Cumulative Class Slides (2025)

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Class 1 slides

Unit 1: TransDigm/Takata

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TRANSDIGM GROUP INC.

SCHROTH

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The Parties

Who was the buyer?

- TransDigmGroup Incorporated
  - Leading supplier of highly engineered airplane components
  - Delaware corporation
  - Headquarters: Cleveland, OH
  - Revenues (2016): $3.1 billion

Who was the buyer?

- TransDigm's AmSafe subsidiary
  - World's dominant supplier of restraint systems (seatbelts) used on commercial airplanes

  - Global revenues (2016): $198 million
  - Headquarters: Phoenix, AZ

Who was the seller?

- Takata Corporation
  - Global manufacturer of automotive safety systems and products for automakers worldwide
    - Also diversified into aviation systems
  - Headquartered in Japan
  - Production facilities on four continents
  - Manufacturer of the airbags subject to the massive recalls
    - U.S. recall of more than 42 million cars (Nov. 2014)
  - Bankruptcy
    - June 2017: Filed for bankruptcy protection in Japan
    - April 2018: Takata was acquired by Key Safety System

What was the seller going to sell?

- The SCHROTH passenger restraint systems business
  - Designs and manufactures proprietary, highly engineered, advanced safety systems for aviation, racing, and military ground vehicles throughout the world
  - History
    - Founded in 1946
    - Built the world's first seat-belt in 1954
    - Entered the aviation business in 1991
    - Acquired by Takata in 2012
  - Facilities in three locations
    - Arnsberg, Germany
    - Pompano Beach, Florida
    - Orlando, Florida
  - Operations
    - Employees: 260
    - Revenues (2016): $37 million
    - Profits: Don't know, but probably between $5 - $10 million annually

SCHROTH®
Safety Through Technology

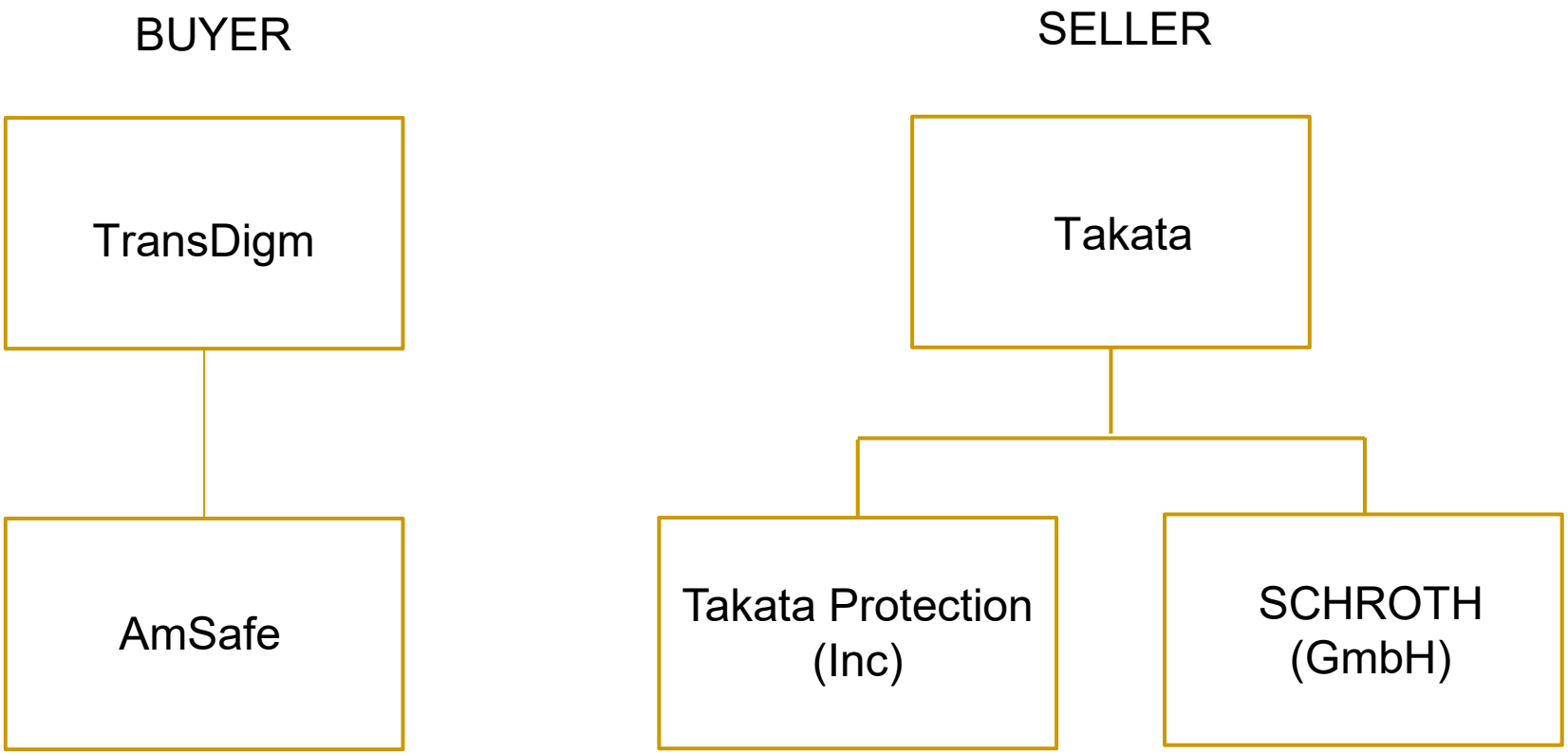
The Transaction

What was the transaction?

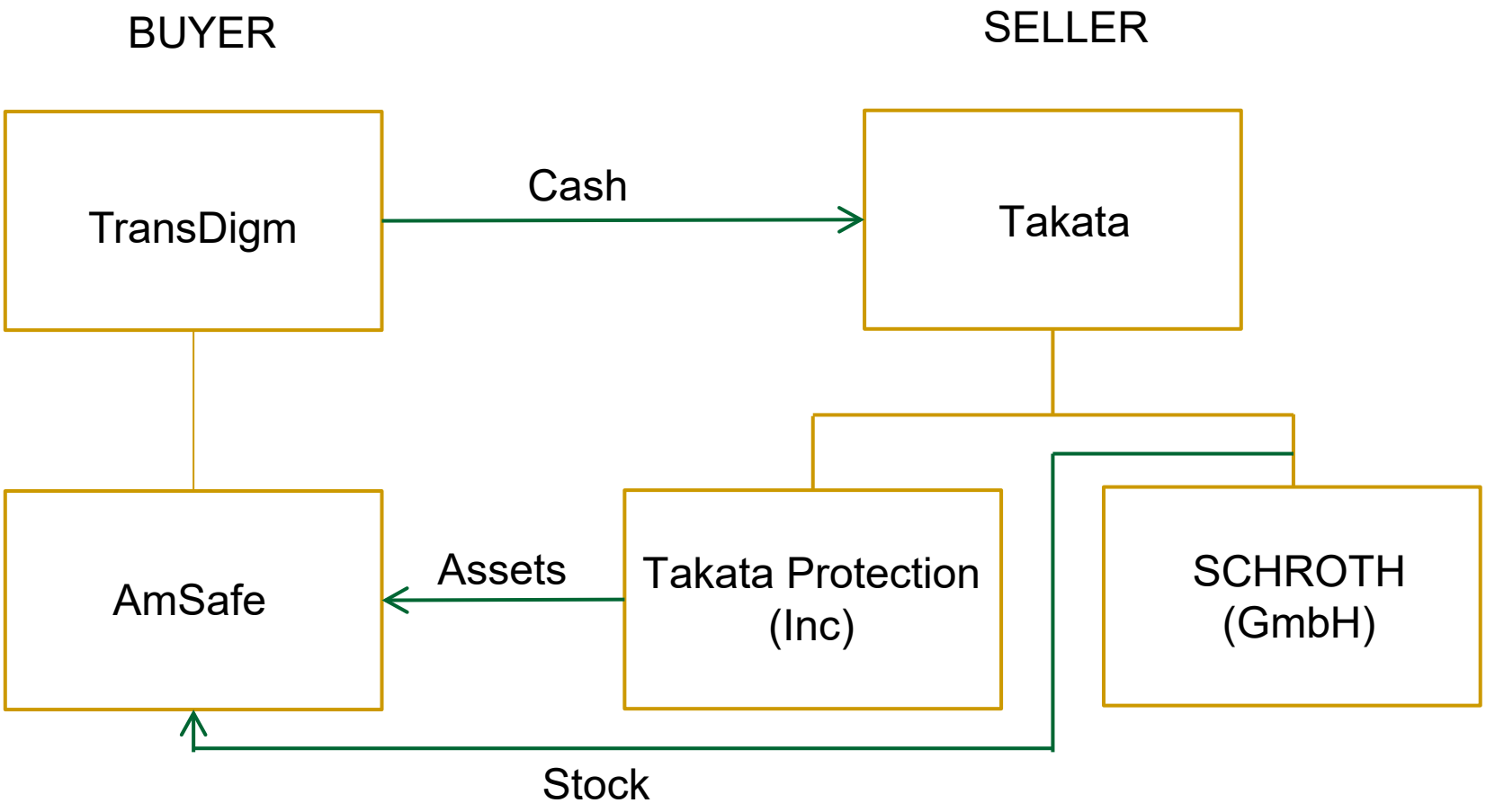
- TransDigm Group to acquire—
  1. Stock of SCHROTH Safety Products GmbH, *and*
  2. Assets of Takata Protection Systems, Inc.

  from Takata Corporation
- Purchase price: $90 million
- Transaction closed: February 22, 2017
  - Five years after being acquired by Takata

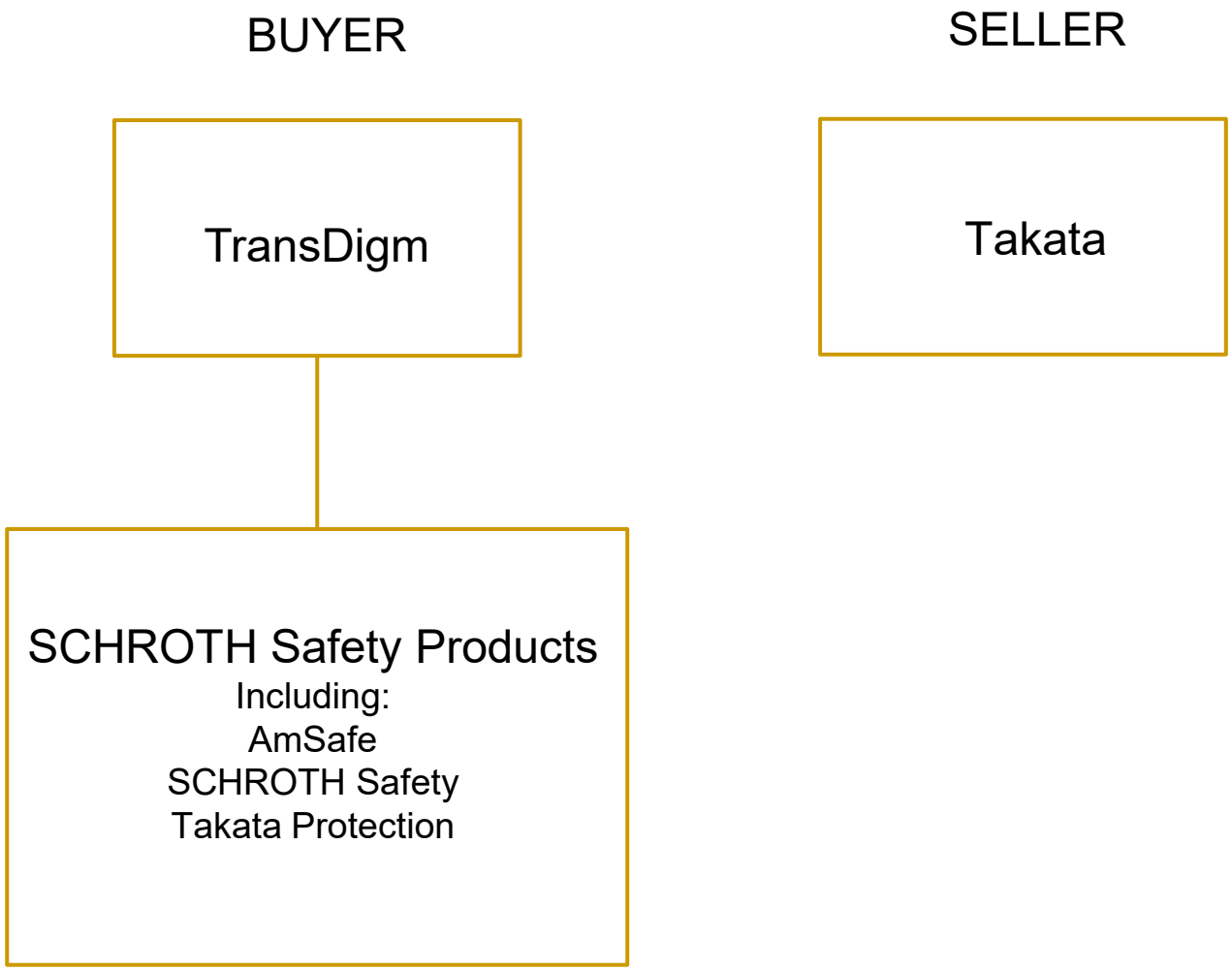
Summary of the deal structure: Before



Summary of the deal structure: Deal

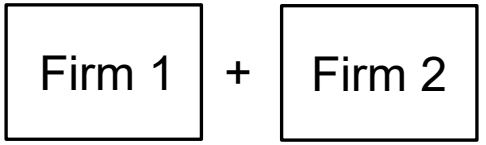


Summary of the deal structure: After

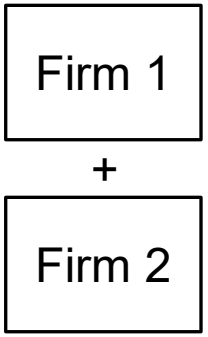


Is this a horizontal transaction?

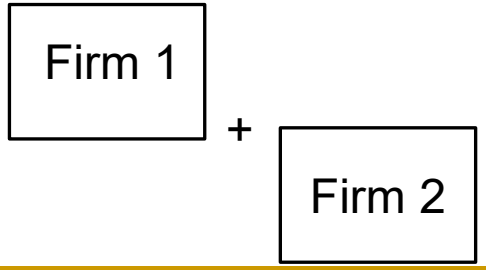
- Yes
- Horizontal transactions:
  - Combine two competitors
  - Sell *substitute* products



- Vertical transactions:
  - Combine two firms at adjacent levels in the chain of manufacture and distribution
  - May be extended to two firms that sell *complementary* products



- Conglomerate transactions
  - Mergers that are neither horizontal nor vertical



The Business Rationale

Why did the parties do the transaction?

- TO MAKE MONEY

Parties do not do deals out of the goodness of their heart

Firms act with the goal of maximizing profit

To make money, the buyer must value the target at more than the target's going concern value

To make money, the seller must value the purchase price at more than the target's going concern value

- Some definitions
  - *Synergies* (a business term)
    - Benefits to the company from the transaction that lower the combined firms' costs or increase its revenues
  - *Efficiencies*
    - The term used in antitrust analysis for synergies that benefit consumers

How can buyers profit from a horizontal deal?

- Cost-saving efficiencies
  - Eliminate duplicative facilities
  - Consolidate corporate functions
  - Rationalize workforce
  - Run the business more efficiently
- Customer value-enhancing efficiencies
  - "Shift the demand curve to the right"
  - Improve the *customer value proposition*
  - Make existing products better or cheaper
  - Create new or improved products better, cheaper, or faster
  - Enhance customer service or support quality

These synergies are procompetitive *because they tend to improve consumer welfare*

How can buyers profit from a horizontal deal?

- Exploit customers
  - Increase prices by reducing competition on price, quality, or service
  - Reduce costs by degrading product quality, service, or other aspects of customer value
- Harm competitors (primarily vertical deals)
  - Gain the incentive and ability to withhold essential products or services from competitors, thereby weakening or excluding rivals and enabling higher prices

These synergies are anticompetitive *because they tend to harm consumer welfare*

Why did Takata buy SCHROTH in 2012?

- TO MAKE MONEY
- How?
  - Conglomerate transaction ("product extension" merger)
    - Saw AmSafe as essentially a monopolist
    - Only SCHROTH and one other company—both small—were in the market for restraint systems
    - Probably making significant profit margins
  - Takata thought it could capture more share and make more profits with SCHROTH than had SCHROTH's current owner
  - BUT Takata's strategy required some initial investment in—
    - Aggressive pricing
    - Innovation

    to gain reputation and market share

Why did TransDigm want to buy SCHROTH?

- TO MAKE MONEY
- How?
  - Horizontal transaction—would eliminate competition from an aggressive "new" competitor
    - Recall that SCHROTH, after being acquired by Takata in 2012, embarked on an ambitious plan to capture market share from TransDigm AmSafe (Compl. ¶ 3)
      - Competing on price
      - Investing in R&D
    - At the time of the signing of the acquisition agreement, SCHROTH was—
      - AmSafe's closest overall competitor
      - AmSafe's only meaningful competitor for certain types of restraint systems
    - TransDigm's strategy—
      - Eliminate Schroth's price competition and so stop competing on price
      - Eliminate innovation competition and reduce R&D costs
      - TransDigm also may have expected some cost-savings synergies

Why did Takata want to sell SCHROTH?

- TO MAKE MONEY
- How?
  - Purchase price more valuable than keeping the business
  - Why might that be the case?
    - SCHROTH needed to compete aggressively to attract customers from TransDigm:
      - Cost money to operate business and conduct R&D
      - Had to price aggressively
      - Probably not making much in profits
    - Had been at it for five years (Compl. ¶ 3)
    - May also have been an effort to obtain cash to stave off bankruptcy in light of the airbag litigations
      - Sale closed in February 2017, three months before Takata's bankruptcy filing

The Law

Statutes

- What federal antitrust statutes could apply to the TransDigm/SCHROTH transaction?
  - Clayton Act § 7
  - Sherman Act § 1
  - Sherman Act § 2
  - FTC Act § 5

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

> **No person** engaged in commerce or in any activity affecting commerce **shall acquire**, directly or indirectly, the whole or any part of the **stock** or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the **assets** of another person engaged also in commerce or in any activity affecting commerce, **where in any line of commerce** or in any activity affecting commerce **in any section of the country**, the **effect** of such acquisition **may be substantially to lessen competition, or to tend to create a monopoly**.[1]

  - *Simple summary*: Prohibits transactions that—
    - "may substantially lessen competition or tend to create a monopoly"
    - "in any line of commerce" (product market)
    - "in any part of the country" (geographic market)

Called the *anticompetitive effects test*

Called the *relevant market*

[1] 15 U.S.C. § 18 (remainder of section omitted)

The Sherman Act

- Sherman Act § 1

> Every **contract, combination** in the form of trust or otherwise, or **conspiracy**, in **restraint of trade** or commerce among the several States, or with foreign nations, is declared to be illegal.[1]

- Sherman Act § 2

> Every person who shall **monopolize**, or **attempt to monopolize**, or **combine or conspire** with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.[2]

[1] 15 U.S.C. § 1.
[2] *Id*. § 2.

The FTC Act

- FTC Act § 5

> **Unfair methods of competition** in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.[2]

  - NB: Unlike other provisions, not included in the definition of "antitrust law" in Clayton Act § 1
    - This will be important when it comes to private actions

[1] 15 U.S.C. § 45(a)(1).

Section 7 is the binding constraint

- The Sherman Act and FTC Act, as applied to mergers, are either coextensive or less restrictive than Section 7 of the Clayton Act

*Section 7 provides the antitrust test for all mergers**

* There is arguably an exception for acquisitions of "nascent" competitors (where Section 2 *might* be more restrictive—we will be looking for a test case)

- Consequently:
  - Invocation of the Sherman Act or the FTC Act is usually superfluous
  - Plaintiffs—including the DOJ and FTC—typically allege only a Section 7 violation
    - BUT the FTC alleges that the *signing* of the merger agreement violates Section 5
- State antitrust law
  - Not preempted by federal law
  - But no state has enacted a statute stricter than Section 7

Section 7 and the Consumer Welfare Standard

Some history

- Until recently, modern antitrust law has focused on anticompetitive effects in downstream markets
  - *Downstream markets* are markets in which the firms of interest sell their products or services
  - *Upstream markets* are markets in which the firms of interest buy the inputs to manufacture their products or create their services

We will focus first on effects in downstream markets

Downstream anticompetitive effects

- How do the DOJ/FTC decide whether a merger is anticompetitive in a downstream market?
  - *Rule*: Modern antitrust law looks to the *consumer welfare standard* to determine whether a merger is likely to substantially lessen competition
  - *Rule*: A merger will have a Section 7 anticompetitive effect if, when compared to the "but for" world without the merger, the world with the merger is likely to harm to customers in the market through—
    - Increased prices
    - Reduced market output
    - Reduced product or service quality
    - Reduced rate of technological innovation or product improvement
    - [Maybe] reduced product variety[1]

These are called *anticompetitive effects*

A firm that has the power to produce or strengthen an anticompetitive effect is said to have *market power*

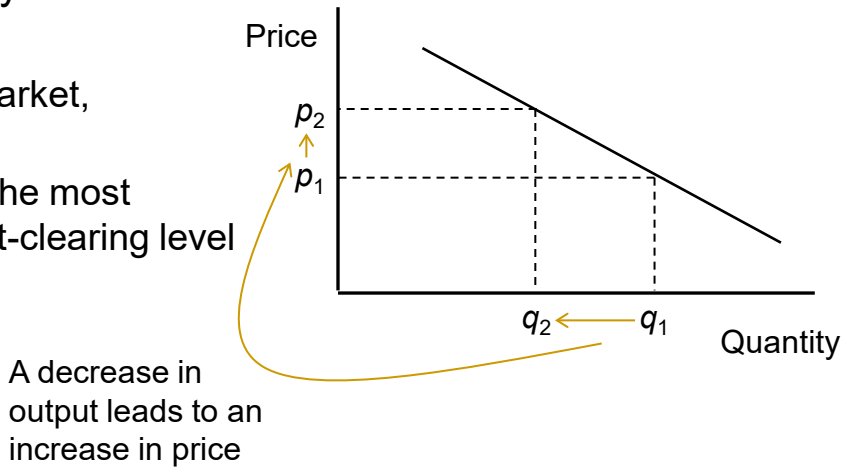
[1] Reduced product variety may or may not have an anticompetitive effect. It can lower costs and benefit consumers if the savings result in lower prices or better products. But it may harm consumers if it limits meaningful choices without offsetting gains. The impact depends on whether consumers are better or worse off after considering both.

Downstream anticompetitive effects

- The anticompetitive effects analysis is *forward looking*
  - Compares the postmerger outcomes with and without the deal
    - Does NOT compare premerger outcomes with postmerger outcomes
    - Requires the investigating agency and the courts to do a *predictive analysis*
      - In the most common situation where the merger has not yet been consummated, the agencies and the courts will have to predict future market outcomes in BOTH with world with the merger and the "but for" world without the merger
  - *Example*: Suppose a merger occurs in a market where prices are decreasing over time
    - The merger is anticompetitive if reduces how fast prices will decrease in the future compared to what would have happened in the "but for" world without the merger
    - The fact the postmerger prices will be lower than premerger prices is irrelevant to the Section 7 anticompetitive effects analysis
  - Can view potential competitors today as future competitors tomorrow

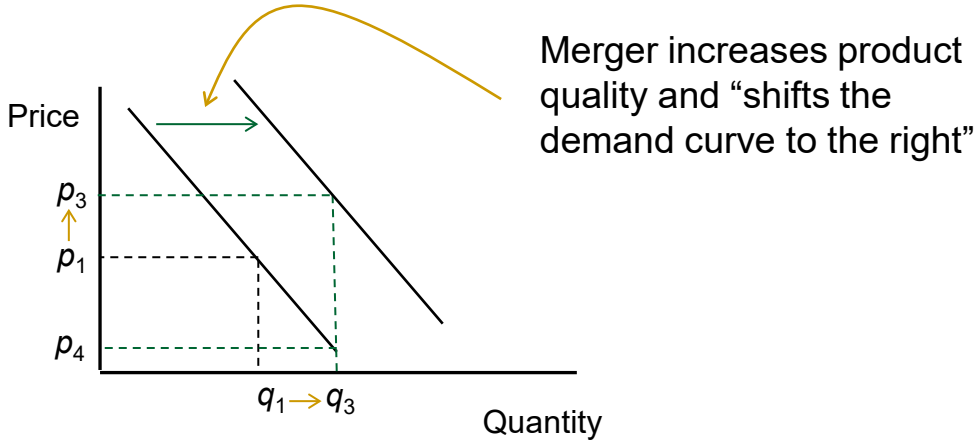
Downstream anticompetitive effects

- Some observations
  1. Prices are usually most easily observed and measurable dimension on which an anticompetitive effect can occur
  2. In competitive effect analysis, an output reduction is equivalent to a price increase
     - In standard economic theory, a firm facing a downward-sloping residual demand curve increases its price by—
       - decreasing output, which
       - creates an artificial scarcity in the market, resulting in
       - The customers valuing the product the most bidding up the price to a new market-clearing level



Downstream anticompetitive effects

- Some observations (cont.)
  3. Conversely, an output increase is (usually) treated as a price decrease
     - A merger that increases output is treated as decreasing "quality-adjusted" price even as it increases the nominal postmerger price
       - The revealed preferences of the customers in increases their unit purchases postmerger demonstrates that the merger increases consumer welfare
       - The difference $p_3 - p_4$ reflects the market's valuation of the product improvement



The conventional wisdom is that when a merger increase output, the merger is procompetitive regardless of the merger's effect on price

  4. Economic models exist to predict price and output effects from mergers that are widely used in merger antitrust analysis

Downstream anticompetitive effects

- Some observations
  5. Economic models to predict quality, rate and direction of technological innovation—
     - Have found little traction in the economics profession, *and*
     - Are not credited with any material probative value by the agencies or the courts

       The result is that merger antitrust analysis focuses primarily on the merger's effects on prices and output

     - It is not, as some critics maintain, that the consumer welfare standard focuses narrowly on price
       - The consumer welfare standard recognizes *all* dimensions on which consumers can be harmed
       - So evidence of anticompetitive harm on nonprice dimensions must come from admissions in the merging parties' documents or statements by executives—evidence that rarely exists (especially in well-counselled companies)

       The upshot is that the agencies rarely, if ever, have challenged a merger primarily on nonprice grounds

Downstream anticompetitive effects

- Four important rules
  1. Absent compelling evidence of significant customer harm on other dimensions, only ***price increases*** count
  2. The merger is anticompetitive if it is likely to result in a price increase or other competitive harm to ***any identifiable customer group***
  3. The agencies believe that ***no customer group is too small*** to deserve antitrust protection
  4. *Corollary*: ***No deal is too small*** not to be challenged

Upstream anticompetitive effects

- *Primary concern*: Reduced prices paid for inputs
  - Wages paid to labor is a central focus
- The history
  - Agencies traditionally focused on downstream customer harm, not supplier-side effects
  - Enforcement focus shifted in the late Obama and first Trump administrations
    - Agencies began exploring theories of harm in upstream (buying) markets, especially labor
    - The Biden administration embraced upstream theories as enforcement doctrine
      - Treated labor and supplier harms as Section 7 violations—even absent downstream harm
      - But it only brought one case
  - Trump 2.0 administration appears to accept upstream enforcement in principle
    - Though likely to apply it cautiously

Consumer welfare standard in practice

- Some operational implications

In each case, assumes compelling evidence of the effect

  - *Downstream effects*: If the merger—
    - Expands market output, the merger is (usually) procompetitive regardless of price effects
    - Reduces market output, the merger is anticompetitive
    - Results in a price increase for some or all customers and no price decrease for any customers, the merger is anticompetitive (unless output expands, usually because of a product or service quality increase)
    - Increases price for some customers but decreases it for others, then the merger is anticompetitive if the wealth transfer to producers from the price increase is greater than the wealth transfer to customers from the price decrease
    - Reduces product or service quality in the market as a whole or reduces the rate of innovation, the merger is anticompetitive
  - *Upstream effects*: If the merger—
    - Reduces input prices with little or no customer benefits, the agencies are likely to regard the merger as anticompetitive
    - Reduces input prices but passes on the savings to downstream customers, the agencies are unlikely to challenge
      - *Exception*: The supplier harms greatly outweigh the customer benefits

The DOJ Investigation

Timing

- Did the DOJ investigation start before or after consummation?
  - After
    - Transaction closed Feb. 22, 2017
    - Complaint filed ten months later on December 21, 2017
- Important distinction
  - Mergers challenged after closing (postconsummation mergers)
  - Merger challenged before closing (preconsummation mergers)

Why is this distinction important?

Timing

- Why didn't the DOJ investigate and challenge the transaction before closing?
  - Probably did not know about it, *or*
  - Was aware of the transaction but not aware of its likely effect on competition
- Didn't the HSR Act filings alert the DOJ to the transaction before closing?
  - No. Apparently not reportable under the Hart-Scott-Rodino Act[1]

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

Hart-Scott-Rodino Act

- Requires large mergers and acquisitions to—
  1. File a *premerger notification report* with the DOJ and FTC
  2. Observe a *statutorily prescribed waiting period* before closing the transaction
     a. *Initial waiting period*: 30 calendar days after filing (for most transactions)
     b. *Final waiting period*: 30 calendar days after all merging parties have responded to their respective second requests (for most transactions)

        NB: A *second request* is a subpoena-like document that—
        1. Contains document requests, narrative interrogatories, and data interrogatories
        2. Can only be issued during the initial waiting period
        3. Can only be issued once to each filing person
        4. Can easily take 4-10 months to respond
- Idea:
  - Much more effective and efficient to block or fix an anticompetitive deal before closing than to try to remediate it after closing

Hart-Scott-Rodino Act

- Why wasn't the TransDigm/SCHROTH transaction reported under the HSR Act?
  - The purchase price was $90 million in cash
  - The HSR threshold in 2017 was $80.8 million
    - In 2025, the threshold is $126.4 million

So the transaction was "prima facie reportable"

  - BUT there are exemptions—Two of which may have applied here to reduce the reportable amount to under the threshold:
    - Foreign stock exemption (for U.S. acquirers)
    - Foreign asset exemption

A transaction that is prima facie reportable where no exemption applies is called "reportable"

Hart-Scott-Rodino Act

- Not jurisdictional
- Agencies can review and challenge transactions that—
  1. Fall below reporting thresholds
  2. Are exempt from the HSR reporting requirements
  3. Have been "cleared" in an HSR merger review
     - "Clearance"—a commonly used term—is a misnomer
     - No immunity attaches to a transaction that has completed an HSR merger without agency enforcement act
       - Compare a merger investigation that is settled with a consent decree
       - A consent decree is entered as a final judgment in a litigation
         → Claim preclusion/res judicata applies

The fact that the TransDigm/Takata deal was not HSR reportable did not preclude the DOJ from investigating and challenging the transaction months or even years after closing

DOJ investigation

- How did the DOJ find out about this transaction?
  - Someone probably called the FTC and complained
  - Maybe Boeing complained
    - Largest U.S. passenger airline manufacturer
    - Isn't it the biggest beneficiary of SCHROTH's competition with AmSafe

    But why would Boeing wait until after the acquisition to complain?

  - Maybe it was a Tier 1 seat manufacturer supplier to Boeing (e.g., Safran, RECARO, Zodiac Aerospace, and Adient Aerospace)

    But why would they wait until after the acquisition to complain?

  - Maybe it was a disgruntled current or former TransDigm employee
  - But probably not a third-party competitor (WHY NOT?)

DOJ investigation

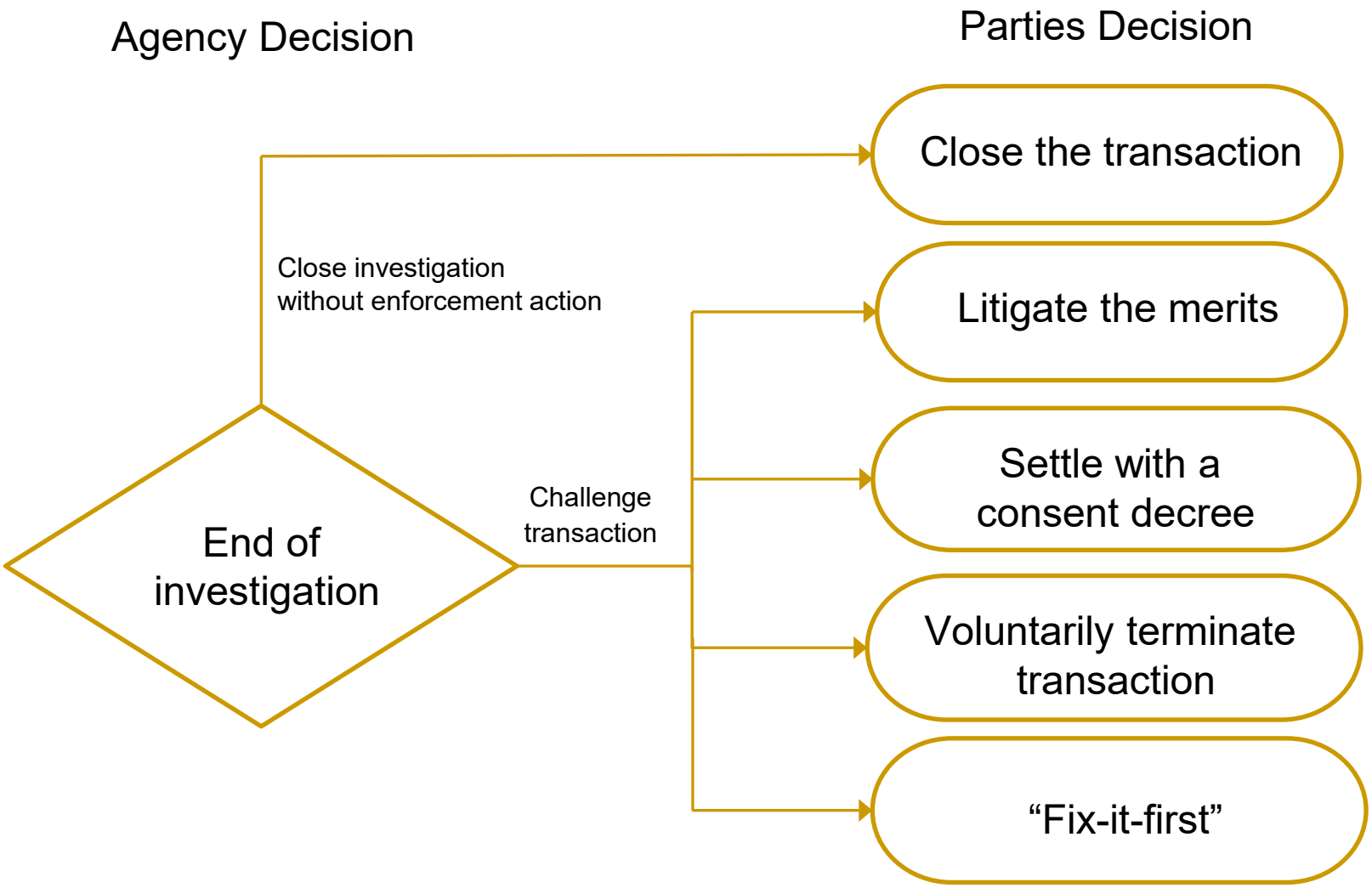
- What did the DOJ do after it learned about the transaction?
  - Opened an investigation

DOJ investigation

- How did the DOJ obtain testimony, documents, and data on which to base its antitrust analysis?
  - Typically would obtain from the parties pursuant to a *second request* under the HSR Act
    - BUT this transaction was not HSR reportable
  - But DOJ also has the power to issue *civil investigative demands* (CIDs)
    - Essentially precomplaint subpoenas
    - Can include document requests, narrative interrogatories, and data interrogatories
    - Is not quite compulsory process (i.e., not self-executing)
      - DOJ must first obtain a court order compelling compliance before sanctions can be imposed
    - May be issued any time during the course of an investigation
    - May be issued to both the merging parties and to third parties
    - Often ask for the same documents and data as a second request
    - Multiple CIDs may be issued in the course of an investigation to the same person

  NB: The FTC can also issue CIDs in antitrust investigations

What were the possible investigation outcomes?



What happened here?

- What did the DOJ do?
  1. Decided that TransDigm's acquisition of SCHROTH violated Section 7 of the Clayton Act, *and*
  2. Told TransDigm that absent an acceptable settlement, the DOJ would file a Section 7 complaint against TransDigm seeking divestiture of the SCHROTH business to a third party

If the FTC had investigated the acquisition,
the procedure would have been different
(but the outcome would have been the same)

What Was the Problem?

Anticompetitive Effects

- What were the anticompetitive effects of the acquisition alleged in the complaint?
  1. Increased prices
     - Prior to the acquisition, customers could and did "play off" the companies against each other to obtain better prices (Compl. ¶ 32)
     - Postmerger, the next closest competitor will not be as price-competitive with the combined firm as SCHROTH was to AmSafe
  2. Reduced innovation
     - Companies also competed against each other through R&D to develop new and better products (Compl. ¶ 32)
     - Could save significant money by curtailing R&D activities postmerger
  3. Significantly increased market concentration
     - Combined the only two significant players in the markets (Compl. ¶ 31)
     - Not really an anticompetitive effect under the prevailing consumer welfare interpretation
       - But the Supreme Court in the 1950s-1960s regarded it as the primary anticompetitive effect—included because of that precedent

All downstream

Two-point lapbelts

1. Two-point lapbelts used on commercial airlines

- Only three competitors premerger (Compl. ¶ 24)
  1. AmSafe was by far the largest
  2. Small, privately held firm that had been in the market for years but had gained little share → little or no competitive significance
  3. SCHROTH, which entered the market with a new, innovative lightweight two-point lapbelt ("Airlite"), which it aggressively marketed to the major international airlines
- *Competitive effects implications*:
  - When three competitors are reduced to two, the remaining competitors are more likely to engage in oligopolistic coordination, which would result in a higher equilibrium market price and reduced rates of innovation
  - If the smallest firm is ignored → "Merger to monopoly" → higher prices

Three-point shoulder belts

2. Three-point shoulder belts used on commercial airlines

- Factual allegations
  1. Only two meaningful competitors premerger (Compl. ¶ 26)
  2. AmSafe was by far the largest
  3. "SCHROTH was aggressively seeking to grow its business at AmSafe's expense"
  4. Probably means that SCHROTH had not achieved any significant sales yet, but that efforts to penetrate the market caused AmSafe to reduce prices
- *Competitive effects implications*:
  - "Merger to monopoly" → higher prices

Technical restraints

3. Technical restraints used on commercial airlines

- Only three significant suppliers premerger (Compl. ¶ 28)
  1. AmSafe ("leading supplier")
  2. SCHROTH ("aggressively seeking to grow")
  3. (Unnamed) international aerospace equipment manufacturer
- *Competitive effects implications*:
  - "3-to-2 merger," resulting in higher equilibrium market prices

Inflatable restraint systems

4. Inflatable restraint systems used on commercial airplanes

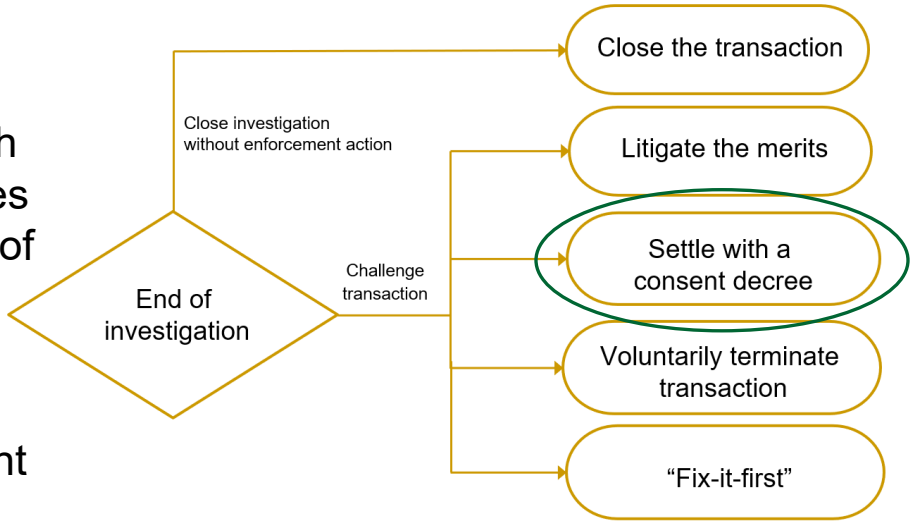
- Only two competitors premerger (Compl. ¶ 30)
  1. AmSafe (which developed technology—offers both inflatable lapbelts and structural mounted airbags)
  2. SCHROTH (offers only structural mounted airbags)
  3. "In recent years, SCHROTH had emerged as a strong competitor to AmSafe in the *development* of inflatable restraint technologies"
     - Only allegation of innovation competition—Not sales competition

Why did the DOJ include this claim?

What Did TransDigm Do?

What happened here?

- What did TransDigm do?
  - Agreed to divest SCHROTH pursuant to a consent decree
    - A consent decree in a DOJ challenge is a final judgment in a litigation that the court enters with the consent of the litigating parties rather than pursuant to a finding of a violation
    - To get the DOJ's agreement, TransDigm agreed to give the DOJ essentially the relief it sought from a litigation of the merits
      - In the past, the DOJ/FTC sometimes have been willing to settle for less than they could get from a successful litigation on the merits
      - Today, not so much



What did the consent settlement require?

- Divestiture of SCHROTH
  - Within 30 days after regulatory clearances or entry of the Hold-Separate Order, TransDigm must divest SCHROTH (including the Takata Protection assets) to—
    - Perusa Partners Fund 2 and SSP MEP Beteiligungs KG (an “upfront buyer”) or
    - another buyer acceptable to DOJ

What did the consent settlement require?

- Divestiture
  - Observations
    1. Historically, the DOJ and FTC always require divestiture relief in horizontal merger cases
    2. The DOJ and FTC require that the divestiture buyer be capable of operating the divested business as an effective, standalone competitor immediately upon closing
       a. The divestiture buyer must acquire all assets—tangible and intangible—necessary to operate the business independently and competitively on a permanent basis
       b. The divestiture buyer must have the operational, managerial, technical, and financial capabilities to run the business without material assistance from the merged firm
       c. Any transition services from the seller must be strictly limited to short-term support (e.g., IT, payroll) and cannot be critical to competitive operations
       d. The divestiture must be structured so that the business remains a going concern with no interruption in production, customer relationships, or competitive presence

What did the consent settlement require?

- Divestiture
  - Observations (cont.)
    3. The agency must approve the divestiture buyer, the divestiture agreement, and any transition services agreements
       - The investigating agency will assess whether the buyer has the *ability* and *incentive* to operate the divestiture business with the same competitive force as did the divestiture seller premerger, including—
         a. the relevant industry experience and expertise
         b. the financial resources to support the divestiture business
         c. A business plan that shows both the ability and the commitment to compete in the market with at least the same competitive force as did the divestiture seller premerger
    4. The DOJ and FTC almost always require a "buyer upfront"
       - Before the agency will agree to a divestiture consent decree—
         a. The parties must identify a divestiture buyer and sign a definitive divestiture agreement for the sale of the divestiture business conditioned only on agency approval
         b. The divestiture buyer must present a business plan to the agency as to how it will operate the divestiture business
         c. The agency's approval of the upfront buyer follows the standards described in Observation 3

What did the consent settlement require?

- Scope of assets to be divested
  - All real and personal property, tooling, inventory, intellectual property, permits, contracts, customer lists, R&D data, and other tangible and intangible assets needed for SCHROTH to operate as a viable, standalone airplane-restraint-system supplier in the hands of the divestiture buyer
  - TransDigm must give full due-diligence access, warrant asset operability, and provide transition services (IT and other support) for up to 12 months, with a possible six-month DOJ extension

What did the consent settlement require?

- Employee provisions
  - SCHROTH employees must be able to receive offers from the buyer
  - TransDigm must waive non-competes/nondisclosures, vest benefits, and refrain from soliciting or rehiring those employees for two years unless the buyer consents
- Backstop "divestiture trustee"
  - If divestiture is not completed on time, the court will appoint a DOJ-selected trustee with full authority—and at TransDigm's expense—to sell the assets
  - TransDigm may object only in cases of trustee malfeasance
    - The divestiture trustee operates independently of TransDigm's control and has no fiduciary obligation to TransDigm to seek the highest price or otherwise act in TransDigm's interest."
- No seller financing
  - TransDigm may not finance any portion of the purchaser's acquisition

What did the consent settlement require?

- Hold-separate obligation
  - Until closing, SCHROTH must be held separate and operated independently to preserve its competitiveness and asset value as an effective standalone competitor pending the closing of the divestiture sale
  - TransDigm executives assigned to SCHROTH are barred from sharing SCHROTH's competitively sensitive information with personnel responsible for AmSafe
    - A firewall plan must be submitted to—and approved by—DOJ
- Monitoring & reporting
  - TransDigm must submit sworn compliance affidavits every 30 days and give DOJ full access to records, facilities, and personnel for inspections

What did the consent settlement require?

- Prior notice of future acquisitions
  - For the decree's term, TransDigm must give DOJ at least 30 days' advance, HSR-style notice (even below HSR thresholds) before acquiring any other airplane-restraint-system assets or interests for the 10-year term of the consent decree
    - Applies globally, not just to the acquisition of companies doing business in the United States
- No reacquisition
  - TransDigm is prohibited from reacquiring any of the divested SCHROTH assets during the term of the consent decree
- Duration & enforcement
  - The Final Judgment lasts 10 years
    - DOJ may terminate after 5 years if decree is no longer necessary
  - DOJ retains authority to seek contempt, extend the decree once, and recover fees and costs for enforcement

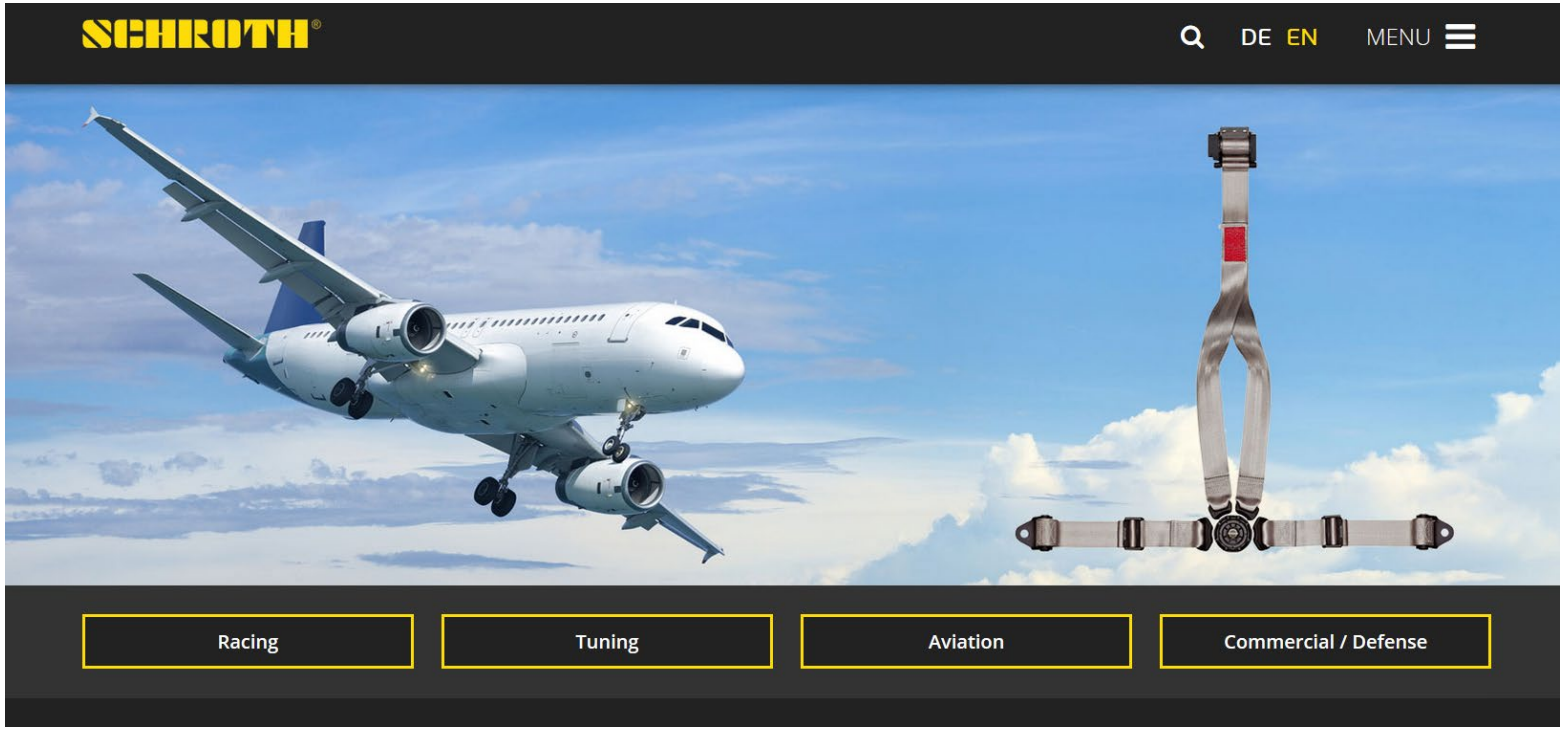
Business rationale for divestiture

- Why did TransDigm agree to divest SCHROTH?
  - What were TransDigm's alternatives?
    1. Continue the litigation
    2. Settle with a consent decree acceptable to the DOJ
  - Why did TransDigm agree to settle?
    - Almost surely the least costly alternative
    - DOJ had a strong case: TransDigm was very likely to lose the litigation, and the DOJ would have obtained a litigated permanent injunction ordering the same divestiture
  - When did TransDigm agree to settle?
    - In the course of the investigation—Prior to litigation
    - Complaint and proposed consent decree were filed simultaneously with the court

The divestiture buyer

- To whom did TransDigm sell SCHROTH?
  - A management buyout (MBO)
    - Business unit's management + a private equity investor (Perusa GmbH)
  - Why sell to management?
    - The DOJ almost surely wanted a "buyer upfront"
    - An MBO was probably both—
      - The quickest solution, *and*
      - Offered the greatest return
  - Did the MBO get a good purchase price?
    - Almost certainly
    - Consent decree solutions almost always involve a "fire sale" of the divestiture assets
      - TransDigm 10-K reported a $32 million impairment charge to write down the assets to fair value. (p. 21)
      - TransDigm paid $90 million to acquire SCHROTH
      - So it is likely the MBO paid only about $58 million for the business
        - Actually, $61.4 million (from TransDigm 8-K, Jan. 26, 2018, at 3)

SCHROTH today



- Reportedly:
  - Approximately 250 employees
  - Sales volume around $51.2 million

First Meeting with the Client

The setup

- You are counsel to TransDigm
  - Prior to signing the purchase agreement, TransDigm's management seeks your advice on—
    1. Whether the antitrust authorities will investigate the transaction?
    2. Whether the DOJ or FTC will challenge the transaction on the merits?
    3. Whether the merging parties can successfully defend on the merits?
    4. If unsuccessful—
       a. What will be the consequences?
       b. What, if anything, can TranDigm do to increase the probability of closing the deal?
       c. Will we be successful?

These are the fundamental questions every client asks at the beginning of a deal

Before the meeting: Learn what you can

1. Look at the websites of both companies
   - Learn about their businesses
   - Try to determine whether there are any product overlaps
2. Search the Internet and newspaper archives using "TransDigm and SCHROTH" as the search request

Assume that you find from this research that—

- *The deal involves a horizontal overlap in safety restraints for commercial airlines*
- *TransDigm is the dominant firm in the business*
- *SCHROTH is an aggressive "new" entrant with a small share*
- *There are few if any other firms in the business*

But no other meaningful information

Goals of the meeting

1. *Teach* the client the operational test for Section 7 illegality
2. *Ask* the client the most important factual questions
3. *Communicate* your view of the antitrust risk in a way that the client understands
4. *Provide* any strategic advice as to how the client might minimize antitrust risk

We will go through each goal in detail

Teach the client the operational test

- Important to begin the meeting with the operational test
  1. Unless the client understands the test, they will not be persuaded by your advice
     - The client will not be persuaded unless they can replicate your analysis and reproduce your conclusion
  2. If the client understands the test, they are more likely to give complete and meaningful answers your factual questions
  3. If the client knows the test, they can continue to think after they leave the meeting about what other facts may be relevant and follow up with you to sharpen the risk analysis
  4. The client *needs* to know the operational test as they move forward with the transaction to understand the antitrust implications of—
     - What they write in their documents
     - What they say to the press and to customers
     - What they say in meetings with the investigating agency

Teach the client the operational test

- Start with Clayton Act § 7
  - Governing merger antitrust statute
  - Other statutes may apply, but they will not be more restrictive than Section 7
  - Section 7 prohibits transactions that "may substantially lessen competition"
- But what does this mean *operationally*?
  - A transaction "may substantially lessen competition" when it is likely to harm an identifiable group of customers by—
    1. Increasing prices
    2. Reducing market output
    3. Reducing product or service quality
    4. Reducing the rate of technological innovation or product improvement
    5. [Maybe] reducing product variety

Clients can grasp the operational test immediately

Teach the client the operational test

- Tell the client how the investigating agency is going to find the facts about the likely competitive effect
  - HSR reportability and merger review process
    - Time to ask questions to find out if the deal is likely to be reportable
  - If the transaction is not HSR reportable, the agency will not investigate the transaction UNLESS they learn about it
    - Can find out from—
      - Reading the newspapers or the trade press, or
      - Someone complains to the agency about the transaction
        - Customer
        - Competitor
        - A disgruntled employee
    - NB: There is no “statute of limitations” for government investigations or prosecutions of mergers
      - The DuPont/GM challenge
      - Today, Meta is being challenged for its past acquisitions of Faccebook and WhatsApp

Teach the client the operational test

- Tell the client how the investigating agency is going to find the facts about the likely competitive effect
  - If the agency opens an investigation, it will—
    1. Entertain a presentation from the merging parties on the deal and engage with the parties throughout the investigation
    2. Interview—and perhaps later depose under oath—employees of the merging parties
    3. Obtain massive amounts of the documents and data from both companies
    4. Interview customers and competitors (and maybe obtain documents and data from them)
    5. Analyze win-loss records of the companies in bidding for projects
    6. Use economists to assist in analyzing the likely competitive effects of the transaction

The most powerful evidence against a transaction often consists of bad documents, executives' admissions against interest in investor presentations or interviews, or customer complaints

Teach the client the operational test

- Bottom line
  - The agency's conclusion on the likely effect on customers will determine the outcome of the investigation
    - NB: It is the *agency's conclusion*, not necessarily the truth, that counts
  - The best defense is a good offense
    - Can we argue that the deal is a "win-win" for the merging parties *and* the customers?
    - Companies do not do deals out of the goodness of their heart—*they do deals to make money*
    - Do we have a story consistent with the business model for the transaction, the documents and other company evidence, and the likely customer responses in staff interviews that the deal will be good for customers?

Best story*: The transaction will enable the combined company to make money by reducing costs and by making better products faster to the benefit of our shareholders and our customers*

Ask the client questions

1. What is the deal rationale?
   - How will TransDigm make money from the transaction?
   - Are there any documents on the business rationale?
     - If so, what do they say? Do they support the business rationale? Or refute it?
   - What are the implications of the business model for customers?
2. What will the company documents say about competition between the two companies?
3. Who are the customers and what will they say to the agency when interviewed?
4. Do we have a sales pitch that we can give the customers that the deal will be good for them?
   - Will they accept it?

Communicate the antitrust risk

- *Answer the client's question*: Based on what you learned in the meeting, what is the antitrust risk presented by the deal?
  - It is not sufficient for you to form a view as to the antitrust risk
  - You must meaningfully communicate the nature of this risk to the client so that the client can make informed business decisions
    - If the client does not understand your advice, they cannot act on it
    - If the client is not persuaded that your advice is correct, they will not act on it

Provide any strategic advice

1. Emphasize the need for a compelling sales pitch for the deal to customers of *both* companies
   - Offer to help the relevant business people develop this pitch and advise on when and how to roll it out
   - Note that it is the customers of the target company that are typically the most difficult to persuade
     - Will eventually need to work with the target company as to how best to persuade its customers
2. Emphasize the need for care in drafting documents
   - "Bad" documents alone can kill a deal
     - Avoid creating documents that suggest—implicitly as well as explicitly—that the deal could harm customers
     - Some documents are "bad" because they were carelessly phrased or factually incorrect, not because they speak the truth—These can also kill a deal
   - If there is one, include the procompetitive business rationale for the deal in as many documents as possible

Provide any strategic advice

3. Consider whether the deal can be structured to make it non-HSR reportable to minimize inquiry risk

Final thoughts

1. Caution the client that this advice is only preliminary and depends on what the client has told you in the meeting
2. Note that more work should be done
   - Would like to send the client a *preliminary information request* for easily obtainable documents and data
   - When confidentiality considerations permit, would like to set up a *meeting with knowledgeable employees* to develop the facts and the arguments further
3. Tell the client that all documents created at the request of counsel should have the following prominent legend:

   PRIVILEGED AND CONFIDENTIAL
   Prepared at the request of counsel

   - Whenever possible, make this legend *machine readable*

Do NOT forget this!!!

Final thoughts

4. Note that at some point in the process we will need to bring the target company onboard
   - The target's evidence and customer outreach program will be equally if not more critical to the outcome of any merger review
   - Note that we should be able to work with the target company under the "common interest" privilege
5. The target, unless incompetently advised, is likely to recognize the antitrust risk in the transaction
   - Should expect that the target will attempt to negotiate some provisions in the purchase agreement to—
     - Decrease the risk of a deal failure, *and*
     - Compensate the target for risk that cannot be eliminated

Unit 2. The DOJ/FTC Merger Review Process

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

August 29, 2025

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

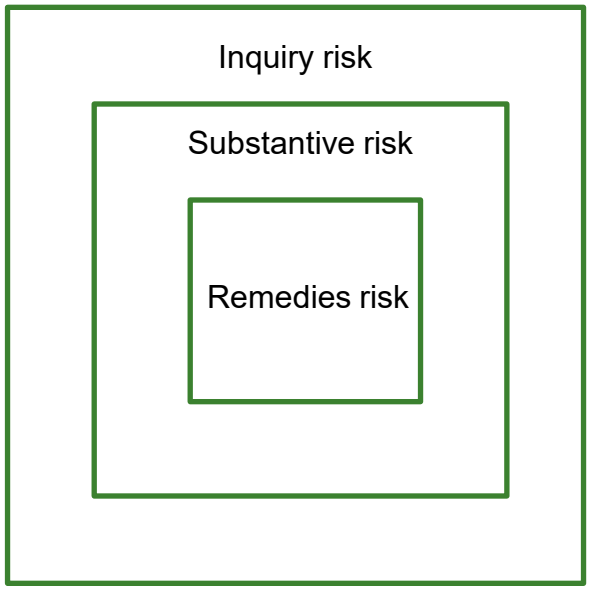
Thinking Systematically about Antitrust Risk

Types of antitrust risks

- *Inquiry risk*: The risk that legality of the transaction will be put in issue
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- *Substantive risk*: The risk that the transaction is anticompetitive and hence unlawful
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- *Remedies risk*: The risk that the transaction will be blocked or restructured
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be "fixed" to alleviate the agency's concerns and if so how?

Types of antitrust risks

- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive



Because the inquiry risk is dependent on the likelihood that the transaction violates the antitrust law, we will examine substantive risk first

Possible outcomes of merger investigations

- Four possible ultimate outcomes:
  1. The investigating agency clears transaction on the merits without taking enforcement action
  2. The parties restructure ("fix") the deal to eliminate the substantive antitrust concern, typically through a divestiture of a line of business
     - Post-closing "fix" under a judicial consent decree (DOJ) or a FTC consent order
     - Restructure the deal preclosing to avoid a consent decree ("fix-it-first")
  3. The investigating agency initiates litigation and either—
     a. The agency wins on the merits, the court issues an injunction blocking the closing, and the parties subsequently terminate their purchase agreement;
     b. The agency and the parties settle the litigation through a consent decree; *or*
     c. The parties win on the merits and subsequently close their deal
  4. The parties voluntarily terminate the deal rather than settle or litigate

Costs associated with antitrust risk

- Delay/opportunity costs
  - Possible delay in the closing of the transaction and the realization of the benefits of the closing to the acquiring and acquired parties
  - The duration of DOJ/FTC investigations has increased substantially during the Trump and Biden administrations:
    - In the Trump administration, the agencies became much more cautious—and the process much more time-consuming—in in agreeing to the parameters of consent decrees and in approving divestitures buyers
    - In the Biden administration, the agencies largely ceased considering consent decrees to resolve investigations but significantly increased the scope of their second requests, requiring much more time for substantial compliance

Average Duration
by Presidential Administration[1]

	Investigations	Average Duration
Obama 2011-2012	56	7.1
Obama (2d term) 2013-2016	119	8.8
Trump 2017-2020	109	11.2
Biden 2021-2022	47	11.6

[1] Data sources: Dechert LLP, DAMITT 2016 Year in Review (Jan. 2017) (2011-2016); Dechert LLP, DAMITT Q3 2023: Merger Control Is a Marathon, Not a Sprint (Oct. 31, 2023) (2017-2022).

Costs associated with antitrust risk

- Delay/opportunity costs
  - If the proposed HSR rules changes are implemented, the time from the signing of the agreement to the conclusion of the investigation is likely to increase by an additional several months[1]
- Management distraction costs
  - Possible diversion of management time and resources into the defense of the transaction and away from running the business
- Out-of-pocket expense costs
  - Possible increased financial outlays for the defense of the transaction

[1] Fed. Trade Comm'n, Notice of Proposed Rulemaking (HSR Rules), 88 Fed. Reg. 42178 (June 29, 2023) (comments close August 28, 2023; to be codified at 16 C.F.R. Pts. 801-803). We will examine the proposed rules changes in Unit 4: Merger Review.

Costs associated with antitrust risk

- Remedies costs:
  - If the transaction is blocked, the foregone benefits to the merging parties of the transaction
  - If the divestiture of a business or assets is required—
    - Any discount from going-concern value that the divestiture seller likely will have to accept
      - Merger divestitures are usually quickly made under “fire sale” conditions
      - Only a limited number of potential buyers may be acceptable to the reviewing agency as the divesture buyer
    - Any loss of synergies associated with the divested businesses
    - The transactions costs associated with the divestiture sale

Premerger Notification and 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
    - Preclosing reporting to both DOJ and FTC by each transacting party
    - Post-filing waiting period before parties can consummate transaction
  - Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a "second request"
  - Designed to alert 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 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 a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review

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

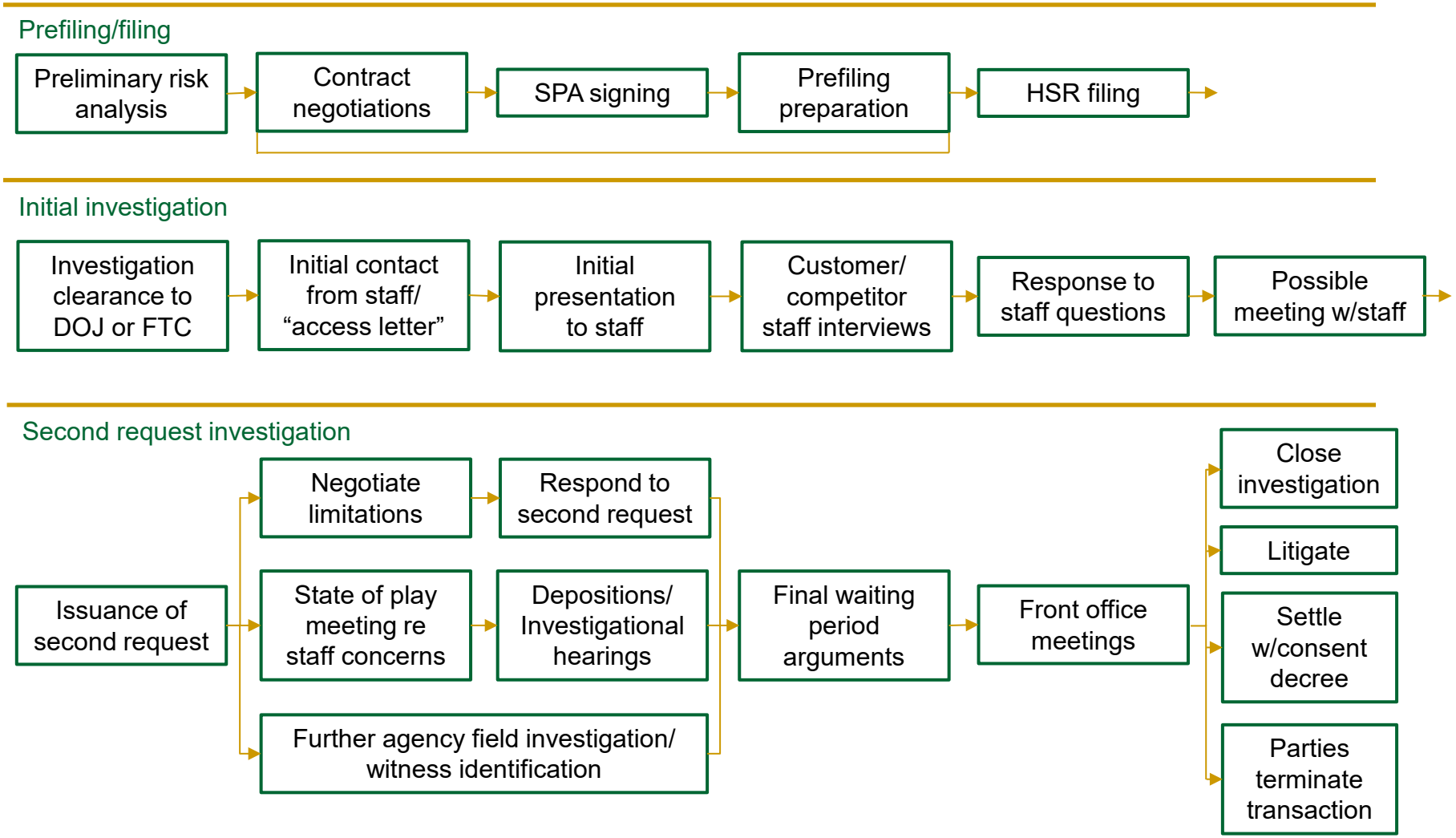
HSR Act

- 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 HSR filings to the DOJ and FTC for substantive review[2]
  - Once a filing has been "cleared" to an agency for review, the filing 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 (APA), 5 U.S.C. §§ 551–559 (APA).
[2] Discussed below.

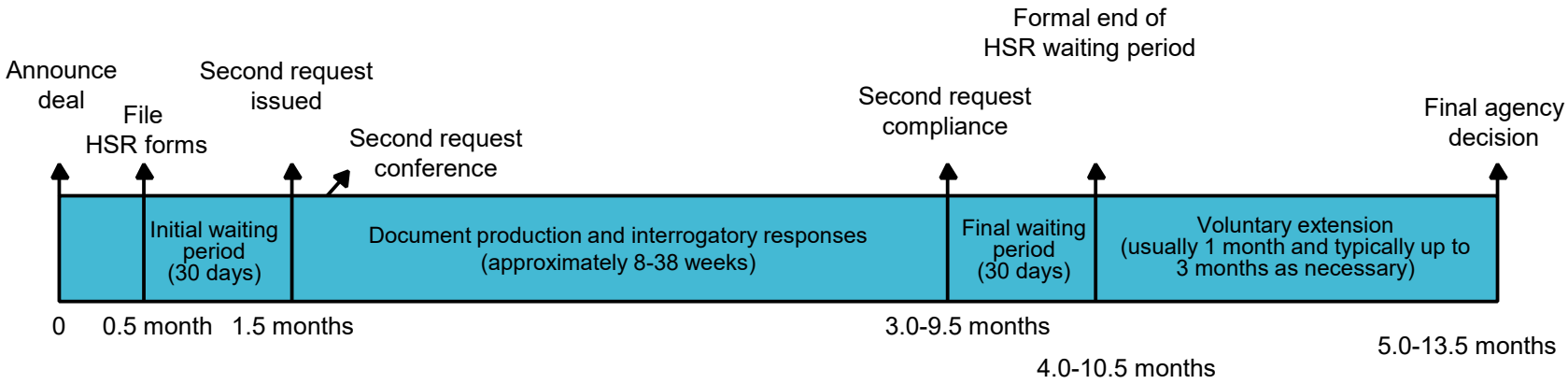
Overview: The HSR Review Process

The HSR review process



The HSR Act review process

- Typical domestic transaction

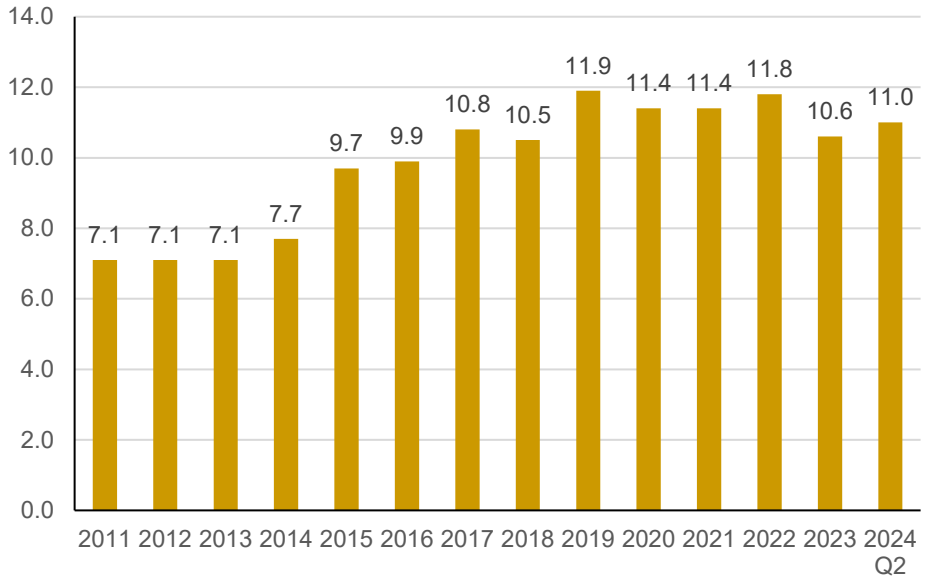


Customer rollout

- 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)



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Source: Dechert LLP, DAMITT 2024 Annual Report: Merger Enforcement at Low Tide on Both Sides of the Atlantic, but 2025 may Bring a Sea Change (Jan. 30, 2025). 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 annual 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 non-corporate entity (such as a partnership or LLC) is regarded 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 closed, Company A is influencing the operational management decisions of Company B. Given this influence, the agencies will view Company A has having obtaining a beneficial interest in Company B and hence to have 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 $126.4 million	Not reportable		
Above $126.4 million up to and including $505.8 million	Reportable if : (1) satisfies the "size of person" test, and (2) no exemption applies		
	Size of person test		
	Acquiring person		*Acquired person*
	$252.9 million (in total assets or annual net sales)	and	$25.3 million (in total assets or annual net sales of a person engaged in manufacturing)
	Or		
	$252.90 million (in total assets or annual net sales)	and	$25.3 million (in total assets of a person not engaged in manufacturing)
	Or		
	$25.3 million (in total assets or annual net sales)	and	$252.9 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, 90 Fed. Reg. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025)

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 non-corporate interests to be acquired + value of interests *and* acquisition confers "control" of the entity
  - 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 $126.4 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 $126.4 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]
$126.4 million
$252.90 million
$1.264 billion
25% of the voting securities if their value exceeds $2.539 billion
50% of the voting securities if their value exceeds $126.4 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 Fed. Reg. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025).

Premerger Notification

New HSR form for use beginning in 2025

On October 10, 2024, the Federal Trade Commission (FTC), with the concurrence of the Department of Justice (DOJ), finalized the most sweeping amendments to the Hart-Scott-Rodino (HSR) premerger notification requirements in over 45 years.[1] The final rule—published in the Federal Register on November 12, 2024, and effective February 10, 2025[2]—expands the scope of required information, formalizes new documentation standards, and tailors disclosure obligations based on transaction type and the filer's role, with the aim of providing antitrust agencies earlier insight into potential competitive effects.

In January 2025, the U.S. Chamber of Commerce and other business groups filed a lawsuit challenging the rule as exceeding statutory authority and violating the Administrative Procedure Act.[3] However, they did not seek a temporary restraining order or preliminary injunction. As a result, the new rules took effect as scheduled on February 10, 2025. The lawsuit remains pending, with the FTC's answer due by April 10, 2025.

[1] Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024).
[2] Premerger Notification; Reporting and Waiting Period Requirements, 89 Fed. Reg. 89216 (Nov. 12, 2024).
[3] Complaint for Declaratory and Injunctive Relief, Chamber of Commerce v. FTC, No. 6:25-cv-00009 (E.D. Tex. filed Jan. 10, 2025).

HSR Act filing

- Both the acquiring and acquired persons must submit their own filing
  - Prior to the 2024 form, the filing parties used the same form
  - With the 2024 changes, the acquiring and acquired persons use separate forms
    - The acquiring person's form now requires significantly more information than the acquired person's form, particularly when horizontal or vertical overlaps exist

    We will focus on the acquiring person's form in the next few slides

- Key categories of information required:
  1. Deal documentation and deal structure
  2. Corporate structure and ownership
  3. Business activities and competitive overlaps
  4. Business documents and internal analysis
  5. Other information

HSR Act filing

1. Deal documentation and deal structure
   - Transaction documents
     - All executed or near-final versions of:
       - Stock purchase agreements, merger agreements, asset purchase agreements
       - Side letters, non-compete clauses, and similar agreements
     - If only a term sheet or agreement-in-principle exists, it must have sufficient detail about the scope of the transaction the parties intend to consummate. This should include some combination of the following:
       - the identity of the parties
       - the structure of the transaction
       - the scope of what is being acquired
       - calculation of the purchase price
       - an estimated closing timeline
       - employee retention policies, including with respect to key personnel
       - post-closing governance
       - transaction expenses or other material terms
   - Narrative descriptions
     - Each strategic rationale for the transaction (with references to supporting documents) discussed or contemplated by the filing person or any of its officers, directors, or employees
     - Deal structure and scope
       - Including a diagram of the transaction (if one exists)
     - Consideration and timing

HSR Act filing

2. Corporate structure and ownership
   - Corporate structure information
     - Majority-owned subsidiaries
     - Significant minority shareholders
     - Significant minority shareholdings (5–49%) in competitors
   - Existing organization charts showing the relationship among affiliated entities
   - Annual reports and financial statements

HSR Act filing

3. Business activities and competitive overlaps
   - Revenue reporting
     - Report the revenue of the filing person using 6-digit NAICS codes with overlap flags
     - In specified industries (e.g., manufacturing, healthcare, energy), revenue must also be broken out by state or facility address to allow geographic market screening
   - Brief narrative description of the acquiring person's and target's business operations

NB: **Bold** indicates one of the most important responses to the investigation agency

HSR Act filing

3. Business activities and competitive overlaps (con't)
   - "Overlap descriptions": For each product or service with overlap, provide—
     - A description of product/service
     - Dollar sales or, if unavailable, usage metrics (e.g., number of users, projected revenue)
     - Categories of customers (e.g., retailers, institutional)
     - **Top 10 customers (measured in dollars) by overlapping category**
     - **Top 10 customers by customer category (e.g., retailer, distributor, broker, government, military)**
   - "Supply relationships description":
     - List any product/service where:
       - Acquiring person supplies to, or buys from, the target or a competitor of the target
       - Transactions exceeded $10 million in the prior year
     - **Report, for the most recent year, the acquiring person's dollar sales of each relevant product to—**
       - **the target and**
       - **any other business known to use the product in competition with the target**
     - **For each of the 10 customers that use the acquiring person's product, report—**
       - **Dollar amount of sales and**
       - **A summary of the terms of the relevant supply or licensing agreements**.

NB: **Bold** indicates one of the most important responses to the investigation agency

HSR Act filing

3. Business activities and competitive overlaps (con't)
   - Officers and directors (for Clayton Act § 8 screening)
     - Disclose all current officers and directors (or equivalents) of entities involved in the development, marketing, or sale of overlapping or related products/services
     - Disclose individuals who currently or recently (within 3 months) served as officers/directors of both the acquiring person and any entity that operates in the same NAICS codes as the target. Disclosure includes expected post-close leadership.
     - For the acquiring entity and all entities it controls, is controlled by, or that will be created as part of the deal, also list individuals likely to become officers or directors post-close who may also serve in competing entities
       - If NAICS codes are unavailable, report based on industry knowledge or belief

HSR Act filing

4. Business documents and internal analysis

a. Competition documents

Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.

b. Confidential information memoranda ("CIM")

Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or of the acquiring entity(s) that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum.

NB: **Bold** indicates one of the most important responses to the investigation agency

HSR Act filing

4. Business documents and internal analysis (con't)

c. Third-party studies, surveys , and analysis and reports

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors ("third-party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring person or of the acquiring entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

d. Synergies and efficiencies documents

Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

HSR Act filing

- Business documents and internal analysis (con't)
  - e. Plans and reports
    - To the CEO

> [P]rovide all regularly prepared plans and reports that were provided to the Chief Executive Officer (CEO) of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

    - To the Board of Directors

> [P]rovide all plans and reports that were provided to the Board of Directors of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

HSR Act filing

- Business documents and internal analysis (con't)
  - Failure to provide all required business documents
    - Makes the HSR filing ineffective, so that the waiting period never started
      - Usually discovered by investigating agency in the document production in a second request
      - Agencies have required parties to refile and go through the entire process (including a second provide request)
    - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

HSR Act filing

5. Other information
   - Prior acquisitions
     - Disclose prior acquisitions in overlapping markets within the past five years
   - Defense or intelligence contracts
     - Disclose any defense/intelligence contract with a value greater than $100M in any overlapping product
   - Foreign subsidies and “covered” nations
     - Identify any subsidy received or committed by a foreign government or "foreign entity of concern" in the last two years.
     - Report any products produced in covered nations subject to countervailing duties or active investigations
     - *Note*: The foreign subsidy reporting satisfies new national security-related disclosure mandates requires by the Merger filing Fee Modernization Act[1]
   - Other merger control filings
     - List other jurisdictions where merger filings are/will be made (including anticipated dates)

[1] *See* Pub. L. No. 117-328, div. GG, tit. II, §§ 201-02, 136 Stat. 4459, 5967, 5969-70 (Dec. 29, 2022) (requiring parties to premerger notification filings to provide information concerning subsidies they receive from countries or entities that are strategic or economic threats to the United States). .

HSR Act filing

- The prescribed forms do not require the filing person to address—
  - Market definition
  - Market shares or market concentration statistics
  - Any antitrust analysis or defense of the transaction

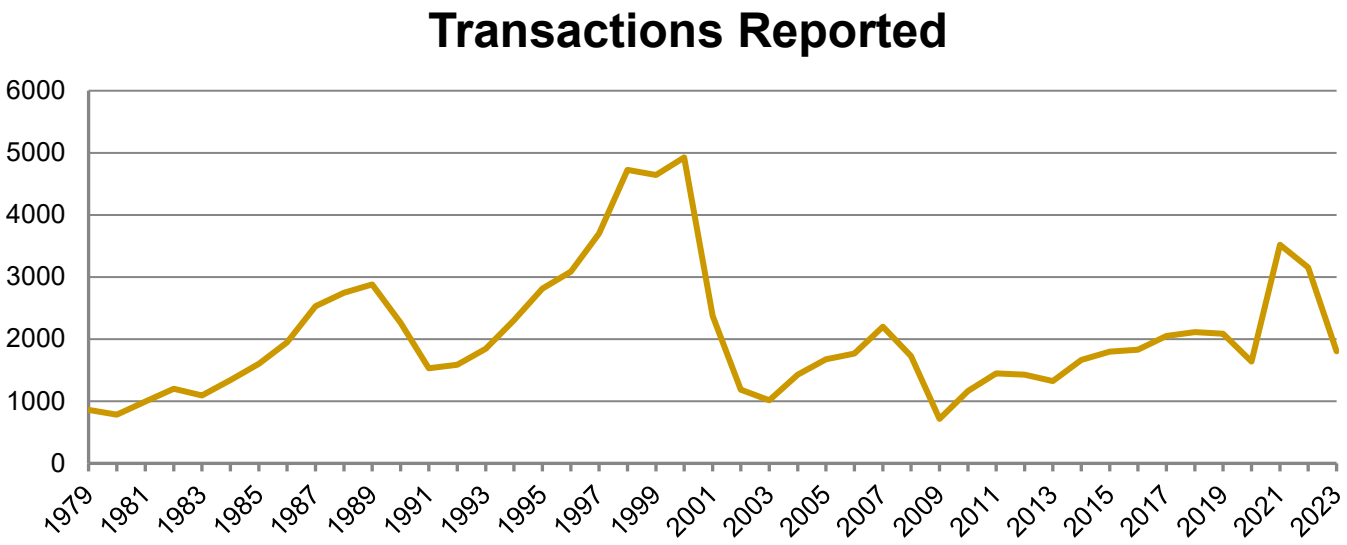
Filing fees

2022		2025[2]	
Value of Transaction[1]	Filing Fee	Value of Transaction[1]	**Filing Fee**
≤ $101.0 million	No filing required	<$179.4 million	$30,000
> $101.0 million but < $202.0 million	$45,000	$179.4 million - <$555.5 million	$105,000
≥ $202.0 million but < $1.0098 billion	$125,000	$555.5 - <$1.111 billion	$265,000
≥ $1.0098 billion	$280,000	$1,111 billion - <$2.222 billion	$425,000
		$2.222 billion - <$5.555 billion	$850,000
		$5.555 billion or more	$2.390,000

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

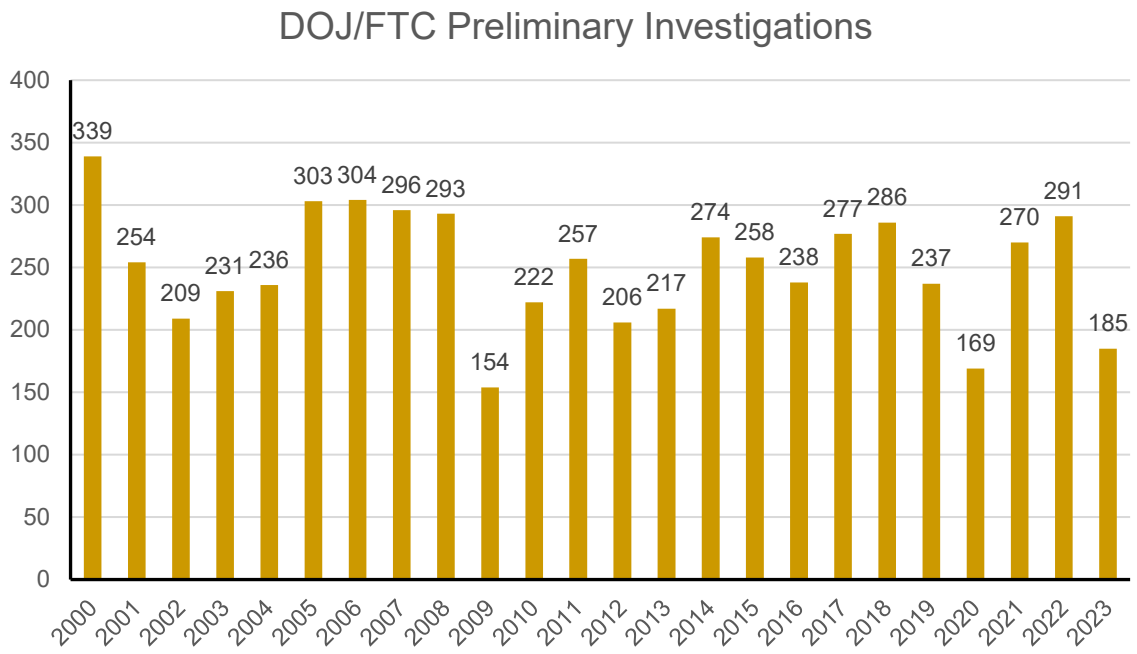
[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2023) (effective Feb. 23, 2022).
[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 Fed. Reg. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025). Congress changed the 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



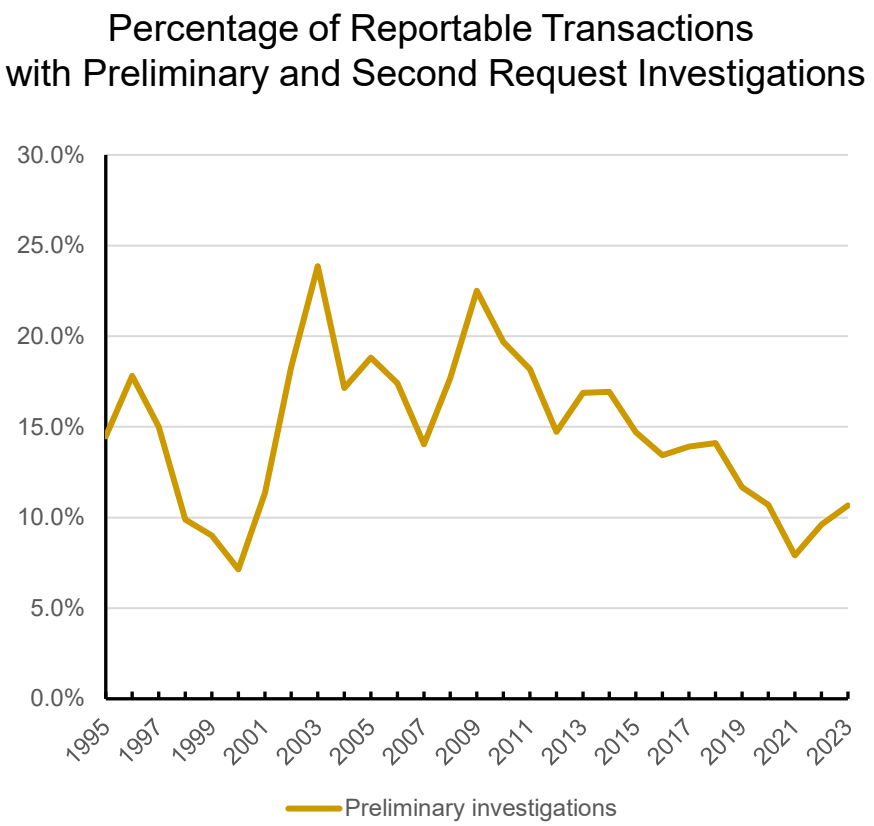
Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2023, at App. A, and prior annual reports.

HSR Act preliminary investigations



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2023, at tbl. III, and prior annual reports.

HSR Act preliminary investigations



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2023, at App. A & tbl. III, 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 bankruptcy code
- Extended waiting period
  - Waiting period extended by issuance of a second request in 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

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
  - $53,088 per day for every day of the violation—Equals $19.4 million per year[3]

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] 90 Fed. Reg. 5580 (Jan. 17, 2025) (increasing civil penalty from $51,744 to $ 53,088 per day effective January 17, 2025, 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 required business 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

“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 $53,088 per day (in 2025)
    - 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
2025	XCL Resources	EP Energy	Gun jumping		$5,600,000	
2024	Legends Hospitality	ASM Global	Gun jumping		$3,500,000	38.9%
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%

HSR Act enforcement actions

- Factoids
  - 70 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 – January 16, 2025: $51,744 per day
    - January 17, 2025 − present: $53,088 per day

Initial Waiting Period Investigations

Preliminaries

- 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"

- DOJ and FTC decide which, if either, of the agencies will do the investigation ("clearance")
  - "Liaison agreement" between DOJ and FTC to prevent duplicative investigations
    - If neither DOJ nor FTC want to open a preliminary investigation—PNO grants early termination of the waiting period
    - If DOJ or FTC (but not both) want to open a preliminary investigation—Requesting agency gets clearance to open investigation
    - If both 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 specific agency have failed miserably
    - Neither the agencies nor their respective congressional oversight committees want to relinquish jurisdiction over any type of merger

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
  - Often a large “first mover” advantage in 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 and answer staff questions
  - Need to 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 hear from customers
    - Staff is strongly biased to accepting customer view in the event of an inconsistency
  - Need to do quickly
    - 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

- Occupies the bulk of the remaining time in the initial investigation
- Customer views are given great weight
  - *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 contacts 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
- Competitor conclusions are 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”
       - 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
     - Typically used when the initial investigation to date indicates no problem but requires a short additional time to complete customer interviews
     - The agency usually grants early termination in the middle of the second initial waiting period

"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

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

Aside: Some notes on privilege

- Attorney-client privilege
  - *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 from an attorney through an attorney-client communication
      - Disclosing the facts necessarily discloses the content of the privileged communication

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

[1] Fed. R. Civ. P. 23(b)(3)(A). Rule 23(b)(3)(A) encapsulates the federal ordinary work product doctrine.

Aside: Some notes on privilege

- The work product doctrine
  - *Attorney opinion work product*:[1] 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

[1] Fed. R. Civ. P. 23(b)(3)(B).

Aside: Some notes on privilege

- The work product doctrine
  - *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[1]
    - Facts discovered in the course of an investigation by an attorney or her agent are at most ordinary work product and subject to discovery only upon a proper showing of hardship

[1] *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

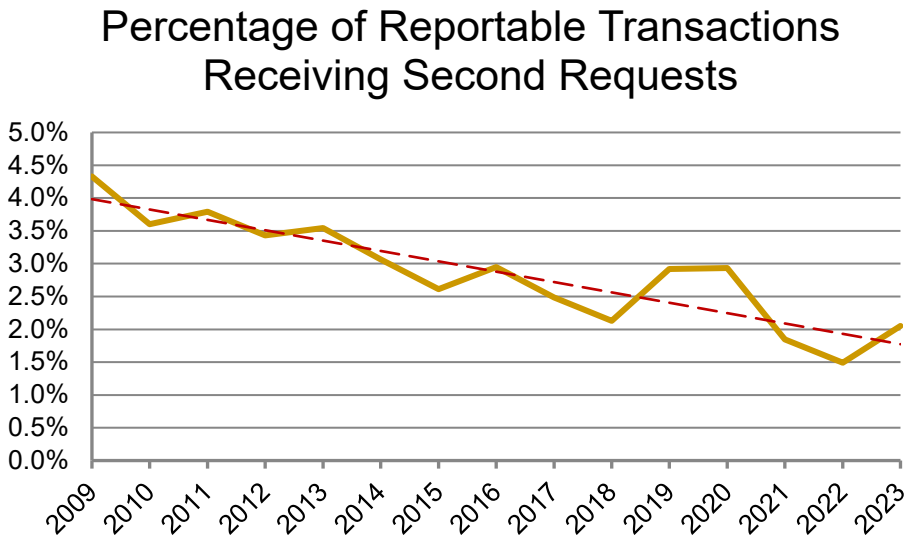
Aside: Some notes on privilege

- The "common interest" privilege
  - *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
  - *Practice hint*:
    - The parties should frame their negotiations to be over what risk-shifting provisions are reasonably necessary to defend the merger and avoid discussing any business reasons for a divergence in views
    - This makes the discussions—that is, the putatively protected communications—to be about differences in the proper approach to the legal strategy, not commercial differences

Second Request Investigations

The second request

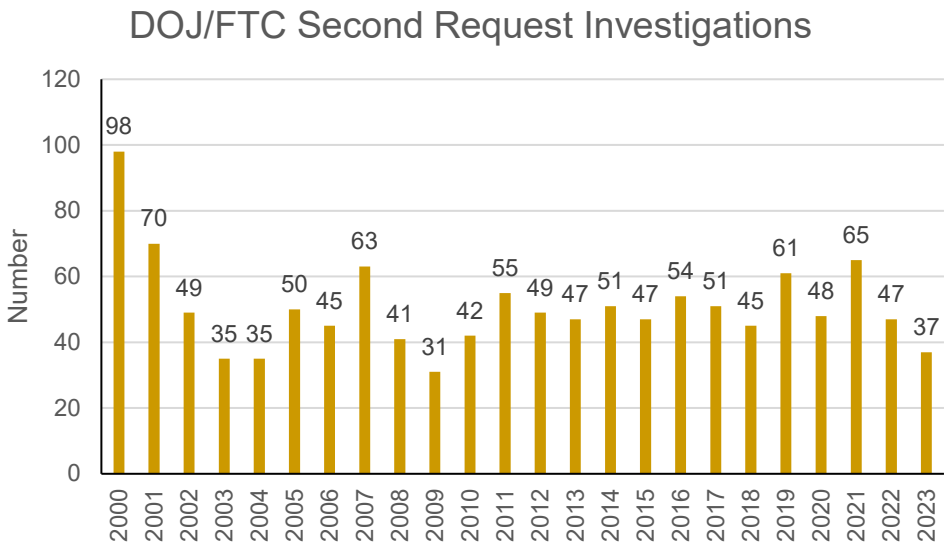
- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a "second request") during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second 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 2023, 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 2023).

“Significant” U.S. Merger Investigations

Source: Dechert LLP, DAMITT 2023 Annual Report: Minding the Gap in Merger Enforcement (Jan. 30, 2024).
Notes: 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.

Second request investigations

TABLE I
FISCAL YEAR 2023[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	2	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	173	10.0%	5	2	2.9%	1.2%	4.0%	0	0	0.0%	0.0%	0.0%
150M - 200M	227	13.1%	10	5	4.4%	2.2%	6.6%	1	0	0.4%	0.0%	0.4%
200M - 300M	293	16.9%	21	1	7.2%	0.3%	7.5%	8	0	2.7%	0.0%	2.7%
300M - 500M	259	14.9%	14	8	5.4%	3.1%	8.5%	2	1	0.8%	0.4%	1.2%
500M - 1000M	364	21.0%	26	21	7.1%	5.8%	12.9%	6	3	1.6%	0.8%	2.5%
Over 1000M	417	24.0%	48	24	11.5%	5.8%	17.3%	9	7	2.2%	1.7%	3.8%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2023, 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 customized with additional specifications
    - Covers e-mail and other electronic documents
  - Typically takes 8-30 weeks to comply (but some companies take much longer)
    - Often covers 60-120 custodians
      - Agencies are making meaningful efforts to reduce this number—target 30-35
    - 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 to defense)
  - Location: Washington, D.C.
  - Can be compelled
    - Civil Investigative Demand (CID) by the DOJ
    - Subpoena by the FTC
  - Transcribed and under oath
  - 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
    - Or, in investigations where litigation is foreseeable, by outside experts retained by agency

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
- 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 insufficient 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

"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
      - The Trump 2.0 agencies have yet to address the question

"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.

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
  - 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
  - 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
  - Timing agreements are enforceable in court through contract or detrimental reliance, not as a violation of the HSR Act
    - I am unaware of any instance where the parties have breached a timing agreement and so there is no enforcement precedents
    - However, there is little doubt that a court faced with a breach would summarily enforce the timing agreement through an injunction for specific performance
  - 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

- 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

Allow deal to close but do not close investigation

- New with the Biden administration
  - No deadline to finish investigation—could remain open indefinitely
  - Agencies have yet to bring a postclosing challenge to one of these deals

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	3	9	5	0	17
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	17.6%	52.9%	29.4%	0.0%	100.0%

Source: Dechert LLP, DAMITT 2023 Annual Report: Minding the Gap in Merger Enforcement (Jan. 30, 2024).

Classes 4-6

Unit 3: Sanford Health/Mid Dakota Clinic

Merger Antitrust Law

Georgetown University Law Center
Dale Collins

September 4, 2025


SANFORD™
HEALTH


MDC
MID DAKOTA CLINIC
The doctors you know and trust.℠

The Deal

What was the transaction?

- Sanford Health to acquire MidDakota Clinic, P.C. (MDC)
  - Purchase the stock and clinic assets of MDC P.C.
  - Purchase the real estate and other assets owned by the Mid Dakota Medical Building Partnership that are leased by MDC
- Purchase price: Not given
  - But appears to be HSR reportable
    - Complaint alleges that "[a]bsent court action, Defendants will be free to close the Transaction after 11:59 pm EST on June 26, 2017"
- Term sheet dated August 22, 2016

Who was the buyer?

- Sanford Heath
  - North Dakota not-for-profit corporation
  - Vertically integrated healthcare delivery system
    - Headquartered in Sioux Falls, SD
    - Operates in nine states
      - More than 40 hospitals
      - More than 250 clinics
    - Sells health insurance in four states

Who was the buyer?

- Sanford Heath
  - Operates Sanford Bismarck
    - Wholly-owned subsidiary
    - Operates Sanford Bismarck Medical Center
      - 217-bed general acute care hospital and Level II trauma center
      - Employs 160 physicians who work in Bismarck or Mandan
      - Largest private employer in the Bismarck-Mandan area
    - Eight primary care clinics
    - Several specialty clinics

Who was the seller?

- Mid Dakota Clinic, P.C.
  - Not-for-profit, physician-owned professional corporation
  - Headquartered and operates in Bismarck, ND
  - Operates
    - Mid Dakota Clinic
    - Mid Dakota Center for Women
    - Ambulatory surgery center
  - Employs 61 physicians
    - 12th largest private employer in Bismarck

The Mechanics of Merger Antitrust Litigation

Antitrust merger litigation generally

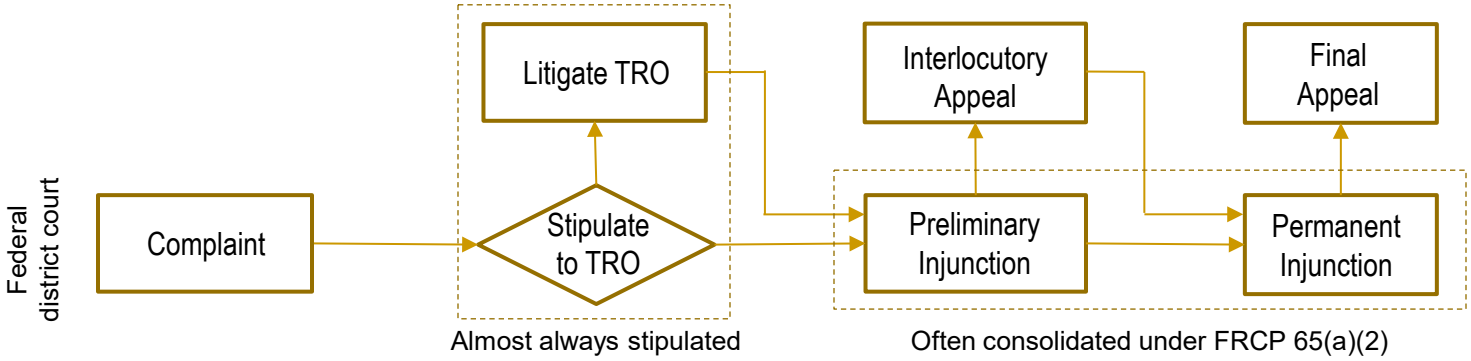
Plaintiff	Trial Forum	Appeal
DOJ	Federal district court	Court of appeals
FTC		
–Preliminary inj.	Federal district court	Court of appeals
–Permanent inj.	FTC administrative trial	Full commission, then any court of appeals with venue
State AGs*	Federal district court	Court of appeals
Private parties*	Federal district court	Court of appeals

* May bring state claims in state court or join state claims in federal court

- Incentive to litigate
  - *By far the strongest*: DOJ and FTC
  - *Weak, but still see some challenges*: State AGs
  - *Almost nonexistant*: Private parties

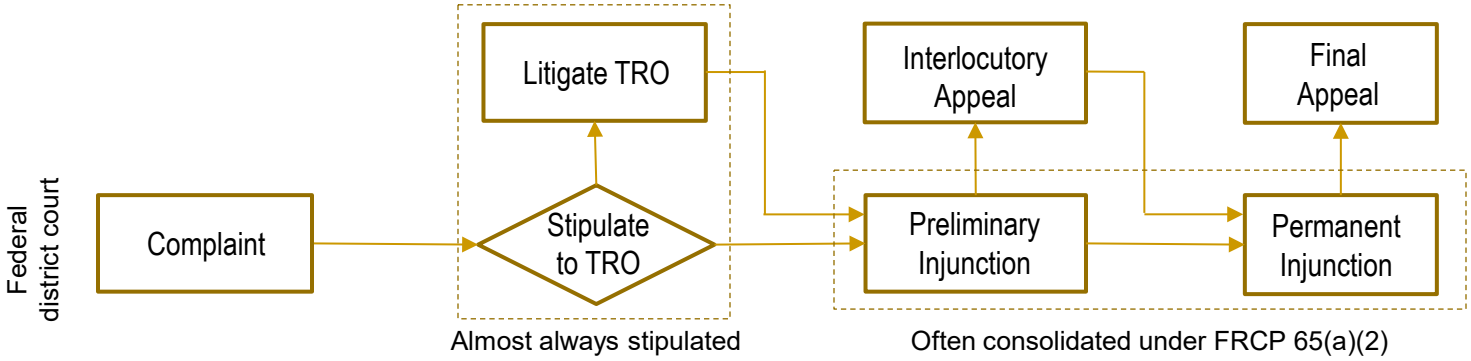
Typical litigation paradigms

DOJ preclosing challenge

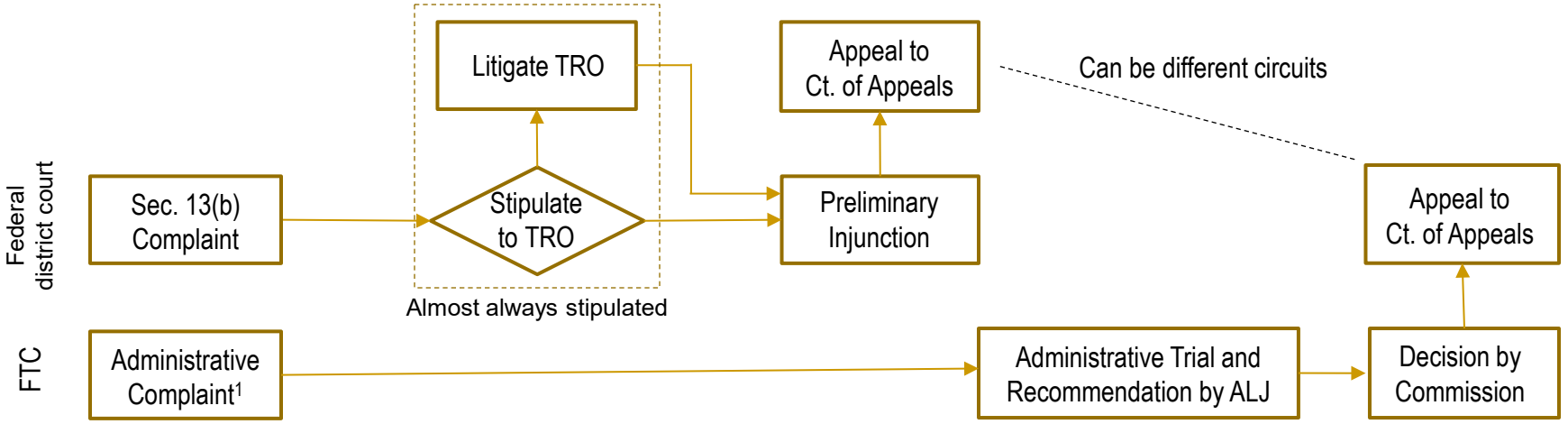


Typical litigation paradigms

DOJ preclosing challenge



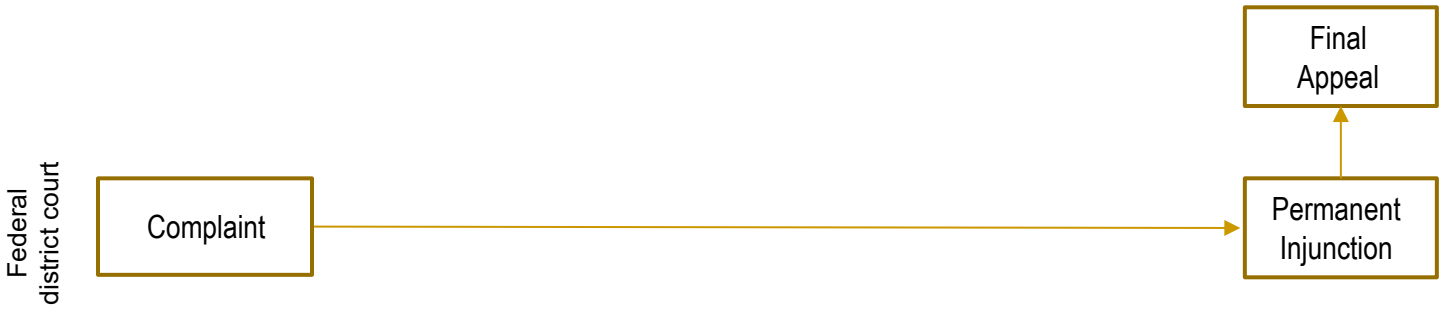
FTC preclosing challenge



[1] The FTC must issue its administrative complaint within 20 days of the entry of a preliminary injunction. FTC Act § 13(b). As a matter of practice, the FTC issues its administrative complaint before or on the date it seeks a preliminary injunction.

Typical litigation paradigms

DOJ postclosing challenge



FTC postclosing challenge

Litigation timing

- WDC views on timing for preclosing challenges

Proceeding	Plaintiff	Formum	Likely timing
Preliminary injunction	DOJ or FTC	Federal district court	6.5 months from filing of the complaint
Appeal from the grant or denial of a PI	DOJ or FTC	Federal court of appeals	Likely to be granted expedited treatment, in which case 6 months
Full trial on the merits	DOJ	Federal district court	Typically consolidated with PI hearing under Rule 65(a)(2): 6.5 months from filing of the complaint
"Recommended decision" by the ALJ[1]	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint
Decision by the Commission	FTC	Full FTC	At the Commission's discretion
Appeal from an FTC decision on the merits	FTC	Federal court of appeal	One year or more

This timing is critical to know in the negotiation of the termination date in the merger agreement

Types of injunctions in merger cases

Injunction type	Relief ordered	
Temporary restraining order (TRO)	Maintain status quo pending decision on a preliminary injunction	
Preliminary injunction	Premerger:	Blocking injunctions
	Postmerger:	Hold separate/preserve assets for divestiture
		Rescission in appropriate cases
Permanent injunction	Premerger:	Blocking injunction
	Postmerger:	Divestiture (recission in one case)

NB: Since actions for injunctive relief sound in equity, they are tried to the court, not to a jury

Preliminary injunctions

- The enabling statutes

DOJ: Clayton Act § 15	FTC: FTC Act § 13(b)
"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute **proceedings in equity** to prevent and restrain such violations."	"Upon a proper showing that, [1] **weighing the equities** and [2] **considering the Commission's likelihood of ultimate success**, [3] such action would be in the **public interest**, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond"

Private parties: Clayton Act § 16
"Any person . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ., **when and under the same conditions** and principles as injunctive relief against threatened conduct that will cause loss or damage **is granted by courts of equity** . . . ."

Winter v. Natural Res. Def. Council, Inc.[1]

- Seminal Supreme Court case on preliminary injunctions
- *Winter* test: "A [private] plaintiff seeking a preliminary injunction must establish
  - "[1] that he is likely to succeed on the merits,
  - "[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
  - "[3] that the balance of equities tips in his favor, and
  - "[4] that an injunction is in the public interest."[2]
- Applies to—
  - The DOJ under Clayton Act § 15
  - Private parties (including states) under Clayton Act § 16
- Does not apply to the FTC
  - FTC Act § 13(b) standard applies instead

[1] 555 U.S. 7 (2008).
[2] *Id* at 20.

Comparison of injunctive relief standards

For North Dakota	For the FTC
***Winter* standard**[1]	**Section 13(b) standard**
A [private] plaintiff seeking a preliminary injunction must establish	A court must find, after
[1] that he is likely to succeed on the merits,	[1] considering the Commission's likelihood of ultimate success
[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,	
[3] that the balance of equities tips in his favor, and	[2] weighing the equities
[4] that an injunction is in the public interest.	that entry of the preliminary injunction would be in the public interest

[1] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Antitrust preliminary injunction standard

- Debate over the Section 13(b) likelihood of success standard
  - The FTC often argues that Section 13(b) modifies the traditional equity standard for the entry of a preliminary injunction
  - Under this view, the FTC need only show—
    - "a fair and reasonable chance of ultimate success on the merits,"[1] *or*
    - more commonly cited by the courts, a "serious question":

> The issue is whether the Commission has demonstrated a likelihood of ultimate success. The Commission meets its burden if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[2]

  - Almost all modern Section 13(b) opinions cite the "serious question" standard
  - BUT the debate is almost academic
    - Except for the articulation of the different standards, the opinions in DOJ Section 15 cases on a permanent injunction and FTC Section 13(b) cases for a preliminary injunction are indistinguishable and all finding for the agency show a certain or almost certain Section 7 violation

[1] *See* FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *urged in* FTC v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER), 2024 WL 81232, at *7 (S.D.N.Y. Jan. 8, 2024).
[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984).

Winter v. Natural Res. Def. Council, Inc.

- DOJ/FTC challenges
  - Irreparable harm is presumed to result if the law is violated
    - Other cases hold that the element of irreparable harm is simply not part of the test when the government is the plaintiff and is seeking to prevent a violation of law
  - Balance of the equities
    - The public equities
      - The public interest in effectively enforcing the antitrust laws
      - The public interest in ensuring that effective relief may be ordered if the government succeeds at the trial on the merits (secondary)
    - Where there is a likelihood of success, the public equities have always outweighed the private equities, whatever they may be
      - I am unaware of any merger antitrust case where the court found the private equities outweighed the public equities if the agency demonstrated a likelihood of success on the merits

    Therefore, the critical factor when the government seeks a preliminary injunction is the likelihood of success on the merits

- *Query*: Can the *Winter* requirements be balanced on a sliding scale?

Temporary restraining orders (TROs)

- Emergency interim relief a court may enter to maintain the status quo pending a fuller hearing on a motion for a preliminary injunction
- Can be entered ex parte when circumstances require[1]
- Duration[2]
  - Not to exceed 14 calendar days
  - May be extended for good cause by the court for an additional 14 calendar days
  - Short duration is the safeguard against the lack of higher standards
    - Absent consent, if of a longer duration, the TRO will be treated as a preliminary injunction and must conform to the more rigorous preliminary injunction standards
  - The parties may agree on a longer extension (stipulated TRO)
- Standard
  - The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction
  - BUT the respective harms to the parties and the public interest will be assessed in light of the very limited duration of the TRO (as opposed through the end of the trial on the merits for a preliminary injunction)

[1] Fed. R. Civ. P. 65(b)(1).

[2] Fed. R. Civ. P. 65(b)(2).

Temporary restraining orders (TROs)

- Rarely litigated in modern merger antitrust practice
  - Judges strongly dislike the timing pressures of an adjudicated TRO and believe that the litigating parties should be able to agree on a scheduling order that will—
    1. Permit the merging parties to take all necessary discovery on an expedited basis before the preliminary injunction hearing, *and*
    2. Include a stipulation not to close the transaction until the motion for a preliminary injunction is decided
  - Since the same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement on a stipulated TRO

Permanent injunctions

- Identical to the preliminary injunction standard applicable to the case
  - EXCEPT that a permanent injunction requires *actual* success on the merits[1]
  - Success on the merits requires proof by the preponderance of the admissible evidence
- The preliminary injunction record
  - In many non-merger cases, the record for a decision on a permanent injunction will be more developed if additional discovery and briefing have occurred since the preliminary injunction hearing
  - *Not the case in merger antitrust challenges*: Lay and expert discovery will be completed, a full trial record will be presented, and the court will hold a multiday evidentiary hearing with live witnesses
  - Although expedited, merger antitrust preliminary injunction hearings are indistinguishable from a full trial on the merits
- Factual findings in the preliminary injunction hearing
  - Not binding in the permanent injunction trial (or even entitled to deference)
  - BUT unlikely to be overturned in the absence of new evidence

[1] Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987).

FTC v. Sanford Health: The FTC's Case

The complaint

- Who were the plaintiffs?
  - FTC
  - State of North Dakota
- Who were the defendants?
  - Sanford Health (and its subsidiary Sanford Bismarck)
  - Mid Dakota Clinic, P.C.
- Where was the complaint filed?
  - United States District Court for the District of North Dakota
- When was it filed?
  - June 23, 2017
- Was the complaint filed pre- or post-closing?
  - Preclosing

The complaint

- What statutes did the plaintiffs allege would be violated?
  - Clayton Act § 7
  - FTC Act § 5
  - North Dakota antitrust law
    - This is a little confusing
    - The district court cited—
      - Section 7 as the only substantive statute that was violated
      - North Dakota law only for remedies
    - But the North Dakota state remedies law should not apply to a federal Section 7 claim
    - In the complaint, however, North Dakota did allege a violation of North Dakota Century Code § 5108.1, the state's analog to the Sherman Act
      - North Dakota does not have an analog to Clayton Act § 7
    - On the other hand, the complaint's prayer for relief did not seek any remedy beyond that provided in Clayton Act § 16, so the North Dakota remedies statute was superfluous
      - Except that the North Dakota law also provides for the award of attorneys' fees when the state prevails in its action

The complaint

- Clayton Act § 7 provides the U.S. antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in **any line of commerce** or in any activity affecting commerce **in any section of the country**, **the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly**. [1]

- Essential elements of a Section 7 violation
  1. Acquisitions of stock or assets that,
  2. "in any line of commerce" (product market)
  3. "in any part of the country" (geographic market)
  4. The effect of the acquisition "may substantially lessen competition or tend to create a monopoly"[2]

Called the *relevant market*

Called the *anticompetitive effects test*

[1] 15 U.S.C. § 18 (emphasis added; remainder of section omitted).

[2] To be within federal subject matter jurisdiction, the parties and the transaction must have the requisite nexus to interstate commerce.

The complaint

- What was the gravamen of the complaint?
  - The acquisition by Sanford Heath of Mid Dakota Clinic would violate Clayton Act § 7 by threatening to lessen competition in physician services "sold and provided to [1] commercial payers and [2] their insured members" in four separate relevant markets—
    1. Adult primary care physician services
    2. Pediatric services
    3. OB/GYN services, and
    4. General surgery physician services

    } Relevant product markets

    in the Bismarck-Mandan area of North Dakota — Relevant geographic market

> The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Defendants consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.[1]

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 2, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

The complaint

- What did the plaintiffs perceive as the source of the problem?
  - The acquisition would significantly increase concentration in each of the alleged relevant markets (creating monopolies or near-monopolies)

Physicians in the Bismarck-Mandan Region

	Sanford Bismarck	Mid Dakota	CHI St. Alexius	Others
Adult PCPs[1]	37	23	5	10
Pediatricians	5	6	0	1
OB/GYNs	8	8	0	1
General surgeons	4	5	0	0

[1] PCPs are primary care providers.

The complaint

- What relief did the plaintiffs seek?
  - *FTC*: Preliminary injunction under FTC Act § 13(b) enjoining the consummation of the transaction until a decision by the FTC on the merits
  - North Dakota:
    - Preliminary injunction under Clayton Act § 16 enjoining the consummation of the transaction until a decision by the FTC on the merits
    - Retain jurisdiction and maintain the *status quo* until the administrative proceeding that the Commission has initiated concludes
      - *Query*: Why ask for this?
    - Attorneys' fees

The complaint

- As to the likelihood of success on the merits, what did the FTC allege it would show?

Prima facie case →

Preempt entry defense →

Preempt efficiencies defense →

68. The Commission has reason to believe that the Transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. In particular, the Commission is likely to succeed in demonstrating, among other things, that:

a. The Transaction would have anticompetitive effects in the adult PCP services, pediatric services, OB/GYN services, and general surgery physician services markets in the Bismarck-Mandan area;

b. Substantial and effective entry or expansion into the relevant service and geographic markets is difficult and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Transaction; and

c. Any efficiencies that Defendants may assert as resulting from the Transaction are speculative, not merger-specific, and are, in any event, insufficient as a matter of law to justify the Transaction.[1]

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 68, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

The complaint

- As to the balance of the equities and the public interest, what did the FTC allege it would show?

Difficulties in obtaining effective post-trial divestiture relief →

69. Preliminary relief is warranted and necessary. The Commission voted unanimously to issue an administrative complaint. Should the Commission rule, after the full administrative trial, that the Transaction is unlawful, reestablishing the status quo ante of competition would be difficult, if not impossible, without preliminary injunctive relief from this Court. The integration of Sanford and MDC's operations, including the elimination or transfer of service lines, the implementation of higher prices, and potential staff reductions, would substantially impair any attempt to restore competition to pre-Transaction levels.

Interim harm from price increases and quality reductions →

70. Moreover, in the absence of relief from this Court, substantial harm to competition could occur immediately, including [1] an increase in the costs that employers and their employees in the Bismarck-Mandan area incur for their healthcare and [2] a reduction in the quality of healthcare administered. Because any potential pro-competitive benefits of the Transaction do not outweigh the significant interim harm to competition and consumers, and should still be available pending the outcome of the administrative trial, the public equities weigh strongly in favor of Plaintiffs' request for preliminary injunctive relief.

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 68, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

Proving the Prima Facie Case

Proving the prima facie case

- Three elements:
  1. *Product market definition*: Courts broadly look at two types of indicia in evaluating evidence on the relevant product market—
     a. The "*Brown Shoe* factors"
     b. The "hypothetical monopolist test"
  2. *Geographic market definition*: Courts broadly look at two types of indicia in evaluating evidence on the relevant geographic market—
     a. "The area of effective competition"
        i. The area where customers of the merging firms can practically turn to alternative suppliers (when customers travel to suppliers—think retail stores)
        ii. The area where alternative suppliers exist that can practically service the customers of the merging firm (when suppliers travel to customers—think plumbers)
     b. The "hypothetical monopolist test"
  3. *Gross anticompetitive effect*: Courts broadly look at two types of indicia in evaluating evidence on the relevant market
     a. The *Philadelphia National Bank* presumption
     b. Explicit theories and supporting direct and circumstantial evidence of likely anticompetitive harm resulting from the merger

Before turning to market definition, we need to examine the Philadelphia National Bank *presumption and* Baker Hughes *burden shifting*

The *PNB* presumption

- Establishes a rebuttable presumption of prima facie anticompetitive Section 7 harm:

> "This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which **produces a firm controlling an undue percentage share of the relevant market**, and **results in a significant increase in the concentration of firms** in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[1]

  - Requires—
    - The combined firm to pass some (unspecified) threshold of *market share*, *and*
    - The transaction to result in a *significant increase in market concentration*

    NB: The opinion was careful to note that it was not setting a lower bound and that some commentators had suggested 20% as a threshold of "undue" market share
  - Supposed to reflect the latest in economic thinking in the then-prevailing *structure-conduct-performance paradigm*
    - "[T] the test is fully consonant with economic theory."[2]
    - "[C]ompetition is greatest when there are many sellers, none of which has any significant share."[3]

[1] United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).
[2] *Id*. (citing extensively to structure-conduct-performance literature).
[3] *Id*.

Baker-Hughes[1]

- Sets out a three-step burden-shifting approach:
  1. The plaintiff bears the burden of proof in market definition and in market shares and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation
     - More generally, this should be the burden of proving a prima facie case (whether or not the *PNB* presumption or other evidence is invoked to show anticompetitive effect)
     - You can think of the burden here as the *burden of production*, that is, the plaintiff must adduce sufficient evidence to allow the trier of fact to find each and every (contested) essential element of a Section 7 violation
     - Essential elements
       1. The relevant product market
       2. The relevant geographic market
       3. The requisite gross anticompetitive effect in the relevant market

Also need to satisfy the interstate commerce element, but this is rarely contested

[1] United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

Baker-Hughes

- Sets out a three-step burden-shifting approach:
  2. If the plaintiff satisfies its burden in Step 1, the *burden of production* shifts in Step 2 to the defendants to adduce evidence sufficient to rebut the plaintiff's prima facie case and create a genuine issue for the trier of fact
     a. Three avenues of rebuttal:
        i. Negate the plaintiff's market definition
        ii. Rebut the predicates of the *PNB* presumption and other evidence of (gross) prima facie anticompetitive effect
        iii. If applicable, provide evidence of one or more downward-pricing pressure defenses

Baker-Hughes

- Uses a three-step burden shifting approach:
  3. *The burden of persuasion* then returns to the plaintiff to prove, in light of all of the evidence in the record, that the merger is reasonably probable to have an anticompetitive effect in the relevant market
     - To the extent defendants have satisfied their burden in Step In Step 3 plaintiffs must prove by the preponderance of the evidence—
       - The relevant product market
       - The relevant geographic market, and
       - The merger will cause a cognizable *net* anticompetitive effect with reasonable probability