

Overview of the
Hart-Scott-Rodino
Annual Report for
Fiscal Year 2019

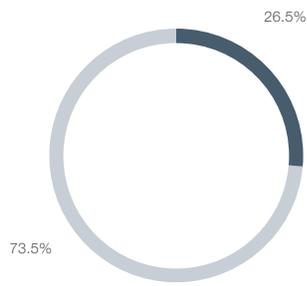
July 2020



The U.S. Federal Trade Commission (“FTC”) and the U.S. Department of Justice Antitrust Division (“DOJ”) recently issued their Hart-Scott-Rodino Annual Report for Fiscal Year 2019 (the “Report”).¹ The key takeaways from the Report are:

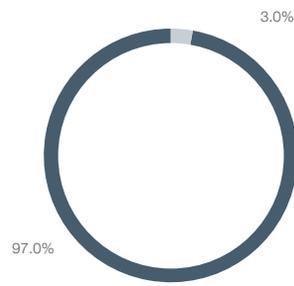
- 1 Notified transactions decreased by 1.0% from last fiscal year, with the number of HSR reportable transactions increasing more than 25% over the past five fiscal years.
- 2 Merger enforcement levels increased relative to previous years, with the antitrust agencies issuing Second Requests in 3.0% of notified transactions.
- 3 Similar to last year, the industries with the most notified transactions were consumer goods & services (representing 30.5% of total notified transactions) and manufacturing (13.2%), although FY 2019 saw an increase of notified transactions in banking & insurance (9.8%), overtaking information technology (8.7%).²
- 4 Remedies were required in most transactions where a Second Request was issued.
- 5 While the number of notified transactions dropped compared to the previous fiscal year, the number of Second Requests increased, although the percentage of agency actions in administrative or federal court remained relatively steady, with the agencies issuing 61 Second Requests, initiating 38 merger enforcement challenges, and bringing five actions in administrative or federal court (compared to 45 Second Requests, 39 challenges, and six cases brought in administrative or federal court in FY 2018).
- 6 The agencies brought two civil enforcement actions for violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”), reflecting the agencies’ continued focus on HSR compliance.





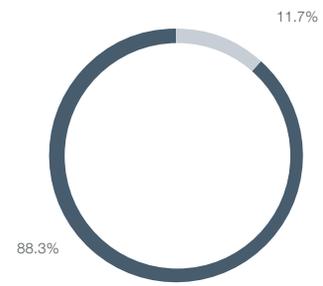
Percentage of Early Termination Requests Granted

- Early termination request granted
- Early termination request not granted



Percentage of Second Requests Issued

- Second request issued
- Second request not issued



Percentage of Transaction that Cleared without Investigation

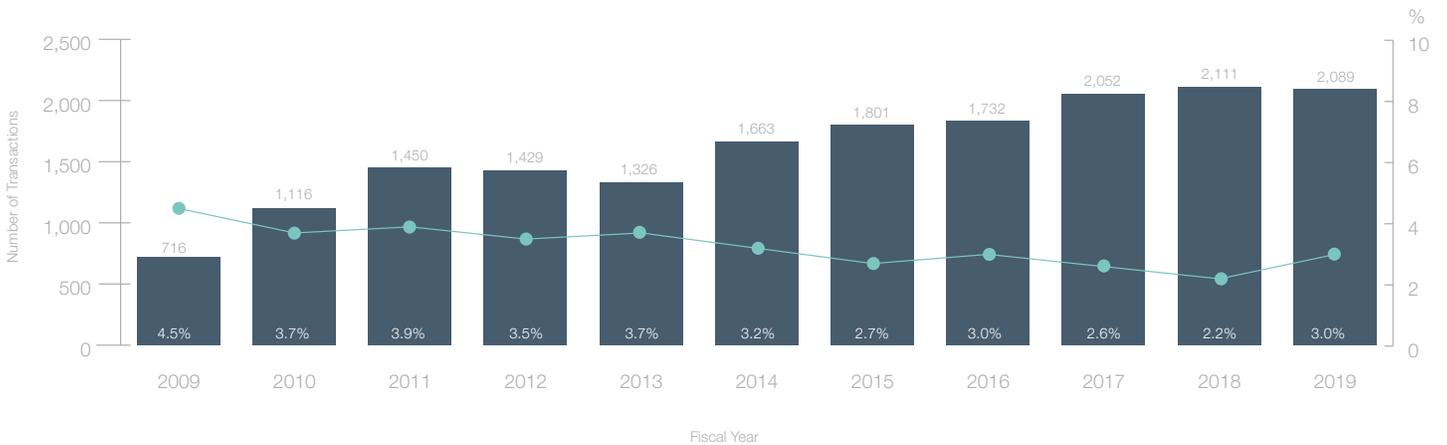
- Transaction that received investigation
- Transactions that cleared without investigation

Total HSR filings down 1.0%

According to the Report, in FY 2019, a total of 2,089 transactions were notified under the HSR Act. This represents a 1.0% decrease from the 2,111 transactions notified during the previous fiscal year (see Figure 1 below).

HR Merger Transactions Reported and Percentage of Transactions Resulting in Second Requests Fiscal Years 2009-2019

Figure 1



More than 88% 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 237 out of 2,030 cases (11.7%).³ Clearance was granted to the FTC in 149 transactions and to the DOJ in 88 transactions. All other transactions (88.3%) completed the HSR process without either agency initiating a preliminary investigation. Compared to previous years, there was a decrease in the percentage of initial investigations cleared to the agencies out of the total number of transactions (14.1% in FY 2018 and 13.9% in FY 2017).

Increase in level of Second Requests

Of the transactions for which one of the agencies conducted an initial investigation, 25.7% (61 out of 237) were subject to a detailed Second Request investigation; 30 Second Requests were issued by the FTC (20.1% of the FTC’s 149 investigated transactions) and 31 were issued by the DOJ (35.2% of the DOJ’s 88 investigated transactions). Compared to previous years, there was an increase in the percentage of Second Requests issued out of the total number of transactions and out of transactions in which an initial investigation was initiated.

DOJ issued more Second Requests than FTC

The DOJ continues to investigate more cases than the FTC, issuing Second Requests in more than 35% of the transactions in which it opened a preliminary investigation.

Majority of early termination requests are granted

Early termination of the HSR waiting period was requested in a total of 1,507 transactions and granted in 1,107 of those transactions, a percentage (73.5%) that has decreased compared to prior years (78.0% in FY 2018 and 78.6% in FY 2017).

Merger challenges remain relatively steady

A total of 38 merger enforcement actions⁴ were brought in FY 2019-21 by the FTC and 17 by the DOJ.⁵ By comparison in FY 2018, 39 merger enforcement actions were brought, 22 by the FTC and 17 by the DOJ. 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.

Merger litigation remains relatively steady

During FY 2019, the FTC and DOJ filed litigation in administrative or federal court to challenge five problematic mergers. This represents a minimal decrease in the level of merger litigation compared to FY 2018, in which the agencies filed litigation in administrative or federal court with respect to six transactions.

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 antitrust 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.

1 Fiscal year 2019 covers the period of October 1, 2018 through September 30, 2019.

2 Based on the industry group of the acquired entity.

3 Of the total number (2,089) of notified transactions, 2,030 were subject to HSR review. Notified transactions that are not subject to HSR review include: (i) incomplete notifications, (ii) exempt transactions (eg, 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.

4 Enforcement actions brought by the agencies include instances where (1) the parties settled with the agencies, (2) the transaction was abandoned or restructured due to concerns raised during the investigation and (3) the agencies filed a complaint in federal court or initiated an administrative proceeding.

5 The FY 2019 merger enforcement actions identified in the Report include non-reportable transactions.



For more information, please contact:

New York

1221 Avenue of the Americas
New York, NY 10020
United States of America

Tel +1 212 610 6300
Fax +1 212 610 6399

Washington, D.C.

1101 New York Avenue, NW
Washington, D.C. 20005
United States of America

Tel +1 202 683 3800
Fax +1 202 683 3999

GLOBAL PRESENCE

Allen & Overy is an international legal practice with approximately 5,500 people, including some 550 partners, working in over 40 offices worldwide.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term **partner** is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

Some of the material in this brochure may constitute attorney advertising within the meaning of sections 1200.1 and 1200.6-8 of Title 22 of the New York Codes, Rules and Regulatory Attorney Advertising Regulations. The following statement is made in accordance with those rules: ATTORNEY ADVERTISING; PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME.