

Hart-Scott-Rodino Governmental Review of Airline Mergers

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a, requires that the federal government review potential anticompetitive effects of a merger before the transaction can be completed. Outlined below are the review procedures as well as how review of recent airline mergers has proceeded. After an in-depth review, APFA's legal and financial advisors are confident the merger plan will satisfy the requirements of Hart-Scott-Rodino.

Hart-Scott-Rodino Review Procedures

There is no specific time period provided for the completion of the review process. For airline mergers, the process has traditionally lasted between thirty days and a little more than six months, but it could be as short as a few weeks and could last longer.

1. **Initiation of Review Process.** The review process is initiated by the acquiring party filing a "Notification and Report Form" and paying a filing fee. This form requires the acquiring party to identify the persons involved and the structure of the transaction, and to provide certain documents such as balance sheets and other financial data. In addition, certain planning and evaluation documents that pertain to the proposed transaction must be submitted. As with all information submitted during the review process, these documents are not made public. The Notification and Report Form must be filed with both the Federal Trade Commission and the Antitrust Division of the Department of Justice. Except for cash tender offers, the acquired party must also file a separate Notification and Report Form to initiate to the review process.
2. **Initial Waiting Period.** Once the necessary Notification and Reports Forms have been properly completed and filed, the parties then must observe a statutory waiting period during which they may not complete the transaction. This initial waiting period lasts 30 days, except that in the case of a cash tender offer or a bankruptcy

transaction covered by 11 U.S.C. § 363(b) it is only 15 days. With exceptions of a cash tender offer, the waiting period does not begin to run until both parties to the transaction have filed Notification and Report Forms.

3. **Preliminary Review.** During the initial waiting period, both agencies undertake a preliminary substantive review of the proposed transaction to determine whether the transaction might adversely affect competition and would therefore warrant closer review. If either or both agencies decide that a proposed transaction warrants further examination, a “second request” for information will be issued. Such a request extends the waiting period.
4. **Early Termination.** A party can request “early termination” of the initial waiting period. A request for early termination must be specified on the Notification and Report Form and will be granted only if both agencies have completed their review and determined not to take any enforcement action during the initial waiting period. It is highly unlikely that early termination would be granted for review of an airline merger. It was not granted (or apparently even sought) in any of the recent airline mergers. Early termination seems to be granted mostly for small transactions.
5. **Completion of Transaction If No Second Request.** If no second request is issued during the initial waiting period, the parties can complete the transaction at the expiration of the initial waiting period. Second requests are routinely issued to review large transactions, and they were made during review of the Delta/Northwest, United/Continental, and Southwest/AirTran mergers. However, no second request was made during the review of the America West/US Airways merger. The review procedures therefore lasted only thirty days in that case.
6. **Second Request Investigation.** If closer examination is deemed warranted, one of the agencies will conduct a “second request

investigation.” The Antitrust Division of the Department of Justice has traditionally had jurisdiction to review proposed airline mergers. A typical second request investigation will include interrogatory-type questions as well as requests for the production of documents. Second request investigations are very burdensome, time-consuming, and expensive. Parties usually negotiate to narrow the scope of second request investigations. Second request investigations can last one month, six months, or even longer. Second request investigations of recent airline mergers have lasted between six and two months.

7. **Second Waiting Period.** The statute imposes a second waiting period after the parties certify, and the agency agrees, that there has been “substantial compliance” with the second request. This waiting period lasts for 30 days, except that in the case of a cash tender offer or a bankruptcy transaction covered by 11 U.S.C. § 363(b) the waiting period is only 10 days. If the reviewing agency determines additional time is necessary it can seek a consensual extension of the waiting period from the parties to the proposed transaction.
8. **Completion of Transaction if No Challenge to the Transaction.** During this second waiting period, the reviewing agency will determine whether to challenge the transaction. If the agency takes no action, the parties can complete the transaction after the waiting period has lapsed. The reviewing agency may also issue an approval of the transaction during this waiting period, which would terminate the waiting period.
9. **Challenge to Transaction.** If the agency decides to challenge the transaction, there are still a few paths to completion of the transaction. An initial decision to challenge a transaction can be appealed within the agency. It is also possible to enter into a consent decree resolving any concerns that the agency may have and allowing the transaction to be completed. If a resolution is not reached, however, the reviewing agency will file for a preliminary

injunction in federal court. The legality of the transaction would then be litigated in court, if it is not abandoned by the parties.

Hart-Scott-Rodino Review of Recent Airline Mergers

In recent airline mergers, the Hart-Scott Rodino review process has taken between thirty days and a little more than six months.

1. **US Airways/America West.** The review of the merger between US Airways and America West Airlines lasted 30 days. The airlines filed Notification and Report Forms on May 23, 2005. The agencies decided not to issue a second request. The airlines were therefore authorized to complete the merger when the initial waiting period lapsed on June 23, 2005.
2. **Delta/Northwest.** The review of the merger between Delta Air Lines and Northwest Airlines lasted a little more than 6 months. The airlines filed Notification and Report Forms on April, 21 2008. The Department of Justice issued a second request on May 21, 2008. The Department of Justice closed its investigation and decided not to challenge the merger on October 29, 2008.
3. **United/Continental.** The review of the merger between United Airlines and Continental Airlines lasted a little less than 4 months. The airlines filed Notification and Report Forms on May 7, 2010. The Department of Justice issued a second request on June 7, 2010. The Department of Justice closed its investigation and decided not to challenge the merger on August 27, 2010. The decision to close the investigation was made “in light of” United and Continental agreeing to transfer slots at Newark Airport to Southwest Airlines.
4. **Southwest/AirTran.** The review of the merger between Southwest Airlines and AirTran Airways lasted a little more than six months. The airlines filed Notification and Report Forms in October 2010. The Department of Justice issued a second request on November 8, 2010. The Department of Justice closed its investigation and decided not to challenge the merger on April 26, 2011.