

What Cos. Evaluating M&A Can Glean From Latest HSR Report

By **Ryan Quillian and John Kendrick** (February 5, 2024, 4:43 PM EST)

The Federal Trade Commission and the U.S. Department of Justice published their Hart-Scott-Rodino annual report for fiscal year 2022 on Dec. 21, 2023.[1]

The report suggests that the number of merger enforcement actions brought by the agencies in fiscal year 2022 was the highest it has been in over 20 years. But that does not tell the whole story.

This article provides observations on the data contained in the 2022 HSR report, which is somewhat dated given that it covers Oct. 1, 2021, through Sept. 30, 2022.

Nevertheless, it is the most recent, and only, public source of certain types of information, e.g., the number of second requests issued by the agencies.

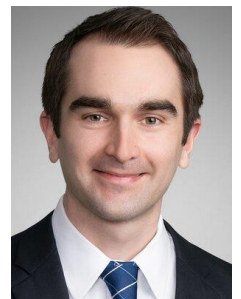
Therefore, the report can provide some insights into trends when combined with other data. This other data includes more recent information that the agencies have made public. Throughout this article, statements about specific years refer to fiscal years unless otherwise noted.

Here are the issues we discuss more fully below, which are important data points for companies as they evaluate potential transactions:

- The percentage of eligible transactions that received a second request decreased in 2022 to a level lower than in any year since at least 2004 — complete second-request data for 2023 is not yet publicly available — and the agencies continue to issue a larger share of second requests in investigations of transactions valued at more than \$1 billion.
- Although the absolute number of merger enforcement actions in 2022 certainly seems high, the enforcement rate — i.e., the number of enforcement actions out of the total number of reported transactions — remains historically low.
 - Other data that the agencies have published indicates that the number and rate of merger enforcement actions dropped sharply in 2023 compared to 2022.
 - The decrease in 2023 was particularly notable at the DOJ, which has not challenged a merger publicly since March 2023.



Ryan Quillian



John Kendrick

- Other interesting data points in the 2022 HSR report include:
 - A significant increase in the number of transactions that the agencies report were restructured or abandoned without being subject to formal enforcement actions, driven by the historically high number of such enforcement actions at the DOJ; and
 - The number of merger enforcement actions exceeded the number of second requests issued by the agencies; the first time that has happened in nearly 20 years.

Beyond enforcement actions, the agencies have combined rhetoric about increasing merger enforcement with policy statements and procedural changes that — in practice — make it more difficult — in terms of time, burden and expense — to get transactions through agency investigations successfully.

The procedural change with the broadest potential impact is the proposal to revamp the HSR notification and report form, but the agencies have also taken other steps, such as declining to grant requests for early termination of the HSR waiting period, that increase the burden on merging companies.

The agencies' approach has increased uncertainty about which transactions they will investigate and challenge, but it has not led to an increase in the rate of merger enforcement activity. To the contrary, the merger enforcement rate is at its lowest point in at least the last 20 years.

The rate of second-request issuance decreased to a historical low.

The 2022 HSR report shows that the number of transactions filed with the agencies remained high in 2022, but the FTC and DOJ opened in-depth investigations into only a small percentage of those deals compared to previous years.

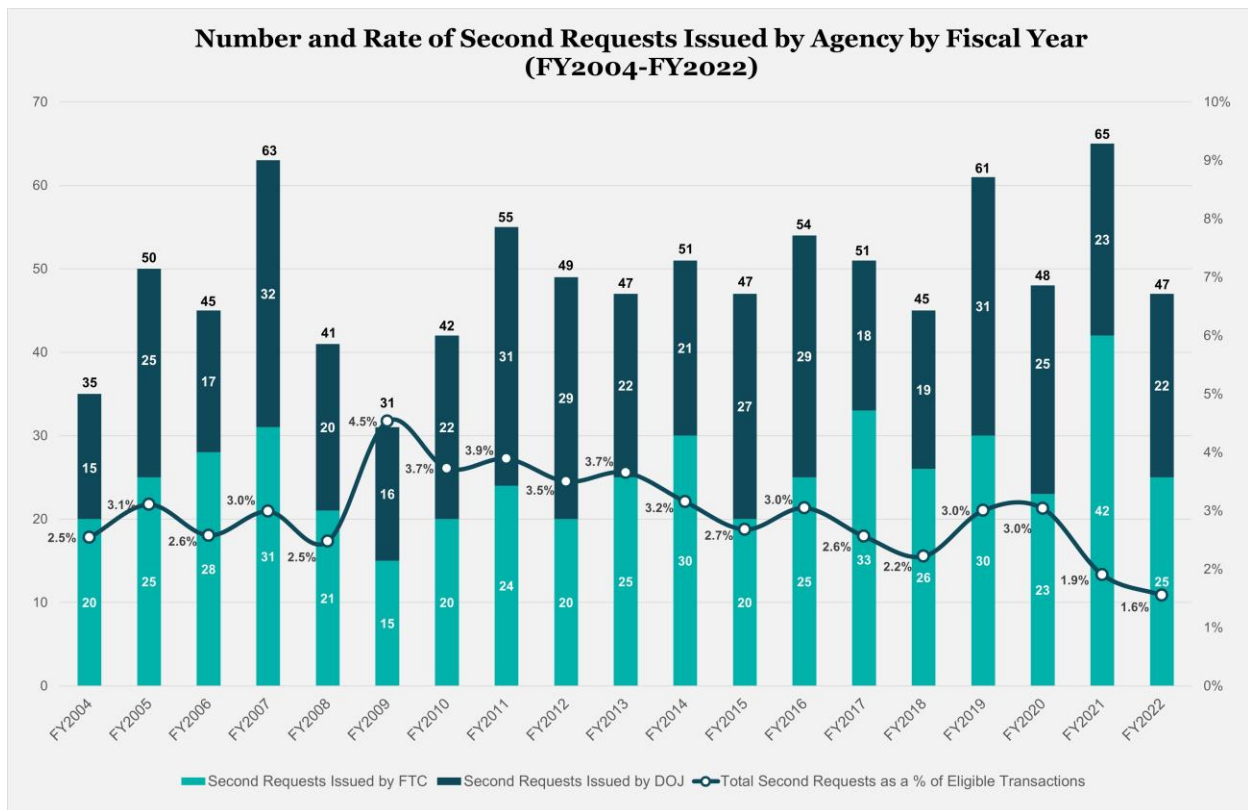
And a majority of the transactions that received second requests were valued at more than \$1 billion, even though those large deals accounted for only one-fifth of eligible transactions.

In 2022, merging parties filed 3,029 transactions that were eligible to receive second requests.[2] That represents the second-highest number of eligible filings since at least 2004, with 2021 being the highest — 3,413.

Despite the relatively high number of eligible transactions, the agencies issued only 47 second requests in 2022, which is closer to the historical average of around 48 than to the high of 65 in 2021.

The decline was largely driven by the FTC, which issued 42 second requests in 2021 but only 25 in 2022 — a 40% drop.

The number issued by the DOJ remained relatively constant — 23 in 2021 and 22 in 2022. The chart below shows the trend in the number of second requests issued by each agency, along with the rate of second-request issuance, i.e., the share of eligible transactions that received second requests.



As the chart above shows, 98.4% of eligible transactions filed in 2022 did not face a second-request investigation. That is the lowest rate of second-request issuance in any year since at least 2004.

As has historically been the case, bigger deals were more likely to attract agency attention.

In 2022, transactions valued at more than \$1 billion accounted for approximately 20% of eligible deals — a 20-year high. However, these transactions received more than half — 55% — of the total number of second requests issued by the agencies — the highest share of second requests for billion-dollar deals since 2018.[3]

In particular, there were 611 transactions valued at more than \$1 billion, and the agencies issued second requests for 26 — 4.3% — of those transactions.

As FTC Chair Lina M. Khan noted in her statement accompanying the release of the 2022 HSR report, over the past two decades "transactions exceeding one billion dollars ... account for an increasing amount of the agencies' investigational resources." [4]

Conversely, in 2022 there were 2,418 deals with transaction values at or below \$1 billion, accounting for 80% of eligible deals but only 45% of the second requests issued by the agencies.

Of the 2,418 eligible transactions valued at \$1 billion or less, only 21 — 0.9% — received second requests.

Thus, everything else equal, transactions valued at more than \$1 billion were approximately five times more likely to receive second requests than transactions of \$1 billion or less — which is relatively consistent with the average over the previous five years.

Khan's statement also suggested that the FTC may have issued more second requests if it had more resources and more time to investigate transactions, saying: "[T]he Commission has been forced to make difficult triage decisions and forego meritorious [merger] investigations" because employee "headcount remains well below what is needed to meet the volume of proposed deals" and "the statutory timelines laid out in the HSR Act have not kept pace with the surge in volume and complexity of transactions."^[5]

Khan asked Congress to address both of those issues by further increasing the FTC's funding and amending the statutory timelines in the HSR Act.

Regardless of the root cause, the historically low rate of second-request issuance is an important data point for companies to consider as they evaluate potential transactions, particularly deals valued at \$1 billion or less.

That said, each transaction is unique, and the risk of a full-phase investigation should be evaluated based on the specific facts well before each HSR filing.

The merger enforcement rate remains historically low.

While the 2022 HSR report indicates that the absolute number of enforcement actions increased in 2022, the percentage of transactions challenged by the FTC and DOJ was lower than in any year since 2007 — other than 2021, which was the lowest in the previous 20 years.

For 2023, currently available information suggests that the number of merger enforcement actions dropped precipitously and that the enforcement rate dropped back to 2021 levels — i.e., to a 20-year low.

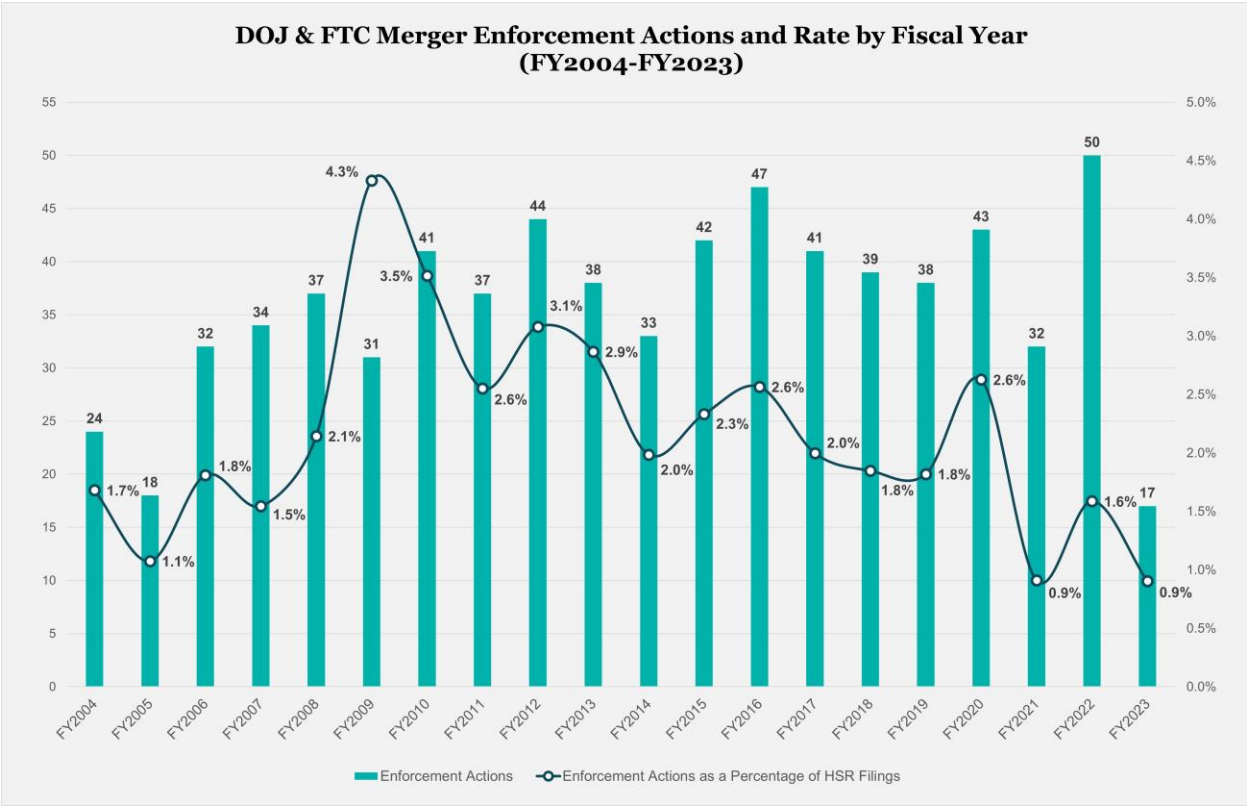
The 2022 HSR report notes that the agencies brought enforcement actions against 50 transactions in 2022.

That number includes 12 litigation complaints, 15 pre-litigation consent agreements — i.e., settlements that are agreed upon before the agency files a complaint challenging the transaction, and 23 transactions the report indicates were either abandoned or restructured as a result of agency antitrust scrutiny.^[6]

These reported numbers reflect the highest absolute number of merger enforcement actions in more than 20 years, as the FTC noted in its press release announcing the 2022 HSR report.^[7]

However, the merger enforcement rate — the number of merger enforcement actions divided by the total number of transactions reported to the agencies — tells a different story.

The following chart shows how the number and rate of merger enforcement actions has changed over the last 20 years — the numbers for 2023 are based on publicly available information, including agency press releases and public statements, as well as preliminary HSR filing data available on the FTC website.^[8]



The chart above shows that — despite the historically high number of merger enforcement actions identified by the agencies in the 2022 HSR report — the merger enforcement rate did not reach a record high; rather, it was at its second-lowest level since 2007.

The chart also shows that — based on currently available data — the agencies challenged just 17 transactions in 2023, which was a 66% drop from 2022 and the lowest absolute number of merger enforcement actions in the last 20 years.

That drop was not entirely a function of the reduced number of transactions filed with agencies in 2023;^[9] the merger enforcement rate also fell back to a 20-year low.

The agencies brought enforcement actions challenging 0.90% of reportable transactions in 2023. Other than 2021 — 0.91% — the next-lowest merger enforcement rate in the last 20 years was in 2005, when the FTC and DOJ challenged 1.07% of reportable transactions.

This apparent reduction in the number and rate of merger enforcement actions in 2023 was particularly pronounced at the DOJ, which — publicly available information indicates — brought only two merger enforcement actions that year.^[10]

In fact, the DOJ has not challenged a merger publicly since March 7, 2023,^[11] when it filed a complaint seeking to block JetBlue Airways Corp.'s proposed acquisition of Spirit Airlines Inc.^[12]

For a more complete picture of the 2023 data, we will have to wait for the official HSR report, which the agencies likely will publish near the end of calendar year 2024 or in early 2025.

It is possible that there have been a significant number of abandoned and restructured transactions that

have not been publicly reported, which could mean that the enforcement rate is higher than suggested by currently available data.

Other Interesting Data Points in the 2022 HSR Report

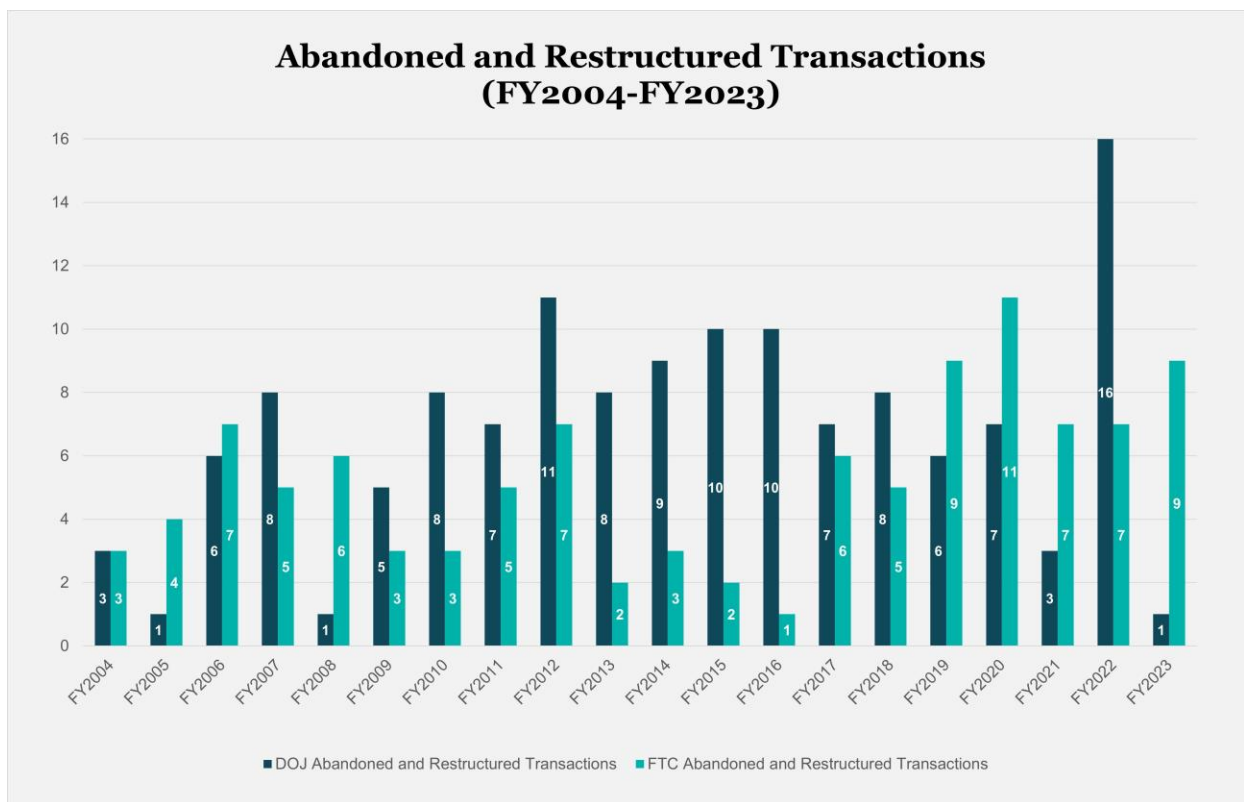
There are two additional pieces of data from the 2022 HSR Report worth highlighting.

1. The agencies reported an unusually large number of abandonments and restructurings.

The 2022 HSR report states that merging parties either abandoned or restructured 23 transactions in response to antitrust concerns raised by the FTC or the DOJ — only four such transactions had previously been identified publicly by the agencies or merging parties.[13]

That is the highest number of abandonments and restructurings reported by the agencies in more than two decades.[14]

Data on the number of abandoned or restructured transactions by agency and by fiscal year are shown in the following chart — the numbers for 2023 are based on publicly available information, including agency press releases and public statements.



As shown in the chart above, the number of abandoned and restructured transactions more than doubled from 2021 to 2022, 10 transactions and 23 transactions, respectively.

The increase at the DOJ stands out because the number of reported abandoned or restructured transactions increased more than five-fold compared to the prior year — from 3 to 16 — and because it was the most reported abandonments and restructurings by either agency in the last 20 years.

Given that the agencies do not provide any information — even the merging parties' identities — about the vast majority of the transactions that they count as abandoned or restructured,[15] it is difficult to analyze this trend in detail.

However, viewed in light of the fact that the DOJ has not entered into a pre-litigation settlement of a merger investigation since the U.S. Senate confirmed Jonathan Kanter as Assistant Attorney General for the Antitrust Division on Nov. 16, 2021,[16] it seems reasonable to infer that more companies faced an essentially binary choice when the DOJ identified competition concerns: litigate or abandon/restructure the transaction.

The number of pre-litigation consent decrees has also decreased recently at the FTC. It issued 11 pre-litigation consent orders in 2022, but only two in 2023 — and none so far in fiscal year 2024.

This is compared with an average of 13.3 consents per year from 2011 to 2020.

In this regard, it bears mention that Sen. Elizabeth Warren, D-Mass., sent a letter to all three FTC commissioners in November 2023 that called on the agency "to reject the use of remedies — both behavioral and structural — in merger review." [17]

It will be interesting to see what happens when the 2023 numbers are available with respect to restructurings and abandonments. The relative lack of information on that front increases uncertainty about the enforcement risk when considering a transaction, as does the decrease in the agencies' use of consent decrees to resolve competition concerns.

As a result, it is important to evaluate the enforcement risks of a given transaction as early as possible when considering a deal.

2. The number of merger enforcement actions exceeded the second-requests number.

According to the 2022 HSR report, the FTC and DOJ issued 47 second requests and challenged 50 deals in 2022.

This is the first time in nearly 20 years that the number of merger enforcement actions exceeded the number of second requests issued by the agencies in a given fiscal year.[18]

This differential appears to be driven by the DOJ's data, which shows that it brought merger enforcement actions against 26 transactions, but only issued second requests in 22 investigations — i.e., there were four more merger enforcement actions than second requests issued by the DOJ in 2022.

The data indicate that the FTC issued 25 second requests and challenged 24 transactions.

The overall difference may be — at least in part — the result of enforcement actions brought in 2022 involving transactions that received second requests in the prior year.

That explanation seems plausible given that the average duration of second-request investigations between calendar years 2020 and 2022 appears to have been higher than the historical average.[19]

The Broader Merger Enforcement Environment

Although the merger enforcement rate is at historical lows, the agencies appear to be pursuing a strategy of general deterrence through stronger anti-merger rhetoric, tougher and more aggressive policy positions and higher procedural hurdles.

First, take rhetoric. Government officials in leadership positions, including President Joe Biden, have made statements emphasizing that they view concentration as a problem and that merger enforcement is a priority.[20]

Agency leaders have also stressed that they plan to focus on litigating to block potentially problematic transactions rather than seeking to reach settlements.[21] We compared the agencies' rhetoric to their enforcement numbers in a previous Law360 guest article.[22]

Second, take policy. The agencies have issued policy statements, such as their new merger guidelines,[23] that indicate an expansive approach to merger enforcement. The FTC also issued an enforcement policy statement claiming broad authority under Section 5 of the FTC Act, including with respect to mergers.[24]

Finally, take procedure. The agencies' proposed changes to the HSR notification and report form — if enacted in their current form — will significantly increase the time, burden and costs for every company involved in a reportable transaction.[25]

Similarly, but less visibly, the agencies have continued the policy they implemented in early 2021 of declining to grant early termination of the HSR waiting period; the number of early terminations granted by the FTC and DOJ dropped almost to zero in 2022.[26]

As we have discussed elsewhere,[27] this strategy has the potential to deter transactions generally — regardless of whether they are competitively beneficial, benign, or problematic. Consistent with that view, former FTC Commissioner Noah Joshua Phillips described, in a 2022 forum hosted by University of California, Berkeley School of Law's Center for Law and Business, the agencies' strategy as imposing "gratuitous taxes on M&A." [28]

However it is characterized, the agencies' approach has the practical effect of increasing uncertainty, which makes it even more important to include antitrust considerations early in the process of deal evaluation.

Those considerations include how the FTC or DOJ is likely to analyze the particular transaction, how the agencies will deal with a potential resurgence[29] of deal activity in 2024 and beyond, how the courts will view the new merger guidelines, and what effect the proposed HSR rule changes will have on merging parties and the investigation process.

Ryan K. Quillian is a partner in the antitrust group at Covington & Burling LLP. He was previously deputy assistant director of the Technology Enforcement Division at the FTC.

John F. Kendrick is an associate at Covington.

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[1] Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRReport.pdf.

[2] There are certain reported transactions for which the FTC and DOJ are not authorized to issue second requests, including "(1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A(c)(6) and 7A(c)(8) of the [Clayton] Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began." Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2022, Appendix A n.2, https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRReport.pdf.

[3] See *id.* at Exhibit A, Table I, Acquisitions by Size of Transaction (by Size Range).

[4] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the FY2022 HSR Annual Report to Congress, Commission File No. P110014, at 2 (Dec. 21, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofChairKhanJoinedbyComm%27rSlaught%27rBedoyareFY2022HSRAnnualReport.pdf.

[5] *Id.* at 2-3.

[6] The data in the 2022 HSR report differ in two ways from other publicly available information on the number of FTC merger enforcement actions in fiscal year 2022.

- First, the report states that merging parties abandoned or restructured seven transactions that year, while the appendix attached to the letter that FTC Chair Lina M. Khan sent to Representative Thomas P. Tiffany on November 3, 2023, only identifies two such transactions. Compare 2022 HSR report, *supra* note 2, at 13 ("In at least seven instances, firms abandoned their mergers after the Commission raised concerns."), with Letter from FTC Chair Lina M. Khan to The Honorable Thomas P. Tiffany (Nov. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023.11.3_chair_khan_letter_to_rep_tiffany_re_merger_challenges.pdf, Appendix A at 1-2, https://www.ftc.gov/system/files/ftc_gov/pdf/appendix_a_-_ftc_merger_enforcement_11.03.23.pdf (identifying only two transactions as "Abandoned during investigation" during fiscal year 2022) [hereinafter "Appendix to Chair Khan's Letter"].
- Second, the 2022 HSR report omits a consent decree listed in the appendix to Chair Khan's letter: the FTC's June 2022 consent decree resolving the agency's concerns with ARKO Corp.'s acquisition of 60 Express Stop retail fuel outlets from Corrigan Oil Company (finalized in August 2022). Compare 2022 HSR report, *supra* note 2, at 15-18 (listing the FTC's consent decrees for 2022 without reference to ARKO/Corrigan) with Appendix to Chair Khan's Letter, *supra*, at 2 (listing ARKO/Corrigan in row 19); see also Press Release, FTC Approves Final Order Restoring Competitive Markets for Gasoline and Diesel in Michigan and Ohio, Fed. Trade Comm'n (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-restoring-competitive-markets-gasoline-diesel-michigan-ohio>.

[7] Press Release, FTC, DOJ Issue Fiscal Year 2022 Hart-Scott-Rodino Notification Report, Fed. Trade Comm'n (Dec. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-issue-fiscal-year-2022-hart-scott-rodino-notification-report>.

[8] See Fed. Trade Comm'n, Premerger Notification Program (last visited Feb. 5, 2024), <https://www.ftc.gov/enforcement/premerger-notification-program>.

[9] Looking at preliminary publicly available data for 2023, the number of transactions filed with the agencies dropped to 1,884 (40% less than in 2022). Preliminary 2023 numbers are derived from the data posted on FTC's Premerger Notification website. See Fed. Trade Comm'n, Premerger Notification Program (last visited Feb. 5, 2024), <https://www.ftc.gov/enforcement/premerger-notification-program>.

[10] DOJ's two publicly announced merger enforcement actions in 2023 were the abandonment of the Tenaris/Benteler Steel & Tube transaction in February 2023 and DOJ's litigated challenge of JetBlue's proposed acquisition of Spirit Airlines, which the agency filed in March 2023. See Press Release, Benteler Steel & Tube Manufacturing Corp. Abandons Merger with Tenaris, S.A. After Justice Department Investigation, Dep't of Justice Antitrust Division (Feb. 6, 2023), <https://www.justice.gov/opa/pr/benteler-steel-tube-manufacturing-corp-abandons-merger-tenaris-sa-after-justice-department>; Press Release, Justice Department Sues to Block JetBlue's Proposed Acquisition of Spirit, Dep't of Justice Antitrust Division (Mar. 7, 2023), <https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit>.

[11] We are aware that AAG Kanter issued a statement in December 2023 when Adobe Inc. abandoned its proposed acquisition of Figma Inc., but the companies explicitly stated that they terminated their merger agreement in response to regulatory scrutiny from the UK and EC (without reference to DOJ). See Press Release, Adobe and Figma Mutually Agree to Terminate Merger Agreement (Dec. 18, 2023), <https://news.adobe.com/news/news-details/2023/Adobe-and-Figma-Mutually-Agree-to-Terminate-Merger-Agreement/default.aspx> ("Adobe and Figma mutually agreed to terminate the transaction based on a joint assessment that there is no clear path to receive necessary regulatory approvals from the European Commission and the UK Competition and Markets Authority.").

[12] The U.S. District Court for the District of Massachusetts enjoined JetBlue's proposed acquisition of Spirit on January 16, 2024, and the merging parties subsequently filed a notice of appeal to the First Circuit.

[13] The four publicly acknowledged abandoned/restructured transactions were:

- On December 3, 2021, the FTC announced that Great Outdoors Group had abandoned its proposed acquisition of Sportsman's Warehouse. See Press Release, Expected Federal Trade Commission Opposition to Transaction Leads Great Outdoors Group, LLC and Rival Sportsman's Warehouse Holdings, Inc. to Abandon Plans for Proposed Merger, Fed. Trade Comm'n (Dec. 3, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/expected-federal-trade-commission-opposition-transaction-leads-great-outdoors-group-llc-rival>.
- On January 25, 2022, Clean Harbors and Vertex Energy announced that they had mutually agreed to terminate their planned transaction after receiving a second request from the FTC in September 2021. See Press Release, Clean Harbors and Vertex Energy Mutually Agree to

Terminate Planned Acquisition of Used Motor Oil Collection and Re-Refining Assets, Clean Harbors (Jan. 25, 2022), <https://ir.cleanharbors.com/news-releases/news-release-details/clean-harbors-and-vertex-energy-mutually-agree-terminate-planned>.

- On March 29, 2022, DOJ announced that Cargotec had abandoned its intended merger of equals with Konecranes after DOJ informed the parties that their settlement proposal was insufficient to address the agency's antitrust concerns. See Press Release, Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue, Dep't of Justice Antitrust Division (Mar. 29, 2022), <https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department>.
- On August 25, 2022, DOJ announced that China International Marine Containers had abandoned its intended acquisition of Maersk after a full-phase DOJ investigation. See Press Release, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation, Dep't of Justice Antitrust Division (Aug. 25, 2022), <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>.

[14] In 2001, there were 28 such restructured or abandoned transactions. See Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2001, at 2, https://www.ftc.gov/sites/default/files/documents/reports_annual/24th-report-fy-2001/hsrarfy2001_0.pdf.

[15] The Report does not provide any information—even the merging parties' names—about the 19 transactions that had not been publicly acknowledged previously, apparently due to confidentiality concerns. See 2022 HSR report, *supra* note 2, at 9 n.21 ("Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the [pre-merger notification] program except in those instances in which that information has already been disclosed."). However, in previous versions of the HSR report, DOJ identified the party names for abandoned/restructured transactions. See, e.g., Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2013, at 10 n.19, <https://www.ftc.gov/system/files/documents/reports/36th-report-fy2013/140521hsrreport.pdf>. That practice apparently stopped in the HSR report for 2019 for unexplained reasons. Compare Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2018, at 9 n.17, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18hsrreport.pdf>, with Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2018, at 9-10, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

[16] The mid-litigation consent agreement that DOJ reached with the parties in its challenge to ASSA ABLOY's proposed acquisition of Spectrum Brands remains the only merger settlement the Antitrust Division has entered since the Senate confirmed AAG Kanter. See Press Release, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division, Dep't of Justice Antitrust Division (May 5, 2023), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum>.

[17] Letter from Sen. Elizabeth Warren to Chair Lina Khan, et al. (Nov. 8, 2023) <https://www.warren.senate.gov/imo/media/doc/2023.11.08%20Letter%20to%20FTC%20re%20A%20mgen%20Horizon%20Merger.pdf>.

[18] In 2003, the agencies issued 35 second requests and challenged 36 transactions. See Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2003, at 2, Appendix A, https://www.ftc.gov/sites/default/files/documents/reports_annual/26th-report-fy-2003/040903hsrrpt03_0.pdf.

[19] See DAMITT 2022 Annual Report: Timing and Remedy Risks Grow for Transactions Hit with Significant Investigations (Jan. 23, 2023), <https://www.dechert.com/knowledge/publication/2023/1/damitt-2022-annual-report--timing-and-remedy-risks-grow-for-tran.html> (showing that the average duration of significant merger investigations from calendar year 2020 to 2022 was approximately 11.5 months compared to an average of 8.1 months for calendar years 2011 to 2016).

[20] See, e.g., Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/> ("Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition. . . . The executive order I'm soon going to be signing commits the federal government to full and aggressive enforcement of our antitrust laws.... No more bad mergers that lead to mass layoffs, higher prices, fewer options for workers and consumers alike."); Memorandum from Chair Lina M. Khan to Commission Staff and Commissioners re: Vision and Priorities for the FTC, at 2 (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (identifying Chair Khan's first policy priority as addressing "rampant consolidation and the dominance that it has enabled across markets," which she said would require "strengthen[ing] our merger enforcement work", and "[g]iven the ongoing merger surge, there is a real risk that markets will become only more consolidated absent our vigilance and assertive posture."); Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york> ("We have an obligation to enforce the antitrust laws as written by Congress, and we will challenge any merger where the effect 'may be substantially to lessen competition, or to tend to create a monopoly.'" (quoting 15 U.S.C. § 18)).

[21] See, e.g., Cecilia Kang, Lina Khan, a Big Tech Critic, Tries Answering Her Own Detractors, N.Y. Times (June 9, 2022), <https://www.nytimes.com/2022/06/09/technology/lina-khan-ftc.html> (quoting Chair Khan as claiming that the FTC is "definitely focusing [its] resources on litigating"); Margaret Harding McGill, FTC's new stance: Litigate, don't negotiate, Axios (June 8, 2022), <https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan> ("We're going to be focusing our resources on litigating, rather than on settling."); Khushita Vasant, US DOJ to take measured, calculated litigation risks in bringing 'righteous' cases, Kanter says, MLex (June 20, 2022), <https://content.mlex.com/#/content/1386776> ("In most instances, the real remedy is to just block the merger entirely and that's our starting point.").

[22] Ryan Quillian, Biden Admin's M&A Rhetoric Outpaces Enforcement Numbers, Law360 (Oct. 30,

2023), <https://www.law360.com/articles/1737934>.

[23] See Covington Alert, U.S. Antitrust Agencies Propose Major Changes to Merger Guidelines (July 21, 2023), <https://www.cov.com/en/news-and-insights/insights/2023/07/us-antitrust-agencies-propose-major-changes-to-merger-guidelines>; Covington Alert, U.S. Antitrust Agencies Finalize Merger Guidelines, Mostly Maintaining Expansive Approach to Merger Enforcement (Dec. 20, 2023), <https://www.cov.com/news-and-insights/insights/2023/12/us-antitrust-agencies-finalize-merger-guidelines-mostly-maintaining-expansive-approach-to-merger-enforcement>.

[24] See Covington Alert, The FTC Signals an Unprecedented Expansion in Its Definition of Unfair Methods of Competition (Nov. 11, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/11/the-ftc-signals-an-unprecedented-expansion-in-its-definition-of-unfair-methods-of-competition>.

[25] See Covington Alert, FTC and DOJ Propose Sweeping Changes to the HSR Form (June 28, 2023), <https://www.cov.com/en/news-and-insights/insights/2023/06/ftc-and-doj-propose-sweeping-changes-to-the-hsr-form>.

[26] In February 2021, the agencies "temporarily" suspended their prior practice of terminating the HSR waiting period early when deals raised no apparent competition concerns. Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, Fed. Trade Comm'n (Feb. 4, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination>. 2022 was the first full year this policy was in effect, and the agencies granted early termination for only five transactions the whole year. See 2022 HSR report, *supra* note 2, at 6 (noting that under the new policy, the agencies only grant early termination "in situations where merging parties enter[] into a consent order or the parties resolve[] the investigating agency's concerns prior to fully complying with a Second Request.").

[27] Ryan Quillian, Biden Antitrust Agencies Bring Fewer Merger Enforcement Actions, but Attempt to Chill Deal Activity in Other Ways (May 22, 2023), <https://www.cov.com/en/news-and-insights/insights/2023/05/biden-antitrust-agencies-bring-fewer-merger-enforcement-actions-but-attempt-to-chill-deal-activity-in-other-ways>.

[28] Noah Joshua Phillips, Disparate Impact: Winners and Losers from the New M&A Policy, Eighth Annual Berkeley Spring Forum on M&A and the Boardroom, at 4 (Apr. 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Phillips_Keynote-Berkeley_Forum_on_MA_FINAL.pdf.

[29] Jeffrey Goldfarb, Backlogged M&A pipeline will burst in 2024, Reuters (Dec. 20, 2023), <https://www.reuters.com/breakingviews/backlogged-ma-pipeline-will-burst-2024-2023-12-19/>.