

Clients & Friends Memo

Hart-Scott-Rodino Annual Report for Fiscal Year 2018: Decreases in Second Requests but Increased Likelihood of Challenged Deal Where Second Request Issued

September 17, 2019

On September 16, 2019, the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”) released the agencies’ [41st Annual Hart-Scott-Rodino Report](#), which summarizes FTC and DOJ actions conducted under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”) during fiscal year 2018, covering October 1, 2017, to September 30, 2018.

Key statistical findings of the report include:

- **Increase in HSR filings.** The total number of HSR filings increased 2.9% in fiscal year 2018 (2,111 transactions reported) compared to fiscal year 2017 (2,052 transactions reported). The percentage of transactions investigated slightly increased from 13.9 percent in fiscal year 2017 to 14.1 percent in fiscal year 2018.
- **Decrease in Second Requests.** The overall number of merger investigations in which Second Requests were issued in fiscal year 2018 decreased compared to the previous year. Second Requests were issued in 45 merger investigations in fiscal year 2018 (26 issued by the FTC and 19 issued by DOJ) compared to 51 in fiscal year 2017 (33 issued by the FTC and 18 issued by DOJ). The overall percentage of transactions in which a Second Request was issued decreased from 2.6 percent in fiscal year 2017 to 2.2 percent in fiscal year 2018.
 - In fiscal year 2018, DOJ issued a higher percentage of Second Requests than the FTC, issuing Second Requests in 24.4 percent of the transactions in which DOJ initiated a preliminary investigation. The FTC issued Second Requests in 12.5% of the transactions in which it opened an initial investigation.
- **Increase in Second Requests leading to challenged transaction.** Where Second Requests were issued, however, there was an increase in the number of transactions which resulted in a challenge by either the FTC or DOJ. In fiscal year 2018, the agencies challenged 86.7 percent (39 challenges resulting from 45 transactions in which Second Requests were

issued) compared to 80.4 percent (41 challenges resulting from 51 transactions in which Second Requests were issued) in fiscal year 2017.

- The FTC brought 22 merger enforcement actions in fiscal year 2018, including five mergers that the Commission voted to block through litigation. In five other matters, the parties abandoned or restructured their transaction due to the Commission's antitrust concerns. Competition concerns were resolved with regard to the remaining 12 transactions through consent orders.
- During fiscal year 2018, DOJ challenged 17 merger transactions. The Division resolved eight cases by filing a complaint and proposed settlement simultaneously in U.S. district court, and the Division litigated to enjoin one transaction. Of the remaining eight challenges, in four the parties abandoned the proposed the transaction, and in the remaining four the parties restructured the transaction to resolve DOJ's concerns.
- DOJ challenged more transactions in which it issued a Second Request compared to the FTC. In fiscal year 2018, DOJ challenged 89.5 percent of the transactions in which it issued Second Requests, and the FTC challenged 67 percent.
- **Decrease in early terminations.** The percentage of transactions in which early termination was requested decreased slightly; early termination was requested in 74.0 percent of transactions in fiscal year 2018 as compared to 77.9 percent in fiscal year 2017. The percentage of requests granted out of the total decreased slightly (78.6 percent in fiscal year 2017 to 78.0 percent in fiscal year 2018).
- **Decrease in corrective filings and related enforcement actions.** During fiscal year 2018, 33 post-consummation "corrective" filings were received (compared to 50 corrective filings received in fiscal year 2017), and the agencies brought no enforcement actions (compared to four brought in fiscal year 2017).

The chart below summarizes the operation of the premerger notification program during the last five fiscal years. The antitrust agencies continue to grant early termination in the majority of transactions in which early termination was requested (78.0%) and to issue Second Requests in only a small number of reportable transactions (2.2%). As in previous years, the vast majority of transactions received no further scrutiny from regulators (85.9%).

Merger Enforcement Trends during Fiscal Years 2014-2018

	2014	2015	2016	2017	2018
Total Transactions Reported	1,663	1,801	1,832	2,052	2,111
Adjusted Transactions in Which Second Request Could Have Been Issued¹	1,618	1,754	1,772	1,992	2,028
Percentage of Transactions Receiving No Further Scrutiny	83.1%	85.3%	86.6%	86.1%	85.9%
Percentage of Transactions in Which Clearance Received to Conduct Preliminary Investigation	16.9%	14.7%	13.4%	13.9%	14.1%
Percentage of Preliminary Investigations Leading to Second Requests	18.7%	18.2%	22.8%	18.4%	15.7%
Percentage of Second Requests Leading to Challenged Transaction	64.7%	89.4%	87.0%	80.4%	86.7%
Overall Percentage of Reportable Transactions in Which Second Requests Were Issued	3.2%	2.7%	3.1%	2.6%	2.2%
Overall Percentage of Reportable Transactions That Were Challenged	2.0%	2.4%	2.7%	2.0%	1.9%
Transactions Involving a Request for Early Termination	1,274	1,366	1,374	1,552	1,500
Percentage Granted	80.0%	79.5%	80.2%	78.6%	78.0%
Percentage Not Granted	20.0%	20.5%	19.8%	21.4%	22.0%

* * *

If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

Joel Mitnick +1 212 504 6555 joel.mitnick@cwt.com

Ngoc Hulbig +1 704 348 5282 ngoc.hulbig@cwt.com

¹ The adjustments exclude the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The adjusted number does not exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).