

Morgan Lewis

M&A ACADEMY

M&A Considerations within Antitrust & HSR

David R. Brenneman & Y. Frank Ren

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Presenters



David R. Brenneman

Partner

Washington, DC



Y. Frank Ren

Associate

Washington, DC

Morgan Lewis

Topics for Discussion



**Recent US Antitrust
Trends &
Developments**



**HSR Act Procedure
& Strategy**



**Document Creation
Guidelines**



**Due Diligence
Guidelines**



**Global Perspective
on Merger Control**



**Antitrust Risk
Allocation in
Contracts**

The background features a dynamic, abstract composition of light trails. On the left, numerous thin, parallel lines in shades of red and orange streak across the frame, creating a sense of rapid movement. These lines transition into a more structured, blue-toned pattern on the right, consisting of multiple parallel lines that resemble a perspective view of a road or a series of tracks receding into the distance. The overall color palette is dominated by deep blues, bright reds, and oranges, set against a dark, almost black background.

1. RECENT US ANTITRUST TRENDS & DEVELOPMENTS

2021 Witnessed a Boom in Number of Reported Transactions, But Will This Continue?

	2019	2020	2021	2022
January	150	154	210	216
February	145	138	304	220
March	156	136	323	-
April	163	72	266	-
May	191	57	326	-
June	161	117	295	-
July	170	110	343	-
August	173	170	369	-
September	158	162	359	-
October	151	233	443	-
November	206	424	607	-
December	164	192	285	-
TOTAL	1,988	1,965	4,130	-

Trends and Developments in Tumultuous Times

- “Brief” suspension of early termination
 - Announced in February 2021; will it return?
- FTC “close at your own risk” letters
 - Scrambles the certainty of expiration of a waiting period, with minimal practical impact
- Treatment of debt
 - “Old & Cold” debt vs. benefitting the sellers
- Industries in crosshairs
 - Private equity
 - Healthcare
 - “Big Tech”
- Timing agreements falling out of favor

Trends and Developments in Tumultuous Times

- Lack of recent informal interpretations on HSR filing issues
 - Last interpretation posted in June 2021
- Vertical enforcement
 - More agency scrutiny of nontraditional theories of harm
 - “Structural” antitrust theories; “too big to exist”
- Proposed updates to merger guidelines
- Focus on labor markets
 - Employee non-compete, no-poach, and wage-fixing agreements
- Uptick in second requests and enforcement actions in benign deals
 - Calls into question whether agencies have resources to pursue their visions



2. HSR ACT PROCEDURES & STRATEGY

HSR Nuts & Bolts: The Basics

- Pre-closing notification (a.k.a. suspensive)
 - Transaction value above \$403.9 million **or**
 - Transaction value above \$101 million and Size of Person test is met
 - Keep in mind that “value” means *HSR value*
- Each side of the transaction files
 - Filings submitted to DOJ and FTC
 - Fees: \$45K / \$125K / \$280K depending on deal value
- Exemptions, exemptions, exemptions
- Noncompliance: \$46,517 per day in civil fines

HSR Nuts & Bolts: The Basics

- Signed writing
 - Non-binding LOI/term sheet
- Confidentiality
 - Information confidential
 - Public notice if ET granted
 - Informal public notice if government contacts third parties
- Assets, voting securities, exclusive IP licenses
 - Non-passive minority acquisitions of voting securities
 - Conversions into voting securities
 - Economic control of partnership or LLC
 - Joint venture formations

HSR: Traps for the Unwary

- **Investment-Only Exemption**

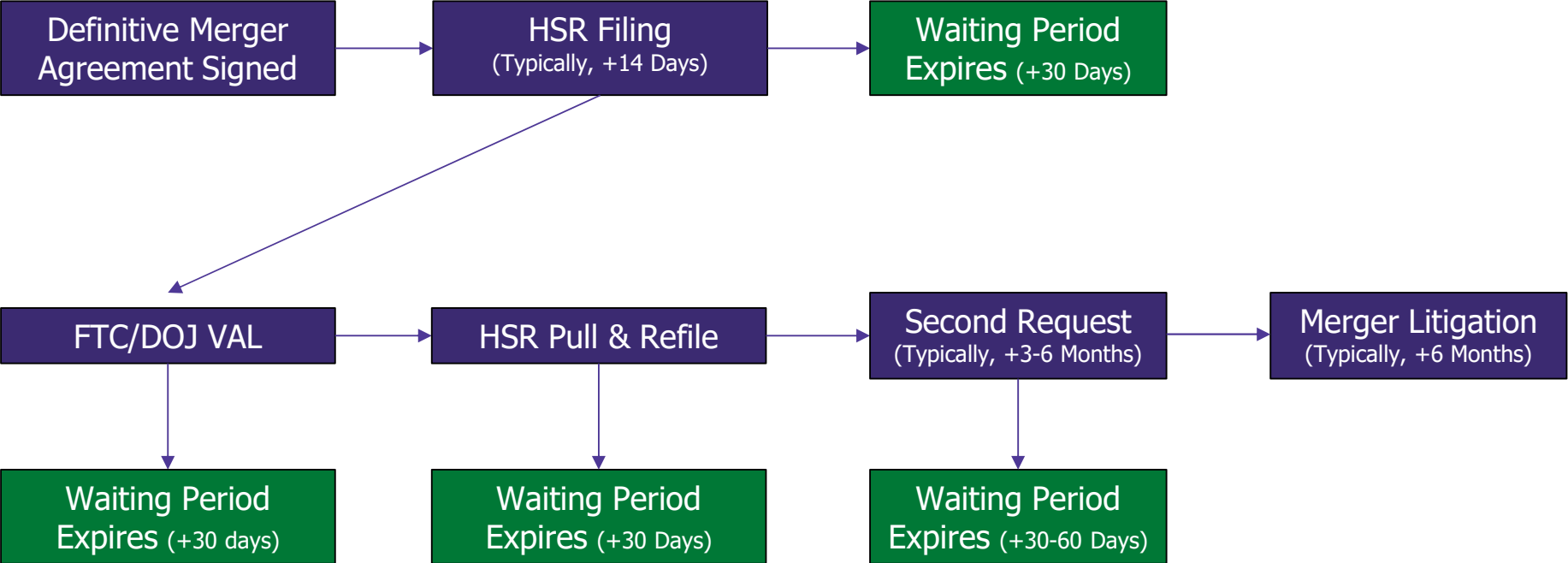
- 10% or less of an issuer's voting securities if held solely for purposes of investment
- New guidance on board observers

- **RSUs, stock awards**

- **1-Year and 5-Year Rules**

- HSR approval is good for only 1 year; need to re-file after 5 years

Typical HSR Transaction Timeline



3. DOCUMENT CREATION GUIDELINES

The background of the slide is a dark blue gradient. It features a series of bright, diagonal light trails that sweep across the frame from the top right towards the bottom left. These trails are primarily red and orange, with some blue and white streaks interspersed, creating a sense of motion and energy. The trails are most concentrated in the upper right corner and become more sparse as they move towards the bottom left.

Document Creation – HSR Items 4(c)/(d)

1. All studies, surveys, analyses and reports
2. That were prepared by or for any officers or directors
3. Discussing the proposed acquisition
4. Addressing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and/or cost or revenue synergies/other efficiencies of the deal

Document Creation – 4(c)/(d)

- Ordinary course documents of Seller may be 4(c) if reviewed by Buyer's officers/directors
 - Be careful what is put in virtual data room
- Board minutes may need to be submitted, but non-deal content can be redacted
- Cannot redact content specific to other deals from 4(c) documents other than board minutes
 - Consider replacing consolidated board deck reviewing all deals with separate documents for each deal
- 4(c) documents for prior iteration of the deal if used to analyze new iteration of same deal are 4(c)

Document Creation: Best Practices

- Rule #1: Replace writing with oral
- Rule #2: Write clearly and avoid hyperbole (no reference to price increases)
- Rule #3: Consult with Legal before putting pen to paper
- Rule #4: Have outside antitrust counsel review drafts
- Rule #5: Educate bankers and other consultants on language to use

Quotes from Bazaarvoice Transaction

“
*our only
meaningful
competitor*

“
*Monopoly
in the
market*

“
*removes
any cheap
entry point
for a future
competitor*

“
*Better
monetization
w/o pricing
pressure*

“
*improves
our pricing
power*

“
*making future
competition
extremely difficult*

“
*less pricing
dilution*

“
*gives us complete
ownership of the
category*

“
*essentially
a duopoly*

Document Creation Best Practices Also Important for “Non-Issue” Deals

- Imprecise, sloppy, or exaggerated statements can lead to unforeseen delays for otherwise non-issue deals
- Example (Project Bear):
 - “Would eliminate a competitor for [BIDDING OPPORTUNITY], leaving only the incumbent as a viable threat”
 - **What businessperson meant:** Buyer, Target, and Incumbent made it to final round of bid process for important prospect, increasing chances that Buyer would win post-closing
 - **What FTC/DOJ read:** There may be a merger to monopoly for a particular type of customer; we need to investigate
 - **Outcome:** Investigation opened; delaying approval by a few weeks

4. DUE DILIGENCE GUIDELINES

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Information Exchanges During Due Diligence

- Two Antitrust Concerns
 - Taking control of Target (“gun jumping” risk – Section 7A)
 - Agreements that reduce competition (Sherman Act)
- Practical Risks
 - Sherman Act requires an agreement
 - Silence or a “wink and nod” can be deemed acceptance!
 - Competitively sensitive information should not be disclosed
 - Customer-level product pricing
 - Product-level profits, costs, or margins
 - R&D by program
 - Employee-specific salary or benefits information
 - When in doubt, use a clean team

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5. GLOBAL PERSPECTIVES ON MERGER CONTROL

Ex-US Merger Control: Timing, Confidentiality, and Signed Writing

- Pre-closing notifications (a.k.a. suspensive) required in most jurisdictions
- Filings tend to be jointly made
- Some jurisdictions require definitive contracts (e.g., China)
- Some jurisdictions publicize fact of filing (e.g., Germany)
- Phase I waiting period is typically 30 to 45 days
- Phase II can be several additional months depending on the jurisdiction
- Pre-notification discussions can materially extend the timeline (e.g., European Commission)
- **Don't forget about Foreign Direct Investment!!!**

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6. ANTITRUST RISK ALLOCATION IN CONTRACTS

Contract Negotiations

- Antitrust covenants
 - “Hell or high water” vs. “walk-away”
 - Where to file and when to file
 - Who pays fees (filing, attorneys, economist)
 - Cooperation of parties and counsel
 - Outside or “drop-dead” dates
- Stand-still provisions
- Reverse break-up or termination fees
- “No other actions that would delay closing” clause
- Conditions precedent to closing
 - No TRO, preliminary injunction, or permanent injunction?
 - No open investigation?

Contract Terms: Risk Allocation (Options)

- Buyer accepts all structural and conduct relief and, at the request of Seller, agrees to litigate; Buyer may direct defense
- Buyer agrees to litigate or pay RBF if unsuccessful
- Buyer agrees to divest up to a specified amount of assets, i.e., assets valued at \$x, or assets generating sales or EBITDA of \$y
- Buyer agrees to divest up to a specified amount of assets AND pay RBF if agency finds divestiture insufficient by drop dead date
- No duty to divest or litigate, but Buyer must pay RBF if no antitrust approval by drop dead date (long timeline)
- Buyer agrees to short drop-dead date (with or without RBF)

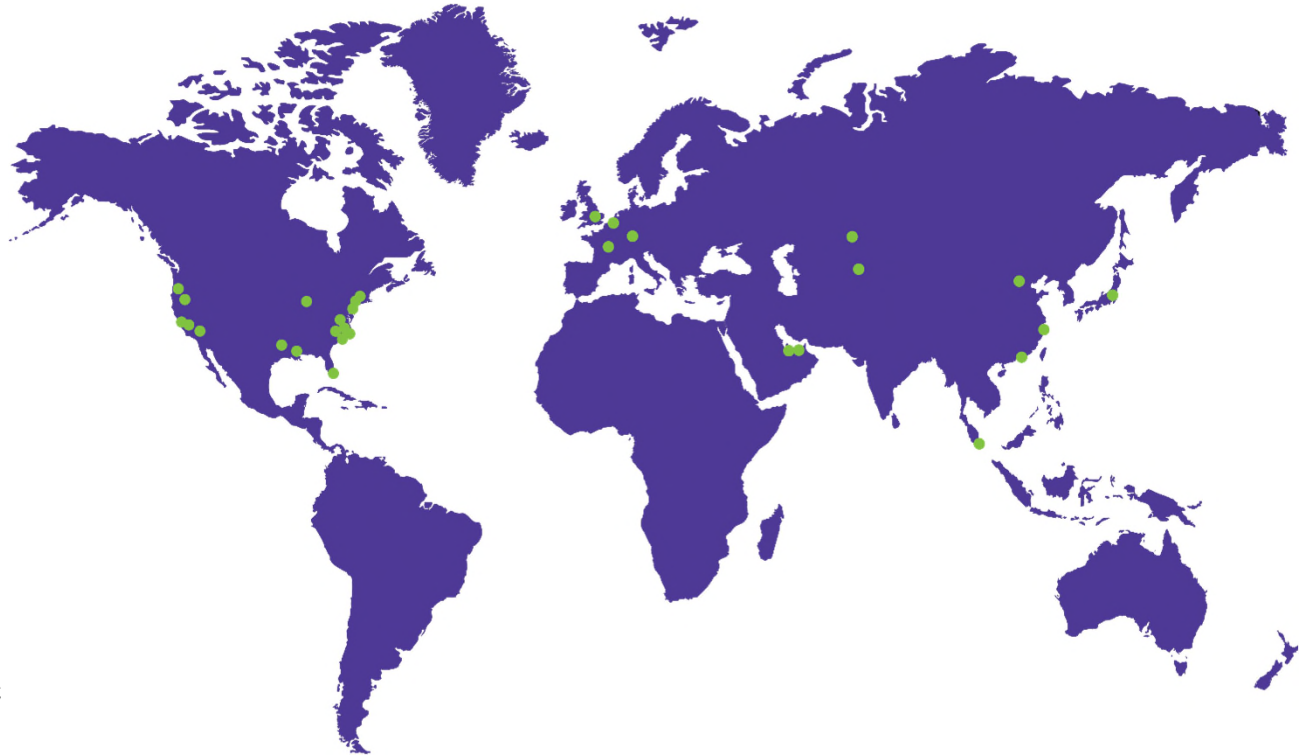
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