# Antitrust Risk-Shifting Provisions in Merger Agreements After the Financial Collapse

**Darren S. Tucker and Kevin L. Yingling**

The global financial crisis has drastically altered the market for corporate acquisitions. Merger volume globally was down in 2008 by almost a third from a year earlier.[1] The stock market's collapse in October 2008 further exacerbated the market uncertainty for deals, and several large announced transactions imploded in the aftermath, including BHP Billiton/Rio Tinto, Waste Management/Republic Services, and Walgreens/Longs Drug Stores. The BHP Billiton/Rio Tinto transaction, originally valued at $188 billion, was the largest deal ever to fail.[2] Merger activity in early 2009 continues to be anemic.[3]

The global economic contraction and credit tightening has reduced the capital available to finance acquisitions, particularly for private equity funds. Some observers have noted that private equity firms have been essentially absent from larger deals.[4] This development contrasts sharply with previous years when ever-higher-priced take-private deals were announced seemingly on a daily basis.[5]

Strategic buyers, which struggled to compete with private equity purchasers during the easy-money bubble years, have now become the most viable purchasers. Indeed, nearly all of the largest deals since August 2007, when the fissures in the credit firmament began to emerge, have been strategic combinations. From emergency bank deals (Bank of America/Merrill Lynch and Wells Fargo/Wachovia) to consumer goods transactions (InBev/Anheuser-Busch, Mars/Wrigley, and Altria/UST), transportation (Delta/Northwest), pharmaceuticals (Pfizer/Wyeth and Merck/Schering-Plough), and technology (Hewlett Packard/EDS and Oracle/BEA Systems), the most high-profile and transformative deals have been predominantly strategic.

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*The authors are grateful to Paul Godek for his analysis of the survey data and Kathleen Pessolano for her research assistance. The authors represented Northwest Airlines in the Delta/Northwest merger discussed in this article.*

[1] Jessica Hall, Global *M&A Falls in 2008*, REUTERS, Dec. 22, 2008, *available at* http://www.reuters.com/article/businessNews/idUSTRE4BL36B20081222.

[2] Stephen Taub & Roy Harris, *Withdrawal of BHP-Rio Tinto Bid Is Biggest Ever*, CFO, Nov. 25, 2008, *available at* http://www.cfo.com/printable/article.cfm/12672723.

[3] Michael J. de la Merced, *Anemic Recovery for Mergers and Acquisitions*, N.Y. TIMES, Mar. 26, 2009, *available at* http://www.nytimes.com/2009/03/26/business/26merge.html ("Worldwide, about $443.7 billion worth of deals have been struck this year . . . . That's a 34 percent drop from the same period in 2008."); David P. Wales, Acting Director, Bureau of Competition, Fed. Trade Comm'n, Remarks, Breakfast with the FTC Bureau Directors, ABA Section of Antitrust Law Spring Meeting 9 (Mar. 27, 2009) (noting that the number of Hart-Scott-Rodino merger filings declined from 112 in February 2008 to 31 in February 2009) (presentation on file with the authors).

[4] Matthew Karnitschnig & Dana Cimilluca, *M&A Went MIA and May Stay that Way*, WALL ST. J., Jan. 2, 2009, at R8 ("Private equity-led buyouts, which accounted for about 15% of all M&A in 2007, fell to 6% of the total in 2008, and aren't likely to recover until firms can secure the large financing packages they need to undertake buyouts."); Vance Cariaga, *Merger Action Percolates Anew, But It Won't Reach 2007's Level*, INVESTOR'S BUS. DAILY, July 22, 2008, at A1 ("Private-equity firms drove last year's M&A boom, but they've spent much of this year on the sidelines.").

[5] David Marcus, *Desperately Seeking Certainty*, THE DEAL, July 18, 2008, *available at* http://www.thedeal.com/newsweekly/features/desperately-seeking-certainty.php ("The past year has been brutal for private equity. . . . The 523 buyouts worth $65 billion since Aug. 1[, 2007] pale in comparison to 2005, 2006 and the first half of 2007.").

With many potential buyers unable to secure funding or handicapped by their own low stock price, potential sellers—many facing their own financial challenges—now have significantly fewer options than in the past several years. Consequently, merger agreements have shifted from generally favoring sellers to favoring buyers. Contracts now tend to contain more buyer-friendly provisions, such as explicit specific performance disclaimers and reverse termination (sometimes called reverse breakup) fees, that essentially function as call options for acquirers.[6]

The trend toward more buyer-friendly merger contracts contrasts with some commentators' expectations at the beginning of the credit crunch. After a number of private equity firms abandoned high-profile acquisitions, several observers predicted that sellers would demand either explicit specific performance requirements or more onerous reverse breakup fees. For the most part, this did not happen.[7] Sellers, faced with fewer prospective purchasers, have had to accept merger contracts tending to favor buyers.[8]

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Whether the recent trend toward more buyer-friendly merger covenants has also affected antitrust risk-shifting provisions has not yet been examined. We surveyed the thirty largest non-financial, non-private-equity merger agreements in each of 2007 and 2008 to identify any patterns or trends in antitrust risk-shifting terms and to see if merging parties have found new ways to apportion antitrust risk in the current deal environment. This sampling provides the first attempt to quantify the effect of the economic downturn on merging parties' assessment of antitrust risk.

## Antitrust Risk-Shifting Provisions

Antitrust risk-shifting devices are a common feature of U.S. merger agreements. The purpose of these provisions is to apportion risks and establish obligations related to potential competition issues raised by the transaction. The most basic risk-shifting provisions set forth in general terms the efforts each party must expend to obtain antitrust clearance. More complex covenants may specify litigation obligations, information-sharing requirements between the parties, divestiture requirements, reverse breakup fees, and regulatory clearance deadlines.

Antitrust risk-shifting provisions in merger contracts can address several important issues for buyers and sellers. After an acquisition is announced but before closing, the seller may have difficulty maintaining its business, in particular, retaining customers and key employees. The target company will want contractual provisions that facilitate a rapid closing and that protect the viability of the firm as a standalone entity should the transaction not close. The buyer, on the other hand, may seek risk-shifting clauses giving it flexibility to address potential antitrust concerns raised by merger regulators. For example, the buyer may want the option to abandon the transaction if the antitrust authorities demand the sale of critical assets to resolve competition issues.

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[6] *Id.* (quoting an M&A lawyer: "The merger agreements in the deals that have been done since the bubble burst have largely followed the reverse break fee, no-financing condition, no-specific-performance paradigm."); Steven M. Davidoff, *Deal Book: Brocade's Financing Problems in Foundry Deal*, N.Y. TIMES, Nov. 17, 2008, *available at* http://dealbook.blogs.nytimes.com/2008/11/17/brocades-financing-problems-in-foundry-deal (discussing the "new strategic [acquisition] model that incorporates a reverse termination fee private-equity-type provision").

[7] Vipal Monga, *Seller Beware*, THE DEAL, Aug. 8, 2008, *available at* http://www.thedeal.com/newsweekly/features/seller-beware.php ("Last year, when the first financial sponsor-backed deals began to implode, conventional wisdom argued that boards of selling corporations would react by demanding more certainty in deals. . . . The conventional wisdom was wrong."); Marcus, *supra* note 5 ("The run of collapsed deals has led some observers to predict that sellers would demand greater contractual certainty from PE shops in merger agreements, but so far that hasn't happened.").

[8] For example, instead of demanding specific performance requirements or larger reverse breakup fees, sellers have sought some greater assurances of consummating the transaction by negotiating stronger financing requirements up front and shortening the time between signing the deal and closing. *See* Marcus, *supra* note 5.

Although antitrust risk-shifting provisions can help parties deal with a variety of issues that arise prior to closing, there are some potential drawbacks to including these provisions in a merger agreement. Most significantly, these clauses may function as a red flag to antitrust regulators. By addressing the potential antitrust risks in the merger agreement, the parties may signal regulators that the transaction raises significant competitive concerns. Moreover, specific provisions that state which assets the buyer must divest to obtain merger clearance may hamper the ability of the parties to negotiate the terms of a consent decree with the government.

There are a few common antitrust risk-shifting provisions. Cooperation clauses ensure coordination between the buyer and seller in obtaining merger approval from the antitrust authorities. These clauses require the parties to coordinate and agree on a strategy for winning antitrust clearance. This cooperation may include drafting white papers and presentations jointly, meeting with government regulators together, and coordinating communications with the antitrust agencies. These clauses encourage the buyer and seller to develop and maintain a unified approach in communicating with the competition authorities.

The "best efforts" clause dictates the parties' obligations to satisfy the conditions to closing, such as antitrust approvals. These covenants typically require the parties to use "commercially reasonable efforts" or "reasonable best efforts," to satisfy the conditions to closing, including the regulatory requirements. Although these covenants usually provide only vague parameters and may be difficult to apply in specific factual circumstances, they do provide a general guide of what is expected from both sides to close the deal.

A purchase agreement may provide more specific requirements for the parties if and when they are confronted by antitrust roadblocks. These requirements may include the buyer agreeing to divest assets to satisfy the antitrust authorities. The precise obligations in these divestiture clauses can vary considerably and are often subject to vigorous negotiation between deal counsel. These provisions sometimes require the buyer to divest all non-material assets required by the antitrust regulators in order to complete the deal but may be silent on the definition of "materiality." Alternatively, the parties may specify assets or businesses to be divested or cap divestitures at a certain dollar amount. At the extreme, a "hell or high water" clause commits the buyer to undertake any obligations or divestitures that the government requires to consummate the transaction, regardless of cost.

Termination clauses in the merger agreement permit one or both parties to abandon the transaction after a certain period of time has passed or a specified event has occurred. For example, an agreement may provide that either party can abandon the deal after nine months or if there is a final, nonappealable government order prohibiting consummation. In general, buyers seek a longer duration for the termination clause to ensure that there is sufficient time to satisfy the closing conditions. Sellers generally prefer a shorter timeframe to minimize the potential deterioration of their businesses while the merger is pending.

Finally, a reverse breakup fee provision requires payment to the seller by the buyer if the acquisition does not close for certain reasons. Reverse breakup fees have been used with increasing frequency as a means of compensation to the target for undergoing the onerous and lengthy review process and the risk of the government blocking the transaction on antitrust grounds.[9]

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[9] Darren S. Tucker & Kevin L. Yingling, *Keeping the Engagement Ring: Apportioning Antitrust Risk with Reverse Breakup Fees*, ANTITRUST, Summer 2008, at 70.

## Antitrust Covenants Tested in the Market Downturn

Antitrust provisions are often hotly debated by the buyer and seller during merger negotiations but are rarely tested in litigation. The recent unraveling of Apollo's acquisition of Huntsman resulted in one of the few judicial discussions of merging parties' obligations under an antitrust "best efforts" covenant.[10]

In May 2007, Huntsman, a chemical manufacturer and marketer, solicited offers for itself and received competing bids from two other chemical companies, Hexion (owned by Apollo) and Basell. Huntsman signed a merger agreement with Basell only to receive a subsequent superior offer from Hexion. Basell refused to match Hexion's higher offer, citing the additional antitrust scrutiny that a Hexion/Huntsman deal would face. Huntsman subsequently terminated the agreement with Basell and, three weeks later, entered into the more lucrative, but riskier, agreement with Hexion.

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During the regulatory review process, Huntsman announced disappointing financial results. The merging parties had signed their agreement "just before the onset of the ongoing crisis affecting the national and international credit markets," and Huntsman's first half of 2008 earnings fell by approximately 20 percent over the previous year.[11] Hexion, seeking to abandon the transaction and avoid paying the $325 million reverse termination fee, sued for a declaratory judgment that Huntsman had suffered a material adverse condition, which would permit Hexion to abandon the transaction without liability.

The judge rejected Hexion's claims, holding that no material adverse condition had occurred and that Hexion had knowingly and intentionally breached the agreement by failing to satisfy its obligations under the antitrust "best efforts" provision. The merger agreement required Hexion to "take any and all action necessary" to secure approval from the antitrust agencies.[12] According to the court, this "hell or high water" provision was not satisfied because Hexion had yet to secure approval from the FTC and still had not certified compliance with the FTC's second request even though the termination deadline was only three weeks away. The judge found that "[r]ather than being a diligent party making all necessary efforts to obtain antitrust clearance, come 'hell or high water,' the court was left with the impression that Hexion had, since May or June, been dragging its feet on obtaining that clearance, pending the outcome of its attempts to avoid the transaction, in contravention of its obligations under the merger agreement."[13]

## Effects of the Financial Downturn on Antitrust Covenants

To see whether antitrust risk-shifting devices changed as the financial downturn intensified at the end of 2007, we examined the purchase agreements for the thirty largest acquisitions of U.S. companies in each of 2007 and 2008, excluding going-private transactions and acquisitions of distressed financial institutions. The survey revealed that the current economic slump affected sev-

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[10] Hexion Specialty Chem., Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008).

[11] *Id.* at 720–21, 740.

[12] *Id.* at 734, 756.

[13] *Id.* at 756. Despite the judge's criticism of Hexion's conduct, Hexion's antitrust counsel testified that Hexion would be able to receive antitrust approval in time to satisfy its obligations under the merger agreement. *Id.* Indeed, after the court ordered it to satisfy its obligations under the merger agreement, Hexion was able to secure a consent decree with the FTC before the merger deadline. *See* Press Release, Fed. Trade Comm'n, FTC Intervenes in Hexion's Proposed Acquisition of Huntsman Corp. (Oct. 2, 2008), *available at* http://www.ftc.gov/opa/2008/10/hexion.shtm.

eral antitrust risk-shifting covenants to the benefit of buyers and resulted in deals closing faster. In contrast, there was no effect on covenants designed to speed the regulatory process or on covenants addressing litigation requirements.

***Traditional Antitrust Risk-Shifting Devices.*** As previously noted, reverse breakup fees have become more widely used to mitigate antitrust risk to sellers in recent years. Since the onset of the financial downturn, the frequency of reverse breakup fees has not changed. Throughout the survey period, approximately 10 percent of the agreements included reverse breakup fees conditioned on failure to obtain regulatory approval. But while the frequency of these termination fee provisions remained steady over the 2007 to 2008 period, their dollar value declined. Figure 1 shows the fees as a percentage of the deal value by agreement date. The downward sloping trend line is statistically significant at the 10 percent level.[14]

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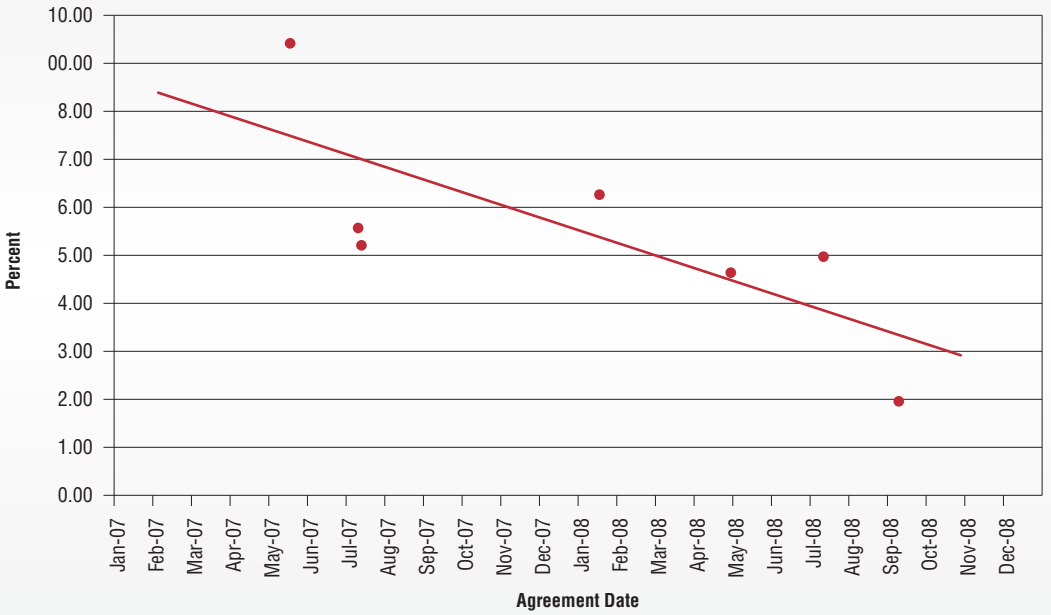
**Figure 1. Breakup Fees as a % of the Deal Value, by Agreement Date, 2007–2008**




Another notable trend is buyers' increasing reluctance to make curative divestitures. In eight of the surveyed transactions in 2007, the buyer agreed to divest assets without a monetary cap to the extent necessary to obtain regulatory approval.[15] No surveyed agreements in 2008 contained a similar provision. Likewise, the number of merger agreements expressly disclaiming a divestiture obligation increased from three in 2007 to five in 2008.

There was no significant change in the time that had to elapse before either merging party could terminate the transaction without penalty. The average time actually increased in 2008 rel-

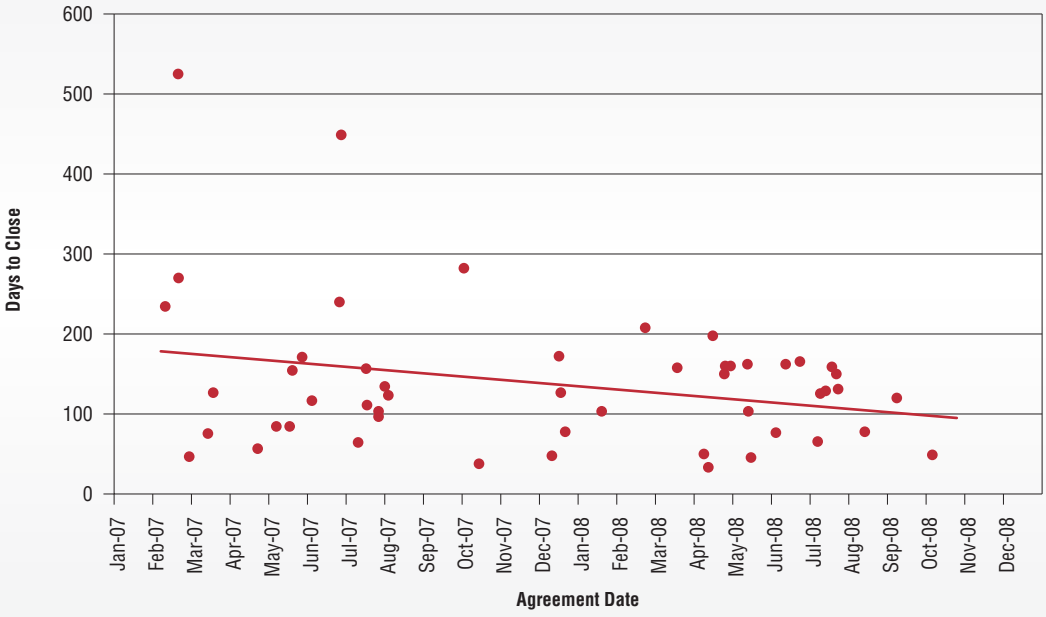
[14] Microsoft's acquisitions of aQuantive before the credit collapse and Greenfield Online in 2008 provide a useful, albeit rough, illustration of the trend. Microsoft "managed to negotiate a beneficial antitrust provision, which left it paying only $5 million [or 1 percent of the deal value] if the [Greenfield Online] deal failed on antitrust grounds, a much better deal than Microsoft received when it acquired aQuantive and agreed to a break fee of $500 million, or 10 percent of the value of the deal." Steven M. Davidoff, *DealBook Blog: The Deal Professor's Year-End Review*, N.Y. TIMES, Dec. 29, 2008, *available at* http://dealbook.blogs.nytimes.com/2008/12/29/the-deal-professors-year-end-review.

[15] These provisions would not necessarily be characterized as "hell or high water" clauses because some disclaim an obligation to divest any assets of the purchaser or to hold separate assets of the target company, while others give the buyer the right to seek to minimize the scope of the divestiture.

ative to 2007, but the difference was not statistically significant. One year remained the most common termination period, with a range from 3 to 18 months.

Even though the termination periods did not noticeably change, the actual time to consummate transactions did decline from 2007 to 2008. Figure 2 shows the number of days to close each deal by agreement date. The downward sloping trend line is statistically significant at the 10 percent level. Another trend apparent from the table is that the time to close transactions has become less dispersed over the surveyed period. Transactions executed in 2007 closed in 38 to 526 days with two deals requiring more than a year. In contrast, transactions executed in 2008 closed in 34 to 209 days with none taking more than nine months.[16]

**Figure 2. Days to Close Deals, by Agreement Date, 2007–2008**




There was no observed change in the litigation requirements over the course of the survey. Twenty-four of the thirty agreements in 2007 contained some type of litigation obligation, compared to twenty-five in 2008. Of the agreements with an express litigation requirement, there appeared to be little change as to parties' precise obligations, e.g., litigating through a preliminary injunction hearing versus litigating through an appeal on the merits. Other common risk-shifting provisions, such as the "best efforts" clause, also showed little variation over time.

***Regulatory Expediting Covenants.*** The surveyed agreements contain a variety of provisions designed to expedite the antitrust review process. The frequency of these provisions did not change noticeably over the period of our survey, suggesting that both buyers and sellers continue to see value in these provisions.

[16] Abandoned transactions were excluded from this part of the survey. Two transactions signed in the second half of 2008 have not yet closed and could affect the upward range of closing times for 2009.

Two merger agreements in our survey contain a deadline for compliance with a second request, if issued. In Delta/Northwest, the deadline was three months;[17] in Plains Exploration/Pogo, the deadline was two months.[18] The second request covenant appears to have had its intended effect in the Delta/Northwest transaction, which moved through the regulatory process rapidly. That merger agreement was signed on April 14, 2008. Just over three months later, on July 23, 2008, Northwest announced in an earnings call that the parties had already complied with the second request.[19] On October 29, 2008, six-and-a-half months after the parties entered into the transaction, the Antitrust Division closed its investigation—a quick review considering the scrutiny given to airline mergers.[20]

A number of surveyed agreements set a deadline for all non-U.S. competition filings. These clauses have become more popular as the number of countries with premerger notification regimes has expanded. The agreements require the parties to make all non-HSR competition filings within fifteen business days on average, with a range of seven to thirty business days.[21] This compares to an average of thirteen days to submit the HSR filing in the same agreements. Some agreements take a slightly different approach by setting a deadline for the parties to compile a list of all required competition filings but without specifying when the filings must be made. In the Alpha/Cleveland Cliffs merger, for example, the parties' counsel were required to compile "a definitive list" of all suspensive merger filings outside the United States within seven days.[22]

A number of the surveyed agreements specify which party has the right to direct the antitrust strategy and discussions with the antitrust agencies. These provisions are designed to prevent disputes between antitrust counsel, notwithstanding the standard practice, in which buyer's counsel takes the lead role. There is some variation in exactly what the lead party is entitled to direct, for instance, taking the lead on "the [antitrust] strategy of the parties,"[23] taking the lead on "pro-

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[17] Agreement and Plan of Merger by and among Delta Air Lines, Inc., Nautilus Merger Corporation and Northwest Airlines Corporation (Form 8-K) § 5.3(e) (Apr. 14, 2008) [hereinafter Delta/Northwest Merger Agreement] ("Each party will certify substantial compliance with respect thereto as promptly as possible, but in no event more than three months after the date of the Second Request.").

[18] Agreement and Plan of Merger by and among Plains Exploration & Production Company, PXP Acquisition LLC and Pogo Producing Company (Form 8-K) § 5.6(a) (July 17, 2007) (parties required to "certify substantial compliance with any request for additional information (also known as a 'second request') issued pursuant to the HSR Act within 60 days of such request"). An analysis of the effectiveness of the Plains/Pogo covenant is not possible because the transaction apparently did not result in a second request.

[19] Northwest Airlines Corp. Second Quarter 2008 Earnings Call Transcript (July 23, 2008) (CEO stating: "We have hit all the milestones so far, including in our view, compliance with the second request under the Hart-Scott-Rodino statute . . . .").

[20] Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/October/08-at-963.html.

[21] Only one of the agreements extends the deadline in the event that one party is dilatory in supplying information to the other party. *See* Agreement and Plan of Merger among Basell AF, BI Acquisition Holdings Limited and Huntsman Corporation (Form 8-K) § 5.4(b) (June 26, 2007) [hereinafter Basell/Huntsman Merger Agreement] (twenty business day filing requirement assumes that "the parties to this Agreement have received from the other party all of the information required to make all of their premerger notification filings").

[22] Agreement and Plan of Merger by and among Cleveland-Cliffs, Inc., Daily Double Acquisition, Inc. and Alpha Natural Resources, Inc. (Form 8-K) § 5.3(g) (July 15, 2008). *See also* Agreement and Plan of Merger by and among Invitrogen Corporation, Atom Acquisition, LLC and Applera Corporation (Form 8-K) § 5.9(b) (June 11, 2008) (parties required to "determine and agree upon, as soon as practicable" a list of jurisdictions requiring competition filings).

[23] Delta/Northwest Merger Agreement, *supra* note 17, § 5.3(f).

ceedings or negotiations" with the antitrust agencies,[24] or taking the lead on "all matters" related to antitrust approvals.[25] Each of these agreements contains language ensuring that the other party is afforded an opportunity to provide input and to stay apprised of developments. All but one of the agreements—that being Delta/Northwest, a merger agreement between equals that designated Northwest as the leader in obtaining antitrust approval—state that the buyer shall play the lead role.

Over a dozen agreements in the survey include provisions prohibiting the parties from intentionally taking steps that might delay antitrust approvals. For example, several agreements prohibit a party from unilaterally extending any antitrust waiting period or agreeing not to close the transaction at the behest of an antitrust authority.[26] Other agreements prohibit the parties from taking "any action" that could reasonably be expected to delay or prevent antitrust clearance or consummation,[27] or forbid the parties from entering into transactions that would "materially delay" antitrust clearance or consummation.[28]

***One transaction in our survey involved what may be a new antitrust risk-shifting device: a "ticking fee."***

One transaction in our survey involved what may be a new antitrust risk-shifting device: a "ticking fee." In June 2008, Republic Services entered into a stock purchase agreement to acquire Allied Waste Industries. The companies were the third and second largest waste hauling and disposal companies in the United States, respectively. One month later, Waste Management, the largest competitor, sent an acquisition proposal to Republic, which rejected the proposal in part because of the greater regulatory complexity and the additional time required to close the deal. Waste Management revised its proposal on August 11, 2008, and included, among other sweeteners, a ticking fee, which would increase the "per share price by an interest component . . . in

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[24] Agreement and Plan of Merger among Basell AF, Bil Acquisition Holdings Limited and Lyondell Chemical Company (Form 8-K) § 5.4(b) (July 16, 2007); Agreement and Plan of Merger among Hexion Specialty Chemicals, Inc., Nimbus Merger Sub Inc. and Huntsman Corporation (Form 8-K) § 5.4(b) (July 12, 2007); Basell/Huntsman Merger Agreement, *supra* note 21, § 5.4(b). *See also* Agreement and Plan of Merger by and among Siemens Corporation, Belfast Merger Co. and Dade Behring Holdings, Inc. (Form 8-K) § 6.09 (July 25, 2007) [hereinafter Siemens/Dade Behring Merger Agreement] ("Parent and its counsel shall have the primary lead role in any discussions and negotiations with any Antitrust Authorities . . . ."); Agreement and Plan of Merger among CME Group Inc., CMEG NY Inc., NYMEX Holdings, Inc. and New York Mercantile Exchange, Inc. (Form 8-K) § 6.5(a) (Mar. 17, 2008) ("CME Group shall take the lead in determining strategy for and conducting" meetings with the government).

[25] Agreement and Plan of Merger by and among Anheuser-Busch Companies, Inc., InBev N.V./S.A. and Pestalozzi Acquisition Corp. (Form 8-K) § 6.5(b) (July 13, 2008); Agreement and Plan of Merger among Philadelphia Consolidated Holding Corp., Tokio Marine Holdings, Inc. and Merger Sub (Form 8-K) § 6.5(b) (July 22, 2008); Agreement and Plan of Merger by and among Philips Holdings USA Inc., Moonlight Merger Sub, Inc. and Respironics, Inc. (Form 8-K) § 6.6(a) (Dec. 20, 2007). *See also* Agreement and Plan of Merger by and among ChoicePoint Inc., Reed Elsevier Group PLC and Deuce Acquisition Inc. (Form 8-K) § 6.6(f) (parent "shall make all decisions, lead all discussions, . . . and coordinate all activities" related to any governmental entity, including litigation strategy).

[26] *See, e.g.*, Siemens/Dade Behring Merger Agreement, *supra* note 24, § 6.09 ("Each of the parties shall . . . not extend any waiting period under the HSR Act and other applicable Antitrust Laws, rules or regulations or enter into any agreement with any Antitrust Authorities not to consummate the transactions contemplated by this Agreement, except with the prior written consent of the other parties hereto.").

[27] *See, e.g.*, Agreement and Plan of Merger among Fresenius SE, Fresenius Kabi Pharmaceuticals Holding, LLC, Fresenius Kabi Pharmaceuticals, LLC and APP Pharmaceuticals, Inc. (Form 8-K) § 6.6(a) (July 6, 2008) ("Parent and its Subsidiaries shall not take or agree to take any action that would reasonably be expected to delay or prevent consummation of the Merger.").

[28] *See, e.g.*, Agreement and Plan of Merger by and among News Corporation, Ruby Newco LLC, Dow Jones & Co., Inc., and Diamond Merger Sub Corporation (Form 8-K) § 5.5(a) (July 31, 2007) ("[N]one of the parties shall . . . acquire, purchase, lease or license (or agree to acquire, purchase, lease or license) any business or collection of assets of any kind or nature if doing so would reasonably be expected to materially delay consummation of the Merger . . . .").

the event our transaction does not close on or before a mutually acceptable date due to delays in antitrust clearance."[29]

A few days later, Republic's board rejected Waste Management's revised offer. In a letter to Waste Management, Republic explained that "[w]hile your 'ticking fee' proposal may address the financial impact of a delay in closing, it does not address operational issues and additional contingencies that would result from a protracted delay."[30] Waste Management withdrew its offer in October 2008, citing the state of the credit markets. While the ticking fee does not appear to have been much of an enticement to Republic, this example demonstrates yet another way in which a buyer attempted to ensure a rapid and successful regulatory review as the financial crisis worsened.

## Conclusion

***The survey results are consistent with buyers having greater bargaining power than sellers due to less competition from other buyers, particularly private equity funds.***

The survey results are consistent with buyers having greater bargaining power than sellers due to less competition from other buyers, particularly private equity funds. This is evident from the lower reverse breakup fees and reduced divestiture obligations. That the termination periods have not become shorter—which sellers ordinarily would demand in an unstable market—is also consistent with a buyer's market.

The survey results are also consistent with both buyers and sellers becoming more concerned about lengthy closings—most likely due to financing risk. This is evident from the consistent use of provisions intended to speed the regulatory process. Given that these provisions are on balance more favorable to sellers, their continued use in a buyers' market suggests that buyers recognize the importance of a quick regulatory review in the current economic environment. As noted earlier, parties are in fact closing transactions faster since the financial crisis hit.

How long these trends will continue is unclear. One would expect to see more balance in antitrust risk-shifting covenants between buyers and sellers once credit becomes more available and more firms emerge as potential bidders. But because of the many other variables that can affect antitrust covenants, making accurate predictions is difficult. For example, uncertainty created by the change in government administrations may already have made some potential buyers more hesitant to strike deals.[31] If, as many expect, merger enforcement is more actively pursued by government officials now than it was under the previous administration, antitrust covenants undoubtedly will adjust to reflect the closing and timing risks the new enforcement approach presents. Therefore, even assuming more stability in the credit and equity markets, other factors will continue to affect the allocation of antitrust risks in merger agreements. ●

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[29] Press Release, Waste Management, Waste Management Improves All-Cash Proposal for Republic Shares (Aug. 11, 2008), *available at* http://www.wm.com/wm/press/pr2008/20080811_WMI__Improves_All-Cash_Proposal_For_Republic_Services_(WMI_08-15).pdf.

[30] Press Release, Republic Services, Republic Services Declines to Enter into Discussions with Waste Management Following Review of Revised Merger Proposal (Aug. 14, 2008), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=82381&p=irol-newsArticle&ID=1187661&highlight=.

[31] *See* de la Merced, *supra* note 3 (quoting a transactions partner: "Until people get a good read on what this administration is going to do on the antitrust side, it's hard to allocate risk.").