Mergers, Market Power, and the Need for More Vigorous Enforcement*

Mergers are extremely common phenomena in our economy. Most raise no competitive concerns. Many allow firms to reduce costs, improve products, and reduce prices, while others simply have no discernible economic effects. But a small and perhaps increasing fraction of mergers threaten harm to competition and consumers. These mergers can facilitate collusion, create incentives for unilateral price increases, reduce incentives to innovate, and make it easier to exclude or artificially disadvantage rivals or suppliers. The resulting competitive harms include higher prices, higher costs, lower quality, slower development of new and better products, and a reduction in product variety and consumer choice. The potential harms to consumers and competition motivated the passage in 1914 of the Clayton Act. As amended in 1950, this statute prohibits mergers whose "effect . . . may be to substantially lessen competition or to tend to create a monopoly." Noteworthy in this statute are the terms used in the phrases "*may* . . . lessen" and "*tend* to create." These terms signal recognition of the fact that merger analysis is a predictive exercise, so that neither its inherent uncertainty nor the possibility of error should stymie enforcement. Moreover, they authorize policy intervention to prevent the growth of market concentration in its early stages—that is, in its incipiency—rather than waiting for the full harms to manifest themselves.

Identifying and preventing the lessening of competition and the creation of monopoly have been key tasks of the Antitrust Division of the Justice Department (DOJ) and the Federal Trade Commission (FTC). Over time these agencies have progressively modified, clarified, and generally improved their approaches to merger control, albeit not without some disagreements. They have incorporated new methods of analysis and responded to new evidence about the effects of mergers and policy. Many of these changes are reflected in the agencies' joint Horizontal Merger Guidelines, the most recent version of which was released in 2010.

In light of the statutes, the Merger Guidelines, and the economic evidence, this chapter of the AAI Transition Report takes stock of current merger control practice of the two antitrust agencies and

---

* This document is a "Preview" of the merger chapter of the AAI's 2016 Presidential Transition Report, which has not yet been published. "Previews" are works in progress, subject to revision and approval by AAI's board of directors. This document may be cited as: Mergers, Market Power, and the Need for More Vigorous Enforcement, AntitrustInstitute.org (Preview of Am. Antitrust Inst. Merger Chapter of 2016 Presidential Transition Rep., posted Mar. 25, 2016).

offers recommendations for improvement. Our focus is on horizontal mergers, that is, mergers between two competing sellers that may pose significant threats of harm to consumers and competition, as these are the main focus of agency activity with respect to mergers. Issues arising from mergers between two large buyers that threaten to create monopsony power are primarily addressed in chapters 4 and 13. Issues stemming from mergers involving vertically related companies and other types of mergers can be quite important as well and will be touched on in this chapter as well as several other chapters in this Report.

We find, in brief, that over the past thirty or more years, in making the predictive judgments required by the merger statute, antitrust enforcers and courts have often moved away from the legislative intent. Specifically, they have too often accepted weak or dubious economic arguments that favor allowing mergers, and have tended too quickly to dismiss sound arguments for enjoining them. The result has been a decline in antitrust merger enforcement at the agencies: the failure to correctly assess the anticompetitive potential of some mergers, the failure to challenge some mergers at the enforcement margin, and the failure to ensure resolution of cases on terms that preserve or restore competition.

In AAI's 2008 Transition Report,[1] we pointed to these disturbing trends and made a series of recommendations for correcting them.[2] The record of the agencies since that time includes a number of commendable changes that correspond to AAI's recommendations. We urged restoration of a presumption against large mergers in concentrated markets, and the revised 2010 Merger Guidelines specifically include language stating that "[m]ergers resulting in highly concentrated markets [defined as a market with an HHI above 2,500] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."[3]

We recommended a more detailed explanation of the model and method for analyzing unilateral effects, and the new Merger Guidelines include exactly such an expanded discussion, which usefully explains mergers between producers of differentiated products. The Guidelines also contain

---

1 AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES (2008), *available at* http://www.antitrustinstitute.org/content/AAI-book-next-antitrust-agenda [hereinafter 2008 TRANSITION REPORT].

2 *Id.* at 139–82.

3 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 19 (2010), *available at* http://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [hereinafter 2010 HORIZONTAL MERGER GUIDELINES].

language that explicitly recognizes that it may not be necessary to define a relevant market when there is direct evidence that a merger would have an anticompetitive effect.[4] This directs attention to types of evidence that are increasingly relied on in economics, readily understood by the courts, and, if appropriately developed, quite convincing.

We also urged restoration of an explicit statement that mergers eliminating a relevant potential competitor would be scrutinized for possible anticompetitive effects. The opening sentence of the 2010 Merger Guidelines now defines "horizontal mergers" to include "mergers and acquisitions involving actual *or potential* competitors."[5] While more may be necessary to explain how an adverse effect on potential competition would be analyzed,[6] that statement is helpful.[7] And our recommendation that more attention should be paid to non-price effects of mergers was met with the statement that the emphasis on price effects in the bulk of the discussion is done "for simplicity of exposition"[8] and that "[e]nhanced market power can also be manifested in non-price terms and

---

[4] 2010 MERGER GUIDELINES, *supra* note 3, § 4, at 7 ("In any merger enforcement action, the Agencies will *normally* identify one or more relevant markets . . . . The Agencies' analysis *need not start with market definition. Some of the analytical tools used by the Agencies* to assess competitive effects *do not rely on market definition* . . . . [E]vidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. *Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition* and market shares.") (emphasis added). *See also id.* § 6 (detailing how unilateral effects are analyzed).

[5] *Id.* § 1 (emphasis added). We also note that the FTC, while not always successful, does appear to be pursuing potential competition theories. *See e.g.*, Fed. Trade Comm'n v. Steris Corp., 2015 WL 5657294 (N.D.Ohio 2015). We believe that continued vigalence on this front is appropriate.

[6] We recognize that the Director of the FTC's Bureau of Competition recently took a step in this direction when she outlined the types of concerns and investigations that the FTC has been undertaking with respect to potential competition issues. Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n, The Forward-Looking Nature of Merger Analysis (2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf. She points out that the FTC is most likely to take action where: (1) Each firm is likely to be a competitor going forward; (2) The merging companies are two of only very few firms likely to successfully develop a future product; and/or (3) Other firms are significantly behind the efforts of either merging party such that the combination is likely to delay the emergence of real competition in the market for the new product.

[7] Under the 1984 Merger Guidelines, the acquisition of a potential new entrant was characterized as a "non-horizontal" merger and reviewed under a different analytical framework than "horizontal mergers." *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 4.0–4.01 (1984) [hereinafter 1984 MERGER GUIDELINES]. Unfortunately, this language was dropped in the 1992 Horizontal Merger Guidelines, so there was no recognition that the acquisition of a potential competitor might raise competitive concerns. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (1992) [hereinafter 1992 MERGER GUIDELINES]. The agencies' 2006 Commentary on the Horizontal Merger Guidelines did not address this issue and defined "horizontal' mergers" as "[m]ergers between competing firms." U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines, at v (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm. As a result, the 2010 language is a very helpful clarification. *See* John Kwoka, *Mergers That Eliminate Potential Competition*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 90 (Einer Elhauge ed., 2012).

[8] 2010 MERGER GUIDELINES, *supra* note 3, § 1, at 2. In contrast, the 1997 revision of the 1992 Merger Guidelines had relegated this point to a one-sentence footnote. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992, rev. 1997) [hereinafter 1997 REVISED MERGER GUIDELINES].

conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."[9]

The agencies also undertook actions consistent with other recommendations in the AAI's 2008 Transition Report. In particular, we recommended that they "improve the effectiveness of merger analysis by conducting more retrospective studies of merger enforcement."[10] Since then, the FTC staff has published several such studies. These studies not only helped provide insights into prior policy, but they have been directly used in some recent lawsuits as evidence that a challenged merger was anticompetitive.[11]

At the same time, we note that certain other policy changes that have been retained are less constructive. Perhaps most significantly, there appears to be an increased tendency (going back over more than a decade) for the agencies to approve mergers in industries with moderate to high concentration, which in turn has led to dangerously high concentration in important industries. In fact, the agencies have effectively abandoned enforcement actions in cases where more than a very few firms remain. Particularly controversial have been decisions to altogether forego challenges or settle for weak remedies in cases such as Ticketmaster-LiveNation, Southwest-AirTran, US Airways-American, ExpressScripts-Medco, Allied-Waste Management, JBS-National Beef, Highmark-Independence BlueCross, and Teva-Barr, among others.

A second troublesome change has been the expanded use of conduct remedies as an alternative to divestitures or outright challenges to competitively problematic mergers. This has occurred despite growing evidence that casts serious doubt on the effectiveness of conduct remedies, which seek to

---

[9] 2010 MERGER GUIDELINES, *supra* note 3, § 1, at 2.

[10] 2008 TRANSITION REPORT, *supra* note 1, at 142.

[11] Studies undertaken by FTC Staff published in 2008 or later include: Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence From Five Selected Case Studies* (NBER, Working Paper No. 13859, 2008); John Simpson & Christopher Taylor, *Do gasoline mergers affect consumers' prices: The Marathon-Ashland and UDS transaction*, 51 J.L. & ECON. 135 (2008); Deborah Haas-Wilson & Christopher Garmon, *Two hospital mergers on Chicago's North Shore: A retrospective study* (Bureau of Econ., Fed. Trade Comm'n, Working Paper No. 294, 2008); Steven Tenn, *The price effects of hospital mergers: A case study of the Sutter-Summit transaction* (Bureau of Econ., Fed. Trade Comm'n, Working Paper No. 293, 2008); Aileen Thompson, *The effect of hospital mergers on inpatient prices: A case study of the New Hanover-Cape Fear transaction* (Fed. Trade Comm'n, Bureau of Econ., Working Paper No. 295, 2009); Orley Ashenfelter & David Hosken, *The effect of mergers on consumer prices: Evidence from five mergers on the enforcement margin*, 53 J.L. & ECON. 417 (2010); Orley Ashenfelter et al., *Retrospective Analysis of Hospital Mergers*, 18 INT'L J. ECON. BUS. 5 (2011); Steven Tenn & John Yun, *The Success of Divestitures in Merger Enforcement: Evidence from the J&J-Pfizer Transaction*, 29 INT'L J. INDUSTRIAL ORG. 273 (2011). However, the FTC Staff has been undertaking such studies for many years. One of the first such studies (which supported an FTC antitrust case) is David Barton & Roger Sherman, *The price and profit effects of horizontal merger: A casestudy,* 33 J. INDUSTRIAL ECON. 165 (1984). *See also* Laurence Schumann et al., *Case Studies of the Price Effects of Horizontal Mergers*, *in* FTC BUREAU OF ECONOMICS STAFF REPORT (1992); Michael Vita & Seth Sacher, *The Competitive Effects of the Not-For-Profit Hospital Mergers: A Case Study*, 49 J. INDUSTRIAL ECON. 63 (2001); Dennis Breen, *The Union Pacific/Southern Pacific rail merger: A retrospective on merger benefits*, 3 REV. NETWORK ECON. 283 (2004).

prevent a merged firm from engaging in anticompetitive conduct through rules.[12] The DOJ explicitly endorsed the wider use of conduct remedies in its 2011 revisions to the *Antitrust Division Policy Guide To Merger Remedies*.[13]

For these and other reasons, and while acknowledging the progress that has been made, AAI continues to believe that much remains to be done. Our major recommendations are as follows.

MAJOR RECOMMENDATIONS

(1) The agencies must aggressively, and more consistently, enforce the Horizontal Merger Guidelines. These Guidelines emphasize that merger law is prophylactic in purpose and predictive in nature. They are designed to prevent mergers that are likely to enhance market power and lead to anticompetitive effects. The agencies must not be so concerned about reducing errors of commission that they commit large errors of omission. The Guidelines state current economic understanding and good policy, so adherence to them will provide clarity and consistency to merger review policy and result in a more competitive economy.

(2) The agencies should enforce the presumption enshrined in case law and the Horizontal Merger Guidelines that certain mergers are so inherently likely to be anticompetitive that little further analysis is required. They should make clear that rebuttal of this presumption requires an extraordinary set of provable factual circumstances. The agencies should also renew their intensive investigation of mergers that lead to moderately concentrated markets, which has been in decline since 2003 and completely ceased between 2008 and 2011. Empirical evidence strongly indicates a substantial likelihood of anticompetitive effects in such cases.

(3) The agencies should continue to emphasize the probative value of direct evidence of anticompetitive effects in all of their investigations and proceedings. They should consistently explain to relevant parties and the courts how direct evidence can reduce or even obviate the need for the traditional two-step approach of first defining a market and

---

12 *See* Diana L. Moss & John Kwoka, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979 (2012); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RESTROSPECTIVE ANALYSIS OF U.S. POLICY (2015).**Error! Main Document Only.**

13 U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf [hereinafter DOJ REMEDIES GUIDE].

then using concentration as a predictor of effects. Where those effects are already known, the questions of market definition and likely effects are directly addressed.

(4) The agencies should redouble their efforts to strengthen the analytical foundation underlying the Merger Guidelines' concern about potential coordinated effects and to develop operational guidance for its application. While neither theory nor empirical work may yield bright lines or simple rules, the ability to reference a well articulated body of understanding would be helpful to the antitrust community and important in judicial proceedings.

(5) The agencies should at every opportunity underscore the practical relevance of the incipiency doctrine in cases of mergers in industries that are poised for consolidation. While incipiency is noted in the current Merger Guidelines, this doctrine may have more potency if it is employed more frequently and explicitly.

(6) The agencies should continue to examine consummated mergers for their anticompetitive effects and challenge them where appropriate. Examination of consummated mergers will help inform the analytical process and judicial understanding of the effects of mergers, while affirming the ongoing role of antitrust in protecting consumers. In doing so, the agencies must act promptly and assertively in order to secure effective relief.

(7) The agencies should adopt an appropriately critical view of claimed efficiencies, which are easy to assert but often difficult to achieve. The Merger Guidelines have adopted somewhat higher concentration thresholds in order to allow for ordinary merger-related efficiencies and obviate the need for further analysis except in the case of truly unusual efficiencies. The agencies should conduct a detailed study of past mergers to determine the extent to which mergers resulted in efficiencies, what types of efficiencies, and of what magnitude.

(8) The agencies should address the growing issue of merger benefits other than conventional cost-saving efficiencies. Where quality improvements and other revenue-increasing outcomes are central to a merger's claimed benefits, the analytical framework and necessary evidence may differ from economies of scale and scope. Because these types of "benefits" have become more frequent and important in parties' justifications for potentially anticompetitive mergers, the Guidelines may need revision to address their analysis and relevant criteria.

(9) For mergers subject to relief, the agencies should use structural relief in all but the most exceptional cases, because structural relief is easier to implement, more administrable, and likely more effective than conduct remedies. AAI endorses the FTC's recently proposed study of remedy policy. While DOJ may lack the authority to conduct an analogous review, we urge DOJ to modify the portion of the 2011 revision of the Remedies Guide that encouraged use of conduct remedies.

(10) AAI endorses expanded use of the retrospective methodology to improve the effectiveness of merger analysis and policy. This methodology can be usefully employed to analyze the competitive effects of consummated mergers, both those that were cleared and those that were allowed to proceed because of court ruling despite agency objection. Further uses include analysis of the effectiveness of various types of remedies and relief, and the conditions that favor the success of each. The agencies should consider routinely requiring merger parties to provide the necessary data for retrospectives, so that over time a substantial database will be created for purposes of evaluating and improving policy.

(11) The agencies should be prepared to litigate cases that would more firmly establish the structural presumption, signal renewed attention to mergers in moderately concentrated markets, and secure structural relief as opposed to conduct remedies wherever possible. The agencies should systematically review whether sufficient resources are being devoted to litigation preparation, with a particular emphasis on whether the agencies successfully attract experienced litigators and train staff attorneys in litigation skills.

(12) The agencies should issue new or updated merger commentaries that explain their legal and economic treatment of potential competition cases, mergers involving network effects and two-sided markets, and vertical mergers or mergers that create or enhance the opportunity for merging parties to exercise market power through exclusionary practices, foreclosure of rivals, and the evasion of regulation. As part of this effort, they should consider whether there are situations where anticompetitive effects may arise when the merger involves the acquisition of a producer of a complementary product, which is not treated in the current Non-Horizontal Merger Guidelines.[14]

---

[14] The Non-Horizontal Merger Guidelines are a vestige of the 1984 Merger Guidelines. *See* 1984 MERGER GUIDELINES, *supra* note 7, § 4 . Although subsequent guidelines revisions focused exclusively on horizontal mergers, Section 4 of the 1984 Guidelines addressed "non-horizontal" mergers and has remained in effect as a standalone statement of DOJ enforcement policy toward vertical and conglomerate acqusistions. *See* U.S. DEP'T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES (1984), *available at* https://www.justice.gov/atr/non-horizontal-merger-guidelines [hereinafter NON-HORIZONAL GUIDELINES]. Subsection 4.1 addresses the "Elimination of Specific Potential Entrants" and subsection 4.2 addresses "Competitive Problems from Vertical Mergers."

(13) The agencies should carefully scrutinize markets for indications and evidence of monopsony power, as set forth in the 2010 Merger Guidelines.[15]

(14) The agencies should demonstrate how they apply the Guidelines and the underlying presumptions by increasing the transparency of their decision-making in individual cases. They should issue closing statements whenever possible, especially in potentially controversial cases.

(15) The agencies should persistently encourage the courts to adopt their approach to merger analysis and educate them through agency guidance, research reports, speeches, and briefs.

(16) The agencies should develop procedures to ensure good working relationships with the state attorneys general in investigating mergers that are of particular concern to the states.

In what follows, we develop the bases for these recommendations.

I. Statutory and Legal Background

A brief, background review of merger control is helpful in understanding current and future merger policies. The primary federal merger statute is Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Act.[16] In addition, the FTC may review mergers under Section 5 of the Federal Trade Commission Act, which allows the FTC to challenge "any unfair method of competition or unfair or deceptive act or practice."[17] 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 to tend to create monopoly."[18] In *Brown Shoe Co. v. United States*,[19] the Supreme Court reviewed the legislative history underlying the Clayton Act and the Celler-Kefauver amendments and determined that Congress intended Section 7 to be applied to stop mergers even where the "trend to a lessening

---

[15] See Chapter 4 and Chapter 13 of this Transition Report for further discussion of mergers involving monopsony power.

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

[17] 15 U.S.C. § 45 (2000). Mergers can also be addressed under Section 1 of the Sherman Act, as agreements in restraint of trade, but that statute is rarely invoked for this purpose.

[18] 15 U.S.C. § 18.

[19] 370 U.S. 294 (1962).

of competition in a line of commerce was still in its incipiency."[20] This perspective differed from the contemporary interpretations of the Sherman Act, which was read to require proof of ongoing harm to competition.[21] The Supreme Court also made clear that the statutory language of Section 7 was designed to stop mergers where there is a probable, rather than a definite, lessening of competition.[22] These determinations remain viable and should continue to guide merger control policy.

A. Horizontal Mergers

In *United States v. Philadelphia National Bank*,[23] the Supreme Court introduced a simplified test to establish the prima facie illegality of certain 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 must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[24]

In other words, a merger may be presumed unlawful when it would result in a large market share in a significantly concentrated market. This test has come to be called the "structural presumption." In the wake of *Philadelphia National Bank*, however, the enforcement agencies challenged, and the Supreme Court endorsed challenges to, a number of mergers between firms with quite modest market shares. Cases such as *United States v. Aluminum Co. of America*,[25] *United States v. Pabst Brewing*

---

[20] *Id.* at 317.

[21] *See id.* at 317–18 (stating that the purpose of the Clayton Act was in part to prevent the application of Sherman Act standards in Section 7 cases). *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362–63 (1963); United States v. E.I. du Pont de Nemours & Co., 353 U.S 586, 589 (1957).

[22] *See* 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."). 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 Clayton Act. As Judge Posner explained in a pair of opinions, the incipiency doctrine reflects the fact that "the statute requires a prediction, and doubts are to be resolved against the tranaction." Fed. Trade Comm'n v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989). "All that is necessary is that the merger create an appreciable danger of [higher prices] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable . . . is called for." Hospital Corp. of America v. Fed. Trade Comm'n, 807 F.2d 1381, 1389 (7th Cir. 1986).

[23] 374 U.S. 321 (1963).

[24] *Id.* at 363.

[25] 377 U.S. 271 (1964).

Co.,[26] and *United States v. Von's Grocery Co.*[27] were justified using controversial interpretations of the incipiency standard.[28]

The Supreme Court took an important step in *United States v. General Dynamics Corp.*[29] There, the Court recognized that market shares based on historical sales can be misleading because they may not accurately reflect a company's ability to compete in the future.[30] Thus, the Court held, the lens for evaluation needs to be widened and other pertinent factors can be considered in deciding whether a substantial lessening of competition will occur. This decision provided the legal basis for a wider economic inquiry into the competitive effects of mergers, framed as an inquiry into how strong any presumption based on market shares should be. *General Dynamics* remains the most recent substantive merger decision of the Supreme Court.[31]

The wider economic inquiry suggested by *General Dynamics* continues to be reflected in the current Merger Guidelines, which frame their "ultimate purpose" as "determining whether a merger may substantially lessen competition."[32] The Guidelines underscore that they are intended to "reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency."[33] They further indicate that if the market is found to be highly concentrated (HHI above 2,500) and the change in HHI exceeds 200 points, a merger "will be presumed to be likely to enhance market power."[34] Leading commentators endorse this approach insofar as they characterize

---

[26] 384 U.S. 546 (1966).

[27] 384 U.S. 270 (1966).

[28] For example, in *Von's Grocery* 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." *Id.* at 278. *See also Philadelphia Nat'l Bank*, 374 U.S. at 362–63 (noting "the intense congressional concern with the trend toward concentration"). Although it is clear that the incipiency doctrine calls for strict anti-merger enforcement, the legislative history and decisions that gave rise to the concept are "disappointingly vague." Robert H. Lande, *Resurrecting Incipiency: From* Von's Grocery *to Consumer Choice*, 68 ANTITRUST L.J. 875, 878 (2001). While few observers would recommend a return to the 1960s' standards, the failure of the agencies to consider trends in consolidation is problematic, as can be seen in DOJ's treatment of recent airline mergers beginning with Delta and Northwest in 2008. The DOJ did not look past the single merger in front of it to ask the question whether the predictable ultimate reduction of major carriers from seven to four was good policy.

[29] 415 U.S. 486 (1974).

[30] *Id.* at 500–01.

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

[32] 2010 MERGER GUIDELINES, *supra* note 3, § 5, at 15.

[33] *Id.* §1, at 1.

[34] *Id.* § 5.3, at 19. 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

current merger law as a probabilistic analysis[35] that is designed to stop the creation of market power in its incipiency,[36] and insofar as they recognize that when a merger leads to a significant increase in concentration in a concentrated market, there is prima facie evidence of anticompetitive effects[37] that shifts the burden of proof to the merging parties.

The principal rebuttal arguments permitted by the Merger Guidelines and the courts involve entry conditions and efficiencies. Entry is well understood in economics and now well established in the Guidelines as a basis for permitting a merger that would appear problematic based on concentration statistics, although mere "ease of entry" in the abstract is insufficient.[38] Rather, entry must be timely, likely, and sufficient to counteract or deter the competitive problem.[39]

The second major rebuttal argument involves efficiencies. Initially the courts were indifferent, and occasionally hostile, to efficiency arguments. For example, in *Proctor & Gamble*, the Supreme Court held that "[p]ossible economies cannot be used as a defense to illegality," noting that "Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[40] The enforcement agencies have been quicker to

---

divide the spectrum of market concentration into three regions broadly characterized as unconcentrated (HHI below 1,500), moderately concentrated (HHI between 1,500 and 2,500), and highly concentrated (HHI above 2,500).

[35] *See, e.g.*, PHILLIP E. AREEDA, JOHN L. SOLOW & HERBERT HOVENKAMP, ANTITRUST LAW 22 (1998). For other treatments of this topic, see AM. BAR ASS'N, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 318 (5th ed. 2002) [hereinafter ANTITRUST LAW DEVELOPMENTS]; AM. BAR ASS'N, SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS 5, 88–90 (Robert S. Schlossberg & Clifford H. Aronson eds., 1st ed. 2000) [hereinafter MERGERS AND ACQUISITIONS].

[36] *See, e.g.*, AREEDA, SOLOW & HOVENKAMP, *supra* note 35, at 19–22; *see generally* Lande, *supra* note 28; LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 11.2f (2d ed. 2006); ANTITRUST LAW DEVELOPMENTS, *supra* note 3, at 334–35; MERGERS AND ACQUISITIONS, *supra* note 35, at 4, 88–90.

[37] *See, e.g.*, AREEDA, SOLOW, & HOVENKAMP, *supra* note 35, at 19–20, 100–04; ANTITRUST LAW DEVELOPMENTS, *supra* note 35 at 335; MERGERS AND ACQUISITIONS, *supra* note 35, at 88–90.

[38] *C.f.* United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984) (noting that while the Supreme Court had never directly stated that ease of entry could be considered and the 1984 Merger Guidelines did not recognize the principle, ease of entry should be considered in appraising whether a merger has the potential to substantially lessen competition).

[39] 2010 MERGER GUIDELINES, *supra* note 3, § 9, at 28.

[40] Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967). *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963) (where effect of merger may be substantially to lessen competition, "[the merger] is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial"); RSR Corp. v. Fed. Trade Comm'n, 602 F.2d 1317, 1325 (9th Cir. 1979); Fed. Trade Comm'n 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 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).

consider efficiencies,[41] and the Merger Guidelines were revised in 1997 to set forth a methodology for incorporating efficiencies into horizontal merger analysis. The criteria are that claimed efficiencies must be verified, merger-specific, and not the product of anticompetitive reductions in output or service. In addition, the Merger Guidelines emphasize the particular importance of marginal cost savings and pass-through to consumers: they state that a merger may 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."[42]

AAI applauds most of the changes reflected in the current revision of the Merger Guidelines, but we have reservations concerning the manner in which the structural criteria (HHI and its change) are currently applied, particularly given the number of mergers violating those criteria that have been approved outright or with conditions that do not appear to resolve the competitive problems.

The wisdom in maintaining a strong structural presumption continues to be supported by economic theory,[43] empirical evidence,[44] and the need to simplify merger-enforcement litigation.[45] While

---

[41] In the 1997 revision of the Merger Guidelines, the agencies added 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 decisions not to challenge a number of mergers. *See, e.g.*, Dep't of Justice, 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.justice.gov/archive/atr/public/press_releases/2008/233845.pdf; Dep't of Justice, 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. Regarding the former, *see* Orley C. Ashenfelter, Daniel Hosken, & Matthew C. Weinberg, *Efficiencies Brewed: Pricing and Consolidation in the U.S. Beer Industry*, 46 RAND J. ECON. 328 (2015).

[42] 2010 MERGER GUIDELINES, *supra* note 3, § 10, at 31. 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, Dep't of Justice), *available at* http://www.amc.gov/commission_hearings/pdf/Statement-Heyer.pdf.

[43] Although industrial-organization economics has evolved in the last 50 years, it remains true that the presumption is "consonant with economic theory." *Philadelphia National Bank*, 374 U.S. at 363. *See generally* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L. J. 269, 276 (2015); Philadelphia National Bank *at 50: Interview with Judge Richard Posner*, 80 ANTITRUST L. J. 205, 207 (2015) [hereinafter *Posner Interview*] ("I continue to think that a high degree of concentration [is] important because it facilitates collusion. The fewer large firms there are in a market, the easier it is for them to collude, either explicitly or tacitly.").

[44] *See* Salop, *supra* note 43, at 277 (citing studies showing correlation between concentration and price); Peter C. Carstensen, *The* Philadelphia National Bank *Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L. J. 219, 247-251 (2015) (citing additional studies showing increased concentration has a strong relationship with higher prices and other harms to competition). Empirical evidence casting doubt on the efficiencies of large mergers also supports the *Philadelphia National Bank* presumption. *See* Carstensen, *supra*, at 252-57. As Judge Posner has explained, the problem of corporate governance (i.e., self-interested CEOs) "casts doubt on any presumption that mergers are efficient. And if there's no presumption that mergers are efficient, that weakens the objection to having rules of presumptive illegality that may seem very strict . . . ." *Posner Interview*, *supra* note 43, at 216.

courts continue to recognize that the presumption is well-ensconced in the case law,[46] there continues to be too much variation in the strength a given court may afford the presumption and what it may demand of defendants in establishing a successful rebuttal.[47] Particularly in our current merger climate, it is important that courts be frequently reminded of the incipiency doctrine's continuing vitality, and that it reflects a congressional judgment that the cost of erroneously permitting an anticompetitive merger is higher than the cost of erroneously blocking a merger that is competitively benign.[48]

B. Vertical and Conglomerate Mergers

Not all mergers are horizontal, although those often attract the most attention. 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.[49] In 1984, the DOJ Merger Guidelines reframed vertical merger analysis around the question of whether such mergers would harm horizontal competition, in either upstream or downstream markets.[50] The lower courts followed the Justice Department's lead by retreating from prior theories of vertical harm and adopting a more permissive approach toward vertical mergers.[51] The degree of attention paid to

---

45 As the Supreme Court noted, "[T]he relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so, in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interests of sound and practical judicial administration." *Philadelphia National Bank*, 374 U.S. at 362 (citations omitted); *see Posner Interview, supra* note 43, at 207 ("I don't think turning an antitrust case into a graduate economics seminar is feasible.").

46 *See, e.g., Heinz*, 246 F.3d at 715; *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).

47 *See Baker Hughes*, 908 F.2d at 991 (questioning whether a "clear showing" is necessarily required).

48 *See generally* Lande, *supra* note 28, at 881 (incipiency mandate may be understood as directing decisionmakers to err more on the side of making "Type I" errors than "Type II" errors). Lande suggests that modern enforcers and many courts seem to have forgotten the incipiency doctrine. *See id.* at 888. However, the doctrine is recognized in the Horizontal Merger Guidelines. *See* 2010 MERGER GUIDELINES, *supra* note 3, § 1 ("Given th[e] inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."). And it has frequently been invoked by the courts of appeal in recent years. *See, e.g., St. Luke's,* 778 F.3d at 783*; Polypore Int'l, Inc. v. Fed. Trade Comm'n*, 686 F.3d 1208, 1213-14 (11th Cir. 2012); *Chicago Bridge & Iron Co. v. Fed Trade Comm'n*, 534 F.3d 410, 423 (5th Cir. 2008); *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 858 (6th Cir. 2005); *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004).

49 *See, e.g.*, *Brown Shoe*, 370 U.S. at 329 (stating that the size of the market foreclosed is an important factor to consider but it is not determinative); Ford Motor Co. v. United States, 405 U.S. 562 (1972).

50 1984 GUIDELINES, *supra* note 7, § 4 (indicating 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).

51 *See, e.g.*, O'Neill v. Coca-Cola Co., 669 F. Supp. 217, 222-24 (N.D. Ill. 1987).

vertical mergers has varied over time, with some observers perceiving greater attention during President Obama's Administration than under that of President George W. Bush.[52]

Vertical mergers can harm competition in a number of ways. They can facilitate collusion or price coordination among horizontal rivals upstream or downstream, confer market power upstream or downstream by excluding some actual or potential rivals (as by raising two-level entry barriers), or facilitate the evasion of other competitive constraints (such as price regulations).[53]

Conglomerate mergers (involving firms that are not related either horizontally or vertically) are potentially troublesome when they reduce potential competition.[54] Conglomerate mergers were also a significant concern of courts and enforcers during the 1960s and early 1970s.[55] But government challenges to these acquisitions declined. Today, conglomerate mergers are most likely to be investigated if they raise concerns about the removal of a particularly significant potential competitor, which is closely related to horizontal merger analysis.[56] The Obama Administration has investigated a number of mergers that threatened the elimination of competitively significant potential competition and vertical foreclosure. But those investigations did not lead to those mergers being prohibited.[57]

---

52 *See, e.g.*, GIBSON DUNN, 2012 ANTITRUST MERGER ENFORCEMENT UPDATE AND OUTLOOK 7 (2012), *available at* http://www.gibsondunn.com/publications/pages/2012AntitrustMergerEnforcementUpdate-Outlook.aspx#_toc318969781 ("It is now conventional wisdom that merger enforcement has been and will continue to be a priority under the Obama Administration. In particular, vertical mergers—mergers that involve the integration of buyers and sellers in the same supply chain—have received far more scrutiny than they had under prior administrations.")

53 *See generally* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995); Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, J. ANTITRUST ENFORCEMENT (forthcoming 2016).

54 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,* 58 J. INDUS. ECON. 767 (2010). *See also* Gloria J. Hurdle et al., *Concentration, Potential Entry, and Performance in the Airline Industry*, 38 J. INDUS. ECON. 119 (1989).

55 *See, e.g.*, Fed. Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

56 *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. 2010 MERGER GUIDELINES, *supra* note 3, § 5.3.

57 *See, e.g.*, Amended Complaint at ¶ 3, United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139 (D.D.C. Jan. 28, 2010), *available at* http://www.justice.gov/atr/cases/f254500/254552.htm ("Live Nation *would become* Ticketmaster's direct competitor in primary ticketing") (emphasis added); Fed. Trade Comm'n, Statement of the Federal Trade Commission Concerning Google/Double-Click, FTC File No. 071-0170 8 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf (discussing Google's role as "potential future competitor of DoubleClick and other third party ad serving firms"). We note that both of these mergers were approved subject to certain conditions.

The Non-Horizontal Merger Guidelines now in effect do not fully capture modern economic understanding of the competitive concerns and the analytical process that should be used to evaluate vertical mergers and conglomerate mergers.[58] For example, the concern over exclusion from a vertical merger goes beyond raising two-level entry barriers and includes harming competition by raising rivals' costs or reducing rivals' access to buyers.[59] The next administration should update and expand the Non-Horizontal Merger Guidelines and bring them in line with modern treatment of mergers involving the elimination of a potential competitor or an independent producer of a complementary product.

II. Economic Effects of Mergers

A. Anticompetitive Motives For Mergers

Underlying the Clayton Act's prohibition of certain mergers have been perceived threats to economic and social welfare from undue concentration. Early interpretations understood the statute's concerns to include overall corporate size and influence on society as well as market-specific concentration and pricing power. But over the past half-century or so, the issues of market power and harm to consumers have become the foundation of merger policy. This shift away from overall size to market-specific concentration was the result of several forces, notably, advances in economics that permitted formalization of the harms to consumers and competition at the market level, and a certain unease with policy directed at preventing the emergence of large corporations. Such a policy increasingly seemed to many observers as possibly sacrificing new technologies and consumer benefits in the process of seeking to rein in large corporations. Reinforcing this view, from the outset the Horizontal Merger Guidelines made clear that the agencies saw their mission strictly as the prevention of market power, and nothing broader.

Also, as is pointed out above, the Director of the FTC's Bureau of Competition recently outlined the types of concerns and investigations that the FTC has been undertaking with respect to potential competition issues. *See* Feinstein, *supra* note 6.

[58] *See generally* NON-HORIZONTAL MERGER GUIDELINES, *supra* note 14. are available at *https://www.justice.gov/atr/non-horizontal-merger-guidelines*. *See* Salop & Culley, *supra* note 53, § I (describing Non-Horizontal Guidelines as "woefully out of date"); Christopher Sagers, *Highlights of the 2012 ABA Antitrust Spring Meeting*, AntitrustConnect Blog (April 9, 2012), *available at* http://antitrustconnect.com/2012/04/09/highlights-of-the-2012-aba-antitrust-spring-meeting/ (quoting FTC Bureau of Competition Director as stating, "Let me put it this way. It's been a pretty long time since I've read those Guidelines.").

[59] *See* Salop & Culley, *supra* note 53, § III (categorizing variety of potential harms from vertical mergers as potential competition effects, exclusionary effects, unilateral effects, coordinated effects, regulatory evasion, and facilitation of harmful price discrimination).

The basis for belief in the nexus between market concentration and market power has long been clear. Numerous theoretical economic models of oligopoly behavior[60] and a large empirical economic literature relating market structure and market power support that proposition.[61] One strand of that literature statistically relates high levels of market concentration (and other characteristics such as entry conditions) to higher market prices. An alternative approach examines consummated mergers to determine whether they have led to higher prices. We shall return to those studies below, but for now suffice it to say that these two approaches are consistent in their findings concerning the structural characteristics that are highly correlated with anticompetitive outcomes.

B. Procompetitive or Benign Motives for Mergers

Mergers may also be prompted by non-economic considerations[62] or the search for efficiencies or other improvements in operations or products. As to the latter, firms may strive to reduce costs by combining complementary assets or realizing greater economies of scale. Seemingly more often in recent cases, however, firms have sought other synergies through merger, such as the spread of "best practices" or improvements in quality.[63] Some of these alternative benefits can be more difficult for the agencies to identify and measure.

Importantly, studies have shown that merging firms often fail to obtain the efficiencies that they anticipate.[64] Occasional shortfalls are no surprise, of course, because acquiring firms cannot have

---

60 *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).

61 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).

62 For a review of various motives, including non-economic motives such as empire building, see Friedrich Trautwein, *Merger Motives and Merger Prescriptions*, 11 STRATEGIC MANAGEMENT J. 283 (1990).

63 F.M. Scherer, *The Merger Puzzle*, *in* FUSIONEN 1, 13-20 (W. Franz, et al. eds., 2002). More generally, merging parties may assert that the acquiring firm possesses managerial skills superior to those of the acquired firm.

64 *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. *See* Carstensen, *supra* note 44, at 256-57 (discussing and citing managerial failures after corporate takeovers where "a complex human organization with internal policies and external relationships" confronts changed management systems, new demands, inconsistent business culture, and the pressure to extract a substantial revenue stream to cover debt payments). Moreover, numerous studies

perfect information about possible synergies, and even the best calculations may be defeated by changing conditions. Yet the frequency with which anticipated efficiencies are not achieved suggests that the agencies should exercise caution in accepting efficiency claims by merging firms and should not be deterred from a rigorous enforcement policy out of concern that it would systematically discourage procompetitive acquisitions.[65]

Despite these concerns, recent versions of the merger guidelines have become more accommodating to efficiency claims than in the past. While some rebalancing is appropriate, many observers see a tendency toward overcorrection, with the agencies erring excessively on the side of accepting efficiency claims that seem inadequately supported or outright implausible. This has resulted in the approval of many competitively problematic mergers. Given the evidence, AAI urges a considerably more careful—indeed, skeptical—view of efficiency claims in merger analysis.

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

A. Introduction

In the 2008 AAI Transition Report, we expressed concerns over lax enforcement during the first term of the George W. Bush Administration and over the increased tendency for some courts to accept firms' dubious economic arguments in defense of their proposed mergers.[66] With the change in administration, President Obama pledged to "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare."[67] In addition,

---

show that the acquiring firm's profitability is 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 63, at 3–4, 8; DAVID J. RAVENSCRAFT & F.M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY (1987); Sara B. Moeller, Frederik P. Schlingemann & René M. 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 63, at 6–9. For a discussion of the costs of merging and of integrating operations, see DIANA L. MOSS, AM. ANTITRUST INST., DELIVERING THE BENEFITS: AIRLINE MERGERS AND EFFICIENCIES (2013), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI_USAir-AA_Efficiencies.pdf. Empirical evidence casting doubt on the efficiencies of large mergers also supports the *Philadelphia National Bank* presumption. Carstensen, *supra* note 44, at 252-57. *See also Posner Interview*, *supra* note 43, at 216 (corporate governacne problems cast doubt on presumption that mergers are efficient).

65 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, et al., *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777 (1989).

66 *See* 2008 TRANSITION REPORT, *supra* note 1, at 155.

67 See Barack Obama, Sen., Statement of Senator Barack Obama for the American Antitrust Institute 1 (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

we have seen the issuance of new Merger Guidelines, countless actions (and inactions) by the antitrust agencies, and more data and further research on agency decisions and outcomes. Our review of the evidence leads to several conclusions.

First, there have been significant changes in merger policy with the Obama Administration, but there is also considerable continuity rooted in widespread acceptance of the Merger Guidelines framework for evaluating mergers, regardless of the political party in charge.

Second, the data are consistent with a distinct quickening of the pace of enforcement activity under the Obama Administration, as measured by the number of agency investigations relative to filings, a change that is to be applauded.

Third, the focus of agency enforcement actions—as opposed to investigations—has narrowed considerably, with challenges to mergers in moderately concentrated industries declining dramatically over the last decade or so. This change is quite troublesome in its implications and effects.

Fourth, regardless of the legislative intent and current pronouncements, the "presumption" of likely anticompetitive effects of mergers in "highly concentrated markets" often is given too little weight and is too easily dismissed by the agencies and, with certain recent exceptions, the courts.

Fifth, the agencies often are too accepting of claimed efficiencies and other benefits from mergers that are doubtful ex ante and consistently prove to be exaggerated or simply false.

Sixth, merger remedies—and especially conduct remedies—have often shown themselves to be ineffective, resulting in harms to consumers even in cases where the antitrust agencies ostensibly have prevailed.

We acknowledge and applaud a number of the changes that have been made in merger control policy, but we strongly believe that further improvements will be necessary to achieve the goal of preserving competition throughout the economy. In what follows, we explain the basis for these conclusions.

B. Merger Control at the Enforcement Agencies

The federal merger control process consists of a series of discrete events and decisions. The process typically begins when mergers that trigger specified size thresholds become known to the antitrust enforcement agencies through a mandatory pre-merger notification process enshrined in the Hart-Scott-Rodino (HSR) Act. If a qualifying transaction is cleared to one of the agencies following pre-merger notification and the agency believes it raises competition concerns sufficient to warrant further investigation, the agency will issue the merging parties a request for additional information, known as a "Second Request." At the conclusion of the Second Request investigation, the agency then decides whether to formally challenge the merger. Finally, if the parties have not abandoned the transaction or made a voluntary modification to "fix it first," the agency seeks an appropriate resolution, be it outright approval, approval subject to a remedy, or outright prohibition.

The vast majority of HSR filings are promptly approved without even a Second Request investigation. For example, in Fiscal 2014, the agencies received 1,663 HSR filings and issued only 51 Second Requests (3.1 percent).[68] Of the fraction that are investigated in any given year, very few lead to fully litigated cases. Most either proceed without remedies or end in abandonments by the parties, voluntary modifications resulting in approval, or approvals subject to remedies. In the 2008 AAI Transition Report, we reviewed HSR data on filings, Second Requests, and enforcement actions and formed a variety of conclusions and recommendations at that time. This Report is updated to include the most recent fiscal year data available. We find progress on some fronts, but shortfalls and disappointments on others.

1. Agency Merger Investigations

The federal antitrust enforcement agencies' reported annual HSR data are perhaps the most reliable and comprehensive data on agency activity and are widely used in academic and other reviews of merger activity by the agencies. That said, it is important to bear in mind several of their limitations.

First, HSR reporting requirements have changed over time, so more mergers were reported in earlier years than today. The most significant change in the HSR reporting thresholds occurred in 2001, when the size-of-transaction test changed from \$15 million to \$50 million. This single change reduced the number of reported transactions by half. Beginning in 2005, smaller annual changes have adjusted the size-of-transaction thresholds for inflation.[69]

Second, the number of mergers, and hence the number of HSR filings, depends on a variety of economic factors, such as the overall state of the economy, the stock market, and other forces that have nothing to do with the administration in office or the strictness of antitrust policy.[70]

---

[68] See the Appendix, Table 5a and Table 6a, for Fiscal Year 2014 and earlier data.

[69] The HSR reporting thresholds are adjusted by considering the change in the gross national product from one fiscal year to the next in the same manner as provided in section 19(a)(5). Specifically, the reporting thresholds are increased (or decreased) by an amount equal to the percentage increase (or decrease) in the gross national product, as determined by the Department of Commerce. 15 U.S.C. §§ 18a, 19(a)(5) (2012).

[70] *See, e.g.*, Sean Becketti, *Corporate Mergers and the Business Cycle*, ECON. REV. 13, 16 (1986), *available at* https://kansascityfed.org/PUBLICAT/ECONREV/econrevarchive/1986/2q86beck.pdf (providing evidence that merger activity is procylical; growing more rapidly during expansions and more slowly during recessions).

Third, the number of merger challenges depends in part on the extent to which merging parties miscalculate the stringency of the antitrust review that they will encounter. Mergers are more frequent when firms are optimistic about their chances of prevailing, but if that expectation is incorrect due to a change of policy, a higher percentage of attempted mergers will be challenged—at least until there is recognition of the new standard. As a result, there may be some "equilibrium" proportion of challenged mergers, with higher (or lower) percentages representing the result of incorrect expectations. The same may occur if agency beliefs about acceptable resolutions to mergers change. For example, if conduct remedies become more acceptable to the agencies, and if they are viewed as more acceptable to merging firms, the latter may attempt more mergers for which they believe such a fix is likely.

For all of these reasons, any inference about the relative strictness of merger policy based only on the relative number of merger complaints issued will be incomplete and likely misleading.[71] Fortunately, we can correct the data to account for some of these distortions. Moreover, in conjunction with other information, such as details about how the administration reviews cases and post-merger retrospective analyses, one obtains consistent insights into the effects and effectiveness of merger policy.

Based on the data available in 2008, which was limited to the first term of the Bush Administration, we expressed the concern that merger enforcement had become increasingly lax over time. We perceived a long-term trend away from the incipiency standard and structural presumption reflected in the legislative history and early case law. We also noted that there appeared to have been a particularly significant decline in merger enforcement efforts during the first term of the Bush Administration, especially at DOJ.[72] This latter observation reflects the fact that policy changes are

---

[71] There are other critiques of the use of these data to draw inferences about policy over time. See, for example, David L. Meyer, Dep. Ass't Att'y Gen. for Civil Enforcement, Antitrust Div., Dept. of Justice, 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* http://www.usdoj.gov/atr/public/speeches/227713.htm. *See also* Dennis Carlton, *Why We Need to Measure the Effect of Merger Policy and How to Do It* (Econ. Analysis Grp., Working Paper No. 14719, 2009). The two primary criticisms are that enforcement rate statistics may be misleading 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* 235, 246 n.86, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

[72] 2008 TRANSITION REPORT, *supra* note 1, at 155. The fact that DOJ's antitrust merger enforcement was particularly lax during the Bush Administration was observed by others. For an econometric analysis that reports this finding, see John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, 22 ANTITRUST 43 (2008), *available at* http://www.axinn.com/media/article/148_Antitrust%20Enforcemen.pdf ("The analysis of 200 mergers reveals that, all else being equal, transactions reviewed by the Antitrust Division during the Bush administration were approximately 24 percentage points *less* likely to be challenged than transactions reviewed by the Antitrust Division or

easier and quicker to implement at an Executive Branch agency like DOJ than at an independent body like the FTC.

Our new analysis of data covering the Bush Administration's second term and also the Obama Administration's first term leads to the following conclusions:

(1) The disparity between the DOJ and FTC enforcement efforts observed during President Bush's first term declined somewhat in President Bush's second term.

(2) The transition from President Bush's Republican Administration to President Obama's Democratic Administration led to a more active DOJ that issued more Second Requests and was involved in more merger enforcement actions.

(3) Because the number of HSR filings was lower during President Obama's first term than it was during President Bush's second term, the trend in increased enforcement at DOJ is also reflected in an increased percentage of HSR filings that led to Second Requests and enforcement actions.

(4) While there were observable differences between the enforcement statistics for the Bush and Obama Administrations, these differences were not "sea changes."

These conclusions follow from the examination of the data. For present purposes, the data have been grouped by administration and term of the administration, although data are reported for each year in the Appendix.[73] Table 1 begins by examining the raw data—unadjusted for the number of mergers—on the average number of Second Requests issued per year by administration (and term for two-term administrations) and by agency since 1982 (see Appendix Tables for data on the number of Second Requests issued per year). The most distinctive feature of these data is the unusually low number of Second Requests issued during the first term of the Bush Administration. While some of this disparity may be accounted for by the 2001 change in filing requirements that lowered the number of HSR filings,[74] this is not likely to be a complete explanation.

FTC during the Clinton administration . . . . On the other hand, all else being equal, transactions reviewed by the FTC during the Bush administration were not less likely to be challenged than transactions in previous years.").

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

[74] 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 71, at 246 n.81. While the shift in reporting thresholds likely reduced the number of Second Requests, it did not necessarily reduce the number of enforcement

Notably, Table 1 shows a slight increase in the number of Second Requests in Bush's second term relative to his first. It also shows that underlying this change was the 20 percent increase in Second Requests issued at the DOJ,[75] while there was no such increase at the FTC. Moreover, the number of Second Requests issued by the DOJ during President Bush's two terms was significantly lower than the number issued during President Obama's first term. In contrast, the FTC issued roughly the same number of Second Requests during President Obama's first term as on average during President Bush's two terms.

These raw Second Request numbers do not account for variation in the number of mergers filed. Table 2 normalizes for merger frequency by dividing the number of Second Requests by the number of merger filings in the same period. As Table 2 shows, the percentage of HSR filings that received Second Requests is higher at both the DOJ and FTC under President Obama than during either of President Bush's two terms. The change is most pronounced at the DOJ, which moved from issuing a smaller proportion of Second Requests than the FTC under President Bush to issuing a larger proportion under President Obama.

In sum, the rate of Second Requests was lowest during the first term of the Bush Administration for both agencies combined and for DOJ individually, and the FTC rate was tied for lowest with the second term of the Clinton Administration.[76] Under the Obama Administration, the number of Second Requests issued increased somewhat, largely because of an increase in the number of Second Requests issued by the DOJ. Controlling for the fact that there were fewer HSR filings during the Obama Administration, one observes a somewhat larger increase in the rate of issuance of Second Requests. This data shows that merger scrutiny has strengthened modestly in the latter Bush Administration and during the subsequent Obama Administration.

---

efforts, since the FTC and DOJ can investigate and bring complaints against mergers that are below the HSR reporting thresholds.

75 DOJ Second Requests rose from an average of 21 per year under President Bush to an average of 26 per year during President Obama's first year (using the lag methodology suggested by FTC Commissioner Leary).

76 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. These patterns have been observed in several sources. *See, e.g.*, 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). Langenfeld and Shulman conclude that DOJ opened fewer merger investigations during the Bush Administration than were opened during the Clinton Administration. They found that 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. Other statistics, discussed below, show that enforcement has declined during the G.W. Bush Administration.

2. Agency Merger Enforcement Actions

A second measure of merger control activity examines the rate of enforcement activity with respect to investigated mergers. A lower rate signifies outright clearance of a larger fraction of mergers that qualify for investigation, implying more lenient policy. There are two distinct sources of information on enforcement activity over time. The first source is the very same HSR filing data as just described, now including numbers (and hence rates) of enforcement activity with respect to the mergers filed under HSR. The second source is FTC data on the number and frequency of enforcement actions over time by market characteristics. We begin with the same HSR source data as examined above.

As shown in Table 3, the average number of merger enforcement actions per year at the two enforcement agencies combined was much lower during the Bush Administration than during the Clinton or Obama Administrations. The average number of challenges during the 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. For example, merger activity was much higher during the Clinton Administration than during George W. Bush's presidency. But the Clinton Administration brought a lower percentage of enforcement actions. Comparison of the Bush Administration and the Obama Administration reveals the same pattern that we saw with the unadjusted case counts discussed above. The Obama Administration challenged a higher percentage of merger filings than did the Bush Administration (roughly 4% for the Obama Administration versus 3% for the Bush Administration).[77] This data is buttressed by the

[77] The data in Table 4 align with similar data collected and reported in Leary, *supra* note 73, at 139 tbl.2, and Baker & Shapiro, *supra* note 71, at 235. While this discussion of changes in merger enforcement over time relies on the best available data, there are analytical issues that should be noted. 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 71. *See also* Langenfeld & Shulman, *supra* note 76, at 5 (noting that in 2007 there were fewer investigations and challenges of mergers by both agencies after President George W. Bush took office and installed new senior administrators at both agencies, and the reductions at least during the period from 2003-2007 did not appear to be due to fewer mergers.). However, a study that reviewed internal FTC staff merger memos concluded that the FTC's review standards did not vary between the Clinton and Bush Administrations. Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996–2003*, 73 ANTITRUST L.J. 531 (2006), *available at* http://www2.owen.vanderbilt.edu/lukefroeb/talks/OFT/2006.ALJ.COATE.pdf.

findings of published studies, informal views of merger lawyers, and press conclusions that merger enforcement was somewhat relaxed during the Bush Administration.[78]

The FTC's number and frequency data consist of a count of all investigated markets and all enforcement actions, by specific characteristics of those markets such as HHI, the change in HHI, the number of significant competitors, and ease of entry. The number of investigated markets is a multiple of the number of mergers, since any single merger will implicate several distinct product or geographic markets.

The FTC's data show that between 1996 and 2003, the FTC investigated 264 mergers involving 1,372 individual markets. Enforcement action was taken in 1,055, or 76.9 percent, of those investigations. As shown in Table 5, the investigations and actions can be broken down according to the level and change in HHI, each within bracketed values. The Table shows, not surprisingly, that the percentage of investigations resulting in enforcement rises with the value of market HHI and with the size of its increase due to the prospective merger.

On further review, however, the FTC's data have troubling implications, particularly when investigations and enforcement actions are arrayed according to the number of significant competitors that would remain in the industry after the prospective merger. As shown in Table 6, at most only about one-third of mergers resulting in five or more competitors were subject to challenge over this period, while at least two-thirds of mergers resulting in four or fewer competitors were subject to challenge.

Table 7 highlights the progression of this troubling trend over time. We see that, during the period from 1996 to 2011, enforcement efforts evolved to concentrate very narrowly on mergers that would result in very few competitors. From 1996 to 2003, for example, the FTC took enforcement action in mergers that would result in as many as seven or eight competitors remaining in the market. Between 2003 and 2007, however, those mergers were subject to far less frequent

---

[78] Michael Bobelian, *Uptick In Antitrust Enforcement Falls Short Of Obama's Promises*, FORBES (Feb 14, 2012), http://www.forbes.com/sites/michaelbobelian/2012/02/14/uptick-in-antitrust-enforcement-falls-short-of-obamas-promises/2/ (quoting Wisconsin DOJ official and head of multistate task force stating that "[t]here is a feeling in the antitrust bar that Obama is more aggressive," but "[i]t is not a radical change"); *see also* Martha M. Hamilton, *Antitrust Enforcement Has Picked Up*, TAMBA BAY TIMES (Jan. 17, 2012), *available at* http://www.politifact.com/truth-o-meter/promises/obameter/promise/395/strengthen-antitrust-enforcement/. For a debate, *see* Daniel Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (2012) (arguing that "merger statistics do not evidence 'reinvigoration' of merger enforcement under Obama"); Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28 (2012) (arguing in response to Crane that "merger enforcement statistics provide clear evidence that the Obama Administration reinvigorated merger enforcement"); Daniel Crane, *The Obama Justice Department's Merger Enforcement Record: A Reply to Baker & Shapiro*, 65 STAN. L. REV. ONLINE 41 (2012) (distinguishing methodological approaches and arguing that his essay shows "antitrust enforcement has become largely technocratic and independent of political ideology").

enforcement. And between 2008 and 2011, all enforcement against mergers with five or more remaining competitors completely ceased. Has the FTC created a de facto safe harbor when five or more competitors remain in the market?

It is important to recognize that neither the law nor the Merger Guidelines nor economic evidence provides a basis for this major shift in merger enforcement. The passive acceptance of all mergers with five or more competitors fails to anticipate how mergers in moderately concentrated sectors can result in dangerously high concentration.[79] The Guidelines state that the risk of anticompetitive outcomes increases in cases where HHI exceeds 1,500 and becomes likely where HHI exceeds 2,500. These thresholds are crossed whenever there are fewer than six or four competitors, respectively, and when there are more competitors if they are unequal in shares.[80] Empirical evidence in economics continues to show a persuasive statistical relationship between high levels of concentration and supernormal price as a basis for the structural presumption.[81] In the face of this, abandonment of merger enforcement at these levels is difficult to comprehend.

While it is not possible to tie these observations directly to the growth of concentration in many prominent industries over the past ten to twenty years or to the policies of particular administrations, the cessation of enforcement actions in moderately concentrated sectors is a very counterproductive and troubling trend that is certainly consistent with growing concentration and consumer harms from mergers. AAI recommends a return to a more traditional standard for mergers that arise in moderately concentrated industries.

3. Merger Outcomes and Remedies

The ultimate test of merger policy, of course, is not the above measures of agency activity, but rather the actual market outcomes of mergers that come before the agencies. Specifically, an effective

---

[79] By approving the merger of Delta and Northwest in 2008, for example, DOJ signaled its sudden willingness to permit mergers among major airlines—something it had historically viewed skeptically. The effect of that approval was to invite mergers by United and Continental, Southwest and AirTran, and US Airways and American, resulting in a complete transformation of the industry. Indeed, that transformation was so complete that within 18 months of approval of the US Airways-American merger, DOJ opened an investigation into collusion among the major carriers. *See, e.g.,* Drew Harwell, Ashley Halsey III & Thad Moore, *Justice Dept. Investigating Potential Airline Price Collusion*, WASHINGTON POST (Jul. 1, 2015), *available at* https://www.washingtonpost.com/business/economy/doj-investigating-potential-airline-collusion/2015/07/01/42d99102-201c-11e5-aeb9-a411a84c9d55_story.html. *See also* KWOKA, *supra* note 12.

[80] Thus, an HHI of 2,500 results from four equal size firms, but that is the absolute minimum value for any four firms. Put differently, an HHI of 2,500 can be achieved by five or more firms of varying degrees of inequality, e.g., five firms with shares of 40, 15, 15, 15, 15; or six with 30, 30, 15, 15, 15, 15; and so forth.

[81] For an analytical discussion of the structural presumption from the viewpoint of decision theory, see Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

merger policy would be one in which only competitively harmless mergers are cleared, only competitively problematic mergers are challenged, and resolutions to challenges fully remedy any competitive problems. Evidence on the effective pursuit of these objectives is very difficult to obtain, however. It requires detailed and reliable information about the outcomes of actual mergers, including price and perhaps non-price effects, properly controlling for alternative influences, other firms that may merge or seek to merge in the affected markets, and whether or not the antitrust agencies challenge and obtain a remedy. In recent years, a growing number of economic studies have examined mergers with some of these factors in mind, and even more recently there have been some notable efforts to synthesize and analyze this literature. These studies are limited in number and do not focus on differences between administrations, but they have proven useful in casting light on key questions about merger policy over some period of time.

The studies in question go by the name of merger retrospectives and usually rely on a methodology called "difference-in-difference," or, simply, DID. DID examines the price of a product arguably affected by a merger before and after the merger itself. In order to control for cost, demand, and any other influences on the price change between those periods, the DID methodology identifies a second product not part of the merger but otherwise subject to the same forces. The change in price of this second product over the same interval is used to adjust the first price difference for all factors except for the merger, and the resulting difference in differences measures the effect of the merger. For example, suppose two airlines merge and fares on a route where they previously competed rise from a base period value of $100 to $106, but over the same period prices on otherwise-comparable routes where they did not compete rise from a base value of $100 to $102. One infers that the merger is responsible for a 4 percent price increase, not 6 percent.

This methodology requires careful consideration of other factors that could influence the difference in value, including correctly identifying the control product or market, care in selecting the time periods, and care in dealing with certain econometric issues. But it has proven to be a tractable and powerful technique for addressing the actual effects of mergers on key outcome variables. Most studies focus on price but some examine non-price outcomes such as product or service quality, cost, and R&D expenditures. Over the past thirty years or so, about fifty published studies have examined the outcomes of mergers using the difference-in-difference methodology either individually (for example, specific named hospital mergers) or collectively (for example, dozens or even hundreds of bank mergers as a group). Discussion here is aided by the recent appearance of several useful compilations of these merger retrospectives.[82]

[82] *See* Graeme Hunter et al., *Merger Retrospective Studies: A Review*, 23 ANTITRUST 34 (2008); John B. Kirkwood, *The Predictive Power of Merger Analysis*, 56 ANTITRUST BULL. 543 (2011); Orley Ashenfelter, *Did Robert Bork Understate the Competitive Impact of Mergers?: Evidence from Consummated Mergers*, 57 J.L. & ECON. S67 (2014).

Here we rely in particular on the evidence reported in Professor John Kwoka's Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy,[83] which is the most comprehensive set of data to date. Professor Kwoka's book surveyed hundreds of candidate studies, ultimately focusing on those that satisfied peer-review quality standards, identified one or more key distinct outcome measures for each merger, and converted those measures into a common metric for comparison purposes. Here we summarize its key findings on price by products and by mergers, followed by some discussion of its findings with respect to non-price outcomes.

The study reported price outcomes for 119 individual products, including 101 from mergers and 18 from joint ventures (in petroleum) and code shares (in airlines). Because all outcomes were subject to controls using DID, mergers that had no net effect (that is, other than what happened to otherwise-comparable companies) should report zero price change. Those with net efficiencies should have price reductions, and those resulting in anticompetitive price increases should show positive price change relative to the baseline.

As shown in Table 8, the mean price change for the 101 products arguably affected by mergers was not zero or random; rather, *it was an increase in excess of 5 percent.* Nearly two-thirds of all measured product prices rose, whereas one might expect a 50-50 split if the changes and the selection of case studies were random. Nearly one-third of the selected case studies report price increases of at least 10 percent, and one-fifth report price increases of at least 20 percent. This evidence supports the view that policy changes that have permitted mergers at ever-increasing levels of concentration have caused significant consumer harm—implying a serious failure of merger control.

Analysis of the evidence in the Kwoka study suggests the following further conclusions:

(1) Some of the largest price increases occur as a result of hospital mergers and airline mergers;

(2) Lesser consolidations in the form of joint ventures and code sharing arrangements do not appear to result in price changes;

(3) Aggregating to the merger level, rather than product by product, results in yet higher average price increases: 7.2 percent;

(4) Studies of groups of mergers collectively representing upwards of two thousand mergers show similar price increases; and

---

[83] KWOKA, *supra* note 12.

(5) Studies that measure non-price effects typically report quality reductions from mergers and declines in R&D expenditures. On the other hand, some also show cost savings and improvements in operating efficiency.

This review of the evidence confirms the concern expressed by many observers that mergers involving changes in concentration that are near Merger Guidelines threshold levels result in price increases that harm consumers, with little evidence of offsetting benefits. While not clearly tied to time or administration, it suggests that merger control policy generally has not succeeded in its stated mission. The "enforcement line" has not been drawn in the right place, and policy has in fact been excessively permissive. In short, too many anticompetitive mergers have been allowed to proceed.

The Kwoka study also examines which of these carefully studied mergers were challenged and which were in turn subject to various remedies. In each case, by linking those ex ante policy decisions to the outcomes as determined in the corresponding merger retrospectives, it provides some of the first systematic evidence on the effectiveness of merger policy, in addition to the effects of mergers themselves.

It reports that the antitrust agencies challenged 36 percent of the mergers in the database. In almost all cases these challenges correctly targeted mergers that, when consummated, later proved to be anticompetitive—often despite attempted remedies. Of mergers in the database that proved not to be anticompetitive, the agencies correctly cleared 75 percent. These data imply that where the agencies took action, they generally made correct decisions.

On the other hand, the agencies challenged only 38 percent of all the studied mergers in the database that resulted in anticompetitive price increases. This raises a serious warning flag indicating that current merger policy has led to substantial under-enforcement. Moreover, the unchallenged mergers on average resulted in price increases in excess of 10 percent, which suggests that the failure to adequately detect and prohibit anticompetitive mergers produced substantial consumer harm. The study also found evidence of an increased tendency toward clearing mergers in recent time periods (e.g., the 2000s vs. the 1980s) but no evidence of a difference between the DOJ and FTC. These data corroborate other findings of inadequate enforcement.

These results are important because they cast direct light on the question of whether the antitrust agencies challenge too many or too few mergers, and relatedly whether they err too often on the side of challenging procompetitive mergers (so-called "Type I errors") or allowing anticompetitive mergers ("Type II errors"). The evidence demonstrates that Type II errors occur far more frequently than Type I errors, resulting in serious under-enforcement that causes substantial harm to consumers. While both errors occur—signifying needed improvement—the evidence reveals a clear, persistent and very harmful policy tilt that is far too risk-averse toward Type II error and far too risk-tolerant of Type I error.

The Kwoka study addresses one further facet of merger control policy, namely, remedies. For nearly one-third of these same carefully studied mergers, the DOJ or the FTC employed structural or conduct remedies as conditions for approval of the merger. Policy has long preferred structural remedies—that is, divestitures—because they preserve the same number of players, do not compromise incentives, and create minimal administrative burden. However, in cases involving vertical relationships or other instances where efficiencies might be sacrificed by divestiture, both agencies have reserved a role for conduct remedies as well. These might involve mandatory supply arrangements, mandatory access provisions, firewall separations of operations, anti-retaliation rules, and so forth.

As noted previously, the agencies (particularly DOJ in its revised 2011 Remedies Guide[84]) have endorsed the wider use of conduct remedies. The Kwoka study found that divestiture remedies were associated with merger outcomes averaging a 6–7 percent price increase, which is below the overall average price increase. Conduct remedies, however, resulted in price increases of about 16 percent, which is well above the average and more than twice that of the price increases after divestiture remedies. While the number of observations for these results was not large, it adds to concerns about the inefficacy of conduct remedies and suggests the DOJ's pivot toward conduct remedies is likely at odds with good policymaking.

A number of commentators have expressed similar concerns. Professor Daniel Crane, for example, identified the Obama Administration's revision to the DOJ Remedies Guide as "a subtle change that could point towards a shift in merger control policy."[85] He noted that reliance on behavioral remedies can be characterized as "'weaker' on merger enforcement, since it allows potentially anticompetitive mergers to close in order to secure their efficiency advantages."[86] Others have concurred, concluding that "the most dramatic shift in merger policy may be the kinds of remedies the agencies are demanding when they challenge proposed transactions," and "[t]heir increasing reliance on behavioral remedies is striking."[87] This view is supported by the agencies' use of

---

[84] *See* DOJ REMEDIES GUIDE, *supra* note 13.

[85] Daniel Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 17 (2012).

[86] *Id.*

[87] David L. Meyer & Joshua A. Hartman, *Merger Enforcement Two Years Later—What Clues Does The Obama Administration's Record Hold For The Two Years Ahead?* XI THE THRESHOLD 3, 13 (2001), *available at* http://media.mofo.com/files/Uploads/Images/110400-Merger-Enforcement.pdf.

regulatory remedies in Comcast/NBCU,[88] GrafTech/Seadrift Coke,[89] and Pepsico/Pepsico bottler acquisitions.[90] AAI itself has voiced concern about this apparent shift away from structural remedies and its effects on merger policy.[91] That said, the FTC and DOJ regularly emphasize a preference for structural remedies.[92]

The results of the Kwoka study, along with recent guidance and enforcement actions embracing behavioral remedies, should sound a wake-up call—if not an outright alarm bell-—on the erosion of merger policy as an effective defense of competitive markets. The connection between merger policy and the current unhappy state of competition and growing consolidation in many key markets is impossible to ignore.

C. Recent Court Decisions

In AAI's 2008 Transition Report, we observed that the lower courts had become far too permissive toward mergers, and that the *Philadelphia National Bank* presumption was being seriously eroded.[93] Too often, taking advantage of the increased flexibility created by this erosion, courts had been holding that mergers should not be blocked where entry was thought to be relatively quick and easy, where powerful buyers were assumed to check the exercise of market power, or where high market shares purportedly did not accurately predict the merger's potential for harm.[94]

---

88 United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

89 United States v. GrafTech Int'l, 75 Fed. Reg. 76,026 (Dec. 7, 2010) (competitive impact statement).

90 PepsiCo, Inc., 75 Fed. Reg. 10,795 (FTC Feb. 26, 2010) (aid to public comment).

91 *See* JOHN E. KWOKA & DIANA L. MOSS, AMERICAN ANTITRUST INSTITUTE, BEHAVIORAL MERGER REMEDIES: EVALUATION AND IMPLICATIONS FOR ANTITRUST ENFORCEMENT (2011), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf.

92 *See e.g.*, William Baer, Assistant Att'y Gen. for Antitrust Div., Dep't of Just., Remarks at the Global Competition Review Fourth Annual Antitrust Law Leaders Forum (Feb. 6, 2015), *avaialable at* http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-global-competition-review-fourth ("Pursuing meaningful structural relief in mergers is important – even when the eggs have been scrambled."); Edith Ramirez, Chairwoman, Fed. Trade Comm'n, FTC Behavioral Remedies, Slides presented at the ABA Antitrust Fall Forum (Nov. 17, 2011), *available at* http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311550_fall_forum_panel_5.pdf ("Behavioral remedies disfavored in merger cases except where substantial merger-specific efficiencies would be lost if relief were structural."). Along these lines, the FTC's decision to undertake a study of the effectiveness of its historical remedies (including structural remedies) is to be applauded. *See* Press Release, Fed. Trade Comm'n, FTC Proposes to Study Merger Remedies (Jan. 9, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies).

93 *See* United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990) (finding the U.S. had proven that the transation would lead to a highly concentrated market but concluding that this would not "doom competition" because "[h]igh concentration has long been the norm in this market").

94 *See, e.g.*, United States v. Waste Management, Inc., 588 F. Supp. 498 (S.D.N.Y. 983), *rev'd* 743 F.2d 976 (2d Cir. 1984) (ease of entry); United States v. Country Lake Foods, 1990-1 Trade Cas. (CCH) ¶69,112 (D. Minn. 1990) (presence of a

Although many courts had expressly or tacitly endorsed the Merger Guidelines approach,[95] this approach itself allows for increased flexibility, and we noted that some courts invoking the Guidelines were being misled into accepting bad economic arguments that are inconsistent with appropriate antitrust enforcement policy.[96]

We also observed that an increasing number of conservative judges were being added to the federal bench,[97] and the federal enforcement agencies often were not prevailing in litigation.[98] During the George W. Bush Administration, for example, we noted that the government prevailed in litigation approximately 50% of the time. The government lost challenges in *Arch Coal*,[99] *SunGard*,[100] *Western*

---

powerful buyer)); United States v. Baker Hughes Inc., 731 F. Supp. 3 (D.D.Cl), *aff'd* 908 F.2d 981 (D.C. Cir. 1990) (high market shares and harmful effects).

95 *See, e.g.*, Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 718, 720 (D.C. Cir. 2001); Fed. Trade Comm'n 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); Fed. Trade Comm'n v. Swedish Match, 131 F. Supp. 2d 151, 160 (D.D.C. 2000); Fed Trade Comm'n v. Cardinal Health, Inc., 12 F. Supp. 2d. 34, 45 (D.D.C. 1998); Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1076 (D.D.C. 1997).

96 *See, e.g.*, United States v Syufy Enters., 903 F.2d 659, 667 n.13 (9th Cir. 1990) (declining to enjoin merger based on single contested example of fringe firm expansion, reasoning that "[w]e 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."); *id.* at 673 (contending that government enforcement poses "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"); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (refusing to enjoin merger of two leading producers of enterprise resource planning software and announcing unreasonably stringent unilateral effects standard whereby "[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").

Syufy was criticized by leading scholars for showing "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." Baker & Shapiro, *supra* note 71, at 240; *accord* 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"). The legal standard annunciated in *Oracle* has rightly been castigated for being inconsistent with "the modern economic understanding of unilateral competitive effects" and because it "throws up unreasonable barriers to proving unilateral competitive effects." Baker & Shapiro, *supra* note 71, at 243.

97 *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).

98 Our discussion included only cases where there was a judicial decision on the merits and excluded cases that were dismissed before a judge's decision, whether because of a settlement or abandonment by the merging parties.

99 Fed. Trade Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

Refining,[101] *Lundbeck (Ovation)*,[102] and *Peoples Natural Gas*,[103] though it prevailed in *Evanston*,[104] *Dairy Farmers*,[105] *Libbey*,[106] *Chicago Bridge*,[107] *UPM-Kymmene Oyj*,[108] *CCC Holdings*,[109] and *Polypore*.[110] While the FTC lost at the district court level in the *Whole Foods* case,[111] a divided D.C. Circuit panel reversed on appeal, with the case being remanded and ultimately settled.[112] In *Equitable Resources*, the FTC lost at the district court level with the court holding that the defendants' actions qualified for state action immunity, but the parties abandoned the deal during the appellate process and the district court's decision was subsequently vacated by the appellate court.[113]

So, where are we today? While AAI continues to believe that district courts too often have embraced inappropriately permissive merger review standards, in recent years courts have been more receptive to the government's arguments, although of course the characeristics of mergers before the courts may have become more obviously troublesome from a competitive point of view. During the

---

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

101 Fed. Trade Comm'n v. Paul L. Foster, Western Refining, Inc*.,* No. 07-352, 2007 U.S. Dist. LEXIS 47606 (D. N.M. May 29, 2007).

102 Lundbeck was previously known as Ovation, so this case is sometimes referred to as the "Ovation" case. Fed. Trade Comm'n v. Lundbeck, Inc., 650 F.3d 1236, 1238 (8th Cir. 2011).

103 Fed. Trade Comm'n v. Equitable Res., 512 F. Supp. 2d 361 (W.D. Pa. 2007) (order vacated June 25, 2008).

104 *In re* Evanston Nw. Healthcare Corp., FTC Docket No. 9315, slip op. at 13 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/07086opinion.pdf. This case followed an FTC retrospective study conducted after the FTC and the DOJ lost a string of hospital merger cases. See Timothy J. Muris, Chairman, Fed. Trade Comm'n, Everything Old is New Again: Health Care and Competition in the 21st Century, Prepared Remarks Before the 7th Annual Competition in Health Care Forum (November 7, 2002), *available at* http://www.ftc.gov/speeches/muris/murishealthcarespeech0211.pdf.

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

106 Fed. Trade Comm'n 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).

107 *In re* Chicago Bridge & Iron Co. N.V., No. 05-60192 (5th Cir. Jan. 5, 2008) (decision in administrative complaint subsequently appealed, with court agreeing with Commission).

108 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.

109 Fed. Trade Comm'n v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009). Although decided during the Obama administration, the complaint in this case was filed in November 2008, under the Bush Administration.

110 Polypore Int'l, Inc. v. Fed. Trade Comm'n, 686 F.3d 1208 (11th Cir. 2012). Although decided during the Obama administration, the adminstrative complaint in this case, which challenged a consummated merger, was issued in September 2008, under the Bush Administration.

111 Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).

112 Fed. Trade Comm'n v. Whole Foods Mkt., Inc., No. 07-5276 (D.C. Cir. July 29, 2008). However, this opinion was amended in November with each of the three judges taking a different stance. Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. Nov. 21, 2008).

113 Fed. Trade Comm'n v. Equitable Res., 512 F. Supp. 2d 361 (W.D. Pa. 2007), *vacated*, June 25, 2008.

Obama Administration, the percentage of courtroom victories has increased substantially.[114] Victories in the district courts include: *Sysco*,[115] *OSF Healthcare*,[116] *Saint Lukes*,[117] *ProMedica*,[118] *Bazaarvoice*,[119] and *H&R Block*.[120] The government also obtained appellate victories in *Saint Lukes*,[121] *ProMedica*[122] and *Polypore*.[123] We have been able to identify only two losses: *LabCorp*[124] and *Steris*.[125] In particular, courts have not been receptive to defendants' efficiency defenses,[126] and they have more readily accepted the government's theories of unilateral anticompetitive effects.

In *Sysco* and *Bazaarvoice*, for example, the government's complaint relied heavily on unilateral effects theories, and both mergers were enjoined. In *Sysco,* the district court identified a relevant market defined around national broadline foodservice customers and found that evidence of high concentration and unilateral effects together "presented a compelling prima facie case of anticompetitive effects," and the defendants' rebuttal evidence was "not sufficient to overcome the presumption of anticompetitive harm."[127] Likewise, in *Bazaarvoice*, the district court questioned *Oracle* and found that where there were threatened unilateral effects coupled with market shares in

---

114 Certain positive developments for merger enfrocement also pre-dated the Obama Administration. For example, parts of the D.C. Circuit's fractured *Whole Foods* decision and its *CCC Holdings* decision appeared to relax the burden of proof that is placed on the FTC, moving towards the traditional presumptions tests—and maybe even beyond the presumptions. In his revised dissenting opinion in *Whole Foods*, Judge Kavanaugh added a section that criticized the opinions of Judge Brown and Judge Tatel for "dilut[ing] the standard for preliminary injunction relief in antitrust merger cases." 548 F. 3d at 1062 (Kavanaugh, J., dissenting). He argued that the majority opinion has "giv[en] the FTC far greater power to block mergers than the statutory text or Supreme Court precedent permit." *Id.*

115 Fed. Trade Comm'n v. Sysco Corporation, 2015 WL 3958568 (D.D.C. 2015).

116 Fed. Trade Comm'n v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1072 (N.D. Ill. 2012).

117 Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys, Ltd., 2014 WL 407446 (D. Idaho Jan. 24, 2014).

118 ProMedica Health Sys., Inc. v. Fed. Trade Comm'n, 749 F.3d 559, 562 (6th Cir. 2014).

119 United States v. Bazaarvoice, Inc., No. 13-CV-00133-WHO, 2014 WL 203966, at *1 (N.D. Cal. Jan. 8, 2014).

120 United States v. H&R Block, 831 F. Supp. 2d 27 (D.D.C. 2011). The DOJ also successfully blocked Electrolux from acquiring General Electric's appliance division when the parties abandoned the transaction after a trial on the merits (but prior to a judicial decision). *See* United States v. AB Electrolux, No. 1:15-CV-01039-EGS (D.D.C. 2015).

121 Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775 (9th Cir. 2015).

122 ProMedica Health System, Inc. v. Fed. Trade Comm'n, 749 F.3d 559 (6th Cir. 2014).

123 Polypore Intern., Inc. v. Fed. Trade Comm'n, 686 F.3d 1208 (11th Cir. 2012).

124 Fed Trade Comm'n v. Lab. Corp. of Am., 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011).

125 Fed. Trade Comm'n v. Steris Corp., 2015 WL 5657294 (N.D.Oh. 2015).

126 *See, e.g., St. Luke's*, 778 F.3d at 788-92; *Sysco,* 2015 WL 3958568 at *59; *Bazaarvoice*, 2014 WL 203966 at *73; *H&R Block*, 833 F. Supp. 2d at 92; *OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1089; *CCC Holdings*, 605 F. Supp. 2d at 72-75.

127 *Sysco*, 2015 WL 3958568, at *43, *48, *59.

excess of 50 percent, "the government easily made a prima facie showing of a Section 7 violation," warranting a presumption of anticompetitive effects.[128]

To be sure, courts' willingness to fully embrace this analytical approach has been mixed. The City of New York lost a merger challenge premised on a unilateral effects theory after a district court rejected upward pricing pressure (UPP) analysis in the market definition context.[129] Then, too, when the court in *CCC Holdings* found that the FTC should be granted an injunction, it based its decision on the FTC's coordinated (rather than unilateral) effects theory.[130]

On balance, while some recent merger decisions are a cause for some optimism, major concerns persist in court analyses of merger cases. These concerns underlie our recommendations that the antitrust agencies and others continue their efforts to educate the judiciary through agency guidance, research reports, speeches, and briefs. For merger policy to be successful, there must be a clear understanding that merger law is a prophylactic regime, under which structural characteristics of markets can create strong presumptions of anticompetitive effects.

IV. Policy Proposals

The evidence reviewed in this chapter indicates that, over a long period of time, merger enforcement has declined as the agencies and courts have relaxed the presumption that mergers in highly concentrated industries are anticompetitive and moved towards a case-by-case economic analysis. The agencies became more reluctant to bring cases, both because of their own inclinations and because of the signals they were getting from district court judges. These changes have opened the door to an increasing number of mergers in major industries and increasing concern over concentration and pricing power.

On the other hand, several substantive changes in the 2010 Merger Guidelines have served to more closely align merger policy with the legislative intent underlying merger law and with current economic learning. In addition, there have been signs that the pace of merger investigations and

---

[128] *Bazaarvoice*, 2014 WL 203966, at *70.

[129] City of New York v. Group Health Inc., 2010 WL 2132246, *6 n.6 (S.D.N.Y. 2010) (noting that the court's research "has not revealed a single decision of a federal court adopting this [UPP] test"). The Second Circuit affirmed. City of New York v. Group Health Inc., 649 F.3d 151, 158 (2d Cir. 2011) (district court's denial of leave to amend was not abuse of discretion where the City "explain[ed] the Upward Pricing Pressure test's usefulness in assessing the impact of a merger" but not "how the test can substitute for a definition of the relevant market in the pleadings").

[130] *See CCC Holdings, Inc.*, 605 F. Supp. 2d at 69, 72 ("the data and predictions [of the FTC's unilateral effects model] cannot reasonably be confirmed by the evidence on this record," and "[w]ithout credible evidence that Audatex is a more distant third choice for a significant share of the market to support the predictions of [the FTC's] models, the Court cannot conclude that the merger is likely to result in unilateral price elevations").

enforcement activity has picked up during the Obama Administration, though the latest data suggests the increase is limited to markets with very high concentration. Merger control in moderately concentrated sectors appears to have virtually ceased. Moreover, both the DOJ and the FTC have too often settled for remedies and conditions that have proven wholly ineffective. Evidence suggests the increased use of conduct remedies is particularly ineffective.

We also note the need for the agencies to evaluate their litigation capabilities so that any decision to opt for a remedy rather than pursuing a court challenge to a merger is not influenced by a shortfall of internal capabilities. We further note the valuable work done by state attorneys general in developing arguments and evidence on mergers of particular local significance, and urge renewed efforts to ensure close cooperation between the FTC or DOJ and the states.

In summary, AAI firmly believes that there is much room—and much need—for further strengthening of merger control policy. We have recommended making merger control more effective by clarifying the Merger Guidelines and orienting agency practice toward ensuring that the merger review process ends in fully competitive markets. It is hoped that our current policy recommendations are followed by the next administration in the same manner our last recommendations were followed by the current administration.

Table 1
Count and Average Second Requests by Administration, Term 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: Hart-Scott Rodino Annual Reports (For FY 2006 through FY 2014); 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 73.
Notes:

1 The administration years are based on Leary’s breakdown 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 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 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 1 (Continued)
Count and Average Second Requests by Administration, Term and Agency

Administration[1]	**Clinton I**				**Clinton II**				**G.W. Bush I**			
Year[2]	’94	’95	’96	’97	’98	’99	’00	’01	’02	’03	’04	’05
Investigations with Second Request (FTC)[3]	46	58	36	45	46	45	43	27	27	15	20	25
Investigations with Second Request (DOJ)[4]	27	43	63	77	79	68	55	43	22	20	15	25
Total Second Requests	73	101	99	122	125	113	98	70	49	35	35	50
Average Number of Second Requests (FTC)[5]	46				40				22			
Average Number of Second Requests (DOJ)	53				61				21			
Difference Between FTC and DOJ Second Requests	19	15	-27	-32	-33	-23	-12	-16	5	-5	5	0
Average Difference Between FTC and DOJ Second Requests By Term	-6				-21				1			

Administration[1]	**G.W. Bush II**				**Obama I**			
Year[2]	’06	’07	’08	’09	’10	’11	’12	’13
Investigations with Second Request (FTC)[3]	28	31	21	15	20	24	20	25
Investigations with Second Request (DOJ)[4]	17	32	20	16	22	31	29	22
Total Second Requests	17	32	20	16	22	31	29	22
Average Number of Second Requests (FTC)[5]	24				22			
Average Number of Second Requests (DOJ)	21				26			
Difference Between FTC and DOJ Second Requests	11	-1	1	-1	-2	-7	-9	3
Average Difference Between FTC and DOJ Second Requests By Term	3				-4			

Table 2
Average Percentage 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]	**G.W. Bush I** *'02-'05*[2]	**G.W. Bush II** *'06-'09*[2]	**Obama I** *'10-'13*[2]
Average Investigations with Second Request (FTC)[3]	2.5%	1.4%	2.4%	1.7%	1.0%	1.7%	1.5%	1.7%
Average Investigations with Second Request (DOJ)	3.1%	1.6%	1.7%	1.9%	1.5%	1.6%	1.4%	2.0%
Average Total Second Requests	5.6%	3.0%	4.1%	3.6%	2.6%	3.3%	2.9%	3.7%
Average Adjusted Investigations with Second Request (FTC)	2.5%	1.4%	2.4%	1.7%	1.1%	2.5%	2.3%	2.4%
Average Adjusted Investigations with Second Request (DOJ)	3.1%	1.6%	1.7%	1.9%	1.6%	2.3%	2.1%	2.8%
Average Adjusted Total Second Requests[4]	5.6%	3.0%	4.1%	3.6%	2.7%	4.8%	4.4%	5.2%

Sources:
Hart-Scott Rodino Annual Reports (For FY 2006 through FY 2014); 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 73.

Notes:
[1] The administration years are based on Leary's breakdown 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, Term 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]	**G.W. Bush I** *'02-'05*[2]	**G.W. Bush II** *'06-'09*[2]	**Obama I** *'10-'13*[2]
Average Merger Enforcement Actions (FTC)[3]	10	15	25	31	30	19	20	22
Average Merger Enforcement Actions (DOJ)	9	9	12	25	44	10	14	18
Total Average Merger Enforcement Actions	19	24	37	56	74	28	34	40
Average Adjusted Merger Enforcement Actions (FTC)	10	15	25	31	31	26	28	28
Average Adjusted Merger Enforcement Actions (DOJ)	9	9	12	25	47	13	20	24
Average Adjusted Total Merger Enforcement Actions[4]	19	24	37	56	78	39	47	52

Sources:

Hart-Scott Rodino Annual Reports (For FY 2006 through FY 2014); 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 73.

Notes:

[1] The administration years are based on Leary's breakdown 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 Actions 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]	**G.W. Bush I** *'02-'05*[2]	**G.W. Bush II** *'06-'09*[2]	**Obama I** *'10-'13*[2]
FTC	Sum of Challenges	40	61	99	124	125	104	110	114
FTC	Sum of Filings[3]	4,036	8,756	6,527	11,042	15,901	5,097	6,194	5,228
FTC	Percent	1.0%	0.7%	1.5%	1.1%	0.8%	2.0%	1.8%	2.2%
DOJ	Sum of Challenges	35	34	49	101	187	53	79	94
DOJ	Sum of Filings	4,036	8,756	6,527	11,042	15,901	5,097	6,194	5,228
DOJ	Percent	0.9%	0.4%	0.8%	0.9%	1.2%	1.0%	1.3%	1.8%
	Total Percent	1.9%	1.1%	2.3%	2.0%	2.0%	3.1%	3.1%	4.0%

Sources: Hart-Scott Rodino Annual Reports (For FY 2006 through FY 2014); 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 73.

Notes:

[1] The administration years are based on Leary's breakdown 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.

Table 5
FTC Merger Investigations by HHI and Change in HHI (1996-2011)
Enforced/Not Enforced

Change in HHI (Delta)

Post Merger HHI		0 - 99	100 - 199	200 - 299	300 - 499	500 - 799	800 - 1,199	1,200 - 2,499	2,500 +	*TOTAL*	Percent Enforced
	0 - 1,799	0/14	17/31	19/20	17/11	3/7	0/1	0/0	0/0	56/84	40.0
	1,800 - 1,999	0/4	5/4	5/6	12/4	12/5	0/0	0/0	0/0	34/23	59.6
	2,000 - 2,399	1/2	1/6	7/8	25/19	32/12	2/2	0/0	0/0	68/49	58.1
	2,400 - 2,999	1/2	4/2	6/5	18/6	44/14	26/10	0/0	0/0	99/39	71.7
	3,000 - 3,999	1/3	3/2	5/2	9/5	25/14	71/21	39/14	0/0	153/61	71.5
	4,000 - 4,999	0/0	2/2	1/1	5/1	10/4	18/4	68/3	0/0	104/15	87.4
	5,000 - 6,999	1/0	6/0	8/2	8/1	19/0	21/2	145/20	47/5	255/30	89.5
	7,000 +	0/0	0/0	1/0	1/0	3/0	9/0	26/1	246/2	286/3	99.0
	Total	4/25	38/47	52/44	95/47	148/56	147/40	278/38	293/7	1055/304	77.6
	Percent Enforced	**13.8**	**44.7**	**54.2**	**66.9**	**72.5**	**78.6**	**88.0**	**97.7**	**77.6**	

Source: U.S. FEDERAL TRADE COMMISSION, HORIZONTAL MERGERS INVESTIGATION DATA, FISCAL YEARS 1996–2011 (January 2013).

TABLE 6
FTC Horizontal Merger Investigations
By Number of Significant Competitors
FY 1996 – FY 2011

		Outcome			
		Enforced	**Closed**	***TOTAL***	**Percent Enforced**
Significant Competitors	2 to 1	297	6	303	98.0
	3 to 2	331	40	371	89.2
	4 to 3	174	51	225	77.3
	5 to 4	66	37	103	64.1
	6 to 5	19	35	54	35.2
	7 to 6	3	22	25	12.0
	8 to 7	6	19	25	24.0
	9 to 8	0	11	11	0
	10 to 9	2	4	6	33.3
	10 +	0	20	20	0
	TOTAL	898	245	1,143	78.6

Source: U.S. FEDERAL TRADE COMMISSION, HORIZONTAL MERGERS INVESTIGATION DATA, FISCAL YEARS 1996-2011 (January 2013).

TABLE 7

Remaining Number of significant competitors	1996-2003		2004-2007		2008-2011	
	Number of investigations	**Percent enforced**	**Number of investigations**	**Percent enforced**	**Number of investigations**	**Percent enforced**
1	133	96.2%	106	100.0%	64	98.4%
2	184	84.8%	94	91.5%	93	95.7%
3	134	76.1%	54	70.4%	37	91.9%
4	52	61.5%	40	65.0%	11	72.7%
5	32	40.6%	16	37.5%	6	0.0%
6	10	20.0%	13	7.7%	2	0.0%
7	12	50.0%	9	0.0%	4	0.0%
8	4	0.0%	7	0.0%	0	0.0%
9	3	66.7%	2	0.0%	1	0.0%
10+	9	0.0%	11	0.0%	0	0.0%
Total	573	77.0%	352	74.7%	218	89.0%

Source: U.S. FEDERAL TRADE COMMISSION, HORIZONTAL MERGERS INVESTIGATION DATA, FISCAL YEARS 1996-2011 (January 2013).

TABLE 8
Percent Price Change Found in Merger Retrospective Studies

	Number of Products	Mean
Overall	101	5.07
Increases	66	9.52
Decreases	35	-3.31

Source: JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RESTROSPECTIVE ANALYSIS OF U.S. POLICY (2015).

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 73.

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]							G.W. 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)			

G.W. Bush II				Obama I			
06	07	08	09	10	11	12	13
28 (42)	31 (47)	21 (34)	15 (20)	20 (28)	24 (34)	20 (30)	25 (34)
17 (29)	32 (47)	20 (31)	16 (21)	22 (31)	31 (42)	29 (40)	22 (32)
45 (71)	63 (94)	41 (65)	31 (41)	42 (59)	55 (76)	49 (70)	47 (66)
24 (36)				22 (31)			
21 (32)				26 (36)			
11 (13)	-1 (0)	1 (3)	-1 (-1)	-2 (-3)	-7 (-8)	-9 (-10)	3 (2)
3 (4)				-4 (-5)			

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]	**G.W. 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 73.

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 Chairwoman until April 1995, when Robert Pitofsky was appointed.

Table 3a

Average Merger Enforcement Actions by Administration, Term 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]	**G.W. 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 73.

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] 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.

[5] Bush appointee Janet Steiger remained FTC Chairwoman 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*[5]	Clinton II *98-00*[2]	G.W. 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 73.

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 Chairwoman until April 1995, when Robert Pitofsky was appointed.

Table 5a
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
2007	2,201	2,108	22	12
2008	1,726	1,656	21	16
2009	716	684	19	12
2010	1,166	1,128	22	19
2011	1,450	1,414	18	20
2012	1,429	1,400	25	19
2013	1,326	1,286	23	15
2014	1,663	1,618	17	16

Sources: Hart-Scott Rodino Annual Reports (For FY 2006 through FY 2014); 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 73.

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.

Table 6a
Second Request Filings

Year[1]	Investigations with Second Request (FTC)	Investigations with Second Request (DOJ)[2]	Total Second Requests
1982	39	26	65
1983	12	22	34
1984	25	36	61
1985	24	43	67
1986	32	39	71
1987	18	40	58
1988	39	29	68
1989	35	29	64
1990	55	34	89
1991	33	31	64
1992	26	18	44
1993	40	31	71
1994	46	27	73
1995	58	43	101
1996	36	63	99
1997	45	77	122
1998	46	79	125
1999	45	68	113
2000	43	55	98
2001	27	43	70
2002	27	22	49
2003	15	20	35
2004	20	15	35
2005	25	25	50
2006	28	17	45
2007	31	32	63
2008	21	20	41
2009	15	16	31
2010	20	22	42
2011	24	31	55
2012	20	29	49
2013	25	22	47
2014	30	31	51

Sources: Hart-Scott Rodino Annual Reports (For FY 2006 through FY 2014); DOJ Workload Statistics 1997–2006, HSR Annual Reports 1978–2006, ABA Antitrust Spring Meeting Report 2004–2006.
Notes:
[1] Fiscal Year data begins in the Tenth Annual HSR Annual Report, which contains fiscal 1986 and 1987 data.
[2] 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 reported above are from the HSR Annual Report.