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Taking Stock of Merger Enforcement Under the Biden Administration

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EXECUTIVE SUMMARY

Competition is the bulwark of a market system. It plays the lead role in the U.S. political economy by promoting fair prices and wages, and the choice, quality, and innovation that benefits consumers and workers. As referees on the playing field of markets, antitrust enforcers and the courts call "balls and strikes" on what mergers or business practices are likely to harm competition. This oversight is essential for protecting markets and the democratic principles on which they rest.

Much like other pro-competition administrations, more aggressive merger enforcement is a leg of the Biden administration's platform. But the Biden strategy is different. It features antitrust agency leadership sourced from the Neo-Brandeisian, anti-monopoly movement that emphasizes concern with bigness. This has spurred debate over assessing the legality of mergers based on "bright-line" tests for bigness versus the existing consumer welfare standard. The latter asks if, and how, the merged firm could wield its greater market power to raise prices, lower wages and benefits, or reduce quality, choice, and innovation.

This Progressive Policy Institute (PPI) report unpacks the Biden merger enforcement record based on data across three decades and five political administrations. The analysis finds that the Biden enforcers have made progress in invigorating merger enforcement in some areas but may be lagging behind in others. PPI's analysis does not address hard-to-measure indicators of more aggressive enforcement, such as deterring harmful consolidation proposals that, as former Assistant Attorney General Bill Baer noted, "never should have made it out of the boardroom."[1]

PPI's analysis reveals three major takeaways from the Biden merger enforcement record so far. One, the Biden enforcers are forcing companies to abandon anticompetitive mergers at the highest rate in 30 years. Two, the rate at which the agencies attempt to block mergers by litigating preliminary injunctions before federal court or administrative judges is also at its highest level. The Biden agencies' "win" rate in court, however, is below the historical average, reflecting an intense effort that has not yet fully paid off. Third, the Biden enforcers have not been as aggressive as their Obama counterparts in invigorating enforcement in the wake of the Republican administrations they immediately succeeded.

PPI's findings regarding the Biden administration's merger control program prompt key policy questions that have wide-ranging implications for enforcement, competition, and consumers. For example, how can success in promoting more aggressive enforcement can be carried forward? What is the impact of the cases lost by the Biden enforcers on legal precedent and will it work against stronger enforcement in the future? What are the implications of the Biden policy of disfavoring merger settlements on advancing policy on stronger, more effective merger remedies?

PPI's analysis suggests that now is a good for the Biden administration to take stock of its policy objectives for merger enforcement by performing a mid-course assessment. This will provide a basis for the administration to assess goals and expectations, agency leadership, and resources for a second term. For a deeper dive into this important topic, please continue reading the full report.

INTRODUCTION

Promoting competition in the U.S. economy is a priority for the Biden administration. This is clear in a 2021 Executive Order (EO) that set forth a plan to harness a multi-pronged "whole of government" approach.[2] Some federal agencies are implementing strong initiatives to promote competition, while others pay lip service to the EO, and yet others have not gotten the message.[3]

As part of the EO's mandate, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) committed to stronger antitrust enforcement. Agency leadership was sourced from the Neo-Brandeisian, anti-monopoly movement that emphasizes concern with bigness. This spurred debate over how to reconcile the legality of mergers based on "bright-line" tests for bigness with the existing consumer welfare standard. The latter asks how a merged firm can wield greater market power to raise prices, lower wages and benefits, or degrade quality, choice, and innovation.

The Biden DOJ and FTC have brought a number of monopolization cases under Section 2 of the Sherman Act, with a strong focus on the digital sector.[4] The Biden DOJ and FTC committed to invigorating merger enforcement under Section 7 of the Clayton Act. In implementing a new merger control program, the Biden agencies proposed new merger reporting requirements under the Hart Scott Rodino (HSR) Act, as well as adopting new merger guidelines.[5]

The Biden agencies signaled early on that they would seek to deny more deals by forcing companies to abandon them or litigating preliminary injunctions in court. The agencies also indicated that they would disfavor merger settlements with merging parties, or allowing deals to proceed subject to remedies. The Biden merger control strategy continues to generate significant attention from Congress, competition advocates, and the business community. But the end of the first Biden term is near and it is important to take stock of progress in achieving more aggressive merger control, for two reasons.

One is to establish a reference point. A mid-course assessment sheds light on whether the more aggressive Biden merger control program is more effective than past administrations. This provides a basis of comparison across the political parties in power and their enforcement strategies, which have important implications. This reference point is established through measurable enforcement statistics. It does not include hard-to-measure indicators of enforcement, such as deterring harmful merger proposals that emerge from board rooms.

A second reason to take stock of the Biden approach to merger control is managing the future of merger enforcement. If the agencies are more effective at denying anticompetitive mergers, then it is important to ask how that can be carried forward by future administrations. There is also the role of legal precedent established by the Biden agencies' successes and failures in litigating injunctions. The former advance stronger enforcement while the latter create troubling legal precedent that could weaken future enforcement.

This report proceeds in several parts. Section II and III provide a brief history of the 25-year movement to invigorate merger enforcement and what Biden enforcers are doing differently. Sections IV and V describe metrics that provide insight into the level of merger enforcement and apply them to the last five political administrations. Section VI looks at administration-over-administration changes and Section VI concludes by identifying major implications that can inform public debate and a mid-course assessment of the Biden approach.

A BRIEF HISTORY OF INVIGORATING MERGER ENFORCEMENT

The role of antitrust enforcement in promoting competition is paramount. A level playing field is visible in fair prices, quality products and services, choice for buyers and sellers, strong incentives to innovate, and opportunities for entry by new players. The exercise of market power by dominant firms and oligopolies deprives market participants of these myriad benefits. Merger law works proactively to stop harmful consolidation before it happens. This is the important "incipiency" standard in Section 7 of the Clayton Act.[6]

The waning role of antitrust enforcement over the last 40 years reflects the pervasive influence of "Chicago School" conservatism.[7] This approach was marked by excessive aversion to the risk of over-enforcement, as well as excessive deference to elusive, pro-competitive justifications for consolidation. Conservative antitrust also featured a narrow interpretation of the consumer welfare standard, under which short-term price increases from a merger could easily be defeated by promised cost reductions. Lax enforcement resulted in, among other effects, higher standards of proof for antitrust plaintiffs and systemic under-enforcement of Section 7.

Beginning in the late 1990s, center-left advocates began pushing back against lax merger enforcement. This response has four major prongs.[8] One is stronger legal standards for mergers, especially the "structural presumption" against highly concentrative horizontal mergers.[9] Another focus is harnessing the full scope of the consumer welfare standard, including the effects of a loss of competition on prices and wages, but also on quality, innovation, and choice.[10] A third priority is calling out ineffective remedies in past merger cases, particularly in mergers that are "too big to fix." A fourth prong is advancing the use of retrospective economic evidence from past mergers to inform future enforcement.

Early messaging from the Biden administration understated the contributions of the center-left in promoting stronger enforcement.[11] This is particularly true of the Obama enforcers, who successfully enjoined a number of harmful, highly concentrative mergers, including Anthem-Cigna and Sysco-US Foods.[12] The practical implication of this oversight is that the business community, competition advocates, and the public were never formally introduced to how the Biden enforcers would do things differently, prompting some confusion about both the process and substance of merger control.

WHAT ARE THE BIDEN ENFORCERS DOING DIFFERENTLY?

The question for the Biden administration is what to do differently on merger enforcement. While it took time for a strategy to coalesce, it appears to have several major prongs. One is to deny more potentially illegal mergers by forcing their abandonment or pursuing injunctions through the litigation process. A second is to agree to fewer settlements to resolve problematic deals. A third is testing out more novel theories of how a merger is likely to substantially lessen competition, in violation of Section 7.

To support this strategy, the DOJ and FTC issued draft revisions to HSR reporting, requiring companies to provide significantly more information on their transactions.[13] The agencies also issued draft merger guidelines in mid-2023 that reinforced many aspects of the 2010 merger guidelines while providing more detailed guidance and new citations to legal precedent.[14] In their draft form, the guidelines shifted away from the analysis of mergers under the prevailing consumer welfare standard.[15] Instead, the draft guidelines set forth quasi-bright line tests for illegality, without a clearly defined role for economic analysis or evidence in rebutting legal theories of competitive harm.

Public comments on the draft guidelines raised concerns about this approach, especially the impact on the transparency of the merger review process, administrability in the courts, and predictability for the business community and the public. The final version of the guidelines, issued in late 2023, significantly tempered Neo-Brandeisian influence.[16]

The reality on the ground reflects a mixed portfolio of enforcement action. Namely, the Biden enforcers are bringing cases that previous enforcers would: (1) assuredly also have brought, (2) also brought, but declined to pursue as aggressively, and (3) not pursued at all. For example, the DOJ prevailed in enjoining the merger of book publishers Simon Shuster and Penguin on the theory that a more powerful buyer of manuscripts would depress compensation to authors.[17] The DOJ also successfully blocked the merger of JetBlue and Spirit Airlines, which risked higher airfares and less consumer choice.[18] These cases involve straightforward concerns such as anticompetitive harm from eliminating head-to-head competitors and highly concentrative mergers. They are strong on theory and facts and tap the full scope of the consumer welfare standard.

However, the DOJ lost its challenge to the vertical merger of UnitedHealth and Change Healthcare, which alleged that the merged company would have stronger incentives to raise rivals' costs and share competitively sensitive information, leading to less competition.[19]

The FTC also lost its case against Meta's acquisition of virtual reality fitness app developer, Within, on the theory that the acquisition eliminated Meta as a potential competitor in the market for virtual reality dedicated fitness apps.[20] The FTC also lost its challenge to Microsoft's acquisition of game developer Activision on the theory that Microsoft would make must-have Activision content exclusive, to the detriment of competing gaming systems.[21]

The Biden agencies' losses tend to involve cases with more novel or complex theories of harm, or that are less supported by compelling evidence. Because the outcomes of litigated injunctions create legal precedent that will have a direct effect on enforcement, the antitrust agencies' win-loss record is important, especially for an administration committed to revitalizing merger control.[22]

Finally, the Biden agencies clearly articulated a policy of disfavoring merger settlements, or seeking to resolve competitive concerns with remedies. Presumably, this is in response to high profile failed remedies in past mergers, including numerous pharmaceutical mergers, Safeway-Albertsons, Hertz-Dollar Thrifty, and in Live Nation-Ticketmaster.[23] The Sprint-T-Mobile merger, approved under the Trump administration, may soon add to that record. Dish TV recently reported that it failed to raise financing to purchase 800 MHz spectrum from T-Mobile that was required in the settlement.[24] This means that Dish will not become the strong "fourth" competitor that the Trump DOJ claimed its settlement would create.[25]

At the same time, merger remedies have successfully restored competition in some cases.[26] A policy disfavoring settlements seems at odds with the importance of advancing remedies policy, which needs reform. This includes promoting line of business divestitures and avoiding conduct remedies, which have been shown in theory and practice to be ineffective.[27] The FTC's recent action to approve the merger of drug makers Amgen and Horizon Therapeutics subject to conduct remedies is a good example of a lack of progress on this front.[28] Moreover, a policy of disfavoring settlements has induced merging parties to take their remedies to court, where they are litigated. Effective merger remedies are best determined by the antitrust agencies. "Litigating the fix" thus risks creating poor precedent and weakening enforcement.[29]

THE MECHANICS AND METRICS OF MERGER CONTROL

The government's pathway to invigorating merger enforcement is marked by a series of increasingly resource-intensive choices. The process of tracking merger enforcement activity starts with data on reported mergers from the agencies' HSR reports to Congress.[30] Only a small fraction of transactions even get beyond the initial stage of review. For example, between 1993-2022, on average, 14% of all reportable HSR transactions were "cleared" per year to either the DOJ or FTC for a closer look, while the rest received "early termination." Of these cleared transactions, about 21% received a second request for more information and 15% were challenged as violations of Section 7.

From this point forward, it is important to look at enforcement measures as a percentage of cleared transactions. Unlike the number of reportable HSR transactions, which display considerable volatility based on merger cycles, the number of clearances is more consistent over time because agency resources constrain how many filings get a closer look. Enforcement statistics are misleading if they are expressed as absolute numbers, as opposed to rates.

For example, the FTC's press release accompanying the 2022 HSR report explained that "[T]he FTC and DOJ together filed 50 merger enforcement actions in fiscal year 2022, representing the highest level of enforcement activity in over 20 years."[31] Fifty-five merger challenges in 2001 translates to a rate of 22% when expressed as a percentage of deals cleared to the agencies. But the 50 deals challenged by the Biden enforcers in 2022 reflects only a 17% challenge rate. The FTC's announcement, therefore, overstates the level of enforcement for 2022 by not accounting for the agencies' relatively larger workload in 2022 versus 2001.

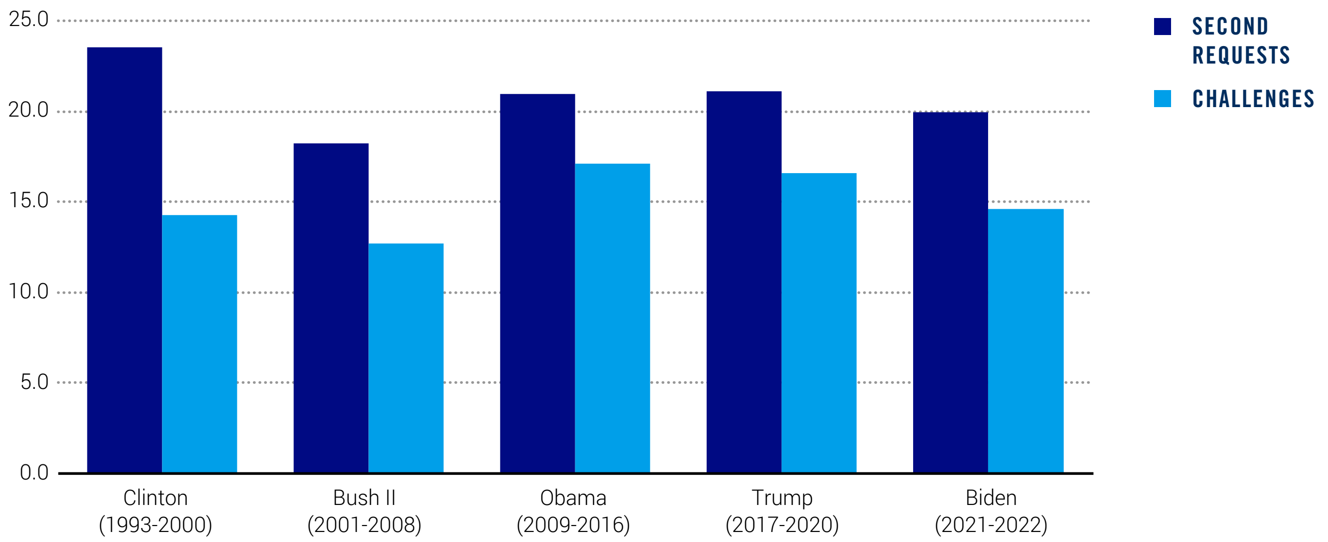
Another major benefit of measuring merger enforcement through rates and not absolute numbers is that we can assess the level of enforcement at *any* point in an administration cycle. This approach provides an objective way to assess the vigor of enforcement, whether it be two years into an administration, or for its entire span. With this in mind, we identify three metrics that are particularly helpful for assessing the vigor of merger control.

One measure is how the agencies prioritize early-stage enforcement, such as second requests, versus later-stage enforcement, such as challenges. A second measure is how, short of litigating an injunction, the agencies resolve mergers that raise competitive concerns by forcing the parties to abandon/restructure them or through settlements that include remedies to restore competition. A third metric is the relationship between the rate at which the agencies litigate injunctions to stop harmful mergers before federal court or administrative judges and the rate at which they win those injunctions. The dynamics of these various pathways that make up merger control have important implications for enforcement.

THE BIDEN RECORD OF MERGER ENFORCEMENT

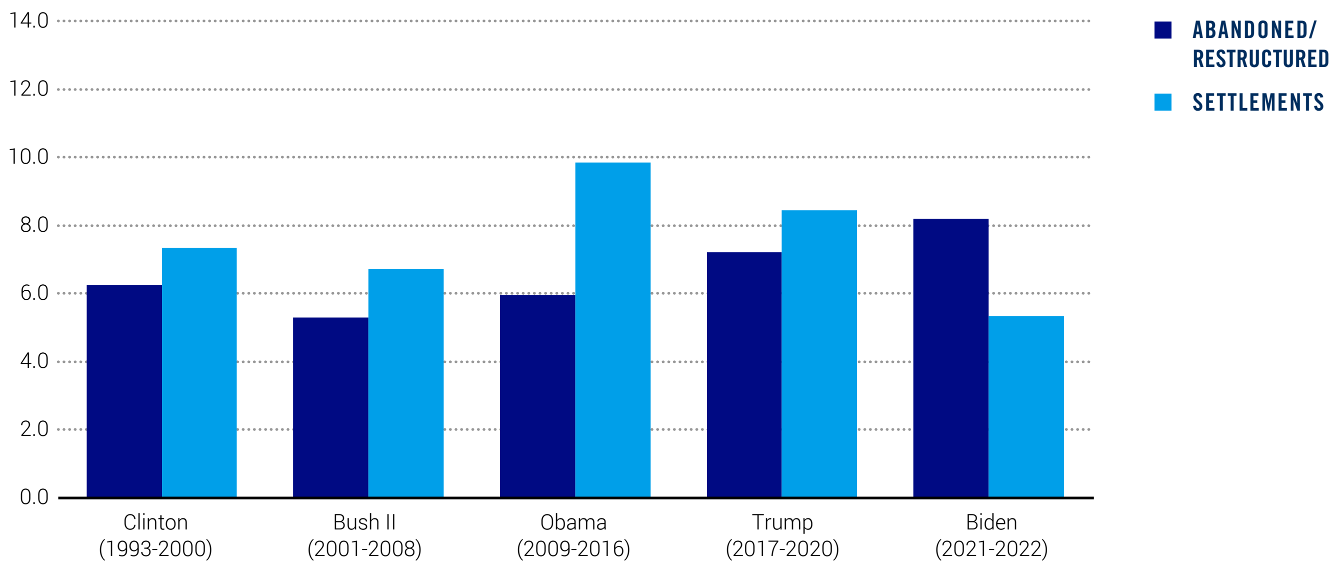
Applying enforcement metrics to different administrations helps frame a clearer picture of the level of merger control. Figure 1 shows results for the first metric — second requests and challenges — over the past five administrations, as a percentage of clearances. Both metrics under the Biden agencies are at their lowest levels since Obama. The rate of second requests is at its peak under Clinton, dips under Bush II, then resurges under Obama. The rate of challenges is at its peak under Obama and lowest under Bush II.

FIGURE 1: SECOND REQUESTS AND CHALLENGES (AS A PERCENT OF CLEARANCES)



The second metric of enforcement assesses how, short of litigating an injunction, the agencies resolve merger challenges. Figure 2 shows results for rates of settlements and abandonments/restructurings, as a percentage of cleared transactions. The rate of abandonments/restructurings under Biden is the highest across all administrations and has been on the rise since Bush II. The majority of Biden enforcers' abandonments/restructurings occurred before the agencies filed complaints in court, which likely explains the fall off in merger challenges. The Biden rate of settlements is the lowest of all administrations, and has been on the decline since Obama. This confirms the Biden enforcers' strategy of disfavoring settlements.

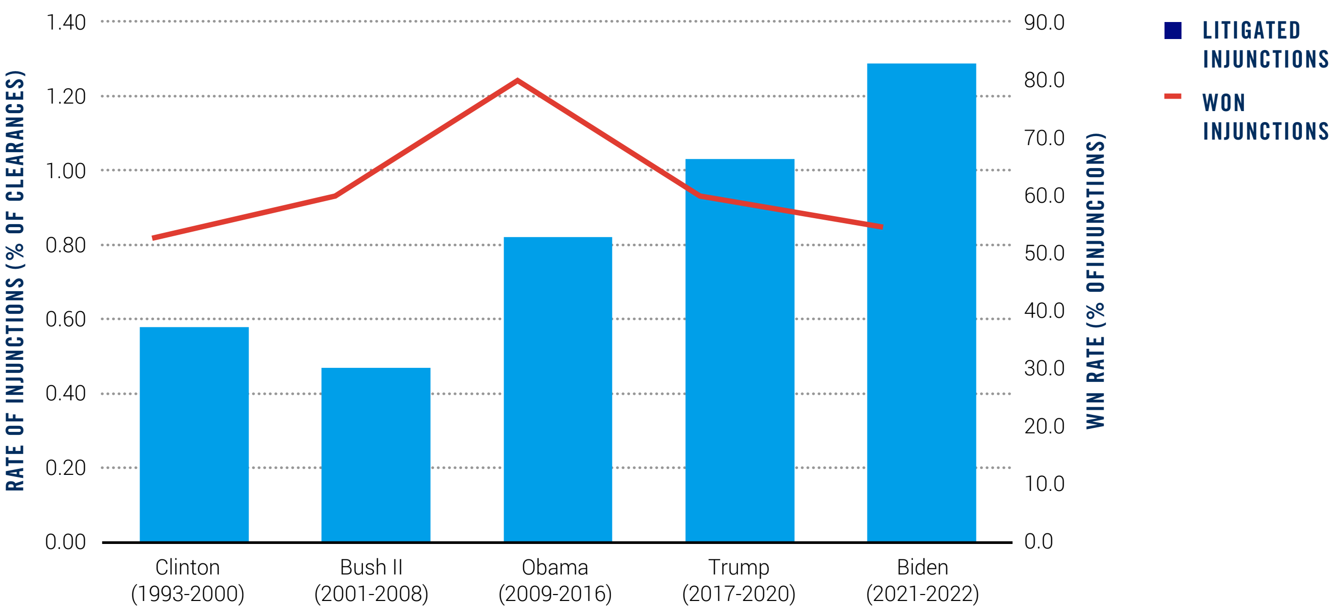
FIGURE 2: ABANDONMENTS AND INJUNCTIONS (AS A PERCENT OF CLEARANCES)



Finally, there is the rate at which the agencies litigated injunctions before federal court or administrative law judges. Figure 3 shows the rate of injunctions that were litigated to a decision, as a percentage of clearances from 1993-2023. Figure 3 includes data from 2023 because it can be collected outside the annual HSR reporting cycle. The injunction rate is at an all-time high under Biden and is lowest under Bush II. The rate rose significantly under Obama, again under Trump, and again under Biden.

The rate at which the government wins the cases it moves to enjoin, however, follows a different pattern. The Biden win rate on injunctions for the first three years of the administration is about 55%, the second lowest of all administrations from 1993-2023, and below the all-administration average of about 62%.[32] The average win rate is even higher, or about 65%, based on data from 2001-2023, when the Obama enforcers jump-started more aggressive enforcement. This increases the gap between the Biden and the all-administration win rate. Moreover, Figure 3 shows that the Obama enforcers had both the highest rate of injunctions and the highest win rate.[33] The Biden enforcers are thus managing a large-scale effort to enjoin mergers but the strategy has not yet proved more successful, on average, than other pro-enforcement administrations.

FIGURE 3: LITIGATED AND WON INJUNCTIONS



CHANGES IN MERGER ENFORCEMENT FROM ADMINISTRATION TO ADMINISTRATION

Figure 4 presents rates of merger enforcement from a different and important perspective, namely, how they change from administration to administration. These include second requests, challenges, settlements, abandonments/restructurings, and litigated injunctions. The clustered bars show the rate of increase or decrease in each enforcement category from the previous administration.

FIGURE 4: ADMINISTRATION-OVER-ADMINISTRATION CHANGES IN MERGER ENFORCEMENT

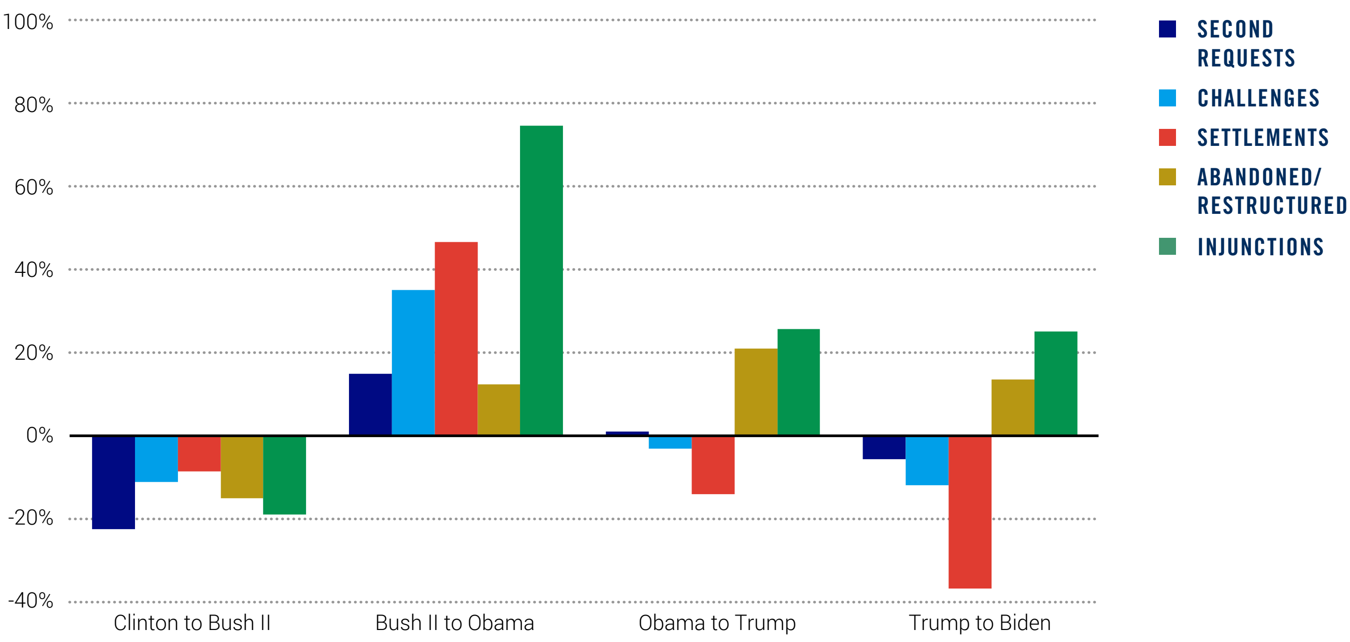


Figure 4 makes clear that the Obama enforcers executed the most aggressive "invigoration" of enforcement after Bush II. Rates of enforcement increased for all five categories. In the transition from Obama to Trump, rates of enforcement fell, with the exception of abandonments/ restructurings and injunctions. The transition from Trump to Biden shows the same general profile. This analysis reveals that the push to deny harmful mergers began with the Obama administration and has continued since. This focuses more attention on an administration's *specific* strategies for more aggressive merger enforcement and the success of those strategies. This brings attention back to Figure 3 and the important relationship between the rate of injunctions and government's success in winning cases.

IMPLICATIONS FOR MERGER ENFORCEMENT POLICY

The results of PPI's analysis of merger enforcement over 30 years and five administrations confirm that the Biden enforcers have invigorated enforcement based on some measures, but are lagging behind in a key area. Perhaps more time is needed for the agencies to show that a strategy of enjoining more mergers will pay off with significantly more wins than losses. Because this measure of enforcement has wide-ranging implications for the allocation of agency resources and establishing new legal precedent, it is a good time for a mid-course assessment of the Biden merger control program. Such an inquiry should consider a number of factors:

- **Agency Resources:** The Biden agencies are directing resources toward forcing more abandonments of problematic mergers and litigating more merger injunctions. While these are clear indicators of more aggressive enforcement at later stages of review, this strategy should ensure that early-stage reviews of potentially problematic mergers are not sacrificed in the process.

- **Merger Settlements:** The Biden agencies are pursuing a policy of disfavoring merger settlements. But it remains that some deals are remediable and competition can be restored through strong structural fixes such as line of business divestitures. Missed opportunities to advance and strengthen remedies, in appropriate cases, exacerbates the problem of "litigating the fix" and works against stronger enforcement.
- **Litigating Merger Injunctions:** The Biden agencies are seeking to enjoin more mergers through litigation. The rate of injunctions is higher than average across five administrations, but the win rate thus far remains below the historical average. Increasing the rate at which the agencies prevail in court by bringing cases that are strong on theory and facts is important for showing progress and avoiding the poor legal precedent that can weaken enforcement.

ABOUT THE AUTHOR

Diana L. Moss is Vice President and Director of Competition Policy at the Progressive Policy Institute. From 2015-2023, Dr. Moss was President of the American Antitrust Institute. She has also served as a federal regulator and in private practice. An economist, her work spans the economic, policy, and legal analysis of antitrust enforcement and sector regulation, with expertise across a number of industries. Dr. Moss has spoken widely on topics involving competition policy and enforcement, testified before Congress, appeared before state and federal regulatory commissions, in federal court, at industry and academic conferences, and has made numerous radio and television appearances.

Dr. Moss has published articles in numerous economic and legal journals. She is the recipient of numerous awards, including; GCR's Women in Antitrust (2016 and 2021) and the American Bar Association, Antitrust Law Section Hall of Fame-inism (2021). She was named to Washingtonian Magazine's "Washington DC's Most Influential People" in 2022 and 2023. She holds a M.A. degree from the University of Denver and a Ph.D. from the Colorado School of Mines. Dr. Moss is Adjunct Faculty in the Department of Economics at the University of Colorado at Boulder.

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