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Cannabis Mergers Skewed Hart-Scott-Rodino Report Data

By **Jack Sidorov** (September 18, 2020, 3:44 PM EDT)

The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice released the Hart-Scott-Rodino annual report for fiscal year 2019 on July 8, 2020.[1]

For more than 40 years, the data provided in each report has been studied by the antitrust bar for revelations about the agencies' merger enforcement efforts and the workings of the antitrust premerger notification program.[2]

In light of the whistleblower testimony of DOJ attorney John Elias,[3] however, the data in the fiscal year 2019 annual report must be read as being distorted by nine DOJ second-request investigations of cannabis industry mergers for which he credibly asserts genuine antitrust concerns were lacking. This makes meaningful comparison with DOJ merger enforcement efforts in previous years difficult.



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For example, in addition to merger challenges, data on second requests is often viewed as a barometer of antitrust enforcement efforts. Second requests are issued to the parties if preliminary review by the FTC or the DOJ during the 30-day HSR waiting period does not assuage competitive concerns, and the agency believes more information is needed. A far cry from TV detective Columbo's "just one more thing," second requests require the production of vast amounts of documents and information; compliance takes months and costs millions.

Appendix A shows the DOJ with 31 second-request investigations in fiscal year 2019, up from 19 in fiscal year 2018 and 18 in fiscal 2017, and more than the 29 in fiscal 2016 — the last full year of the administration of President Barack Obama.

Not counting the nine 2019 cannabis second-request investigations, however, 22 second-request investigations would be more in line with the DOJ totals for the past two fiscal years. This would also bring the percentage of transactions resulting in second requests for the agencies for fiscal year 2019 down to 2.6% instead of the 3% shown in the report.

Moreover, beyond the skewing of the DOJ second-request data by nine out-of-the-ordinary cannabis investigations, the report's discussion of DOJ merger challenges raises questions. The agencies construe merger challenges broadly, as encompassing much more than litigating to block, or, in the case of consummated transactions, undo a transaction. Merger challenges include consent decrees — approved by a district court or the commission — as well as proposed transactions that were abandoned or restructured without formal agency action after the agency raised concerns.

For fiscal year 2019, the report states that the DOJ had 17 merger challenges, 11 of which involved court filings. Of the other six challenges, the report states that five transactions were abandoned after the Antitrust Division raised competitive concerns and one was resolved by the parties addressing concerns that the division had raised.

On the surface, the data for fiscal year 2018 DOJ merger challenges contained in the fiscal year 2018 annual report is similar: 17 merger challenges, nine of which involved court filings, with the other

eight composed of four abandonments and four restructurings.

There is, though, an interesting difference in how the DOJ merger challenges are presented in the fiscal year 2019 report versus fiscal year 2018 and previous reports going back decades. While all of the reports include paragraphs summarizing each of the challenges filed in court, all except the fiscal year 2019 report include a footnote listing the parties to the other DOJ challenges — abandonments and restructurings.[4]

Thus, the fiscal year 2019 report does not disclose how many of the six challenges that did not involve court filings involved cannabis transactions,[5] and we don't know why the DOJ chose this year to depart from its long-standing practice of describing such abandonments and restructurings via footnote.

Another statistic is also skewed in the DOJ's fiscal year 2019 data: the likelihood that a transaction for which the DOJ issues second requests will emerge unscathed and be able to close as proposed. Clients who are getting a DOJ second request will sometimes ask about this when deciding whether to proceed with the time and expense of second-request compliance or whether to abandon the transaction.

There is no hard data on that; not all transactions that were considered merger challenges were necessarily second-request investigations, as they may not have been reported to the agencies under the HSR.[6] Due to strict HSR confidentiality that extends to the fact a notification was filed, the agencies do not reveal in the report whether a particular challenge was triggered by HSR review, unless that information has otherwise already been disclosed.

But by presenting the number of DOJ second-request investigations and number of merger challenges in a particular fiscal year, the annual reports enable ballpark estimates, with appropriate caveats.

The HSR annual reports for fiscal years 2014-2018 show for that overall period 114 DOJ second-request investigations and 96 DOJ merger challenges. That would facially suggest only 18 out of 114 such transactions (16%) emerged unscathed. While the actual percentage emerging unscathed is somewhat higher due to the fact that not all DOJ merger challenges resulted from second-request investigations, the 16% figure does suggest that a recipient of a DOJ second request during that five-year period was in a difficult predicament.

By contrast, the fiscal year 2019 annual report, by showing 31 DOJ second-request investigations and 17 DOJ merger challenges, facially suggests that 14 out of 31 such transactions (45%) emerged unscathed.

While this would suggest a trend toward a significantly higher chance of a transaction emerging unscathed after issuance of DOJ second requests than was seen in the previous five years, the significance of this data is called into question by both the fact that nine of the second-request investigations were cannabis investigations — of seemingly no real antitrust interest — and that an unknown number of the five transactions abandoned during the year were cannabis mergers.

All of this suggests that just as the statistics during baseball's steroid era should be disregarded or at least accompanied by an asterisk, so should the merger enforcement statistics during the DOJ's cannabis era.

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[1] <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau->

competition-department-justice-antitrust-division-hart-scott-rodino/p110014Hart-Scottannualreportfy2019_0.pdf.

[2] See, e.g., <https://www.law360.com/articles/692434/a-late-summer-dive-into-the-Hart-Scott-annual-report>.

[3] https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519.

[4] See, e.g., n. 17 to FY 2018 Annual Report, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18Hart-Scottreport.pdf>.

[5] Elias' written testimony refers to one such cannabis transaction having been abandoned, but does not indicate whether others were as well.

[6] For example, some transactions are investigated and challenged that do not meet Hart-Scott thresholds, and others, such as bank mergers, are exempt from Hart-Scott.

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