Institutional Factors Contributing to the Under-Enforcement of Merger Law

Robert B. Bell and Amanda L. Butler

A past chair of the ABA's Antitrust Law Section observed "a sense even in many of the mainstream segments of the antitrust community that there has been a degree of under-enforcement of antitrust laws especially in merger control,"[1] and a former Antitrust Division chief economist has written that "[t]he clearest area where antitrust enforcement has been overly lax is the treatment of mergers."[2] Federal Trade Commissioners,[3] authors of merger retrospectives,[4] prominent antitrust scholars,[5] and a former Director of the FTC's Bureau of Economics,[6] among others, have voiced similar concerns.

This article focuses on the process by which the antitrust agencies review mergers as a source of weakness in merger enforcement. We identify three aspects of that process that have contributed to a weakening of merger control in the United States: (1) unreported transactions that go unreviewed; (2) transactions that are reported but overlooked, that is, transactions presenting significant antitrust issues that the agencies fail to detect because the issue is not apparent from the parties' Hart-Scott-Rodino filings or readily available public information; and (3) transactions that should be challenged but are not because the agencies do not have the resources to do so. We propose modest changes to remedy each of these problems.

Most of what has been written about under-enforcement of merger law addresses the standards the agencies and courts use to review potentially anticompetitive mergers. One view is that

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1 John Briggs, Panel One: "Populist" Antitrust: A Deviant Mutation or an Overdue Correction?, Where is Antitrust Policy Going? 6th Bill Kovacic Antitrust Salon at 14 (Sept. 24, 2018), https://www.concurrences.com/IMG/pdf/gw_2018_transcript.pdf?45015/703f2bc4fbb704598db8ce5cb3b8e54cf7b8abc8.

2 Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persp., Summer 2019, at 69, 70.

3 Darren S. Tucker & Thomas Bohnett, *The Antitrust Divergence at the FTC: Beyond Vertical Mergers*, Antitrust, Summer 2019, at 37, 38 (describing the remarks of Commissioners Chopra and Slaughter).

4 *See, e.g.*, Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium (Sept. 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf ("Merger retrospectives by FTC economists and others are advancing our understanding of the impacts of recent merger enforcement policy. One can certainly read that body of work as indicating under-enforcement.") (footnote omitted); Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers—Evidence from Consummated Mergers*, 57 J.L. & Econ. S67 (2014); John E. Kwoka, Jr., *Does Merger Control Work: A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 Antitrust L.J. 619 (2013); John E. Kwoka, Jr., Mergers, Merger Control, and Remedies in the United States: A Retrospective Analysis (2015).

5 Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 127–39 (2018); Einer Elhauge, Panel One: "Populist" Antitrust: A Deviant Mutation or an Overdue Correction?, Where is Antitrust Policy Going? 6th Bill Kovacic Antitrust Salon at 20, Concurrences (Sept. 24, 2018), https://www.concurrences.com/IMG/pdf/gw_2018_transcript.pdf?45015/703f2bc4fbb704598db8ce5cb3b8e54cf7b8abc8.

6 Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy (2019).

the structural presumption—the presumption that mergers between competitors that significantly increase concentration in a properly defined market are likely to harm competition—has become weaker as courts place more emphasis on direct evidence of competitive harm and less emphasis on market concentration, making it more difficult for the government to block mergers.[7] Others have criticized the emphasis that agencies and courts place on consumer welfare and economic efficiency, arguing that broader tests that account for a variety of other factors should be considered as well.[8] Another view is that merger reviews have become so complicated that district court judges do not understand them, which favors the private parties and makes the reviewing agency more reluctant to challenge a merger unless it is highly confident of prevailing in court.[9] Most likely, some combination of these factors is at play.[10]

While these are important issues, the institutional aspects of the merger review process that we discuss have largely been overlooked as contributing factors to the under-enforcement of merger law. Even if changes were made to substantive merger law that led to more successful government challenges to mergers, these changes would have little or no effect on a large number of potentially anticompetitive mergers. The agencies exercise very little scrutiny over transactions that fall below the Hart-Scott-Rodino reporting thresholds, so it is difficult to see how changes in the substantive standards would have any significant effect on those transactions. Similarly, changing legal standards would not alter the number of potentially anticompetitive transactions that are inadvertently overlooked. And most importantly, changing legal standards would not enable the agencies to issue more Second Requests. Because the agencies are capacity constrained, they generally do not issue Second Requests except in those cases in which they conclude after their initial 30-day review that a challenge is highly likely, thus allowing closer cases to slip through, since transactions that do not receive a Second Request are not challenged in court and are not subject to consent decrees. For these reasons, the changes in substantive legal standards many scholars have advocated would only solve part of the problem of under-enforcement.

Transactions Below the HSR Reporting Thresholds

When the statutory size-of-person and size-of-transaction tests are met, the Hart-Scott-Rodino Act requires parties to a proposed acquisition of voting securities, assets, or other non-corporate interests to file notification with the FTC and the Department of Justice prior to consummation. The parties must then observe a 30-day waiting period (15 days for cash tender offers and bankruptcy sales) before they may consummate the transaction. If one of the agencies issues a Second Request—a detailed set of interrogatories combined with requests for a large amount of documents and data—the waiting period is extended until 30 days after the parties substantially comply with the Second Request, something that in practice can take several months.

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[7] Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale L.J. 1996, 2007–08 (2018).

[8] *See, e.g.*, Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 Harv. L. & Pol'y Rev. 235, 237 (2017).

[9] Elhauge, *supra* note 5, at 20, 22; Flavia Fortes, *DOJ Chose Novelis Arbitration due to Concerns About Courts' Efficiency, Economics Knowledge, Delrahim Says*, Mlex (Apr. 24, 2020).

[10] One result of this debate is that 12 prominent economists and law professors have suggested that Congress enact legislation that would overturn numerous federal court antitrust decisions and relax evidentiary burdens. Jonathan B. Baker et al., *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets* (Apr. 30, 2020), https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.

The legislative history of the HSR Act makes clear that its purpose is to provide the antitrust agencies with the opportunity to review and, if appropriate, challenge acquisitions prior to consummation.[11] This avoids the problem of "unscrambling the eggs"—constructing effective post-acquisition relief is more difficult if the parties have already merged. It also gives the agencies greater ability to prevent consumer harm by challenging acquisitions before the harm occurs.

When the HSR size-of-transaction threshold was raised from $15 million to $50 million in 2001,[12] it resulted in a sharp decrease in the number of transactions that triggered HSR filings. In the five fiscal years prior to 2001, the agencies received an average of 3,993 filings per year. After the thresholds were raised, filings dropped by over 50 percent to an average of only 1,414 filings per year for the five fiscal years from 2002 to 2006.[13]

While it is impossible to know for certain how many more post-2001 transactions would have been challenged had the filing threshold not been increased, some approximation is possible. We can estimate the number of transactions valued below $50 million that were challenged when such transactions were reportable: in the five fiscal years prior to the 2001 threshold change, about sixteen such transactions were challenged each year.[14]

Following the change, the agencies have challenged a much smaller number of now non-reportable transactions. From 2001 to 2010 the agencies challenged only 22 non-reportable transactions—an average of little over two per year—and from 2011 to 2020 they challenged 19, slightly fewer than two per year.[15] This suggests that the agencies have recently challenged a much smaller number of transactions below $50 million than they did prior to the change.

The agencies monitor newspapers and industry publications for announcements about below-the-threshold transactions, and they investigate complaints they receive from customers and competitors.[16] But inevitably many problematic non-reportable transactions escape their notice. There is no requirement that acquisitions by privately held companies be publicly announced. Public corporations are required to disclose transactions only if they are material, and many below-the-threshold transactions are not material to large public companies. Acquiring companies are well

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[11] *See, e.g.*, S. Rep. No. 94-803, pt. 1, at 7–8 (1976); H.R. Rep. No. 94-1373, at 3 (1976).

[12] 15 U.S.C. § 18a (Pub. L. 106-553, § 1(a)(2) [title VI, § 630(a)], amending subsec. (a)).

[13] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2011, at 1 fig.1 [hereinafter FTC & DOJ HSR Annual Report FY].

[14] The agencies report in their statistics on merger challenges the number of Second Requests issued, by transaction size, but do not classify their merger challenges—suits filed to block transactions, transactions where relief was obtained via a consent decree, and transactions that were abandoned or restructured as a result of concerns voiced during an agency's investigation—by size of transaction. During the five fiscal years prior to the 2001 threshold change, the agencies issued 555 Second Requests. About 25% of those (137) were in transactions where the value of the transaction was below $50 million. *See* FTC & DOJ HSR Annual Report FY 2005, at app. A; *see also* FTC & DOJ HSR Annual Report FY 2000, at app. B, table II; FTC & DOJ HSR Annual Report FY 1999, at app. B, table II; FTC & DOJ HSR Annual Report FY 1998, at app. B, table II; FTC & DOJ HSR Annual Report FY 1997, at app. B, table II; FTC & DOJ HSR Annual Report FY 1996, at app. B, table II. During this same time period of fiscal years 1996–2000, the agencies challenged 357 mergers, indicating that about two-thirds (64 percent) of Second Requests resulted in merger challenges. *See* FTC & DOJ HSR Annual Report FY 2000, at 1–2; FTC & DOJ HSR Annual Report FY 1999, at 2–3; FTC & DOJ HSR Annual Report FY 1998 (unpaginated); FTC & DOJ HSR Annual Report FY 1997 (unpaginated); FTC & DOJ HSR Annual Report FY 1996, at 1–2. Applying that percentage to the number of Second Requests for transactions with a value of less than $50 million provides a rough approximation of the number of those transactions that were challenged—about 81 transactions in total or roughly sixteen transactions per year.

[15] *See* Appendix, Figure 4.

[16] *See, e.g.*, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity, Remarks Before ABA Antitrust Section Annual Meeting (Aug. 7, 2001), https://www.ftc.gov/public-statements/2001/08/antitrust-enforcement-federal-trade-commission-word-continuity.

aware that post-closing conduct can affect the likelihood of an investigation, so they tend to avoid actions that may cause customers to complain to the agencies.[17]

There are two additional reasons why the change in the size-of-transaction threshold has led to more anticompetitive mergers each year than the roughly 16 transactions per year that were challenged before the Amendment.

First, the Amendment provided that beginning in 2004, all dollar-based thresholds in the HSR Act would be indexed to changes in the gross national product. As a result, the size-of-transaction test is now $94 million; the threshold would be $76.4 million had it been indexed to the Consumer Price Index.[18] It is by no means a perfect comparison, but it is telling that in the five years before the change in the size-of-transaction threshold, 38 percent of Second Requests were issued in reported transactions below $100 million.[19]

Second, after the first full year of operation of the HSR premerger notification program, the FTC reported to Congress in 1979 that it is "possible that the inception of the premerger notification program itself has deterred companies from entering into merger agreements which might violate the antitrust laws because of the parties' awareness that their transactions will be subjected to more careful scrutiny than in the past."[20] There is now evidence that the converse is true: raising the size-of-transaction threshold appears to have led to an increase in horizontal mergers below the filing threshold in direct response to a reduction in enforcement activity.[21] This is not a surprising result: it is common sense that as the probability of being subject to an enforcement action falls, the likelihood that direct competitors will merge increases. Indeed, it appears the current situation may be the exact outcome that Attorney General Janet Reno cautioned Congress about during considerations on raising the threshold, noting that if an increase

> did in fact cause anticompetitive transactions to escape HSR review, antitrust enforcers would spend additional resources to find out about—and then investigate—those transactions. It may well be significantly more costly—not only to the government but to the parties and, most importantly, consumers—to investigate and remedy those anticompetitive transactions than it would be utilizing HSR as a premerger investigative tool.[22]

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[17] *See* Rebecca Farrington et al., *Below-Threshold Transactions: Enforcement and Exposure*, White & Case (Nov. 11, 2015) (advising that in below-the-threshold transactions, "it is prudent to avoid rapid and sudden price increases in the first year after closing, particularly if they are not tied to cost increases").

[18] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Apr. 24, 2020) (using the Consumer Price Index to inflate $50 million in January 2000 dollars to March 2020 dollars).

[19] During the five years prior to the 2001 threshold change, the agencies issued 555 Second Requests; 210 or 38% were in transactions valued at less than $100 million. *See supra* note 14.

[20] Fed. Trade Comm'n, Hart-Scott-Rodino Annual Report Fiscal Year 1979, at 8.

[21] Thomas G. Wollman, *Stealth Consolidation: Evidence From an Amendment to the Hart-Scott-Rodino Act*, 1 Am. Econ. Rev.: Insights 77, 79, 87 (2019). (In the ten years following the amendment, there was a significant increase in newly exempt horizontal mergers (253 to 354 per year); when an HSR filing is not required, "direct competitors are much more likely to merge.").

[22] *Dep't of Justice Fiscal Year 2000 Budget Oversight: Hearing before the Committee on the Judiciary, United States Senate*, S. Hrg. 106-276, 106th Cong. 49 (Mar. 12, 1999) (responses of Janet Reno, Att'y Gen). FTC Chairman Robert Pitofsky raised similar concerns about the proposal to raise the filing threshold to $35 million, noting that "any savings from not reviewing the smaller transaction would be offset to some degree by the greater resources needed to identify anticompetitive mergers in the smaller size range that would no longer be reported," concluding that the exclusion of smaller mergers from reporting requirements "would [not] significantly decrease the agency's workload." *Prepared Statement of the Fed. Trade Comm'n Presented by Robert Pitofsky, Chairman on FY 2001 Appropriations Before the Committee on Commerce, Justice, State, Judiciary, and Related Agencies of the Appropriations Committee, United States Senate* 12 n.11 (Apr. 6, 2000).

While it may be politically impossible to turn back the clock and reduce the size-of-transaction threshold, at a minimum the current threshold should be frozen instead of allowing it to continue to climb . . . .

Transactions under $94 million that can have anticompetitive effects include, for example, transactions in specialized national markets, such as medical devices,[23] pharmaceuticals,[24] and semiconductors; transactions in local markets, such as hospitals and clinics,[25] grocery stores, and funeral homes; and so-called killer acquisitions,[26] where incumbent firms acquire innovative firms to shut them down and preempt future competition from them—or to internalize the value of their innovations. Earlier this year, the FTC announced a retrospective study of all non-reportable acquisitions by five leading technology companies—Alphabet (including Google), Amazon, Apple, Facebook, and Microsoft—during the decade beginning 2010, noting the study would aid its considerations of "whether additional transactions should be subject to premerger notification requirements."[27]

An article about killer acquisitions shows that in the pharmaceutical industry, incumbents' acquisitions of targets with drug development projects in the same therapeutic class that use the same mechanism of action, which the authors call overlapping acquisitions, cluster just below the HSR reporting threshold, while non-overlapping transactions do not, suggesting that incumbents intentionally conduct more killer acquisitions in non-reportable transactions where they can expect to avoid antitrust scrutiny.[28] Another recent paper found that more than 80 percent of acquisitions of kidney dialysis facilities that would result in local monopolies were blocked when they are part of reportable transactions, but less than 2 percent were blocked when the transactions were not reportable.[29]

While it may be politically impossible to turn back the clock and reduce the size-of-transaction threshold, at a minimum the current threshold should be frozen instead of allowing it to continue to climb, and the agencies should dramatically increase their efforts to identify and challenge transactions below the threshold that violate Section 7.

A better solution would be to amend the HSR Act to lower the size-of-transaction threshold to $50 million but to have the FTC amend its HSR regulations to permit a new short-form filing for transactions between $50 and $100 million. The 2001 Amendment was enacted because the thresholds had not been adjusted for 25 years and there was a feeling that the premerger notification

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[23] *See, e.g.*, Compl., Otto Bock HealthCare North America, Inc., FTC Docket No. 9378 (Dec. 20, 2017); Compl., Hologic, Inc., FTC Docket No. C-4165 (Aug. 9, 2006).

[24] *See, e.g.*, Compl., Valeant Pharma. Int'l, Inc., FTC Docket No. C-4602 (Feb. 8, 2017); Compl,, FTC et al., v. Mallinckrodt ARD Inc. et al., 1:17-cv-00120 (D.D.C. Jan. 25, 2017).

[25] *See, e.g.*, Compl., Keystone Orthopaedic Specialists LLC & Orthopaedic Specialists of Reading, LTD., FTC Docket No. C-4562 (Dec. 18, 2015); Compl. for Perm. Inj., FTC v. St. Luke's Health Sys., Ltd., 1:13-cv-00116 (D. Idaho Mar. 26, 2013); Compl., United States v. Twin Am., LLC, No. 12-cv-08989 (S.D.N.Y. Dec. 11, 2012).

[26] *See, e.g.*, Compl., Össur Hf, FTC Docket No. C-4712 (Apr. 7, 2020) (alleging that the U.S. myoelectric elbow market is highly concentrated and that Össur, the acquiring party, which was developing its own myoelectric elbow market, would likely compete with the acquired entity absent the proposed acquisition); Compl. for TRO and Prelim. Inj., FTC v. Steris Corp., 1:15-cv-01080 (N.D. Ohio June 4, 2015), Compl., Steris Corp., FTC Docket No. 9365 (May 29, 2015) (alleging that the proposed merger with Synergy, characterized as a significant competitor in markets outside the United States and an actual potential entrant to the U.S. market, would significantly reduce competition in the market for x-ray sterilization services).

[27] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp. (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[28] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions* 40–41 (Wash. Ctr. for Equitable Growth, Working Paper, Apr. 2020), https://equitablegrowth.org/working-papers/killer-acquisitions/. One such non-reportable transaction—which was challenged by the FTC—was Mallinckrodt's acquisition of development rights for Synacthen; after obtaining the rights, Mallinckrodt stopped developing Synacthen in favor of its own drug for treating infantile spasms. *See id.* at 1. The authors estimate that 46 to 63 acquisitions per year (5.3% to 7.4% of pharmaceutical transactions) are killer acquisitions. *See id.* at 47.

[29] Thomas G. Wollman, *How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare* 5 (NBER Working Paper No. 27274, May 2020), https://www.nber.org/papers/w27274.

process was imposing undue delay and burden on small transactions. Allowing a short-form filing for smaller transactions would balance the need for enforcement against the burden on merging parties in those smaller deals if the HSR threshold were reduced.[30]

For those smaller transactions below $100 million, the filing fee could be eliminated or substantially reduced, and the parties would only have to fill out a simplified Notification and Report Form that calls for the most basic information. This might include a description of the transaction, the location of the parties' facilities, and the North American Industrial Classification System (NAICS) codes in which the parties derived revenues in their most recent fiscal year. The initial waiting period for these smaller transactions could also be reduced from 30 days to 15 days, which could be extended to for an additional 30 days if the agencies issue a voluntary request for more information. This would provide the agencies with notice and an opportunity to investigate transactions that may impermissibly reduce competition while imposing a minimal burden on the merging parties.[31]

Problematic Transactions that Are Reported but Overlooked

One reason problematic transactions are overlooked is that the HSR Notification and Report Form does not directly ask whether the parties compete with each other.

Although it does not happen often, occasionally the parties will submit HSR filings for a transaction that raises significant antitrust issues under the existing merger guidelines and enforcement policies, yet the waiting period will expire or the parties will be granted early termination without the agencies contacting the parties or conducting an investigation. As we discuss below, the agencies are capacity constrained. However, the scenario we just described does not appear to be driven by capacity constraints. If it were, it seems likely the staff would issue access letters[32] to gather more information about the transaction and the harm it could potentially cause in order to decide whether it merits a Second Request. Instead, we think that occasionally the staff fails to detect a problematic transaction because there is nothing in the Hart-Scott-Rodino filings or publicly available information suggesting the transaction is problematic.

In our experience, the agencies do not fail to scrutinize large transactions or transactions in key sectors, such as food, energy, and health care, but inevitably there are some transactions in other less visible industries presenting substantive issues that appear to go unnoticed by the agencies. Sometimes the agencies catch their mistakes and bring a post-closing challenge to a transaction that was reported, but that is very rare (only five times in past two decades).[33]

One reason problematic transactions are overlooked is that the HSR Notification and Report Form does not directly ask whether the parties compete with each other. The two items on the

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[30] While the agencies have challenged transactions valued under $50 million, a $50 million filing threshold represents an appropriate tradeoff between not burdening small transactions yet catching many problematic transactions that currently go unreported.

[31] This proposal is more consistent with the current HSR Form, and a more modest and relevant additional burden, than Professor Fiona Scott Morton's proposal. *See Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets, Hearing before the House Committee on the Judiciary: Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship* 116 Cong. Sess. 1 & 2 (Mar. 7, 2019) (testimony of Fiona Scott Morton, Professor, Yale School of Management) (proposing, for mergers valued at $2 million to $20 million, a requirement to list zip codes of all customers and a method of identifying industry that relies on a drop-down menu rather than NAICS codes).

[32] An access letter is not a Second Request; it is a request issued during the initial waiting period asking the parties to voluntarily provide information, such as named customers and competitors, sales information, geographic market information, market share information, and strategic marketing plans. *See* Fed. Trade Comm'n, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents; DOJ, Model Voluntary Request Letter, https://www.justice.gov/atr/page/file/1111341/download.

[33] *See, e.g.*, United States v. Parker-Hannifin Corp., 1:17-cv-01354-UNA (D. Del. Sept. 26, 2017); Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 420–21 (5th Cir. 2008); FTC v. Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Feb. 10, 2004); FTC v. Hearst Trust, Civ. No.1:01CV00734 (D.D.C. Dec. 14, 2001); Compl., Airgas, Inc., FTC Docket No. C-4029 (Dec. 12, 2001).

Form that provide the most information relevant to antitrust analysis are Item 4(c), which requires the submission of all "studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets" and Item 7, which requires parties to list any six-digit NAICS code in which both parties to the transaction derive revenues.

In contrast, Form CO, which is the form used for pre-merger filings with the European Commission and is the model for pre-merger filing forms used in many other jurisdictions, requires parties to provide detailed information about competition between the filing parties. This includes the requirement to state the economic rationale for the transaction (Section 3.2), define the relevant product and geographic markets and explain which are likely to be affected by the transaction (Section 6), and provide market share and capacity estimates (Section 7).

Standing alone, the HSR Notification and Report Form is often not a reliable guide to whether a transaction raises serious antitrust issues. First, well-counseled companies do not create bad Item 4(c) documents—that is, documents that convey the impression that a transaction raises antitrust issues. Second, Item 7 is not always a reliable source of information. Two competitors may legitimately report their revenues under different NAICS codes; in that case Item 7 will not disclose any overlap. Third, many of the six-digit NAICS codes encompass broad industry segments. This can make it difficult to discern how closely two companies compete. For example, two relatively small companies seeking to merge could both derive revenues in a NAICS code such as 332722, Bolt, Nut, Screw, Rivet and Washer Manufacturing, where numerous large competitors derive revenue and the merging parties' revenue is therefore only a very small percentage of the total revenue all companies reported in that code. This could suggest to a busy agency staffer reviewing the filing that the transaction raises no issues. However, the merging parties could be close competitors in a niche with few other competitors, such as the supply of titanium fasteners to airframe manufacturers.

Of course, staff attorneys at the DOJ and FTC do not rely solely on HSR filings to decide whether a transaction warrants scrutiny. They typically review the merging parties' websites and other publicly available information, rely on industry expertise they have developed, and in some cases may have access to relevant information from agency files on other transactions. Nevertheless, these sources may not always reveal antitrust problems in transactions that have them. The resulting error rate, even if already low, could be reduced by simple changes. Without creating the burdens Form CO imposes, the HSR Form could be revised to require the parties to a transaction to disclose whether they are, in fact, direct horizontal competitors. This could be accomplished with a simple question such as, "Do the parties to the transaction compete against each other?" If the parties answer yes, the form could require them to identify the products and geographic areas in which they compete.

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Limited Resources

Although the agencies' caseload has increased, their resources have not. In its most recent budget request the Antitrust Division stated that "between FY2013 and FY2019, the number of mergers the Division reviewed annually increased by more than 50 percent, from 1,326 in FY2013 to 2,091 in FY2019." The Division also reported that "[t]he number of mergers per year valued at more than $1 billion has also increased dramatically, from 128 in FY2010, to 225 in FY2014, to 284 in FY2019."[34] Yet from FY2013 to FY2019 the total number of employees at the two agencies charged with enforcing the merger laws likely fell and almost certainly did not increase.

[34] Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2021 Performance Budget 47 (2020).

The Federal Trade Commission's budget documents show how many employees are assigned to discrete tasks. In FY2013 a total of 209 fulltime equivalents (FTEs) were assigned to premerger notification, merger and joint venture enforcement, and merger and joint venture compliance.[35] In FY2019 there were 211 FTEs assigned to the same tasks.[36] The Antitrust Division does not provide similar detail. Instead, it reports that approximately 60 percent of its FTEs are assigned to civil enforcement and 40 percent to criminal enforcement.[37] The number of civil enforcement FTEs includes employees assigned to merger enforcement, as well as those assigned to civil non-merger enforcement and those who work on both. It therefore overstates the resources available for merger enforcement and masks any shift of resources between merger enforcement and civil non-merger enforcement.[38] In any event, the number of FTEs at the Antitrust Division devoted to civil enforcement dropped from 392 in FY2013[39] to 344 in FY2019.[40]

It is striking that during a period when reported mergers increased by over 50 percent, the number of agency personnel devoted to merger control likely decreased, perhaps substantially at the Antitrust Division. But it is even more striking when one looks back a further ten years and sees that the resources available for merger enforcement in 2013 were already substantially less than they were in 2003, even though there were more reportable transactions in 2013.

Figure 1

Year	No. of Reportable Transactions[41]	FTC Merger-focused FTEs[42]	Antitrust Division Civil FTEs[43]	Total FTEs
FY 2003	1,014	244	553	797
FY 2013	1,326	209	392	601
FY 2019	2,091	211	344	555

[35] Fed. Trade Comm'n, Fiscal Year 2014 Congressional Budget Justification 43 (Apr. 10, 2013).

[36] Fed. Trade Comm'n, Fiscal Year 2020 Congressional Budget Justification 45 (Mar. 11, 2019).

[37] *See, e.g.*, DOJ, Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2020 Performance Budget 15 fig.3 (2019).

[38] We assume that there has been no significant shift of resources between merger and civil non-merger enforcement because the Antitrust Division has not announced any such shift. These figures also predate the Antitrust Division's 2020 hiring spree for additional civil enforcement staff in conjunction with its announced investigation into Alphabet's Google and other technology companies. *See, e.g.*, Diane Bartz, *U.S. Justice Dept. Adds Antitrust Staff Amid Big Tech Probes—Sources*. Reuters (Jan. 27, 2020), https://in.reuters.com/article/uk-tech-antitrust-hiring/u-s-justice-dept-adds-antitrust-staff-amid-big-tech-probes-sources-idINKBN1ZQ23Y.

[39] Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2015 Performance Budget 25 (2014).

[40] Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2021 Performance Budget 24 (2020). A more conscribed analysis of Antitrust Division staffing across the six civil units, encompassing both merger and non-merger enforcement staff, found that the number of staff named in the Antitrust Division's directories decreased by 13% in the two years following February 2017. *See* Kadhim Shubber, *Staffing at Antitrust Regulator Declines Under Donald Trump*, Forbes (Feb. 7, 2019), https://www.ft.com/content/cf1ed2a6-2619-11e9-b329-c7e6ceb5ffdf.

[41] Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2021 Performance Budget 47 (2019) (providing the number of reportable transactions for 2019 and 2013); FTC & DOJ HSR Annual Report FY 2012, at app. A (providing the number of Reportable Transactions for 2003).

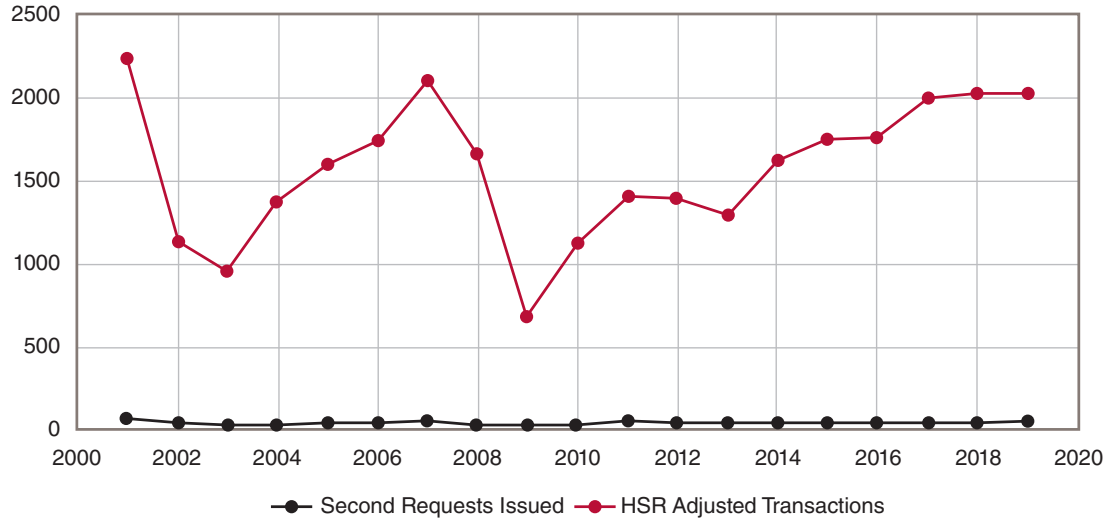
[42] Fed. Trade Comm'n, Fiscal Year 2020 Congressional Budget Justification 45 (Mar. 11, 2019); FTC, Fiscal Year 2014 Congressional Budget Justification, 43 (Apr. 10, 2013); FTC, Fiscal Year 2004 Congressional Budget Justification, 16 (2003).

[43] Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2021 Performance Budget 24 (2019); Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2015 Performance Budget 25 (2013); Antitrust Div., U.S. Dep't of Justice, Congressional Submission FY2004 Performance Budget 26 (2003). Note that the estimate for Division FTEs is an estimate based on the FY2004 budget, as a copy of the Congressional Submission for FY2005, which would have reported on actual FTEs in 2003, could not be located. The calculation of 553 FTEs is based on the projected FY2003 headcount, under the budget for that year as enacted and revised.

A paucity of resources for merger enforcement is not a new phenomenon. In 1976, Richard Posner observed that "appropriations for antitrust enforcement have been parsimonious in relation to the universe of potential antitrust suits" and "the merger guidelines are a good example of how an antitrust enforcement agency subject to a budget constraint . . . forces the agency to bring far fewer cases than it could win."[44]

That the agencies are constrained in their merger enforcement efforts is further illustrated by the number of Second Requests they have issued and the number of mergers they have challenged. One would expect that as merger activity increases, enforcement activity would also increase. This was the case from 1993 to 2002: merger activity and merger enforcement were highly correlated.[45] However, it has not been the case in recent years.

Figure 2
Comparison of Second Requests Issued to Transactions in Which Issuance Was Possible



As this graph and the following table show, the rate of issuance of Second Requests has stayed relatively constant since 2009, while the number of merger filings, even with the HSR thresholds increasing every year, has grown almost three-fold.

[44] Richard A. Posner, Antitrust Law: An Economic Perspective 276 (2d ed. 2001).

[45] Am. Enterprise Inst., *The State of Antitrust Enforcement and Competition in the U.S.* 2 n.5 (Apr. 14, 2020).

Figure 3

Fiscal Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Second Request-Eligible Transactions[46]	684	1128	1414	1400	1286	1618	1754	1772	1992	2028	2030
Second Requests[47]	31	42	55	49	47	51	47	54	51	45	61
Percent of Second Requests Issued[48]	4.5%	3.7%	3.9%	3.5%	3.7%	3.2%	2.7%	3.0%	2.6%	2.2%	3.0%
Merger Challenges[49]	31	41	37	44	38	33	38	47	41	39	38
Percent of Transactions Challenged	4.5%	3.6%	2.6%	3.1%	3.0%	2.0%	2.2%	2.7%	2.1%	1.9%	1.9%

For the nine fiscal years from FY2011 to FY2019, the agencies issued between 45 and 61 Second Requests each year and challenged between 31 and 47 mergers each year, regardless of the number of transactions they reviewed. When the number of reported transactions increased the number of Second Requests and merger challenges did not increase significantly, suggesting that the maximum number of Second Requests the agencies can issue given their current staffing is around 55 to 60 per year, which yields about 40 to 45 merger challenges, at most. Comparing FY2010 and FY2018, there were 900 more Second Request-eligible transactions in 2018 than in 2010, yet the number of Second Requests issued in both years and the number of merger challenges were both virtually the same. Unless one believes that none of the additional 900 mergers in 2018 raised substantial antitrust issues, this is cause for concern. There were also about 900 more Second Request-eligible transactions in 2019 than in 2010. Although more Second Requests were issued in 2019, there were fewer merger challenges in 2019 than in 2010. Moreover, ten of the Second Requests in FY2019 related to the Antitrust Division's probe of mergers in the cannabis industry. It has been alleged that these Second Requests involved only cursory investigations, and in any event none of them resulted in a merger challenge.[50] In short, despite a marked increase in HSR-reported mergers from 2010 to 2019, the number of mergers challenged by the agencies has not increased.

Even if the number of mergers had not increased substantially over time, the agencies would need more staffing. As transactions have grown larger and email has proliferated, Second Requests have yielded vastly more documents for staff to review and analyze, and merger investigations and litigation have become more resource intensive. In addition, the issues raised by many

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[46] FTC & DOJ HSR Annual Report FY 2018, at 6 fig.2, app. A; FTC & DOJ HSR Annual Report FY 2019, at 6 fig. 2, app. A. These adjusted figures omit from the total number of transactions reported transactions for which the agencies were not authorized to issue a second request.

[47] FTC & DOJ HSR Annual Report FY 2018, at app. A; FTC & DOJ HSR Annual Report FY 2019, at app. A.

[48] FTC & DOJ HSR Annual Report FY 2018, at 6 fig.2; FTC & DOJ HSR Annual Report FY 2019, at 6 fig. 2.

[49] FTC & DOJ HSR Annual Report FY 2019, at 2; FTC & DOJ HSR Annual Report FY 2018, at 2–3; FTC & DOJ HSR Annual Report FY 2017, at 2; FTC & DOJ HSR Annual Report FY 2016, at 2; FTC & DOJ HSR Annual Report FY 2015, at 2; FTC & DOJ HSR Annual Report FY 2014, at 2; FTC & DOJ HSR Annual Report FY 2013, at 2; FTC & DOJ HSR Annual Report FY 2012, at 2; FTC & DOJ HSR Annual Report FY 2011, at 2; FTC & DOJ HSR Annual Report FY 2010, at 1–2; FTC & DOJ HSR Annual Report FY 2009, at 1–2.

[50] Testimony of John W. Elias, U.S. House Committee on the Judiciary, June 24, 2020, at 4–5 (asserting that the investigations did not include "interviews of customers or competitors," as "staff were instructed not to conduct interviews," and that few documents provided in response to subpoenas "were viewed by Division staff," with records in one case "show[ing] that the investigation closing process began before the documents had been uploaded and made available for viewing by Division staff."). *But see* Letter of Makan Delrahim to Representatives Jerrold Nadler and Jim Jordan (July 1, 2020) (noting that the DOJ's Office of Professional Responsibility had closed its investigation into allegations of improper conduct in evaluating cannabis mergers).

mergers, especially in many technology sectors, are now much more complicated than they were in the days when the economy was dominated by older manufacturing industries and by simpler wholesale and retail distribution systems. Companies now also generate much more computerized data about their business than ever before, giving the agencies' economists more data they need to analyze than in years past.

Although the agencies do not publish statistics showing the volume of documents produced in response to Second Requests, there is anecdotal evidence that the size of Second Request productions is increasing over time.[51] According to the head of the Antitrust Division, "in this electronic age, merging parties frequently maintain enormous quantities of data and documents. It takes longer for the parties to produce them, and it takes longer for the enforcement agencies to analyze them."[52]

There are also indications that the size of government merger trial teams has increased substantially.[53] It appears that larger teams are needed because transactions are getting larger[54] and the complexity of merger trials is increasing, particularly as the economic analysis put forward by the parties has become more sophisticated.[55]

The first two issues identified in this article as contributing to the under-enforcement of merger law—transactions below the threshold and transactions that are reported but overlooked—are closely related to the resource constraints that the agencies face. When the agencies do not have the resources to challenge all reportable mergers that could and should be challenged, it is entirely rational for them not to use scarce resources to search out smaller, unreported transactions that could be challenged. It makes sense for them to challenge and seek to unwind only those

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[51] A 2014 survey of antitrust practitioners found that an average response to a Second Request included over 1.6 million pages comprising over 300,000 documents. Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, 14 The Threshold, Summer 2014, at 26, 30. In contrast, a law firm that represented CVS in its 2018 merger with Aetna reported that the companies' response to the Second Request required more than 25 million pages of documents. Dechert LLP, *Comments of Dechert LLP on the DOJ/FTC Draft Vertical Merger Guidelines* 2 (Feb. 26. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/dechert_llp_vertical_merger_guidelines_comments.pdf. Another law firm stated that it "collect[ed], review[ed], and produce[d] more than 170 million pages in connection with a Second Request response in a major telecommunications merger." Crowell & Moring LLP, *Antitrust E-Discovery*, https://www.crowell.com/Practices/Antitrust/Antitrust-E-Discovery.

[52] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, It Takes Two: Modernizing the Merger Review Process, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018), https://www.justice.gov/opa/speech/file/1096326/download.

[53] In 2005 the Antitrust Division unsuccessfully challenged Oracle's acquisition of PeopleSoft. A lawyer for PeopleSoft described the Division's trial team as including "fifteen or so lawyers." Gary L. Reback, Free The Market! 315 (2009). The Division's trial team that challenged Dairy Farmers of America Inc.'s 2006 acquisition of Southern Belle Dairy Co. consisted of 21 people, including lawyers, economists, and paralegals. *See* U.S. Dep't of Justice, *Division Update Spring 2007*, https://www.justice.gov/atr/public-documents/division-update-spring-2007 (last visited Apr. 21, 2020). The docket for the FTC's 2007 challenge to the Whole Foods/Wild Oats merger identifies 10 lawyers for the FTC. Docket, FTC v. Whole Foods Market, Inc., 1:07-cv-01021 (D.D.C.). In contrast, there were 44 lawyers and a total of 68 people on the Antitrust Division's trial team in its 2016 challenge to the Anthem/Cigna merger. *See* U.S. Dep't of Justice, Presentation of the Antitrust Division Assistant Attorney General Awards (Dec. 11, 2017), https://www.justice.gov/opa/speech/file/101711/download (recognizing by name the Anthem-Cigna trial team). Also in 2016 the Division blocked the Anthem/Humana merger, with a 57-person team that included 34 lawyers. *See* U.S. Dep't of Justice, Presentation of the Antitrust Division Assistant Attorney General Awards, *supra* (recognizing by name the Aetna-Humana trial team). Similarly, the Antitrust Division's team for T-Mobile/Sprint—a transaction that was settled by a consent decree—consisted of 57 people, including 28 lawyers. *See* U.S. Dep't of Justice, Presentation of the Antitrust Div. Assistant Attorney General Awards (Jan. 21, 2020), https://www.justice.gov/opa/blog-entry/file/1236406/download (recognizing by name the T-Mobile/Sprint team).

[54] U.S. Dep't of Justice, Antitrust Div., Congressional Submission FY2021 Performance Budget 13 fig.2, 47 (2020) (describing the increase in transactions valued at over $1 billion).

[55] Delrahim, *supra* note 52.

unreportable transactions that come to their attention via customer or competitor complaints or that present egregious violations; they do not incur search costs in those cases. Given the small number of cases brought against below-the-threshold transactions, this seems to be the agencies' approach.

Similarly, when an apparently problematic transaction is not investigated, it may be the case that it went unnoticed for the reasons set out above, but it may also be the case that the reviewing agency understood that the transaction might be problematic. The agency could have taken no action because, even though the transaction might violate the antitrust laws, other transactions were better candidates for one of the limited number of Second Requests the agencies have the capacity to issue because they involved more clear-cut violations of the antitrust laws, greater consumer harm, or both.

Conclusion

It should come as no surprise that concentration has increased in many relevant antitrust markets, giving rise to concerns about under-enforcement of the merger laws, once one understands that for many years the antitrust agencies have had to operate a system of triage: scarce antitrust enforcement resources by and large are reserved for the largest transactions, the most serious antitrust violations, and transactions in key sectors such as food, energy, and health care, while reportable transactions that present less egregious antitrust violations and non-reportable transactions are given a free pass.

This is not meant as a criticism of the antitrust agencies. They should be commended for at least three things. First, they have their priorities right. Large transactions, serious antitrust violations (e.g., three-to-two mergers), and mergers in key sectors are the transactions likely to cause the most consumer harm. Second, the agencies have done more with less. As transactions have grown larger and more complex, they have continued to issue the same number of Second Requests with fewer resources. And third, a high percentage—over 80 percent—of the Second Requests the agencies have issued resulted in enforcement actions, suggesting that the agencies have done a good job of focusing their limited resources on the most problematic mergers.[56]

A change in the HSR reporting regime and a minor tweak to the HSR form would enable the agencies to identify and prosecute more anticompetitive mergers than they now can. But the most important step in reversing the under-enforcement of the merger laws would be to increase the agencies' staffing substantially so they would be better able to identify potentially anticompetitive mergers during the initial waiting period, issue more Second Requests, and bring more enforcement actions.[57] Triage should be reserved for periods of unusual spikes in merger activity. It should not be the way the agencies are forced to operate for years on end. ●

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[56] *See* Figure 2. From FY2009 to FY2019 533 second requests were issued and 427 (80%) yielded enforcement actions.

[57] Former FTC Commissioners Bill Kovacic and Joshua Wright are among the leaders in the antitrust community who have called for increased funding. *See* Alison Jones & William E. Kovacic, *The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms* 17 (Apr. 17, 2020), https://res.cloudinary.com/gcr-usa/image/upload/v1587491903/Jones_and_Kovacic_Response_to_House_Judiciary_Commttee_Request._REVISED_Final_version_17_April_2020_mxrssx.pdf; James C. Cooper, Joshua D. Wright & John M. Yun, *Prepared Statement Before the U.S. House of Representatives Committee on the Judiciary, Antitrust Subcommittee, Investigation into the State of Competition in the Digital Marketplace* 34 (Apr. 17, 2020), https://res.cloudinary.com/gcr-usa/image/upload/v1587491902/Written_Testimony_-_Cooper_Wright_Yun_HOUSE_FINAL_WITHEXECSUMM_wqru6e.pdf.

Appendix

Figure 4

Year	Unreported Mergers Challenged
2001	FTC: MSC Software Corp.'s acquisitions of Universal Analytics, Inc. and Structural Analysis & Research Corp.
2003	DOJ: Dairy Farmers of America's acquisition of Southern Belle Dairy Co LLC FTC: Aspen Tech., Inc.'s acquisition of Hyprotech
2006	FTC: Hologic, Inc.'s acquisition of Fischer Imaging Corp.; Dan L. Duncon's acquisition from Duke Energy Field Services of TEPPCO, LLC and limited partnership units of TEPPCO Partners, L.P.
2007	DOJ: Amsted Industries' acquisition of FM Industries; Daily Gazette Co. (Charleston Gazette)'s acquisition of Charleston Daily Mail from Media News
2008	FTC: TALX Corp.'s acquisition of six competitors; Polypore International, Inc.'s Microporous Holding Corp.; Ovation Pharmaceuticals, Inc.'s acquisition from Abbott of NeoPfren drug assets; Microsemi Corp.'s acquisition of assets from Semicoa Inc.; Iverness Medical Innovations, Inc.'s acquisition of assets from ACON
2009	DOJ: Cameron Int'l Corp.'s acquisition of Howe Baker Engineers Ltd.
	FTC: Lubrizol Corp.'s acquisition of The Lockhart Co.; Carilion Clinic's acquisition of the Center for Advanced Imaging and the Center for Surgical Excellence
2010	DOJ: Dean Foods Co.'s acquisition of the Consumer Products Division of Foremost Farms USA; Election Systems and Software, Inc.'s acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc.
	FTC: The Dun & Bradstreet Corporation's acquisition of Quality Education Data; Houghton Int'l's acquisition of D.A. Stuart GmbH; Fidelity Nat'l Financial, Inc.'s acquisition of three LandAmerica Financial, Inc. subsidiaries; NuFarm Limited's acquisition of A.H. Marks Holding Ltd.; Laboratory Corporation of America's acquisition of Westcliff Medical Laboratories, Inc.
2011	DOJ: George's Inc.'s acquisition of Tyson Foods' Harrisonburg, Va., chicken processing complex
	FTC: ProMedica Health System's acquisition of St. Luke's Hospital; Cardinal Health Inc.'s acquisition of nuclear pharmacies from Biotech
2012	DOJ: Twin America LLC (joint venture among Coach USA Inc. and City Sights LLC)
	FTC: Renown Health's acquisitions of Sierra Nevada Cardiology Associates and Reno Heart Physicians; Magnesium Elektron's acquisition of Revere Graphics Worldwide, Inc.
2013	DOJ: Bazaarvoice Inc.'s acquisition of PowerReviews Inc.
	FTC: St. Luke's Health System, Ltd.'s acquisition of Saltzer Medical Group P.A.; Charlotte Pipe and Foundry Company's acquisition of Star Pipe Products, Inc.'s cast iron soil pipe business; Graco, Inc.'s acquisition of Gusmer Corp. and GlasCraft, Inc.; Solera Holdings, Inc.'s acquisition of Actual Systems of America, Inc.
2014	DOJ: Heraeus Electro-Nite Co. LLC's acquisition of Midwest Instrument Co. Inc.
2015	FTC: Keystone Orthopaedic Specialists, LLC's acquisition of Orthopeadic Associates of Reading, Ltd.
2016	FTC: Valeant Pharmaceutical's acquisition of Paragon Holdings I, Inc.
2017	DOJ: TransDigm Group Incorporated's acquisition of SCHROTH Safety Products GmbH and Takata Protection Systems, Inc. from Takata Corporation
	FTC: Mallinckrodt's acquisition of Synacthen Depot; Otto Bock HealthCare North America, Inc.'s acquisition of FIH Group Holdings
2020	FTC: Axon Enterprise, Inc.'s acquisition of VieVu, LLC; Össur Hf's acquisition of College Park Industries, Inc.