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# MERGER REVIEW PROCESS IN THE UNITED STATES

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A. HSR

## A. HSR

### 1. BASICS

- Hart-Scott-Rodino Act is an antitrust notification regime that requires notification of certain transactions to the Antitrust Division of the Department of Justice and Federal Trade Commission to permit antitrust review prior to closing
- Thresholds for 2017 (indexed and changed each year)
  - Size of Person (“SOP”) (roughly \$16.2 million and \$161.5 million measured by total assets or annual net sales)
  - Size-of-Transaction Threshold (“SOT”) (\$80.8 million)
  - Ignore SOP threshold if SOT is more than \$323 million
- Asset acquisitions: SOT=FMV or, if greater, acquisition plus assumption of debt. May have to aggregate multiple transactions between same parties in measuring SOT
- Stock acquisitions: SOT measured by value of all stock **HELD** post-transaction
  - Special Note: Issues related to exercise of employee stock options
- Acquisitions of LLC and partnership interests: file if acquiring “HSR Control” and if value of interests held post transaction exceeds SOT
  - “HSR Control” for LLCs and partnerships is the right to 50% or more of profits or 50% or more of assets on dissolution
- Need to explore HSR exemptions

## A. HSR

### 1. BASICS — CONTINUED

- Cannot file HSR until parties have a signed agreement (can file on non-binding LOI or term sheet)
- The HSR waiting period does not start until both parties have filed their Premerger Notification Forms with the USDOJ and FTC and the filing fee has been paid
  - Filing fees 2017 (fee usually goes in with acquiring person's HSR filing):
    - \$45,000 if SOT > \$80.8 million but < \$161.5 million;
    - \$125,000 if SOT ≥ \$161.5 million but < \$807.5 million; or
    - \$280,000 if SOT ≥ \$807.5 million.
- Cannot close transaction until HSR waiting period has expired
  - Initial 30 day waiting period – Expires automatically unless “Second Request” is issued
  - Early termination (“ET”) (Note that transaction information listed on FTC website if ET granted)

## A. HSR

### 1. BASICS — CONTINUED

## What goes to the agencies on the Premerger Notification Form or as an attachment to the form?

- Party IDs
- Description of transaction
- Index to certain SEC filings and copies of annual reports
- 4(c) and (d) documents
- Revenue information broken down into NAICS codes
- Corporate structure information (subs, large shareholders)
- Information about overlaps of NAICS codes
- Certification and affidavit

## A. HSR

### 2. 4(C) AND 4(D) DOCUMENTS

#### What are 4(c) and 4(d) documents?

- **Item 4(c):** Provide all studies, surveys, analyses and reports (“ASSAR”) which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) (“BOFOD”) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets (“Competitive Issues”), and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.
- **Item 4(d)(i):** CIM BOFOD relating to sale of acquired entity(s) or assets. If no CIM submit document(s) given to any O or D of buyer serving function of CIM. Must go back one year.
- **Item 4(d)(ii):** ASSAR prepared by investment bankers, consultants or other third party advisors for O or D for the purpose of evaluating or analyzing Competitive Issues that specifically relate to the sale of the acquired entity(s) or assets.
- **Item 4(d)(iii):** ASSAR evaluating or analyzing synergies and/or efficiencies prepared by or for any O or D for the purpose of evaluating or analyzing the acquisition.
- Failure to supply all 4(c) and (d) documents with HSR filing can result in fines and/or other penalties (e.g. restart HSR time period). HSR form has to be certified by O or D (or equivalent) as correct so there can be personal liability.

## A. HSR

### 3. COMPETITIVE ANALYSIS

#### **What are antitrust agencies looking at in an M&A investigation?**

- Horizontal Issues (combination of competitors) - focus on likely effect of transaction on prices paid by customers or paid to suppliers
  - Structural approach
    - Define markets (product and geographic) and calculate market shares
    - Calculate market concentration using Herfindahl–Hirschman Index (“HHI”)
  - Unilateral effects – closest competitor
  - Entry (3rd party - deconcentrating; party entry - potential competition issues)
  - Efficiencies
- Vertical Issues (combination of supplier and customer)
  - Foreclosure
  - Facilitation of collusion
  - Evasion of rate regulation

## A. HSR

### 4. WORK DURING INITIAL 30-DAY WAITING PERIOD

- Get antitrust experts involved early in deal that may have competitive issues
- Initiate contact with antitrust agencies before HSR filing or during initial 30 day waiting period
  - Anticipate and prepare to address competitive issues - white paper, presentations by management
  - Anticipate requests for information and documents
- Documents
- Customers/Suppliers
- Withdraw and refile HSR filing
  - Can do once (thereby extending waiting period for 60 days) without paying new filing fee; must update 4(c) and 4(d) searches
  - Any further withdraw/refiles require new filing fee



## A. HSR

### 5. “DUE-DILIGENCE”

#### “Due Diligence”

- Information shared at the initial stage should be limited to what is necessary to determine the feasibility of the transaction
- The appropriate level of care depends on whether the transaction involves a competitor, customer or supplier
- Diligence can become increasingly detailed as the transaction becomes more likely

#### Protecting Competitively Sensitive Information

- Provide older information that is no longer sensitive
- Aggregate data by time, customer, geography or product to ensure that a knowledgeable business person receiving the information cannot reverse engineer the competitively sensitive information
- Set up a clean team (and document the clean team) for transactions likely to invite antitrust scrutiny
  - Select a subset of the diligence team that is not involved in competitively sensitive activities
  - The clean team members will be permitted to share results, but not underlying clean team data, to the diligence team
  - Clean team members will not be able to be involved in competitively sensitive activities until closing or for some period until after negotiations terminate

## A. HSR

### 6. “GUN JUMPING”

#### A. “Gun-Jumping”

##### – HSR Act

- Prohibits parties from influencing day-to-day competitive decisions (among other things)
  - This may include exchanges of certain information
- Requires parties to operate in the ordinary course
- Applies whether or not the parties compete or are vertically related
- Applies until the expiration of the waiting period
- Parties must be able to go their separate ways and compete if a transaction is not consummated

#### B. Sherman Act applies until closing (Price Fixing, exchange of competition sensitive information)

##### – Must comply with these laws

- During diligence
- Integration planning
- In the transaction documents (conduct of business covenants)

## B. Merger Control Outside of the U.S.

## B. MERGER CONTROL OUTSIDE OF THE U.S.

### 1. DEALING WITH FOREIGN FILINGS

- Approximately 100 countries or regional bodies have competition laws requiring pre- or post-merger notification for certain transactions
- If either party to a transaction has revenue or assets outside the U.S., the transaction may trigger antitrust filings in other countries
- Each jurisdiction has its own statutory thresholds that determine whether filing is required in that country
  - Thresholds are typically based on some combination of worldwide and in-jurisdiction revenue for the Target and Buyer Group in the last fiscal year
    - Some jurisdictions also look at Seller Group revenue, asset value, or market shares
  - In most jurisdictions, both the Target and Buyer must have revenue or assets in the country for a filing to be required, but there are several exceptions

## B. MERGER CONTROL OUTSIDE OF THE U.S.

### 1. DEALING WITH FOREIGN FILINGS — CONTINUED

- In most jurisdictions, only one notification form is submitted using information compiled by both parties
- Notification forms are often more substantive than the HSR form (some require documents similar to HSR 4(c) and 4(d) (e.g. Canada) and others detailed information on complex corporate structures)
- Types of transactions covered can vary widely among jurisdictions, especially compared to U.S. practice
  - Joint ventures
  - Minority/passive investments
  - Industry-specific thresholds

## B. MERGER CONTROL OUTSIDE OF THE U.S.

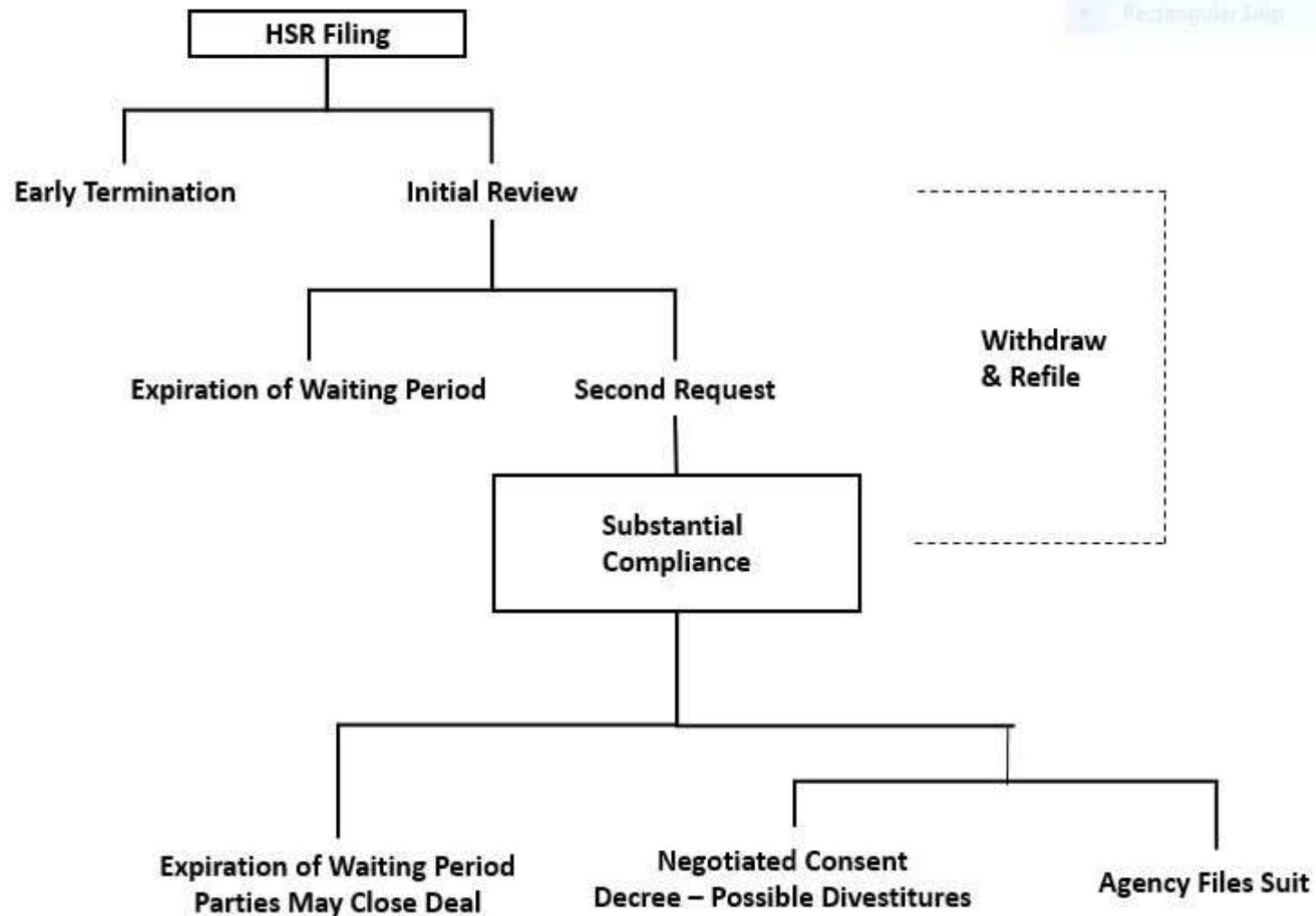
### 1. DEALING WITH FOREIGN FILINGS — CONTINUED

- Filings in most jurisdictions are suspensory
  - The transaction cannot close until a mandatory waiting period has expired
  - Initial waiting periods range from 30-60 days on average
  - Most jurisdictions also have Second Request equivalent that extends the mandatory waiting period (typically called a Phase II investigation)
- Some jurisdictions have formal or informal “pre-filing” consultations or notifications that can lessen or remove burden of formal filing
- Some (limited) international cooperation exists among competition authorities

## C. Second Requests

## C. SECOND REQUESTS

### 1. HART-SCOTT-RODINO (“HSR”) ACT REVIEW TIMELINE





## C. SECOND REQUESTS

### 2. TIMING STRATEGIES

- Some report that the Second Request process takes on average 9 to 10 months
  - Filing to end of waiting period
- Timing Agreements (60-day clock) (Many permutations and combinations).
  - Staff must have 30 days (not including consent negotiations) and
  - Commission and Bureau wants **another** 30 days.
- Timing considerations (illustrative time frames).
  - Day 0 or 30: HSR filing and withdraw and refile
  - Day 30 or 60: Second Request Issues (30 days after filing)
  - Day 60 to 120: Negotiations on scope and timing? (30 to 60 days)
  - Day 120 to 420: Complying/Advocacy/Negotiate (60 to 300 days)
  - Day 180 to 480: Consent Agreement/Certification/Timing Agreements (60 days)
  - Day 240 to 540: Commission vote (No “buyer up front”) (0 to 10 days)
  - Day 240 to 550: Closing
- Offering Remedies to truncate the process?
  - Reduce time frame when staff agrees on concerns and can evidence such concerns.
  - May still need to certify or trust the staff.

## D. Hypothetical Transaction

## **HYPOTHETICAL: TWO GLOBAL COMPANIES, SIGNIFICANT BUT <50% STAKE**

### **Facts**

- GlobalCorp, a major worldwide operator in its line of business, seeks to acquire a 40% share of the voting securities of BigCo, a competing global entity, in a multi-billion dollar cash deal. This 40% stake would give GlobalCorp substantial veto rights over the operations of BigCo, including over annual budgets, business plans, and senior management appointments. In certain business lines and geographies, GlobalCorp and BigCo have as much as a 35% market share.

### **Filing Obligations**

- United States: Initial HSR analysis, filing, and review
  - Thresholds and filing obligations
  - What if BigCo is an LLC?
- Outside the U.S.: Multi-jurisdictional “funnel” approach
  - Joint control/ “decisive influence”
  - Thresholds and filing obligations

### **Second Request timing**

- Transaction timing
- Timing agreements with the U.S. agencies

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