



January 2023

ANTITRUST

DOJ and FTC Jurisdictions Overlap, but Conflicts are Infrequent

Accessible Version

GAO Highlights

Highlights of [GAO-23-105790](#), a report to congressional committees

Why GAO Did This Study

DOJ's Antitrust Division and the FTC each have responsibility for the enforcement of federal antitrust laws. The goal of antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice.

Questions have been raised about potential areas of conflict between DOJ and FTC with respect to antitrust enforcement actions. A House report accompanying the 2021 Consolidated Appropriations Act includes a provision for GAO to study DOJ and FTC antitrust actions.

This report describes (1) the jurisdictions of the DOJ and FTC with respect to antitrust cases, and the extent to which the jurisdictions overlap; (2) the process DOJ and FTC use to determine the investigative agency in a case, and how frequently conflicts arise; and (3) the extent to which antitrust cases have resulted in conflicts between DOJ and FTC after an investigative agency has been identified.

GAO reviewed statutes, relevant agency policies, and DOJ and FTC's annual competition reports for fiscal years 2000-2020, the most recent data available. GAO also analyzed data published in the annual reports and unpublished data from FTC's clearance database. Further, GAO reviewed DOJ and FTC filings in antitrust cases from 2000-2020. In addition, GAO interviewed DOJ and FTC officials about their jurisdictions, processes, and interactions with one another.

View [GAO-23-105790](#). For more information, contact Gretta L. Goodwin at (202) 512-8777 or goodwing@gao.gov.

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DOJ and FTC Jurisdictions Overlap, but Conflicts are Infrequent

What GAO Found

The Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission (FTC) have broad statutorily-based jurisdiction with respect to antitrust cases. In addition, over time each agency developed expertise in a particular industry or market, though there can be overlap. For example, in fiscal year 2020, DOJ and FTC reviewed an equal number of transactions related to internet service providers, web service portals, and data processing services, as both agencies had the authority to do so. The two agencies have developed a process to determine which agency is to investigate each transaction, which they call "clearance". This process establishes standards and criteria for determining which agency has the expertise for the transaction under review. However, agency officials clarified that while expertise in a particular industry or market is the primary factor considered for clearance, other factors—such as resource constraints, emerging industries, and new technologies, among others—may affect the final determination.

DOJ and FTC have an interagency clearance process for determining the investigative agency on antitrust cases, and instances of conflict occur infrequently. Specifically, the clearance process ensures that the agencies have a process to confer and, if necessary, escalate the clearance decision when both agencies wish to investigate the same transaction, known as contested clearance. If left unresolved, this process can ultimately result in clearance decisions being made by agency leadership—the Assistant Attorney General for the Antitrust Division and the Chair of the FTC. According to FTC data GAO analyzed, from fiscal years 2000-2020, the number of contested clearances never rose above 5.5 percent of transactions reported in any 1 year. Further, the number of contested clearances made up less than 1 percent of transactions reported to DOJ and FTC in 4 of the last 5 years GAO reviewed (fiscal years 2016-2020).

Conflict between DOJ and FTC after the clearance process is completed is rare. According to agency officials, after an investigative agency is determined through the clearance process, the other agency rarely interferes or comments on the other's investigations. Further, agency officials from DOJ and FTC noted that they have an amicable relationship and generally have the same interpretation of antitrust matters. GAO's analysis found that DOJ and FTC submitted 420 court filings in antitrust cases over the 20-year period (2000-2020). Out of the 420 filings, GAO found no instances of FTC directly commenting on a DOJ case and only six instances of DOJ commenting on a FTC case without being a party to the litigation. In four of the six cases where DOJ commented on a FTC case, DOJ expressed views in support of FTC's position. In the remaining two cases, DOJ expressed views in opposition to FTC's position. This represents less than 1 percent of the total number of briefs filed over the 20-year period. In one of these two cases, FTC sought review from the Supreme Court, however its petition was denied. In the other case, the appeals court overturned the district court's decision in favor of FTC's position.

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Abbreviations

DOJ	Department of Justice
FTC	Federal Trade Commission
FTC Act	Federal Trade Commission Act of 1914
HSR	Hart-Scott-Rodino Act

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January 3, 2023

Chair
Ranking Member
Subcommittee on Financial Services and General Government
Committee on Appropriations
United States Senate

Chair
Ranking Member
Subcommittee on Financial Services and General Government
Committee on Appropriations
House of Representatives

The Department of Justice’s (DOJ) Antitrust Division and the Federal Trade Commission (FTC) each have responsibility for the enforcement of federal antitrust laws. The goal of antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice.

Public disputes between federal agencies on antitrust cases, such as in the 2019 case *FTC v. Qualcomm*, have raised questions about potential areas of conflict between DOJ and FTC with respect to antitrust enforcement actions. In *FTC v. Qualcomm*, DOJ filed a brief with the court expressing disagreement with the FTC’s position that Qualcomm, a wireless technology company, violated federal antitrust laws.¹ A House report accompanying the 2021 Consolidated Appropriations Act includes a provision for GAO to study DOJ and FTC antitrust actions over the past 25 years.² This report describes: (1) the jurisdictions of DOJ and FTC with respect to antitrust cases, and the extent to which the jurisdictions overlap; (2) the process DOJ and FTC use to determine the investigative agency in a case, and how frequently conflicts arise; and (3) the extent to which antitrust cases resulted in conflicts between DOJ and FTC after an investigative agency was identified.

¹See *FTC v. Qualcomm*, No. 17-CV-00220 (N.D. Cal. May 2, 2019) (Statement of Interest of the United States of America).

²See H.R. Rep. No. 116-456 (2020) (accompanying Pub. L. No. 116-260 (2020)).

To identify the jurisdictions of DOJ and FTC with respect to antitrust cases, we reviewed relevant antitrust statutes, such as the Federal Trade Commission Act, to understand jurisdictions prescribed in law. In instances where DOJ and FTC's jurisdictions overlap, both agencies have agreed that the investigative agency will generally be determined based on expertise in the industry over a certain amount of time, usually 7 years.³ We therefore analyzed merger transaction data reported to DOJ and FTC, by industry, from the agencies' annual competition reports over the 7 fiscal years from 2014-2020, with the 2020 report being the most recent report available. Specifically, this allowed us to identify areas of expertise in practice for each agency, as well as areas where DOJ and FTC's jurisdictions overlapped. These reports summarize DOJ and FTC's antitrust activities during the year and include data tables from DOJ and FTC's premerger notification and clearance databases. We also interviewed DOJ and FTC officials about areas of jurisdiction and how jurisdiction is determined.

To describe the process DOJ and FTC use to determine the investigative agency, and how frequently conflicts arise, we reviewed relevant DOJ and FTC policies and procedures. For example, we reviewed the 2016 DOJ and FTC Clearance Agreement, which sets out the agencies' current process for determining relevant expertise for case review. We also obtained and analyzed unpublished data on the number of transactions that both agencies requested to investigate, referred to as contested clearance, from FTC's clearance database from fiscal years 2000-2020. In addition, we reviewed other relevant data from DOJ and FTC annual competition reports from fiscal years 2000-2020.⁴ For example, we reviewed data on the number of transactions where DOJ or FTC extended the review period because the investigative agency requested additional information from the companies (called Second Request). Further, we interviewed DOJ and FTC officials about how well their processes are working.

³Federal Trade Commission, Bureau of Competition and Department of Justice, Antitrust Division, *Revised FTC/DOJ Clearance Agreement*, (Washington, D.C.: June 22, 2016).

⁴The House report accompanying the 2021 Consolidated Appropriations Act includes a provision for GAO to examine antitrust actions over the past 25 years. We reviewed annual competition reports for the 25-year period from fiscal years 1996-2020. Due to an FTC database change, contested clearance data are only available for 20 of the 25 years (fiscal years 2000-2020). Accordingly, this report includes data for the 20-year period from fiscal years 2000-2020 to consistently present comparative data.

To assess the reliability of the transaction data from the clearance database and the annual competition reports we used to identify the jurisdictions of DOJ and FTC and describe the process used to determine the investigative agency described above, we took a number of steps. We reviewed the data dictionary and user guides for the databases and conducted manual data checks of numbers published across fiscal years in the annual competition reports. In addition, we interviewed agency officials about their processes. We determined that the data were sufficiently reliable for reporting on agency jurisdictions and on DOJ and FTC's clearance process.

To determine the extent to which antitrust cases resulted in conflicts between DOJ and FTC after an investigative agency was decided, we reviewed judicial filings posted on the agencies' websites for a 20-year period, from calendar year 2000-2020. These filings include DOJ and FTC amicus briefs, which are documents submitted to the court by DOJ or FTC when it is not a party to a particular litigation but is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. We also reviewed what prompted such a filing (i.e. whether the agency decided to do it out of its own authority, or at the invitation of the court). We interviewed DOJ and FTC officials to determine their process for case assignment, the procedures for conflict resolution when both agencies are interested in leading an investigation, and the nature and extent of their disagreements (i.e. how they arose and why).

We conducted this performance audit from March 2022 to January 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Antitrust Laws

Although several laws affect the area of antitrust, the three core Federal Antitrust Laws are the Sherman Act of 1890, the Clayton Act of 1914 and

the Federal Trade Commission Act of 1914 (FTC Act).⁵ DOJ and FTC collectively share responsibility for the enforcement of these statutes. While DOJ is solely responsible for the enforcement of criminal violations, both agencies carry out civil enforcement. DOJ's authority to perform civil and criminal enforcement stems from the Sherman and Clayton Acts, while FTC's enforcement authority stems from section 5 of the FTC Act.⁶

- The Sherman Act is the oldest and the principal law governing antitrust. It outlaws all contracts, combinations, and conspiracies that unreasonably restrain interstate and foreign trade. Price fixing, bid rigging, and monopolization of interstate commerce are among the things the Act prohibits.
- The Clayton Act provides more detail on certain practices that the Sherman Act did not clearly prohibit, such as bans on discriminatory prices and services between merchants. In general, the Act seeks to prohibit mergers or acquisitions that are likely to lessen competition or may result in a monopoly.
- The FTC Act created the FTC, and established its authority, which is directed at banning "unfair methods of competition", and "unfair or deceptive acts or practices."⁷ The FTC Act also addresses other practices that harm competition, but that may not clearly fit into categories of conduct formally prohibited by the Sherman Act, as determined by the FTC.⁸ Only the FTC can bring a case under the FTC Act.

In addition to the three primary antitrust statutes, the Hart-Scott-Rodino Act of 1976⁹ is an important piece of legislation that includes a set of amendments that affect antitrust laws, principally the Clayton Act. The

⁵See Sherman Act, Pub. L. No. 94-435, tit. III, § 305(a), 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 1-38); Clayton Act, Pub. L. No. 96-493, 94 Stat. 2568 (1980) (codified at 15 U.S.C. §§ 12-27); Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

⁶Section 5 of the FTC Act prohibits "unfair methods of competition" and has been interpreted by the Supreme Court to supplement the Sherman and Clayton Acts. See 15 U.S.C. § 45; *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953).

⁷The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. *FTC v. Cement Institute*, 333 U.S. 683, 690 (1948).

⁸See *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

⁹Pub. L. No. 94-435, 90 Stat. 1383, 1389 (1976).

Hart-Scott-Rodino Act established the Premerger Notification Program which requires companies to notify DOJ and FTC prior to completing a merger or acquisition transaction to enable DOJ or FTC to evaluate the competitive impact of the transaction.¹⁰

Premerger Notification Process

Under the Hart-Scott-Rodino Act, parties to certain covered mergers and acquisitions must file a premerger notification with DOJ and FTC. The parties must wait the statutorily prescribed waiting period for the agencies to review the filing prior to completing the transactions.¹¹ Once the parties to a proposed transaction have filed their premerger notification, the initial waiting period provided by the Act begins to run—30 days for the vast majority of deals, 15 days for a cash tender offer or a bankruptcy filing.¹²

During the initial waiting period, DOJ and FTC review the transaction to determine any potential antitrust concerns that warrant additional scrutiny. If either agency determines that such concerns exist, it will request to investigate the transaction. The process to determine which agency will investigate the transaction is called the clearance process, which according to agency officials, has existed in some form since 1938.¹³

If, after investigating the transaction, the investigative agency does not identify any concerns, DOJ and FTC can either let the waiting period expire, or at times, recommend that the agencies grant early termination to the parties. If both agencies agree to terminate the waiting period early,

¹⁰According to DOJ and FTC officials, the agencies can also initiate an investigation after companies have consummated their transaction.

¹¹The thresholds that define what constitutes a covered transaction are adjusted on an annual basis by FTC. Section 7A(a)(2) requires the FTC to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5).

¹²The term 'cash tender offer' means a tender offer in which cash is the only consideration offered to the holders of the voting securities to be acquired.

¹³The clearance process is not limited to DOJ and FTC reviews of transactions. This process is also used to determine which agency will lead an investigation into conduct matters.

the parties may proceed with the transaction prior to the expiration of the waiting period.¹⁴

If the investigative agency needs additional information, it may issue a “second request” to the parties to obtain additional information.¹⁵ If, after reviewing the additional information, the investigative agency continues to have concerns about the transaction, the investigative agency can work with the parties to resolve the concern through a consent agreement, challenge the transaction by filing for an injunction in court to either preliminarily or permanently stop the transaction, or initiate administrative proceedings.¹⁶

A summary of the clearance and premerger notification processes can be found in appendix I.

DOJ and FTC Have Broad Jurisdiction over Antitrust Cases, and Their Jurisdictions Largely Overlap

Statutory Jurisdiction and Historical Expertise Determine Which Agency Will Review a Matter

DOJ and FTC have broad statutorily-based jurisdiction with respect to antitrust cases. In addition, over time each agency developed expertise in a particular industry or market.

- **DOJ.** Statutorily, DOJ has broad jurisdiction over antitrust matters. For example, DOJ generally investigates transactions involving banking, savings and loan institutions, and certain common carriers, such as airlines and telecommunications since the FTC Act specifically limits

¹⁴15 U.S.C. § 18a(b)(2).

¹⁵A Second Request stops the waiting period until both parties “substantially comply” with the Second Request. Once the parties submit valid certifications of substantial compliance, the waiting period will then end 30 days (or 10 days for cash tender offers and 11 U.S.C. § 363 bankruptcies) after the date of substantial compliance. The certification of substantial compliance triggers the start of the extended waiting period.

¹⁶Only the FTC can initiate administrative proceedings.

FTC's authority involving these industries.¹⁷ In addition, as stated previously, DOJ has sole jurisdiction over anything that rises to a criminal violation of antitrust law.

According to our review of DOJ and FTC's annual competition reports from fiscal years 2000-2020, in practice DOJ has established expertise in many industries. For example, over the 7 year period from fiscal years 2014-2020, DOJ investigated transactions related to broadcasting, waste management and remediation services, and air transportation, among others.

- **FTC.** The FTC Act gives the agency broad jurisdiction over antitrust matters.¹⁸ However, FTC does not have sole jurisdiction of any industry specifically defined by statute. According to our analysis of public reports from fiscal years 2000-2020, in practice there are certain industries FTC has developed an expertise in and investigates. For example, over the 7 year period from fiscal years 2014-2020, the FTC investigated transactions related to nursing care facilities, chemical manufacturing, and motor vehicle and parts dealers, among others.

DOJ and FTC Jurisdictions Largely Overlap

While DOJ and FTC have broad jurisdiction and have developed areas of expertise in certain industries or markets over time, their civil enforcement jurisdictions overlap to a large extent. For example, in fiscal year 2020, DOJ and FTC reviewed an equal number of transactions related to internet service providers, web service portals, and data processing

¹⁷15 U.S.C. § 45(a)(2). The FTC Act outlines with a general statement the broad jurisdiction of what FTC can do and specifies the topics it cannot review. Since DOJ is the other agency with broad jurisdiction over antitrust enforcement, the topics where FTC's authority is limited falls under the jurisdiction of DOJ. While FTC is not authorized to bring law enforcement actions against banks and common carriers for certain activities directly related to their common carriage, the FTC can sue common carriers for their non-common carrier activities. See *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 863 (9th Cir. 2018) (cellular data plans). In addition, section 6 of the FTC Act authorizes FTC to obtain information from or about common carriers as "necessary to the investigation" of any company or industry that is "not engaged in or is engaged only incidentally in" business as a common carrier under Section 6 of the FTC Act. See 15 U.S.C § 46.

¹⁸In accordance with the FTC Act, the FTC generally has jurisdiction "to prevent persons, partnerships and corporations, with some exceptions including, for example, banks and savings and loan institutions, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce" except for certain areas as described by statute. See 15 U.S.C. § 45(a)(2).

services. Further, while one agency may have developed expertise in a particular industry or market, it does not preclude the other agency from requesting to review a transaction that the other agency has developed expertise in, unless one agency has been granted sole jurisdiction over the industry by statute. For example, while over a 7 year period (fiscal years 2014-2020) the FTC reviewed the majority of cases related to hospitals, in 3 of the 7 years, DOJ also reviewed transactions related to hospitals.¹⁹ A request may also be made because the agency may have a related case or has more capacity to complete the review.

Given that DOJ and FTC largely share jurisdiction over civil antitrust cases, the two agencies have developed a clearance process to determine which agency is to investigate a specific transaction.²⁰ This process establishes standards and criteria for determining which agency has the expertise for the transaction being reviewed, which is the principal ground for clearance decisions.²¹ Further, expertise is largely based on an agency's experience within a particular timeframe, usually 7 years, with the specific product or market involved in the transaction.

¹⁹FTC has the established expertise in hospital mergers, however in these instances, DOJ reviewed transactions involving nonprofit hospitals. The FTC is generally prohibited from investigating transactions related to nonprofit entities under its authority in the FTC Act, though in some cases FTC is able to investigate nonprofit entities under its authorities under the Clayton Act, according to FTC officials.

²⁰The clearance process is not limited to transactions, as it is also used by DOJ and FTC to determine which will investigate a conduct matter.

²¹According to agency officials, though expertise is the principal ground for determining clearance, other factors are considered as well. For example, DOJ and FTC may be notified of a transaction involving a new product or market when neither agency has expertise. Further, availability of agency resources may influence which agency has the capacity to conduct the investigation.

DOJ and FTC Have an Interagency Process for Determining the Investigative Agency on Antitrust Cases, and Conflicts Occur Infrequently

DOJ and FTC Have Established a Process to Determine the Investigative Agency in a Timely Manner

DOJ and FTC's clearance process to determine which agency will investigate a transaction for potential antitrust violations is currently outlined in the 2016 DOJ and FTC Clearance Agreement.²² This agreement establishes the rules that the agencies will follow to enable a timely resolution to incoming transactions for which the agencies have requested clearance. In implementing the clearance process, each agency has developed its own internal processes for reviewing transactions, requesting clearance, and reviewing clearance requests from the other agency. Specifically, agency officials told us:

- **DOJ.** The Antitrust Division has seven teams, called sections, which examine transactions and investigate civil conduct violations.²³ These sections primarily focus on particular industries, but may investigate markets in other industries as well. The relevant section reviews the transaction to determine whether there is an antitrust concern, and if it detects a potential antitrust violation, it will recommend that the Antitrust Division initiate an investigation. In such cases, the relevant section will submit a request to initiate the clearance process to DOJ's premerger notification office. The request summarizes the transaction and DOJ's basis for requesting clearance of the transaction. The section will work with the DOJ liaison—the main point of contact for coordination on clearance with the FTC—in researching DOJ's basis for requesting clearance for the proposed investigation. The DOJ

²²Federal Trade Commission, Bureau of Competition and Department of Justice, Antitrust Division, *Revised FTC/DOJ Clearance Agreement*, (Washington, D.C.: June 22, 2016).

²³The Antitrust Division's seven sections are: (1) the Civil Conduct Task Force (deals with nonmergers); (2) Defense, Industrials, and Aerospace; (3) Financial Services, Fintech, and Banking; (4) Healthcare and Consumer Products Section; (5) Media, Entertainment and Communications; (6) Technology and Digital Platforms; and (7) Transportation, Energy, and Agriculture.

liaison will then input the information into the clearance database, where FTC is officially informed of DOJ's request for clearance.

When FTC has submitted a request for clearance, the DOJ liaison routes the request to the relevant sections of the Antitrust Division to review. The relevant sections will then decide whether to grant clearance to FTC, or if the DOJ should request clearance. According to DOJ officials, the agency tries to respond to each clearance request within 2 business days. If a section has not forwarded its recommendation, the DOJ liaison will follow up and work with the section, where needed, to determine if clearance can be granted.

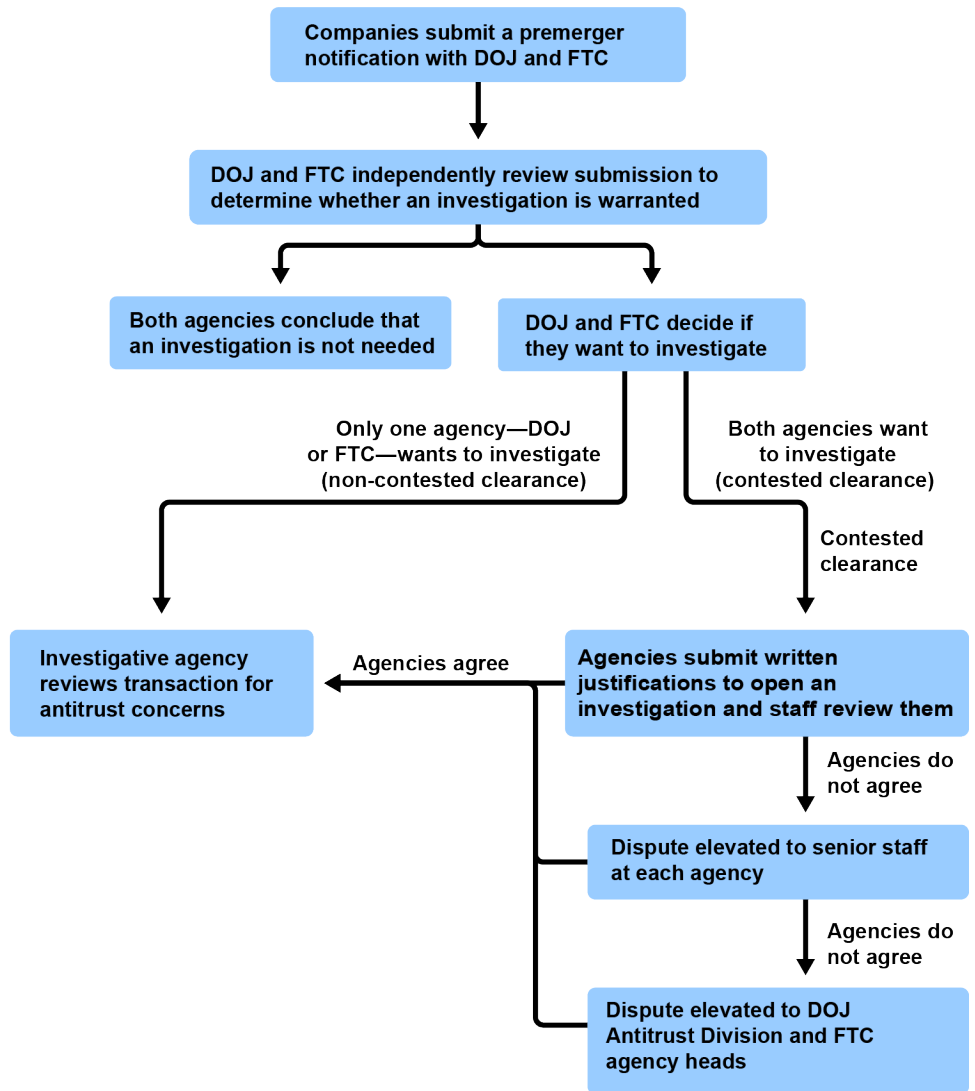
- **FTC.** The FTC's Premerger Notification Office handles the clearance process. When FTC is notified of a potential transaction, the Premerger Notification Office staff route information on the transaction to the relevant litigation team within the FTC's Bureau of Competition, the part of FTC that handles antitrust issues. The relevant litigation team may determine that a closer look is warranted and will submit a clearance request for the transaction. In doing so, the team also searches the clearance database for related matters that FTC has reviewed to justify their expertise to acquire clearance.

According to FTC officials, when DOJ has requested clearance for a particular transaction, the request is circulated by the FTC liaison throughout the FTC's Bureau of Competition. FTC officials further noted that if its liaison has not heard back by 4pm of the next business day whether the relevant litigation team intends to request clearance for that transaction, then FTC will grant clearance to DOJ.

In instances where both DOJ and FTC are requesting clearance to review the same transaction, called "contested clearance", the agencies have a process to confer and, if necessary, escalate the clearance decision. If left unresolved, this process can ultimately result in clearance decisions being made by agency leadership – the Assistant Attorney General for the Antitrust Division and the Chair of the FTC.

Figure 1 illustrates the clearance escalation process.

Figure 1: Summary of Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) Clearance Process For Premerger Notifications



Source: GAO analysis of DOJ and FTC information. | GAO-23-105790

According to DOJ and FTC officials, the clearance process is working well and allows the agencies to make clearance decisions within 2-3 days of the submission of the clearance request. This allows the investigative agency to use the remaining time during the initial 30-day waiting period to review the transaction for any potential antitrust concerns and

determine whether it will need to issue a second request to the parties to obtain additional information.²⁴

We reviewed data from DOJ and FTC annual reports for fiscal years 2000-2020 and found that the agencies issued a second request for a small percentage of the eligible transactions they reviewed each year, ranging from 2 to 4.5 percent of transactions.²⁵ Further, according to DOJ and FTC officials, the remaining transactions not subject to a second request were able to proceed after the initial waiting period was complete or the agencies had granted early termination. Our review of the data also found that, for the majority of transactions, DOJ and FTC were able to resolve clearance and complete the investigation on or before the expiration of the initial 30-day waiting period, thereby allowing the parties to proceed with the transaction.

Conflicts between DOJ and FTC over Jurisdiction Occur Infrequently

While DOJ and FTC have a process for determining which agency will investigate a transaction, the agencies did not frequently contest clearance. According to FTC data we analyzed, from fiscal year 2000-2020, the number of contested clearances never rose above 5.5 percent

²⁴If the investigative agency issues a second request, the waiting period is paused until the parties provide the agency with the requested information. Once the information is provided and certified by the parties, a new waiting period starts, giving the agency 30 days to finalize its investigation and to decide whether or not to challenge the transaction in court.

²⁵There are some transactions that are reported to the agencies in the premerger notification process that the agencies are not authorized to issue a second request for under the Hart-Scott-Rodino Act. Specifically, this includes incomplete transactions where only one party filed a complete notification, transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Act, transactions that were withdrawn before the waiting period began, and transactions that were found to be non-reportable.

of transactions reported under the Hart-Scott-Rodino Act.²⁶ The 5.5 percent figure occurred in 2003, when there were 56 contested clearance matters out of a total of 1,014 transactions reported to the agencies under the Hart-Scott-Rodino Act for the year. Further, the number of contested clearances made up less than 1 percent of the total number of transactions reported to DOJ and FTC under the Hart-Scott-Rodino Act in 4 of the last 5 years covering our review (fiscal year 2016-2020).²⁷

Conflicts between DOJ and FTC on Antitrust Cases After an Investigative Agency Is Identified Are Rare

According to DOJ and FTC officials, after an investigative agency is determined through the clearance process, the other agency rarely interferes or comments on the other's investigations. Further, agency officials from DOJ and FTC noted that they have an amicable relationship and generally have the same interpretation of antitrust matters.

Our analysis found that DOJ and FTC submitted a total of 420 filings—comprised of statements of interest, petitions of writs of certioraris and

²⁶The clearance process is not limited to transactions filed under the Hart-Scott-Rodino Act. The clearance process is also used for transactions that are not reportable under the Act (called non-HSR), for transactions that are reportable but the parties have not yet filed their notification (called pre-HSR), and for already consummated transactions, whether reportable under the Act or not. The clearance process also applies for conduct matters. The FTC data on contested clearance includes all matters for which DOJ and FTC engage in the clearance process. According to FTC officials, it does not have the ability to filter out non-HSR, pre-HSR, and conduct matters from the contested clearance data. As a result, figures reported here represent the total number of contested clearances for the reported period and not just those for transactions reported under the Hart-Scott-Rodino Act. Therefore the actual number of contested clearances for reported transactions may be lower.

²⁷Fiscal year 2019 was the one year we reviewed where the percentage of contested clearances was above one percent of the reported transactions under the Hart-Scott-Rodino Act (33 contested clearances out of 2,089 reported transactions, or 1.6 percent). In fiscal year 2016, there were 13 contested clearances out of 1,832 reported transactions (.7 percent). In fiscal year 2017, there were 12 contested clearances out of 2,052 reported transactions (.6 percent). In fiscal year 2018, there were 20 contested clearances out of 2,111 reported transactions (.9 percent). In fiscal year 2020, there were 13 contested clearances out of 1,637 reported transactions (.8 percent).

amicus briefs—in antitrust cases over the 20-year period (2000-2020).²⁸ Of the 420 filings we reviewed, we found no instances of FTC directly commenting on a DOJ case and only six instances of DOJ commenting on a FTC case without being a party to the litigation.²⁹ Of the six cases where DOJ filed briefs, in four of the cases DOJ expressed views in support of FTC’s position. However, in two cases, DOJ expressed views in opposition of FTC’s position.³⁰ Notably, in the second of these two cases, as presented below, the parties sought review from the Supreme Court, but this petition was denied.

- ***FTC v. Qualcomm Inc. (2019)***³¹. FTC brought an action against the telecommunications company Qualcomm for alleged violations of the Sherman Act and FTC Act. Specifically, FTC accused Qualcomm of anticompetitive behavior in its licensing agreements for computer chips, arguing that Qualcomm’s practices exclude competition and harm market competitors. DOJ filed two statements of interest and one amicus brief throughout the course of the litigation and appeal to

²⁸Our review included all petitions of writs of certioraris, amicus briefs, and statements of interest posted on the FTC and DOJ Antitrust Division websites from 2000-2020. Petitions of writ of certioraris are petitions that ask an appellate court to review a lower court’s decision. This type of petition usually argues that a lower court has incorrectly decided an important question of law, and that the mistake should be fixed to prevent confusion in similar cases. Amicus briefs are documents submitted to the court by one (such as a professional person or organization) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. With respect to statements of interest, DOJ has a broad authority under the Sherman and Clayton Act, but in addition to that, it also has the authority to “attend the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” 28 U.S.C. § 517. DOJ often does this by filing a document called a Statement of Interest, which is a vehicle through which DOJ can state its opinion to the court for any case where DOJ believes it has an interest in the outcome.

²⁹Because DOJ has these additional authorities to offer its opinion on cases through statements of interest, it has more appellate briefs and interventions than FTC.

³⁰Besides the two cases described above, in *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.* 555 U.S. 438 (2009) (“Pacific Bell”) DOJ submitted an amicus brief at the court’s invitation. In a footnote, the brief took issue with the application of a calculation suggested by FTC. We did not include this case in our count because, although the DOJ brief notes some disagreement with the application of a calculation put forward by FTC, this disagreement was not central to the arguments made by either agency and neither agency was a party to the litigation. See *Pacific Bell Telephone Co. v. LinkLine Communications*, No. 07-512 (Sup. Ct. Sept. 4, 2008) (Brief of the United States of America as Amicus Curiae Supporting Petitioners).

³¹See *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

argue against certain aspects of the analyses underlying the district court's ruling. DOJ's amicus brief argues that the district court's analysis, which found a Sherman Act violation, contained fundamental errors in its interpretation of antitrust law.³² Ultimately, the Ninth Circuit Court of Appeals overturned the decision of the lower district court.

- ***In the Matter of Schering-Plough (2006)***³³. FTC issued an order characterizing the agreements of pharmaceutical companies Schering-Plough and Upsher-Smith Laboratories, Inc. to be in violation of Section 5 of the FTC Act. However, upon review by the Eleventh Circuit Court of Appeals, the court ruled in favor of the companies, thereby vacating FTC's order. FTC disagreed with this decision and sought a request for review by the Supreme Court. The Supreme Court called for the views of the Solicitor General. In response, DOJ submitted an amicus brief recommending against the Supreme Court's review of the case because, in DOJ's view, the Eleventh Circuit's decision did not conflict with any other appellate decision. In addition, the brief argued that, while there were important but unsettled issues of federal law, this case was not the best way to present those issues.

Of the 420 documents filed in antitrust cases by DOJ and FTC from 2000-2020, the four filings in the two cases where DOJ opposed FTC's position represents less than 1 percent of the total number of briefs filed. In contrast, 44 of the 420 filings were jointly filed by DOJ and FTC. The results of our analysis support assertions from DOJ and FTC officials that the agencies rarely intervene in each other's investigations after the investigative agency has been determined, and that they have an amicable working relationship.

Agency Comments

We requested comments on a draft of this report from DOJ and FTC. The DOJ and FTC liaisons each provided us with technical comments in an email, which we incorporated as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Attorney General, and the Chair of the Federal Trade

³²FTC v. Qualcomm, No. 19-16122 (9th Cir. Aug. 30, 2019) (Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur).

³³Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005).

Commission. In addition, the report is available at no charge on the GAO website at <https://www.gao.gov>.

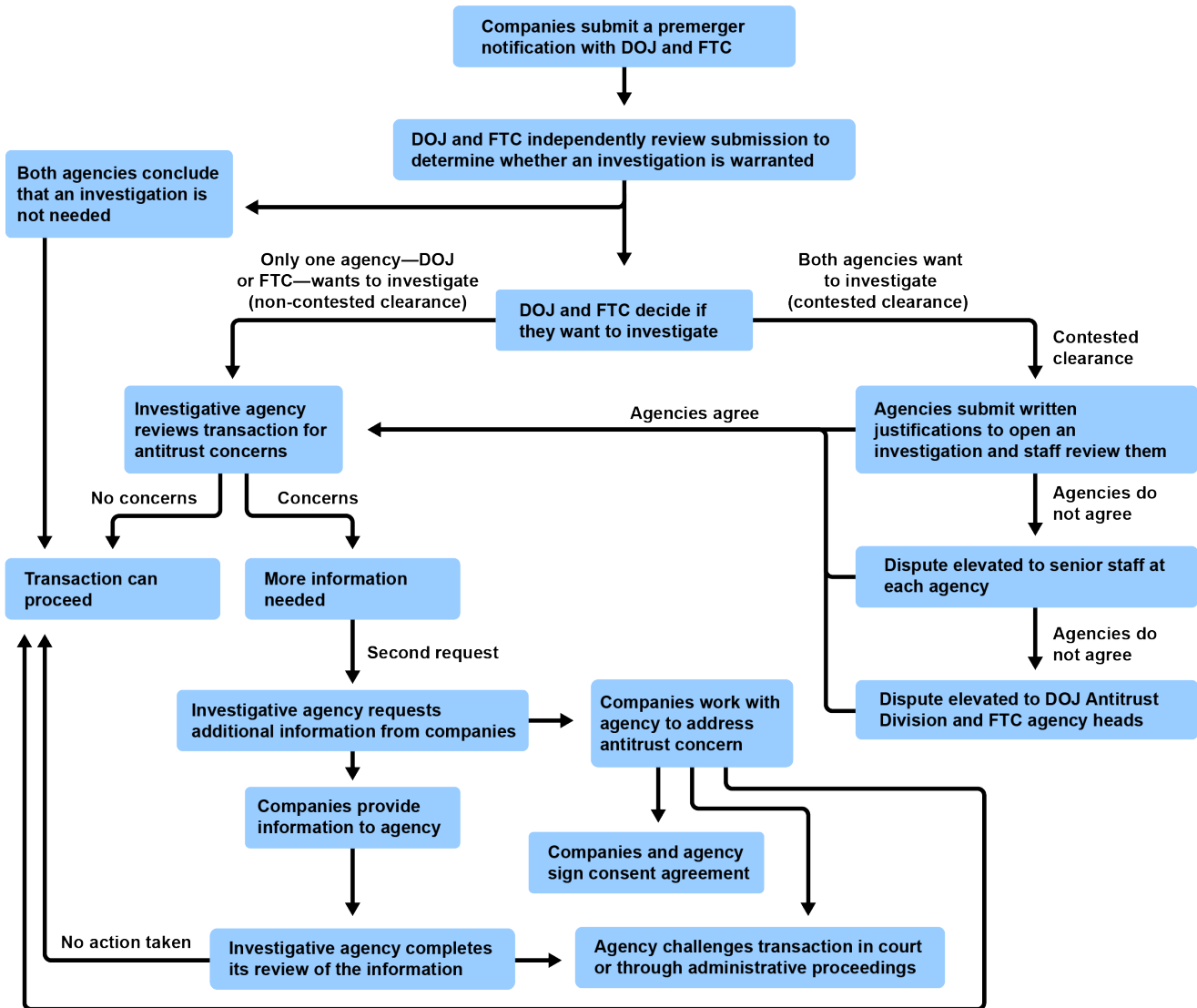
If you or your staff have any questions about this report, please contact Gretta L. Goodwin at (202) 512-8777 or GoodwinG@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix II.

A handwritten signature in black ink that reads "Gretta L. Goodwin". The signature is written in a cursive style with a large, stylized initial "G".

Gretta L. Goodwin
Director
Homeland Security and Justice

Appendix I: Summary of Department of Justice (DOJ) and Federal Trade Commission (FTC) Antitrust Processes

Figure 2: Summary of Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) Clearance and Premerger Notification Processes



Source: GAO analysis of DOJ and FTC information. | GAO-23-105790

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

In addition to the contact named above, Jan Montgomery (Assistant General Counsel), Joseph P. Cruz (Assistant Director), Julia Vieweg (Analyst-in-Charge), and Alejandro Coste-Sanchez made key contributions to this report. Additional support was provided by Nasreen Badat, Michael Clements, Benjamin Crossley, Elizabeth Dretsch, Heidi Nielson, and Andrew Von Ah.

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