

Biden Admin's M&A Rhetoric Outpaces Enforcement Numbers

By Ryan Quillian (October 30, 2023, 4:13 PM EDT)

The Biden administration has claimed that the past 40 years of antitrust enforcement was a failed experiment and promised an increase in merger enforcement, but data for 2023 show that antitrust merger enforcement levels in the United States are at a 20-year low.

The federal antitrust agencies challenged just 12 transactions in the 12-month period ending on Sept. 30, which is the lowest number of federal merger enforcement actions in the last 20 years. The next lowest was in fiscal year 2005, when the Bush administration challenged 18 transactions.

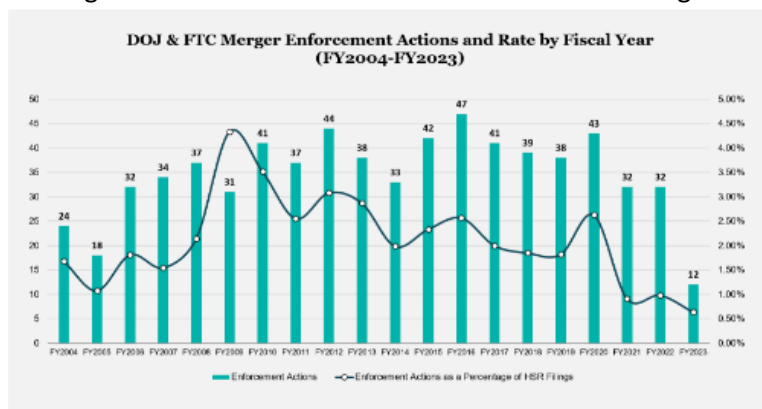


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Although merger enforcement actions are down to historical lows, the agencies appear to be focused on rhetoric and process to deter merger activity more generally, relying on stronger anti-merger statements, tougher and more aggressive policy positions — e.g., the draft merger guidelines — and higher procedural hurdles, such as their proposed changes to the Hart-Scott-Rodino premerger notification program, which will significantly increase the filing burden for every company involved in a reportable transaction.

The Data

The following chart contains data from the last 20 fiscal years on the number of merger enforcement actions brought by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice,[1] as well as the merger enforcement rate, which is the ratio of the number transactions challenged to the number of transactions filed with the agencies.[2]



As shown in the above chart, both the absolute number of merger enforcement actions and the enforcement rate in fiscal year 2023 are the lowest in the last 20 fiscal years.[3]

Even the highest number of annual enforcement actions brought by the current administration — 32 in fiscal year 2021 and fiscal year 2022 — is the lowest since fiscal year 2009, when the Obama administration challenged 31 transactions.

And the enforcement rate in each of the first three fiscal years of the Biden administration is lower than the enforcement rate in any other fiscal year in the dataset.

These results are not driven by just one of the agencies — fiscal year 2023 was the lowest level of merger enforcement in the last 20 fiscal years for the FTC and DOJ individually. The DOJ challenged two transactions in FY2023; the next-lowest number of enforcement actions was in fiscal year 2005, when the DOJ under the Bush administration challenged four transactions.

The FTC challenged 10 transactions in fiscal year 2023; the next-lowest was also in fiscal year 2005, when the FTC challenged 14 transactions.

By contrast, the highest annual number of enforcement actions in the last 20 fiscal years for the FTC was in fiscal year 2020 under the Trump administration (28), and for the DOJ it was in FY2016 under the Obama administration (25).

Compared with the Trump administration, merger enforcement levels under the Biden administration are down in terms of both absolute numbers and as a percentage of the total number of transactions filed with the agencies, as shown in the graphs below.



As the figure on the left shows, the absolute number of enforcement actions was almost 17% lower in the first 11 quarters of the Biden administration (59) than it was during the same period of the Trump administration (71).

The decrease in enforcement activity becomes clearer when you normalize the data to account for the number of transactions filed with the agencies — provided in the figure on the right — which shows that

the enforcement rate during the first 11 quarters of the Biden administration (0.75%) was nearly 40% lower than the enforcement rate during the same period of the Trump administration (1.24%).

Some of the overall decrease in merger enforcement activity may be attributable to the agencies' shift away from consent decrees. In fiscal year 2023, the DOJ entered zero prelitigation consent agreements, whereas during the 10 fiscal years preceding this administration — i.e., fiscal year 2011 to fiscal year 2020 — the DOJ averaged 7.8 prelitigation consents per year.

The FTC entered two prelitigation consent agreements in fiscal year 2023, which is 85% lower than its yearly average during the 10 preceding fiscal years — 13.3 consents per year.

But it is not the case that the agencies are filing significantly more litigated merger challenges compared to previous administrations. For example, the DOJ filed only one merger litigation complaint in fiscal year 2023 — its suit seeking to block the proposed JetBlue-Spirit transaction — compared to its average of 2.1 litigation complaints per year for the 10 fiscal years preceding the Biden administration.

The FTC filed four litigation complaints in fiscal year 2023, which is slightly above its average of 3.6 per year for the 10 years prior to fiscal year 2021. And the majority of the merger challenges that the agencies have litigated during the Biden administration have resulted in trial court opinions against the agencies' requests for injunctive relief.

Trial courts have issued seven opinions in merger enforcement actions filed by this administration,[4] and only one of those (14.3%) went in the agencies' favor.

That one trial court victory came in the DOJ's suit to block Penguin Random House from acquiring Simon & Schuster. — in last year's *U.S. v Bertelsmann SE* decision in the U.S. District Court for the District of Columbia. No trial court has ruled in favor of the FTC under the Biden administration.

Data and the Biden Administration's Rhetoric

The relatively low level of enforcement sharply contrasts with the rhetoric that the Biden administration has used about the need to reinvigorate antitrust enforcement. President Joe Biden — in a statement accompanying his signing of the Executive Order on Promoting Competition in the American Economy in July 2021 — described the situation as follows:

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. We're now 40 years into the experiment of letting giant corporations accumulate more and more power[.] ... I believe the experiment failed[.] ... 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.[5]

The public positions of FTC and DOJ leadership have been consistent with Biden's signing statement. For example, FTC Chair Lina M. Khan's first memo to FTC staff in September 2021 identified her top 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." [6]

She also noted that, "[g]iven the ongoing merger surge, there is a real risk that markets will become only more consolidated absent our vigilance and assertive posture." [7]

Similarly, early in his tenure at DOJ, Assistant Attorney General for the Antitrust Division Jonathan Kanter said, "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.'" [8]

Both Khan and Kanter also have emphasized their focus on litigating merger enforcement challenges. For example, Khan has claimed that the FTC is "definitely focusing [its] resources on litigating." [9]

Kanter similarly claimed that "[i]n most instances, the real remedy is to just block the merger entirely and that's our starting point." [10] However, the data do not suggest that the agencies have increased their merger enforcement litigation. [11]

Deterrence in Lieu of Enforcement

With enforcement of the antitrust laws against specific transactions declining, the agencies appear to be seeking to discourage mergers more generally, such as by focusing on increasing the cost of deal making using procedural changes that carry less direct judicial oversight — or none at all.

The observations of then-FTC Commissioner Noah Joshua Phillips in April 2022 are equally applicable today: "Antitrust enforcement over the last fifteen months has been anything but vigorous — indeed, it has been sclerotic." [12] And yet, Phillips observed, the FTC has engaged in "gratuitously taxing M&A" through various tactics, [13] including:

- Suspending the early termination of the initial Hart-Scott-Rodino Act waiting period for all transactions;
- Increasing the number of Second Requests issued and expanding the scope and burden of those full-phase investigations;
- Adopting a general aversion to consent agreements; and
- For those consent agreements that the FTC enters, [14] imposing a new requirement that the merged entity must obtain the agency's prior approval to engage in future transactions in certain specified industries. [15]

Potentially the most burdensome procedural changes contemplated by the agencies are the proposed revisions to the HSR premerger notification program.

By the agencies' own calculations, the time it takes to prepare an HSR filing under the proposed rules would be, on average, four- to seven-times greater than under the current rules. [16] Using those estimates, if the new rules had been in effect in calendar year 2022, when almost 2,500 transactions were notified to the agencies, merging parties would have spent an additional 535,000 to 1.1 million hours preparing HSR filings. [17]

The agencies' "assumed hourly wage of \$460 for executive and attorney compensation" [18] translates to an increase in the cost of preparing HSR filings ranging from \$246.1 million to \$510.6 million. In reality, the proposed rules would be even more burdensome than that. Economists and practitioners estimate that the agencies' calculations of the time it takes to prepare an HSR filing are

underestimates.[19]

Many of the comments submitted in response to the agencies' Notice of Proposed Rulemaking state that the added burden that the proposed rules would impose an additional tax on transactions and chill procompetitive merger activity, particularly for smaller companies for which the costs are more significant.[20]

Conclusion

There appear to be a number of significant transactions under investigation by the FTC and DOJ. It will be interesting to see whether they will litigate them, whether they will soften their stance on consent agreements or whether they will be cleared without conditions.

Regardless, the agencies are unlikely to raise the Biden administration's overall enforcement rate to a level that is on par with prior administrations.

Correction: A previous version of this article misstated the number of transactions the FTC challenged in 2023. The error has been corrected.

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[1] For FY2004 through FY2021, the data in the first chart come from the agencies' annual HSR Reports. See Fed. Trade Comm'n, Annual Competition Reports (last visited Oct. 27, 2023), <https://www.ftc.gov/policy/reports/annual-competition-reports> [hereinafter "Annual HSR Reports"]. For each fiscal year, the agencies' annual HSR Reports list the "merger enforcement actions in which the [FTC] or [DOJ] took its first public action during [that] fiscal year." See, e.g., Fed. Trade Comm'n & Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2021, at 2 n.2 (Feb. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf [hereinafter "FY2021 HSR Report"]. The agencies list as "merger enforcement actions" the number of (1) litigation complaints, (2) pre-litigation consent orders/decrees, and (3) abandonments or restructurings as a result of antitrust concerns raised by the investigating agency. *Id.* at 2-3.

For FY2022 and FY2023 — for which official agency data is not yet available—the data in the chart comes from publicly available information tallying — for each fiscal year — the number of (1) litigated merger complaints filed by the agencies, (2) pre-litigation consent agreements/decrees entered by the agencies, and (3) abandonments or restructurings in the face of antitrust concerns raised by the FTC or DOJ.

[2] The merger enforcement rate is the total number of merger enforcement actions initiated in a given year divided by the number of transactions reported to the agencies in that year. The DOJ and FTC publish the number of reported transactions in Appendix B of their annual HSR Reports (for data through September 2021). See Annual HSR Reports, *supra* note 1. For October 2021 onward, the

number of transactions reported to the agencies comes from the preliminary figures posted on the FTC's Premerger Notification website. See Fed. Trade Comm'n, Premerger Notification Program (last visited Oct. 27, 2023), <https://www.ftc.gov/enforcement/premerger-notification-program>.

[3] This conclusion holds even if the number of abandonments/restructurings are omitted from the data — the number of litigated enforcement actions plus consents in FY2023 was the lowest in the last 20 fiscal years.

[4] The seven trial court opinions were in (1) Illumina/Grail, (2) Penguin Random House/Simon & Schuster, (3) U.S. Sugar/Imperial Sugar, (4) UnitedHealth Group/Change Healthcare, (5) Booz Allen/EverWatch, (6) Meta/Within, and (7) Microsoft Activision. DOJ apparently does not consider its litigation against the Northeast Alliance between American Airlines and JetBlue, which the agency filed in September 2021, to be a merger enforcement action. See FY2021 HSR Report, *supra* note 1, at 9-10 (listing Visa/Plaid and Aon/Willis Towers Watson as the only two merger litigation complaints filed by DOJ in FY2021).

[5] 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/>.

[6] 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.

[7] *Id.*

[8] Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022) (quoting 15 U.S.C. § 18), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>.

[9] 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>. See also 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.").

[10] 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>.

[11] AAG Kanter recently claimed that the agencies "are seeing dramatically fewer illegal mergers We continue to see thousands of mergers per year. The difference now is that fewer deals present violations of the law." Assistant Attorney General Jonathan Kanter Delivers Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust>. If that is in fact the case, then the agencies should also be issuing fewer second requests, but the most recent data available (from FY2021) suggest the opposite. See FY2021 HSR Report, *supra* note 1, Appendix A (showing a 35%

increase in the number of second requests issued by the agencies from FY2020 to FY2021).

[12] 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.

[13] *Id.* at 6.

[14] Until May 2023, DOJ had not entered a consent agreement since the Senate confirmed AAG Kanter in November 2021. The first and only consent DOJ has entered since November 2021 came mid-trial in the Antitrust Division's litigation seeking to block ASSA ABLOY's proposed acquisition of Spectrum Brands' hardware and home improvement division, and even in agreeing to that settlement, DOJ publicly stated that a complete injunction would have been preferable. See *Competitive Impact Statement, U.S. v. ASSA ABLOY AB*, 1:22-cv-02791, Dkt. 129, at 7 (D.D.C. May 5, 2023) ("The United States respectfully submits that only a complete injunction preventing the original proposed merger would have eliminated those risks. Alternatively, complete divestitures of all relevant standalone business units necessary to fully compete may have diminished those risks significantly. Based on the totality of circumstances and risks associated with this litigation, however, the United States has agreed to the proposed Final Judgment, which includes additional provisions and protections to address some of the concerns identified above.").

[15] Divestiture buyers face similar restrictions if they want to sell the divested assets within 10 years of acquiring them.

[16] See *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178, 42208 (June 29, 2023), <https://www.govinfo.gov/app/details/FR-2023-06-29/2023-13511> [hereinafter "HSR NPRM"].

[17] The agencies estimate that a filing under the current rules takes, on average, 37 hours to prepare. *Id.* The agencies claim that the preparation of filings under the proposed rules will take, on average, 144 hours (for routine filings) and 259 hours (for complex filings). *Id.* Thus, the difference in preparation time will be between 107 and 222 hours. Given that both parties typically make filings, and there were approximately 2,500 reported transactions in CY2022, the lower bound of the increased time will be 535,000 hours (107 x 2 x 2,500) and the upper bound will be 1,110,000 hours (222 x 2 x 2,500).

[18] *Id.*

[19] The agencies "canvassed current Agency staff who had previously prepared HSR filings while in private practice to estimate the projected change in burden due to the proposed amendments...." HSR NPRM, *supra* note 16, at 42207. Commenters have noted that these estimates did not involve any empirical data or incorporate the views of practitioners currently involved in preparing HSR filings, and therefore likely underestimate the time it actually takes to prepare an HSR filing. See, e.g., Submission of Wachtell, Lipton, Rosen & Katz to the Federal Trade Commission as to Request for Comment on 16 CFR Parts 8-10803 — Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules [Project No. P239300], at 19 (Sept. 26, 2023) ("The [agencies'] estimates are not based on any empirical data or discussions with current practitioners, and we submit that the actual current and future costs of complying with the current and proposed HSR regulations, respectively, are and will be much higher than the estimates."); Comment from the U.S. Chamber of Commerce to the Federal Trade Commission

as to Request for Comment on 16 CFR Parts 8-10803 Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules [Project No. P239300], at 75 (Sept. 27, 2023).

[20] See, e.g., Comment from the Consumer Technology Association to the Federal Trade Commission as to Request for Comment on 16 CFR Parts 8-10803 Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules [Project No. P239300], at 6 (Sept. 26, 2023) (stating that the proposed rules risk deterring technology acquisitions and stymieing innovation); Comment from the International Center for Law & Economics to the Federal Trade Commission as to Request for Comment on 16 CFR Parts 8-10803 Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules [Project No. P239300], at 22 (Sept. 27, 2023) (describing how the proposed rules would act as a regressive tax felt most by firms on the margin of HSR reporting thresholds); Comment from Dechert to the Federal Trade Commission as to Request for Comment on 16 CFR Parts 8-10803 Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules [Project No. P239300], at 3 (Sept. 25, 2023) (noting that the proposed rules are likely to chill private investment and may harm small businesses, workers, and consumers).