
Overview of the Merger Review Process

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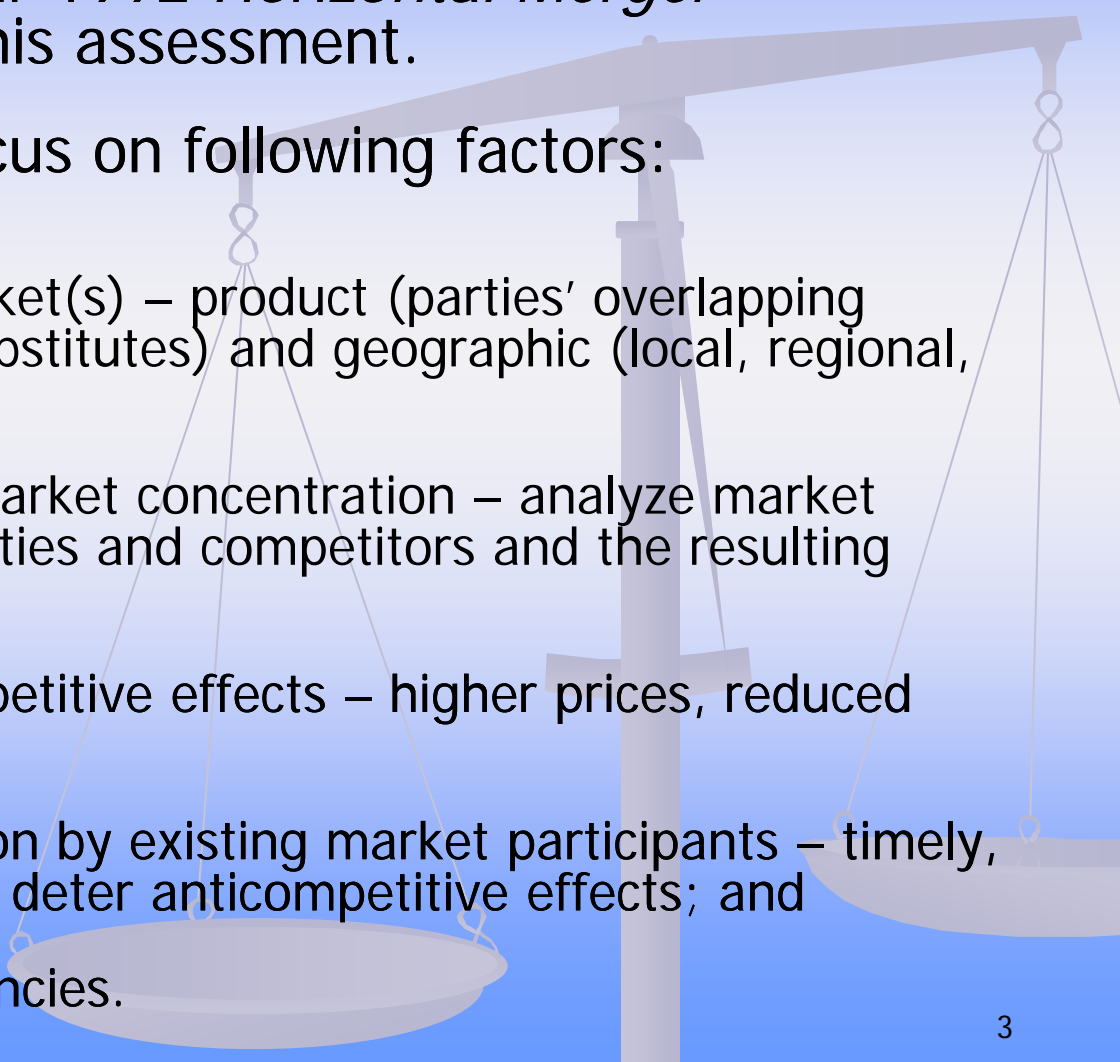
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U.S. Merger Review Process

- Purpose of U.S. Federal Merger Review:
 - Proposed Mergers, Acquisitions and Joint Ventures are reviewed by Department of Justice (DOJ) & Federal Trade Commission (FTC).
 - Review focuses on whether proposed transaction will confer “Market Power” upon newly merged company.
 - Agencies look to see:
 - Will newly merged company have ability to raise prices above competitive levels;
 - Decrease quality or output below competitive levels; or
 - Eliminate competition.

U.S. Merger Review Process

- DOJ and FTC use their 1992 *Horizontal Merger Guidelines* to make this assessment.
 - Merger Guidelines focus on following factors:
 - Defining relevant market(s) – product (parties' overlapping products and close substitutes) and geographic (local, regional, national or global?);
 - Effect of merger on market concentration – analyze market shares of merging parties and competitors and the resulting level of concentration;
 - Likelihood of anticompetitive effects – higher prices, reduced quality or innovation;
 - New entry or expansion by existing market participants – timely, likely and sufficient to deter anticompetitive effects; and
 - Merger-specific efficiencies.
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Hart-Scott-Rodino Review Process

- DOJ and FTC review most mergers under Hart-Scott-Rodino Act (“HSR Act” or “Act”), 15 U.S.C. § 18a.
 - Passed in 1976 to deal with “midnight mergers” closed by parties before government could investigate.
 - Requires parties to acquisitions of assets, voting securities, controlling interests in noncorporate entities (partnerships, LLCs) meeting certain dollar thresholds to submit premerger notification forms to FTC and DOJ and observe statutory waiting period – usually 30 days – before closing.
 - Allows FTC/DOJ to challenge proposed deals – e.g., agencies may seek to enjoin proposed transactions in court.

Hart-Scott-Rodino Review Process

- HSR Act jurisdictional dollar thresholds:
 1. Size-of-persons threshold: “person” on one side of transaction with \$126.2 million or more in total assets or annual net sales and person on other side with \$12.6 million or more in total assets or annual net sales (“person” is ultimate parent on each side—assets and sales based on most recent, fully consolidated financials).
 2. Size-of-transaction threshold: transaction valued at more than \$63.1 million.
- Transactions valued in excess of \$252.3 million are reportable regardless of size of persons.
- Act has many exemptions – e.g., acquisitions in ordinary course of business, real estate, foreign assets and entities.
- Blunt Instrument – 80+% of reportable transactions – no investigation.

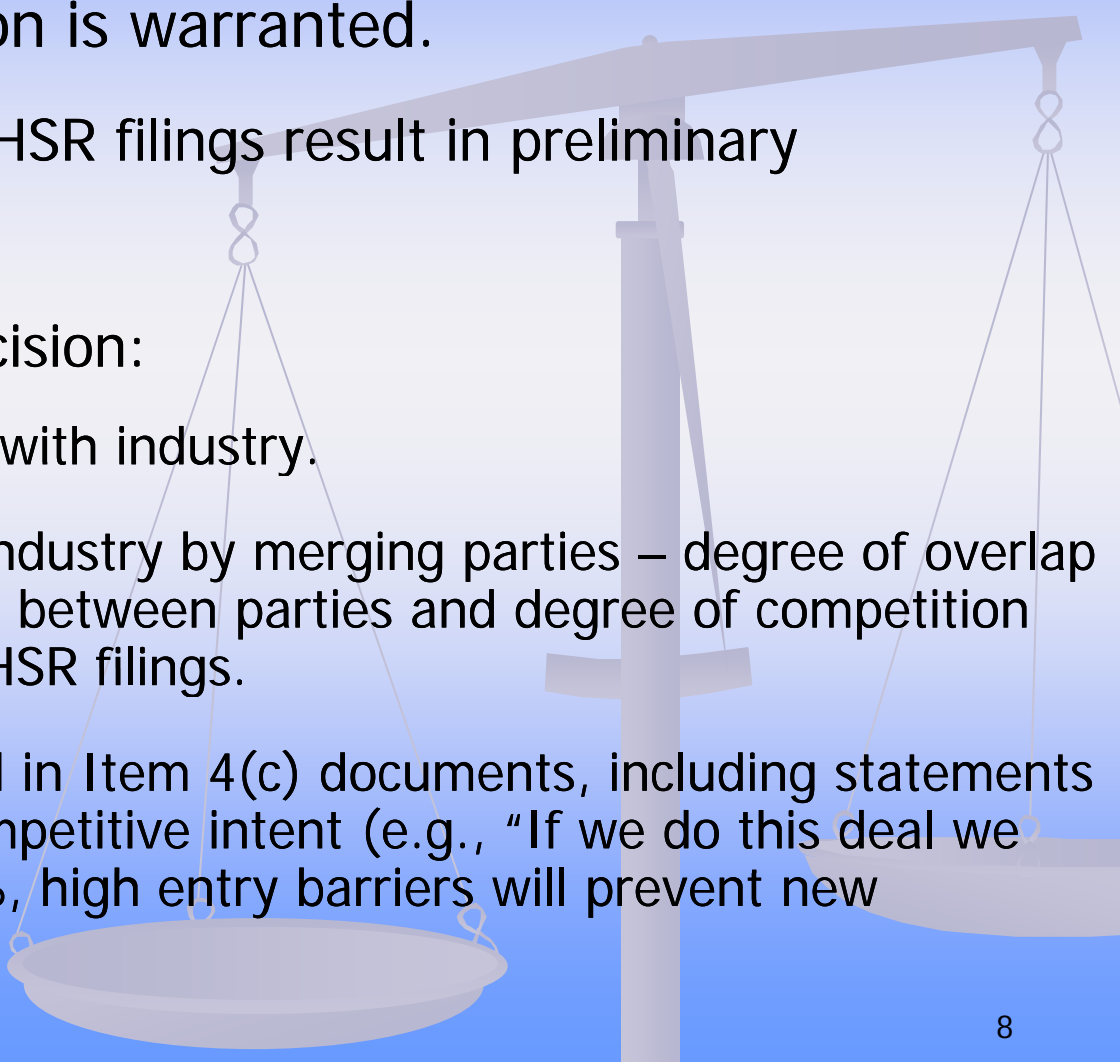
Hart-Scott-Rodino Review Process

- When HSR filing is required, each party must submit copies of premerger notification form to both DOJ and FTC:
 - Timing – anytime after execution of letter of intent or agreement.
 - Information required – financial statements, SEC filings, revenue by NAICS Code, lists of subsidiaries and minority shareholder interests.
 - Parties' NAICS Codes overlap – identify geographic areas in which overlapping products are sold.
 - Item 4(c) – requires submission of documents prepared by or for officers or directors that evaluate proposed transaction with respect to competition, markets and other similar issues.
 - Acquiring person is required to pay filing fee – can range from \$45,000 to \$280,000, depending on value of transaction.

Early Termination

- Parties can request early termination (ET) of 30-day waiting period.
 - Generally granted in 2-3 weeks if no substantive issues.
 - Disadvantage to ET – names of parties published on FTC web site, Federal Register – but ET is requested on 80+% of filings.
 - ET not requested – if no substantive issues, period expires without public disclosure.

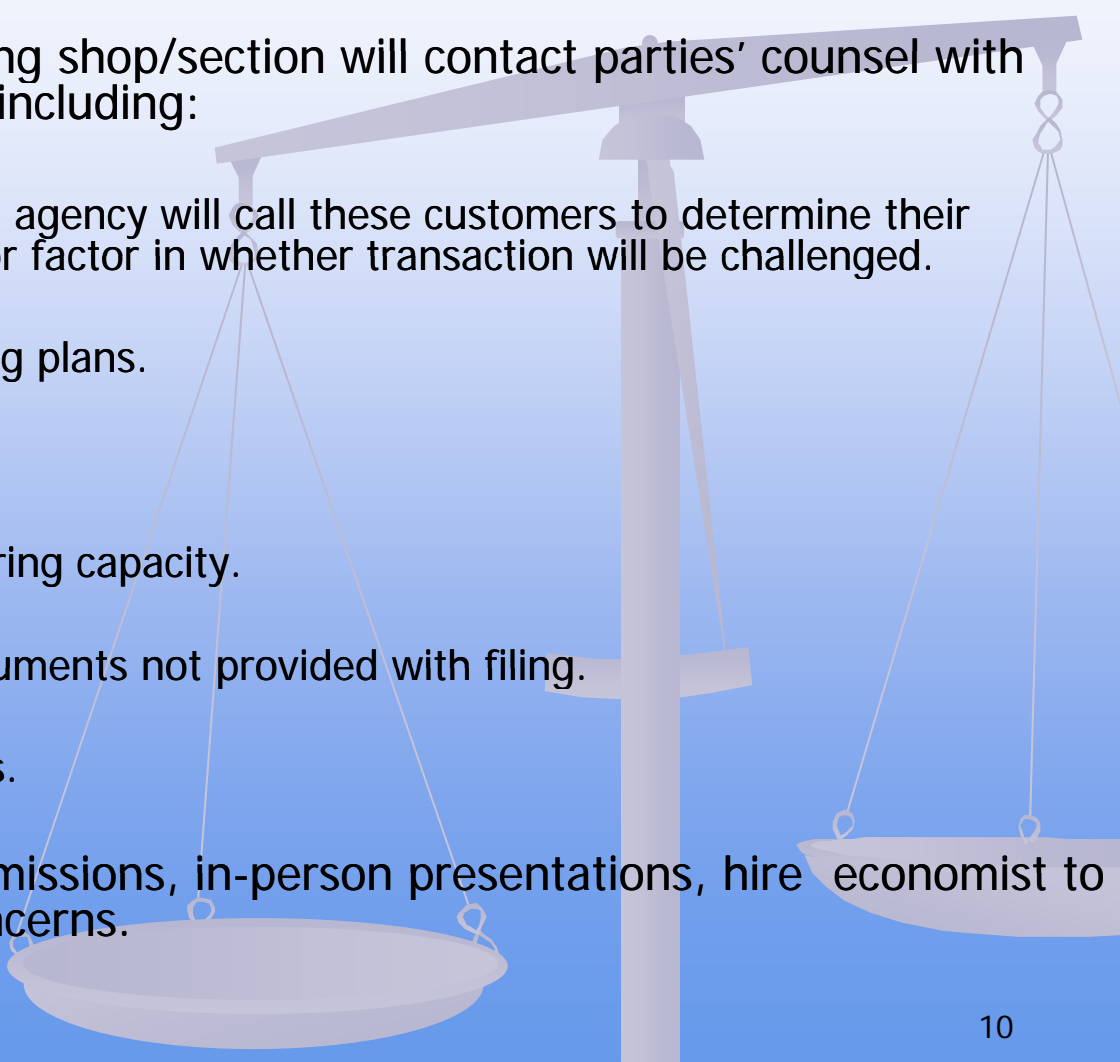
Agency Investigations

- Once filing is made – DOJ and FTC determine whether preliminary investigation is warranted.
 - Approximately 1 in 5 HSR filings result in preliminary investigations.
 - Factors going into decision:
 - Agencies' familiarity with industry.
 - Role played in that industry by merging parties – degree of overlap that appears to exist between parties and degree of competition they face based on HSR filings.
 - Information included in Item 4(c) documents, including statements indicating an anticompetitive intent (e.g., "If we do this deal we can raise prices 20%, high entry barriers will prevent new competition," etc.).
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Agency Investigations

- If there is an investigation, only one agency actually will review transaction.
- Determination of which agency will investigate is made through “clearance process.”
- In general, agencies complete this process in first 10-days or so after HSR filing is submitted – is based on past history, expertise (Rx – FTC, air lines – DOJ).
- In some cases -- extended clearance battles (AOL/Time Warner – 45 days, Pacific Enterprise/Enova – 5 months).

Agency Investigations

- Reviewing agency will assign investigation to particular shop or section.
 - Staff attorney from investigating shop/section will contact parties' counsel with request for basic information, including:
 - List of Top 10-20 customers – agency will call these customers to determine their reaction to transaction – major factor in whether transaction will be challenged.
 - Recent strategic and marketing plans.
 - Win/loss reports.
 - Information about manufacturing capacity.
 - Other transaction related documents not provided with filing.
 - Interview company executives.
 - Parties may make written submissions, in-person presentations, hire economist to address agency economist concerns.
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Second Request

- End of 30-day period, agency concludes no problem – period terminated or expires.
- End of 30-day period, agency continues to have concerns – will issue “request for additional information” commonly known as “second request” (issued in 2%-4% of HSR filings).
- Second request – subpoena requesting a broad range of documents/data.
- Responding – often very burdensome, time-consuming, expensive. (Parties can avoid by withdrawing filing, re-filing to give agency extra time; no fee if buyer re-files within 48 hours of withdrawal).
- Proliferation of e-mail, other electronic documents/data has increased production costs significantly, may require engaging electronic discovery consultant.
- Compliance can take 1-2 months or 6-8 months or more depending on complexity of parties, transaction – can cost several million dollars.

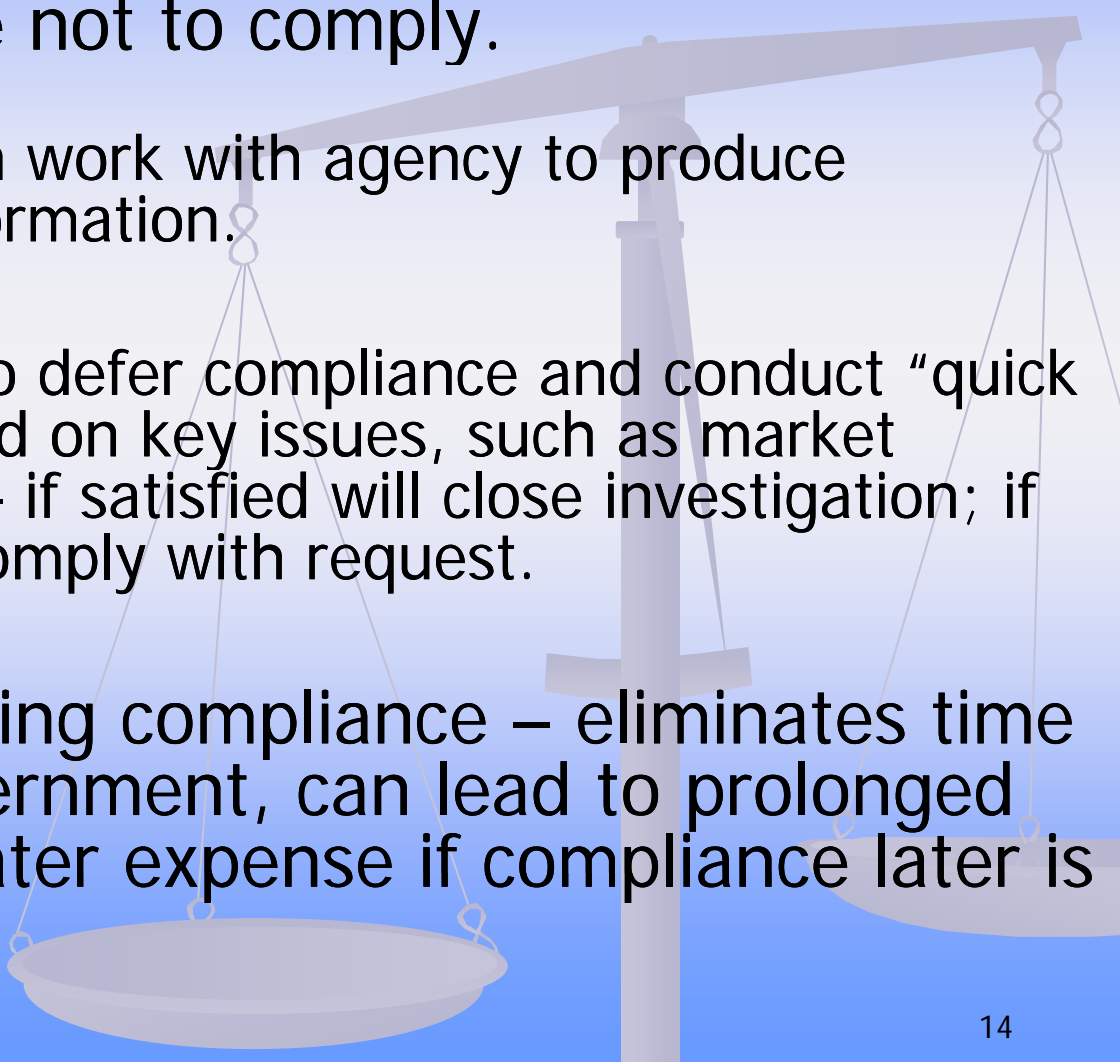
Second Request

- Information typically requested in second request:
 - Organizational charts
 - Detailed descriptions of each relevant product
 - Product brochures
 - Business plans
 - All documents relating to competition in relevant product and geographic markets
 - Documents regarding entry and planned expansions
 - Detailed data regarding sales and prices
 - All documents relating to proposed transaction

Second Request

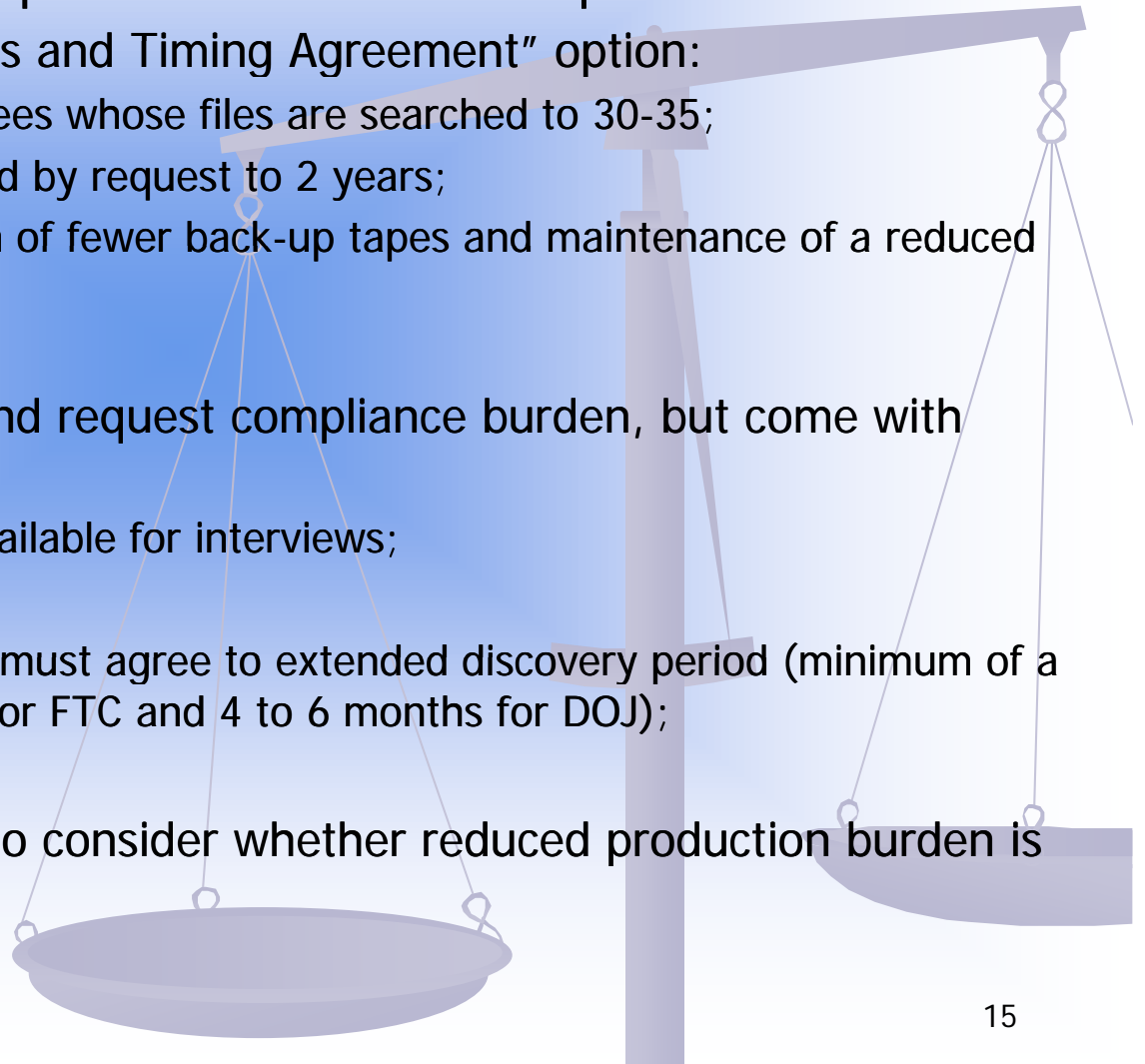
- Parties usually negotiate to narrow request – limit number of custodians, time period covered.
- Once parties believe they have provided reviewing agency with sufficient information, can certify “substantial compliance” with request.
- Agency decides if parties have complied – may lead to disputes.
- Compliance triggers a second statutory waiting period – usually 30 days.
- During second request process – reviewing agency’s attorneys and economists may request additional information not covered by request, depose company executives.
- Parties may make additional submissions (e.g., white papers), presentations, meet with agency attorneys and economists.

Second Request

- Because of burdens imposed by second request, parties may choose not to comply.
 - Instead, parties can work with agency to produce narrower set of information.
 - Agency may offer to defer compliance and conduct “quick look” review focused on key issues, such as market definition or entry – if satisfied will close investigation; if not, parties must comply with request.
 - Problem with avoiding compliance – eliminates time constraints on government, can lead to prolonged investigations, greater expense if compliance later is necessary.
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Second Request Reforms

- FTC and DOJ reforms attempt to streamline review process:
 - Parties can elect a “Process and Timing Agreement” option:
 - Limits number of employees whose files are searched to 30-35;
 - Limits time period covered by request to 2 years;
 - Requires the preservation of fewer back-up tapes and maintenance of a reduced privilege log.
 - Reforms may reduce second request compliance burden, but come with tradeoffs:
 - Must make employees available for interviews;
 - Waive objections;
 - If transaction challenged must agree to extended discovery period (minimum of a 60-day discovery period for FTC and 4 to 6 months for DOJ);
 - Parties and counsel need to consider whether reduced production burden is worth it.



Second Request

- End of second request waiting period:
 - Agency concludes no problem – can grant early termination or allow waiting period to expire, enabling parties to close.
 - After approval agency can come back to challenge transaction – very rare.
 - Agency wants more time – required to go to court but parties usually agree to extension (e.g., agree not to close without prior notice).
 - Agency staff recommends challenging transaction — can appeal up the line (DOJ — front office, Assistant Attorney General; FTC—Bureau of Competition Director, Commissioners) — if appeal fails, agency will go to court to seek preliminary injunction (“PI,” if granted usually ends deal), or parties may abandon transaction.
 - Litigation for permanent relief (may be combined with PI) – DOJ must seek permanent injunction in court, FTC can use administrative process – if litigated can add months to process. Government has lost major cases in recent years (**DOJ** – Oracle/PeopleSoft; **FTC** – Arch Coal, Foster, and Whole Foods [FTC PI motion denied, appeal pending]).

Consent Decrees

■ Consent Decrees:

- Any point in process – parties can negotiate consent decree (60%-70% of second requests end in challenge or request for consent).
- Negotiated between parties and reviewing agency to resolve agency concerns.
- Usually involves divestiture of subsidiaries or divisions, assets (plants, stores), license of patents or other intellectual property.
- Allows parties to conclude deal without it being challenged in court.
- Upon approval by agency is placed on public record for comment (DOJ decree – 60 days, FTC decree – 30 days) – parties permitted to close during comment period, comments rarely result in changes.

Merger Review Outside of HSR Process

- If HSR filing is not required:
 - DOJ and FTC may learn of deal through customer or competitor complaints, press reports.
 - Agencies have authority to review any proposed or consummated merger they believe will have anticompetitive effects.
 - If transaction is challenged absent HSR filing – agencies are not constrained by HSR time limitations – investigation may take longer, particularly if agency has to prioritize HSR investigations.
 - Parties can close at any time but may not be in their interests to close over agency objections – creates ill will, government could seek an injunction – parties more likely to work to convince agency no problem.

State Merger Review

- State Attorneys General may investigate merger even if it is subject to HSR review. Particularly when merger:
 - Raises issues of local concern.
 - Has significant impact on consumers.
 - Involves politically “hot” industry:
 - Hospitals
 - Health insurance
 - Supermarkets
 - Oil refineries, gas stations, etc.
 - Generally, federal agencies take lead.
 - If local issues are prevalent, however, state can play pivotal role:
 - *Wal-Mart Stores v. Rodriguez*, 23 F.Supp.2d 395 (D.P.R. 2002).
 - Puerto Rico sought P.I. despite FTC consent order (grocery stores)

Multi-Jurisdictional Merger Review

- Transactions may be subject to premerger notification requirements in other countries.
- Today, more than 80 countries have merger control statutes.
- Most significant foreign jurisdiction for U.S. companies re merger control – European Union (EU).

European Union

- Unlike HSR filings, initial filings under EU Form CO require parties to provide detailed descriptions of products and markets.
- Generally, merger review by EU will produce same result as in U.S.
- There have been conflicting results, however:
 - E.g., GE/Honeywell (Approved by DOJ but rejected by EU); Sony/BMG (approved by FTC, rejected by EU).

European Union

A filing in the EU is required when:

- Merged companies' worldwide turnover would exceed €5 billion;

And

- Combined EEA-wide turnover of at least two companies individually exceeds €250 million.

OR

- Post-transaction worldwide turnover would exceed €2.5 billion;

AND

- Post-transaction EEA-wide turnover of at least two companies would exceed €100 million;

AND

- Post-transaction turnover would exceed €100 million in at least three member states;

AND

- In each of these three member states, turnover of at least two of parties to deal exceeds €25 million.

Individual Countries

- If EU premerger filing is not required, merger laws of individual member countries apply:
 - Germany – probably European country in which U.S. companies are required to file most often.
- Outside of Europe – Canada, Mexico, **Brazil**, Argentina, South Africa, Israel, South Korea – countries in which U.S. companies frequently must file.
- China recently enacted merger reform that requires premerger approval of transactions exceeding certain threshold – not clear yet what affect this will have on U.S. companies.