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Three years running: Merger enforcement activity continues at historically low levels according to the agencies' most recent HSR report

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The most recent data published by the federal antitrust agencies shows that merger enforcement activity under the current administration continues to be historically low. This may be counterintuitive given the public statements from commentators[1] and the agencies themselves,[2] both of which suggest an aggressive posture and an increase in merger enforcement activity.

But the relatively low level of merger enforcement activity under the Biden Administration is consistent with the agencies' apparent strategy of general deterrence, their evident distrust of merger remedies, and an increase in the number of agency enforcement actions challenging allegedly anticompetitive conduct.

Introduction

On October 10, 2024, the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice published their Hart-Scott-Rodino (HSR) annual report to Congress for fiscal year 2023 (available here: https://bit.ly/4e3R31E), which covers the period between October 1, 2022, and September 30, 2023.[3] This is the most recent — and only — public source of certain types of merger enforcement data, such as the number of second requests issued by the agencies.

Some key takeaways from the 2023 HSR Report include:

- The number of second requests issued by the agencies fell by more than 21% (from 47 in 2022 to 37 in 2023). This decrease was driven entirely by the Antitrust Division, which issued 11 fewer second requests in 2023 compared to 2022 (the FTC issued 1 more second request in 2023 than in 2022).
- For the third year in a row, the percentage of eligible transactions that received a second request in 2023 remained lower than in any year from 2001 to 2020.
- The number of reported transactions fell significantly in 2023 (by 43%), and the number of merger enforcement actions decreased by slightly more (by 45%).[4] As a result, the merger enforcement rate (i.e., the number of merger enforcement actions divided by the total number of reported transactions) decreased, as well. Publicly available information suggests that the merger enforcement rate continued at historically low levels in 2024.

This article discusses certain data related to second requests and merger enforcement actions from the 2023 HSR Report and puts it into historical context, including using publicly available data for 2024.

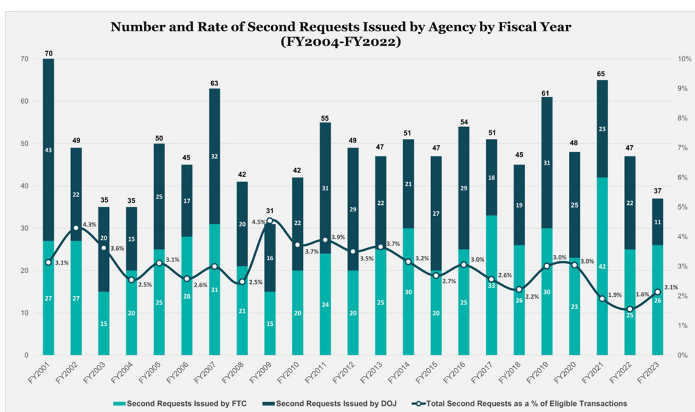
We also examine some potential explanations for the dichotomy between the data — which shows historically low levels of merger enforcement activity under the Biden Administration — and the perception that the FTC and Antitrust Division have increased the level of merger enforcement. Throughout this article, statements about specific years refer to fiscal years unless otherwise noted.

Data and analysis

The 2023 HSR Report shows that in 2023 the agencies issued the fewest second requests since 2009 and challenged the fewest transactions since 2005. Publicly available information suggests that the decrease in the merger enforcement rate may continue in 2024.

Second request data

The 2023 HSR Report shows that the absolute number of second requests issued by the agencies in 2023 fell significantly compared to 2022 and reached its lowest level in almost 15 years.[5] The FTC and the Antitrust Division issued a combined 37 second requests in 2023, which was down from 47 in 2022 (a decrease of more than 20%). Prior to 2023, the agencies had not issued fewer than 40 second requests since 2009 (during the financial crisis), when they issued 31.



The 20% decrease in the absolute number of second requests was driven entirely by the Antitrust Division, which issued only 11 second requests in 2023 compared to 22 in 2022. Between 2001 and 2022, the lowest number of second requests issued by the Antitrust Division was 15 in 2004.

By contrast, the FTC issued 26 second requests in 2023, up from 25 in 2022. In light of the steep decline in the number of second requests coming out of the Antitrust Division, the FTC accounted for more than 70% of the full phase merger investigations in 2023, which is the FTC's largest share in more than 20 years.

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Even with the drop in the absolute number of second requests, the share of eligible transactions that received a second request increased slightly in 2023 due to the precipitous decline in eligible transactions.

In 2023, there were only 1,735 transactions eligible to receive second requests compared to 3,029 in 2022 (a decrease of 43%). As a result, the share of eligible transactions that received second requests increased from 1.55% in 2022 to 2.13% in 2023. That means that neither the FTC nor the Antitrust Division raised serious antitrust concerns about 97.87% of the eligible transactions filed in 2023.

Data on merger enforcement levels

The FTC

The FTC took 16 merger enforcement actions in 2023, which is its fewest since 2006 (when it also took 16). The FTC filed four contested complaints seeking to block transactions in court during 2023. Two of those — *ICE/Black Knight* and *Amgen/Horizon Therapeutics* — settled in the middle of litigation.

In *Microsoft/Activision*, Judge Jacqueline Scott Corley of the Northern District of California denied the FTC's motion for a preliminary injunction, and the FTC's appeal to the Ninth Circuit is still pending (the parties closed the transaction after the FTC failed to obtain an injunction pending appeal).

In *IQVIA/Propel Media*, Judge Edgardo Ramos of the Southern District of New York granted the FTC's motion for a preliminary injunction, and the parties subsequently abandoned the transaction. By way of comparison, the FTC filed six contested complaints per year in 2021, 2022, and 2024.

Of the four fully litigated merger cases that the FTC has filed since the Senate confirmed FTC Chair Lina M. Khan on June 15, 2021, the FTC successfully blocked two transactions — *IQVIA/Propel Media* and *Novant/CHS* — and was unsuccessful in its attempts to block two — Meta/Within and *Microsoft/Activision* (although the latter is on appeal).[6]

We expect another three decisions on litigated FTC complaints in relatively short order — *Kroger/Albertsons*, *Tapestry/Capri*, and *Tempur Sealy/Mattress Firm*.

Two of the FTC's merger enforcement actions in 2023 — *Tractor Supply/Orscheln Farm & Home* and *Quantum/EQT* — were pre-litigation consent agreements. That is the fewest number of consent agreements issued by the FTC in more than 20 years, but 2024 will be even lower because the FTC did not enter a single consent decree to resolve merger-specific harm in 2024.[7] The broader trend away from the use of consent decrees in merger matters is discussed in more detail below.

The FTC's remaining ten merger enforcement actions in 2023 were abandonments or restructurings without a contested complaint. In five of those matters, the identities of the parties were made public in agency press releases, the appendix (https://bit.ly/3A6eFox) to a letter (https://bit.ly/3NBTxJT) Chair Khan sent to Congress, or by the parties themselves. The parties to the other five abandoned transactions remain unknown.

The Antitrust Division took 11 merger enforcement actions in 2023, down from a reported 26 in 2022 and the agency's lowest since 2005.

For 2024, the FTC has issued press releases or made other statements regarding nine transactions that — according to the agency — were abandoned or restructured in response to competition concerns it raised, and the merging parties were identified publicly in all but two of those nine instances.

The antitrust division

The Antitrust Division took 11 merger enforcement actions in 2023, down from a reported 26 in 2022 and the agency's lowest since 2005. Only one of those actions — *JetBlue/Spirit* — was a contested complaint to block a transaction in court; the other ten were reported as transactions that were abandoned or restructured in light of the Antitrust Division's concerns.

Of the four fully litigated merger cases that the Antitrust Division has filed since the Senate confirmed Assistant Attorney General for the Antitrust Division Jonathan Kanter on November 16, 2021, the Antitrust Division has successfully blocked one — *JetBlue/Spirit* — and was unsuccessful in seeking to block three — *UnitedHealth/Change Healthcare, Booz Allen/EverWatch*, and *US Sugar/Imperial Sugar*.[8]

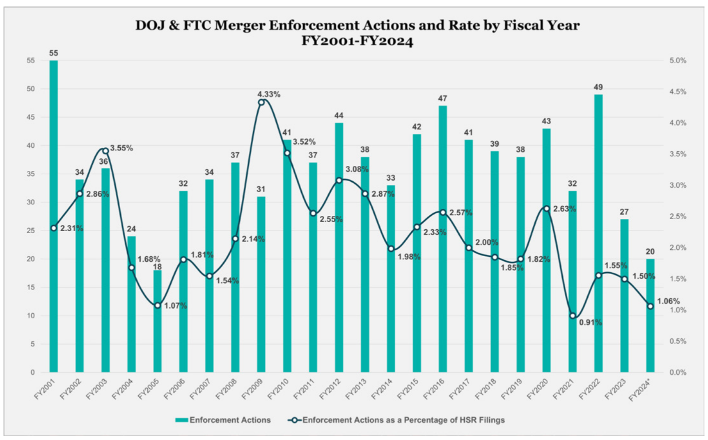
Publicly available information indicates that the Antitrust Division did not file any complaints seeking to block transactions in court in 2024, but DOJ issued press releases identifying five transactions that — according to the agency — the parties either abandoned or restructured in response to competition concerns raised by the Antitrust Division.

The agencies' historically low merger enforcement rate continued for a third year in a row

The chart below contains data on how the number and rate of merger enforcement actions have changed from 2001 to 2024. As the chart shows, the merger enforcement rates in 2021, 2022, and 2023 were some of the lowest in recent memory. And publicly available information suggests that the trend of the previous three years of historically low merger enforcement rates will continue in 2024.

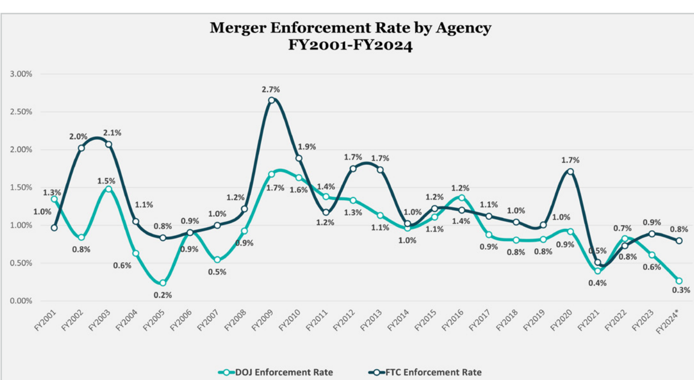
Note that the at the time of publishing, the agencies had not announced the number of HSR filings for September 2024. As a result, we are missing one month's worth of transactions in the denominator for fiscal year 2024, which means the merger enforcement rate for 2024 in the chart below likely overstates the actual merger enforcement rate.

That said, we also do not have complete data for 2024 on the number of transactions that may have been abandoned or restructured in response to concerns raised by either the FTC or the Antitrust Division; that data should become available when the agencies issue their HSR Report for fiscal year 2024.



As shown in this chart, the agencies' merger enforcement rates of 0.91% in 2021, 1.55% in 2022,[9] 1.50% in 2023, and 1.06% in 2024 are the lowest of any year in the dataset other than 2005 (1.07%) and 2007 (1.54%).

These results are not driven by a drop in enforcement rates by just one of the agencies; both agencies' enforcement rates have been low in the last four years compared to prior administrations, as shown in the graph below.



Although the merger enforcement rate has been relatively low under the current administration, the FTC has been significantly more active than the Antitrust Division in terms of the number of transactions it has challenged in court. Between 2021 and 2024, the FTC sued to block 22 transactions compared to 9 by the Antitrust Division.

Potential explanations

So what explains the agencies' historically low level of merger enforcement activity under the Biden Administration? It appears to be a combination of a desire to deter merger activity in general, a decision to decrease the use of consent decrees to resolve merger-specific harm, and a potential shift in resources to conduct enforcement.

A strategy of general deterrence

The agencies appear to be pursuing a strategy of general deterrence regarding mergers. The FTC and the Antitrust Division seem to be pursuing this general deterrence strategy using several tactics:

- ***Stronger anti-merger rhetoric***. For example, Chair Khan commented (https://on.cfr.org/4fajyfH) recently on the success of the perceived increased scrutiny on mergers, stating that "now potential antitrust risk is part of the conversation on day one," which she said is a sign of progress.
- ***Tougher and more aggressive policy positions***. For example, the 2023 Merger Guidelines (https://bit.ly/3Ylr2VR) suggest the agencies plan to continue to scrutinize more — and more types — of transactions than prior administrations. In addition, in September 2024, the Antitrust Division withdrew (https://bit.ly/4fdk5g9) its 1995 Bank Merger Guidelines, stating that it will instead rely on the 2023 Merger Guidelines to analyze bank mergers. There are also examples from earlier in the administration of efforts to use policy as a tool to deter merger activity, such as the FTC's Section 5 Policy Statement (https://bit.ly/4fci1VO).
- ***Higher procedural hurdles***. On October 10, 2024, the FTC — with the concurrence of the Antitrust Division — issued a final rule (https://bit.ly/4h0ptoR)that is expected to overhaul the premerger notification rules, form, and associated instructions, which will require companies engaging in M&A to submit additional information and documentation on a variety of topics. Although the final rules are not as drastic as the changes originally proposed in June 2023, they will still significantly increase the burden on companies that have to submit HSR filings, as the agencies acknowledged when they issued their final rule.[10]

And agency leadership takes the view that this strategy is deterring potentially anticompetitive transactions. For example, in September 2024 AAG Kanter remarked (https://bit.ly/40eUvDg) that as a result of the agencies' efforts "fewer problematic deals come to [the Antitrust Division] in the first place."

However, the agencies' strategy has the potential to suppress merger activity broadly (including transactions that could benefit competition).[11] Former FTC Commissioner Christine Wilson expressed this concern in a Wall Street Journal (https://on.wsj.com/3UkWIt3) article when she resigned from the agency, stating that "FTC leadership has abused the merger review process to impose a tax on all mergers, not only those that hinder competition."

Moving away from consent agreements

Neither agency has accepted a consent decree to remedy merger-specific harm since August of 2023. This reflects the position of current leadership at both agencies that settlements are virtually never an acceptable way for merging parties to resolve the agencies' competition-related concerns with transactions.[12]

This approach is consistent with a letter (https://bit.ly/4hjPQGg) sent by Senator Elizabeth Warren to the FTC in November 2023, in which she called on the agency "to reject the use of remedies — both behavioral and structural — in merger review."

From 2001 to 2020, the agencies averaged almost 20 consent decrees per year; in 2023 they entered two, and in 2024 they entered zero.

The shift away from the use of consent decrees to address merger-specific harms is at least in part responsible for the reduction in the merger enforcement rate. From 2001 to 2020, the agencies averaged almost 20 consent decrees per year; in 2023 they entered two, and in 2024 they entered zero.

Opting not to utilize this tool may result in an increase in abandonments/restructurings, but it has not been enough to make up for zeroing out the number of consent decrees. In addition, if parties restructure transactions outside the context of a consent decree, there are policy implications, including a reduction in transparency, the elimination of government oversight of the remedy, and the lack of an enforcement mechanism.

An apparent shift of resources toward conduct cases

Both agencies have brought a number of conduct cases during the current administration, but the focus on conduct is more noticeable at DOJ. In particular, the Antitrust Division has filed at least six complaints alleging anticompetitive conduct, and the FTC has filed at least three. These cases are consuming a significant amount of the agencies' limited resources, which could impact their capacity to investigate and challenge mergers.

Conclusion

Despite the Biden Administration's rhetoric, merger enforcement rates have remained low, and the number of second requests has dropped, particularly at the Antitrust Division. However, the hallmark of the current leadership at the FTC and the Antitrust Division is uncertainty regarding which transactions they will investigate and which ones they will challenge.

And that uncertainty is likely to continue for the foreseeable future in light of the upcoming election and the questions surrounding whom the new president will select to run the agencies. As a result, it is important to consider and prepare for the potential antitrust implications of your transaction early in the process.

Notes:

[1] *See, e.g.*, Matt Stoller, In Lake Wobegon, All Antitrust Enforcers Are Above Average, BIG (Mar. 19, 2024), https://bit.ly/3YzZsp6, ("Khan and Kanter are far more assertive than the traditional antitrust cops. ... Biden enforcers [ ] are in a different league. They have gone after trillion dollar firms, like Microsoft and Meta, as well as politically powerful corporations like American Airlines, Booz Allen, JetBlue, Illumina, Simon and Schuster, and UnitedHealth Group. ... [T]here is a difference today, whether that's a result of environment or litigation choices, or both. Just in merger trials, Biden's people are doing more trials and they are big game hunters."); Diane Bartz, *US FTC tries again to stop Microsoft's already-closed deal for Activision*, Reuters (Dec. 6, 2023), https://reut.rs/3C6SaQL, ("The [FTC's] legal battle [against Microsoft/Activision] is part of a broader push by the Biden administration to fight mergers and price hikes that affect consumers in areas ranging from medicines to airline tickets.").

[2] For example, in May 2024, Assistant Attorney General of the Antitrust Division Jonathan Kanter touted the Antitrust Division's aggressive merger enforcement strategy, remarking that "the measure of the success of policy development is whether our frameworks lead to results for our clients. ... To see those results, you need look no further than the 20 plus mergers abandoned in response to division concerns in the last two and a half years. ... There are too many more to list." Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Remarks at the American Economic Liberties Project 2024 Antimonopoly Summit (May 21, 2024), https://bit.ly/4hebBr7. FTC Chair Lina M. Khan similarly emphasized that the FTC is "Prioritizing Vigorous Merger Enforcement to Combat Consolidation" in her congressional testimony in May 2024. Testimony of Chair Lina M. Khan Before the House Committee on Appropriations, Subcommittee on Financial Services and General Government, at 22-28 (May 15, 2024), https://bit.ly/4fah2WN, [hereinafter "Khan Subcommittee Testimony"].

[3] On the same day they released the 2023 HSR Report, the agencies issued a corrected annual report for fiscal year 2022. Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report for Fiscal Year 2022 (corrected Sept. 2024), https://bit.ly/3NAINLF, [hereinafter "Corrected 2022 HSR Report"]. The FTC and the Antitrust Division issued a corrected version of the report to address some of the inconsistencies in the data previously published by the FTC, which we discussed in a prior article. *See* Ryan Quillian & John Kendrick, *What Cos. Evaluating M&A Can Glean From Latest HSR Report* (Feb. 5, 2024), https://bit.ly/3NAbYOW. In particular, the FTC corrected the 2022 data for (1) the number of abandoned or restructured transactions in 2022 — down to five from seven — and (2) the number of consent decrees — up to twelve from eleven. *See* Press Release, *FTC, DOJ Issue Fiscal Year 2023 Hart-Scott-Rodino Notification Report and Announce Corrected Fiscal Year 2022 Report*, Fed. Trade Comm'n (Oct. 10, 2024), https://bit.ly/3YyBTwK.

[4] For the purposes of this article, the phrase "merger enforcement actions" refers to litigation complaints, pre-litigation consent decrees, and transactions that were restructured or abandoned in response to antitrust concerns from the agencies. This is consistent with how the FTC and the Antitrust Division count their enforcement matters in their annual HSR reports to Congress, including the 2023 HSR Report.

[5] Data on the number of second requests issued is typically only available through the agencies' annual HSR reports to Congress, so the data from the 2023 HSR Report is the most current information available. In other words, we will not have data for 2024 until the agencies publish their 2024 HSR Report.

[6] Although the Fifth Circuit issued its ruling in *Illumina/Grail* during Chair Khan's tenure, the FTC issued its complaint in that matter on March 30, 2021 (i.e., prior to Chair Khan's confirmation by the Senate on June 15, 2021).

[7] The consent agreements in *Chevron/Hess* and *Exxon/Pioneer* were not traditional behavioral or structural remedies intended to address merger-specific harm. Instead, in each case, the FTC's consent order barred one named individual from being appointed to the combined company's board. Commissioners Melissa Holyoak and Andrew N. Ferguson issued a joint dissenting statement in *Exxon/Pioneer* because the Commission's Complaint did not, in their view, demonstrate that the transaction

itself violated Section 7 of the Clayton Act. See Joint Dissenting Statement of Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson. *In re ExxonMobil Corp.*, Comm'n File No. 241-0004 (May 2, 2024), https://bit.ly/4fhRUg3. The Commissioners stated, "We fear instead that the Commission is leveraging its merger enforcement authority to extract a consent from Exxon rather than addressing the conduct of one misbehaving executive." *Id*. at 1. Commissioners Holyoak and Ferguson echoed similar concerns in their separate dissenting statements in *Chevron/Hess*. *See* Dissenting Statement of Commissioner Melissa Holyoak, *In re Chevron Corp. & Hess Corp.*, Comm'n File No. 241-0008, at 1 (Sept. 30, 2024), https://bit.ly/4eReTyX, ("For the second time in five months, the Majority has used its leverage in the HSR process to extract a consent from merging parties with no reason to believe the law has been violated."); Dissenting Statement of Commissioner Andrew N. Ferguson, *In re Chevron Corp. & Hess Corp.*, Comm'n File No. 241-0008 (Sept. 30, 2024), https://bit.ly/4fd1P6K, ("The Commission's Section 7 theory does not hold water. It rests on a series of implausible and unsupported assumptions that fall well short of pleading a violation of the Clayton Act. But it does satisfy a constituency important to the Commission majority — Democratic politicians who have repeatedly and publicly urged the Commission to block this merger in order to advance their climate agenda.").

[8] Although the district court issued its ruling in *Penguin Random House/Simon & Schuster* during AAG Kanter's tenure, the Antitrust Division issued its complaint in that matter on November 2, 2021 (i.e., prior to AAG Kanter's confirmation by the Senate on November 16, 2021).

[9] The data in the chart for 2022 was updated from our prior article to reflect the corrected 2022 HSR Report issued by the agencies on October 10, 2024. *See* note 3, *supra*.

[10] *See* 16 C.F.R Parts 801 and 802, *Premerger Notification; Reporting and Waiting Period Requirements*, at 127-32, 374-87 (2024), https://bit.ly/4h0ptoR, (attempting to quantify the increased burden the final rule would impose on filers).

[11] *See, e.g.*, Concurring Statement of Commissioner Andrew N. Ferguson, In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803, F.T.C. Matter Number P239300, at 11 (Oct. 10, 2024), https://bit.ly/4f6Ty46, (referring to "the [FTC] majority's general suspicion of mergers and acquisitions").

[12] *See, e.g.*, Khan Subcommittee Testimony, *supra* note 2, at 28 ("As a complement to [the agency's] strengthened merger enforcement, the FTC is also reassessing the efficacy of its approach to merger remedies and identifying how to learn from lessons of the past. Specifically, we strongly disfavor behavioral remedies and will not hesitate to reject proposed divestitures when our experience and expertise suggests that they cannot fully cure the underlying harm.").

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