

Hart-Scott-Rodino Annual Report for FY 2019: Decrease in Second Requests Leading to Challenged Deals

The [Hart-Scott-Rodino Annual Report Fiscal Year 2019](#), published July 8, 2020, by the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ), summarizes FTC and DOJ actions conducted under the Hart-Scott-Rodino Antitrust Improvements Act, or HSR Act, in fiscal year 2019, the period from October 1, 2018, through September 30, 2019.

Noteworthy findings of the report include:

- The total number of HSR filings decreased just 1% in fiscal 2019, compared to fiscal year 2018. The percentage of transactions investigated decreased 17.1%. The percentage of investigated transactions leading to Second Requests increased 63.6%, and the percentage of challenges to reported deals decreased 28.1%.
- The agencies continue to enforce the HSR Act's notification and waiting period requirements in "failure to file" situations.

This update provides key highlights of the annual report and offers practical advice.

Increase in Second Requests and Decrease in Challenged Deals During 2019

In fiscal 2019, a total of 2,089 transactions were reported under the HSR Act, which is just a 1% decrease from the 2,111 transactions reported in fiscal 2018. In 2019, the FTC and the DOJ investigated about 12% of reported transactions in which a Second Request could be issued, a slight decrease from the number investigated in fiscal 2018. Of the transactions investigated, about 26% resulted in the issuance of Second Requests, a 63.6% increase over the 16% reported in fiscal 2018. Where Second Requests were issued, there was a decrease in the number of transactions which resulted in an abandoned or restructured deal, a consent decree requiring the parties to divest assets, or litigation in federal district court, 62.3% compared to 87% in fiscal 2018.

	2015	2016	2017	2018	2019
Reported Transactions for Which Second Requests Could Be Issued	1,754	1,772	1,992	2,028	2,030
Percentage of Transactions in Which Preliminary Investigations Were Opened	15%	13%	14%	14%	11.7%
Percentage of Preliminary Investigations Leading to Second Requests	18%	23%	18%	16%	25.7%

Percentage of Second Requests Leading to Challenged Transaction	89%	87%	77%	87%	62.3%
Percentage of Reportable Transactions That Were Challenged	2.39%	2.65%	1.96%	1.92%	1.87%

Practice Tip: Address Antitrust Concerns Early in the Process

A company considering an acquisition that is likely to raise agency concerns should confer with its antitrust counsel early in the negotiation process. To avoid a Second Request, a company should address potential anti-competitive concerns with counsel during the preparation and filing of reports under the HSR Act and engage with antitrust authorities as soon as possible in the waiting period.

The antitrust enforcement agencies have made clear that transactions driven by COVID-19 economic distress will not be given a "free pass" under the antitrust laws but will instead be analyzed in the same manner as transactions involving other economically distressed firms. This includes firms that have filed for bankruptcy.

Corrective Filings. The statistics cited above do not include agency actions taken in connection with post-consummation "corrective filings." During fiscal year 2019, 21 corrective filings for violations were received, and the agencies brought two enforcement actions, resulting in more than \$5.6 million in civil penalties. This is a decrease in the number of corrective filings from 2018, when 33 such filings were made, and an increase in enforcement actions as none were brought in 2018.

The antitrust agencies examine the circumstances of each violation to determine whether penalties should be sought. Where the agencies are convinced the failure to file was inadvertent, and the parties file corrective filings shortly after discovering the missed filing obligation, the agencies have been less likely to seek civil penalties for the violation—this is generally known as the "one free bite of the apple" approach. However, once a party has received its "one free bite," a subsequent failure to file will result in civil penalties being assessed.

Prompt Corrective Filings May Help Companies Avoid Penalties. When the parties inadvertently fail to file, the enforcement agencies generally do not seek penalties if the parties:

1. Promptly make corrective filings after discovering the failure to file
2. Submit an acceptable explanation for their failure to file
3. Have not previously violated the HSR Act

Post-"One Free Bite of the Apple" Failures to File Can Be Costly. During fiscal year 2019, corrective filing enforcement actions involved (1) an inadvertent failure to file by a party who had previously filed corrective filings for inadvertent failures to file and who was assessed civil penalties of \$609,810 and (2) a scheme to avoid the HSR waiting period in which each of the parties agreed to pay \$2.5 million.

Failures to File Often Involve Corporate Executives or Directors Who Exercised Stock Options or Whose Restricted Stock Units Vested. Although there are many different circumstances under which a failure to file may occur, one of the most common scenarios involves corporate executives or members of the company's board of directors acquiring a very small number of shares of their company's stock by exercising options or warrants to purchase their company's stock or by the vesting of restricted stock units (RSUs).

The failure to file often results in such a situation for a reason. Although the purchase price of the stock acquired through the exercise of the option or warrant typically falls well below the size-of-transaction threshold

(currently \$94 million), or in the case of RSUs, the units simply vest, the executives or directors fail to aggregate the value of those shares with their existing holdings when determining whether an HSR filing is necessary.

Practice Tip: HSR Warning System

To avoid these problems, companies that offer their executives stock options or restricted stock units should implement an HSR warning system that reminds the company and the executive to confer with counsel about the HSR implications of the acquisition well in advance of the date of exercise or vesting.

It Is Not Necessary to Write a Check to Trigger an HSR Filing Obligation. Most situations in which an HSR filing is required involve the acquiring person making a payment or writing a check to the acquired person. However, there are certain types of acquisitions in which no money changes hands, but which may require an HSR filing. Examples of "cashless" acquisitions in which an HSR filing may be required include the exchange of one type of interest in a company for another, such as the conversion of non-voting securities for voting securities or when one corporation buys another and the consideration to the selling shareholders comes in the form of voting securities of the buyer.

Other potentially HSR-reportable acquisitions include consolidations of two or more companies into a "Newco" and the issuance of Newco shares to shareholders of the consolidated companies, reorganizations in which a non-corporate entity such as a partnership or an LLC reorganizes into a corporation or vice versa.

These situations demonstrate the need for an HSR compliance program that not only tracks the companies in which interests are held but which also takes into account how those interests may change or grow over time. As the FTC itself has noted, "[l]imiting an HSR analysis to situations where a check will cross the table can result in the failure to file for reportable acquisitions and substantial penalties."

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