



Overview of the Hart-Scott-Rodino Annual Report for Fiscal Year 2022

January 3, 2024

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 2022** (the Report). Covering the time period from October 1, 2021 through September 30, 2022, the Report provides data on the Agencies' activities in connection with the premerger notification program established under the Hart-Scott-Rodino-Antitrust Improvements Act of 1976, as amended (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 request for additional information and documents (a Second Request). If the Agencies still have concerns after the Second Request review, they may seek a consent order from the parties or bring a court action challenging the merger.

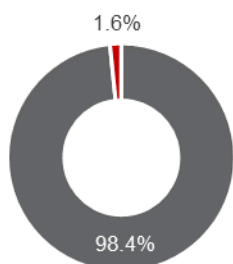
Key Takeaways

1. FY2022 saw a 10.5% **decrease in notified transactions** from the prior fiscal year. While this is a drop from the record-breaking activity of FY2021, the amount of notified transactions in FY2022 still represents a 92.5% increase from the number of notified transactions seen during FY2020, indicating a continued, robust recovery from the Covid-19 pandemic.

2. Similar to prior years, the industries with the most notified transactions were consumer goods and services (representing 31.3% of total notified transactions), manufacturing (10.5%), banking and insurance (10.4%), and information technology (8.7%). FY2022 saw an **increase in notified transactions in manufacturing and banking and insurance.**¹
3. The percentage of early termination requests granted out of the total requested decreased from 19.6% in FY2021 to just a half-percent (0.4%) in FY2022, due to the **continued suspension of the granting of early termination** that began in February 2021. Even then, the small percentage in FY2022 were in connection with consent orders or after partially responding a Second Request.
4. **Second Request investigations remained steady as a share of notified deals** compared to the previous fiscal year, with the Agencies issuing 47 Second Requests, representing 1.6% of notified transactions, compared to last year's 65 Second Requests, representing 1.9% of notified transactions.
5. The Agencies' **merger enforcement activity increased**, with the Agencies initiating 50 merger enforcement challenges, and bringing 12 actions in administrative or federal court (compared to 32 challenges and 8 cases brought in administrative or federal court in FY2021.) **This reflects a record high over the past 20 years.**
6. **In a majority of transactions where the Agencies brought a merger enforcement challenge, remedies were required or the transaction was abandoned.** Of the Agencies' 50 challenges, 16 (32%) were resolved by consent orders or settlements containing remedies, 23 (46%) were abandoned (6 after the relevant Agency filed a complaint). Only 11 transactions (22%) were resolved without a remedy imposed (5 after litigation).

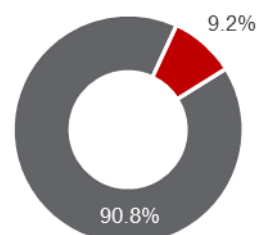
The 11 resolved transactions represent a higher figure than in previous years—compared to 4 in FY2021 (representing 12.4% of the Agencies' challenges) and 4 in FY2020 (representing 9.3% of the Agencies' challenges).
7. The Agencies received 74 post-consummation corrective filings in FY2022, and the agencies brought 2 civil penalty actions for violations of the HSR Act, resulting in USD1.89 million in civil penalties.

Percentage of Second Requests Issued



■ Not Issued ■ Issued

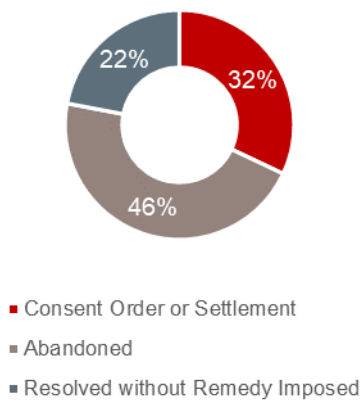
Percentage of Transactions Cleared without Investigation



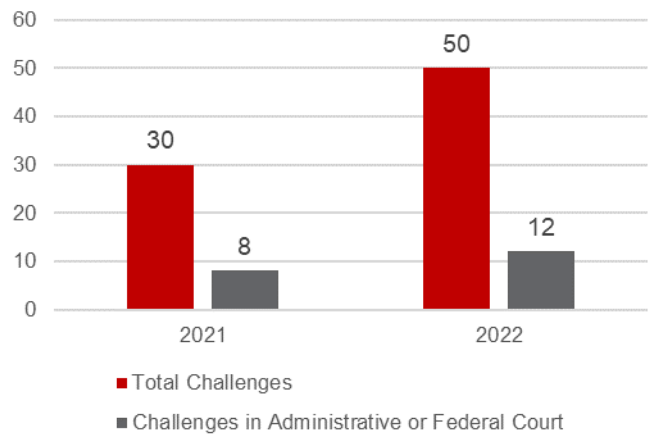
■ No Investigation ■ Investigation

¹ Based on the industry group of the acquired entity.

Resolution of Enforcement Actions

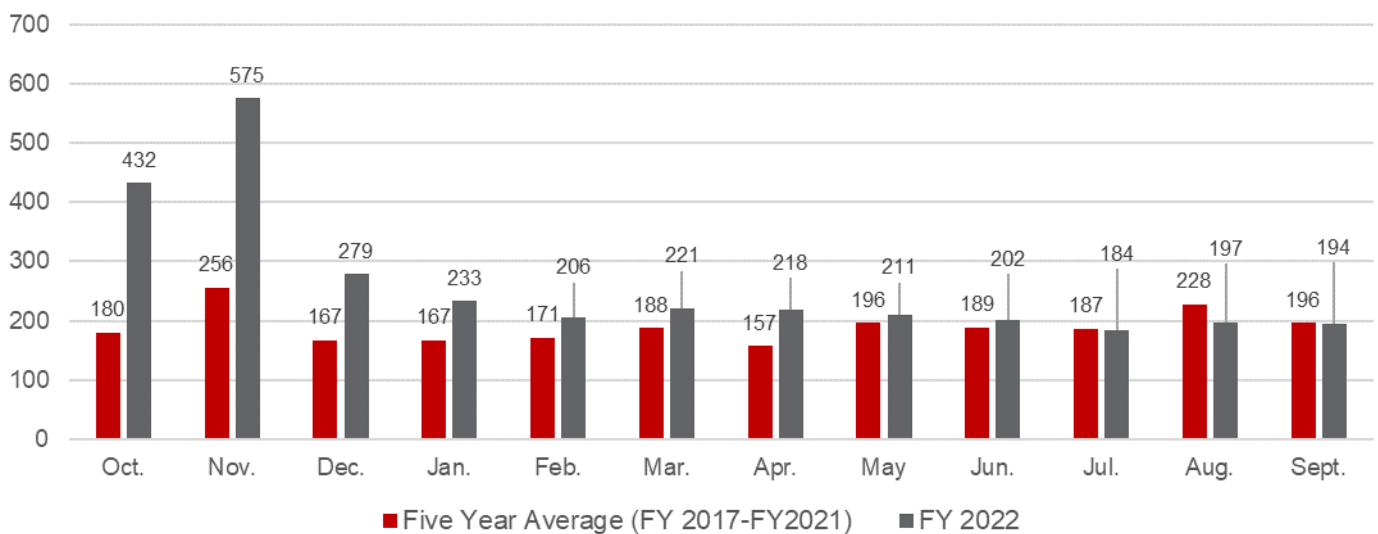


Merger Enforcement Challenges



Report Highlights

HSR Reportable Transactions in FY2022 (Monthly)



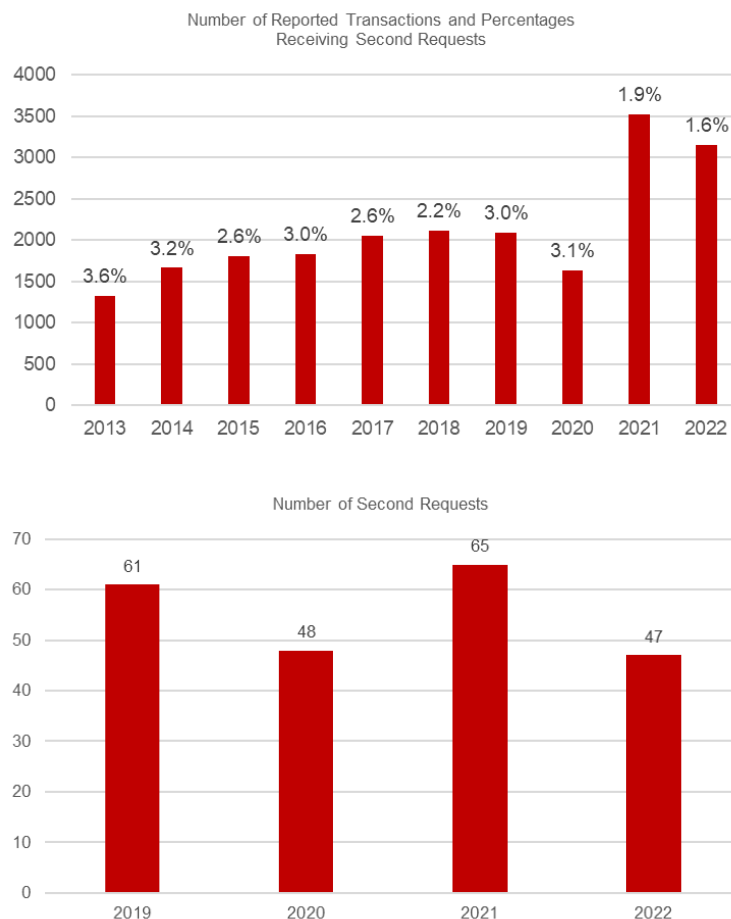
Total HSR filings down 10.5%. In FY2022, a total of 3,152 transactions were notified under the HSR Act. This represents a 10.5% decrease from the record 3,520 transactions notified in FY2021, but a strong upward trend nevertheless from the low activity of FY2020 (1,637 transactions notified) due to the Covid-19 pandemic. As seen above, the monthly filings for FY2022 have outpaced or kept relative pace with the five-year average.

More than 90.8% of transactions received no further scrutiny from the 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 291 out of 3,152 cases (9.2%).² All other transactions (90.8%) completed the HSR process without either agency initiating a preliminary investigation. This reflected a

² Of the total number (3,152) of notified transactions, 3,029 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.

higher percentage of initial investigations cleared to the Agencies out of the total number of transactions than FY2021 (7.9 %) but less than in FY2020 (10.3%).

Consistency in number of Second Requests, but Increase in number of deals subject to a pre-Second Request investigation. As a percentage of notifications overall, the percentage was consistent with, if slightly less than, FY2021. Of the transactions for which one of the Agencies conducted an initial investigation, 47 (16.2%) were subject to a detailed Second Request investigation; the FTC issued 25 Second Requests (13.6% of the FTC’s 184 investigated transactions), and the DOJ issued 22 (20.6% of the DOJ’s 107 investigated transactions). Compared to previous years, this represents an increase in the percentage of deals that were subject to initial scrutiny, but then cleared before issuing a Second Request. When compared to earlier years, the percentage of FY2022 and FY2021 deals subject to a Second Request was smaller than in FY2020 (3.1%) and FY2019 (3.0%), but it is noteworthy that the total number of notified transactions doubled in FY2021. The actual number of Second Requests in the last two years are roughly in line with these earlier years even as the number of notifications nearly doubled.



For deals that attracted scrutiny, record merger enforcement activity. The Agencies brought a total of 50 merger enforcement actions in FY2022—24 by the FTC and 26 by the DOJ. By comparison, in FY2021, 32 merger enforcement actions were brought, 18 by the FTC and 14 by the DOJ. The FTC noted that its merger enforcement activity in FY2022 represented the highest number of FTC enforcement actions in a single year since 2001.

Most enforcement actions (39, representing 78%) were resolved through consent decrees where the parties agree to divestitures and other remedies as a condition of clearance, or were abandoned entirely. FTC enforcement actions accounted for nearly two-third of the total, with 11 consent decrees and 12 abandoned

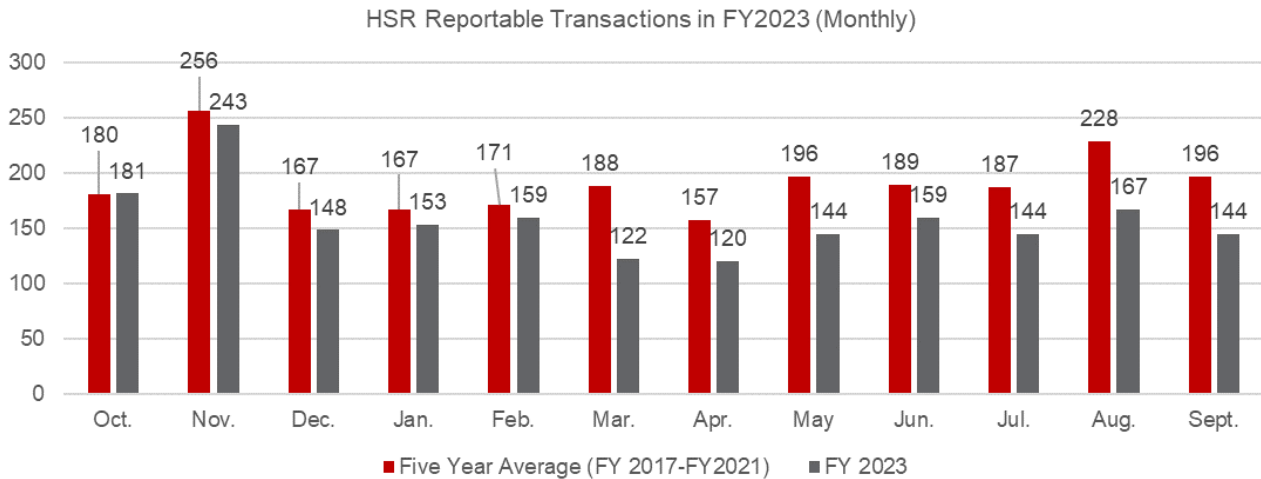
deals comprising nearly all (95.8%) of its 24 enforcement actions. The DOJ’s enforcement actions consisted of 5 consent decrees and 11 abandoned deals, comprising two-thirds of its own enforcement actions (65.4%).

Sharp increase in merger litigation. During FY2022, the FTC filed litigation in administrative or federal court to challenge six mergers, while the DOJ filed lawsuits six times. This represents an increase in the level of merger litigation compared to FY2021, in which the Agencies collectively filed litigation in administrative or federal court to enjoin eight transactions. In particular, these figures represent a significant increase in the level of merger litigation brought by DOJ, up triple from two in FY2021.

Statement of FTC Commissioners applauds merger enforcement and invites HSR changes. A statement accompanying the release of the Report from the FTC Commissioners lauded the historic level of enforcement that the Agencies realized this past fiscal year. The Commissioners also noted, however, the “unprecedented growth in the scale, volume, and complexity of mergers” and the associated challenges faced by the Agencies due to limited resources. Indeed, the Commissioners referenced not only the high volume of reportable transactions in FY2022, but also the growing size and complexity of mergers—transactions exceeding USD1 billion have tripled over the last decade and now account for half of the Agencies’ Second Requests over the past 20 years. Finally, the Commissioners described **the proposed changes to the HSR Form** as “overdue” and urged Congress to realize that “the stakes here [regarding merger review] are real for the American people.”

Looking Ahead at FY2023

The FTC publishes preliminary monthly totals of reported HSR transactions on its website. Using this data, we can estimate preliminary figures for FY2023 (which are, of course, subject to change once next year’s official report is released). The preliminary figures suggest a slight decrease in monthly notifiable transactions as against the five-year average, as seen below. In FY2023 there were 1884 notifiable transactions, compared to 3,152 in FY2022, also indicating an overall decrease.



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 (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales (SRA number 401323). The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP’s affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2024. This document is for general information purposes only and is not intended to provide legal or other professional advice. | NYO1: 2006562290.1