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A Bad Merger of Process and Substance:
Changing the Merger Guidelines and Premerger Review Form

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On June 27, 2023, the Federal Trade Commission (FTC) announced proposed changes to Hart-Scott-Rodino Act ("HSR Act") premerger notification form.[1] Less than a month later, on July 19, the FTC and Department of Justice (DOJ) announced proposed changes to the agencies' joint merger guidelines.[2] These proceedings are closely related, both part of the Biden administration's ongoing efforts to approach U.S. merger law more aggressively. But despite being part of the same substantive agenda, these two sets of changes are governed by distinct procedural rules and, ultimately, are likely to have very different effects on how merger law is enforced in the United States.

Staring even before adoption of the 1982 Merger Guidelines, merger law in the United States has largely tracked developing economic theory.[3] This approach largely rejects structural presumptions as indicative of how a merger is likely to affect consumers (that is, "big" is not necessarily "bad") and it encourages weighing anticompetitive effects of a transaction against its potential procompetitive efficiencies. The antitrust agencies under the Biden administration reject this view.[4] Under the proposed revisions to the merger guidelines, for instance, the FTC and DOJ may "presume that a merger may substantially lessen competition based on market structure alone." More generally, the Chair of the FTC has argued that Section 7 of the Clayton Act:

> is a broad mandate aimed at prohibiting mergers even when they do not constitute monopolization and even when their tendency to lessen competition is not certain. . . . [E]ven if a merger does create efficiencies, the statute provides no basis for permitting the merger if it nevertheless lessens competition.[5]

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[1] Federal Trade Commission, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review* (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[2] Federal Trade Commission, *FTC and DOJ Seek Comment on Draft Merger Guidelines* (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

[3] *See, e.g.,* Debra A. Valentine, *The Evolution of U.S. Merger Law* (Aug, 13, 1996), https://www.ftc.gov/news-events/news/speeches/evolution-us-merger-law ("The Supreme Court changed course in the mid 1970s. The focus on preserving competitors, maintaining fragmented markets and pursuing other social goals shifted to a critical economics-based examination of market power and how it might be exercised.").

[4] *See* The White House, *Fact Sheet: Executive Order on Promoting Competition- in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (calling on the FTC and DOJ "to enforce the antitrust laws vigorously and recognizes that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge.").

[5] Federal Trade Commission, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines* (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

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The substantive changes to both the merger guidelines and the premerger notification form relate to the Biden administration's goals of more aggressive merger enforcement. The changes to each, however, are governed by different procedures. These procedural differences could very well lead to each having vastly different substantive impacts. While most attention is likely to fall upon the proposed merger guideline revisions, the proposed HSR premerger notification form revisions could have more substantial lasting impacts. The discussion below explains the background of the merger guidelines and HSR Act, discusses the procedure and substance of the proposed changes, and considers the likely impact that these proposes will have if implemented.

I. What are the Merger Guidelines and the HSR Premerger Notification Form?

The primary merger law in the United States is Section 7 of the Clayton Act.[6] This law, which is enforced by both the DOJ and FTC,[7] prohibits mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly." The merger guidelines and HSR premerger notification process relate to how the agencies enforce the Clayton Act. The merger guidelines inform the antitrust community and courts how the DOJ and FTC analyze whether transactions are likely to substantially lessen competition. The premerger notification process is a Congressionally-created mechanism that requires parties to relatively large transactions to provide the agencies with notice of, and opportunity to go to court to enjoin, those transactions before they close.

The Merger Guidelines

The Department of Justice released the first federal merger guidelines in 1968.[8] They were subsequently, and substantially revised by the DOJ in 1982; and in 1992 the FTC joined the DOJ in co-authoring the guidelines.[9] The guidelines—especially the 1982 revisions—have significantly affected merger law in the United States and around the world.[10] In particular, the guidelines are generally recognized as having established the "hypothetical monopolist test" as the benchmark against which the competitive effects of a merger are to be measured and translating the complex economics inherent in merger analysis into a guide accessible to lawyers and judges.[11]

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[6] 15 U.S.C. § 18.

[7] *See* Government Accountability Office, *DOJ and FTC Jurisdictions Overlap, but Conflicts are Infrequent* (January 2023), https://www.gao.gov/assets/820/814486.pdf.

[8] United States Department of Justice Antitrust Division, *1968 Merger Guidelines* (Aug. 4, 2015), https://www.justice.gov/archives/atr/1968-merger-guidelines.

[9] *See* United States Department of Justice Antitrust Division, *1982 Merger Guidelines* (Aug. 4, 2015), https://www.justice.gov/archives/atr/1982-merger-guidelines; United States Department of Justice Antitrust Division, *1992 Merger Guidelines* (Aug. 4, 2015), https://www.justice.gov/archives/atr/1992-merger-guidelines. The agencies have also at times released separate vertical merger guidelines. *See, e.g.,* United States Department of Justice Antitrust Division, *2020 Vertical Merger Guidelines* (June 30, 2020), https://www.justice.gov/media/1090651/dl. The current proposed revisions to the merger guidelines encompass both horizontal and vertical mergers.

[10] Federal Trade Commission, *1982 Merger Guidelines "Fundamentally Changed" The Way U.S. Thinks about Mergers and Competition Policy* (June 11, 2002), https://www.ftc.gov/news-events/news/press-releases/2002/06/ftc-chairman-1982-merger-guidelines-fundamentally-changed-way-us-thinks-about-mergers-competition.

[11] *See* Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm* (2002), https://www.justice.gov/archives/atr/1982-merger-guidelines-and-ascent-hypothetical-monopolist-paradigm.

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The success of the merger guidelines in shaping practitioners' and courts' understanding of merger law is in many ways surprising. The antitrust agencies voluntarily wrote and released them to synthesize their understanding of the relevant law and to provide guidance about their approach to reviewing mergers. But the agencies are under no legal obligation to provide this guidance, and the guidelines have no force of law. Their only legal significance comes from their power to persuade.[12] The have proved successful on this front—perhaps, again, perplexingly, as the guidelines have not historically cited to cases or scholarship.

Their success can be attributed to a few factors. In terms of antitrust practice, the guidelines offer a straightforward explanation of how the agencies evaluate mergers. This includes synthesizing moderately complex econometric tools into a structure that can be practically applied by businesses and understood by lawyers and judges. That is no mean feat! Equally important, courts have been willing to accept the guidelines because, as I have argued elsewhere, the agencies have been viewed as "honest brokers" of antitrust law.[13] The guidelines have played a role best analogized to that of the American Law Institute's Restatements of the Law. They do more than merely summarize existing precedent—at some level, they attempt to predict the direction of that precedent. As every first-year law student learns, and usually struggles with, when learning about the Restatements this is a delicate balance. There is a temptation for drafters of such materials to explain what they believe the law should be; going this route can undermine the credibility of the entire enterprise.

In the case of the merger guidelines, the agencies have been successful in walking this path.[14] This is largely because they tracked the Supreme Court's increased attention to the use of economic theory in antitrust law. As Herbert Hovenkamp has explained, many of the Supreme Court's merger "cases were decided in the mid-sixties, [when] neither the antitrust agencies nor the courts had useful empirical theory about the link between mergers and market performance."[15] This was changing by the late 1970s—and even if the Court has not heard any merger cases since before the 1982 guidelines were adopted, it has steadily incorporated economic analysis into its broader antitrust caselaw.[16] The Court's sentiment toward earlier cases is captured by Chief Justice Roberts in a footnote in *linkLine*: "Given

[12] As explained by the Supreme Court in *U.S. v. Mead Corp.*, 533 U.S. 218, 230 (2001), "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." Not only did Congress provide not formal procedures governing promulgation of the merger guidelines: there is no statutory authorization at all for the adoption of the guidelines. In such cases, "agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency," such that the guidelines "may therefore at least seek a respect proportional to [their] power to persuade." *Id.* at 334–35.

[13] Gus Hurwitz & Geoffrey Manne, *Antitrust Regulation by Intimidation*, WALL ST. J. (July 24, 2023, 6:08 PM), https://www.wsj.com/articles/antitrust-regulation-by-intimidation-khan-kanter-case-law-courts-merger-27f610d9

[14] *See* Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022*, TECHFREEDOM (Dec. 20, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4308233; *see also* Fed. Trade Comm'n, *supra* note 10.

[15] Herbert Hovenkamp, *Did the Supreme Court Fix "Brown Shoe"?* PROMARKET (May 12, 2023), https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe/.

[16] *E.g.*, Continental T.V., Inc. v. GTE Sylvania Inc, 442 U.S. 330 (1979); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

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developments in economic theory and antitrust jurisprudence since *Alcoa* [was decided in 1945], we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us."[17]

The Hart-Scott-Rodino Antitrust Improvements Act

Congress enacted the Hart–Scott–Rodino Antitrust Improvements Act (HSR Act) in 1976. The HSR Act created a premerger notification mandate, under which transactions exceeding certain market share or value thresholds must be reported to the DOJ and FTC at least 30 days prior to closing.[18] The agencies use these 30 days to screen proposed large transactions and to determine whether further scrutiny is needed to determine whether a transaction might violate the Clayton Act. The agencies can then issue a request for additional information, called a second request, to the parties to get further details about a transaction and to decide whether to seek to enjoin the merger from proceeding.[19]

The HSR premerger notification requirements address a basic problem of antitrust law: you can't "unscramble an egg."[20] Once a merger is finalized, businesses begin intermingling their operations, their personnel, their finances, their business plans, their trade secrets and intellectual property. The larger the firms, the more impossible it becomes to undo a consummated merger. The premerger notification process creates an opportunity for the antitrust agencies to identify and pause pending mergers to allow for investigation of their potential competitive effects.

When the HSR Act was adopted, it was expected that only 150 or so transactions each year would be large enough to trigger review.[21] This estimate proved to be off by more than an order of magnitude; in recent years, more than that many transactions are notified each month.[22] The effect has largely been to transition merger law in the United States from an *ex post* enforcement-based regime to an *ex ante* regulatory regime.[23]

Despite this change, the premerger notification regime is generally viewed as successful.[24] This is because the program has been designed and managed with the understanding that it is meant only to

[17] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, note 3 (2009).
[18] Or 15 days in the case of tender offers. 15 U.S.C. § 18(b)(1)(B), (e)(1)(A).
[19] HSR further prohibits closing to 30 days from substantial compliance with Second Request.
[20] *See, e.g.*, Statement of Representative Rodino, Merger Oversight and H.R. 13131, *Providing Premerger Notification and Stay Requirements, Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary* (March 10, May 6 and 13, 1976) ("Both agencies can, and will, tell us what we have known for years—you can't unscramble an egg.").
[21] *See* Statement of Federal Trade Commission Chair Khan, *Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules*, at 2 (June 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf.
[22] *Id*.; *see also* Federal Trade Commission, *Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976* (2021), https://www.ftc.gov/policy/reports/annual-competition-reports.
[23] *E.g.*, Joe Simms, *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 (1997).
[24] The FTC's introductory guide to the premerger process, for instance, says of the process that "The Program has been a success." Federal Trade Commission, *What is the Premerger Notification Program? An Overview* (Mar. 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf. This is not to say that the program isn't without critics or criticism. The initial implementation, for instance, did not index reporting thresholds to inflation. By the year 2000, nearly 5,000 transactions were noticed each year. The HSR Act

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identify likely problematic mergers; and conversely that it is meant not to impede the vast majority of mergers that are not likely problematic.[25] Combined with the merger guidelines—which provided clear guidance for how the agencies review materials submitted as part of the premerger notification process—the HSR Act's premerger notification process has created a robust and relatively low burden system. This system enables business and antitrust agencies alike to identify problematic transactions while allowing most teals deals to proceed with minimal cost or delay.

II. Changing the Merger Guidelines and Premerger Notification Rules

In June and July of 2023, the agencies proposed dramatic changes to both the merger guidelines and the premerger information that firms are required to provide under the HSR Act. These changes are discussed, if briefly, in this section. But the procedure by which they are made, and by which they will therefore be evaluated, is best discussed first.

Procedure of the Changes

The merger guidelines are a discretionary policy statement put out by the DOJ and FTC. They are neither required by, nor carry the force of, law. And their adoption or revision therefore requires no formal process. They will succeed or fail as the agencies bring the arguments put forth in them to bear in litigation. If judges find them persuasive, they will continue to be an important tool in merger review; if they fail to persuade, they will cease to be used by the antitrust community. This process will play out over time, case-by-case, at the pace of the common law.

This is true even if the agencies develop and release the new guidelines following a procedure similar to that required by the Administrative Procedure Act (APA). Following such procedures – as the agencies appear to be doing[26] – may make the revised guidelines more persuasive to reviewing courts. But it will not formally entitle them to any greater deference.[27]

Things are different with the changes to the premerger notification process. Some aspects of the process are specified in detail by the statute. For instance, Section (a) species the transactions for which notice must be given.[28] And Sections (b)(1) and (e)(2) specify the timing of the initial waiting period and that for

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was subsequently amended to index thresholds to inflation. Today roughly 2,000 transactions are noticed each year (allowing for some variation during the pandemic). *See* Fed. Trade Comm'n, *supra* note 22, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf. *See also* Report of the Antitrust Modernization Committee, 158 ("the existing pre-merger review system under the HSR Act is achieving its intended objectives of providing a more effective means for challenging mergers raising competitive concerns before their consummation and protecting consumers from anticompetitive effects."), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[25] Andrew G. Howell, *Why Premerger Review Needed Reform-and Still Does*, 43 WM. & MARY L. REV. 1703, 1716 (2002) ("There are several key points to draw from this legislative history. First, the premerger title of the Act was meant only to make the procedural change of requiring notification—it was not meant to change substantive law. Second, the provision was intended to encompass only the very largest of mergers. Finally, there was concern in Congress about not allowing pursuit of merger enforcement goals to place too much of a burden on commerce.")

[26] For instance, proposed changes to the merger guidelines have been published and the agencies are soliciting public comment on them for a period commensurate with what would be typical under the APA's informal rulemaking procedures.

[27] See *supra*, note 12.

[28] 15 U.S.C. § 18a.

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second requests.[29] But Section (d) leaves other aspects of the premerger notification process are left to the agencies to develop by rule, requiring that:

> The Federal Trade Commission, with the concurrence of the [DOJ] and by rule in accordance with section 553 of title 5, consistent with the purposes of this section—shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws[.][30]

In other words, the requirements of the premerger notification process go through the rulemaking process outlines in Section 553 of the APA.[31] This process requires, for instance, putting out a notice of proposed rulemaking, soliciting comments, and publishing final rules that explain their basis and respond to substantial comments.[32] Once through this process, they carry the force of law and are binding on parties and the courts. Any challenge to them would need to show the agency had been arbitrary or capricious in adopting them,[33] or that there were defects in the rulemaking process such as a failure to respond to significant comments or adoption of final rules that were not a "logical outgrowth" of those contained in the proposed changes to the rules.[34]

Substance of the Changes

The proposed changes to both the merger guidelines and the premerger notification form are dramatic: only a brief synopsis of each is offered below.

Since adoption of the 1982 guidelines merger law has increasingly been driven by an economic understanding of competition. This understanding tends to disfavor presumptions about how market structure will affect consumers and competition, emphasizes the importance of weighing pro- and anti-competitive effects of transactions, and treats horizontal and vertical mergers as analytically different. The proposed revisions to the guidelines reverse—arguably reject—these trends. Prior versions of the guidelines lay out the analytical approach that the agencies use in analyzing mergers. They start with a discussion of the evidence and data that goes into their analysis,[35] turn to their approach to analyzing that data,[36] discuss the types of harms that that analysis might identify,[37] and then turn to defenses or justifications that overcome concern about those harms.[38]

The heart of the proposed new merger guidelines foregoes this approach, offering instead thirteen "Guidelines" that the agencies would use to identify whether a merger might "risk lessening []

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[29] *Id.*
[30] 15 U.S.C. § 18a(d).
[31] 5 U.S.C. § 553.
[32] *Id.*
[33] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).
[34] Office of the Federal Register, *A Guide to the Rulemaking Process*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.
[35] *See., e.g.,* 2010 Horizontal Merger Guidelines § 2.
[36] *Id.,* §§ 4–5.
[37] *Id.,* §§ 6–7.
[38] *Id.,* §§ 9–11.

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competition substantially now or in the future."[39] This is a harm-based approach, asserting that any merger that might lessen competition in some way may be challenged regardless whether it would result in offsetting pro-competitive benefits.[40] For instance, the first guideline states that "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets." Other guidelines follow this structure. The proposed guidelines do include some discussion of "rebuttal evidence." This section, however, cites almost exclusively to pre-HSR Act Supreme Court decisions that offer limited allowance for pro-competitive justifications for mergers.[41] This is despite the extensive caselaw at the district and circuit court level that has embraced such analysis since the HSR Act and adoption of the 1982 merger guidelines.[42]

The changes to the premerger notification requirements are similarly dramatic. Perhaps the simplest metric to capture the scope of these changes is the FTC's own estimate of compliance costs. With the current HSR premerger notification form, the FTC estimates that aggregate HSR compliance costs are approximately $120 million per year. Under the new requirements, the FTC estimates this would increase by approximately $350 million, to over $470 million per year.[43] This exceeds the entire 2023 antitrust budget for the FTC and DOJ combined.[44]

More substantively, the proposed changes to the premerger notification form would impose significant and prejudicial costs on firms. For instance, Parts 4(c) and 4(d) of the current premerger notification form require merging parties to provide copies of "all studies, surveys, analyses and reports which were prepared . . . for the purpose of evaluating or analyzing the acquisition" and "all Confidential Information Memoranda . . . that specifically relate to the sale."[45] The proposed changes would require an additional "narrative that would identify and explain each strategic rationale for the transaction."[46] This narrative would not have been created in the course of evaluating a transaction; creating it will come at a real cost in terms of billable hours and executives' time. More important, this is effectively a requirement that the parties prepare a reply brief to a potential future challenge without the benefit of knowing the specific arguments that the agencies might make against the transaction. The prejudicial value that this narrative would have is breathtaking.

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[39] U.S. Dep't. of Just. & Fed. Trade Comm'n, *Draft Merger Guidelines for Public Comment*, at 2 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[40] *Id.* at 6 ("even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition.").

[41] *Id*. at 33. For instance, the proposed guidelines cite to PNB (1963) for the proposition that "possible economies from a merger cannot be used as a defense to illegality."

[42] *See* Sayyed, *supra* note 14 at 20, note 86.

[43] *NPRM: Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178, 42208 (June 29, 2023), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements ("the total estimated additional hours burden is 759,272. . . . Applying the revised estimated hours, 759,272, to the previous assumed hourly wage of $460 for executive and attorney compensation, yields approximately $350,000,000 in labor costs.")

[44] The FTC's 2023 budget request for antitrust enforcement ("Promoting Competition") was $239,613,000. *See* Fed. Trade Comm'n, Fiscal Year 2023 Congressional Budget Justification, https://www.ftc.gov/system/files/ftc_gov/pdf/P859900FY23CBJ.pdf. The Department of Justice's similar request 2023 appropriation was $225,000,000. *See* Dep't of Just., Antitrust Div., Appropriation Figures for The Antitrust Division, Fiscal Years 1903-2023 (Feb. 2023), https://www.justice.gov/atr/appropriation-figures-antitrust-division.

[45] *Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions: Instructions*, https://www.ftc.gov/system/files/ftc_gov/pdf/HSRFormInstructions02.27.23.pdf.

[46] *NPRM: Premerger Notification*, *supra* note 43, at 42191.

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To consider another example, the proposed changes to the premerger notification form also would require parties to provide new information about labor market conditions, including information such as the distribution of employees across commuting zones and the parties' history of OSHA complaints.[47] This, again, would require the creation of new information that firms are not likely to maintain in the ordinary course of business. This concern is even more severe because the agencies' concern with labor market competition issues is of recent provenance.[48] And the relevance of information such as OSHA complaints to antitrust considerations—not even merger-related considerations—is dubious: the majority of OSHA complaints are found in largely unconcentrated, construction-related and similar industries.[49] Perhaps in another few years the agencies will have successfully litigated enough cases involving labor markets to have given shape to this evolving area of law. But today this information would merely be indulging the agencies' fishing expedition.

III. Reading the Tea Leaves: How will the proposed changes fare?

The impacts of the proposed changes to the Merger Guidelines and the HSR premerger notification forms will likely turn as much on the procedures by which they are adopted as the substance of the changes. The fate of the merger guidelines lies in the hands of the courts, which are likely to find the guidelines reasoning and disregard for 40 years of circuit court caselaw unpersuasive. Changes to the HSR premerger notification form, on the other hand, are likely to be accepted by the courts—and to have significant effects on the practice of merger law as a result.

The Merger Guidelines Will Rise or, More Likely, Fall on Their Merits

The power of the merger guidelines is limited to their power to persuade. They do not carry the force of law. Merging firms and the lawyers advising them will only take the guidelines into account to the extent they believe doing so will help proposed mergers be cleared by the DOJ and FTC. In many instances, firms will comply because they do not expect their transactions to raise concerns before the agencies. But in those instances where it is possible that the agencies will challenge mergers, or even issue second requests for additional information, firms and their lawyers will weigh the likelihood that the courts will be persuaded by the merger guidelines.

The proposed changes to the merger guidelines face a bleak future in the courts. They seek to return antitrust caselaw to the era before adoption of the 1982 merger guidelines. But the circuit courts have long since embraced the economic turn underlying the 1982 guidelines.[50] While the Supreme Court hasn't decided a merger case since before 1982, its antitrust jurisprudence has generally tracked the same embrace of economic principles that is seen in the circuit courts' case law.[51] Indeed, the Supreme Court had begun to embrace these changes prior to 1982.[52]

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[47] *Id*. at 42198.

[48] To demonstrate the need for information about labor market conditions in evaluating mergers, the NPRM only identifies two recent (2021 and 2022) decisions by the agencies to bring actions against firms that include labor-market concerns. *Id.* at note 47.

[49] Occupational Safety and Health Administration, U.S. Dep't of Lab. *Top 10 Most Frequently Cited Standards for Fiscal Year 2022*, https://www.osha.gov/top10citedstandards.

[50] *See generally* Sayyed, *supra* note 14.

[51] *See supra*, notes 15–17.

[52] *See, e.g.,* Reiter v. Sonotone Corp., 442 U.S. 330 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) ; United States v. General Dynamics Corp., 415 U.S. 486 (1974). *See also* Hovenkamp, *Did the Supreme Court Fix "Brown Shoe"?*, supra note 15.

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The Premerger Notification Form Risks Challenge as Arbitrary and Capricious

The analysis is more complicated with the HSR premerger notification form.

As an initial matter, the proposed changes *clearly* run contrary to legislative intent. As the Chair of the FTC has herself noted, Congress expected only the 150 largest mergers each year would require notification to the agencies[53] – but today the agencies review roughly 5,000 merger notifications.[54] Representative Rodino, one of the authors of the Act, anticipated that premerger notification would not entail the creation of new information and that compliance should not routinely delay consummation of deals.[55] In the Senate, the view was similarly that there was a "need to avoid burdensome notification requirements or fruitless delays."[56] The proposed premerger notification changes arguably fail on all of these fronts.

But unlike the merger guidelines, changes to the premerger notification process do carry to the force of law. So long as they are not arbitrary or capricious—and a failure to abide by the legislative history would not usually surmount this bar—such changes are binding on parties to a merger and the courts that might review the agencies' review of that merger. The hallmarks of arbitrary or capricious agency action were explained by the Supreme Court in *State Farm*:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[57]

There is good reason to believe that courts will find that the proposed changes are arbitrary and capricious. Section (d) of the HSR Act limits the FTC to requiring production of information that is "relevant to a proposed acquisition as is necessary and appropriate . . . to determine whether such acquisition may, if consummated, violate the antitrust laws." And this text must be read in conjunction with the statutory authority to make second requests that "require the submission of additional information or documentary material relevant to the proposed acquisition." Moreover, any rules must be "consistent with the purposes of this section"—that is, to allow the antitrust agencies an opportunity to review significant mergers prior to their consummation to avoid the "unscrambling the egg" problem.

This section raises many textual questions. What constitutes "necessary" and "appropriate" information; and what does it mean for these words to be conjunctively joined by an "and"? What does the limitation that information be "relevant to the proposed acquisition" mean? Is the "purpose of the section" limited to merger-related antitrust concerns, or more expansively related to the violation of any antitrust laws

[53] *See* Khan, *supra* note 21, at 2.
[54] *See* Fed. Trade Comm'n, *supra* note 24.
[55] Senator Rodino himself indicated, "Government requests for additional information must be reasonable. [. . .] the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government. But lengthy delays and extended searches should consequently be rare.
[56] S. REP. NO. 94-803, pt. 1, at 65, 67 (1976) ("A proper balance should exist between the needs of effective enforcement of the law and the need to avoid burdensome notification requirements or fruitless delays.")
[57] 463 U.S. at 43.

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that might result from consummation of the transaction?[58] Each of these specify factors that Congress did or did not intend the agencies to consider or that may or may not be important aspects of the problem that Congress empowered the agencies to address.

Consider, for instance, what it means for materials to be "relevant to a proposed acquisition." A natural reading would limit this to the materials that firms produced in evaluating the transaction. The agencies would expand the universe of relevant materials, including potentially anything that might inform their determination of the transaction's legality. Courts are likely to say that the limit must be narrower than anything the agencies think relevant to request.[59] The proposed rules would require disclosure of information about OSHA findings issues against the parties, on the theory that OSHA violations correlate with labor market power. But OSHA data reveals that the most OSHA violations occur in industries that are minimally concentrated (e.g., construction). Similarly, the proposed rules would require parties to provide detailed information about the number of employees in broad categories working in overlapping commuting zones.[60] Such information *might* be useful in evaluating the competitive effects of a transaction,[61] but it is not the sort of information that parties to a merger are likely to produce to aid in deciding whether to pursue a merger. That is, from the parties' perspective this information is *not* relevant to a proposed acquisition, even if it might be relevant to the agencies' evaluation of the effects of the proposed acquisition.

This comes into starker relief when considering the meaning of "necessary and appropriate." As an initial matter, and echoing the concerns about what information is relevant to a proposed transaction, "appropriateness" could be determined with respect to purpose—whether it is appropriate for the agencies to use the premerger notification process as a tool for developing novel theories of antitrust law or whether its use should, instead, be limited to screening for transactions that would violate established antitrust precedent.

But "necessary and appropriate" is even more powerfully read as a conjunction. Given the availability of second requests for additional information, it is not necessary, strictly speaking, that *any* information be requested as part of the initial premerger notification—the agencies could request all necessary information through a second request. That, of course, would not be appropriate. Information requested as part of the initial notification must therefore be both necessary, but also not better requested of a subset of parties through a second request. Given that only two percent of all mergers subject to premerger notification receive second requests, there should be a strong preference in favor of requesting information—especially that which might be burdensome to produce—through a second request. At a first approximation, the burden of requesting information of all parties is 50 times as great as it is of only requesting it through second requests; to be appropriate to require such information of all transactions subject to premerger notification, the benefit of requesting it of all parties should therefore be on the order of 50 times the expected benefits of requesting it through the second request process.

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[58] Strictly merger-related concerns would be limited to those that violate Section 7 of the Clayton Act (that is, consummation of transactions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Other concerns that might result from the transaction, such as interlocking directorate prohibited by Section 8 of the Clayton Act, might therefore be excluded.

[59] *See, e.g.*, AT&T Corp. v. Iowa Utils Bd, 525 U.S. 1133 (1999) ("the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do.")

[60] *NPRM: Premerger Notification*, *supra* note 43,at 42198.

[61] Given the coarseness of the data requested, it is doubtful whether it would be analytically useful for such purposes.

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Problematic Premerger Notification Rules Might Survive without Challenge

Were issues like these to be raised in a challenge to the premerger notification process, a court could well decide either for or against the agencies—these are difficult claims to evaluate. But there is reason to worry that such a challenge—even if meritorious—is unlikely to occur. The costs of the premerger notification process act as a tax on transactions. And, as a tax, it is a regressive one, most likely felt by firms considering transactions on the margin of the HSR reporting thresholds.

And because the burdens of this tax are spread across the thousands of firms engaging in HSR-reportable transactions each yeah, none of these firms is likely to have sufficient incentive to challenge the rules. This, despite the serious economic impacts that more onerous premerger notification requirements will have on firms' M&A decisions. The cost of these changes would be measured in the mergers that firms choose not to pursue due to the costs and complexity of the premerger notification process (exacerbated by the agencies' aggressive posture towards mergers generally). A firm that chooses not to pursue a merger due to these costs would not choose to engage in costly and protracted litigation to challenge the premerger notification process. Tragically, this impact is most likely to fall upon the smallest of firms subject to premerger notification obligations. This, too, is despite the fact that such transactions are the least likely to raise competitive concerns or be challenged by the agencies.

And there may be a deeper difficulty with the proposed changes to the HSR premerger notification form: who would even be in a position to challenge them? The pre-merger notification and review process occurs prior to any complaint being filed. Firms that find compliance unduly costly are not likely to incur greater costs trying to bring a challenge to the review process. They will simply abandon transactions that they might have otherwise considered. Firms that can bear these costs will likely have little incentive to compound them by challenging their legitimacy. And for the largest transactions, often valued in the billions of dollars, these costs will be a rounding error.

There is some pernicious irony here, given contemporary concerns about "killer acquisitions"—and fears generally that larger firms buy up smaller rivals to stave off competition. Given concerns such as these, one would expect that the antitrust agencies would want to encourage transactions between smaller firms, allowing them to consolidate their positions against their even larger rivals. Yet it is exactly those transactions that will most likely be scuttled should the changes to the premerger notification process be adopted as proposed.

Conclusion

Shortly after coming into office, President Biden made competition policy a priority for his administration, including a focus on more aggressive use of merger law. The recently proposed changes to the merger guidelines and HSR premerger notification form are the culmination of this focus. Ultimately, the merger guidelines will succeed or fail based on their ability to persuade judges that they accurately portray contemporary merger law. My prognostication is that this effort will fail—spectacularly. The proposed changes to the premerger notification process, on the other hand, are more likely to have lasting effects. Unfortunately, those effects will most likely be carried by the smallest and least likely problematic of transactions while doing little to help the agencies identify or take action to prevent problematic transactions.

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