

HSR Annual Report Shows More Mergers and Fewer Second Requests, But Continued and Aggressive Challenges

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The Federal Trade Commission (FTC) and Department of Justice (DOJ) recently issued their 41st [Annual Report](#) regarding transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). Notably, this year's Annual Report, which covers the federal government's fiscal year (FY) 2018 (i.e., October 1, 2017, through September 30, 2018), is the first such report to solely address antitrust enforcement under the Trump Administration. This report is further evidence that, despite high profile antitrust investigations dominating the news, the rate of significant government antitrust investigations of new transactions continues to decline.

Under the HSR Act, companies [report certain mergers or acquisitions](#) to the government to allow the FTC and DOJ to review the transaction before the parties close. When the reviewing agency has concerns that the transaction could be likely to have negative competitive effects, it conducts an in-depth investigation by issuing a Second Request. The Second Request is an extensive set of requests for documents, data, and other information and usually takes a number of months to answer. Most Second Requests result in a settlement, litigation to block the transaction, or abandonment of the transaction by the parties.

For the second straight year, the number of transactions reported under the HSR Act increased, but the reviewing agencies issued fewer Second Requests. In FY 2018, transacting parties reported 2,028 transactions to the FTC and DOJ in which a Second Request could have been issued, up from 1,992 in FY 2017. However, the Agencies issued only 45 Second Requests in FY2018, down from 51 in FY 2017. Significantly, the absolute number of Second Requests issued by the Agencies was the lowest since FY 2010, and the 2.2% of HSR reportable transactions that received a Second Request was the lowest proportion since FY 2000.

For those transactions that receive a Second Request, however, the chance of clearing the transaction without modification are low. Below are key stats from each reviewing agency's merger enforcement activities during FY 2018.

DOJ

- 78 – Merger investigations opened by the DOJ

- 19 – Second Requests issued by the DOJ
 - 17 of 19 Second Requests DOJ issued investigated transactions valued at \$500 million or more
- 17 – Transactions challenged, including one which was not HSR reportable and had already been consummated
 - 8 – Transactions settled, typically with the parties agreeing to a divestiture
 - 1 – Transactions DOJ litigated in federal court to block the transaction (DOJ lost)
 - 8 – Transactions abandoned or restructured to resolve DOJ antitrust concerns

FTC

- 208 - Merger investigations opened by the FTC
- 26 – Second Requests issued by the FTC
 - 17 of 26 Second Requests the FTC issued investigated transactions valued at \$500 million or more
- 22 – Transactions challenged
 - 12 – Transactions settled, typically with the parties agreeing to a divestiture
 - 5 – Transactions FTC initiated administrative or federal court litigation to block the transaction
 - 5 – Transactions abandoned or restructured to resolve FTC antitrust concerns

The statistics make clear that despite the decrease in transactions receiving a Second Request, the Agencies continue to aggressively challenge transactions that receive a Second Request. In fact, transacting parties that receive a Second Request face a high risk that the reviewing agency will identify a competitive problem that requires them to choose between settling with the FTC or DOJ, abandoning the transaction, or litigating to defend the proposed transaction. Winston’s experienced team of merger antitrust lawyers regularly guide clients through the process of receiving merger clearance and can advise on strategies to avoid a Second Request or comply with a Second Request and receive merger clearance where a Second Request is unavoidable.

3 Min Read

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