

## Anatomy of an Antitrust Merger Investigation

### Guest and Dorsey Panelists

**Dr. Tasneem Chipty**, Managing Principal, Chipty Economics

**Carla Framil Ferrán**, General Counsel, Liberty Communications of Puerto Rico LLC

**Michael Lindsay, Matthew Ralph and Jaime Stilson**, Dorsey & Whitney LLP

### Program Materials

PowerPoint Presentation

### Dorsey Publications and Blog Posts

**Dorsey Blog:** *Hell-or-High-Water Clauses in Uncertain Regulatory Times*, Hannah Tuttle (10/11/22)

Available at: <https://www.dorseydealdividends.com/hell-or-high-water-clauses-in-uncertain-regulatory-times/>

**Dorsey Publication:** *Increase in HSR Reportability Thresholds and Other HSR Developments*, Michael Lindsay, Jaime Stilson, Anthony Badaracco & David Racine (1/25/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/01/increase-in-hsr-reportability-thresholds>

**Dorsey Publication:** *New FTC Position on Debt and HSR Valuation*, Michael Lindsay, Anthony Badaracco, Stephen Weingold & Alyssa Schaefer (9/3/21)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2021/09/new-ftc-position-on-debt-and-hsr-valuation>

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## Housekeeping

**Materials.** Session materials and speaker biographies are available on Dorsey.com for download. Search “Corporate Counsel Symposium 2022.”

**Attendance Sheets** are set on tables in this room. If you miss one check at the registration desk.

**Q&A.** The speakers will not have time to answer audience questions, please contact the speakers or your trusted Dorsey contact.

**CLE.** A CLE code will be announced for attendees in states that require a Code. **CLE Expected:** AZ, CA, CO, IA, IL, MN, ND, NY, OR, TX, UT, WA, WI.

## Guest and Dorsey Speakers



**Dr. Tasneem Chifty**  
Managing Principal  
Chifty Economics



**Carla Framil Ferrán**  
General Counsel  
Liberty Communications of  
Puerto Rico LLC



**Anthony Badaracco**  
Partner  
Dorsey & Whitney LLP



**Michael Lindsay**  
Partner  
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**Matthew Ralph**  
Partner  
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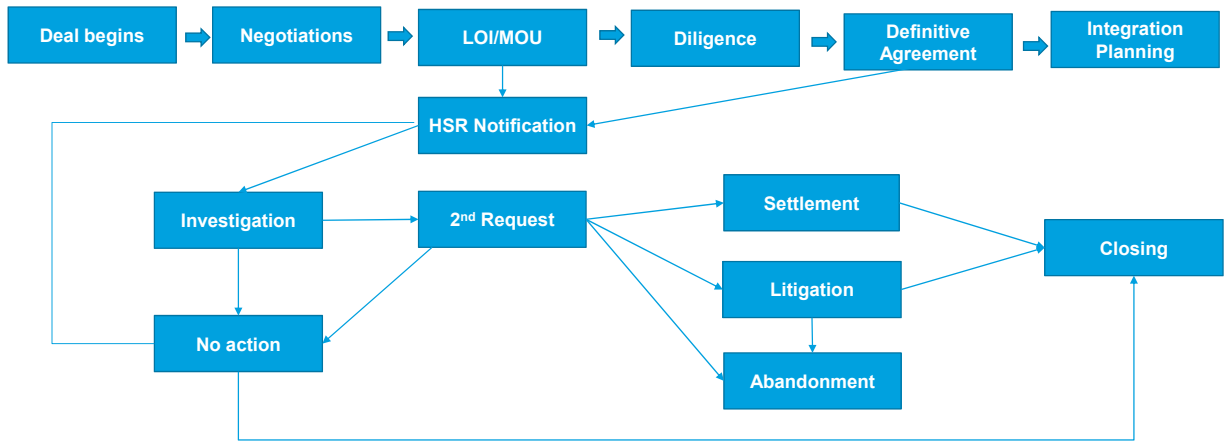


**Jaime Stilson**  
Partner  
Dorsey & Whitney LLP

## What is antitrust risk?

- **Horizontal risk**
  - Acquirer and Target are competitors at same level of distribution, in one or more lines of products or services, in the same geography
    - E.g., Retailer A acquires Retailer B
- **Vertical risk**
  - Target controls significant share of a critical distribution channel or of a component/service used by Acquirer and its competitors
    - E.g., Manufacturer acquires Wholesaler
- **Non-Traditional areas**
  - Effects in labor markets
  - Nascent competition

## Transaction and Investigation Timeline



## Before the Investigation

## Before Signing the Agreement

- **Identify and evaluate antitrust risk (if any)**
  - **If Seller:**
    - Review descriptions of “market” / competition in offering memoranda and other transaction documents
    - Does any potential buyer pose more antitrust risks than others?
    - If the high bidder poses greater risk, does the price difference justify the risk?
  - **If Buyer:**
    - Is the transaction likely to result in an antitrust investigation?
    - Are there better investment opportunities (after adjustment for antitrust risk)?
    - Will this acquisition preclude a *better* opportunity in the future?
  - **Identify synergies/efficiencies**
- **Allocate antitrust risk by contract**

## Basic Antitrust Provisions

- **Contractual obligation to file HSR and other merger control notifications (and deadline for doing so)**
  - Identification of jurisdictions where filing is required
- **Duty of cooperation**
  - Sharing of information and drafts, communications with agencies
- **Compliance with “Second Request” (formal investigation)**
  - Deadlines (and potential extension of Outside Date)
  - Expense of compliance
- **Duty to litigate**
- **Obligation to propose/accept remedies**
- **Reverse termination fee**

## Spectrum of Antitrust Risk Allocation

- **Buyer bears no risk (and either party or both can terminate if Agency issues Second Request)**
- **Buyer must do anything and everything necessary to obtain antitrust clearance (“hell or high water”)**
- **Many points in between**
  - **Filing of non-binding LOI means seller bears all risk (but can walk for any reason)**

## Antitrust Risk Mitigation

- **Provisions are deal-specific and highly negotiated**
- **Examples**
  - **Divest competing locations**
  - **Divest a competing line of business**
    - **Contractual obligation to divest might be limited (e.g., by maximum dollar amount of revenue)**
  - **Grant an IP license to a third party**
  - **Long-term contracts with third-party users (vertical risk)**

## Excerpt from Illumina-Grail Antitrust Provisions

- “[R]easonable best efforts shall include ... Parent and its Subsidiaries offering and agreeing to undertake Permitted Restrictions as reasonably necessary to obtain pre-merger clearance in as timely a manner as reasonably possible from Governmental Authorities under Antitrust Laws in the United States and, if applicable, the UK and Germany .... [I]n no event shall Parent or its Subsidiaries ... be required to agree to or accept (A) any commitment, undertaking or Order to divest, hold separate or otherwise dispose of any portion of its or their respective businesses or assets, including after giving effect to the Transactions, or (B) any limitation on the ability of Parent or its Subsidiaries to acquire or hold or exercise full rights of ownership of any capital stock of the Company or its Subsidiaries ....”

Source: Agreement & Plan of Merger among Illumina, Inc, SDG Ops, Inc., SDG Ops, LLC and Grail, Inc. § 7.07 Ex. 2.1 to Illumina Inc. Form 8-K of Sept. 21, 2020)

## Communication Strategy

- **Counseling inside the company**
- **Positioning outside of the company**

## Early Engagement of Economist

- **If there is potential significant overlap or if there is agency interest in the industry**
- **Examples of early work**
  - **Identify efficiencies and potential theories of harm**
  - **Scope out the projects that could be conducted**
  - **Develop white papers for use during initial waiting period**
    - **Hard to get them done during the waiting period**

## The Investigation



## Informal Stage

- **Initial contact from Agency**
  - Only one agency investigates
  - Typically Day 14 to 21 of HSR waiting period, but can be later
  - Sometimes parties will initiate contact, even before the waiting period
- **Respond to standard and deal-specific informal requests**
  - Org charts, strategic plans and marketing plans for past 3 years, product list (including overlaps), list of competitors and top 10 customers (with contact info) for overlap products, market share information for overlaps
- **Determine whether to “pull and refile”**
  - Effectively extends waiting period from 30 days to 60 days
  - Avoid or at least narrow a Second Request

## “Second Request”

- **Issue internal preservation notice (if not already done)**
- **Identify maximum set of likely custodians**
- **Determine which parts of Second Request are reasonably achievable (and when) and identify the unduly burdensome requests**
- **Negotiate**
  - “Timing agreement”
    - Limitations on number of custodians and deponents in exchange for providing Agency more time after “substantial compliance”
  - Limitations on scope of Second Request
  - Search terms vs. Technology-Assisted Review (“TAR”)

## Role of Economist

- **Areas of study**
  - Studying the extent to which parties compete with each other
  - Quantifying customer overlap
  - Understanding how pricing works (including discounts)
  - Analysis of entry
  - Extent to which past competition is indicative of future competition
- **Tasks**
  - Work with parties to build responses to Second Request data inquiries
  - Run analyses to anticipate what the agency will see in the parties' data
  - Help answer agency questions about the data
  - Model different divestiture scenarios

## Party Witnesses

- **Company should identify different kinds of party witnesses**
  - Company advocates
  - Other voluntary interviewees
  - Others that agency will want to speak with
- **Typically (but not always), agency will conduct informal interviews first**
  - If litigation looks likely, depositions under oath
- **The most likely candidates for interviews include those with sales, marketing, and pricing responsibilities**

## Non-Party Witnesses

- **Agency will contact customers and competitors**
  - Parties must identify top customers, competitors, and suppliers
  - Agencies will have other sources as well
- **Parties should develop strategy for engagement with potential nonparty witnesses**

## “White Paper” – Advocacy for Clearance

- **Objective is to identify arguments and evidence that Agency staff will have to address with Agency management to win authorization to challenge the proposed transaction**
  - Listen to the Agency staff and discern the “hot” issues on their minds
- **Agency may ask for submissions**
- **Parties may also choose to submit voluntarily (including early in the investigation, before the Second Request)**
- **Substance can be purely factual or may involve economic analysis**

## Settlement Discussions

- **Either side can initiate, but if agency staff has decided to recommend a challenge, staff may also invite settlement proposals**
  - Settlement may be bounded by transaction agreement
  - Staff, of course, will be aware of risk allocation provisions
- **Staff will likely request a “pause” of the timing agreement “clock”**
- **Weigh likelihood of settlement vs. outside closing date**

## If No Settlement

- **Agency decides to clear the transaction**
- **Agency expresses opposition (“close at own risk” letter)**
- **Parties abandon the transaction**
- **Agency files action to challenge the transaction and prevent it from going forward**
  - Parties may unilaterally modify the transaction that they propose to proceed with
  - Litigating the “fix” or divestiture proposal

## Thank you for attending!

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**Questions.** If you have questions, you may contact the speakers or call on your trusted Dorsey contact.

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