MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Class 3 (September 1): 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 put the client in a position to make informed decisions about how to proceed (if at all) in light of the transaction's antitrust risks. 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 3-10). While I will address these risks in the context of a merger, they apply to any situation where legal 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 merger 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 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.

The costs of antitrust risk. The class notes then translate these three risk categories into the practical costs they can impose on a transaction: delay/opportunity costs, management distraction, out-of-pocket defense costs, and remedies costs (slides 8-10). As you read those slides, focus on why delay itself can be costly even if the parties ultimately close the deal, and why a divestiture can destroy value through fire-sale pricing, lost synergies, and transaction costs.

Premerger notification and the HSR Act

The HSR Act requires 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 to:

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

Premerger review exists because of a hard lesson: once a problematic merger closes, the damage is difficult to undo. The acquiring firm may fire key employees, shut or sell facilities, end research programs, and integrate operations in ways that permanently weaken the acquired business, so that even a later divestiture order cannot reliably restore the competition that existed before the deal. As the principal House sponsor of the HSR Act put it, unwinding a consummated merger can be "like trying to unscramble an omelet."[1] The HSR Act answers that problem with an early warning system: parties to large transactions must notify the DOJ and FTC and wait before closing, giving the agencies a chance to investigate—and, if necessary, sue to block the transaction—before the assets are scrambled.

Two points frame everything that follows. First, the HSR Act is procedural. It does not change the substantive standard under Section 7 of the Clayton Act, does not confer immunity, and is not jurisdictional. The agencies may investigate and challenge transactions that fall below the reporting thresholds, that are exempt from the HSR Act, or that have already closed. Second, because almost every significant merger enforcement action today arises after an HSR filing, the statutory steps define not only the mechanics of review but also the practical timeline and leverage that govern how deals get done.

The HSR Act provides the institutional framework within which the DOJ and FTC conduct the vast majority of merger investigations. The class notes (slides 11-13) 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 14-17). 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, (2) the initial waiting period investigation, and (3) the second request investigation/final outcome.

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[1] 122 Cong. Rec. 25,051 (1976) (statement of Rep. Peter W. Rodino, Jr.); *see also* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969).

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 a merger agreement in some detail in Class 9.

The HSR filing. 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 18-25). If a transaction is prima facie reportable and no exemption applies, the transaction is *reportable* if it crosses a notification threshold (slide 25). The thresholds in the HSR Act for prima facie reportability and the statutory exemptions are adjusted for inflation annually in the Federal Register. In 2026, the most important number is $133.9 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.[2]

If the transaction is reportable, each party must file its own report on a prescribed form. Technically, this is called the *Notification and Report Form*, but it is commonly referred to as the "HSR filing," "HSR report," or simply "HSR form." I have included the HSR form currently being used in the reading materials (pp. 32-43); the class notes summarize the restored prior form (slides 28-29). There is no need for you to study the form in detail, but you should skim it to get an idea of the types of information and documents that must be submitted with the original filing. In most cases, the most important parts of the form are the business documents the filing person must include, especially those submitted in response to Items 4(c) and 4(d). You should pay careful attention to the notes on these documents (pp. 44-48) and the class notes (slide 29).

An important aside: The 2024 Form Revision

> You should be aware that in 2024, the Biden administration adopted a new form. On November 12, 2024, the FTC promulgated a final rule substantially revising the HSR Notification and Report Form with an effective date of February 10, 2025.[3] The new form replaced the original form, introduced in 1978 and, with only minor

[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026) (pp. 30-31). Be sure to note that the threshold applies to the value of the total voting securities and assets the acquiring person will *hold* as a result of the acquisition, *not* the value of the voting securities and assets the acquiring person 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.

[3] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements: Final Rule, 89 Fed. Reg. 89216 (Nov. 12, 2024); *see* Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024).

adjustments, in effect for almost 50 years. The Biden antitrust agencies, however, believed the original form was inadequate for detecting anticompetitive mergers and proposed expanding it to include 34 new categories of information.[4] The public comments expressed substantial opposition to the proposed changes, arguing that they would impose substantial costs and burdens on the merging parties for very little gain in detection. Although the FTC modified the form in response to these comments, the final form still contained approximately 20 new categories of information and documents required to be submitted with the HSR filing (pp. 49-54 and slides 27, 30-41).

In January 2025, the U.S. Chamber of Commerce and other business groups filed a lawsuit challenging the FTC's new HSR rule, alleging that the agencies promulgated it in excess of their statutory authority and that it was arbitrary and capricious in violation of the Administrative Procedure Act.[5] Notably, the plaintiffs did not seek a temporary restraining order (TRO) or a preliminary injunction to halt the implementation of the new rules. On February 12, 2026, the District Court for the Eastern District of Texas vacated the rule, holding that the HSR Act's "necessary and appropriate" limitation required the FTC to show that the rule's claimed benefits would reasonably outweigh its significant and widespread costs, and that the agency had failed to substantiate its assertions that the revised form would detect illegal mergers more effectively or save sufficient agency resources to justify those costs.[6] The court further held that the rule was arbitrary and capricious for substantially the same reasons because the FTC had failed to consider whether the rule's benefits bore a rational relationship to its costs and had not adequately explained its rejection of less costly and less burdensome alternatives.[7] The Fifth Circuit later denied the FTC's motion for a stay pending appeal,[8] and the antitrust agencies resumed accepting the Form and Instructions that were in place before February 10, 2025.[9]

Following the Fifth Circuit's denial of the stay pending appeal, the antitrust agencies returned to the prior form (the one in the reading materials at pp. 32-43). Within days, however, the agencies renewed their effort to revise the HSR form by launching a joint public inquiry and a request for public comment.[10] On May 26, 2026, the Fifth Circuit held the appeal in abeyance through December 31, 2026,

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[4] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178, 42,185-42,186 (June 29, 2023) (notice of proposed rulemaking); *see* Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023).

[5] Complaint for Declaratory and Injunctive Relief, Chamber of Commerce v. FTC, No. 6:25-cv-00009 (E.D. Tex. filed Jan. 10, 2025).

[6] Chamber of Commerce v. FTC, No. 6:25-CV-9-JDK, 2026 WL 402498, at *8-11 (E.D. Tex. Feb. 12, 2026), *stay pending appeal denied*, No. 26-40094 (5th Cir. Mar. 19, 2026).

[7] *Id*. at *12-13.

[8] Unpublished Order, Chamber of Commerce v. FTC, No. 26-40094 (5th Cir. Mar. 19, 2026) (denying stay pending appeal).

[9] *See* Fed. Trade Comm'n, Premerger Notification Program (Important Notice of March 19, 2026).

[10] *See* Fed. Trade Comm'n, Request for Public Comment Regarding Making Improvements to the Premerger Notification and Report Form (Mar. 25, 2026); *see* Press Release, Fed. Trade Comm'n & Dep't of Justice, Federal Trade Commission and Department of Justice Seek Public Comment on the Premerger Notification and Report Form (Mar. 25, 2026). Public comments may be found here on the Regulations.gov web site.

> while the agencies consider revisions; the agencies told the court they aim to publish any notice of proposed rulemaking by the end of 2026. As of August 11, 2026, no proposed rule had been issued. For this class, keep the distinction straight: the reinstated prior form at pp. 32-43 governs current filings; the major changes adopted in the 2024 form discussed at pp. 49-54 are background on requirements the agencies may seek to revive or modify in a new rulemaking. The prevailing expectation in the bar is that the agencies will seek to reinstate many of the additions to the 2024 HSR form in the next revision. So both forms are relevant in practice: the prior form to see what is required today, and the 2024 revised form to see what is likely to be reinstated in a new rulemaking.

The class notes also include the new fee schedule enacted in 2022, which is to be inflation-adjusted annually, along with the current fee schedule in effect for filings made in 2026 (slide 43). I have included a graph showing the number of filings received by the DOJ and FTC each year through FY 2025, the latest year for which data is available (slide 44).

Initial waiting period. 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 45). The *initial waiting period* is usually 30 calendar days, but it is 15 calendar days for all-cash tender offers and bankruptcy acquisitions. Ordinarily, the initial waiting period does not begin to run until both sides have filed. In an open market transaction—one in which the acquiring person acquires the target's voting securities from someone other than the target itself, such as by buying shares on an exchange or through a cash tender offer—the initial waiting period begins to run when the acquiring person files its form. This prevents a target from blocking an unwanted takeover by simply failing to file its HSR form. Note, however, whether a transaction is an open-market transaction turns on how the target's shares are acquired, not on whether the parties negotiated the deal. A friendly, fully negotiated acquisition structured as a tender offer remains an open-market transaction for this purpose.

The initial waiting period will be extended if the investigating agency issues a *second request* for additional documents, data, and narrative responses (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.[11]

HSR Act violations. For HSR-reportable transactions, the HSR Act prohibits the acquiring firm from acquiring a *beneficial interest*—a critical but undefined term—in the acquired 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:

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[11] *See* Fed. Trade Comm'n, Legal Library: Early Termination Notices (accessed July 21, 2026).

(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 2026, 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.[12]

The class notes cover HSR Act violations (slides 46-50). The *ValueAct* and *Flakeboard* materials (pp. 55-90) provide examples of failure to file and gun jumping violations. The *Nautilus Hyosung* materials (pp. 91-102) address a different but equally important risk: criminal obstruction for submitting false documents in a merger investigation. Read the press releases to get a basic understanding of each matter. For *ValueAct* and *Flakeboard*, if you do not have time to read the complaints in their entirety, read the introduction and fact sections; for *Nautilus Hyosung*, read the Information and Judgment to see how the obstruction charge was resolved. Historically, HSR Act enforcement actions have almost always settled by consent decree. A pending government suit against KKR may be the first HSR enforcement action to result in a merits adjudication of alleged reporting violations.[13]

Initial waiting period investigation

The next stage in the merger process after filing the HSR form is the *initial waiting period investigation* (slides 51-64). 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 with the opportunity to decide whether to review the transaction, allocate investigation responsibility to one agency through the clearance process, and permit the

[12] Clayton Act § 7A(g)(1), 15 U.S.C. § 18a(g)(1); *see* Fed. Trade Comm'n, Adjustments to Civil Penalty Amounts, 90 Fed. Reg. 5580 (Jan. 17, 2025) (increasing civil penalty from $51,744 to $53,088 per day effective Jan. 17, 2025); Cancellation of Penalty Inflation Adjustments for 2026, Regarding the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, OMB No. M-26-11 (Apr. 17, 2026).

[13] *See* Complaint, United States v. KKR & Co., No. 1:25-cv-00343 (S.D.N.Y. filed Jan. 14, 2025). KKR filed a motion to dismiss on April 17, 2025, and briefing was completed on June 2, 2025. The case transferred to Judge Laura Taylor Swain on November 17, 2025. As of July 22, 2026, the motion to dismiss remains under submission. For case materials, see here.

In 2023, the FTC challenged Louisiana Children's Medical Center's acquisition of three New Orleans-area hospitals from HCA Healthcare, Inc., alleging that the acquisitions violated the HSR Act's reporting and waiting period requirements. Although the acquisitions satisfied the statutory thresholds for reportability, LCMC contended that they were exempt because Louisiana had issued a Certificate of Public Advantage ("COPA"), bringing the transactions within the state action doctrine and exempting them from the federal antitrust laws. The parties 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 on state action grounds, without adjudicating whether the parties otherwise had violated the HSR Act's reporting and waiting-period requirements. Louisiana Children's Med. Ctr. v. Attorney General, No. 2:23-cv-01305-LMA-MBN, 2023 WL 6293887 (E.D. La. Sept. 27, 2023).

investigating agency to conduct a preliminary substantive review. The average number of preliminary investigations per year from FY 2010 to FY 2025 was 235, although the percentage of investigations relative to reportable transactions has steadily declined since FY 2010 (slides 53-54).

"Clearance." The merging parties file with both agencies, but a transaction is investigated only if one of them requests a review, and in most reportable transactions neither agency does. When neither agency requests a matter, no investigation occurs, and the agencies are likely to grant early termination of the waiting period upon request. When an agency is interested, responsibility is sorted out through the interagency *clearance process*. If only one agency requests to investigate a transaction, the matter is assigned to it. If both agencies request to review the same transaction, their staffs negotiate which agency will take it, normally assigning the matter to the agency with more experience in the relevant industry or with one of the merging parties. The merging parties have no formal role in clearance and cannot choose their reviewer. Most allocations are routine, but when both agencies strongly want to investigate—often in technology, media, or health care—a clearance dispute between the agencies can itself delay the start of substantive review even as the initial waiting period continues to run (see slide 55).

The initial contact. 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 56). This request will likely be memorialized in a so-called *voluntary access letter*. Unfortunately, there is no current model voluntary access letter on either the DOJ or the FTC websites. The class notes cover the basics and typical content of voluntary access letters (slides 57-58).

During the initial telephone call, the staff will also invite the parties to give a presentation, if they wish, 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 59-60).

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 61).

Outcomes. The initial waiting period investigation ends in one of three ways:

(a) *Close the investigation*. If staff are satisfied that there is no meaningful concern, the investigating agency will close its investigation without taking further enforcement action, terminate the waiting period, or simply allow the waiting period to expire. In some cases where the investigation quickly reveals that the transaction is nonproblematic, the agency will grant early termination of the remaining waiting period.

(b) *Pull and refile*. If the review is nearly complete but the staff needs more time, the agency may ask the parties to withdraw and refile their HSR forms, restarting a new initial waiting period.

(c) *Issue a second request*. If the deal raises significant concerns or is too complex to assess during the initial period, the agency will issue a second request for additional documents, data, and narrative interrogatory responses.

"Extending" the initial waiting period. 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. If the investigating agency wants to extend the initial waiting period investigation—usually because the staff has tentatively concluded that the transaction does not present a competitive concern but still needs time to complete its field investigation—it may suggest to the merging parties that they "pull and refile" the HSR form. A "pull and refile" before the end of the initial waiting period and the issuance of any second request restarts a new initial waiting period. It is sufficient for the buyer to pull and refile its HSR form. This requires a refresh of any responses to the original form, a search for any new Item 4(c) or 4(d) documents, and a new certification, but if the updated form is filed within two business days of the withdrawal of the original form, no new filing fee is required (slides 63-64).[14]

Conducting a joint defense. 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 DOJ and the FTC have recognized 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."[15]

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 65-75). Pay particular attention to slide 75's caution about separating common legal interests from commercial bargaining over risk-shifting terms. The reading materials provide two important applications in practice.

The first document addresses a situation in which a buyer has requested that its investment bank analyze the potential sale of certain businesses that the buyer anticipates, on the advice of counsel, 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 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. 104-09). Upon receiving the letter, the DOJ dropped its demands that the disputed documents be produced.

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[14] *See* 16 C.F.R. § 803.12(c); *see* Fed. Trade Comm'n, Tips on Withdrawing and Refiling an HSR Premerger Notification Filing (updated May 12, 2025).

[15] 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.

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 customers about the deal, antitrust counsel "instructed" the client to call the customers, ask specific questions to ascertain their reactions, and report back to counsel on the responses, which counsel would use to inform his antitrust analysis and defense strategy. At an investigatory hearing (what the FTC calls a pretrial complaint deposition), the FTC attorney asked the testifying company official whether he had spoken with 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. 110-17).

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, commonly known as a *second request*. The second request is the pivot point of the entire process, and its defining feature is burden. The agency gets only one second request per party and must issue it before the initial waiting period expires. Moreover, the remaining time the agency has to investigate the transaction before the HSR Act waiting period expires depends on how long the merging parties take to respond to their respective second requests. As a consequence, the agency asks for everything conceivably relevant to assessing the potential competitive effects of the transaction, resulting in sweeping demands for documents, data, and narrative responses across many custodians and years of files (see slides 76-81, especially slide 80).

Second requests. Second requests are somewhat like precomplaint subpoenas, although they are not compulsory process in the ordinary sense. The parties do not have to respond to a second request as they would to a subpoena or civil investigative demand, but the issuance of a second request extends the HSR Act waiting period until the parties substantially comply with their respective second requests and the final waiting period runs out. The practical consequence is straightforward: if the parties do not respond, the waiting period never expires, and they cannot close their deal.

The slides provide a brief overview of second request investigations (slides 80-81). I have included the current DOJ model second request in the reading materials (pp. 119-45). As painful as it might be, read the model second request with some care. Second requests are a foundational element in any sophisticated merger antitrust practice.

The final waiting period. If the reviewing agency issues a second request before the end of the initial waiting period, the HSR Act extends the waiting period until the parties substantially comply with their respective second requests and then for an additional final waiting period. As with the initial waiting period, the final waiting period ordinarily does not begin to run until both parties have substantially complied. In a tender offer and certain court-approved bankruptcy sales, however, the final waiting period runs from the acquiring person's substantial compliance, even if a second request to the acquired person remains outstanding. The final waiting period is usually 30 calendar days, but it is 10 days for an all-cash tender offer or for certain court-approved bankruptcy sales (see slide 82).

Substantial compliance. Given the volume of documents and data required by a second request, a critical question is how complete compliance must be to begin the final waiting period. The HSR Act uses the term "substantial compliance" but does not define it. The class notes present the competing readings (slides 83-85): the legislative history suggests a relatively lenient, practical standard; the FTC historically has treated a deficiency determination as meaning that the final waiting period never began; and a contrary statutory reading is that a filing person may start the final waiting period by submitting its response with a statement of reasons for any noncompliance, leaving the agency to seek a Section 7A(g)(2) court order if it believes substantial compliance is lacking. No court has resolved that conflict.

The courts have rarely been called on to address substantial compliance because the investigating agency and the merging parties almost always find it in their mutual interest to compromise any dispute outside of court. The closest historical example 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 83-87) and, if you want to have a fun read about a party going after an agency, read the *Blockbuster* brief.[16]

Timing agreements. Because the final waiting period is rarely long enough for the agency to complete its review, prepare a recommendation, and give the parties a meaningful opportunity to present their defenses, the agency in a second request investigation almost always asks the merging parties to enter into a timing agreement. A timing agreement is a contractual commitment by the parties not to close for an agreed period after the statutory HSR waiting period expires. The investigating agency may request a substantial amount of additional time, but the parties can often negotiate a shorter period, commonly 60 or even 30 days after the statutory waiting period expires. If the parties refuse, the agency may enter litigation mode and threaten to stop discussing the merits or a possible settlement. Unless the parties believe further interaction with the agency is

[16] *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.

futile, they usually agree to extend the practical review period through a timing agreement (slides 88-89).[17]

The 2026 DOJ model timing agreement. On July 23, 2026, the Antitrust Division published a model timing agreement for second request investigations.[18] The model sets out two tracks following issuance of a full second request. The first is an optional "Expedited Consideration" track, under which the parties initially make a limited Priority Production rather than comply with the entire second request. The second is full compliance, which applies if the parties decline Expedited Consideration or if the Division, after reviewing the Priority Production, requires them to proceed to full compliance.

Under the *Expedited Consideration* track, the parties receive a full second request but initially respond only with an accelerated "Priority Production"—one directed to the custodians, specifications, and data that the Division determines, in its sole discretion, may be determinative. The production must be made on a rolling basis, accompanied by specified information about search and collection methodology and by a privilege log, and certified as complete under penalty of perjury. In return, the Division commits to a Front Office meeting within 21 days after the Priority Production is complete and, within 14 days after that meeting, to tell the parties whether it will close the investigation or grant early termination, narrow the second request or the investigation, or require full compliance.

The second track governs compliance with the second request, as issued or modified, either because the parties declined Expedited Consideration or because the Division, after reviewing the Priority Production, decides to continue the investigation. Each party may confine its document search to an agreed custodian list, subject to the Division's right to add a negotiated number of additional custodians. The model also provides for a negotiated cap on CID depositions, requires rolling productions on a fixed schedule, and sets out detailed rules governing data productions, certification, and claimed deficiencies. In particular, Division staff ordinarily must identify deficiencies within 20 days after certification, and the model limits the consequences of deficiencies asserted later. The model further gives both sides agreed exclusions from preservation and production for specified categories of electronically stored information, attorney communications, and expert materials.

Whether the parties begin under Expedited Consideration or proceed directly to full compliance, they take on the model agreement's broader timing and litigation commitments. Unless the Division closes its investigation, the parties agree—

1. To close no earlier than 60 days after the Compliance Date (for an ordinary transaction, 30 days beyond the statutory final waiting period), subject to extension for specified production and deposition delays
2. To give the Division 14 days' written notice before closing

[17] 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.

[18] *See* U.S. Dep't of Justice, Antitrust Div., Model Timing Agreement (July 2026); Press Release, U.S. Dep't of Justice, Justice Department Resumes Targeted HSR Merger Review Process (July 23, 2026). Both are in the supplemental materials.

3. Not to initiate a declaratory judgment action against the Division relating to the acquisition
4. If the Division files a complaint seeking to enjoin the transaction, not to close until 10 days after entry of an appealable judgment that does not prohibit consummation
5. That the Division need not seek a temporary restraining order or preliminary injunction in any litigation challenging the transaction
6. Not to argue that the extent of the Division's precomplaint discovery or the length of its investigation should diminish, expedite, forestall, or otherwise limit postcomplaint discovery
7. That second request compliance does not give the Division all of the discovery it may need to prepare for trial

As a practical matter, I see little reason for merging parties to enter into the model timing agreement. They are under no obligation to sign it—or any timing agreement—and should do so only if it serves their interest. The Expedited Consideration track offers the prospect of avoiding or reducing the burden of full second request compliance, but that prospect is highly uncertain. The parties must first negotiate the scope of the Priority Production—itself a potentially lengthy process—without knowing whether the Division will ultimately close or materially narrow the investigation, a decision committed to the Division's sole discretion. And if they defer full-compliance work while pursuing Expedited Consideration, only to have the Division require full compliance in the end, the detour may add months to the investigation. If they instead press ahead with full compliance in parallel, they incur much of the cost and burden that Expedited Consideration is meant to spare them. Either way, they have already accepted the significant timing and litigation commitments described above.

The full-compliance track offers even less in return for those commitments. Its principal benefits —negotiated limits on custodians and CID depositions, modifications to second request specifications and data productions, and preservation and expert material protections—are matters the parties generally can negotiate directly with the Division in an ordinary second request investigation, without accepting the model's restrictions. The promised meetings with investigating staff and the Front Office add little, since parties ordinarily get them anyway. Most important, the model requires the parties to surrender the right to bring a declaratory judgment action relating to the acquisition. In a dispute over substantial compliance, that concession eliminates their principal source of leverage: the ability to force the issue into federal court on their own timetable and seek a judicial determination that their response was sufficient to start the final waiting period. For me, that concession is a deal-breaker.

Nor must the parties obtain anything in return for simply giving the Division additional time. If, as is often the case, they are willing to commit only not to close for a specified period after expiration of the HSR waiting period—often 30 calendar days—without imposing reciprocal obligations on the Division, the Division will accept that commitment. Accordingly, while the Division's renewed emphasis on targeted second requests is welcome, I expect that few merging parties, if any, will conclude that entering into the model timing agreement is in their interest.

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 90). After that, the agency will make its decision.

At the end of its review, the class notes identify five practical outcomes (slide 92):

(1) *Close the investigation and let the deal proceed without challenge.* If the statutory waiting period remains open, the agency may grant early termination.

(2) *Negotiate a consent decree*, typically requiring the divestiture of overlapping businesses or assets to a buyer approved by the agency.

(3) *Sue to block the deal*. The DOJ and FTC currently seek preliminary and permanent injunctive relief in federal district court. Historically, the FTC pursued a bifurcated path: it sought a preliminary injunction in district court and tried the merits in an administrative proceeding.

(4) *Abandon the deal*. The parties may terminate the transaction and walk away if they conclude that the agency will challenge the deal and that no mutually acceptable settlement is available.

(5) *"Fix-it-first"*. The parties restructure the transaction before closing to eliminate the problematic overlap, commonly by narrowing the assets to be acquired or by selling assets to a third party. The restructured transaction may require new HSR notifications. If the agency is satisfied that the restructuring eliminates the competitive concern, no consent decree or other enforcement action is necessary.

The outcome data in the class notes are worth a quick look (slide 93). They show the sharp decline in consent resolutions during the Biden years and the return of consent settlements in 2025-2026.

A negotiated "fix-it-first" restructuring implements a curative divestiture before the main transaction closes, rather than through a postclosing consent decree obligation.[19] The approach became more prominent during the Biden administration when the Biden DOJ was unwilling to accept consent decrees to settle investigations; with Trump 2.0's return to structural consent settlements, it is likely to be less prominent.[20]

For this class, focus on the procedural consequence: if the parties restructure before closing, the agency reviews the restructured transaction rather than the original overlap.

Two practical points matter. First, the agency must still be satisfied that the divestiture package and the buyer will preserve competition after the restructuring.[21] Second, if the parties file on the

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

[20] The Antitrust Division under AAG Jonathan Kanter did not negotiate consent decrees to resolve concerns emerging from an investigation—the DOJ's view was 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 were affected.

[21] Because the main transaction and the curative divestiture are related, the agency will insist that the divestiture actually preserve competition; otherwise the restructuring does not eliminate the Section 7 concern.

original transaction and later pursue a fix-it-first restructuring, they may need to withdraw and refile HSR notifications for the restructured transaction.[22]

Unlike the European Commission, neither the DOJ nor the FTC can block a pending transaction on its own. To stop a pending merger, each agency currently must obtain injunctive relief from a federal district court. The FTC historically used a different litigation pathway, seeking a district court preliminary injunction while trying the merits administratively, but its current merger litigation path is the same as the DOJ's (slide 92). We will examine merger litigation in more detail in the next class.

Finally, remember that closing an investigation—what practitioners loosely call "clearance"—does not give the transaction immunity from a later challenge. The DOJ, the FTC, state attorneys general, and private plaintiffs may all challenge a transaction after it closes under the same Section 7 standard that would apply before closing. In practice, postclosing challenges are much less common than preclosing HSR investigations, but the legal authority remains important.

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

Dale Collins

[22] 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 1919, at 18.