

ACC NCR FALL CONFERENCE

In-House Primer

Managing Regulatory and Other Legal Risks in M&A Transactions



MANAGING REGULATORY AND OTHER LEGAL RISKS IN M&A TRANSACTIONS

September 13, 2022



| AGENDA

- Introduction
 - Regulatory Issues in M&A
 - Antitrust Considerations
 - Trade and National Security Considerations
 - Q&A
-



I INTRODUCTIONS



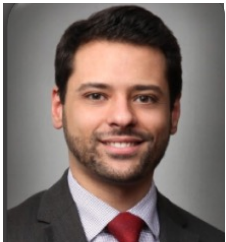
**ZAREMA A.
JARAMILLO**

Managing Partner, Washington DC
Partner, Antitrust/Competition
Lowenstein Sandler



MEREDITH BEUCHAW

Partner, The Tech Group, M&A
Lowenstein Sandler



HENRIQUE CANARIM

**Assistant General Counsel - Securities,
Governance & Transactions**
Leidos



ABBHEY E. BAKER

Counsel, Global Trade & National Security
Lowenstein Sandler

ANTITRUST: A PRIMER FOR THE GENERALIST

- Whether or not antitrust filings will be required in connection with a deal will impact both deal timing and certainty of deal closing (as well as what happens after a deal) – these are key issues to get ahead of early and to socialize internally to properly set expectations
- If a deal is over a certain threshold size in the US, or if a target has significant ex-US revenue, pre-merger notification filings may be required and should be discussed early with counsel
- Regardless of whether a filing will be required, if a deal is competitively sensitive antitrust counsel should be consulted regarding sensitivities around information sharing
- Care should be taken in creating deal-related documents, especially for deals that are competitively sensitive or with respect to which a filing may be required

CFIUS: A PRIMER FOR THE GENERALIST

- Like antitrust, CFIUS can impact both deal timing and certainty of closing (as well as what happens after a deal) – therefore it is important to get counsel involved early and set expectations appropriately
- If a buyer is non-US or has substantial investment from outside of the US, CFIUS may be implicated

M&A-RELATED ANTITRUST FRAMEWORK



- Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”)
 - Requires filing a notification with the DOJ and the FTC if certain thresholds are met
- Foreign premerger notification requirements
- Section 7 of the Clayton Act, 15 U.S.C. § 18
 - Prohibits certain mergers and acquisitions and interlocking directorates
 - Allows private rights of action
- Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45
 - Prohibits certain mergers and acquisitions

HSR: SIZE OF TRANSACTION TEST

- Large financing rounds may require certain investors to submit HSR premerger notifications to the DOJ and FTC and await expiration of the 30 day HSR waiting period before closing.
- HSR can be triggered by an acquirer obtaining holdings valued above a monetary threshold, which is \$101 Million in 2022 (*adjusted annually for changes in nominal GNP*).
- The size of transaction is based on the sum of the value of voting securities to be acquired plus those already held of the issuer.
- Where the size of transaction does not exceed a higher threshold (\$403.9 million in 2022), HSR will be triggered only if each party independently meets a “size of person” test. For example, if the issuer (*together with any parent entity*) lacks the requisite assets and sales revenue (*on a worldwide basis*), no filing is required, even if the acquiring entity meets the requisite value of assets or sales revenue.

CONFIDENTIAL AND RESTRICTED

I HSR: SIZE OF PERSON TEST



- One party must have total assets or annual net sales of \$202 million or more.
- The other party must have total assets or annual net sales of \$20.2 million or more, but if the acquired party is not engaged in manufacturing, it must have annual net sales of \$202 million or more or total assets of \$20.2 million.
- Note that these thresholds apply to the size of the parties, and not merely to the size of the acquiring entity and the acquired entity, so it is necessary to look to the ultimate parent entity of each and include all entities controlled by it.
- These thresholds are adjusted annually for changes in nominal GNP, with the next adjustment likely to occur around February 2023.

I HSR: POTENTIAL EXEMPTIONS



- Where HSR size thresholds are met, a transaction may nonetheless be exempt from HSR requirements. For example, certain acquisitions of shares of foreign issuers that lack a significant nexus (assets/sales) with the US.
- Note that an acquisition of non-corporate interests (such as LLC interests and similar interests in non-US entities) cannot trigger HSR unless “control” of the entity is obtained. In the case of non-corporate interest, “control” is defined as the right to 50% or more of such entity’s profits or assets upon dissolution.
- There is an HSR exemption for acquisitions “solely for the purpose of investment” that result in holdings of 10% or less of an issuer. Because the exemption is construed very narrowly as requiring purely passive intent with no intention of participating in the basic business decisions of the issuer, it is generally not relied upon for venture investments.
- The DOJ/FTC may extend the HSR waiting period by issuing a “second request” to enable such agencies to review the deal’s competitive impact.
 - Complying with a second request is expensive and time consuming.

CONFIDENTIAL AND RESTRICTED

I HSR: CIVIL PENALTIES



- Potential penalties for failing to file are substantial: a maximum of \$46,517 per day of the violation as of 2022 (*subject to automatic annual inflation adjustment*) in addition to negative publicity.
- To date, all of the agencies' roughly 60 HSR violation cases have settled before trial. In almost every case, the underlying transaction was not challenged as a substantive antitrust violation.
- The agencies typically have not sought penalties for a first violation that is technical, seemingly inadvertent, and subsequently self reported. Nevertheless, sophisticated investors have paid significant penalties for second such HSR violations involving minority stock acquisitions.
 - Recent examples include: Berkshire Hathaway (\$896,000), MacAndrews & Forbes (\$720,000), and John Malone (\$1.4 million).
- And the agencies have sought and obtained penalties as high as \$11 million for minority acquisitions that were not viewed as inadvertent (*e.g., ValueAct*).

CONFIDENTIAL AND RESTRICTED

I CLEAN TEAM AGREEMENTS



For strategic acquisitions or where there is a competitive overlap or competitively sensitive information is being shared as part of due diligence:

- Determine whether a Clean Team Agreement (CTA) is needed, what kind, and customize if/as needed
- Review documents before sharing with the other side – should there be a clean team / clean room?
 - Competitively Sensitive Information (CSI) is any non-public information that may allow one party to predict the other party's pricing or output strategies or influence its own competitive decisions.
 - CSI is current or future prices, fee schedules, pricing policies, pricing formulas, plans or other competitive terms of sale (e.g., financing) regarding a company's products.
- Not just a process. This really matters.
 - <https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger>
 - Penalty for inappropriate sharing of information same as for gun jumping: up to \$42,530 per day
 - Reputational risk with agencies

RISK SHIFTING PROVISIONS IN MERGER AGREEMENTS

- Antitrust risk management and allocation - key negotiating point
- Efforts Clauses
 - Hell or High Water
 - Best Efforts
 - Reasonable Best Efforts
- Litigation and Divestitures
- Break-up and Reverse Break-Up Fees

PREVENTING BAD/UNHELPFUL DOCUMENTS

- Issue is not document management, it's document creation
- Assume agencies will see every relevant document
- Ensure consistency across internal and external documents
- Control document creation by company and allies
- Train business people
 - How to avoid creating bad documents
 - Some communications are better made by phone or in person
 - How to create good documents
 - Writing emails creates a permanent record (good and bad)
- Recent DOJ/FTC challenges highlight internal “bad” documents about the proposed deal
 - DOJ complaint challenging Visa/Plaid (Nov. 2020) stated: “By acquiring Plaid, Visa would eliminate a nascent competitive threat”

I AFTER THE DEAL IS SIGNED



- Strict rules on role of buyer between signing and closing
- Buyer must avoid exercising control – “gun jumping”
- Much more “shades of gray” than “black and white”
- Strikes most business people as counter-intuitive
- Purchase Agreement will have carve outs from “ordinary course” decisions
 - Those need to be drafted with gun jumping in mind
- Seek antitrust experts’ guidance for:
 - press statements
 - internal messaging
 - external/customer messaging – trade shows
 - joint sales calls?

M&A-RELATED ENFORCEMENT TRENDS



- Suspension of Early Termination and “Close at Own Risk” Letters
 - In February 2021, citing the change in administration and high volume of filings, FTC, with DOJ’s support, announced a temporary suspension of granting early terminations of the HSR waiting period while FTC reviewed its procedures for granting early termination
 - FTC subsequently announced that for transactions where it had not been able to fully investigate during the HSR waiting period, FTC would issue letters warning the parties that FTC had an ongoing investigation and that the parties may close “at their own risk.”
- Prior Notice & Approval
 - FTC reinstated a historical policy to include language in merger settlements that require prior notice and approval of further transactions in the relevant market, even if they would not otherwise be reportable under the HSR Act
- Asserting Greater Control Over Divestiture Buyers
 - FTC stated it would require buyers of assets divested as part of a merger consent decree to become a party to the consent agreement for purposes of requiring buyers to seek prior approval of any future sale of those assets for a minimum number of years.

ANTITRUST CONSIDERATIONS: CONCLUSIONS

- During the diligence phase, remain mindful of potential pre-transaction antitrust filing requirements and consult with counsel as may be necessary to review any such requirements.
- Monitor FTC/DOJ developments directed at minority investment programs in competitive businesses.
- Maintain internal controls that protect against anticompetitive activities in relation to portfolio company businesses, including how information on pricing and product is shared internally.
- Be mindful of the interlocking directorship prohibition for minority investments.

FOREIGN DIRECT INVESTMENT REVIEWS (CFIUS) – EXPANDING JURISDICTION AND ENFORCEMENT

- Foreign Investment Risk Review Modernization Act – August 2018 Expansion of CFIUS jurisdiction:
 - Real estate transactions — sale, lease or concession near sensitive facilities
 - Non-controlling investments (“covered investments”) in high-risk sectors where foreign party will receive certain rights, access or involvement:
 - Critical technology
 - Critical infrastructure
 - Sensitive personal data
- Mandatory filing requirements for:
 - Certain transactions involving “substantial” foreign government interest
 - Transactions involving critical technologies (including emerging and foundational technologies)
 - Failure to make a mandatory filing can result in a fine up to the value of the transaction
- Increased Enforcement
 - Increasing investigation of closed transactions
 - Continuing hiring at and new non-notified office at CFIUS
 - Focus on export classifications
 - Attention on private equity funds and treatment of foreign partners
- Must look all the way up and through to individual beneficial owners of buyer(s)/investor(s) or controlling parties (ex: GP’s or management entities in funds)

I WHAT IS CRITICAL TECHNOLOGY?



Critical Technology is defined as:

- Defense articles and services;
- **Certain items on the Commerce Control List;**
- Any nuclear materials, parts, software, facilities, and equipment;
- Select agents and toxins; and
- **Emerging and foundational technologies.**

EXPORT CONTROLS – INCREASED CONTROLS ON U.S. TECHNOLOGY WILL CONTINUE = MORE CFIUS FILINGS MAY BE REQUIRED

- Export Control Reform Act of 2018 included a process for evaluating and increasing controls on Emerging and Foundational Technology
- February 2022 – White House released expanded list of emerging and critical technologies
 - Advanced Computing
 - Advanced Engineering Materials
 - Advanced Gas Turbine Engine Technologies
 - Advanced Manufacturing
 - Advanced and Networked Sensing and Signature Management
 - Advanced Nuclear Energy Technologies
 - Artificial Intelligence
 - Autonomous Systems and Robotics
 - Biotechnologies
 - Communication and Networking Technologies
 - Directed Energy
 - Financial Technologies
 - Human-Machine Interfaces
 - Hypersonics
 - Networked Sensors and Sensing
 - Quantum Information Technologies
 - Renewable Energy Generation and Storage
 - Semiconductors and Microelectronics
 - Space Technologies and Systems

| SENSITIVE PERSONAL DATA



1. *Identifiable Data*

- Can be used to distinguish or trace an individual's identity
- “Maintained or collected”
- On more than 1 million individuals by U.S. businesses
- If the identifiable data is within one of 10 categories

2. *Results of individual's genetic tests, including genetic sequencing data*

- Regardless of the amount of such data collected
- Excludes data derived from the U.S. government databases

I CRITICAL INFRASTRUCTURE



- “Systems and assets (physical or virtual), so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”
- CFIUS may review transactions involving U.S. businesses that own, operate, manufacture, supply, or service critical infrastructure in certain subsectors:
 - Telecommunications
 - Utilities
 - Energy
 - Transportation

WHEN CAN U.S. COMPANIES TAKE FOREIGN INVESTMENT WITHOUT TRIGGERING CFIUS?

- Foreign company has no control of the U.S. business
- If the foreign investor is limited partner with no control, no board seat, access to material nonpublic information, or involvement in substantive decision making of a TID U.S. business
- Majority of equity in “foreign entity” is owned by U.S. nationals
- Entities from Excepted Foreign States:
 - **Excepted Foreign States:** Australia, Canada, New Zealand, and the UK
 - **Excepted investors** must meet additional criteria to qualify, including:
 - Any foreign person with 10% or more voting interest must be a national of an excepted state or organized under its laws with principal place of business in an excepted state or the U.S.
 - 75% or more of board members, observers must be U.S. nationals or nationals of one or more excepted states
 - To qualify, individuals cannot hold citizenship with any non-Excepted Foreign State

CONSEQUENCES OF NOT MAKING A CFIUS FILING

- CFIUS may initiate its own review to address national security concern
- CFIUS may require mitigation measures to address the national security concern
- CFIUS may impose financial penalties
- **CFIUS may require parties to unwind a transaction/divest**

| CFIUS TIMING



MANDATORY DECLARATION*



Day 1

Day 45
Notice
Period

Day 90
Investigation Period
(could be extended 15
days in rare cases)

Day 105
Presidential
Decision
(if necessary)

VOLUNTARY NOTICE

*Can be used as a voluntary filing as well.

I RECENT CFIUS ACTIONS AND PENALTIES



- 2020 Actions: Beijing Shiji Information Technology ordered to divest 2018 acquisition of StayNTouch
- 2019 Actions:
 - iCarbon X ordered to divest from PatientsLikeMe and HealthTell
 - Beijing Kunlun Tech agrees to divest 2018 acquisition of Grindr and restrict access to data
 - CFIUS investigating ByteDance acquisition of TikTok
 - Penalties ranging from \$750,000 to \$1 million for failure to restrict data and failure to establish policies

CFIUS self initiating cases and reviewing past transactions!

Penalties can include:

- Up to \$250,000 per violation for misstatements, omissions, or false certifications
- \$250,000 or **the value of the transaction**, whichever is greater, for failure to comply with mandatory declaration requirements
- \$250,000 or **the value of the transaction**, whichever is greater, for intentional or gross negligence violation of a material provision of a mitigation agreement

TRADE CONTROLS DILIGENCE AND POST CLOSE COMPLIANCE – FAST PACED CHANGES INCREASE RISK

- Supply chain risks, liabilities and unexpected costs. Ex: High tariffs on Chinese imports and goods from Xinjiang region prohibited unless importer can rebut the presumption items were made with forced labor.
 - Likely we will see additional supply chain security measures in the future.
- Recent additions to Entity List and OFAC sanctions related to war in Ukraine.
- Expanded licensing requirements and trade controls for exports to Russia and Belarus with a policy of denial.
- Revocation of Hong Kong's special status – U.S. export controls no longer distinguish between Hong Kong and China.
- Military End-Use/End-User List and US persons support of a military intelligence end-use/user in Belarus, Cambodia, China, Russia, Burma, Venezuela, Cuba, Iran, North Korea, or Syria = license required but likely denied.
- In 2021 licenses allowing certain sales to Huawei were revoked = rapidly changing policies.
- Prohibitions on transactions involving information and communications technology/services controlled by foreign adversaries
- Increased compliance expectation and regulatory enforcement – marked increase for tech industry. Ex: cryptocurrency.
- Increased FCPA enforcement in 2022 - DOJ continues enforcement against individuals.

I QUESTIONS & ANSWERS



■ **THANK YOU!**



SPEAKER BIOGRAPHIES



Managing Partner
Washington DC Office
Partner
Antitrust/Competition

Washington, D.C.
T: +1 202.753.3830
zjaramillo@lowenstein.com

American University,
Washington College of Law
(J.D. 2005)

Baldwin-Wallace University
(B.A. 2000)

New York
District of Columbia

ZAREMA A. JARAMILLO



Zarema's practice focuses on complex antitrust matters including government investigations, M&A transactions, and complex litigation, including high-stakes class action defense. Zarema regularly advises clients on enforcement matters before state and federal agencies, and regularly counsels on competition issues, including refusals to deal, distribution and franchising restraints, tying arrangements, group purchasing, price discrimination, exclusive dealing, leveraging, joint ventures, and trade association activities. She also counsels clients contemplating complex transactions that may be affected by antitrust statutes including Hart-Scott-Rodino. In addition, Zarema advises clients on compliance with U.S. and foreign anti-bribery and anti-corruption regulations, U.S. sanctions and export controls, and foreign investment reporting requirements.

She represents clients in many sectors including financial services, technology, energy, and life sciences. She also counsels and defends clients with respect to regulatory compliance with international laws, including the Foreign Corrupt Practices Act, Export Administration Regulations, and Office of Foreign Assets Control economic sanctions. Her work with financial institutions and their executives centers on securities class actions and investigations by the U.S. Securities and Exchange Commission, the U.S. Department of Justice, the Federal Energy Regulatory Commission, and the Treasury Department.

Zarema's clients benefit from her extensive experience in and understanding of the U.S. government. Prior to private practice, Zarema served as an international trade specialist for the U.S. Department of Commerce's International Trade Administration in the Office of China and, later, as the Acting Director of the U.S. Department of Commerce's Corporate Governance Program in the Office of Russia. While at Commerce, she designed and implemented training programs for business professionals and legal practitioners in Russia and Central Asia to address antitrust, anti-bribery, and other corporate compliance issues.

Zarema is fluent in Russian and proficient in French.



Partner

**The Tech Group,
Venture Capital & Tech
M&A, Mergers &
Acquisitions**

New York

T: +1 646.414.6915

mbeuchaw@lowenstein.com

Duke University School of
Law (J.D. 2006)

Dartmouth College (B.A.
2003)

New York

MEREDITH BEUCHAW



Meredith leads M&A transactions and has counseled clients both on the buy and sell side through hundreds of deals for over 15 years.

Her practice sits at the intersection M&A and innovation. Meredith counsels growth companies and startups as well as the venture capital, growth, and private equity funds that fund them in connection with mergers, acquisitions, restructurings, corporate governance, divestitures, and other related transactional matters. She also frequently represents the acquirers of growth companies and startups, including Fortune 500 companies and private equity funds. Meredith is a market leader in deal-making involving sellers with venture capital/growth equity backing.

She has extensive experience in the technology and life sciences sectors. Meredith works closely with boards of directors, investors, and management teams, guiding them through every stage of the deal cycle.

Meredith was named to the Inaugural list of “Leading Women Lawyers in New York City” by Crain’s and has been awarded the “M&A Advisor Emerging Leaders” award (2016) and the “LMG Rising Stars Corporate/M&A Rising Star Award” (2016).

She is deeply knowledgeable regarding market players and terms, and she brings that knowledge and experience to bear in her practical, hands-on approach to deal-making. Prior to joining Lowenstein, Meredith was a partner in the M&A group of Cooley LLP, where she represented well-known clients in technology and life sciences.



Counsel
Global Trade & National Security

Washington, D.C.
T: +1 202.753.3806
abaker@lowenstein.com

American University
Washington College of Law
(J.D. 2011)

University of Massachusetts
Boston (2008), summa cum laude

District of Columbia
Massachusetts

ABBNEY BAKER

Abbey works with businesses and entrepreneurs seeking to expand their market position in the global economy while considering national security, trade regulation, and foreign policy concerns. She advises domestic and foreign companies on:

- Remaining compliant with U.S. and foreign export, sanctions, import, and anti-bribery regulatory requirements
- Addressing Committee on Foreign Investment in the U.S. (CFIUS) and Foreign Investment Risk Review Modernization Act (FIRRMA) requirements and risk
- Managing liabilities in cross-border M&A and private equity investment transactions
- Navigating dynamic trade policies

Her experience analyzing, identifying, and leveraging opportunities for doing business worldwide while avoiding the pitfalls associated with global trade has allowed her to guide clients through obstacles in regions around the world.

Abbey counsels both large industry players and small tech startups on a broad array of trade compliance issues, including the Bureau of Industry and Security's (BIS) export controls for commercial goods; the Department of State's Directorate of Defense Trade Controls (DDTC) registration and compliance requirements related to the manufacture, brokering, or export of Defense Products and Services; Office of Foreign Assets Control (OFAC) economic sanctions considerations and prohibitions (including those on Iran, Cuba, North Korea, Syria, and Russia/Crimea); anti-bribery compliance; U.S. Customs and Border Protection (CBP) procedures and obligations; and Bureau of Economic Analysis (BEA) inbound and outbound foreign investment filings. She assists clients in completing import and export classifications, country of origin determinations (for both CBP purposes and Buy American Act purposes related to government contracting), voluntary disclosures, and licensing requests, as well as responding to BIS, DDTC, OFAC, and CBP inquiries, import seizures, and other trade enforcement matters. Notably, she has honed her skills in the following industries: aerospace and aviation, night vision and thermal imaging, software as a service (SAAS), biotech, fintech, and other new and emerging technology spaces.



**Assistant General
Counsel**
Leidos

HENRIQUE CANARIM

Henrique is Vice President and Sr. Assistant General Counsel for Securities, Governance and Transactions and Assistant Corporate Secretary at Leidos. Henrique serves as lead counsel for SEC disclosure and reporting, corporate governance, ESG reporting, M&A and capital markets, NYSE compliance, proxy statement preparation and annual stockholder meeting matters, insider trading, equity compensation, and support of Leidos' Investor Relations, Treasury, Corporate Sustainability, and Controller teams. Henrique is a member of Leidos' PRIDE ERG national leadership team and serves as chair of the ACC NCR Corporate Law Committee and co-chair of the ACC NCR's LGBTQ+ Affinity Group.



STAY CONNECTED

[lowenstein.com](https://www.lowenstein.com)

[@LowensteinLLP](https://twitter.com/LowensteinLLP)



NEW JERSEY NEW YORK PALO ALTO UTAH WASHINGTON D.C.

© 2022 Lowenstein Sandler LLP