

## Paper Trail: Working Papers and Recent Scholarship

**Editor's Note:** Editor John Woodbury comments on a provocative paper suggesting that shareholding by institutional investors has had a substantial and adverse impact on competition, the recovery from the Great Recession, and income inequality. He also comments on a report recently released by the U.S. antitrust agencies on their FY 2014 enforcement activities.

Send suggestions for papers to review to [page@law.ufl.edu](mailto:page@law.ufl.edu) or [jwoodbury@crai.com](mailto:jwoodbury@crai.com).

—WILLIAM H. PAGE AND JOHN R. WOODBURY

### Recent Papers

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**Einer Elhauge, Horizontal Shareholding as an Antitrust Violation (Aug. 19, 2015) (forthcoming Harvard Law Review (2016)), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2632024](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632024)**

Einer Elhauge (Petrie Professor of Law, Harvard Law School) begins this paper in an unusual tenor for a scholarly work:

An economic blockbuster has recently been exposed. A small group of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other. (p. 1.)

The “blockbuster” refers to a recent paper by Azar, Schmalz, and Tecu (Azar et al.) that suggested that investments by institutional investors in multiple competitors on particular airline routes have raised fares by 3–11 percent.<sup>1</sup> Elhauge first describes the theory behind the paper and then draws out its implications across a whole array of issues, which, Elhauge argues, may be resolved through a more aggressive antitrust policy.

#### Summary of Azar et al.<sup>2</sup>

Azar et al. observe that institutional investors account for about 70–80 percent of publicly-traded firms. (p. 1.) In the airline industry—the laboratory of Azar et al., seven institutional investors accounted for 60 percent of the stock of United Airlines as well as having significant ownership shares in Delta, Southwest, and JetBlue. (Azar et al., Online Appendix Table A.<sup>3</sup>) Similarly, the four

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<sup>1</sup> Jose Azar, Martin C. Schmalz & Isabel Tecu, *Anti-competitive Effects of Common Ownership* 37 (Ross School of Business, Working Paper No. 1235, Apr. 21, 2015), <http://ssrn.com/abstract=2427345>. I offered observations on an earlier version of that paper in the Dec. 2014 *Antitrust Source*, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/dec14\\_paper\\_trail\\_12\\_16f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_paper_trail_12_16f.authcheckdam.pdf). I will refer to some of these observations in my discussion below.

<sup>2</sup> While I am confident that most would want to read the more technical discussion of the theory and the empirical analysis in the original Azar et al., Elhauge provides a useful non-technical summary of the logic and the empirical analysis. My previous comments (*see supra* note 1) on Azar et al. chart a middle course.

<sup>3</sup> Jose Azar, Martin C. Schmalz & Isabel Tecu, *Online Appendix to: Anti-Competitive Effects of Common Ownership* (Mar. 3, 2015), <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWVpbnxtYXJ0aW5jc2NobWFsenxneDo5YTM1MDU0NjU0ODY0ODQ>.

leading shareholders of JP Morgan-Chase have substantial ownership interests in Bank of America and Citigroup. (Azar et al., Table 1.) In brief, the paper concludes that ownership interests by institutional investors in multiple market rivals are prevalent throughout the economy.

At a basic level, the potential anticompetitive implications of these ownership holdings can be illustrated with a simple example. Suppose that a large institutional investor held 70 percent of the shares of two firms that compete in some market. To maximize its profits from its investments, the investor would direct the managers of the rivals (if it had control over the two firms) to be less aggressive in competing with each other, thus resulting in higher prices and reduced output of the two firms. If the firms were independently owned, one rival's gain from competing aggressively would (generally speaking) be reflected in the losses of the other firm. The single aggressive firm that reaps profits from this strategy cares not for the losses of its rival. In contrast, in considering the profitability of aggressive competition, the investor's profitability is its share of the gains to the aggressive firm less its share of the losses of the rival. In other words, the profitability of aggressive competition to the investor is less than that of the aggressor firm.

But Azar et al. note that "it is important to recognize that investors need not explicitly communicate their interests to management" to reduce the rivalry between the two firms. (p. 5.) The managers of both firms will know the identity of the investor—that information is in the public domain—and that the leverage held by the large investor could be used to punish managers who do not act to reduce rivalry between the two firms. In my view, that compliance mechanism in and of itself may not be sufficient given the efforts by institutional investors to directly persuade management to implement their goals. As Azar et al. observe (p. 5), there is "circumstantial evidence that asset managers 'engage' with portfolio firms about product market strategy, which suggests that 'active ownership' by 'passive' investors can indeed be part of the mechanism" by which institutional investors communicate their preferences to management, including preferences to soften competition between the rivals.

Of course, unlike my example, there are multiple institutional investors and Elhauge notes (pp. 1–2) that a relatively small number of institutional investors "share" stock ownership in large rival firms. Multiple investors can complicate the coordination of rivals. But if the interests of these institutional investors are aligned in that they would prefer that the value of their investments be enhanced by reduced competition among the rivals, the rivals' managers will act in a way that reduces that rivalry, increases prices, and reduces output.

Azar et al. test this proposition empirically for the airline industry. Based on work by O'Brien and Salop,<sup>4</sup> the metric of interest is a modified HHI (MHHI) that can be used to measure "the likelihood of anticompetitive effects in a way that took into account partial ownership overlaps among horizontal rivals." (Elhauge, p. 8.) Specifically, Azar et al. decompose the MHHI into the HHI and the Delta MHHI, where the Delta MHHI is simply the difference between the MHHI and the "ordinary" HHI. Thus, Azar et al. can distinguish between the price effects of the "ordinary" HHI and the incremental effect of ownership overlaps by institutional investors. Using the airline industry as its laboratory, Azar et al. find, as reported earlier, that for the typical airline route, prices are elevated by 3–11 percent over and above the price effects of the "ordinary" HHI as a result of the concentration of institutional investment holdings. Elhauge interprets the Azar et al. results as evidence of pervasive anticompetitive harm from the holdings of large institutional investors: "empirical analy-

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<sup>4</sup> Daniel O'Brien & Steven Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559 (2000).

sis indicates that having substantial horizontal shareholdings actually does raise prices significantly when the owned firms compete in concentrated markets.” (Elhauge, p. 10.)

### **Industry-Based Performance Contracts**

Elhauge applies the results of Azar et al. to three different economic conundrums. First, he considers executive compensation packages that are tied to industry rather than firm performance or reflect a combination of both. Citing other literature, Elhauge’s paper explains that “this method of compensation provides executives with a windfall that is unrelated to executive performance and thus harmful to corporate shareholders.” (Elhauge, p. 11.) Elhauge considered an alternative explanation for the persistence of these seemingly inefficient compensation structures that has been discussed in the literature, namely, managerial power. But Elhauge observes that this alternative explanation ignores the potentially pervasive influence of institutional investors over the firm’s managers. Instead, Elhauge argues that the persistence of these compensation schemes advances the interests of institutional investors in elevating prices across all firms in the industry, an argument he bases on the results of Azar et al. According to Elhauge, “Managers who increase individual corporate performance by competing with rivals and taking away market share decrease institutional investor profits across the industry by decreasing industry profits.” (Elhauge, p. 12.)

Elhauge (p. 13) cites evidence that until the 1980s, managers were ousted for firm-specific reasons but thereafter, those decisions became tied to industry performance. Elhauge notes that this change “coincides with the increasing share of stock held by institutional investors, which has grown from 34% of all stock in 1980 to 67% of all stock in 2010.” (Elhauge, p. 13.)

### **The Failure of High Corporate Profits to Increase Investment and Generate High Growth**

Elhauge begins this section by observing that “[a]nother big recent economic puzzle in recent years has been why, at a time when corporate profits have been at record highs, corporations have been so reluctant to invest those profits on expanding output.” (Elhauge, p. 14.) To make this concrete, he cites statistics that indicate corporate investments as a percentage of GDP were 50 percent higher in the late 1990s than today. (Elhauge, p. 14.)

Why might this be happening? For Elhauge, the explanation might be the pervasive reach of institutional shareholders. By effectively cartelizing major (and minor) industries, these investors have discouraged the extent of investments that high returns would normally signal in competitive markets. That competition corrosion seemingly resulting from institutional shareholding could have such a substantial macro-level output effect seems possible to Elhauge, who notes that the Azar et al. paper identified an output reduction of 6 percent “in at least one industry.” (Elhauge, p. 16.)

For those who might remain skeptical, Elhauge takes us back to the Great Depression, contending that the recovery began not with the World War II war effort to build a military, but in 1938: “Military stimulus cannot explain the recovery that began in 1938 because that recovery actually had to overcome military spending cuts.” (Elhauge, p. 17.) Elhauge describes the 1933–1938 period as one in which the National Industrial Recovery Act (NIRA) allowed pervasive cartelization of U.S. industry, resulting in a 60 percent reduction in investment and a 13 percent reduction in output, “causing about 60% of the post-1933 depression in national output.” (Elhauge, p. 18.) By contrast, when this policy was reversed in 1938, “after dropping 32% from 1937 to 1938, industrial production rose by an average of 22% per year” between (presumably) 1938 and 1941. (Elhauge,

p. 20.) Thus, he concludes that “while other factors surely contributed, the evidence indicates that increased antitrust enforcement played a key role in bringing us out of the Great Depression.” (Elhaug, p. 21.) To be sure, he acknowledges that an antitrust taming of institutional shareholders may not have had the same effects in pulling the U.S. out of the Great Recession, but he also concludes that a rigorous antitrust policy towards institutional shareholders holding stakes in market rivals is “likely to be significant for the national economy.” (Elhaug, p. 21.)

### **The Recent Rise in Economic Inequality**

Finally, Elhaug focuses on the now well-documented but still controversial evidence on the increase in income inequality, most notably the evidence in Thomas Piketty’s provocative and widely read book, *Capital in the Twenty-First Century*.<sup>5</sup> He notes that Piketty found that “income inequality in the U.S. rose from 1900 to 1940, dropped sharply after 1940, and stayed low until 1980 and has since been rising to return to pre-1940 levels.” (Elhaug, p. 22.)

It doesn’t take much effort to predict Elhaug’s explanations. Antitrust was in its infancy from 1900–1940 and was, in Elhaug’s view, a period of relatively lax antitrust enforcement: “Although the Sherman Act was enacted in 1890, antitrust enforcement was rare until 1938 and anticompetitive conduct was common.” (Elhaug, p. 17.) And, as discussed above, Elhaug contends antitrust enforcement became more aggressive in 1938, coinciding with the decline in inequality through the 1980s before once again increasing. In addition to the rise in institutional shareholding beginning in the 1980s, Elhaug argues that the Chicago School critique of antitrust resulted in much less aggressive enforcement of antitrust.

To the extent that one thinks that at least some of that narrowing [of antitrust enforcement] has incorrectly allowed more anticompetitive mergers and conduct, the variations in economic inequality may reflect variations in general antitrust enforcement. . . . In short, although perhaps not a full solution to the problem of economic inequality, antitrust enforcement against horizontal shareholdings certainly seems the remedy that has the least political and economic cost associated with it. (Elhaug, pp. 25–26.)

### **Closing Observations**

My first reaction to Elhaug’s admittedly interesting speculations on the role of antitrust is “Wow.” I certainly would never have thought that appropriate antitrust enforcement could become a key arrow in the quiver of macro tools. In my career as an economist with the government and in the private sector, I felt satisfied considering the much narrower (yet highly significant) antitrust goal of advancing the interests of consumers. Which at least leads me to be a bit skeptical of the broad and deep swath of antitrust in our macro economy as painted by Elhaug.

One place to begin anchoring my skepticism is a response to the already quoted language at the very beginning of the Elhaug paper:

An economic blockbuster has recently been exposed. A small group of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other. (p. 1.)

One might mistakenly think that there is in fact evidence that these shareholdings have had an anticompetitive effect across the sweep of U.S. markets and industries. In fact, as interesting and

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<sup>5</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

provocative as the Azar et al. paper is, the evidence provided in the paper by Azar et al. is only for the airline industry. In my view—and as I stated in my comments on the Azar et al. paper in an earlier edition of *The Antitrust Source*, given the prevalence of these holdings of institutional investors in market rivals, more research is certainly required before modifying antitrust policy. The idea that one should generalize the results of this single study of a single industry to dramatically change the focus of antitrust policy seems without any empirical justification. This lack of evidence infects all of Elhauge's policy recommendations.

Further, the analysis in Azar et al., while important and useful, is certainly not bulletproof. As one example (and one noted in my initial review of the paper), an institutional investor may have interests in multiple airline rivals and investments in firms that service those rivals (e.g., meal services, baggage services, travel agencies) that complement airline travel. An increase in airline fares would reduce the investor's profits from these complements. That does not mean that the institutional shareholdings may not have an anticompetitive effect—the fact that Azar et al. found such an effect for the airline industry is evidence to the contrary. But it does mean that the effects may vary substantially by industry and by the investment strategy of the institutional investor. That the DOJ has begun investigating the effect of institutional shareholdings in the airline industry is welcome news in that the DOJ can probe more deeply (in terms of documents and investigative hearings as well as data requests to various parties) into the web of relationships described by Azar et al.<sup>6</sup>

With respect to the executive compensation conundrum (and putting aside my concerns about the paucity of evidence on anticompetitive shareholding), Elhauge notes that compensation tied to industry performance occurs even in unconcentrated markets, “where the anticompetitive explanation is likely weak.” (Elhauge, p. 14.) Yet, Elhauge still emphasizes the anticompetitive effect as “perhaps more important in explaining the overall trend [in the growth of these compensation schemes].” (Elhauge, p. 14.)

The issue, of course, is whether firms in unconcentrated markets adopting these schemes do so because they are efficient. And if so, what role the efficiencies should play in evaluating the effects of such practices in more concentrated industries.<sup>7</sup> It seems to me that before any aggressive antitrust enforcement against institutional investors is initiated, it would be good to know to what extent the shareholdings of multiple rivals are also driven by efficiency concerns and how those concerns may differ across industries. To do otherwise invites false positives in enforcement, harming consumers, and impeding the growth Elhauge believes will be released by such a policy.

Can aggressive antitrust enforcement encourage additional private-sector investment? Again, there is as yet no evidence that the Azar et al. findings generalize across industries. While he describes how antitrust enforcement may have helped the U.S. to escape the Great Depression, Elhauge's evidence is highly qualitative and again more of the correlation rather than the causation variety. Elhauge admits that there were other factors at play (Elhauge, p. 21) and that the Great Recession wasn't nearly as deep as the Great Depression. Certainly, the extent of the explicit (and legal) cartelization under the NIRA was likely far more widespread than is (illegal) cartelization

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<sup>6</sup> David McLaughlin & Mary Schlangenhein, *US Looks at Airline Investors for Evidence of Fare Collusion*, BLOOMBERG BUSINESS (Sept. 22, 2015), <http://www.bloomberg.com/news/articles/2015-09-22/do-airfares-rise-when-carriers-have-same-investors-u-s-asks>.

<sup>7</sup> To be sure, practices that are procompetitive when adopted by firms in a competitive market may nonetheless be harmful to consumers when adopted by firms that have market power or are seeking market power.

today. As a result it is unclear what effect unwinding institutional shareholdings would have had on macro variables in the Great Recession. Still, he argues that the effect is “likely to be significant for the national economy.” (Elhauge, p. 21.) Putting aside the costs of false positives, the issue remains, given the alternative policies available to government, whether devoting resources to this endeavor rather than to the use of other macro tools (e.g., investment tax credits, lower taxes on consumers with a high marginal propensity to consume) generates benefits greater than the costs.

Finally, the evidence for Elhauge’s matching of the extent of antitrust enforcement with growing income inequality is both highly qualitative and (yet again) at best reflects a correlation and not causation. As elsewhere, Elhauge certainly qualifies his conclusions. He notes that “horizontal shareholdings may not be the sole or main cause of that rise. . . . Further research will be necessary.” (Elhauge, p. 25.) Still, he negates that caution with a conclusion that “the evidence so far suggests that increasing horizontal shareholdings probably have played some significant role in increasing economic inequality.” (Elhauge, p. 25.) Not to put too fine a point on this, my understanding has been that in addition to the poor needing money, they also need education, adequate health care, and freedom from discrimination to escape the cycle of poverty and narrow the income gap between the rich and poor. Further, the lower prices coming from (justified) aggressive antitrust benefit the poor (the price of a small car could fall) and the not-so-poor (the price of a luxury car could fall). While one might argue about which income group has a higher marginal utility of income, one cannot help but wonder if antitrust policy should really be an important tool in reversing income inequality.

In short, the Elhauge paper “overclaims” the power of institutional shareholdings to shape not only narrow antitrust policy but broad and substantial macro policy goals as well. In my view, the conclusions are very premature given the absence of evidence on the prevalence of the harm caused by institutional shareholdings. After all, Azar et al. found evidence in only one industry. Further, even putting aside the question of the prevalence of the anticompetitive effects of institutional shareholding, the “connections” that Elhauge finds between institutional shareholdings on the one hand and, on the other hand, the manner of executive compensation, the ability of aggressive enforcement to accelerate the recovery out of the Great Recession, and the role of antitrust in countering economic inequality require much more careful research. We have a long way to go before concluding that antitrust enforcement has a far more important role to play in a macro environment.

Given the creativity of Elhauge in applying the Azar et al. results to a range of other problems—however much I might disagree with the strength that he has ascribed to the still-unproven effects of the pervasiveness of institutional shareholdings, the Elhauge paper is worth the read.<sup>8</sup> In addition, it certainly provides an easy-to-digest explanation of the Azar et al. results. One might hope that the Elhauge paper will encourage researchers to test the pervasiveness of the anticompetitive effects found for one industry by Azar et al., to identify any capital market or managerial-control efficiencies that might accompany institutional shareholding (not acknowledged by Elhauge) and to identify methods for testing Elhauge’s description of the competitive effects of institutional shareholding on economic growth and economic inequality. Such advances will provide a sound basis for considering how antitrust generally should be fine-tuned to account for the effects of institutional shareholdings.

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<sup>8</sup> I should note in passing that I did not discuss one key section of the Elhauge paper—the legal bases for pursuing institutional shareholdings on antitrust grounds, another reason for reading the paper.

**Federal Trade Commission and U.S. Department of Justice, Hart-Scott-Rodino Annual Report: Fiscal Year 2014 (Aug. 12, 2015), [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr\\_report.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr_report.pdf)**

The Annual Report provides a variety of high-level statistics on the merger enforcement activities of the two antitrust agencies during Fiscal Year 2014. A summary of the report follows.

First, the number of transactions in which a second request (“second request transactions”) could have been issued totaled 1,618 (Appendix A in the Report), a 26 percent increase over 2013 and more than double those in the 2009, the nadir of such transactions over the past ten years and likely attributable to the Great Recession. This confirms what we probably have known for some time—mergers are back.

Table 1 below is adapted from the Report’s Table I and describes the incidence of second requests during FY2014 by size of the transaction and by agency. Overall, over 30 percent of these transactions were valued at \$500 million or more, 14 percent over \$1 billion.

While the FTC was more successful in its clearance efforts—11.2 percent overall for the FTC v. 5.7 percent for the DOJ, the incidence of second requests was about the same for both agencies—1.9 percent for the FTC v. 1.3 percent for the DOJ. (Table 1.)

Perhaps a more interesting statistic: Of the 30 second requests issued by the FTC, 17 (or 57 percent) resulted in merger challenges while over 76 percent of the second requests issued by the DOJ (16 of the 21 second requests issued) resulted in merger challenges (which includes simultaneous consents). (Report, p. 2) One could interpret this as the DOJ being a more aggressive enforcer, but that would probably be wrong given all the other factors at play. But regardless, the likelihood of a challenge at either agency seems substantial if a second request is issued.

About 11 percent of the transactions valued at \$1 billion or more were issued second requests by both agencies, with the FTC issuing somewhat more than the DOJ (7% v. 4%) (Table 1 below). For transactions valued between \$500 million and \$1 billion, the FTC’s second requests accounted for 2 percent of all transactions in that asset group while the DOJ’s second requests accounted for about 1.3 percent. So, the raw data suggest that there is little difference between the agencies with respect to the issuance of a second request for larger deals. Attaching any significance to these small differences is fraught with risk. Some of these differences within value categories

**Table 1**  
**Acquisitions by Size of Transaction (by Size Range)**  
**Fiscal Year 2014**

Transaction Range (\$ Millions)	HSR Transactions Percent	Clearance Granted to FTC or DOJ Percent of Transaction Range Group		Second Request Investigations Percent of Transaction Range Group		
		FTC	DOJ	FTC	DOJ	Total
50M - 100M	10.6%	7.6%	5.8%	0.6%	1.2%	1.8%
100M - 150M	18.8%	6.6%	3.3%	0.3%	0.3%	0.7%
150M - 200M	11.5%	9.7%	2.7%	0.0%	0.5%	0.5%
200M - 300M	11.6%	6.9%	4.3%	0.5%	1.1%	1.6%
300M - 500M	15.1%	14.3%	7.4%	2.0%	0.8%	2.9%
500M - 1000M	18.5%	9.3%	5.0%	2.0%	1.3%	3.3%
Over 1000M	13.9%	24.0%	12.0%	7.1%	4.0%	11.1%
<b>ALL TRANSACTIONS</b>	<b>100.0%</b>	<b>11.2%</b>	<b>5.7%</b>	<b>1.9%</b>	<b>1.3%</b>	<b>3.2%</b>

Source: Report Table I

are also subject to small numbers issues, may reflect differences in the kinds of matters the agencies considered, and, in any event, these agency differences are not all that great.

Table 2 below is based on Report Table VI and identifies second requests issued by size of the acquirer. About 4.2 percent of the transactions for which the acquirer's assets exceeded \$1 billion were issued second requests, with the FTC at 2.3 percent and the DOJ at 1.9 percent. For acquirers with assets in the \$500 million to \$1 billion range, the FTC-issued second requests accounted for 2 percent for all the transactions in this acquirer-asset range. The DOJ did not issue any second requests in this asset range.

Table 3 below (based on Report Appendix A) provides a time series of different metrics for the period FY 2005–2014. Although again these data are merely raw averages, the trends still may be of interest. As noted above, the number of FY 2014 second-request transactions increased 26 percent over FY 2013, but at a level very close to FY 2005 (1,618 in 2013 v. 1,610 in 2005). The number of these transactions is substantially less than the peak year of FY 2007 (2,108).

**Table 2**  
Transaction by Assets of Acquiring Person  
Fiscal Year 2014

Asset Range (\$ Millions)	HSR Transactions Percent	Clearance Granted to FTC or DOJ Percent of Asset Range Group		Second Request Investigations Percent of Asset Range Group		Total
		FTC	DOJ	FTC	DOJ	
Below 50M	10.2%	0.6%	4.2%	0.6%	0.0%	0.6%
50M - 100M	1.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	1.7%	7.1%	3.6%	0.0%	0.0%	0.0%
150M - 200M	2.3%	2.6%	2.6%	0.0%	0.0%	0.0%
200M - 300M	3.8%	4.9%	4.9%	0.0%	1.6%	1.6%
300M - 500M	5.1%	2.4%	4.8%	1.2%	0.0%	1.2%
500M - 1000M	9.3%	7.3%	6.0%	2.0%	0.0%	2.0%
Over 1000M	66.6%	14.9%	6.3%	2.3%	1.9%	4.2%
<b>ALL TRANSACTIONS</b>	<b>100.0%</b>	<b>11.2%</b>	<b>5.7%</b>	<b>1.9%</b>	<b>1.3%</b>	<b>3.2%</b>

Source: Report Table VI

**Table 3**  
Second Request Transactions

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Number of Second Request Transactions	1,610	1,746	2,108	1,656	684	1,128	1,414	1,400	1,286	1,618
Percent Change	n/a	8%	21%	-21%	-59%	65%	25%	-1%	-8%	26%
Number of Second Requests	50	45	63	41	31	42	55	49	47	51
Percentage of All Transactions	3.1%	2.6%	3.0%	2.5%	4.5%	3.7%	3.9%	3.5%	3.7%	3.2%
FTC Second Requests (%)	1.6%	1.6%	1.5%	1.3%	2.2%	1.8%	1.7%	1.4%	1.9%	1.9%
DOJ Second Requests (%)	1.6%	1.0%	1.5%	1.2%	2.3%	2.0%	2.2%	2.1%	1.7%	1.3%
Early Termination Transactions	1,385	1,468	1,840	1,385	575	953	1,157	1,094	990	1,274
Percent Granted	72.0%	74.8%	76.2%	73.7%	68.9%	73.9%	76.8%	82.4%	80.5%	80.1%
	<b>2005-2014</b>	<b>2005-2008</b>	<b>2009-2014</b>	<b>2009-2010</b>	<b>2011-2014</b>					
Second Request Percentages	3.2%	2.8%	3.7%	4.0%	3.5%					
Early Termination Percentages	76.1%	74.3%	77.9%	72.0%	79.9%					

Source: Report Appendix A

The lower part of Table 3 includes the second request percentages (of second-request transactions) for various time periods. Over the entire period 2005–2014, second requests were issued in 3.2 percent of all transactions. The contrast between 2005–2008—the last years of the Bush Administration—and 2009–2014 (the Obama Administration) seems notable but not blindingly different. In 2005–2008, second requests accounted for 2.8 percent of all transactions while accounting for 3.7 percent in the later period. Also of note, perhaps, following the issuance of the 2010 Horizontal Merger Guidelines, the second request percentage fell from 4 percent in the 2009–2010 period to 3.5 percent in the 2011–2014 period.

Drawing inferences from these time series is fraught with unidentified confounding and confounding events, but it is interesting that the second request percentage rose during the early Obama years but fell after the adoption of the 2010 Merger Guidelines. The latter might provide solace to practitioners who may have feared that the new Guidelines would lead to more aggressive antitrust enforcement. Similarly, such practitioners might find solace in that early termination was granted in nearly 80 percent of the second request transactions in the 2011–2014 period following the adoption of the new Guidelines but only 72 percent in the 2009–2010 period. Of course, those who saw the revisions as necessary to correct what might have been thought as a too-lax enforcement regime might be surprised and disappointed. But again, caution is required in attempting to draw inferences from the raw data. ●

—JRW