6. The DOJ/FTC Merger Review Process

Professor Dale Collins
Antitrust Law: Case Development and Litigation Strategy
Georgetown University Law Center

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Topics

- Thinking systematically about antitrust risk
- Assessing substantive risk
- The HSR Act
- Overview of the HSR merger review process
- Premerger notification
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

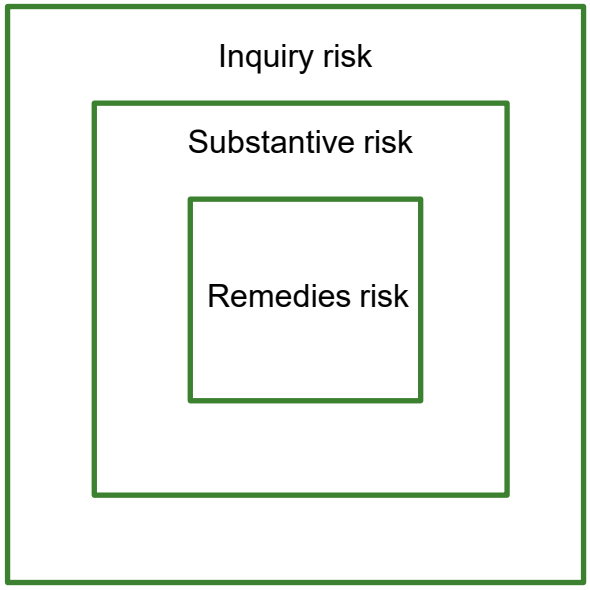
THINKING SYSTEMATICALLY ABOUT ANTITRUST RISK

Types of antitrust risks

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

Types of antitrust risks

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



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

Possible outcomes of merger investigations

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

Costs associated with antitrust risk

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

Focus first on substantive risk

- Inquiry risk comes first chronologically
  - Inquiry risk depends largely on—
    1. The *likelihood* that the challenger will prevail, *and*
    2. The *reward* that the challenger will obtain from a successful challenge
- But the analysis starts with substantive risk
  - The first factor in inquiry risk is a function of the substantive risk—so we need to study that first
  - Substantive risk depends on—
    1. The costs to the parties of defending the transaction against the challenge,
    2. The likelihood that the parties will not be able to successfully defend their deal on the merits, *and*
    3. The costs to the parties of failing to defend successfully

Assessing Substantive Risk

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

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

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

Called the *anticompetitive effects test*

Called the *relevant market*

- Other statutes
  - Sherman Act §§ 1-2 and FTC Act § 5 also regulate mergers
  - BUT are either coextensive or less restrictive than Clayton Act § 7[2]

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

[2] Progressives and Neo-Brandeisians argue that Sherman Act § 2 and FTC Act § 5 can reach certain mergers that Section 7 may not reach. This view has yet to be tested in court.

Clayton Act § 7

- Incipiency standard:
  - The law: The Supreme Court has interpreted the "may be" and "tend to" language in the anticompetitive effects test to—
    - Require proof only of a *reasonable probability* that the proscribed anticompetitive effect will occur as a result of the challenged acquisition[1]
    - Not require proof that an actual anticompetitive effect will occur
  - The practice
    - In practice, courts do not employ any nuanced view of a "reasonable probability" although they give lip service to the term
    - Rather, they appear to ask whether it is more likely than not that a challenged merger will have an anticompetitive effect
  - The critics
    - Critics argue that this is tantamount to requiring proof of an actual anticompetitive effect (i.e., proof of a fact under the preponderance of the evidence standard)
    - To critics, this is too high a standard: Proof of a "reasonably probability" should recognize violations when the mergers presents an appreciable risk of an anticompetitive effect, even if the merger is not more likely to be anticompetitive
    - The problem for courts
      - Courts apply a preponderance of the evidence standard in everyday practice
      - It is unclear how—or even if—courts would deal with a probability threshold less than 50%

[1] United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957).

Anticompetitive effects test

- Distinction: Downstream and upstream markets
  - Downstream markets
    - *Definition*: Sellers merge and customers sustain any anticompetitive harm
    - Almost all horizontal merger challenges historically have alleged anticompetitive harm in a downstream market
    - Consequently, the merger guidelines and almost all case law to date address downstream markets
  - Upstream markets
    - *Definition*: Buyers merge and suppliers sustain any anticompetitive harm
    - Very few horizontal merger challenges have alleged anticompetitive harm in an upstream market
    - Consequently, the case law is almost nonexistent for upstream markets
      - The tests for anticompetitive effects from horizontal mergers in upstream markets are unsettled
    - Upstream markets are a focus of the Biden antitrust enforcers
      - Especially concerned that mergers can anticompetitively affect labor markets

Anticompetitive effects in downstream markets

- *Modern view under the consumer welfare standard*:[1] Transaction threatens—with a reasonable probability—to hurt some *identifiable* set of customers in the (downstream) market through:
  - Increased prices
  - Reduced market output
  - Reduced product or service quality
  - Reduced rate of technological innovation or product improvement
  - (Maybe) reduced product diversity[2]

These are called *anticompetitive effects*

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

- Forward-looking analysis
  - Compare the postmerger outcomes with and without the deal
  - Can view potential competitors today as future competitors tomorrow

[1] The modern view dates from the late 1980s or early 1990s, after the agencies and the courts had assimilated the 1982 DOJ Merger Guidelines.

[2] The idea that reduced product diversity may be a cognizable customer harm was formally introduced in the 2010 DOJ/FTC Horizontal Merger Guidelines. A reduction in product diversity is typically accompanied by a reduction in costs, so the balance of whether a reduction in product diversity is anticompetitive or procompetitive can often be difficult to determine and hence is rarely a driver in merger antitrust decision making.

Assessing substantive risk

Assessing substantive risk requires a *prediction* that the parties will not be able to successfully defend their transaction on the merits

So how to we make that prediction?

First, an important distinction

- Basic distinction
  - *Decision making*: How do the agencies ***decide*** a merger is anticompetitive?
  - *Explanation*: How do the agencies ***explain*** why they believe that the merger is anticompetitive?
- Why is this distinction important?
  - How the agencies (or the courts) explain their decisions often does not reveal why they decided on that particular outcome
  - What you read in judicial opinions may only be the justification of an outcome that the judge reached for other (unexplained) reasons

Bottom line:

Cannot rely entirely on what courts and agencies say to explain a decision

Must also consider emotive factors

A predictive model*

- We are going to look at a model that ***predicts*** merger antitrust outcomes
- The model does ***not purport to describe*** how the investigating agency in fact decides merger outcomes
- The model's ***only purpose is to predict enforcement outcomes***, not be a description of actual agency decision making

* Applies only to downstream markets (i.e., where sellers merge and any harm is to customers).

There is a lot of rhetoric from the heads of the FTC and the Antitrust Division that they are looking at a variety of factors in addition to a merger's effects on customer groups in assessing the merger's legality. BUT to date, there has been only one challenge that could not be predicted by the agency's expressed view on its effect on customers. *See* United States v. Bertelsmann SE & Co. KGaA, No. CV 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022) (finding the merger would likely produce an anticompetitive reduction in compensation to authors in a book publishing merger).

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - They ask a simple, basic question:

Is the merger likely to result in anticompetitive harm to any identifiable customer group?

  - If the answer is YES, the investigating agency will find a way to package it into a theory of anticompetitive merger harm under merger antitrust law precedent and the Merger Guidelines and pursue enforcement action
  - If the answer is NO, the investigating agency will close the investigation without taking enforcement action (and, in most cases, without providing any explanation of their decision)
- This is *the* central question in most merger antitrust investigations
  - It will drive almost everything we do in this course

Assessing substantive antitrust risk

- The predictive model—Four important rules
  1. Absent compelling evidence of significant customer harm from other sources, only ***price increases*** count
  2. The merger is anticompetitive if it is likely to result in a price increase or other competitive harm to ***any identifiable customer group***, no matter how small
  3. The agencies believe that ***no customer group is too small*** to deserve antitrust protection
  4. The agencies believe that ***no merger is too small*** to challenge

Assessing substantive antitrust risk

- Key factors in the decision to challenge horizontal mergers:
  - The existence of incriminating documents
    - Or occasionally incriminating public statements by management
  - Customer complaints
  - Closeness and uniqueness of competition between the merging parties
    - Especially evidence of unique head-to-head price competition between the merging parties
  - The number of other realistic alternative competitor-suppliers for each identifiable customer group
  - Dominance (high market share) of one of the merging parties
  - “Natural experiments”
  - History of actual or attempted collusion/coordination in the market
  - High barriers to entry/repositioning

The predictive model for horizontal mergers

Reduction in Bidders/Competitors*

5 → 4	Usually clears if no bad documents and no material customer complaints
4 → 3	Usually challenged unless there are no bad documents and there is a strong procompetitive business rationale, some customer support, *and* minimal customer complaints
3 → 2	Almost always challenged unless there are no bad documents, and there is a compelling business rational that is strongly supported by customers and no material customer complaints
2 → 1	Always challenged

* Critically, these must be ***meaningful*** and ***effective alternatives*** from the perspective of the customer; "fringe" firms that customers do not regard as feasible alternatives do not count

Special Case #1:

Unilateral effects

Two firms that compete very closely with one another but much less with other firms in the market

Special Case #2:

Elimination of a maverick

Elimination of a firm that has been especially disruptive in the marketplace (a maverick)

Special Case #3:

Elimination of a potential entrant

In a high concentrated market, the acquisition by or of a firm that otherwise would have entered the market and thereby increased competition

Basic structural tests for horizontal mergers

- The chances of successfully defending a deal *improve* if—
  - There are demonstrable powerful forces that constrain price increases or other anticompetitive behavior beyond the mere number of incumbent competitors
  - Three major forces:
    1. *Entry, repositioning, or output expansion* by third-party competitors in response to anticompetitive behavior by the combined company
       - Requires low barriers to entry or repositioning
    2. *Powerful customers*, who can use their bargaining leverage to stop the combined firm from acting anticompetitively
       - Requires a detailed explanation of how the bargaining will work to constrain the combined firm
       - Defense on works firm-by-firm—Small firms without the requisite bargaining power can still be hurt
    3. *Efficiencies*, where the procompetitive pressure of the efficiencies outweighs the anticompetitive pressure of the increased market power
       - More on this below
       - Agencies very skeptical

Basic structural tests for horizontal mergers

- Defenses
  - These forces are *legal defenses* if they are sufficient in likelihood and magnitude to completely offset the likely customer-harming aspects of the transaction
  - Basic distinction #2
    - *Negative defense*: The merger is not anticompetitive in the first instance
    - *Affirmative defense*: Even if the merger is anticompetitive, it is nonetheless not unlawful
  - Technically—
    - A *negative defense* denies an element of the plaintiff's prima facie case
    - An *affirmative defense*
      - accepts the elements of the prima facie case as true, but
      - raises matters outside of the prima facie case that provide a justification or an excuse to absolve the defendant from liability

There are no affirmative defenses in modern antitrust law

Another basic distinction

- Truth v. evidence
  - The agencies (and the courts) deal in *evidence*
  - Having the truth but being unable to prove it will not win the day
  - The investigating staff also needs evidence to be able to prove its case to the agency decision makers and, if necessary, in litigation

So what are the sources of evidence?

Major sources of evidence

1. Company documents submitted with the original HSR filing
2. Company responses to second requests in an HSR Act review
   - Ordinary course of business documents
   - Responses to data and narrative interrogatories
3. Interviews/testimony/public statements of merging firm representatives
4. Interviews with knowledgeable customers
5. Interviews with competitors
6. Customer responses in staff interviews and to DOJ Civil Investigative Demands (CIDs) or FTC subpoenas
7. Analysis of bidding or "win-loss" data
   - Including the ability of customers to play the merging firms off one another
8. "Natural" experiments
9. Expert economic analysis

Major sources of evidence

- Consummated (closed) transactions
  - Observed effects
    - Most notably, price increases enabled by the merger
  - PLUS all of the evidence probative in preconsummated transactions

Synergies/Efficiencies

Synergies/efficiencies

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

Synergies are relevant to the antitrust analysis only to the extent they are passed on or otherwise benefit to customers

Synergies

- Types of synergies enabled by the deal
  1. Customer value-enhancing efficiencies
     - Making existing products better or cheaper
     - Creating new products or product improvement better, cheaper, or faster
  2. Cost-saving efficiencies
     - Reductions in duplicative costs
     - Increases in the productive efficiency of the combined operation (e.g., through best practices, transfer of more efficient production technology)
  3. Anticompetitive synergies
     - Eliminating competition on price, quality, service, or innovation and so increase profits (horizontal theory of anticompetitive harm)
     - Creating an incentive and ability to withhold important/ essential products or services used by competitors and so eliminate competition and increase price (vertical theory of anticompetitive harm)

Efficiencies

- Efficiencies play two roles in an antitrust merger analysis
  1. They provide an explanation why the acquiring firm is pursuing the deal (and probably paying a significant premium) that does not depend on price increases to customers or other anticompetitive effects
  2. In some cases, efficiencies can tip the agencies into not challenging the deal
     - Where efficiencies exist in a problematic market, the procompetitive pressure resulting from the efficiencies can offset any anticompetitive pressure from the elimination of competition
     - Where efficiencies exist outside of the problematic market, the agencies can weigh very large efficiencies outside of the market against very small anticompetitive effects inside the market and exercise their prosecutorial discretion not to challenge the deal
       - As a matter of law, however, efficiencies outside of a relevant market cannot be weighed against anticompetitive effects inside the market

Efficiencies

- To be credited by the investigating agency, synergies must be:[1]
  1. Merger-specific
     - That is, could not be accomplished in the absence of the merger
  2. Verifiable by sufficient evidence
  3. Would completely and immediately be sufficient to offset any anticompetitive tendencies of the merger
  4. Not be the result of an anticompetitive effect of the transaction
- Agency view
  - Efficiencies usually given very little weight in the Obama and, more surprisingly, the Trump administrations
  - This skeptical—if not hostile—view of efficiencies has continued in the Biden administration

[1] U.S, Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (rev. 2010).

The HSR Act

HSR Act

- Hart-Scott-Rodino Act[1]
  - Enacted in 1976 and implemented in 1978
  - Applies to large mergers, acquisitions and joint ventures
  - Imposes reporting and waiting period requirements
    - Preclosing reporting to both DOJ and FTC by each transacting party
    - Post-filing waiting period before parties can consummate transaction
  - Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a "second request"
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
    - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
  - Not jurisdictional: Agencies can review and challenge transactions—
    - Falling below reporting thresholds
    - Exempt from HSR reporting requirements
    - "Cleared" in a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review

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

HSR Act

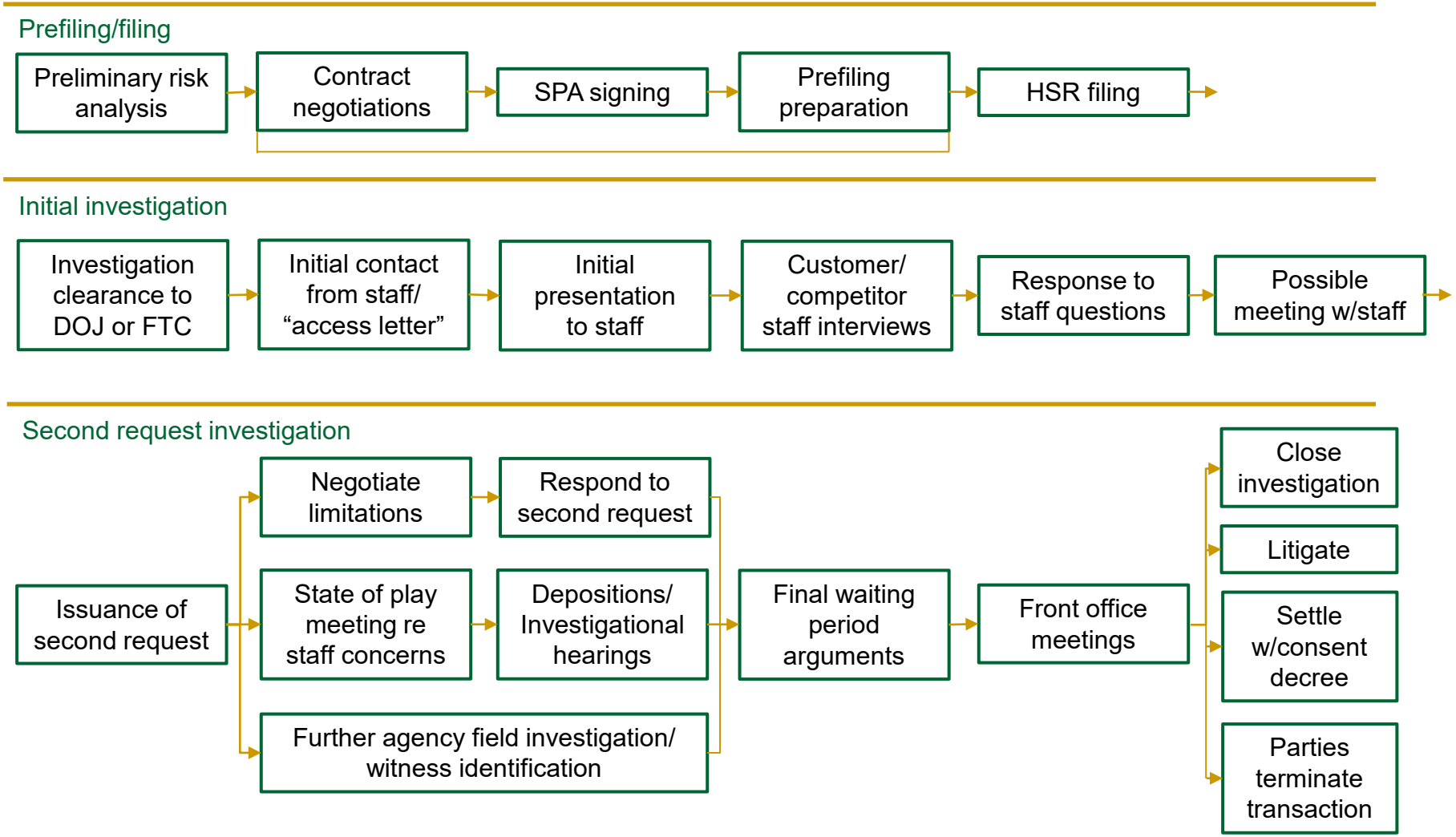
- Basic materials
  - The HSR Act, 15 U.S.C. § 18a (also known as Section 7A of the Clayton Act)
  - The HSR Act implementing regulations[1]
  - Formal FTC interpretations of the implementing regulations
  - Informal staff interpretations of the implementing regulations
  - The HSR reporting form and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

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

[2] Discussed below.

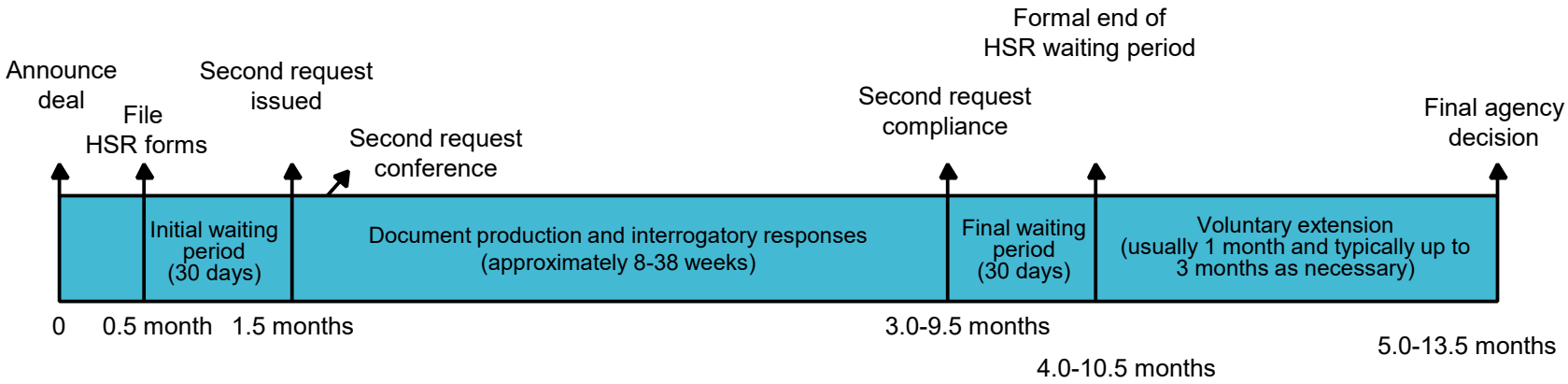
Overview: The HSR Review Process

The HSR review process



The HSR Act review process

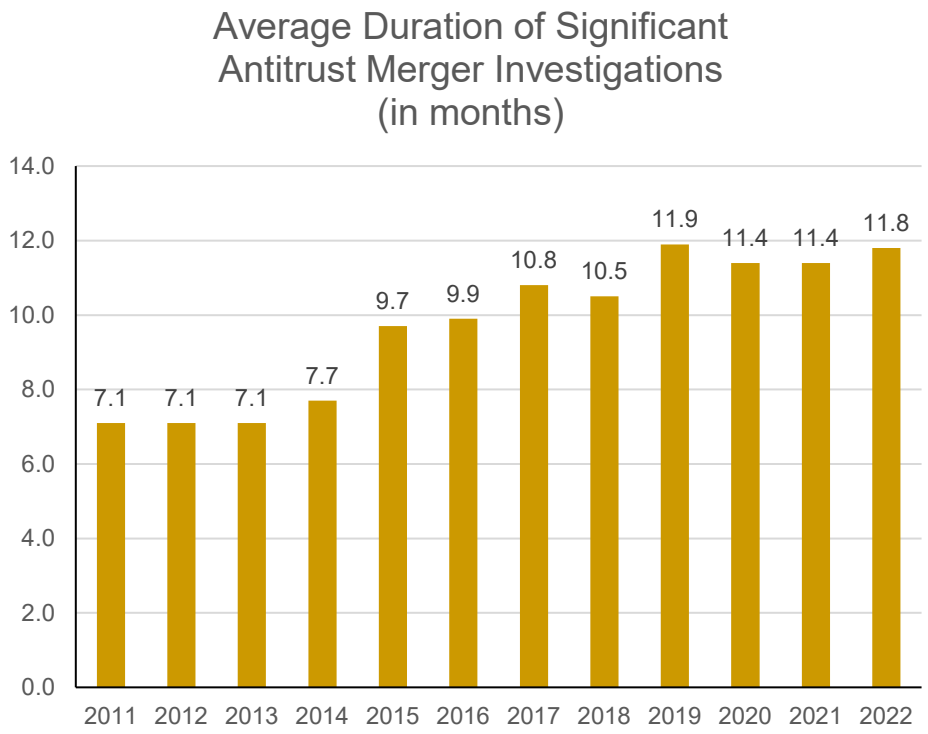
- Typical domestic transaction



Customer rollout

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

The HSR Act review process



Average Duration by Presidential Administration

	Investigations	Average Duration
Obama 2011-2012	56	7.1
Obama (2d term) 2013-2016	119	8.8
Trump 2017-2020	109	11.2
Biden 2021-2022	47	11.8

Source: Dechert LLP, DAMITT 2022 Annual Report: Timing and Remedy Risks Grow for Transactions Hit with Significant Investigations (Jan. 23, 2023); Dechert LLP, DAMITT 2016 Year in Review (Jan. 2017). DAMITT is the Dechert Antitrust Merger Investigation Timing Tracker. Dechert defines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include indepth second request investigations in which the agency concludes there is no antitrust concern but issues no closing statement. Dechert calculates the duration of an investigation from the date of deal announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

HSR Act Reportability

Basic prohibition

- Section 7A(a)

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

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

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

Acquisition of voting securities or assets

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

[1] 16 C.F.R. § 801.1(f)(1)(i).

Acquisition of voting securities or assets

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

[1] 16 C.F.R. § 801.1(f)(1)(i).

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability
Up to and including $111.4 million	Not reportable
Above $111.4 million up to and including $445.5 million	Reportable if : (1) satisfies the "size of person" test, and (2) no exemption applies Size of person test *Acquiring person* — *Acquired person* $222.7 million (in total assets or annual net sales) and $22.3 million (in total assets or annual net sales of a person engaged in manufacturing) *Or* $222.7 million (in total assets or annual net sales) and $22.3 million (in total assets of a person not engaged in manufacturing) *Or* $22.3 million (in total assets or annual net sales) and $222.7 million (in total assets or annual net sales)
In excess of $445.5 million	Reportable absent an exemption

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

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 88 Fed. Reg. 5004 (Jan. 26, 2023) (effective Feb. 27, 2023).

Prima facie reportability

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

Selected exemptions

- Intraperson
  - Acquiring and acquired person are the same
- Investment
  - Hold no more than 10% of target's outstanding voting securities
    - 15% for certain institutional Investors
  - Acquirer must have a purely passive investment intention
    - Any membership on the board of directors or other involvement in the management of the company (other than voting shares) voids exemption
- Convertible voting securities
  - Acquired securities have no present voting rights
- Acquisitions of non-U.S. assets
  - Must not generate sales in or into the U.S. of more than $111.4 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either
  - Do not confer control over the target, or
  - Do not involve assets in the U.S. or sales in or into the U.S., over $111.4 million

Notification thresholds

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

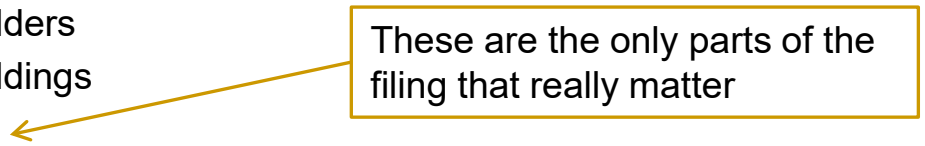
Notification thresholds[1]
$111.4 million
$222.7 million
$1.1137 million
25% of the voting securities if their value exceeds $2.2274 billion
50% of the voting securities if their value exceeds $111.4 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 88 Fed. Reg. 5004 (Jan. 26, 2023) (effective Feb. 27, 2023).

Premerger Notification

HSR Act filing

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



HSR Act filing

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

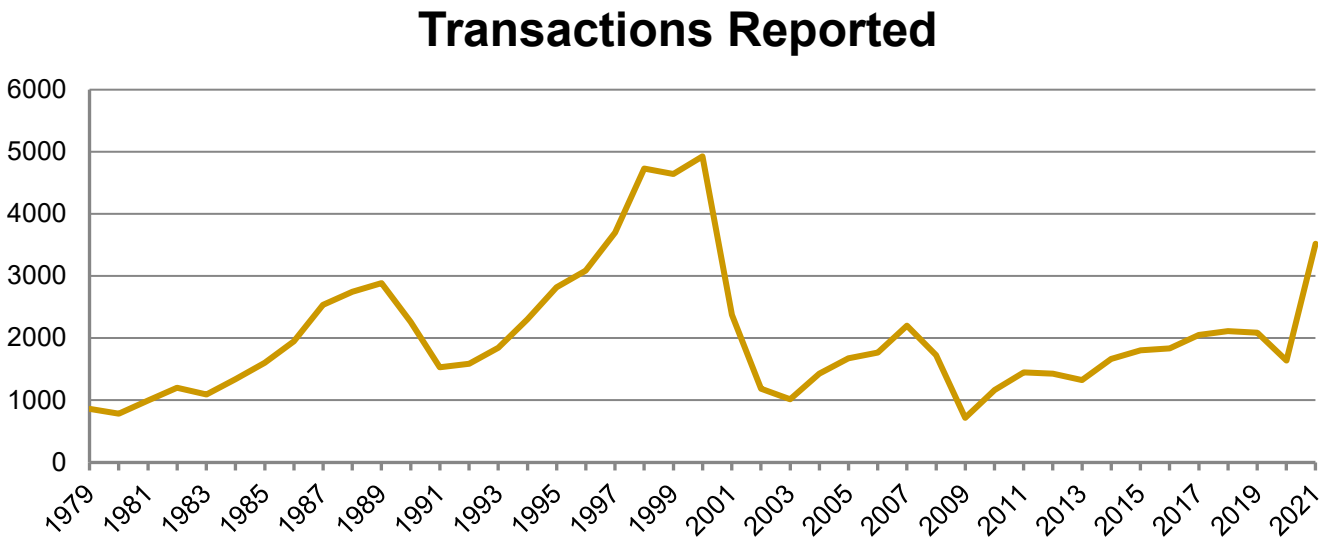
Filing fees

2022		2023[2]	
Value of Transaction[1]	Filing Fee	Value of Transaction[1]	**Filing Fee**
≤ $101.0 million	No filing required	>111.4 million -161,4 million	$30,000
> $101.0 million but < $202.0 million	$45,000	161.5 million - $4999,9 million	$100,000
≥ $202.0 million but < $1.0098 billion	$125,000	$500,000 - $999.9 million	$250,000
≥ $1.0098 billion	$280,000	$1 billion - $1.9 billion	$400,000
		$2 billion - $4.9 billion	$800,000
		$5 billion or more	$2.25 million

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

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2023) (effective Feb. 23, 2022).
[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 88 Fed. Reg. 5004 (Jan. 26, 2023) (effective Feb. 27, 2023). Congress changed the baseline of the filing fees in the Merger Filing Fee Modernization Act of 2022, contained in the Consolidated Appropriations Act of 2023, Public Law 117–328, Div. GG, 136 Stat. 4459, ____ (Dec. 29, 2022).

HSR Act notifications



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2020, at App. A, and prior annual reports.

Statutory waiting periods

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

HSR Act violations

- HSR Act prohibition
  - The HSR Act provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person" in a reportable transaction without observing the filing and waiting period requirements[1]
  - The HSR regulations provide that a person holds (acquires) voting securities or assets when it has a "beneficial interest" in them[2]
- Two basic types of violations
  - *Failure to file*: Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
  - *Gun jumping*: Filing a HSR report but exercising influence over the target's decision making sufficient to indicate the transfer of a beneficial interest in the target before the end of the waiting period
- Can be expensive
  - $50,120 per day for every day of the violation—Equals $18.3 million per year[3]

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] 88 Fed. Reg. 1499 (Jan. 11, 2023) (increasing civil penalty from $46,517 to $50,120 per day effective January 11, 2023, purusuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114–74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute's enactment)).

Failure to file

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

"Gun jumping"

- Violation
  - The FTC takes the position that a person has a beneficial interest in the voting securities or assets of the target company within the meaning of the HSR Act when the person can exercise a material degree of management influence on the current (preclosing) operations of the target
    - Especially decisions regarding how to compete in the marketplace
  - Exercising this influence prior to the end of the waiting period is called "gun jumping"
    - Violates the HSR Act, regardless of effect on competition, because, for HSR Act purposes, the acquiring company has acquired the target without observing the waiting period—subjects the acquiring company to a civil penalty of $50,120 per day (in 2023)
    - May also violate Section 1 of the Sherman Act if the influence creates an anticompetitive effect in the marketplace (e.g., the coordination of bids by merging competitors)
    - The acquiring person cannot violate the HSR Act after the waiting period has expired, but it can still violate the Sherman Act if the transaction has not closed

Some recent HSR Act enforcement actions

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

HSR Act enforcement actions

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

Initial Waiting Period Investigations

Preliminaries

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

"Clearance"

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

Initial contact by investigating staff

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

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

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

[2] The DOJ has published a model voluntary access letter, which is also included in the required reading.

Initial merits presentation

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

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

Initial merits presentation

- Ideal structure (when the facts fit)
  1. Provide an overview of the parties and the transaction
     - Identify other jurisdictions in which the transaction is reportable
  2. Provide an overview of the industry (if the staff is not familiar with the industry)
  3. Explain the business model driving the transaction
     - The deal is procompetitive—a win-win for the company and the customers
     - "We make the most money by providing more value to customers, improving productive efficiency, and reducing costs without reducing product or service quality"
     - Essential to give a compelling reason for doing the deal that is not anticompetitive
  4. Identify the customer benefits implied by the business model
     - Customers will be better off with the transaction than without it
     - Agencies give little credit in the competitive analysis to efficiencies or cost savings that are not passed along to customers
  5. Explain why market conditions would not allow the transaction to be anticompetitive in any event
     - "We could not raise price even if we wanted. Customers have alternatives to which they can turn to protect themselves in the event we try to raise price or otherwise harm them."
     - Alternatives can be other current suppliers, firms in related lines of business that can expand their product lines, new entrants, or customer self supply (vertical integration)

Customer/competitor interviews by staff

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

End of the initial waiting period

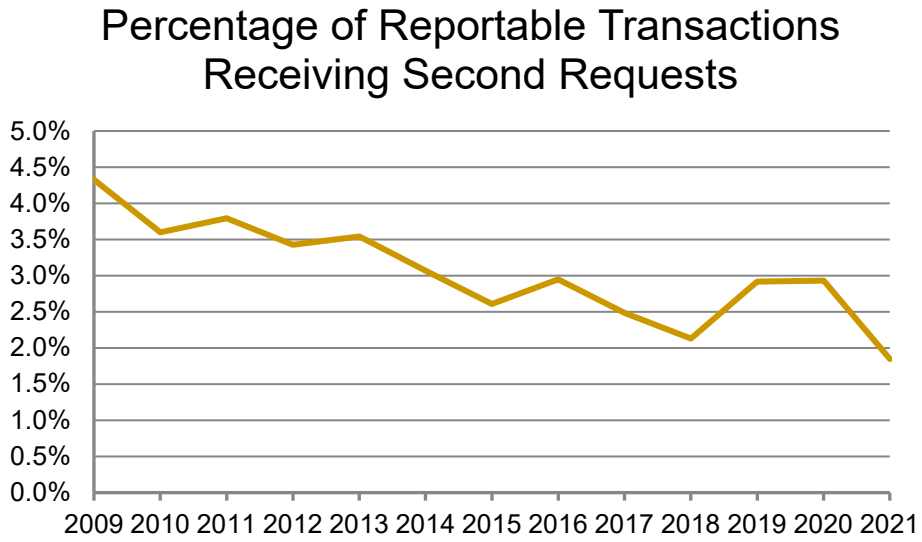
- Three options for the agency
  1. Close the investigation
  2. Issue a second request
     - Most important factors—
       - Incriminating company documents
       - Significant customer complaints
       - Four or less competitors postmerger for horizontal transactions (5→ 4 deals)
       - Merging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

       NB: Any one of these factors can be sufficient to trigger a second request investigation
     - A second request must be authorized—
       - By the assistant attorney general (typically delegated to a deputy assistant attorney general)
       - By the Federal Trade Commission (typically delegated to the chairman or a commissioner)
  3. Convince the parties to “pull and refile” their HSR forms to restart the initial waiting period
     - Typically used when the initial investigation to date indicates no problem but requires a short additional time to complete customer interviews
     - The agency usually grants early termination in the middle of the second initial waiting period

Second Request Investigations

The second request

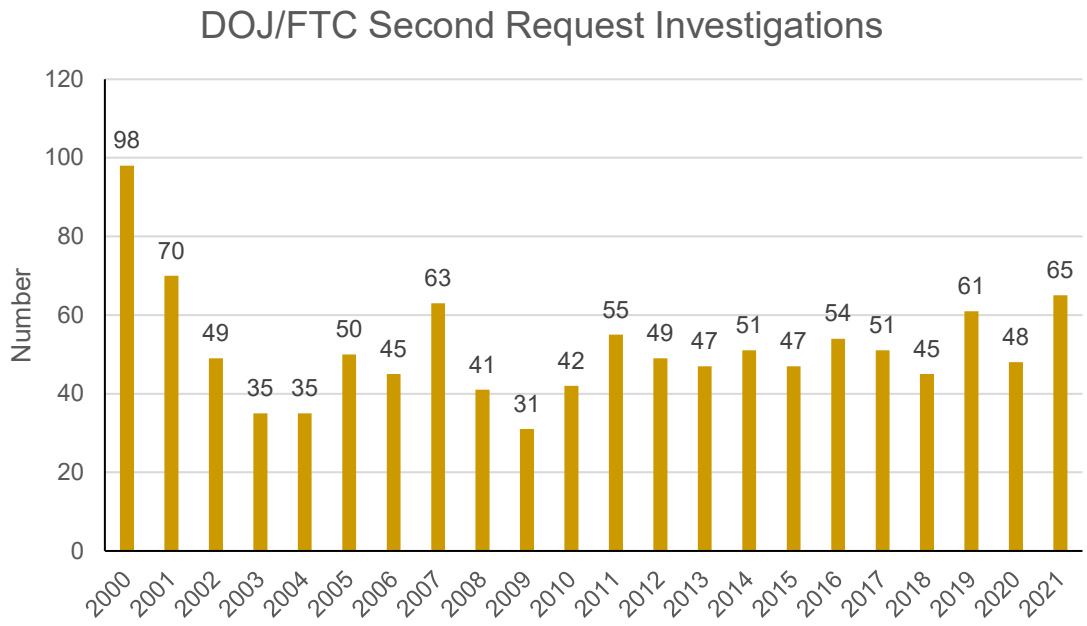
- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a "second request") during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second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



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2021, at App. A.

Total number of second request investigations

- By year since 2000



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year App. A (for FY 2010 and FY 2021).

Second request investigations

TABLE I
FISCAL YEAR 2021[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	48	1.4%	0	1	0.0%	2.1%	2.1%	0	0	0.0%	0.0%	0.0%
100M - 150M	433	12.7%	19	5	4.4%	1.2%	5.5%	4	1	0.9%	0.2%	1.2%
150M - 200M	538	15.8%	13	13	2.4%	2.4%	4.8%	1	2	0.2%	0.4%	0.6%
200M - 300M	373	10.9%	17	8	4.6%	2.1%	6.7%	2	2	0.5%	0.5%	1.1%
300M - 500M	458	13.4%	23	12	5.0%	2.6%	7.6%	6	2	1.3%	0.4%	1.7%
500M - 1000M	985	28.9%	45	29	4.6%	2.9%	7.5%	13	5	1.3%	0.5%	1.8%
Over 1000M	578	16.9%	47	38	8.1%	6.6%	14.7%	16	11	2.8%	1.9%	4.7%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

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

Second request investigations

- Second request
  - Blunderbuss request
    - If you can only ask once, ask for everything
    - DOJ and FTC each have “model” second requests, but typically customized with additional specifications
    - Covers e-mail and other electronic documents
  - Typically takes 6-16 weeks to comply (but some companies take much longer)
    - Often covers 60-120 custodians
      - Agencies are making meaningful efforts to reduce this number—target 30-35
    - Interrogatories, including:
      - Detailed sales data
      - Bid and win/loss data
      - Requirements for entry into the marketplace
      - Rationale for deal
    - Document requests, including:
      - Business, strategic and marketing plans
      - Pricing documents
      - Product and R&D plans
      - Documents addressing competition or competitors
      - Customer files and customer call reports
    - Non-English language documents must be translated into English

Second request investigations

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

Final waiting period

- Timing
  - Begins when all parties have submitted proper second request responses
    - *Exception*: In open market transactions, timing depends only on when the acquiring person complies (to avoid delaying tactics by the target in hostile transactions)
  - Ends 30 calendar days later
    - 10 days in a cash tender offer
- The final waiting period is often too short to complete the investigation
  - Given the time it takes—
    - For the investigating staff to analyze information and documents submitted by the parties in response to their second requests
    - For the investigating staff to finalize its analysis and recommendation, *and*
    - For agency management to review the staff's recommendation and make a decision on the disposition of the investigation
    - *Conclusion*: The final waiting period provides too little time for the agency to make an informed decision

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

Timing agreements

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

Timing agreements

- A timing agreement does not technically extend the HSR Act waiting period
  - Surprisingly, many members of the bar (and some attorneys in the enforcement agencies) believe that the parties can voluntarily "extend" the HSR Act waiting period
  - The FTC Premerger Notification Office's position, on advice from the FTC General counsel, is that the waiting period is set by statute and cannot be extended by agreement, although the parties can commit by contract not to close the transaction before a certain time
  - Timing agreements are enforceable in court through contract or detrimental reliance, not as a violation of the HSR Act
    - I am unaware of any instance where the parties have breached a timing agreement and so there is no enforcement precedents
    - However, there is little doubt that a court faced with a breach would summarily enforce the timing agreement through an injunction for specific performance
  - The fact that a timing agreement does not extend the HSR Act waiting period has significant implications for "gun-jumping" violations, which cannot occur after the waiting period has ended

The final arguments

- Four formal meetings at the end of the investigation

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

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

Merger Review Outcomes

Possible outcomes in DOJ/FTC reviews

Close investigation

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

Litigate

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

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

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

Allow deal to close but do not close investigation

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

Outcomes in "significant" investigations

	Consent	Abandoned	Litigation	Closing Statement	Total
2016	26	1	6	0	33
2017	23	1	3	0	27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6	0	27
2022	8	2	10	0	20
2016	78.8%	3.0%	18.2%	0.0%	100.0%
2017	69.7%	3.0%	9.1%	0.0%	100.0%
2018	48.5%	3.0%	9.1%	9.1%	100.0%
2019	45.5%	6.1%	21.2%	6.1%	100.0%
2020	66.7%	6.1%	24.2%	3.0%	100.0%
2021	63.0%	14.8%	22.2%	0.0%	100.0%
2022	40.0%	10.0%	50.0%	0.0%	100.0%

Source: Dechert LLP, DAMITT 2022 Annual Report: Timing and Remedy Risks Grow for Transactions Hit with Significant Investigations (Jan. 23, 2023). Notes: Dechert declines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release.