

# 2021 Second Request Trends Report

A LOOK AT HSR SECOND REQUESTS IN 2021  
AND WHAT WE CAN EXPECT FOR 2022

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# HSR Background and Landscape

The antitrust environment ebbs and flows in response to shifts in presidential administration, regulatory strategy, economic climate, and other factors.

Law firms that regularly deal with HSR Second Requests, as well as companies that anticipate merger and acquisition (M&A) activity in the future, must pay careful attention to these changes. The better they understand the landscape, the better they can anticipate how regulatory agencies will act and can navigate the process with higher confidence and likelihood of success.

This report examines the current regulatory climate, analyzes recent and historical trends in Second Requests, provides commentary from experts, and offers predictions for what to expect in 2022 and beyond.

**MARCH**  
Pandemic begins, near-complete halt of M&A activity

**FEBRUARY**  
Biden administration begins

**FEBRUARY**  
Invasion of Ukraine and economic sanctions imposed on Russia

2020

2021

2022

**FEBRUARY**  
FTC suspended early termination option

**DECEMBER**  
FTC and DOJ allocated additional funds for 2021:

- FTC received additional \$20M
- DOJ received additional \$18M

**MAY**  
Biden administration proposed increasing FTC and DOJ budgets and staff even more

**JULY**  
Executive order on promoting competition, calling for agencies to vigorously enforce antitrust laws

**SEPTEMBER**  
FTC announced:

- Higher scrutiny around more market factors
- Minimum requirements for submission updates
- Requiring details on eDiscovery tools prior to application
- Discontinuing the partial privilege log option

**AUGUST**  
FTC asserts regulators' right to investigate and challenge M&As beyond review period  
FTC may now send out a warning letter that M&As can proceed at their own risk

**JANUARY**  
FTC leaders advocated for longer review periods

**JANUARY**  
Assistant AG Jonathan Kanter remarked that in most situations, agencies should block transactions rather than negotiate

# HSR Background

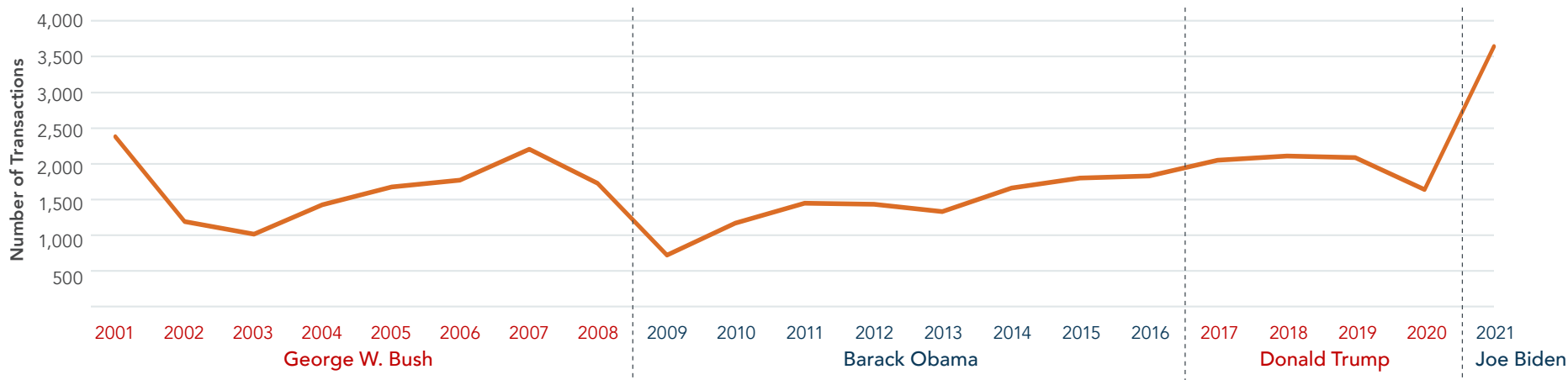
The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) draw their antitrust powers from a handful of laws. Primarily, these are the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, Section 13(b) of the Federal Trade Commission Act, and Section 15 of the Clayton Act. These laws enable the FTC and DOJ to seek effective preliminary relief against mergers that are anticompetitive and would thereby cause harm to businesses and consumers.<sup>1</sup>

Pursuant to the HSR Act, parties of certain proposed acquisitions must report their intentions to the FTC and DOJ prior to consummation. This requirement applies when the value of the acquisition and/or size of the parties, as measured by their sales and assets, meet certain thresholds. After notifying the agencies, parties must wait a specified period, usually 30 days, before they may complete the transaction.<sup>2</sup>

During the waiting period, the DOJ or FTC may determine that further inquiry is necessary and may issue a request for additional information and evidence (called a “Second Request”). The Second Request extends the waiting period for a specified time, by the end of which all parties must comply with the request (called “substantial compliance”). The additional time and documentation give regulators an opportunity to further scrutinize the deal and take action before it’s finalized.<sup>3</sup>

As noted above, the amount of HSR transaction activity in a given year is highly dependent on a range of factors such as the presidential administration, regulatory strategy, and economic climate.

## Reported HSR Transactions Over the Last 20 Years



# Mergers and Acquisitions in the 2020s

Early 2020 saw a near-complete halt to M&A activity due to the worldwide economic shutdown caused by the COVID-19 pandemic. Activity fell nearly 50% in the first quarter of 2020 compared to 2019.<sup>4</sup>

**In 2021, leading into 2022, both economic activity and M&As resurged. Merger notifications reached a record high of 3,644 for the fiscal year in 2021—more than double the annual average (1,600) from 2001-2020.<sup>5</sup>**

Factors playing into this include market optimism around the rebounding economy, low-cost financing, large amounts of private capital, and an urge to get deals done before the passing of potential tax legislation that would impact capital transactions.<sup>6</sup> Experts suggest that this surge in dealmaking could be expected to continue for at least two years.<sup>7</sup> Having said that, the invasion of Ukraine and ensuing sanctions have infused more uncertainty into the global economy—though it is still too early to say what longer-term impacts this volatility will have on M&A activity in 2022 and beyond.

## Biden Administration Antitrust Approach

### SIGNS OF A STRICTER CLIMATE

President Biden took office alongside a wave of bipartisan distrust toward larger companies, particularly technology companies, and calls to revise older anti-competition regulations. Lawmakers on both sides of the aisle were advocating for more antitrust enforcement against large organizations, especially those considered Big Tech. For instance, in the first half of 2021, lawmakers introduced legislation that called for stricter scrutiny of mergers, as well as legislation that would allow the government to break up Big Tech companies for breaking non-discrimination rules. While some of this legislation has since stalled, they were nevertheless harbingers of a much stricter anti-competitive environment in Washington. Indeed, since President Biden's administration began, in February 2021, its actions in the antitrust space indicate a much more aggressive approach compared to recent administrations, which has influenced how Second Requests are investigated and handled.

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*In February of 2021, Senator Klobuchar introduced legislation to potentially strengthen the antitrust laws. That’s interesting because her bill, as proposed, would force merging parties to prove that certain deals would not harm competition. This is a reversal of the way that it currently works, which is that the government bears the burden to prove that a deal challenged in court would harm competition. As of today, the bill has not advanced.*

— Kristin H. Sanford, Counsel, Weil, Gotshal & Manges LLP

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## EXECUTIVE ORDER ON PROMOTING COMPETITION

The administration’s overall antitrust approach was laid out in July of 2021, with an Executive Order (EO) that articulates a broad and aggressive “whole of government” approach to antitrust. While this EO didn’t speak directly to the Second Request process, it did signal that the administration would direct the DOJ and FTC to look with much more scrutiny at potential mergers. It called for the agencies to “vigorously” enforce antitrust laws, even to the point of looking at past transactions that may have been in violation of antitrust laws and regulations despite going unchallenged by previous administrations.

## AN AGENCY PREFERENCE FOR LITIGATION OVER SETTLEMENT

On January 24, 2022, Assistant Attorney General Jonathan Kanter remarked at a New York State Bar Association’s Antitrust Law Section event that, in most situations, the Agency should seek to block transactions rather than negotiate a remedy with the parties to fix the issue.<sup>8</sup>

Kanter stated: “Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.”<sup>9</sup>

## BIDEN ADMINISTRATION APPOINTMENTS

An early sign that the Biden administration would be more aggressive toward antitrust activity was his selection of agency heads and policy advisors.



### Lina Khan

*FTC Chair*

Prior to her appointment, Khan had been a vocal critic of Big Tech companies, which she considered monopolistic.<sup>10</sup> Under her leadership, the FTC has scrutinized mergers that previously had never been subject to much agency examination, such as vertical mergers.



### Jonathan Kanter

*Assistant Attorney General, overseeing DOJ Antitrust Division*

Kanter was also a vocal critic of Big Tech prior to his selection, having pursued antitrust lawsuits against technology companies in his private practice.<sup>11</sup>



### Tim Wu

*Special Assistant to the President for Technology and Competition Policy  
(National Economic Council)*

Wu is another vocal critic of mergers leading to large companies, as outlined in his 2018 book, "The Curse of Bigness: Antitrust in the New Gilded Age."<sup>12</sup> He has been an influential voice in the administration around antitrust issues, crafting much of the framework for its anti-competition stance, including the July EO on promoting competition.

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*There is an intellectual revolution here, which the President has embraced. Part of that effort is to bring back antitrust as a popular movement, rather than as an abstract academic thing.<sup>13</sup>*

— Tim Wu

*The New Yorker, July 12, 2021*

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*The last 14 months of merger enforcement has seen an injection of moderate hostility and, perhaps more than anything, general uncertainty into the regulatory review of mergers in the United States. This appears to be more true at the Federal Trade Commission than the Department of Justice Antitrust Division, but that could be based more on the fact that DOJ leadership has not been in place as long as FTC leadership rather than any substantive difference.*

— Corey W. Roush, Partner, Akin Gump



## HSR Impacts: Tighter Regulations and Stronger Scrutiny

Spurred on by rising M&A HSR filings and the FTC and DOJ's struggles with limited resources, the administration translated its anticompetitive attitude into a handful of distinct policy changes that impacted the regulatory environment for mergers and Second Request activity in 2021. The most important of these changes are outlined below.

### LONGER DEAL TIMES

In February of 2021, the FTC suspended the HSR early termination option, which had allowed parties to close deals within 10–15 days (instead of the 30-day statutory waiting period) so long as they had the FTC's consent. As a result, parties have started initiating their HSR filings much earlier in order to start the waiting period.<sup>14</sup>

In January of 2022, FTC Commissioner Rebecca Slaughter and FTC Chair Khan advocated for even longer review periods. In their view, the "30-day timeline imposed on the agencies after parties certify they have 'substantially complied' with the inquiry have not kept pace with the increased volume and complexity of transactions and their related data and documents since passage of the HSR Act in 1976."<sup>15</sup>

### GROWTH IN AGENCY BUDGETS AND STAFF

In December of 2020, the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights announced that the FTC and DOJ would be allocated additional funds for 2021, in order to fight the growing "monopoly problem" in the U.S. The FTC saw a \$20 million increase over what it received in fiscal year 2020, while the DOJ received nearly \$18 million more.<sup>16</sup>

In May of 2021, the Biden administration proposed increasing the agencies' budgets and staffs even more. The proposal would increase the FTC's staff by 110 employees and its budget by 11%, lifting it to \$389.8 million. Budget for the Justice Department's Antitrust Division would grow from \$185 million to \$201 million, an increase of 8.6%.<sup>17</sup> The FTC Chair again asked Congress for more funding in January of 2022, along with an increase in HSR filing fees.<sup>18</sup>



## WARNING LETTERS

In August of 2021, the FTC’s Bureau of Competition issued a statement that, on its face, appeared to change the terms and timing of Second Requests. The statement asserts the FTC and DOJ’s right to investigate and challenge mergers beyond the traditional 30-day period of review—“even after the companies have merged and even if the merger was subject to premerger review.” In the Bureau’s eyes, the FTC’s failure to challenge a deal during the review period doesn’t mean the deal is approved, and the agency maintains the right to challenge it in the future.

Thus, for deals that the FTC was unable to fully investigate within the requisite timeline, it now may send out a “Pre-Consummation Warning Letter” alerting companies that the investigation remains open, that the agency could still determine the deal to be unlawful, and that companies proceed with the deal “at their own risk.”<sup>19</sup>

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*While (the warning letter statement) has been a source of some anxiety, it appears to have been a red herring thus far. First, the agencies have always had the ability to bring post-closing challenges; indeed, the FTC is currently challenging a deal that was consummated a decade ago. Thus, parties have always closed with some risk of a post-closing challenge. Second, companies have been closing despite receiving the letters, and we have not yet seen any efforts to unwind a deal that received a warning nor have we seen many active continuing investigations.*

— Corey W. Roush, Partner, Akin Gump

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## MORE RIGOROUS AND STREAMLINED SECOND REQUEST PROCESS

In September of 2021, the Bureau of Competition announced a change to its Second Request process in order to make the best use of its “limited resources” and to more closely align with the DOJ’s Second Request process. These changes include:

- Providing heightened scrutiny to a broader range of market factors during Second Request investigations. Among these, “how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete.”
- Discontinuing the option to submit a “partial privilege log,” which had been allowed under previous FTC guidance.
- Only considering requests for modifications after the companies under investigation have provided certain foundational information, such as:
  - Descriptions of the business responsibilities of employees and agents responsible for relevant lines of business, and
  - Basic information about how the companies maintain data that is responsive to specifications in the Second Request.
- Requiring detailed information, prior to the application of eDiscovery tools, about how each company will use such tools to identify responsive materials.
- Changing official FTC policy so that Bureau staff now provide the full Commission with access to Second Requests and voluntary access letters by uploading them into a secure system.<sup>20</sup>

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*I think the biggest driver of trends in merger control are the agencies themselves. The FTC recently changed their rules so that a partial privilege log is no longer permitted and modifications to the specs in Second Requests are going to be harder to get. We have seen the agencies, particularly the FTC, become more aggressive in discovery and try to put up more roadblocks to clearing mergers. It may vary by industry, but I think there is an emerging bipartisan consensus that mergers should be scrutinized more in general.*

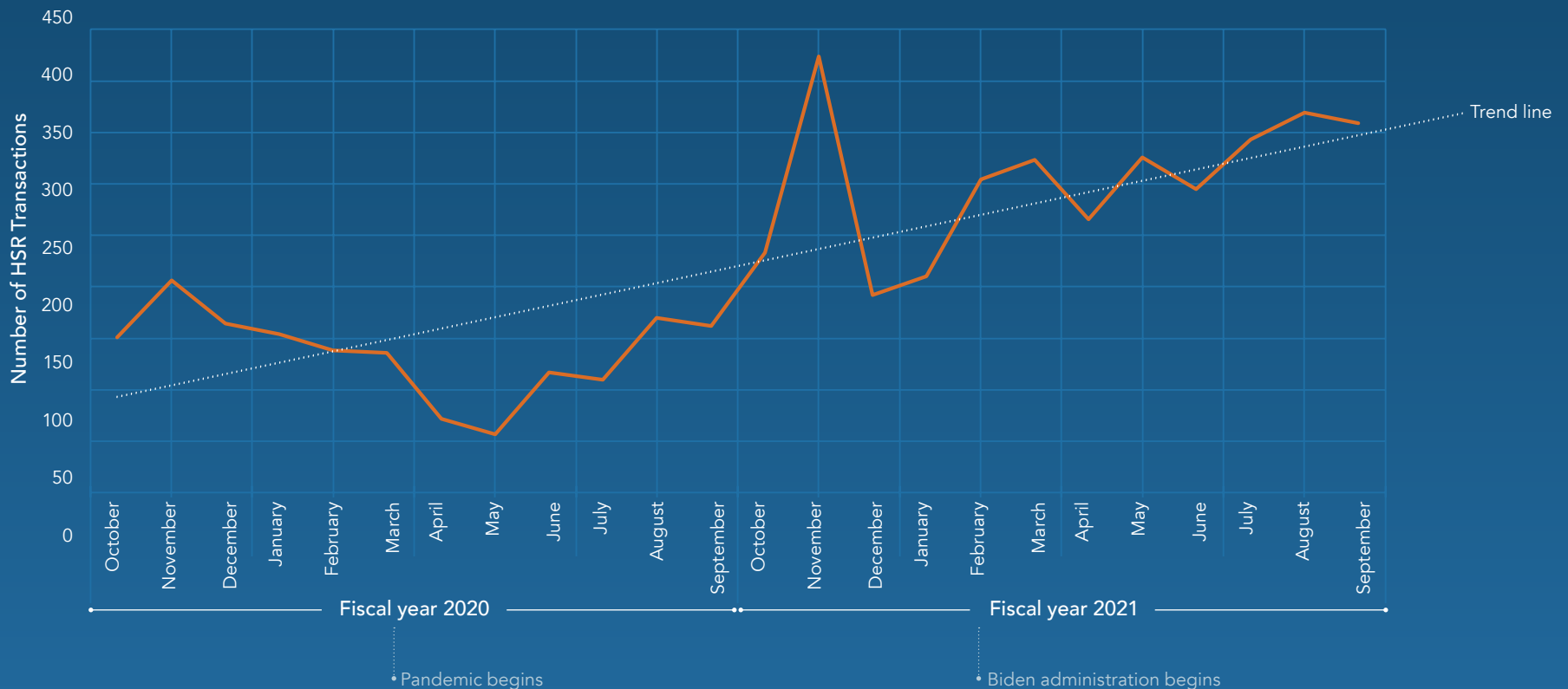
— Harsha Kurpad, eDiscovery Case Attorney  
at Latham & Watkins

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# 2021 Activity and Estimates

Despite a stricter climate, it certainly appears that 2021 was a record-setting year for Second Requests. The FTC and DOJ repeatedly remarked about the volume of reported mergers and their struggle to keep up. A detailed view of this activity, however, requires drawing from multiple sources.

## HSR Transactions by Month



## Reported HSR Transactions (Preliminary Numbers)

The agencies publish preliminary numbers for total HSR reported transaction filings each month, but they *don't* report how many resulted in Second Requests. Official data for 2021 will not be available until the DOJ/FTC Annual Report is published in late 2022.

In the meantime, we can analyze preliminary 2021 metrics published by the agencies, as well as historical trends from previous years and insights from practicing M&A attorneys, to get a better picture of what Second Request activity was like in 2021.

As noted by both agencies, preliminary numbers show a volume of 3,644 reported HSR transactions in fiscal year 2021. This is 1,500 more than the total in 2019, the next-highest level from the last 10 years. A number of factors may play into this surge, including mergers planned in 2020 but deferred to 2021 because of the pandemic, as well as the rapid economic rebound in the summer of 2020.

### SETTING THE STAGE FOR 2021

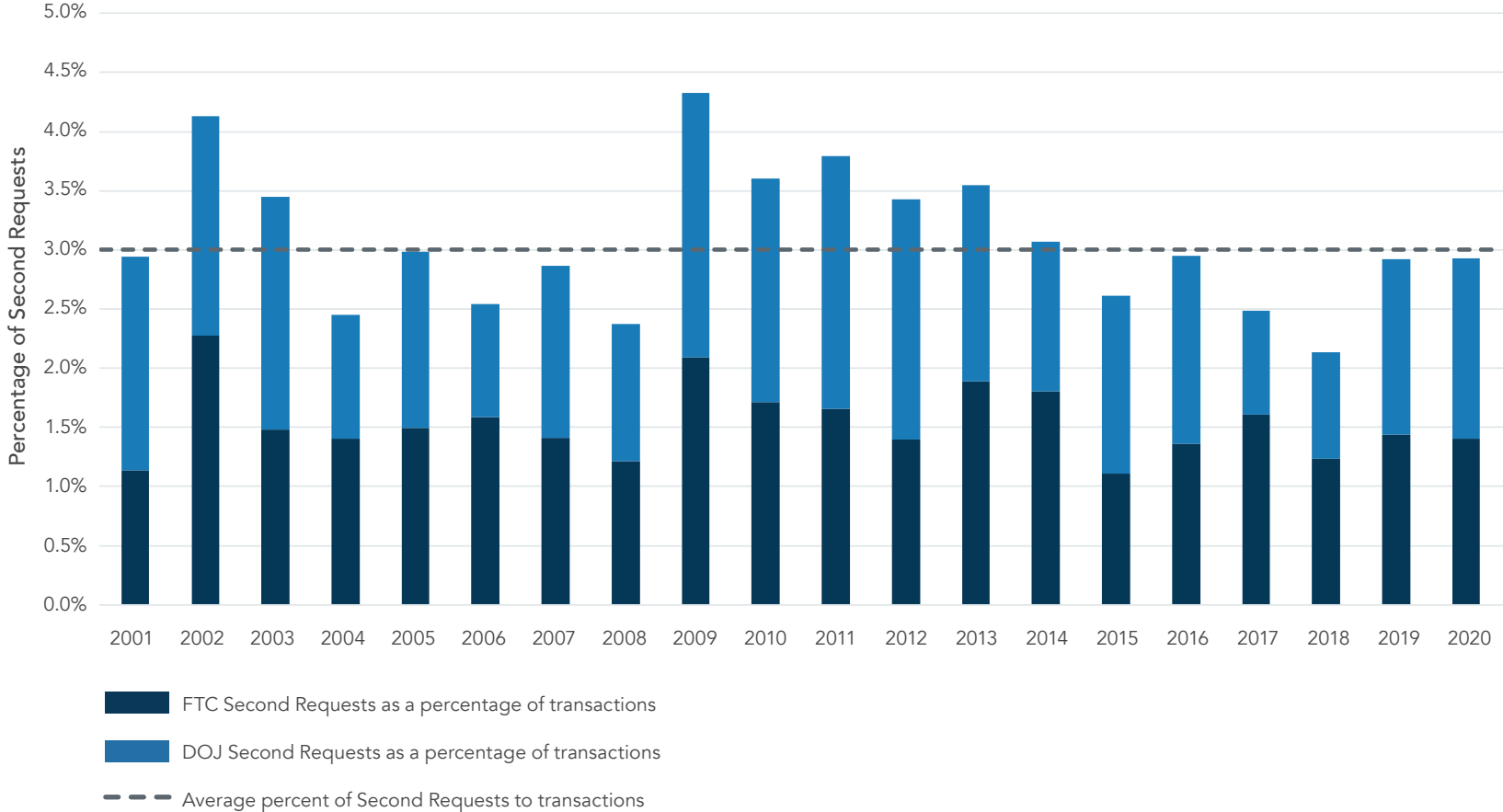
To get a picture of Second Requests in 2021, we can start by looking back at final metrics from 2020.

The FTC and DOJ's HSR annual report for fiscal year 2020 showed 1,673 reportable merger transactions—the lowest amount in seven years.<sup>21</sup> The drop is understandable given the economic shutdowns and pressures wrought by the global pandemic.

Although HSR filings went down in 2020, agency activity continued throughout the economic shutdown. In the 2020 report, the FTC noted that they closed the physical offices where HSR filings are submitted due to the pandemic, and for the first time offered an online portal for HSR document submissions. This seemed to work well for them: The Commission brought 28 merger enforcement challenges during fiscal year 2020—the highest number since 2001, when Congress raised the filing thresholds.

Second Request investigations kept pace with previous years as well. Although the total number of investigations dropped—48 in 2020, down from 61 in 2019—the percentage of transactions that resulted in Second Requests held strong at 3.0 percent. In both years, the number of Second Requests was split almost evenly between the FTC and DOJ.<sup>22</sup>

## Second Requests as a Percentage of Transactions



## SECOND REQUEST ESTIMATES

We suspect that the Second Request trend flipped in 2021—that the total number went up, but the percentage went down. We won’t know for sure until the FTC and DOJ publish their report, but the data currently available, combined with the agencies’ statements and maneuvers during the year, suggest that to be the case.

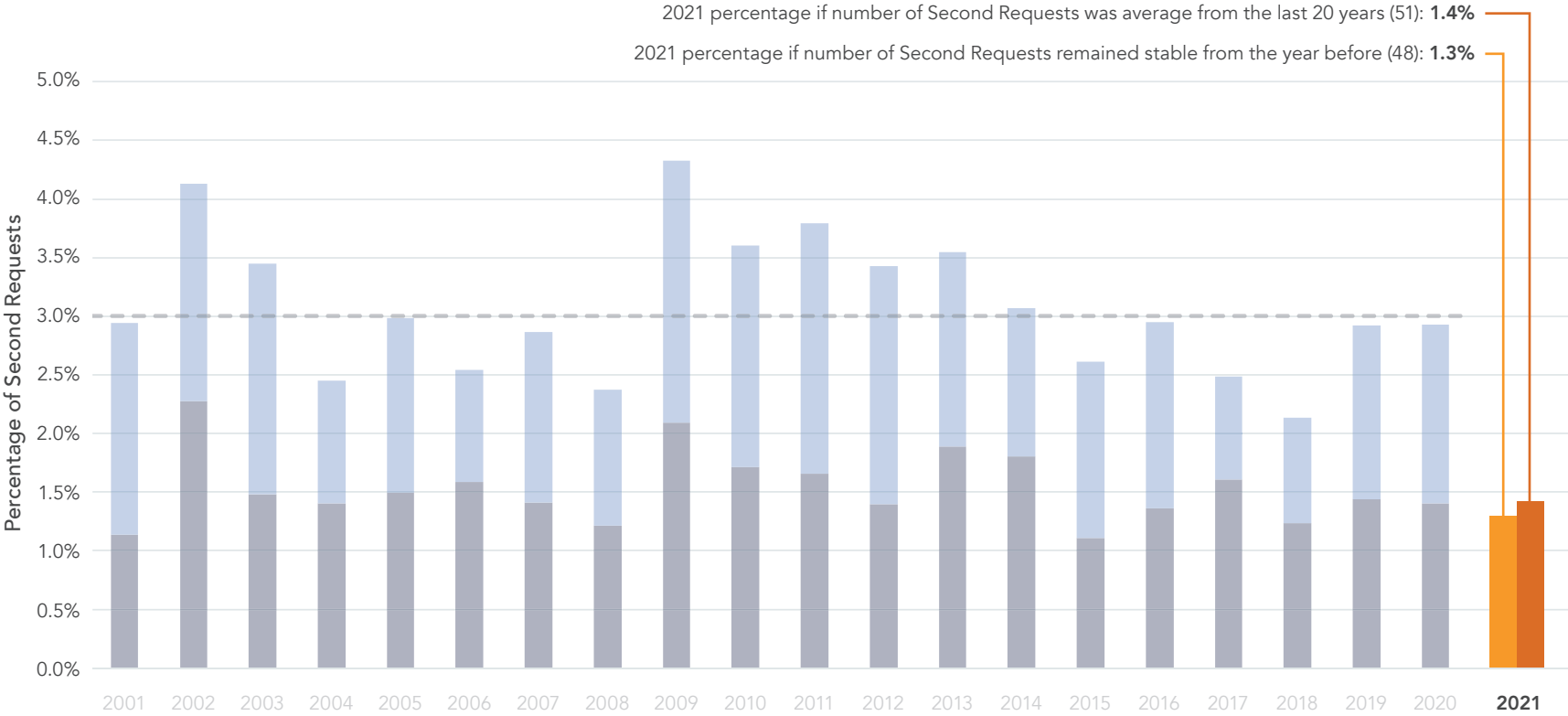
It’s doubtful that regulators maintained the recent 3.0 percentage rate. To do that, with 3,644 reported HSR transactions for the year, the FTC and DOJ would have to issue 109 Second Requests. That would be the highest mark in the last 20 years, at a time when the pandemic was still closing government offices and courts, agency resources were limited, and data volumes were soaring.

## HSR Second Requests in Relation to Transactions



Our hypothesis is further bolstered by the regulatory changes described earlier, such as the FTC extending its review deadlines and asserting the right to scrutinize mergers outside the formal Second Request process. Steps like these show the agency seeks more time and opportunity to perform its antitrust duties and, therefore, probably wasn't capable of record-smashing numbers.

## Second Requests as a Percentage of Transactions



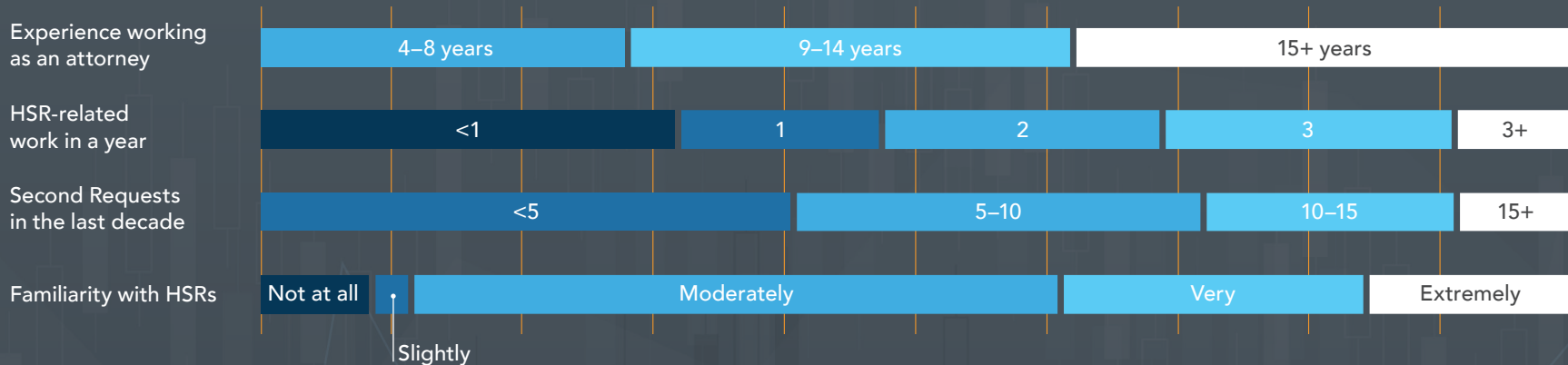
# Insights From the Field

In 2021, Lighthouse surveyed a group of 103 experts from corporations and law firms, to explore current trends and challenges related to Second Requests. The respondents represent a large cross section of corporations from various industries, as well as both large and mid-sized law firms. The majority of respondents had an in-depth understanding of Second Requests.

## 2021 Survey Respondents



## Respondent Experience





## EFFICIENCY AND RESOLUTION ARE TOP OF MIND

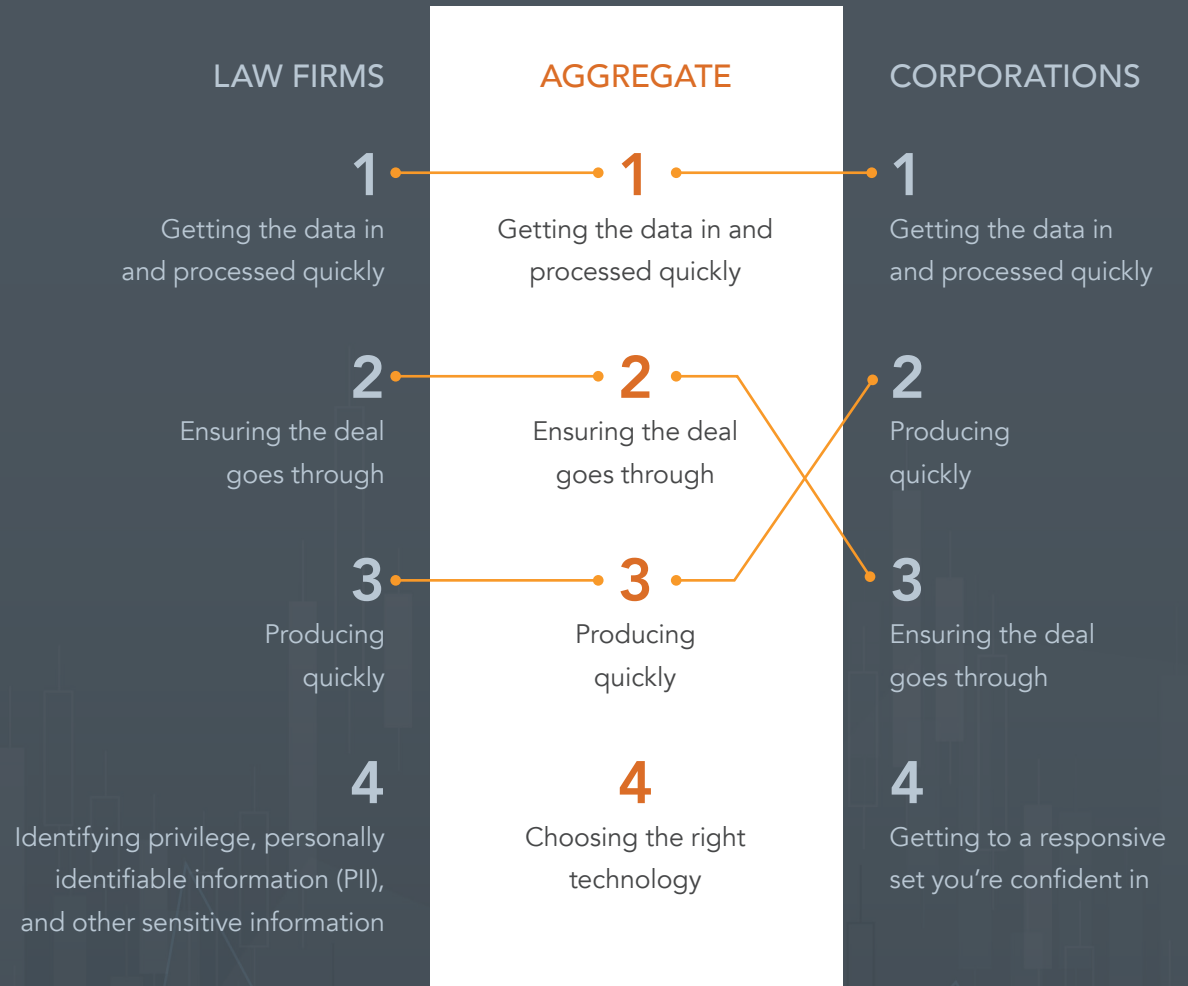
On average, law firm and corporate respondents reported similar challenges and hurdles in responding to Second Requests in 2021.

Chief among these are challenges related to review process speed and bringing deals through to completion. These make sense in the face of growing data volumes and the increasing scrutiny and power of regulatory agencies.

Looking at law firm and corporate responses separately, however, reveals some nuance. Efficiency hurdles still ranked high for both groups, but corporate respondents showed greater interest in getting to an ideal responsive set (i.e., the set of documents produced for review by government agencies). This correlates with corporations having more to lose from sharing unnecessary or incomplete information with regulators, which can lead to inadvertent disclosures and/or a deal falling through at the last minute.

Taken together, the top challenges cited by both law firms and corporations translate into needing technology for Second Requests that can increase review accuracy (thereby reducing risk), as well as speed up the review process (in order to produce quickly and ensure the deal goes through).

## Top Reported Challenges During the Second Request Process



## 2021 Technology Update

Technology takes a pivotal role in the Second Request process. As noted above, law firms and corporations with experience in that process agree that speed and accuracy rank among their highest concerns. As data grows in volume and complexity—and government agencies increase their scrutiny both of the content of documents and the technology used to produce them—parties will rely more and more on the accuracy and speed of eDiscovery technology and the technological expertise behind it to help them manage this burden.



*That collected and produced data volumes continue to expand on Second Requests is not news to most. But the rate of that expansion drastically increased because of the pandemic, specifically because of the uptick in usage of collaborative communication tools as a replacement for in-person business conversations. In our experience over multiple Second Requests, average data volumes per custodian doubled in a single year.*



— Christian J. Mahoney, Counsel, Cleary Gottlieb



Fortunately, 2021 brought [new advancements in the technology assisted review \(TAR\) tools](#) that are often used to find and categorize data. Specifically, newer tools that use more advanced artificial intelligence (AI) have been approved by the FTC and DOJ to identify responsiveness and privilege during Second Requests in 2021.

With the power of advanced AI, these tools utilize capabilities like Natural Language Processing (NLP) and deep learning that make them more accurate, efficient, and flexible than traditional TAR tools. Because of how these capabilities align with the top concerns cited by law firms and corporations in the Lighthouse 2021 survey, as well as aligning with regulators' increased scrutiny of eDiscovery tools and accuracy during Second Requests, we expect to see increased utilization of advanced AI in Second Request discovery moving forward.

# Does AI Have a Future in Second Requests?

CHALLENGES	TRADITIONAL TAR TOOLS	ADVANCED AI TAR TOOLS
 <p>Speed</p>	<p>Changing a dataset mid-process requires resetting tools to start at the beginning.</p> <p>Teams may contend with costly restarts or may delay beginning until they have a dataset they're confident will not change.</p> <p>Responsive review must be complete before privilege assessment can begin.</p>	<p>Advanced models allow documents to be added or removed mid-process without having to start over.</p> <p>Teams can begin review as soon as approved by the government.</p> <p>All data assessment can occur at the same time, for faster analytic results.</p>
 <p>Accuracy</p>	<p>Responsive sets may be more inclusive than necessary, risking delays, disclosures, and other complications.</p> <p>Privilege and PII detection may be simultaneously overbroad (incorrectly identifying information that does not fall into either category) and under-inclusive (failing to identify PII and privilege, leading to the disclosure of sensitive information).</p>	<p>Responsive, privilege, and sensitive data (such as PII) is identified more accurately so only what is absolutely necessary is produced, mitigating risk for responding organizations.</p>

# 2022 Outlook for Second Requests

We suspect that 2022 will be similar to 2021: Large volumes of HSR transactions and increased scrutiny by both the DOJ and FTC, resulting in a large number of Second Requests, even if the percentage of transactions to Second Requests remains low.

Despite changes that further empower regulators, the percentage of Second Requests issued in relation to reported transactions may fall below the recent average of 3.0%. As in 2021, 3% seems unreasonably high given the explosive amount of HSR reported transactions so far. By February of fiscal year 2022, we were already 49% of the way to meeting 2021's record transaction number and beyond the total amount filed in most other years. Even if there is a significant decrease in M&A activity later in the year, total transactions for 2022 will be higher than the recent average, so agencies will likely have to make Second Requests on a smaller percentage of filings.

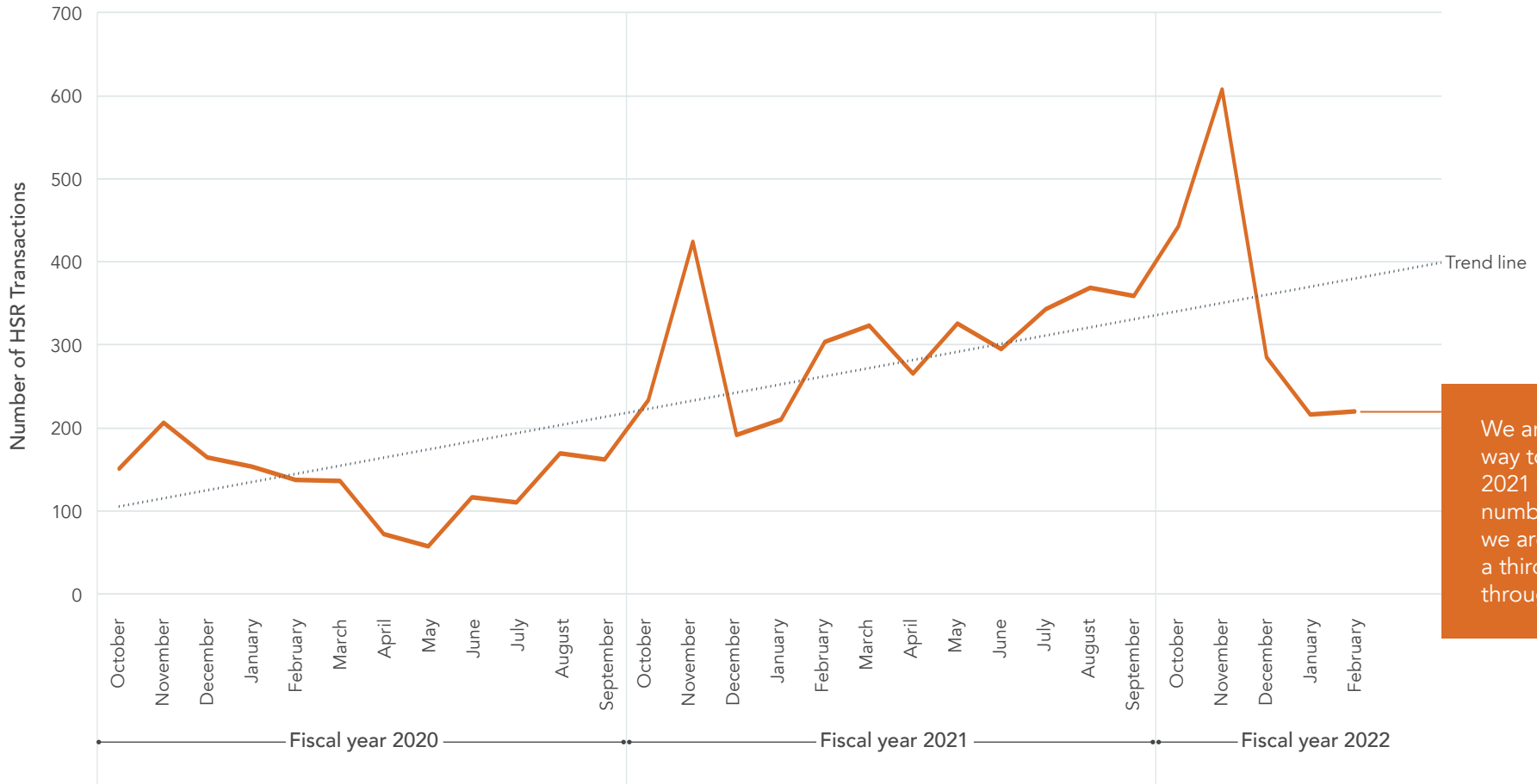
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*We expect the trends we observed in 2021 to continue in 2022 and beyond: longer reviews and greater uncertainty creating capital premiums on non-reportable or clearly uncontroversial transactions. Indeed, we expect these trends to magnify in 2022 because: (1) pending legislation is seemingly gaining bipartisan support, most apparently the Platform Competition and Opportunity Act; (2) a third FTC Democrat commissioner will be confirmed eventually; and (3) the antitrust agencies are working on new merger guidelines (the FTC rescinded the vertical guidelines last year).*

— Corey W. Roush, Partner, Akin Gump

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# HSR Transactions by Month



We are **49%** of the way to meeting the 2021 transaction number even though we are just over a third of the way through the year

## What This Means in Practice for 2022

Organizations that expect to be involved in M&A activity may be able to anticipate a similar volume of Second Request work in 2022 as occurred in 2021. However, they should prepare for that work to be more onerous and unpredictable, with greater agency scrutiny, extenuated timelines, and more investigations that end with litigation. Organizations should also expect increased M&A unpredictability caused by Russia's invasion of Ukraine, and the resulting economic sanctions and market volatility.

As across all of eDiscovery, there will be increasingly large and complex data volumes in 2022. This growth, already commonplace year-over-year, is now heightened by the mass migration of data to the Cloud and other outcomes of organizations' dependence on remote work since early 2020.

Reliable and flexible review tools play a critical role in such an environment, helping parties achieve the speed and accuracy they seek.

## Tips for Attorneys Undergoing Second Requests in 2022

- Structure deals in a way that reduces problematic areas before reporting to agencies.
- Engage with agencies early to avoid surprises in an already tumultuous environment.
- Expect longer investigation time for agencies and prepare clients for longer timelines.
- Prepare early for large and more complicated data volumes and ensure you have the right partner(s) and advanced technology in place that can help manage the documents through the review process.

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*Data volume increases are likely to continue in 2022 and beyond. This makes conversations with regulators on scope of the Second Request, proportionality, and usage of advanced tools to manage burden both on responsiveness and privilege classification all the more important. It also makes it crucial for clients to utilize attorney teams that know the advocacy, technology, and data science well enough to customize an approach to the specific needs of each Second Request.*

— Christian J. Mahoney, Counsel,  
Cleary Gottlieb

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# Contributors

Lighthouse would like to thank the following attorneys for contributing quotations to this report. The quotes expressed in this report are those of the individual attorneys, and not those of their respective employers. Note that all information provided in this report does not, and is not intended to, constitute legal advice. Any ideas or views expressed outside contributor quotations are authored by Lighthouse.

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Harsha has been in the eDiscovery space for over 10 years, working on both the vendor and law firm sides. He started out as Project Manager and evolved into an eDiscovery attorney. Harsha's practice primarily involves HSR Second Requests but he also has expertise in Antitrust litigation matters, Government Investigations (SEC, DOJ, and FTC), Securities litigation, and White Collar Investigations.

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For 25 years, Lighthouse has provided innovative software and services to manage the increasingly complex landscape of enterprise data for compliance and legal teams. Lighthouse leads by developing proprietary technology that integrates with industry-leading third-party software, automating workflows, and creating an easy-to-use, end-to-end platform. By developing the industry's first true AI engine, approved by both the DOJ and FTC, Lighthouse provides better, faster, and more economical results with its solutions than other tools on the market. Lighthouse also delivers unique proprietary applications and advisory services that are highly valuable for large, complex matters, and a new SaaS platform designed for in-house teams. Whether reacting to incidents like litigation or governmental investigations, or designing programs to proactively minimize the potential for future incidents, Lighthouse partners with multinational industry leaders, top global law firms, and the world's leading software provider as a channel partner.

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