The American Antitrust Institute

Antitrust Enforcement Data Shows SMARTER Act Is Not So Smart

The American Antitrust Institute (AAI)[1] has reviewed workload statistics compiled in U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) Annual Competition Reports to test the "theory" underlying the Standard Merger and Acquisition Reviews Through Equal Rules Act ("SMARTER Act").[2] As the bill's sponsors explained at a recent Senate Antitrust Subcommittee hearing, the SMARTER Act seeks to eliminate supposedly disparate treatment of mergers handled by the DOJ and FTC by (1) preventing the FTC from ever using its administrative process to adjudicate a proposed merger, and (2) requiring the FTC to meet the DOJ's theoretically more stringent standard for obtaining a preliminary injunction to block a merger in federal court. AAI's review indicates that the concerns of the bill's sponsors are without foundation.

AAI has opposed the SMARTER Act on several grounds. First, the FTC's use of administrative powers should be carefully safeguarded, because it has contributed critically to the effective shaping of U.S. merger policy without detracting from the speed or effectiveness of merger review.[3] Second, any difference in the preliminary injunction standard is more theoretical than real, and if a uniform standard is to be adopted, it should be the FTC's standard, which allows the agency to obtain a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[4] Additionally, any change in the law may have harmful unintended consequences, including unnecessarily burdening the federal judiciary with new litigation over the meaning and value of the

[1] The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org.

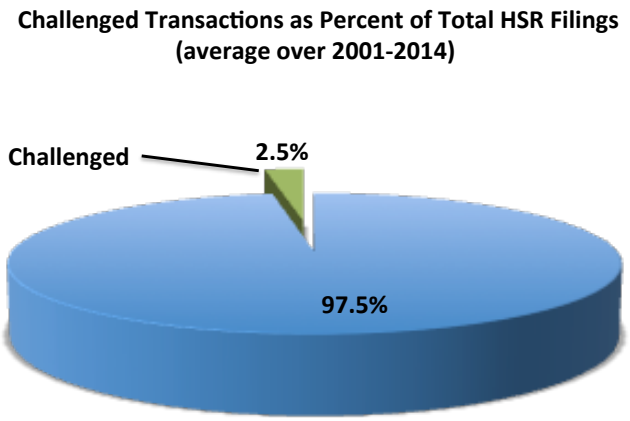
[2] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Div., ANNUAL REPORTS TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, available *at* https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports (reports queried for fiscal years 2001-2014).

[3] *See Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on H.R. 2745 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 49-51, (2015) (Statement of Albert A. Foer, Senior Fellow, Am. Antitrust Inst.); *id.* at 68-72 (Response to Questions for the Record from Albert A. Foer, Senior Fellow, Am. Antitrust Inst.).

[4] 15 U.S.C. § 53(b); *see supra* note 3.

body of legal precedent involving merger cases brought by the FTC in federal court under the existing standard.

The workload statistics reveal that the SMARTER Act is a proverbial "solution in search of a problem." The chance that any deal will be affected by a supposed divergence between the procedures and standards used by the two agencies is trivial. On average, for the period from 2001-2014, businesses that submitted HSR filings enjoyed a 97.5% chance that their deals would be approved without being challenged and a 96.7% chance that their deals would be approved without even a Second Request.



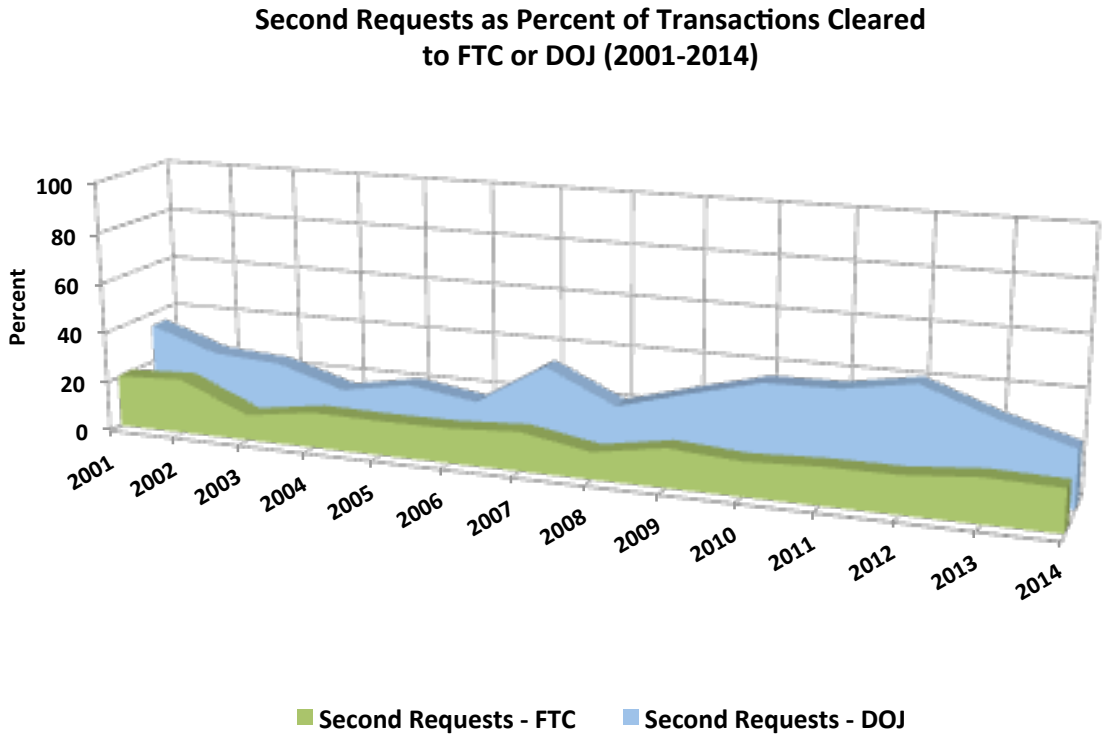
Moreover, the workload data do not support the central argument of the bill's sponsors, namely that firms are unfairly prejudiced when their mergers are reviewed by the FTC rather than DOJ. On the contrary, the workload data demonstrate that firms that have their merger reviewed by the DOJ are *more* likely to have their merger closely scrutinized or challenged than firms whose mergers are reviewed by the FTC.

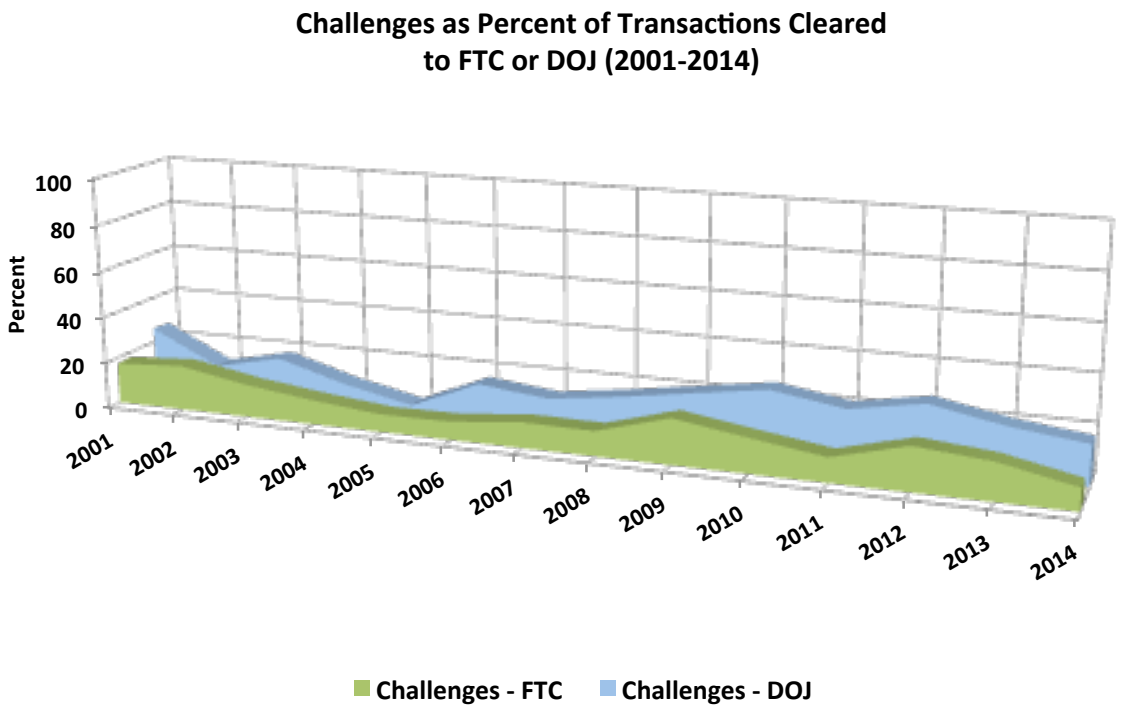
Fiscal Year 2014 provides a simple example. The DOJ and FTC reported a combined 1,663 Hart-Scott-Rodino filings. Among them, 93 mergers were cleared for investigation to the DOJ and 181 mergers were cleared to the FTC. As shown in the table below, DOJ issued Second Requests in 23% of the merger transactions cleared to it, and challenged 17%, while the FTC issued Second Requests in 17% of the merger transactions cleared to it, and challenged 9%.

Workload statistics for the period from 2001-2014, presented in the table and charts below, show the same results. On average, the DOJ issued Second Requests in 28% of merger transactions cleared to it and challenged 18%, while the FTC issued Second Requests in 15% of merger transactions cleared to it and challenged 13%.

FTC and DOJ Workload Statistics Show SMARTER Act Is Not So Smart

Agency	2014		2001-2014 (average)	
	Second Requests	Challenges	Second Requests	Challenges
	(as percent of transactions cleared to the agency)			
FTC	17%	9%	15%	13%
DOJ	23%	17%	28%	18%





This means that if a merger was cleared for investigation to the agency with the supposedly unfair advantages last year, the deal stood a 35% *better* chance of avoiding a Second Request investigation and an 89% *better* chance of avoiding a challenge. For the period from 2001-2014, the deal had an 87% better chance of avoiding a Second Request investigation and a 38% better chance of avoiding a challenge.

The enforcement data suggest many things, but one of them is definitely *not* what the SMARTER Act purports to cure: an unfairness caused by differences in standards and procedures at the FTC and DOJ. On the contrary, the SMARTER Act would create uncertainty and new litigation to solve a problem that, empirically, does not exist. This is not smart at all.