

Morgan Lewis

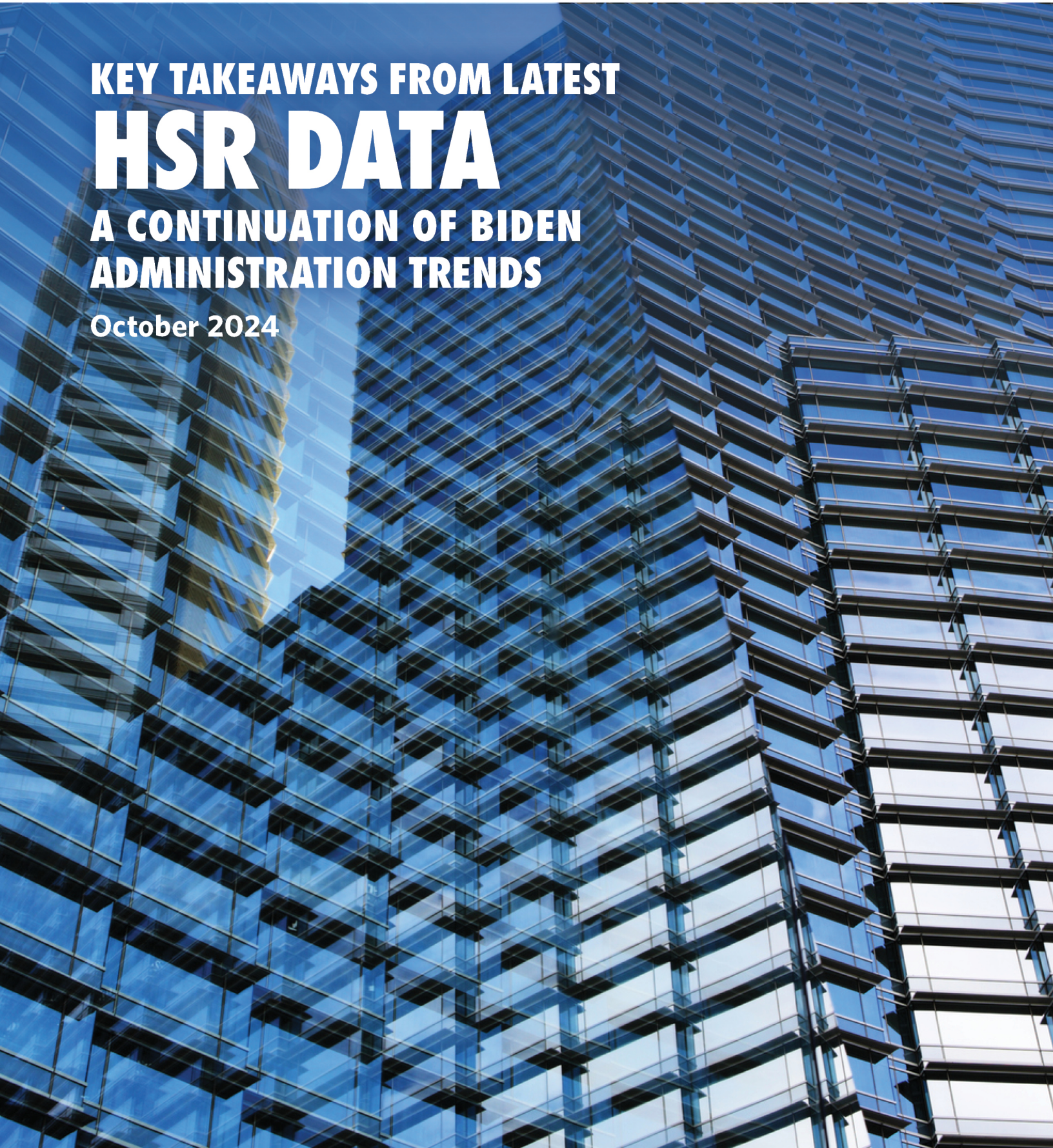
REPORT

KEY TAKEAWAYS FROM LATEST

HSR DATA

**A CONTINUATION OF BIDEN
ADMINISTRATION TRENDS**

October 2024



KEY TAKEAWAYS FROM LATEST HSR DATA: A CONTINUATION OF BIDEN ADMINISTRATION TRENDS

On the same day it released its final Hart-Scott-Rodino Act (HSR) Rules,¹ the Federal Trade Commission (FTC) released the Hart-Scott-Rodino Annual Report for Fiscal Year 2023 (the Report),² which includes Hart-Scott-Rodino Act filing (HSR filing) statistics for the most recent year available (October 1, 2022 to September 30, 2023) and provides a rich data set to assess the outcome of the US Department of Justice (DOJ) and FTC's enforcement efforts.

In 2023, we analyzed these and other data across prior administrations.³ The latest data set shows a continuation of trends we highlighted previously:

1. Although the total number of HSR filings submitted in FY 2023 plummeted from the previous year, not much 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. The number of HSR filings submitted so far in FY 2024 is moderately higher than those submitted in FY 2023 based on statistics released so far.
2. The Biden administration's positive outcomes from merger litigation (i.e., injunctions or parties abandoning deals) remains about the same as those of prior administrations; very few merger matters were litigated in FY 2023.
3. In FY 2023, there were only two pre-litigation settlements at the FTC, and none with the DOJ. Perhaps as a result, the percentage of deals subject to a Second Request ending in abandonment or restructuring (including, e.g., a "fix-it-first" divestiture) has continued to spike.
4. It remains the case that 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).
5. Increasingly, the government *rarely* issues second requests to deals valued at or below \$200 million and instead targets deals valued above \$1 billion. In fact, only one of 402 HSR filings submitted for deals valued at or below \$200 million was issued a Second Request, compared with 16 of 417 transactions valued above \$1 billion in FY 2023.
6. Only a handful of industries account for almost half of all second requests, with merger and acquisition targets in healthcare, broadcasting, and oil and gas mergers most likely to receive one.
7. There has been a pronounced downward trend in "intra-industry" mergers during the Biden administration.

¹ [US Federal Trade Commission Issues Final Rules on HSR Pre-Merger Reporting](#) (Oct. 14, 2024).

² U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, [Hart-Scott-Rodino Annual Report for Fiscal Year 2022](#) (Dec. 2023).

³ [Biden Administration's HSR Data: 7 Key Takeaways and Some Surprises](#) (Jan. 2024).

Morgan Lewis

In this report, we examine the data on each of these points as well as other relevant findings and discuss the implications for dealmakers in this enforcement environment, including 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), resulting often 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.⁴
- *Fiscal Year* – The FTC and DOJ fiscal years begin on October 1 and end on September 30. Fiscal Year 2023 began October 1, 2022, and ended September 30, 2023. 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 2023, the FTC and DOJ issued second requests for only 37 transactions, the lowest number issued in the previous 10 years. The percentage of second requests issued per transaction was slightly up (2.0%) as compared to 2022 (1.5%), but still below the prior 10-year average.

The FTC and DOJ had 28 enforcement actions in FY 2023, which is the lowest in the last 10 years, and the relative rate of enforcement in FY 2023 (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 1.9%.

⁴ Given that both buyer and seller need to separately file HSR for each transaction, the number of filings is about double these figures.

Morgan Lewis

1,805 HSR reportable transactions were notified during FY 2023, a 42.7% decrease from the year before.⁵ However, it appears that HSR-reportable deals have increased for FY 2024. Data related so far for the FTC’s most recent fiscal year (October 2023 through September 2024) shows 1,885 transactions, with one month unaccounted for.

Fiscal Year	Investigations		Second Requests		Enforcement Actions ⁶		HSR Filings
	Percent ⁷	Number	Percent ⁸	Number	Percent ⁹	Number	Total submitted
2023	10.2%	185	2.0%	37	1.6%	28	1,805
2022	9.2%	291	1.5%	47	1.6%	49	3,152
2021	7.7%	270	1.8%	65	0.9%	32	3,520
Biden	8.8%	746	1.8%	149	1.3%	110	8,477
2020	10.3%	169	2.9%	48	2.6%	43	1,637
2019	11.3%	237	2.9%	61	1.8%	38	2,089
2018	13.5%	286	2.1%	45	1.8%	39	2,111
2017	13.5%	277	2.5%	51	2.0%	41	2,052
Trump	12.3%	969	2.6%	205	2.0%	161	7,889
2016	13.0%	238	2.9%	54	2.6%	47	1,832
2015	14.3%	258	2.6%	47	2.3%	42	1,801
2014	16.5%	274	3.1%	51	2.0%	33	1,663
2013	16.4%	217	3.5%	47	2.9%	38	1,326
Obama (2nd Term)	14.90%	987	3.0%	199	2.4%	160	6,622
<i>Average</i>	<i>12.4%</i>	<i>246</i>	<i>2.5%</i>	<i>50</i>	<i>2.0%</i>	<i>39</i>	<i>2,090</i>

⁵ More detailed statistics regarding enforcement activity in FY 2024 will not be available until late 2024.

⁶ 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.

⁷ 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.

⁸ *Id.*

⁹ This includes only those enforcement actions brought during the fiscal year, regardless of which fiscal year the HSR filing was submitted.

Morgan Lewis

Few Merger Litigation Outcomes, With Similar Success

In FY 2023, the Biden administration continued to have about the same level of success as prior administrations in using litigation to block deals it views as anticompetitive. Of the six transactions the FTC or DOJ sought to enjoin, the FTC and DOJ prevailed in three and lost one, while two settled during litigation.

	PI Grants /Deals Abandoned Post-Litigation	Total Deals Litigated¹⁰	% of Deals Blocked Via Litigation
Biden FY 2023	3	6	50% ¹¹
Biden (through present)	18	26	69%
Trump	15	23	65%
Obama (2 nd Term)	19	26	73%

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

The Biden administration continues to enter 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. Although the FTC agreed to two pre-litigation settlements in FY 2023, the DOJ has not entered into one since November 12, 2021.

	Post-Litigation Settlement	Pre-Litigation Settlement	Total Settlements	HSR Filings	Percent Ending in Settlement
FY 2023	2	2	4	1,805	0.22%
Biden (through FY 2023)	5	32	37	8,477	0.44%
Trump	3	79	82	7,889	1.04%
Obama (2 nd Term)	5	89	94	6,622	1.42%

Perhaps because formal settlements with the FTC and DOJ are an unlikely outcome, there has been a recent uptick in parties taking matters into their own hands to avoid litigation by abandoning or restructuring their transactions in response to antitrust scrutiny. Of the 10 transactions abandoned or restructured in the face of FTC scrutiny in 2023, at least four were abandoned.

¹⁰ Includes all transactions in which the DOJ or FTC initiated administrative or federal court litigation.

¹¹ Includes DOJ's trial victory in *United States v. American Airlines Group Inc.*, No. CV 21-11558-LTS, 2023 WL 4766220 (D. Mass. July 26, 2023), which the FTC reports as a merger matter.

Morgan Lewis

	DOJ		FTC	
	DOJ Second Requests	% Abandoned / Restructured	FTC Second Requests	% Abandoned or Restructured
FY 2023	11	90.9%	26	38.5%
Biden (through FY 2023)	56	51.8%	93	25.8%
Trump	93	30.1%	112	27.7%
Obama (2 nd Term)	99	27.2%	100	8.0%

Most Second Requests End in Enforcement Actions

Data continues to indicate that a transaction in which a second request has been issued ends in an enforcement action about 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.

	Second Requests	Enforcement Actions	Percent
FY 2023	37	28	75.7%
Biden (through FY 2023)	149	110	73.8%
Trump	205	161	78.5%
Obama (2 nd Term)	199	160	80.4%

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

FY 2023 continues to show that the largest HSR reportable deals are more likely to result in an investigation and second request than the smallest HSR-reportable deals. Transactions valued in excess of \$1 billion were about three times more likely to be investigated and 15 times more likely to receive a second request than transactions valued at or below \$200 million.

At the same time, the agencies continue to investigate and issue second requests to transactions of all sizes. In fact, transactions valued below \$1 billion received more investigations and second requests than transactions valued above \$1 billion.

Morgan Lewis

FY 2023 HSR Filing Data					
Transaction Valuation	# of Transactions	# of Transactions Investigated	% of Transactions Investigated	# of Second Requests	% of Transactions Receiving Second Request
Less Than \$500 M	954	66	6.92%	12	1.26%
\$500 M or Greater but Less Than < \$1 BN	309	39	12.62%	8	2.59%
Greater Than \$1 BN	472	80	16.95%	17	3.60%

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 industry¹² in which the acquired entity derived revenue, reveals that 11 of 85 industries account for nearly half of all second requests, and that acquisitions of companies involved in broadcasting, hospitals, and petroleum and coal manufacturing have had among the highest likelihood of receiving a second request.

Biden Administration Through FY 2023			
Industry Based on Acquired Entity Deriving Revenue	Adjusted HSR Transactions	Second Requests	Percent Receiving Second Request
All	8,177	149	1.8%
Ambulatory	239	7	2.90%
Broadcasting	29	4	13.80%
Fabricated Metal Manufacturing	94	4	4.30%
Food and Kindred Products	159	5	3.10%
Hospital	49	5	10.20%
Machinery Manufacturers	137	5	3.60%
Petroleum and Coal Manufacturing	24	5	20.80%
Pharma / Chemical Manufacturing	351	8	2.30%
Professional, Scientific and Technical Services	263	12	4.60%
Publishing	739	8	1.10%
Wholesalers – Nondurable	325	9	2.80%

Other HSR statistics suggest a disproportionate number of second requests may be aimed at pharmaceutical and chemical manufacturing transactions. Of the 521 transactions during the Biden administration in which the acquiring person derived revenues in this industry, 19 (3.6%) received a

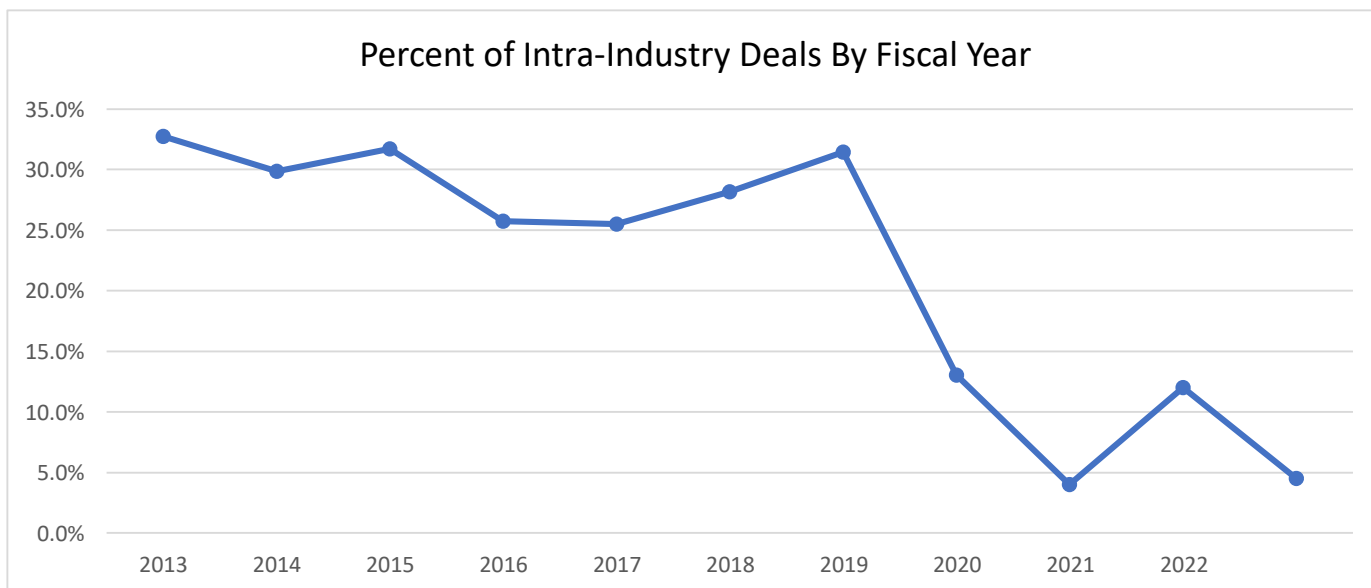
Morgan Lewis

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.

Conversely, HSR filings submitted by newly formed private equity funds rarely received scrutiny. The percentage of HSR filings submitted on behalf of an entity with “fund” or “LP” in its name, which is indicative of a private equity acquisition, has grown from about 10% in 2000 to over 40% in 2022. Of the 241 HSR filings submitted by an acquiring person that did not derive revenue from any code, which includes new investment funds, none received a second request and only two (less than 1%) were investigated.

INTRA-INDUSTRY DEALS CONTINUE TO FALL AS PERCENTAGE OF TOTAL DEALS

Data show there has been a steep decline during the Biden Administration with respect to the percentage of HSR Act reportable transactions that are “intra-industry” transactions, both in terms of total number and percentage of all HSR Act reportable transactions. Just 7.1% of transactions during the Biden Administration (FY 2021–2023) have been identified as “intra-industry,” compared with 25.2% during Trump (FY 2017–2020) and 29.8% in the second Obama administration (FY 2013–2016). In FY 2023, only 79 transactions were identified as “Intra-Industry,” the lowest number since at least 2013.



It is worth noting that the FTC assigns each of the Acquiring Person and Acquired Entity to a single THREE-digit NAICS code, and the FTC does not explain the methodology for doing so. In releasing the final HSR Act Rules, the FTC estimates that 45% of HSR filings will have at least one overlap of NAICS code.¹³ Still, assuming the FTC uses consistent allocation methodology over the years, the lessening of intra-industry mergers during the Biden Administration is noteworthy.

¹³ This estimate includes overlaps in the newly created competition descriptions portion of the new HSR form. Federal Trade Commission, Final Rules: Hart-Scott-Rodino Antitrust Improvements Act of 1976 (unpublished) 380 (2024).

TAKEAWAYS

The latest available FTC/DOJ merger and acquisition enforcement data appears to support trends we had identified previously regarding the level and focus of antitrust enforcement during the Biden administration and provides rich insights into which deals are likely to attract investigations and second requests.

Morgan Lewis

At Morgan Lewis, we're always ready to respond to the needs of our clients and craft powerful solutions for them.

Connect with us     

www.morganlewis.com

© 2024 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP.

In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship.

Prior results do not guarantee similar outcomes. Attorney Advertising.

102824_242153

Morgan Lewis

CONTACTS

If you have any questions or would like more information on the issues discussed in this report, please contact any of the following:

Authors

David R. Brenneman	+1.202.739.5056	david.brenneman@morganlewis.com
Harry T. Robins	+1.212.309.6728	harry.robins@morganlewis.com
Damos Anderson	+1.202.739.5058	damos.anderson@morganlewis.com
Bernard W. Archbold	+1.202.739.5696	bernard.archbold@morganlewis.com

New York

Stacey Anne Mahoney	+1.212.309.6930	stacey.mahoney@morganlewis.com
Harry T. Robins	+1.212.309.6728	harry.robins@morganlewis.com
M. Luisa Di Lauro	+1.212.309.6842	luisa.dilauro@morganlewis.com

Washington, DC

David R. Brenneman	+1.202.739.5056	david.brenneman@morganlewis.com
Joshua M. Goodman	+1.202.739.5418	joshua.goodman@morganlewis.com
Ryan Kantor	+1.202.739.5343	ryan.kantor@morganlewis.com

ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world. For more information about us, please visit www.morganlewis.com.