How would you describe the current merger control climate, including any trends in particular industry sectors?

Both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) continued to be active in 2014 and the beginning of 2015 in antitrust merger enforcement. In their annual reports, the FTC and DOJ provided the following merger control enforcement statistics for 2014:

- The number of transactions reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, rose by 25% between 2013 and 2014, from 1,326 to 1,663.
- The FTC filed complaints relating to 17 proposed transactions in 2014. Of those, 14 were filed along with corresponding consent orders and three were contested by the parties. Additionally, three transactions were abandoned after the FTC indicated its intent to seek remedies.
- Of the transactions investigated by the DOJ in 2014, 20 were challenged, restructured or abandoned.
- The total number of enforcement actions brought by the agencies in 2014 was 37, one fewer than in 2013.

The agencies have continued to pursue M&A enforcement actions in 2015. For example, as of April 30 2015, the FTC had entered into six consent decrees to address competition concerns involving transactions, putting it on pace to exceed the number of consent decrees made in 2014. Moreover, the proposed Comcast/Time Warner merger was abandoned due to regulatory headwinds from the DOJ and the Federal Communications Commission. Also in 2015, National CineMedia and Screenvision abandoned their proposed transaction after the DOJ filed a lawsuit alleging that the transaction violated the antitrust laws.

Two specific recent enforcement trends are of note. First, healthcare-related businesses continue to be a key focus area for antitrust regulators (both for mergers and generally). Despite arguments that collaboration and consolidation are encouraged by the requirements of the Affordable Care Act, regulators have indicated that they will continue to pursue enforcement actions against transactions and conduct that they believe will negatively affect competition. In fact, 11 of the 14 FTC consent decrees in 2014 were associated with pharmaceutical or medical device transactions. Further, 46% of all FTC enforcement actions between 2010 and 2014 – including mergers and acquisitions (as well as other types of enforcement action) – were in the general healthcare, pharmaceutical or medical device industries. In 2014 the FTC also enjoyed two federal circuit court victories in contested healthcare mergers: Promedica’s acquisition of St Luke’s Hospital and St. Luke’s Health System’s acquisition of Saltzer Medical Group. In Promedica, the Sixth Circuit upheld the commission’s finding that Promedica’s acquisition of St Luke’s in Ohio would harm competition and violate Section 7 of the Clayton Act. The Supreme Court declined to hear Promedica’s appeal. In St Luke’s Health System, the Ninth Circuit similarly denied an appeal by St. Luke’s Health System of a district court opinion that found that its non-reportable and consummated acquisition of Saltzer Medical Group violated the Clayton Act and Idaho state law.

Second, the agencies continue to be willing to investigate and challenge consummated transactions. In addition to the FTC’s high-profile victory in St Luke’s Health System, the DOJ prevailed in January 2014 in its challenge against Bazaarvoice Inc’s 2012 acquisition of PowerReviews Inc. Neither of these two acquisitions met the Hart-Scott-Rodino reporting thresholds and therefore they were not examined by antitrust agencies before closing.

Are there any proposals to reform or amend the existing merger control regime?

Three recent and proposed reforms and amendments are worth highlighting.
First, the dollar thresholds that determine whether a transaction is reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended are adjusted annually. The Federal Trade Commission’s (FTC) Pre-merger Notification Office usually issues a press release each January or February announcing the new thresholds.

Second, in 2013 the FTC issued changes to the regulations that set out the relevant filing thresholds, requirements, exemptions and procedures (Hart-Scott-Rodino Rules). The new Hart-Scott-Rodino Rules expanded the merger control reporting requirements for pharmaceutical companies in certain proposed acquisitions of essential patent rights. In May 2014 a district court for the District of Columbia upheld the new rules, finding that the FTC provided a reasoned basis for the change and the decision was not arbitrary. A pharmaceutical trade association appealed the decision and the case was recently argued before the DC Circuit. The new Hart-Scott-Rodino Rules are now in effect, but the appeal is worth monitoring.

Third, in March 2015 the FTC changed several of its internal rules of practice, including the rule governing how it navigates a situation where a federal court denies a preliminary injunction and the resulting impact on an administrative proceeding. Further, in September 2014 legislation was proposed in Congress that aimed to harmonise certain procedures and standards applied by the FTC and Department of Justice in antitrust merger reviews, the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act. The bill was not passed during that congressional session, but in March 2015 Utah Senators Mike Lee and Orrin Hatch announced a plan to introduce reform legislation similar to the SMARTER Act in the Senate.

**Legislation, triggers and thresholds**

**What legislation applies to the control of mergers?**

**USA**

**Cadwalader Wickersham & Taft LLP**

**Substantive standards**

The primary statute governing antitrust merger review in the United States is the Clayton Act of 1914, 15 USC §§ 12–27. Section 7 of the Clayton Act prohibits acquisitions where the effect “may be substantially to lessen competition, or tend to create a monopoly” in “any line of commerce or in any activity affecting commerce in any section of the country” (15 USC § 18).

In addition to the Clayton Act, two other federal antitrust statutes may be applied to mergers and other significant acquisitions: the Sherman Act and the Federal Trade Commission (FTC) Act. Section 1 of the Sherman Act proscribes “every contract, combination... or conspiracy” that unreasonably restrains trade in interstate or foreign commerce (15 USC § 1). Section 2 of the Sherman Act prohibits monopolisation, attempts to monopolise and combinations or conspiracies to monopolise any part of interstate or foreign commerce (15 USC § 2). Section 5 of the FTC Act prohibits “unfair method[s] of competition or unfair or deceptive act[s] or practice[s] in or affecting commerce” (5 USC § 45).

The FTC and the Department of Justice (DOJ) have published horizontal and non-horizontal merger guidelines. Although they do not have the force of law, these identify specific factors that the agencies will consider in determining whether a proposed transaction will have a negative effect on competition.

Many state legislatures have passed their own antitrust laws that apply within that state. State laws often closely parallel federal antitrust law, but there may be some distinctions.

Other government agencies responsible for regulating certain industries also have jurisdiction to review and approve transactions, based at least in part on competition principles. For example, the Federal Communications Commission, the Department of Transportation and the Federal Energy Regulatory Commission have authority to review certain transactions within their respective areas of focus. The legal standards governing these reviews can be different from those applied by the FTC and the DOJ. For example, in certain industries, agencies may be able to review the transactions under a broader ‘public interest’ standard (ie, whether the transaction is consistent with the public interest).

**Procedure**

In addition to the above enforcement statutes, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 USC § 18a (§ 7A of the Clayton Act) establishes a pre-closing reporting requirement for certain large transactions. If a transaction triggers the reporting requirement, the relevant parties to the transaction must each file a formal notification with the FTC and the DOJ and the transaction cannot close until the applicable waiting periods have expired or been terminated. If beneficial ownership is transferred prematurely – known as ‘gun jumping’ – the Hart-Scott-Rodino Act authorises substantial penalties for each day that the parties are non-compliant with its requirements. The Hart-Scott-Rodino Act is intended to allow the antitrust agencies an opportunity to review the transaction and address any competitive concerns before any potentially anti-competitive results take effect.

The agencies also have rules that they must follow in connection with their investigations and remedies. For example, the
What is the relevant authority?

For most transactions, both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have concurrent authority to review and challenge proposed mergers and acquisitions. Parties to reportable transactions must file formal notification with both agencies, although only one agency will be ultimately responsible for the investigation. For transactions in industries where Congress has not granted exclusive jurisdiction for the antitrust review, the DOJ and FTC engage in a clearance process and assign the filing based on expertise and experience in similar transactions.

In terms of the substantive legal standards governing an antitrust merger review, both the DOJ and the FTC have authority to challenge a transaction under the Clayton Act. The DOJ has authority to enforce Sections 1 and 2 of the Sherman Act, and the FTC does not; however, the FTC can effectively challenge conduct that would violate the Sherman Act under the FTC Act. Although not law, the agencies’ merger guidelines provide guidance regarding the types of merger and proposed conduct that violate the antitrust laws.

State attorneys general’s offices may also investigate proposed transactions under both federal laws and the laws of their own state. These investigations are typically conducted in conjunction with a federal investigation by the FTC or the DOJ. Further, other federal agencies may review transactions using competition principles under slightly different legal standards.

Transactions caught and thresholds

Under what circumstances is a transaction caught by the legislation?

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, parties to certain transactions involving the acquisition of assets, voting securities and non-corporate interests must file formal notification of the proposed transaction with the Federal Trade Commission (FTC) and Department of Justice (DOJ) and wait until the prescribed waiting periods have expired or been terminated before consummating the deal. The Hart-Scott-Rodino Act applies to acquisitions of voting securities, regardless of whether the transaction involves the transfer of control, confers a majority or a minority interest, creates a joint venture or constitutes a complete merger of two entities. For acquisitions of unincorporated entities, the Hart-Scott-Rodino Act applies only to transactions that confer a controlling interest.

Transactions that do not meet the jurisdictional monetary thresholds of the Hart-Scott-Rodino Act can still be reviewed and challenged by the FTC, the DOJ and other regulators, although adherence with the procedures of the Hart-Scott-Rodino Act is not required.

Assets

Although the term ‘assets’ is not defined in either the Hart-Scott-Rodino Act or the Hart-Scott-Rodino Rules, the FTC and the DOJ have defined ‘assets’ to include both tangible and intangible goods. Intangible goods include downloadable music, mobile apps and other intellectual property.

Voting securities

The Hart-Scott-Rodino Rules define ‘voting securities’ as any securities that grant the current right to vote (ie, the right to vote for the election of directors of the issuer or an entity included within the same person as the issuer) to the holder of the securities or that can be converted into securities that grant voting power to the holder. An acquisition of securities that does not confer voting power is exempt from the Hart-Scott-Rodino Act filings requirements. Convertible securities that have not yet been converted, as well as options and warrants, are also exempted from the filing requirements at the time of their acquisition. If the conversion of these financial instruments would result in the holder meeting the Hart-Scott-Rodino Act jurisdictional thresholds, Hart-Scott-Rodino notification may be required before converting or exercising the financial instruments if no exemption applies.

Non-corporate interests

A ‘non-corporate interest’ is defined as “an interest in any unincorporated entity which gives the holder the right to any profits of the entity or, in the event of dissolution of the entity, the rights of any of its assets after payment of its debts”. If the acquisition of a non-corporate interest exceeds the jurisdictional thresholds and confers control of the acquired entity on the acquiring person, the Hart-Scott-Rodino filing requirement applies unless there is an applicable exemption.
For non-corporate entities (e.g., limited liability companies and limited partnerships), ‘control’ is defined as the right to 50% or more of the profits or the right to 50% or more of the assets upon dissolution.

**Internal restructurings**

The Hart-Scott-Rodino Act exempts most internal reorganisations from the filing requirements under the ‘intraperson transaction’ exemption. Transactions where the same ultimate parent entity controls the acquiring and at least one of the acquired persons are exempt. The person that ultimately controls the buyer or seller is considered an ultimate parent entity. For corporate entities, ‘control’ means holding 50% or more of the voting securities of the corporation or the present right to appoint 50% or more of the board. As noted above, ‘control’ for unincorporated entities is holding the right to 50% or more of the profits or the right to 50% or more of the assets upon dissolution. If the transaction meets the jurisdictional thresholds and no exemption applies, the Hart-Scott-Rodino Act may require a filing for an internal reorganisation if there is a change in the ultimate parent entity.

**Do thresholds apply to determine when a transaction is caught by the legislation?**

Transactions that meet each of the following criteria (as applicable) are reportable under the Hart-Scott-Rodino Act Antitrust Improvements Act of 1976, as amended, unless a specific exemption under the Hart-Scott-Rodino Act or Hart-Scott-Rodino Rules applies:

| Commerce test | • Either party is engaged in commerce or an activity affecting commerce; and  
• The size of transaction and size of person (if applicable) tests are met. |
| Size of transaction test | • As a result of the transaction, the acquiring person will hold an aggregate total amount of voting securities, unincorporated interests or assets of the acquired person valued in excess of $305.1 million (as adjusted); or  
• As a result of the transaction, the acquiring person will hold an aggregate total amount of voting securities, unincorporated interests or assets of the acquired person valued in excess of $76.3 million (as adjusted); and the size of person test thresholds are met. |
| Size of person test | • Either the acquiring or the acquired person has at least $15.3 million (as adjusted) in total assets or net annual sales; and  
• The other party has at least $152.5 million (as adjusted) in total assets or net annual sales. |

The Federal Trade Commission (FTC) revises all monetary thresholds, including the applicable reporting thresholds, annually to account for changes in gross national product. The adjusted thresholds are typically indicated by ‘as adjusted’ language. The thresholds stated above became effective on February 20, 2015.

Some transactions qualify for an exemption under the Hart-Scott-Rodino Act or Hart-Scott-Rodino Rules. Parties to these transactions need not report the transaction, even if the jurisdictional thresholds are met. For example, the following transactions are exempt from filing under the Hart-Scott-Rodino Act:

- stock splits and dividends that do not increase the percentage of stock owned by any person;
- certain acquisitions of voting securities solely for investment purposes;
- intraperson acquisitions;
- certain acquisitions of goods or realty in the ordinary course of business;
- acquisitions of certain real property;
- acquisitions of non-voting securities and obligations that are not voting securities (e.g., mortgages, bonds and deeds of trust); and
- certain acquisitions involving foreign governments and entities.

The Hart-Scott-Rodino Rules and corresponding guidance from the agencies can be nuanced with regards to whether a filing is necessary; experienced antitrust counsel can offer advice in determining whether a transaction is exempt. Further, regulators may still investigate and seek to enjoin or unwind any transaction that they believe is harmful to competition, even if the transaction does not meet the jurisdictional thresholds of the Hart-Scott-Rodino Act or an exemption renders a filing unnecessary.
Informed guidance

Is it possible to seek informal guidance from the authority on a possible merger from either a jurisdictional or a substantive perspective?

Parties to potentially reportable transactions may anonymously seek informal guidance from the Federal Trade Commission’s (FTC) Pre-merger Notification Office (PNO) to determine whether a filing is required under the Hart-Scott-Rodino Act Antitrust Improvements Act of 1976, as amended. The PNO posts formal and informal interpretations of the Hart-Scott-Rodino Act and related regulations on the FTC website.

Additionally, parties can seek an advisory opinion from the Federal Trade Commission concerning the legality of proposed conduct; although these are rarely, if ever, used for proposed mergers or acquisitions. Parties may also request a so-called ‘business review’ letter from the Department of Justice (DOJ), whereby the DOJ will state its present enforcement intentions. As with the FTC advisory opinion process, the DOJ business review letter process is rarely, if ever, used in the merger context. The issuance of a business review letter or advisory opinion does not alter the parties’ reporting obligations under the Hart-Scott-Rodino Act.

Foreign-to-foreign

Are foreign-to-foreign mergers caught by the regime? Is a ‘local impact’ test applicable under the legislation?

If there is sufficient connection to the United States and the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, outlined above are met, foreign-to-foreign mergers will trigger the filing requirement and the parties must make a Hart-Scott-Rodino filing unless an exemption applies.

Two potential exemptions for foreign-to-foreign transactions are discussed below: acquisitions of foreign assets and acquisitions of the voting securities of a foreign issuer.

**Acquisitions of foreign assets**
The acquisition of assets located outside the United States is exempt if the assets to be acquired generated less than $76.3 million (as adjusted) in sales in or into the United States during the most recent fiscal year.

If an acquisition of foreign assets exceeds this threshold, it is still exempt from the Hart-Scott-Rodino Act filing requirements if it meets all of the following four criteria:

- Both the acquiring and acquired persons are foreign.
- The aggregate total sales of both persons in or into the United States are less than $167.8 million (as adjusted) in their respective most recent fiscal years.
- The aggregate total assets in the United States of the acquired and acquiring persons are less than $167.8 million (as adjusted).
- The assets that will be held as a result of the transaction are valued at less than $305.1 million (as adjusted).

**Acquisitions of the voting securities of a foreign issuer**
If a US person purchases the voting securities of a foreign issuer, the transaction is exempt under the Hart-Scott-Rodino Rules unless:

- the issuer made aggregate sales in or into the United States of over $76.3 million (as adjusted) in the most recent fiscal year; or
- the issuer holds assets located in the United States with an aggregate value of over $76.3 million (as adjusted).

If a foreign person acquires the voting securities of a foreign issuer, the acquisition is exempt unless:

- the transaction confers control of the issuer to the foreign person; and
- the issuer either:
  - made aggregate sales in or into the United States of over $76.3 million (as adjusted) in the most recent fiscal year; or
  - holds assets located in the United States with an aggregate value of over $76.3 million (as adjusted).

The Hart-Scott-Rodino Rules define a ‘foreign issuer’ as “an issuer which is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States”. Whether an acquiring entity is a ‘foreign person’ is determined by the ultimate parent entity.

If the same person (either US or foreign) is acquiring interests in multiple foreign issuers from the same acquired person, the assets located in the United States and sales in or into the United States must be aggregated for all issuers to
If a foreign issuer exceeds the above thresholds, an acquisition of voting securities by a foreign person may still be exempt if the following four criteria are met:

- Both the acquiring and acquired persons are foreign.
- The aggregate sales of both persons in or into the United States are less than $167.8 million (as adjusted) in their respective most recent fiscal years.
- The aggregate total assets in the United States of both persons are less than $167.8 million (as adjusted).
- The value of the assets held as a result of the transaction is less than $305.1 million (as adjusted).

**What types of joint venture are caught by the legislation?**

**USA**

**Cadwalader Wickersham & Taft LLP**

As with mergers or other acquisitions, joint ventures that meet the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, jurisdictional thresholds are subject to the filing requirements unless an exemption applies. However, the monetary thresholds for joint ventures differ from those for other transactions. If a joint venture meets the commerce test and an exemption does not apply, a Hart-Scott-Rodino filing is required in two circumstances.

The first is where:

- the acquiring person has annual net sales or total assets of $152.5 million (as adjusted) or more;
- the joint venture will have total assets of $15.3 million (as adjusted) or more; and
- at least one other acquiring person has annual net sales or total assets of $15.3 million (as adjusted) or more.

The second is where:

- the acquiring person has annual net sales or total assets of $15.3 million (as adjusted) or more;
- the joint venture will have total assets of $152.5 million (as adjusted) or more; and
- at least one other acquiring person has annual net sales or total assets of $15.3 million (as adjusted) or more.

For joint ventures, the ‘acquiring persons’ are the joint venture’s creators; the joint venture itself is the ‘acquired person’.

**Notification**

**Process and timing**

**USA**

**Cadwalader Wickersham & Taft LLP**

If a transaction meets the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and no exemption applies, pre-merger notification is mandatory and suspensory (ie, the parties are prohibited from consummating the transaction until the applicable waiting periods have expired or been terminated). Regulators may also challenge a transaction that is non-reportable if they believe it may be harmful to competition. Regulators will not accept Hart-Scott-Rodino filings for non-reportable transactions, although in theory parties to a non-reportable transaction can bring the transaction to the attention of regulators before close, thereby potentially avoiding litigation costs if the agencies later determine that the deal violated the antitrust laws.

**What timing requirements apply when filing a notification?**

**USA**

**Cadwalader Wickersham & Taft LLP**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and Hart-Scott-Rodino Rules do not impose specific timing requirements on parties to reportable transactions, but parties may not close a reportable transaction until they have filed the Notification and Report Form for Certain Mergers and Acquisitions (Hart-Scott-Rodino Form) and the applicable waiting periods have expired or been terminated. Parties may file the Hart-Scott-Rodino Form based on an executed contract, an agreement in principle or a letter of intent. Often, the timing for the parties to complete and submit their Hart-Scott-Rodino filings is negotiated and included in the written agreement for the transaction. Although a binding agreement need not be in place before the filing, each party to the transaction generally must submit an affidavit stating...
that an agreement has been reached and the filing party has a good-faith intention to consummate the proposed transaction. If the transaction is an acquisition of voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit with its Hart-Scott-Rodino filing stating that it has a good-faith intention to consummate the proposed transaction and has served notice on the issuer regarding the issuer’s potential reporting obligations.

Hart-Scott-Rodino notification expires one year following the expiration or termination of the applicable waiting periods. Within that timeframe, the acquiring party must meet or exceed the notification threshold for which the proposed transaction was notified (eg, close the proposed transaction or acquire voting securities valued at the jurisdictional threshold). After one year, another Hart-Scott-Rodino filing will be required with respect to any notification threshold not met or exceeded.

What form should the notification take? What content is required?

Parties to a reportable transaction must notify antitrust regulators of the transaction and provide relevant information and documents using the standard Notification and Report Form for Certain Mergers and Acquisitions (Hart-Scott-Rodino Form). That form is available on the Federal Trade Commission and Department of Justice websites. The Hart-Scott-Rodino Form requires that parties submit information, which regulators can use to evaluate the competitive effects of the proposed transaction, including:

- the parties’ identities and the transaction’s structure;
- financial data and other information filed with the Securities Exchange Commission;
- revenue information categorised by North American Industry Classification System (NAICS) code; and
- previous acquisitions by the acquirer of businesses that may have derived revenues in the same NAICS codes as the acquired party.

Item 4 of the Hart-Scott-Rodino Form is particularly important. It requires parties to submit certain documents relating to the transaction, including:

- all studies, surveys, analyses and reports prepared by or for an officer or director for the purpose of evaluating the transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets;
- confidential information memoranda, bankers’ books and pitch books; and
- documents relating to synergies and efficiencies.

In addition to documents and information relating to the competitive effects of the proposed transaction, the parties must generally certify the accuracy of the information in the Hart-Scott-Rodino Form and submit either the executed agreement or an affidavit stating that they have reached an agreement and that the filing party has a good-faith intention to consummate the proposed transaction. The certification and affidavit must be either notarised or signed under penalty of perjury. If the transaction is an acquisition of voting securities from non-controlling shareholders, the acquiring person only must submit an affidavit with its Hart-Scott-Rodino filing stating it has a good-faith intention to consummate the proposed transaction and has served notice on the issuer regarding the issuer’s potential reporting obligations.

Is there a pre-notification process before formal notification, and if so, what does this involve?

Pre-notification discussions with regulators before formal notification can occur in certain circumstances. When they do occur, pre-filing discussions and information exchanges typically focus on:

- obtaining antitrust clearance within the initial waiting period by providing the reviewing agency with more time than the 30-day (or 15-day) initial waiting period; and/or
- reducing the scope of a potential second request (ie, a request for additional information and documentary material).

Whether before or after the formal filing, the agency that is assigned the transaction may also request that the parties supply information, including strategic and marketing plans, lists of products sold and products in development and lists of top customers. The investigating agency may seek information about the industry from third parties, such as customers and competitors, even before any Hart-Scott-Rodino filing is submitted.
Parties to a reportable transaction must wait to implement a merger until after the applicable waiting periods have expired or been terminated. The reviewing agency may terminate the applicable waiting period early if it determines that there are no competitive concerns.

Guidance from authorities

What guidance is available from the authorities?

The Federal Trade Commission’s (FTC) Pre-merger Notification Office posts both formal and informal interpretations relating to the jurisdiction of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, on the FTC website. Parties may also seek an advisory opinion from the FTC or request that the Department of Justice (DOJ) informally review the proposed transaction and indicate its enforcement intentions, although – as mentioned above – these are rarely issued in merger cases.

Additionally, the DOJ and the FTC jointly published the Horizontal Merger Guidelines in 2010, which replaced previous guidelines from 1992, as revised in 1997. The Horizontal Merger Guidelines are intended to “outline the principal analytical techniques, practices, and the enforcement policy” of the regulators. The agencies have also published the Non-Horizontal Merger Guidelines (often referred to as the Vertical Merger Guidelines), which explain how the agencies analyse vertical mergers. Finally, both agencies publish past enforcement actions on their websites, including analyses of the consent orders that indicate the agency’s competitive concerns with proposed transactions. Prior court decisions also may provide guidance on the legal standards governing whether a transaction violates the antitrust laws.

Fees

What fees are payable to the authority for filing a notification?

The acquiring person in a reportable transaction must pay a filing fee to the Federal Trade Commission at the time of filing that is based on the value of the transaction.

The current filing fees are as follows:

<table>
<thead>
<tr>
<th>Value of transaction</th>
<th>Fee amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greater than $76.3 million (as adjusted), but less than $152.5 million (as adjusted)</td>
<td>$45,000</td>
</tr>
<tr>
<td>$152.5 million (as adjusted) or greater, but less than $762.7 million (as adjusted)</td>
<td>$125,000</td>
</tr>
<tr>
<td>$762.7 million or greater (as adjusted)</td>
<td>$280,000</td>
</tr>
</tbody>
</table>

Publicity and confidentiality

What provisions apply regarding publicity and confidentiality?

Information and documentary material that parties submit to the Federal Trade Commission (FTC) and Department of Justice pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, are confidential and may not be made public. The fact that the parties have made a Hart-Scott-Rodino filing is included in the act’s confidentiality protections. However, in the process of conducting their investigation, agencies may effectively disclose the existence of a filing through their communications with third parties. Additionally, if the reviewing agency grants early termination, the grant is published on the FTC website and in the Federal Register. Information obtained through the Hart-Scott-Rodino process may also be disclosed to Congress or in a judicial or administrative proceeding. However, a court may also issue
a protective order to prevent the public disclosure of confidential information that is produced during litigation.

Individual states and foreign jurisdictions may request that the parties execute a waiver to allow the investigating federal agency to share Hart-Scott-Rodino materials. Before granting a requested confidentiality waiver or sharing requested information, parties should be aware that states and foreign jurisdictions may have different confidentiality protections and privilege standards.

Penalties

Are there any penalties for failing to notify a merger?

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The penalties for failing to notify the agencies of a reportable transaction can be substantial; the parties each may be fined up to $16,000 per day for each day of non-compliance with the Hart-Scott-Rodino Act Antitrust Improvements Act of 1976, as amended. If the Department of Justice and Federal Trade Commission have competitive concerns with the transaction, they may also seek to unwind the transaction. Antitrust authorities publicly report the fines imposed on persons that violate the Hart-Scott-Rodino Act’s requirements.

Procedure and test

Procedure and timetable

What procedures are followed by the authority? What is the timetable for the merger investigation?

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For most transactions, when the Department of Justice and Federal Trade Commission (FTC) receive a Hart-Scott-Rodino filing, they determine between themselves which agency will review the transaction based on relevant experience in the industry. The filing (typically by both parties, but by only the acquiring person if the transaction is an acquisition of voting securities or non-corporate interests from someone other than the issuer or the unincorporated entity) triggers the initial phase of the review process, commonly known as the initial waiting period. During the initial waiting period—30 days for most transactions or 15 days for cash tender offers and bankruptcy transactions covered by 11 USC § 363(b)—the parties are prohibited from closing the transaction. If the reviewing agency determines that the proposed transaction does not raise competitive concerns, the parties are free to consummate the merger once the initial waiting period expires or is terminated. The reviewing agency may, at the request of the parties, terminate the waiting period early if it determines that there are no competitive concerns. The reviewing agency may also grant early termination sua sponte (ie, on its own motion), although in practice this rarely occurs.

An acquiring person may ‘pull and refile’ its current Hart-Scott-Rodino Form, thereby restarting the initial waiting period and granting the agencies additional time to review the transaction. The FTC Pre-merger Notification Office will allow the acquiring person to use this procedure once without requiring an additional filing fee where:

- the proposed acquisition does not materially change;
- Item 4 of the Hart-Scott-Rodino Form is updated; and
- the filing is resubmitted with a new certification and affidavit within two business days.

If the reviewing agency has unresolved concerns after the initial waiting period, it may issue a request for additional information and documentary material, commonly known as a ‘second request’. The issuance of a second request typically extends the waiting period for an additional 30 days after both parties certify substantial compliance with the second request (or 10 days for cash tender offers or bankruptcy transactions covered by 11 USC § 363(b)). If the transaction involves the acquisition of voting securities or non-corporate interests which are to be acquired from a holder or holders other than the issuer or unincorporated entity, the waiting period is not affected by non-compliance of the acquired person (ie, the acquiring party need only certify substantial compliance to trigger the second waiting period). Compliance with a second request may take many months. The reviewing agency may also seek a timing agreement from the parties, whereby the parties voluntarily agree not to close the transaction until an agreed date beyond the expiration of the waiting period.

What obligations are imposed on the parties during the process?

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- the proposed acquisition does not materially change;
- Item 4 of the Hart-Scott-Rodino Form is updated; and
- the filing is resubmitted with a new certification and affidavit within two business days.

If the reviewing agency has unresolved concerns after the initial waiting period, it may issue a request for additional information and documentary material, commonly known as a ‘second request’. The issuance of a second request typically extends the waiting period for an additional 30 days after both parties certify substantial compliance with the second request (or 10 days for cash tender offers or bankruptcy transactions covered by 11 USC § 363(b)). If the transaction involves the acquisition of voting securities or non-corporate interests which are to be acquired from a holder or holders other than the issuer or unincorporated entity, the waiting period is not affected by non-compliance of the acquired person (ie, the acquiring party need only certify substantial compliance to trigger the second waiting period). Compliance with a second request may take many months. The reviewing agency may also seek a timing agreement from the parties, whereby the parties voluntarily agree not to close the transaction until an agreed date beyond the expiration of the waiting period.
Parties are prohibited from closing a reportable transaction during the applicable waiting periods. Although parties may work collectively during the Hart-Scott-Rodino waiting period to plan for post-close integration, they must be careful to avoid ‘gun-jumping’ (i.e., the transfer of beneficial ownership before the expiration of the waiting period). Interim covenants in the transaction agreement should be analyzed to determine the impact on the seller’s ordinary course of business. For gun-jumping and potentially other antitrust reasons, the exchange of potentially competitively sensitive information must also be monitored carefully or the parties may risk incurring substantial penalties. Typically, there is at least one enforcement action relating to gun-jumping every year or two.

What role can third parties play in the process?

The Department of Justice and the Federal Trade Commission will often speak with relevant third parties (e.g., customers, competitors, and other industry experts) during their investigations of proposed transactions. During these interactions, the agencies may ask third parties about the competitive dynamics in the marketplace and their views of the proposed transaction. The antitrust agencies may request information from third parties on a voluntary basis or via formal processes such as subpoenas or civil investigative demands. Third parties can also comment on proposed remedies after a proposed consent decree is posted.

Additionally, the Clayton Act allows third parties that have been injured by the transaction to challenge the acquisition through private litigation.

Substantive test

What is the substantive test applied by the authority?

The agencies typically challenge mergers under Section 7 of the Clayton Act, which prohibits acquisitions where the effect “may be substantially to lessen competition, or tend to create a monopoly” in “any line of commerce or in any activity affecting commerce in any section of the country” (15 USC § 18). Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission (FTC) Act also apply to mergers.

The Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines (often referred to as the Vertical Merger Guidelines) issued by the Federal Trade Commission and the Department of Justice explain the analysis conducted by the agencies when they are evaluating a proposed transaction. While these guidelines are helpful and influential, they are not the law. Although the merger review is typically forward looking, where the information is available, the agencies place significant weight on observed post-merger price increases or adverse changes to customers. Agencies will also look to numerous other fact-specific areas, including:

- historical events or natural experiments;
- the merging parties’ market share in a relevant market;
- the level of concentration in a relevant market;
- the change in concentration caused by the merger;
- the closeness of competition of the merging parties;
- the potential for coordination before and after the transaction;
- entry/expansion conditions and barriers; and
- whether the merger will eliminate a ‘maverick’ firm.

Merger-specific efficiencies (i.e., those that are likely to materialise as a result of the merger and likely would not materialise in the absence of the merger) will be considered by the reviewing agency as a mitigating factor against the potentially harmful competitive effects of the proposed transaction. Litigated court decisions and agency consent decrees provide guidance on the substantive standards governing antitrust violations for mergers and acquisitions.

Carve-outs

Does the legislation allow carve-out agreements in order to avoid delaying the global closing?

Parties to reportable transactions may not close until the applicable waiting periods have expired or been terminated. In theory, it may be possible to close a portion of the transaction that is not subject to Hart-Scott-Rodino notification.
However, this is uncommon and parties that wish to close part of the deal before the expiration of the Hart-Scott-Rodino waiting period risk ‘gun-jumping’ penalties and should consult with counsel in advance.

Is a special substantive test applied for joint ventures?

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Although some additional legal issues may arise in the joint venture context, the substantive test for determining whether a potential joint venture violates the antitrust laws is essentially the same as the test applied for other types of transaction.

Potential outcomes

What are the potential outcomes of the merger investigation? Please include reference to potential remedies, conditions and undertakings.

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Both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have the authority to seek to enjoin or unwind a merger that they believe is likely to harm competition. A merger investigation has four potential outcomes:

- No action is taken by the reviewing agency, in which case the parties are free to close the transaction at the expiration or early termination of either the initial Hart-Scott-Rodino waiting period or the waiting period following issuance of a request for additional information and documentary material.
- The parties are allowed to close the transaction based on negotiated structural and/or behavioural remedies that resolve the reviewing agency’s antitrust concerns.
- The reviewing agency attempts to block the merger via litigation. To block a transaction, the DOJ must sue in federal court. The FTC may use its own internal administrative proceeding for the trial on the merits. Both the FTC and the DOJ may seek a preliminary injunction in federal court that prevents the parties from closing the transaction during the pending litigation.
- The parties may abandon the transaction before conclusion of the Hart-Scott-Rodino process.

Right of appeal

Is there a right of appeal?

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Federal antitrust agencies can either allow a transaction to proceed by not taking any action or seek to block the transaction by filing a complaint in either federal court or an administrative proceeding for the Federal Trade Commission (FTC).

If the reviewing agency is granted a preliminary injunction in federal court prohibiting the parties from closing the transaction, the parties may appeal the court’s decision to a federal circuit court of appeals. If the relevant agency sues to enjoin the transaction in federal court, the parties or the agency can also appeal the court’s decision on the merits to the relevant federal circuit court of appeals.

If the transaction is challenged by the FTC in an administrative process, the parties may appeal the decision of the administrative law judge to the full commission. After the full commission renders a decision, the parties may appeal that decision to a federal circuit court in any circuit in which the company resides or does business. The parties may ultimately petition the Supreme Court to hear the case, although it is rare for the Supreme Court to accept such an appeal.

Do third parties have a right of appeal?
Only the parties to the decision have standing to appeal the decision of a federal court or administrative law judge. However, if a third party brings a private suit under the Clayton Act, that party may appeal a federal district court’s decision to the relevant federal circuit court of appeals.

**Time limit**

**What is the time limit for any appeal?**

Typically, an appeal to a federal circuit court must be filed within 30 days. If one of the parties is the United States or a US agency, as is common in merger cases, the notice of appeal may be filed by any party within 60 days of entry of the judgment or order being appealed. For administrative cases before the Federal Trade Commission, an administrative law judge’s decision may be appealed to the commission by either party within 30 days.

**Law stated date**

**Please state the date as of which the law stated here is accurate.**

The law stated here is accurate as of May 1 2015.