M&A ACADEMY

M&A CONSIDERATIONS WITHIN ANTITRUST & HSR

David R. Brenneman & Bernard W. Archbold February 21, 2023

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Presenters

David R. Brenneman
Partner
Washington, DC

Bernard W. Archbold
Associate
Washington, DC

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Topics for Discussion

1. RECENT US ANTITRUST TRENDS & DEVELOPMENTS

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HSR Filing Volume Trending Toward 2019 Levels

Month	2019	2020	2021	2022	% change from '21
January	150	154	210	216 (153 in 2023)	2.9% (-27.1% from 2022)
February	145	138	304	220	-27.6%
March	156	136	323	223	-31.0%
April	163	72	266	230	-13.5%
May	191	57	326	226	-30.7%
June	161	117	295	210	-28.8%
July	170	110	343	192	-44.0%
August	173	170	369	212	-42.5%
September	158	162	359	195	-45.7%
October	151	233	443	181	-59.1%
November	206	424	607	243	-60.0%
December	164	192	285	148	-48.1%

Trends and Developments in Uncertain Times (1/4)

- Remedies more challenging to pursue
  - AAG Kanter: “remedies short of blocking a transaction too often miss the mark”
    - Last DOJ settlement was late 2021
    - Recently noted being open to “remedy proposals” but won’t take on “central planning” function re remedies
  - FTC willing to settle but will be “skeptical” and “risk averse”
    - Have sought “prior approval” provisions
  - Result: more merger litigation with mixed record - DOJ lost three merger trials and won one in 2022; FTC lost each of two merger trials
  - “Fix it first” strategy (including sale to private equity) approved by courts
- Vertical mergers
  - DOJ and FTC both unsuccessfully litigated “vertical” theories of harm in court
- FTC and DOJ announced revision of Horizontal and Vertical Merger Guidelines
  - Will address updated market definition analysis, nascent competition, digital markets, when a presumption of harm to competition should exist, monopsony power, and labor market competition

Trends and Developments in Uncertain Times (2/4)

- Renewed interest in noncompetes
  - On Jan. 5, 2023, FTC issued notice of proposed rule making re noncompete clause ban
    - Proposed rule would largely ban use of noncompete clauses for sellers entering into employment agreements with buyers (with limited exceptions)
  - In June 2022, FTC entered into Consent Order limiting noncompetes (Arko/Corrigan)
- Heightened scrutiny on information exchanges
  - On Feb. 3, 2023 – DOJ withdrew three "outdated" health care policy statements which shaped how to think about information exchanges
  - DOJ shifting toward "case-by-case" enforcement approach
  - Unclear whether this will affect information exchanges in transactions

Trends and Developments in Uncertain Times (3/4)

- Renewed DOJ interest in Section 8, which prohibits a "person" from serving as officer/director of two competing "corporations" meeting certain size thresholds (certain *de minimis* exemptions apply)
  - Questions regarding potentially unlawful interlocks now more frequent in merger reviews
  - DOJ separately investigating public companies using civil investigative demands to challenge potentially unlawful interlocks
  - In Oct. 2022, DOJ announced resignations of directors allegedly engaged in interlocks that violated Section 8
- DOJ Interpretations of Section 8
  - Plain meaning applies only to directors serving on "corporations" though DOJ interprets its applicability more broadly to include LLCs
  - DOJ views "person" as corporate representative, not just natural persons
- Information exchanges between appointed directors/observers remain critical

Trends and Developments in Uncertain Times (4/4)

- Merger Filing Fee Modernization Act of 2022
  - Effective Feb. 27, 2023
  - Modestly reduced filing fees for transactions valued below $500 million
  - Increased filing fees for transactions valued at or above $500 million
    - Top filing fee increased from $280,000 to $2.25 million (~8x increase) for deals of $5 billion or more
    - Disclosures required for certain foreign state "subsidies"

HSR Filing Fees: Smaller Deals See Minor Fee Reduction / Larger Deals See Substantial Fee Increases

Feb 23, 2022 – Feb. 26, 2023, Values

Transaction Valuation	Filing Fee Until 2/26
In excess of $101 million, but less than $202 million	$45,000
$202 million or more, but less than $1.0098 billion	$125,000
$1.0098 billion or more	$280,000

Values Beginning Feb. 27, 2023

Transaction Valuation	Filing Fee as of 2/27
In excess of $111.4 million, but less than $161.5 million	$30,000
$161.5 million or more, but less than $500 million	$100,000
$500 million or more, but less than $1 billion	$250,000
$1 billion or more, but less than $2 billion	$400,000
$2 billion or more, but less than $5 billion	$800,000
$5 billion or more	$2.25 million

Continuation of 2021 Trends and Developments

- Lack of Premerger Notification Office Informal Interpretations
  - Last public interpretation posted in June 2021
- “Brief” suspension of early termination (ET)
  - Announced February 4, 2021; ET remains suspended despite HSR filings nearing 2019 levels
  - No sign that ET grants will resume soon
- Industries in crosshairs
  - Private equity
  - Healthcare
  - “Big Tech”
- Second Request Reviews
  - Parties continue to forgo timing agreements

2. HSR ACT PROCEDURES & STRATEGY

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HSR Nuts & Bolts: The Basics

- Pre-closing notification (a.k.a. suspensory)
  - Transaction value above $111.4 million* and Size of Person test is met ***or***
  - Transaction value above $445.5 million* (Size of Person test inapplicable)
    - Keep in mind that "value" means *HSR value*
- Each side of the transaction files
  - Filings submitted to DOJ and FTC
  - Fees: $30K / $100K / $250K / $400K / $800K / $2.25 million depending on deal value*
- Exemptions, exemptions, exemptions
- HSR avoidance devices
- Noncompliance: $50,120 per day in civil fines (effective January 11, 2023)

*Values reflect those effective on and after Feb. 27, 2023

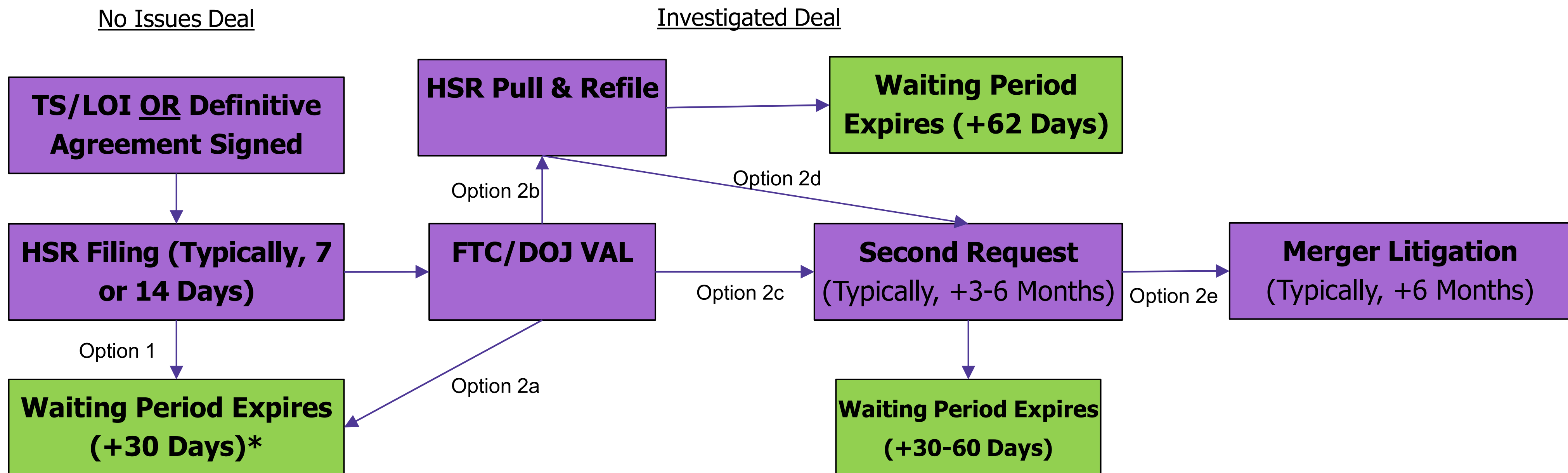
HSR Nuts & Bolts: The Basics

- Signed writing
  - Non-binding term sheet/LOI or definitive agreement
- Confidentiality
  - Information confidential
  - Public notice if ET granted
  - Informal public notice if government contacts third parties
- Assets, voting securities, economic control of partnership or LLC
  - Non-passive minority acquisitions of voting securities
  - Conversions into voting securities
  - Exclusive IP licenses
  - 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 after waiting period expires; need to re-file after 5 years

Typical HSR Transaction Timelines



*Waiting period is 15 days for certain transaction types (e.g., cash tender offers and bankruptcies)

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3. DOCUMENT CREATION GUIDELINES

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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: 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

Sample Quotes from Agency Enforcement Actions

“ *our only meaningful competitor*

“ *Monopoly in the market*

“ *improves our pricing power*

“ *less pricing dilution*

“ *gives us complete ownership of the category*

“ *making future competition extremely difficult*

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

“ *Better monetization w/o pricing pressure*

“ *essentially a duopoly*

4. DUE DILIGENCE GUIDELINES

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Information Exchanges During Due Diligence

- Two Antitrust Concerns
  - Taking control of Target before closing ("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
- Clean teams

5. GLOBAL PERSPECTIVES ON MERGER CONTROL

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

- Pre-closing notifications (a.k.a. suspensory) 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!!!***

6. ANTITRUST RISK ALLOCATION IN CONTRACTS

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Contract Negotiations

- Antitrust covenants
  - “Hell or high water” vs. “walk-away”
  - Where to file and when to file
  - Who pays fees (filing, attorneys, economist)
    - Now more important than ever for larger deals ($2.25 million filing fees)
  - Cooperation of parties and counsel
  - Outside or “drop-dead” dates
  - For non-reportable deals, efforts post-closing
- 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 divesture 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)
- **Timing, timing, timing!!!**

Questions?

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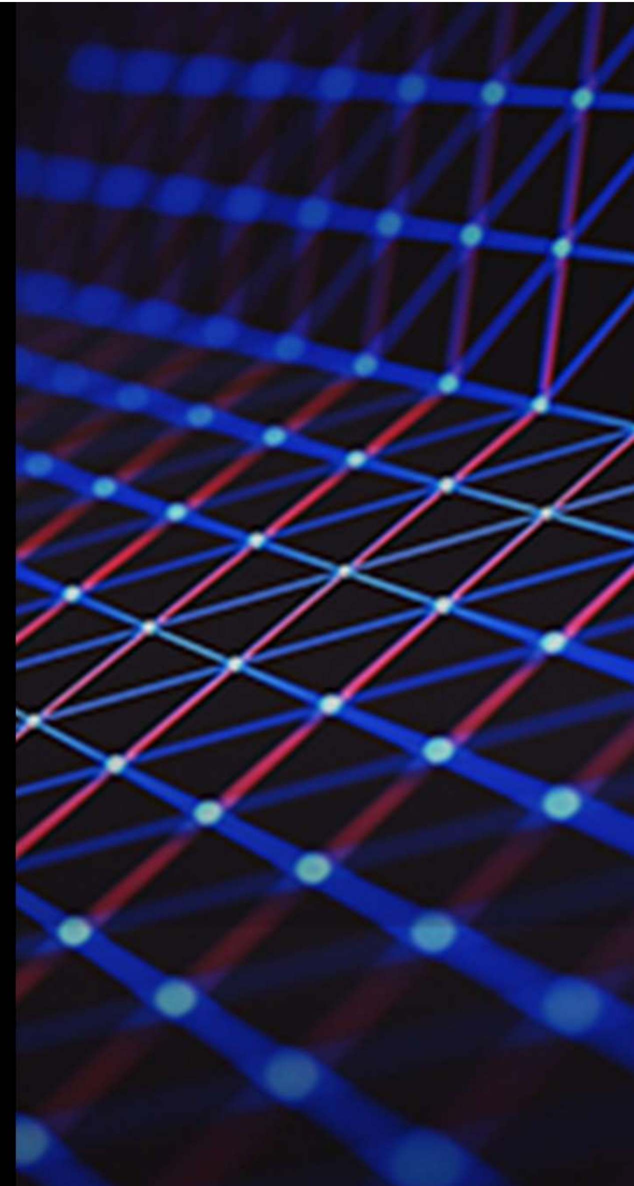
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



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Biography

David Brenneman
Partner
Washington, D.C.
+1.202.739.5056
David.brenneman@morganlewis.com

David R. Brenneman represents clients on the antitrust aspects of mergers and acquisitions (M&A), joint ventures, and other business combinations and has experience in a wide range of industries, including technology, telecommunications, life sciences, and financial services. David has coordinated premerger notifications and regulatory review around the world for hundreds of multimillion- and multibillion-dollar transactions. He has defended several high-profile transactions before the US Department of Justice (DOJ) Antitrust Division, US Federal Trade Commission (FTC), and European Commission, and has represented several investment management firms in connection with DOJ investigations under Section 8 of the Clayton Act.

David regularly counsels clients with respect to agency strategy and procedure; premerger conduct counseling; contract negotiations; merger control analysis, filings, and approvals; and substantive advocacy before various competition law authorities in the United States and abroad. David has guided clients through numerous DOJ and FTC investigations and second requests and has prepared Hart-Scott-Rodino (HSR) and other merger control filings for hundreds of transactions. David has also guided clients through investigations into possible Clayton Act Section 8 violations. He frequently writes on topics concerning merger review and the HSR Act and his writings have appeared in Law360, The M&A Lawyer, and various American Bar Association publications, among others.

David is a member of the Morgan Lewis Committee on Foreign Investment in the United States (CFIUS) Working Group.

Biography

Bernard W. Archbold
Associate
Washington, D.C.
+1.202.739.5696
Bernard.archbold@morganlewis.com

Bernard W. Archbold represents US and international clients in a variety of transactional antitrust matters including mergers, acquisitions, and joint ventures as well as in governmental investigations, civil antitrust litigations, and criminal cartel cases. Bernard conducts transaction-specific antitrust due diligence and works on premerger notification under the Hart-Scott-Rodino Act, international merger control, and merger investigations by the Federal Trade Commission and US Department of Justice.

During law school, Bernard worked as a research assistant to former Federal Trade Commission (FTC) Chairman, Timothy J. Muris, and former FTC Commissioner, Joshua D. Wright, on a variety of antitrust issues. He also worked as a law clerk in the Bureau of Competition at the FTC, where he assisted with government investigations involving antitrust issue in the healthcare industry.

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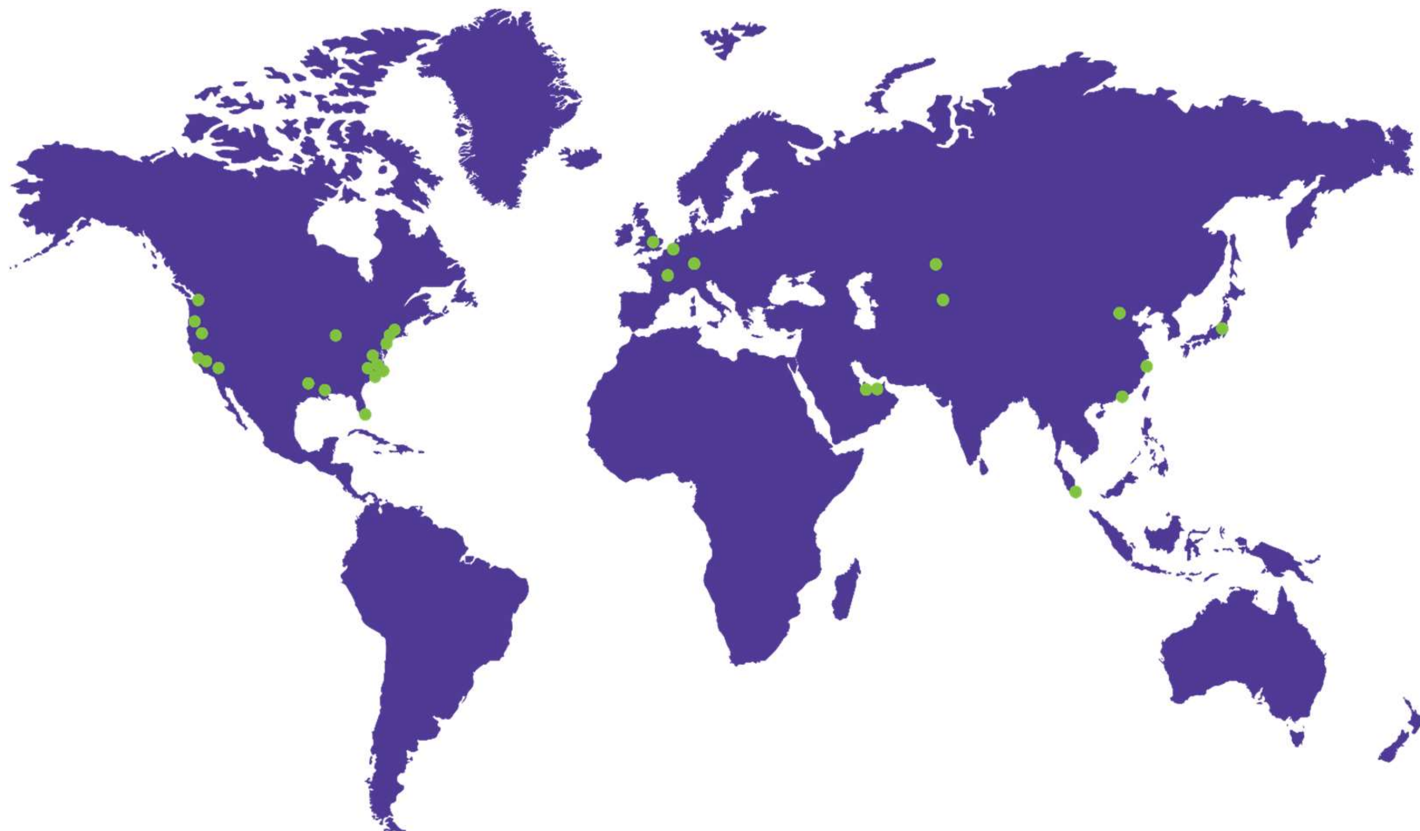

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