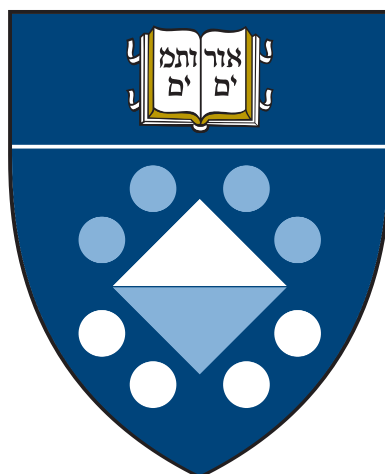

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Department of Justice Conference

Paper 5

Reforming HSR Premerger Notification and Review

May 2023

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Premerger notification and review is an essential piece of the U.S. antitrust enforcement regime. Significant evidence demonstrates that corporations take the possibility of HSR notification seriously; so much so that they often structure their merger activity to avoid it.[1] Although the antitrust agencies have the authority to challenge any merger, of any size, the effect of which "may be substantially to lessen competition, or tend to create a monopoly,"[2] in practice the agencies almost never challenge a merger that does not meet the HSR premerger notification threshold.[3]

Unfortunately, the HSR process is failing to keep up with the threats of anticompetitive mergers in today's markets. Though the number of merger challenges fluctuates from year to year, the long-term trend shows a steady decrease.[4] Meanwhile, market concentration has increased. Evidence suggests not just correlation but also causation: lax merger review has contributed to the rise in market concentration over the past few decades.[5] What's more, the current merger review process is particularly ill-suited to address some of today's market realities. These include the challenges of serial mergers and monopolization in digital markets,[6] the increase in private equity ownership across the economy,[7] widespread monopsony power held by employers,[8] and growing evidence of monopolization through repeated below-threshold mergers in certain small geographic markets.[9]

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[1] *See, e.g.*, Thomas G. Wollman, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AM. ECON. REV: INSIGHTS 77 (2019) [*hereinafter* Wollman, *Stealth Consolidation*]; Thomas G. Wollman, *How to Get Away with Merger: Stealth Consolidation and Its Effects on US Healthcare* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274, 2021), http://www.nber.org/papers/w27274 [*hereinafter* Wollman, *How to Get Away with Merger*].
[2] 15 U.S.C. § 18.
[3] Wollman, *Stealth Consolidation*, *supra* note 1, at 79-84.
[4] *See, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015) (presenting evidence of less aggressive merger control in the past few decades); U.S. FED. TRADE COMM'N & U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2021, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf (showing a 50% decrease in the rate of second requests between Fiscal Years 2012 and 2021).
[5] KWOKA, *supra* note 4.
[6] *See, e.g.*, Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (allowing claims of repeated anticompetitive acquisitions by Meta (Facebook) to proceed); Complaint, United States et al v. Google LLC, No. 1:23CV00108 (D.D.C. filed Jan. 24, 2023) (alleging a series of anticompetitive acquisitions by Google as part of its conduct to monopolize digital advertising markets); Susan Athey & Fiona Scott Morton, *Platform Annexation*, 84 ANTITRUST L.J. 677 (2022) (discussing tech platforms' use of mergers to annex tools in adjacent markets and inhibit horizontal competition).
[7] *See, e.g.*, McKinsey & Co., McKinsey Global Private Markets Review: Private Markets Turn Down the Volume (Mar. 21, 2023), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/mckinseys-private-markets-annual-review (showing a 2023 slowdown but significant, persistent increases in private equity activity and other private market investment over the past decade-plus).
[8] *See, e.g.*, Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 263 (2018); Non-Compete Clause Rule, 88 Fed. Reg. 2482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).
[9] *See, e.g.*, Wollman, *How to Get Away with Merger*, *supra* note 1; U.S. Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott-Rodino Annual Report to Congress (July 8, 2020),
https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

To be sure, the deficiencies of the merger review process have many causes and have led to many reform proposals. For example, many scholars have written about the need for changes to the Merger Guidelines, which the agencies are currently revising.[10] These proposals typically address the substantive legal and economic standards of merger review, which is of course an essential target of reform.

This paper addresses a less-discussed topic in merger review reform: the HSR premerger notification and review process. The HSR premerger process is governed by the Hart-Scott-Rodino Act of 1976 and rules promulgated pursuant to that Act by the FTC with the concurrence of the DOJ.[11] While the statute sets out some key components of the process, such as the threshold for triggering the premerger notification requirement, the details are subject to the rulemaking decisions of the antitrust agencies.[12] Yet, despite significant room for improvement, the agencies have not recently adopted any significant changes to these rules.[13] Further, the changes that have been proposed—such as a 2020 proposal that appears to have been dropped—mistakenly focus on reducing the burdens on the filing parties and increasing the amount of process the agencies need to go through.[14] These kinds of proposals are largely misdirected. Their emphasis on reducing burdens to industry often serve to make mergers even harder for the agencies to challenge and impose a greater strain on the agencies' already-limited resources.[15] Such reforms are unlikely to address the main problem with merger control today: the agencies' failure to challenge the many existing anticompetitive mergers.

This paper advances proposals for making the HSR process more effective in equipping the agency to block anticompetitive mergers and more efficient in its use of the agencies' limited time and resources. These proposals target operational and informational problems at the premerger notification stage (including the notification form and attached documents), the second-request stage, and the merger challenge litigation stage.

The key proposals are as follows:

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[10] *See, e.g.*, Thurman Arnold Project, Yale School of Mgmt., *Merger Guidelines*, https://som.yale.edu/centers/thurman-arnold-project-at-yale/merger-guidelines (last visited May 20, 2023) (collecting comments on revisions to the Horizontal Merger Guidelines).

[11] 15 U.S.C. § 18a.

[12] *Id.* § 18a(d).

[13] The most recent changes were finalized in 2021, increasing the threshold pursuant to the statutory requirement. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 86 Fed. Reg. 7870 (Feb. 2, 2021).

[14] *See, e.g.*, Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053 (proposed Dec. 1, 2020) (to be codified at 16 C.F.R. pts. 801, 802, 803); U.S. Dep't of Just., Remarks by Makan Delrahim, It Takes Two: Modernizing the Merger Review Process (Sept. 25, 2018), https://www.justice.gov/opa/speech/file/1096326/download.

[15] One interesting exception is Professor Samuel Weinstein's article, which argues that onerous merger review procedures cause competition problems and should be reduced or eliminated except in highly concentrated markets. *See* Samuel N. Weinstein, *Anticompetitive Merger Review*, 56 GA. L. REV. 1057 (2022). His findings demonstrate the need for a more efficient merger review process, even if his recommendations differ from those put forward in this paper.

1. **Premerger notification:** Revise the HSR notification form to require that the merging parties submit the following additional information:
    a. A set of provisional definitions of relevant markets and market shares for each product and input / labor market in which the firms overlap, nationally and for the top five sub-geographies, as well as two smaller potential relevant markets, including the basis for the market definitions;
    b. For private equity filers / acquirers, all of the above information for all of their portfolio companies, across all of their funds, including minority stakes;
    c. A short narrative summary of all the "additional materials" attachments, including some context about each document, including when it was written, for what audience, what its purpose was, and an explanation of likely procompetitive and anticompetitive effects from the merger; and
    d. Explanations of sources and methods for any studies or facts and figures provided in the "additional materials" attachments.
2. **Second request:** Require the parties to submit detailed customer, market, and other data necessary for proper merger analysis in a format created by the agencies, along with all sources and methods.
3. **Litigation:** Create a presumption—or potentially a prohibition—against the parties using any other economic data on the competitive effects of the proposed merger, market definition, etc., as evidence in any litigation besides the data provided in the agencies' template during the second-review process.
4. **Other:** Draft model state legislation that would require reporting of small mergers in local geographic markets, allowing states to catch harmful small mergers and augment the federal agencies' resources.

Together, these proposals aim to help the agencies better use their limited resources to identify likely anticompetitive mergers, including those in new kinds of products markets (such as ever-evolving digital markets), those that involve labor/supplier markets or present monopsony issues, those in which one or both parties are (or are owned by) private equity firms, and small geographic markets with below-threshold mergers. The proposals would tilt the operational and logistical scales of the process toward the agencies, while preserving and fair and transparent process for merging parties.

Each of the proposals below begins with a discussion of the problems it addresses. Scholars and enforcers have written about some of these issues, while others have received less commentary. While this discussion of problems is not meant to be comprehensive, it highlights those that are particularly ripe for addressing through procedural reforms to HSR review.

I. Proposals for the Notification Stage

Initial HSR notification represents the agencies' only chance to catch a potentially problematic merger before it is consummated and becomes difficult to unscramble. Yet the process at this critical initial stage has significant problems. This Section discusses three of those problems and puts forward three proposals to tackle them.

At the outset, it is important to note that many of these problems stem from a core issue: there are too many mergers and not enough enforcement resources. If the agencies had infinite time and resources, many of the problems below could be surmounted. Indeed, the current design might even be preferable, to the extent it gives the merging parties significant flexibility and imposes minimal burdens in making their initial filings. But, of course, the agencies reviewing merger filings are severely limited in terms of both time and staff resources. Under the HSR statute, the agencies have thirty days from premerger notification to decide whether to initiate the second-request stage, otherwise the parties can legally consummate the merger.[16] Given the internal reviews and approvals (rightly) required to move to the second-request stage, that means the staff have to flag potentially problematic mergers within just days after filing. Meanwhile, the agencies have had flat or declining staffing numbers, even as the economy grows and the number of mergers increases. Thus, the number of person-hours available to review each merger is low and declining.

That resource problem, at least, could be addressed through a significant increase in the agencies' budgets. Such an increase may not be possible in today's political environment. But even if it were, the notification process would still be ill-equipped to handle issues specific to digital markets, monopsony, private equity, and small mergers. The proposals below are necessary reforms that the agencies can undertake now through rulemaking, without waiting for Congress.

Proposal 1: Require Submission of Potential Market Definitions and Market Shares, in Both Product and Labor Markets

Problem: Insufficient Market Data

The HSR rules' requirements for initial premerger notification result in submissions that lack standardization, exclude essential information about important market realities, and enable companies to bury relevant evidence of potential harm.

Effective merger analysis requires knowing two key facts: (1) whether the merging parties compete in the same market, either for outputs or inputs; and (2) if so, what market share each firm has, and the combined firm would have, in those markets. While these facts are not the be-all and end-all of the merger analysis, they serve as useful heuristics and first steps in the analysis for short-staffed agencies trying to identify mergers that merit greater scrutiny.[17] Yet

[16] 15 U.S.C. § 18a(b)(1)(B). The agencies can still challenge a merger at any time after the waiting period ends, but doing so is harder. *See* Holly Vedova, *Adjusting Merger Review to Detail with the Surve in Merger Filings*, U.S. Fed. Trade Comm'n (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[17] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [*hereinafter* HORIZONTAL MERGER GUIDELINES]. The determination of whether a merger is "horizontal" or "vertical" is also often integral to the merger analysis, although that distinction may be less relevant in the context of internet platforms. *See,* Athey & Scott Morton, *supra* note 6.

several features of the notification form hinder agency staff's ability to form an initial impression of those two facts.

First, the form asks the parties to classify the markets in which they operate only in terms of NAICS codes. The NAICS classification system, developed by the Department of Commerce, includes nearly 2,000 industry subcategories.[18] So NAICS codes do provide some valuable information. But NAICS categories are not contiguous with relevant markets for antitrust purposes, nor were they designed to be. That problem is particularly glaring in newer industries like digital markets; for instance, there is just one NAICS code for "software publishers," with no accompanying subcodes.[19] That level of detail provides very little insight into the competitive dynamics of the merger. It is also consistent with the agencies' generally disappointing record of challenging digital mergers—between 2001 and 2019, the agencies challenged only one deal in the digital sector.[20] But even beyond that glaring problem, NAICS codes are insufficient to indicate whether the parties compete in the same market.

Second, the form requests no information about the parties' market shares in their relevant markets or industries. Instead, for each NAICS code. the form requests only the amount of annual revenue that each party earns in that industry. Without context—such as the share of a relevant market that such revenue represents—those numbers convey very little useful information.

Third, parties that operate nationally often just list "United States" as their geographic market, rather than specifying submarkets. This makes it very difficult for the agencies to identify whether a merger might cause competitive problems in a particular sub-geography, even if it might not at the national scale.

Fourth, the form requests no information at all about the labor or other input markets in which the parties operate. The form requests revenue numbers, rather than expenditure numbers), only from NAICS codes based on "non-manufactured and manufactured *products*."[21] This oversight reflects the agencies' historic focus on product markets to the detriment of labor market issues. Now that the agencies are prioritizing labor and input markets, it is past time for the HSR forms to catch up.

These severe limitations on the HSR form's data collection leaves agency staff to conduct their own analysis of the companies' activities based on publicly available databases, which are

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[18] *See* U.S. Census Bureau, 2022 NAICS Change Structure with Change Indicator, *available at* https://www.census.gov/naics/ (last viewed May 17, 2023).

[19] *See id.* The only other subcategories related to digital markets, out of the 2022 NAICS Code's nearly 2,000 subcategories, are (1) "Computer and Computer Peripheral Equipment and Software Merchant Wholesalers"; (2) "Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services"; and (3) "Web Search Portals and All Other Information Services." *Id.*

[20] Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AM. ANTITRUST INST. 5-6 (Jul. 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf (discussing the Google-ITA challenge).

[21] Instructions to FTC Form C4, 16 C.F.R. pt. 803.90.

often incomplete and use their own market definitions. This leaves the reviewing staff to use imprecise, non-standardized proxies for market share information. In addition, the agencies have very little if any access to information about companies' share of employees, contractors, or suppliers in a given market (as opposed to product market share), making monopsony analysis basically impossible.

Proposal:

To quickly and effectively review the thousands of merger filings the agencies review each year, agency staff need more complete and actionable information about the merging parties' markets and shares, in all relevant input and output markets. The notification form should be revised to require the following sets of information:

- In addition to NAICS/NAPCS codes,[22] the merging parties should have to provide their own market definitions for all markets in which the two merging firms plausibly overlap. They should provide at least three options for market definition—what they think the appropriate market definition is, as well as two smaller markets. For each potential relevant market, they should explain how they arrived at that definition, and they should provide back-up data, models, and assumptions. In addition, the merging parties should provide their firms' shares of each of those markets and indicate what the estimated combined share would be.

- The firms should provide the above market analysis at both the nationwide level (or the largest sub-national level at which they operate), as well as for any and all relevant sub-geographies. Sub-geographies may be contiguous with metropolitan statistical areas, but the geographies provided should be tailored to the geographic market in which they believe they operate, based on the analysis above. If there are no relevant sub-national geographic markets plausibly at issue in the transaction, the parties do not have to list any. However, if the government later finds unreported geographic markets, the parties will be subject to the same penalties that apply to other inaccuracies on this form.

- Critically, the above information must be provided not only for the merging firms' product markets, but also for the labor and other input markets in which they participate. This information is totally missing from the current form and is essential for monopsony analysis of proposed mergers.[23]

[22] The agencies could consider eliminating the requirement for NAICS/NAPCS codes entirely, since they would almost always be less valuable than a tailored assessment of the relevant antitrust markets. However, these standardized codes might still be useful to the agencies for administrative purposes. For example, using standardized codes would help the agencies, Congress, and researchers track merger trends across sectors and industries. On a more basic level, I believe the agencies also use these codes to sort mergers into industry sections for review. But if the agencies feel the codes provide little or no administrative benefit, they could be removed from the form altogether.

[23] The market definitions and market shares submitted at this stage need not be admissible at trial, and the agencies could make clear to parties that these would not be used as evidence at trial. The market definitions, shares, and other economic evidence used at trial should be limited to what is developed in the second-request process, as described in

Proposal 2: Require the Above Information about All Private Equity Acquirer's Portfolio Companies across All Funds

Problem: Insufficient Ownership and Competition Information for Private Equity-owned Parties

The information problems are even more severe when one of the merging parties is, or is owned by, a private equity firm. Technically, the notification form does ask for information about the "ultimate parent entity" of both parties, including some information about their other holdings.[24] In practice, however, filings tend to have insufficient information about relevant holdings and the markets in which they operate. First, because the relevant "ultimate parent entity" is often a single fund of the private equity firm, the form often lists at most only the other holdings within the fund, not all the holdings across all the private equity firm's funds. Often, the forms do not even list the holdings within a single fund, because the instructions are not clear that those are required. The agency staff gets no information about the holdings of the other funds, even though those other funds are subject to the same private equity firm's management and investment decisions.

Second, even for the holdings of the single fund acquiring the firm, the form requests only the name of the company. It does not request any information about the industries or geographies in which those companies operate, their size, or any other information that might be useful in assessing the competitive effects of the merger. Thus, a private equity fund could purchase the largest competitor of a firm they already own in another fund, and the agencies would have no way to know that from the notification form. Instead, agency staff have to search other sources for whatever information is publicly available about the private equity firms other holdings. But with just days to review the filing and identify issues, as noted above, that kind of research is not practicable and leaves significant room for error.

Proposed Reform:

Merging parties whose ultimate parent entities are private equity firms should have to include the information discussed in Proposal 1 above for all of the PE firm's portfolio companies, in all of its funds. This should include companies in which the PE firm owns only a

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Proposal 4 below—including the agencies' models as well as any alternates that the parties may submit. These preliminary market definitions and shares would be used only for the initial agency assessment. However, the agencies would be free to ask questions about these initial submissions at the second-request stage and penalize the parties if they find that what the parties submitted at the notification stage was baseless, implausible, or intended to deceive the staff reviewing the notification. If the agencies found evidence of that, the parties should be subject to all legal penalties associated with misrepresentations on the notification forms.

[24] Notification and Report Form for Certain Mergers and Acquisitions, Item 3, Item 4, Item 6(c)(i), 16 C.F.R. pt. 803.90.

minority share.[25] First, the parties should have to provide the names, NAICS codes of all the portfolio companies in all of the PE firm's funds. If any one of those portfolio companies overlapped—in any of the potential product, input, or geographic markets defined above—with the acquired firm, the parties would have to provide the required three market definitions and shares for all of those overlapping markets. Second, the parties should have to provide the above market analysis information for all plausibly overlapping markets between any of the portfolio companies of the acquirer and the acquired firm.

Proposal 3: Require More Context and Backup Sources and Methods for Item 4 Documents

Problem: Disorganized and Non-standardized Attached Documents

The HSR notification form requires the parties to submit four sets of supplemental documents that the companies prepared and used to evaluate the merger: (1) all studies, surveys, analyses, and reports created to evaluate or analyze the acquisition; (2) all Confidential Information Memoranda related to the sale of the entity; (3) all studies, surveys, analyses, and reports prepared by investment bankers or other advisers about the merger; and (3) all studies, surveys, analysis, and reports evaluating synergies or efficiencies of the merger.[26]

These submissions are not conducive to the quick initial assessment required in the HSR process. For one thing, the submissions often number in the many hundreds, if not thousands, of pages, and they often contain many duplicates or slight variations of the same documents. Indeed, the merging parties have the ability (attorney time and resources) and incentive to flood the agencies with redundant documents, including those specifically prepared for antitrust review, that bog down the understaffed agencies working on a tight timeline. Further, the documents do not need to be submitted in any sort of standard order or format. They are also provided with no context besides their title, date of preparation, and the name and title of each individual who prepared them (or just the lead author or third-party preparer).[27] And the documents often contain company- or industry-specific jargon and data, with no explanation required or provided.[28]

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[25] For more discussion of the issue of minority ownership by PE firms, see U.S. Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra Regarding the Hart-Scott-Rodino Act Premerger Notification Rulemaking Notices 2-3 (Sept. 21, 2020), https://www.ftc.gov/system/files/documents/public_statements/1580695/p110014hsrrulemakingchoprastatement2.pdf.

[26] Notification and Report Form for Certain Mergers and Acquisitions, Item 4(c)-(d), 16 C.F.R. pt. 803.90.

[27] Instructions to FTC Form C4, 16 C.F.R. pt. 803.90.

[28] In addition, DOJ leadership has stated that they are concerned about filers not providing all the information required by the notification form. U.S. Dep't of Just., Remarks by Andrew Forman, Antitrust Merger Enforcement: The Role of M&A Lawyers and Select Enforcement Priorities (Sept. 17, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-antitrust-division-delivers-remarks-aba/ ("Recent experience suggests some companies may not be living up to their HSR obligations, including adopting lax methods that do not reflect the importance of this process. As a result, the Division is taking a closer look at certain filings—including those of regular filers—to ensure processes are in place to provide the antitrust agencies with all of the information necessary to assess whether an investigation should be opened.").

Further, to the extent these documents do include useful information—such as studies on market share or price, quality, or competition effects—the agencies impose no standards at all as to how those figures are calculated or requirements for disclosure of the underlying data. This positions the agencies to rely on non-transparent party "findings" that may be highly favorable to the parties and unhelpful to the staff's analysis.

Proposed Reform:

The merging parties could do much more to make the required supplemental documents useful and navigable for agency staff. As a place to start, the parties should be required to submit the following information:

- The parties should provide a narrative of the submitted documents that explains each one and how it fits within the firm's merger process and timeline. This narrative should include the basic information that the parties are currently required to provide, including who prepared the document and when. The narrative description should also include other information, such as (a) a summary (no shorter than a paragraph and no longer than two pages) of the document's content and major findings; (b) who the audience for the document was and when and how they received it; (c) what the purpose of creating the document was (e.g., for management to pitch the board on the proposed merger); and (d) how the document's content differs from other documents in the submission. The parties should have to attest that these narratives were accurate and complete, and they should be subject to legal consequences (including perjury) if these narratives are found through the second-request or discovery process to have been materially inaccurate or incomplete.

- For any studies, facts, or figures about competition, product or input prices, market shares, or similar information included in the submitted materials, the parties should have to provide explanations of the underlying sources, methods, and assumptions. This includes providing the underlying data and models, just as they would for the proposed relevant markets required under Proposal 1. As noted with respect to the narrative described above, the parties should have to attest that their explanations are complete and accurate, and they should face legal consequences if these submissions are later found to be materially inaccurate or incomplete.

II. Second Request Stage

Proposal 4: Require Market Definition, Share, and Merger Simulation Data in Templates and Models Provided by the Agencies

Problem: Insufficient Data and Information Asymmetries

Information asymmetries and standardization problems continue at the second-request stage.

First, although the agencies can compel significant amounts of data and information from the parties through civil investigative demands (CIDs) once they enter the second-request process, the agencies are not guaranteed to get all the information they request. In practice, the agencies and the parties negotiate these demands, and the agencies rarely if ever go to court to enforce an order. And under the previous administration, the agencies effectively negotiated against themselves when the DOJ unilaterally committed to request fewer documents from fewer custodians in second requests.[29]

Second, the agencies are at a disadvantage in these data requests because they can never know as much about the parties' business and data as the parties themselves do. The second-request process often lasts just ninety to 180 days (subject to a timing agreement between the agency and the parties), which gives limited time for the agency staff to determine exactly what data to request, negotiate with defense counsel to get the data, and then ensure it comes in the correct format. Further, the second-request stage suffers from the same risk of "document dumps" as the initial notification stage.

In the end, the data that the agencies receive during the second-review process and use to determine whether to challenge the merger will likely not represent the entirety of the data that the parties will end up using in their own defense in any litigation. This means the agencies are at a disadvantage at the outset.

Proposed Reform:

Rather than requesting and analyzing firms' economic data on an ad hoc, case-by-case basis—subject to extensive negotiation with defense counsel and significant time pressures—the agencies should create their own data templates and models that the merging parties have to fill out and submit during the second-request process. These templates and models would include tools like the UPP and GUPPI models, demand estimation models, and the hypothetical monopolist test—tools that the agency already uses and publicizes. They would yield the key economic evidence to be used, alongside other direct and documentary evidence, in the agency's consideration of whether to challenge the merger, including market definitions and market shares, upward pricing pressure, and other evidence of unilateral or coordinated effects.

The agencies should develop the templates and models through a rigorous process, working with legal, economic, labor, and business experts. It may make sense to develop different data templates and models for different industries, different kinds of markets (e.g., product vs. labor markets), and different relationships between the merging firms (e.g., horizontal, vertical, or a more complex platform relationship). These templates and models should be published in the CFR as an FTC rulemaking under the HSR Act, similar to the current

[29] *See* U.S. Dep't of Just., Frequently Asked Questions: Voluntary Requests and Timing Agreements (Nov. 2018), https://www.justice.gov/atr/page/file/1111331/download.

notification form, and they should be subject to notice-and-comment procedures. They should be updated on a regular basis—potentially more regularly than the Merger Guidelines—so as to reflect the latest scholarship and market realities.

If the parties believe that the agencies' templates and models do not properly capture the competitive effects of the merger, the parties should have to provide to the agencies any alternative analyses—including models and underlying data—that they believe are better. They should also provide an explanation for why these models and data are superior.[30] The agencies can then evaluate whether their models are indeed insufficient or whether the parties' models and data have problems.

This proposal, unlike most of the others in this paper, would require a significant upfront investment of the agency's time and resources. However, it would yield significant benefits over time, as discussed further below.

III. Litigation Stage

Proposal 5: Recommend a Presumption Against Parties Using Any Other Market or Merger Simulation Analysis Besides the Analysis Provided at the Second-Request Stage

Problem:

Once a suit is filed and proceeds past a motion to dismiss, the agencies can compel significant additional data on a longer timeline. But a wealth of data and models can create its own problems. As many scholars have observed (and criticized), antitrust litigation today is often a "battle of the experts," with each side's economists presenting their own data and analyses as a generalist judge or lay jury attempts to select the more convincing side.[31] Judges' and juries standard tools—*Daubert* rulings and credibility assessments—are far from guaranteed to lead fact-finders to the right answer on the anticompetitive likelihood of the merger.

Though the agencies provide guidance to courts as to how to assess economic evidence and which data and models are more reliable, the Merger Guidelines say little about what kinds of models and data the agencies use, and courts should use, in assessing the competitive effects of a merger. Further, what they do say is that courts should credit direct evidence of anticompetitive

[30] It is possible that both the agencies' models and the parties' alternative models will yield different market definitions than the parties initially proposed during the notification stage. That would not pose a problem. The notification stage would require multiple proposed markets definitions, whereas the second-request stage requires the parties and the government to determine their single best market definitions (and other economic evidence). That said, if the parties were to propose a market definition at the second-request stage that was significantly different from any of the options they proposed at the notification stage, the parties could be subject to penalties for inaccurate or incomplete initial reporting.

[31] *See, e.g.*, Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 N.U. L. REV. 1261 (2012).

effects based on past experience, not just future projections based on economic models; but courts may not actually do so.[32]

Proposed Reform:

The agencies could do more to structure the economic evidence in merger litigation and guide courts as to how to assess that evidence. This would further help to level the playing field for the agencies. It would also make merger litigation more predictable and more legally and economically sound. The agencies should encourage courts to provide a strong presumption in favor of referring only to the agencies' own templates and models during any merger litigation. The presumption should be that the parties use the economic models created and promulgated by the agencies through the open and rigorous process described above. These models should be understood to reflect the latest and best tools for merger analysis. Once the parties submit the results of their analysis, using the data templates and models created by the agencies, they should be bound by those submissions during litigation.

If the parties submitted alternative analyses, data, or models during the second-request process, the parties could argue for the court to accept those instead of the agencies'. However, the agencies should encourage courts to apply a presumption against that alternative and to require a high bar for replacing the agencies' established, state-of-the-art models in favor of new ones. Only if the court was convinced, by clear and convincing evidence, that the defendants' models and data were more accurate should it admit that evidence for consideration at trial.

Critically, the agencies could ask the court to waive that presumption in particular cases, if the agencies did not oppose the parties' alternate models. The standard models that the agencies develop through the process described above may not always capture the realities of each market at issue—particularly in new or developing markets—and the agencies need not oppose good-faith efforts by the parties to bring in other valuable economic evidence. As discussed in Proposal 4 above, the parties would be able to present their alternate models at the second-request stage. That evidence might convince the agencies not to challenge the merger in the first place. But even if the agencies chose to go ahead with a challenge—because the parties' alternate model showed concerning potential effects, or because of other evidence or concerns about hard-to-model coordinated effects or innovation effects—they might still be open to the court considering the agencies' alternate models. In that case, an agency could notify the court (likely in a response to the parties' motion to the court to consider its alternate evidence) that it does not object to some or all of that evidence. This would allow the court to still consider the best available evidence, while also properly putting the burden on the parties to convince either the government and/or the court that their models are better than those established by the agencies' rigorous, publicly informed process.

To establish the above presumptions, the agencies could issue guidance (either as part of the Merger Guidelines or separately) explaining it and advocating for courts to adopt it. Courts

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[32] *See* HORIZONTAL MERGER GUIDELINES, *supra* note 17, at 3.

generally see the antitrust agencies' guidance as highly persuasive, and the agencies should make a strong effort to convince the courts of the superiority and greater administrability of their models and methods. If necessary, the agencies could also consider advocating for Congress to pass legislation requiring such a presumption in merger litigation under the Clayton Act. However, that would likely not be necessary; courts apply other evidentiary presumptions in antitrust cases (such as the structural presumption) that have not been legislated and only appear in agency guidelines.

IV. Other Reforms

The above proposals do not fully cover all the HSR premerger notification reforms necessary to address the problems and market realities identified. For instance, with respect to harmful below-threshold mergers in certain small geographic markets (e.g., dialysis centers and hospitals), Professor Fiona Scott Morton has proposed lowering the threshold for all mergers and creating an expedited "EZ-merge" notification process for mergers as small as $2 million in value.[33] That reform would likely require legislative action. In addition, some have called for a reform in how the agencies account for debt in the value of the transaction. Parties are currently able to manipulate the nominal value of their mergers for HSR reporting purposes through certain debt transactions.[34] The agencies could revise their treatment of debt transactions when determining deal size through rulemaking or informal guidance.

The agencies should adopt both of those reforms. However, this paper does not discuss them further because they would likely create more work for already-strapped staff by increasing the number of reported transactions (and because they have been proposed elsewhere). Still, this paper's proposals complement those two proposals because, by more efficiently using the agencies 'existing resources, this paper's proposals would free up the agencies 'resources to review even more mergers.

There is, however, one way for the agencies to help ensure more review of below-threshold mergers, which is the subject of the final proposal.

Proposal 6: Draft Model State Legislation for Review of Below-Threshold Mergers in Small Geographic Markets

Problem: Harmful Below-Threshold Mergers

Harmful mergers often escape HSR review altogether because they fall below the reporting threshold. This can be because the geographic or monetary size of the total market in which the merging firms operate is small, because the parties use debt to reduce the nominal

[33] Testimony of Fiona M. Scott Morton, U.S. House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Mar. 7, 2019), https://www.congress.gov/116/meeting/house/109024/witnesses/HHRG-116-JU05-Wstate-MortonF-20190307.pdf.

[34] *See* Chopra, *supra* note 25, at 4.

value of the transaction, or because the acquired firm is a small nascent competitor. Though the agencies still have the power to investigate and block below-threshold mergers, they rarely do.[35] Identifying those mergers requires significant proactive work that is often not feasible given the agencies' resource constraints. Further, merely lowering the reporting threshold would still strain the agencies' resources by dramatically increasing the number of mergers for the staff to review.

Proposal

One resource-efficient way to detect more harmful small mergers is to empower the states to do so. States already play an important role in antitrust enforcement through both their ability to force the federal antitrust laws and their own state antitrust statutes. Yet, very few states have enacted their own premerger notification regimes. Only in the past few years have three states (Connecticut, Washington, and Connecticut) established premerger notification programs for mergers in the health care sector. These are promising reforms and should be expanded beyond just health care.[36]

The agencies should support more states to enact their own premerger notification programs by drafting model legislation for states to adopt. The model legislation should include the following features:

- A reporting threshold significantly below the federal threshold (as low as $2 million);

- Coverage over all markets that have demonstrated a substantial risk of anticompetitive mergers, as determined by the Attorney General or other appropriate state agency. The agencies should explain that this should include at least the markets in which there is already strong econometric evidence of harmful small mergers (e.g., dialysis centers, hospitals, supermarkets), but it can also include other markets identified by the state as deserving of greater attention;

- Funding for sufficient antitrust staff to review the filings;[37] and

- A general rulemaking delegation to the Attorney General or other appropriate state agency to set the rules of premerger review, similar to the HSR Act's delegation to the FTC and DOJ.

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[35] *See supra* note 3.
[36] Barbara Sicalides et al., *State Enforcers Expanding Premerger and Antitrust Jurisdiction Over Healthcare Transactions: Guidance for This Growing Trend,* AM. BAR ASSOC. (Dec. 15, 2020), https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2020-2021/december-2020/sta-enf/.
[37] The agencies should also encourage Congress to establish a grant program to help agencies fund this initiative.

The agencies should also support states that adopt a premerger notification program by sharing with the state agencies the models and other tools developed for federal premerger review, as described in Proposal 4 above.

V. Benefits and Potential Risks of the Proposed Reforms

The above reforms are primarily intended to enable the antitrust agencies to more efficiently and effectively review and challenge mergers. However, they would provide benefits not just to the agencies, but also to reviewing courts and even the merging parties. In addition, the proposals come with some potential risks that are worth considering.

A. *Benefits and Risks to the Agencies*

This paper's proposals would significantly increase the amount, standardization, and usefulness of information that the agencies receive about mergers that meet the HSR threshold. The reforms to the initial notification would significantly streamline that process, which is essential given the agencies' limited staff resources and the increasing number of filings. The proposals would also place more of the analytical work onto the parties, who have the easiest access to and familiarity with their own information, thereby reducing the significant information asymmetries that the agencies face. The requirement of market definition and market shares at the initial filing stage would also align the initial HSR review process with market realities, rather than relying on the blunt instruments of NAICS codes and decontextualized revenue numbers. And the requirement of data about input and labor markets would significantly increase agencies' ability to challenge mergers for their potential monopsony effects. Finally, at the second-request and litigation stages, the data and model standardization proposal would prevent agencies from manipulating results, using questionable models, or otherwise painting too rosy a picture of the merger's potential effects.

Risks to the agencies are limited, as these proposals would undoubtedly shift the process in their favor. That said, the requirement to create and regularly revise authoritative data templates and models for use in the second request and in merger litigation would be a significant new work-stream for the agencies. However, the agencies already aim to keep up with the latest methods in merger simulation and analysis; they use models internally and publicize some of them for external reference.[38] This additional work would we well worth the investment, particularly if the process is reputable and courts apply the agency's requested presumption. Even if not, it is difficult to imagine that a transparent, fair, expert-driven process for developing data templates and models for merger simulation would not have at least some persuasive effect on the courts.

B. *Benefits and Risks to Reviewing Courts*

The proposal for more standardized economic analysis could significantly improve the process of adjudicating merger challenges from the judges' perspective. Judges already rely upon

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[38] *See* HORIZONTAL MERGER GUIDELINES, *supra* note 17, at 21.

the Merger Guidelines and other guidance to help them navigate the often-complex economic analyses involved in antitrust litigation. The agencies' authoritative models would help ensure the judge that the economic evidence he or she is crediting has a strong basis in best practice and was the process of a rigorous process. It would also allow the court to focus on other issues, such as direct evidence of competitive harms, qualitative and documentary evidence, and other legal questions. This would represent a better division of labor in antitrust litigation: leaving the assessment of economic modeling and simulation to a deliberative, expert-driven, open agency process, and allowing judges to focus on legal issues. Indeed, this model could have the benefit of making economic evidence in antitrust litigation more standardized and less of a focus. The agencies' models would say what they say, they would become well-understood by judges, and then the focus of the litigation would shift to other topics such as qualitative and documentary evidence, remedies, and other legal issues.

This division of labor is not without its risks, but they are manageable. First, excessive deference to the agency's models could cause the courts to discount actually compelling arguments by the parties. It could also stifle the development of new merger analysis tools. However, those issues would be mitigated because the deference to the agencies' templates and models would only be a presumption, not an absolute rule. In addition, the agencies could waive their objection—or even decide not to challenge the merger at all—if they agreed that some or all of the parties' economic evidence was better. Defendants could still introduce alternative models; they would just face an appropriately high bar in convincing the agencies and the courts to credit their models above those designed by the agencies' process.

C. *Benefits and Risks to Merging Parties*

Merging parties would benefit from a more standardized and predictable process. They would know what data are required and how that data would be used throughout the process. In many cases, merging parties might not even need to hire economists to analyze their data; they could just use the agencies' models and deal with whatever results those models yield. It would also make the second-request process more predictable and streamlined. Though this proposal would not prevent the agencies from request other kinds of documents and depositions in a second-request process, it would at least delimit the quantitative/data requests that the parties should expect.

On the other hand, these reforms clearly impose additional costs on merging firms. The new requirements of the initial notification form would require significant additional work from both lawyers and economists / data analysts. In addition, the presumption in favor of the government's models in litigation would make it harder for defendants to present more favorable evidence of the impacts of their mergers. In the end, more mergers would likely be challenged, and more successfully, which is not in the financial interest of the merging parties. But that is not a risk that the agencies, in considering these proposals, should concern themselves with.

VI. Conclusion

The HSR merger review process, having gone unreformed for too long, is creaking under the weight of increasingly complex mergers in ever-changing markets. It needs immediately improvement if it is to allow agencies to prevent more harmful mergers. These reforms would provide significant improvements to the current process. The agencies should consider these kinds of fundamental reforms to the process in their next revisions to the HSR rules.