2023 Merger Guidelines and Impact on the Future of M&A Transactions

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February 21, 2024

Agenda

- Merger Review Process
- Current Antitrust Enforcement Landscape
- New Merger Guidelines
- Role of Documents in Merger Review
- Pre-Merger and Pre-Closing Rules

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Merger Review Process

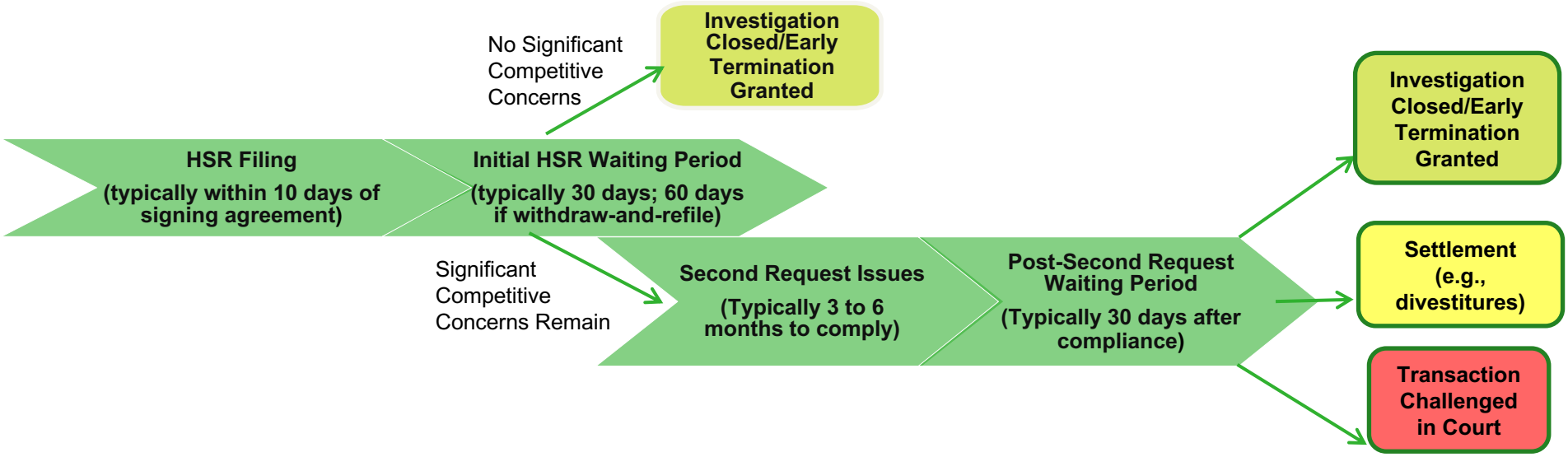
U.S. Antitrust Laws Specific to M&A

- **Clayton Act Section 7**
  - "No person . . . shall **acquire** . . . **assets of another person** . . . where in any line of commerce . . . in any section of the country, the effect of such acquisition **may be substantially to lessen competition, or to tend to create a monopoly**"

- **Hart-Scott-Rodino ("HSR") Antitrust Improvements Act**
  - Pre-merger notification is required for certain transactions in the U.S. under the HSR Act
    - Intended to prevent unlawful transactions before they occur
    - Enforced by the U.S. Federal Trade Commission and U.S. Department of Justice Antitrust Division

U.S. Antitrust Merger Review Process

- Parties to certain large transactions (generally valued at $119.5 million or above) must file premerger notification forms with the U.S. antitrust agencies and wait for government review
- If a transaction requires an HSR filing, parties may not close until the HSR waiting period has expired
- Note: The agencies may review non-reportable transactions



HSR Filing Thresholds as of March 2024 (thresholds are adjusted annually)

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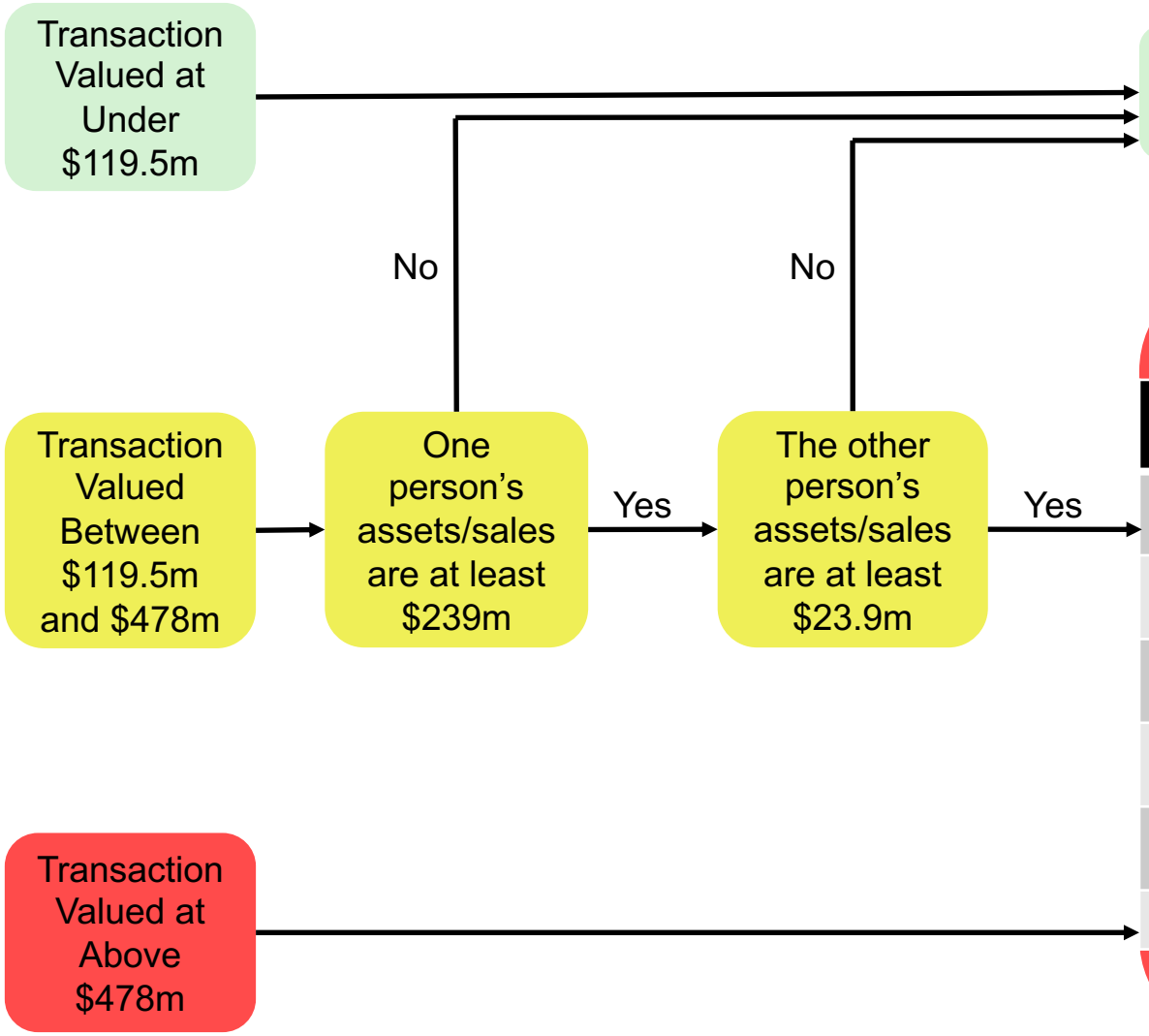

Filing Required

Transaction Valued at:	Filing Fee
$119.5m or more, but less than $173.3m	$30,000
$173.3m or more, but less than $536.5m	$105,000
$536.5m or more, but less than $1.073b	$260,000
$1.073b or more, but less than $2.146b	$415,000
$2.146b or more, but less than $5.365b	$830,000
$5.365b or more	$2,335,000

The HSR Filing

- **Typically both parties must submit HSR filings in order to initiate the HSR waiting period**
  - Filing form requires general information about the parties and the transaction
  - Parties also must submit "4(c)" and "4(d)" documents
    - 4(c) documents = *e.g.*, documents prepared by or for officers or directors for the purpose of evaluating or analyzing the transaction with respect to markets/competition
    - 4(d) documents = *e.g.*, confidential information memoranda, certain investment banker/consultant reports, certain synergies/efficiencies analyses
  - Parties also must submit copies of the relevant agreement
- **On June 27, 2023, the Agencies announced proposed changes to the HSR form and instructions. Though not imminent, they include the following new requirements:**
  - Expanded scope of 4(c) and 4(d) documents, including drafts
  - Submission of ordinary course business plans
  - Identification of horizontal and vertical overlaps
  - Identification of officers, directors, and board observers, as well as detailed employee information
  - Expanded disclosures of 5% or greater minority holders and prior transactions
  - Additional requirements for filings based on agreements in principle

Initial HSR Waiting Period

- **The initial HSR waiting period is typically 30 days**
  - Antitrust agency will review the HSR filings and may conduct an investigation
  - May issue voluntary information requests to parties and contact other industry participants, including customers, competitors, and suppliers
  - For cash tender offers and certain transactions out of bankruptcy, the initial waiting period is 15 days
  - Early Termination of the initial waiting period is currently suspended
- **Generally there are three possible outcomes at the end of the initial HSR waiting period:**
  - No significant competitive concerns, the HSR waiting period expires or “early termination” is granted
  - Competitive concerns not yet resolved, parties elect to “pull and re-file” HSR filings to give the agency another waiting period to investigate
  - Competitive concerns remain, antitrust agency issues Second Requests to both parties

Second Request

- **If the agency issues a Request for Additional Information and Documentary Material (known as a "Second Request"), the HSR waiting period is automatically extended**
  - A Second Request is a broad subpoena that asks for documents, data, and other information
  - Copies of "Model" Second Requests can be found on the DOJ and FTC websites:
    - https://www.justice.gov/atr/file/706636/download
    - https://www.ftc.gov/enforcement/merger-review
  - The issuance of Second Requests often extends the HSR waiting period for several months while the parties work to comply
  - The agency will continue to conduct its investigation during this time period, may seek depositions (or "investigational hearings") of party employees and/or issue civil investigative demands to other industry participants

Conclusion of Agency Investigation

- **Following the issuance of Second Requests, the agency investigation will conclude in one of three ways:**
  - The agency will close its investigation and allow the transaction to proceed;
  - The agency will accept a remedy/consent order; or
  - The agency will challenge the transaction in court

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Current Antitrust Enforcement Landscape

The Regulatory Landscape has Become Much More Challenging in the Biden Administration

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- **The Biden Administration has changed the merger enforcement landscape**
  - Appointed highly aggressive enforcers Lina Khan (FTC) and Jonathan Kanter (DOJ) and policy director "Competition Czar" (Columbia Professor Tim Wu, since returned to academia)
  - Withdrawn and significantly revised Merger Guidelines, pursuing novel theories
  - Signaled skepticism regarding merger remedies
  - Particular focus on technology and healthcare sectors and labor markets
  - Similar aggressiveness being seen in Europe (Post-Brexit CMA, EC, member states), Australia (ACCC)

Agencies Pursuing Broader Array of Potential Theories of Harm

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- **The DOJ and FTC are investigating an increasingly broad array of potential theories of competitive harm beyond price – some untested:**
  - More focus on product quality, service, convenience, locations, privacy/data, reduced or slowed innovation
  - Monopsony issues (i.e., buyer power)
    - The DOJ's antitrust suit to block the Penguin/Simon & Schuster merger is based on a theory of reduced compensation to authors rather than increased book prices
  - Harm to employees
    - President Biden's July 2021 Executive Order expressly aims to increase competition in labor markets through (i) new rules, (ii) enhanced enforcement to limit labor restrictions, and (iii) challenges to transactions that harm employees
    - FTC hired an economist in 2020 whose specialty is non-compete agreements and impact on labor

Agencies Pursuing Broader Array of Potential Theories of Harm (cont.)

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- **The DOJ and FTC are investigating an increasingly broad array of potential theories of competitive harm (cont.):**
  - Ability and incentive to engage in post-merger bundling, tying, or exclusionary conduct
  - The return of "big is bad" and conglomerate theories, even aside from market shares
  - Environmental/sustainability issues

- **Silver Linings: (1) the more untested a theory that the agencies put forth, the more difficult it would be for the agency to defend it in court, and (2) agency resources are limited and can't focus on every deal**

Agencies Seeking to Expand their Antitrust Toolkit

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- **The DOJ and FTC are making more aggressive use of existing statutes, including:**
  - Broader use of Section 7 of the Clayton Act
    - Section 7 prohibits mergers or acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly"
    - Mergers historically have been challenged as "substantially lessening competition"
    - DOJ's challenges to UnitedHealth/Change Healthcare and Grupo Verzatec/Crane Composites rely on the "tend to create a monopoly" prong as an independent basis for liability
  - Use of Sherman Act §§ 1 and 2 to challenge mergers
    - Altria/Juul Labs (minority investment) (Section 1)
    - Visa/Plaid merger (Section 2)
    - Facebook/Instagram/WhatsApp (Section 2)

Investigations Taking Longer, with More Uncertainty for Merger Partners

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- The agencies are issuing more Second Requests and the bar to issue a Second Request appears to be lower
- Longer and more burdensome merger investigations, which currently average 10-12 months, up from ~7 months a decade ago
- Both the FTC and DOJ have issued "warning letters" claiming that investigations are ongoing and post-closing challenges may occur

"If you share the hostile view of mergers to which antitrust reformers subscribe, then **HSR . . . looks more like an opportunity to slow or stop M&A activity in general**. . . . Using HSR this way has several benefits:

First, it allows you to talk about it, broadcasting hostility to M&A that has a **positive branding effect for enforcers** and may also have some deterrent effect for M&A;

Second, you can **sow uncertainty and run up the cost of getting deals done,** taxing M&A and making the market for corporate control less efficient;

Third, these strategies can be **accomplished without courts**; and

Fourth, it **shields enforcers from political accountability** for enabling M&A."

Commissioner Noah Phillips, *Disparate Impact: Winners and Losers from the New M&A Policy* (April 27, 2022)

Agencies Pursuing More Rigorous Remedy Requirements Up-Front

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- The Agencies are increasingly aggressive about merger remedies, particularly at the DOJ
- When remedies are accepted, they are subject to greater (and longer) scrutiny
- The FTC recently announced a policy implementing "prior approval" requirements ***for the original acquirer and the divesture buyers*** in its consent orders
  - As part of any settlement, the divestiture buyer agrees to notify the FTC of any future sales of the assets they acquire in the divestiture order, for a period of up to ten years, ***and may not close that transaction unless the FTC approves***

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New Merger Guidelines

The 11 Guidelines

1. **Mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market**

2. **Mergers can violate the law when they eliminate substantial competition**

3. **Mergers can violate the law when they increase the risk of coordination**
   - Highly concentrated markets or markets with a history of anticompetitive coordination can lead to the inference that the merger may substantially lessen competition

The 11 Guidelines (cont.)

4. **Mergers can violate the law when they eliminate a potential entrant in a concentrated market**

5. **Mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete**

6. **Mergers can violate the law when they entrench or extend a dominant position**

The 11 Guidelines (cont.)

7. **When an industry undergoes a trend toward consolidation, the Agencies consider whether it increases the risk a merger may substantially lessen competition or tend to create a monopoly**

8. **When a merger is part of a series of multiple acquisitions, the Agencies may examine the whole series**
   - The Agencies consider the cumulative effect of a pattern of multiple acquisitions

9. **When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform**
   - The Agencies believe that multi-sided platforms have characteristics that can exacerbate or accelerate competition problems

The 11 Guidelines (cont.)

10. **When a merger involves competing buyers, the Agencies examine whether it may substantially lessen competition for workers, creators, suppliers, or other providers**

11. **When an acquisition involves partial ownership or minority interests, the Agencies examine its impact on competition**

Key Takeaways – Presumptions and Rebuttal Evidence

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- The Guidelines created a lower threshold for triggering a presumption of illegality
- A merger is presumed illegal in either of the below cases:

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

- The Guidelines clarify that a presumption of illegality may be rebutted or disproved and introduced a sliding scale with higher concentration levels requiring stronger rebuttal evidence

Key Takeaways – Reliance on Case Law from an Earlier Era

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- There are several citations in the Guidelines to case law dating back to the 1960s
- The Guidelines highlight the case of *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) for the proposition that markets can be defined using "practical indicia"
  - Doing so could allow the Agencies to define a broad market based on those practical indicia, skip the hypothetical monopolist test, and go straight to competitive effects
- The Guidelines also encourage a return to the stricter horizontal structural presumption originally outlined in *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963), whereby a concentration of greater than 30% created a presumption of illegality

Key Takeaways – Focus on Potential Competition

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- The Guidelines make clear the Agencies' intent to continue pursuing the potential competition theory of harm
  - This is in spite of the FTC's recent failed attempt to block the merger between Meta and Within based on this theory of harm
    - See "Weil Represents Meta in High-Stakes Trial Victory over FTC," for more information, available here: https://www.weil.com/articles/weil-represents-meta-in-high-stakes-trial-victory-over-ftc
- The Guidelines condemn the acquisition of a "nascent threat" by a "dominant firm," and articulate the Agencies' conviction that both the potential and perceived potential competition theories of harm are meaningful
- There are also different standards regarding the likelihood of entry – a lower standard for the Agencies to show harm to competition and a higher standard for merging parties to rebut a demonstrated risk that competition might be harmed

Key Takeaways – Increased Scrutiny of Vertical Mergers

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- The Guidelines maintained the "ability and incentive to foreclose rivals" framework for the evaluation of vertical mergers
- However, there is now a lower bar for scrutiny of vertical transactions
  - The Guidelines target mergers that "***may*** limit access" to products or services that rivals use to compete
- Further, the Guidelines depart from the traditional focus on harm to competition and expand vertical analysis to consider harm to dependent rivals
  - A merger's effect on competition in the relevant market is just one of four factors the Agencies will examine to assess a merger's ability and incentive to limit access to dependent rivals [other factors include the availability of substitutes, the competitive significance of the related product, and competition between the merged firm and dependent firms]

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Role of Documents in Merger Review

Documents Play an Important Role in Antitrust Regulatory Review

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- Statements and analyses contained in parties' and third-party advisors' deal documents will directly affect the decision of the Agencies to open a detailed investigation and seek an enforcement action
  - The Agencies can also require production of other documents and data (including ordinary course documents) as part of their antitrust review of a deal
- Examples of documents submitted to the Agencies:
  - Investment Committee Memos and presentations by the internal deal team to the Investment Committee, executive teams, Board of Directors, or other decision-makers
  - Presentations and other materials prepared by bankers
  - Industry analyses or reports by third-party consultants
  - Information packages prepared by the seller or its investment banker or outside consultant, for distribution to prospective purchasers, including offering memoranda, pitch-books, teasers, and similar selling type documents
  - Management and diligence presentations
  - E-mails regarding the transaction that discuss competitive or industry conditions
  - E-mails or analyses regarding synergies or efficiencies
  - Information in the seller's dataroom used by the buyer to analyze the transaction with respect to competition

Types of "Hot" Documents that Have Raised Antitrust Concerns

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- **Customer Harm**
  - Suggesting an action will lead to higher prices, less discounting, diminished quality or service, reduced innovation, or other negative customer impacts

"Barton sent an email to other Bazaarvoice executives regarding why the company should consider acquiring PowerReviews, saying that 'taking out one of your biggest competitors can be game-changing.' He listed the 'Pros' of the deal, including '**[e]limination of our primary competitor**' and '**relief from the price erosion that Sales experiences in 30-40% of deals… of up to 15-30%.**'"

U.S. v. Bazaarvoice, Inc. (2014)

- **Barriers to Entry and Expansion**
  - Suggesting that there are barriers to entry that make it unlikely that a significant new entry will occur within two years
  - Suggesting that there are impediments to regional or local competitors expanding their sales

Seller: The target's "platform offers a wide **moat providing protection against market entrants**."

FTC v. Costar Grp., Inc. (2020)

Types of "Hot" Documents that Have Raised Antitrust Issues (cont.)

- **Market Shares**
  - Suggesting that the transaction will lead to a highly concentrated market

Seller's CEO: Post-merger, the two companies "collectively will **control almost 90% of the market**."

In the Matter of Cabell Huntington Hospital, Inc. (2016)

  - Presenting market shares that do not include the full array of competitors, or are based on artificially narrow "markets"

AA Exec. #1: "**If we show full network results … no Bueno**"

AA Exec. #2: "Yeah"

AA Exec. #1: "Based on what I'm hearing here **if I was DOJ I could easily kill any deal** … any deal"

AA Exec. #2: "I think that the regulatory case for this domestic JV with ATI doesn't exist."

AA Exec. #2: "It's going to be a constant uphill battle and we are not going to convince DOJ."

U.S. v. American Airlines (2021)

Types of "Hot" Documents that Have Raised Antitrust Issues (cont.)

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- **Buying Power With Suppliers**
  - Documents describing how a transaction will create greater "clout" or "leverage" or "buying power" with suppliers

Documents revealed that the goal of the scheme would be "to build a platform with national scale by consolidating practices with high market share in a few key markets," thereby gaining, "**negotiating leverage with commercial payors**."

FTC v. U.S. Anesthesia Partners, Inc. (2023)

- **Lack of Competitive Alternatives**
  - Suggesting that the parties are the primary or only viable choices for certain customers

US Foods' internal documents recognized that "Sysco will 'come hard' after [the customer] …. **Only 'true' options for … [the customer] is either Sysco or USF[.]** The regional players will bid, but not be seriously considered."

FTC v. Sysco/US Foods (2015)

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Pre-Merger and Pre-Closing Rules

Applicable Rules for Pre-Merger Due Diligence

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- The antitrust laws limit the sharing of "competitively sensitive information," which is the type of information that could facilitate collusion or other unlawful conduct
- The goal of these rules is to preserve competition prior to close and if the transaction is not consummated
- Competitively-sensitive information may include, but is not limited to, non-public information on the following topics:
  - Pricing/Margin information: contract terms with producers, current or future prices, pricing policies and formulas, promotional plans, current or future profit margins, etc.
  - Strategy information: current or future competitive strategies, including business or marketing plans, expansion plans, and investment plans, etc.
  - Specific information about customers, producers, or vendors: bidder or bid information, pricing, profitability, terms, product development plans, etc.
  - Information about negotiations: bidding opportunities, status or other information about negotiations with producers, vendors, or other business partners
  - Employee-specific HR information: disaggregated, non-public salary or bonus information, key employment terms, etc.

Clean Teams During Pre-Merger Due Diligence

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- Merging companies should not share any competitively-sensitive information with each other prior to closing unless pursuant to pre-approved protocols (e.g., a clean team) and subject to counsel approval
- Clean Teams allow pre-approved individuals (i.e., a subset of the deal team) to access sensitive information of the other party and then prepare summaries that are approved in advance by antitrust counsel to be shared with the rest of the deal team
  - Clean teams generally consist of outside advisors and certain internal executives who are not involved in sales, pricing, or other competitive activities (legal and finance executives are common clean team candidates)
  - Outside counsel should review any clean team work product prior to it being shared with non-clean team members, to ensure that no competitively-sensitive information is shared

Applicable Rules for Pre-Closing

- Antitrust laws generally require that merging firms operate as separate companies until a transaction actually closes
  - In addition, for transactions that are reportable pursuant to the Hart-Scott-Rodino (HSR) Act, it is a *per se* offense for the merging companies to integrate their businesses or assets, or for the buyer to exert operational control or influence over the seller's ordinary course business activities or competitive decision-making before the HSR waiting period expires
  - Section 1 of the Sherman Act prohibits improper coordination or integration
- The goal is to allow the government time to review the transaction.
  - The penalty for violating the HSR Act can be up to or more than $50,000 per day
- Violating these rules (or even the *appearance* of a violation) may delay regulatory approval for the acquisition by causing investigation into tangential matters
- The parties can *plan* for integration, but *must not implement* any plans or begin integrating until regulatory clearance is obtained and the transaction has closed

Additional Considerations for In-House Counsel

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- **These materials focus on the HSR antitrust review process, however, there are more than 100 merger control regulations outside the U.S.**
  - The thresholds for filing and merger review processes vary across jurisdictions
  - If you have a transaction involving parties with subsidiaries, assets, or revenues outside the U.S., you should consult with local counsel in the relevant jurisdiction(s)
- **Be mindful that, even if a transaction is not reportable under the HSR Act, it is still subject to the antitrust laws**
- **Consider careful communications even before considering a transaction**
- **In addition, there may be other reporting requirements, such as CFIUS and FDI**

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EDUCATION

University of Oklahoma College of Law (J.D., 1992)

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John Scribner is an antitrust partner in the Washington, DC office and represents international and US clients on their most significant antitrust matters. His practice focuses on mergers and antitrust litigation.

John has played a lead role in obtaining regulatory clearance for transactions in a variety of industries and possesses significant antitrust merger experience in the high-tech and pharmaceutical areas. He regularly counsels clients such as Adobe, Applied Materials, Sanofi, and Abbott Laboratories on potential transactions. Among his notable matters, John secured U.S. Department of Justice clearance for Iron Mountain's $2.6 billion acquisition of Recall Holdings. Iron Mountain and Recall were both leading providers of document management services in the U.S. John recently obtained antitrust clearance for Sanofi in connection with a number of significant acquisitions including Bioverativ, Ablynx, and Alnylam. He also secured Federal Trade Commission clearance for Abbott relating to its acquisition of Alere.

John has also done extensive work in private antitrust litigation, including defending conspiracy, monopolization, tying, and antitrust counterclaims in patent cases on behalf of Johnson & Johnson, Eastman Kodak, Applera Corporation, Bertelsmann and Providence Equity Partners.

Several ranking directories consistently recognize John for his outstanding legal performance. John has been named by *Chambers USA* as a leading lawyer in Antitrust and has been listed in the Washington, DC *Super Lawyers* for antitrust. He is also recognized by *Legal 500* for merger control and by Legal Media Group's *Expert Guides* as a top Competition & Antitrust practitioner in the US. *The National Law Journal* named John a 2020 "Washington, DC Trailblazer," an honor awarded to 50 attorneys in the nation's capital who are "innovators and thought leaders" in their respective practice areas. And, most recently, John was named to *Lawdragon 500's* inaugural "Leading Litigators in America" guide which honors "all-star litigators" from across the US who specialize in an array of litigation matters with "decades of experience on their feet in leading roles in state or federal courts and before government agencies."

Prior to joining Weil, John spent five years as a litigation attorney with the Federal Trade Commission where he was actively involved in merger and non-merger investigations in a wide range of industries, including defense, pharmaceuticals, infant formula, aviation, energy, industrial products, medical devices and high technology. He served as lead attorney in the FTC's investigation of Boeing's acquisition of McDonnell Douglas. While at the FTC, he received the Award for Superior Service and the Award for Meritorious Service.

John speaks on a number of antitrust topics including how to get your life sciences deal past the US antitrust authorities, the role of efficiencies in merger investigations and on antitrust issues that arise in patent litigation.

John received his J.D. in 1992 from the University of Oklahoma College of Law where he served as Note Editor of the *Oklahoma Law Review*.

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Kristin Sanford is a partner in Weil's Antitrust group. Her practice focuses on mergers and acquisitions, government investigations, and general antitrust counseling with experience across a wide range of industries, including medical devices, pharmaceuticals, hospitality, and retail, among others.

Prior to joining Weil, Kristin interned at the US Federal Trade Commission in a commissioner's office. Kristin is a member of the American Bar Association's Section of Antitrust Law, served as a Young Lawyer Representative for the Section's Task Force on International Divergence of Dominance Standards (2017 – 2019), and has been a contributing editor to the ABA's Annual Review of Antitrust Law Developments.

Kristin obtained her J.D. from the Georgetown University Law Center where she served as a Law Fellow in the Legal Research and Writing Department and Managing Editor of The Georgetown Journal of Legal Ethics. She earned her B.A., with distinction, from Duke University. Prior to law school, Kristin was a revenue management analyst at American Airlines.

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Troy Cahill is General Counsel and Corporate Secretary for LaserShip, Inc. and OnTrac Logistics, Inc. He is an accomplished, results-driven executive who is experienced with developing and implementing strategies to achieve long-term goals. He has a proven ability to lead multi-site organization change in challenging circumstances, manage legal matters effectively, coordinate mergers of culturally distinct organizations, and create authentic, lasting relationships to contribute to overall organizational effectiveness.