

## Mergers Down But FTC Challenges Up: Report

By Joseph Marks

Law360, New York (October 06, 2010) -- Major corporate mergers have declined significantly since the onset of the recession, but the Federal Trade Commission is investigating a much higher percentage of those filings, resulting in many more mergers being revised or scuttled entirely, according to the agency's new report.

Pre-merger notification filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 dropped nearly 60 percent between the 2008 fiscal year and fiscal 2009, from 1,726 filings to 716, according to the FTC's Hart-Scott-Rodino 2009 Annual Report released Friday.

But the number of FTC "secondary requests," which signify a major investigation, more than doubled as a percentage of total HSR filings during that period — from 2.5 percent of all filings in fiscal '08 to 4.5 percent in fiscal '09 — according to the report.

Some of the secondary requests issued in one fiscal year are for HSR notifications filed the previous year, so those percentages don't represent the absolute increase in enforcement between the two years.

The number of HSR notifications that were challenged in court during fiscal 2009 or resulted in the parties abandoning or significantly restructuring their merger also more than doubled as a percentage of HSR notifications filed that year — from 2.1 percent in fiscal '08 to 4.3 percent in fiscal '09 — according to the report.

The FTC's fiscal year runs from Oct. 1 to Sept. 30, meaning the current numbers are just over a year old. But the report, nonetheless, highlights a significant increase in HSR enforcement during the financial crisis, according to Mayer Brown LLP's Christopher Kelly.

Mergers are much more likely to face a costly and time-consuming investigation for the remainder of the financial crisis, he said.

The increased scrutiny is probably due more to the same number of FTC attorneys reviewing fewer than half as many deals, rather than any anti-corporate sentiment that came with the financial crisis or the change in administrations, Kelly claimed.

For companies considering mergers or acquisitions now, Kelly said, "it's a fact of life that it's a smaller pond you're going to be swimming in, so if someone's fishing there you could get hooked."

Kelly said he was most struck by the parallel rise of FTC investigations and court challenges.

While the numbers do not line up entirely, Kelly said, it appears as if nearly every merger the FTC questioned was ultimately either altered in some major way, scrapped entirely, or extensively litigated.

Kelly also attributed the FTC success in those challenges primarily to the agency's comparatively low workload.

Mayer Brown, whose attorneys prepared a primer on the report, estimates fiscal 2010 HSR filings will rise to around 1,200.

The total value of transactions requiring HSR notification dropped nearly 60 percent between fiscal 2008 and fiscal 2009, from \$1.3 trillion to \$533 billion, according to the FTC report.

Mergers in fiscal '09 were down 85 percent from fiscal 2000, when the FTC raised its threshold for merger notification to its current level of \$50 million, according to the report.

A July analysis by Law360 shows that, over the past two years, U.S. antitrust agencies have also challenged more mergers that are significantly below the Hart-Scott-Rodino Antitrust threshold.

That investigation, which focused on antitrust agency press releases and other publicly available agency reports from 2001 through 2010 identified at least 18 challenged transactions that were well below the HSR threshold. Of those 18 challenges, nine occurred between 2008 and 2010.

--Additional reporting by Jacqueline Bell