
Antitrust and M&A in the Era of Trump

Presented by

Howard Shelanski

Jesse Solomon

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Davis Polk

Davis Polk & Wardwell LLP

Agenda

1. Overview of U.S. Merger Review
2. Antitrust Leaders in the Trump Administration
3. Enforcement Trends Across Administrations: Four Key Metrics
4. Obama-Era Enforcement Trends
5. Considerations for Antitrust Merger Enforcement in Trump Era

Overview of U.S. Merger Review

U.S. Merger Review Overview

- **Premerger notification statute:** Hart-Scott-Rodino (HSR) Antitrust Improvements Act
 - Generally required for transactions where U.S. component valued at more than \$80.8M
 - Mandatory waiting period to allow for antitrust review prior to closing transactions
 - Review by the FTC or DOJ depending mostly on industry expertise
 - Initial waiting period of 30 days (or 15 days for cash tender offers and bankruptcies)
 - In a small proportion of deals, the agency issues a “second request,” which can add months (sometimes many months)
- **Basic test:** In the U.S., mergers cannot “create or enhance market power”—which is “the ability profitably to maintain prices above competitive levels for a significant period of time”
 - Define relevant antitrust “market” and measure concentration of that market
 - Each deal evaluated on its facts, but rule of thumb: horizontal deals leaving 5-6 strong firms presumed not to harm competition; presumption diminishes and reverses once 3 or fewer strong firms remain
 - Evaluate competitive effects, e.g.: (1) are the parties close rivals? (2) are there good alternative suppliers for customers? (3) will prices rise, or output decline? (4) are there likely new entrants?
 - Evaluate efficiencies generated by the transaction
- We will discuss how the Obama-era agencies applied that test, how the agencies under Trump may take a different approach, and the consequences for getting deals done.

Antitrust Leaders in the Trump Administration

Antitrust Enforcement In The Trump Era

Antitrust Division of U.S. Department of Justice

- Nominated: Makan Delrahim (R)
 - Current role as Deputy Counsel to President Trump
 - Previously a private lobbyist/lawyer and counsel to Senate Judiciary Committee
 - Prior leadership position in Antitrust Division (under George H.W. Bush)
 - Nomination cleared Senate Judiciary Committee June 8



*Makan
Delrahim*

Federal Trade Commission

- 5-member bipartisan commission
 - Acting Chair: Maureen Ohlhausen (R)
 - Commissioner: Terrell McSweeney (D)
 - 3 vacancies (assumed 2 R, 1 D)
 - Reports: Chair: Joe Simons (R)
Comms: Noah Phillips (R) and Rohit Chopra (D)



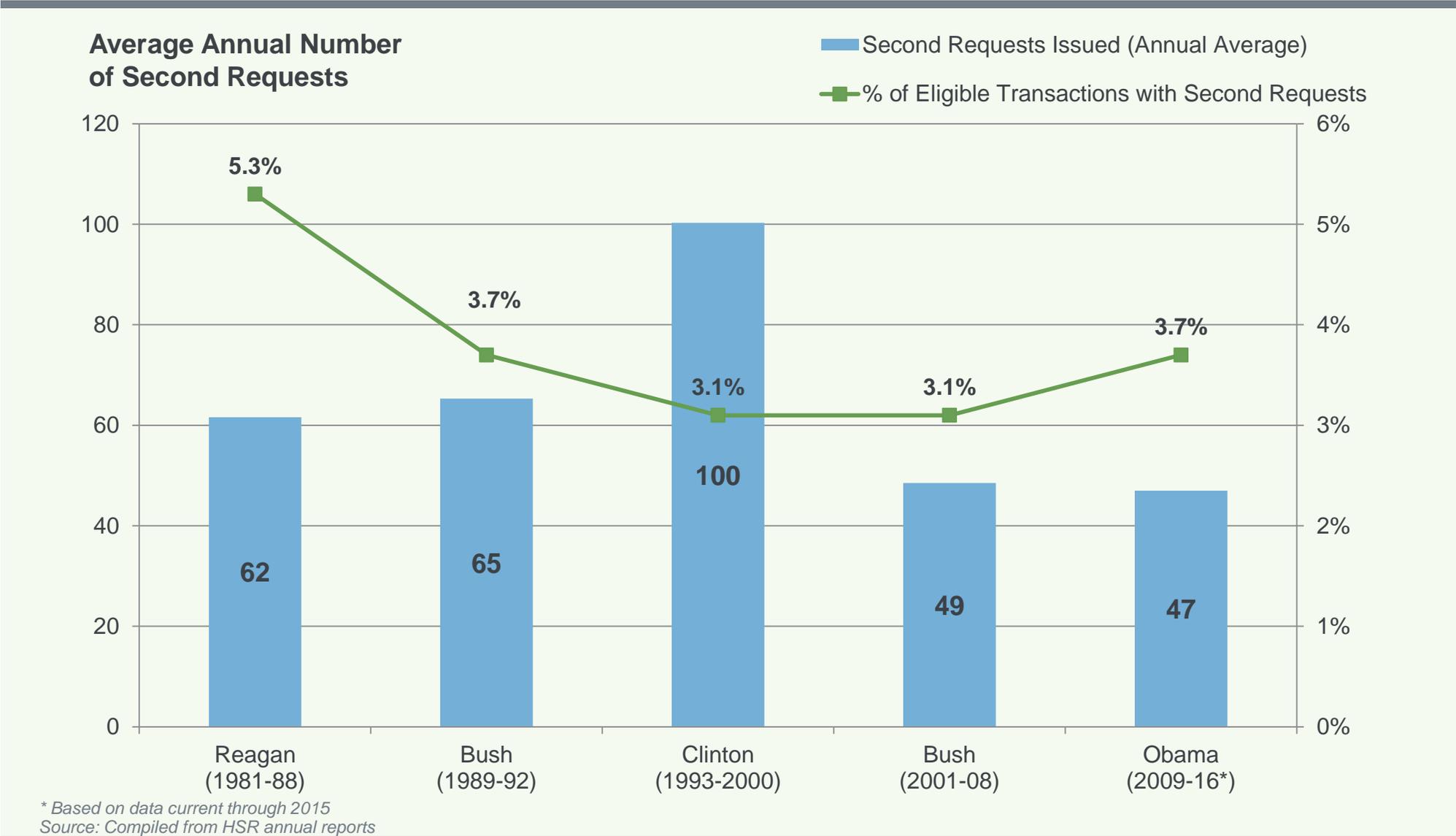
*Maureen
Ohlhausen*



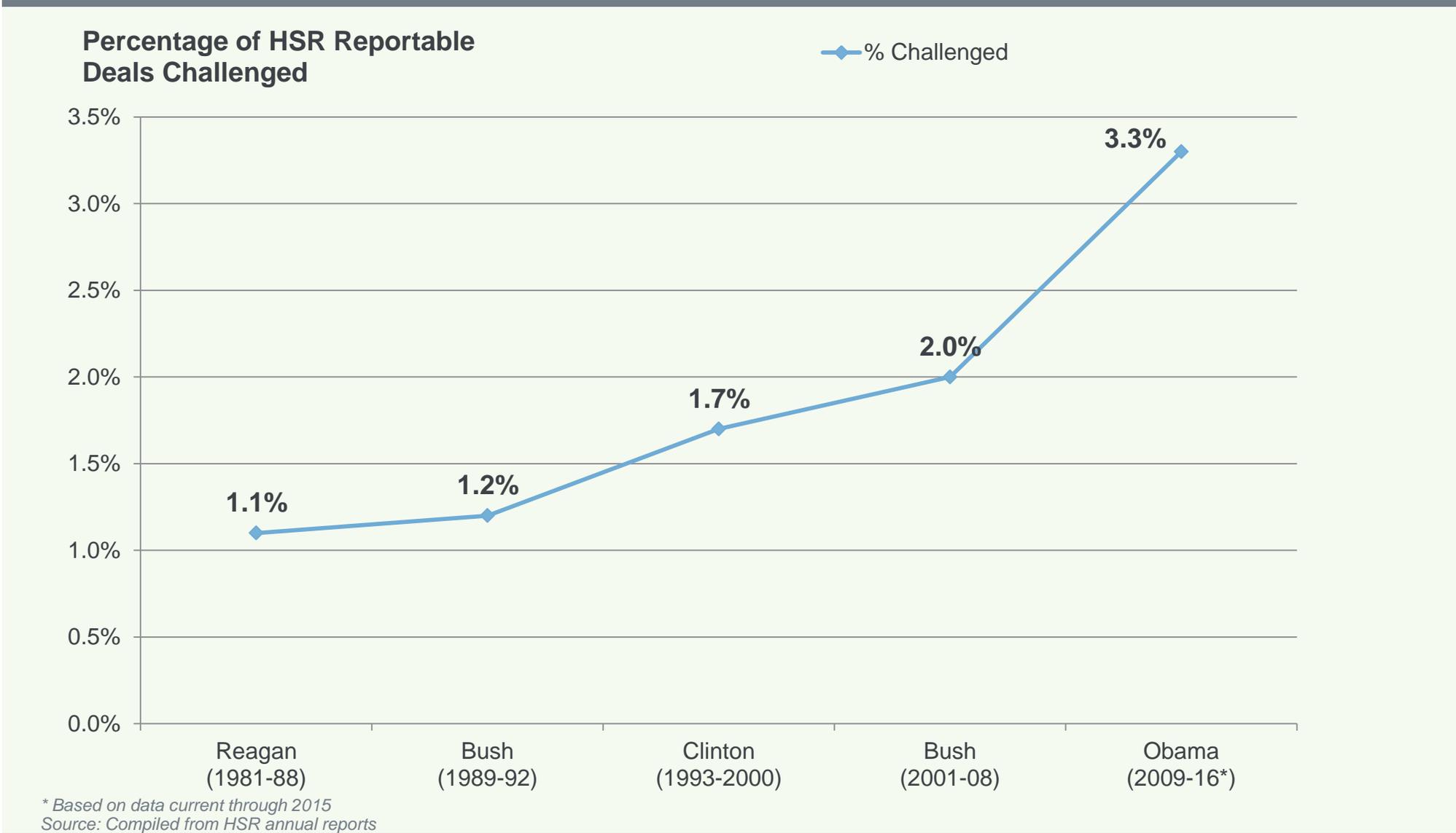
*Terrell
McSweeney*

Enforcement Trends Across Administrations: Four Key Metrics

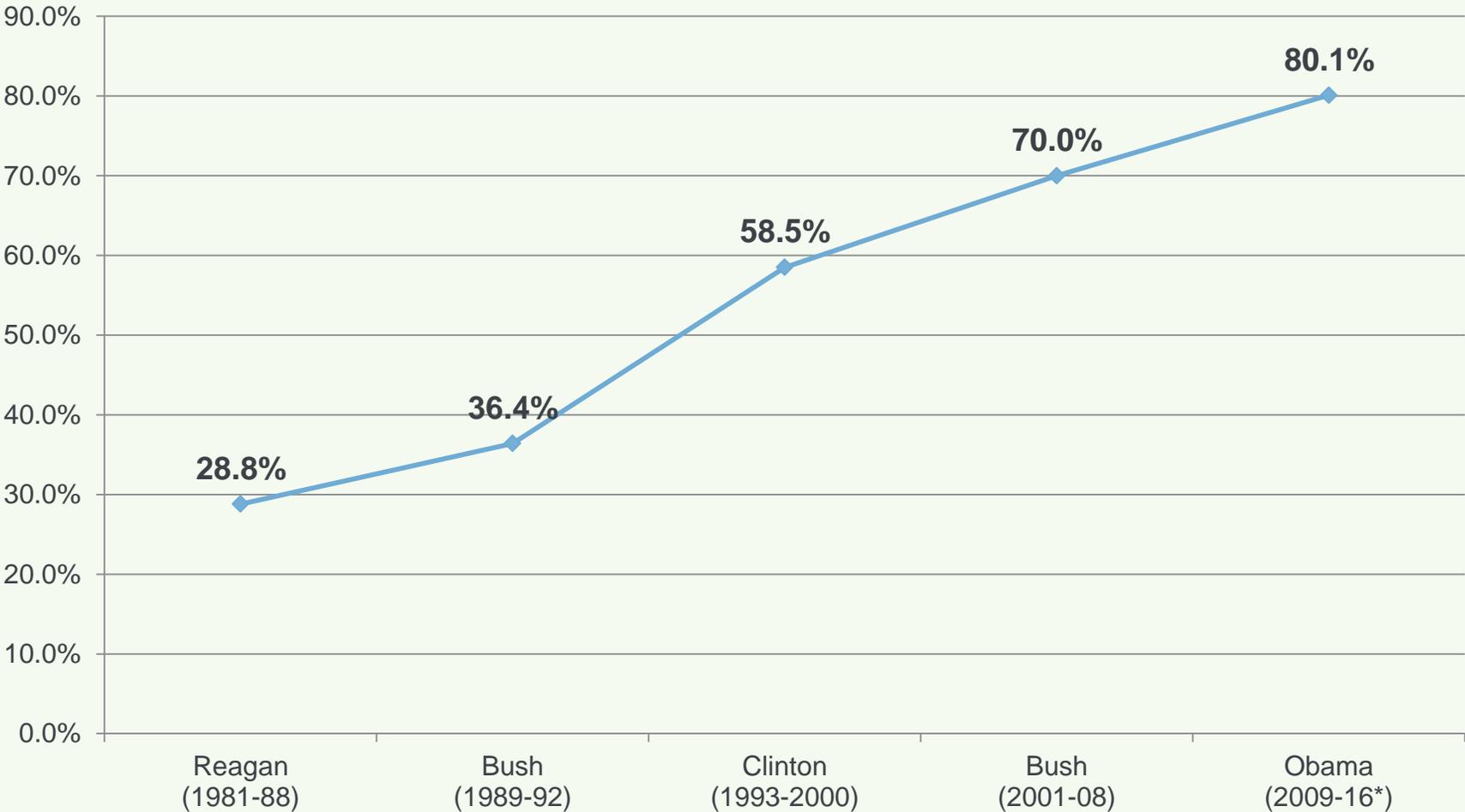
Second Requests



Agency Challenges to Transactions

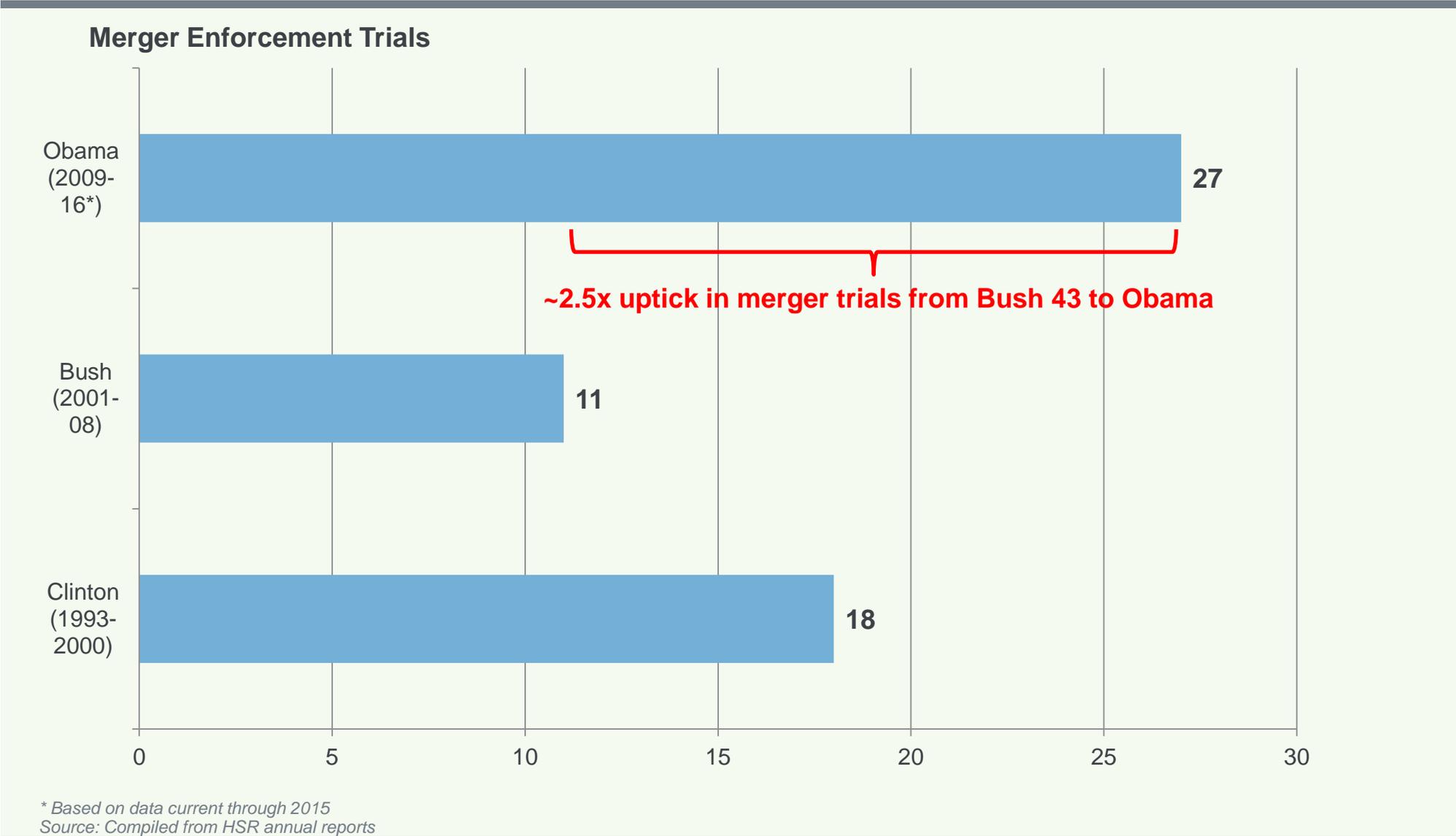


Ratio of Challenges (Settled, Litigated, or Abandoned) to Second Requests



* Based on data current through 2015
Source: Compiled from HSR annual reports

Greater Willingness to Litigate . . .



. . . And Less Willingness to Settle

In the Obama era, the agencies demonstrated less willingness to settle, rebuffing offers to negotiate remedies and litigating challenges outright

DOJ

- *Electrolux/GE* (2015)
- *Anthem/Cigna* (2016)
- *Aetna/Humana* (2016)

FTC

- *Sysco/US Foods* (2015)
- *Staples/Office Depot* (2016)



Both the DOJ and the FTC have strengthened their litigation capabilities in recent years by hiring experienced trial counsel

Obama-Era Enforcement Trends: Qualitative Analysis

The Metrics Tell Only Part of the Story

Even where antitrust enforcement does not vary dramatically across administrations, important substantive differences exist. Compared to the G.W. Bush agencies, the Obama antitrust agencies were generally:

- More receptive to novel theories of harm
- More concerned about vertical conduct
- More skeptical of merger efficiencies
- Less concerned about over-enforcement errors

To set a baseline against which to measure enforcement in the Trump era, we will look briefly at a few recent enforcement trends with respect to:

- Market definition
- Theories of harm
- Remedies

1. Market Definition

In the Obama era, the agencies made greater use of a provision in the agency guidelines to define markets not just by type of product, but also by subset or “type” of customers

■ Example: *Electrolux/GE* (2015)

- Market defined as “major cooking appliances sold to contract-channel purchasers such as homebuilders and property managers in the United States”
 - Led DOJ to exclude the competitive relevance of LG and Samsung (counted as competitors only in the retail channel)
- The DOJ’s *Electrolux/GE* market definition was at odds with the position that the DOJ itself took 10 years ago in *Whirlpool/Maytag*
 - In 2006, the DOJ closed a lengthy investigation of *Whirlpool/Maytag* without a remedy—in part by crediting LG and Samsung as major competitive constraints in the same product lines



2. Theories of Harm

Agencies frequently focus on price effects—whether a merger will permit the parties to raise prices by even a small amount. But in several Obama-era deals, the U.S. agencies focused on other theories of harm as well, e.g.:

- **Harm to innovation/R&D**
 - E.g., *Applied Materials/Tokyo Electron*
- **Harm to service standards**
 - E.g., *Electrolux/GE*
- **Harm from offering “a breadth of offerings” across products**
 - E.g., *Halliburton/Baker Hughes*
- **Privacy/ability to extract customer information**
 - E.g., *Google/ITA*
- **Foreclosure of supplies/customers (for vertical deals)**
 - E.g., *Comcast/NBCUniversal*

3. Remedies

Generally, transactions that pose antitrust concerns raise two practical questions:

1. Is the antitrust issue “fixable” in the form of a remedy?
 - Can the part of the deal posing the antitrust concern be separated from the deal rationale?
 - If not, can the client proceed where there is no fix?
2. If there is a fix, what is the “type” of remedy, and how does the remedy affect deal value?
 - Historically, the agencies default to structural remedies (e.g., divestitures) to alleviate merger concerns. Behavioral or “conduct” remedies have generally been disfavored.

Structural Remedies	Behavioral Remedies
More risk of value dilution	Less risk of short-run value dilution, but possible long-run effects
Simpler/cleaner to execute	Continuing oversight post-closing

During the Obama era, the agencies demonstrated a willingness to use behavioral remedies—in both vertical and horizontal deals

Considerations for Antitrust Merger Enforcement in the Trump Era

Considerations for the Trump Era: Implications for Merger Enforcement

Trump antitrust agency leadership will likely be less interventionist in key respects:

- More reliant on market self-correction and more reluctant to make over-enforcement errors
 - Greater willingness to credit evidence of synergies and potential for competitive entry/expansion
 - Less concern about vertical integration
 - FTC clearance of *Amazon/Whole Foods* without extended investigation
- Greater willingness to negotiate remedies rather than challenge mergers in court
 - DOJ settlement of *Dow/DuPont* with limited divestitures (June 15, 2017)
 - But: the FTC reportedly drew a hard line on the original *Walgreen's/Rite-Aid* transaction
- More caution about novel theories of harm and novel approaches to remedies

Merger scrutiny under Trump might also *tighten* for certain cases:

- Acquisitions of U.S. companies by foreign interests
- Mergers that reduce or eliminate U.S. jobs or production facilities
- Mergers that could be enforcement “trophies”: even market-oriented agencies like to show they are vigilant and enforcing the law
 - FTC and DOJ challenges of *DraftKings/FanDuel*, *Energy Solutions/Waste Control Specialists* (June 2017)

Bottom Line: Basic process and investigation intensity may not change dramatically, but in most cases we expect an increased probability of getting the deal through

“Staff Decisions” v. “Front Office” Decisions



Career civil servants—line staffers and their direct managers—have considerable discretion in deciding what theories of harm to investigate. Staff also tend to receive substantial deference in decisions to issue a second request (e.g., high water mark of second requests during Reagan era)



Caveat: reduced budgets and hiring freezes can reduce agency resources to investigate during these phases

“Front office” political appointees tend to exercise the most influence when it comes to decisions about whether to litigate (e.g., low water mark of challenges during Reagan era)

*Extensions to the review periods are sometimes granted, and reviews can take several months

Bellwethers in 2017

Key Transactions and M&A Developments to Watch in 2017



- *AT&T/Time Warner*
- *Bayer/Monsanto*
- *Discovery Communications/Scripps Networks*
- *Walgreens/Rite-Aid (revised version)*
- *United Technologies/Rockwell Collins*
- **EU Investigation into deficient merger control filings (incorrect/misleading filings and gun-jumping)**

Best Practices: Timing, Risk Allocation, and Messaging the Deal

- Until a clearer picture of agency approaches comes into focus, merging parties should consider the following:
 - **On Timing:**
 - Parties should not presume an immediate shortening merger reviews going forward. As a general rule, significant antitrust reviews can still take a year or more, even if they will result in fewer challenges. Deal timelines might therefore not change much, despite an increased likelihood of ultimate success
 - **On Antitrust Risk Allocation in Merger Agreements:**
 - As antitrust merger enforcement becomes more conservative and restrained, there will be a narrower zone of risk to be addressed through “efforts” covenants
 - Less antitrust pressure on reverse termination fee negotiations
 - **On Making the Case for the Deal: Efficiencies on Offense, not Just Defense**
 - An affirmative, pro-competitive case for increased innovation/investment and deal-specific efficiencies will likely be better received by new agency leadership

Lawyer Profiles

Howard Shelanski

PARTNER



Washington DC Office

202 962 7060 tel

202 962 7197 fax

howard.shelanski@davispolk.com

Mr. Shelanski is a partner in Davis Polk's Litigation Department in Washington DC. He is one of the nation's leading authorities on antitrust and regulation, with high-level experience at the Federal Trade Commission, the Federal Communications Commission, and in the Executive branch of government. Mr. Shelanski is also a Professor of Law at Georgetown University.

Mr. Shelanski served as Administrator of the White House Office of Information and Regulatory Affairs from 2013 to 2017. Previously, he was Director of the FTC's Bureau of Economics, where he supervised economic analysis and advised the Commission on economic policy matters. From 2009 to 2011, he served as the Bureau's Deputy Director.

Before joining the FTC and the Georgetown Faculty, Mr. Shelanski was a Professor of Law at the University of California, Berkeley, where he co-directed the Berkeley Center for Law and Technology from 2000 to 2008.

He was Chief Economist of the Federal Communications Commission from 1999 to 2000, and a Senior Economist for the President's Council of Economic Advisers at the White House from 1998 to 1999.

Mr. Shelanski served as a law clerk to Justice Antonin Scalia of the U.S. Supreme Court, Judge Louis H. Pollak of the U.S. District Court for the Eastern District of Pennsylvania and Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia Circuit.

PROFESSIONAL HISTORY

- Partner, Davis Polk since 2017
- Administrator, Office of Information and Regulatory Affairs, White House Office of Management and Budget, 2013-2017
- Director, Bureau of Economics, Federal Trade Commission, 2012-2013
- Professor of Law, Georgetown University since 2011

Howard Shelanski (cont.)

PARTNER

- Counsel, Davis Polk, 2011-2012
- Deputy Director, Bureau of Economics, Federal Trade Commission, 2009-2011
- Professor of Law, University of California, Berkeley, 1997-2009
- Chief Economist, Federal Communications Commission, 1999-2000
- Senior Economist, White House Council of Economic Advisers, 1998-1999
- Law Clerk, Hon. Antonin Scalia, U.S. Supreme Court, 1994-1995
- Law Clerk, Hon. Louis H. Pollak, U.S. District Court, E.D. Pennsylvania, 1993-1994
- Law Clerk, Hon. Stephen F. Williams, U.S. Court of Appeals, D.C. Circuit, 1992-1993

ADMISSIONS

- District of Columbia

EDUCATION

- B.A., History, Haverford College, 1986
- J.D., UC Berkeley School of Law, 1992
- Ph.D., Economics, UC Berkeley, 1993

Jesse Solomon

PARTNER



Washington DC Office
202 962 7138 tel
202 962 7096 fax
jesse.solomon@davispolk.com

Mr. Solomon is a partner in Davis Polk's Litigation Department, practicing in the Washington DC office. He provides general antitrust counseling to clients, including on the competition law aspects of mergers and acquisitions, and he represents clients in antitrust investigations of transactions undertaken by the Federal Trade Commission and the U.S. Department of Justice and develops global strategies for obtaining clearance of transactions across international jurisdictions.

WORK HIGHLIGHTS

Antitrust Representations

- General Electric in numerous transactions relating to the sale of GE Capital lending units
- Syngenta in:
 - ChemChina's \$43 billion acquisition of the company
 - Its successful defense of a takeover proposal by Monsanto
- Manhattan Beer in its \$250 million acquisition of Windmill Distributing's beer brand distribution rights
- ConAgra in the \$2.7 billion sale of its private brands business to TreeHouse Foods
- Smith & Nephew in connection with its \$1.7 billion acquisition of ArthroCare
- AstraZeneca:
 - On the U.S. antitrust aspects of the \$119 billion acquisition proposal by Pfizer
 - In its \$1.15 billion acquisition of Pearl Therapeutics
- Tyson Foods in its \$8.55 billion acquisition of Hillshire Brands
- BATS Global Markets:
 - In its merger with CBOE
 - In its acquisition of Direct Edge
- Comcast in its \$37.25 billion joint venture with NBCUniversal

Jesse Solomon (cont.)

PARTNER

RECOGNITION

- “Distinguished Legal Writing Award” – The 2013 Burton Awards for Legal Achievement
- “Best Academic Mergers Article” – 2013 Antitrust Writing Awards

PROFESSIONAL HISTORY

- Davis Polk since 2008
- Partner, 2016-present

ADMISSIONS

- District of Columbia
- State of California

EDUCATION

- B.A., English Literature, Emory University, 2001
 - Phi Beta Kappa
 - Robert W. Woodruff Scholar
 - *summa cum laude*
- M.A., English Literature, Emory University, 2001
 - *summa cum laude*
- J.D., UC Berkeley School of Law, 2008
 - Order of the Coif
 - Senior Notes and Comments Editor, *California Law Review*

Appendix

Hart-Scott-Rodino Act

- Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976
- Requires filing of pre-merger notification and observance of a waiting period prior to closing certain transactions, including:
 - mergers;
 - acquisitions; or
 - transfers of securities or assets
- Generally, HSR filings required for transactions valued at more than \$80.8 million (whether U.S. transactions or U.S. sales/assets exceed threshold)
- Waiting period is 30 days; 15 days in the case of cash tender offers
- In a small proportion of deals, the agency issues a “second request” for additional information. Second requests usually take at least several months to resolve.

Two Antitrust Agencies Review Mergers in the U.S.: The FTC and the DOJ



Horizontal Merger Guidelines

- **Basic test:** In the U.S., mergers cannot “create or enhance market power”—which is “the ability profitably to maintain prices above competitive levels for a significant period of time”
- **Basic steps of merger analysis:**
 - Define relevant antitrust market(s)
 - Measure market concentration
 - Evaluate competitive effects
 - Competitive alternatives
 - “Proximity” of competition between parties
 - Assess likelihood of entry or expansion
 - Evaluate efficiencies created by the transaction
- **Rule of thumb:** As a broad generalization, the agencies tend to presume that mergers leaving 5-6 strong firms in the market are not anticompetitive; that presumption diminishes and ultimately reverses once there would be 3 or fewer strong firms post-merger
 - But: these presumptions are not conclusive. Each deal needs to be considered on its facts.
- **Note:** The above reflects the guidelines for horizontal deals (the standard for vertical deals generally has to do with foreclosure of access to input supply or to customers)



What is the relevant market?