

A New Era of Midnight Mergers: Antitrust Risk and Investor Disclosures

*Based on BFI Working Paper 2022-50, [“A New Era of Midnight Mergers: Antitrust Risk and Investor Disclosures,”](#)
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Firms completed over \$2.3 trillion of undisclosed mergers between 2002 and 2016, representing 30% of all merger activity.

Companies merge all the time, whether it's for market share expansion, diversification, risk reduction, or some combination of these and other factors, with the aim to increase profits. However, companies are not always eager to share the news.

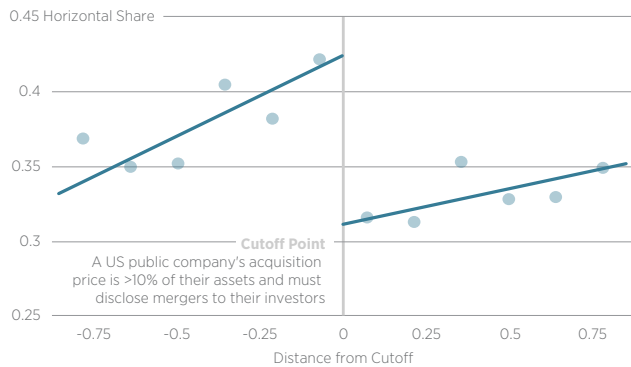
While rules stipulate reporting requirements for certain mergers, many go unreported, or they are reported so late in the process (“midnight mergers”) that antitrust authorities who might otherwise oppose a particular combination have no recourse but to let the new business entity move forward. The merger is already baked into the market cake.

For managers, there are trade-offs to weigh when considering whether or when to report. On the one hand, managers who seek to maximize the wealth of current shareholders typically want to disclose positive news about the company as soon as possible. This argues for openness when it comes to mergers. On the other hand, broadcasting a merger could alert antitrust authorities to a merger that might otherwise have escaped their attention, putting the deal at risk and eliminating any possible shareholder gains.

This new research employs a model and empirical analysis to study the relationship between investor disclosures and antitrust risk in publicly traded companies. In particular, the authors examine whether investor disclosures pose an antitrust risk and whether, as a result, managers withhold news of mergers from investors, especially if those deals involve acquiring a rival. Their model makes the following predictions:

- The share of horizontal mergers (or those where companies occupy the same industry and thus are more likely in direct competition) is lower among transactions that require mandatory investor disclosures.
- Managers find nondisclosure profitable for at least some mergers.
- A higher share of undisclosed mergers than disclosed ones are horizontal.
- The fourth prediction provides an expression for the expected antitrust-related cost of investor disclosures, which are strictly positive.

Figure 1 • Investor Disclosures Pose Antitrust Risk



Note: This Figure plots the share of mergers that are horizontal against the distance from the cutoff value, above which the acquirer must disclose the transaction to its investor.* (For legibility, the authors assign the observations to evenly sized bins and plot averages along the axes.) Horizontal mergers involve a target and acquirer that occupy the same industry, so they are more likely to reduce competition relative to non-horizontal mergers. This Figure shows that horizontal mergers are much less likely among transactions that must be reported to investors, which implies that mandatory investor disclosures deter anticompetitive deals by introducing antitrust risk. See the working paper for more details.

*A publicly traded US acquirer must disclose a merger to its investors whenever the transaction value exceeds 10% of the acquirer's assets. Hence, the distance to the cutoff value is equal to the difference between a merger's transaction-value-to-acquirer-assets ratio and 10%. Firms make these disclosures using Item 2.01 of Form 8-K.

To test the first prediction, the authors rely on the fact that US public companies must disclose mergers to their investors when the acquisition price is greater than 10% of their assets. They show that the share of horizontal mergers fall sharply at the 10% threshold, consistent with the idea that investor disclosures pose antitrust risk.

The authors take the remaining predictions to a rich dataset that captures the value of all mergers, including an inferred measure of unreported mergers, to find that firms completed over \$2.3 trillion of undisclosed mergers between 2002 and 2016, representing almost 80% of all transactions (and about 30% when those transactions are weighted by their value).

This work not only suggests the degree to which research and policymakers underestimate the amount of stealth consolidation, but it also raises important questions for further research, including: What are the consequences of such vast undercounting? From an antitrust perspective, has insufficient enforcement played a more prominent role in the economy than previously believed? From a corporate finance perspective, are the returns to M&A activity greater than once thought? And many more, including the role of private equity investors in acquisitions involving horizontal competitors.

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