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ANALYZING JOINT VENTURES UNDER THE U.S. ANTITRUST LAWS

PRESENTATION TO THE

COMPETITION POLICY RESEARCH CENTER
INTERNATIONAL SYMPOSIUM ON MERGER
REVIEW AND BUSINESS ALLIANCES

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INTRODUCTION
JOINT VENTURES INCLUDE A WIDE RANGE OF JOINT BUSINESS ACTIVITY

- Joint ventures may take many forms; there is no established definition of “joint venture” in the U.S.
- Any collaboration among competitors, joint investment or partial ownership short of a merger may be considered to be a joint venture.
- The label does not determine the legality or analysis; rather, the effect of the venture on competition determines the legality of a joint venture.
- Lawful joint ventures generally integrate resources of two or more companies, e.g., production facilities, R&D efforts, purchasing functions or sales efforts, for the purpose of reducing costs, developing or introducing new products or services or otherwise improving performance.

TYPES OF BUSINESS ALLIANCES

- Regardless of structure or form, whether or not notifiable under the U.S. premerger notification rules, a joint venture's formation and operation is subject to review under U.S. antitrust law.
  - Parties may enter into a **contractual relationship** to develop, produce or sell a product or service.
  - Parties could establish a **legal entity** and contribute assets to such entity, each party owning a certain share of the business.
  - The venture could **combine all assets of their parents** (e.g., a contribution of all components of a business, similar to a full function joint venture partially owned by each parent).
  - The venture could perform **select functions for their parents** (e.g., R&D, production, sales or purchasing joint ventures).

NOTIFIABLE JOINT VENTURES

- The structure and value of the joint venture is important in determining if it is reportable under The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act).
- The HSR Act provides that no person shall acquire **voting securities or assets** exceeding certain thresholds unless they file a notification and observe a waiting period.
  - Acquisitions of non-corporate interests (LPs and LLCs) are treated differently than corporate entities.
- Parties must contribute assets or voting securities; contractual joint ventures are not notifiable.

NOTIFIABLE JOINT VENTURES—CONTINUED
FILING THRESHOLDS

- If the value of the acquired voting securities or assets is **less than $84.4[1] million**, no filing is required.
- If the value of the voting securities or assets acquired[2] is **greater than $337.6[1] million**, then a filing is required unless an exemption applies.
- If **between $84.4[1] million** and **$337.6[1] million**, then the transaction is reportable if one person[3] has assets or net sales greater than **$168.8[1] million** and the other person[3] has assets or net sales of **$16.9[1]** million.

1. Figures are effective during 2018 and are adjusted annually.
2. The HSR Act provides detailed rules for aggregating and valuing acquired assets and voting securities.
3. "Person" is the "ultimate parent entity" and its controlled entities, which is similar to the concept of "group."

NOTIFIABLE JOINT VENTURES—CONTINUED
EXAMPLES

- **Example 1:** Party A and Party B enter into a contract to allow Party B to take and sell 50% of the production from a plant.
  - This is **not reportable** under the HSR Act, regardless of value, because there is no acquisition of voting securities or assets.
- **Example 2:** Party A and Party B agree to establish a joint venture entity. Party A will contribute a plant worth $99 million and Party B will contribute a plant worth $101 million. Party A will hold 49% of the JV and Party B will hold 51%. Each party will agree to take its pro-rata share of the output of the joint venture.
  - If the JV is an LLC, Party A has no filing because it is not obtaining control of the JV (the right to 50% of the profits or assets upon dissolution).
  - If the JV is a corporation, Party A and Party B will have to submit a notice because both are acquiring voting securities in excess of $84.4 million.

NOTIFIABLE JOINT VENTURES—CONTINUED
EXAMPLES—CONTINUED

- **Example 3:** Party A buys 40% of Party B for $100 million.
  - If Party B is a corporation, Party A must file a notice.
  - If Party B is an LLC or LP, no filing is required.
- **Example 4:** Party A is a limited partnership with a general partner (GP). The GP has day-to-day control of Party A, limited partner units and incentive distribution rights (rights that give the GP the incentive to grow the business). Party B buys the GP and obtains operational control over Party A.
  - No filing is required if the GP does not have the right to 50% of the profits or assets upon dissolution of Party A.
  - The transfer of operational control in this instance is insufficient to require a HSR Act notice.

ANTITRUST ANALYSIS OF JOINT VENTURES

Whether or not a joint venture is notifiable, the formation and operation of the joint venture is subject to U.S. Antitrust Law.

Section 1 of the Sherman Act:
Agreements that unreasonably restrain trade

Section 2 of the Sherman Act:
Monopolization, attempts to monopolize, and conspiracies to monopolize

Section 5 of the Federal Trade Commission Act:
Unfair Methods of Doing Business

Section 7 of the Clayton Act:
Substantial Lessening of Competition

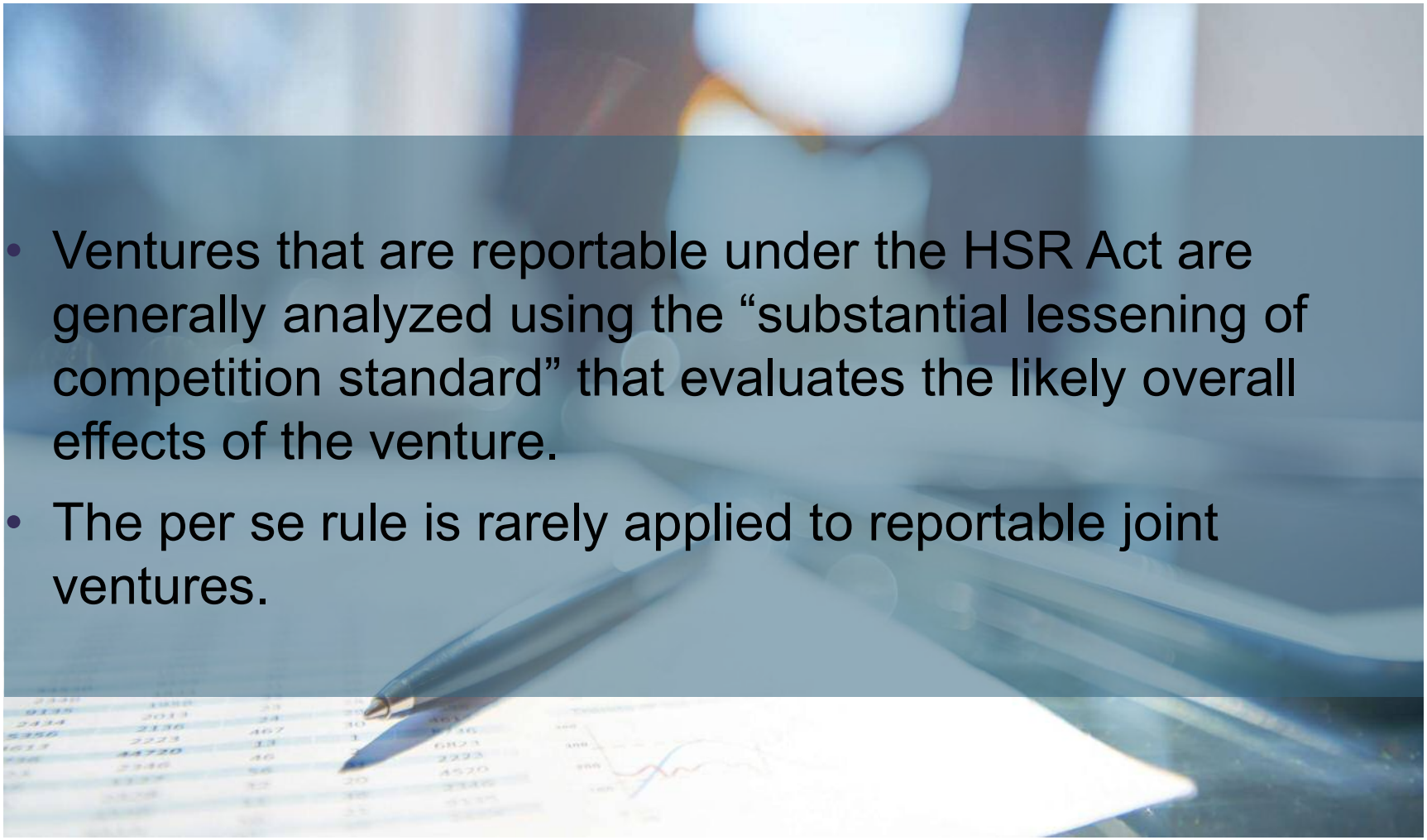
ANTITRUST ANALYSIS OF JOINT VENTURES—CONTINUED

- First, determine if joint venture falls within the category of agreements that always or almost always harm competition.
  - "Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects."
  - Price fixing, bid rigging, customer allocation, etc.
- If there is a plausible efficiency or an integration of resources, the courts and agencies will evaluate the overall effect on competition of the joint venture.
- "Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect."

ANTITRUST ANALYSIS OF JOINT VENTURES—CONTINUED

- If anticompetitive effects obvious (e.g., no plausible integration of resources) or the agreement inherently suspect, the agencies will challenge the venture.
- Otherwise, an overall assessment of the venture's effect on competition will be applied.
  - Market shares and market concentration
  - Form of collaboration
  - Foreclosure of competition and spillover effects
  - Whether collaboration facilitates collusion between the parents
  - Ease of entry
  - Procompetitive benefits
- This includes analyzing the effect of the joint venture at the formation stage and when the joint venture is operational.

ANTITRUST ANALYSIS OF JOINT VENTURES—CONTINUED



- Ventures that are reportable under the HSR Act are generally analyzed using the "substantial lessening of competition standard" that evaluates the likely overall effects of the venture.
- The per se rule is rarely applied to reportable joint ventures.

ANALYSIS OF JOINT VENTURES
EXAMPLES

- **Example 2 from above:** Party A and Party B agree to establish a joint venture entity. Party A will contribute a plant worth $99 million and Party B will contribute a plant worth $101 million. Party A will hold 49% of the JV and Party B will hold 51%. Each party will agree to take its pro-rata share of the output of the plant.
  - If reportable, the antitrust agencies will use a substantially lessening of competition analysis.
  - If Party A and Party B have competing businesses, the agencies will examine the degree of head-to-head competition, concentration, and the effects on the market.
  - If Party A and Party B agree to contribute all of their operations to the joint venture and they do not compete outside of the joint venture, the analysis likely will end with the substantial lessening of competition analysis.
    - The antitrust laws continue to apply.
  - Because Party A and Party B will continue to compete after the joint venture, the venture is unlikely to be found unlawful at its formation. However, Party A and Party B, having established a joint venture to compete with each other, must continue to compete. The per se rule or a truncated rule of reason could apply to an agreement not to compete between the parents.

QUESTIONS?

SPEAKER BIOGRAPHY

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Education

- George Washington University Law Center, J.D., 1990
- University of Iowa, Ph.D., Economics, 1994
- Emory University, B.A., Economics, 1981

Recognition

- *Chambers USA*, Antitrust (District of Columbia), 2010–2018
- Selected to the Washington, DC Super Lawyers list, *Super Lawyers* (Thomson Reuters), 2012–2017
- *Legal 500 US*, M&A Antitrust, 2012–2014
- American Lawyer Media, Washington DC & Baltimore's Top Rated Lawyers, 2012–2013

William (Billy) Vigdor came to Vinson & Elkins from the Federal Trade Commission (FTC) in 2003. He assists clients in identifying and managing the antitrust and national security risk of global mergers and joint ventures.

Billy provides substantive and strategic antitrust risk assessments in a wide array of industries and transaction structures (mergers, acquisitions, and joint ventures) and represents clients before the FTC, Department of Justice, and states attorneys general. He assists clients in addressing global merger control issues and in assessing risks. Billy also represents clients before the Committee on Foreign Investment in the United States (CFIUS).

Billy represents clients in some of the most complex mergers and acquisitions, joint ventures, partial ownerships, and government investigations involving price-fixing and monopolistic practices, as well as multijurisdictional merger control. He works with a wide range of clients, including hedge funds, master limited partnerships, and private equity firms. His antitrust work covers most of the economy, including energy (from well to burner tip or gas tank), petrochemicals, health care, technology, aerospace, telecommunications equipment, auto parts, retailing, food manufacturing, and pharmaceuticals. Billy has experience persuading agencies not to challenge mergers and not to issue second requests. Since 1995, Billy has represented clients—buyers, sellers, and privately and government-owned—in multibillion dollar transactions before CFIUS, including companies involved in energy, technology, telecommunications, petrochemicals, satellites, real estate, and other industries. He has assisted clients in negotiating FOCI mitigation agreements with CFIUS agencies.

Representative Experience

- Represented 7-Eleven, Inc. in series of transactions acquiring retail locations.
- Represented Space Systems Loral in its sale to McDonald Detwiler.
- Represented Nexeo Solutions in its $1.6 billion sale to WL Ross.
- Representing AltaGas Ltd. in its approximately $6.4 billion acquisition of WGL Holdings
- Represented Johnson Controls, Inc. in its approximately $20 billion merger with Tyco, Inc
- St. Luke's Episcopal Health System in its $1 billion transfer to the Catholic Health Initiatives, a nationally recognized healthcare system
- Obtained Federal Trade Commission approval for the acquisition of Energy Transfer Partners LP's (ETP) propane cylinder exchange business, Heritage Propane Express (HPX), by JP Energy Partners
- V&E represented Plains All American Pipeline, L.P. before the FTC in its divestiture of the Rocky Mountains Pipeline System
- Represented Eagle Rock Energy Partners in the $1.325 billion contribution of its midstream business to Regency Energy Partners

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