

Antitrust/Competition

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Fiscal Year 2022 Hart-Scott-Rodino Annual Report Provides Data on Antitrust Merger Enforcement for First Full Fiscal Year of Biden Administration

By **Jack Sidorov, Zarema A. Jaramillo, Jonathan L. Lewis, Jeffrey M. Shapiro, Sydney J. Kaplan, and Josh E. Morris**

The Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) on December 21, 2023, released the **FY 2022 HSR Annual Report** (the Report). The Report covers the period October 1, 2021, through September 30, 2022, which represents the first full fiscal year of the Biden Administration's merger enforcement efforts.

As with prior Hart-Scott-Rodino (HSR) Annual Reports, the Report provides a plethora of data, including the number of transactions filed, the number and type of merger challenges (defined broadly to include transactions that were restructured or abandoned during antitrust review), and the number of second request investigations and by which agency.

3,152 Reportable Transactions

The total number of transactions reported remained high, down from 3,520 in FY 2021 but well above the roughly 2,000 that has been typical in recent years. As the Report focuses on FY 2022 and does not address more than a year of data since the end of FY 2022, it does not mention that the number of reported transactions (based on monthly data on the FTC Premerger Notification Office (PNO) website) has fallen more than 40 percent for FY 2023, totaling 1,884.

50 Merger Challenges

The FTC challenged (in the broad sense noted above) 24 transactions, and the DOJ challenged 26. The total of 50 merger challenges is somewhat higher than in

recent years, commensurate with the high volume of HSR filings.¹

Both agencies have for many years settled many merger challenges via FTC consent orders or, for the DOJ, judicial consent decrees. The FTC continued this practice in FY 2022, settling 11 matters via consent orders. While the DOJ settled four matters via consent decrees filed simultaneously with a complaint, all were before November 16, 2021, when Jonathan Kanter, who vocally opposes the use of consent settlements instead of litigation, was confirmed as Assistant Attorney General of the Antitrust Division.

Second Requests Were Issued in 1.6 Percent of Transactions

The Report states that there were 47 second request investigations in FY 2022 and that the number of second requests has remained fairly consistent over the past decade. Interestingly, however, the Report fails to mention that the percentage of transactions resulting in second requests reached a record low of 1.6 percent. Indeed, previous Annual Reports have included a bar graph in the body of the Report showing the percentage of transactions for each year of a 10-year period that resulted in second requests,² but that bar graph is not included in the FY 2022 Report.

The agencies allow parties to pull and refile their HSR notification, which can enable parties to give the reviewing agency additional time beyond the statutory initial 30 days to investigate a proposed transaction without issuing second requests. It is plausible that

¹ It is possible that some of these 50 challenges were of transactions that were not reported under HSR.

² The second request percentage was within a range of 1.9 percent to 3.7 percent between FY 2012 and FY 2021.

the percentage of transactions resulting in second requests may be lower than it otherwise would be because of an increasing use of this mechanism. However, neither the FY 2022 Report nor previous HSR Annual Reports provide data on the use of pull and refile.

More Than 90 Percent of Transactions Did Not Entail Any Contact From the Agencies

If staff from either agency in reviewing HSR filings and publicly available information believes that further review is needed during the initial 30-day waiting period, it must obtain “clearance” from the other agency before it can contact either the parties or third parties such as customers or competitors. For FY 2022, clearance was obtained for 9.2 percent of transactions, meaning that for more than 90 percent of transactions, not even limited further information was sought.

Note that the FTC and DOJ subsequently, in June 2023, proposed sweeping changes to HSR notification requirements,³ greatly expanding the universe of documents and information that would be required to be submitted with all HSR filings. This means that parties in more than 90 percent (based on FY 2022 data) of transactions filed will need to provide this information despite such transactions raising no concerns that would lead to questions or an investigation. The proposed HSR notification changes have undergone public comment and have not yet been finalized.

HSR Compliance Investigations and Cases

During FY 2022, 74 post-consummation “corrective” filings were made, and two HSR Act compliance cases were brought and settled, resulting in a total of \$1.89 million in civil penalties.

The Report states, consistent with most recent Annual Reports: “If parties inadvertently fail to file, the agencies generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.”⁴

Takeaways From the Report

In sum, to the extent that the Annual Report is of interest (and we read it so that you don’t have to), it is both for what it says and what it doesn’t say about

the HSR program and merger enforcement during FY 2022.

Interestingly, while past Annual Reports have noted the PNO responding to practitioners’ questions about the application of the HSR rules in so-called informal interpretations cataloged on the PNO website, neither the FY 2022 nor the FY 2021 Report mentions these interpretations, which, tellingly, have not been supplemented since June 2021.⁵ Failure of the two most recent reports to highlight such guidance from the FTC’s PNO staff is consistent with the sense among many HSR practitioners that the FTC under Chair Khan, who took office in June 2021, has in some respects reined in the scope of advice that the experienced and dedicated PNO staff can give.

³ <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

⁴ No such statement appeared in the FY 2021 Annual Report, causing some concern that the agencies may have departed from the “one bite at the apple” policy for self-reported, inadvertent failures to file. The reappearance of this statement in the Report assuages those concerns.

⁵ While this online catalog of PNO informal interpretations is not mentioned in the Report, the Report does state that “PNO staff is always available to help HSR practitioners comply with HSR notification requirements.”

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

JACK SIDOROV

Senior Counsel

T: 202.753.3799

jsidorov@lowenstein.com

ZAREMA A. JARAMILLO

Partner

T: 202.753.3830

zjaramillo@lowenstein.com

JONATHAN L. LEWIS

Partner

T: 202.753.3824

jlewis@lowenstein.com

JEFFREY M. SHAPIRO

Partner

T: 973.597.2470

jshapiro@lowenstein.com

SYDNEY J. KAPLAN

Associate

T: 646.414.6828

skaplan@lowenstein.com

JOSH E. MORRIS

Associate

T: 202.753.3767

jmorris@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

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