

2015 Trends in U.S. Merger Enforcement and A Look Forward to 2016

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Agenda

- Merger Enforcement Trends & Lessons
- HSR Act Primer & Key Enforcement Lessons
- Q&A

Merger Enforcement Trends & Lessons

US Agencies Aggressively Challenging Mergers

- Both DOJ and FTC continued to explore opportunities in 2015 to challenge transactions in court
 - › Agencies ready, willing and able to litigate to block problematic deals
 - › Reasonable alignment between enforcement willingness/appetites of FTC and DOJ despite divergent leadership
- In several cases, the agencies were successful in litigation
 - › Electrolux/General Electric appliance business (DOJ July 2015)
 - › Sysco/US Foods (FTC February 2015)
- In one case, the parties prevailed in defending against the agencies' court challenges
 - › Steris/Synergy Health (FTC May 2015) – but note failure of fact not FTC theory here

US Agencies Aggressively Challenging Mergers

- The agencies filed suit in other cases in 2015 that will reach the courtroom in 2016
 - › Staples/Office Depot (FTC December 2015)
 - › 3 Proposed Hospital Mergers (FTC 4Q2015) headed for court
 - Advocate Health Care/North Shore University Health System
 - Cabell Huntington Hospital/St. Mary's Medical Center
 - Penn State Hershey Medical Center/Pinnacle Health System

- Aggressiveness also extends to using Section 1 theories, as in United/Delta leasing of landing slots at Newark Airport
 - › Arguably only a Section 1 case because of previous (approved) consolidation

US Agencies Aggressively Challenging Mergers

- Parties abandoned a multitude of transactions in 2015 in the face of stern agency opposition
 - › Thai Union-Chicken of the Sea/Bumble Bee Foods (DOJ December 2015)
 - › Comcast/Time Warner Cable (DOJ April 2015)
 - › Applied Materials/Tokyo Electron (DOJ April 2015)
 - › National CineMedia/Screenvision (DOJ March 2015)

US Agency Merger Investigations Leading to Clearances

- The agencies investigated many high-profile transactions in depth but subsequently approved a number of transactions, either unconditionally or with remedies
 - › Zillow/Trulia (FTC February 2015)
 - › Expedia/Orbitz (DOJ September 2015)
 - › Dollar Tree/Family Dollar Stores (FTC July 2015)
 - › RJ Reynolds/Lorillard (FTC May 2015)
- When remedies achieved, they are almost always structural in nature
 - › Behavioral remedies strongly disfavored by both agencies
 - › Structural remedies will need to restore competitive dynamics immediately

US Agency Enforcement Trends and Perspective

Key Learnings and Issues To Continue To Watch For in 2016

- FTC and DOJ will continue to focus on any relevant customer segment when defining relevant markets of any size and demand characteristics
 - › From “national” customers (see, e.g., *Staples* and *Sysco*) to very “local” customers (see, e.g., *Dollar Tree*)
- FTC and DOJ have renewed their focus on price discrimination markets, defined around select, identifiable customers deemed uniquely at risk from a merger’s alleged competitive effects
 - › See, e.g., *Electrolux*
- The agencies will continue to seek ways to incorporate modern economic analytic tools (such as Gross Upward Pricing Pressure Index (“GUPPI”) analysis) into their investigations
 - › See, e.g., FTC Commissioners closing statement in *Dollar Tree*

US Agency Enforcement Trends and Perspective

Key Learnings and Issues To Continue To Watch For in 2016

- The *Steris* challenge underscores that regulators will be vigilant to examine the effects of a merger on both actual and potential - even speculative - future competition
- FTC will likely continue to focus particular merger review scrutiny on the advanced technology and pharmaceutical, medical products and healthcare industries
 - › This focus will be targeted not only on outright acquisitions but also on licenses, non-compete restraints, distribution and marketing contracts and other potentially restrictive agreements
- Both agencies will continue to vigorously cooperate in their investigations with both U.S. state and foreign investigatory authorities and parties should expect that evidence and economic data pertaining to their cases will be shared and discussed liberally with such third-party governmental entities

US Agency Enforcement Trends and Perspective

Key Learnings and Issues To Continue To Watch For in 2016

- Duration of antitrust investigations also increasing
 - › One report suggested that significant antitrust merger investigations took an average of 9.6 months in 2015, more than a third longer than the average just two years ago (7.7 months in 2014)
 - › In 2015, there were 37 significant merger investigations
 - Seven generated complaints seeking to block proposed deals
 - 24 of which were resolved by consent orders
- Reverse break-fees, drop-dead dates, and other antitrust risk shifting provisions are essential in crafting agreements
 - › Break-fees average between 3-5% but as high as 10% (as low as 0)

International Merger Enforcement Trends and Perspectives

- Over 130 countries now have some form of merger control reportability
- European Union and US are aligned in unprecedented ways, including through investigative processes
 - › Daily discussions between case teams
- Canada continues to be a reliable partner to US merger control enforcement efforts
- China continues to improve its policies and procedures but difficult to predict outcome of Chinese merger reviews given relative youth of the agency and differences in economic philosophy
- Other Asian and South American countries continue to be active in enforcement

HSR Act Primer & Key Enforcement Lessons

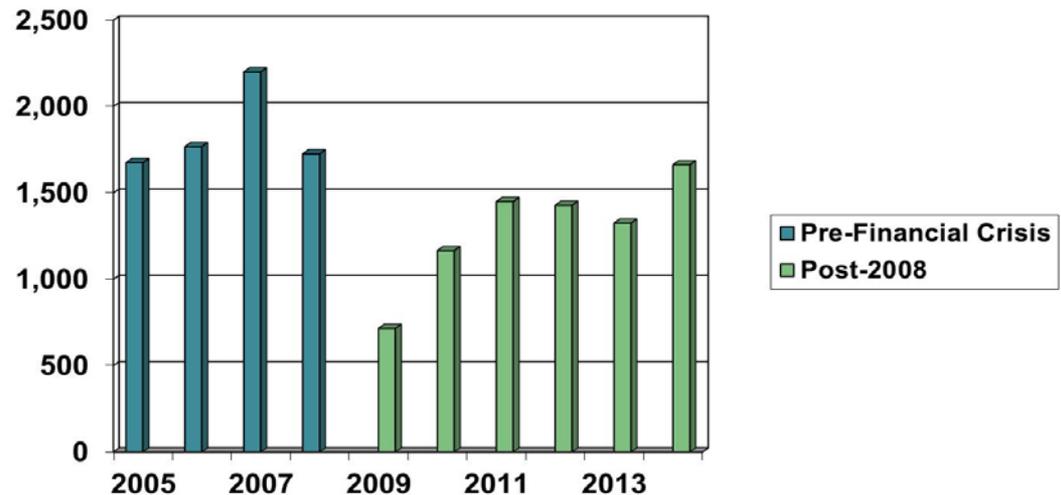
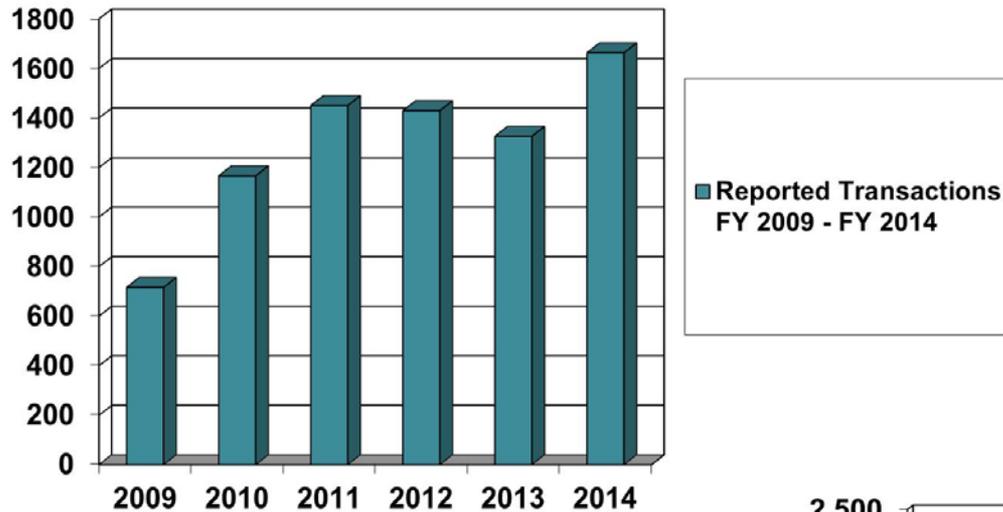
H-S-R Act Primer – Reporting Requirement

- Size-of-Transaction Test
 - › The value of the transaction must be more than \$76.3 million
 - › After February 25th, SoT test increases to \$78.2 million
- Size-of-Person Test
 - › A person on one side of a transaction must have net sales or total assets of \$152.5 million (\$156.3 million); and
 - › A person on the other side of the transaction must have net sales or total assets of \$15.3 million (\$15.6 million) or more
- The size-of-person test is not applicable to transactions that have a value of more than \$305.1 million (\$312.6 million)

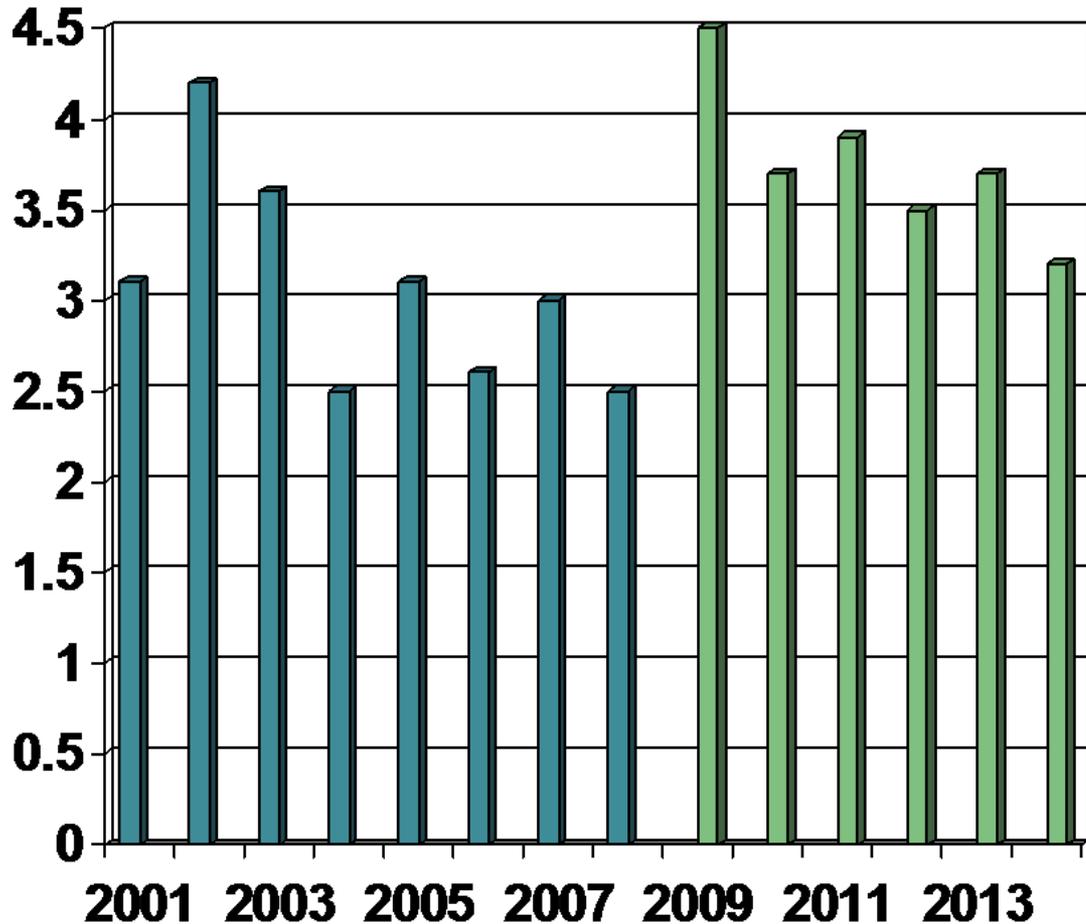
H-S-R Act Aggregation Rule

- Incremental acquisitions must be aggregated with the fair market value of existing holdings
- The aggregate value determines whether a filing is required
- When aggregation can trigger a filing:
 - › Open market purchases
 - › Follow-on investments/financings
 - › Option exercises
 - › Warrant exercises on convertible debt
 - › Converting non-voting to voting equity

H-S-R Act Filings Are Up... But Still Lower Than Before the Financial Crisis



More Second Requests – Despite Fewer Mergers



Bush - % of Filings
Obama - % of Filings

Indicates greater willingness to investigate transactions in the Obama administration than during Bush

HSR Compliance – 2015 Enforcement

- Significant civil penalties for three minority investors who failed to file notification
- Minority investors often use the “passive investor” exemption to conclude an H-S-R Act notification is not required:
 - › May hold no more than 10% of the target’s outstanding voting stock
 - › Solely for purposes of investment
- 2015 dramatized the need for minority investors to tread carefully before relying on the passive investment exemption
 - › Requires a nuanced analysis of an investor’s actual investment intent
 - › Should involve experienced H-S-R Act counsel

HSR Compliance – 2015 Enforcement

- Third Point LLC: Conduct that indicates an activist intent to influence management and the basic business decisions of the company include:
 - › Holding a board seat or nominating a candidate for the board of directors
 - › Proposing corporate action that requires shareholder approval
 - › Soliciting proxies
 - › Being an officer of the issuer
 - › Being a competitor of the issuer

- Len Blavatnik
 - › Investor acquired 29.1% of TangoMe's outstanding voting securities valued at approximately \$228 million – second violation, “penalty” = \$656,000

- Leucadia National Corporation
 - › Failed to report a conversion of its ownership interest in the financial services company Knight Capital Group, Inc. into voting securities – second violation, “penalty” \$240,000

HSR: Reminder on Key Reportability Rules

- Investment Rental Property Exemption
 - › Applies to the acquisition of real property that (1) is currently rented or held for rent by the seller and (2) will be used by the buyer “solely for rental or investment purposes”
 - › New Rule
 - The exemption applies only if the buyer will behave strictly like a landlord
 - The exemption is not available if the buyer intends to profit from a business conducted on the property
- Potential Changes to the REIT Exemption
 - › Currently, acquisitions by a REIT acting in conformity with IRS rules are considered ordinary course transfers and exempt from the HSR Act
 - › Strong sentiment that the Premerger Notification Office focus will be on taxable REIT subsidiaries
 - › PNO signaled that a REIT holding an operating company is “perhaps not in the ordinary course” and that the PNO is currently reexamining the scope of the REIT exemption

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