THINK AGAIN—ALLOCATING ANTITRUST RISK IN A CLIMATE OF PROTRACTED INVESTIGATIONS

By Brian Burke and John Fedele[1]

"Now the time has come. There are things to realize."
The Chambers Brothers (Time Has Come today)

I. INTRODUCTION

The potential for substantive antitrust scrutiny can complicate and substantially delay negotiations for any proposed merger or acquisition agreement. In today's climate of antitrust enforcement, protracted investigations can negate the effect of terms negotiated and agreed to by parties in pursuit of certain downside protection against the occurrence of unhappy consequences during the period after signing and before any closing. As a result, parties may want to consider a different approach to allocating antitrust risk.

To be sure, the interest in preventing undesirable post-signing occurrences is not limited to antitrust matters. Negotiating mutually agreeable provisions that govern both a buyer's and a seller's conduct between signing and closing in any proposed transaction has long presented challenges. Particular circumstances for given transactions drive each party's approach. Counsel for each side attempts to identify any potential pitfalls and proposes provisions to protect their respective client's interests. But the longer the period between signing and closing, the greater the opportunity for the agreed terms potentially to be inoperative to the detriment of one or both parties. In particular, enhanced and more aggressive antitrust enforcement in the United States and increasingly throughout the world is having this effect.

This article briefly addresses the concept of "antitrust risk" before highlighting a few recent and high-profile transactions that have been subjected to prolonged antitrust investigations by the U.S. Antitrust Agencies and discussing several factors that may contribute to the lengthening of U.S. antitrust investigations. Following that, it examines several provisions that parties traditionally have utilized to allocate antitrust risk, and considers whether different approaches to allocating antitrust risk may be warranted in light of today's protracted review periods.

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A. "Antitrust Risk"

At its essence, the term "antitrust risk" refers to the risk that one or more antitrust authorities around the world will condition their clearance decision[2] on receipt of some commitment from the buyer, usually a divestiture[3] of some sort, or will refuse to clear the proposed acquisition altogether on the basis of antitrust concerns. Notably, the nature and extent of this "risk" often is not readily apparent or easily agreed upon in advance and it is susceptible to misjudgment.[4] Even when the parties agree, however, on the amount and type of "antitrust risk" presented by a proposed transaction, their respective tolerance for assuming some or all of it is a complicated calculus requiring consideration of multiple, interrelated factors—*e.g.* how long will parties have to pursue clearance; how much effort the parties have to exert in responding to antitrust investigatory requests; what, if any, commitment will be required in relation to an antitrust authority's remedial demands.

The relative bargaining position of the parties can have a significant influence on the agreed terms addressing the allocation of any perceived antitrust risk presented by a proposed transaction. But, in the current enforcement environment, it seems that parties are more frequently encountering situations where their expectations regarding the anticipated level of antitrust scrutiny and the time table for closing the transaction are misaligned. This misalignment creates the opportunity for intervening events to alter the dynamics of the transaction and allow for the parties' interests in pursuing the transaction to diverge—encouraging, for example, the seller to consider alternative purchasers or the buyer to "run out the clock" on the transaction until its termination rights have ripened without either party breaching their obligations under the transaction agreement. Anecdotally, the increased activity by so-called "activist investors" in publicly traded companies to obtain influence over company management through board representation or otherwise also can have some effect on the structure and form of proposed transactions as well as the result of any antitrust review, depending upon the views of any activist investors.[5]

B. Recent Transactions

Calendar year 2015 saw a record-setting level of merger activity, surpassing $5 trillion for the first time ever.[6] And the U.S. Antitrust Agencies were very active in the area of merger enforcement—initiating several litigation challenges.[7] Bill Baer, former Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, put it this way in his March 2016 testimony before a U.S. Senate Subcommittee:

> The merger wave is back. Big time. Global merger and acquisition volume has reached historic levels in terms of number, size and complexity. In FY 2015, 67 proposed mergers were valued at more than $10 billion. That is more than double the annual volume in 2014. Last year 280 deals were worth more than $1 billion, nearly double the number from FY 2010.[8]

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2 Antitrust authorities may affirmatively "approve" or "authorize" notified transactions in certain jurisdictions. In the United States, notified transactions simply receive "clearance" to close but are not affirmatively authorized or approved as lawful.

3 The FTC and the Antitrust Division, as well as most other non-U.S. Antitrust Authorities—including the European Commission—prefer that any competitive concerns identified in investigations of proposed mergers be addressed through structural remedies, which include the divestiture of assets necessary for a divestiture buyer to replace the competition lost as a result of the transaction. *See, e.g.* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf and https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

4 *See, e.g.* http://www.nytimes.com/2015/04/25/business/media/comcast-time-warner-cable-deal.html?_r=0 (quoting Comcast officer as stating "[t]his is not that complicated a deal from an antitrust or a regulatory perspective" at the time of Comcast's proposed combination with Time Warner, which was abandoned in April 2015 due to antitrust and other regulatory scrutiny).

5 *See, e.g.* http://www.bloomberg.com/news/articles/2015-12-10/dow-chemical-dupont-a-merger-that-activist-investors-can-love (describing influence of activist investors on the structure of the proposed $120 billion combination of Dow Chemical and DuPont).

6 *See, e.g.* http://www.prnewswire.com/news-releases/dealogic-data-shows-2015-ma-volume-surpasses-5-trillion-300197391.html.

7 *See, e.g.* FTC Calendar Year 2015 Stats and Data (noting six filed merger cases) (available at https://www.ftc.gov/node/943403).

8 Statement of Bill Baer, Assistant Attorney General, Antitrust Division, before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of Committee on the Judiciary, at p. 6 (March 9, 2016) (available at https://www.judiciary.senate.gov/imo/media/doc/03-09-16%20Baer%20Testimony.pdf)

Going further, Baer testified that some recent strategic transactions amount to "merger overreach" that "never should have made it out of the boardroom."[9] Debbie Feinstein, the Director of the Federal Trade Commission's ("FTC") Bureau of Competition, recently expressed a similar view, stating: "There are deals that come to us that we're surprised to see, and we're surprised that people are surprised that we think that they are problematic."[10] Those views have been manifested through enforcement decisions, including litigated cases, and extended review periods conducted by both federal antitrust agencies. During the Obama administration, the U.S. Antitrust Agencies have reportedly blocked or prevented more than twice as many transaction as were similarly derailed during the first seven years of the George W. Bush administration—32 versus 10.[11] To illustrate, the table below lists some recent high-profile transactions that have received or are receiving close scrutiny from either the FTC or the Antitrust Division.

FTC		Antitrust Division	
Transaction	Announced/Status	Transaction	Announced/Status
Sysco/US Foods	December 2013 / abandoned June 2015	Applied Materials / Tokyo Electron	September 2013 / abandoned April 2015
Staples / Od Deal	February 2015 / court decision pending	Comcast/Time Warner	February 2014 / abandoned April 2015
Ball/Rexam	February 2015 / review pending	AB Electrolux/General Electric	September 2014 / abandoned December 2015
Anthem/Cigna	July 2015 / review pending	Halliburton/Baker Hughes	November 2014 / abandoned May 2016
Aetna/Humana	July 2015 / review pending	Charter/Time Warner	May 2015 / Settled April 2016

With respect to the "antitrust risk" shifting provisions and their relationship to the antitrust review timeline for the above transactions, the AB Electrolux/General Electric transaction bears particular attention. General Electric ("GE") exercised its right to terminate the proposed $3.3 billion sale of its appliance business to Electrolux at its earliest opportunity on December 7, 2015, just before the end of the trial in the Antitrust Division's attempt to block the transaction. After expending substantial resources to endure more than one year of antitrust review and rather than learn the trial's result, GE chose to invoke its right to the $175 million reverse break-up fee the agreement reportedly obligated Electrolux to pay to GE. [12] As a result, Electrolux not only incurred the obligation to pay the reverse break-up fee, but lost the opportunity to hear whether the

[9] *Id*. at 6.

[10] http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=789716&siteid=191&rdir=1

[11] http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=784461&siteid=191&rdir=1.

[12] http://www.wsj.com/articles/ge-terminates-sale-of-appliance-business-to-electrolux-1449474391.

parties' arguments in defense of the combination would succeed, potentially allowing the transaction to close. The Electrolux management expressed disappointment in GE's decision, [13] and its Chief Executive Officer resigned shortly thereafter.[14] Just over five weeks after terminating the agreement, GE announced an agreement to sell its appliance business to Haier Group for $5.4 billion, or $2.1 billion more than its proposed sale to Electrolux.[15]

The Electrolux/GE transaction is just one recent example of where the parties' respective interests in completing the transaction diverged at some point during the period after the agreement was signed. From reports, it seems that the protracted antitrust review was not expected—apparently due to reliance upon the Antitrust Division's decision to clear Whirlpool's 2006 acquisition of Maytag.[16]

The point is that the likely scope and duration of any antitrust review along with the intensity of the potential opposition to the transaction by competent antitrust authorities can be difficult to predict, particularly in the current, more aggressive enforcement environment.

II. CONTRIBUTING FACTORS

The precise reasons for extended substantive antitrust reviews by the U.S. Antitrust Agencies cannot be generalized. As is frequently the case in legal matters, the facts and circumstances involved in any particular transaction inform the duration of the antitrust review period. That being said, there are a few worthwhile observations to make regarding potential contributing factors.

At the outset, recall that President Obama pledged to "reinvigorate antitrust enforcement" during his 2008 campaign. While some may dispute whether he has fulfilled this promise, there unquestionably were some notable actions taken by the leadership at both the Antitrust Division and the FTC following Obama's 2008 election to strengthen their respective litigation capabilities. Both agencies invested heavily in litigation resources, bringing in highly experienced litigators from private practice to ensure they had the ability to win at trial.

A speech by Joseph Wayland, then Acting Assistant Attorney General for the Antitrust Division, delivered in 2012 entitled "Litigation in the Antitrust Division" captures this point well.[17] In that speech, Wayland highlighted how significantly the Division's approach to litigation had changed during his tenure—*e.g.* pointing out a change to the Division's case management system "to ensure that litigation issues are considered at a very early stage in both our merger and non-merger investigations"[18] and the importance of making "early strategy decisions during the investigative process to enable [the Division] to win cases."[19] Moreover, Wayland characterized the Division as becoming "more aggressive in using the parties[' evidence] to put on [the Division's] cases."[20] Wayland was the lead attorney in the Division's successful 2011 challenge of H&R Block's proposed acquisition of TaxACT—the first contested merger challenge victory for the Division in nearly a decade.

This is not to suggest that the additional litigation capabilities added by the Antitrust Division and the FTC have led the agencies to make questionable enforcement decisions. But when those capabilities are coupled with a procedure where litigation strategy is a required consideration "early" in the merger review

[13] *Id.*

[14] http://www.wsj.com/articles/electrolux-ceo-mcloughlin-quits-a-month-after-collapse-of-ge-deal-1452497627.

[15] http://www.wsj.com/articles/chinas-haier-to-buy-ge-appliance-business-for-5-4-billion-1452845661.

[16] http://www.law360.com/articles/674839/doj-sues-to-block-3-3b-electrolux-ge-unit-tie-up.

[17] https://www.justice.gov/atr/file/518906/download.

[18] *Id.*at 6.

[19] *Id.* at 7.

[20] *Id.* at 9.

process, a more adversarial posture may be perceived by the targets of the investigation, which can result in a longer and more deliberate review process.

Apart from the enhanced litigation capabilities, the nature and size of the transactions under review certainly can affect the length of the investigatory period. Larger/more complex deals can have numerous and varied product and/or geographic overlaps, which can take longer to investigate. When there are multiple larger transactions being reviewed, the resources of the U.S. Antitrust Agencies can become stressed to the point where attention may have to be prioritized. Potentially, work on the smaller or more recently notified transactions would be slowed, which would prolong the overall investigatory process for such transactions.

Similarly, multinational transactions can raise potential competitive concerns in the United States as well as other jurisdictions. Today's climate of greater coordination between antitrust enforcers across jurisdictions not only during the investigation but also possibly upon fashioning an appropriate remedy[21] certainly can extend the antitrust review period beyond what might otherwise occur.

The investigatory procedure also can contribute to a prolonged review process. The Hart-Scott-Rodino Act[22] ("HSR Act") established the framework under which proposed transactions are to be reviewed by the FTC and the Antitrust Division. That statutory framework provides that if the agencies believe that a notified transaction warrants additional scrutiny after conclusion of the initial review period—typically 30 days—then the reviewing agency can issue a request for additional information and documents (a so-called "Second Request"). The issuance of a Second Request extends the statutory review period until 30 (or 10, if the acquisition is out of bankruptcy or structured as an all-cash tender offer) days after both parties have substantially complied with the Second Request.

The ordinary practice at the U.S. Antitrust Agencies, however, is to approach the parties soon after issuing a Second Request to discuss a "timing agreement."[23] Timing agreements can include a number of different provisions from one transaction to the next, but a critical component is that they remove the transaction from the timing framework provided under the HSR Act.[24] Stated differently, parties consent to an extended post-Second Request compliance review period in any "timing agreement." Of course, the parties do not have to enter into any "timing agreement" but the refusal to enter into a timing agreement can create a more adversarial relationship with agency staff—*i.e.* they may take a more rigid approach on certain investigatory issues (*e.g.* requests to narrow the scope of the Second Request) than they would otherwise in an effort to prevent the parties from more quickly complying with the Second Request. In any transaction, parties must weigh the pros and cons of entering into a "timing agreement." Any negotiation regarding the scope of,

[21] *See, e.g.* United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews, (Oct. 14, 2011) (revised best practices include "greater emphasis on coordination among the agencies at key stages of their investigations, including the final stage in which agencies consider potential remedies to preserve competition.") (available at https://www.justice.gov/opa/pr/united-states-and-european-union-antitrust-agencies-issue-revised-best-practices-coordinating); and "Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement," Assistant Attorney General Bill Baer (Sept. 29, 2015) (citing the DOJ's recent coordination on merger remedies with the EU in the investigation of GE's acquisition of Alstom) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-ninth-annual-global-antitrust).

[22] 15 U.S.C. § 18a (2012).

[23] Both the Division and the FTC initially announced their positions on timing agreements in 2006—offering enticements to parties in return for agreeing to an alternative review schedule—principally a capped number of documentary custodians each party will have to search for material that may be responsive to the Second Request. *See* Reforms to the Merger Review Process, Announcement by Deborah Platt Majoras, Chairman, FTC (Feb. 16, 2006) (available at https://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf); and Merger Review Process Initiative, United States Department of Justice Antitrust Division, at 1 (Dec. 14, 2006) (available at https://www.justice.gov/sites/default/files/atr/legacy/2006/12/15/220237.pdf).

[24] *See, e.g.* Division Model Process & Timing Agreement (available at https://www.justice.gov/atr/merger-review-process-initiative-model-pta-letter). The U.S. Antitrust Agencies have not published statistics regarding the content or number of timing agreements entered into since announcing their positions on timing agreements.

as well as compliance with, a Second Request, whether a "timing agreement" is in place or not, can take a substantial amount of time.

Related to the investigatory procedure, the U.S. Antitrust Agencies recently have been taking a lot of time to evaluate the sufficiency of potential divestiture packages and to approve proposed divestiture purchasers. Once the investigating agency deems a proposed transaction to be problematic, any divestiture proposal offered by the parties must be evaluated to ensure that it is sufficient to replace the competition lost by the notified transaction as well as the commercial viability of the assets to be divested—including the quality of the experience and business plan put forth by the proposed divestiture purchaser. This evaluation can take time and may result in the investigating agency insisting on an expanded divestiture package.[25] A few recent instances of failed divestitures[26] have heightened interest at both agencies to take extra care in navigating the divestiture—approval process. Indeed, Debbie Feinstein stated recently that finding an acceptable divestiture buyer may be more challenging (and time consuming) than it has been in the past, particularly in consolidated or consolidating industries.[27]

The recently abandoned transaction between Halliburton and Baker Hughes is illustrative. Halliburton proposed a divestiture package of up to $7.5 billion, but the proposal was not accepted by the Division because it would not have sufficiently replaced the competition lost as a result of the transaction. David Gelfand, Deputy Assistant Attorney General for the Division, commented that "I think [no viable remedy was available]. The reason is the anticompetitive effect spread across so much of the business, there was no way to divest individual, freestanding businesses without divesting the entire company."[28] Gelfand summed up the Division's position as follows: "Our policy on remedies is, you have to be able to address the competitive issues raised by the transaction. If parties want to roll the dice and see if they can convince us, that's their prerogative, but they should understand that we're ready to litigate these cases."[29]

Another factor that can contribute to an extended investigation is the increasingly significant role econometric analysis plays in merger investigations. The Division and the FTC jointly issued an update to the Horizontal Merger Guidelines in 2010.[30] The 2010 Guidelines largely reflect the pre-existing practices at the agencies, but they stress the use of econometric analysis more than the prior version of the Guidelines.[31]

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[25] For example, the Antitrust Division insisted that Anheuser Busch InBev divest the entire U.S. business of Grupo Modelo in its 2013 acquisition—not just the overlapping assets. *See* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case.

[26] Approximately one year after the FTC's approval of a divestiture prior to clearing the combination of Hertz and Dollar Thrifty the divestiture buyer declared bankruptcy, and the divestiture assets were purchased out of bankruptcy by entities not subject to the FTC's review or approval. Similarly, the FTC approved a divestiture of a number of stores to smaller grocery store chain prior to clearing the combination of Albertsons and Safeway, but several months later the divestiture purchaser declared bankruptcy and the FTC was forced to permit Albertsons to buy back some of the divested stores.

[27] *See* http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=790136&siteid=191&rdir=1. Feinstein observed that private equity firms are likely to play a more significant role in divestiture sales where there are a limited number of acceptable strategic purchasers (*i.e.* those already participating in the relevant market), a more frequent occurrence in increasingly consolidated markets. Feinstein stated further that private equity firms can be legitimate buyers of divestiture assets provided that they have viable business plans. The vetting process for these buyers—including this business-plan review—may contribute to prolonging the merger-clearance process.

[28] *See* http://www.law360.com/competition/articles/791567?nl_pk=147463b6-7c6a-4741-8d61-398281916e4b&utm_source=newsletter&utm_medium=email&utm_campaign=competition

[29] *Id.*

[30] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) (available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf).

[31] Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years," 77 ANTITRUST L.J. 701, 704 (2010) (noting that the 2010 Guidelines reflected "ongoing changes in Agency enforcement practice and advances in economic learning.").

Indeed, economists played an important role in drafting the 2010 Guidelines.[32] Both agencies have a very capable staff of economists who work in tandem with agency staff attorneys. The volume of data required to conduct econometric analyses can be substantial, and performing the analysis can be complicated. Additionally, given the significant weight that can be given to econometric analysis in any antitrust investigation, parties typically retain their own economists to perform econometric analysis—perhaps, even most frequently, before producing the requisite data to the investigating agency. More to the point, the collection of the requisite data, the preparation and evaluation of (potentially) dueling econometric analysis can be very time consuming.

None of the factors addressed here can be pointed to as the sole cause behind the prevailing protracted U.S. antitrust review periods. But in combination they represent conditions that can explain and even justify why merger investigations by the U.S. Antitrust Agencies of certain transactions have taken and are taking longer than they may have previously.

III. TRADITIONAL ANTITRUST RISK-SHIFTING PROVISIONS

There are several tools that parties have traditionally used to allocate between themselves the risk that a transaction will be challenged or blocked by a U.S. Antitrust Agency or non-U.S. competition authority. This would include provisions where the parties anticipate that their proposed transaction may only be permitted to proceed with substantial modifications to the structure of the transaction or other concessions. Several such provisions are addressed here.

A. "Hell or High Water" Provisions

Perhaps the simplest form for allocating antitrust risk is the so-called "hell or high water" provision, which provides that the buyer will take all necessary steps to complete the transaction and address any objections raised by any antitrust authorities. Such steps can include agreeing to any divesture required by the reviewing antitrust agency or agreeing to other types of behavioral remedies imposed as a means of restoring competition lost as a result of the transaction. With the exception of a transaction where no remedy short of blocking the transaction is capable of addressing the potential anticompetitive effects, the buyer bears the entire risk of opposition from the U.S. Antitrust Agencies and/or non-U.S. competition authorities.

While these types of provisions provide sellers a great deal of protection, nominally at least, few buyers are willing to agree to a straight-forward/unqualified "hell or high water" provision—particularly in the current climate of increased aggression by the U.S. Antitrust Agencies, including the refusal to accept substantial divestiture proposals from parties to resolve perceived antitrust concerns.[33]

More typically what happens is that the separate components of "antitrust risk" are negotiated separately. The parties generally agree on each bearing something less than the absolute obligation required by a "hell-or-high water" provision. Even where a seller is fortunate enough to obtain a "hell or high water" commitment, the provision, by itself, may not provide the deal certainty the seller is seeking.

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[32] *Id.* (author Shapiro, former Deputy Assistant Attorney General for Economics, Antitrust Division, DOJ, notes that he was a member of the joint DOJ/FTC Horizontal Merger Guidelines working group, as were Dr. Joseph Farrell, Director of the Bureau of Economics at the FTC at the time, and Howard Shelanski, then Deputy Director for Antitrust at the FTC Bureau of Economics).

[33] The FTC's refusal to accept Sysco and U.S. Foods' offer to divest 11 distribution centers to the third-largest broadline food distributor in the U.S.—Performance Food Group—is an example of the challenges that parties have faced when attempting to resolve agency concerns with proposed remedies. A federal district court ultimately sided with the FTC's argument that the divesture proposal was insufficient. *See* https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes. Similarly, as referenced, the Division rejected several settlement proposals from Halliburton as part of its failed effort to secure clearance for its proposed acquisition of Baker Hughes. *See* http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=761680&siteid=191&rdir=1. Indeed, U.S. Attorney General Loretta Lynch stated that Halliburton's proposed divestitures fell "well short" of preserving competition. *See* http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=783640&siteid=191&rdir=1.

Stated differently, a pure "hell or high water" provision would require the purchaser to pay the seller the agreed consideration for the target business irrespective of whether the buyer would ever be permitted to take possession or control of the target assets by competent antitrust authorities. This, in effect, would represent a "reverse break-up fee" (discussed below) of 100 percent of deal value, where the more typical average for such fees falls in the range of 3-5 percent of total deal value.[34] And, again, in today's climate of more aggressive antitrust enforcement even non-risk averse purchasers almost certainly would be unwilling to agree to a naked "hell or high water"/100 percent reverse break-up fee provision.

B. Reverse Break-Up Fees

A reverse break-up fee[35] is paid by the buyer to the seller in the event that an agreed transaction does not close. From an antitrust perspective, the primary purpose of the reverse break-up fee is to compensate the seller for the time and effort spent in support of a transaction that is ultimately not consummated because of objections from antitrust regulators, as well as any damage done to the value of the target business during the pendency of antitrust review. The reverse break-up fee is also intended to incentivize the buyer to aggressively pursue obtaining all government approvals necessary to close a transaction. This implicitly assumes that the reverse break-up fee is set at an amount higher than the cost incurred by the buyer to comply with any remedy demand by the reviewing agency.

Other issues that may be presented are the conditions placed on the seller to obtain the reverse break-up fee. In some cases, a buyer may want assurances that the failure to obtain antitrust clearance for the proposed transaction is not a result of the seller failing to fulfill its obligations to comply with any investigative demands issued to the seller during the course of an antitrust investigation. While typically this concern is addressed through a "best efforts" or cooperation provision that sets forth the steps that each party must take to address agency concerns, respond to agency inquiries and ultimately secure the ability to close the transaction, some buyers may seek to condition payment of the fee on the seller having sufficiently fulfilled its "best efforts" obligations. Notably, any dispute over whether any agreed reverse break-up fee must be paid would be determined under principles of contract law.

In addition, where payment of a reverse break-up fee is at stake, buyers may seek sole control over engaging with the relevant antitrust agencies. Because the buyer faces the prospect of paying a potentially hefty penalty if the transaction does not receive antitrust clearance, it may want to ensure that the antitrust review proceeds in a manner that it believes presents the best prospect for success.

There are several high-profile examples of reverse break-up fees being paid in recent years following a failure to receive required antitrust clearance. Perhaps the most well-known reverse break-up fee payment was paid following the termination in 2011 of an attempt to combine two of the largest providers of wireless communication services, which involved a payment of approximately $5 billion, or roughly 15 percent of the total purchase price.

Payment of a similarly large break-up fee was involved in Halliburton's proposed acquisition of Baker Hughes. Under the terms of the agreement, Baker Hughes was to receive a $3.5 billion reverse break-up fee—approximately 10 percent of the total $35 billion deal value[36]—if the transaction did not close due to antitrust

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[34] *See, e.g.* Houlihan Lokey, 2014 Transaction Termination Fee Study (available at https://www.hl.com/uploadedFiles/11_Blogs/Fairness_and_Solvency_Opinions/2014-hl-transaction-termination-fee-study.pdf. The reverse break-up fees have been trending higher in percentage and total dollar terms for larger targets where antitrust concerns are present. *See*, *e.g.* http://us.practicallaw.com/6-516-1589.

[35] A "break-up fee," by comparison, is paid by the seller to the buyer and is intended to protect the buyer—primarily by deterring third-party bidders or other post-signing conduct by the seller that prevents the deal from closing.

[36] If Either Halliburton or Baker Hughes Call Off Deal, It Would Be Costly, Michael J. De La Merced, N.Y. Times, Nov. 18, 2014 (available at http://dealbook.nytimes.com/2014/11/18/call-the-whole-thing-off-for-either-halliburton-or-baker-hughes-it-would-be-costly/?_r=0).

concerns.

Note too that reverse break-up fees need not be a fixed amount. Certain agreements have incorporated an escalating component into the break-up fee provision, whereby the fee is increased if the buyer has not closed the transaction before a specific date or metric. For example, in Akorn's 2013 acquisition of Hi-Tech Pharmacal the amount of the reverse break-up fee increased from approximately $41 million to $48 million if the buyer exercised an option to extend the termination date by one month.[37]

Setting the amount of the reverse break-up fee requires careful consideration of multiple factors. A seller must consider the amount that would be required to compensate it for the damage done to its business by a protracted antitrust review or an abandoned transaction—*e.g.* lost business, personnel losses, etc.[38] This can be a difficult calculus and certain sellers may determine that no amount, short of the total consideration, would be sufficient. Likewise, buyers must consider what amount of reverse break-up fee may be sufficient simultaneously to encourage an otherwise hesitant seller to enter into the agreement but low enough to offer an economical escape in the event of uneconomical (from the buyer's perspective) remedy demands by an investigating antitrust agency. In today's enforcement climate, this calculus is more complicated.

C. Obligations to Litigate

Another common risk-shifting provision sets forth the parties' respective obligation to litigate to defend the transaction should the reviewing antitrust agency decide to challenge the proposed transaction in court. The obligation can vary from no obligation to litigate, litigation through a preliminary-injunction hearing or a merits trial or defense through all available stages of appeal. The incentives of the parties to a transaction in setting the obligation's parameters may be influenced by the other agreed "risk shifting" provisions. For example, a significant divestiture commitment may substantially reduce the likelihood of litigation such that the parties are less concerned about the impact of a potential litigation challenge.

Sellers typically want to ensure that buyers will sufficiently commit themselves to a transaction such that they will not walk away from a deal once litigation is threatened or initiated by the investigating U.S. Antitrust Agency. This desire is frequently in tension with a buyer's desire to have the ability to abandon a transaction and to control the strategic direction of obtaining clearance to proceed with a transaction—*i.e.* buyers also may desire some cost/timing certainty.

In order for any provision obligating the parties to litigate to be meaningful, parties must make sure that termination provisions are aligned with the scope of the litigation obligation. Any litigation will be preceded by the initial review period and the Second Request investigatory period, which takes several months and perhaps a year or more, as well as pre-hearing discovery period. Without alignment, the effect of the litigation commitment may be nullified by a protracted antitrust investigation. Put another way, a commitment to litigate until a "final and non-appealable order," for example, will have little effect if the agreement's longstop date is 12 months from the date the agreement is signed because there almost certainly will not be enough time to complete even the initial trial or preliminary-injunction hearing within a 12-month period.

D. Circumscribed Divestiture Obligations

Where a buyer is unwilling to accept an unlimited divestiture commitment required to resolve any antitrust concerns of the U.S. Antitrust Agencies, limited divestiture commitments can be made. There are various measures by which a divestiture commitment can be limited.

On the end of the spectrum where the buyer assumes more risk, the buyer's obligation to divest can be

[37] *See* Akorn Inc. Form 10-Q, filed Nov. 12, 2013.

[38] *See, e.g.* http://www.wsj.com/articles/office-depot-cites-delayed-staples-tie-up-for-earnings-shortfall-1461670987?tesla=y (Office Depot citing the protracted antitrust review of its proposed combination with Staples for missed earnings target).

limited by whether the divestiture would have a material adverse effect on the business of the combined

company. Alternatively, the obligation to divest can also be based on whether the divestiture would have a material adverse effect on just the business of the acquiring company or the target. Relying on "material adverse effect" provisions can, however, create some ambiguity in precisely what is required of a buyer. While there may be advantages to this ambiguity, for example, if one is concerned that greater specificity might serve as a signal to the reviewing agency about the specific antitrust concerns the parties have regarding the proposed transaction, this ambiguity can also lead to disputes between the parties.

One potential solution to this problem is to have more clearly delineated limitations on what a buyer is obligated to divest. The divestiture obligation may identify specific assets or business lines, or can also be limited by a specific metric. For example, the cap on divestitures might be a specific number of facilities, a predetermined total asset value or the amount of revenues or EBITDA generated by the business to be divested. The more specific the provision the greater the risk of highlighting the area of potential concern for the reviewing antitrust agency.

Separately, the agreement may impose no obligation on the buyer to make any divestitures or commitments in order to secure requisite antitrust clearances but, instead, leave the decision solely up to the discretion of the buyer.

Once again, the parameters for any divestiture-obligation provision can be affected by other agreed risk-shifting provisions—*e.g.* the timing of the investigation, the time within which the buyer must propose and agree to the divestiture and whether the occurrence of an "overbroad"/"excessive" remedy demand by the investigating agency nullifies or triggers other antitrust-risk-shifting obligations, like payment of a reverse break-up fee.

E. Ticking Fee

Another way to incentivize a buyer to conclude any antitrust investigation and obtain the requisite clearance decisions as quickly as possible as well as to compensate a seller for enduring an extended antitrust review is the payment of a "ticking fee." Under a ticking-fee provision, the buyer agrees to an increase in the consideration payable to a seller as the time period between signing and closing (or satisfaction of conditions to closing, like obtaining required antitrust clearances) passes certain triggers. Such triggers could include, for example: issuance of a "Second Request" by the reviewing agency and failure to comply with that Second Request within a specified period of time; and extension of the "drop-dead date" in order to address antitrust concerns.

A recent example of the use of a ticking fee was in Cypress Semiconductor Corp.'s ("Cypress") bid for Integrated Silicon Solutions Inc. ("ISSI"). Cypress was in a competitive bidding situation with Uphill Investment Co. ("Uphill") to acquire ISSI. ISSI's management, however, had concerns that an acquisition by Cypress would be subject to lengthy review by the U.S. Antitrust Agencies. To assuage those concerns, Cypress agreed to divest ISSI's static random-access memory business if necessary to close the transaction. In addition, Cypress included in its proposal a $0.10-per-share ticking fee for every three months it took to get regulatory approval, up to $0.20 a share.[39] Ultimately, ISSI elected to accept Uphill's offer despite Cypress' proposal including the possibility of an increased transaction value.[40]

A ticking fee tied to payment of the transaction's consideration will only be invoked if the transaction ultimately closes. If the transaction is blocked or abandoned based upon antitrust concerns then the ticking fee provision would be nullified. Alternatively, as referenced, there can be a "ticking" component added to the

[39] "Uphill Investment Ups Bid to $730M for Integrated Silicon," June 23, 2015 (available at http://www.law360.com/articles/671184/uphill-investment-ups-bid-to-730m-for-integrated-silicon).

[40] "ISSI Shareholders Approve Acquisition by Uphill Investment," June 29, 2015 (http://www.bloomberg.com/news/articles/2015-06-29/issi-shareholders-approve-acquisition-by-uphill-investment).

reverse break-up fee.

F. Buyer Pays Expenses

Where a seller is concerned about the financial impact of an extended antitrust investigation, another risk-shifting mechanism available to the parties is a requirement that the buyer pay the seller's costs for responding to any antitrust investigatory requests, including legal fees. The parameters for any such provision can vary to exclude certain categories of costs, and they could include all of the seller's transaction costs—*i.e.* not just those associated with obtaining antitrust clearances. In return for such a commitment from the buyer, sellers typically are required to consult with the buyer with respect to, if not before, the retention of antitrust counsel, consultants and experts. Additionally, buyers frequently insist on a provision explicitly granting them sole control over the antitrust defense strategy if they are going to be responsible for all expenses.

G. Termination Rights

Another provision by which parties allocate antitrust risk is through the setting of a date after which the parties may terminate the transaction, assuming certain conditions have not been met. One of the most common conditions that permits a party to invoke the right to terminate the agreement after a date certain is failure to obtain required antitrust clearance.

When the parties expect scrutiny from antitrust regulators, selection of an appropriate termination date is an important consideration. As a general matter, shorter termination dates may allow the parties to avoid the expense of complying with a Second Request or litigating with the FTC or the Antitrust Division. Longer termination dates allow for greater flexibility, including preserving the possibility for litigation and subsequent appeals.

In today's climate, the challenge is in accurately predicting the length of time that will be required to conclude any antitrust investigation successfully. This can be particularly challenging and time consuming when a transaction requires premerger notification in multiple jurisdictions and coordination is required. Moreover, the U.S. Antitrust Agencies can point to the fact that the termination provisions agreed to by the parties at the outset can simply be extended by mutual agreement in order to facilitate the completion of any antitrust investigation. While such extensions certainly have been done, there also have been several instances where the parties' respective interest in agreeing to any extensions may not be aligned. Parties should independently consider both possibilities from the outset in order to avoid or (at least) to confront knowingly that potential downside in the future.

IV. ALLOCATING RISK IN TODAY'S U.S. ANTITRUST ENFORCEMENT CLIMATE

Practical considerations having nothing to do with potential antitrust concerns prevent parties from allowing for an indefinite period between signing and closing a proposed transaction. A buyer's financing commitments, for example, can have a substantial influence on the deadline for closing, *i.e.* the transaction's "long stop" or "drop dead" date. Nevertheless, the potential for antitrust scrutiny can derail any transaction's closing timeline. Understanding this and appreciating that the aggressive posture of the U.S. Antitrust Agencies will better enable parties to consider alternative antitrust risk-shifting provisions that are informed by and function well with the parties' respective termination rights as well as the agreed schedule for closing.

For transactions with greater flexibility in the closing schedule, parties may wish to consider relying on the occurrence of milestones as the transaction progresses rather than fixed time periods or dates in their agreements. Depending upon the structure, this may enable decisions to be made (and consequences determined) at some point after the required antitrust filings have been made and, therefore, enable the parties to be more informed regarding the expected timeline, likelihood and expenses for obtaining the required antitrust clearances. The provisions can run to the benefit or detriment of either party—depending upon their respective views of and tolerances for the antitrust risks presented.

Such milestones could include, for example: the issuance of a Second Request, the parties' substantial compliance with a Second Request, the initiation of litigation by an investigating U.S. Antitrust Agency, the completion of a merits trial or preliminary injunction hearing and the pursuit of any appeals following an initial litigation result. And with the occurrence of each selected milestone certain rights or obligations may be triggered—*e.g.* an increase in the consideration for the transaction or the reverse break-up fee, a right to terminate the agreement unilaterally, an obligation to cover the other parties' transaction expenses, an increase in any divestiture commitment for the buyer, a decrease in the divestiture commitment by the buyer. Alternatively, the transaction timeline simply could be automatically extended after the occurrence of each milestone or could be structured around the milestones without reference to any particular date.

Once again, it is important to recall that provisions allocating antitrust risk between the parties to any proposed transaction that raises antitrust issues will be reviewed closely by the U.S. Antitrust Agencies. And those provisions may highlight or signal an antitrust concern that was not otherwise apparent and/or provide leverage to the investigating agency in the negotiating of any settlement.

The negotiating dynamics for each transaction are different and will determine the agreed framework for allocating any perceived antitrust risk. Nevertheless, the potential for intervening events following the execution of a transaction agreement to affect the import of the provisions agreed to at signing and intended to provide for some downside protection to one or another party should be recognized. Traditional antitrust risk-shifting provisions will continue to be deployed but parties should think strategically and creatively regarding what adjustments may be advisable in order to accommodate increasingly unpredictable and lengthy antitrust review periods.