Many high-technology industries are in a period of rapid and accelerating consolidation. The worldwide technology recession is no doubt a driving force in this consolidation. Other contributing factors are the increased maturity of many technology markets, such as personal computers, and the commodity pricing that follows. It may be that technology in some fields has outraced perceived needs. Whatever the causes, the consequences are clear enough: most segments are seeing hundreds of competitors reduced to dozens, or dozens reduced to a handful. According to one recent market report, more than twenty-five percent of the leading software companies have disappeared in the last year as a result of increased merger and acquisition activity. Analysts anticipate that this pace will increase over the next three years, and a full fifty percent of the software industry will take part in this “period of massive consolidation.” In an August 12, 2003, BusinessWeek online interview, M&A expert Tom Taulli cited technology as the most promising area for mergers. “This M&A trend in tech will not be just a short-term trend. Many small- and microcap tech companies are ripe to be acquired and likely will be so in the next couple of years.”

**Heightened U.S. Enforcement Activity**

High-technology firms must prepare for the increasing antitrust scrutiny that is invariably accompanying this wave of consolidation. In fact, this last year alone, we have seen the U.S. agencies launch a number of major investigations in technology industries—among others, an eight-month investigation into the Synopsys/Avant!
merger, the review and challenge of two acquisitions of competitors by MSC.Software, the August 2003 announced Federal Trade Commission (“FTC”) challenge to Aspen Technology’s 2002 acquisition of Hyprotech, Ltd., and the Antitrust Division of the Department of Justice’s (“DOJ’s”) investigation into PeopleSoft’s acquisition of J.D. Edwards and Oracle’s ongoing hostile tender offer for PeopleSoft. Regulators have concluded that some segments of high-technology industries have become so concentrated that the few remaining players may have the ability to harm competition, either unilaterally or through coordinated interaction with the few remaining market participants.

As the agencies have turned their collective regulatory eyes towards high-technology transactions, their focus has broadened beyond the competitive effects of the merger to include the pre-merger activities of parties. Stepped-up review of pre-closing merger activities has led to several high profile actions against technology companies for “gun jumping” violations (i.e., unlawful pre-merger integration activities). The FTC and the DOJ recently have made examples of several high-technology companies, imposing substantial penalties against Gemstar ($5.67 million U.S.) and Computer Associates ($638,000 U.S.), concluding that the two companies had engaged in improper information sharing and pre-merger coordination with their respective transaction partners in the period of time between the signing and close of their mergers.

Remarkably, the risks of antitrust enforcement no longer end with closing of the transaction following agency review under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”). Under the HSR Act, parties to a merger or acquisition of stock and/or voting securities of a certain size are required to
report the transaction to the U.S. antitrust agencies—both the FTC and the DOJ. The parties must then await approval from the agencies or expiration of a 30-day waiting period before closing the transaction. Achieving HSR clearance has traditionally been considered by companies as the final (and only real) antitrust hurdle. Although the competition agencies have always had the legal authority to challenge an anticompetitive merger after close, such challenges were rare. Recent enforcement activity by the FTC and DOJ demonstrates, however, that mergers not subject to the HSR Act—and even those previously approved under the Act’s reporting structure—are increasingly susceptible to investigation and challenge even years after the companies combine.

What does this increasing focus by antitrust regulators mean for high-technology companies contemplating a merger decision in a period of rampant consolidation? Clearly, this heightened antitrust attention has made it all the more important for merging parties to consider antitrust at each stage of the deal process, and to act at each stage to minimize risks. Antitrust risk management starts not with announcement of the deal, but when a combination is no more than a gleam in the eye of a company or its banker.

Merging parties have the opportunity to allocate or shift the antitrust risks in negotiating the terms of the merger agreement itself. They have the obligation to conduct themselves so as to minimize antitrust risk during the period before the merger closes. They have the incentive, even after the deal closes, to act with awareness that the antitrust authorities may yet investigate and possibly seek to unwind their transaction. We discuss below means of minimizing the antitrust risk during each of these phases of the merger process. In doing so, we highlight illustrative U.S. agency enforcement actions in technology M & As over the last year.
Mitigating and Shifting Antitrust Risk in the Merger Agreement

It is never too early to involve counsel to mitigate the potential risk associated with antitrust regulatory review. Where a deal presents a potential antitrust concern—for example, where two competitors in a relatively concentrated industry plan on combining—it is wise to engage antitrust counsel at the outset. Counsel should assess the likelihood of agency review, whether a formal “Second Request” or “Phase Two” investigation is likely, and whether a transaction presents sufficient competition concerns that the antitrust agencies are likely to demand remedial relief, such as divestiture, or to block the transaction entirely. Armed with that assessment, the company will be positioned to effectively mitigate antitrust risk—not only by controlling its document trail, but also by allocating the antitrust risks in the merger agreement itself. Targets, for example, can negotiate significant break-up fees payable if agency antitrust review delays or dooms a merger agreement; and acquirers can limit their obligation to divest key assets in the event that the agencies demand structural reorganization as a condition to clearing the business combination.

Whenever parties anticipate that the DOJ or FTC will engage in a substantive antitrust review of a transaction—particularly if a Second Request or a challenge is possible—it is critical to draft merger agreements with a clear allocation of the antitrust risk and expression of the parties’ respective obligations. Conflict on these points might otherwise undermine the parties’ antitrust presentations to the reviewing agency, not to mention their trust in one another as antitrust pressures mount. Several key clauses come into play:
Cooperation Clauses. Particularly for the target/seller, it is important to mandate that the parties and their counsel consult and cooperate with one another in the antitrust analysis and during agency review—in presentations to or meetings with the government, in white papers, stipulations with the agency on timing and submission of materials, and in any negotiation of a proposed consent decree. Key decisions during the antitrust review, such as formal submissions or proposals on a consent decree, should be subject to the review and approval of both the purchaser and seller. Cooperation clauses may go so far as to prohibit the initiation of ex parte communications with the antitrust agencies, or at least require prompt notice and disclosure of such communications as soon as they occur.

“Run-away” buyers—acquirers with no restrictions on their ability to communicate, negotiate or reach deals with the agencies—oftentimes will marginalize or even fail to consider the effects of their decisions on the on-going viability of the target/selling company’s business. For example, a target company may be in the position of hemorrhaging customers during the period between signing and close, and may need quick resolution of the antitrust issues to protect the viability of the company. Without a strong cooperation clause, the buyer in that situation has no obligation to consider these issues (and in fact may benefit by further weakening the target) during the course of antitrust review.

Best Efforts. Cooperation is only the beginning. Merger agreements also require some level of diligence by both parties to ensure that the merger closes. These “best efforts” clauses loosely define the obligation of the parties to ensure that the merger clears various shareholder and regulatory hurdles—including antitrust. A best efforts
clause, for example, might require the buyer to “use all commercially reasonable efforts to resolve any objections [by the FTC, DOJ or European Commission] as may be asserted with respect to the transaction under the antitrust laws.” So worded, this language probably does not mandate that the acquiring party divest assets in order to secure antitrust approval—i.e., divestiture would not normally be deemed “commercially reasonable.” The standard of efforts may be calibrated higher by using “reasonable best efforts” or even “best efforts” provisions, which require increased levels of sacrifice by the acquirer, and the target, in surmounting antitrust objections. However, without a provision specifically requiring divestiture in the merger agreement, a buying party likely would have a strong argument that it would not be required to shed any material assets or license significant intellectual property to avoid a challenge to the merger.

**Divestiture Limitations.** As a result, the parties—particularly the target—may well find it wise to clearly articulate divestiture obligations in the merger agreement. The buyer may wish to specify that “reasonable best efforts” does not require it to sell, license or otherwise dispose of or hold separate “any material portion of the business or assets” involved. “Materiality” itself may be calibrated; it may refer only to the company or assets being acquired—a relatively easy test to meet—or more broadly to “material” for the entire business of the combined companies. The target/seller, by contrast, may insist that the buyer expressly agree “to make any and all divestitures as are a prerequisite to the FTC or DOJ not seeking to prevent the transaction.” Alternatively, rather than agreeing to divest specific assets or divisions, the acquiring party may place a ceiling on its divestiture obligation by reference to a specific sales level. Such a clause would
permit the buyer to retain “crown jewel” assets or divisions with sales exceeding this sales threshold (without naming the crown jewels).

More detailed and express divestiture provisions, of course, signal to the agencies that the parties have antitrust concerns about their deal. Even worse, such provisions may even suggest to the reviewing agency a remedy or framework to resolve competitive concerns. Potentially, a divestiture clause that sets forth which assets the parties are willing to shed may act as a proposed structural remedy, thereby inviting the agencies to demand such relief. Careful judgment is required here. Nevertheless, where the antitrust risk is real, there may be little point to pretending otherwise in the agreement. The agencies will see the issue as soon as the press release is issued, so the parties’ primary objective should instead be to ensure that their respective obligations in the event of antitrust resistance are clearly articulated. To avoid disputes during the investigation, and minimize the risk of litigation should the transaction fail, it may be important to set forth specifically what the buyer is obligated to do, despite the danger of “signaling” the antitrust authorities.

**Break-Up Fees.** Break-up fees are quite common in mergers, to compensate either party for failures by the other to perform under its respective representations and warranties. The buyer, for example, may be entitled to a break-up fee should the target’s board later reject the merger, or accept a competing offer. A smaller target in a technology acquisition may also want to insist on payment of a break-up fee in the event that the transaction is blocked for antitrust reasons—or even if it is delayed by antitrust review beyond an established “drop-dead” date (typically 6 to 9 months after signing).
Technology companies that are acquisition targets often face enormous potential damage if the transaction fails. As soon as the deal is announced, banks and analysts start opining about the risk of antitrust delay or challenge, thereby seeding the fear, uncertainty and doubt (commonly referred to as “FUD”) that can be the death knell for a smaller company. Arbitrageurs immediately vote with their share purchases and sales, expressing through the “spread” between offer and market price what the market believes is the likelihood of antitrust clearance. In quickly evolving markets, targets often face customer flight in the uncertain period between signing and close: sales decline as customers wait to see the outcome, or default to more stable and certain competitive offerings. As FUD intensifies, key employees, recruited aggressively by competitors, may leave. The morale of those remaining, wondering about their future, degrades. As the antitrust investigation drags on, R&D momentum often stalls and top management is distracted by the staggering demands of compliance with agency demands. Product roadmaps may go into limbo, further undermining the target’s viability, as an independent entity should the merger ultimately fail.

When the period of time between announcing and closing a merger is extended for months by antitrust review, lost sales, employees and product development can be dramatic and debilitating. Break-up fees offer some protection for the target by providing a financial cushion in the event that a merger cannot be consummated because of antitrust problems. They are intended to compensate in part for the sales and development opportunities sacrificed during the aborted merger process. The magnitude of a break-up fee should reflect the anticipated damage to the seller if the deal falls apart or is challenged; the fee is often negotiated as a percentage of the total purchase price. Break-
up fees in technology deals can vary from 1-15% of the total deal value, but most often cluster in the 2-3 percent range. The negotiated fee also reflects, of course, the parties’ best judgment about how serious the antitrust risk is. To that extent, large break-up fees can also signal the agencies that the parties see a problem. Buyers will cite this downside as a reason not to include such fees in the merger agreement.

**Termination Clauses.** At what point in the process should antitrust break-up fees be available? Parties often negotiate hotly the point in time at which a merger may be terminated by one or both parties because of antitrust delay or challenge, and the amount (if any) of a break-up fee. Termination rights and break-up fees may be triggered as early as the issuance of a Second Request or as late as the entry of a final, non-appealable court order barring the transaction, years down the line. Intermediate triggering events may be a decision by an agency to file a lawsuit challenging the transaction, entry of a preliminary injunction by the federal court, or simply a “drop-dead date” agreed to by the parties.

Perhaps the most aggressive termination clause in the authors’ experience was that negotiated for their client ProBusiness Services, Inc. when it recently agreed to be acquired by competitor ADP. That acquisition successfully closed in June of this year after months of investigation by the DOJ, which had been anticipated by counsel. Perhaps because the buyer was sufficiently confident of antitrust approval, it agreed to a right in ProBusiness to terminate—and be paid a $25 million break-up fee—if “any litigation or proceeding is pending . . . or has been threatened to be instituted by any Person or governmental body, which in the good faith judgment of the Board of Directors
of [ProBusiness] is reasonably \textit{likely to result} in an order . . . prohibiting . . . or impairing the benefits of the transactions contemplated by this Agreement.” (Emphasis added.)

The time at which the right to terminate because of antitrust concerns becomes available is often a strategic consideration for both parties. Where a transaction presents substantial antitrust risk, both parties must assess the costs and benefits of a protracted battle with the antitrust agencies. The timing is crucial, especially from the target’s perspective: Does the target want to hold the buyer’s feet to the antitrust fire, risking its own engagement in a long and protracted legal battle that may end badly, or prefer an escape hatch early in the process, perhaps without full visibility into the most likely outcome of the antitrust investigation? The parties must no less carefully consider who has the right to terminate in the event that antitrust risks become severe. Should it be within the sole discretion of the target, who may have the incentive to get out at the first sign of trouble and collect a substantial break-up fee, or should it be based upon objective criteria, (\textit{i.e.}, a date certain, or at the time a Second Request issues)?

\textit{Payment of HSR/Antitrust Fees and Expenses.} Oftentimes, parties do not consider the extraordinary cost of an extended antitrust investigation, which may multiply with review by the European Commission and other international agencies. A Second Request investigation in the U.S. alone can cost each party several million dollars in legal fees, document production expenses and the expense of retaining an economic consulting firm. Litigating a later government challenge to the merger can easily equal those expenses. It may therefore be prudent for smaller target companies to negotiate for the buyer to pay any costs of an antitrust investigation or litigation.
These are but the most typical merger agreement terms that can dramatically shift or allocate the antitrust risk between buyer and seller. There are other opportunities for the parties to mitigate or shift the antitrust risk in the agreement itself. Perhaps the most common mistake, particularly in smaller or rushed transactions that may carry antitrust exposure, is not involving counsel early in the process and addressing these alternative clauses in an informed manner. Antitrust counsel can ascertain the likelihood and extent of antitrust review, and where protections should be built into merger agreements to offset the effects of potentially lengthy delays in the process, as well as to counsel as how best to protect against agency challenge or demands for significant divestitures before the merger can close.

Mitigating Risk By Controlling the Pre-Merger Activities of Both Parties

The parties’ conduct in the period between signing and closing the transaction can also serve greatly to magnify or minimize antitrust risk. During this time period, especially in high-technology industries, companies believe that it is crucial to continue due diligence and begin pre-merger integration planning. The antitrust laws, however, place significant restrictions on parties’ abilities to engage in such activity. As of late, U.S. antitrust agencies have more vigorously sought to punish companies who prematurely took steps to integrate operations before the close of the merger.

In conducting due diligence on the value and feasibility of the transaction, which continues even after an agreement to merge is reached, parties inevitably must exchange competitively sensitive information. Proper evaluation of a target business is often tied to its pipeline sales, sensitive research and development plans, and financial information, including gross margins, costs of goods sold and overhead expenses. Quick integration
following close also may require an early and detailed analysis of research and development, next generation products, and the profitability of certain existing product lines. In Hewlett-Packard’s acquisition last year of Compaq, for example, the parties had a segregated integration planning team, eventually numbering hundreds of people, who spent months planning for the post-close period. No less was necessary, the parties felt, in order quickly to capture merger efficiencies and “hit the ground running” in highly competitive markets.

After signing a definitive merger agreement, an acquiring party must be able to protect the value of the business that it intends to acquire. Without the authority to place some limitations on the target’s ability to conduct business before the close of a merger, a buyer may find that by the time it assumes control over the target’s operations, the value of the acquisition has diminished substantially. Targets may take (or fail to take) actions that dilute the value of their assets—for example, by entering into long-term and less-than-favorable contracts with suppliers, by allowing key employees to leave in anticipation of post-close upheaval, or by losing important customers who are uncertain of the buyer’s plans and roadmap for existing products.

These legitimate business needs may clash with U.S. antitrust laws, which are designed to protect and promote competition. The HSR Act, where notification of the DOJ and FTC is required, bars any conduct amounting to implementation of the merger (as distinct from planning) prior to expiration of the HSR waiting period—regardless of whether the merging companies compete. The Sherman Act, applicable until the moment the merger is consummated, prohibits competing companies from taking any action to lessen the competition between them while the merger is pending. Both statutes,
therefore, constrain the conduct of parties prior to close. While intensely frustrating to the businesspeople anxious to get on with it, and perhaps counter-intuitive, the antitrust laws require parties to a merger to forego integration, maintain their separate identities and the competitive status quo until the transaction has cleared any antitrust review and in fact been completed. Putative merger partners that once competed must continue to compete as though no agreement to merge were in place, even after signing a definitive agreement to combine operations, and must carefully control their sharing of competitively sensitive information.

The practical challenge for merger partners in the uncertain (and sometimes extended) period before close is to design merger agreements, conduct needed due diligence, preserve the value of the target’s business and plan for eventual integration without running afoul of the antitrust laws. The U.S. antitrust agencies recently have taken action to punish companies whose pre-merger conduct crossed antitrust boundaries.

Most recently, on February 6, 2003, the DOJ settled a suit that it brought against Gemstar-TV Guide for pre-merger conduct violations in connection with Gemstar’s acquisition of TV Guide; a merger that was consummated in July 2000. To settle the lawsuit, Gemstar-TV Guide agreed to pay $5.67 million in civil penalties—the largest sum ever obtained by the antitrust agencies in a pre-merger coordination lawsuit.

Preceding the merger agreement, Gemstar and TV Guide competed in the interactive television programming guide market. The DOJ Complaint alleged that the parties agreed to stop competing for customers after they signed the merger agreement but before the merger actually closed. In addition, the DOJ contended that the parties
agreed upon pricing and service terms for customers and jointly managed their interactive program guide businesses before the expiration of the HSR Act.

The Complaint set forth that before the parties had begun to negotiate their merger agreement—which was a lengthy process that began as an effort to settle a long-running patent dispute—the parties actively competed for the right to enter into long-term and lucrative contracts with cable television providers to provide them and their customers with interactive programming guides. According to the Complaint, the parties historically competed on price, service and technology terms. The government alleged that once the merger negotiations commenced, the parties almost entirely ceased competing for business.

The Complaint set forth several specific instances where the parties agreed to stop aggressive negotiations with customers until the merger closed—what the parties themselves coined as “slow-rolling” customers (i.e., stalling). In addition, the parties agreed to allocate their customers and stop competing in certain markets. Thus, according to the DOJ, competition “ceased pursuant to a general agreement that Gemstar would phase out its marketing operations in the relevant markets,” so that TV Guide could pursue those opportunities without concern that Gemstar would undercut their offers. In addition, “Gemstar and TV Guide entered into agreements” whereby the parties agreed to “adhere to ‘standard terms’ that they had previously agreed upon, with details and responses to counter-offers to be worked out through further discussion between the merging parties.” In sum, the Complaint set forth clear examples where the parties fixed prices, allocated customers and divided markets—all activities that are generally considered per se illegal under the Sherman Act.
Antitrust counsel can help mitigate the risk associated with illegal pre-merger coordination if the parties bring them in early in the process. Pre-merger coordination issues often raise potentially complex considerations that require antitrust analysis as they arise. Effective antitrust counsel can often suggest ways to accomplish the business goal with minimum risk; indeed, the authors frequently find themselves reassuring a merger client that it may go further in planning or information sharing than thought.

Some pre-merger activities that commonly occur and may raise antitrust issues include:

- **Sharing of product roadmap information to plan close.** Whether the parties can share this information depends on whether the parties compete, have properly firewalled this information from those who would use it to affect competition, and require it for legitimate post-close integration planning purposes.

- **Terminating employees.** Of course, each company is entitled to terminate its own employees at any time, so long as such action is consistent with the terms of the merger agreement. In some instances an acquirer would like to trim redundant workforce personnel immediately upon close of the merger. It would likely violate the antitrust laws against gun jumping for such an acquirer to (1) demand that the target eliminate job positions before close of the merger, or (2) work with the target to effectuate reductions in personnel before close.

- **Sharing confidential customer lists or customer pipeline information.** In Gemstar, the DOJ set forth clear guidance as to when customer
information can be shared. Generally, merging competitors should not share such customer-specific information, unless pursuant to a Non-Disclosure Agreement, kept to a small group of individuals for integration purposes, and used only to value the transaction.

In short, in the period of time between signing and closing the parties must consider the significant antitrust issues associated with pre-merger communication and integration planning. Given the heightened scrutiny that the antitrust agencies have paid in this area, coupled with the need to “move quickly” in the high-technology world, it is wise to involve antitrust counsel early in the post-signing planning process to provide guidance to those involved both in integration planning for the combined company and those managing the day-to-day sales and marketing activities.

Mitigating the Antitrust Risk Post-Close

The antitrust risk, while certainly lessened, does not end with close of the transaction. Within the past year, the FTC has challenged consummated mergers in the Nastran software and process simulation software markets, and has launched an extended post-close investigation into a merger in the electronics design automation (“EDA”) market.

These cases remind us that the U.S. agencies can, at any time, challenge a problematic merger under Section 7 of the Clayton Act. Therefore, public filings, statements and press releases should be carefully reviewed when a company is announcing the successful completion of it merger with a competitor—especially in highly concentrated markets where no HSR review has occurred. A poorly drafted press release trumpeting, "market power" or "barriers to entry" or “market share leader,” for
example, can invite government inquiry that the parties escaped before close. Other examples of high-risk conduct after the merger closes:

- post-acquisition price increases, to distributors or end-users;
- decisions to cut back or stop supporting a target company product line, especially when contrary to earlier reassurances; and
- forcing customers prematurely to migrate to different platforms or “upgrade” to the buyer’s software.

These examples, and indeed any careless disregard of the target company’s customers or suppliers, may lead them to complain to the antitrust agencies. Complaints are particularly likely where disgruntled customers cannot easily turn to alternative suppliers—either because switching costs are prohibitively high, or simply because no other suppliers exist. Such complaints, if sufficient in magnitude, can lead to a protracted antitrust investigation, and even a post-close demand that the company divest assets to restore the pre-merger competitive balance. This risk is highlighted by three recent government investigations that resulted in action or threats of action even after mergers had closed.

**Aspen Technology.** On August 7, 2003, the FTC brought suit to unwind a merger, alleging that Aspen Technology, Inc.’s (“AspenTech”) $106.1 million acquisition of Hyprotech, Ltd. (“Hyprotech”) in 2002 was anticompetitive. The transaction was exempt from the reporting obligations of the HSR Act. According to Susan Creighton, Director of the FTC’s Bureau of Competition, “AspenTech’s purchase of Hyprotech directly led to the combination of two of the three largest firms in the development and sale of certain process engineering simulation software.” According to
the Commission’s complaint, AspenTech’s acquisition of Hyprotech violated Section 7 of the Clayton Act and dramatically increased concentration in the relevant product markets. Based on company documents, the FTC alleged that the combined AspenTech/Hyprotech holds as much as 82 percent of the process simulation software market.

In its complaint, the Commission is seeking the divestiture, to a willing and able buyer, of all Hyprotech software, intellectual property, contract rights and other assets necessary to restore competition in the market. The complaint also seeks the recission and assignment of any Hyprotech product contracts entered into since the closing of the merger. In sum, the Commission is seeking completely to restore the market to the state it was in before the transaction was consummated. Companies must consider such a possibility when they acquire competitors, particularly when the transaction is not reportable under the HSR Act. For a company like AspenTech, not only does it lose the valuable assets it acquired from Hyprotech if the FTC prevails, but perhaps more importantly it loses two years of independent product development that it would have engaged in but for the futile attempt to acquire its competitor. The opportunities lost for a company like AspenTech could be considerable: while AspenTech may be returned to the position it was in two years ago, all of its competitors or potential competitors presumably have during that time continued to develop next generation products.

**MSC.Software.** The FTC recently secured considerable relief from MSC.Software, in connection with a post-close investigation of two non-HSR-reportable acquisitions of the company’s competitors in the advanced Nastran market. The two companies acquired by MSC.Software, combined, had less than 10 percent market share.
In settling with the FTC, MSC.Software was required to divest two viable Nastran business units to restore competition in the industry. “Viable” meant two entities with market share roughly equal to that of MSC.Software. The net effect of this post-close investigation, launched after customers complained to the agencies, was the creation of competitors that were far greater in size than the companies acquired by MSC.Software in the first instance.

**Synopsys.** Synopsys acquired Avant! in 2001. Both companies were significant participants in the EDA market. Following a six-month HSR investigation initiated by the FTC, the FTC did not challenge the transaction, and allowed the Synopsys/Avant! merger to close. The FTC continued its investigation under Section 7 of the Clayton Act for another seven weeks to determine whether or not to bring an administrative complaint and challenge the already consummated merger. This post-close investigation was a stark reminder that, while the pre-merger notification rules of the HSR Act facilitate government merger review, they in no way proscribe agency investigation or challenge at any time.

Indeed, in Synopsys/Avant! the FTC emphasized that it will continue to scrutinize deals closely even after they close, and will seek to unwind them if they raise competitive concerns. Several FTC Commissioners intimated that they would not be reluctant to act if the combined Synopsys/Avant! firm acted anticompetitively. In separate statements, the Commissioners warned that the agency would “be on the lookout for anticompetitive conduct stemming from this acquisition, which could justify a future enforcement action against Synopsys,” and that “the Commission will act swiftly and forcefully if we detect any anticompetitive effects.”
These “warning shots” by FTC Commissioners were not unique: When the FTC cleared the Hewlett-Packard acquisition of Compaq in March 2002, Commissioner Mozelle Thompson issued a statement concluding with: “I expect that the Commission will continue in the future to investigate any conduct that could threaten the price, quality, and innovation competition that the computer industry provides to our economy and consumers.” Practically speaking, acquisition participants in consolidated industries must be wary that their actions will be closely monitored even post-consummation, and conduct themselves accordingly.

Conclusion

U.S. agency scrutiny of technology mergers has accelerated over the past year as software and other markets have undergone intense consolidation. Those trends promise to continue for the foreseeable future. Merging parties no longer have the luxury of relying on review and clearance under the HSR merger notification law. They must give special and early attention, in any transaction involving competitors, to assessing and minimizing the antitrust risk. They must first exploit their opportunity to allocate the antitrust risks in negotiating the terms of the merger agreement itself. Thereafter, the parties are bound by the HSR Act and the Sherman Act to conduct themselves as separate companies, maintaining the competitive status quo, throughout the period before the merger closes. Finally, even after the deal closes, merging parties must take cognizance of recent enforcement actions demonstrating that the antitrust authorities may yet investigate and possibly seek to unwind their transaction.