

CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies

Fiscal Years 2010–2019 (Sixth Edition)

Includes Analysis on FY 2020 Reported Merger Transactions

This update is the sixth in a series of annual Cornerstone Research reports that describe merger investigations and enforcement activity at the Bureau of Competition at the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ).

The findings in this report are based on data from the past 10 joint FTC/DOJ annual reports to Congress, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Reports), for fiscal years 2010 through 2019. The FY 2019 HSR Report was published on July 8, 2020, and covers activity from October 1, 2018, through September 30, 2019. The federal government’s fiscal year runs from October 1 of the prior year through September 30 of the current year.

Starting with this edition, the report also incorporates “real time” data on merger filings published by the FTC Bureau of Competition’s Premerger Notification Office (PNO Filings Data). The PNO Filings Data, first made public on July 9, 2020, report monthly figures for HSR filings that occurred from October 1, 2019, through September 30, 2020.

This report looks at the recent activity levels and historical trends based on data from the past 10 HSR Reports. The report covers all stages of merger investigations—filings, clearances, second requests, and challenges. It also includes analyses of merger enforcement by size, industry, and agency.

To provide further insight into industry trends, Cornerstone Research’s Enforcement Rate Indicator (ERI) reports the share of second requests in an industry sector relative to its share of transactions.

Finally, the report reviews merger filings trends for FY 2020 based on the recently released PNO Filings Data.

This annual update analyzes recent activity levels and historical trends at all stages of merger investigations.

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The views expressed in this report are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

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Executive Summary

This annual update offers context for evaluating possible outcomes of individual cases as they proceed through the regulatory review process. Unless otherwise noted, the highlights below refer to FY 2019, which covers October 2018–September 2019.

Transactions, Clearances, and Second Requests¹

- There were 2,030 reported transactions, only two more than in FY 2018.² (page 3)
- Clearances (i.e., transactions cleared for further agency investigation) as a share of reported transactions declined relative to the prior fiscal year. (page 4)
- In contrast, second requests as a percentage of cleared transactions rose after a three-year decline. (page 5)
- Nearly half of second requests involved transactions exceeding \$1 billion. (page 6)
- The Manufacturing industry had the largest share of reported transactions. (page 7)

Enforcement Rates by Industry

- Between FY 2018 and FY 2019, the cross-industry Enforcement Rate Indicator (ERI) increased. This was driven by increases in the ERIs in the Manufacturing, Health Services, Pharmaceuticals, and Retail Trade sectors. (page 8)
- Manufacturing, Health Services, and Pharmaceuticals continued to have large shares of clearances relative to their shares of reported transactions. (page 9)
- Utilities, Retail Trade, and Manufacturing had the highest proportions of clearances converted to second requests. (page 10)

Challenges

- The agencies challenged 38 mergers in FY 2019, one fewer than in FY 2018. As a fraction of reported transactions and as a fraction of second requests, challenges were below their FY 2010–FY 2018 average. (page 12)
- About half (47 percent) resolved in consent orders or decrees. The parties abandoned or restructured their transactions in 39 percent of the challenges, and court proceedings were initiated in 13 percent. These percentages are broadly in line with historical trends observed between FY 2010 and FY 2018. (page 12)

In FY 2019, the agencies initiated five court proceedings, and state attorneys general initiated one court proceeding. Merging parties prevailed in all three court proceedings that went to trial.

- The agencies initiated five court proceedings. Trials were held in two of these proceedings with the merging parties prevailing in both. (page 12)
- In a rare move, attorneys general of nine U.S. states and the District of Columbia filed a suit in federal court to enjoin a proposed merger before the DOJ had completed its investigation and approved the merger with conditions. The merging parties eventually prevailed at trial. (page 12)

2020 Reported Merger Transactions

- In the wake of the COVID-19 pandemic, merger filings fell by 49 percent in the third fiscal quarter of 2020 but rebounded to FY 2019 levels in August and September 2020. (page 13)

Key Trends

Both the number of reported transactions and the number of second requests increased in FY 2019, which covers October 2018–September 2019. Despite a decrease in clearances, the FTC and the DOJ issued more second requests and challenged a similar number of mergers relative to FY 2018. The agencies also initiated court proceedings for five mergers, in line with the FY 2010–FY 2018 historical average.

- **Reported merger transactions continued to rise, but at a lower rate:** The number of reported transactions increased to 2,030 in FY 2019, the highest number in the past 10 fiscal years. However, the growth in merger transactions has become relatively flat relative to the previous five fiscal years. (page 3)
- **Clearances as a share of transactions decreased in FY 2019:** This reverses last year’s trend, although overall clearances as a share of transactions have dropped 40.7 percent since FY 2010. (page 4)
- **Second requests as a share of transactions increased in FY 2019:** This is a reversal relative to the prior two fiscal years during which second requests as a share of transactions had been decreasing. (page 4)
- **Second requests still skewed toward larger transactions:** In every year since FY 2014, transactions larger than \$1 billion accounted for over 40 percent of second requests. (page 6)
- **Manufacturing and Information had the highest share of second requests in FY 2019:** The two industries have had the highest shares of second requests over the last nine fiscal years, and together accounted for over 35 percent of the second requests in FY 2019. (page 7)

The number of second requests increased to a 10-year high in FY 2019.

- **Health Services early stage ERI remained high:** Since FY 2010, Health Services has had the largest or second-largest fraction of transactions cleared for investigation. (page 9)
- **Utilities and Retail Trade had large late stage ERIs in FY 2019:** Despite experiencing zero second requests in FY 2018, these industries had the largest fractions of clearances converted into second requests in FY 2019. (page 10)
- **The DOJ continued to convert a higher proportion of clearances into second requests than the FTC:** In FY 2019, the cross-industry average late stage ERI was 35.2 percent at the DOJ and 20.1 percent at the FTC. (page 11)
- **Fewer challenges resulted in consent orders/decrees:** Only 47 percent of the agencies’ challenges resolved in FY 2019 resulted in consent orders/decrees, the lowest percentage since FY 2010. (page 12)

Figure 1: Summary Statistics

	Average FY2010–FY2017	FY 2018	FY 2019
Merger Transactions	1,546	2,028	2,030
Clearances Granted	244	286	237
Second Requests	50	45	61
Challenges	40	39	38
Court Proceedings	5	6	5

Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The agencies define “merger transactions” as “adjusted transactions in which a second request could have been issued” (HSR Reports FY 2010–FY 2019).³ Court Proceedings for FY 2019 do not include the action initiated by state attorneys general against the parties to the proposed T-Mobile/Sprint merger. See page 12.

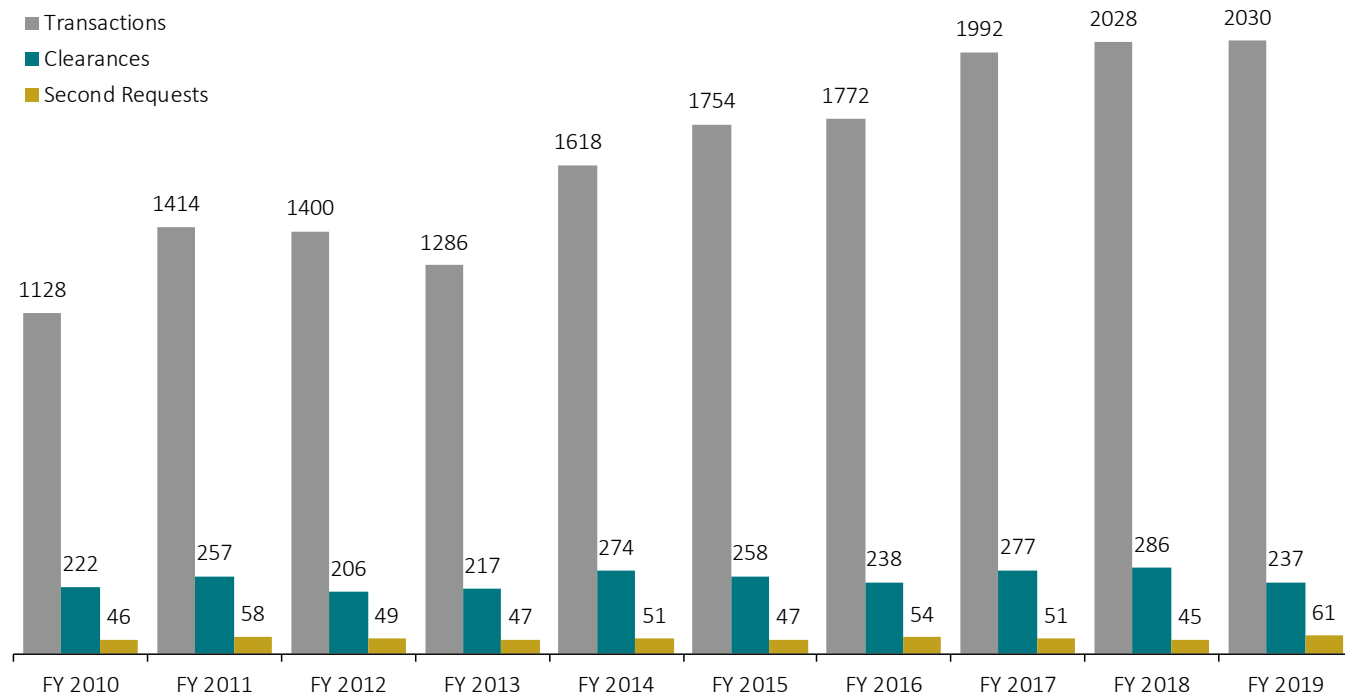
Reported Transactions, Clearances, and Second Requests

- The number of reported transactions grew to 2,030 in FY 2019, a marginal increase compared to 2,028 transactions in FY 2018. The growth rate in FY 2019 was the third lowest in the past 10 fiscal years, with a substantial decrease relative to the FY 2010–FY 2018 average of 8.2 percent year-on-year.
- The number of clearances decreased. In FY 2019, 237 transactions were cleared to the FTC or the DOJ for further investigation, compared to 286 in FY 2018 and 277 in FY 2017.⁴ While lower than in the two prior fiscal years, this number is on par with the FY 2010–FY 2018 average of 248.
- Second requests increased to 61 in FY 2019 compared to 45 in FY 2018 and a FY 2010–FY 2018 average of approximately 50.

In FY 2019, the growth in reported transactions came to a halt, while the number of second requests increased by 36 percent.

- DOJ scrutiny of mergers in the cannabis industry contributed to this increase in second requests. According to the whistleblower testimony of a DOJ attorney to the House Judiciary Committee, the DOJ issued nine second requests for mergers in the cannabis industry that did not raise anticompetitive concerns.⁵ Without counting these nine second requests, the number of second requests would have increased to 52 in FY 2019, rather than 61, still higher than all but two years over the period FY 2010–FY 2018.⁶

Figure 2: Reported Merger Transactions and Agency Actions FY 2010–FY 2019



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

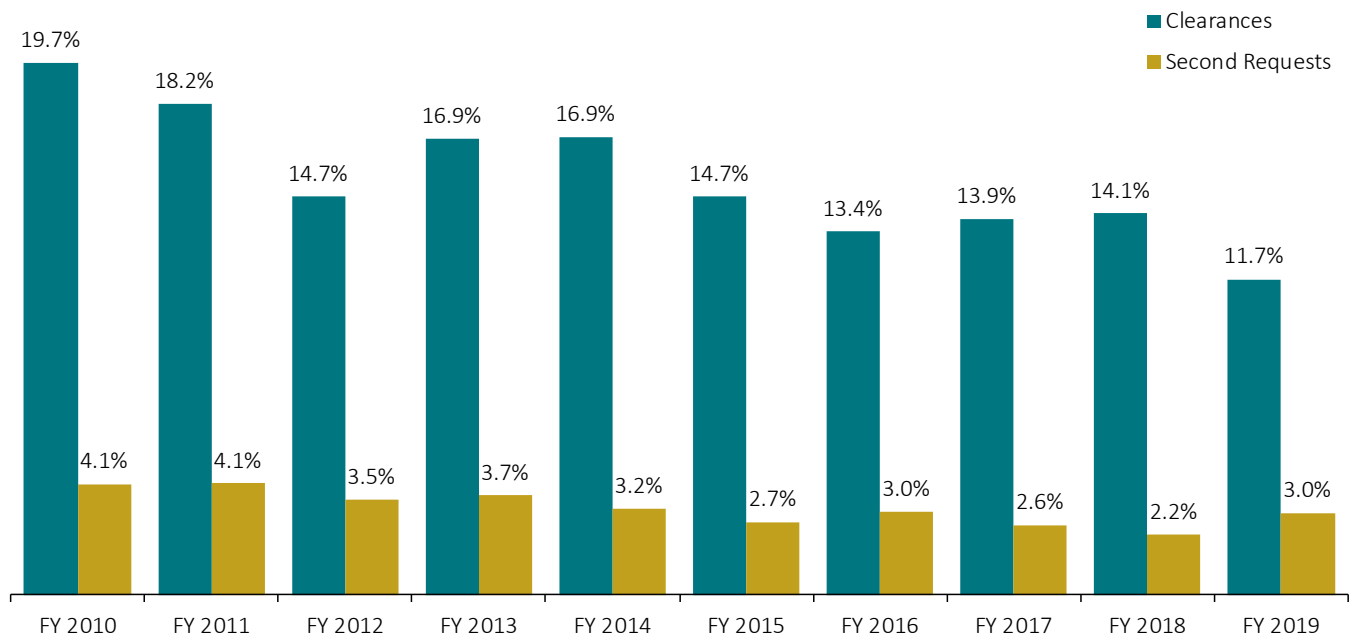
Note: The agencies define “reported merger transactions” as “adjusted transactions in which a second request could have been issued” (HSR Reports FY 2010–FY 2019).

Likelihood of Clearance and Second Request

- In FY 2019, the share of reported transactions that received clearance for investigation declined to 11.7 percent, reversing a two-year upward trend.
- The share of reported transactions receiving second requests increased to 3 percent, the highest share since FY 2016 and a reversal of the previous two-year downward trend.
- Despite the reversal in recent trends observed in FY 2019, in each of the last five fiscal years, the shares of both clearances and second requests were below the FY 2010–FY 2018 historical averages of 15.5 percent and 3.1 percent, respectively.
- Since FY 2010, overall clearances as a share of transactions have dropped 40.7 percent, while second requests as a share of transactions have dropped 26.3 percent. This appears to be a consequence of the number of transactions rising rapidly over this period, while the number of clearances and second requests remained relatively stable over time.

As a share of reported transactions, clearances decreased while second requests reached the highest level since FY 2016.

Figure 3: Agency Actions as a Share of Reported Merger Transactions FY 2010–FY 2019



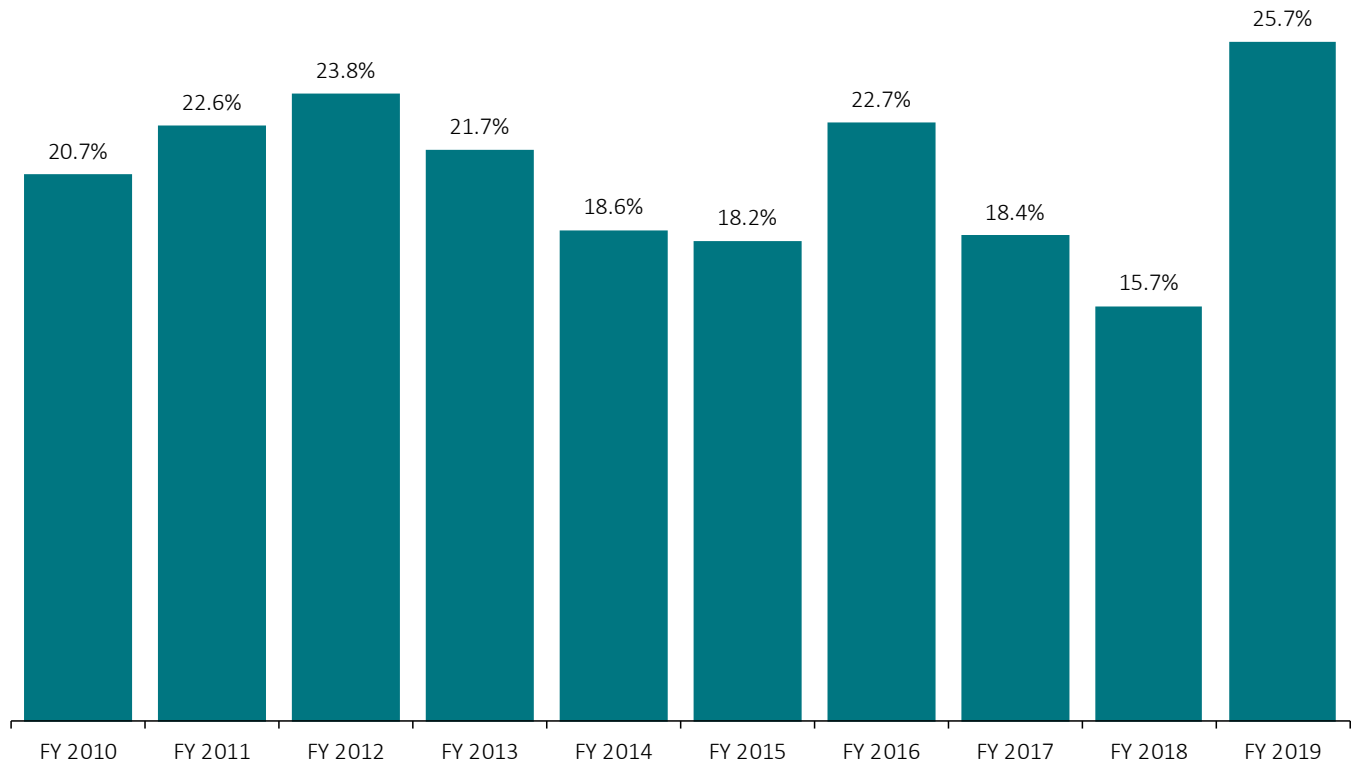
Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The agencies define “reported merger transactions” as “adjusted transactions in which a second request could have been issued” (HSR Reports FY 2010–FY 2019). For details on these ratios, see endnote 1.

- Driven by a decline in clearances and a substantial increase in second requests relative to the prior fiscal year, the percentage of cleared transactions that received second requests increased from 15.7 percent in FY 2018 to 25.7 percent in FY 2019.
- This large increase put the share of second requests relative to clearances at the highest level observed since FY 2010 and well above its FY 2010–FY 2018 average of 20 percent.

The percentage of cleared transactions receiving second requests increased, reversing the trend observed over the last two fiscal years.

Figure 4: Second Requests as a Share of Clearances
FY 2010–FY 2019



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019. For details on these ratios, see endnote 1.

Second Requests by Transaction Size

- Second requests were most common for transactions larger than \$1 billion in FY 2019, similar to historical trends. Of the second requests issued in FY 2019:
 - For the third straight fiscal year, none were for transactions valued at less than \$100 million.
 - 23 percent were for transactions between \$100 million and \$500 million, down from 24 percent in FY 2018.⁷
 - 31 percent were for transactions between \$500 million and \$1 billion, up from 18 percent in FY 2018.
 - 46 percent were for transactions valued at more than \$1 billion, a decrease from 58 percent in FY 2018.

The share of second requests issued for transactions exceeding \$500 million was equal to or above the historical average for the sixth consecutive year.

- The share of second requests issued for transactions between \$500 million and \$1 billion was above the FY 2010–FY 2018 historical average, while the share for transactions valued at more than \$1 billion was at the historical average.
- The share of second requests issued for transactions between \$100 million and \$500 million as well as for transactions below \$100 million remained below their FY 2010–FY 2018 historical averages.

Figure 5: Second Requests by Reported Merger Transaction Size FY 2010–FY 2019

Transaction Group	Average FY 2010–FY 2018	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
< \$100M	5%	13%	3%	8%	9%	6%	0%	9%	0%	0%	0%
\$100M–\$500M	30%	46%	38%	35%	30%	25%	23%	24%	27%	24%	23%
\$500M–\$1,000M	19%	13%	17%	20%	26%	20%	11%	22%	22%	18%	31%
> \$1,000M	46%	28%	41%	37%	36%	49%	66%	44%	51%	58%	46%

Legend	< 15%	15%–25%	25%–35%	35%–45%	45%+
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Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

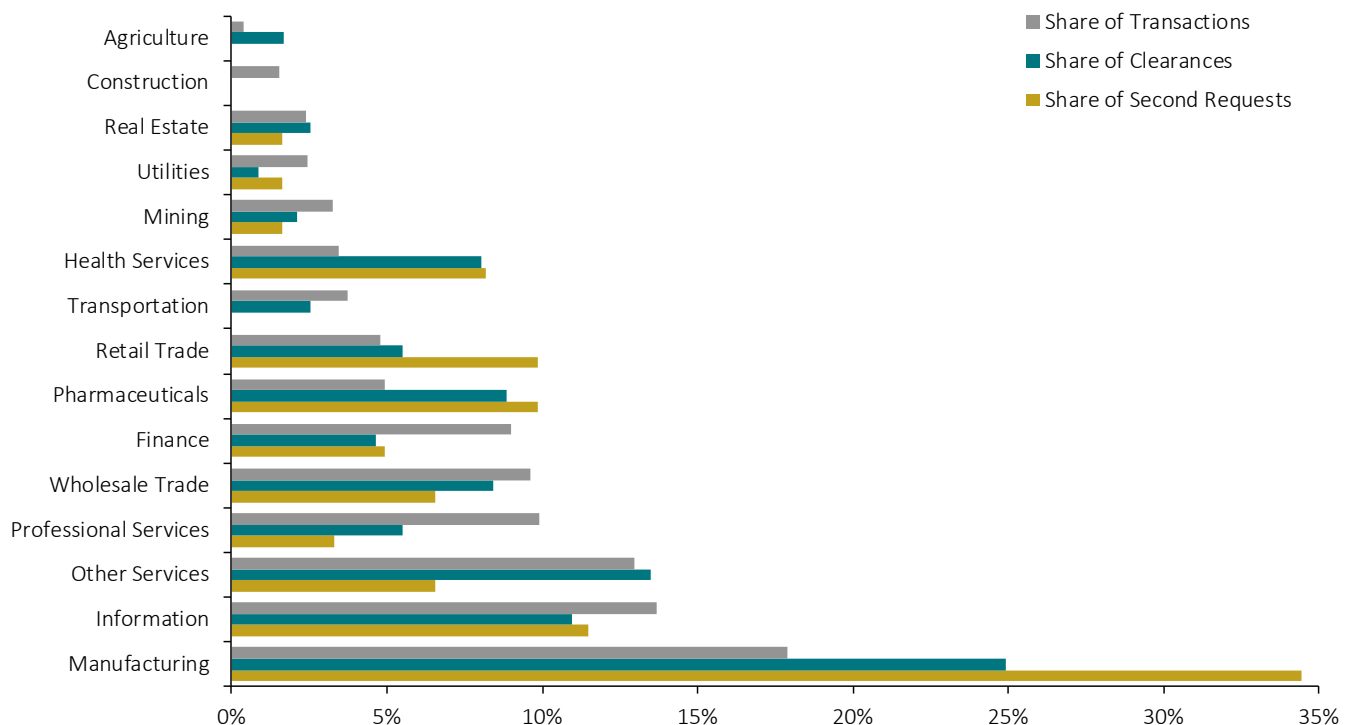
Note: The transaction group categorizes transactions by deal size. Percentages may not add up to 100 percent due to rounding. The agencies define “reported merger transactions” as “adjusted transactions in which a second request could have been issued” (HSR Reports FY 2010–FY 2019).

Transactions and Second Requests by Industry

- Manufacturing accounted for the largest share of reported transactions (17.9 percent), clearances (24.9 percent), and second requests (34.4 percent). This sector has had the largest average share of transactions, clearances, and second requests for the previous nine fiscal years.
- Information accounted for the second-largest share of transactions (13.7 percent) and second-largest share of second requests (11.5 percent). This sector ranks second in the average share of transactions and second requests over the previous nine fiscal years.
- Pharmaceuticals accounted for only 4.9 percent of transactions, but 9.8 percent of second requests. Consistent with the previous nine fiscal years, this suggests that the sector is more likely than others to receive second requests.
- Health Services accounted for only 3.4 percent of transactions, but 8.2 percent of second requests, suggesting that, like Pharmaceuticals, this sector was more likely to receive second requests in FY 2019. This is consistent with the sector’s historical experience over the previous nine fiscal years.

The Manufacturing and Information sectors continued to account for the first- and second-largest share of second requests.

Figure 6: Reported Merger Transactions, Clearances, and Second Requests by Industry Sector FY 2019



Source: HSR Report FY 2019, covering October 2018–September 2019

Note: The agencies define “reported merger transactions” as “adjusted transactions in which a second request could have been issued” (HSR Report FY 2019). The HSR Report classifies mergers according to the target firm’s two-digit NAICS code, an industry classification scheme outlined by the Bureau of Labor Statistics. The Pharmaceuticals industry is defined by the three-digit NAICS code of 325, which includes both pharmaceutical and chemical manufacturers. The Other Services group includes Accommodation; Administration of Human Resource Programs; Administrative and Support Services; Amusement, Gambling, and Recreation Industries; Educational Services; Food Services and Drinking Places; Management Companies and Enterprises; Miscellaneous Durable Goods; Nonclassifiable Establishments; Performing Arts, Spectator Sports, and Related Industries; Personal and Laundry Services; Religious, Grantmaking, Civic, Professional, and Similar Organizations; Repairs and Maintenance; and Waste Management and Remediation Services.

Enforcement Rates by Industry

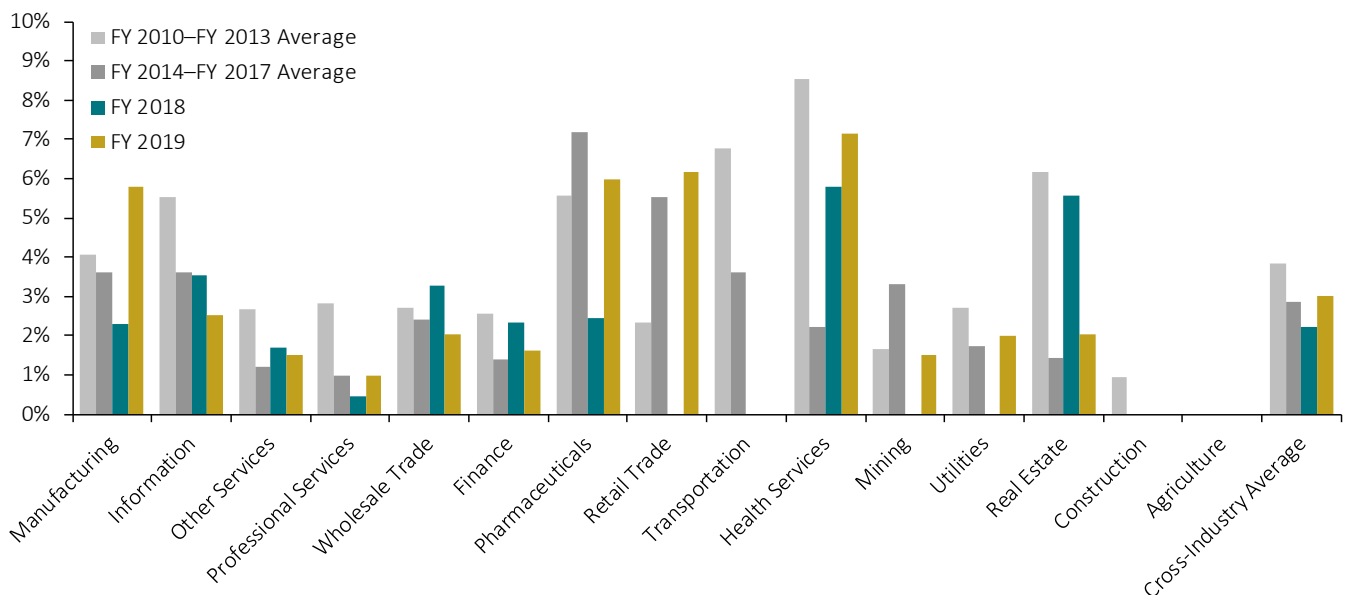
The Enforcement Rate Indicator (ERI) is calculated as the number of second requests divided by the number of transactions for a given sector and time period.⁸ An ERI greater than the cross-industry average ERI indicates that the industry is overrepresented among second requests; an ERI less than the cross-industry average ERI indicates that the industry is underrepresented among second requests. This report calculates the ERI separately for FY 2010–FY 2013 (covering the period October 2009–September 2013), FY 2014–FY 2017 (covering the period October 2013–September 2017), FY 2018 (covering the period October 2017–September 2018), and FY 2019 (covering the period October 2018–September 2019). This report also calculates early stage ERI (page 9) and late stage ERI (page 10).

- The cross-industry average ERI increased from 2.2 percent in FY 2018 to 3 percent in FY 2019. This reverses a generally declining trend over the previous nine fiscal years.
- The ERIs in Manufacturing, Information, Health Services, and Pharmaceuticals are above cross-industry average enforcement rates in all or most time periods considered. This suggests that transactions in these industries are more likely to receive second requests than transactions in other industries.
- The ERI in Manufacturing increased substantially in FY 2019 reaching 5.8 percent, a higher ERI than in any of the previous nine fiscal years.
- The ERI in Pharmaceuticals substantially exceeded the cross-industry average in FY 2019, consistent with historical trends. The ERI for this sector increased from 2.4 in FY 2018 to 6 percent in FY 2019.

The cross-industry ERI increased between FY 2018 and FY 2019, as did the ERIs in the Manufacturing, Health Services, Pharmaceuticals, and Retail Trade sectors.

- As in FY 2018, Health Services had the largest ERI (7.1 percent). This sector’s ERI has continued to increase since FY 2017.
- After no second requests in FY 2018, the Retail Trade ERI climbed to 6.2 percent in FY 2019, the second-highest ERI for the fiscal year.

Figure 7: Enforcement Rate Indicator (ERI) by Industry Sector FY 2010–FY 2019



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The figure shows the Enforcement Rate Indicator in 14 industry sectors and a residual category called Other Services for FY 2010–FY 2013, FY 2014–FY 2017, FY 2018, and FY 2019. Industry sectors are arranged by number of transactions in FY 2019. The figure also shows the cross-industry average Enforcement Rate Indicator over the same time periods. For details, see endnote 9.

Early Stage Enforcement Rates by Industry

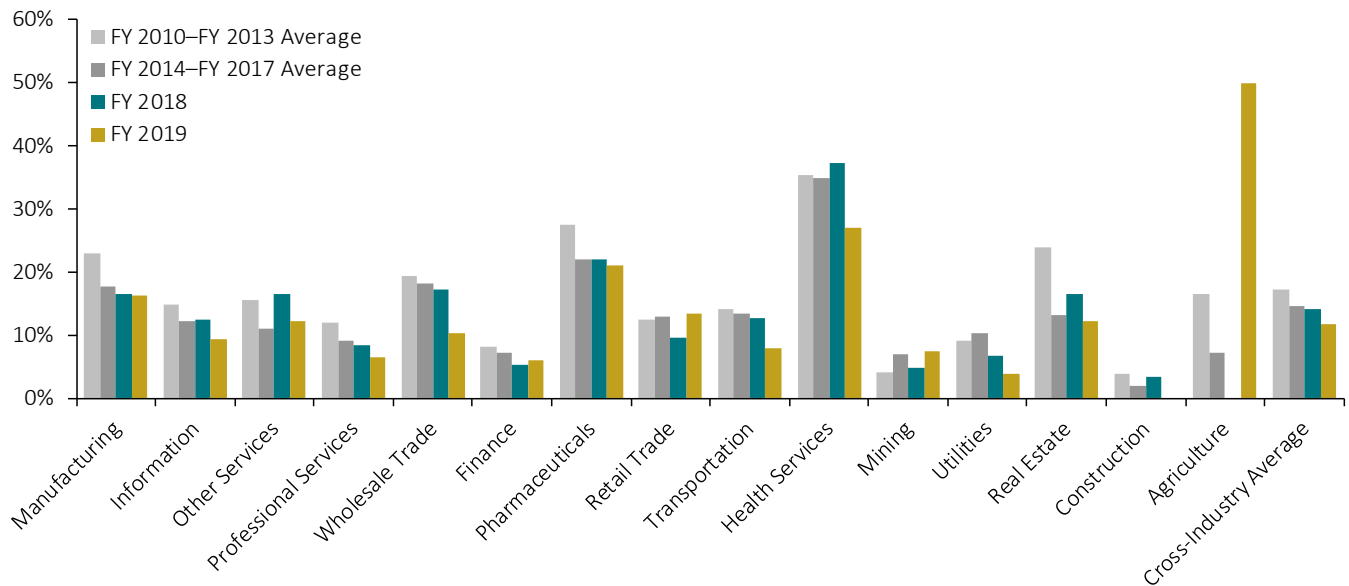
Early stage ERI is calculated as the number of clearances divided by the number of transactions for a given sector and time period. An early stage ERI greater than the cross-industry average early stage ERI indicates that the industry is overrepresented among clearances; an early stage ERI less than the cross-industry average early stage ERI indicates that the industry is underrepresented among clearances.

- The cross-industry average early stage ERI decreased from 14.1 percent in FY 2018 to 11.7 percent in FY 2019, consistent with the trends observed in the previous nine fiscal years.
- Most sectors have also seen early stage ERIs declining over time, including Manufacturing, Information, Wholesale Trade, Professional Services, and Transportation.
- In contrast to this overall trend, the early stage ERI for the Agriculture sector increased to 50 percent in FY 2019, the highest value for the fiscal year. However, this industry has historically had a low number of transactions resulting in volatile ERIs.
- Finance, Retail Trade, and Mining also experienced increases in early stage ERIs for FY 2019.

Early enforcement rates declined in FY 2019 for most sectors.

- Despite a decline in its early stage ERI to 27.1 percent in FY 2019, the Health Services sector had the second-highest early stage ERI for the year and continued to be overrepresented among clearances.
- Manufacturing, Health Services, and Pharmaceuticals historically have had early stage ERIs above the cross-industry average.

Figure 8: Early Stage Enforcement Rate Indicator (ERI) by Industry Sector FY 2010–FY 2019



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The figure shows the early stage ERI in 14 industry sectors and a residual category called Other Services for FY 2010–FY 2013, FY 2014–FY 2017, FY 2018, and FY 2019. Industry sectors are arranged by number of transactions in FY 2019. The figure also shows the cross-industry average early stage ERI over the same time periods. For details, see endnote 9.

Late Stage Enforcement Rates by Industry

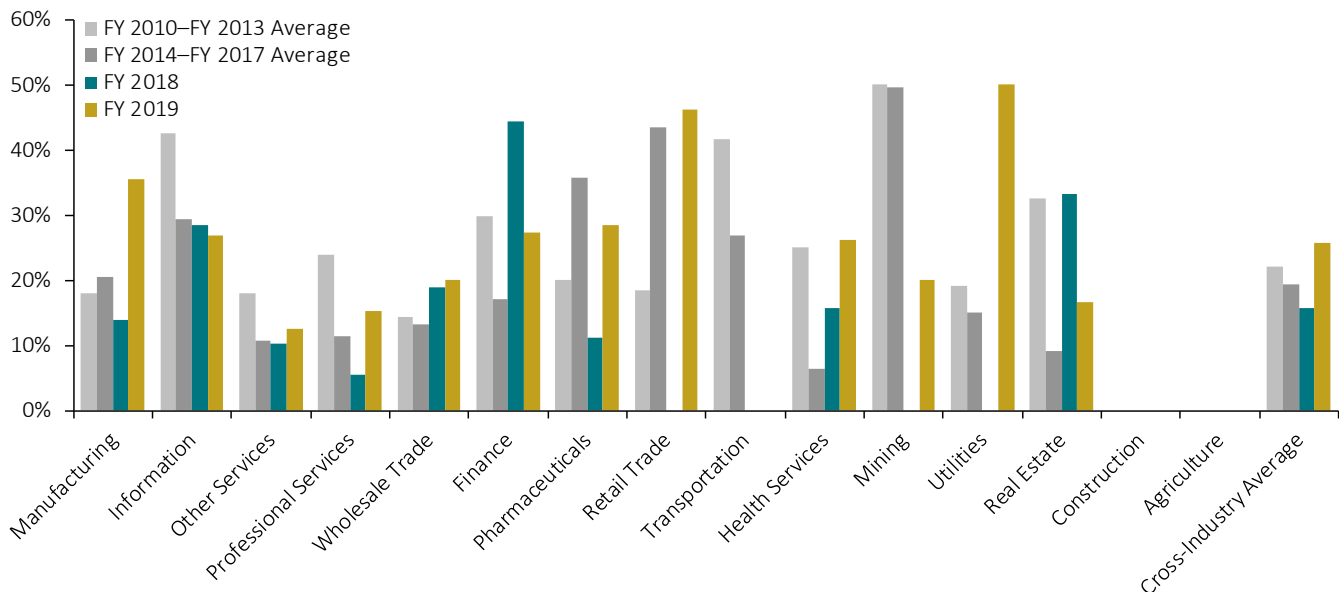
Late stage ERI is calculated as the number of second requests divided by the number of clearances for a given sector and time period. A late stage ERI greater than the cross-industry average late stage ERI indicates that the industry is overrepresented among second requests; a late stage ERI less than the cross-industry average late stage ERI indicates that the industry is underrepresented among second requests.

- After decreasing for the previous two fiscal years, the share of clearances converted into second requests increased to 25.7 percent in FY 2019.
- Sectors overrepresented among second requests in FY 2019 include Manufacturing, Information, Finance, Health Services, Pharmaceuticals, Retail Trade, and Utilities, with many experiencing large increases relative to FY 2018.
- While the Information late stage ERI consistently exceeds the cross-industry average, the late stage ERI for other sectors fluctuates. This suggests that second requests may be targeted more to merger characteristics than to industry.
- Utilities and Retail Trade had the largest late stage ERIs in FY 2019 (50 percent and 46.2 percent) despite having no second requests in FY 2018.

Late stage ERIs rose across industries in FY 2019, with the Utilities, Retail Trade, Manufacturing, and Mining sectors experiencing pronounced increases.

- The Manufacturing late stage ERI was above the cross-industry average in FY 2019 and below it in FY 2018. Similarly, the late stage ERI for this sector was above the cross-industry average in FY 2014–FY 2017 and below it FY 2010–FY 2013.
- The Pharmaceuticals late stage ERI increased from 11.1 percent in FY 2018 to 28.6 percent in FY 2019, while the Finance late stage ERI decreased from 44.4 percent to 27.3 percent over the same period.

Figure 9: Late Stage Enforcement Rate Indicator (ERI) by Industry Sector FY 2010–FY 2019



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The figure shows the late stage ERI in 14 industry sectors and a residual category called Other Services for FY 2010–FY 2013, FY 2014–FY 2017, FY 2018, and FY 2019. Industry sectors are arranged by number of transactions in FY 2019. The figure also shows the cross-industry average late stage ERI over the same time periods. For details, see endnote 9.

Late Stage Enforcement Rates by Agency

While the FTC and the DOJ each investigate mergers and issue clearances and second requests, the agencies may differ in late stage enforcement rates. This may be, in part, because the agencies handle mergers in different industry sectors. In general, the FTC issues clearances and second requests in industries with high consumer spending, including health services, pharmaceuticals, professional services, food, energy, and computer technology. The DOJ exercises exclusive antitrust authority in industries such as banking, telecommunications, railroads, and airlines.¹⁰

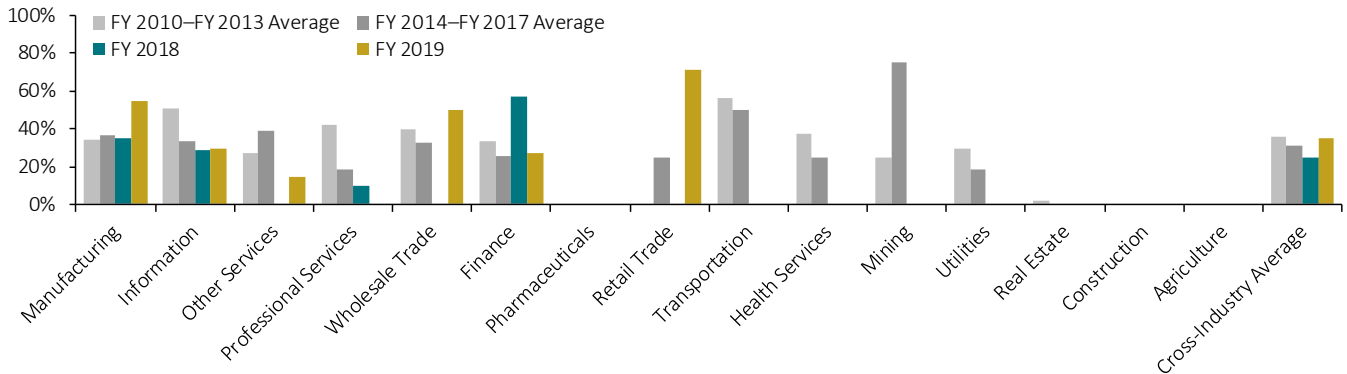
- Between FY 2018 and FY 2019, late stage ERIs increased at both agencies consistent with the increase in second requests observed over the same period. Late stage ERI across industries increased from 24.4 percent in FY 2018 to 35.2 percent in FY 2019 at the DOJ and from 12.5 to 20.1 percent at the FTC.
- This increase in late stage ERIs is concentrated in specific sectors: Manufacturing, Wholesale Trade, and Retail Trade at the DOJ, and Manufacturing, Professional Services, Health Services, Pharmaceuticals, Retail Trade, Mining, and Utilities at the FTC.

Between FY 2018 and FY 2019, late stage enforcement increased at both the FTC and the DOJ.

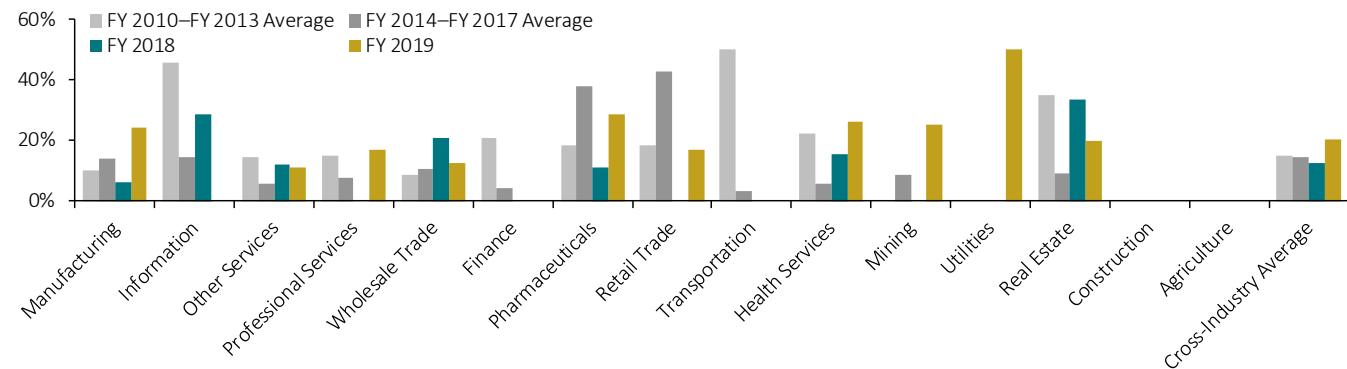
- Historically, however, differences in late stage ERI by sector do not persist over time at either agency. This suggests that late stage enforcement decisions may be targeted to merger characteristics rather than industry.

Figure 10: Late Stage Enforcement Rate Indicator (ERI) by Agency and Industry Sector FY 2010–FY 2019

Department of Justice



Federal Trade Commission



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The figures show the late stage ERI in 14 industry sectors and a residual category called Other Services for FY 2010–FY 2013, FY 2014–FY 2017, FY 2018, and FY 2019 calculated separately for clearances and second requests issued by the DOJ and for clearances and second requests issued by the FTC. Industry sectors are arranged by number of transactions in FY 2019. The figures also show the cross-industry average late stage ERI over the same time periods. For details, see endnote 9.

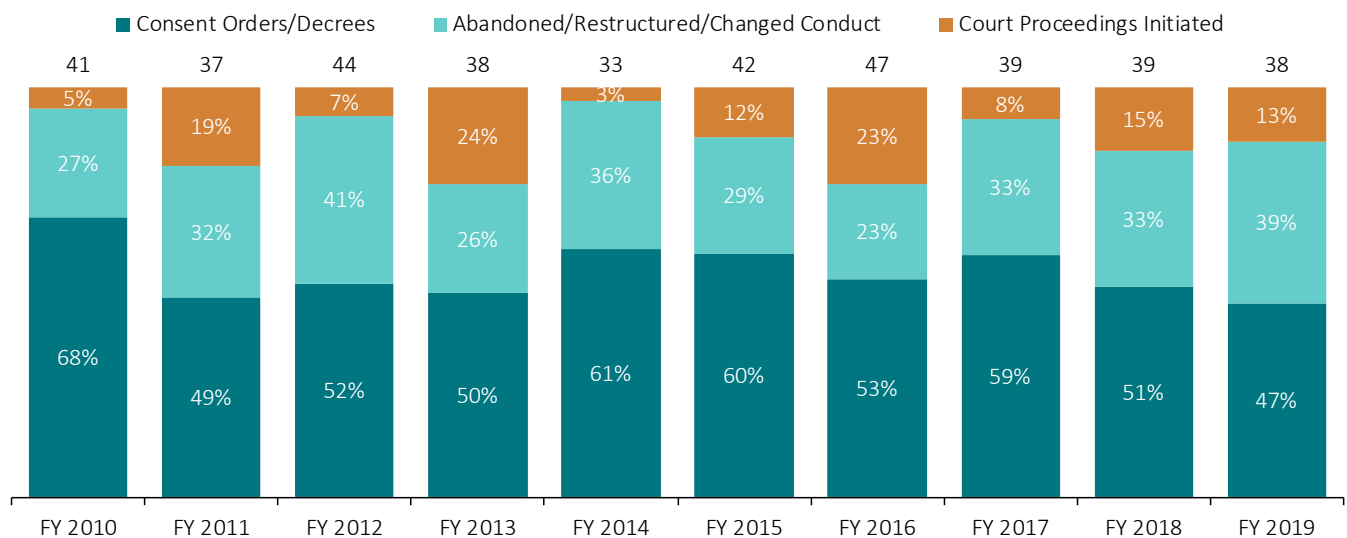
Merger Challenge Resolutions

- The agencies challenged 38 mergers in FY 2019, on par with the FY 2010–FY 2018 average of 40. Challenges as a percentage of reported transactions (1.9 percent) were below the FY 2010–FY 2018 average (2.5 percent).
- Challenges as a percentage of second requests (62.3 percent) declined relative to their FY 2010–FY 2018 average (80.4 percent), mainly driven by an increase in second requests. The decline was more pronounced at the DOJ.
- In FY 2019, 47.4 percent of the challenges resolved in a consent order/decreed (below the FY 2010–FY 2018 average of 55.8 percent), and 39.5 percent of challenges resolved with parties abandoning their transaction, restructuring it, or changing conduct (above the FY 2010–FY 2018 average of 31.1 percent).
- Five court proceedings were initiated by the agencies in FY 2019, in line with the FY 2010–FY 2018 average of 5.2:
 - After the DOJ filed a complaint, Quad and LSC, two significant magazine, catalog, and book printers in the United States, abandoned their proposed merger.
 - After prevailing in an arbitration establishing that aluminum automotive body sheet was a properly defined relevant product market, the DOJ required Novelis to divest Aleris’s North American automotive body operations to consummate the merger.
 - The DOJ lost a federal court trial against Sabre and Farelogix. According to the DOJ, the merger would have allowed Sabre, the dominant U.S. provider of airline booking services, to eliminate a disruptive competitor. The transaction was abandoned after U.K. authorities found it unlawful under U.K. law.
 - The FTC dismissed its administrative complaint after a federal judge denied a preliminary injunction on the merger between Evonik and PeroxyChem, two hydrogen peroxide producers.
 - Fidelity and Stewart, two of the four largest title insurance underwriters in the United States, abandoned their proposed merger after the FTC initiated court proceedings.

Merging parties prevailed in the three trial proceedings initiated in FY 2019.

- In addition, in June 2019, attorneys general of nine U.S. states and D.C. sought to enjoin the proposed T-Mobile/Sprint merger in federal court before the DOJ had concluded its investigation. The DOJ approved the merger in July 2019 conditional on the divestiture of Sprint’s prepaid business to DISH. The FCC also approved the merger with conditions in November 2019. The court ruled in favor of the defendants in February 2020.¹¹

Figure 11: Resolution of Challenged Merger Transactions FY 2010–FY 2019



Source: HSR Reports FY 2010–FY 2019, covering October 2009–September 2019

Note: The aggregate number of challenges includes challenges on both consummated and non-consummated transactions. Percentages may not add up to 100 percent due to rounding.

FY 2020 Reported Merger Transactions

New data released by the FTC Bureau of Competition’s Premerger Notification Office indicate that reported merger transactions were down in FY 2020, as the COVID-19 pandemic began to hit the United States. Reported merger transactions in the third fiscal quarter (April–June) were notably low, but rebounded in the fourth quarter.

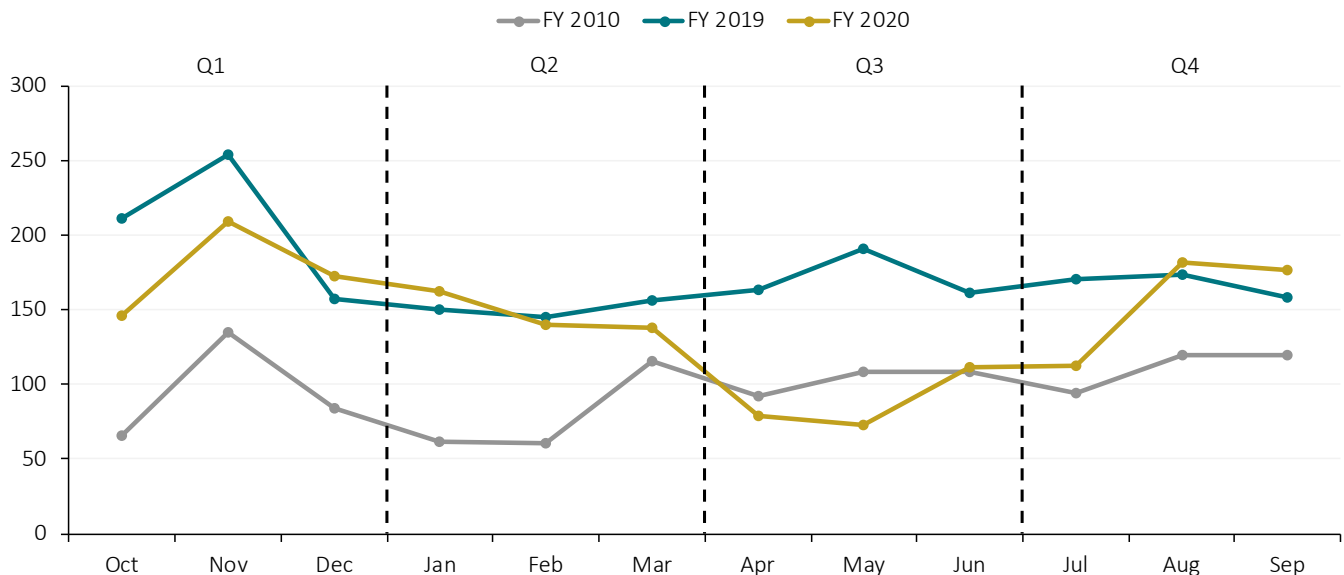
On July 9, 2020, the FTC Bureau of Competition’s Premerger Notification Office started publishing total monthly counts of merger transactions reported to the agencies pursuant to the HSR Act (PNO Filings Data).¹² While the data made public refer to raw monthly totals and may not match the official figures that will be published in future HSR Reports, the agencies expect the differences to be small.¹³ This report uses PNO Filings Data covering October 2019–September 2020 to examine trends in reported merger transactions for FY 2020.

Overall, the number of merger transactions reported to U.S. government agencies in FY 2020 decreased 19 percent from FY 2019. For the first time in the past 10 fiscal years, the number of reported transactions for the third fiscal quarter dropped below 270. The 263 transactions reported in Q3 FY 2020 were 49 percent lower than reported transactions in Q3 FY 2019.

In a reversal of this trend, however, there were 471 reported merger transactions in Q4 FY 2020, just 6 percent lower than Q4 FY 2019. While the fourth quarter saw a significant increase, the total number of reported merger transactions for the year is still notably lower than the FY 2019 total.

A decline in reported transactions does not necessarily translate into less enforcement activity. As shown in Figure 2 above, the number of second requests has remained steady over time. If the number of second requests remains at historical levels, the drop in the number of transactions reported to the agencies in FY 2020 would translate into a larger proportion of transactions being scrutinized more closely compared to last year.

Figure 12: Reported Merger Transactions
FY 2010, FY 2019, and FY 2020



Source: HSR Report FY 2019, covering October 2018–September 2019, Appendix B: Table 1; Premerger Notification Program: HSR Transactions by Month
 Note: The number of reported transactions for FY 2020 is based on new data that the FTC Bureau of Competition’s Premerger Notification Office first made public on July 9, 2020. The data report monthly figures for raw HSR Act filings. While the raw figures currently available for FY 2020 may not match the official figures that will be published in future HSR Reports, the agencies expect the differences to be small. The number of reported transactions for FY 2010 and FY 2019 are based on “transactions reported” rather than “adjusted transactions in which a second request could have been issued” as in the rest of this report to ensure better comparability with the raw FY 2020 figures. See endnote 13.

Overview of the Merger Review Process

Reported Transactions

The parties to a proposed merger transaction must file specified information about the transaction with the antitrust agencies. This applies to any transaction with a value exceeding the thresholds defined in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The antitrust agencies then have an initial 30 days (15 days for cash tenders or bankruptcies) to investigate whether the transaction might harm competition. The merging parties may not consummate the transaction during this waiting period.

Clearances

The FTC and the DOJ conduct a preliminary review of the transaction. If either agency believes the transaction warrants additional scrutiny, they follow a clearance process to determine which agency will conduct the investigation. The industry of the merging firms and historical experience are factors that determine which agency receives clearance to proceed with the review.

Second Requests

By the end of the initial 30-day waiting period, the investigating agency must decide whether to issue a second request to the parties, asking them to provide additional documents and information. The request may require substantial disclosure of company data and documents. If the agency issues a second request, the merging parties take the time they need to comply. The merger cannot be consummated before the parties are in substantial compliance with the second request.

If no second request is issued, the parties are free to consummate the merger at the end of the initial 30-day period.

Challenges

Once the parties have complied with the second request, the investigating agency has 30 days (10 days for cash tenders or bankruptcies) to decide whether to challenge the transaction. A challenged merger might proceed if the parties and the investigating agency can agree on modifications to the proposed transaction that would remedy the competitive issue the agency perceives. If the parties and the agency cannot agree, the merger may result in litigation.

If the agency takes no action, the parties are free to consummate the merger after the post-compliance waiting period expires.

Endnotes

¹ Clearances and second requests follow transaction filings with a delay. As a result, a transaction filing toward the end of a fiscal year could be cleared or issued a second request in the next fiscal year. The government's HSR Reports tabulate transactions, clearances, and second requests in the fiscal year in which they occur. Therefore, the "share" of transactions cleared or receiving a second request could be artificially increased by recording a clearance or second request for a transaction reported toward the end of the prior year. It could also be artificially decreased by missing a clearance or second request for a transaction reported toward the end of the current year. There is no reason to believe that one of these biases systematically dominates the other. Similarly, for any given time period, the percentage of second requests to clearances, although informative, must be interpreted with caution. Some transactions receiving second requests in the current fiscal year may have been cleared in the previous fiscal year. Further, some second requests issued during the current fiscal year could be challenged in the next fiscal year.

² See HSR Reports FY 2010–FY 2019, covering October 2010–September 2019. Throughout this report, the terms "reported merger transactions," "reported transactions," or "transactions" refer to what the HSR Reports describe as "adjusted transactions in which a second request could have been issued." In addition to adjusted transactions, the HSR Reports include information on filings that could differ from transactions for a number of technical reasons, including that filings could be withdrawn before any agency action. Because this report compares the number of agency actions with the number of transactions on which the agencies could have acted, "adjusted transactions" are more relevant than filings.

³ The DOJ has restated data for FY 2010 and FY 2011 that reflect corrections to prior annual reports regarding the number of second requests that were issued. Due to the lack of restated data by size and industry sector, the original HSR Reports are used to determine the amount of second requests issued in Figure 1 as well as in Figures 2–7, 9, and 10.

⁴ Whether to request clearance for any particular proposed transaction is at the antitrust agencies' discretion. A reduction in clearances relative to transactions could reflect a change in case mix or in available resources. In the first instance, fewer mergers requiring additional investigation—beyond an initial review of public information and the merger filing—might predominate on the docket. For example, the two companies proposing to merge are not competitors, or the transaction would not lead to competitive harm. In the second instance, a reduction in clearances might reflect a change in available resources. However, research found no significant relationship between workload and enforcement activity at the FTC between 1996 and 2003. See Malcolm B. Coate and Shawn W. Ulrick, "Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996–2003," *Antitrust Law Journal* 73, no. 2 (2006): 531–570.

⁵ See Diana Novak Jones, "Barr's Dislike for Pot Spurred DOJ Probes, Whistleblower Says," *Law360*, June 23, 2020, <https://www.law360.com/articles/1286014/barr-s-dislike-of-pot-spurred-doj-probes-whistleblower-says>; Jack Sidorov, "Cannabis Mergers Skewed Hart-Scott-Rodino Report Data," *Law360*, September 18, 2020, <https://www.law360.com/corporate/articles/1311527/cannabis-mergers-skewed-hart-scott-rodino-report-data->; "Curaleaf Plan to Build Biggest US Cannabis Company Faces Close DOJ Antitrust Scrutiny," *MLex*, September 5, 2019, <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/mergers-and-acquisitions/curaleaf-plan-to-build-biggest-us-cannabis-company-faces-close-doj-antitrust-scrutiny>.

⁶ With a total of 52 rather than 61 second requests, the share of reported transactions receiving second requests would have increased to 2.6 percent, in line with the value for FY 2017 (see Figure 3), while the percentage of cleared transactions that received second requests would have increased to 21.9 percent, higher than all but three years over the period FY 2010–FY 2018 (see Figure 4). DOJ enforcement of mergers related to cannabis contributed to the high number of second requests observed in the \$500 million–\$1 billion range, as five out of the nine mergers related to cannabis that received a second request by the DOJ in FY 2019 had valuations higher than \$500 million but lower than \$1 billion (see Figure 5). DOJ enforcement of cannabis mergers also likely contributed to the FY 2019 increase in late stage ERIs for the Wholesale Trade and Retail Trade sectors (see Figure 10). See "Curaleaf Plan to Build Biggest US Cannabis Company Faces Close DOJ Antitrust Scrutiny," *MLex*, September 5, 2019, <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/mergers-and-acquisitions/curaleaf-plan-to-build-biggest-us-cannabis-company-faces-close-doj-antitrust-scrutiny>; "Curaleaf, Grassroots Receive US DOJ Second Request for Information on Cannabis Merger," *MLex*, September 13, 2019, <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/mergers-and-acquisitions/curaleaf-grassroots-receive-us-doj-second-request-for-information-on-cannabis-merger>; "MedMen Inks Blockbuster \$682 Million Stock Deal to Acquire Medical Cannabis Firm PharmaCann," *Marijuana Business Daily*, October 11, 2018, <https://mjbizdaily.com/medmen-inks-blockbuster-682-million-stock-deal-to-acquire-medical-cannabis-firm-pharmacann/>; "Harvest Health & Recreation to Acquire Verano, Creating One of the Largest U.S. Multi-State Cannabis Operators," *Businesswire*, March 11, 2019, <https://www.businesswire.com/news/home/20190311005503/en/>; "Curaleaf to Acquire Grassroots, Creating the World's Largest Cannabis Company," Curaleaf Press Release, July 17, 2019, <https://ir.curaleaf.com/2019-07-17-Curaleaf-to-Acquire-Grassroots-Creating-the-Worlds-Largest-Cannabis-Company>; "Curaleaf to Acquire Select, the Leading Cannabis Wholesale Brand in the U.S.," Curaleaf Press Release, May 1, 2019, <https://ir.curaleaf.com/2019-05-01-Curaleaf-to-Acquire-Select-the-Leading-Cannabis-Wholesale-Brand-in-the-U-S>; "Cresco Labs to Acquire Origin House in Largest-Ever Public Company Acquisition in the U.S. Cannabis Sector," Cresco Labs Press Release, April 1, 2019, <https://investors.crescolabs.com/investors/press-releases/press-release-details/2019/Cresco-Labs-to-Acquire-Origin-House-in-Largest-Ever-Public-Company-Acquisition-in-the-US-Cannabis-Sector/default.aspx>.

⁷ During FY 2019, the agencies challenged 38 transactions, including smaller transactions. For example, the FTC challenged NEXUS Gas Transmission's \$160 million proposed acquisition of Generation Pipeline, which the FTC alleged would likely have harmed competition for natural gas transport in parts of Ohio. The FTC also challenged Marathon's \$240 million proposed acquisition of REROB's Express Mart retail motor fuel and convenience stores, which the FTC alleged would likely have harmed competition for gasoline and diesel sales in five New York markets. See *In the Matter of DTE Energy Company*, FTC Dkt. C-4691, and *In the Matter of Marathon Petroleum Corporation*, FTC Dkt. C-466.

⁸ Two industries with similar ERIs may have different reasons for that focus. Transaction size may drive the ERI for an industry with a disproportionate share of mega-deals (i.e., transactions with values exceeding \$1 billion). By contrast, other factors may drive the ERI in an industry with mergers spread uniformly across a range of transaction sizes. The HSR Reports do not break out second requests by transaction size and industry, so the factors driving a particular industry's ERI cannot be readily identified.

⁹ The last set of bars shows the cross-industry average ERI over each time period, calculated as the total number of second requests across all industries over the indicated time period divided by the total number of transactions across all industries over the indicated time period. Industry sectors are defined by the two-digit NAICS code classification scheme outlined by the Bureau of Labor Statistics. The Pharmaceuticals industry is defined by the three-digit NAICS code of 325, which includes both pharmaceutical and chemical manufacturers. The Other Services group includes Accommodation; Administration of Human Resource Programs; Administrative and Support Services; Amusement, Gambling, and Recreation Industries; Educational Services; Food Services and Drinking Places; Management Companies and Enterprises; Miscellaneous Durable Goods; Nonclassifiable Establishments; Performing Arts, Spectator Sports, and Related Industries; Personal and Laundry Services; Religious, Grantmaking, Civic, Professional, and Similar Organizations; Repairs and Maintenance; and Waste Management and Remediation Services. Numbers in the figure may differ slightly from those in the text due to rounding. The ERI is equal to zero if there are no transactions in a given sector or due to rounding.

¹⁰ While the FTC and the DOJ both enforce U.S. antitrust laws, the agencies generally allocate enforcement responsibility for a particular transaction based on industry. This helps the agencies avoid duplication of effort and allows each agency to focus on industries in which it has developed expertise. See "The Enforcers" in "Guide to Antitrust Laws," Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers>.

¹¹ See "New York Attorney General James Moves to Block T-Mobile and Sprint Megamerger," New York State Office of the Attorney General, June 11, 2019, <https://ag.ny.gov/press-release/2019/new-york-attorney-general-james-moves-block-t-mobile-and-sprint-megamerger-0>; "Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish," Department of Justice, July 26, 2019, <https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package>; "FCC Approves Merger of T-Mobile and Sprint," Federal Communications Commission, November 5, 2019, <https://docs.fcc.gov/public/attachments/DOC-360637A1.pdf>; Drew FitzGerald and Sarah Krouse, "T-Mobile, Sprint Deal Wins Approval, Reshaping Industry," *Wall Street Journal*, February 11, 2020, <https://www.wsj.com/articles/judge-approves-merger-of-t-mobile-and-sprint-11581427244>.

¹² The first release of these data covered the period October 1, 2019, through June 30, 2020. Subsequent releases, which happen monthly, cover the most recent six-month period. This report uses available data made public in the original July release and the October 2020 release. The data are available on the homepage of the Premerger Notification Office and are updated monthly. See "Real-Time Transparency for HSR Transaction Numbers," Federal Trade Commission, July 9, 2020, <https://www.ftc.gov/news-events/blogs/competition-matters/2020/07/real-time-transparency-hsr-transaction-numbers>; "Premerger Notification Program: HSR Transactions by Month," Federal Trade Commission, <https://www.ftc.gov/enforcement/premerger-notification-program>.

¹³ Reported transactions figures currently available for FY 2020 may not match monthly totals published in future HSR Reports because the agencies adjust the numbers to eliminate transactions that were not reportable, incomplete, withdrawn, or that relate to noncompetitive notifications under the HSR Act. To the extent that the number of withdrawn transactions turns out to be larger in FY 2020 than in prior fiscal years, the difference between current figures and figures published in future HSR Reports would be larger than in prior fiscal years, and the actual drop in reported transactions would be larger than what it currently appears. See "Real-Time Transparency for HSR Transaction Numbers," Federal Trade Commission, July 9, 2020, <https://www.ftc.gov/news-events/blogs/competition-matters/2020/07/real-time-transparency-hsr-transaction-numbers>. The data are available on the homepage of the Premerger Notification Office. See "Premerger Notification Program: HSR Transactions by Month," Federal Trade Commission, <https://www.ftc.gov/enforcement/premerger-notification-program>.

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