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Anticompetitive Merger Review

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ANTICOMPETITIVE MERGER REVIEW

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U.S. antitrust law empowers enforcers to review pending mergers that might undermine competition. But there is growing evidence that the merger-review regime is failing to perform its core procompetitive function. Industry concentration and the power of dominant firms are increasing across key sectors of the economy. In response, progressive advocates of more aggressive antitrust interventions have critiqued the substantive merger-review standard, arguing that it is too friendly to merging firms. This Article traces the problem to an additional source: the merger-review process itself. The growing length of reviews, the competitive restrictions that merger agreements place on acquisition targets during review, and the targets' resulting loss of strength harm competition and consumers. As a result, an enforcement regime designed to protect competition is damaging it instead. The rise of antitrust reverse termination fees (ARTFs)—payments from the acquirer to the target if the merger fails antitrust review—demonstrates the anticompetitive effect of the review process. This Article argues that these fees represent the parties' negotiated prediction of the competitive costs to the target of entering the merger agreement (and therefore the competitive gains to the acquirer and other rivals in the relevant market). Reform proponents have suggested several potential ways to shorten merger investigations, such as limiting enforcement agencies' discovery demands, but these modifications only reduce the problem at the margins. This Article

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proposes a more effective reform: a requirement that the antitrust enforcement agencies announce a "merger watchlist"—a group of highly concentrated markets in which they are likely to challenge any *proposed merger, unless one of the firms is failing. This strategy, which the antitrust agencies have employed in an ad hoc fashion in the past, will discourage anticompetitive mergers and eliminate lengthy reviews that harm consumers.*

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I. INTRODUCTION

In 2011, AT&T agreed to purchase T-Mobile for $39 billion.[1] The merger agreement included an antitrust reverse termination fee provision (ARTF) that required AT&T to pay T-Mobile a significant sum if the deal was terminated on antitrust grounds.[2] The merger would have reduced the number of national mobile wireless telecommunications carriers from four to three, with the merged entity becoming the new largest U.S. carrier.[3] It faced an uphill battle with antitrust enforcers. The Antitrust Division of the U.S. Department of Justice sued to block the acquisition, and after litigating for several months, the parties terminated the deal.[4] Before they did so, an industry analyst observed that AT&T was content to let the litigation process play out, but the lengthy merger review and litigation was harming T-Mobile, which was losing customers to other carriers.[5] Under the ARTF provision, AT&T paid T-Mobile $4.2 billion in cash and other assets when the deal died.[6]

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[1] STOCK PURCHASE AGREEMENT BY AND BETWEEN DEUTSCHE TELEKOM AG AND AT&T INC. 16 (2011) [hereinafter AT&T/T-MOBILE STOCK PURCHASE AGREEMENT], https://www.sec.gov/Archives/edgar/data/732717/000119312511072458/dex21.htm.

[2] *Id.* at 70–71.

[3] *See* Second Amended Complaint at 6, United States v. AT&T Inc., 1:11-cv-01560-ESH, (D.D.C. Sept. 30, 2011) ("If this transaction is consummated, AT&T and T-Mobile would become the nation's largest wireless carrier.").

[4] *See* Press Release, U.S. Dep't of Just., Just. Dep't Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011), https://www.justice.gov/opa/pr/justice-department-issues-statements-regarding-att-incs-abandonment-its-proposed-acquisition (stating that the DOJ sued to "protect consumers who rely on competition" and "[w]ith the parties' abandonment, . . . achieved that result").

[5] *See* Cornelius Rahn, *Deutsche Telekom, AT&T at Odds as T-Mobile Deal Crumbles*, BLOOMBERG (Sept. 9, 2011 9:46 AM), https://www.bloomberg.com/news/articles/2011-09-08/deutsche-telekom-at-t-seen-at-odds-with-t-mobile-deal-crumbling (quoting an industry analyst as saying, "AT&T still wants the deal to go through, but if there's no hope for it, then it's to their benefit to prolong the process. . . . For [T-Mobile], it's just the other way around. This is a window of opportunity for all players to grab customers from T-Mobile.").

[6] *See* Michael J. de la Merced, *T-Mobile and AT&T: What's $2 Billion Among Friends?*, N.Y. TIMES (Dec. 20, 2011), https://dealbook.nytimes.com/2011/12/20/att-and-t-mobile-whats-2-billion-among-friends/ (noting that the breakup fee included $3 billion in cash and at least $1 billion in cellular airwaves, known as spectrum, which the companies valued at different amounts); Ingrid Lunden, *Competition Weighs on T-Mobile USA: Q2 Sales Down to $4.9B, Customer Figures 'Continue to Present Challenge,'* TECHCRUNCH (Aug. 9, 2012, 2:17 AM) (reporting that T-Mobile USA "says it recorded a $1.2 billion increase in spectrum licenses as a result of the AWS spectrum received as part of the terminated AT&T transaction"), https://techcrunch.com/2012/08/08/competition-weighs-on-t-mobile-usa-q2-sales-down-to-4-9b-customer-figures-continue-to-present-challenge.

The AT&T/T-Mobile saga is in many ways an antitrust success story. The Antitrust Division forced the firms to abandon what was almost certainly an anticompetitive deal, and T-Mobile rebounded to become a strong competitor.[7] But this story also suggests serious problems with the U.S. merger-review process: lengthy reviews involving highly concentrated markets harm target companies and benefit acquiring firms, which enjoy reduced competition for the duration of the investigation and merger challenge (perhaps explaining why AT&T was in no hurry to resolve the litigation). More importantly, these lengthy reviews harm consumers, who suffer from this reduced competition, often in the form of higher prices.[8] Acquiring firms sometimes are willing to promise to pay the target firm if a deal is abandoned, suggesting that ARTFs could function as a vehicle for buying competitive peace for the length of an investigation. The merger-review process, which is designed to protect competition, is rife with opportunities for anticompetitive mischief.

With industry concentration and the power of dominant companies increasing across key sectors of the economy, the U.S. merger-review regime has been subject to intense scrutiny over the past few years. Progressive critics have focused on lax enforcement and the substantive merger-review standard, which they argue is too friendly to merging firms.[9] Concerns about the merger-review

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[7] *See* William J. "Bill" Baer, Assistant Att'y Gen., Antitrust Div., Dep't of Just., Remarks as Prepared for Delivery to the New York State Bar Association: Reflections on Antitrust Enforcement in the Obama Administration 16 (Jan. 30, 2014), https://www.justice.gov/atr/file/517761/download ("Since AT&T terminated its effort to eliminate T-Mobile as a rival, T-Mobile has spearheaded increased competition in wireless services.").

[8] *Cf. Competitive Effects*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects (last visited May 25, 2022) ("[C]onsumers may face higher prices, lower quality, reduced service, or fewer choices as a result of [a] merger . . . between competitors.").

[9] *See, e.g.*, AM. ANTITRUST INST., THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S. 3 (2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf ("[L]ax enforcement of hundreds of transactions over time has resulted in 'creeping' concentration in many markets, resulting in tight oligopolies and dominant firms."); Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 463–64 (2020) (critiquing the substantive review standard for bank mergers and arguing for a more expansive merger-review standard across industries); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 70 (2019) ("The clearest area where antitrust enforcement has been overly lax is the treatment of mergers."); *Modern Antitrust Enforcement*, YALE SCH. MGMT.: THURMAN ARNOLD PROJECT, https://som.yale.edu/faculty-

process typically are the province of corporate interests and the antitrust enforcement agencies themselves.[10] But the process—the nuts and bolts of how the agencies conduct merger reviews—also raises anticompetitive risks that stem from the increasing length of merger investigations.

Merger reviews for potentially anticompetitive acquisitions are taking longer than ever. The Antitrust Division reported that in 2017 "significant merger reviews" by the Division and the Federal Trade Commission (FTC)[11] (together, the Agencies) "took an average of 10.8 months to resolve," an increase of 65% from an average of 7.1 months in 2013.[12] By 2019, that average had risen to 11.9 months, and in 2020 and 2021 it was 11.4 months.[13] There are a number of possible reasons for this increase, including the ever-

research-centers/centers-initiatives/thurman-arnold-project-at-yale/antitrust-enforcement-data-0 (last visited May 25, 2022), ("The evidence overall supports the conclusions that interpretations of U.S. antitrust laws have been too lax toward consolidation and that a significant strengthening of horizontal merger enforcement is needed.").

[10] *See, e.g.*, Donald G. Kempf, Jr., Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum: Merger Reviews: Do They Take Too Long? 2 (Nov. 17, 2017), https://www.justice.gov/opa/speech/file/1012156/download (giving a government perspective on problems in the merger-review process); Scott E. Gant, Andrew Z. Michaelson & Edward J. Normande, *The Hart 'Scott' Rodino Act's First Amendment Problem*, 103 CORNELL L. REV. ONLINE 1, 2 (2017) (arguing that in "recent years," because of the FTC's interpretation of a specific exemption, Hart-Scott-Rodino (HSR) filing requirements have "applied to more than ten times the number of transactions originally envisioned"); Ryan Radia, *Congress Should Reform Antitrust Law with SMARTER Act*, COMPETITIVE ENTER. INST. (May 31, 2018), https://cei.org/blog/congress-should-reform-antitrust-law-with-smarter-act/ (arguing that the "cumbersome" HSR "process needs a serious rethinking" and asserting that the merger-review regime "usually" requires merging firms to spend "millions—or sometimes *billions*—of dollars on top of the cost of the transaction itself").

[11] In the United States, authority to review mergers under the antitrust laws is allocated to both the Antitrust Division of the Department of Justice and the Federal Trade Commission. *Merger Review*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review, (last visited May 25, 2022). The two Agencies determine on a case-by-case basis which of them will review particular deals. *Id.*

[12] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium: It Takes Two: Modernizing the Merger Review Process 2 (Sept. 25, 2018) (citing *DAMITT Q2 2018 Update: Duration of Significant Antitrust Merger Investigations May Have Plateaued Despite Unchanged Levels of Enforcement in the US and EU*, DECHERT LLP (July 19, 2018), https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s-- antitr.html), https://www.justice.gov/opa/speech/file/1096326/download.

[13] *DAMITT 2021 Report: Merger Investigation Activity Sinks More Deals*, DECHERT LLP (Jan. 31, 2022), https://www.dechert.com/knowledge/publication/2022/1/damitt-2021-report--merger-investigation-activity-sinks-more-dea.html [hereinafter *DAMITT 2021 Report*] (providing an average review time of 11.4 months for significant merger investigations in 2021).

growing quantity of data and documents that merging parties retain and are required to review and produce and the increasing number of transactions involving multiple international jurisdictions.[14]

Proponents of merger-review reform, including past Antitrust Division leadership, argue that the lengthy process is problematic because it burdens both businesses and the Agencies themselves.[15] They also assert that delaying procompetitive mergers is harmful to consumers who must wait to reap the benefits of any merger efficiencies.[16] Critics of the merger-review process observe that, in its current form, it bears little resemblance to what Congress intended when passing the 1976 Hart-Scott-Rodino Antitrust Improvements Act (HSR),[17] which created modern merger review. They contend that the goal of HSR simply was to require merging parties in a limited number of significant acquisitions to notify the Agencies of the transaction before closing the deal, and, for those deals that the Agencies were worried about, to mandate that the parties produce a modest amount of additional information for the Agencies to evaluate.[18] In the view of these critics, HSR currently applies to too many transactions and gives the Agencies too much power to make demands on merging parties.[19]

These critics are right to worry about the increasing length of merger reviews, but they are wrong about the reasons. I contend

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[14] *See* Delrahim, *supra* note 12, at 2 (discussing factors that have led to an increase in the duration of "significant merger reviews").

[15] *See* Delrahim, *supra* note 12, at 5 ("[L]ong merger reviews . . . can waste public and private resources.").

[16] *See id.* at 3 (arguing that part of the Antitrust Division's mission is to "ensur[e] that pro-competitive mergers are not unduly delayed by our review process"); Kempf, *supra* note 10, at 3 ("[D]elaying procompetitive mergers is anticompetitive.").

[17] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in scattered sections of 15 & 28 U.S.C.).

[18] *See, e.g.*, William Blumenthal, *Overenforcement in the Hart-Scott-Rodino Second Request Process*, *in* THE ECONOMICS OF THE ANTITRUST PROCESS 15 (Malcom B. Coate & Andrew N. Kleit eds., 1996) ("Congress anticipated that Second Request responses would be compiled in one or two weeks and would consist of a few cartons of materials that had already been collected by the parties to the transaction in connection with their own premerger reviews."); Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 865–66 (1997) (noting that "the congressional objective in 1976 was much more limited" than the "comprehensive scheme of merger regulation" that resulted).

[19] *See, e.g.*, Sims & Herman, *supra* note 18, at 869 (discussing the "transformation of merger practice" post-HSR, resulting in less litigation and "elevat[ing] the federal antitrust agencies from the role of prosecutor/litigator to the much more powerful role of economic regulator").

that such reviews are anticompetitive, not because of forfeited efficiencies—which often are doubtful in contested mergers and rarely passed on to consumers[20]—but because acquisition targets are competitively hamstrung once a merger agreement is signed and tend to lose a significant amount of competitive strength during the merger-review process. Merger agreements typically restrict the target's activities in a variety of ways, essentially barring it from undertaking any new competitive initiatives. Such agreements prohibit the target, absent acquirer approval, from entering any material contracts, paying dividends, acquiring any assets, increasing employee or director compensation, taking on any debt, or changing its business strategies in any way that does not comport with past practice.[21] Further, it is well understood that once parties enter a merger agreement, acquisition targets risk suffering severe competitive harms, such as losing customers and key personnel who may decide to jump ship before the deal is consummated.[22] Therefore, the moment a merger agreement is signed and made

[20] *See* Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75, 104 (2020) ("[A] very large and reputable body of findings show that, generally and overall, mergers lead to losses of productive efficiencies, including relatively large losses in some cases." (footnote omitted)); Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183, 186 (2018) ("[A] substantial body of research . . . concludes that most mergers do not create value for anyone, except perhaps the investment bankers that have negotiated the deal.").

[21] *See, e.g.*, AGREEMENT AND PLAN OF MERGER BY AND AMONG CIGNA CORP., EXPRESS SCRIPTS HOLDING CO., HALFMOON PARENT, INC., HALFMOON I, INC. AND HALFMOON II, INC. 55–59 (2018), https://www.sec.gov/Archives/edgar/data/1532063/000119312518077568/d526729dex21.htm (barring Express Scripts, as of the date of the agreement, from acquiring any material assets or properties valued at over $150 million; increasing the compensation or benefits of any current or former employee, officer, or director; making aggregated capital expenditures in excess of Express Scripts' capital expenditure forecast; and entering, amending, or terminating early any material contract (as defined in the agreement) "other than in the ordinary course of business consistent with past practice"); AGREEMENT AND PLAN OF MERGER BY AND AMONG ON SEMICONDUCTOR CORP., FALCON OPERATIONS SUB, INC. AND FAIRCHILD SEMICONDUCTOR INTERNATIONAL, INC. 37–41 (2015), https://www.sec.gov/Archives/edgar/data/1036960/000119312515380198/d27668dex21.htm (barring Fairchild from authorizing, declaring, or paying any dividends; increasing the compensation or benefits of any of its current or former officers, directors, or employees; and entering, materially modifying, materially amending, or terminating any material contract (as defined in the agreement), except for transactions in the ordinary course of business consistent with past practice).

[22] *See, e.g.*, Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 VAND. L. REV. 1161, 1222 (2010) ("For selling companies, an acquisition transaction places immense pressure on the company's business, including potential loss of employees and customers and disruption of the company's ordinary business operations . . . .").

public, competition in the relevant market suffers, and so do consumers.

In many cases, this merger-review-related loss of competition is trivial. The review period is short, and the firms subsequently are merged. But in the subset of cases where the Agencies pursue an investigation (by issuing what is called a Second Request), the competitive harm is more problematic. And it becomes increasingly problematic the longer the Second-Request period lasts. By definition, the transactions most likely to harm competition will fall into this category, and these deals often involve the most concentrated markets. If a market is highly concentrated, loss of a vigorous competitor for almost a year (and in some cases more) will almost always harm consumers.

Although measuring anticompetitive impact can be difficult, I argue that the existence and size of ARTFs can serve as a valuable proxy for competitive harm. Many merger agreements require that the acquiring firm compensate the target if consummation of the agreement is unreasonably delayed or if the deal is terminated due to legal restraints arising under the antitrust laws, including a lengthy merger investigation, litigation, or judgment blocking the merger. These fees can be significant, both in absolute terms and as a percentage of the overall deal price. For example, in 2018, in the thirteen deals valued at over $400 million for which merger agreements were publicly available, these fees ranged from $30 million to $2.1 billion and from 2.3% to 12.5% of the deal price.[23]

Uncertainty exists as to what drives the size of ARTFs. Some scholars have argued that merging parties often fail to base these fees on any systematic pricing rationale.[24] Others have contended that acquiring parties prefer larger ARTFs to signal to the enforcement agencies the parties' confidence that the deal is

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[23] SHEARMAN & STERLING LLP, ANTITRUST UNPACKED: ANTITRUST REVERSE TERMINATION FEES (2020), https://live.shearmancms.icvmgroup.net/siteFiles/files/reverse_breakup_fees2020_03_30chart.pdf.

[24] *See, e.g.*, Afsharipour, *supra* note 22, at 1222 & n.232 (arguing that reverse termination fees often are not "calculated according to any actual methodology" (citing Vijay Sekhon, *Valuation of Reverse Termination Options in Mergers and Acquisitions*, 7 BERKELEY BUS. L.J. 72, 78 (2010))); Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481, 515–516 (2009) (finding that, in private equity transactions, the reverse termination fee typically was not calculated using an accurate pricing methodology).

procompetitive.[25] This Article takes a new approach. It argues that the fee represents the parties' negotiated prediction of the competitive costs to the target of entering the merger agreement (and therefore the competitive gains to the acquirer and other rivals in the relevant market). These costs and gains are incurred *during the merger-review period*. This means that ARTFs will be based in part on the parties' subjective views of how likely it is that the antitrust agencies will require a lengthy review or ultimately sue to block the transaction.[26] The ARTF is designed to compensate the target if the transaction is not consummated, at which point the target must resume competing. In this sense, the fee is potentially procompetitive because it can allow the target to regain some of its competitive strength if the deal falls through.

ARTFs also may indicate the possibility of anticompetitive manipulation of the merger-review process, however. Knowing that merger investigations sometimes take over a year to resolve, in theory it can make sense for a firm to declaw a rival temporarily by entering a merger agreement, thereby restraining the target's ability to compete in return for the promise of a reverse payment by which the acquirer will share with the target supracompetitive profits that accrue during a long merger investigation. Predictably lengthy merger reviews invite this abusive strategy. Trends in merger enforcement and economic concentration lend support to this theory: ARTFs have become more prevalent, even though the likelihood of an agency merger challenge has not increased over the past decade,[27] despite growing industry concentration. It is possible that ARTFs' popularity has risen *because* markets have become

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[25] *See* Albert H. Choi & Abraham L. Wickelgren, Reverse Breakup Fees and Antitrust Approval 2 (Nov. 2019) (unpublished manuscript), https://lawle2014.files.wordpress.com/2019/11/reverse-breakup-fee-191113.pdf ("[A] large reverse break-up fee can be a credible signal that the acquirer believes the deal is pro-competitive.").

[26] Firms appear to have a mixed record at making these predictions. One survey of ARTFs found that while *inclusion* of a breakup fee was strongly correlated with a higher likelihood of a Second Request and agency enforcement action, ARTFs' *size* "as a percentage of the deal's value was *inversely* related to both the likelihood of a second request and the likelihood of an enforcement action." Darren S. Tucker & Kevin L. Yingling, *Keeping the Engagement Ring: Apportioning Antitrust Risk with Reverse Breakup Fees*, 22 ANTITRUST 70, 73 (2008).

[27] *See* Choi & Wickelgren, *supra* note 25, at 15 ("Reverse termination fees are becoming fairly common in large corporate acquisitions."); JOHN E. KWOKA, WASH. CTR. FOR EQUITABLE GROWTH, U.S. ANTITRUST AND COMPETITION POLICY AMID THE NEW MERGER WAVE, 18 (2017), https://equitablegrowth.org/research-paper/u-s-merger-policy-amid-the-new-merger-wave/?longform=true (noting that there has been "a substantial shift of policy away from merger enforcement actions in all but the most concentrated markets" in recent years).

more concentrated, increasing the rewards for forestalling competition.

Proponents of merger-review reform have suggested a number of possible ways to shorten the investigation process. Former head of the Antitrust Division, Assistant Attorney General (AAG) Makan Delrahim, for example, announced a set of measures intended to "modernize" merger-review procedures.[28] These reforms included giving the parties an opportunity to meet with Division leadership early in the process; creating model voluntary request letters and timing agreements, which are intended to streamline document and data productions and simplify negotiations between the parties and the Division; and reducing the number of custodians and depositions the Division requires during Second Requests.[29] In return, the Division sought earlier production of documents and data and an end to "gamesmanship" involving privilege logs.[30] Delrahim pledged that as long as "parties expeditiously cooperate and comply throughout the entire process," the Division "will aim to resolve most investigations within six months of filing."[31]

While six months certainly would be an improvement over the current situation where investigations involving Second Requests average nearly a year, it is still a significant amount of time for consumers to suffer from reduced competition. Add to that the many more months or years required if the Agencies challenge a merger in court, and the result is that some transactions may harm competition for well over a year before their status is resolved. With that consumer harm in mind, this Article proposes a more effective reform than those put forth to date. Rather than trying to reduce at the margins the time it takes to complete a Second-Request investigation in the most contentious cases, the antitrust enforcement agencies should announce a "merger watchlist": a set of markets for which, due to high levels of concentration, they are likely to challenge *any* proposed merger unless one of the parties can meet the requirements of a failing-firm defense.[32]

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[28] *See* Delrahim, *supra* note 12, at 6–12 (listing several reforms "[the Division is] taking to modernize [the] merger review process").

[29] *Id.* at 6–9.

[30] *Id.* at 9–10.

[31] *Id.* at 6.

[32] The enforcement agencies will not challenge a merger if the "imminent failure . . . of one of the merging firms would cause the assets of that firm to exit the relevant market." U.S.

This approach has several advantages. First, immediate litigation would eliminate the lengthy Second-Request period during which competition is chilled. A trial (if the parties decide to go ahead with the transaction) will take time, but in the current system that time is layered on top of an already lengthy investigation. Perhaps more importantly, the merging parties likely will be less willing to raise prices or otherwise soften competition during a trial than they would be during a merger investigation. This reform, therefore, would reduce the duration of consumer harm. Second, the knowledge that the Agencies are likely to challenge deals in specified markets should reduce the probability that firms in those markets will attempt to merge in the first place. It also lessens the chances that firms will engage in the anticompetitive strategy of using ARTF provisions to buy competitive peace for the duration of a Second-Request investigation. Third, eliminating the lengthy Second-Request period for mergers in highly concentrated markets—and reducing the total number of mergers in those markets—will free the Agencies to use their scarce personnel resources in other ways, including on conduct investigations, criminal inquiries, and mergers in less concentrated markets that present difficult analytical or legal challenges.

There is precedent for this approach to merger review. During the Obama Administration, for example, Antitrust Division leadership publicly suggested—after successfully blocking the AT&T/T-Mobile transaction—that the Division would sue to block any further attempted acquisitions in the mobile wireless telecommunications market.[33] Division leadership made the same

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DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 32 (2010) [hereinafter 2010 HORIZONTAL MERGER GUIDELINES], https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf. Due to the breadth of criteria, the defense is rarely invoked successfully. *See* Ian Conner, *On "Failing" Firms—and Miraculous Recoveries*, FED. TRADE COMM'N (May 27, 2020 10:13 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries ("[T]he Bureau [of Competition] rarely finds that the facts support a failing firm argument.").

[33] *See* William J. "Bill" Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Keynote Address at the Future of Video Competition and Regulation Conference at Duke Law School: Video Competition: Opportunities and Challenges (Oct. 9, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition ("[We] have been wary of wireless carriers' efforts to combine. . . . That is why the Justice Department and the FCC moved to block AT&T's

statement about the cable television market.[34] The idea that the Agencies should bring clarity and certainty to their enforcement intentions in highly concentrated markets continues to resonate. At the very least, even if the comprehensive reforms this Article proposes prove politically impractical, the Agencies should take into account reduced competition during merger review when determining whether to challenge a transaction immediately, rather than going through the Second-Request process. More than a year of consumer harm from a complex merger review is a significant consideration that should put a thumb on the scale for agency decision-makers.

The Article proceeds in three Parts. Part II explores the history of the U.S. merger-review regime, describes the current state of that regime, and details critiques of the merger-review process. Part III explains how merger review in the United States has become anticompetitive, explores merger agreements' competitive effects, and analyzes the role and competitive significance of ARTFs. Part IV proposes a path toward reforming the U.S. merger-review regime that will protect competition and strengthen the enforcement agencies.

II. MERGER REVIEW IN THE UNITED STATES

The U.S. merger-review regime is the nation's primary bulwark against industry concentration. Growing concern about the outsized power of large companies in the United States has spurred vigorous criticism of this regime. This Part reviews the history of merger review in the United States, details how the merger-review process functions currently, and introduces critiques of that process.

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proposed acquisition of T-Mobile in 2011. More recently, when Sprint and T-Mobile publicly suggested they were exploring a combination that also would have reduced national wireless carriers from four to three, the skepticism of DOJ and the FCC forced that idea off the drawing board."); *See* Edward Wyatt, *Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says*, N.Y. TIMES (Jan. 30, 2014), https://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says/ (reporting that Assistant Attorney General Baer had stated that "further consolidation among the top wireless carriers would face intense scrutiny . . .").

[34] *See* Wyatt, *supra* note 33 ("Mr. Baer said that the division would similarly scrutinize any proposed merger among cable television companies.").

A. FRAMEWORK

Substantive merger review in the United States is governed by section 7 of the Clayton Act, which prohibits transactions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[35] This standard grants the antitrust enforcement agencies the authority to intercede and prevent competitive problems that particular mergers might pose by suing to block a transaction based on the possibility that it will cause competitive harm.[36] Procedurally, U.S. merger review can be divided into two eras: before and after the enactment of the Hart-Scott-Rodino Act in 1976. Before HSR, the antitrust enforcement agencies often received no advance notice of pending mergers; they would learn about most deals only once they were consummated.[37] The Agencies were able to challenge mergers post-consummation, but even if they prevailed in merger litigation, remedying the competitive problem was often difficult because the merged firms had time to integrate their assets in ways that could make divestiture challenging.[38]

This remedial problem was the impetus for reforming merger review in the mid-1970s. Representative Peter Rodino summarized the issue in his comments on the premerger notification provisions of what would become HSR:

> The problem this bill cures is startlingly simple, but it goes to the very foundations of our merger law. Under present law, companies need not give advance notification of a planned merger to [the Agencies]. But if the merger is later judged to be anticompetitive, and

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[35] 15 U.S.C. § 18.

[36] *See, e.g.*, Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 46 (2018) ("An important purpose of the antitrust merger law is to arrest certain practices in their 'incipiency,' by preventing business firm acquisitions that are likely to facilitate them.").

[37] *See, e.g.*, William J. "Bill" Baer, Former Director, Bureau of Competition, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, FED. TRADE COMM'N (Oct. 31, 1996), https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act (explaining the pre-HSR "major problem" of the "'midnight merger' that took place before the agencies found out about it" and stating that "before HSR, relatively few mergers were challenged at the premerger stage").

[38] *See id.* (arguing that another "major problem prior to HSR was that a remedy to fix a competitive problem . . . was too often ineffective" because "[o]nce a merger takes place and the firm's operations are integrated, it can be very difficult or impossible to unscramble the eggs and reconstruct a viable, divestable group of assets").

> divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.[39]

Rodino contended that the "solution" to this problem "is clear": require "adequate notice of impending large mergers so that [the Agencies] may judge [a merger's] competitive aspects before the merger goes through."[40] The Antitrust Division and the Department of Justice's Office of Legislative Affairs endorsed this reasoning, although the Attorney General questioned the value of premerger notification.[41]

HSR has three titles. Title I expands the DOJ's power to use subpoenas in conducting antitrust investigations.[42] Title III is a *parens patriae* provision that allows state attorneys general to file suit in federal court on behalf of state residents harmed by conduct that violates the federal antitrust laws.[43] Title II addresses premerger notification.[44] In its original form, this Title included an automatic-stay provision under which a federal court would be required to stay any merger upon request by the government.[45] This provision encountered strong opposition on the ground that it gave

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[39] 122 CONG. REC. 25,051 (1976) (statement of Rep. Rodino).

[40] *Id.*

[41] *See* Memorandum from Edward H. Levi, Att'y Gen. of the United States, to President Gerald Ford 1 (Sept. 27, 1976), https://www.fordlibrarymuseum.gov/library/document/0055/1669524.pdf ("I personally question the importance of the premerger notification provision . . . . The Antitrust Division believes it is necessary because of the difficulty otherwise of obtaining sufficient evidence to sustain a preliminary injunction."). *But see* Letter from Michael M. Uhlmann, Assistant Att'y Gen. of the United States, to Hon. James T. Lynn, Director, Off. of Mgmt. & Budget 2 (Sept. 27, 1976), https://www.fordlibrarymuseum.gov/library/document/0055/1669524.pdf (noting that HSR's premerger notification requirement "will allow the antitrust enforcement agencies to investigate the competitive impact of such potentially significant [proposed mergers] and to bring suit, if suit is warranted, before the parties have taken irreversible steps toward consolidation of operations").

[42] *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1383–90 (1976) (codified in scattered sections of 15 & 28 U.S.C.).

[43] *See* 15 U.S.C. § 15c ("Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State . . . for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.").

[44] *See* 15 U.S.C. § 18a ("[N]o person shall acquire . . . any voting securities or assets of any other person, unless both persons . . . file notification . . . .").

[45] 122 CONG. REC. 16,915 (1976) (statement of Sen. McClure) (describing the "automatic stay provision" as "a preliminary injunction lasting until final judgment is issued").

the Agencies too much power essentially to terminate mergers, and ultimately it was eliminated from the final bill.[46]

As enacted, HSR's premerger notification title established what has become the modern merger-review regime in the United States. Under this system, merging firms entering transactions that exceed certain dollar thresholds must notify the antitrust enforcement agencies of these deals and cannot consummate them until a waiting period expires.[47] In making their initial HSR notifications, firms must provide specific information on the proposed transaction, the merging firms, and the lines of business in which the merging firms are engaged; if they possess them, the parties also must produce certain internal documents analyzing the proposed transaction.[48] The initial burden on filing parties is light: in many cases, parties will have few or no documents to produce at this early stage.[49]

The waiting period for most transactions is thirty days, although the parties can seek early termination, which often is granted.[50] The

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[46] *See id.* (arguing that this "arbitrary and absolute enforcement agency power to stop and kill business transactions which are not inherently unlawful is at war with the most fundamental traditions of our jurisprudence").

[47] 15 U.S.C. § 18a(a) ("[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . .").

[48] Item 4(c) of the HSR premerger notification form requires the merging parties to "[p]rovide 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." FED. TRADE COMM'N, ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS (2016), https://www.ftc.gov/system/files/attachments/premerger-notification-program/hsr_form_instructions_090116_0.pdf. Items 4(d)(i) and 4(d)(ii) require parties to provide "Confidential Information Memoranda prepared by or for any officer(s) or director(s) . . . that specifically relate to the sale of the acquired entity(s) or assets," as well as certain "studies, surveys, analyses and reports" relating to the competitive impact of the transaction "prepared by investment bankers, consultants or other third party advisors." *Id.*

[49] *Mergers and Corporate Consolidation in the New Economy: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 82 (1998) (statement of Robert Pitofsky, Chairman, Fed. Trade Comm'n) ("The initial review of mergers under the Hart-Scott-Rodino Act imposes only minimal burdens on businesses.").

[50] *See* 15 U.S.C. § 18a(b), (e) (stating that the waiting period as thirty days and noting the Federal Trade Commission and the Assistant Attorney General's power to terminate the waiting period). The waiting period for cash tender offers is fifteen days. *Id.* In February 2021, the FTC and Antitrust Division temporarily suspended the practice of granting early terminations. *See* FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, FED. TRADE COMM'N (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

Act also provides that the Agencies may, before termination of the waiting period, "require" from the parties "the submission of additional information or documentary material relevant to the proposed acquisition."[51] This Second Request allows the Agencies to extend the initial waiting period until the parties have achieved "substantial compliance" with the request.[52]

The legislative record reveals little about the intended nature and impact of the "additional information" the Act would allow the Agencies to seek from merging parties.[53] Representative Rodino asserted that the Agencies' requests for additional information "plainly . . . must be reasonable" and that "lengthy delays and extended searches should consequently be rare."[54] He observed that it was the risk of "protracted delays of many months—which might effectively 'kill' most mergers"—that led House and Senate committees to drop the automatic-stay provisions contained in the original bills.[55] And he argued that "[t]o interpret the requirement of substantial compliance" with a Second Request "so as to reverse this clear legislative determination would clearly constitute a misinterpretation of this bill."[56] What would be an unreasonable request, according to Rodino? He offered that "a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable."[57]

Based on this legislative history, some commentators have argued that Congress intended HSR to grant the enforcement agencies only modest new powers in response to the problems posed by having to litigate consummated mergers.[58] These powers were to apply, they asserted, only to a limited number of the largest

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[51] 15 U.S.C. § 18a(e)(1)(A).

[52] 15 U.S.C. § 18a(g)(2)(B).

[53] *See* 122 CONG. REC. 25,052 (1976) (statement of Rep. Hutchinson) ("If additional information is necessary it may be requested.").

[54] *Id.* at 30,877 (statement of Rep. Rodino).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See, e.g.*, Sims & Herman, *supra* note 18, at 878–79 (arguing that HSR's premerger notification requirements were "modest medicine for a modest problem—the small number of large 'midnight mergers'" that were the justification for the Act—and that "the Second Request power" HSR granted "was seen as being so limited that it did not raise" concerns over "potential bureaucratic encroachment").

transactions.[59] On this reading, the modern implementation of HSR's merger-review provisions grants the enforcement agencies much more extensive powers to hold up a far broader range of mergers than Congress intended.[60] Other observers have countered that even in its more expansive modern form, the HSR process solves the problems of non-reporting, lengthy post-merger litigation, and ineffective post-consummation remedies in a way that benefits both consumers and the business community.[61]

Legislative intent aside, the Act does not set any explicit limits on the "additional information" the Agencies may seek, except that it must be "relevant to the proposed acquisition."[62] It does provide some recourse for merging firms that believe the Agencies have abused their Second-Request powers.[63] The Act requires the FTC and the Assistant Attorney General in charge of the Antitrust Division to "designate a senior official who does not have direct responsibility for the review" of a particular merger to "hear any petition" merging parties might file to determine whether a Second Request is "unreasonably cumulative, unduly burdensome, or duplicative."[64] Such petitions are rarely successful.[65]

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[59] *See id.* at 877 ("The legislative history of HSR is quite clear: the premerger notification provisions of the HSR Act were intended to apply only to 'the very largest corporate mergers—about the 150 largest out of the thousands that take place every year.'" (quoting H.R. REP. NO. 94-1373, at 11 (1976))).

[60] *See id.* at 878 ("Congress plainly did not intend to create a huge new merger regulatory scheme; it did not intend to give the antitrust agencies unilateral power to stop a transaction without ever going to court . . . ."); *id.* at 879 ("We are certain that even HSR's drafters would be amazed at the comprehensive regulatory process that has developed over the past two decades.").

[61] *See, e.g.*, Baer, *supra* note 37 ("Premerger notification under HSR has dramatically changed the way the antitrust agencies conduct merger enforcement, and both consumers and the business community have benefited.").

[62] 15 U.S.C. §18a(e)(1)(A).

[63] 15 U.S.C. § 18a(e)(1)(B).

[64] 15 U.S.C. §18a(e)(1)(B)(i).

[65] *See* Joe Sims, Robert C. Jones & Hugh M Hollman, *Merger Process Reform: A Sisyphean Journey?*, 23 ANTITRUST 60, 64–65 (2009) ("The [Second Request] appeal process . . . is irrelevant. . . . Indeed, when the rare appeals have been taken, our experience is that it is more likely that agency management will insist upon additional requirements than overrule the staff.").

B. CURRENT STATE OF U.S. MERGER-REVIEW PROCESS

Only large transactions (currently those valued at $101 million or more) are subject to HSR pre-merger notification requirements.[66] In the past ten years, the number of transactions reported pursuant to HSR has ranged from about 1,300 to 2,100 a year.[67] Only a small percentage of these filings resulted in a Second Request and fewer still in an agency challenge.[68] But the duration of Second Request reviews has been growing markedly longer.

During the decade between fiscal year (FY) 2011 and FY 2020, an average of 1,739 transactions were reported to the Agencies annually.[69] The number of filings grew relatively steadily over this decade, from a low of 1,326 reported transactions in FY 2013 to a high of 2,111 in FY 2018.[70] On average, the Agencies issued Second Requests on 3.08% of reported transactions over that ten-year span.[71] That percentage has been falling steadily over the past decade, from a high of 3.9% in 2011 to a low of 2.2% in 2018, though there was a slight uptick in FY 2019 and 2020.[72] This means that the vast majority of HSR filings (97.8% in FY 2018)[73] are cleared within thirty days. Second Requests are more likely to be issued for larger transactions.[74] For example, in FY 2020, the Agencies issued Second Requests on 6.4% of the 234 reported transactions valued at over one billion dollars.[75] They issued no Second Requests on the 27 reported transactions valued between $50 and $100 million and

[66] Premerger Notification Office Staff, *HSR Threshold Adjustments and Reportability for 2022*, FED. TRADE COMM'N (Feb. 11, 2022), https://www.ftc.gov/enforcement/competition-matters/2022/02/hsr-threshold-adjustments-reportability-2022.

[67] LINA M. KHAN & RICHARD A. POWERS, BUREAU OF COMPETITION, FED. TRADE COMM'N & ANTITRUST DIV., U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2020 1 (2021), https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

[68] *See id.* at 8 (demonstrating that less than four percent of filings annually resulted in Second Requests for the fiscal years 2011–2020); *see also id.* at 2, 9 (stating that the Federal Trade Commission brought twenty-eight merger enforcement challenges during the 2020 fiscal year and the Antitrust Division brought fifteen).

[69] *Id.* at 1.

[70] *Id.* The number of filings dipped to 1,637 in FY 2020 from 2,089 in FY 2019, likely due to the COVID-19 pandemic. *Id.*

[71] *Id.* at 8.

[72] *Id.*

[73] *Id.*

[74] *See id.* at Exhibit A (showing increase in the percentage of Second-Request investigations as the monetary size of transactions increases).

[75] *See id.*

issued them on 1.2% of the 250 reported transactions valued between $100 and $150 million.[76]

Agency merger challenges are rare. The Antitrust Division averaged 18.6 public merger challenges a year from FY 2010 to FY 2019,[77] and the FTC averaged 21.6 merger enforcement actions annually during the same period.[78] The total number of merger challenges the two Agencies brought during that decade represents an annual average of 2.3% of all notified transactions.[79] Not all these challenges involved HSR-reportable deals, however, so the percentage of notified transactions resulting in an agency challenge was less than 2.3%.[80]

The length of merger investigations has increased steadily over the past decade. One analysis found that the duration of "significant" U.S. merger investigations rose from an average of 7.1 months in the years 2011–2013 to 11.4 months in 2020.[81] The median length of significant merger investigations in 2020 was 10.4 months, up from 9.8 months in 2019.[82] This report also found that

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[76] *Id.*

[77] *See* ANTITRUST DIV., U.S. DEP'T OF JUST., WORKLOAD STATISTICS, FY 2010–2019, at 4 https://www.justice.gov/atr/file/788426/download. This "Merger Challenges" metric includes both actions filed in district court and "Transactions Restructured or Abandoned Prior to Filing a Complaint as Result of an Announced Challenge." *Id.*

[78] *Competition Enforcement Database*, FED. TRADE COMM'N, https://www.ftc.gov/competition-enforcement-database (last visited May 29, 2022). This total includes consent decrees, federal injunctions, administrative complaints, and "Abandoned/Fix-it-First/Restructured" transactions. *Id.*

[79] This figure is generated by taking the total number of notified transactions during the period FY 2010–FY 2019, *see* FED. TRADE COMM'N, BUREAU OF COMPETITION & U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2019 1, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf, and dividing it by the total number of merger challenges the Agencies brought during that period, *see* ANTITRUST DIV., *supra* note 77, at 4; *Competition Enforcement Database*, *supra* note 78.

[80] For example, in 2013 the Antitrust Division challenged a merger between Bazaarvoice and PowerReviews, two providers of online ratings and reviews platforms, for which there was no HSR filing. *See* Complaint at 1, United States v. Bazaarvoice, 2014 WL 203966 (N.D. Cal. 2013) (No. 13-0133).

[81] *DAMITT 2020 Report: Antitrust Merger Enforcement Trends Amid the Pandemic, U.S. Elections and Brexit*, DECHERT LLP (Jan. 27, 2021) [hereinafter *DAMITT 2020 Report*], https://www.dechert.com/knowledge/publication/2021/2/damitt-2020--year-in-review-u-s--and-eu-merger-review-durations.html. This report defines "significant" merger investigations as including HSR "reportable transactions for which the result of the investigation by the [Agencies] is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release." *Id.*

[82] *Id.*

significant merger reviews in 2019 were on average 3.7 months shorter at the Antitrust Division than they were at the FTC,[83] which the authors suggested might be the result of merger-review reforms the DOJ announced in 2018.[84] That gap closed in 2020, however, when FTC reviews lasted only 0.1 months longer than DOJ reviews.[85] In 2021 the average length of significant merger investigations was 11.4 months[86] and in the first quarter of 2022 it was 12.6 months.[87]

Agency officials have openly expressed their concerns about the increasing length of merger investigations. In a speech titled "Merger Reviews: Do They Take Too Long?," the Antitrust Division's Deputy Assistant Attorney General for Litigation addressed the movement toward longer investigations and stated that Antitrust Division leadership "wants to reverse the trend by increasing the speed and reducing the burden of merger reviews."[88] The then-head of the Antitrust Division observed in 2018 that "[t]here is widespread agreement that significant merger reviews are taking longer to complete" and that "nobody wins with unduly lengthy reviews."[89] FTC officials have been more cautious in their comments about the length of merger reviews. In written testimony before the Senate Judiciary Committee's Antitrust Subcommittee, the former FTC Chairman stated that the agency was aware of "concerns that merger investigations are taking longer than they used to."[90] He announced development of "a more robust system of

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[83] *Id.*

[84] *See* Alec Burnside et al., *DAMITT Q3 2019: Trump Administration Efforts to Block Mergers Near Record; EU Divestitures Increasingly Require Preapproved Buyers*, DECHERT LLP (Oct. 31, 2019) [hereinafter *DAMITT Q3 2019*], https://www.dechert.com/knowledge/news/2019/10/damitt-q3-2019.html ("Merger review reforms at DOJ are having an impact, with DOJ significant investigations taking 3.9 months less on average than FTC significant investigations.").

[85] *DAMITT 2020 Report*, *supra* note 81.

[86] *DAMITT 2021 Report*, *supra* note 13.

[87] *DAMITT Q1 2022 Report: Significant Merger Investigations Face Steeper Hurdles to Settlement*, DECHERT LLP, https://www.dechert.com/knowledge/publication/2022/4/damitt-q1-2022--significant-merger-investigations-face-steeper-h.html (April 21, 2022) [hereinafter *DAMITT Q1 2022 Report*].

[88] Kempf, *supra* note 10, at 2.

[89] Delrahim, *supra* note 12, at 2–3.

[90] *Oversight of the Enforcement of the Antitrust Laws, Hearing Before the S. Comm. on the Judiciary and Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 115th Cong. 6 (2018) (statement of Joe Simons, Chairman, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1413916/p180101_commission_testimony_re_antitrust_law_enforcement_10032018.pdf.

tracking key milestones in the merger-review process to determine whether this perception has merit and, if so, why some reviews may be taking longer."[91]

Observers have proposed a number of explanations for why merger reviews are taking significantly longer than in the recent past. The most commonly identified culprit is the retention of the increasingly large amounts of documents and data that electronic communication and storage makes possible.[92] The merging firms must spend more time reviewing and determining whether to produce these documents and data, and the Agencies subsequently must devote longer periods to analyzing these productions than in the past. Relatedly, greater access to firms' data has allowed the Agencies to undertake increasingly sophisticated economic analyses of mergers' potential effects.[93] But those tools require production of this additional data, and the Agencies often mandate that such data be produced in their favored format, which takes additional time and resources.[94]

New technologies could potentially mitigate some of these increased burdens. In 2014, the Antitrust Division began inviting parties to use "technology assisted review" (TAR) to prepare Second Request productions that the Agencies could review more quickly. The Division has stated that it has used TAR protocols in several merger matters.[95] It reported that "TAR produced smaller, more responsive document productions," which "contained much more

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[91] *Id.*

[92] *See, e.g.*, Delrahim, *supra* note 12, at 2 ("[I]n 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 enforcement agencies to analyze them."); Sims et al., *supra* note 65, at 60 ("[T]he 800-pound gorilla is the technology problem—too much electronic material available and too much of it demanded by the agencies.").

[93] *See, e.g.*, Sims et al., *supra* note 65, at 60 ("Two reinforcing phenomena—electronic document/data availability and more sophisticated economic analysis by the agencies" have resulted in significant burdens on merging parties."); Alexei Alexis, *FTC Attributes Merger Review Delays to Companies,* BLOOMBERG L. (June 15, 2017 9:24 AM), https://biglawbusiness.com/ftc-attributes-merger-review-delays-to-companies (stating that the FTC's Acting Director of the Bureau of Competition "acknowledged that . . . the FTC and many other antitrust agencies adopted an economics approach that generally results in more data and more complex analysis than in prior eras").

[94] *See* Sims et al., *supra* note 65, at 64 ("[T]he agencies generally require parties to create and run programs to turn the large volumes of data into a format that the agency prefers to work with. Reprogramming mountains of data is time-consuming and very expensive . . . .").

[95] TRACY GREER, ANTITRUST DIV., U.S. DEP'T OF JUST., TECHNOLOGY-ASSISTED REVIEW AND OTHER DISCOVERY INITIATIVES AT THE ANTITRUST DIVISION 4 (2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/03/27/304722.pdf.

relevant information," with the result that "Division staff have experienced substantial benefit, and the producing parties have reported substantial time and cost savings."[96] The Division subsequently incorporated TAR requirements into the Model Second Request, and agency personnel believe this approach has been "effective."[97] Nonetheless, TAR has not reversed, nor apparently even slowed, the trend toward longer investigations.

Another factor identified as contributing to longer merger reviews is that the Agencies more frequently require parties to mergers where divestitures will be necessary to eliminate competitive harm to name "upfront buyers" for the divestiture assets.[98] An "upfront buyer" (or "buyer up front") is an identified purchaser of assets to be divested, pre-approved by the reviewing agency, with which the merging firm has executed an acceptable purchase agreement before the agency agrees to a proposed consent decree.[99] In the Agencies' view, upfront buyers provide several valuable benefits, including allaying any concerns about the adequacy of the parties' proposed divestiture package or that an acceptable buyer will not emerge to purchase the assets, and generally limiting the risk that the divestiture remedy will fail to restore competition to the affected market(s).[100] Upfront buyers also assure the Agencies that the proposed remedy will happen quickly, reducing any anticompetitive harm to consumers that might have arisen post-consummation but before a buyer was secured.[101] For these reasons, the Agencies have shown a strong preference for upfront buyers in recent years.[102] Indeed, one study concluded that

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[96] *Id.* at 5.

[97] TRACY GREER, ANTITRUST DIV., U.S. DEP'T OF JUST., AVOIDING E-DISCOVERY ACCIDENTS & RESPONDING TO INEVITABLE EMERGENCIES: A PERSPECTIVE FROM THE ANTITRUST DIVISION 5–6 (2017), https://www.justice.gov/atr/page/file/953381/download.

[98] *See* Delrahim, *supra* note 12, at 2 ("[W]hen divestitures are required to protect competition and remedy anticompetitive elements to transactions, [the Antitrust Division] increasingly require[s] upfront buyers that are pre-approved before consent decrees can be filed.").

[99] *See, e.g.*, *Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq (last visited May 29, 2022) (describing "buyer up front").

[100] *Id.*

[101] *Id.*

[102] *See, e.g.*, Delrahim, *supra* note 12, at 2 ("[W]hen divestitures are required . . . we increasingly require upfront buyers that are pre-approved before consent decrees can be filed."); Maria Raptis, Thorsten C. Goetz, Joseph M. Rancour & Amaury S. Sibon, *Antitrust and Competition: Trends in US and EU Merger Enforcement*, SKADDEN LLP (Jan. 2016),

in 2019 80% of agency divestiture consent decrees required an upfront buyer and that since the beginning of 2018 only three "significant U.S. investigations" involving divestiture consent decrees did not require upfront buyers.[103] Finding, analyzing, and negotiating about upfront buyers is time-consuming and resource-intensive.[104] The same study found that investigations involving upfront buyers took two months longer than those where the agency allowed the parties to find a buyer post-consummation.[105]

The proliferation of merger-review regimes around the world,[106] combined with the increasing number of transactions involving multiple international jurisdictions, is another factor identified as leading to lengthier merger investigations.[107] Delays result because the U.S. Agencies may find it beneficial to coordinate with foreign enforcers reviewing the same deal,[108] and the merging firms may move more slowly to synchronize their U.S. filings with their international filings.[109]

Finally, some within the Agencies have argued that the increasing length of merger investigations has been driven mainly by strategic behavior on the merging firms' part.[110] On this view, parties hold up consummation of their deals by, for example,

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https://www.skadden.com/insights/publications/2016/01/antitrust-and-competition-trends-in-us-and-eu-merg (advising that merging firms "should be aware of antitrust enforcers' preference for an 'upfront buyer' in any proposed merger remedy" and observing that "U.S. agencies, particularly the Federal Trade Commission (FTC), regularly require upfront buyers").

[103] *DAMITT Q3 2019*, *supra* note 84.

[104] *See* Delrahim, *supra* note 12, at 2 (stating that requiring upfront buyers "adds time" to merger reviews).

[105] *Id.*

[106] *See* Peter Alexiadis, Elsa Sependa & Laura Vlachos, *Merger Control: 'Around the World in 80 Days: Management of the Merger Review Process of Global Deals'*, 19 BUS. L. INT'L 201, 202 (2018) (noting "enormous growth in the number of merger control regimes around the world . . . almost doubling from around 80 in 2008 to over 150 in 2018").

[107] *See, e.g.*, Delrahim, *supra* note 12, at 2 ("[M]ore and more transactions are international in scope. Necessary coordination with our foreign counterparts . . . could add time.").

[108] *Id.*

[109] *See, e.g.*, John Harkrider & Michael O'Mara, *Managing Timing of Multi-Jurisdictional Review*, *in* GLOBAL COMPETITION REVIEW, MERGER REMEDIES GUIDE 87 (Ronan P. Harty & Nathan Kiratzis eds., 2d ed. 2019) ("[I]n the US the parties may either delay HSR filing or delay substantial compliance with a Second Request to make sure that the US review is finished at the same time as review in other jurisdictions."); Kempf, *supra* note 10, at 2 ("[P]arties might . . . delay making their HSR filings . . . to synchronize schedules with the reviews of foreign antitrust enforcers.").

[110] *See, e.g.*, Alexis, *supra* note 93 (reporting that the FTC's acting Director of the Bureau of Competition believes the "time it takes antitrust regulators to review tie-ups is 'largely' in the hands of the merging parties").

waiting to file their HSR notifications so they can meet with the agency before the initial waiting period is triggered, pulling and re-filing their HSR notifications, and delaying Second-Request compliance to stay in step with investigations in other jurisdictions or to gain some advantage in their negotiations with the Agencies.[111]

C. CRITIQUES OF THE MERGER-REVIEW PROCESS

The HSR merger-review process has been criticized for decades.[112] The list of complaints is long: HSR applies to too many transactions; it is inconsistent with Congress's intent; it transformed merger review from a law-enforcement function to an unchecked regulatory regime; it is too expensive; it unnecessarily burdens businesses and the Agencies; it takes too long; and it harms consumers by delaying consummation of pro-competitive mergers.[113] Many of these criticisms are interrelated: they boil down to an argument that the Agencies have taken a law that Congress intended to apply only to the largest transactions—and to grant the Agencies the power to request a modest amount of information to determine whether to challenge those transactions—and created instead a regulatory scheme that sweeps broadly and gives the Agencies what amounts to an automatic stay[114] on deals that concern them.[115] This automatic-stay power and the scope of the Agencies' Second Request authority causes investigations to last longer and become more expensive for the merging parties and the Agencies.[116]

According to critics and some enforcement agency personnel, the burdens of this overlong investigatory process fall squarely on

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[111] *See e.g.,* Kempf, *supra* note 10, at 2 ("The parties also control the pace and timing of document production, and they can exercise that control to their strategic advantage.").

[112] *See, e.g.,* Sims et al., *supra* note 65, at 60 ("[T]here has been one constant [since enactment of HSR] complaints about the burdens of the Second Request process.").

[113] *See generally id.* (describing various complaints about the HSR merger-review process).

[114] *See* Sims & Herman, *supra* note 18, at 881 ("[T]he agencies have taken full advantage of provisions in HSR giving them the ability to ask for information to essentially create the automatic stay of a transaction that the 94th Congress explicitly refused to grant . . . .").

[115] *See id.* at 878 ("Congress plainly did not intend [HSR] to create a huge new merger regulatory scheme . . . or to impose burdensome information production requirements upon merging parties.").

[116] *See id.* at 881–82 ("[T]he agencies have used the Second Request process to create a whole new discovery mechanism, unconstrained by the Federal Rules (or any other rules, for that matter) . . . . [Second Requests] are, in most cases, highly intrusive, overly burdensome, and exceedingly expensive—totally different from what was intended and expected by the Congress that passed the HSR Act.").

businesses and the Agencies.[117] They are borne by consumers only to the extent that the HSR process delays their enjoyment of mergers' procompetitive benefits.[118] The costs imposed on businesses are obvious. It is expensive to go through the HSR merger-review process. Filing fees alone range from $45,000 to $280,000, but that is just the tip of the iceberg.[119] Merging firms must pay for antitrust counsel to determine if they need to file an HSR notification and then, if they are required to file, to shepherd them through the process. If an investigation involves a Second Request, expenses mount dramatically as reams of documents must be reviewed and produced.[120] Antitrust counsel will hire expert economists and ramp up their efforts to ensure the transaction is not challenged or to find a remedy the Agencies will accept.[121] A survey of Second Request compliance costs published in 2014 found that the median direct cost of complying (including attorney, paralegal, and economist fees and e-discovery services) was approximately $4.3 million per party per investigation.[122] Using the then-current figure of an annual average of 46 Second Requests, the authors estimated that the total yearly direct costs attributable to the HSR program were approximately $400 million.[123] Other observers have estimated that the average Second-Request

[117] *See, e.g.*, *id.* at 884–92 (detailing costs HSR imposes on merging parties and the Agencies).

[118] *See* Delrahim, *supra* note 12, at 3 ("The Antitrust Division's mission is to protect competition for the benefit of American consumers. That means ensuring that pro-competitive mergers are not unduly delayed by our review process."); Sims & Herman, *supra* note 18, at 885–86 ("[D]uring the time that deals are delayed . . . the economy is denied whatever competitive benefits would result.").

[119] *See* *Filing Fee Information*, FED. TRADE COMM'N (Mar. 4, 2021), https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information (providing filing fee information by size of transaction).

[120] *See, e.g.*, Sims et al., *supra* note 65, at 61–62 ("A primary driver of increased costs [for complying with a second request] is the . . . massive increase in the number of electronic documents and data that are gathered from individuals' computers and companies' network drives" and "[i]t is clear that a major part of the length of Second Request investigations is a result of the huge burden on parties to assemble all the documents and data for compliance.").

[121] *See, e.g.*, *id.* at 64 (asserting that providing data to the Agencies in their preferred format is "is time-consuming and very expensive, since it frequently requires significant involvement by outside economists and other consultants"); Sims & Herman, *supra* note 18, at 886 (explaining that "[o]ut-of-[p]ocket [c]osts" for HSR compliance include "lawyers' and economists' fees").

[122] Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, 14 THRESHOLD 26, 33–35 (2014), http://www.crai.com/sites/default/files/publications/Threshold-Summer-2014-Issue.pdf.

[123] *Id.* at 37.

investigation results in "compliance costs" of $5 million and that for "larger deals" those costs can be as high as $10 or $20 million.[124]

There are also indirect costs to merging firms in terms of employees' and executives' time spent working with antitrust counsel and preparing for and being deposed.[125] To the extent that a proposed transaction will result in any cost savings or efficiencies for the merging firms, the merger-review process delays those benefits for the duration of the investigation.[126] The sum total of these benefits lost to delay might be significant considering the number of transactions that are subject to the HSR process annually.[127]

Lengthy merger investigations also tax enforcement agency resources.[128] They consume copious amounts of attorney, economist, and paralegal time, as well as technological resources.[129] Merger enforcement is a core element of the enforcement agencies' mission, but if merger investigations could be shortened without sacrificing enforcement quality, the Agencies would have additional resources to commit to criminal and civil non-merger matters.[130] This is an especially significant consideration in light of the Agencies' limited budgets.[131]

The impact of lengthy merger reviews on consumers is less discussed than the effects on businesses and the Agencies. To the extent that consumer harm is contemplated, it is said to arise from delays in the realization of merger efficiencies that would benefit consumers.[132] This theory of harm depends on two assumptions,

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[124] Sims et al., *supra* note 65, at 61.

[125] *See* Sims & Herman, *supra* note 18, at 886 (identifying out-of-pocket HSR compliance costs including "lost management and other employee time" and the "depositions of numerous company witnesses").

[126] *See id.* at 885–86 (adding that the economy is likewise denied any resulting competitive benefits during the review period).

[127] *See id.* at 886 ("What makes this delay appear . . . particularly costly is that it is imposed on nearly 3000 transactions that the agencies concede raise no antitrust issues whatever.").

[128] *See* Boberg & Dick, *supra* note 122, at 37 (noting Second Request costs borne by the Agencies, including "staffing and computing resources").

[129] *See* Delrahim, *supra* note 12, at 5 ("The government also spends enormous amounts of time and money reviewing mergers that go to a second request.").

[130] *See id.* ("Once we are in a position to understand the competitive significance of the transaction, however, every additional minute and dollar spent reviewing the merger is deadweight loss.").

[131] *See id.* (stating that the Antitrust Division has "limited resources" and that "over the past ten years" the Division's "budget has stayed roughly constant in nominal terms, which means it has declined in real terms").

[132] *See* Kempf, *supra* note 10, at 2–3 (asserting that "delaying procompetitive mergers is anticompetitive" while "shortening merger reviews . . . . promote[s] competition").

both of which are questionable in many cases: that individual mergers create cognizable, merger-specific efficiencies and that any significant portion of any realized efficiencies is passed on to consumers in the form of lower prices, higher quality goods, or enhanced innovation.[133] Courts typically are dubious about claimed merger efficiencies: an efficiencies defense rarely saves a merger in cases where the government has established a prima facie case of competitive harm.[134] And there is reason to doubt that in many cases significant cognizable efficiencies are passed on to consumers.[135] As Melissa Schilling has observed, "a substantial body of research on whether mergers create value for the firm's shareholders concludes that most mergers do not create value for anyone, except perhaps the investment bankers that have negotiated the deal."[136]

While this theory of consumer harm due to the increasing length of merger reviews is dubious, that does not mean consumers are unscathed by long investigations. The following Parts introduce a new theory of competitive harm caused by the current merger-review system. This harm flows from provisions in most merger agreements that freeze competition between the merging parties until a deal is consummated or abandoned and the competitive damage acquisition targets suffer once they enter a merger agreement. These effects, coupled with the length of investigations of mergers in highly concentrated industries, can result in significant competitive harm. Further, predictably lengthy merger reviews provide an opportunity for firms to game the system by

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[133] *See, e.g.*, Gregory J. Werden, Luke M. Froeb & Steven Tschantz, *The Effects of Merger Efficiencies on Consumers of Differentiated Products*, 1 EUR. COMPETITION J. 245, 263 (2005) ("It is likely to be clear in many cases that merger-specific efficiencies could not decrease marginal costs by enough to prevent price increases, and in some cases, that the reverse is likely to be true.").

[134] *See* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 741 (2017) ("Evidence of efficiencies has rarely succeeded in rebutting an accepted prima facie case of illegality.").

[135] *See id.* at 740–41 (citing empirical work suggesting that current merger policy "underestimates competitive harm, exaggerates passed-on efficiencies, or produces some combination of both"); Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp 1066, 1090 (D.D.C. 1997) (finding that the merging parties' "projected pass through rate—the amount of the projected savings that the combined company expects to pass on to consumers in the form of lower prices—is unrealistic").

[136] Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL. 183, 186 (2018).

significantly reducing competition for a year or more in return for a payment by the acquiring party to the target.

III. ANTICOMPETITIVE MERGER REVIEW

To see how the current merger-review regime has become anticompetitive, it is necessary to appreciate how most merger agreements restrict competition between the merging parties, to understand the competitive damage acquisition targets suffer post-signing, and to consider the increased use of antitrust reverse termination fees and other antitrust risk-shifting provisions in merger agreements.

A. MERGER AGREEMENTS' EFFECTS ON COMPETITION

Acquisition agreements are complex documents, the details of which can differ dramatically from transaction to transaction, but they all tend to contain the same general types of provisions: covenants, representations and warranties, closing conditions, and termination rights.[137] Covenants are commitments the merging firms make to govern their conduct between signing the acquisition agreement and consummating the deal.[138] Unless the buyer consents to some other arrangement, the seller's covenants typically require the company (and its subsidiaries) to continue in the post-signing period to conduct business "in the ordinary course" and "consistent with past practice" and to use "reasonable best efforts to preserve intact" the company's assets, business operations, and goodwill.[139] In many agreements, the seller also pledges not to pay

[137] *See* Afsharipour, *supra* note 22, at 1170–71 ("Most acquisition agreements . . . follow a similar structure with several key parts which make up the bulk of the agreement. These include representations and warranties, covenants, closing conditions, and termination rights."); Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. ECON. & ORG. 330, 333 (2005) ("Three sets of provisions reflect the three basic transactional engineering elements of a corporate acquisition agreement: representations and warranties, covenants, and conditions.").

[138] *See* Gilson & Schwartz, *supra* note 137, at 334 ("Covenants . . . bridge the temporal gap between execution and closing. Covenants require or prohibit particular verifiable actions, such as complying with regulations or not declaring an unusual dividend.").

[139] BUSINESS COMBINATION AGREEMENT BY AND AMONG T-MOBILE US, INC., HURON MERGER SUB LLC, SUPERIOR MERGER SUB CORPORATION, SPRINT CORPORATION, STARBURST I, INC. & GALAXY INVESTMENT HOLDINGS, INC. 70–71 (2018), https://www.sec.gov/Archives/edgar/data/101830/000119312518140782/d565324dex21.htm.

any dividends, take on any debt, modify, renew, waive, or terminate material contracts, acquire material assets, make any loans, increase executive compensation, or enter any new line of business.[140] The cumulative effect of these covenants is to freeze the target in place. This makes sense from the acquirer's perspective: it wants to ensure that the target firm is no different in any material respect upon consummation than it was the day the agreement was entered. But the result is that the target must "pull its competitive punches" from the moment the agreement is signed.

To be sure, antitrust law limits the extent of the acquirer's influence over the target in the period between signing and consummation. So-called gun-jumping rules prohibit the acquirer from exercising control prematurely over the target's operations.[141] These rules derive from section 1 of the Sherman Act and the Hart-Scott-Rodino Act.[142] Under section 1, the parties to an acquisition agreement must continue to treat each other as competitors until the deal is consummated.[143] Accordingly, they are barred from agreeing to fix prices or output levels and from allocating customers.[144] These prohibitions exist regardless of whether the transaction is reportable under HSR. For transactions subject to HSR, the Act prohibits the acquirer from exercising "beneficial

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Similar language can be found in many acquisition agreements. *See, e.g.*, AGREEMENT AND PLAN OF MERGER AMONG JONES LANG LASALLE INC., JLL CM, INC., JLL CMG, LLC & HFF, INC. 54–55 (2019), https://www.sec.gov/Archives/edgar/data/1380509/000119312519080078/d720770dex21.htm; TRANSACTION AGREEMENT AND PLAN OF MERGER AMONG GENERAL ELECTRIC COMPANY, BAKER HUGHES INCORPORATED, BEAR MERGERSUB, INC. & BEAR NEWCO, INC. 51–52 (2016), https://www.sec.gov/Archives/edgar/data/808362/000095010316017539/dp69954_ex0201.htm.

140 *See, e.g.*, *supra* notes 21 & 139.

141 *See* William Blumenthal, Fed. Trade Comm'n, Remarks Before the Association of Corporate Counsel: The Rhetoric of Gun-Jumping 7 (2005) ("[T]he most serious transgressions have occurred where the merging firms prematurely combine significant aspects of their day-to-day operations and manage themselves as one.").

142 *See id.* at 1–2 (explaining that conduct of "firms proposing to merge" is "subject to Section 1 of the Sherman Act" and "may also be subject to" HSR, "which prohibits the acquisition of beneficial ownership without first filing premerger notification and observing a waiting period").

143 *See, e.g.*, Competitive Impact Statement at 7, United States v. Flakeboard America Ltd., No. 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014) [hereinafter Flakeboard America Competitive Impact Statement], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/flakeboard_cis.pdf (stating that section 1 prohibitions "remain[] in force during the premerger period: the pendency of a proposed transaction does not excuse transacting parties of their obligations to compete independently").

144 *See, e.g.*, *id.* ("[U]ntil a transaction is consummated, a party that coordinates with its rival on price, output, or other competitively significant matters may violate Section 1.").

ownership" of or control over the target until the HSR waiting period expires.[145] The companies must "remain separate and preserve their status as independent economic actors" throughout the waiting period.[146]

The antitrust enforcement agencies have pursued several gun-jumping investigations over the past two decades. In 2014, the Antitrust Division settled a gun-jumping complaint against Flakeboard America Limited and SierraPine, competitors in the production of medium-density fiberboard.[147] After Flakeboard and SierraPine entered an agreement for Flakeboard to purchase three SierraPine mills, but before the HSR waiting-period expired, the parties agreed that SierraPine would close one of the three mills and transfer its customers to Flakeboard.[148] SierraPine subsequently shuttered the mill and Flakeboard gained "a significant number" of SierraPine's customers.[149] The Division alleged that this conduct was an illegal restraint of trade under section 1 of the Sherman Act and that it amounted to a premature transfer of operational control and beneficial ownership to Flakeboard, violating HSR.[150] The settlement required the parties to disgorge $1.15 million in unlawful profits for violating section 1 and to pay an additional $3.8 million in civil penalties for the HSR violation.[151] In 2017, the Division settled a gun-jumping case against Duke Energy for $600,000.[152] Duke had agreed to purchase the Osprey Energy Center from Calpine Corporation, but before the

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[145] The indicia of beneficial ownership include "the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock or to determine who may vote the stock, [and] the investment discretion (including the power to dispose of the stock)." Hart-Scott-Rodino Antitrust Improvements Act of 1976, 43 Fed. Reg. 33,449, 33,450, 33,458 (July 31, 1978) ("[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless . . . the waiting period . . . has expired . . . .").

[146] Flakeboard America Competitive Impact Statement, *supra* note 143, at 8.

[147] *See* Press Release, U.S. Dep't of Just., Justice Department Reaches $5 Million Settlement with Flakeboard, Arauco, Inversiones Angelini and Sierrapine for Illegal Premerger Coordination (Nov. 7, 2014), https://www.justice.gov/opa/pr/justice-department-reaches-5-million-settlement-flakeboard-arauco-inversiones-angelini-and ("The settlement resolves the department's allegations that Flakeboard, Arauco and SierraPine engaged in illegal premerger coordination . . . .").

[148] *See* Flakeboard America Competitive Impact Statement, *supra* note 143, at 8–9.

[149] *Id.* at 6.

[150] *Id.* at 7.

[151] United States v. Flakeboard America Ltd., No. 3:14-cv-04949-VC, 2015 WL 12656838, at *2 (N.D. Cal. 2015).

[152] *See* United States v. Duke Energy Corp., No. 17-116 (BAH), 2017 WL 2819875, at *1 (D.D.C. 2017).

HSR waiting-period expired, Duke entered a "tolling agreement" with Osprey that gave Duke control over Osprey's output as well as the right to receive day-to-day profits and losses from Osprey's business.[153] The Division alleged that "from the moment the tolling agreement went into effect, Osprey ceased to be an independent competitive presence" in the relevant market.[154]

These enforcement actions demonstrate that the Agencies take seriously the limits HSR and the Sherman Act place on merging parties' conduct pre-consummation. But while these gun-jumping rules prohibit acquiring firms from exercising direct control over targets during the pre-consummation period, they do not solve the problem of reduced competition inherent in standard sellers' covenants. Indeed, the Department of Justice has made clear in consent decrees that gun-jumping prohibitions do not bar merging firms from requiring that a party to a transaction "continue operating in the ordinary course of business" or that a party "forego conduct that would cause a material adverse change in the value of to-be-acquired assets."[155] Gun-jumping restrictions may deter the most egregious abuses of the merger-review period, but the underlying anticompetitive problems remain.

These problems extend beyond the limits placed on a target's ability to compete to more lasting damage to the target's competitive capacity. It is well understood that acquisition targets risk significant competitive harms, such as the loss of upper management and key personnel, who may be concerned that they will not have a future with the merged firm.[156] Targets also may lose customers who are uncertain if they want to stay with the merged company, and they are likely to find it difficult to gain new

[153] Competitive Impact Statement at 2, United States v. Duke Energy Corp., No. 1:17-cv-00116 (D.D.C. Jan. 18, 2017).

[154] *Id.* at 3.

[155] *Flakeboard America Ltd.*, 2015 WL 12656838, at *2–3.

[156] *See, e.g.*, Afsharipour, *supra* note 22, at 1173 (describing "the seller's risks in connection with the proposed sale of the company, including the loss of employees and senior management, the prolonged disruption of ordinary business operations, and the fear of securities class actions in the event the transaction fails to close"); Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM. & MARY L. REV. 2007, 2087 (2009) (noting that public announcement of a merger agreement creates "risks that employees will fear that the merger will have adverse consequences for them personally and will thus become distracted or seek alternative employment").

customers while the acquisition is pending.[157] And, in cases where a publicly announced acquisition falls through, the target might experience a reduction in its valuation because the market may assume that the target was flawed in some way.[158] Further, merging firms might collaborate in ways that reduce competition between them without rising to the level of a gun-jumping violation. Inevitably, merging firms must work together in the pre-consummation period to prepare to integrate once the deal goes through.[159] This planning often will include information exchanges between the firms, which can facilitate coordination.[160] Finally, if the target's managers expect to become executives in the newly merged firm, they are likely to have greatly diminished incentives to compete vigorously against their future employer.[161]

Compelling empirical evidence exists regarding the harm to competition that occurs once a merger agreement is entered. In their study of the effects of mergers in the airline industry from 1985 to 1988, E. Han Kim and Vijay Singal demonstrated that merging firms began to exercise market power by raising prices during the period in which they announced the merger and *before* integration.[162] This result shows that, at least in the airline industry

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[157] *See* Afsharipour, *supra* note 22, at 1222 ("For selling companies, an acquisition transaction places immense pressure on the company's business, including potential loss of employees and customers and disruption of the company's ordinary business operations . . . ."); Miller, *supra* note 156, at 2087 (noting risks to the target from public announcement of merger agreement, including "risks that customers may take their business elsewhere"); Tucker & Yingling, *supra* note 26, at 71 (arguing that the seller "may have difficulty competing for wary customers" during the merger-review process).

[158] *See* Afsharipour, *supra* note 22, at 1173 ("[T]he breakdown of a publicly-announced acquisition will likely mean that 'the rejected [seller] will suffer valuation backlash [and] . . . is going to be viewed by the market as tainted, and that taint is going to be directly reflected in the target's stock price.'" (alterations in original) (quoting Elizabeth Nowicki, *Lessons Learned from Private Equity Deals* 4 (Working Paper, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430213)).

[159] *See, e.g.*, E. Han Kim & Vijay Singal, *Mergers and Market Power: Evidence from the Airline Industry*, 83 AM. ECON. REV. 549, 556 (1993) ("Even without an explicit price-fixing agreement, the mere anticipation of a merger would make the participating firms more cooperative.").

[160] *See, e.g.*, *id.* ("Getting the two management teams together to discuss merger possibilities provides a relatively safe and convenient forum to arrive at mutually beneficial pricing strategies.").

[161] *See* Miller, *supra* note 156, at 2064 (asserting that "the target's managers [who] . . . will become employees of the acquirer . . . have very strong personal incentives to act during the interim period as the acquirer would want . . .").

[162] *See* Kim & Singal, *supra* note 159, at 552, 557 (finding that "[d]uring the announcement period" before consummation, "merging and rival firms in normal-firm mergers increase their

during this time period, anticompetitive harm began to occur as soon as a merger agreement was signed.[163] Kim and Singal also found that once mergers were consummated, the merging firms and their rivals lowered their relative fares, suggesting that merger efficiencies outpaced any additional market power achieved through integration.[164] Overall, the authors determined that merger announcements resulted in "large increases in relative airfares" during the period in which the deal was announced and in subsequent efficiency gains upon consummation that "offset much, but not all, of the impact of market power."[165]

Other merger retrospective studies also demonstrate an increase in prices as a result of transactions in a range of industries, though some empirical analyses of specific mergers have found no price effects.[166] In 2013, a meta-analysis of merger retrospectives undertaken by John Kwoka determined that the average price effect found in retrospectives of individual mergers was a 6% increase.[167] Moreover, of the fifty-three mergers studied, forty (75.5%) resulted in a price increase, while thirteen (24.5%) led to a price decrease.[168] The Kim and Singal study remains particularly salient because it separates the effect of entering the agreement from the subsequent integration.[169] Its results are consistent with the theory that competition is reduced as soon as a merger agreement is signed and

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fares by 11 percent and 13 percent . . . suggest[ing] that discussions culminating in a possible merger between normal [non-failing] firms are conducive to cooperative pricing behavior").

[163] *See id.* at 557 (stating that merger agreements among airlines that were not "motivated by financial distress . . . result[ed] in large increases in relative airfares during the announcement period").

[164] *See id.* at 557 (suggesting that price declines during the merger completion period show that "efficiency gains dominate any additional market power that may arise due to resolution of uncertainty").

[165] *Id.*

[166] *See, e.g.*, Graeme Hunter, Gregory K. Leonard & G. Steven Olley, *Merger Retrospective Studies: A Review*, 23 ANTITRUST 34, 34 (2008) (reviewing the results of merger retrospective studies and concluding that "the majority of studies that analyze price effects have found post-merger price increases" but that a "significant minority of studies have found no price effects").

[167] John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 631 (2013) ("The overall average price change for the 53 transactions is a positive 6.04 percent . . . .").

[168] *See id.* at 631–32 (finding that "[o]f the 53 price estimates, a total of 40, or 75.5 percent, report postmerger price increases" and that "[t]hirteen transactions . . . are found to result in price decreases").

[169] *See* Kim & Singal, *supra* note 159, at 557 (finding that "normal" (non-failing) merging firms and their rivals increased their fares "[d]uring the [merger] announcement period" whereas during the "completion period, both the merging and rival firms *decrease[d]* their relative fares").

that competitive harm continues throughout the period before consummation.[170] Further evidence for this theory can be found in another common feature of acquisition agreements: Antitrust Reverse Termination Fees.

B. ANTITRUST REVERSE TERMINATION FEES

Acquisition agreements typically include provisions that allocate the risk of a deal falling through.[171] One common risk these agreements address is that of a party abandoning the deal.[172] They do so through provisions requiring the parties to pay a termination fee if they walk away.[173] In the event that the seller abandons the transaction, perhaps because another buyer emerges with a more attractive bid, merger agreements often contain a provision requiring the seller to pay the buyer a "standard termination fee" (STF).[174] Starting in the early 2000s, parties increasingly began providing for the risk that the *buyer* would abandon the deal by including "reverse termination fee" (RTF) provisions under which the buyer would pay the seller if the buyer was unable or chose not to complete the transaction.[175] In her study of RTFs, Afra Afsharipour showed that these provisions allocate a number of deal risks, including the risk that the buyer would be unable to secure financing for the deal, that the buyer would decline to close the transaction for other reasons, or that the transaction would be barred or delayed by regulators or antitrust authorities.[176]

It is this last type of RTF, those that address regulatory and antitrust risk, that are of the most interest in relation to the merger-

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[170] Kim and Singal found that merger agreements between non-failing airlines "are conducive to exercise of market power [and] result[ed] in large increases in relative airfares during the announcement period; but upon merger completion, efficiency gains offset much, but not all, of the impact of market power." *Id.*

[171] *See* Afsharipour, *supra* note 22, at 1163 ("Acquisition agreements are peppered with various provisions designed to mitigate, allocate, or address the ramifications of deal risk.").

[172] *See id.* ("Perhaps the most obvious deal risk is of one party abandoning the transaction.").

[173] *See id.* ("One of the primary ways of dealing with this risk [of deals falling through] is through termination fee provisions.").

[174] *See id.* ("Typically, acquisition agreements provide for a standard termination fee . . . to be paid by the seller in the event that the seller does not complete the transaction due to specific triggers.").

[175] *See id.* at 1180, 1183 ("RTFs began to take on a much more significant role in private equity acquisition agreements beginning in 2005.").

[176] *See id.* at 1194–95 (listing RTF triggers found in strategic merger agreements from 2003 and 2004).

review process. ARTFs shift the risk to the buyer that a transaction will be delayed or blocked because of antitrust considerations.[177] In the 2018 merger agreement between Cigna Corporation and Express Scripts Holding Company, for example, the parties agreed that either of them could terminate the deal and abandon the merger if "any Legal Restraint permanently restraining, enjoining or otherwise prohibiting or making illegal the Merger or otherwise prohibiting consummation of the Merger shall become final and nonappealable."[178] The agreement also provided that if either party terminated the agreement on these grounds, then the buyer would pay the seller $2.1 billion within two business days following termination.[179] Similarly, the December 13, 2017 merger agreement between Walt Disney and Twenty-First Century Fox stated that if either party terminated the agreement "as the result of any applicable Antitrust Law, Communications Law or Foreign Regulatory Law or an Order imposed by a Governmental Entity with jurisdiction over" such laws, Disney would have to pay Twenty-First Century Fox $2.5 billion.[180]

In addition to an ARTF triggered by government action barring the transaction under the antitrust laws, many merger agreements also include a termination date provision, which allows one or both of the parties to abandon the transaction if it has not closed by a date certain.[181] In the December 2017 merger agreement between CVS and Aetna, for example, the parties agreed that either party could terminate the deal "if the merger ha[d] not been consummated on or before December 3, 2018" but that this date could be extended to June 3, 2019 if the only reason the deal had not been

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[177] *See* Tucker & Yingling, *supra* note 26, at 71 ("To shift some [antitrust-related] risk to the purchaser, a target may demand a reverse breakup fee payable if regulatory clearance is not secured.").

[178] AGREEMENT AND PLAN OF MERGER BY AND AMONG CIGNA CORP., EXPRESS SCRIPTS HOLDING CO., HALFMOON PARENT, INC., HALFMOON I, INC. & HALFMOON II, INC. 97 (2018), https://www.sec.gov/Archives/edgar/data/1532063/000119312518077568/d526729dex21.htm.

[179] *Id.* at 100.

[180] AGREEMENT AND PLAN OF MERGER AMONG TWENTY-FIRST CENTURY FOX, INC., THE WALT DISNEY COMPANY, TWC MERGER ENTERPRISES 2 CORP. & TWC MERGER ENTERPRISES 1, LLC 90 (2017) [hereinafter FOX/DISNEY MERGER AGREEMENT], https://www.sec.gov/Archives/edgar/data/1308161/000119312517370718/d489755dex21.htm.

[181] *See* Tucker & Yingling, *supra* note 26, at 72 ("[M]erging parties typically agree to a termination, or 'drop dead,' date that permits one or both parties to abandon the transaction after a certain period of time has passed.").

consummated was that antitrust clearance had not been secured.[182] If at the June 3, 2019 termination date antitrust clearance still had not been obtained and the deal had not been consummated, the buyer (CVS) would have to pay the seller (Aetna) a "Regulatory Termination Fee" of $2.1 billion.[183] While there are a number of reasons transactions might be delayed, thereby triggering the termination date provision, as the CVS-Aetna agreement suggests, the failure to gain antitrust or other regulatory approvals is among the most likely.[184] In such cases, the termination date provision acts as a form of ARTF.[185]

ARTFs appear to be a commonly used tool to allocate antitrust risks to the buyer.[186] A database tracking publicly filed merger agreements for deals valued at over $400 million and involving a publicly traded target company, shows that of 1,351 qualifying transactions in the period January 1, 2005 to March 31, 2020, 164 (12.1%) included an ARTF.[187] These provisions are becoming more prevalent over time. In the period January 1, 2015, to March 31, 2020, there were 529 qualifying transactions of which 81 (15.3%) had an ARTF.[188]

ARTFs typically are not the only type of antitrust risk-shifting provisions firms include in merger agreements. Parties also often

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[182] AGREEMENT AND PLAN OF MERGER AMONG CVS HEALTH CORPORATION, HUDSON MERGER SUB CORP. & AETNA INC. 99 (2017), https://www.sec.gov/Archives/edgar/data/1122304/000095010317012202/dp83737_ex0201.htm.

[183] *Id.* at 103.

[184] *See id.*; *see also* FOX/DISNEY MERGER AGREEMENT, *supra* note 180, at 86–87 (providing for extended termination dates if the deal had not received regulatory or antitrust approval by the initial termination date).

[185] *See* Tucker & Yingling, *supra* note 26, at 72 (noting that the "two agreements in our survey in which a reverse breakup fee was actually paid . . . resulted from reaching the drop dead date without government approval").

[186] *See, e.g.*, David Shine, *Antitrust Termination Fees: Rational or Emotional?*, PAUL HASTINGS: STAY CURRENT 1 (2015) ("Recently, however, big [ARTFs] have returned.").

[187] Dale Collins, *Antitrust Reverse Termination Fees—2020 Q1 Update*, SHEARMAN & STERLING LLP: ANTITRUST UNPACKED (June 8, 2020), https://www.antitrustunpacked.com/blog_print.cfm?&printF=1. The MergerMetrics Database, from which these results are taken, includes transactions where: (1) the target company is incorporated in the U.S.; (2) the target company is publicly traded; and (3) the acquirer owns less than 50 percent of the target when the deal is announced and is "seeking to acquire 100% of the target's equity." SHEARMAN & STERLING: ANTITRUST UNPACKED, ANTITRUST REVERSE TERMINATION FEES 8 (2019), https://www.antitrustunpacked.com/siteFiles/files/reverse_breakup_fees2019_09_30chart.pdf. Further, the transaction must be valued at $400 million or greater, and the merger agreement must be publicly filed. *Id.*

[188] Collins, *supra* note 187.

agree to so-called efforts covenants or cooperation clauses that allocate the burden and costs of seeking antitrust clearance to one or both parties.[189] The force of these covenants varies. Some seller-friendly covenants, termed "hell or high water" clauses, require the buyer to accept any remedial measures the enforcement agencies might demand to approve the deal.[190] Weaker versions of this provision might require the buyer to divest any non-material assets, identify certain assets to be divested, or place a cap on the value of divested assets.[191] Another, more neutral approach is for both parties to commit to using "best efforts" or "reasonable best efforts" to attain government clearance of the transaction.[192] These provisions might mandate that both parties agree to divestitures or other remedies necessary to gain such clearance.[193] In some cases, this remedial commitment is limited only to actions that would not have a material adverse impact on the buyer or the seller.[194]

While both efforts covenants and ARTFs allocate antitrust risk, there is an important distinction between the two types of provisions: the former affects the likelihood of consummation and the strength of the merged entity by requiring the parties to make concessions to the enforcement agencies, sometimes including divestitures, whereas the latter most directly affects the post-termination viability of the seller. Some observers have argued that sellers should be more concerned with the breadth of the buyer's efforts covenants than with the existence or size of an ARTF because stricter efforts covenants increase the chances of a transaction being consummated.[195] ARTFs arguably have a less direct effect on the

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[189] *See* Tucker & Yingling, *supra* note 26, at 71–72 (describing cooperation clauses and "best efforts" covenants); Shine, *supra* note 186, at 2–3 (discussing efforts covenants and their relationship with ARTFs).

[190] Tucker & Yingling, *supra* note 26, at 72 ("The most extreme form of a 'best efforts' clause is a so-called hell or high water clause.").

[191] *See id.* (detailing types of antitrust-related efforts covenants firms employ other than "hell or high water" clauses).

[192] *See, e.g.*, AGREEMENT AND PLAN OF MERGER AMONG CAMPBELL SOUP CO., TWIST MERGER SUB, INC. & SNYDER'S-LANCE, INC. 45 (2017) [hereinafter CAMPBELL SOUP CO. MERGER], https://www.sec.gov/Archives/edgar/data/16732/000095015917000274/ex2-1.htm (requiring that the merging parties use "reasonable best efforts" to effectuate the merger, including to obtain any necessary government approvals).

[193] *See* Tucker & Yingling, *supra* note 26, at 72 (describing various divestiture provisions).

[194] *See, e.g.*, CAMPBELL SOUP CO. MERGER, *supra* note 192, at 47 (excepting remedial actions that will have "individually or in the aggregate, a Company Material Adverse Effect").

[195] *See, e.g.*, Shine, *supra* note 186, at 3 ("The scope of the efforts that the acquirer will be willing to undertake to satisfy the antitrust regulators should therefore have much greater significance to a target than the existence or size of an [ARTF].").

likelihood of consummation, though an ARTF might have an impact if it is large enough that the buyer would prefer to make a painful divestiture that satisfies enforcers, rather than pay the ARTF. A large ARTF also may signal a buyer's commitment to consummate a transaction.[196]

The academic literature on ARTFs is limited, and there is no consensus on how parties determine their magnitude in individual deals. Afsharipour observed that the size of RTFs in many cases may not be driven by careful calculations of regulatory risk.[197] In her survey of RTFs, she found that, in several transactions, the parties set the RTF to be equal to the deal's STF (paid by the seller to the buyer).[198] Afsharipour contended that because RTFs and STFs play distinctly different roles in merger agreements, there is no compelling rationale for linking their amounts.[199] She concluded that parties that agree on RTFs and STFs of equal size probably do so to ease negotiations over the fees.[200] Both Afsharipour and Steven Davidoff Solomon have argued that the size of RTFs often appears unmoored from any identifiable methodology.[201]

A 2008 empirical study of ARTFs by Darren Tucker and Kevin Yingling sheds light on potential reasons for their inclusion in merger agreements and the variations in their size.[202] Tucker and Yingling identified and analyzed thirty-one merger agreements from the period 2000–2008 that included ARTFs and observed

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196 *See id.* at 2 ("A meaningful [antitrust termination fee] may provide a target additional tangible comfort that the acquirer will fully comply with, or even exceed, its covenant obligations."); *see also* Choi & Wickelgren, *supra* note 25, at 2 (arguing that a large ARTF signals the acquirer's confidence that a deal is procompetitive, which can "help[] the antitrust authorities more effectively decide which mergers to challenge").

197 *See* Afsharipour, *supra* note 22, at 1222 ("[I]t is not clear whether [RTFs are] calculated according to any actual methodology.")

198 *See id.* at 1221 ("Somewhat surprisingly, in a number of transactions parties are continuing to set the RTF to be equal to the STF.").

199 *See id.* (explaining that there is "little rationale for linking the amount of the RTF to the amount of the STF").

200 *See id.* at 1222 ("[I]t seems that the only logical reason for setting the two fees at the same amount was 'simplifying negotiations and a general sense of equity' . . . ." (citation omitted)).

201 *See id.* ("[I]t is not clear whether the [RTF is] calculated according to any actual methodology."); *see also* Davidoff, *supra* note 24, at 515 (arguing that, in private equity deals, the RTF "structure created an option" which "was not calculated according to any option pricing method. Nor did it appear to be calculated by reference to the damage incurred by [the seller] in the event that it was exercised by the private equity firm").

202 *See* Tucker & Yingling, *supra* note 26, at 75 (summarizing their survey's findings and conclusions).

several patterns in these provisions.[203] First, they found a correlation between inclusion of an ARTF in a merger agreement and the likelihood of Second Requests and agency enforcement actions.[204] Of the thirty-one deals they studied that included an ARTF, nineteen were subject to a Second Request (61%), and the Agencies challenged ten (32%).[205] These rates are far higher than the average from that period, in which the Agencies issued Second Requests on only 3.6% of notified transactions and challenged only 2.4%.[206]

Second, Tucker and Yingling found that the *size* of an ARTF as a percentage of the deal price was inversely related to the probability that the Agencies would issue a Second Request or challenge a deal.[207] In their survey, the average ARTF for transactions receiving a Second Request was 3.6% of the deal price, compared to an average of 4.7% for the deals that did not receive a Second Request.[208] For deals in the survey group that the Agencies challenged, the average ARTF was 2.0% of the deal price, compared to 5.1% for transactions that did not trigger an enforcement action.[209] Based on these findings, Tucker and Yingling concluded that ARTFs "standing alone may not serve as a valid proxy" for merging parties' "assessments of antitrust risk."[210] They speculated that parties set their ARTFs in part based on non-antitrust related concerns or that other provisions, such as efforts clauses, were doing the risk-shifting work.[211] The other possibility they noted is that parties might not be particularly good at predicting the enforcement agencies' reactions to specific deals.[212]

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[203] *See id.* at 72 (describing their methodology for identifying acquisition agreements to include in the survey).

[204] *See id.* at 73 ("[A]greements with reverse breakup provisions result in a high rate of second requests and enforcement actions.").

[205] *Id.*

[206] *Id.*

[207] *See id.* ("[T]he size of the reverse breakup fee measured as a percentage of the deal's value was *inversely* related to both the likelihood of a second request and the likelihood of an enforcement action.").

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *See id.* ("Either the fee is being adjusted for factors unrelated to antitrust concerns or other risk-shifting provisions . . . address[] the issue.").

[212] *See id.* ("[T]he parties may have simply misgauged the level of regulatory scrutiny applied by the competition agencies.").

Third, while five transactions in the survey group were abandoned by the parties, only two resulted in an ARTF being paid, and the average dollar amount for those two payments was 1.8% of the deal price, notably lower than the average 4.2% for all other agreements surveyed.[213] The authors found in this result additional evidence that higher ARTFs may incentivize acquirers to expend greater effort to ensure that a deal receives antitrust clearance.[214] The sample sizes in Tucker and Yingling's study are small, so caution about the implications of the data is warranted, especially with regard to the relationship between the size of an ARTF as a percentage of the deal price and enforcement outcomes.[215] Still, the difference in the rate of Second Requests for deals with an ARTF as compared to the overall population of deals is notable and suggests that if parties are trying to use ARTFs to signal the enforcers that their deals are pro-competitive, that strategy did not work during the survey period.

Given this background, what conclusions can be drawn about what drives the frequency and size of ARTFs? Rational sellers and buyers will take into account a number of factors in negotiating an ARTF. First, both parties will consider the likelihood that the enforcement agencies will delay, challenge, or successfully block a transaction.[216] The higher the probability that the deal will face antitrust scrutiny, the more important the ARTF becomes to the seller and the more likely the buyer will be required to agree to an ARTF as a condition of the seller entering the deal.[217] From the seller's point of view, the size of the ARTF it seeks will be driven by its predictions about the length of any merger investigation and its possible outcome. In negotiating the ARTF, the seller has two key priorities: incentivizing the buyer to consummate the deal and—if the deal falls through—recovering funds sufficient to compensate it for the competitive damage it suffers during the merger-review period.

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[213] *Id.* at 74.

[214] *See id.* ("[T]he higher fees may have their intended effect of encouraging the buyer to obtain regulatory clearance.").

[215] *See id.* at 73 (acknowledging that the survey's sample size was "somewhat small").

[216] *See supra* note 176 and accompanying text.

[217] *See* Tucker & Yingling, *supra* note 26, at 71 ("To shift some of this [antitrust] risk to the purchaser, a target may demand a reverse breakup fee payable if regulatory clearance is not secured.").

Sellers may try to use an ARTF to incentivize a buyer to follow through on a transaction even if the enforcement agencies require the buyer to divest significant assets. To best effectuate this strategy, the seller will aim to negotiate an ARTF whose value exceeds the value of any likely required divestitures. If the seller achieves this goal, it is more likely the buyer will choose to make the necessary divestitures rather than abandon the deal. A large ARTF therefore could be evidence that the seller thinks it possible or even likely that the enforcement agencies will determine that the proposed deal is anticompetitive. On this theory, the size of such an ARTF provides a clue to the value of the competitive overlap between the merging parties. A billion-dollar ARTF could be an indication that the seller thinks there is around a billion dollars' worth of potentially harmful overlap between the firms.

The seller also can use the ARTF as a form of insurance should the deal fall through. Because the target firm starts to lose competitive capacity as soon as the deal is signed and continues to lose it as the merger-review process unfolds, the seller will seek the highest fees in situations with predictably long review periods and uncertain outcomes. There is a sense, then, in which higher ARTFs are *procompetitive*. Considering the length of significant merger investigations and the resulting damage to sellers, ARTFs are a tool for potentially restoring some competitive balance if a deal falls through.[218]

The buyer has the opposite incentives. If the buyer believes the chances are high that a deal will be blocked, it will want to negotiate a lower ARTF (or avoid one altogether). For reasons explored above, however, the buyer may be less sensitive to the length of a merger investigation. With its former rival competitively neutered by the merger agreement and the rival's executives potentially incentivized to pull their competitive punches, the buyer might be able to enjoy increased profits as soon as the agreement is entered. Further, the longer the review period goes on, the weaker the target gets, so even if the deal falls through, the buyer is facing a less potent competitor than existed before the deal was entered. The

[218] *See, e.g.*, Darren S. Tucker & Kevin L. Yingling, *Antitrust Risk-Shifting Provisions in Merger Agreements After the Financial Collapse*, 8 ANTITRUST SOURCE 1, 2 (2009) [hereinafter Tucker & Yingling, *After the Financial Collapse*] (arguing that sellers may use antitrust risk-shifting provisions to "protect the viability of the firm as a standalone entity should the transaction not close").

buyer therefore will balance the costs imposed on it if the transaction is not cleared against the competitive benefits it gains during the merger-review period and the lasting damage to its competitor if the deal fails. One way to view the buyer's situation is that it is essentially using the ARTF to purchase competitive peace for the length of the investigation, so it should be willing to pay more than it would without that benefit. The more concentrated a market, the more the buyer should be willing to pay for this competitive peace. Neutering a rival for a year or more in a market with only four major competitors, for instance, is more valuable to a buyer than if the market featured ten viable rivals.

Both parties also must consider the risk to the deal of including an ARTF in their merger agreement. The antitrust enforcement agencies might interpret the inclusion of a significant ARTF as a sign that a deal is potentially anticompetitive, and they may be inclined to look more closely at such transactions than they would otherwise.[219] Albert Choi and Abraham Wickelgren argue, however, that acquirers can use large ARTFs to signal enforcement agencies that the acquirer believes the deal is procompetitive.[220] Their theory is that the Agencies will view an acquirer as more likely to agree to a large ARTF in situations where the acquirer thinks the merger is less likely to be challenged and blocked.[221] This seems like a costly strategy for the acquirer with potentially limited payoff. Rather than assuring the Agencies that an acquirer is confident that a transaction will pass antitrust muster, a large ARTF may send the opposite signal: that the seller insisted on a large breakup fee because it is sufficiently concerned that the transaction will be blocked. Instead of giving agency staff comfort that a transaction is not anticompetitive, a large ARTF may be a red flag that causes agency staff to consider issuing a Second Request for a transaction they might otherwise not look at twice.[222] Tucker and Yingling's finding that merger agreements including an ARTF were seventeen

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[219] *See* Tucker & Yingling, *supra* note 26, at 71 ("Reverse breakup fees may signal to antitrust authorities that a merger poses substantial antitrust issues.").

[220] *See* Choi & Wickelgren, *supra* note 25, at 2 (contending that because a large breakup fee "is more costly to the acquirer the more likely the merger is to be challenged, and the more likely a court is to find the merger anti-competitive, a large reverse breakup fee can be a credible signal that the acquirer believes the deal is pro-competitive").

[221] *Id.*

[222] *See* Tucker & Yingling, *After Financial Collapse*, *supra* note 218, at 3 (asserting that ARTFs "may function as a red flag to antitrust regulators [and] . . . signal regulators that the transaction raises significant competitive concerns").

times more likely to result in a Second Request and thirteen times more likely to result in an agency enforcement action than agreements lacking an ARTF supports this interpretation.[223]

Further, whatever signals an ARTF sends to enforcers will be of minimal importance to an agency decision about whether to challenge a merger and whether that challenge is successful. To make out their prima facie case in a Clayton Act section 7 action to block a merger, the Agencies must define a relevant product and geographic market and demonstrate probable harm to competition in that market based on market concentration, competitive overlap between the merging parties, and other market realities.[224] The existence and size of an ARTF has no place in this analysis, and it would be unlikely for the Agencies to rely in any significant way on an ARTF in litigation to block a merger.[225] Indeed, agency personnel have stated publicly that they do not take ARTFs into account in making enforcement determinations. An Antitrust Division official explained in 2015 that attorneys in his group "look at" ARTFs, "but . . . at the end of the day we know we still have to do the substantive analysis."[226] An FTC section head agreed that enforcers "look at" ARTFs, "but they don't have a big bearing on the outcomes and they can be off point from the more detailed discussions we need

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[223] *See* Tucker & Yingling, *supra* note 26, at 73 (discussing a survey of merger agreements with reverse breakup fee provisions and finding that 61% of these agreements resulted in a second request, as compared to 3.6% for all HSR reported transactions during the period 2002–2006, and that 32% of the surveyed agreements with reverse breakup fee provisions resulted in a government challenge, as compared to 2.4% for all HSR reported transactions during that period).

[224] *See, e.g.*, United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 49–50 (D.D.C. 2011) ("'The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.' . . . To establish this presumption, the government must 'show that the merger would produce "a firm controlling an undue percentage share of the relevant market, and [would] result [ ] in a significant increase in the concentration of firms in that market."'" (alterations in original) (first quoting United States v. Baker Hughes, Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); and then quoting Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001))).

[225] *See, e.g.*, William McConnell, *Antitrust Protections Hardly Provide a 'Road Map' for Merger Challenges, Regulators Say*, THESTREET (April 16, 2015 4:59 PM), https://www.thestreet.com/markets/mergers-and-acquisitions/antitrust-protections-hardly-provide-a-road-map-for-merger-challenges-regulators-say-13115920 ("[I]t's a myth that regulators rely on covenants allocating antitrust risk to guide merger investigations . . . . [Such] agreements play virtually no role in the government's analysis of whether a transaction poses a threat to competition.").

[226] *Id.* (quoting William Stallings, Chief of Transportation, Energy & Agriculture Section, Antitrust Div., Dep't of Just.).

to have."[227] Former Acting Assistant Attorney General of the Antitrust Division, Deborah Garza, recalled asking staff attorneys about the antitrust risk allocation provisions in a merger agreement and that they responded, "Why would you want to know that? . . . What difference does that make? We want to get to the right answer."[228]

If the parties are proceeding rationally, the size of an ARTF will reflect a compromise between the buyer's and seller's positions, conditioned by the relative strength of the parties' bargaining power. When the seller is in the stronger position, the expectation is that the ARTF will be larger than if the buyer has the upper hand. Because a seller will want to use an ARTF to incentivize the buyer to consummate the deal even if the enforcement agencies require painful divestitures, and the seller's competitive capacity is weakened during lengthy merger investigations, sellers will fight for a larger ARTF in transactions that they anticipate will face significant agency scrutiny, and they will use their bargaining power for other goals in transactions they believe will be cleared quickly. If the buyer has more negotiating leverage than the seller, it is likely that the ARTF will be smaller, or there will be no ARTF at all. There is some limited empirical evidence supporting this supposition. Tucker and Yingling surveyed the use of ARTFs during the financial crisis of 2007–2008.[229] The authors found that the dollar value of ARTFs fell during this period, a result they interpreted as consistent with their theory that buyers generally had more leverage than sellers in merger negotiations during the crisis.[230]

A comparison of ARTFs in two telecommunications mergers—AT&T/T-Mobile and T-Mobile/Sprint—illustrates how these negotiating dynamics might work. The AT&T/T-Mobile merger agreement was signed in 2011.[231] At that time, there were four

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[227] *Id.* (quoting Michael Moiseyev, Assistant Dir., Mergers I, Bureau of Competition, Fed. Trade Comm'n).

[228] *Id.*

[229] Tucker & Yingling, *After the Finanaical Crisis*, *supra* note 218 at 4 ("To see whether antitrust risk-shifting devices changed as the financial downturn intensified at the end of 2007, we examined the purchase agreements for the thirty largest acquisitions of U.S. companies in each of 2007 and 2008.").

[230] *Id.* at 4–5 (reporting survey results showing that the financial crisis resulted in antitrust risk-shifting provisions becoming more buyer-friendly, including lower ARTFs as a percentage of deal value).

[231] AT&T/T-MOBILE STOCK PURCHASE AGREEMENT, *supra* note 1.

major, national mobile wireless telecommunications carriers; AT&T was the second-largest carrier and T-Mobile was the fourth-largest.[232] Although T-Mobile's market share had been declining in the years before it entered the merger agreement, it was not in danger of failing.[233] The merger was proposed during the Obama administration, a period in which the Antitrust Division was more likely to challenge mergers than during either the Bush or Trump Administration.[234] Sentiment at the time was that the Division should challenge the merger and was likely to do so.[235] Herbert Hovenkamp, among the leading antitrust scholars in the country, observed that "[i]t's only a slight overstatement to say that if they weren't going to block this one, the Justice Department might as well just throw the antitrust guidelines out the window . . . . This merger clearly seems to violate them."[236] The Division did challenge the merger, and the parties ultimately abandoned the deal.[237] The merger agreement included an ARTF that required AT&T to pay T-Mobile $3 billion in cash and provide it with spectrum ultimately

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[232] *See* CHARLES B. GOLDFARB, CONG. RSCH. SERV., R41813, THE PROPOSED AT&T/T-MOBILE MERGER: WOULD IT CREATE A VIRTUOUS CYCLE OR A VICIOUS CYCLE? 1 (2011).

[233] Even the merging parties' expert economists did not claim that T-Mobile was in serious financial distress. They asserted only that, "[a]bsent this transaction, T-Mobile USA's competitive significance is likely to decline in the future." Dennis W. Carlton, Allan Shampine & Hal Sider, Declaration Before the Fed. Commc'ns Comm'n, In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, at 6–7 (Apr. 20, 2011), https://ecfsapi.fcc.gov/file/7021240428.pdf; *see also* Gigi Sohn, *Lots of Potential Buyers for T-Mobile if They Want to Leave the US Market*, PUB. KNOWLEDGE (June 7, 2011), https://www.fcc.gov/ecfs/filing/6016377900 ("*T-Mobile is still profitable*. Yes, it lost subscribers in the first quarter of this year, but one bad quarter is hardly the kind of 'failing firm' to which antitrust authorities give more leeway when considering otherwise anticompetitive mergers.").

[234] *See* AM. ANTITRUST INST., *supra* note 9, at 7 (showing that the rates of both Second Requests and merger challenges were higher during the Obama Administration than during the George W. Bush and Trump Administrations).

[235] *See, e.g.*, James B. Stewart, *Antitrust Suit Is Simple Calculus*, N.Y. TIMES (Sept. 9, 2011), https://www.nytimes.com/2011/09/10/business/att-and-t-mobile-merger-is-a-textbook-case.html ("[I]f ever there was a merger likely to be blocked on antitrust grounds, this is it.").

[236] *Id.*

[237] *See* Press Release, U.S. Dep't of Just., *supra* note 4 (detailing how the Justice Department's filing of a lawsuit led to the dissolution of the merger).

valued at $1.2 billion.[238] This $4.2 billion ARTF represented 10.8% of the $39 billion deal price.[239]

The T-Mobile/Sprint merger agreement was signed in 2018.[240] The mobile wireless telecommunications market still included four major carriers; T-Mobile was the third-largest carrier and Sprint the fourth-largest.[241] The deal was reviewed by the Antitrust Division, which was less aggressive in merger enforcement under the Trump Administration than it had been during the Obama Administration.[242] Rather than try to block the merger, the Antitrust Division entered a consent decree with the parties, requiring them to make several divestitures to the DISH Network, including Sprint's pre-paid cell business, certain spectrum assets, 20,000 cell sites, and hundreds of retail stores.[243] The Division's remedial goal was to facilitate the emergence of DISH as a new, fourth national competitor in the mobile wireless telecommunications market.[244] The FCC approved the merger on a

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[238] *See* de la Merced, *supra* note 6 (noting that the breakup fee included $3 billion in cash and that the companies placed different values on the spectrum portion of the fee); Lunden, *supra* note 6 (reporting that "T-Mobile USA says it recorded a $1.2 billion increase in spectrum licenses as a result of the AWS spectrum received as part of the terminated AT&T transaction").

[239] AT&T/T-MOBILE STOCK PURCHASE AGREEMENT, *supra* note 1, at 16.

[240] *See* BUSINESS COMBINATION AGREEMENT BY AND AMONG T-MOBILE US, INC., ET AL. AND DEUTSCHE TELEKOM AG, ET AL. (2018), https://www.sec.gov/Archives/edgar/data/1283699/000110465918028086/a18-12444_1ex2d1.htm.

[241] *See* Andrew Limbong, *T-Mobile Completes Takeover of Rival Company Sprint*, NPR, https://www.npr.org/2020/04/01/825523250/t-mobile-completes-takeover-of-rival-company-sprint (Apr. 1, 2020 5:57 PM) (noting that T-Mobile and Sprint were the "third and fourth largest wireless companies in the United States" (emphasis omitted)).

[242] *See* AM. ANTITRUST INST., *supra* note 9, at 7 (finding that rates of Second Requests and merger challenges fell by close to 20% during the Trump Administration, as compared to the Obama Administration.); BUREAU OF COMPETITION, FED. TRADE COMM'N & ANTITRUST DIV., U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2018, at 6 (2018), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18hsrreport.pdf (showing that the percentage of transactions receiving Second Requests fell during the first two years of the Trump Administration to levels lower than any year during the Obama Administration).

[243] *See* Press Release, U.S. Dep't of Just., Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package (detailing the consent decree the Department of Justice entered with T-Mobile and Sprint).

[244] *Id.* (quoting Assistant Attorney General Delrahim of the Justice Department's Antitrust Division as stating that the settlement "will provide Dish with the assets and transitional services required to become a facilities-based mobile network operator that can provide a full range of mobile wireless services nationwide").

party-line 3–2 vote.[245] Several states challenged the transaction with the goal of blocking it under section 7 of the Clayton Act.[246] The merging parties prevailed in that suit.[247]

The T-Mobile/Sprint merger agreement included an ARTF of $600 million, which was 2.3% of the $26.5 billion deal price.[248] What explains the nearly five-fold difference between the size of the ARTF as a percentage of the deal price in these two merger agreements? There are obvious similarities between the deals. Both agreements involved two of the four major national mobile wireless telecommunications carriers, and both would have reduced the number of significant competitors in this market from four to three. But there are key differences too. The T-Mobile/Sprint deal was reviewed by the Trump Antitrust Division, which increased the likelihood of a favorable outcome for the parties.[249] And, while both deals represented four-to-three mergers, AT&T/T-Mobile would have merged the second- and fourth-largest carriers, with a combined national market share of over 40%[250] and a share of over 50% in certain local markets at the time,[251] while T-Mobile/Sprint

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[245] *See* Fed. Commc'ns Comm'n, No. 18-197, Mem. Op. and Order, Declaratory Ruling, and Order of Proposed Modification in In the Matter of Applications of T-Mobile US, Inc., and Sprint Corporation for Consent To Transfer Control of Licenses and Authorizations, at 6 (Nov. 15, 2019) (providing details on the merger consideration); Richard Gonzales, *FCC Clears T-Mobile/Sprint Merger Deal*, NPR (Nov. 5, 2019, 7:44 PM), https://www.npr.org/2019/11/05/776578139/fcc-clears-t-mobile-sprint-merger-deal ("The commissioners approved the deal . . . on a closed-door, 3-2 party-line vote.").

[246] *See* Redacted Third Amended Complaint at 35–36, New York v. Deutsche Telekom AG, No. 1:19-cv-5434-VM-RWL (S.D.N.Y. September 18, 2019) (requesting that the court find that the proposed merger violates section 7 of the Clayton Act and enjoin the parties from consummating the transaction).

[247] *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 189 (S.D.N.Y. 2020) ("Plaintiff States' request to enjoin the Proposed Merger should be denied.").

[248] *See* BUSINESS COMBINATION AGREEMENT BY AND AMONG T-MOBILE US, INC., ET AL. AND DEUTSCHE TELEKOM AG, ET AL. 113 (2018), https://www.sec.gov/Archives/edgar/data/1283699/000110465918028086/a18-12444_1ex2d1.htm (specifying the $600 million reverse termination fee); Edmund Lee & Katie Benner, *U.S. Approves T-Mobile-Sprint Merger, a Deal that Would Reshape the Industry*, N.Y. TIMES, (July 26, 2019), https://www.nytimes.com/2019/07/26/business/media/sprint-tmobile-merger.html (describing the $26.5 billion deal price).

[249] *See supra* notes 234, 242.

[250] FED. COMMC'NS COMM'N, SEVENTEENTH REPORT, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES 16 (2014), https://www.fcc.gov/document/17th-annual-competition-report (explaining the market share of each cellular provider).

[251] *See* Second Amended Complaint at 13, United States v. AT&T Inc., 1:11-cv-01560-ESH (D.D.C. Nov. 6, 2011) (detailing the combined market share in some major metropolitan markets if the merger was consummated).

merged the third- and fourth-largest carriers with a combined market share of about one-third of the national market,[252] likely making the latter deal somewhat less anticompetitive. Finally, there is some indication that Sprint was in worse shape in 2018 than T-Mobile was in 2011.[253] Some analysts believed that had the merger been blocked, Sprint might not have survived as a going concern.[254]

The variation in the size of the ARTFs in these two deals is consistent with the bargaining dynamics discussed above. The AT&T/T-Mobile deal faced an uphill merger-control battle. It was a four-to-three merger in a highly concentrated market involving the second- and fourth-largest carriers, and the merged entity would have become the biggest firm in that market. Further, the deal took place in a period of relatively aggressive antitrust enforcement. T-Mobile was weaker than AT&T, but it was also an aggressive competitor,[255] it was not in any danger of failing,[256] and it had other potential suitors,[257] giving it bargaining leverage. So, this was a deal that had a high likelihood of being challenged, and ultimately blocked, and the parties had relatively equal bargaining power. Under those circumstances, a large ARTF should be expected. T-Mobile had the leverage to insist on a significant breakup fee, knowing that the longer the merger-review process took, the weaker it would become.[258] AT&T had reason to pay the fee in part because it was buying competitive peace from a maverick firm for over a year. As an industry analyst put it at the time, "AT&T still wants the deal to go through, but if there's no hope for it, then it's to their benefit to prolong the process . . . . For [T-Mobile], it's just the other

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[252] *See* United States v. Deutsche Telekom AG, No. CV 19-2232, 2020 WL 1873555, at *2 (D.D.C. Apr. 14, 2020) ("New T-Mobile would account for 'roughly one-third of the national retail mobile wireless service market . . . .'").

[253] *See, e.g.*, Clare Duffy, *Sprint May Soon Be a Dead Brand . . . One Way or Another*, CNN BUS. (Nov. 23, 2019, 8:16 AM), https://www.cnn.com/2019/11/23/tech/sprint-history-tmobile-merger/index.html ("Without T-Mobile[,] Sprint probably would have struggled to stay afloat and may have ended in bankruptcy court, something even Sprint has begun to hint at.").

[254] *See id.* (reporting that if the Sprint-T-Mobile deal "[fell] through, analysts say Sprint will likely end up in Chapter 11 bankruptcy court . . . .").

[255] *See, e.g.*, Stewart, *supra* note 235 (reporting that internal T-Mobile documents "boasted about its 'disruptive pricing'" and noting that T-Mobile was the first carrier to introduce Android phones).

[256] *See supra* note 233.

[257] *See* Rahn, *supra* note 5 (reporting that Deutsche Telekom's Chief Financial Officer stated that the firm had been in talks with five potential buyers for their U.S. branch).

[258] *See supra* notes 156–59.

way around. This is a window of opportunity for all players to grab customers from T-Mobile."[259]

The situation in T-Mobile/Sprint was very different. This merger was less likely to be challenged and blocked, both because it involved the two smallest national carriers and due to the laxer enforcement standards of the Trump Administration. Sprint, which was in serious financial trouble and was struggling to compete, likely had less bargaining power than T-Mobile. Under these conditions, it is not surprising that the ARTF was significantly lower than in AT&T/T-Mobile. Sprint had both less reason and less bargaining power to insist on a high ARTF. With the likelihood of a successful merger challenge relatively low, Sprint would have been less concerned about a lengthy merger investigation sapping its competitive strength. And even if it had significant concerns, its ability to act on them was limited, considering its dire financial situation.

The aftermath of the AT&T/T-Mobile deal demonstrates how ARTFs can serve as pro-competitive devices. AT&T paid T-Mobile the $4.2 billion breakup fee, including spectrum assets, and T-Mobile not only regained its competitive footing—it prospered.[260] In the years following termination of the deal, T-Mobile's market share increased from 9.3% in 2012[261] to 15.4% in 2016.[262] There is also evidence that the mobile wireless telecommunications market became more competitive overall in the wake of the failed deal. Prices for consumers fell, and there appeared to be no reduction in service quality.[263]

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[259] *Id.*

[260] *See* Baer, *supra* note 7, at 16 ("Since AT&T terminated its effort to eliminate T-Mobile as a rival, T-Mobile has spearheaded increased competition in wireless services. Shortly after the merger was abandoned, T-Mobile announced a $4 billion investment in modernizing its network and deploying 4G LTE service. It then made a series of moves to offer cheaper and better customer contracts, including offering plans without annual contracts and selling Apple's iPhone 5 on better terms than the competition." (footnote omitted)).

[261] *See* FED. COMMC'NS COMM'N, NINETEENTH REPORT, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES 15 tbl.II.C.2 (2016).

[262] *See* FED. COMMC'NS COMM'N, TWENTIETH REPORT, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES 21 tbl.II.C.1 (2017), file:///C:/Users/sweinst4/Downloads/FCC-17-126A1%20(1).pdf.

[263] *See, e.g.*, YALE SCHOOL OF MANAGEMENT, MERGER EXAMPLE: AT&T–T-MOBILE 18 ("[P]ricing and quality indicators for mobile wireless usage . . . show an improvement after the abandonment of the AT&T–T-Mobile merger.").

But there is also a sense in which ARTFs can be viewed as signaling an anticompetitive strategy on the part of buyers. Predictably lengthy merger reviews incentivize buyers to enter merger agreements even when there is a significant risk of the deal being blocked on antitrust grounds because a buyer can expect reduced competition from its merger partner during the course of the investigation.[264] In a highly concentrated market with a review lasting a year or more, the buyer (and the other firms in the market) likely will be able to charge higher prices than before the deal was entered. In this context, it is possible to view the ARTF as a form of reverse-payment from the buyer to the seller by which the buyer shares with the seller some of the supracompetitive profits the buyer earned during the merger-review period.

Even if buyers do not consciously engage in this strategy, ARTFs nonetheless are an indication of the anticompetitive effects of lengthy merger reviews. In the absence of a time-consuming Second-Request investigation, a seller would not need a hefty payment from the buyer if the deal fell through. ARTFs are only necessary because the seller suffers competitive harm during a prolonged investigation.

IV. REFORMING MERGER REVIEW

The previous Part explained how the merger-review process in the United States has become anticompetitive. It demonstrated that the increasing length of merger reviews harms competition and consumers and that ARTFs are evidence of this competitive harm. This Part surveys current merger-reform proposals and explains why they do not solve the problem of anticompetitive merger review. It then proposes a new solution to this problem: legislation requiring the enforcement agencies to announce a merger watchlist comprising markets in which they would likely challenge any proposed merger.

A. CURRENT REFORM PROPOSALS

The trend toward increasingly long merger investigations has sparked reform proposals both from within the Agencies and from

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[264] *See supra* notes 20–22 and accompanying text.

outside parties. At the Antitrust Division, then-AAG Delrahim announced in 2018 a set of initiatives designed to shorten merger reviews.[265] These proposals included granting parties an early meeting with Division leadership, publishing model voluntary request letters and model timing agreements to help parties streamline the review process, and reducing the number of document custodians and depositions the agency will require during Second Requests.[266] In return, Delrahim stated that the Division would expect from merging parties "[f]aster and [e]arlier" document productions, including rolling productions, earlier data production, and a cessation of privilege log "gamesmanship."[267] To protect itself in cases where litigation becomes necessary, the Division also would expect a longer discovery period after a complaint is filed, compensating for the reduced time Division staff would have to review documents and data during the Second-Request period.[268] As the AAG explained, the vast majority of mergers are not challenged, so the parties are not giving up anything in most cases by agreeing to defer some discovery until the Division files a complaint.[269] Finally, Delrahim pledged to increase transparency around the merger-review process by releasing statistics on how long Division merger reviews take, including the average length of Second-Request investigations and the average amount of time from opening an investigation to early termination or closing.[270]

There were some initial indications that these reforms may have helped shorten review times at the Antitrust Division. A survey of the length of merger reviews at the U.S. Agencies showed that the average duration of "significant . . . merger investigations" at the Division dropped from a high of 10.8 months in 2017 to 10.5 months in 2018.[271] Further, after the Division adopted its process reforms, a significant gap in review times developed between the Division and the FTC, which had not made the same systematic efforts to streamline reviews.[272] In 2019, significant reviews took 13.6 months

[265] *See* Delrahim, *supra* note 12, at 1 (detailing a series of merger-review process reforms).
[266] *Id.* at 6–9.
[267] *Id.* at 9–10.
[268] *Id.* at 10.
[269] *Id.*
[270] *Id.* at 12.
[271] *DAMITT 2020 Report*, *supra* note 81.
[272] *See DAMITT Q3 2019*, *supra* note 84 (comparing duration of investigations at the FTC and the Antitrust Division and observing that Division "reforms to streamline the merger review process . . . appear to be having an impact").

at the FTC, 3.7 months longer than they took on average at the Division.[273] Some caution in evaluating this gap in review times is warranted, however, considering credible allegations of procedural irregularities at the Antitrust Division that might have temporarily reduced the average investigation time at the agency.[274] And the gap disappeared in 2020, when review times at the DOJ increased and the Agencies' average review times were almost identical.[275] In any event, despite the temporary improvements at the Division, the overall average duration of significant U.S. merger investigations continues to top 11 months.[276] In the first quarter of 2022, the average duration was 12.6 months.[277]

Even if it had been sustainable, the Antitrust Division's fleeting progress in shortening average merger-review times was encouraging, but not sufficient. Ten months is a very long time for consumers to suffer reduced competition in a concentrated market. And even if the Division were to meet its goal of reducing to six months the average time it takes to complete an investigation,[278] that would still be a lengthy period for consumers to endure competitive harm, especially considering that some of those matters will lead to litigation, which will prolong the damage.

A comparison to agency analysis of entry as a merger defense is illuminating in this context. For merging parties to claim an entry defense successfully under the 2010 *Horizontal Merger Guidelines*,

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[273] *DAMITT 2020 Report*, *supra* note 81.

[274] In June 2020, John Elias, an attorney at the Antitrust Division, alleged that Attorney General Bill Barr had ordered Second-Request investigations of certain mergers in the cannabis industry because "he did not like the nature of their underlying business." *See Testimony Before the H. Comm. on the Judiciary* 3 (June 24, 2020) (statement of John W. Elias), https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519. Elias asserted that these sham inquiries "accounted for 29 percent of the Antitrust Division's full-review merger investigations in Fiscal Year 2019." *Id.* at 2. He noted that one of these investigations was opened in March of 2019 and closed in September of the same year, making it shorter than the average significant Division investigation by around three months. *Id.* at 3–4. The Division undertook nine other cannabis merger investigations in 2019. *Id.* at 4. If these additional investigations were as short as the first one, they would have decreased the Division's average merger-review times for 2019 significantly.

[275] *DAMITT 2020 Report*, *supra* note 81 ("The gap in duration between significant investigations led by the DOJ and FTC largely disappeared in 2020 after a record four-month disparity in 2019.").

[276] *DAMITT 2021 Report*, *supra* note 13 (providing an average review time of 11.4 months for significant merger investigations in 2021).

[277] *DAMITT Q1 2022 Report*, *supra* note 87.

[278] *See* Delrahim, *supra* note 12, at 6 ("Provided that the parties expeditiously cooperate and comply throughout the entire process, we will aim to resolve most investigations within six months of filing.").

they must demonstrate that any such entry would be "timely, likely, and sufficient" to "deter or counteract" the competitive harm the transaction will cause.[279] The Agencies define timely entry as when "the impact of entrants" is "rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry."[280] Earlier versions of the *Horizontal Merger Guidelines* stated explicitly that timely entry had to occur within two years of consummation.[281] In other words, the Agencies considered two years the cutoff point at which too much harm would have occurred to permit the parties to consummate the transaction. The revised 2010 *Guidelines* allow for the possibility that entry would have to occur sooner than two years to prevent permanent competitive harm.[282] The duration of harm from the average significant merger review currently is one year. And it is longer for most litigated transactions, thus approaching the duration that the Agencies have determined causes irredeemable harm to competition in the merger context. This suggests that the harm arising from merger reviews that last a year, or even six months, should be unacceptable under the Agencies' policies.

The Agencies' preference for up-front buyers is also instructive in considering the competitive harm that lengthy merger reviews cause.[283] This preference is based in part on a concern about competitive harm that might occur once a merger has closed but

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[279] 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 32, at 28.

[280] *Id.* at 29.

[281] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 27 (1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf ("The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years . . . .").

[282] *See, e.g.*, COVINGTON & BURLING LLP, E-ALERT ANTITRUST: U.S. ANTITRUST AGENCIES ISSUE REVISED HORIZONTAL MERGER GUIDELINES 4 (2010), https://www.cov.com/-/media/files/corporate/publications/2010/08/us-antitrust-agencies-issue-revised-horizontal-merger-guidelines.pdf ("[I]nstead of requiring entry within two years, the Guidelines require entry to be 'rapid,' which could be a period shorter than two years."); ANTITRUST GROUP, SHEARMAN & STERLING LLP, THE 2010 DOJ AND FTC HORIZONTAL MERGER GUIDELINES: INCREASING REALISM WHILE REDUCING PREDICTABILITY 6 (2010), http://appliedantitrust.com/09_merger_guidelines/merger_guidelines/ss_210_revisions8_2010.pdf ("We believe [that the revised treatment of timeliness of entry in the *2010 Horizontal Merger Guidelines* means that] the agencies will demand that the parties show that sufficient entry is likely to occur in a timeframe considerably shorter than two years in most cases.").

[283] *See supra* notes 89–96 and accompanying text.

before assets are divested under a consent decree.[284] The Agencies are sufficiently worried about the period post-merger in which the merged entity seeks a buyer for the divestiture assets that they now require most merging parties to find and strike a deal with an approved purchaser before a consent decree is finalized.[285] On this same logic, the Agencies should be concerned about a year of competitive harm that occurs during the merger-review period.

Outside experts have recommended more substantial changes to the HSR framework. In their 1997 article on reforming the merger-review process, Joe Sims and Deborah P. Herman argued that the HSR reporting thresholds should be raised, so fewer transactions would be subject to merger review, and that Second-Request demands should be sharply limited to include only "material readily available or actually used by the parties in their merger analysis."[286] The authors also urged that if the Agencies' Second-Request authority was not pared back, the merging parties should be able to appeal to a federal magistrate to quash portions of Second-Request demands.[287] These proposals likely would reduce some of the problems the current merger-review regime raises, but at the risk of even greater competitive harm. Requiring parties to notify fewer mergers is likely to lead to greater concentration than currently exists.[288] The Agencies would have to return to litigating more mergers post-consummation, which would defeat the purpose of HSR.[289] Limiting the Agencies' power to request documents and data might streamline the review process and be an effective reform. As argued below, however, this approach does not go far enough in some cases.

In 2009, Sims, writing with Robert Jones and Hugh Hollman, recommended a series of process reforms to the merger-review framework, including limiting the number of custodians to be

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[284] *See, e.g.*, *Frequently Asked Questions About Merger Consent Order Provisions,* FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq, (last visited May 31, 2022) ("Buyers up front also reduce the risk of interim harm to competition by speeding up accomplishment of the remedy.").

[285] *DAMITT Q3 2019*, *supra* note 84 (finding that 80% of agency divestiture consent decrees in 2019 required an upfront buyer).

[286] Sims & Herman, *supra* note 18, at 901–02 (emphasis omitted).

[287] *Id.* at 902 (asserting that a magistrate judge, as a neutral arbiter, would shift agency attitudes and promote "a fairer and more efficient process").

[288] *See* AM. ANTITRUST INST., *supra* note 9 (noting that lax merger enforcement "has resulted in 'creeping' concentration in many markets").

[289] *See* Baer, *supra* note 37 (noting that "before HSR, relatively few mergers were challenged at the premerger stage").

searched, limiting the time-period for responsive documents to two years and the time-period for data to three years, requiring parties to make rolling document productions, eliminating the privilege log altogether, and requiring the Agencies to determine whether to challenge a deal within forty-five days of certification of substantial compliance with a Second Request.[290] These proposed reforms are similar to many of the reforms the Division introduced in 2018, which have proven only minimally effective to date.[291]

B. A MORE EFFECTIVE APPROACH TO REFORM

There is widespread agreement that Second-Request investigations take too long.[292] Antitrust Division leadership and business-side interests have argued that the burdens of these lengthy reviews fall on merging parties and the Agencies.[293] This Article contends that lengthy merger reviews primarily harm consumers, who suffer from reduced competition in affected markets during the pendency of an investigation. A solution that addresses both sets of concerns is to remove certain mergers from the HSR regime. Business-side interests would prefer to raise the HSR filing threshold so that parties are required to notify fewer transactions. Another approach, and a more effective reform, is to remove *the most problematic mergers in the most concentrated markets* from the HSR regime. After all, these are the transactions that tend to take the longest to review and that cause the most consumer harm.[294] The most impactful reform of the HSR process, given the arguments above, is for the enforcement agencies to announce a "merger watchlist": a set of highly concentrated markets in which they are likely to immediately challenge any merger between competitors absent a credible failing-firm defense. There are two ways such a reform could happen. Congress could

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[290] Sims et al., *supra* note 65, at 65.

[291] *See supra* notes 258–69 and accompanying text.

[292] *See, e.g.*, Delhrahim, *supra* note 12, at 5 ("Certainly everyone in the business community who has received a second request, and everyone in the private bar who has worked on one, understands how burdensome compliance can be."); Sims et al., *supra* note 65, at 60 (noting that since HSR's enactment, "there has been one constant: complaints about the burden of the Second Request process").

[293] *See. e.g.*, Delrahim, *supra* note 12 at 5 ("Long merger reviews . . . can waste public and private resources."); Kempf, *supra* note 10, at 2 ("[S]hortening merger reviews . . . reduce[s] the burdens on the merging parties and the Antitrust Division.").

[294] *See supra* notes 89, 156–61 and accompanying text.

legislatively require the Agencies to take this step, or the Agencies could do so on their own. If neither of these reforms happens, the Agencies at the least should take into account anticompetitive harm during the merger-review period in determining whether to challenge a deal without a lengthy investigation.

1. Benefits of Reform. Agency publication of a list of markets in which they are likely to immediately challenge any horizontal merger would have several significant benefits. First, and most obviously, it would eliminate for most mergers in these markets the lengthy Second-Request period during which competition and consumers are harmed. Litigation to block such mergers would be time-consuming, but in the current system that time is layered on top of an already lengthy investigation period. This reform would significantly reduce the duration of consumer harm that takes place after merger agreements are signed in highly concentrated markets.

This approach would be especially relevant for deals for which the parties are willing to work with enforcers during a Second Request to try to find a remedy that satisfies the reviewing agency but are unwilling to go to trial to defend the merger. Under the reforms proposed here, those firms will simply decline to enter a merger agreement at all, entirely eliminating the competitive harm. For parties that are willing to go to trial after a Second-Request investigation, this reform is still likely to reduce the total time between entering the merger agreement and resolution of merger litigation. Under the current system, the Agencies ask for discovery during litigation despite having demanded documents, data, and depositions during the Second-Request investigation. This reform would eliminate this duplication. Further, the merging firms may be less willing to raise prices or otherwise harm competition during the pendency of an antitrust trial than they would be during a Second-Request investigation.

Second, a public statement that the Agencies are likely to challenge mergers in specified markets would reduce the chances that firms in those markets would try to merge at all. It is one thing for firms in highly concentrated markets to try their luck with a proposed merger in hopes that a deal can be worked out with the Agencies. It is another thing entirely to commit to a transaction that will probably lead directly to litigation. Boards and shareholders are much less likely to approve transactions under these circumstances. Even more than eliminating the Second-Request period for mergers in highly concentrated markets, this reluctance to merge may have significant benefits for competition.

Relatedly, this reform would address concerns that the Agencies have transformed the HSR process from what was intended to be a law-enforcement function into a full-blown regulatory regime.[295] It would do so by discouraging the practice of expending agency resources during lengthy investigations to conjure new competitors in highly concentrated markets by requiring divestitures to potential new entrants.[296] The T-Mobile/Sprint merger is a prime example of the problems this approach can create. The Division concluded that the mobile wireless telecommunications market was highly concentrated and that reducing the number of competitors from four to three would harm competition in the market.[297] Rather than suing to block the merger, however, the Division worked with the parties during a lengthy investigation to divest assets to DISH to create a potential new fourth competitor.[298] Instead of simply challenging the merger to maintain the four competitors that already existed, the Division bent over backwards to try to encourage the emergence of a new rival. But there is no guarantee that DISH will follow through and become an effective competitor in the wireless market.[299] Had the mobile wireless telecommunications market been on a merger watchlist, with the threat of likely litigation, this time-consuming and potentially

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[295] *See, e.g.*, Sims & Herman, *supra* note 18, at 878–79 ("Congress plainly did not intend [HSR] to create a huge new merger regulatory scheme . . . . We are certain that even HSR's drafters would be amazed at the comprehensive regulatory process that has developed over the past two decades.").

[296] *See id.* at 898 ("[T]he vast majority of merger challenges today are resolved by consent decree[,] litigation is extremely rare[,] and divestiture . . . is once again common.").

[297] *See* Competitive Impact Statement at 7, United States v. Deutsche Telekom AG, No. 1:19-cv-02232-TJK (D.D.C. July 30, 2019) (concluding that "[t]he market for retail mobile wireless service in the United States is highly concentrated and would become more so if T-Mobile were allowed to acquire Sprint" and detailing harms that would result from elimination of a fourth national carrier).

[298] *Id.* at 2–3, 8–13 (explaining the proposed Final Judgement, including divestitures to DISH, "to ensure that DISH can . . . grow to replace Sprint as an independent and vigorous competitor in the retail mobile wireless service market in which the proposed merger would otherwise lessen competition").

[299] *See, e.g.*, Karl Bode, *The Dish 'Fix' for the T-Mobile-Sprint Merger Seems More Shortsighted than Ever*, VERGE (July 21, 2021), https://www.theverge.com/2021/7/21/22585761/dish-t-mobile-att-sprint-competition-editorial ("Instead of simply blocking the merger and finding a way to prop up Sprint, the resulting solution always required a great deal of optimism in both the integrity of corporate merger promises and the competency of US regulators. Now consumers are left waiting for a network that may never arrive, based on relationships that were sour from the start.").

fruitless process could have been avoided, and agency resources could have been preserved for other, better uses.

This leads to the third advantage of this reform: it preserves limited agency resources for other pressing missions, including working on more difficult merger cases in less-concentrated markets, pursuing conduct investigations, and prosecuting criminal matters.[300] The Division and the FTC have an expansive mission and limited resources.[301] By eliminating the Second-Request periods for mergers in the most concentrated markets, and likely reducing altogether the number of these mergers parties enter, the Agencies' attorneys and economists can turn their attention to the many other matters that take a back seat during significant merger investigations. This preservation of personnel resources is particularly significant considering the recent push at the Agencies to address the threats posed by the big platform companies.[302]

2. Operationalizing Reform. There are several ways to operationalize these HSR reforms. Legislation likely would be an effective path because it would ensure that the Agencies could not avoid implementing the reform. Congress could mandate that the Agencies create and update public merger watchlists for highly concentrated markets, defined as markets where the Herfindahl-Hirschman Index (HHI) exceeds a certain threshold.[303] Such

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[300] *See* Sims & Herman, *supra* note 18, at 890 ("[B]ecause of the physical demands required to keep up with this never-ending and constantly growing assembly line of HSR filings, the agencies almost certainly devote too few resources to other nonmerger matters, ranging from conduct investigations to regulatory reform.").

[301] *See* David Balto, Opinion, *New FTC Commissioners Should Follow Four Critical Principles*, HILL (May 3, 2018), https://thehill.com/opinion/finance/386108-new-ftc-commissioners-should-follow-four-critical-principles/ ("The [antitrust] agencies have extremely limited resources. They must marshal those resources efficiently to focus on those matters that have the biggest bang for the buck."); Delrahim, *supra* note 12, at 5 (stating that the Antitrust Division has "limited resources" and that "over the past ten years," the Division's "budget has stayed roughly constant in nominal terms, which means it has declined in real terms").

[302] The FTC brought an antitrust suit against Facebook in December 2020, and the DOJ sued Google in October 2020. *See* Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Dec. 9, 2020); Complaint, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020).

[303] The Herfindahl-Hirschman Index is a standard measure of market concentration used in the *2010 Horizontal Merger Guidelines* and often employed by courts. It is calculated by taking the sum of the squares of the market shares of individual firms in a relevant market. 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 32, at 18. The *2010 Horizontal Merger Guidelines* state that the Agencies divide mergers into three categories based on HHIs: "Unconcentrated Markets" with HHIs below 1500; "Moderately Concentrated Markets" with

legislation, for example, could mandate that the Agencies put on the watchlist any relevant market where the HHI exceeds 2500, the threshold for "Highly Concentrated Markets" in the 2010 *Horizontal Merger Guidelines*.[304] Congress would not be best situated to do the work of defining the relevant market(s) in individual cases; that should be left to the Agencies, which would maintain a public list of markets where these criteria are met, along with a list of participants in those markets. These lists would put firms on notice that the Agencies would likely sue to block any transaction between current or potential competitors in these markets.

Another possibility would be for Congress to give the Agencies more latitude to decide which markets should go on a merger watchlist. Under this approach, the Agencies still would be required to maintain such lists but would not be bound by the HHI cutoff and could use their specialized expertise to determine which markets would be included. This system would give the Agencies flexibility not to list markets with HHIs of over 2,500 if their specific characteristics suggested a merger would not be harmful or to include markets with HHIs below 2,500 where the Agencies are nonetheless concerned that mergers would harm competition. An advantage to this approach would be to make merger policy more responsive to shifts in political sentiment as presidential administrations come and go. The transparency of these lists also would highlight contrasting approaches between administrations. The prevailing view is that antitrust enforcement generally has been a non-partisan enterprise since the Nixon administration;[305] these lists will expose the extent to which that is true. It would be

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HHIs between 1500 and 2500; and "Highly Concentrated Markets" with HHIs above 2500. *Id.* at 19. The Agencies are unlikely to challenge mergers in Unconcentrated Markets. *Id.* Mergers in Moderately Concentrated Markets where the deal causes an increase in the HHI of over 100 points, however, "potentially raise significant competitive concerns and often warrant scrutiny." *Id.* And, in Highly Concentrated Markets, the Agencies advise that mergers causing an HHI increase of between 100 and 200 points "potentially raise significant competitive concerns and often warrant scrutiny," whereas mergers causing an HHI increase of over 200 points "will be presumed to be likely to enhance market power." *Id.*

[304] *Id.* at 18–19.

[305] *See, e.g.*, Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 14 (2012) ("[T]he core of antitrust enforcement has been practiced in a relatively nonideological and nonpartisan way over the last several decades."). This sentiment has been thrown into serious doubt by credible accusations that the Trump Administration Antitrust Division pursued investigations for purely political reasons. *E.g.*, Elias, *supra* note 274, at 3–4 (detailing allegations that the Antitrust Division pursued certain investigations for political reasons).

revealing, for example, if the Antitrust Division under one administration had thirty markets on its merger watchlist and under the following administration it had only five.

New antitrust legislation is rare. So, while a legislative approach to the problem of anticompetitive merger review might be preferable, it is more likely that the Agencies would have to act on their own. Absent legislation, the Agencies could on their own initiative announce a list of markets in which they are likely to challenge any proposed merger. There is precedent for this approach. In 1969, during the first year of the Nixon Administration, Attorney General John Mitchell sounded an alarm about increasing concentration in the U.S. economy. He observed that "[t]he number of corporate mergers has more than doubled in the last two years," and "[m]ore importantly, these mergers have involved an increasing number of large firms."[306] "In 1948," Mitchell continued, "the nation's 200 largest industrial corporations controlled 48 percent of the manufacturing assets," while in 1969 "these firms control 58 percent" and the "top 500 firms control 75 percent of these assets."[307] Mitchell concluded that the "danger that this super-concentration poses to our economic, political and social structure cannot be overestimated."[308] To remedy this problem, Mitchell announced that the Antitrust Division "will probably oppose any merger by one of the top 200 manufacturing firms of any leading producer in any concentrated industry" and "may very well oppose any merger among the top 200 manufacturing firms or firms of comparable size in other industries." [309] Mitchell predicted that the "results of this policy" would be "to achieve the type of voluntary compliance we now have in most of the antitrust field."[310] In other words, by announcing a policy of challenging certain very large mergers, Mitchell anticipated that firms would decide independently to stop pursuing such transactions.

While Mitchell's prohibition swept too broadly and failed to account for the possibility that large firms nonetheless may be subject to competitive discipline, the idea that the Agencies should

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[306] Hon. John N. Mitchell, Att'y Gen. of the United States, Address Delivered Before the Georgia Bar Association 15 (June 6, 1969), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/06-06-1969b.pdf.

[307] *Id.* at 4.

[308] *Id.*

[309] *Id.* at 15.

[310] *Id.* at 16.

bring clarity and certainty to their enforcement intentions in highly concentrated markets makes good sense. More recently, during the Obama administration, AAG William J. Baer made clear in the wake of the Division's win in the AT&T/T-Mobile litigation, that the Division would sue to block any further proposed mergers in the mobile wireless telecommunications market.[311] Baer told the *New York Times* in 2014 that "[i]t's going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers."[312] He also said the Division would apply the same approach to any proposed merger among cable television providers.[313] In a 2015 speech, Baer explained,

> [W]e have been wary of wireless carriers' efforts to combine. Such efforts often do not lead to the promised market improvements but instead simply result in higher prices and less innovation for consumers. That is why the Justice Department and the FCC moved to block AT&T's proposed acquisition of T-Mobile in 2011. More recently, when Sprint and T-Mobile publicly suggested they were exploring a combination that also would have reduced national wireless carriers from four to three, the skepticism of DOJ and the FCC forced that idea off the drawing board. Today, consumers are continuing to benefit from four choices among carriers . . . .[314]

The message to industry participants was clear: The Division believed that the wireless market should continue to have at least four competitors, and it would oppose any merger that would reduce the number of rival firms to three or fewer.[315] Division leadership

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[311] *See* Wyatt, *supra* note 33. *See* Edward Wyatt, *Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says*, N.Y. TIMES (Jan. 30, 2014), https://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says/.

[312] *Id.*

[313] *Id.*

[314] Baer, *supra* note 33.

[315] *See* Diane Bartz, *Top U.S. Antitrust Official Uncertain of Need for Four Wireless Carriers*, REUTERS (June 1, 2018, 12:09 PM), https://www.reuters.com/article/us-sprint-m-a-tmobile/top-u-s-antitrust-official-uncertain-of-need-for-four-wireless-carriers-

had said as much to Sprint and T-Mobile, and those firms decided not to test the proposition by pursuing a merger at that time.[316]

During the Trump Administration, AAG Delrahim delivered a different message to the market. In a 2018 conversation with reporters about the proposed Sprint/T-Mobile deal, Delrahim stated, "I don't think there's any magical number [of competitors] that I'm smart enough to glean," rejecting the Obama Administration's four-competitor approach.[317] The Division subsequently struck a deal with Sprint and T-Mobile, allowing the transaction to go through, although the agency ultimately conceded that four competitors made sense in this market.[318]

These examples demonstrate that the Agencies can announce what amount to merger bans in specific industries, with the effect of discouraging proposed transactions in those markets, and that new administrations can retract those policies, perhaps inviting consolidation. To be sure, this kind of policymaking is easier to accomplish at the Antitrust Division, which is run by a single AAG,[319] than it would be at the FTC, where three votes from five commissioners are needed to make decisions.[320] Nonetheless, at any given time, there may be three votes or more in support of announcing a set of markets in which the FTC would likely oppose any proposed merger, effectively operating in the same fashion as any watchlist the Division created. Proceeding through independent

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idUSKCN1IX5AS (describing the Obama Administration's "firm backing of the need for four U.S. wireless carriers"); Alan Friedman, *DOJ Antitrust Chief Says There's No Reason Why U.S. Must Have Four Major Wireless Carriers*, PHONEARENA.COM (June 2, 2018, 1:42 PM), https://www.phonearena.com/news/U.S.-antitrust-head-says-U.S.-can-have-3-major-wireless-carriers_id105421 ("[T]he Obama administration felt that there should be four major U.S. carriers for the sake of competition.").

[316] *See* Baer, *supra* note 33 ("[W]hen Sprint and T-Mobile publicly suggested they were exploring a combination that also would have reduced national wireless carriers from four to three, the skepticism of DOJ and the FCC forced that idea off the drawing board.").

[317] Bartz, *supra* note 315.

[318] *See* Competitive Impact Statement at 7–8, United States v. Deutsche Telekom AG, No. 1:19-cv-02232-TJK (D.D.C. July 30, 2019) (detailing harms that would result from elimination of a fourth national carrier and explaining that the proposed structural relief was designed to "ensure the development" of a new fourth carrier to remedy the "anticompetitive harms that . . . otherwise would have occurred as a result of the merger").

[319] *Antitrust Division Org Chart*, FED. TRADE COMM'N (Jan. 6, 2021), https://www.justice.gov/jmd/functions-manual-antitrust-division-org-chart ("The Assistant Attorney General (AAG) for Antitrust manages the entire Division.").

[320] *See* Malcolm B. Coate & Andrew N. Kleit, *The Political Economy of Federal Trade Commission Administrative Decision Making in Merger Enforcement* 1 (Fed. Trade Comm'n & La. St. U., Working Paper No. 210, 1995) ("Decisions are made by a majority vote of the five Commissioners, in response to staff recommendations on particular cases.").

agency action is bound to be less systematic and less reliable than if Congress required the Agencies to announce markets in which they are likely to oppose any merger among rivals, but it is better than providing no guidance at all about the Agencies' enforcement intentions in specific markets.

3. Risks. Despite their many benefits, whether mandated by Congress or enacted on the Agencies' own initiative, the merger-process reforms proposed above also would raise certain risks. Perhaps the most significant of these risks would be the potential loss of the discovery advantage the Agencies gain during a lengthy Second-Request investigation. Under the current system, by the time the Agencies determine to challenge a merger on which the parties have made an HSR filing, agency staff and leadership have had months to review the firms' documents and data. This extended review-period allows the Agencies to develop their litigation strategies and carefully evaluate their chances of prevailing in a suit to block the merger. Division economists and outside experts will have had time to feed the parties' data into economic models, and agency lawyers will be familiar with the documents and deposition testimony they will be able to rely on at trial. These significant advantages are lost if the Agencies challenge a merger immediately, without a Second-Request investigation.

Instead of relying on the special discovery advantages the Second-Request investigation grants the Agencies, merger challenges subject to the reformed system would proceed like any other civil litigation. The government would request post-complaint discovery from the parties, including documents, data, and deposition testimony, and would build its case around those materials. The Agencies have shown they can prevail under these conditions. In June 2012, Bazaarvoice, a provider of on-line ratings and reviews platforms, acquired its closest competitor, PowerReviews.[321] The parties claimed that the transaction did not meet the HSR filing requirements, so they consummated the deal without informing the government.[322] In January 2013, the

[321] *See* Complaint at 4, United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. Jan. 10, 2013) (No. 13-cv-00133) [hereinafter Bazaarvoice, Inc. Complaint].

[322] *See, e.g.*, *United States v. Bazaarvoice: A Cautionary Antitrust Tale for High-Tech Mergers*, COOLEY LLP (May 8, 2014), https://www.cooley.com/news/insight/2014/united-states-v-bazaarvoice-a-cautionary-antitrust-tale-for-hightech-mergers ("Bazaarvoice acquired PowerReviews in a transaction that was not subject to mandatory pre-merger notification under the HSR Act . . . .").

Antitrust Division challenged the consummated merger.[323] In the absence of Second-Request materials, the Division relied on standard discovery demands to establish its case.[324] The parties proceeded to trial, and the Division prevailed.[325] To remedy the violation, the court ordered the merged company to divest all of the PowerReviews assets it had acquired in the merger and to make additional concessions to allow for the divestiture buyer to compete with Bazaarvoice.[326] The outcome in this case demonstrated that the Agencies can prevail in merger litigation without the benefit of Second-Request discovery. There are many other examples of both the Agencies[327] and private plaintiffs[328] winning merger challenges relying only on standard civil litigation discovery tools.

Another risk these reforms pose is a potential decrease in pro-competitive mergers. If the enforcement agencies include in their merger watchlists markets that either are incorrectly defined or not highly concentrated, then firms considering what might be pro-competitive transactions could decide to abandon those deals. The 2007 merger between XM Radio and Sirius illustrates the problem. XM Radio and Sirius were the only two major providers of satellite radio at the time of the transaction.[329] Had the Antitrust Division,

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[323] *See* Bazaarvoice, Inc. Complaint, *supra* note 321, at 1 ("The United States . . . brings this civil action to . . .remedy[] the June 2012 acquisition of PowerReviews, Inc. by Defendant Bazaarvoice").

[324] *See generally* Joint Case Management Statement, Discovery Plan and (Proposed) Order, United States v. Bazaarvoice, Inc., 2014 WL 2303281 (N.D. Cal. Feb. 7, 2013) (No. 13-cv-00133).

[325] United States v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 203966, at *106 (N.D. Cal. Jan. 8, 2014) (finding that Bazaarvoice's acquisition of PowerReviews "violated section 7 of the Clayton Act").

[326] *See* Third Amended Final Judgment at 2, 5, United States v. Bazaarvoice, Inc., No. 13-cv-00133 (N.D. Cal. Dec. 2, 2014) (requiring defendant to "divest the Divesture Assets within ten (10) days of the entry of the Final Judgement").

[327] *See, e.g.*, Fed. Trade Comm'n, Opinion of the Commission on In the Matter of Otto Bock HealthCare North America, Inc., No. 9378, at 4 (Nov. 1, 2019) (successful challenge to non-HSR-reportable merger of manufacturers of microprocessor-equipped prosthetic knees resulting in an FTC order requiring merged entity to divest entire acquired business); Final Judgment at 5–6, United States v. Dean Foods Co., 2011 WL 11544329 (E.D. Wis. July 29, 2011) (No. 10-CV-59) (post-consummation claim brought against non-HSR-reportable merger in milk industry resulting in court-ordered divestitures).

[328] *See, e.g.,* Steves & Sons, Inc. v. Jeld-Wen, Inc., 345 F. Supp. 3d. 614, 624, 682 (E.D. Va. 2018) (ordering divestiture after private plaintiff prevailed in jury trial on Clayton Act section 7 claim against consummated merger of manufacturers of certain door parts).

[329] *See* David Folkenflik, *Satellite Radio's Sirius, XM Seek Merger*, NPR (Feb. 20, 2007, 06:00 AM), https://www.npr.org/templates/story/story.php?storyId=7492250 (quoting FCC Chair Kevin Martin as stating that the regulatory "hurdle here would be high . . . as the

which reviewed the merger, considered only market concentration, under the reforms this Article proposes, it might have determined to challenge the transaction without a merger investigation. As it happened, during the course of the Division's investigation, the agency decided that the transaction would not substantially lessen competition.[330] Among other factors, the Division reached this conclusion because it was persuaded that emerging technologies, including "next-generation wireless networks capable of streaming Internet radio to mobile devices[,] . . . [were] likely to offer new or improved alternatives to satellite radio."[331] This prediction came to fruition; the merged SiriusXM quickly faced stiff competition from smartphones and, eventually, even in-car Internet.[332]

The risks illustrated by the Sirius/XM deal are real, but they are manageable. While the Agencies are not infallible, they have robust tools for defining markets and tend not to make serious mistakes in that regard. Nonetheless, the Agencies should be open to persuasion by industry. If a case can be made for why a merger in what appears to be a highly concentrated market nonetheless will not harm competition, the firms considering such a merger should be able to make that case *before* signing a merger agreement triggering likely litigation, and the Agencies should be open to it. There is no harm to competition caused by parties who have not yet signed a merger agreement lobbying the Agencies to take their market off the merger watchlist. And if the Agencies are not persuaded, the parties have the option of taking the matter to court.

4. Altering Agency Incentives. The advantages of the Agencies publicly announcing markets in which they are likely to challenge any proposed merger significantly outweigh any litigation disadvantage incurred by the loss of Second-Request discovery and

Commission originally prohibited one company from holding the only two satellite radio licenses").

[330] *See* U.S. DEP'T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATION OF XM SATELLITE RADIO HOLDING INC.'S MERGER WITH SIRIUS SATELLITE RADIO INC. 1 (2008), https://www.justice.gov/archive/atr/public/press_releases/2008/231467.htm ("[T]he Division concluded that the evidence does not demonstrate that the proposed merger of XM and Sirius is likely to substantially lessen competition, and that the transaction therefore is not likely to harm consumer.").

[331] *Id.* at 4.

[332] *See* Joe Mont, *10 Online 'Radio Stations' Taking on Sirius XM*, THESTREET (Oct. 13, 2011), https://www.thestreet.com/personal-finance/10-online-radio-stations-taking-on-sirius-xm-11276128 (noting a "continued push by online radio stations, music services and app-based content aggregators looking to take a bite out of satellite-based Sirius XM").

the risk of discouraging some pro-competitive mergers. These reforms therefore would reduce competitive harm compared to the current system. Even in the absence of legislation requiring the Agencies to announce their enforcement intentions or independent agency action to the same effect, however, agency staff should at the very least consider the competitive harm lengthy merger reviews cause in determining whether to challenge a merger sooner rather than later.

While the Division in recent years has tried to shorten merger-review times, the Agencies' and their staffs' incentives often favor thoroughness and deliberation over speed in merger investigations.[333] Because the parties are unable to consummate their deal during the pendency of the review, the Agencies face little outside pressure to move quickly to reach a resolution or to bring suit to block the transaction. But these incentives should change once the anticompetitive effect of the merger-review process is recognized. *Just because the parties cannot consummate their deal during the review period does not mean that their agreement does not have an anticompetitive impact on the relevant market.* This Article has shown that as soon as a deal is signed in a concentrated market, competition is reduced, and competitive harm continues to accrue for the length of the merger investigation. This knowledge should alter the Agencies' approach to mergers in concentrated markets by putting a heavy thumb on the scale toward moving quickly to sue to block such a merger.

This strategy will have salutary effects. In some cases, the parties, seeing that the agency will not work toward a negotiated solution, will simply abandon the merger. But even if the parties are willing to go to trial, the litigation period likely will be shorter than the combined length of a Second-Request investigation and a trial, and the parties are less likely to raise prices or otherwise harm competition during a trial than they would be during the merger-review period.

5. ARTF Reform. Where should ARTFs fit into this reform proposal, if at all? The competitive impact of ARTFs in acquisition agreements is complex. On the one hand, they are potentially pro-

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[333] *See, e.g.*, Sims et al., *supra* note 65, at 62 ("[T]here is little institutional incentive [for the Agencies' staff] to speed up the [merger review] process. Just the opposite is true, more time to respond gives the staff more time to think, analyze and become more comfortable with their decision.").

competitive. Choi and Wickelgren argue that large ARTFs assist the enforcement agencies in identifying mergers unlikely to harm competition.[334] This Article contends that ARTFs can be pro-competitive when they are large enough to allow the target to regain competitive capacity after a lengthy merger review. But, as explained above, large ARTFs also might facilitate an anticompetitive agreement for an acquirer to share with the target the acquirer's supracompetitive profits that accrue during a long merger investigation. Acquiring parties might find it profitable to enter a merger agreement in a highly concentrated market, even if the chances of consummation are low and even if they have to pay the target a large ARTF, if the supracompetitive profits they will earn during the year-plus investigation and the dollar-value of the lasting competitive damage to the target are larger than the termination fee.[335]

The competitive tradeoffs inherent in ARTFs are sufficiently complex—and the procompetitive benefits sufficiently clear—that it would be premature to take any definitive steps against ARTFs at this point. Certainly, banning them in all cases is not yet merited and might be harmful. Whether agency action against parties anticompetitively employing ARTFs is advisable will depend on the facts of individual cases, but the enforcement agencies should account for ARTFs' pro-competitive potential before taking steps that might broadly chill their use.

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The reforms proposed in this Part would effectively address the challenges of anticompetitive merger review. The risks these reforms pose are real, but manageable, and their benefits are significant. Implementation of these proposals would result in firms entering fewer anticompetitive merger agreements, a reduction in anticompetitive harm from proposed mergers in highly concentrated markets, and a significant savings in agency resources that can be put to better use. These reforms would arrest and begin

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[334] *See* Choi & Wickelgren, *supra* note 25, at 2 ("[A] large reverse break-up fee can be a credible signal that the acquirer believes the deal is pro-competitive[,] . . . [which] likely helps the antitrust authorities more effectively decide which mergers to challenge . . . .").

[335] *See supra* Section II.B (discussing ARTFs as a vehicle for sharing supracompetitive profits garnered during lengthy merger reviews).

to reverse the trend of treating merger review as a regulatory regime, rather than a law-enforcement function.

V. CONCLUSION

The past several years have seen widespread criticism of lax merger enforcement in the United States and critiques of the substantive merger-review standard. Much less has been said about the U.S. merger-review process. This Article has demonstrated that the increasing length of merger reviews in the United States has a pernicious effect on competition in concentrated markets. Competition in these markets is reduced as soon as parties enter a merger agreement, both because these agreements place competitive restrictions on the target company and because the target suffers increasing damage to its business as the merger-review period drags on. This Article contends that ARTFs are evidence of this competitive problem and might be used strategically by acquirers to buy competitive peace for a period of a year or more. But these ARTFs also serve a pro-competitive purpose by providing the resources for a firm to regain its competitive capacity if a deal falls through. This Article proposes reforms to the merger-review process that will reduce the duration of competitive harm caused by anticompetitive merger review, discourage anticompetitive mergers, and preserve agency resources for other important missions. These reforms will steer the Agencies away from their regulatory approach to merger enforcement and back toward the law-enforcement mission envisioned in the Clayton Act.