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# Reflections on Bush Administration M&A Antitrust Enforcement and Beyond

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By Ilene Knable Gotts and James F. Rill\*

## I. INTRODUCTION

The election of Barack Obama as President—and the culmination of the Bush Administration—mark an appropriate time to reflect on the Bush Administration’s legacy for M&A antitrust enforcement. As noted below, the past eight years have seen impressive improvements in the merger review process, use of economics and reliance on evidence in merger analysis, and U.S. participation in international policy fora. Increased transparency has been an important element in achieving these objectives. Nevertheless, charges have been made by some antitrust economists and practitioners that federal antitrust enforcement has been lax during the Bush Administration.<sup>1</sup> The “record,” however, critics rely upon is far from clear, particularly given the complexities in trying to make those comparisons.<sup>2</sup> Paradoxically, while attacking the agencies for under-enforcement, the critics point to a poor track record in court to suggest that “anything goes” on the merger front. The perceptions of the level of enforcement can be skewed by a few high-profile decisions by the enforcement agencies not to challenge a merger and a limited set of court decisions that were highly fact-specific and of marginal bearing for future jurisprudence. Moreover, such perceptions are often “lagging indicators” of present or future outcomes. This article will describe some of the achievements during the past eight years that the new antitrust leadership can build upon. We will also discuss the perception of lax enforcement, as well as what we believe is the actual status quo, as a basis for forecasting what future enforcement policy might be. Finally, this article recommends some changes the new administration could undertake that would increase the efficiency and efficacy of merger enforcement.<sup>3</sup>

## II. MILESTONES IN ENFORCEMENT

The criticism directed at the antitrust agencies’ enforcement program overlooks a wide range of accomplishments and initiatives that the U.S. Department of Justice (the “DOJ”) and Federal Trade Commission (the “FTC”) have achieved during the past eight years. These undertakings, described below, involve both procedural and substantive advances in both

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domestic and international fronts. The new administration would do well to continue and to build upon these efforts.

### *A. Merger Review Process Initiatives Should Have Continuing Effect in Next Administration*

Procedural changes at both the DOJ and the FTC have significantly impacted enforcement statistics and should universally be viewed as positive developments. Throughout the Bush Administration's tenure, both agencies engaged in a variety of projects to increase the efficiency of the merger review process—and were more successful than prior administrations in achieving progress. In 2001, each agency announced initiatives to increase the efficiency of investigations, including a reduction in the length of merger reviews.<sup>4</sup>

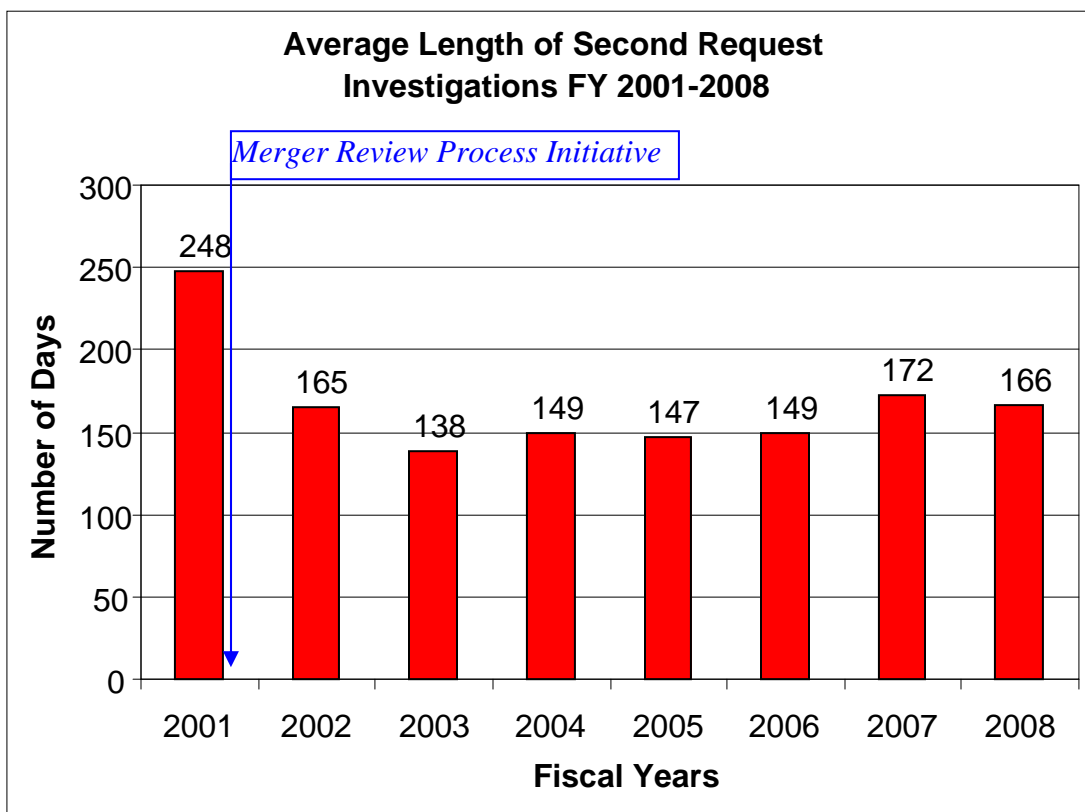
Perhaps the single-most positive development involves the effective use of the initial waiting period, which is likely a major reason that, as illustrated in Appendix A, there has been a significant decrease in the number of second requests issued, particularly at the DOJ.

In contrast to the two fiscal years before the DOJ initiative (FY 2000-2001)—when approximately 40 percent of the agency's preliminary investigations resulted in second requests—in recent years, the data show that around 30 percent of such investigations receive second requests. Although there may be variations from year-to-year based on the nature of transactions being proposed (e.g., strategic versus financial), the trend has been fairly consistent. The DOJ's recent track record is in line with that of the FTC's during the Clinton Administration, with the FTC continuing to grant, on average, fewer second requests in cleared transactions than the DOJ.<sup>5</sup> The staff and transaction parties have further eliminated the need for issuance of second requests in some transactions by extending the initial waiting period in transactions with discrete issues, through one or more "pull and refile" of the notifications, thereby restarting the clock.<sup>6</sup> The DOJ reports that in FY 2008 alone, 24 transactions were pulled and refiled; of those, only six subsequently received a second request.<sup>7</sup> This practice has become particularly useful in cash-tender offer situations, given the shorter initial waiting period.<sup>8</sup>

The agencies still issue second requests in about 25-30 percent of transactions investigated, and a large part of their resources is used in conducting such full investigations of these transactions. Given the public and private costs of a second request review, both agencies seek to limit the second request process to those transactions highly likely to raise concerns. Indeed, the FTC's strategic plan issued in late 2006 set a goal of 90 percent for the percentage of second request transactions that resulted in a positive enforcement outcome (i.e., challenge, consent, or deal abandonment).<sup>9</sup> To date, however, there has not been a consistent track record meeting this objective, although, in the last two years, a very high percentage of such transactions resulted in enforcement.

There has been some improvement in the agencies limiting the burden of the second request. Both agencies acknowledge the burdens of second requests and undertook during the Bush years (as had prior administrations) to decrease the length of the second request by

issuing revised model second requests,<sup>10</sup> best practices for data and remedies, and a consultative procedure whereby the staff and transaction parties can discuss the issues and, where appropriate, stage discovery to focus on potentially discrete dispositive issues.<sup>11</sup> These initiatives appear to have had an impact. The average length of the DOJ's second request investigations, for instance, dropped by 46 percent from mid-2001, when the initiatives were announced, to FY 2005, and although there has been a slight increase since then on average, the decrease remains significant:



In November 2007, the DOJ indicated that between June 1, 2006 and July 31, 2007 it had closed, within 90 days of the expiration of the initial waiting period, approximately 60 percent of the investigations in which a second request was issued.<sup>12</sup> Moreover, of the 16 second requests that the DOJ issued and completed during FY 2008, almost two-thirds were decided without full compliance with the second request, including 7 of the 9 transactions in which the DOJ took enforcement action.<sup>13</sup>

But both agencies condition the availability of the second request modifications on the parties conceding certain timing and discovery rights. The quid pro quo component for obtaining these reductions and adopting a cooperative dialogue with the staff at the agency provides the agency with leverage over timing of the investigation and negates the certainty of

the timing provided in the HSR Act itself. Although blatant abuses of the process are not common, a 2000 Congressional mandate<sup>14</sup> sought to inject procedural due process into the second request process. Both agencies established procedures for resolving disputes that may arise in connection with the breadth of, or compliance with, second requests.<sup>15</sup> Despite the implementation of these internal review procedures, there have been very few transactions in which parties have exercised the appeals process, and none of these appeals has resulted in material reductions of what the staff has insisted on retaining within the second request. There also remains no litigated legal standard on what constitutes substantial compliance.<sup>16</sup> Thus, the true potential for an impartial check on agency action during the second request has yet to be realized, and the system's workings depend on the good faith conduct of the staff and agency officials.

### ***B. Increased Transparency***

#### **1. Increased Transparency Demonstrates Reliance on Economic and “Sticky Facts” in Agency Decision-making**

Transparency is an important part of policy enforcement and serves the objective of ensuring that both agency staff and the business community are informed regarding the standards that will be applied in merger review. Increased transparency can impact enforcement statistics, to the extent that the business community foregoes transactions that are likely to be blocked. Throughout the Bush Administration, both agencies provided greater transparency and guidance in their decision-making process through the issuance of statements in certain transactions not requiring relief. These statements cite, among other things, ease of entry and expansion,<sup>17</sup> efficiencies,<sup>18</sup> changed market conditions,<sup>19</sup> and countervailing-buying power<sup>20</sup> as the bases for not challenging the respective transactions. These closing statements also provide insight into the rigorous evidentiary and economic analysis undertaken by the staff in full reviews.<sup>21</sup>

The closing statement in connection with merger review of rival contenders Carnival Corporation and Royal Caribbean Cruises Ltd. for P&O Princess Cruises plc constituted the first example of the new transparency initiative. The statement revealed the degree to which economic analysis and data mining could impact ultimate agency decision-making in the Bush Administration. The merger was procedurally and substantively prolonged and complex, with dueling bidders—involving the review of different antitrust authorities—only adding to the complexity. In November 2001, Royal and Princess announced their proposed \$3.7 billion merger utilizing a dual-listed company (“DLC”) structure.<sup>22</sup> Due to the DLC structure of the transaction and the respective operations of the parties, the Royal/Princess transaction was not reportable in the European Union (“EU”) or under HSR. Nevertheless, the competition authorities of the United Kingdom, Germany, and the United States reviewed the transaction. In December 2001, rival Carnival responded by announcing a \$5.5 billion hostile bid for Princess.<sup>23</sup> The EU and the United States reviewed the Carnival/Princess transaction. Both transactions faced initial skepticism and intense scrutiny by the applicable competition authorities. At the

time, Carnival was the world's largest cruise company, with 43 ships and about a 32 percent share of worldwide cruise sales; Royal held the number two position, with 23 ships and about 24 percent share of worldwide cruise sales; and Princess was in third place, with 19 ships and just over an 11 percent share of worldwide cruise sales.<sup>24</sup>

After initially expressing "serious doubts" about Carnival's bid, on July 24, 2002, EU Commissioner Mario Monti announced that the EU would approve the transaction.<sup>25</sup> After noting how closely the EU and the United States had worked together on this transaction,<sup>26</sup> Commissioner Monti suggested that the U.S. situation was markedly different in terms of structure of demand and supply.<sup>27</sup>

As reflected in the FTC's Carnival closing statement, the staff concluded, based on the quantitative data, that the transaction was unlikely to raise concerns under either a unilateral-effects theory or a coordinated-interaction theory.<sup>28</sup> The staff found that any market definition resulting in a uniform price increase would have enlarged the market to such a magnitude that it would negate the establishment of a competitive effect.<sup>29</sup> On October 4, 2002, a majority of the FTC adopted the staff's views, with Commissioners Mozelle W. Thompson and Sheila F. Anthony issuing a dissenting statement.<sup>30</sup> The dissent indicated that the extremely high post-merger concentration levels in the North American cruise markets create a presumption of coordinated interaction.<sup>31</sup> Moreover, Commissioners Anthony and Thompson were unconvinced that entrance by new firms or expansion by smaller rivals would thwart these potential effects.<sup>32</sup>

Then Bureau of Competition Director Joseph Simons aptly summarized: "The ultimate lesson of the cruise investigation is that the Guidelines mean what they say. High concentration creates a presumption of problems—but that presumption can be rebutted by the facts in a specific matter. Here, the facts—particularly quantitative and financial analyses—rebutted the presumption."<sup>33</sup>

The FTC's closing statement in the proposed acquisition of Adelphia Communications Corporation by Comcast Corporation and Time Warner Cable, Inc., and the accompanying cable distribution swaps, similarly describes a rigorous evidentiary and economic analysis exploring whether: (1) The transaction would foreclose satellite, over-builder, and telephone distribution competitors' access to regional sports networks; and (2) even if such foreclosure occurred, consumers would be worse off. The FTC considered, and rejected, the possibility that increased "clustering of systems"—i.e., the common ownership of adjacent cable distribution systems in certain metropolitan areas—would reduce competition.<sup>34</sup>

In the Federated/May transaction, the closing statement explained why the FTC deviated from the previously established market definition consisting of traditional or conventional department stores.<sup>35</sup> Under the traditional definition, this transaction would have resulted in creating "high levels of concentration among conventional department stores in many parts of the country, and thus facially appeared to raise issues of competitive concerns."<sup>36</sup> The FTC statement detailed the evolution of the retail industry and concluded that the evidence

of pricing patterns “provides the most compelling, objective demonstration that . . . conventional department stores are not in a distinct market.”<sup>37</sup> Instead, the FTC found that department stores face competition from multiple retail formats and must take these alternative formats into account when they make inventory and pricing decisions. Accordingly, the FTC’s statement clearly reflected a diametric shift in the treatment of department store transactions due to the changes that have occurred in the retail industry in the last decade.<sup>38</sup>

The use of closing statements continued in FY 2008. On December 20, 2007, the FTC issued a statement in connection with its four-to-one vote to close its eight-month investigation of Google’s proposed acquisition of DoubleClick Inc.<sup>39</sup> The staff reportedly conducted over 100 interviews and obtained more than two million pages of documents from the parties, as well as the records of documents from third parties. The agency staff analyzed three principal theories of potential competitive harm. First, it considered—and rejected—whether the combination would eliminate direct and substantial competition between the two companies. Second, the agency examined, under potential competitive theories, the implications of Google’s continuing efforts to enter the third-party ad serving markets. The staff would have been concerned if these efforts had the potential to eliminate a competitor that was uniquely positioned to have a pro-competitive effect. The staff found, however, that current competition in the market is vigorous and Google’s entry would not significantly impact such competition. Third, the agency considered whether the acquisition would allow Google to exploit DoubleClick’s position in the third-party ad serving markets to benefit Google’s ad intermediation product, AdSense. The FTC found that, since the evidence did not show DoubleClick had market power in the third-party ad serving markets, it was unlikely that Google could foreclose competition or manipulate DoubleClick’s products to disadvantage Google’s competitors. Nor did the evidence demonstrate that any aggregation of data would harm competition in the ad intermediation market.

Commissioner Pamela Jones Harbour issued a dissenting statement on the basis of “alternative predictions on where this market is heading, and the transformative role the combined Google/DoubleClick will play if the proposed acquisition is consummated.” Commissioner Harbour raised concerns regarding network effects and the likelihood of tipping. She expressed concerns regarding the data integration aspects of the merger and recommended continuing the investigation to analyze further the parties’ post-merger intentions. In addition, Commissioner Harbour suggested that the Commission could have required a firewall to ensure that, for some period of time, the databases would remain separate. Commissioner Liebowitz issued a concurring statement explaining his reluctance “to condition a merger (or vote to block a deal) for conduct that might take place afterwards, especially without substantial anxiety from the potentially disadvantaged parties—that is, the Internet publishers and advertisers—and especially in such a dynamic industry where competing would not be under the same impediments.” The FTC coordinated its investigation with foreign competitive agencies, including those from Australia, Canada, and the EU.<sup>40</sup>



The DOJ similarly issued a statement regarding the closing of its investigation of Hearst Corporation's proposed acquisition of newly created "tracking stock" of MediaNews Group Inc. ("MNG").<sup>41</sup> The transaction parties had revised the initial transaction so as to limit the 30 percent equity stake in MNG's newspaper business to operations outside of the San Francisco area, where both MNG and Hearst own and publish newspapers. The DOJ focused on whether the proposed investment would give one party an incentive to compete less vigorously in the Bay Area or would provide sources of influence by Hearst or MNG over the other's Bay Area activities. Because Hearst's minority investment in MNG will not bring the companies under common ownership or control, interactions among them will continue to be subject to scrutiny under Section 1 of the Sherman Act.

On March 24, 2008, the DOJ issued a statement announcing the closing of its investigation of the proposed merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius").<sup>42</sup> The DOJ indicated that the evidence did not show that the merger would enable the parties—two satellite radio providers—to increase prices to satellite radio customers for several reasons, including: a lack of competition between the parties in important segments even without the merger; the competitive alternative services available to consumers; technological change that is expected to make those alternatives increasingly attractive over time; and efficiencies likely to flow from the transaction that could benefit consumers.

The DOJ concluded that the parties are not likely to compete absent the merger because customers must acquire specialized, non-interchangeable equipment, and there has not been significant competition for customers who have already subscribed to one or the other service. For potential new subscribers, past competition had resulted in long-term (i.e., through 2012 or beyond), sole-source contracts that provided incentives to all of the major auto manufacturers to install their radios in new vehicles, such that there is not likely to be significant further competition between the parties in this channel for many years. In the retail channel, where the parties might continue to compete absent the merger, the DOJ found that the evidence did not support narrowly defining the market to satellite radio, but instead should include various alternative sources for audio entertainment (e.g., AM/FM radio, HD radio, MP3 players, iPods, and wireless telephone offerings).

XM and Sirius seek to attract subscribers in a wide variety of ways, including commercial-free music, exclusive programming, niche music formats, out-of-market sporting events, and a variety of news and talk formats. These offerings reflect an effort to attract consumers with highly-differentiated interests and tastes, such that, while the radio offerings of these two companies are likely to be close substitutes for some customers, they do not appear to be so for other customers. For example, for a customer interested in baseball games on XM, the closest substitute would be baseball games on terrestrial radio, not Sirius, which does not carry baseball. The DOJ also did not find that the parties had the ability to identify and price-discriminate against those actual or potential customers that viewed the two firms as the closest substitutes.



In addition, the DOJ noted that a number of technology platforms are under development that would likely offer new or improved alternatives to satellite radio, including next-generation wireless networks capable of streaming Internet radio to mobile devices. The DOJ believed that these alternatives mitigated the potential competitive concerns for the time when the long-term contracts with the car manufacturers expire.

The DOJ believed that, even if there were concerns regarding the ability for the combined firm to increase prices in the mass-market retail channel, the efficiencies from the transaction “likely would undermine any such concern.”<sup>43</sup> The DOJ “confirmed” that the parties would likely realize significant variable and fixed cost savings through the merger, the magnitude of which could not be estimated with precision. The DOJ believed, however, that the likely variable cost savings, which are the savings that would most likely be passed on to consumers in the form of lower prices, would be substantial. The DOJ cited as an example the ability to consolidate development, production, and distribution efforts on a single line of radios, thereby eliminating duplicative costs and realizing economies of scale.

The DOJ also closed an eight-month investigation of the joint venture between SABMiller plc (“Miller”) and Molson Coors Brewing Company (“Coors”) that will combine their beer operations in the United States and Puerto Rico.<sup>44</sup> The DOJ indicated that a key part of its investigation entailed verifying that the venture would likely produce substantial and credible savings that would significantly reduce the companies’ costs of producing and distributing beer, including large reductions in variable costs.

## **2. Agency Studies and Reports Increase Transparency and Embrace Understanding of Agency Antitrust Approach**

The FTC is currently conducting an extensive internal review and retrospective self-evaluation in connection with its 100<sup>th</sup> anniversary. The FTC previously held a series of workshops and issued reports, particularly regarding horizontal merger enforcement. The FTC held a public workshop on February 12, 2008 on unilateral effects analysis in merger review.<sup>45</sup> In 2003, then FTC Chairman Muris noted that, “more than 20 years have passed since the introduction of the Herfindahl-Hirschman Index (“HHI”) as an important initial factor in the review of horizontal mergers.”<sup>46</sup> A 2003 report and a subsequent workshop constituted significant steps to undertake a dialogue with the private bar regarding the role of concentration in agency decision-making. The report shows that the vast majority of government challenges from 1998-2003 involved market concentration levels (both in terms of post-merger HHI and increases in HHI) far above the safe-harbor thresholds set forth in the Merger Guidelines. The data indicate that less than 5 percent of the challenged markets had concentration below 1,800 (and almost all of these were in the petroleum sector). Only 13 percent of the challenged markets involved concentration levels of 2,500 or below. Indeed, more than half of the challenged markets involved post-merger concentration levels of more than 4,000.<sup>47</sup>

The agencies issued several reports with data for FYs 1996-2007.<sup>48</sup> The reports provide data for transactions in which the FTC closed the investigation or took enforcement action (i.e., by entry into a consent or the challenge/abandonment of the transaction) separately based upon the market concentration, number of competitors, presence or absence of “hot documents,” “strong customer complaints,” and easy “entry conditions.” During the reported period, the FTC issued second requests in 326 merger investigations. Excluded from the data were transactions involving (1) non-horizontal theories of competitive concerns; (2) the elimination of potential competition; and (3) partial ownership interests. Also, the data did not include investigations that were closed prior to the development of a complete record concerning market structure. Enforcement decisions were provided separately for concentration levels for the oil, grocery, pharmaceutical, and chemicals industries (“Key Enforcement Sectors”). Outside of the Key Enforcement Sectors, the data showed the challenge rate to be as follows: three to two transactions, 86 percent; four to three transactions, 72 percent; five to four transactions, 61 percent; and in markets with five or more competitors post-transaction, only one in 13 were challenged.

As evidenced by the released data, the pronouncements of agency officials, the enforcement decisions, and the actions of the agencies, the focus of the officials at both agencies has been reviewing the data, documents, and customer and competitor views to obtain a complete picture of the structure and workings of the affected markets. The computer and internet era has made possible the collection and modeling of data for certain industries that were simply unthinkable a decade ago. Such econometric and natural experiments should result in better predictions of potential effects from transactions. This may also explain some of the drop-off in absolute enforcement statistics.

In March 2006, the FTC and the DOJ jointly released a Commentary on the Horizontal Merger Guidelines.<sup>49</sup> The Commentary explains how the FTC and the DOJ apply particular Horizontal Merger Guidelines principles in the context of actual merger investigations. The Commentary provides a more elaborate articulation of the practice of the agencies than the Guidelines. It identifies the creation or enhancement of market power as the core concern of the antitrust laws. Underlying the intensively fact-driven nature of merger investigations, the Commentary discusses the use of evidence in addressing the multiple analytical elements that are part of the agencies’ “integrated approach to merger review.” The agencies describe their analytical approach as adopting an integrative analytic approach rather than a linear, step-by-step progression through the Guidelines’ relevant market definition and competitive effects sections. Particularly useful is the Commentary’s discussion of efficiencies and its role in the antitrust review process.

Earlier in the Bush years as well, the FTC staff sponsored a series of public workshops to receive public opinion regarding the merger review process. In March 2002, the FTC issued a FAQs on Merger Remedies;<sup>50</sup> in November 2002, the FTC’s Bureau of Economics released Best Practices for Data and Economic and Financial Analyses in Antitrust Investigations,<sup>51</sup> and the FTC’s Bureau of Competition announced a new set of Guidelines for Merger Investigations in

December 2002,<sup>52</sup> and Guidelines for Negotiating Merger Remedies in April 2003.<sup>53</sup> The overall pattern of increased transparency is commendable and has had a marked impact on the quality of merger analysis and fact-gathering both by the private bar and by the enforcement agencies and is to be commended.

### *C. Federal Agencies Leadership Role in International Transactions and International Fora*

During the Bush Administration, the federal agencies' role expanded on the international front as the agencies actively pursued the development of joint working initiatives for merger reviews, took leadership roles in international fora, and assisted in capacity-building in emerging competition authorities worldwide. Such initiatives are essential to effective merger enforcement and critical to our business community. The number of jurisdictions around the world that have established merger review regimes has burgeoned. There are now over 100 jurisdictions that have a merger review regime. At the same time, businesses are expanding across multiple jurisdictions, and often multiple continents. The confluence of these two trends creates an international business environment in which an increasing number of transactions may be subject to review in multiple jurisdictions.

The complexities are further compounded to the extent that authorities take an expansive view of their jurisdictional reach. Indeed, it is not unusual for a transaction involving multinational corporations to be subject to review by over a dozen separate competition authorities.<sup>54</sup> As merger review regimes proliferate, the potential for inconsistent—or even contradictory—outcomes increases for so long as there are substantive and procedural differences between jurisdictions and uncoordinated enforcement actions undertaken by the reviewing authorities. Close coordination and cooperation to avoid inconsistent outcomes is needed—and it is important to the U.S. business community that the U.S. agencies take a leadership role.

#### **1. Coordination of Reviews**

Outcome-determinative clashes in approaches in specific transactions are fortunately rare. GE/Honeywell<sup>55</sup> provided the most recent such large conflict between the United States and the European Union and served as a wake-up call for the international business community, as well as the agency officials. GE/Honeywell served as the impetus for competition authorities to renew and expand discussions regarding how to improve the coordination of merger review processes. After the rhetoric subsided in the very public fight between U.S. and EU officials regarding the GE/Honeywell decision, these two leading authorities in merger review reinvigorated their Merger Working Group, which consists of staff lawyers and economists from the EU, the DOJ, and the FTC, in the fall of 2001.<sup>56</sup> On October 30, 2002, the United States and EU issued a joint statement of Best Practices for coordinating their respective competition reviews of mergers.<sup>57</sup> A number of the points included in the Best Practices statement had already been employed informally by the agencies.<sup>58</sup> The Best Practices

statement does not contain specific recommendations on case scheduling. Instead, it provides a general approach for setting a timetable in individual merger cases.<sup>59</sup>

The United States has also entered into cooperation agreements with Australia, Brazil, Canada, Germany, Israel, Japan, and Mexico.<sup>60</sup> These agreements are helpful when one authority is actively investigating the transaction and the other jurisdiction or jurisdictions are willing to let one (or a combination) of those authorities take the lead.<sup>61</sup> Where a number of authorities are actively investigating the transaction, these agreements are of limited utility.<sup>62</sup> Moreover, without a waiver from the parties, the agencies are unable to discuss confidential information received from the parties. Nevertheless, in a number of transactions during the Bush Administration, competition authorities have worked cooperatively during the investigation stage to reach a common (or at least parallel and complementary) determination.<sup>63</sup> Similarly, in several recent transactions, competition authorities cooperated at the remedies stage.<sup>64</sup> The way these transactions were handled reflects the formal and informal frameworks that the United States has developed with the various jurisdictions to reduce divergent outcomes of merger reviews and to expedite merger reviews.

## 2. Leadership Role in International Fora

Some initiatives with possible broader applicability to developing antitrust authorities are the product of projects undertaken by such international bodies as the Organization for Economic Cooperation and Development (the “OECD”) and the International Competition Network (the “ICN”).<sup>65</sup> Both the FTC and DOJ have had an active leadership role in these organizations. This role has been key to minimizing potential clashes in individual merger reviews due to: (1) increased mutual trust and respect among authorities; (2) convergence on key aspects of substantive merger analysis; and (3) some procedural harmonization.

The United States’ participation in international competition organizations is by no means new. Since the 1960s, the OECD has promoted cooperation among authorities in the major industrial nations on antitrust matters, including the issuance of a number of non-binding recommendations. The U.S. Department of Justice has been a key member of the working groups that developed these initiatives, including in recent years serving as the Chair of the Working Party on International Cooperation of the Competition Committee. In 2005, the OECD issued a Recommendation on Merger Review that prescribed best practices, including coordination and cooperation among competition authorities in merger cases.<sup>66</sup> The OECD Recommendations address, among other issues, notification and review procedures, coordination and cooperation between reviewing authorities, and provision of sufficient resources and powers to the enforcement authorities. To some extent, the creation of the ICN reinvigorated the OECD. In the past 5 years, the OECD held Best Practice Roundtables to encourage convergence on substantive merger analysis on such topics as Dynamic Efficiencies in Merger Analysis (2007),<sup>67</sup> Vertical Mergers (2007),<sup>68</sup> Competition in Bidding Markets (2006),<sup>69</sup> Barriers to Entry (2005),<sup>70</sup> Competition on the Merits (2005),<sup>71</sup> Merger Remedies (2004)<sup>72</sup> and Media Mergers (2003).<sup>73</sup>

The ICN is perhaps even more influential than the OECD, particularly with emerging jurisdictions. The ICN was the direct outgrowth of the deliberations and report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust in 2000. On October 25, 2001, an international coalition of antitrust officials announced the launch of the ICN as a global competition initiative. The ICN provides a platform “to make international antitrust enforcement more efficient and effective” by focusing on improving worldwide cooperation and enhancing convergence through dialogues.<sup>74</sup> Although the ICN’s creation could be attributable to the Clinton Administration, the credit for its establishment into a major international forum and achievements since formation truly belongs to the Bush Administration. The ICN Merger Review Working Group (which is chaired by the DOJ) aims to “promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction’s merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multijurisdictional merger reviews.”<sup>75</sup> The ICN Merger Review Working Group consists of two subgroups: Notification and Procedures, and Merger Investigation and Analysis.<sup>76</sup> The work of each of these subgroups is reviewed below.

**ICN Notification and Procedures Subgroup.** The Notification and Procedures Subgroup has developed eight Guiding Principles for Merger Notification and Review<sup>77</sup> and a set of 13 Recommended Practices for Merger Notification Procedures.<sup>78</sup> The eight guiding principles are: (1) convergence; (2) sovereignty; (3) transparency; (4) nondiscrimination on the basis of nationality; (5) procedural fairness; (6) efficient, timely, and effective review; (7) coordination; and (8) protection of confidential information. The Notification and Procedures Subgroup also prepared a report (based on available survey and anecdotal information) on the costs and burdens of multi-jurisdictional merger review, which it recently updated.<sup>79</sup> The Recommended Practices advocate: (1) sufficient nexus between the transaction’s effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) flexibility in the timing of merger notifications; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; (7) procedural fairness; (8) transparency; (9) confidentiality; (10) interagency merger review coordination; (11) remedies; (12) competition agency powers; and (13) review of merger control provisions.<sup>80</sup>

The interagency coordination Recommended Practice stresses that: (1) competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern; (2) interagency coordination should be conducted in accordance with applicable laws and other legal instruments and doctrines; (3) interagency coordination should be tailored to the particular transaction under review and the needs of the competition agencies conducting the merger investigation; (4) competition agencies should encourage and facilitate the merging parties’ cooperation in the merger coordination process; and (5) reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.



At the 2005 ICN meeting, the ICN adopted Recommended Practices on remedies and competition agency powers.<sup>81</sup> The remedies' Recommended Practices indicate that a remedy should address the identified competitive harm arising from the proposed transaction. The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies. Procedures and practices should be established to ensure that remedies are effective and easily administrable. Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy. The Recommended Practices on competition agency powers stress the need for objective application and enforcement of merger review laws.

In April 2006, the Notification and Procedures Subgroup released the Implementation Handbook, which contains examples of legislative text, rules, and practices from various competition agencies that conform to selected ICN Recommended Practices.<sup>82</sup> The handbook is intended to be a tool for agencies interested in understanding and implementing the Recommended Practices. The ICN also held a workshop in 2006 to promote implementation of the Guiding Principles and Recommended Practices<sup>83</sup> and held an interactive workshop in 2008 to promote greater understanding and further implementation of the ICN's Recommended Practices for Merger Notification and Review Procedures.

ICN Merger Investigation and Analysis Subgroup. The Investigation and Analysis Subgroup focuses on the analytical framework and investigative techniques for merger review, including the substantive standards for prohibiting mergers, the criteria for applying those standards, and the tools and techniques used for developing reliable evidence. The Investigation and Analysis Subgroup issued an Analysis of Merger Guidelines report in Spring 2004<sup>84</sup> that identifies merger guidelines around the world, catalogues their common features and meaningful differences, and offers a template of illustrative analytical practices from the various guidelines to assist other jurisdictions in preparing their own guidelines. In addition, the Investigation and Analysis Subgroup provided a draft Merger Guidelines Workbook in June 2005 and produced the final Workbook in May 2006.<sup>85</sup> The Workbook is intended for use by jurisdictions preparing new or revised merger guidelines. The Investigation and Analysis Subgroup presented the final document at the May 2006 ICN meeting.<sup>86</sup> This Subgroup held a merger investigative techniques workshop in March 2007. The Investigation and Analysis Subgroup also issued a report on its review of merger remedies in June 2005.<sup>87</sup>

The investigative techniques work focuses on the development of best practices for investigating mergers, including: (1) methods for gathering reliable evidence; (2) effective planning of a merger investigation; and (3) the use of economists and the evaluation of economic evidence. In 2005, the Investigation and Analysis Subgroup issued an investigative techniques handbook for merger review.<sup>88</sup> The handbook is designed to inform ICN members of the various tools and techniques used in merger review, to help members organize and use their tools more efficiently, and to provide for an effective process for the evaluation of evidence.

The Merger Working Group also adopted three Recommended Practices for Merger Analysis during the meeting held in Kyoto, Japan in April 2008.<sup>89</sup> These Recommended Practices are derived from the Merger Guidelines Workbook and are intended to complement the detailed descriptions of merger analysis in the Workbook. The Recommended Practices address: (1) the efficacy of an agency's legal framework for analyzing proposed mergers; (2) the use and role of presumptions and safe harbors or thresholds; and (3) the analysis of entry and expansion.<sup>90</sup> The ICN announced that the Merger Working Group would be developing additional recommended practices on unilateral and coordinated effects in 2008-2009.<sup>91</sup>

### III. NOTEWORTHY ENFORCEMENT AND JUDICIAL TRENDS

#### *A. Enforcement Primarily, But Not Exclusively, Focused on Horizontal Mergers and Unilateral Effects*

Although officials from both agencies expressed interest in pursuing coordinated effects theories, most of the concerns identified in merger investigations continue to involve "unilateral effects" theories in horizontal mergers.<sup>92</sup> Officials from both agencies during the first term of the Bush Administration expressed renewed interest in bringing matters premised on coordinated interaction theories of competitive harm.

Indeed, only a few consents<sup>93</sup> and court challenges<sup>94</sup> were premised solely on perceived coordinated effects. As Assistant Attorney General ("AAG") Thomas D. Barnett indicated on June 26, 2008:

The agencies formally introduced the specific terminology of unilateral effects analysis in the 1992 revision to the Horizontal Merger Guidelines. Since that time, my perception is that agency use of these theories has changed significantly. While I have not attempted to go all the way back to 1992, the last seven years are illustrative. The Division filed 58 merger complaints during the period from fiscal year 2001 to the present. Forty-one included only a unilateral effects claim, six included only a coordinated effects claim, and the remaining eleven contained both. There seems little doubt that recent merger challenges have focused more extensively on unilateral effects claims that was the case prior to 1992. It is worth examining the reasons for this apparent shift. I perceive at least two key factors.

First, the economy has evolved in a direction that makes unilateral effects more likely to be a relevant concern. Our world has become increasingly complex, with increasingly sophisticated and differentiated products and services to match. We no longer live in a world where products in a given category are virtually identical in terms of functionality, with the principal differences being price and perhaps reliability. . . .

Second, the economic tools that we have been developing in recent years lend themselves more readily to unilateral effects analysis than to coordinated effects analysis.<sup>95</sup>



The track record recently in bringing cases premised/based solely on unilateral effects, however, has been unfavorable to the government, with courts finding the asserted market definitions counter to intuition or common sense.

As with the prior administration, although almost all enforcement actions invoked horizontal concerns,<sup>96</sup> the vertical transactions requiring relief arose typically due to input foreclosure of what is tantamount to an “essential” component<sup>97</sup> or because it facilitated coordinated effects downstream.<sup>98</sup> These vertical concerns were more likely to be addressed through behavioral relief,<sup>99</sup> although, in some cases, the agency required a divestiture of some of the upstream assets.<sup>100</sup> In a few transactions, concerns arose due to minority ownership interests, with the agency sometimes being willing to impose behavioral relief,<sup>101</sup> but usually forcing the divestiture of the overlapping interest.<sup>102</sup> A small percentage of merger investigations involved potential competition- or buyer-power (monopsony) theories.<sup>103</sup> Both agencies have become increasingly sophisticated in their knowledge of intellectual property law, sometimes focusing the relief in consents upon intangible assets and rights,<sup>104</sup> or including in consents, as part of the relief, provisions that alter the merging party’s litigation rights in order to lower or eliminate entry barriers for others to compete in the affected market.<sup>105</sup>

### ***B. Agencies Brought a Number of Consummated Merger Challenges***

The agencies’ enforcement record must include post-consummation challenges. The HSR Act provides the federal agencies with the opportunity to investigate and, where appropriate, to challenge pre-consummation (under Clayton Act § 7) those transactions that likely would substantially lessen competition. In addition, the agencies can challenge a consummated transaction in a federal district court or, in the FTC’s case, as an administrative case before an administrative law judge (“ALJ”). The agencies brought 18 post-consummation challenges during the Bush Administration, with four of these challenges still pending when the Obama Administration assumed the Presidency.<sup>106</sup>

Initially, the FTC decided to use the post-consummation challenge option in the hospital merger area—an industry in which the FTC had almost always lost when bringing its pre-merger challenges. Clearly, establishing the anticompetitive effects becomes easier post-consummation—particularly if prices increase or output decreases. But, as the Evanston Hospital challenge described below demonstrates, the FTC post-consummation “victory” may be difficult to effectuate—particularly if relief occurs several years post-consummation. The background of this case is worthy of discussion.

On August 6, 2007—three and one half years after the FTC started its administrative challenge—the Commission issued an unanimous administrative opinion finding that ENH’s acquisition of Highland Park seven years earlier violated Clayton Act § 7.<sup>107</sup> The FTC found that the hospitals had exercised market power and the anticompetitive effects were not offset by merger-specific efficiencies.<sup>108</sup> The FTC’s opinion recited the statements of senior officials that demonstrated they expected prices to be higher due to increased bargaining leverage. The FTC found that the econometric analysis performed by both the staff’s and parties’ economists

supported this conclusion. Moreover, the FTC rejected the argument that these increases reflected ENH's attempts to correct a multi-year failure by ENH's senior officials to charge market rates to many of its customers or to reflect increased demand for Highland Park's services due to post-merger improvements. Notably, however, the FTC indicated that "while structural remedies are preferred for § 7 violation . . . this is a highly unusual case in which a conduct remedy rather than a divestiture, is more appropriate. . . . The long time that has elapsed would make a divestiture more difficult, with greater risks of unforeseen costs and failures." Chairman Majoras' opinion indicates that if the hospital were sold, a key cardiac surgery unit that resulted from the integration might be closed. No explanation was given, however, regarding why a joint venture would have not been successful for retaining these benefits. Rather, the FTC required ENH to establish separate and independent conduct negotiation teams for each hospital to allow managed care organizations ("MCOs") to negotiate separately for the competing hospitals, thereby "re-injecting competition between them for the business of MCOs."<sup>109</sup>

The ENH case may be an extreme case of the challenges the FTC can face in post-merger challenges. Moreover, the recently proposed changes in Part III proceedings may be helpful in shortening the process somewhat, but are still not going to eliminate the potential for frustration of effective relief. On December 16, 2008, the FTC took the unusual step of commencing a civil action in federal district court in Minnesota challenging the legality of Ovation's 2006 acquisition of the drug NeoProfen rather than merely challenging the acquisition in an administrative proceeding; the FTC seeks, among other relief, disgorgement of profits.<sup>110</sup> Nevertheless, post-consummation challenges are likely to be a last-recourse act, by the FTC, particularly to the extent that the FTC's new litigation strategy deployed in Whole Foods and Inova (discussed below) is proven to be successful for the FTC.

### *C. Effect of Court Challenges in Enforcement Policy*

The success rate of court challenges provides an important exogenous factor in both agency enforcement decisions (and statistics) as well as business community perceptions and actions. Certain critics of the Bush Administration conclude that "under the current administration, the federal enforcement agencies have most commonly not prevailed in litigation, though there are only a small number of such cases."<sup>111</sup> The Bush Administration's track record in court is as follows: the FTC tried five preliminary injunction challenges in district court, winning one<sup>112</sup> and losing four<sup>113</sup> (one of which, Whole Foods, has been subsequently reversed by the D.C. Circuit).<sup>114</sup> In another of the "losses," Equitable Resources, the FTC obtained an injunction pending appeal of the state action issues and the transaction parties abandoned the transaction.<sup>115</sup> The FTC considers such an outcome a "victory." In addition to the five tried challenges, the FTC brought a challenge to Inova's purchase of Prince William Hospital System.<sup>116</sup> Faced with the likelihood of an injunction and FTC administrative proceeding, the parties abandoned that transaction.<sup>117</sup> In the first 100 days of FY 2009 (when Bush Administrative appointees remained in power), the FTC commenced simultaneous administrative proceedings and federal district court preliminary injunction challenges to block

CCS Corporation's acquisition of Newpark Environmental Services;<sup>118</sup> the merger of CCC Information Services and Mitchell International Inc;<sup>119</sup> and Oldcastle Architectural Inc.'s acquisition of Pavestone Companies.<sup>120</sup> In both CCS/Newpark and Oldcastle/Pavestone, the parties abandoned the transaction after the FTC commenced litigation. Thus, taking into account these abandoned transactions and the reversal, the FTC's litigation record is at least 67 percent—and improving.

The DOJ tried three preliminary injunction actions—winning one<sup>121</sup> and losing two.<sup>122</sup> At the end of FY 2008, one post-consummated merger challenge remained pending.<sup>123</sup> In the first 100 days of FY 2009, the DOJ brought two new court challenges—one action to block the combination of JBS and National Beef Packing Co.<sup>124</sup> and another to unwind the July 2008 acquisition of Semicoa by Microsemi.<sup>125</sup> As with enforcement actions generally, almost all of these court challenges were premised on unilateral effects—not coordinated effects. In most of the losses, the court explicitly rejected the asserted relevant market. In some of the losses, the court found that customers had other actual or potential choices.<sup>126</sup> The courts either did not believe the customers that testified for the agency or found their testimony unpersuasive in the absence of corroborating economic evidence.<sup>127</sup> The courts also tended to side with the economists, industry experts, and competitors presented by the defendants.

The American Antitrust Institute (“AAI”) attributes the recent string of court losses in part to the fact that the judges were generalist judges with limited antitrust experience and perhaps a lessening of litigation skills or experience at the antitrust enforcement agencies.<sup>128</sup> Courts expected the government to prove its case with pricing data and other economic modeling—in addition to corroborating testimony. Harmful company documents were either ignored<sup>129</sup>—or put into context as being only a less reliable subset of the company's documents,<sup>130</sup> dated and/or inaccurate<sup>131</sup> when factoring in the other evidence. On the other hand, the courts almost universally concluded that the transaction parties failed to meet their burden in establishing an efficiencies defense.<sup>132</sup>

Thus, equally applicable to both sides, the party bearing the burden of proof in court has been tasked with presenting a consistent view of the market based on customer and/or industry expert testimony, company documents, and economic data. Bare assertions alone are not enough to prevail—albeit whether based on economic theory, customer statements, or a portion of internal documents. Rather, courts expect to see all three—economic analysis supported by testimony and documents—in support of the case. As one commentator recently noted, “like a stool, a merger case will not stand with only two of these three legs.”<sup>133</sup>

The FTC has developed a challenge strategy recently that, if left unchanged, could tip the balance decidedly in its favor in the future. On July 29, 2008, a divided three-judge panel of the United States Court of Appeals for the District of Columbia Circuit reversed the district court's ruling that had denied the FTC's request for an injunction against the merger of Whole Foods and Wild Oats. Although on November 21, 2008 Judge Tatel no longer “joined” in Judge Brown's opinion but instead “concurred” in the decision, thereby changing that status of Judge

Brown's opinion from a "majority opinion" to the "opinion of the court." It is unclear what the precedential impact of the decision will be long-term. The FTC may argue in future cases that the Whole Foods decision absolves it of the need to establish the primary elements of a Clayton Act § 7 case when it seeks a PI. Both Judges Brown and Tatel held that the FTC need not settle on a single product or geographic market definition or a theory of harm at the PI phase. Both judges indicate, for example, that the FTC need not commit to a specific relevant product and geographic market definition because "it is quite conceivable that the FTC might need to seek such relief before it has settled on the scope of the product and geographic markets implicated by a merger."<sup>134</sup> Rather, the FTC "just has to raise substantial doubts about a transaction. One may have such doubts without knowing exactly what arguments will eventually prevail."<sup>135</sup>

This language cannot help but remind one of what antitrust merger law used to be like under many now long-discredited U.S. Supreme Court decisions from the 1960s. Not surprisingly, the reasoning of the majority opinion prompted the dissenting judge, Judge Kavanaugh, to take the majority to task for essentially "allow[ing] the FTC to just snap its fingers and block a merger."<sup>136</sup> Judge Kavanaugh notes that the opinions of Judge Brown and Judge Tatel dilute the standard for preliminary injunction relief such that the FTC need not demonstrate a likelihood of success on the merits and finds the "serious questions" approach they adopt to be inconsistent with the relevant statutory test and the approach recently repudiated by the U.S. Supreme court in *Munaf v. Geren*.<sup>137</sup> Judge Kavanaugh concludes that, under the proper standard, "the FTC may obtain a preliminary injunction only by establishing a likelihood of success—namely, a likelihood that, among other things, the merged entity would possess market power and could profitably impose a significant and non-transitory price increase."<sup>138</sup>

In future cases, the FTC is likely to combine the petition for a PI in the D.C. Circuit with the simultaneous commencement of an administrative proceeding with an aggressive schedule. The FTC took this dual track approach in its recent challenge of Inova Health System Foundation's ("Inova") proposed acquisition of Prince William Health System ("PWHS"), which operates a hospital in Manassas, Virginia. With five hospitals, Inova is the largest hospital system in Northern Virginia. After a two-year investigation, the FTC challenged the proposed acquisition. The FTC commenced an administrative proceeding on May 9, 2008 and took the unusual step of designating Commissioner J. Thomas Rosch as the ALJ. The administrative complaint alleged that because of the close competition between Inova and PWHS, health plans are able to negotiate to keep health care prices down. In contrast, the defendants argue that Inova would have upgraded the hospital facility, similar to what it had done with a hospital it purchased in Loudoun, Virginia. On May 12, 2008, the FTC (and the Virginia Attorney General) also sought a PI pending the conclusion of the administrative proceeding.

The Inova district court judge ruled on May 30, 2008 that the motion for PI would be decided solely on the papers filed by the parties. The FTC's decision to commence an administrative proceeding with a Commissioner serving as the ALJ, and to seek its preliminary

injunction, seems to be a strategy to counter arguments by a transactions partner that the administrative proceeding process takes a couple of years to complete.<sup>139</sup> Even with the expedited administrative process, however, most transactions will not be able to survive the time it will take, particularly to achieve judicial oversight of the FTC's decision. In Inova, faced with the potential delay, the transaction parties abandoned the merger on June 6, 2008.<sup>140</sup>

Several observations can be made concerning the impact of court decisions on merger enforcement. First, it is somewhat inconsistent for critics to attack the agencies for being excessively timid in enforcement decisions and, simultaneously, to criticize their win-loss record in court. Second, the agencies are constrained by court review and it seems clear that, in general, the courts are demanding more convincing proof of likely competitive injury in merger cases than in the past. Third, we question the FTC's attempt to circumvent full court view at the preliminary injunction stage by revision of its Part III rules.<sup>141</sup> This effort seems not only to suggest a judicial rubber stamp of agency action but to threaten the due process rights of merging parties.

#### **IV. HAS ANTITRUST ENFORCEMENT BEEN MATERIALLY LOWER DURING THE BUSH ADMINISTRATION?**

Business news assertions in the recent few years have sent the message to the business community that antitrust enforcement is lax. In January 2007, for instance, The Wall Street Journal indicated that "The federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish."<sup>142</sup> Similarly, two months later, the New York Times declared that XM/Sirius had "reason to be optimistic" about DOJ clearance: "the Bush Administration has been more permissive on antitrust issues than any administration in modern times."<sup>143</sup> These press stories were reinforced by a widely-publicized paper of two economists—Jonathan B. Baker and Carl Shapiro—in April 2007 (and subsequently updated) that shows "using merger enforcement data and a survey [they] . . . conducted of merger practitioners that the decline in antitrust enforcement is ongoing, especially at the current Justice Department."<sup>144</sup> Subsequent antitrust articles have debated some of the findings. This section will discuss: (1) the Baker/Shapiro "results"; (2) the fallacy and limitations to the Baker/Shapiro results; and (3) the reasons why enforcement levels might differ at the two agencies.

##### ***A. Baker/Shapiro: The "Basis" for Lax Enforcement Perceptions***

Baker and Shapiro's research "updates" the results of a study developed by former FTC Commissioner Thomas Leary to compare the Reagan, Bush I, and Clinton Administrations' enforcement levels. The key statistic used to measure enforcement level is the agency enforcement actions as a fraction of HSR filings. Commissioner Leary assigned years to presidential terms with a one-year lag to account for the delay in transitioning of the new administration's officials into office. The use of multiyear averages smoothes year-to-year variations in the data and helps eliminate the problem of information for a particular year being



skewed because the filing year and the year the enforcement action occurs are not the same. The results reported by Commissioner Leary are as follows:

**Merger Enforcement Challenges as a Percentage of Adjusted HSR Filings**

	<b>1982-85 Reagan I</b>	<b>1986-89 Reagan II</b>	<b>1990-93 Bush</b>	<b>1994-97 Clinton</b>	<b>1998-2000 Clinton II</b>
<b>FTC</b>	1.0%	0.7%	1.5%	1.1%	0.7%
<b>DOJ</b>	0.8%	0.4%	0.8%	0.9%	1.1%
<b>Total</b>	1.8%	1.1%	2.3%	2.0%	1.8%

In updating the study, Baker and Shapiro recognize the challenge in accounting for the changes in the HSR reporting rules that became effective in February 2001, most notably raising the reporting threshold to \$50 million. They conclude that filings after the change were 40 percent of what they would have been had the reporting rules been the same; based on the level of second requests in FY 2000 that were issued for the below-\$50 million transactions; 0.98 percent of these transactions received second requests; and, based on enforcement levels from 1990-2000 on transactions requests, determined that for every 1000 transactions not filed that previously would have been filed, there would have been six additional enforcement actions. Baker and Shapiro then proportion the enforcement results between the DOJ and FTC on a one-third-to-two-thirds basis, consistent with prior enforcement levels. Based on these adjustments, Baker and Shapiro report the following results:

**Merger Enforcement Challenges as a Percentage of Adjusted HSR Filings**

	<b>2002-05 George W. Bush I</b>	<b>2006-07 George W. Bush II <sup>P</sup></b>
<b>FTC</b>	0.8%	0.6%
<b>DOJ</b>	0.4%	0.4%
<b>Total</b>	1.2%	1.0%

P = Preliminary Estimates

They conclude that “[d]uring the first term of the GW Bush administration, the rate of merger challenges for DOJ and the total for both agencies were below the average of those reported by Commissioner Leary, while the FTC figure was close to the average. The DOJ number was identical to the merger enforcement rate observed during the second term of the Reagan administration, which was the lowest in modern history. According to the preliminary

estimates for the second term, the merger enforcement rate at DOJ remained at the same low level observed during the previous years. Because the FTC rate simultaneously declined to a below-average figure, the total federal merger enforcement rate for the second term dropped below the lowest level previously recorded.”

They further state that, in the raw data for 2002 to 2005 if not corrected to account for the change in the reporting rules, the FTC enforcement rate was 1.5 percent of adjusted HSR filings and the DOJ enforcement rate was 0.75 percent of adjusted HSR filings. Baker and Shapiro then indicate that to be equivalent to the 0.9 percent average rate for agency enforcement under the pre-2001 rules that each agency would need to be at the 1.8 percent level. Finally, Baker and Shapiro indicate that even within the GW Bush years, the trend toward lax enforcement has increased: “had the two federal enforcement agencies challenged mergers during 2006 and 2007 at the rate the FTC did during the first term of the current administration (which was slightly below the historical average), the agencies would have challenged twenty-four more mergers each year (fifteen more at the Antitrust Division and nine more at the FTC).” Moreover, Baker/Shapiro indicate that the “data from the [Reagan] period are consistent with contemporaneous reports that senior officials frequently overruled staff recommendations to challenge acquisitions, and the few mergers that were challenged were typically mergers to very high levels of concentration.”<sup>145</sup>

Baker and Shapiro purport to have “confirmed our interpretation that merger enforcement became much more lenient during the current administration by surveying twenty experienced antitrust practitioners [identified as 20 of the 24 ‘leading individuals’ in antitrust in DC, 2006 chambers USA]. The survey respondents consistently reported that the ‘likelihood of successful agency review for the merging firm’ for a given horizontal merger is sharply higher now (March 2007) than it would have been ten years ago (when Joel Klein ran the DOJ and Robert Pitofsky headed the FTC).”<sup>146</sup>

Baker and Shapiro acknowledge at various points in their paper, as potential reasons for deviation in results, the following: (1) the composition of HSR filings (e.g., more private equity/financial filings versus strategic filings, percentage of the filings that are not horizontal, or involve minority/passive investors); (2) the mix of deals in terms of the severity of antitrust issues; (3) the industries in which the transactions occur; and (4) greater transparency permitting the antitrust bar to predict better enforcement decisions, therefore discouraging firms from proposing transactions that would generate enforcement actions. They summarily dismiss each of these factors in turn, however, as not materially changing the conclusions they reach. As to the composition of the merger filings and the mix of deals, Baker/Shapiro indicate that they “are skeptical of this benign interpretation of the low merger enforcement rate during the current administration. . . . It cannot rationalize the recent drop in DOJ enforcement actions unless an implausibly large fraction of all HSR filings now involve non-horizontal deals. . . .”<sup>147</sup>



### ***B. Problems with Baker/Shapiro "Findings" Overall***

The Baker/Shapiro study is based upon a series of assumptions, each of which, if tweaked slightly, could significantly impact the rigor of their findings. This section will highlight some of the potential flaws in their assumptions, not with the purpose of proving a high level of enforcement, per se, but to establish why the Baker/Shapiro findings create an unreliable sense of empirical accuracy and authority.

First, it may simply not be possible to compare enforcement results for pre-2001 and post-2001 because of the impact that the number of filings could have had on the staff resources (which may, for instance, account for some of the differences in enforcement levels in 2002-2003, after the sharp decline in merger activity from the dot.com burst, versus the record M&A levels of 2005-2007), inflation, and a variety of non-HSR-related factors that could impact the competitiveness and size of companies and sectors of the economy. Putting that general concern aside, however, the methodology Baker/Shapiro use appears to be flawed. Appendix C provides the statistics relating to 1994-2000 HSR filings that fell below \$50 million. The data for filings over this entire time frame (rather than the regression log utilized by Baker/Shapiro) so as to adjust for yearly variations, indicate that just over 50 percent of reported transactions were below \$50 million (Baker/Shapiro adjust their findings by 60 percent). Next, using just FY2000, Baker/Shapiro calculate that only 0.98 percent of the smaller transactions received second requests. If the entire Clinton Administration period for which data are available (1994-2000) is used instead, then the percentage of smaller transactions that received second requests from 1994-2000 would be 1.3 percent instead of 0.98 percent.

As mentioned above, it is simply not possible to treat transactions reported pre-2001 and post-2001 as the same, since major changes in the Hart-Scott-Rodino filing requirements irrevocably changed the volume and type of transactions presented to the agencies. Baker/Shapiro believe that the average percentages from the pre-2001 period need to be doubled to adjust for the lower filing levels. It is unclear why this should be the case, given that it is a percentage of the transactions rather than simply a numbers count. Also, the leadership within each administration does not neatly correlate to a different "leader" or "leaders," and, given the potential distortion from small number samplings, this paper aggregates both Clinton Administration terms and GW Bush Administration terms (less the first year of office in each case, as Commissioner Leary did in his study). A difference of views also exists regarding whether the type of deal has changed significantly during the two time frames. For instance, former FTC Chairman Muris analyzed the overlap codes to show that fewer overlaps occurred in more recent deals than in prior deals (e.g., in 1998, 65 percent of mergers had a horizontal overlap, compared to 49 percent in 2007).<sup>148</sup> Former AAG Hewitt Pate stated at the Spring 2008 ABA Section of Antitrust Law Roundtable:

I think, frankly, on the statistical merger game—and we will undoubtedly talk about Baker and Shapiro measuring whether there is as much enforcement during this period as others—the agencies don't choose the cases that come to them. I think these statistics provide

very little. We've had, for example, a predominance of private equity activity in changes of corporate control recently, which provide less occasion for enforcement. . . . The real question is: Was the right analysis applied? Are there cases that should have been brought that weren't? Let's talk about that on the merits.<sup>149</sup>

Further support for the variability of enforcement activity based on the type of transactions that are in vogue at a given time period can be seen by comparing the relatively higher volume of leveraged buyout ("LBO") and private equity ("PE") transactions in Appendix D with the corresponding level of enforcement actions in Appendix A. The impact of an almost two-fold increase in the absolute number of financial transactions is likely even greater given the decrease in filings between the two time periods. The drop off in FY2004-FY2007 also appears to correspond to a significant up tick in these strategic transactions (as well as in the number of filings that the staff needed to review overall). This may also, at least in part, explain the "results" that Baker/Shapiro find empirically.<sup>150</sup>

Perhaps there is a way to take into account these deviations in the mix of transactions in the data itself. There has always been "healthy competition" between the FTC and the DOJ to be the agency to investigate and, where appropriate, challenge transactions. Accordingly, both agencies may try to protect their turf by seeking clearance to investigate transactions that even potentially raise competition issues. Thus, comparison of the actions taken with respect to "investigated" transactions would deal with eliminating some of the uninteresting transactions from the outset.

But, as suggested above, even using the "investigated" base to measure enforcement would tend to leave uncorrected the mix-of-transactions factor. Therefore, a better benchmark may be based on the transactions receiving second requests, since presumably most of the non-horizontal and financial/minority transactions would be dealt with either from the outset or during the preliminary investigation. To our knowledge, none of the critics is suggesting that "politics" may be resulting in under-enforcement at these decision points. Indeed, the criticism voiced by Baker/Shapiro and others appears to be that the top officials at the agencies "kill" challenges that the staff would otherwise bring. If such activity were to be occurring, then presumably it would occur, not at the time of the decision to investigate the transaction, or even at the decision to issue a second request, but instead at the conclusion of the review process.

Thus, a comparison of the percentage of second requests resulting in challenges would appear to be a way to adjust to the hypothesis that the underlying deals have changed. This approach, however, still would not totally correct for possibly lower enforcement statistics that may be due to staff overload (thereby not eliminating pre-second-request transactions that ultimately do not get challenged) or the possibility that, in some administrations, officials push for "cheap consents" to bolster statistics, as suggested by the Muris Article. Rather than choosing the correct barometer, provided below is a comparison of the data contained in the Annual Reports to Congress for the Clinton and Bush Administrations (underlying data is

provided in Appendix B), which suggest that on the basis of raw numbers enforcement activity has not lagged on a combined agency basis:

	1994-2000	2002-2008	2002-1/06/09 <sup>151</sup>
<b>% of Adjusted Transactions Investigated</b>	11.9%	16.8%	
<b>% of Adjusted Transactions with Second Requests</b>	2.96%	2.99%	
<b>% of Investigated Transactions with Second Requests<sup>152</sup></b>	24.8%	17.8%	
<b>% of Second Requests Resulting in Challenges</b>	61.8%	67.6%	71.7%
<b>% of Adjusted Transactions Challenged</b>	1.8%	2.03%	2.15%

The results of the survey add little probative value to the determination of the entire track record of the administrations. The perceptions of events that occurred 10 to 20 years ago become vague. The sampling size is very small and consists of less than two dozen “inside the Beltway” antitrust practitioners. It does not, for instance, include members of the antitrust bar in New York, where arguably much of the M&A activity originates. It includes practitioners who do little or no merger work, concentrating instead on cartels, litigation, and unilateral conduct.

Moreover, the perceptions of the decisions of a few high-profile cases, such as Whirlpool/Maytag,<sup>153</sup> Monsanto/Delta and Pine Land,<sup>154</sup> and (the then pending but subsequently decided) XM/Sirius<sup>155</sup> transactions can greatly impact the “perceptions” of the public. All three of these transactions were thoroughly investigated by the staff and the parties raised persuasive explanations as to why the mergers would not result in market power or higher prices/lower innovation. Surely it is a disservice to the staffs of both agencies to pin the conclusions of enforcement activity overall on a handful of the hundreds of mergers investigated in the last eight years—much less the dozens of transactions the agencies challenged. Nor, we submit, is there any probative value to the survey, which appears so problematic from a survey design perspective.

If there was truly under-enforcement by the agencies, it is difficult to discern why the agencies have lost so many of the cases they have brought. The evidentiary record upon which the agencies relied to make their enforcement decisions for some reason has not resonated with the courts charged with deciding whether to order, at the agencies’ behest, a PI blocking the merger. As a result, the common edict expressed by Justice Stewart that “the government

always wins”<sup>156</sup> seemed to have been reversed (particularly in 2004-2007), perhaps explaining the reticence of some officials to bring challenges in close cases.

It is also too simplistic and potentially inaccurate to conclude from the perceived litigation track record that the agencies (particularly the DOJ) do not bring challenges in court, or always lose, and therefore are ineffective enforcers. As mentioned above, the agencies have been successful in obtaining consents and restructured transactions to resolve concerns. Also, in a number of cases, the transaction parties abandoned their transactions<sup>157</sup>—either before or after a complaint was filed—due to agency concerns.<sup>158</sup> Also, in a number of court challenges, the parties settled with the agency before trial.<sup>159</sup> These outcomes should also be considered agency “wins,” since presumably in these matters the agency had good chances of prevailing.

Finally, state attorneys general have jurisdiction to challenge mergers, and have for the last two decades have been active participants in the HSR review process. In prior administrations, states even brought challenges in matters in which they were not satisfied with the decision of the reviewing federal enforcement agency<sup>160</sup> Indeed, in 1993 the National Association of Attorneys General promulgated horizontal merger guidelines that differed to a degree from the federal 1992 guidelines.<sup>161</sup> Although there were a few examples during the Bush Administration years of such state attorney general intervention,<sup>162</sup> we note that this handful of instances in which the states acted were statistically insignificant (except perhaps in FY 2005, in which about half of these interventions occur and which appears to be an outlier year in federal enforcement). We believe that the lack of significant separate state attorney general intervention overall further supports our belief that there has not been systematic under-enforcement during the Bush Administration years.

### *C. Do the Agencies Differ in Their Level of Merger Enforcement and Why?*

The above discussion, however, does not entirely answer allegations voiced by Baker/Shapiro that the “Pitofsky FTC brought enforcement the actions at the rate of 0.75 percent of HSR filings—similar to the Muris FTC’s 0.8 percent rate, close to the historical average of 0.9 percent, and roughly double the rate of the current DOJ. AAG Klein’s DOJ was slightly above the historical average of 1.0 percent.”<sup>163</sup> In a subsequent *The New Republic* article, Baker further expounds that

“If Bush’s Justice Department is the most hands-off since Reagan’s (and it may be worse), Bush’s Federal Trade Commission makes for a startling contrast. Perhaps because its five staggered-term commissioners must vary in party affiliation, making it inherently less ideal logical, the FTC’s antitrust wing over the last eight years has actually worked the way it’s supposed to . . . while the Bush Justice Department avoided merger challenges . . . the FTC has brought them at about the usual rate.”<sup>164</sup>

Similarly, Harkrider’s econometric analysis suggests that, all else being equal, transactions in the sample were nearly 24 percent less likely to be challenged by the DOJ during the Bush Administration than in the Clinton Administration and remained about the same

during both administrations at the FTC. Harkrider acknowledges that the types of mergers may have been qualitatively different in these time periods, as well as the possibility that merger commitments in the merger agreements could have impacted these results, but concludes that “[d]espite all of these caveats, it seems clear that the merger enforcement behavior was different in 2001 to 2006 as compared to 1996 to 2000, a result that is hardly surprising given the change from a Democratic to a Republican administration.”<sup>165</sup> Based on the data in Appendix B, however, the results of each of the FTC and DOJ from FY 2002 through January 20, 2009 are as follows:

	FTC	DOJ
Percentage of Preliminary Investigations to Second Request	14.3%	21.4%
Percentage of Preliminary Investigations to Enforcement Action	11.4%	14.0%
Percentage of Second Requests to Enforcement Action	80.8%	67.7%

Although a bit lower than the FTC’s rate, the percentage of second requests in which the DOJ took action was substantial and well within the historic range of prior administrations.

First, there is no doubt that the differences in attitudes regarding the appropriate threshold for settling cases can impact “close cases” and therefore skew the enforcement action results. As the data indicate, these differences exist even within each institution and administration. Baker/Shapiro reflect these differences when comparing the Steiger FTC statistics to the Pitofsky statistics. So, too, can these differences exist between the two agencies at any given time. Reflect upon the differences in the rhetoric between the FTC and DOJ officials in the last few years. As then-FTC Chairman Deborah Platt Majoras responded in a July 15, 2007 interview to the question regarding “are you more friendly to mergers than previous administrations?”:

I read that all the time. It’s simply not borne out at the FTC. You look at the number of mergers we’ve challenged or if you look at it as a percentage of the merger filings, it’s pretty even since about the first Bush administration. I can’t think there was a merger that people have point to and said, “Why didn’t you guys take a closer look or why didn’t you challenge it?” To me it’s not some political thing that shifts a whole heck of a lot.<sup>166</sup>

The FTC has repeatedly said that, in close or novel cases, it will bring a challenge, preferring to develop case law by bringing close cases and losing than not bringing an action at all. Indeed, as reported in one article, FTC Chairman Deborah Platt Majoras has said she wants to bring a case, and she said, “You can’t win if you don’t play.”<sup>167</sup> Similarly, Chairman Majoras has indicated:

I would love to see the Court take a merger case. I think, by my calculation, the Supreme Court hasn’t decided a substantive merger issue since the 1970s. We’ve been working under the

1992 Merger Guidelines, including a unilateral effects regime, for a number of years. While a lot of us talk about how we think it's fairly settled the way we review mergers, some people, I think, disagree. I think it would be terrific.

I may be a little more optimistic about the possibility of the Court taking on a merger case because, perhaps, if we had an FTC merger case in Part 3, especially if the AMC doesn't have its way and Part 3 is still a meaningful part of our enforcement regime, then I think it is possible that we could get one up, and I think that would be a good thing.

More recently, FTC Commissioner J. Thomas Rosch said. "Litigious? Emphatically no. . . We're willing to lose. . . That doesn't mean we want to lose, and we certainly don't vote out cases that we think we're going to lose. But we are willing to vote out cases when we think there's a violation."<sup>168</sup>

In contrast, at the DOJ, the agency will bring cases if it believes that it will win, based on the evidentiary record before it. As Deputy AAG for Civil Enforcement David L. Meyer indicated in November 2007:

When staff does reach [the conclusion that a transaction will likely cause substantial harm] . . . we are cognizant of the fact that we do not possess any authority to command that parties abandon or restructure their transaction. We are law enforcers, not sector regulators. If we believe that a transaction would violate Section 7, we must persuade a district court that we are correct and invoke the equitable power of the court to enjoin the transaction or require an appropriate remedy. Pleading and proving a Section 7 violation in court poses challenges, as some recent outcomes in litigated merger cases underscore . . . do we take into account whether we could prevail in court if we were put to that test? Absolutely. It would be irresponsible to bring cases that we had no reasonable expectation of winning.<sup>169</sup>

AAG Thomas O. Barnett explained at the 2008 ABA Section of Antitrust Law Spring Meeting:

. . . Are we, or the FTC, afraid to litigate a merger case? We like to litigate merger cases—it's professionally rewarding—but you have to pick the right cases. We are ready to do it.

There have been times when I have signed a complaint, on the expectation that we would be filing it within days. The parties then elected to come to the settlement table and we resolved it through a consent decree. That's a win/win. It's a very positive outcome. But I mention it to underscore that at the time we actually thought we were going to litigate.<sup>170</sup>

In June 2008 remarks, AAG Barnett defended the DOJ's record by noting:

Since FY2001, the Division has identified problems with 112 transactions . . . [with] a . . . 98 percent success rate since FY2001, and since 2004, our win record is—so far—unblemished; we have obtained relief in 100 percent of the transactions in which a problem was identified during that period.



What is more, in the vast majority of cases we have achieved this record without having to undergo the delay, expense, and uncertainty of contested litigation. . . .<sup>171</sup>

This difference in enforcement philosophy may have had an impact on a case-by-case basis, but the impact is very subtle and has been vastly overstated by the critics.

The enforcement actions may also be impacted by some other institutional factors, which also can impact a particular official's enforcement philosophy. First, there are structural differences between the agencies that can affect the outcome (as well as the timing of the investigation) in some small percentage of mergers. At the DOJ, the true ultimate decision-maker is the AAG.<sup>172</sup> Having one decision-maker streamlines the decision-making process. In contrast, the ultimate decision-making at the FTC occurs at the Commissioner level—consisting of five Commissioners of different political parties and perspectives. Thus, the process at the FTC is one of consensus and discussion, which can take additional time and, at times, compromise among the Commissioners in order to satisfy the various constituencies. Again, not a lot of weight should be given to these structural differences at the reviewing agency for the vast majority of transactions that are cleared (either early in the process or following a full investigation) or resolved amicably through a straightforward divestiture, but they could make a difference in a close case.

Today, there are also clear differences between the FTC and the DOJ regarding certain aspects of relief. These differences can impact how the enforcement statistics look to the casual observer. The DOJ has consistently been willing to permit parties to “fix” transactions absent a consent if it has assurances that the relief will be implemented.<sup>173</sup> The DOJ also has been willing to enter into “pocket consents” that provide parties with the flexibility to close time-sensitive hostile transactions prior to the conclusion of the investigation or when certain regulatory approvals are likely to resolve the competitive concerns. The DOJ has used pocket decrees in a variety of settings in the last few years. For example, as in *Mital/Arcelor*,<sup>174</sup> the DOJ previously entered into a pocket decree in the *Connor Brothers*<sup>175</sup> transaction, recognizing that to hold up the transaction for the completion of the full investigation would have killed the transaction due to idiosyncrasies existing under the operative foreign law. In *Raycom*<sup>176</sup> and *GE/Media General*,<sup>177</sup> the DOJ similarly entered into pocket decrees in the event that the FCC orders addressing the concerns were not followed. Pocket decrees have also been obtained as an insurance policy in situations in which the parties have offered a “fix-it-first.” Again, the focus of the DOJ has been on whether there are adequate safeguards in place to ensure that any concerns will be addressed. The DOJ has very rarely included “crown jewels” provisions in its consent decrees,<sup>178</sup> and typically provides a three-to-six month period for divestitures. As illustrated in the *SBC/ATT* and *Verizon/MCI* transactions, the DOJ has accepted relief other than the divestiture of one of the transaction parties' assets in order to preserve the efficiencies of the main transaction.<sup>179</sup> In contrast, the FTC has not permitted parties to “fix” transactions absent consent orders and will not enter into “pocket decrees.”<sup>180</sup>



Another exogenous factor is that the level of activity at the two agencies can differ as a result of which sectors of the economy have been consolidating and which agency historically reviews those sectors. For example, take the volume of transactions in two sectors that have been traditionally allocated to DOJ: communications and paper. As Appendix D shows, the average number of communications transactions for the five-year period of 1996 to 2000 and the seven-year period 2001 to 2007 decreased by about a third. In the paper section, the decrease is even more dramatic; from 1996-2000 there were, on average, almost 80 transactions per year, compared with 48 for 2001-2007, i.e., about 60 percent less.<sup>181</sup> In the banking industry, also under the jurisdiction of the DOJ, the number dropped a whopping 46 percent. Accordingly, even if the transactions raised the same issues, there were less opportunities for the DOJ to review these transactions.

Moreover, markets do not remain the same over time. One DOJ official suggests that many of the transactions the DOJ reviews involve companies operating in the services and technology sectors where, on average, transportation costs are lower and change is more rapid than in some of the more traditional “industrial” sectors of the economy.<sup>182</sup> Perhaps the most “changed” industry in the entire economy is the telecommunications sector when one considers the advent of the internet (and the introduction of internet telephony), the entry of the Baby Bells into long distance, and the ubiquity of mobile phone service, not to mention the coinciding changes in regulatory frameworks, including the auctioning of additional spectrum.<sup>183</sup>

Also, many of the transactions reviewed by the DOJ during this time frame were subject to review (and imposition of conditions and relief) and/or ongoing regulation by regulatory bodies, such as the FCC or the Federal Reserve, thereby obviating the need for intervention by the DOJ. Without doubt, these exogenous factors had bearing on the enforcement statistics of the DOJ, as compared with the FTC.

Even factoring in these differences, however, there still seems to be a difference in the ultimate decision and the perceived role of the agency in close cases. But, the difference is not so significant that one can conclude that the Bush Administration DOJ has on the whole been lax on merger enforcement, as some critics clearly suggest. As Deborah Feinstein concludes in her article, “[m]any mergers continue to be resolved only after concessions by the parties, and investigative levels remain high. Whatever one’s views about the relative enforcement policies of the Clinton or Bush Administration’s, reports of the complete demise of federal merger enforcement have been exaggerated.<sup>184</sup>

## **V. LOOKING FORWARD: WILL THE ELECTION MAKE A MATERIAL DIFFERENCE IN THE REVIEW OF A PARTICULAR MERGER?**

Given the extensive antitrust expertise that will remain at the agencies, as well as that of the officials that President Obama nominated for leadership positions, it seems unlikely that changes in merger enforcement will occur in any but the closest of decisions and, even then, to the extent that an individual official decides a matter in one direction or another, will most likely be decided not on the existence of any fundamental difference in principles or objectives

but on a difference in how they view the facts and the likely effects of the conduct in the particular matter. But, as pointed out above, the institutional differences between the two agencies, as well as personal enforcement philosophies, may impact decision-making in some specific merger reviews.

Although most of the staff and some of the officials (particularly at the FTC, where Commissioners may serve seven-year terms) will remain, two other developments may—depending on how they evolve—have a greater impact on enforcement postures than even who has been appointed to the leadership roles. The courts' role in merger settlements and challenges is currently evolving. First, depending on the outcome in the two areas discussed below, material differences may exist between the agencies in the process undertaken by each. Second, the court's role could impact the outcome of the cases reviewed and the willingness of both the agencies and the parties to settle.

One of the areas that is currently evolving concerns the judiciary's role in DOJ consents. Any proposed consent with the DOJ must be filed and approved by a federal district court under the Antitrust Procedures and Penalties Act of 1974, commonly known as the "Tunney Act."<sup>185</sup> As originally adopted, the Tunney Act listed factors that "the court may consider;" the Act granted the court the discretion to determine which cases require its examination. Congress amended the Tunney Act in 2004 to mandate that the court consider certain factors, thereby potentially expanding the judicial mandate. Nonetheless, the amendments explicitly indicate that "nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."<sup>186</sup>

An intense debate commenced regarding the meaning of the 2004 amendments when the DOJ sought approval of its proposed final judgments in the SBC/AT&T and Verizon/MCI transactions.<sup>187</sup> When ultimately approving the proposed consent (17 months after the DOJ filed the case), the court found that, in amending the Tunney Act, Congress sought to foreclose "judicial rubber-stamping" but did not intend for the court to reject proposed remedies merely because the court believed other remedies were preferable. The court framed the relevant question as not whether a proposed remedy is the "best one" but whether it is "within the reaches of the public interest."<sup>188</sup> The court also saw its role as ensuring that the consent is written unambiguously, including whether the proposed judgment makes implementation of the judgment manageable and the compliance mechanisms work.<sup>189</sup> We hope that the delay in the approval by the court of these particular settlements will be *sui generis*, due to their being the first major settlements reviewed under the revised Tunney Act in which multiple third parties raised concerns. Otherwise, the willingness of both the DOJ and the transaction parties to settle concerns with a consent may be adversely affected, particularly when compared with the autonomy of the FTC in entering into—and accepting—consents.

A more systemic concern arises in connection with the diverging role of the courts in providing a meaningful role in a merger challenge initiated by the FTC versus the DOJ. When the DOJ challenges a transaction by filing a case in federal district court, the judge decides

whether to grant a preliminary injunction to the merger and ultimately whether the merger is anticompetitive. In contrast, the FTC itself can ultimately decide as part of an administrative proceeding whether the merger is anticompetitive, subject theoretically to appellate court review and, when it brings an action in district court, it is merely seeking a preliminary injunction of the merger pending its review.

In a July 3, 2008 speech, FTC Commissioner J. Thomas Rosch suggests that the FTC “arguably abdicated” its responsibility to judge unfair competition cases—which, he implies, includes merger challenges—and allowed that responsibility to fall onto federal district courts. Commissioner Rosch believes Congress did not originally intend that outcome:

Congress concluded that it was in the public interest to grant this judicial authority to the Commission instead of to the federal district courts. That too is apparent from the language of Section 5(b). Nowhere in that provision is concurrent judicial authority—or any authority to review Commission decisions—given to the federal district courts. To the contrary, the power to review Commission decisions is given exclusively to the federal appellate courts. Again, this was no accident. In proposing the new agency to the House of Representatives, President Wilson expressed skepticism that federal district courts were equipped “to adjust the remedy to the wrong in the way that will meet all other circumstances of the case” and confidence that the Commission could and would do so.<sup>190</sup>

Commissioner Rosch posits that

...for the last five years, the Congressional intent has arguably been turned on its head. First, in Arch Coal, and more recently in the challenges to the Western/Giant and Whole Foods/Wild Oats mergers, federal district courts in Section 13(b) proceedings made the Commission’s likelihood of success on the merits at a plenary trial, instead of the public interest, the ultimate issues. Indeed, in Arch Coal and Whole Foods, the courts essentially turned proceedings on the Commission’s application for a preliminary injunction into plenary trials on the merits.

Yet, the resulting different standards and procedure for FTC-initiated and DOJ-initiated challenges to mergers could well be outcome-determinative in close cases and would no doubt significantly impact the actions of the respective agencies and transaction parties in a material number of transactions. AMC repeatedly noted that any differences—real or perceived—between the FTC and the DOJ in their merger challenges can undermine public confidence:

Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger. A divergence undermines the public’s trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties’ assent to a consent decree... [T]he commission makes three interrelated recommendations for

administrative action and legislative change that, together, will ensure that parties before either agency face comparable procedural approaches and burdens when an injunction is sought, regardless of which agency reviews the merger.

[1] The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties. . . .

[2] Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino act merger cases. . . .

[3] Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and . . . the [DOJ] by amending Section 13(b) of the Federal Trade Commission to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the [DOJ]. . .<sup>191</sup>

Thus, how much deference district courts must give the FTC in merger cases is a critical question, particularly in light of the string of district court losses the FTC has otherwise suffered. Any differences—real or perceived—between the FTC and the DOJ in their merger challenges could undermine public confidence.

## VI. RECOMMENDATIONS FOR THE NEXT ADMINISTRATION

### A. *Procedural Changes*

To build upon the progress of the Bush Administration years, the Obama Administration should consider four procedural changes.

First, the two agencies should be encouraged to enter into a clearance allocation arrangement, thereby eliminating potential uncertainty as to timing and outcome as well as differences in outcome according to which agency ultimately is cleared to investigate the transaction.<sup>192</sup> A clearance agreement would also increase the number of “working days” in the initial waiting period, thereby potentially decreasing the number of second requests even further.

Second, the agencies should offer transaction parties the opportunity to trade off an abbreviated second request in favor of allowing the agencies another opportunity for discovery from the transaction parties in any transaction that is challenged by the agency in court, without coupling it with a prolonged second request waiting period. This step might reduce the incentive for the agencies to issue all-encompassing second requests as well as to permit quicker staff review. Given that almost all transactions are either cleared or resolved through consent,

this alternative path would eliminate the added expense and time built into the process that is the result of treating all transactions as if they were going to be litigated.

Third, a federal magistrate could be designated, instead of a person within each respective agency, to determine appeals concerning second requests, thereby preventing “gaming” of the system by either the transaction parties or agency staff. It is far from clear, however, that including this approach would work in practice.

Fourth, the scope and burden of electronic production should be addressed, particularly at the DOJ, where the technical requirements are more expensive to implement than at the FTC. The ABA recommends the creation of a joint working group to engage in a dialogue regarding these issues.

### ***B. Continuation of Transparency Objectives***

Transparency is a key element to an effective enforcement regime. It is not only important to ensure that the business community and agency staff engage in the most up-to-date methodology in merger analysis, but serves an important role outside the United States in supporting the U.S. leadership role in international policymaking. Accordingly, the next administration should consider periodically issuing brief summaries or digests as to their reasons for not proceeding on significant matters so that the business community could gauge better what arguments are worth developing.

In addition, it has been almost 15 years since the agencies issued their latest Horizontal Merger Guidelines (and 10 years since the efficiencies section was added). The vertical and conglomerate merger discussion in the Guidelines, which were not addressed in 1992, are particularly out-of-date. The ABA and some other well-respected antitrust experts have suggested that the agencies consider whether new, updated merger guidelines would be appropriate at this time.<sup>193</sup> On the other hand, the existing guidelines have achieved widespread acceptance by the courts and foreign authorities and have contributed very substantially to clarifying the analytical path of the agencies in reviewing mergers

As a first step, we recommend that the agencies form a working group that includes members of the bar and possibly workshops to compare prior agency commentary and releases with more recently issued guidelines of other jurisdictions (e.g., the EU and United Kingdom) and economic and business literature to ensure that the views publicly communicated by the agencies reflect current best practices. To the extent that there is a disparity between what has been communicated and current practices or state-of-the-art practice, the agencies could then ensure that these views are publicly communicated.

We do not need to decide at this time whether ultimately new merger guidelines will be advisable to achieve the transparency objectives and leadership role of the United States in lieu of other communications that elaborate on aspects of the current merger guidelines. First, given the process of drafting new guidelines that reflect a consensus view of both agencies, it is by no means clear that such guidelines would provide as complete and accurate of a discussion as



might be achieved through the papers published in connection with a workshop, speeches, press releases, or other working papers of the staff. Moreover, given the considerable time that is likely to lapse before the new guidelines issued, such interpretive communications can fill any perceived gap existing from reference to the existing guidelines. Topics that could be readily addressed through reports and commentaries would be a more comprehensive discussion of the factors suggesting or negating the existence of unilateral and coordinated effects; the appropriate application of the guidelines framework in delineating markets for industries undergoing significant and permanent changes due to convergence of technologies or product/service developments; the application of the guidelines analysis to high-technology markets, including the role and timing of actual and potential entry by the transaction parties and third-parties and the assertion of innovation markets; the role and recognition of buyer power; the significance and measurement of low-sunk-cost entry; the application of the guidelines analysis to bid-markets; and the recognition and role of mavericks.

Also, as discussed *supra*, the focus of the agencies has been primarily on unilateral-effects cases. Part of this reliance has arisen from the use of economics to develop “evidence” based on data and merger simulations in support of such theories. In contrast, the agencies have not developed tools to identify and prove coordinated-effects cases. The agencies may find that focusing on such effects, potentially through the use of merger retrospectives to understand better what market structures and dynamics foster coordinated effects, would provide for a more balanced approach to merger analysis. Indeed, well-designed merger retrospectives could be generally useful to understand what creates and maintains market power, market dynamics, and competitive effects. As former Deputy AAG for Economics Dennis Carlton recently stated,

Imagine that the Federal Reserve Board was trying to control the rate of inflation but did not have access to price statistics. Instead, it relied on opinions of a few non-randomly chosen shoppers about how fast they thought prices were rising. I suspect that the Fed would do a much poorer job of controlling inflation than it now does. Moreover, it is possible that in the absence of reliable quantitative information, monetary policy could be heavily influenced by the ideological views of the people running the Federal Reserve Board. . . . Without quantitative measures of the effectiveness of merger policy and of the accuracy of the government’s analyses underlying merger policy, judgments about the appropriate antitrust policy will be based on qualitative information that can be subject to alternative interpretations. . . . There is a need to gather post-merger industry data and a need to gather the predictions of DOJ merger analysis in order to evaluate whether U.S. policy and analysis can be improved. Strong opinions are not substitutes for quantitative analysis.<sup>194</sup>

FTC Chairman William Kovacic also strongly advocated such retrospective studies in a September 2008 speech.<sup>195</sup> Studies of consummated mergers that were questioned but not challenged, or challenged unsuccessfully, would be useful to determine whether the predicted effects occurred when the predictions were based on certain types of evidence. The ABA Transition Report recommends that the agencies select a sample of prior merger decisions—including both decisions to intervene and decisions to decline enforcement—to assess whether

subsequent developments in the mandates involved justified the decisions. The ABA also suggests that the costs and benefits of consummated merger challenges be assessed separately.<sup>196</sup>

### *C. International Advocacy Is Important*

This section outlines some of the potential measures through which multijurisdictional merger review could be improved and the potential for unnecessary regulatory costs minimized.

Although convergence may not be the silver bullet to achieve successful international merger enforcement, initiatives that help to “mind the gap” among reviewing agencies are a worthwhile endeavor. To a large extent, many of the measures necessary to foster procedural convergence—which would help to reduce burden and inconsistencies—would be met if individual states adopted the thirteen ICN Recommended Practices for merger notification procedures detailed above. The ideal level of substantive convergence is somewhat more difficult to achieve, although the ICN working group on mergers is making progress in this regard. Perhaps the best way to achieve the optimal level of substantive convergence is through the exchange of ideas and the practical experience gained from cooperating with other competition agencies on actual cases.

Convergence need not mean moving towards the most widespread system or the lowest common denominator likely to achieve consensus. Instead, genuine efforts should be made to adopt the very best possible system—even if that means creating a new system. As pointed out by former AAG R. Hewitt Pate, convergence should not follow a “mixing bowl” approach that “blends together a hodgepodge of different standards and processes without any regard for whether some might be more effective or appropriate than others.”<sup>197</sup>

Substantive convergence will not guarantee that agencies will reach the same conclusions. First, there may be differences in factual situations in different markets. Second, there will always remain some scope for justified differences of opinion. Reasonable people applying the same law and the same analysis may reach different conclusions on similar facts.<sup>198</sup> Nor would it be appropriate to use convergence to codify principles that could not evolve over time or that may not be appropriate for all jurisdictions.

The close cooperation existing among antitrust agencies in a number of jurisdictions needs to be encouraged and become even more widespread. When regulators are sufficiently familiar and comfortable with each other simply to pick up the phone and discuss a pending investigation, the risk of divergent decisions is reduced. In particular, when ideas are exchanged at an early stage before opinions have become entrenched, discussions are likely to reduce the risk of conflicting decisions.

Such a relationship of trust and respect will also foster substantive convergence. The use of work-sharing arrangements should be expanded to include an allocation of investigation topics exclusively to the competition authority that has the greatest interest and nexus to the



issue. Waivers could be granted by the parties so that the competition authorities could engage in a dialogue regarding the results of the investigation. In large, complex transactions in which the parties waive confidentiality, it may also be possible for the authority not taking primary responsibility for the investigation to lend a staff member to the investigating authority to work on the particular transaction. During the remedies stage, it could be more efficient and effective to have one competition authority take the lead in seeking a remedy that can take care of all competitive concerns raised in a specific transaction. This should help avoid situations in which remedies imposed in one jurisdiction frustrate those imposed in another jurisdiction or frustrate the achievement of the pro-competitive benefits of the transaction (e.g., synergies, new product innovations) in another jurisdiction. Such an approach is consistent with recommendations in the ICPAC Report.<sup>199</sup> Yet, even some of the major jurisdictions (e.g., EU) currently may lack the discretion to forego exercise of jurisdiction in merger cases. Such restrictions on discretion, however, would not prevent those jurisdictions from accepting commitments that are the same as, or similar to, those offered by the transaction parties in another jurisdiction.

The use of joint studies and roundtable discussions to develop policy is an important way for competition authorities to reach consensus and to develop better tools for analyzing transactions on particular issues. The ICN's Merger Subgroups should continue their initiatives to promote convergence through expansion of such projects as the Merger Guidelines Report. Continued analysis in areas in which there is no widespread consensus is needed. Joint ex post and empirical merger studies to explore such topics as efficiencies, treatment of distressed industries and firms, vertical and conglomerate merger analysis, and remedies may be useful—although they may also be costly to agencies and to businesses if they are required to participate in such studies. Some competition authorities have undertaken ex post studies of mergers, including those in which the transaction parties were required to provide remedies and others are currently in the process of doing so.

Ex post studies are important to the evolution of effective competition enforcement and striking the right balance between private and public interests. The results of such studies should be shared publicly to the extent consistent with confidentiality provisions, so that the business community can make informed decisions regarding mergers and acquisitions activity. The methodology and results of such studies should also be discussed among competition authorities and refined in subsequent studies.

Principles of international law, such as territorial sovereignty and proportionality, also can provide useful guiding considerations for competition authorities in order to ensure that one jurisdiction does not unintentionally thwart the enforcement scope of other jurisdictions. Such principles form the underpinnings for comity. The U.S.-EU Best Practices recognize the role of the enforcement agencies in avoiding the potential for harm as a result of conflicting remedies. In most instances, the exercise of comity principles is an exercise of prosecutorial discretion. The United States indicates, “[t]he agencies will listen to the views of foreign agencies regarding particular remedies and, provided that competition concerns in the U.S. market are addressed, will make efforts to accommodate the interests of foreign governments.

The FTC has in at least one nonpublic matter benefited from a remedy obtained by a foreign agency that addressed completely the competition concerns in the United States so that the FTC did not have to bring its own enforcement action.<sup>200</sup> The U.S. agencies should consider adopting guidelines for determining when to apply comity principles to avoid inconsistent enforcement action and to achieve greater convergence in competition laws at both the bilateral and multilateral levels. Thresholds should be adopted so mergers that lack sufficient nexus to a particular jurisdiction are not subject to notification.

The development of best practices should continue to be undertaken, including by some of the multinational organizations, such as ICN, European Competition Network (“ECN”) and OECD to foster the convergence discussion where the regulatory burdens are felt most acutely by transaction parties and perhaps can be most practically addressed; focusing particularly on remaining issues of procedural divergence such as market share tests, timing, rights of parties to information and the opportunity to be heard, meaningful oversight of the investigating agency, and rights of appeal. Greater transparency, including more information published on analysis in individual cases, helps to foster substantive convergence. The focus should continue to be on implementation by jurisdictions of the best practices adopted by the ICN, OECD, and ECN, and through bilateral and multilateral cooperation agreements. In addition, peer-review proceedings of organizations such as OECD could include as part of their investigation and review such topics as the authorities’ willingness and ability to work cooperatively with other jurisdictions, as well as their consideration of comity principles.

In addition, the U.S. should consider the potential of expanding its existing bilateral arrangements to include some of the more important emerging economies, such as China and India. Other soft convergence can be achieved through staff exchanges and training assistance between agencies. The private sector can encourage such convergence through waivers that facilitate the exchange of information and analysis among the reviewing agencies.

Finally, it is critical that the U.S. agencies devote resources to capacity-building among the various jurisdictions that belong to the ICN and OECD, including by remaining active in the ICN’s work on unilateral conduct, merger review procedure and analysis, and cartels, and in various training workshops, as well as the OECD Competition Committee’s substantive roundtables and peer reviews.<sup>201</sup> The technical assistance provided by the agencies to staff attorneys internationally should be continued, and assistance should be expanded to include more training on economic theory and practice in antitrust enforcement.

#### D. Investment in Agency Staff Is Important

As noted by both the ABA Transition report and the AAI Report, the trial capabilities of the agency staff are important to the effectiveness of federal antitrust enforcement.<sup>202</sup> The ABA recommends that the agencies should consider: (1) implementing a “best practices” standard to prepare lawyers to try cases and to remain trial-ready through the sharing of information and programs; (2) designating as “senior trial counsel” a limited number of experienced staff lawyers who would actively supervise trial preparation; and (3) in exceptional circumstances

and on a case-by-case basis, retain outside antitrust counsel to prepare or try cases. We endorse all three recommendations and also urge the ABA and other organizations to offer litigation training programs that will be accessible to government lawyers, in order to assist the agencies in the development of their staffs' capabilities.

## VII. CONCLUSION

From a competition policy standpoint, the Bush Administration antitrust agencies continued many of the initiatives of the prior administrations and achieved significant improvements in both their merger review process and transparency, as well as their leadership role in international competition fora. The agencies were busy for most of the Bush Administration years in reviewing specific transactions and, as indicated above, challenging those transactions in which a second request was warranted. The agencies also continued to develop and test economic theories and tools. Staff were expected to engage in a robust review of the entire body of evidence and to engage in a meaningful dialogue with the parties regarding the merits as well as possible remedies. Nevertheless, the perception of some observers was that the Bush Administration (particularly the DOJ) was lax in its merger enforcement. The hype surrounding the likely increase in merger enforcement under the Obama Administration should eliminate from the discussion any perceptions—right or wrong—that mergers will not be reviewed and, where concerns arise, challenged, either in court or by requiring that the parties remedy the concerns. The Obama Administration would be well served by continuing and building upon the internal and external procedures developed by the Bush Administration rather than in any way drastically changing the course.

**Appendix A: Summary of Transactions by Fiscal Year (FY)<sup>203</sup>**

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u> <u>204</u>
<b>Reported Transactions</b>	2,305	2,816	3,087	3,702	4,728	4,642	4,926	2,376	1,187	1,014	1,454	1,695	1,768	2,201	1,761
<b>Adjusted Transactions<sub>204</sub></b>	2,128	2,612	2,864	3,438	4,575	4,340	4,749	2,237	1,142	968	1,377	1,610	1,746	2,108	1,659
<b>Number of Preliminary Investigations</b>	362	378	510	516	452	391	339	262	209	231	236	203	304	296	305
<b>Number of Second Requests</b>	73	101	99	122	125	113	98	70	49	35	35	50	45	63	41
<b>% of Adjusted Transactions Investigated</b>	17%	14%	18%	15%	10%	11%	7%	12%	18%	24%	17%	13%	17%	13%	18%
<b>% of Adjusted Transactions with Second Requests</b>	3.5%	3.8%	3.5%	3.5%	2.7%	2.6%	2.1%	3.1%	4.3%	3.6%	2.5%	3.1%	2.6%	2.9%	2.5%
<b>% of Investigated Transactions with Second Requests</b>	20%	27%	19%	24%	28%	29%	29%	27%	23%	15%	15%	25%	15%	21%	13%

## Appendix B: Agency Enforcement Record

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008 ccv
<b>Second Requests (Total)</b>	73	101	99	122	125	113	98	70	49	35	35	50	45	63	41
<b>Number resulting in challenges, consents, restructurings, etc.</b>	44	51	57	59	84	77	80	55	34	35	24	18	32	38	34
<b>% resulting in challenges, etc.</b>	60%	50%	58%	48%	67%	68%	82%	79%	69%	100%	69%	36%	71%	60%	83%
<b>% of adjusted transactions challenged</b>	2.06 %	1.95 %	1.99 %	1.72 %	1.84 %	1.77 %	1.68 %	2.46 %	2.97 %	3.62 %	1.74 %	1.11 %	1.83 %	1.80 %	2.04 %
<b>DOJ (Second Request)</b>	27	43	63	77	79	68	55	43	22	15	15	25	17	32	20
<b>Number of Preliminary Investigations</b>	126	108	210	263	174	173	150	123	85	83	94	120	101	95	103
<b>% of Investigations to second requests</b>	21%	40%	30%	29%	45%	39%	37%	35%	26%	18%	16%	21%	17%	33%	10%
<b>Number resulting in challenges, consents, restructurings, etc.</b>	22	18	30	31	51	47	48	32	10	15	9	4	16	21	15
<b>% second requests resulting in challenges, etc.</b>	81%	42%	48%	40%	64%	69%	87%	74%	45%	100%	60%	16%	17%	66%	75%
<b>% of investigated transactions challenged</b>	17.5 %	16.7 %	14.3 %	11.8 %	29.39 %	27.2 %	32%	26%	11.8 %	18.1 %	9.6%	3.3%	15.8 %	22.1 %	14.6 %
<b>FTC (Second Requests)</b>	46	58	36	45	46	45	43	27	27	20	20	25	28	31	21
<b>Number of Preliminary Investigations</b>	236	270	300	253	278	218	189	131	124	148	142	183	203	201	202
<b>% of Investigations to second requests</b>	19%	21%	12%	18%	17%	21%	23%	21%	22%	14%	14%	14%	14%	15%	10%
<b>Number resulting in challenges, consents, restructurings, etc.</b>	20	33	27	28	33	30	32	23	24	20	15	14	16	22	19
<b>% second requests resulting in challenges, etc.</b>	43%	57%	75%	62%	72%	66%	74%	85%	88%	100%	75%	56%	57%	71%	90%
<b>% of investigated transactions challenged</b>	8.5%	12.2%	9%	11.07 %	11.9%	13.8%	16.9%	17.6%	19.4%	13.5%	10.6%	7.7%	7.9%	10.9%	9.4%

### Appendix C: Transactions Below \$50 Million Threshold

	1994	1995	1996	1997	1998	1999	2000	TOTAL
HSR Adjusted Transactions	906	1,420	1,550	1,761	2,398	2,163	2,247	12,445
% total adjusted transactions	43%	54%	54%	48%	52%	56%	47%	N/A
Number investigated	98	126	260	172	144	124	89	953
% of investigated transactions	27%	23%	39%	33%	32%	32%	26%	N/A
Number of second requests	19	24	31	27	27	17	22	167
Percentage of second requests	27%	24%	31%	22%	22%	15%	22%	

### Appendix D: Type of Transactions

Year	LBOs	PE	Communications	Paper	Grocery	Petro	Pharma	Banks	Chemical
1996	223	389	394	108	245	472	106	694	247
1997	232	480	416	95	227	540	108	554	235
1998	210	524	441	76	226	472	97	540	221
1999	240	597	539	67	173	329	94	408	196
2000	377	732	644	53	151	270	102	328	224
2001	198	475	424	38	125	232	95	298	149
2002	216	528	329	35	94	288	91	224	127
2003	188	716	309	42	137	357	148	306	194
2004	346	991	321	44	138	406	130	312	152
2005	497	1,248	288	55	130	448	119	217	174
2006	688	1,565	283	57	169	597	132	290	206
2007	693	1,734	324	66	211	590	125	272	212
2008	349	897	151	31	117	371	92	121	140

Source: Thomson Financial SDC Platinum

<sup>1</sup>See Jonathan B. Baker and Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, prepared for the Kirkpatrick Conference on Conservative Economic Influence on U.S. Antitrust Policy, Georgetown University Law Center (April 2007) (revised October 2007) (“Baker/Shapiro Study”), available at <http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf>; Dennis Berman, *The Game: Handicapping Deal Hype and Hubris*, WALL ST. J. (Jan. 16, 2007) at C1; Jonathan B. Baker and Carl Shapiro, *Detecting and Revising the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST 29 (Summer 2008) (“Baker/Shapiro Antitrust Article”); George Cary, *Current Merger Enforcement: A House Divided Cannot Stand on a One Legged Stool* (Nov. 15, 2007) (“Cary Article”) at 3; American Antitrust Institute, *The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44<sup>th</sup> President*, Vandepas Publishing (Sept. 2008) (“AAI Report”) at 155; James Langerfeld & Daniel R. Shulman, *The Future of U.S. Federal Antitrust Enforcement – Learning from Past and Current Influences*, 8 SEDONA CONF. J. 1, 5 (2007) (concludes that the DOJ opened fewer merger investigations during the GW Bush Administration; although the decline in the issuance of second requests could reflect either a decline in enforcement or improved Bush efficiency in enforcement agency operations, other statistics show that



enforcement has declined). *But see* Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003*, available at <http://www.ftc.gov/os/2005/02/0502economicissues.pdf> (a study that reviewed internal FTC staff merger memoranda concluded that the FTC's review standards did not vary between administrations).

<sup>2</sup>See Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, 22 ANTITRUST 37 (Summer 2008) ("Muris Article").

<sup>3</sup>Many of our suggestions are substantially the same as the recommendations expressed by the ABA Section of Antitrust Law in its recently released 2008 Transition Report see ABA, American Bar Association Section of Antitrust Law 2008 Transition Report (Nov. 2008) ("ABA Transition Report"), available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf> and the final report of the Antitrust Modernization Commission, Antitrust Modernization Commissions Report of Recommendations (April 2007) ("AMC Report"), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

<sup>4</sup>See DOJ, Merger Review Process Initiative (Oct. 12, 2001; revised Aug. 4, 2004), available at <http://www.usdoj.gov/atr/public/204895.htm>; FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period ("FTC Voluntary Submission Guide"), available at <http://www.ftc.gov/bc/hsr/hsrguidance.shtm>. These initiatives were subsequently revised, most notably by the DOJ in 2006, to offer additional limitations on searches if the transaction parties agree to an investigation schedule and to a set time period for the DOJ to conduct post-complaint discovery should the investigation result in contested litigation. *See* DOJ, Merger Review Process Initiative (revised Dec. 14, 2006) ("DOJ Merger Initiative"), available at <http://www.usdoj.gov/atr/public/220237.htm>. Unfortunately, only one company has utilized this option to date. *See* Thomas O. Barnett, Current Issues in Merger Enforcement: Thoughts on Theory Litigation Practice, and Retrospective (June 26, 2008) ("Barnett June 26, 2008 Remarks"), available at <http://www.usdoj.gov/atr/public/speeches/234537.htm>.

<sup>5</sup>See, e.g., FTC & DOJ, ANNUAL REPORT TO CONGRESS, FISCAL YEAR 2006 (2007), available at <http://www.ftc.gov/reports/hsr06/>.

<sup>6</sup>See, e.g., In the Matter of Agrium Inc., Docket No. C-4219 (May 5, 2008), available at <http://www.ftc.gov/os/caselist/0810073/index.shtm>.

<sup>7</sup>See J. Robert Kramer, II, Director of Operations, Antitrust Div., DOJ, Merger Review Process Retrospective (Nov. 14, 2008) ("Kramer Speech").

<sup>8</sup>See Cecile Kohrs Lindell, *Merger filings plummet*, THE DEAL (Nov. 14, 2008).

<sup>9</sup>See FTC, Federal Trade Commission Strategic Plan, Fiscal Years 2006-2011 (Sept. 30, 2006), available at <http://www.ftc.gov/opp/gpra/spfy06fy11.pdf>.

<sup>10</sup>See FTC, Introductory Guide III to the Premerger Notification Program (July 2006), available at <http://www.ftc.gov/bc/hsr/introguides/guide3.pdf>.

<sup>11</sup>See FTC, Reforms to the Merger Review Process (Feb. 16, 2006) at 5, available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>. *See* DOJ, Press Release, Antitrust Division Announces Amendments to Its 2001 Merger Review Process Initiative (Dec. 15, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/220302.htm](http://www.usdoj.gov/atr/public/press_releases/2006/220302.htm).

<sup>12</sup>See David L. Meyer, Deputy Assistant Attorney Gen., Antitrust Div., DOJ, Merger Enforcement Is Alive and Well at the Department of Justice (Nov. 15, 2007) ("Meyer Speech"), available at <http://www.usdoj.gov/atr/public/speeches/227713.htm>.

<sup>13</sup>See Kramer Speech at 13.

<sup>14</sup>See Public Law 106 – 553.

<sup>15</sup>See DOJ, Second Request Internal Procedure (Revised Jun. 2001), available at <http://www.usdoj.gov/atr/public/8430.htm>; 16 C.F.R. § 2.20 (2008).

<sup>16</sup>There is only one reported case in which one of the enforcement agencies challenged a transaction party's failure to comply with a second request, and the ultimate decision does not include any substantive discussion. *See* FTC v. McCormick & Co., 1988-1 Trade Cas. (CCH) ¶ 67,976 (D.D.C. 1988).

<sup>17</sup>See In re Omnicare, Inc./NeighborCare, Inc., File No. 041-0146 (FTC June 16, 2005) (statement of the Commission), available at <http://www.ftc.gov/os/caselist/0410146/050616stmtcomm0410146.pdf>; DOJ, Press Release, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Chicago Mercantile Exchange Holdings Inc.'s Acquisition of CBOT Holdings Inc. (June 11, 2007), available at [http://www.usdoj.gov/opa/pr/2007/June/07\\_at\\_422.html](http://www.usdoj.gov/opa/pr/2007/June/07_at_422.html) (the merger parties were not uniquely situated to enter into each other's markets; NYSE/Euronext announced intention to offer futures products, and IntercontinentalExchangeCbot intends to offer interest rate futures). Moreover, entry may have played an important mitigating role in the DOJ's clearance of the Blackboard/WebCT transaction in late 2005 without a second request and the FTC's clearance of the Seagate/Maxtor transaction. No statements, however, were issued in either of these transactions confirming the basis for the clearance.

<sup>18</sup>See DOJ, Press Release, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Airlines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/238849.htm](http://www.usdoj.gov/atr/public/press_releases/2008/238849.htm); DOJ, Press Release, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008) ("XM Press Release"), available at [http://www.usdoj.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html); DOJ, Press Release,

Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Joint Venture Between SABMiller plc and Molson Coors Brewing Company (Jun. 5, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/233845.htm](http://www.usdoj.gov/atr/public/press_releases/2008/233845.htm); DOJ, Press Release, Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215326.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm); DOJ, Press Release, Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the America West / US Airways Investigation (June 23, 2005), available at <http://www.usdoj.gov/opa/pr/2005/June/05at338.htm>. Efficiencies also constituted one of the reasons cited by DOJ for clearing the NewsMedia acquisition of certain Knight Ridder newspapers from McClatchy and for not requiring additional relief in the SBC/AT&T and Verizon/MCI transactions. See *United States v. SBC Commc'ns, Inc.*, No. 05-2102 (D.D.C. Oct. 27, 2006) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f212400/212424.pdf>; *United States v. Verizon Commc'ns, Inc.*, No. 05-2103 (D.D.C. Oct. 27, 2006) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f212400/212433.pdf>.

<sup>19</sup>See XM Press Release; *United States v. SBC Commc'ns, Inc.*, Civil Action No. 1:05CV02102 (D.D.C. Nov. 16, 2005) (competitive impact statement) ("SBC Competitive Impact Statement"), available at <http://www.usdoj.gov/atr/cases/f213000/213026.htm>; *United States v. Verizon Commc'ns, Inc.*, Civil Action No. 1:05CV02103 (D.D.C. Nov. 16, 2005) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f213000/213028.htm>; In re Federated Department Stores, Inc./The May Department Stores Company, File No. 051-0111 (FTC Aug. 30, 2005) (statement of the Commission), available at <http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf>.

<sup>20</sup>See DOJ, Press Release, Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215326.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm); *United States v. SBC Commc'ns, Inc.*, Civil Action No. 1:05CV02102 (D.D.C. Nov. 16, 2005) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f213000/213026.htm>. Although the DOJ did not issue a statement when it cleared Blackboard Inc.'s purchase of WebCT, Inc. or the FTC when it cleared Seagate Technology's purchase of Maxtor Corporation, it appears that in both cases the reviewing agency concluded that final equipment manufacturers had sufficient market power to defeat any attempts by manufacturers following those two transactions to exercise market power. Press Release, Blackboard Inc., Blackboard and WebCT Announce Agreement to Merge (Oct. 12, 2005), available at <http://www.blackboard.com/company/press/release.aspx?id=767025>; Press Release, Seagate Technology, Seagate Technology to Acquire Maxtor Corporation (Dec. 21, 2005), available at [http://www.seagate.com/www/v/index.jsp?locale=en-US&name=Seagate\\_Technology\\_To\\_Acquire\\_Maxtor\\_Corporation&vgnnextoid=1e8a814fef83e010VgnVCM100000dd04090aRCRD](http://www.seagate.com/www/v/index.jsp?locale=en-US&name=Seagate_Technology_To_Acquire_Maxtor_Corporation&vgnnextoid=1e8a814fef83e010VgnVCM100000dd04090aRCRD).

<sup>21</sup>See, e.g., In re Google Inc., File No. 071-0101, (FTC Dec. 20, 2007) (statement), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf> (staff reportedly conducted over 100 interviews, and obtained more than two million pages of documents from the parties, as well as the records of documents from third parties).

<sup>22</sup>See Royal Caribbean, Press Release, P&O Princess Cruises plc and Royal Caribbean Cruises Ltd. Combine to Create the World's Largest Cruise Vacation Group (Nov. 20, 2001), available at <http://www.royalcaribbean.com/ourCompany/pressCenter/pressReleases/info.do?sessionId=0000SF3DMZwI43xtvwDmLdO75FL:13hldil87?prDate=11-20-2001&prCode=B>, <http://www.royalcaribbean.com/ourCompany/pressCenter/pressReleases/info.do?sessionId=0000SF3DMZwI43xtvwDmLdO75FL:13hldil87?prDate=11-20-2001&prCode=C> and <http://www.royalcaribbean.com/ourCompany/pressCenter/pressReleases/info.do?sessionId=0000SF3DMZwI43xtvwDmLdO75FL:13hldil87?prDate=11-20-2001&prCode=D>.

<sup>23</sup>See Adrian Sainz, *Carnival in Hostile Bid for Princess*, JUNEAU EMPIRE ONLINE NEWS (Dec. 18, 2001), available at [http://www.juneauempire.com/stories/121801/sta\\_carnivalcruise.shtml](http://www.juneauempire.com/stories/121801/sta_carnivalcruise.shtml).

<sup>24</sup>See FTC, Press Release, Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc (Oct. 4, 2002) ("FTC Carnival Statement"), available at [www.ftc.gov/os/2002/10/cruisestatement.htm](http://www.ftc.gov/os/2002/10/cruisestatement.htm).

<sup>25</sup>See James Kanter, DJ EU Clearance Leaves Cruise Rivals Looking to US Regulators (July 24, 2002).

<sup>26</sup>Confidentiality waivers by the parties facilitated the information-sharing that allowed the agencies to conduct parallel analyses and arrive at compatible solutions to the competition issues.

<sup>27</sup>See FTC Carnival Statement.

<sup>28</sup>*Id.*; See also David Scheffman, Director, Bureau of Economics, FTC, Cruise Investigation: Empirical Economics, Financial Analyses (Nov. 2002), available at [www.ftc.gov/be/hilites/ftcabrownbag.pdf](http://www.ftc.gov/be/hilites/ftcabrownbag.pdf).

<sup>29</sup>*Id.*

<sup>30</sup>See FTC Carnival Statement; Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, Royal Caribbean/Princess and Carnival/Princess (Oct. 4, 2002), available at [www.ftc.gov/os/2002/10/cruisedissent.htm](http://www.ftc.gov/os/2002/10/cruisedissent.htm).

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>See Simons Carnival Speech at 11.

<sup>34</sup>In July 2006, the FCC also approved this transaction, with conditions, Federal Communications Commission, In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and

subsidiaries, debtors-in-possession), to Time Warner Cable Inc. et al. (memorandum opinion and order) (July 21, 2006), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-105A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-105A1.pdf).

<sup>35</sup>See, e.g., *The Bon-Ton Stores, Inc. v. The May Dep't Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994).

<sup>36</sup>See FTC, Press Release, FTC Issues Statement on Closure of Federation/May Investigation (Aug. 30, 2005), available at [www.ftc.gov/opa/2005/08/federatedmay.htm](http://www.ftc.gov/opa/2005/08/federatedmay.htm).

<sup>37</sup>*Id.*

<sup>38</sup>Several states disagreed with this analysis, however, and entered into consents with the transactions parties requiring the divestiture of select stores consistent with a narrow market definition.

<sup>39</sup>See *In re Google Inc.*, File No. 071-0101 (Dec. 20, 2007) (statement), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

<sup>40</sup>On March 11, 2008, the EU approved the transaction without any conditions. See Press Release, European Union, Mergers: Commission clears proposed acquisition of DoubleClick by Google (Mar. 11, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426>.

<sup>41</sup>See DOJ, Press Release, Statement of the Department of Justice's Antitrust Division Regarding its Investigation of Hearst Corporation's Proposed Acquisition of Tracking Stock in MediaNews Group Inc. (Oct. 25, 2007), available at [http://www.usdoj.gov/opa/pr/2007/October/07\\_at\\_853.html](http://www.usdoj.gov/opa/pr/2007/October/07_at_853.html).

<sup>42</sup>See DOJ, Press Release, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008) ("XM Press Release"), available at [http://www.usdoj.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html).

<sup>43</sup>See XM Press Release.

<sup>44</sup>See DOJ, Press Release, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Joint Venture Between SABMiller plc and Molson Coors Brewing Company (Jun. 5, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/233845.htm](http://www.usdoj.gov/atr/public/press_releases/2008/233845.htm).

<sup>45</sup>See FTC, Transcript, Unilateral Effects Analysis and Litigation Workshop (Feb. 12, 2007), available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/transcripts/021208\\_sess1.pdf](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/021208_sess1.pdf).

<sup>46</sup>See FTC, Press Release, FTC and DOJ Plan Analysis of Past Merger Enforcement Cases (Nov. 18, 2003), available at <http://www.ftc.gov/opa/2003/11/mergercases.shtm>. The AAI Report indicates that, since 1996, 72 percent of the FTC's merger enforcement actions came only when the post-merger HHI reached 2400 or more, and when there were deltas of over 500. AAI Report at 157. The AAI Report further states that, at the FTC, mergers generally become close calls only when they reduce the number of significant firms from four to three; with more firms, enforcement is less frequent. Industry-specific patterns that align with this general pattern exist at both agencies. See AAI Report at 157.

<sup>47</sup>On October 21, 2004, the DOJ issued a merger remedies guide to provide the public "with an understanding of the Division's analytical framework for and implementing relief in merger cases." See DOJ, Press Release, Antitrust Division Issues Merger Remedies Guide (Oct. 21, 2004), available at [http://www.usdoj.gov/atr/public/press\\_releases/2004/205912.htm](http://www.usdoj.gov/atr/public/press_releases/2004/205912.htm).

<sup>48</sup>See FTC, Horizontal Merger Investigation Data, Fiscal Years 1996-2007 (2008), available at <http://www.ftc.gov/opa/2008/12/horizmerger.shtm>. In 2007, the FTC had issued additional data through FY 2005, available at <http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf>. In late 2003, the FTC and the DOJ published a report summarizing data on market structure for the horizontal mergers they opposed during FY 1999-2003. See FTC, DOJ, Merger Challenges Data, FY 1999-2003 (Dec. 18, 2003), available at <http://www.ftc.gov/os/2003/12/mdp.pdf>. During 2004, the FTC published a similar report on nearly all mergers it had investigated through the issuance of a second request in FY 1996-2003. See FTC, Horizontal Mergers Investigation Data, FY 1996-2003 (Aug. 31, 2004), available at <http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf>. The data show that, during the relevant time period, the FTC has rarely challenged a merger unless the post-merger HHI exceeded 2,400 and the HHI increase was greater than 500 points. The judge in the Arch Coal decision took note of the publicly released statistics.

<sup>49</sup>See FTC, DOJ, Commentary on the Horizontal Merger Guidelines, available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>; FTC, Press Release, FTC, DOJ Issue Joint Commentary on the Horizontal Merger Guidelines (March 27, 2006) ("Commentary"), available at <http://www.ftc.gov/opa/2006/03/mergercom.htm>. The Commentary is the latest elaboration on current enforcement standards.

<sup>50</sup>See FTC, FAQs on Merger Remedies (March 2002), available at <http://www.ftc.gov/bc/mergerfaq.shtm>.

<sup>51</sup>See FTC, Bureau of Economics, Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations (Nov. 7, 2002), available at <http://www.ftc.gov/be/ftcbebp.pdf>.

<sup>52</sup>See FTC, Bureau of Competition, Statement of the Federal Trade Commission's Bureau of Competition on Guidelines for Merger Investigations (Dec. 11, 2002), available at [www.ftc.gov/os/2002/12/bcguidelines0212\\_11.htm](http://www.ftc.gov/os/2002/12/bcguidelines0212_11.htm).

<sup>53</sup>See FTC, Bureau of Competition, Guidelines for Negotiating Merger Remedies (Apr. 2, 2003), available at [www.ftc.gov/opa/2003/04/mergerremedies.htm](http://www.ftc.gov/opa/2003/04/mergerremedies.htm).

<sup>54</sup>See William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309 (2003).

<sup>55</sup>Case No. COMP/M2220, Gen. Elec./Honeywell, Commission Decision of 3 July 2001, aff'd, Cases T-209 and 210/01, *Honeywell Int'l v. Comm'n and Gen. Elec. v. Comm'n*, 2005 E.C.R. II-5575 (2005). See, e.g., William J. Kolasky, Deputy Ass't Att'y Gen., DOJ, Antitrust Div., *Conglomerate Mergers and Range Effects: It's a long way from Chicago to Brussels*, Address before George Mason University Symposium (Nov. 9, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9536.htm>; See also Alec Burnside, *GE, Honey, I Sunk the Merger*, 2002 EUR. COMPETITION L. REV. 107.

<sup>56</sup>See FTC, Press Release, E.U. Meet to Discuss Continuing Antitrust Cooperation (Sept. 24, 2001), available at <http://www.ftc.gov/opa/2001/09/muris.shtm>; See Press Release IP/01/1795, *supra* note 11.

<sup>57</sup>See FTC, Press Release, United States and European Union Antitrust Agencies Issue "Best Practices" for Coordinating Member Reviews (Oct. 30, 2002), available at <http://www.ftc.gov/opa/2002/10/euguidelines.shtm>.

<sup>58</sup>See US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (2002), available at <http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm>.

<sup>59</sup>*Id.*

<sup>60</sup>See DOJ, Antitrust Cooperation Agreements, available at [http://www.usdoj.gov/atr/public/international/int\\_arrangements.htm](http://www.usdoj.gov/atr/public/international/int_arrangements.htm).

<sup>61</sup>See Sheridan Scott, "C" for Competition: How We Get Things Done in a Globalized Business World (June 17, 2005), [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/insight%20speech\\_eng.pdf/\\$file/insight%20speech\\_eng.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/insight%20speech_eng.pdf/$file/insight%20speech_eng.pdf).

<sup>62</sup>See Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 917 (2002-03).

<sup>63</sup>Examples of mergers where close coordination and cooperation between the reviewing agencies took place include Case No. COMP/M.1378, Hoechst/Rhône Poulenc, Commission Decision of 30 Jan. 2004; Case No. COMP/M.2922, Pfizer/Pharmacia, Commission Decision of 27 Feb. 2003; Case No. COMP/M.2972, DSM/Roche Vitamins, 2004 O.J. (L 82) 73; Case No. COMP/M.3354, Sanofi-Synthelabo/Aventis, Commission Decision of 26 Apr. 2004; Case No. COMP/M.3280, Air France/KLM, Commission Decision of 11 Feb. 2004; Case No. COMP/M.3225, Alcan/Pechiney (II), Commission Decision of 29 Sept. 2003; Case No. COMP/M./3083, GE/Instrumentarium, 2004 O.J. (L 109) 1; Case No. COMP/M.3333, Sony/BMG, 2005 O.J. (L 62) 30; Case No. COMP/M.3216, Oracle/PeopleSoft, 2005 O.J. (L 218) 6; Case No. COMP/M.4242, Thermo Electron/Fisher Scientific, Commission Decision of 9 Nov. 2006; and Case No. COMP/M.4141, Linde/BOC, Commission Decision of 6 June 2006. See FTC, Press Release, *FTC Challenges Owens Corning's Acquisition of Saint Gobain Assets* (Oct. 26, 2007) (FTC investigated cooperatively with the EU and Mexican competition authorities), available at <http://www.ftc.gov/opa/2007/10/corning.shtm>. See also DOJ, Press Release, *Justice Department Requires Thomson to Sell Financial Data and Related Assets in Order to Acquire Reuters* (Feb. 19, 2008) ("This resolution by the Antitrust Division, the European Commission, and the Canadian Competition Bureau is an example of effective cooperation in global competition enforcement[.]"), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/230250.pdf](http://www.usdoj.gov/atr/public/press_releases/2008/230250.pdf); Eur. Comm'n, Press Release IP/08/260, *Mergers: Commission Clears Acquisition of Reuters by Thomson Subject to Conditions* (Feb. 19, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/260>; Canadian Competition Bureau, Press Release, *Competition Bureau Clears Thomson Acquisition of Reuters* (Feb. 19, 2008), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02574e.html>. In contrast, as also noted in ICN's Merger Remedies Review Project, in the EC's review of the Shell/BASF joint venture (Case No. COMP/M.1751, Commission Decision of 29 Mar. 2000), which entailed all of their worldwide polypropylene and polyethylene interests, the EU "could have usefully coordinated much earlier with the U.S. authorities, i.e., during the investigation phase when assessing the remedy. . . ." ICN Mergers Working Group, Analytical Framework Subgroup, *Merger Remedies Review Project* 29 (2005) ("Merger Remedies Review Project").

<sup>64</sup>See, e.g., Thomson/Reuters disclosed *supra*; FTC, Press Release, *FTC Settlement Would Preserve Competition in U.S. Market for Fluoropolymer Resins* (May 2, 2002) (Solvay/Montedison-Ausimont) (coordination between EU and FTC to design a uniform remedy), available at <http://www.ftc.gov/opa/2002/05/solvayausimont.shtm>.

<sup>65</sup>The OECD has provided for cooperation between member countries in the enforcement of their national competition laws since 1967. See ICN, *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedures* 4 (2005) ("ICN Implementation Report") See also J. William Rowley & A. Neil Campbell, *Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report*, 5 BUS. L. INT'L 110 (2004).

<sup>66</sup>See OECD, Recommendation of the Council on Merger Review, C (2005) 34 (Mar. 23, 2005).

<sup>67</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., *Dynamic Efficiencies in Merger Analysis*, OECD Doc. No. DAF/COMP(2007)41, 2008, available at <http://www.oecd.org/dataoecd/53/22/40623561.pdf>.

<sup>68</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., *Vertical Mergers*, OECD Doc. No. DAF/COMP(2007)41, 2008, available at <http://www.oecd.org/dataoecd/24/49/39891031.pdf>.

<sup>69</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., *Competition in Bidding Markets*, OECD Doc. No. DAF/COMP(2006)31, 2006, available at <http://www.oecd.org/dataoecd/44/1/38773965.pdf>.

<sup>70</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., *Barriers to Entry*, OECD Doc. No. DAF/COMP(2005)42, 2005, available at <http://www.oecd.org/dataoecd/43/49/36344429.pdf>.



<sup>71</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., Competition on the Merits, OECD Doc. No. DAF/COMP(2005)27, 2005, available at <http://www.oecd.org/dataoecd/7/13/35911017.pdf>.

<sup>72</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., Merger Remedies, OECD Doc. No. DAF/COMP(2004)21, 2004, available at <http://www.oecd.org/dataoecd/61/45/34305995.pdf>.

<sup>73</sup>See OECD, Directorate for Financial and Enterprise Affairs, Competition Comm., Media Mergers, OECD Doc. No. DAF/COMP(2003)16, 2003, available at <http://www.oecd.org/dataoecd/15/3/17372985.pdf>.

<sup>74</sup>See ICN, Memorandum from the ICN on the Establishment and Operation of the International Competition Network, available at <http://www.internationalcompetitionnetwork.org/media/library/mou.pdf>.

<sup>75</sup>See ICN, Merger Working Group, 2007-2008 Work Plan, available at [http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger\\_Working\\_Group\\_2007-2008wp.pdf](http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_Working_Group_2007-2008wp.pdf).

<sup>76</sup>The Analytical Framework for Merger Review and Investigative Techniques Subgroups were recently combined into one subgroup: the Merger Investigation and Analysis Subgroup. See ICN, Mergers Working Group, 2005-2006 Subgroup Draft Work Plans (2005), available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_4thbonn\\_2005/Mergers2005-06\\_Work\\_Plan.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_4thbonn_2005/Mergers2005-06_Work_Plan.pdf).

<sup>77</sup>See ICN, Merger Working Group, Guiding Principles for Merger Notification and Review (2002) (hereinafter, Principles for Merger Notification and Review), available at <http://www.internationalcompetitionnetwork.org/media/archive0611/icnnpguidingprin.htm>.

<sup>78</sup>See ICN, Merger Working Group, Recommended Practices for Merger Notification Procedures (2003) (hereinafter, Recommended Practices for Merger Notification Procedures), available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf>.

<sup>79</sup>See ICN, Merger Working Group, Notification and Procedure Subgroup, Report on the Costs and Burdens of Multijurisdictional Merger Review (2004), available at <http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf>.

<sup>80</sup>The first three Recommended Practices were adopted at the ICN's Annual Conference in Naples in September 2002. See Konrad von Finckenstein, *International Antitrust Policy and the International Competition Framework*, INTERNATIONAL ANTITRUST LAW AND POLICY 37 (2002 Fordham Corp. L. Inst., Barry E. Hawk ed., 2003). The next four were adopted at the Annual Conference in Merida in June 2003. See Fernando Sanchez Ugarte, Chairman, ICN Steering Group, Presentation at the 2004 Antitrust Conference, New York (Mar. 4, 2004). The last four were adopted at the Annual Conference in Seoul in April 2004. See ICN, Press Release, New Merger Review Standards Issued by International Competition Network (Apr. 22, 2004), available at <http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2004/04/22/7>. The ICN adopted the last two recommended practices at its Annual Conference in Bonn, Germany, in June 2005. See ICN, Recommended Practices for Merger Notification Procedures, *supra* note 72.

<sup>81</sup>*Id.*

<sup>82</sup>See ICN, Implementation Handbook, *supra* note 24.

<sup>83</sup>See ICN, Mergers Working Group, 2006-2007 Work Plan (2006), available at [http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger\\_Working\\_Group\\_2007-2008wp.pdf](http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_Working_Group_2007-2008wp.pdf).

<sup>84</sup>See ICN, Mergers Working Group, Analytical Framework Subgroup, Project on Merger Guidelines (2004), available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_3rd\\_seoul\\_2004/amg\\_chapl\\_overview.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_3rd_seoul_2004/amg_chapl_overview.pdf).

<sup>85</sup>See ICN, Merger Guidelines Workbook, *supra* note 25.

<sup>86</sup>*Id.*

<sup>87</sup>See ICN, Merger Remedies Review Project, *supra* note 28.

<sup>88</sup>See ICN, Merger Working Group, Investigative Techniques Subgroup, ICN Investigative Technique Handbook for Merger Review (2005), available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_4th\\_bonn\\_2005/Investigative\\_Techniques\\_Handbook.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Investigative_Techniques_Handbook.pdf).

<sup>89</sup>See ICN, Merger Working Group, Recommended Practices for Merger Analysis (2008), available at [http://www.internationalcompetitionnetwork.org/media/library/Cartels/Merger\\_WG\\_1.pdf](http://www.internationalcompetitionnetwork.org/media/library/Cartels/Merger_WG_1.pdf).

<sup>90</sup>*Id.*

<sup>91</sup>See ICN, Merger Working Group, 2008-2009 Work Plan (2008), available at [http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger\\_WG\\_3.pdf](http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_3.pdf).

<sup>92</sup>The distinction between coordinated interaction and unilateral effects is complicated. In unilateral theories, the merged entity has the ability to increase its prices profitably and unilaterally, as established in a differentiated Bertrand oligopoly, or auction models with a merger of the two lowest cost bidders. In coordinated interaction theories, the merger results in an increased likelihood that the remaining firms can coordinate their actions to reduce competition or in a decreased likelihood that any existing coordination would break down. This reduction in competition may come from the firms now being able to collude explicitly, or, more likely, a change in the incentives and the ability of the competitors to engage in tacit coordination. In August 2002, then Assistant Attorney General Charles A. James noted that "reaching too quickly for unilateral effects theories to the exclusion of

meaningful coordinated effects analysis could result in the Division missing cases that should be brought or crafting its relief too narrowly." See Charles A. James, Assistant Attorney General, DOJ, Rediscovering Coordinated Effects, Remarks at the Annual Meeting of ABA Section of Antitrust Law (Aug. 13, 2002), available at <http://www.usdoj.gov/atr/public/speeches/200124.htm>. Accord R. Hewitt Pate, Assistant Attorney General, Antitrust Division, DOJ, Antitrust Enforcement at the DOJ—Issues in Merger Investigations and Litigation, ABCNY Speech (Dec. 10, 2002), available at [www.usdoj.gov/atr/public/speeches/200868.htm](http://www.usdoj.gov/atr/public/speeches/200868.htm) (noting the DOJ's interest in coordinated effects theory; Timothy J. Muris, Chairman, FTC, Improving the Economic Foundations of Competition Policy (Jan. 15, 2003), available at [http://www.ftc.gov/speeches/muris/improve\\_confoundatio.shtm](http://www.ftc.gov/speeches/muris/improve_confoundatio.shtm) (indicating the FTC's renewed interest in coordinated effects theory).

<sup>93</sup>At the DOJ, for instance, See *United States v. Mittal Steel Company N.V.*, Case No. 1:06-CV-01360 (D.D.C. Aug. 1, 2006) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f217400/217491.htm> (the transaction would result in two firms—the merged firm and a third party—accounting for more than 80 percent of all sales of tin mill products in the eastern United States, thereby facilitating coordination, and the merger eliminated Acelor's Dofasco mill as a maverick); *United States v. CEMEX, S.A.B. de C.V.*, No. 1:07-CV-00640 (D.D.C. May 23, 2007) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f223500/223543.htm> (in one of the markets, the primary concern was coordinated); *United States v. Vulcan Materials Company*, Case No. 1:07-CV-02044 (D.D.C. Nov. 13, 2007) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f227600/227646.htm> (merger would reduce the number of firms in Western Atlanta from 4 to 3, making tacit or explicit coordination more likely); *United States v. SGL Carbon AG*, Civil Action No. 03-521 (W.D. Pa. Apr. 15, 2003) (verified complaint), available at <http://www.usdoj.gov/atr/cases/f200900/200935.htm>; *United States v. UPM-Kymmene Oyj*, Civil No. 03C2528 (N.D. Ill. July 25, 2003) (memorandum opinion and order), available at <http://www.usdoj.gov/atr/cases/f201100/201196.htm>; and *United States v. Waste Management, Inc. and Allied Waste Industries, Inc.*, Case No. 1:03CV01409 (D.D.C. July 22, 2003) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f201100/201187.htm>.

<sup>94</sup>See, e.g., *United States v. UPM-Kymmene Oyj*, Civil No. 03C2528 (N.D. Ill. Apr. 15, 2003) (verified complaint), available at <http://www.usdoj.gov/atr/cases/f200900/200942.htm> (labelstock producers); *FTC v. Arch Coal, Inc.*, Civ. No. 1:04CV534 (D.D.C. Apr. 1, 2004) (complaint), available at <http://www.ftc.gov/os/2004/04/archcoalcmp.pdf> (coordinated interaction among coal producers in SPRB region).

<sup>95</sup>See Barnett June 26, 2008 Remarks.

<sup>96</sup>As reported by the agencies, from FY1996-2007, only 6.5 percent of second requests contained a vertical theory for potential harm.

<sup>97</sup>See, e.g., *United States v. Monsanto Co.*, No. 1:07-cv-00992 (D.D.C. May 31, 2007) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f223600/223679.pdf> (divestiture of germplasm); In the Matter of Lockheed Martin Corporation, File No. 051 0165 (FTC Oct. 3, 2006) (agreement containing consent order), available at <http://www.ftc.gov/os/caselist/0510165/0510165agreement.pdf> (launch vehicles; no discrimination provisions; firewalls).

<sup>98</sup>See, e.g., *United States v. Premdor Inc.*, Civil No. 1:01CV01696 (D.D.C. Aug. 3, 2001) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f9000/9017.htm>.

<sup>99</sup>See, e.g., *United States v. Northrop Grumman Corporation and TRW Inc.*, Civil No. 1:02CV02432 (D.D.C. June 11, 2003) (final judgment), available at <http://www.usdoj.gov/atr/cases/f201000/201076.htm> (nondiscrimination provisions); FTC, Press Release, *FTC Orders Significant Divestitures in Clearing Valero's Acquisition of Kaneb Services and Pipe Line Partners* (June 15, 2005), available at <http://www.ftc.gov/opa/2005/06/valerokaneb.shtm> (The order requires Valero, the largest petroleum terminal operator and second-largest operator of liquid petroleum pipelines in the United States, to develop an information firewall and maintain open, non-discriminatory access to two retained Northern California terminals, in order to ensure access to ethanol terminaling in Northern California following its acquisition of Kaneb); FTC, Press Release, *FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo* (Sept. 15, 2008), available at <http://www.ftc.gov/opa/2008/09/fresenius.shtm> (prevents Fresenius from reporting an intra-company transfer price to CMS for Venofer that is higher than the level set forth in the order); FTC, Press Release, *FTC Intervenes in Hexion's Proposed Acquisition of Huntsman Corp.* (Oct. 2, 2008), available at <http://www.ftc.gov/opa/2008/10/hexion.shtm>.

<sup>100</sup>See, e.g., *United States v. Monsanto Co.*, No. 1:07-cv-00992 (D.D.C. May 31, 2007) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f223600/223679.pdf> (divestiture of germplasm) ("Monsanto"); *United States v. Premdor Inc.*, Civil No. 1:01CV01696 (D.D.C. Apr. 8, 2002) (final judgment), available at <http://www.usdoj.gov/atr/cases/f8900/8909.htm> (divestiture of molded doorskin production). Also note that in 2004, in the Cytec/Digene transaction the parties abandoned a transaction with both horizontal and vertical concerns raised by the FTC. See FTC, Press Release, *Federal Trade Commission Seeks to Block Cytyc Corporation's acquisition of Digene Corporation*, FTC File No. 021-0098 (June 24, 2002), available at [http://www.ftc.gov/opa/2002/06/cytyc\\_digene.htm](http://www.ftc.gov/opa/2002/06/cytyc_digene.htm).

<sup>101</sup>See *In re TC Group, L.L.C.*, File No. 061-0197 (FTC Jan. 25, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0610197/decisionorder.pdf> (relinquish daily involvement, convert interest into passive investment, firewall).

<sup>102</sup>See *United States v. AT&T Inc. and Dobson Communications Corporation*, Case 1:07-CV-01952 (D.D.C. Oct. 30, 2007) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f227300/227309.htm>; *United States v. CommScope, Inc.*



and Andrew Corporation, Case 1:07-cv-02200 (D.D.C. Dec. 6, 2007) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f228300/228364.htm> (30 percent interest in Andes); United States v. Bain Capital, Thomas H. Lee Partners, L.P. and Clear Channel Communications, Inc., Case 1:08-cv-00245 (D.D.C. Feb. 13, 2008), available at <http://www.usdoj.gov/atr/cases/f230100/230166.htm> (divestiture in markets overlapping with Cumulus and Univision); United States v. Univision Comms. Inc. and Hispanic Broadcasting Corp., No. 1:03-CV-01952 (D.D.C. May 7, 2003) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f201000/201006.htm>.

<sup>103</sup>From FY 1996-2007, potential competition and buyer power theories were included as a basis for a second request in 2.6 percent and 2.3 percent of second requests respectively. Many of the pharmaceutical transactions concerned the elimination of a potential competitor in the market as a result of the merger. For instance, in the last 100 days of the Bush Administration, the FTC asserted in its Inverness Medical Innovation challenge that “but for” the transaction, ACON would have developed new consumer protection tests; and in Ovation, that the acquisition of NeoProfen was to thwart the competitive threat that its imminent entry would have on the monopoly position of Indocin. See FTC, Press Release, Inverness Medical Innovation Settles FTC Charge That it Stifled Future Competition in U.S. Market for Consumer Pregnancy Tests (Dec. 23, 2008), available at <http://www.ftc.gov/opa/2008/12/inverness.shtm>; FTC, Press Release, FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition (Dec. 16, 2008), available at <http://www.ftc.gov/opa/2008/12/ovation.shtm>. Outside the pharmaceuticals area, the FTC recently challenged on potential competition grounds the CCS/Newpark transaction and the DOJ challenged Microsemi’s consummated acquisition of Semicco on potential competition theories. See FTC, Press Release, FTC Moves to Block CCS’s Proposed Acquisition of Rival Newpark Environmental Services (Oct. 23, 2008), available at <http://www.ftc.gov/opa/2008/10/redsky.shtm>; DOJ, Press Release, Justice Department Files Antitrust Lawsuit Against Microsemi Corporation (Dec. 18, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/240549.htm](http://www.usdoj.gov/atr/public/press_releases/2008/240549.htm). On October 20, 2008 the DOJ and ten states filed a preliminary injunction action to block the combination of the third and fourth largest beef packers, partially on the basis that the combination would leave feed lots in the market with only one major buyer of fed cattle. See United States v. JBS S.A., Case No. 08-CV-5992, (N.D.II. Dec. 20, 2008) (complaint) available at <http://www.usdoj.gov/atr/cases/f238300/238388.htm>.

<sup>104</sup>See, e.g., United States v. Amsted Indus., Inc., No. 1:07-CV-00710, (D.D.C. Apr. 18, 2007) (final judgment), available at <http://www.usdoj.gov/atr/cases/f224900/224931.htm> (rights to “market specific intellectual assets” for casting patterns); United States v. Reuters (add cite) (license remedy); United States v. CommScope, Inc. and Andrew Corporation, Case 1:07-cv-02200 (D.D.C. Dec. 6, 2007) (competitive impact statement), available at <http://www.usdoj.gov/atr/cases/f228300/228364.htm> (required divestiture of underlying IP to third party subject to the license with Andes); In the Matter of Johnson & Johnson, Docket No. C-4154 (Dec. 27, 2005) (agreement containing consent order), available at <http://www.ftc.gov/os/caselist/0510050/051102agree0510050.pdf> (license to Abbott).

<sup>105</sup>See, e.g., In re Chevron Corporation and Unocal Corporation, Docket No. C-4144 (FTC July 27, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510125/050802do0510125.pdf> (parties to cease from enforcing Unocal’s relevant patents, undertaking any new enforcement efforts to patents, collecting damages, royalties, or other payments, and to dismiss all pending infringement actions); In re Kyphon Inc., Docket No. C-4201 (FTC Dec. 7, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0710101/071207decision.pdf>.

<sup>106</sup>See generally Ilene Knable Gotts & Philip A. Proger, *Closed but Not Safe? FTC Challenges Consummated Transactions*, 5 M&A LAWYER 17 (May 2002) for an article discussing the law underlying such challenges.

<sup>107</sup>See In re Evanston Northwestern Healthcare Corp., No. 9315 (FTC Aug. 6, 2007) (opinion), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>.

<sup>108</sup>See Amiee E. DeFilippo, *Summary of APA Brown Bag Program on Implications for Merger Analysis from the Evanston Decision*, THE THRESHOLD (Fall 2007) at 38, 40.

<sup>109</sup>See FTC, Press Release, Commission Rules That Evanston Northwestern Healthcare Corp.’s Acquisition of Highland Park Hospital Was Anticompetitive (Aug. 6, 2007), available at <http://www.ftc.gov/opa/2007/108/evanston.shtm>.

<sup>110</sup>See FTC, Press Release, FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition (Dec. 16, 2008), available at <http://www.ftc.gov/opa/2008/12/ovation.shtm>.

<sup>111</sup>See AAI Report at 167.

<sup>112</sup>See FTC v. Libbey, Inc. 2002-1 Trade Cas. (CCH) ¶ 73,650 (D.D.C. 2002) (largest producers of soda-line glassware to the U.S. food industry; court rejected that proffered fixes worked because of outsourcing arrangement).

<sup>113</sup>See FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 121 (D.D.C. 2004); FTC v. Equitable Res., Inc., No. 07-0490, 2007 U.S. Dist. LEXIS 35061 (W.D. Pa. May 14, 2007); FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007); FTC v. Western Ref., Inc., No. 07-352, 2007 U.S. Dist. LEXIS 47606 (D.N.M. May 29, 2007)

<sup>114</sup>See In the Matter of Whole Foods Mkt, Inc, 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008).

<sup>115</sup>See FTC v. Equitable Res., Inc., No. 07-2499 (3d Cir. June 1, 2007) (order of the court of appeals), available at <http://www.ftc.gov/os/caselist/0610140/070601order.pdf>.

<sup>116</sup>See FTC, Press Release, FTC and Virginia Attorney General Seek to Block Inova Health System Foundation's Acquisition of Prince William Health System (May 9, 2008) ("Inova Press Release"), available at <http://www.ftc.gov/opa/2008/05/inova.shtm>.

<sup>117</sup>See Cecile Kohrs Lindell, *Hospitals Cancel Merger Plans*, THE DAILY DEAL (Jun. 6, 2008) ("Inova Article"), available at <http://www.thedeal.com/servlet/ContentServer?pagename=TheDeal/TDDArticle/TDStandardArticle&bn=NULL&c=TDDArticle&cid=1212755504285>.

<sup>118</sup>See FTC, Press Release, FTC Moves to Block CCS's Proposed Acquisition of Rival Newpark Environmental Services (Oct. 23, 2008), available at <http://www.ftc.gov/opa/2008/10/redsky.shtm>

<sup>119</sup>See FTC, Press Release, FTC Launches Suit to Block Merger of CCC and Mitchell (Nov. 25, 2008), available at <http://www.ftc.gov/opa/2008/11/cccmitchell.shtm>.

<sup>120</sup>See FTC, Press Release, FTC Sues to Block Oldcastle Architectural's Proposed Acquisition of the Pavestone Companies (Jan. 14, 2009), available at <http://www.ftc.gov/opa/2009/01/crh.shtm>.

<sup>121</sup>See *United States v. UPM-Kymmene Oyj*, Civil No. 03C2528 (N.D. Ill. July 25, 2003) (memorandum opinion and order), available at <http://www.usdoj.gov/atr/cases/f201100/201196.htm> (merger between labelstock producers blocked on coordinated effects grounds).

<sup>122</sup>See *United States v. SunGard Data Systems, Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>123</sup>See *United States v. Darby Gazette Co.*, No. 2: 07-0329 (S.D. W. Va. filed May 22, 2007).

<sup>124</sup>See DOJ, Press Release, Justice Department Files Lawsuit to Stop JBS S.A. from Acquiring National Beef Packing Co. (Oct. 20, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/238382.htm](http://www.usdoj.gov/atr/public/press_releases/2008/238382.htm).

<sup>125</sup>See DOJ, Press Release, Justice Department Files Antitrust Lawsuit Against Microsemi Corporation (Dec. 18, 2008), available at [http://www.usdoj.gov/atr/public/press\\_releases/2008/240549.htm](http://www.usdoj.gov/atr/public/press_releases/2008/240549.htm).

<sup>126</sup>See, e.g., *United States v. SunGard Data Sys.*, supra (DOJ failed to establish that a substantial number of customers lacked alternative solutions).

<sup>127</sup>See generally Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 ANTITR. L. J. 87 (2007); Ilene Knable Gotts & Daniel Hemli, *Just the Facts: the Role of Customer and Economic Evidence in M&A Analysis*, 13 GEO. MASON L. REV. 1217 (2006); See, e.g., *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 121 (D.D.C. 2004) ("customers do not, of course, have the expertise to state what will happen in the market"); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) ("the most persuasive testimony . . . is not what they say in court, but what they do in the market").

<sup>128</sup>See AAI Report at 168-69.

<sup>129</sup>See *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), revs'd 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008)

<sup>130</sup>In contrast to *FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997), where the court found the pricing data and company documents consistent in establishing a separate market and unilateral effect from the merger, in *Whole Foods* the court used the company's documents to support the economic data (particularly the defendant's critical loss analysis) to show why the market was not sustainable.

<sup>131</sup>In *FTC v. Foster*, 2007-1 Trade Cases ¶ 75,735, 2007 WL 1793441 (D.N.M. 2007), the FTC's economic expert unsuccessfully relied on a preliminary draft of an incremental products marketing document created in 2005 to argue that increasing Giant's production would result in lower prices in Albuquerque. The court pointed out that the company would not have relied upon the document and a later presentation to the Board did not use the data or assumptions of the draft document. The court buttressed its conclusions with the testimony of the defendant's economic expert.

<sup>132</sup>See, e.g., *Oracle*, supra; *FTC v. Foster*, supra.

<sup>133</sup>See, e.g., Cary Article at 3.

<sup>134</sup>See 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008) at 5.

<sup>135</sup>Id.

<sup>136</sup>See 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008) at 20.

<sup>137</sup>See 128 S. Ct. 2007, 2219 (2008), as cited at 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008) at 28, 29.

<sup>138</sup>See 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008) at 29.

<sup>139</sup>See Cecile Kohrs Lindell, *Hospital feud in two courtrooms*, DAILY DEAL (May 27, 2008), available at <http://www.thedeal.com/servlet/ContentServer?pagename=TheDeal/TDDArticle/TDStandardArticle&bn=NULL&c=TDDArticle&cid=1211840628371>.

<sup>140</sup>See Inova Article.

<sup>141</sup>As discussed in Comments filed by the American Bar Association Section of Antitrust Law in response to the Commission's notice of proposed revisions to the Part III rules, the proposed changes will not sufficiently alter the timing of a final decision to permit most transactions to remain alive and all time limitations imposed seem to be, at least for the initial phases, at the expense of defendants—not the FTC. See ABA, Comment of the ABA Section of Antitrust Law in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rulemaking—P072104 (Nov. 6, 2008), available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-3and4.pdf>. The FTC proceeded despite concerns raised by the

bar with issuing final interim rules on December 23, 2008. Press Release, FTC Issues Final Rules Amending Parts 3 and 4 of its Rules of Practice; Rules are Designed to Expedite and Streamline the Entire Part 3 Proceeding (Dec. 23, 2008), available at <http://www.ftc.gov/opa/2008/12/part3.shtm>. Interestingly, a review of the FTC's records in administrative hearings over the last twenty-five years disclosed that in almost every single contested Sherman Act case with disputed facts, the FTC ruled in favor of complaint counsel, even where the Administrative Law Judge had ruled for the parties. See A. Douglas Melamed, Comments Submitted to the Federal Trade Commission, Workshop Concerning Section 5 of the FTC Act (Oct. 17, 2008). In many of those cases, the courts of appeals or the Supreme Court subsequently reversed the FTC. Although these cases did not involve merger challenges, it nevertheless suggests that there may be a bias against defendants and, unlike a Sherman Act case, it is unlikely that a merger will remain intact long enough to prevail in a Court of Appeals.

<sup>142</sup>See Dennis Berman, *The Game: Handicapping Deal Hype and Hubris*, WALL ST. J. (January 16, 2006) at c1.

<sup>143</sup>See Stephen Labaton, *Sirius Chief Talks of Ways to Get MX Deal Approved*, N.Y. TIMES (March 1, 2007), available at [http://www.nytimes.com/2007/03/01/technology/01radio.html?\\_r=1&scp=1&sq=Sirius%20Chief%20Talks%20of%20Ways%20&st=cse&oref=slogin](http://www.nytimes.com/2007/03/01/technology/01radio.html?_r=1&scp=1&sq=Sirius%20Chief%20Talks%20of%20Ways%20&st=cse&oref=slogin).

<sup>144</sup>See Baker/Shapiro Study.

<sup>145</sup>See Baker/Shapiro Antitrust Article at 30.

<sup>146</sup>*Id.*

<sup>147</sup>*Id.* at 30-31.

<sup>148</sup>See Muris Article.

<sup>149</sup>See Kathryn M. Fenton, A. Douglas Melamed, Mario Monti, Timothy J. Muris, R. Hewitt Pate and Robert Pitofsky, *Round Table Discussion: Advice for the New Administration*, 22 ANTITRUST 8, 10-1 (Summer 2008).

<sup>150</sup>The FY2004-2005 statistics truly are outliers and have the potential of distorting the results. In a recent article, Deborah Feinstein endeavors to attribute the subsequent uptick in FY2007 to a reaction by the business community in trying increasingly problematic transactions in response to a perception of lax enforcement environment at the agencies, subsequently resulting in a higher percentage of transactions being challenged by the agencies. See Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down But Not Out*, 21 ANTITRUST 74 (Summer 2007) ("Feinstein Article"). Feinstein concludes that, "if true, the observed decline in Bush era merger challenges tends to understate the degree to which enforcement postures have become more conservative." See Feinstein Article at 75. We respectfully submit that such prognoses overstate the importance of competition enforcement in the decision-making of businesses regarding whether to proceed with transactions in any but the close cases—and there are simply not that many close transactions to explain the fluctuations, nor the continued higher level of enforcement. Another explanation could be the uptick in the number of transactions in FY2004-2006 taxed agency resources.

<sup>151</sup>The results for the complete Bush Administration fiscal years, if anything, understate the enforcement activities, particularly for the latter years, since they do not include enforcement activity from the beginning of FY 2009: for the FTC 3 consents, 3 litigation challenges, and one abandoned transaction (as well as a consent and litigation in two consummated mergers); and at the DOJ, 5 consents and one court challenge (as well as one challenge of a consummated merger).

<sup>152</sup>John Harkrider similarly analyzes the statistics for 1996 to 2006 and finds that the ratio of clearances to challenges and second requests to clearances have fallen in the latter period, perhaps reflecting greater efficiency in the review process by only issuing second requests when the agency is likely to challenge the transaction and sparing other transactions the significant direct and indirect costs of a second request. Harkrider further determines that the agencies challenged a higher percentage of second requests between 2001 and 2006 than they did from 1996 to 2000, which he attributes entirely to the FTC, which raised its ratio from 70 percent to 82 percent during the two time periods, respectively. See John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, 22 ANTITRUST 43, 45 (Summer 2008) ("Harkrider Article"). Harkrider also endeavors to present a probit econometric estimation looking at 212 transactions during this time frame. Harkrider finds that the FTC statistics between the two administrations remain the same, but the DOJ enforcement statistics were significantly lower in the Bush Administration. Harkrider has two noteworthy caveats for his results: (1) the model only examines merger challenges once a second request has been issued, leaving open the possibility that the agencies may now be using a different standard for the issuance of the second request; (2) the scope of remedies may be different. Harkrider also seems to find a difference based on what the risk allocation provisions of the underlying purchase agreement might provide.

<sup>153</sup>In *Maytag/Whirlpool*, despite combined market shares for residential washing machines of over 70 percent by one contested measure, the DOJ permitted the transaction to proceed on the basis of strong rivalry, fringe growth from established domestic brands and imports, buyer power, and efficiencies. Also, recognition of changed market conditions that mitigated the potential for the exercise of market power (a/k/a the General Dynamics defense) appears to have featured prominently in agency decisions to clear several, other high-profile transactions without requiring any relief (albeit typically after the agency conducted a protracted investigation).

<sup>154</sup>For a discussion of the Monsanto/Delta and Pine Land merger See Ilene Knable Gotts, *U.S. Agencies Flex Muscle in FY 2007 Merger Review But FTC Unanimously Loses in Court*, Issue 1, 2008 ANTITRUST REPORT 2, 37-39 (2008).

<sup>155</sup>See *infra* Section I.B.

<sup>156</sup>See *United States v. Von's Grocery Co.*, 384 U.S. at 301.

<sup>157</sup>See, e.g., Inova Article; Press Release, U.S. Dep't of Justice, DOJ and Several States will Sue to Stop United Airlines from Acquiring US Airways (July 27, 2001), available at [http://www.usdoj.atr/public/press\\_releases/2001/8701.htm](http://www.usdoj.atr/public/press_releases/2001/8701.htm); *United States v. General Dynamics and Newport News*, 01-CV-02200 (D.D.C. Oct 23, 2001) (complaint), available at <http://www.usdoj.gov/atr/cases/f9300/9373.htm>; *United States v. Echostar, Hughes Electronic, GM, and Direct TV*, 1:02-CV-02138 (Oct. 31, 2002) (complaint), available at <http://www.usdoj.gov/atr/cases/f200400/200409.htm>.

<sup>158</sup>This is particularly the case at the DOJ where the agency accepts "fix-it-firsts" and pocket decrees that are never "counted" once the regulatory agency acts.

<sup>159</sup>First Data, *supra*; *United States v. Dairy Farmers of America, Inc.*, *supra*.

<sup>160</sup>See, e.g., *California v. American Stores Co.*, 495, U.S. 271 (1990); *New York v. Kraft General Foods*, 926 F.Supp. 321 (S.D.N.Y. 1995); *California v. Sutter Health Sys.*, 84 F.Supp.2d 1957 (N.D.Cal 2000).

<sup>161</sup>NAAG, *Horizontal Merger Guidelines*(1993), reprinted in 4 trade Reg. Rep. (CCH) ¶ 13,406.

<sup>162</sup>See *Wal-Mart Stores Inc. v. Rodriguez*, Civ. No. 02-2778PG, 2002 WL 31931657 (D. P.R Dec. 26, 2002) (Puerto Rico Attorney General unsuccessfully tried to have court enjoin merger); *State of California v. Marquee Holdings, Inc. and LCE Holdings Inc., Compliant for Equitable Relief for Violation of Clayton Act* (Dec. 22, 2005), available at [http://ag.ca.gov/newsalters/cms05/05-109\\_0a.pdf](http://ag.ca.gov/newsalters/cms05/05-109_0a.pdf) (California required divestiture of two San Francisco movie theatres in the AMC/Loews merger); *District of Columbia v. Marquee Holdings Inc.*, Complaint (Dec. 22, 2005), available at <http://occ.dc.gov/occ/frames.asp?doc+occ/lib/occ/amcloewscomplaint.pdf> (DC required AMC/Loew's to sell two theaters); Five states—California, Massachusetts, Maryland, Pennsylvania, and New York—disagreed with the FTC in the Federated/May transaction and required Federated to sell 26 California, 7 Massachusetts, 4 Maryland, 3 New York, and 7 Pennsylvania stores, with priority given to certain specified potential buyers (which are each traditional department store competitors). See PA Attn'y Gen., Press Release, AG Corbett resolves antitrust concerns following merger of Federated Department Stores and the May Company (Aug. 30, 2005), available at <http://www.attorneygeneral.gov/press/release.cfm?p=093757EC-AFC3-E88-91754088B02FBC02>; (in 2 locations in Pennsylvania, the companies may sell the properties to buyers for any purpose); N.Y. Att'y Gen., Press Release, Department Store Chain to Divest Three NY Stores as Part of Acquisition (Aug. 30, 2005), available at [http://www.oag.state.ny.us/press/2005/aug/aug30b\\_05.html](http://www.oag.state.ny.us/press/2005/aug/aug30b_05.html); FTC, Press Release, FTC Challenges Rite Aid's Proposed \$3.5 Billion Acquisition of Brooks and Eckerd Pharmacies from Canada's Jean Coutu Group, Inc. (June 4, 2007), available at <http://www.ftc.gov/opa/2007/06/riteaid.shtm> (3 more stores divested to satisfy state attorneys general concerns); Press Release, Commonwealth of Mass. Office of the Attorney Gen., Attorney General Martha Coakley and Ten Other States Reach Settlement in School Bus Merger Case (Sept. 26, 2007), available at [http://www.mass.gov/?pageID=pressreleases&agId=Cago&prModName=cagopressrelease&prFile=2007\\_09\\_26\\_bus\\_settlement.xml](http://www.mass.gov/?pageID=pressreleases&agId=Cago&prModName=cagopressrelease&prFile=2007_09_26_bus_settlement.xml) (Massachusetts Attorney General required First Group/Laidlow to sell nine school bus transportation contracts in areas of Massachusetts to another school bus operator; and All American Patriots, New Mexico Attorney General King Joins 12 State Effort to Protect Farmers (Aug. 30, 2007) available at [http://www.allamericanpatriots.com/48730641\\_new\\_mexico\\_new\\_mexico\\_attorney\\_general\\_king\\_joins\\_12\\_state\\_effort\\_protect\\_farmers](http://www.allamericanpatriots.com/48730641_new_mexico_new_mexico_attorney_general_king_joins_12_state_effort_protect_farmers) (13 State attorneys called for the court to reject the proposed consent decree in the Monsanto/Delta and Pine Land transaction).

<sup>163</sup>See Baker/Shapiro Antitrust Article at 31.

<sup>164</sup>Jonathan B. Baker, *Turning on Itself, How Dueling Agencies in the Bush Administration Made Mincemeat of Antitrust Regulation Policy*, THE NEW REPUBLIC (Sept. 15, 2008).

<sup>165</sup>See Harkrider Article at 48.

<sup>166</sup>See On the Record: Deborah Platt Majoras, Chairwoman, FTC, SFGate.com (July 15, 2007), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/07/15/BUGC2QVKBO1.DTL&type=printable>.

<sup>167</sup>See Cecile Kohrs Lindell, *McData forces FTC Juggling*, THE DAILY DEAL (January 11, 2007), available at <http://www.thedeal.com/servlet/ContentServer?pagename=TheDeal/TDDArticle/TDStandardArticle&bn=NULL&c=TDDArticle&cid=1168374848220>.

<sup>168</sup>See ABA, ABA Antitrust Fall Forum: random notes, 731 FTC: Watch 4 (Nov. 24, 2008).

<sup>169</sup>See Meyer Speech.

<sup>170</sup>See Kathryn M. Fenton, Christopher B. Hockett, Thomas O. Barnett, Robert L. Hubbard, Neelie Kroes and Deborah Platt Majoras, Roundtable Conference with Enforcement Officials, theantitrustsource.com (April 2008), available at <http://www.abanet.org/antitrust/at-source/08/04/Apr08-EnforceRT4=25f.pdf>, at 5.

<sup>171</sup>See Barnett June 26, 2008 Remarks.

<sup>172</sup>The Assistant Attorney General reports to the Attorney General, but intervention by the Attorney General, while not unprecedented, is very rare.

<sup>173</sup>See DOJ, Press Release, Justice Department Requires Restructuring of Acquisition by Aggregate Industries plc of Wakefield Materials Co. (Sept. 6, 2002), available at [http://www.usdoj.gov/atr/public/press\\_release/2002/200194.htm](http://www.usdoj.gov/atr/public/press_release/2002/200194.htm); DOJ, Press Release, Justice Department Requires Suiza Foods and Dean Foods to Divest 11 Dairy Processing Plants (Dec. 18, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/9721.htm](http://www.usdoj.gov/atr/public/press_releases/2001/9721.htm); DOJ, Press Release, Justice Department Requires SunTrust Bank and



Huntington National Bank to Make Divestitures in Florida (Dec. 3, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/9645.htm](http://www.usdoj.gov/atr/public/press_releases/2001/9645.htm); and DOJ, Press Release, Justice Department Requires Wells Fargo and Company to Make Divestitures in Two States (Nov. 29, 2001), available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/9623.htm](http://www.usdoj.gov/atr/public/press_releases/2001/9623.htm). In addition, on February 6, 2002, American General Media – Rocky Mountain and Salisbury Broadcasting were permitted to acquire two radio stations in Colorado after agreeing to divest stations in Aspen and Vail, Colorado and to terminate a joint sales agreement.

<sup>174</sup>See DOJ, Press Release, Justice Department Requires Divestiture in Mittal Steel's Acquisition of Arcelor (Aug. 1, 2006), available at [http://www.usdoj.gov/opa/pr/2006/August/06\\_at\\_483.html](http://www.usdoj.gov/opa/pr/2006/August/06_at_483.html).

<sup>175</sup>See DOJ, Press Release, Justice Department Requires Sardines Divestiture in Connors Bros. Acquisition of Bumble Bee (Aug. 31, 2004), available at [http://www.usdoj.gov/atr/public/press\\_releases/2004/205267.htm](http://www.usdoj.gov/atr/public/press_releases/2004/205267.htm).

<sup>176</sup>See Frannie Wellings, Free Press successfully petitions FCC over Raycom ownership, Free Press (Jan. 18, 2006), available at <http://freepress.net/fcc/update.php?id=115/>.

<sup>177</sup>See Media General Inc., Press Release, Media General Completes Purchase of Four NBC Television Stations (June 26, 2006), available at <http://www.sec.gov/Archives/edgar/data/216539/000119312506136662/dex991.htm>.

<sup>178</sup>But see Monsanto.

<sup>179</sup>See DOJ, Press Release, Justice Department Announces Agreement to Modify SBC/BellSouth Consent Decree (Aug. 11, 2004), available at [http://www.usdoj.gov/opa/pr/2004/August/04\\_at\\_555.htm](http://www.usdoj.gov/opa/pr/2004/August/04_at_555.htm).

<sup>180</sup>The one noted exception was when the FTC entered into hold separate order on June 26, 2005 to permit Hoechst AG's acquisition of Marion Merrell Dow pending the conclusion of the FTC investigation. See Marion Merrell Dow Inc. Form 8-K, filed on June 28, 1995, available at <http://www.secinfo.com/d1sTx.a8.htm>.

<sup>181</sup>By comparison, compare the results for grocery and petroleum transaction volume in Appendix D. Deal volume in these two sectors (which historically accounts for about 55 percent of the markets challenged by the FTC) dropped just about 10 percent between these two periods, due to a drop in grocery transactions, with petroleum deal volume remaining the same. The third area in which the FTC tends to be active is chemicals, which also remained about the same in volume during these two periods. A fourth area—Pharma—actually increased almost 20 percent in deal volume during the second period.

<sup>182</sup>See Meyer Speech.

<sup>183</sup>For a general discussion on the transformation of the telecommunications industry See Ilene Knable Gotts, *Telecommunications Without Borders? The Impact of US Pre-Merger Regimes*, COMPETITION L. INT'L (Oct. 2006); Ilene Knable Gotts, *Back to the Future? Will Telecommunications and Entertainment Service Providers Be Permitted to Converge Globally?*, 7 BUS. L. INT'L 308 (Sept. 2006); Ilene Knable Gotts and Damian G. Didden, *The Goldilocks Standard: Getting the Antitrust Review Standard "Just Right" for the Telecommunications Industry*, ANTITRUST REPORT 3 (Summer 2004).

<sup>184</sup>See Feinstein Article at 80.

<sup>185</sup>See 15 U.S.C. § 16(b) (2000).

<sup>186</sup>See 15 U.S.C. § 16(e)(2) (Supp. 2005).

<sup>187</sup>See *United States v. SBC Comm'ns, Inc.*, No. 05-2102 (D.D.C. Oct. 27, 2006) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f212400/212424.pdf>; *United States v. Verizon Comm'ns, Inc.*, No. 05-2103 (D.D.C. Oct. 27, 2006) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f212400/212433.pdf>. On July 25, 2006, Judge Sullivan refused to enter the proposed consents but instead required resubmission of more information. On March 29, 2007—17 months after the DOJ filed complaints in both of these matters—Judge Sullivan granted the DOJ's motion for entry of the final judgments in both cases, finding that entry is in the public interest. The court determined that under the Tunney Act it was not the court's task to decide whether: (1) the mergers under review as a whole run afoul of the antitrust laws; (2) they are altogether in the public interest; or (3) they should be approved by other branches of the federal government. Rather, the court's role is limited to whether the divestitures agreed upon by the merging parties and the DOJ are "in the public interest." For a more extensive discussion of the Tunney Act process and these matters, See Ilene Knable Gotts, *U.S. Agencies Flex Muscle in FY2007 Merger Review BA FTC Unanimously Loses in Court*, Issue 1, 2008 ANTITRUST REPORT 2, 9-12 (2008).

<sup>188</sup>*Id.* at 15.

<sup>189</sup>*Id.*

<sup>190</sup>See J. Thomas Rosch, Comm'r, FTC, A Peek Inside: One Commissioner's Perspective on the Commissioner's Roles as Prosecutor and Judge, Remarks Presented at the NERA 2008 Antitrust & Trade Regulation Seminar (July 3, 2008), available at <http://ftc.gov/speeches/rosch/080703nera.pdf> at 12.

<sup>191</sup>See AMC Report at 138, 139.

<sup>192</sup>The ABA 2008 Transition Report and AMC recommended changes to the clearance process to eliminate unnecessary delay and uncertainty. See ABA Transition Report at 6 and AMC Report (beginning at 130).

<sup>193</sup>The AMC Report (recommendation #11d) at 51; ABA Transition Report; and AAI Report at 171 (all recommend as well that the Merger Guidelines be updated to incorporate modern economic learning, particularly concerning vertical and conglomerate mergers.)

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<sup>194</sup>See Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It*, 22 ANTITRUST 39, 42 (Summer 2008) (“Carlton Article”).

<sup>195</sup>William E. Kovacic, Chairman, Federal Trade Commission, *The United States and the Future Development of Global Competition Policy*, Georgetown Global Antitrust Enforcement Symposium, Washington, D.C. (Sept. 23, 2008) available at <http://www.ftc.gov/speeches/kovacic/080923compolicygwkovacic.pdf>.

<sup>196</sup>The AAI Report at 172 also urges the agencies to conduct more retrospective studies of merger enforcement, particularly to analyze the effects of mergers in close cases that were not challenged or mergers that the agencies challenged but the courts declined to enjoin.

<sup>197</sup>Accord R. Hewitt Pate, *Current Issues in International Antitrust Enforcement*, 2004 FORDHAM CORP. L. INST. 17, 21.

<sup>198</sup>See Sally Southey, Assistant Commissioner of Competition, Canadian Competition Bureau, *Canadian Perspectives on International Cooperation*, Address before the 2003 International Conference on Competition Policies/Laws, Taiwan.

<sup>199</sup>See International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* (Feb. 2000) at 76, 78.

<sup>200</sup>See United States submission to the February 15, 2005 OECD Roundtable Discussion on Cross-Border Remedies in Merger Review.

<sup>201</sup>Accord Kovacic Georgetown Speech.

<sup>202</sup>See ABA Transition Report at 13; AAI Report at 172.

<sup>203</sup>Throughout this article, data are reported by FY, commencing October 1 and ending September 30 of each year.

<sup>204</sup>Adjusted to include only those filings in which a party could have received a second request.

<sup>c</sup>These data do not include transactions reported in FY 2008 but for which the agencies took enforcement action or caused the parties to abandon the transaction during the first 100 days of FY 2009 (i.e., pre-Inauguration).