

# **BIDEN ADMINISTRATION'S HSR DATA: 7 KEY TAKEAWAYS (AND SOME SURPRISES)**

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## BIDEN ADMINISTRATION'S HSR DATA: 7 KEY TAKEAWAYS (AND SOME SURPRISES)

The Federal Trade Commission (FTC) recently released the Hart-Scott-Rodino Annual Report for Fiscal Year 2022 (the Report)<sup>1</sup>, which includes Hart-Scott-Rodino Act filing (HSR filing) statistics for the most recent year available (October 1, 2021 to September 30, 2022) and provides a rich dataset to assess the outcome of the US Department of Justice (DOJ) and FTC's enforcement efforts.

We analyzed these and other data, and the results highlight some surprising continuities with past administrations as well as some marked shifts:

1. Despite media coverage implying that merger enforcement spiked during the Biden administration,<sup>2</sup> according to the numbers released so far, not much has changed in terms of the overall likelihood that an HSR-reportable deal will be investigated, receive a Second Request, result in an enforcement action, or result in litigation.
2. Similarly, despite media coverage characterizing the Biden administration as aggressively—albeit unsuccessfully—seeking to block deals it believes are anticompetitive, the number of litigated cases continues to be small, and the Biden administration's positive outcomes from merger litigation (i.e., injunctions or parties abandoning deals) are about the same as those of prior administrations.
3. There are, however, at least two new, and perhaps correlated, trends. Data shows there has been a sharp decrease in settlements over the last year or two. Perhaps as a result, data suggests about 35-45% of transactions receiving Second Requests are now abandoned prior to litigation (and even more are restructured)—a substantially higher number than prior years, although the number of affected transactions remains small.
4. Despite press reporting on agency concerns about private equity, no unique focus on private equity deals is apparent from the data.
5. The vast majority—nearly three quarters—of all transactions in which a Second Request was issued were subject to an enforcement action (i.e., pre-litigation deal abandonment or restructuring, settlement, or litigation).
6. Larger deals and deals in certain industries—including broadcasting, health care (e.g., hospitals), machinery manufacturing, and pharmaceuticals/chemicals manufacturing appear more likely to draw a Second Request.
7. The FTC is about twice as likely to open an investigation than is the DOJ; however, DOJ investigations are much more likely to end in a Second Request than FTC investigations.

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<sup>1</sup> U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, [Hart-Scott-Rodino Annual Report for Fiscal Year 2022](#) (Dec. 2023).

<sup>2</sup> See, e.g., Andrew Ross Sorkin et al., [Biden's Antitrust Team Isn't Backing Down From a Fight on Deals](#), *The New York Times* (July 19, 2023); Ed Hammond, [Economic Reality and Antitrust Theory Paralyze M&A](#), *Washington Post* (May 2, 2023).

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Below, we discuss the data on each of these points as well as other relevant findings and discuss the implications for dealmakers in this enforcement environment. For example, the Report contains valuable information to drive deal planning, antitrust risk allocation, and termination provisions in transactional agreements.

## KEY TAKEAWAYS FROM LAST 10 YEARS OF HSR DATA

The following are definitions of terms used in the discussion below:

- *Investigation* – The FTC or DOJ is granted clearance to open an investigation during the initial 30-day HSR waiting period, which may or may not result in a so-called “Second Request.”
- *Second Request* – The FTC or DOJ issues a “Request for Additional Information or Documentary Material” under the HSR Act (akin to a subpoena), often resulting in months-long reviews.
- *Enforcement Action* – The FTC or DOJ and the merging parties agree on a settlement, or the merging parties abandon or restructure the deal in response to an antitrust investigation or defend the deal in court against an FTC or DOJ lawsuit. Note that some enforcement actions have been brought with respect to transactions that are not HSR-reportable.
- *HSR Filings* – The number of transactions reported under the HSR Act to the agencies rather than the number of filings, given that for HSR purposes, buyer and seller must separately file for the same transaction.<sup>3</sup>
- *Fiscal Year* – The FTC and DOJ fiscal years begin on October 1 and end on September 30. Fiscal Year 2022 began October 1, 2021 and ended September 30, 2022. Second Requests and enforcement actions may not occur in the same year in which an HSR Act filing is made; therefore, the statistics set forth below regarding the likelihood that an HSR-reportable transaction results in a Second Request or enforcement action in a particular year are inexact.
- *Administration* – For purposes of this analysis, the Biden administration includes FY 2021 – FY 2023 (unless otherwise stated); the Trump administration includes FY 2017 – FY 2020; and the second term of the Obama administration includes FY 2013 – FY 2016.

### **Likelihood of any HSR-Reportable Transaction Being Subject to an Investigation, a Second Request, or An Enforcement Action is Relatively Consistent Over the Past Decade**

In FY 2022, the FTC and DOJ (the agencies) issued Second Requests for only 1.6% of all HSR-reportable transactions, the lowest percentage in the last 10 years, although the total number of Second Requests issued (47) was similar to prior years. Further, the FTC and DOJ opened investigations with respect to only 9.6% of all HSR Act reportable transactions (including transactions that did and did not receive Second Requests), which is also below average compared to the prior 10 years.

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<sup>3</sup> Given that both buyer and seller need to separately file HSR for each transaction, the number of filings is about double these figures.

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Although the agencies' 50 enforcement actions in FY 2022 is the most in the last 10 years, the relative rate of enforcement in FY 2022 (i.e., percentage of enforcement actions of the total number of HSR filings submitted during that fiscal year)—i.e., 1.6%—is below the prior 10-year average of 2.1%.

Fiscal Year	Investigations		Second Requests		Enforcement Actions <sup>4</sup>		HSR Filings
	Percent <sup>5</sup>	Number	Percent <sup>6</sup>	Number	Percent <sup>7</sup>	Number	Total submitted
2022	9.6%	291	1.5%	47	1.6%	50	3,152
2021	7.9%	270	1.9%	65	0.9%	32	3,520
<b>Biden</b>	<b>8.4%</b>	<b>561</b>	<b>1.7%</b>	<b>112</b>	<b>1.2%</b>	<b>82</b>	<b>6,672</b>
2020	10.7%	169	3.0%	48	2.6%	43	1,637
2019	11.7%	237	3.0%	61	1.8%	38	2,089
2018	14.1%	286	2.2%	45	1.8%	39	2,111
2017	13.9%	277	2.6%	51	2.0%	41	2,052
<b>Trump</b>	<b>12.3%</b>	<b>969</b>	<b>2.6%</b>	<b>205</b>	<b>2.0%</b>	<b>161</b>	<b>7,889</b>
2016	13.4%	238	3.0%	54	2.6%	47	1,832
2015	14.7%	258	2.7%	47	2.3%	42	1,801
2014	16.9%	274	3.2%	51	2.0%	33	1,663
2013	16.9%	217	3.7%	47	2.9%	38	1,326
<b>Obama (2<sup>nd</sup> Term)</b>	<b>14.90 %</b>	<b>987</b>	<b>3.0%</b>	<b>199</b>	<b>2.4%</b>	<b>160</b>	<b>6,622</b>
<i>Average</i>	<i>13%</i>	<i>258</i>	<i>2.7%</i>	<i>52</i>	<i>2.1%</i>	<i>40</i>	<i>2,118</i>

The FTC has issued only two years of comprehensive HSR filing statistics (FY 2021 and FY 2022) for the Biden administration; statistics issued for FY 2023, which include data indicating the number of investigations and Second Requests, are incomplete. FY 2021 and FY 2022 were unusual years, with the first and second highest number of HSR filings submitted since the size of transaction threshold was

<sup>4</sup> Includes transactions in which a final consent order was issued or settlement was entered into; transactions that were abandoned or restructured as a result of antitrust concerns raised during the investigation; and transactions in which the agencies pursued litigation in administrative or federal court.

<sup>5</sup> Based on an adjusted number of HSR filings to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a complaint notification); and (4) transactions withdrawn before the waiting period began.

<sup>6</sup> *Id.*

<sup>7</sup> This includes only those enforcement actions brought during the fiscal year, regardless of which fiscal year the HSR filing was submitted.

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increased to \$50 million (as adjusted) in 2001. In the FTC's most recent fiscal year (Oct. 2022 through Sept. 2023), parties submitted HSR filings for only 1,884 transactions, a 40.2% decrease.<sup>8</sup>

The decline in HSR Act filings since FY 2022 means the FTC and DOJ have had more resources to allocate to each individual HSR reportable transaction, and their total resources will likely increase going forward. The annual budget of the FTC increased from \$376.5 million in FY 2022 to \$430 million in FY 2023, and the annual budget of the DOJ increased from \$200 million in FY 2022 to \$225 million in FY 2023.<sup>9</sup> The FTC is seeking \$590 million for FY 2024<sup>10</sup>; and the DOJ is seeking a budget of \$324.8 million for FY 2024.<sup>11</sup>

These funding increases, along with forthcoming changes to HSR Act Rules and recently published merger guidelines, will give the agencies new tools to investigate transactions and bases to pursue enforcement actions, although what effect this has on the FTC's and DOJ's enforcement rates remains to be seen.

## Similar Likelihood of Deals Blocked via Litigation or the Threat of Litigation

It has widely been reported that the Biden administration's win/loss record in obtaining merger injunctions in court has lagged compared with prior administrations.<sup>12</sup>

On one hand, this narrative is supported by the outcome of the very few merger litigations in which a court makes a preliminary injunction determination: the Biden administration has thus far secured four injunctions with six losses. Comparatively, the Trump administration had seven wins and five losses<sup>13</sup> and the second term of the Obama administration had seven wins and just two losses.

On the other hand, the Biden administration's record has recently improved after scoring its third and fourth injunction on December 29, 2023 and January 16, 2024, respectively.<sup>14</sup> Further, the Biden administration has enjoyed about the same level of success as prior administrations in using litigation to

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<sup>8</sup> More detailed statistics regarding enforcement activity in FY 2023 will not be available until late 2024.

<sup>9</sup> See Morgan Lewis LawFlash, [New Legislation Dramatically Increases Funding to US Antitrust Agencies over Five Years, Ensuring Aggressive Enforcement](#) (Jan. 10, 2023).

<sup>10</sup> U.S. Fed. Trade Comm'n, [Congressional Budget Justification for Fiscal Year 2024](#) (Mar. 13, 2023).

<sup>11</sup> U.S. Dep't of Justice, Antitrust Div., [FY 2024 Performance Budget Congressional Justification Submission](#) (Nov. 14, 2023).

<sup>12</sup> See, e.g., Diane Bartz, [U.S. keeps losing antitrust court battles but few expect pullback](#) (Oct. 4, 2022), Reuters.

<sup>13</sup> Wins include *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016), in which the US Court of Appeals for the Third Circuit reversed the decision of the district court, and granted a preliminary injunction, and in *Opinion of the Commission, Otto Bock Healthcare North America, Inc.*, FTC Docket No. 9378 (Nov. 1, 2019), in which the FTC prevailed in administrative court, and the parties divested assets thereafter. Losses include the FTC withdrawing its administrative complaint in *In the Matter of Cabell Hunting Hospital, Inc.*, Docket No. 9366 (Jul. 6, 2016) after West Virginia passed legislation effectively making the transaction challenged by the FTC lawful under state law.

<sup>14</sup> See *FTC v. IQVIA Holdings Inc.*, 2023 U.S. Dist. LEXIS 232185 (S.D.N.Y. Dec. 29, 2023); *United States v. JetBlue Airways Corp.*, No. CV 23-10511-WGY, 2024 WL 162876 (D. Mass. Jan. 16, 2024).

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block deals it views as anticompetitive, when including both preliminary injunctions *and* transactions that were abandoned after the agencies filed a complaint are included. Accordingly, at least at this point in time, the narrative that the Biden administration’s litigation record is meaningfully worse than the prior administrations’ does not appear to hold up.

	<b>PI Grants /Deals Abandoned Post-Litigation</b>	<b>Total Deals Litigated<sup>15</sup></b>	<b>% of Deals Blocked Via Litigation</b>
Biden (through present)	16	25	64%
Trump	15	23	65%
Obama (2 <sup>nd</sup> Term)	19	26	73%

## **Agency Settlements Are Sharply Down and Abandonments and Restructurings Are Becoming the Norm**

The Biden administration entered into far fewer formal consent orders/settlements than the prior Trump administration or last term of the Obama administration, and the drop has continued into FY 2023. The DOJ, which entered into only four pre-litigation settlements in FY 2022, has not entered into a pre-litigation settlement since November 12, 2021. Meanwhile, the FTC has agreed to just one pre-litigation settlement since October 2022.

	<b>Post-Litigation Settlement</b>	<b>Pre-Litigation Settlement</b>	<b>Total Settlements</b>	<b>HSR Filings</b>	<b>Percent Ending in Settlement</b>
Biden (through FY 2023)	3	30	33	8,556	0.39%
Trump	3	79	82	7,889	1.04%
Obama (2 <sup>nd</sup> Term)	5	89	94	6,622	1.42%

Perhaps because formal settlements with the agencies are an unlikely outcome, there has been a recent uptick in parties taking matters into their own hands to avoid litigation: either by abandoning or restructuring their transactions in response to antitrust scrutiny.

- In FY 2022, parties abandoned 10 transactions during DOJ investigations (compared with none in FY 2021) and restructured six (compared with just three in FY 2021). The DOJ has not yet released comparable data for FY 2023.
- Meanwhile, FY 2023 data released by the FTC in response to a request from Congress shows that parties abandoned nine transactions during FTC investigations (compared with just three in FY 2022).<sup>16</sup> Moreover, another two transactions were abandoned

<sup>15</sup> Includes all transactions in which the DOJ or FTC initiated administrative or federal court litigation.

<sup>16</sup> See App’x to Letter to The Honorable Thomas P. Tiffany, from Lina M. Khan, Chair, U.S. Fed. Trade Comm’n (Nov. 3, 2023), [Appendix A: Merger Enforcement \(Jun. 2021 – Present\)](#), hereinafter (the Letter). Note that the FTC has not released FY 2023 data regarding the number of transactions that were restructured during FTC investigations, or the number of Second Requests the FTC has issued. Further,

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during an FTC investigation in the first month of FY 2024, the last month in which such data has been reported.

In fact, recent data suggests that over the past year or two, roughly 35–45% of all transactions in which a Second Request has been issued now end in abandonment as a result of an antitrust investigation prior to litigation, and even more are restructured.

	DOJ		FTC	
	DOJ Second Requests	% Abandoned / Restructured	FTC Second Requests	% Abandoned / Restructured
FY 2023	<i>TBD</i>	<i>TDB</i>	<i>TBD</i>	<b>&gt; ~36% (est.<sup>17</sup>) / unknown*</b>
FY 2022	22	<b>45.4% / 27.2%</b>	25	8.0% / 20.0%
FY 2021	23	0.0% / 13.0%	42	16.6% (combined abandoned or restructured)
Trump	93	20.4% / 9.7%	112	27.7% (combined abandoned or restructured)
Obama (2nd Term)	99	19.1% / 18.1%	100	8.0% (combined abandoned or restructured)

What is not possible to measure from these data is the extent to which parties' inability to enter into formal settlements with the FTC and DOJ, as well as the perceived increase in enforcement and louder government rhetoric, is reducing the number of strategic mergers, i.e., dampening mergers and acquisitions and consequently reducing innovation and efficiencies.<sup>18</sup>

before FY 2022, the FTC generally reported the total number of deals abandoned or restructured without differentiating between the two with respect to FTC investigations. According to the Report, there were seven total abandoned or restructured transactions, of which, according to the Letter, two were abandoned transactions.

<sup>17</sup> Although it is not known how many Second Requests the FTC issued in FY 2023, we do know that 11 transactions were abandoned in FY 2023 prior to litigation. Even if the FTC issued the same number of Second Requests (25) as in FY 2022 (when there was 40% more HSR-reportable transactions), the rate of abandonment would have been 36%, a substantial uptick from the rate of abandonments and restructurings combined during the Trump administration. Moreover, enforcement actions including abandonment often occur in the fiscal year after the Second Request was issued. The number of restructured transactions in FY 2023 has not yet been reported; historically, the FTC does not provide separate tallies of abandoned or restructured transactions investigated by the FTC.

<sup>18</sup> Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), ("I am pleased to report that our remedies policy is working. We are seeing dramatically fewer illegal mergers, which benefits the public, conserves valuable resources and provides greater clarity and predictability to the business community.").

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## No Unique Focus on Private Equity Buyers

There has been significant press coverage on the Biden administration's efforts to reign in private equity, which include proposed new HSR Act disclosures for private equity firms<sup>19</sup> and new proposed merger guidelines focused on "roll-up" strategies.<sup>20</sup>

However, few private equity transactions have resulted in an enforcement action during the Biden administration. By our count, only about five of about 60 enforcement actions that have been announced by the FTC or DOJ during the Biden administration involved a private equity (or private equity backed) buyer.

## Most Second Requests End in Enforcement Actions

Data indicates that a transaction in which a Second Request has been issued ends in an enforcement action about a 70–80% of the time. Again, here *enforcement action* is defined as either the FTC or DOJ and the merging parties agree on a settlement, or the merging parties abandoned or restructured the transaction, or were subject to court challenge.

	<b>Second Requests</b>	<b>Enforcement Actions</b>	<b>Percent</b>
Biden (through FY 2022)	112	82	73.2%
Trump	205	161	78.5%
Obama (2 <sup>nd</sup> Term)	199	160	80.4%

Recent data suggests that the likelihood of an enforcement action after receiving a Second Request remains very high. In fact, the DOJ reported more enforcement actions in FY 2022 (26) than the number of Second Requests that the DOJ issued in either FY 2022 (22) or FY 2023 (23), suggesting that the vast majority, and perhaps all, resulted in an enforcement action.<sup>21</sup>

The story is similar with respect to the FTC: using number of Second Requests the FTC issued in FY 2022 (25) as a proxy, in FY 2023, more than half resulted in either abandonment (36%) pre-litigation settlement (8%); or post-litigation settlement (8%); and the remaining 48% were either restructured pre-litigation or closed without any enforcement action.

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<sup>19</sup> See, e.g., Stefania Palma, et. al., [US private equity faces extra scrutiny under new merger review rules](#), (Jul. 1, 2023), *Financial Times*; Morgan Lewis LawFlash, [New HSR Form Will Transform the US Merger Review Process](#).

<sup>20</sup> See Morgan Lewis LawFlash, [New US Merger Guidelines Signal Continued Aggressive Merger Enforcement at DOJ, FTC](#) (Dec. 21, 2023).

<sup>21</sup> It is possible that some enforcement actions were taken with respect to transactions for which a Second Request was issued prior to FY 2021 or that did not require an HSR Act filing.



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## Larger Deals and Deals in Certain Industries More Likely to Result in Second Request

The HSR statistics reveal which types of transactions have been most likely to be investigated and receive a Second Request during the Biden administration.

Generally, larger deals have attracted more scrutiny. Transactions in the Biden administration valued in excess of \$1 billion have been about three times more likely to be investigated and six times more likely to receive a Second Request than transactions valued below \$300 million.

	% of Transactions Investigated		% of Transactions Receiving Second Request	
	< \$300 M	> \$1 BN	< \$300 M	> \$1 BN
FY 2022	6.3%	15.7%	0.4%	4.3%
FY 2021	5.4%	14.7%	0.9%	4.7%
Biden (through FY 2022)	5.8%	15.2%	0.7%	4.4%

Transactions involving targets in certain industries have also been more prone to receive Second Requests. The HSR statistics, which shows all HSR reportable transactions by the industry<sup>22</sup> in which the acquired entity derived revenue, reveals that eight of 85 industries account for over one third of all Second Requests, and that acquisitions of companies involved in broadcasting, hospitals, and machinery manufacturing have had more than double the likelihood of receiving a Second Request than average.

Biden Administration Through FY 2022			
Industry Based on Acquired Entity Deriving Revenue	Adjusted HSR Transactions	Second Requests	Percent Receiving Second Request
All	6,442	112	1.7%
Ambulatory	206	4	1.9%
Broadcasting	24	4	16.7%
Internet Service Providers	220	4	1.8%
Hospital	27	3	11.1%
Machinery Manufacturers	103	4	3.9%
Wholesalers – Nondurable	236	5	2.1%
Pharma / Chemical Manufacturing	267	7	2.6%
Publishing	628	7	1.1%
Professional, Scientific and Technical Services	77	8	1.0%

Other HSR statistics suggest that a disproportionate number of Second Requests may be aimed at pharmaceutical and chemical manufacturing transactions. Of the 346 transactions during the Biden

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administration in which the acquiring person derived revenues in this industry, 13 (3.8%) received a Second Request; it is possible some of the “acquired entities” involved in these transactions were clinical stage pharmaceutical companies that did not derive revenue in any industry.

## More FTC Investigations than DOJ; About Same Number of Second Requests

Most agency investigations do not result in a Second Request. However, which agency investigates a transaction does change the likelihood in outcome of a Second Request.

The FTC is more likely to launch an investigation than the DOJ, although the DOJ has increased its share of investigations during the Biden administration. Additionally, with the exception of FY 2021, when the FTC issued a record 67 Second Requests, the DOJ is more likely to issue a Second Request after an investigation is launched. Ultimately, the FTC and DOJ issue a similar number of Second Requests.

	% of Total Investigations		% of Investigations Resulting in Second Request		% of Second Requests Issued	
	FTC	DOJ	FTC	DOJ	FTC	DOJ
FY 2022	63.2%	36.8%	13.6%	20.6%	53.2%	46.8%
FY 2021	60.7%	39.3%	25.6%	21.7%	64.6%	35.4%
Biden	62.0%	38.0%	19.2%	21.1%	59.8%	40.2%
Trump	68.9%	31.1%	16.8%	30.9%	54.6%	45.4%
Obama (2 <sup>nd</sup> Term)	69.0%	31.0%	14.7%	32.4%	50.3%	49.7%

## CONCLUSIONS/TAKEAWAYS

The latest available FTC/DOJ merger and acquisition enforcement data appears to refute certain media narratives with respect to the FTC/DOJ’s enforcement record; reveals certain new and unexpected trends; and provides rich insights into which deals are likely to attract investigations and Second Requests.

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