

Data On Biden's Tough Antitrust Stance Paints Subtler Picture

By **Amanda Wait and Leslie Roter** (February 1, 2022)

U.S. antitrust authorities have publicly decried the growth of dominant companies and have announced initiatives to increase merger enforcement and conduct more rigorous merger reviews. But looking behind the rhetoric to the data shows that enforcement may not be increasing as much as companies may fear — at least not yet.

What we are seeing, however, are administrative and substantive changes that are leading to longer and more burdensome reviews.

The Rhetoric

This past year has heralded an evolution in competition policy as antitrust law remained a prominent part of public discourse. On July 9, 2021, President Joe Biden signed a sweeping executive order that called for antitrust agencies to more aggressively scrutinize proposed mergers and acquisitions in certain major sectors, including energy, health care and technology.[1]

Multiple bills were introduced in Congress and in state legislatures that, if passed, would significantly alter antitrust law and affect its enforcement.[2] Most significantly, new leadership took office at both of the U.S. antitrust agencies, with Lina Khan becoming chair of the Federal Trade Commission and Jonathan Kanter heading the Antitrust Division of the U.S. Department of Justice.

We have already seen sweeping changes in antitrust enforcement practices. Even before Khan's confirmation to the FTC, both the FTC and DOJ indefinitely suspended grants of early terminations of the Hart-Scott-Rodino Act waiting period in February 2021.[3]

Once Khan assumed office in June 2021, the FTC rescinded numerous other long-standing merger enforcement policies and implemented new protocols. For example, in August 2021, the FTC began issuing preconsummation warning letters to parties in several transactions in which it did not complete its investigation within the HSR waiting period.[4]

The agency also announced that it was broadening the scope of second requests, which could include investigating noncompetition concerns,[5] rescinded its adherence to the vertical merger guidelines and other informal agency guidance,[6] and announced more stringent requirements on parties obtaining consent decrees.[7]

While the DOJ has not implemented the same new practices adopted by the FTC, the division is signaling a move toward more aggressive merger enforcement. Together with the FTC, the DOJ launched a public review of the horizontal merger guidelines to inform their consideration of potential revisions and updates.[8]

Further, Kanter recently stated in remarks to the New York State Bar Association's antitrust law section that "merger remedies short of blocking a transaction too often miss the mark." [9] He advised that "full weight must be given to preserving competition that already exists in a market," which "will often mean that we cannot accept anything less than an



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injunction blocking the merger — full stop.”[10]

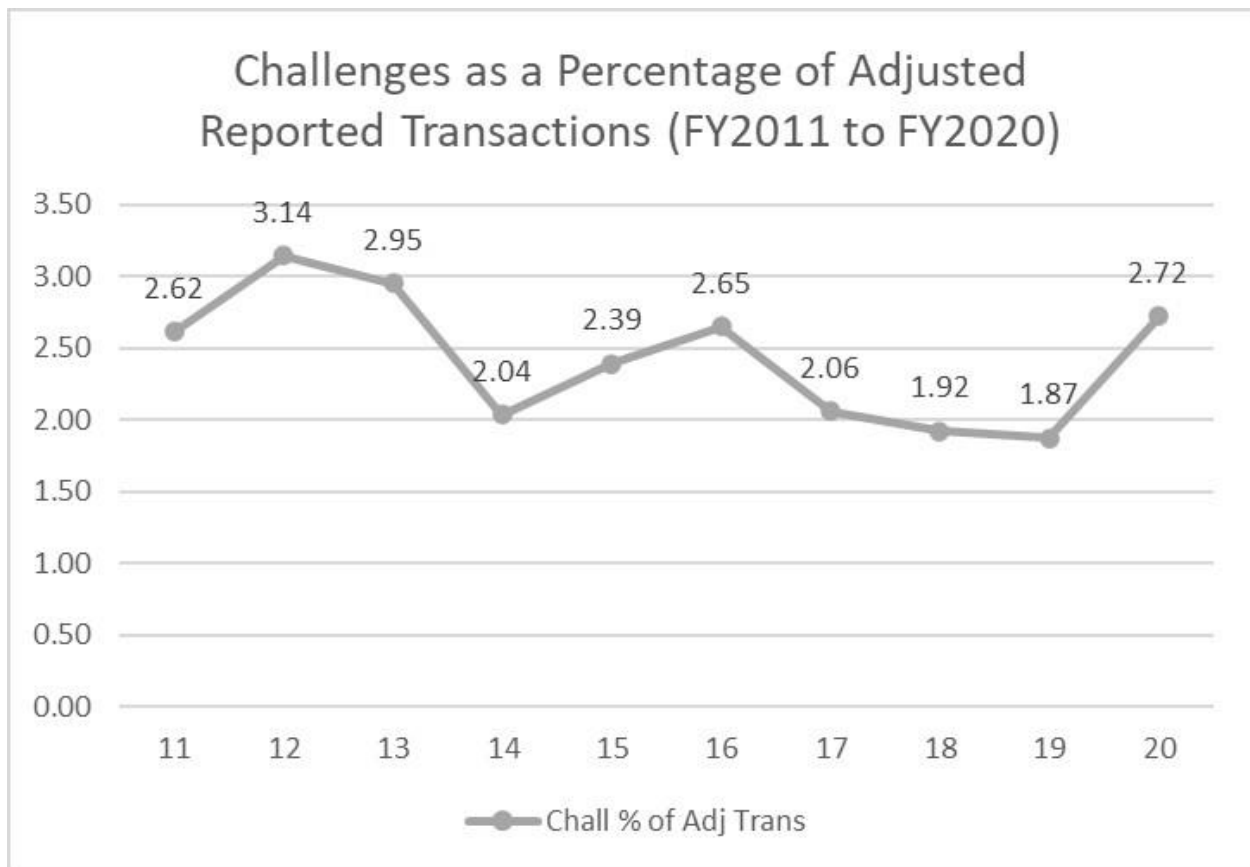
The Data

Yet with all this attention to antitrust merger enforcement, we are not seeing a commensurate increase in enforcement. At least not yet.

Mergers and acquisition activity that is reportable to the FTC and DOJ pursuant to the HSR Act has increased dramatically over the past decade. According to the FTC and DOJ's HSR annual reports, the number of adjusted transactions reported under the HSR Act increased from 1,414 in fiscal year 2011 to 2,030 in fiscal year 2019, seeing a decline during the fiscal year 2020 pandemic, and then rebounding to 3,644 in fiscal year 2021.[11]

Yet, the number of mergers challenged as a percentage of these reported transactions has remained fairly consistent at about 2% to 3% of all adjusted reported transactions over the past 10 years. In fact, the number of challenged transactions appears to have actually decreased in fiscal year 2021 — both in terms of the number of transactions challenged and as a percentage of the adjusted reported transactions.

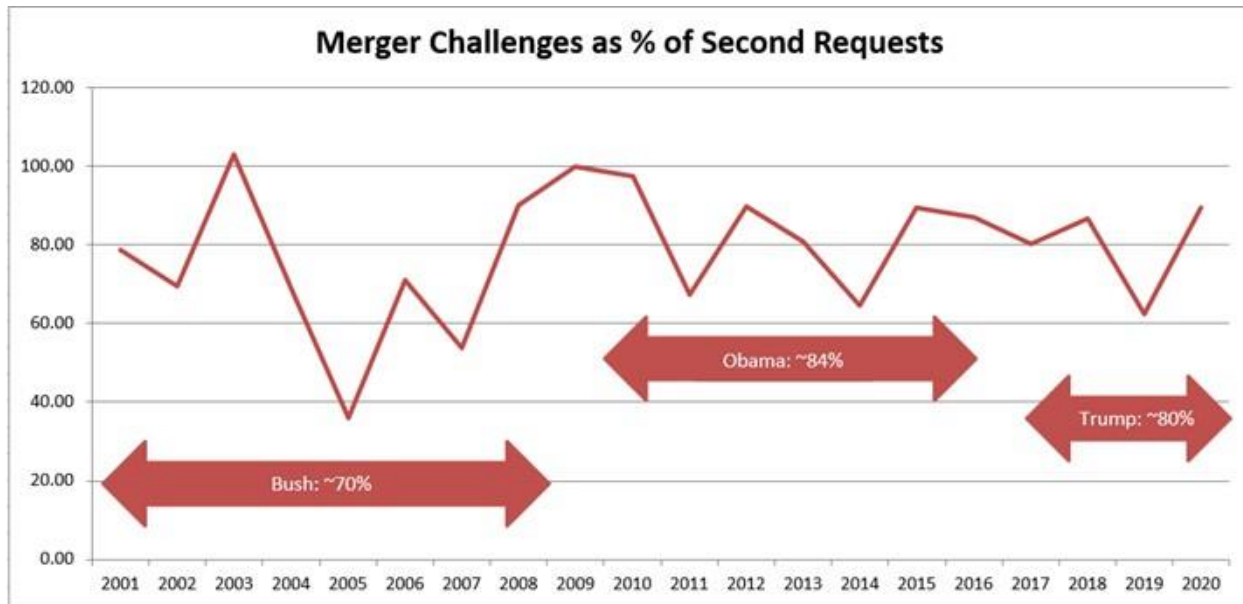
By our count, the FTC challenged only 15 transactions in fiscal year 2021 — about half of the number of challenges the year before — whereas the DOJ challenged about the same number of transactions — 14 or 15 — as the prior year.



Because there can often be a time lag of several months to over a year between a transaction being reported under the HSR Act and a challenge, we also considered the

percentage of transactions that received a second request that were challenged.

This data shows that the percentage of reported transactions receiving a second request increased substantially from the fiscal years comprising the Bush administration to the Obama administration, and remained high under the Trump administration.



Final HSR statistics for the first fiscal year of the Biden administration — fiscal year 2021 — are not available. The FTC and DOJ typically release final HSR statistics about a year after the completion of the fiscal year.

We expect the numbers under the first year of the Biden administration to look similar to the trends we have seen under the Obama and Trump administrations.

Looking Behind the Numbers

The number of challenges and second requests issued, however, do not tell the full story of merger enforcement under the Biden administration for at least three reasons.

First, numbers are reported by government fiscal year, which runs from Oct. 1 to Sept. 30 annually. This does not track with a presidential administration nor with the appointment or confirmation of the heads of the U.S. antitrust agencies.

For example, the fiscal year 2021 numbers will only include 3.5 months of FTC enforcement under Khan's leadership and Kanter was not confirmed until after the start of fiscal year 2022.[12]

Therefore, any increase in merger challenges that may result from Biden's antitrust enforcement officials would not be fully captured by the fiscal year 2021 data.

Second, this data does not reflect the administrative and procedural changes that we are seeing crop up in merger reviews and that are resulting in longer and more burdensome investigations. FTC's moratorium on early termination grants, its extension of time for merger review beyond the statutory HSR waiting period, and its prohibition on second

request modifications until the parties provide additional information about their companies and key employees, have contributed to longer review timelines.[13]

Even when governed by a negotiated, and complied-with timing agreement, the FTC may make its decision after the timing agreement deadline.[14] Further, we have seen the overall time for a merger investigation increase, primarily due to the agencies requiring longer review periods during the second request stage, despite parties taking less time to respond to a second request in light of advances in Artificial Intelligence that expedite reviews.

Third, we are seeing substantive changes in the merger review process that are substantially affecting the burden of responding to second requests. In September 2021, the FTC announced it would be expanding the scope of investigation topics to include new lines of inquiry, such as a transaction's potential effects on labor markets, effects on competitive incentives due to investment firm involvement, and its cross-market effects.[15]

Second requests issued by the agency have already begun to reflect its investigation of such nontraditional facets of competition. For example, the FTC has recently sought information about unemployment, workforce unionization, and social and governance issues. [16]

In addition, the FTC and DOJ recently announced a joint effort to solicit public input on ways to "modernize federal merger guidelines to better detect and prevent illegal, anti-competitive deals in today's modern markets." [17] The public request for information focuses on whether the guidelines' approach adequately accounts for current changes and trends in the modern economy, most specifically, with respect to digital markets.[18]

The agencies also posed questions about less concrete components of merger analyses — for example, whether market definition should play a secondary role to analysis of effects on the incentive to innovate, how to determine whether there is a "trend toward concentration in the industry," and whether prohibiting mergers that "may ... tend to create a monopoly" includes preventing monopolies in their incipiency through serial acquisitions.[19]

It is unclear whether this enforcement environment will ultimately have a chilling effect on M&A activity or if it will bolster competition. It is also unclear how courts will respond to the FTC and DOJ's shifting merger enforcement framework. However, during this time of flux, it is important for companies to keep antitrust issues in mind from the outset of any M&A efforts. Companies must give thought to merger agreement provisions, possible divestiture options and the cost of a lengthy path to merger clearance.

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[1] See Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021), available

at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[2] See e.g., Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021), available at https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf; Twenty-First Century Antitrust Act, S. 933, 2021-2022 Leg. (Ny 2021), available at <https://legislation.nysenate.gov/pdf/bills/2021/s933a>.

[3] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

[4] In such letters, the parties are informed that they will be consummating their transactions "at their own risk" if they do so prior to the Commission completing its investigation. See Holly Vedova, Adjusting Merger Review to Deal with the Surge in Merger Filings (Aug. 3, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

[5] See Holly Vedova, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (Sep 28, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined>; see also Bryan Koenig, 'Nontraditional Questions' Appearing in FTC Merger Probes, Law360 (Sept. 24, 2021), <https://www.law360.com/articles/1425218>.

[6] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf; see also Holly Vedova, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sep. 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

[7] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900p_riorapprovalstatement.pdf.

[8] See Fed. Trade Comm'n & U.S. Dep't of Justice, Request for Information on Merger Enforcement (2022), available at <https://www.regulations.gov/docket/FTC-2022-0003/document>; see also Chair Lina M. Khan, Remarks Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), available at https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf; Assistant Attorney General Jonathan Kanter, Remarks to Modernizing Merger Guidelines (Jan. 18, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines>; Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan, 18, 2022), <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

[9] Assistant Attorney General Jonathan Kanter, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>.

[10] *Id.*

[11] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report: Fiscal Year 2020 (2021), https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf [hereinafter HSR Annual Report FY 2020]. Data for Fiscal Year 2021 is not yet final, but the FTC's Premerger Notification Office posts monthly statistics on HSR adjusted reported transactions on its website at <https://www.ftc.gov/enforcement/premerger-notification-program>.

[12] Chair Khan was confirmed on June 15, 2021. AAG Kantor was confirmed on November 16, 2021.

[13] Compare Fed. Trade Comm'n, Model Second Request – Revised Oct.2021 (2021), available at https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf (updated language requires a description each "[p]erson's responsibilities in any capacity relating to the Proposed Transaction or any Relevant Product [Service] provided in any Relevant Area" in order to "facilitate discussions about any potential modifications" about the scope of the company's search or interrogatory response obligations), with Fed. Trade Comm'n, Model Second Request – Revised Apr. 2019 (2019), available at https://www.ftc.gov/system/files/attachments/merger-review/april2019_model_second_request_final.pdf.

[14] See e.g., Press Release, 7-Eleven Inc., Response to FTC Commissioner Statement (May 14, 2021), <https://corp.7-eleven.com/corppress-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement>. Compare Joint Concurring Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter In the Matter of Seven & i Holdings Co., Ltd. (June 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591382/in_the_matter_of_seven_i_201_0108_-_statement_of_chopra_and_slaughter.pdf, with Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the Closing of the 7-Eleven and Marathon Transaction, File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108s-evenmarathonphillipswilsonstatement.pdf.

[15] Holly Vedova, *supra* note 5.

[16] Bryan Koenig, *supra* note 5.

[17] Press Release, Federal Trade Comm'n, *supra* note 8.

[18] See *supra* note 8.

[19] Fed. Trade Comm'n & U.S. Dep't of Justice, *supra* note 8.