PHOENIX CENTER POLICY BULLETIN NO. 65

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September 2023

DO HART-SCOTT-RODINO FILING REQUIREMENTS NEED REFORM?

Abstract: A recent proposal by the Federal Trade Commission to expand substantially the information requirements for Hart-Scott-Rodino pre-merger filings could increase compliance costs by nearly $2 billion annually. Despite the economic significance of the proposal, the Agency offers no cost-benefit analysis of its plan. In this BULLETIN, we provide a simple economic model of information acquisition relevant to the Agency's proposal, which suggests, given that the vast majority of mergers are competitively inconsequential, that the Agency's approach is arbitrary and inefficient. An alternative approach targeting risky mergers with information requests is recommended, thereby reducing the burden on business and Agency staff. This approach also facilitates a cost-benefit analysis of either expanding or contracting information requests in merger filings.

I. Introduction

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") is a federal law that requires companies to notify the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") (hereinafter the "Agencies") before completing mergers or acquisitions which meet certain statutory thresholds.[1] If a transaction meets these thresholds, then the merging parties must submit a pre-merger filing, along with an applicable filing fee, detailing information about their business, financials, and the transaction itself, including details about the parties involved, market shares, and other relevant data that, according to the statute, are "necessary and appropriate" for the antitrust Agencies "to determine whether such acquisition may, if

[1] 15 U.S.C. § 18a.

consummated, violate the antitrust laws."[2] The Agencies have thirty-days to review this information from the date of filing, although it can be shortened or extended under certain circumstances.[3] If the Agencies have concerns about potential antitrust issues, then they may request additional information by several means (a "Second Request" being the most formal), each of which extends (or resets) the waiting period while the Agencies conduct a more in-depth review of the transaction's potential impact on competition.[4] If the Agencies find no competitive problem, then the merger may proceed. But if the Agencies, after review of the parties' filings, believe that the transaction may substantially lessen competition, then the Agencies can either try to enter into a Consent Decree with the parties (which may include some sort of structural or behavioral conditions) or, barring that, seek to block the merger outright in court. Each year, on average, only about 3% of mergers (about 50 of several thousand) are subjected to more intense scrutiny by the antitrust authorities.[5]

The Biden Administration has adopted a hostile approach to mergers.[6] The latest manifestation of this hostility is the FTC's recent *Notice of Proposed Rulemaking* ("*NPRM*") to revise the HSR filing requirements.[7] These proposed revisions would substantially increase the costs of complying with the HSR's notification process across the American economy—even though the statute was were originally intended to target only the largest mergers—by demanding more information and documents in the pre-merger filing.[8] The Biden Administration claims the current information requirements are "insufficient for the Agencies to conduct an effective and

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2 15 U.S.C. § 18a(d)(1).

3 15 U.S.C. §18a(b).

4 15 U.S.C. §18a(e).

5 For a full discussion of these results, *see* Section III *infra*.

6 *See, e.g.,* J. Zymeri, *Biden Administration Doubles Down on Its Hostility to Corporate Mergers*, NATIONAL REVIEW (July 29, 2023) (available at: https://www.nationalreview.com/news/biden-administration-doubles-down-on-its-hostility-to-corporate-mergers); S. Hill, *Biden's Antitrust Push,* AMERICAN PURPOSE (July 21, 2023) (available at: https://www.americanpurpose.com/articles/bidens-antitrust-push); s*ee also* EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY, The White House (July 09, 2021) (available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy).

7 Federal Trade Commission, 16 C.F.R. Parts 801 and 803, RIN 3084–AB46, Pre-merger Notification; Reporting and Waiting Period Requirements, 88 FED. REG. 42178 (June 29, 2023) (available at: https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf).

8 *C.f.*, D. Platt Majoras (Chairman, Federal Trade Commission), *Reforms To The Merger Review Process*, FEDERAL TRADE COMMISSION (2006), (available at https://www.ftc.gov/sites/default/files/attachments/mergers/mergerreviewprocess.pdf); J. Sims, R. Jones, H. Hollman, *Merger Process Reform: A Sisyphean Journey*, 23 ANTITRUST 60-68 (2009) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735408); A.G. Hollman, *Why Pre-merger Review Needed Reform - And Still Does*, 43 WILLIAM & MARY LAW REVIEW 1703-1745 (2001-2002).

efficient initial evaluation of a transaction's likely competitive impacts."[9] Estimates suggest the proposed reforms will increase the cost of compliance for filers by $1.7 billion annually,[10] and more than tripling the resources required for DOJ or FTC review at a time the FTC admits to a "resource strain [that] is complicating the Agencies' effort to challenge all anticompetitive deals."[11] Historical enforcement patterns indicate that nearly all mergers are competitively inconsequential, and resource constraints limit the ability of the Agencies to process this avalanche of new information and to increase by much their enforcement actions. Some practitioners describe the proposed reforms as little more than a "merger tax" aimed at reducing merger activity altogether, raising a "barrier-to-merger" for mergers that pose no threat to competition while having little-to-no effect on more consequential transactions that already face greater scrutiny and informational requirements.[12]

These proposed reforms to the HSR process are sensibly analyzed as an information acquisition problem. In this BULLETIN, we sketch out a basic cost-benefit framework of the FTC's proposed reform, whereby the additional information is a means by which to reduce errors (Type I and Type II) in merger enforcement.[13] Our analysis suggests the blanket demand for more information has no rational basis and conflicts both with Congressional intent and Agency practice. Additional information on possibly anticompetitive mergers may be obtained using existing alternatives, a fact the Agency ignores in its *NPRM* and an oversight in conflict with the requirements of OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-4.[14] There are certainly less

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9 *NPRM supra* n. 7, 83 FED. REG. at 42180.

10 The $1.7 billion is based on 7,096 filings (*see NPRM, supra* n. 7, 88 FED. REG. at 42208) and an increase costs of $233,000 per filing from the *U.S. Chamber HSR/Merger Guidelines Practitioner Survey*, U.S. Chamber of Commerce (September 9, 2023) (available at: https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process)

11 *See* H. Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, Bureau of Competition, Federal Trade Commission (September 28, 2021) (available at: https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave).

12 J. M. Rancour, *et al., FTC and DOJ Propose Dramatic Expansion of HSR Filings' Scope*, Skadden, Arps, Slate, Meagher & Flom LLP (July 6, 2023) (available at: https://www.skadden.com/insights/publications/2023/07/ftc-and-doj-propose-dramatic-expansion).

13 A Type I error is a false positive (blocking a merger that should be allowed), while a Type II error is a false negative (allowing a merger that should be blocked).

14 *Circular A-4*, U.S. OFFICE OF MANAGEMENT AND BUDGET (September 17, 2003) ("Once you have determined that Federal regulatory action is appropriate, you will need to consider alternative regulatory approaches. [] You should study alternative levels of stringency to understand more fully the relationship between stringency and the size and distribution of benefits and costs among different groups. [] You should consider setting different requirements for large and small firms, basing the requirements on estimated differences in the expected costs of compliance or in the

(Footnote Continued….)

costly ways for the Agencies to conduct an effective and efficient evaluation of a transaction's likely competitive impacts than to impose costs on thousands of mergers that are plainly inconsequential. Using available alternatives rather than blanket data requests also permits the FTC (and DOJ) to conduct a thorough cost-benefit analysis of its proposal—an analysis missing from the *NPRM*.

II. Background

The Hart-Scott-Rodino Antitrust Improvements Act requires businesses to notify the FTC and the DOJ before they can proceed with certain mergers or acquisitions, thus providing the government with an opportunity to review these transactions for potential antitrust concerns before they are completed.[15] If a merger meets certain financial thresholds, then the HSR process requires a pre-merger notification (the "HSR Form"), where the parties are required to provide certain information about the transaction and the parties involved. The antitrust Agencies have thirty days to review this form, along with any additional information they procure from other sources on the companies and the markets involved.

Upon receiving the pre-merger filing, the Agencies have several paths forward. First, the Agencies may allow the review window to expire, at which point the merger may be consummated. Second, the Agencies may grant a request for early termination, allowing the merger to close prior to the thirty-day review period. Third, if the Agencies are concerned that the transaction may reduce competition, then they may seek additional information by several means including a Second Request, which, historically, is a strong signal that the Agencies intend to engage in an enforcement action.

Figure 1 summarizes the disposition of pre-merger filings over the decade ending in 2020.[16] On average, each year the Agencies reviewed 1,739 transactions involving 3,457 pre-merger filings (each party to the transaction must file).[17] Only about 3% of mergers are issued a Second

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expected benefits. [] You should describe the alternatives available to you and the reasons for choosing one alternative over another.") (available at: https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#c). Similar language is found in the *Draft Circular A-4*, U.S. OFFICE OF MANAGEMENT AND BUDGET (April 6, 2023) ("When you have identified a range of alternatives (*e.g.*, different levels of stringency), you should determine the cost-effectiveness of each option compared with the baseline as well as its incremental cost-effectiveness compared with successively more stringent requirements.") (available at: https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf).

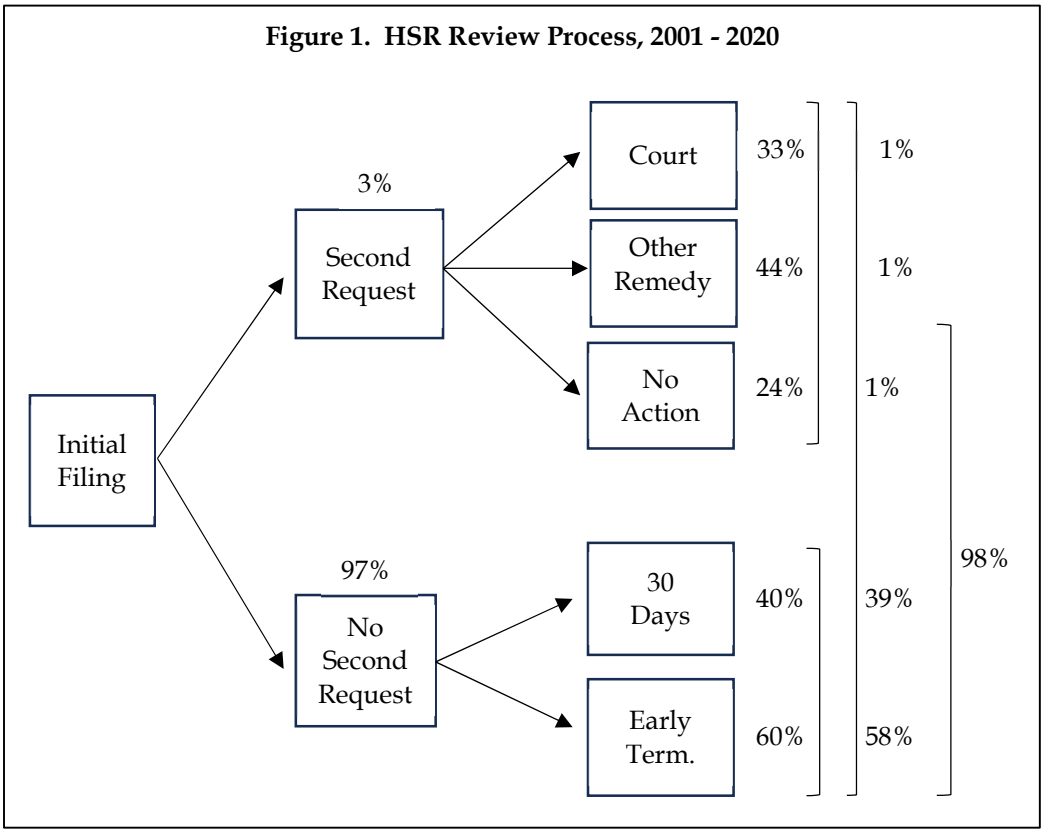
[15] A detailed description of the HSR process is provided in D. Collins, *The DOJ/FTC Merger Review Process: Unit 4*, Georgetown University Law Center (August 23, 2023) (available at: https://appliedantitrust.com/000_Merger_antitrust_law2023/04ma_merger_review/unit04ma_merger_review_class_notes2023.pdf).

[16] HSR REPORTS, Federal Trade Commission (multiple years) (available at: https://www.ftc.gov/policy/reports/annual-competition-reports).

[17] *Id*.

Request, or about 50 mergers each year, while the remaining 97% of mergers are allowed to proceed without further scrutiny. Most mergers, therefore, are competitively inconsequential, even if one speculates there is a great deal of underenforcement by the Agencies. For mergers faced with a Second Request, about 33% were subjected to a court challenge, 44% resulted in some sort of other remedy (e.g., divestiture), while the remaining 24% were permitted to proceed without conditions. In all, the Agencies acted upon about 1% of pre-merger filings and 2% of mergers.[18] The request-to-remedy rate seems reasonable and suggests the Agencies are effective in deciding which mergers to scrutinize. If anything, the past suggests that too many Second Requests are issued, though we should expect a deeper analysis to find no cause for concern in many cases.

Figure 1. HSR Review Process, 2001 - 2020



For the 97% of merger filings not subjected to a Second Request, about 60% of mergers were of so little competitive consequence that they were granted early termination by the Agencies,

[18] This recent decade is not special as a similar enforcement pattern has been observed for several decades. Over the past 32 years, for example, the Second Request rate was likewise 3%.

allowing the merger to proceed prior to the expiration of the thirty-day review period.[19] About 78% of early termination requests are granted. The remaining 40% of mergers receiving no Second Request were permitted to close after the review period. In all, 98% of mergers posed no apparent competitive risk and were allowed to proceed without modification or challenge by the Agencies, and 58% of all mergers were granted early termination.

Two important stages of the HSR process are excluded from Figure 1. Second Requests are demanding and expensive, consuming substantial resources of both the merging parties and the Agencies. Estimates suggest that a Second Request, on average, costs between $5 and $15 million to produce (and more for a larger, more complex merger) and extends the review process by many months.[20] In cases where the pre-merger filing leads the Agencies to engage in a preliminary investigation about the merger's competitive effects, the Agencies may seek additional information and/or an extended review time by two means: (1) a "Pull-and-Refile"; or (2) a "Voluntary Access Letter." A "Pull-and-Refile" allows the merging parties pull their pre-merger filings and then refile the forms to allow the Agencies more time to gather more information and review the transaction.[21] The refiled forms may be unchanged or else may include additional information requested by the Agencies. This procedure restarts the thirty-day clock upon filing and requires no additional filing fees, and, most importantly, may avoid a Second Request. A "Voluntary Access Letter" is another type of request, where the Agencies seek additional information not contained in the pre-merger filing that may assist in deciding about the need to issue a Second Request.[22] Merging parties typically comply with the access letter as doing so may avoid the weightier Second Request. The FTC provides a list (on its website) of the sorts of information and documents common to the Voluntary Access Letter and encourages

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[19] *About Early Termination Notices*, Federal Trade Commission (last visited September 10, 2023) (available at: https://www.ftc.gov/enforcement/pre-merger-notification-program/early-termination-notices/about-early-termination-notices).

[20] Collins, *supra* n. 15; *Report and Recommendations,* Antitrust Modernization Commission (April 2007) (available at: https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) ($5 to $10 million; 1.46 inflation adjustment to 2023); P. Boberg and A. Dick, *Findings From The Second Request Compliance Burden Survey*, 14 THE THRESHOLD: NEWSLETTER OF THE MERGERS & ACQUISITIONS COMMITTEE 26-37 (2014) (available at: https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf) ($4.3 million; inflation factor 1.28 to 2023). Inflation calculator available at: https://data.bls.gov/cgi-bin/cpicalc.pl.

[21] *Running Time*, Federal Trade Commission (June 30, 2014) (available at: https://www.ftc.gov/enforcement/competition-matters/2014/06/running-time); *FTC Formalizes HSR Withdraw and Refile Procedures*, Health Law Alert, Baker Donelson (2013) (available at: https://www.bakerdonelson.com/ftc-formalizes-hsr-withdraw-refile-procedures).

[22] *Guidance for Voluntary Submission of Documents During the Initial Waiting Period*, Federal Trade Commission (last visited September 10, 2023) (available at: https://www.ftc.gov/enforcement/pre-merger-notification-program/hsr-resources/guidance-voluntary-submission-documents).

firms to compile such information prior to filing and consider including that information in the pre-merger filing.

In the FTC's *NPRM*, the Commission claims that the information contained the current pre-merger filing is "insufficient for the Agencies to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers," and proposes to substantially increase the information requirements of the pre-merger filing.[23] The proposal includes, among other things: (1) a narrative rationale for the transaction (2) details about the specific investment vehicles and corporate relationships; (3) a list of products or services in which the merging parties compete, including the identities of customers; (4) a list of non-horizontal business relationships, such as supply agreements; (5) projected revenue streams for the to-be-acquired business; (6) transactional documents, including all non-privileged drafts; (7) internal documents describing market conditions (going beyond the historical limitation to those materials provided to "officers and directors"); (8) the structures of the entities involved, including specifically private equity structures; (9) details of prior acquisitions for the past 10 years (going beyond the current five-year requirement); and (10) information about labor markets, including employee classifications and commuting zones. Some practitioners describe the proposed pre-merger filing as a "mini Second Request," a term also used to describe the Voluntary Access Letter, a frequently used tool by the Agencies.[24]

The *NPRM* proposes requiring this additional information in *all* pre-merger filings. A recent survey by the U.S. Chamber of Commerce of antitrust practitioners and former Agency staff and officials suggests the proposed reform will be costly. The cost of a pre-merger filing will increase from about $80,000 to $313,000, for an additional cost of $233,000 per filing and $466,000 per merger, totaling $1.7 each year billion for all mergers.[25] The blanket demand for information presumes that the current pre-merger filing is almost entirely ineffective at detecting unproblematic mergers and ignores the high-cost of obtaining the additional information. The *NPRM* offers no cost-benefit analysis of the proposed change in rules.

Also, the *NPRM* ignores Congressional intent. According to the legislative history, Congress intended the pre-merger notification to affect "those mergers or acquisitions that were most likely to have a substantial effect on competition."[26] Even if some smaller mergers "run afoul of the Clayton Act," Congress felt it would "impose an undue and unnecessary burden on business" if

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23 *NPRM, supra* n. 7, 88 FED. REG. at 42180.

24 Rancour, *et al., supra* n. 12.

25 *See supra* n. 10.

26 *See* A.G. Howell, *Why Pre-merger Review Needed Reform - And Still Does*, 43 WILLIAM & MARY LAW REVIEW 1703 (2002).

the pre-merger notification applied universally. That is, *size matters*. In drafting the HSR Act, Congress sought "a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays."[27] To limit its reach, Congress established a size threshold for the notification requirement, which, at the time, aimed to capture the 150 largest mergers annually. For several reasons (including a failure to adequately adjust the thresholds), thousands of mergers are caught in the HSR net each year, burdening not only business but also the Agencies tasked with processing the large volume of transactions.

Unlike the *NPRM*, the legislative history of the HSR Act is consistent with the basic economics of information acquisition. In the next section, we review a simple cost-benefit analysis of information acquisition. This analysis exposes the flaws in the *NPRM*'s proposal, and points to a more sensible way for the antitrust Agencies to proceed.

III. A Cost-Benefit Model

It is useful to review some basic economics of the antitrust Agencies' information acquisition problem with a cost-benefit framework. Alchian's (1969) classic analysis of the role of obtaining costly information to make efficient decisions remains relevant today: information is costly, perfect information is prohibitively costly, and, because there are often various means of obtaining information, one should consider their efficient combination in practice.[28] These observations apply with great force in merger reviews due to the large variance in the sizes, complexities, and potential competitive consequences of the thousands of mergers the FTC and DOJ are required to examine each year. Alchian emphasizes that the amount of information an agent should rationally obtain depends on the impact of the information on her ability to select the best option, and on the benefits a better decision is likely to provide. LaValle and Rappaport (1968) provide extended examples concerning when costly information, if of limited utility or mediocre quality, is not worth obtaining: "it makes no sense to purchase such information [] because the decision maker's optimal act could have been chosen without ever receiving the information."[29] If information was free, and had any predictive value, it would always be used by the rational agent in a decision problem (though *not necessarily in a game*) but information sought in merger reviews is not free, and for many (if not most) mergers additional information has no effect on the agencies' decisions.

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[27] *Id*.

[28] A.A. Alchian, *Information Costs, Pricing, and Resource Unemployment*, 7 ECONOMIC INQUIRY 109-128 (1969) ("They key, which, till recently, seems to have been forgotten, is that *collecting information about potential exchange opportunities* is costly and can be performed in various ways.").

[29] I.H. LaValle and A. Rappaport, *On the Economics of Acquiring Information of Imperfect Reliability,* 43 THE ACCOUNTING REVIEW 225-230 (1968) at pp. 227-8.

A. *A Simple Cost-Benefit Model*

With these observations, it is worthwhile to examine the information acquisition problem in a setting resembling the HSR Act's requirements. Although we return to the important issues of the sequential nature of merger approval and the potential strategic consequences of changing the rules later, we will limit the analysis here to information acquisition that always improves the decision maker's accuracy in assessing the social consequences of the merger, and we will assume information can be represented by a continuous variable with smoothly-increasing underlying social costs. We will also assume the agency acts to maximize social welfare.

Let S denote a signal that the agency receives on the social welfare consequences of a proposed merger, and let the true welfare consequences of the merger be denoted by T. There are two potential welfare states associated with the merger, denoted by G (good) and B (bad). Both the true state (T) and the signal (S) can take on the values G or B. Hence, $T \in \{G, B\}$ and $S \in \{G, B\}$. We represent the unconditional probability that the true welfare state of merger is bad ($T = B$) by p_B.

Let f_B denote the probability that a signal of "bad" received by the agency is false (a Type I error). Furthermore, f_G is the probability that a signal of "good" received by the agency is false (a Type II error). The joint and marginal probabilities associated with the agency's signal and the true state are summarized in the following table:

Table 1. Joint and Marginal Probabilities of the Signal

	$T = G$	$T = B$	
$S = G$	$1 - p_B - f_B$	f_G	$1 - p_B - f_B + f_G$
$S = B$	f_B	$p_B - f_G$	$p_B + f_B - f_G$
	$1 - p_B$	p_B	1

We assume the social welfare benefit of a good merger ($T = G$) is represented by V and there is a social welfare loss of L associated with a bad merger ($T = B$). Let us assume the agency follows a policy wherein they approve or reject the merger application based on the signal. The expected social welfare associated with such a signal-based agency policy would be:

$$W_S = (1 - p_B - f_B)V - f_G L \,. \tag{1}$$

One may generally assume that proposed mergers are in the private interests of the applicants. Hence, in the absence of any action by the agency, we assume the merger will occur. The welfare for this baseline is given as:

$$W_0 = (1 - p_B)V - p_B L \,. \tag{2}$$

The gain in welfare associated with the signal-based agency policy would be given by the difference:

$$\Delta W = W_S - W_0 = p_B L - f_B V - f_G L \,. \tag{3}$$

The maximum possible gain would be to precisely eliminate the fraction of bad mergers, but this is tempered by false negatives and false positives associated with the imperfect signal. The accuracy of the signal would likely be dependent on the amount of information collected by the agency regarding the merger together with their ability to correctly process that information. Accordingly, we view the *false bad* and *false good* probabilities as potentially decreasing functions of information, denoted by *I*. Information production and processing is not free, and we assume there are costs for the merger applicant and the agency regarding the production and processing of merger information. We denote these costs by the function, *C*(*I*). Presuming differentiability, our basic assumptions regarding the impact of a change in merger information is given by:

$$f_B'(I) < 0, \quad f_G'(I) < 0, \quad C'(I) > 0 \,. \tag{4}$$

Likewise, there would likely be diminishing returns to information and potentially increasing marginal costs:

$$f_B''(I) > 0, \quad f_G''(I) > 0, \quad C''(I) \geq 0 \,. \tag{5}$$

If we presume that the antitrust Agencies are social welfare maximizing agents, then the Agencies will compare the gains from their signal-based policy with the costs of information. Hence, their objective function to be maximized would be:

$$Z(I) = \Delta W(I) - C(I) = p_B L - V f_B(I) - L f_G(I) - C(I) \,. \tag{6}$$

This simple expression encapsulates the observations of Alchian and other analysts on the proper use of costly information. Information has benefits and costs. The benefits arise from improved decision-making: how much good will the information do? This, in turn, depends on how often the information causes a change in the decision, and how that change, if it is adopted, affects the outcome obtained. Even information that makes the best choice obvious may not be worth paying for if other choices provide nearly identical results. Conversely, information that does little to shed light on the problem may also be inefficient to obtain even when different choices have very different consequences. It is the combination of *useful information* and *consequential decisions* that support costly information acquisition.

The expression above, if it is positive for a given value of *I*, indicates that that level of information acquisition is welfare improving compared to doing nothing. The optimal amount

of information to obtain requires some simple calculus. The first-order necessary condition to maximize this welfare objective with respect to information is,

$$Vf_B'(I) + Lf_G'(I) + C'(I) = 0 \,. \tag{7}$$

As with all optimality conditions in Economics, Expression (7) indicates that information should be acquired up to the point that the marginal benefit it confers equals its marginal cost. The benefit has two components. By assumption, the information reduces the probabilities of either approving a bad merger or prohibiting a good one. These components, in turn, have value insofar as the consequences of these mistakes matter—*i.e.*, it depends on the magnitudes of V and L. So, reducing the probability of enforcement errors may be of little consequence if either V or L is small (e.g., a small affected market); $\partial I^*/\partial V \,,\ \partial I^*/\partial L > 0$. As expressed in the legislative history, the fact that smaller mergers may "run afoul of the Clayton Act" does not justify the imposition of an "undue and unnecessary burden on business."[30] If the harm (L) from a bad merger is small, then the additional cost of the information may be too large to justify obtaining it.[31] Or, even if L is large, if the additional information has a small effect on the probability that a signal of "good" is false (f_G'), then the information is not worth obtaining. The marginal cost of the information matters also, of course, and those costs include the companies' costs of producing the information, the Agencies' costs of processing the information, and other indirect costs. As proposed, the HSR reforms represent a sizable increase in costs to both the merging parties and the Agencies, but the *NPRM* is silent on how such information will affect the error rates and on how to justify increasing the costs of pre-merger filings for plainly inconsequential mergers.

The optimality condition in Expression (7) does not include the magnitude p_B, the unconditional probability that a merger is bad; the size of that probability does not affect the marginal costs or benefits of information. However, Equation (6) does include p_B and the reason is clear: the frequency of bad mergers affects whether information should be sought or not but, if it is sought, the amount sought does not depend on the population frequency of potentially bad mergers. A high value of p_B implies that the policy of prohibiting mergers based on a bad signal is more likely to be superior to doing nothing, but the optimal amount of information to ask for is independent of this probability.

The analysis, though very simple and traditional, holds several lessons for HSR reform and the current debate invited by the Agencies' proposed reforms. First, optimal information

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[30] *See* Howell, *supra* n. 26.

[31] The DOJ estimates the benefits of civil enforcement (including mergers) as being about 2% of the total market affected, so reducing the enforcement errors in small markets has small benefits. *Congressional Submission, Performance Budget*, Antitrust Division: Department of Justice (Multiple years) (available at: https://www.justice.gov/doj/budget-and-performance; https://www.justice.gov/archives/jmd/justice-management-division-archive).

acquisition is necessarily tailored to the problem being considered: *how much will the information sought change the probabilities of the merger being properly assessed as good or bad, how large are the consequences of an error, and how much will this information cost*? A "one size fits all" approach is unlikely to have good efficiency properties unless the population of potential mergers is very homogenous in size and social consequence, which it is not. Second, it is plausible that, in some cases, no information beyond the *ex ante* information in the pre-merger filing on which the probabilities are initially assessed would be worth obtaining: formally, this implies that the first order condition is negative at $I = 0$, while informally it suggests the case where the merger proposal is clearly of little or no competitive consequence. Put another way, the question is not simply how much information permits the agency to accurately detect anticompetitive mergers, but also how much information is required to clearly identify inconsequential mergers. The current pre-merger filing is suitable for the latter in most cases, so it is rational to use that information to cull the easy cases and avoid the needless addition of costs on those transactions.

A few comments on the static nature of the model studied here. Under current practice, the great majority of merger filings (97%) elicit no further request for information from the FTC (see Figure 1), and 58% of mergers, on average, are so inconsequential (from a competition perspective) that they are allowed to proceed prior to the expiration of the thirty-day review period. One could then take those mergers as not fitting into that category as usefully conceptualized by the problem as written here, where the question becomes how much further information to require, given the beliefs and information extant at that moment. A requirement of procedural uniformity in the HSR Form, where all merger applicants have an identical form to complete, is clearly a profound constraint on the Agencies' analysis of mergers, at least in some cases. Ideally, information acquisition should be tailored to economic circumstances in each application. (In the European Union, for example, transactions involving parties with small combined market shares may submit a "short form."[32]) The current practice, in which a targeted group of mergers of greatest concern is subjected to extensive information production through several means, while the vast majority of mergers that are of little or no concern are not impeded, is a sensible response to the uniformity issue. Raising the cost of the pre-merger filing for all mergers, therefore, is profoundly inefficient as costly data requests are of limited value in low-risk populations, and such "[w]aste and inefficiencies in the process are paid for by taxpayers, shareholders, and consumers—and they are one and the same."[33]

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[32] https://www.gtlaw.com/en/insights/2023/6/us-antitrust-regulators-propose-substantial-additions-to-hsr-notification-requirements.

[33] Majoras, *supra* n. 8 at p. 7.

B. *A More Sensible Path Forward*

The path forward seems straightforward. Inconsequential mergers, which perhaps constitute over 90% of the population, may be reliably detected using the current information in the pre-merger filing. Thus, the high costs of obtaining additional information may be avoided for the bulk of transactions. For those mergers not so easily identified as unproblematic, the Voluntary Access Letter (or Pull-and-Refile process) may be used to obtain the additional information sought in the *NPRM*. This approach is not novel; it is routinely used by the Agencies and there is no barrier to greater use of the procedure. Several antitrust practitioners have observed that the *NPRM's* proposed data request is not unlike the current model Voluntary Access Letter, and amendments to such requests are easily made.[34] As noted by the law firm Baker Botts:

> Today, the FTC and DOJ gather much of the same information required by the proposed amendments using "voluntary access letters," which they issue to parties only after they initially screen a merger and decide to open a preliminary investigation. The Agencies' model access letters, which are generally tailored to specific transactions, request parties to voluntarily provide information such as: organization charts; strategic and marketing plans; descriptions of products and services including products in development; customer and competitor lists with contact information; and market share information.[35]

Requesting additional information from a few potentially problematic mergers is far more efficient than requesting the same information from all mergers of which most are inconsequential. *Why impose costs on 2,000 mergers when doing so on 200 mergers would do*? Targeting additional information requests reduces the burden on business while respecting the resource constraints of the antitrust Agencies. The *NPRM*'s proposal presumably will overwhelm staff, largely due to the need to review information useless for most mergers, and this redirection of resources could, in fact, reduce enforcement actions. The Chamber of Commerce's survey suggest that the *NPRM*'s proposal will increase the review time for pre-merger filing by more

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[34] *See, e.g., Antitrust Authorities Propose Revisions and Additions to the Pre-merger Notification Process*, Baker & McKenzie (June 29, 2023) ("The new requirements include information and disclosures that would typically be requested in a Voluntary Access Letter") (available at: https://insightplus.bakermckenzie.com/bm/antitrust-competition_1/united-states-antitrust-authorities-propose-revisions-and-additions-to-the-pre-merger-notification-process).

[35] *Proposed HSR Amendments Dramatically Increase Burden of Pre-Merger Notification Filings - Stakeholders Have Sixty Days to Comment*, Baker Botts (June 20, 2023) (available at: https://www.bakerbotts.com/thought-leadership/publications/2023/june/proposed-hsr-amendments-dramatically-increase-burden-of-pre-merger-notification-filings-stakeholders).

than threefold, and to process the information in the thirty-day window would require a doubling of staff.[36]

Using history as a guide, the antitrust Agencies have a great deal of information with which to guide the selection of mergers to investigate. In Table 2, for instance, we see that the probability of a Second Request varies substantially across the deal size of the merger. As might be expected, smaller mergers and firms are less likely to draw attention, as the cost-benefit analysis (and legislative history) indicates is appropriate. Looking at the sales and assets of the merging parties, there are likewise differences across size, and differences between the sizes of the acquired and acquiring firms. An Analysis of Variance ("ANOVA") indicates that there is useful information on the sizes of the deals and parties involved that may be used to distinguish between potentially problematic and innocuous mergers, at least based on past enforcement priorities.

Table 2. Second Request Rates by Deal Size and Party (2007 – 2021)

	Deal	Sales		Assets	
$50 - 100 mil.	0.012	0.014	0.007	0.016	0.014
$100 - 150 mil.	0.012	0.019	0.010	0.023	0.009
$150 - 200 mil.	0.012	0.020	0.011	0.016	0.006
$200 - 300 mil.	0.018	0.023	0.012	0.028	0.014
$300 - 500 mil.	0.022	0.026	0.015	0.030	0.013
$500 - 1000 mil.	0.028	0.039	0.021	0.033	0.016
> $1000 mil.	0.100	0.059	0.047	0.056	0.041
Not Available	…	0.048	0.003	0.030	0.033
ANOVA F-stat	14.82***	13.76***	50.53***	15.00***	27.12***

Similarly, the probability of a Second Request varies substantially by industry (based on a three-digit NAICS).[37] Several industries have not faced a Second Request in over a decade, and there is substantial differentiation in the Second Request rate among industries—and between the industries of the acquiree and the acquired. About 42% of industries have Second Request rates of less than 1%, accounting for about 20% of all mergers. Very few industries have a Second Request rate exceeding 10%, yet these are obvious targets for closer scrutiny. Similarly, industry concentration and intra-industry mergers are historically more likely to receive a Second Request. Any agency's pet enforcement priorities (e.g., Big Tech) may also be targeted.

The data analyzed here are aggregates, but that is what is publicly available. Merger-specific data would provide more details about enforcement priorities and allow the agencies to use

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[36] *U.S. Chamber HSR/Merger Guidelines Practitioner Survey*, *supra* n. 10.

[37] *See* HSR REPORTS, *supra* n. 16.

predictive modeling. Tucker (2013) analyzes such data (which is proprietary) and finds several interesting patterns.[38] Regression analysis using such data could be used to assign probabilities to competitive concerns (based on the history of Second Requests and even remedies), and these probabilities could be used for targeting additional information requests, thus avoiding the costly blanket requests for information that serves no merger enforcement purpose.

C. *Facilitating a Cost-Benefit Analysis*

Targeting information requests is a more efficient approach to information acquisition; it is feasible using existing means. An additional benefit of this approach is that it can permit the Agencies to conduct a thorough cost-benefit analysis of expanding or retracting information requests. In effect, the costs and benefits of the proposed reforms may be estimated by a sort of experimentation, an idea detailed in the paper *Randomizing Law* by Abramowicz, Ayers, and Listokin (2013).[39] For instance, mergers could be evaluated at the early stages using only the current pre-merger filing information, and then evaluated again after the supplementary information is obtained by a Voluntary Access Letter. If the additional information fails to improve the selection of mergers deserving closer scrutiny, then it makes no sense to increase the scope of information requests broadly, but it may be sensible to scale down the requests. If the information is useful only for certain types of mergers, then the Voluntary Access Letters could be targeted accordingly. We doubt that such an analysis would support the current proposal, which is akin to using chemotherapy as a prophylactic for all patients (including those with a hay fever or a broken arm). Moreover, this cost-benefit approach permits the Agencies to show their "whys and wherefores" for a costly reform, thus avoiding the arbitrary and capricious decision-making that threatens the entire proposal.

IV. Conclusion

In its recent *NPRM*, the FTC proposes to increase greatly the information required in all pre-merger HSR filings, raising the cost of all such filings by nearly $2 billion annually; doing so seems in direct contradiction to Congressional intent and rational decision-making. While some reform may be warranted, it need not be over-ambitious or inefficient, and should be subjected to a cost-benefit analysis. As we see it, any sensible and efficient reform of the HSR process should incorporate, at a minimum, the fact that most mergers are value-creating and pose no risk to competition. Many if not most of these mergers can be identified using only the information currently requested in the pre-merger filing. Policies that increase the costs to consummate competitively inconsequential mergers have no offsetting benefits and should be avoided.

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[38] D.S. Tucker, *A Survey of Evidence Leading to Second Requests at the FTC*, 78 ANTITRUST LAW JOURNAL 591-617 (2013).

[39] M. Abramowicz, I. Ayres and Y. Listokin, *Randomizing Law*, 159 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 929 (2011) (available at: https://scholarship.law.gwu.edu/faculty_publications/236).

Reforms should not be based on a one-size-fits-all approach. To the extent more information is needed to better identify problematic mergers, the Agencies have alternative means to obtain it including, primarily, the Voluntary Access Letter. Such letters can be targeted at potential problematic mergers whilst avoiding imposing costs on the bulk of mergers that plainly pose no risk to competition. There is no justification for imposing costs on mergers that the Agencies have no intent to scrutinize and act upon—why impose costs on 2,000 mergers when doing so on 200 mergers would do? If necessary, then the HSR Form might be amended with a few questions to accommodate changes in the law or enforcement interests without excessive burden.

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