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Reading the Tea Leaves: Will the Trump Administration Impact Antitrust M&A Enforcement?

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1-I. Will the Trump Administration Impact Antitrust M&A Enforcement?

As M&A activity remained at high levels during 2017,[1] the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "Commission") and the enforcement policies of the Obama Administration continued to govern for a significant part of the year. The agencies have used consent orders to resolve agency concerns—and even to communicate enforcement policy for the last few decades.[2] In the last few years of the Obama Administration, the agencies (particularly the DOJ) showed a willingness to commence litigation to challenge a merger. The Obama Administration ended as it began: with a continuous path forward of aggressive enforcement of the antitrust laws, both through consents and litigation, with the clear intent to leave a mark on enforcement precedent and principles.

The shift to new leadership under the Trump Administration has been slow. FTC Chairwoman Edith Ramirez resigned from the Commission, effective February 10, 2017, ending a nearly seven-year term on the Commission.[3] On January 25, 2017, President Trump designated Commissioner Maureen K. Ohlhausen as Acting Chairman of the FTC.[4] The Commission has remained short three commissioners—one of whom cannot be a Republican—even as of the end of the calendar year. The divided Commission led to at least two tied votes in the past year, which resulted in the FTC not imposing any enforcement action in these two

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[1] The agencies report statistics on a fiscal year ("FY"), which commences on October 1 and ends on September 30. In addition to providing a review of agency actions during FY2017, this article will discuss developments during the fourth quarter of 2017 ("Q42017"). Mergers and acquisitions activity involving U.S. targets reached $1.5 trillion in 2017.

[2] *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent, William E. Kovacic: An Antitrust Tribute—Liber Amicorum* (Feb. 28, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf (raises concerns that the shift toward consents has created the potential for the agency to extract from the parties commitments well beyond what the agency could obtain in litigation, and that such commitments may impair—rather than improve—competition, and thereby harm consumers).

[3] Press Release, Fed. Trade Comm'n, *FTC Chairwoman Edith Ramirez Announces Resignation* (Jan. 13, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/01/ftc-chairwoman-edith-ramirez-announces-resignation.

[4] Press Release, Fed. Trade Comm'n, *Statement of Acting FTC Chairman Ohlhausen on Appointment by President Trump* (Jan. 25, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/01/statement-acting-ftc-chairman-ohlhausen-appointment-president.

matters.[5] On October 19, 2017, President Trump announced having picked Joseph S. Simons (a Republican) as the nominee for Chairman, and Noah Phillips (a Republican) and Rohit Chopra (a Democrat) for the two vacant seats. On January 25, 2018, President Trump officially nominated Joseph Simons, Noah Phillips, and Rohit Chopra, as well as Christine Wilson (a Republican) for Commission spots. On March 28, 2018 President Trump announced the nomination of Rebecca Kelly Slaughter (Democrat) for the last remaining open seat. The Senate confirmed these nominees. In May 2018, President Trump swore in all of the new commissioners except for Christine Wilson, who will assume her position once Commissioner Ohlhausen vacates her seat.

Congress confirmed the nomination of Makan Delrahim as the Assistant Attorney General of the DOJ's Antitrust Division on September 27, 2017—at the very end of FY2017. Andrew Finch had been serving in the role of Acting Assistant Attorney General since April 10, 2017. Other members of the leadership team at the DOJ joined over the Summer of 2017.

In the meantime, some key members of the Democratic congressional leadership have been active in advocating for major changes in the antitrust process and standards, all under the rubric of a "better deal." The Democratic leadership in the Senate introduced legislation that would radically change the process and standards applied during merger review.

The delay in the transition and congressional proposals have increased the level of uncertainty in the M&A realm in strategic deals involving large incumbent firms. Although some observers predicted that a Republican administration would be less aggressive on enforcement than the Obama Administration—paving the way for certain transactions that may have been difficult to achieve in prior years—such a conclusion is premature at best. Antitrust enforcement generally is bipartisan, without dramatic swings in either direction based on the party of the Administration. Antitrust analyses are premised on facts and economics. To the extent there are any differences in outcomes, it will only be on a small number of marginal cases; the more likely area of change concerns the remedies imposed to resolve any anticompetitive concerns.

1-II. Agency Merger Enforcement Activities

A. FTC

During FY2017, the FTC brought two new litigation challenges in federal district court—with the transaction parties abandoning one of the transactions soon after the filing of the complaint and the FTC winning a preliminary injunction ("PI") in the other case. In addition, the FTC won in the one case it had pending at the end of FY2016. Outside of litigation, the FTC obtained one consent decree in a consummated transaction and 13 consent decrees in non-consummated transactions.

In December 2017, the FTC brought a challenge in federal district court to block the combination of two chloride titanium dioxide producers. In addition, in Q42017, the FTC entered into three consent decrees in proposed acquisitions and one consent in a consummated merger.

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[5] The two transactions involved Mid America's purchase of an ethanol terminal from Valero and Walgreens' purchase of Rite Aid Stores.

1. *FTC Litigation Challenges*

a. *FTC Prevails in Advocate/NorthShore Hospital Merger Challenge*

On December 18, 2015, the FTC authorized its staff to challenge the proposed merger of Advocate Health Care Network ("Advocate") and NorthShore University HealthSystem ("NorthShore").[6] The FTC alleged that the merger would create the largest hospital system in the North Shore area of Chicago, accounting for in excess of 50% of general acute care inpatient hospital services. Advocate has 12 hospitals and NorthShore has four hospitals. As a result, the FTC contended that the combination was "likely to significantly increase the combined system's bargaining power with health plans."[7] The complaint added that the two hospitals are close competitors with a history of upgrading their facilities, investing in new technologies, and adjusting their managed care contracting approaches in response to each other. The complaint asserted that entry or expansion would be unlikely to offset the likely harm to consumers caused by the lost competition. Finally, the complaint posited that the potential cost savings and improvements were neither substantiated nor merger specific and were insufficient to outweigh the likely competitive harm from the merger.

The district court held a six-day hearing, during which the hospitals challenged the "false market" delineated by the FTC, since it excluded about 60 general acute care inpatient hospitals along Chicago's North Shore. On June 20, 2016, Judge Jorge L. Alonso denied the FTC's request for a PI.[8] The district court found that the FTC had improperly excluded some hospitals from its alleged geographic market. The court found that the FTC's economist had used "flawed criteria" to exclude certain facilities, such as "destination hospitals," that draw patients from throughout the Chicago metropolitan area. The temporary injunction motion filed after the decision by the FTC indicated that the relevant market should not turn on whether some patients went to hospitals outside of the alleged market, but instead on whether commercial payors would rather pay a "small but significant increase in price" than fail to include any NorthShore hospitals in their networks.[9] The court granted the FTC's request for an injunction pending appeal.[10]

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[6] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Two Chicago-area Hospital Systems* (Dec. 18, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-two-chicago-area-hospital-systems. The FTC also authorized its staff to seek a PI in the U.S. District Court for the Northern District of Illinois. The Illinois Attorney General joined the FTC in opposing the merger; both filed the district court case challenge on December 21, 2015. Complaint, *In the Matter of Advocate Health Care Network*, 1:15-cv-11473, Docket No. 9369 (N.D. Ill. Dec. 17, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/151218ahc-pt3cmpt.pdf.

[7] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Two Chicago-area Hospital Systems* (Dec. 18, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-two-chicago-area-hospital-systems.

[8] Amended Memorandum Opinion and Order, *FTC v. Advocate Health Care Network*, No. 15-c-11473 (N.D. Ill. June 20, 2016), *available at* http://cases.justia.com/federal/district-courts/illinois/ilndce/1:2015cv11473/319662/485/0.pdf?ts=1466512953.

[9] *Id*. at 8.

[10] Order Granting Plaintiffs' Motion for Injunction Pending Appeal, *FTC v. Advocate Health Care Network*, No. 15-cv-11473, Docket No. 482 (N.D. Ill. June 17, 2016), *available at* https://www.unitedstatescourts.org/federal/ilnd/319662/482-0.html.

The FTC and the State of Illinois appealed the case to the Seventh Circuit.[11] The FTC argued on appeal that the district court erred as a matter of law because it did not properly consider the "hypothetical monopolist" test, which the FTC states is the standard test routinely used for both geographic and product market definitions. Eleven state attorneys general filed an *amicus curiae* brief supporting the FTC's position.[12] On August 8, 2016, the American Hospital Association ("AHA") filed its *amicus curiae* brief on the defendants' side, which acknowledges that the test provides a "useful framework," but does not require the application of a particular methodology or econometric model.[13] Rather, the AHA stated that the district court took the correct approach and evaluated all available evidence.

The Seventh Circuit held oral arguments on August 19, 2016, during which Judge Diane Wood expressed concern that Judge Alonso did not understand the hypothetical monopolist test. Judge David Hamilton also questioned the defendants on the increase in prices following NorthShore's acquiring of Highland Park Hospital in 2000. On October 31, 2016, the Seventh Circuit overturned the district court, finding that the district court's understanding of the market was "clearly erroneous."[14] The appellate court remanded the case for rehearing by the district court; on March 7, 2017, the district court enjoined the merger and the parties subsequently abandoned the transaction.[15] On March 27, 2017, the FTC dismissed its administrative case as well.[16]

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[11] Notice of Appeal, *FTC v. Advocate Health Care Network*, No. 15-cv-11473 (N.D. Ill. June 15, 2016), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/advocate/1_13b/advocate%20ndill_noa6_15_2016.pdf.

[12] Brief of the States of Conn., Idaho, Iowa, Me., Mass., Minn., Miss., Mont., Or., Pa., and Wash. as Amicus Curiae in Support of the Appellants, *FTC v. Advocate Health Care Network*, No. 16-2492 (7th Cir. July 22, 2016), *available at* http://members.naag.org/assets/files/Antitrust/files/Advocate-Amicus-FINAL.pdf.

[13] Brief of the American Hosp. Ass'n as *Amicus Curiae* in Support of Appellees and Affirmance, *FTC v. Advocate Health Care Network*, No. 16-2492 (7th Cir. Aug. 8, 2016), *available at* http://www.aha.org/content/16/160808-amici-brief-mergers.pdf.

[14] Opinion at 3, *FTC v. Advocate Health Care Network*, No. 16-2492 (7th Cir. Oct. 31, 2016), *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D10-31/C:16-2492:J:Hamilton:aut:T:fnOp:N:1854909:S:0. The Seventh Circuit found that the court had incorrectly applied the hypothetical monopolist test. The test is an iterative process, first proposing a region and then using available data to test the likely results of a price increase in that region. In addition, the opinion indicates that "the evidence was not equivocal on two points central to the commercial reality of hospital competition in this market: most patients prefer to receive hospital care close to home, and insurers cannot market healthcare plans to employers with employees in Chicago's northern suburbs without including at least some of the merging hospitals in their networks." *Id.* pp. 2–3.

[15] Press Release, Fed. Trade Comm'n, *Statement from Federal Trade Commission's Bureau of Competition Acting Director on District Court Ruling to Enjoin Advocate/NorthShore Hospital Merger* (Mar. 7, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/03/statement-federal-trade-commissions-bureau-competition-acting.

[16] Press Release, Fed. Trade Comm'n, *After Two Chicago-area Hospital Systems Abandon Proposed Merger, FTC Dismisses Case from Administrative Trial Process* (Mar. 22, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/03/after-two-chicago-area-hospital-systems-abandon-proposed-merger.

b. *DraftKings/FanDuel Combination Aborted After FTC Sues*

On June 19, 2017, the FTC authorized filing suit jointly with the Offices of the Attorneys General in the State of California and the District of Columbia in federal district court in the District of Columbia to block the merger of two fantasy sports sites, DraftKings and FanDuel.[17] The FTC alleged that the combined firm would have more than 90% of the U.S. market for paid daily fantasy sports contests. The FTC further asserted that the parties are each other's most significant competitor, competing to offer the best prices and product quality, including prize pools and variety. The FTC rejected as a "meaningful substitute" season-long fantasy sports contests due to the length of those contests and the limitations on the number of entrants. On June 21, 2017, Judge Ketanji Brown Jackson granted a temporary restraining order.[18] On July 13, 2017, the parties abandoned the transaction.[19]

c. *FTC and North Dakota Attorney General Win Injunction in Clinic Merger*

On June 22, 2017, the FTC and the North Dakota Attorney General filed a complaint in the U.S. District Court of North Dakota seeking a PI to block Sanford Health's proposed acquisition of Mid Dakota Clinic, Inc.[20] Sanford Health owns more than 40 hospitals and 250 clinics; Mid Dakota Clinic has eight facilities, primarily in Bismarck, North Dakota. The complaint alleges that the deal would significantly reduce competition for adult primary care physician services, pediatric services, OB/GYN services, and general surgery physician services in the greater Bismarck and Mandan metropolitan areas. The case alleges that the transaction parties are each other's closest rivals. The transaction would create a physician group with a 75% to 85% share of physicians providing the various services in the greater Bismarck and Mandan metropolitan areas, and the only group offering surgical services in those areas.

An administrative trial on the merger was set to begin on November 28, 2017. On October 6, 2016, the transaction parties moved to postpone commencement of the administrative hearing in the proceeding to January 30, 2018 and to stay all pre-hearing deadlines for two months. The transaction parties argue that if, after all appeals in the injunction proceeding are exhausted, they are enjoined from consummating the acquisition, they will abandon the transaction. On the other hand, the parties indicate that if the district court denies an

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[17] Press Release, Fed. Trade Comm'n, *FTC and Two State Attorneys General Challenge Proposed Merger of the Two Largest Daily Fantasy Sports Sites, DraftKings and FanDuel* (June 19, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/06/ftc-two-state-attorneys-general-challenge-proposed-merger-two.

[18] Alex Schiffer, *Federal judge orders temporary stop to DraftKings, FanDuel merger*, WASH. POST (June 21, 2017), *available at* https://www.washingtonpost.com/news/innovations/wp/2017/06/21/federal-judge-orders-temporary-stop-to-draftkings-fanduel-merger/?utm_term=.41e33f28eb10.

[19] David Purdum, *Planned merger between DraftKings, FanDuel is off*, ESPN (July 14, 2017), *available at* http://www.espn.com/chalk/story/_/id/20002903/in-abrupt-fashion-draftkings-fanduel-merger-off, and *DraftKings and FanDuel Call Off Merger*, Associated Press, *available at* https://www.nytimes.com/2017/07/13/sports/draftkings-and-fanduel-call-off-merger.html.

[20] Complaint, *FTC v. Sanford Health*, 1:17-cv-00133-DLH-CSM (W.D.N.D. June 23, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/1710019sanfordfedcomplaint.pdf. The FTC also commenced a challenge in its administrative court.

injunction, they will move to have the case withdrawn from adjudications or to dismiss the administrative hearing. Therefore, under either scenario, deferring commencement of the administrative hearing is likely to avoid expenditures of resources by all parties.[21]

A four-day trial began on October 30, 2017 before Magistrate Judge Alice Senechal of the district court in Bismarck. In total, over 1,600 exhibits and 16 testifying witnesses were entered into evidence. According to the FTC, Sanford employs 36 primary care physicians and Mid Dakota employs 23. CHI, Sanford's closest competitor, employs five physicians and has been reliant on Mid Dakota. In pediatrics, Mid Dakota and Sanford would have 20 physicians, while CHI would have none on an outpatient basis; there are 15 OB/GYNs between Sanford and Mid Dakota, with a few others unaffiliated; and 10 general surgeons at Sanford and Mid Dakota, with none at CHI.

Sanford and Mid Dakota argued that Blue Cross Blue Shield of North Dakota would be a "powerful buyer" that would be able to restrain rate increases. Blue Cross arguably sets rates on a uniform basis statewide. Moreover, the transaction parties argue that Blue Cross still is the leading health insurance firm, despite having lost a large contract for North Dakota public employees to Sanford's health insurance division, and, therefore, would continue to set its own prices. Finally, the transaction parties argued that the combined entity would be able to do more for patients in the community.

On November 3, 2017, the Commission granted an extension of the evidentiary hearing in the administrative proceeding until December 12, 2017.[22] On November 14, 2017, the FTC and the transaction parties jointly moved to postpone commencement of the administrative proceeding to January 17, 2018, which the Commission granted on November 21, 2017.[23]

On December 13, 2017, Judge Senechal issued an order preliminarily enjoining the merger until an administrative trial before the FTC is complete.[24] On December 15, 2017, the transaction parties filed their notice of appeal of the PI to the Eighth Circuit.[25] On December 21, 2017, the Commission continued the commencement of the administrative proceeding until 21 days after the Eighth Circuit renders its judgment in the appeal.[26]

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[21] Unopposed Expedited Motion for Further Continuance of Administrative Proceedings Pending Appeal of Order, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Dec. 18, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/sanford_589083.pdf.

[22] Order Granting 14-Day Continuance, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Nov. 3, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9376_sanford_mid_dakota_order_granting_14-day_continuance_11-3-17.pdf.

[23] Order Granting Further Continuance of Administrative Proceedings, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Nov. 21, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/9376_sanford_mid_dakota_order_granting_further_continuance_11212017.pdf.

[24] Memorandum of Decision, Findings of Fact, Conclusions of Law and Order, *FTC v. Sanford Health et al.*, Case No. 1:17-CV-00133-ARS (D.N.D. Dec. 15, 2017).

[25] Order, *Fed. Trade Comm'n v. Sanford Health*, No. 1:17-cv-00133 (D.N.D. Dec. 13, 2017).

[26] Order Granting Further Continuance of Administrative Proceedings, *In the Matter of Sanford Health and Mid Dakota Clinic, P.C.*, FTC Docket No. 9376 (Dec. 21, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/sanford_mid_dakota_order_granting_further_continuance_12212017.pdf.

d. *FTC Challenges Tronox-Cristal Merger*

On December 5, 2017, the FTC brought an administrative action challenging Tronox Ltd.'s $2.2 billion acquisition of chemical mining and processing company National Titanium Dioxide Company Limited ("Cristal"). The FTC's complaint alleges that the transaction combines the two largest producers of titanium dioxide, a pigment. The FTC alleges that, without a remedy, the acquisition would allow Tronox "and the other top supplier, Chemours Company, to control the vast majority of chloride titanium dioxide sales in the North American market."[27] Chloride titanium dioxide is used to color a broad range of materials: although white pigment can be made through either a chloride or sulfate process, the bulk of titanium dioxide in the United States and Canada uses the chloride process due to its ability to yield brighter and more durable coatings. The FTC concludes that sulfate process titanium dioxide is not an adequate substitute for the product that Tronox and Cristal offer.

The FTC alleges that if the deal were to be consummated, the four remaining suppliers in the market would find it easier to coordinate on pricing and production and that it was unlikely that there would be new entry. The agency cited in support of the Third Circuit's October 2017 decision in a private antitrust suit brought by Valspar Corp. against E.I. DuPont de Nemours and Co., accusing DuPont of conspiring to fix the price of the pigment. Although the Third Circuit did not revive the suit, the FTC points to the opinion's reference to the industry as "an oligopoly dominated by a handful of firms . . . with substantial barriers to entry" as supportive of its suit and that "the evidence supporting the FTC's complaint shows that the proposed merger would make that situation even worse. . . ."[28]

The defendants countered with a statement that the deal is "highly synergistic" and would enhance competition in the industry. Tronox asserts that the FTC is drawing the product market too narrowly by leaving sulfate process titanium dioxide out of the relevant market, and the geographic market too narrow in excluding Mexico and global imports from Europe and Asia. Tronox also indicated that it would close the transaction, claiming that the HSR waiting period had expired.[29] The FTC rebutted with a statement that the companies had agreed to give the Commission 10 business days' notice before consummating the transaction. Given the right to challenge a merger outside of the HSR Act waiting period, however, this point of contention is not dispositive.

In its Answer as well, Tronox denies that there is a "North American chloride TiO2" market, both on the basis that the market is global, and that it includes TiO2 produced using both the chloride and sulfate processes.[30] Tronox also denies that there are significant barriers

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[27] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Major Titanium Dioxide Companies* (Dec. 5, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies.

[28] *Cf. Valspar Corp. v. E.I. DuPont De Nemours and Co.*, 873 F.3d 185 (3d Cir. 2017).

[29] Charles McConnell, *Tronox boss says company will fight "unmerited" FTC lawsuit*, GCR (Dec. 7, 2017), *available at* https://globalcompetitionreview.com/article/usa/1151471/tronox-boss-says-company-will-fight-%E2%80%9Cunmerited%E2%80%9D-ftc-lawsuit.

[30] Answer ¶ 5, Fed. Trade Comm'n, *In the Matter of Tronox Ltd.*, Docket No. 9377 (Dec. 8, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/588992.pdf.

to entry, that expansion or repositioning are unlikely, or that global trade flows would not counteract any purported attempt to raise prices in a particular region anticompetitively. Tronox also indicates that the acquisition will generate significant cognizable efficiencies.

Although the Commission authorized the FTC staff to bring a PI action to block the consummation of the transaction, the staff did not do so, and did not need to do so as long as the European Commission has not approved the transaction. The issue that this presents the transaction parties is one of timing. The transaction agreement provided for a termination date of May 21, 2018.[31] As the administrative law judge recognized at a pretrial conference on December 20, 2017, the administrative law proceeding will not be finished by that date.[32]

2. *FTC Consents*

In FY2017, the FTC entered into 13 consents resolving concerns raised by proposed transactions: (1) Abbott Laboratories/St. Jude Medical, Inc. (vascular closure devices);[33] (2) Boehringer Ingelheim/Sanofi (animal health products);[34] (3) Enbridge Inc./Spectra

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[31] The transaction parties have subsequently extended the date until March 31, 2019. Press Release, *Tronox Announces Extension to Cristal Ti02 Acquisition Agreement*, Tronox.com (Mar. 1, 2018), *available at* http://investor.tronox.com/releasedetail.cfm?ReleaseID=1059244.

[32] Pretrial Conf. Tr. 77-78, *In the Matter of Tronox* (Dec. 20, 2017). Tronox indicates that the administrative proceedings will not be completed until late 2018. On February 23, 2018, the ALJ issued an order granting a joint motion to revise the scheduling order. On January 23, 2018, Tronox had brought a declaratory judgment action in the Northern District of Mississippi (where Tronox has its largest manufacturing facility), accusing the FTC of delaying to file the PI action so as to "run out the clock instead of resolving the legality of the Tronox-Cristal transaction on the merits." Emergency Compl. for Declaratory J. ¶ 3, *Tronox Ltd. v. Fed. Trade Comm'n*, C.A. No. 18-cv-10-SA-RP (N.D. Miss. Jan. 23, 2018). Tronox requested that the court (1) require the FTC to bring its federal-court complaint in time to litigate the merits of the case or (2) enjoin the FTC from trying to block the acquisition. Alternatively, Tronox requested that the court "give [Tronox] its day in court, conduct the trial that ordinarily occurs, and declare that the FTC has no right under Section 13(b) of the FTC Act to enjoin the transaction." *Id.* at ¶ 5. On March 7, 2018, Tronox voluntarily dismissed this case because it had been able to get the seller to agree to extend the termination date under the agreement until March 31, 2019, negating the need for the court's action.

[33] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Abbott Laboratories' proposed $25 billion Acquisition of Rival Medical Device Maker St. Jude Medical, Inc.* (Dec. 27, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/12/ftc-puts-conditions-abbott-laboratories-proposed-25-billion. Abbott agreed to divest two of its medical device businesses—St. Jude's vascular closure device business and Abbott's steerable sheath business—to Terumo Corporation. According to the complaint, without these divestitures, the merged firm would control more than 70% of the market for vascular closure devices; in addition, St. Jude had a near-monopoly position for steerable sheaths and Abbott had recently entered the market. The proposed consent also requires Abbott to notify the FTC if it intends to acquire lesion-assessing ablation catheter assets from Advanced Cardiac Therapeutics ("ACT"). This type of catheter provides feedback to the physician regarding the force being applied by the catheter and the temperature of the target. Currently, only St. Jude and one other company provide such catheters in the United States and Abbott and ACT have a partnership to develop and market them.

[34] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition to Proposed $13.53 Billion Deal between German Pharmaceutical Boehringer Ingelheim and Paris-based Sanofi* (Dec. 28, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/12/ftc-requires-divestitures-condition-proposed-1353-billion-deal. The transaction involved a swap of Sanofi's animal care subsidiary, Merial, for Boehringer's consumer healthcare business unit. The FTC required the divestiture of five types of animal health products: (1) canine vaccines (transaction would reduce the number of suppliers to three); (2) feline vaccines (the parties were the two leading

Energy Corp. (natural gas pipeline transportation);[35] (4) DaVita, Inc./Renal Ventures Management, LLC (outpatient kidney dialysis clinics);[36] (5) China National Chemical Corporation/Syngenta AG (pesticides);[37] (6) Emerson Electric Co./Pentair plc (switchboxes);[38]

suppliers and the number of competitors would have been reduced to three); (3) rabies vaccines (the parties were the top two suppliers, with a combined 75% share, and the transaction would have left only three suppliers); (4) macrocyclic lactone parasiticides used in cattle (the parties were two of the three primary suppliers, with a combined share of more than 65%); and (5) parasiticides used in sheep (the parties were the two primary suppliers, with a combined share of more than 78%). The order names two upfront buyers. Eli Lilly's Elanco Animal Health division acquired the animal vaccines and Bayer AG acquired the parasite control products.

[35] Press Release, Fed. Trade Comm'n, *FTC Preserves Competition in Merger of Enbridge Inc. and Spectra Energy Corp* (Feb. 16, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/02/ftc-preserves-competition-merger-enbridge-inc-spectra-energy-corp. Enbridge is the sole owner and operator of the Walker Ridge Pipeline; Spectra has an indirect stake in DCP Midstream Partners, LP, which owns the Discovery Pipeline, and has access to competitively sensitive information as well as significant voting rights, which, in the hands of Enbridge, would purportedly provide Enbridge with the incentive and opportunity to unilaterally increase pipeline costs for natural gas producers located in the Green Canyon, Walker Ridge, and Keathley Canyon areas in the Gulf of Mexico. The proposed consent agreement requires Enbridge to establish firewalls to limit its access to non-public information about the Discovery Pipeline; board members of the Spectra-affiliated companies that hold the 40% interest in the Discovery Pipeline must be recused from any vote involving the pipeline, with limited exceptions; and Enbridge must notify the FTC before undertaking certain specified acquisitions. The consent will remain in effect for 20 years.

[36] Press Release, Fed. Trade Comm'n, *FTC Requires Kidney Dialysis Chain DaVita, Inc. to Divest Assets as a Condition of Acquiring Competitor Renal Ventures Management LLC* (Mar. 28, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/03/ftc-requires-kidney-dialysis-chain-davita-inc-divest-assets. The consent requires DaVita to divest ownership in seven dialysis clinics—five in suburban and urban areas in New Jersey and two outside of Dallas, Texas. DaVita's and Renal Ventures' clinics in each of these areas compete directly with each other, and the FTC concluded that in each of these areas the combination would result either in a monopoly or a reduction in competition to two competitors. DaVita will divest its seven clinics to an upfront buyer, PDA-GMF Holdco, LLC. Under the proposed consent, DaVita is barred from contracting with the medical directors of the seven clinics for three years and must provide transition services for up to two years.

[37] Press Release, Fed. Trade Comm'n, *FTC Requires China National Chemical Corporation and Syngenta AG to Divest U.S. Assets as a Condition of Merger* (Apr. 4, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/04/ftc-requires-china-national-chemical-corporation-syngenta-ag. The FTC alleges that the merger would harm competition in the U.S. markets for three pesticides: (1) the herbicide paraquat, used to clear fields prior to the growing season; (2) the insecticide abamectin, used to protect primarily citrus and tree nut crops; and (3) the fungicide chlorothalonil, used to treat peanuts and potato crops. Syngenta owns the branded version of each of these products, and ChemChina, which focuses on generics, was either the first- or second-largest generic supplier in the United States for each of these products. The consent provides for the sale of ChemChina's rights and assets of the three products to an upfront buyer, AMVAC. The FTC indicates that it cooperated with antitrust agencies in Australia, Canada, the European Union ("EU"), India, and Mexico in the review of the transaction and potential remedies.

[38] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Acquisition of Industrial Valve Manufacturer Pentair plc by Emerson Electric Co.* (Apr. 28, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/04/ftc-imposes-conditions-acquisition-industrial-valve-manufacturer. The transaction parties are manufacturers of industrial valves and control products, including switchboxes, used in the oil and gas, chemical, petrochemical, power, and related industries. Switchboxes are devices used to monitor and control valves that regulate the flow of liquids and gases in such industrial facilities. The parties would together account for about 60% of the sales of switchboxes in the United States. In addition, the parties have the most widely used brands and, according to the FTC, for many customers have the only acceptable brands of switchboxes, which

(7) Sherwin-Williams Company/Valspar Corporation (industrial wood coatings);[39] (8) Alimentation Couche-Tard Inc./CST Brands, Inc. (retail fuel stations/convenience stores);[40] (9) Broadcom Limited/Brocade Communications Systems, Inc. (fibre channel switches);[41] (10) Baxter International/Claris Lifesciences (injectable drugs);[42] (11) Mars, Incorporated/

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provide a critical safety function and therefore brand reputation and product reliability are very important to the customer. The consent requires Emerson to divest Westlock Controls Corporation, the Pentair subsidiary that designs, manufactures, and sells switchboxes, to an upfront buyer, Crane Co. The FTC indicates that it cooperated with antitrust agencies in Canada, the EU, and Mexico.

[39] Press Release, Fed. Trade Comm'n, *FTC Requires Sherwin-Williams to Divest Assets as a Condition of Acquiring Valspar* (May 26, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/05/ftc-requires-sherwin-williams-divest-assets-condition-acquiring. The FTC found that the acquisition would reduce competition in the North American market for industrial wood coatings used to make furniture, kitchen cabinets, and building products. Three firms—Sherwin-Williams, Valspar, and AkzoNobel—manufacture and sell 70% of North American industrial wood coatings. The FTC concluded that the combined firm would be likely to exercise unilateral market power and that the other remaining competitors would compete less aggressively against each other. The consent provides for the divestiture of Valspar's North American industrial wood coatings business to Axalta Coating Systems Ltd.

[40] Press Release, Fed. Trade Comm'n, *FTC Requires Retail Fuel Station and Convenience Store Operator Alimentation Couche-Tard Inc. to Divest up to 71 Fuel Stations as a Condition of Merger with Competitor CST Brands, Inc.* (June 26, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/06/ftc-requires-retail-fuel-station-convenience-store-operator. The FTC required the divestiture of 71 CST fuel stations to Empire and giving Empire the option of acquiring an additional location owned by Alimentation Couche-Tard Inc. ("AC-T") (this additional site had been damaged by a tornado in early 2017). The stations are located in Arizona, Colorado, Florida, Georgia, Louisiana, New Mexico, Ohio, and Texas. According to the FTC, the geographic markets for the retail sale of gasoline and diesel fuel are localized, generally within a few blocks to a few miles. The FTC concluded that, absent these divestitures, AC-T would be able to exercise unilateral market power, since CST was AC-T's only or closest competitor, as well as increase coordinated efforts in those markets where three or two competitors would remain.

[41] Press Release, Fed. Trade Comm'n, *FTC Accepts Proposed Consent Order in Broadcom Limited's $5.9 Billion Acquisition of Brocade Communications Systems, Inc.* (July 3, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/07/ftc-accepts-proposed-consent-order-broadcom-limiteds-59-billion. Consent imposes a firewall to remedy the FTC's concerns that Broadcom's acquisition of Brocade would not impact competition in the worldwide market for fibre channel switches. Fibre channel switches are part of storage area networks that transfer data between service and storage in data centers. Broadcom manufactures the fibre channel application-specific integrated circuits ("ASICs") that are custom tailored to carry out the functions of each switch. Brocade and Cisco are the only two competitors worldwide for fibre channel switches and Broadcom supplies both companies with ASICs to make fibre channel switches. The complaint alleges that Broadcom's acquisition of Brocade could harm worldwide competition in the downstream fibre channel switch market because, as Cisco's supplier of ASICs, Broadcom has extensive access to Cisco's competitively sensitive confidential information. As the new owner of Brocade, Broadcom could allegedly use that information to unilaterally exercise market power or to coordinate action between Brocade and Cisco. The proposed consent order would prevent Broadcom from using Cisco's competitively sensitive confidential information for any purpose other than the design, manufacturing, and sale of fibre channel ASICs for Cisco. It requires Broadcom's business group responsible for developing, producing, selling and marketing fibre channel ASICs for Cisco to maintain separate facilities and a separate information technology system with security protocols that allow access only to authorized individuals. The proposed consent order provides for the appointment of a monitor for five years, which can be extended by the Commission for up to an additional five years.

[42] Press Release, Fed. Trade Comm'n, *FTC Requires Baxter International and Claris Lifesciences to Divest 2 Types of Pharmaceutical Products as Condition of Baxter Acquiring Injectable Drugs Business from Claris*

VCA Inc. (veterinary clinics);[43] (12) Integra LifeSciences Holdings Corp./Johnson & Johnson's Codman Neuro division (neurosurgery/crucial care medical devices);[44] and (13) Abbott Laboratories/Alere Inc. (medical devices).[45] In Q42017, the FTC entered into three additional consent decrees: (1) Red Ventures Holdco, LP/Bankrate, Inc. (third-party paid referral service);[46] (2) Becton, Dickinson and Co./C. R. Bard, Inc. (medical devices);[47] and (3) Potash Corp. of Saskatchewan Inc./Agrium Inc. (chemicals used to make fertilizer).[48]

(July 20, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/07/ftc-requires-baxter-international-claris-lifesciences-divest-2. Consent requires parties to divest two types of drugs to an upfront buyer: (1) the antifungal agent fluconazole, which is used to treat fungal and yeast infections, in saline intravenous bags (Baxter and Claris are two of only four significant competitors, with a combined share of nearly 60%); and (2) intravenous milrinone, which dilates blood vessels, lowers blood pressure and facilitates blood flow (currently sold by three companies, with Claris expected to enter the market shortly).

[43] Press Release, Fed. Trade Comm'n, *FTC Requires Mars to Divest 12 Veterinary Clinics as a Condition of Acquiring Pet Care Company VCA Inc.* (Aug. 30, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/08/ftc-requires-mars-divest-12-veterinary-clinics-condition. The proposed consent requires Mars to divest 12 veterinary clinics in 10 cities to identified upfront buyers to retain competition for certain specialty and emergency veterinary services between Mars' Benfield Pet Hospital business (which is located primarily in PetSmart stores and BluePearl emergency and specialty clinics) and VCA specialists. Mars must provide reasonable financial incentives to key employees to continue in their positions in the divested clinics. For a year after the order takes effect, Mars is prohibited from entering into contracts with any specialty or emergency veterinarian affiliated with a divested clinic. Mars is also required for 10 years after the order takes effect to notify the FTC if it plans to acquire any additional specialty or emergency veterinary clinics in specified geographic areas. On December 18, 2017, the FTC responded to public comments by modifying the proposed order to allow long-standing arrangements that permit veterinarians at different clinics to cover for each other temporarily to continue at both Mars clinics and divested clinics. Press Release, Fed. Trade Comm'n, *FTC Alters Final Consent Order in Response to Public Comments, Preserving Competition for Specialty and Emergency Veterinary Services in 10 U.S. Localities* (Dec. 19, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-alters-final-consent-order-response-public-comments.

[44] Press Release, Fed. Trade Comm'n, *FTC Requires Divestiture of 5 Medical Device Product Lines as Condition of Integra Acquiring Johnson & Johnson's Codman Neuro Division* (Sept. 27, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/09/ftc-requires-divestiture-5-medical-device-product-lines-condition. The complaint alleges harm in five product lines, and that Integra would have accounted for between 38% and 94% of each product line post-acquisition. The consent provides for the divestiture of Integra's business for these five product lines to Natus Medical Incorporated. In addition, Integra must divest its manufacturing facility in San Diego, California and must supply Natus with cranial access kits until Natus is able to secure its own supply source. The FTC indicates that it worked with the staff of the UK's Competition and Markets Authority in the investigation of this transaction.

[45] Press Release, Fed. Trade Comm'n, *FTC Requires Abbott Laboratories to Divest Two Types of Point-Of-Care Medical Testing Devices as Condition of Acquiring Alere Inc.* (Sept. 28, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/09/ftc-requires-abbott-laboratories-divest-two-types-point-care. The FTC alleged that the proposed acquisition would harm competition in the United States for the sale of two types of medical devices: point-of-care blood gas testing systems and point-of-care cardiac marker testing systems. The consent requires the parties to divest the rights and assets, including related intellectual property, manufacturing technology, and business information, as follows: (1) Alere's blood gas testing system, including Alere's two Ottawa, Canada facilities, will be divested to Siemens Aktiengesellschaft; and (2) Alere's cardiac marker testing system, including Alere's San Diego, California facility, will be divested to Quidel Corporation. The FTC notes that it worked cooperatively with the staff of the antitrust agencies in Canada and the EU in analyzing the proposed transaction and remedies.

[46] Press Release, Fed. Trade Comm'n, *Parties Agree to Divestiture of Senior Living Facilities Referral*

3. *Restructured Transactions*

On June 29, 2017, Walgreens abandoned its $9.4 billion proposed acquisition to acquire Rite Aid, announced in October 2015, and instead proposed buying about half (2,186) of Rite Aid's 4,600 stores, three distribution centers and inventory, for $5.1 billion, after the FTC raised antitrust concerns regarding Walgreens' original plan. Walgreens reportedly had offered to divest 1,200 stores to Fred's. These stores are primarily located in the Northeast, Midwest, and Southeastern United States. With the original deal's cancellation, Walgreens paid Rite Aid a $325 million breakup fee.

The revised transaction would still make Walgreens the nation's largest pharmacy store chain. Consumer advocates continued to voice concerns over Walgreens' pricing power and bargaining leverage with landlords, healthcare companies, and vendors. Walgreens indicated that the new transaction would allow the company to make its stores more efficient, and projected $400 million in annual "synergies." The new proposal also gave Rite Aid the right to purchase generic drugs through Walgreens to gain the cost advantages it would be losing from selling locations to Walgreens. As part of the new deal, Rite Aid agreed not to open new stores in the locations where it is selling to Walgreens for two years.

On September 19, 2017, Walgreens announced that it had been cleared by the FTC to proceed in a further modified transaction that would reduce the number of stores to 1,932

Service Caring.com as a Condition of Red Venture's Acquiring Bankrate (Nov. 3, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/11/parties-agree-divestiture-senior-living-facilities-referral-service. The FTC alleges that Red Ventures and Bankrate supply proprietary internet content and customer leads for a variety of industries. Bankrate's Caring.com competes with A Place for Mom.com, a third-party paid senior living facilities referral service jointly owned by two of Red Ventures' largest shareholders. The two online services are the first and second largest providers and are alleged to be each other's closest competitors for both national and local business. Under the settlement, the parties will divest Caring.com within six months and provide transition services to the acquirer. The Commission may appoint a monitor. In addition, the parties must establish firewalls.

[47] Press Release, Fed. Trade Comm'n, *FTC Requires Divestiture of Two Medical Device Product Lines as Condition of Becton, Dickinson and Company Acquiring C. R. Bard, Inc.* (Dec. 22, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2018/01/ftc-approves-final-order-requiring-divestiture-two-medical-device. The FTC required the sale of Becton Dickinson's soft tissue core need biopsy device business and Bard's tunneled home drainage catheter systems business to Merit Medical Systems. In the United States, the combination would allegedly have monopolized (combined share was 98%) this type of catheter. Combined, the transaction parties would have had a 60% share of soft tissue core needle biopsy sales. The EU also required Becton Dickinson to divest its soft tissue core needle biopsy product line worldwide, as well as on tissue marker products under development. European Comm'n, Press Release IP/17/4024, *Mergers: Commission approves acquisition of Bard by BD, subject to conditions* (Oct. 18, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-4024_en.htm.

[48] Press Release, Fed. Trade Comm'n, *FTC Requires Canadian Fertilizer and Chemical Companies PotashCorp and Agrium to Divest 2 Production Facilities as Condition of Merger, available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-requires-canadian-fertilizer-chemical-companies-potashcorp (Dec. 27, 2017). The transaction parties were Canada's two largest fertilizer producers. The FTC found that the merger would harm concentration in the market for superphosphoric acid, a highly concentrated form of phosphoric acid used in the crop nutrient phosphate, and the combined market share for the two parties would be over 65% for nitric acid sold to customers near their nitric acid plants in Ohio. Both products are used in making fertilizers. Under the consent, Agrium's Conda, Idaho, superphosphoric acid facility will be sold to Itafos, and its North Bend, Ohio, nitric acid facility will be sold to Trammo Inc.

along with the three distribution centers for $4.38 billion.[49] The stores to be purchased are located primarily in the Northeast and Southern United States, and the three distribution centers are located in Dayville, Connecticut; Philadelphia, Pennsylvania; and Spartanburg, South Carolina. The transition of these distribution centers to Walgreens will not occur for at least 12 months.

Walgreens' announcement occurred on the same day that the two sitting FTC Commissioners—Acting Chairman Ohlhausen and Commissioner McSweeny—issued statements explaining their diverging votes in this matter.

Commissioner McSweeny stated at the outset that she disagreed with allowing Walgreens' acquisition of 1,932 Rite Aid stores to move forward without further investigation.[50] According to Commissioner McSweeny, the transaction would leave two or fewer major pharmacy chains in a number of regions where Walgreens and Rite Aid formerly competed. In addition, she believes there could be "upward pressure of prices" due to the transaction's potential impact on Rite Aid's costs in obtaining generic drug prices. While conceding that as part of the transaction Rite Aid would secure an option to purchase generic drugs from Walgreens for 10 years might "protect, and potentially even lower, Rite Aid's generic drug acquisition costs *in the short term* [10 years]. . .[she did] not understand how this will solve the issue from a competition standpoint."

Acting Chairman Ohlhausen responded to Commissioner McSweeny's assertions, indicating that the staff had conducted an exactingly thorough investigation of the competition issues associated with Walgreens' acquisition of Rite Aid over a 22-month period and that the acquisition is not a "three-to-two" merger.[51] Three major pharmacy chains will continue to compete to win the business of third parties forming commercial, Medicare, and Medicaid retail pharmacy networks. In addition, in some parts of the country, either Rite Aid or Walgreens (or both) have a limited presence, and, in some places, different types of retail pharmacy providers, including mass merchants and supermarkets, are significant competitors. Walgreens' acquisition of Rite Aid stores in the revised transaction is limited to areas where competition between the two firms is not significant. Finally, under the supply agreement, Rite Aid is likely to achieve comparable or even lower costs for the foreseeable future, which should make Rite Aid a more attractive and effective competitor in those markets where it has a meaningful presence.

The *Walgreens/Rite Aid* decision marked the second time in 2017 that the two Commissioners disagreed and, as a result, no FTC enforcement action was taken. The first one was

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[49] *See* Walgreens Press Release, *Walgreens Boots Alliance Secures Regulatory Clearance for Purchase of Stores and Related Assets from Rite Aid* (Sept. 19, 2017), *available at* http://www.walgreensbootsalliance.com/newsroom/news/walgreens-boots-alliance-secures-regulatory-clearance-for-purchase-stores-and-related-assets-from-rite-aid.htm.

[50] *See* Fed. Trade Comm'n, Statement of Commissioner Terrell McSweeny Regarding the Walgreens/Rite Aid Transaction (Sept. 19, 2017), *available at* https://www.ftc.gov/system/files/documents/public_statements/1255043/1710181_walgreens_rite_aid_statement_of_commissioner_mcsweeny.pdf.

[51] *See* Fed. Trade Comm'n, *Statement of Acting Chairman Maureen K. Ohlhausen Regarding the Walgreens/Rite Aid Transaction* (Sept. 19, 2017), *available at* https://www.ftc.gov/system/files/documents/public_statements/1255033/1710181_walgreens_rite_aid_statement_of_acting_chairman_ohlhausen.pdf.

in the *Valero/Plains* transaction, which ultimately was abandoned by the parties after the California Attorney General challenged the transaction in federal district court.[52]

4. *Consummated Merger Challenges*

On November 7, 2016, the FTC announced that Valeant Pharmaceuticals International, Inc., the Canadian parent of Bausch + Lomb, had agreed to divest Paragon Holdings I, Inc. ("Paragon") to settle charges that its May 2015 acquisition of Paragon substantially lessened competition in the sale of FDA-approved buttons used in the production of rigid gas permeable ("GP") contact lenses.[53] Valeant and Paragon were the two largest manufacturers of these GP buttons, accounting for more than 70% of U.S. sales. The upfront divestiture buyer is a newly created entity headed by the former president of Paragon. In addition, Valeant committed to sell to the divestiture buyer the assets of Pelican Products LLC, a contact lens packaging company that Valeant acquired after its purchase of Paragon, which is the only producer of FDA-approved vials used for shipping certain GP lenses. The complaint alleged that prices had increased and discounts had been reduced as a consequence of the Paragon transaction.

On December 20, 2017, the FTC issued an administrative complaint challenging Otto Bock's September 22, 2017 acquisition of FIH Group Holdings d/b/a Freedom Innovations.[54] The FTC alleged that the acquisition "harmed competition in the U.S. market for microprocessor prosthetic knees by eliminating head-to-head competition between the two companies, removing a significant and disruptive competitor, and entrenching Otto Bock's position as the dominant supplier."[55]

5. *Closing Statements*

On August 23, 2017, the FTC issued a statement concerning its decision not to further pursue an investigation of Amazon.com, Inc.'s acquisition of Whole Foods Market Inc.[56] Opponents of the transaction expressed concern about Amazon's market power in online retailing and its entry into brick-and-mortar supermarkets damaging adjacent businesses and disrupting employment.[57] The allegations include Amazon's ability to use its e-commerce

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[52] *See* 'State Attorney General Enforcement' discussion *infra* at II.C. *See* I.A.3 for discussion on the *Walgreens/Rite-Aid* transaction.

[53] Press Release, Fed. Trade Comm'n, *FTC Requires Parent Company of Bausch + Lomb to Divest Paragon* (Nov. 7, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/11/ftc-requires-parent-company-bausch-lomb-divest-paragon. The purchase price for Paragon was $69.1 million, below the $76.3 million HSR threshold in effect in May 2015.

[54] Press Release, Fed. Trade Comm'n, *FTC Challenges Consummated Merger of Companies That Make Microprocessor Prosthetic Knees* (Dec. 20, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor.

[55] *Id.*

[56] Press Release, Fed. Trade Comm'n, *Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc.* (Aug. 23, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau.

[57] Ron Knox, *Congressman's Amazon letter echoes New Deal thinking* (July 14, 2017) GCR USA, *available*

platform to exercise control over pricing and promotion of its products over other sellers, as well as threatening local communities through diminished economic opportunity for wage earners. These allegations raise novel concerns, similar to the recent comments of U.S. Senators Elizabeth Warren and Bernie Sanders championing the expansion of antitrust law's scope to include the broader concept of economic opportunity.[58] Amazon defended the transaction as a way to expand its offerings and to benefit consumers with increased convenience and innovation.

B. U.S. Department of Justice

The DOJ began FY2017 with three merger challenges pending in federal district court. During FY2017, the DOJ won two of the pending cases at trial and the transaction parties abandoned the remaining case prior to trial. During the fiscal year, the DOJ brought two additional district court challenges to mergers—one of these cases settled with a significant divestiture prior to trial and the DOJ won a PI in the other case. The DOJ entered into nine consents to resolve concerns in proposed mergers; one additional transaction was reportedly abandoned due to the agency raising antitrust concerns.

Since October 1, 2017, the DOJ has brought its challenge to AT&T's acquisition of Time Warner Inc. in federal district court. In addition, in Q42017, the DOJ entered into three consents to resolve concerns in proposed mergers and into one settlement in a consummated merger. These consents suggest there may be some noteworthy changes in settlement "boilerplate."

1. *Court Cases*

a. *DOJ Wins Both Suits to Block Health Insurance Industry Mergers*

On July 21, 2016, the DOJ (and attorneys general from multiple states and the District of Columbia) brought suits in the federal district court for the District of Columbia, challenging both Anthem, Inc.'s ("Anthem") proposed acquisition of Cigna Corp. ("Cigna") and Aetna Inc.'s ("Aetna") proposed acquisition of Humana Inc. ("Humana").[59] The DOJ press release stated:

> The complaints allege that the two mergers—valued at $54 billion and $37 billion—would harm seniors, working families and individuals, employers and doctors and other healthcare providers by limiting price competition, reducing benefits, decreasing incentives to provide innovative wellness programs and lowering the quality of care.[60]

The filing of these challenges marked the culmination of an almost full-year investigation by the DOJ. The *Aetna/Humana* transaction was announced on July 3, 2015, while rumors were already circulating about a potential *Anthem/Cigna* deal. Aetna hoped that, by being

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at http://globalcompetitionreview.com/article/1144588/congressman%E2%80%99s-amazon-letter-echoes-new-deal-thinking.

[58] *Id. See also* discussion on 'Possible Legislative Changes . . .' *infra* at IV.

[59] Press Release, U.S. Dep't of Justice, *Justice Department and State Attorneys General Sue to Block Anthem's Acquisition of Cigna, Aetna's Acquisition of Humana* (July 21, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

[60] *Id*. at 1.

"first," its review would not be tied to the Anthem transaction. However, when Anthem and Cigna announced their deal only three weeks later, the DOJ decided to consider both transactions in tandem.

The appeal of combining the two cases was apparent from the plaintiffs' standpoint: if the two deals were consummated, the "Big Five" health insurance companies would become the "Big Three." All four companies were successful providers that competed to provide Medicare Advantage[61] services. They also competed to sell health insurance on the public exchanges established by the Affordable Care Act ("ACA"). In addition, all four companies, according to the complaint, competed to develop new models of care. On August 5, 2016, Judge John Bates decided to keep only the *Aetna/Humana* case. The *Anthem/Cigna* case was reassigned to Judge Amy Berman Jackson.

(1) *Aetna/Humana*

In the *Aetna/Humana* complaint, the DOJ alleges that the parties are two of the largest and fastest-growing Medicare Advantage competitors in the country. Before agreeing to merge, Humana was projecting continued enrollment growth and Aetna had aggressive expansion plans. The two companies already compete in more than 600 counties—almost 90% of the counties in which Aetna offers Medicare Advantage. The impact of competition would be particularly acute in 364 of the 600 counties.

Although both companies participate in the individual and family exchanges across a broad geographic footprint, the complaint focuses on the overlaps in three states: Florida, Georgia, and Missouri. In these states, the two companies compete in more than 100 counties combined. Aetna had recently announced plans to exit from most of the public exchanges in 2017. After announcement of the acquisition at issue, Humana decided to reduce its public exchange offerings. The complaint alleges that 17 relevant markets would be harmed.

Prior to the commencement of the lawsuit, Aetna had proposed remedies, including divestitures of parts of Aetna's, and/or Humana's, Medicare Advantage business and had had initial discussions with potential buyers. The complaint indicates that these remedies were inadequate. According to the complaint, proposed remedies must give the buyer both the means and the incentives to effectively compete. The divestitures proposed by Aetna were transfers of contracts to cover individual employees in numerous counties. Nothing would prevent the enrollees from switching back during the next enrollment period. The remedy package did not provide the buyer with an intact business unit. The DOJ argued that the buyer would not be able to replicate the infrastructure, *i.e.*, the physicians, hospitals, technology platforms, claims processing systems, or employees with the requisite knowledge to administer these services. In addition, the divestitures would not include enrollees in related insurance lines, *e.g.*, special needs plans, group Medicare Advantage plans, employer groups, or Medicare Advantage plan enrollees in counties adjacent to the proposed divestitures. Nor did the remedy package attempt to address the concerns raised regarding

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[61] Medicare Advantage is a market-based alternative to traditional Medicare.

public exchange competition. In sum, the DOJ argued that the remedy would leave the buyer dependent on Aetna—potentially for years.[62]

Judge Bates scheduled the trial to begin on December 5, 2016. On August 15, 2016, Aetna announced that it would reduce its participation in the public healthcare exchanges from 778 counties to 242 counties, and decrease the number of states in which it operates from 15 to four.[63] In their answer pleadings, both Aetna and Humana challenged the DOJ's "contrived market definition," indicating that Medicare Advantage and traditional Medicare ("Original Medicare") are "functionally interchangeable substitutes." Humana challenged the DOJ's allegations of harm in the ACA exchanges on the basis that the markets are "highly volatile" and that current market performance is not a barometer for future competition.

A 13-day trial began in December 2016 in the *Aetna/Humana* case. On January 23, 2017, Judge Bates issued a 158-page opinion ruling in favor of the DOJ in *Aetna/Humana*, thereby blocking the transaction.[64] The court determined that the sale of Medicare Advantage is a separate relevant product market from Medicare. The court found that competition from Original Medicare options would not constrain the exercise of market power in Medicare Advantage.[65] In addition, the court rejected the transaction parties' claim that their proposal to divest 290,000 Medicare Advantage customers to Molina Healthcare would eliminate the competitive harm that the merger would likely produce. Molina has not been successful in its forays into the individual Medicare Advantage market in the past. The court indicated that courts are often skeptical of a divestiture that relies on a continuing relationship between the seller and the buyer of divested assets because it leaves the buyer susceptible to the seller's actions. The court was also concerned by the "fire sale" price, which, when coupled with some Molina documents, indicated that the divestiture buyer had significant concerns regarding the viability of the divestiture.

The court concluded that the merger would likely substantially lessen competition in the market for individual Medicare Advantage customers in all 364 complaint counties. It premised its decision on the market concentration figures in what it delineated as the Medicare Advantage product market, and the considerable evidence of head-to-head competition between the transaction parties. It rejected the defendants' arguments that federal regulation would prevent the combined firm from raising prices or reducing benefits, the likelihood of timely and sufficient entry, and the adequacy of the proposed divestiture to Molina to replace competition eliminated by the merger.

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[62] Almost all of the 20 states required to approve the transaction had done so at the time the DOJ filed its complaint.

[63] Press Release, Aetna Inc., *Aetna to Narrow Individual Public Exchange Participation* (Aug. 15, 2016), *available at* http://investor.aetna.com/phoenix.zhtml?c=110617&p=irol-newsArticle&ID=2195571. Apparently, on July 5, 2016, Aetna indicated to the DOJ that it would expand its participation in individual marketplaces to at least five more states if the deal was approved; however, if the DOJ sued, Aetna stated that it would withdraw its presence in all but 10 states.

[64] Press Release, U.S. Dep't of Justice, *U.S. District Court Blocks Aetna's Acquisition of Humana* (Jan. 23, 2017), *available at* https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana.

[65] Memorandum Opinion at 56–58, *United States v. Aetna Inc.*, No. 16-1494, Docket No. 306 (Jan. 23, 2017), *available at* https://www.justice.gov/opa/press-release/file/930361/download.

The court also determined that Aetna's withdrawal from the individual public exchanges in three states was done in connection with the case, and, in any event, Aetna was an actual potential competitor for antitrust purposes in 17 complaint counties. In addition, the court found that, for three complaint counties in Florida, Aetna was an actual competitor and that the proposed merger would have caused a substantial lessening of competition in those three Florida counties. Finally, the court was unpersuaded that the stated efficiencies generated by the merger would be sufficient to mitigate the transaction's anticompetitive effects for consumers in the impacted markets. On February 14, 2017, Aetna decided not to appeal this decision; the parties mutually agreed to terminate the transaction, with Aetna paying Humana a $1 billion breakup fee.[66]

(2) *Anthem/Cigna*

In the *Anthem/Cigna* case, the complaint alleged harm to competition in four markets: (1) national commercial health insurance accounts; (2) local commercial health insurance accounts; (3) individual exchanges; and (4) purchase of healthcare services by commercial insurers.

Of the "Big Five," only four offer a nationwide commercial network sufficient to serve the country's largest employers. Anthem and Cigna view each other as close competitors for these accounts and have adopted strategies for winning national business from each other. In 14 states, their combined market share is greater than 40% of all national accounts.

Also, Anthem and Cigna are offering two of a few remaining options for large-group employers in more than 35 metropolitan areas. The merger allegedly will slow the much-needed transition to value-based contracting.

In at least two metropolitan areas—St. Louis and Denver—Aetna and Cigna are key competitors for selling policies to individuals and families on public exchanges. The complaint asserts that much of Cigna's growth has been at Anthem's expense. In both Colorado and Missouri, the parties are the second-and third-largest healthcare insurance providers. In St. Louis, the combined firm would have 25% of all enrollees. There has been strong head-to-head competition between the two firms.

Finally, Anthem's high market share provides significant bargaining leverage with physicians and hospitals. In 35 metropolitan areas, the merger would significantly increase Anthem's ability to impact the reimbursement rates it pays providers. In addition, the complaint alleges that the merger would reduce innovation from the cooperative efforts with providers to enter into alternative models.

The complaint also rejects as a countervailing factor the extent to which Anthem anticipates lowering the reimbursement rates paid to physicians and hospitals for their services as a result of the merger. The reductions stem from a drop in competition and may not be treated as efficiencies. Anthem apparently did not offer any remedies to the DOJ.

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[66] Press Release, Aetna Inc., *Humana Announces Termination of Merger with Aetna; Schedules Conference Call with Investors* (Feb. 14, 2017), *available at* http://press.humana.com/press-release/current-releases/humana-announces-termination-merger-aetna-schedules-conference-call-i.

In a brief order issued August 12, 2016, Judge Jackson set a trial date for November 21, 2016, with a conclusion by December 30, 2016. She provided the DOJ 10 days to present its case and gave Anthem six days.

On September 27, 2016, the DOJ indicated that it would not pursue claims in its case that the merger would harm competition in the sale of healthcare insurance policies to individuals through the ACA exchanges;[67] instead, the DOJ's case focused on the potential reduction in competition in the sale of health insurance to national employers and to large-group accounts in 35 metropolitan areas.

Trial in the *Anthem/Cigna* case ran from November 21, 2016 to January 3, 2017. On February 8, 2017, Judge Jackson ruled in favor of the DOJ in *Anthem/Cigna*.[68] The court found that the merger would likely impact the market for the sale of health insurance to "national accounts"—customers with greater than 5,000 employees, usually spread over at least two states—within the 14 states where Anthem operates as the Blue Cross Blue Shield licensee. The court found that the evidence demonstrated that large employers have a unique set of characteristics and needs that drive their purchasing processes and decisions, and that the industry as a whole recognizes national accounts as a distinct market. Although the two parties compete head to head regarding many aspects of their offerings, the court rejected the argument that Anthem's primary competitor for national accounts was Cigna. In addition, the court found that national accounts tend to be sophisticated, well-informed customers and thus have countervailing bargaining power. Nevertheless, because the merger would reduce the number of national carriers from four to three,[69] and the market shares would increase materially in an already concentrated market, the court found that the merger's overall effect would be anticompetitive.

Perhaps the most interesting aspect of the decision is the court's review of Anthem's efficiencies claims. The court determined that it did not need to decide whether (1) the combination would also affect competition in the sale of national accounts within the entire United States or (2) the merger would harm competition downstream in the sale of health insurance to large-group employers of greater than 100 employees in the 35 separate local regions within Anthem's states. The court did find, however, that the evidence showed that the combination would have an anticompetitive effect on the sale of health insurance to large groups in at least one of the alleged markets—Richmond, Virginia.[70] Finally, the court

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[67] Special Master Report and Recommendation No. 4, *United States v. Anthem, Inc.*, No. 1:16-cv-1493, Docket No. 172 (D.D.C. Sept. 30, 2016) (Docket No. 172).

[68] Press Release, U.S. Dep't of Justice, *U.S. District Court Blocks Anthem's Acquisition of Cigna* (Feb. 8, 2017), *available at* https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna. *See also United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 258 (D.D.C. 2017).

[69] The district court indicated that even if insurers with small networks enter the market, these "niche" products do not appeal to large national employer accounts. *United States v. Anthem, Inc*., 236 F. Supp. 3d at 180–81.

[70] The court found a presumption of anticompetitive effect in this market based on Anthem and Cigna being the city's first- and second-largest competitors, with a combined market share of between 65% and 78%, and Anthem had not shown that the remaining competition or potential market entrants from outside the Richmond, Virginia area would likely constrain a price increase by Anthem post-merger. *Id*. at 256.

determined that it did need to reach a decision on the allegations in the complaint that the merger would also harm competition upstream in the market for the purchase of healthcare services from hospitals and physicians in the 35 separate local regions.

The court rejected the efficiencies proffered by Anthem. Anthem argued that the combined company would achieve $2.4 billion in medical costs savings through its ability to (1) rebrand Cigna customers as Anthem customers, thereby giving them access to Anthem's existing lower rates; (2) exercise an affiliate clause in some provider agreements to allow Cigna customers access to Anthem's lower rates; and (3) renegotiate lower rates with providers. It found that the savings were not merger specific because they were based on rates that either company was able to attain and that Cigna customers could simply purchase the Anthem product today, rather than having to have the Cigna product "rebranded." It rejected as well the proposition that the merger was necessary to allow Anthem's customers access to Cigna's product offerings and that Anthem could not develop and offer these products on its own. It found that Anthem's plan to exercise the affiliate clause was unlikely to work and also rejected the claimed savings through renegotiation. Thus, it concluded that the claimed savings were aspirational rather than Anthem's demonstration of the extraordinary efficiencies that are needed to offset likely competitive harms.

On February 9, 2017, Anthem noticed its intention to appeal the district court's decision.[71] Anthem's appeal focused on the court's rejection of the efficiencies that it introduced at trial. On April 28, 2017, a three-judge panel of the D.C. Circuit, in a divided (2:1) ruling, rejected Anthem's argument that the trial court had not properly weighed Anthem's claim that the merger would produce billions of dollars in cost savings. The standard of review applied was "an abuse of discretion." Judge Judith Rogers' opinion indicated that "[d]espite widespread acceptance of the potential benefit of efficiencies as an economic matter . . . it is not at all clear that they offer a viable legal defense to illegality under Section 7."[72] The opinion explains that D.C. Circuit precedent holds that "evidence of efficiencies could rebut a *prima facie* showing . . . , which is not invariably the same as an ultimate defense to Section 7 illegality."[73] The court, however, leaves "for another day" the question of whether efficiencies can be an ultimate defense to Section 7 illegality and proceeds on the assumption that efficiencies as presented by Anthem could be such a defense under a "totality of the circumstances" approach. Nevertheless, Judge Rogers found that Anthem failed to show that the district court clearly erred in rejecting Anthem's purported cost savings as an offsetting efficiency. Judge Rogers found that the evidence of medical cost savings was neither merger specific nor sufficiently verifiable to offset the likely competitive harms of the merger. In fact, although Judge Rogers believed that the district court "clearly erred in finding that the

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[71] Anna Wilde Mathews, *Anthem to Appeal Decision Against Cigna Deal*, WSJ (Feb. 9, 2017), *available at* https://www.wsj.com/articles/anthem-to-appeal-decision-against-cigna-deal-1486641957.

[72] *United States v. Anthem, Inc.*, 855 F.3d 345, 355 (D.D.C. 2017). Several circuit courts, including the D.C. Circuit, have previously held that evidence of verifiable, merger-specific efficiencies can rebut a presumption that a merger is unlawful. Courts, however, have not decided whether efficiencies can provide a total defense to a transaction that would otherwise violate Section 7 of the Clayton Act. The U.S. Supreme Court's last word on this issue was in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967), when the Court stated that "[p]ossible economies cannot be used as a defense to illegality," but Justice Harlan disagreed on this point in his concurrence.

[73] *United States v. Anthem, Inc.*, 855 F.3d at 355.

application of Anthem rates to customers that choose to remain with Cigna is not merger specific," she finds that this fact is "immaterial to the district court's ultimate conclusion that the merger would be unlawful because these claimed efficiencies are not sufficiently verifiable."[74] The Circuit Court focused on the verifiability problems with the ability to generate merger cost savings from invoking an affiliate clause and renegotiating provider rates. The Court noted that the merger would reduce any incentive for Cigna customers to move to Anthem-branded products because Cigna plans would offer the same provider rates as Anthem plans. In addition, once the provider contracts expire and the affiliate clauses are no longer operative, the providers could aggressively renegotiate rates. The Court rejected Anthem's assumption that it would secure lower provider rates in renegotiations. In addition, the Court questioned whether the cost savings, if achieved, would be passed on to consumers. The Court noted statements in Anthem's documents that appeared to undermine these claims.

Judge Rogers ruled that the district court also reasonably determined that Anthem had failed to make the showing required to mitigate the threatened loss of innovation. The opinion also upholds the district court's decision on the anticompetitive effects in the Richmond, Virginia market and concluded that this holding provided an independent basis for the injunction, even absent a finding of anticompetitive harm in the 14-state national accounts market.

Judge Patricia Millett wrote a concurring opinion to "underscore the foundational problems that pervade Anthem's and the dissenting opinion's insistence that any reduction in provider rates, standing alone, excuses an anticompetitive merger."[75] Judge Brett Kavanaugh wrote a dissenting opinion premised on his finding that "the record decisively demonstrates that this merger would be *beneficial* to the employer-customers who obtain insurance services from Anthem and Cigna."[76]

Although Anthem dropped any further appeal of the Circuit Court's decision to the U.S. Supreme Court, the fight between the transaction parties is not over. After Judge Jackson issued her decision, Cigna and Anthem sued each other in Delaware state court. Among other things, Cigna sought to terminate the transaction and receive the $1.85 billion breakup fee that the acquisition agreement specifies, as well as more than $13 billion in damages as a result of an alleged breach of contract by Anthem. Anthem has alleged that Cigna breached its reasonable best efforts obligations under the merger agreement and is claiming the right to monetary damages from Cigna.

b. *Parties Abandon Merger of High-Speed Precision Planting Systems Companies Prior to Trial*

On August 31, 2016, the DOJ sued in the Northern District of Illinois to enjoin the proposed acquisition of Precision Planting LLC ("Precision Planting"), a subsidiary of Monsanto Company, by Deere & Company ("Deere").[77] This challenge apparently occurred

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[74] *Id*. at 358–59.

[75] *Id*. at 369.

[76] *Id*. at 373.

[77] Complaint, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. Aug. 31, 2016), *available at*

after the DOJ had cleared the transaction under the HSR Act, when, according to the transaction parties, the DOJ "change[d] its mind . . . when a Deere competitor protested."[78] The DOJ alleges that Precision Planting and Deere are the only two significant U.S. providers of high-speed precision planting systems,[79] which involves a technology that allows farmers to plant crops accurately at high speeds. The complaint further indicates that high-speed precision planting is a "revolutionary technology that marries planting speed and accuracy"[80] that is characterized as a "True Game Changer for Agriculture,"[81] and is expected to become the industry standard in the future.

The complaint alleges that, if the deal were allowed to proceed, Deere would dominate the market and be able to raise prices and slow innovation at the expense of American farmers who rely on these planting systems. In fact, in evaluating the benefits of acquiring Precision Planting, Deere apparently estimated that eliminating competition from Precision Planting would allow it to avoid cutting its prices by 5% to 15%.[82] Combined, the parties account for at least 86% of the market. Moreover, the DOJ complaint dismisses the competitiveness of solutions offered by Kinze Manufacturing and Horsch, LLC as being comparable.[83] Moreover, while today Precision Planting licenses Case and AGCO with technology to retrofit their equipment to offer high-speed precision planting systems, the DOJ asserts that, post-acquisition, Deere would likely set the price, technology, and go-to-market timing of high-speed precision planting systems supplied to such competitors so as to not undercut its own planting systems sales, which would likely entrench Deere as the dominant provider of such systems, and limit competitive choices available to American farmers.[84]

On May 1, 2017, about a month before the trial was scheduled to commence, Monsanto terminated the deal.[85] Monsanto indicated that it had spoken with several third parties that had expressed interested in purchasing its planter units.

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https://www.justice.gov/opa/file/889071/download.

[78] Answer of Defendant Deere & Company, *United States v. Deere & Co*., 16-cv-08515 (N.D. Ill. Oct. 12, 2016), *available at* http://www2.dtn.com/ag/assets/Deere_Reponse_to_DOJ_Lawsuit.pdf; *see also* Daniel Siegel, *Deere, Monsanto Tell DOJ To Leave Planter Co. Deal Alone*, LAW360 (Oct. 13, 2016), *available at* https://www.law360.com/articles/851448/deere-monsanto-tell-doj-to-leave-planter-co-deal-alone.

[79] The defendants in their answers to the complaint contend that high-speed precision planting systems is not a meaningful economic market, partly on the grounds that Precision Planting sells the components that the DOJ alleges comprise such a system individually. Answers of Defendants Deere & Co. and Monsanto Co., at 1, *United States v. Deere & Co.*, 16-cv-08515, Docket Nos. 89 and 90 (N.D. Ill. Oct. 12, 2016).

[80] Complaint, *United States v. Deere & Co.*, at ¶ 2.

[81] *Id*. at ¶ 1.

[82] *Id*. at ¶ 5.

[83] *Id*. at ¶ 32.

[84] *Id*. at ¶ 37. The transaction parties indicate that, as part of the deal, Ag Leader Technology will have the right to manufacture, sell, and even improve upon, Precision Planting's products.

[85] Chelsea Naso, *Monsanto Drops Planting Unit Deal With Deere A Month Ahead Of DOJ Trial*, LAW360 (May 1, 2017), *available at* https://www.law360.com/articles/919288/monsanto-drops-planting-unit-deal-with-deere-a-month-ahead-of-doj-trial.

c. *DOJ Successfully Challenges EnergySolutions/Waste Control Specialists Combination*

On November 16, 2016, the DOJ sued in district court in Delaware to block the proposed combination of EnergySolutions, Inc. ("EnergySolutions"), a wholly owned subsidiary of Rockwell Holdco, Inc., and Waste Control Specialists LLC ("Waste Control"), a wholly owned subsidiary of Andrews County Holdings, Inc.[86] The DOJ alleges that, prior to Waste Control opening its low-level radioactive waste ("LLRW") disposal facility in 2012, EnergySolutions was the disposal facility available to commercial LLRW generators in 36 states. In addition, the DOJ asserts that EnergySolutions and Waste Control competed aggressively and that the elimination of competition between the companies would have wide-ranging effects throughout the United States because it would create a near-monopoly for the disposal of commercially generated LLRW from nuclear power plants at a time when utilities are preparing to bid out nuclear reactor decommissioning projects. In addition, according to the DOJ, these higher costs would be passed on to businesses and consumers in the form of higher utility bills. Moreover, higher LLRW disposal rates would impact the use of nuclear technologies for medical, pharmaceutical and research purposes.

The transaction parties argued that the transaction would actually promote competition and benefit consumers. They did not agree with the DOJ's alleged product and geographic market, and asserted that new competitors can easily enter the market. Finally, the transaction parties argued that Waste Control is a "failing firm" that would be unable to meet its financial obligations as they come due and had been unsuccessful in finding other buyers.

On November 23, 2016, the transaction parties filed a motion to have the case transferred to the Western District of Texas,[87] which the court denied on December 21, 2016.[88] A 10-day trial began on April 25, 2017.

On June 21, 2017, Judge Sue Robinson granted a PI, blocking the combination.[89] The court indicated that, to prevail under a failing firm defense, they must establish that (1) the target's resources were so depleted and the prospect of rehabilitation so remote that it forced the distinct probability of business failure, and (2) there was no other prospective buyer of the target business. The court indicated that it did not need to decide whether the target would fail without the transaction because the company had not sought alternative buyers. Rather, the court found that the company had "essentially engaged in a single-bidder process and

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[86] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block EnergySolutions' Acquisition of Waste Control Specialists* (Nov. 16, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-energysolutions-acquisition-waste-control-specialists.

[87] Memorandum of Law in Support of Defendants' Motion to Transfer Venue, *United States v. EnergySolutions, Inc.*, No. 1:16-cv-01056, Docket No. 18 (D. Del. Nov. 23, 2016), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_doj/energysolutions2016/energysolutions_ddel_transfer_motion11_23_2016memo.pdf.

[88] Stan Parker, *Radioactive Waste Cos. Can't Move Merger Suit To Texas*, LAW360 (Dec. 21, 2016), *available at* https://www.law360.com/articles/875816/radioactive-waste-cos-can-t-move-merger-suit-to-texas.

[89] Eric Kroh, *DOJ Wins Bid To Block $367M Radioactive Waste Cos.' Merger*, LAW360 (June 21, 2017), *available at* https://www.law360.com/articles/937069/doj-wins-bid-to-block-367m-radioactive-waste-cos-merger.

then agreed to several deal protection devices that made it impossible to entertain other offers."[90] In addition, the court found that "purported self-help" strategies, such as storage, onsite burial and waste minimization, were not alternatives to permanent disposal. Thus, according to the court, certain customers lack negotiating power in the absence of a rival to EnergySolutions. The court also refused to consider whether any regulations would constrain anticompetitive effects on the grounds that the defendants had not mentioned this defense in either their opening or closing arguments. The court similarly believed that the defendant had not provided a basis for evaluating efficiencies. Finally, the court found that regulatory barriers and licensing difficulties would not only bar entry, but also the potential for expansion by existing competitors.

d. *DOJ Challenge of Parker-Hannifin Corporation's Consummated Acquisition of CLARCOR Inc. Settles*

The DOJ filed suit on September 26, 2017 in the federal district court of Delaware, challenging the consummated acquisition of CLARCOR Inc. by Parker-Hannifin Corporation.[91] The complaint alleges that the transaction substantially lessened competition in markets for aviation fuel filtration products in the United States by eliminating "all head-to-head competition between the only two domestic manufacturers of these products, effectively creating a monopoly in the United States."[92] The DOJ asserted that, as a result of the lost competition, customers would face higher prices and a loss of innovation and service quality.[93]

The challenge arose seven months after the transaction's consummation and following the expiration of the HSR Act waiting period. The DOJ's press release notes that "[d]uring the pendency of the department's investigation, Parker-Hannifin failed to provide significant document or data productions in response to the department's requests. In addition, the company has not agreed to enter into a satisfactory agreement to hold separate the fuel filtration businesses at issue and to maintain their independent viability pending the outcome of the investigation and, now, this litigation."

On December 18, 2017, the DOJ entered into a settlement with Parker-Hannifin Corp. that requires the divestiture of Parker Hannifin's Facet filtration business, including its aviation fuel filtration assets.[94]

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[90] *United States v. EnergySolutions, Inc.*, No. 1:16-cv-0156-SLR, 2017 WL 2991799, at *20 (D. Del. July 13, 2017), *available at* https://www.justice.gov/atr/case-document/file/1007831/download.

[91] Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business* (Sept. 26, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.

[92] Complaint, *United States v. Parker-Hannifin Corporation*, 1:17-cv-01354-UNA, Docket No. 1 (D. Del. Sept. 26, 2017), *available at* https://www.justice.gov/atr/case-document/file/999341/download.

[93] *Id*. at ¶¶ 37–39, 51.

[94] Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement With Parker-Hannifin* (Dec. 18, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin.

e. *Antitrust Division Challenges Proposed AT&T/Time Warner Combination*

On November 20, 2017, the DOJ filed suit in the United States District Court for the District of Columbia challenging AT&T Inc.'s ("AT&T") proposed $108 billion acquisition of Time Warner Inc. ("TW").[95] AT&T (along with its satellite TV subsidiary, DirecTV) is the nation's largest distributor of traditional subscription television. TW owns many of the top TV networks, including TNT, TBS, CNN, and HBO. The DOJ's complaint asserts:

> [D]istributors that control popular programming "have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition." Specifically . . . such vertically integrated programmers "can much more credibly threaten to withhold programming from [distributors]" and can "use such threats to demand higher prices and more favorable terms." . . . [T]he newly combined firm likely would . . . use its control of Time Warner's popular programming as a weapon to harm competition. AT&T/DirecTV would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks, and it would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers. The proposed merger would result in fewer innovative offerings and higher bills for American families.[96]

On November 28, 2017, AT&T and TW filed their Answer.[97] The defendants argue that with the advent of digital platforms such as Netflix, Apple, Google, Facebook, Hulu, Amazon, Snapchat, and Twitter, there is an abundance of choices for consumers.[98] The proposed AT&T/TW merger "is a pro-competitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace. . . .[N]o competitor will be eliminated by this merger. This transaction is. . .a classic vertical deal. . .so that the merged company can compete more effectively against market-leading cable incumbents and insurgent tech giants."[99] The transaction parties assert:

> [T]his transaction presents absolutely no risk of harm to competition or consumers. Rather, the transaction will allow the combined company to drive innovation in video content and distribution; develop an over-the-top path for Time Warner content to reach consumers directly; develop new ad-supported video models that shift more costs to advertisers and off consumers; use AT&T's consumer data to increase the value of Turner's substantial advertising inventory and create a platform for other programmers to do the same; use the same data to improve Time Warner's decisions as to content investment, marketing and promotions, and scheduling of programming; enable numerous cross-promotional opportunities and achieve substantial cost savings by integrating various key functions and

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[95] Press Release, U.S. Dep't of Justice, *Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner* (Nov. 20, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.

[96] Complaint at 1–2, *United States v. AT&T Inc.*, 17-cv-02511 (D. D.C. Nov. 20, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012896/download.

[97] Answer, *United States v. AT&T Inc.*, 17-cv-02511 (D. D.C. Nov. 28, 2017), *available at* https://cdn.arstechnica.net/wp-content/uploads/2017/11/att-answer-to-doj.pdf.

[98] *Id.* at ¶ 1.

[99] *Id.* at ¶ 2.

operations of both companies.[100]

Furthermore, "[b]ased on [the Comcast/NBCUniversal] . . . precedent . . . AT&T and Time Warner fully expected to resolve the Government's review of this merger by agreement, rather than litigation."[101] TW has "extended to third-party distributors the same sort of arbitration protections that the Government embraced in Comcast/NBCUniversal."[102]

Judge Richard Leon set an expedited schedule for discovery and a trial date of March 19, 2018.

2. *Consents*

In FY2017, the DOJ entered into nine consents involving proposed transactions: (1) Westinghouse Air Brakes Technologies Corporation/Faiveley Transport S.A. (freight car brakes business);[103] (2) Alaska Air Group Inc./Virgin America Inc. (codeshare agreement);[104]

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[100] *Id.* at ¶ 6.

[101] *Id.* at ¶ 7.

[102] *Id.* at ¶ 8.

[103] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Faiveley Transport's U.S. Freight Car Brakes Business Before Wabtec Acquisition* (Oct. 26, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-faiveley-transport-s-us-freight-car-brakes-business. Wabtec provides a wide range of equipment used on freight railcars, including components of freight car brake systems used in the U.S. freight rail network, and, according to the DOJ, is a dominant supplier of complete freight railcar systems in the United States. Faiveley Transport North America, a wholly owned subsidiary of Faiveley Transport S.A., makes and sells rail equipment and is allegedly one of only three major companies that supplies freight car brake components in the United States. The DOJ also alleged that the transaction would eliminate Faiveley as a potential competitor in the development, manufacture and sale of freight car brake control valves, and thereby would maintain a duopoly in the market. The consent decree requires Wabtec to divest Faiveley's entire U.S. freight railcar business to Amsted Rail Company Inc. The divestiture includes Faiveley's FTEN control valve, a freight car brake control valve under development.

[104] Press Release, U.S. Dep't of Justice, *Justice Department Requires Alaska Airlines to Significantly Scale Back Codeshare Agreement with American Airlines in Order to Proceed with Virgin America Acquisition* (Dec. 6, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-alaska-airlines-significantly-scale-back-codeshare-agreement. According to the DOJ, Alaska Airlines and Virgin America have both offered lower prices and better service than the larger airlines. The complaint alleges that Alaska Air's codeshare agreement with American Airlines, the world's largest airline, which allows Alaska Air to market American flights on over 250 routes, creates incentives for Alaska Air to compete less aggressively on routes both carriers serve and to forgo launching new service in competition with American. In contrast, Virgin has a network that "extensively" overlaps with American's network and has competed aggressively with American. According to the DOJ, this head-to-head competition has resulted in American offering consumers lower prices and better service on the overlapping routes. The complaint alleges that the codeshare relationship would cause Alaska Air to compete less vigorously with American than Virgin does today and would make Alaska Air less likely than Virgin to launch new service in direct competition with American. Accordingly, the consent requires Alaska Air to significantly reduce the scope of the codeshare agreement and prohibits Alaska Air and American from codesharing on routes where Virgin and American compete today and on routes where Alaska Air would otherwise be likely to launch new service following the merger. The settlement does permit the parties to continue codesharing in the limited circumstances where it is unlikely to lead to competitive harm and may offer benefits to consumers. Notably, the consent does not require changes to any other agreements between Alaska Air and American, including interline or reciprocal loyalty agreements on any of Alaska Air's other airline partnerships. In addition, the settlement requires Alaska Air to obtain the DOJ's approval before selling or leasing any of the

(3) AMC Entertainment Holdings Inc./Carmike Cinemas Inc. (movie theatres);[105] (4) Clear Channel Outdoor Holdings, Inc./Fairway Media Group LLC (billboards);[106] (5) Smiths Group plc/Safran S.A. (explosive trace detectors);[107] (6) Danone S.A./The WhiteWave Foods Company Inc. (raw and fluid organic milk);[108] (7) General Electric Co./Baker Hughes

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gates or slots that were divested to Virgin and expressly prohibits Alaska Air from transferring any interest in the assets to American.

[105] Press Release, U.S. Dep't of Justice, *AMC Required to Divest Movie Theatres, Reduce NCM Ownership and Complete Screen Transfers in Order to Complete Acquisition of Carmike Cinemas* (Dec. 20, 2016), *available at* https://www.justice.gov/opa/pr/amc-required-divest-movie-theatres-reduce-ncm-ownership-and-complete-screen-transfers-order. The DOJ found that AMC and Carmike competed head to head to attract moviegoers, and required the divestiture of movie theatres in 15 local markets. In addition, AMC is a founding member of National Cinemedia LLC ("NCM"), the number one provider of preshow services to exhibitors, and remains one of NCM's largest investors and exhibitors. In turn, Carmike is the largest exhibitor in the network of NCM's main competitor, Screenvision Exhibitions, Inc. ("Screenvision"), and is one of Screenvision's largest investors. According to the DOJ, NCM and Screenvision are the country's two leading preshow cinema advertising networks and combined account for over 70% of movie theatre screens. The DOJ alleged that, unaltered, the acquisition would likely weaken competition between NCM and Screenvision because they would have a significant common owner and/or that AMC could undermine Screenvision's ability to compete for advertisers and exhibitors by potentially restricting Screenvision's ability to rely on Carmike's growth to expand its network. The consent requires AMC to sell down its interests in NCM to below 5%, to relinquish all of its governance rights in NCM, and to transfer 24 theatres comprising 384 screens to the Screenvision network. Finally, the consent requires AMC to establish firewalls to ensure that it does not obtain NCM, Screenvision, and other movie exhibitors' competitively sensitive information or become a conduit for the flow of such information between NCM and Screenvision.

[106] Press Release, U.S. Dep't of Justice, *Clear Channel Outdoor and Fairway Media Group Required to Divest Billboards in Order to Complete Asset Swap Transaction* (Dec. 22, 2016), *available at* https://www.justice.gov/opa/pr/clear-channel-outdoor-and-fairway-media-group-required-divest-billboards-order-complete-asset. Clear Channel and Fairway both owned and operated billboards in the Atlanta and Indianapolis metropolitan areas that are located in close proximity to each other. Under the proposed swap, Clear Channel would acquire Fairway billboards in Atlanta in exchange for Clear Channel billboards in Indianapolis. The settlement requires Clear Channel and Fairway to divest 13 billboards in Indianapolis to Circle City Outdoor, LLC and 44 billboards in Atlanta to Link Media Georgia, LLC.

[107] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Morpho's Explosive Trace Detection Business Before Smiths Acquisition* (Dec. 22, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-morpho-s-explosive-trace-detection-business-smiths. The DOJ alleges that Smiths and Morpho are two of only three leading providers of explosive trace detection ("ETD") devices for air passenger travel and air cargo screening at U.S. airports. Desktop ETD devices detect trace amounts of explosive residue or narcotics from a tiny sample swabbed from the object and placed inside the ETD device. The complaint alleges that the competition between Smiths and Morpho has resulted in lower prices, better service, and more innovative desktop ETD devices. The consent requires Smiths to divest Morpho's global ETD business within 90 days to an approved buyer. The EU worked with the DOJ in the course of their respective investigations and had similarly required the divestiture of Morpho's global ETD business.

[108] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Danone's Stonyfield Farms Business in Order for Danone to Proceed with WhiteWave Acquisition* (Apr. 3, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-danone-s-stonyfield-farms-business-order-danone. Danone S.A.'s wholly owned indirect subsidiary, Stonyfield Farms, is a purchaser of raw and fluid organic milk. According to the DOJ, Stonyfield's long-term strategic partnership and supply and licensing agreements with WhiteWave's primary competitor in the procurement of organic milk and the supply of branded fluid packaged milk, CROPP Cooperative, would have provided incentives and opportunities for

Incorporated (refinery chemicals and services);[109] (8) Dow Chemical Company/E.I. DuPont de Nemours & Co. (crop protection and petrochemical products);[110] and (9) Showa Denko K.K./SGL Carbon SE (graphite electrodes).[111]

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cooperative behavior between the two leading purchasers of raw organic milk in the Northeast. This cooperation would purportedly have resulted in farmers receiving less favorable contract terms for the purchase of their raw organic milk. In addition, the DOJ alleged that the acquisition would have aligned the interests of the producers of Stonyfield, Horizon, and Organic Valley—which the DOJ asserted were the only three national fluid organic milk brands—and therefore risked higher prices and fewer choices for U.S. consumers. The consent requires the divestiture of Stonyfield within 90 days to an approved buyer, thereby severing the entanglements between CROPP and Danone (as the owner of Horizon). The DOJ believes that the divestiture will preserve competition for the purchase of raw organic milk from Northeastern dairy farmers and the sale of fluid organic milk to consumers.

[109] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of General Electric Company's Water & Process Technologies Business before Merger with Baker Hughes Incorporated* (June 12, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-general-electric-company-s-water-process-technologies. The DOJ required GE to divest its water and process technologies business ("GE Water"), indicating that the proposed transaction, without this divestiture, would substantially lessen competition for refinery chemicals and services in the United States. The DOJ alleged that the merger would combine two of the four companies that provide the sophisticated chemicals and services required to refine crude oil and natural gas. GE and Baker Hughes had shares in the market in the United States of 20% and 35%, respectively. The DOJ provided until the end of September 2017 for divestiture. The DOJ press release indicates that it cooperated closely in conducting its investigation with its counterparts in a number of jurisdictions, including the EU, Canada, and Australia.

Although GE divested assets accounting for 90% of its GE Water revenues, as of October 2017, it had not divested title to assets in certain jurisdictions. The DOJ and GE entered into a modified judgment in which GE agreed (1) to make daily "incentive payments" to the DOJ for each day in 2018 the divestitures are not fully completed; and (2) to reimburse the DOJ $50,000 for the attorneys' fees and costs incurred relating to the delays and enforcing the original consent decree. The daily payments could be up to $12,000 per day if GE fails to divest assets in eight countries listed as due by January 1, 2018, and could increase up to $16,500 per day after May 15, 2018, when complete divestiture is to occur in another three countries. Press Release, U.S. Dep't of Justice, *Justice Department Requires General Electric Company to Make Incentive Payments to Encourage Completion of Divestitures Agreed to as a Condition of Baker Hughes Merger* (Oct. 17, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-general-electric-company-make-incentive-payments-encourage.

[110] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Certain Herbicides, Insecticides, and Plastics Businesses in Order to Proceed with Dow-Dupont Merger* (June 15, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics. The DOJ, along with the attorneys general of Iowa, Mississippi, and Montana, required the parties to divest multiple crop protection products that are broadleaf herbicides for winter wheat and insecticides for chewing pests for specialty crops. The settlement requires the parties to divest DuPont's market-leading Finesse herbicide and Rynaxypyr insecticide products to a buyer to be approved by the United States. In addition, the consent required a divestiture of two Dow petrochemical products that are ethylene derivatives (acid copolymers and ionomers) in which the merged entity would allegedly have had a monopoly. The DOJ press release indicates that it cooperated closely with the EU throughout the investigation, and notes that the EU announced on March 27, 2017 that it would approve the merger conditioned on certain divestitures, including several products also to be divested under the DOJ settlement, as well as DuPont's assets used for research and development of new crop protection materials.

[111] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture Of SGL's U.S. Graphite Electrodes Business In Order For SDK To Proceed With Its Acquisition Of SGL's Global Graphite Electrodes Business* (Sept. 27, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-sgls-us-graphite-electrodes-business-order-sdk. On September 27, 2017, the DOJ announced a proposed

In Q42017, the DOJ entered into three consents in proposed transactions: (1) CenturyLink, Inc./Level 3 Communications, Inc. (telecommunications services);[112] (2) Entercom Communications Corp./CBS Radio, Inc. (radio stations);[113] and (3) Vulcan Materials Company/Aggregates USA, LLC's (aggregates facilities).[114] In addition, the DOJ required a divestiture in one consummated merger, involving TransDigm's February 2017 acquisition of Schroth Safety Products.[115] Changes in remedy policy and terms will warrant careful watch over the next year. For example, in a recent consent decree—*CBS/Entercom*—the DOJ applied the standard it must meet in a civil contempt action for failure to comply with the settlement's terms from "clear and convincing evidence" to a "preponderance of the evidence" standard. In the *TransDigm* proposed judgment, not only is there the "preponderance of the evidence"

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settlement to resolve competition concerns about Showa Denko K.K.'s (SDK's) acquisition of SGL Carbon SE's (SGL's) global graphite electrodes business to Tokai Carbon Co., Ltd. Under the settlement, SDK must divest SGL's entire U.S. graphite electrodes business. The DOJ alleges that the transaction would have reduced from three to two the number of major domestic suppliers of large ultra-high power graphite electrodes used by U.S. electric arc furnace steel mills "in an industry where a local manufacturing presence is important to customers to ensure reliability of supply at an affordable cost." The DOJ further alleges that, due to domestic technical services being critical to these U.S. steel mills, such steel mills would not purchase from producers outside the United States. Absent the divestiture, SDK and SGL purportedly would have had a combined 56% market share.

[112] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for CenturyLink to Proceed with Its Acquisition of Level 3 Communications* (Oct. 3, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-centurylink-proceed-its-acquisition-level-3. The DOJ alleged that the combined companies would have reduced competition for local fiber-optic-based telecommunications services in Albuquerque, New Mexico, Boise, Idaho, and Tucson, Arizona and the sale of intercity dark fiber for 30 routes. The settlement requires the divestiture of Level 3's telecommunications networks in Albuquerque, Boise, and Tucson, and granting of dark fiber indefeasible rights of use for 30 intercity routes.

[113] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures of Radio Stations in Boston, San Francisco and Sacramento as Part of Entercom's Acquisition of CBS Radio* (Nov. 1, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-radio-stations-boston-san-francisco-and-sacramento. The DOJ alleged that the proposed transaction would have eliminated head-to-head competition between the parties' radio stations for local and national advertisers in Boston, Massachusetts, San Francisco, California, and Sacramento, California. The settlement requires the divestiture of 13 radio stations in these cities.

[114] Press Release, U.S. Dep't of Justice, *Justice Department Requires Vulcan to Divest 17 Aggregate Facilities in Order to Acquire Aggregates USA* (Dec. 22, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-vulcan-divest-17-aggregate-facilities-order-acquire-aggregates. Both parties produce and sell coarse aggregate, which is used in the construction of highways, including as an essential input in asphalt concrete and ready-mix concrete. They were allegedly the only two producers in Knoxville, Tennessee, Tri-Cities, Tennessee, and Abingdon, Virginia areas. Under the proposed settlement, Vulcan will divest 13 active quarries and yards and four inactive quarries in these areas to Blue Water Industries.

[115] The DOJ required that TransDigm Group Incorporated divest two businesses it acquired from Takata Corporation in February 2017 in a non-HSR reportable transaction. The DOJ asserts that these divestitures are necessary to restore competition in markets for various types of restraint systems used on commercial airplanes. According to the DOJ, TransDigm's AmSafe subsidiary is the world's largest supplier of restraint systems used on commercial airplanes and Schroth was its only meaningful competitor. Schroth was allegedly a growing competitive threat to AmSafe in terms of price and R&D of new restraint technologies. Under the settlement agreement, TransDigm will divest all of Schroth, including its facilities in Pompano Beach, Florida and Arnsberg, Germany, to a German consortium. Press Release, U.S. Dep't of Justice, *Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired From Takata* (Dec. 21, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-requires-transdigm-group-divest-airplane-restraint-businesses-acquired.

standard, but also a provision that TransDigm will reimburse the DOJ for any attorneys' fees, experts' fees, and costs incurred in connection with any effort to enforce the judgment.[116] The *Vulcan/Aggregates* consent also contains these provisions.

3. *Abandoned Transactions*

On October 5, 2016, Lam Research Corp. and KLA-Tencor Corp. abandoned their plans to merge after the DOJ indicated that it had serious concerns about the impact of the proposed transaction on the supply of semiconductor fabrication equipment and process technology, particularly for metrology and inspection uses.[117]

1-III. Enforcement Trends and Issues

A. Pharma/Healthcare Active Area of Investigation and Enforcement Action

Pharma/healthcare continued to be a very active area in 2017, both in terms of volume of transactions and government enforcement actions. Both the FTC and the DOJ have been active in investigating and taking enforcement action in various sectors of this industry.[118] In the pharma sector, the FTC introduced additional theories of harm that deviated from well-established precedent. In addition, the FTC brought court challenges this year involving the healthcare sector, and the DOJ prevailed at trial on the healthcare insurance cases it brought in 2016.

As in prior years, a significant portion of the FTC's consents in 2017 involved pharmaceutical transactions. In the last decade, the methodology applied to pharma mergers has developed, with a focus on possible overlaps in both branded and generic drugs, as well as generic overlaps in which the number of actual and potential competitors post-merger would be fewer than four or five firms. The life cycle stage of a particular drug treatment determines the FTC's focus. Some pharma deals involve overlaps at the development stages, *i.e.*, for a new therapeutic treatment for which there is no commercial product to date. Such "innovation market" challenges, involving actual competition for future products, are complex and involve judgment calls regarding likelihood, foreseeability, and a determination of what projects competing companies have in their pipelines.[119] Until the first generic is

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[116] [Proposed] Final Judgment at 18–19, XV. Enforcement of Final Judgment, *United States v. TransDigm Grp. Inc.*, 17-cv-02735 (D.D.C. Dec. 21, 2017), *available at* https://www.justice.gov/opa/press-release/file/1019821/download. Trade Reg. Rep. (CCH) 45,117.

[117] Press Release, U.S. Dep't of Justice, *Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans* (Oct. 5, 2016), *available at* https://www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans.

[118] *See* Sharis A. Pozen, Former Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Competition And Health Care: A Prescription For High-Quality, Affordable Care*, Remarks as Prepared for the World Annual Leadership Summit on Mergers and Acquisitions in Health Care (Mar. 19, 2012), *available at* https://www.justice.gov/atr/file/518931/download, for a general overview of recent DOJ healthcare activity.

[119] Ilene Knable Gotts & Richard T. Rapp, *Antitrust Treatment of Mergers Involving Future Goods*, ANTITRUST SOURCE at 102 (Fall 2004), *available at* http://www.nera.com/content/dam/nera/publications/2004/Antitrust_ Magazine_Fall_2004.pdf; Rosa M. Abrantes-Metz, Christopher P. Adams & Albert D. Metz, *Empirical Facts and Innovation Markets: Analysis of the Pharmaceutical Industry*, ANTITRUST SOURCE at 1 (Spring 2005), *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/06_mar05_abrametz323.authcheckdam.pdf.

introduced into the market, competition may exist among competing branded drugs for a particular therapeutic treatment. Next, the competition focus shifts to the branded product and its generic bioequivalent, which gets approved into the marketplace through an abbreviated new drug application ("ANDA") process. Many pharma deals involve a company without a commercially available product, but that is poised to enter the market—for instance, a company with a pending ANDA to introduce a generic version of a drug. Since all drug sellers must register with the Food and Drug Administration ("FDA"), the FTC is able to obtain information on who has applied to sell a drug, how far along it is in the pipeline, and what other companies are also pursuing approval. Such future competition is routinely analyzed in a merger review.

According to the FTC, once there are two or more generics available, a distinct generic market emerges in which the generic rivals set prices on the basis of other generic rivals, rather than relative to the branded product. The FTC also indicated that economic research establishes that with each additional generic, further price decreases will occur, although, once there are five to six generics in the marketplace, such benefits become less measurable. In addition, once there are five or six generics on the market, research indicates that it is unlikely that the prices will go back to the level of the point when the fourth generic entered the marketplace, even if a competitor is eliminated due to "stickiness" in pricing. As a result, in most cases, antitrust concerns in a generic-to-generic overlap will arise when: (1) one of the firms in the combination would have been a likely entrant with the fifth generic, since the merger would eliminate the benefit from such entry; (2) the merger will reduce the number of generics from five to four and the two parties account for a very large share of the generic sales of the drugs; or (3) the merger will reduce the number of generics from four to three. The inquiry is very fact specific, with exceptions to the above that raise additional concerns, such as if the overlap involves an injectable form (in which case issues may arise, even in a six-to-five merger), branded generics play an important role in the market, or direct consumer marketing or physician preferences impact the interchangeability of branded and generic versions.

During 2017, FTC consents followed the same reasoning—requiring the merger parties to sell products or relinquish marketing rights in markets with four to three, three to two, and two to one competitors post-merger, as well as divestitures in markets in which the transaction parties are among a few firms with products in development.

In 2016, the *Teva/Allergan* merger[120] included the FTC also considering, in addition to the above-mentioned theories, whether the transaction potentially would create competitive concerns that extend beyond markets for individual pharmaceutical products. Specifically, the FTC considered the following: first, whether a large portfolio of generic drugs could provide the merging company with a breadth of a portfolio large enough to give it an advantage in winning business in individual drug product markets, *i.e.*, give the combined firm pricing power through the bundling of drug portfolios; second, whether it would affect

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[120] Press Release, Fed. Trade Comm'n, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (July 27, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle.

incentives to challenge branded-drug patents, *e.g.*, discourage the combined firm from filing patent challenges against branded drug manufacturers; and, finally, as in the *Ciba-Geigy/Sandoz* transaction in FY1996,[121] the Commission considered whether the transaction would discourage development of new generic products.

The FTC has been very active in challenging any hospital system/physician group combinations. The hospital challenges were protracted, with trials and appeals to federal circuit courts. As is true with most antitrust matters, market definition is often the critical determinant of whether the agency will require relief, and, if challenged, whether the agency will prevail before the court. In healthcare cases, however, market delineation is often tricky, due to such factors as the divergence between payor and physician/consumer and applicable regulatory regimes. Also, given the country's focus on healthcare reform, it is not surprising that hospitals have tried to assert quality and cost-savings objectives as defenses to a transaction.

Even combinations of specialty physician groups, particularly in rural areas, can raise concerns. In FY2016, for example, one of the consents involved a consummated combination of six independent orthopedic practices in Berks County, Pennsylvania. The FTC alleged that, pre-merger, health plans could choose among the individual practices. This trend continued in FY2017, with the *Sanford Health/Mid Dakota Clinic* challenge.

As discussed above, on July 21, 2016, the DOJ simultaneously sued to block Anthem's proposed acquisition of Cigna and Aetna's proposed acquisition of Humana. The two transactions would have reduced the number of big health insurance companies from five to three. Crucial to the DOJ's victory in these cases were the market definitions adopted by the courts. In addition, the courts were skeptical of the efficiencies claims of the parties.

The continued consolidation of healthcare and pharma companies is likely to continue in 2018. In fact, a number of high-profile hospital and healthcare transactions have already been announced.[122] In addition, CVS Corp. proposes acquiring Aetna Inc. and United Health Group Inc. proposes acquiring DaVita Medical Group. The treatment of these vertical transactions will be worth following as well.

B. The Agencies—and the Courts—Focus on Merger Remedies

Both the FTC and the DOJ have consistently focused on remedies and required comprehensive divestiture packages to resolve their concerns.[123] In addition, many of the

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[121] Press Release, Fed. Trade Comm'n, *FTC Accord in Ciba-Geigy/Sandoz Merger To Prevent Slowdown in Gene Therapy Development & Preserve Competition in Corn Herbicides, Flea-Control Markets* (Dec. 17, 1996), *available at* https://www.ftc.gov/news-events/press-releases/1996/12/ftc-accord-ciba-geigysandoz-merger-prevent-slowdown-gene-therapy.

[122] *See*, *e.g.*, Dignity Health/Catholic Health Initiatives, in which the parties combined have 139 hospitals in 28 states. Some observers raise the question whether the FTC may include as part of its inquiry wider market definitions. *Hospital Consolidation Could Test FTC Approach*, Antitrust & Trade Reg. Rep. (BNA) Vol. 110, No. 2825, at 1421 (Dec. 22, 2017).

[123] Part of the attention on remedies may be attributed to the reasons that the FTC considers resulted in three of its divestiture sales being unsuccessful. The first of these reported "failures" occurred in connection with the FTC's November 2012 order that Hertz sell its Advantage low-cost rental business and rights to operate 29 Dollar

litigated matters were initiated after the agencies rejected the remedies proposed by the transaction parties. In some of those cases, the court was asked to review the adequacy of these remedies.

In January 2017, the FTC issued its long-awaited merger retrospective study.[124] The study reviewed 89 merger orders entered into between 2006 and 2012. The FTC concluded that the study confirmed that the FTC's merger remedy practices are generally effective. Four areas, however, were earmarked for adjustment.

First, the study found that divestiture buyers of a more limited package of assets were deemed not to succeed at times, even when the buyer was identified upfront. The FTC indicated that, going forward, parties can expect that proposals to divest selected assets will undergo more detailed scrutiny and that the Commission will accept a proposal of less than the entire ongoing business only if the parties and the divestiture buyer demonstrate that

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Thrifty airport locations in order to gain clearance of its $2.3 billion acquisition of Dollar Thrifty. Hertz sold the business to Simply Wheelz, a subsidiary of Franchise Services of North America, which at that time operated U-Save Car Rental. The divestiture acquisition occurred in early 2013. As part of the acquisition, Simply Wheelz opted to lease 24,000 vehicles from Hertz under an agreement that required Simply Wheelz to auction the cars by the end of 2014, and if sold for less than Hertz's claimed value, to pay Hertz the difference.

The FTC issued its final order on July 10, 2013; four months later, on November 5, 2013, Simply Wheelz filed for bankruptcy, reportedly in part due to Hertz's exercise of its right to terminate its fleet-leasing arrangement with Advantage, since Advantage owed Hertz in excess of $39 million. In January 2014, the FTC sought public comments on the sale of the bankrupt Advantage Rent-a-Car operations to Catalyst Capital Group ("Catalyst"), a private equity firm, which would purportedly need to spend more than $100 million on Advantage to acquire a new fleet of rental vehicles. The FTC approved the sale on January 30, 2014. Catalyst opted to operate only 40 of the 70 locations available for purchase, and, ultimately, the bankruptcy court put 22 of these locations up for bid; Hertz and Avis were awarded 10 and 12 sites, respectively. These sites had been closed for months prior to being auctioned off; without these divestitures, the assets were likely to have exited the market. In light of the circumstances, the FTC permitted Hertz to reacquire the sites.

A second "failed" divestiture has arisen in connection with the divestiture of 146 supermarkets to Haggen Holdings, LLC ("Haggen") on January 27, 2015 to resolve concerns about Albertsons' acquisition of Safeway. On August 14, 2015, Haggen announced that it would close 27 acquired stores and, on September 8, 2015, Haggen filed for Chapter 11 bankruptcy to permit it to reorganize with only its core profitable stores. On September 24, 2015, Haggen announced that it would exit from California, Arizona, and Nevada, and continued to operate only 37 stores in those states. Haggen, Cerberus International, and Safeway petitioned the FTC on September 23, 2015, seeking approval on an expedited basis of a modification of the consent to permit Albertsons to rehire Haggen employees who were otherwise being terminated by Haggen, without violating the consent order. The FTC had no choice but to grant this request.

Finally, the divestiture buyer in the *Dollar Tree/Family Dollar* transaction had mixed success in the stores it acquired. Of course, these retail divestitures have occurred in a very challenging retail industry environment generally. For instance, in the recent *Bass Pro/Cabela* transaction, the FTC issued a no-action letter closing the investigation after the staff conducted an extensive second request investigation. The FTC found that the sporting goods marketplace today is large and highly fragmented, with numerous competitors, including large full-line sporting goods stores, independents, and retail giants Walmart and Amazon. Omnichannel pricing ensured that there was no price discrimination; switching to a pricing system based on zones or local competitive conditions was not feasible or desirable, with pricing being done nationally.

[124] Fed. Trade Comm'n, *The FTC's Merger Remedies 2006–2012* (Jan. 2017), *available at* https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

divesting the more limited asset package is likely to maintain or restore competition. An example cited is that the ongoing business divestiture is infeasible. In addition, the Commission indicated that it may require divestiture of assets (including manufacturing facilities) related to additional complementary products, the use of brand or trade names, or other affirmative conduct obligations, including facilitating the transfer of customers, to ensure the buyer's viability.

Second, the study indicated that divestiture buyers sometimes have had unforeseen complexities in transferring critical back-office functions and need more time to transition these services. The FTC indicated that it is important that the divestiture buyer be able to conduct due diligence to understand what back-office support services it needs and that it will undertake additional scrutiny in this area. In addition, the FTC takes the position that critical back-office functions on a transitional basis must be supplied to the divestiture buyer at no more than the parties' cost.

Third, the study raised concerns that some divestiture buyers have lacked adequate funding commitments to ensure success. As a result, the FTC indicated that it is now paying closer attention to the sources of and limitations on funds available to the divestiture buyer and how those factors may affect the divestiture buyer's competitive and financial viability.

Finally, the study found the need to focus on the due diligence undertaken by the divestiture buyers, including the access to facilities and employees.

The Obama Administration had previously provided guidance on its views of merger remedies on June 17, 2011, when the DOJ issued an updated policy guide:

> The touchstone principle for the [Antitrust] Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. . . . In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions. Structural remedies may be appropriate in vertical merger matters as well, but conduct remedies often can effectively address anticompetitive issues raised by vertical mergers. In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare.[125]

Precedent during the Obama Administration included the agencies imposing a variety of behavioral conditions to support a structural divestiture. Transition services arrangements and supply arrangements have become more routinely included, beyond the pharmaceutical industry, where they had already been the norm.[126] In FY2016, for instance, the FTC required that ArcLight augment its sale of terminals with requirements that it: (1) maintain minimum throughput volumes at the terminals for two years, and (2) supply the divestiture buyer with renewable fuels that may be blended with liquid propane products for five years.

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[125] U.S. Dep't of Justice, Antitrust Division, *Policy Guide to Merger Remedies*, at 1–2 (June 2011), *available at* https://www.justice.gov/opa/pr/antitrust-division-issues-updated-merger-remedies-guide.

[126] *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for Regal Beloit Corporation to Proceed with Its Acquisition of A.O. Smith Corporation's Electric Motor Business* (Aug. 17, 2011), *available at* http://www.justice.gov/opa/pr/2011/August/11-at-1056.html; Hold Separate Stipulation and Order, *United States v. Bemis Co., Inc.*, No. 1:10-cv-00295 (D.D.C. Feb. 24, 2010), *available at* http://www.justice.gov/atr/cases/f255700/255715.htm.

Mandatory licensing provisions may also alleviate competitive concerns by enabling competitors access to a key input;[127] some of the consents, however, include not only a license for technology, but the right to purchase the technology or to transfer the license to a third party later.[128] In addition, non-discrimination provisions have been included to incorporate the concepts of equal access, equal effort, and equal terms.

Similarly, the FTC's *CoStar/LoopNet* consent contained what the FTC characterized as "conduct relief that is unusual in a merger settlement."[129] In addition to requiring that the parties divest LoopNet's interest in Xceligent, a competing database that the FTC considered to be the "most similar competitor for information services" to CoStar, the consent also "imposes certain conduct requirements to assure the continued viability of Xceligent as a competitor to the merged firm and to reduce barriers to competitive entry and expansion. These additional provisions will facilitate Xceligent's geographic expansion and prevent foreclosure of [the parties'] established customer base." For five years, the consent: (1) prohibits CoStar and LoopNet from restricting customers' ability to support Xceligent; (2) requires CoStar and LoopNet to allow customers to terminate their existing contracts, without penalty, with one year's prior notice;[130] and (3) bars the merged firm from requiring customers to buy any of its products as a condition for receiving other products, and from requiring customers to subscribe to multiple geographic coverage areas to gain access to a single area in which they are interested. In addition, the consent requires, for three years, that CoStar and LoopNet continue to offer their customers core products on a stand-alone basis. A related provision prohibits the parties from limiting use of Xceligent's REApplications product, a software tool for managing market research in connection with customers' purchase, lease, or license of CRE database services from competitors.

Conduct remedies have primarily been used to resolve concerns in vertical mergers. Such remedies, however, are not always accepted by the DOJ. For instance, during the Obama Administration, Deputy Assistant Attorney General Jon Sallet indicated:

> In vertical transactions, observers sometimes assume that conduct remedies will always be available and sufficient. But that is not the current practice of the Division—if it ever was . . . . Some vertical transactions may present sufficiently serious risks of foreclosing

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[127] *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc.* (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-at-445.html; Press Release, U.S. Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), *available at* http://www.justice.gov/opa/pr/2011/January/11-at-061.html.

[128] *See, e.g.*, Proposed Final Judgment, U.S. Dep't of Justice, *United States v. Cameron Int'l Corp.*, No. 1:09-cv-02165 (D.D.C. Nov. 17, 2009), *available at* http://www.justice.gov/atr/cases/f252000/252080.htm.

[129] Press Release, Fed. Trade Comm'n, *FTC Places Conditions on CoStar's $860 Million Acquisition of LoopNet* (Apr. 26, 2012), *available at* http://www.ftc.gov/opa/2012/04/costar.shtm.

[130] Similarly, the *ArcLight/Gulf* consent requires that ArcLight and Gulf customers in the relevant markets be able to cancel their terminaling service contracts without penalty for six months after the divestiture. *See* Press Release, Fed. Trade Comm'n, *FTC Requires Energy Investor ArcLight Energy Partners Fund to Divest Assets as a Condition of Acquiring Gulf Oil Limited Partnership from Cumberland Farms, Inc.* (Dec. 28, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-requires-energy-investor-arclight-energy-partners-fund-divest.

> rivals' access to critical inputs or customers, or otherwise threaten competitive harm, that they require some form of structural relief or even require that the transaction be blocked.[131]

The Trump Administration leadership at the Antitrust Division has indicated that, although it is not saying it would never accept behavioral remedies, the standard for proving that the remedy will cure the anticompetitive harms is high. Rather, the DOJ will typically require structural relief to remedy antitrust concerns rather than behavioral remedies. In a keynote speech at the ABA Fall Forum on November 16, 2017, Assistant Attorney General Malcom Delrahim explained that behavioral remedies are "fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market."[132] Such regulatory schemes "require centralized decisions instead of a free market process. They also set strict rules devoid of the dynamic realities of the market."[133] In addition, such remedies are challenging to enforce, presuming "that the government should serve as a roving ombudsman of the affairs of business. Even if we wanted to do that, we often don't have the skills or the tools to do so effectively."[134]

It is unclear to what extent the FTC will diverge from the DOJ by accepting conduct remedies in the future.[135] Acting Bureau of Competition Director Bruce Hoffman indicated recently:

> [T]he FTC prefers structural remedies to structural problems, even with vertical mergers.[136] But, at the same time, the FTC recognizes that "in some cases . . . a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration. . . . [I]f the FTC looks closely at a vertical merger that raises the concerns . . . no one should be surprised if the FTC requires structural relief . . . . If that can't be achieved without sacrificing the efficiencies that motivate the merger, then [it] can look at conduct remedies. If those won't work—or will be too difficult and problematic . . . to be confident that they will work without an excessive commitment of FTC resources where [it is] . . . effectively turned into a regulator—then there should be no surprise if [the FTC were to] seek to block the merger."[137]

The agencies have also required divestitures to include out-of-market assets (*i.e.*, a divestiture package that goes beyond the assets in the relevant market).[138] In *Community*

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131 Jon Sallet, Deputy Assistant Attorney General of the Antitrust Division, Remarks at the American Bar Association Fall Forum, *The Interesting Case of the Vertical Merger* (Nov. 17, 2016), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

132 Makan Delrahim, Assistant Attorney General of the Antitrust Division, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

133 *Id.*

134 *Id.*

135 Bruce Hoffman, Acting Director, Bureau of Competition, Remarks at Credit Suisse 2018 Washington Perspectives Conference, *Vertical Merger Enforcement at the FTC* (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

136 *Id.* at 7.

137 *Id.* at 8–9.

138 For a discussion of remedies, including out-of-market assets from the FTC's perspective, see Dan Ducore,

Health Systems/Health Management Associates,[139] the FTC's concerns were focused on general acute care inpatient hospital services sold to commercial health plans in two geographic areas; the FTC, however, required that Community Health Systems include in its divestiture package the hospital facilities and all outpatient services and operations that were affiliated with the hospital, regardless of whether those services were provided at the hospital. The FTC viewed the outpatient business as necessary for the buyer of each hospital to be as effective a competitor as Health Management Associates had been prior to the transaction.

In addition, in *Sun Pharmaceutical/Ranbaxy*,[140] the FTC required the firms to sell assets related to three dosages of generic minocycline capsules on the premise that the combination would impact future competition for three strengths of generic minocycline tablets used to treat a variety of infections. The FTC's rationale for including the generic capsules was that it would allow the upfront buyer to use a shorter FDA regulatory process because it would control both products and use the same ingredient supplier (API).

In *Holcim/Lafarge*,[141] the FTC conditioned clearance on the divestiture of plants and terminals, including a terminal in Alberta, Canada and a cement plant in Ontario, Canada. Canadian assets that are named in the FTC consent decree were included by the FTC as necessary to remedy competitive concerns in northern U.S. markets.

In *ZF Friedrichshafen AG/TRW Automotive Holdings Corp.*,[142] the FTC conditioned approval of a $12.4 billion merger that would create the world's second-largest auto parts supplier with the divestiture of TRW's linkage and suspension business in North America and Europe, even though only suppliers that have production facilities in the United States, Canada, and Mexico were deemed eligible to compete for U.S. business.[143] In addition, in *NXP Semiconductors*, the parties agreed to divest all NXP assets that are used primarily for manufacturing, research, and development of RF power amplifiers, including a manufactur-

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Fed. Trade Comm'n, Bureau of Competition, *Divestitures may include assets outside the market* (Apr. 24, 2015), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/04/divestitures-may-include-assets-outside-market.

[139] Press Release, Fed. Trade Comm'n, *FTC Requires Community Health Systems, Inc. to Divest Two Hospitals as a Condition of Acquiring Rival Hospital Operator* (Jan. 22, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/01/ftc-requires-community-health-systems-inc-divest-two-hospitals.

[140] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Sun Pharmaceutical's Proposed Acquisition of Ranbaxy* (Jan. 30, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-puts-conditions-sun-pharmaceuticals-proposed-acquisition.

[141] Press Release, Fed. Trade Comm'n, *FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger* (May 4, 2015), *available at* http://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets.

[142] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen AG and TRW Automotive Holdings Corp.* (May 5, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf.

[143] As noted in the *Director's Report Spring 2016*, the EU had determined as well that the merger would reduce competition in the chassis components for cars and trucks market. The broader divestiture resolved concerns in both jurisdictions. Deborah L. Feinstein, Fed. Trade Comm'n, Bureau of Competition, *Director's Report Spring 2016*, *available at* https://www.ftc.gov/system/files/documents/public_statements/944113/feinstein_-_spring_update_april_2016.pdf.

ing facility in the Philippines, a building in the Netherlands to house management and some testing labs, as well as all patents and technologies used exclusively or predominantly for the RF power amplifier business, based on the finding that the market for RF power amplifiers is worldwide. The FTC worked with the staff of antitrust agencies in the EU, Japan, and Korea on all aspects of the analysis, including potential remedies, in order to reach compatible approaches on an international scale.

The agencies have also taken a more expansive stance in transactions involving innovation and future generations of products. For instance, Applied Materials Inc. and Tokyo Electron Ltd. abandoned their merger plans after the DOJ informed them that their remedy proposal had failed to resolve the DOJ's competitive concerns.[144] Although the merger parties had reportedly offered to divest the overlapping etching and depositing business line of Tokyo Electron, the DOJ thought that the package did not adequately address the future impact of the deal on innovation in future generations of semiconductor equipment. Similarly, in the *Nielsen/Arbitron* transaction, the FTC focused on protecting a future market for syndicated audience cross-platform measurement services. The consent conditioned that transaction's approval on Nielsen's obligation to: (1) continue its cross-platform project with ESPN Inc. and comScore, Inc.; and (2) license Arbitron's Portable People Meter and related data, as well as software and technology being used in the ESPN project, to an FTC-approved third party for up to eight years.[145]

The same is true in consummated merger challenges. In both *Chicago Bridge*[146] and *Polypore*,[147] the FTC required the parties to include assets outside of the market to restore competition within the relevant market and to provide the divestiture buyer with the ability to compete. In addition, in *Valeant*,[148] the FTC required Valeant not only to divest the entire hard contact lens business it had acquired from Paragon Holdings in 2015, but also the assets

[144] Press Release, U.S. Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (Apr. 27, 2015), *available at* https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department.

[145] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Nielsen's Proposed $1.26 billion Acquisition of Arbitron* (Sept. 20, 2013), *available at* http://www.ftc.gov/opa/2013/09/nielsen.shtm. Commissioner Wright dissented from the decision on the basis that the future market theory should be subject to a higher evidentiary standard. *See* Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, FTC No. 131-0058 (Sept. 20, 2013), *available at* http://www.ftc.gov/os/caselist/1310058/130920nielsenarbitron-jdwstmt.pdf.

[146] FTC Opinion, *In the Matter of Chicago Bridge & Iron Company*, FTC Docket No. 9300 (Jan. 6, 2005), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2005/01/050106opionpublicrecordversion9300_0.pdf?utm_source=govdelivery.

[147] FTC Opinion, *In the Matter of Polypore International, Inc.*, FTC Docket No. 9327 (Dec. 13, 2010), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf?utm_source=govdelivery.

[148] Agreement Containing Consent Order, *Valeant Pharmaceuticals Int'l, Inc.*, FTC File Nos. 151-0236 and 161-0028 (Nov. 7, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/161107_paragon_pelican_agreement_2.pdf.

it had later acquired that the FTC deemed necessary to ensure that the divested business will continue to have access to the vials it needs for its finished contact lens business.[149]

Consistent with the recent findings of the FTC Merger Remedies Study, both agencies increasingly require the parties to identify an acceptable upfront buyer before accepting divestiture packages. The upfront buyer requirement is justified by the agencies as being necessary to ensure that the divestiture will be effective in maintaining competition at the same level as it had been pre-transaction. The transaction parties, however, can face substantial delay from the process: the need to identify a divestiture buyer, negotiate a divestiture agreement, and have that buyer and the divestiture package vetted by the agencies before the main transaction is permitted to proceed can literally add months to the merger review process.

Moreover, as mentioned above, the agencies have been willing to challenge transactions in which the parties have offered large divestiture packages. In a recent FTC blog, the authors distinguished the divestiture package offered in *Superior/Canexus* from the package offered in *Ball/Rexam*:

> [In *Superior*,] the Commission determined that it had reason to believe that the acquisition even with the proposed divestitures would still result in competitive harm. . . . Though substantial, none of the various proposals included the right package of plants and other assets to fully eliminate both output suppression and coordination concerns with the underlying merger . . . . [In contrast, in *Ball/Rexam*, the sale of assets to Ardagh] would make it the third largest producer in the U.S. and the world . . . . Its entry as a substantial and viable competitor remedies both unilateral and coordinated concerns with the underlying merger while still allowing Ball to achieve beneficial efficiencies through its acquisition of Rexam.[150]

The DOJ rejected the large divestiture package offered by the parties in the *Halliburton/ Baker Hughes* merger and highlighted the agency's requirement that the divestiture must preserve competition in every market that the merger affects. The agencies will be skeptical of packages that entail "piecemeal" assets and entanglements between the parties. Similarly, the DOJ rejected the divestiture package offered by *Aetna/Humana*. Although in the *Halliburton/Baker Hughes* case the parties abandoned the merger prior to trial, in some recent merger challenges, the defendants sought to "litigate the fix" by proposing a divestiture remedy for the court to consider when deciding whether to block the consummation of the transaction.[151]

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[149] The proposed revisions to the *Antitrust Guidelines for International Enforcement and Cooperation* also indicate that the agencies will seek a remedy that involves conduct or assets outside the United States if it deems that doing so is necessary to ensure the remedy's effectiveness and is consistent with the agency's international comity analysis.

[150] Sean Sullivan & Ben Gris, Fed. Trade Comm'n, Bureau of Competition, *What does it take to settle a merger case?*, at 2 (July 22, 2016), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2016/07/what-does-it-take-settle-merger-case.

[151] *See, e.g.*, Complaint, *United States v. Halliburton Co.*, No. 1:16-cv-00233 (D. Del. Apr. 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download; Complaint, *United States v. Aetna Inc.*, No. 3-99 CV 398-H (N.D. Tex. June 21, 1999), *available at* https://www.justice.gov/atr/case-document/complaint-1; Complaint, *FTC v. Staples, Inc.*, No. 1:15-cv-02115 (D.D.C. Dec. 9, 2015), *available at* http://res.cloudinary.

This strategy is not a new one. In *Libbey*, the defendant, as a party to a merger agreement, amended its agreement after the FTC challenged its merger with a competitor.[152] Although the amended agreement stated that it "supersede[d] all prior agreements," the FTC advocated that the court evaluate the original agreement in deciding whether an injunction should be issued.[153] The court disagreed, holding that "parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns." The court further held that when parties so amend a merger agreement, a court must evaluate the new agreement in deciding whether an injunction should be issued.[154]

In 2004, the same court applied *Libbey* in the *Arch Coal* ("Arch") case.[155] In that case, the merging parties, prior to the FTC's administrative complaint, had structured their merger to include two separate transactions: (1) the acquisition by Arch of Triton Coal Co. ("Triton"), including both of its mines in the Southern Powder River Basin of Wyoming; and (2) the subsequent sale, contingent upon the consummation of the merger, of one of Triton's mines to a third party, Peter Kiewit Sons', Inc. ("Kiewit"), which Arch had entered into during the FTC's investigation and prior to any litigation. The FTC filed a motion in limine to exclude for purposes of the PI hearing all evidence of the planned post-merger sale of the Triton mine to Kiewit. The FTC argued that the sale was simply the parties' proposed remedy to the merger that the FTC had challenged, and was not an integral part of the transaction properly before the court. The court disagreed. "[T]he Court does not find this structural choice to be dispositive on the issue of whether the Kiewit transaction should be considered in the preliminary injunction proceeding." In *Libbey*, the court noted that, even after the parties had amended their merger agreement, the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement that the FTC was challenging and that was properly before the court for review on the FTC's motion for PI.[156] Here, as well, Arch informed the FTC that it had signed an agreement with Kiewit and the FTC then issued its administrative complaint challenging the merger, "determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell . . . to Kiewit."[157] Thus, the FTC had assessed and in reality challenged the merger agreement, including the [Kiewit] divestiture.[158] The court rejected the FTC's allegations that the merger would nevertheless increase the risk of coordination. Instead, the

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com/gcr-usa/image/upload/v1449787115/FTCvStaplesfedctcomplaint_paudu1.pdf.

[152] *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 42–43 (D.D.C. 2002).

[153] *Id.* at 46.

[154] *Id.*

[155] *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. Aug. 16, 2004) (memorandum opinion denying Complaint Counsel's motion in limine).

[156] *Libbey*, 211 F. Supp. 2d at 46.

[157] Memorandum in Support of FTC's Motion In Limine at 4, *FTC v. Arch Coal, Inc.*, 1:04-cv-00534, Docket No. 50 (June 3, 2004), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/arch_coal/ddc/arch_coal_ddc_exclude_open6_3_2004.pdf.

[158] *Id.* at 4–5.

court considered the impact of the divestiture on market shares, and even credited the divestiture buyers' plans to expand the mine's output.

In *CCC Holdings*, the court considered—but rejected—the effectiveness of a licensing agreement with a third company, Web-Est, that the transaction parties asserted would enhance the competitiveness of an existing competitor by eliminating existing restrictions on Web-Est's ability to compete and would allegedly allow Web-Est to replace competition lost from the transaction.[159] The court determined that it can be a "problem" to allow "continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior."[160]

Moreover, it is not enough to indicate during a pending court proceeding that the transaction will be restricted and that the firm *will sell* assets to a single buyer as "a new, unified business."[161] In *Ardagh*, the judge concluded that it was "premature and precipitous" to consider the proposal and doubted that the proposal could be thoroughly studied in the three weeks remaining before the hearing of the PI.[162]

In FY2015, in the *Sysco* case, the transaction parties had entered into an agreement to divest significant assets to Performance Food Group ("PFG") to eliminate the competitive concerns raised by the proposed transaction. After noting that there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger,[163] the court reviewed the testimony and documents and found the divestiture lacking. Specifically, the court is "not persuaded that . . . a sufficient number of national customers will view PFG as a viable alternative to the merged entity 'on day one' to maintain the intensity that characterizes the present competition between Sysco and USF."[164] The court finds that, as with *CCC Holdings*, the transition services agreement provided that PFG would provide access to USF private label products for three years, and the right to license USF's database for at least five years, with a continuing option for five more years. The court concluded that "PFG, therefore, [would] not be a truly independent competitor."[165]

Similarly, the court rejected the commitments of the buyer in a proposed stipulation filed just before trial not to engage in certain conduct in *OSF Healthcare*.[166] Although the court found that the stipulation addressed some consensus, it determined that the provisions did not fully address the concerns because "[i]t does not specifically preclude price increases or

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[159] *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 56–59 (D.D.C. 2009).

[160] *Id.*, 605 F. Supp. 2d at 59.

[161] Brian Mahoney, *Deal In Ardagh's $2B Merger Left Out Of FTC Case, For Now*, LAW360 (Sept. 24, 2013), *available at* https://www.law360.com/articles/475274/deal-in-ardagh-s-2b-merger-left-out-of-ftc-case-for-now.

[162] *Id.*

[163] *FTC v. Sysco Corp.*, 113 F. Supp. 3d (D.D.C. 2015).

[164] *Id.* at 73 and 76.

[165] *Id.* at 78.

[166] *FTC v. OSF Health Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).

otherwise limit the ability . . . to exercise market power in order to achieve higher prices."[167] Finally, as mentioned above, the court considered—but rejected as inadequate—the divestitures offered by the parties in the *Staples/Office Depot* case.

The same principle applies to the DOJ's merger challenges. In *United States v. Franklin Electric Co.*, the DOJ challenged a joint venture under Section 7 of the Clayton Act. The district court in that case also rejected the DOJ's argument that the court should not consider the defendants' proposed transaction to resolve the DOJ's antitrust concerns.[168] However, the proposed remedy in *Franklin Electric* was found to be inadequate to resolve concerns raised by the proposed merger.

In FY 2017, the court in the *Aetna/Humana* transaction similarly rejected the efficiency of the fix. The court found that a divestiture of customers would be inadequate to address concerns, given the potential likelihood that customers will stay with the seller. In addition, the court concluded that the "fire sale" and the divestiture buyer's documents established that the divestiture buyer had significant concerns regarding the viability of the divestiture.

C. State Attorneys General Enforcement

State Attorneys General ("AGs") have also played a role in merger enforcement. For over two decades, AGs have participated, with the transaction parties' consent, in the HSR review process; they have also been parties to court challenges (particularly in the healthcare arena), and sometimes in settlements with the federal agencies. It has been relatively rare, however, for an AG to bring a challenge on a transaction reviewed—and cleared without enforcement action—by one of the federal agencies. With the election of President Trump, however, several state enforcers have suggested they will "fill the void" should the new administration take a more lax enforcement view. Beau Buffier, Chief of the Antitrust Bureau of the Office of the Attorney General of New York, in a presentation titled "*Episode VII: The Force Awakens*,"[169] indicated that states such as New York are ready to step in should the federal government not be vigilant: "We are potentially in a world in which the state AGs have to step up the rule of law."[170] Buffier further indicated that "We do have a coalition of willing states who are quite skeptical of the new administration and the new mercantilism and are really determined to preserve sensible regulation that protects the interests of our consumers."[171] Victor Domen, Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General, echoed this sentiment.[172] While acknowledging that states do not automatically receive notifications under the HSR Act, Buffier noted that state enforcers could still learn of proposed mergers through public filings and use their subpoena powers

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[167] *Id.* at 1085.

[168] *United States v. Franklin Elec. Co.*, Civ. A. No. 00-C-334-C (W.D. Wis. July 19, 2000) (order denying plaintiff's motion in limine).

[169] Melissa Lipman, *NY Enforcer Urges States To 'Rearm' For Merger Scrutiny*, LAW360 (Mar. 30, 2017), *available at* https://www.law360.com/articles/907932/ny-enforcer-urges-states-to-rearm-for-merger-scrutiny.

[170] *Id.*

[171] *Id.*

[172] Expert Analysis, *Takeaways From The ABA Antitrust Spring Meeting: Part 1* (Apr. 3, 2017), *available at* https://www.law360.com/articles/901278/takeaways-from-the-aba-antitrust-spring-meeting-part-1.

to gain access to materials that have been provided to the federal government. Based on the express power of states under the Clayton Act to sue to enjoin a merger, Buffier warned that anyone who expects a merger with significant national effects to "sail through" as a result of the new administration should "think again."

And there has already been at least one instance of such intervention. When the FTC in a 1:1 decision decided not to challenge Valero's proposed repurchase of two Bay Area terminals to store light petroleum products that it was required to divest under a 2005 FTC consent decree from Plains All American Pipeline, the State of California brought a case to block the deal.[173] Although the judge denied a PI because of Plains' existing long-term contracts and Valero's assurances that it would not alter the terminals—thereby making irreparable harm between July 12, 2017 and trial in January 2018 unlikely—he raised "serious[] consider[ations]" about whether the proposed deal would have anticompetitive effects in the market for bulk sales of gasoline in northern California and northern Nevada.[174] On September 19, 2017, the transaction parties terminated the transaction, citing the impact of the uncertainty of the extensive trial on employees and customers and the significant cost related to defending the lawsuit.[175]

1-IV. HSR Enforcement and Procedural Developments

A. Premerger Notification Violations

1. *Mitchell Rales Pays $720,000 Civil Penalty for HSR Act Violations*

On April 12, 2017, Mitchell Rales agreed to pay $720,000 in civil penalties to resolve charges that he violated the HSR Act when his wife acquired additional voting securities of Colfax Corporation in 2011, and of Danaher Corporation in 2008.[176] Mr. Rales made a corrective filing when he bought additional Danaher shares in 2016. Although Mr. Rales contended that the violations were inadvertent, he had previously failed to file and had paid civil penalties to settle an earlier HSR enforcement action in 1991.

2. *Ahmet Okumus Pays $180,000 Civil Penalty for HSR Act Violations*

On January 17, 2017, Ahmet Okumus agreed to pay $180,000 in civil penalties to resolve charges that he violated the HSR Act when he acquired voting securities of Web.com Group, Inc. in 2016.[177] Mr. Okumus made a corrective filing under the HSR Act at the $50 million

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[173] Am. Complaint, *State of California v. Valero Energy Corp.*, No. 17-cv-3786-WHA, Docket No. 88 (N.D. Cal. Sept. 6, 2017).

[174] Michael Phillis, *Valero Terminal Deal Won't Be Halted Before Trial*, LAW360 (Aug. 29, 2017), *available at* https://www.law360.com/articles/958640?scroll=1.

[175] Zacks Equity Research, *Valero & Plains All American Abandon Asset Purchase Plan*, ZACKS.COM (Sept. 19, 2017), *available at* https://www.zacks.com/stock/news/276277/valero-amp-plains-all-american-abandon-asset-purchase-plan.

[176] Press Release, U.S. Dep't of Justice, *Mitchell Rales to Pay $720,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements* (Jan. 17, 2017), *available at* https://www.justice.gov/opa/pr/mitchell-rales-pay-720000-civil-penalty-violating-antitrust-premerger-notification.

[177] Press Release, U.S. Dep't of Justice, *Ahmet Okumus to Pay $180,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements* (Jan. 17, 2017), *available at* https://www.justice.gov/opa/pr/ahmet-okumus-

threshold (as adjusted) on November 21, 2014 for Web.com voting securities acquired beginning September 11, 2014. After the expiration of the waiting period, Mr. Okumus was permitted to acquire additional Web.com voting securities without making another HSR Act filing so long as he did not exceed the $100 million (as adjusted) threshold. By June 27, 2016, Mr. Okumus exceeded this higher threshold but did not file another notification under the HSR Act or observe the waiting period prior to completing this transaction. On July 14, 2016, Mr. Okumus sold enough shares of Web.com that he fell below the $100 million threshold. Thus, the settlement amount is less than the full potential civil penalty for the 18 days that Mr. Okumus was in violation of the HSR Act.

3. *Fayez Sarofim Pays $720,000 Civil Penalty for HSR Act Violations*

On October 28, 2016, Fayez Sarofim agreed to pay $720,000 in civil penalties to resolve charges that he violated the HSR Act when he acquired voting securities of Kinder Morgan, Inc. in 2001, 2006, and 2012, and of Kemper Corporation in 2007.[178] Mr. Sarofim was serving as a board member at each company when he acquired voting shares, and, therefore, was ineligible for an investment-only exemption from filing HSR notifications. Mr. Sarofim made corrective HSR Act filings on November 21, 2014. The FTC adjusted the penalty downward from the maximum permitted under the HSR Act because the violations were inadvertent, Mr. Sarofim self-reported the violations after discovery, and he was willing to resolve the matter by consent decree and avoid prolonged investigation and litigation.

4. *Duke Energy Pays $600,000 Civil Penalty for HSR Act Violations*

The DOJ alleges that at the same time that Duke Energy ("Duke") agreed to purchase Osprey Energy Center ("Osprey") from Calpine Corporation that Duke entered into a "tolling agreement" that immediately gave Duke control over Osprey's output and gave Duke the right to receive the day-to-day profits and losses from Osprey's business.[179] According to the DOJ, once the tolling agreement went into effect, Osprey ceased to be an independent competitor. This occurred before Duke made the HSR Act notifications and observed the required waiting period. Thus, such conduct constituted "gun jumping."

1-V. Possible Legislative Changes: Calls for Tougher Merger Enforcement on Large Firms Contradict Sound Antitrust Policy

On September 14, 2017, U.S. Senator Amy Klobuchar (Ranking Member of the Senate Antitrust Subcommittee) introduced two bills that, if enacted, would substantially change the process and substantive standards for antitrust merger review in the United States.[180] The proposals, which have been endorsed by several other Democratic Senators, are the latest and

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pay-180000-civil-penalty-violating-antitrust-premerger-notification-requirements.

[178] Press Release, U.S. Dep't of Justice, *Fayez Sarofim to Pay $720,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements* (Oct. 28, 2016), *available at* https://www.justice.gov/opa/pr/fayez-sarofim-pay-720000-civil-penalty-violating-antitrust-premerger-notification.

[179] Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with Duke Energy Corporation for Violating Premerger Notification and Waiting Period Requirements* (Jan. 18, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-duke-energy-corporation-violating-premerger.

[180] Eric Kroh, *Sen. Klobuchar Unveils Bills To Beef Up Merger Enforcement*, LAW360 (Sept. 14, 2017),

most definitive legislative expression of a desire for tougher merger enforcement. Sentiment against large companies and "mega-mergers," both in the United States and abroad, is on the rise, along with a sense that market concentration operates to the detriment of consumers and employees. Were it to gain wider support, the proposed legislation would signal a break from decades of antitrust enforcement policy centered on rigorous, fact-driven analysis and consumer welfare.

The proposed bills follow a policy paper released by the Democratic Congressional leadership in July, entitled "A Better Deal: Better Jobs, Better Wages, Better Future."[181] The first of these bills,[182] the Merger Enforcement Improvement Act, S.1811, would increase procedural costs and burdens for large mergers and companies. The bill would require higher HSR Act filing fees for large transactions,[183] annual reports by parties to consent decrees detailing consumer benefits, and agency investigations into holdings by institutional investors,[184] the effectiveness of merger settlements, and the impact of mergers on wages, innovation, and new business formation.

The second bill, the Consolidation Prevention and Competition Promotion Act, S.1812, would change the substantive injunctive standard from the current requirement that has been in effect for over a century, under which the agencies must prove that a merger would substantially lessen competition or tend to create a monopoly to a lesser standard that a transaction is "materially likely" to cause more than *de minimis* harm to competition. In large "mega-mergers,"[185] the bill would further shift the burden of proof from the government to the transaction parties. Finally, the legislation would create yet another regulator, an "independent competition advocate," with a mission to make recommendations to the FTC and the DOJ.

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available at https://www.law360.com/articles/964180/sen-klobuchar-unveils-bills-to-beef-up-merger-enforcement.

181 Eric Kroh, *Dems' 'Better Deal' Antitrust Plan Would Entail Sea Change*, LAW360 (Aug. 2, 2017), *available at* https://www.law360.com/articles/950589/dems-better-deal-antitrust-plan-would-entail-sea-change; *see also A Better Deal: Better Jobs, Better Wages, Better Future*, *available at* https://dpcc.house.gov/abetterdeal.

182 Merger Enforcement Improvement Act, S.1811 (proposed Sept. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1811.

183 For transactions valued at $5 billion or more, the HSR Act filing fee would increase to $2.25 million.

184 Some recent scholarship suggests that competitive firms in concentrated markets charge higher prices if they have significant institutional shareholders in common that are "active" in governance. *See, e.g.*, José Azar, Martin Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership?*, JOURNAL OF FINANCE (Forthcoming) (Apr. 22, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345; *but see* John R. Woodbury, *Can Institutional Investors Soften Downstream Product Market Competition?*, CPI Antitrust Chronicle (June 2017), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2017/06/CPI-Woodbury.pdf. During the second Obama Administration term, the DOJ conducted an investigation of the airline industry based on these theories, but did not find sufficient evidence to bring an enforcement action. Brent Kendall & Susan Carey, *Obama Antitrust Enforcers Won't Bring Action in Airline Probe*, WSJ (Jan. 11, 2017), *available at* https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781.

185 Consolidation Prevention and Competition Promotion Act, S.1812 (proposed Sept. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1812. The bill does not define what would constitute a "mega-merger." The extra scrutiny would apply to transactions in which the value of the acquired business exceeds $5 billion.

Judicial precedent in government challenges to mergers and the antitrust agencies' enforcement guidelines reflect a strong consensus among public and private sector economists, lawyers, consumer advocates, and the business community—a mainstream approach to antitrust enforcement that gives weight to the economic benefits of efficiency-enhancing transactions, while guarding against potential harms from excessive concentration. The agencies' enforcement policies have remained largely constant and effective across a range of administrations. The proposed legislation would alter that, and be a potential source of divergence between the United States agencies and other mature antitrust enforcement agencies.

1-VI. Conclusion

Absent passage of the pending legislation to alter materially the merger review standards, the new leadership at the DOJ will almost certainly have its own views of enforcement and will apply those views in deciding which cases to bring and which remedies to accept. The same is true at the FTC, where all of the seats have now been filled by President Trump, including the selection of the new Chairman Joe Simmons. The Trump Administration's antitrust leadership has provided little guidance to date regarding its views of antitrust enforcement. Nonetheless, changes in administrations typically do not impact the vast majority of transactions reviewed by the agencies. The leadership tends to leave its mark on the closer decisions, and, as suggested above, the remedies imposed to avoid challenges.