AAI AMERICAN ANTITRUST INSTITUTE

Competition Law Center
THE GEORGE WASHINGTON UNIVERSITY

Rapporteur's Report
"50 Years of HSR: The Past and Future of Premerger Notification"

A Joint Conference of the American Antitrust Institute and the Competition Law Center at the George Washington University Law School (Sept. 30, 2026)

Held on the fiftieth anniversary of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), this conference brought together architects of the HSR Act, former agency officials, practitioners, and international competition experts to assess the past and future of premerger review. All agreed that the HSR Act's introduction of premerger notification and review was revolutionary and largely a success. However, the program also examined persistent challenges with the current system. These challenges include the second request process, interagency clearance, upfront disclosure requirements, rapidly changing digital markets, and procedural divergence among the growing number of jurisdictions reviewing global transactions. Drawing on five decades of experience with HSR and newer approaches abroad, participants considered a range of potential reforms. Some reforms that were discussed involved more targeted initial disclosures, genuine pre-filing consultation, more effective review of second requests, greater transparency in agency decision-making, and greater international standardization of merger-notification requirements.

Opening Remarks

Randy Stutz, President, American Antitrust Institute

AAI President Randy Stutz opened the program by reflecting on the fiftieth anniversary of the Hart-Scott-Rodino Act ("HSR Act") and the relationship between substantive antitrust rights and the procedures necessary to vindicate them. Drawing an analogy to the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, Stutz observed that procedural rules can be inseparable from the substantive Sherman Act rights they are intended to protect, and that procedural barriers can, as a practical matter, prevent a claimant from enforcing a substantive statutory right.

Stutz suggested that the HSR Act raises a related question about the effective vindication of Section 7 of the Clayton Act. Section 7 is an incipiency statute, prohibiting acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The HSR Act's premerger notification and waiting-period requirements provide the procedural mechanism that allows the antitrust agencies to identify and challenge potentially anticompetitive transactions before they are consummated. Stutz observed that it is difficult to imagine how the agencies could fully realize Congress's ambitions for Section 7 without that mechanism. The fiftieth anniversary

of HSR therefore provides an opportunity to consider how the procedural framework created by HSR has become intertwined with the substantive objectives of the Clayton Act.

Bill Kovacic, Professor of Law, George Washington University

William 'Bill' Kovacic opened by placing the Hart-Scott-Rodino Act in its historical context. Kovacic emphasized how different the landscape of merger enforcement was before HSR's enactment in 1976, when the antitrust agencies largely depended on a voluntary notification process to learn about proposed transactions. Kovacic also reflected on the life and legacy of Senator Philip Hart, for whom the Act is partly named. Hart's influence extended well beyond antitrust. Known as the "Conscience of the Senate," he was a prominent advocate for civil rights and consumer protection, supported the Civil Rights Act of 1964, and served as floor manager for the Voting Rights Act of 1965. Against that broader record of public service, Kovacic situated Hart's leadership on antitrust and the legislation that ultimately became the HSR Act as one part of a much larger commitment to protecting individual rights and the public interest.

Fireside Chat with Bernard Nash & Bill Kovacic: The Origins of HSR

Bill Kovacic (Professor of Law, George Washington University, and Former FTC Chairman)

Bernard Nash (Cozen O'Connor; Drafter of the HSR Act as Counsel to the U.S. Senate Antitrust Subcommittee, 1971–77)

Bill Kovacic sat down with Bernard Nash, who helped draft the Hart-Scott-Rodino Antitrust Improvements Act, to discuss Nash's career, the origins of HSR, and the legislative battle that ultimately produced the Act.

Nash's Path to the Senate.

Kovacic began by asking Nash about the path that brought him to the Senate Antitrust Subcommittee.

Nash recalled growing up in New York, becoming the first member of his family to attend college, and initially studying accounting at City College before deciding during his senior year to pursue law. Upon joining the SEC after law school, he gained exposure to competition issues involving regulated industries, including mergers in oil-and-gas and electric-power industries, applying concentration principles under the Public Utility Holding Company Act. Those experiences ultimately brought him to the attention of the Senate.

Origins of HSR.

Kovacic next asked where the idea for the legislation that became the HSR Act originated.

Nash emphasized how fortunate he felt to have worked for Senator Philip Hart, who chaired the Senate Antitrust Subcommittee. The committee initially explored legislation aimed at restructuring

concentrated industries, but Nash and his colleagues eventually concluded that such legislation had little prospect of passage. They instead focused on two problems they believed Congress could realistically address: the difficulty of challenging mergers only after consummation and limitations on state attorneys general seeking to enforce the antitrust laws.

Hart agreed with that assessment, and his staff spent roughly a year developing legislation. Nash recalled that Hart was determined that the project be bipartisan and instructed his staff to recruit a senior Republican supporter. The resulting legislation contained three principal components, including premerger notification, expansion of civil investigative demands, and expanded state enforcement authority.

Nash acknowledged that the initial proposal deliberately contained provisions the drafters expected to surrender during negotiations, giving them room to compromise without sacrificing the legislation's essential objectives. The bill was introduced in March 1975.

Business Opposition and the Senate Filibuster.

Kovacic asked whether the bill's proponents anticipated the intensity of opposition from the business community.

Nash said they did not. Opponents adopted what he characterized as a strategy of delay, producing repeated filibusters and procedural obstacles. Initially, during the committee review process, the minority opposition refused to submit its views for inclusion in the committee report. However, Hart's relationships with Senate leadership helped move the legislation onto the floor.

Once the bill was on the floor, opponents proposed substantive amendments and employed procedural tactics, both of which were designed primarily to consume time. Nash recalled motions to reconsider votes and lengthy amendments that senators insisted be read aloud. Majority Leader Mike Mansfield responded by keeping the Senate in session from early morning until around midnight and limiting other committee business. The confrontation became significant enough that Mansfield discussed changing the Senate's filibuster rules. Ultimately, the Senate passed the legislation 65–19 on June 10, 1976, after more than seventy roll-call votes and numerous additional votes.

Nash also recalled a Senate in which intense disagreement did not necessarily produce personal hostility. Senators and their staffs continued negotiating across party lines even during a bitter legislative fight. He contrasted that institutional culture with the present, suggesting that declining faith in institutions has made such cooperation more difficult.

Compromise and Passage.

As Republican support became less certain, the bill's proponents made several concessions. Most significantly, they abandoned an automatic-stay provision. Nash regarded that as a sensible concession in retrospect, recognizing that automatic government restraints can themselves create problems. Other compromises included changes involving civil investigative procedures and the proposed mechanism for monetary recovery in state antitrust actions.

The House presented a separate challenge. After the Senate legislation began moving, House Judiciary Committee Chairman Peter Rodino and his staff pursued somewhat different versions of its components, initially handling them as three separate bills. The Ford Administration opposed the *parens patriae* proposal, and business opposition helped keep the legislation in the House Rules Committee for months. The House eventually consolidated the measures. There was no formal conference committee or conference report; instead, House and Senate negotiators worked out their differences informally before final passage.

The White House and President Ford.

Nash recalled that the bill's supporters did not know whether President Gerald Ford would sign the legislation. Several White House advisers recommended approval, while at least one recommended a veto. Nash remembered that even the veto recommendation inadvertently underscored the legislation's significance. Ford ultimately signed the bill, allowing Hart—who was gravely ill with cancer—to see the legislation become law before his death in December 1976.

State Enforcement and *Illinois Brick*.

Nash emphasized that Congress understood that the legislation would give state attorneys general substantial new responsibilities at a time when many state offices had little or no dedicated antitrust capacity. Congress therefore separately provided federal assistance that could be used to develop state antitrust enforcement staffs. Nash contrasted those beginnings with the sophisticated antitrust operations now maintained by states such as New York, California, and Colorado.

Asked to reflect on the legislation, Nash identified two principal regrets. Procedurally, he wished the bill's supporters had recognized sooner that much of the opposition was designed simply to consume legislative time. Substantively, he regretted that Congress did not resolve the indirect-purchaser problem that would soon reach the Supreme Court in *Illinois Brick*. Nash recalled trying to secure a federal cause of action to effectively overturn the Court's decision but encountering firm resistance in the House. Although pleased with HSR's accomplishments, he regards the failure to address *Illinois Brick* as unfinished business.

Hart's Final Months and Legacy.

Nash closed by returning to Senator Hart. By the final stages of the legislation, Hart was seriously ill with cancer, and Senate leaders made extraordinary efforts to allow him to continue participating. Nash recalled Hart carrying an airsickness bag because of his illness and Ted Kennedy stepping in physically and legislatively when Hart's condition made it difficult for him to continue. Nash viewed those moments as emblematic both of Hart's determination and of the institutional relationships that helped carry the legislation to enactment.

Hart died shortly after HSR became law. Nash recalled his reputation as the "Conscience of the Senate" and the subsequent naming of a Senate office building in his honor. For Nash, HSR was therefore not simply a technical reform to merger procedure, but part of the broader legislative legacy of a senator with whom he had worked closely during the final years of Hart's life.

Panel 1 – HSR: The First 50 Years

Moderator: Bill Kovacic (Professor of Law, George Washington University, and Former FTC Chairman)

Panelists: Bill Baer (Brookings Institution); Debbie Feinstein (Partner, Arnold & Porter); David Shonka (Former Acting General Counsel, Federal Trade Commission)

William Kovacic moderated a discussion with Bill Baer, Debbie Feinstein, and David Shonka on the implementation and evolution of HSR.

How has HSR evolved in practice?

Kovacic first invited Baer to reflect on the implementation of HSR over his career in government and private practice. Baer began by emphasizing Bernard Nash's importance not only to HSR but also to the development of state antitrust enforcement, suggesting that Nash had understated his own role. Baer then traced his experience with HSR from his early years as an FTC staff attorney through private practice at Arnold & Porter and later government service. He highlighted efforts to make merger review more efficient, including substantially reducing the time DOJ and the FTC spent resolving clearance disputes and improving the administration of the HSR process. Baer also emphasized the importance of complete disclosure, recalling enforcement actions involving parties that failed to disclose material terms of their transactions.

What has HSR taught the agencies about merger remedies?

Turning to Feinstein, Kovacic asked about lessons from the FTC's experience reviewing and remedying mergers. Feinstein stressed the difficulty of restoring competition once the "eggs are mixed," underscoring the importance of effective premerger review. She described the FTC's retrospective study of past merger remedies under Chair Edith Ramirez, which examined whether divested businesses actually remained viable competitors. That work helped the Commission identify shortcomings in earlier remedial practices, including rigid divestiture periods that could allow assets to deteriorate before an effective competitor emerged.

What did HSR change for government litigators?

Kovacic next asked Shonka to reflect on HSR from the perspective of an FTC lawyer working shortly after its enactment. Shonka, who joined the Commission in 1977, emphasized HSR's importance as an evidence-gathering mechanism. Early enforcement required agency lawyers and courts to work through questions concerning the use of materials obtained during premerger investigations. He also recalled matters in which parties threatened to consummate transactions despite agency objections, forcing the Commission to seek expedited judicial relief. Those experiences demonstrated the importance of investigating transactions before consummation rather than attempting to reconstruct competition afterward.

Why are second requests so burdensome?

Kovacic then turned to the operation of the second-request process. Feinstein acknowledged that only a small fraction of HSR filings receive intensive investigation but emphasized that second requests can be extraordinarily burdensome, sometimes requiring production of tens of millions of pages. She attributed some of that breadth to the FTC's institutional structure: staff must ultimately present a matter to five commissioners and therefore tend to request everything that any commissioner might conceivably need to evaluate the transaction. That incentive can produce requests substantially broader than what an individual staff attorney might otherwise consider necessary.

Kovacic and Feinstein then focused on Congress's effort to constrain those burdens. Congress mandated an internal appeals process through which parties can challenge the scope of a second request. Feinstein explained, however, that the mechanism has not worked particularly well in practice and is now rarely, if ever, used. Kovacic agreed that the process had failed to become the meaningful institutional check Congress envisioned. He recalled trying during his own tenure at the FTC to make the appeals process more effective, but the appropriate cases never came before him. Their exchange highlighted a persistent tension in HSR administration: staff face strong incentives to build a record broad enough to satisfy the Commission, while the mechanism Congress created to discipline excessively burdensome requests has largely fallen into disuse.

What is HSR's broader institutional significance?

The panel ultimately returned to the importance of *ex ante* merger review. HSR's effects cannot be measured solely by second requests or litigated challenges. Premerger review can affect transactions before an enforcement action becomes necessary, including by causing parties to abandon or restructure transactions that present significant competitive concerns.

Panel 2 – HSR and Its International Influence

Moderator: Randy Stutz (President, American Antitrust Institute)

Panelists: Hugh Hollman (Honeywell Aerospace); Rachel Brandenburger (University of Oxford); Allan Fels (Former Chair, ACCC)

Randy Stutz moderated a discussion with Hugh Hollman, Rachel Brandenburger, and Allan Fels on the international development of premerger notification and the influence of HSR on merger-control regimes around the world.

What was happening outside the United States when HSR was enacted?

Stutz began by asking the panelists to place HSR in an international context. Brandenburger emphasized how different European merger control looked in the 1970s. The European Community did not adopt a comprehensive merger-control regime until 1989, when it simultaneously established substantive merger rules and procedures for administering them. The European system borrowed important features from HSR, including distinct phases of review and fixed timelines, but differed in fundamental respects: transactions require affirmative clearance

from the European Commission, and the Commission can prohibit a merger administratively, subject to judicial review.

Hollman noted that premerger notification itself predated HSR. Japan adopted a notification regime after World War II as part of the U.S.-influenced restructuring of the Japanese economy, while Germany and other jurisdictions later developed their own notification requirements prior to HSR. What distinguished HSR, he suggested, was a procedural system built around objective thresholds, a fixed waiting period, and meaningful penalties for noncompliance. Hollman emphasized that premerger notification has since become an essential feature of effective merger law because it provides both enforcement capability and predictability for businesses.

Why did premerger notification spread around the world?

The panelists identified globalization and economic liberalization as important drivers of premerger notification internationally. Hollman observed that trade liberalization encouraged countries to adopt competition laws, which in turn created demand for merger-control and notification regimes. Brandenburger emphasized the corresponding need for procedural uniformity: as transactions increasingly crossed borders, divergent regimes created opportunities for forum shopping and imposed greater costs on merging parties.

Fels connected the spread of merger control to the end of the Cold War. As economies privatized state-owned enterprises, policymakers recognized that replacing a public monopoly with a private monopoly would not necessarily produce competitive markets. The development of competition regimes therefore became part of broader economic reform.

The panel highlighted the proposed GE/Honeywell merger as a turning point. U.S. authorities cleared the transaction while European authorities prohibited it, demonstrating that a transaction acceptable to its home regulator could nevertheless be stopped elsewhere. Fels explained that episodes like GE/Honeywell helped spur the creation of the International Competition Network and intensified efforts toward international convergence. Brandenburger added that China's adoption of a comprehensive competition regime in 2008 further complicated global merger review, introducing both another major reviewing authority and geopolitical considerations into multinational transactions.

Has international merger control influenced the United States in return?

Stutz next asked about "reverse influence"—whether the proliferation of foreign merger regimes has changed U.S. practice. Brandenburger contrasted the United States' more prosecutorial, court-centered model with the administrative model used in the European Union and widely adopted elsewhere. Countries designing new systems have generally found the administrative model easier to import, and China's regime, for example, more closely resembles the European model than the American one. International cooperation has nevertheless influenced U.S. enforcement, including by allowing agencies to obtain information and documents gathered in parallel foreign reviews.
Hollman agreed that the world largely adopted HSR's concept of premerger notification without adopting the American institutional structure surrounding it. Most jurisdictions placed merger review primarily in administrative agencies rather than courts. He contrasted those systems, where

the agency generally controls both the timetable and the initial decision, with the United States, where merging parties retain greater control over timing and the government ordinarily must persuade an independent court to stop a transaction. The comparison, he suggested, raises an important question about the value of judicial involvement in U.S. merger enforcement.

Fels pointed to Australia as an especially revealing example. Although Australia's legal traditions resemble those of the United States, it has moved from a more voluntary and court-centered process toward a mandatory administrative regime, bringing it closer to the dominant international model. He attributed the change partly to concerns that the former system allowed strategic behavior by merging parties, including late notification and incomplete disclosure.

Does overlapping enforcement undermine convergence?

Stutz then asked about the American system of overlapping federal and state merger enforcement. Hollman noted an irony: the United States has spent decades advocating international convergence while sometimes struggling to achieve convergence among its own enforcement authorities. Fels warned that the proliferation of reviewing jurisdictions strengthens the case for clear notification requirements and strict deadlines; without them, individual jurisdictions can potentially delay a global transaction and gain leverage over the parties.

The panelists also expressed concern that international enthusiasm for convergence may be weakening. Brandenburger observed that even relatively technical procedural matters continue to vary substantially across jurisdictions, forcing counsel to provide the same underlying information in many different forms. Foreign-investment review and growing protectionist pressures are likely to make coordination still more difficult.

Can notification procedures themselves be harmonized?

Stutz finally turned to thresholds and the design of notification regimes. Hollman described a standardized global notification form as something of a "holy grail." Rather than convergence toward a common filing, jurisdictions have increasingly front-loaded their merger processes with different information requirements. He suggested that developing a standardized set of essential information necessary to begin review would be a valuable project for the International Competition Network.

Hollman also identified HSR's reliance on objective, transaction-based thresholds, rather than market-share thresholds, as one of its major strengths. Market-share triggers require parties to make substantive competitive judgments merely to determine whether they must file. Although some newer regimes continue to incorporate market-share tests, he noted that such thresholds have generally become less attractive.

Brandenburger contrasted mandatory notification with the United Kingdom's traditionally voluntary system. The absence of mandatory notification does not mean the Competition and Markets Authority is passive: the CMA actively monitors transactions, can "call in" mergers for review, and possesses interim powers designed to prevent parties from integrating while a

transaction is under investigation. Recent reforms have also subjected certain transactions involving firms with strategic market status to mandatory requirements under the DMCCA.

Fels explained that Australia ultimately moved away from its voluntary regime after experience revealed its limitations. Parties could notify late, withhold information, or complete transactions without the competition authority learning of them at all. Australia's absence of a mandatory filing system also sometimes left its authority behind foreign agencies reviewing the same global transaction.

The panel concluded by identifying a tension between convergence and experimentation. Greater procedural uniformity could reduce unnecessary burdens on global transactions, but uniform standards also create a risk of convergence around the lowest common denominator. Brandenburger noted that mechanisms such as informal briefing papers can provide businesses with greater predictability even within systems that do not require universal notification. Hollman closed on the broader lesson of fifty years of experience: whatever disagreements remain about the details of merger review, the global spread of premerger notification demonstrates the enormous influence—and, in his view, the fundamental success—of the HSR model.

Panel 3 – Premerger Notification – Future Challenges

Moderator: Barak Richman (Professor of Law, George Washington University)

Panelists: Marianela López-Galdos (Meta); Andrea Murino (Kirkland & Ellis); Sarah Pugh (WilmerHale)

Barak Richman moderated a discussion with Marianela López-Galdos, Andrea Murino, and Sarah Pugh on whether the HSR process remains well suited to modern merger review and how it might be improved.

Is the current HSR process giving agencies the information they actually need?

The panelists generally agreed on the continuing need for premerger notification but questioned whether the current process efficiently serves that purpose. Murino described a disconnect between the burdens imposed on merging parties and the usefulness of the information ultimately provided to agency staff. Parties perform substantial amounts of costly and tedious work, yet the HSR form does not necessarily give agency lawyers the insight they need to evaluate a transaction. She also identified continuing delays in the interagency clearance process, when DOJ and the FTC must determine which agency will review a transaction.

Pugh suggested that some expanded disclosures may nevertheless be valuable, pointing to information concerning foreign investments as an example. López-Galdos likewise saw a mismatch between existing procedures and contemporary business realities. She emphasized the speed of competition in AI and other innovative industries, where delays in obtaining clearance can have significant competitive consequences if rivals are able to move first.

Has front-loading improved merger review?

López-Galdos addressed the recent effort to front-load substantially more information into the HSR filing process, questioning whether requiring more documents and information at the outset actually produces faster or better merger review. The issue has taken on particular significance following the successful challenge to the FTC's 2024 revisions to the HSR Form, which had substantially expanded parties' initial disclosure obligations. López-Galdos emphasized that whether front-loading improves review is ultimately an empirical question: requiring more information at the beginning of the process should not be assumed to produce better results without evidence demonstrating that it does. She argued that genuine pre-filing consultation should instead play an important role in identifying what information agencies actually need. She also raised the unresolved question of how the HSR framework should address new forms of transactions like 'license-and-release' agreements that may not fit comfortably within traditional merger categories.

Is there a consensus on reform?

Richman asked whether the panelists could identify areas of agreement about how HSR should change. Pugh observed that there remains particularly little consensus concerning transactions in digital markets. Richman noted the remarkable stability of the basic HSR framework over nearly fifty years and asked what institutional courage would be necessary to reconsider established practices.

Murino responded that policymakers ultimately need to make choices about what information is actually necessary. In her view, the current form collects substantial information that does not advance the agencies' analysis. Richman added that institutional incentives may contribute to the problem: particularly for junior staff, requesting additional information can feel safer than deciding that information is unnecessary. Murino contrasted that experience with matters handled by experienced DOJ teams, which she suggested can sometimes identify the important issues and move transactions through the process relatively quickly.

What does *Trump v. Slaughter* mean for the FTC?

Richman also asked how changes to the FTC's institutional structure might affect merger review following *Trump v. Slaughter*. The panelists emphasized the uncertainty surrounding that question. Murino pointed to institutional inertia at the FTC, under its five-member commission structure, and questioned how readily the agency will adapt, particularly when compared with foreign competition authorities that may have greater flexibility to change their procedures.

Should the agencies explain their decisions not to challenge mergers?

An audience member asked whether merger review would benefit from something analogous to the Tunney Act—a requirement that the agencies provide greater public explanation for their clearance decisions. The panelists expressed broad agreement that greater explanation would be valuable. At the same time, they acknowledged the practical tradeoff: requiring detailed statements explaining clearance decisions could itself consume agency resources and further delay the merger-review process.

The discussion ultimately returned to a recurring theme: the case for premerger notification remains strong, but the process may need reform. The challenge, then, is designing a process that gives agencies the information and time necessary for meaningful review without imposing costs and delays that do little to improve enforcement.

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