

# 18. Biden's Antitrust Gamble

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In July 2021, President Biden signed a sweeping Executive Order calling for aggressive antitrust enforcement out of a concern that the federal government had let industries become too concentrated, with harms to workers, farmers, small business, and consumers.<sup>2</sup> The Order focused on agriculture, tech, healthcare, pharmaceuticals, telecommunications, and labor markets. The Federal Trade Commission ('FTC') and Department of Justice ('DOJ') (the 'agencies') have taken heed. Over the past three years, they have overhauled long-standing policies and guidelines for merger and criminal enforcement, initiated controversial rulemaking regarding employee non-compete provisions, made and proposed consequential changes to the merger review process, reinvigorated old, largely disregarded antitrust statutes, and initiated many enforcement actions, especially in the priority industries identified in Biden's Executive Order. Under Biden, the agencies have shown a hostility towards mergers and conventional antitrust theory, a desire to push the boundaries of the law and economic theory, and a reluctance to solve antitrust concerns through negotiated remedies as opposed to litigation.

The agencies' aggressive new approach has had an impact. They have secured plea deals in novel criminal antitrust matters, caused parties to abandon or restructure acquisitions by creating greater regulatory uncertainty and process burdens, and industry is taking notice. In the courts, however, the agencies so far have had a mixed record under Biden. The DOJ has lost all of its criminal no-poach and wage-fixing trials in court and also failed to secure a guilty verdict in a more conventional cartel case involving alleged price-fixing, despite three attempts. The DOJ and FTC also have lost several merger cases in court, especially where they tried to push novel theories and refused to accept remedies offered by the parties. As of late, the agencies secured a number of wins in litigated merger cases, although mostly cases involving conventional horizontal merger challenges. Meanwhile, the agencies' proposed rulemaking and new merger guidelines have not yet been tested in court. The agencies have also had to contend with resource constraints on their ambitious agenda. For example, while the agencies challenged and litigated a greater number of mergers in 2022 than in any year during the last few Administrations, as a percentage of reported M&A transactions, the Biden

Administration so far has challenged mergers at a significantly lower rate than prior Administrations (in part due to much larger transaction volumes during the Biden years).

At the FTC, the aggressive enforcement agenda and management approach of its new Chair was not uniformly welcomed with open arms. During the first two years of the Biden Administration, a government survey showed low morale at the FTC<sup>3</sup> (although it reportedly has improved since then),<sup>4</sup> and many senior staff reportedly left due to dissatisfaction or disagreement with new leadership.<sup>5</sup> Moreover, in 2023, the last remaining Republican FTC Commissioner, Christine Wilson, resigned noisily, openly criticizing the Democratic FTC Chair Lina Khan's aggressive new approach to antitrust enforcement as '*disregard for the rule of law and due process*'.<sup>6</sup> Since then, the FTC had been operating with three Democratic Commissioners

1 The authors thank Yusuke Konishi, John Bogert and Isabella Solórzano for their assistance in preparing this article. The views expressed here are the authors' alone and do not necessarily represent the views of Axinn or any of its clients.

2 Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>

3 Cat Zakrzewski, *Sinking FTC workplace rankings threaten Chair Lina Khan's agenda*, Washington Post (July 13, 2022), <https://www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings/>

4 Emily Birnbaum & Leah Nysten, *FTC Staff Morale Rises, Survey Shows Increased Satisfaction*, BloombergLaw (Nov. 13, 2023), <https://news.bloomberglaw.com/antitrust/ftc-staff-morale-rises-survey-shows-increased-satisfaction>

5 Dan Papszun, *FTC Lawyers Leave at Fastest Rate in Years as Khan Sets New Tone*, BloombergLaw (Mar. 16, 2023), <https://news.bloomberglaw.com/antitrust/senior-ftc-staff-departures-spike-as-ambitious-agenda-looms>

6 Lauren Feiner, *Republican FTC Commissioner Wilson announces resignation, saying Chair Khan has a 'disregard for the rule of law'*, CNBC (Feb. 14 2023), <https://www.cnbc.com/2023/02/14/republican-ftc-commissioner-wilson-announces-resignation.html>

and no Commissioner on the other side of the political aisle. That absence of dissension made it yet easier for the Commission to pursue its aggressive enforcement agenda but made it yet more vulnerable to the criticism of being politicized. In March 2024, two new Republican Commissioners were finally added to the FTC, returning it to a more bipartisan state.<sup>7</sup>

In this contribution, we provide an overview of Biden's antitrust enforcement to date and some of its practical implications. Although the jury is not yet out on his antitrust legacy, President Biden is taking a gamble with his Administration's aggressive and litigious approach; if pushed too far, it may lead to course corrections by courts or future Administrations that constrain rather than further his antitrust ambitions in the long term.

## II Aggressive Merger Enforcement Efforts with Mixed Results

### 1. Consequential Policy Changes to Tamp Down on Mergers

Under Biden, the agencies have implemented several policy changes to deter parties from entering mergers and acquisitions or to cause them to abandon them, including the following.

*The FTC's Prior Approval Requirements for Future Mergers.* In October 2021, the FTC revived its long abandoned 'Prior Approval' policy (which was previously rescinded in 1995). It requires merging parties that agree to settle FTC merger concerns through a consent decree, to obtain prior FTC approval for future deals 'for every relevant market where harm is alleged to occur, for a minimum of ten years', even if such deals would not be HSR reportable.<sup>8</sup> This policy increased the stakes for parties involved in a deal requiring a consent decree by effectively giving the FTC veto power over future transactions in the relevant market. Companies subject to the prior approval requirement may face a harder time competing effectively to buy companies or assets in competitive sales processes because sellers may view them as coming with 'extra baggage'. Buyers and sellers have adapted to address this risk expressly in merger agreements and, where feasible, have implemented remedies proactively to try to avoid a

consent decree that would trigger the preapproval requirement.

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*The DOJ's Public Hostility Towards Settlements.* Soon after his appointment, DOJ Assistant Attorney General ('AAG') Jonathan Kanter openly stated that 'merger remedies short of blocking a transaction too often miss the mark'<sup>9</sup> and has rejected numerous attempts to 'fix' a merger since then.<sup>10</sup> Like the FTC's preapproval policy, this policy position has upped the stakes for merging parties and has caused many to forego, abandon or restructure deals. And, even where the DOJ ultimately has accepted a negotiated remedy, it has been able to extract remedies broader than originally offered by the parties. In *Assa Abloy/Spectrum*, for example, the DOJ accepted a divestiture remedy requiring Assa Abloy to divest its entire U.S. and Canadian residential locks businesses, which was significantly broader than the parties' initial proposal to the DOJ that included only certain brands.<sup>11</sup> That said, merging parties willing to see through litigation have improved their chances by proactively offering or incorporating remedies in their deals to force the agencies to litigate the sufficiency of the 'fix' in court, which has proven to be a successful strategy.

*New Merger Guidelines.* Following President Biden's Executive Order, the agencies withdrew the 2020 Vertical Merger Guidelines published during the Trump Era and released the new 2023 Merger Guidelines.<sup>12</sup> The 2023 Merger Guidelines reflect the Biden Administration's much more aggressive merger enforcement practice. They consi-

7 Press Release, Fed. Trade Comm'n, 'FTC Chair Welcomes Ferguson and Holyoak as FTC Commissioners, Congratulates Commissioner Slaughter on Confirmation to Another Term' (Mar. 8, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-chair-welcomes-ferguson-holyoak-ftc-commissioners-congratulates-commissioner-slaughter>

8 Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in merger Orders (July 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597894/p859900priorapprovalstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf). Since the announcement of the 'prior approval' policy, the FTC has attached the prior approval requirement in all 14 of its divestiture consent decrees. In addition, the FTC has also imposed prior approval in a consent decree involving behavioral remedies only in *Amgen/Horizon*.

9 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., 'Remarks to the New York State Bar Association Antitrust Section' (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>

10 The DOJ notably rejected a divestiture package that the EU accepted for the Cargotec/Konecranes merger. See Press Release, U.S. Dep't of Just., 'Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue' (March 29, 2022), <https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department>

11 Press Release, U.S. Dep't of Just., 'Justice Department Reaches Settlement in Suit to Block Assa Abloy's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division' (May 5, 2023), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum>

12 Press Release, Fed. Trade Comm'n, 'Federal Trade Commission and Justice Department Release 2023 Merger Guidelines' (Dec. 18, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines>

derably expand the agencies' scrutiny of mergers compared to prior Administrations by (i) materially lowering the HHI thresholds for which horizontal mergers are considered presumptively anticompetitive,<sup>13</sup> and (ii) setting forth several less conventional theories of harm not previously addressed in merger guidelines, such as: whether a merger will harm competition in the labor market; whether a merger will entrench a firm's dominant position; whether a merger is part of a series of transactions with a cumulative effect of undermining competition; and whether mergers by multi-sided platforms will disadvantage other competitors by allowing the platform to favor its own products.

Whether the new merger guidelines will become influential, will depend in significant part on court adoption. The courts embraced the agencies' previous horizontal merger guidelines. To adopt the lower HHI thresholds and some of the non-horizontal theories of harm in the Biden Administration's new guidelines, courts would need to cast aside the previous guidelines and case law built upon them and harken back to older, at times discredited, case law or create new precedent altogether. It is not clear if courts will be willing to do that. As discussed below, the few, less traditional merger cases the agencies have brought under Biden so far, mostly have not fared well in the courts. Whether the new merger guidelines will be influential also depends on the outcome of the Presidential elections this year, since a Republican Administration could withdraw Biden's new guidelines just like this Administration has done with merger guidelines from the previous Administration.

*A Proposal to Adopt Form CO-Style HSR Forms.* In June 2023, the FTV and DOJ proposed major changes to the premerger notification form (the HSR form) and associated instructions. The proposed changes mark the agencies' move towards a more comprehensive merger reporting regime, more akin to the European Commission's merger notification form (Form CO). The new HSR form, once implemented, will require parties to disclose much more detailed information, among others, regarding horizontal overlaps and vertical business relationships between the merging parties, as well as labor and employment matters and foreign subsidiaries.<sup>14</sup> Merging parties also would have to produce yet more documents with the HSR filing than is currently required. The burdens of the HSR filing would significantly increase, which is not consistent with the original intent behind the HSR Act. The new requirements also would give the agencies a lot of room to delay the start of the HSR waiting period by claiming the filings are incomplete. If the agencies adopt the proposed new HSR filing requirements, it is only a matter of time until they get

tested in court. Agency representatives recently suggested that they may tone down some of the most drastic changes they proposed and that they expect to finalize the changes in a matter of weeks.<sup>15</sup>

## 2. Biden's Taste for Litigating Mergers is Borne Out by the Numbers

While it is too early to quantify Biden's merger enforcement legacy, since only two fiscal years of data are available (2021–2022), there are several notable takeaways already from the statistics summarized below in Figure 1.

First, the numbers show that the agencies have made true on their policy to litigate much more than settle. Both in absolute average annual numbers and as a percentage of second requests issued, the agencies' negotiated settlements (26.8%) declined since the Trump (41.0%) and Obama (49.2%) Administrations. On the other hand, again both in absolute average annual numbers and as a percentage of second requests issued, the agencies litigated mergers in court much more often under Biden (17.0%) than under Trump (8.8%) and Obama (8.5%). As discussed below, however, the agencies' merger litigation track record under Biden has been mixed so far. While the agencies have strung together a number of wins in court recently, including in their challenges to the *Penguin Random House/Simon & Schuster*, *JetBlue/American Airlines*, *Illuminal/Grail* (on appeal), *IQVIA/PMI*, and *JetBlue/Spirit Airlines* deals, they lost their challenges to the *UnitedHealth/Change Healthcare*, *U.S. Sugar*, *Booz Allen/Ever Watch*, *Meta/Within*, and *Microsoft/Activision* deals.

Second, the predictive value of a second request seems to have declined under Biden. Under Trump and Obama, a second request was followed by settlement, litigation, or abandonment/restructuring of a deal in 78.5% and 83.2% of cases, respectively, while under Biden, so far, a second request was followed by such intervention in 73.2% of cases. That is consistent with an industry perception that in certain types of deals – especially those involving industry incumbents acquiring nascent companies – the FTC appeared to issue second requests as a deterrent, even if it ultimately had no intention of challenging the deal. This perception was particularly prevalent in 2021, when the agencies only challenged mergers in 49.2% of the cases where they issued a second request.

Third, despite the agencies' aggressive merger enforcement agenda, the statistics reveal they have had to contend with significant resource constraints. As a percentage of reported deals eligible for a second request, the agencies have issued second requests at a lower rate under Biden (1.7%) than under Trump (2.7%) and Obama (3.4%). Similarly, the rate of agency interventions (settlements, litigation, or abandonment/restructuring of a deal based on agency concerns), as a percentage of reported deals eligible for a second request,

13 U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf).

14 Press Release, Fed. Trade Comm'n, 'FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review' (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>

15 72nd ABA Antitrust Law Spring Meeting (Apr. 10–12, 2024).

Figure 1: Annual Averages During Administration<sup>6</sup>

	Obama ('09-16)	Trump ('17-20)	Biden ('21-22)
HSR Reported Transactions	1,423	1,972	3,336
Total Second Requests	47	51	56
Total Agency Merger Challenges	39	40	41
Negotiated Settlements (Consent Orders) <sup>2</sup>	23	21	15
Parties Abandoned/Restructured Deal Due to Agency Concerns <sup>3</sup>	12	15	17
Agency Filed Lawsuit to Challenge Merger <sup>4</sup>	4	5	10
% of Reported, Second-Request Eligible, <sup>5</sup> Deals Leading to Second Request	3.4%	2.7%	1.7%
% of Reported, Second-Request Eligible, <sup>6</sup> Deals Leading to Challenge	2.8%	2.1%	1.3%
% of Second Requests Leading to Challenge	83.2%	78.5%	73.2%
% of Second Requests Leading to Negotiated Settlement	49.2%	41.0%	26.8%
% of Second Requests Leading to Abandonment/Restructuring	25.5%	28.8%	29.5%
% of Second Requests Leading to Litigation	8.5%	8.8%	17.0%

1 U.S. Dep't Of Just. & Fed. Trade Comm'n, Hart-Scott-Rodino Annual Report FY 2009 to 2022, <https://www.ftc.gov/policy/reports/annual-competition-reports>.

2 These figures include the settlements that were made after the agency filed a complaint.

3 These figures exclude the mergers that the merging parties voluntarily abandoned or restructured after the agency filed a complaint.

4 These figures exclude the mergers where a settlement was made after the agency filed a complaint and include the mergers that the merging parties voluntarily abandoned or restructured after the agency filed a complaint.

5 These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These deals include, et al., transactions reported pursuant to the statutory exemptions, transactions which were found to be non-reportable, and transactions withdrawn before the waiting period began. *E.g.*, Fed. Trade Comm'n & U.S. Dep't of Just., Hart-Scott-Rodino Annual Report Fiscal Year 2022, 22 n.2, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/FY2022HSRRReport.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRRReport.pdf)

6 *Id.*

likewise has been meaningfully lower under Biden so far (1.3%) than under Trump (2.1%) and Obama (2.8%). These declines in second request and intervention ratios are largely due to the fact that the Biden Administration had to contend with a significantly higher number of reported mergers in its first two years (over 3,300 HSR filings in each year, compared to an annual average of around 1,400 under Obama and 1,970 under Trump) (see figure 1).

### 3. Horizontal Mergers

While the Biden Administration, and even the Trump Administration before it, have put more emphasis on challenging non-horizontal mergers compared to prior Administrations, many of their merger enforcement actions continue to involve horizontal theories of harm, especially in healthcare, tech, or pharmaceutical industries.

#### a. Continued Focus on Hospital Mergers

Healthcare, and hospital mergers in particular, have long been one of the agencies' foremost enforcement priorities. That has continued to be the case under Biden. Since 2021, the FTC has caused four abandoned hospital mergers: *HCA/Stewart*, *RWJ/Saint Peters*, *LifeSpan/CNE*, and *John Muir Health/San Ramon Medical*. Its recent challenge of *Novant/CHS* is still pending.

In addition to traditional horizontal theories of harm from hospital mergers, under Biden the FTC has increasingly examined cross-market theories of harm as well, exploring whether a merger of hospitals in different geographic markets can increase the merging parties' negotiation leverage over payors, despite the parties' lack of geographic overlap. The FTC was said to have examined such cross-market effects in the *Beaumont/Spectrum* and *Atrium/Advocate* mergers, but both mergers closed without litigation.<sup>16</sup>

#### b. Nascent Competitors

Under Biden, the agencies have had a focus on acquisitions of nascent competitors, particularly in tech and healthcare.

On July 27, 2022 the FTC filed a complaint to block Meta's proposed acquisition of Within, a developer of virtual

16 JC Reindl, FTC, *Dana Nessel devoted months to Beaumont and Spectrum megamerger*, Detroit Free Press (May 26, 2022), <https://www.freep.com/story/money/business/michigan/2022/05/26/ftc-dana-nessel-beaumont-spectrum-megamerger/9826501002/>; Samantha Liss, *The Advocate-Atrium merger closed without an antitrust challenge. What does that mean for competition in 2023?*, HealthcareDive (Dec. 22, 2022), <https://www.healthcaredive.com/news/advocate-atrimum-merger-closes-antitrust-challenge-hospitals/638101/>

reality fitness apps.<sup>17</sup> While the deal presented limited horizontal overlap, because Meta did not have its own virtual reality fitness app, the FTC's complaint alleged that Meta had the technology and infrastructure to develop its own fitness VR app and would lose all incentive to do so after the merger. However, the theory did not garner support from the court, which found Meta's *de novo* entry to be not reasonably probable.<sup>18</sup>

Despite the FTC's loss in court, it has enjoyed some success in obtaining merger remedies or abandonments based on nascent competition theories. For example, in *Medtronics/Intersect*, the FTC reached a consent decree requiring the parties to divest a subsidiary of the target,<sup>19</sup> which was a nascent competitor to Medtronics in ear, nose, and throat medical devices.<sup>20</sup> Similarly, in *ANI/Novitium*, the FTC secured the divestiture of two of ANI's generic drug lines because Novitium was one of only a few firms capable of entering either concentrated generic markets in the near future.<sup>21</sup> In *Sanofi/Maze*, the parties abandoned the merger after the FTC filed suit because Sanofi was one of two providers of intravenous Pompe disease treatment, and Maze was developing an oral medication.<sup>22</sup>

### c. Heightened Scrutiny of Labor Market Effects

The current Administration has made labor markets an enforcement priority and routinely examines labor market impacts in its merger investigations. In November 2022, the DOJ brought its first merger challenge that was based on a theory of labor market effects in *Penguin Random House/Simon & Schuster* and won a preliminary injunction blocking the merger. The DOJ alleged that the merger between the largest and the fourth largest publishers in a market of five large publishers would substantially lessen competition for the publishing rights to authors' anticipated top-selling books. The DOJ was concerned this merger would harm best-selling authors by decreasing compensation

for those publishing rights.<sup>23</sup> In February 2024, the FTC sued to block the merger between grocery giants Kroger and Albertsons. Beyond traditional horizontal theories of harm to consumers from grocery store mergers, the FTC has also asserted the novel claim that the merger would harm competition for labor by combining the two largest employers of union grocery workers in the United States.<sup>24</sup> Notably, the parties offered to divest over 400 stores to remedy the competition concerns, which the FTC rejected<sup>25</sup> – another example of the current Administration's appetite for litigation over settlement. This therefore will be another case where the government has to litigate the fix.

## The current Administration has made labor markets an enforcement priority and routinely examines labor market impacts in its merger investigations

The FTC also examined labor effects in the abandoned *LifeSpan/CNE* deal. Although the FTC brought no labor market claims in the complaint, Chair Lina Khan and Commissioner Kelly Slaughter issued a concurring statement to the FTC's complaint in February 2022, in which the two stated that they would have brought a labor market effect claim and cited to empirical studies studying the negative effects mergers can inflict on wages, benefits, and working conditions.<sup>26</sup>

### d. First Litigation Challenge of Serial Acquisitions by Private Equity

Under Biden, the agencies also have made so-called private equity ('PE') firm roll-ups an enforcement priority, expressing significant skepticism about such transactions and the PE business model more generally. Accordingly, in Septem-

17 Complaint, Fed. Trade Comm'n v. Meta Platforms Inc., No. 5:22-CV-04325-EJD (N.D. Cal. July 27, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-meta-platforms-incmark-zuckerbergwithunlimited-ftc-v>

18 Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892, 921-25, 938, 941 (N.D. Cal. 2023).

19 Decision, In the Matter of Medtronic, Inc. and Intersect ENT, Inc., FTC Docket No. C-4763 at 6 (June 30, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110184-medtronicintersect-matter>

20 Complaint, In the Matter of Medtronic, Inc. and Intersect ENT, Inc., FTC Docket No. C-4763 (June 30, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110184-medtronicintersect-matter>

21 Complaint, In the Matter of ANI/Novitium, FTC Docket No. C-4754 (Nov. 10, 2021), <https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0101-aninovitium-matter>

22 Complaint, In the Matter of Sanofi and Genzyme Corporation and Maze Therapeutics Inc., FTC Docket No. 9422 (Dec. 11, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2310091-sanofimaze-therapeutics-inc-matter>

23 Press Release, U.S. Dep't of Just., 'Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster' (Nov. 2, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>

24 Press Release, Fed. Trade Comm'n, 'FTC Challenges Kroger's Acquisition of Albertsons' (Feb. 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons>

25 David Shepardson & Chris Sanders, *US FTC suing to block \$25 bln Kroger-Albertsons supermarket deal*, Reuters (Feb. 27, 2024), <https://www.reuters.com/markets/deals/us-ftc-announce-it-is-suing-block-kroger-albertsons-merger-monday-semafor-2024-02-26/#:~:text=Kroger%2C%20the%20biggest%20grocer%20in,FTC%20called%20that%20proposal%20inadequate>

26 In the Matter of Lifespan Corp. and Care New England Health System, FTC Docket No. 9406 (Feb. 17, 2022) (concurring statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan). Relatedly, in *UnitedHealth/LHC*, in which UnitedHealth would acquire the in-home health and hospice care provider, LHC Group, the FTC issued a second request, but the deal closed in February 2022 without further agency challenge. Paige Minemyer, *UnitedHealth, LHC Group close \$5.4B merger deal*, FierceHealthcare (Feb. 22, 2023), <https://www.fiercehealthcare.com/payers/unitedhealth-lhc-group-close-54b-merger-deal>; Paige Minemyer, *FTC requests additional details on UnitedHealth's acquisition of LHC Group*, FierceHealthcare (June 13, 2022), <https://www.fiercehealthcare.com/payers/ftc-requests-additional-details-unitedhealths-acquisition-lhc-group>

ber 2023, the FTC sued U.S. Anesthesia Partners, Inc. ('USAP'), a provider of anesthesia services in Texas, and PE firm Welsh, Carson, Anderson & Stowe ('Welsh'),<sup>27</sup> alleging that USAP, backed by Welsh, engaged in a series of transactions to increase market power in anesthesia providers in Texas and drive up the prices of anesthesia services. The FTC also has leveraged its prior approval policy on acquisitive PE firms where there was a pattern of serial acquisitions to gain additional control over future PE mergers.<sup>28</sup>

*e. When Healthcare Meets Online Advertising Tech: FTC v. IQVIA*

In July 2023, the FTC sued to block IQVIA Holdings Inc. ('IQVIA'), the world's largest health care data provider, from acquiring Propel Media, Inc. ('PMI'), the owner of DeepIntent, a demand-side platform that targeted healthcare professionals ('HCPs') via programmatic advertising.<sup>29</sup> The FTC challenged the merger based on a horizontal theory of harm that the merger would reduce a narrow market for HCP programmatic advertising from three into two providers. It also asserted a vertical theory of harm that the merger would give IQVIA the ability and incentive to leverage its datasets to foreclose or otherwise disadvantage rivals in HCP programmatic advertising. The court found for the FTC on the horizontal theory of harm and did not reach the FTC's vertical theory of harm.<sup>30</sup>

#### 4. First Vertical Merger Litigation Success in a Long Time

Under Trump, the agencies began expressing skepticism about resolving concerns regarding vertical mergers with behavioral remedies, with the DOJ deciding to challenge the *AT&T/Time Warner* merger in court, rather than accepting well-established behavioral remedies. Despite the DOJ's loss of that litigation under Trump, under Biden, the agencies have doubled down on challenging vertical mergers in court. Initially, that led to another string

of losses, much like the fate of the *AT&T/Time Warner* court challenge. The DOJ lost its vertical merger challenge in *UnitedHealth/Change Healthcare*, and the FTC lost its vertical merger challenges in *Microsoft/Activision* and *Illumina/Grail* (initial loss). The merging parties' successful defenses against these vertical merger challenges were in part due to them proactively offering or implementing remedies to address the competition concerns. Even though the government rejected the proposed fixes and sued to block all three mergers, the proposed fixes allowed the parties to litigate the sufficiency of those fixes in court, which proved effective in each case.

In 2023, however, the agencies welcomed their first partial success in a litigated challenge of a vertical merger since the 1970s when the FTC appealed its initial loss in *Illumina/Grail*. Illumina was the only provider of DNA sequencing technology used in multi-cancer early detection (MCED) tests, and Grail provided MCED tests using Illumina's technology as an input. In March 2021, the FTC sued to block Illumina's proposed acquisition of Grail, alleging that the deal would allow Illumina to withhold its input technologies from Grail's competitors. The FTC Staff lost its challenge before an Administrative Law Judge ('ALJ'), but the Commission reversed the ALJ's decision. On appeal, the Fifth Circuit vacated the Commission's decision and remanded it back to the Commission for further proceedings, but in doing so it validated the Commission's theory and findings of vertical foreclosure. The Fifth Circuit upheld the Commission's finding that the FTC Staff carried its initial burden to prove its vertical foreclosure theory, but it remanded the case because the Commission had imposed too high a legal standard on the parties to show that Illumina's proposed remedy of long-term supply contracts would prevent substantial vertical foreclosure.<sup>31</sup>

### III. A Nostalgia for Old Rules and Heavy Litigation Focus on Tech

Under Biden, the agencies have rolled out a series of policy updates in civil conduct enforcement, signaling their intention to expand agency power over conduct where enforcement has long been dormant. Meanwhile, the Biden Administration has doubled down on litigation against tech companies, where many of the agencies' civil enforcement resources are spent.

27 Press Release, Fed. Trade Comm'n, 'FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practice Across Texas' (Sept. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>

28 In *JAB/SAG Veterinary*, the FTC imposed a prior approval requirement for JAB's all future mergers of veterinary clinics in California and Texas and national a prior notice requirement, even though the proposed transaction only concerned certain local markets. In the Matter of JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners, LLC, FTC Docket Nr. C-4766 (Aug. 2, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110140-jab-consumer-partnersnational-veterinary-associatessage-veterinary-partners-matter>.

Similarly, in *Quantum/EQT*, the FTC required Quantum to obtain prior approval before acquiring additional EQT shares. Press Release, Fed. Trade Comm'n, 'FTC Approves Final Order to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal' (Oct. 10, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-approves-final-order-prevent-interlocking-directorate-arrangement-anticompetitive-information>

29 In the Matter IQVIA Holdings Inc. and Propel Media Inc., FTC Docket No. 9416 (July 17, 2023).

30 Fed. Trade Comm'n v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER), 2024 WL 81232 (S.D.N.Y. Jan. 8, 2024).

31 *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036 (5th Cir. 2023).

## 1. Agencies Revamp Dormant Policies and Statutes under Biden

### *Expanding Section 5 Power.*

Under Biden, the FTC withdrew and replaced its 2015 policy statement on Section 5 of the FTC Act.<sup>32</sup> Section 5 of the FTC Act empowers the FTC to act against ‘unfair methods of competition’. Past Administrations have generally interpreted the scope of Section 5 consistently with the Sherman Act or Clayton Act and rarely brought stand-alone actions under Section 5. In the new Section 5 policy statement, the FTC has taken the position that its power to prohibit ‘unfair methods of competition’ is ‘broader than, and different from’ the Sherman and Clayton Acts. It claims that Section 5 empowers the FTC to address additional conduct, including conduct that has been ruled not to violate the Sherman Act or the Clayton Act through decades of prior case law. With its new Section 5 policy statement, the FTC seems to be trying to create a regime more similar to the European Commission’s under Art. 101 and 102 of the EC Treaty. While the Section 5 statement is another step the agencies took to reinvigorate antitrust law, it remains to be seen if and how the courts will depart from established case law.

### *Robinson-Patman Act Investigations.*

In the wake of the FTC’s November 2022 Section 5 policy statement, the FTC started investigations in the beverage industry under the Robinson-Patman Act. In January 2023, the FTC reportedly was investigating whether Coca-Cola and PepsiCo engaged in unlawful price discrimination in the soft drink market.<sup>33</sup> In October 2023, the FTC filed a petition seeking a federal court order to force Total Wine & More to comply with an FTC civil investigative demand, as part of an investigation into whether Southern Glazer’s Wine & Spirits LLC, a distributor of wine and spirits products, had violated the Robinson-Patman Act or otherwise engaged in unfair methods of competition.<sup>34</sup>

In the antitrust community, the Robinson-Patman Act against price discrimination had long been considered a largely dormant statute, inconsistent with modern economic theory. The agencies had not enforced this statute since 2000.

### *Interlocking Directorates.*

Section 8 of the Clayton Act prohibits directors and officers from serving on interlocking positions in competing companies.<sup>35</sup> Perhaps as part of its concern surrounding PE firms acquiring and holding competing companies in their portfolios, the agencies have expressed intention to enforce Section 8 in numerous speeches.<sup>36</sup> So far, the DOJ under the Biden Administration has unwound interlocking directorates in eleven companies, spanning the healthcare, technology, entertainment, insurance, transportation, aerospace, and education industries.<sup>37</sup>

## 2. Proposed Non-Compete Ban

On January 5, 2023, the FTC announced new proposed rulemaking under its newly expanded Section 5 reach to prevent employers from imposing non-competes on their employees. The proposed rule, if adopted, would ban employers from entering into or maintaining existing noncompetes with employees, and it would extend to independent contractors and employees alike.<sup>38</sup> Although the proposed rule has not yet been finalized, the FTC has already taken actions against four companies over employee noncompetes, all of which concern low-wage

32 Fed. Trade Comm’n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf)

33 Bloomberg, *FTC Is Investigating Coke, Pepsi Price Discounting Under Antitrust Law* (Jan. 10, 2023), <https://www.bloomberg.com/news/articles/2023-01-10/ftc-probing-coke-pepsi-price-discounting-under-antitrust-law>

34 Press Release, Fed. Trade Comm’n, ‘FTC Takes Total Wine to Federal Court to Enforce Compliance with Antitrust Civil Investigative Demand’ (Oct. 20, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-takes-total-wine-federal-court-enforce-compliance-antitrust-civil-investigative-demand>

35 15 U.S.C. § 19.

36 See e.g., Jonathan Kanter, Assistant Att’y Gen., U.S. Dep’t of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>

37 Press Release, U.S. Dep’t of Just., ‘Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates’ (Oct. 19, 2022), <https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially-illegal-interlocking-directorates>; Press Release, U.S. Dep’t of Just., ‘Justice Department’s Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates’ (Mar. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal-interlocking-directorates>; Press Release, U.S. Dep’t of Just., ‘Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department’s Ongoing Enforcement Efforts Against Interlocking Directorates’ (Aug. 16, 2023), <https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-department-s-ongoing-enforcement-efforts-against-interlocking-directorates>; Press Release, U.S. Dep’t of Just., ‘Two Warner Bros. Discovery Directors Resign after Justice Department Expresses Antitrust Concerns’ (Apr. 1, 2024), <https://www.justice.gov/opa/pr/two-warner-bros-discovery-directors-resign-after-justice-department-expresses-antitrust>

38 Press Release, Fed. Trade Comm’n, ‘FTC Proposes Rule to Ban Non-compete Clauses, Which Hurt Workers and Harm Competition’ (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>

or blue-collar manufacturing jobs.<sup>39</sup> If and when the FTC finalizes this rulemaking, its authority to promulgate such rules for noncompete provisions is likely to be tested in the courts.

### 3. Litigation Focus on Tech

The agencies continue to litigate against certain tech companies, which started towards the end of the Trump Administration with two cases filed against Google and Meta and has grown substantially under Biden, with the DOJ filing additional lawsuits against Google and Apple, and the FTC filing additional lawsuits against Meta (challenge of Meta's proposed acquisition of Within), Microsoft (challenge of its proposed acquisition of Activision Blizzard), and Amazon (challenge of its marketplace practices).

The cases reflect a viewpoint at the agencies that tech companies have grown too big through acquisitions (including acquisitions investigated and permitted to proceed long ago under previous Administrations) and alleged self-preferencing practices

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#### *FTC v. Amazon*

In September 2023, the FTC and seventeen State Attorneys General sued Amazon, alleging that Amazon has illegally maintained its monopoly power by preventing third-party sellers from selling products at lower prices at competing retailers and by tying eligibility for Prime to Amazon's proprietary fulfillment service, Fulfillment by Amazon (FBA). According to the suit, this has raised the cost for

<sup>39</sup> For example, in *Prudential Security*, the FTC challenged a non-compete restriction that prevented employed security guards from being employed by any competing firm within a 100-miles radius. In the Matter of Prudential Security, Inc., FTC Docket No. C-4787 (Mar. 8, 2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2210026-prudential-security-et-al-matter>. The FTC also imposed similar prohibitions against non-competes on three glass container manufacturers, O-I Glass Inc., Ardagh Group S.A., and Anchor Glass Container Corp. Press Release, Fed. Trade Comm'n, 'FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers' (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>; Press Release, Fed. Trade Comm'n, 'FTC Takes Action Against Another Company That Imposed Harmful Noncompete Restrictions on Its Workers' (Mar. 15, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-takes-action-against-another-company-imposed-harmful-noncompete-restrictions-its-workers>

suppliers of selling on multiple platforms and foreclosed independent fulfillment services.<sup>40</sup>

#### *FTC v. Meta*

In December 2020, the FTC sued Meta alleging that it has obtained monopoly power through its acquisitions of Whatsapp and Instagram and subsequent refusals to let rivals interoperate with its platforms.<sup>41</sup> In January 2022, the D.C. District Court denied Meta's second motion to dismiss the FTC's case, finding that the FTC had plausibly alleged a dominant, durable share in personal social networking (PSN) services and that Meta's acquisitions were anticompetitive.<sup>42</sup> Meta recently filed a motion for summary judgment to seek dismissal of the case before trial.

#### *United States v. Google*

In October 2020, the DOJ under the Trump Administration sued Google, alleging that Google illegally monopolized the search advertising market through agreements that provided for preinstallation, prominent placement or default setting of Google's search engine on mobile devices, browsers, computers, and other devices.<sup>43</sup> The bench trial ended in November 2023,<sup>44</sup> closing arguments are scheduled for May 2024,<sup>45</sup> and the court's findings of fact and conclusions of law are expected to come in the months thereafter.

On January 24, 2023, under Biden, the DOJ brought another lawsuit against Google, alleging that Google monopolized certain alleged display advertising technology markets and that Google's advertising technology practices constitute unlawful tying.<sup>46</sup> A jury trial is expected to start in this matter in September 2024.<sup>47</sup>

#### *United States v. Apple*

On March 21, 2024, the DOJ filed a lawsuit alleging that Apple engaged in a course of exclusionary conduct, including various contractual restrictions, using its control

<sup>40</sup> Complaint, Fed. Trade Comm'n et al v. Amazon.com Inc., No. 2:23-cv-01495 (W.D. Wash. Sept. 26, 2023), ECF No. 1, <https://www.ftc.gov/legal-library/browse/cases-proceedings/1910129-1910130-amazoncom-inc-amazon-ecommerce>

<sup>41</sup> Complaint, Fed. Trade Comm'n v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Dec. 9, 2020), ECF No. 3, <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v>

<sup>42</sup> Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34, 46–50, 52–60 (D.D.C. 2022).

<sup>43</sup> Complaint, United States v. Google LLC, No. 1:20-cv-03010 (Oct. 20, 2020), ECF No. 1, <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc>.

<sup>44</sup> Nico Grant & David McCabe, *What Google Argued to Defend Itself in Landmark Antitrust Trial*, NewYorkTimes (Nov. 15, 2023), <https://www.nytimes.com/2023/11/14/technology/google-antitrust-trial-defense.html>

<sup>45</sup> Lauren Feiner, *Google foreshadows its final arguments in search monopoly trial*, TheVerge (Feb. 23, 2024), <https://www.theverge.com/2024/2/23/24080493/google-doj-antitrust-search-lawsuit-final-arguments-post-trial-brief-filed>

<sup>46</sup> Press Release, U.S. Dep't of Just., 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies' (Jan. 24, 2023), <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>

<sup>47</sup> Axinn represents Google in this case.



over the iPhone to (attempt to) monopolize markets for smartphones and performance smartphones.<sup>48</sup>

In addition to the series of lawsuits against these tech companies, the FTC recently announced a market study into investments and partnership by tech companies related to generative AI.<sup>49</sup>

#### IV. Labor-Focus in Criminal Enforcement Hurts Stat Sheet and Faces Headwinds

Under Biden, the DOJ has become more stingy and demanding in its leniency and compliance program requirements, while pursuing an active criminal antitrust enforcement docket, focused on no-poach and wage-fixing matters and marked by a brief revival of Section 2 of the Sherman Act as a criminal enforcement tool. However, as discussed and shown below, the fines and prison sentences the DOJ has secured under Biden are lower than in prior Administrations so far, while it has suffered a series of painful losses in prosecuting criminal matters in court. This combination of developments may change the calculus for would-be defendants in making decisions about seeking leniency or accepting plea deals versus going to court.

##### 1. Policy Updates

###### *Updated DOJ Guidelines on Corporate Compliance Programs*

In March 2023, the DOJ's Criminal Division rolled out its updated guidance on its prosecutors' Evaluation of Corporate Compliance Programs. The new guidance amplified the DOJ's previously announced expectations that effective compliance programs include policies establishing compensation and claw-back programs to incentivize compliance.

The updated advice also incorporates guidance on the use of personal devices and communication platforms and indicates that if companies have not produced communications from third-party messaging applications, prosecutors will inquire about companies' ability to access such communication, and answers may influence the offer the company receives in resolving criminal liability.<sup>50</sup>

###### *Leniency Program*

In April 2022, the DOJ updated its leniency program. The revised leniency program clarified or attached additional requirements for an applicant to receive leniency. As before, a successful leniency applicant must be the first company to self-report and 'promptly' report the wrongdoing, and the DOJ places the burden upon an applicant to prove its self-reporting was prompt. Now, in addition to making restitution to injured parties where possible, a successful applicant must also endeavor 'to improve its compliance program to mitigate the risk of engaging in future illegal activity'.<sup>51</sup> The policy also now uniformly and expressly requires that the 'applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity' – a condition that under the prior program was expressly required for Type A leniency (available before the DOJ opens an investigation) and treated as implicitly required for Type B leniency (available before and after the DOJ opens an investigation).<sup>52</sup>

##### 2. Criminal Enforcement

Since 2021 and as of April 2024, the DOJ has prosecuted at least 26 corporations and 85 individuals and imposed \$420 million in criminal fines and penalties.<sup>53</sup> During 2020–2023, the average prison sentence was fifteen months (see Figures 2 and 3).<sup>54</sup>

48 Press Release, U.S. Dep't of Just., 'Justice Department Sues Apple for Monopolizing Smartphone Markets' (March 21, 2024), <https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets>

49 Press Release, Fed. Trade Comm'n, 'FTC Launches Inquiry into Generative AI Investments and Partnerships' (Jan. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships>

50 U.S. Dep't of Just., Evaluation of Corporate Compliance Programs (updated Mar. 2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

51 U.S. Dep't of Just., Corporate Leniency Policy (Aug. 1993), <https://www.justice.gov/atr/file/810281/dl> (rescinded); U.S. Dep't of Just., 7-3.300 - Antitrust Division Leniency Policy and Procedures (Apr. 2022), <https://www.justice.gov/atr/page/file/1490246/dl?inline>

52 U.S. Dep't of Just., 7-3.300 - Antitrust Division Leniency Policy and Procedures (Apr. 2022), <https://www.justice.gov/atr/page/file/1490246/dl?inline>; U.S. Dep't of Just., Corporate Leniency Policy (Aug. 1993), <https://www.justice.gov/atr/file/810281/dl> (rescinded); U.S. Dep't of Just., Model Corporate Conditional Leniency Letter (Nov. 2018), <https://www.justice.gov/atr/page/file/1112911/dl?inline>

53 U.S. Dep't of Just., Criminal Enforcement Trends Charts (Oct. 24, 2023), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>; Press Release, U.S. Dep't of Just., 'Executives Charged with Bid Rigging, Territorial Allocation and Defrauding the U.S. Forest Service After a Wiretap Investigation' (Dec. 15, 2023), <https://www.justice.gov/opa/pr/executives-charged-bid-rigging-territorial-allocation-and-defrauding-us-forest-service-after>; Press Release, U.S. Dep't of Just., 'Additional Contractors Indicted for Rigging Bids and Defrauding the U.S. Military in South Korea' (Mar. 6, 2024), <https://www.justice.gov/opa/pr/additional-contractors-indicted-rigging-bids-and-defrauding-us-military-south-korea>

54 U.S. Dep't of Just., Criminal Enforcement Trends Charts (Oct. 24, 2023), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>

Figure 2: Criminal Fines & Penalties (2014-2023)

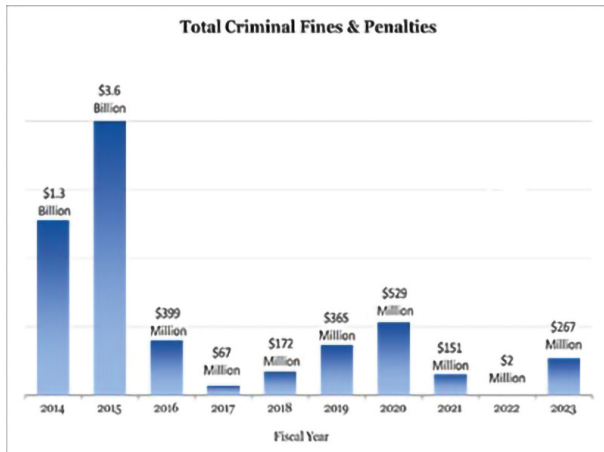
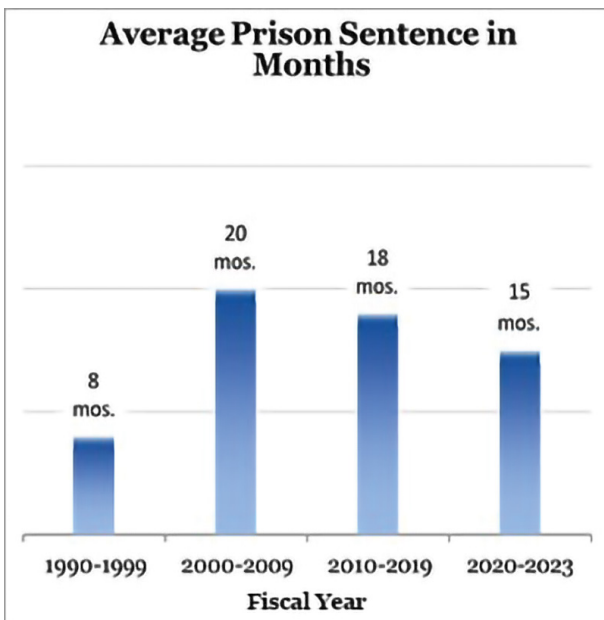


Figure 3: Average Prison Sentences (1990-2023)



While this reflects an active docket, as shown in the charts above, the fines and sentence statistics declined from prior Administrations. That likely has to do with DOJ's focus on more domestic no poach and wage fixing rather than large international cartels. However, more activity can be expected, as Deputy AAG Kumar noted, because as of January 2024, the DOJ had over 150 grand jury investigations open,<sup>55</sup> and back in fiscal year 2022, 150+ pending grand jury investigations constituted a 30-year high.<sup>56</sup>

55 Manish Kumar, Deputy Assistant Att'y Gen., U.S. Dep't of Just., 'Introductory Remarks on the Evolution of International Cartel Enforcement Coordination for the New York State Bar Association' (Jan. 16, 2024), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-manish-kumar-delivers-introductory-remarks-evolution>

56 Dep't of Just., FY 2024 Performance Budget Congressional Justification (CJ) Submission (Mar. 13, 2023), [https://www.justice.gov/d9/2023-03/atr\\_fy\\_2024\\_pb\\_narrative\\_omb\\_cleared\\_03.13.23.pdf](https://www.justice.gov/d9/2023-03/atr_fy_2024_pb_narrative_omb_cleared_03.13.23.pdf)

Meanwhile, the DOJ suffered a series of losses in all of its no-poach and wage-fixing criminal trials, in addition to losing its third attempt to convict executives in the chicken industry of alleged price-fixing, after the first two trials were declared mistrials due to a hung jury.<sup>57</sup>

*a. Criminal Prosecution of Sherman Act Section 2 Offenses*  
 In April 2022, AAG Kanter signaled in a speech the DOJ's intent to revive criminal enforcement of Section 2, stating that '[s]ince the 1970s, Section 2 has been a felony, just like Section 1'.<sup>58</sup> Following this statement, in the second half of 2022, the DOJ brought two Section 2 criminal charges – the first time in nearly fifty years.<sup>59</sup>

On October 31, 2022, the DOJ obtained a guilty plea from the owner of a Wyoming pavement and asphalt company for attempted monopolization under Section 2 of the Sherman Act.<sup>60</sup> The charge alleged that the owner proposed to a competing company to enter into an agreement to divide highway sealing projects in certain states.<sup>61</sup> The competing company refused and reported the conduct to the DOJ.<sup>62</sup> Had this invitation been accepted, it would have been a straightforward market allocation cartel case.

On December 6, 2022, the DOJ unsealed an indictment charging twelve individuals with violations of both Sections 1 and 2 in the transgrante industry, which transports cars from the U.S. through Mexico to South America. The indictment alleged that defendants, operating as a single entity, engaged in anticompetitive acts, including fixing prices and pooling and dividing revenues according to pre-negotiated agreements.<sup>63</sup> The Section 2 charge in this case

57 Patrick Thomas & Dave Michaels, *Justice Department Fails for Third Time to Convict Chicken Executives in Price-Fixing Trial*, Wall Street J. (July 8, 2022), <https://www.wsj.com/articles/chicken-industry-officials-acquitted-in-price-fixing-case-11657287202>; Bob Van Voris, *Chicken Trial Failures Have Judge Asking Why Do This Over Again*, Bloomberg (Mar. 29, 2022), <https://www.bloomberg.com/news/articles/2022-03-29/chicken-price-fixing-trial-ends-in-mistrial-for-a-second-time>

58 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., 'Opening Remarks at 2022 Spring Enforcers Summit' (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>

59 *Axinn Antitrust Insight: DOJ Officials Raise Specter of Criminal Monopolization Prosecutions*, Axinn (Mar. 15, 2022), [https://www.axinn.com/media-articles-Axinn\\_Antitrust\\_Insight\\_DOJ\\_Officials\\_Raise\\_Specter\\_Criminal\\_Monopolization\\_Prosecutions.html](https://www.axinn.com/media-articles-Axinn_Antitrust_Insight_DOJ_Officials_Raise_Specter_Criminal_Monopolization_Prosecutions.html); Jimmy Attridge, *DOJ Provides More Specific Guidance About Criminal Enforcement of Section 2*, Axinn (Nov. 16, 2023), <https://viewpoints.axinn.com/post/102isi6/doj-provides-more-specific-guidance-about-criminal-enforcement-of-section-2>

60 *Id.*

61 Press Release, U.S. Dep't of Just., 'Executive Pleads Guilty to Criminal Attempted Monopolization' (Oct. 31, 2022), <https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization>.

62 Charge at 4, United States v. Zito, 1:22-cr-00113-SPW (D. Mont., Sept. 19, 2022), ECF No. 1, <https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization>

63 Press Release, U.S. Dep't of Just., 'Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transgrante Industry and Extort Competitors Near U.S.-Mexico Border' (Dec. 6, 2022), <https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transgrante-0>

was somewhat superfluous since the case involved actual extortion and other violent criminal conduct.<sup>64</sup>

Because one case resulted in a plea and the other is pending, neither case has tested the legal sufficiency of criminal Section 2 claims.

#### *b. No-Poach and Wage-Fixing Agreements*

No-poach and wage-fixing have been criminal enforcement priorities for the DOJ for some time now. While they precede the Biden Administration, they certainly have picked up speed under his Administration, which has brought several significant criminal no-poach cases. Although the DOJ has successfully indicted companies and individuals, withstood motions to dismiss, and obtained a guilty plea and a pre-trial diversion agreement, it has yet to secure a jury win in any of its criminal labor market cases.<sup>65</sup>

#### Plea Agreement in VDA OC, LLC.

In October 2022, the DOJ obtained a guilty plea from VDA OC LLC, a healthcare staffing company in Nevada, for conspiring to allocate employee nurses and fix their wages. The DOJ alleged that from October 2016 to July 2017, VDA, one of the two primary providers of contract nursing services to the Clark County School District, conspired with other contract healthcare staffing firms to allocate nurses and fix the wages of those nurses. VDA pleaded guilty and was ordered to pay a criminal fine.<sup>66</sup> In March 2023, the DOJ also obtained a grand jury indictment for an executive of the company for conspiring to fix wages of nurses.<sup>67</sup>

#### Multiple Trial Losses

Despite success in securing pleas in VDA, the DOJ lost all four criminal no-poach cases that went to trial.<sup>68</sup> The challenges the DOJ encounters at trial are likely driven partly by juries' unwillingness to put defendants behind bars for

conduct related to hiring and partly by the difficulty in presenting evidence proving an agreement.<sup>69</sup>

In 2022, the DOJ lost both no-poach cases it took to court. In *United States v. Davita*, the DOJ alleged that Davita, a kidney dialysis provider, and three of its competitors agreed not to solicit each other's executives and to ask Davita employees seeking job opportunities with competitors to inform Davita before they could receive an offer. The jury in July 2021 acquitted the defendants of any wrongdoing.<sup>70</sup> In *United States v. Jindal*, the jury similarly returned a not guilty verdict on the DOJ's allegation of a wage-fixing agreement among physical therapist assistants,<sup>71</sup> although Jindal was found guilty of obstructing the FTC's proceedings.<sup>72</sup> In 2023, the DOJ again suffered two consecutive losses on no-poach cases. In March 2023, the jury acquitted four managers of several home care agencies of conspiring to fix the wages of Personal Support Specialist (PSS) workers and to refrain from hiring each other's workers. Commentors surmised that the jury might have found lack of a criminal agreement because the DOJ alleged that the managers fixed wages at \$15 to \$16 per hour, but the agencies in fact paid PSS workers at a higher rate.<sup>73</sup>

The agencies have made good on President Biden's 2021 Executive Order to increase antitrust enforcement. Their crusade under Biden has caused many more litigated antitrust cases and fewer settlements than has been typical under prior Administrations, across merger, Section 2, and cartel matters

Perhaps the most painful loss came in the most recent case in *United States v. Patel*, where the court entered an order acquitting the defendants before the case went to jury, finding that no reasonable jury could convict based on the evidence presented. In the court order, the judge noted that 'the alleged agreement itself had so many exceptions that it

64 Jimmy Attridge, *DOJ Provides More Specific Guidance About Criminal Enforcement of Section 2*, Axinn (Nov. 16, 2023), <https://viewpoints.axinn.com/post/102isi6/doj-provides-more-specific-guidance-about-criminal-enforcement-of-section-2>

65 See discussion Section IV.2.b.

66 Press Release, U.S. Dep't of Just., 'Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses' (Oct. 27, 2022), <https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses>

67 Press Release, U.S. Dep't of Just., 'Health Care Staffing Executive Indicted for Fixing Wages of Nurses' (Mar. 16, 2023), <https://www.justice.gov/opa/pr/health-care-staffing-executive-indicted-fixing-wages-nurses>. In September 2023, the DOJ announced that a grand jury returned a superseding indictment to add fraud charges for fraudulently concealing that conspiracy and the government's investigation in order to see the company for over \$10 million. Press Release, U.S. Dep't of Just., 'Fraud Charges Added Against Health Care Staffing Executive in Las Vegas' (Sept. 7, 2023), <https://www.justice.gov/opa/pr/fraud-charges-added-against-health-care-staffing-executive-las-vegas>

68 See discussion Section IV.2.b.

69 Davide Mamone, *Mekki: DOJ bringing more no-poach and wage-fixing cases*, GCR (Dec. 7, 2023), <https://globalcompetitionreview.com/gcr-usa/article/mekki-doj-bringing-more-no-poach-and-wage-fixing-cases>; Daniel Oakes, Tiffany Rider & Lindsey Strang, 'Losing per se: Potential fallout from the U.S. Department of Justice's no-poach enforcement', *Concurrences* (2023), [https://www.axinn.com/assets/htmldocuments/\\_03.concurrences\\_4-2023\\_on-topic\\_no-poach%20007.pdf](https://www.axinn.com/assets/htmldocuments/_03.concurrences_4-2023_on-topic_no-poach%20007.pdf)

70 Daniel Oakes, Tiffany Rider & Lindsey Strang, 'Losing per se: Potential fallout from the U.S. Department of Justice's no-poach enforcement', *Concurrences* (2023), [https://www.axinn.com/assets/htmldocuments/\\_03.concurrences\\_4-2023\\_on-topic\\_no-poach%20007.pdf](https://www.axinn.com/assets/htmldocuments/_03.concurrences_4-2023_on-topic_no-poach%20007.pdf)

71 *United States v. Jindal*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex.).

72 *United States v. Jindal*, 621 F. Supp. 3d 727 (E.D. Tex. 2022).

73 Barbara Sicalides et al., 'DOJ Fails to Convict in No-Poach/Wage Fixing Case', *ABA* (Apr. 12, 2023), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2023-april/doj-fails-to-convict/#:~:text=Summary,1%20of%20the%20Sherman%20Act](https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-april/doj-fails-to-convict/#:~:text=Summary,1%20of%20the%20Sherman%20Act)

could not be said to meaningfully allocate the labor market of engineers (...).<sup>74</sup>

## V. Looking Forward: What to Expect

The agencies have made good on President Biden's 2021 Executive Order to increase antitrust enforcement. Their crusade under Biden has led to many more litigated antitrust cases and fewer settlements than has been typical under prior Administrations, across merger, Section 2, and cartel matters. The agencies also have introduced many new and significant changes in policy and process, all directed towards a much more expansive and aggressive view and enforcement of antitrust law. For the corporate world, this has had several implications requiring an adjustment of expectations and approach. Regulatory certainty has decreased materially. There are many more concerns and theories that the agencies are likely to pursue than before, and often contrary to what prior Administrations did. And, the stakes, costs, and uncertainty of timing have increased too, due to policy and process changes and the agencies' preference to litigate over settlement. That said, the agencies' ambitious approach has caused them to lose in court regularly, which presents opportunities for corporate defendants prepared to go the distance. What's more, the agencies' focus on certain industries, companies, and conduct, combined with their resource constraints, has meant that other industries, companies, and conduct have received less attention.

In the M&A world, this new environment means that merging parties need to consider either earlier exit opti-

ons or longer deal timelines (depending on objectives), greater use of reverse break fees, designing risk allocation provisions around new agency policies like prior approval requirements, and more proactively offering and implementing remedies to force agencies to litigate the fix. In civil enforcement, the FTC is finalizing its proposed ban on non-competes, which may have significant impact on businesses' hiring and recruitment practices, but the legality of the ban is likely to be litigated in the courts. The agencies are expected to continue their aggressive litigation agenda in tech and perhaps pursue it in healthcare as well. In criminal enforcement, the DOJ's stingier approach to leniency and compliance programs, along with its string of losses, may change the calculus of would-be defendants in such matters as to whether to seek leniency, accept a plea, or litigate, depending on circumstances.

What the future holds depends on how the agencies' new guidelines, rulemaking, process changes, and cases will fare in the courts and what will happen in next year's Presidential elections. A Republican win could mean significant changes, including possibly a withdrawal and replacement of the merger guidelines, among other things.

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<sup>74</sup> Bryan Koenig & Nadia Breid, 'DOJ's Latest, Biggest No-Poach Trial Thrown Out', LAW360 (Apr. 28, 2023), <https://www.law360.com/articles/1602209>