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Contributed by Dechert LLP ***Authors:*** James Fishkin, Paul Denis, Mike Cowie, Rani Habash

Law and Practice

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CONTENTS

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Dechert's global antitrust/competition team is a Destination Practice for clients seeking strategic representation. Clients often come to Dechert specifically for their antitrust needs, integrating our strategic guidance with input from their other advisers. We advise on a wide range of matters, including merger control, cartel and abuse of dominance investigations, class actions and other contentious proceedings, state aid and regulatory compliance. Our focus is on our clients' most business-critical situations and matters with high levels of complexity and risk, often involving multiple legal and commercial issues across jurisdictions. We complement our knowledge of antitrust/competition law with experience in government affairs, economics and communications, which we co-ordinate to deliver cohesive advice tailored to our clients' objectives. We bring to all our assignments a deep understanding of the commercial world, with a special focus on industries subject to government regulation.

The authors would like to acknowledge the contribution of Beverly Ang in the preparation and drafting of this chapter. Ms. Ang is an associate in Dechert's Antitrust team, based in New York.

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James Fishkin is a partner in Dechert LLP's Washington, D.C. office and a member of the firm's antitrust/competition practice. He combines both government and private sector experience within his practice, which focuses on advising clients on mergers and acquisitions covering a wide range of industries, including supermarket chains and other retailers, consumer and food product manufacturers, healthcare firms, internet-based firms, and chemical and industrial gas firms. He has been a key participant in several of the most significant litigated merger cases that have set important precedents, including representing Whole Foods Market, Inc. in FTC v. Whole Foods Market, Inc. and the Federal Trade Commission in FTC v. Staples, Inc. and FTC v. H.J. Heinz Co. Mr. Fishkin also has obtained successful outcomes for clients in high-profile FTC and DOJ merger investigations, including Ritchie Bros./IronPlanet, Albertsons/Safeway, CVS Health/Target Corporation, OfficeMax/Office Depot, and Monster/HotJobs. He was also selected by the Department of Justice to serve as the court-appointed Divestiture Trustee for the Grupo Bimbo/Sara Lee merger.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Clayton Act is the primary merger control legislation in the United States and precludes acquisitions of stock or assets the effect of which may be substantially to lessen competition. Mergers also may be challenged under the Sherman Act, which prohibits agreements that unreasonably restrain trade as well as monopolisation, attempted monopolisation and conspiracy to monopolise, or the Federal Trade Commission Act (FTC Act), which focuses on unfair methods of competition and unfair or deceptive acts or practices. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), which governs the premerger notification process in the United States, is incorporated into the Clayton Act. Every state, as well as the District of Columbia, Puerto Rico and the Virgin Islands, also has its own antitrust law. Most of these antitrust laws are comparable to the federal antitrust laws.

The FTC and the Antitrust Division of the Department of Justice (DOJ) (collectively, the Agencies) share jurisdiction for reviewing proposed mergers. The Agencies jointly issued the current version of the Horizontal Merger Guidelines in 2010, which outline the principal analytical techniques, practices and enforcement policy regarding mergers of actual or potential competitors under the federal antitrust laws. The Agencies also jointly issued the Commentary on the Horizontal Merger Guidelines in 2006, which provides detailed insights into the Agencies' decision-making process regarding a large number of merger matters, and the 1996 Statements of Antitrust Enforcement Policy in Health Care for hospital mergers. The DOJ does not currently rely on its 1984 Non-Horizontal Merger Guidelines for vertical merger analysis; however, these guidelines have not been formally superseded or rescinded.

Parties to a proposed joint venture or other type of business combination outside the scope of the HSR Act may request an opinion by the DOJ as to whether the proposed conduct is lawful under its Business Preview programme. Similarly, the FTC's Rules of Practice provide that the Commission or its staff may issue advisory opinions to help clarify FTC rules and decisions relating to proposed conduct. FTC advisory opinions concerning a proposed merger or acquisition are unlikely to be appropriate except in rare circumstances such as small hospital mergers that may fall within the "safety zone" described in the 1996 Statements of Antitrust Enforcement Policy in Health Care.

Pursuant to the HSR Act, the FTC is authorised to prescribe the regulations and format of notification that are "necessary and appropriate" to carry out the purposes of the HSR Act. The FTC's Premerger Notification Office also occasionally issues guidance relating to the application of the HSR Act and related regulations, in the form of both formal and informal interpretations, as well as posts on its Competition Matters blog.

1.2 Legislation Relating to Particular Sectors

While the federal antitrust laws apply to most transactions, both foreign and domestic, transactions in heavily regulated industries – such as banking, healthcare, telecommunications, pharmaceuticals, railroads and defence – may also be subject to additional approvals.

Banking transactions may require separate prior approval from the Federal Reserve Board; telecommunications transactions may require separate approval from the Federal Communications Commission; certain mergers and acquisitions by electric utility companies may require prior approval by the Federal Energy Regulatory Commission; and the Food and Drug Administration may require separate approval for transactions involving companies in the food safety, tobacco, pharmaceutical, biopharmaceutical and medical device industries. The Surface Transportation Board has exclusive authority to approve proposed railroad mergers although it must "accord substantial weight" to recommendations by the DOJ regarding competitive effects. Although each of the respective agencies has different authority to block or approve

transactions, parties should take care to ensure all relevant approvals are granted for each transaction.

The Committee on Foreign Investment in the United States (CFIUS) is authorised to review acquisitions of control of United States businesses by non-United States persons to determine the effect of such transactions on United States national security. While most reviews are initiated voluntarily by transaction parties, CFIUS may initiate a review on its own. CFIUS reviews are more likely to occur where target entities involve defence-related activities, critical infrastructure or critical technologies, or are located near sensitive United States governmental facilities. Although rare, the President may block any such transaction that would cause a national security threat after CFIUS review.

1.3 Enforcement Authorities

The FTC and DOJ are the authorities tasked with enforcing the federal antitrust laws, and they share authority over merger cases under the Clayton Act and the HSR Act. The FTC also has authority to challenge merger cases under the FTC Act.

In practice, the Agencies typically allocate merger cases through a clearance process that is based on the particular expertise of each Agency. The FTC tends to investigate mergers in the industries of defence, pharmaceuticals and retail, whereas the DOJ typically investigates mergers relating to financial services, telecommunications and agriculture.

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere with a Transaction**, to block a proposed merger the Agencies must obtain injunctive relief from a federal district court. The FTC, which is an independent administrative agency, may seek a preliminary injunction if necessary from a federal district court pending the completion of a trial before an administrative law judge. The DOJ must seek a preliminary injunction at the time they initiate litigation if the merging parties do not stipulate or agree not to merge prior to the trial as well as a permanent injunction after a trial before a federal district court, although the preliminary and permanent injunction proceedings are frequently combined.

Certain transactions that require non-antitrust regulatory approvals are exempt from the requirements under the HSR Act. For example, banking transactions often require approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System or the Federal Deposit Insurance Corporation, and may be exempt from the HSR Act, provided in certain circumstances that copies of filings with the relevant federal agency are contemporaneously filed with the FTC and DOJ.

2. Jurisdiction

2.1 Notification

Merger control requirements in the United States are compulsory. If the parties meet the jurisdictional thresholds of the HSR Act, absent an exemption, they must file a Notification and Report Form (HSR Form) with the FTC and DOJ, pay a filing fee,and observe a 30-day waiting period (15 days in the case of cash tender offers and certain bankruptcy transactions) prior to consummating their transaction.

2.2 Failure to Notify

Parties failing to file a required notification under the HSR Act are subject to a civil penalty of up to USD41,484 per day of non-compliance. The maximum civil penalty is subject to a cost-of-living adjustment, which is based on the percentage change between the US Department of Labor's Consumer Price Index for All-Urban Consumers (CPI-U) for the prior year. The adjusted maximum civil penalty figures typically are announced in January, and the changes take effect immediately upon announcement. Civil penalties are calculated based on the number of days in which the party is in violation – from the day a filing should have been made until the party makes a corrective filing and observes the 30-day waiting period (15 days in the case of cash tender offers and certain bankruptcy transactions).

In practice, penalties are rarely levied at the maximum civil penalty amount. The Agencies have had a longstanding "one free bite at the apple" approach pursuant to which it will generally not seek civil penalties for a person's first violation as long as that person self-reports the violation, makes a corrective filing and details the circumstances demonstrating that the failure to file was inadvertent. Repeat offenders, on the other hand, are often fined several hundred thousand dollars to several million dollars per violation, even if the violation was inadvertent or under advice of experienced counsel. The largest fine ever levied for a failure to make an HSR notification under the HSR Act was USD11 million against affiliates of ValueAct Capital Management L.P. in 2016 to settle the DOJ's lawsuit arising from improper reliance on the "solely for the purpose of investment" exemption under the HSR Act.

2.3 Types of Transactions

The HSR Act covers all types of transactions involving the acquisition of voting securities, assets or non-corporate interests (i.e. partnership or membership interests) that meet certain jurisdictional thresholds across all industry sectors with limited exceptions for transactions exempt from the federal antitrust laws and subject to approval by a federal agency. "Voting securities" include any securities that, at present or upon conversion, entitle the holder to vote for a director of the issuer. Acquisitions of convertible voting securities (e.g. options, warrants, non-voting convertible

preferred stock) are generally exempt from the filing requirements because they do not have the present right to vote for directors. A notification could be required, however, prior to the exercise or conversion of such securities.

Whether a transaction constitutes a potentially reportable acquisition under the HSR Act will depend on whether the transaction results in a transfer of beneficial ownership of voting securities, assets or non-corporate interests from one ultimate parent entity to a different ultimate parent entity. See **2.4 Definition of 'Control'**.The concept of beneficial ownership under the HSR Act differs materially from the United States securities law concept of the same name, though they do overlap to a certain degree. The HSR Act does not provide a definition of beneficial ownership but its underlying Statement of Basis and Purpose highlights the following relevant factors: (i) the right to obtain the benefit of any increase in value or dividends; (ii) the risk of loss of value; (iii) the right to vote the stock or to determine who may vote the stock; and (iv) investment discretion, including the power to dispose of the stock. As such, certain restructurings or reorganisations may require a filing under the HSR Act if there is transfer involving different ultimate parent entities. For example, a transaction between a corporation and its majority-owned subsidiary is likely to be exempt as an "intraperson transaction", whereas a transaction between one private equity fund and another related fund sharing a common manager may be reportable.

Similarly, with respect to goods and real property, relevant factors include: (i) which party maintains insurance on the goods or property; (ii) the right to benefit from any increase in value; (iii) the risk of loss of value; and (iv) the ability to dispose of the goods or property. Therefore, a long-term lease that exhausts the useful life of the underlying asset, or a grant of a licence that is exclusive in any field of use, may be reportable as an asset acquisition.

In contrast to acquisitions of voting securities of a corporation, acquisitions that do not confer control of a non-corporate entity are not reportable under the HSR Act.

2.4 Definition of 'Control'

The concept of "control" for HSR purposes is a bright line test that is generally more narrow than group concerns, which focus on entities under common management. Control of a corporation means ownership of 50% or more of its outstanding voting securities, or having the present contractual right to designate 50% or more of its board of directors. Control of a non-corporate entity means having the right to 50% or more of its profits or, upon dissolution, its assets. The entity (or individual) at the top of the ownership structure that is not controlled by any other entity (or individual) is deemed to be the "ultimate parent entity". The relevant "groups" for HSR Act purposes are the ultimate parent entity of the acquiring party together with all entities it controls directly or indirectly (collectively, the Acquiring Person) on one hand, and the ultimate parent entity of the acquired party together with all entities it controls directly or indirectly (collectively, the Acquired Person) on the other hand. (Certain exemptions, such as the foreign issuer exemption, focus instead on the acquired entity rather than the Acquired Person as a whole.)

While an acquisition of a non-corporate entity is only reportable if it confers control, minority acquisitions of voting securities – even small percentages that do not carry any special governance or veto rights – may be reportable if they meet the jurisdictional thresholds.

2.5 Jurisdictional Thresholds

Whether a particular transaction is subject to the requirements of the HSR Act depends on the application of three jurisdictional tests:

- the "size of transaction" test;
- the "size of person" test; and
- the commerce test.

Dollar-denominated thresholds in the HSR jurisdictional tests are indexed annually to prior year changes in gross national product (GNP). The FTC typically releases the revised HSR thresholds in January taking effect 30 days later in February.

With very few exceptions, all transactions will satisfy the commerce test (as either the Acquiring or Acquired Persons will be engaged in commerce or some activity affecting commerce).

The size of transaction test is met if, as a result of the transaction, the Acquiring Person will hold voting securities, assets or non-corporate interests of the Acquired Person valued in excess of USD84.4 million. In determining the sizeof transaction, one must generally include the value of any voting securities, assets and non-corporate interests of the Acquired Person already held by the Acquiring Person. There are other factors to consider in calculating the size of transaction (e.g. assumed liabilities, amounts paid for non-voting securities, or third-party debt of the acquired entity) which may differ depending on the transaction structure, such that the calculation of the size of transaction is not as straightforward as it may otherwise seem.

The size of person test is applicable for transactions valued at USD337.6 million or less. The size of person test is met if a transaction involves:

- voting securities or assets of a person engaged in manufacturing with worldwide annual net sales or total worldwide

assets of USD16.9 million or more being acquired by any person with total worldwide assets or worldwide annual net sales of USD168.8 million or more;
- voting securities or assets of a person not engaged in manufacturing with total assets of USD16.9 million or more being acquired by any person with total worldwide assets or worldwide annual net sales of USD168.8 million or more; or
- voting securities or assets of a person with annual net sales or total assets of USD168.8 million or more being acquired by any person with total worldwide assets or worldwide annual net sales of USD16.9 million or more.

2.6 Calculations of Jurisdictional Thresholds

The jurisdictional thresholds for purposes of the size of transaction test are calculated based on the value of the voting securities, assets and non-corporate interests that the Acquiring Person will hold in the Acquired Person *as a result of the transaction*.

Publicly traded voting securities are valued based on the greater of the Market Price (the lowest closing quotation during the 45 days prior to closing) or the Acquisition Price (all consideration to be paid, whether in cash or in kind).

Non-publicly traded voting securities are valued based on the Acquisition Price or the Fair Market Value of the stock if the Acquisition Price is undetermined.

Assets are valued based on the Fair Market Value of the assets or, if determined and greater than the Fair Market Value, the Acquisition Price.

Non-corporate interests are valued based on the Acquisition Price or the Fair Market Value of the non-corporate interests if the Acquisition Price is undetermined.

If necessary, a Fair Market Value determination must be made in good faith by the board of directors of the Acquiring Person or its delegee as of any date within 60 calendar days prior to filing (if filing is required) or within 60 days prior to closing (if filing is not required).

The jurisdictional thresholds for purposes of the size of person test are calculated on the basis of worldwide sales or assets of the Acquiring and Acquired Persons. Annual net sales are determined by reference to the Acquiring or Acquired Person's latest consolidated annual income statement; total assets are based on the book value of the assets contained in the Acquiring or Acquired Person's most recent regularly prepared consolidated balance sheet(s). Where the Acquiring or Acquired Person does not have a regularly prepared balance sheet, such person may need to prepare a pro-forma balance sheet listing all assets held at the time of the acquisition (in the case of the Acquiring Person, not including any cash to be used as consideration for the acquisition or for expenses incidental thereto, nor any securities of the same Acquired Person).

Sales or assets booked in a foreign currency should be converted based on the Interbank Exchange Rate. For an annual statement of income, the parties should use the average exchange rate for the year reported. For a regularly prepared balance sheet or pro-forma balance sheet, the parties should use the exchange rate in effect for the date of the relevant balance sheet.

2.7 Relevant Businesses/Corporate Entities for the Purpose of Calculation

The jurisdictional thresholds are calculated with respect to the Acquiring and Acquired Persons which are deemed to include all entities under common control (i.e. having the same ultimate parent entity). See **2.4 Definition of 'Control'**.If the seller is not included within the Acquired Person, its sales and assets do not need to be counted for the size of person test. This could be the case, for example, when a holder of a small percentage of stock in a widely held corporation sells those shares to a third-party buyer in a private sale. The seller's revenues and assets would be irrelevant but the sales and assets of the corporation and the Acquiring Person would be relevant.

Changes in the business during the reference period, such as acquisitions, divestments or business closures, should be reflected by adjusting the financials to include all controlled entities at the time of the acquisition as if only those controlled entities (at the time of the acquisition) were held by the ultimate parent entity for the reference period.

2.8 Foreign-to-Foreign Transactions

The HSR Act applies to all acquisitions of voting securities, assets or non-corporate interests that meet the jurisdictional thresholds. However, certain foreign-to-foreign transactions may qualify for an exemption from the HSR Act reporting requirements.

- Acquisitions of assets located outside the United States are exempt, unless the assets generated sales in or into the United States exceeding USD84.4 million in the most recent fiscal year. Even if such threshold is exceeded, if both Acquiring and Acquired Persons are foreign under the HSR rules, the transaction is nonetheless exempt if valued at USD337.6 million or less and the aggregate sales of the Acquiring and Acquired Persons in or into the United States are less than USD185.7 million and the aggregate total assets of the Acquiring and Acquired Persons located in the United States are less than USD185.7 million.
- Acquisitions of voting securities of a foreign issuer by a US Acquiring Person are exempt unless the issuer holds assets located in the United States having a Fair Market Valueof

over USD84.4 million or made sales in or into the United States of over USD84.4 million, in the aggregate with its controlled entities, in the most recent fiscal year.
- Acquisitions of voting securities of a foreign corporate issuer by a foreign Acquiring Person are exempt unless the acquisition will confer control of the issuer and the issuer holds assets located in the United States having a Fair Market Value of over USD84.4 million, or made sales in or into the United States, on an aggregate basis withits controlled entities, of over USD84.4 million in the most recent fiscal year. The transaction is nonetheless exempt if it is valued at USD337.6 million or less, the aggregate sales of the Acquiring and Acquired Persons in or into the United States are less than USD185.7 million, and the aggregate total assets of the Acquiring and Acquired Persons located in the United States are valued at less than USD185.7 million.
- Acquisitions by or from foreign governmental entities are exempt if the ultimate parent entity of either the Acquiring or Acquired Person is controlled by a foreign state, foreign government, or agency thereof, and the acquisition is of assets located within the foreign state or of voting securities or non-corporate interests of an entity organised under the laws of that jurisdiction.

2.9 Market Share Jurisdictional Threshold

The HSR Act does not use a market share test, although market share information may become relevant if the Agencies initiate a substantive antitrust inquiry into the transaction.

2.10 Joint Ventures

Joint ventures are subject to the HSR Act and the relevant reporting requirements. Specific rules apply to determine whether joint ventures meet the jurisdictional thresholds.

Generally speaking, the formation of joint ventures or other corporations is reportable under the HSR Act if an Acquiring Person has annual sales or total assets of USD168.8 million or more, the joint venture or other corporation will have total assets of USD16.9 million or more, and at least one other Acquiring Person has annual sales or total assets of USD16.9 million or more. A formation is also reportable under the HSR Act where an Acquiring Person has net sales or total assets of USD16.9 million or more, the joint venture or other corporation will have total assets of USD168.8 million or more, and at least one other Acquiring Person has annual sales or total assets of USD16.9 million or more.

A formation of an unincorporated entity (e.g. a partnership or limited liability company) is reportable under the HSR Act where an Acquiring Person has annual sales or total assets of USD168.8 million or more, and the newly formed entity has total assets of USD16.9 million or more, provided that the Acquiring Person will have control of the newly formed entity. Alternatively, a formation is also reportable under the HSR Act where an Acquiring Person has annual sales or total assets of USD16.9 million or more, and the newly formed unincorporated entity has total assets of USD168.8 million or more, provided that the Acquiring Person will have control of the newly formed entity.

For the purposes of satisfying the thresholds, contributors to the joint venture or newly formed entity shall be deemed Acquiring Persons, and the joint venture, corporation or newly formed entity shall be deemed the Acquired Person.

For the size of person test, corporate joint ventures require a second Acquiring Person to meet the defined size of person test, whereas non-corporate joint ventures omit this requirement but mandate that the Acquiring Person must gain control (e.g. the right to 50% or more of the profits or assets upon dissolution) of the non-corporate joint venture.

2.11 Power of Authorities to Investigate a Transaction

Even if a transaction does not meet the jurisdictional thresholds of the HSR Act, it is still subject to the other antitrust laws. The Agencies may choose to review a non-reportable transaction either before or after consummation. Given that investigations challenging conduct under the Sherman Act, the Clayton Act or the FTC Act do not have a statute of limitations, the potential for Agency scrutiny could continue indefinitely post-consummation. If a consummated merger violates the antitrust laws, the same types of remedies are available as in the case of reportable mergers.

2.12 Requirement for Clearance Before Closing

The HSR Act is suspensory and, if a filing is required, parties may not close the transaction until the expiration or termination of the HSR waiting period. The statutory waiting period is 30 days for most transactions and typically begins after both parties submit their corresponding HSR filings, the filings have been deemed to be complete by the FTC's Premerger Notification Office, and the filing fee has been paid. In the case of open market purchases, option exercises, and certain other transactions where the Acquiring Person makes a filing and serves notice on the Acquired Person, the waiting period begins oncethe Acquiring Person makes the filing and serves notice on the Acquired Person. Unless the Agencies take action prior to the expiration of the waiting period, the waiting period expires automatically on the thirtieth day at 11:59 p.m. Eastern Standard Time, and the parties are able to consummate their transaction thereafter. In cash tender offer and certain bankruptcy transactions, the waiting period is shortened to 15 days. Note that the waiting period extends to the next business day when a waiting period expires over a weekend or on a legal public holiday.

2.13 Penalties for Implementation of a Transaction Before Clearance

Parties that close a transaction prior to the expiration or termination of the HSR waiting period are subject to a civil penalty of up to USD41,484 per day of non-compliance.

In addition, parties that engage in "gun jumping" activities, including the transfer of beneficial ownership – construed broadly – of the acquired company prior to expiration or termination of the HSR waiting period, are also subject to civil penalties of up to USD41,484 per day of non-compliance. Penalties are applied in practice and are made public.

2.14 Exceptions to the Suspensive Effect

There are no exceptions to the suspensory requirement of the HSR Act. Although some transactions have shorter waiting periods than the standard 30-day waiting period, such as cash tender offers and certain bankruptcy transactions, all transactions that are reportable under the HSR Act must observe the applicable waiting period prior to consummation. The Agencies may, however, grant early termination of the waiting period. See **3.11 Accelerated Procedure**.

2.15 Circumstances Where Closing Before Clearance Is Permitted

The Agencies will not permit closing before the expiration or early termination (see **3.11 Accelerated Procedure**) of the applicable waiting period and will not allow carve-outs, ring fencing or hold separate agreements that allow certain portions of the transaction to close while the businesses or assets in the United States are segmented and not closed on until after clearance. Premature closing of the transaction may subject the parties to civil penalties of up to USD41,484 per day of non-compliance.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no specific deadlines for making HSR filings. Other than in the case of tender offers, certain bankruptcy transactions, and open market purchase and similar transactions, a filing cannot be made under the HSR Act prior to the execution of a transaction agreement between the parties. The agreement between the parties, upon which the HSR filing is made, must be signed but need not be binding or otherwise formalistic.

The parties must also close the transaction within one year after the expiration or early termination of the waiting period in order to avoid making a second filing with respect to the same transaction. Where less than a controlling interest is being acquired in a corporation, the Acquiring Person will have one year to cross the notification threshold selected in the HSR Form. Once this notification threshold is crossed, subsequent acquisitions of voting securities of the same Acquired Person by such Acquiring Person will be exempt for a period of five years after the expiration or early termination of the waiting period, provided that the Acquiring Person does not cross a higher notification threshold. The various notification thresholds are as follows: (i) USD84.4 million; (ii) USD168.8 million; (iii) USD843.9 million; (iv) 25% of the outstanding voting securities of an issuer if valued at greater than USD1,687.8 million; or (v) 50% of the outstanding voting securities of an issuer if valued at greater than USD84.4 million.

Apart from the above, there are no specific statutory timing requirements for when a notification must be made after the execution of a transaction agreement, other than that the applicable waiting period must expire or be terminated prior to the consummation of a reportable transaction.

3.2 Type of Agreement Required

Generally speaking, a signed agreement must be submitted with each HSR filing, with the exception of certain types of transactions, such as open market purchases or select bankruptcy cases. There is no obligation that the agreement is formal or binding. Filings may be made on a basic letter of intent or similar document that identifies the parties to the transaction and discusses the general nature of the transaction.

3.3 Filing Fees

The filing fees range from USD45,000 to USD280,000 and must be paid on or prior to the date of filing, or the filing will be deemed incomplete and the waiting period will not begin to run until the fee is paid. Although both the Acquiring and Acquired Persons submit separate filings, only one fee is paid with respect to each reportable acquisition, which is the obligation of the Acquiring Person unless the parties have agreed otherwise. The filing fee amount is based on the size of transaction listed on the HSR Form, which includes the value of all voting securities, assets and non-corporate interests of the Acquired Person to be held as a result of the acquisition. The filing fee for transactions valued at greater than USD84.4 million but less than USD168.8 million is USD45,000. For transactions valued at USD168.8 million or greater but less than USD843.9 million, the filing fee is USD125,000. For transactions valued at USD843.9 million or greater, the filing fee is USD280,000.

3.4 Parties Responsible for Filing

Under the HSR Act, both the Acquiring and the Acquired Persons must submit separate HSR filings. The filings are made on behalf of each of the respective ultimate parent entities. See **2.4 Definition of 'Control'** for more detail on how an ultimate parent entity is determined.

3.5 Information Required in a Filing

The elements of a filing under the HSR Act are relatively straightforward and consist of the completed HSR Forms, the attachments to the HSR Form, including copies of financial statements and the so-called "4(c) and 4(d)" documents (documents prepared by or for directors or officers for the purpose of evaluating or analysing the transaction with respect to competition, competitors, markets, market shares, potential for sales growth or expansion into product or geographic markets, synergies or efficiencies), and the filing fee.

In addition to describing the structure of the transaction and the relationship of parties to the proposed transaction, the HSR Form requires the parties to list US revenues for the most recent completed year by North American Industry Classification System codes (NAICS Codes). Parties must also disclose information about their controlled entities, significant shareholders and minority shareholdings. To the extent that the parties both report revenues in the same NAICS Codes, additional disclosures need to be made with regard to overlapping lines of business.

An Acquiring Person needs to respond on behalf of itself and all controlled entities. In the case of a private equity fund or holding company that controls a number of operating companies, for example, the required disclosures can be lengthy and include detailed information regarding other companies that have no relation to the reportable transaction. By contrast, an Acquired Person's filing is largely limited to disclosures concerning the entities or assets being sold.

Unlike antitrust or merger control filings in other jurisdictions, there is no narrative required to discuss the impact on the market, changes to competition, competitors of the relevant parties, or the like. Instead, the Agencies use the "4(c) and 4(d)" documents to obtain a view of the competitive impact of the transaction through the eyes of the parties. The FTC's Premerger Notification Office takes a broad view of the type of documents that meet the 4(c) and 4(d) criteria. However, parties are not required to translate 4(c) and 4(d) documents that are in a language other than English.

The HSR Form and an accompanying affidavit must be signed by an authorised signatory of the Acquiring or Acquired Person, attesting to the completeness and accuracy of the information provided in the HSR filing and to the good faith intention to consummate the transaction. In lieu of notarisation, the signatory may swear under the penalty of perjury.

3.6 Penalties/Consequences if Notification Is Deemed Incomplete

A "substantial compliance" standard applies with respect to the necessary disclosures under the HSR Act. If the HSR filing is incomplete, the waiting period will not begin until the requisite information is provided. As long as the parties observe the waiting period and take steps to cure the deficiencies in the filing, no fines are levied. Once the deficiency is cured, the Agencies will issue written confirmation setting forth the start and end dates of the initial waiting period.

Acquiring or Acquired Persons (as well as any of their respective officers, directors or partners) that consummate a reportable transaction prior to the expiration or termination of the waiting period are subject to potential civil penalties under the HSR Act of up to USD41,484 per day of non-compliance.

An individual who knowingly signs an HSR Form on behalf of the Acquiring or Acquired Person that is not complete may be subject to criminal punishment for committing an act of perjury. Acquiring or Acquired Persons (as well as any of their respective officers, directors or partners) that consummate a reportable transaction based on an HSR Form that is not complete may also be subject to potential civil penalties under the HSR Act of up to USD41,484 per day of non-compliance.

3.7 Penalties/Consequences if Notifying Party Supplies Inaccurate or Misleading Information

An HSR filing that contains inaccurate or misleading information may not satisfy the substantial compliance standard, and the waiting period will not begin until the filing is in substantial compliance. If the parties were to consummate the transaction prior to the expiration or termination of the waiting period, they would be subject to potential civil penalties under the HSR Act of up to USD41,484 per day of non-compliance.

An individual who knowingly signs an HSR Form on behalf of the Acquiring or Acquired Person that is not true and correct may be subject to criminal punishment for committing an act of perjury. Acquiring or Acquired Persons (as well as any of their officers, directors or partners) that consummate a transaction based on an HSR Form that is not true and correct may also be subject to potential civil penalties under the HSR Act of up to USD41,484 per day of non-compliance.

3.8 Phases of the Review Process

As discussed in **3.1 Deadlines for Notification**, the Acquiring and Acquired Persons are not required to complete HSR filings by any specific time and they can file any time after the binding transaction agreement or letter of intent has been executed. The review process typically begins after the Acquiring and Acquired Persons complete their HSR filings unless the parties engage in pre-notification discussions with the Agencies (see **3.9 Parties Engaging in Pre-notification Discussions with the Authorities**).

The "initial waiting period" is 30 calendar days (15 days in the case of cash tender offers and certain bankruptcy transactions), which commences when the FTC's Premerger Notification Office determines that the HSR filings by the parties to a proposed transaction are complete and the filing fee has been received. Under the HSR Act, if the initial waiting period expires without either Agency taking any action, the HSR process ends and parties may consummate their transaction. If the transaction does not involve a substantive overlap or competitive issue, the overall timeline for clearance is typically 30 calendar days after the HSR filing is submitted (15 days for cash tender offers and certain bankruptcy transactions), subject to the grant of early termination, which is discussed in **3.11 Accelerated Procedure**.

During the initial waiting period, one of the Agencies may seek clearance from the other to open a preliminary investigation of the proposed transaction and decide if further information is required. Under the HSR rules, parties to a transaction can effectively extend the initial 30-day waiting period (15 days in the case of cash tender offers and certain bankruptcy transactions) by withdrawing their HSR filing and refiling within two business days to avoid paying an additional filing fee. The process of formally withdrawing an HSR filing and refiling, generally referred to as "pull-and-refile", provides the reviewing Agency staff and the parties with a second initial 30-day waiting period to address competitive issues that remain unresolved and potentially avoid a second request.

Prior to the end of the typical initial 30-day waiting period, if the reviewing Agency chooses to formally request additional documents and information – generally referred to as a "second request" – the waiting period under the HSR Act is suspended while the parties respond to and certify substantial compliance with their second requests, which may add months to the review timeline as the second requests can be rather burdensome. Once each party has substantially complied with its second request, the waiting period resumes and extends by statute for an additional 30 calendar days. In addition to the several months that it may take parties to substantially comply with a second request, parties to the transaction may enter into timing agreements with Agency staff that typically add additional time to the review process.

According to the Dechert Antitrust Merger Investigation Timing Tracker (DAMITT), significant merger investigations resolved during the 12 months ending Q1 2018 lasted an average of 9.7 months from announcement of the transaction to the conclusion of the Agency investigation. The 9.7-month average covers 31 merger investigations of proposed HSR reportable transactions concluded by the DOJ and FTC during this 12-month time period that resulted in either a closing statement, consent order, complaint challenging a transaction, or transaction abandonment for which the Agency issued a press release.

3.9 Parties Engaging in Pre-Notification Discussions with the Authorities

Pre-notification discussions with the antitrust Agencies are not required. In transactions with substantive overlap or potential competitive issues, however, counsel to the parties may engage the Agencies in pre-notification discussions in order to discuss the merits of the transaction and provide additional time for the Agencies to review the transaction with the goal of avoiding the issuance of a second request. Information provided to the Agencies prior to an HSR filing is treated as confidential information.

3.10 Requests for Information During the Review Process

During fiscal year 2017 (October 1, 2016 to September 30, 2017), the FTC and DOJ collectively sought clearance from the other to open preliminary investigations and further review 277 of 1,992 HSR transactions (approximately 14%) during the initial waiting period (see **3.8 Phases of the Review Process** regarding the initial waiting period). For transactions subject to a preliminary investigation, the Agency staff typically issue a "voluntary request letter" (also called a "voluntary access letter") seeking key relevant information that is not requested in the HSR filing such as strategic and market plans, a list and description of overlapping products manufactured and sold, market share information for overlapping products, top customer contact information, customer win/loss data, a list of competitors and suppliers, and other relevant information. The voluntary requests vary in the burden they impose on the parties and many can be responded to within a few days, especially if the parties prepare in advance. This information enables the staff to more quickly focus on competitive issues and to help resolve questions about the proposed transaction. Although these requests are voluntary, parties are strongly urged to provide responses as quickly as possible.

During fiscal year 2017, the FTC and DOJ collectively issued 51 second requests representing 1.7% of the 1,992 HSR transactions during that time period. Responses to second requests, which consist of a combination of requests for documents and data as well as detailed interrogatories, are extraordinarily burdensome and costly. A typical second request response includes millions of pages of documents and may take several months for the parties to comply. See **3.8 Phases of the Review Process** for a summary of the DAMITT data regarding the length of time for significant merger matters that receive second requests.

3.11 Accelerated Procedure

There is no short form procedure for review; all transactions are subject to the same requirements with respect to the required elements of an HSR Form.

However, there is a procedure by which filing parties can apply for an accelerated review, which is known as "early termination". By checking a box on the HSR Form – with no additional fee or justification for the request – the parties can request that the Agencies terminate the HSR waiting period prior to its expiration.

Although a request for early termination of the HSR waiting period is subject to Agency discretion, early termination is often granted about two to three weeks into the standard 30-day waiting period if the proposed transaction does not raise significant competitive issues. Early termination is infrequent for transactions which qualify for the shorter 15-day waiting period, such as cash tender offers and certain bankruptcy transactions.

During fiscal year 2017 (October 1, 2016 to September 30, 2017), 77.9% of the 1,992 adjusted HSR filing transactions included a request for early termination. The Agencies granted early termination for 78.6% of the requests. In total, 61.2% of the HSR filings in fiscal year 2017 received early termination.

If early termination of the HSR waiting period is granted, the names of the parties to the transaction are published in the Federal Register and posted on the FTC's website.

4. Substance of the Review

4.1 Substantive Test

Section 7 of the Clayton Act, the primary substantive merger provision under the federal antitrust laws, prohibits the acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly". The key question the Agencies ask is whether the proposed (or consummated) merger is likely to create or enhance market power or facilitate its exercise.

See **1.1 Merger Control Legislation** for the analytical techniques used by the Agencies.

4.2 Markets Affected by a Transaction

Relevant product and geographic markets in which to assess where the potential adverse competitive effects may occur are typically narrowly defined. To determine the relevant product market under the 2010 Horizontal Merger Guidelines, the Agencies identify a product or group of products such that a hypothetical profit-maximising firm that was the only present and future seller of those products likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product sold in the market by at least one of the merging firms. The Agencies may also define a product market based on a targeted subset of customers to whom a hypothetical monopolist likely would profitably impose a SSNIP. The Agencies typically use a SSNIP of 5% of the price paid by consumers, but the SSNIP test is not a tolerance test for price increases that may result from a merger. Any price increase that may result from a merger is generally considered unlawful.

The Agencies identify the relevant geographic market by applying the same techniques used to define a relevant product market. The relevant geographic market is the area where a hypothetical profit-maximising firm that was the only present and future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one of the merging parties' locations in the market. The Agencies may also define a relevant geographic market based on the location of targeted customers if a hypothetical monopolist could discriminate based on the customer's location.

The Agencies also analyse ease of entry into the relevant market since a merger is unlikely to enhance market power if entry is so easy that the merged firm could not profitably raise prices or reduce competition. Entry is considered easy if it would be timely, likely, and sufficient in its magnitude, character and scope to deter and counteract the adverse competitive effects at issue. Timeliness is generally defined as entry that is "rapid enough" to make unprofitable overall the actions causing the adverse effects. Entry is considered likely if it would be profitable. Sufficiency is new entry by one or more firms that will replicate the scale and strength of the merging firms.

In addition to analysing relevant markets and ease of entry, the Agencies analyse competitive effects, which is discussed in **4.4 Competition Concerns**, and potential economic efficiencies, which is discussed in **4.5 Economic Efficiencies**.

4.3 Reliance on Case Law

Although the Agencies seek to build strong bilateral relations with foreign competition authorities and to cooperate on individual merger investigations (see **7.4 Cooperation with Other Jurisdictions**), the Agencies do not rely on case law from other jurisdictions in making enforcement decisions.

4.4 Competition Concerns

The Agencies typically will investigate mergers on theories involving unilateral effects, coordinated effects, the elimination of potential competition, foreclosure and raising rivals' costs. Both monopoly power and monopsony power concerns may be the subject of investigation. Horizontal and

vertical effects are considered. In the absence of the merged firm potentially raising prices, restricting output, decreasing innovation, or otherwise exercising market power, the Agencies do not typically consider conglomerate or portfolio effects.

4.5 Economic Efficiencies

The Agencies will consider efficiency claims asserted by the merging parties although the burden on the merging parties for successfully asserting efficiencies is substantial. The Agencies will only recognise verifiable efficiency claims that are merger-specific, cognizable and likely to reverse the proposed merger's likely harm to consumers.

Merger-specific efficiencies are efficiencies that can only be accomplished with the proposed merger and are unlikely to be accomplished by another means. As stated in the 2010 Horizontal Merger Guidelines, the parties also must substantiate their efficiency claims so that "the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when they would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific". The Agencies will not consider efficiency claims that are "vague, speculative, or otherwise cannot be verified by reasonable means".

Cognizable efficiencies are verified merger-specific efficiencies that are not derived from anticompetitive reductions in output or service. The Agencies "will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be to anticompetitive in any relevant market". To make this determination, the Agencies "consider whether the cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market" by preventing price increases in the relevant market.

The Agencies utilise a sliding scale analysis in comparing the magnitude of cognizable efficiencies against the magnitude of likely harm to competition absent the efficiencies – the "greater the potential adverse competitive effect, the greater must be the cognizable efficiencies, and the more they must be passed on to the consumer for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market". When the potential adverse effect is likely to be particularly substantial, "extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive". The Agencies specifically state in their 2010 Horizontal Merger Guidelines that efficiencies almost never justify a merger to monopoly or near-monopoly.

4.6 Non-competition Issues

In general, the Agencies limit their review to the substantive antitrust merits of a transaction. On occasion, the Agencies may coordinate their review of a proposed transaction with other regulatory agencies – such as the Federal Communications Commission, the Federal Energy Regulatory Commission and the Department of Transportation – that may also be reviewing the proposed transaction. However, the Agencies' review does not account for non-competition issues.

In the last year there has been a growing interest in "Hipster Antitrust", which seeks to reject the long-held consumer welfare paradigm in favour of a broader public interest standard requiring the Agencies and courts to consider social and political concerns in merger analysis such as the loss of jobs, lower wages and the impact on small businesses. Senior Agency officials have recently noted potential concern with harm to workers resulting from mergers creating monopsony power in labour markets, but at the time of writing the Agencies have not specifically adopted elements from the Hipster Antitrust movement in their decision-making and are continuing to follow the consumer welfare paradigm.

4.7 Special Consideration for Joint Ventures

Joint ventures are typically evaluated using the same criteria as applied to mergers. See **4.1 Substantive Test**.

Joint ventures may be pro-competitive in that they allow participants to realise a number of otherwise unattainable market efficiencies through economies of scale or combining research and marketing activities. However, joint ventures may also be anticompetitive if they reduce the joint venture parties' incentives to compete against one another, or if their independent decision-making is limited outside of the joint venture because of combined control or combined financial interests in production, assets, or other business operations. The lawfulness of a joint venture may also be evaluated under Sections 1 and 2 of the Sherman Act and under Section 5 of the FTC Act using rule of reason analysis.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with a Transaction

The DOJ and FTC each have extensive statutory powers that enable them to initiate enforcement actions. The Agencies, however, do not have the power to prohibit a potentially anticompetitive merger after the expiration of the HSR waiting period. Only the courts may issue an order to block a transaction. The judicial processes that each Agency may pursue to seek such an order differ.

Section 15 of the Clayton Act enables the DOJ to file in federal district court a complaint and motions for preliminary

injunction (if necessary) and ultimately a permanent injunction to block a proposed transaction that may substantially lessen competition in violation of Section 7 of the Clayton Act. DOJ merger challenges are decided in bench trials before federal district court judges. The DOJ has the burden to demonstrate with a reasonable probability of success (i.e. greater than "mere possibility" and less than "certainties") that the merger may substantially lessen competition. The party that loses may appeal to the appropriate federal court of appeals. The DOJ can also seek judicial action to unwind a consummated merger.

Unlike the DOJ which can seek a permanent injunction to block a merger after a bench trial, the FTC only possesses the power to seek in a federal district court preliminary injunctive relief to block a proposed merger pending the completion of an administrative trial. To obtain preliminary injunctive relief, Section 13(b)(2) of the FTC Act requires the FTC to make "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest".

At the same time that the FTC seeks preliminary injunctive relief, it typically issues a parallel administrative complaint charging that the proposed merger may constitute an unfair method of competition in violation of Section 5 of the FTC Act and may substantially lessen competition in violation of Section 7 of the Clayton Act. The FTC also has the authority to pursue an administrative trial even if it is not successful in obtaining a preliminary injunction; however, in April 1995 the FTC issued a formal policy statement where it said it would only pursue administrative litigation following the denial of a preliminary injunction in rare cases. Since that time, the FTC has not continued with an administrative trial after failing to obtain a preliminary injunction. The FTC can also seek to unwind a consummated merger through the administrative trial process when there is no opportunity to obtain a preliminary injunction.

The FTC's administrative complaint is litigated in a trial before an administrative law judge (ALJ), an FTC employee appointed by the Office of Personnel Management with partially protected tenure and status. The ALJ's initial decision and order may be appealed to the full Commission, whose decision may then be reviewed in the federal courts of appeal.

5.2 Parties' Ability to Negotiate Remedies

Negotiations between the merging parties and the Agencies regarding remedies may take place at any stage in the review process and may be initiated by the merging parties, but it is unlikely that the Agencies will negotiate until after they have investigated the merits of a transaction. Remedies negotiations typically commence after the Agency staff express their concerns with the transaction. See **5.4 Typical Remedies** and **9.3 Current Competition Concerns** regarding the scope of acceptable remedies.

5.3 Legal Standard

The DOJ's 2011 Policy Guide to Merger Remedies states that "[t]he touchstone principle for the Division in analysing remedies is that a successful merger remedy must effectively preserve competition in the relevant market" and that the level of relief must "effectively address each of the Division's competitive concerns". Similarly, the FTC's Bureau Competition states in its Frequently Asked Questions About Merger Consent Order Provisions that "[e]very order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets".

5.4 Typical Remedies

Structural remedies consisting of a partial divestiture of an ongoing standalone business unit have been the most common remedies for a horizontal merger that the Agencies have determined would likely have an adverse competitive effect. The FTC Bureau of Competition's 2012 Negotiating Merger Remedies policy statement says that "the Commission prefers structural relief in the form of a divestiture to remedy the anticompetitive effects of an unlawful horizontal merger". Similarly, the DOJ's 2011 Policy Guide to Merger Remedies states that "the Division will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers".

Structural divestitures are likely to include all assets (or licences to those assets) necessary for the divestiture purchaser to be an effective long-term viable competitor of the merged entity but have typically not consisted of an entire ongoing standalone business unit. Assistant Attorney General Makan Delrahim and other senior DOJ officials have expressed strong concerns that partial or carve-out divestitures of less than an ongoing standalone business unit are not sufficient, in part due to the relatively high failure rate of partial divestitures reflected in the FTC's January 2017 Merger Remedies study. The FTC Merger Remedies study found that for the 2006-2012 period, approximately 30% of partial divestitures of ongoing standalone business units failed while divestitures of an entire ongoing standalone business unit had a 100% success rate. Joseph Simons, the new Chairman of the FTC, also recently stated that the 30% failure rate for partial divestitures "is too high and needs to be lowered substantially, or ideally zeroed out altogether".

The Agencies may seek behavioural or conduct remedies in very limited circumstances for horizontal and vertical mergers. As discussed in **9.3 Current Competition Concerns**, Assistant Attorney General Makan Delrahim has expressed strong views against behavioural remedies, which are regarded as less effective than structural relief and require ongoing regulatory obligations. The FTC's Bureau of Competition has also recently stated that it "disfavors behavioral remedies and

will accept them only in rare cases based on special circumstances of an industry or particular transaction".

The Agencies generally define what these conduct or behavioural remedies might be – firewall provisions, non-discrimination provisions, mandatory licensing provisions, transparency provisions, anti-retaliation provisions, and prohibitions on certain contracting practices – but, as the DOJ notes in its 2011 Policy Guide to Merger Remedies, "other conduct remedies are also possible". The FTC Bureau of Competition's 2012 Negotiating Merger Remedies policy statement similarly says that conduct relief may be required to remedy the anticompetitive effects of a vertical merger and that the conduct relief may include a requirement to erect firewalls to protect confidential information or a requirement not to favour certain entities.

As discussed in **4.6 Non-Competition Issues**, the Agencies only focus their remedy on competition-related issues.

5.5 Negotiating Remedies with the Authorities

The FTC and DOJ have different procedures for accepting and finalising consent agreements.

The FTC staff negotiate a proposed consent agreement with the parties to the transaction which is incorporated into an Agreement Containing Consent Order (ACCO). The ACCO is signed by the staff and the merging parties and then submitted to the Director of the Bureau of Competition for approval based on a recommendation by staff. Upon approval by the Director of the Bureau of Competition, the ACCO, staff recommendation and related materials are then submitted to the Commission for a vote to accept or reject the proposed consent agreement. If a majority of the commissioners voting on the matter find "reason to believe" that the proposed transaction is unlawful and that the ACCO will accomplish the remedial goals, the FTC will accept the proposed consent agreement for a 30-day public comment period and will also issue a Complaint, provisional Decision and Order, and Analysis of Proposed Consent Order to Aid Public Comment. The FTC's acceptance of an ACCO and provisional Decision and Order for public comment typically enables the parties to close their transaction. The staff will respond to all comments. Following the public comment period the FTC can accept the Decision and Order as final, reject it or revise it.

The DOJ staff negotiate a consent agreement with the parties to a transaction in the form of a Proposed Final Judgment that is submitted for approval to the Assistant Attorney General in charge of the Antitrust Division based on the recommendation of the staff. The Antitrust Procedures and Penalty Act of 1974, commonly called the Tunney Act, requires the DOJ to submit its consent agreement in the form of a Proposed Final Judgment and a Competitive Impact Statement to a federal district court for approval. Under the Tunney Act, a federal district court judge may enable the parties to close their transaction during the 60-day comment period. The DOJ staff will respond to all comments. Following the public comment period, a federal district court judge can approve the consent agreement and issue a Final Judgment or alternatively reject the order and require additional or different provisions.

5.6 Conditions and Timing for Divestitures

In cases involving negotiated settlements, typically the parties may close the merger upon entry of the consent agreement for public comment. Such remedies must be completed within a specified time period in the consent agreement after the closing of the transaction. Where the Agencies require a contractually bound up-front buyer for the divested assets, the parties to the transaction must obtain prior approval of the up-front buyer before the Agencies will approve the consent agreement. The up-front buyer, however, is not always required to close its acquisition of the divested assets at the same time that the parties close their transaction as long as it is contractually obligated to complete the acquisition within the agreed-upon specified time period in the consent agreement. DAMITT reports that up-front buyers were required in over 80% of consent orders in the 12 months ending Q1 2018.

The Agencies monitor and enforce compliance with negotiated remedies. Parties to settlement agreements may have a trustee appointed by the Agencies to monitor compliance and ensure the effectiveness of the remedy. In cases of divestiture remedies, the Agencies may also appoint a divestiture trustee to ensure that an agreed-upon divestiture or a "crown jewel" package of assets is completed if the parties fail to complete the required divestiture in the agreed-upon time period.

At the FTC, the Compliance Division in the Bureau of Competition oversees enforcement of merger remedies. Failure to comply with a remedial agreement is a violation of Section 5(l) of the FTC Act and may result in civil penalties of up to USD41,484 per day for non-compliance as well as injunctive and other equitable relief.

On April 19, 2018, Assistant Attorney General Makan Delrahim announced plans to establish an Office of Decree Enforcement in the Antitrust Division of the Department of Justice with the sole goal to ensure compliance with, and enforcement of, consent decrees. The DOJ may seek a contempt order, including a monetary fine, from the appropriate federal district court if the parties to the Final Judgment fail to comply with the terms. Prior to the autumn of 2017 the DOJ needed to show "clear and convincing" evidence to seek a contempt order for a violation of a Final Judgment. Beginning in the autumn of 2017 the DOJ began requiring

parties to agree to a lower "preponderance of the evidence" standard for seeking a contempt order for a violation of a Final Judgment.

5.7 The Decision

The Agencies do not issue decisions affirmatively approving or permitting proposed mergers. Instead, the parties to a proposed HSR reportable merger can only consummate their transaction if the HSR waiting period has either expired or been terminated early.

All notices of early termination of the HSR waiting period are published in the Federal Register and posted on the FTC website. There are no public announcements for other transactions where the Agencies allow the waiting to period expire.

An FTC decision to seek a preliminary injunction and to commence administrative litigation to block a proposed merger or to accept a consent order reflecting negotiated remedies requires a majority of the commissioners voting on the matter after considering a recommendation by staff and management. The same procedure applies to challenges to consummated mergers. The Director of the Bureau of Competition or another official in the Bureau of Competition will notify counsel for the parties shortly after the commissioners have made their decision. A press release, non-confidential version of the complaint and, if applicable, the draft consent order and an analysis to aid public comment are made public.

The Assistant Attorney General in charge of the Antitrust Division makes the final decision for the DOJ to seek injunctive relief in a federal district court to block a proposed merger (or unwind a consummated merger) or to accept a consent order reflecting negotiated remedies after reviewing a recommendation by staff and management. A senior DOJ official will notify the parties either shortly before or after the complaint has been filed in a federal district court. A press release, non-confidential version of the complaint and, if applicable, the draft consent order and a competitive impact statement are made public.

Although the Agencies historically only issued press releases announcing adverse determinations, including when a complaint had been filed in court, both Agencies sometimes issue press releases or make public statements when closing out significant matters. For example, in August 2017 the FTC's Acting Director of the Bureau of Competition issued a statement regarding the FTC's decision not to further investigate Amazon's proposed acquisition of Whole Foods, and in March 2018 the FTC issued a formal Statement of the Commission regarding its decision to close the investigation of the proposed merger of European eyewear makers Essilor and Luxottica Group.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As discussed in **2.8 Foreign-to-Foreign Transactions**, certain types of foreign-to-foreign transactions are exempt from the HSR Act reporting provisions. Other types of foreign-to-foreign transactions, however, require HSR filings. Over the last year the Agencies sought and obtained remedies for several foreign-to-foreign transactions. The FTC obtained an enforcement action against China National Chemical Corporation and Swiss global agricultural company Syngenta AG's proposed merger in April 2017 where the parties agreed to divest three types of pesticides to settle charges that the proposed merger would cause significant consumer harm in the United States. The DOJ obtained an enforcement against the UK's Smiths Group plc's proposed acquisition of Morpho from France's Safran S.A. in March 2017 where the merging entities were two of the only three suppliers of desktop explosive trace detection services in the United States. The DOJ also obtained an enforcement action against Japan's Showa Denko K.K.'s proposed acquisition of Germany's SGL Carbon SE in September 2017 where the parties agreed to divest SGL Carbon SE's entire United States graphite electrodes business.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Each HSR filing requires the filing party to include the transaction agreement, as well as agreements not to compete and other agreements between the parties. Although parties to a reportable transaction are required to include any non-competition and other agreements as a part of their HSR filings, there are no assurances that such ancillary agreements will be reviewed during the HSR waiting period. The Agencies have the authority to challenge these restrictions at a later date even if they do not challenge the transaction as anticompetitive.

7. Third Party Rights, Confidentiality and Cross-border Cooperation

7.1 Third Party Rights

Input from third parties such as competitors, customers, distributors, suppliers and other industry participants is often critical in shaping the review of the Agencies. Information provided by third parties may cause the Agencies to look closely at certain aspects of a transaction, commence an investigation or seek an enforcement action.

For transactions that are not reportable under the HSR Act but which may be anticompetitive, it is often the input of third parties, such as customers or competitors, that brings

competitive concerns to the attention of the Agencies. Customer complaints are typically the type of third-party input that is given the most weight, though competitors and other third parties also typically make their concerns known to the Agencies during the course of a merger review.

Confidential information that the Agencies seek from third parties is protected by various statutory provisions. For FTC matters, the FTC Act contains protections against disclosure of confidential information obtained from third parties. Section 6(f) of the FTC Act prohibits the FTC from disclosing any trade secret or any commercial or financial information obtained from any person, with the exception of providing the information to appropriate federal law enforcement agencies where its confidentiality will be maintained and it will be used only for official domestic law enforcement purposes or any foreign law enforcement agency under the same circumstances. Sections 21(b) and 21(f) of the FTC Act protect the confidentiality of information obtained through compulsory process in investigations, including civil investigative demands (CID) and subpoenas, or submitted voluntarily by a party when compulsory process could have been used, from disclosure. The exception to these provisions is that they do not prevent the FTC from disclosing confidential information obtained during an investigation to any committee or subcommittee of Congress.

For DOJ matters, confidential information obtained from third parties that is submitted in response to a CID under the Antitrust Civil Process Act (ACPA) is protected from public disclosure under the Freedom of Information Act although such information may be disclosed to a committee or subcommittee of Congress. The DOJ can also use information that it receives in response to a CID before any "court, grand jury or federal administrative agency" and it may use the information in a deposition pursuant to another CID. Similarly, the DOJ can also provide the information to the FTC, although the FTC is subject to the same confidentiality provisions that apply to the DOJ. Third-party confidential information that is submitted voluntarily to the DOJ and not in response to a CID is not protected by the provisions of the ACPA or HSR Act. Parties submitting information voluntarily under these circumstances typically request and receive a confidentiality letter providing written assurances that the information they submit will be protected from public disclosure or that they will be provided with adequate advance notice.

7.2 Contacting Third Parties

As discussed in **7.1 Third Party Rights**, the Agencies typically seek input from third parties in investigating proposed transactions. The Agencies generally request telephone interviews with senior officers. The Agencies also may subpoena individuals from third parties for depositions or investigational hearings. The Agencies also frequently request documents and information from third parties either voluntarily or through compulsory process in the form of CIDs and subpoenas. The information that the Agencies seek voluntarily or from CIDs and subpoenas includes sales data, business and strategic plans, and documents relating to the proposed transaction under investigation. The Agencies also may seek input from third parties to ensure that the merger remedies will be effective.

7.3 Confidentiality

All material submitted by the Acquiring and Acquired Persons under the HSR Act is confidential and protected from public disclosure under the Freedom of Information Act, subject only to the information becoming public in the event of a challenge to the transaction by one of the Agencies. The "fact of filing" is also confidential, unless early termination of the waiting period is requested and granted, in which case the names of the parties to the transaction are published in the Federal Register and posted on the FTC's website. Although materials submitted by the Acquiring and Acquired Persons are exempt from public disclosure under the Freedom of Information Act, such information may be disclosed to a committee or subcommittee of Congress.

7.4 Cooperation with Other Jurisdictions

Employing both formal and informal agreements, the Agencies cooperate with foreign competition authorities. The United States has bilateral cooperation agreements with 11 jurisdictions: Germany (1976); Australia (1982); the European Union (1991); Canada (1995); Brazil, Israel and Japan (1999); Mexico (2000); Chile (2011); Colombia (2014); and Peru (2016). The Agencies entered a Memorandum of Understanding with the Russian Federal Antimonopoly Service in November 2009, with the three Chinese antitrust agencies in July 2011, with the Indian competition authorities in September 2012, and with the Korea Fair Trade Commission in September 2015. The Agencies are also often called upon to assist emerging or nascent regimes in connection with drafting merger control thresholds, guidelines and regulations.

The Agencies also have multilateral arrangements regarding international mergers, including the 2014 Recommendation of the Organisation for Economic Co-operation and Development (OECD) Council Concerning Co-operation on Competition Investigations and Proceedings, which promotes enforcement cooperation, emphasising the importance of informal communications through the sharing of non-confidential information. The Agencies also participate in the International Competition Network (ICN) Merger Working Group (MWG), which most recently updated its recommended practices for reviewing proposed mergers in March 2018.

In cases involving competition concerns in more than one jurisdiction, the Agencies and their foreign counterparts of-

ten exchange information, which may include both publicly available information and "agency confidential" information. This latter information includes information that the Agencies do not routinely disclose publicly but on which no statutory disclosure prohibitions exist. Examples of "agency confidential" information can include staff views on market definition, competitive effects and remedies.

In order to disclose information submitted by the parties, however, an Agency must obtain a waiver of confidentiality. Merging parties often waive confidentiality protections to assist with the facilitation of cooperation, reduce information production burdens and avoid incompatible remedies. In 2013, the Agencies released a joint model waiver of confidentiality designed to streamline the waiver process, reducing the time and resources previously involved in negotiating waivers. In January 2017 the Agencies also revised their Antitrust Guidelines for International Enforcement and Cooperation, which provide guidance relating to investigative tools and cooperation with foreign authorities.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

As discussed in **5.1 Authorities' Ability to Prohibit or Interfere with a Transaction** and **5.7 The Decision**, the FTC and DOJ must typically seek a preliminary or permanent injunction in federal district court to prevent the closing of a transaction after the expiration of the HSR waiting period, which may take several months or longer. An appeal of the decision reached by the district court may be made in the federal court of appeals by either the parties or the Agencies. Merging parties may also appeal adverse FTC administrative trial initial decisions by the ALJ to the full Commission, and an adverse decision by the Commission to a federal court of appeals.

8.2 Typical Timeline for an Appeal

Although there may be expedited processes for appeals available to the parties, appeals will typically take approximately 10 months from a decision by a federal district court to a decision by a federal court of appeals concerning a proposed merger based on the average length of time for FTC and DOJ merger matters on appeal since 1995 as compiled by Dechert LLP. Using the same Dechert LLP database for consummated mergers, the appellate timeframe is much longer. The average time from a district court decision in a DOJ challenge to a consummated merger to a decision by a federal court of appeals is approximately 23 months. For FTC challenges to consummated mergers, the average time is approximately 27 months.

Since 2010, the Agencies have twice succeeded in appealing the denial of a preliminary injunction motion to seeking to block a merger. See FTC v. Hershey Medical Center/PinnacleHealth System (2016) and FTC v. Advocate Health Care/NorthShore (2016). At the time of writing, the DOJ had filed a notice of appeal with the district court but had not yet appealed the June 2018 AT&T/Time Warner district court decision that the proposed transaction was not unlawful.

During the same period, merging parties also have had no success appealing their loss to the Agencies in district court. At the time of writing, Sanford Health and Mid Dakota Clinic are before the Court of Appeals for the Eighth Circuit appealing the December 2017 decision from a district court issuing a preliminary injunction blocking the proposed merger.

8.3 Third Parties Appealing a Clearance Decision

If the FTC or DOJ clears a merger, adversely affected third parties do not have a right of appeal under the HSR Act. Third parties with standing do, however, have separate rights to bring a private action against the merging parties under the Clayton Act.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The jurisdictional thresholds applicable under the HSR Act are adjusted annually in January of each year and become effective 30 days later based on changes in GNP. Apart from these annual adjustments, changes to the HSR Act are not particularly common, although changes to the interpretations of the HSR Act and regulations – issued by the Premerger Notification Office of the FTC – are common.

One significant legislative proposal is the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, known as the "SMARTER Act", which seeks to ensure that the FTC will be subject to the same standard as the DOJ when seeking a preliminary injunction to block a proposed merger. The SMARTER Act also eliminates the ability of the FTC to pursue administrative litigation for proposed mergers after the FTC seeks to obtain a preliminary injunction in federal court. The SMARTER Act (H.R. 5645) was passed by the House of Representatives on May 9, 2018, and is awaiting a vote by the Senate at the time of writing.

9.2 Recent Enforcement Record

Parties failing to file a required notification under the HSR Act are subject to civil penalties of up to USD41,484 per day of non-compliance. Adjustments are made to the maximum civil penalties annually as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The next annual adjustment is expected in January 2019. Although first-time violators typically may avoid a fine if a corrective filing is made and the antitrust Agencies are lenient,

parties that have violated the HSR Act previously are often fined. Although such fines may not amount to the maximum allowed under the maximum civil penalties amount, fines typically range from several hundred thousand dollars to several million dollars.

During fiscal year 2017 (October 1, 2016 to September 30, 2017), the FTC and DOJ brought four enforcement actions resulting in settlements totaling USD2.2 million in civil penalties for violations of the HSR Act. The largest fine for failure to make a notification is USD11 million, which was levied in 2016 in connection with the settlement by affiliates of ValueAct Capital Management L.P. with the DOJ for improper reliance on the "solely for the purpose of investment" exemption.

During fiscal year 2017, the FTC brought 21 merger enforcement challenges to HSR reportable transactions, including 14 in which it accepted consent orders for public comment, all of which resulted in final orders; six in which the transactions were abandoned or restructured as a result of antitrust concerns raised during the investigation; and one in which the FTC initiated administrative litigation. These enforcement actions touched on numerous sectors of the economy, including consumer goods and services, pharmaceuticals, healthcare, high-tech and industrial goods, and energy.

During fiscal year 2017, the DOJ brought 18 merger enforcement challenges to HSR reportable transactions, including 11 with filed complaints in US district court. In nine of these 11 challenges, the DOJ simultaneously filed a proposed settlement. In six of the remaining challenges, the parties abandoned the proposed transaction, and in one, the parties restructured the transaction to resolve DOJ's concerns.

The Agencies also pursued merger enforcement actions against non-reportable transactions during this time period. In June 2017 the FTC successfully sued to block the merger of healthcare providers Sanford Health and Mid Dakota, and in December 2017 the FTC challenged Otto Bock HealthCare's consummated acquisition of Freedom Innovations.

Over the last year, the threat of enforcement action has caused a number of parties to abandon their transactions, including Ultra Electronics Holdings plc and Sparton Corporation in March 2018 after an investigation by the DOJ (the only two qualified suppliers of sonobuoys to the United States Navy) and Walgreens' decision to terminate its proposed acquisition of all of Rite Aid in June 2017.

The Agencies have also recently successfully challenged transactions in court, including US v. Aetna/Humana (2017), US v. Anthem/Cigna (2017), US v. Energy Solutions/Waste Control Specialists (2017), FTC v. Advocate Health Care/North Shore University HealthSystem (2017), and FTC v. Sanford Health/Mid Dakota Clinic (2017). At the time of writing, FTC v. Tronox Limited/Cristal and FTC v. Wilhelmsen Maritime Services/Drew Marine Group are in litigation in federal district court. The FTC also has an ongoing administrative trial against the consummated Otto Bock/FIH Group Holdings merger. The DOJ failed to prevail at trial in US v. AT&T/Time Warner. At the time of writing, the DOJ had filed a notice of appeal with the district court but had not yet appealed the June 2018 district court decision.

The Agencies have also recently filed complaints in federal district court to block mergers that were ultimately either abandoned or settled, including US v. Deere & Co./Monsanto's Precision Planting LLC (transaction abandoned in 2017 before trial), US v. Parker-Hannifin/CLARCOR's aviation fuel filtration business (consummated merger settled in 2017 before trial), and FTC v. DraftKings/Fan Duel (transaction abandoned in 2017 before trial). The FTC also filed administrative complaints to block the J.M. Smucker Co./ConAgra's Wesson cooking oil and CDK Global/AutoMate transactions. Both of these matters were abandoned in 2018 before the FTC filed complaints in federal district court seeking a temporary restraining order and preliminary injunction to block the mergers.

9.3 Current Competition Concerns

Both the DOJ and the FTC have new appointees in place. Makan Delrahim was confirmed as the Assistant Attorney General for the Antitrust Division on September 27, 2017. For the first time since the FTC was founded in 1915, the Unites States Senate confirmed at the same time five presidential nominees to serve as commissioners. Joseph Simons was appointed Chairman and sworn in on May 1, 2018. Noah Phillips, Rohit Chopra and Rebecca Kelly Slaughter were sworn in on May 2, 2018. The fifth nominee, Christine White, was confirmed by the Senate and will become a commissioner when Commissioner Maureen Ohlhausen's term expires in September 2018 or sooner if she leaves the FTC.

In terms of substantive merger enforcement trends, the Agencies today appear to be as aggressive as the prior administration. The Agencies are also far less inclined to settle for remedies that they perceive as providing anything less than complete relief and that entail even a relatively slight risk of failure due to several high-profile failed divestitures over the last several years.

Under Assistant Attorney General Makan Delrahim, the DOJ is significantly stepping up demands for structural relief consisting of ongoing standalone business units rather than partial carve-out divestitures of select assets. One recent example is the extent of structural divestitures in the May 2018 Bayer/Monsanto settlement. The DOJ is also strongly opposed to behavioural remedies because it believes they are typically less effective than structural relief and require

ongoing regulatory review. One example of this new policy is the DOJ's decision in November 2017 to attempt to block AT&T's acquisition of Time Warner, a vertical merger that may have been settled as a behavioural remedy in prior administrations in a manner similar to Comcast/NBC Universal, a comparable transaction, in 2011. As stated in **8.1 Access to Appeal and Judicial Review**, the DOJ failed to prevail at trial in US v. AT&T/Time Warner, although at the time of writing, the DOJ had filed a notice of appeal with the district court but had not yet appealed the district court decision.

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Similarly, FTC Chairman Simons has stated that one of his priorities is to improve the effectiveness of merger remedies. As discussed in **5.4 Typical Remedies**, the January 2017 FTC Merger Remedies study found that approximately 30% of the partial divestitures in merger orders from 2006 to 2012 failed and that this rate of failure "is too high and needs to be lowered substantially, or ideally zeroed out altogether". FTC Chairman Simons also stated that another one of his priorities for the FTC is to "devote substantial resources to determine whether its merger enforcement has been too lax, and if that's the case, the agency needs to determine the reason for such failure and to fix it."