



The In-House Lawyer: Comparative Guides

United States: Merger Control

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This country-specific Q&A provides an overview to merger control laws and regulations that may occur in the [United States \(US\)](#).

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control>

1. Overview

The merger control regime in the United States is governed by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), as well as implementing regulations contained in 16 C.F.R. parts 801-803. Both the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) perform substantive antitrust review of covered transactions. However, the FTC, through its Premerger Notification Office, is the principal enforcement agency for the HSR Act.

Filing under the HSR Act is mandatory for transactions that meet the Act's filing thresholds. The HSR Act does not require the parties to a transaction to obtain the affirmative approval of the FTC or DOJ. Rather, it imposes reporting and waiting period obligations on the parties to give the enforcement agencies time to review a transaction and make a determination whether challenge it in court. The HSR Act requires parties to covered transactions to submit Notification and Report Forms to the FTC and DOJ, and to observe a 30-calendar-day waiting period prior to closing the transaction. The waiting period may be "early terminated" if the parties have requested such treatment and the transaction does not present competition issues. The waiting period may also be extended through issuance of a "Second Request" for information by the FTC or DOJ. A Second Request extends the waiting period for 30 calendar days following the parties' substantial compliance with the request.

The HSR Act employs two principal thresholds to determine which transactions are covered by its notification and waiting period requirements: the size-of-person test and the size-of-transaction test. Both are adjusted annually (typically in February) to reflect changes in the U.S. gross national product. The HSR Act also has exemptions for acquisitions that do not have a sufficient nexus with US commerce.

The HSR filing itself is relatively straightforward compared to other jurisdictions. It requires each party to complete a form with a short transaction description and basic information about the filing party, as well as the submission of certain documents that may have been prepared by the party analysing the transaction with respect to competition-related topics.

2. Is mandatory notification compulsory or voluntary?

Notification under the HSR Act is compulsory for transactions that meet the filing thresholds and are not subject to an exemption. The FTC and DOJ do not accept voluntary filings for transactions that do not meet the filing thresholds.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

The HSR Act prohibits closing the notified transaction until expiration or early termination of the HSR waiting period. The Act does not permit parties to “carve out” portions of the transaction for closing prior to expiration or early termination of the waiting period.

4. What are the conditions of the test for control?

For acquisitions of voting securities and assets, the HSR Act does not use a “control” test for determining whether a filing is required. Voting securities and assets acquisitions that meet the notification thresholds are reportable, regardless of whether they confer “control” of the acquired company. By contrast, acquisitions of interests in unincorporated entities (such as LLCs or partnerships) are only reportable if, in addition to the numeric thresholds being met, the acquiring party will hold 50% or more of the equity in the acquired entity as a result of the acquisition. The test is whether, as a result of the acquisition, the acquiring party will have the right to 50% or more of the profits or 50% or more of the assets upon dissolution of the unincorporated entity.

5. What are the conditions on minority interest in your jurisdiction?

Acquisitions of voting securities that meet the HSR Act numeric thresholds are reportable even if they do not confer control of the acquired entity. Thus, for example, an acquisition of 20% of the voting securities of an acquired corporation would be reportable if the size-of-person and size-of-transaction tests were met, even though the acquisition would not confer control over the acquired company. The HSR Act does recognize an “investment-only” exemption in certain circumstances. If, as a result of an acquisition, the acquiring party will hold 10% or less of the outstanding voting securities of the acquired company, and if the acquiring party has purely passive investment intent, then the acquisition is exempt regardless of the dollar value of the acquired voting securities.

6. **What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?**

The HSR Act applies two principal jurisdictional thresholds: the size-of-person test and the size-of-transaction test. Transactions valued at up to US\$312.6 million are reportable only if both thresholds are met. For transactions valued at greater than US\$312.6 million, the size-of-person test does not apply. Transactions valued above that amount are reportable without regard to the size-of-person test.

Size-of-Person Test

For transactions valued at up to US\$312.6 million, both parties must meet the size-of-person test for the transaction to be reportable. The size-of-person test is determined based on the total assets and annual net sales of the “acquiring person” and “acquired person” to the transaction. Each “person” includes the “ultimate parent entity” (UPE) of the party to the transaction, and all entities “controlled” by the UPE. “Control” means, in the case of a corporation, holding 50% or more of the outstanding voting securities or having the contractual power presently to designate 50% or more of the members of the board of directors. In the case of a partnership or LLC, “control” means having the right to 50% or more of the profits or 50% or more of the assets upon dissolution.

For the size-of-person test to be met, either the acquiring or acquired person must have total assets or annual net sales of US\$156.3 million or more, and the other person must have total assets or annual net sales of US\$156.3 million or more. There is a variation to this general rule, however. If the acquiring person meets the US\$156.3 million threshold, and if the acquired person is not engaged in manufacturing, then the threshold for the acquired person is US\$15.6 million in total assets or US\$156.3 million in annual net sales. In all cases, the total assets of a person are as stated on the UPE’s last regularly prepared, fully consolidated balance sheet. The annual net sales of a person are as stated on the UPE’s last regularly prepared, fully consolidated, annual income statement. As with other HSR thresholds, the size-of-person thresholds are adjusted annually, typically in February, to reflect changes in the US gross national product.

Size-of-Transaction Test

For a transaction to be reportable under the HSR Act, the value of the voting securities, assets, or controlling interest in an unincorporated entity to be held by the acquiring person as a result of the acquisition must exceed US\$78.2 million. Voting securities and interests in unincorporated entities held “as a result of” an acquisition include any securities or interests already held by the acquiring person, as well as the additional securities or interests to be acquired. Thus, for example, if an acquiring person already held voting securities of a target corporation valued at US\$50 million, and proposed to acquire additional voting securities of the target valued at US\$30 million, the acquisition of the additional voting securities would trigger an HSR filing obligation, because the total value of the voting securities of the target held “as a result of” the acquisition would be US\$80 million, above the US\$78.2 million threshold. The HSR Act employs aggregation rules for assets acquisitions as well, generally requiring aggregation of the value of assets acquired or agreed to be acquired from the same acquired person within 180 days. As with other HSR thresholds, the size-of-transaction threshold is adjusted annually, typically in February, to reflect changes in the US gross national product.

7. **How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

Determination of “value” for HSR purposes varies depending on what is being acquired.

Publicly traded voting securities. For publicly traded voting securities, the value is the higher of the acquisition price, if determined, and the market price. If the acquisition price is undetermined, the value is the market price.

Untraded voting securities, and interests in unincorporated entities. For untraded voting securities and interests in unincorporated entities, the value is the acquisition price, if determined. If the acquisition price is undetermined, the value is the fair market value as determined in good faith by the acquiring person.

Assets. For assets, the value is the higher of the acquisition price (including assumed liabilities), if determined, and the fair market value as determined in good faith by the acquiring person.

United States Nexus

Even if a transaction meets the HSR thresholds for size of person and size of transaction, it may fall under HSR exemptions for transactions that do not have a sufficient nexus to US commerce. Note that all thresholds are adjusted annually for changes in the US gross national product.

Assets. The acquisition of assets located outside the United States is exempt, unless the assets to be held as a result of the acquisition generated sales in or into the United States of greater than US\$78.2 million in the acquired person’s most recent fiscal year.

Voting securities. The acquisition of voting securities of a foreign corporation by a US person is exempt, unless the foreign corporation has assets located in the United States valued at greater than US\$78.2 million, or made sales in or into the United States in its most recent fiscal year of greater than US\$78.2 million. The acquisition of voting securities of a foreign corporation by a foreign person is exempt unless the same thresholds are met, and the foreign person will “control” the foreign corporation as a result of the acquisition. Further exemptions potentially available in an acquisition of a foreign corporation by a foreign person are described below in the section addressing “foreign-to-foreign” mergers.

8. **Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

The HSR Act does not have formal rules regarding use of exchange rates when determining whether its thresholds have been met. However, the FTC has issued guidance on performing currency conversions. The FTC recommends using the Interbank Exchange Rate when converting foreign currencies to dollars. When calculating annual net sales, apply the average exchange rate over the fiscal year reported. When calculating total assets, apply the exchange rate as of the date of the balance sheet.

9. **Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?)**

If the formation of a joint venture involves existing entities, then the same thresholds would apply to the acquisition of assets, voting securities, or a controlling interest in an unincorporated entity as they would to any other acquisition.

Joint ventures sometimes may involve the formation of a new entity. When multiple parties contribute assets to a newly formed entity (Newco), the Newco is treated as the acquired person for purposes of calculating the size-of-person test, and is deemed to have in it all the assets that will be contributed to it in the formation transaction. Each contributing party is deemed an acquiring person, and the value of the transaction is the value of the voting securities or unincorporated interests in the Newco received by the contributing party in the formation. The rules for formation transactions vary slightly depending upon whether the Newco being formed is a corporation or an unincorporated entity such as an LLC or partnership. All thresholds are adjusted annually to reflect changes in the US gross national product.

Formation of a Corporation

In the formation of a Newco corporation, the size-of-person test is met if either the Newco or the acquiring person has total assets or annual net sales of US\$15.6 million or more; the other party has total assets or annual net sales of US\$156.3 million or more; and at least one other acquiring person – i.e., another party contributing assets to the Newco corporation – has total assets or annual net sales of US\$15.6 million or more.

Formation of an Unincorporated Entity

In the formation of a Newco unincorporated entity, the size-of-person test is met if either the Newco or the acquiring person has total assets or annual net sales of US\$15.6 million or more, and the other party has total assets or annual net sales of US\$156.3 million or more. Also, as with other acquisitions of interests in unincorporated entities, an acquisition of an interest in a Newco unincorporated entity is reportable only if the acquiring person will control the unincorporated entity as a result of the acquisition.

10. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

The HSR Act recognizes certain exemptions applicable to “foreign-to-foreign” transactions. All thresholds are adjusted annually to reflect changes in the US gross national product.

Assets

In general, the acquisition of assets located outside the United States is exempt, unless the assets to be held as a result of the acquisition generated sales in or into the United States of greater than US\$78.2 million in the acquired person’s most recent fiscal year. Where both the acquiring person and acquired person are foreign, an assets acquisition that exceeds that threshold may nevertheless be exempt if the aggregate sales of the acquiring and acquired persons in or into the United States is less than US\$171.9 million in the parties’ respective most recent fiscal years; the aggregate total assets of the acquiring and acquired persons located in the United States is less than US\$171.9 million, and the value of the transaction does not exceed US\$312.6 million.

Voting Securities

In general, the acquisition of voting securities of a foreign corporation by a US person is exempt, unless the foreign corporation has assets located in the United States valued at greater than US\$78.2 million, or made sales in or into the United States in its most recent fiscal year of greater than US\$78.2 million. The acquisition of voting securities of a foreign corporation by a foreign person is exempt unless the same thresholds are met, and the foreign person will “control” the foreign corporation as a result of the acquisition. Where both the acquiring person and acquired person are foreign, a voting securities acquisition that exceeds the US sales or assets threshold may nevertheless be exempt if the aggregate sales of the acquiring and acquired persons in or into the United States is less than US\$171.9 million in the parties’ respective most recent fiscal years; the aggregate total assets of the acquiring and acquired persons located in the United States is less than US\$171.9 million, and the value of the transaction does not exceed US\$312.6 million.

11. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

The FTC and DOJ do not accept voluntary filings.

12. **Additional information: Jurisdictional Test**

Not applicable.

13. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

Section 7 of the Clayton Act prohibits any merger or acquisition where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” In 2010, the FTC and DOJ jointly issued the latest version of the Horizontal Merger Guidelines (Guidelines), which lay out the agencies’ enforcement priorities and describe their general approach to merger review. According to the Guidelines, the agencies focus their attention on transactions that would tend to “create, enhance, or entrench market power or to facilitate its exercise.” The Guidelines note that the agencies will consider whether a transaction would facilitate increased prices, reduced output, or diminished innovation, or would otherwise harm consumers as a result of a reduction in competition. The agencies have placed far more emphasis on horizontal mergers than vertical transactions. They consider both unilateral and coordinated effects theories, as appropriate.

14. **Are non-competitive factors relevant?**

The FTC and DOJ do not consider factors beyond the competitive effects of a proposed transaction.

15. **Are there different tests that apply to particular sectors?**

The FTC and DOJ take into account the unique characteristics of an industry when applying Section 7 of the Clayton Act and the Horizontal Merger Guidelines, but they do not apply a different legal standard to different industries.

16. **Are ancillary restraints covered by the authority’s clearance decision?**

The agencies take into account noncompete agreements and similar ancillary restraints in the course of their review of a transaction, and require the parties to submit copies of any noncompetition agreements with their HSR filings. The effects of such agreements are factored into the agencies’ review of the competitive effects of the transaction.

17. **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

The HSR Act does not impose a deadline for notification of a transaction. However, the parties may not close the notified transaction until the relevant HSR waiting period has expired or been early terminated.

18. **What is the earliest time or stage in the transaction at which a notification can be made?**

The US antitrust enforcement agencies will not review hypothetical transactions. The parties must have signed some form of an agreement prior to submitting their HSR filings. The signed agreement need not be the definitive agreement; a signed letter of intent will suffice. Each party must also include a sworn affidavit (or declaration under penalty of perjury) affirming that the party has the good-faith intent to complete the transaction that is the subject of the notification.

19. What is the basic timetable for the authority's review?

The HSR Act does not require an affirmative approval from the FTC or DOJ. It merely imposes notification and waiting period obligations on merging parties, allowing the agencies the opportunity to review a transaction for antitrust issues before it closes. If the agencies believe a transaction raises significant antitrust concerns, they must go to court to obtain an injunction to prevent a transaction from closing.

The FTC or DOJ will undertake a preliminary review of a transaction during the initial 30-calendar-day waiting period. For the vast majority of transactions, the 30-calendar-day waiting period expires with the FTC and DOJ taking no further action, and the transaction is permitted to close. If, at the end of the initial waiting period, one of the agencies believes the transaction warrants further investigation, the agency may issue a "Second Request" for information. Only one agency will issue a Second Request for any given transaction.

The Second Request extends the HSR waiting period until 30 calendar days following both parties' substantial compliance with the Second Request. A Second Request consists of a lengthy set of document requests and interrogatories, similar to civil discovery. The agencies may also notice depositions of company officials during the Second Request process. As a practical matter, substantial compliance with a Second Request frequently requires several weeks or months to complete, so the Second Request process can extend the timetable for antitrust review substantially. At the end of the second 30-calendar-day waiting period, the FTC or DOJ must decide whether to allow the transaction to close or seek to challenge it in court. If the agencies believe that a transaction presents competition issues that can be cured by divestitures, they may enter into negotiations with the transacting parties around agreed-upon divestitures to avoid litigation.

Frequently, the exact scope and timing of compliance with the Second Request, as well as the agency's timing in reaching a decision, are the subject of negotiations between the parties to the transaction and the agency. The end result is often an extension of the time for completion of the agency's review beyond the statutory 30-calendar-day period.

20. Under what circumstances the basic timetable may be extended, reset or frozen?

In addition to issuance of a Second Request, the initial 30-calendar-day waiting period also may be extended if the acquiring person elects to "pull and refile" its HSR filing. At the end of the initial 30-calendar-day period, the acquiring person withdraws its filing, and submits an updated filing within two business days (the acquired person is not required to withdraw). The acquiring person does not need to pay an additional filing fee, but this process extends the waiting period for an additional 30 calendar days. The parties may only take advantage of the pull-and-refile process once. Occasionally, during the course of its investigation, the reviewing agency may discover that one of the transacting parties failed to submit all responsive documents with its HSR filing. In such circumstances, the agency may require the party to refile its HSR filing with all responsive documents, and restart the 30-calendar-day waiting period.

21. Are there any circumstances in which the review timetable can be shortened?

The parties to a reportable transaction can request the FTC and DOJ to grant "early termination" of the HSR waiting period. Requesting early termination simply consists of checking a box on the HSR form. The likelihood that a particular transaction may receive early termination depends largely on the competitive merits of the transaction. A transaction that clearly presents no competitive concerns is more likely to receive early termination than a transaction that requires a more in-depth review. However, the agencies are never required to grant early termination, and even a transaction that is competitively benign may not receive early termination. There is no set time period for when early termination is granted. Although two weeks is common, early termination may be granted sooner, or later, or not at all.

22. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

Each party to a reportable transaction is required to submit its own HSR filing. Although each party's filing is unique, the parties frequently coordinate on some portions, such as the description of the transaction.

23. What information is required in the filing form?

The HSR Act requires each party to submit a Notification and Report Form (Form). The Form is relatively straightforward, and requires a short transaction description along with basic information from the parties. Unlike some other jurisdictions, the parties are not required to provide an affirmative statement on the markets involved and the impact of the transaction on those markets.

Items 1-3 require basic information about the transaction that both parties will need to provide, including contact information, value of the transaction, and description of the transaction. Item 4 has several subparts requiring (a) SEC registration numbers; (b) annual reports or annual financial statements; and (c)-(d) the production of internal documents as attachments to the Form (described further below). Item 5 requires the reporting of revenues from the last completed fiscal year, allocated according to the industry in which the revenues were derived as provided by the North American Industry Classification System. Item 6 requires filing persons to report: (a) certain subsidiaries with sales in or into the United States; (b) greater than 5% shareholders of the filing person and acquiring or acquired entity, if applicable; and (c) certain minority shareholdings in entities that may compete with the target. Item 7 requires basic information on possible overlapping Item 5 revenues. Item 8 requires the acquiring person to disclose certain prior acquisitions within the same industry as the present target.

24. Which supporting documents, if any, must be filed with the authority?

In addition to a copy of the transaction agreement, any noncompetition agreements, and annual financial statements, the HSR Act requires parties to produce the following deal-related documents if they were prepared by or for an officer or director of one of the parties: (1) confidential information memorandum; (2) synergy or efficiency studies; and (3) any document that analyses the proposed transaction with respect to markets, competition, competitors, market share, potential for sales growth, or expansion into product or geographic markets. The parties may also need to produce documents addressing these topics that were prepared by advisors such as consultants or investment bankers. If the documents are in a foreign language, they need not be translated into English. However, if an English translation exists, it must be produced along with the foreign language version.

The Form includes two signature pages. One is an affidavit in which the filing party attests that an agreement has been executed relating to the transaction described in the Form, and that the party has the good-faith intent to complete the transaction. The second is a certification page in which the party certifies that the Form is complete and accurate. Both signature pages must either be notarized or signed under penalty of perjury.

25. **Is there a filing fee? If so, please specify the amount in local currency.**

The HSR Act has a single filing fee. Payment of the fee is the obligation of the acquiring person, unless the parties agree between themselves to shift or split the fee. The amount of the fee varies with the size of the transaction, as follows:

Size of Transaction	Filing Fee Amount
Greater than US\$78.2 million, but less than US\$156.3 million	US\$45,000
US\$156.3 million or greater, but less than US\$781.5 million	US\$125,000
US\$781.5 million or greater	US\$280,000

26. **Is there a public announcement that a notification has been filed?**

Generally, the fact that the parties to a transaction have submitted filings under the HSR Act is not made public. The one exception to this rule is if the agencies grant early termination of the HSR waiting period. In that case, the identity of the parties and the date of the grant of early termination are published in the Federal Register and on the FTC’s web site. Publication typically occurs within a day or two of the grant of early termination. Even where early termination is granted, however, the contents of the filings and the supporting documentation will remain confidential.

27. **Does the authority seek or invite the views of third parties?**

The DOJ and FTC frequently solicit input from a variety of market participants during the course of a merger investigation. The most valuable third-party input typically comes from customers of the transacting parties, but the agencies will obtain the views of others in the market as well, such as competitors or trade associations. The agencies may also subpoena documents and data from third parties, as well as conduct interviews or depositions of knowledgeable individuals. The agencies typically do not engage in third-party outreach during the very preliminary stages of a review, but if they believe a transaction warrants a more thorough evaluation, they may engage with third parties during the initial 30-day waiting period, as well as during the Second Request.

28. **What information may be published by the authority or made available to third parties?**

Information submitted to the FTC and DOJ in connection with the HSR process is confidential and exempt from the Freedom of Information Act. The agencies may not disclose the parties’ filings, supporting documents, or other data and documents provided to the agencies, except in very limited circumstances. If the 30-day waiting period expires with no action taken by the agencies, the fact of the filing will remain confidential as well. If the agencies grant early termination of the HSR waiting period, the identity of the parties and the date of the early termination grant will be published in the Federal Register and on the FTC’s web site, typically within a day or two of the early termination grant. However, the filings themselves and all supporting documentation will remain confidential.

29. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

The agencies will cooperate with authorities in other jurisdictions in investigations of multi-national transactions. The FTC and DOJ have entered into numerous cooperation agreements with other jurisdictions, including Canada, Mexico, the EU, China, Japan, and others. However, the confidentiality protections of the HSR Act mean that the agencies may not share information with other authorities without a waiver of confidentiality protections by the parties to the transaction.

30. **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

Historically, the FTC and DOJ have a strong preference for structural remedies (divestitures) as opposed to conduct remedies that would require ongoing oversight. More recently, however, the agencies have obtained conduct relief as well as structural relief.

For structural remedies, the agencies require that the divestiture be sufficient to remedy the identified competitive concern. The agencies require a binding commitment by the parties to divest the assets, and have a preference for an upfront buyer. In some circumstances the agencies may permit the parties to close their transaction subject to a commitment to find a buyer at a later date, but typically will require the ability to appoint a trustee to sell the divested assets if a sale is not completed in a timely way. In either event, the agencies require that a divestiture buyer be approved to ensure that the buyer is financially stable, will compete going forward, and that the divestiture will restore the competition lost through the transaction.

31. **What procedure applies in the event that remedies are required in order to secure clearance?**

Remedy discussions generally happen during the course of a Second Request. Ideally, the parties to the transaction and the agency staff will have an ongoing dialogue about the status of the investigation, the competitive concerns raised by the agency, and whether a divestiture would be sufficient to address those concerns. There is no “deadline” for the parties to offer a remedy, but if the agency believes a transaction is anticompetitive and the parties are unwilling or unable to offer a divestiture, the alternative will be an injunction proceeding in federal court. Any proposed divestiture will be carefully evaluated by the agency to ensure it would be sufficient to remedy the competition concerns raised by the transaction. Even if the parties to a transaction with competitive issues offer a remedy at the very beginning of the HSR process, the likelihood of a Second Request is very high to allow the reviewing agency time to develop the scope of the competitive issues presented by the transaction, and to evaluate the proposed divestiture and whether it will address the agency’s concerns.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

As the agency tasked with administering the HSR program, the FTC typically takes the lead on enforcement matters for failing to make a required HSR filing. The FTC can impose civil penalties of up to US\$40,000 per day for every day a transaction is closed without the parties having complied with their HSR Act filing obligations. Although the penalties technically apply to both parties, historically the FTC has obtained civil penalties only from acquiring parties. The FTC has a “one free bite” policy, under which it may elect not to seek civil penalties from a party for its first failure to file, if the failure was inadvertent. However, the FTC will typically seek civil penalties for any subsequent failure to file by that party, even if the failure is inadvertent.

The agencies also frequently seek civil penalties for “gun-jumping,” or prematurely transferring beneficial ownership of the acquired company or assets prior to the expiration of the HSR waiting period. The HSR Act requires that the parties to the transaction remain separate and independent until after expiration of the HSR waiting period. The agencies have obtained gun-jumping settlements for conduct during the waiting period that is inconsistent with the parties’ independent status, such as the acquiring person approving pricing decisions for the seller, or involving itself in the negotiation of the seller’s ordinary-course contracts.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?

Filings under the HSR Act must be complete and accurate and are submitted under penalty of perjury. The agencies have obtained substantial civil penalty settlements from filing parties that failed to produce all required documents with their HSR filings, and have also obtained settlements from individuals for certifying incomplete HSR forms.

34. Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?

The US enforcement agencies do not have affirmative “approval” authority over transactions. If the FTC or DOJ believes that a proposed transaction presents competitive concerns, they must go to federal district court to obtain an injunction prohibiting the transaction from closing. The FTC may also commence administrative litigation before an administrative law judge to halt the transaction. In either case, the losing party at the district court level may appeal the decision to a US Court of Appeals.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

Both the FTC and DOJ have taken an increasingly aggressive approach to merger enforcement in recent years. Healthcare has been a focus for both agencies, with the FTC challenging several recent hospital mergers, and the DOJ challenging two large health plan mergers. The agencies also seem to be increasingly sceptical of the sufficiency of divestiture relief to remedy perceived competitive problems, preferring to block problematic mergers in their entirety.

36. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

There are no announced reforms to either the HSR Act or substantive merger review standards on the horizon. The future direction of merger enforcement may turn to some degree on the outcome of the upcoming presidential election. A victory by Secretary Clinton would likely mean a continuation of the agencies' current relatively aggressive approach to merger enforcement. A win by Mr. Trump might signal a slightly less aggressive posture. Regardless, any changes are likely to be at the margins, impacting relatively few enforcement decisions. The vast majority of transactions would be unaffected by the results of the election.