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Transparency In Merger Enforcement:

Taking Stock of the Deals That Didn't Bark



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Transparency In Merger Enforcement Taking Stock of the Deals That Didn't Bark



Key Findings

More than 82% of merger enforcement actions announced by the U.S. antitrust agencies in 2024 involved a litigated challenge (complaint) or the deal being abandoned. But only 17 enforcement actions were reported in total—well below the number of Second Requests reported by the agencies each year in annual reports to Congress. In other words, agency press releases were focused on only complaints and abandonments, leaving out substantial activity that went unreported. This unreported activity, however, is important for companies considering how long it takes to clear their deals.

To help fill that gap, we have created a substantially larger dataset of extended (Second Request) investigation activity that includes both announced enforcement actions and investigations publicly disclosed by merging parties, which goes back to 1996. These data provide a more comprehensive report on merger investigation outcomes than agency statements alone. Key findings in our first report include:

- In 2024, at least 58% percent of publicly disclosed Second Request investigations concluded without any agency press release, which is substantially higher than the 26% recorded for 2020.
- Somewhat surprisingly, at least 60% of publicly disclosed Second Request investigations ended with a closed deal under the Biden administration. By comparison, this figure was 75% under Trump 1.0.
- The number of Second Request investigations disclosed in press releases fell by 32% under the Biden administration, reducing agency transparency.
- The duration of Second Request investigations with and without agency press releases converged in 2024, showing that even parties to investigations that were not the subject any of formal enforcement action needed an average of around 11 months to obtain clearance.

Introduction

There can be little debate that the Biden administration changed the paradigm for merger enforcement.

Under the Biden administration, among other things, the agencies overhauled and consolidated the Merger Guidelines (the analytical playbook for antitrust review of mergers), revamped the Hart-Scott Rodino (HSR) premerger notification program, reinvigorated enforcement of laws prohibiting interlocking directorates, and prosecuted new theories of competitive harm. Perhaps by design, the administration's focus on what could be unlawful without describing "safety zones" for transactions contributed to the climate of uncertainty and may have chilled strategic transactions. Consequently, we often heard during the Biden administration that prospects for clearance for deals subject to extended antitrust (Second Request) review were bleak.

A fair reading of the most publicized aspects of the record would support this view. In 2024, the Federal Trade Commission (FTC) and Department of Justice (DOJ) disclosed a total of 14 transactions subject to Second Request investigations that were either abandoned by the parties or challenged by the agencies. Meanwhile, the agencies only disclosed three transactions that resulted in a settlement. Together, more than 82% of outcomes disclosed in agency press releases resulted in an abandonment or litigated challenge. By contrast, in 2020, the last year of Trump 1.0, agency press releases disclosed 21 Second Request investigations ending in announced settlements. And back in 2020, by comparison, just 33% of Second Request outcomes disclosed by the agencies ended in an abandonment or litigated merger challenge. On the surface, this nearly 50% jump in agency disclosed Second Requests ending in a complaint or abandoned transaction seems like a sea change for merger enforcement.

None of this should have been unexpected. The Biden administration made no secret of its distaste for settlements. Indeed, Assistant Attorney General Jonathan Kanter made his skepticism of merger settlements clear soon after taking office, warning in January 2022 that accepting remedies to fix anticompetitive mergers should be the "exception, not the rule." True to his words, he chose not to announce even one settlement before litigation for the entirety of his tenure.¹

The FTC soon aligned with DOJ in this regard. Director of the Bureau of Competition Holly Vedova warned in early 2023 that "parties should expect the agency to be skeptical and risk averse when considering offers to settle in our merger investigations." The number of pre-complaint settlements announced by the FTC dropped precipitously thereafter, from eight in 2022 to one in 2023 and three in 2024. Importantly, three of the four pre-complaint settlements that the FTC accepted in 2023 and 2024 largely addressed interlocking directorate concerns rather than traditional merger concerns. Otherwise, press releases began to tilt towards abandonments and complaints at both agencies.

¹ DOJ announced its last pre-complaint merger settlement on November 12, 2021, four days before Kanter was sworn in as Assistant Attorney General. Up to that point, DOJ had announced ten settlements in 2021. After taking the helm, DOJ announced no pre-complaint settlements for the balance of the Biden administration.

These trends understandably led sirens to go off in board rooms during the Biden era, which may have been the point. The prevailing agency theme seemed to be “deterrence,” which the agencies may have accomplished. Yet while the agencies may have prevented some transactions from signing, they also announced relatively fewer merger investigations in press releases.

An examination beyond the announced case activity by the Biden administration helps put this record into better context. Agency press releases, while helpful, can only take observers so far, which should have been obvious from overall enforcement figures reported by the agencies’ alone. According to the most recent [HSR Annual Report to Congress](#) (the HSR Report), for example, the U.S. antitrust agencies launched Second Request investigations on an average of nearly 50 transactions per year between fiscal years 2021 and 2024. Over this same period, the agencies only reported outcomes for an average of 19 transactions per year. Simple math accordingly dictates that agency press releases accounted for less than half of all Second Request investigation activity. This report is intended to provide a more complete picture of overall Second Request investigation activity, allowing parties to make more informed decisions about the state of merger enforcement and, by extension, the time required for significant transactions to clear antitrust review.

Methodology

The Akin Agency Transparency in Merger Enforcement (TIME) Report is a fulsome study of publicly available material relating to Second Request or equivalent investigations conducted by the U.S. antitrust agencies under U.S. merger control laws.

We acknowledge upfront that there is no way for private parties to track every Second Request investigation. The agencies are bound by strict confidentiality obligations under the HSR Act, which prevents a clear window into their activity. All parties should value the professionalism of agency staff in this regard, even if it cuts against full transparency.

At the same time, parties to transactions under investigation often are not silent about merger investigation activity and outcomes. Public companies, for example, are often required to disclose the receipt of Second Requests under certain circumstances, typically under penalty of perjury. When issued, these certified disclosures are inherently credible.

The Akin Agency TIME Report considers all available information on Second Requests disclosed by either the U.S. antitrust agencies or the parties to each transaction themselves since 1996. Our sources include agency press releases, other agency materials released without press statements, and other verifiable disclosures offered by parties to notified transactions or their agents through U.S. Securities and Exchange Commission (SEC) filings, corporate press releases, court filings and other public statements. In this study, transactions subject to Second Requests are tracked by the following outcomes:

Outcome	Description
Complaint	An investigation that ends with a complaint to block the transaction.
Abandoned	An investigation that ends with a deal being abandoned without any complaint (whether announced in an agency press release or not).
Settlement	An investigation that ends with an announced settlement (consent decree or consent order).
Recommendation	An investigation that ends with an agency recommendation to another federal or state authority but no direct settlement.
Closing Statement	An investigation that ends with a formal agency closing statement.
Closed Without Statement	An investigation that ends with a closed deal and no agency press release.

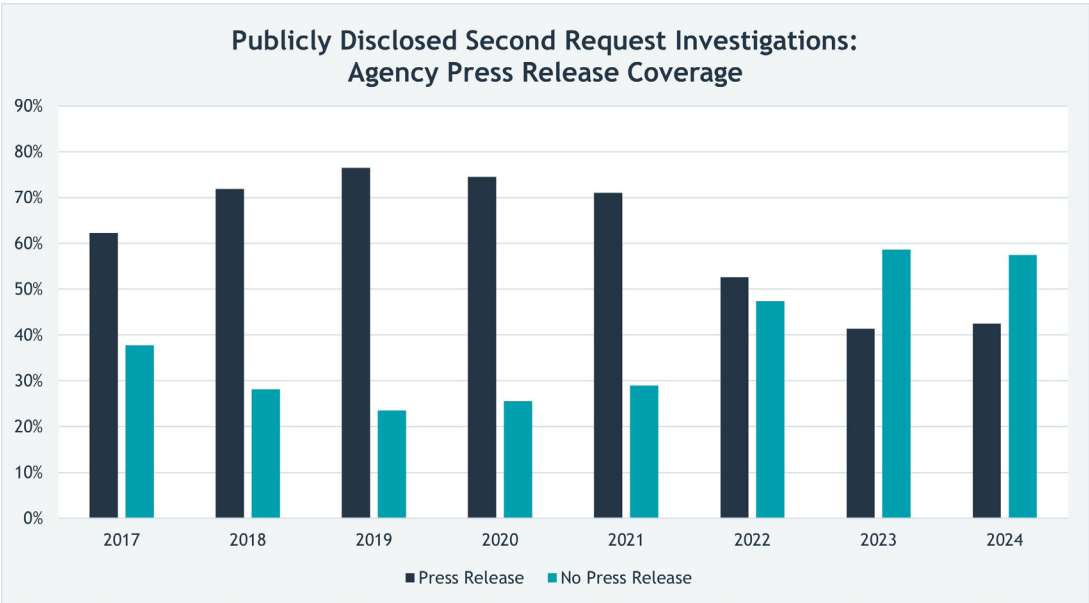
Our data includes information about Second Request investigations beyond what the agencies disclosed in press releases alone. Yet because our goal is increased transparency, we also aim to be transparent about the extent to which our data may not show the complete picture when benchmarked against agency statistics so that you can put our findings into context.

Findings By Outcome

Our data show good news for parties considering merger activity. While there may be a perception that significant merger investigations are increasingly ending in complaints or abandoned transactions, this view is based on agency press releases alone.

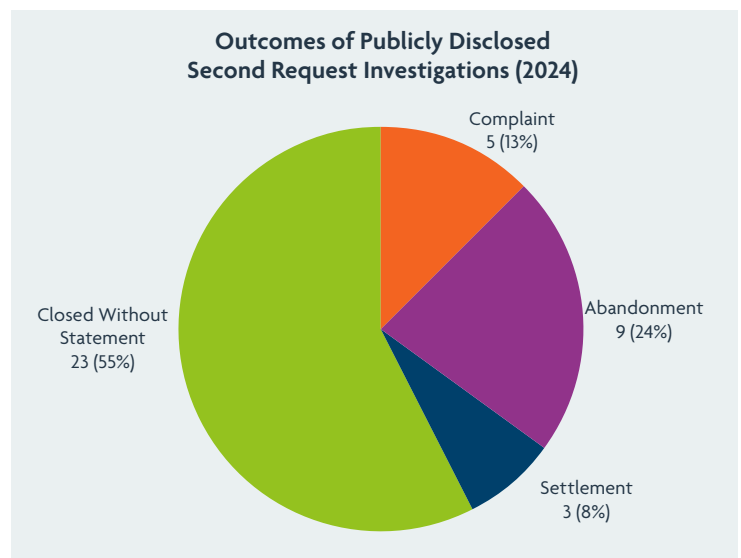
Merger Investigation Transparency Dies in Darkness

It is true that Second Request investigations announced by the agencies are increasingly ending in adverse decisions. But publicly disclosed Second Requests are increasingly ending without any agency announcement at all. Indeed, as shown below, the proportion of publicly disclosed Second Request investigations that concluded without agency statements in both 2023 and 2024 exceeded the proportion of publicly disclosed Second Request investigations that ended with an agency announcement.

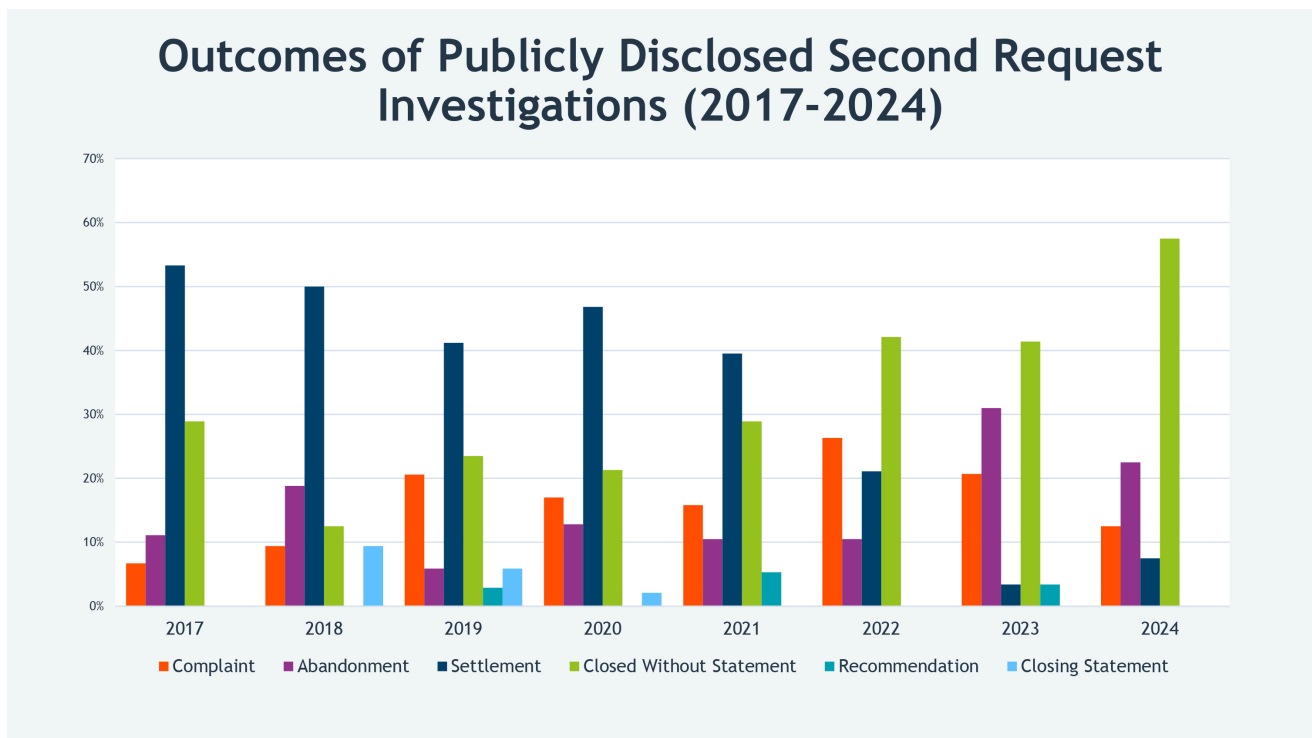


It is worth repeating that our data only track *publicly disclosed* Second Requests, so, if anything, we are *undercounting* the number of Second Request investigations that closed without agency announcement. So, while 82% of agency press releases ended in a complaint or abandoned transaction in 2024, that figure relies on only 17 agency press releases; it ignores *at least* 23 transactions that were subject to Second Request investigations but closed without any agency statement the same year. Indeed, the most common outcome for publicly disclosed Second Request investigations *by far* in 2024 was a closing without an agency statement, which amounted to more than double the number of abandonments, complaints and settlements *combined*.

The proportion of publicly disclosed Second Request investigations that closed without an agency statement in recent years is well above historic norms. Between 2009 and 2020, for example, about 26% of publicly disclosed Second Request investigations closed without an agency statement, with those numbers generally trending down for most of this period. And as the proportion of publicly disclosed Second Request investigations closing with a formal settlement began to drop in 2021, the data show a corresponding spike in the proportion of publicly disclosed Second Request investigations that closed without an agency statement, as shown below.



Interestingly, the percentages of publicly disclosed Second Request investigations that concluded in an abandonment or a complaint *both* went down in 2024, further demonstrating the importance of examining Second Request investigations that had no accompanying agency statement.



Agency Silence Does Not Imply “Unconditional” Clearance

Importantly, the high proportion of publicly disclosed Second Request investigations that closed without agency statements in recent years does not necessarily mean that the agencies cleared these transactions unconditionally *without remedies*. Instead, there is some evidence, albeit incomplete, that some merging parties resolved agency concerns using *informal* remedies (e.g., divestitures up front) short of formal settlements, even if those efforts were noticeably absent from agency press releases.

In September 2022, for example, parties to two separate bank mergers—Umpqua Holdings Corporation/Columbia Banking System, Inc. and U.S. Bancorp/MUFG Union Bank—disclosed Letters of Agreement with the DOJ Antitrust Division that required divestitures and related commitments to receive clearance after prolonged merger investigations. These agreements in substance match prior agreements that DOJ previously reported frequently, including in BB&T/SunTrust (2019), Huntington Bancshares/TCF Financial Corp. (2021) and BancorpSouth/Cadence Bank (2021). In fairness, it is not clear that the agencies always reported similar bank merger settlements. For instance, there is at least one example of a similar divestiture agreement that also was not announced under the first Trump administration in 2019. Still, our data show that DOJ has entered at least 49 similar bank merger settlements since 1996, and DOJ publicly reported about 94% of those settlements. In that context, DOJ’s decision not to publicize these two bank merger settlements is notable.

Because bank mergers are covered by a somewhat different statutory scheme than other mergers reviewed under the HSR Act, some may argue that bank merger settlements are exceptions. In addition, while DOJ did not announce those informal settlements in 2022, Assistant Attorney General Kanter did announce that DOJ would no longer enter into informal bank merger settlements in June 2023, and we are not aware of any such settlements that were entered after that date.

However, we have seen similar informal settlements in other industries. In energy, for example, DOJ submitted a Comment to the Federal Energy Regulatory Commission (FERC) recommending divestitures in one transaction. As later confirmed in the HSR Annual Report to Congress, the buyer in that deal “offered to restructure its proposed acquisition by divesting [a] power plant in Ohio,” and “FERC issued an Order on February 16, 2024, mandating the divestiture.” Again, while DOJ did disclose this outcome later in a report to Congress, it did not report this outcome in a formal press release at the time when it occurred.

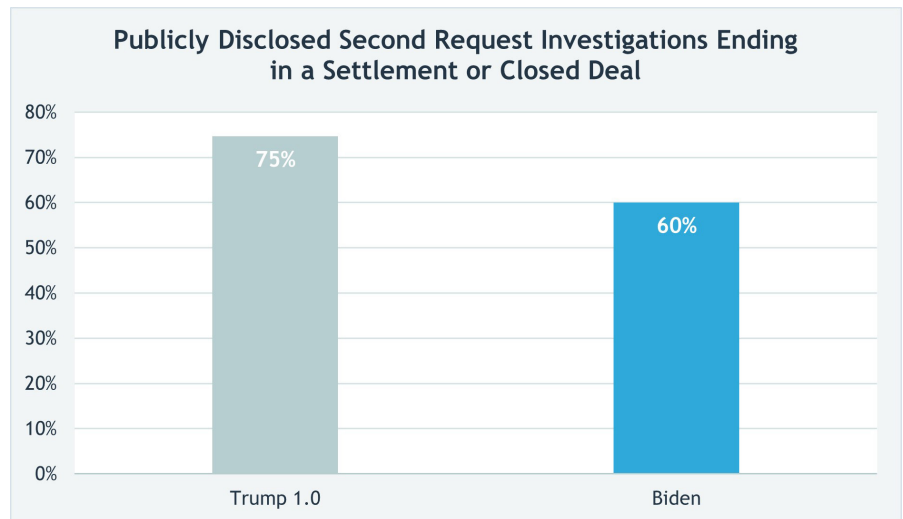
In transportation, the parties to the *Alaska Airlines/Hawaiian Airlines* merger may have also resolved concerns through an informal settlement. Indeed, while the parties to that matter confirmed that extended discussions to resolve competitive concerns occurred, DOJ never released a statement confirming any settlement in connection with that review. It is possible, of course, that the parties convinced DOJ that there were no concerns. Because DOJ and the U.S. Department of Transportation (DOT) coordinate review of airline mergers, however, it seems more likely that any DOJ concerns were addressed by the separate settlement negotiated with DOT.

Some have described this type of merger enforcement as “shadow settlements,” which DOJ denied were occurring. Admittedly, some of this may be semantics. For example, if another regulatory agency reached a formal settlement in coordination with DOJ, it is not clear that this should be viewed as a shadow settlement. Similarly, if parties have restructured transactions irrevocably to carve-out potential competitive issues up front, it is unclear that any settlement would be warranted at all. But there can be no question that public announcements about the full range of Second Request investigations would improve the ability of the private bar to understand the time and risks associated with merger review.

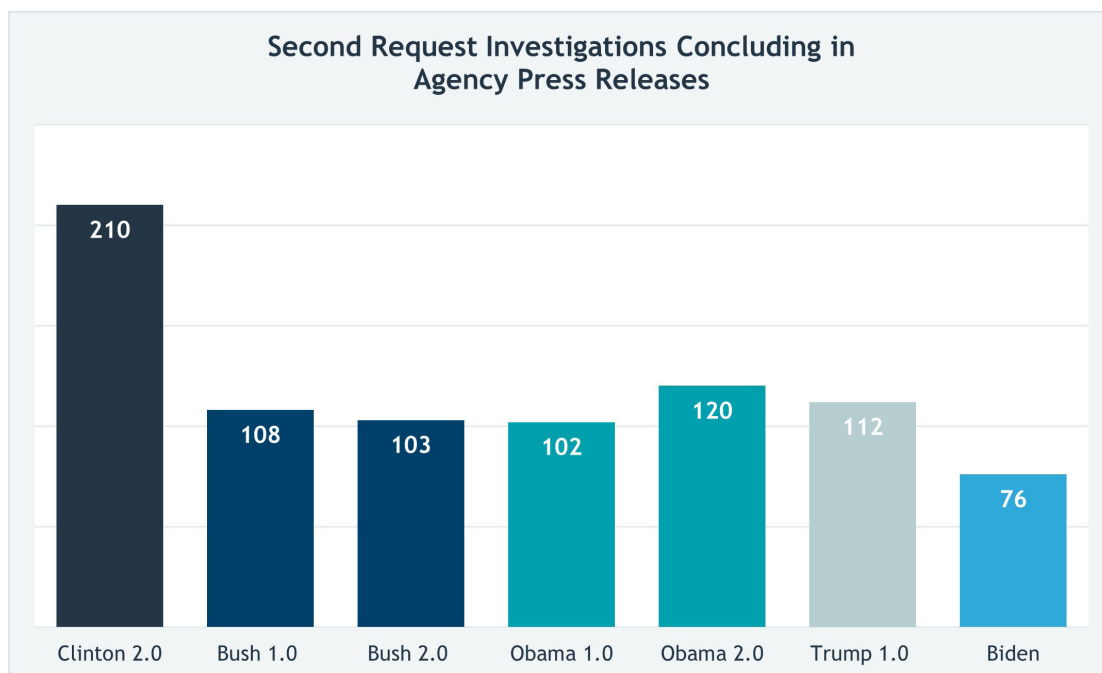
A Greater Proportion of Deals Were Challenged or Abandoned Under Biden

Despite the surprisingly high number of publicly disclosed Second Request investigations that closed without agency comment under the Biden administration, as previously noted, the Biden era could not be characterized as light on antitrust enforcement. Indeed, our data show that publicly disclosed Second Request investigations were more likely to be blocked or abandoned under the Biden administration than under the first Trump administration. Around 75% of publicly disclosed Second Request investigations ultimately ended in a settlement or closed deal under the first Trump administration, as opposed to at least 60% in the Biden era.

Despite the appearance of tougher enforcement by this metric, however, the glass here is still half full. *At least 60%* of transactions subject to Second Request investigations under the Biden administration still closed. In other words, Second Request review was not necessarily a kiss of death for M&A activity in recent years. Even under the Biden antitrust team, more than half of all transactions issued Second Requests made it across the finish line.



Nevertheless, despite a relatively robust public record for many of these transactions, the number of agency press releases related to Second Request investigations has declined precipitously. As a result, despite some claims that the Biden administration set new records for merger enforcement, the number of concluded investigations announced by the agencies hit historic lows under the Biden administration.

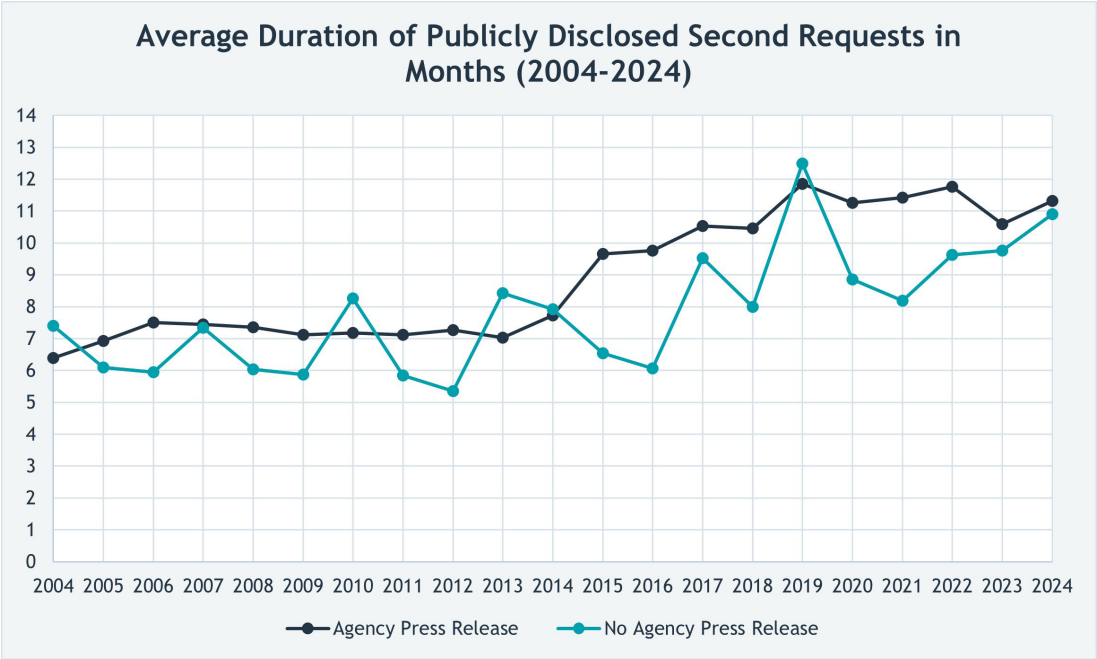


Findings By Duration

Given the number of publicly disclosed Second Request investigations that closed without an agency statement, we examined whether Second Request investigations that end *without* an agency press release follow a different timeline on average than investigations that end *with* an announced enforcement action.

Agency Press Release Data is Generally a Reliable Barometer for the Timing of Review Overall, Especially in Recent Years

On the whole, we would have expected transactions that clear without any agency action to have shorter timelines than transactions that resulted in a settlement, complaint or abandonment—especially where transactions required no fixes of any kind (in other words, were truly cleared unconditionally). Over time, our data shows that this intuition is generally correct. But as shown below, the difference between investigations that ended without an agency press release and transactions that ended with announced actions narrowed considerably in the last two years of the Biden administration. Although the difference was as wide as 3.2 months in 2021, it narrowed to less than one month in 2024.



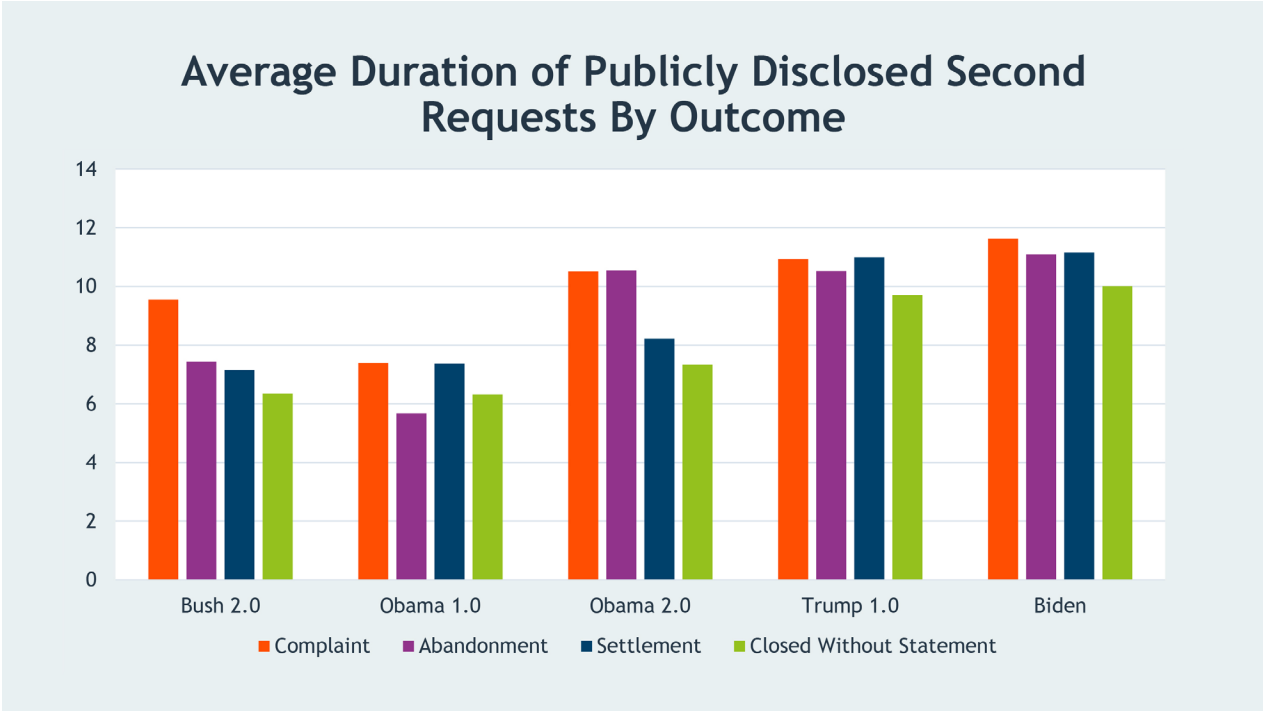
These insights should help merging parties plan. Deal partners may assume that Second Request investigations that are not ultimately subject to a publicly disclosed enforcement action have materially shorter timelines. While that may be true in some cases, our data suggest that, on average, the duration of Second Request investigations that conclude quietly is not materially shorter than Second Request investigations that end with an agency

statement, especially in recent years. Parties to a Second Request today would be wise to plan for at least 10-12 months to get through the investigation before considering any time that may be necessary to defend the transaction in the event of a litigation complaint.

Investigation Timelines Beyond Average Durations Were a Warning Sign for Deals in 2024

Extended investigation timelines do not always portend a negative result in merger reviews. Sometimes the agencies just need time to resolve all potential concerns. But the data show that Second Request investigations that resulted in agency challenge on average had a pre-complaint duration of 13.4 months in 2024, which was at least two months longer than the average duration of all other outcomes. In other words, investigations that exceeded the average review in 2024 were more likely to receive a complaint. This insight about timing for a complaint is also noteworthy because it was not heavily influenced by outliers. Indeed, only two of five litigation complaints filed to block transactions in 2024 arrived in less than 12 months. The remaining three lawsuits were filed on or after 14 months.

Looking back further, the data generally confirm that, on average, complaints do generally have longer investigation timelines. Nevertheless, the gap between the average time to a complaint and the average time to a closed transaction without any agency action is often narrower than we might have expected across administrations.



A Transparency Gut Check

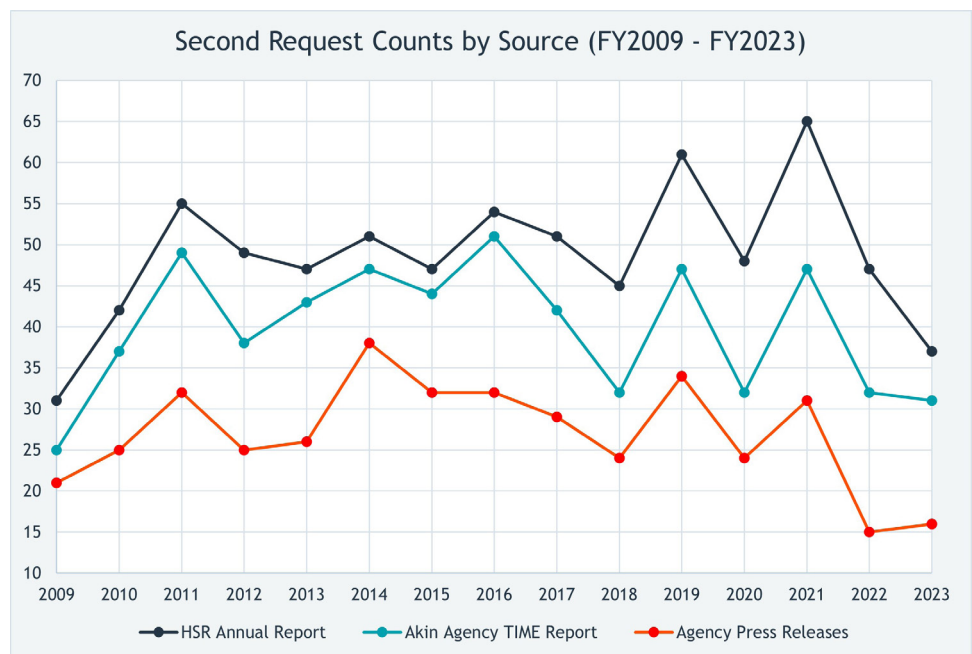
Given the recent dwindling of agency press releases, we wanted to see how closely the number of agency disclosed investigations matched the broader public record. Our data provide insights on many transactions subject to publicly disclosed Second Request investigations that closed without formal agency acknowledgement and, over the last two years of the Biden administration in particular, the number of those transactions on which the agencies remained silent swamped the actions that were announced.

The Importance of Knowing the Unknown

To check the reliability of our data, we mapped out the number of Second Requests that the FTC and DOJ reported each year in their [HSR Annual Report to Congress](#) against both the number of Second Requests covered by agency press releases and the full number of Second Requests tracked in our data. Our dataset substantially narrows the gap between the deals captured in agency press releases and the aggregate statistics included in the agencies' annual reports. Between fiscal years 2009 and 2016, for example, our data includes 88% of Second Requests issued by the agencies; agency press releases only cover 61% of Second Requests issued over the same period. Moreover, as shown to the right, the number of Second Requests covered by our data tracks much more closely with the total number of Second Requests issued each year than agency press releases count alone.

At the same time, these figures show that there are limits to

how much the public can learn from the agencies and the parties themselves, and that the information available in the public record has been declining. This trend did not begin under the Biden administration. Instead, the data suggest that this divergence began under the first Trump administration. Potential explanations may include increasing numbers of Second Requests directed at private companies, foreign issuers or large public companies for transactions that are small enough to not trigger materiality-based SEC disclosure requirements.



Conclusion

For better or worse, press releases from U.S. antitrust enforcers have become less common and, in the last two years of the Biden administration, have focused almost entirely on transactions that were abandoned or challenged.

By contrast, the agencies said little about a silent majority of deals that unceremoniously received clearance. As our analysis shows, focusing on agency-announced actions alone ignores a substantial volume of agency activity. A more robust analysis of the merger enforcement record demonstrates that, even under the Biden administration, the agencies continued to be quite pragmatic, including when it came to considering potential merger fixes short of a formal settlement.

Even under the Biden administration, the most common result of a Second Request investigation was a closed transaction, and not a complaint or an abandonment. At the same time, our data shows that getting a deal through without a formal settlement has taken more time in recent years. Parties planning significant merger activity that could be subject to a Second Request would be wise to budget for at least 10-12 months to complete the investigation before considering an additional 5-7 months, if necessary, to defend the transaction in court.

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