Unit 6. The DOJ/FTC Merger Review Process

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Topics

- The HSR Act
- Overview of the HSR merger review process
- Premerger notification
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

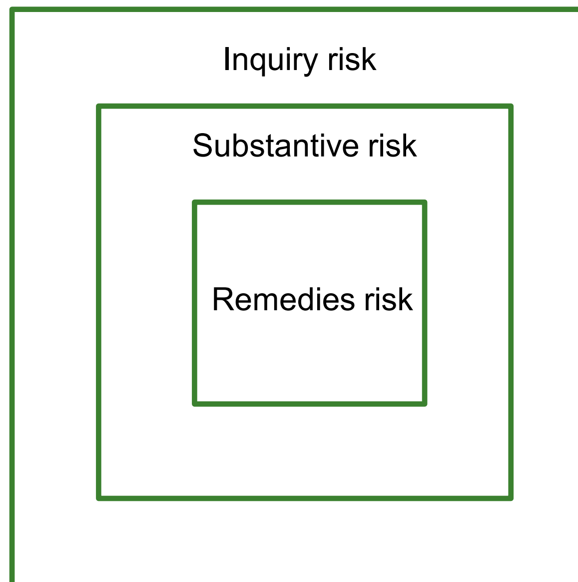
Thinking Systematically about Antitrust Risk

Types of antitrust risks

- *Inquiry risk*: The risk that legality of the transaction will be put in issue
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- *Substantive risk*: The risk that the transaction is anticompetitive and hence unlawful
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- *Remedies risk*: The risk that the transaction will be blocked or restructured
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be "fixed" to alleviate the agency's concerns and if so how?

Types of antitrust risks

- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive



Because the inquiry risk is dependent on the likelihood that the transaction violates the antitrust law, we will examine substantive risk first

Possible outcomes of merger investigations

- Four possible ultimate outcomes:
  1. The investigating agency clears the transaction on the merits without taking enforcement action
  2. The parties restructure (“fix”) the deal to eliminate the substantive antitrust concern, typically through a divestiture of a line of business
     - Post-closing “fix” under a judicial consent decree (DOJ) or a FTC consent order
     - Restructure the deal preclosing to avoid a consent decree (“fix-it-first”)
  3. The investigating agency initiates litigation and either—
     a. The agency wins on the merits, the court issues an injunction blocking the closing, and the parties subsequently terminate their purchase agreement;
     b. The agency and the parties settle the litigation through a consent decree; *or*
     c. The parties win on the merits and subsequently close their deal
  4. The parties voluntarily terminate the deal rather than settle or litigate

Costs associated with antitrust risk

- Delay/opportunity costs
  - Possible delay in the closing of the transaction and the realization of the benefits of the closing to the acquiring and acquired parties
  - The duration of DOJ/FTC investigations has increased substantially during the Trump and Biden administrations:
    - In the Trump administration, the agencies became much more cautious—and the process much more time-consuming—in agreeing to the parameters of consent decrees and in approving divestiture buyers
    - In the Biden administration, the agencies largely ceased considering consent decrees to resolve investigations but significantly increased the scope of their second requests, requiring much more time for substantial compliance

Average Duration by Presidential Administration

	Investigations	Average Duration
Obama 2011-2012	56	7.1
Obama (2d term) 2013-2016	119	8.8
Trump 2017-2020	109	11.2
Biden 2021-2024	76	11.3
Trump 2.0 2025	6	12.3

[1] Data sources: Dechert LLP, DAMITT 2016 Year in Review (Jan. 2017) (2011-2016); Dechert LLP, DAMITT 2025 Review: Merger Investigations Neared Record Lows and Remedy Policies Shifted (Jan. 29, 2026) (2017-2025).

Costs associated with antitrust risk

- Management distraction costs
  - Possible diversion of management time and resources into the defense of the transaction and away from running the business
- Out-of-pocket expense costs
  - Possible increased financial outlays for the defense of the transaction

Costs associated with antitrust risk

- Remedies costs:
  - If the transaction is blocked, the foregone benefits to the merging parties of the transaction
  - If the divestiture of a business or assets is required—
    - Any discount from going-concern value that the divestiture seller likely will have to accept
      - Merger divestitures usually must be made quickly under "fire sale" conditions
      - Only a limited number of potential buyers may be acceptable to the reviewing agency as the divestiture buyer
    - Any loss of synergies associated with the divested businesses
    - The transaction costs associated with the divestiture sale

Premerger Notification and The HSR Act

HSR Act

- Hart-Scott-Rodino Act[1]
  - Enacted in 1976 and implemented in 1978
  - Applies to large mergers, acquisitions and joint ventures
  - Imposes reporting and waiting period requirements
    - Preclosing reporting to both DOJ and FTC by each transacting party
    - Post-filing waiting period before parties can consummate transaction
  - Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a "second request"
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
    - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
  - Not jurisdictional: Agencies can review and challenge transactions—
    - Falling below reporting thresholds
    - Exempt from HSR reporting requirements
    - "Cleared" in a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

HSR Act

- Basic materials
  - The HSR Act, 15 U.S.C. § 18a (also known as Section 7A of the Clayton Act)
  - The HSR Act implementing regulations[1]
  - Formal FTC interpretations of the implementing regulations
  - Informal staff interpretations of the implementing regulations
  - The HSR reporting form and instructions
- Administration
  - The FTC Premerger Notification Office (PNO) is responsible for the procedural administration of the premerger notification program under the HSR Act
  - There is a "clearance process" to allocate HSR filings to the DOJ and FTC for substantive review[2]
  - Once a filing has been "cleared" to an agency for review, the filing is sent to the appropriate investigating section for review, investigation, and possible challenge

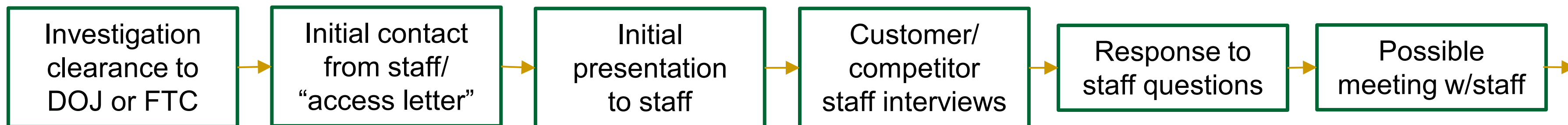
[1] 16 C.F.R. pts 801-803. The C.F.R. is the Code of Federal Regulations. It is an annually updated codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government. The departments and agencies usually promulgate these rules and regulations pursuant to a congressional delegation of power and have the force of law. The rulemaking process is governed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559 (APA).
[2] Discussed below.

Overview: The HSR Review Process

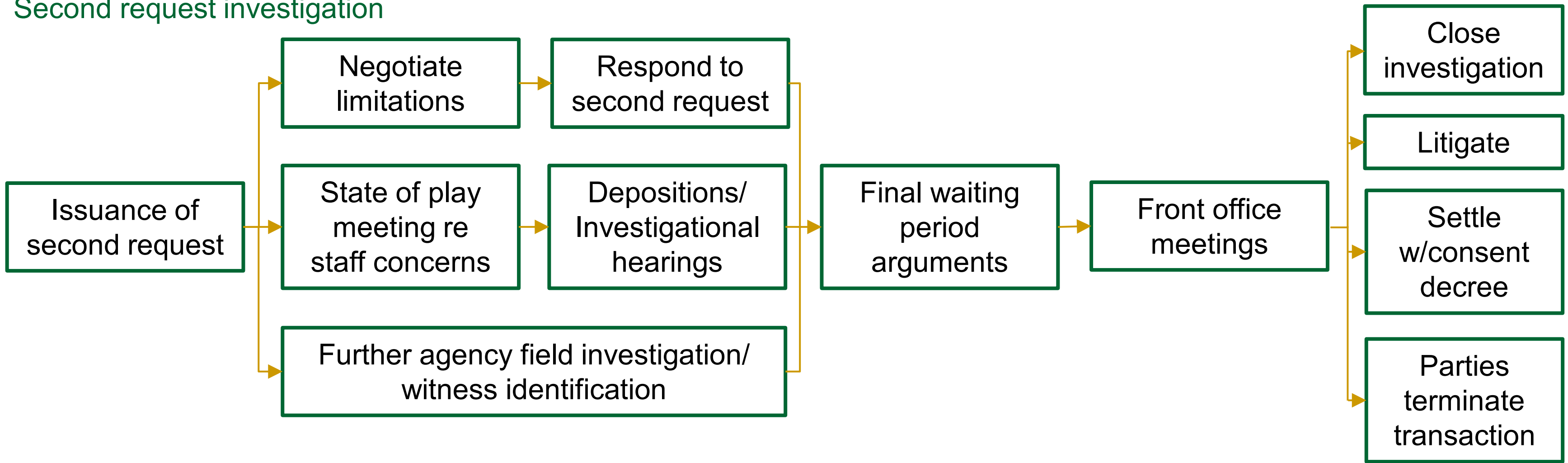
The HSR review process

Prefiling/filing

Initial investigation

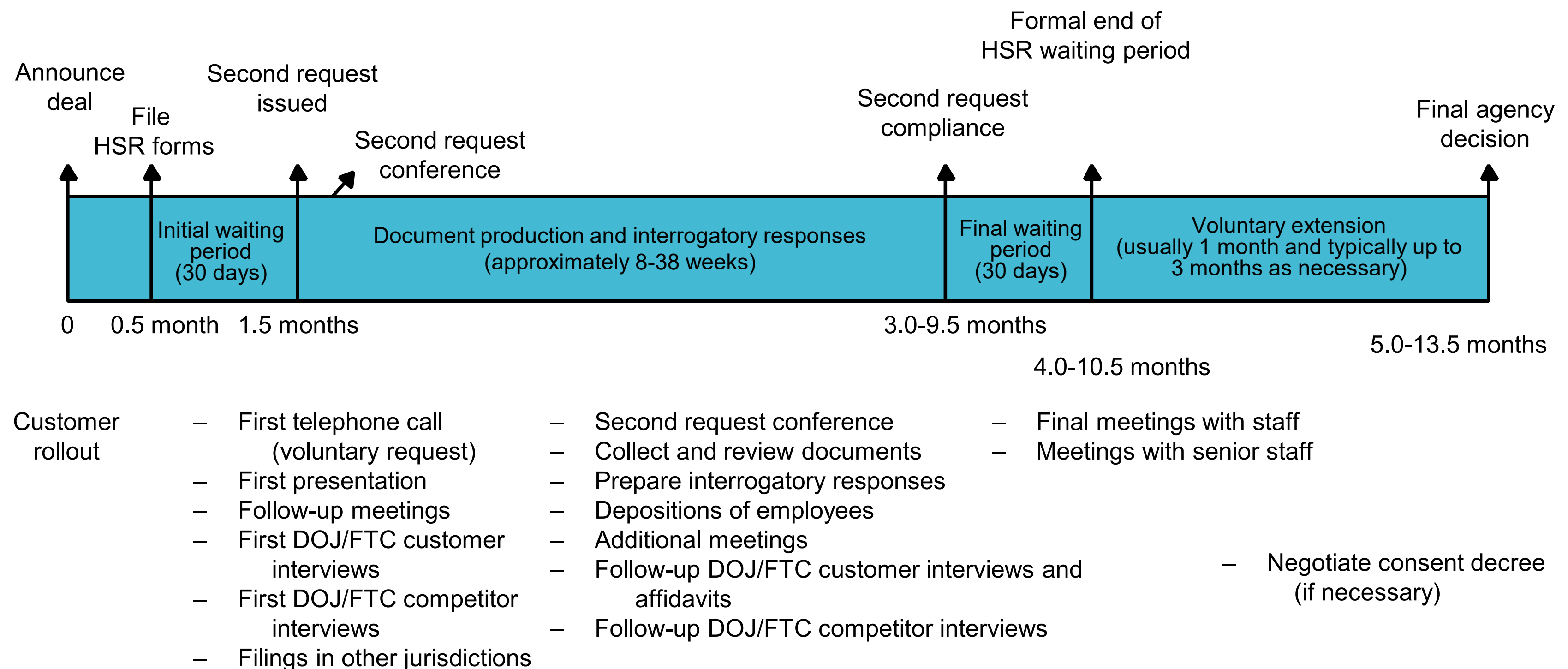


Second request investigation

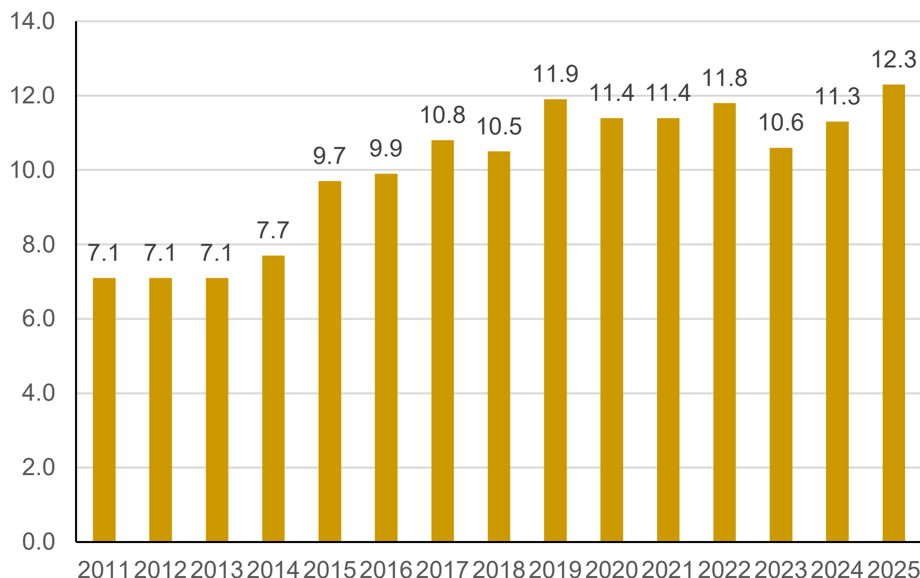


The HSR Act review process

- Typical domestic transaction



The HSR Act review process



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Source: Dechert LLP, DAMITT 2025 Review: Merger Investigations Neared Record Lows and Remedy Policies Shifted (Jan. 29, 2026). DAMITT is the Dechert Antitrust Merger Investigation Timing Tracker. Dechert defines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include in-depth second request investigations in which the agency concludes there is no antitrust concern but issues no closing statement. Dechert calculates the duration of an investigation from the date of deal announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

HSR Act Reportability

Basic prohibition

- Section 7A(a)

> [N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . and the waiting period . . . has expired . . . .[1]

- A reportable transaction is one that—
  - Involves the acquisition of voting securities or assets
  - Satisfies the thresholds for prima facie reportability[2]
  - Does not fall into one of the exemptions provided by the HSR Act or implemented by the HSR Rules
- Thresholds are adjusted annually for inflation
  - Beginning in FY 2005, the reporting thresholds are adjusted annually by the percentage changes in the gross national product during the prior fiscal year compared to the gross national product for the fiscal year ending September 30, 2003.

[1] 15 U.S.C. §18a(a).
[2] Pub. L. No. 106-553, 114 Stat. 2762 , 2762A-109 (effective February 1, 2001).

Acquisition of voting securities or assets

- The HSR Act applies only to acquisitions of voting securities or assets
- Voting securities
  - "[S]ecurities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer"[1]
- Assets
  - No special definition
  - The acquisition of a 50% or greater ownership interest in a non-corporate entity (such as a partnership or LLC) is regarded as an acquisition of the entity's underlying assets
  - An exclusive license is regarded as an asset for HSR reporting purposes

[1] 16 C.F.R. § 801.1(f)(1)(i).

Acquisition of voting securities or assets

- Acquisition
  - Obtaining the "beneficial interest" in the underlying voting securities or assets
  - Does not require a formal transfer of legal title
    - *Example*: Company A has a signed purchase agreement to acquire the voting securities of Company B from its parent company. Although the transaction has not yet closed, Company A is influencing the operational management decisions of Company B. Given this influence, the agencies will view Company A has having obtained a beneficial interest in Company B and hence to have acquired Company B for HSR Act purposes.

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability		
Up to and including $133.9 million	Not reportable		
Above $133.9 million up to and including $535.5 million	Reportable if: (1) satisfies the "size of person" test, and (2) no exemption applies Size of person test		
	Acquiring person		*Acquired person*
	$267.8 million (in total assets or annual net sales)	and	$26.8 million (in total assets or annual net sales of a person engaged in manufacturing)
	Or		
	$267.8 million (in total assets or annual net sales)	and	$26.8 million (in total assets of a person not engaged in manufacturing)
	Or		
	$26.8 million (in total assets or annual net sales)	and	$267.8 million (in total assets or annual net sales)
In excess of $535.5 million	Reportable absent an exemption		

* Based on the value of voting securities and assets the acquiring person will hold as a result of the acquisition, including the value of any previously acquired voting securities.

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026).

Prima facie reportability

- Measuring thresholds
  - Measured against everything the acquiring person will hold as a result of the pending acquisition, not just the amount to be acquired in the pending transaction
- Asset acquisitions
  - Acquisition price + value of assumed liabilities
- Voting securities acquisitions
  - Acquisition price for voting securities to be acquired + value of voting securities already held
  - Note: Acquisitions of minority interests can be reportable
- Acquisitions of ownership interests in LLCs, partnerships and other noncorporate entities
  - Acquisition price for non-corporate interests to be acquired + value of interests already held *and* acquisition confers "control" of the entity
  - For HSR Act purposes, "control" is defined as the right to 50% or more of the entity's profits and/or 50% or more of the entity's assets upon dissolution

Selected exemptions

- Intraperson
  - Acquiring and acquired person are the same
- Investment
  - Hold no more than 10% of target's outstanding voting securities
    - 15% for certain institutional Investors
  - Acquirer must have a purely passive investment intention
    - Any membership on the board of directors or other involvement in the management of the company (other than voting shares) voids exemption
- Convertible voting securities
  - Acquired securities have no present voting rights
- Acquisitions of non-U.S. assets
  - Must not generate sales in or into the U.S. of more than $133.9 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either
  - Do not confer control over the target, or
  - Do not involve assets in the U.S. or sales in or into the U.S., over $133.9 million

Notification thresholds

- An otherwise reportable transaction is not subject to the reporting and waiting period requirements of the HSR Act if
  1. The reporting and waiting period requirements were satisfied within the last five years for a prior acquisition, *and*
  2. The pending acquisition will not cause the acquiring person to cross a notification threshold

Notification thresholds[1]
$133.9 million
$267.8 million
$1.339 billion
25% of the voting securities if their value exceeds $2.678 billion
50% of the voting securities if their value exceeds $133.9 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026) .

Premerger Notification

The 2024 HSR form revision (now vacated)

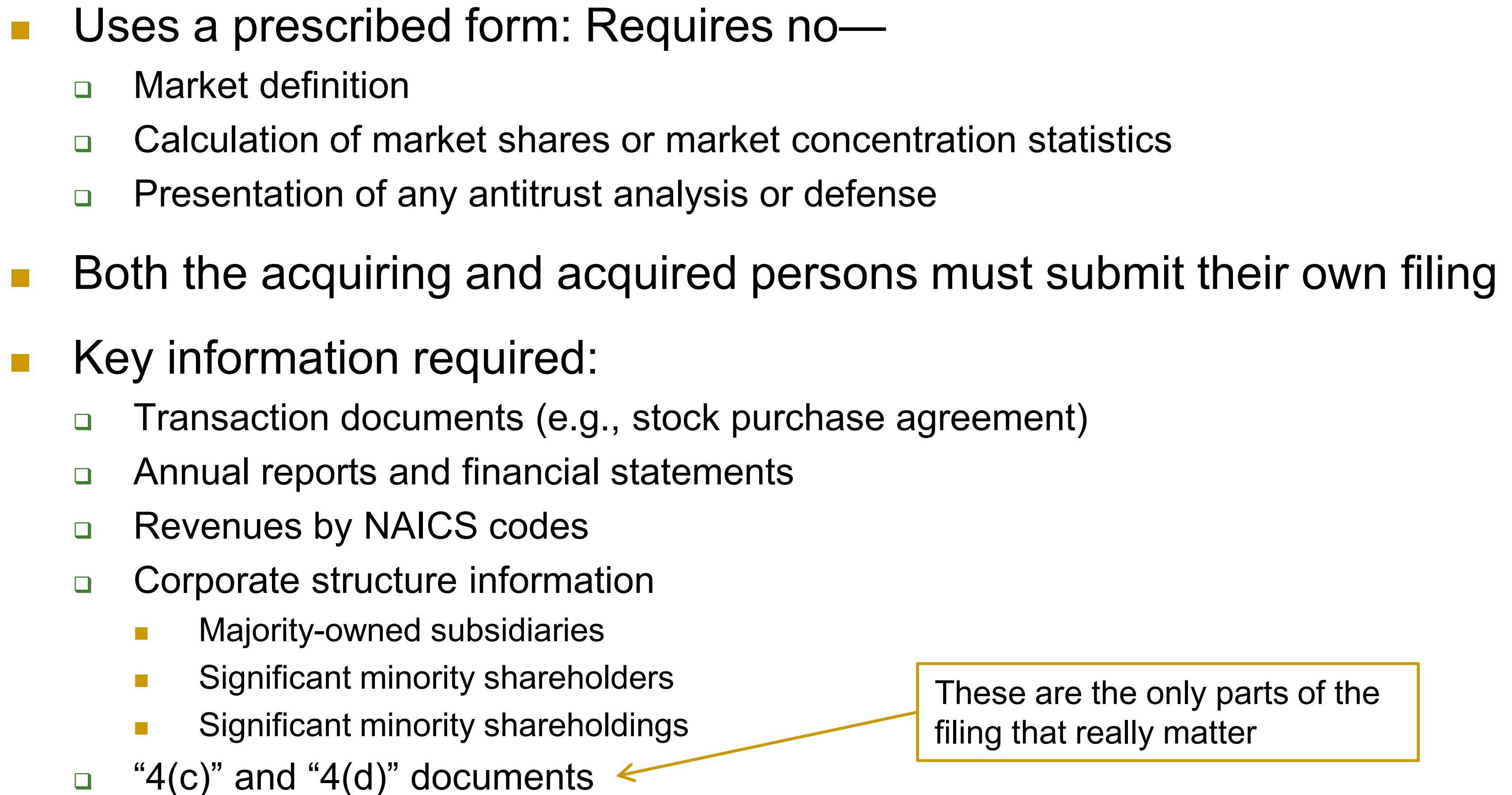
On October 10, 2024, the Federal Trade Commission (FTC), with the concurrence of the Department of Justice (DOJ), finalized the most sweeping amendments to the Hart-Scott-Rodino (HSR) premerger notification requirements in over 45 years.[1] The final rule—published in the Federal Register on November 12, 2024, and effective February 10, 2025[2]—expanded the scope of required information, formalized new documentation standards, and tailored disclosure obligations based on transaction type and the filer's role, with the aim of providing antitrust agencies earlier insight into potential competitive effects.

In January 2025, the U.S. Chamber of Commerce and other business groups filed a lawsuit challenging the rule as exceeding statutory authority and violating the Administrative Procedure Act.[3] However, they did not seek a temporary restraining order or preliminary injunction. As a result, the new rules took effect as scheduled on February 10, 2025.

After more than a year in effect, the rule promulgating the 2024 HSR form revisions was vacated as invalid.[4] Although the antitrust agencies resumed accepting the Form and Instructions that were in place before February 10, 2025, they have renewed their effort to revise the HSR form by launching a joint public inquiry and request for public comment. Presumably, the agencies will be seeking to reinstitute many of the new additions in the 2024 HSR form.

[1] Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024).
[2] Premerger Notification; Reporting and Waiting Period Requirements, 89 Fed. Reg. 89216 (Nov. 12, 2024).
[3] Complaint for Declaratory and Injunctive Relief, Chamber of Commerce v. FTC, No. 6:25-cv-00009 (E.D. Tex. filed Jan. 10, 2025).
[4] *See* Chamber of Commerce v. FTC, No. 6:25-CV-9-JDK, 2026 WL 402498 (E.D. Tex. Feb. 12, 2026), *stay pending appeal denied*, No. 26-40094 (5th Cir. Mar. 19, 2026).

HSR Act filing (using the restored prior form)



- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense
- Both the acquiring and acquired persons must submit their own filing
- Key information required:
  - Transaction documents (e.g., stock purchase agreement)
  - Annual reports and financial statements
  - Revenues by NAICS codes
  - Corporate structure information
    - Majority-owned subsidiaries
    - Significant minority shareholders
    - Significant minority shareholdings
  - "4(c)" and "4(d)" documents

These are the only parts of the filing that really matter

HSR Act filing (using the restored prior form)

- 4(c) and 4(d) documents
  - 4(c) documents
    - Studies, surveys, analyses or reports
    - Prepared by or for officers or directors of the company (or any entities it controls)
    - That analyze the transaction
    - With respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets
  - 4(d) documents
    - Confidential Information Memoranda (“CIM”)
    - Third party advisor documents
    - Synergy and efficiency documents
  - Failure to provide all 4(c) and 4(d) documents
    - Makes the HSR filing ineffective, so that the waiting period never started
      - Usually discovered by investigating agency in the document production in a second request
      - Agencies have required parties to refile and go through the entire process (including a second second request)
    - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

HSR Act filing (using the vacated 2024 form)

- Both the acquiring and acquired persons must submit their own filing
  - Prior to the 2024 form, the filing parties used the same form
  - When the 2024 changes were in effect, the acquiring and acquired persons used separate forms
    - The 2024 acquiring person's form required significantly more information than the acquired person's form, particularly when horizontal or vertical overlaps exist

We will focus on the acquiring person's form in the next few slides

- Key categories of information required:
  1. Deal documentation and deal structure
  2. Corporate structure and ownership
  3. Business activities and competitive overlaps
  4. Business documents and internal analysis
  5. Other information

HSR Act filing (using the vacated 2024 form)

1. Deal documentation and deal structure
   - Transaction documents
     - All executed or near-final versions of:
       - Stock purchase agreements, merger agreements, asset purchase agreements
       - Side letters, non-compete clauses, and similar agreements
     - If only a term sheet or agreement-in-principle exists, it must have sufficient detail about the scope of the transaction the parties intend to consummate. This should include some combination of the following:
       - the identity of the parties
       - the structure of the transaction
       - the scope of what is being acquired
       - calculation of the purchase price
       - an estimated closing timeline
       - employee retention policies, including with respect to key personnel
       - post-closing governance
       - transaction expenses or other material terms
   - Narrative descriptions
     - Each strategic rationale for the transaction (with references to supporting documents) discussed or contemplated by the filing person or any of its officers, directors, or employees
     - Deal structure and scope
       - Including a diagram of the transaction (if one exists)
     - Consideration and timing

HSR Act filing (using the vacated 2024 form)

2. Corporate structure and ownership
   - Corporate structure information
     - Majority-owned subsidiaries
     - Significant minority shareholders
     - Significant minority shareholdings (5–49%) in competitors
   - Existing organization charts showing the relationship among affiliated entities
   - Annual reports and financial statements

HSR Act filing (using the vacated 2024 form)

3. Business activities and competitive overlaps
   - Revenue reporting
     - Report the revenue of the filing person using 6-digit NAICS codes with overlap flags
     - In specified industries (e.g., manufacturing, healthcare, energy), revenue must also be broken out by state or facility address to allow geographic market screening
   - Brief narrative description of the acquiring person's and target's business operations

HSR Act filing (using the vacated 2024 form)

3. Business activities and competitive overlaps (con't)
   - "Overlap descriptions": For each product or service with overlap, provide—
     - A description of product or service
     - Dollar sales or, if unavailable, usage metrics (e.g., number of users, projected revenue)
     - Categories of customers (e.g., retailers, institutional)
     - **Top 10 customers (measured in dollars) by overlapping category**
     - **Top 10 customers by customer category (e.g., retailer, distributor, broker, government, military)**
   - "Supply relationships description":
     - List any product/service where:
       - Acquiring person supplies to, or buys from, the target or a competitor of the target
       - Transactions exceeded $10 million in the prior year
     - **Report, for the most recent year, the acquiring person's dollar sales of each relevant product to—**
       - **the target and**
       - **any other business known to use the product in competition with the target**
     - **For each of the 10 customers that use the acquiring person's product, report—**
       - **Dollar amount of sales and**
       - **A summary of the terms of the relevant supply or licensing agreements**.

NB: **Bold** indicates one of the most important responses to the investigation agency

HSR Act filing (using the vacated 2024 form)

3. Business activities and competitive overlaps (con't)
   - Officers and directors (for Clayton Act § 8 screening)
     - Disclose all current officers and directors (or equivalents) of entities involved in the development, marketing, or sale of overlapping or related products/services
     - Disclose individuals who currently or recently (within 3 months) served as officers or directors of both the acquiring person and any entity that operates in the same NAICS codes as the target. Disclosure includes expected post-close leadership.
     - For the acquiring entity and all entities it controls, is controlled by, or that will be created as part of the deal, also list individuals likely to become officers or directors post-close who may also serve in competing entities
       - If NAICS codes are unavailable, report based on industry knowledge or belief

HSR Act filing (using the vacated 2024 form)

4. Business documents and internal analysis

   a. **Competition documents**

> Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.

   b. **Confidential information memoranda ("CIM")**

> Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or of the acquiring entity(s) that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum.

NB: **Bold** indicates one of the most important responses to the investigation agency

HSR Act filing (using the vacated 2024 form)

4. Business documents and internal analysis (con't)

   c. **Third-party studies, surveys, analysis, and reports**

> Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors ("third-party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring person or of the acquiring entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

   d. **Synergies and efficiencies documents**

> Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

HSR Act filing (using the vacated 2024 form)

- Business documents and internal analysis (con't)
  e. Plans and reports
    - To the CEO

> [P]rovide all regularly prepared plans and reports that were provided to the Chief Executive Officer (CEO) of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

    - To the Board of Directors

> [P]rovide all plans and reports that were provided to the Board of Directors of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

HSR Act filing (both forms)

- Business documents and internal analysis (con’t)
  - Failure to provide all required business documents
    - Makes the HSR filing ineffective, so that the waiting period never started
      - Usually discovered by investigating agency in the document production in a second request
      - Agencies have required parties to refile and go through the entire process (including a second second request)
    - Also, civil penalties (fines) for closing a transaction without observing the applicable waiting period

HSR Act filing (using the vacated 2024 form)

5. Other information
   - Prior acquisitions
     - Disclose prior acquisitions in overlapping markets within the past five years
   - Defense or intelligence contracts
     - Disclose any defense/intelligence contract with a value greater than $100M in any overlapping product
   - Foreign subsidies and “covered” nations
     - Identify any subsidy received or committed by a foreign government or "foreign entity of concern" in the last two years.
     - Report any products produced in covered nations subject to countervailing duties or active investigations
     - *Note*: The foreign subsidy reporting satisfies new national security-related disclosure mandates required by the Merger Filing Fee Modernization Act[1]
   - Other merger control filings
     - List other jurisdictions where merger filings are/will be made (including anticipated dates)

[1] *See* Pub. L. No. 117-328, div. GG, tit. II, §§ 201-02, 136 Stat. 4459, 5967, 5969-70 (Dec. 29, 2022) (requiring parties to premerger notification filings to provide information concerning subsidies they receive from countries or entities that are strategic or economic threats to the United States).

HSR Act filing

- The prescribed forms do not require the filing person to address—
  - Market definition
  - Market shares or market concentration statistics
  - Any antitrust analysis or defense of the transaction

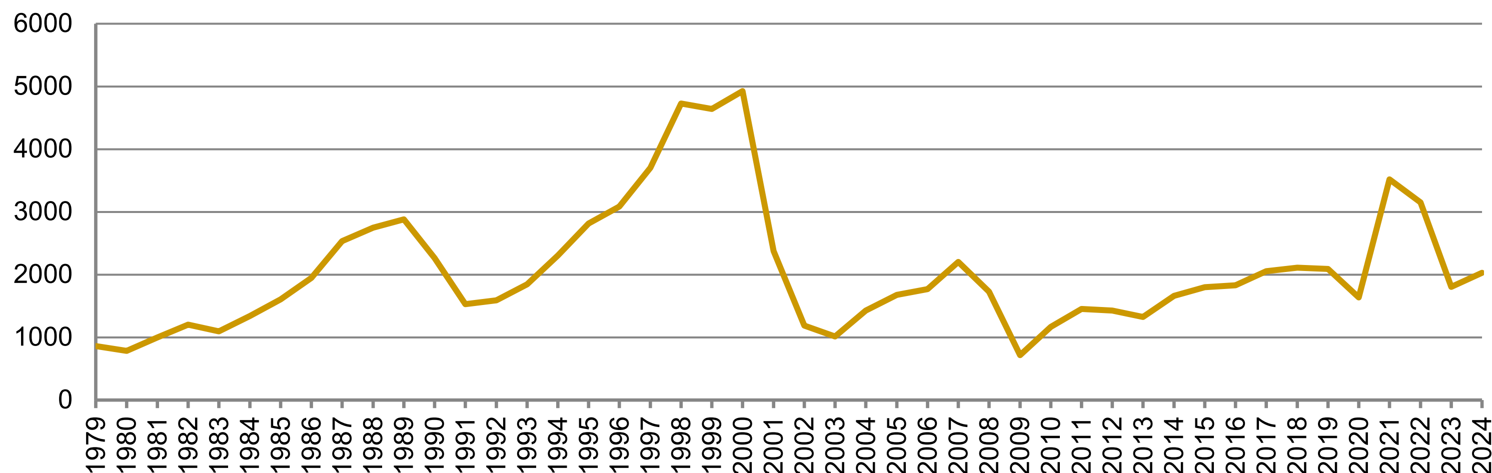
Filing fees

2022		2026[2]	
Value of Transaction[1]	Filing Fee	Value of Transaction[1]	**Filing Fee**
≤ $101.0 million	No filing required	< $133.9 million	No filing required
> $101.0 million but < $202.0 million	$45,000	$133.9 million - <$189.6 million	$35,000
≥ $202.0 million but < $1.0098 billion	$125,000	$189.6 million - <$586.9 million	$110,000
≥ $1.0098 billion	$280,000	$586.9 million - <$1.174 billion	$275,000
		$1.174 billion - <$2.347 billion	$440,000
		$2.347 billion - <$5.869 billion	$875,000
		$5.869 billion or more	$2.460,000

- Paid by the purchaser, unless the parties agree to a different arrangement (e.g., split the fee)

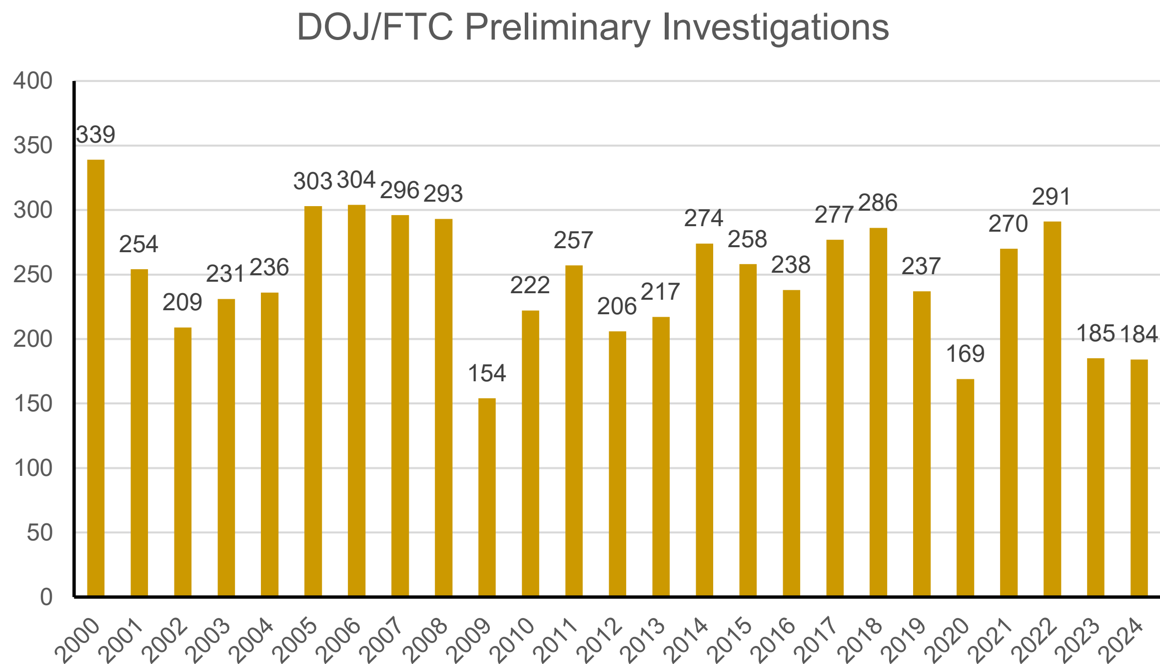
[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).
[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026). Congress changed the baseline of the filing fees in the Merger Filing Fee Modernization Act of 2022, contained in the Consolidated Appropriations Act of 2023, Public Law 117–328, Div. GG, 136 Stat. 4459, ____ (Dec. 29, 2022).

HSR Act notifications



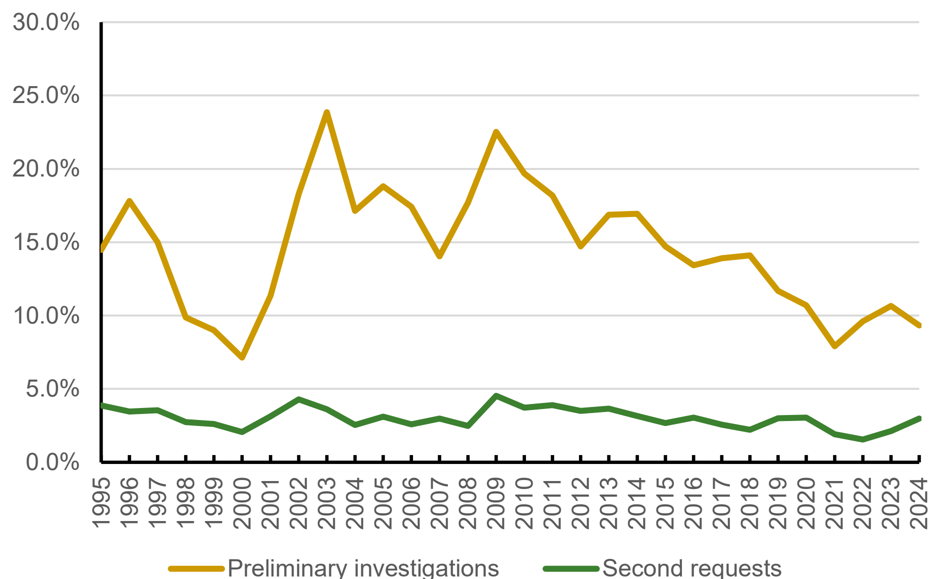
Source: Fed. Trade Comm’n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2024, at App. A, and prior annual reports.

HSR Act preliminary investigations



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2024, at tbl. III, and prior annual reports.

HSR Act preliminary investigations



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2024, at App. A & tbl. III, and prior annual reports.

Statutory waiting periods

- General rule
  - Cannot close a reportable transaction until the waiting period is over
  - The duration of the waiting period is prescribed by the HSR Act
- Initial waiting period
  - 30 calendar days generally
  - 15 calendar days in the case of—
    - a cash tender offer, *or*
    - acquisitions under § 363(b) of bankruptcy code
- Extended waiting period
  - Waiting period extended by issuance of a second request in initial waiting period
  - Waiting period extends through—
    - Compliance by all parties with their respective second requests
    - PLUS 30 calendar days (10 calendar days in case of a cash tender offer and certain bankruptcy transactions)
- Investigating agency may grant *early termination* of a waiting period at any time[1]

[1] The FTC and DOJ suspended the practice of granting early termination of the initial waiting period in February 2021. *See* Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021). The suspension continued until the Trump administration took office and appears to have resumed in March 2025.

HSR Act violations

- HSR Act prohibition
  - The HSR Act provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person" in a reportable transaction without observing the filing and waiting period requirements[1]
  - The HSR regulations provide that a person holds (acquires) voting securities or assets when it has a "beneficial interest" in them[2]
- Two basic types of violations
  - *Failure to file*: Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
  - *Gun jumping*: Filing a HSR report but exercising influence over the target's decision making sufficient to indicate the transfer of a beneficial interest in the target before the end of the waiting period
- Can be expensive
  - As of 2025, $53,088 per day for every day of the violation—Equals $19.4 million per year[3]

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] Fed. Trade Comm'n, Adjustments to Civil Penalty Amounts, 90 Fed. Reg. 5580 (Jan. 17, 2025) (increasing civil penalty from $51,744 to $53,088 per day effective January 17, 2025, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute's enactment)).

Failure to file

- Violation
  - Failing to file an HSR report and observe the waiting period requirements in a reportable transaction
- Scenarios
  1. Failure to file at all
     - Intentional failure to file
     - Inadvertent failure to file
     - Improper invocation of an exemption (usually the investment exception)
  2. Filing an insufficient report (e.g., a report that is incomplete because it does not contain all required business documents)
- Prosecutorial discretion
  - Vigorous enforcement for intentional failures to file
  - “One-bite” rule for inadvertent failures to file
    - No enforcement action on first failure
    - Enforcement actions on subsequent failures
  - Varies with culpability in invoking exemption

"Gun jumping"

- Violation
  - The FTC takes the position that a person has a beneficial interest in the voting securities or assets of the target company within the meaning of the HSR Act when the person can exercise a material degree of management influence on the current (preclosing) operations of the target
    - Especially decisions regarding how to compete in the marketplace
  - Exercising this influence prior to the end of the waiting period is called "gun jumping"
    - Violates the HSR Act, regardless of effect on competition, because, for HSR Act purposes, the acquiring company has acquired the target without observing the waiting period—subjects the acquiring company to a civil penalty of $53,088 per day (in 2025)
    - May also violate Section 1 of the Sherman Act if the influence creates an anticompetitive effect in the marketplace (e.g., the coordination of bids by merging competitors)
    - The acquiring person cannot violate the HSR Act after the waiting period has expired, but it can still violate the Sherman Act if the transaction has not closed

Some recent HSR Act enforcement actions

Year	Acquirer	Target	Violation	Reason	Disposition	% of Max
2025	XCL Resources	EP Energy	Gun jumping		$5,600,000	69.9%
2024	Ryan Cohen	Wells Fargo	Failure to file	Not investment	$985,320	2.18%
2024	Legends Hospitality	ASM Global	Gun jumping		$3,500,000	38.9%
2021	Clarence L. Werner	Werner Enterprises	Failure to file	Inadvertent	$486,900	0.46%
2021	Biglari Holdings	Cracker Barrel	Failure to file	Inadvertent	$1,400,000	25.9%
2021	Richard Fairbank	Capital One	Failure to file	Inadvertent	$637,950	2.3%
2019	Third Point	Dow	Failure to file	Inadvertent	$609,810	15.2%
2019	Canon	Toshiba Medical	Gun jumping		$2,500,000 (each party)	39.3%
2018	James M. Dolanea	Madison Square Garden	Failure to file	Inadvertent	$609,810	13.9%
2018	Duke Energy	Calpine	Gun jumping		$600,000	25.2%
2017	Ahmet H. Okumus	Web.com	Failure to file	Inadvertent	$180,000	65.3%
2017	Mitchell P. Rales	Colfax Danaher	Failure to file	Inadvertent	$720,000	1.6%
2016	Fayez Sarofim	Kinder Morgan	Failure to file	Not investment	$720,000	
2016	Caledonia Investments	Bristow Group	Failure to file	Beyond five-year period for exemption	$480,000	7.6%
2016	ValueAct	Baker Hughes Halliburton	Failure to file	Not investment	$11,000,000	
2016	Len Blavatnik	TangoMe	Failure to file	Inadvertent	$656,000	25.2%
2015	Leucadia Nat'l Corp	Goober Drilling	Failure to file	Inadvertent	$240,000	3.4%
2015	Third Point Offshore Fund	Yahoo	Failure to file	Not investment	None	
2015	Flakeboard	SierraPine	Gun jumping		$1,900,000 (each party)	53.5%
2014	Berkshire Hathaway	USG Corporation	Failure to file	Inadvertent	$896,000	100.0%

HSR Act enforcement actions

- Factoids
  - 71 total enforcement actions since the HSR Act was enacted—all settled by consent decree
  - Maximum fines
    - September 5, 1978 - November 19, 1996: $10,000 per day
    - November 20, 1996 - February 8, 2009: $11,000 per day
    - February 9, 2009 - July 31, 2016: $16,000 per day
    - August 1, 2016 – January 23, 2017: $40,000 per day
    - January 24, 2017 – January 21, 2018: $40,654 per day
    - January 22, 2018 – February 13, 2019: $41,584 per day
    - February 14, 2019 – January 13, 2020: $42,530 per day
    - January 14, 2020 – January 12, 2021: $43,280 per day
    - January 13, 2021 – January 9, 2022: $43,792 per day
    - January 10, 2022 – January 10, 2023: $45,517 per day
    - January 11, 2023 – January 9, 2024: $50,120 per day
    - January 11, 2024 – January 16, 2025: $51,744 per day
    - January 17, 2025 − present (?): $53,088 per day[1]

[1] In early January 2026, the FTC should have published the maximum civil penalty amount for 2026. However, I cannot find it on the FTC web site, the Federal Register, or the Internet. I have submitted an FOIA request to the FTC.

Initial Waiting Period Investigations

Preliminaries

- Parties must file their respective HSR forms with both the DOJ and the FTC
  - Separate forms are required for each reporting person
- FTC Premerger Notification Office review
  - Only for technical compliance on form—no review of substance
  - Allocated to DOJ or FTC for review through agency “clearance” process
  - Responsible agency assigns to litigating section for substantive review

"Clearance"

- DOJ and FTC decide which, if either, of the agencies will do the investigation ("clearance")
  - "Liaison agreement" between DOJ and FTC to prevent duplicative investigations
    - If neither DOJ nor FTC want to open a preliminary investigation—PNO historical practice has been to grant early termination of the waiting period
      - Except during the Biden administration, when the agencies suspended the practice of granting early termination
    - If DOJ or FTC (but not both) want to open a preliminary investigation—Requesting agency gets clearance to open investigation
    - If both DOJ and FTC want to open a preliminary investigation—Agencies negotiate to allocate the investigation based on prior experience with the industry or the merging parties (and which agency got the last contested clearance)
- Process can be fraught with strategic behavior by agencies
  - In extreme cases, "clearance battles" can last until the last day of the initial waiting period
  - Efforts to reform "clearance" process by allocating specific industries to specific agency have failed miserably
    - Neither the agencies nor their respective congressional oversight committees want to relinquish jurisdiction over any type of merger

Initial contact by investigating staff

- Usually occurs 7-10 days after filing
- Three purposes
  1. Inform parties of the investigation and introduce the investigating staff
  2. Request that the parties provide certain information to the staff on a voluntary basis—
     - Most recent strategic, marketing and business plans
     - Internal and external market research reports for last 3 years
     - (Sometimes) product lists and product descriptions
     - (Perhaps) competitor lists and estimates of market shares
     - Customer lists of the firm's top 10-20 customers (including a contact name and telephone number)[1]

     The request is usually made orally in the first telephone call from the staff and then followed in writing in what is called a *voluntary access letter* or (equivalently) *voluntary request letter*[2]
  3. Invite the parties to make a presentation to the staff on the competitive merits of the transaction

[1] The agencies do not ask for customer lists in transactions involving consumer goods sold in retail stores, because the agencies do believe that retail customers lack the knowledge and sophistication to make good predictions about the competitive effect of the merger.

[2] The DOJ has published a model voluntary access letter, which is also included in the required reading. NB: The letter is dated and probably does not reflect current DOJ practice. The DOJ has not posted a more current version on its website.

Initial merits presentation

- Critical to do completely, coherently, and quickly
  - Often a large “first mover” advantage in being the first to give the staff a systematic, coherent way to think about the transaction
  - Well-prepared business people are the best to present
    - Agencies not impressed with “testifying” lawyers—especially outside counsel
  - Need to anticipate and answer staff questions
  - Need to be clear and compelling
    - Cannot win on an argument that the staff does not understand or finds ill-supported
  - Need to anticipate and be consistent with what the staff is likely to hear from customers
    - Staff is strongly biased to accepting customer view in the event of an inconsistency
  - Need to do quickly
    - By the time of the initial call from the investigating staff, usually about one-third of the initial waiting period will be over

The best presentations anticipate all the issues the staff will raise, provide answers that are supported by company documents and consistent with customer perceptions, and have all of the facts right. Ideally, the rest of the investigation needs to do no more than defend the analysis of the first presentation.

Initial merits presentation

- Ideal structure (when the facts fit)
  1. Provide an overview of the parties and the transaction
     - Identify other jurisdictions in which the transaction is reportable
  2. Provide an overview of the industry (if the staff is not familiar with the industry)
  3. Explain the business model driving the transaction
     - The deal is procompetitive—a win-win for the company and for customers
     - “We make the most money by providing more value to customers, improving productive efficiency, and reducing costs without reducing product or service quality”
     - Essential to give a compelling reason for doing the deal that is not anticompetitive
  4. Identify the customer benefits implied by the business model
     - Customers will be better off with the transaction than without it
     - Agencies give little or no credit in the competitive analysis to efficiencies or cost savings that are not passed along to customers
  5. Explain why market conditions would not allow the transaction to be anticompetitive in any event
     - “We could not raise price even if we wanted. Customers have alternatives to which they can turn to protect themselves in the event we try to raise price or otherwise harm them.”
     - Alternatives can be other current suppliers, firms in related lines of business that can expand their product lines, new entrants, or customer self-supply (vertical integration)
     - NB: Critical that customers confirm that the “alternatives” are in fact realistic suppliers

Customer/competitor interviews by staff

- Occupies the bulk of the remaining time in the initial investigation
- Customer views are given great weight
  - *Theory*: The purpose of the antitrust laws is to protect customers from competitive harm, and sophisticated customers should have a good idea of whether they will be competitively harmed by the transaction under review
  - Staff will attempt to call all of the contacts on the customer lists provided by the merging companies in response to the initial voluntary request
  - Staff often will accept customer complaints uncritically but question customer support
  - Customer reactions may differ depending on the position of the contact person
    - For example, the CEO of a customer may take a broader and more nuanced view of the transaction than a procurement manager
- Competitor conclusions are given little weight
  - *Theory*: Anticompetitive transactions are likely to benefit competitors by raising market prices, so competitor complaints are more likely the result of concerns about procompetitive efficiencies than anticompetitive effect—and the agencies know this
  - But competitor interviews can be useful in understanding more about the industry
    - Complaining competitors are often willing to spend considerable time educating the staff
    - Customers usually just want the staff to go away unless they strongly oppose the deal

End of the initial waiting period

- Three options for the agency
  1. Close the investigation
  2. Issue a second request
     - Most important factors—
       - Incriminating company documents
       - Significant customer complaints
       - Four or fewer competitors postmerger for horizontal transactions (5→ 4 deals)
       - Merging parties are uniquely close competitors to one another (“unilateral effects”)
       - Merger eliminates a “maverick”
       - Obvious significant foreclosure possibilities (for vertical transactions)

       NB: Any one of these factors can be sufficient to trigger a second request investigation
     - A second request must be authorized—
       - By the assistant attorney general (typically delegated to a deputy assistant attorney general)
       - By the Federal Trade Commission (typically delegated to the chairman or a commissioner)
  3. Convince the parties to “pull and refile” their HSR forms to restart the initial waiting period
     - Typically used when the initial investigation to date indicates no problem but requires a short additional time to complete customer interviews
     - The agency usually grants early termination in the middle of the second initial waiting period

"Pull and refile"

- The idea
  - In some circumstances, the investigating agency may indicate that it may be in the parties' interest to "pull and refile" their HSR reports
    - Typically, this occurs when the investigating staff has not been able to complete its initial field investigation (especially its customer interviews) but believes given the investigation to date the transaction does not present any material antitrust concerns
      - WDC: In my experience, the investigating staff takes suggestions of a "pull and refile" seriously—they will not suggest it unless they believe that they can complete the investigation in the extended time period without the need to issue a second request
    - The benefit to the staff is that it does not have to expend the time and effort to prepare a second request, which it otherwise would have to do to continue the investigation
  - What the agency wants is a few more weeks to complete its initial investigation and hopefully close the investigation without a second request
  - *The problem*: The waiting periods under the HSR Act are statutory and hence cannot be extended by agreement even if the merging parties want to give the staff more time
  - *The solution*:
    - The acquiring person "pulls" (withdraws) its HSR filing for the transaction, returning the transaction to its status before any HSR report was filed
    - Shortly thereafter, the acquiring person refiles (resubmits) an updated HSR report for the transaction, which starts a new HSR initial waiting period (usually 30 calendar days) and gives the staff a new initial waiting period to complete its investigation

"Pull and refile"

- The mechanics[1]
  - The acquiring person withdraws ("pulls") its HSR report for a reportable transaction prior to the expiration or early termination of the waiting period and prior to the issuance of a second request
    - Technically, the acquiring person must submit a written request to the FTC PNO to withdraw the filing and state its intention to refile
    - This means there is no HSR filing for the transaction and no waiting period running
  - Within two business days of the withdrawal, the acquiring person resubmits ("refiles") its HSR report updated with any new data, any new 4(c) and 4(d) documents, and a new certification and affidavit
    - The refiling starts a new initial waiting period (usually 30 calendar days)
  - The acquiring party does not have to pay a new filing fee with the refiling but—
    - The transaction does not materially change from the one reported in the original filing, and
    - The parties follow the above procedures

    NB: The filing fee is waived only for the first "pull and refile" in a transaction
  - Historically, the agency often granted early termination in the middle of the new initial waiting period

[1] *See Premerger Notification Office,* Fed. Trade Comm'n, Tips on Withdrawing and Refiling an HSR Premerger Notification Filing (updated September 15, 2017)

Aside: Some Notes on Privilege

Aside: Some notes on privilege

- Attorney-client privilege
  - *Rule*: The attorney-client privilege applies to—
    1. A communication
       - Includes verbal exchanges, written correspondence, emails, or any other form of communication
       - The communication may be from the lawyer to the client, from the client to the lawyer, or both
    2. Between an attorney and a client
       - May also encompass agents of either who help facilitate the legal representation
    3. Made in confidence
       - That is, there is an expectation of privacy at the time of the communication, and the communication is not intended to be disclosed to third parties
    4. For the purpose of seeking, obtaining, or providing legal assistance
       - Includes communications from the client containing responses to questions posed by the lawyer

Aside: Some notes on privilege

- Attorney-client privilege
  - *Rule*: The violation of any of these four elements negates the privilege and subjects the communication to discovery
  - *Rule*: The attorney-client privilege shields *communications* from discovery; it does not shield *facts*
    - *Exception*: Facts learned from an attorney through an attorney-client communication
      - Disclosing the facts necessarily discloses the content of the privileged communication

Aside: Some notes on privilege

- The work product doctrine
  - *Ordinary work product*:[1] A party may not discover—
    1. documents and tangible things
    2. that are prepared in anticipation of litigation or for trial
    3. by or for another party or its representative
    4. UNLESS the party shows that it—
       a. has substantial need for the materials to prepare its case and
       b. cannot, without undue hardship, obtain their substantial equivalent by other means

[1] Fed. R. Civ. P. 26(b)(3)(A). Rule 26(b)(3)(A) encapsulates the federal ordinary work product doctrine.

Aside: Some notes on privilege

- The work product doctrine
  - *Attorney opinion work product*:[1] The exception does not apply to materials that disclose "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"
    - NB: If only a portion of otherwise discoverable material contains attorney opinion work product, the protected attorney opinion work product should be redacted and the rest of the material produced

[1] Fed. R. Civ. P. 26(b)(3)(B).

Aside: Some notes on privilege

- The work product doctrine
  - *Rule*: Although the work product doctrine applies only to documents and tangible things, the protection cannot be pierced by inquiring into the content of a protected document[1]
    - Facts discovered in the course of an investigation by an attorney or her agent are at most ordinary work product and subject to discovery only upon a proper showing of hardship
    - Thus, work product protection ordinarily cannot be evaded by using deposition questions to probe protected investigative work performed by an attorney or the attorney's agent

[1] *See, e.g.,* Order re Petition to Limit or Quash Subpoenas Ad Testificandum Dated April 24, 2009, File No. 091-0064 (July 21, 2009) (in the FTC's investigation of Thoratec Corp.'s pending acquisition of HeartWare International).

Aside: Some notes on privilege

- The work product doctrine
  - Public policy behind the work product doctrine
    - *Promote adversarial litigation*: Allows attorneys to prepare for litigation without fear that their strategy, theories, mental impressions, or research will be exposed to their adversaries
    - *Preserves the integrity of the legal process*: Ensuring that attorneys can candidly evaluate and prepare their cases without concern that their work will be revealed
    - *Prevents unfair advantage*: Avoids situations where one party can free-ride off the investigatory and preparatory work of another attorney
  - Work product in investigations
    - Although the work product doctrine does not automatically apply to all investigations, they do apply if the investigation provides reasonable grounds for anticipating litigation
    - *The practice*: Almost all merger investigations by the FTC or DOJ provide reasonable grounds for anticipating litigation and hence triggering work product protections

Aside: Some notes on privilege

- The problem
  - Merging parties would like to share and coordinate their initial analysis and defense of the transaction
  - BUT ordinarily doing so would violate the attorney-client confidentiality requirement, negate any attorney-client privilege, and subject the communications to discovery by a second request, CID, or subpoena in an agency investigation or litigation

The solution: *The "common interest" privilege provides an exception to the confidentiality requirement and retains the attorney-client privilege for communications among parties with a common legal interest*

Aside: Some notes on privilege

- The "common interest" doctrine
  - *Rule*: When the communication involves—
    - The sharing of privileged information
    - Among parties with a common legal interest

    the communication remains protected by the attorney-client privilege
  - *Rule*: Apart from this exception, all parties must continue to satisfy the elements of the attorney-client privilege for shared communications to preserve the privilege
  - *History*:
    - The common interest privilege originated as the "joint defense" privilege
    - But the courts expanded it to include communications outside of the context of litigation

Aside: Some notes on privilege

- The "common interest" doctrine
  - *Agency practice*: Recognizes communications among merging parties to share and coordinate their analysis and defense of the transaction, including the sharing of--
    - Antitrust *analyses* of the transaction in the course of negotiations
    - Antitrust analyses of the transaction during the investigation
    - Strategies to defend the transaction generally
    - Strategies to settle the investigation of the transaction through a consent decree or "fix it first" restructuring

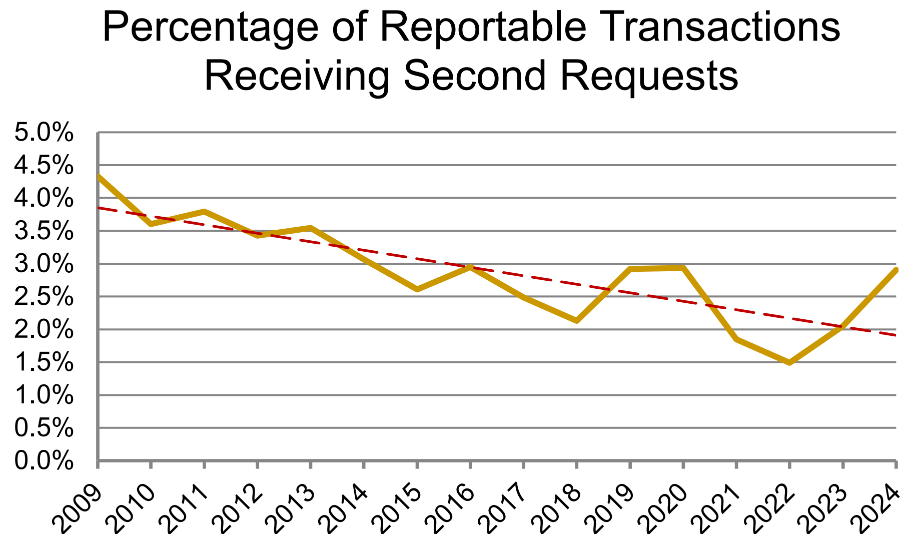
Aside: Some notes on privilege

- The "common interest" doctrine
  - *Query*: Do differences in commercial objectives defeat the common interest privilege in negotiating risk-shifting provisions (e.g., the cap on a divestiture commitment)?
    - Although both parties share the common legal interest in defending the transaction against an antitrust challenge—
      - The seller wants the deal to close regardless of the cost to the buyer of any divestiture, while
      - The buyer wants the deal to close if and only if the costs of divestiture are not so high that they destroy the attractiveness of the transaction
    - As far as I am aware, this situation has not been addressed by a court
  - *Practice hint*:
    - The parties should frame their negotiations to be over what risk-shifting provisions are reasonably necessary to defend the merger and avoid discussing any business reasons for a divergence in views
    - This makes the discussions—that is, the putatively protected communications—to be about differences in the proper approach to the legal strategy, not commercial differences

Second Request Investigations

The second request

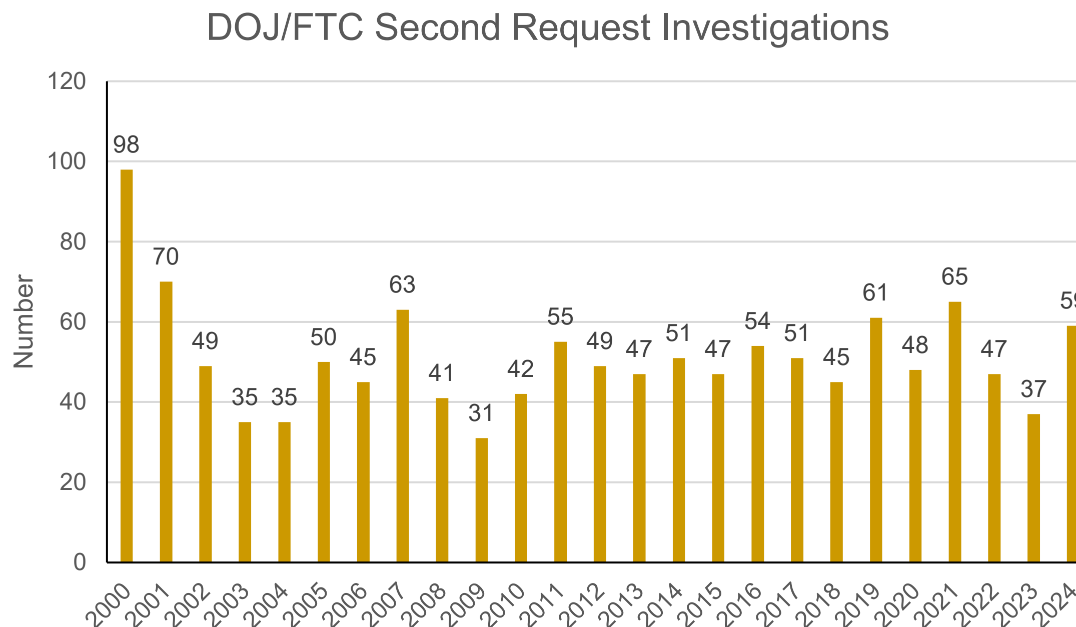
- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a “second request”) during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second requests, *and*
  - Observe a final waiting period (usually 30 days) following compliance



Source: Fed. Trade Comm’n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year app. A (reports for FY 2010 and FY 2024).

Total number of second request investigations

- By year since 2000



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year app. A (reports for FY 2010 and FY 2024).

Second request investigations

TABLE I FISCAL YEAR 2024[1] ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]													
TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]					
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP			
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	4	0.2%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	129	6.5%	1	3	0.8%	2.3%	3.1%	0	1	0.0%	0.8%	0.8%
150M - 200M	315	16.0%	6	4	1.9%	1.3%	3.2%	1	2	0.3%	0.6%	1.0%
200M - 300M	237	12.0%	9	7	3.8%	3.0%	6.8%	1	1	0.4%	0.4%	0.8%
300M - 500M	235	11.9%	6	5	2.6%	2.1%	4.7%	1	2	0.4%	0.9%	1.3%
500M - 1000M	548	27.8%	16	16	2.9%	2.9%	5.8%	4	7	0.7%	1.3%	2.0%
1000M - 10B	488	24.7%	57	43	11.7%	8.8%	20.5%	17	14	3.5%	2.9%	6.4%
Over 10B	17	0.9%	8	3	47.1%	17.6%	64.7%	6	2	35.3%	11.8%	47.1%
ALL TRANSACTIONS	1,973	100.0%	103	81	5.2%	4.1%	9.3%	30	29	1.5%	1.5%	3.0%

Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2024, at Ex. A, Table I.

Second request investigations

- Second request
  - Blunderbuss request
    - If you can only ask once, ask for everything
    - DOJ and FTC each have "model" second requests, but typically customized with additional specifications
    - Covers e-mail and other electronic documents
  - Typically takes 8-30 weeks to comply (but some companies take much longer)
    - Often covers 60-120 custodians in multiproduct investigations
    - Interrogatories, including:
      - Detailed sales data
      - Bid and win/loss data
      - Requirements for entry into the marketplace
      - Rationale for deal
    - Document requests, including:
      - Business, strategic and marketing plans
      - Pricing documents
      - Product and R&D plans
      - Documents addressing competition or competitors
      - Customer files and customer call reports
    - Non-English language documents must be translated into English

Second request investigations

- Depositions of business representatives of parties
  - Often 3-5 employees for each party
    - Often senior person knowledgeable about U.S. sales and competition for U.S. customers
    - Can include sales representatives for key accounts
    - R&D directors (if R&D is important to defense)
  - Location: Washington, D.C.
  - Can be compelled
    - Civil Investigative Demand (CID) by the DOJ
    - Subpoena by the FTC
  - Transcribed and under oath
  - Typically each lasts 6-8 hours
- Documents and testimony from customers and competitors
  - Testimony will be memorialized in a sworn affidavit
- Expert economic analysis
  - By experts retained by the parties
  - By agency experts
    - Or, in investigations where litigation is foreseeable, by outside experts retained by agency

Final waiting period

- Timing
  - Begins when all parties have submitted proper second request responses
    - *Exception*: In open market transactions, timing depends only on when the acquiring person complies (to avoid delaying tactics by the target in hostile transactions)
  - Ends 30 calendar days later
    - 10 days in a cash tender offer and certain bankruptcy transactions
- The final waiting period is often too short to complete the investigation
  - Given the time it takes—
    - For the investigating staff to analyze information and documents submitted by the parties in response to their second requests
    - For the investigating staff to finalize its analysis and recommendation, *and*
    - For agency management to review the staff's recommendation and make a decision on the disposition of the investigation
    - *Conclusion*: The final waiting period provides insufficient time for the agency to make an informed decision

An investigation that cannot reasonably be completed in the time available is detrimental to the parties: If the agency has serious concerns when time runs out, it will initiate litigation and continue the investigation in postcomplaint discovery

“Substantial compliance”

- *Query*: What constitutes a sufficient response to a second request to start the running of the final waiting period?
  - Under the HSR Act, it is sufficient if the merging parties “substantially comply” with the demands of the second request
    - Clayton Act § 7A(e)(1)(B)(i): Provides that the agency may appoint a person to determine “whether the request for additional information or documentary material has been *substantially complied* with” if the reporting person believes that it has submitted a sufficient response
    - Clayton Act § 7A(g)(2): Provides that a district court may order compliance and extend the waiting period “until there has been *substantial compliance*” with the notification requirement or a second request

This is the HSR Act’s enforcement provision

  - But neither the HSR Act nor the implementing rules provide any guidance on what constitutes “substantial compliance”
    - The agencies at times in the past have taken the position that “substantial compliance” means full compliance except for insignificant deficiencies regardless of—
      - the probative value of the missing documents or information on whether the agency should challenge the transaction, or
      - The burden on the reporting party of compliance to this extent
    - This appears to have been the standard the agencies apply in the Biden administration
      - The Trump 2.0 agencies have yet to publicly address the question

"Substantial compliance"

- *Query*: What constitutes a sufficient response to a second request start the running of the final waiting period?
  - The HSR Act legislative history indicates a much more lenient standard for "substantial compliance":

> *[G]overnment requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them*. If the merging parties are prepared to rely on it, all of it should be available to the Government. *But lengthy delays and extended searches should consequently be rare*. It was, after all, the prospect of protracted delays of many months--which might effectively "kill" most mergers--which led to the deletion, by the Senate and the House Monopolies Subcommittee, of the "automatic stay" provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination would clearly constitute a misinterpretation of this bill.
>
> In sum, *a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable*. In these cases, a failure to comply with such umeasonable portions of a request would not constitute a failure to "substantially comply" with the bill's requirements. All the equities of the particular situation should be considered in determining what constitutes "substantial compliance."[1]

[1] 122 Cong. Rec. 30877 (Sept. 16, 1976) (statement of Rep. Peter W. Rodino) (emphasis added). At the time, Rodino was chairman of the House Judiciary Committee and is the "R" in the HSR Act. Rodino remarks are particularly probative of legislative intent since he was the sponsor of H.R. 14580, 94th Cong., 2d Sess. (1976), which, with minor amendments, was ultimately substituted for the Senate-approved version of Title II of the Antitrust Improvements Act. Rodino included the above remarks in what described as a statement of "legislative intention" regarding the Act. *See id*. at 30875.

“Substantial compliance”

- Final note: *Blockbuster Video*
  - There has been no litigated decision on what constitutes “substantial compliance”
    - The most developed argument was made in 2005 the FTC’s challenge to Blockbuster’s compliance with its second request in connection with Blockbuster’s contested hostile takeover of Hollywood Entertainment Corp (d/b/a Hollywood Video)[1]
      - Hollywood Video had signed a merger agreement with Movie Gallery, Inc.
      - Blockbuster, Hollywood Video’s largest competitor in movie rentals, made a topping bid in a tender offer and a bidding war ensued
      - It was critical that Blockbuster resolve any antitrust concerns before the scheduled shareholders vote by Hollywood Video shareholders on the Movie Gallery merger agreement
        - A universal rule is that that shareholders—which by the time of the shareholder vote will be almost all arbitrageurs—will vote affirmatively for whichever deal is presented to them first
        - Once the shareholders approve a deal, the company can no longer exercise a “fiduciary out,” terminate the merger agreement, and accept the topping bid
      - Although Blockbuster offered to divest hundreds of Hollywood Video retail outlets, the FTC found the offer insufficient and would not accept a consent settlement
      - The FTC strategy appeared in part to block the deal by asserting that Blockbuster had not made a sufficient response to its second request to start the running of the final waiting period and running out the time until the HW shareholder vote on the Movie Gallery transaction
      - The litigation settled when the FTC agreed that the waiting period would end before the HW shareholder vote

[1] *See* Memorandum of Points and Authorities by Defendant in Opposition to Plaintiff's Motion for Order Pursuant to Section 7A(g)(2) of the Clayton Act (Mar. 7, 2005). In the interests of full disclosure, I was the lead counsel for Blockbuster and the author of this brief.

Timing agreements

- "Timing agreements"
  - Concept
    - Contractual commitments by the merging parties not to close the transaction for a period of time after the expiration of the HSR Act waiting period
  - Agencies like to negotiate timing agreements early in a second request investigation so that they know how much time they have before the deal can close to complete their investigation
  - Have historically accepted 60 days beyond the normal expiration of the waiting period
    - 30 days for the staff (making a total of 60 days for the staff after second request compliance)
    - 30 days for the front office
  - Parties typically agree to a timing agreement—but negotiate the duration
    - Provides additional time for the agency to complete its investigation
    - May be necessary to complete meetings to enable the merging parties to make their arguments before senior agency management and the AAG/Commissioners
      - In the absence of a timing agreement, all of the staff's efforts in the last month or so of the investigation will be devoted to building a case for a preliminary injunction, not to objectively analyzing the merits of the transaction or having meetings to hear arguments
    - Usually better than being sued!
      - The investigating agency will sue to block the transaction if it cannot complete its analysis before the transaction closes
    - Almost surely will be necessary if the merging parties want to negotiate a consent settlement

Timing agreements

- A timing agreement does not technically extend the HSR Act waiting period
  - Surprisingly, many members of the bar (and some attorneys in the enforcement agencies) believe that the parties can voluntarily "extend" the HSR Act waiting period
  - The FTC Premerger Notification Office's position, on advice from the FTC General Counsel, is that the waiting period is set by statute and cannot be extended by agreement, although the parties can commit by contract not to close the transaction before a certain time
  - Timing agreements are enforceable in court through contract or detrimental reliance, not as a violation of the HSR Act
    - I am unaware of any instance where the parties have breached a timing agreement and so there is no enforcement precedents
    - However, there is little doubt that a court faced with a breach would summarily enforce the timing agreement through an injunction for specific performance
  - The fact that a timing agreement does not extend the HSR Act waiting period has significant implications for "gun-jumping" violations, which cannot occur after the waiting period has ended

The final arguments

- Four formal meetings at the end of the investigation

	DOJ	FTC
1	Investigating staff	Investigating staff
2	Section Chief & staff	Assistant Director & staff
3	Deputy Assistant Attorneys General (legal and economics)	Directors meeting (Bureau of Competition/ Bureau of Economics)
4	Assistant Attorney General	FTC Commissioners (meet individually)

Note: The last meeting with the AAG or the Commissioners is sometimes inappropriately called a "last rites" meeting

- Numerous informal meetings can occur up the chain at the end of the investigation
- *Critical question*: How much of its analysis will the investigating staff disclose to the parties?

Merger Review Outcomes

Possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- 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
  Historically, has pursued permanent injunctive relief in an administrative trial[1]

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 the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

Allow deal to close but do not close investigation

- New with the Biden administration
  - No deadline to finish investigation—could remain open indefinitely
  - Agencies have yet to bring a postclosing challenge to one of these deals

Possible outcomes in DOJ/FTC reviews

- Possible changes in FTC merger challenges in Trump 2.0
  - The FTC under Chair Andrew Ferguson appears to be moving away from relying on Part 3 administrative adjudication to resolve the merits of merger cases.
  - In his *Synopsys/ANSYS* statement, Chairman Ferguson, joined by Commissioners Holyoak and Meador, explained that in "nearly all" FTC merger cases, the federal preliminary injunction litigation and any appeal are effectively dispositive:
    - If the FTC wins, the parties usually abandon the deal
    - If the FTC loses, the merger closes and the Commission dismisses the administrative case[1]
  - Consistent with that approach, in FTC v. Henkel the Commission authorized staff to seek a permanent injunction and permanent equitable relief in federal district court.[2]

1 Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador in the Matter of Synopsys, Inc./ANSYS, Inc. 2 & n.7 (May 28, 2025).
[2] *See* Press Release, Fed. Trade Comm'n, FTC Sues to Stop Loctite, Liquid Nails Construction Adhesive Merger (Dec. 11, 2025) (stating that the Commission authorized staff to seek a "permanent injunction"); Complaint at 1, FTC v. Henkel AG & Co. KGaA, No. 1:25-cv-10371 (S.D.N.Y. Dec. 15, 2025) (seeking "a permanent injunction" and "other permanent equitable relief").

Outcomes in "significant" investigations

	Consent	Abandoned	Litigation	Closing Statement	Total
2016	26	1	6	0	33
2017	23	1	3	0	27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6	0	27
2022	8	2	10	0	20
2023	1	5	6	0	12
2024	3	9	5	0	17
2025	8	1	5	2	16
2016	78.8%	3.0%	18.2%	0.0%	100.0%
2017	69.7%	3.0%	9.1%	0.0%	100.0%
2018	48.5%	3.0%	9.1%	9.1%	100.0%
2019	45.5%	6.1%	21.2%	6.1%	100.0%
2020	66.7%	6.1%	24.2%	3.0%	100.0%
2021	63.0%	14.8%	22.2%	0.0%	100.0%
2022	40.0%	10.0%	50.0%	0.0%	100.0%
2023	8.3%	41.7%	50.0%	0.0%	100.0%
2024	17.6%	52.9%	29.4%	0.0%	100.0%
2025	50.0%	6.25%	31.25%	12.5%	100.0%

Source: Dechert LLP, DAMITT 2025 Review: Merger Investigations Neared Record Lows and Remedy Policies Shifted (Jan. 29, 2026).