NO EXIT

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Fast-growing startups in search of capital and liquidity have traditionally sought to exit the private capital market through M&A or IPO. Until recently, antitrust enforcers rarely challenged startup acquisitions. But under the Biden administration, enforcers worried about the growing dominance of Big Tech sued to block more startup deals. Since antitrust restricts M&A but not IPOs, one might expect that greater antitrust enforcement would cause startups to substitute one kind of exit for another, leading to more IPOs. That did not happen. While M&A and IPOs both provide liquidity, they are not perfect substitutes. We model heterogeneity in M&A and IPO pricing to explore how increased antitrust enforcement impacts venture capital. Economies of scale and scope, synergies, regulatory costs, market power, and market cyclicality can cause IPO valuations to fall significantly below M&A prices. And heightened antitrust scrutiny can reduce the value of an IPO by undermining one of its main advantages: access to publicly traded equity that can be used as currency for future acquisitions.

In this Article, we show how startups have responded to the antitrust crackdown not by choosing a different exit but by choosing no exit. Startups are easing liquidity pressure by letting employees cash out their shares in tender offers. Venture capitalists are extending their exit horizons by forming continuation funds. Would-be acquirers have developed new structures to evade antitrust law, such as the centaur—a private company funded by public company cash flows—and the reverse acquihire—a mass employee exodus from a startup to a public tech company, coupled with a cloaked payoff to the startup's investors. We explain the implications of these changes for competition policy, capital formation, and the continuing erosion of transparency into socially important businesses.

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Introduction

The six most valuable companies in the world were once venture-backed startups. Alphabet, Amazon, Apple, Meta, Microsoft, and Nvidia started out as small, private companies. They raised money from venture capitalists (VCs) to fuel their growth. They developed new technologies—search engines, online marketplaces, personal computers, social networks, operating systems, and graphics processing units. And then they did what most fast-growing private companies used to do—they went public.[1]

Venture-backed startups used to have predictable lifecycles.[2] A startup would raise a new round of capital every twelve to twenty-four months.[3] After several rounds, the startup's founders and employees would want to convert their shares to cash,[4] and its VCs would need to deliver returns to their limited partners (LPs).[5] The startup would exit the private market, so its shareholders could exit their investments. For some startups, the exit was an initial public offering (IPO). For others, the exit was an acquisition by a larger company.

The predictability of the startup lifecycle made the private-public divide coherent.[6] When a startup grew enough to have a significant impact on society, it would usually become a public company or be sold to one.

Around the turn of the century, though, the startup lifecycle began to change, and the private-public divide began to blur. The number of IPOs fell precipitously.[7] The share of startups exiting by acquisition rose.[8] Many startups stayed private even as they grew into large companies. Some became "unicorns"—private companies valued at over $1 billion.[9]

This Article is about what happened next. Antitrust policy during the Biden administration reshaped the startup ecosystem. The antitrust laws give the government broad authority to sue to block mergers that could substantially lessen competition.[10] Antitrust enforcers have long policed M&A deals among public companies. But they generally

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1 Will Gornall & Ilya A. Strebulaev, The Economic Impact of Venture Capital: Evidence from Public Companies 2, 3, 43 (June 2021) (unpublished manuscript) https://ssrn.com/abstract=2681841 [https://perma.cc/4AYR-WMCE] (providing empirical evidence that venture-backed companies developed foundational technologies and subsequently went public).

2 *See* Elizabeth Pollman, *Startup Governance*, 168 U. Pa. L. Rev. 155, 165–74 (2019) [hereinafter Pollman, *Startup Governance*] (describing, in detail, how the typical startup business models and capital structure evolves over time).

3 *Id.* at 173.

4 *See infra* Section IV.A.

5 *See* Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 Stan. L. Rev. 1067, 1071–72 (2003) (describing the contractual compensation structures of VC funds).

6 *See* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 Hastings L.J. 445, 461–62 (2017) (cataloguing the reasons why companies typically decide to go public).

7 For data, see *infra* Section I.B.

8 For data, see *infra* Section I.B.

9 *The Complete List of Unicorn Companies*, CB Insights, https://www.cbinsights.com/research-unicorn-companies [https://perma.cc/J94M-RKN9].

10 *See infra* Section II.A.

ignored acquisitions of startups.[11] Startups rarely attain a market share that would raise concern under traditional merger analysis.[12] So while acquirers had to notify antitrust enforcers about startup acquisitions over certain dollar thresholds, the enforcers rarely sued to block these deals.[13] When Facebook bought Instagram and Google bought DoubleClick, enforcers didn't mount a challenge.[14]

But near the end of the first Trump administration, enforcers started to scrutinize startup deals more closely. And the era of permissive merger review ended under President Biden. He appointed Lina Khan to chair the Federal Trade Commission (FTC) and Jonathan Kanter to lead the Antitrust Division of the Department of Justice (DOJ).[15] Khan and Kanter stepped up enforcement, challenging more deals and settling fewer cases with consent decrees.[16] They also made changes to the merger review process that increased the burden on merging parties, making it lengthier, more expensive, and more uncertain.

Khan and Kanter believed—arguably with good reason—that incumbent tech companies were buying startups to choke off nascent competition.[17] So they started to challenge these deals. Between 2012 and 2019, enforcers challenged only three startup acquisitions. Between 2020 and 2023, they challenged fourteen.[18] Lawsuits or the credible threat of lawsuits killed deals between Adobe and Figma (design

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11 *See infra* Section II.C.

12 *See generally* U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines 5–6 (2023) [hereinafter 2023 Merger Guidelines] (explaining the traditional view among the Supreme Court and antitrust enforcers that mergers resulting in one firm controlling a large market share are presumptively illegal).

13 *See infra* Section II.A.

14 *See FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program*, Fed. Trade Comm'n (Aug. 22, 2012) https://www.ftc.gov/news-events/news/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition-instagram-photo-sharing-program [https://perma.cc/3XUF-6T85]; Christian Berqvist, *Did Enforcers Make the Right Call When Clearing Google/Doubleclick?*, Network L. Rev. (June 2, 2025), https://www.networklawreview.org/bergqvist-google-doubleclick [https://perma.cc/KE32-8LAG].

15 *Lina M. Khan Sworn in as Chair of the FTC*, Fed. Trade Comm'n (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc [https://perma.cc/HWU5-CRLG]; *Senate Confirms Jonathan Kanter as Assistant Attorney General at DOJ Antitrust Division*, U.S. Senate Comm. on the Judiciary (Nov. 16, 2021), https://www.judiciary.senate.gov/press/dem/releases/senate-confirms-jonathan-kanter-as-assistant-attorney-general-at-doj-antitrust-division [https://perma.cc/AL9U-ZLLW].

16 *See infra* Section II.B.

17 Khan articulated this position in a report on competition in digital markets that she co-wrote as a staffer in the U.S. House of Representatives. Majority Staff of the Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 11 (Comm. Print 2020).

18 *See infra* Figure 7 and note 208 and accompanying text.

software),[19] Sanofi and Maze (pharmaceuticals),[20] Qualcomm and Autotalks (automotive),[21] and Google and Wiz (cybersecurity).[22] The chilling effect spread across Silicon Valley, putting would-be acquirers, founders, and VCs on notice that acquisitions by large incumbents were risky.[23]

So how did startups respond? One might expect that they would substitute one kind of exit for another—that blocking acquisitions would lead to more IPOs. But while IPOs and acquisitions both provide liquidity, they are not perfect substitutes. The price that a startup commands in an acquisition may exceed the valuation it can achieve in an IPO because of synergies, economies of scale and scope, or the premium incumbents are willing to pay to eliminate potential competitors. The IPO market is also highly cyclical, so going public at the wrong time could be costly. And heightened antitrust scrutiny can reduce the value of an IPO by undermining one of its main advantages: access to publicly traded equity that can be used as currency for future acquisitions.

Instead of choosing a different exit, many startups are choosing no exit. In this Article, we show how startups and their would-be acquirers have developed new strategies to achieve their goals. The antitrust crackdown has increased the importance of two trends that predate it—the rise of employee tender offers and continuation funds.[24] In an employee tender offer, a startup lets its employees cash out some or all of their shares while the startup remains private. Secondary sales of startup shares used to be small deals, and they were typically limited to founders or other key employees.[25] But now rank-and-file startup

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19 Press Release, Dylan Field, Co-Founder & Chief Exec. Officer, Figma, Figma and Adobe Are Abandoning Our Proposed Merger (Dec. 18, 2023), https://www.figma.com/blog/figma-adobe-abandon-proposed-merger [https://perma.cc/P7JT-HCQG].

20 Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Sanofi's Proposed Acquisition of Maze Therapeutics' Pompe Disease Drug (Dec. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-sanofis-proposed-acquisition-maze-therapeutics-pompe-disease-drug [https://perma.cc/R5S5-KTL3].

21 *Qualcomm Ends Bid to Buy Israel's Autotalks After Antitrust Probe*, Reuters (Mar. 22, 2024), https://www.reuters.com/business/media-telecom/qualcomm-ends-bid-buy-israels-autotalks-after-antitrust-probe-2024-03-22 [https://perma.cc/M27U-5JVB].

22 *See, e.g.*, Nico Grant, *Google's $23 Billion Plan to Buy Cybersecurity Start-Up Wiz Falls Apart*, N.Y. Times (July 23, 2024), https://www.nytimes.com/2024/07/23/technology/google-wiz-deal-ipo.html [https://perma.cc/CS44-57Q5] (stating that "the regulatory hurdles" facing the transaction "appeared steep").

23 *See infra* Section II.C.

24 *See infra* Section IV.A–B.

25 *See* Darian M. Ibrahim, *The New Exit in Venture Capital*, 65 Vand. L. Rev. 1, 16–17 (2012); Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. Pa. L. Rev. 179, 194 (2012) [hereinafter Pollman, *Information Issues*].

employees can sell their shares, and the secondary market for startup equity has multiplied in value.[26] Continuation funds let VCs stay invested in their portfolio companies longer than traditional venture funds allow. And as a result, startups face less liquidity pressure and can postpone exits.

Thwarted acquirers have also developed strategies to evade merger enforcement. One of their strategies is a new structure that we call a centaur—a private company that is funded primarily by public company cash flows.[27] The two largest centaurs are OpenAI and Anthropic, the companies behind ChatGPT and Claude. OpenAI has raised more than $13 billion from Microsoft,[28] and Anthropic has raised $8 billion from Amazon and $3 billion from Google.[29] Corporate VC investments by operating companies have been rising for the last two decades.[30] But the centaur structure goes beyond traditional corporate VC by crowding out other investors and tying the fate of the startup and the public company with a deep commercial partnership.[31] These deals allow Big Tech to access cutting-edge technology—and exercise influence over potential competitors—without an acquisition.

Another strategy is the reverse acquihire.[32] In this kind of deal, a large tech company persuades the founders and key employees of a startup to quit en masse. Then it hires the former employees and makes a payment to the shell of the startup they left behind, which is ostensibly a fee to license the startup's tech but is really a means to pay off its VCs. A reverse acquihire is an acquisition in substance but not form. And it's becoming popular—Microsoft, Amazon, Alphabet, and Meta have all used it.[33]

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26 *See* Hans Swildens, *How Big Is the Secondary Market for Venture Capital? An Updated View to a $130B Market*, Indus. Ventures (July 5, 2022), https://www.industryventures.com/insight/how-big-is-the-secondary-market-for-venture-capital-an-updated-view-to-a-130b-market [https://perma.cc/Y6XA-RAQ8].

27 *See infra* Section IV.C.

28 Berber Jin & Corrie Driebusch, *The $14 Billion Question Dividing OpenAI and Microsoft*, Wall St. J. (Oct. 18, 2024), https://www.wsj.com/tech/ai/the-14-billion-question-dividing-openai-and-microsoft-71cf7d37 [https://perma.cc/E7FY-X7G4].

29 George Hammond, Madhumita Murgia & Arash Massoudi, *Google Invests Further $1bn in OpenAI Rival Anthropic*, Fin. Times (Jan. 22, 2025), https://www.ft.com/content/ed631513-dd37-44a3-a536-b2002f5727cc [https://perma.cc/K2E6-QHSJ].

30 For data, *see infra* Section IV.C.

31 *See* Darian M. Ibrahim, *Corporate Venture Capital*, 24 U. Pa. J. Bus. L. 209, 231–33 (2021) [hereinafter Ibrahim, *Corporate Venture Capital*] (describing the drawbacks that limit traditional corporate VC's potential to displace other investment).

32 *See infra* Section IV.D.

33 *See, e.g.*, Krystal Hu & Harshita Mary Varghese, *Microsoft Pays Inflection $650 Mln in Licensing Deal While Poaching Top Talents, Source Says*, Reuters (Mar. 21, 2024), https://www.reuters.com/technology/microsoft-agreed-pay-inflection-650-mln-while-hiring-its-staff-information-2024-03-21 [https://perma.cc/2AJ5-LE4M]; Alex Heath, *This is Big Tech's*

Our main claim in this Article is descriptive. We aim to show that heightened antitrust enforcement has transformed the private-public divide. We want securities regulation and antitrust scholars to appreciate how their seemingly autonomous fields of law are beginning to interact. But our arguments also carry implications for public policy.

We contend that antitrust enforcers should consider the hydraulic effects of their actions.[34] Restricting exits affects how startups perceive their options. Making acquisitions riskier will push some startups to exit via IPO. Making IPOs more costly will push some startups to exit via acquisition. Simultaneously discouraging both acquisitions and IPOs will result in some startups choosing a third path—staying private longer, evading the antitrust laws, and creating new structures that might harm competition and diminish transparency. And if these distortions reduce venture returns relative to traditional exits, they might increase the cost of capital for the next generation of startups. The social benefits of enhanced antitrust enforcement can make these tradeoffs worthwhile, but we argue that there are real costs to narrowing the merger aperture, which enforcers ought to consider.[35]

At the same time, we think that in some circumstances, enforcers need to be *more* aggressive. They should prevent acquirers from making an end run around the antitrust laws. A reverse acquihire can harm competition just as much as a formal acquisition. And it's possible that the centaur structure or other large corporate venture capital investments will be used to neuter competition. We argue that antitrust enforcers shouldn't let companies circumvent merger enforcement by structuring their transactions to avoid Hart-Scott-Rodino (HSR) filing requirements. HSR Rule 801.90 provides that the economic substance of a deal, rather than its form, triggers the requirement for merging

Playbook for Swallowing the AI Industry, The Verge (July 1, 2024), https://www.theverge.com/2024/7/1/24190060/amazon-adept-ai-acquisition-playbook-microsoft-inflection [https://perma.cc/7WBQ-C7BU]; Miles Kruppa & Lauren Thomas, *Google Paid $2.7 Billion to Bring Back an AI Genius Who Quit in Frustration*, Wall St. J. (Sept. 25, 2024, 5:30 AM), https://www.wsj.com/tech/ai/noam-shazeer-google-ai-deal-d3605697 [https://perma.cc/KG47-6DKH]; Cory Weinberg, *Meta Agreed to Pay up for Scale AI but Then Wanted More for Its Money*, The Information (June 16, 2025, 12:37 PM), https://www.theinformation.com/articles/meta-agreed-pay-scale-ai-wanted-money [https://perma.cc/URE7-SZ7U].

34 *See infra* Section V.A.

35 *Cf.* Ke Rong, D. Daniel Sokol, Di Zhou & Feng Zhu, *Antitrust Platform Regulation and Entrepreneurship: Evidence from China* 11–12 (Harvard Bus. Sch. Working Paper, No. 24-039, 2025) (finding empirically that venture capital investment and entry of new startups in affected industries fell substantially in the wake of enhanced antitrust enforcement against platform companies in China), https://www.hbs.edu/ris/Publication%20Files/24-039_b82dc910-02d8-4aa4-acc8-2d6273493a03.pdf [https://perma.cc/C86J-9G3B].

parties to file with the government.[36] The agencies can and should seek significant fines for these types of HSR violations.[37]

It remains too early to tell how the antitrust crackdown—if it persists during the second Trump administration—will ultimately shape the availability of startup finance. Although heightened scrutiny of acquisitions may increase the cost of capital, we are not as worried as some other scholars are about capital formation.[38] Venture deal activity and fundraising have declined in the last two years but are still at historically high levels.[39] The emergence of employee tender offers and continuation funds shows that startups and VCs are finding new ways to access capital and liquidity. Private ordering is resilient.

We are worried, however, about transparency.[40] In the old venture capital cycle, by the time a startup's technology began to significantly impact society, it would have been exposed to the scrutiny of the public markets—disclosures, short sellers, and securities litigators. The startup would have an IPO and become subject to public company regulations. Or the startup would be acquired by a company already subject to public company regulations. Today, some of the most important firms developing artificial intelligence are being funded by public companies, but because the AI firms themselves are still private, they can keep the public in the dark.

Our argument proceeds in five Parts. In Part I, we explain why startups need to exit and analyze recent trends in M&A and IPOs. In Part II, we describe how the Biden administration changed antitrust enforcement. In Part III, we provide an economic model of how antitrust interventions affect startup exit decisions. In Part IV, we introduce the new strategies that startups and acquirers have pursued in response to the antitrust crackdown. In Part V, we discuss the implications for public policy.

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36 16 C.F.R. § 801.90 (2025); *see also* D. Daniel Sokol & Robert J. Rhee, *Control Capture and Competition* (Univ. of S. Cal. Ctr. for L. & Soc. Sci., Research Paper No. 2509, 2025), https://ssrn.com/abstract=5242360 [https://perma.cc/E2QC-EDMS] (arguing that "substance over form should prevail when" antitrust policy "is grounded in avoidance of specific bad outcomes").

37 *See* 15 U.S.C. § 18a(g)(1) (setting original daily penalty for the HSR violations). In January 2025, the FTC raised the daily fine for HSR violations to $53,088 a day. *See* Adjustment to Civil Penalty Amounts, 90 Fed. Reg. 5580 (Jan. 17, 2025). The DOJ recently sued private equity firm KKR for what it alleged were serial violations of the Act and asserted that the maximum penalty for these violations "exceeds $650 million." Press Release, U.S. Dep't Just. Off. Pub. Affs., Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law (Jan. 14, 2025), https://www.justice.gov/opa/pr/justice-department-sues-kkr-serial-violations-federal-premerger-review-law [https://perma.cc/MLR6-MQF9].

38 *See infra* Section V.B.

39 *See* Nat'l Venture Capital Ass'n, 2024 Yearbook (2024) [hereinafter 2024 Yearbook].

40 *See infra* Section V.C.

I
The Venture Capital Cycle

In the late twentieth century, venture-backed startups followed a predictable lifecycle from founding to exit. After the dot-com bust, the cycle grew longer and more complex. Startups stayed private longer and, when they did exit, they increasingly chose acquisitions over IPOs. In this Part, we describe the traditional venture capital cycle and explain how it had already started to change *before* antitrust enforcers began to crack down on acquisitions.

A. Venture Finance

Imagine that it's the 1990s, and you want to start a business. If you wanted to open a pizzeria, it wouldn't be hard to find capital. You could use your own savings, borrow from friends and family, or get a loan from a bank. But suppose you want to build a software company. You'll need a lot of capital to buy the servers and pay engineers. Unless you're a billionaire or hang out with billionaires, you won't be able to bootstrap your company. And you're also not likely to get help from a bank. A loan officer doesn't care if your business has a small chance of being worth billions one day. They just care whether you're likely to make the interest payments on the loan and pay back the principal. If your business plan won't generate revenue for many years, you're not worth the risk.

The answer to your predicament is venture capital. VCs specialize in betting on high-risk, high-reward business ideas.[41] They invest with equity rather than debt, so they care more about upside potential than downside risk. If your software company grows to be worth billions, their shares in your company will be worth tens or hundreds of millions. VCs are willing to take this kind of risk because they are diversified. They invest in a portfolio of startups knowing that many will fail but hoping that one of them will generate exponential returns that will make the portfolio a success.[42]

The money that VCs invest in your startup won't be their money. VCs raise capital from institutional investors—mutual funds, pension funds, sovereign wealth funds, and university endowments. These

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[41] *See* Brian J. Broughman & Matthew T. Wansley, *Risk-Seeking Governance*, 76 Vand. L. Rev. 1299, 1318 (2023).

[42] *See* Sebastian Mallaby, The Power Law: Venture Capital and the Making of the New Future 44–45 (2022) (explaining that venture capitalists accept high failure rates because they invest in portfolios of startups, aiming for a few exponential successes to offset losses).

institutional investors are the LPs in venture funds.[43] They play a passive role—you'll likely never see them. The VCs, by contrast, will take an active role in management, serving as the general partner (GP) for the fund. The VC firm that leads your fundraising round will typically bargain for a seat on your board of directors.[44]

The VCs will have a singular goal: maximize the value of your company in the next five to seven years.[45] Venture funds have a limited life, traditionally ten years.[46] At the end of a fund's life, the VCs must deliver the returns to the LPs, and they have strong incentives to maximize those returns. In a typical venture fund, VCs receive 20% of the fund's profits.[47] They also receive an annual management fee usually equal to 2% of capital committed to the fund.[48] The greater the returns, the greater the profits and the greater the likelihood that the VCs will be able to raise subsequent funds and earn more management fees.

As your startup grows, it will follow a rhythm. Every twelve to twenty-four months, you will raise another round of venture capital, issue new shares to another set of VCs, and add a new seat on the board.[49] Every time you issue new shares, you will dilute your share of the company's equity. And every time you add new seats to the board, you will reduce your control over the company. But if all goes well, each new round of investors will pay more for their shares than the last, raising the implied value of your company and your shares.[50]

If your startup keeps growing, you will eventually develop two needs that more rounds of private financing can't solve.[51] First, your business will start to need more capital than VCs can provide.[52] Second,

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[43] *See* Gilson, *supra* note 5, at 1068.

[44] *See* Michael Ewens & Nadya Malenko, *Board Dynamics over the Startup Lifecycle* 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27769, 2024); Brian J. Broughman, *The Role of Independent Directors in Startup Firms*, 2010 Utah L. Rev. 461, 461 (2010); Brian Broughman, *Independent Directors and Shared Board Control in Venture Finance*, 9 Rev. L. & Econ. 41, 41–43 (2013).

[45] Broughman & Wansley, *supra* note 41, at 1308–13.

[46] Josh Lerner & Ramana Nanda, *Venture Capital's Role in Financing Innovation: What We Know and How Much We Still Need to Learn*, 34 J. Econ. Persp. 237, 253 (2020).

[47] *Id.* at 254.

[48] *Id.*

[49] *See* Pollman, *Startup Governance*, *supra* note 2, at 173.

[50] Staged financing protects VCs against poor performance by giving them the power to withhold a future round of financing if a startup fails to grow as expected. Xuan Tian, *The Causes and Consequences of Venture Capital Stage Financing*, 101 J. Fin. Econ. 132, 132 (2011).

[51] By the time that a startup approaches an exit, the founder may have already been replaced with a new CEO. But the replacement CEO would have similar incentives to the original founder. The VCs who bring in the new CEO will try to ensure that the CEO's compensation aligns with the VCs' need for exit.

[52] *See* Pollman, *Startup Governance*, *supra* note 2, at 174–75.

your VCs, your employees, and you will start to need liquidity.[53] The VCs must sell their shares before time runs out to deliver returns to their LPs. You and your employees will want to convert your paper wealth to cash. Once your startup equity becomes a large part of your net worth, you'll want to sell at least some of it to diversify risk.[54] But private company securities are restricted, so there is no liquid market for selling them.[55]

The easiest way to satisfy your capital and liquidity needs is for your company to exit the private capital markets. There are two kinds of exit available. You could (i) sell the entire company to a strategic buyer (an acquisition) or (ii) take the company public by listing its shares on a stock market and making an initial public offering of its securities (an IPO). In either an acquisition or an IPO, your startup's exit from the private market allows your startup's shareholders to exit their investments.

If your company exits through an acquisition, all of your company's shares will be purchased by another business, typically a large publicly traded company.[56] The deal can be structured as either a cash deal or a stock deal. In a cash deal, the buyer pays you and your shareholders in cash, providing immediate liquidity. In a stock deal, the buyer offers its own shares as compensation, giving you equity in the buyer's company. In both cases, all shareholders gain liquidity at the time of the sale. An acquisition lets the VCs deliver returns to their LPs. But it will likely require you to cede control of your company's future to the acquiring entity. The acquirer might decide to fire you, disassemble your team, or use the technology you developed for a different purpose than you had envisioned.

If your company exits through an IPO, its shares can be traded on an exchange like NASDAQ or the NYSE. You and other key investors will typically be subject to a six-month lockup before you can sell your shares. The lockup introduces risk because the share price may fluctuate considerably in the first six months. But an IPO has its advantages. It allows you to maintain control of your company. And it gives you a publicly listed class of equity that can serve as currency for future acquisitions and reduce the cost of subsequent equity financing.

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53 *Id.* at 185–87.

54 *See* Broughman & Wansley, *supra* note 41, at 1306.

55 *See* Pollman, *Information Issues*, *supra* note 25, at 180–82 (explaining the relevant securities regulations).

56 While it is possible to do a stock deal with a privately traded buyer, this is uncommon as it does not represent a real exit and does not provide liquidity. Shareholders of the selling firm would trade in their restricted stock in the original company for restricted stock in a different private firm.

B. Exit Trends

The venture capital cycle that we have just described changed in the 2000s and 2010s. Startups stayed private longer and, when they did exit, it was more often through acquisition than IPO. In this Section, we dig into the data to illuminate these trends.

We have charted exit outcomes for U.S. venture-backed startups over the past forty years, using data from the National Venture Capital Association annual yearbooks.[57]

Figure 1 reports the percentage of U.S. venture-backed exits that were IPOs and acquisitions for each year from 1985 to 2023.[58] IPOs predominated in the 1980s and early 1990s, often accounting for over 80% of exits. The fraction of exits that were IPOs, however, plummeted after the dot-com bubble burst in 2000, representing less than 20% of exits every year between 2001 to 2023.[59]

This decline in IPOs can't be blamed on a decline in well-funded startups. From 2001 through 2022, the total amount of venture funding raised climbed to an all-time high.[60] Instead, startups were increasingly *choosing* not to go public. We have entered a regime of "issuer choice."[61]

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[57] Data are pulled from the 2014 and 2024 editions of the NVCA yearbook. *See* 2024 Yearbook, *supra* note 39; Nat'l Venture Capital Ass'n, 2014 Yearbook (2014) [hereinafter 2014 Yearbook]. For all figures in this Article, data representing years 1985–2010 is pulled from the 2014 Yearbook and data representing years 2011–2023 is pulled from the 2024 Yearbook. For an explanation of data methodology for each Yearbook, see 2014 Yearbook, *supra*, at 117–18 and 2024 Yearbook, *supra* note 39, at 71.

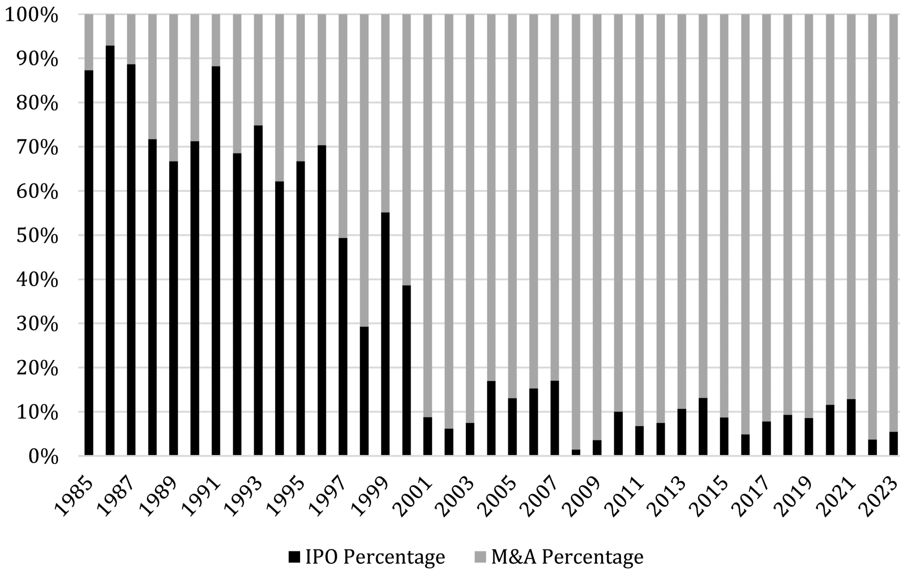
[58] *See* 2024 Yearbook, *supra* note 39, at 32–33; 2014 Yearbook, *supra* note 57, at 73 fig. 4.03, 77 fig. 4.07.

[59] The figures reported in this Section do not separately categorize venture-backed firms that exited through de-SPAC transactions (that is, through mergers with special purpose acquisition companies). Technically, a de-SPAC is an M&A exit because the target is acquired by a SPAC. Substantively, however, a de-SPAC functions more like an IPO, as it allows a startup to become publicly traded without going through the traditional IPO process. Using data reported by Huang, Ritter, and Zhang, we estimate that including de-SPAC transactions as IPOs would increase the percentage of VC-backed exits categorized as IPOs by approximately 3% in 2020 (to 15%), 7.5% in 2021 (to 20%), 4.7% in 2022 (to 8%), and 4.1% in 2023 (to 10%). *See* Rongbing Huang, Jay R. Ritter & Donghang Zhang, Going Public with IPOs and SPAC Mergers 47 tbl. 12 (Dec. 3, 2024) (unpublished manuscript), https://ssrn.com/abstract=4608607 [https://perma.cc/QT9A-ZSFC]. For earlier years, the impact of de-SPACs on exit percentages appears to be de minimis.

[60] 2024 Yearbook, *supra* note 39, at 17.

[61] Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 Geo. L.J. 337, 372 (2013).

FIGURE 1: IPO AND M&A EXITS (1985 TO 2023)



Scholars have offered various explanations for the decline in IPOs. The data suggest that the drop-off has been concentrated among small firms.[62] The most prominent explanation focuses on regulatory costs introduced by the Sarbanes-Oxley Act of 2002, particularly the compliance requirements of Section 404, which mandates detailed internal control audits.[63] These costs are largely fixed, disproportionately affecting smaller firms and deterring them from pursuing IPOs.[64] Others argue that a variety of regulatory

62 *See, e.g.*, Robert P. Bartlett III, Paul Rose & Steven Davidoff Solomon, *The Small IPO and the Investing Preferences of Mutual Funds*, 47 J. CORP. FIN. 151, 151 (2017).

63 *See* William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private*,*"* 55 EMORY L.J. 141, 143 (2006) ("There is certainly anecdotal evidence that the increased cost of regulation is forcing some smaller issuers out of public markets."); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 46 (2002) ("[L]arge, established issuers and law and accounting firms will tend to find it easier to comply with new regulations than smaller or newer firms."); Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 CARDOZO L. REV. 531, 546 (2012) (finding the cost of initial compliance with Section 404 ranges from $1.5 million to $7.3 million).

64 *See* Ehud Kamar, Pinar Karaca-Mandic & Eric Talley, *Going-Private Decisions and the Sarbanes-Oxley Act of 2002: A Cross-Country Analysis*, 25 J.L. ECON. & ORG. 107, 129 (2009) (explaining that Sarbanes-Oxley's internal control mandates under Section 404 impose substantial fixed compliance costs, which reduce small firms' incentives to pursue IPOs).

and institutional changes—notably decimalization, Regulation FD, and the Global Analyst Research Settlement—have reduced the incentives for analysts to cover small-cap stocks.[65] This drop-off in analyst attention has arguably undermined aftermarket support and reduced the visibility of smaller public companies, making it harder for them to raise capital and thus reducing the attractiveness of IPOs for small firms.[66]

Structural changes in the broader economy also may have played a role. Some scholars argue that increasing economies of scale and scope favor larger firms and make smaller firms more likely to be acquired than to go public.[67] While the Sarbanes-Oxley Act received considerable attention in the financial press, the weight of the evidence suggests that the decline in IPOs started several years earlier, and that the dot-com bubble caused a rush to market that masked the underlying decline.[68]

Regardless of the reason—and multiple explanations may be correct[69]—the percentage of venture-backed IPOs sharply declined, starting in the mid-1990s and then bottoming out after the dot-com bubble burst in 2001.[70] As a percentage of venture-backed exits, the IPO market has not recovered to its pre-2000 levels. Instead,

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65 *See* David Weild & Edward Kim, A Wake-up Call for America, 19, 22 (2009) (arguing that the switch to penny decimalization in 2001 narrowed trading spreads—making it unprofitable for brokers to fund research on small-cap stocks and that the 2003 Global Analyst Research Settlement further curtailed analyst coverage by separating research from investment banking revenues); Armando Gomes, Gary Gorton & Leonardo Madureira, *SEC Regulation Fair Disclosure, Information and the Cost of Capital*, 13 J. Corp. Fin. 300, 301 (2006) (finding "that the adoption of Reg[ulation] FD caused a significant reallocation of information-producing resources, resulting in a welfare loss for small firms").

66 *See* Weild & Kim, *supra* note 65, at 22, 25.

67 Ziaohui Gao, Jay R. Ritter & Zhongyan Zhu, *Where Have All the IPOs Gone?*, 58 J. Fin. Quantitative Analysis, 1663, 1664–65 (2013). For other structural explanations of reduced interest in public markets from small, private companies see Craig Doidge, G. Andrew Karolyi & René M. Stulz, *The U.S. Left Behind? Financial Globalization and the Rise of IPOs Outside the U.S.*, 110 J. Fin. Econ. 546 (2013) (arguing that the United States is experiencing an IPO listing gap); Bartlett III et al., *supra* note 62 (finding that mutual funds reevaluated risk after the 1998 Russian financial default and this change caused them to stop participating in small firm IPOs).

68 *See* Jay Kesten, *The Law and Economics of the Going-Public Decision*, *in* The Oxford Handbook of IPOs 39–40 (Douglas Cumming & Sofia A. Johan eds., 2018).

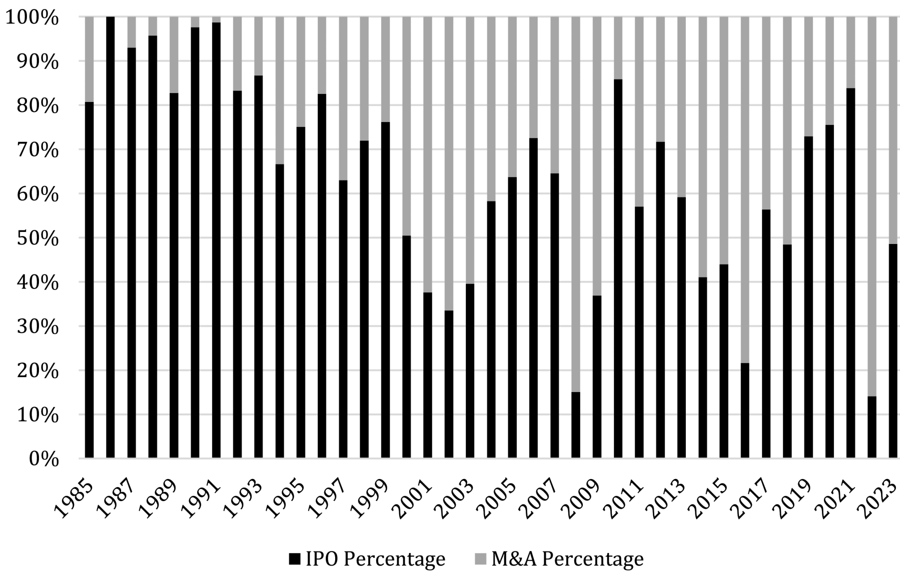
69 The discussion above is incomplete and does not explore other factors that could also influence IPO activity. In particular, we focus on structural and regulatory changes that help explain long run trends and pay less attention to year-to-year fluctuations. Two important macroeconomic episodes—the global financial crisis of 2008 and the post-COVID spike in inflation and interest rates—also impact IPO activity, as evidenced by the troughs and peaks in Figure 2, *infra*.

70 *See supra* Figure 1.

acquisitions have become the dominant exit route in the past two decades.[71]

To be sure, there are still some very large firms that exit via IPO, and these mega-IPO exits are important to VC returns. To illustrate, we recreate Figure 1 with exits weighted by deal size. Figure 2 reports the percentage of total venture-backed exit dollars obtained via IPOs and acquisitions for each year from 1985 to 2023.[72] Even after 2000, we find several years in which the VC industry received more than 60% of total exit returns from IPOs.[73]

FIGURE 2: IPO AND M&A EXIT ($-WEIGHTED)



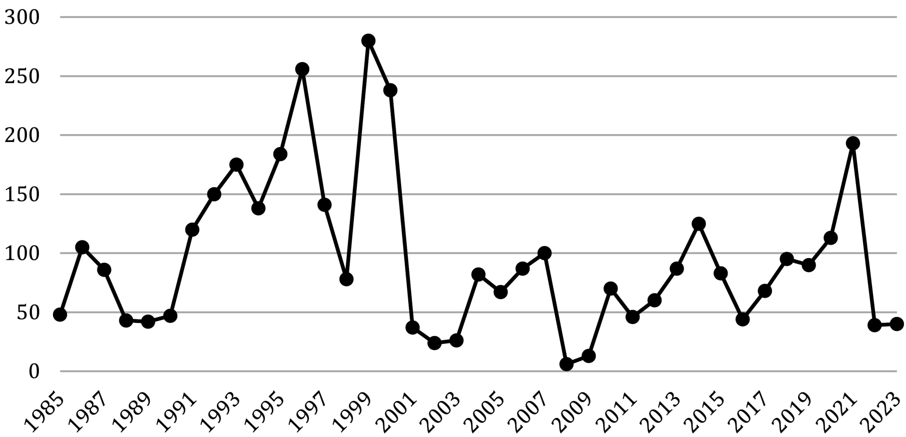
[71] *See* Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 14 (2021).

[72] *See* 2024 YEARBOOK, *supra* note 39, at 32–33; 2014 YEARBOOK, *supra* note 57, at 73 fig. 4.03, 77 fig. 4.07. Comparing IPO and M&A exit valuation is not quite apples-to-apples. To avoid artificially inflating IPO exit values, we use pre-offer valuations. For pre-2011 pre-IPO valuations we subtract post-IPO value from the value of the public offering. *See* 2014 YEARBOOK, *supra* note 57, at 73 fig. 4.03. For data 2011 and on, we reference "Deal Value." *See* 2024 YEARBOOK, *supra* note 39, at 32.

[73] Some caveats, however, are in order. It is difficult to compare acquisitions and IPOs by deal value because, while every IPO price is a matter of public record, the price of an acquisition often remains private. Indeed, pricing data is reported for less than half of all M&A deals in the NVCA annual reports.

Focusing on larger firms, the IPO story is not so much one of decline as one of extreme year-to-year cyclicality. To illustrate, Figure 3 reports the number of venture-backed IPO exits each year from 1985 to 2023.[74] During market downturns—for example, the period immediately following the dot-com crash and the global financial crisis—the IPO market effectively shuts down. But even outside of economic downturns there is hard-to-explain fluctuation from one year to the next. For instance, almost three times as many IPOs occurred in 2014 as in 2016.

FIGURE 3: IPO COUNT (1985 TO 2023)



Compare this to Figure 4, which reports the number of acquisitions of venture-backed startups each year.[75] Both figures report data over the 1985 to 2023 period, and yet the year-to-year fluctuation is much more pronounced among IPOs than among acquisitions. The acquisition data in Figure 4 largely reflects the growth of the VC industry over this period with steady year-over-year growth in exits.[76] By contrast, Figure 3 is a series of peaks and valleys. Practitioners view the relative stability of the acquisition market as a way to fill some of the gaps in the IPO

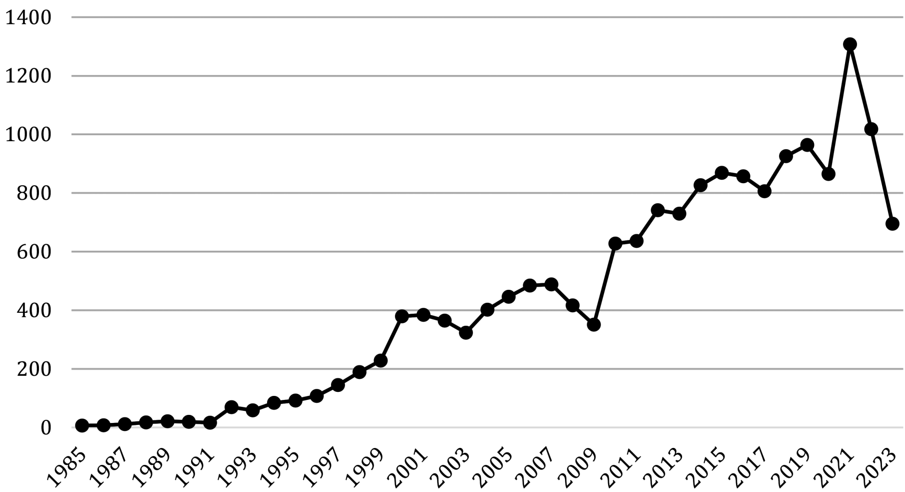
[74] *See* 2024 YEARBOOK, *supra* note 39, at 32; 2014 YEARBOOK, *supra* note 57, at 73 fig. 4.03.

[75] 2014 YEARBOOK, *supra* note 57, at 77 fig. 4.07; 2024 YEARBOOK, *supra* note 39, at 33.

[76] Even though publicly disclosed acquisition data is incomplete, data from the NVCA yearbooks suggests that M&A exits have risen significantly in dollar terms—from about $74 billion spent on startup acquisitions in the 1990s to $257 billion in the 2000s, and $445 billion in the 2010s. *See* 2014 YEARBOOK, *supra* note 57, at 77 fig. 4.07; 2024 YEARBOOK, *supra* note 39, at 33.

market.[77] Startups that might have pursued an IPO under different conditions opt for an acquisition if they are ready for exit during a cold IPO market.

FIGURE 4: M&A COUNT (1985 TO 2023)



An increasing number of startups, though, are not choosing between an IPO or an acquisition. They are choosing to remain private. Over the last several decades, Congress and the SEC have gradually made it easier for startups to raise capital in private markets.[78] In the 2010s, new classes of investors—private equity firms, mutual funds, and sovereign wealth funds—started making direct investments in startups, which made it easier for startups to remain private.[79] The increasing availability of late stage capital led to the creation of unicorns.

Figure 5 illustrates the interaction between the gradual rise of large, late-stage startups and the exit bottleneck. It reports the number of venture-backed startups with valuations greater than $500 million—known as "minicorns"—that exit each year (line graph) and that remain inside venture portfolios (bar chart).[80] Each year

77 *See, e.g.*, Jeffrey Gangemi, *M&As Are Up, IPOs Are Down. What's the Story?*, CORNELL BUS. NEWS (Feb. 28, 2019), https://business.cornell.edu/hub/2019/02/28/mas-are-up-ipos-are-down-whats-the-story [https://perma.cc/Z6B6-FZ4S].

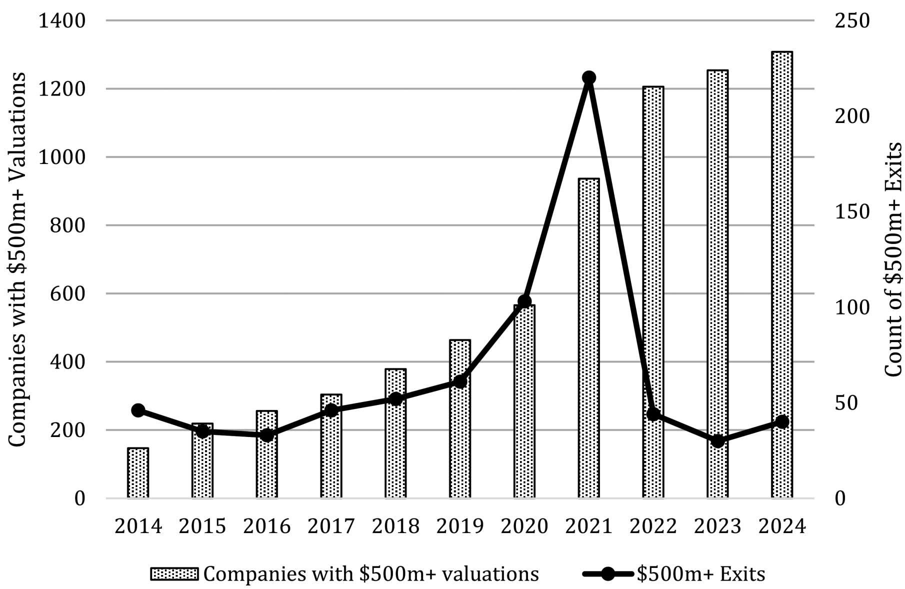
78 *See* de Fontenay, *supra* note 6, at 467–70.

79 *See* Pollman, *Startup Governance*, *supra* note 2, at 175.

80 PITCHBOOK & NAT'L VENTURE CAPITAL ASS'N, Q4 2024 VENTURE MONITOR 3 (2025).

from 2015 to 2021, we see a steady increase in both the number of minicorns and minicorn exits. But starting in 2022, we observe a sharp divergence. The number of startups with valuations greater than $500 million continues to increase, but exits do not. While a number of factors likely explain these patterns, we believe that one important factor is increased antitrust scrutiny of startup acquisitions.

FIGURE 5: MINICORNS AND MINICORN EXITS



II
ANTITRUST AND STARTUP ACQUISITIONS

Under the Biden administration, the DOJ and the FTC stepped up enforcement of the antitrust laws. The agencies tightened scrutiny of firm conduct and significant mergers. They also broke with past practice of resolving most contentious merger challenges with consent decrees allowing transactions to proceed and declared their intention to sue to block problematic deals instead. The agencies took a particular interest in Big Tech's acquisitions of startups. They sued to block some deals and to unwind others.[81] The FTC also enacted a series of policy changes that

[81] *See, e.g.*, Complaint at 2, FTC v. Microsoft Corp., No. 3:23-cv-02880 (N.D. Cal. June 12, 2023) (seeking a temporary restraining order and preliminary injunction preventing Microsoft from acquiring Activision Blizzard); Complaint at 2, FTC v. Meta Platforms,

made the merger review process in general more challenging, expensive, and uncertain for merging parties.[82] And while the government didn't always win in court, the credible threat of antitrust enforcement, and the enhanced procedural burdens and uncertainty surrounding merger review, reshaped the dealmaking environment in Silicon Valley.

A. Merger Enforcement and Dealmaking

1. Background Law and Merger Review Process

Antitrust law restricts firms' ability to merge. Section 7 of the Clayton Act bars transactions that "may substantially lessen competition" or "tend to create a monopoly."[83] The Act gives antitrust enforcers the authority to sue to block a merger before it is consummated, if they can show that the transaction is likely to harm competition.[84] The antitrust enforcement agencies can also challenge consummated mergers under Section 2 of the Sherman Act,[85] which prohibits unlawful acquisition or maintenance of monopoly power. Such post-consummation Section 2 challenges are comparatively rare, however.[86] Startup acquisitions are subject in the first instance to the antitrust enforcement agencies' merger review process, governed by Section 7, which is our focus here.

No. 3:22-cv-04325 (N.D. Cal. July 27, 2022) (seeking temporary restraining order and preliminary injunction preventing Meta from acquiring Within); First Amended Complaint at 76, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Aug. 19, 2021) [hereinafter Facebook Complaint] (challenging Facebook's acquisitions of Instagram and WhatsApp).

82 *See infra* Section II.B.2.

83 15 U.S.C. § 18. Many state laws have similar prohibitions. *See, e.g.*, Colo. Rev. Stat. § 6-4-107 (2024) (Colorado law restricting unlawful mergers).

84 *See, e.g.*, Herbert J. Hovenkamp, *Prophylactic Merger Policy*, 70 Hastings L.J. 101, 102 (2018) ("An important purpose of the antitrust merger law is to arrest [antitrust harms] in their 'incipiency,' by preventing business firm acquisitions that are likely to facilitate them."). Courts and enforcers take a multi-faceted approach to merger analysis under Section 7 of the Clayton Act. However, the effect of a proposed transaction on concentration in a relevant market is often a key criterium in determining which mergers are challenged and whether those challenges are successful. *See, e.g.*, 2023 Merger Guidelines, *supra* note 12, at 2 ("Market concentration is often a useful indicator of a merger's likely effects on competition.").

85 15 U.S.C. § 2.

86 A recent example of a Section 2 challenge to a consummated merger is the Federal Trade Commission's case against Meta, which alleged that Facebook unlawfully maintained its monopoly power in "personal social networking" via its acquisitions of Instagram and WhatsApp. Facebook Complaint, *supra* note 81, at 76; *see also* Complaint at 3, United States v. Microsemi Corp., No. 1:08-cv-1311 (E.D. Va. Dec. 18, 2008) (challenging consummated merger under Section 7 of the Clayton Act and Section 2 of the Sherman Act). Consummated mergers are also subject to challenge under Section 1 of the Sherman Act (15 U.S.C. § 1), which bars unreasonable restraints of trade. *See* Org. for Econ. Coop. & Dev., Directorate for Fin. and Enter. Affs. Competition Comm., Disentangling Consummated Mergers – Experiences and Challenges – Note by the United States 2 (2022), https://www.justice.gov/atr/media/1347651/dl?inline [https://perma.cc/B8XX-CASM].

The nuts and bolts of U.S. merger review procedure are dictated by the 1976 Hart-Scott-Rodino Act.[87] Before HSR, parties had no obligation to notify the federal antitrust enforcement agencies about impending deals, so the agencies often found out about potentially problematic mergers only after the transactions had been consummated.[88] While the government could sue to unwind an anticompetitive merger post-consummation, remedying the harm frequently proved challenging. Once the merged firms had combined their assets, courts would be forced to find ways to "unscramble the eggs," which was often administratively difficult.[89]

Congress enacted HSR to address this problem by requiring firms to notify the agencies of mergers and acquisitions that exceed certain dollar-value thresholds and to wait to consummate their deals until the agencies have had an opportunity to review them.[90] For these larger transactions, HSR mandates that merging firms file a notification with the agencies and provide certain information about their deal, the parties, and their lines of business. An HSR filing starts a thirty-day waiting period during which one of the two antitrust enforcement agencies—the FTC or the DOJ—will review the deal to see if it appears to raise competition issues.[91] If a deal does not seem to pose a

[87] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in scattered Sections of 15 U.S.C. and 28 U.S.C.).

[88] *See, e.g.*, William J. Baer, Former Dir., Bureau of Competition, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, Fed. Trade Comm'n (Oct. 31, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act [https://perma.cc/VX7R-C2Q9] (describing the "major problem" of the "midnight merger,"—transactions that were negotiated in secret and "that took place before the agencies found out about" them—and noting that "before HSR, relatively few mergers were challenged at the premerger stage").

[89] *Id.*; *see also* H.R. Rep. No. 94-1373, at 11 (1976) (Conf. Rep.) ("'Unscrambling' [a] merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.").

[90] 15 U.S.C. § 18a(a) ("[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . .").

[91] When an HSR notification is received, the agencies confer to determine which of them will be assigned the transaction. The decision on which agency will review a transaction is made through what is called the "clearance process." *See Premerger Notification and the Merger Review Process*, Fed. Trade Comm'n, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process [https://perma.cc/EQ3N-NDTH]. During this process, staff from the two agencies "consult" and "the matter is 'cleared' to one agency or the other for review." *Id.* Officials from the agencies have explained 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." U.S. Gov't Accountability Off., GAO-23-105790, Antitrust: DOJ and FTC Jurisdictions Overlap, but Conflicts are Infrequent 2 (2023). The first day of the waiting period is the day after both agencies receive the HSR filing. Premerger Notification Off. Staff, Bureau

competitive problem, the enforcement agencies will let the thirty-day clock run without notifying the parties. At that point, the parties are free to consummate their transaction. Before the Biden administration, parties also could seek "early termination" of the waiting period.[92] When granted, early termination allows the parties to consummate their transaction before expiration of the thirty-day clock.[93]

If the details provided in an HSR filing raise concerns for the reviewing agency, it can demand additional information from the parties by issuing what is called a "second request."[94] While the disclosure requirements of an initial HSR filing are relatively limited, second requests often require merging parties to produce a significant volume of documents and data, and to make personnel available for depositions. The second request suspends the thirty-day clock, until the point when the parties certify "substantial compliance" with the second request, initiating a second thirty-day waiting period.[95]

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of Competition, *Getting in Sync with HSR Timing Considerations*, Fed. Trade Comm'n (Aug. 31, 2017), https://www.ftc.gov/enforcement/competition-matters/2017/08/getting-sync-hsr-timing-considerations [https://perma.cc/7UCZ-D6GE].

92 The Biden administration antitrust enforcers suspended early termination during the entirety of their term. Jeff Jaeckel, Alexander Okuliar, David Shaw & Aaron Sheinman, *New HSR Guidelines and Biden Administration Enforcement Policy Create Challenging Environment for US Mergers*, Glob. Competition Rev. (Aug. 12, 2024), https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2025/article/new-hsr-guidelines-and-biden-administration-enforcement-policy-create-challenging-environment-us-mergers [https://perma.cc/PQ8P-L3MT] ("Shortly after President Biden's inauguration . . . the agencies 'paused' early termination and, at the time of writing, have not announced any intention to resume."). The early termination option was reinstated in February 2025 concurrent with changes to the HSR prenotification form going into effect. *FTC Finalizes Changes to Premerger Notification Form*, Fed. Trade Comm'n (Oct. 10, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form [https://perma.cc/935X-DX69] ("Following the final rule coming into full effect, the Commission will lift its categorical suspension on early termination of [HSR filings].").

93 Before the Biden administration, parties often sought early termination, and the agencies often granted it. For example, in 2017, parties sought early termination on 76% of notified transactions and the agencies granted 79% of those requests. In 2018, those figures were 71% and 78%; in 2019, they were 72% and 73%. *See* Lina M. Khan & Richard A. Powers, Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., U.S. Dep't of Just., Hart-Scott-Rodino Ann. Rep. Fiscal Year 2020 app. A (2021) [hereinafter 2020 HSR Report], https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf [https://perma.cc/C2CZ-MYPM].

94 *See Premerger Notification and the Merger Review Process*, *supra* note 91 (describing second requests as the alternative to consummating a merger after initial HSR review); 15 U.S.C. § 18a(e)(1)(A) (stating that the antitrust enforcement agencies may "prior to the expiration of the 30-day waiting period . . . require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition").

95 15 U.S.C. § 18a(g)(2)(B).

In cases where an agency believes a transaction poses significant competition issues, the merging firms often will seek to remedy these concerns during the initial waiting period or during the second request. Firms typically will propose structural remedies (divestitures) or conduct remedies to address the agency's concerns.[96] Prior to the Biden administration, merger enforcement for problematic transactions often involved negotiations between the parties and the reviewing agency regarding these types of remedies, resulting in a consent decree.[97] Some scholars and other experts have characterized this type of merger enforcement as more closely resembling regulation than law enforcement.[98]

Only relatively large transactions are subject to HSR's premerger notification mandate. In 2025, parties had to notify the agencies of their deal if it exceeded $126.4 million ("Size of Transaction Test") and one party had annual net sales or total assets of at least $252.9 million, while the other party had annual net sales or total assets of at least $25.3 million ("Size of Person Test").[99] If their transaction was valued at over $505.8 million, then the parties had to notify the agencies regardless of their size.[100] HSR's requirements apply not only to mergers and other complete tie-ups between firms, but also to partial acquisitions, including, subject to certain exemptions, venture capital investments. One important exemption for venture capital firms is that a newly

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96 *See* U.S. Dep't of Just., Antitrust Div., Merger Remedies Manual 4 (2020) ("Merger remedies take two basic forms: one addresses the *structure* of the market, the other the *conduct* of the merged firm. Structural remedies generally will involve the sale of businesses or assets by the merging firms.").

97 *See* 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, 898 (1997) ("[T]he vast majority of merger challenges today are resolved by consent decree[;] . . . litigation is extremely rare . . . . [a]nd divestiture . . . is once again common."); *see also infra* Section II.A.2 (showing that most merger challenges in the Obama and first Trump administrations were resolved with a consent decree).

98 *See* D. Daniel Sokol, *Antitrust Merger Control as a Regulatory Sandbox*, 49 J. Corp. L. 403, 403 (2024) (arguing that "[f]ederal antitrust changed the way it approved merger control by moving from *ex post* litigation to a quasi-regulatory *ex ante* regime in 1976 with the passage of the Hart-Scott-Rodino Act"); Joe Sims, Robert C. Jones & Hugh M. Hollman, *Merger Process Reform: A Sisyphean Journey?*, 23 Antitrust 60 (2009) (arguing that "today's HSR process" has "become a full-blown merger regulation system"); Sims & Herman, *supra* note 97, at 865 (describing the premerger notification provisions of the HSR Act as "the most important factor in the replacement of merger control through litigation with a comprehensive scheme of merger regulation").

99 *See New HSR Thresholds and Filing Fees for 2025*, Fed. Trade Comm'n (Feb. 6, 2025), https://www.ftc.gov/enforcement/competition-matters/2025/02/new-hsr-thresholds-filing-fees-2025 [https://perma.cc/73BQ-RU72]; *see also* 16 C.F.R. § 801.1(h) (2025) (describing original notification thresholds).

100 *See New HSR Thresholds and Filing Fees for 2025*, *supra* note 99.

formed entity holding only cash to make an acquisition is considered to have no assets for purposes of HSR and therefore will not satisfy the Size of Person Test.[101] An entity of this type therefore will not be required to make an HSR filing for acquisitions valued at less than $505.8 million, though it will have to file for transactions valued at that number or more.[102]

2. *Enforcement Trends*

Across presidential administrations, the antitrust enforcement agencies issue second requests on only a small percentage of notified deals, usually the bigger deals, and challenge even fewer. Before the Biden administration, the agencies resolved most of these challenges with negotiated consent decrees.

During the ten-year period from fiscal year (FY) 2011 through FY 2020, firms notified the agencies of an average of 1,687 transactions per year.[103] The volume of filings during this period ranged from

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101 *See* 16 C.F.R. § 801.11(e) (2025) (describing exemption for newly formed entities holding only cash).

102 HSR's "investment-only" or "passive-investor" exemption is also sometimes relevant for VC investments, though its application is narrow. *See* Debbie Feinstein, Ken Libby & Jennifer Lee, *"Investment-only" Means Just That*, Fed. Trade Comm'n (Aug. 24, 2015) https://www.ftc.gov/enforcement/competition-matters/2015/08/investment-only-means-just [https://perma.cc/STH2-7RLS] ("We have long made clear that the investment only exemption is a narrow exemption."). This exemption applies if an entity acquires less than ten percent of the voting securities of a firm and the entity has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. 801.1(i)(1) (2025); *see* Feinstein, Libby & Lee, *supra*, at 1–2 (explaining the limits of the investment-only exemption). The 1978 Statement of Basis and Purpose that accompanied issuance of the HSR rules stated that conduct evidencing an intent "inconsistent with investment purpose" includes "(1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; [and] (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer." Background Information to § 801.1(i)(1), 43 Fed. Reg. 33465 (July 31, 1978). Because VCs often take a board seat or otherwise participate in management of their portfolio companies, the passive-investor exemption will not apply to many VC investments.

103 Of the total number of HSR filings each year, a small subset involve transactions for which, for various reasons, the agencies are not authorized to issue a second request. Such transactions include those (1) for which only one party filed an HSR, (2) that are exempt from a second request under certain provisions in the Clayton Act, (3) that turn out to be non-reportable, and (4) that are withdrawn before a second request is issued. *See, e.g.*, 2020 HSR Report, *supra* note 93, app. A n.2; Lina M. Khan & Jonathan Kanter, Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., U.S. Dep't of Just., Hart-Scott-Rodino Ann. Rep. Fiscal Year 2023 app. A (2024) [hereinafter 2023 HSR Report], https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf [https://perma.cc/92K4-5EUY]. The agencies record the number of notified transactions for which they can issue second requests and refer to this statistic as "Adjusted Transactions In Which A Second Request Could Have Been Issued." *See, e.g.*, 2020 HSR Report, *supra* note 93, app. A. We use here this adjusted transactions figure. The average total HSR filings for the period FY 2011–FY

a low of 1,286 in FY 2013 to 2,028 in FY 2018.[104] Only a tiny slice of these notified transactions was subject to enhanced agency review. Enforcers issued second requests on an average of just 3.01% of eligible notified transactions during this period.[105] Accordingly, almost all notified transactions were cleared within the thirty-day waiting period.[106] During the first three years of the Biden administration, filings averaged 2,726 annually.[107] The rate of second requests fell during the Biden administration, to an average of 1.82% of eligible notified transactions for FYs 2021–2023.[108] However, as we explain below, the Biden administration enforcers were much more willing to sue to block problematic transactions than their counterparts had been during the Obama and first Trump administrations.

The chances that the agencies will look closely at a notified transaction increase with a deal's size. In FY 2019, for example, the agencies issued second requests on 10.3% of notified transactions valued at over $1 billion and on 4% of those valued at between $500 million and $1 billion.[109] Smaller transactions received much less scrutiny.[110] This trend was similar during the Biden administration.[111]

Agency scrutiny of notified mergers is rare, and agency enforcement actions are rarer still. From FY 2011 to FY 2020, the FTC brought an average of 22.2 merger enforcement actions per year,[112] while the DOJ

2020 was 1,739 per year. *See id.* For further analysis of these enforcement statistics, see Samuel N. Weinstein, *Anticompetitive Merger Review*, 56 GA. L. REV. 1057, 1075–78 (2022) (detailing current state of merger-review process).

104 2020 HSR REPORT, *supra* note 93, app. A.

105 This percentage is of notified transactions for which the agencies were authorized to issue a second request. *See* 2023 HSR REPORT, *supra* note 103, app. A n.4.

106 So, for example, in 2020, 97% of transactions were not subject to a lengthy second-request review. *See id.* app. A. In 2018, that figure was 97.8%. *See* 2020 HSR REPORT, *supra* note 93, app. A.

107 *See* 2023 HSR REPORT, *supra* note 103, at 1.

108 *See id.* app. A.

109 *See id.* ex. A.

110 In FY 2019, the agencies issued no second requests on deals valued at between $50 and $100 million. They issued them on 1.5% of deals valued at between $100 and $150 million, 0.7% of deals valued at between $150 and $200 million, and 0.4% of deals valued at between $200 and $300 million. *Id.*

111 In FY 2023, for example, the agencies issued second requests on 3.8% of deals valued at over $1 billion, 2.5% of those valued at between $500 million and $1 billion, 1.2% of those valued at between $300 and $500 million, 2.7% of those valued at between $200 and $300 million, and 0.4% of those valued at between $150 and $200 million. The agencies issued no second requests on transactions valued at between $50 and $150 million. *Id.* app. A.

112 *See Competition Enforcement Database*, FED. TRADE COMM'N, https://www.ftc.gov/competition-enforcement-database [https://perma.cc/4K7C-29YS]. This total includes consent decrees, federal injunctions, administrative complaints, and "Abandoned/Fix-it-First/Restructured" transactions. *Id.* An abandoned transaction is a deal that the parties decided to kill in the face of an agency investigation. A fix-it-first remedy is a structural

brought an average of 18.2 public merger challenges.[113] Taken together, these figures represent an average of 2.4% of notified transactions over that decade.[114] The trend was similar during the Biden administration, though the enforcement rate was even lower. During FYs 2021 through 2023, the FTC initiated an average of 19 merger enforcement actions, while the DOJ brought an average of 17.33 merger challenges.[115] Together, the agencies challenged 1.33% of eligible notified transactions in these years.

While the drop in the percentage of merger challenges and second requests during the Biden administration might appear to suggest laxer enforcement, this is not what happened. Rather, as we show below, the Biden administration tightened enforcement by curtailing the established practice of settling most merger challenges in a way that allowed the deals to move forward and choosing instead to sue to block more deals.

Agency enforcement actions have four possible outcomes: (1) a consent decree, (2) voluntary restructuring pre-complaint, (3) abandonment, and (4) post-complaint litigation, sometimes

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remedy (typically a divestiture) that the parties execute, and an enforcement agency accepts, before a transaction is consummated. *See* Org. for Econ. Coop. & Dev., Directorate for Fin. and Enter. Affs. Competition Comm., Remedies in Merger Cases, Submission by the United States 7 (2011), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf [https://perma.cc/7BGK-PCHJ]. If accepted by an enforcement agency, a fix-it-first remedy avoids the need for the agency to file a complaint. A "restructured" transaction is one in which the parties unilaterally change the substance of their deal to try to eliminate any potential anticompetitive harm it otherwise might have caused. The difference between a fix-it-first remedy and a restructured transaction is that in the latter scenario, the enforcement agency does not agree to the fix. *See* Merger Remedies Manual, *supra* note 96, at 17 n.64.

113 The DOJ defines "Merger Challenges" as including "court challenges, settlements, abandonments, and fix-it-firsts" (transactions the parties restructured before the Division filed a complaint). Antitrust Div., U.S. Dep't of Just., Workload Statistics, FY 2010–2019, at 4, https://www.justice.gov/d9/pages/attachments/2015/10/27/workload-statistics.pdf [https://perma.cc/2G7B-V5DA].

114 We calculated this figure by taking the total number of merger challenges the agencies brought during the period FY 2011–FY 2020, *see supra* notes 112–13 and accompanying text, and dividing it by the total number of eligible notified transactions during that period, *see* 2023 HSR Report, *supra* note 103; 2020 HSR Report, *supra* note 93. Not every one of these merger challenges involved an HSR-notified deal, so the average challenge rate for notified deals was below 2.3%.

115 *See Competition Enforcement Database*, *supra* note 112; Lina M. Khan & Jonathan Kanter, Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., U.S. Dep't of Just., Hart-Scott-Rodino Ann. Rep. Fiscal Year 2021, at 9, 13 (2023), https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2021 [https://perma.cc/SN3G-KQ7B]; Lina M. Khan & Jonathan Kanter, Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., U.S. Dep't of Just., Hart-Scott-Rodino Ann. Rep. Fiscal Year 2022, at 9, 13 (corrected 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/fy2022hsrreportcorrected.pdf [https://perma.cc/W3W5-A8VJ]; 2023 HSR Report, *supra* note 103.

including a trial. Before the Biden administration, the most common outcome was a consent decree, in which the merging firms agreed to measures, often divestitures, designed to remedy a transaction's probable anticompetitive effects. Consent decrees are filed simultaneously with a complaint, resolving the allegations of anticompetitive effects alleged in the complaint. Sometimes the parties, anticipating a government investigation and potential lawsuit, preemptively restructure their transaction to assuage the government's concerns, by divesting assets before their deal is consummated.[116] This approach is referred to as a "fix-it-first" strategy. If the agency accepts the "fix" there is no need for it to file a complaint.[117] In other cases, the parties might abandon their transaction in the face of a government investigation. Finally, in a small number of cases, the government sues to block a transaction and litigates against the merging parties.

During both the Obama and first Trump administrations, consent decrees were by far the most common outcome for contested mergers. In the period FY 2011–2020, according to one metric, an average of 68.36% of agency merger enforcement actions resulted in a consent decree.[118] In that same period, an average of 14.7% of enforcement actions resulted in a complaint being filed (without a consent decree), either in federal court or at the FTC, while 5.36% of transactions were abandoned by the parties.[119] The remaining publicly announced investigations resulted in a closing statement, in which the investigating agency explained its decision not to challenge a merger or seek a remedy.[120] Thus, while enforcement priorities differed between the Obama and first Trump administrations, enforcers in both periods

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116 *See* Merger Remedies Manual, *supra* note 96, at 17 (describing fix-it-first remedies).

117 *Id.* In some cases, the merging parties unilaterally restructure their transaction to try to eliminate any anticompetitive effects it might otherwise have. This is distinct from a fix-it-first remedy because in this scenario the enforcement agency does not "'accept' the fix." *Id.* at 17 n.64.

118 *See DAMITT 2020 Report: Antitrust Merger Enforcement Trends Amid the Pandemic, U.S. Elections and Brexit*, Dechert LLP (Jan. 27, 2021), https://www.dechert.com/knowledge/publication/2021/2/damitt-2020--year-in-review-u-s--and-eu-merger-review-durations.html [https://perma.cc/SR2D-BH64]. The authors of this study define significant merger investigations as HSR reportable transactions "for which the result of the investigation by" the antitrust enforcement agencies "is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release." *Id.*

119 *See id.*

120 *See, e.g.*, Press Release, U.S. Dep't of Just., Antitrust Div., Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of London Stock Exchange Group and Refinitiv (July 31, 2020), https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-closing-its-investigation-london-stock [https://perma.cc/RU8M-HUTA] (explaining the DOJ's decision not to challenge the London Stock Exchange Group's Acquisition of Refinitiv).

pursued a similar overall strategy of resolving most merger challenges with a negotiated settlement.

B. Antitrust Enforcement Under Biden

The Biden administration enforcers had a different view of how to conduct antitrust enforcement. President Biden made clear early on his commitment to a more vigorous competition policy than that of his predecessors.

Shortly after his inauguration, Biden issued an Executive Order on "Promoting Competition in the American Economy."[121] The Order announced a "whole-of-government" approach to competition policy, involving not just the antitrust agencies, but a host of other federal agencies with authority to protect and promote competition.[122] To this end, the Order created the White House Competition Council, composed of the heads of many federal agencies.[123] The Competition Council's remit was to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy."[124] The Order also required agencies to take various actions to strengthen their competition rules.[125]

President Biden's choices to lead the antitrust enforcement agencies, Lina Khan at the FTC and Jonathan Kanter at the DOJ's Antitrust Division, shared a more expansive view of the role that antitrust and competition policy should play in structuring the U.S. economy. Before joining the FTC, Chair Khan was well known as a "Neo-Brandeisian" scholar who argued that the antitrust laws had been systematically underenforced since the 1980s.[126] In her scholarship, Chair Khan contended that the prevailing consumer welfare

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121 Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

122 *Id.* at 36989.

123 Members of the Council included the heads of the departments of Treasury, Defense, Justice, Agriculture, Commerce, Labor, Health and Human Services, and Transportation. *Id.*

124 *Id.* at 36990.

125 For example, the Order mandated that the Attorney General, in consultation with banking regulators, "adopt a plan" within six months for "the revitalization of [bank] merger oversight" and that the chair of the FTC should "consider" working with the Commission to "exercise" the FTC's "rulemaking authority" to "curtail the unfair use of non-compete clauses." *Id.* at 36992.

126 *See, e.g.*, Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L.J.F. 960, 964 (2018) [hereinafter Khan, *Ideological Roots*] ("The sweeping market power problem we confront today is a result of the current antitrust framework."); Lina M. Khan, *Book Review: The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1663 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in The New Gilded Age (2018)) (highlighting the elements of the "Neo-Brandeisian agenda that would resuscitate antitrust," including more aggressive merger enforcement, more "big case" strategy against

standard—with its narrow focus on consumer harm as measured by price effects, innovation effects, and product quality—was inconsistent with congressional intent in passing the antitrust laws.[127] She argued that those laws were designed to achieve a broader set of goals—preserving small businesses, protecting labor, and safeguarding democracy.[128] Like other Neo-Brandeisians, Khan believes that industrial concentration poses a threat to consumers, workers, and American democracy such that reducing and preventing further concentration should be the central goal of antitrust enforcement.[129]

Assistant Attorney General (AAG) Kanter had been a practicing lawyer rather than an academic before joining the government, and he did not have a similar body of work explaining his positions. But it was clear from the beginning of his tenure that he shared many of Chair Khan's views on how to enforce the antitrust laws.[130]

Khan and Kanter moved quickly to change the agencies' approach to merger enforcement through several key policy choices. The most visible and widely discussed changes were to litigation strategy. Under Khan and Kanter, the agencies deviated sharply from the prior era of consent-decree focused enforcement, choosing to litigate rather than settle most merger challenges. Khan and Kanter also made several changes to the merger review process that increased

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dominant companies, increased use of corporate breakups to remedy antitrust violations, and abandoning the consumer-welfare standard).

127 *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 Harv. L. & Pol'y Rev. 235, 270 (2017) (arguing that congresspeople "involved in the debates preceding the passage of the principal antitrust laws voiced a number of concerns, including the protection of consumers and suppliers from firms with market power, the defense of small businesses from the predatory tactics of large rivals, and the preservation of democracy").

128 *Id.*

129 Khan, *Ideological Roots*, *supra* note 126, at 978–79 (advocating for "[r]estoring a theory of [market] power that accords with the original values of antitrust—including a distrust of concentrated private power"); Zephyr Teachout, *The Long Future of the Neo-Brandeisian Movement, in Three Parts*, Network L. Rev. (2024) (describing the Neo-Brandeisian movement's vision for antitrust law as "a tool to promote fair competition, prevent market concentration, and ensure that economic power is distributed broadly rather than concentrated in the hands of a few").

130 *See* David McCabe, *The Trustbuster Who Has Apple and Google in His Sights*, N.Y. Times (Mar. 22, 2024), https://www.nytimes.com/2024/03/22/technology/jonathan-kanter-apple-antitrust.html [https://perma.cc/FS8E-HV4D] (detailing Kanter's career as a lawyer, and quoting Lina Khan describing Kanter as "an insider who had also come to very similar conclusions" about the antitrust laws being "an essential tool to make the economy more fair"); David Dayen & Alexander Sammon, *The New Brandeis Movement Has Its Moment*, Am. Prospect (July 21, 2021), https://prospect.org/justice/new-brandeis-movement-has-its-moment-justice-department-antitrust-jonathan-kanter [https://perma.cc/954J-B3Z7] (describing Khan and Kanter as part of a small group that became "the backbone of what came to be known as the 'New Brandeis' movement").

the burden on merging parties, making the process more expensive, more unpredictable, and lengthier. Finally, the agencies updated their merger guidelines to reflect their more hawkish approach to merger enforcement.

1. Litigation Strategy

We begin with litigation strategy. The Biden enforcers announced that the agencies would no longer aim to resolve most merger litigation with consent decrees. Instead, they would sue to block problematic deals. In making this determination, Khan and Kanter signaled that they were willing to accept more litigation risk than earlier administrations had been comfortable with.[131]

AAG Kanter expressed his concern that "merger remedies short of blocking a transaction too often miss the mark."[132] He asserted that when the agency determines that a merger is likely to harm competition, "in most situations we should seek a simple injunction to block the transaction."[133] Among other reasons Kanter cited for the move away from consent decrees was that divestitures are difficult to craft in dynamic markets and that divested assets often are acquired by firms that do not use them to their best effect, with the result that consent decrees lead to what he called "concentration creep."[134] As for the advantages of litigating, Kanter observed that "settlements do not move the law forward" and that new court opinions applying the antitrust laws "in modern markets" will "provide clarity to businesses."[135] Kanter stated that enforcers "need to be willing to take risks" in bringing cases requiring courts to apply "old precedents" to today's markets.[136]

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[131] *See* Khushita Vasant, *US DOJ to take Measured, Calculated Litigation Risks in Bringing 'Righteous' Cases, Kanter Says*, MLex (June 20, 2022), https://www.mlex.com/mlex/articles/2125653/us-doj-to-take-measured-calculated-litigation-risks-in-bringing-righteous-cases-kanter-says [https://perma.cc/VXS3-R5KU] (stating AAG Kanter's position that "the agency isn't afraid of losing lawsuits and will take measured and calculated risks in bringing 'righteous' cases"); *Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section*, U.S. Dep't of Just.: Off. of Pub. Affs. (Jan. 24, 2022) [hereinafter *Kanter*], https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york [https://perma.cc/93FG-AN4L] (asserting that "we need to be willing to take risks and ask the courts to reconsider the application of old precedents to [current] markets").

[132] *Kanter*, *supra* note 131.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

Similarly, Chair Khan announced that the FTC would be "focusing our resources on litigating, rather than on settling."[137] Like Kanter, Khan rejected the prevailing regulatory model of merger enforcement, where the merging parties and the agencies work together to craft settlements addressing the competitive harms of proposed deals. She observed that helping parties "fix" otherwise unlawful deals "is not work that the agency should have to do."[138]

The results of this shift away from a policy favoring merger settlements to one favoring litigation are evident in the enforcement statistics. In FY 2021, the numbers looked somewhat similar to the longer-term trend: Of twenty-seven significant merger investigations the agencies undertook, 62.96% resulted in a consent decree, 22.22% in a complaint, and 14.81% in abandonment.[139] But in FYs 2022–2024, once the Biden enforcers' approach was in full effect, the number of consent decrees fell to an average of 24.49% of significant merger investigations, while abandonments rose, averaging 32.65% over these years.[140] Complaints were also up sharply in this period, and were the outcome in an average of 42.86% of significant merger investigations.[141] As a result, for the first time in a long time, under the Biden administration, a significant merger investigation was more likely to end in a lawsuit or an abandonment than a negotiated settlement. In FY 2022, of twenty significant merger investigations, twelve resulted in a complaint being filed or the parties walking away from their deal.[142] Only eight ended in a consent decree.[143] The figures were even starker in 2023, when eleven investigations resulted in a

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137 Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan [https://perma.cc/7VV3-MT9C].

138 *Id.*

139 *See DAMITT 2023 Annual Report: Minding the Gap in Merger Enforcement*, DECHERT LLP (Jan. 30, 2024), https://www.dechert.com/knowledge/publication/2024/1/damitt-2023-annual-report—minding-the-gap-in-merger-enforcement.html [https://perma.cc/7MWW-P75C]. The Dechert Antitrust Merger Investigation Timing Tracker (DAMITT) survey defines "significant investigations" as those that "were the subject of a consent decree, complaint, closing statement, or agency press release announcing an abandoned transaction." *Id.* This category does not include investigations in which the agencies took no enforcement action but did not issue a closing statement, nor does it include "abandoned or restructured transactions for which the agencies have not issued a press release." *Id.*

140 *See DAMITT Q1 2025: Slow Start to Merger Enforcement Amid Leadership Transitions in U.S. and EU*, DECHERT LLP (May 1, 2025), https://www.dechert.com/knowledge/publication/2025/4/damitt-q1-2025.html [https://perma.cc/N2YT-4CYF]. According to this survey, forty-nine "significant U.S. merger investigations" were concluded in FYs 2022–2024. *Id.*

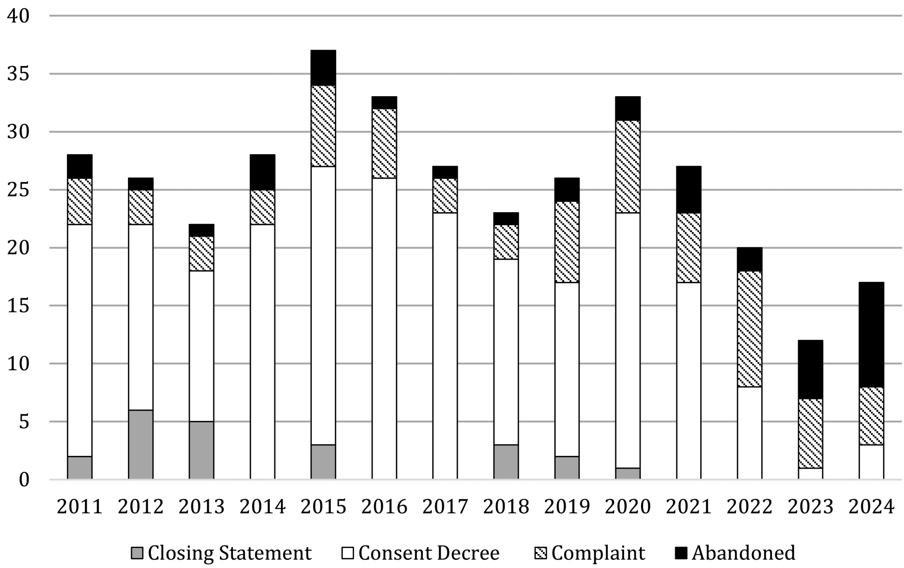
141 *See id.*

142 *Id.*

143 *Id.*

complaint or an abandonment and only one in a consent decree.[144] In 2024, fourteen investigations ended with an abandonment or a complaint and three with a consent decree.[145] These trends are represented in Figure 6, below.[146]

FIGURE 6: OUTCOMES OF SIGNIFICANT MERGER INVESTIGATIONS (DOJ + FTC)



The agencies' more aggressive litigation stance resulted in losses in some merger cases, including the FTC's challenges to Meta's acquisition of Within[147] and Microsoft's acquisition of Activision Blizzard,[148] as well as the DOJ's challenges to U.S. Sugar's acquisition of Imperial

144 *Id.*

145 *Id.*

146 *Id.*; *DAMITT 2016 Year in Review: Significant Antitrust Merger Investigations Longer Than Ever; Deal Agreements Reflect Expected Delays*, DECHERT LLP (Jan. 12, 2017), https://info.dechert.com/10/7980/january-2017/damitt-2016-year-in-review.asp [https://perma.cc/NV9E-NCYU].

147 *See* FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892 (N.D. Cal. 2023) (denying FTC's motion for preliminary injunction against Meta and Within barring them from consummating their merger).

148 *See* FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023) (denying FTC's motion for preliminary injunction against Microsoft and Activision barring them from consummating their merger), *aff'd*, FTC v. Microsoft Corp., 136 F. 4th 954 (9th Cir. 2025).

Sugar[149] and Booz Allen Hamilton's acquisition of EverWatch.[150] But the reluctance to settle and the willingness to take cases to trial appears to have had the desired effect of chilling merger activity, particularly for more problematic deals. This chilling effect can be seen, in part, in the sharp uptick in abandoned transactions the agencies recorded.[151] After a post-pandemic spike in fiscal years 2021 and 2022, HSR filings were down significantly in 2023, though they recovered slightly in 2024.[152] HSR filing volume is affected by many factors, so it is difficult to draw any firm conclusions from these variations. More broadly, however, evidence shows that the agencies' enhanced enforcement dissuaded some firms from pursuing deals that they thought might face antitrust scrutiny.[153] The Biden administration's enforcers believed that this was the direct result of their strategy: "Simply put," AAG Kanter stated, "most anticompetitive deals are no longer getting out of the boardroom."[154]

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149 *See* United States v. U.S. Sugar Corp., C.A. No. 21-1644, 2022 WL 4544025 (D. Del. Sept. 28, 2022) (finding that the government had not met its burden of proof and declining to enjoin U.S. Sugar's acquisition of Imperial Sugar).

150 *See* United States v. Booz Allen Hamilton Inc., Civ. Action No. 22-1603, 2022 WL 9976035 (D. Md. Oct. 17, 2022) (denying government's motion for a preliminary injunction against Booz Allen Hamilton and EverWatch barring them from consummating their merger).

151 *See DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement* (Aug. 6, 2024), https://www.dechert.com/knowledge/publication/2024/8/damitt-q2-2024--abandonments-dominate-the-podium-in-merger-enfor.html [https://perma.cc/NHC7-XYBV] (stating that the six abandoned transactions the antitrust enforcement agencies announced in the first half of 2024 "is the most abandonments" the authors have "recorded in a single year" and describing this spike in abandoned transactions as feeling "less like a shift and more like a landslide"). *Id.*

152 *See* 2023 HSR Report, *supra* note 103, app. A; *Premerger Notification Program*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/premerger-notification-program [https://perma.cc/3LS9-HBNP] (listing preliminary HSR filing totals for 2024).

153 *See, e.g.*, Leah Nylen & Michelle F. Davis, *Big Deals Being Chilled by Biden's Aggressive Antitrust Agenda*, Bloomberg L. (May 10, 2023), https://www.bloomberglaw.com/bloomberglawnews/antitrust/XUPMJDS000000?bna_news_filter=antitrust#jcite [https://perma.cc/E8ZY-94MX] (reporting that the Biden enforcers' "aggressive stance on antitrust is chilling merger activity among the country's biggest companies" and that their litigation-first approach "has discouraged some companies from pursuing unions they would've leapt at in the past"); Alex Llanos, *A New Global Antitrust Regime and Its Chilling Effect on Mergers*, Mia. Int'l & Comp. L. Rev. (Nov. 26, 2023), https://international-and-comparative-law-review.law.miami.edu/a-new-global-antitrust-regime-and-its-chilling-effect-on-mergers [https://perma.cc/AF63-E3ST] (arguing that aggressive antitrust enforcement has "had a chilling effect on mergers, especially in the U.S.").

154 *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at the Second Annual Spring Enforcers Summit*, U.S. Dep't of Just.: Off. of Pub. Affs. (Mar. 27, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-second-annual-spring [https://perma.cc/69SN-E4G2].

2. *Early Termination*

While the shift from settlement to litigation garnered the most headlines, it is not the only way in which the Biden administration transformed merger enforcement. The agencies made a number of changes to their merger review processes that caused reviews to become lengthier, more uncertain, and more burdensome for the parties. These changes included (1) suspending the early termination program, (2) requiring parties entering consent decrees with the FTC to agree to give prior notice and seek prior approvals from the agency for future transactions, (3) admonishing parties that the running of HSR's thirty-day waiting period did not necessarily mean that the agencies would not challenge a merger, and (4) altering the HSR form to require parties to provide more information and documents with their initial filings.

Certain of these changes addressed important gaps in merger enforcement—for example the threat of industry roll-ups and board interlocks—while others appeared less targeted. We do not address the overall merits of these reforms in this Part. Our point is only that these policy changes chilled merger activity, especially mergers that were likely to garner agency scrutiny. We consider each of these policies in turn below.

We begin by discussing suspension of the early termination program because it is the strongest evidence that the Biden enforcers intended to chill merger activity across the board, rather than taking aim only at the most problematic transactions. The agencies' early termination program permits either merging party to request that the agencies end the HSR waiting period before the thirty-day clock has run.[155] By allowing merging parties whose transactions pose no competitive threat to consummate their deals more quickly, early termination reduces the time and expense of merger review and lowers deal risk, at least on the margins.[156] In the first days of the Biden administration, the antitrust agencies announced that they were suspending the early termination program. The FTC stated that due to the "transition to the

155 Premerger Notification Office Staff, Bureau of Competition, *supra* note 91. Certain transactions have only a fifteen-day waiting period. Early termination was available for those transactions too. *Id.*

156 *See* Statement from Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, and Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Regarding the Commission's Indefinite Suspension of Early Termination (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf [https://perma.cc/GGM7-9C39] (asserting that the HSR thirty-day waiting period "comes at a cost, which is why Congress gave the Agencies the discretion to reduce the burden by terminating review of competitively benign transactions early").

new Administration" and "the unprecedented volume of HSR filings for the start of a fiscal year," the Commission, "with support from the Antitrust Division . . ., will be reviewing the processes and procedures used to grant early termination."[157] During this review, the FTC said it would temporarily suspend the early termination program, though it "anticipate[d] that this temporary suspension [would] be brief."[158] Ultimately, the program was suspended for four years—until February 2025—when it was reinstated concurrent with revisions to the HSR form taking effect.[159]

Before its suspension, the early termination program was popular with merging parties. Early termination was often sought and often granted. For example, in 2017, parties sought early termination on 76% of notified transactions and the agencies granted 79% of those requests.[160] Other years were similar.[161] Critics of suspending the program, including two former FTC Commissioners, questioned the Commission's proffered explanation for the change and argued that the move was a way to "increase delay and uncertainty" for merging parties.[162] Whatever the merits of suspending the program, doing so inarguably extended the pendency of merger review for many merging parties, increasing the expense of compliance and raising the risk that deals would collapse. And, unlike some of the other Biden administration merger review changes, this policy change affected all parties with mergers before the

157 *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination*, Fed. Trade Comm'n (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination [https://perma.cc/SS4M-CYFL].

158 *Id.*

159 *FTC Finalizes Changes to Premerger Notification Form*, Fed. Trade Comm'n (Oct. 10, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form [https://perma.cc/T659-V8H9] ("Following the final rule coming into full effect, the Commission will lift its categorical suspension on early termination of [HSR filings].").

160 2020 HSR Report, *supra* note 93, app. A. As explained in footnote 103, *supra*, some transactions for which an HSR notification is filed are not eligible for a second request. These percentages were generated based on the number of transactions that were eligible for a second request. *See* 2020 HSR Report, *supra* note 93, at 6 n.10.

161 For instance, in 2018, parties sought early termination on 71% of notified transactions, and 78% of those requests were granted; in 2019, those figures were 72% and 73%. 2020 HSR Report, *supra* note 93, app. A.

162 J. Howard Beales III & Timothy J. Muris, Competitive Enter. Inst., Achieving Change at the Federal Trade Commission: Success and Failure 56 (2024), https://cei.org/wp-content/uploads/2024/05/Achieving-Change-at-the-Federal-Trade-Commission.pdf [https://perma.cc/8YK9-UKCL]. Commissioners Noah Joshua Phillips and Christine S. Wilson issued a statement criticizing the decision to suspend early termination. They noted that "in more than four decades of HSR Act review, the Agencies have never suspended early termination because of leadership transitions or increased merger filings," and stated that they "view the proffered justifications . . . as unpersuasive." Statement of Noah Joshua Phillips and Christine S. Wilson, *supra*, note 156.

agencies. Indeed, the burdens of the suspension fell most heavily on parties with deals least likely to harm competition, as those were the transactions most likely to be granted early termination in the ordinary course.[163] The policy therefore appeared to reflect an effort to reduce merger activity generally, not just for the most problematic deals.

3. *Prior Notice and Prior Approval*

Another FTC action that affected firms' appetite to merge was its decision in October 2021 to revive an older practice of requiring firms entering consent decrees resolving merger litigation to provide prior notice and obtain prior approval for subsequent mergers in the same product and geographic markets, and sometimes other markets too.[164] In July 2021, the Commission, on a party-line 3-2 vote, withdrew a 1995 policy statement that had mostly ended this practice.[165] Their justification was that since the practice had been curtailed, the Commission had been "forced to re-review the same transaction on numerous occasions at considerable expense."[166] In its October 2021 statement reinstating the prior approval policy, the Commission made clear that its intent was in part to reduce merger activity: "Too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures."[167] This strategy made sense from

163 The agencies will grant early termination only if they complete their review and determine that they will not take an enforcement action before the running of the thirty-day clock. *About Early Termination Notices*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/about-early-termination-notices [https://perma.cc/4PFK-UFFL]. Therefore, the suspension of the early termination program only affected deals that would not have otherwise merited more in-depth review. *See also* Sokol, *supra* note 98, at 416 (stating that early termination applied to "deals that were non-problematic" allowing them to "be cleared under HSR quickly").

164 *See* Statement from Fed. Trade Comm'n on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021) [hereinafter FTC Prior Approval Statement], https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf [https://perma.cc/FK5M-S9KG].

165 Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers [https://perma.cc/MF6V-MDVX].

166 *Id.* The FTC pointed to the two times it sued to block Staples' acquisition of Office Depot as an example of having to relitigate the same transaction and stated that "[o]ther industries involving FTC re-review of the same deal include gasoline retailing and wholesaling, gasoline import terminaling, hot oil used to process aluminum, and industrial chemicals." *Id. See also* FTC v. Staples Inc., 190 F. Supp. 3d 100 (D.D.C. 2016) (granting preliminary injunction blocking Staples' acquisition of Office Depot); FTC v. Staples Inc., 970 F. Supp. 1066 (D.D.C. 1997) (granting preliminary injunction blocking Staples' acquisition of Office Depot).

167 FTC Prior Approval Statement, *supra* note 164, at 1.

the firms' perspective, the Commission asserted, because there were "few downsides" to attempting it.[168] The threat of a prior approval provision imposed a potentially significant cost on these acquisitive firms, however, possibly derailing their merger strategy.

The Commission also incentivized firms to abandon potentially anticompetitive deals by stating that it was "less likely" to pursue a prior approval provision against firms that walked away from deals before certifying substantial compliance with a second request.[169] Earlier abandonments save Commission resources. Prior approval provisions are also valuable from the FTC's point of view in preventing serial acquisitions below the HSR threshold.[170] In the wake of this policy change, the FTC once again began including prior notice and prior approval provisions in its consent decrees.[171] Often these provisions' requirements last ten years.[172]

The FTC's prior notice and prior approval policy change increased the risk for merging parties of deals collapsing.[173] A former principal

168 *Id.*

169 *Id.* at 2.

170 *Id.* at 1 (stating that prior approval provisions are a "critical tool that serves several Commission interests" including "[d]etecting deals below the HSR reporting thresholds").

171 Practical Law Antitrust, *Prior Approval and Prior Notice Antitrust Risk-Shifting Provisions*, THOMSON REUTERS WESTLAW PRECISION (2024), https://www.westlaw.com/w-036-7623?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/DH32-VE29] (stating that between July 2021 and October 2022 all twelve of the FTC's consent decrees included prior approval provisions, though neither of the DOJ's two decrees had them).

172 *See* FTC Prior Approval Statement, *supra* note 164, at 2 (stating that the FTC's prior approval requirements will last "for a minimum of ten years"); Press Release, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinic* (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis [https://perma.cc/2UGY-4LBA] (announcing that under a proposed consent decree, DaVita would be required for a period of ten years to seek prior FTC approval for any future acquisition of an "ownership interest in a dialysis clinic" in Utah).

173 *See, e.g.*, Leon B. Greenfield, Hartmut Schneider, Álvaro Mateo Alonso & Sarah E. Pugh, *We Didn't Like Your Merger, So Please Come Back: FTC Issues New Prior Approval Policy for Challenged and Aborted M&A Transactions*, WILMERHALE (Oct. 29, 2021), https://www.wilmerhale.com/en/insights/client-alerts/20211029-we-didnt-like-your-merger-so-please-come-back-ftc-issues-new-prior-approval-policy-for-challenged-and-aborted-ma-transactions [https://perma.cc/L6YW-VR87] (asserting that the FTC's prior approval Policy Statement "may chill deal activity, which may be the Commission's goal"). Evidence of this effect can be found in modifications in antitrust risk-shifting provisions in some merger agreements. *See* Practical Law Antitrust, *supra* note 171 (stating that some merging parties have accounted for the possibility of an agency requiring a prior notice and prior approval provision in the risk-shifting provisions in their merger agreements). These risk-shifting provisions typically mandate the level of effort merging parties must devote to seeing their deal through an antitrust investigation. *Id.* Sometimes they require "best efforts" to consummate a transaction, sometimes they include a "hell or high water" clause, under which an acquirer makes an unqualified commitment to take specific measures to ensure

deputy assistant attorney general at the Antitrust Division noted that "[s]ome buyers may decide that they're not willing to take on the risk associated with prior approval requirement."[174] Critics of the FTC's policy observed that prior approval provisions "can be a significant cost to any settlement."[175]

4. *Warning Letters*

While not as significant a burden as the changes to its prior approval policy, the FTC's treatment of HSR's thirty-day waiting period is another example of a policy that increased uncertainty for merging parties. In August 2021, the FTC's Bureau of Competition publicly warned that due to "a tidal wave of merger filings" it was having trouble fully investigating deals before the thirty-day deadline.[176] As a result, the Bureau announced that it would begin sending "warning letters" to merging parties whose deals the agency was not able to fully vet before the deadline. These letters informed the parties that, "[a]lthough the waiting period will expire imminently, the Commission's investigation remains open and ongoing."[177] Further, the letters warned, that "if the parties consummate this transaction before the Commission has completed its investigation, they would do

the transaction survives antitrust review. *See generally* Stephen Fraidin, Joel Mitnick & Ross Steinberg, *Hell or High Water Provisions in Merger Agreements: A Practical Approach*, Harv. L. Sch. F. on Corp. Governance (May 25, 2022), https://corpgov.law.harvard.edu/2022/05/25/hell-or-high-water-provisions-in-merger-agreements-a-practical-approach [https://perma.cc/J799-BGCQ] (describing hell or high water clauses in merger agreements). Once the FTC started to require prior approval provisions, some merging firms negotiated the acquirer's willingness to accept such a clause in a consent decree. *Id.* Some merger agreements stated that the buyer was under no obligation to agree to such a provision, others that the buyer was obligated to agree only if the requirements were immaterial. *Id.* However, some agreements required that the buyer agree to a prior notice or prior approval provision if required to get the deal through. *Id.* Negotiations over these provisions and the threat of having to accept a prior approval provision in a consent decree could cause deals to collapse. *See* Greenfield et al., *supra* (contending that the FTC's prior approval policy "introduces an important new consideration into the antitrust risk assessment for transactions that may draw FTC action, and [that] it is crucial that parties consider these factors when contemplating the risks and benefits of such deals").

174 Siri Bulusu, *Private Equity Deals at Risk After FTC Prior Approval Rule Shift*, Bloomberg L. (Nov. 19, 2021), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X678FR3O000000?bna_news_filter=antitrust#jcite [https://perma.cc/FY46-2MNF].

175 Beales III & Muris, *supra* note 162, at 57.

176 Holly Vedova, *Adjusting Merger Review to Deal with the Surge in Merger Filings*, Fed. Trade Comm'n (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings [https://perma.cc/D6QP-H2XR].

177 *Sample Pre-Consummation Warning Letter*, Fed. Trade Comm'n (Aug. 3, 2021), https://www.ftc.gov/system/files/attachments/blog_posts/Adjusting%20merger%20review%20to%20deal%20with%20the%20surge%20in%20merger%20filings/sample_pre-consummation_warning_letter.pdf [https://perma.cc/7AGA-DSQA].

so at their own risk."[178] While the agencies have always possessed the power to bring post-consummation merger challenges, the language of this warning letter and the accompanying public statement suggested that such challenges might become more frequent.[179] By stating that the termination of the waiting period no longer meant that the agencies would not challenge a deal, these letters extended the period during which merging parties faced litigation uncertainty.[180] And because there was no indication from the agency that this policy would apply only to potentially problematic transactions, it is entirely possible that parties whose deals were competitively benign or even pro-competitive received these warnings, threatening transactions that the FTC was unlikely to challenge.

5. *HSR Form*

Another key Biden-era merger review process change was the significant alterations the agencies made to the HSR form that firms must complete when they make their filings. These changes, which went into effect in February 2025, require merging firms to provide a broader range of information and documents covering a longer period of time than the prior form. For example, the new form extends to the acquired party the requirement to list certain prior transactions in the same industry, mandates that the acquiring party list its officers and directors who serve as officers or directors of firms in the same industry as the

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178 *Id.*

179 *See* Org. for Econ. Coop. & Dev., Directorate for Fin. and Enter. Affs. Competition Comm., Disentangling Consummated Mergers – Experiences and Challenges – Note by the United States 2 (2022), https://one.oecd.org/document/DAF/COMP/WD(2022)42/en/pdf [https://perma.cc/U9AS-Z5Y4] ("In the United States, the same federal law applies to both consummated and unconsummated mergers, and there is no statute of limitations on when the Agencies can initiate a merger challenge."). For an example of a successful challenge to a consummated merger, see United States v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014) (holding that Bazaarvoice's consummated acquisition of its rival, PowerReviews, violated Section 7 of the Clayton Act).

180 *See, e.g.*, Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *Statement Regarding the Announcement of Pre-Consummation Warning Letters* (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf [https://perma.cc/WG6X-7QST] (asserting that the antitrust agencies' warning letters, in conjunction with other changes to the merger review process will "increase the cost and decrease the certainty of completing transactions"); *The FTC's New 'Warning Letter' in Merger Reviews: More Waiting After the HSR Waiting Period?*, WilmerHale (Aug. 16, 2021), https://www.wilmerhale.com/en/insights/client-alerts/20210816-the-ftcs-new-warning-letter-in-merger-reviews-more-waiting-after-the-hsr-waiting-period [https://perma.cc/MZP8-L8SA] (stating that the FTC's new warning letter policy "represents a marked departure from tradition and has significant practical implications for the merger review process going forward," including "greater uncertainty" for merging parties).

target, and expands the requirement to report minority interest holders of the acquiring and acquired firms.[181] The new form is designed to enhance enforcement efforts generally and also aims to achieve several specific enforcement goals, such as combatting anticompetitive roll-ups and limiting board interlocks.[182]

The new form will also have the effect of making HSR filings more expensive and time-consuming for parties. The FTC estimated that the changes will increase the time involved in preparing a filing by sixty-eight hours and raise the costs of filing by about $40,000 on average.[183] Counsel for merging parties have warned their clients that satisfying these new requirements will mean additional lead time and will increase the burden on filers.[184] Critics argue that the form changes are unnecessary and are calculated to reduce merger activity.[185] In its comments on the original version of the proposed rule changes, for example, the American Hospital Association questioned whether the changes were "intended to make the initial investigation phase more

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181 *2025 HSR Form Updates: What Filers Need to Know*, Fed. Trade Comm'n (Jan. 2, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/HSR-Form-Updates-FINAL-POSTED-01-02-25.pdf [https://perma.cc/K5QV-4ANP].

182 *See* Statement of Lina M. Khan, Chair, Fed. Trade Comm'n, joined by Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, and Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, Regarding the Final Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300, and Regarding the FY2023 HSR Annual Report to Congress, Commission File No. P859910, at 3–4 (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/khan-slaughter-bedoya-statement-regarding-final-premerger-notification-form-hsr-rules-fy2023-hsr-annual-report-to-congress.pdf [https://perma.cc/2UHP-EQS9] (explaining that the updated notification form will help the agencies identify anticompetitive roll-up strategies); Premerger Notification; Reporting and Waiting Period Requirements, 89 Fed. Reg. 89216, 89294–98 (Nov. 12, 2024) (to be codified at 16 C.F.R. pts. 801, 803) (discussing the decision to include in the updated notification form additional reporting requirements regarding board interlocks).

183 Premerger Notification; Reporting and Waiting Period Requirements, 89 Fed. Reg. 89216, 89255–56 (Nov. 12, 2024) (to be codified at 16 C.F.R. pts. 801, 803).

184 *See, e.g.*, *FTC Adopts Major Changes to HSR Merger Notification Form*, Latham & Watkins (Oct. 11, 2024), https://www.lw.com/admin/upload/SiteAttachments/FTC-Adopts-Major-Changes-to-HSR-Merger-Notification-Form.pdf [https://perma.cc/8BDQ-HH95] (cautioning that under the new HSR rules, "parties to HSR-reportable deals will need to budget substantially more time to prepare their HSR filings than under the old rules, and should prepare for additional burden to gather the required information"); *FTC Issues New HSR Form – What You Need to Know*, WilmerHale (Oct. 11, 2024), https://www.wilmerhale.com/en/insights/client-alerts/20241011-ftc-issues-new-hsr-form-what-you-need-to-know [https://perma.cc/5KEZ-AJML] (stating that the new form "will fundamentally change the way in which transactions are reported in the United States and materially increase the burden of preparing HSR filings").

185 *See, e.g.*, Alex R. Reinauer, *Is the Federal Trade Commission Serious About Premerger Notification?*, Regulation, Spring 2024, at 6, 7, https://www.cato.org/regulation/spring-2024/federal-trade-commission-serious-about-premerger-notification [https://perma.cc/82FC-UV4Z] (asserting that abandoned transactions "may be in line with FTC chair Lina Khan's intentions in changing the HSR Form").

'efficient,' as the FTC claims or simply to deter mergers in the first place."[186]

6. *Merger Guidelines*

Turning from process to substance, the most significant change to merger policy the Biden enforcers made was to revise the agencies' Merger Guidelines. These Guidelines describe the agencies' approach to merger analysis. First issued by the DOJ in 1968, the agencies have revised them periodically since then, including major revisions in 1982, 1997, and 2010.[187] While not binding on courts, the Guidelines have long been considered important guidance and are often cited in judicial opinions.[188] The most recent revision—the 2023 Merger Guidelines[189]—reflect the Biden administration's more aggressive approach to merger enforcement. Among the most notable changes in this version was a lowering of the post-merger concentration thresholds and levels of merger-related changes in concentration at which the agencies state they will be concerned that a merger might pose a competitive problem.[190] These thresholds had been raised in 2010 to reflect what was then agency practice.[191] The 2023 revision lowered the thresholds to what they had been in the 1992 Guidelines, signaling an expansion of the pool of mergers the agencies might challenge.[192] The revised Guidelines also focused on several theories of harm that were not explicitly addressed in earlier versions, including mergers in markets undergoing "a trend toward consolidation," mergers that are part of a "series of multiple

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186 Melinda Reid Hatton, Gen. Couns. & Sec'y, Am. Hosp. Ass'n, *Comments to FTC Re: 16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300* (Sept. 5, 2023), https://www.aha.org/lettercomment/2023-09-05-aha-urges-ftc-withdraw-proposed-changes-premerger-notification-rules [https://perma.cc/N6JN-CPHS].

187 For a history of the merger guidelines, see Daniel Francis, *The 2023 Merger Guidelines and the Arc of Antitrust History*, 39 J. Econ. Persps. 3, 7–12 (2025).

188 *See* 2023 Merger Guidelines, *supra* note 12, at 6 n.15 (stating that "courts routinely [have] cited to the guidelines and [their] HHI thresholds in decisions"); Mahshad Badii, *Antitrust's North Star: The Continued and Nameless Judicial Deference Toward the Merger Guidelines*, 77 Stan. L. Rev. 1189, 1192 (2025) ("[C]ourts have heavily relied upon the Guidelines to decide merger cases for over fifty years." (footnote omitted)).

189 2023 Merger Guidelines, *supra* note 12.

190 *Id.* at 5–6.

191 U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines 18–19 (2010).

192 2023 Merger Guidelines, *supra* note 12, at 5–6; Jay B. Sykes, Cong. Rsch. Serv., LSB11138, The 2023 Merger Guidelines: Analysis and Issues for Congress 2 (2024) (explaining that the "lowered concentration thresholds in the 2023 Guidelines revert to the levels employed by the 1992 Merger Guidelines").

acquisitions," and mergers involving multi-sided platforms.[193] As Chair Khan's chief economist put it, the total effect of the revisions is "to more rigorously scrutinize mergers and acquisitions after decades of underenforcement."[194]

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In sum, during the Biden administration, enforcers took a range of measures that had the effect of increasing the burdens on merging parties and chilling at least some merger activity. They broke with past practice in determining to litigate most merger challenges to judgment, rather than to work with parties to find a remedy that would allow deals to be consummated. And the Biden antitrust enforcers exercised their control over the merger review process to institute policy changes—like eliminating early termination, requiring more burdensome provisions in consent decrees, reducing the certainty provided by the running of HSR's waiting period, and requiring merging parties to provide more information with their filings—that made merger review more time-consuming, expensive, and uncertain. Finally, the agencies encapsulated their more aggressive merger litigation stance in revised Merger Guidelines.

C. Increased Scrutiny of Startup Deals

The changes to merger enforcement we have been discussing affected *all* types of firms. These changes were even more dramatic for venture-backed startups because the baseline level of enforcement was so low.

Until recently, the antitrust enforcement agencies rarely sued to block startup acquisitions. In 2019, the American Antitrust Institute (AAI) published a report that examined 720 Big Tech acquisitions over thirty years.[195] The report focused on one subset of these transactions—two hundred deals from the period 2001–2017 involving data processing, hosting, and related services.[196] It found that, while the antitrust agencies subjected a higher percentage of these acquisitions

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193 2023 Merger Guidelines, *supra* note 12, at 3.

194 John Kwoka, *The Next Administration Must Finish the Merger Guidelines Revision*, ProMarket (Sept. 19, 2024), https://www.promarket.org/2024/09/19/the-next-administration-must-finish-the-merger-guidelines-revision [https://perma.cc/2KME-86BA].

195 Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, Am. Antitrust Inst. 2 (2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf [https://perma.cc/7DJS-VGB8].

196 *Id.* at 5–6.

to intense scrutiny (i.e., a second request), they challenged only one of these deals (Google's acquisition of ITA Software).[197]

According to the AAI report, several reasons exist for this paucity of enforcement actions. First, many of the acquired companies were small players with limited (or no) market share. At least initially, it was unclear when and how best to challenge these acquisitions of nascent competitors.[198] Second, markets in which some consumers do not pay for a product or service with money—zero-price markets—are more prevalent in tech than in other industries.[199] Enforcers and academics needed some time to determine how to measure non-price competitive effects in these markets in a way that could persuade courts that specific mergers would harm consumers.[200] Third, because of the fluid nature of many technology markets, market definition is often more challenging than it might be in more traditional industries.[201]

Starting late in the Trump administration, however, and then picking up in earnest under the Biden administration, the agencies began challenging the Big Tech firms.[202] They brought Sherman Act Section 2[203] monopolization cases against Amazon,[204] Apple,[205] and

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[197] *Id.*

[198] *See id.*; *see also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879, 1880–81 (2020) (stating that while "[g]overnment enforcers have expressed interest in protecting nascent competition[,]" they "face a dilemma" in that the nascent competitor's "eventual significance is uncertain" and there is often "a lack of present, direct competition" between the nascent competitor and the incumbent).

[199] Moss, *supra* note 195, at 8 (noting that many of the "markets in which some of the Big Tech companies participate do not involve a price-based metric of exchange," a fact that "might pose challenges for antitrust enforcers under the current interpretation of the law and the consumer welfare standard"). Moss argues, however, that anticompetitive conduct in zero-price markets is "not beyond the reach of the consumer welfare standard." *Id.*

[200] *See id.*; John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. Penn. L. Rev. 149, 151 (2015) (noting "antitrust law's nearly complete lack of attention" to zero-price markets' "functioning and implications").

[201] *See* Moss, *supra* note 195, at 8; *see also* Hemphill & Wu, *supra* note 198, at 1880–81 (explaining that "enforcers face a dilemma" in analyzing acquisitions of nascent competitors because, while they "often pose a uniquely potent threat to an entrenched incumbent, the firm's eventual significance is uncertain, given the environment of rapid technological change in which such threats tend to arise").

[202] *See* Rebecca Haw Allensworth, *Long-Term Consumer Welfare* 4–5 (Vand. L. Rsch. Paper No. 5133539, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5133539 [https://perma.cc/F7RN-F2NM] (arguing that the monopolization and merger cases brought during the first Trump and Biden administrations showed "a deep commitment to protecting consumer interests").

[203] 15 U.S.C. § 2.

[204] Second Amended Complaint at 129–34, FTC v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash. Oct. 31, 2024).

[205] First Amended Complaint at 72–75, United States v. Apple Inc., No. 2:24-cv-04055 (D.N.J. June 11, 2024).

Meta,[206] and two cases against Google.[207] The agencies also challenged several Big Tech mergers. More broadly, enforcers sharply increased their scrutiny of startup deals.

FIGURE 7: ANTITRUST CHALLENGES TO STARTUP M&A DEALS

Year	Startup Deals Challenged	Startup Share of All Challenges
2011–2019	5	2.0%
2020–2023	14	15.2%

As Figure 7 shows, challenges to startup deals spiked between 2020 and 2023, both in absolute terms and as a percentage of overall enforcement activity.[208] Some of these challenges resulted in litigation losses, including the FTC's attempts to block Meta's acquisition of Within and Microsoft's acquisition of Activision.[209] However, other challenges—or the perceived threat of a challenge—have led parties to startup acquisitions to abandon their deals.

Consider some recent examples of busted startup deals, involving both Big Tech and other types of acquirers:

In November 2020, the DOJ challenged Visa's proposed acquisition of Plaid, a private fintech firm which had been developing a payments platform.[210] The parties abandoned their deal in January 2021. Trump Assistant Attorney General Makan Delrahim celebrated this "victory for American consumers and small businesses,"

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206 Facebook Complaint, *supra* note 81, at 76–78.

207 Complaint at 132–38, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023); Amended Complaint at 55–57, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021).

208 In Figure 7, "Startup Share of All Challenges" is the number of challenged startup deals as a percentage of "Significant US Merger Investigations" as reported by DAMITT. *See DAMITT Q1 2025: Slow Start to Merger Enforcement Amid Leadership Transitions in U.S. and EU*, *supra* note 140. To identify startup deals the agencies challenged in this period, we asked ChatGPT, using its Deep Research feature, to read every press release from the FTC and DOJ Antitrust Division from 2011–2024 that announced a merger enforcement action and determine how many of those actions involved a transaction where one of the parties was a startup. We had our research assistant independently perform the same task for a subset of four years, to check Deep Research's reliability. A copy of these results is on file with the *New York University Law Review*.

209 *See supra* notes 147–48 and accompanying text.

210 Press Release, U.S. Dep't of Just., Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block [https://perma.cc/B7WY-ZTQ5].

which prevented Visa from acquiring "an innovative and nascent competitor."[211] For its part, Visa blamed the lengthy investigation and litigation process for killing the deal.[212]

In December 2020, the FTC voted to seek a federal court injunction halting Proctor & Gamble's bid to acquire the startup Billie, a maker of women's razors and other beauty products.[213] The parties subsequently abandoned their deal in January 2021.[214] In a statement, the FTC said it challenged the transaction because "it would have eliminated dynamic competition from Billie."[215] The companies said that it was in their "best interests not to engage in a prolonged legal challenge."[216]

In December 2023, fifteen months after announcing their intent to merge to regulators and investors, Adobe and Figma, a producer of design software, abandoned their transaction in the face of a potential DOJ challenge and pressure from international enforcers.[217] Figma's CEO stated that abandoning the acquisition was the only option, as "we no longer see a path toward regulatory approval of the deal."[218]

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211 *Id.*

212 *Visa and Plaid Announce Mutual Termination of Merger Agreement*, VISA (Jan. 12, 2021), https://investor.visa.com/news/news-details/2021/Visa-and-Plaid-Announce-Mutual-Termination-of-Merger-Agreement/default.aspx [https://perma.cc/8U8K-3QDV] (stating that Visa was "confident we would have prevailed in court," but that it had already been "a full year since we first announced our intent to acquire Plaid, and protracted and complex litigation will likely take substantial time to fully resolve").

213 Press Release, Fed. Trade Comm'n, FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc., (Dec. 8, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc [https://perma.cc/RT4X-HTFT].

214 Press Release, Ian Conner, Dir., Fed. Trade Comm'n Bureau of Competition, Statement Regarding the Announcement that the Procter & Gamble Company Has Abandoned Its Proposed Acquisition of Billie, Inc. (Jan. 5, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/01/statement-ian-conner-director-ftcs-bureau-competition-regarding-announcement-procter-gamble-company [https://perma.cc/G5TN-T4J8].

215 *Id.*

216 Sarah Perez, *P&G Terminates Plan to Acquire Razor Startup Billie Following FTC Lawsuit*, TECHCRUNCH (Jan. 5, 2021, 11:41 AM), https://techcrunch.com/2021/01/05/pg-terminates-plan-to-acquire-razor-startup-billie-following-ftc-lawsuit [https://perma.cc/B9B5-NXUY].

217 David Wadhwani, *Adobe & Figma Update*, ADOBE BLOG (Dec. 18, 2023), https://blog.adobe.com/en/publish/2023/12/18/adobe-figma-updates [https://perma.cc/C8LL-2NZF]; Leah Nylen, Anna Edgerton & Brody Ford, *DOJ Preps Antitrust Suit to Block Adobe's $20 Billion Figma Deal*, BLOOMBERG (Feb. 23, 2023, 5:44 PM), https://www.bloomberg.com/news/articles/2023-02-23/doj-preparing-suit-to-block-adobe-s-20-billion-deal-for-figma [https://perma.cc/G3G9-H5P7].

218 Field, *supra* note 19.

Also in December 2023, Sanofi terminated its deal for an exclusive license to Maze Therapeutics' drug to treat Pompe disease.[219] The FTC sued to block the transaction, asserting that it "would eliminate a nascent competitor poised to challenge Sanofi's monopoly in the Pompe disease therapy market."[220] Sanofi stated that it was "disappointed" with the FTC's decision to challenge the deal and that "[t]he delay associated with a long litigation" had led it "to conclude that it would not be in the best interests of patients to contest this litigation."[221]

In March 2024, Qualcomm abandoned its deal to acquire Autotalks, a maker of communications chips for automobile safety, "due to lack of regulatory approvals in a timely manner."[222] The FTC issued a statement praising the decision and noting that, "based on its probe into this proposed merger," the agency had concerns that the acquisition would damage competition in these chipsets.[223] United Kingdom enforcers were also investigating the deal.[224]

Wiz, a cybersecurity provider, walked away from a $23 billion acquisition offer from Google in July 2024.[225] Reports cited antitrust scrutiny as driving Wiz's decision.[226] Wiz's leadership stated that it would go public instead.[227] In March 2025, however, Wiz and Google announced that their deal was back on and that Google would pay $32 billion to acquire the company.[228] Reports indicated that the parties

219 Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Sanofi's Proposed Acquisition of Maze Therapeutics' Pompe Disease Drug (Dec. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-sanofis-proposed-acquisition-maze-therapeutics-pompe-disease-drug [https://perma.cc/P539-BNQV].

220 *Id.*

221 Press Release, Sanofi, Statement on FTC Challenge to Proposed License Agreement with Maze Therapeutics (Dec. 11, 2023), https://www.sanofi.com/en/media-room/press-releases/2023/2023-12-11-21-08-20-2794272 [https://perma.cc/8RYB-9KN4].

222 *Qualcomm Ends Bid to Buy Israel's Autotalks After Antitrust Probe*, Reuters (Mar. 22, 2024, 4:13 PM), https://www.reuters.com/business/media-telecom/qualcomm-ends-bid-buy-israels-autotalks-after-antitrust-probe-2024-03-22 [https://perma.cc/3XD4-RLH3] (quoting Qualcomm statement on terminating the deal).

223 Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Qualcomm's Proposed Acquisition of Autotalks (Mar. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/statement-regarding-termination-qualcomms-proposed-acquisition-autotalks [https://perma.cc/U65R-V9WP].

224 *See* Competition & Mkts. Auth., *Qualcomm Incorporated / Autotalks Ltd Merger Inquiry,* GOV.UK (Mar. 25, 2024), https://www.gov.uk/cma-cases/qualcomm-incorporated-slash-autotalks-ltd-merger-inquiry [https://perma.cc/SH32-N34Z].

225 Grant, *supra* note 22.

226 *See, e.g.*, *id.* (stating that "the regulatory hurdles" facing the transaction "appeared steep").

227 *Id.*

228 Press Release, Google, Google Announces Agreement to Acquire Wiz (Mar. 18, 2025), https://blog.google/inside-google/company-announcements/google-agreement-acquire-wiz [https://perma.cc/8PV8-YKRV].

revived their deal because they expected to receive more favorable antitrust treatment under the new Trump administration.[229]

Two other abandoned deals bear mention. Though they differ from these other transactions in that they did not involve startup acquisitions, these scotched deals reflect the agencies' skepticism about Big Tech acquisitions:

In February 2022, after the FTC sued to block the transaction, semiconductor design company NVIDIA chose to abandon its deal to buy semiconductor software provider Arm.[230] NVIDIA stated that the parties had decided to terminate their deal "because of significant regulatory challenges preventing the consummation of the transaction."[231] Softbank, the conglomerate that owns Arm, subsequently announced that Arm would go public instead.[232]

In January 2024, Amazon walked away from its agreement to acquire iRobot, a publicly traded producer of robot vacuums and mops,[233] for $1.4 billion.[234] The companies cited their perceived inability to achieve regulatory approval in the European Union as the reason for terminating their agreement.[235] However, the FTC also investigated this deal and, in a statement regarding the abandonment, observed that its inquiry had "revealed significant concerns about the transaction's potential competitive effects."[236]

Turning from abandonments to litigation:

In December 2023, the Fifth Circuit found substantial evidence supporting the FTC's challenge to the acquisition of Grail, a startup

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229 *See, e.g.*, Anirban Sen & Krystal Hu, *Google's $32 Billion Deal for Wiz Accelerated Under Trump, Sources Say*, Reuters (Mar. 19, 2025), https://www.reuters.com/technology/cybersecurity/googles-32-billion-deal-wiz-accelerated-under-trump-sources-say-2025-03-19 [https://perma.cc/5U47-9JYD] ("[T]he real closer for the Wiz and Google executives was the change at the White House that brought with it the prospect of a friendlier antitrust review under Trump . . . .").

230 *NVIDIA and Softbank Group Announce Termination of NVIDIA's Acquisition of Arm Limited*, NVIDIA Newsroom (Feb. 7, 2022), https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited [https://perma.cc/Y82E-VZEL].

231 *Id.*

232 *Id.*

233 *See* iRobot Corp., Annual Report (Form 10-K) 3 (Mar. 12, 2025).

234 *Amazon and iRobot Agree to Terminate Pending Acquisition*, iRobot (Jan. 29, 2024), https://media.irobot.com/2024-01-29-Amazon-and-iRobot-agree-to-terminate-pending-acquisition [https://perma.cc/4QWG-4NS4].

235 *Id.* ("Amazon's proposed acquisition of iRobot has no path to regulatory approval in the European Union, preventing Amazon and iRobot from moving forward together . . . .").

236 Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Amazon's Proposed Acquisition of iRobot (Jan. 31, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/statement-regarding-termination-amazons-proposed-acquisition-irobot [https://perma.cc/45L4-2TTE].

that makes cancer screening tests, by Illumina, a DNA sequencing provider.[237] Illumina ultimately divested Grail.[238]

The FTC's Section 2 monopolization claim against Meta, which is currently being litigated, is based in large part on Facebook's acquisition of two startups: Instagram (acquired in 2012) and WhatsApp (acquired in 2014).[239] To remedy the alleged violation, the FTC is seeking a court order requiring Meta to divest Instagram and WhatsApp.[240]

This string of abandoned transactions and government victories is evidence of the impact of enhanced antitrust enforcement on startup M&A exits. The FTC's Meta litigation shows the agencies' willingness to challenge even deals consummated long ago, putting acquirers on notice. Of course, it is difficult to measure the deterrent effect of these terminated deals and aggressive litigation strategy. But we suspect that these publicly busted acquisitions represent only a fraction of the deals that have died in the boardroom in the shadow of more aggressive antitrust enforcement.

III
Exit Pricing and Substitutability

What is the impact of increased antitrust scrutiny on startup exits? In this Part, we consider two alternative explanations: (A) the "*substitutes* hypothesis" and (B) the "*divergent pricing* hypothesis." These hypotheses reflect different views about whether startups can shift between acquisitions and IPOs without significant loss of value. We present them as two ends of a thought experiment: If exits are close substitutes, blocking one channel should simply shift firms to the other; if exit valuations diverge, blocking one channel will reduce firm value and potentially change which firms are funded in the first place.

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237 Illumina, Inc. v. FTC, 88 F.4th 1036, 1061 (5th Cir. 2023) (finding that the FTC had satisfied its burden of showing that the merger was "likely to substantially lessen competition" in the U.S. "market for the research, development, and commercialization" of multi-cancer early detection tests). This was a significant victory because it involved a vertical merger, which is typically more difficult to challenge than a horizontal merger. *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019) ("Given all the competing considerations at play, 'the analysis of vertical mergers' has been described as 'much more complex than the analysis of horizontal mergers.' Things are made more difficult still by the lack of modern judicial precedent involving vertical merger challenges . . . ." (quoting David T. Scheffman & Richard S. Higgins, *Vertical Mergers: Theory and Policy*, 12 Geo. Mason L. Rev. 967, 967 (2004))).

238 Press Release, Illumina, Illumina Completes the Divestiture of GRAIL (June 24, 2024), https://investor.illumina.com/news/press-release-details/2024/Illumina-completes-the-divestiture-of-GRAIL/default.aspx [https://perma.cc/L2F5-4UCR].

239 *See* Facebook Complaint, *supra* note 81, at 31, 39, 76.

240 *Id.* at 79.

We develop a simple model that captures both possibilities and shows how heterogeneity in M&A and IPO exit valuations affects the expected value of startups at the time of initial financing. This dynamic can influence whether startups receive funding, how they negotiate terms with investors, and whether they pursue alternative strategies when traditional exits are constrained. The model thus provides a foundation for analyzing the new patterns of no exit we examine in Part IV.

A. *The Substitutes Hypothesis*

We begin with the premise that the mode of exit should not impact valuation. Whether a portfolio company exits via acquisition or via an IPO, the underlying business has the same revenues and projected cash flows. In either case, financial theory values a business based on its projected future cash flows, discounted to present value.[241] Moreover, the appropriate discount rate is based on the firm's exposure to systematic risk and is independent of whether the firm exits through an acquisition or an IPO.[242] In either case, the capital asset pricing model (CAPM) would apply the same discount rate to value the business.[243] Consequently, absent synergies, transaction-specific frictions, or market imperfections, the pricing of a firm in an M&A exit should closely align with its pricing in an IPO.

This theoretical framework suggests that heightened antitrust enforcement, which blocks or deters M&A exits, should lead to a corresponding increase in IPOs as startups pivot to the next-best exit option. If markets are efficient and these exit routes are truly close substitutes, startups that cannot sell via M&A should find IPOs equally attractive, and investors should value these firms similarly in either scenario.

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241 *See* Richard A. Brealey, Stewart C. Myers, Franklin Allen & Alex Edmans, Principles of Corporate Finance 4–10 (14th ed. 2025).

242 *See* William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk*, 19 J. Fin. 425, 425 (1964) (explaining that a "typical classroom explanation of the determination of capital asset prices" generally includes "the assertion that somehow a market risk-premium is also determined with the prices of assets adjusting accordingly to account for differences in their risk").

243 *Id.* To be sure, while the CAPM centers on market risk and thus applies the same discount rate regardless of an M&A or IPO exit, other asset-pricing models may diverge. For example, the Fama–French three-factor model applies a small-firm premium that may yield a higher discount rate for a stand-alone public offering than a strategic acquirer would use to value it as an acquisition target. *See* Eugene F. Fama & Kenneth R. French, *Common Risk Factors in the Returns on Stocks and Bonds*, 33 J. Fin. Econ. 3, 6–8 (1993) (expanding the CAPM by adding size and value factors to explain cross-sectional variation in stock returns).

This perspective is bolstered by anecdotal evidence suggesting that some firms that were blocked from pursuing M&A exits have subsequently gone public. For example, Arm and Figma both had IPOs after antitrust enforcers complicated their plans to be acquired. If M&A and IPO exits are priced similarly, this substitution effect should manifest clearly. There should be minimal loss in firm value and a predictable rise in IPOs when regulatory barriers constrain M&A exits.

B. The Divergent Pricing Hypothesis

The *substitutes* hypothesis relies on strong assumptions regarding the absence of various market imperfections, such as synergies, economies of scale and scope, market power, asymmetric information, asset pricing bubbles, and transaction costs. In its purest form, it is clearly unrealistic. Relaxing these assumptions helps us identify conditions under which one type of exit may systematically yield higher valuations than the other. For instance, synergies between a strategic acquirer and a startup may cause acquisition prices to exceed IPO valuations.[244]

High acquisition prices could also arise for less benign reasons. They may reflect monopoly pricing, where an acquirer pays more to eliminate competition or secure market dominance. Incumbent tech firms may be willing to pay a premium to control startups developing disruptive technologies.[245]

While market conditions influence both IPO and M&A activity, cyclicality based on pricing bubbles appears more pronounced in IPOs.[246] IPOs are highly sensitive to macroeconomic conditions and investor appetite for new listings. During hot markets, firms may achieve valuations well above their intrinsic value due to speculative demand. Conversely, in cold markets, IPO valuations can fall sharply. Consistent with this, using the same data underlying Figure 2, we find that from 1985 to 2023 the standard deviation of aggregate annual exit value for VC-backed IPOs was more than three times higher ($92,442 million)

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244 *See* Gao et al., *supra* note 67, at 1664–65 (arguing for economies of scope and economies of scale as the reasons for small firms' lower public market prices compared to their valuations in trade sales); *see also* Yangyang Cheng, D. Daniel Sokol & Carmelo Cennamo, *Rethinking the Traditional M&A Motivations within the Platform Acquisitions Context* 6–8 (Univ. of S. Cal. Ctr. for L. & Soc. Sci., Research Paper No. 2505, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5090369 [https://perma.cc/5SN4-FFYQ] (identifying platform companies' strategic motivations for pursuing mergers and acquisitions, including achieving "efficiencies and synergies that extend beyond traditional metrics[,]" maintaining "technological leadership[,] . . . driving innovation[,] and reducing market competition").

245 *See* Mark A. Lemley & Matthew T. Wansley, *Coopting Disruption*, 105 B.U. L. Rev. 457, 490–97 (2025).

246 *See supra* Section I.B.

than for M&A exits ($25,313 million).[247] The greater volatility of IPO pricing reduces the substitutability between IPOs and acquisitions under certain market conditions.

Regulatory costs associated with being a public company could influence exit decisions and valuation gaps. Firms going public face ongoing compliance costs related to regulations such as the Sarbanes-Oxley Act and Regulation FD.[248] These costs—especially relevant for smaller firms—potentially reduce the benefits of going public and suggest lower IPO valuations.

Asymmetric information between a firm's insiders and prospective acquirers and IPO investors could also impact relative pricing. In M&A deals, due diligence allows sharing of confidential information and helps the buyer accurately price the target. By contrast, IPO investors rely on limited disclosures in offering documents, creating uncertainty about the firm's true value. Insiders can signal quality by retaining equity post-IPO, but investors may still price IPOs at a discount to account for perceived risk.[249]

Finally, part of the appeal of an IPO is that it provides a company with publicly traded shares that can be used as currency for acquisitions. In a recent study, CFOs were asked why they chose to go public, and the most common response was to make acquisitions.[250] Other research finds that firms that have recently gone public are "more prolific acquirers than the mature public firms within their industry."[251] If regulators aggressively block M&A activity in a given industry, however, the value of having publicly traded shares for acquisitions declines. Firms in impacted industries lose not only a potential exit channel but also the strategic advantage of being publicly listed.

Our point is not to suggest that one form of exit will systematically lead to a higher price. Indeed, the divergent pricing hypothesis is not based on a single mechanism, but rather a variety of considerations that collectively suggest that IPOs and acquisitions are not always

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247 *See supra* note 72. Of course, there is also volatility in the amount of M&A activity from year to year. *See generally* Matthew Rhodes-Kropf & S. Viswanathan, *Market Valuation and Merger Waves*, 59 J. Fin. 2685 (2004).

248 *See supra* notes 63–65 and accompanying text.

249 *See* Hayne E. Leland & David H. Pyle, *Informational Asymmetries, Financial Structure, and Financial Intermediation*, 32 J. Fin. 371, 371 (1977) (explaining that an insider's willingness to invest in the firm "may serve as a signal to the lending market of the true quality of the project"); *see also* Luigi Zingales, *Insider Ownership and the Decision to Go Public*, 62 Rev. Econ. Stud. 425, 430–31 (1995) (positing that outside investors' willingness to pay for an insider's shares is based in part on the size of the insider's stake in the firm).

250 James C. Brau & Stanley E. Fawcett, *Initial Public Offerings: An Analysis of Theory and Practice*, 61 J. Fin. 399, 406 (2006).

251 Ugur Celikyurt, Merih Sevilir & Anil Shivdasani, *Going Public to Acquire? The Acquisition Motive in IPOs*, 96 J. Fin. Econ. 345, 346 (2010).

close substitutes. Synergies, economies of scale and scope, regulatory costs, and monopoly pricing may drive higher valuations in M&A transactions, while inefficiencies of scale and IPO market cyclicality may favor IPOs under other conditions.

C. Model

We operationalize the *substitutes* and *divergent pricing* hypotheses by focusing on the extent of heterogeneity, or variation, in the price of an M&A exit relative to an IPO for the same firm. These hypotheses represent two ends of a spectrum: Low variation suggests the exit options are close substitutes, while high variation implies significant pricing divergence.

To clarify intuition, consider the following model. At time $t = 0$, an entrepreneur (E) negotiates with a venture capitalist (VC) to fund a new firm. We assume the firm only needs a single round of financing. One period later ($t = 1$), the firm chooses one of three mutually exclusive strategies: (i) an M&A exit yielding payoff m, (ii) an IPO yielding payoff i,[252] or (iii) No Exit, in which the firm remains private and yields a payoff n.

Exit payoffs are characterized as follows. The M&A value m and the IPO value i are uncertain at $t = 0$ but are realized and observed by all parties at $t = 1$. Each is independently and uniformly distributed on $[V - \sigma, V + \sigma]$ where V is the common ex ante mean and $\sigma \in [0, V]$ measures heterogeneity in exit payoffs.

In contrast, the value of the No Exit alternative $[n]$ is certain and publicly known at $t = 0$. We assume that $V - \sigma < n < V$, which ensures that the No Exit option is less desirable ex ante than the average market-based exit. However, it can be more valuable ex post in downside scenarios—specifically, when both $m < n$ and $i < n$. At $t = 1$, the firm will implement whichever strategy maximizes value: $\max(m, i, n)$.[253]

At $t = 0$, the firm requires an initial investment of K. The VC provides investment in exchange for an equity stake in the firm. We assume competition among potential investors gives the entrepreneur bargaining power and allows her to capture the economic surplus.[254] Consequently, at $t = 0$, the parties will agree to a contract that gives the

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252 Technically, in an IPO, the actual exit for E and VC would be delayed by lockups. For ease of analysis, we assume all parties can exit at $t = 1$ at the IPO offering price.

253 There is no conflict regarding exit strategy in our simple model since both parties benefit by choosing the highest valued option.

254 Investor competition is a standard assumption in finance. *See, e.g.*, Philippe Aghion & Patrick Bolton, *An Incomplete Contracts Approach to Financial Contracting*, 59 Rev. Econ. Stud. 473, 475 (1992) ("We suppose for simplicity that there are many wealthy investors looking for good investment opportunities and fewer entrepreneurs with good projects . . . .").

VC an equity stake α such that α times the expected value equals the initial investment:

$$\alpha * \mathrm{E}[\max(m, i, n)] = K$$

Because the firm will choose the most lucrative of the three exit options, its expected value exceeds the expected value of any single option considered in isolation. The expected value of the firm is given by[255]:

$$\mathrm{E}[\max(m, i, n)] = V + \frac{\sigma}{3} + \frac{(n-(V-\sigma))^3}{(12\sigma^2)} \tag{1}$$

In this expression, V is the expected value of an M&A exit or IPO on its own; $\sigma/3$ captures the option value of being able to select the higher payout between an M&A exit or IPO; and the cubic term $[\frac{(n-(V-\sigma))^3}{(12\sigma^3)}]$ represents the added value of a guaranteed floor (No Exit), which is exercised only in downside states.

Given the entrepreneur's bargaining power, she retains the surplus and the VC gets an expected payout equal to its investment K. Solving for α, the VC's share is:

$$\alpha = K/(V + \frac{\sigma}{3} + \frac{(n-(V-\sigma))^3}{(12\sigma^2)})$$

The entrepreneur retains the remainder, $1-\alpha$.

This valuation and equity arrangement depends on all three exit strategies—M&A, IPO, and No Exit—being viable options. If one of the exit scenarios is rendered unavailable, the firm's ex ante valuation and the terms of the investment contract will adjust. In our setting, the concern is that increased antitrust scrutiny may effectively block the M&A option for some startups, leaving the firm to choose between an IPO or No Exit.

In that case, the firm's expected value falls to:

$$\mathrm{E}[\max(i, n)] = V + \frac{(n-(V-\sigma))^2}{4\sigma} \tag{2}$$

Here, the first term V is the expected value of an IPO on its own, and the second term reflects the ex ante value of having the fallback option to remain private when $i < n$.[256]

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[255] The appendix provides supporting calculations for Equations (1) and (2).

[256] Recall that $V-\sigma < n < V$. This assumption ensures that the No Exit option is viable for some realized values of m and i.

To quantify the expected value loss from removing the M&A option, we subtract Equation (2) from Equation (1). Let Δ denote this difference:

$$\Delta = \frac{\sigma}{3} + \frac{\left(n-(V-\sigma)\right)^3}{(12\sigma^2)} - \frac{\left(n-(V-\sigma)\right)^2}{4\sigma}$$

To understand the bounds of this loss, consider two limiting cases. First, when $n \to (V-\sigma)$, the payoff from No Exit is equivalent to the worst possible IPO. In which case, the cubic and quadratic terms vanish and $\Delta = \sigma/3$. Second, when $n \to V$, the payoff from No Exit is equivalent to the mean IPO. In that case, No Exit provides a valuable reservation price and $\Delta = \sigma/6$.[257] Removing the M&A option reduces expected firm value by an amount between $\sigma/6$ and $\sigma/3$.

This model helps clarify the economic intuition behind the substitutes and divergent pricing hypotheses. The key parameters driving these outcomes are σ, which captures heterogeneity in market-based exit valuations, and n, which reflects the value of the No Exit alternative.

When $\sigma \to 0$, the M&A and IPO outcomes are tightly clustered around a common expected value. In this case, the option to choose between them adds little value, and the model predicts that eliminating one exit path—such as M&A—has minimal impact on firm valuation. This aligns with the substitutes hypothesis, under which M&A and IPOs are equivalent from the perspective of shareholder value.

By contrast, when σ is large, the value of selecting between two highly variable exit outcomes becomes significant. The loss of the M&A option in this setting can impose a substantial reduction in expected firm value, consistent with the divergent pricing hypothesis. The magnitude of this loss, however, also depends on the value of n. As n increases, the No Exit alternative becomes a more attractive fallback, mitigating the decline in firm value when M&A exits are foreclosed. Some blocked M&A deals, rather than becoming lower-value IPOs, may instead shift to No Exit outcomes.

Viewed ex ante, the implications of the *divergent pricing* hypothesis are more complex. Because the expected value of the firm declines when M&A deals are blocked, VC investors will demand a larger equity stake to justify the same level of capital investment. In our model, α is adjusted upwards such that $\alpha = K/\mathrm{E}\left[\max(i,n)\right]$.

257 This follows by substituting V for n and then grouping terms.

The entrepreneur's residual stake $(1-\alpha)$ is correspondingly reduced. Some startups that could have raised financing under a more permissive M&A regime may no longer be able to do so. This occurs when:

$$\mathrm{E}\left[\max(i,n)\right] < K < \mathrm{E}\left[\max(m,i,n)\right]$$

Finally, the model predicts that the likelihood of No Exit will increase in two circumstances: (i) when σ is large, amplifying the dispersion in public market exit values; and (ii) when n is high, increasing the attractiveness of remaining private. As we show in the next Part, recent developments in the venture capital market have made the No Exit option more viable.

IV
Creatures of No Exit

The increased scrutiny of startup acquisitions has not led to a resurgence of IPOs—or at least not yet. Instead, startups and VCs have figured out how to find more capital and liquidity within the private market. And some would-be acquirers have developed novel transaction structures that help evade merger enforcement. In this Part, we consider two trends that began before the antitrust crackdown but took on new significance in its wake—employee tender offers and continuation funds. Then we argue that two new structures emerged in response to the crackdown—the centaur and the reverse acquihire.

A. Employee Tender Offers

Until recently, a startup's investors wouldn't exit their investment until the startup exited the private market. But even before the antitrust crackdown, that was starting to change. We begin with the background law.

Securities regulation restricts the sale and resale of private company securities.[258] Private companies don't have to disclose the kind of information—financial statements, risk factors, material contracts—that public companies must disclose. The Supreme Court has held that only investors who can "fend for themselves" without disclosures may buy private company securities.[259] The pre-IPO marketplace for a startup's shares is dominated by financial

[258] *See* Pollman, *Information Issues*, *supra* note 25, at 187–91 (discussing securities regulations on private companies).

[259] SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

institutions, accredited investors (high net worth individuals), and a startup's own employees.[260]

Startups also have good reasons to control who they let on their cap table. Shareholders have rights under Delaware law—such as the right to inspect a company's books and records—that can provide an unwelcome check on management.[261] And Section 12(g) of the Exchange Act provides that startups must register their securities if they accumulate more than $10 million in assets and either 2,000 shareholders of record or 500 shareholders of record who aren't accredited investors.[262] No startup wants to trigger Section 12(g) inadvertently. So many startups carefully monitor who buys their shares. And they encumber employee equity with restrictions on resale.[263]

These regulatory and contractual restrictions have traditionally limited the secondary market for startup shares. If a founder or a key employee wanted to buy a house or send a kid to college, a startup's board might let them sell some of their shares in a one-off transaction. And there have always been investors trying to get into hot startups—indeed, the SEC once had to shut down a market offering derivative bets on startup equity.[264] But for the most part, VCs, founders, and startup employees accepted that their investment was illiquid until the company exited.

In the last two decades, though, the secondary market has started to change. Consider Facebook. In 2009, Russian investor Yuri Milner approached Mark Zuckerberg with a proposal.[265] Milner wanted to invest in Facebook, and the company's employees were unable to liquidate the millions they had in equity without an IPO.[266] So Milner pitched a two-tier offer. Facebook would issue him some new preferred shares, which he would buy at a high price.[267] At the same time, Facebook employees who wanted liquidity would sell him their outstanding common shares, which he would buy at a lower price.[268] The deal satisfied everyone's

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260 *See* David F. Larcker, Brian Tayan & Edward Watts, *Cashing It In: Private-Company Exchanges and Employee Stock Sales Prior to IPO*, Stan. Closer Look Series, Sept. 12, 2018, at 1, https://www.gsb.stanford.edu/faculty-research/publications/cashing-it-private-company-exchanges-employee-stock-sales-prior-ipo [https://perma.cc/3XUT-A6KJ].

261 Del. Code Ann. tit. 8, § 220 (2025).

262 15 U.S.C. § 78l(g).

263 *See* Larcker et al., *supra* note 260, at 2–3.

264 *See* Press Release, Sec. & Exch. Comm'n, SEC Announces Enforcement Action for Illegal Offering of Security-Based Swaps (June 17, 2015), https://www.sec.gov/newsroom/press-releases/2015-123 [https://perma.cc/X5DT-3FJE].

265 Mallaby, *supra* note 42, at 273–77.

266 *Id.* at 275.

267 *Id.* at 275–76.

268 *Id.*

needs—Milner got more shares, employees got liquidity, and Facebook could put off its IPO.[269]

Over time, secondary sales by rank-and-file employees like in Milner's deal with Facebook have evolved into today's "employee tender offer." Here's how it works. First, a startup or its bankers will organize a group of investors interested in buying the startup's shares.[270] Investors' interests can be bundled together into a special purpose vehicle, so that they count as only one "holder of record" for Section 12(g).[271] Next, the company or the prospective investors will make a tender offer to the startup's existing shareholders—early investors and employees. Because of SEC rules, the offer has to be kept open for twenty days.[272] In that window, the employees will tender their shares, and the company or new investors will buy them. The startup's shareholders get liquidity, but the startup remains private.

As more startups have become unicorns, the secondary market has exploded. According to an estimate by Industry Ventures, the secondary market quintupled from $12 billion in 2010 to $60 billion in 2021.[273] Some employee tender offers are as large as exits. For example, in 2024, the payments startup Stripe made its employees a tender offer worth $700 million.[274] Several months later, Stripe said it would buy another "$50,000 worth of vested shares from each employee" in another tender offer.[275] More recently, the data analytics company Databricks announced that it had raised an unprecedented $10 billion Series J.[276]

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269 Startups customarily announce valuations based on the—usually false—assumption that the implied market price of each of a startup's shares is the same as the price paid for its most recent round of preferred shares. *See* Will Gornall & Ilya A. Strebulaev, *Squaring Venture Capital Valuations with Reality*, 135 J. Fin. Econ. 120, 121–22 (2020).

270 *See Tender Offers*, Carta (Dec. 15, 2023), https://carta.com/learn/equity/liquidity-events/tender-offer [https://perma.cc/S67N-2J5J] (outlining the stages in a tender offer).

271 *See* Langevoort & Thompson, *supra* note 61, at 355–61 (explaining how Facebook considered a special purpose vehicle to avoid triggering section 12(g) and postpone its IPO).

272 17 C.F.R. § 240.13e-4(f)(1)(i) (2025).

273 Swildens, *supra* note 26.

274 Cory Weinberg, *Stripe, Now Gushing Money, Plans New Employee Tender*, The Information (Aug. 22, 2024, 10:52 AM), https://www.theinformation.com/articles/stripe-now-gushing-money-plans-new-employee-tender [https://perma.cc/VL85-KCR9].

275 *Id.*

276 Paul Sawers, *Databricks Closes $15.3B Financing at $62B Valuation, Meta Joins as 'Strategic Investor*,*'* TechCrunch (Jan. 22, 2025, 6:39 AM), https://techcrunch.com/2025/01/22/databricks-closes-15-3b-financing-at-62b-valuation-meta-joins-as-strategic-investor [https://perma.cc/YE75-G7WS]. We call the financing unprecedented because of its size and the infrequency with which startups pursue a Series J. *See Advanced Search*, Crunchbase, https://www.crunchbase.com/discover/funding_rounds/5438ec175ff7eff87e460b7cf6d308cc [https://perma.cc/EU5Z-RHKP] (identifying only twenty-two Series J funding announcements); Shopify Staff, *Startup Funding Stages: How Each Stage of Fundraising Works*, Shopify (Apr. 29, 2025), https://www.shopify.com/blog/startup-funding-stages

The company was motivated to raise such a large sum, according to one report, because it wanted to fund an employee tender offer and postpone its IPO.[277]

In some cases, a large private financing round and an employee tender offer can substitute for a thwarted exit. Recall that in December 2023, Adobe abandoned its plan to acquire Figma for $20 billion in the face of a potential DOJ challenge.[278] In May 2024, Figma announced an employee tender offer worth $900 million.[279] The tender offer valued Figma at $12.5 billion, a significant discount from the proposed acquisition.[280] That discount is consistent with the divergent pricing hypothesis—investors weren't expecting to realize all of the value that Adobe expected.

As it turned out, Figma's investors made a killing. In April 2025, Figma announced that it had filed for an IPO.[281] In July 2025, the company went public. By the end of its first day of trading, Figma reached a market capitalization of $67.7 billion—well above both the $12.5 billion valuation implied by its employee tender offer in 2024 and the $20 billion that Adobe was going to pay to buy the company in 2023.[282]

Employee tender offers do not resemble the unlimited secondary trading of a public stock market. But they have effectively separated startup shareholders' need to exit their investments from their company's need to exit the private market.

B. Continuation Funds

VCs are also adapting to the world of no exit by extending their investment time horizons. LPs are increasingly agreeing to extend the lives of venture funds. By the mid-2010s, the average life of a venture

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[https://perma.cc/6LQW-H5UT] (implying that startups have historically sought to exit the private market by or before Series E).

277 Sawers, *supra* note 276.

278 *See supra* notes 217–18 and accompanying text.

279 Brody Ford, *Design Startup Figma Valued at $12.5 Billion in Secondary Share Sale*, Bloomberg (May 16, 2024, 3:53 PM), https://www.bloomberg.com/news/articles/2024-05-16/figma-valued-at-12-5-billion-in-secondary-share-sale [https://perma.cc/XW4H-Y4TK].

280 *Id.*

281 *See* Jaiveer Shekhawat, *Figma Confidentially Files for Much Awaited US IPO After $20 Billion Adobe Deal Collapse*, Reuters (Apr. 15, 2025), https://www.reuters.com/markets/deals/figma-confidentially-files-us-ipo-2025-04-15 [https://perma.cc/J3R3-TP7T].

282 Natallie Rocha & Michael J. de la Merced, *This Start-Up's $20 Billion Sale Died. It Came Fighting Back*, N.Y. Times (July 31, 2025), https://www.nytimes.com/2025/07/31/technology/figma-ipo.html [https://perma.cc/U3WX-P9RK].

fund was fourteen years.[283] More recently, VCs have started to use a structure developed by private equity—the continuation fund.[284] The goal of a continuation fund is to enable VCs to stay invested in their portfolio companies past the end of their fund's life while also giving LPs the option to exit.

It works like this.[285] The VCs start with a fund that is nearing the end of its life—this is the legacy fund. Then they form a new fund from scratch—this is the continuation fund. The continuation fund buys the assets of the legacy fund—its portfolio of shares in late-stage startups. The LPs of the legacy fund have a choice. They can cash out their interests in the legacy fund or they can roll over their interests in the legacy fund into the continuation fund. If some of the legacy LPs cash out of their investment, new LPs can buy interests in the continuation fund.

Continuation funds are controversial. They create a web of conflicts of interest.[286] The VCs owe a duty of loyalty to both the legacy fund and the continuation fund, which creates a conflict when the two funds transact.[287] VCs may be biased in favor of the interests of the LPs in the continuation fund, whose investment they can't take for granted.[288] And the opportunity to draw management fees from a continuation fund might lead VCs to discourage their legacy fund portfolio companies from exiting.[289] In part due to concerns about these conflicts, continuation funds are becoming less popular in private equity.[290]

In venture capital, though, continuation funds are on the rise. Blue chip VCs like General Catalyst, New Enterprise Associates, and Lightspeed have all formed continuation funds.[291] General Catalyst's new continuation fund, for example, is reportedly worth between $800

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283 *See* Diane Mulcahy, *The New Reality of the 14-Year Venture Capital Fund*, Institutional Inv. (Feb. 19, 2015), https://www.institutionalinvestor.com/article/2bsv31916hb46dpp501ds/portfolio/the-new-reality-of-the-14-year-venture-capital-fund [https://perma.cc/S5PU-3VLH].

284 *See* Swildens, *supra* note 26; Kobi Kastiel & Yaron Nili, *The Rise of Private Equity Continuation Funds*, 172 U. Pa. L. Rev. 1601, 1619–22 (2024) (presenting data to demonstrate that "[c]ontinuation funds have been one of the most popular trends in the private equity world over the last few years").

285 *See* Kastiel & Nili, *supra* note 284, 1615–17 (describing the processes and concerns associated with continuation funds).

286 *See id.* at 1623–32.

287 *See id.* at 1626–28.

288 *See id.* at 1629–31.

289 *See id.* at 1631–32.

290 Michelle Celarier, *Are Continuation Funds Losing Their Allure?*, Institutional Inv. (Aug. 20, 2024), https://www.institutionalinvestor.com/article/2dnkx56cahb3iopfs1pmo/corner-office/are-continuation-funds-losing-their-allure [https://perma.cc/3UGQ-5SLY].

291 Marina Temkin, *General Catalyst Is Working on a 'Continuation' Fund Worth up to $1B, Sources Say*, TechCrunch (Oct. 7, 2024, 5:12 PM), https://techcrunch.com/2024/10/07/general-catalyst-is-working-on-a-continuation-fund-worth-up-to-1b-sources-say [https://perma.cc/P26Q-CEYL].

million and $1 billion.[292] It's expected to include shares of the crypto unicorn Circle, the HR unicorn Gusto, and (our friend from employee tender offers) Stripe.[293]

Some VCs are also experimenting with strip sales—selling some but not all of the assets in their portfolio.[294] A strip sale can enable a venture firm to stay in a hot startup past the life of a fund while providing partial liquidity to its LPs.

We doubt that the antitrust crackdown caused VCs to initially become interested in continuation funds. But we think that the antitrust crackdown has made continuation funds more valuable. When a venture fund nears the end of its life and a promising portfolio company is facing obstacles to an acquisition, a continuation fund provides a solution.

C. Centaurs

Now we turn to two trends that we believe are directly caused by the antitrust crackdown. Here, we shift our focus from startups to the public tech companies that want to buy them. These would-be acquirers have worked with startups to create new structures that aim to achieve their goals without technically acquiring the startups. We call one of these structures the "centaur." But to understand it, we need to first explain the practice it grew out of—corporate venture capital.

A traditional venture investment is made by an independent investment company—sometimes called a financial VC.[295] A corporate venture capital investment, by contrast, is made by an operating company. In some cases, the company invests directly. In other cases, it invests through an investment fund that it owns, like GV (formerly Google Ventures), Intel Capital, or Salesforce Ventures.[296] Most but not all corporate VCs are public corporations, and many are large public corporations.[297]

Over the past two decades, the relative influence of corporate VC has steadily grown. In the second half of the 2000s, corporate VCs

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292 *Id.*

293 *Id.*

294 Kate Clark, *Venture Capitalists Turn to Novel Methods to Return Cash*, The Information (Sept. 13, 2024, 6:00 AM), https://www.theinformation.com/articles/venture-capitalists-turn-to-novel-methods-to-return-cash [https://perma.cc/9NAW-3UW7].

295 *See* Ibrahim, *Corporate Venture Capital*, *supra* note 31, at 209–12 (comparing traditional VC to corporate VC).

296 *Id.* at 221–24; *see also* Jennifer S. Fan, *Catching Disruption: Regulating Corporate Venture Capital*, 2018 Colum. Bus. L. Rev. 341, 351, 354 (discussing the corporate venture capital arms of Intel and Google); *What We Do*, Salesforce Ventures, https://salesforceventures.com [https://perma.cc/KQ2Q-39SL] (discussing corporate venture capital arm of Salesforce).

297 Ibrahim, *Corporate Venture Capital*, *supra* note 31, at 222–24.

contributed 29% of all venture dollars raised.[298] In the 2010s, their share rose to 41.8%.[299] And in the first four years of the 2020s, it reached 49.8%.[300] In other words, almost half of all the money that startups have raised recently came from other operating companies.

The main difference between corporate VCs and financial VCs is that corporate VCs pursue strategic goals beyond generating a return.[301] One of these strategic goals is reconnaissance.[302] Like financial VCs, corporate VCs vet a large number of startups.[303] Then they invest in a small percentage of those companies. They can also bargain for a seat on the board, either as a director or an observer.[304] During their vetting and board service, they gain access to private information about emerging technologies, nascent markets, and talented engineers and managers.[305]

Another strategic goal is building commercial relationships. Corporate VCs often arrange deals in which their portfolio companies become customers, suppliers, or partners with their parent company in developing new technology.[306]

Corporate VC investments can also work like an option to purchase a startup. Corporate VCs who serve on a portfolio company's board will absorb information about its value as an acquisition target.[307] They will also typically learn when a portfolio company receives an acquisition offer. But of course, a corporate VC can only exercise the option if the government won't sue to block the acquisition—as Illumina learned with Grail.[308]

When a large tech company can't buy a startup but wants more control over it than a conventional corporate VC investment would allow, it can turn the startup into what we call a centaur. A centaur is formally an independent, private company. Like a unicorn, a centaur has a market value more typical of a mid- or large-cap public company.

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298 2024 Yearbook, *supra* note 39, at 30.

299 *Id.*

300 *Id.*

301 *See* Ibrahim, *Corporate Venture Capital*, *supra* note 31, at 224–25 (discussing benefits companies obtain from startup investment).

302 *See* Josh Lerner, *Corporate Venturing*, Harv. Bus. Rev., Oct. 2013, at 86, 89 (highlighting different goals associated with corporate venture capital).

303 *See* Fan, *supra* note 296, at 342–46.

304 *Id.* at 412–19 (discussing fiduciary duties associated with board membership for appointees of corporate VCs).

305 *Id.* at 364–65; *see also* Lemley & Wansley, *supra* note 245 (arguing tech giants co-opt emerging technologies to prevent competition).

306 *See* Fan, *supra* note 296, at 366.

307 *See id.* at 409 (arguing that corporate VC arms allow corporations to understand new technologies and identify futures acquisitions).

308 *See supra* notes 237–38 and accompanying text.

But unlike a unicorn, a centaur's capital doesn't come primarily from private investment funds—it comes from one or two public companies. In other words, a centaur is a startup that takes a massive corporate VC investment that crowds out other investors and couples that investment with a deep commercial partnership.

The most prominent centaur is OpenAI. When it was founded, OpenAI was a nonprofit with a mission to build an artificial general intelligence "that is safe and benefits all of humanity."[309] But its founders came to realize that "donations alone would not scale with the cost of computational power and talent required."[310] So in 2019, OpenAI created a "capped-profit" subsidiary, and Microsoft paid $1 billion for an economic interest in that subsidiary.[311] The companies also agreed on a commercial partnership in which Microsoft would become OpenAI's "preferred partner for commercializing new AI technologies."[312]

In 2023, OpenAI became a true centaur. Microsoft invested $10 billion in OpenAI[313]—a sum that shattered the norms of corporate VC. The companies deepened their commercial partnership, integrating OpenAI's models into Microsoft's products like GitHub.[314] Later that year, when OpenAI's nonprofit board fired its CEO, Sam Altman, Microsoft came to his rescue.[315] Altman threatened to start a new AI lab at Microsoft, and most of OpenAI's engineers signed a letter threatening to follow him.[316] Within days, the board reinstated Altman, and he cashiered the board members who had fired him.[317]

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309 *Our Structure*, OpenAI (May 5, 2025), https://openai.com/our-structure [https://perma.cc/SQ2R-VBBB] (discussing the history of OpenAI).

310 *Id.*

311 James Vincent, *Microsoft Invests $1 Billion in OpenAI to Pursue Holy Grail of Artificial Intelligence*, The Verge (July 22, 2019, 10:08 AM), https://www.theverge.com/2019/7/22/20703578/microsoft-openai-investment-partnership-1-billion-azure-artificial-general-intelligence-agi [https://perma.cc/AV5K-JEDH].

312 *OpenAI Forms Exclusive Computing Partnership with Microsoft to Build New Azure AI Supercomputing Technologies*, Microsoft (July 22, 2019), https://news.microsoft.com/2019/07/22/openai-forms-exclusive-computing-partnership-with-microsoft-to-build-new-azure-ai-supercomputing-technologies [https://perma.cc/9RD4-8LWD].

313 Cade Metz & Karen Weise, *Microsoft to Invest $10 Billion in OpenAI, the Creator of ChatGPT*, N.Y. Times (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/business/microsoft-chatgpt-artificial-intelligence.html [https://perma.cc/EX4H-LXTU].

314 *Id.*

315 Cade Metz, Tripp Mickle, Mike Isaac, Karen Weise & Kevin Roose, *Five Days of Chaos: How Sam Altman Returned to OpenAI*, N.Y. Times (Nov. 22, 2023), https://www.nytimes.com/2023/11/22/technology/how-sam-altman-returned-openai.html [https://perma.cc/S6R9-ZWAY].

316 *Id.*

317 *Id.*

Another prominent centaur is OpenAI's rival Anthropic. The company was founded by engineers who quit OpenAI after a dispute over its direction.[318] Like OpenAI, Anthropic is closely intertwined with the public company world. It has raised $8 billion from Amazon and $3 billion from Google.[319] And also like OpenAI, Anthropic has a commercial partnership with a public company. Anthropic doesn't just use Amazon's cloud services—the two are collaborating on software and chips.[320]

In 2024, Dario Amodei, one of Anthropic's founders, was asked in an interview why he "hooked up" his company to a large corporation.[321] He replied: "[A]nyone who wants to build [an AI model] is going to need to find some way to finance it. . . . You can be a large company. You can have some kind of partnership . . . with a large company. Or governments would be the other source."[322]

It's telling that Amodei doesn't even mention the possibility of an exit. Anthropic doesn't need an IPO because it can raise capital from Amazon and Google at a lower cost and with less hassle—as long as it agrees to the partnerships. And acquisitions face the potential threat of merger enforcement. It's not that tech companies don't want to buy AI startups. In fact, DeepMind, an AI lab that competes with OpenAI and Anthropic, was formally acquired by Google in 2014.[323] But that was before antitrust enforcers started to crack down on startup deals. Today, an acquisition of a company like Anthropic is off the table. If Amazon tried to buy Anthropic outright, the government might sue to block the deal.

One might object here that we are missing the real reason behind these structures. Isn't OpenAI a nonprofit and Anthropic a public benefit corporation so that they can develop AI safely with less pressure

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318 Cade Metz, Karen Weise, Nico Grant & Mike Isaac, *Ego, Fear and Money: How the A.I. Fuse Was Lit*, N.Y. Times (Mar. 4, 2024), https://www.nytimes.com/2023/12/03/technology/ai-openai-musk-page-altman.html [https://perma.cc/377H-GWXM] (discussing competition in Silicon Valley around AI).

319 *Google Invests Further $1bn in OpenAI Rival Anthropic*, Fin. Times (Jan. 22, 2025), https://www.ft.com/content/ed631513-dd37-44a3-a536-b2002f5727cc [https://perma.cc/KN9Z-6VX3].

320 *Powering the Next Generation of AI Development with AWS*, Anthropic (Nov. 22, 2024), https://www.anthropic.com/news/anthropic-amazon-trainium [https://perma.cc/F9QA-THM2].

321 The Ezra Klein Show, *What If Dario Amodei Is Right About A.I.?*, N.Y. Times (Apr. 12, 2024), https://www.nytimes.com/2024/04/12/opinion/ezra-klein-podcast-dario-amodei.html [https://perma.cc/3MAA-7BJG].

322 *Id.*

323 Catherine Shu, *Google Acquires Artificial Intelligence Startup DeepMind for More Than $500M*, TechCrunch (Jan. 26, 2014, 5:20 PM), https://techcrunch.com/2014/01/26/google-deepmind [https://perma.cc/W55M-K479].

to focus on short term profits?[324] Our response is yes, but that's not the whole story. AI safety stakeholderism can't fully explain the centaurs' capital structures. The centaurs could have been organized as truly independent nonprofits or public benefit corporations, and they could have sought funding from a diverse group of donors or investors. But instead, they chose to raise capital from Microsoft, Amazon, and Google and accept the constraining partnerships that come with it. That suggests that the tech giants are willing to supply capital at a more attractive price than other investors. We don't know for sure why that is, but we doubt that they are spending billions on charity.

We also don't yet know how long centaurs can live. OpenAI and Anthropic might grow tired of their public company partners and seek new investors. Recent reports suggest that Altman is already chafing at Microsoft's influence over OpenAI.[325] A cyclical change in the IPO market or a shift in antitrust enforcement priorities might make an exit attractive. But for now, some of the most important research in AI is being funded and influenced by public companies in the secrecy of the private markets.

D. Reverse Acquihires

Some public tech companies have responded to the antitrust crackdown with a more brazen strategy: the "reverse acquihire."[326] It works like this. The target startup's founders and engineering team quit their jobs en masse. A large, public tech company hires them all immediately. Then the tech company makes a suspiciously generous payment to the shell of the startup in exchange for a non-exclusive license to its technology.[327]

There were three reverse acquihires of AI unicorns in 2024. In March, the founders of Inflection AI—a startup valued at $4 billion—quit their jobs.[328] They immediately took new jobs at Microsoft, and

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324 Whether these structures can actually change incentives is an open question. *See* Gad Weiss, Aligned Structuring of AI Startups 3 (July 3, 2025) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4943590 [https://perma.cc/BX9J-UFC3] (discussing how OpenAI and Anthropic shift control away from profit incentives toward public welfare).

325 *See* Berber Jin, *OpenAI and Microsoft Tensions Are Reaching a Boiling Point*, Wall St. J. (June 16, 2025, 3:58 PM), https://www.wsj.com/tech/ai/openai-and-microsoft-tensions-are-reaching-a-boiling-point-4981c44f [https://perma.cc/HDC5-A7DX].

326 Heath, *supra* note 33.

327 *See* Berber Jin, Tom Dotan & Miles Kruppa, *Struggling AI Startups Look for a Bailout from Big Tech*, Wall St. J. (Aug. 6, 2024, 5:30 AM), https://www.wsj.com/tech/ai/struggling-ai-startups-look-for-a-bailout-from-big-tech-3e635927?mod=itp_wsj [https://perma.cc/C44G-56C6].

328 Hu & Varghese, *supra* note 33.

most of Inflection's seventy employees followed them.[329] Microsoft paid the shell of Inflection $650 million—$620 million for a license to its AI models and "$30 million for Inflection to agree not to sue over Microsoft's poaching."[330] Inflection used the money to pay off the company's investors, including the VC firm Greylock.[331]

In June, the founders of Adept AI—a startup valued at over $1 billion[332]—said they would quit their jobs.[333] They took new jobs at Amazon, and roughly sixty-six percent of Adept's employees followed them.[334] Amazon paid the shell of Adept for a license and managed to keep the size of the payment quiet.[335] It's not clear how investors made out at Adept, but they knew the drill. Greylock, the main backer of Inflection, also invested in Adept.[336]

Then in August, the founders of Character AI—a startup valued at $1 billion—quit their jobs.[337] They took new jobs at Google, and about thirty Character employees followed them.[338] Google paid the shell of Character a whopping $2.7 billion.[339] The money "was used to buy shares from Character's investors and employees and to fund the startup's continued operations."[340] In other words, the license fee facilitated a large secondary sale.

In 2025, Meta introduced a new variant of these deals—*the reverse acquihire disguised as a centaur*. Meta paid around $14 billion to the startup Scale AI.[341] In exchange, it received a 49% stake in Scale.[342] So far, it sounds a lot like a centaur. But as part of the deal, Scale's

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329 *See id.*

330 Julie Bort, *Here's How Microsoft is Providing a 'Good Outcome' for Inflection AI VCs, as Reid Hoffman Promised*, TechCrunch (Mar. 21, 2024, 3:50 PM), https://techcrunch.com/2024/03/21/microsoft-inflection-ai-investors-reid-hoffman-bill-gates [https://perma.cc/59HX-GXGP].

331 *See id.*

332 Taylor Soper, *Amazon Hires Founders from Well-Funded Enterprise AI Startup Adept to Boost Tech Giant's 'AGI' Team*, GeekWire (June 28, 2024, 12:32 PM), https://www.geekwire.com/2024/amazon-hires-founders-from-well-funded-enterprise-ai-startup-adept-to-boost-tech-giants-agi-team [https://perma.cc/9ANT-R99Y].

333 *See An Update from Adept*, Adept (June 28, 2024), https://www.adept.ai/blog/adept-update [https://perma.cc/4C44-EMET] (explaining that "the Adept co-founders and some of the team are joining Amazon's AGI organization to continue to pursue the mission of building useful general intelligence").

334 Heath, *supra* note 33.

335 *See id.*; *see also* Jin et al., *supra* note 327 (reporting that the license fee was about $330 million, but only based on anonymous sources "familiar with the matter").

336 Heath, *supra* note 33.

337 *See* Kruppa & Thomas, *supra* note 33.

338 *Id.*

339 *Id.*

340 *Id.*

341 Weinberg, *supra* note 33.

342 *Id.*

CEO Alexandr Wang will join Meta.[343] Some of Scale's "top technical employees" will follow him to Meta.[344] And $12.8 billion of that approximately $14 billion investment is set to be paid out to Scale shareholders in a dividend![345] According to one report, "[t]he structure was intentional. Executives at Meta and Scale AI were worried about drawing the attention of regulators."[346]

Acquihires have long been a standard practice in Silicon Valley.[347] But until recently, they had nothing to do with antitrust avoidance. Instead, they were a means for a tech company to attract a team of engineers simply and quickly.[348] Startups would turn to acquihires when they failed to raise another fundraising round and were close to liquidation.[349] In a classic acquihire, there were two pools of cash.[350] First, there was deal consideration paid to the startup's shareholders in exchange for a covenant not to sue, some of the startup's assets, and/or the startup's equity.[351] Second, there was a compensation pool for the newly hired engineers, which was subject to vesting, so the engineers had the incentive to stick around with their new employer.[352]

An acquihire can leave everyone involved better off. The acquihirer gets the talent and possibly intellectual property it wants. The startup's founders and employees get new jobs, possibly with above-market salaries to compensate for the value of the startup equity that they have abandoned. The VCs get paid off with the deal consideration. And if the startup had no realistic alternative other than liquidation, there's no harm to competition or innovation.[353]

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343 *Id.*

344 Cory Weinberg, *Meta to Pay Nearly $15 Billion for Scale AI Stake and Startup's 28-Year-Old CEO*, The Information (June 10, 2025, 8:08 AM), https://www.theinformation.com/articles/meta-pay-nearly-15-billion-scale-ai-stake-startups-28-year-old-ceo [https://perma.cc/URE7-SZ7U].

345 Weinberg, *supra* note 33.

346 Mike Isaac & Cade Metz, *Meta Invests $14.3 Billion in Scale AI To Kick-Start Superintelligence Lab*, N.Y. Times (June 12, 2025), https://www.nytimes.com/2025/06/12/technology/meta-scale-ai.html [https://perma.cc/JD9X-CUFW].

347 *See, e.g.*, John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 Duke L.J. 281, 283–84 (2013) (describing "the acqui-hiring transaction structure that has become commonplace in Silicon Valley"); *see also* Elizabeth Pollman, *Startup Failure*, 73 Duke L.J. 327, 356–59 (2023) (describing acquihires concept).

348 Coyle & Polsky, *supra* note 347, at 293–95.

349 *Id.* at 295.

350 *Id.* at 296–301.

351 *Id.* at 297–98.

352 *Id.*

353 *See generally* 2023 Merger Guidelines, *supra* note 12, at 30–31 (explaining the "failing firm defense," which posits that an acquisition does not lessen competition when the acquired firm would experience business failure but for the merger).

A reverse acquihire resembles a traditional acquihire in terms of cash flow. There is deal consideration and a compensation pool. The deal consideration is the license fee.[354] The compensation pool is the compensation that the former startup employees receive in their new roles at Big Tech.[355]

But the motivation for a reverse acquihire is different—it is anticompetitive. Inflection, Adept, Character, and Scale were all unicorns.[356] Adept's founders were reportedly tired of fundraising,[357] but these weren't companies on the cusp of liquidation. A deal of this size would be worth the cost of a formal acquisition.[358] Microsoft, Amazon, Google, and Meta didn't use the reverse acquihire structure to save time or money—they used it as an end run around the antitrust laws. Due to their size, if these deals were structured as conventional mergers, they would have triggered an HSR filing.[359] By instead using a reverse acquihire, the parties (at least arguably) avoided triggering HSR.

The antitrust enforcers seem to realize what reverse acquihires are about, and they are taking action to address them. The FTC is investigating Microsoft's deal with Inflection.[360] And the Commission is also asking Amazon to answer questions about its deal with Adept.[361] Enforcers may face some tricky line-drawing problems when addressing these deals. Offering a competitor's employee a high salary to leave is pro-competitive. And non-exclusive licensing deals would not generally raise antitrust concerns. But the context of the antitrust crackdown on Big Tech's startup acquisitions is what suggests that reverse acquihires are anticompetitive.

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354 *See* Jin et al., *supra* note 327 (describing how Google, Amazon, and Microsoft paid licensing fees of $2.7 billion, $330 million, and $650 million, respectively).

355 *See id.* (describing compensation paid to new acquihired employees).

356 *See The Complete List of Unicorn Companies*, *supra* note 9; *see also* Hu & Varghese, *supra* note 33 (valuing Inflection AI at $4 billion); Soper, *supra* note 332 (valuing Adept at $1 billion); Kruppa & Thomas, *supra* note 33 (valuing Character at $1 billion); Weinberg, *supra* note 33 (valuing Scale AI at $25 billion).

357 *See An Update from Adept*, *supra* note 333 (lamenting that time spent fundraising is time diverted from "bringing to life [Adept's] agent vision").

358 *Cf.* Coyle & Polsky, *supra* note 347, at 321 (noting that investors perceive companies that undergo a traditional acquihire as "not meaningfully different from those companies that fail").

359 *See supra* Section II.B.5 (discussing changes in the HSR forms).

360 Dave Michaels & Tom Dotan, *FTC Opens Antitrust Probe of Microsoft AI Deal*, Wall St. J. (June 6, 2024, 4:28 PM), https://www.wsj.com/tech/ai/ftc-opens-antitrust-probe-of-microsoft-ai-deal-29b5169a [https://perma.cc/H23S-WT83].

361 Krystal Hu, Greg Bensinger & Jody Godoy, *Exclusive: FTC Seeking Details on Amazon Deal with AI Startup Adept, Source Says*, Reuters (July 16, 2024, 11:09 AM), https://www.reuters.com/technology/ftc-seeking-details-amazon-deal-with-ai-startup-adept-source-says-2024-07-16 [https://perma.cc/5BHE-HF9F].

V
Policy Implications

Startups, VC, and large technology companies function as a system. Changes to securities and antitrust law will have hydraulic effects across the system. Making IPOs more costly will push some firms to exit by acquisition. Making M&A more difficult will shift some startups to IPOs. And policies that simultaneously discourage both IPOs and M&A will cause some startups to stay private longer, evade the antitrust laws, and create new types of entities whose benefits and risks are difficult to evaluate.

Securities regulators and antitrust enforcers should think more broadly about these hydraulic effects when they make rules or file lawsuits. Congress and the White House should consider the interconnectedness of the system when they craft competition and innovation policy. An all-of-government approach to competition policy should mean not only enhancing antitrust enforcement where appropriate but also accounting for the potential negative effects of making exit more difficult. In this Part, we consider the effects of restricting M&A exits on competition, capital formation, and the transparency of socially important businesses.

A. Competition

The Biden administration's antitrust enforcers believed—arguably with good evidence—that the antitrust laws had been underenforced for decades.[362] Amped up enforcement was required, in their view, to reduce concentration, thereby safeguarding consumers, workers, local businesses, and democracy.[363] On the merger front, this approach meant fewer settlements, more litigation, and increased procedural burdens on merging parties.[364]

One goal of this policy, of course, was to enforce the antitrust laws as these leaders understood them. But the broader aim of reducing merger activity generally has had knock-on effects on the startup ecosystem worth considering. From the enforcers' point of view, what is

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362 *See, e.g.*, Herbert Hovenkamp, *Distinguishing Harms from Benefits in the 2023 Merger Guidelines*, ProMarket (Aug. 31, 2023) https://www.promarket.org/2023/08/31/herbert-hovenkamp-distinguishing-harms-from-benefits-in-the-2023-merger-guidelines [https://perma.cc/FB4M-MYDL] (stating that "abundant economic evidence indicates that merger law is underenforced"); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 Antitrust 33, 36, 42 (2021) (opining that "antitrust enforcement has been too lax, largely as a result of the durable influence of the Chicago School").

363 *See supra* notes 121–29 and accompanying text.

364 *See supra* Section II.B.

the desired outcome for startups whose deals are blocked or abandoned or that decide not to test the enforcers at all? Perhaps that outcome is an IPO, which creates another publicly funded competitor and prevents further consolidation. From that perspective, the Adobe/Figma story might have been these antitrust enforcers' ideal outcome. As we saw above, the parties walked away from their deal in 2023 under pressure from U.S. and international antitrust enforcers.[365] In April 2025, Figma announced that it had filed for an IPO.[366] Later in 2025, Figma went public and closed its first day of trading at $67.7 billion.[367] As a result of the deal being abandoned, Figma's investors were richly rewarded and Adobe's dreams of further consolidation were dashed. If that is the desired outcome from a competition policy standpoint, then one way to facilitate it is to make IPOs less burdensome and more attractive. As it stands, however, other, less desirable outcomes are likely to proliferate.

1. Centaurs

One such outcome—both predictable and undesirable—is the attempted evasion of merger enforcement. Consider centaurs. As we discussed in the previous Part, Amazon, Google, and Microsoft have invested billions of dollars in OpenAI and Anthropic. These investments are well above HSR's reporting thresholds.[368] But those thresholds apply only to acquisitions of—or investments in—corporate entities and to acquisitions of voting shares. Non-corporate entities (NCEs), like LLCs, are treated differently than corporations under HSR. For a filing to be required, not only must the size-of-transaction and, where necessary, size-of-person thresholds be crossed, but a buyer must also gain control of an NCE.[369] The HSR Act defines "control" for unincorporated entities to mean "having the right to 50 percent or

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365 *See supra* notes 217–18 and accompanying text.

366 *See* Jaiveer Shekhawat, *Figma Confidentially Files for Much Awaited US IPO After $20 Billion Adobe Deal Collapse*, Reuters (Apr. 15, 2025), https://www.reuters.com/markets/deals/figma-confidentially-files-us-ipo-2025-04-15 [https://perma.cc/J3R3-TP7T].

367 Rocha & de la Merced, *supra* note 282.

368 In 2025, the HSR size-of-transaction threshold is $126.4 million. *New HSR Thresholds and Filing Fees for 2025*, *supra* note 99. Microsoft invested $13.75 billion in OpenAI. *See* Jin & Driebusch, *supra* note 28. Amazon and Google invested $8 billion and $3 billion respectively in Anthropic. *See* Greg Bensinger & Deborah Mary Sophia, *Amazon's $8 Billion Bet on AI: CEO Andy Jassy Reveals Investments in Anthropic and Alexa+*, USA Today (Apr. 10, 2025, 8:00 PM), https://www.usatoday.com/story/money/business/2025/04/10/amazon-artificial-intelligence-8-billion-investment/83034351007 [https://perma.cc/8RMF-EL2K]; Cade Metz, Nico Grant & David McCabe, *Inside Google's Investment in the A.I. Start-Up Anthropic*, N.Y. Times (Mar. 11, 2025), https://www.nytimes.com/2025/03/11/technology/google-investment-anthropic.html [https://perma.cc/SZC6-ZMQT].

369 *See* 16 C.F.R. §§ 801.50(b), 801.2(f) (2025); Aslihan Asil, Jon M. Barrios & Thomas G. Wollman, *Misaligned Measures of Control: Private Equity's Antitrust Loophole*, 18 Va. L. &

more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity."[370] Because OpenAI is organized as an NCE, Microsoft can invest huge sums of money in it without triggering antitrust review, as long as it stops short of acquiring control as defined in the Act. Similarly, acquisitions of non-voting shares in an entity are not subject to HSR.[371] Because it appears that Google acquired non-voting shares of Anthropic, that investment also is not subject to HSR.[372] Amazon has a similar arrangement with Anthropic.[373]

Of course, the antitrust agencies can investigate centaurs even without an HSR filing or its equivalent. Indeed, both UK and U.S. enforcers investigated the AI centaurs in 2024 and 2025. The UK's Competition and Markets Authority (CMA) ended its probe into Microsoft's OpenAI investment in March 2025. The agency found that, while it "believes that Microsoft acquired material influence over OpenAI in 2019," based on the "commercial realities of the relationship" between the companies, it "does not believe that Microsoft currently controls OpenAI's commercial policy, and instead exerts a high level of material influence over that policy."[374] As a result, the CMA concluded that there had been "no change of control giving rise to a relevant merger situation" and that therefore the agency lacked jurisdiction to review the arrangement "in its current form."[375]

In the United States, the FTC in January 2024 initiated a study of the Microsoft/OpenAI, Amazon/Anthropic, and Google/Anthropic

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Bus. Rev. 51, 70 (2023) (stating that "acquisitions of non-corporate interests are reportable only when they confer control").

370 16 C.F.R. § 801.1(b)(1)(ii) (2025).

371 Hart-Scott-Rodino specifies that "no person shall acquire, directly or indirectly, any voting securities of any other person, unless both persons . . . file notification." 15 U.S.C. § 18a(a). *See also* Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L. J. 559, 567 (2000) (stating that the "HSR Act applies more narrowly to acquisitions of 'voting securities,'" perhaps reflecting a "view that acquisitions of non-voting stock raise less antitrust concern").

372 *See Alphabet Inc.'s Partnership with Anthropic PBC*, Competition & Mkts. Auth. 2 (Nov. 19, 2024) (UK), https://assets.publishing.service.gov.uk/media/676959bae6ff7c8a1fde9d33/Full_text_decision__.pdf [https://perma.cc/52C8-UFJY] (stating that Google had acquired non-voting shares of Anthropic).

373 *See* Billy Perrigo, *How Anthropic Designed Itself to Avoid OpenAI's Mistakes*, Time (May 30, 2024, 1:46 PM), https://time.com/6983420/anthropic-structure-openai-incentives [https://perma.cc/5AKB-KGPW] (reporting that Amazon and Google "do not own voting shares in Anthropic").

374 *Microsoft Corporation's Partnership with OpenAI, Inc., Decision on Relevant Merger Situation, Summary*, Competition & Mkts. Auth. 3 (Mar. 5, 2025), https://assets.publishing.service.gov.uk/media/67fe26ef712bf73dea135449/____Full_text_decision__.pdf [https://perma.cc/5QQF-QJNT].

375 *Id.*

partnerships. Exercising its authority under Section 6(b) of the FTC Act, the agency issued orders to the five companies requesting information about these agreements and their "strategic rationale" as well as the "transactions' competitive impact."[376] The Commission released its report in January 2025.[377] The report avoided analyzing the competitive impact of these partnerships, stating that such an analysis "is beyond the scope of this report" in part because it would require additional "case specific facts" to undertake.[378] However, the report did highlight features of these partnerships that in the FTC's view "may warrant further consideration."[379] These features include "access to key inputs" like computing resources and skilled engineers; switching costs for AI developers, which might make it more difficult for them to change their cloud service providers; and access by Microsoft, Amazon, and Google to "sensitive technical and business information that might be unavailable to others."[380]

Without explicitly characterizing these agreements as devices to avoid HSR filing requirements, the FTC report drew comparisons between these "new forms of agreements," which "may represent a new strategy by large technology firms seeking to form relationships with AI model developers," and earlier efforts by Big Tech to avoid reporting transactions.[381] Other observers have stated explicitly that the deals were designed to evade the antitrust laws.[382] Microsoft gave up its board observer position on the OpenAI board in July 2024, likely in response to ongoing antitrust scrutiny.[383]

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[376] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Generative AI Investments and Partnerships (Jan. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships [https://perma.cc/WD4N-G6WK]. Section 6(b) of the FTC Act authorizes the agency to require firms to "file with the Commission . . . annual or special . . . reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other" entities of the firms in question. 15 U.S.C. § 46(b). The FTC Act also empowers the agency to "make public from time to time such portions of the information obtained by it" under its 6(b) authority "as are in the public interest." 15 U.S.C. § 46(f).

[377] Fed. Trade Comm'n, Off. Tech. Staff, Partnerships Between Cloud Service Providers and AI Developers (Jan. 2025).

[378] *Id.* at 29.

[379] *Id.*

[380] *Id.* at 29–37.

[381] *Id.* at 6–7.

[382] *See, e.g.*, David McCabe, *U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI*, N.Y. Times (June 5, 2024), https://www.nytimes.com/2024/06/05/technology/nvidia-microsoft-openai-antitrust-doj-ftc.html [https://perma.cc/5PG4-Z8Y7] ("Microsoft structured its minority stake in OpenAI in part to avoid antitrust scrutiny . . . .").

[383] Foo Yun Chee, *Microsoft Ditches OpenAI Board Observer Seat to Stave off Antitrust Scrutiny*, Reuters (July 10, 2024, 5:30 PM), https://www.reuters.com/technology/

2. *Reverse Acquihires*

Reverse acquihires also bear the hallmarks of an effort to avoid antitrust scrutiny. Recall that in a reverse acquihire, Big Tech firms hire away a startup's key talent, license its critical intellectual property, and make a substantial payment to the shell of the startup, sufficient to pay off its investors.[384] This approach achieves the goals of a traditional acquisition, while avoiding the standard acquisition structure that would trigger merger review. European enforcers have already recognized that reverse acquihires are reportable transactions ("concentrations," in European parlance), that should be subject to antitrust scrutiny if jurisdictional thresholds are met. The German Federal Cartel Office (Bundeskartellamt), for example, found that Microsoft's "takeover of all" Inflection personnel, its licensing of Inflection's IP, and the financing agreements between the firms "constitute a merger which is generally subject to merger control in Germany."[385] But because Inflection had only "minor" operations in Germany, the Bundeskartellamt concluded that it could not review the substance of the transaction.[386] Based on these same factors, and Inflection's announcement that it planned to shift its business focus "to a different activity," the European Commission (EC) also concluded that the Microsoft/Inflection agreement was "a structural change in the market that amounts to a concentration" under EU law.[387] However, because the transaction did not exceed the EU's notification thresholds and seven Member States had determined that while the transaction should be treated as a concentration they

microsoft-ditches-openai-board-observer-seat-amid-regulatory-scrutiny-2024-07-10 [https://perma.cc/D4VW-AKKV].

384 *See supra* Section IV.D.

385 Press Release, Bundeskartellamt, Taking Over Employees May Be Subject to Merger Control in Germany–Bundeskartellamt Not Competent to Review Microsoft/Inflection Transaction as Inflection Has No Substantial Operations in Germany (Nov. 29, 2024), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/29_11_2024_Microsoft.html?nn=48916 [https://perma.cc/2D2H-8MV7]. The UK's Competition and Markets Authority also found that the Microsoft/Inflection transaction "falls within [its] merger control jurisdiction for review." *Microsoft Corporation's Hiring of Certain Former Employees of Inflection and Its Entry into Associated Arrangements with Inflection, Summary*, Competition and Mkts. Auth. (Apr. 9, 2024), https://assets.publishing.service.gov.uk/media/66d82eaf7a73423428aa2efe/Summary_of_phase_1_decision.pdf [https://perma.cc/ZH79-LK9D]. However, on the merits, the CMA concluded that the "[t]ransaction does not give rise to a realistic prospect of a substantial lessening of competition (SLC) as a result of horizontal unilateral effects." *Id.*

386 Press Release, Bundeskartellamt, *supra* note 385.

387 Press Release, Eur. Comm'n, Commission Takes Note of the Withdrawal of Referral Requests by Member States Concerning the Acquisition of Certain Assets of Inflection by Microsoft, (Sept. 17, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727 [https://perma.cc/D8NA-3AEP].

could not review the deal under their national merger laws, the EC took no action against Microsoft.[388] In a statement on the EC's decision, Microsoft said that "[w]e continue to be confident that the hiring of talent promotes competition and should not be treated as a merger."[389]

While European enforcers treated reverse acquihires as mergers, these transactions do not appear to be reportable in the United States under HSR. The FTC Premerger Notification Office's baseline rule is that the grant of an exclusive license to a patent or trademark amounts to an asset transfer to the licensee and is therefore reportable under HSR if the size-of-person and size-of-transaction thresholds are met.[390] However, for the license to be treated as an asset in this way, it must be exclusive, even as against the licensor.[391] Non-exclusive licenses will not trigger an HSR filing.[392] Because the licenses in these reverse-acquihire deals are non-exclusive, the transactions likely are not reportable under HSR.[393] This is the case even though, without the key personnel to best implement the IP, it is not clear that other firms would want to take a license. And the licensors, which retain rights to their IP, do not appear to be in a position to compete with the Big Tech licensees.

Reverse acquihires therefore seem to fall into a gap in the HSR reporting regime, and that is likely the point. Indeed, the FTC opened an investigation into whether the Microsoft/Inflection transaction was

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388 *Id.*

389 Foo Yun Chee, *No Merger Scrutiny of Microsoft's Hiring of Inflection Staff, EU Says*, REUTERS (Sept. 18, 2024, 2:42 PM), https://www.reuters.com/markets/europe/eu-antitrust-regulators-will-not-act-microsofts-hiring-inflection-staff-2024-09-18 [https://perma.cc/5Z3K-PJGD].

390 Am. Bar Ass'n, PREMERGER NOTIFICATION PRACTICE MANUAL 55 (5th ed. 2015).

391 *Id.*

392 *Id.*

393 *See Microsoft Corporation's Hiring of Certain Former Employees of Inflection and Its Entry into Associated Arrangements with Inflection*, COMPETITION & MKTS. AUTH. 2 (Oct. 24, 2024) (UK), https://assets.publishing.service.gov.uk/media/6719ff5f549f63039436b3c8/__Full_text_decision__.pdf [https://perma.cc/2SB9-CSVK] (noting that Microsoft had entered "a non-exclusive licensing deal to utilize Inflection IP in a range of ways"); Annie Palmer, *Amazon Beefs Up AI Development, Hiring Execs from Startup Adept and Licensing Its Technology*, CNBC (June 28, 2024, 7:32 PM), https://www.cnbc.com/2024/06/28/amazon-hires-execs-from-ai-startup-adept-and-licenses-its-technology.html [https://perma.cc/9WW6-WTVM] (reporting that Amazon was taking a non-exclusive license to Adept's technology); Kenrick Cai, *Google Hires Top Talent from Startup Character.AI, Signs Licensing Deal*, REUTERS (Aug. 2, 2024, 5:18 PM), https://www.reuters.com/technology/artificial-intelligence/google-hires-characterai-cofounders-licenses-its-models-information-reports-2024-08-02 [https://perma.cc/F375-JGKG] (reporting that Character.AI had granted Google a non-exclusive license to its technology).

structured specifically to avoid antitrust scrutiny.[394] A month later, it opened a similar inquiry into the Amazon/Adept deal.[395]

3. Preventing Evasion

As centaurs and reverse acquihires demonstrate, tightening merger enforcement should put the agencies on high alert for evasion. And the agencies have tools to combat it. HSR Rule 801.90 addresses transaction structures designed to avoid HSR filing requirements.[396] The rule states that any "transaction(s) or other device(s) entered into or employed for the purpose of avoiding" HSR obligations "shall be disregarded," and compliance obligations will be determined by applying HSR and its rules "to the substance of the transaction."[397] In other words, the agencies will look through a transaction's structure to its substance. The FTC has stated that it will apply a "but for" test to evaluate transaction structures that might be designed to avoid HSR, and ask: "[B]ut for the requirement to file and observe the waiting period, would the parties have selected this form of transaction?"[398]

The penalty for violating the HSR Act currently is just over $50,000 per day.[399] Fines have run into the millions of dollars.[400] Repeat offenders might be subject to significant financial penalties. For instance, in January 2025, the Department of Justice sued KKR regarding a series of alleged HSR violations.[401] The Department stated that "the maximum penalty"

394 Dave Michaels & Tom Dotan, *FTC Opens Antitrust Probe of Microsoft AI Deal*, Wall St. J. (June 6, 2024, 4:28 PM), https://www.wsj.com/tech/ai/ftc-opens-antitrust-probe-of-microsoft-ai-deal-29b5169a [https://perma.cc/VD7Z-J9WL] (reporting that the FTC opened an investigation to "try[] to determine whether Microsoft crafted a deal that would give it control of Inflection but also dodge FTC review of the transaction").

395 Krystal Hu, Greg Bensinger & Jody Godoy, *Exclusive: FTC Seeking Details on Amazon Deal with AI Startup Adept, Source Says*, Reuters (July 16, 2024, 11:09 AM), https://www.reuters.com/technology/ftc-seeking-details-amazon-deal-with-ai-startup-adept-source-says-2024-07-16 [https://perma.cc/6GNK-GPGH] (noting that the FTC's "informal inquiry" "reflects . . . the [agency's] growing concern about how AI deals have been put together").

396 16 C.F.R. § 801.90 (2025).

397 *Id.*

398 *Seeing the Whole Picture on Avoidance Devices*, Fed. Trade Comm'n (Sept. 23, 2020), https://www.ftc.gov/enforcement/competition-matters/2020/09/seeing-whole-picture-avoidance-devices [https://perma.cc/4ZWZ-2BG6].

399 In January 2025, the FTC raised the daily fine for HSR violations to $53,088 a day. *See Adjustment to Civil Penalty Amounts*, 90 Fed. Reg. 5580 (Jan. 17, 2025).

400 *See, e.g.*, *GameStop CEO Ryan Cohen to Pay Nearly $1 Million Penalty to Settle Antitrust Law Violation*, Fed. Trade Comm'n (Sept. 18, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/gamestop-ceo-ryan-cohen-pay-nearly-1-million-penalty-settle-antitrust-law-violation [https://perma.cc/VMH6-KRB4] (announcing civil penalty of $985,320 for failing to file HSR form when required to do so).

401 Press Release, U.S. Dep't Just. Off. Pub. Affs., Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law (Jan. 14, 2025), https://www.justice.gov/

for those violations is more than $650 million.[402] While this maximum fine would be far larger than any such penalty to date, it is a reminder that muscular enforcement of HSR avoidance rules could potentially be an effective counter to creative transaction structures designed to get around HSR filing requirements. Reverse acquihires seem ripe for challenge under Rule 801.90. These are acquisitions in all but name: The acquiring company gets the target company's technology and its most important employees, and it pays a price sufficient to compensate the target's investors. But for the requirements of HSR, "would the parties have selected this form of transaction?" It seems unlikely.

Another knock-on effect of tightening merger enforcement is that, in addition to attempting to evade enforcement, firms employ transaction structures that might be more difficult to challenge under the antitrust laws. Taming evasion is one thing, but challenging reverse acquihires and the other types of conduct described in the previous Section under Clayton Act Section 7 or Sherman Act Sections 1 or 2 presents substantive challenges for the enforcement agencies. Unlike a standard merger or acquisition, for which there are case precedents, reverse acquihires present novel issues. The outcome of any litigation is less certain. Antitrust enforcers should consider this cost when narrowing the merger path to exit. It is possible that it is better for society to litigate rather than settle most merger challenges. And it is certainly possible that some enforcers believe that to be the case. But in making that determination, hidden costs, like those that would be imposed by litigating against creatures of no exit, must be accounted for.

4. *Targeting Enforcement*

We also believe that antitrust review of startup acquisitions can be more surgical. The Biden enforcers tightened enforcement and made the merger review process more expensive, burdensome, and uncertain, in an effort to discourage, across-the-board, mergers large enough to require a filing. The hydraulics of antitrust enforcement, as we have explained them, counsel for a more targeted approach to merger policy. Measures that combat those mergers most likely to be anticompetitive are sensible and long overdue. In that sense, litigating rather than settling significant merger cases is good policy. Requiring firms that enter consent decrees remedying anticompetitive mergers to agree to seek prior approval or give prior notice of future

opa/pr/justice-department-sues-kkr-serial-violations-federal-premerger-review-law [https://perma.cc/59WR-2NYL].

402 *Id.*

transactions in the same relevant markets might also be seen as a targeted reform, affecting only those firms that already have entered anticompetitive deals. These provisions are burdensome, however, and the threat of their imposition might kill even some deals that are not anticompetitive. Whether the gains from these provisions in terms of preventing future anticompetitive acquisitions outweigh the harms that are caused by the loss of some procompetitive or competitively benign deals due to a buyer's reluctance to commit to entering such a consent decree is hard to say. But the risk of that outcome is worth evaluating.

Broader brush policies, like ending early termination or warning firms that they close deals at their own risk after the thirty-day HSR period lapses, are blunt instruments that might do more harm than good. The early termination policy in particular increased the filing burden primarily on firms whose deals were least likely to harm competition.[403] On the margins, that policy might have resulted in the loss of procompetitive or benign deals during the HSR process. And the signal the policy sent, as well as the extra time and expense it meant for merging parties, might have discouraged some firms from transacting at all. This broader chilling of merger activity is not costless. In addition to the lost deals, it might mean a reduction in capital flowing into the startup sector, a relative loss of transparency as firms stay private longer, and enhanced incentives to evade HSR altogether. And because one of the major reasons firms go public is to make acquisitions, a chilling of merger activity might mean fewer IPOs too, exacerbating these trends.

B. Capital Formation

Some scholars worry that greater scrutiny of startup acquisitions will dry up financing for the next generation of startups.[404] They reason that, if enforcers block more acquisitions, VCs will generate lower returns. And when VCs deliver lower returns to their LPs, the LPs will become less willing to invest in new venture funds. As a consequence, less capital will be available for new startups.

We don't think this argument can be dismissed. Our model shows that, when there is a pricing differential between an acquisition and the alternative exit option and that alternative option is foreclosed, the net expected value of investing in a startup will decline.[405]

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403 *See supra* Section II.B.2.

404 *See* Devin Reilly, D. Daniel Sokol & David Toniatti, *The Importance of Exit Via Acquisition to Venture Capital, Entrepreneurship, and Innovation*, 32 Minn. J. Int'l L. 159, 160–65 (2023).

405 *See supra* Section III.C.

Nevertheless, we are cautiously optimistic that greater antitrust scrutiny of startup acquisitions is compatible with a robust venture capital market. The rise of employee tender offers and continuation funds shows that VCs and startups can adapt to changing exit options. It's possible that the increased availability of capital and liquidity in the private markets has made startups more willing to wait for a hot IPO market to go public. That could explain why 2021 was the hottest IPO market in history—even though it bookended a decade of declining IPOs.

It's also possible that no exit may become a permanent state. There is no legal obstacle to a startup remaining a private company indefinitely, with VCs and employees cycling in and out based on their idiosyncratic liquidity needs.[406] Late-stage startups could start to resemble older large, private companies such as Cargill and Mars, except with much more frequent turnover in their shareholder base. From the perspective of capital formation, that could be a sustainable equilibrium.

It's too early to draw strong conclusions from the data. We are only a few years into the experiment of greater antitrust scrutiny of startups. VC deal value in 2023 and 2024 was down from 2021 and 2022 but is still near historical highs.[407] VC fundraising has likewise fallen from its peak in 2022 but is still above pre-pandemic levels.[408] If there is any long-run impact on returns, it may take years for LPs to see it and adjust their allocations. And, of course, it's not clear whether the new Trump administration will scrutinize startup acquisitions as closely as Khan's FTC and Kanter's DOJ.

C. *Transparency*

We are more worried about the unintended effect that the antitrust crackdown might have on transparency. Public companies are required to make disclosures about their finances, operations, and risks.[409] The primary audience for these disclosures is investors. But disclosure also creates positive externalities for a company's competitors, suppliers, customers, workers, and regulators.[410] Public

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406 The company would, of course, need to monitor secondary transactions to ensure that it did not inadvertently trigger Section 12(g). *See supra* Section IV.A.

407 PitchBook & Nat'l Venture Cap. Ass'n, Venture Monitor Q4 2024, at 7 (2024), https://nvca.org/document/q4-2024-pitchbook-nvca-venture-monitor-2 [https://perma.cc/Q2F8-42J3].

408 *Id.* at 31.

409 *See* 15 U.S.C. §§ 78*l*, 78m; 17 C.F.R. § 229 (2024).

410 *See* de Fontenay, *supra* note 6, at 497–98 (noting that certain aspects of the public company disclosure regime are "unabashedly oriented to the *public interest*"); Ann M.

companies are also subject to scrutiny from analysts, short sellers, and securities litigators.[411] Each of these groups has incentives to investigate public companies and disclose what their investigations reveal. Their efforts add to the positive information externalities of public company regulation.

In the traditional venture capital cycle, the need to exit ensured that, once a startup grew to a scale where it could significantly affect society, it would become more transparent. If the startup went public, it would have to start making disclosures. If it was acquired by a public company, the acquirer would have to start disclosing information about the finances, operations, and risks of the acquired startup to the extent that they were material to the combined company. A startup that doesn't exit doesn't have to make comparable disclosures.[412]

The centaurs illustrate the problem. OpenAI and Anthropic are pushing the frontier of artificial intelligence—perhaps the most socially important technology of our time. And they are scaling rapidly by spending money from Alphabet, Amazon, and Microsoft. But the centaurs need to disclose almost nothing. And the public companies that fund them only need to disclose information that is material to *them*, not to the centaurs they are funding.

There are at least two ways that Congress or (possibly) the SEC could address this problem. First, they could nudge private companies into the public market. In the Biden administration, the SEC considered the possibility of interpreting Section 12(g) in a way that "looks through" record shareholders to the underlying beneficial owners.[413] This change could have the effect of forcing late-stage startups to either tightly restrict their shareholder base (and thus limit their own liquidity) or go public. But it's not clear whether such an interpretation of Section 12(g) would be consistent with the text and legislative history of the Exchange Act.[414]

Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 Yale J. on Reg. 499, 546 (2020).

411 *See* Matthew T. Wansley, *Taming Unicorns*, 97 Ind. L.J. 1203, 1224–35 (2022).

412 They are, however, required to provide basic information about private placements by filing Form D with the SEC. *See* 17 C.F.R. § 230.503 (2024).

413 Paul Kiernan, *SEC Pushes for More Transparency from Private Companies*, Wall St. J. (Jan. 10, 2022, 6:00 PM), https://www.wsj.com/articles/sec-pushes-for-more-transparency-from-private-companies-11641752489 [https://perma.cc/ZK56-VPDR].

414 *See* Alexander I. Platt, *Legal Guardrails for a Unicorn Crackdown*, 120 Mich. L. Rev. Online 89, 94–108 (2022) (arguing that the text of the Exchange Act supports the position that Section 12(g) only authorizes the SEC to look through holders of record, not beneficial owners).

Second, they could impose disclosure requirements on large, private companies.[415] In 2023, SEC Commissioner Caroline Crenshaw proposed that the SEC revise Regulation D—the main safe harbor that startups use for private placements—to require private companies to make periodic disclosures.[416] But again, there are questions about whether her proposal is consistent with the text of the Securities Act and Exchange Act.[417] By the end of the Biden administration, the SEC had acted on neither of these proposals.

We leave it to securities regulation scholars to debate the merits of either approach. We just want to point out that greater antitrust scrutiny of startup acquisitions has exacerbated the problem. And as long as that level of scrutiny continues, the problem likely isn't going away. We expect that private companies will continue to opt for no exit. Unless the law changes, the public will continue to be in the dark.

Conclusion

According to the National Venture Capital Association, "[a] venture capital ecosystem without exits is like dancing without music, doable but somewhat nonsensical."[418] We agree that it's doable. With employee tender offers and continuation funds, startups and VCs have the ability to raise capital and get liquidity in the private markets indefinitely. But whether it makes sense is more complicated. If the startups that would have been acquired evolve into centaurs or are gutted in reverse acquihires, antitrust isn't achieving its goals. And if socially important businesses fade into the shadows, securities regulation isn't achieving its goals either.

415 For academic proposals to require disclosure from large, private companies, see Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. Rev. 583, 598–610 (2016); Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules that Require Firms to Make Periodic Disclosures*, 88 Ind. L.J. 151, 208–11 (2013); Renee M. Jones, *The Unicorn Governance Trap*, 166 U. Pa. L. Rev. Online 165, 179 (2017); Lipton, *supra* note 410, at 563–67; Wansley, *supra* note 411, at 1256–58.

416 Caroline A. Crenshaw, Comm'r, Sec. & Exch. Comm'n, Big "Issues" in the Small Business Safe Harbor: Remarks at the 50th Annual Securities Regulation Institute (Jan. 30, 2023).

417 *See* Alexander I. Platt, *(More) Legal Guardrails for a Unicorn Crackdown*, 98 N.Y.U. L. Rev. Online 359, 369–74 (2023) (arguing that the SEC may lack the authority to implement Commissioner Crenshaw's proposal under Sections 13(a) and 15(d) of the Exchange Act).

418 2024 Yearbook, *supra* note 39, at 32.

Appendix

This Appendix provides computations supporting the expected values reported in Equation (1) and Equation (2) from Section III.C of the Article.

A. Set-up

IPO value: $i \sim U[V-\sigma, V+\sigma]$

M&A value: $m \sim U[V-\sigma, V+\sigma]$, m is independent of i

No-Exit value: n has a fixed value observed at $t=0$ such that $V-\sigma < n < V$

Let $a = V-\sigma$ and $b = V+\sigma$.

B. Expected Value with Three Exit Options

Define the random variable $Y = \max\{m, i\}$. Because m and i are i.i.d. uniform, Y has a triangular pdf: $f_Y(y) = \dfrac{(y-a)}{(2\sigma^2)}$, for $y \in [a, b]$.

The project payoff with all exits available is $Z_3 = \max\{Y, n\}$. Using the fact that only draws with $Y < n$ are replaced by n, we can split the expected value into two integrals:

$$\begin{aligned}
\mathbb{E}[Z_3] &= \int_a^n n f_Y(y)dy + \int_n^b y f_Y(y)dy \\
&= \left(\frac{n}{2\sigma^2}\right)\int_a^n (y-a)dy + \left(\frac{1}{2\sigma^2}\right)\int_n^b y(y-a)dy \\
&= \left(\frac{n}{2\sigma^2}\right)\frac{(n-a)^2}{2} + \left(\frac{1}{2\sigma^2}\right)\left[\frac{b^3-n^3}{3} - a\frac{b^2-n^2}{2}\right]
\end{aligned}$$

Substituting for a and b and simplifying leaves us with Equation (1):

$$\mathbb{E}[\max(m, i, n)] = V + \frac{\sigma}{3} + \frac{(n-(V-\sigma))^3}{(12\sigma^2)}$$

C. Expectation with IPO or No-Exit Only

If antitrust precludes M&A, the payoff simplifies to $Z_2 = \max\{i, n\}$, which only involves one random draw and thus a constant pdf: $f_i(y) = \dfrac{1}{2\sigma}$.

Given that only draws with $i < n$ are replaced by n, we can split the expected value into two integrals:

$$\mathbb{E}[Z_2] = \int_a^n n f_i(y)dy + \int_n^b y f_i(y)dy = \frac{n}{2\sigma}(n-a) + \frac{1}{2\sigma}\left[\frac{b^2 - n^2}{2}\right]$$

Substituting for a and b and simplifying leaves us with Equation (2):

$$\mathbb{E}[\max(i,n)] = V + \frac{(n-(V-\sigma))^2}{4\sigma}$$