Unit 3. Allocating Antitrust Risk in Merger Agreements

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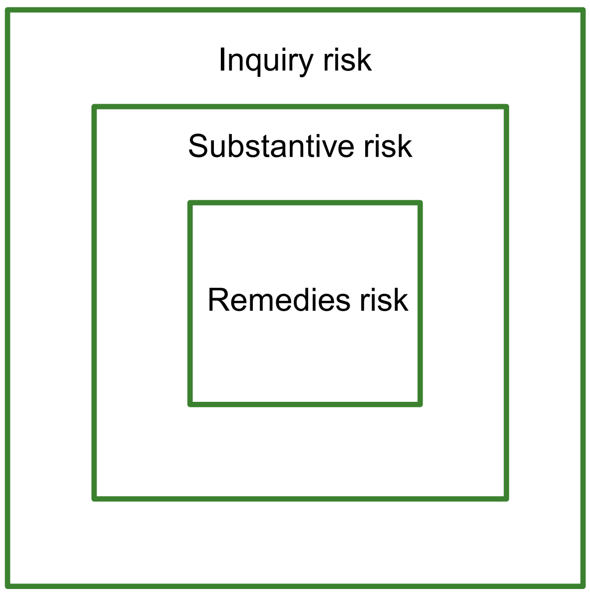
Thinking Systematically about Antitrust Risk

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. *Clearance*: The investigating agency clears transaction on the merits without taking enforcement action
  2. *Fix*: The parties restructure ("fix") the deal to eliminate the substantive antitrust concern, typically through a divestiture of a line of business
     a. Post-closing "fix" under a judicial consent decree (DOJ) or an FTC consent order
     b. Restructure the deal preclosing to avoid a consent decree ("fix-it-first")
  3. *Litigate*: 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 termination ("drop dead") date in the merger agreement occurs during the pendency of the litigation and one of the merging parties exercises its unilateral right to terminate the transaction;
     c. The agency and the parties settle the litigation through a consent decree; *or*
     d. The parties win on the merits and subsequently close their deal
  4. *Terminate*: 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 2021-2024 1H	70	11.3

[1] Data sources: Dechert LLP, DAMITT 2016 Year in Review (Jan. 2017) (for 2011-2016); Dechert LLP, DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement (Aug. 6, 2024) (for 2017-2024 1H).

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 (Proposed 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). As of August 27, 2024, the FTC has not promulgated a final rule. We will examine the proposed rule changes in Unit 4: Merger Review.

Costs associated with antitrust risk

- Remedies costs:
  - If the transaction is blocked—
    1. The foregone benefits to the merging parties of the transaction
    2. Any payments made by the buyer to the seller (e.g., an antitrust reverse termination fee or ticking fee)[1]
  - If the divestiture of a business or assets is required—
    1. Any discount from going-concern value that the divestiture seller likely will have to accept
       - Merger divestitures must be made in a short period of time set by the consent decree
       - Only a limited number of potential buyers may be acceptable to the reviewing agency as the divesture buyer
       - These conditions usually result in a "fire sale" where the divestiture buyer pays a discounted price significantly below fair market value
    2. Any loss of synergies associated with the divested businesses
    3. The transactions costs associated with the divestiture sale

[1] We will examine antitrust reverse termination and ticking fees in Class 8.

Strategic Objectives of Buyers and Sellers

Note on terminology

- Buyers, sellers, and targets
  - Parties
    - *Buyer*: The side that takes control of the combined company after the closing
    - *Seller*: The side that gives up control to the buyer for some purchase consideration
    - *Target*: The part of the seller's business that the buyer will acquire
      - May be the whole of the seller, a subsidiary corporation, an unincorporated line of business, or specific assets
  - Standard case: S sells T to B
    - S is the seller
    - T is the target (in many agreements called the *Company*)
    - B is the buyer (in many agreements called the *Parent* if a subsidiary of the buyer is the actual party involved in the transaction)
- M&A agreements
  - Sloppiness in naming agreements prevails
  - Unless the context indicates otherwise, in this course the following terms are synonymous:
    - M&A agreement
    - Merger agreement
    - Purchase agreement
    - Sale and purchase agreement

Party objectives in M&A agreements

- Sellers
  - Three goals
    1. Obtain the highest purchase price possible
       - Get the buyer to pay as close as possible to its reservation price (i.e., the highest price the buyer is willing to pay to do the deal)
         - The buyer's reservation price will be determined by the synergies the buyer expects the transaction to generate and the expected value of its next best alternative to doing the deal (i.e., its opportunity cost)
       - In other words, extract in the purchase price all of the gains from trade that the buyer expects to obtain from the deal
    2. Close the transaction
       - Called *certainty of closing*
       - Sellers do deals in order to get paid
       - No matter how high the purchase price, the seller does not get paid unless the deal closes
         - If the purchase price is all cash, the seller does not care what value the buyer loses in order to close
         - If some of the consideration includes the buyer's stock, then a loss in the transaction value to the buyer that materially affects the value of the buyer's stock can be a concern to the seller
       - Seller tends to lose value during the pendency of the transaction
         - Loses going concern value during the pendency of the transaction (the "damaged goods" problem)
           - Often lack strategic direction and focus between the signing and the closing
           - Key employees often leave the company for jobs in other companies
         - Purchase price in a second auction after a failed transaction is typically much less even after accounting for damaged goods problem

Party objectives in M&A agreements

- Sellers (con't)
  - Three goals
    3. Minimize the delay between signing and closing
       - Usually a very minor concern to sellers compared to the purchase price and certainty of closing
       - Unless the delay affects the probability of closing, in an all-cash deal the cost of delay is only the time value of money
         - But delay can in some circumstances affect the probability of closing. Two situations—
           - If the delay exceeds the merger agreement's "drop-dead" date, then the buyer can unilaterally terminate the agreement and walk away from the deal
           - If the delay jeopardizes the buyer's financing for the deal, the buyer can lose its financing

Party objectives in M&A agreements

- Buyers
  - Three goals
    1. Obtain the lowest purchase price possible
       - Get the seller to accept a sale price as close as possible to its reservation price (i.e., the lowest amount the seller is willing to accept to do the deal)
         - The seller's reservation price will be determined by the expected value of its next best alternative to doing the deal (i.e., its opportunity cost)
       - In other words, retain in the purchase price all of the gains from trade that the buyer expects to obtain from the deal
    2. Close the transaction provided the deal generates sufficient value; otherwise, walk away from the transaction without loss of value
       - Buyers do deals to generate value above their opportunity costs
       - "Value" is expansively defined
         - Usually means that the deal will be financially accretive (increases earnings per share)
         - But can include other considerations (e.g., keeping the target from being acquired by a competitor)
       - If the deal cannot generate value, the buyer wants to be able to terminate the purchase agreement without further loss of value (e.g., paying the seller a termination fee)
    3. Minimize the delay between signing and closing
       - Usually a more important consideration to buyers than to sellers
       - Buyer wants to—
         - Minimize loss in target's value during pendency of deal
         - Obtain control of the target in order to begin reaping gains from the deal
         - Free up buyer management resources to pursue other opportunities

Contractual Risk Allocation

Possible outcomes in DOJ/FTC reviews

1. Close investigation	• Deal closes as originally structured
2. Litigate	• Deal may or may not close depending on outcome of litigation
3. Settle w/consent decree	• Restructured deal closes shortly *after* the main deal closes
4. Parties terminate transaction	• Deal does not close
5. "Fix it first"	• Restructured deal closes *before* the main deal closes

Allocating antitrust risk in M&A agreements

- The purchase agreement: The tension—
  - Sellers want the contract provisions to maximize the certainty of closing
  - Buyers want the contract provisions to enable them to terminate the agreement without loss of value if the closing is no longer in the buyer's interest
- Agreement can contain provisions that change the probability of closing in light of the antitrust risk
  - Can impose obligations on the buyer to propose and accept a consent decree to settle the investigation or litigation
    - *"Hell or high water" provision*: Imposes an unqualified obligation to fix any antitrust problem
    - *Qualified hell or high water provision*: Places limits on the buyer's obligation to fix any problems
  - Can impose obligations on the parties to litigate a government challenge
  - Can lengthen the amount of time to the "drop dead date"—the date on which either party can unilaterally terminate the agreement without cause—to give the parties more time to negotiate a settlement or litigate
  - Can impose termination "penalties" on the buyer
    - *Antitrust reverse termination fee* (antitrust break-up fee): Requires the buyer to pay the seller some specified amount in the event the deal does not close for antitrust reasons
    - *Crown jewel provision*: Gives the seller the option to purchase certain of the buyer's assets (almost always at a below-market price) in the event that the deal does not close for antitrust reasons
    - "*Take or pay" provision*: Requires the buyer to pay the purchase price even if the deal does not close (but, not surprisingly, very rare)

Allocating antitrust risk in M&A agreements

- Effects on party objectives
  - Antitrust provisions can affect the expected value of the transaction to the buyer and the seller (in different ways) and so affect their reservation prices for the deal
    - A hell or high water provision (unqualified or qualified) will—
      - decrease the expected value of the transaction to the buyer, *and*
      - increase the probability of closing and hence increase the expected value of the deal to the seller
    - An antitrust reverse termination fee will—
      - Impose costs on the buyer for terminating the transaction and hence incentivize the buyer at the margin to fix the antitrust problem, lowering the expected value of the transaction to the buyer but increasing the probability of closing
      - Increase the expected value of the transaction for the seller
        - NB: Sellers negotiate for antitrust reverse termination fees to incentivize the buyer to fix the problem; recoupment of the seller's sunk costs in pursuing a failed transaction ("busted deal") is typically a very minor consideration.
    - An extended drop dead date can have an ambiguous effect
      - May increase the probability of closing (say through defeating a government challenge in litigation)
      - Can give the buyer a credible threat to put the agency to its proof and impose costs on the agency, increasing the buyer's bargaining position in settlement negotiations and so decreasing the costs of settlement and increasing the probability of closing
      - May cause further significant decline in the value of the target
        - Increasing the expected value to the buyer by weakening the target as a competitor if the buyer believes that the transaction ultimately will not close
        - Decreasing the going concern value of the target if the transaction ultimately does not close

Allocating antitrust risk in M&A agreements

- Other antitrust-related provisions
  - Relevant merger control filings
    - Which merger clearances should be disclosed?
    - Which merger clearances should be closing conditions?
  - Cooperation on regulatory matters
    - Where and when to make merger filings?
    - Agreement on specific tactics and timing for filings?
    - Who controls the defensive strategy?
    - Obligations of the parties to share information to defend the transaction?
  - Integration planning
    - What information must the seller share with the buyer to facilitate preclosing integration planning?
    - What else must the seller do to assist in integration planning?
      - E.g., Cooperate in designing IT integration between the two companies

Anatomy of Merger Agreements

M&A agreements

- Where are the antitrust provisions located in an M&A agreement?
  - Appear throughout the agreement depending on whether they are a—
    - Definition
    - Representation or warranty
    - Covenant
    - Condition precedent (sometimes called a *closing condition*)
    - Event or consequence of the termination of the agreement

- Typical organization of M&A agreements
  1. Definitions
  2. The transaction (what is being acquired, acquisition structure, purchase consideration)
  3. Representations and warranties of the seller
  4. Representations and warranties of the buyer
  5. Covenants
  6. Conditions precedent
  7. Termination
  8. General provisions

M&A agreements

- Typical organization of M&A agreements
  1. Definitions
     - Among other things, may define—
       - Antitrust laws
       - HSR Act
       - Government authority
       - Material adverse effect
       - Termination fee
     - Can be substantive: For example—
       - Antitrust laws may specify certain laws and exclude all others
       - Government authority may specify some authorities and exclude all others
       - Termination fee may specify the actual amount of the termination fee
  2. The transaction
     - Identifies the transaction and obligates the contracting parties to consummate the transaction in accordance with the terms of the agreement
       - In a sale and purchase agreement, identifies the business or assets the seller is selling and the consideration the buyer will pay for them
       - In a merger agreement, identifies the companies to be merged, the form of the merger, the conversion of shares, and the initial organization of the merged company

M&A agreements

- Typical organization of M&A agreements (con't)
  3. Representations and warranties
     - Separate sections for the acquired side and acquiring side
     - Reps and warranties of the acquired side are often very detailed
       - Usually will include facts on which the acquiring side is relying to obtain the benefits of the bargain it is anticipating
       - Common topics include authority to engage in the transaction, required consents or clearances, capitalization, intellectual property, tax, financial statements, compliance with law, employment, ERISA, and material contracts.
     - Reps and warranties of acquiring side are usually limited
       - Generally go to the legal and financial ability of the buyer to complete the transaction
       - UNLESS part of the consideration is the buyer's stock (in which case the seller with probably want reps and warranties on the buyer's business)
     - Due diligence
       - *Due diligence* typically involves an investigation by the buyer of the target's business to establish its assets, liabilities, and commercial potential for the purpose of valuation
       - Buyers usually demand significant cooperation from the seller/target in investigations of the conditions of the business (including reviewing business and legal records), inspecting facilities, interviewing management, and understanding the target's systems and processes
         - NB: Especially when the companies are competitors, the antitrust laws can regulate the timing and extent of due diligence activities
       - Some due diligence results may be reflected in the reps and warranties
         - Especially when the facts may change between the time of the investigation and the closing

M&A agreements

- Typical organization of M&A agreements (con't)

  5. Covenants
     - Impose contractual obligations on the parties during the pendency of the agreement
     - While some covenants are reciprocal, other covenants will be specific to the buyer or the seller
     - Examples of common covenant provisions:
       - *Conduct of business*: Imposes limits on how the target will conduct its business between the signing and the closing
         - Typical requirement is that the target operate only in the ordinary course of business
           - Excludes extraordinary actions such as the sale of a plant
         - Covenant subject to the requirements of the antitrust laws
       - *"Efforts" clause*: Specifies the efforts that the parties must undertake to close the transaction
       - *No solicitation*: Obligates the seller not to solicit other bids for the business
         - But does not prevent consideration of unsolicited offers

M&A agreements

- Typical organization of M&A agreements (con't)
  6. Conditions precedent
     - Specify the conditions that must be satisfied before the parties are required to execute their respective sale and purchase obligations
     - While some conditions precedent are reciprocal, other conditions will be specific to the buyer or the seller
     - Examples of common conditions precedent:
       - No law or order making the consummation of transaction unlawful
       - HSR Act waiting period has expired or been terminated
         - An increasing number of merger agreements are now containing an express provision that a "Preconsummation Warning Letter" does not negate any closing condition
       - The reps and warranties are true in all material respects
       - No material adverse change in the business since the signing of the agreement
  7. Termination provisions
     - Provide for the *termination* of the agreement (and therefore the obligations imposed by the agreement on the parties) under specified conditions
     - Provides for any payments or other actions that must be taken as a consequence of termination

Specific Antitrust Provisions

Specific provisions: Merger control filings

- "Consents and approvals" reps and warranties
  - Merging parties typically represent that the execution of the agreement and consummation of the transaction will not require any consents and approvals except for compliance with the HSR Act or ECMR (if applicable)
  - For other jurisdictions:
    - Parties typically provide for all "applicable," "all required foreign approvals" or all "necessary foreign approvals" (generally understood as those with mandatory suspensory effect)
      - If used, may have a carve out for those foreign filings that would not have a material adverse effect if not obtained
    - Alternatively, the merging parties can specify those jurisdictions for which satisfaction of the merger control requirements are conditions precedent
      - Satisfaction of merger control requirements for jurisdictions that are not specified are *not* conditions precedent, even if the closing would violate the jurisdiction's laws
      - So the buyer has an obligation to close even if the laws of a nonspecified jurisdiction prevent closing
      - *Legal effect*: The buyer has breached the purchase agreement by failing to close
        - BUT no U.S. court is likely to order specific performance if the closing would violate foreign law
        - The buyer, however, would be liable to the seller for compensatory money damages for the breach

Specific provisions: Merger control filings

- Where do merger control filings need to be made?
  - As of 2019, 135 jurisdictions have merger control filing requirements[1]
    - Most have mandatory reporting requirements
    - Many are suspensory—cannot close without filing and obtaining clearance
      - E.g., Austria, Brazil, Canada, China, EU, Germany, Japan, Mexico, South Korea, United States
    - A few are voluntary (e.g., U.K., Australia, New Zealand, Singapore)
      - NB: Anticompetitive mergers typically are still unlawful in voluntary reporting regimes
    - A few are not suspensory (e.g., Argentina, COMESA)
      - But notification filings must still be made
- When do the merger filings have to be made?
  - Two considerations
    - Starting the clock as quickly as possible
    - Allowing sufficient time for preparation of defense and customer contacts
- Which clearances will be incorporated in the closing conditions?
  - Major jurisdictions almost always specifically identified
  - *Query*: What are the legal consequences if the closing conditions do not include clearance in a suspensory jurisdiction where a filing is required but no filing is made?

[1] OECD, II OECD Competition Trends 2021: Global Merger Control 9 (2021).

Specific provisions: Litigation closing condition

- Common formulation: No threatened or pending litigation
  - Typically provides that no government action is pending or threatened that seeks to delay or prevent consummation of the transaction
  - *Question*: What constitutes a "threat" of litigation?
  - *Question*: What about private party actions?
- Alternative: No order
  - Typically provides that no restraint, preliminary or permanent injunction or other order or prohibition preventing the consummation of the transaction shall be in effect
  - *Legal effect*: "If you can (legally) close, you must close"
- Carve-out
  - From a seller's perspective, may wish to have a carve-out that prior to asserting the failure of the condition, the asserting party must be in compliance with its efforts obligations (e.g., to settle or litigate)

Specific provisions: Litigation covenant

- Are the parties committed to litigating in the event of an antitrust challenge?
  - May be imposed on the buyer alone or on both parties
  - Obligation may be to litigate through to a final, non-appealable judgment
    - But parties can specify something less in the purchase agreement (e.g., litigate to a decision on the merits in a preliminary injunction proceeding)
- Interacts with—
  - Any obligation to accept remedies in order to obtain clearance
  - The drop-dead date
    - Should the purchase agreement provide that the drop-dead date is automatically extended to keep the deal pending through the conclusion of litigation?
    - If available, should the unilateral right to terminate during litigation be reciprocal?

Specific provisions: Restructuring obligations

- Can arise in two provisions
  - “Efforts” covenant
  - Specific covenant to offer and accept remedies

Specific provisions: Efforts covenant

- Sets standard for obligations to obtain antitrust "clearances"
  - And do other things to ensure the deal closes
- These covenants usually only provide vague parameters, but they do provide a general guide of what is expected from both parties
  - Best efforts;
  - Reasonable best efforts/commercially reasonable best efforts, or
  - Reasonable efforts

Decreasing level of required efforts

Specific provisions: Efforts covenant

- Unqualified “best efforts” provision
  - Usually taken to imply an obligation to offer or accept restructuring relief if necessary to obtain antitrust clearance
  - Often coupled with express risk-shifting provision
- “Reasonable best efforts”/“commercially reasonable best efforts”
  - Something less than best efforts/something more than reasonable efforts
  - Most common formulation in antitrust covenants
  - Obligation not well defined by courts
    - Usually chosen precisely for this reason
  - *Conventional wisdom*: Does not imply an obligation to offer or accept material restructuring relief to obtain antitrust clearance
    - Can add an express proviso to make explicit or limit the obligation
- “Reasonable efforts”
  - Generally regarded as imposing no obligations that would change the transaction or reduce the benefit of the deal to the buyer in any meaningful way

Specific provisions: Remedies

- Range of alternatives

Decreasingly onerous on Buyer

  - Unqualified "hell or high water" provision
  - Qualified hell or high water provision (capped divestiture obligation)
  - Remain silent and rely on general efforts covenant
  - Explicit no divestiture obligation

Specific provisions: Remedies

1. Unqualified "hell or high water" provision
   - Requires seller to offer whatever remedy is necessary to obtain antitrust clearance[1]
     - Includes divestitures, licenses, behavioral undertakings, and hold separates
     - Theoretically could require divestiture of the entire target business
       - But investigating agency has no incentive to accept such a fix
     - Unqualified HOHW provisions are rare
       - These provisions must be clearly drafted to avoid litigation over what the HOHW provision requires
       - A "commercially reasonable best efforts" clause does not entail an unqualified HOHW obligation[2]
     - Qualified HOHW provisions are much more common

[1] *See, e.g.*, Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *46 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (holding that an unqualified HOHW covenant requires the buyer to "take all actions necessary" to secure antitrust clearance and requiring efforts that "shall be unconditional and shall not be qualified in any manner"); Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 716, 756 (Del. Ch. 2008) (awarding $325 million for breach of multiple covenants including an unqualified HOHW provision to "take any and all action necessary" to obtain antitrust clearance where Hexion "dragg[ed] its feet on obtaining that clearance," including by failing to respond to interrogatories from the FTC).
[2] *See In re* Anthem-Cigna Merger Litig., 2020 WL 5106556, at *96 (Del. Ch. Aug. 31, 2020), *judgment entered*, (Del. Ch. 2020), *aff'd sub nom.* Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. 2021).

Specific provisions: Remedies

1. Unqualified "hell or high water" provision
   - HOHW provisions are not self-executing: The investigating agency still must agree in its discretion to accept the remedy
     - The investigating agency has complete discretion whether to accept a proffered consent settlement
       - There is no recourse if the agency rejects a consent settlement
       - The agency's rejection of a consent settlement is not reviewable under the Administrative Procedure Act
   - Effectiveness
     - Even prior to the Biden administration, the investigating agency has rejected settling the investigation regardless of the terms of the proposed consent decree (e.g., Staples/Office Depot, AT&T/T-Mobile, NASDAQ/NYSE Euronext)
     - In the Biden administration, given the policy of the Antitrust Division not to settle investigations with consent decrees and the increasingly reluctance of the FT to accept them, even unqualified HOHW provisions may not be very effective in promoting deal certainty
   - Remedies for breach
     - The breach of a HOHW provision sounds in contract
       - The usual remedy for breach of contract is damages or specific performance
         - As a practical matter, the time required to litigate a breach of contract action eliminates specific performance
       - A HOHW provision requires effort on the part of the buyer—it does not mandate an outcome
       - Consequently, a breach of a HOHW clause will not entitle the buyer to damages if the proof shows that the investigation agency would not have accept a consent settlement even if the buyer performed its HOHW obligations

Specific provisions: Remedies

2. Qualified hell or high water provision (capped divestiture obligation)
   - Limited to certain business, product lines, or assets specified in the merger agreement
     - May also be limited by revenue, EBITDA, materiality or any other cap—very flexible
       - *Example*: No divestitures that would cause a "material adverse effect" on the target
     - Much more common than unqualified HOHW covenants
   - Examples
     - Kroger's $19.5 billion pending acquisition of Albertsons: Divestiture limited to 650 Kroger or Albertsons stores
       - Including any stores that are transferred to a subsidiary to be spun-off ("SpinCo")
       - Also includes a $600 million ARTF
     - Assa Abloy's $4.3 billion acquisition of Spectrum Brands: Divestiture limited to specific businesses (not publicly disclosed)
     - Genuine Parts' $1.3 billion acquisition of Kaman Distribution Group: Divestiture limited to assets generating consolidated net sales for the 12-month period ended December 31, 2021 below 5% of the consolidated net sales of Target for the same period
     - The Cooper Companies' $1.6 billion acquisition of Generate Life Sciences: Divestiture limited to assets that would not cause a diminution in the value of the combined company exceeding a specified amount (not publicly disclosed)

[1] *See In re* Anthem-Cigna Merger Litig., 2020 WL 5106556, at *96 (Del. Ch. Aug. 31, 2020), *judgment entered*, (Del. Ch. 2020), *aff'd sub nom.* Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. 2021).

Specific provisions: Remedies

3. Remain silent and rely on general efforts covenant
   - *Conventional wisdom*: Will not require the buyer to divestiture or otherwise restructure the deal in order to avoid an agency challenge
   - A "commercially reasonable best efforts" clause does not entail an unqualified HOHW obligation[1]
     - But it may require consent decree proposals (or even "litigate the fix" efforts) to the extent the divestitures in question are commercially reasonable in light of the expected benefits of the deal to the buyer
     - *Query*: What a "best efforts" clause require?
       - There are no cases on oint
4. Explicit "no divestiture" obligation
   - Speaks for itself

[1] *See In re* Anthem-Cigna Merger Litig., 2020 WL 5106556, at *96 (Del. Ch. Aug. 31, 2020), *judgment entered*, (Del. Ch. 2020), *aff'd sub nom.* Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. 2021).

Specific provisions: Remedies

The "Road Map" Problem

Item 3(b) of the HSR form requires the reporting party to submit a copy of the most recent version of the acquisition agreement. When the divestiture obligations are explicit in the agreement, the investigating agency will see them (the agency always looks) and learn what remedies the buyer is required to accept if the agency demands it. Buyers often resist including unqualified or qualified hell or high water provisions for this reason, arguing that it completely deprives them of bargaining leverage in settlement negotiations with the agency.

Queries:

> Can the joint defense privilege or work product doctrine shield a risk-shifting provision from disclosure in an HSR filing, second request, or litigation discovery?
>
> Even if there the provisions can be protected from disclosure in an HSR filing or discovery, are there securities laws disclosure obligations that require the divestiture obligations to be disclosed anyway?

Specific provisions: Litigation

- Are the parties committed to litigating in the event of an antitrust challenge?
  - Obligation may be imposed on the buyer alone or on both parties
  - Obligation may be to litigate through to a final, non-appealable judgment, or something less
- Interacts with—
  - Any obligation to accept remedies to obtain clearance
    - The more onerous the obligation, the more the buyer may want a credible threat to litigate in the hope of improving its bargaining leverage with the investigating agency when negotiating a settlement
  - The drop-dead date
    - A litigation obligation (or right) is meaningless in the absence of time to litigate
    - Should the drop-dead date automatically be extended?
    - Should the unilateral right to terminate be symmetrical?

NB: If buyer wants a credible threat to litigate, the contract must (1) obligate the seller to litigate; (2) obligate the seller to cooperate with the buyer in the litigation; and (3) provide for an extended dropdead date sufficient to conclude the litigation

Specific provisions: Antitrust-related payments

1. Antitrust reverse termination fees
2. Nonrefundable partial payments or “deposits”
3. Ticking fees
4. “Take or pay” obligation

Antitrust reverse termination fees (ARTFs)

1. Reverse breakup fee with an antitrust trigger
   - Payable by the buyer to the seller where:
     1. the transaction does not close before the purchase agreement is terminated, and
     2. the only conditions not satisfied are the antitrust clearance conditions
   - Some ARTFs are payable on the termination date, whether or not the merger agreement has been termination
     - If the transactions subsequently closes, a paid ATRF typically is applied to the purchase price (in effect, making the ARTF a nonrefundable downpayment)
   - Other reverse termination fees[2]
     - Merger agreements contain reverse termination fees payable for nonregulatory reasons, including—
       - Acceptance of a superior proposal and termination of the merger agreement
       - Failure of the target's shareholders to approve the merger agreement
   - Compare *termination fees*
     - Payable by the seller to the buyer under conditions that allow the buyer to back out of the deal
       - A common example is the buyer's failure to obtain the required third-party financing
     - Delaware courts had held that a reverse termination cannot be a material impediment to a topping bid and have limited reverse termination fees to 3%-4% of equity value
       - ARTFs do not impede topping bids and are not limited in magnitude by Delaware courts

[1] Analysis Group, *The Use of Reverse Termination Fees in Merger Reviews* (Sept. 2019).
[2] *See generally* Houlihan Lokey, 2022 Transaction Fee Termination Study 22 (Apr. 2023).

Antitrust reverse termination fees

1. Reverse breakup fee with an antitrust trigger
   - ARTFs are becoming more common in modern agreements
     - Sellers usually try to negotiate some form of remedy obligation and/or higher purchase price to avoid paying the antitrust reverse breakup fee
     - Nonetheless, ARTFs appeared in over 22% of deals subject to “heightened regulatory risk” in 2022, up significantly from 16% in 2021 and 15% in 2020[1]
     - One study found that 21 out of 44 deals receiving second requests between 2016 and 2018 had ARTFs[2]
     - Approximately 85% of the ARBFs in publicly disclosed deals above the HSR threshold in 2023 ($111.4 million) were for deals valued at $1 billion or more[3]

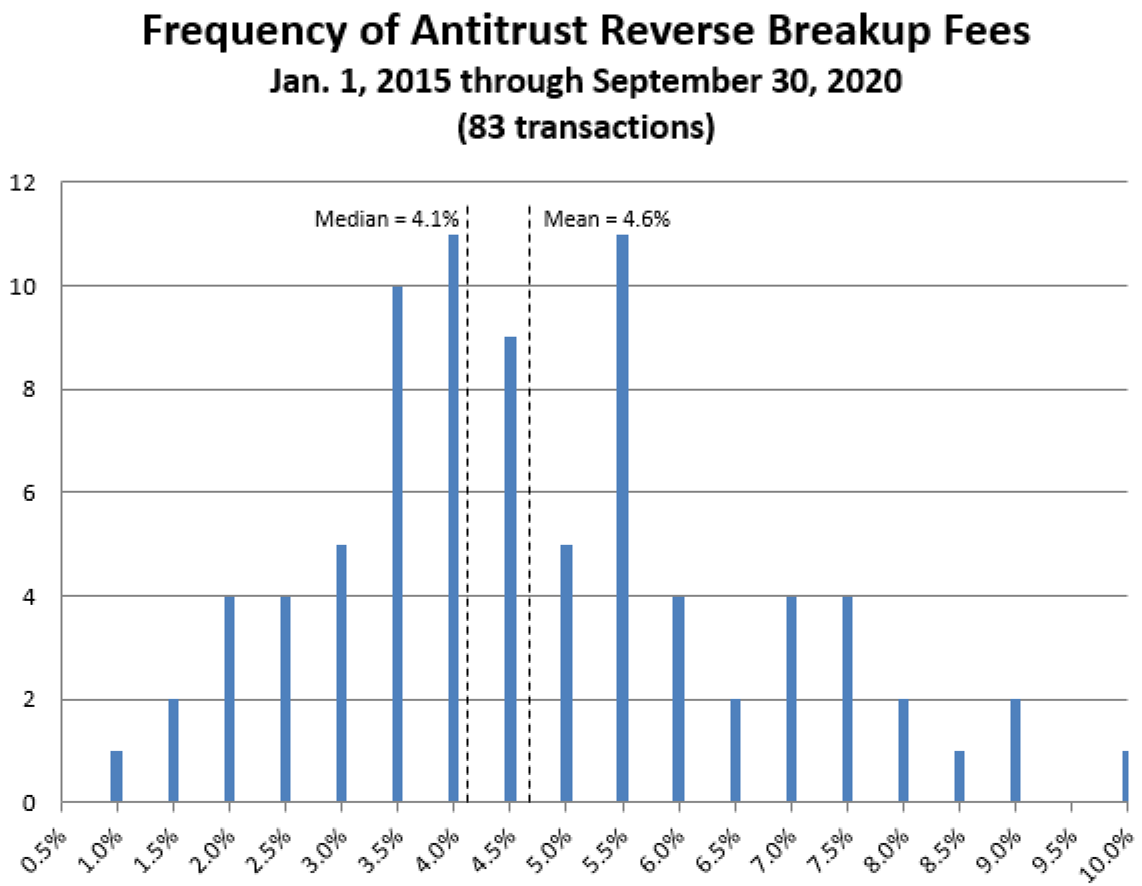
[1] Richard Hall & Maurio A. Fiore, Cravath, Swaine & Moore LLP, U.S. Regulatory Merger Control Regimes Negotiating with Deal Delays in Mind 5 (2023). For this report, deals with “heightened regulatory risk” U.S. mergers and acquisitions of U.S. reporting companies (excluding REITs and debt-only issuers) with an announced deal value at signing of at least $100 million that requires an HSR premerger filing and where the merger agreement contains an “efforts clause” specifying the efforts the parties must take to get antitrust approval. The Cravath data set includes 105 public deals for 2022, 120 public deals for 2021, 68 public deals for 2020 and 110 public deals for 2019. The deals in this data set represent 85% and 75% of all public U.S. M&A deals for 2022 and 2021, respectively. *Id.* at 7 n.3.
[2] Analysis Group, *The Use of Reverse Termination Fees in Merger Reviews* (Sept. 2019).
[3] Fenwick, Antitrust Breakup Fees: 2023 Data and Key Takeaways for Future Dealmaking (Mar. 14, 2024).

Antitrust reverse termination fees

1. Reverse breakup fee with an antitrust trigger
   - Size of fee—Varies widely
     - Complete sample (January 1, 2005, through September 30, 2020)[1]
       - 1359 transactions total; 171 with antitrust reverse termination fees)
       - Mean: 5.1%
       - Median: 4.2%
       - Largest: 39.8% (Monsanto acquisition of Delta and Pine Land)
       - Smallest: 0.1% (CapitalSource's proposed acquisition of TierOne)
       - Highest absolute dollar value: $4.2 billion (AT&T's proposed acquisition of T-Mobile) (15.4%)
     - 5-year plus subsample (January 1, 2015, through September 30, 2020)[2]
       - 83 transactions with antitrust reverse termination fees
       - Mean: 4.6%
       - Median: 4.1%
       - Largest: 12.5% (Novartis' acquisition of Endocyte)
       - Smallest: 0.6% (AT&T's acquisition of Time Warner)
       - Highest absolute dollar value: $2.5 billion (Walt Disney's acquisition of 21st Century Fox) (4.6%)
     - Cravath reports that ARTFs rose to 5.69% of equity value in 2022[3]
       - 35% of public M&A deals containing ARTFs contained ATFs of 6% or higher in 2022, compared to only 22% in 2021

[1] Dale Collins, Shearman & Sterling LLP, Antitrust Reverse Termination Fees—2020 Q3 Update (Dec. 28, 2020) (data set).
[2] *Id*.
[3] Richard Hall & Maurio A. Fiore, Cravath, Swaine & Moore LLP, U.S. Regulatory Merger Control Regimes Negotiating with Deal Delays in Mind 5 (2023).

Antitrust reverse termination fees



WDC: I stopped collecting data when I retired from practice in late 2020. For the complete set of my most recent data set, see here.

Antitrust reverse termination fees

1. Reverse breakup fee with an antitrust trigger
   - Some (big) recent examples
     - Intercontinental Exchange's pending $15.6 billion acquisition of Black Knight: $725 million (4.6%)
     - Microsoft's $67.9 billion acquisition of Activision: Staged depending on timing
       - $2.0 billion (29.5%)—effective for the period of 1 year after signing
       - $2.5 billion (3.68%)—effective for the period between 1 year and 15 months after signing
       - $3.0 billion (4.42%)—effective for the period after 15 months
     - Kroger's $24.6 pending acquisition of Albertsons: $600 million (2.4%)
     - Pfizer's $5.4 billion acquisition of Arena Pharmaceuticals: $350 million (6.5%)
     - Merck's $11.0 bill acquisition of Acceleron Pharma:
       - $650 million (5.9%)—effective for the period of 5 months after signing (not exact)
       - $750 million (6.8%)—effective for the period between 5 months and 10 months after signing (not exact)
     - JetBlue's abandoned $3.8 billion acquisition of Spirit Airlines: $470 million (12.4%)
       - Consists of $70 million plus $400 million less any prepayment amounts and the ticking fees previously paid by JetBlue
     - Illumina's $8.0 billion acquisition of GRAIL: $300 million (3.75%)
     - Aon's $31.4 billion acquisition of Willis Towers Watson: $1.0 billion (2.9%)

NB: Parties can structure the size of an ARTF to change depending on how long the deal is held open

Payments

2. Ticking fees
   - Requires the buyer to pay some consideration—often interest—on the purchase price if the transaction is not closed by a particular date
     - The payment is often made to the shareholders, not the target
       - In contrast with an ATRF, which is paid to the target (or seller)
     - Aim to motivate the buyer to obtain regulatory clearances quickly by increasing the cost of the transaction over time to the buyer
   - Once relatively rare in public transactions, becoming more common in the current antitrust environment
     - Standard General's $5.1 billion acquisition of TEGNA: Daily per share ticking fee equivalent to—
       - $0.05 per month if the closing occurs between 9 and 12 months of signing
       - Increases to $0.075 per month if the closing occurs between 12 and 13 months after signing
       - Increases to $0.10 per month if the closing occurs between 13 and 14 months after signing
       - Increases to 0.125 per month if the closing occurs between 14 and 15 months after signing
     - JetBlue's $3.6 billion acquisition of Spirit
       - $0.10 per share per month to Spirit shareholders beginning on a specified date until closing or termination
       - If closing occurs during the first 12 months, treated as a prepayment of the purchase price up to a maximum reduction of $1.15 per share
       - If closing or termination occurs after the first 12 months, not treated as a prepayment

Payments

3. Nonrefundable partial payments
   - Like a ticking fee but requires more than the payment of interest
   - Payable on a specified schedule
   - Surprisingly rare
4. "Take or pay" clauses
   - Requires the buyer to pay the seller the purchase price even if the deal does not close
   - But offset by a "refund" in the amount of the sales price minus expenses when the seller ultimately sells the business to a third party
   - *Extremely* rare (but there are examples)

Cooperation covenants

- Specifies the level of cooperation by parties in obtaining antitrust clearances
- Typical requirements
  - Advance notice and review of communications and submissions with the agency
  - Right to attend meetings/conferences with the agency
    - Subject to agreement by the agency (historically has not been a problem)
  - Right to review 4(c), 4(d), and second request documents
    - Subject to some categories of proprietary or competitively sensitive documents being provided on an "outside counsel only" basis
- Party interests
  - Buyer usually wants to control the process and not have the seller operating independently with governmental authorities
  - Seller wants to know what is going on to ensure the buyer is fulfilling its efforts obligations
  - Both want to maximize their respective knowledge of the evidence being submitted to the agency

Timing provisions

- Timing for filings
  - Often “as promptly as possible”
  - But some delay (5-10 business days) may be desirable to permit:
    - Indepth substantive analysis
    - Customer rollout
    - Coordination in submitting required merger filings
- Other timing-related provisions
  - Provisions agreeing not to withdraw filings or enter into a timing agreement without the consent of the other merging party
  - Buyer or seller may want to impose a specific deadline on second request compliance to ensure that the HSR waiting period will expire no later than a certain date

Timing and termination

- Drop-dead date
  - Does it provide a contract term long enough for expected approvals?

    As a matter of practice, most merger agreements involving public companies provide for a dropdead date of one year after the signing

  - If the transaction presents meaningful antitrust concerns or if one of the parties has a litigation right, does the dropdead date provide a contract term long enough to complete the investigation and possible litigation?
    - Prior to 2021, most merger agreements with meaningful antitrust concerns had a termination date of twelve month, with an extension of up to six months in the event of delays in getting regulatory clearance or litigation Six months, *or*
      - Some agreements had a three-month extension, with, another extension of three months if litigations was still pending
      - Recall that courts usually can make a preliminary injunction decision with 6.5 months of the filing of a complaint
    - With investigations becoming increasingly burdensome and time-consuming in the Biden administration, some parties have negotiated longer termination dates
      - Examples of two-year termination dates in recent merger agreements:
        - JetBlue's $3.6 billion acquisition of Spirit Airlines (one year with two six-month extensions)
        - CVS Pharmacy's $7.2 billion acquisition of Signify Health (one year with two six-month extensions)
        - Kroger's $19.5 billion acquisition of Albertsons (two years)

Summary

Risk-shifting summary

	Buyer-friendly	⟷	Seller-friendly
Level of efforts	Commercially reasonable efforts	Reasonable best efforts	Best efforts
Obligation to make divestitures	Silent/expressly excluded	Divestitures up to cap – measured in asset or revenue terms or MAC applying to part or all of acquired or merged business	Obligation to make any and all divestitures necessary to gain clearance no matter how much or what impact is (HOHW)
Timing for other aspects of regulatory review	Silent/may be deadline for submission of HSR filing	Silent/may be deadline for submission of HSR filing	Express timing for submission of filing, Second Request compliance and other milestones
Timing for offering divestitures	Silent	Silent	Express timing for offering remedies to obtain clearance
Control of regulatory process	Buyer controls; require cooperation from Seller and may give access and information	Buyer leads; Seller entitled to be present at meetings, calls; obligation on Buyer to communicate certain matters to Seller	Full involvement of Buyer in negotiations with regulators; Seller prohibited from communicating without Buyer (except as required by law)
Obligation to litigate	Silent/expressly exclude/litigate at buyer's option	Silent/expressly exclude	Obligation to litigate if regulators block exercisable at seller's option; does not relieve buyer of obligations to make divestitures
Termination provisions	Open-ended, extendable at buyer's option	Tolling at either party's option	Tolling at seller's option
Reverse break-up fee	None	Possible	Substantial fee; provision for interim payments and interest
Time to termination date	As long as buyer anticipates needing to fully defend transaction on merits, plus ability to extend at buyer's option	Tolling at either party's option	Tolling at seller's option at specified inflection points (e.g., second request compliance, commencement of litigation)
"Take or pay" provision	None	None	Requires payment of full purchase price by termination date even if transaction cannot close

Summary: Will the deal close?

- The framework for assessing a horizontal transaction

What "markets" should be analyzed?	"Market" here means any identifiable subset of customers that purchase from one or both of the merging parties (*not* a Merger Guidelines relevant market)
What "markets" will be challenged?	*Ultimate question*: Will customers likely be harmed in prices, quality, or innovation? Are the parties head-to-head competitors? How many other realistic alternative sources of supply? Are the parties uniquely close competitors? Is one of the merging parties a "maverick"? Is one of the merging parties a potential entrant? Will there be significant customer complaints? Are there "bad" company documents or "bad" company public statements? ?
Can the problematic "markets" be fixed?	*Ultimate question*: Can the threat to customers be eliminated through a divestiture? What businesses or assets need to be divested to solve the antitrust problem? Are additional assets necessary to make the divestiture assets separable from the business? Are additional assets necessary to make the divestiture assets saleable? Are there buyers acceptable to the reviewing agency? Will the agency require a single buyer for all divestiture assets?
Is the deal still worthwhile?	What is the loss of value (including lost synergies) due to the divestiture(s)? What contractual protection can be obtained to ensure against a bad deal? *Important but not critical*: How long will all of this take?

In the Biden administration, should also have to consider "buyer" (input) markets