MERGER CONTROL

US

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SECTION 1: Overview

1.1 Please provide a brief overview of your jurisdiction's merger control legislative and regulatory framework.

Section 7 of the Clayton Act sets forth the substantive legal standard under which mergers and acquisitions that affect US commerce are reviewed. Section 7 prohibits mergers and acquisitions where the effect of such transaction 'may be substantially to lessen competition, or tend to create a monopoly'. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) and the rules promulgated under the HSR Act provide the procedural framework for the US merger control regime, including the requirements and thresholds for pre-merger notifications. A third statute, Section 5 of the Federal Trade Commission Act, grants the Federal Trade Commission (FTC) the authority to challenge transactions that will constitute an 'unfair method[s] of competition'. The Sherman Act may also be applicable to merger transactions, and each of the individual states has its own respective antitrust laws. However, enforcement under these statutes is far less common than under the Clayton Act and FTC Act.

The two federal antitrust enforcement agencies with primary responsibility for enforcing the federal antitrust laws are the Antitrust Division of the Department of Justice (DOJ) and the FTC. The FTC and DOJ have concurrent jurisdiction, meaning that either agency has the authority to review transactions subject to the federal antitrust laws. However, both agencies cannot review the same transaction, so that in practice, the agencies will decide between them whether the FTC or DOJ will review a particular transaction, typically based on prior industry experience. In addition, individual state attorneys general may have jurisdiction to enforce both federal and state antitrust laws. Private parties also have the right to bring enforcement actions seeking to block mergers if they can demonstrate injury under

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the antitrust laws.

1.2 What have been the key recent trends and developments in merger control?

US merger enforcement has been extremely active, particularly over the past decade when antitrust leadership under the Obama administration brought an unprecedented number of merger challenges. Under Obama, the DOJ and FTC remained focused predominantly on horizontal mergers – consolidation between two firms that compete directly in the same competitive space – and were particularly sceptical of mergers between competitors selling products to customers with specialised needs. For example, in 2015, the FTC blocked *Sysco/US Foods* on the grounds that it would have combined the only two broadline foodservice distributors equipped to serve large national customers. Similarly, in 2016, the FTC successfully challenged *Staples/Office Depot* on the basis that it would significantly reduce competition in the market for the sale and distribution of consumable office supplies to large business customers in the US. And while merger enforcement occurred across a variety of industries, the healthcare industry has been a major focus of US merger enforcement in recent years. The agencies challenged several proposed transactions involving hospitals, pharmaceuticals, and health services and insurance providers, including proposed mergers between *Aetna/Humana* and *Anthem/Cigna*.

1.3 Briefly, what is your outlook for merger control and antitrust over the next 12 months, including any foreseeable legislative reform/revisions?

Recent nominations and appointments by the Trump administration may suggest that merger enforcement in the Trump administration will follow a mainstream Republican antitrust policy, which has tended to be less interventionist than Democratic administrations. However, there are signals that merger enforcement will be more active under the Trump administration than under past Republican administrations. US regulators recently challenged *AT&T/Time Warner*, despite the fact that the government has not attempted to block a vertical merger in decades. And though challenges to transactions that have received HSR clearance are extremely rare, US enforcers also sued to unwind Parker-Hannifin's acquisition of Clarcor, a deal that previously received HSR clearance. Both actions suggest that the Trump administration is unlikely to be lax in its merger enforcement.

Consistent with the agencies' broader focus on health care, transactions involving insurance, hospitals, pharmaceuticals and medical devices will likely continue to be area of active merger enforcement. Further, authorities will continue to see fines in cases where parties fail to satisfy HSR reporting requirements, irrespective of any substantive antitrust issues.

SECTION 2: Jurisdiction

2.1 What types of mergers and transactions are caught by the rules? What constitutes a merger and how is the concept of control defined?

The HSR Act requires parties to certain mergers and acquisitions to submit a notification and wait a specified period of time before closing the transaction. The HSR Act applies to transactions involving the acquisition of assets, voting securities, or non-corporate interests (NCIs). The Act typically applies to transactions effecting a transfer of control or merger of two distinct entities, but the Act can apply regardless of whether the transaction involves the transfer of control, confers a majority or minority interest, creates a joint venture (JV), or constitutes a complete merger of two entities. However, acquisitions of a minority interest in a non-corporate entity are not subject to the HSR Act's filing requirements.

2.2 What are the jurisdictional thresholds for notification? Can the authorities investigate a merger falling below these 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. Under the current dollar thresholds effective February 27 2017, merging parties must file notice of a proposed transaction if, as a result of the transaction: (1) at least one of the merging parties is engaged in an activity affecting US commerce; (2) the size of the transaction is valued at more than $80.8 million; and (3) if the transaction is valued between $80.8 million and $323 million, one of the parties had sales or assets of at least $161.5 million in its most recent fiscal year and the other party had sales or assets of at least $16.2 million. The size-of-person test does not apply if the transaction is valued in excess of $323 million.

The HSR Act is a procedural statute and even if a transaction is not reportable under the HSR Act, Section 7 of the Clayton Act makes clear that the DOJ and FTC may still investigate and challenge transactions falling outside these thresholds. There is no statute of limitations on the agencies' ability to investigate a transaction. Indeed, in *Parker Hanifan/Clarcor*, the DOJ challenged the proposed transaction even though the 30-day HSR waiting period had elapsed.

2.3 Are foreign-to-foreign transactions caught by the rules? Is a local effect required to give the authority jurisdiction to review it?

As a general rule, the HSR Act applies to transactions between non-US parties, but only when the assets or business being acquired has a sufficient nexus with the United States. An acquisition of assets located outside the United States is exempt unless those assets generated net annual US sales of $80.8 million (as adjusted) in the most recent year. Likewise, acquisition of a non-US company will be exempt unless the acquired entity has $80.8 million (as adjusted) in assets located in the United States, or had most recent annual net sales of in excess of $80.8 million (as adjusted). Importantly, even for non-US companies with sales or assets exceeding the asset or sales exemption thresholds, a filing is not required unless the contemplated acquisition would confer control of the acquired entity, meaning acquisition of 50% or more of the voting securities of a corporation, or of an equity stake in a non-corporate entity entitling it to 50% or more of the entity's profits, or 50% of its assets upon dissolution.

SECTION 3: Notification

3.1 When the jurisdictional thresholds are met, is a filing mandatory or voluntary? What are the risks/sanctions for failing to notify a transaction and closing prior to clearance?

If a transaction meets the HSR thresholds and no exemption applies, then the parties to the transaction must file and may not close until the statutory waiting period expires or is terminated. There are no exceptions to this suspensive effect. Parties who fail to comply with the reporting requirements, or who fail to observe the mandatory waiting period, are subject to civil penalties of up to $40,000 per day. The DOJ and FTC actively monitor public sources for unreported transactions and will take action against parties for noncompliance when warranted. The agencies typically bring one to two enforcement actions per year against noncomplying parties.

3.2 Who is responsible for filing? Do filing fees apply?

If a proposed transaction meets the HSR thresholds, all parties to the transaction must make an HSR filing. The HSR Act provides that all acquiring persons must pay a filing fee with the antitrust agencies. The fee is based on the filing fee threshold that is in effect at the time of filing, and the current (2017) fee thresholds are as follows: $45,000 for transactions valued between $80.8 million and $161.5 million, $125,000 for transactions valued between $161.5 million and $807.5 million and $280,000 for transactions valued at $807.5 million or greater.

3.3 Is there a deadline for filing? What are the filing requirements and how onerous are they?

There is no filing deadline for filing a pre-merger notification under the HSR Act. However, if a proposed transaction meets the HSR thresholds, then the merging parties cannot consummate the transaction until after they have filed and the applicable waiting period has expired or been terminated. The requirements for filing under the HSR Act are generally less onerous than the requirements in other jurisdictions, but include the parties' identities and the transaction's structure, the transaction agreement, financial data and other similar information, documents prepared for evaluating and analysing the proposed transaction, revenues the parties derive from sales in or into the US, and geographic sales information in certain cases.

3.4 Are pre-notification contacts available, encouraged or required? How long does this process take and what steps does it involve?

In some cases, it may be advisable to initiate pre-notification contacts with the DOJ or FTC. This is particularly true for transactions raising complex or difficult competition issues. Such contacts may help avoid an in-depth investigation or at least narrow the scope of such an investigation. The DOJ and FTC often welcome early engagement because, among other things, it gives the authorities more time to review the transaction. Early engagement can vary in length and is usually accomplished informally, through contact with DOJ and FTC officials.

SECTION 4: Review processes and timetables

4.1 What is the standard statutory timetable for clearance and is there a fast-track procedure? Can the authority extend or delay this process? What are the different steps and phases of the review process?

For most transactions, the initial waiting period lasts 30 days, unless the parties ask for and are granted early termination. For cash tender offers and certain bankruptcy transactions, the initial waiting period is 15 days. The transacting parties are free to complete the proposed transaction if they do not receive a request for additional information from the US antitrust agencies before the end of the waiting period, or upon the grant of early termination.

The US antitrust agencies can extend the initial waiting period by issuing a request for additional information and documentary material (a Second Request). For most transactions, a Second Request extends the waiting period for 30 days after substantial compliance with the Second Request by all the parties. For cash tender offers and certain bankruptcy transactions, a Second Request extends the waiting period for just 10 days after substantial compliance with the Second Request by the acquirer. Once the parties substantially comply with the Second Request, the agency reviewing the proposed transaction can allow the parties to close the transaction, seek an order enjoining the transaction, or enter into a negotiated consent agreement with the parties.

There is no formal fast-track or short form review process under the HSR Act. However, as discussed above, some types of transactions (cash tender offers and certain bankruptcy transactions) have shorter HSR waiting periods. Further, merging parties may request early termination of the waiting periods. The reviewing agency has full discretion to grant or deny the parties' request for early termination.

4.2 What is the substantive test for clearance? What are the theories of harm the authorities will investigate? To what extent does the authority consider efficiencies arguments?

The substantive test for merger clearance is set forth in Section 7 of the Clayton Act, which prohibits mergers, acquisitions, and the formation of a joint venture or transfer of a joint venture interest where the effect of such transaction 'may be substantially to lessen competition, or tend to create a monopoly'. The DOJ and the FTC have developed specific guidelines and a detailed analytical framework for evaluating mergers under Section 7. The analytical framework in the guidelines considers the following factors in evaluating the competitive impact of a proposed transaction: (1) the extent to which the transaction increases market concentration; (2) the extent to which the transaction will eliminate direct competition between the parties; (3) the extent to which the transaction will encourage coordinated interaction in the market; (4) whether entry into the market would deter or counteract any anticompetitive effect otherwise likely to result from the transaction; and (5) the extent the which the transaction will produce merger-specific, verifiable and quantifiable efficiencies that do not arise from anticompetitive reductions in output or service.

4.3 Are remedies available to address competition concerns? What are the conditions and timing issues applicable to remedies?

Merging parties often resolve merger-related competition concerns through a negotiated consent decree with the reviewing agency. These remedy negotiations typically begin after the merging parties have complied with the Second Request. However, the parties sometimes begin these discussions at the outset of an agency investigation when the antitrust issues are obvious.

There are two types of merger remedies: remedies that address the structure of the post-transaction market, and remedies that address the behaviour of the post-merger entity. The most common structural remedy is divestiture of certain assets or lines of business. The agencies will generally insist upon a divestiture remedy if the proposed merger creates horizontal competition issues. The agencies typically require a behavioural remedy only when the merger creates vertical concerns. For certain horizontal mergers that raise heightened antitrust concerns, the antitrust agencies may pursue both a divestiture of business assets and a behavioural remedy.

If the merging parties and the reviewing agency agree to a remedy, the settlement will be memorialised in a formal consent decree. For transactions reviewed by the FTC, settlements are not valid until they are made publicly available for 30 days and are ratified by the Commission. Consent decrees in cases brought by the DOJ must receive approval from a federal district court in order to be valid. Courts will approve the consent decree if it finds the settlement to be in the public interest. If the DOJ or FTC identify an antitrust issue and are unable to reach a settlement with the merging parties, the agencies can attempt to challenge the transaction through litigation.

SECTION 5: Judicial review

5.1 Please describe the parties' ability to appeal merger control decisions and the time-limits applicable. What is the typical time-frame for appeals?

While the US antitrust agencies have the authority to review proposed merger transactions, they do not have the ability to prohibit the closing of a proposed transaction. Instead, the DOJ or FTC must affirmatively bring a litigation action against the merging parties, typically a motion for preliminary injunction before a federal district court. If the agency obtains an injunction, then the parties can appeal to the appropriate federal circuit court of appeals. However, this appeal process can be lengthy. Appeals generally take from six months to over a year to conclude and are therefore rarely pursued. Merging parties typically abandon a transaction if the government successfully obtains an injunction. Of course, if the government fails to obtain an injunction, the parties are free to consummate their transaction. While rare, the agencies sometimes seek an appeal of the denial of an injunction, even after the merging parties have closed the challenged transaction.

This FTC has a separate administrative process that runs parallel to the federal action, pursuant to which the agency brings an administrative complaint before an FTC Administrative Law Judge (ALJ). The merging parties can appeal an adverse ruling by the ALJ to the full five-member Commission, and the Commission's decision can be appealed to a federal circuit court.