

FTC Releases New Data on Horizontal Merger Investigations

The U.S. Federal Trade Commission (“FTC”) released a [staff report](#) earlier this month that provides new data on the agency’s horizontal merger investigations. The report updates a 2008 version and now covers 264 investigations in which a second request was issued from 1996 through 2011. The report provides data on purported market concentration, number of competitors, impact of hot documents, existence of customer complaints, and ease of entry.

The updated data confirms generally known enforcement trends. The higher the Herfindahl-Hirschman Index (HHI), a measure of concentration, the greater the likelihood of a second request. Higher HHIs also correspond with increased rates of follow-on litigation or an agreement containing a consent order, in other words, an enforcement action. According to the FTC, incidence of customer complaints and hot documents within the parties’ files correlates with a higher likelihood of investigation, while easier entry correlates with lower investigation rates. Other trends are more nuanced. The study examines data separately for key industries and reveals how certain industries appear more likely to receive second requests despite lower levels of concentration (for example, oil). The data also indicate how often second requests can result in an enforcement action in certain industries. According to the FTC, the rate is 76% in oil markets, 87% in chemicals, and 60% in electronically-controlled devices and systems. In hospital markets, by contrast, there is a 60% rate of no enforcement action.

The FTC’s study, however, should be treated with caution in predicting future enforcement actions. Modern merger reviews usually require a nuanced analysis of transaction-specific competitive effects. Numerical screens such as HHIs are only one of the first steps in any such analysis. More sophisticated methodologies include customized merger simulations or the evaluation of natural experiments. Precisely because merger analyses are highly fact-specific, and notwithstanding the newly reviewed [Merger Guidelines](#), there is no exhaustive list of methodologies the agencies employ or facts the agencies consider. Nonetheless, the report is useful to generally predict the likelihood of antitrust scrutiny in particular industries.

For more information, please contact the Ropes & Gray attorney who usually advises you.