



Overview of the Hart-Scott-Rodino Annual Report for Fiscal Year 2020

Pandemic-induced lull in M&A activity drove down the number of reportable transactions by 21.6% in FY2020, though preliminary monthly figures for FY2021 have quickly climbed and surpassed pre-pandemic levels

November 24, 2021

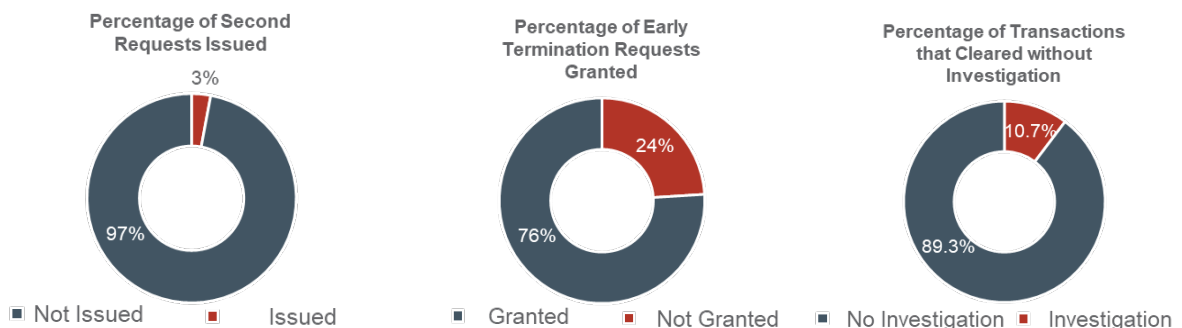
Introduction

The Federal Trade Commission (**FTC**) and the U.S. Department of Justice Antitrust Division (**DOJ**) (collectively, the **Agencies**) recently issued the Hart-Scott-Rodino Annual Report for Fiscal Year 2020 (the **Report**). Covering the time period from October 1, 2019 through September 30, 2020, the Report, which provides data on the premerger notification program established under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the **HSR Act**), shows a dramatic decrease in notified transactions as a result of the global COVID-19 pandemic in FY2020.

However, this is only a partial picture of the pandemic's effects on merger activity – since the time period covered by the Report, preliminary data indicates that the number of transactions has increased and now vastly exceeds pre-pandemic monthly numbers. In response, the Agencies have reallocated resources and staff to meet demand and suspended early termination of review, creating additional uncertainties in the merger review process. While the Report does not capture the full extent of the surge in filings, it does show a quick rebound after an initial precipitous drop in April and May.

The key takeaways from the Report are:

1. FY2020 saw a 21.6% **decrease** in notified transactions from the prior fiscal year, driven in large part by the global COVID-19 pandemic and the responses of businesses and governments. The statistics from the months following FY2020, however, indicate a robust recovery, with more than twice the number of notifications in November 2020 as compared to November 2019.
2. Merger enforcement levels **remained steady** from the prior year, with the Agencies issuing Second Requests in 3.0% of notified transactions, but higher than the 2.7% average over the past five fiscal years.
3. Similar to the prior year, the industries with the most notified transactions were consumer goods & services (representing 28.2% of total notified transactions), information technology (10.6%), manufacturing (10.2%), and banking & insurance (10.1%). FY2020 saw an **increase** in notified transactions in information technology and banking & insurance.¹
4. In **almost all transactions** where the Agencies brought a merger enforcement challenge, remedies were required or the transaction was abandoned or restructured. The Agencies brought 43 challenges, of which 18 (42%) were resolved by consent orders or settlements containing remedies, 19 (44%) were abandoned (4 after the relevant Agency filed a complaint), and 2 (5%) remain pending. Only 4 transactions (9%) were resolved without a remedy imposed (1 after litigation).
5. The absolute number of Second Requests decreased in line with the decline in notified transactions, but the Agencies' **merger enforcement activity increased**, with the Agencies issuing 48 Second Requests, initiating 43 merger enforcement challenges, and bringing 7 actions in administrative or federal court (compared to 61 Second Requests, 38 challenges, and 5 cases brought in administrative or federal court in FY2019).
6. The Agencies received 23 post-consummation corrective filings in FY2020, but did not bring any civil enforcement actions for violations of the HSR Act.



Two separate statements accompanying the release of the Report from the Democratic and Republican FTC Commissioners highlighted the two groups' dueling perspectives. The Democratic Commissioners focused on the recent surge in M&A activity and associated challenges faced by the Agency, including the FTC's limited resources for merger review and enforcement. Meanwhile, the Republican Commissioners were critical of policy changes concerning the scope of second requests, among other changes, and focused on the need for additional transparency.

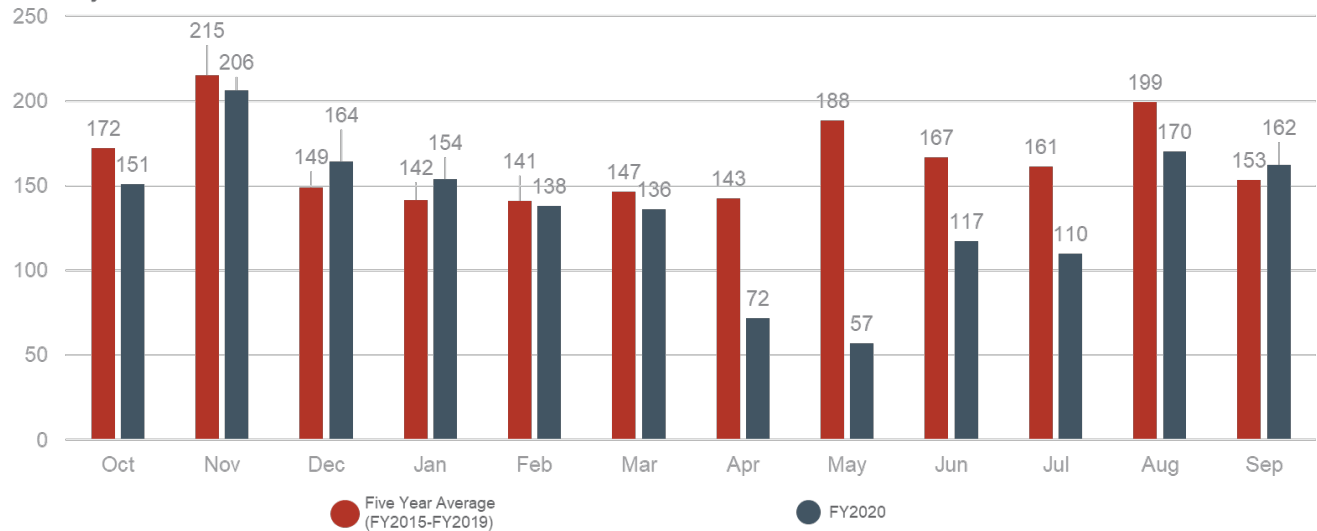
¹ Based on the industry group of the acquired entity.

Report Highlights

The Report clearly shows the profound effect of the global COVID-19 pandemic on M&A activities in FY2020, characterized by a drastic drop in filings in April and May with a rebound in June and July gathering pace through August and September.

HSR Reportable Transactions in FY2020

Monthly Totals



As described in the FY2021 data below, filings have continued to increase since the end of FY2020, reaching 424 in November 2020, which represented the highest monthly total in two decades.

Total HSR filings down 21.6%. In FY2020, a total of 1,637 transactions were notified under the HSR Act. This represents a 21.6% decrease from the 2,089 transactions notified in FY2019 and a sharp departure from the strong upward trend of the last decade, with comparable numbers not seen since FY2014.

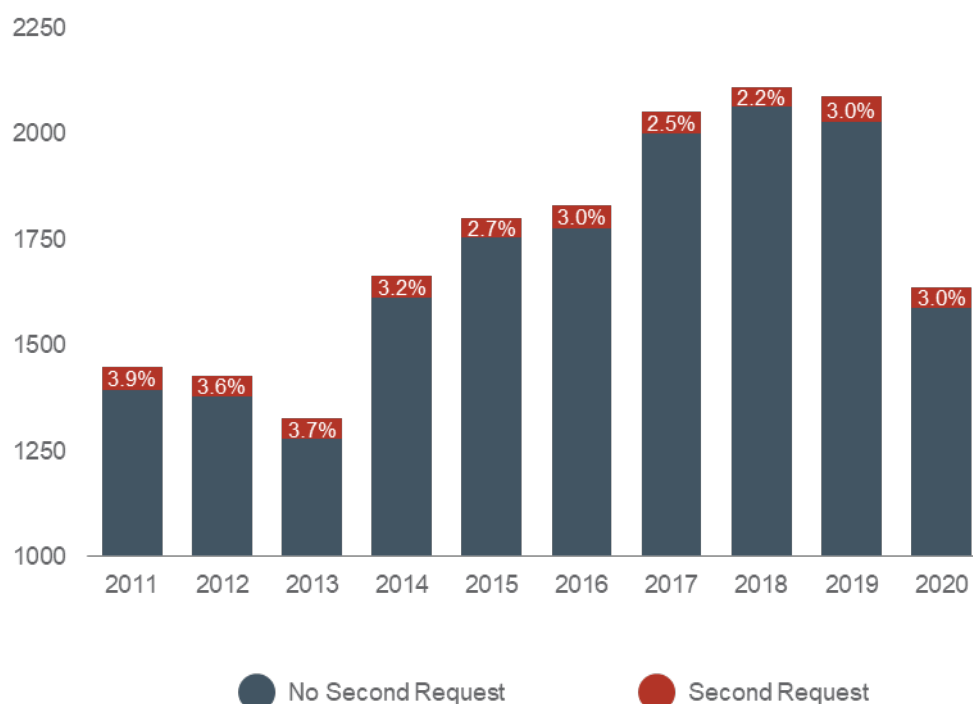
Percentage of grants of early termination requests in line with past years. Parties requested early termination of the HSR waiting period in a total of 1,133 transactions and received it in 861 of those transactions (76.0%). This is in line with the past ten years, which saw the Agencies grant early termination requests, on average, in 78.7% of transactions where requested.

More than 89% of transactions received no further scrutiny from the antitrust agencies. Through a process known as “clearance,” representatives of both the FTC and DOJ meet to assign transactions, raising potential competition concerns to either agency for the purpose of conducting an initial investigation. Clearance to conduct an initial investigation was granted to the FTC or DOJ in only 169 out of 1,580 cases (10.7%).² All other transactions (89.3%) completed the HSR process without either agency initiating a preliminary investigation. This reflected a continued decrease in the percentage of initial investigations cleared to the Agencies out of the total number of transactions (11.7% in FY2019 and 14.1% in FY2018).

² Of the total number (1,637) of notified transactions, 1,580 were subject to HSR review. Notified transactions that are not subject to HSR review include: (i) incomplete notifications, (ii) exempt transactions (e.g., which are reviewable by another federal agency but are still subject to filing with the FTC and DOJ), (iii) non-reportable transactions, and (iv) withdrawn transactions.

Increase in level of Second Requests. Of the transactions for which one of the Agencies conducted an initial investigation, 48 (28.4%) were subject to a detailed Second Request investigation; the FTC issued 23 Second Requests (in 21.7% of the FTC’s 106 investigated transactions), and the DOJ issued 25 (in 39.7% of the DOJ’s 63 investigated transactions). Compared to previous years, this represents an increase in the percentage of Second Requests issued for transactions in which an initial investigation was initiated. While the percentage of Second Requests out of the total number of transactions notified was consistent with FY2019, it was higher than FY2018 and FY2017.

Percentage of Transactions that Received Second Requests
Number of Transactions



Merger challenges increased. The Agencies brought a total of 43 merger enforcement actions in FY2020 – 28 by the FTC and 15 by the DOJ. By comparison, in FY2019, 38 merger enforcement actions were brought, 21 by the FTC and 17 by the DOJ. The FTC noted that its merger enforcement activity in FY2020 represented the highest number of FTC enforcement actions in a single year since 2001. As in prior years, most enforcement actions are resolved through consent decrees where the parties agree to divestitures and other remedies as a condition of clearance.

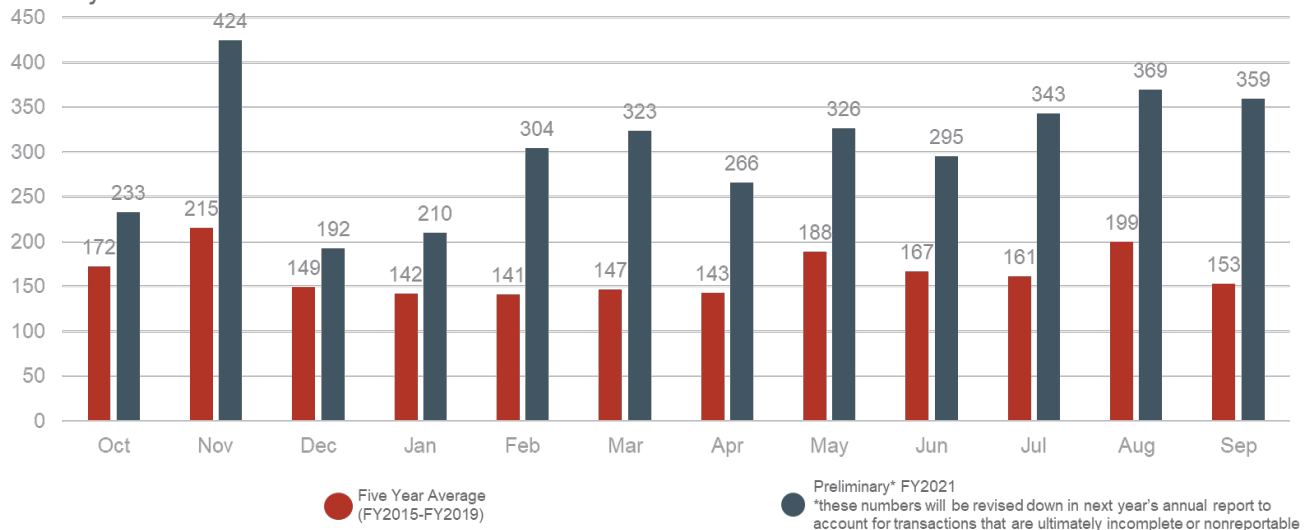
Increase in FTC merger litigation. During FY2020, the FTC filed litigation in administrative or federal court to challenge 7 problematic mergers, while the DOJ did not file any such cases. This represents an increase in the level of merger litigation compared to FY2019, in which the Agencies filed litigation in administrative or federal court with respect to 5 transactions, as well as a significant increase in the level of merger litigation brought by the FTC, up from 2 in FY2019. The DOJ’s 15 merger challenges in FY2020 were resolved either by settlement, by the parties’ abandonment of the transaction, or by the parties addressing the DOJ’s concerns during the course of the merger investigation.

Statements by FTC Commissioners on the Report

The Democratic and Republican FTC Commissioners issued separate statements accompanying the release of the Report. These statements address the sustained surge of reportable HSR transactions since the initial slowdown early in the pandemic but agree on little else. As of September 10, 2021 the Agencies have received “over 8,000 electronic HSR filings, representing over 4,000 transactions” since the FTC’s electronic filing system was established on March 18, 2020, with preliminary monthly totals vastly outstripping numbers from recent fiscal years.

HSR Reportable Transactions in FY2021

Monthly Totals



FTC Chair Lina Khan and fellow Democratic Commissioner Rebecca Slaughter released a **statement** focusing on the effects of the ongoing surge in reportable transactions which began in late 2020 and has continued into 2021. The statement addresses the lack of resources and staff available to handle the caseload, pointing to the stagnation of funding and the decline in staffing over recent decades. It also identifies the HSR Act’s statutory timelines as problematic in light of these thinly-spread resources, describing the 30-day window for review as “crippling.” According to the statement, the FTC has taken a number of steps in response to these constraints, including the recent introduction of pre-consummation “warning letters” which are issued to indicate the presence of an open and ongoing investigation near or at the expiry of the initial 30-day waiting period. The statement closes by calling for additional resources and new legislation to increase filing fees for larger transactions.

The **statement** of the FTC’s Republican Commissioners, Noah Joshua Phillips and Christine Wilson, focuses on criticizing the new majority’s approach and identifying other causes of the FTC’s recent inability to meet statutory timelines. The statement criticizes current FTC practices, such as broadening of the scope of Second Requests to include non-competition concerns, challenging transactions at lower levels of concentration, and other changes in the agency’s practice under its new leadership, citing these points as potential reasons that the FTC is falling behind the DOJ in timely merger reviews. The Republican Commissioners also raised the concern that the FTC has brought very few merger enforcement actions in FY2021, showing a “remarkable drop” in enforcement from FY2020, and noted that most of the FY2021 enforcement actions were initially brought under the prior administration. The statement closes by calling for additional transparency through the provision of additional, readily available data to the public.

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About the HSR Act. The HSR Act requires parties to certain mergers and acquisitions to file a notification with the FTC and DOJ prior to consummating the proposed transaction. Upon filing, a 30-day waiting period (15 days in the case of a cash tender offer or bankruptcy sale) begins during which the parties may not close the transaction. During this window, the Agencies assess whether the transaction is likely to have any anticompetitive effects. If deemed necessary, the FTC and DOJ are authorized to extend the waiting period by issuing a Second Request for additional information and documents. If after the Second Request review there are still concerns at the Agencies, the FTC or DOJ may seek a consent order from the parties or bring a court action challenging the merger.

Key points

Reportable transactions significantly decreased in FY2020 due to the pandemic but, in the months since, have recovered and surpassed the highs of recent fiscal years.

General enforcement and investigation trends continued in FY2020.

There is little agreement among FTC Commissioners on the causes of, and solutions to, the workload facing the Commission.

Contacts



Elaine Johnston

Partner Co-Head Antitrust
New York

Tel +1 212 610 6388

elaine.johnston@allenoverly.com



John Roberti

Partner Co-Head Antitrust
Washington, D.C.

Tel +1 202 683 3862

john.roberti@allenoverly.com



Noah Brumfield

Partner
Washington, D.C.

Tel +1 202 683 3847

noah.brumfield@allenoverly.com



Puja Patel

Associate
New York

Tel +1 212 610 6311

puja.patel@allenoverly.com



Eun Joo Hwang

Associate
New York

Tel +1 212 756 1183

eunjoo.hwang@allenoverly.com

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