

More New Kids on the Block: State-of-the-Art M&A Clauses That You Need to Know

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Antitrust Timelines in the Current Environment

Overview:	<ul style="list-style-type: none">▪ Biden administration has ramped up an aggressive focus on antitrust and competition issues▪ FTC and DOJ have been suffering from resource constraints rendered particularly acute by a historic boom in the M&A markets▪ The factors above have yielded generally longer timelines applicable to getting deals through the antitrust clearance process
HSR Waiting Period:	<ul style="list-style-type: none">▪ 30 days for most transactions; 15 days in the case of cash tender offers and certain bankruptcies
Early Termination:	<ul style="list-style-type: none">▪ If FTC/DOJ will not issue Second Request (discussed below), agencies can let waiting period expire or grant early termination▪ Early termination has been suspended since February 4, 2021
Second Request:	<ul style="list-style-type: none">▪ FTC or DOJ can issue a "Second Request" if they seek additional time and information to evaluate competitive effects of a transaction▪ Comprehensive investigatory and documentary request issued to both acquiring and acquired persons▪ Generally extends waiting period until 30 days after substantial compliance by both parties with the second request (10 days for cash tender offers and certain bankruptcies)▪ Second request process was revised in September 2021 to be even more comprehensive and rigorous▪ Time periods for completing second request reviews have lengthened from around 6 months to 9-10 months or longer

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Antitrust Timelines in the Current Environment (cont'd)

- Pull-and-Refile:**
 - Tactic that parties may decide to use to avoid the issuance of a second request
 - Parties may determine to withdraw an HSR filing voluntarily prior to termination of waiting period and refile within two business days
 - Resets the original 30 day HSR waiting period
 - Allows additional time to negotiate a settlement with the agencies or to close an investigation
 - First pull-and-refile does not require payment of a new HSR filing fee but doing so more than once does require such a payment
- Other Factors:**
 - Pre-consummation "warning letter" can inject additional timing uncertainty
 - For cross-border transactions, antitrust timing requirements of other jurisdictions can significantly affect timelines, with some non-U.S. competition authorities also striking a decidedly more aggressive tone
 - Need to provide careful guidance to parties on gun-jumping and information exchange in view of lengthy antitrust process
 - Consider whether the acquisition agreement should address potential for new risks such as government shutdowns to cause further delay

In general, expect a longer process and set a longer outside date.

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Remedies – Overview

- "Hell-or-High Water" to "Anti-HoHW" are the extreme pro-seller and pro-buyer standards. Most deals wind up somewhere in the middle
- Three traditional forms of limited divestiture commitments:
 - Specified list of assets for divestiture
 - Financial metric threshold (revenue most common)
 - Materiality threshold

Practice Points

- Bespoke thresholds or materiality standards
- Target on the back?
- Making assets off-limits (e.g., all buyer assets, a specified list of assets)
- Limits to behavioral remedies?
- Including Burdensome Condition Qualifier in Closing Condition
- Treatment of synergies/integration
- "Material" as compared to what?
- Don't assume you can bury key points in the disclosure schedules!

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Remedies – Specified Assets

Specified Assets Example – JetBlue pending \$11B acquisition of Spirit

"Notwithstanding anything to the contrary in this Agreement, in connection with the receipt of any necessary license, permit, waiver, approval, authorization or order of a Governmental Entity (including under the HSR Act), neither Parent nor the Company (nor any of their respective Subsidiaries or Affiliates) shall be required to agree to [take Divestiture Action] if such action would or would reasonably be expected to result in a material adverse effect on Parent and its Subsidiaries (including the Company and its Subsidiaries) after giving effect to the transactions contemplated hereby, taken as a whole; provided, however, that (x) **Parent hereby agrees to take the Divestiture Action with respect to any of the assets set forth on Section 5.5(e)(x) of the Parent Disclosure Schedule [From Proxy: take actions w/rt any of Spirit's assets in airports in Boston, NYC and Florida],** (y) it is understood and agreed that subject to the other provisions of this Section 5.5, the identity of any additional Divestiture Actions shall be determined by Parent in its sole and absolute discretion and (z) in no event shall Parent be required to agree to or effect any Divestiture Action set forth on Section 5.5(e)(z) of the Parent Disclosure Schedule [From Proxy: take any action that in Parent's discretion would materially and adversely affect the anticipated benefits of the transaction]."

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Remedies – Financial Metric Threshold

Financial Metric Example (with specified asset carve-outs and behavioral remedy limits) – Lockheed Martin \$5B acquisition of Aerojet Rocketdyne (blocked on antitrust grounds)

"Neither Purchaser nor any of its Subsidiaries shall be required to dispose of or hold separate, or agree to dispose of or hold separate, license or restrict its ownership and operation of, all or any portion of the business or assets of the Acquired Companies or Purchaser and its Subsidiaries, except that Purchaser shall be required, if necessary to obtain regulatory approval from any Governmental Authority necessary for consummation of the Contemplated Transactions, **to divest, hold separate, license or otherwise dispose of businesses or assets of any of the Acquired Companies in connection with or after the Closing that, in the aggregate, generated less than \$280 million of sales in the Company's fiscal year 2020; provided that, in no event will Parent be obligated to divest any businesses or assets of the Acquired Companies (x) exclusively associated with one or more organizations listed in [the Disclosure Schedules] or (y) located or managed by or at any one or more of the facilities identified in [the Disclosure Schedules].**"

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