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# ANATOMY OF A MERGER: A PRACTICAL GUIDE TO ANTITRUST M&A REVIEWS FOR THE UNINITIATED

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There is an old saying that minor surgery is surgery that happens to someone else. The same could be said to those who say that lengthy antitrust reviews are rare. For all of the attention paid to antitrust issues in the popular press, only a small number of transactions that pose serious antitrust questions are subject to lengthy reviews—on average, just 2% to 4% of all transactions filed with the antitrust agencies. Although they are rare, a lengthy antitrust merger review can be a disruptive event for a company, especially for those companies, lawyers, and personnel who have not been through such a review before.

This article provides a practical introduction to the antitrust merger review process. In addition, we address the key decisions that have to be made along the way, as well as strategies for minimizing the burden on the company (to the extent possible) and maximizing the chances of a successful outcome.

## Activities Prior to a Merger Filing

The first steps in merger analysis are to determine whether (1) a transaction is reportable under the Hart-Scott-Rodino ("HSR") Act, (2) merger control filings outside the United States will be required, and (3) there are substantive antitrust concerns with the transaction.

### *Merger Control Filings*

Under the HSR Act, parties to transactions that meet certain statutory thresholds must pre-report the transaction to the U.S. Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC"). Determining whether a filing is required under the HSR Act can be complex. Knowledge of the HSR statute, the implementing regulations, a large body of informal guidance, and some experience and judgment can help determine whether an HSR filing is required. At a very high level, certain joint ventures and acquisitions of assets, voting securities, or other "non-corporate interests" may require an HSR filing. While there are a number of exemptions, the basic reporting thresholds, updated annually based on GNP, are as follows until early 2021:

- Commerce Test: Either party must be engaged in activity affecting commerce.
- Size-of-Transaction Test: The acquirer must hold, as a result of the transaction, assets, voting securities, or other non-corporate interests in excess of $94 million, and the size of person test must be met, unless the value of the holdings exceeds $376 million, in which case the transaction must be reported.
- Size-of-Person Test: Either party has annual net sales or total assets of at least $188 million, and the other party has annual net sales or total assets of at least $18.8 million. The rules are different if the parties are not engaged in manufacturing.

Merger control thresholds outside the United

 

States vary widely. Some jurisdictions base their filing requirements on sales in or into the country, whereas others consider global revenue, the seller's revenue, or local assets. Yet other jurisdictions peg filings to combined or individual market shares or "share of supply." In most cases, the best place to start is with the buyer's and target's turnover by country and asset schedule.

HSR filings are mandatory if the jurisdictional thresholds are met, and an HSR filing suspends the deal closing until clearance is received. Outside the U.S., however, if thresholds are tripped, there is variation as to whether a filing is mandatory and whether the closing is suspended until clearance is received. In the vast majority of jurisdictions, filings are mandatory and suspend closing. This is the case, for example, in the EU and China. In some jurisdictions (such as Australia, Singapore, and the UK), filings are voluntary and there is thus no obligation to suspend closing (except if ordered so by the authority), but agencies usually have post-consummation enforcement authority.

Most major law firms employ lawyers who focus on HSR and multijurisdictional merger control analysis and can quickly ascertain where filings must be made. If your deal triggers voluntary filing thresholds, you will need to make a strategic decision about whether to file at all or risk a late-breaking (or even post-consummation review). Factors to consider include the substantive antitrust risk, either party's prior filing history in the jurisdiction, either party's volume of business in the jurisdiction, the buyer's risk tolerance, enforcement history and priorities in the jurisdiction, and the potential for lengthy reviews in other countries.

As the parties conduct due diligence, and if they sign a deal, integration planning, counsel can help the parties avoid unlawful premerger coordination (known as "gun jumping") or information sharing that can lead to an independent agency investigation.

### *Substantive Antitrust Risk Analysis*

It is also critical to conduct an antitrust analysis to evaluate whether the transaction presents material antitrust risk. Of course, many transactions have no such risk and it may be easy to make this determination. For transactions that have antitrust risk, investing time, effort, and resources to evaluating that risk can have a big payoff.

Section 7 of the Clayton Act empowers the DOJ and FTC to seek to block transactions where the effect "may be substantially to lessen competition, or tend to create a monopoly" in any line of commerce. The purpose of a DOJ or FTC investigation is to determine whether the transaction will reduce competition in a way that harms customers through higher prices, lower quality, reduced output, inferior products or services, less product choice, or reduced innovation.

The agencies have issued guidelines that outline the types of competitive harm that can result from different types of transactions and describe how the agencies will evaluate them. The Horizontal Merger Guidelines, first issued in 1968 and updated several times since, outline the principal economic and legal theories that the agencies apply to transactions involving competitors or potential competitors. The Vertical Merger Guidelines, issued this year, do the same for vertical mergers that combine two or more companies operating at different levels of the same supply chain. The Vertical Merger Guidelines also cover diagonal mergers and companies that offer complementary products.[1] Over the last 25 years, horizontal mergers have comprised about 95% of DOJ and FTC enforcement decisions.[2]

Antitrust counsel typically will request to interview business personnel knowledgeable about competition for the product(s) at issue. Depending on the organization (and who knows about the transaction), the right interviewee might be the CEO, business development, or the product manager. Counsel also likely will request documents and data to support its analysis. The DOJ and FTC place significant weight on the merging parties' pre-deal business documents, and if they conduct a preliminary investigation, the reviewing agency will request that the parties "voluntarily" submit them. Although requests should be tailored to your business, the most helpful documents typically include strategic/business plans, competitor analyses, market share data, third-party industry reports, customer win/loss data, top customer lists, and documents discussing the rationale for the deal.

At the appropriate time, antitrust counsel for the parties should connect to ensure that there is a common understanding of the facts. Although it is incumbent on both sides to investigate the facts, sometimes the parties see the facts differently, or one side may have knowledge that the other does not. For example, the leading competitor in an industry may not view a small company as a competitor, but the small company's strategy might focus on stealing customers from the leader. Likewise, one party to the deal might have confidential plans to enter a market and compete with the other party to the deal. In deals where there is antitrust risk, merging parties typically enter into a joint defense agreement that governs sharing of confidential, privileged, and competitively-sensitive information between outside counsel.

With the facts described above, experienced antitrust counsel typically can provide an assessment of the risk that the DOJ or FTC will conduct no investigation, a preliminary investigation, or a so-called "Second Request" investigation. In many, but not all cases, antitrust counsel will have an educated view on which agency, DOJ or FTC, is likely to review,[3] and sometimes, even which staff attorney.

The substantive analysis also will help antitrust counsel advise on the antitrust risk allocation in the transaction documents. Sellers want deal certainty and therefore want the buyer to commit to any and all structural or behavioral remedies necessary to obtain antitrust clearance. While a buyer might be willing to commit to certain remedies, it will not want to agree to any remedy that materially affects the strategic or financial value of the deal. For example, there may not be a viable structural remedy if the target sells just a single product, multiple products are produced in a single facility via a single business unit, or if distinct products are difficult, if not impossible, to disentangle in a reasonable time period (*e.g.*, software). Perhaps more important, a structural divestiture may eliminate the very benefits of the deal (*e.g.*, synergies, efficiencies, streamlined production, improved distribution) that motivated the deal in the first instance. Antitrust counsel can advise on whether the DOJ or FTC might demand a remedy, including which remedies (often a divestiture) are likely to be palatable to the authorities. The substantive antitrust risk also can impact a number of other provisions in the transaction documents, including whether to contest or respond to a Second Request or litigation, closing conditions, interim operating covenants, non-compete clauses, control of antitrust strategy, cooperation, termination, and break-up fees.

 

## Preparing the Filings

Assuming an HSR filing is required, the company should start to prepare an HSR submission at least two weeks ahead of the filing date. Although HSR filings lack detailed information on markets and affected competition compared to many merger control filings outside of the U.S., it can nonetheless take time to collate the required information in the form that the U.S. agencies require. The HSR form requests information about the parties, details about the transaction, U.S. revenue reported by industry classification code, shareholders, shareholdings, and in some cases, details about states where sales are made and prior transactions.

The most time consuming part of HSR preparation typically is the collection of documents responsive to Items 4(c) and 4(d) of the form. Those requests require merging parties to submit all documents, prepared by or for any officer or director, that analyze the transaction with respect to markets, market shares, competition, competitors, synergies, efficiencies, or potential for sales growth or expansion into new product or geographic markets.

If the agency discovers that the company missed collecting and submitting documents responsive to Items 4(c) or 4(d) of the HSR form, the consequences can be severe. They range from restarting the HSR waiting period (even well into the Second Request process) to assessment of civil penalties. The maximum civil penalty in 2020, adjusted annually, is $43,280 per day, per violation.[4] Omitting responsive 4(c) and 4(d) documents also can lead to a separate agency investigation that distracts from or slows the merger investigation.

Although merger control filings outside the U.S. vary widely, they are more substantive. For example, filings with the European Commission and China's State Administration for Market Regulation can take several weeks or longer to prepare and may include detailed information about the parties, market shares, competitors, supply and demand substitution, precedent, customers, and suppliers, among other details. Merger control filings outside the U.S. are also sometimes subject to a lengthy consultation process with the reviewing agency in which the parties submit a draft filing, the agency asks questions, and the parties respond. In some jurisdictions, the review period does not start until the consultation process ends. In other cases, several rounds of agency questions can pause the review clock.

## How Does the Initial U.S. Waiting Period End?

Once both parties submit their HSR filings, there are four possible outcomes: (1) the waiting period expires naturally, (2) the agencies grant early termination of the waiting period, (3) the parties withdraw and refile, or (4) the DOJ or FTC extends the waiting period by issuing a "Second Request." Each outcome is described below.

**Waiting Period Expires Naturally.** Under the HSR Act, it is unlawful to complete a transaction that must be notified until the waiting period, 30 days for most transactions, has expired.[5] Waiting periods expire naturally, unless extended or terminated early, at 11:59 p.m. ET on the 30th day following an HSR filing if the last day is not a weekend or a federal holiday, in which case the waiting period expires on the next business day. If the DOJ and FTC allow a waiting period to expire naturally, the parties will not receive a clearance notice from the agencies.

**Early Termination.** The agencies have discretion to terminate the waiting period before the full 30-day waiting period has run if either party makes the request on its HSR form. Since 2010, such "early termination" (or "ET") was requested in between 71% and 82% of all filed transactions, and granted between 73% and 82% of the time.[6] Both the DOJ and FTC must agree to grant ET, which is granted (or not) completely at their discretion, and the agencies can grant ET (or not) at any time during the waiting period. While the fact of an HSR filing is confidential,[7] if the DOJ and FTC grant early termination, a notice is published on the FTC website.[8] Therefore, the most common reason that parties choose not to request early termination is that they do not want the fact of their transaction made public. Though less common, some companies do not like the uncertainty of ET and prefer clearance on a date certain.

**Pull & Refile.** Other than a Second Request (detailed below), no mechanism exists under the HSR Act to extend the 30-day waiting period if the agency needs more time to review the transaction. Therefore, an informal practice developed (now formally codified) in which the buyer may withdraw its filing and resubmit (with updated information) within two business days without having to pay a second filing fee. The refiling restarts the waiting period. Parties may use this "pull and refile" strategy if they think they can avoid a burdensome Second Request by providing the DOJ or FTC more information and time for its review. Even if a Second Request is a certainty, this strategy can be an effective tool to narrow the scope of a Second Request, for example, by convincing the DOJ or FTC to eliminate products or geographies from its second phase review.

**Second Request.** DOJ or FTC can extend the waiting period by issuing a massive subpoena for documents, data, and interrogatories (*i.e.*, the Second Request). If the DOJ or FTC issue a Second Request, the parties cannot close their transaction until 30-days (in most cases) after they comply with the Second Request.[9] Responding to a Second Request, detailed below, is burdensome and can take several months.

## The Initial Waiting Period

Over the last three fiscal years (2017-2019), the DOJ and FTC received between 2,052 and 2,111 HSR filings and the agencies issued Second Requests in between 2.2% and 3.9% of eligible transactions since 2010.[10] Second Requests are rare, but they are difficult and costly events, and they push out the timetable of a transaction by many months. Therefore, as may be evident from this discussion, there is a premium on using the waiting period(s) wisely to avoid a Second Request, if possible.

One of the first strategy decisions for antitrust counsel is whether to contact the DOJ or FTC staff about the deal. In some cases, the best strategy is to "file and duck," *i.e.*, the parties make their filings and wait for the DOJ or FTC to make contact (if at all). This strategy is common in deals with no antitrust issues, or in certain other cases where strategically it may be better not to call attention to a particular issue. In some cases, staff may not reach out to the parties until late in the waiting period, leaving little time to investigate (or for the parties to convince staff there is no cause for concern). It may be necessary to pull and refile to avoid a Second Request if staff needs more time to investigate.

In other cases, the right strategy might be to prepare a presentation to convince the reviewing agency that there is no need for a Second Request. Of course, there are approaches short of a full presentation, including, for example, placing a call to DOJ or FTC staff to let them know about the transaction and briefly explaining why there is no cause for concern.

In the initial waiting period, the DOJ, the FTC, or both, can open a preliminary investigation into the competitive effects of the transaction. In such cases, the agencies typically issue a voluntary request letter ("VRL") that calls for submission of many of the same materials that your antitrust counsel requested for its analysis. Unlike a Second Request, a VRL typically involves submission of a select number of documents and data files—perhaps dozens or hundreds of documents—not millions. It is also important to know that a VRL is only nominally "voluntary." If a company does not respond, more likely than not, the requesting agency will issue a Second Request.

If the DOJ or FTC identify an antitrust concern, the primary way that they get up to speed and test that concern is to contact customers. In the agencies' view, well-informed customers are in the best position to understand how they would likely respond to a price increase, the viability of alternative products or suppliers, and other competitive facts. VRLs typically include a request for top customer lists for each overlap product, including customer contacts. Before submitting the customer list to the DOJ or FTC, the parties should develop a customer outreach plan that identifies top customers or customers that are likely to lodge a complaint with the DOJ or FTC. The plan also should include talking points for executive or manager outreach that explains the benefits of the deal for the customer's business and alerts the customer to expect a call from the agency. The company should inform antitrust counsel about any feedback from customers.

As noted above, the fact of an HSR filing and the documents that the parties submit to the agencies are confidential.[11] However, before the DOJ and FTC begin making calls to customers, competitors, and other marketplace participants, you should prepare for news of the deal to become known in the industry, or even leak to the press, if the company has not already announced the transaction.[12]

## Responding to a Second Request

### *The Mechanics of the Response*

A company's first Second Request can be an overwhelming experience. Because antitrust cases are fact intensive, they can require production of large numbers of documents and vast amounts of data from the merging parties. In addition, because a Second Request occurs in the context of M&A, time is usually of the essence. Antitrust counsel can typically handle the "heavy lifting," but in our experience, it is worthwhile to identify a point person to be on call to help outside counsel track down information, set up calls with business personnel, follow-up internally, and transmit documents and data.

It is also important to understand that a Second Request differs from a litigation subpoena in several important ways. Although the agencies will negotiate their requests (to a degree), unlike in litigation, there is no objective authority (*i.e.*, a judge) to discipline what may seem to be unreasonable requests. Second, the agencies have more leverage than a plaintiff in private litigation because the statutory waiting period that forces the merger review to a conclusion does not begin to run until the parties comply with the Second Request.

Once the Second Request arrives, the company should suspend its document retention policy to ensure that the company is maintaining responsive materials. Antitrust counsel can work with you to implement a litigation hold that is broad enough to preserve the relevant data, but not so broad that it overwhelms the company's data systems.

Second Requests have four types of requests, detailed below. Each request type will have a different work stream and calls for distinct engagement with the agency. You should bucket requests into three categories: requests that the company can fulfill, requests for which the company does not have information, and requests that are unduly burdensome. It is this last category that needs to be the focus of modification negotiations with the agency.

1. **"All documents" requests.** "All documents" requests call for collection of "all documents" related to particular subjects such as business plans, competition, entry, sales, efficiencies, etc. The parties and the reviewing agency typically negotiate a custodian list from whom to collect, review, and produce responsive documents. The company (or outside counsel) will need to retain an e-discovery vendor to assist with the document collection, production, and review, and to decide on a strategy for document review. In most Second Requests, predictive coding balances a client's need for speed, cost, and precision.

2. **Single document requests.** DOJ and FTC require that the parties produce single copies of certain documents such as board minutes, financial statements, or company policies.

3. **Data requests.** A Second Request will include broad requests to identify and produce vast amounts of data from the company. Parties and the agencies typically meet to discuss data sources and agree upon a more limited (but still very broad) list of data sets to produce. The agencies' data requests may call for production of sales, transactions, marketing, bid, win/loss, costs, IP, financial, procurement, or other data. In recent years, data productions have become more burdensome than the document productions.

4. **Interrogatories**. Second Request interrogatories may require the parties to identify and describe their products, detail projected efficiencies, and indicate whether companies have entered, exited, or expanded in recent years, among other issues.

The most common way to limit the scope of a Second Request is to agree to a list of employees ("custodian list") from whom the company will produce documents. In exchange for agreeing to modify the Second Request, including agreeing to a custodian list, the DOJ and FTC typically require that the parties enter into a Timing Agreement. A Timing Agreement is an agreement between the parties and the agency setting forth their obligations during the investigation and deadlines for concluding the merger review. The Timing Agreement may identify the custodians whose files the company must search, data it must collect, the number of depositions allowed, dates or volumes for rolling productions, priority requests, and the schedule for any meetings with agency leadership. The agreement does not override the HSR Act but sets intermediate deadlines and commits the parties not to close their transaction for a certain period beyond the statutory 30-day waiting period following compliance with the Second Request. The model FTC Timing Agreement includes a 60-90 day post-Second Request review period whereas the DOJ's is 60 days. During the COVID-19 crisis, the agencies have added 30 additional days to the post-compliance periods in their model timing agreements, *i.e.*, FTC is 120 days, DOJ is 90 days.

For the agencies, a Timing Agreement allows staff to focus on their examination of the merits of the transaction without simultaneously having to prepare a case for possible litigation. For the parties, in exchange for agreeing to delay their transaction, the agency will narrow the Second Request, the number of depositions, and other aspects of an investigation. Therefore, while parties can decline a Timing Agreement, such a decision comes at a price: the agency may be less willing to grant modifications to the Second Request, commit to a cap on the number of depositions, or complete the review within a certain time.

It can take anywhere from three to five months to respond to a Second Request, depending on the issues involved in the review, and sometimes substantially longer. For example, it will take less time to complete a Second Request response involving a single product in a single market or a discrete set of issues compared to a merger review involving hundreds of local markets or dozens of products.

### *What Happens at the DOJ or FTC While Merging Parties Are Complying with a Second Request?*

- Staff completes more interviews with customers, competitors, or other marketplace participants.
- Staff reviews the parties' document submissions.
- In-house DOJ or FTC economists review the parties' data submissions and attempt to model the effects of the transaction.
- Staff issues and obtains discovery from third parties (*e.g.*, customers, competitors, others).
- Staff takes depositions of the merging parties' senior leadership or other personnel.
- Staff lawyers and economists explore theories of anticompetitive harm.
- Staff briefs agency management about its review.

## What Strategic Decisions Must the Company Make During a Second Request?

### *Economists*

As noted above, the DOJ and FTC have in-house economists that will pour over data to develop economic models that predict what will happen to prices, output, or other indicia of competition post-closing. At both agencies, the economists also make their own recommendations about a challenge to the transaction. Economics involves as much art as it does science, and it therefore will be important for the parties to have their own economic expert to analyze the same data (so they know what the agencies' economists are seeing), engage with the agencies' economists, and develop their own analysis about why the transaction will not harm competition.

Whether, when, and who to hire as an economic expert is among the most important decisions in the merger review process. While the input of an economist can be critical, economic analysis is data intensive and complex, and therefore time consuming and costly. Experienced antitrust counsel, working with the economist, can help you evaluate whether and when to complete certain work, balancing advocacy with cost. Economists also can help the company compile data for its Second Request response.

Of course, not every matter requires an

economist. For example, it is not necessary to retain an economist in a deal with low antitrust risk that is likely to be cleared during the initial waiting period. In contrast, in the case of a sure Second Request, the parties should consider retaining an economist as early as possible to help with early risk analysis and to get a jump-start on advocacy before the agencies.

If synergies or efficiencies are a key motivation for the transaction, the company also should consider whether to hire a separate efficiencies consult that can assist the company with its efficiencies planning. The agencies' merger guidelines credit certain efficiencies more than others and an efficiencies consultant experienced with agency reviews can help the merging parties prepare a report to document those facts.

### *Advocacy*

In addition to playing defense (the Second Request response), the parties need to consider their offense (advocacy). During the Second Request, counsel for the parties should have regular communications with agency staff (and their economists) to understand what competition concerns, if any, staff has identified. Groups within the agencies, and even individual staff lawyers, vary in how open they are about the competition concerns.

Counsel and the parties must consider what course they should take to respond to any of staff's concerns. Depending on the nature of the concerns, potential strategies include lawyers' and/or economists' presentations to staff, offering staff the option to interview businesspeople, submitting documents or data that address the concerns, or preparing written advocacy such as letters, white papers, or economic papers. Although the nature of any advocacy should be tailored to the concerns at issue, antitrust advocacy is typically detailed and well-sourced, heavily relying on the parties' own documents and data—and other market realities—as the basis for the arguments as to why the transaction is unlikely to substantially lessen competition.

Of course, experienced antitrust counsel often can anticipate many of the issues that the staff is likely to raise. In deals with significant antitrust risk, it is often advisable to begin gathering evidence, drafting white papers, and preparing economic analysis, early in the review—sometimes even before the HSR filing.

### *Further Customer Engagement*

Although a number of elements influence agency decisions to challenge a transaction, customer complaints/concerns are a key factor.[13] Agency staff will refuse to identify the source of any customer complaints, though most staff will indicate that a complaint exists and attempt to characterize the nature of the complaint, at least at a high level. Therefore, after initial customer outreach during the waiting period, it is often advisable to stay in contact with customers about their conversations with the agency.

To the extent customers voice concerns, the merging parties should consider how to resolve those concerns to avert an agency challenge. Depending on the complaint, examples include extending existing contracts or prices, agreeing to long-term supply, guaranteeing access to certain products or technology, or setting minimum quality standards, among other things. Although the agencies are skeptical of private agreements, they can be effective because the DOJ and the FTC rarely litigate a merger case without witnesses (usually customers or competitors) to testify about competitive harm that could occur in the marketplace.[14] Of course, the business will need to weigh the impact of a private agreement on the deal value.

The DOJ and FTC also understand that customers (and particularly competitors) sometimes oppose a transaction for reasons that are ill informed, self-serving, or unrelated to the antitrust laws.[15] Understanding the nature of customer complaints will help counsel explain, if true, why third-party concerns are unfounded.

It may become advisable to obtain letters of support or declarations from customers showing that customers have plenty of competitive alternatives, among other facts. Written customer support serves four purposes. First, it increases the agency's litigation risk, demonstrating that there are customers who support the deal and believe there is sufficient competition for their business, which in turn may make the agency question whether to bring a case at all. Second, it may raise doubt in staff's mind about the veracity of the remaining customers who oppose the deal. Third, in the event there is litigation with the agency over the merger, it will be more difficult for a customer to walk away from its position in a written support letter or declaration. Finally, it may neutralize any written support that the agency obtains from customers.

### *Remedies*

If the parties are obliged to offer a remedy or a remedy is likely, the parties and counsel should plan for the remedy as early as possible. Legal counsel should direct remedy planning so that it is likely to satisfy the legal remedy requirements that DOJ and FTC have established and therefore protected by the attorney-client privilege. Although DOJ and FTC remedy policy could fill its own book, there are a few key principles to know.

**Types of Remedies.** Remedies can be either "structural," typically meaning a divestiture of some kind, or "behavioral," meaning the merged company agrees to take certain actions or refrain from conduct.[16] Both the DOJ and FTC have a "strong preference" for structural divestitures to cure anticompetitive harm in mergers.[17] The agencies expect the remedy to replace fully and immediately the competition allegedly lost as a result of the transaction. The agencies prefer divestitures of ongoing business units (and not just contracts, limited assets, etc.), although just 40% of FTC structural divestitures involve divestiture of an ongoing business, as opposed to selected assets.[18]

Absent unique circumstances, neither the DOJ nor FTC in the current administration are likely to seriously consider a standalone behavioral remedy.[19] The FTC's 2017 remedy study reported that it required structural relief in 87% of all horizontal merger remedies in the study period (2006-2012).[20] It is also important to know that the agency may demand that the divestiture is broader than the product or geography at issue if the agency believes that a broader product portfolio or geographic footprint is necessary for the divestiture buyer to compete effectively.

If a divestiture is necessary, the parties will need to consider:

- whose assets will be divested (the buyer's or the seller's or sometimes, portions of both);
- what assets will go into the package (tangible and intangible);
- which employees are necessary to the divested business;
- what additional products or services must go in the divestiture;
- how best to separate the business;

- what other products or services are produced in or sold from any divested facilities;
- the extent to which relevant contracts could be assigned to a divestiture buyer;
- when and what type of sales process they should conduct;
- what transition services or supply arrangements, if any, are necessary; and
- who are the most viable buyers of the divested assets.

**The Goldilocks Problem: Identifying a Divestiture Buyer.** In addition to vetting the divestiture package, the agency will expect to closely vet the potential buyer, a process that has become lengthier over time following several high-profile failed divestitures. The focus of the agency's inquiry will be the buyer's experience in the industry, financial capability, business acumen, existing personnel capabilities, facilities and assets, intellectual property rights, product portfolio, R&D capabilities, experience obtaining regulatory approvals related to the divested products (if relevant), independence from the merging parties, and intent to use the divestiture assets to compete in the relevant market. If the divestiture buyer already sells competing products, the agency will investigate whether its acquisition also would create competitive concerns. In some cases, it is difficult to find a buyer with the right level of experience, but that does not create an independent competitive problem.

**Buyer Upfront.** Divestitures can involve an upfront buyer or a post-order buyer. In the former, the parties identify an agency-approved buyer and negotiate and execute a purchase agreement before finalizing the settlement documents with the agency. With a post-order buyer, the parties agree to divest an asset package to an agency-approved buyer within a certain period following the settlement with the agency. In such cases, the parties may close their underlying transaction and agree to hold the divestiture assets separate (*i.e.*, not integrate those assets with the merged entity) until an approved buyer is identified and the divestiture sale can occur. The FTC has required an upfront buyer in nearly 70% of its structural divestitures.[21] Buyer upfront settlements can add significant time the length of a review therefore should be factored into the overall transaction timeline.

**Fix-it-First.** In some cases, the parties should consider a "fix-it-first" remedy. Under this strategy, the parties implement a remedy (typically a divestiture) to preempt a long agency review and settlement. A fix-it-first remedy can be signed-up before an HSR filing and may be conditioned on clearance of the main transaction. A fix-it-first remedy can be attractive if there is an obvious antitrust risk that is very likely to result in a divestiture. Although the agencies typically still investigate the merger and the divestiture, a fix-it-first remedy may shorten the investigation and decrease the likelihood of litigation.[22]

Of course, a fix-it-first remedy is not without risk. Like with all divestitures, the agencies will closely vet both the asset package and the buyer. If either does not pass muster, the merging parties may have to "litigate the fix," find another buyer, or renegotiate the asset package if it could not build flexibility into the divestiture agreement. Historically, DOJ has been more accepting of fix-it-first remedies than the FTC,[23] but the FTC also has settled fix-it-first transactions via consent decree.

 

## How Does a Merger Review End?

Near the end of the review period, typically in the post-Second Request compliance period, the parties will have meetings with agency staff in which staff will indicate whether there are concerns it has been unable to resolve, and whether it will recommend a challenge to a merger. If there are no such concerns, staff will close the investigation (or let timing expire) and the parties can consummate their transaction. If staff has concerns, the parties should consider whether to submit more advocacy, make an appeal to agency leadership, offer a remedy to resolve staff's concerns, or abandon the transaction. Throughout a merger review, staff will have had regular meetings with agency leadership about the status of the investigation.[24] Therefore, more often than not, agency leadership is inclined to agree with staff's recommendation. However, in some cases, agency leadership may give greater weight to litigation risk and antitrust policy considerations or direct staff to reevaluate certain issues.

If the parties and the agency cannot work out an agreement to resolve their concerns, then either the parties abandon the transaction or the agency may seek a court order to block the transaction.

## How Does Merger Review Differ if the Transaction Is Not HSR Reportable?

Although there are many differences for transactions that are not HSR reportable, the primary difference is that the parties are not prohibited from closing the transaction until they receive antitrust clearance. Nevertheless, when or if the DOJ or FTC find out about a non-reportable transaction, they have authority to investigate, just like in an HSR reportable deal. If the investigation occurs prior to closing (or sometimes immediately after closing), the DOJ or FTC might ask the parties to hold the acquired assets separate until the agency completes its investigation. If the parties refuse, the agency might seek a temporary restraining order and preliminary injunction in court to prevent the buyer from comingling the assets and preserve the agency's ability to unwind the transaction if necessary. In other cases, the agency will send a letter to the buyer warning it of the risks of closing and/or integrating the business.

The risk of a pre-closing antitrust investigation in a non-reportable transaction might be low if the parties plan to "sign and close." However, if there will be some period between signing and closing, the parties should consider how to allocate the risk of a pre-closing antitrust investigation in the transaction documents. In some cases, it may be advisable to notify the DOJ or FTC about a non-reportable transaction, particularly if the agency is likely to find out about and investigate the transaction, and the parties want to resolve antitrust issues prior to closing.

## Best Practices for Ensuring a Smooth Merger Review

1. ***Identify Merger Control Filings Early.*** Understanding where you have to make merger control filings will be key to managing internal expectations. Filing requirements and review periods differ dramatically, and knowing where you need to file will allow you to get a head start on those filings that require more upfront work (*e.g.*, Europe and China).

2. ***Manage the Review Globally***. If your deal has multiple global antitrust filings, it is also important to develop a comprehensive timeline and strategy to ensure that you are not making inconsistent arguments to the various antitrust agencies. Each agency will conduct its own investigation, but they coordinate on evidence, argu-

ments, and remedies. Therefore, you will be at a disadvantage if you do not have a globally coordinated strategy. Moreover, global coordination can help minimize the impact of the flood of data and document requests that will be necessary to complete the filings.

3. ***Do the Homework***. Spending the time to conduct a proper antitrust analysis minimizes the risk of surprises during the review, and will help the company make informed decisions about the antitrust risk allocation in the transaction agreement.

4. ***Manage the Documents***. Documents (particularly the Item 4(c) and 4(d) documents) play a critical role in investigations and you should assume that a DOJ or FTC staff lawyer will read every document in the company. Documents should always be truthful and accurate, but avoid characterizations, hyperbole, claims, or terms-of-art that could be misinterpreted by agency lawyers, reading documents out of context.

5. ***Due Diligence & Integration Planning***. The business will be excited about the deal and feel pressure to hit the ground running in order to meet post-deal targets. However, until closing, the parties must continue to operate as independent companies and not share competitively sensitive information. Unlawful premerger coordination (known as "gun jumping") or information sharing can lead to an independent agency investigation, and even slow agency review of your main deal. Experienced counsel can help the company accomplish its diligence and integration planning goals without running afoul of the antitrust laws.

6. ***Have a Customer Strategy***. Customer complaints are a leading reason that deals end up in long investigations. Your strategy should include a communications plan to educate customers about the benefits of the deal, a strategy to neutralize illegitimate or self-serving complaints, as well as a strategy for resolving customer concerns, if any.

7. ***Do Divestiture Planning Early*** (if relevant). If the transaction has significant antitrust risk, before signing up the deal, the company should consider whether there is a palatable divestiture, the problem assets can be separated, and there is a divestiture buyer that is likely to pass agency review. Waiting until the end of a review to develop an asset package and marketing plan may rush the company, leave value on the table, or extend the length of the review. Divestiture planning needs to be balanced with the risk that the DOJ or FTC uncover your plans before you have exhausted efforts to keep the assets at issue. Once you go to market with a divestiture package, you should expect the agency to hear about the divestiture from the marketplace.

*The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.*

**ENDNOTES:**

[1]Products are complements if they are not inputs to each other, their demand rises and falls together, and a price increase of one product decreases the demand for the other product. For example, if the price of electric-car batteries increases, car manufacturers might purchase fewer electric motors too. Diagonal mergers combine an input supplier and a downstream rival of the input supplier that does not use the input; for example, a manufacturer of gasoline-powered cars acquires a manufacturer of electric-car batteries.

[2]Comments of the American Bar Association Antitrust Law Section on the U.S. Antitrust Agencies' Draft Vertical Merger Guidelines, at 3 (Feb. 22, 2020), https://www.americanbar.org/content/d

 

am/aba/administrative/antitrust_law/comments/february-2020/comment-22420-ftc-doj.pdf.

[3]Both the DOJ and FTC have authority to review mergers (and HSR filings are submitted to both), but only one agency will investigate. The DOJ and FTC rely on an agreement between them to decide which agency reviews, typically based on prior experience. For example, DOJ traditionally handled matters involving airlines, health insurance, beer, cable and satellite television, and steel, among other industries, and the FTC handled matters involving airframes, automobile parts, building materials, chemicals, energy, hospitals, medical devices, pharmaceuticals, certain consumer-packaged goods, grocery stores, and retail stores, among other industries. The process by which DOJ or FTC takes jurisdiction is known as clearance. Despite the clearance agreement and precedent, clearance disputes are common because there are industries in which both or neither agency has experience. These include computer hardware and software, Internet-based services, certain defense products, construction materials, and agriculture, among others. In some cases, both agencies may investigate until they can resolve clearance. Only one agency can issue a Second Request.

[4]This maximum civil penalty applies to all violations of the HSR Act, for example, to a failure to file a transaction that must be notified.

[5]For cash tender offers and bankruptcies pursuant to Section 363(b) of the Bankruptcy Code, the initial waiting period is 15 days. *See* 15 U.S.C.A. § 18a(b)(1)(B) and 11 U.S.C.A. § 363(b)(2)(B).

[6]DOJ & FTC, Hart-Scott-Rodino Annual Report, at Appendix A (FY 2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf [Hereinafter 2019 HSR Annual Report].

[7]*See* 15 U.S.C.A. § 18a(h) ("Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.").

[8]FTC, Early Termination Notices, https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices.

[9]In the case of a cash tender offer or bankruptcy, the agency has 10 days to complete its review once the buyer has complied with its Second Request. FTC, Premerger Notification and the Merger Review Process, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review.

[10]2019 HSR Annual Report, at 2.

[11]Also, if there is litigation over the merger, the confidentiality of the parties' documents will be subject to a protective order and, if there are disputes, review by the judge. Although courts are amenable to protecting truly confidential material, most courts view openness as fundamental to the judicial process. A company should expect that at least some sensitive business documents may be cited in court filings or used in open court. *See* 15 U.S.C.A. 18a(h) (noting that HSR confidentiality protections do not extend to judicial proceedings).

[12]It is possible to ask the DOJ or FTC to conduct interviews without mentioning the parties to the deal, but staff will say that it hampers its ability to conduct a thorough investigation, and therefore may result in a longer review. It also may not be difficult for knowledgeable marketplace participants to deduce why the agency is calling.

[13]In vertical transactions, complaining customers also might be your competitors.

[14]*See e.g.*, Response of Plaintiff U.S. to Public Comment on the Proposed Final Judgment, *U.S. v. Learfield Commc'ns, LLC*, Case No. 1:19-cv-00389, at 14 (D.D.C. Feb. 3, 2020), https://www.justice.gov/atr/case-document/file/1243546/download (noting that the merging parties "unilaterally implemented several irrevocable changes to . . . the contractual rights of employees and customers . . . [that] increased the [DOJ's] litigation risk for seeking to enjoin the transaction").

[15]DOJ & FTC, Horizontal Merger Guidelines,

at § 2.2.2 (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2i.

[16]Examples include information firewalls, forced arbitration, compulsory licensing, access or fair dealing requirements, and supply agreements, among others.

[17]Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., Remarks at the Federal Telecommunications Institute's Conference in Mexico City (Nov. 7, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute ("The Division has a strong preference for structural remedies over behavioral ones.").

[18]FTC, The FTC's Merger Remedies 2006-2012, at 14 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[19]Both agencies sometimes require temporary behavioral commitments to effectuate a structural divestiture, *e.g.*, a supply agreement, firewall, or license.

[20]FTC, The FTC's Merger Remedies 2006-2012, at 13 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

[21]*Id*. at 14.

[22]Fix-it-first also can be attractive if there are other regulatory approvals required for the divestiture transaction, for example, foreign direct investment laws.

[23]DOJ, Antitrust Division Policy Guide to Merger Remedies, 26-28 (Oct. 2004), https://www.justice.gov/atr/page/file/1175136/download ("The Division does not discourage acceptable fix-it-first remedies.").

[24]The agencies have different leadership structures and organization. The DOJ, a cabinet-level department in the executive branch, is led by the assistant attorney general for antitrust, who reports to the attorney general and is supported by a number of deputy assistant attorneys general. The FTC is an independent agency with five president-appointed commissioners who serve seven-year terms. No more than three commissioners can be from any one political party. The two FTC departments (known as bureaus) that have the most involvement in merger reviews are the Bureau of Competition and Bureau of Economics. Each bureau has a director and several deputy directors.