Antitrust Merger Control as a Regulatory Sandbox

D. Daniel Sokol*

INTRODUCTION

Federal antitrust changed the way it approved merger control by moving from *ex post* litigation to a quasi-regulatory *ex ante* regime in 1976 with the passage of the Hart-Scott-Rodino Act (HSR).[1] HSR established a premerger notification process that considers the size of transactions and creates size of person thresholds.[2] HSR, therefore, enables regulators to learn about competitive effects of mergers before they happen. When regulators become aware of mergers after the fact, intervention may often be too late. By addressing competitive concerns before a merger is consummated, government antitrust practice changed to focus more on mergers than other forms of conduct,[3] and became more regulatory because of this *ex ante* approach to proposed transactions.[4]

Whereas a number of prior works criticize this quasi-regulatory approach on transparency and accountability grounds,[5] this Article suggests that since the passage of HSR, the antitrust merger control system historically has worked very well. This approach has worked particularly regarding the creation of greater legal certainty for merging parties and the antitrust agencies. Relatively clear guidelines have led to a set of outputs of case law, negotiated settlements, and transactions that have been abandoned because of legitimate antitrust agency scrutiny. This Article contributes to the framing of antitrust merger control by suggesting that, in key aspects, antitrust merger control under HSR may

* Carolyn Craig Franklin Chair in Law, and Professor of Law and Business, USC Gould School of Law and USC Marshall School of Business; Senior Advisor, White & Case LLP.

1. 15 U.S.C. § 18a.

2. *Id.*

3. *Compare* ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION WORKLOAD STATISTICS FY 2010–2019, at 1 (reporting that about 60% of all Antitrust Division investigations focused on mergers in fiscal years 2010–2019), *and Competition Enforcement Database*, FED. TRADE COMM'N, https://www.ftc.gov/competition-enforcement-database [https://perma.cc/3XAV-ECCX] (reporting about 83% of agency enforcement actions were "merger" enforcement actions between 2012–2022), *with* ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION WORKLOAD STATISTICS FY 1907–1979, at 1 (reporting that the bulk of Antitrust Division investigations focused on Sherman section 1 violations). The FTC began reporting enforcement activity in 1996, meaning it did not report enforcement actions pre-HSR. *See Modern Antitrust Enforcement*, YALE SCH. OF MGMT., https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement [https://perma.cc/T9R7-9MRK].

4. E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1024–30 (1986).

5. A. Douglas Melamed, Commentary, *Antitrust*: *The New Regulation*, ANTITRUST, Fall 1995, at 13, 14 (explaining merger control's shift "from the Law Enforcement Model toward the Regulatory Model"); Harry First, *Is Antitrust "Law"?*, ANTITRUST, Fall 1995, at 9, 9 (identifying the "shift on the policy continuum toward bureaucratic regulation").

be viewed as an early attempt at a "regulatory sandbox."[6] The regulatory sandbox is a mechanism to reduce regulatory uncertainty where innovation may matter and where discussions regarding innovations between government authorities and firms as can be worked out together. The regulatory sandbox is increasingly receiving attention in financial regulation, among other fields.[7] Much like in financial regulation, the antitrust regulatory sandbox overall has proven successful[8] though, at times, antitrust merger control may still require some tweaks to make it more effective.[9] Yet, business certainty under the antitrust regulatory sandbox may be threatened by a current shift in antitrust that creates less certainty through a lack of transparency and shifting goals and makes predictability of outcomes more difficult to discern. This Article identifies some of the current issues as well as offers some solutions.[10]

I. IMPORTANCE OF MERGER CONTROL

The debate over *ex ante* and *ex post* review is an old one within the legal literature.[11] The same is true in antitrust, where the concerns in merger review also differentiate

6. Dirk A. Zetzsche et al., *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 FORDHAM J. CORP. & FIN. L. 31, 64–68 (2017) (describing regulatory sandboxes in finance).

7. *See Overview of Regulatory Sandbox*, MONETARY AUTH. OF SING., http://www.mas.gov.sg/Singapore-Financial-Centre/Smart-Financial-Centre/FinTech-Regulatory-Sandbox.aspx [https://perma.cc/UDU9-BYPG] (providing a broad explanation of how Singapore's regulatory sandbox works); *FinTech Regulatory Sandbox*, AUSTL. SEC. & INVS. COMM'N, https://asic.gov.au/for-business/your-business/innovation-hub/regulatory-sandbox [https://perma.cc/2AUH-9H6F] (explaining Australia's "enhanced regulatory sandbox"); Robert Savoie & Philip (PJ) Hoffman, *The Evolving Regulatory Response to Innovation: Special Purpose National Bank Charters, Regulatory Sandboxes, and No-Action Letters*, 74 BUS. LAW. 527, 531 (2019) (surveying how, in response to technical innovations in financial services, the regulatory sandbox may be used); Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 248–49 (2019) (explaining the tradeoffs of utilizing the regulatory sandbox in response to innovations in financial technology); Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL'Y 25, 37–38 (2020) (explaining the adoption of sandboxes in fintech regulation).

8. Wiliam J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J., 825, 826 ("HSR has become essential for antitrust to keep pace with our dynamic economy.").

9. On the limitations of antitrust merger control, see Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018) (arguing to strengthen the structural presumption); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018) (arguing modern monopsony analysis focuses "relatively little attention" to bargaining leverage); and Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1 (2007) (discussing the difficulties merger enforcement has in regulating markets that are marked by high rates of innovation).

10. The rest of this symposium appears to have taken a similar approach. Christine P. Bartholomew, *The Dark Side of Antitrust Statements of Interest*, 49 J. CORP. L. 233 (2024); Joseph J. Bial & Alex J. Evans, *Criminal Enforcement of Section 2—How Significant Is the Threat?*, 49 J. CORP. L. 263 (2024); Richard A. Epstein, *The DOJ and FTC's Misguided Attack on Mergers*, 49 J. CORP. L. 275 (2024); Erik Hovenkamp, *Platform Exclusion of Competing Sellers*, 49 J. CORP. L. 299 (2024); William E. Kovacic, *Antitrust, Transformation, and Enduring Policy Change*, 49 J. CORP. L. 321 (2024); Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism's Democracy Paradox*, 49 J. CORP. L. 347 (2024); Seth C. Oranburg, *Antitrust Law for Blockchain Technology*, 49 J. CORP. L. 379 (2024); Sean P. Sullivan, *Against Efforts to Simplify Antitrust*, 49 J. CORP. L. 419 (2024).

11. *See, e.g.*, Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring,* 6 J. LEGAL STUD. 193, 209 (1977) ("The discussion of ex ante and ex post has produced a number of empirical propositions regarding the legal process-too many to summarize here.").

between static and dynamic efficiencies.[12] While the benefits of *ex ante* versus *ex post* in antitrust is ambiguous in some formal economic models,[13] the costs and benefits become clearer with qualitative case analysis and with empirical work.

Merger control plays an important role in antitrust.[14] Every major antitrust jurisdiction has embraced merger control, an *ex ante* way to address the potential competitive harms of proposed mergers.[15] But a merger control statute alone is not sufficient to address the complexities of mergers and to give firms and their lawyers the ability to anticipate the types of methodologies that the antitrust authority will use. Perhaps the greatest development in antitrust merger policy has been the development of merger guidelines.[16] Merger guidelines create transparency and greater predictability by identifying the core concepts that motivate the merger control system as well as explain the legal and economic analytical framework applied within merger control by the agencies.[17] Overall, in the United States, the prior iterations of the horizontal merger guidelines in their various incarnations have been successful in providing predictability to merging parties and have been embraced by courts.[18]

When there is a lack of clarity in the merger control process because the goals, process, and substantive analysis of merger control are not clear, proposed mergers that benefit society may become delayed or even undermined, thereby creating economy wide problems. For a subset of mergers, deals that are either neutral or efficiency-creating may not be contemplated or may be abandoned. This is true for mergers for which there is an

12. *See generally* Org. for Econ. Coop. & Dev. [OECD], *Ex Ante Regulation and Competition in Digital Markets* (2021), https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf [https://perma.cc/K7CM-3VU8] (comparing how different countries' stress *ex ante* and *ex post* regulation differently for regulating digital markets).

13. *See* David Besanko & David F. Spulber, *Contested Mergers and Equilibrium Antitrust Policy*, 9 J.L. ECON. & ORG. 1, 3 (1993) (discussing how the weighted significance of "social-welfare" and "consumers' surplus" impacts equilibrium enforcement outcomes in economic models); Marco Ottaviani & Abraham L. Wickelgren, *Ex Ante or Ex Post Competition Policy? A Progress Report*, 29 INT'L J. INDUS. ORG. 356, 359 (2011) (finding "that ex post control has an undesirable chilling effect on ex ante incentives to undertake some socially desirable mergers").

14. OECD, *OECD Competition Trends 2021, 2 Global Merger Control*, at 8 (2021), https://www.oecd.org/daf/competition/oecd-competition-trends-2021-vol2.pdf [https://perma.cc/3TLJ-LMGP] ("Effective merger review is a key component of almost all competition regimes intended to prevent consumer harm resulting from transactions that significantly reduce competition. While most mergers do not cause harm to competition and will often generate efficiencies, certain may create competition problems that require competition authority intervention.").

15. *Id.* ("As of 2019, almost all jurisdictions in the world have some form of merger control regime, assessing mergers' competitive impact in their relevant markets.").

16. Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 107–14 (2002) (discussing the history and evolution of U.S. merger guidelines).

17. D. Daniel Sokol et al., *Antitrust Mergers and Regulatory Uncertainty*, 78 BUS. LAW. 1099, 1099, 1104–06 (2023).

18. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 781, 804–08 (2006).

efficiency rationale that increase scale[19] or scope[20] and are horizontal,[21] vertical,[22] or diagonal (adjacent)[23] mergers. For another subset of deals (some of which overlap with efficiency-oriented deals), uncertainty increases costs by introducing a delay in the merger process.[24] This delay may impact the financing window of a proposed deal for the acquirer or create uncertainty for the target because of a delay that may impact key employees or contractual parties. The length of "second requests," which are requests for more information beyond the initial 30 days for merging parties may be costly because of the time involved as well as the amount of effort to comply with such requests. As Fidrmuc, Roosenboom, and Zhang explain in the context of second requests for additional information from the merging parties,

> Second Requests increase the compliance costs and the interim uncertainty of announced but not yet completed deals. This is because of extra concessions merging firms may need to agree to, extra documents merging firms are requested to provide, and the time it takes to do so. Moreover, extended time to completion may be associated with other related costs, such as costs of keeping financing for the deal in place and keeping anxious employees and customers on board.[25]

However, these sorts of costs are not unique to second requests but also to earlier calculations of the risk/reward tradeoff of mergers in the merger control process. Some of these requests are justified. The choices of the parameters of merger control are likely to have material effects on the costs and burdens of legal compliance. As such, they impact the desirability to undertake M&A activity because of what may be a "regulatory tax" that

---

19. Bart M. Lambrecht, *The Timing and Terms of Mergers Motivated by Economies of Scale*, 72 J. FIN. ECON. 41 (2004).

20. Oliver Hart & Bengt Holmstrom, *A Theory of Firm Scope*, 125 Q.J. ECON. 483, 494–95 (2010).

21. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 210 (2003) (providing an overview of the law and economics in this area); Orley Ashenfelter, Daniel Hosken & Mathew Weinberg, *Did Robert Bork Understate the Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S77 (2014); Malcolm B. Coate, *A Retrospective on Merger Retrospectives in the United States*, 12 J. COMPETITION L. & ECON. 209 (2016).

22. Jaideep Shenoy, *An Examination of the Efficiency, Foreclosure, and Collusion Rationales for Vertical Takeovers*, 58 MGMT. SCI. 1482, 1500 (2012) ("Collectively, our findings indicate that firms use corporate takeovers to expand their vertical boundaries consistent with an efficiency improvement rationale . . . ."); Laurent Frésard, Gerard Hoberg & Gordon M. Phillips, *Innovation Activities and Integration Through Vertical Acquisitions*, 33 REV. FIN. STUD. 2937, 2970 (2020) (finding innovation-intense industries are less vertically integrated); Roger D. Blair et al., *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*, 27 GEO. MASON L. REV. 761, 777–79 (2020).

23. *See* Milan Miric, Margherita Pagani & Omar A. El Sawy, *When and Who Do Platform Companies Acquire? Understanding the Role of Acquisitions in the Growth of Platform Companies*, 45 MIS Q. 2159, 2167–69 (2021) (analyzing trends of digital platform companies acquiring non-platform companies); Zhuoxin Li & Ashish Agarwal, *Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook's Integration of Instagram*, 63 MGMT. SCI. 3438, 3439–40 (2017) (analyzing social media platforms integration of third-party applications through acquisition).

24. *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 134 (2007), https://digital.library.unt.edu/ark:/67531/metadc1228317/m2/1/high_res_d/amc_final_report.pdf [https://perma.cc/5ZQ2-EHRP] ("[W]hen [clearance disputes] occur they can cause significant delays in the review of a proposed transaction . . . .").

25. Jana P. Fidrmuc, Peter Roosenboom & Eden Quxian Zhang, *Antitrust Merger Review Costs and Acquirer Lobbying*, 51 J. CORP. FIN. 72, 79 (2018).

governments impose on mergers that are not anti-competitive. Of note, this is not merely a tax on the overall business community. Rather, a merger system that lacks intellectual clarity as to substance, transparency, and clear procedural rules also taxes the limited resources of antitrust enforcers that need to focus on actual problems that merger control identifies. These taxes include the potential negative impacts in industries that regularly create competition concerns as well as individual deals in sectors where the competition concerns are less severe.

II. THE IMPORTANCE OF REGULATORY CERTAINTY AND ANTITRUST MERGER POLICY

There is a focus on *ex ante* regulation of mergers for two potential reasons. In the first, antitrust enforcers face uncertainty with regard to post merger activity.[26] Because of the uncertainty of intervention based on imperfect information, antitrust authorities must have an effective structural presumption that allows them to intervene when there is a substantial lessening of competition.[27] In the second, the agencies are concerned about the potential for over- or under-enforcement when missing the anti-competitive effects of a merger are difficult to undo.[28] That is, consummated mergers are difficult to unwind because one firm has been absorbed into the other and might not be able to survive as a stand-alone entity as a result of *ex post* enforcement. This push towards a quasi-regulatory regime for merger control makes merger control unique in the antitrust toolkit that is otherwise *ex post* enforcement focused.

This Article takes an institutional approach to merger control. Others have suggested institutional approaches to merger control,[29] but none have framed it in a way that addresses core questions of innovation and investment as part of the form of regulatory sandbox, which this Article will explore more in Part II.B. In this reframing, antitrust operationalized the regulatory sandbox approach long before this sort of phenomenon was identified in the literature outside of antitrust. This Part analyzes how antitrust worked toward a sandbox model and the justification for the model.

---

26. *See* Ottaviani & Wickelgren, *supra* note 13, at 359 (discussing how merged firms are incentivized to hide information about the effects of their merger to distort a government's *ex post* regulatory decisions).

27. Peter C. Carstensen, *The* Philadelphia National Bank *Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L.J. 219, 264–66 (2015); Sean P. Sullivan, *What Structural Presumption?: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis*, 42 J. CORP. L. 403, 438 (2016).

28. Hovenkamp & Shapiro, *supra* note 9, at 1997 ("This *Philadelphia National Bank* burden-shifting approach has been critical for effective horizontal merger enforcement by the Department of Justice (DOJ) and the Federal Trade Commission (FTC).").

29. *See, e.g.*, Menesh S. Patel, *Merger Breakups*, 2020 WIS. L. REV. 975 (arguing for increasing antitrust challenges while adhering to institutional principles); Matthew Jennejohn, *Innovation and the Institutional Design of Merger Control*, 41 J. CORP. L. 167, 208–12 (2015) (exploring the recent experimentalist approach to antitrust and proposing policies for an institutional evolution); Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 360–70 (2011) (critiquing the asymmetry of benefits and risks in current antitrust enforcement and proposing solutions); D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055 (2010) (exploring the dynamic interrelationship across antitrust institutions).

A. A Primer on Antitrust Merger Policy

The antitrust regulatory sandbox story begins with the passage of the HSR in 1977.[30] The Act created a pre-notification system for transactions that resulted in a change in ownership based on company size transaction size thresholds.[31] HSR, combined with merger guidelines, created a system of *ex ante* review with predictable rules and negotiation strategies between merging parties and enforcers.

In the U.S. antitrust systems, two federal antitrust agencies regulate merger activity, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC).[32] The two agencies have some differences. The most obvious is in institutional design. While the DOJ is an executive agency,[33] the FTC is a five-member independent agency that has a mix of antitrust, consumer protection, and data privacy functions.[34] For purposes of basic institutional structure, the FTC should operate with less political control because of their independence relative to DOJ.[35]

To improve regulatory certainty and transparency as well as to align merger practice with the latest thinking in economic analysis, the FTC and DOJ have published horizontal merger guidelines at various intervals.[36] The joint DOJ and FTC current Merger Guidelines (which include coverage of both horizontal and non-horizontal mergers) were most recently issued in December 2023.[37]

---

30. 15 U.S.C. § 18a.

31. *Id.*

32. Notably, the Department of Transportation (DOT) and Federal Communications Commission (FCC) have some antitrust authority and oversight in their respective domains, although they are not the only agencies with overlapping competition authority relating to mergers. For example, FCC will review major transactions among telecommunications companies and the DOT reviews antitrust immunity or joint venture applications among airlines. However, the FTC and (more commonly) DOJ typically coordinate with these organizations and reserve the authority to challenge DOT and FCC decisions.

33. *See generally* James F. Rill & Stacey L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577 (2014) (describing the antitrust policies of different administrations).

34. William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2086 (2015) (describing the FTC as a "competition agency"); *FTC Policy Work on Privacy and Data Security*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/topics/protecting-consumer-privacy-security/ftc-policy-work [https://perma.cc/3WEC-4ASH].

35. Kovacic & Winerman, *supra* note 34, at 2100; DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 35–38 (2011).

36. *See* U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (1982), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf [https://perma.cc/XX7C-64MF]; U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (1984), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf [https://perma.cc/6KFH-4GSN]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf [https://perma.cc/43F2-8RUK]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf [https://perma.cc/43F2-8RUK]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [https://perma.cc/6CRE-PGUA] [hereinafter 2010 HMG].

37. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/reports/merger-guidelines-2023 [https://perma.cc/SEH8-XUWF].

Even though these are joint guidelines, the jurisdictional overlap of the agencies is not always clear.[38] Largely, the DOJ and FTC have specialization in separate industries.[39] Yet, sometimes there are clearance battles for the same deal.[40] The aggressiveness of the different agencies may vary either at the staffer or agency level. When there is divergence in the approach of the agencies, the divergence creates a lack of predictability and confidence in the agencies.[41] This type of risk may change the risk shifting in contractual provisions in a merger agreement such as divesture or litigation obligations, ticking fees, break-up, or reverse break-up fees, or even interactions with agency staff or "front office" (political) management. The aggressiveness of agency staff or leadership also may have an impact on deal structure and influence whether the merger parties offer a "fix it first" remedy or other behavioral or structural remedies to get the merger through.[42]

The antitrust system is one where cases are atypical rather than typical. In a given year, only a tiny fraction of merger cases go to trial. Of those that do, the agency is relatively certain that they will win because the competitive effects trend much more towards anti-competitive harm.[43] The structural presumption in courts compounded by clear efficiencies not being challenged leads to less in-court negotiations between the government and merging parties.[44] The lack of modern-era Supreme Court substantive merger law also pushes much of the decision-making to the agency level.[45] The success of the HMG over time has been on issues of process and transparency, timing, and substance in merger review before the agencies has reduced uncertainty and allowed both for better outcomes for the antitrust system and for decision-making by firms on whether and on what terms to pursue a merger, as per global best practices.[46]

A newly issued set of merger guidelines changes this dynamic.[47] Prior iterations of the merger guidelines have restated agency practice as it relates to where the law is and the economic framework under which the basis exists for merger control.[48] Put differently,

---

38. *E.g.*, William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1025 (2012) (discussing how the structuring of the DOJ and FTC creates gaps and compliments in federal enforcement); CRANE, *supra* note 35, at 42–46.

39. CRANE, *supra* note 35, at 39.

40. Bryan Koenig, *For DOJ and FTC, Clearing Deals Remains a Gray Area*, LAW360 (Mar. 20, 2020), https://www.law360.com/articles/1255073/for-doj-and-ftc-clearing-deals-remains-a-gray-area [https://perma.cc/3RKH-EMUV].

41. *See* ANTITRUST MODERNIZATION COMM'N , *supra* note 24, at 134 (explaining how uncertainty increases costs by introducing delay in the merger process).

42. John D. Harkrider, *Risk-Shifting Provisions and Antitrust Risk: An Empirical Examination*, ANTITRUST, Fall 2005, at 52, 52.

43. Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 55–56 (2021).

44. Jeffrey T. Macher et al., *The Evolution of Judicial Standards: Evidence from Litigated Merger Trials* 13 (Georgetown McDonough Sch. of Bus., Rsch. Paper No. 3809174, 2022), https://ssrn.com/abstract=3809174 [https://perma.cc/VSP4-FZJL] (finding that merger litigation cases have shifted in favor of the agencies).

45. D. Daniel Sokol & James A. Fishkin, Response, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 48–49 (2011).

46. *See generally ICN Recommended Practices for Merger Notification and Review Procedures*, INT'L COMPETITION NETWORK (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [https://perma.cc/3GZB-A5S7].

47. *See generally* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://ftc.gov/reports/merger-guidelines-2023 [https://perma.cc/SEH8-XUWF].

48. *Id.* at 1.

typically antitrust guidelines have explained both before the agencies and courts what matters, why it matters, and how much it matters.[49]

The departure in the current guidelines is a more variable methodology that seems to abandon the consumer welfare standard for more structural presumptions and, hence, makes it more difficult to distinguish pro- from anti-competitive mergers.[50] The decoupling of law from economics makes the legal burden shifting more difficult to understand. All these changes in the merger guidelines increase regulatory uncertainty.

B. Regulatory Certainty and the Merger Sandbox

Regulatory sandboxes are said to have their origin in fintech regulation and in the United Kingdom's Financial Conduct Authority, which described the sandbox as "a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question."[51] A literature has emerged to highlight the potential and pitfalls of the regulatory sandbox model, which is mostly positive, and highlights how risk of regulatory intervention that would chill innovation can be mitigated through the sandbox approach.[52] More generally, empirical work across fields and regulated sectors show results that suggest that regulatory certainty plays an important role in firm decision-making.[53]

---

49. *Id.*

50. Jason Furman & Carl Shapiro, Opinion, *How Biden Can Get Antitrust Right*, WALL ST. J. (July 27, 2023), https://www.wsj.com/articles/how-biden-can-get-antitrust-right-khan-ftc-justice-department-guidelines-11364639 (on file with the *Journal of Corporation Law*).

51. FIN. CONDUCT AUTH., REGULATORY SANDBOX 1 (2015), https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf [https://perma.cc/DJ7W-BWH9].

52. Brummer & Yadav, *supra* note 7, at 291–97; *see also* Jacob S. Sherkow, *Regulatory Sandboxes and the Public Health*, 2022 U. ILL. L. REV. 357, 368–71 (examining the policy rationale for regulatory sandboxes in the public health context and their associated risks); *but see* Hilary J. Allen, *Regulatory Sandboxes*, 87 GEO. WASH. L. REV. 579, 606 (2019) ("This Article, however, joins the chorus of voices cautioning that financial innovation should not be pursued uncritically as something that is inherently good.").

53. *See* Alice Bonaime, Huseyin Gulen & Mihai Ion, *Does Policy Uncertainty Affect Mergers and Acquisitions?*, 129 J. FIN. ECON. 531, 539–42 (2018) (showing that policy uncertainty negatively impacts firm-level acquisition decisions); George Bittlingmayer, *Stock Returns, Real Activity, and the Trust Question*, 47 J. FINANCE 1701, 1727 (1992) (summarizing findings correlating stock prices to antitrust activity); Ariel Dora Stern, *Innovation Under Regulatory Uncertainty: Evidence from Medical Technology*, 145 J. PUB. ECON. 181, 193–94 (2017) (noting small firms "are less likely to enter new device markets as pioneers" because of the increased costs of delay in seeking administrative approval of the new device); Utpal Bhattacharya et al., *What Affects Innovation More: Policy or Policy Uncertainty?*, 52 J. FIN. & QUANT. ANALYSIS 1869, 1869 (2017) (finding innovation activity "drop[s] significantly during times of policy uncertainty"); Graeme Guthrie, *Regulating Infrastructure: The Impact on Risk and Investment*, 44 J. ECON. LIT. 925, 950–51 (2006) (finding firms are less likely to invest in innovation when faced with regulatory uncertainty); Jerome Detemple & Yerkin Kitapbayev, *The Value of Green Energy Under Regulation Uncertainty*, 89 ENERGY ECON. 1, 2 (2020) (finding, in the green energy market, "policy uncertainty postpones . . . investment when the policy change is . . . retroactive"); Nicholas Bloom et al., *Investment and Subjective Uncertainty* 1, (Nat'l Bureau of Econ. Rsch., Working Paper No. 30654, 2022), https://www.nber.org/papers/w30654 [https://perma.cc/4B8J-SZ5M] ([I]nvestment is strongly and robustly negatively associated with higher uncertainty . . . ."); *see generally* Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of the General Data Protection Regulation on Technology Venture Investment*, 40 MKTG. SCI. 661 (2021).

The regulatory sandbox approach is particularly important because regulation tends not to do well in the face of technological change.[54] In this sense, the regulatory sandbox approach has implications for antitrust. In many ways, the regulatory sandbox approach predates financial regulation and other fields as antitrust was perhaps the first area in which the sandbox approach was attempted. The regulatory sandbox approach was done in the merger context but simply was not framed this way. This idea has important salience to today's debates about changes in antitrust merger policies under the Biden administration.

The antitrust regulatory sandbox framing for mergers contrasts with earlier descriptions of antitrust merger analysis. Prior scholarship focuses on what is believed to be a design flaw of the merger control system—negotiated remedies are less certain, accountable, and transparent than enforcement.[55] William Blumenthal summarizes the common concerns:

> The debate centers around two broad categories of issues. The more common set of issues relates to the burdens imposed in administering the Act's premerger notification obligations and the question of whether those burdens are necessary in order to fulfill the Act's legitimate objectives. The more subtle set of issues is collateral to the Act itself and falls within the realm of jurisprudence—the unanticipated effect of the Act in shifting the primary locus of merger law from the courts to the enforcement agencies, the procedural structure of the review process before the agencies, and the "private law" consequences of the confidentiality and discretion with which the process unfolds.[56]

Ironically, what has often been criticized by antitrust practitioners as a quasi-regulatory approach without sufficient judicial review, is not a design problem of merger regulation. Rather, it is the compelling design feature of merger regulation. The give-and-take between the merging parties and the antitrust agencies is what has created an antitrust system that has allowed innovation to flourish, especially in light of general parameters of merger guidelines and cases to inform courts as the law of merger enforcement. Merger guidelines have done what they were supposed to do—give merging parties better predictability as to how agencies view merger enforcement and tweaking merger guidelines as there are advances in economic understanding.[57] Thus, the framework of what gets

---

54. Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 631 ("[R]egulation [of new technologies] has been counterproductive, ineffective, overly costly, or nonexistent.").

55. *See* Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932, 932–33 (2001) (identifying how bilateral negotiations "affect the validity and legitimacy" of merger enforcement); Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 881–84 (1997) (discussing "a number of important developments" in merger review that have limited government accountability); William Blumenthal, *Introductory Note*, 65 ANTITRUST L.J. 813, 815 (1997) (noting two issues posed by pre-merger review: (1) striking the balance of imposing burdens of administering statutory obligations, and (2) shifting merger law from the courts to the agencies); Thomas C. Arthur, *The Law Deficit in Merger Cases*, CPI ANTITRUST CHRON., July 2019, no. 2, at 1, 2 (arguing that there is a dearth of clear judicial decisions to guide process).

56. Blumenthal, *supra* note 56, at 815.

57. Nancy L. Rose & Carl Shapiro, *What Next for the Horizontal Merger Guidelines?*, ANTITRUST, Spring 2022, at 4, 5 ("Historically, the Guidelines have been written with three audiences and goals in mind: (1) to inform the business community, so as to deter anticompetitive mergers without imposing unnecessary costs on other

decided in the shadow of the law that impacts most transactions (and proposed transactions) is where the overall framework has done well.

For all the protestation about the burdens, merging parties have found ways to work through them on a regular basis for decades. The antitrust regulatory sandbox works at several levels. The regulatory discussions regarding the potential competitive effects are an iterative process that happen at a number of levels. Through the initial HSR filing and the second request, there are discussions between the outside counsel (and their economists) who file the HSR premerger notification form and the agency staff. In situations in which the second requests are issued, there are further discussions regarding specific second request specifications that are more in-depth reviews of competitive concerns and potential remedies. The mechanism in which these concerns get resolved is in keeping with the regulatory sandbox approach—antitrust risk gets addressed through iterative discussions between merging parties and staff. During the discussions in a merger investigation, merging party counsel attempt to convince the agency staff not to oppose the merger for a variety of case-specific reasons. The staff normally has significant discretion on how to address cases. The more concerns there are, the more agency management gets involved as these discussions may not lead to an outcome in which concerns can be addressed and in which the agency may need to go to court for an injunction to block the merger. These different negotiations make up the majority of the practice of merger law before the antitrust agencies. How exactly the system has worked as well as it has despite its flaws remains difficult to address empirically because of the lack of counterfactuals and difficulties determining the deterrent effect of mergers.[58] This is not to suggest that some scholars have not tried.[59]

Litigation in mergers plays a small role. Over time, the courts have moved toward a pro-government position.[60] Indeed, of the 21 horizontal merger cases brought between August 2010 and July 2020 by the DOJ or FTC, the government won 17 of these cases.[61] This is not surprising given what one might expect given that the Priest-Klein hypothesis suggests as to the proclivity of parties to settle close cases.[62] While it is important to block

---

mergers; (2) to participate in a dialogue with the courts, so as to further the development of the case law; and (3) to provide a handbook to Agency staff, so as to guide them in how best to investigate horizontal mergers.").

58. Philip Nelson & Su Sun, *Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies' Estimates*, 69 ANTITRUST L.J. 921, 940 (2001).

59. *E.g.*, George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & ECON. 225, 236 (1966) (finding that the 1950 amendments deterred horizontal mergers and increased both vertical and conglomerate mergers); B. Espen Eckbo & Peggy Wier, *Antimerger Policy under the Hart-Scott-Rodino Act: A Reexamination of the Market Power Hypothesis*, 28 J.L. & ECON. 119, 121 (1985) (finding that HSR was ineffective in picking better cases); Joseph A. Clougherty & Jo Seldeslachts, *The Deterrence Effects of US Merger Policy Instruments*, 29 J.L. ECON & ORG. 1114, 1141 (2013) (finding that settlements do not improve deterrence but blocking mergers do); Ashenfelter, Hosken & Weinberg *supra* note 21, at S96 ("While Bork's specific policy recommendations may have been too permissive, the general changes he advocated for horizontal merger policy have likely improved consumer welfare.").

60. Macher et al., *supra* note 45, at 1.

61. Shapiro & Shelanski, *supra* note 44, at 55–56.

62. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 54–55 (1984).

deals to signal toughness,[63] blocking mergers creates resource problems and the agencies have resource constraints, especially when the mergers do not present traditional antitrust concerns. More recent merger challenges in court have shifted the strong won-loss record of government but that is because the agencies in the current Biden administration have brought more marginal cases (ironically making it harder to win merger challenges in the future with some poor case chooses).

III. CONTEMPORARY PROBLEMS

The current regulatory antitrust sandbox system is under attack by the Biden antitrust agencies as part of a broader push to reduce total merger activity. Many of the unwritten rules of the antitrust regulatory sandbox are being reinvented in a way that increases regulatory uncertainty through changes in procedures that reduce transparency, reduces traditional procedural rules that provided due process for the merging parties, and changes the substantive standard in an *ad hoc* manner.[64] This mix of transparency, procedural, and substantive shifts create outcomes that are harder to plan for in deal calculations and likely chill investment.[65]

In related work, I undertook practitioner quantitative and qualitative surveys to better understand the antitrust merger landscape.[66] The surveys were constructed to respond to four broad lines of inquiry:

> (1) Whether the U.S. agencies' current stance has generated regulatory uncertainty that is different from any usual uncertainty surrounding changes in administrations;
>
> (2) If #1 is true, whether regulatory uncertainty has altered the type of counsel lawyers have been providing to their clients;
>
> (3) If #2 is true, whether parties and lawyers are reluctant to invest the time and capital necessary to pursue certain mergers; and

63. *Compare* Jo Seldeslachts, Joseph A. Clougherty & Pedro Pita Barros, *Settle for Now but Block for Tomorrow: The Deterrence Effects of Merger Policy Tools*, 52 J.L. & ECON. 607, 607 (2009) (finding that merger settlements are not enough to deter mergers), *with* Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2668–69 (2013) (finding settlement demands can improve deterrence), *and* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 188–89 (discussing the relative power positions of the agencies and merging parties).

64. Sokol at al., *supra* note 17, at 1102–04.

65. This would be a mistake.

> By limiting the number of companies that can make acquisitions through a proposed change in merger law, limitations would be placed on the ability of new ventures to exit. It also potentially chills incentives for such firms to scale up because they may be punished for being too successful with such restrictions placed upon them.

Gary Dushnitsky & D. Daniel Sokol, *Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments That Fund It*, 24 VAND. J. ENT. & TECH. L. 255, 286–87 (2022); *accord* George Chondrakis, *Unique Synergies in Technology Acquisitions*, 45 RSCH. POL'Y 1873, 1873–74 (2016) (discussing efficiencies developed by acquirers in the technological market through acquisitions with other firms that are technologically proximate).

66. Sokol et al., *supra* note 17, at 1110.

(4) Whether the methodologies, tools, and theories applied by the agencies are likely to be correlated with the relevant industry, with select industries facing differential scrutiny and novel theories of competitive harm.

The quantitative survey provides interesting insights into the current perceptions of the DOJ and FTC. The survey also shows large differences in practitioners' experience with the agencies relative to two years ago. In particular, the online survey reported:

- 35 percent of respondents perceive the DOJ's enforcement to be efficiency-degrading compared with 66 percent of respondents with the same perception of the FTC. [67]
- 48 percent of respondents observe a divergence between the respective review processes of the DOJ and FTC. This divergence is observed in speed of review, stringency and depth of analysis, and the steps needed to have staff and front office reach a decision. [68]
- 60 percent of respondents state that the DOJ has addressed traditional non-price effects over the past two years. However, 78 percent of respondents state that the DOJ rarely or never provided guidance on its methodology to address traditional non-price effects. 82 percent of respondents state that the FTC has addressed traditional non-price effects over the past two years, and 79 percent indicated that the FTC rarely or never provided guidance on its methodology to address traditional non-price effects. [69]
- 48 percent of respondents perceive that the DOJ's consideration of efficiency gains has been reduced or eliminated as compared with two years ago, while 58 percent perceive the same about the FTC. [70]
- Compared with two years ago, the DOJ is perceived as more aggressive on vertical mergers by 48 percent of respondents and on diagonal or adjacent mergers by 39 percent of respondents. The FTC is perceived as more aggressive on vertical mergers by 68 percent of respondents and on diagonal or adjacent mergers by 56 percent of respondents. [71]
- 48 percent of respondents (but only 8 percent of economists) indicate that the counsel offered to clients has changed considerably over the past two years, with 85 percent observing increased regulatory scrutiny. The greater scrutiny is seen to have increased the amount of time and costs related to merger completion. [72]

The various concerns and their implications—based in part on a qualitative set of interviews with over 20 large law firm partners across significant law firms who are merger specialists as well as a number of in-house counsel across the country and across industries—are enumerated below.

---

67. *Id.* at 1115.
68. *Id.*
69. *Id.* at 1115–16.
70. *Id.* at 1116.
71. Sokol et al., *supra* note 17, at 1116.
72. *Id.* at 1116–17.

A. Insufficient Resources

At both agencies, practitioners are concerned that deals are understaffed. Staff are being told to investigate many, many more theories of harm and many, many more deals. As a result, staff are spread very thin. In practice, this means that the staff is just not up to speed with reading materials that get submitted and actually getting through customer calls. It is particularly bad at the FTC, according to survey respondents. The reason for the particular problems at the FTC is a result of staff being shifted to high profile mergers, regardless of the potential competitive effects on the proposed transactions. Additionally, the FTC's staffing of cases that are low probability wins in court has contributed to the current state of affairs.

B. Increased Polarization of the Merger Process

Discussions with law firm practitioners suggest that staff have lost discretion on particular cases vis-à-vis the political appointees. In a change from prior Democratic and Republican administrations, FTC staff now require the approval of the front office for most aspects involved in an investigation—both procedural and substantively. In spite of the usual agency practice and the merger guidelines, FTC staff are now told to investigate particular issues like labor or IP without any real guidance. However, they cannot explain what they are trying to investigate. This creates uncertainty for the merging parties who want to be able to craft responses that are reflective of concerns. Not understanding the concerns makes this more difficult because it suggests that it may not be possible to address the concerns. This, in turn, creates uncertainty and delay, which may induce more mergers to fall apart due to a shrinking financial window and/or increased uncertainty that the deal will close.

C. Substantial Compliance

Staff increasingly suggest to merger parties that they are not in substantial compliance with HSR. This push towards non-compliance changes what had been the situation in prior administrations—in an area of the law that was never well defined by court cases. While the HSR Act refers to "substantial" compliance, this term was never defined in the Act or implementing rules.[73] In the stage of second requests, what it means to "substantially comply" is not articulated that well in case law either. Merging parties have to substantially comply in every deal that gets a Second Request. Yet, in many recent matters, there has been at least one "concern" that was never closed out. Few cases offer guidance. In *FTC v. McCormick & Co*.,[74] the meaning of compliance was not articulated particularly clearly, although the court granted the FTC's request for an injunction. The court explained,

---

73. In the original Statement of Basis and Purpose, the DOJ and FTC took the position that "[a] complete response, within the meaning of the act and rules, is one that supplies all requested information. Anything less than a complete response potentially is not substantial compliance. The rule does not define substantial compliance, and the agencies contemplate resolving whether a person has substantially complied on a case-by-case basis." 43 Fed. Reg. 33450, 33508 (July 31, 1978).

74. FTC v. McCormick & Co., CIV. A. No. 88-1128, 1988 WL 43791 (D.D.C. Apr. 26, 1988).

> [t]he statutory . . . waiting period has not begun, and will not begin, unless and until McCormick substantially complies with the [Second Request] by providing complete responses . . . .
>
> . . . .
>
> . . . A complete response is one that either (a) sets forth all the information and documentary material required to be submitted pursuant to the request, or (b) in the event a person is *unable* to provide a complete response, a detailed statement of the reasons for non-compliance.[75]

This uncertainty in the meaning of substantial compliance may lead to greater uncertainty and delay.

D. Suspension of HSR Early Termination

Under prior administrations, early termination allowed for deals that were non-problematic to be cleared under HSR quickly. However, in February 2021, the FTC announced a "temporary" suspension of early termination.[76] Even as the merger wave post-COVID pandemic from Trump to Biden slowed down, there have not been efforts to resume grants of early termination. End of early termination has timing consequences for year-end deals that need to close for business reasons, such as tax.

E. Pre-Consummation Warning Letters

The DOJ and FTC are sending "warning letters" when unable to complete investigations.[77] Parties can close the transactions but do so "at their own risk."[78] Of course, the agencies always had this power but generally did not use it. In the typical situation, "warning letters" are generally viewed as non-events because the FTC and DOJ always retain authority to investigate a merger after closing. That is, the expiration of the HSR waiting period never insulates parties from future investigation, but it is more difficult to challenge a closed merger. What has changed is that letters are now being issued on a regular basis even when parties are never contacted during the initial waiting period.

F. Rejection of Merger Settlements

Merger settlements have long been a part of the regulatory sandbox for the same reason that settlements overall make up a large part of the litigation process. Settlements

---

75. *Id.* at *1–2.

76. Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination [https://perma.cc/RKD6-ZNWF].

77. Holly Vedova, *Adjusting Merger Review to Deal with the Surge in Merger Filings*, FED. TRADE COMM'N (Aug. 3, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings [https://perma.cc/QGB2-BG6U].

78. *Id.*

reduce uncertainty and cost.[79] Antitrust leadership at both agencies have expressed skepticism that divestitures or behavioral remedies provide an effective solution to restoring competition in potentially anticompetitive deals. For example, Assistant Attorney General for Antitrust Jonathan Kanter explained:

> I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction.[80]

Similarly, Chair Lina Khan has stated, "[t]hat is not work that the agency should have to do."[81] These statements have been backed up by the agency leadership not allowing staff to settle. The implication is that any deal can go to litigation. On the margins, this chills potentially pro-competitive deals where the financing window is not long enough to contemplate merger litigation. It also is happening at a time when the agencies are bringing new, riskier merger challenges with novel theories of harm in which the behavior does not seem as problematic as traditional deals that get challenged.

G. Prior Notice & Pre-Approval

The FTC rescinded a 1995 Policy Statement on Prior Approval and Prior Notice Provisions by a 3-2 partisan vote in July 2021.[82] The 1995 statement required prior approval and prior notice provisions only for parties who had previously consummated an unlawful merger when there was a "credible risk" of a future unlawful merger.[83] Now, parties to consent decrees must agree to obtain prior approval and give prior notice for future mergers in the same product and geographic market.[84] Those parties that must provide prior notice may be put at a disadvantage when competing in deals. This approach chills certain types of deals by acquirers in industries that tend to be serial acquirers.[85]

---

79. Daniel L. Rubinfeld, *Antitrust Settlements, in* 1 THE OXFORD HANDBOOK OF INT'L ANTITRUST ECON. 172, 174–75 (Roger D. Blair & Daniel Sokol eds., 2014).

80. Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york [https://perma.cc/L74B-KWDW].

81. Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan [https://perma.cc/Q488-LDHE].

82. Press Release, Fed. Trade Comm'n., FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers [https://perma.cc/FME6-TB55].

83. *Id.*

84. *Id*.

85. *See generally* Matthew J. Higgins & Daniel Rodriguez, *The Outsourcing of R&D Through Acquisitions in the Pharmaceutical Industry*, 80 J. FIN. ECON. 351 (2006) (finding that acquirers in the pharmaceutical industry harbor unique benefits, including outsourcing R&D and gaining advantageous information).

H. Timing Agreements

The agencies are increasingly aggressive with Timing Agreements including building in lengthy (i.e., 150-day) discovery periods in the event of litigation. In theory, the extended time is supposed to give the agencies more time to review the Second Request materials and to negotiate a remedy with the parties. However, in practice, the agencies are using timing as a weapon to kill the deal through the cost of delay.

IV. POLICY CLARITY AND CONCLUSION

The regulatory sandbox model has proven to be relatively effective in reducing regulatory uncertainty and improving investment and innovation outcomes.[86] The antitrust regulatory sandbox is generally a success, even if at the margins there are important changes that can be made.[87] The problem with the current Biden administration's approach has been to reduce transparency (even with the newly promulgated merger guidelines) and to change the procedural norms for the regulatory sandbox. Substantive standards are also at a disconnect with case law and economic analysis.

Combined, the breakdown of the antitrust regulatory sandbox threatens innovation, creates additional costs to the merger system, and chills the types of mergers that should be made without at the same time making it too easy for firms to merger when there are clear competitive concerns. To the extent that the agencies want to change antitrust practice, they should do so in a way that modifies the sandbox in a way that does not fundamentally alter its nature.

86. Jayoung James Goo & Joo-Yeun Heo, *The Impact of the Regulatory Sandbox on the Fintech Industry, with a Discussion on the Relation Between Regulatory Sandboxes and Open Innovation*, J. OPEN INNOVATION: TECH. MKT. & COMPLEXITY, June 2020, at 15.

87. *See, e.g.*, Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PA. L. REV. 1941, 1944–45 (2020) (noting how agencies may be giving too great a weight to efficiencies).