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## Why Premerger Review Needed Reform - And Still Does

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# NOTES

## WHY PREMERGER REVIEW NEEDED REFORM—AND STILL DOES

In 1976, Congress devised the Hart-Scott-Rodino Act<sup>1</sup> (HSR) to improve the enforcement of existing U.S. antitrust law.<sup>2</sup> One of the key elements of the scheme was a requirement that transacting parties notify enforcement agencies before launching certain major mergers and acquisitions.<sup>3</sup> This premerger notification, according to advocates, would enhance policing of a small number of transactions, about 150 per year, possessing particular potential to be problematic.<sup>4</sup>

During the twenty-five years since HSR's inception, this originally modest reporting program has grown in a manner not only dramatic, but unintended.<sup>5</sup> By the year 2000, federal antitrust agencies were examining the *majority* of U.S. merger and

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1. Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in 15 and 28 U.S.C. (2000)).

2. HSR sought to improve enforcement through three major titles. Title I expands the investigative tools available to the Department of Justice. *See* 15 U.S.C. §§ 1311-1314. Title II establishes the premerger notification requirement. *Id.* § 18a. Title III gives state attorneys general *parens patriae* authority to sue for Sherman Act violations. *Id.* § 15c. The premerger notification program is the target of the 2000 amendment and the focus of this Note. Accordingly, references to HSR throughout this Note are to title II.

3. Parties to major transactions must file information on the current operations of the entities involved and a description of the proposed transaction prior to consummating the merger or acquisition in question. The authority to require the information is contained in 15 U.S.C. § 18a(d)(1)(e), but the specific filing requirements are contained in implementing rules issued by the Federal Trade Commission (FTC). For a discussion of filing requirements, see generally STEPHEN M. AXINN ET AL., *ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT* § 8, and app. B, C (rev. ed. 1993).

4. *See infra* notes 103-12 and accompanying text.

5. *See infra* notes 119-23 and accompanying text.

acquisition activity<sup>6</sup> and dedicating an ever-expanding portion of their resources to the program.<sup>7</sup> As a result, practitioners and enforcement officials grew concerned that the program was weakening the effectiveness of the enforcement agencies,<sup>8</sup> if not wreaking substantive change in antitrust law,<sup>9</sup> and there were calls for its revision.<sup>10</sup>

On December 21, 2000, President Clinton signed the Fiscal Year (FY) 2001 Commerce-Justice-State Appropriations Bill.<sup>11</sup> At first glance, this legislation appears to answer the calls for revision of HSR's premerger notification program. Buried in this 320-page omnibus bill are four pages<sup>12</sup> of language amending<sup>13</sup> the program. Most notably, the amendment institutes inflation adjustment in an attempt to slow or stop the growth of premerger notification required under the program.<sup>14</sup>

Although it is too early to measure the full impact of the recent amendment,<sup>15</sup> it is not too soon to consider whether this change truly answers cries for reform, or merely mutes them. This Note asserts that the 2000 amendment does not adequately revamp the

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6. See *infra* note 137 and accompanying text.

7. The FTC, for example, dedicates more than two-thirds of its Bureau of Competition resources to merger enforcement, "strain[ing] . . . FTC resources to the breaking point." *The Antitrust Enforcement Agencies: The Bureau of Competition of the Federal Trade Commission and The Antitrust Division of the Department of Justice: Hearing Before the Comm. on the Judiciary*, 106th Cong. 10 (2000) (statement of Chair. Pitofsky) [hereinafter *Antitrust Hearings*].

8. *Id.* at 18; see generally *Symposium: Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 ANTITRUST L.J. 813 (1997) [hereinafter *Symposium*].

9. 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, 880-84 (1997).

10. See, e.g., *Symposium*, *supra* note 8.

11. Pub. L. No. 106-553, 114 Stat. 2762, 2762A51 (2000). The portion in question amends Section 7A(a) of the Clayton Act, and is codified at 15 U.S.C.A. § 18a(a) (2002).

12. 114 Stat. at 2762A108 to 2762A111. This Note refers to these four pages as "the amendment" or "the recent amendment."

13. Changes include restructuring of the reporting thresholds, establishment of a tiered fee structure, and expansion of the mandatory waiting period prior to consummating certain transactions. *Id.*

14. Beginning in FY 2005, reporting thresholds will be annually adjusted based on percentage change in the Gross National Product. See *id.* at 2762A109. For a discussion of inflation adjustment as a solution to the excessive growth of premerger notification, see *infra* notes 224-29 and accompanying text.

15. The changes to the Act took effect on February 1, 2001. 114 Stat. at 2762A111.

program because, although the inflation adjustment should greatly slow the growth of the program, the amendment does not reverse the substantive change induced by twenty-five years of HSR growth. Finally, this Note proposes reforms that would help restore balance to antitrust law: a return to a more limited review system and a switch to a less surrogate-based jurisdiction test.<sup>16</sup>

This Note considers premerger notification in five sections. The first section opens the examination with a brief review of U.S. antitrust law prior to HSR and premerger notification.<sup>17</sup> This section discusses the statutory nature of U.S. antitrust law as first established, then it reviews the development of the field and the delicate balance achieved between agency regulation and statutory/judicial guidance.

Section two discusses the creation of the Hart-Scott-Rodino Act as a means of providing understanding of the Act's goals.<sup>18</sup> The section outlines the perceived problems leading to HSR's passage and summarizes the premerger notification provisions. Consideration of the legislative history reveals that Congress sought to cause only procedural changes, to encompass only the very largest of mergers, and to minimize the burden placed on commerce.

The third section addresses the dramatic growth of reporting under the Act and outlines the causes of this growth.<sup>19</sup> It then considers the impact of this growth, particularly with regard to the burdens HSR creates and the substantive changes it has wrought in antitrust law. Next, the section considers how the problems with premerger notification are a product of the surrogate, i.e., dollar-based, definition of the jurisdiction test. This analysis illuminates the need for change in the jurisdiction test.

With this understanding of the preamendment situation, section four examines potential solutions to the jurisdiction test problem.<sup>20</sup> The search for an alternative begins with discussion of the

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16. Rather than directly determining if a merger is among the X biggest in a given year, a surrogate-based test uses some other measure of a transaction's "bigness."

17. See *infra* notes 22-75 and accompanying text.

18. See *infra* notes 76-117 and accompanying text.

19. See *infra* notes 118-90 and accompanying text.

20. See *infra* notes 191-237 and accompanying text.

premerger notification programs of other countries. This review reveals no valuable new model, however, because all functional systems use a surrogate definition. Consequently, this section then considers methods of resetting and adjusting the current test. Finally, this section outlines a new, less surrogate-based test, determined more directly by the level of merger activity.

In light of these options for a revised test, section five examines how the test that was actually implemented by the recent amendment fails to resolve the problems at hand.<sup>21</sup> It then considers whether this was an act of commission or omission by reviewing the legislative history of the amendment. Finally, section five explains how a more limited program of review and a new, less surrogate-based jurisdiction test could help restore balance to antitrust law by further reducing the burden of HSR notification and returning responsibility to the courts.

### THE DELICATE BALANCE

This section sets the stage for an examination of premerger notification by briefly reviewing the development of U.S. antitrust law prior to HSR. It emphasizes the delicate balance achieved between statutory/judicial guidance and agency regulation.<sup>22</sup>

#### *Early Restraints on Trade*

When the American colonists included the British common law tradition among the things they chose to haul to the New World, they implicitly accepted the idea of restraint of trade.<sup>23</sup> In the early days of the Republic, these "unwritten" rules were sufficient for controlling commerce in the new nation. The Industrial Revolution

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21. See *infra* notes 238-61 and accompanying text.

22. Nominally, U.S. antitrust law consists of a statutory branch, governed by the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000), and the Clayton Act, 15 U.S.C. § 15a, and an administrative branch, governed primarily by the Federal Trade Commission Act, 15 U.S.C. §§ 41-51.

23. Restraint of trade was an established common law theory at the time. For a discussion of guilds, crown monopolies, and the origin and growth of common law restraints, see J.D. HEYDON, *THE RESTRAINT OF TRADE DOCTRINE* 1-36 (1971); MICHAEL J. TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS* 3-29 (1986).

and the Civil War, however, brought fundamental changes in the nature of economic power and the nation in which it was wielded.<sup>24</sup> Until this point, "combinations among manufacturers were few in number and narrow in scope. The inadequacy of transportation facilities, and the comparatively small capital investment per firm, prevented manufacturers from reaching out to any considerable extent into the territory of their potential rivals; and there was thus less occasion for association."<sup>25</sup> This age of primacy for family trades and small businesses was drawing to a close, however, and as the nation entered the Gilded Age, the era of the Robber Baron reached full flower.<sup>26</sup>

### *Development of The Trusts*

The increasing and improving mechanization of Reconstruction industry allowed producers to turn out far more goods than ever before,<sup>27</sup> while the improving system of canal and railroad transport allowed the nationalization of previously isolated markets.<sup>28</sup> The result was a business environment ripe for the growth of larger, more efficient companies than ever before. Smaller competitors who could be driven out or bought out were absorbed rapidly,<sup>29</sup> but as

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24. BRIAN HOLDEN REID, *THE AMERICAN CIVIL WAR AND THE WARS OF THE INDUSTRIAL REVOLUTION 19-22* (1999); PETER N. STEARNS, *THE INDUSTRIAL REVOLUTION IN WORLD HISTORY* 48-53 (1993).

25. ELIOT JONES, *THE TRUST PROBLEM IN THE UNITED STATES* 6 (1922).

26. The term "Gilded Age" was coined by Mark Twain to describe the close of the nineteenth century. See generally BRYANT MOREY FRENCH, *MARK TWAIN AND THE GILDED AGE: THE BOOK THAT NAMED AN ERA* (1965). The origin of "Robber Baron" is unclear, but it refers to the Industrial Statesmen and Kings of Capitalism who amassed unprecedented power during the period. For more on these individuals, see *THE ROBBER BARONS: SAINTS OR SINNERS?* (Thomas B. Brewer ed., 1970).

27. The Tobacco Trust provides a good example. An expert "hand roller" of the time could make around 2000 cigarettes per day, but a rolling machine could turn out 100,000 daily. JOHN WILBER JENKINS, JAMES B. DUKE: *MASTER BUILDER* 66 (1927). The cost of manufacture fell from eighty cents to thirty cents per thousand. *Id.* at 69.

28. STEARNS, *supra* note 24, at 49.

29. Cleveland, home to Standard Oil, hosted nearly fifty independent refineries prior to industry consolidation. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 111 (1998). During one six week period, John D. Rockefeller purchased twenty-two of the remaining twenty-six local competitors. *Id.* at 143. Similarly, "[o]f twenty-two Pittsburgh refiners in existence when Rockefeller [entered that market] ... only one was still in existence independently two years later." *Id.* at 163.

the survivors began to achieve the efficiencies<sup>30</sup> of vertical integration<sup>31</sup> and interstate operations, they faced state law roadblocks to their continued consolidation.

Some states threatened taxation on the entire capital stock of any corporation doing business within their borders.<sup>32</sup> It was preferable, therefore, to hold control of other companies rather than to hold ownership of those companies' assets. Almost all states, however, did not allow chartered companies to hold the stock of other firms.<sup>33</sup> The less-expensive option of acquiring a controlling interest would not suffice; outright purchase of the competitor's business was required. By making that purchase, though, companies risked substantial tax liability.<sup>34</sup>

The escape from this Catch 22 came in the form of an old common law device known as a trust. Typically, stockholders of several companies exchanged their stock and voting power for trust certificates representing their percentage of the combined businesses, now labeled a "trust."<sup>35</sup> Thus, a trust was simply a form of holding company, "but without the 'formalities' of a name or legal incorporation, and without the necessity of public disclosure."<sup>36</sup> By the end of the century, there would be more than 300 such trusts formed,<sup>37</sup> the largest of them individually controlling more than one

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30. Although the question of whether the Gilded Age trusts abused their monopolistic position may be debated, the companies that formed those trusts unquestionably drove costs down. For example, between 1870 and 1890, rail freight rates declined fifty-four percent. Francis B. Thurber, *Influence of The Trust On Prices*, in *THE TRUST: ITS BOOK* 135, 136 (James H. Bridge ed., 1902). The cost of kerosene, the primary product of the oil companies, declined seventy-two percent between 1871 and 1902. *Id.* at 137. Sugar refiners reduced the margin between raw and granulated sugar prices by sixty-three percent in ten years. *Id.* at 138.

31. Vertical integration refers to integration of firms performing functions at successive stages of a product's production and distribution. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 628 (2000).

32. D.T. ARMENTANO, *THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES* 75 (1972).

33. *Id.*

34. The acquired business's assets would now be part of the acquiring corporation's assets, and as such, would be subject to increased state taxation.

35. ARMENTANO, *supra* note 32, at 75; 1 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* 105 (1980).

36. ARMENTANO, *supra* note 32, at 75.

37. MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 1861-1901*, at 382 (1934).

billion dollars—in 1900 dollars—worth of capital.<sup>38</sup> This concentration of massive economic power without close public supervision was to be their undoing.

### *Public Outcry Against The Trusts*

The profound economic and social changes in the United States during this period were quite traumatic, and corporations and trusts became a lightning rod for discontent. Books, magazines, newspapers, and political cartoons touted “fraudulent schemes, graft, and political corruption.”<sup>39</sup> From 500-page treatises decrying the “rapacious monopolists” who were “allowed by Congress to plunder the nation,”<sup>40</sup> to magazines such as *North American Review* covering the “growing antimonopoly movement” and “destructive hostility toward moneyed corporations,”<sup>41</sup> to newspapers, exemplified by Henry Lloyd’s perfection of muckraking for the *Tribune*, trusts were under attack on all fronts, with the “public” demanding that Congress take action. Even law reviews joined in the hunt, with the very first *Harvard Law Review* volume warning that this “new monster . . . may realize the Satanic ambition,—infinite and irresponsible power free of check or conscience.”<sup>42</sup> Those who attacked the trusts were said to be “anti trust,” and with Congress open to the idea of statutory regulation of commerce,<sup>43</sup> they were about to impel the creation of an entirely new—and eponymous—field of law.

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38. THOMAS J. MISA, *A NATION OF STEEL: THE MAKING OF MODERN AMERICA 1865-1925*, at 166 (1995). The magnitude of this figure is highlighted by the fact that the budget for the *entire government* had reached this mark only a few years earlier. Hon. T.B. Reed, *Spending Public Money*, 154 N. AMER. REV. 319, 319 (1892) (defense, by Speaker of the House, of the 51st Congress approving a budget of “a billion of dollars”), available at <http://cdl.library.cornell.edu.moa>.

39. 1 KINTNER, *supra* note 35, at 126.

40. EDWARD WINSLOW MARTIN [JAMES DABNEY MCCABE], *HISTORY OF THE GRANGE MOVEMENT; OR, THE FARMER'S WAR AGAINST MONOPOLIES* 9, 396 (Reprints of Economic Classics ed., 1969) (1873).

41. FRANK LUTHER MOTT, *A HISTORY OF AMERICAN MAGAZINES: 1865-1885*, at 292-93 (1938) (citation omitted).

42. F.T. Stimson, “Trusts,” 1 HARV. L. REV. 132, 132 (1887).

43. In 1887, Congress had enacted the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1877) (codified as amended at 49 U.S.C. §§ 1-1022 (1994 & Supp. V 1999)), the first comprehensive economic regulatory legislation.



*The Sherman Act: Statutory Regulation*

Between January 10, 1888, and President Benjamin Harrison's signing of the Sherman Antitrust Act<sup>44</sup> on July 2, 1890, Congress considered forty-two bills and two resolutions for constitutional amendment<sup>45</sup> to control these "commercial monsters."<sup>46</sup> Had Congress desired to establish administrative regulation of this field, its recently enacted Interstate Commerce Act provided a ready model.<sup>47</sup> A similar, though less-powerful, administrative agency for antitrust was in fact proposed,<sup>48</sup> as were regulation by tariff, taxation, voiding of patents, prohibition of purchase of trust-made goods, forfeiture of corporate stock and rights, voiding of trusts' contracts, and eliminating courts' jurisdiction over suits by trusts.<sup>49</sup> Congress, however, chose to rely on statutory rather than administrative regulation.<sup>50</sup> Explicit provisions of the Sherman Act—including creation of criminal and civil actions; assignment of enforcement responsibility, through the courts, to the Attorney General; and express provision of federal subject matter jurisdiction

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44. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2000)). The Sherman Act was neither isolated nor original as a statutory response to antitrust concern—by 1890, fourteen states had already established some type of statutory antimonopoly provision. HENRY R. SEAGER & CHARLES A. GULICK, JR., *TRUST AND CORPORATION PROBLEMS* 341-42 (1929).

45. See *BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS*, S. DOC. NO. 147, at 3-459 (2d. Sess. 1903).

46. 20 CONG. REC. 1457 (1889) (statement of Sen. Jones).

47. The Interstate Commerce Act, as amended in 1889, created the nation's first fully independent administrative agency, the Interstate Commerce Commission, to oversee interstate transport. JOSHUA BERNHARDT, *THE INTERSTATE COMMERCE COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 1-9 (1923); HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 154 (1955). The Commission had the power to "collect data . . . , subpoena witnesses, hear complaints and render decisions." THORELLI, *supra*, at 154. Regulation by administrative law was thus a known option.

48. H.R. 4406, 50th Cong. (1888).

49. These and other proposals for dealing with the trust problem, from a "trust tax" of forty percent to penitentiary sentences at hard labor, may be found in the forty-two bills mentioned in the text accompanying note 45 *supra* and the accompanying Congressional Record. For representative examples of the listed provisions, see S. DOC. NO. 147, at 3-9, 36, 63-68, 411-12 (1903).

50. Given the requirement that the Department of Justice sue to enforce the Act, it was unavoidably administrative, in the sense that there was agency action involved. The framework established, however, was as close to a "pure" statutory system as possible.

and nationwide service<sup>51</sup>—make clear this choice of a statutory model for antitrust.<sup>52</sup>

### *Clayton and Federal Trade Commission Acts: Balancing*

Congress had left to the courts the task of interpreting the vague text of the Sherman Act,<sup>53</sup> and over the next quarter-century, the courts sought to define antitrust law. Application of the Sherman Act varied from hollow<sup>54</sup> to aggressive,<sup>55</sup> but overall, enforcement of the law was largely ineffectual. The first fourteen years of Sherman Act jurisprudence saw only twenty-three suits by the Department of Justice, with losses in nearly half of them.<sup>56</sup> Formation of a dedicated Antitrust Division in 1903<sup>57</sup> contributed to an increase to nearly 130 suits over the next decade.<sup>58</sup> Despite the period being a time of the most rapid and significant concentration of business yet seen, with more than 600 trusts in existence by 1914,<sup>59</sup> the government still lost more than forty percent of the cases it brought.<sup>60</sup>

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51. Sherman Antitrust Act sections 1-3, 7, 4, and 5, respectively. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2000)).

52. To the limited extent that statements by individual members of Congress can represent legislative intent, those of Senator Sherman are also instructive. Sherman indicated the bill "has for its single object to invoke the aid of the courts" in dealing with trusts. 21 CONG. REC. 2457 (1890).

53. Senator Sherman introduced his bill by stating that the courts should define "the precise line between lawful and unlawful combinations. . . . All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts . . . have done for centuries." *Id.* at 2460.

54. *See, e.g., United States v. E.C. Knight*, 156 U.S. 1 (1895) (holding "monopoly in the manufacture" outside the reach of the Sherman Act when no monopoly in commerce shown). The court so held despite the Sugar Trust's control of *ninety-eight percent* of the "entire quantity of sugar refined in the United States." *Id.* at 18 (Harlan, J., dissenting).

55. *See, e.g., United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897) (stating that "the language of the Act included *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" without exception or limitation) (emphasis added).

56. *See* HOUSE SELECT COMMITTEE ON SMALL BUSINESS, 84TH CONG., CONGRESS AND THE MONOPOLY PROBLEM: FIFTY-SIX YEARS OF ANTITRUST DEVELOPMENT, 1900-1956, at 659 (Comm. Print 1957) [hereinafter MONOPOLY PROBLEM].

57. *See* THORELLI, *supra* note 47, at 534-37.

58. *See* MONOPOLY PROBLEM, *supra* note 56, at 659.

59. 51 CONG. REC. 14218 (1914) (statement of Sen. Thompson).

60. *See* MONOPOLY PROBLEM, *supra* note 56, at 659.

Public sentiment continued to run high against the trusts, and although the Court struck down the formidable Standard Oil Trust, the "Rule of Reason" laid out in that case<sup>61</sup> helped fuel the movement to update antitrust law.<sup>62</sup> President Wilson was elected in part on an antitrust platform,<sup>63</sup> and the program he proposed to a joint session of Congress<sup>64</sup> was combined with several bills already under consideration to become the basis of new trust legislation known as the Clayton Act and the Federal Trade Commission Act.<sup>65</sup>

The key point to note about this new legislation is that despite the apparent failure of antitrust law to that point, Congress did not abandon the Sherman Act.<sup>66</sup> Instead, the new acts merely supplemented it, approaching the antitrust problem from two directions—regulatory and statutory. First, the Federal Trade Commission Act<sup>67</sup> adopted a more regulatory approach in that it established "a new commission with power to review all trade practices and to order a respondent to cease and desist from using

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61. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911) (holding that the Sherman Act prohibited only those restraints of trade which were unreasonable). "Reasonable" restraint of trade had been discussed in prior cases, but many argued that the opaque *Standard Oil* Rule of Reason made consistent results impossible. See Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 341-46 (2000). Generally, the Rule in this context refers to allowing courts, in considering horizontal restraint and cartel questions, to weigh competitive factors in determining whether a trade-restraining action is reasonable and thus whether it interferes with competition and is an antitrust violation. SULLIVAN & GRIMES, *supra* note 31, at 192-99.

62. To say that *Standard Oil* fueled the movement for change is not to endorse a Populist view that it departed from other formative era antitrust cases. For more on competing views of this era, see Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 1-13 (1999).

63. ELIOT JONES, *THE TRUST PROBLEM IN THE UNITED STATES* 333-35 (1922).

64. 51 CONG. REC. 1962-64 (1914).

65. 11 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, PART II: THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976*, at 997-1007 (1985). Note that the FTC Act is not technically an antitrust statute, despite its concern with anticompetitive activities. See 15 U.S.C. § 41 (2000).

66. In recommending new legislation the Senate Committee indicated that the Sherman Act "should stand as the fundamental law upon the subject." SENATE COMM. ON INTERSTATE COMMERCE, S. REP. NO. 1326, at 2 (1913). Further, debate on the bill explicitly indicated it was "not a substitute for the antitrust law but is in aid of the enforcement of [it]." 51 CONG. REC. 12734 (1914) (statement of Sen. Newlands). Most importantly, the FTC Act itself indicated it shall not "be construed to alter, modify, or repeal the said antitrust Acts." FTC Act § 11, 15 U.S.C. § 51.

67. Ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-51).

those particular practices that it determined to be unfair."<sup>68</sup> Although contemporaneous understanding of the Commission may have been that its zone of regulation lay more toward the judicial than legislative end,<sup>69</sup> the Commission had full regulatory power, which has been made only more clear as time has passed.<sup>70</sup> The FTC Act itself, however, expressly indicated a continuing role for statutory antitrust.<sup>71</sup> To that end, the Clayton Act<sup>72</sup> reinforced the Sherman Act's statutory system of antitrust law. The Clayton Act approached the problem more specifically than the Sherman Act by "making particular business practices unlawful."<sup>73</sup> Local price discrimination, exclusive dealing and tying contracts, holding companies, corporate acquisitions and mergers, and interlocking directorates were among the practices explicitly covered.<sup>74</sup>

Together, the two new acts established a mix of statutory definition, regulation, and prohibition on the one hand, and administrative law regulation by a governing agency on the other. This delicate balancing, created by design, remained the central feature of antitrust law for more than fifty years.<sup>75</sup>

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68. 11 KINTNER, *supra* note 65, at 990.

69. JONES, *supra* note 63, at 354.

70. 15 U.S.C. §§ 45, 46, 57a (outlining Commission authority). In fact, the agency became so powerful Congress was forced to restrict FTC power due to its "refusal to heed legislative guidance." William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 871 (1989).

71. FTC Act § 11, 15 U.S.C. § 51. In fact, FTC power to act beyond the express statutory bounds of the Sherman and Clayton Acts in antitrust matters has been challenged. *See, e.g.*, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-50 (1972) (noting distinction between FTC action on antitrust grounds and action on public policy grounds. FTC action on antitrust grounds is subject to judicial review and must be grounded in either "the letter or spirit" of the Sherman or Clayton Acts.); *see also* *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454-55 (1986) (endorsing *Sperry* distinction of FTC action on antitrust grounds from action on public policy grounds).

72. Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27, 44; 29 U.S.C. § 52).

73. ROGER SHERMAN, *ANTITRUST POLICIES AND ISSUES* 39 (1978) ("The Clayton Act could be seen as an effort to define unreasonable behavior more specifically to make it easier to prove, thereby harnessing the rule of reason to good effect.").

74. Clayton Act §§ 2, 3, 7, 8.

75. There have been a number of amendments changing certain elements of the construct, notably revisions to the Clayton Act, but none of them altered the basic structure. *E.g.*, *Wilson Tariff Act* (1894) (including importers of goods under antitrust law); *Webb-Pomerene Act* (1918) (exempting exporters); *McCarron-Ferguson Act* (1945) (exempting insurance industry); *Newspaper Preservation Act* (1970) (exempting newspapers); *Robinson-*

## THE CREATION OF HART-SCOTT-RODINO

*Background: Origins and Form*

The balanced statutory/regulatory approach functioned well for a number of years. But as the 1970s dawned, there was growing concern that government policing of mergers was becoming ineffective.<sup>76</sup> At first glance, this seems improbable in light of the fact that a defendant's win in 1974<sup>77</sup> represented the government's *first* outright loss in nearly a quarter-century of merger litigation.<sup>78</sup> Justice Stewart's famous remark that "[t]he sole consistency" in merger litigation is that "the Government always wins"<sup>79</sup> not only alluded to the government's perfect win record on liability before the Warren Court,<sup>80</sup> but to the general consensus on the government's policing effectiveness. The government, however, actually lost more often than not on the issue of remedy. For example, in one ten-year period, the government obtained no relief or deficient relief in twenty-nine of thirty-nine cases.<sup>81</sup> Further, even after achieving an order for post-acquisition relief, the average case took more than five years to reach that relief.<sup>82</sup> During this lag time, the firms' assets, operations, and management become integrated, and so, according to the claims of HSR proponents, the firms become "in effect, irreversibly 'scrambled' together. The independent identity of the acquired firm disappears. 'Unscrambling' the merger and restoring the acquired firm to its

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Patman Antidiscrimination Act (1936) (changing areas of Clayton Act price discrimination coverage); Celler-Kefauver Antimerger Act (1950) (redefining Clayton Act section 7 mergers and expanding coverage to sale of assets). For nearly 7000 pages of details on these and thirteen other amending statutes prior to HSR, see 1-9 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* (1978-1985).

76. AXINN, *supra* note 3, §§ 1.04[1][b] to 1.04[2].

77. See *United States v. General Dynamics Corp.*, 415 U.S. 486, 511 (1974).

78. Eleanor M. Fox, *Antitrust, Mergers and the Supreme Court: The Politics of Section 7 of the Clayton Act*, 26 MERCER L. REV. 389, 410-11 (1975).

79. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

80. Fox, *supra* note 78, at 396.

81. Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 51 (1969).

82. H.R. REP. NO. 94-1373, at 9 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2641.

former status as an independent competitor is difficult at best, and frequently impossible.<sup>83</sup>

To combat this problem, the idea of a mandatory premerger notification program arose.<sup>84</sup> As eventually adopted in title II of Hart-Scott-Rodino (Clayton Act section 7a), premerger notification requires that certain mergers and acquisitions be reported to the FTC and Justice Department, and imposes a waiting period while the agencies review the transaction.<sup>85</sup> With a few specified exceptions, the original notification requirement applied when 1) interstate commerce was involved or affected,<sup>86</sup> 2) one of the parties was at least a \$10 million entity and the other at least a \$100 million entity,<sup>87</sup> and 3) at least fifteen percent or \$15 million of the acquired entity would be held.<sup>88</sup> Understanding the precise form of the original test, however, is less important to an analysis of the recent amendment than is understanding the forces behind that form. To that end, a review of the Act's legislative history is essential.<sup>89</sup>

83. *Id.* at 8, reprinted in 1976 U.S.C.C.A.N. at 2640-41.

84. A limited requirement already existed under FTC rules. It, however, covered only a few transactions and lacked any waiting period provision. See 39 Fed. Reg. 35717-18 (1974).

85. See generally 15 U.S.C. § 18a (2000).

86. *Id.* § 18a(a)(1). This is known as the Commerce Test.

87. *Id.* § 18a(a)(2). This is known as the Size-of-Person Test. The 2000 amendment institutes an annual adjustment to the \$10 million/\$100 million threshold for transactions from \$50-\$200 million, and requires report of *all* transactions over \$200 million. Pub. L. No. 106-553, 114 Stat. 2762, 2762A109 (2000). Exact determination of whether the Size-of-Person Test is met is controlled by the premerger notification rules at 16 C.F.R. §§ 801-802 (2001).

88. 15 U.S.C. § 18a(a)(3). This is the Size-of-Transaction Test. The 2000 amendment eliminates the fifteen percent threshold and changes the dollar threshold to \$50 million. 114 Stat. at 2762A109.

89. Understanding legislative history and intent with regard to HSR is of value because of the brevity of the statutory language and the lack of common law precedent. Compare *United States v. Turkette*, 452 U.S. 576, 580 (1981) (indicating that statutory language is conclusive only when it is unambiguous and only "in the absence of a 'clearly expressed legislative intent to the contrary'") (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), with *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . ."), and Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intent' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."). In any case, despite wide divergence on the purposes of antitrust law, compare ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) (indicating the only goal of antitrust law is to increase economic efficiency), with Robert Pitofsky, *The Political Content of Antitrust*, 127

*Legislative History*<sup>90</sup>

Any discussion of the legislative history behind the Act should be prefaced by noting that its passage was marked by "extraordinary parliamentary procedures" as it emerged from a "legislative morass."<sup>91</sup> The Act, as passed, was based on a compromise bill constructed without conference, and "because of the number of separate bills and titles [involved], the legislative history of the Act is a patchwork of testimony, floor statements, debates, Committee Reports and 'Additional Statements.'"<sup>92</sup> As to the premerger notification provisions, however, "[t]he legislative history of HSR is quite clear."<sup>93</sup>

There are several key points to draw from this legislative history. First, the premerger title of the Act was meant only to make the procedural change of requiring notification—it was not meant to change substantive law.<sup>94</sup> Second, the provision was intended to encompass only the very largest of mergers.<sup>95</sup> Finally, there was concern in Congress about not allowing pursuit of merger enforcement goals to place too much of a burden on commerce.<sup>96</sup>

*"Only Procedural Change"*

The legislative history of HSR indicates that the premerger title of the Act was intended to make only the procedural change of requiring notification, and was not meant to change substantive law.<sup>97</sup> In fact, when Representative Rodino introduced the final

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U. PA. L. REV. 1051 (1979) (arguing that antitrust laws protect values, including fear of excessive concentration of economic power, and enhance individual and business freedom), review of the legislative history at least makes clear the goals of premerger notification. See *infra* notes 90-117 and accompanying text.

90. For a far more detailed legislative history of the Hart-Scott-Rodino Act, see generally 10-11 KINTNER, *supra* note 65.

91. Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 681-82 (1977).

92. *Id.* at 682.

93. Sims & Herman, *supra* note 9, at 877.

94. See *infra* notes 97-102 and accompanying text.

95. See *infra* notes 103-12 and accompanying text.

96. See *infra* notes 113-17 and accompanying text.

97. For example, it was not meant to change the standard for determining legality of the merger, nor the burden of proof for a preliminary injunction against the merger. See 10

version of the bill, he explicitly stated that "[t]he bill in no way alters the substantive legal standard" for merger review.<sup>98</sup> The point was repeated throughout debate on the Act: "Let me emphasize that this bill makes no changes in the substantive law of mergers;"<sup>99</sup> "I wish to stress that the legislation makes procedural, rather than substantive changes in the Nation's antitrust laws;"<sup>100</sup> "This bill does not change the substance of the merger law at all ...."<sup>101</sup> In fact, intentional substantive changes contained in earlier drafts of the title were rejected.<sup>102</sup>

### *Capturing the Big 150, Not a Fixed Dollar Value*

Despite the fact that Congress defined jurisdiction in dollar terms, the point of this "size" requirement was to ensure capture of certain transactions, not to cover transactions solely because they surpassed that \$10 million/\$100 million figure. Because this contention may seem contrary to the plain language of the \$100 million limit, consider the following facts:

a) In introducing the bill, Senator Hart described the premerger notification requirement as governing "[g]iant corporations" which he then described with the \$100 million tag,<sup>103</sup> indicating that the focus of the requirement was the largest mergers, more so than those over a certain fixed dollar amount.

b) The \$100 million mark was relevant not for its dollar value, but for capturing a certain number of transactions. The tailoring committee 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. To this end, the Committee adopted a number of

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KINTNER, *supra* note 65, at 7.

98. H.R. REP. NO. 94-1373, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2637.

99. 122 CONG. REC. 25052 (1976) (statement of Rep. Rodino).

100. *Id.* (statement of Rep. Hughes).

101. *Id.* at 25055 (statement of Rep. McClory).

102. Charles W. Smith & Robert A. Lipstein, *Premier Notification: Coverage, Corporate Planning and Compliance*, 47 ANTITRUST L.J. 1181, 1183 n.12 (1979) (referring to rejection of the automatic stay provision and the change from a strict to substantial compliance standard in reporting).

103. 121 CONG. REC. 8143 (1975).



amendments ... including ... a reduction in the number of transactions subject to ... the provisions ....<sup>104</sup> Consider the following excerpt from the Senate report on the issue, indicating numbers of transactions as the basis for that careful tailoring and reduction:

Approximately the largest 700 U.S. companies meet the \$100 million jurisdictional requirement. Although \$100 million companies account for roughly 40 percent of mergers and acquisitions, [title II's] *dual* requirement of (i) a \$100 million acquiring company, and (ii) a \$10 million acquired company would have required ... notification, over the past 5 years, in less than 100 transactions per annum. With this limitation, the Committee sought to include within the ambit of the premerger notification provision primarily those mergers or acquisitions that were most likely to have a substantial effect on competition. That is not to say that smaller mergers may not run afoul of the Clayton Act. To include the bulk of the approximately 3,000 mergers that have occurred annually in the course of the past several years would, however, in the Committee's judgment impose an undue and unnecessary burden on business.<sup>105</sup>

c) One of the final items considered prior to passage of the Senate version was an amendment that proposed a \$250 million limit, as opposed to a \$100 million upper limit.<sup>106</sup> This change was rejected on the grounds that the \$100 million point was relevant not for its dollar value, but for its covering a certain level of transactions. "It is estimated that about 100 transactions per year will be reported under this \$100 million test. ... Arbitrarily increasing the threshold to \$250 million will eliminate a number of mergers that could be anticompetitive and which should be reported."<sup>107</sup>

d) When Representative Rodino reported the bill out of the House Committee on the Judiciary, he indicated that the premerger requirement was for "the very largest corporate mergers—about the 150 largest out of the thousands that take place every year. ... If these premerger reporting requirements were imposed on every

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104. S. REP. NO. 94-803, pt. 1, at 65 (1976).

105. *Id.* at 66.

106. See 122 CONG. REC. 17438-39 (1976).

107. *Id.* at 17438-39 (statement of Sen. Abourezk).

merger, the resulting added reporting burdens might more than offset the decrease in burdensome divestiture trials. That is why [this requirement] applies only to approximately the largest 150 mergers annually.”<sup>108</sup>

e) In debate, Representative Rodino reiterated: “[T]he terms of the bill are such that it will reach only about the largest 150 mergers a year.”<sup>109</sup>

f) Representative Hughes similarly stated: “As a result of the limitations set forth in the bill, only the very largest mergers would be required to give advance notice. Of the several thousand mergers which have taken place annually over the last several years, only 150 per year would have met ... the threshold requirements.”<sup>110</sup>

g) A discussion regarding the use of dollar values to “define small business” highlights the bill’s use of a dollar amount as a surrogate for a transaction number, due largely to the difficulty of otherwise identifying those transactions:

Rep. Ashbrook: “I would like to know where [the bill] specifically exempts small business.”

Rep. Hughes (after discussing the \$10 million/\$100 million provision): “Would not [you] agree that that is a fairly large corporation?”

Rep. Ashbrook: “I ... do not think that this bill necessarily would contain definitions of small businesses which would be uniformly agreed to.”

Rep. Hughes: “[W]e would have a very difficult job in trying to define small business; but I think that the standard that is used is carefully tailored to apply only to the 150 largest corporate acquisitions each year ....”<sup>111</sup>

h) Finally, the statement of Representative Rodino during House reconsideration is particularly illuminating, because one of the named sponsors of the Act expresses the legislative intent behind it: “The Senate bill permitted the [agencies] to promulgate rules

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108. H.R. REP. NO. 94-1373, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2643. Notably, there was no intent that the notification program catch all problematic mergers. Rodino went on to admit “smaller, illegal mergers may still be consummated.”

109. 122 CONG. REC. 25052 (1976).

110. *Id.*

111. *Id.* at 25054.

subjecting 'small' mergers—involving companies [below the \$10 million/\$100 million threshold]—to the notification and waiting requirements provided by this bill. The House bill completely deleted this provision, and so does the compromise bill. ... [T]he coverage of this bill should be decided by Congress ....<sup>112</sup> In other words, Congress did not intend that all, or even most, mergers be subject to premerger notification. Further, the statement indicates that subjecting the majority of mergers to such review, as has become the case through the neglected factor of inflation, is a proper subject for congressional action.

### *Burdening Commerce*

The third point about HSR's legislative history worth considering is congressional concern that changes wrought by it not burden commerce. Recall the "careful balancing" to avoid "unduly burdening business with unnecessary paperwork or delays;"<sup>113</sup> the determination that including the "bulk" of annually occurring mergers would "impose an undue and unnecessary burden on business;"<sup>114</sup> the desire that the adopted provisions "neither deter nor impede consummation of the vast majority of mergers and acquisitions."<sup>115</sup> Further evidence of this concern for limiting the burden that premerger notification causes may be found in the numerous transactions exempted from the requirements<sup>116</sup> and in the provisions for the enforcing agencies to create even further exemptions if the subject transactions are "not likely to violate the antitrust laws."<sup>117</sup>

In sum, Congress sought to cause only procedural changes, to encompass only the very largest of mergers, and to minimize the burden placed on commerce. What they actually got was something quite different.

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112. 122 CONG. REC. 30877 (1976).

113. See *supra* note 104 and accompanying text.

114. See *supra* note 105 and accompanying text.

115. S. REP. NO. 94-803, pt. 1, at 66 (1976).

116. 15 U.S.C. § 18a(c) (2000).

117. *Id.* § 18a(d)(2)(B).

## HSR'S "PROCEDURAL" CHANGE SUBSTANTIVELY ALTERS ANTITRUST<sup>118</sup>

### *Dramatic Growth of Premier Review*

Constructing a surrogate jurisdiction test, that is, one defined in fixed dollar terms,<sup>119</sup> was a convenient way for Congress to ensure premerger notification of the largest transactions each year. This structure, however, meant that, by the turn of the millenium, agency jurisdiction would explode beyond its intended bounds.<sup>120</sup> The first full year of HSR reporting, 1979, saw 859 reportable transactions.<sup>121</sup> The year 2000 saw 4926 reportable transactions,<sup>122</sup> a fivefold increase from inception, and more importantly, a greater

118. For several earlier views on the impact of HSR premerger notification, see generally *Symposium, supra* note 8.

119. The preamendment jurisdiction test of whether notification is required included the \$10 million/\$100 million Size-of-Person Test and the \$15 million Size-of-Transaction Test. See *supra* notes 87-88 and accompanying text.

120. A Congressional intent to allow these dollar limits to govern the issue until a vaguely discussed legislative return to the issue might be read into the comments discussed *supra* note 112. The material discussed *supra* notes 103-12 and accompanying text, however, shows a clear intent to use these limits merely to capture the largest mergers each year. If the jurisdiction test is capturing far more than those top 100-150 mergers, then the agencies are exceeding their intended jurisdictional bounds.

121. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, 10-YEAR WORKLOAD STATISTICS REPORT FY 1978-1987 (1987) [hereinafter *WORKLOAD STATISTICS 1987*], reprinted in *Oversight and Authorization Hearings Into the Policies and Enforcement Record of the Antitrust Division (DOJ): Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 517 (1988). This number exceeds both House and Senate estimates of annual filings, but is in keeping with the 650-750 annual filings projected by the FTC. See *Antitrust Improvements Act of 1975: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm. on S.1284*, 94th Cong. 66 (1975) (testimony of Chair. Engman); *supra* notes 103-12 and accompanying text. This may indicate the dollar limit was too low even at the outset. FTC Chairman Engman's testimony indicated the agency recommended a \$250 million threshold to capture the top 150 mergers. *Antitrust Improvements Act of 1975, supra*, at 66, 72. Notably, Engman went on to state: "If we had to conduct full investigation of all mergers exceeding the \$100 million [test], the fruits of our efforts might not be worth the cost." *Id.* at 71-72. Note that reportable transactions are distinct from actual filings because "[u]sually, two filings are received, one from the acquiring person and one from the acquired person." FEDERAL TRADE COMM'N, THE TWENTY-SECOND ANNUAL REPORT TO CONGRESS REGARDING THE HART-SCOTT-RODINO (HSR) PREMIER NOTIFICATION PROGRAM 28 app. A n.1 (1999) [hereinafter *TWENTY-SECOND ANNUAL REPORT*].

122. FEDERAL TRADE COMM'N, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2000, at App. A (2001) [hereinafter *TWENTY-THIRD ANNUAL REPORT*], available at <http://www.ftc.gov/os/2001/04/annualreport2000.pdf>.

than 3000 percent increase over Congress's target level of the 150 largest mergers annually.<sup>123</sup>

### *Causes of This Growth*

There are three primary causes<sup>124</sup> of this growth: real growth in the annual number of transactions,<sup>125</sup> real growth in the size of parties to those transactions and in the size of the transactions themselves,<sup>126</sup> and inflation devaluing the reporting thresholds.<sup>127</sup>

### *Increasing Total Transactions*

Even a cursory review of popular media comments reflects a widespread awareness among the general public of an ongoing surge in merger activity,<sup>128</sup> and statistics support this popular conception. The annual number of U.S. mergers has increased from

123. Compare Congressional intent to capture only "the very largest" transactions, *supra* notes 103-12 and accompanying text, with FEDERAL TRADE COMM'N, TWENTY-FIRST ANNUAL REPORT TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976 (1998) [hereinafter TWENTY-FIRST ANNUAL REPORT] ("As indicated in past annual reports, the HSR program ensures that *virtually all* significant mergers or acquisitions occurring in the United States will be reviewed by the antitrust agencies prior to consummation.") (emphasis added).

124. Increased compliance may have some effect as well. On the other hand, the FTC and DOJ have taken active steps to reduce reporting through exemptions, reducing the effect of both inflation and real growth. See, e.g., David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J.L. & PUB. POL'Y 61, 119-20 (1999) (discussing "two major expansions of HSR exemptions" which resulted in approximately twenty-percent and ten-percent reductions in filings).

125. See *infra* notes 128-29 and accompanying text.

126. See *infra* notes 130-33 and accompanying text.

127. See *infra* notes 134-38 and accompanying text.

128. See, e.g., Justin Martin, *CEOs In Danger*, CHIEF EXECUTIVE, Oct. 1, 2000, at 22, 25 ("With the U.S. in the midst of a massive merger wave . . ."); Peter Skarzynski, *When Mega-Mergers Don't Make Sense*, CHIEF EXECUTIVE, June 1, 2000, at 40 ("The wave of merger mania that's been going strong for several years now . . ."); David Stires, *Riding The Buyout Wave*, FORTUNE, Dec. 18, 2000, at 142 ("The pace of mergers and acquisitions has been rising since 1992 . . ."); Sandra Sugawara, *Merger Wave Accelerated in '99: Economy, Internet Driving Acquisitions*, WASH. POST, Dec. 31, 1999, at E1 (noting the recent "frenzy of merger madness, capping a dramatic wave of global corporate consolidation that has been gaining momentum through much of this decade."); Kirk Victor & Michael Posner, *Merger Mania*, 32 THE NAT'L J. 2280 (2000) ("[A] tidal wave of mega-mergers [has] reshape[d] the country's corporate landscape . . .").

2276 transactions in 1976 to 9566 transactions for 2000.<sup>129</sup> Increased numbers of mergers, of course, may be expected to lead to increased reportable transactions and increased filings.

### *Increasing Size of the Parties and Transactions*

If the size of the parties involved or the size of the transaction “grew across” the reportable dollar value, then reportable transactions and associated filings grew as well.<sup>130</sup> Inflation-correcting the 1976 test value to current-day dollars yields a Size-of-Person test of \$31.1 million/\$311 million.<sup>131</sup> These numbers indicate that, on an inflation-corrected basis, as many as two thousand notifications should have been filed in 2000<sup>132</sup>—a significant change from the first few years of reporting. It is impossible to tell from the reporting statistics whether this real growth in notification is due to the increased total number of transactions, real growth of the parties, real growth of the transactions—or a combination thereof. Its significance, however, lies in the revelation that *more than one half of the growth in notification is due to inflation.*<sup>133</sup>

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129. See *Twenty-Five Year Statistical Review*, MERGERSTAT REV., Jan. 2001, at 256. The FTC primarily attributes increasing mergers to the following factors: globalization of competition, deregulation, industry downsizing and consolidation, technological change, and financial market conditions. *Mergers and Corporate Consolidation in the New Economy: Hearings Before the Comm. on the Judiciary*, 105th Cong. 52-53 (1998) (statement of Chair. Pitofsky).

130. There is a recognized trend of growth in the size of parties and transactions. During testimony before Congress, FTC Chairman Pitofsky recently indicated “the dollar value of commerce affected by these mergers has . . . increased by] an astounding eleven-fold during the past decade. . . . In the past year alone, companies filed notifications for 273 mergers with a transaction size of one billion dollars or more . . . .” *Antitrust Hearings*, *supra* note 7, at 10.

131. CPI-U figures show a 68.9% decrease between 1976 and 2002. See U.S. DEPT OF LABOR, CONSUMER PRICE INDEX (Feb. 20, 2002), available at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiat.txt>.

132. See TWENTY-THIRD ANNUAL REPORT, *supra* note 122, exhibit A, table VI, VIII (indicating a minimum of 3082—at most 3408—acquiring persons had assets of more than \$311 million and at least 2282—possibly up to 2947—acquired entities had assets of more than \$31.1 million). Note that this rough estimate considers only devaluation of the Size-of-Person Test, based on 2000 values.

133. Total growth was from 861 to 4926 notifications, while real, i.e., inflation-corrected, growth was from 861 to as many as 2000 notifications. See *supra* notes 121-22, 132 and accompanying text. Note that inflation-correcting from the first full year of reporting requires using a 1979 to 2000 CPI-U correction, but the estimate of reporting using the FTC

*Inflation*<sup>134</sup>

During the twenty-five years since HSR's passage, the value of the dollar, based on the Consumer Price Index, has decreased by *more than two-thirds*.<sup>135</sup> Adjusted for inflation, the 1976 \$10 million/\$100 million jurisdiction test is effectively at a \$3.11 million/\$31.1 million level in constant 1976 terms.<sup>136</sup> This drastic change in the value of the jurisdiction test amount, coupled with the other factors discussed previously, has meant that rather than the largest 150 transactions annually, more than one-half of all transactions<sup>137</sup> each year must be reported to and reviewed by the agencies.<sup>138</sup>

*Impact of This Growth*

In view of the dramatic growth in premerger notification, the key question becomes: Is the current state of affairs necessarily a bad thing? A former head of the FTC's premerger office described the program as having "dramatically changed" merger enforcement to the benefit of "both consumers and the business community."<sup>139</sup>

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report does not change. This is because the tables in that report cover ranges of transactions.

134. Ironically, although inflation has radically affected the test, and will continue to eat away at the reporting thresholds until FY2005, the penalty for violating the Act, currently \$11,000 per day, has been subject to inflation adjustment for years. See Federal Civil Penalties Inflation Adjustment Act of 1990 §§ 1-6, Pub. L. No. 101-410, 104 Stat. 890-92 (1990), amended by Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (current version at 28 U.S.C.S. § 2461 nt. (2002)).

135. Based on the CPI-U figures discussed *supra* note 131.

136. The Size-of-Transaction Test has been similarly affected, with the 1976 requirement to report only those transactions over \$15 million now being effectively reduced to a \$4.8 million threshold.

137. Filings were required on 4926 of 2000's 9566 total mergers. TWENTY-THIRD ANNUAL REPORT, *supra* note 122, at App. A; *Statistical Review*, *supra* note 129, at 256.

138. Another way of considering the increase is to see that the 150 largest mergers in 1979 represented only seven percent of total merger activity (150 of 2128 transactions). See *Statistical Review*, *supra* note 129, at 269. Even if Congress had desired a fixed percentage, rather than the fixed number of 150 they indicated, only about 670 mergers (seven percent of 9566) should have been reviewed in 2000. In either case, the scope of review has dramatically departed from Congressional intent—from 1.6% of all year 2000 mergers under a fixed 150, or from seven percent under a fixed percentage, to more than fifty percent.

139. William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 826 (1997). Baer headed the FTC's Bureau of Competition.

Conversely, a Department of Justice official involved in developing the premerger notification scheme has indicated "it is not at all clear" that the "dramatic impact" of HSR is "desirable."<sup>140</sup> To determine whose view on the desirability of imposing premerger notification on an ever-increasing portion of transactions is correct, this section briefly reviews the benefits and costs of premerger notification after twenty-five years.

### *Benefits of Premerger Review*

Finding actual benefits arising out of HSR premerger notification is key because, as one FTC premerger authority acknowledged, "Premerger notification [sic] is not an end in itself. Its value lies in its demonstrated ability to improve our substantive review of mergers under the Clayton Act."<sup>141</sup>

In practice, premerger notification *has* improved the substantive review of mergers. The benefits of premerger notification have come in the form envisioned by Congress in its enactment: prior notice of mergers, opportunity to challenge them before consummation, and reduction of post-acquisition litigation.<sup>142</sup> These benefits, the enforcement agencies claim, translate to consumer savings.<sup>143</sup> The DOJ estimates their merger enforcement actions during fiscal year 1999 saved consumers from paying four billion dollars in higher prices.<sup>144</sup> Estimates of FTC actions increased this direct benefit by an additional \$1.2 billion.<sup>145</sup> Although some portion of these savings

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140. Sims & Herman, *supra* note 9, at 865-66. As Deputy Assistant Attorney General in the Antitrust Division, Sims advocated the Administration's position during debate on HSR. *Id.* at 865 n.3.

141. James W. Mullenix, *The Premerger Notification Program at The Federal Trade Commission*, 57 ANTITRUST L.J. 125, 130-31 (1988).

142. See TWENTY-SECOND ANNUAL REPORT, *supra* note 121, at 26.

143. There also have been claims of benefits to the business community. See Baer, *supra* note 139, at 839-41.

144. ANTITRUST DIV., DEPT OF JUSTICE, FY2000 CONGRESSIONAL BUDGET SUBMISSION 64 (1999), reprinted in *Appropriations for 2000: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 106th Cong. 745 (1999). Note that this figure includes savings from all transactions—reportable, nonreportable and not reported. A rough measure of apportionment may be taken by looking at Preliminary Inquiries (PI's) opened. Approximately three-quarters of Antitrust Division PI's resulted from HSR filings. See *id.* at 62, reprinted at 743.

145. See *Antitrust Hearings*, *supra* note 7, at 13.



would have been achieved without premerger notification, the requirement has nonetheless benefitted consumers.<sup>146</sup> Given these acknowledged benefits, the question becomes: Are these benefits worth the burdens that the premerger notification program, in its current form, imposes to achieve them?

### *Economic Burdens*

Affixing an exact price tag on the premerger notification program is difficult.<sup>147</sup> It is not difficult, however, to recognize the sources of that cost. The most obvious and direct is the HSR filing fee. Acquiring persons must pay a substantial filing fee with their premerger notification.<sup>148</sup> In FY 1999, these filing fees resulted in a burden of nearly \$230 million on U.S. merger activity.<sup>149</sup> Further, the 2000 amendment establishes a tiered fee system, with rates from the current \$45,000 fee up to \$280,000 per filing.<sup>150</sup>

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146. Of course, these "savings" may be viewed as a shifting of expense, as they can be considered to come at a cost to some of those same consumers in their role as stock and mutual fund shareholders.

147. For an accounting of the total direct cost of HSR at almost \$1.5 billion a year as of 1996, see Sims & Herman, *supra* note 9, at 890-92. They contend that more than \$1 billion of this cost is for "transactions that raise virtually no antitrust problems." *Id.* at 892; see also William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 909 (1997) ("The benefits in terms of catching one or two small transactions the agency might otherwise miss hardly justifies imposing well over \$1 billion in unnecessary transaction costs on American businesses seeking to complete perfectly routine transactions, the overwhelming majority of which do not require any substantive antitrust review whatsoever."). For an argument that these estimates are based on assumptions "either internally inconsistent or implausible on their face," see BAER, *supra* note 139, at 852-53.

148. The fee was \$45,000 prior to the 2000 amendment. 15 U.S.C. § 18a (1994). The history of this provision indicates there was no fee to file prior to 1989.

149. In fact, the entire FY2000 budget for the DOJ Antitrust Division, as well as all of the appropriation for the Bureau of Competition (FTC), was derived from these filing fees. See S. REP. NO. 106-76, at 140 (1999).

150. Pub. L. No. 106-553, 114 Stat. 2672, 2762A109 (2000). This change may be expected to raise the burden imposed by filing fees to at least \$380 million per year. H.R. Res. 467, 106th Cong. 6-7 (2000) (estimating that amount for a \$45,000 to \$200,000 scale). Note that these figures do not include the impact of HSR civil penalties. See, e.g., *United States v. Blackstone Capital Partners II Merchant Banking Fund L.P.*, No. 99-0795, 1999 U.S. Dist. LEXIS 5526, 1999-1 Trade Cas. (CCH) ¶ 72,484 (D.D.C. Mar. 31, 1999) (imposing \$2.7 million penalty); *United States v. Automatic Data Processing*, No. 96-0606, 1996 U.S. Dist. LEXIS 21160; 1996-1 Trade Cas. (CCH) ¶ 71,361 (D.D.C. Apr. 10, 1996) (\$2.9 million); *United States v. Sara Lee Corp.*, No. 1:96CD00196, 1996 U.S. Dist. LEXIS 21173, 1996-1 Trade Cas. (CCH)

Another obvious burden of premerger notification is the cost of conducting filing. In addition to the agencies' costs in running the premerger program, whether funded by filing fees or general fund taxes, the parties to the transactions bear significant direct costs in filing. The amount of data required is considerable. As of 1987, the FTC received about twelve and one-half feet of premerger filings every week<sup>151</sup>—and the number of filings has nearly doubled since then.<sup>152</sup> Beyond the investigation, computation, and reporting involved in any potential merger, those subject to filing incur significant fees from attorneys, accountants, and economists, as well as the cost of depositions, transcripts, exhibits, and document preparation. If the agency decides to require filing of further information,<sup>153</sup> these costs increase drastically—one case reportedly involved over 8000 boxes of documents.<sup>154</sup> Preparing a Second Request can often take a large company "several months and cost more than a million dollars."<sup>155</sup>

Finally, the premerger notification program imposes a notable burden as a result of the repercussions of the transaction costs involved. The cost of fees and filings couple with the chilling effect of review to create transaction costs that may prevent desirable mergers—ones that would benefit the consumer—from occurring.<sup>156</sup> These repercussions appear in at least two cases: First, when beneficial mergers that push the envelope on permissibility are not proposed,<sup>157</sup> and second, when beneficial proposed transactions are abandoned or scuttled in the face of agency concern.<sup>158</sup>

HSR affects potential transactions. In drafting HSR, Congress considered a proposal for an automatic stay provision that would have imposed an automatic temporary restraining order on mergers

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¶ 71,301 (D.D.C. Feb. 8, 1996) (\$3.1 million).

151. Mullenix, *supra* note 141, at 126.

152. The agencies received 2533 HSR filings in 1987, compared with 4926 by 2000. See Workload Statistics 1987, *supra* note 121; TWENTY-THIRD ANNUAL REPORT, *supra* note 122, at App. A.

153. This procedure is known as a Second Request.

154. Sims & Herman, *supra* note 9, at 886.

155. Kolasky & Lowe, *supra* note 147, at 907; see also 146 CONG. REC. 10990 (2000) (statement of Sen. Hatch) ("Complying with such second requests has become extraordinarily burdensome, often costing companies in excess of \$1 million.").

156. Sims & Herman, *supra* note 9, at 885-86.

157. See *infra* note 159-62 and accompanying text.

158. See *infra* notes 163-70 and accompanying text.

for up to thirty days, with provision for an additional thirty days.<sup>159</sup> This provision, under fire from the Administration and business,<sup>160</sup> was eliminated. This deletion was in part because, as the Assistant Attorney General heading the Antitrust Division acknowledged during testimony on the bill, an automatic stay provision "operate[s] as a *severe disincentive* to mergers generally . . . ."<sup>161</sup>

The agencies, however, have "taken full advantage of provisions in HSR giving them the ability to ask for information to essentially create the automatic stay of a transaction that the 94th Congress explicitly refused to grant—and that the agencies themselves agreed (in 1976) was a bad idea."<sup>162</sup> The result is that this potential hold on aggressive—but still legal and beneficial—transactions may create just such a severe disincentive to their proposal.

HSR also affects proposed transactions. Once transactions have been proposed, and filings made, the chilling effect may become even more pronounced. The agencies have the power to block acquisition pending compliance with not only the initial filing requirements, but the Second Request provisions<sup>163</sup>—power equivalent to an injunction. This sort of restraint

introduces business uncertainties and risks that may lead to cancellation for reasons having little to do with the defendant's evaluation of the probable ultimate result. It appears that no proposed merger has survived [this type of opposition] for any substantial period of time. Many mergers are delicate transactions involving compromises and predictions about the future. Obviously, changes in the capital market, the economy, and the industry may make the merger more or less attractive to the parties. The financing of a merger may be dependent on

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159. 122 CONG. REC. 17268 (1976) (statement of Sen. Byrd).

160. 10 KINTNER, *supra* note 65, at 18-19.

161. S. REP. NO. 94-803, pt. 2, at 213 (1976) (emphasis added).

162. Sims & Herman, *supra* note 9, at 881. Further, the 2000 amendment expands the length of the waiting period that follows substantial compliance with second requests to thirty days for most transactions. Pub. L. No. 106-553, 114 Stat. 2672, 2672A110 (2000).

163. The initial filing contains information on the current operations of the entities involved and a description of the proposed transaction. *See supra* note 3. Second Requests are mandatory requests for additional information that are issued by the enforcement agencies for transactions in which they open an investigation. *See* Federal Trade Commission/Department of Justice, *Model Request for Additional Information and Documentary Material*, [Mar. 23, 1995] 6 Trade Reg. Rep. (CCH) ¶ 42,524, at 42,753-60 (Mar. 28, 1995).

loans from financial institutions that cannot remain committed indefinitely without regard to changes in the money market.<sup>164</sup>

An agency challenge, or even an expression of concern, might result in the premature restructuring<sup>165</sup> or abandonment of the proposed transaction.<sup>166</sup> This may be the case because "when the Commission decides to challenge a merger, in most cases the transaction is abandoned before suit is filed. When the transaction is not abandoned, it is usually resolved as a consent order requiring divestiture."<sup>167</sup> Although agency officials tout these changes or abandonments as a sign of the effectiveness of their enforcement programs,<sup>168</sup> the same points highlight the potential for over-enforcement. The question is whether all of the thirty-eight consent agreements and thirty-eight abandonments<sup>169</sup> during a recent year involved transactions that would have been harmful or illegal. If the agencies have anything less than a perfect track record in terms of predicting competitiveness following these proposed transactions,

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164. Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 HARV. L. REV. 391, 393 (1965). Although the quote refers to judicially imposed injunctions, the effects of HSR investigations can be similar. Further, comments with regard to timing may be even more pertinent in the twenty-first century as increased speed of communication and capital flow make deals more vulnerable.

165. This may come in the form of a consent decree, where parties agree to changes desired by the agencies.

166. This is such a concern that some merger proposals have begun to expressly account for it. The record-setting Time Warner-America Online merger agreement, for example, obligates the parties to fight agency action rather than scuttle the deal. *A Bet That the FTC Will Blink*, NEWSWEEK, Dec. 11, 2000, at 6. Very few transactions, however, "can afford the delay inherent in litigating, even through a preliminary injunction, and even fewer parties have the stomach for the additional legal fees entailed in such litigation." Kolasky & Lowe, *supra* note 147, at 910-11.

167. Mullenix, *supra* note 141, at 125.

168. For example, the director of the FTC's Bureau of Competition: "Once again, the Bureau had a busy year. We entered into 22 merger consents . . . Parties abandoned another 9 transactions after we expressed competition concerns." Richard G. Parker, *Report from the Bureau of Competition*, Address at the ABA Antitrust Section 2000 Spring Meeting (April 7, 2000), available at <http://www.ftc.gov/speeches/rgpbc.htm>.

169. The 1999 annual HSR report to Congress listed eighteen consents and twelve abandonments for FTC cases, twenty consents and twenty-six abandonments for DOJ cases. TWENTY-SECOND ANNUAL REPORT, *supra* note 121, at 2-3. Similarly, the 2000 report showed the FTC with eighteen consents and nine abandonments, while the DOJ saw eighteen consents and twenty-nine abandonments/restructurings. TWENTY-THIRD ANNUAL REPORT, *supra* note 122, at 2-3.

then they have in fact harmed consumers by depriving them of the same benefits of competition those agencies tout.<sup>170</sup>

The burden imposed on the consumer—and on businesses—through beneficial transactions never proposed and beneficial transactions restructured or abandoned is difficult to determine. It is, however, no less real than the benefit to consumers produced by the prevention of illegal or competition-reducing transactions.

*The Substantive Impact of Growth in This "Procedural" Program*

Potentially more significant than the burdens imposed on commerce by the program are the changes that HSR has wrought in the nature of antitrust law. "[T]he premerger notification provisions of the HSR Act have been . . . the most important factor in the replacement of merger control through litigation with a comprehensive scheme of merger regulation."<sup>171</sup> The problem with such change is that it endangers the statutory aspects of antitrust law—inadvertently upsetting the statutory/regulatory balance<sup>172</sup> that legislators were explicit about preserving when creating HSR.<sup>173</sup> Rather than statutory regulation overseen by the impartial arbiter of the courts, antitrust law increasingly is controlled through regulation and increasingly is a regulatory, rather than balanced field.

"Today the primacy of the antitrust caselaw is in jeopardy."<sup>174</sup> In large part, this is because "the Supreme Court hasn't heard a merger case in something like 25 years. And even at the lower court level, . . . few cases actually go to a verdict by a judge and a district and even fewer go to courts of appeals."<sup>175</sup> In the decade preceding

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170. They also have acted contrary to the goals Congress had in establishing the program. "I cannot emphasize too strongly that it is the sole purpose of this legislation to provide an opportunity to enforcement agencies to preview mergers and not in any way alter the normal flow of capital." 122 CONG. REC. 25053 (1976) (statement of Rep. Hutchinson).

171. Sims & Herman, *supra* note 9, at 865.

172. See *supra* notes 53-75 and accompanying text.

173. See *supra* notes 97-102 and accompanying text.

174. Daniel J. Gifford, *The Jurisprudence of Antitrust*, 48 SMUL. REV. 1677, 1698 (1995).

175. *New Economy: Hearings*, *supra* note 129, at 66 (statement of Chair. Pitofsky); accord Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1425 (1998).

HSR, the Supreme Court produced “an average of more than one merger opinion a year,”<sup>176</sup> but has not produced a single substantive merger opinion since.<sup>177</sup> Similarly, federal district court and administrative litigations have fallen to “less than half the rate of the pre-HSR period,”<sup>178</sup> with the agencies together averaging only about eight district court merger cases per year—out of as many as 220 HSR investigations a year.<sup>179</sup>

Instead of caselaw implementation of the statutory model, “regulation and administrative law-making have replaced the courts as the source for creation and enforcement of antitrust law.”<sup>180</sup> In fact, “[t]he law in the case reports can no longer be assumed to represent the operational law. Indeed, to a large extent the caselaw is misleading.”<sup>181</sup> “Supreme Court opinions ... are widely viewed as obsolete. Supreme Court precedents formally governing ... corporate mergers embrace archaic positions which are widely recognized as no longer valid.”<sup>182</sup> Agency guidelines “now enjoy considerably greater stature than the case law ...”<sup>183</sup> Legality is often “determined in accordance with internal guide lines rather than case law. The agencies then negotiate complex consent decrees with the private parties in which the courts play only a largely symbolic role in reviewing these decrees.”<sup>184</sup> In short, when the majority of transactions are governed by agency rules—both formal guidelines and informal actions such as “expressions of

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176. Sims & Herman, *supra* note 9, at 866.

177. In part, this may be due to the 1974 repeal of the Expediting Act, 15 U.S.C. § 29, which required that appeal of civil antitrust actions brought by the government go directly to the Supreme Court.

178. Sims & Herman, *supra* note 9, at 866 n.7.

179. See WORKLOAD STATISTICS 1987, *supra* note 121; ANTITRUST DIV., U.S. DEP'T OF JUSTICE, 10-YEAR WORKLOAD STATISTICS REPORT FY 1990-1999 (2000) [hereinafter WORKLOAD STATISTICS 1999]. The impact of over-aggressive merger policing is also reflected in decreases in other types of litigation. For example, the agencies averaged eight monopoly cases per year from 1970-1976, but less than one per year since. U.S. GEN. ACCOUNTING OFFICE, CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 44 (1990); WORKLOAD STATISTICS 1987, *supra* note 121; WORKLOAD STATISTICS 1999, *supra*.

180. Waller, *supra* note 175, at 1400.

181. Gifford, *supra* note 174, at 1679.

182. *Id.* at 1680.

183. Waller, *supra* note 175, at 1404.

184. *Id.* at 1394.

concern<sup>185</sup>—the body of law in question becomes increasingly one of a regulatory nature.

### *This Is a Dollar-Based Problem*

In creating premerger notification, Congress desired 1) only a procedural change, 2) to apply a notification requirement to only about the biggest 150 mergers per year, and 3) to avoid burdening commerce to the maximum extent possible.<sup>186</sup> What they got was a massive program of agency review that 1) has induced substantive change in the nature of merger and acquisition law due to its present size, 2) covers nearly half of all mergers and acquisitions in the U.S., and 3) imposes significant burdens on commerce.<sup>187</sup> This divergence between Congress's intent and the functioning of HSR by 2000 was due to the dramatic growth of filing, which in turn, was due to increasing numbers and size of transactions and the impact of inflation on the jurisdiction test.<sup>188</sup> The fixed-dollar-based jurisdiction test originally established for HSR reporting is innately flawed due to its failure to account for inflation. Further, because the level of reporting has had twenty-five years to grow beyond its intended bounds, a related problem is the current level of reporting. In other words, instituting an inflation adjustment starting today<sup>189</sup> is not sufficient to correct the problem with the dollar-based test. If it is retained, it must also be adjusted to account for the change in value since 1976 and possibly for the initial error in establishing it "too low."<sup>190</sup> To determine the optimum way to "adjust" the original test, the next section considers options for change.

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185. See *supra* notes 165-66 and accompanying text.

186. See *supra* notes 97-117 and accompanying text.

187. See *supra* notes 118-70 and accompanying text.

188. See *supra* notes 120-38 and accompanying text.

189. Or in FY2005, as does the 2000 amendment. See *supra* note 14. Of course, that amendment does change the Size-of-Transaction Test—to \$50 million dollars with no percentage requirements—effective February 1, 2001. Pub. L. No. 106-553, 114 Stat. 2762, 2762A109 (2000).

190. See *supra* note 121.

## POTENTIAL CHANGES TO THE ACT

*Searching for Another Model*

Investigating other premerger notification systems in search of alternative approaches will aid in measuring the effectiveness of the 2000 amendment. More than seventy other countries have some sort of competition law,<sup>191</sup> about forty of which involve some type of premerger review.<sup>192</sup> A brief consideration of the systems of some major free-world trading partners follows.

*Japan*

Postwar antitrust law in Japan was patterned after U.S. antitrust laws, including the Sherman Act, the Clayton Act, and the FTC Act.<sup>193</sup> As such, the fact that Japan was the first nation to adopt a premerger notification program<sup>194</sup> might seem to make it a particularly appetizing candidate for emulation. Established in 1949, there has been no altering of the test because it is quite simple: "Every company in Japan which wishes to become a party to a merger, regardless of its corporate size, is required to file a report with [Japan's Fair Trade Commission.]"<sup>195</sup> Of course, from enactment through March 1982, only one merger was found to violate the Japanese prohibition on lessening competition.<sup>196</sup> Whatever the goals of the Japanese system, therefore, the search for a model should move elsewhere.

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191. William M. Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 NW. J. INT'L L. & BUS. 287, 287 (2000).

192. See Eleanor M. Fox, *Foreword: Mergers, Market Access and the Millennium*, 20 NW. J. INT'L L. & BUS. 203, 204 (2000).

193. HIROSKI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS OF JAPAN* 11 (1983).

194. SULLIVAN & GRIMES, *supra* note 30, at 540 n.31.

195. IYORI & UESUGI, *supra* note 193, at 14-15, 85.

196. *Id.* at 85-86.



*European Community*

The European Community adopted premerger notification provisions in 1989.<sup>197</sup> Parties are required to report transactions if their aggregate worldwide turnover<sup>198</sup> exceeds five billion Euro (U.S. \$4.38 billion) and at least two of the parties each have turnover in excess of 250 million Euro (U.S. \$219 million) in a member state.<sup>199</sup> If the transaction is confined largely to one member state, it is exempted from European Union (EU) reporting—it will be considered under national laws.<sup>200</sup> The EU program, then, is similar to the U.S. program, in that it uses a money-based value as a surrogate for merger “bigness.” It is distinct, however, in that the Merger Regulation directs periodic adjustment of the amount<sup>201</sup> and the amount is far higher than the U.S. threshold. In 1999, for example, the EU requirement produced only 292 notifications.<sup>202</sup> The EU model serves mainly to suggest periodic adjustment as an option and to reiterate the previously discussed need to reduce the scope of U.S. notification.

*France, Italy, and Germany*

Most EU member states have national notification programs where not preempted by the EU regulation.<sup>203</sup> The French program is voluntary.<sup>204</sup> The Italian program is compulsory, but is largely a mirror of the EU program—with U.S. \$400 million aggregate and

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197. Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395), as amended by Council Regulation 1310/97 of 30 June 1997, 1997 O.J. (L 180), available at <http://europa.eu.int/comm/competition/mergers/legislation/regulation>.

198. This is essentially net sales value. *See id.* at 5 (defining turnover as “amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings’ ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover”).

199. *See id.* at 1; Hannay, *supra* note 191, at 289.

200. Hannay, *supra* note 191, at 290; Kolasky & Lowe, *supra* note 147, at 909.

201. 1997 O.J. (L 180) at 2. The adjustment is left to the judgment of the Council—it is not expressly tied to inflation. *Id.*

202. Report from the Commission to the Council on the application of the Merger Regulation thresholds, COM(2000) 399 final, at 8 (June 28, 2000), available at [http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000\\_0399en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0399en01.pdf).

203. *See supra* notes 197-202 and accompanying text.

204. Hannay, *supra* note 191, at 293.

U.S. \$40 million individual thresholds,<sup>205</sup> and thus adds nothing new to the discussion. Germany also adds nothing new, setting an aggregate turnover threshold of one billion Deutschmark (DM) (U.S. \$447.5 million) and a DM 50 million (U.S. \$22.4 million) individual threshold, with some exemptions.<sup>206</sup>

### *United Kingdom*

The UK has “no system of compulsory notification” under its antitrust laws,<sup>207</sup> instead relying on a voluntary filing system in which mergers may not be attacked if a filing has been made and no government challenge is raised within twenty to forty-five days.<sup>208</sup> This qualified invulnerability may encourage filing on any case subject to investigation. In the UK, transactions a) over £70 million (\$100 million), or b) affecting more than twenty-five percent of a good or service in a substantial part of the UK, are subject to investigation.<sup>209</sup> This is in effect a nonmandatory threshold. Again, we see a larger-than-U.S. money-based value, but this model adds the intriguing idea of a market share test. Unfortunately, determining market share is a well-known problem in antitrust law,<sup>210</sup> and the UK approach suffers from this problem.<sup>211</sup>

### *Canada*

Canada has a mandatory premerger notification system<sup>212</sup> that is similar to the U.S. system in that it uses a Party-Size Threshold and a Transaction-Size Threshold. The Party-Size Threshold requires that parties have Canadian assets or that sales exceed

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205. *Id.* at 294.

206. *Id.* at 295.

207. BARRY J. RODGER & ANGUS MACCULLOCH, *COMPETITION LAW AND POLICY IN THE EUROPEAN COMMUNITY AND UNITED KINGDOM* 242 (1999).

208. *Id.* at 242-43.

209. *Id.* at 237.

210. *See* SULLIVAN & GRIMES, *supra* note 31, at 20-70.

211. This is particularly true because the market in question may be twenty-five percent of a “substantial part” of the UK. In *Regina v. Monopolies and Mergers Comm’n*, 1 WLR 23 (H.L. 1992), the House of Lords held that as little as 1.65% of the area and 3.2% of the population of the UK was a substantial part for this purpose. The market share test is thus a very easy one for the government to meet.

212. Canadian Competition Act, R.S.C. 1985, ch. C-34, Part IX (1993) (Can.).

Canadian (CA) \$400 million (U.S. \$251 million).<sup>213</sup> The Transaction-Size Threshold is complex, but basically it varies from CA \$35 to CA \$70 million (U.S. \$22 to \$44 million) with transaction type—asset acquisition, stock acquisition, amalgamation, or combinations (such as joint ventures).<sup>214</sup> The Canadian system, thus, does not provide an approach significantly different from the U.S. approach.

### *Summary*

The approach taken by all of these models,<sup>215</sup> save the market-share prong of the UK test, is to define the jurisdiction of the premerger notification program through some surrogate for bigness—be it sales, assets or some combination thereof. All such approaches share the problems of the current U.S. system.<sup>216</sup> The difficulties with the market share test in the UK exemplify concerns with that approach—problems that recently led Belgium to abandon market share in favor of an EU-like test.<sup>217</sup> In short, analyzing the premerger programs of other nations reveals no new structure on which to base a revised HSR jurisdiction test.

### *Options for "Adjusting" the Original Test*

The most obvious response to the devaluation of the jurisdiction test is to raise the dollar amounts in question. The preliminary issue with such a proposal is whether this adjusting is done in a manner consistent with the goals of the Act.<sup>218</sup> The question is whether the amount should be corrected by returning to Congressional intent and setting a value that correctly reflects the

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213. *Id.* § 109.

214. *Id.* § 110.

215. The same is true of Argentina, Austria, Belgium, Hungary, Ireland, Mexico, the Netherlands, Poland, South Korea, and Switzerland. Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L. & BUS. 233, 238-39 (2000). Greece, Portugal, Spain, Taiwan, and Turkey use alternative sales/market share systems as in the UK. *Id.* at 239-40.

216. For more on these problems, see *supra* notes 118-38 and accompanying text.

217. Fiebig, *supra* note 215, at 239.

218. Of course, it is possible to ignore the legislative history, for example, by arbitrarily setting new amounts. This may have been done in the 2000 amendment, although the legislative history of the amendment is so slight there is no indication that such ignoring was intended. See *infra* notes 238-57.

150 largest transactions (or, in light of the increased total number of transactions, to a number proportional to the increase in mergers), or by simply inflation-adjusting the original dollar value. The answer is not simple.

Setting a value to capture only the 150 largest current day transactions would result in a jurisdiction test of well over one billion dollars for each party,<sup>219</sup> and would capture only the largest 1.6% of all mergers<sup>220</sup>—a percentage so small that it might hamper the effectiveness of the program. Similarly, adjusting the dollar value to a level corresponding to the level of filing at program inception<sup>221</sup> would also result in a jurisdiction test of more than one billion dollars for the acquiring and one-half billion dollars for the acquired persons.<sup>222</sup> A similar Size-of-Transaction test would involve only billion dollar events.<sup>223</sup>

If returning to the idea of an extremely low number—be it the originally envisioned top 150 or the equivalent of program-inception-level filing—would endanger the effectiveness of the program, then perhaps merely adjusting the original values for inflation is appropriate.

Adjusting the amounts established in 1976 to reflect a similar value in 2002 dollars would yield a \$31.1 million/\$311 million Size-of-Person Test and a \$46.7 million Size-of-Transaction Test,<sup>224</sup> and could be expected to immediately reduce filings by about half.<sup>225</sup> Such a test not only negates the effects of future inflation, but corrects for the effects of past inflation. It also reduces the burden on commerce while still insuring notification of major mergers. The actual change made by the 2000 amendment is in fact fairly close to this option—the amendment adjusts the Size-of-Transaction Test to \$50 million and then institutes a prospective annual inflation adjustment on not only it, but on the original, 1976 dollar value

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219. See TWENTY-THIRD ANNUAL REPORT, *supra* note 122, exhibit A, tbls. VI, VIII.

220. See *supra* note 138.

221. The first full year of HSR notification saw filings on 7.0% of all mergers. *Id.*

222. Capturing approximately the top 7.0% of year 2000 filings would require these thresholds. See TWENTY-THIRD ANNUAL REPORT, *supra* note 122, exhibit A, tbls. VI, VIII.

223. *Id.* at tbl. I.

224. Based on the CPI-U figures discussed *supra* note 131.

225. Based on 2000 filing data. See TWENTY-THIRD ANNUAL REPORT, *supra* note 122, exhibit A, tbl. II.

Size-of-Person Test.<sup>226</sup> Although this change is more effective than some of the reforms considered, it is still not entirely true to the congressional intent behind that program, in that it is based on a dollar amount that was too low originally.<sup>227</sup> Even at half their current level, filings would be far above the originally envisioned level and there is no apparent target level in mind here.<sup>228</sup> Furthermore, twenty-five years of experience have shown that a jurisdiction test defined in dollars may not be the optimum way to capture for review a desired level of merger activity. Adjustment provisions admittedly help remove inflation as a major factor in reporting growth—a change recommended by scholars.<sup>229</sup> They do not, however, change the fact that dollar values are an indirect measure of the “bigness” of a transaction. If the goal of premerger notification is to ensure agency review of the largest mergers each year, then some measure of current merger activity should be part of the jurisdiction test.

### *Another Approach to the Problem*

Obviously, legislation simply directing that the biggest mergers be reported is not feasible—as shown by the struggle to draft 1976 language.<sup>230</sup> Instead, a jurisdiction test should be established that relies on an annual adjustment of the reporting threshold. The Commerce Test would remain unchanged. The Size-of-Person Test could be deleted, as per the recent House plan, or indexed as per the Senate proposal. The Size-of-Transaction Test, however, would reflect the level of merger activity and would determine whether filings were required.

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226. See *supra* note 14.

227. The 859 filings the first full year of HSR effect were more than five times the desired 150. See *supra* notes 103-12, 121-23 and accompanying text.

228. S. 1854 came closest, as sponsor Sen. Hatch explained the purpose of the change was to exempt mergers and acquisitions not posing any competitive concerns and reduce reporting by half. 146 CONG. REC. S10990 (2000) (statement of Sen. Hatch). Indicating reporting would be reduced by half, however, is not exactly establishing a target level.

229. See Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1324 (1999) (recommending indexing limits to inflation). Note that adjustment provision has precedent in Title 15 sections. See, e.g., 15 U.S.C. § 19(a)(5) (2000); cf. *supra* note 134 (discussing adjustment of HSR penalties).

230. See *supra* notes 103-12 and accompanying text.

The agencies are already required to provide a significant amount of data on HSR and merger activity via the annual report.<sup>231</sup> With this data at hand, agency determination of the appropriate level of merger “bigness” for required reporting, and thus the setting of an appropriate Size-of-Transaction, is possible. For example, if Congress were to determine that the biggest ten percent of all mergers should be subject to premerger notification requirements,<sup>232</sup> and so direct the agency,<sup>233</sup> a review of 2000 data would reveal the proper review level for the current pace of mergers as 957 reviews per year.<sup>234</sup> This number could then be used to determine the Size-of-Transaction Test for the next year—in this case, somewhere over \$150 million.<sup>235</sup> For FY2001, any transaction over this threshold would require premerger notification. This system would be less surrogate-based because, although still defined in an annually promulgated dollar amount, that amount would be based more directly on the actual size of a merger relative to overall merger activity.

Such a revised test, which included an explicit target level of review—ten percent in the example above—and an annual promulgation of the threshold supporting that level, would answer concerns about not only past but also future growth. There are several advantages<sup>236</sup> to such a program:

a) It would negate the impact of inflation. This proposal carries the benefits of other indexed proposals. The Size-of-Person Test, which will be indexed, would directly negate the impact of inflation through the annual adjustment mechanism. Further, the Size-of-Transaction Test would also achieve the benefits of an indexed system, albeit indirectly. Because the annually promulgated

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231. 15 U.S.C. § 18a(j); see also TWENTY-THIRD ANNUAL REPORT, *supra* note 122.

232. Most likely subject to exemptions, as now, and mandatory notification provisions for high-interest fields.

233. Of the two antitrust enforcement agencies, the FTC is the proper one for this role because “[t]he FTC, unlike the DOJ, is an independent regulatory agency with authority to conduct formal administrative . . . and rulemaking proceedings . . . .” Kolasky & Lowe, *supra* note 144, at 895.

234. Ten percent of 9566 mergers is 957. See *supra* note 129 and accompanying text.

235. TWENTY-THIRD ANNUAL REPORT, *supra* note 122, exhibit A, tbl. I.

236. The primary disadvantage would be that the reporting threshold would change annually—but any plan that includes periodic changes to account for inflation carries this problem.

threshold would be determined anew each year, using merger values at the time of adjustment, inflation would be no more of a factor than in an indexed system.

b) Congress would control agency action and the burden on commerce. Congress's intent will be achieved—if they desire a ten percent review level, then reviews will remain at or near ten percent rather than fluctuating with variations in merger activity. Further, it will be an explicitly determined value, rather than the haphazardly achieved level set by a purely prospective indexing.

c) It would account better for the long term. Unlike a fixed-number test or even an indexed test, a test determined by current merger rate is capable of *declining*. The record merger pace seen during the 1990s is unlikely to continue forever, and a test built to capture a certain number—or percentage—of this record pace at record transaction values will be poised to create further, unforeseen problems when this merger wave passes. On the other hand, when a new wave begins—or the current one intensifies—real growth in transactions, whether due to transaction size or numbers of transactions, would not endanger effective review of the target transactions due to overreporting.

d) Finally, this test would account for the substantive changes wrought by HSR because, by reducing the scope of the program to something approximating that envisioned at its creation, the power of the enforcing agencies to impact the course of antitrust law by regulating and influencing parties prior to their pushing the bounds of statutory antitrust would be reduced to nearer what Congress intended.<sup>237</sup>

### THE FAILURE OF THE 2000 CLAYTON ACT AMENDMENT

The recent amendment does contribute to resolving problems created by HSR growth. Adjusting the jurisdiction test threshold to \$50 million accounts for inflationary growth since the program's creation, and the inflation-adjustment provision will help control the problem in the future. These changes help to address concerns about burdens on commerce created by HSR. Where the

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237. Any reduction in scope helps in this manner somewhat, even the 2000 amendment. But a more significant reduction, such as to the top ten percent, is needed.

amendment fails, however, is by leaving in place substantive changes resulting from a test too loose at inception, which did not account for real growth in merger activity. The result is the decline in statutory and caselaw governance of the field, and the growth of a large and expanding body of regulatory law. If, because it fails to address this issue, the recent amendment endorses this shift to regulatory law, the question becomes: Was this endorsement intentional or accidental?

### *Legislative History of the Recent Amendment*

Express congressional support for legislative change of the HSR jurisdiction test began to appear in early 1999.<sup>238</sup> By the end of that year, bills were introduced in both chambers proposing such change.<sup>239</sup> The legislative history of both bills is very sparse, as neither received a committee report. H.R. 4194 never left the House, and was not discussed or debated outside committee.<sup>240</sup> Similarly, the Senate bill, S. 1854, was the subject of no substantive comment and no debate between its November 4, 1999 introduction and its October 19, 2000 passage.<sup>241</sup> Unfortunately for those who wish to understand Congress's design in passing the recent amendment, neither bill went to the White House on its own. Instead, the amending language became part of the FY2001 Commerce-Justice-State Appropriations Bill.<sup>242</sup> In analyzing legislative intent behind the amendment then, only Senate discussion of S. 1854 at introduction and after passage, and discussion of the appropriation measure proves instructive.

On introducing S. 1854, Senator Hatch expressly acknowledged the original design of HSR:

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238. See 145 CONG. REC. S3527 (1999) (Hatch Amend. No. 207 to S. Con. Res. 20).

239. The House considered the "Small Business Merger Fee Reduction Act of 2000," H.R. 4194, 106th Cong. (2000), and the Senate produced the "Hart-Scott-Rodino Antitrust Improvements Act of 1999," later known as the "21st Century Acquisition Reform and Improvement Act of 2000," S. 1854, 106th Cong. (2000).

240. Other than Daily Digest mentions of committee work, its only appearances in the Congressional Record are a notation of referral to committee and the addition of sponsors. See 146 CONG. REC. H1851, H2341, H7003 (2000).

241. Cf. 146 CONG. REC. S10834-35 (2000) (submitting amended text of bill); S10848-50 (2000) (reprinting bill and recording passage).

242. See *supra* notes 11-14 and accompanying text.



When the statute was first enacted, Congress intended to limit the scope of the Hart-Scott-Rodino Act to very large companies involved in very large transactions. At that time, the House Judiciary Committee reported that the statute would apply "only to the largest 150 mergers annually: These are the most likely to 'substantially lessen competition'—the legal standard of the Clayton Act."<sup>243</sup>

Hatch continued and indicated that the increase in reporting threshold was meant to provide "regulatory and financial relief for companies" and "to ensure that the Antitrust Division [of the Justice Department] and the FTC efficiently allocate their finite resources to those transactions that truly deserve antitrust scrutiny."<sup>244</sup> These purposes, however, do not indicate that the purpose of HSR was changed with the amendment. The only indication of the desired scope of the program is a comment that the increased thresholds "effectively exempt[] from the Act's notification requirement mergers and acquisitions that, based on the FTC's data, do not pose any competitive concerns."<sup>245</sup> Such a nebulous standard as "not posing competitive concerns," inferred from the effect of the change rather than a stated goal of it, does not seem likely as a purposeful change in direction for a program with legislative intent as clear as that of HSR, particularly when the speaker had just reiterated that clear intent.

Immediately after Senator Hatch's remarks, cosponsor Senator Kohl spoke, indicating the bill would "lessen the agencies' burden," "enable the agencies to allocate their resources," and "lessen regulatory burdens and expenses imposed on small businesses."<sup>246</sup> The only hint of an intended change in scope was in comments, similar to Senator Hatch's, about eliminating review of transactions posing no competitive concerns.

The next record of discussion of the issue did not come until after S. 1854 had already passed the Senate—comments arguably the

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243. 145 CONG. REC. S13974 (1999) (statement of Sen. Hatch).

244. *Id.*

245. *Id.* This comment was made in regard to a \$35 million Size-of-Transaction Test, rather than the enacted \$50 million threshold. There is no indication of the standard for that determination, nor of legislative guidance for it.

246. 145 CONG. REC. S13975 (1999) (statement of Sen. Kohl).

least indicative of "legislative intent." Co-sponsoring Senators Leahy and Hatch reiterated the goals professed for the bill on its introduction, restating what the existing notification program was improperly including, but not necessarily changing its defined scope.<sup>247</sup>

Senator Hatch pushed for attachment of HSR changes "to one of the remaining 'must-pass' vehicles,"<sup>248</sup> and after S. 1854 passed to the House, there was almost no discussion of it as a discrete item of legislation. Instead, the HSR amending language was embedded in the FY2001 Commerce-Justice-State Appropriations Bill.<sup>249</sup> This indeed became a "must-pass" bill, as Congress progressed through a record twenty-one continuing resolutions to keep the federal government operating.<sup>250</sup> Unfortunately, substantive discourse on the enacted changes to HSR was negligible in connection with a bill that "was not subject to amendment. The underlying appropriations bills went straight from the [individual body] Committee to the conference committee, totally bypassing the [House or] Senate floor."<sup>251</sup>

The only comments about the HSR changes were a near verbatim restatement by Senator Kohl of his comments on the passage of S. 1854,<sup>252</sup> and a House Appropriations Subcommittee statement to accompany the bill.<sup>253</sup> The subcommittee explanatory language merely indicates that the "bill was developed through negotiations by subcommittee members"<sup>254</sup> and that "[t]he conference agreement includes a new section 630, which modifies existing law to include a three-tiered Hart-Scott-Rodino fee structure that increases the

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247. 146 CONG. REC. S10920-21 (2000) (statement of Sen. Leahy); *id.* at S10989-90 (statement of Sen. Hatch).

248. 146 CONG. REC. S10990.

249. *See supra* notes 11-14 and accompanying text.

250. 146 CONG. REC. S11855 (2000) (statement of Sen. Byrd).

251. *Id.* at S11280 (statement of Sen. Byrd). Notably, this sort of use of must-pass appropriations bills to enact substantive law drew considerable fire. *E.g., id.* at H12444 (statement of Rep. Obey) ("This bill has been a poster child on how not to run a legislative body."); *id.* at S11233 (statement of Sen. McCain) ("Congress should not permit the appropriations process to circumvent the normal legislative process.").

252. *Id.* at S11872 (statement of Sen. Kohl).

253. *Id.* at H12446-82 (statement of Rep. Rogers).

254. *Id.* at H12446.

filing threshold for a merger transaction from \$15,000,000 to \$50,000,000. Similar language was included in" prior versions.<sup>255</sup>

In short, neither the express statutory language, nor the recorded legislative history, indicate that the 2000 amendment was expressly intended to change the scope of HSR reporting from the largest mergers annually. Similarly, the other goals of the original HSR enactment, achieving only procedural change and minimizing the burden on commerce,<sup>256</sup> were not explicitly altered.<sup>257</sup>

### *The Impact of the Amendment*

Regardless of whether the recent amendment was meant to act as an explicit endorsement of the growing movement from balanced to regulatory-based antitrust law, the impact of the amendment *makes* it a sub silentio endorsement. Unless there is further change, the level of agency review will remain higher than envisioned by Congress and higher, perhaps, than it should be. Unfortunately, the "change in favor of a regulatory agency-centered approach has become so entrenched that the changes are probably irreversible."<sup>258</sup> The only way the change is likely to be reversed<sup>259</sup> is for Congress to further amend the Clayton Act to provide for review of a much smaller percentage of merger activity, in keeping with the original intent of the premerger notification program. Although this could be accomplished by an inflation-adjusted, dollar-based test targeting the largest 150 mergers or a corresponding percentage,<sup>260</sup> a more elegant solution, which places Congress more fully in control of premerger notification and the course of the nation's antitrust law, is to establish a less surrogate-based, percentage-based system.<sup>261</sup>

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255. *Id.* at H12481.

256. *See supra* notes 97-102, 113-17 and accompanying text.

257. In fact, minimizing HSR burdens was a theme repeated throughout the sparse legislative history. *See supra* notes 243-47 and accompanying text.

258. Waller, *supra* note 175, at 1386.

259. The agencies could themselves reverse it by radically expanding exemptions, to the point where coverage of the program was reduced to a small percentage of all mergers. Self interest, however, indicates this is highly unlikely. For more on this Public Choice theory, see *id.* at 1426-30.

260. *See supra* notes 218-23 and accompanying text.

261. *See supra* notes 230-37 and accompanying text.

## CONCLUSION

The runaway growth of HSR's premerger notification program has significantly altered it from what was envisioned at its creation. The 2000 amendment addresses some of the issues associated with this growth. The annual adjustment provision will curb the problematic growth due to inflation, and the increase in reportable transaction threshold to \$50 million will reduce the level of reporting significantly. In short, this amendment is better than continued unchecked growth. The change does not adequately address the departure of the program from its intended, very limited scope, however, and it does not have the flexibility that a less surrogate-based test would have. To more fully resolve the problems with HSR premerger notification, and perhaps more importantly, prevent antitrust law from becoming almost exclusively a regulatory field, the Size-of-Person Test should be adjusted for inflation since 1976, and the Size-of-Transaction Test should be set annually, at a level that would capture a specific rather than somewhat random portion of merger activity. The portion should be a much smaller segment of all merger activity, ensuring a future role not only for the agencies, but also for the courts, in U.S. antitrust law.

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