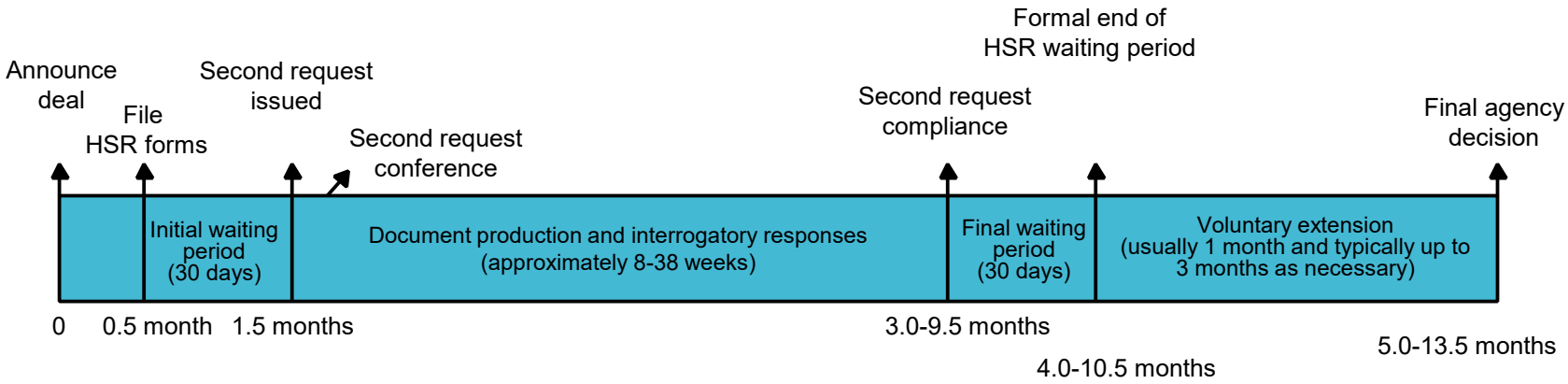
Overview: The HSR Review Process

The HSR review process



The HSR Act review process

- Typical domestic transaction

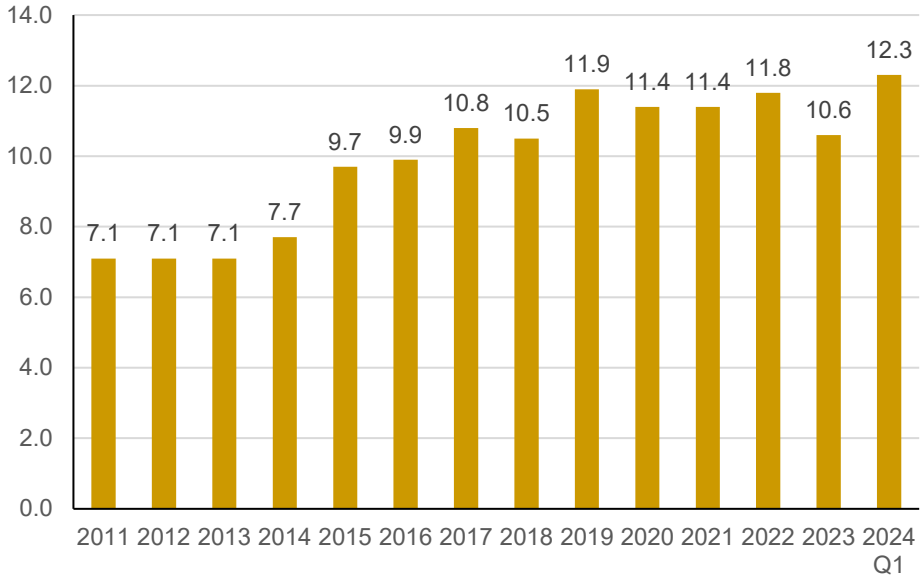


Customer rollout

- First telephone call (voluntary request)
- First presentation
- Follow-up meetings
- First DOJ/FTC customer interviews
- First DOJ/FTC competitor interviews
- Filings in other jurisdictions
- Second request conference
- Collect and review documents
- Prepare interrogatory responses
- Depositions of employees
- Additional meetings
- Follow-up DOJ/FTC customer interviews and affidavits
- Follow-up DOJ/FTC competitor interviews
- Final meetings with staff
- Meetings with senior staff
- Negotiate consent decree (if necessary)

The HSR Act review process

Average Duration of Significant Antitrust Merger Investigations (in months)



Average Duration by Presidential Administration

	Investigations	Average Duration
Obama 2011-2012	56	7.1
Obama (2d term) 2013-2016	119	8.8
Trump 2017-2020	109	11.2
Biden 2021-2024 Q1	65	11.5

Source: Dechert LLP, DAMITT Q1 2024: Merger Enforcement Begins 2024 with a Bang (Apr. 25, 2024); Dechert LLP, DAMITT 2016 Year in Review (Jan. 2017). DAMITT is the Dechert Antitrust Merger Investigation Timing Tracker. Dechert defines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include indepth second request investigations in which the agency concludes there is no antitrust concern but issues no closing statement. Dechert calculates the duration of an investigation from the date of deal announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

HSR Act Reportability

Basic prohibition

- Section 7A(a)

> [N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . and the waiting period . . . has expired . . . .[1]

- A reportable transaction is one that—
  - Involves the acquisition of voting securities or assets
  - Satisfies the thresholds for prima facie reportablility[2]
  - Does not fall into one of the exemptions provided by the HSR Act or implemented by the HSR Rules
- Thresholds are adjusted annually for inflation
  - Beginning in FY 2005, the reporting thresholds are adjusted annually by the percentage changes in the gross national product during the prior fiscal year compared to the gross national product for the fiscal year ending September 30, 2003.

[1] 15 U.S.C.18a(a).
[2] Pub. L. No. 106-553, 114 Stat. 2762 , 2762A-109 (effective February 1, 2001).

Acquisition of voting securities or assets

- The HSR Act applies only to acquisitions of voting securities or assets
- Voting securities
  - "[S]ecurities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer"[1]
- Assets
  - No special definition
  - The acquisition of a 50%or greater ownership interest in a noncorporate entity (such as a partnership or LLC) is treated as an acquisition of the entity's underlying assets
  - An exclusive license is regarded as an asset

[1] 16 C.F.R. § 801.1(f)(1)(i).

Acquisition of voting securities or assets

- Acquisition
  - Obtaining the "beneficial interest" in the underlying voting securities or assets
  - Does not require a formal transfer of legal title
    - *Example*: Company A has a signed purchase agreement to acquire the voting securities of Company B from its parent company. Although the transaction has not yet formally closed, Company A is influencing the operational management decisions of Company B. Given this influence, the agencies will view Company A as having obtained a beneficial interest in Company B and hence acquired Company B for HSR Act purposes.

[1] 16 C.F.R. § 801.1(f)(1)(i).

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability
Up to and including $119.5 million	Not reportable
Above $119.5 million up to and including $478.0 million	Reportable if : (1) satisfies the "size of person" test, and (2) no exemption applies Size of person test *Acquiring person* — *Acquired person* $239.0 million (in total assets or annual net sales) and $23.9 million (in total assets or annual net sales of a person engaged in manufacturing) *Or* $239.0 million (in total assets or annual net sales) and $23.9 million (in total assets of a person not engaged in manufacturing) *Or* $23.9 million (in total assets or annual net sales) and $239.0 million (in total assets or annual net sales)
In excess of $478.0 million	Reportable absent an exemption

* Based on the value of voting securities and assets the acquiring person will hold as a result of the acquisition, including the value of any previously acquired voting securities.

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 89 Fed. Reg. 7708 (Feb. 5, 2024) (effective Mar. 6, 2024)

Prima facie reportability

- Measuring thresholds
  - Measured against everything the acquiring person will hold as a result of the pending acquisition, not just the amount to be acquired in the pending transaction
- Asset acquisitions
  - Acquisition price + value of assumed liabilities
- Voting securities acquisitions
  - Acquisition price for voting securities to be acquired + value of voting securities already held
  - Note: Acquisitions of minority interests can be reportable
- Acquisitions of ownership interests in LLCs, partnerships and other noncorporate entities
  - Acquisition price for noncorporate interests to be acquired + value of interests
  - Acquisition must also confer “control” over the acquired person
    - For HSR Act purposes, “control” is defined as the right to 50% or more of the entity’s profits and/or 50% or more of the entity’s assets upon dissolution

Selected exemptions

- Intraperson
  - Acquiring and acquired person are the same
- Investment
  - Hold no more than 10% of target's outstanding voting securities
    - 15% for certain institutional Investors
  - Acquirer must have a purely passive investment intention
    - Any membership on the board of directors or other involvement in the management of the company (other than voting shares) voids exemption
- Convertible voting securities
  - Acquired securities have no present voting rights
- Acquisitions of non-U.S. assets
  - Must not generate sales in or into the U.S. of more than $119.5 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either
  - Do not confer control over the target, or
  - Do not involve assets in the U.S. or sales in or into the U.S., over $119.5 million

Notification thresholds

- An otherwise reportable transaction is not subject to the reporting and waiting period requirements of the HSR Act if
  1. The reporting and waiting period requirements were satisfied within the last five years for a prior acquisition, *and*
  2. The pending acquisition will not cause the acquiring person to cross a notification threshold

Notification thresholds[1]
$119.5 million
$239.0 million
$1.1195 billion
25% of the voting securities if their value exceeds $2.39 billion
50% of the voting securities if their value exceeds $119.5 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 89 Fed. Reg. 7708 (Feb. 5, 2024) (effective Mar. 6, 2024).

Premerger Notification

NB: The FTC has issued a Notice of Proposed Rulemaking to change the rules governing premerger notification. The changes are significant. At this point, however, the changes are only proposed and are in the public comment period. We will examine the current premerger notification regime first and then at the end of the deck look at how things might change if the proposed rules are ultimately promulgated as the final rules

HSR Act filing[1]

- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense
- Both the acquiring and acquired persons must submit their own filing
- Key information required:
  - Transaction documents (e.g., stock purchase agreement)
  - Annual reports and financial statements
  - Revenues by NAICS codes
  - Corporate structure information
    - Majority-owned subsidiaries
    - Significant minority shareholders
    - Significant minority shareholdings
  - "4(c)" and "4(d)" documents

These are the only parts of the filing that really matter

[1] On June 27, 2023, FTC announced a Notice of Proposed Rulemaking (NPRM) that, if implemented, would significantly change the U.S. merger notification process. *See* Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (to be codified at 16 C.F.R. Pts. 801-803); Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023). We will examine first the existing HSR merger notification process and at the end of the deck briefly review the proposed changes.

HSR Act filing

- 4(c) and 4(d) documents
  - 4(c) documents: Four requirements—
    1. Studies, surveys, analyses or reports
    2. Prepared by or for officers or directors of the company (or any entities it controls)
    3. That analyze the transaction
    4. With respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets
  - 4(d) documents: Three types—
    1. Confidential Information Memoranda ("CIM")
    2. Third-party advisor documents
    3. Synergy and efficiency documents
  - Failure to provide all 4(c) and 4(d) documents
    - Makes the HSR filing ineffective, so that the waiting period never started
      - Usually discovered by investigating agency in the document response to a second request
      - Agencies have required parties to refile and go through the entire process (including a second second request) when missing 4(c) or 4(d) documents are discovered
    - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

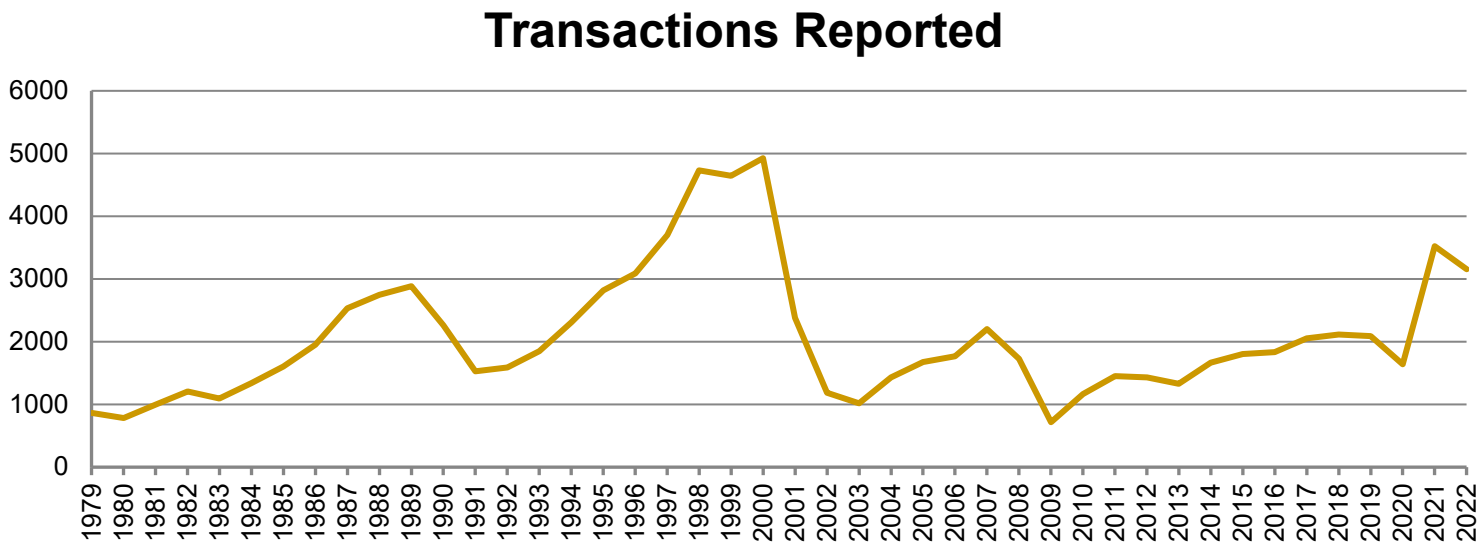
Filing fees

2022		2024[2]	
Value of Transaction[1]	Filing Fee	Value of Transaction[1]	**Filing Fee**
≤ $101.0 million	No filing required	<$173.3 million	$30,000
> $101.0 million but < $202.0 million	$45,000	$173.3 million - <$536.5 million	$100,000
≥ $202.0 million but < $1.0098 billion	$125,000	$536.5 - <$1.073 billion	$260,000
≥ $1.0098 billion	$280,000	$1,073 billion - <$2.146 billion	$415,000
		$2.146 billion - <$5.365 billion	$830,000
		$5.365 billion or more	$2.335,000

- Paid by the purchaser, unless the parties agree to a different arrangement (e.g., split the fee)

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2023) (effective Feb. 23, 2022).
[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 89 Fed. Reg. 7708 (Feb. 5, 2024) (effective Mar. 6, 2024). Congress changed the baseline of the filing fees in the Merger Filing Fee Modernization Act of 2022, contained in the Consolidated Appropriations Act of 2023, Public Law 117–328, Div. GG, 136 Stat. 4459, ____ (Dec. 29, 2022).

HSR Act notifications



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2022, at App. A, and prior annual reports.

Statutory waiting periods

- General rule
  - Cannot close a reportable transaction until the waiting period is over
  - The duration of the waiting period is prescribed by the HSR Act
- Initial waiting period
  - 30 calendar days generally
  - 15 calendar days in the case of—
    - a cash tender offer, *or*
    - acquisitions under § 363(b) of the bankruptcy code
- Extended waiting period
  - Waiting period extended by the issuance of a second request in the initial waiting period
  - Waiting period extends through—
    - Compliance by all parties with their respective second requests
    - PLUS 30 calendar days (10 calendar days in case of a cash tender offer)
- Investigating agency may grant *early termination* of a waiting period at any time[1]

[1] The Biden enforcement agencies have suspended, whether as a matter of policy or practice, granting early terminations since mid-2021. According to the FTC web site, the last early termination was granted on July 21, 2021. *See* Fed. Trade Comm'n, Legal Library: Early Termination Notices (accessed August 24, 2023).

HSR Act violations

- HSR Act prohibition
  - The HSR Act provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person" in a reportable transaction without observing the filing and waiting period requirements[1]
  - The HSR regulations provide that a person holds (acquires) voting securities or assets when it has a "beneficial interest" in them[2]
- Two basic types of violations
  - *Failure to file*: Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
  - *Gun jumping*: Filing a HSR report but exercising influence over the target's decision making sufficient to indicate the transfer of a beneficial interest in the target before the end of the waiting period
- Can be expensive
  - $51,744 per day for every day of the violation—Equals $18.9 million per year[3]

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] 89 Fed. Reg. 1445 (Jan. 10, 2024) (increasing civil penalty from $50,120 to $51,744 per day effective January 10, 2023, purusuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114–74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute's enactment)).

Failure to file

- Violation
  - Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
- Scenarios
  1. Failure to file at all
     - Intentional failure to file
     - Inadvertent failure to file
     - Improper invocation of an exemption (usually the investment exception)
  2. Filing an insufficient report (e.g., a report that is incomplete because it does not contain all Item 4(c) and 4(d) documents)
- Prosecutorial discretion
  - Vigorous enforcement for intentional failures to file
  - "One-bite" rule for inadvertent failures to file
    - No enforcement action on first failure
    - Enforcement actions on subsequent failures
  - Varies with culpability in invoking exemption

Insufficient experience to see if the Biden agencies continue this practice

"Gun jumping"

- Violation
  - The FTC takes the position that a person has a beneficial interest in the voting securities or assets of the target company within the meaning of the HSR Act when the person can exercise a material degree of management influence on the current (preclosing) operations of the target
    - Especially decisions regarding how to compete in the marketplace
  - Exercising this influence prior to the end of the waiting period is called "gun jumping"
    - Violates the HSR Act, regardless of effect on competition, because, for HSR Act purposes, the acquiring company has acquired the target without observing the waiting period—subjects the acquiring company to a civil penalty of $ 51,744 per day (in 2024)
    - May also violate Section 1 of the Sherman Act if the influence creates an anticompetitive effect in the marketplace (e.g., the coordination of bids by merging competitors)
    - The acquiring person cannot violate the HSR Act after the waiting period has expired, but it can still violate the Sherman Act if the transaction has not closed

Some recent HSR Act enforcement actions

Year	Acquirer	Target	Violation	Reason	Disposition	% of Max
2021	Clarence L. Werner	Werner Enterprises	Failure to file	Inadvertent	$486,900	0.46%
2021	Biglari Holdings	Cracker Barrel	Failure to file	Inadvertent	$1,400,000	25.9%
2021	Richard Fairbank	Capital One	Failure to file	Inadvertent	$637,950	2.3%
2019	Third Point	Dow	Failure to file	Inadvertent	$609,810	15.2%
2019	Canon	Toshiba Medical	Gun jumping		$2,500,000 (each party)	39.3%
2018	James M. Dolan	Madison Square Garden	Failure to file	Inadvertent	$609,810	13.9%
2018	Duke Energy	Calpine	Gun jumping		$600,000	25.2%
2017	Ahmet H. Okumus	Web.com	Failure to file	Inadvertent	$180,000	65.3%
2017	Mitchell P. Rales	Colfax Danaher	Failure to file	Inadvertent	$720,000	1.6%
2016	Fayez Sarofim	Kinder Morgan	Failure to file	Not investment	$720,000	
2016	Caledonia Investments	Bristow Group	Failure to file	Beyond five-year period for exemption	$480,000	7.6%
2016	ValueAct	Baker Hughes Halliburton	Failure to file	Not investment	$11,000,000	
2016	Len Blavatnik	TangoMe	Failure to file	Inadvertent	$656,000	25.2%
2015	Leucadia Nat'l Corp	Goober Drilling	Failure to file	Inadvertent	$240,000	3.4%
2015	Third Point Offshore Fund	Yahoo	Failure to file	Not investment	None	
2015	Flakeboard	SierraPine	Gun jumping		$1,900,000 (each party)	53.5%
2014	Berkshire Hathaway	USG Corporation	Failure to file	Inadvertent	$896,000	100.0%
2013	Barry Diller	Coca Cola	Failure to file	Inadvertent	$480,000	5.0%
2013	MacAndrews & Forbes	Scientific Games	Failure to file	Beyond five-year period	$720,000	42.9%
2012	Biglari Holdings	Cracker Barrel	Failure to file	Not investment	$850,000	50.1%

HSR Act enforcement actions

- Factoids
  - 67 total enforcement actions since the HSR Act was enacted—all settled by consent decree
  - Fines
    - September 5, 1978 - November 19, 1996: $10,000 per day
    - November 20, 1996 - February 8, 2009: $11,000 per day
    - February 9, 2009 - July 31, 2016: $16,000 per day
    - August 1, 2016 – January 23, 2017: $40,000 per day
    - January 24, 2017 – January 21, 2018: $40,654 per day
    - January 22, 2018 – February 13, 2019: $41,584 per day
    - February 14, 2019 – January 13, 2020: $42,530 per day
    - January 14, 2020 – January 12, 2021: $43,280 per day
    - January 13, 2021 – January 9, 2022: $43,792 per day
    - January 10, 2022 – January 10, 2023: $45,517 per day
    - January 11, 2023 _ January 9, 2024: $50,120 per day
    - January 11, 2024 _ present: $51,744 per day

Initial Waiting Period Investigations

Preliminaries

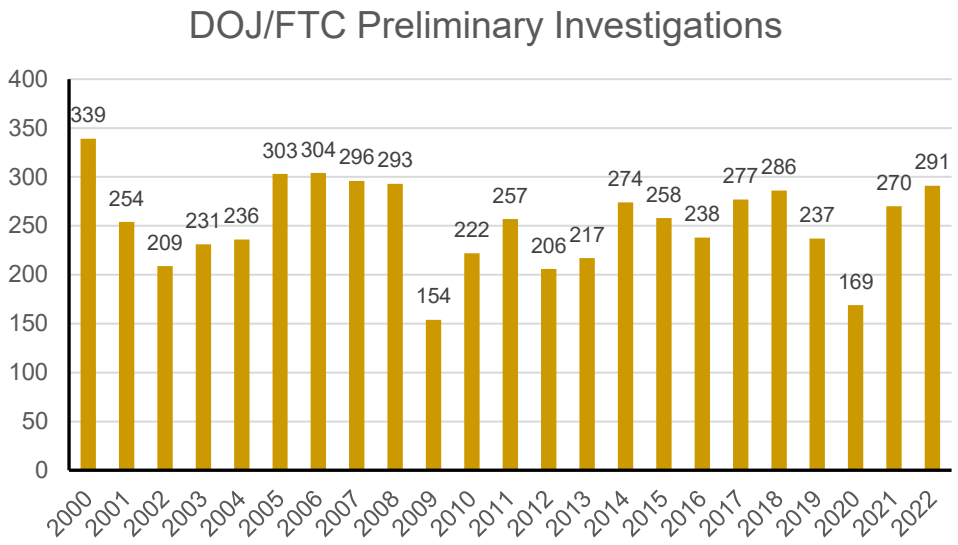
- The parties must file their respective HSR forms with both the DOJ and the FTC
  - Separate forms are required for each reporting person
- FTC Premerger Notification Office review
  - Only for technical compliance on form—no review of substance
  - Allocated to DOJ or FTC for review through agency "clearance" process
  - Responsible agency assigns to litigating section for substantive review

"Clearance" process

- The DOJ and FTC jointly decide which, if either, of the agencies will review the reported merger ("clearance")
  - There is a "liaison agreement" between DOJ and FTC to prevent duplicative investigations
    - If neither the DOJ nor FTC want to open a preliminary investigation—PNO grants early termination of the waiting period
    - If either the DOJ or FTC (but not both) want to open a preliminary investigation—Requesting agency gets clearance to open investigation
    - If both the DOJ and FTC want to open a preliminary investigation—Agencies negotiate to allocate the investigation based on prior experience with the industry or the merging parties (and which agency got the last contested clearance)
- Process can be fraught with strategic behavior by agencies
  - In extreme cases, "clearance battles" can last until the last day of the initial waiting period
  - Efforts to reform "clearance" process by allocating specific industries to a specific agency have failed miserably
    - Neither agencies nor their respective congressional oversight committees want to relinquish jurisdiction over any type of merger

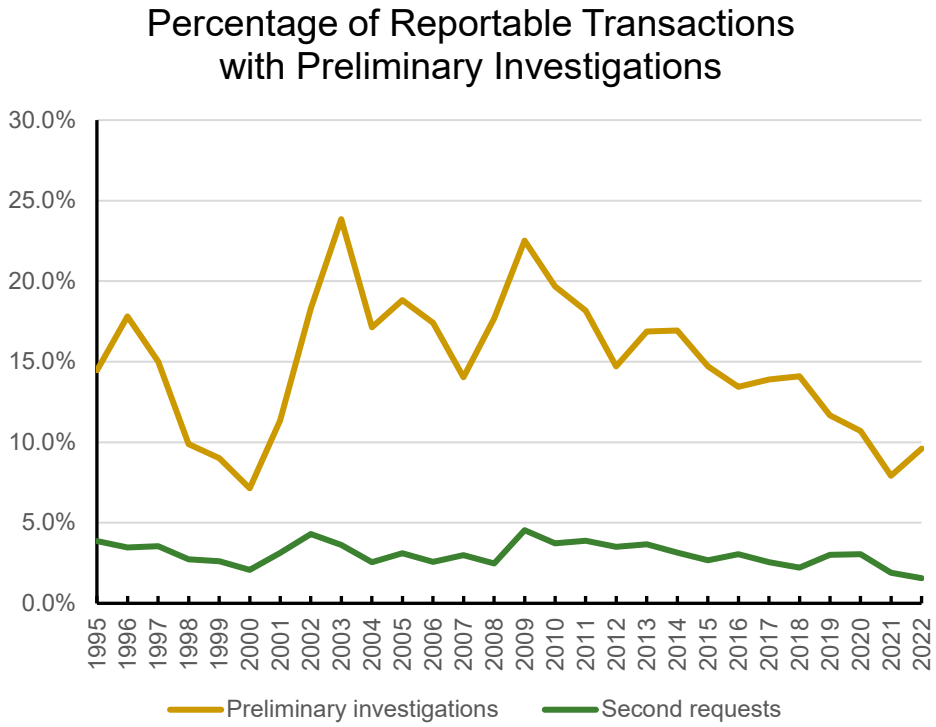
Preliminary investigation

- Since FY 2000, the average number of preliminary investigations by both agencies was 253
  - The variation is not very great
    - Average from FY 2000 to FY 2009: 262
    - Average from FY 2010 to FY 2022: 246



Preliminary investigations

- The number of preliminary investigations as a percentage of reportable transactions has been steadily dropping since 2009
  - There was a slight uptick in FY2022
  - The rate in 2022 (9.6%) was less than half of the rate in 2009 (22.5%)



Initial contact by investigating staff

- Usually occurs 7-10 days after filing
- Three purposes
  1. Inform parties of the investigation and introduce the investigating staff
  2. Request that the parties provide certain information to the staff on a voluntary basis—
     - Most recent strategic, marketing and business plans
     - Internal and external market research reports for last 3 years
     - (Sometimes) product lists and product descriptions
     - (Perhaps) competitor lists and estimates of market shares
     - Customer lists of the firm's top 10-20 customers (including a contact name and telephone number)[1]

     The request is usually made orally in the first telephone call from the staff and then followed in writing in what is called a *voluntary access letter* or (equivalently) *voluntary request letter*[2]
  3. Invite the parties to make a presentation to the staff on the competitive merits of the transaction

[1] The agencies do not ask for customer lists in transactions involving consumer goods sold in retail stores, because the agencies do not believe that retail customers lack the knowledge and sophistication to make good predictions about the competitive effect of the merger.

[2] The DOJ has published a model voluntary access letter, which is also included in the required reading. NB: The letter is dated and probably does not reflect current DOJ practice. The DOJ has not posted a more current version on its website.

Initial merits presentation

- Critical to do completely, coherently, and quickly
  - There is often a significant “first mover” advantage to being the first to give the staff a systematic, coherent way to think about the transaction
  - Well-prepared business people are the best to present
    - Agencies not impressed with “testifying” lawyers—especially outside counsel
  - Need to anticipate staff questions, prepare responses, and answer staff questions in the meeting
  - Need to be clear and compelling
    - Cannot win on an argument that the staff does not understand or finds ill-supported
  - Need to anticipate and be consistent with what the staff is likely to see in the company documents and hear from customers
    - Staff is strongly biased toward accepting customer view in the event of an inconsistency
  - Need to do the presentation quickly—so it needs to be prepared in advance
    - By the time of the initial call from the investigating staff, usually about one-third of the initial waiting period will be over

The best presentations anticipate all of the issues the staff will raise, provide answers that are supported by company documents and consistent with customer perceptions, and have all of the facts right. Ideally, the rest of the investigation needs to do no more than defend the analysis of the first presentation.

Initial merits presentation

- Ideal structure (when the facts fit)
  1. Provide an overview of the parties and the transaction
     - Identify other jurisdictions in which the transaction is reportable
  2. Provide an overview of the industry (if the staff is not familiar with the industry)
  3. Explain the business model driving the transaction
     - The deal is procompetitive—a win-win for the company and for customers
     - "We make the most money by providing more value to customers, improving productive efficiency, and reducing costs without reducing product or service quality"
     - Essential to give a compelling reason for doing the deal that is not anticompetitive
  4. Identify the customer benefits implied by the business model
     - Customers will be better off with the transaction than without it
     - Agencies give little or no credit in the competitive analysis to efficiencies or cost savings that are not passed along to customers
  5. Explain why market conditions would not allow the transaction to be anticompetitive in any event
     - "We could not raise price even if we wanted. Customers have alternatives to which they can turn to protect themselves in the event we try to raise price or otherwise harm them."
     - Alternatives can be other current suppliers, firms in related lines of business that can expand their product lines, new entrants, or customer self supply (vertical integration)
     - NB: Critical that customers confirm that the "alternatives" are in fact realistic suppliers

Customer/competitor interviews by staff

- Will occupy the bulk of the remaining time in the initial investigation
- The investigating agency will give great weight to customer views
  - *Theory*: The purpose of the antitrust laws is to protect customers from competitive harm, and sophisticated customers should have a good idea of whether they will be competitively harmed by the transaction under review
  - Staff will attempt to call all of the contracts on the customer lists provided by the merging companies in response to the initial voluntary request
  - Staff often will accept customer complaints uncritically but question customer support
  - Customer reactions may differ depending on the position of the contact person
    - For example, the CEO of a customer may take a broader and more nuanced view of the transaction than a procurement manager who only sees the loss of an independent supplier
- Historically, competitor conclusions have been given little weight
  - *Theory*: Anticompetitive transactions are likely to benefit competitors by raising market prices, so competitor complaints are more likely the result of concerns about procompetitive efficiencies than anticompetitive effect—and the agencies know this
  - But competitor interviews can be useful in understanding more about the industry
    - Complaining competitors are often willing to spend considerable time educating the staff
    - Customers usually just want the staff to go away unless they strongly oppose the deal

End of the initial waiting period

- Three options for the agency
  1. Close the investigation
  2. Issue a second request
     - Most important factors—
       - Incriminating company documents
       - Significant customer complaints
       - Four or less competitors postmerger for horizontal transactions (5→ 4 deals)
       - Merging parties are uniquely close competitors to one another (“unilateral effects”)
       - Merger eliminates a “maverick”
       - Acquisitions by dominant firms (especially in the high-tech sector)
         - New emphasis with the Biden administration
       - Obvious significant foreclosure possibilities (for vertical transactions)

     NB: Any one of these factors can be sufficient to trigger a second request investigation
     - A second request must be authorized—
       - By the assistant attorney general (typically delegated to a deputy assistant attorney general)
       - By the Federal Trade Commission (typically delegated to the chairman or a commissioner)
  3. Convince the parties to “pull and refile” their HSR forms to restart the initial waiting period to give the investigating agency more time to decide whether to issue a second request

"Pull and refile"

- The idea
  - In some circumstances, the investigating agency may indicate that it may be in the parties' interest to "pull and refile" their HSR reports
    - Typically, this occurs when the investigating staff has not been able to complete its initial field investigation (especially its customer interviews) but believes given the investigation to date the transaction does not present any material antitrust concerns
      - WDC: In my experience, the investigating staff takes suggestions of a "pull and refile" seriously—they will not suggest it unless they believe that they can complete the investigation in the extended time period without the need to issue a second request
    - The benefit to the staff is that it does not have to expend the time and effort to prepare a second request, which it otherwise would have to do to continue the investigation
  - What the agency wants is a few more weeks to complete its initial investigation and hopefully close the investigation without a second request
  - *The problem*: The waiting periods under the HSR Act are statutory and hence cannot be extended by agreement even if the merging parties want to give the staff more time
  - *The solution*:
    - The acquiring person "pulls" (withdraws) its HSR filing for the transaction, returning the transaction to its status before any HSR report was filed
    - Shortly thereafter, the acquiring person refiles (resubmits) an updated HSR report for the transaction, which starts a new HSR initial waiting period (usually 30 calendar days) and gives the staff a new initial waiting period to complete its investigation

"Pull and refile"

- The mechanics[1]
  - The acquiring person withdraws ("pulls") its HSR report for a reportable transaction prior to the expiration or early termination of the waiting period and prior to the issuance of a second request
    - Technically, the acquiring person must submit a written request to the FTC PNO to withdraw the filing and state its intention to refile
    - This means there is no HSR filing for the transaction and no waiting period running
  - Within two business days of the withdrawal, the acquiring person resubmits (refiles") its HSR report updated with any new data, any new 4(c) and 4(d) documents), and a new certification and affidavit
    - The refiling starts a new initial waiting period (usually 30 calendar days)
  - The acquiring party does not have to pay a new filing fee with the refiling bf—
    - The transaction does not materially change from the one reported in the original filing, and
    - The parties follow the above procedures

    NB: The filing fee is waived only for the first "pull and refile" in a transaction
  - Historically, the agency often granted early termination in the middle of the new initial waiting period[2]

[1] *See Premerger Notification Office,* Fed. Trade Comm'n, Tips on Withdrawing and Refiling an HSR Premerger Notification Filing (updated September 15, 2017)

[2] The FTC and DOJ suspended the practice of granting early termination of the initial waiting period. *See* Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021).

Aside: Some notes on privilege

- Attorney-client privilege
  - *Rule*: The attorney-client privilege applies to—
    1. A communication
       - Includes verbal exchanges, written correspondence, emails, or any other form of communication
       - The communication may be from the lawyer to the client, from the client to the lawyer, or both
    2. Between an attorney and a client
       - May also encompass agents of either who help facilitate the legal representation
    3. Made in confidence
       - That is, there is an expectation of privacy at the time of the communication, and the communication is not intended to be disclosed to third parties
    4. For the purpose of seeking, obtaining, or providing legal assistance
       - Includes communications from the client containing responses to questions posed by the lawyer
  - *Rule*: The violation of any of these four elements negates the privilege and subjects the communication to discovery
  - *Rule*: The attorney-client privilege shields *communications* from discovery; it does not shield *facts*
    - *Exception*: Facts learned through an attorney-client communication
    - *Possible exception*: Facts learned in collecting information requested by an attorney in order to provide legal advice

      These communications and the underlying facts may also be protected under the work product doctrine

Aside: Some notes on privilege

- The work product doctrine
  - *Ordinary work product*:[1] A party may not discover—
    1. documents and tangible things
    2. that are prepared in anticipation of litigation or for trial
    3. by or for another party or its representative
    4. UNLESS the party shows that it—
       a. has substantial need for the materials to prepare its case and
       b. cannot, without undue hardship, obtain their substantial equivalent by other means
  - *Attorney opinion work product*:[2] The exception does not apply to materials that disclose "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"
    - NB: If only a portion of otherwise discoverable material contains attorney opinion work product, the protected attorney opinion work product should be redacted and the rest of the material produced
  - *Rule*: Although the work product doctrine applies only to documents and tangible things, the protection cannot be pierced by inquiring into the content of a protected document without seeking the document itself.[3]

[1] Fed. R. Civ. P. 23(b)(3)(A). Rule 23(b)(3)(A) encapsulates the federal ordinary work product doctrine.
[2] *Id*. 23(b)(3)(B).
[3] *See, e.g.,* Order re Petition to Limit or Quash Subpoenas Ad Testificandum Dated April 24, 2009, File No. 091-0064 (July 21, 2009) (in the FTC's investigation of Thoratec Corp.'s pending acquisition of HeartWare International).

Aside: Some notes on privilege

- The work product doctrine
  - Public policy behind the work product doctrine
    - *Promote adversarial litigation*: Allows attorneys to prepare for litigation without fear that their strategy, theories, mental impressions, or research will be exposed to their adversaries
    - *Preserves the integrity of the legal process*: Ensuring that attorneys can candidly evaluate and prepare their cases without concern that their work will be revealed
    - *Prevents unfair advantage*: Avoids situations where one party can free-ride off the investigatory and preparatory work of another attorney
  - Work product in investigations
    - Although the work product doctrines do not automatically apply to all investigations, they do apply if the investigation provides reasonable grounds for anticipating litigation
    - *The practice*: Almost all merger investigations by the FTC or DOJ provide reasonable grounds for anticipating litigation and hence triggering work product protections

Aside: Some notes on privilege

- The problem
  - Merging parties would like to share and coordinate their initial analysis and defense of the transaction
  - BUT ordinarily doing so would violate the attorney-client confidentiality requirement, negate any attorney-client privilege, and subject the communications to discovery by a second request, CID, or subpoena in an agency investigation or litigation

The solution: *The "common interest" privilege provides an exception to the confidentiality requirement and retains the attorney-client privilege for communications among parties with a common legal interest*

Aside: Some notes on privilege

- The "common interest" privilege
  - *Rule*: When the communication involves—
    - The sharing of privileged information
    - Among parties with a common legal interest

    the communication remains protected by the attorney-client privilege
  - *Rule*: Apart from this exception, all parties must continue to satisfy the elements of the attorney-client privilege for shared communications to preserve the privilege
  - *History*:
    - The common interest privilege originated as the "joint defense" privilege
    - But the courts expanded it to include communications outside of the context of litigation

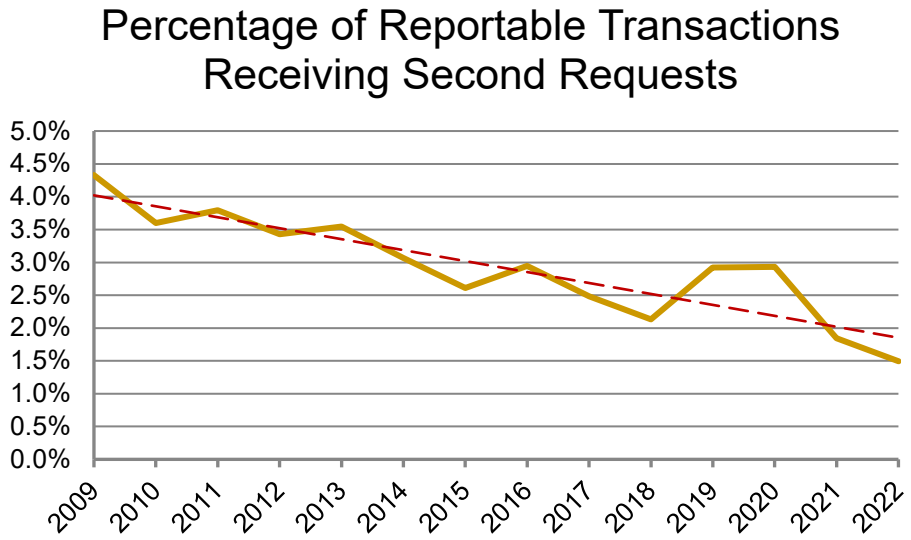
Aside: Some notes on privilege

- The "common interest" privilege
  - *Agency practice*: Recognizes communications among merging parties to share and coordinate their analysis and defense of the transaction, including the sharing of--
    - Antitrust *analyses* of the transaction in the course of negotiations
    - Antitrust analyses of the transaction during the investigation
    - Strategies to defend the transaction generally
    - Strategies to settle the investigation of the transaction through a consent decree or "fix it first" restructuring
  - *Query*: Do differences in commercial objectives defeat the common interest privilege in negotiating risk-shifting provisions (e.g., the cap on a divestiture commitment)?
    - Although both parties share the common legal interest in defending the transaction against an antitrust challenge—
      - The seller wants the deal to close regardless of the cost to the buyer of any divestiture, while
      - The buyer wants the deal to close if and only if the costs of divestiture are not so high that they destroy the attractiveness of the transaction
    - As far as I am aware, this situation has not been addressed by a court

Second Request Investigations

The second request

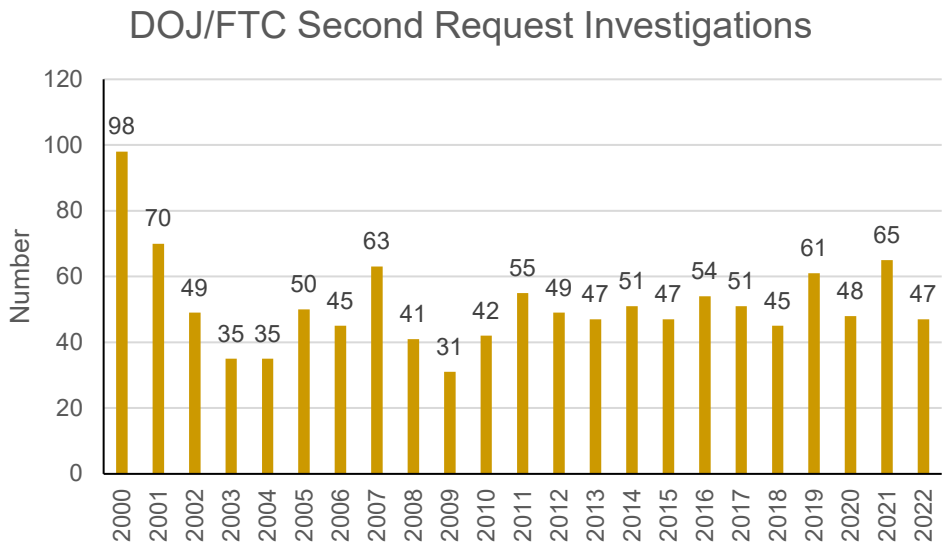
- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a "second request") during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second requests, *and*
  - Observe a final waiting period (usually 30 days) following compliance



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2022, at App. A.

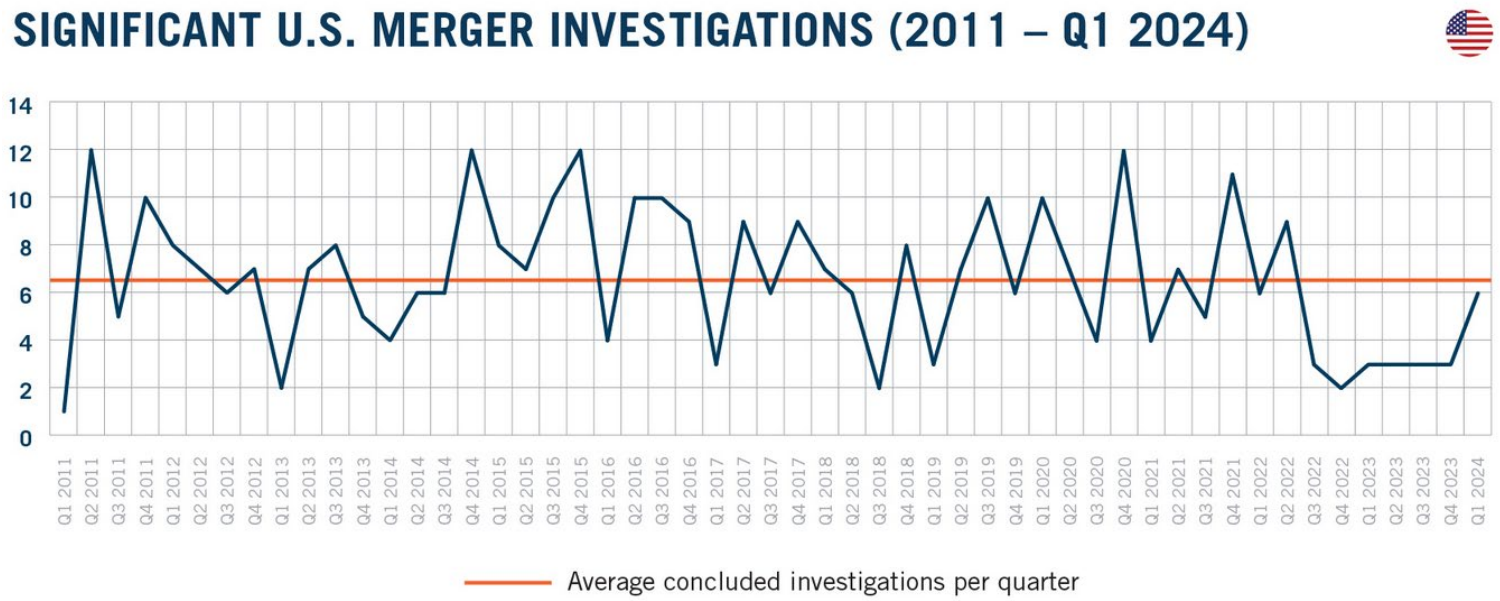
Total number of second request investigations

- By year since 2000



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year App. A (for FY 2010 and FY 2022).

“Significant” U.S. Merger Investigations



Source: Dechert LLP, DAMITT Q1 2024: Merger Enforcement Begins 2024 with a Bang (Apr. 25, 2024).
Notes: Dechert declines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release.

Second request investigations

TABLE I FISCAL YEAR 2022[1] ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]												
TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	25	0.8%	0	1	0.0%	4.0%	4.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	401	13.2%	11	7	2.7%	1.7%	4.5%	1	2	0.2%	0.5%	0.7%
150M - 200M	402	13.3%	14	8	3.5%	2.0%	5.5%	0	1	0.0%	0.2%	0.2%
200M - 300M	513	16.9%	29	15	5.7%	2.9%	8.6%	2	0	0.4%	0.0%	0.4%
300M - 500M	434	14.3%	26	14	6.0%	3.2%	9.2%	3	3	0.7%	0.7%	1.4%
500M - 1000M	643	21.2%	43	27	6.7%	4.2%	10.9%	3	6	0.5%	0.9%	1.4%
Over 1000M	611	20.2%	61	35	10.0%	5.7%	15.7%	16	10	2.6%	1.6%	4.3%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2022, at Ex. A, Table I.

Second request investigations

- Second request
  - Blunderbuss request
    - If you can only ask once, ask for everything
    - DOJ and FTC each have “model” second requests but typically customize them with additional specifications for each transaction
    - Covers e-mail and other electronic documents as well as hard copy materials
  - Typically takes 6-20 weeks to comply (but some companies take much longer)
    - Can cover 60-120 custodians
    - Interrogatories, including:
      - Detailed sales data
      - Bid and win/loss data
      - Requirements for entry into the marketplace
      - Rationale for deal
    - Document requests, including:
      - Business, strategic, and marketing plans
      - Pricing documents
      - Product and R&D plans
      - Documents addressing competition or competitors
      - Customer files and customer call reports
    - Non-English language documents must be translated into English

Second request investigations

- Depositions of business representatives of parties
  - Often 3-5 employees for each party
    - Often senior person knowledgeable about U.S. sales and competition for U.S. customers
    - Can include sales representatives for key accounts
    - R&D directors (if R&D is important in the transaction)
  - Location: Typically Washington, D.C.
  - Can be compelled
    - Civil Investigative Demand (CID) by the DOJ
    - Subpoena by the FTC
  - Transcribed and under oath (sometimes videotaped)
  - Typically each lasts 6-8 hours
- Documents and testimony from customers and competitors
  - Testimony will be memorialized in a sworn affidavit
- Expert economic analysis
  - By experts retained by the parties
  - By agency experts
    - In investigations where litigation is likely, the agency typically also retains outside experts

Final waiting period

- Timing
  - Begins when all parties have submitted proper second request responses
    - Exception: In open market transactions, timing depends only on when the acquiring person complies (to avoid delaying tactics by the target in hostile transactions)
  - Ends 30 calendar days later
    - 10 days in a cash tender offer

"Substantial compliance"

- *Query*: What constitutes a sufficient response to a second request start the running of the final waiting period?
  - Under the HSR Act, it is sufficient if the merging parties "substantially comply" with the demands of the second request
    - Clayton Act § 7A(e)(1)(B)(i): Provides that the agency may appoint a person to determine "whether the request for additional information or documentary material has been *substantially complied* with" if the reporting person believes that it has submitted a sufficient response
    - Clayton Act § 7A(g)(2): Provides that a district court may order compliance and extend the waiting period "until there has been *substantial compliance*" with the notification requirement or a second request

This is the HSR Act's enforcement provision

  - But neither the HSR Act nor the implementing rules provides any guidance on what constitutes "substantial compliance"
    - The agencies have 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
    - This is almost surely the standard the agencies apply in the Biden administration

"Substantial compliance"

- *Query*: What constitutes a sufficient response to a second request start the running of the final waiting period?
  - The HSR Act legislative history indicates a much more lenient standard for "substantial compliance":

> *[G]overnment requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them*. If the merging parties are prepared to rely on it, all of it should be available to the Government. *But lengthy delays and extended searches should consequently be rare*. It was, after all, the prospect of protracted delays of many months--which might effectively "kill" most mergers--which led to the deletion, by the Senate and the House Monopolies Subcommittee, of the "automatic stay" provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination would clearly constitute a misinterpretation of this bill.
>
> In sum, *a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable*. In these cases, a failure to comply with such umeasonable portions of a request would not constitute a failure to "substantially comply" with the bill's requirements. All the equities of the particular situation should be considered in determining what constitutes "substantial compliance."[1]

[1] 122 Cong. Rec. 30877 (Sept. 16, 1976) (statement of Rep. Peter W. Rodino) (emphasis added). At the time, Rodino was chairman of the House Judiciary Committee and is the "R" in the HSR Act. Rodino remarks are particularly probative of legislative intent since he was the sponsor of H.R. 14580, 94th Cong., 2d Sess. (1976), which, with minor amendments, was ultimately substituted for the Senate-approved version of Title II of the Antitrust Improvements Act. Rodino included the above remarks in what described as a statement of "legislative intention" regarding the Act. *See id*. at 30875.

"Substantial compliance"

- Final note: *Blockbuster Video*
  - There has been no litigated decision on what constitutes "substantial compliance"
    - The most developed argument was made in 2005 the FTC's challenge to Blockbuster's compliance with its second request in connection with Blockbuster's contested hostile takeover of Hollywood Entertainment Corp (d/b/a Hollywood Video)[1]
      - Hollywood Video had signed a merger agreement with Movie Gallery, Inc.
      - Blockbuster, Hollywood Video's largest competitor in movie rentals, made a topping bid in a tender offer and a bidding war ensued
      - It was critical that Blockbuster resolve any antitrust concerns before the scheduled shareholders vote by Hollywood Video shareholders on the Movie Gallery merger agreement
        - A universal rule is that that shareholders—which by the time of the shareholder vote will be almost all arbitrageurs—will vote affirmatively for whichever deal is presented to them first
        - Once the shareholders approve a deal, the company can no longer exercise a "fiduciary out," terminate the merger agreement, and accept the topping bid
      - Although Blockbuster offered to divest hundreds of Hollywood Video retail outlets, the FTC found the offer insufficient and would not accept a consent settlement
      - The FTC strategy appeared in part to block the deal by asserting that Blockbuster had not made a sufficient response to its second request to start the running of the final waiting period and running out the time until the HW shareholder vote on the Movie Gallery transaction
      - The litigation settled when the FTC agreed that the waiting period would end before the HW shareholder vote

[1] *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 this brief.

Final waiting period

- The final waiting period is often too short to complete the investigation
  - Given the time it takes—
    - For the investigating staff to analyze information and documents submitted by the parties in response to their second requests
    - For the investigating staff to finalize its analysis and recommendation, and
    - For agency management to review the staff's recommendation and make a decision on the disposition of the investigation
    - Conclusion: The final waiting period provides too little time for the agency to make an informed decision

An investigation that cannot reasonably be completed in the time available is detrimental to the parties: If the agency has serious concerns when times runs out, it will initiate litigation and continue the investigation in postcomplaint discovery

Timing agreements

- "Timing agreements"
  - Concept
    - Contractual commitments by the merging parties not to close the transaction for a period of time after the expiration of the HSR Act waiting period
  - Agencies like to negotiate timing agreements early in a second request investigation so that they know how much time they have before the deal can close to complete their investigation
  - Typically will accept 60 days beyond the normal expiration of the waiting period
    - 30 days for the staff (making a total of 60 days for the staff after second request compliance)
    - 30 days for the front office
  - Parties typically agree to a timing agreement—but negotiate the duration
    - Provides additional time for the agency to complete its investigation
    - May be necessary to complete meetings to enable the merging parties to make their arguments before senior agency management and the AAG/Commissioners
      - In the absence of a timing agreement, all of the staff's efforts in the last month or so of the investigation will be devoted to building a case for a preliminary injunction, not to objectively analyzing the merits of the transaction or having meetings to hear arguments
    - Usually better than being sued!
      - The investigating agency will sue to block the transaction if it cannot complete its analysis before the transaction closes
    - Almost surely will be necessary if the merging parties want to negotiate a consent settlement

Timing agreements

- A timing agreement does not technically extend the HSR Act waiting period
  - The FTC Premerger Notification Office's position, on advice from the FTC General Counsel, is that the waiting period is set by statute and cannot be extended by agreement, although the parties can commit by contract not to close the transaction before a certain time
  - Surprisingly, many members of the bar (and some attorneys in the enforcement agencies) believe that the parties can voluntarily "extend" the HSR Act waiting period
    - Even those who know better often talk of timing agreements "extending" the HSR waiting period—what they really mean is that the parties cannot close the deal because of a commitment they made to the investigating agency in the timing agreement
  - Timing agreements are enforceable in court through contract or promissory estoppel, not as a violation of the HSR Act
    - I am unaware of any instance where the parties have breached a timing agreement and there are no enforcement precedents
    - However, there is little doubt that a court faced with a breach would summarily enforce the timing agreement through a specific performance injunction
  - The fact that a timing agreement does not extend the HSR Act waiting period has significant implications for "gun-jumping" violations, which cannot occur after the waiting period has ended

The final arguments

- Four formal meetings at the end of the investigation

	DOJ	FTC
1	Investigating staff	Investigating staff
2	Section Chief & staff	Assistant Director & staff
3	Deputy Assistant Attorneys General (legal and economics)	Directors meeting (Bureau of Competition/ Bureau of Economics)
4	Assistant Attorney General	FTC Commissioners (meet individually)

Note: The last meeting with the AAG or the Commissioners is sometimes inappropriately called a “last rites” meeting

- Numerous informal meetings can occur up the chain at the end of the investigation
- *Critical question*: How much of its analysis will the investigating staff disclose to the parties?

Merger Review Outcomes

Possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- Agency grants early termination prior to normal expiration

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court
  Seeks permanent injunctive relief in administrative trial

Settle w/consent decree

- Historically, the typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

"Fix it first"

- Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party
- Merging parties file new HSR notifications for the restructured transaction
  - HSR reports also may need to be filed for the restructured transaction
- When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement act

Possible outcomes in DOJ/FTC reviews

Allow deal to close but do not close investigation

- New with the Biden administration
  - No deadline to finish investigation—could remain open indefinitely
  - Agencies send a "preconsumation warning letter" to the parties alerting them to the continuation of the investigation and the possibility of a postclosing challenge[1]
  - Agencies have yet to bring a postclosing challenge to one of these deals

[1] For the FTC's model letter, see Fed. Trade Comm'n, Sample Pre-Consummation Warning Letter. The DOJ and FTC are free to bring Section 7 actions even after the conclusion of an HSR merger review. The most notable modern example is the FTC's challenge initiated in 2020 of Facebook's acquisition of Instagram in 2012 and WhatsApp in 2014. Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. filed Dec.9, 2020). The district court rejected Facebook's effort to dismiss the complaint as untimely. See FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 30-32 (D.D.C. 2021).

Outcomes in "significant" investigations

	Consent	Abandoned	Litigation	Closing Statement	Total
2016	26	1	6	0	33
2017	23	1	3	0	27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6	0	27
2022	8	2	10	0	20
2023	1	5	6	0	12
2024 Q1	0	4	2	0	6

2016	78.8%	3.0%	18.2%	0.0%	100.0%
2017	69.7%	3.0%	9.1%	0.0%	100.0%
2018	48.5%	3.0%	9.1%	9.1%	100.0%
2019	45.5%	6.1%	21.2%	6.1%	100.0%
2020	66.7%	6.1%	24.2%	3.0%	100.0%
2021	63.0%	14.8%	22.2%	0.0%	100.0%
2022	40.0%	10.0%	50.0%	0.0%	100.0%
2023	8.3%	41.7%	50%	0.0%	100.0%
2024 Q1	0.0%	66.7%	33.3%	0.0%	100.0%

Source: Dechert LLP, DAMITT Q1 2024: Merger Enforcement Begins 2024 with a Bang (Apr. 25, 2024).

Outcomes in "significant" investigations

- Trends over the last five quarters (2023-2024 Q1)[1]
  - The DOJ and FTC concluded 18 significant investigations over the last five quarters, one−third of those in 2024 Q1
  - The DOJ has not settled an investigation by consent since AAG Kanter was sworn in on November 16, 2021
    - The only matter the DOJ settled by consent to date was essentially forced by the court in the middle of trial[2]
  - In the last five quarters, all but one significant investigation concluded with either the commencement of litigation or an abandonment of the transaction—
    - 94% of investigations concluded with litigation (8) or abandonment (9)
    - Only one transaction was settled by consent by either the DOJ or the FTC[3]
      - The FTC's consent decree resolved an antitrust investigation into the proposed acquisition by EQT Corporation of two companies backed by equity commitments from funds managed by Quantum Energy Partners for $2.6 billion in cash and approximately $2.6 billion in EQT common stock.
      - The consent decree was unusual because it did not require any restructuring of the horizontal acquisition but rather prohibited QEP from occupying a seat on EQT's board of directors to prevent an alleged interlocking directorate and the potential sharing of competitively sensitive information.

[1] Dechert LLP, DAMITT Q2 2023: When Avoiding Settlements, Does Merger Enforcement Settle for Less? (July 26, 2023).
[2] *See* Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division (May 5, 2023).
[3] Decision and Order, QEP Partners, LP, No. C-4799 (F.T.C. Oct. 10, 2023); *see* Press Release, Fed. Trade Comm'n, FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Oct. 10. 2023).

Update:
New Proposed HSR Notification Changes

Proposed HSR notification changes

- Background
  - On June 27, 2023, the FTC announced that the Commission, with the DOJ's concurrence, would be publishing a Notice of Proposed Rulemaking (NPRM) to amend the rules governing the HSR notification process[1]
    - The HSR Act gives the FTC, with the concurrence of the AAG, to "require that the notification . . . be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws."[2]
    - Any resulting final rules, of course, cannot alter the HSR Act
    - It remains an open question whether the proposed rules, if implemented, lie within the power delegated by Congress to the FTC to promulgate
  - As proposed, the rule would—
    - fundamentally change the HSR notification process, *and*
    - significantly increase the cost, burden, and timing for parties filing HSR notifications
  - This would be the first fundamental revision of the HSR reporting requirements since the original form was issued 45 years ago

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

Proposed HSR notification changes

- Timing
  - The rulemaking is subject to—
    - A 60-day public comment period (which closes August 28, 2023, unless extended);
      - On August 4, the FTC extended the public comment period to September 27, 2023[1]
    - Any modification by the FTC and DOJ of the proposed rules in the wake of public comments and any further thinking by the agencies;
    - A review of the proposed final rules by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA);[2] and
    - Potential legal challenges under the Administrative Procedure Act

[1] *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Extend Public Comment Period by 30 Days on Proposed Changes to HSR Form (Aug. 4, 2023).
[2] 44 U.S.C. §§ 3501-3521.

Key proposed changes

- Competition analysis
  - Narrative explanation of any current and potential future horizontal overlaps between the parties
    - For each overlap, sales information, customer information (including contact information), and a description of any licensing arrangements, noncompete agreements, and nonsolicitation agreements
  - Narrative explanation of any vertical relationships between the parties
    - Submission of all agreements between the acquired and acquiring persons that were in effect at the time of filing or one year previous (e.g., supply or licensing agreements)
  - More granular geographic information at the street-address level for certain overlaps
  - More expansive information regarding acquisitions in the last 10 years of businesses that offer a product that overlaps with the other party
  - Projected revenue streams for pre-revenue companies
  - Information regarding customers for overlapping products and services, including customer contact information
  - Mandatory disclosure of required foreign merger control filings

Key proposed changes

- Information about the transaction
  - Narrative explanation of each filing person's strategic rationale(s) for the transaction (with citations to supporting documents), including those but not limited related to—
    - Competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other reporting person
    - Expansion into new markets
    - Hiring the sellers' employees (so-called acquihires)
    - Obtaining certain intellectual property, or
    - Integrating certain assets into new or existing products, services or offerings
  - A diagram of the deal structure with an explanation of all the entities involved persons involved in the transaction
  - A detailed transaction timeline of key dates and conditions to closing
  - Any agreements in place between the parties at the time of filing or within the year prior to the date of filing

Key proposed changes

- Required business documents
  - Broadening the scope of Item 4(c) and 4(d) documents that analyze the transaction to include—
    - Documents prepared by or for "supervisory deal team leads" in addition to officers and directors; *and*
    - Drafts (not just final versions) of all responsive documents
  - Full English translations of all foreign-language documents submitted with the HSR filing
    - No translations are currently required
  - Board reports and certain semi-annual and quarterly ordinary course business plans that evaluate the competitive aspects of any overlapping product or service.

Key proposed changes

- Information about the reporting company
  - A description of business operations of all entities within the acquiring person
    - This could be extensive for conglomerates and private equity (PE) funds
  - Expanding the requirements for identifying minority investors
  - Sweeping new requirements to identify officers, directors, and board observers for all entities within the acquiring and acquired person (or in the case of unincorporated entities, individuals exercising similar functions), as well as those who have served in the position within the past 2 years
  - Identification of the company's communications and messaging systems
  - Certification that the company has taken steps to suspend ordinary document destruction practices for documents and information "related to the transaction," regardless of whether the transaction raises any substantive antitrust issues

Key proposed changes

- Labor markets
  - Provide the aggregate number of employees of the company for each of the five largest occupational categories by six-digit Standard Occupational Classification (SOC) codes
    - The SOC is an employee classification system developed by the Department of Labor Statistics.
  - Indicate the five largest 6-digit SOC codes in which both parties (the acquiring person and the acquired entity) employ workers
    - For each overlapping 6-digit SOC code, list each Employee Research Service (ERS) commuting zone in which both parties employ workers and provide the aggregate number of classified employees in each ERS commuting zone
      - The ERS was developed and maintained by the Department of Agriculture
  - Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters

Key proposed changes

- Agreement documents
  - Currently
    - A filing requires a copy of the most recent version of—
      - the contract or agreement (but not including exhibits or schedules), *or*
      - letter of intent (LOI) to merge or acquire
    - The letter of intent can be bare bones and not include even the basic terms of an agreement
  - Proposed rule
    - Requires:

> [C]opies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction.[1]

    - Documents that constitute the agreement must be executed, but draft documents will suffice *if* they provide sufficient detail" about the transaction:

> If there is no definitive executed agreement, provide a copy of the most recent draft agreement or term sheet that provides *sufficient detail* about the scope of the entire transaction that the parties intend to consummate.[2]

    - While the proposed rules do not define "sufficient detail," the agencies likely will demand something like a detailed term sheet
      - Bare bones LOIs that have been acceptable in the past almost surely will not be sufficient
      - This means that negotiations will have to be much further along than they are today in many deals

[1] HSR NPRM, 88 Fed. Reg. at 42213. [2] *Id*.

Some observations

- Deficiencies in filing
  - Documents
    - Currently, a party's failure to submit all 4(c) and 4(d) document with the original filing can make the filing inoperative and, once discovered, require the party to make a new complete filing, which starting the running of a new HSR waiting period
    - The proposed expanded document requirements increases the risk that required documents will be missed and that the agencies will reject the original filing as deficient
  - Narratives
    - Currently, an HSR filing does not require the creation of any new narratives
    - The proposed changes require the creation of narratives describing the strategic rationale for the transaction, horizontal overlaps, and supply relationships, raising the possibility that the agency will find the narratives "inadequate" and refuse to recognize the filing as effective
  - Agreement documents
    - Currently, a filing can be made on a bare bones letter of intent
    - The proposed rules require that if the absence of an executed definitive agreement, the parties can file only if the letter of intent or term sheet contains "sufficient detail" about the scope of the transaction, raising the possibility that the agency will find that these documents provide insufficient detail and therefore refuse to recognize the filling as effective

Disputes over the sufficiency of a filing may need to be resolved in a declaratory judgment action in a federal district court

The upshot

- The existing way
  - The reporting regime since the HSR Act was put into effect in 1978 has been to ask for only the minimal information necessary to determine whether to open a preliminary investigation during the initial waiting period
  - In the preliminary investigation, additional information to inform the agency whether to issue a second request was obtained through:
    1. The presentations by the merging parties
    2. Responses by the merging parties to a “voluntary request letter” for documents, data, and other information
    3. Responses by the merging parties to other questions from the investigating staff
    4. Telephone interviews with customers, competitors, industry analysts, and other third parties
    5. Internet research on the merging parties and the products of interest
    6. Presentations, if any, by firms and interest groups opposing the deal
- Under the proposed rules
  - Much of the information the investigation agency gathered from the merging parties during the preliminary investigation will now be required as part of the HSR notification form

The upshot

- The burden
  - In FY 2021[1]—
    - 3413 transactions were reported
    - Clearance was granted to open preliminary investigations in 270 transaction (7.9%)
    - Second requests were issued in 65 transactions (1.9%)

If the proposed rules had been in effect in FY 2021, the burden of the additional reporting requirements would have been imposed on 3142 reportable transactions where neither the DOJ nor the FTC had sufficient concern to request clearance to open a preliminary investigation

[1] Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2021, at Ex. A, Table I.

Likely challenges

- If the final rules look like the proposed rules, the final rules will almost certainly be challenged in court as being outside of the authority of the FTC to promulgate
  1. The delegation of rulemaking authority is limited to "necessary and appropriate" documents and information to enable the agencies to determine whether the reported transaction violates the antitrust laws[1]
  2. Under the current reporting regime, the agencies notification of pending reportable transactions—Internet research, voluntary access letters, second requests, and field investigations with customers and competitors provide the agencies all the information they need to determine whether a transaction violates the antitrust laws
  3. This is confirmed by the fact that since 1978, when HSR reporting began, the agencies have challenged only a handful of reportable transactions (say, less than four) that were "cleared" in the merger review
     - Under *DuPont/GM*, laches does not run against the DOJ or the FTC, so a postclearance Section 7 challenge—even 30 years after the closing—is not time barred
     - The fact that the agencies are not bringing postclearance challenges indicates that the agencies are able to determine whether a transaction violates Section 7 under the historical reporting regimes, so that the additional requirements are neither "necessary" or "appropriate"

[1] 15 U.S.C. § 18a(d)(1). Also, look at the legislative history of the HSR Act discussed above.

Timing of final rule

As of July 20, 2024, the FTC has yet to promulgate a final rule changing the HSR form