

# What Does the Billion-Dollar Deal Mean for Stronger Merger Enforcement?

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## I. Introduction

The Biden Administration's antitrust chiefs at the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have committed to invigorating merger enforcement.<sup>1</sup> There is good reason for this. In stopping harmful mergers in their incipiency, merger control enforced under Section 7 of the Clayton Act is the first line of defense against rising concentration, which fosters the emergence of dominant firms and oligopolies.<sup>2</sup> Prioritizing merger enforcement as a centerpiece of antitrust reform implicitly recognizes two leading factors that have weakened enforcement over the last several decades.

One is the role of error-cost analysis in merger enforcement, or incorrectly giving more weight to the risk of wrongly enforcing against a pro-competitive merger than to the risk of failing to enforce against an anticompetitive merger. A second factor is under-enforcement of the "structural presumption."<sup>3</sup> Conservative courts have operationalized this by increasing the burden on plaintiffs to prove anticompetitive effects from as-yet unconsummated, highly concentrative mergers. In raising this bar, courts have effectively lowered the burden on merging parties in defending presumptively illegal mergers with promises of future cost savings and consumer benefits.

There is strong economic evidence that error-cost analysis and under-enforcement of the structural presumption have weakened merger enforcement.<sup>4</sup> Agency strategy for addressing these factors in order to support more vigorous merger enforcement, however, has wide-ranging implications. One is how the agencies allocate scarce resources in deciding which transactions get early-stage review through the "second request" process. Another is the same calculus, but for late-stage enforcement, or investigations that may ultimately lead to merger challenges. Yet another is the potential reallocation of agency resources between early-stage and late-stage enforcement. A final implication is how the agencies resolve illegal challenged mergers, either by settling competitive concerns with remedies in consent decrees, forcing the parties to abandon or restructure their deals, or seeking to enjoin them in federal court.

The remarkable growth in the size of mergers over time should be a major factor in the agencies' calculus for managing risk, allocating scarce resources, and developing and implementing a program of more vigorous enforcement.<sup>5</sup> The 1990s ushered in the era of the "billion-dollar merger," with a six-fold increase over the 1980s in the average nominal value of mergers worth over \$1 billion.<sup>6</sup> Since the 1990s, the billion-dollar merger continues to have impact on merger enforcement. For example, analysis of agency data reported under the Hart Scott Rodino (HSR) Act indicates that billion-dollar transactions are ever-present in the agencies' workload.<sup>7</sup> Different types of large horizontal, vertical, and ecosystem

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<sup>1</sup> Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines, U.S. Dept. of Justice, Antitrust Division (Jan. 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines>.

<sup>2</sup> See, e.g., Robert Lande, *Resurrecting Incipency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST LAW J. 875 (2001).

<sup>3</sup> See, e.g., Herbert Hovenkamp and Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE LAW J. (2018).

<sup>4</sup> See e.g., Jonathan B. Baker, *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST LAW J. (2015). See also, John Kwoka, *The Structural Presumption And The Safe Harbor In Merger Review: False Positives Or Unwarranted Concerns?* 81 ANTITRUST LAW J. (2017).

<sup>5</sup> See, e.g., Keynote Remarks of Assistant Attorney General Jonathan Kanter at Georgetown Antitrust Law Symposium, Respecting the Antitrust Laws and Reflecting Market Realities, U.S. Department of Justice, Antitrust Division (Sept. 13, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust>.

<sup>6</sup> *List of largest mergers and acquisitions* (1870s through 2020s), WIKIPEDIA (last visited, Aug. 22, 2022), [https://en.wikipedia.org/wiki/List\\_of\\_largest\\_mergers\\_and\\_acquisitions](https://en.wikipedia.org/wiki/List_of_largest_mergers_and_acquisitions).

<sup>7</sup> Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *FEDERAL TRADE COMMN.* (last visited Aug. 22, 2022), <https://www.ftc.gov/policy/reports/annual-competition-reports>. The analysis uses data covering the 35-year period from 1985-2020 for transaction report categories ranging from less than \$50 million to more than \$1 billion in size.

mergers have taken shape over time, thus increasing complexity. Moreover, in contrast to those below \$1 billion, the frequency of billion-dollar mergers is strongly correlated with their value. When merger activity is in a cyclical upswing, therefore, the agencies will be reviewing a commensurately larger number of billion-dollar transactions. All of these factors have material implications for the allocation of agency resources and the effectiveness of enforcement.

Agency reporting data indicates that, in contrast to mergers valued below \$1 billion, billion-dollar mergers play a unique, major role in both early- and late-stage enforcement. Importantly, billion-dollar deals feature prominently in the universe of mergers that the agencies challenge, supporting the notion that large mergers generally pose a greater likelihood of raising competitive concerns. Moreover, billion-dollar transactions account for an outsized proportion of illegal mergers that are settled, versus resolved through other means. The implications of such deals are well-known. For example, William Baer, Assistant Attorney General under the Obama Administration said in 2016: *“There are some deals that are so antitrust-risky that they never ought to make it out of the executive suite or the corporate boardroom.”*<sup>8</sup> This statement signaled that mergers raising significant antitrust risks would be met with government resistance, thus encouraging greater awareness by companies and their antitrust advisors to avoid consuming agency resources with facially problematic proposals.

Accounting accurately for the role of the billion-dollar deal in merger enforcement and analysis of its implications for stronger enforcement is hampered by outdated HSR reporting. As of 2020, the agencies continue to include *all* billion-dollar mergers in a single category. This stands in stark contrast multiple categories for deals worth less than \$1 billion. This reporting convention masks important information about how enforcement levels and trends potentially vary by different sizes of billion-dollar mergers. This White Paper unpacks the billion-dollar merger through analysis of reporting data. It examines the implications for agency decision-making around resource allocation and pathways for resolving challenged mergers. The paper concludes with takeaways on what the billion-dollar merger means for a program of stronger merger enforcement.

## II. The Advent of the Billion-Dollar Merger

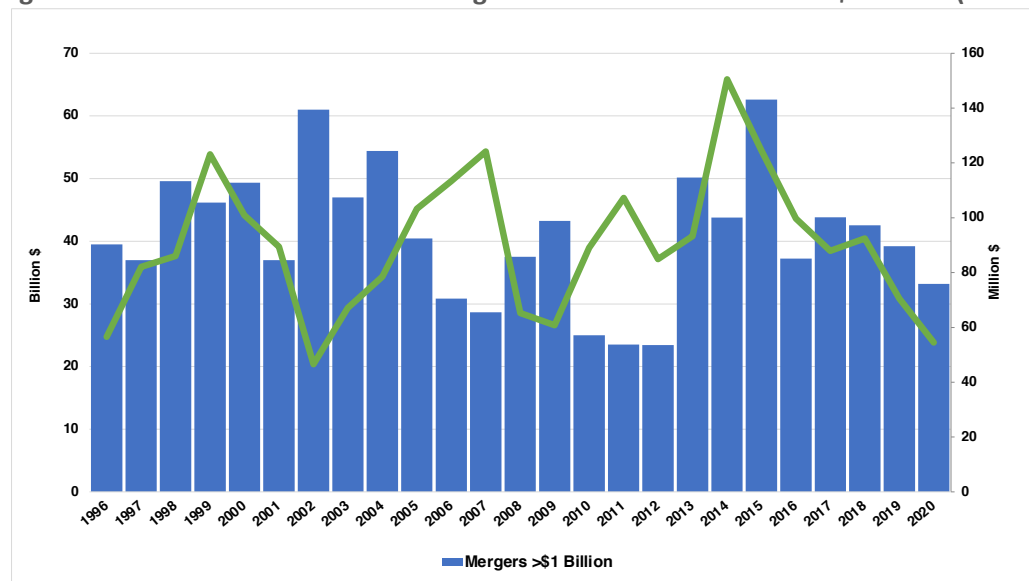
The billion-dollar deal is a prominent feature of merger activity over the last four decades. Growth in the real value of such transactions is positive, while that of mergers less than \$1 billion is negative. This indicates that the growth of the billion-dollar merger is due to more than simply inflation. Since the mid-1990s, there appear to be several cycles of merger activity, which are apparent in both annual transaction counts and total transaction values for deals worth above, and below, one billion dollars.<sup>9</sup> Deal counts increase with each successive cycle over the last 25 years. Figure 1 shows the *average* nominal value of transactions valued above and below \$1 billion from 1996-2020. It reveals more blunted volatility in activity for billion-dollar deals, as compared to those worth less than one billion. Given that large mergers may take multiple years to investigate, and settle or litigate, the average nominal value of billion-dollar deals provides a good sense of the tax on agency resources necessary to review them.

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<sup>8</sup> Michael J. de la Merced and Leslie Picker, *Megamergers Face Deterrents in the United States*, NEW YORK TIMES (Apr. 6, 2016), <https://www.nytimes.com/2016/04/07/business/dealbook/megamergers-face-deterrents-in-the-united-states.html>.

<sup>9</sup> See *supra* note 6 for data sources on billion-dollar mergers. Data on all mergers derived from *Announced M&A in the United States by Numbers and Value by Years*, INSTITUTE FOR MERGERS, ACQUISITIONS & ALLIANCES (last visited Aug. 22, 2022), <https://imaa-institute.org/mergers-and-acquisitions-statistics/united-states-ma-statistics/>.

**Figure 1**  
**Average Nominal Transaction Value of Mergers Worth Above and Below \$1 Billion (1996-2020)**



Unlike mergers worth below a billion dollars, there is a strong correlation between the count and value of mergers worth more than a billion dollars over the period 1996 to 2020. This implies that when M&A activity is in a cyclical upswing, the agencies will be faced with a large number of reviews involving large deals.<sup>10</sup> These mergers can raise any number of issues. For example, horizontal mergers of two large, head-to-head rivals can significantly lessen competition, leading to substantial increases in concentration. A large vertical merger can lead to the exercise of market power at horizontal levels through enhanced incentives to exclude rivals from access to key inputs or distribution. Ecosystem mergers can enhance incentives for a dominant firm to leverage market power across a digital platform, cloud computing, and applications. Because these transactions are now fixtures in the merger enforcement landscape, the antitrust agencies should plan carefully for how to evaluate them, especially as part of a broader program for invigorating merger enforcement.

### III. Early-Stage Enforcement and the Billion-Dollar Merger

Assessing the impact of billion-dollar deals on early-stage enforcement is a first step in understanding how a more vigorous program of merger enforcement should account for them. We do this through a variety of measures taken directly, or derived, from enforcement data reported by the agencies in annual competition reports to Congress.<sup>11</sup> A useful measure of early-stage enforcement “intensity” or “scrutiny” is the relationship between the level of second requests and level of total HSR filings.<sup>12</sup> We calculate this as the ratio of percentage of transactions receiving second requests for each transaction size category, to the percentage of total reportable transactions for each transaction size category.

The early-stage enforcement ratio has a number of advantages. Because it is based on relative percentages, the ratio normalizes variation in activity due to merger cycles. It also provides insight into both the static and dynamic dimensions of enforcement. A lower ratio indicates a lower level of second

<sup>10</sup> Philip J. Isom, *2021 was a blowout year for M&A - 2022 could be even bigger*, KPMG ADVISORY, <https://advisory.kpmg.us/articles/2021/blowout-year-global-ma.html>.

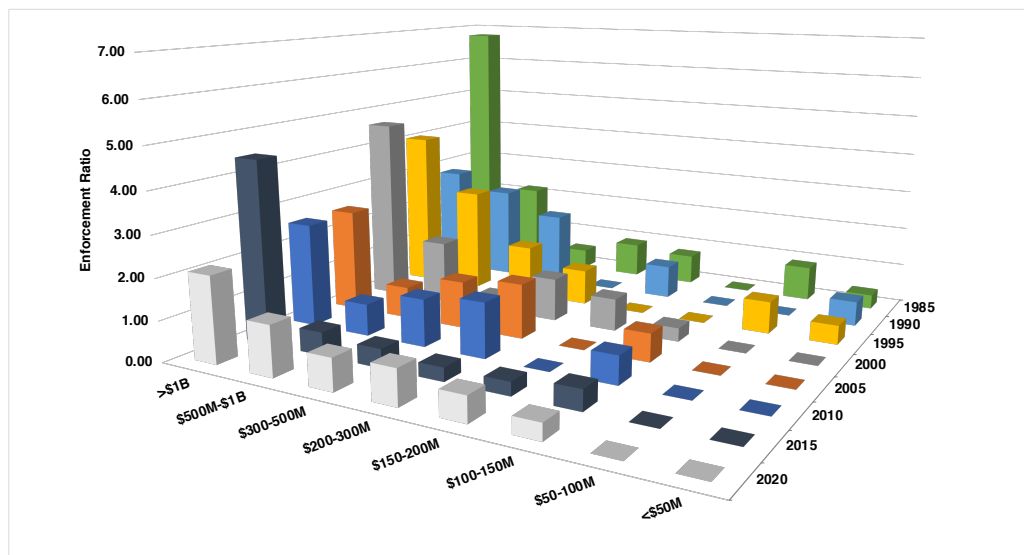
<sup>11</sup> *Supra*, note 7.

<sup>12</sup> Based on data from Table I of the annual HSR report.

requests relative to total filings for each transaction size category. This implies a lower level of early-stage enforcement scrutiny. A higher ratio indicates a higher level of second requests relative to total filings for each transaction size category, or a higher level of early-stage scrutiny. An increasingly higher (or lower) ratio over time, or across categories of transaction size, indicates a pattern of stronger (or weaker) scrutiny.

Figure 2 is a three-dimensional graphic showing the early-stage enforcement ratio at five-year intervals from 1985-2020. It is based on “size of transaction” data, adjusted for inflation (i.e., 2020 dollars).<sup>13</sup> Figure 2 reveals that early-stage enforcement scrutiny is different for smaller versus larger deals. For example, the ratio is very low, if not zero, for numerous data points for transactions valued at less than \$50 million, up to about \$200 million. At \$200 million in transaction size, early-stage scrutiny generally increases with the size of transaction, where the ratio is highest for transactions larger than \$1 billion. The early-stage enforcement ratio, across all transaction size categories, trends downward over the period. The ratio for the category of transactions valued above \$1 billion also trends downward, but at a faster rate than all transaction size categories over the period.

**Figure 2**  
**Early-Stage Enforcement Ratio Based on Size of Transaction (1985-2020)**



The “size of transaction” ratio analysis offers important initial perspective, but it does not provide information on specific features of the merging parties, such as the relative sizes of the acquirer and acquiree. These features are increasingly important in motivating more vigorous merger enforcement. For example, concern over chronic under-enforcement of acquisitions of small rivals by large incumbent firms is a central issue in merger reform, as illustrated by Facebook’s billion-dollar acquisitions of Instagram (2012) and WhatsApp (2014) and health insurer UnitedHealthcare’s acquisition of Change Healthcare (2021).<sup>14</sup> The relative sizes of merging firms are also important in evaluating large “merger of equals.” These deals include more recent multi-billion-dollar mergers such as Aetna-Humana (2016), Dow-Dupont (2017), and AT&T-Time Warner (2017), all three of which were challenged by the DOJ.

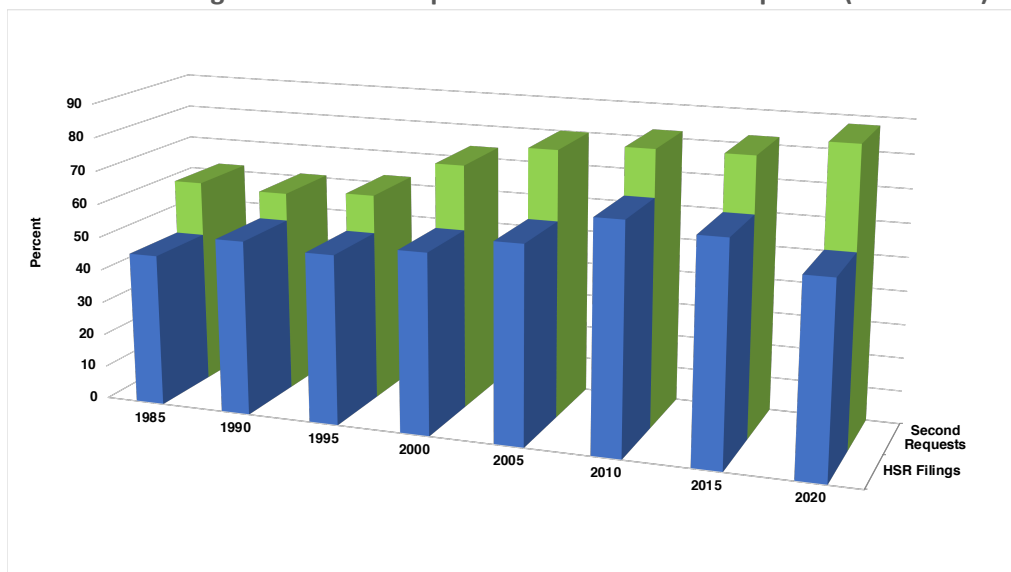
<sup>13</sup> Reporting threshold were increased a number of times over the period 1985-2020. To account for the fall-off in reporting for smaller transaction size categories as a result, we combined data for the category of <\$50 million for all years.

<sup>14</sup> See, e.g., Opening Statement in U.S. et al. v. UnitedHealth Group Inc. & Change Healthcare Inc., U.S. Department of Justice (Aug. 1, 2022), <https://www.justice.gov/atr/case-document/file/1523361/download>.



To get a better sense of early-stage enforcement based on the relative size of the merging parties, we looked at two additional HSR-based measures. The first measure is HSR filings by the size of the acquirer’s assets.<sup>15</sup> Transactions featuring acquirers with assets of \$1 billion or more constitute a significant share of both total HSR filings and second requests from 1985-2020. As shown in Figure 3, billion-dollar acquirers accounted for 46% of filings in 1985, rising to a peak of about 68% in 2010, and falling off somewhat through 2020. Despite this decline, the rate at which enforcers issued second requests for transactions involving billion-dollar acquirers increased from about 62% in 1985 about 87% in 2020. Taken together, these trends imply that that the early-stage enforcement ratio for billion-dollar mergers by “size of acquirer” *increases*, albeit modestly over time, in contrast to a slightly *declining* trend based on the “size of transaction” ratio.

**Figure 3**  
**Total HSR Filings and Second Requests For Billion-Dollar Acquirers (1985-2020)**



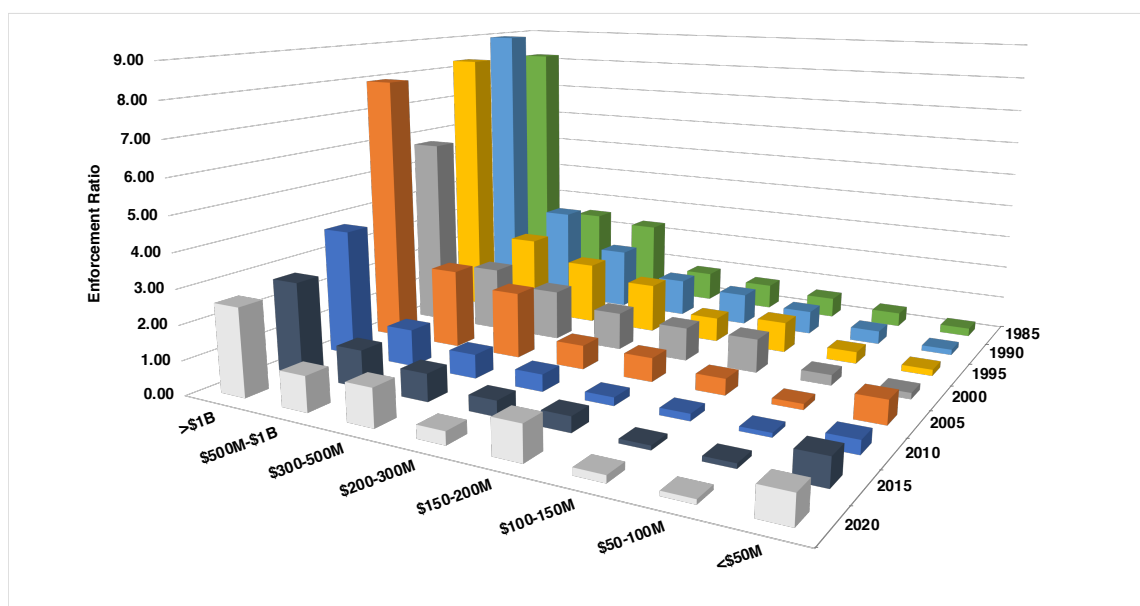
A second measure focuses on mergers of equals, or the ratio of the number of total filings by assets of acquirers, to the number of total filings by assets of acquirees.<sup>16</sup> For ratios of less than one, there are relatively more billion-dollar acquirees than billion-dollar acquirers for transactions in a size category. For ratios of more than one, there are relatively more acquirers than acquirees. For ratios with a value around one, there are relatively equal numbers of acquirers and acquirees, implying more matchups of relatively equal size firms.

Figure 4 shows the results. Generally, ratios increase with the size of transaction, especially before 2010, indicating relatively larger acquirers, as compared to acquirees. The ratio is also very high for deals worth \$1 billion and up, indicating very large acquirers, as compared to acquirees. This makes sense in that for the largest companies, there are only a handful of potential merger partners that are similar in size. However, ratios decrease markedly for billion-dollar deals beginning in 2010 and remain at a lower level through 2020, suggesting that the size disparity between acquirers and acquirees narrowed over the decade, or that we see an increase in the number of billion-dollar mergers of equals.

<sup>15</sup> Based on Table VI of the annual HSR report.

<sup>16</sup> Based on Tables VI and VIII of the annual HSR report.

**Figure 4**  
**Relative Size of Billion-Dollar Acquirers v. Acquirees (1985-2020)**



## IV. Late-Stage Enforcement Trends and the Billion-Dollar Merger

Results from analysis of early-stage enforcement raise a number of questions about late-stage enforcement. Every merger investigation, and challenge that may result from it, begins with a second request, extending resource allocation decisions across the entire review process. At the same time, early-stage reviews that do not result in more in-depth investigations may free up resources for other early-stage or late-stage purposes. The role of the billion-dollar merger in this process is likely to be significant. For example, beginning in 2005, the agencies began to reverse a five-year free-fall in the rate of merger challenges. Since then, that rate has generally been on the rise, increasing on average just over 10% per year over the last 15 years.<sup>17</sup>

Not surprisingly, in recent years, billion-dollar deals account for the majority of merger challenges. Based on a sample from 2015-2020, we found that mergers worth \$1 billion and up account for about three-quarters of the number, and almost the entire value, of challenged transactions, thus highlighting the dominant role of the billion-dollar merger in late-stage enforcement.<sup>18</sup> Figure 5 shows a frequency distribution of challenged mergers from 2015-2020 based on value, revealing positive skew to the lower end of spectrum, with the most commonly occurring value at about \$3 billion and an average value of almost \$14 billion.

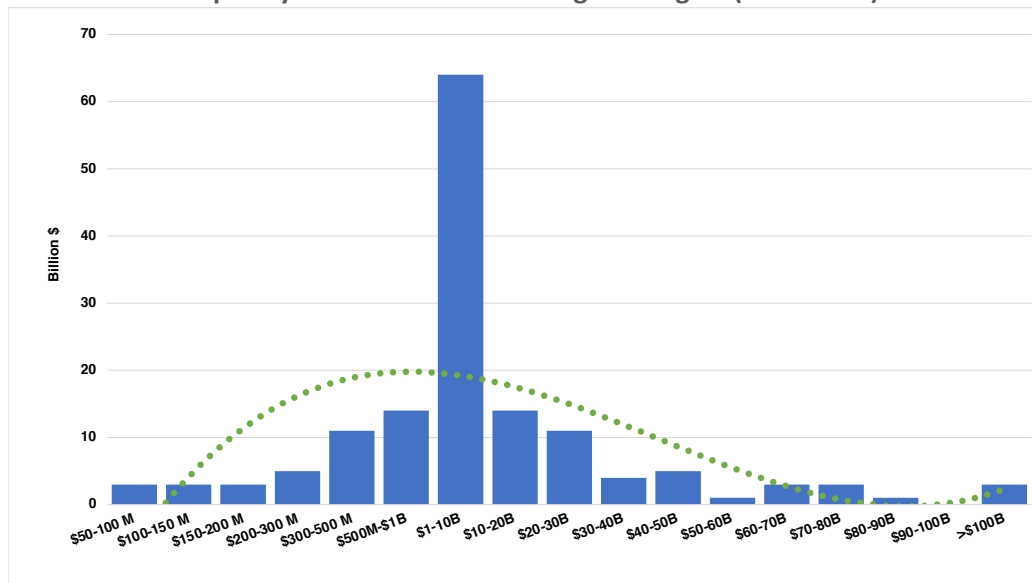
Given the outsized role of the billion-dollar merger in late-stage enforcement, we looked more closely at how challenged mergers were resolved by the agencies. Here again, the billion-dollar deal stands out. Almost 60% of abandoned and litigated mergers from 2015-2020 are worth more than \$1 billion. This

<sup>17</sup> The dataset on merger challenges is developed from the narratives included in the agencies' annual HSR reports.

<sup>18</sup> We identified about 170 challenged mergers that were summarized in annual HSR reports, including information on whether the agency forced the abandonment or restructuring of the merger, moved to enjoin it in federal court, or settled it with remedies in a consent order. The FTC frequently reports the value of the mergers in their report summaries, while the DOJ does not, so we used public sources to determine the value of mergers challenged by either agency.

includes one of the highest valued mergers ever litigated, Anthem-Cigna, valued at almost \$54 billion.<sup>19</sup> In contrast to litigated mergers, a much higher percentage, close to 80%, of settled deals are worth more than \$1 billion. The DOJ and FTC settled three of the highest valued transactions, worth more than \$100 billion each, between 2015-2020: *Dow-DuPont* (agricultural biotechnology, 2017), *United-Raytheon* (aerospace and defense systems, 2020), and *ABInBev-SAB Miller* (beer, 2016).

**Figure 5**  
**Frequency Distribution of Challenged Mergers (2015-2020)**

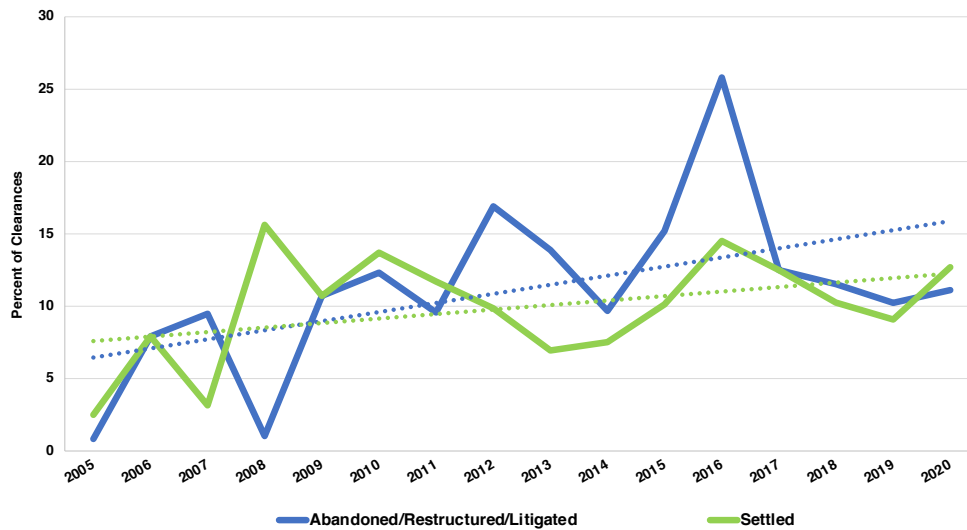


The prominent role of the billion-dollar merger in merger settlements calls attention to an important reality. That is, namely, the agencies have historically settled *more* challenged mergers than they did not settle by forcing the parties to abandon or restructure them, or moving to enjoin them. Between 2005-2020, for example, that agencies settled, on average, more than one-half (about 56%) of all challenged mergers. However, the agencies' track records on resolving merger challenges are markedly different. Figures 6 and 7 show DOJ and FTC merger challenges, as a percentage of total clearances, that are settled versus not-settled (i.e., abandoned, restructured, or litigated). Figure 6 indicates that since about 2011, the rate at which the DOJ resolves challenged mergers through settlement is *lower* than that for transactions it does not settle. This gap widens across the second term of the Obama administration (2012-2016). Based on extrapolation of the fitted trend lines for each series, this gap could continue to grow over time.

<sup>19</sup> Mergers litigated by the agencies also include low value deals, such as *U.S. v. Tribune Publishing*, valued at only \$56 million.

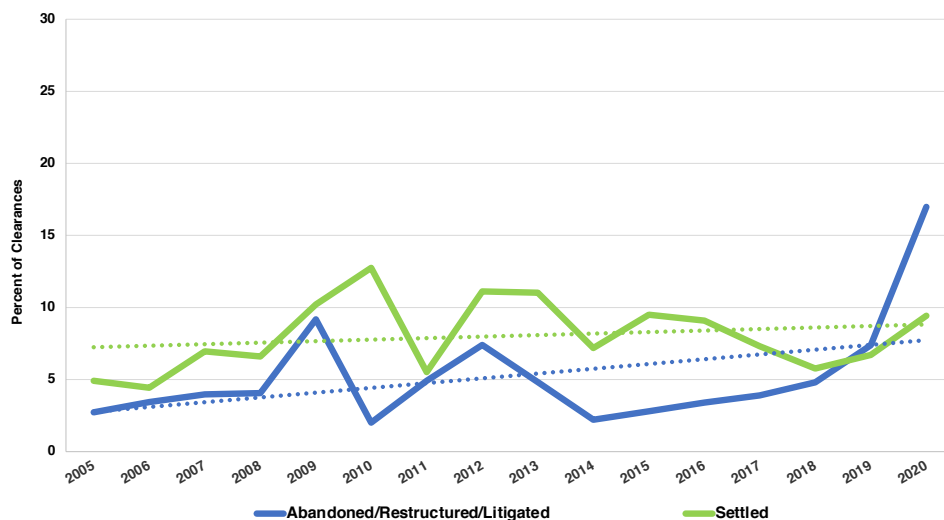


**Figure 6**  
**Challenged Mergers Settled v. Litigated by the DOJ (2005-2020)**



The FTC data show a very different pattern, as shown in Figure 7. Indeed, the rate at which the Commission resolves challenged mergers through settlement exceeds that of non-settlements. In fact, settlements significantly exceeded non-settlement resolutions for an extended period of time between about 2010-2018. Based on the fitted trend lines for each series, however, this gap may be closing. The FTC’s preference for settling challenged mergers may be due to a number of factors. The operation of the agency as an independent commission features five commissioners, who may find it difficult, at times, to find consensus on merger policy and therefore decisions to settle relatively more mergers. Differences in how the FTC’s Bureau of Competition and Bureau of Economics analyze and view mergers may also be a contributing factor.

**Figure 7**  
**Challenged Mergers Settled v. Litigated by the FTC (2005-2020)**



When we combine agency data on resolution of merger challenges (not shown), it is clear that the point at which the rate of settlements falls below that of non-settlements occurred only recently, in 2019. This is due largely to the DOJ's more aggressive approach to resolving merger challenges, while the FTC has much to overcome in a trend of favoring settlements over the past decade.

## **V. Analysis of Enforcement Trends Around the Billion-Dollar Merger**

### **A. Early-Stage Enforcement Reveals the Tension Between Review of Billion-Dollar and Other Deals**

Analysis of early-stage enforcement highlights a fundamental tension. "Size of transaction" analysis shows a slight decline over the last 25 years, overall and for billion-dollar mergers. But a closer look at measures that incorporate information on the relative sizes of acquirers and acquirees provides additional insight. For example, analysis by "size of acquirer" shows that the agencies have actually engaged in stronger early-stage enforcement for deals where acquirers are worth \$1 billion and up.

Moreover, analysis of mergers of equals also indicates that the gap between the relative sizes of billion-dollar acquirers and acquirees has narrowed over the last several years, indicating that large mergers-of-equals may be becoming more prevalent. This makes sense, in that numerous markets in the U.S., including wireless telecommunications, airlines, and hospital systems, have seen significant consolidation and limited entry and, therefore, rising concentration. Collectively, these findings have implications for the allocation of agency resources within both early-stage and late-stage enforcement, but also between early- and late-stage enforcement. One question is whether early-stage enforcement of billion-dollar mergers potentially diverts resources away from enforcement of smaller, mid-size deals. These transactions themselves raise important questions since under-enforcement of successive, moderately concentrative, smaller mergers in some markets is a potential driver of rising concentration.

These and other dynamics warrant attention. They make the case for the need for agency reporting that adds more categories for mergers above \$1 billion, as opposed to the current convention of a single reporting category. More granularity in the reporting data would increase transparency and facilitate analysis of how different levels of billion-dollar deals impact merger enforcement. This is particularly important in light of current efforts to invigorate merger enforcement at the DOJ and FTC.

### **B. The Billion-Dollar Deal Plays an Outsized Role in Late-Stage Enforcement, Highlighting Key Issues for Merger Reform**

Late-stage enforcement scrutiny, as measured by merger challenges, has been on the rise for the last 30 years. For the last 15 years, this trend opposes early-stage enforcement intensity based on "size of transaction" analysis, which appears to be somewhat in decline. This prompts the question: How can early-stage enforcement have softened while late-stage enforcement has intensified? Findings on the major role of billion-dollar mergers in both early- and late-stage enforcement help reconcile this disparity. Mergers involving billion-dollar acquirers get significant attention in early-stage enforcement. Moreover, billion-dollar mergers account for the lion's share of challenges and the majority of merger settlements.

These findings strongly support the notion that large mergers raise commensurately significant competitive concerns, making agency decision-making around resolving large merger challenges a central issue in invigorating merger enforcement. It is important, therefore, to look closely at the motivations for settling challenged mergers. In some cases, for example, the government may anticipate being forced to “litigate the fix” in a restructured merger. But it is well known that this strategy can result in weaker up-front remedies, in contrast to signaling to the parties a willingness to litigate without considering a remedy. While this is a complex decision, it does not change the fact that to advance stronger merger enforcement, the agencies must take risks in moving to enjoin more and different types of cases.

A second factor in assessing the motivation for settlement is mounting evidence that most claimed efficiencies from mergers do not materialize.<sup>20</sup> The largely failed \$26 billion merger of Sprint and T-Mobile is a case in point. Here, the government settled a presumptively illegal four-to-three merger. But a largely unsuccessful remedy, in the absence of many merger-related benefits, illustrates the perils of settling mergers to address anticompetitive effects in one part of a transaction while preserving efficiencies in another.<sup>21</sup>

A third factor that should influence decisions on resolving challenged deals is remedy. For example, in mergers with large anticompetitive effects, the burden on a remedy to restore lost competition increases commensurately, increasing the risk that a remedy will fail, with unmitigated adverse consequences. There are numerous illustrations of “risky” remedies. One is a growing list of failed divestitures in highly concentrative mergers, such as in the Safeway-Albertsons and Hertz-Dollar Thrifty mergers.<sup>22</sup> A second is the proven higher risk of failure where the agencies accept targeted asset divestitures, instead of line-of-business divestitures.<sup>23</sup>

A third example of risky remedies is the ineffectiveness of conduct remedies, as is clear from the Live Nation-Ticketmaster merger. There, the DOJ amended the consent decree a decade later, in light of evidence that the merged company had persistently violated it.<sup>24</sup> Last, but not least, is the practice of consistently settling mergers in the same sector. The FTC’s policy of always taking divestitures in challenged pharmaceutical mergers has arguably contributed to a shrinking group of generic manufacturers. Many of these firms are now defendants in federal civil and criminal, state, and private antitrust cases.<sup>25</sup>

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<sup>20</sup> One study finds that almost 70% of mergers studied failed to achieve expected revenue synergies. See, Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, *Where mergers go wrong*, MCKINSEY QUARTERLY (May 1, 2004), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong>.

<sup>21</sup> See, e.g., Melody Wang and Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal From the Start*, PROMARKET.ORG (Apr. 23, 2021), <https://www.promarket.org/2021/04/23/dish-t-mobile-sprint-merger-disastrous-deal-lessons/> and American Antitrust Institute & Public Knowledge, Letter to Acting Assistant Attorney General Richard Powers, Strategic Consolidation, Market Power, and Efficiencies in the Media/Entertainment and Distribution Markets: Implications for Antitrust Reviews of Proposed Mergers (Sept. 2, 2021), [https://www.antitrustinstitute.org/wp-content/uploads/2021/09/AAI\\_PK-Ltr-on-Warner-Media-Disc\\_9.2.21.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2021/09/AAI_PK-Ltr-on-Warner-Media-Disc_9.2.21.pdf).

<sup>22</sup> See, e.g., Anna Marcum, *Failed divestiture: Albertsons is bidding on 36 Haggen stores, including some it used to own*, OREGONLIVE.COM (Jan. 9, 2019), [https://www.oregonlive.com/window-shop/2015/11/albertsons\\_bids\\_on\\_36\\_haggen\\_s.html](https://www.oregonlive.com/window-shop/2015/11/albertsons_bids_on_36_haggen_s.html) and David McLaughlin, Mark Clothier and Sara Forden, *Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned*, BLOOMBERG (Nov. 28, 2013), <https://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned#xj4y7vzkg>.

<sup>23</sup> Federal Trade Commission, Bureau of Competition and Economics, FTC’s MERGER REMEDIES 2006-2012 (2017), [www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100\\_ftc\\_merger\\_remedies\\_2006-2012.pdf](http://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf).

<sup>24</sup> Letter to Assistant Attorney General Makan Delrahim re: Amended Final Judgment: U.S v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc., AMERICAN ANTITRUST INSTITUTE (Feb. 4, 2020), [https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI\\_Ltr-to-DOJ\\_LN-TM\\_F.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf).

<sup>25</sup> See, e.g., Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission’s Merger Policy in the Pharmaceutical Sector*, AMERICAN ANTITRUST INSTITUTE (Sept. 3, 2020).

Alone or together, the foregoing agency practices and policies have very likely decreased the effectiveness of merger enforcement. To the extent the agencies seek to strengthen enforcement, therefore, addressing the risks of settling relatively more challenged mergers—and especially billion-dollar deals—should be a priority. This is particularly true of the FTC, which lags behind the DOJ in flipping its record of settling more mergers that it forces parties to abandon, or seeks to enjoin. Much like for early-stage enforcement, the importance of more granularity in agency reporting on various size categories of billion-dollar mergers would aid significantly in determining their implications for resource allocation and the effectiveness of merger enforcement.

## V. Recommendations

- **Billion-dollar deals are a prominent feature in agency merger review.** Billion-dollar transactions feature centrally in both early-stage and late-stage merger review. They pose significant competitive concerns, agency resource allocation issues, and unique problems around the resolution of challenges, particularly settlements and the consequences of risky remedies. This suggests that the agencies take a very close look at how billion-dollar merger fit into a more vigorous enforcement program, especially as we approach an upswing of mergers.
- **The agencies should study trends around early- and late-stage enforcement.** Analysis shows that while some measures of early-stage enforcement scrutiny are in decline, others indicate that resources are focused on mergers involving billion-dollar acquirers. In light of a rising level of merger challenges, especially for billion-dollar deals, it is important for the agencies to examine the implications of these trends for the allocation of resources, and especially for scrutiny of small to mid-size mergers, which may fly under the enforcement radar.
- **The agencies should document the successes and failures of settlements in billion-dollar mergers.** The agencies' aggregate track record reveals that more mergers are settled than are abandoned, restructured, or enjoined. The outsized role of the billion-dollar mergers in merger challenges and settlements magnifies their significant anticompetitive risks and highlights unrealized efficiencies claims and the risk of remedy failure. As the agencies seek to enjoin more billion-dollar mergers, the FTC should rethink its tendency to settle relatively more mergers than it seeks to enjoin.
- **Agency reporting on billion-dollar deals is out of date and should be reformed soon as possible.** The agencies' practice of including all billion-dollar transactions in a single category masks important information about how different sizes and types such mergers affect agency resource allocation and the effectiveness of enforcement. Moreover, it restricts analysis that relies on publicly available information. Agency reporting should be revised to include multiple categories of transactions above \$1 billion to aid in analysis and increase transparency.
- **Additional resources are necessary to invigorate merger enforcement that is dominated by the billion-dollar deal.** The agencies should engage in planning that recognizes the ongoing role of the billion-dollar merger in the need for enforcement resources. Requests for higher levels of appropriations should be supported by empirical and qualitative analysis of the role of the billion-dollar merger, and why settling mergers has weakened enforcement.