15. Contractual Merger Antitrust Risk Allocation
Possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the statutory period with the agency taking enforcement action
- Agency grants early termination prior to normal expiration

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court
  Seeks permanent injunctive relief in administrative trial

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

- Parties will not settle at agency’s ask and will not litigate
- Agency concludes that no settlement will resolve agency concerns (AT&T/T-Mobile, NASDAQ/NYSE Euronext)
Antitrust considerations in merger agreements

- Key antitrust issues
  - Relevant merger control filings
    - Which merger clearances should be disclosed in reps and warranties?
    - Which merger clearances should be closing conditions?
  - Cooperation on regulatory matters
    - Where and when to make merger filings?
    - How much information sharing?
    - Agreement on specific tactics and timing?
    - Agreement to litigate any challenges to the acquisition?
  - Antitrust risk-shifting provisions
    - Settlement and divestiture commitments
    - Reverse breakup fees
    - Other payments
  - Drop-dead date and termination provisions
    - Why can either party terminate the merger agreement without cause?
    - Does the merger agreement provide for enough time to defend the merger in the HSR review and, if necessary and desirable, in litigation?
Merger control filings

- “Consents and approvals” reps and warranties
  - Merging parties typically represent that the execution of the agreement and consummation of the transaction will not require any consents and approvals except for compliance with the HSR Act or ECMR (if applicable)
  - For other jurisdictions:
    - Parties can identify in advance all other specific jurisdictions, but this requires significant due diligence and agreement up-front
    - Parties typically refer to all “applicable”, “all required foreign approvals” or all “necessary foreign approvals” (generally understood as those with mandatory suspensory effect)
    - May have a carve out for those foreign filings that would not have a material adverse effect if not obtained
Merger control filings

- Where do merger control filings need to be made?
  - Over 100 jurisdictions have merger control filing requirements
    - Most are mandatory and suspensory—cannot close without filing and obtaining clearance
    - A few are voluntary (e.g., U.K., Australia, New Zealand)
    - A few are not suspensory (e.g., Indonesia)

- When do the merger filings have to be made?
  - Two considerations
    - Starting the clock as quickly as possible
    - Allowing sufficient time for preparation of defense and customer contacts

- Which clearances will be incorporated in the closing conditions?
  - Major jurisdictions almost always specifically identified
  - Query: What if the closing conditions do not include clearance in a suspensory jurisdiction in which a filing is required?
Litigation closing condition

- Common formulation: No threatened or pending litigation
  - Typically provides that no government action is pending or threatened that seeks to delay or prevent consummation of the transaction
  - Question: What constitutes a “threat” of litigation?
  - Question: What about private party actions?

- Alternative: No order
  - “If you can close, you must close”
  - Typically provides that no restraint, preliminary or permanent injunction or other order or prohibition preventing the consummation of the transaction shall be in effect

- Carve-out
  - From a seller’s perspective, may wish to have a carve-out that prior to asserting condition, the asserting party must be in compliance with its best efforts obligations (e.g., to settle or litigate)
Litigation covenant

- Are the parties committed to litigate in the event of an antitrust challenge?
  - May be imposed on buyer alone or on both parties
  - Obligation may be to litigate through to a final, non-appealable judgment, or something less

- Interactions with—
  - Any obligation to accept remedies in order to obtain clearance
  - The drop-dead date
    - Should the drop-dead date automatically be extended?
    - Should the unilateral right to terminate be symmetrical?
Restructuring obligations

- Can arise in two provisions
  - “Efforts” covenant
  - Specific covenant to offer and accept remedies
Efforts covenant

- Sets standard for obligations to obtain antitrust clearances
- These covenants usually only provide vague parameters, but they do provide a general guide of what is expected from both parties
  - Best efforts;
  - Reasonable best efforts;
  - Reasonable efforts; or
  - Commercially reasonable efforts

Decreasing level of required efforts
Efforts covenant

- Unqualified “best efforts” provision
  - Usually taken to imply an obligation to offer or accept restructuring relief if necessary to obtain antitrust clearance
  - Often coupled with express risk-shifting provision

- “Reasonable best efforts”/“commercially reasonable best efforts”
  - Something less than best efforts/something more than reasonable efforts
  - Most common formulation in antitrust covenants
  - Obligation not well defined by courts
    - Usually chosen precisely for this reason
  - Conventional wisdom: Does not imply an obligation to offer or accept material restructuring relief to obtain antitrust clearance
    - Can add express proviso to make explicit or limit obligation

- “Reasonable efforts”
  - Generally regarded as imposing no obligations that would change the transaction or reduce the benefit of the deal to the buyer in any meaningful way
Specific covenant re remedies

- Range of alternatives
  - “Hell or high water” provision
  - Capped divestiture obligation
  - Remain silent and rely on general efforts covenant
  - Specifically exclude divestitures

- Unqualified “hell or high water” provision
  - Requires seller to offer whatever remedy is necessary to obtain antitrust clearance
    - Includes divestitures, licenses, behavioral undertakings, and hold separates
    - Theoretically could require divestiture of entire target business
  - HOHW provisions are not self-executing—Agency still must agree to accept remedy
    - In some deals, agency will not accept any consent decree (e.g., Staples/Office Depot, AT&T/T-Mobile, NASDAQ/NYSE Euronext)
Specific covenant re remedies

- Qualified remedies obligations
  - Limited to certain business, product lines, or assets
  - Limited by revenue, EBITDA or materiality cap

- Remain silent and rely on general efforts covenant

- Explicit no divestiture obligation

- “Road map” problem
  - Informs agency of issues and remedies available for the asking
  - Queries:
    - Can the joint defense privilege or work product doctrine shield a risk-shifting provision from disclosure in an HSR filing or second request?
    - Even if there are, are there disclosure obligations under applicable securities laws?
Litigation

- Are the parties committed to litigate in the event of an antitrust challenge?
  - May be imposed on buyer alone or on both parties
  - Obligation may be to litigate through to a final, non-appealable judgment, or something less

- Interaction of litigation provision with—
  - Any obligation to accept remedies to obtain clearance
    - The more onerous the obligation, the more the buyer will want a credible threat to litigate
  - The drop-dead date
    - A litigation obligation (or right) is meaningless in the absence of time to litigate
    - Should the drop-dead date automatically be extended?
    - Should the unilateral right to terminate be symmetrical?
Antitrust-related payments

- Antitrust reverse termination fees
- Nonrefundable partial payments or “deposits”
- Ticking fees
- “Take or pay” obligation
Antitrust reverse termination fees

Reverse breakup fee with an antitrust trigger
- Payable by the buyer to the seller where:
  - the transaction does not close before the purchase agreement is terminated, and
  - the only conditions not satisfied are the antitrust clearance conditions
- Historically relatively rare, but seeing more often in modern agreements
  - Sellers usually negotiate some form of remedy obligation and/or higher purchase price to avoid reverse breakup fee

Size of fee—Varies widely
- Sample: January 1, 2015 – January 31, 2018
  - 417 transactions
  - 66 with antitrust reverse termination fees (15.8%)
- Percentage of transaction value
  - Largest: 12.5%
    - Have been larger before 2015: 39.81% (Monsanto acquisition of Delta and Pine Land)
  - Smallest: 0.6%
    - Have been smaller before 2015: 0.11% (CapitalSource’s proposed acquisition of TierOne)
  - Mean: 4.7%
  - Median: 4.4%
- Highest absolute dollar value
  - $4.2 billion (AT&T’s proposed acquisition of T-Mobile) (15.4%)
Antitrust reverse termination fees

NB: The difference between the intervals is not uniform.
Antitrust reverse termination fees

Recent examples

<table>
<thead>
<tr>
<th>Announcement Date</th>
<th>Acquiror</th>
<th>Target</th>
<th>Status</th>
<th>Equity Value ($M)</th>
<th>Antitrust Reverse Breakup Fee Amount ($M)</th>
<th>% of Equity Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/18/2018</td>
<td>Novartis AG</td>
<td>Endocyte, Inc.</td>
<td>Completed</td>
<td>$1,202.89</td>
<td>$150</td>
<td>12.5%</td>
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<td>4/29/2018</td>
<td>T-Mobile US, Inc.</td>
<td>Sprint Corp.</td>
<td>Pending</td>
<td>$26,513.01</td>
<td>$600.00</td>
<td>2.3%</td>
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<tr>
<td>3/8/2018</td>
<td>Cigna</td>
<td>Express Scripts</td>
<td>Completed</td>
<td>$53,895.83</td>
<td>$2,100</td>
<td>3.9%</td>
</tr>
<tr>
<td>12/14/2017</td>
<td>Walt Disney</td>
<td>Twenty-First Century Fox</td>
<td>Completed</td>
<td>$54,721.78</td>
<td>$2,500</td>
<td>4.6%</td>
</tr>
<tr>
<td>12/3/2017</td>
<td>CVS Health</td>
<td>Aetna</td>
<td>Completed</td>
<td>$67,822.82</td>
<td>$2,100</td>
<td>3.1%</td>
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<tr>
<td>11/3/2016</td>
<td>AAM</td>
<td>MPG</td>
<td>Completed</td>
<td>$1,453.98</td>
<td>$101.79</td>
<td>7.0%</td>
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<tr>
<td>10/31/2016</td>
<td>General Electric</td>
<td>Baker Hughes</td>
<td>Abandoned</td>
<td>$35,900.00</td>
<td>$1,300.00</td>
<td>3.6%</td>
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<tr>
<td>4/28/2016</td>
<td>Comcast Corp.</td>
<td>Dreamworks Animation</td>
<td>Completed</td>
<td>$3,800.00</td>
<td>$200.00</td>
<td>5.3%</td>
</tr>
<tr>
<td>3/4/2016</td>
<td>AMC Entertainment</td>
<td>Carmike Cinemas</td>
<td>Completed</td>
<td>$356.46</td>
<td>$50.00</td>
<td>6.8%</td>
</tr>
<tr>
<td>10/27/2015</td>
<td>Walgreens Boots Alliance</td>
<td>Rite Aid</td>
<td>Abandoned</td>
<td>$9,416.39</td>
<td>$325.00</td>
<td>3.5%</td>
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<tr>
<td>10/21/2015</td>
<td>Western Digital Corp.</td>
<td>SanDisk</td>
<td>Completed</td>
<td>$17,139.75</td>
<td>$1,060.42</td>
<td>6.2%</td>
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<tr>
<td>7/3/2015</td>
<td>Aetna</td>
<td>Humana</td>
<td>Blocked</td>
<td>$34,088.24</td>
<td>$1,000.00</td>
<td>2.9%</td>
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<tr>
<td>6/20/2015</td>
<td>Anthem</td>
<td>Cigna</td>
<td>Blocked</td>
<td>$47,215.57</td>
<td>$1,850.00</td>
<td>3.9%</td>
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<tr>
<td>2/12/2015</td>
<td>Expedia</td>
<td>Orbitz Worldwide</td>
<td>Completed</td>
<td>$1,329.58</td>
<td>$115.00</td>
<td>8.6%</td>
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<tr>
<td>2/4/2015</td>
<td>Staples</td>
<td>Office Depot</td>
<td>Blocked</td>
<td>$6,205.61</td>
<td>$250.00</td>
<td>4.0%</td>
</tr>
<tr>
<td>11/17/2014</td>
<td>Halliburton</td>
<td>Baker Hughes</td>
<td>Abandoned</td>
<td>$34,600.00</td>
<td>$3,500.00</td>
<td>10.1%</td>
</tr>
<tr>
<td>11/17/2014</td>
<td>Actavis</td>
<td>Allergan</td>
<td>Completed</td>
<td>$67,365.83</td>
<td>$2,100.00</td>
<td>3.1%</td>
</tr>
<tr>
<td>8/1/2014</td>
<td>Scientific Games</td>
<td>Bally Technologies</td>
<td>Completed</td>
<td>$3,194.97</td>
<td>$105.00</td>
<td>3.3%</td>
</tr>
<tr>
<td>7/28/2014</td>
<td>Zillow</td>
<td>Trulia</td>
<td>Completed</td>
<td>$2,631.48</td>
<td>$150.00</td>
<td>5.7%</td>
</tr>
<tr>
<td>2/20/2014</td>
<td>Brookdale Senior Living</td>
<td>Emeritus</td>
<td>Completed</td>
<td>$1,380.13</td>
<td>$143.00</td>
<td>10.4%</td>
</tr>
<tr>
<td>1/28/2014</td>
<td>Martin Marietta Materials</td>
<td>Texas Industries</td>
<td>Completed</td>
<td>$2,059.29</td>
<td>$140.00</td>
<td>6.8%</td>
</tr>
<tr>
<td>12/8/2013</td>
<td>Sysco</td>
<td>US Foods (p)</td>
<td>Blocked</td>
<td>$3,500.00</td>
<td>$300.00</td>
<td>8.6%</td>
</tr>
<tr>
<td>3/20/2011</td>
<td>AT&amp;T</td>
<td>T-Mobile USA</td>
<td>Abandoned</td>
<td>$39,000.00</td>
<td>$4,200.00</td>
<td>10.8%</td>
</tr>
</tbody>
</table>
Payments

- **Ticking fees**
  - Require buyer to pay interest on purchase price if transaction not closed by particular date
  - Aim to motivate buyer to obtain regulatory clearances quickly
  - Relatively rare in public transactions
    - Dow Chemical/Rohm and Hass: 5% of equity value
    - Boston Scientific/Guidant: 3% of equity value

- **Nonrefundable partial payments**
  - Like a ticking fee but requires more than the payment of interest
  - Payable on a specified schedule

- **“Take or pay” clauses**
Cooperation covenants

- Specifies level of cooperation by parties in obtaining antitrust clearances

- Typical requirements
  - Advance notice and review of communications and submissions with agency
  - Right to attend meetings/conferences with agency
    - Subject to agreement by agency
  - Right to review 4(c) and second request documents

- Party interests
  - Buyer usually want to control process and not have seller operating independently with governmental authorities
  - Seller wants to know what is going on to ensure buyer is fulfilling efforts obligations
  - Both want to maximize knowledge of the evidence submitted to the agency
Timing provisions

- **Timing for filings**
  - Often “as promptly as possible”
  - But some delay (5-10 business days) may be desirable to permit:
    - Indepth substantive analysis
    - Customer rollout
    - Coordination in submitting required merger filings

- **Other timing-related provisions**
  - Provisions agreeing not to withdraw filings, extend waiting periods or enter into timing agreement without consent of other party
  - Seller may want to impose a specific deadline on second request compliance
Timing and termination

- **Drop-dead date**
  - Typical: One year from signing
  - Does it provide long enough for expected approvals and litigation?
    - One year should be enough in most cases
    - Can include an extension (often +120 days) in the event of a second request or Phase II investigation
    - Can add further extension (often 3 months + 3 months) to permit litigation of a preliminary injunction (but does not permit an appeal)
  - MAC clause: If business likely to deteriorate significantly during a prolonged antitrust review, may need provisions to ensure MAC is not used to avoid any divestiture commitments or avoid payment of reverse breakup fees
# Risk-shifting summary

<table>
<thead>
<tr>
<th></th>
<th>Buyer-friendly</th>
<th>Seller-friendly</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Level of efforts</strong></td>
<td>Commerciably reasonable efforts</td>
<td>Reasonable best efforts</td>
</tr>
<tr>
<td><strong>Obligation to make divestitures</strong></td>
<td>Silent/expressly excluded</td>
<td>Divestitures up to cap – measured in asset or revenue terms or MAC applying to part or all of acquired or merged business</td>
</tr>
<tr>
<td><strong>Timing for other aspects of regulatory review</strong></td>
<td>Silent/may be deadline for submission of HSR filing</td>
<td>Silent/may be deadline for submission of HSR filing</td>
</tr>
<tr>
<td><strong>Timing for offering divestitures</strong></td>
<td>Silent</td>
<td>Silent</td>
</tr>
<tr>
<td><strong>Control of regulatory process</strong></td>
<td>Buyer controls; require cooperation from Seller and may give access and information</td>
<td>Buyer leads; Seller entitled to be present at meetings, calls; obligation on Buyer to communicate certain matters to Seller</td>
</tr>
<tr>
<td><strong>Obligation to litigate</strong></td>
<td>Silent/expressly exclude/litigate at buyer's option</td>
<td>Silent/expressly exclude</td>
</tr>
<tr>
<td><strong>Termination provisions</strong></td>
<td>Open-ended, extendable at buyer's option</td>
<td>Tolling at either party's option</td>
</tr>
<tr>
<td><strong>Reverse break-up fee</strong></td>
<td>None</td>
<td>Possible</td>
</tr>
<tr>
<td><strong>Time to termination date</strong></td>
<td>As long as buyer anticipates needing to fully defend transaction on merits, plus ability to extend at buyer's option</td>
<td>Tolling at either party's option</td>
</tr>
<tr>
<td><strong>“Take or pay” provision</strong></td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>
SUMMARY
Summary: Will the deal close?

The framework for assessing a horizontal transaction

- What “markets” should be analyzed?
  - “Market” here means any identifiable subset of customers that purchase from one or both of the merging parties (not a Merger Guidelines relevant market)

- What “markets” will be challenged?
  - Ultimate question: Will customers likely be harmed in prices, quality, or innovation?
  - Are the parties head-to-head competitors?
  - How many other realistic alternative sources of supply?
  - Are the parties uniquely close competitors?
  - Is one of the merging parties a “maverick”?
  - Is one of the merging parties a potential entrant?
  - Will there be significant customer complaints?
  - Are there “bad” documents?

- Can the problematic “markets” be fixed?
  - Ultimate question: Can the threat to customers be eliminated through a divestiture?
  - What businesses or assets need to be divested to solve the antitrust problem?
  - Are additional assets necessary to make the divestiture assets separable from the business?
  - Are additional assets necessary to make the divestiture assets saleable?
  - Are there buyers acceptable to the reviewing agency?
  - Will the agency require a single buyer for all divestiture assets?

- Is the deal still worthwhile?
  - What is the loss of value (including lost synergies) due to the divestiture(s)?
  - What contractual protection can be obtained to ensure against a bad deal?
  - Important but not critical: How long will all of this take?