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Comments of

TechFreedom

Bilal Sayyed[i]

In the Matter of

Proposed Changes to the HSR Notice and Reporting Form

16 CFR Parts 801-803, Hart-Scott-Rodino Coverage, Exemption and Transmittal Rules

Project No. P239300

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[i] Bilal Sayyed is Senior Competition Counsel of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He was previously Director of the Office of Policy Planning at the Federal Trade Commission and has over twenty-years' experience with the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act. He can be reached at bsayyed@techfreedom.org.

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INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act[1] ("HSR Act" or "Act") requires parties to the acquisition of assets or voting securities, or the acquisition of certain non-corporate interests ("acquisition") to provide notice of the acquisition to the Federal Trade Commission and Department of Justice (the "Agencies") to observe a thirty-day waiting period before consummating the acquisition.[2] The notification and waiting period requirements allow the Agencies to investigate whether the acquisition raises competitive concerns. In support of identifying acquisitions that raise competitive concerns, the HSR Act requires parties to an acquisition to provide certain information to the Agencies through the reporting mechanism of the Antitrust Improvements Act Notification and Report Form (the "Form"). The Agencies seek comment on a proposal to modify and significantly expand the information required to complete the Form.[3] The Agencies should resist this impulse. Instead, they should adopt a more targeted and narrow approach to slightly, not significantly, expanding the information necessary to complete the Form. The Agencies should also exempt a significant percentage of transactions from the notice and waiting period requirements of the HSR Act.

A review of historical data shows clearly that the Act, and its implementing rules, are overinclusive. For those acquisitions that continue to require notification, the Form can be revised, in part, to adopt a slightly broader use of the existing "if-then" format for certain information and documents necessary to complete the Form. The request for additional documents and information to complete the Form should not be used as a fishing expedition but should be targeted to request no more than that information and documents the Agencies have a well-grounded basis for requesting at the notification stage. In addition, the Agencies should abandon the request for narrative responses with regard to market definition and other subjective factors that are relevant for an antitrust review; this request will significantly expand the time required to prepare an HSR filing, will be subject to dispute (and thus may lead staff to bounce the filing), and will open the certifying persons to a perjury charge if there is disagreement on the basis for the narrative responses.

TechFreedom therefore welcomes the opportunity to comment on the proposed changes to the Form. Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank dedicated

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[1] 15 U.S.C. § 18a.

[2] *Id.*

[3] U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, REQUEST FOR COMMENT ON HART-SCOTT-RODINO COVERAGE, EXEMPTION, AND TRANSMITTAL RULES (June 29, 2023), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

TechFreedom has, in the recent past, weighed in on significant issues with respect to merger policy—for example:

- We provided comments on the Agencies' July 2023 Draft Merger Guidelines.[4]
- We provided comments on the Agencies' Request for Information on Merger Enforcement.[5]
- We analyzed the pros and cons of the Agencies' 2020 Vertical Merger Guidelines.[6]
- We recommended that the FTC retain the "without unduly burdening legitimate business activity" clause in the Agency's mission statement when drafting the FTC's Strategic Plan for 2022-2026.[7]

I. The Agencies' Implementation of the HSR Act's Notification and Waiting Period Requirements Is Significantly Inefficient and Burdensome.

The HSR Act sets out a size-of-transaction test: parties to acquisitions valued greater than $200 million must observe the notification and waiting period requirements of the Act, unless otherwise exempt; parties must also file when the value of an acquisition is greater than $50 million but not greater than $200 million when one party to the acquisition has assets or annual net sales of $10 million or more, and when the other party to the acquisition has assets or annual net sales of $100 million or more, unless otherwise exempt. They must further observe, in most cases, a thirty-day waiting period before consummating the transaction.[8]

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[4] Comments of TechFreedom, In the Matter of Draft Merger Guidelines (Sept. 18, 2023), https://techfreedom.org/wp-content/uploads/2023/09/Bilal-Sayyed-Merger-Guidelines-Comments-9-18-2023.pdf.

[5] Comments of TechFreedom, In the Matter of Request for Information on Merger Enforcement (Apr. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf.

[6] *TechFreedom Praises, Critiques New Vertical Merger Guidelines*, TECHFREEDOM (June 30, 2020), https://techfreedom.org/techfreedom-praises-critiques-new-vertical-merger-guidelines/.

[7] Comments of TechFreedom, Draft FTC Strategic Plan for FY2022-2026, Docket ID: FTC-2021-0061 (Nov. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/11/FTC-2021-0061-0010_attachment_1.pdf.

[8] The jurisdictional thresholds of both the size-of-person test and the size-of-transaction test are adjusted annually. The size-of-person test is slightly more complicated than the text states; in some instances, it is only met where the acquired person has assets of or greater than $10 million (as adjusted). The waiting period in all-cash tender offers is fifteen days, not thirty days. 15 U.S.C. § 18a.

If the acquisition raises competitive concerns, the Agencies may extend the thirty-day waiting period by issuing a request for additional information ("second request") that tolls consummation of the acquisition until the parties certify compliance with the second request and observe an additional thirty-day waiting period. (Compliance with a second request usually takes 3-6 months and can be substantially longer.) The parties and the Agencies often negotiate an extension to this second thirty-day period. If the acquisition raises sufficient competitive concerns, the Agencies may seek a federal district court order that temporarily, preliminarily, or permanently enjoins the transaction. In the alternative, the parties may agree to address the Agencies' concerns through the formal process of a consent order (with the Federal Trade Commission), or a consent decree (with the Department of Justice, by court order), or through informal means (so-called "fix-it-first" arrangements).

The HSR Act is significantly inefficient, as the data presented below will demonstrate.

The percentage of filings receiving early termination of the otherwise statutorily required thirty-day HSR waiting period illustrates the overinclusiveness of the HSR Act's reporting requirement. Over the twenty-nine-year period 1993–2021, 86% of acquisitions notified under the HSR Act requested early termination of the waiting period; of those 86% (52,945 filings), 74% received early termination. Approximately 64% of all transactions notified during the twenty-nine-year period thus received early termination.[9] (See Figure One.)

Investigation and enforcement data also illustrate the Act's overinclusiveness. Over the twenty-nine-year period 1993–2021, the antitrust Agencies received notice of 61,394 acquisitions but challenged only 1,274 (2.1%).[10] Over the same twenty-nine-year period, the

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[9] Some of these transactions may have been subject to some level of investigation, and some may even have received a second request. However, the number subject to investigation during the HSR Act waiting period is undoubtedly low and would not affect this percentage significantly. In February 2021, the Commission, with the concurrence of the Department of Justice, stopped granting early termination of the waiting period. *See* Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination. The data necessary to perform this calculation is found in the electronic file HSR AND MERGER ENFORCEMENT DATA 1993-2021, included as an attachment to this submission.

[10] Data is collected on a fiscal year basis from the Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, https://www.ftc.gov/policy/reports/annual-competition-reports. Calculations and figures use "adjusted transactions in which a second request could have been issued" as the measure of annual HSR filings.

We analyze the period beginning 1993 because it most closely comports with the release of the 1992 Horizontal Merger Guidelines, the "blueprint for the architecture of merger analysis." Antitrust Modernization Commission, Report and Recommendations at 54–55 (2007) (citations omitted), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. It is difficult to identify a litigated horizontal merger matter of the past 25 years that has not relied, at least in part, on the analytical framework of the Horizontal Merger Guidelines. For cases applying some or all of the framework or analytic

Agencies sought formal approval ("clearance") from each other to initiate an investigation in less than 14% of acquisitions notified under the HSR Act and issued second requests in just under 3%.[11] While the raw numbers of merger filings, clearance requests, second requests, and enforcement actions vary from year to year, the clearance requests, second requests, and enforcement actions as a percentage of merger filings do not vary much. (See Figures Two and Three.)

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insight of the 2010 Horizontal Merger Guidelines, *see* Fed. Trade Comm'n v. Sanford Health, 926 F.3d 959 (8th Cir. 2019); United States v. Anthem, 855 F.3d. 345 (D.C. Cir. 2017); Fed. Trade Comm'n v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016); Saint Alphonsus Medical Center-Nampa v. St. Luke's, 778 F.3d 775 (9th Cir. 2015); ProMedica Health System v. Fed. Trade Comm'n, 749 F.3d 559 (6th Cir. 2014); Fed. Trade Comm'n v. Thomas Jefferson Univ., 505 F. Supp. 3d. 522 (E.D. Pa. 2020); Fed. Trade Comm'n v. Peabody Energy, 492 F. Supp. 3d 865 (E.D. Mo. 2020); Fed. Trade Comm'n v. Rag-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020); United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020), vacated, 2020-1 Trade Cas. (CCH) ¶¶ 81, 294; New York v. Deutsche Telecom AG, 439 F. Supp. 3d 179 (S.D.N.Y 2020); Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d. 27 (D.D.C. 2018); Fed. Trade Comm'n v. Tronox Ltd., 332 F. Supp. 3d. 187 (D.D.C. 2018); United States v. Energy Sols, Inc., 265 F. Supp. 3d 415 (D. Del. 2017); United States v. Aetna, 240 F. Supp. 3d. 1 (D.D.C. 2017); Fed. Trade Comm'n v. Staples, 190 F. Supp. 3d 100 (D.D.C. 2016); FTC v. Sysco, 113 F. Supp. 3d 1 (D.D.C. 2015); United States v. Bazaarvoice, Inc., 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014); Fed. Trade Comm'n v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012); Fed. Trade Comm'n v. LabCorp., 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011); United States v. H&R Block, 833 F. Supp. 2d 36 (D.D.C. 2011). In most of these litigated matters, but not all, the court found for the government.

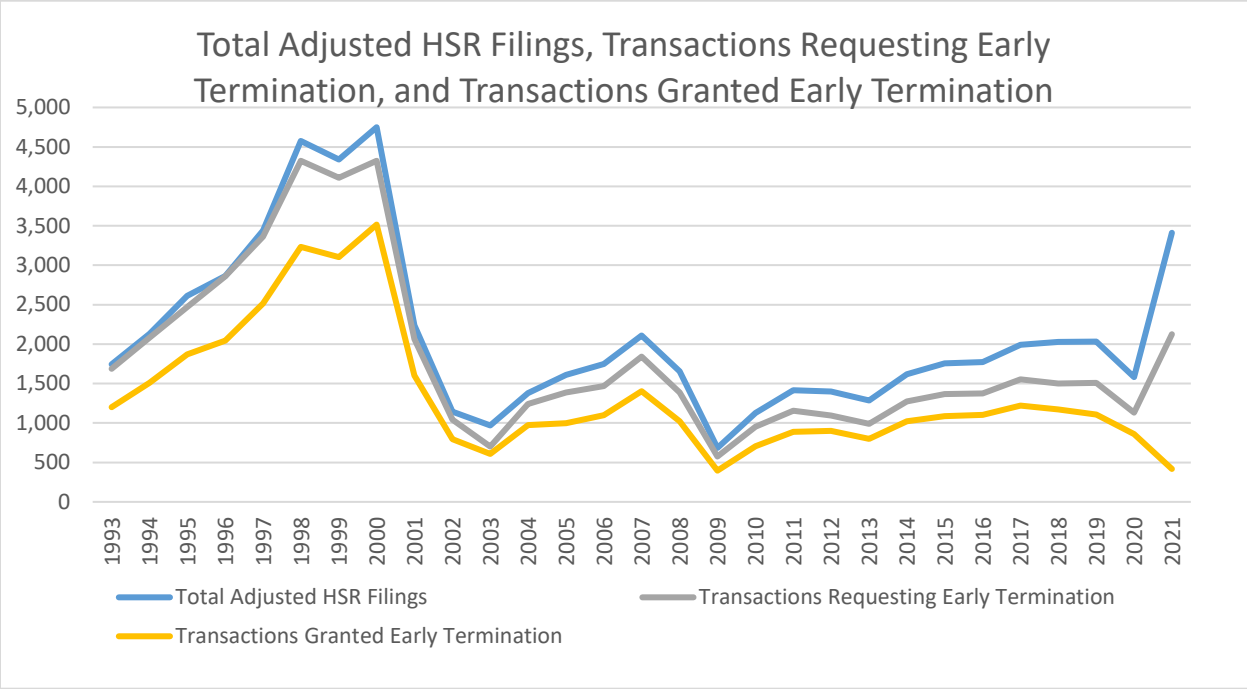
For cases applying some or all of the framework or analytic insight of the 1992 Horizontal Merger Guidelines, see, among others, Fed. Trade Comm'n v. Whole Foods Mkt., 548 F.3d 1028 (D.C. Cir. 2008); Chi. Bridge & Iron Co. N.V. v. Fed. Trade Comm'n, 534 F.3d 410 (5th Cir. 2008); Fed. Trade Comm'n v. Heinz, 246 F.3d 708 (D.C. Cir. 2001); Fed. Trade Comm'n v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); United States v. Engelhard Corp., 126 F.3d 1302 (11th Cir. 1997); Fed. Trade Comm'n v. CCC Holdings, Inc. 605 F. Supp. 2d 26 (D.D.C. 2009); Fed. Trade Comm'n v. Foster, 2007-1 Trade Cas. (CCH) ¶¶ 75, 725 (D.N.M. 2007); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Ca. 2004); Fed. Trade Comm'n v. Arch Coal, 329 F. Supp. 2d 109 (D.D.C. 2004); United States v. UPM-Kymmene Oyj, 2003-2 Trade Cas. (CCH) ¶¶ 74, 101 (N.D. Ill. 2003); Fed. Trade Comm'n v. Libbey, 211 F. Supp. 2d 34 (D.D.C. 2002); United States v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001); Fed. Trade Comm'n v. Swedish Match N. Am., Inc., 131 F. Supp. 2d. 151 (D.D.C. 2000); Fed. Trade Comm'n v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997); Fed. Trade Comm'n v. Staples, 970 F. Supp. 1066 (D.D.C. 1997). In most of these litigated matters, but not all, the court found for the government.

The data analysis runs through 2021, and not later, because 2021 because that is the most recent year for which published, comprehensive statistics are available. However, while the public data for 2022 and 2023 are not complete, and not available in final form, nothing in the public data suggests a material change in the Agencies' enforcement activity.

An earlier compilation of the public data, for the period 1981 through 2000, is provided by then-FTC Commissioner Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L. J. 105 (2002), at table 1.

[11] Electronic file HSR AND MERGER ENFORCEMENT DATA, 1993-2021 is provided as an attachment to this submission.

Figure 1: Total Annual HSR Filings, Filings Requesting Early Termination, and Filings Granted Early Termination



Note: The FTC stopped granting early termination requests in February 2021.

Figure 2: Annual Clearance Requests, Second Requests, and Challenges

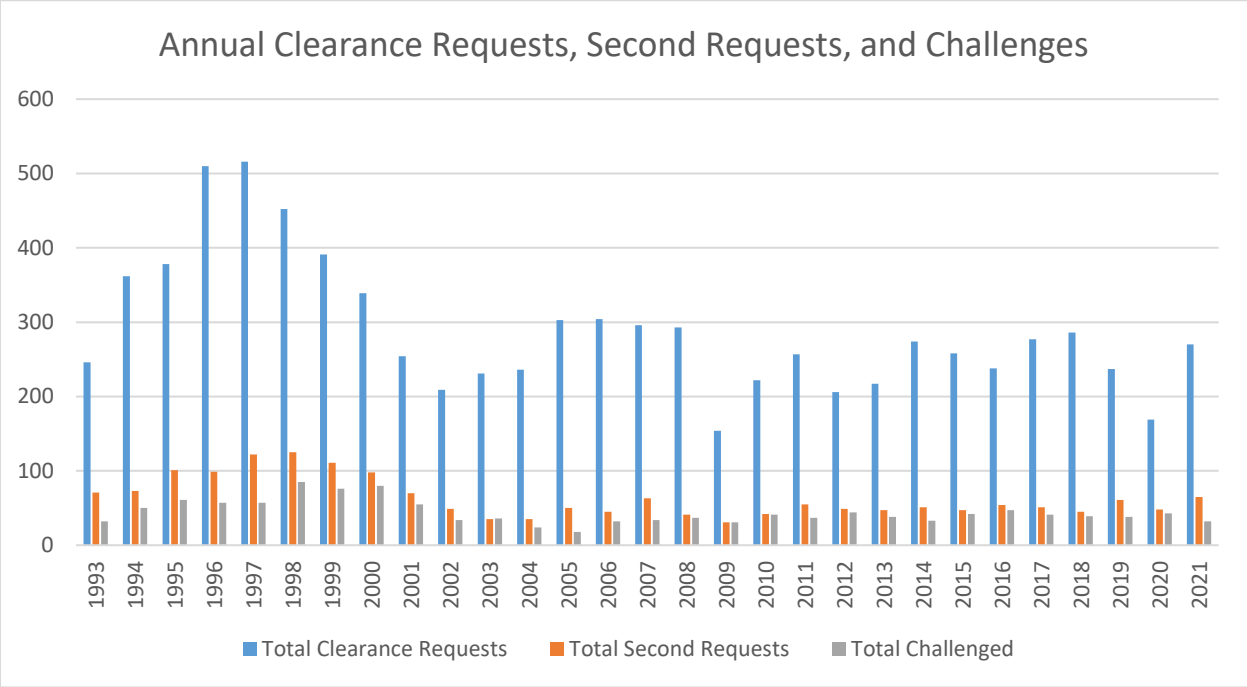
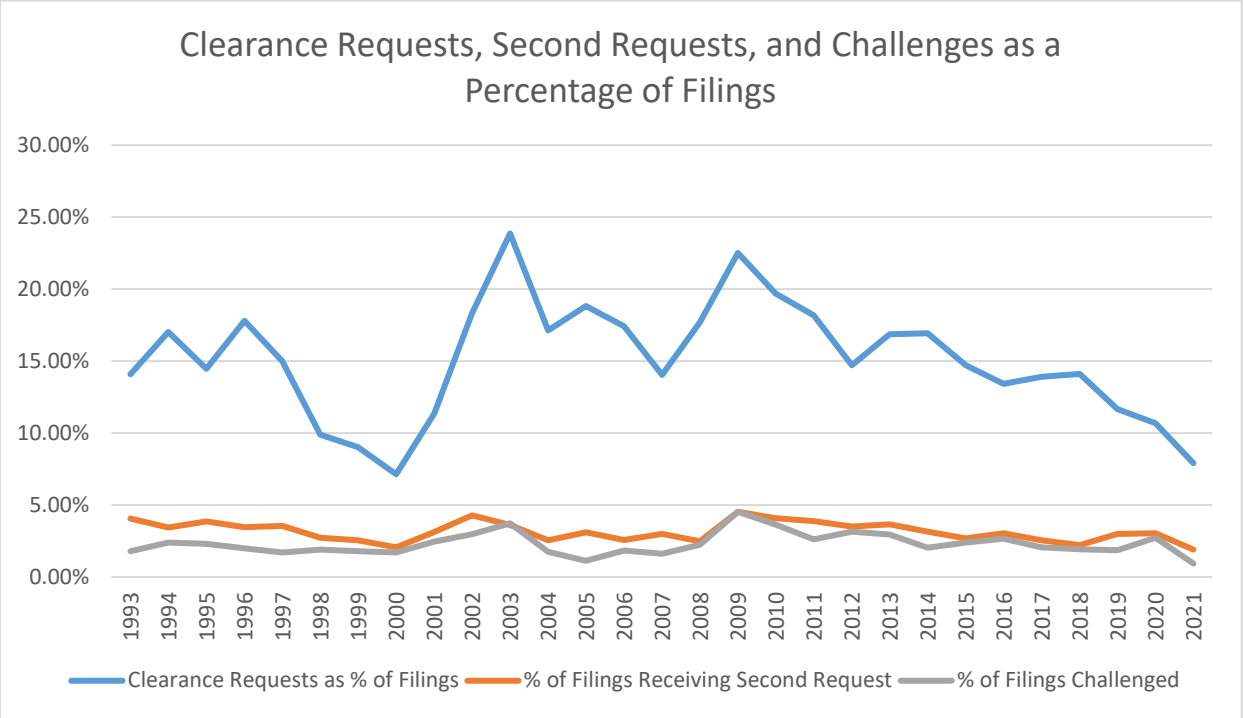


Figure 3: Annual Clearance Requests, Second Requests, and Challenges as a Percentage of HSR Filings



The number of notified transactions is substantially in excess of what the drafters of the Act predicted: they expected the Act would require notification of no more than around 150 transactions per year[12] and recognized that a notification regime requiring "thousands" of notifications per year would be burdensome, not only to business but to Agency staff.[13]

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[12] In seeking support for the Act, Representative Peter W. Rodino explained that the HSR notification requirements would "require[] advance notice . . . for the very largest corporate mergers—about the 150 largest out of the thousands that take place every year." REPORT OF THE H. COMM. ON THE JUDICIARY, H.R. REP. NO. 94-1373, at 11 (1976), reprinted in 11 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 989, 993 (1985). The House Committee was commenting on H.R. 14580, requiring notification of all acquisitions where one corporation party to the acquisition had net sales or total assets of $10 million or more, and another had net sales or total assets of $100 million or more, and the acquiring corporation would hold voting securities representing 25% or more of the acquired corporation's stock, assets, or share capital, or an aggregate total amount of stock, share capital and assets valued in excess of $20 million. H.R. 14580, 94th Cong. (1975), reprinted in 11 KINTNER, supra, at 983–88. See also REPORT OF THE S. COMM. ON THE JUDICIARY, S. REP. NO. 94-803, at 66 (1976), reprinted in 10 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 210, 258 (1985) ("Title V's dual requirement of (i) a $100 million acquiring company, and (ii) a $10 million acquired company would have required . . . notification, over the past five years, in less than 100 transactions per annum."); S. 1284, 94th Cong. (1975), reprinted in 10 KINTNER, supra, at 190–209.

[13] *See* H.R. REP. NO. 94-1373, at 11, reprinted in 11 KINTNER, *supra* note 12, at 989, 994 ("If these premerger reporting requirements were imposed on every merger, the resulting added reporting burdens might more than offset the decrease in burdensome divestiture trials. That is why [the bill] applies only to approximately

Figures 1-3 indicate that concern that the Act would "overwhelm[] the [Agencies] with trivia" was prescient.[14]

Complying with the requirements of the current HSR Form can be extensive and burdensome, especially for complex transactions likely to raise competitive concerns sufficient to warrant the issuance of a second request. A failure to comply with the reporting requirements of the Form can result in the filing being "bounced" and, after resubmission of a corrected Form, a restart of the original thirty-day waiting period; this can happen at even the late stages of an investigation that, pursuant to the issue of a second request, extended the original waiting period. Thus, in complex deals thought likely to raise competitive concerns, the filing parties often go through an extensive internal discovery process to identify information and documents to be submitted with the Form. The Agencies propose to extend and expand this burden to all notifiable transactions.

The waiting period requirement itself can also be burdensome, delaying consummation of transactions that pose no competitive problems for up to thirty days plus the time required to complete and submit the Form. The proposed revisions may, and likely will, significantly expand the time required to complete and submit an HSR filing, in part because the new requirements are likely to require extensive discussion with staff (and perhaps management), including for transactions for which no competitive concern is likely or possible (with the possible exception of a theory consistent with the "anything-goes" language of draft Guideline 13 in the Draft Merger Guidelines).

The Agencies propose to expand on the Act's inefficiency by increasing the notification burden on all filing parties—not only the approximately 15% whose acquisitions have historically raised some modest level of competitive concern, but the other 85% of filers whose acquisitions did not. This is unnecessary and inconsistent with the law.[15]

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the largest 150 mergers annually[.]"); see also S. REP. NO. 94-803, at 66, reprinted in 10 KINTNER, *supra* note 12, at 210, 258 ("To include the bulk of the approximately 3,000 mergers that have occurred annually in the course of the past several years would, however, in the Committee's judgment, impose an undue and unnecessary burden on business.").

[14] REPORT OF THE S. COMM. ON THE JUDICIARY (MINORITY VIEWS), S. REP. NO. 94-803, at 216, reprinted in 10 KINTNER, *supra* note 12, at 313, 352.

[15] The proposed intention to significantly expand the scope of the Form is inconsistent with the Paperwork Reduction Act requirements and is likely "arbitrary and capricious" with rulemaking under the Administrative Procedures Act.

A. Recommendation: Any Revisions to the Form Should Be Limited to Situations Where the Parties to a Filing Meet Certain Metrics

It is not necessary to require the parties to all filings to provide more information with the initial filing; instead, additional requirements for submission of the Form should be limited to acquisitions where the parties or the transaction meet certain metrics. The Form currently requires parties to provide certain additional information within the initial filing where the parties to an acquisition identify an overlap in North American Industry Classification System (NAICS) codes.[16] The Agencies may, if they wish, identify certain metrics that trigger the reporting of additional information or documents with the initial HSR filing. The Agencies are in the best position to do this, but experience and a review of historical data allows for some suggestions.

A review of Table 1 of the HSR Annual Report, 2002–2021, shows that, over time, a significantly higher percentage of acquisitions valued at $1 billion or more were consistently the subject of the most clearance requests and almost always received second requests more often than acquisitions valued below $1 billion (Figures 4 and 5).

[16] *See* requirements of Item 7 and Item 8 in the instructions for the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions, https://www.ftc.gov/system/files/ftc_gov/pdf/HSRFormInstructions02.27.23.pdf.

Figure 4: Clearance Grants by Value of Transaction

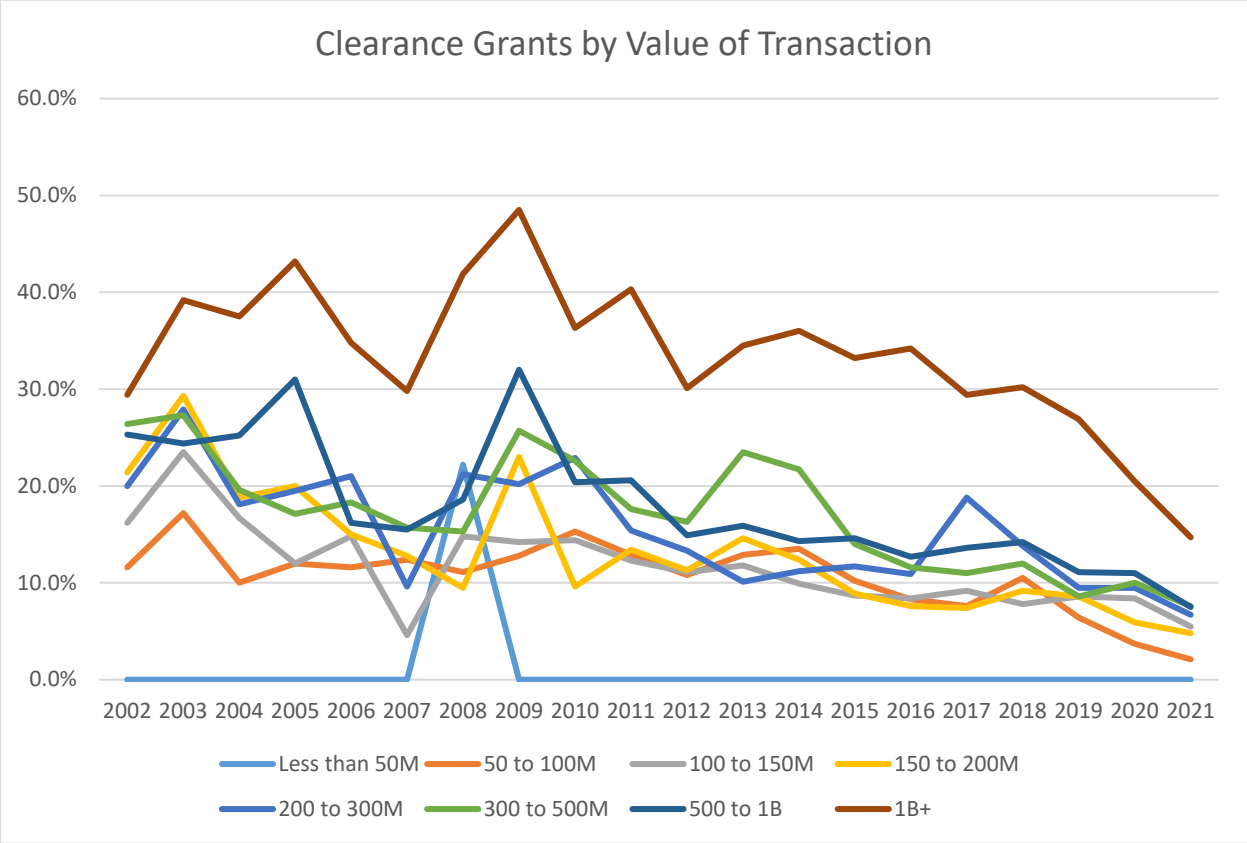
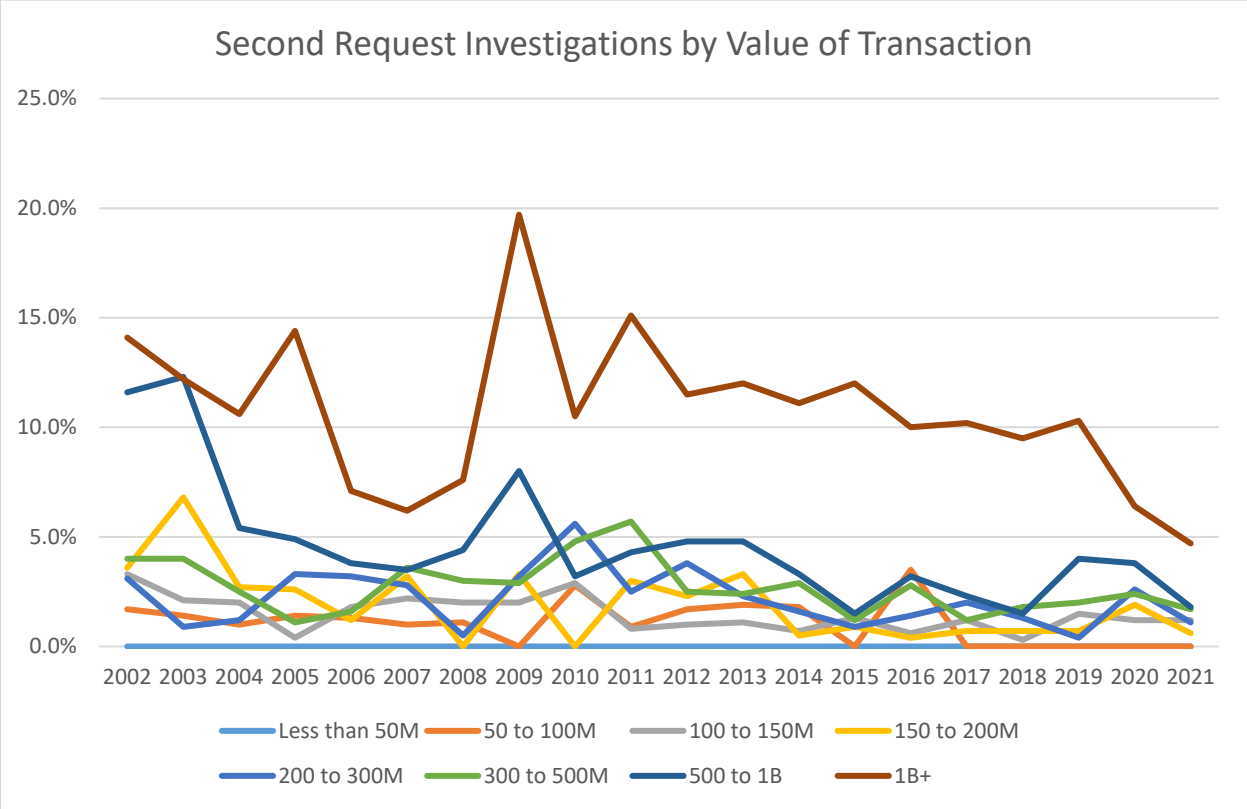


Figure 5: Second Request Investigations by Value of Transaction



While the size of a transaction is not necessarily a good proxy for antitrust harm, the Agencies' experience suggests that larger transactions get more scrutiny and are more likely to receive second requests. The Agencies may consider whether parties to acquisitions valued at, or greater than, $1 billion should provide additional information on the initial reporting Form to better utilize the initial waiting period. That information should not be extensive but should be consistent with and no broader than the information historically requested in voluntary access letters. The Commission has publicly identified this information: (i) organization chart; (ii) strategic plans and marketing plans for the previous three years; (iii) list of products manufactured and sold; (iv) list of products in development; (v) list of top ten customers (for overlap products); (vi) list of competitors (for overlap products); (vii) market share information (for overlap products).[17]

[17] 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. Because an HSR filing may be made prior to public acknowledgement of an acquisition, neither customers nor competitors should be contacted without notice to the filing parties, and, in most cases, prior to an acquisition (or related) agreement between the parties. Where an acquisition is confidential and not yet signed, contact with customers or competitors may impact the negotiation of an

Alternatively, because even this will be overinclusive, the Agencies may choose to require the submission of additional documents and information with the initial filing when a) the transaction value is or exceeds $1 Billion, and, either of b)(i) where the parties to the acquisition identify an overlap at the NAICS six-digit code level; or b)(ii) where the parties to the acquisition identify a material vendor-vendee relationship.[18]

Where a party to a filing does not report revenue at Item 5 of the Form (revenue by NAICS code), the Agencies may wish to consider requiring that person to provide certain, limited, ordinary course documents that identify the potential lines of business the person intends to or expects to operate in, and a list of products or applications in development.

B. Recommendation: Standard Occupational Category Data, Commuting Zone Data, and OSHA Complaint Data Are Not Germane to an Antitrust Inquiry and Should Not Be Included with the Initial Filing

In all but extraordinary cases, a merger that lessens competition for labor will also lessen competition for a product or service market. The NPRM requests information intended to populate a new "Labor Markets" section of the Form. The NPRM suggests filing persons be required to provide information on employees, as classified into five six-digit standard occupational categories, and worker and workplace safety information.

This information is of zero utility to the Agencies. For example, the SOC data is neither collected from nor consistent with a relevant geographic market and is not uniquely associated with anything likely to be a relevant product market. Worker safety data is not likely correlated with labor market power but with type of industry.

The Agencies have not put forth a credible or non-speculative explanation why the information requested will have any relevance to an antitrust analysis of labor markets in merger investigation. That is not surprising because there is none. The Agencies need to do substantial additional homework on the analysis of labor markets rather than request

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acquisition. Narrative responses to questions on the Form may raise disputes or conflict with staff; market definition and market share can be subjective or based on information not available to the filing parties; thus narrative responses may result in conflict with staff (delaying the filing, or resulting in a bounce of the filing), and will likely place the certifying person in the awkward position of certifying to accuracy of subjective definitions and data prepared as part of the filing. For both reasons, the Agencies should not ask for narrative responses to subjective questions in the HSR filing.

[18] A material vendor-vendee relationship can be based on revenue (e.g., purchases from or sales to one of the parties to the acquisition exceeds $10 million), percentage of input costs (e.g., product purchased from the other party to the acquisition exceeds 10% of total input costs), or percentage of sales (e.g., product sold to the other party to the acquisition exceeds 20% of total sales of product), or some combination of metrics.

thousands of filing parties provide information that the Agencies are simply speculating may have some relationship to market power in a labor market.

C. Recommendation: Any Expansion of the Form's Reporting Requirements Should Be More Cognizant of the Procedures Used to Obtain Additional Information During the 30-Day Waiting Period and to Extend the 30-Day Waiting Period

The Commission's proposal claims that the information and documents submitted with the Form are insufficient to identify transactions that should be subject to a more thorough investigation and that this limitation leads to an inefficient use of the thirty-day waiting period. The Commission's concern is substantially overstated and neglects at least three well-accepted and well-known practices by which, for more than twenty-five years, the Agencies have obtained additional information from the parties to a transaction and from others during the initial waiting period. The Agencies rarely rely only on the information provided with the Form when deciding whether to issue a second request.

For transactions that may raise competitive concerns—the roughly 15% for which one agency receives clearance to open a preliminary investigation—the Agency staff frequently asks the parties to provide data and documents to supplement the information contained in the form during the initial thirty-day period. This includes requests for contact information for top customers of both parties; ordinary-course business documents, including strategic plans; significantly detailed sales data; the companies' best estimates of their market shares; and other information related to potential product, geographic and now labor markets.

Very few experienced antitrust counsels apply a "file-and-duck" strategy; in transactions that are likely to raise competitive concerns, an experienced counsel often proactively reaches out to the Agencies and attempts to assuage or address likely concerns, or at least to narrow the Agencies' concerns, during the initial thirty-day waiting period. They often do this before submitting their HSR filing, thus delaying putting the Agencies on the clock. Alternatively, if the Agencies' interest is a surprise, experienced antitrust counsel are frequently very responsive to information requests during that initial thirty-day period; remember, of course, that absent responsiveness, the Agencies can extend the waiting period by issuing a second request. There are few to no benefits for parties who stiff the Agencies; in the author's experience, failure to provide information on a voluntary basis during the initial waiting period makes it substantially likely the Agencies will issue a second request.

The Agencies have also adopted an informal practice that allows the initial thirty-day waiting period to be extended by the parties, through use of a "pull-and-refile" of the initial HSR filing. In instances where a second request may issue, the Agencies have allowed parties to pull

their HSR filing and resubmit an updated filing within two business days (without an additional filing fee) and restart the thirty-day clock. This allows for extended discussion prior to a second request and effort to identify areas of potential competitive concern.

The proposed notice is written as if these and other informal procedures are neither available nor widely used, with the Agencies suggesting that imposing similar or larger burdens on the universe of filing parties will allow for more efficient use of the initial thirty-day period. This is nonsense. The Agencies already receive thousands of filings every year for acquisitions that do not raise competitive concerns. The proposed revisions to the Form will not only burden filing parties but burden the Agencies and will become a clog on competition, the market for corporate control, and Agency resources.

The Agencies can better utilize the initial thirty-day period by making clear, up front, what information will be requested during the initial waiting period to allow counsel to prepare it for quick submission to the Agencies upon request; the Agencies should therefore publish updated guidance on documents likely to be requested during the initial waiting period. Staff can request information consistent with the model during the initial waiting period, explaining to the parties any deviation from the model.

Competition is unlikely to be harmed by maintaining the present combination of the existing Form and such informal procedures as noted above instead of revising the Form as proposed.

D. Recommendation: The Agencies Should Adopt Additional Rules That Exempt Transactions from the Reporting and Waiting Period Requirements of the HSR Act.

The HSR Act allows the Commission, with the concurrence of the Attorney General, to adopt rules to exempt acquisitions from the notice and reporting requirements of the Act.[19] "Whenever the Commission can determine that a class of transactions is unlikely to violate the antitrust laws, it has sought, with the concurrence of the Assistant Attorney General for Antitrust, to exempt such transactions from all notification obligations and the delay inherent in premerger review."[20]

The Commission last adopted significant exemptions in 1996.[21] In 2020, the Commission proposed an additional exemption for acquisitions resulting in the acquiring person holding

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[19] 15 U.S.C. §18a(d)(2)(B).

[20] Premerger Notification Reporting and Waiting Period Requirements, 53 Fed. Reg. 36,831, 36,833 (proposed Sept. 22, 1988) (to be codified at 16 C.F.R. pts. 801–803).

[21] Fed. Trade Comm'n, Final Rule: Premerger Notification; Reporting and Waiting Period Requirements, 61 Fed. Reg. 13,666 (Mar. 28, 1996), https://www.federalregister.gov/documents/1996/03/28/96-7529/premerger-notification-reporting-and-waiting-period-requirements.

no more than 10% of the voting securities of the acquired entity.[22] The Commission should enact this proposal.

We propose two additional exemptions.

The Commission has sufficient information to recognize what nearly every antitrust merger lawyer recognizes: it is extremely rare for the Agencies to challenge an acquisition of voting securities where the acquisition will not transfer control of the target company.[23] On this record, the Commission, with the concurrence of the Department of Justice, should exempt from the reporting requirements of the Act those acquisitions of voting securities that do not result in the acquiring person acquiring control of the target issuer. Such an exemption would essentially codify existing practice.

Similarly, a review of the Agencies' enforcement record since the enactment of the HSR Act shows that the Agencies do not usually challenge, as a percentage of either merger notification filings or as a percentage of enforcement challenges, non-horizontal transactions. While non-horizontal transactions can raise competitive concerns, they are almost always resolved through behavioral and not structural relief.[24] Thus, the concerns about "unscrambling" already-consummated mergers that motivated the creation of a pre-merger notice and waiting period requirements are not usually present in non-horizontal transactions.

These two exemptions would likely significantly decrease the number of acquisitions that are subject to the reporting requirements, and thus the burdens, of the HSR Act, without a significant impact, if any, on substantive merger enforcement. This, in turn, would allow the FTC to focus its attention on mergers that are more likely to harm consumers.

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[22] Fed. Trade Comm'n, Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77,053 (Dec. 1, 2020), https://www.federalregister.gov/documents/2020/12/01/2020-21754/premerger-notification-reporting-and-waiting-period-requirements.

[23] The HSR Rules define control as the holding of 50% or more of the voting securities eligible to vote for the issuer's board of directors, or the right to appoint 50% or more of the board of directors of the acquired issuer, or, in the case of non-corporate entities, the right to 50% of its profits, or 50% of its assets upon dissolution. Alternatively, the Agencies appear to define control as holding 25% of the voting securities (or the equivalent) when seeking information from the filing person in requests for additional information. See Definition D 1 of the Model Second Request, https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf.

[24] Steve C. Salop & Daniel P. Culley, Vertical Merger Enforcement Actions: 1994-April 2020 (April 15, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2684107.

E. Recommendation: The Agencies Should Enter into an Improved Clearance Agreement with Respect to Their Review of Acquisitions

At present, clearance disputes between the Agencies can sometimes squander the initial thirty-day waiting period. While both Agencies can investigate the same acquisition, in practice, the Agencies seek clearance to determine which Agency will do so. The clearance process avoids dual investigations and a waste of government resources. However, at times the clearance process itself does not work efficiently, due to a lack of clarity between the Agencies as to who has a stronger claim to review an acquisition, or because of strategic use of the clearance process to establish support to review a future acquisition. The Agencies should clarify and strengthen the clearance process to avoid bureaucratic impediments to a more efficient use of the initial waiting period.

CONCLUSION

The HSR Act requires notice of significantly more transactions than are likely to raise competitive issues. In the most recent twenty-nine-year period for which data is available, the Agencies received notice of 61,394 acquisitions. In only 8,385 of those transactions did one or both Agencies request clearance to investigate whether the acquisition raised competitive issues. In only 1,274 of those matters did either Agency pursue an enforcement action.

The Agencies propose to significantly increase the burden on parties to submit an initial HSR filing. This burden will fall on every transaction, including the 85% of filings unlikely to raise issues sufficient to trigger any interest from either Agency. The burden, as described in the NPRM, is significant and disproportionate to the Agencies' need. The Agencies should revise their proposal to expand the information required to submit the initial filing in accordance with the recommendations identified above.

Respectfully submitted,

_____/s/_____
Bilal Sayyed
Senior Competition Counsel
TechFreedom
bsayyed@techfreedom.org
1500 K Street NW
Floor 2
Washington, DC 20005

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