



Yale SCHOOL OF  
MANAGEMENT

# The Merger Review Process

- What Actually Happens -

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PROFESSIONAL CORPORATION

WSGR

# Hello and Welcome


- Thank you, Fiona Scott Morton – a great colleague as well as GCR’s “Economist of the Year.”.
- Who am I?
  - Partner at Wilson Sonsini NYC.
  - Antitrust practice since 1976
  - Served on Antitrust Modernization Commission
  - Chaired the ABA Antitrust Section
  - Have been privileged (and lucky) to work over the years for Coca-Cola, Google, Netflix, Live Nation, Twitter, and American Express (often as a plaintiff or complainant)
- What am I going to talk about?
  - The nuts and bolts of what happens, from a lawyer’s perspective, in the merger process from deal conception to review, if necessary, in the court of appeals . . .
    - Many thanks to my partner Scott Sher for his help.

## Let's [not] do a deal

- The general counsel tells you the company is about to embark on a competitively sensitive acquisition.
- What is the reason for the deal? Make sure the client has a good efficiency explanation.
  - Efficiency for these purposes generally means cost-savings or product improvements.
  - Can't depend on weakening competition directly or indirectly, e.g., price increases or raising barriers to entry.
  - If the deal will get a look-see by an agency, critical to be able to give a good reason why the client is doing the deal.
- As early as possible, make sure that the company is careful with what is to be said or written.
- Note the following for HSR reportable transactions (discussed later) directly from the FTC:

**“Item 4(c) of the HSR Form requires filers to submit documents prepared by or for officers or directors used to evaluate or analyze the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. Item 4(d) of the Form requires filers to submit certain documents prepared by or for officers or directors that relate to the acquisition, including confidential information memoranda, documents prepared by third party advisors, and documents evaluating or analyzing synergies. These documents often reveal important aspects of the competitive environment in which the transaction takes place, and are key to the agencies’ initial review of a transaction.”**

# Let's [not] do a deal



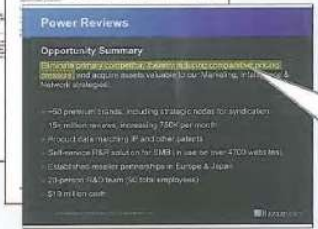
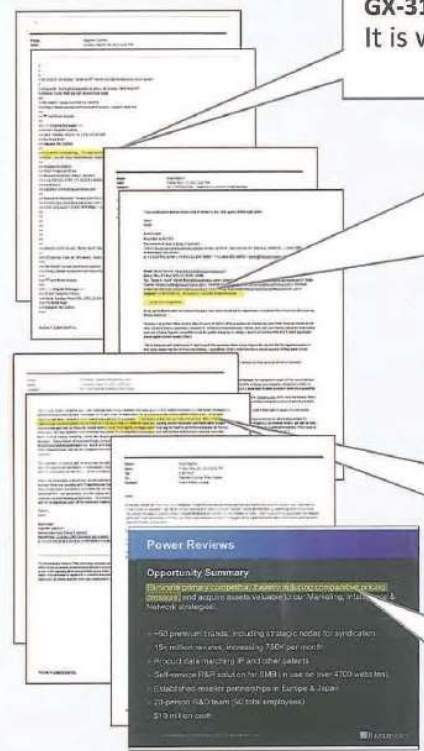
## How Bazaarvoice Referred to PowerReviews

**GX-315**  
It is worth considering. To take out **the only competitor we have....**  
— Then-CFO Stephen Collins, Mar 6, 2011

**GX-316**  
**Subject: CONFIDENTIAL – Reasons to consider PowerReviews...**  
as our first acquisition.  
\* \* \*  
**Pros**  
Elimination of **our primary competitor**  
— Co-founder Brant Barton, Apr 21, 2011


**GX-518**  
Potentially taking out **our only competitor**, who is both suppressing our price points (by as much as 15% according to Osborne)...could be a highly strategic move...  
— Brett Hurt, May 4, 2011

**GX-521**  
Eliminate **primary competitor**, thereby reducing comparative pricing pressure....  
— Brant Barton, May 20, 2011



**Power Reviews**  
Opportunity Summary  
Eliminate primary competitor, thereby reducing comparative pricing pressure...  
—50 person team including strategic need for syndication  
—15 million rev, possibly 750K per month  
—Proven sales history (3 and 5 star sellers)  
—200 million (150K total) on the (10M) in use on over 400 websites  
—Established reseller partnerships in Europe & Japan  
—3 person R&D team (50 total employees)  
—\$10 million cash

# Let's [not] do a deal



## How Bazaarvoice Referred to PowerReviews

**GX-321**  
[P]otential benefits from a combination:

1. No meaningful direct competitor.

– Stephen Collins, Nov 15, 2011

**GX-1181**  
We may have the opportunity to acquire our largest competitor PowerReviews.

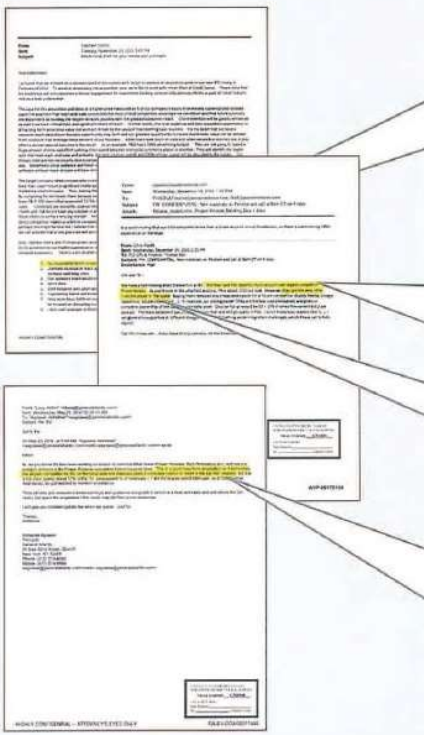
– Chris Pacitti, Dec 14, 2011

**GX-1181**  
[T]hey are the only other credible player in the space.

– Chris Pacitti, Dec 14, 2011

**GX-948**  
This is a good long term acquisition as it eliminates the largest competitor for BV on the retail side and basically gives it complete control of most of the top 500 retailers....

– Abhishek Agrawal, May 23, 2012



## Hiring the investment bank

- Independent bankers are often critical to value a deal.
- Bankers make projections.
- Projections include projections of price, volume, and other variables.
- Don't let them predict a price increase! Ban the term "barriers to entry"!
- Monitor their presentations.





## Negotiating the deal – antitrust risk

- Antitrust is often the most complex area to negotiate in a transaction document, and next to price, is the most important provision, as it dictates what the parties are obligated to do to clear a deal. Risk provisions include:
  - **Best Efforts Clauses:**
    - Anything from “all best efforts” to “reasonable efforts”. These general provisions are almost always clarified with more specific obligation clauses because the term is relatively vague.
  - **Divestiture Requirements:**
    - All divestitures? No “material” divestitures? Divest assets up to an amount of revenue generated? No remedies at all?
  - **Reverse Breakup Fees:**
    - Fee amount: high fee can incentivize the buyer to take all actions necessary to obtain regulatory approval, much like a hell or high water clause, whereas a lower fee amount can mitigate the extent to which the seller can shift antitrust risks to the buyer. Average between 4-5%, as high as 10% or more.
  - **Obligation to Litigate:**
    - Stage of litigation – specify how far parties are willing to litigate (e.g., through trial; non-appealable judgment, etc.) and who pays fees.
  - **Drop Dead Dates:**
    - Often most important clause because it sets a time limit, regardless of other provisions.

# Recent Significant Deals

| Deal Names of Parties    | Deal Size       | Antitrust Reverse Breakup Fee | Divestiture Requirement                      | Litigation Requirement |
|--------------------------|-----------------|-------------------------------|--|------------------------|
| Abbott/St. Jude          | \$30 billion    | None                          | Divestiture required; limited by materiality | None                   |
| Aetna Plc/Humana Inc.    | \$37 billion    | 2.7%                          | Divestiture required; limited by materiality | Required to litigate   |
| Anthem Inc./Cigna Corp.  | \$54.2 billion  | 3.41%                         | Divestiture required; limited by materiality | Required to litigate   |
| AT&T/Time Warner Cable   | \$108.7 billion | 0.46%                         | Divestiture required; limited by materiality | Required to litigate   |
| Bayer/Monsanto           | \$66 billion    | 3.03%                         | Divestiture required; limited by materiality | Required to litigate   |
| Dell/EMC                 | \$67 billion    | None                          | Divestiture required                         | Required to litigate   |
| Marriott/Starwood        | \$13.3 billion  | None <sup>1</sup>             | Divestiture required; limited by materiality | Required to litigate   |
| Microsoft/LinkedIn       | \$26.2 billion  | None                          | Divestiture required; limited by materiality | Required to litigate   |
| QualComm/NXP             | \$47 billion    | 4.26%                         | Divestiture required; limited by materiality | Required to litigate   |
| Sherwin Williams/Valspar | \$11.3 billion  | None                          | Divestiture required; limited by materiality | Required to litigate   |
| Verizon/Yahoo!           | \$4.83 billion  | None                          | Divestiture required; limited by materiality | Required to litigate   |
| Walgreens/RiteAid Corp.  | \$17.2 billion  | 3.46%                         | Divestiture required; limited by materiality | None                   |

1. Marriott/Starwood did contain a \$400,000,000 termination fee payable by either party for deal termination, not specifically related to antitrust



## Hiring the economist

- Issues in the deal vs. expert's experiences.
    - Industry expertise often critical, always a plus.
  - Will econometrics be involved, offensively or defensively?
  - What has the expert said or written?
  - What is the expert's relationship and reputation with the economists at the relevant agency?
  - What about outside the U.S.?
  - Does the expert do his/her own work?
  - How capable is the economists' support team?
  - What will it cost?
- 
- Hiring the economist early is almost always useful and is often essential.
  - Industry experts often helpful too.



# Hart-Scott-Rodino

- For deals over a certain size (~\$92mm for 2019), parties submit a Hart-Scott-Rodino Act (HSR) merger notification filing with the Federal Trade Commission (FTC) and the Department of Justice (DOJ).
  - Substantial fines for failure to file.
  - Determining whether there is an obligation to file can be very complicated; FTC staff will help on a no-names basis.
  - Note that agencies can sue before or after consummation whether the deal is reportable under HSR or not. Bazaarvoice was a sub-HSR, nonreportable transaction; DOJ sued post-consummation.
- The HSR filing triggers a 30-day waiting period, during which time parties cannot close.
  - Often, in obviously benign deals, the agency will grant “early termination” of the waiting period.
- Generally, after 30 days, the reviewing agency must clear the transaction or issue a “Second Request” (i.e., a subpoena).
- Once parties comply with the Second Request, a second 30-day waiting period begins (unless extended by agreement, which is typical), after which the agency must clear, settle, or file suit to block the transaction.
- Agencies will keep filed materials confidential and exempt from FOIA. But if the case goes to trial, rigorous sealing requirements will apply.

# Clearance

- Only one U.S. agency investigates any particular merger.
  - Note that “clearance” issues over which agency will review a transaction may delay substantive review as each agency fights to claim a transaction during the initial 30-day waiting period.
- Clearance typically based on the agency’s experience in the relevant industry.
  - DOJ always gets telecom deals, airlines, insurance, live entertainment, media, others.
  - FTC gets food retailing, pharmaceuticals, boats, recorded music, energy, others.
  - Still others (especially tech) can be a fight; Google deals can be handled by either agency.
    - Google/ITA (DOJ), Google/DoubleClick (FTC).
- Clearance battles happen, now somewhat less frequently than in prior years, but still too often.
  - Agencies try to resolve differences in 7-9 days but often fail.
  - WSGR has had several deals in technology markets that have not cleared until day 30.
  - When that happens, the agency usually issues a Second Request – not necessarily because the deal raises serious questions, but because the agency lawyers can’t bear the risk of allowing the deal to close when they know next-to-nothing about it.
  - Antitrust Modernization Commission proposed a mandatory coin toss after 9 days, but Congress has not acted.

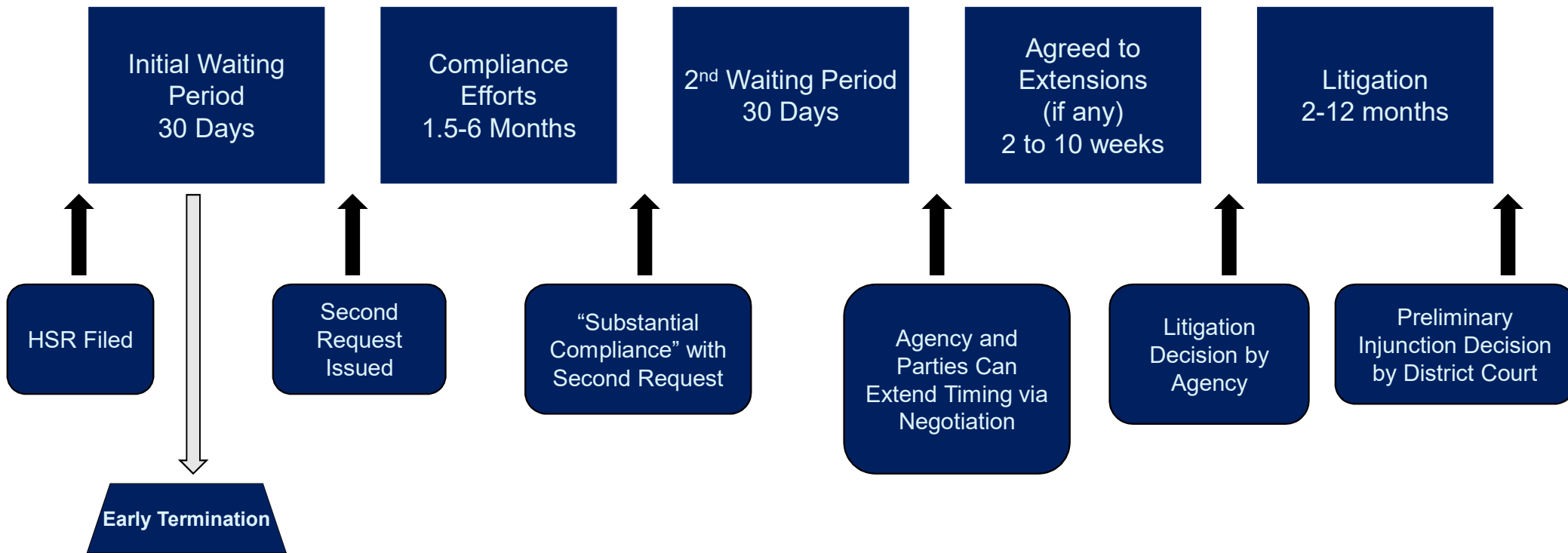
## Clearance

- War story interlude.
- Palm/Handspring, 2003. The first two companies with smartphones announced a merger. My partner, Scott Sher, represented the buyer, Palm. We filed HSR.
- Scott was sure we would get a call, because back then, these were the two primary smartphone companies (and the leaders in PDAs).
- On day 30, Scott received a call from DOJ and FTC together. It was surreal – they told him that, although they thought the deal deserved investigation, they couldn't agree which agency would review, so they decided to take a pass.
- They did this because they believed that smartphones could become important, and didn't want to concede jurisdiction (and thus added “industry experience”) to the other agency. So, they cleared on the 30th day without ever looking.

## The dreaded “Second Request”

- The vast majority of mergers raise no serious competition concerns, and the agencies will often grant “early termination” of the initial 30-day waiting period.
- But, if the reviewing agency believes that a transaction warrants further investigation, it will issue a request for additional information and documentary material (“Second Request”).
- Second Request extends the waiting period until 30 days (or 10 days for all-cash tender offers or bankruptcy transactions) after substantial compliance by all parties (or by the acquiring person in case of tender offers or bankruptcy transactions). Timing can be (and is often) extended by agreement.
  - At the end of the second waiting period the agency must sue, settle, or allow the deal to close.
- Second Requests are massive subpoenas. (Essentials of the form are available on agency websites.) Many a general counsel has had a near coronary after seeing one for the first time.
  - Critical to negotiate modifications to the request so that compliance is possible. Staff will generally cooperate.
  - Second Requests typically delay closing of a transaction by several months and cost millions of dollars.
    - FTC says that they expect at least an extra three months in exchange for reasonable modifications to the Second Request. DOJ says it expects to finish nearly every investigation (except the most complicated) within six months after filing HSR. FTC deals will inevitably take longer.
- In recent years, a Second Request has been followed by a lawsuit, a consent decree, or abandonment roughly 75% of the time, so it’s bad news in any number of respects.
  - If you get one, start thinking harder about a consent.

# Regulatory Review Timeline (U.S.)



# Foreign Pre-Merger Filing Requirements

- Almost 100 countries today have some form of pre-merger notification.
- SAMR in China and the European Commission are especially noteworthy.
  - The review period in China and EC includes a pre-notification period which the agency has wide discretion to extend.
  - Most other countries also have some form of nexus requirement to trigger filing, but these vary widely.
- The timelines outside US are traditionally longer than domestic review, e.g., in China:
  - Western Digital / Hitachi: 12 months
  - LAM / KLA Tencor : 12 months (abandoned)
  - HP / Samsung: 13 months
  - Mediatek / M\*Star :14 months
  - Qualcomm / NXP: 14+ months (abandoned)
- Chinese regulators have in the past focused on non-antitrust industrial policy concerns and required more extensive remedies unrelated to the antitrust analysis, such as compulsory licensing of unrelated technology. Recently, however, Chinese officials have said they will stop this tactic.
- Important to retain competent counsel (and sometimes economists) to deal with each affected jurisdiction. Substantive standards should be, but are not always, similar.



# Gun-Jumping

- Care must be taken during the lengthy review process to avoid “gun-jumping.”
- Under HSR Act, it is impermissible for Buyer to exert operational control over Seller in the period before the termination of the HSR waiting period, regardless of whether the companies compete.
  - Cannot restrict ordinary course discounting.
  - Cannot change product roadmap.
  - Cannot jointly sell.
  - Cannot change “signage” on Target’s facilities.
- Also, if the companies compete, then the Sherman Act also places restrictions on information sharing up until close.
  - Diligence clean teams.
  - Stage integration planning so that the most sensitive information not shared until you have deal certainty, or have a clean team for integration planning as well.

## Dealing with Staff

- FTC has four merger “shops,” organized by industry, and headed by “assistant directors.”
- DOJ has six, also organized by industry type, but which handle conduct investigations as well as mergers; DOJ sections are headed by “chiefs.”
- Engaging with staff early on is important.
  - Pull-and-refile:
    - Often used to continue discussions during initial 30-day waiting period to avoid Second Request.
  - Timing agreements:
    - Provide a measure of certainty to the companies and the agency as to what will happen when; lack of such an agreement can place staff in a litigation posture.
    - DOJ model agreement is very detailed: <https://www.justice.gov/atr/page/file/1111336/download>.

## Dealing with Staff

- If you want your deal cleared, candor with staff is always critical.
  - Staff knows more than you. They can and do call and subpoena competitors, customers, and talk with other regulatory authorities about the state of the market. You only know what your clients know. If you say something less than fully truthful, Staff will find out.
  - Acknowledge weaknesses and explain why the deal should clear anyway, perhaps with a modest fix.
  - Arguments should be made with reference to the Merger Guidelines (2010), which agency staff must follow.
  - Efficiency claims must be meticulously presented (to what will be a skeptical audience).
  - Staff will discuss the substantive issues and this is an opportunity that should not be missed.

## Dealing with Staff

- Staff will look first at the effect (in a horizontal deal) on the number of significant firms in the suspected relevant market.
  - A 6-5 may get a look but will likely clear.
  - A 5-4 will get a closer look but will still probably clear.
  - A 4-3 will get a close look but could go either way, although still probably ok under Trump.
    - Let's watch T-Mobile/Sprint.
  - A 3-2 will get a very close look and will be challenged absent highly unusual circumstances.
    - See *FTC v. Heinz*, 246 F.3d 708 (D.C. Cir. 2001) (Heinz/Beech Nut).
  - A 2-1 will get blocked absent extraordinary circumstances.
- Vertical deals are far more complex but require at least that one if not both markets in the vertical chain be highly concentrated.
- Many many other issues are considered, primarily the definition of the relevant market, and others such as barriers to entry.

## Dealing with Staff

- Sometimes Staff sends a clear signal that they oppose the deal; in other cases, when Staff is nearly complete, they will tell you what the recommendation will be.
  - At the FTC, recourse is first to the bureau directors (competition and economics), and then to the commissioners.
  - At DOJ, recourse is first to the relevant DAAG and then to the AAG.
- One option is to pay hardball and fight everything if the deal is going to wind up in court anyway.
  - In one case, we complied with a Second Request in a matter of days without advance notice. Staff then had to decide whether to sue (and to prepare their case) in just 30 days. The agency blinked and cleared the deal.
    - This is not a recommended strategy. Staff have long memories. In this case, though, financing would expire on the Staff's preferred timeline, so there was no real choice.

# White Papers

- If a deal has potential issues, addressing them in memoranda called “white papers” is often effective.
- White papers typically address the legal, factual, and economic issues in the case, and most often address concerns staff have raised.
- Frequently, there will be more than one white paper, addressing different issues, as well as white papers by the economist directed to the agency economists.

# Complaints

- A good but not conclusive indicator of a problem with a deal is a complaint from a customer. As the agencies consider price increases to customers the most immediate harm from an anticompetitive merger, customer complaints are powerful indicators of Second Requests and can suggest a forthcoming challenge.
  - Not always. In Bazaarvoice, we provided 100 customers to say they supported or didn't care about the merger. DOJ had zero. But the DOJ's economist said that he knew more than the customers, and the judge agreed with him. In Oracle/Peoplesoft, the judge didn't credit the customers opposing the merger.
- It is important (but not a get-out-of-jail-free card) to reach out to customers as soon as the deal is announced. Their support can only be helpful, while a complaint can crater a deal.
  - I once called the FTC on behalf of a customer to complain about a deal that was only in discussion – had not been signed. The staffer started making calls and the deal died then and there.
- Competitor complaints are different. One view is that a competitor complaint signals a procompetitive deal, as competitors' interests favor reduced, not enhanced, competition. If the competitor is reporting anticompetitive foreclosure (typically in a vertical merger), the complaint will get more attention. The EC credits them either way.



## Front Office/Commissioners

- If Staff recommends letting the deal through (or letting it through with a consensual remedy), it is rare (but not unprecedented) for the agency to overrule.
- When Staff recommends suit, the parties always go to the higher-ups to try to turn things around.
- Higher-ups' default is always to support Staff, and turning around a Staff recommendation to sue is difficult. But nothing ventured, nothing gained.
- At DOJ, meeting will be with the relevant DAAG, the AAG, and an army of Staff.
- At the FTC, the Sunshine Act has been interpreted to preclude meetings with more than one commissioner at a time. So as many as five commissioner meetings may be needed. Attorney advisors and some Staff will attend and listen.

## State AGs

- State AGs have statutory standing to sue to block mergers in federal court.
- States often partner with the relevant federal agency to investigate mergers and then join the agency's case when filed.
- But States must issue their own subpoenas and do not get any waiting period before they must complete their review.
- Since States were given authority to sue in 1976, States have nabbed several settlements but have prevailed in just two (State-only) litigated cases.

# Remedies

- Point of any remedy is to restore competition to what it would have been had there been no merger.
- Depending of course on the deal, the agencies may condition closing on a variety of different remedies, such as:
  - Divestiture of some of the assets involved
  - Compulsory licensing of IP
  - Commitments of supply to the divestiture buyer
  - Firewalls
  - Nondiscrimination provisions
- The agencies always prefer structural remedies, such as divestiture, as these do not require continued supervision by the agency.
- Current DOJ preference for structural relief is very strong.
- FTC, in contrast, continues to authorize behavioral remedies, even though less preferred, if satisfied they will cure the competitive problem.
  - E.g., firewall in Staples/Essendant.

## Suit & Trial

- If the deal is not cleared and settlement not reached, the agency will sue, possibly joined by one or several State AGs.
- This will be the first opportunity for the defendants to get meaningful discovery.
  - The agency will likely have many GBs of nonparty documents from the HSR investigation.
  - Both sides will get whatever other discovery is warranted depending on the tightness of the time frame the parties and court have agreed upon.
- In DOJ cases, trial of the preliminary injunction and the final merits will be in a single proceeding based on custom over the past 30 years.
- For the FTC, the grant or denial of the preliminary injunction may be followed by trial on the merits in FTC administrative proceedings.
  - There have been efforts in Congress to prevent the FTC from doing this but unlikely to pass with Democrats in control of the House.
- Trials typically take from two to four weeks. Next is post-trial briefing, argument, and release of opinion, which takes an additional six to twelve weeks, sometimes depending on deal term deadlines.

## Suit & Trial

- When in court, the agencies will rely far less on the Guidelines than on *Philadelphia National Bank* and its structural presumption.
- From 1962 through the early 1970s – mostly the era of the Warren Court – the Supreme Court decided many merger cases. Until 1974, the government always won.
- Government cases went directly to the Supreme Court from the district courts under the Expediting Act. But that Act was repealed in December 1974, and the Supreme Court has not decided a merger case since 1975.
  - Cargill in 1986 and Brunswick in 1977 involved mergers, but the issue in both was just whether the private plaintiff had standing to sue, and neither did.
- Courts give great respect to the Merger Guidelines, even when inconsistent with Supreme Court precedents. But the precedents are still nominally binding. And the agencies will cite them constantly.
- Merging parties can and will cite more recent cases, such as Oracle/Peoplesoft, which apply a modern economic approach arguably consistent with the Guidelines but at some variance from the older Supreme Court precedents.
- Agencies prefer suing in D.C., especially the FTC, but will go elsewhere if venue is obviously more appropriate. Always a bench trial.

# Appeals

- Appeal will lie to the applicable court of appeals whether it's a preliminary injunction or final judgment.
- Standard of review is that findings of fact are upheld unless clearly erroneous, while review on points of law is de novo. Whether to grant relief and on what terms is nominally an "abuse of discretion" standard. In practice, the standard is quite deferential.
- Appeals are typically decided faster than in most other cases, typically 2-6 months.
- Review in the Supreme Court is by certiorari and none has been granted in a merger case since the Expediting Act was repealed in 1974.
  - There haven't been that many petitions, but the bar and the academy are making enough noise that the next credible petition that makes it there stands a good chance of success.

# Case studies



## Seagate / Samsung (2012)

- Six weeks after Western Digital announces its proposed acquisition of Hitachi Data, Seagate announces proposed acquisition of Samsung HDD [hard disk drive] business.
- Both deals could not happen, because of substantial consolidation in both the PC HDD market and also in enterprise HDDs.
  - There were just four major hard drive suppliers; if both deals cleared, the market would go from 4 to 2.
- Europe has a “first to file rule,” also called the “priority rule,” which allows the first party to file its Form CO [the EC’s pre-merger notification form] to have its deal considered as though the other one is not pending. Seagate took advantage and filed before Western Digital.
- Seagate’s deal cleared, while Western Digital’s was blocked.
- All other agencies, while not having a first to file rule, concluded that there was no point in not following the EC rules, to avoid inconsistent remedies.

## Coke/CCE (2010)

- In early 2010, Pepsi announced that it would be acquiring its largest independent bottlers, giving it direct ownership of over 80% of its U.S. distribution. Not wanting to cede the competitive advantage of vertical integration to Pepsi, Coke elected to do the same by buying the 67% of the stock of its largest bottler, Coca-Cola Enterprises, that it did not already own.
- The competition issue was that the Pepsi bottlers and CCE amounted collectively to over 75% of the distribution of the DPSU brands (Dr Pepper, 7-Up, Canada Dry, etc.). The FTC was concerned that the acquisitions would allow Coke and Pepsi to disadvantage the DPSU brands' distribution to increase their own market shares.
  - At least for Coke, this wasn't true. Coke would lose some of the profits CCE made from DPSU distribution if it adopted such a strategy and would not recover the loss through added sales of its own brands.
- FTC cleared both deals subject to firewalls. The personnel responsible for sales of Coke products could not know or be involved with the distribution of DPSU brands.
  - Is this a good solution?
  - Post-merger studies indicate that prices for Coke and Pepsi brands declined while DPSU prices increased. What does that tell you?

## Qualcomm / Broadcom (2018)

- Broadcom launched largest hostile takeover bid in history and largest technology deal at the time (\$146bn)
- There were two primary bases for Qualcomm to oppose the deal other than price – CFIUS and antitrust
- President ultimately concluded that on national security grounds “Broadcom could NEVER acquire Qualcomm”
- Also substantial antitrust defense
  - In wireless and several other markets, serious antitrust doubts about the deal.
  - Likely a 14+ month review, which would have significantly damaged Qualcomm.
  - Uncertain remedy demands in China and US.
  - Broadcom was unwilling to include divestiture requirements for several key product areas.

## Google/DoubleClick (2008)

- As part of a competitive bidding process, Google enters into an agreement to acquire DoubleClick for \$3.1bn.
  - DoubleClick was a system to display banner ads across a network of websites and track their performance to better target internet users.
  - Google's AdWords and AdSense were text-based ad systems, not display.
- There were several other firms also bidding on the assets, including Microsoft.
- In order for Google to have an attractive competitive bid, it needed to provide DoubleClick with deal certainty.
  - Google agrees to a Hell or High Water Clause.
  - Google agrees to pay the entire purchase price of \$3.1bn PLUS interest, even if the deal did not close because of antitrust concerns.
- When Google's bid was accepted, Microsoft complained to the FTC.
  - What do you make of that? Would Microsoft complain if the effect of the acquisition caused ad prices (and profits) to rise?
- Deal cleared the FTC over one dissent.

## Nuance / VST (2007)

- In May 2007, Nuance announces the proposed acquisition of VoiceSignal Technologies for an estimated \$300m, which it financed through the acquisition of debt.
- DOJ issues a Second Request in the early part of July 2007, which normally results in a several month investigation as to the legality of the deal.
- In July 2007, the credit markets tightened substantially, making it impossible for Nuance to extend credit terms beyond the end of August.
- Thus, to have any chance for the deal to survive, Nuance needed to comply with the Second Request by the end of July 2007. If it extended beyond August 2007, Nuance would not have the funds needed to acquire VST.
  - Solution was to comply with Second Request over a weekend.
  - Staff fumed but deal cleared.

## Zillow/Trulia (2014-15)

July 28, 2014      August 4, 2014      September 3, 2014      Sept. 22, 2014      October 15, 2014      Oct. 23 – Nov. 18, 2014      Jan. 16, 2015      February 13, 2015

|                       |            |                       |                             |                        |                        |                           |                                |
|-----------------------|------------|-----------------------|-----------------------------|------------------------|------------------------|---------------------------|--------------------------------|
| Transaction announced | HSR Filing | Second Request Issued | Timing Agreement (2DR + 60) | Substantial Compliance | Investigative Hearings | Front Office Presentation | FTC cleared without conditions |
|-----------------------|------------|-----------------------|-----------------------------|------------------------|------------------------|---------------------------|--------------------------------|

- \$3.5bn acquisition of Zillow's closest competitor.
- FTC investigation noted substantial ordinary-course documents evidencing head-to-head competition; apparent "3-2" merger in online real estate advertising portals.
- In February 2015, the FTC cleared the transaction without any remedies or divestitures following a "rigorous" and "comprehensive" review of the record:
  - Economic and empirical market evidence did not demonstrate a distinct market for online real estate advertising portals.
  - Parties did not have the ability to price discriminate against any class of real estate agents.
  - Alternative advertising sources constrained Parties' ability to raise prices.

# Further Reading



**The Merger  
Review Process**  
A Step-by-Step Guide to U.S.  
and Foreign Merger Review  
Fourth Edition

AMERICAN BAR ASSOCIATION  
ANTITRUST  
LAW  
DEFENDING LIBERTY  
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2018

GETTING THE  
DEAL THROUGH