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Merger Control

USA – Law & Practice

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Law & Practice

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Section 7 of the Clayton Act (15 U.S.C. § 18) sets forth the substantive legal standard under which merger and acquisition transactions that affect United States commerce are reviewed. Section 7 prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) ("HSR Act"), along with the rules and regulations promulgated thereunder ("HSR Rules"), set forth the procedural framework for the merger control regime, including the requirements and thresholds for filing pre-merger notifications, exemptions from filing, the relevant waiting periods, and penalties for noncompliance. In addition, Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) ("FTC Act") grants the Federal Trade Commission ("FTC") the authority to challenge acquisitions that would constitute an "unfair method[s] of competition."

The Sherman Act may also be applicable to merger transactions. Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits agreements in restraint of trade and Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits monopolisation or attempts to monopolise. However, enforcement under the Sherman Act is less common than under Section 7 of the Clayton Act largely because the substantive elements under Section 7 are much less stringent than those of the Sherman Act. Finally, each of the 50 individual states has its own respective antitrust laws, which typically mirror the substantive elements of the federal antitrust laws.

There are no separate U.S. antitrust laws for a foreign transaction, which may be subject to the Clayton Act, HSR Act, FTC Act, and/or Sherman Act, if the transaction has the requisite effect on U.S. commerce. Mergers involving certain industries are subject to industry-specific laws and regulations. For example, most bank mergers are subject to the Bank Merger Act (12 U.S.C. § 1828(c)) or the Bank Holding Company Act (12 U.S.C. § 1841 *et seq.*), which exempt most bank merger transactions from the HSR Act and contain substantive standards that are similar, but not identical, to Section 7 of the Clayton Act.

The two U.S. federal antitrust enforcement agencies with primary responsibility for enforcing the federal antitrust laws are the FTC and the Antitrust Division of the U.S. Department of Justice ("DOJ"). The FTC and DOJ have "concurrent" jurisdiction, meaning either agency is competent to review a transaction, but the agencies decide between them whether the FTC or the DOJ will review any particular transaction – both agencies cannot review the same transaction. The agencies make this determination based on prior industry experience. For example, the FTC has expertise in pharmaceuticals and chemicals, and the DOJ has expertise in telecommunications and airlines.

In addition, individual state attorneys general may have jurisdiction to enforce both federal and state antitrust laws. It is relatively rare for a state attorney general to bring a merger investigation of challenge on its own, but not uncommon for one or more to participate in an FTC or DOJ merger investigation that directly affects their state. Private parties, such as the merging parties' customers and possibly competitors, also have the right to bring enforcement actions seeking to block mergers if they can demonstrate appropriate injury, but such challenges are rare.

2. Jurisdiction

2.1 Notification

The HSR Act requires parties to certain mergers and acquisitions to submit a Notification and Report Form with information about their businesses and wait a specified period of time before closing the transaction. There are specific jurisdictional thresholds that must be met for a transaction to be reportable, as well as a number of exemptions to the notification requirements. The HSR Act's jurisdictional thresholds apply regardless of the industry. There are no special thresholds for particular sectors.

Non-Reportable Transactions

The HSR Act is a procedural statute and even if a transaction is not reportable under the HSR Act, that does not preclude the DOJ or FTC from investigating the transaction. Non-reportable transactions may come to the attention of the agencies through the press or through third-party complaints. If an agency believes that a proposed non-reportable transaction may adversely affect competition, it may request that the parties suspend closing pending an investigation by the agencies. It may also seek a preliminary injunction to prevent parties from closing a non-reportable deal that raises substantive concerns. If an agency concludes that a consummated transaction has substantially lessened competition, it may seek to unwind the transaction or other appropriate remedies. There is no statute of limitations on the agencies' ability to investigate a transaction.

2.2 Failing to Notify

Parties who fail to notify a reportable transaction are subject to civil penalties of up to USD16,000 per day. The agencies regularly monitor public sources for unreported transactions and will take action against offending parties when warranted. In determining whether to take action, the agencies consider various factors, including whether:

- the failure to file was the result of understandable or simple negligence;
- a corrective filing was made promptly after the violation was discovered;
- the parties have realised any benefit that they would not otherwise have realised; and/or
- the parties have implemented adequate measures to prevent future violations.

The agencies typically bring one or two enforcement actions a year. The FTC's website keeps a comprehensive list of HSR enforcement actions dating back to 1984.

2.3 Types of Transactions that are Caught

The HSR Act applies to transactions involving the acquisition of voting securities, NCIs, and/or assets. The HSR Act can apply regardless of whether the transaction involves the transfer of control, confers a majority or a minority interest, creates a joint venture, or constitutes a complete merger of two entities. Acquisitions of voting securities or assets that meet the jurisdictional thresholds and do not fall within an exemption, are subject to the HSR Act's notification requirements, regardless of whether there is a change of control. Thus, acquisitions of minority or other interests that do not confer control are covered by the Act. However, acquisitions of a minority interest in a non-corporate entity are not subject to the HSR Act's filing requirements.

- **Voting Securities**. The HSR Rules define "voting securities" as any securities that presently or upon conversion entitle the holder to vote for the election of directors of the issuer. The HSR Rules exempt from the filing requirements the acquisition of securities that do not presently confer voting power. Thus, the acquisition of convertible securities, options, and warrants are exempt from the HSR Act's notification requirements. However, a filing would be required prior to converting or exercising such financial instruments if their conversion or exercise would result in the acquirer holding the present right to vote for directors, provided the jurisdictional thresholds are met and no exemptions apply.
- **Non-Corporate Interests**. A party that acquires an NCI, such as an interest in a partnership or a limited liability corporation, may also have to file if the acquisition will confer "control" of the acquired entity. The test for control with respect to NCIs is whether the acquiring person would be entitled to 50% or more of the profits of the entity, or of the entity's assets in the event of dissolution.
- **Assets**. Although the HSR Act and HSR Rules do not expressly define the term 'asset', the agencies have broadly interpreted 'asset' to include both tangible and non-tangible goods. For example, the agencies have considered the acquisition of intellectual property to be a reportable event when the value of the intellectual property exceeded the HSR Act's jurisdictional thresholds and no exemptions applied. However, the acquisition of a non-exclusive license is not considered to be the acquisition of an asset.
- **Internal Restructurings**. Internal reorganisations generally do not require notification because they fall under the exemption for "intra-person transactions."
- **Acquisitions Involving Foreign Companies or Assets**. Acquisitions by foreign companies of U.S. voting securities, NCIs, or assets are subject to the same standards as the acquisition by a U.S. acquirer. Acquisitions of foreign issuers, NCIs or assets (by either U.S. or foreign acquirers) are also generally subject to the HSR Act, but may be eligible for an exemption, as discussed below.

- **Formations of Joint Ventures**. The formation of a joint venture is subject to the requirements of the HSR Act if it meets the jurisdictional thresholds and no exemption applies. In analysing whether the formation of a joint venture is subject to the HSR requirements, the persons contributing to the joint venture are deemed to be acquiring persons, and the joint venture is deemed to be the acquired person. For joint ventures where the size-of-person test is applicable - i.e. where the acquiring person will hold an aggregate amount of voting securities and assets valued in excess of USD76.3 million (as adjusted) but not in excess of USD305.1 million - the HSR Rules provide a modified size-of-person test.

The size-of-person test for joint ventures is met if either:

- the acquiring person has annual net sales or total assets of USD152.5 million (as adjusted) or more, at least one other acquiring person has annual net sales or total assets of USD15.3 million (as adjusted) or more, and the joint venture will have total assets of USD15.3 million (as adjusted) or more; or
- (the acquiring person and at least one other acquiring person has annual net sales or total assets of USD15.3 million (as adjusted) or more, and the joint venture will have total assets of USD152.5 million (as adjusted) or more.

Exemptions

- Parties to a transaction that satisfies the jurisdictional thresholds of the HSR Act may qualify for an exemption and thus not be required to make an HSR filing. Common exemptions include: acquisitions of goods and realty in the ordinary course of business;
- acquisitions of voting securities solely for the purpose of investment, which applies only if the acquirer will hold not more than 10% of the issuer's voting securities;
- intraperson transactions, where the acquiring person and the acquired person are majority-owned by the same person;
- stock splits and dividends that do not increase the percentage of stock owned by any person;
- acquisitions of certain real property;
- certain acquisitions of carbon mineral reserves; and
- acquisitions of foreign issuers and assets.

2.4 Jurisdictional Thresholds

The HSR Act sets forth three tests for determining whether a transaction is required to be notified to the FTC and DOJ: the size-of-transaction test, the size-of-person test, and the commerce test. The FTC adjusts the original dollar thresholds of the HSR Act annually to reflect changes in the gross national product. The adjusted dollar amounts referenced throughout this chapter refer to the dollar thresholds that went into effect on February 20, 2015.

The size-of-transaction test is satisfied if, as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-corporate interests (NCI), and assets of the acquired person valued at more than USD76.3 million (as adjusted). Importantly, the test is not what is being acquired in the instant transaction, but what the acquiring person will hold as a result of the instant transaction.

The size-of-person test is satisfied if one of the parties had sales or assets of at least USD152.5 million (as adjusted) in its most recent fiscal year and the other party had sales or assets of at least USD15.3 million (as adjusted). The size-of-person test does not apply, however, if as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of USD305.1 million (as adjusted). The commerce test is satisfied if either of the parties to a transaction is engaged in U.S. commerce or in an activity affecting commerce. This test is almost always satisfied.

If a party acquires an entity or assets constituting substantially all of the assets of an operating unit after its most recent fiscal year, the entity's or operating unit's revenues and assets should be reflected in the calculation of whether the jurisdictional thresholds are met. Similarly, if a party sells an entity or operating unit after its most recent fiscal year, the sales and assets of that entity or operating unit should not be reflected in the jurisdictional threshold calculations. The acquisition or sale of assets that do not constitute substantially all of the assets of an operating unit should not be reflected in the calculation.

The HSR Rules set forth specific methods for calculating whether the size-of-transaction and size-of-person tests are met.

- **Size of Transaction**. The HSR Rules set forth specific methods for valuing voting securities, NCI and assets. The value of publicly traded voting securities is the higher of the market price or the acquisition price. If the acquisition price of publicly traded shares has not been determined, the value is the market price. For non-publicly traded voting securities, the securities are valued at their acquisition price or, if the acquisition price has not been determined, at fair market value. Fair market value must be determined in good faith by the board of directors (or its designee) of the acquiring person. NCI are valued in the same manner as non-publicly traded voting securities. Assets must be valued at their fair market value, or at their acquisition price if the acquisition price is determined to be greater than fair market value.
- **Size of Person**. Generally, a person's annual net sales are as stated on its last regularly prepared annual statement of income, and its total assets are as stated on its last regularly

prepared balance sheet. These financial statements must be as of a date not more than 15 months old, and must have been prepared in accordance with procedures normally used by the filing person.
- **Sales or Assets booked in a Foreign Currency**. When sales or assets are booked in a foreign currency, the parties should convert those sales or assets from foreign currency to U.S. dollars using the Interbank Exchange Rate. For an annual statement of income, use the average exchange rate for the year reported. For a regularly prepared balance sheet, use the exchange rate in effect for the date on the balance sheet. For a pro-forma balance sheet, use the exchange rate for the date the pro-forma balance sheet is created. For the acquisition price, use the exchange rate for the date of closing. For a fair market value, use the exchange rate for the date the fair market valuation is created.

2.5 Foreign-to-Foreign Transactions

Transactions involving parties outside the U.S. are subject to the HSR Act if there is a sufficient nexus with the U.S.

U.S. Acquirer/Foreign Issuer

The HSR Rules exempt acquisitions where a U.S. person purchases voting securities of a foreign issuer unless the issue r (including any entities it controls) either holds assets located in the U.S. having an aggregate value of over USD76.3 million (as adjusted) or made aggregate sales in or into the U.S. of over USD76.3 million (as adjusted) in its most recent fiscal year. A "foreign issuer" is defined as "an issuer which is not incorporated in the U.S., is not organised under the laws of the U.S. and does not have its principal offices within the U.S." If the acquisition is by a foreign person, the acquisition is exempt unless the transaction will confer control (50%+) of the issuer and the issuer either holds assets located in the U.S. having an aggregate value of over USD76.3.9 million (as adjusted) or made aggregate sales in or into the U.S. of over USD76.3 million (as adjusted) in its most recent fiscal year.

Foreign Acquirer/Foreign Issuer

The acquisition by a foreign person of a foreign issuer is exempt unless the foreign issuer either holds assets located in the U.S. having an aggregate value of over USD76.3 million (as adjusted) or made aggregate sales in or into the U.S. of over USD76.3 million (as adjusted) in its most recent fiscal year, and the acquisition will confer control of the foreign issuer, meaning over 50% of the voting securities will be held by the acquirer as a result of the transaction.

Even if the foreign issuer whose securities are being acquired exceeds these thresholds, the acquisition will nonetheless be exempt where:

- both acquiring and acquired persons are foreign;
- the aggregate sales and total assets of both persons in or into the U.S. are less than USD167.8 million (as adjusted) in their respective most recent fiscal years; and
- the value of the voting securities held as a result of the transaction is less than USD305.1 million (as adjusted).

Acquisitions of Foreign Assets

The HSR Rules exempt acquisitions of assets located outside the U.S. unless the assets generated sales in or into the U.S. exceeding USD76.3 million (as adjusted) in the acquired person's most recent fiscal year. Even if a transaction exceeds this threshold, the HSR Rules nonetheless exempt the transaction where:

- both the acquiring and acquired persons are foreign;
- the aggregate sales of the acquiring and acquired persons in or into the U.S. are less than USD167.8 million (as adjusted) in their respective most recent fiscal years; and
- the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than USD167.8 million (as adjusted); and
- the assets that will be held as a result of the transaction are valued at less than USD305.1 million (as adjusted).

2.6 Exceptions to Suspensive Effect

If a transaction meets the HSR Act's jurisdictional threshold and no exemption applies, the parties will need to file and must suspend closing until the statutory waiting period expires or is terminated early. There are no exceptions to this suspensive effect, and the U.S. antitrust agencies do not permit a reportable transaction to close prior to expiration or early termination of the HSR waiting period. Penalties for closing prior to expiration or early termination of the HSR waiting period are the same as those described above for failure to notify a reportable transaction.

3. Procedure: Notification to Clearance

3.1 Filing Fees

The HSR Act requires all acquiring persons to pay a filing fee. The total value of the securities, NCIs, or assets to be held as a result of the transaction determines the amount of the fee. The parties must pay the filing fee to the FTC at the time of filing. The filing fees change once each year to reflect inflation. The current (2015) filing fees are as follows:

- for a transaction value between USD76.3 million and USD152.5 million, the fee amount is USD45,000;
- for a transaction value between USD152.5 million and USD762.7 million, the fee amount is USD125,000;
- for a transaction value of USD762.7 million or greater, the fee amount is USD280,000.

3.2 Information Required for Filing

If the transaction is reportable under the HSR Act, then all parties to the transaction must make an HSR filing. The HSR Rules set forth what information is required to be submitted in the notification form as well as what documents are required to be attached as exhibits to the form. Such information includes, but is not limited to, the parties' identities and the transaction's structure; the transaction agreement; financial data and other information filed with the SEC; documents prepared for evaluating and analysing the proposed transaction; revenues the parties derive from sales in or into the U.S. organised by North American Industry Classification System ("NAICS") codes, and geographic sales information for any businesses where both parties report in the same NAICS code.

In particular, Item 4(c) of the HSR notification form requires the parties to submit as exhibits all studies, surveys, analyses and reports prepared by or for officers or directors of the parties to evaluate or analyse the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. Item 4(d) required the submission of similar documents created by investment bankers, consultants or other third-party advisers. The HSR filing must be in English and if any of the submitted information is in a foreign language, all existing English versions, outlines, or summaries must be submitted. The parties must certify the accuracy of the information in the HSR filing and must submit an affidavit attesting to the transaction agreement (if applicable) and the good-faith intention to complete the transaction. The parties must either notarise the certification and affidavit or sign a declaration under penalty of perjury.

A party that files an incomplete or otherwise deficient HSR notification can be subject to a "bounce" notice, requiring the offending party to resubmit with complete and/or corrected information and thereby resetting the initial HSR waiting period, as described below. In cases where the FTC or DOJ deems that the party acted willfully in making an incomplete or deficient HSR filing, the authorities may seek civil penalties, as described above.

There is no deadline for filing a pre-merger notification under the HSR Act. However, if the merger transaction requires a notification filing under the Act, then the proposed transaction cannot be consummated until after the requisite parties have filed and the applicable waiting periods have expired or have been terminated. The parties need not have a binding agreement to make their respective HSR filings, but can do so on the basis of a letter of intent or memorandum of understanding. Moreover, a party may seek to acquire controlling shares in a public company without any agreement with the target corporation, but such acquisition may still require HSR filings.

3.3 Phases of the Review Process

For most transactions, the initial waiting period begins once all requisite parties make their respective HSR filings. The initial waiting period generally lasts 30 days, unless the parties ask for and are granted early termination. For cash tender offers and acquisitions in bankruptcy covered by 11 U.S.C. §363(b), the initial waiting period is 15 days. Also, for cash tender offers, the initial waiting period begins when only the acquiring person makes its HSR filing; the acquired party must then file within ten days after the acquiring party has filed.

The agencies can extend the initial waiting period by issuing a request for additional information or documentary material (a "Second Request"). If a Second Request is issued, the waiting period is generally extended until 30 days following substantial compliance with the Second Request by both the acquiring and acquired parties. For cash tender offers and §363(b) bankruptcy transactions, the waiting period extends for ten days following substantial compliance with the Second Request by the acquirer. Failure of the acquired party to comply with a Second Request in tender offers or acquisitions of voting securities through third parties does not affect the waiting period.

A Second Request typically seeks very detailed and expansive information about the parties' businesses and the reasons for, and likely effects of, the transaction. A model Second Request is available on the FTC's website. The parties are free to engage the authorities in pre-notification discussions, and this practice is common when the substantive issues are complex. The FTC and DOJ often welcome such early engagement because, among other things, it gives the authorities more time to review the transaction and can help avoid a Second Request or at least narrow the scope of a Second Request.

A Second Request response often comprises many gigabytes of data and the equivalent of hundreds of thousands (or even millions) of pages of documents. All foreign language documents responsive to the Second Request typically must be translated into English. In addition, the authorities may issue Civil Investigative Demands ("CIDs") to senior executives of the parties compelling their sworn testimony. Accordingly, substantial compliance with a Second Request is often an expensive, time-consuming and burdensome endeavour. Depending on the scope, the nature of the parties (how they keep their data and documents, whether they have foreign-language documents), and the resources available, substantial compliance with a full Second Request typically takes several months and costs millions of U.S. dollars in out-of-pocket legal fees and costs.

Parties often seek to modify and narrow the scope of the Second Request to alleviate the time, cost and burden of substantial compliance, and the authorities are often amenable at least to some modifications. The authorities may also seek information from third parties (typically competitors and/or customers of the merging parties) on a voluntary basis and can issue CIDs to third parties compelling the submission of relevant information.

Under the HSR Act and Rules, the parties may close when this second waiting period expires (or if early termination is requested and granted). However, for transactions raising complex or difficult competition issues, the parties often enter into a "timing agreement" with the government that tolls the second waiting period for some agreed-upon time. Timing agreements are typically used in transactions that result in some type of consent remedy (such as a divestiture) to give sufficient time for the parties and the authorities to negotiate the remedy.

As noted above, certain types of transactions (cash tender offers, acquisition of assets in bankruptcy) have shorter HSR waiting periods. Otherwise, there is no short-form, fast-track or other type of accelerated review under the HSR Act and Rules, other than requesting early termination of the waiting periods, which the authorities have full discretion to grant or not. However, the parties can engage in several practices designed to give the FTC or DOJ additional time to review the transaction initially to avoid a Second Request or at least to narrow the scope of a potential Second Request. For example, they may engage in pre-notification discussions with the authorities, as noted above. The parties also may "pull and refile" — i.e. they can withdraw their respective HSR filings and refile, which provides the government additional review time by restarting the initial 30-day (or 15-day) waiting period.

4. Substance of Review

4.1 Substantive Test

The principal substantive law governing mergers, acquisitions, and joint ventures is Section 7 of the Clayton Act. This provision prohibits mergers, acquisitions and the formation of a joint venture or transfer of a joint venture interest where the "effect" of such a transaction "may be substantially to lessen competition, or to tend to create a monopoly." Section 7 may be enforced by the Antitrust Division, the FTC, state attorneys general, or private plaintiffs, but the substantive standards applicable under Section 7 do not differ in significant respects depending on the party seeking to enforce the antitrust laws. Similarly, Sections 1 and 2 of the Sherman Act, Section 5 of the FTC Act, and state merger statutes can also be used to challenge mergers depending on the enforcing party, but again the decisional law generally applies the usual Section 7 standards.

The U.S. antitrust agencies have developed specific guidelines and a detailed analytical framework for evaluating mergers under Section 7. These guidelines were first released by the Antitrust Division in 1968, and have been periodically updated since their original publication. The current iteration is the Horizontal Merger Guidelines released jointly by the FTC and the Antitrust Division in 2010. While earlier iterations of the guidelines addressed vertical mergers as well as horizontal mergers, more recent versions, including the 2010 Horizontal Merger Guidelines, address only horizontal mergers, which account for the vast majority of mergers that raise antitrust concerns. The analysis applied by courts to challenged mergers closely tracks the agencies' framework, with many courts explicitly relying on the guidelines issued by the Antitrust Division and FTC.

The analytical framework described in the guidelines considers a number of factors in evaluating whether a merger or acquisition may substantially lessen competition:

- the extent to which the transaction increases concentration in a defined relevant market – i.e. if the transaction significantly increases concentration in a market that is already highly concentrated, the agencies may presume that the transaction will result in anticompetitive effects;
- the extent to which the transaction will eliminate direct competition between the parties ("unilateral effects");
- the extent to which the transaction will enable or encourage coordinated interaction in the relevant market ("coordinated effects");
- the extent to which entry into the relevant product market would deter or counteract any anticompetitive effects otherwise likely to result from the transaction; and
- the extent to which the transaction will produce merger-specific, verifiable and quantifiable efficiencies that do not arise from anticompetitive reductions in output or service.

The agencies have emphasised that this analysis is not linear. Rather, both the enforcement agencies and the courts apply a more sophisticated analysis under which all factors are considered in a holistic inquiry designed to answer the ultimate question of whether the transaction will substantially lessen competition. A similar analysis is applied to determine whether mergers can raise competitive concerns in other circumstances, such as where a merger does not involve direct competitors, but instead is between one firm that already competes within the relevant market and a second firm that is perceived to be a potential entrant into that market (i.e. a "potential competition" merger)

4.2 Competition Concerns

Competitive concerns may also be raised by "vertical mergers," ie mergers involving firms in an actual or potential supplier/customer relationship. While recent versions of the agencies' merger guidelines do not specifically address concerns raised by vertical mergers, the enforcers continue to review such mergers for potential anticompetitive effects. The agencies' analysis of vertical mergers is less structured than that applied to horizontal mergers, but typically focuses on whether the combined firm will have the ability and incentive to foreclose downstream rivals from access to needed inputs, or upstream rivals from access to customers or distribution channels.

4.3 Non-Competition Issues
Finally, it should be noted that while the antitrust agencies' reviews of mergers, acquisitions and joint ventures are focused only on competition concerns, these transactions may also be subject to review and approval by other federal agencies, such as the Federal Communications Commission, or foreign antitrust authorities. To the extent that they have jurisdiction, these other federal agencies and foreign authorities will participate in the merger review process, taking into account regulatory or other particular interests and concerns when reviewing the transaction.

4.4 Joint Ventures
Section 7 also applies to the formation of a joint venture or transfer of a joint venture interest. The agencies will analyse a joint venture as a merger under the general framework outlined above if:

- the participants are competitors in a relevant market,
- the formation of the collaboration involves an efficiency-enhancing integration,
- the integration eliminates all competition between the participants in the relevant market, and
- the collaboration does not end by its own terms within a certain period of time.

The agencies will seek to ensure that any legitimate collaboration between the parties within the joint venture does not cause "spillover effects" such as impermissible information exchange or other coordination between the parties involving areas or activities outside the scope of the parties' joint venture.

5. Decision: Prohibitions and Remedies

5.1 Prohibition of Transactions
If the U.S. antitrust agencies conclude that a transaction is unlikely to harm competition, they may simply allow the applicable statutory waiting period to expire, permitting the parties to close the transaction. Alternatively, the parties may request that the agencies grant "early termination" of the HSR waiting period. If the agencies grant a request for early termination, the names of the parties and the date of early termination will be published on the FTC website and in the Federal Register. In a small number of cases, the agencies may issue a "closing statement" explaining their reasoning for closing an investigation, but such statements are not routine, and the agencies are not required to issue them. Closing statements are more likely to be issued in cases with significant public interest and complex antitrust analysis.

If the antitrust agencies believe that a transaction is likely to have adverse competitive effects, the investigating agency will issue a Second Request at the conclusion of the initial waiting period, which requires the parties to submit responses to detailed interrogatories, and broad, comprehensive documents requests. The issuance of a Second Request extends the HSR waiting period until 30 days (or ten days in a cash tender offer or an acquisition in bankruptcy) after the date of compliance with the Second Request. Once the parties submit a certification of substantial compliance, the reviewing agency has a limited amount of time to determine whether or not to challenge the transaction in court.

5.2 Negotiation of Remedies
Assuming the agency's determination is adverse, the parties may discuss whether there is a remedy that would resolve the agencies' concerns while also being agreeable to the merger parties. In fact, almost all merger concerns are resolved through a negotiated consent decree or order with the reviewing agency. Where the transaction raises obvious antitrust issues, the parties may even begin these discussions at the outset of the agencies' investigation. More commonly, remedy discussions begin after the parties have certified compliance with the Second Request, and the HSR waiting period begins running again.

5.3 Typical Remedies
Merger remedies may take two basic forms: they may address the structure of the post-transaction market, or the conduct of the merged firm. In a horizontal merger, the agencies typically insist on a structural remedy in the form of a divestiture, often in combination with some conduct relief designed to ensure the effectiveness of the structural remedy. Where the antitrust agencies identify vertical concerns, the agencies are more likely to support the use of conduct remedies on a standalone basis. In cases where the agencies require a curative divestiture, they will often also require that the parties identify an "up-front" buyer of the assets or business to be divested, particularly where the parties seek to divest assets comprising less than an autonomous, ongoing business or where the assets to be divested are susceptible to deterioration pending completion of the divestiture.

5.4 Remedial Procedures
If the parties and the agencies are able to agree on a remedy, the settlement will be memorialised in a formal consent decree. The consent decree process, however, can differ depending on which agency is reviewing the transaction. At the FTC, the Commission will issue an administrative complaint detailing its allegations together with the pro-

posed settlement and a competitive analysis of the settlement. These materials are made publicly available and are subject to public comment for a period of 30 days. Once this period ends, the consent decree is finally approved by the FTC. Because the DOJ does not have an administrative litigation process available to it, the agency must seek approval of consent decrees from a federal district court. It files a similar set of documents – complaint, settlement, and competitive analysis – with the federal district court, and publishes the materials in the Federal Register. Comments from the public may be submitted directly to the court. If the court finds that the settlement is in the public interest, the court will approve the settlement. Parties are typically permitted to close the main transaction prior to completing any required divestitures, so long as they agree to maintain the assets to be divested and submit periodic reports to the agencies affirming compliance with their obligations.

If the agencies identify a concern with a merger and are not able to reach a settlement with the parties, the agencies can attempt to challenge the transaction through litigation. As a first step, the agencies will typically ask a federal district court to issue a preliminary injunction prohibiting the parties from consummating the transaction pending a full trial on the merits. The court will issue the preliminary injunction if the agencies can show that irreparable harm would result in the absence of the injunction and there is a sufficient likelihood of succeeding at trial. If the court issues a preliminary injunction, in most cases the parties will abandon the transaction rather than litigate the challenge through trial. However, the parties may also elect to litigate. Where the action is brought by the Antitrust Division, it will continue in a federal court, whereas the FTC may choose to conduct its own administrative proceeding, the results of which are subject to federal judicial review.

The FTC and DOJ actively seek remedies, and frequently challenge transactions where the merging parties are not willing to agree to sufficient remedies. In the fiscal year 2014, the Antitrust Division and FTC challenged 33 transactions. The agencies will also not hesitate to challenge transactions involving foreign parties, if they believe the transaction will result in anticompetitive effects within the U.S. For example, in 2013, the FTC challenged the acquisition of Saint-Gobain, a French industrial manufacturer, by Ardagh, a glass and metal packaging supplier based in Luxembourg, where both companies owned glass container plants in the U.S. and had significant sales in the U.S.

6. Ancillary Restraints

If a transaction subject to HSR notification is accompanied by ancillary restraints or related transactions, the agencies will also review the ancillary restraints or transactions to ensure that they do not raise antitrust issues, either independently or when viewed together with the primary transaction. Separate notifications are typically not required for ancillary restraints or related transactions unless those transactions independently satisfy the HSR criteria for filing. However, the agencies may request additional information from the parties regarding the ancillary restraints or related transactions.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third Parties' Involvement

The agencies will often seek information from third parties to facilitate their review of a transaction. These requests may ask for documents, data, or oral testimony, and may be directed at customers, competitors, and other knowledgeable industry participants or observers. This information is typically sought on a voluntary basis, although the agencies have the power to issue compulsory process to third parties, and occasionally exercise their authority when the circumstances warrant. Third parties interested in the agencies' review of a transaction may also voluntarily offer information and arguments to the agencies, and often do so on their own initiative, but the agencies are not required to take such information into account, or otherwise permit third parties to participate in the review process. While third parties have limited rights to participate in the agencies' review, as noted earlier, any private party threatened with injury may bring its own challenge to the transaction in a federal district court.

7.2 Confidentiality

Information submitted to the agencies in connection with their review of a transaction enjoys significant statutory and regulatory confidentiality protection, and the agencies take their confidentiality obligations seriously. Such information, including the fact of notification itself, is exempt from disclosure under the Freedom of Information Act, and may not be shared with state or foreign enforcement authorities or other third parties without the consent of the producing party, except under very limited circumstances. However, information may be disclosed in court documents if the agencies ultimately decide to challenge the transaction, and, of course, the merger parties' names are made public if they seek and receive early termination of the HSR waiting period.

7.3 Co-operation with Other Jurisdictions

The agencies pride themselves on the extent to which they co-operate and coordinate with their foreign counterparts on merger control issues. This co-operative relationship has been cemented by Memoranda of Understanding (MOUs) and bilateral agreements with the most active and significant foreign jurisdictions, such as the European Union and China, while co-operation with other regulators takes place on an ad hoc basis. The agencies coordinate with their counterparts not only on competition policy issues, but also on issues related to specific transactions, including timing, substantive review, and remedies. The agencies claim to have worked with other enforcers in 40% of their merger challenges over the past five years. However, the agencies may not share or discuss with foreign enforcers confidential information submitted by producing parties without a confidentiality waiver from such parties.

8. Appeals and Judicial Review

As described above, to stop a pending merger transaction, the DOJ or FTC must affirmatively bring a litigation action, typically a motion for preliminary injunction ("PI") before a federal district court. Litigation usually takes several months to nearly a year, including expedited discovery, presentation of evidence and arguments to the district court, and time for the court to make its decision. The litigating parties can appeal an adverse ruling to the appropriate federal circuit court of appeals; however, the time required to brief the matter, participate in oral arguments and await the decision of the court, can be lengthy – six months to over a year, unless the party seeks and obtains an expedited appeal. As a result, appeals from PI rulings are rare, and if the government successfully obtains the PI, the merging parties typically will abandon the transaction. Conversely, if the government loses the PI, the parties typically will be free to close the transaction; the government will be reluctant to seek an appeal due to the practical difficulties in unwinding a closed transaction. While rare, the agencies sometimes seek an appeal of the denial of a preliminary injunction, even after the merging parties have closed the challenged transaction. For example, the FTC successfully appealed in the Whole Foods/ Wild Oats merger in 2008, ultimately resulting in a settlement whereby Whole Foods divested 32 former Wild Oats stores.

The FTC has a separate administrative process that runs parallel to the PI action, pursuant to which the agency brings an administrative complaint before an FTC Administrative Law Judge ("ALJ"). The decision of the ALJ can be appealed to the full five-member Commission, and the Commission's final decision can be appealed to a federal circuit court.

9. Recent Developments

9.1 Recent or Impending Changes to Legislation

As noted above, the HSR filing thresholds adjust every year to reflect changes in inflation. Apart from these adjustments, there have not been any significant recent amendments to the HSR Act. The FTC and DOJ issue a joint annual report of merger enforcement that provides statistics regarding HSR filings and a brief description of all merger enforcement actions over the prior fiscal year. The annual report is available on each agency's respective websites.

9.2 Current Competition Concerns

The current competition concerns of both the FTC and DOJ are reflected in recent policy papers and articles written by senior officials, which are available on the respective agencies' websites. In addition, specific competitive concerns are discussed in briefs, consent orders, and other materials related to settled consent judgments, which are also publicly available to the extent not protected from disclosure under FOIA or a protective order endorsed by a court. These concerns often stem from timely issues that arise in specific industries. For example, the FTC has a strong interest in healthcare, both in the merger and non-merger context, which has become prominent due to the recent passage of the Affordable Care Act and substantial consolidation in many different segments of the healthcare industry (e.g. payors, hospitals and other providers, pharmaceuticals, medical devices).

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