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United States

MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in United States.

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UNITED STATES
MERGER CONTROL

1. Overview

In the United States, the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) review transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), and the implementing regulations contained in 16 C.F.R. parts 801-803 (HSR Rules). Premerger notification under the HSR Act is mandatory for transactions that meet certain filing thresholds if no exemption applies. A transaction is potentially reportable under the HSR Act if either party to the transaction is engaged in commerce or in any activity affecting commerce, and the 'size-of-person test' and the 'size-of-transaction test' are satisfied. Both the 'size-of-person test' and the 'size-of-transaction test' are based on certain monetary thresholds and are adjusted annually to reflect changes in US GDP. The HSR Act contains exemptions from filing for certain types of acquisitions, including acquisitions that do not have a sufficient nexus to US commerce.

For most transactions requiring a filing, each acquiring person and acquired person must submit a premerger notification form, containing a short description of the transaction and basic information about the filing party. The parties are also required to submit certain documents that analyse the transaction with respect to competition-related topics and expected synergies or efficiencies.

The HSR Act imposes reporting and waiting period obligations of 30 calendar days (or 15 calendar days for a cash tender offer or certain bankruptcy transactions). During the waiting period, the enforcement agencies assess the likely effect on competition of the proposed transaction. The parties to a transaction may not close until the statutory waiting period has expired, or the government has granted early termination of the waiting period. The reviewing agencies will only grant early termination if they have determined that the transaction is not likely to lessen competition. Since February 4, 2021, the FTC and DOJ announced that they were suspending temporarily early termination. As of September 2022, early termination has remained suspended.

If, after the initial waiting period, the FTC or DOJ require further information to determine whether the transaction would result in anticompetitive effects, the waiting period is extended through the issuance of a 'Request for Additional Information and Documentary Material' which consists of a lengthy set of document, data, and interrogatory requests (known as a 'Second Request'). The Second Request extends the waiting period until 30 calendar days after both parties have substantially complied with the Second Request (10 days for cash tender offers and certain bankruptcies). At the end of this second waiting period, the reviewing agency must decide whether to close the investigation and allow the transaction to proceed, enter into a negotiated settlement with the parties, or block the transaction in court.

2. Is notification compulsory or voluntary?

Under the HSR Act, notification is compulsory for transactions that meet the filing thresholds and are not subject to an exemption.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Transactions that are subject to the HSR Act are prohibited from closing until expiration or early termination of the waiting period. Parties may not 'carve out' portions of the transaction for closing prior to expiration or early termination of the waiting period.

4. What types of transaction are notifiable or reviewable and what is the test for control?

A transaction is potentially reportable under the HSR Act if either party to the transaction is engaged in commerce

or in any activity affecting commerce, and the 'size-of-person test' and the 'size-of-transaction test' are satisfied. The HSR Act covers various types of transactions including mergers and acquisitions of assets, voting securities, exclusive licenses to certain intellectual property, or a controlling interest in a non-corporate entity (e.g., a limited liability company or partnership). The formation of joint ventures is also covered by the HSR Act. In addition, the FTC and DOJ have jurisdiction to review the competitive effects of all transactions under the antitrust laws, even those that are not reportable under the HSR Act.

Under the HSR Act, acquisitions of interests in non-corporate entities that meet the notification thresholds and are not exempt must be reported only if the acquisition results in 'control' of the entity. The control test for non-corporate interests is whether, as a result of the acquisition, the acquiring party will have the right to 50% or more of the profits or 50% or more of the assets upon dissolution of the non-corporate entity.

For acquisitions of voting securities, the HSR Act and associated rules do not use a control test for determining reportability. However, in order to determine whether a corporate entity is controlled (i.e., is part of an acquiring person or acquired person), the HSR Rules define control of a corporate entity as holding 50% or more of the voting securities of the issuer or having the contractual power to designate 50% or more of its board of directors.

Determining whether a non-US entity is a corporation or a non-corporate entity requires an examination of the shareholder rights. If the entity issues securities that allow the holders to vote for the election of a supervisory board of directors, then the entity is treated as a corporate entity for HSR purposes. If it does not, then the entity is treated as a non-corporate entity for HSR purposes.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

Under the HSR Act, an acquisition of voting securities that meets the monetary filing threshold is reportable even if the acquiring person does not obtain control of the acquired entity. However, the HSR Act exempts certain acquisitions of voting securities if made 'solely for the purpose of investment.' This 'investment-only' exemption is available if, as a result of the acquisition, an acquiring person holds 10% or less of the voting securities of the target issuer and has only passive investment intent (i.e., has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer" under HSR Rule 801.1(i)(1)). In addition, acquisitions made directly by certain institutional investors, where the institutional investor holds less than 15% of the target issuer as a result of the transaction, may be exempt if the acquisition is made in the ordinary course of business and the institutional investor has only passive investment intent. In each of these cases, the acquisition is exempt even if the dollar value of the acquired voting securities is above the filing threshold. As a practical note, the 'investment-only' exemptions are narrow exemptions, and determining whether specific conduct is inconsistent with a claim of investment-only purpose is a fact-specific endeavour that requires careful scrutiny.

For acquisitions of interests in non-corporate entities (like an LLC or LP) that meet the notification thresholds and are not exempt, only acquisitions that confer 'control' require notification (described in response to Question 4 above).

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

A proposed transaction is potentially reportable under the HSR Act if both the 'size-of-person test' and the 'size-of-transaction test' are satisfied and no exemption applies. In addition, the transaction must meet the commerce test, which is satisfied if either party to the transaction is engaged in commerce or in any activity affecting commerce. In practice, the commerce test is met for almost every transaction so the reportability analysis turns on whether the other monetary thresholds are met. The threshold values for the 'size-of-person test' and the 'size-of-transaction test' do not vary based on the particular sector in which the parties participate and are adjusted each January or February based on any change in the US GDP from the previous year. The threshold values listed below are as of February 2022. In February 2021, for the first time in over 10 years, the threshold values had decreased as compared to the previous year. In February 2022, however, the HSR thresholds again increased.

Size-of-Transaction Test

The 'size-of-transaction test' is satisfied if, as a result of the transaction, the acquiring person will hold voting securities, non-corporate interests, or assets of the acquired person with a total value of at least $101 million. In the case of an acquisition of non-corporate interests, the transaction must also result in the

acquiring person gaining control of the entity (described in response to Question 4 above). For transactions valued between $101 million and $403.9 million, the parties must also meet the 'size-of-person test.' When a transaction's size is greater than $403.9 million, the transaction is subject to the HSR Act regardless of whether the 'size-of-person test' is met, unless an exemption applies.

Generally, the 'size-of-person test' is satisfied if one party has annual net sales or total assets of $202 million or more and the other has annual net sales or total assets of $20.2 million or more. To determine the size-of-person, the 'ultimate parent entity' (UPE) of each party to the transaction must be determined together with all entities 'controlled' by each UPE. A UPE is an entity that is not controlled by any other entity or individual.

Typically, a party's annual net sales are determined by looking at the last regularly prepared annual income statement and a party's total assets are determined by looking at the last regularly prepared balance sheet. If the party or any of its controlled entities have unconsolidated financials, the non-duplicative annual net sales and total assets must be aggregated from each entity's financials. A party may not rely on financials that are dated more than 15 months before the premerger notification or the transaction's closing date.

Certain types of acquisitions are exempt from the requirements of the HSR Act even if they would otherwise meet the filing threshold requirements. The most common exemptions include (1) acquisitions of goods and realty in the ordinary course of business, (2) acquisitions of certain types of real property, (3) acquisitions of no more than 10% of the voting securities of an issuer solely for the purpose of investment, (4) intra-person transactions, (5) acquisitions of non-voting securities, and (6) acquisitions of foreign entities or assets lacking a sufficient economic nexus to the US.

In addition, the HSR Act requires the aggregation of the value of certain past acquisitions with current acquisitions. The determination of whether aggregation is required varies based on whether assets, voting securities, non-corporate interests, or a combination of the three were previously acquired and which are going to be acquired in the proposed transaction. Sometimes earlier acquisitions do not need to be aggregated if the acquisition qualified for certain exemptions under the HSR Act.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

Under the HSR Act and associated rules, the process of determining a transaction's value depends on whether voting securities, non-corporate interests, or assets are being acquired.

The threshold values listed below are as of February 2022 and are adjusted annually.

Assets

For an asset acquisition, the transaction value is determined by looking at the fair market value (FMV) or, if higher, the acquisition price. FMV is determined by the board of directors of the acquiring person or its delegee within 60 calendar days of the filing (or if a filing is not necessary, 60 calendar days prior to closing). There is no specific accounting technique that the board of directors is required to use; however, the determination must be made in good faith. The acquisition price is equal to the total amount of consideration that the seller receives in the transaction. If the acquisition price is not known, the value of the transaction will be considered FMV.

The acquisition of non-US assets is exempt, unless, in the aggregate, the non-US assets to be held by the acquiring person as a result of the acquisition generated sales in or into the US of greater than $101 million in the acquired person's most recent fiscal year.

Voting Securities

For an acquisition of voting securities of a US entity, the value is based on the value of the voting securities that will be held as a result of the transaction. If the voting securities are publicly traded, the value of the shares to be acquired is the greater of the acquisition price or market price. If the acquisition price is undetermined, publicly traded voting securities are valued based on market price. For open market purchases, tender offers, conversions, or exercises of options or warrants, market price is determined based on the lowest closing stock quotation during the 45 calendar days prior to closing. For transactions subject to an agreement or letter of intent, market price is determined by looking at the lowest closing stock quotation within the 45 calendar days before closing but not earlier than the day before execution of the agreement or letter of intent. If both the acquisition price and market price are undetermined, the value of the voting securities is their FMV.

If the voting securities are not publicly traded, the value of the privately held voting securities is either the acquisition price, if determined, or the FMV if the acquisition price is not determined.

An acquisition of voting securities of a non-US entity by a US person is exempt, unless the non-US entity and any entity it controls has US assets with a FMV greater than $101 million, or made sales in or into the US of greater than $101million in its most recent fiscal year. An acquisition of voting securities of a non-US corporation by a non-US person is exempt unless the same thresholds are met, and the transaction confers control of the non-US corporation.

Non-Corporate Interests

For an acquisition of non-corporate interests in a transaction that will confer control of a non-corporate entity, the value is based on the acquisition price, if determined, or the FMV if the acquisition price is not determined.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

While the HSR Act does not have codified rules regarding the use of exchange rates when determining whether the HSR Act's thresholds have been met, the FTC has issued general guidance regarding foreign currency conversions. The FTC recommends that parties use the Interbank Exchange Rate and follow certain guidelines:

- 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 on the date of 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 calculated

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Joint ventures that do not involve the formation of a new corporate or non-corporate entity (i.e., involve existing entities) are HSR reportable if they meet the relevant size-of-transaction and size-of-person thresholds, one of the parties forming the joint venture is engaged in commerce, and no exemption applies.

When a joint venture involves the formation of a new entity (Newco), each contributing party is considered an acquiring person and the Newco is considered the acquired entity. The rules determining whether a formation triggers a filing vary depending upon whether the Newco is a corporation or an unincorporated entity.

The threshold values listed below are as of February 2022 and are adjusted annually.

Formation of a Corporate Entity

In the formation of a US Newco corporation, each acquiring person must submit an HSR filing if no exemption applies and the value of that acquiring person's shares of the new corporate entity is either over $403.9 million or between $101 million and $403.9 million and the 'size-of-person test' is met. The value of an acquiring person's voting securities of the Newco is based on the acquisition price of the Newco's voting securities, if determined, or the fair market value (described in response to Question 7 above) of the acquiring person's contributions to the Newco if the acquisition price is not determined. The 'size-of-person test' is met if:

- The acquiring person has annual net sales or total assets of at least $20.2 million and (1) the Newco has assets of $202 million and (2) at least one of the other acquiring persons has assets or annual net sales of at least $20.2 million, or
- The acquiring person has annual net sales or total assets of at least $202 million and (1) the Newco has assets of $20.2 million and (2) at least one of the other acquiring persons has assets or annual net sales of at least $20.2 million.

Formation of a Non-Corporate Entity

In the formation of a US Newco non-corporate entity, the transaction is reportable if that acquiring person acquires control of the Newco. An acquiring person that acquires control of the Newco must submit an HSR filing if the value of that acquiring person's shares of the non-corporate entity is either over $403.9 million or between $101 million and $403.9 million, the 'size-of-person test' is met, and no exemption applies. The value of an acquiring person's controlling interest in the Newco is based on the acquisition price of the controlling interest in the Newco, if determined, or the fair market value of the controlling interests. The 'size-of-person test' is met if:

- The acquiring person has annual net sales or total assets of at least $20.2 million and the

Newco has total assets of $202 million, or
- The acquiring person has annual net sales or total assets of at least $202 million and the Newco has total assets of $20.2 million.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

Each acquisition related to a particular transaction must be analysed independently and is separately subject to the HSR Act. If a transaction involves multiple steps that happen simultaneously (i.e., at the exact same time) and two or more of these steps would be separately reportable, the 'continuum principle' applies. Under the continuum principle, parties do not need to file on the intermediate steps of a transaction as long as they make an HSR filing on the final reportable step of the transaction. The timing of the steps must be simultaneous in order for the continuum principle to apply. Practitioners often seek out informal guidance from the FTC to confirm on a no-names, hypothetical basis that their structure warrants a single filing.

Transactions must be analysed closely to determine if an acquisition related to the overall transaction may trigger additional HSR reporting obligations. For example, if, as a result of a transaction, an acquiring person will obtain control of issuer 'A' who holds, but does not control, voting securities of issuer 'B,' then the acquisition of the voting securities of issuer 'B' is a 'secondary acquisition' and is separately subject to the HSR Act and may require an additional HSR filing. Additionally, certain stock-for-stock 'backside' transactions may be subject to a separate HSR filing obligation.

For HSR filings that are part of the same overall transaction, the antitrust agencies have advised parties submitting multiple filings to note that the filings are related in both the cover letter submitted with each filing as well as the transaction description in item 3(a) of the HSR form. For more information on the items included in an HSR filing, please refer to the response to Question 23.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

Under the HSR Act, an entity is deemed to be 'foreign' if it is not incorporated in the US, is not organized under the laws of the US, and does not have its principal offices in the US.

Foreign-to-foreign transactions can trigger an HSR filing if they exceed the filing threshold and are not exempt. There are certain exemptions that are specifically applicable to 'foreign-to-foreign' transactions.

The threshold values listed below are as of February 2022 and are adjusted annually.

Assets

The acquisition of foreign assets is exempt, unless the assets to be held as a result of the acquisition generated sales in or into the US greater than $101 million during the acquired person's most recent fiscal year. If both the acquiring person and acquired person are foreign, an asset acquisition that exceeds the $101 million threshold may still be exempt if (1) the aggregate sales in or into the US of the acquiring person and acquired person are less than $222.2 million in their respective most recent fiscal years, (2) the aggregate total US assets of the acquiring and acquired persons are less than $222.2 million and (3) the acquiring person will not hold assets or voting securities of the acquired person that exceed $403.9 million as a result of the transaction.

Voting Securities

An acquisition of voting securities of a foreign issuer by a foreign person is exempt unless (1) the transaction confers control of the foreign issuer by the foreign person (i.e., if, as a result of the acquisition, the acquiring person will hold 50% or more of the voting securities of that issuer or will have the contractual right to designate 50% or more of the board of directors), and (2) the foreign issuer, along with any entity it controls, hold US assets with a fair market value of more than $101million, or made aggregate sales in or into the US of over $101 million in its most recent fiscal year. Even if the US sales or assets thresholds are met, the acquisition of control of a foreign issuer by a foreign person may still be exempt if (1) the aggregate sales in or into the US of the acquiring person and acquired person are less than $222.2 million in their respective most recent fiscal years, (2) the aggregate total US assets of the acquiring and acquired persons are less than $222.2 million, and (3) the acquiring person will not hold assets or voting securities of the acquired person that exceed $403.9 million as a result of the transaction.

Note, a 'foreign person' means that a person or the UPE (as described in response to Question 6 above) is: (A) not incorporated in the United States, not organized under the laws of the US and does not have its principal offices within the US; or is (B) neither a citizen of the US nor resides in the US, if a natural person. A 'foreign

issuer' means that an issuer is not incorporated in the US, is not organized under the laws of the US, and does not have its principal offices within the US.

An acquisition of a foreign issuer with no presence, sales, or assets in the US does not require an HSR filing, regardless of whether the acquisition is made by a foreign or US person.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Not applicable.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

Section 7 of the Clayton Act prohibits mergers or acquisitions where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.' The 2010 *Horizontal Merger Guidelines* set out the agencies' framework and general approach to determining whether a merger is likely to enhance or create market power or facilitate an exercise of market power. Merger review is forward-looking and attempts to determine whether a merger may lead to anticompetitive effects by facilitating increased prices, reducing output, diminishing innovation, or would otherwise harm consumers as a result of a reduction in competition. The agencies analyse two ways in which a merger can reduce competition: by enhancing the ability of the remaining competitors to act in a coordinated way (coordinated effects) or by enabling the merged firm to independently raise prices profitably (unilateral effects).

Regardless of the industry sector involved in a proposed transaction, the FTC or DOJ will conduct a fact-specific inquiry concerning the effects of the specific transaction on that industry. Across all industries, the FTC and DOJ apply the same test: Section 7 of the Clayton Act and the *Horizontal Merger Guidelines*.

On January 18, 2022, FTC Chair Lina M. Khan and Assistant Attorney General of the DOJ Antitrust Division Jonathan Kanter launched a joint review and public inquiry of the jointly-issued 2010 *Horizontal Merger Guidelines* (as discussed in Question 36). FTC Chair Khan stated that "this review of the merger guidelines is especially timely and ripe" because for the FTC "to accurately detect and analyze potentially illegal transactions in the modern economy, ensuring that [its] merger guidelines reflect these new realities is critical." Similarly, Assistant Attorney General Kanter stated that the agencies "need to strengthen our guidelines to ensure they are fit for purpose in the modern economy." At the time of this article, the comment period for the public inquiry had ended but the agencies had not published their updates to the *Horizontal Merger Guidelines*.

14. Are factors unrelated to competition relevant?

Section 7 of the Clayton Act was designed to protect competition, not competitors. When reviewing a transaction, the FTC and DOJ traditionally focus on the transaction's impact on competition. In addition, the FTC and DOJ have started to consider factors such as worker's rights and the impact of a transaction or conduct on historically underserved communities.

15. Are ancillary restraints covered by the authority's clearance decision?

In addition to the executed agreement (or contract or letter of intent) relating to the transaction, parties are required to submit any ancillary agreements not to compete or any other agreements between the parties, including side letters or agreements that bear on the terms of the transaction and are binding on the parties (such as those reflecting additional antitrust obligations or agreements) as part of their respective HSR filings. The agencies consider the effects of such agreements when reviewing the competitive effects of the transaction. The FTC has recently suggested greater scrutiny of mergers with non-compete agreements, particularly in the technology sector, including in non-reportable transactions.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

The HSR Act does not have a statutory filing deadline. Parties may make their respective HSR filings at any time as long as they have an agreement in principle that is reduced to writing, such as a signed term sheet or letter of intent, or if the buyer intends to make open market purchases. However, the parties may not close the notified transaction until the relevant HSR waiting period has expired or been terminated early by the agencies. In practice, parties often agree to make their

HSR filings within a certain number of days (e.g., 5 or 10 business days) after signing a term sheet, letter of intent, or merger agreement.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Parties may make their HSR filings at any time as long as they have an agreement in principle that is in writing, such as a signed term sheet or letter of intent, or if the buyer intends to make open market purchases. In a negotiated transaction, each party's notification must also include a sworn affidavit (or declaration under penalty of perjury) affirming, if applicable, that an agreement has been executed and the filing person has the good-faith intent to complete the transaction that is the subject of the notification.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Parties may engage the antitrust agencies in discussions prior to making an HSR filing. This is most common in transactions that are high-profile or present potentially complex antitrust considerations, or if an agency has a history of recent enforcement activity in the same or a similar industry. By engaging early in the process, parties hope to identify and quickly resolve any concerns in a timely manner. Because pre-notification discussions may risk added antitrust agency scrutiny, parties should consider whether to engage in pre-notification discussions on a case-by-case basis.

19. What is the basic timetable for the authority's review?

Under the HSR Act, parties that meet the filing thresholds must file premerger notification forms and wait for the FTC or DOJ to review the transaction.

Once the parties have submitted their filings, FTC and DOJ staff consult on the filing and determine if the transaction warrants an initial review. If so, the matter is 'cleared' to the agency with more expertise in the relevant industry. Recently, parties in a variety of industries have experienced delays due to agency clearance disputes, even for transactions in industries where one of the agencies historically had expertise. The assigned agency then conducts a review of the transaction during the initial waiting period (30 calendar days following submission of the premerger notification filing or 15 calendar days for cash tender offers or certain bankruptcy transactions). The vast majority of reviewed transactions are allowed to proceed after the initial waiting period expires or is terminated. If, however, at the end of the initial waiting period, the reviewing agency believes the transaction raises competition issues that merit further review, the reviewing agency may extend the waiting period by issuing a Second Request. On average, the FTC and DOJ issue a Second Request in less than five percent of filed transactions. When a Second Request is issued, the HSR waiting period is extended until 30 calendar days (10 days for cash tender offers and certain bankruptcies) following both parties' certification of substantial compliance with the Second Request.

As a practical matter, parties typically require several months to substantially comply with a Second Request, due to production of potentially hundreds of thousands of internal documents and extensive sales, marketing, and production data. While the parties are complying with the Second Request or shortly after substantial compliance with the Second Request, the agencies may also require depositions (known as investigational hearings at the FTC) of company executives and third party customers, competitors, and suppliers.

The agencies encourage the parties to negotiate the scope of a Second Request and the timing of substantial compliance, as well as the reviewing agency's timing to reach a decision.

In practice, the agency's review is usually negotiated between the parties and the reviewing agency to extend beyond the second 30-calendar-day period after substantial compliance. At the end of the second waiting period, the reviewing agency must decide whether to close the investigation and allow the transaction to proceed, enter into a negotiated settlement with the parties, or challenge the transaction in federal district court (and, if the FTC is reviewing the transaction, through its administrative process). Depending on the complexity of the industry and the proposed transaction, it can take approximately 10-12 months from premerger notification to an agency filing a court action to block a transaction.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

The initial HSR waiting period also may be extended without paying a new filing fee if the acquiring person elects to 'withdraw and refile' its HSR filing. Under this process, at the end of the initial 30-day waiting period

(or 15-day waiting period for cash tender offers and certain bankruptcy acquisitions), the acquiring person withdraws its filing, and submits the filing again within two business days (the acquired person is not required to withdraw). The refiling results in a new initial waiting period. The acquiring company may only take advantage of the withdraw-and-refile process without paying a new filing fee once and only if the proposed acquisition does not change in a material way. As described above, if at the end of the initial waiting period (after re-filing), the reviewing agency believes the transaction raises competition concerns that merit further review, the reviewing agency may extend the waiting period by issuing a Second Request.

Occasionally, the reviewing agency may discover that one of the parties failed to submit all required documents with its HSR filing. In such circumstances, the agency may restart the initial waiting period by requiring the party to resubmit its HSR filing with the requisite responsive documents.

21. Are there any circumstances in which the review timetable can be shortened?

Either party to a reportable transaction may request that the waiting period be terminated before the statutory HSR waiting period expires. This is known as a request for 'early termination' and requires the filing person to mark the appropriate section of the HSR form.

A request for early termination may be granted where one party to a transaction makes the request but the other does not. A party may also request early termination after filing, while the waiting period is still open, by sending letters to both agencies making a request for early termination. Similarly, parties may rescind a request for early termination by sending letters to both agencies.

All grants of early termination are published on the FTC's website in the early terminations index and in the Federal Register, which provides the issued transaction number, the date early termination was granted, and the names of the acquiring and acquired persons.

On February 4, 2021, the FTC, with the support of the DOJ, announced the temporary suspension of granting early termination. The agencies indicated that their decision reflected a need to pause during the period of transition to a new presidential administration as well as a large spike in the number of HSR filings before the agencies. As of September 2022, the agencies have not re-started granting early termination except after the reviewing agency has issued a Second Request, but before the parties have substantially complied with that request, and only in two limited circumstances: if (1) the reviewing agency has resolved its competitive concerns through its investigation, or (2) the parties enter into a consent agreement to resolve the agency's competitive concerns.

22. Which party is responsible for submitting the filing?

For reportable transactions, each party is required to submit its own HSR filing. In practice, counsel for the filing parties usually coordinate on certain portions of the filing that contain common information (e.g., the description of the transaction) and confirm which documents are responsive to Items 4(c) and 4(d) of the HSR form for both filing parties. The HSR initial waiting period begins when the agencies have received complete HSR filings from both parties to the transaction, with the exception of § 801.30 transactions (tender offers and acquisitions of voting securities from third parties), where the acquiring party must notify the acquired party of the transaction, and the HSR waiting period begins upon the submission of the acquiring party's HSR filing. The HSR filing fee must also be paid before the waiting period will start.

23. What information is required in the filing form?

If a proposed transaction is reportable under the HSR Act and no exemptions apply, each party must submit a premerger notification form to the FTC and DOJ. The HSR form and accompanying attachments provide information about, among other things, the structure and value of the transaction, the parties involved, certain financial information about each party, and each party's structure and holdings.

The introductory section and Item 1 of the HSR form require certain preliminary information including how the filing fee will be paid, whether the party will request early termination, and certain basic information about the filing party. Items 2-3 require information regarding the transaction, including the names and addresses of the transacting parties, a description of the transaction, the type and value of the transaction, and copies of the documents that constitute the agreement. Item 4 requires a registration number for certain entities that file annual reports with the US Securities and Exchange Commission (SEC), annual reports or annual financial statements, and certain competition-related documents. Item 5 requires the reporting of revenues from US operations from the last completed fiscal year, including a breakdown of non-manufacturing revenues (using 6-

digit North American Industry Classification System (NAICS) codes) and manufacturing revenues (using the 6-digit NAICS codes and 10-digit North American Product Classification System (NAPCS) codes). Item 6 requires, among other things, information regarding certain subsidiaries and five percent or greater shareholders, as well as minority shareholdings in entities that may compete with the target. Items 6(c) and 7 require certain information to be submitted if both filing persons in a transaction report revenues in the same Item 5 code(s). Finally, Item 8 requires the acquiring person to disclose certain prior acquisitions within the past five years in any overlapping codes.

A certification signed by an officer of the filing party or one of its controlled entities must accompany the HSR form, stating that the filing is, to the best of his or her knowledge, 'true, correct, and complete.' In a negotiated transaction, each party's notification must also include a sworn affidavit (or declaration under penalty of perjury) affirming that an agreement has been executed and the filing person has the good-faith intent to complete the transaction that is the subject of the notification. In open-market purchases and certain acquisitions of shares from third parties, only the acquiring person must submit an affidavit with its notification that states, among other things, that the acquiring person has the good-faith intention to make the acquisition reported and has provided certain information about the proposed acquisition in a written notice to the acquired person.

24. Which supporting documents, if any, must be filed with the authority?

Several supporting documents must be submitted as part of the premerger notification filing. These include a copy of the documents that constitute the transaction agreement along with any ancillary non-compete agreements (per Item 3(b)), and certain annual reports and annual audit reports (per Item 4(b)). In addition, parties are required to submit all final documents prepared by or for an officer or director for the purpose of evaluating the transaction to the extent the analysis relates to markets, market shares, competition, competitors, opportunities for sales growth or product or geographic expansion (per Item 4(c)). The parties must also provide certain information memoranda, documents prepared by investment bankers or other consultants, and documents related to synergies and/or efficiencies (per Item 4(d)).

25. Is there a filing fee?

The acquiring person is responsible for the payment of a filing fee, which varies depending on the value of the transaction, unless the parties agree between themselves to shift or split the fee. The various size-of-transaction monetary thresholds dictate the amount of the filing fee for a particular transaction. As of February 2022, the filing fees are the following:

Size of TransactionFiling Fee AmountThe fee is paid to the FTC and must be submitted in US currency. The filing fee is typically sent via wire transfer and must be net of any service, transfer, or wiring fees charged by a bank or financial institution.

Greater than $101 million, but less than $202 million	$45,000
$202 million or greater, but less than US$1,009.8 million	$125,000
$1,009.8 million or greater	$280,000

26. Is there a public announcement that a notification has been filed?

Under the HSR Act, all information about the filing, including the fact of the filing itself, is kept confidential (except in limited instances of an administrative or judicial proceeding or by request of Congress). The only exception is grants of early termination. In these instances, the contents of the filings and the supporting documentation remain confidential and only the identity of the filing parties, the date of the grant of early termination, and the assigned transaction number are published in the Federal Register and on the FTC's website. As described more fully in response to Question 21, as of September 2022, the FTC and DOJ have temporarily halted granting early termination except in certain limited circumstances after the reviewing agency has issued a Second Request, but before the parties have substantially complied with that request.

27. Does the authority seek or invite the views of third parties?

When investigating a transaction that raises competitive issues, the reviewing agency will conduct interviews with the parties' competitors, customers, suppliers, and other relevant industry participants. As part of its investigation, the reviewing agency may also issue subpoenas to third party industry participants for documents, data, and even deposition testimony. The reviewing agency uses the information from this outreach effort to gain a better understanding of how the affected markets operate, to assess the facts and arguments advanced by the parties, to gather evidence

about the industry and the potential impacts of the transaction, and to identify supportive third-party witnesses for trial.

28. What information may be published by the authority or made available to third parties?

All documents and information submitted with the HSR form are confidential and are also exempt from disclosure under the Freedom of Information Act, except in limited circumstances such as when required as part of an administrative or judicial proceeding or if disclosed to Congress. If the parties do not request early termination of the HSR waiting period and the agencies do not take any action with respect to the proposed transaction, even the fact that a filing was made remains confidential. Under the HSR Act, if the parties request early termination, the FTC must give notice of such a grant, providing only the assigned transaction number, the identity of the filing parties and the date early termination was granted. As described more fully in response to Question 21, since February 2022, the FTC and DOJ have temporarily halted granting early termination except in certain limited circumstances after the reviewing agency has issued a Second Request, but before the parties have substantially complied with that request (this temporary suspension remains in effect as of September 2022). In the event of an administrative or judicial proceeding to block the transaction, the reviewing agency could seek to use HSR documents. The parties to such an action typically seek a protective order to avoid public disclosure of their confidential information during the judicial proceeding.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The US antitrust agencies may cooperate with authorities in other jurisdictions when investigating multi-jurisdictional transactions. The 2017 DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation (the 'Guidelines') discuss the US agencies' international enforcement policy and investigative tools. The Guidelines explain in detail that, where relevant and appropriate, cooperation can include: initiating informal discussions and informing cooperating authorities of respective investigations; engaging in detailed discussions of substantive issues; exchanging information; conducting joint interviews; and coordinating remedy design and implementation. However, the HSR Act prohibits the US antitrust agencies from disclosing information obtained pursuant to the HSR Act without a waiver of confidentiality from the parties. Merging parties will often provide a waiver of confidentiality to the relevant foreign authority. Waivers generally allow the cooperating authorities to share documents, statements, data, and other information. Parties contemplating complex, cross-border transactions should anticipate and plan to navigate merger control authorities who are cooperating across the globe.

30. What kind of remedies are acceptable to the authority?

The guiding principle for the antitrust agencies is that a merger remedy must effectively preserve competition in the relevant market. The FTC and DOJ favour structural remedies, such as divestitures of a business unit or standalone business assets, which could achieve that goal. Though permissible, conduct remedies (e.g., firewall provisions, non-discrimination provisions, mandatory licensing provisions, transparency provisions, anti-retaliation provisions, and prohibitions on certain contracting practices) are extremely rare. In September 2020, the DOJ released a new Merger Remedies Manual, reaffirming the general approach of requiring structural remedies (i.e., divestitures) to remedy competitive concerns. Although the 2020 Mergers Remedies Manual indicated "in some cases a private equity purchaser may be preferred," both U.S. agencies have now openly increased scrutiny against private equity firms as divestiture buyers.

Structural remedies are also becoming rare. In 2022, the DOJ and the FTC announced strong preferences for challenging transactions in court instead of pursuing settled remedies. Assistant Attorney General of the Antitrust Division Jonathan Kanter has noted in numerous speeches that divestitures may be an option only in exceptional circumstances. He has acknowledged that divestitures could be appropriate where "business units are sufficiently discrete and complete that disentangling them from the parent company in a non-dynamic market is a straightforward exercise." Similarly, FTC Chair Lina Khan has stated that the FTC will focus its "resources on litigating rather than on settling."

In some instances, the agencies are accepting non-traditional alternatives for non-traditional harms, such as those that may address labour or other factors important to the agencies.

31. What procedure applies in the event that remedies are required in order to secure clearance?

Typically, throughout the reviewing agency's investigation, the parties and agency staff discuss competitive issues raised by the transaction and potential remedies to address such concerns. Any proposed divestiture is scrutinised and evaluated by the agency to ensure it effectively remedies anticompetitive concerns identified during the investigation. Parties often offer a remedy after the reviewing agency has identified competitive issues, to ensure that any fix addresses the agency's concerns.

The agencies require a buyer up front in the vast majority of divestitures. In contrast to an upfront buyer remedy, post-order consents typically allow the parties to divest the required assets or business approximately three to six months after the merger is consummated. The latter are becoming exceedingly rare. In either case, the agencies require approval of the buyer of divested assets to ensure that (1) the buyer is financially stable, (2) the buyer will be able to compete going forward, and (3) the divestiture will restore any competition lost due to the transaction.

If an upfront buyer has been identified, the parties typically draft and propose a divestiture package. The agencies closely vet the proposed buyer and the divestiture package, or negotiate alternatives. The parties and the agencies would also negotiate the terms of the settlement or consent decree. The agencies may require a letter of intent or purchase agreement between the seller and the proposed divestiture buyer before entering into a consent decree. DOJ consent decrees are subject to the Tunney Act, which requires that a U.S. federal district court review the proposed remedy and the competitive impact of the proposed decree in the relevant market to determine whether the settlement is in the public interest. The Tunney Act also requires a 60-day public notice and comment period before the court issues a final order. Parties can close the transaction during this period (usually subject to a hold separate order).

As mentioned in Question 30, if the reviewing agency has evidence that a transaction may be anticompetitive, it is highly likely that the agency will sue to block the transaction, rather than negotiating a remedy.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Penalties for a failure to file a premerger notification, filing an incomplete premerger notification, or closing a reported transaction prior to expiration of the waiting period may result in civil penalties of up to $46,517 each day the person is in violation of the HSR Act. In practice, the agencies typically do not seek penalties for the first offense if parties inadvertently fail to file, but will seek penalties for a second mistake or for other types of violations. While $46,517 is the maximum daily civil penalty, the actual penalty will depend on the fact-specific circumstances of the case.

Failure to provide required Items 4(c) and 4(d) documents as part of an HSR filing is taken very seriously by the FTC and DOJ. Substantial fines have been assessed for parties failing to provide these responsive documents. In some instances, if the omissions impacted the reviewing agency's investigation, the parties have had their filings 'bounced' and have been forced to restart the HSR waiting period.

Parties may not begin to consummate a transaction until the waiting period expires or is terminated by the agencies. If an acquiring person begins to exercise control over the operations or assets to be acquired before the expiration of the waiting period (referred to as gun-jumping) that person may face a civil penalty of up to $46,517 per day for a violation of the HSR Act. The FTC and DOJ have initiated several multi-million dollar civil penalty actions for gun-jumping violations.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

A certification signed by an officer of the filing party or one of its controlled entities must accompany a notification under the HSR Act stating that the filing is, to the best of his or her knowledge, 'true, correct, and complete.' If a filing has certain deficiencies, the antitrust authorities may 'bounce' an HSR filing and require that a party correct the deficiency and restart the HSR waiting period when the deficiency has been fixed.

The antitrust agencies have assessed sizable civil penalties (currently, up to $46,517 per day per violation) for failing to produce all required documents with their HSR filings.

In at least one exceptional case, *United States v. Kyoungwon Pyo*, criminal charges were brought for extreme violations in connection with the HSR Act. There, the DOJ successfully obtained a guilty plea from a company executive for criminal obstruction of justice for intentionally altering pre-existing documents to mislead the US antitrust agencies.

34. Can the authority's decision be appealed to a court?

If a proposed transaction presents competitive concerns, and the parties are unable or unwilling to remedy the reviewing agency's concerns, the agency will challenge the transaction in federal court. The losing party at the district court level may appeal the decision to a US Court of Appeals. The FTC also has the authority under the FTC Act to pursue administrative proceedings before an administrative law judge and that initial decision can be appealed and is subject to review by the full FTC. The parties can then appeal to any US court of appeals with jurisdiction over the relevant business.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

In the past year, the FTC and DOJ have pursued an aggressive and expansive stance on competition enforcement. A number of trends have emerged, including the wide breadth of enforcement actions, the growth of interagency cooperation on competition policy, and the unpredictable nature of merger reviews today.

FTC and DOJ Continue to Focus on 'Big Tech' Merger Enforcement, But Are Also Aggressively Challenging Non-Tech Transactions of All Sizes

In the past 18 months, the DOJ and the FTC have investigated and challenged a number of transactions of all sizes – even some low-value deals – across a number of sectors. U.S. antitrust authorities are continuing to focus on the technology sector with ongoing investigations or litigations: *Meta/Within Unlimited*, *Broadcom/VMware, and Microsoft/Activision Blizzard.* The agencies have also initiated detailed investigations and challenges to transactions in other sectors such as publishing (*U.S. v. Bertelsmann SE & CO. KGaA, et al.*), sugar (*U.S. v. United States Sugar Corporation, et al.*), insurance (*U.S. v. Aon plc and Willis Towers Watson plc*), healthcare (*U.S. v. UnitedHealth Group, Inc. and Change Healthcare Inc.*, *Illumina/Grail*), e-cigarettes (*Altria/Juul Labs*) industrial products (*U.S. v. Grupo Verzatec S.A. de C.V., et al., U.S. v. Wienerberger AG, et al., U.S. v. ASSA ABLOY AB, et al.*), airlines (*U.S. v. American Airlines Group Inc. and JetBlue Airways Corporation*) and defence (*Lockheed/Aerojet*).

Year One of President Biden's Executive Order on Competition Shows Unprecedented Cross-Agency Competition Cooperation

In 2021, President Biden announced the Executive Order on Promoting Competition in the American Economy ("Order"). The Order established the White House Competition Council ("Competition Council), tasked with implementing a whole-of-government approach to competition policy, and encouraged a number of cross-sector and cross-agency initiatives. Since then, the Order and the Competition Council have brought unprecedented levels of coordination across the U.S. federal government on competition policy. For example, in January 2022, the DOJ and the U.S. Department of Agriculture ("USDA") released a statement to protect against unfair and anticompetitive practices in agriculture. In March 2022, the DOJ and the U.S. Labor Department signed a memorandum of understanding aimed at protecting workers from employer collusion, ensuring compliance with the labour laws, and promoting a competitive labour market. In May 2022, the U.S. Treasury Department's Office of the Comptroller of the Currency announced efforts to work with the DOJ and other U.S. federal banking agencies to review frameworks to analyse bank mergers. In August 2022, the FTC and DOJ submitted a joint comment to the Federal Energy Regulatory Commission urging it to preserve competition in the wholesale electricity markets. Since 2021, the Competition Council has also continued to emphasize that new frameworks are warranted to address challenges posed by online platforms and urged increased attention to industries such as ocean shipping and clean energy markets.

For merger control, this enhanced cooperation means that U.S. antitrust agencies are likely to consider other agency views in their investigations. For example, in July 2022, the USDA and DOJ collaborated to develop a merger settlement with Cargill, Sanderson Farms, and Wayne Farms. The DOJ settlement included a requirement that Cargill pay Sanderson Farms' chicken growers in a manner consistent with the USDA's proposed rulemaking.

Expansive, Aggressive, and Unpredictable Merger Investigations and Litigations

The DOJ and the FTC, buttressed by the support of the White House Competition Council, have implemented a number of policy changes that have introduced a broader, and more uncertain, approach to enforcement. For example, in December 2021, speaking at the FTC and DOJ workshop on labour markets, Chair Khan and AAG Kanter advocated for the U.S. antitrust authorities to evaluate the effects of transactions in labour markets, and announced plans to consider how transactions may affect workers' wages and working conditions. Historically, the U.S. agencies did not consider impacts on labour markets in merger analysis. In another

example of a new area of inquiry, in August 2022, the FTC announced efforts to consider the effects of a transaction on historically underserved communities. In addition to these changes, the FTC also eliminated the need for staff to seek approval from FTC Commissioners to investigate reportable and non-reportable transactions, as well as initiate conduct investigations. This provides a streamlined process for staff to send compulsory process (i.e., civil investigative demands or subpoenas) to parties in investigations of transactions that may not meet the value thresholds.

In addition to the broader scope of investigations, both across sectors and in the types of issues investigated, U.S. antitrust agencies have used procedural mechanisms to introduce uncertainty into the merger review process. For example, negotiating timing agreements and remedies have become more complicated and the agencies are demanding more time to review transactions. Further, U.S. antitrust authorities have explained publicly that remedies are not going to be considered in most cases (as discussed in Question 30).

In practice, these policy changes along with the suspension of early termination and the issuance of warning letters, mean that Second Requests can be more unpredictable and broader in scope, and therefore more costly and time-consuming for merging parties to comply with.

Increasing Appetite for Vertical Merger Enforcement

There have been a number of vertical merger actions, evincing an increasing appetite for bringing vertical challenges. For example, in March 2021, the FTC filed an administrative complaint to block Illumina's $7.1 billion acquisition of Grail alleging that this transaction would reduce competition for certain key cancer therapies. The FTC alleged that the merger would give Illumina the incentive and ability to disadvantage Grail's multi-cancer testing competitors by raising their costs for, or by foreclosing them from, accessing Illumina's must-have technologies.

In December 2021, the FTC sued to block U.S. chip supplier Nvidia's $40 billion acquisition of Arm Ltd., a company focused on semiconductor and software design. The FTC alleged that the transaction would give one of the world's largest chip suppliers control over key computing technology and design, which rival firms rely on to develop their own competing chips. The parties terminated the transaction two months later.

In January 2022, the FTC sued to block Lockheed Martin's $4.4 billion proposed acquisition of Aerojet. The FTC alleged that the transaction would allow Lockheed to control critical components that could harm rivals and would further consolidate the defence and national security markets. In February 2022, the parties terminated the transaction.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

There will be two key developments to watch in the next 12 months: (i) potential reforms to the Horizontal and Vertical Merger Guidelines, the key framework for the U.S. antitrust authorities when reviewing transactions; and (ii) proposals to change merger control laws in U.S. Congress.

Changes to Horizontal and Vertical Merger Guidelines are Forthcoming

As mentioned in Question 13, the U.S. antitrust authorities are jointly reviewing and planning to reissue new versions of the *Horizontal Merger Guidelines* and the *Vertical Merger Guidelines*. In January 2022, the FTC and DOJ issued a public "Request for Information," which asked for comments from the public on how the U.S. antitrust agencies can "modernize enforcement of antitrust laws." Their Request for Information broadcasts the agencies' focus on certain issues, such as whether market definition is necessary in all cases, safeguarding against acquisitions of nascent or potential competitors, labour markets, and monopsony. The Request for Information also includes a number of questions targeting digital markets and technology companies. For example, they request input on how the guidelines should approach market definition in zero-price markets or negative-price markets, and they ask for views on "competition for attention" and the "appropriate indicia of market power in complex and multi-sided markets." The comment period concluded in April 2022 with the agencies receiving over 5,000 responses. The new Guidelines are set to be released sometime in Fall or Winter 2022. Based on the Request for Information and commentary from leadership at the DOJ and FTC, practitioners anticipate the revised Guidelines will represent a significant change in the agencies' approach to merger analysis.

Proposals to Change Merger Control Laws in U.S. Congress Grow, But Remain Stalled

A number of legislative proposals have been introduced in both houses of the U.S. Congress that would affect merger review both procedurally and substantively. As of September 2022, none of these proposals has been enacted into law. These proposals would, among other

provisions, raise filing fees to help fund the increased enforcement at the agencies, lower the standard of proof to enable the agencies to bring more merger challenges, and even ban 'mega mergers' that meet certain thresholds. Most notably, the calls for reform have come from both Republicans and Democrats, despite the fractious nature of U.S. Congress currently. Of the proposed bills, the American Innovation and Choice Online Act, cosponsored by U.S. Senators Amy Klobuchar (D) and Chuck Grassley (R), in addition to other Republican and Democratic senators, has received the most traction, but has not been put up to a vote yet due to other legislative priorities.

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