CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

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

Fiscal Years 2011–2020 (Seventh Edition)

Includes Analysis on FY 2021 and FY 2022 Reported Merger Transactions

This update is the seventh in a series of annual Cornerstone Research reports that describe merger investigations and enforcement activity at the Bureau of Competition of 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 Act) for fiscal years 2011 through 2020 (HSR Reports). The FY 2020 HSR Report was published on November 8, 2021, and covers activity from October 1, 2019, through September 30, 2020. The federal government's fiscal year runs from October 1 of the prior year through September 30 of the current year.

This report also incorporates "real-time" data on merger filings published by the FTC Bureau of Competition's Premerger Notification Office (PNO Filings Data), which were first made public on July 9, 2020. The PNO Filings Data used in this report contain monthly figures for HSR filings that occurred from October 2020 through September 2022.

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.

This report also reviews merger filings trends for FY 2021–FY 2022 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 2020, which covers October 2019–September 2020.

Transactions, Clearances, and Second Requests[1]

- There were 1,580 reported transactions in FY 2020, significantly fewer than in FY 2019.[2] This decline may be a reflection of the economic uncertainty associated with the early stages of the COVID-19 pandemic. (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 slightly from FY 2019. Although the number of both clearances and second requests declined, clearances declined more steeply than second requests. (page 5)
- The proportion of second requests involving transactions exceeding $1 billion dropped to a 10-year low of 31%, while the proportion involving transactions ranging from $100 million to $500 million increased from 23% to 38%. (page 6)
- The Information industry had the largest share of reported transactions, replacing Manufacturing for the first time since Cornerstone Research has published this report. (page 7)

Enforcement Rates by Industry

- Between FY 2019 and FY 2020, the cross-industry Enforcement Rate Indicator (ERI) remained constant. (page 8)
- Real Estate, Transportation, and Utilities experienced large increases in shares of clearances relative to their shares of reported transactions. (page 9)
- Finance, Pharmaceuticals, and Retail Trade had the highest proportions of clearances converted to second requests. (page 10)

Challenges

- The agencies challenged 43 mergers in FY 2020, five more than in FY 2019. As a fraction of reported transactions and as a fraction of second requests, challenges were above their FY 2011–FY 2019 average. (page 12)
- Fewer than half (40%) of the challenges resolved in consent orders or decrees, reaching a 10-year low. The parties abandoned or restructured their transactions in 42% of the challenges. (page 12)

In FY 2020, the agencies initiated eight court proceedings, more than the FY 2011–FY 2019 average, while the share of challenges resolving in a consent order or decree reached a 10-year low.

- The agencies initiated eight court proceedings. Trials were held in three of these proceedings with the merging parties prevailing in two. The FTC has appealed its loss in one of those proceedings, and the appeal has not yet concluded. (page 12)

FY 2021–FY 2022 Reported Merger Transactions

- In FY 2021, the number of merger filings grew by 123% compared to FY 2020. In each fiscal quarter, the number of filings was at a record high when compared to the same fiscal quarter for each of the prior 10 fiscal years. (page 13)
- Merger filings remained above historical averages throughout FY 2022. (page 13)

Key Trends

The number of reported transactions, clearances, and second requests decreased in FY 2020. Despite this, the FTC and the DOJ challenged more mergers relative to FY 2019. The agencies also initiated court proceedings for eight mergers, higher than the FY 2011–FY 2019 historical average.

- **Reported merger transactions declined**: The number of reported transactions decreased to 1,580 in FY 2020, the lowest number since FY 2013. This represents the steepest decline in reported transactions in the past 10 fiscal years. (page 3)
- **Clearances as a share of transactions decreased in FY 2020**: This continues last year's trend. Overall clearances as a share of transactions have decreased 41.2% since FY 2011. (page 4)
- **Second requests as a share of transactions stayed constant in FY 2020**: This is in contrast to the previous fiscal year during which second requests as a share of transactions increased. (page 4)
- **Second requests shifted away from larger transactions**: For the first time since FY 2013, transactions larger than $1 billion accounted for less than 40% of second requests. (page 6)
- **Information, Manufacturing, and Health Services had the highest shares of second requests in FY 2020**: Information and Manufacturing have had the highest shares of second requests over the nine fiscal years prior to FY 2020, and together accounted for over 35% of the second requests in FY 2020. In FY 2020, Health Services surpassed Information as the sector with the second-highest share of second requests. (page 7)

The decline in the number of proposed transactions in FY 2020 following the onset of the COVID-19 pandemic was the steepest in the past 10 fiscal years.

- **The Health Services sector early stage ERI remained high and its late stage ERI increased**: Since FY 2011, Health Services has had the largest or second-largest fraction of transactions cleared for investigation. In FY 2020, Health Services also saw a pronounced increase in late stage ERI relative to FY 2019. (page 9)
- **Pharmaceuticals and Retail Trade had high late stage ERIs in FY 2020**: These industries had the largest fractions of clearances converted into second requests in FY 2020. (page 10)
- **The DOJ continued to convert a higher proportion of clearances into second requests than the FTC**: In FY 2020, the cross-industry average late stage ERI was 39.7% at the DOJ and 21.7% at the FTC. (page 11)
- **Fewer challenges resulted in consent orders/decrees**: Only 40% of the agencies' challenges resolved in FY 2020 resulted in consent orders/decrees, a 14.9% decline from FY 2019, reaching a 10-year low. (page 12)

Figure 1: Summary Statistics

	Average FY 2011–FY 2018	FY 2019	FY 2020
Merger Transactions	1,658	2,030	1,580
Clearances Granted	252	237	169
Second Requests	50	61	48
Challenges	40	38	43
Court Proceedings	6	5	8

Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

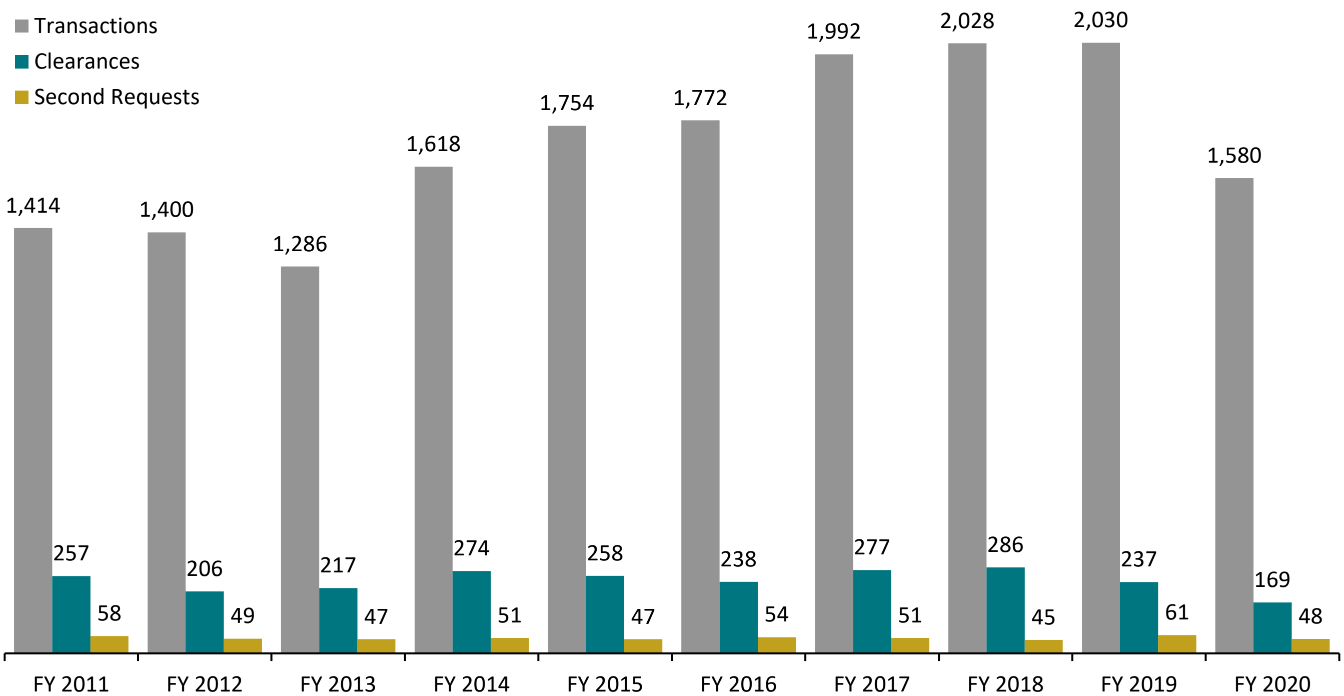
Note: The agencies define "merger transactions" as "adjusted transactions in which a second request could have been issued" (HSR Reports FY 2011–FY 2020).[3]

Reported Transactions, Clearances, and Second Requests

- The number of reported transactions decreased to 1,580 in FY 2020, a substantial decline from 2,030 transactions in FY 2019. This reverses the pattern of year-over-year increases in reported transactions from FY 2013 to FY 2019 and may reflect the economic uncertainty associated with the early stages of the COVID-19 pandemic.
- The number of clearances decreased. In FY 2020, 169 transactions were cleared to the FTC or the DOJ for further investigation, compared to 237 in FY 2019 and 286 in FY 2018.[4] The FY 2020 number is substantially lower than the FY 2011–FY 2019 average of 250.
- Second requests decreased to 48 in FY 2020 compared to 61 in FY 2019 and the FY 2011–FY 2019 average of approximately 51.
- Although the number of transactions, clearances, and second requests all declined in FY 2020, clearances declined more sharply than reported transactions and second requests.

Reported transactions declined in FY 2020 for the first time since FY 2013.

Figure 2: Reported Merger Transactions and Agency Actions
FY 2011–FY 2020



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

Note: The agencies define “reported merger transactions” as “adjusted transactions in which a second request could have been issued” (HSR Reports FY 2011–FY 2020).

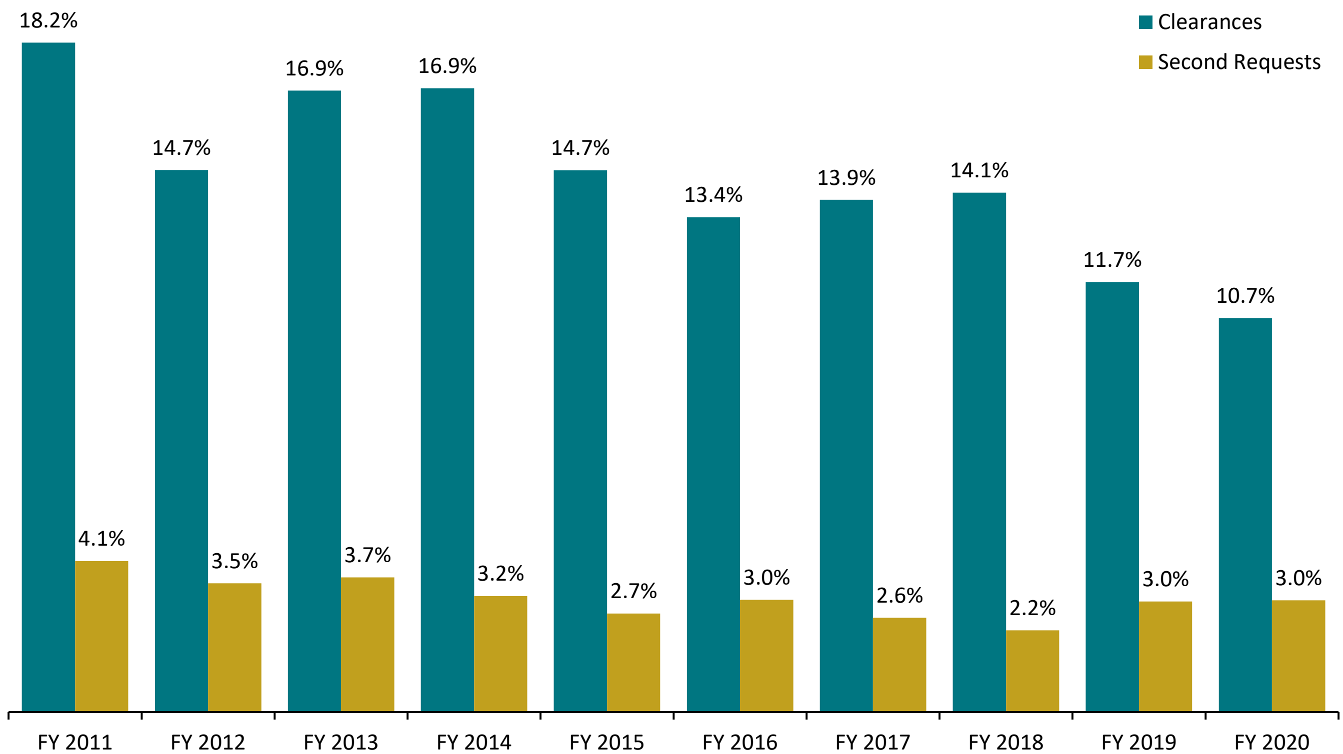
Likelihood of Clearance and Second Request

- In FY 2020, the share of reported transactions that received clearance for investigation declined to 10.7%, the lowest share in the past 10 fiscal years.
- The share of reported transactions receiving second requests stayed constant at 3.0%.
- In each of the last six fiscal years, the share of clearances was at or below the FY 2011–FY 2019 historical average of 14.7%.

As a share of reported transactions, clearances decreased to a 10-year low, while second requests remained constant.

- In FY 2020, the share of second requests was in line with the FY 2011–FY 2019 historical average of 3.0%.

Figure 3: Agency Actions as a Share of Reported Merger Transactions
FY 2011–FY 2020



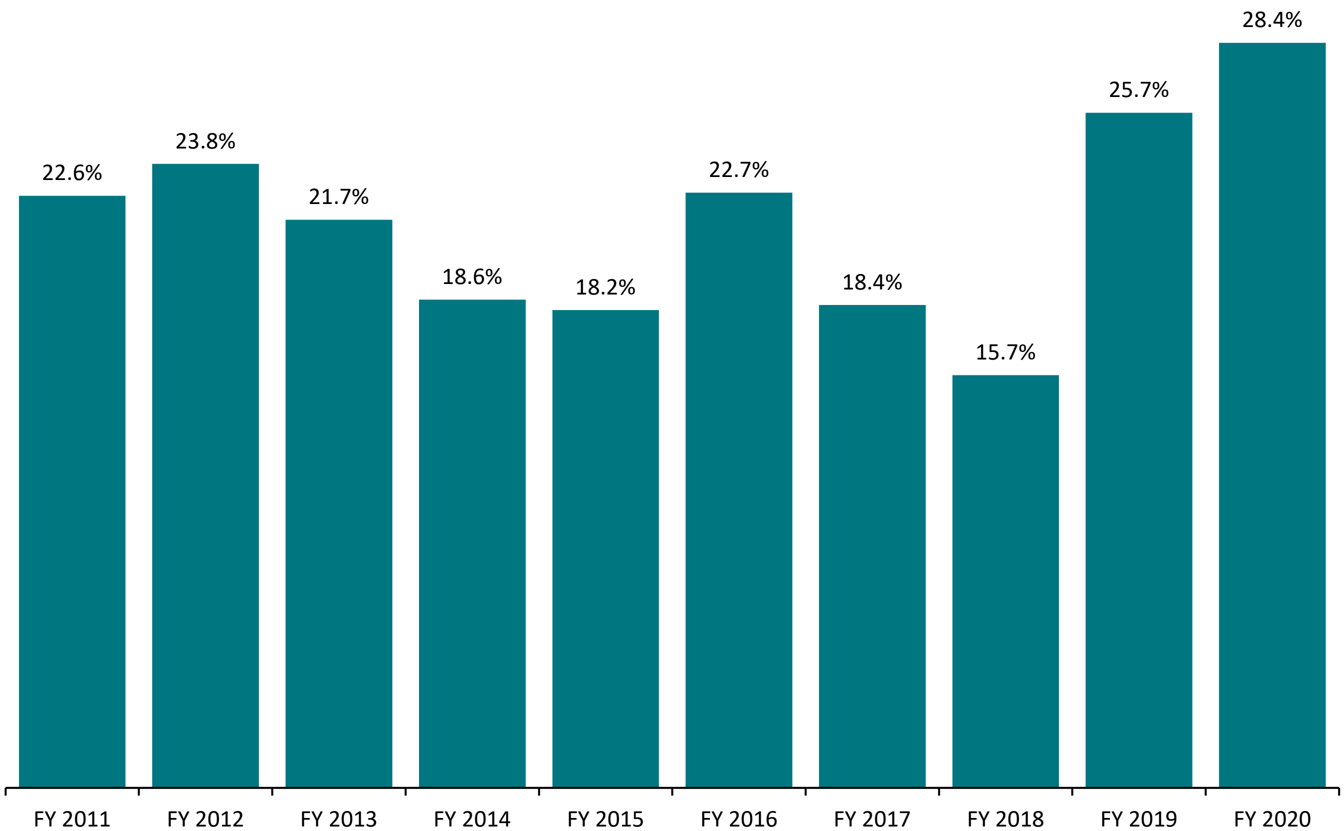
Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

Note: The agencies define "reported merger transactions" as "adjusted transactions in which a second request could have been issued" (HSR Reports FY 2011–FY 2020). For details on these ratios, see endnote 1.

- Driven by the larger decline in clearances relative to the decline in second requests from the prior fiscal year, the percentage of cleared transactions that received second requests increased from 25.7% in FY 2019 to 28.4% in FY 2020.
- This increase put the share of second requests relative to clearances at a 10-year high and well above its FY 2011–FY 2019 average of 20.6%.

The percentage of cleared transactions receiving second requests increased, continuing the trend observed from the prior fiscal year.

Figure 4: Second Requests as a Share of Clearances
FY 2011–FY 2020



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020. For details on these ratios, see endnote 1.

Second Requests by Transaction Size

- For the first time since FY 2011, second requests were most common for transactions between $100 million and $500 million.
- Of the second requests issued in FY 2020:
  - For the fourth straight fiscal year, none were for transactions valued at less than $100 million.
  - 38% were for transactions between $100 million and $500 million, up from 23% in FY 2019.[5]
  - 31% were for transactions between $500 million and $1 billion, the same percentage as FY 2019.
  - 31% were for transactions valued at more than $1 billion, a decrease from 46% in FY 2019.

The share of second requests issued for transactions exceeding $1 billion was below its nine-year historical average for the first time in seven years.

- The share of second requests issued for transactions between $500 million and $1 billion was above the FY 2011–FY 2019 historical average (21%), while the share of second requests issued for transactions valued at more than $1 billion was below the historical average (47%).
- The share of second requests issued for transactions between $100 million and $500 million was above the FY 2011–FY 2019 historical average (28%), reaching its highest level since FY 2011.
- The share of second requests issued for transactions below $100 million remained lower than its FY 2011–FY 2019 historical average (4%).

Figure 5: Second Requests by Reported Merger Transaction Size
FY 2011–FY 2020

Transaction Group	Average FY 2011–FY 2019	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
< $100M	4%	3%	8%	9%	6%	0%	9%	0%	0%	0%	0%
$100M–$500M	28%	38%	35%	30%	25%	23%	24%	27%	24%	23%	38%
$500M–$1,000M	21%	17%	20%	26%	20%	11%	22%	22%	18%	31%	31%
> $1,000M	47%	41%	37%	36%	49%	66%	44%	51%	58%	46%	31%

Legend	< 15%	15%–25%	25%–35%	35%–45%	45%+

Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

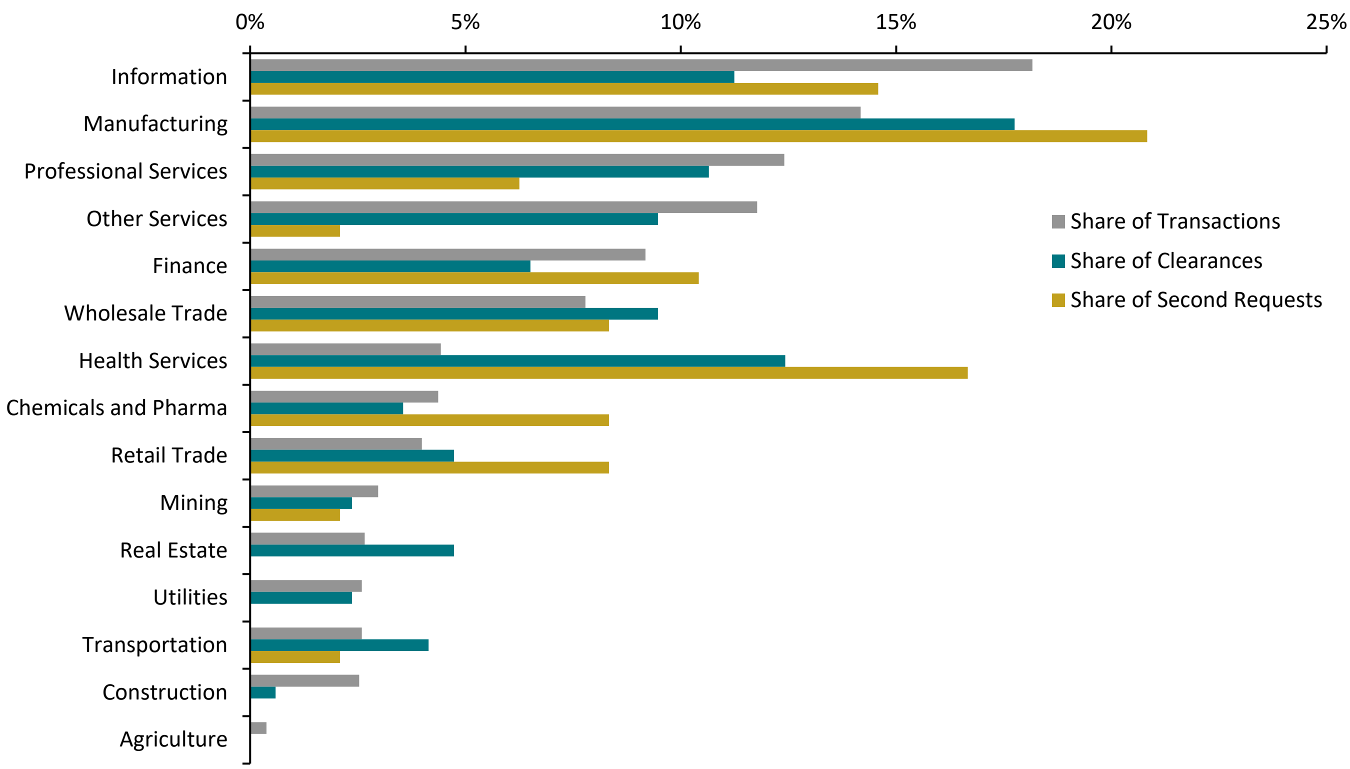
Note: The transaction group categorizes transactions by deal size. Percentages may not add up to 100% due to rounding. The agencies define "reported merger transactions" as "adjusted transactions in which a second request could have been issued" (HSR Reports FY 2011–FY 2020).

Transactions and Second Requests by Industry

- Information accounted for the largest share of reported transactions (18.2%), as well as the third-largest shares of clearances (11.2%) and second requests (14.6%).
- Manufacturing accounted for the second-largest share of transactions (14.2%), as well as the largest shares of clearances (17.8%) and second requests (20.8%).
- Pharmaceuticals accounted for only 4.4% of transactions but 8.3% of second requests, consistent with the trend observed in the previous nine fiscal years. This suggests that transactions in this sector are more likely than others to receive second requests.
- Health Services accounted for only 4.4% of transactions but 16.7% of second requests, suggesting that, like Pharmaceuticals, transactions in this sector were more likely to receive second requests.
- Retail Trade accounted for only 4.0% of transactions but 8.3% of second requests.

For the first time in the past 10 fiscal years, Information had the largest share of reported transactions.

Figure 6: Reported Merger Transactions, Clearances, and Second Requests by Industry Sector
FY 2020



Source: HSR Report FY 2020, covering October 2019–September 2020

Note: The agencies define "reported merger transactions" as "adjusted transactions in which a second request could have been issued" (HSR Report FY 2020). 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; 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

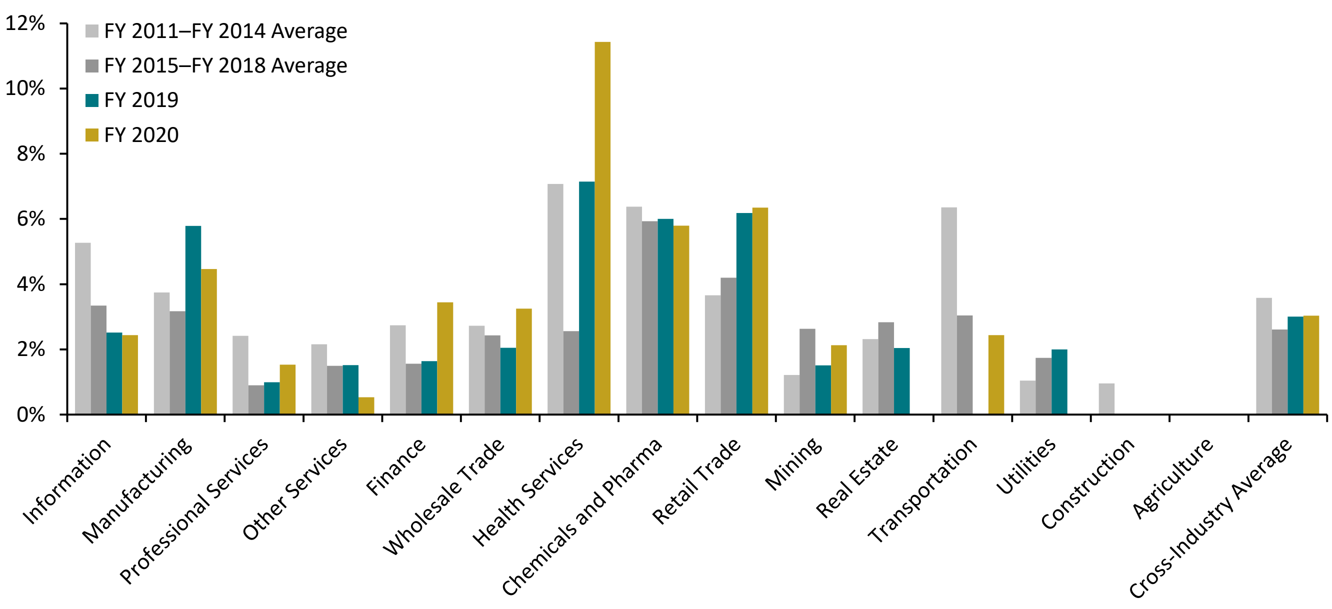
The Enforcement Rate Indicator (ERI) is calculated as the number of second requests divided by the number of transactions for a given sector and time period.[6] An ERI greater than the cross-industry average indicates that the industry is overrepresented among second requests; an ERI less than the cross-industry average indicates that the industry is underrepresented among second requests. This report calculates the ERI separately for FY 2011–FY 2014 (covering the period October 2010–September 2014), FY 2015–FY 2018 (covering the period October 2014–September 2018), FY 2019 (covering the period October 2018–September 2019), and FY 2020 (covering the period October 2019–September 2020). This report also calculates early stage ERI (page 9) and late stage ERI (page 10).

- The cross-industry average ERI stayed constant at 3.0% in FY 2020.
- The ERIs in Manufacturing, Health Services, Pharmaceuticals, and Retail Trade 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 Health Services increased substantially in FY 2020, reaching 11.4%. As in FY 2019, this industry experienced the largest ERI. This is also the third consecutive year that the industry's ERI increased.
- The ERI in Manufacturing declined from 5.8% in FY 2019 to 4.5% in FY 2020 but remained above its historical averages.

The ERI in Health Services remained the largest across all industries in FY 2020.

- The ERI in Pharmaceuticals substantially exceeded the cross-industry average in FY 2020, consistent with historical trends. The ERI for this sector was relatively consistent from FY 2019 (6.0%) to FY 2020 (5.8%).
- The ERI in Information continued its downward trend in FY 2020, reaching 2.4%. As in FY 2019, the ERI in Information was below the cross-industry average in FY 2020.

Figure 7: Enforcement Rate Indicator (ERI) by Industry Sector
FY 2011–FY 2020



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

Note: The figure shows the Enforcement Rate Indicator in 14 industry sectors and a residual category called Other Services for FY 2011–FY 2014, FY 2015–FY 2018, FY 2019, and FY 2020. Industry sectors are arranged by number of transactions in FY 2020. The figure also shows the cross-industry average Enforcement Rate Indicator over the same time periods. For details, see endnote 7.

Early Stage Enforcement Rates by Industry

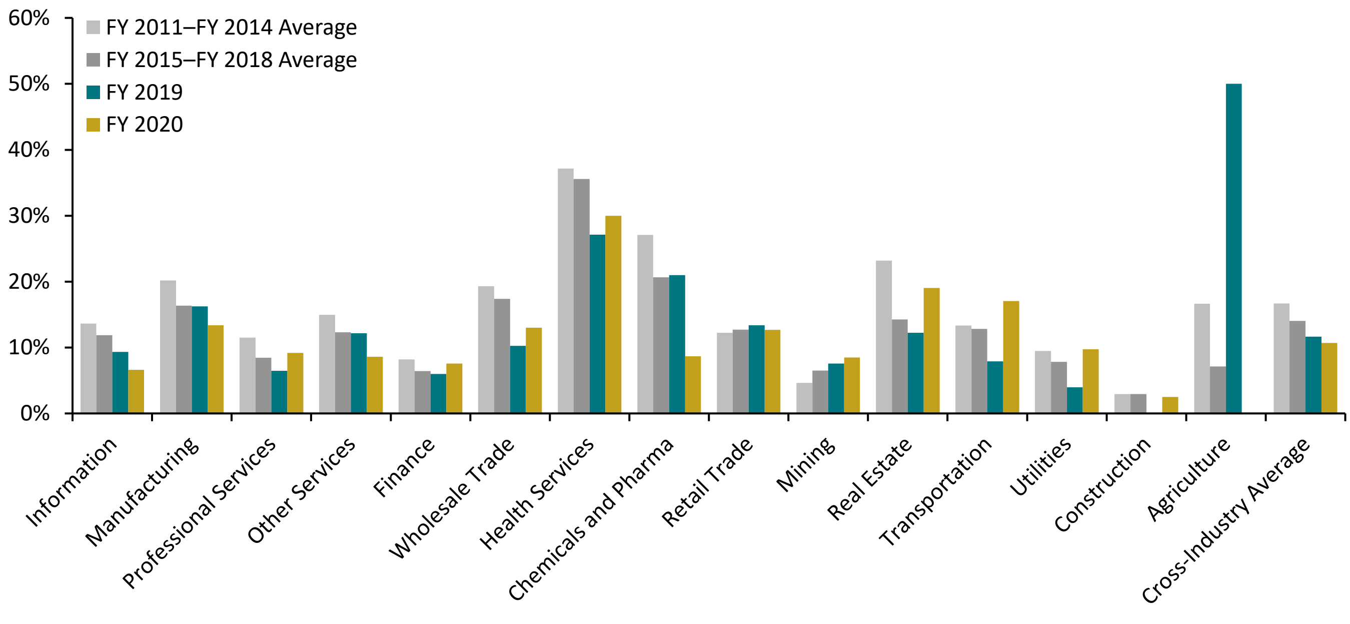
Early stage ERI is calculated as the number of clearances divided by the number of transactions for a given sector and time period. An early stage ERI greater than the cross-industry average early stage ERI indicates that the industry is overrepresented among clearances; an early stage ERI less than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

- The cross-industry average early stage ERI decreased from 11.7% in FY 2019 to 10.7% in FY 2020, consistent with the trend observed in the previous nine fiscal years.
- In contrast to this overall trend, nine out of 15 sectors saw an increase in early stage ERIs in FY 2020: Professional Services, Finance, Wholesale Trade, Health Services, Mining, Real Estate, Transportation, Utilities, and Construction.
- The early stage ERI for the Agriculture sector sharply decreased from 50% in FY 2019 to 0% in FY 2020, the only sector with no clearances in FY 2020. This industry historically has had a low number of transactions resulting in volatile ERIs.

The cross-industry early stage enforcement rate continued to decline in FY 2020 despite increases in nine of 15 sectors.

- Pharmaceuticals, Information, Manufacturing, Other Services, and Retail Trade also experienced decreases in early stage ERIs.
- Manufacturing and Health Services historically have had early stage ERIs above the cross-industry average.

Figure 8: Early Stage Enforcement Rate Indicator (ERI) by Industry Sector
FY 2011–FY 2020



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

Note: The figure shows the early stage ERI in 14 industry sectors and a residual category called Other Services for FY 2011–FY 2014, FY 2015–FY 2018, FY 2019, and FY 2020. Industry sectors are arranged by number of transactions in FY 2020. The figure also shows the cross-industry average early stage ERI over the same time periods. For details, see endnote 7.

Late Stage Enforcement Rates by Industry

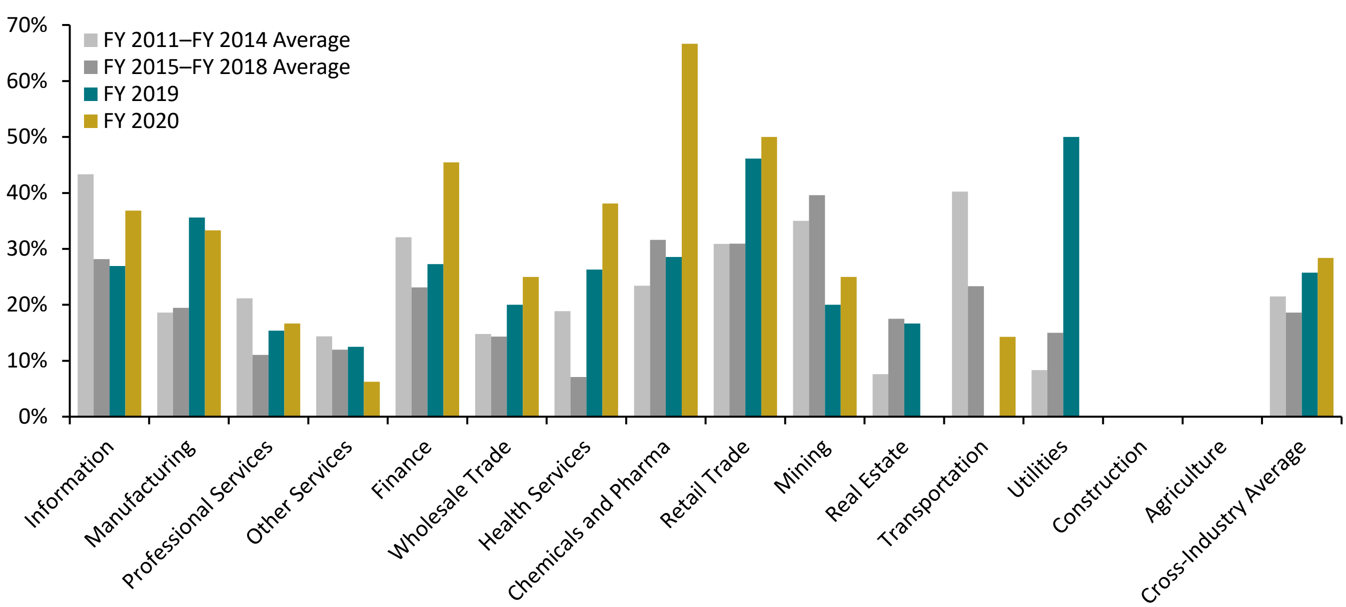
Late stage ERI is calculated as the number of second requests divided by the number of clearances for a given sector and time period. A late stage ERI greater than the cross-industry average late stage ERI indicates that the industry is overrepresented among second requests; a late stage ERI less than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

- The overall share of clearances converted into second requests increased to 28.4% in FY 2020.
- Sectors overrepresented among second requests in FY 2020 were Information, Manufacturing, Finance, Health Services, Pharmaceuticals, and Retail Trade, with many experiencing large increases relative to FY 2019.
- The Information, Finance, Pharmaceuticals, and Retail Trade late stage ERIs consistently exceed the cross-industry average for each time period considered. This implies that transactions in these sectors may be more likely to be converted from clearances to second requests than transactions in other sectors.
- Utilities had zero second requests in FY 2020, despite having the highest late stage ERI in FY 2019.

Late stage ERIs rose across industries in FY 2020, with the Information, Finance, Health Services, Pharmaceuticals, and Transportation sectors experiencing pronounced increases.

- The Pharmaceuticals late stage ERI increased from 28.6% in FY 2019 to 66.7% in FY 2020, marking the highest late stage ERI in FY 2020.
- The Transportation late stage ERI increased from 0% in FY 2019 to 14.3% in FY 2020.

Figure 9: Late Stage Enforcement Rate Indicator (ERI) by Industry Sector
FY 2011–FY 2020



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

Note: The figure shows the late stage ERI in 14 industry sectors and a residual category called Other Services for FY 2011–FY 2014, FY 2015–FY 2018, FY 2019, and FY 2020. Industry sectors are arranged by number of transactions in FY 2020. The figure also shows the cross-industry average late stage ERI over the same time periods. For details, see endnote 7.

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.[8]

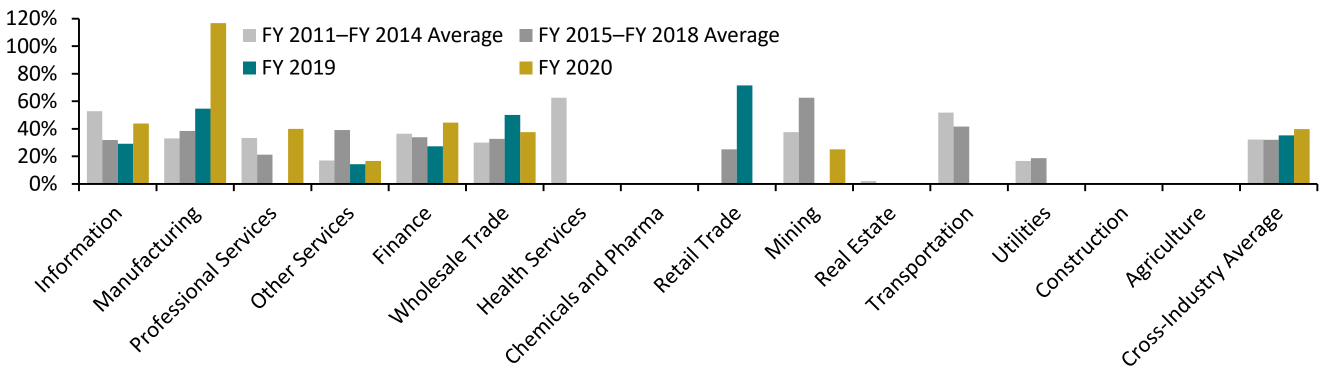
- Between FY 2019 and FY 2020, late stage ERIs increased at both agencies. Late stage ERI across industries increased from 35.2% in FY 2019 to 39.7% in FY 2020 at the DOJ, and from 20.1% to 21.7% at the FTC.
- This increase in late stage ERIs is concentrated in specific sectors: Information, Manufacturing, Professional Services, Finance, and Mining at the DOJ; and Finance, Health Services, Pharmaceuticals, Retail Trade, and Transportation at the FTC.

In FY 2020, late stage enforcement increased at both the FTC and the DOJ.

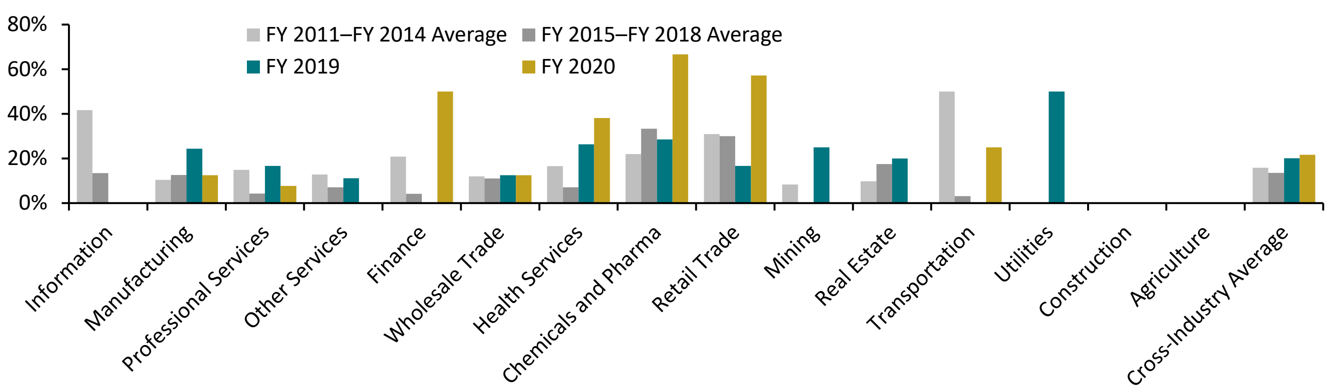
- Historically, however, differences in late stage ERI for most sectors do not persist over time at either agency. This suggests that late stage enforcement decisions may be targeted to merger characteristics rather than industry. One notable exception is the Manufacturing sector; in this sector the DOJ converts a higher share of clearances to second requests than does the FTC.

Figure 10: Late Stage Enforcement Rate Indicator (ERI) by Agency and Industry Sector
FY 2011–FY 2020

Department of Justice



Federal Trade Commission



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

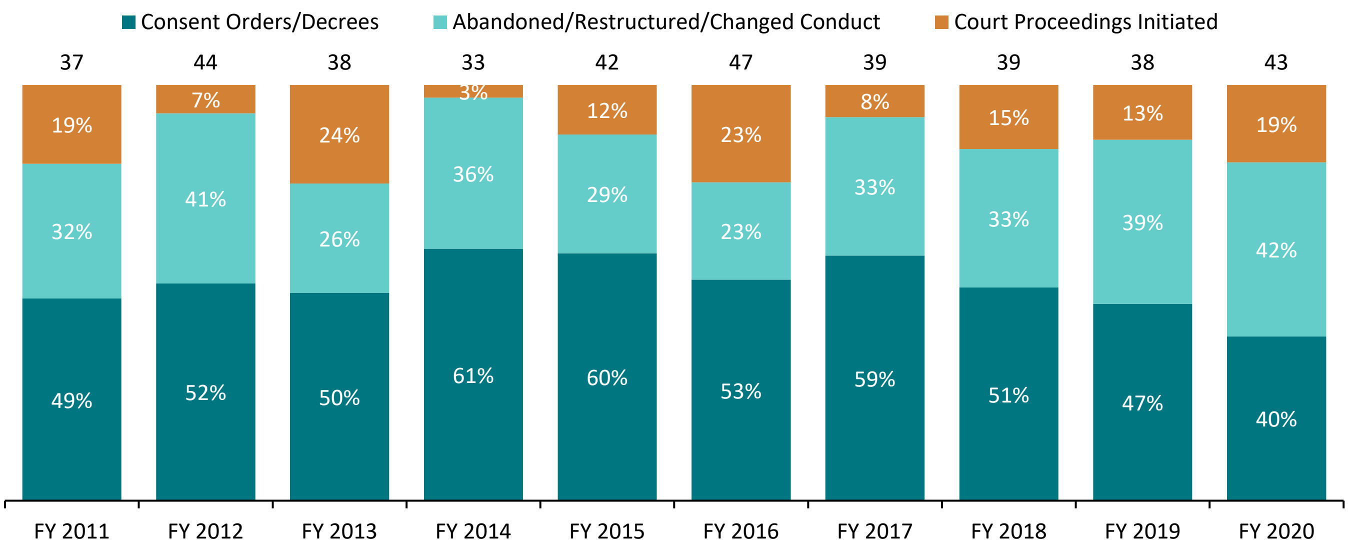
Note: The figures show the late stage ERI in 14 industry sectors and a residual category called Other Services for FY 2011–FY 2014, FY 2015–FY 2018, FY 2019, and FY 2020 calculated separately for clearances and second requests issued by the DOJ and for clearances and second requests issued by the FTC. Industry sectors are arranged by number of transactions in FY 2020. The figures also show the cross-industry average late stage ERI over the same time periods. For details, see endnote 7. The ERI for Manufacturing at the DOJ exceeds 100% in FY 2020 likely due to delays between clearance and second request. See endnote 1.

Merger Challenge Resolutions

- The agencies challenged 43 mergers in FY 2020, an increase over the FY 2011–FY 2019 average of 40. Challenges as a percentage of reported transactions (2.7%) were above the FY 2011–FY 2019 average (2.3%). Challenges as a percentage of second requests (89.6%) increased relative to their FY 2011–FY 2019 average (77.1%).
- In FY 2020, 39.5% of the challenges resolved in a consent order/decree (below the FY 2011–FY 2019 average of 53.5%), continuing the downward trend of the previous two years. Additionally, 41.9% of challenges resolved with parties abandoning their transaction, restructuring it, or changing conduct, above the FY 2011–FY 2019 average of 32.5%.
- Eight court proceedings were initiated by the agencies in FY 2020, above the FY 2011–FY 2019 average of 5.6:
  - After filing a complaint challenging Geisinger Health's partial acquisition of Evangelical Community Hospital, the DOJ settled with the parties. The parties agreed to limits on conduct and a cap on Geisinger Health's ownership interest in Evangelical Community Health.
  - The FTC filed an administrative complaint seeking to enjoin Jefferson Health's acquisition of Albert Einstein Healthcare Network, both leading healthcare providers in the Philadelphia area. After denial of a preliminary injunction, the agency dismissed its complaint.
  - The FTC entered a final consent order regarding anticompetitive agreements between Axon and Safariland. Administrative proceedings to unwind Axon's acquisition of VieVu, a former subsidiary of Safariland and competitor in the police body-worn camera systems market, are ongoing.
  - The FTC filed an administrative complaint challenging Altria's acquisition of 35% of JUUL Labs' voting securities and associated agreements. The FTC has appealed a February 2022 initial decision that dismissed the complaint; as of the publication of this report, there has been no decision on the appeal.
  - Finally, parties involved in the remaining four court proceedings abandoned their respective mergers. These parties were Post and TreeHouse Foods; Illumina and Pacific Biosciences; Edgewell and Harry's; and Peabody Energy and Arch Coal. Peabody Energy and Arch Coal abandoned their joint venture after a federal judge granted a preliminary injunction.

The share of challenges resolving in a consent order/decree declined for the third consecutive year, reaching a 10-year low.

Figure 11: Resolution of Challenged Merger Transactions
FY 2011–FY 2020



Source: HSR Reports FY 2011–FY 2020, covering October 2010–September 2020

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

FY 2021–FY 2022 Reported Merger Transactions

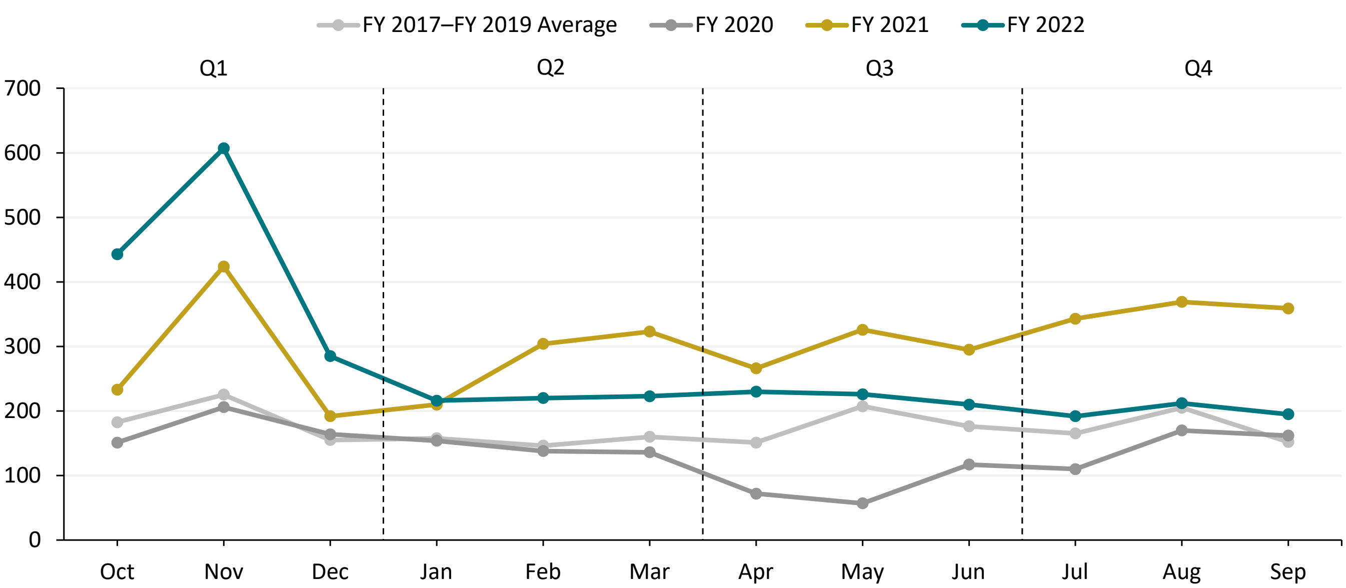
Data released by the FTC Bureau of Competition's Premerger Notification Office indicate that reported merger transactions were up in FY 2021 and FY 2022 compared to FY 2020 and historical averages.

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).[9] 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.[10] This report uses PNO Filings Data covering October 2020–August 2022 to examine trends in reported merger transactions for FY 2021 and FY 2022.

Overall, the number of merger transactions reported to U.S. government agencies in FY 2021 increased 123% from FY 2020. Compared to May 2020, merger transactions increased 472% in May 2021, a larger year-over-year increase than any other FY 2021 calendar month. On its own, the increase in the number of merger transactions in FY 2021 might reflect regression to the mean following the onset of the COVID-19 pandemic in March 2020.

However, the high numbers of merger filings persisted into FY 2022; in fact, in every month of FY 2021 and FY 2022 except August 2022, the number of merger transactions was higher than in the same calendar month during any of the fiscal years between FY 2011 and FY 2020. Furthermore, the total number of reported merger transactions in just the first three fiscal quarters of FY 2022 was higher than the average annual total between FY 2017 and FY 2019. Taken together, these facts indicate that the trend of high merger filings seen in FY 2021 continued in FY 2022.

Figure 12: Reported Merger Transactions
FY 2017–2019, FY 2020, FY 2021, and FY 2022



Source: HSR Reports FY 2017–FY 2020, covering October 2016–September 2020, Appendix B: Table 1; Premerger Notification Program: HSR Transactions by Month

Note: The number of reported transactions for FY 2021 and FY 2022 is based on data that the FTC Bureau of Competition's Premerger Notification Office first made public on July 9, 2020, and updated regularly thereafter. The data report monthly figures for raw HSR Act filings. While the raw figures currently available for FY 2021 and FY 2022 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 2017–FY 2020 is 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 2021–FY 2022 figures. See endnote 10.

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 HSR Act. 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 2011–FY 2020, covering October 2010–September 2020. 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 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] During FY 2020, the agencies challenged 43 transactions, including smaller transactions. For example, the FTC challenged Post's proposed acquisition of TreeHouse Foods, valued at $110 million. According to the HSR Report, "Post and TreeHouse were two of only three significant manufacturers and distributors of private label ready-to-eat cereal." The HSR Report noted that the FTC's complaint "alleged that the proposed merger would have given Post more than a 60 percent market share in an already concentrated market and would have eliminated the vigorous head-to-head competition between Post and TreeHouse." The FTC contended that the "proposed merger would have increased prices and reduced quality for private label ready-to-eat cereal." See HSR Report FY 2020, covering October 2019–September 2020, pp. 13–14. See also *In the Matter of Post Holdings Inc. and Treehouse Foods Inc.*, FTC Dkt. C-9388.

[6] 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.

[7] 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; 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.

[8] 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/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

[9] The first release of these data covered the period October 1, 2019, through June 30, 2020, with subsequent releases occurring on a monthly basis. This report uses available data made public in the September 2022 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/enforcement/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.

[10] Reported transactions figures available for FY 2020 from the Premerger Notification Office do not match monthly totals published in the FY 2020 HSR Report 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. The total number of reported transactions in the HSR Report is 4% lower than the number reported in the PNO Filings Data. See "Real-Time Transparency for HSR Transaction Numbers," Federal Trade Commission, July 9, 2020, https://www.ftc.gov/enforcement/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. See also HSR Report FY 2020.

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