Negotiating for Certainty in an Uncertain World

Matthew D. Kent

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# NEGOTIATING FOR CERTAINTY IN AN UNCERTAIN WORLD

Matthew D. Kent

## Table of Contents

- **Introduction** ........................................................................................................................................... 124
- **I. Understanding & Evaluating Antitrust Risk: A Primer** ............................................................................. 125
  - A. Identifying Potential Substantive Antitrust Risk ................................................................. 125
  - B. Identifying Required Pre-Merger (and Post-Merger) Notification Filings .............................. 127
- **II. The Anatomy of a Deal: Antitrust Provisions** ...................................................................................... 128
  - A. Required Consents, Approvals and Conditions to Close (Common) ........................................... 129
  - B. Cooperation & Control (Common) ............................................................................................... 129
  - C. Filing Fees & Costs (Common) ..................................................................................................... 130
  - D. Efforts Required to Achieve Regulatory Consents & Approvals (Common) ............................. 130
  - E. Litigation & Appeals (Common) ................................................................................................. 134
  - F. Remedy & Divestiture Provisions (Common) ............................................................................. 134
  - G. Breakup & Reverse Breakup Fees (Uncommon) ........................................................................... 136
  - H. Termination & End Dates ............................................................................................................. 137
- **Conclusion** .................................................................................................................................................. 137
INTRODUCTION

With increased antitrust scrutiny in the United States and abroad, deal makers are facing extended timelines for regulatory approvals, increased deal uncertainty, and even failed transactions. Antitrust agencies magnify the impact of aggressive enforcement by being less willing to settle with merging parties or work with them to “fix” a problematic deal through divestiture or behavioral remedies. Those failures have consequences. From resignations of chief executive officers to languishing stock prices, a failed (or gutted) transaction can create a lasting “hangover” for companies. But the impact of a failed transaction is not restricted to boardroom resignations or the stock price of would-be suitors. When parties fail to clear required antitrust regulatory hurdles, secondary litigation can spawn over whether the parties breached the underlying deal agreement—including specific provisions detailing the efforts required to obtain regulatory approvals. Questions inevitably arise over whether the parties’ conduct was “commercially reasonable” or whether certain activities they undertook constitute “reasonable best efforts.”

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This Article provides a basic education for deal makers on (1) the typical antitrust risk-shifting provisions included in deal agreements and best practices given increased antitrust enforcement and extended regulatory approval timelines and (2) recent case law developments concerning those provisions.

I. UNDERSTANDING & EVALUATING ANTITRUST RISK: A PRIMER

The starting point for crafting and negotiating antitrust risk-shifting provisions in deal documents is (1) to assess the potential for substantive antitrust risk and (2) to identify any pre-merger notification filing requirements. Antitrust counsel should be involved in deal discussions at the earliest stages to advise on these gating items as they will allow the deal team to set a realistic timeline for obtaining required clearances and craft a global strategy for pre-merger notification filings and substantive antitrust advocacy. An early understanding of the antitrust landscape can provide a strategic advantage in negotiating the deal provisions. Such a head start allows the deal team to have a better understanding of potential pain points, better implement strategies to maximize deal certainty or provide flexibility, depending on the client’s goals and desires.

A. Identifying Potential Substantive Antitrust Risk

Any merger or stock/asset acquisition that may substantially lessen competition or tend to create a monopoly is subject to challenge under Section 7 of the Clayton Act and may also violate Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. The Federal Trade Commission (“FTC”) and Antitrust Division of the Department of Justice (“DOJ”) possess broad remedial powers to block, undo, or even restructure proposed business consolidations that pose a risk of substantially anticompetitive impact under one or more of these federal statutes. For deals

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8 It is beyond the scope of this article to provide a detailed understanding of substantive antitrust analysis or recent court decisions on merger challenges.

9 See generally Fed. Trade Comm’n & U.S. Dep’t of Just., Antitrust Guidelines for Collaborations Among Competitors (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (detailing the examination of other transaction structures, such as joint ventures or joint operating agreements).


11 See 15 U.S.C.A. § 1 (subjecting mergers and acquisitions to the prohibitions of the Sherman Act if they evidence a “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”); 15 U.S.C.A. § 2 (prohibiting any mergers that monopolize or attempt to monopolize a particular market); 15 U.S.C. § 45 (subjecting mergers and acquisitions to the prohibitions of the FTC Act if they constitute “an unfair method[] of competition”).

that have an international component, it is important to consider and evaluate the application of those jurisdictions’ competition laws on the proposed transaction.\textsuperscript{13}

Horizontal mergers are mergers between actual or potential competitors.\textsuperscript{14} Horizontal mergers cause antitrust concern because they generally eliminate a competitor and thus may reduce competition.\textsuperscript{15} When assessing the competitive effects of a horizontal merger, federal agencies and courts generally examine the potential for two types of harm: (1) that the merging parties may exercise market power completely on their own, known as “unilateral effects,”\textsuperscript{16} or (2) that the merging parties may participate in tacit collusion (as a result of significant concentration), known as “coordinated interaction.”\textsuperscript{17}

In contrast, a vertical merger is between two parties that are not in competition with one another; vertically merging parties are instead at different levels of the chain of distribution.\textsuperscript{18} For example, a widget manufacturer acquiring a distributor that sells its widgets would constitute a vertical merger. Historically, vertical mergers were not subject to significant antitrust scrutiny, but the DOJ and FTC have both brought merger enforcement actions seeking to prevent vertical mergers.\textsuperscript{19} Moreover, the DOJ and FTC’s 2023 Merger Guidelines make clear that concern will arise if a vertical merger limits entry into the market or forecloses competition.\textsuperscript{20}


\textsuperscript{15} \textit{Id.}


\textsuperscript{17} \textit{See id.} at 8.

\textsuperscript{18} United States v. AT&T Inc., 310 F. Supp. 3d 161, 192 (D.D.C. 2018) (distinguishing horizontal from vertical mergers); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 130 (D.D.C. 2022) (stating that a vertical merger is “a merger between companies that perform different supply chain functions for a common good or service,” whereas a horizontal merger occurs between companies that compete at the same level of a relevant market’s supply chain).

\textsuperscript{19} \textit{See AT&T Inc.}, 310 F. Supp. 3d at 193-94 (noting that there is a “lack of modern judicial precedent involving vertical merger challenges,” in part because the DOJ “Antitrust Division apparently has not tried a vertical merger case to decision in four decades?”); Physician Specialty Pharmacy, LLC v. Prime Therapeutics, LLC, No. 18-cv-1044, 2019 WL 5149866 at *11 (D. Minn. Aug. 8, 2019) (stating that challenges to vertical mergers are rare and “substantially more difficult than challenging a horizontal merger”).

Understanding the type of merger and the potential for substantive antitrust risk is helpful because it allows the parties to consider or craft potential remedies\textsuperscript{21} that may satisfy antitrust authorities and build those into the deal agreements.

B. Identifying Required Pre-Merger (and Post-Merger) Notification Filings

A second predicate to understanding and predicting antitrust risk and timelines is determining where pre-merger notification filings may be required. Even where there are no “substantive” antitrust issues presented by a transaction, deal documents need to include provisions that ensure required approvals and conditions are satisfied before closing. While deals that are not subject to notification—sometimes referred to as sub-reportable deals—may still result in antitrust scrutiny, the tools available to regulators to detect and prevent such acquisitions vary.\textsuperscript{22}

In the United States, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) requires the parties of certain large mergers (above established thresholds) to file a notification with federal agencies and observe a waiting period before consummating the transaction.\textsuperscript{23} Although the normal HSR waiting period is thirty days, the parties have the option of pulling and re-filing their HSR filing to provide a second thirty-day waiting period (often called a “pull and refile”).\textsuperscript{24} Parties often take advantage of a pull and refile period to respond to substantive questions and concerns the agencies may have in an effort

\textsuperscript{21} The relationship between the merging parties (horizontal or vertical) may also impact the potential remedies that could be offered to antitrust regulators to remedy antitrust concerns. In a merger between competitors, structural remedies that include a divestiture of a business or product may be required. See Dehoog v. Anheuser-Busch InBev SA/NV, 899 F.3d 758, 760 (9th Cir. 2018) (affirming dismissal of a private Section 7 claim to stop a merger between two brewing companies because the DOJ conditioned approval of the merger on one defendant “divest[ing] entirely its domestic beer business,” so the plaintiffs “could not plausibly allege” the merger “would substantially lessen competition in that market”). In contrast, the potential for vertical merger harm can be remedied through behavioral remedies or conduct provisions that ensure the merging parties agree not to engage in conduct that is concerning to the antitrust regulators. See generally ANTITRUST DIV., U.S. DEP’T OF JUST., MERGER REMEDIES MANUAL (2020), https://www.justice.gov/atr/page/file/1312416/download.

\textsuperscript{22} See, e.g., Complaint, In re Evanston N.W. Healthcare Corp. & ENH Med. Grp., Inc., No. 9315 (FTC Feb. 10, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040210ehmcomplaint.pdf (challenging hospital acquisition four years earlier that allegedly had led to increased prices); Opinion of the Commission, In re Evanston N.W. Healthcare Corp., No. 9315 (FTC Aug. 6, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf (holding acquisition was anti-competitive and implementing structural remedy); Healthtrust, Inc., 59 Fed. Reg. 55668 (FTC Nov. 8, 1994) (imposing consent order required acquiring hospital to divest certain assets in order to proceed with the remainder of proposed transaction); In re Reading Hosp., 113 F.T.C. 285 (1990) (imposing consent order five years after merger consummated and over a year after the parties had terminated their association voluntarily).


\textsuperscript{24} Id.; Withdraw and Refile Notification, 16 C.F.R. § 803.12 (2018).
to avoid the DOJ or FTC issuing a “Second Request” for documents and additional information about the parties and transaction.\textsuperscript{25} The issuance of a Second Request prevents the parties from consummating the transaction until the companies have substantially complied with the Second Request and observed another thirty-day waiting period, where the FTC or DOJ can apply to a federal district court to stop the transaction through a preliminary injunction.\textsuperscript{26} Complying with a Second Request can be time-intensive and expensive.\textsuperscript{27}

Outside the United States, more than one hundred jurisdictions have implemented some form of merger control laws or pre-merger notification requirements.\textsuperscript{28} Each of those jurisdictions has its own approach to transaction reviews/approvals and has waiting periods and timelines that apply to their reviews.\textsuperscript{29} Some jurisdictions have implemented post-merger filing regimes that are only required after a deal is completed.\textsuperscript{30}

II. THE ANATOMY OF A DEAL: ANTITRUST PROVISIONS

Although every deal is unique and the negotiated provisions vary based on the transaction, several antitrust-related provisions are frequently included in deal documents, including (1) representations and warranties concerning the required consents, approvals, and regulatory conditions to close;\textsuperscript{31} (2) regulatory cooperation and control provisions; (3) the level of efforts required by the parties to achieve regulatory consents and approvals, including specific provisions

\textsuperscript{26} Id.
\textsuperscript{27} See Letter from Joseph Angland, Chair, Section of Antitrust L., Am. Bar Ass’n, to the Antitrust Modernization Commission (Feb. 22, 2007), http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/070222_abamergers.pdf (providing estimates of the cost for Second Request Compliance in 2007 based on survey responses); ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 163 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (“One estimate places the current cost of responding to a second request investigation at between $5 million and $10 million. The time needed for review of a transaction and receipt of approval from the agency now can be six months or longer.”).
\textsuperscript{28} See Foster & Li, supra note 13 (“In 1990, fewer than 12 jurisdictions worldwide had merger control laws; today, more than 120 jurisdictions have introduced merger control regimes . . . .”) (internal citations omitted).
\textsuperscript{29} Id.
\textsuperscript{30} Id.
about Second Request compliance, litigation, and appeals;\textsuperscript{32} (4) end dates or “drop-dead” dates;\textsuperscript{33} and (5) reverse break-up fees.\textsuperscript{34}

A. Required Consents, Approvals and Conditions to Close (Common)

A common feature in nearly every deal agreement is a representation and warranty related to the required consents and approvals needed to close the transaction.\textsuperscript{35} Such representations and warranties often include specific references to the necessary antitrust or regulatory approvals when pre-merger notification is required.\textsuperscript{36} Deal agreements also include specific antitrust or regulatory conditions to close.\textsuperscript{37} Clarity and precision on the required approvals and consents is critical to protect both parties.

Broad provisions that create amorphous conditions to close should be avoided. For example, a condition to close that reads: “All applicable waiting periods under the HSR Act and under any similar foreign statutes and regulations applicable to the Merger shall have expired, terminated or where applicable approvals have been obtained” invites a dispute between the parties. The lack of specificity on the required approvals and specific jurisdictions may create an incentive for a party second-guessing the merger to “create” new regulatory hurdles or technical compliance obligations to avoid closing.

Involving antitrust counsel early in the process allows for a complete vetting of the potential international pre-merger filing obligations and allows the parties to jointly decide on which of the required filings will be conditions to close.

B. Cooperation & Control (Common)

When regulatory filings are required and anticipated, parties often agree to a broad range of cooperation provisions to ensure the parties are transparent with one another and working to achieve the regulatory clearance at issue.\textsuperscript{38} These


\textsuperscript{33} DeFilippo et al., supra note 32.

\textsuperscript{34} Id.

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.
include obligations that the parties cooperate to complete any required regulatory filings, provide one another with communications with a governmental authority, allow counsel notice of and the opportunity to attend meetings with governmental authorities, and allow the other party an opportunity to review and comment on materials before they are submitted to a governmental authority. These provisions are all intended to provide a steady flow of information between the parties’ outside counsel and to ensure that no surprises arise during the regulatory clearance process.

Some deal agreements also designate the party that will control the regulatory approval process and advocacy to governmental entities. Control provisions often provide the buyer with control of the regulatory process in exchange for shifting more risk to the buyer by requiring more extensive actions to achieve approval.

C. Filing Fees & Costs (Common)

The parties also need to determine who is responsible for paying regulatory filing fees and covering costs (if any) that are incurred to achieve regulatory approvals. Filing fees vary by jurisdiction but can be sizeable. Moreover, the cost and burden of preparing merger control filings varies dramatically by jurisdiction and often depends on the party taking the lead on the particular filing. In the event a substantive merger investigation is initiated, expenses can rapidly increase as the parties must hire economists and engage a team of antitrust counsel to advocate for the transaction. Sellers generally want to reduce expenses, minimize the amount of time to close, and maximize deal certainty. To that end, sellers may propose language placing these expenses and burdens on the buyer.

D. Efforts Required to Achieve Regulatory Consents & Approvals (Common)

At the time of signing, the parties have a mutual incentive to push the deal forward to closing, but as issues arise, the desires and goals of the parties may

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39 Id.
40 Id.
change. As a result, in conjunction with cooperation provisions, parties may also include specific provisions detailing the ongoing efforts that each party must undertake to achieve antitrust clearances or overcome regulatory hurdles.\(^{43}\) These “efforts” provisions are the most important antitrust risk-shifting provisions as they govern the parties’ behavior during the merger review and clearance process.\(^{44}\)

Antitrust efforts provisions can be broad and vague (e.g., “commercially reasonable efforts to obtain required approvals”) or they can be specific and prescriptive (e.g., the parties agree to promptly comply with a Second Request or agree to divestitures).\(^{45}\) Many permutations of these antitrust risk-shifting provisions exist.\(^{46}\) Common standards used to describe the efforts required include “commercially reasonable efforts,” “reasonable best efforts,” “best efforts,” or “hell-or-high water” protection.\(^{47}\) The level of efforts required can be viewed on a spectrum:

While parties often negotiate to include these efforts provisions, courts have been mixed in how they interpret the provisions in follow-on litigation.\(^{48}\) The results of court decisions vary, but the takeaway is clear: merging parties and antitrust counsel must be cautious about how much reliance is placed on a vague description of the efforts required.\(^{49}\) Therefore, the parties’ time and negotiating energy are better spent on enumerating the specific activities the parties are required to undertake (e.g., Second Request compliance, litigation, appeals, divestitures) or provisions that provide commercial leverage to encourage

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\(^{43}\) See Karen Kazmerzak, et al., Antitrust Covenants in the Spotlight Following Recent Failed Mergers, 34 ANTITRUST 68, 68 (2020) (“Antitrust attorneys will often advise on the efforts a party will agree to undertake to receive antitrust clearance.”).

\(^{44}\) See id. (“For antitrust practitioners, the key areas of risk that could thwart consummation often include feasibility of securing antitrust clearances with or without remedial conditions and the time or legal process (e.g., Second Request, litigation) necessary to address those hurdles.”).

\(^{45}\) See id.

\(^{46}\) See id. at 68-69.

\(^{47}\) Id. (noting “reasonable efforts” and “[g]ood faith efforts” are two other types of efforts clauses available).

\(^{48}\) See id. at 69 (“Although deal practitioners may generally follow these standards when drafting, commentators who have surveyed the case law find little support for the distinctions that transactional lawyers draw.”).

\(^{49}\) See id.
completion of the transaction (i.e., reverse break fees). In undertaking an analysis of what efforts these provisions require, courts are most influenced by the other provisions that describe and implement these efforts.

1. **Commercially Reasonable Efforts (Common).** This language is generally viewed as the most lenient standard. Courts describe the required activities as requiring “at the very least some conscious exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes one’s business interests.” This is a buyer-friendly standard where the conduct of the parties is assessed through an objective lens.

2. **Reasonable Best Efforts and Best Efforts (Common).** While invoking a clause with “best efforts” is viewed as requiring more than “commercially reasonable” efforts, many commentators have observed that there may be little practical difference between the applicability of reasonable best efforts and best efforts in a court’s eyes. For example, in *Akorn, Inc. v. Fresenius Kabi AG*, the court stated that both commercially reasonable efforts and reasonable best efforts require the party to “take all reasonable steps” to solve problems and complete the transaction.

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50 See id (noting that after “[g]ood faith efforts,” a “commercially reasonable efforts” clause the lowest standard required by an efforts clause).


52 See id.

53 See Charles M. Fox, Working With Contracts: What Law School Doesn’t Teach You 88 (2d ed. 2002) (“‘Best efforts’ is the most stringent standard.”); Ryan M. Murphy, Giving It Your Best Effort. Efforts’ Standards Under Delaware Law, Mergers & Acquisitions L. Rep. (Apr. 25, 2016) (“The conventional thinking subscribed to by most practitioners is a sliding scale in which ‘best efforts’ constitutes the highest level of commitment followed regressively by ‘reasonable best efforts,’ ‘reasonable efforts’ and ‘commercially reasonable efforts.’”).

54 See generally Ryan Aaron Salem, Comment, An Effort to Untangle Efforts Standards Under Delaware Law, 122 Penn St. L. Rev. 793, 806-10 (2018).


56 Akorn, 2018 WL 4719347 at *87 (citing Alliance Data Sys. Corp. v. Blackstone Cap. Partners V L.P., 963 A.2d 746, 763 n.60 (Del. Ch. 2009)); see also Coady Corp. v. Toyota Motor Distrs., Inc., 361 F.3d 50, 59 (1st Cir. 2004) “‘Best efforts’ is implicitly qualified by a reasonableness test.”).
consistent with other decisions that temper the “best efforts” obligation with actions that are reasonable and in good faith.\(^{57}\)

(3) **Hell-or-High-Water (“HOHW”) (Rare).** A HOHW provision is a rare provision that requires the buyer “to 'take any and all action necessary’ to obtain antitrust approval for the transaction, and prohibits [the buyer] from taking ‘any action with the intent to or that could reasonably be expected to hinder or delay the obtaining of’ such approval.”\(^{58}\) A HOHW is a seller-friendly standard that is viewed as providing greater deal certainty because the buyer must do *anything* in its power to achieve merger approval.\(^{59}\) HOHW provisions shift all antitrust risk onto the buyer.\(^{60}\) A HOHW provision is more likely to be included in transactions where there is little or no substantive antitrust risk.\(^{61}\) In transactions where there is some or significant antitrust risk, the inclusion of a HOHW provision can present considerable challenges as the antitrust regulators can extract and dictate the terms of divestitures and changes.\(^{62}\)

The value of HOHW obligations are tempered by the end date or termination date. A HOHW without sufficient time to implement a remedy may not provide greater deal certainty.\(^{63}\) In addition, the agencies have made clear that they are less willing to settle or “fix” problematic deals.\(^{64}\) With current antitrust regulators, a HOHW may present implementation challenges as the agencies

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\(^{57}\) See, e.g., Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 613 (2d Cir. 1979) (holding a party need not bankrupt itself attempting to satisfy a “best efforts clause”); *see also* Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc., 832 F.2d 214, 227-28 (1st Cir. 1987) (finding “best efforts” have never been held to mean or require every conceivable effort); Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC, 842 F. Supp. 2d 502, 511 (S.D.N.Y. 2012) (interpreting “best efforts” to “impose[] an obligation to act with good faith in light of one’s own capabilities.”).

\(^{58}\) Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 756 (Del. Ch. 2008); *see also* Akorn, 2018 WL 4719347, at *46 (“Akorn also relies on Fresenius’s specific commitment to ‘take all actions necessary’ to secure antitrust clearance, which the Merger Agreement states shall require efforts that ‘shall be unconditional and shall not be qualified in any manner.’ This level of commitment is generally called a ‘Hell-or-High-Water Covenant.’”).

\(^{59}\) See Kazmerzak et al., supra note 43, at 69.

\(^{60}\) See id.; Aimee E. DeFilippo et al., supra note 32.

\(^{61}\) Hell or high water provisions are not frequently litigated, but in Akorn, the Delaware Court of Chancery interpreted a hell or high water provision and found that the buyer did not materially breach the covenant when it briefly pursued a divestiture package with the FTC that it knew would delay approval and closing. Akorn, 2018 WL 4719347, at *99-100.

\(^{62}\) See id.; Aimee E. DeFilippo et al., supra note 32.

\(^{63}\) See Jonathan Kanter, supra note 3 (“[M]erger remedies short of blocking a transaction too often miss the mark.”).
may be unwilling to resolve antitrust concerns through a settlement or divestiture.\textsuperscript{55}

\textbf{E. Litigation \& Appeals (Common)}

Some parties agree to fight for their deal to the very end by agreeing on litigation provisions.\textsuperscript{66} A litigation provision usually requires the buyer to fight a legal challenge by the government to block the transaction.\textsuperscript{67} Of course, with litigation comes uncertainty and increased costs that may be untenable, so the parties may contract for this possibility. Litigation requirements are particularly important to sellers who have embarked on the merger approval process, taken on business uncertainty, and could potentially be harmed if the merger fails to consummate.\textsuperscript{68} Some provisions also require that the parties exhaust all appeals of any adverse trial court decision.\textsuperscript{69} Like a HOHW provision, provisions that require the parties to litigate are only valuable if there is enough time before the end date or termination date to reach a decision on the merits.

\textbf{F. Remedy \& Divestiture Provisions (Common)}

Another common feature is to set forth the potential remedies or divestitures that the parties (or buyer) are willing accept to ensure regulatory approval of the deal.\textsuperscript{70} Divestiture provisions can be unqualified (e.g., buyer is required to take all actions necessary to obtain antitrust approvals, including agreeing to the sale, divestiture or other conveyance or holding separate of assets or permitting the Company to sell, divest or otherwise convey or hold separate its assets) or they can be more restrictive and limited (e.g., no party is required to commit to or effect any sale, divestiture, lease, holding separate pending a sale or other transfer or disposal, or any other restriction or action if such actions in the aggregate would or would reasonably be expected to have a materially adverse impact).\textsuperscript{71}

Divestiture provisions commonly have parameters that set forth the lines of business, products, or even the revenues/sales limitations for a divestiture.\textsuperscript{72}

\textsuperscript{55} See id.
\textsuperscript{65} See id.
\textsuperscript{66} Peter D. Lyons et al., Strategic Deals Require Strategic Thinking: Antitrust Provisions to Consider in Negotiated Transactions, 14 No. 2 M \& A Law.
\textsuperscript{67} See DeFilippo et al., supra note 32.
\textsuperscript{68} See id.
\textsuperscript{69} See Lyons et al., supra note 66.
\textsuperscript{70} See id. at 5.
\textsuperscript{71} See id.
\textsuperscript{72} See id.
Another common formulation is to limit required divestitures and remedies to products or a business that would not constitute a material adverse event on the deal or buyer. When a buyer wants to make it clear that no divestiture or remedies are required, they can insert specific language making clear that the required efforts do not include offering or accepting a divestiture.

Currently, the ability to present a potentially problematic transaction and negotiate a divestiture resolution with the FTC and DOJ is significantly diminished. The FTC and DOJ have made it clear that settlements—even those including divestitures—are disfavored and that they intend to challenge problematic transactions. While there are some limited examples of successful divestitures or remedies during the Biden-Harris administration, they are infrequent. But the parties are not without options if a divestiture would remedy the problematic features of a proposed transaction. One method of remedying these issues is to engage in a “fix-it-first” where the parties dispose of the problematic overlap before filing an HSR with the agencies. There are several examples of parties using the fix-it-first method successfully to complete deals, but it requires careful planning and timing to execute effectively.

Divestiture and remedy provisions are sometimes thought to highlight potential competition concerns for antitrust authorities. Skeptical parties may also believe that the antitrust authorities view these provisions as a blueprint for the remedies/divestitures that should be demanded in a particular transaction.

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73. Id. (noting that a buyer’s divestiture obligations may be limited to “a materiality cap”).
74. See sources cited supra note 3.
76. See Leon B. Greenfield et al., Fix-It-First: A Seismic Shift in U.S. Antitrust Agency Approaches to Merger Remedies, CPI ANTITRUST CHRON., Nov. 2023, at 2 (“This sea change in merger enforcement policy is leading merging parties increasingly to contemplate ‘fix-it-first’ strategies, whereby the parties modify the proposed transaction to address antitrust concerns—typically by reaching an agreement with a buyer of assets to be divested—without entering a consent decree with the agency.”).
77. See id. at 5 (noting that despite increased antitrust enforcement “fewer transactions are resulting in agency action or abandonment because with the agencies unwilling or reluctant to enter consent decrees, they seem to be allowing more deals to proceed unchallenged in consideration of a fix-it-first remedy or by determining not to take any action regarding transactions that might have resulted in consent decrees in the past.”).
78. See Lyons et al., supra note 66.
79. See id.
To avoid this, parties kept these types of agreements embedded in joint defense agreements or side letters to protect them from disclosure. But the DOJ and FTC have made clear that parties who fail to provide these side agreements with their HSR filing do so at their own risk, as the DOJ and FTC view these as important deal provisions that must be submitted with the parties’ HSR filings.

G. Breakup & Reverse Breakup Fees (Uncommon)

There can also be specific provisions that require one of the parties to pay a fee to the other party in the event the merger agreement is terminated or the merger is not completed within a particular period of time. Breakup fees are normally protective of buyers and ensure that if the target terminates the agreement to sell to a more favorable suitor, the buyer is protected. In contrast, reverse breakup fees require the buyer to provide compensation to the seller in the event the deal is not completed by a triggering event or end date. During the long and uncertain merger review period, the seller’s customers, partners, suppliers, or employees may seek new opportunities or seek to de-risk their supply chain. The goal of a reverse break fee is to compensate a seller for the inevitable deterioration of the business during this period. If included, a reverse break fee is typically between three to five percent of the purchase price.

Reverse break fees can also incentivize the buyer by reinforcing the regulatory efforts provisions. For example, a buyer who may face a reverse breakup fee would likely be willing to accept a minor divestiture even if it was not contractually obligated to undertake the divestiture to avoid the fee. Similarly, the buyer may be willing to accept other remedies. While not a common feature of most deal documents, reverse break fees also provide a clear remedy for the seller in the event the transaction is not completed. As a result,

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80 See id.
82 See Afra Afsharipour, Transforming the Allocation of Deal Risk Through Reverse Termination Fees, 63 VAND. L. REV. 1161, 1163-64 (2010).
84 See id.
85 See id. at 71.
87 See Tucker & Yingling, supra note 83, at 71.
88 See id.
it increases deal certainty and mitigates the risk that a party will later opportunistically use the deal agreement and efforts provisions to avoid obtaining required regulatory clearances.

H. Termination & End Dates

Finally, many merger agreements contain antitrust risk provisions permitting one or both of the parties to terminate the deal if it has not yet closed by a set date, called an end date. Sometimes other provisions in the agreement allow the parties to extend the end date if the parties are litigating with the government about the propriety of the deal. The benefit of this provision is that it provides the parties with security that there will not be an indefinite period of consummation which aids in business outlook and planning. Many of the other antitrust risk-shifting provisions only have power (e.g., HOHW or litigation provisions) to the extent there is time to complete the required activities.

CONCLUSION

In a world of aggressive enforcement, lengthier merger review timelines, and more extensive international merger control, early consideration of antitrust risk and who bears that risk in transactions is essential. But as can be seen through the discussion above, antitrust risk shifting provisions cannot be negotiated or viewed in a vacuum. Practitioners should consider the level of antitrust risk, clearances required, type of transaction, timeline for completion, and impact of a failed transaction when formulating antitrust risk-shifting provisions.

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89 See DeFilippo et al., supra note 32.
90 See id.
91 See id.