**MERGER ANTITRUST LAW**

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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**Class 3 (September 2): The DOJ/FTC Merger Review Process (Unit 2)**

On Tuesday, we examine the DOJ/FTC merger review process under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). For reasons we will discuss, state and private merger antitrust challenges are rare, so almost all challenges result from DOJ and FTC merger reviews.

*Antitrust risk*. We will start Unit 2 with a brief discussion of how to think systematically about antitrust risk. Lawyers give advice; clients make decisions. The goal is to get the client into a position to make informed decisions about how to proceed (if at all) in light of the transaction's antitrust risk. However, a big problem for practitioners, and hence for clients, is how to convey a meaningful sense of the client's risk. Overall, I find that antitrust lawyers do a terrible job in this area.

I find that, by far, the best way to think about antitrust risk is in three nested buckets: (1) inquiry risk, (2) substantive risk, and (3) remedies risk. This framework is a natural way for business people to think about legal risk generally and antitrust risk in particular (slides 3-9). While I will address these risks in the context of a merger, they apply to any situation where antitrust risk of any type is present.

1. *Inquiry risk* is the risk that the transaction's merits will be seriously examined. Antitrust questions do not materialize out of thin air. Someone must have the incentive and the institutional means of raising the question. Inquiry risk can be easily analyzed from this perspective. The HSR Act and the DOJ/FTC merger review process are central to assessing inquiry risk.
2. *Substantive risk* refers to the likelihood that the transaction will be deemed to violate antitrust laws. Substantive risk arises if and only if there is an inquiry. Analysis of substantive risk requires an identification of the possible theories of antitrust liability that could apply to the situation and then a dispassionate evaluation of those theories in light of the evidence to which the parties have access (including their own documents) or can develop (notably expert evidence), as well as a judgment about the evidence that the investigating agency may develop from third parties that is not available to the merging parties (at least absent discovery in the course of litigation).
3. *Remedies risk* reflects the consequences of a finding that the transaction violates the antitrust laws. Remedies risk is analyzed in terms of the possible outcomes of a finding of a violation and their associated probabilities of occurrence. These outcomes include the range of possible "fixes" (restructurings) of a transaction to eliminate the violation or otherwise negate the concern, as well as the likelihood of their acceptance by the relevant decision-maker—the investigating agency or the court—and the associated costs of these restructurings. Remedies risk must also account for the possibility that there is no "fix" that would eliminate the antitrust problem to the satisfaction of the investigating agency.

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

4. file a *notification report form* with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission before closing their transaction, and
5. observe a statutory-prescribed postnotification *waiting period* before they can close their transaction (usually 30 calendar days for a preliminary review and multiple months for an in-depth review).

The HSR Act provides the institutional framework within which the DOJ and FTC conduct the vast majority of merger investigations. The class notes (slides 10-12) give a basic summary of the HSR Act. The class notes also provide a more detailed schematic of the DOJ/FTC merger review process under the HSR Act, which you should study very closely (slides 13-16). Next, read the FTC's explanations of the process (pp. 5-22). I could ask you to read the text of the HSR Act, but it is long, complicated, and tedious. For our purposes, the reading materials and class notes will suffice. However, if you would like to read the statute, I have included the HSR Act in the reading materials (pp. 23-29).

I think about the merger review process in three stages:

1. *Prefiling/filing*. Prefiling work includes conducting a preliminary antitrust risk analysis for the client, negotiating the merger agreement with the other party in friendly deals or preparing for a hostile takeover, and developing the antitrust defense for the transaction. We will return to contractual risk-shifting in the merger agreement in some detail in Class 8.

   After the prefiling work is completed, it is time to make the merger control filing. First, it is necessary to determine whether the transaction is *reportable*, that is, whether the HSR Act and its implementing regulations require the parties to submit a merger control filing to the DOJ and FTC. This assessment involves two steps: (a) determining whether the transaction meets the statutory threshold size tests and so is *prima facie reportable*, and (b) determining whether an exemption applies. The rules here are quite involved, but I have summarized the most important ones in the class notes (slides 17-24). If a transaction is prima facie reportable and no exemption applies, the transaction is *reportable* if it crosses a notification threshold (slide 24). The thresholds in the HSR Act for prima facie reportability and the statutory exemptions are adjusted for inflation annually in the Federal Register. In 2025, the most important number is $126.4 million, which is the value of voting securities and assets of the acquired person that the acquiring person must *hold* as a result of the acquisition (the value of any existing holdings plus the value of the voting securities or assets to be acquired in the transaction in question) as the first prerequisite of reportability.[1]

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 FED. REG. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025). (pp. 30-31). Be sure to note that the threshold applies to the value of the total voting securities and assets the acquiring will hold as a result of the acquisition, *not* the value of the voting securities and assets the acquisition will acquire in the transaction. Under the holding threshold, an acquisition in principle could be reportable even if it involved the purchase of one share of voting stock or $1.00 of assets. Be sure you understand why.

If the transaction is reportable, each party must file its own report on a prescribed form. Technically, this is the Notification and Report Form, but it is commonly referred to as the "HSR filing," "HSR report," or simply "HSR form." Before the 2024 reforms, the acquiring and acquired persons completed the same form. The 2024 reform created different forms for the acquiring and acquired persons. I have included the current form for the acquiring person (the more comprehensive of the two forms) and the instructions in the reading materials (pp. 35-63). You only need to skim these materials to get a general sense of the breadth of information and documents the form requires. I have also described the form for the acquiring person in the class notes (slides 26-38), which warrants somewhat more attention.[2]

In most cases, the most important parts of the form are the business documents that the filing person is required to include, especially those documents submitted in response to Items 4(c) and 4(d). You should pay careful attention to the notes on these documents (pp. 64-70) and the class notes (slides 33-36). The class notes also include the new fee schedule enacted in 2022, which is to be inflation-adjusted annually, along with the current schedule of fees in effect for filings made in 2025 (slide 39). I have included a graph showing the number of filings received by the DOJ and FTC each year through FY 2023, the latest year for which data is available (slide 40).

In addition to filing the required HSR reports, the parties to a reportable transaction must observe a specified statutory waiting period before closing their transaction (slide 41). The *initial waiting period* is usually 30 calendar days (15 calendar days for all-cash tender offers) after all required HSR reports have been filed. In negotiated transactions, where the buyer will acquire stock of a subsidiary or assets directly from the seller, both the buyer and the seller must file their respective HSR reports before the waiting period begins to run. In open market transactions, where the buyer acquires the target's stock on the open market (including through a tender offer), the waiting period starts to run after the buyer has filed its HSR form. (This prevents the target in a hostile transaction from defeating the acquisition simply by not filing its HSR form.) The initial waiting period will be extended if the investigating agency issues a second request (discussed below). The investigating agency may grant early termination of a waiting period at any time, including during an extended second request period. A long-established policy was to grant early termination in the initial waiting period when neither the DOJ nor the FTC indicated they wanted to review the transaction. Unfortunately, the Biden administration ceased this practice, so no early terminations were granted during the bulk of that administration. The Trump 2.0 administration, however, has resumed the practice.[3]

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

[2] If you want to examine the HSR form for the acquired person, you can find it here.

[3] *See* Fed. Trade Comm'n, Legal Library: Early Termination Notices (accessed Aug. 29, 2025).

(a) The parties can simply fail to file.

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

(c) The parties file, but one of their filings is incomplete (usually because the party failed to include all of the required business documents).

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

The first three types of violations are *failures to file*; the last type of violation is commonly referred to as *gun-jumping*. In 2025, the HSR Act provides for civil penalties of up to $53,088 per day for every day of the violation, or approximately $19.4 million per year, as well as injunctive relief. The class notes cover HSR Act violations (slides 42-46). The *ValueAct*, *Flakeboard*, and *Nautilis* materials in the reading materials (pp. 72-119) provide three examples of HSR Act violations. Read the press releases to get a basic understanding of each case. If you do not have time to read the complaints in their entirety, try to read the press releases and the introduction and fact sections of the complaints. To date, only one action for an HSR Act violation has been litigated on the merits, and it was decided against the FTC on grounds of immunity; all other alleged violations have been settled by consent decree.[4]

2. *Initial waiting period investigation*. The next stage in the merger process after filing the HSR form is the *initial waiting period investigation* (slides 47-54). As noted above, the initial waiting period under the HSR Act is 30 calendar days (15 calendar days for all-cash tender offers). This waiting period is intended to provide the agencies the opportunity to decide whether one or both of them would like to review the transaction, allocate the investigation responsibility to one of the agencies (so that both of them will not be investigating simultaneously—this is called the "clearance process" (see slide 49)—and permit the investigating agency to conduct a preliminary substantive review. The average number of preliminary investigations per year from FY 2010 to FY 2023 was 250, although the number of investigations as a percentage of the reportable transactions has steadily declined since FY 2010 (slides 40-42).

   If one of the agencies initiates an initial waiting period investigation, the investigating staff will contact the merging parties to introduce themselves and request that the parties voluntarily submit some additional information (slide 52). This request will likely be memorialized in a so-called "voluntary access letter." I have included the Biden DOJ model

[4] In 2023, the FTC alleged that the Louisiana Children's Medical Center's acquisition of three New Orleans area hospitals from HCA Healthcare, Inc. violated the HSR Act. Although the acquisitions satisfied the thresholds for reportability, LCMC claimed that the acquisitions were exempt from the HSR Act's reporting and waiting period requirements because they had received a Certificate of Public Advantage ("COPA") from Louisiana, making these acquisitions exempt from the antitrust laws under the state action doctrine. Both sides filed cross-motions for summary judgment. On September 27, 2023, the district court granted LCMC's motion and dismissed the FTC's claims with prejudice. Louisiana Children's Med. Ctr. v. Attorney General, No. 2:23-cv-01305-LMA-MBN (E.D. La. Sept. 27, 2023).

form in the reading materials (pp. 136-38).[5] Neither the Biden nor the Trump 2.0 FTC has released a model letter, but the FTC's website provides guidance on the likely nature of a voluntary request (p. 139). During the initial telephone call, the staff will also invite the parties to give a presentation, if they wish to do so, on why the transaction does not present an antitrust problem. For reasons we will discuss in class, the parties should always take advantage of this invitation (see slides 53-54).

During the initial waiting period investigation, the staff will also conduct interviews (usually by telephone) with customers and competitors in the industry. The slides provide additional details (slide 55).

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

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

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

(c) convince the merging parties to "pull and refile" their HSR forms to restart a new initial waiting period (slides 56-58).

It is important to note that the FTC Premerger Notification Office (which is responsible for the administration of the HSR Act) takes the position that the waiting periods are prescribed by statute and cannot be modified by agreement. Accordingly, the parties cannot voluntarily "extend" the initial waiting period to give the agency more time to investigate. However, they can commit by a contractual "timing agreement" with the investigating agency outside of the HSR Act not to close the transaction until sometime after the HSR waiting period has expired. We will examine timing agreements after we introduce second request investigations.[6]

Finally, in assessing the antitrust risks and preparing to defend against a possible merger investigation and potential litigation, the merging parties may wish to share their analysis with one another and negotiate a joint defense strategy. (Indeed, it would be foolish not to do so.) However, sharing an attorney's analysis of the transaction and defense strategy with a third party—here, the merger partner—normally violates confidentiality and waives the attorney-client privilege. However, the common interest privilege provides an exception that permits the sharing of otherwise protected communications with another party if the sharing facilitates a "common legal interest" between the parties. The practice of the DOJ and FTC has been to recognize that the merging parties have a common legal interest in defending the transaction. As a result, the agencies have not attempted to pierce the so-called "common interest privilege."[7]

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[5] Whether this is still current is anyone's guess, especially since much of the information in the 2021 model voluntary request letter is now included in the original HSR filings under the 2024 reform.

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

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

The law of privilege is fundamental to the practice of both litigators and transactional lawyers. You should not start your law practice without a good grounding in privilege law. The class notes provide a quick review of the attorney-client privilege, the work product doctrine, and the common interest privilege (slides 59-69). The reading materials provide two important applications in practice.

The first document addresses a situation where a buyer has requested its investment bank to analyze the potential sale of certain businesses that the buyer, on the advice of counsel, anticipates will need to be divested as part of a consent settlement. The commercial consequences of a possible divestiture sale are critical for the buyer to know when negotiating the purchase price and other merger agreement terms. In response to its second request specification, which required the disclosure of all documents related to the transaction, the buyer claimed attorney-client and work product protection over all communications between the buyer and the investment bank concerning the divestiture analysis. The DOJ rejected the privilege claims and demanded that all documents exchanged between the investment bank and the client be produced. The reading materials contain an anonymized letter sent to the DOJ in defense of the privilege claims (pp. 121-26). Upon receiving the letter, the DOJ dropped its demands that the disputed documents be produced. Although the letter was written over twenty years ago, the analysis and supporting case citations remain relevant, allowing for the same defense to be made today.

The second document addresses whether communications between a merging party and its customers regarding the deal, under the particular circumstances of the transaction, are protected under the work product doctrine. As you know from the class notes, the antitrust agencies have relied heavily on customer reactions to a transaction. Accordingly, the merging party needs to learn, as best it can, how its customers are reacting to the deal. Moreover, when customers have concerns, companies may be able to mitigate those concerns, perhaps by clarifying a misunderstanding about the deal or the combined company's future strategy, or by extending a contract to give the customer confidence that its prices will not be adversely affected by the transaction. It is also important for the company's antitrust counsel to be aware of customer reactions to provide the client with legal advice about the possible risks the transaction presents and to formulate a defense. Typically, communications between a merging party and its customers are not shielded from the government, and the investigating agency is entitled to discovery on these communications through a second request, a CID, or testimony under oath in a deposition. In this case, however, before any contact with the customers about the deal, antitrust counsel "instructed" the client to call the customers, ask specific questions to ascertain the customer reactions, and report back to counsel on the responses, which counsel would use to inform his antitrust analysis and defense strategy. In an investigational hearing (what the FTC calls a pretrial complaint deposition), the FTC attorney asked the testifying company official whether he had spoken to customers about the transaction. Antitrust counsel objected because any communication with customers was protected by the work product doctrine and instructed the witness not to answer. The objection ultimately was elevated to the Commission on a motion to quash. The reading material contains the Commission's order recognizing the privilege (pp. 127-34).

3. *Second request investigations*. Before the initial waiting period ends, if the reviewing agency decides that an in-depth investigation is warranted, it will issue a Request for

> Additional Information and Documentary Material (more fondly known as a "second request"). Second requests are somewhat like precomplaint subpoenas, although they are not compulsory process. The parties do not have to respond to a second request as they would to a subpoena or a civil investigative demand (CID), but, as explained below, the issuance of a second request extends the HSR Act waiting period for a statutorily prescribed time (usually 30 calendar days) after all parties have properly responded to their respective second requests. The upshot is that if the parties do not respond to their second requests, the waiting period never expires, and they cannot close their deal.
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> The slides give a brief overview of second request investigations (slides 70-76). I have included the Biden FTC model second request in the reading materials (pp. 140-66). As painful as it might be, read the FTC's model second request with some care.[8] Second requests are a preliminary element in any sophisticated merger antitrust practice.

If the reviewing agency issues a second request before the end of the initial waiting period, the HSR Act extends the waiting period for the period of time that it takes for the merging parties to comply with their respective second requests, plus an additional 30 calendar days (10 days for an all-cash tender offer) (see slide 75).

*Substantial compliance*. Given the amount of documents and data demanded by a second request, a crucial question is how complete compliance must be to initiate the final waiting period. The standard in the HSR Act is "substantial compliance," but the term is not defined in the act or its implementing regulations. The agencies have at times taken the position that "substantial compliance" means full compliance, except for insignificant deficiencies, regardless of the probative value of the missing documents or information, or whether the agency should challenge the transaction or the burden on the reporting party of compliance to this extent. The Biden agencies almost always took this view, although I am unaware of anything in the public record that confirms this. The courts have not been called to address the question since the investigating agency and the merging parties almost always find it in their mutual interest to compromise any dispute outside of court. The closest a court has come to addressing the issue was the FTC's 2005 challenge to Blockbuster Video's compliance with its second request in connection with Blockbuster's contested hostile takeover of Hollywood Video. The transaction involved an extremely time-sensitive contested hostile takeover bid, and it was in Blockbuster's interest to accelerate matters by forcing the FTC into court. The FTC quickly compromised the dispute with a short extension of the waiting period acceptable under Blockbuster's timetable, but not before Blockbuster filed its brief in opposition. Look at the class notes (slides 76-78) and, if you want to have a fun read about a party going after an agency, read the Blockbuster brief.[9]

*Timing agreements*. The agencies believe, with some justification, that the statutory time periods in the HSR Act provide too little time (1) for the staff to complete the review of the second request submissions and prepare its recommendation and (2) for the ultimate decision-makers within the agency to consider the staff recommendations and a reasoned decision on the investigation record

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8 The DOJ's model second request no longer appears on the ATD's website. Perhaps it has been withdrawn, presumably to revise it. Over the summer, I sent an FOIA request and received a copy of model second request with a date of April 2022. I have no idea whether it is currently effective or not. I suspect that it is not.

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

as to the outcome of the investigation. As a result, the investigating agency in second request investigations almost always asks the merging parties to enter into a "timing agreement" that commits the parties not to close their transaction until some specified time after the statutory waiting period expires. The investigating agency can request an excessive amount of additional time, but the parties can usually persuade the agency to accept 60 or even 30 days after the waiting period expires. If the parties do not agree to an extension, the agency typically enters "litigation mode" and threatens to cease discussing the merits or a possible settlement with the parties. Therefore, unless the parties believe that further interaction with the investigating agency is likely futile, the parties almost always agree to extend the time for the investigation through a timing agreement (slides 81-82).[10]

*Merger review outcomes*. After the evidence is gathered, the parties will have the opportunity to make a presentation—actually, a series of presentations—to various levels of the agency, explaining why the transaction should not be challenged (slide 83). After that, the agency will make its decision.

There are four possible traditional outcomes of a full investigation: (1) the agency closes the investigation without taking enforcement action, (2) the parties settle the investigation through a consent decree (which typically will require the divestiture of assets or businesses), (3) the agency commences litigation to block the transaction, or (4) the parties voluntarily terminate the transaction. The class notes summarize these outcomes, including some historical statistics on the distribution of agency investigation outcomes (slides 84-86). The distribution significantly shifted in the Biden administration, with the agencies being *much* less willing to accept consent decrees, resulting in more litigations and more voluntary terminations. Although it is still early, the Trump 2.0 agencies appear to be shifting back to the pre-Biden distribution of outcomes.

The Biden administration has introduced two notable changes in the menu of possible investigation outcomes. You should be aware of them, although their practical significance was never particularly great, and the two practices are unlikely to be continued in the Trump 2.0 agencies. A knowledge of recent agency practices, even if those practices are no longer in effect, will signal a significant knowledge of merger antitrust practice and enhance your credibility when dealing with colleagues and co-counsel.

First, although historically both the DOJ and the FTC finished their investigations by the end of the HSR waiting period—or, if there was one, the timing agreement—the Biden antitrust agencies, in a number of their early investigations, have allowed the deal to close while "continuing" the investigation and "reserving" the right to challenge the transaction postclosing. I use scare quotes because the agencies have always had the right to challenge a merger postclosing when they do not take enforcement action, so this is nothing new. What was new was the warning letter itself, which appeared to be designed solely to intimidate the merging parties. Sophisticated counsel and their clients gave the warning letter little thought, especially since neither agency appeared to have actually continued to investigate any of these transactions, much less taken enforcement action against them. (For that reason, the warning letter is sometimes derisively called a "bedbug letter" by some defense counsel.) The practice of sending these warning letters has received almost no

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

publicity over the last three years of the Biden administration, indicating either that the agencies have stopped sending the letters or that firms are giving them little attention.

Second, the Biden agencies' reluctance to accept consent decrees is giving the "fix it first" solution some traction.[11] A "fix it first" approach implements a curative divestiture *before* the main transaction closes. (By contrast, a divestiture consent decree permits divestiture to close *after* the main transaction closes, although sometimes only a matter of days separates the two). The merging parties sometimes implement "fix it first" solutions early in the investigation, if not before the parties file their HSR notifications and the investigation commences. However, in the Biden administration, it was more common for the parties and the investigating agency to agree to a "fix-it-first" solution during or even at the end of an investigation.[12]

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

Three more observations on "fix it first" solutions. First, the divestiture sale agreement can be conditioned on the termination of the HSR waiting period for the main transaction without enforcement action, so the divestiture seller would not have to sell unless the FTC had "cleared" the restructured transaction. Second, the FTC will need to be convinced that the divestiture sale

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

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

will preserve competition in Chattanooga after the closing of the main transaction. Therefore, the FTC will vet the divestiture agreement and the divestiture buyer just as it would in a consent decree exercise.[13] Third, if the merging parties file on the original transaction and later decide to pursue a "fix it first" solution, they can withdraw their original HSR notifications and refile on a restructured transaction.[14]

Interestingly, unlike the European Commission, neither the DOJ nor the FTC has the authority to block a pending transaction on its own (although the FTC can challenge a consummated transaction administratively and order appropriate relief, including divestiture). Instead, to block a pending transaction, both the DOJ and the FTC must obtain a preliminary injunction from a federal district court. We will see this in all of our case studies of preconsummation challenges where the parties elected to litigate.

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

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[13] Since the main transaction and the divestiture sale are related, the FTC will take the position that the merging parties' failure to implement a curative divestiture that preserves competition in Chattanooga is an anticompetitive effect of the main transaction that results in a Section 7 violation.

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