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Minimizing Antitrust Risks in Non-Reportable Acquisitions

Lessons Learned from Agency Challenges of Consummated Deals

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Voluntary HSR Filings: A Modest Proposal

BY ROBERT B. BELL

ACQUISITIONS THAT BOTH FALL below the Hart-Scott-Rodino Act's size thresholds and raise significant antitrust issues create particularly thorny problems for antitrust lawyers, as well as for buyers and sellers. These transactions have become more numerous since the basic size-of-transaction threshold was raised in 2001 from $15 million to $50 million. This article explores some of the problems these transactions present, and proposes a solution—voluntary pre-merger filings—that would improve antitrust enforcement and reduce risks to acquiring parties that discourage transactions from taking place.

When statutory size tests are met, the HSR Act requires the parties to proposed acquisitions of assets or voting securities to report the transaction to the Federal Trade Commission and the Department of Justice prior to consummation. The parties must then observe a thirty-day waiting period[1] (fifteen days in the case of a cash tender offer or a bankruptcy sale)[2] before they may consummate the transaction.[3]

The legislative history of the HSR Act makes clear that its purpose is to provide the antitrust agencies with the opportunity to review and, if appropriate, challenge, mergers and acquisitions prior to consummation.[4] This avoids the problem of "unscrambling the eggs"—constructing effective post-acquisition relief. It also gives the agencies the opportunity to prevent consumer harm by challenging transactions before the anticipated harm occurs.

An acquisition is not reportable if it does not satisfy the HSR size-of-transaction test,[5] if the size-of-parties test is not met,[6] or if it is exempted by the statute or the rules.

Developing Information About a Non-Reportable Transaction

Developing information about a non-reportable transaction is more difficult than developing information about a larger, reportable transaction. The antitrust agencies have repeatedly emphasized that their analysis of a proposed acquisition is based on a careful review of market facts.[7] Therefore, an antitrust lawyer attempting to advise a client about the antitrust risk presented by a transaction that does not require a filing would begin by attempting to gather as much information as possible about the merging firms, their competitors, the products they sell, and the markets for those products.

Information about how the agencies have previously analyzed acquisitions in the same market is particularly helpful. Court decisions, government pleadings, competitive impact statements filed in connection with consent decrees, and closing statements that the agencies occasionally issue when they decide not to challenge a transaction are invaluable. However, it is rare to find these documents when the market is small.

A second good source of information is SEC filings. They include audited financial statements and sometimes contain helpful descriptions of the issuers' products, competitors, and general strategy. But small companies are unlikely to be public companies that make SEC filings, and analysts are less likely to issue reports on small companies. Another commonly used source of information is trade association data, but participants in small markets are unlikely to be represented by a trade association.

This leaves an antitrust lawyer analyzing a transaction that falls under the reporting threshold with three main sources of information: the client's documents, the client's employees, and competitors' Web sites. Small companies often do not create many of the most helpful types of documents, such as detailed market analyses and long-term strategic plans. While even a small company's sales and marketing team is likely to be very knowledgeable about the company's products and customers, it may know relatively little about its competitors and the competitors' plans, and very little about foreign companies that might expand their sales into the United States. And while there may be helpful information on competitors' Web sites, it is highly likely that for a non-reportable transaction, a great deal of information an antitrust lawyer would like to have in order to advise a client will simply be unavailable.

Needless to say, the buyer still wants to know what antitrust risk it would be assuming if it goes forward with a non-reportable transaction. Ironically, when it is a close call whether the agencies will challenge a transaction, the parties and their antitrust counselors have less information and greater uncertainty—and are therefore worse off—when the value of the transaction is low.

Challenges to Consummated Transactions

The agencies aggressively look for and challenge consummated transactions that are not reportable. If the transaction is not reportable, an obvious first question is how the antitrust agencies will even know the transaction has taken place. In 2001, shortly after the Hart-Scott-Rodino Act was amended to increase the size-of-transaction test from $15 million to $50 million, then-FTC Chairman Timothy Muris directed the FTC staff "to increase our efforts in reviewing the business press and other sources to identify potentially problematic transactions" that fall below the new filing threshold.[8]

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Commissioner J. Thomas Rosch recently suggested that "[r]eview of consummated mergers could also be stepped up with freed up resources resulting from a decline in HSR filings."[9]

In addition to monitoring the trade press and newspapers,[10] the agencies investigate complaints they receive from customers and competitors. Moreover, they may learn about a transaction in the course of investigating a different transaction. While there is a chance that the agencies will not learn about a non-reportable transaction that raises significant antitrust issues, that is a dangerous assumption, especially because there is no statute of limitations for government challenges to mergers.[11]

If one or both agencies learn about a small transaction, an obvious question is whether they will care about it. After all, the agencies have larger, more important transactions to pursue. The answer is a resounding yes: Not only have the agencies said they will challenge consummated non-reportable mergers, but they have done so at least twelve times since 2001, as shown in Table 1.[12] As the Acting Director of the FTC's Bureau of Competition said, "[C]onsummation of a merger will not in any way slow or deter us from challenging acquisitions that raise serious antitrust issues."[13] Indeed, in one recent challenge, the FTC is seeking a particularly aggressive remedy'—both divestiture of the acquired business and disgorgement of "ill-gotten gains" allegedly resulting from anticompetitive post-merger price increases.[14] And where the agencies have learned about non-reportable transactions before they were consummated, they have taken preemptive action, forcing the parties to abandon their transactions[15] or agree to remedies in advance of closing.[16]

The FTC's challenge to Polypore International Inc.'s acquisition of Microporous Products L.P., both of which manufacture battery separators, is a good illustration of the enforcement timeline when an agency begins its investigation shortly after the transaction closes. This transaction, which fell below the HSR size-of-transaction threshold, was consummated in February 2008, and the FTC began an investigation in March 2008. The Commission filed suit in September 2008, seeking the prohibition of any further integration activities between the two companies, a divestiture, and the rescission of any contracts Polypore entered into after the acquisition.[17]

Polypore contends that the relevant battery separator market is a highly competitive worldwide market,[18] while the Commission contends that Polypore accounts for more than half of the world's sales of high performance polyethylene battery separators to the flooded lead acid battery industry[19] and that North American battery manufacturers do not import separators from abroad.[20] The trial before an Administrative Law Judge is set to begin on April 14, 2009.[21]

The Stakes Are Higher in Non-Reportable Transactions

Both the difficulty of sharing risk and the size of risk are greater in non-reportable transactions. In a reportable transaction that raises antitrust issues, the parties often negotiate a termination provision in the purchase agreement. These can take many forms, but a common one allows the buyer to walk away if the parties have not closed the transaction by a drop dead date.[22] Another variation requires the parties to respond to a second request[23] if one is issued, but allows the buyer to abandon the transaction if the agencies state their intention to file suit to block the transaction. These and other variations allow the buyer and seller to share the antitrust risk in reportable transactions where the HSR Act establishes clear mileposts.

In contrast, in a non-reportable transaction it is more difficult to draft risk-sharing provisions. For example, a buyer in a non-reportable transaction may want a contractual provision stating that it is not required to close if there is a pending antitrust investigation. A seller might agree that the buyer is not required to close if an agency has opened a formal investigation, i.e., issued a Civil Investigative Demand or a subpoena, but the buyer will likely want a provision that covers informal investigations as well, since the agencies typically conduct informal investigations before they issue compulsory process. Defining what constitutes an informal investigation can be problematic, as it could range from *any* inquiry from an agency to a request for voluntary production of information about the transaction and the affected market(s). Defining when an informal investigation ends can be equally problematic.

After negotiating a purchase agreement, the parties to a reportable acquisition file HSR notification. The agency to which the transaction is cleared has thirty days from the filing date to issue a second request.[24] Once both parties substantially comply with the second request, the agency has thirty days to file suit to block the transaction.[25] In the situation where the government decides to file suit to challenge a transaction and the buyer is able to abandon the transaction, the cost to the buyer of abandoning the transaction is (1) the transaction costs unrelated to antitrust, including the cost of retaining banking and tax advisors, performing due diligence, and negotiating the purchase agreement; (2) the Hart-Scott-Rodino filing fee;[26] and (3) the cost of complying with the second request.

Contrast that with a non-reportable transaction where the parties negotiate the purchase agreement and close the transaction without informing the government. If one of the

antitrust agencies decides to investigate, it will open an investigation and issue one or more civil investigative demands. There is no statutory deadline for such an investigation, so it can go on much longer and cost more to respond to than a second request.[27] If the agency decides to file suit to force divestiture, the buyer's choices are limited. Where the acquisition is small enough to be non-reportable, it is rare that a partial divestiture will cure the competitive problems. Indeed, as Table 1 demonstrates, it is common for the relief to be divestiture of all of the acquired assets. This often leaves the buyer with only two choices, neither of which is very appealing: sell all of the assets that were acquired, or litigate against the government. A forced sale may be at a much lower price than the buyer's purchase price, and litigating a Section 7 case against the government is a very expensive proposition, even if the transaction is small and the relevant market narrow. *Polypore* illustrates that point well. The buyer was subject to a six-month long investigation, followed by seven months of discovery and pre-trial proceedings, and is facing an administrative trial and post-trial proceedings that likely will last several months and could result in an appeal to the Commission and, ultimately, an appeal to a federal court of appeals. In contrast to reportable transactions, where the parties often negotiate provisions that apportion the antitrust risk, in a non-reportable transaction all of the antitrust risk typically falls on the buyer.

Where the government challenges a consummated, non-reportable transaction, the buyer bears the following costs: (1) the transactional costs unrelated to antitrust, including the cost of retaining banking and tax advisors, performing due diligence, and negotiating the purchase agreement (similar to the cost where the transaction is reportable); (2) the cost of complying with the civil investigative demand(s) (at least as great as the cost of complying with the second request and likely greater); and (3) the cost of litigating against the government or selling the acquired assets at a "fire sale" price (not present in the reportable transaction). Thus, not only does the buyer bear all of this risk, but all other things being equal, the downside risk is substantially greater in a non-reportable transaction than it is in a reportable transaction where the buyer can abandon the transaction. As a result, buyers are likely to be deterred from entering into some non-reportable transactions that they would enter into if the risks were lower, e.g., if the transaction were reportable.

Self Reporting

Currently there are no good alternatives to closing a non-reportable transaction and waiting to see if one of the agencies opens an investigation. There are potentially two ways for the parties to learn before closing a non-reportable transaction whether the government intends to challenge it. The first possibility is to file HSR notification. However, if the transaction does not satisfy the Act's size tests, the Premerger Notification Office will reject the filings. It takes the position that the size tests are jurisdictional and that it cannot accept a filing for a transaction that falls below the Act's size tests.

A second option is to accept the agencies' invitation to inform them about the transaction before closing. One downside to doing so is that it is tantamount to waving a red flag—one would not bother to notify the agencies about a non-reportable transaction unless the transaction presented an antitrust issue. The other downside is delay. If the parties tell the agencies about a non-reportable transaction, the likely response is a request for an agreement that the parties will not close until the staff concludes its investigation. Indeed,

Table 1: Post-Consummation Challenges, 2001–2008*

Parties/Deal	Challenged
MSC Software Corp.'s acquisitions of Universal Analytics, Inc. and Structural Analysis & Research Corp.	2001/10/10
Chicago Bridge & Iron Company acquisition of Pitt-Des Moines, Inc. (reported under HSR)	2001/10/25
Airgas, Inc. ac quisition of Puritan Bennett Medical Gas Business from Mallinckrodt (reported under HSR)	2001/10/26
The Hearst Trust, The Hearst Corporation acquisition of Medi-Span, Inc. (reported under HSR)	2001/11/20
Dairy Farmers of America acquisition of Southern Belle Dairy Co. LLC	2003/4/24
Aspen Technology, Inc. acquisition of Hyprotech	2003/8/6
Evanston Northwestern Healthcare Corp. acquisition of Highland Park Hospital (reported under HSR)	2004/2/10
Hologic, Inc. acquisition of Fischer Imaging Corp.	2006/7/7
Dan L. Duncan acquisition from Duke Energy Field Services of TEPPCO, LLC and limited partnership units of TEPPCO Partners, L.P.	2006/8/18
Amsted Industries acquisition of FM Industries	2007/4/18
Daily Gazette Company (Charleston Gazette) acquisition of Charleston Daily Mail from MediaNews	2007/5/22
TALX Corp. acquisition of six competitors	2008/4/28
Polypore International, Inc./Microporous Holding Corp.	2008/9/10
Ovation Pharmaceuticals, Inc. acquisition from Abbott of NeoPfren drug assets	2008/12/16
Microsemi Corporation acquisition of assets from Semicoa Inc.	2008/12/18
Inverness Medical Innovations, Inc. acquisition of assets from ACON	2008/12/23

** An expanded version of this table, containing the reason for challenge and the relief, is available on* The Antitrust Source *at www.antitrustsource.com.*

the agencies sometimes threaten to seek a temporary restraining order or hold separate order unless the parties agree to enter into a timing agreement.[28] While this may sound like the procedure under the HSR Act, there is a significant difference. The HSR Act has statutory deadlines: the agency has thirty days to decide whether to issue a second request[29] and thirty days from the date of compliance with a second request to file suit.[30] In contrast, there are no deadlines for an investigation of a transaction not subject to the HSR Act, so the closing could be significantly delayed.

Voluntary HSR Filings

The Federal Trade Commission is granted broad power under the HSR Act to "prescribe such other rules as may be necessary and appropriate to carry out the purposes" of the Act.[31] It should use that authority to promulgate rules enabling parties to make voluntary HSR filings. When a transaction does not meet the Act's size tests, the Commission should charge the same $45,000 filing fee that the Act requires for transactions with a value between $50 million (as adjusted) and $100 million (as adjusted). Once voluntary filings are made by both parties to a transaction that does not require notification, the same rules and procedures that apply to mandatory filings should apply.

However, voluntary filings should be just that—voluntary. In a tender offer or other purchase where voting securities are acquired from a person other than the issuer ("801.30 transactions"), the rules create a procedure where the acquiring person must notify the issuer whose voting securities are to be acquired of the details of the transaction,[32] the waiting period begins when the acquiring person files notification,[33] and the acquired person must file within fifteen days (ten days in the case of a cash tender offer) of receiving the acquiring person's notification.[34] In 801.30 transactions that fall below the filing threshold, the target should be notified that it *may* file HSR notification but is not required to do so.

The principal objection to voluntary HSR filings is that they will attract special attention from the staff because parties will file voluntarily only if their transaction raises a serious antitrust issue. However, many parties are likely to file notifications for transactions that do not raise serious antitrust issues. Although the agencies can always challenge a transaction after HSR notification has been filed and the waiting period(s) observed, a grant of early termination or expiration of the HSR waiting period is justifiably perceived as providing a high degree of comfort because post-closing challenges to reported transactions are exceedingly rare. There were 11,695 HSR filings from the beginning of fiscal year 2001 through the end of fiscal year 2007,[35] but only four post-closing challenges to transactions that had been notified under the HSR.[36] In at least two of these cases the agencies clearly were not guilty of approving a transaction and then changing their minds: in one case the FTC blamed the failure to catch the transaction on the parties' failure to file crucial 4(c) documents,[37] and in another the parties closed during the FTC's investigation of the transaction, choosing to accept the risk that the FTC would issue a Complaint.[38] And in at least one case there were significant post-closing price increases that contributed to the decision to file a Complaint.[39]

Corporate lawyers are risk averse, and they are likely to make voluntary filings where doing so gives them greater comfort by reducing the likelihood of future adverse government action. Perhaps the closest analogy is the voluntary reporting regime established in 1988 by the Exon-Florio Amendment to the Defense Production Act of 1950. It authorizes the President to prohibit "any merger, acquisition or takeover" of a U.S. company by a foreign entity if "there is credible evidence that the foreign entity exercising control might take action that threatens national security."[40] Parties can voluntarily file notification with the Committee on Foreign Investments (CFIUS), which has thirty days to decide whether to undertake an investigation. Providing voluntary notice immunizes a transaction from subsequent action under Exon-Florio, while failure to notify an acquisition makes it vulnerable to Presidential action indefinitely.

Following passage of Exon-Florio, it became widespread practice to file voluntary notification for any acquisition by a foreign entity, no matter how remote the possible concern over national security. Indeed, the Committee on Foreign Investment has had to implore parties not to file notification for transactions that bore no relationship to national security.[41]

To be sure, there are differences between the voluntary procedure under Exon-Florio and the voluntary HSR filings proposed here. Exon-Florio filings are free; voluntary HSR filings would require a $45,000 filing fee. A voluntary Exon-Florio filing absolutely immunizes a party from any risk of adverse action after the waiting period has expired; a voluntary HSR would not create an absolute immunity, although as a practical matter it would significantly reduce exposure to a post-closing challenge. Nevertheless, it seems likely that allowing voluntary HSR filings would neither result in so many more filings that the agencies would be swamped, nor so few filings that voluntary filings automatically would be singled out for more stringent review than mandatory filings.

Pareto Improvement

In economics, a change that makes at least one party better off without making anyone worse off is called a Pareto improvement. Allowing voluntary HSR filings would make the enforcement agencies, consumers, buyers, and sellers better off without making anyone worse off. Voluntary HSR filings would enable the agencies to conduct antitrust investigations before transactions close and assets are shut down or integrated into the buyer's business in ways that make effective divestiture difficult if not impossible. It would also enable the agencies to investigate and file suit to block anticompetitive transactions before consumers suffer any harm from them. This would be a clear benefit to antitrust enforcement, and should be welcomed by the agencies. They should

also welcome the additional revenue that voluntary filings would create for them.

The current system acts as a tax on non-reportable transactions that raise antitrust issues, which is to say that it discourages transactions. By lowering transaction costs and enabling buyers and sellers better to share antitrust risk, voluntary filings would make both buyers and sellers better off by facilitating more transactions. ■

[1] 16 C.F.R. § 803.10(b).

[2] *Id.*

[3] The thirty-day waiting period may be shortened by a grant of early termination, 15 U.S.C. § 18a(b)(2), or lengthened by the issuance of a request for additional information, 15 U.S.C. §18a(e)

[4] *See, e.g.*, S. Rep. No. 803, 94th Cong., 2d Sess. 215 (1976), H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), HSR Act Statement of Basis and Purpose, 43 Fed. Reg. 33,450, 33,450 (July 31, 1978) ("The amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions, but instead provides the enforcement agencies with advance notice of, and information about, certain transactions, and with an opportunity to seek a preliminary injunction in Federal district court to prevent consummation of any such transactions which may, if consummated, violate the antitrust laws.").

[5] The HSR size-of-transaction test, 15 U.S.C. § 18a(a)(2)(B)(i), was increased to $50 million in 2001, and is adjusted annually for inflation (currently $65.2 million). Federal Trade Commission, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, http://www.ftc.gov/os/2008/01/P859910sec7a.pdf.

[6] The size-of-parties test, 15 U.S.C. § 18a(a)(2)(B)(ii), is not satisfied if no party has annual net sales or total assets of more than $100 million adjusted for inflation (currently $130.3 million). An exception to this rule is that all transactions with a value of more than $200 million adjusted for inflation (currently $260.7 million) require notification regardless of the size of the parties. 15 U.S.C. § 18a(a)(2)(A).

[7] Thomas O. Barnett, Assistant Att'y Gen., Antitrust Division, U.S. Dept. of Justice, Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives, Lewis Bernstein Memorial Lecture (June 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/234537.htm) ("Any useful assessment of merger decisions must begin with a careful analysis of facts in specific cases."); Joseph J. Simons, Director, Bureau of Competition, Fed. Trade Comm'n, Merger Enforcement at the FTC, Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (Oct. 24, 2002), *available at* http://www.ftc.gov/speeches/other/021024mergeenforcement.shtm ("[I]t is important to bear in mind, as the Commission noted [in its analysis of its decision not to challenge the non-reportable proposed alliance between Royal Caribbean and Princess cruise lines], that each merger involves highly individualized facts, and each investigation will turn on those specific facts."); Mary L. Azcuenaga, Commissioner, Fed. Trade Comm'n, FTC Enforcement Under Section 7 of the Clayton Act, Remarks Before the Practicing Law Institute (Mar. 9, 1994), *available at* http://www.ftc.gov/speeches/azcuenaga/pli94.shtm ("Section 7 cases are complex and difficult, and each case depends on its particular facts. The scope and depth of the factual inquiry in a merger investigation is quite extensive.").

[8] Timothy J. Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word, Continuity, Remarks Before ABA Antitrust Section Annual Meeting (Aug. 7, 2001), *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm.

[9] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Implications of the Financial Meltdown for the FTC, NY Bar Association Annual Dinner (Jan. 29, 2009), *available at* http://www.ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf.

[10] Federal Trade Commission Bureau of Competition, Department of Justice Antitrust Division, Hart-Scott-Rodino Annual Report Fiscal Year 2007 at 7 ("The agencies monitor compliance through a variety of methods, including the review of newspapers and industry publications for announcements of transactions. . . ."), *available at* http:www.ftc.gov/05/2008/11/hsrreportfy2007.pdf [hereinafter 2007 HSR Annual Report].

[11] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957) ("[T]he Government may proceed [under Section 7] at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961) (ordering divestiture of General Motors stock acquired between 1917 and 1919).

[12] Of the sixteen post-consummation challenges listed in Table 1, four were post-consummation challenges to reportable transactions: FTC v. Hearst Trust, Civ. No. 1:01-cv-734 (D.D.C. Dec. 14, 2001), *available at* http://www.ftc.gov/os/caselist/ca101cv00734ddc.shtm; Chicago Bridge & Iron Co. N.V., FTC Docket No. 9300, *available at* http://www.ftc.gov/os/caselist/d9300.shtm; Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, *available at* http://www.ftc.gov/os/adjpro/d9315/index.shtm; Airgas, Inc., FTC Docket No. C-4029, *available at* http://www.ftc.gov/os/caselist/c4029.shtm. *See also infra* note 35 and accompanying text. In addition, the FTC challenged Whole Foods acquisition of Wild Oats before consummation, and continued its litigation after the transaction was consummated.

[13] Press Release, Fed. Trade Comm'n, FTC Issues Administrative Challenge to Polypore International, Inc.'s Consummated Acquisition of Microporous Products L.P. and Other Anticompetitive Conduct (Sept. 10, 2008) (quoting David P. Wales, Acting Director of the FTC's Bureau of Competition), *available at* http://www.ftc.gov/opa/2008/09/polypore.shtm.

[14] FTC v. Ovation Pharms., Inc., Civ. No. 0:2008-cv-6379, Complaint ¶ 5 (D. Minn. Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf.

[15] For instance, in *Meade Instruments Corp./Tasco Holdings Inc.* (2002), the Commission authorized the staff to seek an injunction to stop the combination of the companies based on the transaction's anticompetitive effect in the market for telescopes, and the parties abandoned the transaction. *See* ABA Section of Antitrust Law, The Merger Review Process: A Step-By-Step Guide to Federal Merger Review 261 n.14 (3d ed. 2006) [hereinafter Merger Review Process]; *see also* http://www.ftc.gov/opa/2002/05/meadecelestron.shtm.

[16] In *3d Systems/DTM Corp.* (2001), for example, the parties entered a consent decree following DOJ's challenge. *See* Merger Review Process, *supra* note 15, at 261 n.13; *see also* http://www.usdoj.gov/atr/cases/indx303a.htm.

[17] Polypore Int'l, Inc., Complaint § XIV (Sept. 10, 2008), *available at* http://www.ftc.gov/os/adjpro/d9327/index.shtm.

[18] *See* Shannon Henson, *FTC Raises Red Flag on Finished Battery Deal*, Competition L. 360 (Sept. 11, 2008), http://competition.law360.com/articles/68956.

[19] Complaint ¶ 1, *supra* note 14.

[20] *Id.* ¶ 17.

[21] Polypore Int'l, Inc., Order on Motion to Reschedule Hearing Date (Oct. 7, 2008), *available at* http://www.ftc.gov/os/adjpro/d9327/index.shtm.

[22] Robert S. Schlossberg, *Negotiating The Transaction: Issues for the Antitrust Dealmaker*, Antitrust, Summer 2005, at 34, 38–39 ("The drop-dead date may mean that even though the parties have committed to litigate an agency merger challenge they will have the right to walk away either before litigation commences or sometime thereafter, if the litigation extends beyond that date.").

[23] Under the HSR Act the agencies are empowered to issue requests for "additional information and documentary material relevant to the proposed acquisition," 15 U.S.C. § 18a(e)(2), generally referred to as "second requests."

[24] 16 C.F.R. § 803.10(b).

[25] *Id.*

[26] *See* ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS, Instructions (specifying $45,000 filing fee for transactions above $50 million but less than $100 million (as adjusted)), *available at* http://www.ftc.gov/bc/hsr/hsrform.shtm.

[37] MERGER REVIEW PROCESS, *supra* note 15, at 264 ("Postconsummation review is typically more lengthy because the agency feels less time pressure to complete its review before a planned closing date.").

[28] *See id.* at 262 n.16.

[29] 16 C.F.R. § 803.10(b).

[30] *Id.*

[31] 15 U.S.C. § 18a(d)(2)(C).

[32] 16 C.F.R. § 803.5(a)(1).

[33] 16 C.F.R. § 801.30(b)(1).

[34] 16 C.F.R. § 801.30(b)(2).

[35] The number of HSR filings is provided in the agencies' most recent Annual Report. *See* 2007 HSR ANNUAL REPORT, *supra* note 10, at 2.

[36] FTC v. Hearst Trust, Civ. No. 1:01-cv-734 (D.D.C. Dec. 14, 2001), *available at* http://www.ftc.gov/os/caselist/ca101cv00734ddc.shtm; Chicago Bridge & Iron Co. N.V., FTC Docket No. 9300, *available at* http://www.ftc.gov/os/caselist/d9300.shtm; Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, *available at* http://www.ftc.gov/os/adjpro/d9315/index.shtm; Airgas, Inc., FTC Docket No. C-4029, *available at* http://www.ftc.gov/os/caselist/c4029.shtm.

[37] FTC v. Hearst Trust, Complaint ¶¶ 16–18, *available at* http://www.ftc.gov/os/2001/04/hearstcmp.htm.

[38] MERGER REVIEW PROCESS, *supra* note 15, at 261 n.15 (discussing *Chicago Bridge & Iron Co. N.V.*).

[39] "The Federal Trade Commission today issued an antitrust complaint against a corporation . . . that acquired a nearby hospital and shortly thereafter imposed allegedly anticompetitive price increases." Press Release, Fed. Trade Comm'n, FTC Challenge, Hospital Merger that Allegedly Led to Anticompetitive Price Increases (Feb. 10, 2004), http://www.ftc.gov/opa/2004/02/enh.shtm. *See also* James Lowe, Leon Greenfield, and Jeffrey Ayer, *Review and Challenge of Unreported Deals*, COMPETITION L. 360, http://search.law360.com/print_article/82065 ("[P]ost-closing conduct can affect both the likelihood and the outcome of an investigation. . . . [S]ignificant price movements or service level changes may attract the attention of the agencies. . . .").

[40] 50 U.S.C. app. § 2170(d)(4).

[41] *E.g.*, Testimony of Assistant Secretary for International Affairs Clay Lowery, U.S. Dept. of the Treasury, Before the House Homeland Security Committee (May 24, 2006) ("Many transactions notified to the Committee do not raise national security issues."); J. Rosener & G. Dorris, *Uncle Sam Watches Nervously: Foreign Investment in U.S. Industries*, 15 J. CORP. ACCT. & FIN. 31, 35 (2004) ("of an estimated 1,500 notifications since [Exon-Florio's] inception, the President has blocked only one deal."); U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON NATIONAL SECURITY, VETERANS AFFAIRS, AND INTERNATIONAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES, DEFENSE TRADE: MITIGATING NATIONAL SECURITY CONCERNS UNDER EXON-FLORIO COULD BE IMPROVED 5–6 (of 320 transactions notified to the Committee between 1997 and 2001, 96 percent were cleared within thirty days, and only four resulted in investigations), *available at* http://www.gao.gov/new.items/d02736.pdf.