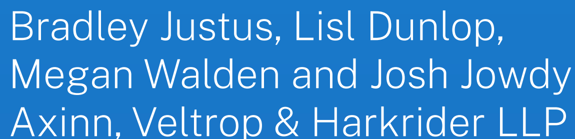
Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Merger Control 2023

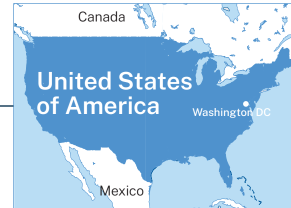
Definitive global law guides offering comparative analysis from top-ranked lawyers

USA: Law & Practice
and
USA: Trends & Developments



Bradley Justus, Lisl Dunlop,
Megan Walden and Josh Jowdy
Axinn, Veltrop & Harkrider LLP

USA



Law and Practice

Contributed by:
Bradley Justus, Lisl Dunlop, Megan Walden and Josh Jowdy
Axinn, Veltrop & Harkrider LLP

Contents

1. Legislation and Enforcing Authorities p.5
1.1 Merger Control Legislation p.5
1.2 Legislation Relating to Particular Sectors p.6
1.3 Enforcement Authorities p.6

2. Jurisdiction p.6
2.1 Notification p.6
2.2 Failure to Notify p.7
2.3 Types of Transactions p.7
2.4 Definition of “Control” p.7
2.5 Jurisdictional Thresholds p.8
2.6 Calculations of Jurisdictional Thresholds p.9
2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.9
2.8 Foreign-to-Foreign Transactions p.9
2.9 Market Share Jurisdictional Threshold p.10
2.10 Joint Ventures p.10
2.11 Power of Authorities to Investigate a Transaction p.10
2.12 Requirement for Clearance Before Implementation p.11
2.13 Penalties for the Implementation of a Transaction Before Clearance p.11
2.14 Exceptions to Suspensive Effect p.11
2.15 Circumstances Where Implementation Before Clearance Is Permitted p.11

3. Procedure: Notification to Clearance p.12
3.1 Deadlines for Notification p.12
3.2 Type of Agreement Required Prior to Notification p.12
3.3 Filing Fees p.12
3.4 Parties Responsible for Filing p.13
3.5 Information Included in a Filing p.13
3.6 Penalties/Consequences of Incomplete Notification p.13
3.7 Penalties/Consequences of Inaccurate or Misleading Information p.14
3.8 Review Process p.14
3.9 Pre-notification Discussions With Authorities p.14
3.10 Requests for Information During the Review Process p.14
3.11 Accelerated Procedure p.15

4. Substance of the Review p.15
4.1 Substantive Test p.15
4.2 Markets Affected by a Transaction p.16
4.3 Reliance on Case Law p.16
4.4 Competition Concerns p.16
4.5 Economic Efficiencies p.16
4.6 Non-competition Issues p.17
4.7 Special Consideration for Joint Ventures p.17

5. Decision: Prohibitions and Remedies p.17
5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.17
5.2 Parties' Ability to Negotiate Remedies p.18
5.3 Legal Standard p.18
5.4 Typical Remedies p.18
5.5 Negotiating Remedies With Authorities p.19
5.6 Conditions and Timing for Divestitures p.19
5.7 Issuance of Decisions p.19
5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.19

6. Ancillary Restraints and Related Transactions p.20
6.1 Clearance Decisions and Separate Notifications p.20

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.20
7.1 Third-Party Rights p.20
7.2 Contacting Third Parties p.20
7.3 Confidentiality p.20
7.4 Co-operation With Other Jurisdictions p.20

8. Appeals and Judicial Review p.21
8.1 Access to Appeal and Judicial Review p.21
8.2 Typical Timeline for Appeals p.21
8.3 Ability of Third Parties to Appeal Clearance Decisions p.21

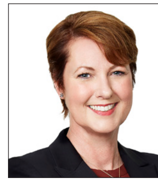
9. Foreign Direct Investment/Subsidies Review p.21
9.1 Legislation and Filing Requirements p.21

10. Recent Developments p.22
10.1 Recent Changes or Impending Legislation p.22
10.2 Recent Enforcement Record p.23
10.3 Current Competition Concerns p.24

Axinn, Veltrop & Harkrider LLP combines the skills, experience and dedication of the world's largest firms with the focus, responsiveness, efficiency and attention to client needs of the best boutiques. The firm was established in the late 1990s by lawyers from premier Wall Street firms with a common vision: to provide the highest level of service and strategic acumen in antitrust, intellectual property and high-stakes litigation. Axinn's lawyers have served as lead or co-lead counsel on nearly half a trillion dollars in transactions and, in the last ten years alone, have handled more than 250 litigations.

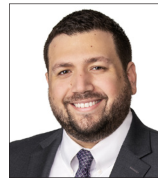
Authors

Bradley Justus focuses his practice on antitrust law, including mergers, litigation, government investigations, and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory. In addition to appearing in courts throughout the country, before the Department of Justice, and before the Federal Trade Commission, Bradley has represented major clients facing merger reviews by the European, Brazilian, Chinese, Korean, Canadian, Mexican, and Japanese competition regulators.



Lisl Dunlop has over 30 years of experience in antitrust and competition issues, practising in the US, Europe and Australia. Her clients include leading US and multinational companies in a broad range of industries, including the media, technology, life sciences, and healthcare sectors. Lisl is a trusted adviser for companies navigating global antitrust reviews of significant transactions, where her experience working in other jurisdictions and appearing before a variety of regulators provides particular value.

Megan Walden focuses her practice on merger analysis, government investigations, and antitrust counselling. She has previously assisted national and multinational companies across a variety of industries, including the life sciences, transportation, and retail sectors.



Josh Jowdy focuses his practice on federal and state antitrust law, including both transactions and litigations, with an emphasis on corporate merger clearance. He also counsels businesses navigating competition concerns in forming joint ventures and other collaborative arrangements.

Axinn, Veltrop & Harkrider LLP

114 West 47th Street
New York
NY 10036
USA

Tel: +1 212 728 2200
Fax: +1 212 728 2201
Web: www.axinn.com

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Merger Control Legislation

The primary merger control legislation in the US is Section 7 of the Clayton Act, which prohibits acquisitions that may substantially lessen competition. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") (Section 7A of the Clayton Act) governs the pre-merger notification process. Mergers may also be challenged under the Sherman Act, which prohibits agreements that unreasonably restrain trade (Section 1) and monopolisation, attempts to monopolise, and conspiracies to monopolise (Section 2), or Section 5 of the Federal Trade Commission Act (the "FTC Act"), which prohibits unfair methods of competition. States, as well as the District of Columbia, Puerto Rico and the Virgin Islands, have their own antitrust laws, many of which are analogous to the federal antitrust statutes.

Merger Guidelines

The FTC and the Antitrust Division of the Department of Justice (DOJ) (the "Agencies") share jurisdiction over merger review. In 2010, the Agencies jointly issued the currently operative version of the Horizontal Merger Guidelines, which outline the Agencies' core analytical techniques, practices and enforcement policies regarding mergers of actual or potential competitors under the federal antitrust laws.

The Agencies finalised new Vertical Merger Guidelines in June 2020, which outline the "principal analytical techniques, practices and enforcement policies" applied to analyse non-horizontal mergers such as vertical mergers, "diagonal mergers", and mergers of complements. After the change in administration in January 2021, in September 2021, the FTC unilaterally withdrew the 2020 Vertical Merger Guidelines.

In July 2023, the FTC and DOJ released draft updated Merger Guidelines, which reflect new principles and priorities the Agencies have adopted during the Biden Administration. The public will have the opportunity to provide comments to the draft Guidelines, which the Agencies will consider as they finalise the updated Guidelines for publication. Overall, the new Guidelines, coupled with recent proposed changes to the content of HSR filings, indicate a scepticism towards transactions, with lower market concentration thresholds and rejection or narrowing of certain defences.

Agency Rules and Guidance

The FTC is authorised to issue formal regulations that are "necessary and appropriate" to carry out the purposes of the HSR Act. The "HSR Rules" are complex and extensive, and apply to reportability, exemptions, and filing procedures.

The FTC's Premerger Notification Office also issues guidance relating to the application of the HSR Act and related regulations in the form of both formal and informal interpretations, as well as posts on its *Competition Matters* blog.

1.2 Legislation Relating to Particular Sectors

Sector-Specific Approvals

Transactions within highly regulated sectors of the economy, such as banking, healthcare, insurance, telecommunications, railroads, and defence, may also require approval from their federal or state sectoral regulators. For example:

- banking transactions may require approval by the Federal Reserve Board;
- telecom transactions may require approval by the Federal Communications Commission;
- transactions involving energy companies may require approval of the Federal Energy Regulatory Commission;
- mergers of insurance companies may require approval by state Commissioners of Insurance; and
- mergers of healthcare organisations may be subject to review and approval by state health departments and antitrust agencies.

1.3 Enforcement Authorities

Primary Enforcement Agencies

Both the FTC and DOJ enforce the federal antitrust laws and share jurisdiction over merger review under the Clayton Act and the HSR Act. The FTC also has authority to challenge mergers under the FTC Act. In addition, the FTC manages the HSR pre-notification regime. Under Section 16 of the Clayton Act, state Attorneys General can also seek to enjoin mergers.

The Agencies allocate merger cases through a co-operative clearance process that is primarily based on the expertise of each Agency. The FTC tends to investigate mergers relating to healthcare, pharmaceuticals, professional services, retail industries, and food, whereas the DOJ typically investigates mergers relating to media and entertainment, telecommunications, insurance, aerospace, financial services, and agriculture. In other industries, such as digital platforms, responsibility is less clear and the decision about which agency will review a transaction can be more complex.

Courts

To delay closing of a proposed merger, the Agencies must obtain preliminary injunctive relief from a federal district court. To block a transaction, the DOJ must seek a final injunction from a federal district court, whereas the FTC proceeds through its Part 3 administrative court process. Private parties, including customers and competitors, may also challenge mergers in federal courts. Private enforcement actions, however, are relatively rare.

2. Jurisdiction

2.1 Notification

If the transaction meets the jurisdictional thresholds of the HSR Act and does not qualify for an exemption, the parties must each submit a premerger notification and observe the HSR waiting period. The parties must file their HSR Forms with both Agencies.

2.2 Failure to Notify

Failure to comply with the requirements of the HSR Act may result in civil penalties of up to USD50,120 per day. The FTC adjusts the maximum HSR civil penalty annually for inflation. In practice, parties are rarely penalised with the maximum amount.

Historically, the FTC has had an informal "one free pass" practice and generally has not sought civil penalties for a party's first inadvertent violation if that party self-reports the violation, makes a corrective filing, and provides a detailed explanation of the circumstances that contributed to their failure to file. The FTC routinely seeks penalties of hundreds of thousands or millions of dollars in cases where the FTC suspects bad faith or a party is a repeat offender.

2.3 Types of Transactions

HSR-Reportable Transactions

The HSR Act requires that parties to certain mergers or acquisitions notify the Agencies prior to closing the proposed transaction. HSR filing requirements apply to transactions involving the acquisition of voting securities, assets, or non-corporate interests that meet certain jurisdictional thresholds. See **2.5 Jurisdictional Thresholds**.

Internal Restructuring

To be HSR reportable, a transaction must result in a transfer of beneficial ownership of voting securities, assets, or non-corporate interests from one ultimate parent entity to a different ultimate parent entity. See **2.4 Definition of "Control"**. Restructurings or reorganisations in which the ultimate parent entity does not change generally do not require an HSR filing.

Entity Formation

HSR notification is required for the formation of certain types of joint ventures. The formation of corporate joint ventures is treated under the HSR Rules as acquisitions of voting securities of the venture by the venturers.

The formation of non-corporate joint ventures requires HSR notification only when one of the parties will "control" the new venture. See **2.10 Joint Ventures**.

2.4 Definition of "Control"

"Control" is defined under the HSR Act as either:

- holding 50% or more of the outstanding voting securities of an issuer or, where an entity has no outstanding voting securities, having the right to 50% or more of the entity's profits or, upon dissolution, its assets; or
- having the present contractual power to designate 50% or more of the directors of a corporation or of the trustees of certain trusts.

An entity or individual that is not controlled by any other entity is considered the Ultimate Parent Entity (UPE). The relevant "persons" for HSR Act purposes are the UPE of the acquiring party, together with all entities it controls directly or indirectly (the "Acquiring Person"), and the UPE of the acquired party, together with all entities it controls directly or indirectly (the "Acquired Person").

Minority Acquisitions

Minority acquisitions of corporate voting securities – even small percentages – may be reportable if they meet the HSR thresholds and no exemption applies. In contrast, acquisitions of interests in non-corporate entities (such as limited liability companies or partnerships) are only reportable if the acquisitions confer control.

2.5 Jurisdictional Thresholds

Three jurisdictional tests determine whether a transaction is within the scope of the HSR Act:

- the commerce test;
- the “size-of-transaction” test; and
- the “size-of-person” test.

HSR thresholds are adjusted annually based on changes in the US gross national product. The revised thresholds are typically announced by the FTC in January and take effect 30 days later. The following discussion is based on the thresholds in effect from February 2023.

Commerce Test

The commerce test is met if either party is engaged in commerce or any activity affecting commerce; therefore, nearly all transactions will satisfy the commerce test.

Size-of-Transaction Test

The size-of-transaction test is met if, as a result of the transaction, the Acquiring Person will hold voting securities, assets, or non-corporate interests of the Acquired Person valued in excess of USD111.4 million. In general, the size of the transaction includes the present value of any voting securities and non-corporate interests of the Acquired Person already held by the Acquiring Person. For asset acquisitions, the size of transaction includes the present value of any assets acquired from the Acquired Person within the previous 180 days and the present value of any assets of the Acquired Person to be acquired pursuant to a letter of intent executed in the preceding 180 days. Depending on the transaction structure, valuing the size of a transaction can be complex. See **2.6 Calculations of Jurisdictional Thresholds**.

Size-of-Person Test

The size-of-person test is applicable for transactions valued at more than USD111.4 million but not more than USD445.5 million. Transactions valued at more than USD445.5 million will be subject to HSR notification without regard to the size of the parties if no exceptions apply.

In general, the size-of-person test is met if one of the persons involved in the transaction has USD222.7 million or more in annual net sales or total assets, and the other has USD22.3 million or more. If the acquired person is not engaged in manufacturing, only its total assets are considered, unless its total sales are USD222.7 million or more. There also are specific size-of-person rules applying to joint venture formations.

Exemptions

Even if a transaction meets the HSR thresholds, it may still be non-reportable if it qualifies for one of the numerous exemptions. Some key exemptions include:

- acquisitions of certain assets in the ordinary course of business, including new goods and current supplies;
- acquisitions of certain types of real property, such as certain new and used facilities, unproductive real property (eg, raw land), office and residential property, and hotels and motels (excluding ski facilities and casinos);
- acquisitions of up to 10% of voting securities of an issuer if for the purposes of investment only;
- acquisitions of interests in entities that themselves hold HSR-exempt assets;
- stock dividends and splits and reorganisations;
- acquisitions of certain foreign assets and certain foreign-issuer voting securities; and
- intra-person transactions.

2.6 Calculations of Jurisdictional Thresholds

Size-of-Transaction Test

The size-of-transaction test is calculated based on the value of the voting securities, assets, and non-corporate interests that the Acquiring Person will hold in the Acquired Person as a result of the transaction.

- Publicly traded voting securities are valued based on the greater of the market price (generally the lowest closing quotation during the 45 days prior to closing) or the acquisition price (all consideration to be paid, whether in cash or in kind).
- Acquisitions of non-publicly traded voting securities and non-corporate interests are valued based on the acquisition price (or, if the acquisition price is not determined, the fair market value).
- Acquisitions of assets are valued based on the greater of the fair market value or, if determined, the acquisition price.

Size-of-Person Test

The size-of-person test is calculated based on the worldwide sales or assets of the Acquiring and Acquired Persons as reflected in each party's last regularly prepared consolidated annual income statement and last regularly prepared consolidated balance sheet. These financial statements must be no more than 15 months old. Where a person does not have a regularly prepared annual income statement or balance sheet, the UPE must prepare a pro forma balance sheet that lists all assets held at the time of the acquisition and – in the case of the Acquiring Person – excludes any cash to be used as consideration for the acquisition, any expenses incidental thereto, and any securities of the same Acquired Person. An Acquired Person's revenues and assets include the assets and/or revenues of the target.

The size-of-person assessment should reflect the annual net sales and total assets of all controlled entities at the time of the proposed acquisition. If there is a change of business between the date of the last balance sheet and time of filing – such as an acquisition or divestiture – it must be taken into account.

Annual net sales recorded in a foreign currency should be converted to US dollars based on the average interbank exchange rate for the given year, and assets recorded in a foreign currency should be converted to US dollars based on the interbank exchange rate as of the date of the business's last regularly prepared balance sheet.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Whether an entity meets the HSR size-of-person threshold is based on the revenues and assets of the Acquiring and Acquired Persons. See **2.4 Definition of "Control"** and **2.6 Calculation of Jurisdictional Thresholds**.

2.8 Foreign-to-Foreign Transactions

Certain foreign-to-foreign transactions and acquisitions of foreign assets or voting securities by US entities that are otherwise covered by the HSR Act may qualify for an exemption. These exemptions are intended to exclude from HSR reportability acquisitions that may have limited significance or impact in the USA.

Under the HSR Rules, a foreign person is an entity whose Ultimate Parent Entity is not incorporated in the United States, is not organised under the laws of the United States, and does not have its principal offices within the United

States, or, in the case of a natural person, a person who is not a citizen of the United States and who does not reside in the United States.

Asset Acquisitions

Acquisitions of assets located outside the USA that generated aggregate sales in or into the USA of USD111.4 million or less in the most recent fiscal year are exempt. This exemption applies to acquisitions by both US and non-US acquirers.

Asset acquisitions valued at USD445.5 million or less are exempt where both the Acquiring and Acquired Persons are foreign persons under the HSR Rules, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD245 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA have a fair market value of less than USD245 million.

Acquisitions of Voting Securities of a Foreign Issuer

Acquisitions of voting securities of a foreign corporate issuer by a US person are exempt unless the issuer holds US-based assets (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) with a fair market value of over USD111.4 million, or made sales in or into the USA, on an aggregate basis with its controlled entities, of over USD111.4 million in the most recent fiscal year.

Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt unless the acquisition will confer control of the issuer *and* the issuer holds US-based assets in excess of the thresholds described above.

Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt if the transaction is valued at USD445.5 million or less, the aggregate sales of the Acquiring and Acquired Persons in or into the USA are less than USD245 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the USA (excluding investment assets, voting or non-voting securities of another person, or certain credits or obligations related to joint ventures) are valued at less than USD245 million.

Acquisitions by or From Foreign Governmental Entities

Acquisitions by or from foreign governmental entities are exempt if the Ultimate Parent Entity of either the Acquiring or Acquired Person is controlled by a foreign state, foreign government, or foreign agency and the acquisition is of assets located within the foreign state or of voting securities or non-corporate interests of an entity organised under the laws of that jurisdiction.

2.9 Market Share Jurisdictional Threshold

The HSR Act filing thresholds do not include a market share test.

2.10 Joint Ventures

Joint ventures are subject to specific and complex rules under the HSR Act and may be notifiable unless an exemption applies. Under the HSR Rules, the contributors to a joint venture are deemed Acquiring Persons, and the joint venture is deemed the Acquired Person.

2.11 Power of Authorities to Investigate a Transaction

The Agencies have authority to investigate and challenge transactions that do not meet HSR

filing requirements. Although such investigations occur somewhat infrequently, the Agencies at times have acted quickly to challenge non-reportable transactions. Parties should not assume that non-HSR reportable transactions will escape review.

The Agencies' power to challenge conduct under the Clayton Act, the Sherman Act or the FTC Act does not have a statute of limitations, and therefore the potential for Agency scrutiny is indefinite. The Agencies may investigate a transaction even if they declined to challenge the transaction during the HSR review process. The FTC most notably exercised this authority in 2021 in bringing suit against Facebook, alleging, among other charges, that Facebook had consummated multiple anti-competitive acquisitions in an effort to maintain monopoly power, including its acquisitions of Instagram in 2012 and WhatsApp in 2014.

2.12 Requirement for Clearance Before Implementation

If an HSR filing is required, parties may not close the transaction until the expiration or termination of the waiting period. Typically, the statutory waiting period is 30 days and begins after both parties submit their HSR filings and the filing fee has been paid. For open-market purchases, conversions, option exercises, and certain other (generally, non-negotiated) transactions, the waiting period begins once the Acquiring Person submits an HSR filing.

Unless the Agencies issue a second request or sue to block the transaction, the waiting period expires automatically on the 30th day after filing at 11.59pm Eastern Standard Time (EST), and the parties may close the transaction. In cash tender offers and certain bankruptcy transactions, the waiting period is shortened to 15 days. The waiting period extends to the next business day when a waiting period expires over a weekend or on a legal public holiday.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Parties that close a transaction or transfer beneficial ownership prior to the expiration or termination of the waiting period (conduct commonly referred to as "gun-jumping") are subject to civil penalties of up to USD50,120 per day. Although in the majority of cases the Agencies have imposed penalties substantially less than the maximum permitted by law, gun-jumping fines commonly range in the hundreds of thousands, if not millions, of dollars. See **2.2 Failure to Notify**.

2.14 Exceptions to Suspensive Effect

There are no exceptions to the waiting requirement of the HSR Act. Parties to all reportable transactions must observe the applicable waiting period prior to consummation.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Under no circumstances will the Agencies permit closing before expiration or early termination of the applicable waiting period. Carve-outs, ring fencing, or hold-separate agreements are not permitted. Premature closing may subject the parties to civil penalties of up to USD50,120 per day of non-compliance and potential additional equitable relief.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no deadlines for making HSR filings; parties can submit HSR filings at any time after executing a transaction agreement or letter of intent (LOI), and for certain types of transactions (eg, tender offers, secondary acquisitions, and certain bankruptcy transactions), parties may file prior to signing.

Once the waiting period ends, the parties have one year to close the transaction before a new filing is needed. In the case of an acquisition of less than a controlling interest in a corporation, the Acquiring Person has one year to meet or cross the notification threshold (based on size-of-transaction) it reported on its filed HSR Form. Once crossed, for four more years, the Acquiring Person may acquire further voting securities from the same Acquired Person without further HSR filing as long as the sum of the initial and further acquisitions does not cross the next, higher HSR notification threshold.

3.2 Type of Agreement Required Prior to Notification

A signed agreement, such as a letter of intent, merger agreement, or purchase and sale agreement typically must be submitted with each HSR filing, with the exception of certain types of transactions, such as tender offers, secondary acquisitions, and certain bankruptcy transactions. Agreements need not be formal or binding.

In June 2023, the FTC published a notice of proposed rule-making which would dramatically alter the requirements for an HSR filing. Among its provisions, the proposed rule-making would require parties to execute a more detailed agreement than has previously been required. The public comment period is scheduled to expire on 28 August 2023; the new rule is not expected to take effect until the fourth quarter of 2023, at the earliest.

3.3 Filing Fees

The size of the transaction reported on the parties' HSR Form determines the filing fee. The Merger Filing Fee Modernization Act of 2022 made significant changes to the schedule of HSR filing fees. Filing fees were reduced modestly for smaller-value transactions and were increased substantially for higher-value transactions. The following fee amounts and transaction value thresholds are effective beginning February 2023:

- USD30,000 for transactions valued in excess of USD111.4 million but less than USD161.5 million;
- USD100,000 for transactions valued at USD161.5 million or greater, but less than USD500 million;
- USD250,000 for transactions valued at USD500 million or greater, but less than USD1 billion;
- USD400,000 for transactions valued at USD1 billion or greater, but less than USD2 billion;
- USD800,000 for transactions valued at USD2 billion or greater, but less than USD5 billion; and
- USD2.25 million, for transactions valued at USD5 billion or greater.

Fees may be paid prior to or upon filing. The Acquiring Person is responsible for payment of the filing fee, although it may be allocated between the parties by agreement. Fees are payable by electronic wire transfer (EWT), bank cashier's check, or certified check. Fees must be paid in US currency.

3.4 Parties Responsible for Filing

For most transactions, both the Acquiring and the Acquired Persons must submit separate HSR filings. As a matter of practice, parties typically co-ordinate on the content and timing of their respective filings.

3.5 Information Included in a Filing

A complete HSR filing consists of the HSR Form(s) (including required attachments and accompanying affidavit(s)) and the filing fee.

HSR Form

Among other requirements, the HSR Form requires each person to:

- describe the transaction's structure;
- list US revenues for the most recent completed year by North American Industry Classification System codes (NAICS Codes) and, for manufacturing industries, by North American Product Classification System codes (NAPCS Codes);
- provide additional disclosures with respect to any overlapping lines of business;
- submit all documents prepared by or for officers or directors for the purpose of evaluating or analysing the transaction with respect to competition, competitors, markets, market shares, potential for sales growth or expansion into product or geographic markets, as well as all confidential information memoranda, bankers' books, other third-party consultants' materials, and documents describing synergies and efficiencies ("4(c) and 4(d) documents"); and
- disclose information about each party's controlled entities, significant shareholders, and minority shareholdings.

An Acquiring Person must respond on behalf of itself and all its controlled entities. By contrast, an Acquired Person's filing is largely limited to disclosures concerning the entities or assets being sold.

Unlike antitrust or merger control filings in other jurisdictions, parties are not required to describe the transaction's impact on the market or competition. Instead, the Agencies rely on the 4(c) and 4(d) documents to assist in the assessment of the competitive impact of the transaction.

Parties are not required to translate HSR attachments into English but must provide any English-language versions that are available at the time of filing.

In June 2023, the FTC published a notice of proposed rule-making, which would dramatically expand the scope of information required in parties' initial HSR filings. Among the many additions proposed are new narrative descriptions about the parties and their transaction; broader document production requirements; and expanded disclosures about corporate governance.

The public comment period for the proposed rule-making is scheduled to run until 28 August 2023, after which time the FTC will respond to comments and publish its final rule. Parties filing HSR in late 2023 and 2024 should monitor the FTC's progress through the rule-making process, to ensure their filings comport with all operative requirements.

3.6 Penalties/Consequences of Incomplete Notification

The Premerger Notification Office of the FTC rejects as incomplete filings missing required information (often referred to as "bouncing" an HSR notification). If the HSR filing is incomplete, the waiting period will not begin until the req-

uisite information is provided. As long as parties observe the waiting period and take steps to cure any filing deficiencies, no fines will be levied.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Acquiring or Acquired Persons that consummate a reportable transaction based on an incomplete or inaccurate HSR Form may be subject to civil penalties. Additionally, an individual who knowingly signs an incomplete or inaccurate HSR Form on behalf of the Acquiring or Acquired Person may be subject to criminal punishment for perjury.

3.8 Review Process

Initial Waiting Period

The "initial waiting period" (30 calendar days or 15 days in the case of cash tender offers and certain bankruptcy transactions) begins when both parties have filed their HSR Forms (or when an acquirer files in the case of acquisitions of voting securities or non-corporate interests from third parties). If the initial waiting period expires without either Agency taking any action, the parties may consummate the transaction.

During the initial waiting period, either Agency may open a preliminary investigation of the proposed transaction to identify competitive issues and determine if further information is required. An Agency may request briefings with the parties and/or request that the parties provide additional information on a voluntary basis.

Under the HSR Rules, parties to a transaction may restart the waiting period with no additional filing fee by withdrawing the filing and refiling within two business days. This "pull-and-refile" process effectively extends the initial waiting period by an additional 30 days to allow time to address unresolved issues and potentially avoid a second request.

Second Request

Before the end of the initial waiting period, the reviewing Agency may choose to issue a "second request" formally requesting additional documents and information. The issuance of a second request suspends the waiting period while the parties respond and certify substantial compliance. Once each party has substantially complied with its second request, a second waiting period begins (typically 30 days, or 10 days in the case of a cash tender offer or bankruptcy filing). If the reviewing Agency does not seek to block the transaction during the second waiting period, the parties may consummate the transaction.

3.9 Pre-notification Discussions With Authorities

For most transactions, pre-notification discussions with the Agencies are not required. When a transaction is likely to raise significant competitive concerns, parties may engage the Agencies in pre-notification discussions to provide additional time to review the transaction and reduce the risk or narrow the scope of a second request.

3.10 Requests for Information During the Review Process

Voluntary Access Letter

If the reviewing Agency opens a preliminary investigation, the reviewing Agency may issue a "voluntary access letter" during the initial waiting period. A voluntary access letter requests information that is not required in the HSR filing, such as strategic and market plans, information on overlapping products, market share information, top customer contact information, customer win/loss data, competitor and supplier lists, and other information. Parties should be

prepared to respond to a voluntary access letter within a few days. Prompt co-operation increases the likelihood that the reviewing Agency will be able to resolve competitive concerns within the initial waiting period.

Second Request

If competitive concerns are not resolved at the end of the initial waiting period, the reviewing agency may issue a "second request", which generally extends the waiting period until 30 days after compliance. A second request is a voluminous demand for documents and data as well as detailed interrogatories. Second requests are extraordinarily burdensome and costly. A typical second request response includes millions of pages of documents and compliance may take several months. Both Agencies have published model second requests that provide examples of the type of information typically requested.

Parties that receive second requests may enter into a timing agreement with the Agency establishing protocols for compliance with a second request, milestone dates for events leading up to substantial compliance, and extensions of time for the Agency to make an enforcement decision after waiting period expiry. Both Agencies have published model timing agreements on their websites.

3.11 Accelerated Procedure

All transactions subject to HSR notification requirements must complete an HSR filing. There is no short form or simplified procedure.

Historically, the Agencies granted "early termination" of the initial waiting period for transactions that posed little competitive risk. If early termination is granted, the names of the parties to the transaction are published in the Federal Register and posted on the FTC's website. In February 2021, the Agencies announced they would temporarily stop granting early termination. As of June 2023, the Agencies have not resumed granting early termination.

4. Substance of the Review

4.1 Substantive Test

A detailed guide to the Agencies' recent approach to merger analysis is contained in the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, although enforcement policies are in flux. New draft Merger Guidelines, published for public comment in July 2023, best reflect the Agencies' approach to merger review in the Biden Administration.

In general, the Agencies review a proposed transaction to determine whether the transaction will create, enhance, or entrench market power or facilitate its exercise. The Agencies consider whether a transaction is likely to reduce competition or negatively impact consumers (eg, result in increased prices or reduced output, quality or innovation) either because (i) the merged firm will have sufficient market power such that raising prices or reducing output, quality or innovation will be profitable, or (ii) there will be so few firms left in the market that the remaining firms will be able to co-ordinate their conduct. The Agencies also consider vertical issues of whether a transaction will combine market power at different levels of the supply chain in a manner that might create the incentive and ability to disadvantage rivals, or provide access to competitively sensitive information of competitors.

To block a transaction, the Agencies must show in court that a transaction is likely to substantially reduce competition in a relevant market.

4.2 Markets Affected by a Transaction

Affected markets are defined on both a product and geographic dimension. In general terms, relevant product markets comprise all the products and services that customers perceive as close substitutes; a geographic market is that area where customers would likely turn to buy the goods or services in the product market. Recently, the Agencies have also focused on a transaction's potential effects on labour markets, particularly where the parties draw their work force from a common pool of employees.

In addition to econometric analysis, the Agencies also consider a variety of qualitative factors, such as industry recognition of the product as its own market and whether the product has peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, and/or specialised vendors.

4.3 Reliance on Case Law

There is a significant body of merger jurisprudence in the US courts. The Agencies do not rely on case law from other jurisdictions in making enforcement decisions, but may co-ordinate with foreign competition authorities on individual merger investigations.

4.4 Competition Concerns

The Agencies have investigated mergers under theories of unilateral effects, co-ordinated effects, the elimination of potential competition, and vertical merger theories of foreclosure of competitors and raising rivals' costs. The FTC also has recently brought a challenge to a pharmaceutical merger based on a conglomerate bundling theory of harm (Amgen/Horizon). The current leadership has expressed interest in moving away from the traditional "consumer welfare" standard (which focused on impacts on consumers from increased prices, lower quality and reduced innovation) to considering a broader range of factors, including harms to workers, monopsony, conglomerate effects, aggregation of data, exclusionary practices, cross-market effects and increased ownership by private equity firms.

Labour market issues are a particular priority for the Biden administration, and consequently impacts on workers have become significantly more important in merger reviews and challenges over the last two years. The Agencies' draft updated Merger Guidelines specifically address review of a transaction's potential effects on labour markets by articulating principles of market definition and theories of harm to workers that may result from lessened competition in labour markets.

4.5 Economic Efficiencies

The Agencies will consider economic efficiencies generated by a transaction as a potential offset to competitive concerns. Both Agencies have expressed scepticism about efficiency justifications, however, and the "efficiencies defence" has not been routinely accepted by courts.

The burden on parties to demonstrate efficiencies is significant, and when a reviewing agency believes a transaction would harm competition, even well-documented and substantial efficiencies are unlikely to fully resolve concerns.

Parties must provide evidence that the asserted efficiencies are likely to occur, cannot be accomplished through other means, and are sufficient to counteract the proposed transaction's harm to consumers. For efficiencies to be recognised, they must be verifiable and merger-specific and cannot result in any anti-competitive reduction in output or service. The Agencies will not consider vague or speculative claims.

4.6 Non-competition Issues

Historically, the Agencies have not considered non-competition issues when analysing proposed transactions. The current leadership, however, has expressed a broader view of the role of antitrust than previous administrations, arguing that vigorous antitrust enforcement plays a role in supporting the "preservation of our democratic political and social institutions". In addition to considering a broader range of competition effects, including effects in labour markets (see **4.4 Competition Concerns**), the Agencies have suggested that they will consider impacts of transactions on a variety of factors, including the environment, social and racial inequity, and privacy.

4.7 Special Consideration for Joint Ventures

The Agencies typically review joint ventures (JVs) by analysing their overall competitive effect. JVs may be pro-competitive if they allow participants to provide goods or services that are less expensive, more valuable to consumers, or brought to market faster than would be possible without the JV. JVs may harm competition if they reduce the JV parties' incentives to compete against one another, if the parties' independent decision-making is limited outside the JV because of combined control or combined financial interests, or if the JV facilitates collusion.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The judicial processes that each Agency may pursue to block a transaction differ.

DOJ

To obtain an order to either block a proposed transaction or unwind a completed transaction that may violate Section 7 of the Clayton Act, the DOJ must file in federal district court a complaint and motions for a preliminary injunction (if the transaction has not closed) and a permanent injunction.

To obtain a preliminary injunction to prevent a transaction closing pending a decision on the merits, the DOJ must show that its likelihood of success on the merits and the threat of irreparable harm outweighs any potential harm to the defendant and any opposing public interest in granting the injunction. To prove a Section 7 violation and obtain a permanent injunction, the DOJ has the burden to demonstrate with a "reasonable probability" (ie, greater than a "mere possibility" but less than a "certainty") that the merger will, or currently does, substantially lessen competition. Frequently, courts collapse the preliminary and final injunction hearings into one. The losing party may appeal to the federal court of appeals.

FTC

The most common path that the FTC follows to challenge a proposed merger is to seek a preliminary injunction in federal district court under Section 13(b) of the FTC Act, while simultaneously filing an administrative complaint under Part 3 of the FTC Rules seeking an order that the transaction violates the FTC Act ("Part 3 proceedings"). If a transaction has already closed, the FTC proceeds under Part 3 only. If the FTC fails to obtain a preliminary injunction (and does not appeal or loses an appeal of the preliminary injunction decision), its current policy is to discontinue Part 3 proceedings unless continuing to do so would serve the public interest.

To obtain injunctive relief under Section 13(b), the FTC need only make "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest". This is understood to be a lower standard than the "balancing of the equities" standard applying to DOJ preliminary injunction cases.

Administrative complaints are litigated before an administrative law judge (ALJ), an FTC employee appointed by the Office of Personnel Management. The ALJ's initial decision and order may be appealed to the full Commission, whose decision may then be reviewed by the federal court of appeals.

5.2 Parties' Ability to Negotiate Remedies

The Agencies have traditionally accepted remedies to address competitive concerns. Over the last several years, both Agencies have expressed a strong preference for structural remedies and scepticism of the effectiveness of behavioural remedies. More recently, both Agencies have indicated that merger remedies will only be available as a way to address competitive concerns in exceptional cases, which is borne out by their recent enforcement activities. See **10.2 Recent Enforcement Record**.

While remedy discussions may take place at any stage in the review process, they rarely begin before the Agency staff have investigated the transaction and identified concerns. In transactions with narrow but obvious concerns, parties may approach the Agency early with a prearranged "fix". See **5.4 Typical Remedies**.

5.3 Legal Standard

In September 2020, the DOJ issued its most recent Merger Remedies Manual, which states that the DOJ will insist on a remedy that preserves competition and resolves the anti-competitive problem. Similarly, the FTC's 2012 Negotiating Merger Remedies Statement notes that "acceptable" remedies must "maintain or restore competition in the markets affected by the merger."

5.4 Typical Remedies

The FTC's 2012 Negotiating Remedies Manual and DOJ's 2020 Merger Remedies Manual provide insight into the Agencies' negotiating process and requirements, but may not fully reflect the preferences of the current administration.

When the Agencies determine that a horizontal merger is likely to have anti-competitive effects, the Agencies generally prefer structural remedies consisting of divesting an ongoing standalone business unit. Structural divestitures consisting of less than a standalone business must include all assets (or licences to those assets) necessary for the divestiture purchaser to be an effective, long-term viable competitor of the merged entity. The Agencies typically require the parties to obtain prior approval of a contractually bound buyer for the divested assets before they will approve the consent agreement.

The Agencies accept behavioural or conduct remedies in very limited circumstances and have increasingly expressed scepticism about whether behavioural remedies are effective. Neither Agency has accepted a consent decree involving only conduct remedies since 2019.

In very rare cases, the Agencies have also pursued disgorgement of profits in consummated mergers as a remedy. The FTC's authority to obtain disgorgement is currently in question under a recent Supreme Court ruling.

5.5 Negotiating Remedies With Authorities

The Agencies have different procedures for accepting and finalising negotiated remedies.

FTC

The parties and the FTC staff negotiate a proposed consent agreement, which must be signed by the staff and merging parties, approved by the Director of the Bureau of Competition, and approved by a majority of the Commissioners. At this point, the parties are usually permitted to close their transaction. The FTC then opens a 30-day public comment period, issuing a complaint, provisional Decision and Order, and an Analysis of Proposed Consent Order to Aid Public Comment. Following the public comment period, the FTC can accept the Decision & Order as final, reject it, or revise it.

DOJ

The parties and the DOJ staff negotiate a consent agreement in the form of a Proposed Final Judgment (PFJ). Once the PFJ has been approved by the Assistant Attorney General, the Agency files in federal district court a complaint, the PFJ and a competitive impact statement. The court makes a preliminary order accepting the PFJ, which usually permits the parties to close the transaction. Under the Tunney Act, the DOJ must publish the PFJ and related materials for a 60-day public-comment period, following which it submits a report to the court that the PFJ is in the "public interest" and the court makes the PFJ final. The Tunney Act process is usually uneventful; however, in one notable recent case (CVS/Aetna, 2019), a judge did ask the parties to hold the acquired business separate pending public comment, and conducted hearings with live witnesses before concluding that the settlement was in the public interest.

5.6 Conditions and Timing for Divestitures

Conditions and Timing

See **5.5 Negotiating Remedies With Authorities**.

Monitoring and Enforcement

The Agencies monitor and enforce compliance with negotiated remedies. Where provided in the consent agreement, the Agencies may also appoint monitors to ensure the compliance and effectiveness of the remedy.

5.7 Issuance of Decisions

The Agencies do not affirmatively approve proposed mergers. They simply allow the HSR waiting period to expire or terminate the waiting period early. Occasionally, for significant transactions, the Agencies will issue a press release when closing an investigation and/or a "closing statement" explaining the reasons for closing the investigation, such as the DOJ's July 2020 statement on the closing of its investigation of London Stock Exchange Group and Refinitiv.

Challenges to mergers are public. Complaints are filed in federal district court (and in the case of the FTC, Part 3), and appear on public court and agency dockets. In addition, the Agencies make press releases when challenging mergers. Court and Part 3 decisions in merger challenges are on the public record.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The Agencies may seek remedies or challenge foreign-to-foreign transactions where the transactions impact US markets. For example, in June 2021, the DOJ filed suit to block UK firm Aon PLC's proposed USD30 billion acquisition of UK company Willis Tower Watson, alleging the transaction would eliminate competition in

US markets by merging two of the "Big Three" global insurance brokers. Shortly after the DOJ filed suit to block the transaction, Aon and Willis abandoned the merger.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Parties must submit the transaction agreement as well as any agreements not to compete and any other agreements between the parties with their HSR filings. The Agencies will review the transaction as a whole, and may raise concerns about ancillary restraints in the review process. Recently, employment-related non-compete agreements have been a particular focus of review. Typically, parties amend ancillary agreements rather than jeopardise clearance of the entire transaction. Even if no concerns are raised during the merger review process, the Agencies maintain the discretion to challenge any ancillary restraints or collateral agreements at a later time.

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

7.1 Third-Party Rights

Complaints and Agency-solicited input from customers, suppliers, competitors and other industry participants often meaningfully inform merger review. Customer complaints are typically most influential; however, input from other industry participants can also be important in identifying non-reportable transactions or causing the Agencies to look more closely at certain aspects of a transaction.

Third parties may challenge transactions in district court, although such actions are rare. See **1.3 Enforcement Authorities**.

7.2 Contacting Third Parties

The Agencies routinely seek input from customers, suppliers, competitors and other third parties to confirm or complement staff's competitive analysis of proposed transactions or remedies. The Agencies frequently interview customers, suppliers and competitors. The Agencies may also issue subpoenas for depositions (DOJ) or investigational hearings (FTC) and frequently request documents and information from third parties either voluntarily or through CIDs and subpoenas.

7.3 Confidentiality

All materials submitted by the Acquiring and Acquired Persons under the HSR Act are confidential under the Freedom of Information Act, subject only to public disclosure if the transaction is challenged by one of the Agencies. The "fact of filing" is also confidential, unless disclosed by the parties themselves, or unless early termination is requested and granted, in which case the parties' names are published in the Federal Register and on the FTC's website. Additionally, such confidential information may be disclosed to a committee or subcommittee of Congress.

The confidentiality of information obtained from third parties through informal phone calls and meetings, or through formal Civil Investigative Demands (CIDs), and the identity of third parties under either process, is statutorily protected.

7.4 Co-operation With Other Jurisdictions

The USA has bilateral and/or multilateral co-operation agreements including commitments

to consult and co-operate on competition matters and to properly maintain the confidentiality of shared information with 13 jurisdictions: Germany, Australia, the EU, Canada, the UK, Brazil, Israel, Japan, Mexico, New Zealand, Chile, Colombia and Peru. The Agencies have also entered into less formal, non-binding memoranda of understanding with competition agencies in Russia, the People's Republic of China, India and South Korea. The Agencies also co-operate through multilateral organisations including the Organisation for Economic Co-operation and Development (OECD) and International Competition Network (ICN).

When competition issues span multiple jurisdictions, the Agencies may exchange views and information with their foreign counterparts; however, to share information submitted by the parties, the Agencies must first obtain a waiver of confidentiality. Parties typically agree to such waivers to appease enforcers and potentially avoid incompatible remedies. The Agencies have released a joint model waiver of confidentiality.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere With Transactions** and **5.7 Issuance of Decisions**, the Agencies must seek an injunction in federal district court to stop a proposed transaction from closing after the expiration of the HSR waiting period. The parties or the Agencies may appeal this decision to the federal court of appeals. The parties may also appeal adverse FTC Part 3 decisions to the full Commission and appeal Commission decisions to the federal court of appeals.

8.2 Typical Timeline for Appeals

Appeals can take many months to conclude and are rarely pursued.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties do not have the right to appeal an Agency's decision not to challenge a transaction. Third parties with standing may, however, bring a private action against the merging parties under the Clayton Act or Sherman Act. See **1.3 Enforcement Authorities**.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Foreign Direct Investment

The Committee on Foreign Investment in the United States (CFIUS) is an interagency body that has jurisdiction to review any transaction that may result in foreign control of a US business. CFIUS also has jurisdiction over transactions that involve a foreign actor obtaining a *non-controlling* interest in certain types of business of special concern to US national security (referred to as "TID" businesses since they involve "critical Technologies" or "critical Infrastructure" or the collection or maintenance of "sensitive personal Data" of US citizens). Most CFIUS filings are voluntary, but a filing is mandatory for acquisitions in which (i) a foreign government actor will obtain a substantial interest in a US TID business, or (ii) any foreign actor will acquire an interest in a US business associated with technologies that require US regulatory authorisation for export or transfer. CFIUS can impose penalties for a failure to file a mandatory transaction.

CFIUS evaluates each transaction it reviews along three dimensions:

- the ability and intention of the acquirer to harm national security ("threat");
- the degree to which the target US business is susceptible to exploitation by the acquirer ("vulnerability"); and
- the reasonably foreseeable impact on US national security ("consequence").

CFIUS tends to focus on transactions involving the defence industry, emerging technologies, critical infrastructure, and the mass collection of sensitive personal data. While CFIUS's enabling legislation and regulations apply equally to acquirers of all nationalities, acquirers with ties to China have tended to receive greater scrutiny. If CFIUS determines it has national security concerns about a given transaction, it can negotiate with the parties to put in place measures that mitigate those concerns (eg, limiting access to sensitive systems or facilities to US personnel) or it may recommend that the President block the transaction altogether. A Presidential block is exceedingly rare – fewer than ten transactions have been blocked in the 40+ years CFIUS has been in existence.

Foreign Merger Subsidy Disclosure Act

Under the Foreign Merger Subsidy Disclosure Act (FMSDA), signed into law in December 2022, parties filing pre-merger notifications under the HSR Act will be required to disclose information about subsidies they receive from "foreign entities of concern", such as entities controlled by China, Iran, North Korea, Russia, and other entities included on the Specially Designated Nationals and Blocked Persons List (SDN). The FMSDA seeks to prevent foreign entities from distorting US markets and acquiring control or influence over critical US assets through acquisitions by state-owned enterprises and companies receiving foreign subsidies.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

The HSR thresholds are adjusted annually, and changes in the interpretations of the HSR Act and its regulations – issued by the Premerger Notification Office of the FTC – are common.

Policy Changes

As noted in **3.11 Accelerated Procedure**, in February 2021, the Agencies announced they would temporarily stop granting early termination during the initial HSR waiting period.

In October 2021, the FTC announced a policy of requiring all merging parties subject to a Commission remedy order to obtain prior approval for a minimum of ten years before closing any future transactions affecting any relevant markets for which a violation was alleged. Prior approval requirements may extend beyond the narrow markets affected by the original transaction, and the FTC has claimed they may pursue prior approval requirements even if a transaction is abandoned. Transactions subject to prior approval will not benefit from HSR Act review timelines or the ability to force the FTC to sue to block a deal, and accordingly prior approvals may take significantly longer than traditional HSR review. Additionally, all buyers of divested assets must seek prior approval before selling assets acquired through consent decrees for a minimum of ten years.

In November 2022, the FTC announced a policy regarding Section 5 of the FTC Act, which covers "unfair methods of competition". The FTC's previous policy applied Section 5 only in a narrow set of circumstances, when a restraint of trade was unreasonable in economic terms. Under the updated policy, the FTC will broaden its

approach to Section 5 to address anti-competitive conduct not covered by the Sherman and Clayton Acts. The policy statement includes a non-exhaustive list of conduct the FTC will target under the revised policy, which includes "mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws".

Recently Enacted Legislation

The Merger Filing Fee Modernization Act of 2022, adopted in December 2022, made significant changes to the schedule of HSR filing fees, including much larger filing fees for high-value acquisitions (see **3.3 Filing Fees**); requires HSR filings to include a detailed accounting of any subsidy a filing person has received from a foreign government; and limits litigants' ability to transfer and consolidate antitrust actions brought by state attorneys general into multidistrict litigations.

Pending Rule-Making

In June 2023, the FTC published a notice of proposed rule-making, which would dramatically expand the scope of information required in parties' initial HSR filings. (See **3.2 Type of Agreement Required Prior to Notification** and **3.5 Information Included in a Filing**.) The proposed rule-making would not disturb the rules governing whether a filing is required under the HSR Act; it would only expand the content required in the filing.

The public comment period for the proposed rule-making is scheduled to run until 28 August 2023, after which the FTC will respond to comments and publish its final rule. Parties filing HSR in late 2023 and 2024 should monitor the FTC's progress through the rule-making process, to ensure their filings comport with all operative requirements.

10.2 Recent Enforcement Record

Remedies

Under the Biden administration, both Agencies have noted that they prefer to block transactions outright rather than accept remedies that do not fully preserve competition. The Agencies have expressed scepticism that remedies effectively preserve competition and have increasingly rejected the use of behavioural remedies.

In 2022, the Agencies entered into 14 consent agreements, all of which contained some form of divestiture. However, in 2023 the FTC has not accepted any remedies, and the DOJ has accepted only one divestiture proposal and then only after first challenging the transaction in court following pressure by the presiding judge to reach a settlement (US v Assa Abloy).

In response to Agency resistance to remedies, parties have increasingly sought to "fix it first" by modifying their transaction, typically by negotiating arrangements conditional upon closing. In one case, Quickrete's acquisition of Forterra, the parties went ahead with divestitures that would resolve overlap concerns and the DOJ closed its investigation without a consent decree. In other cases, the remedy forms part of a defence to a court challenge. For instance, after the DOJ sued to enjoin United's acquisition of Change Healthcare, the parties successfully convinced the court that the proposed divestiture of Change's ClaimsXten to TPG would replace any pre-merger competition that would otherwise be lost.

Enforcement Actions

The Agencies have undertaken enforcement action against several mergers in 2022 and 2023. Enforcement actions can take several forms:

- settling with negotiated remedies at the conclusion of an investigation (14 cases);

- abandonment by the parties after the Agency has expressed concerns but prior to a complaint being filed (five cases);
- abandonment after a complaint has been filed (six cases); or
- proceeding through a court challenge.

In litigated cases, between 1 January 2022 and 10 May 2023, the Agencies have been successful in five cases and lost four cases. There are several active merger litigations ongoing.

Fines

As discussed in **2.2 Failure to Notify**, the FTC routinely seeks penalties for repeat offenders who fail to file a required HSR Notification. In 2021, in US v Clarence L Werner and US v Biglari Holdings, Inc, the DOJ settled claims that the defendants had unlawfully failed to report their acquisitions for USD486,900 for 4,708 days of non-compliance and USD1.4 million for 126 days of non-compliance, respectively.

10.3 Current Competition Concerns

The Biden administration has taken an aggressive stance on antitrust enforcement and sought to embolden federal antitrust agencies in challenging mergers and other potentially anti-competitive conduct. President Biden issued a sweeping executive order in July 2021 addressing competition issues across the economy and embraced reformists pushing for more vigorous and unorthodox enforcement.

The Agencies have also advocated for a departure from the economic analysis and principles that have driven case law over the last 40 years that sought to analyse or predict actual market effects from mergers and other business conduct. Instead, Agency leadership has signalled a focus on the impacts of overall consolidation on workers and small businesses and scepticism of claimed pro-competitive benefits such as economies of scale or elimination of double marginalisation.

Continuing trends towards more aggressive enforcement and risk-taking that began during the last administration, the Agencies have also challenged vertical deals (rejecting offers for behavioural remedies) and acquisitions of nascent competitors.

DOJ

At the DOJ, Assistant Attorney General Kanter's enforcement agenda includes:

- championing a move away from the consumer welfare standard (which focuses on a transaction's effects on output, price and quality) towards an approach that focuses on rivalry and competition;
- reassessing "outdated" precedents in light of "new market realities";
- litigating rather than settling cases with the intent to establish new case law; and
- bringing more monopolisation cases.

Under Kanter's leadership, the DOJ has challenged or threatened to challenge multiple transactions. The DOJ has had a mixed record in its challenges, winning its challenges to US Sugar's proposed acquisition of Imperial Sugar Company and Penguin Random House's proposed acquisition of Simon & Schuster. DOJ lost its challenges to United Healthcare's acquisition of Change Healthcare and Booz Allen's acquisition of EverWatch. In several other cases, DOJ challenges have caused deals to be abandoned.

FTC

At the FTC, Chair Khan has set out an aggressive enforcement agenda. Her broad vision for the Commission calls for a strategic approach

that, among other things, targets "root causes" of harm, focuses on "structural incentives that enable unlawful conduct", and implements forward-looking action, particularly regarding next-generation innovation and nascent industries. Under Chair Khan, the FTC has implemented wide-ranging policy changes designed to discourage mergers.

The FTC successfully challenged a merger of two New Jersey hospitals in Hackensack Meridian/Englewood, and also issued an order prohibiting the acquisition of Grail by Illumina (overturning a decision by the FTC Administrative Law Judge, who found for the parties). The Illumina/Grail decision is on appeal. In addition, the FTC has challenged several other transactions, causing the parties to abandon their deals.

Limits to US Enforcement Efforts

The Agencies' aggressive and emboldened enforcement approach under the Biden administration has faced significant headwinds in US courts. Nevertheless, the Agencies' persistent willingness to challenge transactions rather than accept remedies will continue to have a chilling effect on companies reluctant to become test cases for the Agencies' unconventional theories of harm.

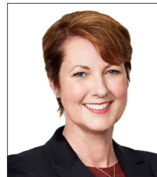
Trends and Developments

Contributed by:
Bradley Justus, Lisl Dunlop, Megan Walden and Josh Jowdy
Axinn, Veltrop & Harkrider LLP

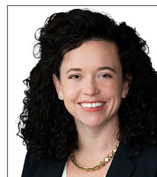
Axinn, Veltrop & Harkrider LLP combines the skills, experience and dedication of the world's largest firms with the focus, responsiveness, efficiency and attention to client needs of the best boutiques. The firm was established in the late 1990s by lawyers from premier Wall Street firms with a common vision: to provide the highest level of service and strategic acumen in antitrust, intellectual property and high-stakes litigation. Axinn's lawyers have served as lead or co-lead counsel on nearly half a trillion dollars in transactions and, in the last ten years alone, have handled more than 250 litigations.

Authors

Bradley Justus focuses his practice on antitrust law, including mergers, litigation, government investigations, and counselling. Bradley has represented clients in several of the most high-profile and complex deal reviews and antitrust litigations in recent memory. In addition to appearing in courts throughout the country, before the Department of Justice, and before the Federal Trade Commission, Bradley has represented major clients facing merger reviews by the European, Brazilian, Chinese, Korean, Canadian, Mexican, and Japanese competition regulators.



Lisl Dunlop has over 30 years of experience in antitrust and competition issues, practising in the US, Europe and Australia. Her clients include leading US and multinational companies in a broad range of industries, including the media, technology, life sciences, and healthcare sectors. Lisl is a trusted adviser for companies navigating global antitrust reviews of significant transactions, where her experience working in other jurisdictions and appearing before a variety of regulators provides particular value.



Megan Walden focuses her practice on merger analysis, government investigations, and antitrust counselling. She has previously assisted national and multinational companies across a variety of industries, including the life sciences, transportation, and retail sectors.

Josh Jowdy focuses his practice on federal and state antitrust law, including both transactions and litigations, with an emphasis on corporate merger clearance. He also counsels businesses navigating competition concerns in forming joint ventures and other collaborative arrangements.

Axinn, Veltrop & Harkrider LLP

114 West 47th Street
New York
NY 10036
USA

Tel: +1 212 728 2200
Fax: +1 212 728 2201
Web: www.axinn.com

Competition in Labour Markets Is Now a Priority in US Agencies' Merger Review

Introduction

While historically US antitrust regulators have focused merger reviews on the impact of transactions on customers, in recent years the regulators have paid special attention to a transaction's impacts on workers. Where merging parties compete with one another in hiring from a common labour pool – especially when that common labour pool has specialised skill sets or is geographically concentrated – parties may potentially receive as much scrutiny on employee compensation and hiring as they receive on pricing practices and bidding records.

Investigations of labour markets aim to identify whether a transaction will give the post-merger entity undue power in negotiating the terms of employment with its workers, and in particular the transaction's likely impact on wages (if any). This has been a hot research topic among US economists in recent years, and different economic methodologies have reached disparate conclusions on the potential effect of mergers on wages. These methodologies will be refined by court review in the near future, as regulators in the US have telegraphed an appetite to litigate merger claims.

Under the Biden Administration, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (the

"Agencies") have declared their intent to challenge mergers based on purported labour-market harms. In HSR waiting-period discussions, merging parties have increasingly found themselves devoting advocacy to the Agencies' concerns that proposed mergers may result in employment monopsonies or oligopsonies. And at present, the FTC is considering dramatically increasing the content of HSR filings, in particular to include information about relevant labour markets. Although there has been only one merger challenge based on labour-market harms brought to date, competition for labour will likely be a continued area of Agency interest during merger reviews. Parties may be required to explain why the merger will not have negative effects on workers, and labour-market effects could tilt the balance in the Agencies' analysis of whether to seek to block a transaction outright.

Biden Administration policies

President Biden issued a sweeping Executive Order in July 2021 addressing competition across the economy. The Executive Order emphasised purported impacts of market concentration on workers and affirmed the Administration's policy to "enforce the antitrust laws to combat... the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets".

In January 2022, the FTC and DOJ announced their joint effort to "modernize" the Agencies' Merger Guidelines, which set out the Agencies' framework for analysing proposed transactions. In July 2023, the Agencies released draft Merger Guidelines, which directly address the potential impact of a transaction on labour markets, by articulating principles of market definition and potential theories of harm to workers that may result from lessened competition in labour markets. The public will have the opportunity to provide comments on the draft Guidelines, which the Agencies will consider as they finalise the Guidelines for publication.

At the DOJ, Assistant Attorney General Jonathan Kanter has expressed concern that labour markets have become "even more concentrated than product markets" in the US, with impacts on workers' wages and quality of life. Kanter has repeatedly stated that the DOJ will investigate and seek to block monopsonies that harm workers, in addition to pursuing criminal penalties for wage-fixing, no-poach and non-solicitation agreements that harm workers.

Lina Khan, chair of the FTC, has likewise stated the FTC's intent to address anti-competitive harms to workers, including by investigating labour effects of mergers and scrutinising non-compete clauses during merger review. Khan has expressed concern in particular for negative effects mergers may have on workers' wages, schedules and bargaining power.

Enforcement to date

Challenges to proposed mergers

A form of labour-market concerns was prominent in the DOJ's high-profile challenge to a proposed merger of large US book publishers. In November 2021, the DOJ filed suit to block Penguin Random House's proposed USD2.18 billion acquisition of competitor Simon & Schuster. The opening line of the government's complaint stated, "Authors are the lifeblood of book publishing." The complaint alleged that the acquisition, in consolidating two of the "Big Five" publishing houses, would afford the post-merger Penguin Random House outsize power in negotiating compensation to authors. Accordingly, the government defined the relevant product market to be the purchasing market for publishing rights from authors – not the sales market for books to

retailers or consumers. And when the complaint did mention potential harm to consumers, it did not allege higher book prices, but rather alleged that the transaction would depress author pay and reduce the quality and variety of titles published.

Following a 12-day trial, the US District Court for the District of Columbia ruled for the DOJ and enjoined the transaction (United States v Bertelsmann SE & Co KGAA, No CV 21-2886-FYP, 2022 WL 16949715 (DDC Nov. 15, 2022)). The court adopted the DOJ's proposed market definition by examining the top end of the market for publishing rights: book titles expected to be bestsellers, which earn their authors the largest advance compensation. If the merger were consummated, the court found that the remaining "Big Four" publishing houses would constitute a highly concentrated market for these highest-demand titles, and that the post-merger Penguin Random House would have a near-50% share of that market. Against that competitive landscape, the court credited the government's econometric analysis that, in eliminating one of the "Big Five" US book publishers, the deal would depress author compensation and increase risks of co-ordination.

The injunction against the Penguin Random House merger stands as the most noteworthy merger victory of either Agency during the Biden Administration to date. And while authors are not employees of publishing houses, Assistant Attorney General Kanter touted the court's decision as "a victory for workers more broadly" which "reaffirms that the antitrust laws protect competition for the acquisition of goods and services from workers".

Additionally, as of June 2023, many expect that grocer Kroger's proposed USD24.6 billion acquisition of Albertsons will be the next test of the Agencies' willingness to challenge mergers based on harm to workers. Workers, US lawmakers and consumer advocacy groups have opposed the deal since its announcement, and the FTC has reportedly been in discussions with the parties' labour unions during its extended review of the merger. In testimony before the US Senate Judiciary Subcommittee on Antitrust, Competition, and Consumer Rights, Kroger CEO Rodney McMullen emphasised Kroger's commitment to improving wages and the merger's expected benefits for the parties' more than 710,000 employees. McMullen promised Kroger would not lay off any "frontline workers" or close any stores, distribution centres or manufacturing centres as a result of the proposed merger, including stores likely to be divested.

If the FTC decides to pursue enforcement action, it is unlikely to accept any form of remedy. FTC Chair Khan has previously expressed scepticism that either structural or behavioural remedies adequately prevent competitive harm from mergers, and in pre-FTC work ((2017) 11 Harv L & Pol'y Rev 235) criticised the FTC's 2015 approval of Albertson's acquisition of Safeway with divestitures as a "spectacular failure". If the FTC seeks to block the merger, Kroger has vowed to fight.

Striking non-competes in proposed mergers

The Agencies' concerns about labour-market competition may also surface regarding non-compete arrangements already in place or entered into alongside the merger agreement. This approach is consistent with the FTC's overall hostility to non-compete agreements: in early 2023, the FTC proposed a new rule that would largely ban employers from entering non-compete agreements with their workers. The FTC has received tens of thousands of public com-

ments in response to its notice of proposed rulemaking, and as of June 2023 it is still weighing those comments before finalising the proposed rule.

In October 2021, as part of a divestiture settlement concerning dialysis service provider Davita's acquisition of competing dialysis clinics, the FTC barred Davita from enforcing the target's pre-existing non-compete agreements with its physician employees (or entering into new non-compete agreements with those physicians). Notably, the FTC's complaint did not allege that the acquisition would harm competition for physicians' labour; the FTC's theory of harm was premised entirely on downstream effects felt by local dialysis patients in the form of price increases and/or lesser quality service. In a concurring statement, Commissioner Christine Wilson justified the non-compete bar as necessary to ensure the effectiveness of the divestiture, given the short supply of relevant physicians locally to operate the divested clinics. Even so, the scope of the bar on non-compete enforcement was far broader than needed to ensure the viability of the divested clinics: Davita was barred from enforcing its non-compete agreements not only with physicians seeking employment at the divested clinics, but with physicians seeking employment at any Davita competitor across the entire state of Utah.

In other cases, the FTC has demonstrated that it will seek to limit non-compete agreements not only in transactions involving highly specialised employees, as in the Davita deal, but also in those affecting rank-and-file employees. In June 2021, the FTC challenged retail gas, diesel and convenience store operator 7-Eleven's recently closed USD21 billion acquisition of competing retail fuel locations in markets across the United States. To settle the FTC's concerns, 7-Eleven agreed to divest retail locations in several markets most impacted by the transaction. As in its action against Davita, the FTC's complaint did not allege that the transaction would harm competition for relevant workers. But, as part of the settlement, the FTC barred 7-Eleven from enforcing non-compete provisions against employees or franchisees working or doing business with the divested assets. Once again, the Commissioners maintained that the non-compete provisions had been struck to ensure the success of the divestiture.

Federal comment on state review of healthcare mergers

In 2022, the FTC submitted a comment to the New York State Department of Health (NY DOH) opposing SUNY Upstate Medical University and Course Health System's application for a Certificate of Public Advantage (COPA), which would have exempted the parties' proposed merger from federal antitrust scrutiny. The FTC expressed concern that the proposed merger would eliminate competition between the health systems, resulting in higher prices and lower quality care for patients. The FTC also argued that the merger would result in lower wages and worse working conditions for hospital employees, with potential impacts on the recruitment and retention of healthcare professionals in the parties' primary service area, particularly for registered nurses and respiratory therapists. The FTC rejected the parties' proposed conduct remedies as "vague and unenforceable... aspirational goals" insufficient to remedy the merger's potential anti-competitive harms, and noted that the proposal lacked provisions to remedy potential impacts on employee wages. The FTC urged the NY DOH to deny the parties' COPA application. In February 2023, the parties withdrew their COPA application and abandoned the proposed transaction.

The FTC seriously considered litigating labour consolidation claims in another hospital system merger in early 2022, when state-level enforcers raised concerns for workers. Lifespan Corporation and Care New England Health System are the two largest healthcare providers in the state of Rhode Island. Reviewing the proposed merger under Rhode Island state law, the Rhode Island Attorney General's office found that the transaction was likely to harm both patients and healthcare workers. For workers, the Rhode Island Attorney General expected the transaction would create a "dominant healthcare employer" with "significantly increased power... to hold down the wages it pays or benefits it offers to Rhode Island's skilled healthcare workers".

At the federal level, FTC staff investigated the merger's likely effect on healthcare workers and reached similar conclusions. Two votes on the FTC – Chair Khan and Commissioner Rebecca Kelly Slaughter – supported litigating claims premised on these labour theories, citing a "growing body of empirical research" about the effects of employer consolidation on workers. The Commissioners also noted the "especially pernicious" impacts of consolidation in the healthcare sector, "where skilled medical professionals are uniquely limited in employer options within their local geographic area". Ultimately, a majority of the FTC did not agree that a labour claim was warranted. The FTC (joined by the Rhode Island Attorney General) filed suit premised only on downstream theories of harm to Rhode Island patients, and the parties abandoned the deal two weeks later.

Looking ahead

Many deals will not raise genuine threats to competition in labour markets (National Bureau of Economic Research, Working Paper No 24395 (2019)). Still, the DOJ's successful challenge in the proposed merger of Penguin Random House and Simon & Schuster, the dedicated discussions of labour markets in the draft updated Merger Guidelines, and the Agencies' repeated public comments about their continued focus on labour market competition, foreshadow likely enforcement efforts to come. While for decades parties have primarily assessed merger antitrust risk based on potential harm to consumers, merging parties must be prepared to address potential harms to workers, including effects on worker's wages, benefits and bargaining power. As a result, merging parties and their advisers should be aware that potential efficiencies in the form of workforce reductions or lower wages, which may benefit consumers by reducing costs, are likely to compound (rather than mollify) the Agencies' concerns over a deal's effect on competition.

Merging parties should also be aware that the Agencies, once convinced that a transaction is likely to result in labour-market harms, are unlikely to accept behavioural remedies such as commitments to maintain current workforce capacity or wages and benefits. While the Agencies may accept structural remedies, it is the Agencies' stated preference and demonstrated policy to block transactions outright, rather than accept negotiated consent decrees. Parties therefore should be prepared to present arguments addressing potential labour-market harms early in the HSR waiting period. The Agencies will likely continue to pursue opportunities to demonstrate that preventing harm to workers is a top priority for the Administration.

In June 2023, the FTC published a notice of proposed rule-making to dramatically expand the scope of information required in parties' initial HSR filings. Among the many new items contemplated by the proposed rule-making, the

new HSR filing would require disclosures of each party's employee headcount, broken down by geographic region where the parties' employee types overlap. The new HSR filing would also require disclosures relating to prior labour enforcement actions against the parties, even where those enforcement actions do not relate to the proposed transaction. If implemented, these changes would provide basic employment information about the parties to the DOJ and FTC at the outset of their initial review period.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com