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M&A Hot Topics (Part 1): Biden's New Executive Order and Recent Trends from DOJ and FTC

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Welcome!



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Biden Executive Order (July 9, 2021)

Announcement of Administration Policy of:

- Greater government-wide focus on competition issues, with the antitrust agencies directed to "enforce the antitrust laws fairly and vigorously."
- Creation of White House Competition Council to "coordinate, promote, and advance Federal Government efforts" on competition.
- "The Order includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy."



Biden Executive Order: M&A

- Calls for "greater scrutiny of mergers," in particular:
 - by "dominant" platforms
 - acquisitions of nascent competitors (so-called killer acquisitions)
 - serial mergers
 - accumulation of data
 - competition by "free" products
 - effects on user privacy
- FTC and DOJ to "challenge prior bad mergers that past Administrations did not previously challenge."
- Focus on, **among other things**, labor, agriculture, healthcare (which includes pharma, hospitals, and insurance), and the tech sector markets.

FTC and DOJ Joint Statement re: Biden Executive Order

"We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. **The current guidelines deserve a hard look to determine whether they are overly permissive.** We plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law."

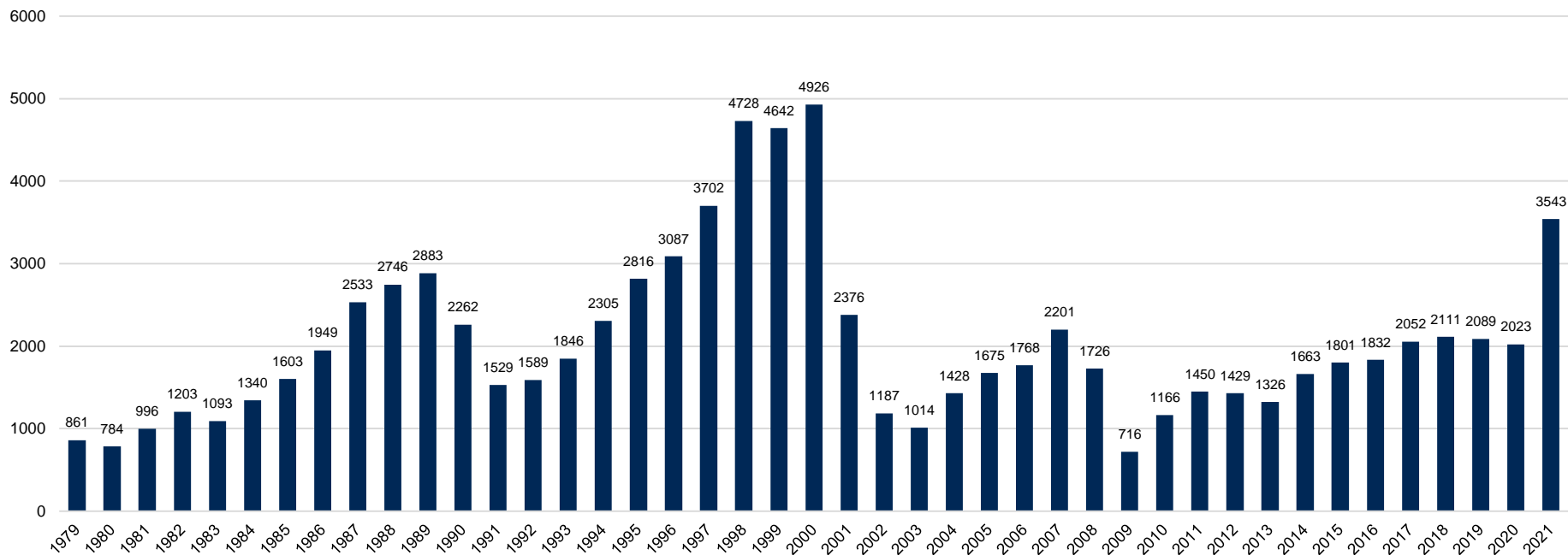


Vertical Merger Guidelines

- On September 15th, FTC voted 3-2 along party lines to withdraw the 2020 Vertical Merger Guidelines.
 - Democratic Commissioners argued that the 2020 Guidelines were not economically sound and unsupported by law or market realities.
 - Republican Commissioner Christine Wilson dissented, calling the move another example of FTC reducing transparency by withdrawing guidance and defending the existing framework.
 - Republican Commissioner Noah Phillips also dissented.
 - "Regret that once again the rug is being pulled out from honest businesses without explanation or sound basis, with minimum notice required by law, no analysis guidance, and no public input, reducing clarity and removing guidance."
- DOJ will (for now) still abide by the 2020 Vertical Merger Guidelines.



HSR-Reported Transactions by Year



Early Termination Suspended

- In February 2021, FTC suspended grants of early termination for transactions not presenting anticompetitive concerns due to "the unprecedented volume of HSR filings."
- Although FTC indicated the suspension would be temporary, it remains ongoing.



FTC Announces Use of "Pre-Consummation" Warning Letters

- FTC claims that it has been "hit by a tidal wave of merger filing that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines."
- FTC will now send out "standard form letters" for deals that cannot be fully investigated within the requisite timelines.
- Notably the letter states:
 - "if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk."
- Commissioner Wilson issued a rebuke of FTC stating that the letters "threaten the integrity of the HSR process."

Second Request News

On September 28, FTC announced **several changes** to how it "investigate[s] mergers and acquisitions, as well as... second requests and... second request negotiations."

- FTC will consider additional factors when issuing a Second Request, such as effects on labor markets and cross-market effects.
- FTC will seek additional information about the business and relevant personnel, especially regarding those responsible for negotiating, analyzing, or recommending the transaction.
- FTC will seek additional information about the use of e-discovery tools, including how each company under review intends to use e-discovery, to more closely align with the DOJ Second Request Model.
- FTC's privilege log practice will more closely align with DOJ. FTC will no longer allow "partial privilege log[s], but will "remain open to modifications in appropriate circumstances."
- FTC will make a few housekeeping changes, including making all Second Requests available to the full commission and revising its online model for Second Requests and Voluntary Access letters.

Chair Khan Memo on Vision and Priorities

- In internal memo to FTC Staff on September 22, 2021, Khan outlined her vision for a new "strategic approach" and "policy priorities."
- Strategic approach includes "anticipating problems" and "being especially attentive to next-generation technologies, innovations, and nascent industries across sectors."
- Policy priorities include addressing "rampant consolidation and the dominance that it has enabled across markets," which "will require both finding ways to strengthen our merger enforcement work as well as generally focusing our resources on scrutinizing dominant firms."

Source: <https://www.bloomberg.com/opinion/articles/2021-08-25/wall-street-is-ready-to-put-lina-khan-s-ftc-to-the-test>

Some Other (Mostly FTC) Notable News

- Instituted a [moratorium](#) on FTC Staff's participation in public events and press outreach.
- Reportedly delayed and late involvement in the details of merger reviews, which has led to last-minute questions during the preliminary investigation stage.
- Evaluation of certain HSR rules (e.g., debt) and informal interpretations.
- Releases summary of 6(b) study.
- Resolution relating to “Common Director and Officers and Common Ownership.”
- Commission votes on key merger-related policy decisions have been along party lines.



Questions



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