Chapter Four

Tightening Up on Mergers

Mergers can benefit the economy, allowing firms to reduce costs, improve products and reduce prices. Mergers can also harm competition and consumers. They can facilitate collusion, create opportunities and incentives for unilateral price increases, reduce incentives to innovate, and reduce competition by creating a market structure that allows the merged firm to exclude or artificially disadvantage rivals or suppliers. These dynamics may lead to higher prices, higher costs, lost opportunities for mutually beneficial trades, lower quality, a lower rate of development of new and better products, and a reduction in product variety and consumer choice. The problem for antitrust enforcement agencies and courts is to distinguish the harmful mergers from the more common procompetitive or benign ones. This chapter is concerned with an analysis of markets from the perspective of sellers; issues arising in the analysis of mergers that threaten to create monopsony power will be taken up in the buyer power and agriculture sector chapters.

The economic issues involved in identifying anticompetitive mergers are well understood, and, for horizontal mergers (mergers between rivals), summarized in the government's Merger Guidelines.[1] Antitrust enforcers and courts evaluate the competitive effects of mergers by interpreting the factual record through that economic lens. They must make judgments about facts in order to determine how to apply the economic principles set forth in the Merger Guidelines. Those judgments are necessarily predictive, consistent with the statutory prohibition against mergers that "may" substantially lessen competition or "tend" to create a monopoly.[2]

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[1] U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992, rev. 1997) [hereinafter MERGER GUIDELINES].

[2] Section 7 of the Clayton Act, 15 U.S.C. §18 (1994). Robert Steiner has criticized the current approach to horizontal merger analysis as employing a simplistic model that ignores the horizontal consequences of vertical relationships. In particular, Steiner argues that when analyzing the prices that consumers pay for manufactured products after a horizontal merger, it is inadequate to use a "single-stage" model that focuses only on the manufacturing level. Instead, one must undertake a "multi-stage" analysis that considers the effect that wholesalers and retailers have on the pricing of these products. *See* Robert L. Steiner, *The Third Relevant Market,* 45 ANTITRUST BULL. 719 (2000).

The statutory language reflects an incipiency approach to merger enforcement. Congress sought to review mergers using more strict standards than those applied under the Sherman Act to anticompetitive agreements, monopolization and attempted monopolization. In making the predictive judgments required by the antimerger statute in recent years, however, conservative antitrust enforcers and courts have tended too readily to accept – on inadequate evidence – economic arguments available under the Merger Guidelines that favor allowing mergers, and have tended too quickly to dismiss economic arguments for enjoining acquisitions. The result has been a decline in antitrust merger enforcement at the agencies, particularly the Department of Justice (DOJ), and courtroom losses in some cases where the merger probably should have been stopped.

The challenges for the new administration are to correct the systematic tendency of the federal enforcement agencies, the DOJ and Federal Trade Commission (FTC), to allow mergers that should be stopped and to encourage the courts to do the same. Both of those tasks can be accomplished by developing, applying, and advocating a series of presumptions clarifying the line where enforcement should generally occur and the factual showings that merging firms must make in rebuttal.

In recognition of the longstanding legislative and judicial concern about stopping trends toward market concentration in their incipiency, the agencies should give particular attention to market concentration while updating the older legal analysis of the role of concentration in light of modern economic learning. In doing so, the agencies should consider whether mergers that lead to very high concentration levels – higher than the concentration levels currently discussed in the Merger Guidelines – should be strongly presumed to be anticompetitive, with a presumption that the merging firms could overcome only by providing compelling rebuttal evidence. In addition, the agencies should articulate what kinds of factual showings would ground comparably strong presumptions of harm at lower concentration levels.

As part of the effort to reinvigorate antitrust policy, the antitrust authorities should undertake to articulate more clearly their approach to merger analysis and the economic and legal basis for it. This effort should include the preparation of guidelines in areas where no modern guidelines exist and the clarification of existing guidelines, as well as the regular provision of more comprehensive statements describing the analysis that underlies particular merger decisions. In addition, to educate courts and the public, as well as to serve as a basis for improved agency policies, the antitrust agencies should undertake a more vigorous research effort that includes detailed reviews of consummated mergers. This research effort should review both mergers that were allowed to proceed without any remedial intervention and mergers for which a remedy was required, in order to assess the effectiveness of merger reviews and particular remedies.

MAJOR RECOMMENDATIONS

Specifically, the AAI recommends that the agencies:

- systematically identify various factual showings from which harm to competition from horizontal mergers should be strongly presumed and the factual showings that would rebut those harms;
    - base those strong presumptions on careful analysis of the contemporary economic literature and merger enforcement history, with attention to the significance of high and increasing market concentration, and incorporate those presumptions into the Merger Guidelines or a guidance document that would supplement the Merger Guidelines;
    - in recognition of both the legislative history of the Clayton Act, with its emphasis on incipiency and of the reality that current HHI thresholds are not followed in a meaningful way, amend the Merger Guidelines to say, as do the National Association of Attorneys General Merger Guidelines, that as HHI levels increase beyond the levels giving rise to a presumption of anticompetitive effects, the less likely it is that other factors will overcome the presumption, and, to clarify the strength of the presumption, indicate by way of example that when the HHI exceeds 2500 and the change exceeds 200, the presumption should rarely be overcome;

- clarify other aspects of merger analysis by revising or supplementing the Merger Guidelines;
    - clarify the information needed to demonstrate unilateral competitive effects and explain when unilateral effects can be demonstrated through direct evidence without need for market definition;

  - highlight the significance of mergers' nonprice effects, particularly the effects of mergers on variety, choice, quality, and innovation
  - explain how the agencies analyze conglomerate mergers that would reduce potential competition;
  - update agency guidance on vertical mergers;

- demonstrate how the agency applies its merger guidelines and the underlying presumptions by increasing the transparency of agency decision-making in individual cases;

- encourage the courts to adopt the agencies' approach to merger analysis, through agency guidance, research reports, speeches and briefs;

- improve the effectiveness of merger analysis by conducting more retrospective studies of merger enforcement;
  - analyze the competitive effects of consummated mergers, including those that the agencies challenged, but that were allowed to proceed because of court rulings, to assess merger review standards;
  - analyze consent settlements to assess effectiveness of relief;
  - systematically analyze successes and failures in merger litigation to draw lessons about how to argue competitive effects, entry, efficiencies, and other issues more effectively in the future;

- review systematically whether sufficient resources are devoted to litigation preparation, with a particular emphasis on whether the agencies successfully attract experienced litigators and train staff attorneys in litigation skills.

I. Statutory and Legal Background

Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Antimerger Act, is the primary federal merger statute.[3] In addition, the FTC may review mergers under Section 5 of the Federal Trade Commission Act, which allows the FTC to

[3] Clayton Act § 7, 15 U.S.C. §18 (1994). The Celler-Kefauver Act expanded the Clayton Act to apply it to a broader range of acquisitions.

challenge "any unfair method of competition or unfair and captive act or practice,"[4] and mergers can also be addressed under Section 1 of the Sherman Act, as agreements in restraint of trade.

Section 7 of the Clayton Act prohibits the acquisition of voting securities or assets when "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create monopoly."[5] The Supreme Court reviewed the legislative history underlying the Clayton Act and the Celler-Kefauver amendments in *Brown Shoe Co. v. United States*.[6] According to the Court, Congress intended that Section 7 be applied to stop mergers even where the "trend to a lessening of competition in a line of commerce was still in its incipiency," unlike the Sherman Act, which required proof of ongoing harm to competition.[7] The Supreme Court also made clear that the statutory language should be interpreted to mean that Section 7 seeks to stop mergers where there is a probable, rather than definite, lessening of competition.[8]

A. Horizontal Mergers

In *United States v. Philadelphia National Bank*, the Supreme Court introduced a simplified test of prima facie illegality for horizontal mergers:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it

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[4] 15 U.S.C. §45 (2000).

[5] 15 U.S.C. §18 (1994).

[6] 370 U.S. 294, 315 – 23 (1962).

[7] *Id.* at 317 – 18. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963) and United States v. E.I. du Pont de Nemours & Co., 353 U.S 586, 589 (1957).

[8] *Brown Shoe*, 370 U.S. at 323; *see also E.I. du Pont de Nemours*, 353 U.S. at 589 ("Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a *reasonable probability*, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation.") (emphasis added). Although many parts of the *Brown Shoe* opinion have become obsolete, the Supreme Court has never repudiated its view that Congress incorporated an incipiency mandate into the antimerger statute.

> must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[9]

In other words, proof that a merger will significantly increase concentration creates a "structural presumption" of illegality. Moreover, in cases such as *United States v. Aluminum Co. of America*,[10] *United States v. Pabst Brewing Co.*,[11] and *United States v. Von's Grocery Co.*,[12] the Supreme Court found that mergers of firms with small shares could run afoul of Section 7. These 1960s decisions emphasized that Congress had adopted an incipiency standard, out of concern about ongoing trends toward increasing concentration, rather than focusing on whether consummation of the merger would have immediate price effects.[13]

While the Supreme Court found for the merging parties in *United States v. General Dynamics Corp.*,[14] the Court did not reverse the preceding law. Instead, the Court simply pointed out that market shares based on historical sales levels were misleading because they ignored the fact that the acquired company did not have assets that would allow it to compete effectively in the future (i.e., it had few coal reserves that could be sold in competition with other firms in the future). Still, this decision provided the legal basis for a wider economic inquiry into the competitive effects of mergers, framed as an inquiry into whether a presumption based on market shares misleads as a basis for

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[9] 374 U.S. at 363.

[10] 377 U.S. 271 (1964).

[11] 384 U.S. 546 (1966).

[12] 384 U.S. 270 (1966).

[13] For example, in *Von's Grocery*, 384 U.S. at 278, the Court explained that Section 7 reflected Congressional concerns "that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed." See also *Philadelphia Nat'l Bank*, 374 U.S. at 362 – 63 (noting "the intense congressional concern with the trend toward concentration"). However, "[t]he legislative history and decisions that gave rise to the incipiency doctrine are disappointingly vague. As a result, although it is clear that the concept calls for strict anti-merger enforcement, no firm definition of incipiency has been established." Robert H. Lande, *Resurrecting Incipiency: From* Von's Grocery *to Consumer Choice*, 68 ANTITRUST L.J. 875, 878 (2001).

[14] 415 U.S. 486 (1974). Three months later, the Court reaffirmed the *Philadelphia National Bank* presumption, but omitted "clearly" from its characterization of the evidence necessary to show that the merger would not likely have an anticompetitive effect. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974).

predicting harm to competition. *General Dynamics* remains the most recent substantive merger decision of the Supreme Court.[15]

The wider economic inquiry suggested by *General Dynamics* is recognized in the 1982 Merger Guidelines. While the 1982 Merger Guidelines were characterized by some as a "retreat" from the "many populist merger landmarks of the Warren Court era" because of their reliance on economic analysis, they nonetheless maintained the same "basic methodology of *United States v. Philadelphia National Bank*."[16] The current Merger Guidelines are direct descendants of the 1982 Guidelines, and are structured around the key elements of the Warren Court case law. They frame the "ultimate inquiry" as "whether the merger is *likely* to create or enhance market power or to facilitate its exercise,"[17] and underscore that they are intended to "reflect the congressional intent that merger enforcement should interdict competitive problems in their *incipiency*."[18] Although the Merger Guidelines disclaim any effort to allocate burdens of proof,[19] they indicate that if the market is found to be highly concentrated (HHI above 1800)[20] and the change in HHI exceeds 100 points, "it will be *presumed* that [the merger is] likely to create or enhance market power or facilitate its exercise."[21]

The current Merger Guidelines may be understood as an effort to interpret the approach embraced by the Supreme Court in *Philadelphia National Bank* and *General Dynamics*

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[15] The Court decided three bank merger cases the following year, relying on *General Dynamics* and has not issued a substantive merger enforcement decision since.

[16] Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311 (1983) (discussing the 1982 Merger Guidelines, on which today's Merger Guidelines are based).

[17] MERGER GUIDELINES, *supra* note 1, at §0.2 (emphasis added). *See also id.* §1.0 (noting that "the analytic process described in this section ensures that the Agency evaluates the likely competitive impact of a merger . . .").

[18] *Id.* § 0.1 (emphasis added).

[19] *Id.* (emphasis added).

[20] The Herfindahl Hirschman Index (HHI) summarizes concentration in a market with a statistic calculated by summing the squares of the individual market shares of all the market participants. The Merger Guidelines divide the spectrum of market concentration into three regions broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800) and highly concentrated (HHI above 1800). *Id.* §1.5.

[21] *Id.* §1.51 (emphasis added).

through the lens of modern economic analysis. Given that Warren Court's merger decisions remain controlling Supreme Court precedent and that the Merger Guidelines parallel much of this law, it is not surprising that legal scholars and the American Bar Association Antitrust Section recognize that current merger law is a *probabilistic analysis*[22] that is designed to stop the creation of market power in its *incipiency*[23] and that when a merger leads to *a significant increase in concentration there is prima facie evidence of anticompetitive effects*[24] that shifts the burden of proof to the merging parties.

The Merger Guidelines and the courts today permit the merging firms to offer a wide range of rebuttal arguments to the government's prima facie case based on high and increasing market concentration. Ease of entry, for example, is well established as a basis for permitting a merger that would appear problematic based on concentration statistics.[25] However, as the Merger Guidelines indicate, entry must be timely, likely, and sufficient to counteract or deter the competitive problem before rebuttal arguments based on ease of entry will be accepted.[26]

For a long time, merger law did not consider efficiencies as a possible rebuttal argument. For example, in *United States v. Philadelphia National Bank*, the Supreme Court found that where the effect of a merger may be substantially to lessen competition in a market it "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[27] The enforcement agencies were quicker to consider

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[22] *E.g.*, IV PHILLIP E. AREEDA, JOHN L. SOLOW, & HERBERT HOVENKAMP, ANTITRUST LAW 22 (1998); AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 318 (5th ed. 2002) [hereinafter ANTITRUST LAW DEVELOPMENTS]; AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS 5, 88 – 90 (2000) [hereinafter MERGERS AND ACQUISITIONS] .

[23] *See, e.g.*, AREEDA, SOLOW, & HOVENKAMP, *supra* note 22, at 19 – 22; Lande, *supra* note 13; LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 11.2f (2d ed. 2006); ANTITRUST LAW DEVELOPMENTS, *supra* note 22, at 334 – 35; MERGERS AND ACQUISITIONS, *supra* note 22, at 4, 88 – 90.

[24] *See, e.g.*, AREEDA, SOLOW, & HOVENKAMP, *supra* note 22, at 19 – 20, 100 – 04; ANTITRUST LAW DEVELOPMENTS, *supra* note 22, at 335; MERGERS AND ACQUISITIONS, *supra* note 22, at 88 – 90.

[25] *See, e.g.*, United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984).

[26] MERGER GUIDELINES, *supra* note 1, § 3.

[27] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963). *See also* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); RSR Corp. v. FTC, 602 F.2d 1317, 1325 (9th Cir. 1979); FTC v. Coca-Cola Co., 641 F. Supp. 1128, 1139 n.25 (D.D.C. 1986). Commentators who were sympathetic to incorporating the analysis of efficiencies into other areas of antitrust were historically reluctant to advocate an efficiencies

efficiencies,[28] and in recent years some lower courts have evidenced some willingness to hear evidence related to efficiencies.[29] Still, efficiencies have never been the sole reason for a successful judicial defense to a government merger challenge.

The Merger Guidelines were revised in 1997 to set forth a methodology for incorporating efficiencies into horizontal merger analysis. To count, as the Guidelines make clear, efficiencies must be cognizable: they must be substantiated so they can be verified, merger-specific, and not the product of anticompetitive reductions in output or service. In particular, the Merger Guidelines focus on whether a merger generates efficiencies that undermine coordination between competitors or that will be passed on (because the marginal cost of supplying the product is lowered), making a post-merger price increase less likely. The agencies will permit a merger to proceed if "the cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market." [30]

The Antitrust Modernization Commission (AMC) viewed the treatment of efficiencies as an area where further clarification would be helpful. It encouraged the enforcement

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defense to mergers, because of the difficulty trading off harms to competition against procompetitive benefits. *See, e.g.*, RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 133 – 36 (2d ed. 2001).

[28] The agencies revised the Merger Guidelines in 1997 to add an expanded discussion of efficiencies, making it clear that they consider them in their analysis. They have also cited efficiencies among the reasons underlying their decision not to challenge a number of mergers. *See, e.g.*, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of the Joint Venture Between SABMiller plc and Molson Coors Brewing Company (June 5, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/233845.htm; and Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (March 24, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm.

[29] For a survey of cases through mid-2002, see William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers,* 71 ANTITRUST L.J. 207, 231 – 35 (2003). Later examples include FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 150 – 53 (D.D.C. 2004); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1174 (N.D. Cal. 2004). *See also* MERGERS AND ACQUISITIONS, *supra* note 22, at 251 – 72.

[30] MERGER GUIDELINES, *supra* note 1, at § 4.0. Although this test (and agency practice) focuses on efficiencies that benefit consumers, rather than total efficiencies, other provisions in the Merger Guidelines permit the agencies to consider cost savings and other efficiencies that would not be passed on to consumers. *See Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement* 8 (Nov. 17, 2005) (statement of Kenneth Heyer, on behalf of the DOJ), *available at* http://www.amc.gov/commission_hearings/pdf/Statement-Heyer.pdf.

agencies to give substantial weight to efficiencies,[31] and to give more credit to certain fixed-cost savings, such as research and development expenses in dynamic, innovation-driven industries where marginal costs are low relative to typical prices. [32]

B. Vertical and Conglomerate Mergers

During the 1960s and early 1970s, the Supreme Court established precedents holding vertical mergers unlawful when the result was to foreclose rivals from small portions of the market.[33] Section 4 of the 1984 DOJ Merger Guidelines, which is still in effect as a statement of DOJ enforcement policy toward vertical acquisitions, reframed vertical merger analysis around the question of whether such mergers would harm horizontal competition, in either upstream or downstream markets.[34] The lower courts followed the Justice Department's lead by retreating from prior judicial hostility to vertical mergers.[35]

Conglomerate mergers were also a significant concern of courts and enforcers during the 1960s and early 1970s.[36] But government challenges to these acquisitions are now rare. To the extent conglomerate mergers generate enforcement attention today, they most likely involve potential competition theories, which are closely related to horizontal

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[31] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 56 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm. [hereinafter AMC REPORT].

[32] *Id.* There is some ambiguity about the extent to which the antitrust agencies consider fixed cost savings that will result from a merger when undertaking their evaluations. Footnote 37 to the Merger Guidelines opens the door to the consideration of efficiencies that only lower long-run marginal costs, but do not change short-run marginal costs. *See also* FTC STAFF REPORT, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE, at 34 Ex. 132, *available at* http://www.ftc.gov/opp/global/report/gc_v2.pdf ("an arbitrary exclusion of fixed costs from cognizable efficiencies is unwarranted because savings in fixed costs may affect competition and have an ultimate downward effect on prices").

[33] Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (foreclosure from less than 10% of the market, combined with an industry trend toward vertical integration); Ford Motor Co. v. United States, 405 U.S. 562 (1972) (*Autolite*).

[34] The 1984 Guidelines indicated that a vertical merger could harm competition by raising "two-level" entry barriers (because vertical integration may make it necessary for a new competitor to enter simultaneously both upstream and downstream), by facilitating horizontal collusion (as by making it easier for colluding firms to detect cheating or eliminate a disruptive buyer), or by permitting public utilities to evade rate regulation.

[35] *See, e.g.*, O'Neill v. Coca-Cola Co., 669 F. Supp. 217 (N.D. Ill. 1987).

[36] *See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

merger analysis.[37] Nonhorizontal mergers tend to raise greater concern among enforcers in the European Union than in the United States.[38]

II. Economic Effects of Mergers

A. Anticompetitive Motives For Mergers

The threat of market power from horizontal merger holds an important place in our nation's historical memory. Between 1895 and 1904, more than 1800 firms in more than 150 manufacturing industries consolidated through merger, often fashioning new companies accounting for more than 70% of a market.[39] Market power was often the obvious goal, as many of these industries took advantage of what was then a loophole in the antitrust laws to replace cartels by mergers to monopoly. The Clayton Act was enacted in 1914 to close that loophole.

High and increasing market concentration is often associated with the exercise of market power. This conclusion is consistent with many theoretical economic models of oligopoly behavior [40] and with the empirical economic literature relating market structure and market power.[41] The empirical literature shows that high levels of market

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[37] *See generally* John E. Kwoka, *Mergers Involving Constraining and Prospective Competitors,* 52 CASE W. RES. L. REV. 173 (2001). The Merger Guidelines recognize potential competition theories involving uncommitted entrants as horizontal mergers. *See* MERGER GUIDELINES, *supra* note 1, at § 1.32.

[38] *See* EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR COMPETITION, GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (2007), *available at* http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf.

[39] NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895 – 1904 (1985). *See also* RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895 – 1956, at 102 – 03 (1959) (two-thirds of firm disappearances and three-fourths of merger capitalizations were likely accounted for by mergers that gained a leading position in the market).

[40] *See, e.g.*, George Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964) (relating the HHI of market concentration to cartel stability); Keith Cowling & Michael Waterson, *Price-Cost Margins and Market Structure*, 43 ECONOMICA 267 (1976) (relating price-cost margins to the HHI of market concentration in Cournot equilibrium); Robert E. Dansby & Robert D. Willig, *Industry Performance Gradient Indexes*, 69 AM. ECON. REV. 249 (1979) (relating changes in aggregate surplus to the HHI in Cournot equilibrium).

[41] The modern empirical literature relates concentration to price, not profits. Empirical studies of the relationship are surveyed in Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 988 (Richard Schmalensee & Robert Willig eds., 1989) (Stylized Fact 5.1). For some within-industry studies, see CONCENTRATION AND PRICE (Leonard Weiss ed., 1989); Timothy F. Bresnahan & Valerie Y. Suslow, *Oligopoly Pricing with Capacity Constraints*, 15/16 ANNALES D'ECONOMIE ET DE STATISTIQUE 267 (1989); Jonathan B. Baker, *Econometric Analysis in* FTC v. Staples*,* 18 J. PUB. POL'Y & MARKETING 11 (1999).

concentration are typically associated with higher market prices when entry is not easy and that substantial increases in concentration may generate large increases in price.

Studies of consummated mergers provide examples of acquisitions that have led to higher prices.[42] These include two sets of airline mergers that occurred during the 1980s – Northwest's acquisition of Republic and TWA's acquisition of Ozark[43] – as well as a 1990 hospital merger in Santa Cruz, California.[44] They also include other mergers in disparate industries.[45]

Horizontal mergers can harm competition and consumers by facilitating collusion, creating opportunities and incentives for unilateral price increases,[46] reducing incentives to innovate, and reducing competition by creating a market structure that excludes or artificially disadvantages rivals or suppliers. These dynamics may lead to higher prices, higher costs, lost opportunities for mutually beneficial trades, lower quality, a lower rate of development of new and better products, and a reduction in product variety and consumer choice. These theories are well established in the economics literature. Unilateral and coordinated effects of horizontal mergers are discussed appropriately and in detail in the 1992 Horizontal Merger Guidelines and in more recent agency commentary on the Merger Guidelines.

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[42] The data that would allow researchers to undertake careful analyses of the price effects of consummated mergers are only rarely available, so there are only a limited number of examples.

[43] Craig Peters, *Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry*, 49 J. L. & ECON. 627 (2006); E. Han Kim & Vijay Singal, *Mergers and Market Power: Evidence from the Airline Industry*, 83 AM. ECON. REV. 549, 550 (1993); Gregory J. Werden, Andrew S. Joskow & Richard S. Johnson, *The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry*, 12 MANAGERIAL & DECISION ECON. 341, 348 (1991); Severin Borenstein, *Airline Mergers, Airport Dominance, and Market Power,* 80 AM. ECON. REV. 400, 404 (1990).

[44] Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study,* 49 J. INDUS. ECON. 63 (2001).

[45] *See, e.g.*, Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Selected Case Studies*, (NBER Working Paper No. W13859, Oct. 2007); David M. Barton & Roger Sherman, *The Price and Profit Effects of Horizontal Merger: A Case Study*, 33 J. INDUS. ECON. 165 (1984) (which describes the price and profit increasing effects of consummated mergers in the duplicating microfilm market that were later challenged by the FTC).

[46] Unilateral effects may arise among sellers of differentiated products, in auction or bidding market settings, among sellers of homogeneous products, or when dominant firms acquire fringe rivals.

Vertical mergers can harm competition in a number of ways. Anticompetitive effects can arise from a vertical merger that facilitates collusion or price coordination among horizontal rivals upstream or downstream, confers market power upstream or downstream by excluding some actual or potential rivals (as by raising two-level entry barriers), or facilitates the evasion of other competitive constraints (such as price regulations).[47] Conglomerate mergers (involving firms that are not related either horizontally or vertically) are potentially troublesome when they reduce potential competition.[48] DOJ guidance involving vertical mergers does not fully capture the breadth of the exclusion concern, which goes beyond raising two-level entry barriers to include mergers that harm competition by raising rivals' costs or reducing rivals' access to buyers. Similarly, the enforcement agency guidance with respect to horizontal mergers does not fully capture the breadth of the possible problem arising from acquisitions of potential rivals, which may extend beyond the acquisition of an uncommitted entrant to include the acquisition of a committed potential entrant that imposes competitive discipline. The next administration should extend its merger guidelines to address these possibilities.

B. Procompetitive or Benign Motives for Mergers

While some mergers may generate anticompetitive effects, most have other motives. Some benign motives for merger are financial. For example, firms may merge to take advantage of what they believe to be short term mispricing by the stock market,[49] to

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[47] *See generally* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995).

[48] For an empirical study of the competitive effects of a potential competition merger, see John Kwoka & Evgenia Shumilkina, *Eliminating a Competitive Constraint: The Price Effect of Merging with a Potential Entrant in Airlines* (Northeastern Univ. Working Paper, January 2008). *See also* Gloria J. Hurdle, Richard L. Johnson, Andrew S. Joskow, Gregory J. Werden, & Michael A. Williams, *Concentration, Potential Entry, and Performance in the Airline Industry*, 38 J. INDUS. ECON. 119 (1989).

[49] For example, overvalued acquirers may use their overvalued stock to buy targets that are uninformed about the true value of the acquirer's stock. *See, e.g.*, Andrei Shleifer & Robert Vishny, *Stock Market Driven Acquisition*, 70 J. FIN. 295 (2003); Michael Jensen, *Agency Costs of Overvalued Equity* (Harvard Business School Working Paper, 2004). Also see discussion of random variations in stock prices and informational asymmetries between the buying firm and the selling firm that may lead to mergers in F.M. Scherer, *The Merger Puzzle*, *in* FUSIONEN 9 – 13 (W. Franz, et al. eds., 2002).

reduce the financial risks associated with ownership of their portfolio of assets by hedging,[50] or to take advantage of tax breaks.[51]

Many mergers are motivated by the prospect of efficiencies. Firms may seek to reduce costs by combining complementary assets or realizing greater economies of scale. In other cases, firms may seek to obtain other synergies, such as the spread of "best practices" across firms.[52] But studies show that merging firms frequently fail to obtain the efficiencies that they anticipate.[53] While occasional shortfalls are no surprise – acquiring firms cannot have perfect information about possible synergies, and even the best calculations may be defeated by changing conditions – the frequency with which anticipated efficiencies are not achieved suggests caution in accepting efficiency claims by merging firms and arguably reduces the worry that an aggressive merger enforcement policy would systematically discourage procompetitive acquisitions. Moreover, the

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[50] For example, given the fluctuations in oil prices that have been observed over the last decade, it would not be surprising if different oil company executives have different projections about future oil prices. If so, this means that executives at different oil companies could place very different values on particular oil reserves. The differing valuations could induce a company that places a relatively high value on the reserves to acquire a company that values the reserves relatively lower.

[51] Denis A. Breen, *The Potential for Tax Gain as a Merger Motive: A Survey of Current Knowledge and Research Opportunities* (F.T.C. Bureau of Economics Working Paper, July 1987). Another motive, which may or may not be benign, involves empire-building by managers not fully constrained by shareholders. This and other motives are discussed in Friedrich Trautwein, *Merger Motives and Merger Prescriptions*, 11 STRATEGIC MGMT. J. 283 (1990).

[52] Scherer, *supra* note 49, at 1, 13 – 20. More generally, the acquiring firm may possess managerial skills superior to those of the acquired firm.

[53] See generally Louis Kaplow & Carl Shapiro, *Antitrust*, *in* 2 HANDBOOK OF LAW AND ECONOMICS § 4.3 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (citing evidence from stock prices and accounting data that demonstrates that firms systematically overpay for the companies they acquire). This evidence suggests that firms are systematically over-optimistic about the efficiencies they can achieve by merging, most likely because many mergers are motivated by managerial hubris and managers often underestimate integration problems. Moreover, numerous studies show that the acquiring firm's profitability was adversely affected by merger. *See, e.g.*, F.M. Scherer, *A New Retrospective on Mergers*, 28 REV. INDUS. ORG. 327, 330 – 31 (2006); Scherer, *supra* note 49, at 3 – 4, 8; DAVID J. RAVENSCRAFT & F.M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY (1987); S. Moeller, F. Schlingemann, and R. Stulz, *Wealth Destruction on a Massive Scale? A Study of Acquiring-firm Returns in the Recent Merger Wave* 60 J. FIN. 757, 757 (2004); Raymond S. Hartman, *The Efficiency Effects of Electric Utility Mergers: Lessons from Statistical Cost Analysis*, 17 ENERGY L.J. 401, 413 – 15 (1996). Moreover, a number of mergers that evidenced an expected increase in value at the time the acquisition was announced subsequently showed significant declines. *See, e.g.*, Scherer, *supra* note 49, at 6 – 9. Some merging firms are nevertheless able to obtain the efficiencies they expected, however. For a comparison of premerger predictions with actual outcomes in a merger that yielded substantial productivity gains, see F.M. Scherer, *Memorandum to Attorney General Griffin Bell on the Proposed Merger of two Steel Companies* (1978), *reprinted in* F.M. SCHERER, COMPETITION POLICY, DOMESTIC AND INTERNATIONAL 8 & 253 – 58 (2000); and RAVENSCRAFT & SCHERER, *supra* at 275 – 79.

substantial variation in outcomes across mergers generally argues for caution in weighing efficiency claims.[54] In addition, when mergers have the potential to harm consumers, substantial efficiencies are typically required to offset that threat.[55] The 1992 Horizontal Merger Guidelines were revised in 1997 to incorporate a reasonable approach to evaluating the efficiencies from merger and accounting for them in assessing the competitive effects of acquisitions.[56]

III. Recent Merger Policy in the Enforcement Agencies and the Courts

A. Introduction

Antitrust policy regarding mergers has improved greatly over the past quarter-century through two major developments: the introduction of 1982 Merger Guidelines and the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR), which allowed the government to review large mergers before consummation. By integrating economics into merger analysis, the Merger Guidelines added economic rigor and interadministration stability to merger analysis. By giving the agencies advance notification of mergers and the ability to request additional information, HSR allowed the agencies to intervene before the merging parties "scrambled the eggs," eliminating effective remedies to problematic mergers. Observing the resulting changes in merger enforcement, the AMC concluded that "while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical

54 Although it is not possible to do any such evaluation with arithmetic precision, conceptually the appropriate calculation using a consumer welfare standard requires estimating the expected net present value of the efficiencies passed on to consumers. This approach involves estimation of the magnitude of such efficiencies multiplied by the probability of achieving them, net of any short term losses to consumers due to reduced competition until the efficiencies are achieved, appropriately discounted to their present value at the time of the merger. *See* Dennis Yao & Thomas Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of and Efficiencies Defense*, 62 ANTITRUST L.J. 23 (1993).

55 Gregory J. Werden, *A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products*, 44 J. INDUS. ECON. 49 (1996); Alan A. Fisher, Frederick Johnson, & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777 (1989).

56 However, the treatment of fixed cost savings in efficiencies analysis is not clear. We would encourage the agencies explicitly to consider fixed-cost efficiencies that will lower long-run marginal costs in a way that benefits downstream customers, evaluating future benefits from merger in terms of their discounted present value. *See generally* COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE WORKING GROUP ON MERGER ENFORCEMENT 8 & n.27 (submitted to the Antitrust Modernization Commission, July 15, 2005). For a similar view, see AMC REPORT, *supra* note 31, at 56, 58 – 59 (recommendation #7).

research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound."[57]

This overly-comfortable conclusion ignores two major areas of current concern with merger policy. First, antitrust enforcement has grown lax during the past several years, particularly at DOJ. This conclusion is based in part on enforcement statistics, which will be discussed below.[58] In theory, the most direct way to identify lax enforcement would be subsequent review of the outcome of agency investigations – particularly investigations involving those mergers not challenged notwithstanding the competitive concerns that led the American Antitrust Institute (AAI) to call for careful agency review.[59] In practice, however, it is difficult for outsiders to second guess agency decisions after the fact, because they lack access to the confidential investigatory record. We therefore call upon the agencies themselves to conduct more retrospective reviews of merger decisions, emphasizing controversial mergers allowed to proceed by the agencies without challenge (such as Whirlpool's acquisition of Maytag or the XM/Sirius satellite radio transaction) and mergers challenged by the agencies that were allowed to proceed by the courts (such as the Whole Foods/Wild Oats merger or Oracle's acquisition of PeopleSoft).[60]

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[57] *See* AMC REPORT, *supra* note 31, at 53 (recommendation #3a).

[58] We have reviewed the available data. We believe that these data, interpreted in conjunction with other available information, are a sufficient basis for raising the concerns we identify. Nonetheless, we encourage additional research into U.S. merger policy and the economics underlying merger analysis, which will be promoted by our transparency recommendations. *Cf.* Dennis Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It* 1 (Economic Analysis Group Discussion Paper EAG 07-15, Dec. 2007) (noting the "dearth of quantitative studies and measures of the effects of merger policy").

[59] Since 2001, AAI has expressed concern about ten mergers that the agencies have permitted to proceed without challenge. These include Synopsis/Avanti (2001), the cruise line mergers (2002), the Orbitz joint venture (2003), Smithfield/Farmland Foods (2003); Brown & Williamson/RJ Reynolds (2004), Maytag/Whirlpool (2006), AT&T/Bell South (2006); Express Scripts/Caremark (2006); Northwest/Midwest (2007); and XM/Sirius (2008). *See also* Warren E. Grimes & John E. Kwoka, *A Study in Merger Enforcement Transparency: The FTC's* Ocean Cruise *Decision and the Presumption Governing High Concentration Mergers*, ANTITRUST SOURCE (May 2003), http://www.abanet.org/antitrust/at-source/03/05/metstudy.pdf (arguing that the FTC's decision not to challenge two proposed cruise line mergers bypassed the structural presumption without an adequate basis).

[60] Such retrospectives would likely involve in part the use of compulsory process. If DOJ believes that it lacks the statutory authority to compel information for this purpose, we call upon it to request that authority from Congress and, pending award of that authority, we suggest that the FTC investigate mergers reviewed by DOJ as well as those reviewed by the FTC.

Second, in recent years some lower courts have too readily accepted economic arguments available under the Merger Guidelines that favor allowing mergers and have tended too quickly to dismiss both the presumption of harm to competition arising from high and increasing market concentration and economic arguments for enjoining acquisitions. These courts have not taken seriously the determinations of Congress and the Supreme Court that merger law is a probabilistic analysis that is designed to stop the creation of market power in its incipiency and that when a merger leads to a significant increase in concentration, there is prima facie evidence of anticompetitive effects that shifts the burden of proof to the merging parties. We discuss below the bases for these concerns.

B. Merger Enforcement at the Enforcement Agencies

The AAI is concerned that merger enforcement has become increasingly lax in recent years, particularly at DOJ and in the courts. This unfortunate trend is evident in the available data on merger enforcement rates and in a review of recent enforcement actions and court decisions. The recent nonenforcement approach at DOJ recalls the view of the department's leadership during the second term of the Reagan administration, which set the previous modern standard for lax merger enforcement. Then-Assistant Attorney General Douglas Ginsburg believed that enforcers should evaluate mergers under a "criminal law standard" – presumably meaning that the government should not challenge mergers unless enforcers were sure, beyond a reasonable doubt, that the merger would be anticompetitive.61 This thinking appears to have been embraced by some judges who are hearing merger cases, making it more difficult for the antitrust agencies to prevail.

1. Agency Investigations

The federal antitrust enforcement agencies report detailed data on HSR filings, second requests, and enforcement actions. These data have been relied upon in academic studies of merger trends, although their use for drawing conclusions has recently been criticized by government officials responding to criticisms of the sort made below.[62] The credibility

[61] Douglas Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1283 (1988). Ginsburg's predecessor as Assistant Attorney General, Paul McGrath, had declared that he was challenging mergers under a Sherman Act standard (rather than a Clayton Act standard). Neil Henderson, *Baldrige Merger Plan Criticized; Changes in Law Called Unnecessary*, WASH. POST, March 3, 1985, at F1.

[62] For a critical discussion of efforts to use historical merger enforcement data to make comparisons of enforcement policies over time, see David L. Meyer, Deputy Assistant Attorney General for Civil Enforcement, Antitrust Division, DOJ, *Merger Enforcement Is Alive and Well at the Department of Justice*, Remarks at the ABA Antitrust Section Fall Forum 6 – 7 (Nov. 15, 2007), *available at*

of the conclusions drawn from these data is enhanced by their confirmation in the other analyses we describe. Analysis in the tables presented below adopts Thomas Leary's convention of defining the dates of an administration with a one-year lag, giving credit for enforcement actions during a transition year to the previous administration.[63] The qualitative conclusions are not particularly sensitive to this definitional choice, as is shown in the Appendix, which presents statistics based on an alternative dating scheme.

With respect to merger investigations, one can get an idea of the extent to which the agencies are actively reviewing mergers by counting the number of second requests (requests for additional information using compulsory process) that they issue. Table 1 reports the average number of second requests issued per year, by administration (and term for two-term administrations) and agency since 1982. The most distinctive feature of these data is the unusually low number of second requests issued during the George W. Bush (GW Bush) presidency. Much of that disparity may be accounted for by the possibility that the 2001 change in filing requirements lowered the number of second requests.[64] When the raw number of second requests during the GW Bush administration is adjusted to address this issue, the table shows that the GW Bush administration average rises to equal the average during the Reagan administration (the second lowest after that of GW Bush).

These raw numbers do not account for variation in the number of mergers filed. Table 2 normalizes the number of second requests to do so. The table also adjusts for the 2001 change in HSR filing rules. The table shows that after these adjustments, the rate of second requests was lowest during the GW Bush administration for both agencies

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http://www.usdoj.gov/atr/public/speeches/227713.htm; Dennis Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It* 1 (Economic Analysis Group Discussion Paper EAG 07-15, December 2007). The two primary criticisms are that enforcement rate statistics may mislead if the types of transactions change over time and that variation in the observed level of agency enforcement may reflect changes in the extent to which merging firms and their antitrust counsel misperceive the stringency of enforcement standards more than shifts in those standards. These criticisms were anticipated and addressed in Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* 14 – 15, 18 n.86 (Oct. 2007), *available at* http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf.

[63] Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 122 (2002).

[64] On February 1, 2001, the HSR reporting requirements were altered to raise the minimum cut off for reporting from $15 million to $50 million. Premerger Notification, 66 Fed. Reg. 8680 (Feb. 1, 2001). About 60% of the filings in earlier years were below the new threshold level. *See* Baker & Shapiro*, supra* note 62, at 17 n.81.

combined and for DOJ individually, and the FTC rate was tied for lowest with the second term of the Clinton administration.[65] Others have also observed this pattern.[66]

2. Agency Merger Challenges

The antitrust agencies have largely focused their enforcement efforts on horizontal mergers in markets that are very highly concentrated. Since 1996, 72% of the FTC's merger enforcement actions came only when the post-merger HHI reached 2400 or more, and when there were deltas (changes in the HHI) of over 500.[67] At theFTC, mergers generally become close calls only when they reduce the number of significant firms from four to three; with more firms, enforcement is less frequent.[68] Industry-specific patterns that align with this general pattern have been reported by the FTC and DOJ.[69]

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[65] Without accounting for the 2001 change in filing rules, the rate of second request issuance was lowest during the second term of the Clinton administration.

[66] *See also* James Langenfeld & Daniel R. Shulman, *The Future of U.S. Federal Antitrust Enforcement – Learning From Past and Current Influences*, 8 SEDONA CONF. J. 1, 5 (2007), who conclude that DOJ opened fewer merger investigations during the GW Bush administration than were opened during the Clinton administration (e.g., the number of DOJ merger investigations fell from its high of 338 in 1997 to fewer than 140 per year from 2002 to 2006). The decline in second requests could reflect either a decline in enforcement or improved efficiency in enforcement agency operations (a successful effort to avoid issuing second requests in situations where it is extremely unlikely that further investigation will turn up a serious antitrust problem). Other statistics, discussed below, show that enforcement has declined during the GW Bush administration.

[67] FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996 – 2005, Table 3.1 (Jan. 25, 2007), *available at* http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf. The predictive value of these analyses depends importantly on how well the FTC defined the relevant antitrust market.

[68] The same internal FTC study shows that the agency routinely challenges four-to-three mergers if customers complain or it uncovers "hot documents" during the investigation and that challenges are less frequent if more firms are present. *Id.* (compare Tables 6.1, 6.2, 8.1 & 8.2).

[69] FED. TRADE COMM'N, MERGER CHALLENGES DATA, FISCAL YEARS 1999 – 2003 (Dec. 18, 2003), *available at* www.ftc.gov./os/2003/12/mdp.pdf. With the exception of the petroleum industry, only two mergers below the highly concentrated HHI of 1800 were challenged between 1999 and 2003, notwithstanding the Merger Guidelines' observation that with post-merger concentration in the 1000 to 1800 HHI range, "mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending on the factors set forth in Sections 2 – 5 of the Guidelines." MERGER GUIDELINES, *supra* note 1, at § 1.51. The Merger Guidelines also indicate concern about mergers resulting in post-merger HHIs over 1800 that produce an increase in the HHI of more than 50 points. However, of the over 1200 markets with HHIs of 1800 or more, the agencies challenged only 38 that had a change in the HHIs of 199 or less. For further discussion on the level of enforcement, see John Kwoka, *Some Thoughts on Concentration, Market Shares, and Merger Enforcement* (presented at the FTC/DOJ Workshop on Merger Enforcement, Washington, DC, Feb. 17, 2004).

As is shown in Table 3, the average number of merger enforcement actions (both litigated cases and consent agreements) [70] per year at the two enforcement agencies combined has been much lower during the GW Bush administration than during the Clinton administration. As the table further indicates, this conclusion holds even after adjusting for the possibility that the change in HSR filing requirements reduced the number of enforcement actions by making it more difficult for the antitrust agencies to identify problematic mergers among the smaller mergers that are no longer reported. The average number of challenges during the GW Bush administration was comparable to that during the Bush Sr. administration and exceeded that observed during the Reagan administration.

Like the number of second requests, the raw number of merger enforcement actions does not account for variation in the number of mergers. Table 4 adjusts for this variation. The adjusted enforcement rate statistics reported in the table suggest that merger enforcement has grown lax during the current administration.[71] In particular, the enforcement rate (enforcement actions as a percentage of adjusted HSR filings) for both agencies combined is markedly lower during the first term of the GW Bush administration (1.2%) than during the either term of the Clinton administration (2.0% and 1.8%).[72] The low rate of merger enforcement across the agencies is driven by a low rate at DOJ; the FTC figure for the first term of the GW Bush administration is slightly

[70] Most enforcement actions are resolved by consent settlements rather than litigation. The "enforcement actions" usage may mislead to the extent it is read to equate more such actions with better enforcement, and, in consequence, to ignore the possibility, not at issue in recent agency conduct, that enforcement might be excessively strict.

[71] The data in Table 4, while created independently, align with similar data collected and reported in Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 139 (2002) (Table 2) and Baker & Shapiro, *supra* note 62, at 1. While this discussion of changes in merger enforcement over time relies on the best available data, there are analytical issues that should be recognized when interpreting these data. First, merger enforcement rates may be affected by changes in the composition of HSR filings that were not controlled for in the analysis. Second, the number of problematic mergers that are filed under HSR could have declined over time as law firms "learn" about the antitrust agencies changing standards and improve their advice to clients. These interpretive issues are addressed in detail in Baker & Shapiro, *supra* note 62.

[72] This conclusion is not the result of including in the Clinton administration statistics the end of Chairman Janet Steiger's term. (Steiger was a Bush Sr. appointee who served as FTC Chairman until Robert Pitofsky took office in April 1995.) As indicated in the tables presented in the Appendix, if the Clinton administration is viewed as commencing in 1996, the average enforcement rate for both agencies combined over the entire administration is 1.8%. Nor do the GW Bush administration statistics change markedly if extended to 2006, according to an analysis by the AAI. (The 2006 ratios were calculated as being 0.5% at DOJ, 0.5% at the FTC, and 1.1% for DOJ and FTC combined.)

above that for the FTC during the second term of the Clinton administration. Only in Reagan's second term has either the combined percentage or the DOJ percentage been near the low level observed during the first term of the GW Bush administration.

Langenfeld and Shulman have confirmed this pattern in the data. They concluded: "There are fewer investigations and challenges of mergers by both agencies since President [George W.] Bush took office and installed new senior administrators at both agencies, and the reductions at least since 2003 do not appear to be due to fewer mergers."[73]

The trends observed in the agencies' merger data align with the views of merger lawyers. Specifically, a survey of experienced merger practitioners reveals that they perceive that merger enforcement has become more lax during the GW Bush administration.[74] The survey respondents also reported "changes in merger enforcement occurring at all stages of the merger review process: fewer second requests, a greater likelihood that an investigation will be closed rather than lead to an enforcement action, and a willingness to accept weaker remedies in those cases where enforcement actions are taken."[75] In addition, the survey respondents identified a more pronounced shift toward more lax enforcement at DOJ than at the FTC.[76]

[73] Langenfeld & Shulman, *supra* note 66, at 5. However, a study that reviewed internal FTC staff merger memos concluded that the FTC's review standards did not vary between the Clinton and GW Bush administrations. MALCOLM B. COATE & SHAWN W. ULRICK, TRANSPARENCY AT THE FEDERAL TRADE COMMISSION: THE HORIZONTAL MERGER REVIEW PROCESS 1996 – 2003, *available at* http://www.ftc.gov/os/2005/02/0502economicissues.pdf.

[74] Baker & Shapiro, *supra* note 62, at 17 – 18. The survey respondents agreed on this conclusion regardless of whether they thought the observed trend in agency enforcement was in the public interest.

[75] *Id.*

[76] *Id.*

Table 1

Count and Average Second Requests by Administration and Agency

Administration[1]	***Reagan I***				***Reagan II***				***Bush Sr.***			
Year[2]	*82*	*83*	*84*	*85*	*86*	*87*	*88*	*89*	*90*	*91*	*92*	*93*
Investigations with Second Request (FTC)[3]	39	12	25	24	32	18	39	35	55	33	26	40
Investigations with Second Request (DOJ)[4]	26	22	36	43	39	40	29	29	34	31	18	31
Total Second Requests	65	34	61	67	71	58	68	64	89	64	44	71
Average Number of Second Requests (FTC)[5]	25				31				39			
Average Number of Second Requests (DOJ)	32				34				29			
Difference Between FTC and DOJ Second Requests	13	-10	-11	-19	-7	-22	10	6	21	2	8	9
Average Difference Between FTC and DOJ Second Requests By Term	-7				-3				10			

Sources: DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities;* American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:

[1] The administration years are based on Leary's break down of Presidential terms, which uses a lag time of one year after the new term begins.

[2] Fiscal year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3] A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. The adjusted figures appear in parenthesis. When allocating the Adjusted Total Second Requests and the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

[4] HSR Investigations with Second Request differ in 1997 and 1998 in the DOJ Workload Statistics and HSR Annual Report because the DOJ Workload Statistics include the number of second requests and the number of Civil Investigative Demands (CIDs) issued. The data used is from the HSR Annual Report.

[5] Average is calculated by adding the count of second requests in the term and dividing by the number of years in the term.

<table>
<tr><th colspan="4">Clinton I</th><th colspan="4">Clinton II</th><th colspan="4">GW Bush I</th></tr>
<tr><td>94</td><td>95</td><td>96</td><td>97</td><td>98</td><td>99</td><td>00</td><td>01</td><td>02</td><td>03</td><td>04</td><td>05</td></tr>
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<tr><td colspan="4">46</td><td colspan="4">40 (43)</td><td colspan="4">22 (31)</td></tr>
<tr><td colspan="4">53</td><td colspan="4">61(66)</td><td colspan="4">21 (30)</td></tr>
<tr><td>19</td><td>15</td><td>-27</td><td>-32</td><td>-33</td><td>-23</td><td>-12</td><td>-16 (-22)</td><td>5 (6)</td><td>-5 (-5)</td><td>5 (5)</td><td>0 (1)</td></tr>
<tr><td colspan="4">-6</td><td colspan="4">-21 (-23)</td><td colspan="4">1 (2)</td></tr>
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Table 2

Average Percent of Second Requests by Number of Adjusted Transactions

Administration[1]	***Reagan I*** *82-85*[2]	***Reagan II*** *86-89*[2]	***Bush Sr.*** *90-93*[2]	***Clinton I*** *94-97*[2]	***Clinton II*** *98-01*[2]	***GW Bush I*** *02-05*[2]
Average Investigations with Second Request (FTC)[3]	2.5%	1.4%	2.4%	1.7%	1.0%	1.7%
Average Investigations with Second Request (DOJ)	3.1%	1.6%	1.7%	1.9%	1.5%	1.6%
Average Total Second Requests	5.6%	3.0%	4.1%	3.6%	2.6%	3.3%
Average Adjusted Investigations with Second Request (FTC)	2.5%	1.4%	2.4%	1.7%	0.9%	1.0%
Average Adjusted Investigations with Second Request (DOJ)	3.1%	1.6%	1.7%	1.9%	1.4%	0.9%
Average Adjusted Total Second Requests[4]	5.6%	3.0%	4.1%	3.6%	2.3%	1.9%

Sources:
DOJ Workload Statistics 1997 – 2007; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*; American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
[1] The administration years are based on Leary's break down of Presidential terms which uses a lag time of one year after the new term begins.

[2] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3] HSR Investigations with Second Request differ in 1997 and 1998 in the DOJ Workload Statistics and HSR Annual Report because the DOJ Workload Statistics include the number of second requests and the number of CIDs issued. The data used is from the HSR Annual Report. Average percentages are calculated by summing the counts of second requests for each year in the term and dividing by the sum of the adjusted transactions for each year in the term.

[4] A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. The adjusted figures are used to calculate percentages. When allocating the Adjusted Total Second Requests and the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

Table 3

Average Merger Enforcement Actions by Administration and Agency

Administration[1]	***Reagan I*** *82-85*[2]	***Reagan II*** *86-89*[2]	***Bush Sr.*** *90-93*[2]	***Clinton I*** *94-97*[2]	***Clinton II*** *98-01*[2]	***GW Bush I*** *02-05*[2]
Average Merger Enforcement Actions (FTC)[3]	10	15	25	31	30	19
Average Merger Enforcement Actions (DOJ)	9	9	12	25	44	10
Total Average Merger Enforcement Actions	19	24	37	56	74	28
Average Adjusted Merger Enforcement Actions (FTC)	10	15	25	31	31	26
Average Adjusted Merger Enforcement Actions (DOJ)	9	9	12	25	47	13
Average Adjusted Total Merger Enforcement Actions[4]	19	24	37	56	78	39

Sources:
DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*, American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
[1] The administration years are based on Leary's break down of Presidential terms which uses a lag time of one year after the new term begins.

[2] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3] Average is calculated by adding the number of merger enforcement actions in the term and dividing by the number of years in the term.

[4] A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. When allocating the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

Table 4

Merger Enforcement Challenges as a Percentage of Adjusted HSR Filings

	Administration[1]	***Reagan I*** *82-85*[2]	***Reagan II*** *86-89*[2]	***Bush Sr.*** *90-93*[2]	***Clinton I*** *94-97*[2]	***Clinton II*** *98-01*[2]	***GW Bush I*** *02-05*[2]
FTC	Sum of Challenges	40	61	99	124	125	104
	Sum of Filings[3]	4,036	8,756	6,527	11,042	18,790	12,743
	Percent	1.0%	0.7%	1.5%	1.1%	0.7%	0.8%
DOJ	Sum of Challenges	35	34	49	101	187	53
	Sum of Filings	4,036	8,756	6,527	11,042	18,790	12,743
	Percent	0.9%	0.4%	0.8%	0.9%	1.0%	0.4%
	Total Percent	1.9%	1.1%	2.3%	2.0%	1.8%	1.2%

Sources: DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*, American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
[1]The administration years are based on Leary's break down of Presidential terms which uses a lag time of one year after the new term begins.

[2] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3] A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60%, for only 11 of 12 months in 2001. Adjusted filings and merger enforcement actions are used in the calculations in this table. When allocating the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

C. *Recent Court Decisions*

Since *General Dynamics*, the lower courts have become far more willing to permit mergers than the Supreme Court was during the 1960s and early 1970s. The *Philadelphia National Bank* presumption that horizontal mergers leading to high and increasing market concentration harm competition has eroded to the point where an appellate decision written by then-Judge Clarence Thomas comes close to suggesting that the presumption has been completely abolished,[77] and these days it is often ignored by courts and enforcers. Taking advantage of the increased flexibility created by the erosion of the structural presumption, courts have held that mergers should not be blocked where entry is relatively quick and easy, where the exercise of market power would be checked by the presence of powerful buyers, and where high market shares do not accurately predict the merger's potential for harm.[78]

This shift in the judicial analysis has been accompanied by the incorporation by the courts of the economic learning that underlies the Merger Guidelines. Indeed, a significant number of courts have expressly or tacitly endorsed the Merger Guidelines approach.[79] Unfortunately, the increased flexibility that the Guidelines allow has permitted some courts to accept bad economic arguments inconsistent with appropriate antitrust enforcement policy. The appropriate response of the new administration to this phenomenon depends on whether those decisions generally reflect calculation by conservative judges seeking to narrow antitrust enforcement,[80] or a lack of understanding by generalist judges without much antitrust experience. Some lower court decisions, particularly *Syufy* and *Oracle*, likely reflect the first problem; others may reflect the second.

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[77] *See* United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

[78] For a discussion of the relevant cases, see Robert H. Lande & James Langenfeld, *From Surrogates to Stories: The Evolution of Federal Merger Policy*, 11 ANTITRUST 5 (1997).

[79] *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 718, 720 (D.C. Cir. 2001); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120, 123 – 31, 145 – 46, 150 (D.D.C. 2004); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1108, 1111 – 13, 1116 – 17, 1122 – 23 (N.D. Cal. 2004); United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172, 182 (D.D.C. 2001); FTC v. Swedish Match, 131 F. Supp. 2d 151, 160 (D.D.C. 2000); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d. 34, 45 (D.D.C. 1998); FTC v. Staples, Inc., 970 F. Supp. 1066, 1076 (D.D.C. 1997).

[80] On the increase in the number of conservative judges, see, e.g., David Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1166 – 67 (1999) (noting a predominance of Republican judges in the federal judiciary); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 395 n.87 (1999) (recognizing a "long stretch of Republican appointments to the federal bench during the 1980's and early 1990's") (citations omitted).

The *Syufy* case arose out of a DOJ challenge to three acquisitions by Syufy, a Las Vegas movie theater owner, which gave Syufy control of virtually all the theaters in that city.[81] DOJ charged that in the years following these transactions, Syufy had exercised monopsony power over distributors of first-run films, exploiting its position as the only major exhibitor in Las Vegas to pay distributors less than they would have received in a competitive market. Writing for the Ninth Circuit, Judge Alex Kozinski concluded that the district court had properly declined to enjoin the merger because entry was easy. He reached that conclusion based on a single contested example of fringe firm expansion, without analyzing whether other firms had the ability and incentive to enter by following the same model. *Syufy* evaluated entry conditions by asking whether new firms *could* enter the market, without recognizing that it needed also to evaluate whether those firms likely *would* do so.[82] This approach reasons from the dubious assumptions that markets are invariably competitive and that antitrust routinely makes matters worse[83] – indulging a noninterventionist prejudice consistent with the skepticism Judge Kozinski articulated elsewhere in the opinion about the value of antitrust enforcement.[84]

In the *Oracle* case, a district court chose not to block a merger between Oracle and PeopleSoft, two leading producers of enterprise resource planning software (which is used by large and complex enterprises to integrate firm-wide data).[85] In the view of

[81] United States v Syufy Enters., 903 F.2d 659 (9th Cir. 1990).

[82] *Id.* at 667 n.13 ("We cannot and should not speculate as to the details of a potential competitor's performance; we need only determine whether there were barriers to the entry of new faces into the market.") .

[83] Judge Kozinski contends that government enforcement can create "a real danger of stifling competition and creativity in the marketplace," and that in a free enterprise system, merger decisions "should be made by market actors responding to market forces, not by government bureaucrats pursuing their notions of how the market should operate." *Id.* at 673.

[84] *See also* Baker & Shapiro, *supra* note 62, at 7 ("the reasoning and rhetoric of Judge Alex Kozinski's opinion shows what mischief can arise when a court, having discarded the discipline of the structural presumption, chooses to indulge its noninterventionist prejudices rather than engage in serious economic inquiry and careful antitrust analysis"); Stephen Calkins & Frederick Warren-Boulton, *The State of Antitrust in 1990* (paper presented at Cato Institute Conference, A Century of Antitrust: The Lessons, The Challenges, Washington, DC, Apr. 1990) ("the opinion exudes antipathy for merger enforcement"); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 112 (1991) (the opinion "dispatched the government's case in a torrent of ridicule" and "depicted[ed] the Justice Department's decision to prosecute as virtually irrational").

[85] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

DOJ, this was a merger among sellers of differentiated products threatening unilateral anticompetitive effects. This theory of harm to competition from merger is well-established among antitrust economists, described in the 1992 Horizontal Merger Guidelines, and routinely employed at the federal antitrust enforcement agencies.[86] However, in rejecting the government's case, the district court judge – an antitrust expert with noninterventionist views on antitrust policy – held that "[t]o prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position."[87] This legal standard is inconsistent with "the modern economic understanding of unilateral competitive effects" and it "throws up unreasonable barriers to proving unilateral competitive effects."[88] In consequence, "the *Oracle* decision could effectively nullify the structural presumption in many cases, by making it difficult for plaintiff to define any relevant market other than an extremely broad one in which market shares are low."[89] We have already seen unfortunate fallout from Judge Walker's hostility to unilateral effects: a recent study finds "some evidence that the *Oracle* decision has indeed caused the Justice Department to scale back its merger enforcement efforts."[90]

While one might be tempted to view *Oracle* as an "outlier" that can be dismissed as an anomaly, under the current administration, the federal enforcement agencies have most commonly not prevailed in litigation, though there are only a small number of such cases.[91] Court losses since 2001 include *Arch Coal*,[92] *SunGard*,[93] *Whole Foods*,[94] and *Western*

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[86] *See generally* Carl Shapiro, *Mergers with Differentiated Products*, 10 ANTITRUST 23 (1996); Kaplow & Shapiro, *supra* note 53, at 1139 – 49; Jonathan B. Baker, *Why Did the Antitrust Agencies Embrace Unilateral Effects?* 12 GEO. MASON L. REV. 31 (2003).

[87] *Oracle*, 331 F. Supp. 2d at 1123.

[88] Baker & Shapiro, *supra* note 62, at 11.

[89] *Id.*

[90] *Id.* at 12.

[91] The FTC also lost in FTC v. Equitable Res., Inc., 512 F. Supp. 2d 361 (W.D. Pa. 2007), but the district court opinion was vacated on appeal when the parties unilaterally abandoned the transaction, making the appeal moot. *See* FTC v. Equitable Res., Inc., No. 07-2499 (3rd Cir. Feb. 5, 2008). A decision is pending in United States v. Daily Gazette Co., No. 2:07-0329 (S.D. W. Va., May 22, 2007) (complaint available at http://www.usdoj.gov/atr/cases/f223400/223469.pdf). DOJ was victorious in United States v. Dairy Farmers of Am., 426 F.3d 850 (6th Cir. 2005), which reversed an award of summary judgment against DOJ on a narrow question involving the significance of partial ownership without control. The case subsequently settled.

Refining[95]; victories include *Dairy Farmers*,[96] *Libbey*,[97] *Chicago Bridge*,[98] and *UPM-Kymmene Oyj*.[99] While the government's litigation record is somewhat better over a longer time period,[100] the agencies have lost numerous cases over the last two decades, particularly challenges to hospital mergers.[101]

The recent string of court losses for the enforcement agencies, largely at the hands of generalist judges with limited antitrust experience, is cause for concern. If it is indeed a trend, it may have multiple explanations. It may reflect changes in judicial appointees, by which more recently appointed judges are less knowledgeable about antitrust or more skeptical about the likely success of government intervention in economic affairs than their predecessors, leading courts too often to accept uncritically unsound economic

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92 FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

93 United States v. SunGard Data Systems, Inc., Civ. Action No. 01-2196 (ESH/JMF) (D.D.C. Oct. 22, 2001).

94 FTC v. Whole Foods, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007) (appeal pending).

95 Federal Trade Commission v. Paul L. Foster, Western Refining, Inc., No. 07-352, 2007 U.S. Dist. LEXIS 47606 (D. N.M. May 29, 2007).

96 United States v. Dairy Farmers of Am., 426 F.3d 850 (6th Cir. 2005).

97 FTC v. Libbey, Inc., Civ. No. 02-0060 (D.D.C. Apr. 22, 2002) (FTC filed for preliminary injunction; court granted preliminary injunction on April 22, 2002, which led parties to abandon transaction before administrative hearing).

98 Chicago Bridge & Iron Company N.V. v. FTC, No. 05-60192 (5th Cir. Jan. 5, 2008); Chicago Bridge & Iron Company N.V., Docket No. 9300 (issued Oct. 25, 2001) (decision in administrative complaint subsequently appealed, with court agreeing with Commission).

99 United States v. UPM-Kymmene Oyj, 2003 U.S. Dist LEXIS 12820 (N.D. Ill. July 24, 2003), *available at* http://www.usdoj.gov/atr/cases/f201100/201196.htm.

100 Government victories include FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2001); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998); and FTC v. Alliant Techsystems, 808 F. Supp. 9 (D.D.C. 1992).

101 The FTC and DOJ have lost every preliminary injunction case brought to challenge hospital mergers that reached a decision since 1992, a total of six losses in a row. *See* H.E. Frech III, James Langenfeld & R. Forrest McCluer, *Elzinga-Hogarty Tests and Alternative Approaches for Market Share Calculations in Hospital Markets*, 71 ANTITRUST L.J. 921 (2004). Outside of hospital cases, government losses include United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) and United States v. Englehard Corp., 970 F. Supp. 1463 (M.D. Ga. 1997), *aff'd*, 126 F.3d 1302 (11th Cir. 1997).

arguments made by defendants.[102] It may reflect greater demands that the courts have placed on plaintiffs in business litigation generally. Or, it may reflect a lessening of litigation skills or experience at the antitrust enforcement agencies.

To the extent that the problem results from uninformed judges, the agencies can respond by providing more guidance. In particular, the agencies can help judges avoid over-reliance on bad economic arguments by systematically identifying various factual showings from which harm to competition from merger should be presumed, and the factual showings that would rebut those harms.[103] The agencies can encourage courts to adopt and rely on those presumptions by incorporating them into a guidance document that would supplement the Merger Guidelines and promoting that guidance in agency decisions, speeches and briefs.

The last two possibilities – greater demands placed on plaintiffs by the courts and lessening of litigation skills and experience at the agencies – pose a management issue for the new administration and its enforcement agency appointees. While the FTC and DOJ have many talented people that work long hours, at times they appear undermanned when they litigate large mergers in court. There may be several reasons for this. First, as discussed above, courts today often demand a more detailed substantive analysis than was required in the past.

Second, the increased reliance on data analyses in litigation may exacerbate a structural disadvantage of antitrust plaintiffs. Most of the information in antitrust agency data sets is typically provided by the merging firms. This places the antitrust agency at a disadvantage because it has less ready access to the people that assemble the data and know the "quirks" that underlie it.[104]
Third, merger litigation increasingly relies on extensive economic analyses – whether in the context of defining markets, proving competitive effects or assessing efficiencies.

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[102] *Cf.* Baker & Shapiro, *supra* note 62, at 23 – 30 (critiquing common merging firm arguments involving the extent of competition among oligopolists, the ease of entry and expansion, and the significance of merger-related efficiencies).

[103] For one proposal on structuring such presumptions, see *id.* at 30 – 43.

[104] In contrast, the merging parties have access to their entire corporate staffs and expert consultants, which gives them more ready access to factual ammunition that can be used in the litigation. In consequence, any factual misstep by the complaining agency is likely to be caught because of these resources, while the reverse is substantially less likely.

The agencies may be at a disadvantage in preparing such analyses quickly because, unlike the merging firms, they do not have direct access to corporate executives with a strong incentive to assist them and they have less time to prepare (since the merging firm's legal team will know about the merger before the HSR filing, unlike the agency's team).

Fourth, growing salary differentials between the private and public sectors, combined with agency budget constraints, may mean that the agencies are going to court with fewer experienced litigators than in the past. Remedies for these possible problems extend beyond the four corners of merger analysis at the agencies.

IV. Policy Proposals

The evidence set forth above depicts a continuing decline in merger enforcement at the federal antitrust agencies, especially DOJ.[105] We have also identified a troubling trend of recent agency losses in merger litigation in federal court. Neither of these trends in merger enforcement appears prompted by developments in economic analysis or the law; rather, they seem inconsistent with sound economic and legal analysis.

To address these problematic trends in merger enforcement, the AAI proposes that the new administration restore an active merger enforcement program informed by modern economic thinking. We do not call for changes to Section 7 of the Clayton Act. Rather, our recommendations aim to make enforcement of the statute more effective by clarifying the Merger Guidelines and the basis for these guidelines. Our particular policy recommendations are set forth below.

- The enforcement agencies should systematically identify various factual showings from which harm to competition from merger should be presumed and the factual showings that would rebut those harms.

[105] *See also* Baker & Shapiro, *supra* note 62, at 1 ("We show using merger enforcement data and a survey we conducted of merger practitioners that the decline in antitrust enforcement is ongoing, especially at the current Justice Department.").

- The enforcement agencies should base those presumptions on careful analysis of the contemporary economic literature and merger enforcement history,[106] with attention to the significance of high and increasing market concentration.

- The enforcement agencies should amend the Merger Guidelines to say that as HHI levels increase beyond the levels giving rise to a presumption of anticompetitive effects, it is less likely that other factors will overcome the presumption. Moreover, to clarify the strength of the presumption, the agencies should indicate by way of example that when the HHI exceeds 2500 and the change exceeds 200, the presumption should rarely be overcome.

- The agencies should revise or supplement the Merger Guidelines to identify the factual basis for other presumptions of harm that might arise at lower concentration levels.

- The agencies should demonstrate how they apply those presumptions by increasing the transparency of agency decisionmaking in individual cases.[107]

- The agencies should encourage the courts to rely on those presumptions, through agency guidance, research reports, speeches, and briefs.

- The agencies should update the Merger Guidelines to incorporate modern economic learning about possible anticompetitive effects of vertical mergers and conglomerate acquisitions of potential rivals.[108]

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[106] To this end, the agencies should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy. *See* AMC REPORT, *supra* note 31, at 50 (recommendation #10).

[107] This should include issuing "closing statements" when appropriate, to explain why the agency chose not to take enforcement action. It should also include frequent and routine reporting of statistics on merger enforcement (as the FTC did in 2004 and updated more recently) to identify factors such as concentration levels, customer complaints, and "hot documents" that affect the likelihood of enforcement. In addition, the agencies should periodically invite outside experts (with support of agency staff) to assess their decisions in individual cases after the fact. The AMC has also encouraged increased agency transparency. *See* AMC REPORT, *supra* note 31, at 50 (recommendation #11). For a discussion of the importance of transparency, see Warren Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. (2003).

[108] This is similar to a recommendation of the AMC. *See* AMC REPORT, *supra* note 31, at 51 (recommendation #11d).

- The agencies should review systematically whether they are devoting sufficient resources to litigation preparation, with a particular emphasis on attracting experienced litigators and training staff attorneys in litigation skills.

- The agencies should conduct more retrospective studies of merger enforcement, particularly to analyze the effects of mergers in close cases that were not challenged or mergers that the agencies challenged but the courts declined to enjoin.

Appendix

Table 1a.

Count and Average Second Requests by Administration and Agency

(Transition Years Omitted)

Administration[1]	***Reagan***							***Bush Sr.***		
Year[2]	*82*	*83*	*84*	*85*	*86*	*87*	*88*	*90*	*91*	*92*
Investigations with Second Request (FTC)[3]	39	12	25	24	32	18	39	55	33	26
Investigations with Second Request (DOJ)[4]	26	22	36	43	39	40	29	34	31	18
Total Second Requests	65	34	61	67	71	58	68	89	64	44
Average Number of Second Requests (FTC)[5]	27							38		
Average Number of Second Requests (DOJ)	34							28		
Difference Between FTC and DOJ Second Requests	13	-10	-11	-19	-7	-22	10	21	2	8
Average Difference Between FTC and DOJ Second Requests By Term	-7							10		

Sources:
DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*; American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
[1] The administration years are the actual years the President was in office omitting transition years.

[2] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3]A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. The adjusted figures appear in parentheses. When allocating the Adjusted Total Second Requests and the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

[4]HSR Investigations with Second Request differ in 1997 and 1998 in the DOJ Workload Statistics and HSR Annual Report because the DOJ Workload Statistics include the number of second requests and the number of CIDs issued. The data used is from the HSR Annual Report.

[5] Average is calculated by adding the count of second requests in the term and dividing by the number of years in the term.

[6] Bush Sr. appointee Janet Steiger remained FTC Chairman until April 1995, when Robert Pitofsky was appointed. From 1996 to 2000, second requests averaged 43 at the FTC and 68 at DOJ, with an average difference of -25.

Clinton[6]							***GW Bush I***			
94	*95*	*96*	*97*	*98*	*99*	*00*	*02*	*03*	*04*	*05*
46	58	36	45	46	45	43	27 (36)	15 (22)	20 (30)	25 (37)
27	43	63	77	79	68	55	22 (30)	20 (27)	15 (25)	25 (36)
73	101	99	122	125	113	98	49 (66)	35 (49)	35 (55)	50 (74)
46							22 (31)			
59							21 (30)			
19	15	-27	-32	-33	-23	-12	5 (6)	-5 (-5)	5 (5)	0 (1)
-13							1 (2)			

Table 2a

Average Percent of Second Requests by Number of Adjusted Transactions

(Transition Years Omitted)

Administration[1]	***Reagan I*** *82-85*[2]	***Reagan II*** *86-88*[2]	***Bush Sr.*** *90-92*[2]	***Clinton I*** *94-97*[2]	***Clinton*** *96-00*[5]	***Clinton II*** *98-00*[2]	***GW Bush I*** *02-05*[2]
Average Investigations with Second Request (FTC)[3]	2.5%	1.4%	2.4%	1.7%	1.1%	1.0%	1.7%
Average Investigations with Second Request (DOJ)	3.1%	1.7%	1.7%	1.9%	1.7%	1.5%	1.6%
Average Total Second Requests	5.6%	3.2%	4.1%	3.6%	2.8%	2.5%	3.3%
Average Adjusted Investigations with Second Request (FTC)	2.5%	1.4%	2.4%	1.7%	1.1%	1.0%	1.0%
Average Adjusted Investigations with Second Request (DOJ)	3.1%	1.7%	1.7%	1.9%	1.7%	1.5%	0.9%
Average Adjusted Total Second Requests[4]	5.6%	3.2%	4.1%	3.6%	2.8%	2.5%	1.9%

Sources:
DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*; American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
[1] The administration years are the actual years the President was in office omitting transition years.

[2] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3] HSR Investigations with Second Request differ in 1997 and 1998 in the DOJ Workload Statistics and HSR Annual Report because the DOJ Workload Statistics include the number of second requests and the number of CIDs issued. The data used is from the HSR Annual Report. Average percentages are calculated by summing the counts of second requests for each year in the term and dividing by the sum of the adjusted transactions for each year in the term.

[4]A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. The adjusted figures are used to calculate percentages. When allocating the Adjusted Total Second Requests and the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

[5]Bush appointee Janet Steiger, remained FTC Chairman until April 1995 when Robert Pitofsky was appointed.

Table 3a

Average Merger Enforcement Actions by Administration and Agency (Transition Years Omitted)

Administration[1]	*Reagan I* 82-85[2]	*Reagan II* 86-88[2]	*Bush Sr.* 90-92[2]	*Clinton I* 94-97[2]	*Clinton* 96-00[5]	*Clinton II* 98-00[2]	*GW Bush I* 02-05[2]
Average Merger Enforcement Actions (FTC)[3]	10	14	26	31	30	32	19
Average Merger Enforcement Actions (DOJ)	9	8	13	25	41	48	10
Total Average Merger Enforcement Actions	19	22	39	56	71	80	28
Average Adjusted Merger Enforcement Actions (FTC)	10	14	26	31	30	32	26
Average Adjusted Merger Enforcement Actions (DOJ)	9	8	13	25	41	48	13
Average Adjusted Total Merger Enforcement Actions[4]	19	22	39	56	71	80	39

Sources:
DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*, American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
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[4] A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. When allocating the Adjusted Merger Enforcement Actions between the

FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

[5] Bush appointee Janet Steiger, remained FTC Chairman until April 1995 when Robert Pitofsky was appointed.

Table 4a

Merger Enforcement Challenges as a Percentage of Adjusted HSR Filings

(Transition Years Omitted)

	***Administration*[1]**	***Reagan I*** *82-85*[2]	***Reagan II*** *86-88*[2]	***Bush Sr.*** *90-92*[2]	***Clinton I*** *94-97*[2]	***Clinton*** *96-00*[4]	***Clinton II*** *98-00*[2]	***GW Bush I*** *02-05*[2]
FTC	Sum of Challenges	40	42	78	124	149	96	104
	Sum of Filings[3]	4,036	6,221	4,782	11,042	19,966	13,664	12,743
	Percent	1.0%	0.7%	1.6%	1.1%	0.7%	0.7%	0.8%
DOJ	Sum of Challenges	35	25	38	101	206	145	54
	Sum of Filings	4,036	6,221	4,782	11,042	19,966	13,664	12,743
	Percent	0.9%	0.4%	0.8%	0.9%	1.0%	1.1%	0.4%
	Total Percent	1.9%	1.1%	2.4%	2.0%	1.8%	1.8%	1.2%

Sources:
DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*; American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:
[1] The administration years are the actual years the President was in office omitting transition years.

[2] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data.

[3] A change in HSR Merger filing requirements in February 2001 is assumed to have reduced filings by 60% for only 11 of 12 months in 2001. Adjusted filings and merger enforcement actions are used in the calculations in this table. When allocating the Adjusted Merger Enforcement Actions between the FTC and DOJ between years 2002 and 2005, a ratio over the four years is used instead of ratios for an individual year.

[4] Bush appointee Janet Steiger, remained FTC Chairman until April 1995 when Robert Pitofsky was appointed.

Table 5

Underlying HSR Filings and Enforcement Data By Year

Year[1]	*HSR Transactions Received*	*Adjusted Transactions*[2]	*Merger Enforcement Actions (FTC)*[3]	*Merger Enforcement Actions (DOJ)*
1982	1,203	713	12	14
1983	1,093	903	5	7
1984	1,340	1,119	14	9
1985	1,603	1,301	9	5
1986	1,949	1,660	7	6
1987	2,533	2,170	12	8
1988	2,746	2,391	23	11
1989	2,883	2,535	19	9
1990	2,262	1,955	35	17
1991	1,529	1,376	29	13
1992	1,589	1,451	14	8
1993	1,846	1,745	21	11
1994	2,305	2,128	28	22
1995	2,816	2,612	43	18
1996	3,087	2,864	27	30
1997	3,702	3,438	26	31
1998	4,728	4,575	34	51
1999	4,642	4,340	30	46
2000	4,926	4,749	32	48
2001	2,376	2,237	22	32
2002	1,187	1,142	24	10
2003	1,014	968	21	15
2004	1,454	1,377	15	9
2005	1,695	1,610	14	4
2006	1,768	1,746	16	16

Sources: DOJ Workload Statistics 1997 – 2006; HSR Annual Reports 1978 – 2006; Bureau of Competition, Federal Trade Commission, *Antitrust Enforcement Activities*; American Bar Association, Antitrust Section, Spring Meeting Reports 2004 – 2006; and Leary, *supra* note 63.

Notes:

[1] Fiscal Year data begins in the Tenth Annual HSR Annual Report which contains fiscal 1986 and 1987 data. Earlier data is on a calendar year basis.

[2] Adjusted transactions reflect only the adjustments made by the reporting agencies to eliminate duplicative filings that would overstate the number of mergers that are filed.

[3] Merger enforcement action counts are taken from Commissioner Leary's speech and include abandoned transactions, which are not found in HSR Annual Reports prior to 1997.