U.S. M&A Merger Enforcement in the Limelight in FY 2019

Ilene Knable Gotts*

1-I. Introduction

The Trump Administration's leadership at the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "Commission") continued to explore the scope of the antitrust laws and made its views known on some of the topics under debate. As with prior administrations, the agencies used consent orders to resolve agency concerns—and even to communicate enforcement policy over the last few decades.[1] In addition, the agencies continued to bring court challenges and had success at blocking transactions at the trial court level.

Over the past few years, the political arena and the enforcement agencies have focused on antitrust enforcement policy as part of a broader industrial and societal policy. Each of the major Democratic Presidential candidates has expressed views on the role of antitrust policy, with some advocating major changes in the law, particularly with respect to agricultural and high technology firms. Some key members of the Democratic congressional leadership have also been active in advocating for major changes in antitrust procedures and standards, all under the rubric of a "Better Deal." In addition, congressional committees have held hearings on a wide range of topics, including the consumer welfare standard. In 2018, the FTC initiated a series of public hearings. By the conclusion of the final hearing on June 12, 2019, the Commission had included thousands of participants and close to 950 written comments during 14 sessions held during 23 days over a year-long period.[2] These hearings involved an expansive range of topics, including whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and antitrust policy.[3] Also included as a separate topic was the analysis of monopsony power in labor markets. The FTC plans to use this information to generate reports and guidance regarding enforcement policy.

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* Mrs. Gotts is a partner in the New York law firm of Wachtell, Lipton, Rosen & Katz. The views expressed in this paper are the author's alone and should not be attributed to Mrs. Gotts's firm or its clients.

[1] *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 agencies to extract from the parties commitments well beyond what the agencies could obtain in litigation, and that such commitments may impair—rather than improve—competition, and thereby harm consumers).

[2] *Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Oversight of the Enforcement of the Antitrust Laws,"* at 13 (Sept. 17, 2019) (statement of Joe Simons, Chairman of Fed. Trade Comm'n), *available at* https://www.ftc.gov/system/files/documents/public_statements/1544480/senate_september_competition_oversight_testimony.pdf.

[3] Press Release, Fed. Trade Comm'n, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st.

Regardless of whether the pending Senate bills (discussed *infra*) pass, antitrust enforcement is likely to remain vigorous. As indicated above, the current leadership of the antitrust agencies have challenged in court and required remedies with respect to several mergers. As discussed further below, vertical merger enforcement has been particularly active, as illustrated by the DOJ's challenge of the *AT&T/Time Warner* transaction. In addition, both agencies have expressed concern over using behavioral remedies to resolve competitive concerns, even for vertical mergers. Both agencies—but the FTC in particular—have focused on innovation and nascent competition in their investigations and challenges.[4] Healthcare remains a key industry for agency scrutiny and challenge. Narrow market definitions and a focus on unilateral efforts are pervasive in the allegations in the enforcement actions.

Transaction parties should be cognizant of the current antitrust environment when planning for the review of their transactions. The parties should identify not only current overlapping operations that may raise issues under traditional horizontal merger theories, but also other possible areas of inquiry, including vertical merger issues and the elimination of potential competition as a result of the transaction. Transaction parties should also have a clear understanding of what remedies they will be prepared to offer if, at the end of the investigation, an agency remains concerned about the transaction, and whether they are prepared to litigate if these concerns cannot be resolved. The long-term implications of the hearings and the focus on antitrust enforcement, however, are likely to have a greater overall impact than on specific transactions alone.

1-II. Agency Merger Enforcement Activities

A. FTC

As discussed below, during FY 2019, the FTC had a very successful litigation record: (1) the Eighth Circuit affirmed a favorable hospital merger preliminary injunction ("PI") decision; (2) the administrative law judge ("ALJ") ruled in the FTC's favor in an administrative proceeding in which a trial court had issued a PI in FY 2018, and the transaction parties subsequently settled; (3) the ALJ ruled in the FTC's favor in a consummated merger challenge; and (4) the FTC brought a new administrative challenge that the transaction parties abandoned after the case was filed. The FTC also brought another PI challenge that remains active. Outside of litigation, the FTC obtained remedies as a condition for clearance in 11 proposed transactions. In another transaction, the parties abandoned the transaction during the FTC's investigation due to antitrust concerns.

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[4] *See, e.g.*, Complaint, *In the Matter of CDK Glob. Inc.*, FTC Docket No. 9382 (Mar. 19, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf (even though Auto/Mate had only a 6% share of the DMS software market, it was on the cusp of becoming a much more important and vibrant competitor); 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; Press Release, Fed. Trade Comm'n, *Administrative Law Judge Upholds FTC's Complaint Challenging Consummated Merger of Companies that Make Microprocessor Prosthetic Knees* (May 7, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/05/administrative-law-judge-upholds-ftcs-complaint-challenging. On December 17, 2019, the FTC authorized an action to block Illumina Inc.'s proposed acquisition of Pacific Biosciences of California on the basis that the acquisition would eliminate nascent competition.

1. *FTC Litigation Challenges*

a. *FTC and North Dakota Attorney General Win in Clinics Merger Challenge*

The Eighth Circuit's decision affirming the district court's grant of a PI on June 13, 2019 ended a two-year challenge of the transaction.[5] On June 22, 2017, the FTC and the North Dakota Attorney General had 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.[6] Sanford Health owns more than 40 hospitals and 250 clinics nationally; Mid Dakota Clinic has eight facilities, primarily in Bismarck, North Dakota. The complaint alleged 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 alleged that the transaction parties were 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, 2017, the transaction parties moved to postpone commencement of the administrative hearing in the proceeding to January 30, 2018 and to stay all prehearing deadlines for two months. The transaction parties argued that if—after all appeals in the injunction proceeding were exhausted—they would be enjoined from consummating the acquisition, they would abandon the transaction. On the other hand, the parties indicated that if the district court denied an injunction, they would move to have the case withdrawn from adjudication or to dismiss the administrative hearing. Therefore, under either scenario, deferring commencement of the administrative hearing would be likely to avoid expenditure of resources by all parties.[7]

A four-day trial began on October 30, 2017 before 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 37 primary care physicians and Mid Dakota employs 23. CHI, Sanford's closest competitor, employs five primary care physicians and has been reliant on Mid Dakota for additional physicians. In pediatrics, Mid Dakota and Sanford would have 10 physicians, while CHI would have none on an outpatient basis; there are 16 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 ("Blue Cross") 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 argued that Blue Cross was still the leading health insurance firm, despite having lost a large contract for North Dakota public

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[5] Opinion, *FTC* v. *Sanford Health*, No. 17-3783 (8th Cir. June 13, 2019), *available at* https://ecf.ca8.uscourts.gov/opndir/19/06/173783P.pdf.

[6] Complaint, *FTC* v. *Sanford Health*, No. 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.

[7] Unopposed Expedited Motion for Further Continuance of Administrative Proceedings Pending Appeal of Order Granting Motion for Preliminary Injunction, *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.

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 serve better the patients in the community.

On November 3, 2017, ALJ D. Michael Chappell granted an extension of the evidentiary hearing in the administrative proceeding until December 12, 2017.[8] 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 ALJ granted on November 21, 2017.[9]

On December 13, 2017, Judge Senechal issued an order preliminarily enjoining the merger until an administrative trial before the FTC was completed.[10] On December 15, 2017, the transaction parties filed their notice of appeal of the PI to the Eighth Circuit.[11] On December 21, 2017, the ALJ continued the commencement of the administrative proceeding until 21 days after the Eighth Circuit rendered its judgment in the appeal.[12]

On June 13, 2019, the Eighth Circuit affirmed the grant of a PI by the district court.[13] The Court rejected the transaction parties' argument that the district court had improperly shifted the burden of persuasion to the transaction parties. The Court of Appeals also found no "clear error" in the district court's rejecting the argument that the combined firm could not raise prices on Blue Cross, the main payor, because it was a "dominant buyer" with a statewide pricing schedule. The Court pointed to Blue Cross's testimony contradicting the parties' arguments. The Court also rejected the transaction parties' arguments regarding timely entry by another competitor, merger-specific efficiencies, and that Mid Dakota was a "weakened competitor."

b. *FTC Wins at Trial in Its Challenge of the 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 Ltd. ("Cristal"). The FTC's complaint alleged that the transaction would combine the two largest producers of titanium dioxide (a pigment) would create a dominant firm, and 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."[14] Chloride process 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

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[8] 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.

[9] 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.

[10] Memorandum of Decisions, Findings of Fact, Conclusions of Law; and Order, *Fed. Trade Comm'n* v. *Sanford Health*, No. 1:17-cv-00133 (D.N.D. Dec. 13, 2017).

[11] *Id.*

[12] 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.

[13] *FTC* v. *Sanford Health*, No. 17-3783 (8th Cir. June 13, 2019), *available at* https://ecf.ca8.uscourts.gov/opndir/19/06/173783P.pdf.

[14] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Major Titanium Dioxide Companies*

dioxide production in the United States and Canada uses the chloride process, due to its ability to yield brighter and more durable coatings. The FTC concluded that sulfate process titanium dioxide is not an adequate substitute for the chloride process titanium dioxide that Tronox and Cristal offer.

The FTC alleged 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 opined that it was unlikely that there would be any new entry. The agency cited in support 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 pointed 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 "[t]he evidence supporting the FTC's complaint shows that the proposed merger would make that situation even worse . . . ."[15]

The defendants countered that the deal would be highly synergistic and would enhance competition in the industry.[16] Tronox asserted that the FTC was drawing the product market too narrowly by omitting sulfate process titanium dioxide from the relevant market, and making the geographic market too narrow in excluding Mexico and global imports from Europe and Asia. In its Answer as well, Tronox denied that there was a "North American chloride titanium dioxide" market, both on the basis that the market is global, and that it includes titanium dioxide produced using both the chloride and sulfate processes.[17] Tronox also denied that there were significant barriers to entry, that expansion or repositioning were unlikely, or that global trade flows would not counteract any purported attempt to raise prices in a particular region. Tronox also indicated that the acquisition would 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 (the "EC") had not approved the transaction. The issue that this presented to the transaction parties was one of timing. The transaction agreement provided for a termination date of May 21, 2018. As the ALJ recognized at a pretrial conference on December 20, 2017, the administrative law proceeding would not be completed by that date.[18] On March 1, 2018, the transaction parties reached an agreement to extend the termination date until March 31, 2019.[19] On

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(Dec. 5, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies.

[15] *Id.*; *cf. Valspar Corp.* v. *E.I. DuPont de Nemours & Co.*, 873 F.3d 185, 189–90 (3d Cir. 2017).

[16] Respondents' Proposed Findings of Fact and Conclusions of Law, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Aug. 8, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/tronox_respondents_proposed_findings_of_fact_public.pdf.

[17] Answer and Defenses of Respondent Tronox Ltd. ¶ 5, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Dec. 8, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/588992.pdf.

[18] Pretrial Conf. Tr. 77–78, *In the Matter of Tronox* (Dec. 20, 2017), Exhibit B to Answer and Defenses of Defendant Tronox Ltd., *FTC* v. *Tronox Ltd.*, No. 1:18-cv-06122-TNM (D.D.C. July 12, 2018), ECF No. 41-3. Tronox indicated that the administrative proceedings would not be completed until late 2018. On February 23, 2018, the ALJ issued an order granting a joint motion to revise the scheduling order, Order Granting Joint Motion to Revise the Scheduling Order and Issuing Second Revised Scheduling Order, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Feb. 23, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/180223ordergrantingjointmotion589754.pdf.

[19] The transaction parties subsequently extended the termination date to March 31, 2019. Press Release, Tronox Ltd., *Tronox Announces Extension to Cristal TiO2 Acquisition Agreement* (Mar. 1, 2018), *available at* http://investor.tronox.com/news-releases/news-release-details/tronox-announces-extension-cristal-tio2-acquisition-agreement.

March 7, 2018, Tronox voluntarily dismissed the case because the extension of the termination date until March 31, 2019 negated the need for the court's action.

A trial before the ALJ occurred during May and June 2018, followed by a post-trial briefing. Closing arguments took place on September 18, 2018. Before the ALJ issued his decision, the EC approved the deal, conditioned on the sale of a business supplying chloride process titanium dioxide pigments used for paper laminates.[20] Since the EC approval was the only remaining hurdle to closing, the parties could have closed as early as July 16, 2018. The FTC reacted to the EC's decision by filing in district court on July 10, 2018 an action to enjoin the closing pending the ALJ's decision.[21]

The PI case was assigned to Judge Trevor McFadden. On July 13, 2018, Judge McFadden scheduled a limited two-day trial with live witness testimony to commence on August 7, 2018. The FTC presented two witnesses who testified that buyers in North America source titanium dioxide on a regional basis and that the chloride-processed product is significantly superior to the sulfate-based product. The witnesses also testified that it would be extremely cost- and time-prohibitive for customers to switch their products, and that such a transition would take years. The product bought by North American customers is in slurry form, which contains 25% water, making it economically infeasible to transport across long distances over extended periods of time.

On September 5, 2018, the district court granted the FTC its PI.[22] On the substantive issues, Judge McFadden found that the FTC had successfully established as the cognizable antitrust market the sale of chloride process titanium dioxide in North America. The FTC raised "serious, substantial, and difficult questions about the merger's possible anticompetitive effects" and "presented credible evidence that the merger will create a highly concentrated market in which producers face greater incentives to engage in strategic output withholding."[23] Although there are six major producers, Chemours and the combined Tronox-Cristal would control almost three-quarters of global supply. The district court also stated that the evidence in the case "[p]oints to [i]ncentives for and a [h]istory of [s]trategic [o]utput [w]ithholding."[24] The court also rejected the imposition of a hold-separate order for Tronox's Ashtabula, Ohio plant instead of the PI.

On December 7, 2018, ALJ Chappell issued his initial decision upholding allegations in the FTC's complaint challenging the merger. Judge Chappell found that "the evidence proves that the planned Acquisition may substantially lessen competition [in the relevant market for the sale of chloride process titanium dioxide in North America] in violation of Section 7 of the Clayton Act

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[20] Press Release, Tronox Ltd., *Tronox Receives European Commission Conditional Approval of Proposed Cristal Acquisition* (July 4, 2018), *available at* http://investor.tronox.com/node/11911/pdf. The transaction had already been approved in Australia, China, Colombia, New Zealand, Saudi Arabia, South Korea, and Turkey.

[21] Complaint, *FTC* v. *Tronox Ltd*., 332 F. Supp. 3d 187 (D.D.C. 2018), ECF No. 1, *available at* https://www.ftc.gov/system/files/documents/cases/001_2018-07-10_complaint_tronox.pdf.

[22] Order, *FTC* v. *Tronox Ltd*., 332 F. Supp. 3d 187 (D.D.C. 2018), ECF No. 106, Public Version filed on Sept. 12, 2018 at ECF No. 108, *available at* https://www.ftc.gov/system/files/documents/cases/tronox_pi_opinion_redacted.pdf. *See also* Press Release, Fed. Trade Comm'n, *Statement by FTC Bureau of Competition Director Bruce Hoffman on the Court Granting a Preliminary Injunction in the Tronox/Cristal Matter* (Sept. 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/09/statement-ftc-bureau-competition-director-bruce-hoffman-court.

[23] Memorandum Opinion at 219, *FTC* v. *Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018), *available at* https://www.ftc.gov/system/files/documents/cases/tronox_pi_opinion_redacted.pdf.

[24] *Id.* at 208.

and Section 5 of the FTC Act."[25] The decision concluded that the planned acquisition would create a highly concentrated market and increase the likelihood of coordinated conduct among the remaining competitors. In addition, the court rejected defendants' arguments regarding entry and expansion as well as cognizable synergies or efficiencies that might justify the likely anticompetitive effects of the transaction. On January 28, 2019, defendants appealed the initial decision to the full Commission.[26] Among other things, the appeal sought the amendment of the proposed order that would enjoin the transaction so as to be limited in scope to the U.S. assets that were the focus of the evidence and findings in the case. At the same time, FTC staff and the parties entered into settlement discussions intended to fully resolve the Commission's competitive concerns. On March 18, 2019, the FTC and the defendants filed a joint motion to withdraw the matter from adjudication,[27] which was granted for the purpose of considering a proposed consent agreement on March 22, 2019.[28] On April 9, 2019, the FTC reached a settlement with the parties under which the parties would divest certain of Cristal's North American titanium dioxide assets to Ineos within 30 days of the closing of the acquisition.[29]

c. *FTC Challenges Evonik's Proposed Acquisition of PeroxyChem Holding Company*

On August 2, 2019, the FTC authorized the issuance of an administrative complaint and the filing of a PI complaint in the U.S. District Court for the District of Columbia to block Evonik Industries AG's ("Evonik") proposed acquisition of PeroxyChem Holding Company ("PeroxyChem").[30] The FTC alleged that the merger would substantially reduce competition in the Pacific Northwest and the Southern and Central United States for the production and sale of hydrogen peroxide, a commodity chemical used for oxidation, disinfection, and bleaching. According to the complaint, most hydrogen peroxide produced in North America is sold to pulp and paper customers for bleaching pulp and de-inking recycled paper. Hydrogen peroxide is also used to sterilize food and beverage packaging, and in chemical synthesis, fracking, water treatment, and the electronics industry. The FTC asserts that, for most end uses, there are no effective substitutes, and, because of high transportation costs, customers prefer nearby suppliers.

The FTC asserted both coordinated effects (it cites to an oligopoly structure with a long history of price fixing) and unilateral effects (with only one other hydrogen peroxide producer in the

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[25] Initial Decision at 60, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Dec. 14, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/docket_9377_tronox_et_al_initial_decision_redacted_public_version_0.pdf.

[26] Respondents' Appeal of the Initial Decision, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Jan. 28, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/190128respondents_appeal_id593386.pdf.

[27] Joint Motion to Withdraw Matter from Adjudication, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Mar. 18, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d09377_jt_mtn_towithdraw_matter_from_adjudicationpublic594003_002.pdf.

[28] Order Withdrawing Matter from Adjudication for the Purpose of Considering a Proposed Consent Agreement, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Mar. 22, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d09377_tronox_ftc_order_withdrawing_from_part3_03222019.pdf.

[29] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger* (Apr. 10, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/04/ftc-requires-divestitures-tronox-cristal-suppliers-widely-used.

[30] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Two Hydrogen Peroxide Producers* (Aug. 2, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/08/ftc-challenges-proposed-merger-two-hydrogen-peroxide-producers.

Pacific Northwest and three other producers remaining in the Southern and Central United States). In addition, the complaint alleges that customers have benefited from competition between Evonik and PeroxyChem in the form of lower prices. The administrative trial is scheduled to begin January 22, 2020.

d. *Parties Abandon Fidelity National Financial's Acquisition of Stewart Information Services After FTC Issues Administrative Complaint*

On September 6, 2019, the FTC voted 3-1-1 (with Chairman Simons recused and Commissioner Wilson opposing the decision) to issue an administrative complaint seeking to block Fidelity National Financial, Inc.'s ("Fidelity") acquisition of rival title insurance underwriter Stewart Information Services Corporation ("Stewart").[31] Title insurance protects customers and lenders in real estate transactions from financial loss that results from defects in the property's title and nearly every real estate transaction in the United States includes a title insurance policy. Fidelity and Stewart are two of the four largest title insurance underwriters in the United States. Although the FTC had previously conditioned clearance of proposed transactions involving Fidelity with the divestiture of its title plan assets, this case was the first time the Commission also alleged that the elimination of competition would likely harm customers seeking to purchase title insurance for large commercial transactions.

The FTC indicated that the "Big 4" title insurance companies—of which Fidelity and Stewart are two—have the financial strength, commercial expertise, and national footprint to underwrite large commercial transactions with a liability amount in excess of $20 million, and, on a national level, that the Big 4 account for more than 85% of all title insurance sales, with Fidelity and Stewart combined accounting for more than 43% of sales nationwide. The FTC asserted that the transaction would eliminate significant head-to-head competition between Fidelity and Stewart in 45 states and the District of Columbia. Among the Big 4, Stewart purportedly has shown a willingness to undercut the other underwriters, and has developed a reputation for finding creative and customer-friendly ways to decrease costs. The FTC alleged that each state is a separate market, that the combined market share for the transaction parties for large commercial transactions is greater than 50%, and, in most states, that the share for all title insurance is greater than 40%. Absent competition from Stewart, the FTC argued, Fidelity would not need to compete as aggressively on price, coverage, underwriting requirements or service and the elimination of Stewart would also increase the ability and incentive of the remaining underwriters to pursue tacitly a more cooperative strategy, all to the detriment of customers in large commercial transactions.

Fidelity and Stewart also own extensive and overlapping networks of title plants, which are the databases of detailed information about the chain of title to individual properties that are indexed for search purposes. Title plants are specific to a single county or metropolitan area. The FTC alleges that the merger would result in harm to competition in at least six local areas by eliminating competition between the title plants the transaction parties own separately, and in another eight localities by giving Fidelity a greater ownership stake in title plants that are jointly owned today. The acquisition would thereby increase the incentive and ability of Fidelity acting alone or with the remaining joint title plant owners to raise prices or reduce output for title information services.

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[31] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed $1.2 Billion Merger of Title Insurance Providers Fidelity National Financial, Inc. and Stewart Information Services Corporation* (Sept. 6, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/09/ftc-challenges-proposed-12-billion-merger-title-insurance.

On September 10, 2019, Fidelity announced that it had terminated its agreement to purchase Stewart and that it would pay Stewart a breakup fee of $50 million.[32]

2. *FTC Consents*

The FTC entered into 11 consents in proposed transactions: (1) Penn National Gaming, Inc./Pinnacle Entertainment, Inc. (casinos);[33] (2) Praxair, Inc./Linde AG (industrial gas);[34] (3) Marathon Petroleum Corporation/Express Mart (gasoline/convenience stores);[35] (4) Aloke and

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[32] Tomi Kilgore, MARKET WATCH, *Fidelity National to terminate deal to buy Stewart Information Services, citing FTC concerns* (Sept. 10, 2019), *available at* https://www.marketwatch.com/story/fidelity-national-to-terminate-deal-to-buy-stewart-information-services-citing-ftc-concerns-2019-09-10; *see also* Press Release, Fed. Trade Comm'n, *Statement of Bruce Hoffman, Director of FTC's Bureau of Competition, on Fidelity National Financial, Inc.'s Decision to Drop Proposed Acquisition of Stewart Information Services Corporation* (Sept. 10, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/09/statement-bruce-hoffman-director-ftcs-bureau-competition-fidelity.

[33] Press Release, Fed. Trade Comm'n, *FTC Requires Casino Operators Penn National Gaming, Inc. and Pinnacle Entertainment, Inc. to Divest Assets in Three Midwestern Cities as a Condition of Merger* (Oct. 1, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-casino-operators-penn-national-gaming-inc-pinnacle. The FTC alleged that the proposed acquisition would harm competition for casino services in St. Louis, Missouri; Kansas City, Missouri; and Cincinnati, Ohio by eliminating direct competition between the merger parties. According to the FTC, in St. Louis, the acquisition would reduce the number of competitors from four to three, resulting in a highly concentrated market with just two properties that would compete with Penn, only one of which has a casino that provides significant competition. In both Kansas City and Cincinnati, the acquisition would reduce the number of competitors from five to four. Although entry by a tribal casino is possible in Ohio, the FTC concluded that such entry would not be likely or timely enough to deter or counteract the proposed acquisition's anticompetitive effects due to the time and expense involved. The consent requires the merger parties to divest the following assets to Boyd Gaming Company within 10 days of the closing of the acquisition: (1) in St. Louis, Pinnacle's Ameristar St. Charles property, as well as a perpetual, royalty-free license to continue to use the "Ameristar" trade name; (2) in Kansas City, Pinnacle's Ameristar Kansas City property and use of the "Ameristar" trade name; and (3) in Cincinnati, divestiture of both the Pinnacle Belterra Park and Belterra Resort properties casinos. The order also requires the parties to provide transitional services, if requested, for at least 24 months.

[34] Press Release, Fed. Trade Comm'n, *FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger* (Oct. 22, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc. The FTC required the divestiture of assets for nine industrial gases product markets. The FTC alleged that the proposed merger would have enabled the merged firm to exercise market power unilaterally because, for many customers, the merging firms are the two best alternatives. The proposed merger would also make collusion or coordinated action among the remaining firms more likely. In bulk liquid oxygen and bulk liquid nitrogen, the geographic markets are local and there are 17 distinct geographic markets that would be adversely impacted; in bulk liquid argon—a much more expensive product—the market is national. In bulk liquid carbon dioxide, there are nine separate geographic regions impacted. In bulk liquid hydrogen, the high value of the product results in a national market, in which the merger would remove one of the four suppliers. In bulk refined helium, Linde and Praxair are two of the largest suppliers in the world, accounting for 40% of global supply on a combined basis. In excimer laser gases (used in the semiconductor industry to produce computer chips and liquid crystal displays, and in medical applications to perform laser vision-correction surgery), Praxair and Linde are two of only four U.S. suppliers. In onsite hydrogen and onsite carbon monoxide ("HyCO"), the merger would reduce the number of significant suppliers from four to three. The consent required the parties to divest within four months of closing: (1) to Messer Group GmbH, Linde's U.S. bulk liquid oxygen, nitrogen, and argon businesses, including all 32 merchant separation units, 16 carbon dioxide facilities, source contracts equal to all of Praxair's helium source contract volume, Linde's U.S. excimer laser gas business, and Linde's North American liquid hydrogen production facility; (2) to Matheson Tri-Gas, Inc., five of Linde's HyCO facilities outside the Gulf Coast region and Linde's liquid hydrogen pipeline in the Gulf Coast region; and (3) two of Linde's HyCO plants back to their respective customers.

[35] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition of Marathon Petroleum Corpora-*

Suchitra Lohia/M&G Resins USA LLC (PET resin joint venture);[36] (5) Staples Inc./Essendant Inc. (office supply products sold to small- and mid-sized businesses);[37] (6) Fresenius Medical Care

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tion's Acquisition of Express Mart (Oct. 25, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-divestitures-condition-marathon-petroleum. The FTC complaint alleged that the acquisition would harm competition for both retail gasoline and retail diesel in five local markets in New York State. In four of the local gasoline retail markets, the acquisition would reduce the number of significant competitors from three to two and, in the fifth market, from four to three. In three of the retail diesel markets, the merger would result in a merger to monopoly; in one market, a reduction of significant competitors from three to two; and in the remaining market, a reduction from four to three. The complaint alleged unilateral effects. Under the consent, Marathon was required to divest retail fuel assets to Sunoco within 90 days of the acquisition.

[36] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions in Joint Venture among Three Producers of PET Resin* (Dec. 21, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/12/ftc-imposes-conditions-joint-venture-among-three-producers-pet. This transaction involved a joint acquisition out of bankruptcy of an under-construction PET production facility. Alpek S.A.B. de C.V. (DAK), a Mexican company, Indorama Ventures Plc, a Thai company, and Far Eastern New Century ("FENC"), a Taiwanese company, formed a joint venture company, Corpus Christi Polymers LLC ("CCP"), to bid for M&G Chemicals S.A.'s PET production facility in bankruptcy. In March 2018, the bankruptcy court approved the sale of the three-way joint venture, which intended to complete construction of the PET production facility. The consent prohibited each joint venture member from owning more than a one-third equity interest in CCP and from owning a greater share of the tolling rights than their one-third share. The consent (1) limited the information that can be shared regarding capacity utilization as well as other competitively sensitive information regarding CCP, (2) prohibited the members from directly or indirectly influencing members of CCP's board of managers, subject to limited exceptions, (3) restricted members' ability to hire former CCP independent board members, (4) prohibited the joint venture members from soliciting or recruiting CCP employees, and (5) restricted the members from hiring former CCP employees for positions involving PET or PTA sales, marketing, or from making production decisions in the relevant market, for a period of one year. The consent has a term of 20 years. A monitor has been appointed.

[37] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc.* (Jan. 28, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply. Staples is the largest vertically integrated reseller of office products and one of only two retail office supply superstore chains in the United States. Essendant is the largest U.S. wholesale distributor of office products, which it sells to office supply resellers through a network of distribution centers and delivery trucks. The FTC alleged that Staples competed with Essendant-sourced independent dealers to sell office supplies to mid-sized business customers and that, as a result of the acquisition, Staples would have access to commercially sensitive business information on Essendant's reseller customers and on those resellers' end-customers, which could allow Staples to offer higher prices when bidding against a reseller for an end-customer's business. In a three-to-two vote, the parties agreed to a consent that would impose a firewall limiting access to commercially sensitive information of dealers who buy from Essendant, including those dealers' data about their customers, to only those Staples employees who will be performing wholesale functions, allows the Commission to appoint a monitor, and requires prior notice for certain acquisitions, for a period of 10 years. Commissioner Slaughter issued a dissenting statement based on the staff's identified significant evidence of likely harm and Commissioner Slaughter's belief that the parties had not provided evidence showing that the merger's likely harm would be offset by cognizable procompetitive benefits. Statement, Fed. Trade Comm'n, *Statement of Commissioner Rebecca Kelly Slaughter* (Jan. 28, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1448321/ 181_0180_staples_essendant_slaughter_statement.pdf.

Commissioner Slaughter believed that the remedy did not address Staples' control over Essendant's prices to its independent reseller competitors or its enhanced incentives to hamper independent reseller competition. Commissioner Chopra also issued a dissenting statement (Statement, Fed. Trade Comm'n, *Statement of Commissioner Rohit Chopra* (Jan. 28, 2019)), *available at* https://www.ftc.gov/system/files/documents/public_statements/1448335/181_0180_staples_essendant_chopra_statement_1-28-19_0.pdf. Commissioner Chopra believed that the merger raised horizontal concerns as well, questioned the efficacy of the firewall provision, and raised concerns about Sycamore's ownership of Essendant, given that it is a private equity fund that the Commissioner believes could have incentives that are not aligned with investment and vigorous competition.

AG/KGaA/NxStage Medical, Inc. (bloodline tubing sets);[38] (7) UnitedHealth Group/DaVita Medical Group (physician services);[39] (8) Quaker Chemical Corp./Houghton International Inc.

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[38] Press Release, Fed. Trade Comm'n, *FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger* (Feb. 19, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc. The FTC alleged that the acquisition would likely result in substantial competitive harm to consumers in the U.S. market for bloodline tubing sets used in hemodialysis treatment, since Fresenius and NxStage are two of only three significant suppliers of bloodline tubing sets used in open architecture hemodialysis machines in the United States. Fresenius and NxStage together comprise 82% of the market for bloodline tubing sets. The proposed settlement requires Fresenius to divest to B. Braun all assets and rights to research, develop, manufacture, market, and sell NxStage's bloodline tubing sets. Fresenius must continue to supply B. Braun with bloodline tubing sets for a limited time while B. Braun develops its own manufacturing capability. The Commission voted to accept—the consent was 3–2. Commissioners Chopra and Slaughter issued dissenting statements, raising concerns on the vertical aspects of the transaction as well. Fresenius is one of the two largest providers of in-clinic and in-home dialysis treatment and a manufacturer of dialysis equipment; NxStage manufactures SystemOne, which Commissioner Slaughter indicated is the only competitively significant in-home hemodialysis machine. Commissioner Slaughter further stated that, as a result of the transaction, the merged entity would have a monopoly or near-monopoly position for the manufacturing and sale of both in-clinic and in-home hemodialysis machines. Commissioner Slaughter was concerned that Fresenius would have the profit incentive to foreclose or raise the costs of its rivals when it acquired and controlled access to SystemOne, especially given its position as the dominant supplier of in-clinic dialysis machines and a significant supplier of other products used by competing dialysis clinics.

[39] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group* (June 19, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition. In a unanimous vote, the FTC approved the acquisition of DaVita Medical Group ("DMG") by UnitedHealth Group Incorporated's ("UHG") physician healthcare provider subsidiary, Optum, conditioned upon the divestiture of DMG's operations in the Las Vegas area to Intermountain Healthcare. The complaint alleged that, without a remedy in the Las Vegas area, the proposed acquisition would likely reduce competition in the markets for (1) managed care provider organization ("MCPO") services sold to Medicare Advantage ("MA") insurers; and (2) MA plans sold to individual MA members. The FTC alleged that the proposed acquisition would eliminate competition between Optum and DMG, resulting in one company controlling more than 80% of the services delivered by MCPOs to MA insurers. The FTC also alleged that the proposed merger would have resulted in anticompetitive effects due to the vertical integration of UHG's UnitedHealthcare, the largest MA insurer in Las Vegas, with a larger combined MCPO service provider. The Commission split—two-to-two—along party lines on whether the FTC should have sued to block the transaction, based solely on vertical integration grounds, in Colorado Springs, a territory in which Optum did not have a physician services group, based on a theory that DMG's MCPO services and physicians serve as inputs to the MA insurance plans that UnitedHealthcare and other health insurers sell to employers and individuals, and that UHG would find it profitable post-acquisition to raise DMG's prices to rival MA plans (a "raising rivals' costs" ("RRC") theory), because doing so would reduce these plans' benefits and induce some customers to switch to UnitedHealthcare's MA products. Commissioners Phillips and Wilson concluded: "the evidence in Colorado, quantitative and qualitative, reflected both dynamics [*i.e.*, both the incentive to RRC and the elimination of double-marginalization, which places downward pressure on prices in the output market], with mixed results. In our view, taken together, the evidence would not have convinced a judge that the proposed acquisition was likely, on balance, to harm consumers in Colorado." Statement, Fed. Trade Comm'n, *Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson*, Comm'n File No. 181-0057 (June 19, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1529366/181_0057_united_davita_statement_of_cmmrs_p_and_w.pdf. Commissioners Slaughter and Chopra reached an opposite conclusion: "We believe the evidence uncovered by Commission staff demonstrates that the vertical merger of United's health insurance and DMG's healthcare services businesses would likely result in actionable harm to competition in Colorado. We were prepared to challenge the transaction in court, given the likelihood of harm. We acknowledge that Commission action involving Colorado would have borne significant litigation risks, but we believe such risks were worth taking." Statement, Fed. Trade Comm'n, *Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra*, Comm'n File No. 181-0057 (June 19, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1529359/

(metal-processing products);[40] (9) Boston Scientific Corp./BTG plc (drug-eluting beads);[41] (10) U.S. Foods Holding Corp./Services Group of America, Inc. (broadline food service distribution);[42] and (11) Nexus Gas Transmission LLC/Generation Pipeline LLC (natural gas pipeline).[43]

181_0057_united_davita_statement_of_cmmrs_s_and_c.pdf.

The Nevada Attorney General entered into a consent decree with the parties to provide it with the ability to enforce the FTC's order. Press Release, Nevada AG, *Att'y General Ford Joins Federal Trade Commission to Maintain Competition in Nevada's Health Care System* (June 20, 2019), *available at* http://ag.nv.gov/News/PR/2019/Attorney_General_Ford_Joins_Federal_Trade_Commission_to_Maintain_Competition_in_Nevada%E2%80%99s_Health_Care_System/. As noted in the Statement of Commissioners Slaughter and Chopra, the Attorney General of Colorado entered into a consent with the parties that provided behavioral relief that, among other things, aimed at ensuring that DMG in Colorado did not terminate current MA payors using its physician services. Press Release, Colorado AG, *Antitrust challenge and settlement to the UnitedHealth Group and DaVita merger will safeguard competition, cost, and quality of healthcare for seniors in the Colorado Springs Area* (June 19, 2019), *available at* https://coag.gov/press-room/press-releases/06-19-19.

[40] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Quaker Chemical Corp.'s Acquisition of Houghton International Inc.* (July 23, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-conditions-quaker-chemical-corps-acquisition-houghton. The FTC alleged that the transaction parties are the only two commercial suppliers of aluminum hot rolling oil ("AHRO") in North America and the two largest commercial suppliers of steel cold rolling oil ("SCRO"). In addition, the combination would substantially lessen competition in associated technical support services. The consent requires Quaker to divest Houghton's AHRO and SCRO product lines and related assets to an identified buyer. In addition, the consent requires Quaker to divest to Total certain product lines used in conjunction with AHRO and SCRO, including steel cleaners and AHRO-compatible hydraulic fluids.

[41] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures and Imposes Conditions on Boston Scientific Corp.'s Acquisition of BTG plc* (Aug. 7, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/08/ftc-requires-divestitures-imposes-conditions-boston-scientific. The FTC alleged that Boston Scientific ("BSC") and BTG are the two largest suppliers of drug-eluting beads ("DEBs") in the United States. DEBs are microscopic beads used to treat certain liver cancers in combination with chemotherapy drugs in a procedure called transarterial chemoembolization. The complaint further alleges that new competition is unlikely to occur in a timely manner to deter the anticompetitive effects of the proposed merger. The merger would, according to the FTC, eliminate head-to-head competition between BSC and BTG in a highly concentrated market, which would allow the combined firm to exercise market power unilaterally, resulting in higher prices, reduced innovation, and fewer choices for consumers. Under the proposed consent, within 10 days after BSC's acquisition of BTG, BSC will divest to Varian its DEBs business, as well as its bland bead product line, which is used in another type of procedure. The FTC required the divestiture of BSC's bland bead business to ensure the divestiture's effectiveness.

[42] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures and Imposes Conditions on US Foods Holding Corp.'s Acquisition of Services Group of America* (Sept. 11, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/09/ftc-requires-divestitures-imposes-conditions-us-foods-holding. The FTC's complaint alleged that, in Eastern Idaho, Western North Dakota, and the Seattle area, the transaction would eliminate a key broadline distributor and limit customers' ability to switch between distributors to obtain better pricing and services. As proposed, the transaction would allegedly harm competition nationally, resulting in higher prices and lower quality and service to multiregional and national customers. Services Group of America belongs to a consortium of regional competitors that the FTC found to compete with US Foods to service these accounts. Under the proposed consent, US Foods must divest three of Services Group's distribution centers within 30 days of closing of the transaction to identified buyers who are members of the consortium.

[43] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on NEXUS Gas Transmission, LLC's Acquisition of Generation Pipeline LLC* (Sept. 13, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/09/ftc-puts-conditions-nexus-gas-transmission-llcs-acquisition. The FTC found that the proposed joint venture's acquisition of an Ohio pipeline would harm competition to provide natural gas pipeline transportation in a three-county area that includes Toledo, Ohio. NEXUS, which is owned by DTE and Enbridge, agreed to purchase Generation Pipeline LLC, which owns and operates a 23-mile pipeline in the area from North Coast Gas Transmission LLC and several other owners. According to the FTC, the contract included a non-compete clause that keeps North Coast from competing to

3. *Consummated Merger Challenges*

In December 2017, the FTC sued Otto Bock HealthCare North America, Inc. ("Otto Bock"), the North American subsidiary of a German prosthetic limb maker, over its September 2017 acquisition of Freedom Innovations ("Freedom"), arguing that the acquisition eliminated existing competition in the market for microprocessor prosthetic knee ("MPK") products.[44] At issue are (1) whether Freedom was Otto Bock's only rival in a relevant market before the transaction, and (2) how the acquisition impacted competitive conditions. An MPK is a type of advanced artificial knee that uses sensors to make real-time adjustments. Otto Bock's newest model is alleged to be very comparable to Freedom's. Together, Otto Bock and Freedom comprise 70% of MPK sales; the FTC claims there are only four additional competitors worldwide, all of which operate on a significantly smaller scale. According to the FTC, the transaction would not only eliminate competition between the transaction parties, but also result in higher prices, lower quality and less innovation.[45]

The defendants contend that Freedom was in severe financial distress and was likely to exit the market. In addition, defendants point to four other MPK producers that have the capacity and ability to continue to manufacture and sell such products, ensuring a competitive market.

The hearing before ALJ Chappell began on July 10, 2018. On June 19, 2018, the transaction parties filed a motion to withdraw the matter from adjudication for consideration of proposed settlement, which the FTC opposed; on July 9, 2018, the ALJ denied the motion.[46] An initial decision was scheduled to be filed on or before March 28, 2019. On March 18, 2019, the ALJ extended the filing date to April 29, 2019.

On May 7, 2019, ALJ Chappell announced his Initial Decision, in which he upheld the FTC's complaint challenging the consummated merger. Judge Chappell found that the direct competition between the parties had enabled the clinics to negotiate lower prices and spurred innovation and that the transaction's significant increase in competition gave rise to a presumption that the

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provide natural gas pipeline transportation for three years after the acquisition closes in parts of Ohio. North Coast has a 280-mile natural gas transmission pipeline system that includes the covered counties. The FTC found the non-compete clause eliminated actual and potential competition for three years and was not reasonably limited in scope to protect a legitimate business interest. The proposed consent required the parties to eliminate the non-compete clause from the agreement. In addition, absent prior Commission approval, the parties are prohibited from agreeing to restrict competition in these three Ohio counties.

Although the consent was approved in a 5-0 vote, Commissioners Chopra and Slaughter issued a statement and Commissioner Wilson issued a separate concurring statement that differs in tone regarding the role of non-compete agreements.

[44] 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.

[45] Complaint, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (Dec. 20, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf; Answer and Affirmative Defenses of Respondent Otto Bock, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (Jan. 10, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/180110ottobockanswer.pdf. The transaction value was below the HSR Act notification threshold and, therefore, was not reversed prior to consummation.

[46] Opinion and Order of the Commission, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (July 9, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/d09378_otto_bock_commission_opinion_and_order_redacted_public_version_7-9-18.pdf.

acquisition would substantially lessen competition. Under the Order, Otto Bock is required to divest the assets of Freedom no later than 90 days after the Order becomes final. On May 8, 2019, the parties filed a Notice of Appeal.[47]

4. *Closing Statements*

On November 29, 2018, the FTC issued a statement on its unanimous vote to close the investigation of the proposed combination of CareGroup, Inc. (parent of Beth Israel Deaconess Medical Center, Mount Auburn Hospital, and New England Baptist Hospital), Lahey Health System, Inc., Seacoast Regional Health System, Inc., BIDCO Hospital, LLC, and BIDCO Physicians, LLC.[48] The FTC staff had investigated whether the proposed combination of the involved hospitals and physicians in eastern Massachusetts would lessen competition. The FTC worked closely with the Massachusetts AG. In addition, the Massachusetts Health Policy Commission had conducted an independent review under Massachusetts state law.[49] Concurrent with the FTC's closing statement was an announcement by the Massachusetts AG of a settlement with the parties that included certain price caps over a period of seven years. The FTC statement indicated:

> The Commission does not typically pursue behavioral remedies, such as price caps, in merger cases. We recognize, however, that this settlement seeks to satisfy two goals of critical importance to the Massachusetts AG: first, to preserve access to health care for underserved populations in Massachusetts; and second, to limit price increases for Massachusetts health care consumers.

Although the FTC indicated that the "assessment of whether to take enforcement action was a close call . . . based on Commission staff's work and in light of the settlement . . . we have decided to close this investigation."[50]

5. *Abandoned Transactions*

On April 8, 2019, the FTC issued a statement indicating that Republic National Distributing Company and Breakthru Beverage Group had abandoned their proposed merger.[51] FTC staff had

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[47] Respondent's Notice of Appeal, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (May 8, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d09378_rs_notice_of_appealpublic594588.pdf. On November 6, 2019, the Commission affirmed the ALJ decision and ordered Otto Block to unwind its acquisition. The company indicated that it intends to appeal the Commission's decision in the D.C. Circuit.

[48] Press Release, Fed. Trade Comm'n, *Statement of Federal Trade Commission Concerning Its Vote to Close the Investigation of a Proposed Transaction Combining Massachusetts Healthcare Providers* (Nov. 29, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/11/statement-federal-trade-commission-concerning-its-vote-close.

[49] MASSACHUSETTS HEALTH POLICY COMM'N, *The Proposed Merger of Lahey Health System; CareGroup and its Component Parts, Beth Israel Deaconess Medical Center, New England Baptist Hospital, and Mount Auburn Hospital; Seacoast Regional Health System; and Each of their Corporate Subsidiaries into Beth Israel Lahey Health; AND The Acquisition of the Beth Israel Deaconess Care Organization by Beth Israel Lahey Health; AND The Contracting Affiliation Between Beth Israel Lahey Health and Mount Auburn Cambridge Independent Practice Association*, HPC-CMIR-2017-2 (Sept. 27, 2018), *available at* https://www.mass.gov/files/documents/2018/09/27/Final%20CMIR%20Report%20-%20Beth%20Israel%20Lahey%20Health.pdf?_ga=2.98859422.1276499543.1546201931-67683217.

[50] Statement, Fed. Trade Comm'n, *Statement of the Federal Trade Commission Concerning the Proposed Affiliation of CareGroup, Inc.; Lahey Health System, Inc.; Seacoast Regional Health System, Inc.; BIDCO Hospital LLC; and BIDCO Physician LLC*, FTC File No. 171-118 (Nov. 29, 2018), *available at* https://www.ftc.gov/system/files/documents/closing_letters/nid/1710118_bidmc_commission_closing_statement.pdf.

[51] Press Release, Fed. Trade Comm'n, *Statement of the FTC's Bureau of Competition Regarding Announcement that Republic National Distributing Company and Breakthru Beverage Group have Terminated Their Acquisition Agreement*

been investigating the transaction and had informed the parties of their significant concerns about likely anticompetitive harm if the transaction was completed due to higher prices and diminished services in the distribution of wine and spirits in several states.

B. U.S. Department of Justice

The DOJ began FY 2019 with only one active litigation matter, its appeal of the district court's decision in the *AT&T/Time Warner* merger challenge. During FY 2019, the DOJ brought three district court challenges to proposed mergers—the parties soon thereafter abandoned one of the transactions, and, in the other two, the cases remain pending. The DOJ also had an unusual review of one of its settlements under the Tunney Act, but eventually the judge approved the settlement. The DOJ entered into consents to resolve concerns in seven proposed mergers; one additional transaction was reportedly abandoned due to the agency raising antitrust concerns.

1. *Court Challenges*

a. *Antitrust Division Loses Appeal of AT&T/Time Warner Trial Loss*

On November 20, 2017, the DOJ filed suit in the U.S. District Court for the District of Columbia, challenging AT&T Inc.'s ("AT&T") proposed $108 billion acquisition of Time Warner Inc. ("TW").[52] 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 television 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 rival [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.[53]

On November 28, 2017, AT&T and TW filed their Answer.[54] The defendants argued that, with the advent of digital platforms such as Netflix, Apple, Google, Facebook, Hulu, Amazon, Snapchat, and Twitter, there is an abundance of choice for consumers.[55] 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

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(Apr. 8, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/04/statement-ftcs-bureau-competition-regarding-announcement-republic.

[52] 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.

[53] Complaint at 1–2, *United States* v. *AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017), *available at* https://www.justice.gov/opa/press-release/file/1012896/download.

[54] Answer, *United States* v. *AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. Nov. 28, 2017), *available at* https://cdn.arstechnica.net/wp-content/uploads/2017/11/att-answer-to-doj.pdf.

[55] *Id.* ¶ 1.

transaction is . . . a classic vertical deal . . . so that the merged company can compete more effectively against market-leading cable incumbents and insurgent tech giants."[56] 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 operations of both companies.[57]

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."[58] TW has "extended to third-party distributors the same sort of arbitration protections that the Government embraced in Comcast/NBCUniversal."[59]

Judge Richard Leon set an expedited schedule for discovery and a six-week trial commenced on March 19, 2018. On June 12, 2018, the court issued a 172-page opinion denying the DOJ's request for a PI and discouraging the DOJ's seeking of a stay of the decision.[60] Two days later, the DOJ and AT&T agreed that AT&T would hold TW separate until the earlier of February 28, 2019 or the final resolution of the matter, permitting AT&T to complete its acquisition.[61]

The court's decision was an unequivocal victory for the defendants. The court applied the traditional antitrust burden-shifting framework, under which: (1) the DOJ must first show that the merger is likely to substantially lessen competition in the relevant market; (2) the defendants then must rebut that burden by providing evidence of efficiencies that outweigh the merger's anticompetitive effects; and (3) the DOJ is then required to reply with additional evidence of anticompetitive effects. Judge Leon found that the DOJ had failed at the first step—making a fact-specific showing that the transaction would lessen competition in any market. First, the court rejected the DOJ's theory that the transaction would increase AT&T's leverage over its rivals to extract higher prices because the combined company could withstand the loss of advertising and subscriber fees during a blackout by consumers switching to DirecTV, which AT&T owns. The court found that the DOJ's evidence was contradicted by examples of distributors successfully operating without Turner content. Second, the court rejected the DOJ's claim that AT&T—acting either unilaterally or in concert with Comcast/NBCUniversal—would foreclose or restrict "must-have" Turner content. The court dismissed AT&T's ordinary course business documents

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[56] *Id.* ¶ 2.

[57] *Id.* ¶ 6.

[58] *Id.* ¶ 7.

[59] *Id.* ¶ 8.

[60] Memorandum Opinion, *United States* v. *AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), ECF No. 146, *available at* https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.146.0_1.pdf.

[61] Joint Motion to Modify Case Management Order, *United States* v. *AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. June 14, 2018), ECF No. 148; Exhibit A to Joint Motion to Modify Case Management Order, *United States* v. *AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. June 14, 2018), ECF No. 148-1, *available at* https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.148.0.pdf.

that appeared to be supportive of the theory as being inconsistent with actual industry trends and AT&T's business incentive to obtain broad distribution of Turner content. Finally, the court rejected the DOJ's theory that AT&T would foreclose its rivals from using HBO as a promotional tool to attract and retain customers. Rather, the court found that this was a "gossamer thin claim," partly due to the court's conclusions that "Netflix is an adequate substitute for HBO" and that "HBO is in the fight of its life[.]"[62]

The court emphasized the dramatic changes that the video distribution and video programming industries were experiencing. It found ordinary course business documents unpersuasive in light of these developments. Moreover, the court rejected the DOJ's economic expert's use of an economic bargaining model that predicted content prices to increase because it rested on assumptions and critical inputs that the court found were contradicted by the evidence. The court found more persuasive the natural experiments supported by defendants' expert testimony that showed that prior vertical integration had not led to higher content prices.

Although not needed to justify his decision, the judge, in a footnote, criticized the DOJ for failing to account for the effect of Turner's commitments to arbitrate content disputes and not to impose blackouts. The court found that TW's commitment was yet another "reason[] to be skeptical of the Government's increased-leverage theory of competitive harm" and described it as "extra icing on a cake already frosted."[63]

On July 12, 2018, the DOJ filed its notice of appeal with the U.S. Court of Appeals for the D.C. Circuit.[64] In its appeal, the DOJ requested an accelerated timeline, with all legal briefs to be filed by mid-October and oral arguments shortly thereafter. On August 6, 2018, the DOJ filed its opening brief, in which it asserted that the district court had made "two fundamental errors" in reaching its verdict.[65] First, the DOJ argued that "[t]he district court erroneously concluded that the merger will not give Time Warner *any* increased bargaining leverage,"[66] even though "[t]he court agreed that Time Warner enjoyed bargaining leverage before the merger."[67] Judge Leon rejected the inputs into the bargaining model as well as the key principles underlying the model. Second, the court incorrectly concluded that TW "would not maximize the profits of the combined entity as a whole by extracting higher fees from rival distributors when negotiating with them for Turner content."[68] This conclusion basically rejected the principle of "corporate-wide profit maximization," while at the same time the court accepted that the merger would result in cost savings through coordination between TW and DirecTV.

On September 20, 2018, AT&T filed a brief in the Court of Appeals, stating that the government had not met its burden: "In the crucible of litigation, DOJ's claims were exposed as both narrow and fragile." AT&T further noted that this lawsuit was the "first litigated challenge to a vertical merger in four decades, prompting many press outlets to question whether the White House had

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[62] Memorandum Opinion at 163, 251–253 & n.60, *United States* v. *AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), ECF No. 146.

[63] *Id.* at 241 n.51.

[64] Notice of Appeal, *United States* v. *AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), ECF No. 153.

[65] Proof Brief of Appellant United States of America at 37, *United States* v. *AT&T Inc.*, No. 18-5214 (D.C. Cir. Aug. 6, 2018) (Public Version—Sealed Material Deleted).

[66] *Id.* at 30.

[67] *Id.*

[68] *Id.* at 31.

improperly influenced DOJ's decision to bring the case." On September 26, 2018, in a highly unusual move, nine state AGs filed a brief supporting AT&T's position.[69] The AGs pointed out that not only did they not support the DOJ's appeal, but not a single state joined with the DOJ in bringing the suit, which, according to the brief, is a rare occurrence. The State AGs said the district court's decision that the DOJ's case against the deal was without merit validated the absence of state support for the suit.

On October 11, 2018, the DOJ filed a reply brief asserting that "AT&T's brief, which is little more than a revisionist 58-page summary of the district court's opinion, does not remedy the economic and logical inconsistencies in the decision. Tellingly, AT&T rarely defends the court's logic. Instead, it attempts to construct a new opinion, incorrectly elevating a handful of the court's musing footnotes and phrases as if they were holdings."[70] Furthermore, "there is no merit to AT&T's hyperbolic contention that the economics of bargaining predicts that *any* vertical merger in the pay-television industry will result in higher programming prices. . . . As the government showed, for a merger to lessen competition substantially . . . the programmer must have the type of content that can drive consumers who lose it to switch, and the distributor must earn a margin on subscribers gained from the switch. . . . Most vertical mergers do not meet this standard. This one does."[71]

On February 26, 2019, the D.C. Circuit affirmed the district court's denial of an injunction.[72] It found that there were no structural presumptions of illegality in a vertical case, acknowledging that vertical transactions produce efficiencies. The court found that the DOJ had failed to take into account the arbitration agreement that the defendants had offered distributors in the event of a pricing or contract dispute. In addition, the Court noted the rapidly changing and "dynamic" industry, citing the rise of both Netflix and Hulu as new competitors. The parties had presented into the record a retrospective study that showed the lack of harm from prior transactions. The Court indicated that "'[T]he Nash theorem [which the DOJ relied on] arrives at a result that follows from a certain set of premises,' while the theory 'asserts nothing about what situation in the real world fit those premises,'" and that "the district court found more probative the real-world evidence offered by AT&T than that offered by the government."[73] As a result, the Court found the government's objections that the district court had misunderstood and misapplied economic principles and clearly erred in rejecting the quantitative model as unpersuasive.

b. *Printing Companies Abandon Deal After DOJ Brings Suit*

On June 20, 2019, the DOJ brought a PI action in the Northern District of Illinois seeking to block Quad/Graphics, Inc.'s ("Quad") proposed acquisition of LSC Communications Inc. (formerly part of R.R. Donnelley) ("LSC").[74] The complaint alleges that the transaction would

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[69] Proof Brief of AT&T Inc., DIRECTV Group Holdings, LLC & Time Warner Inc. at 1, *United States* v. *AT&T Inc.*, No. 18-5214 (D.C. Cir. Sept. 20, 2018); Proof Bipartisan Brief of the States of Wisconsin, Alabama, Georgia, Louisiana, New Mexico, Oklahoma, South Carolina, Utah, and the Commonwealth of Kentucky as *Amici Curiae* in Support of Defendants-Appellees, *United States* v. *AT&T Inc.*, No. 18-5214 (D.C. Cir. Sept. 26, 2018).

[70] Proof Reply Brief of Appellant United States of America at 1, *United States* v. *AT&T Inc.*, No. 18-5214 (D.C. Cir. Oct. 11, 2018) (Public Version—Sealed Material Deleted).

[71] *Id.* at 12–13.

[72] Opinion, *United States* v. *AT&T Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

[73] *Id.* at 1037, 1039.

[74] *See* Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Quad's Acquisition of LSC* (June 20,

combine the only two significant providers of magazine, catalog, and book printing services, including the printing, finishing, and distribution of publications to newsstands, retail facilities, and postal service for delivery to consumers' homes.[75] The complaint further asserts that the two companies are by far the largest printers in the United States and are relied upon by the largest publishers and retailers to ensure that high-quality products are printed and distributed on time.[76] The complaint focuses heavily on the head-to-head competition between the parties, citing extensively quotes from internal presentations and emails, and alleges that the acquisition would put an end to the "price war" between the two, thereby allowing it to dominate the magazine, catalog, and book printing markets.

Defendants indicated that the proposed merger is essential to their continued survival. They cite to the migration of readers to the Internet, resulting in decreased revenues, layoffs and the closing of many traditional media companies. The transaction would permit print media to compete because, according to the parties, it would create a highly efficient print manufacturing and distribution platform that would save clients time and expense. Their primary competition is not from other printers but these other forms of media, and neither party accounts for more than 5% of the total print industry.

On July 23, 2019, the parties terminated their transaction, citing the expense and time involved in court proceedings. Quad also indicated that it would pay LSC a reverse termination fee of $45 million.[77]

c. *DOJ Challenges Sabre's Acquisition of Farelogix*

On August 20, 2019, the DOJ filed a civil action in the federal district court of Delaware seeking to block Sabre Corporation's ("Sabre") acquisition of Farelogix, Inc. ("Farelogix").[78] The complaint alleged that Sabre was the dominant provider of airline booking services in the United States, with over 50% of airline bookings through travel agencies, and over 80% of such bookings through large travel management companies. Sabre operates a global distribution system ("GDS"), which is a digital platform that provides booking services to airlines in addition to other functionalities. The complaint alleged that Sabre and the other two GDSs "have resisted innovation, while charging airlines high booking fees for services that lack the functionality airlines and travelers demand. The GDS's outdated technology has limited airlines' ability to sell—and travelers' ability to choose from—airlines' entire suite of offerings."[79] The complaint further alleged that "Farelogix has emerged as an innovator that threatens to erode Sabre's dominance."[80] The complaint asserted that "[f]or over a decade, Farelogix's airline customers have

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2019), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-quad-s-acquisition-lsc.

[75] *See* Complaint, *United States* v. *Quad/Graphics, Inc.*, No. 19-cv-04153 (N.D. Ill. June 20, 2019), *available at* https://www.justice.gov/opa/press-release/file/1175936/download.

[76] *See id.*

[77] Arjun Panchadar & David Shepardson, *LSC, Quad/Graphics abandon $1.4 billion merger after U.S. antitrust suit*, REUTERS (July 23, 2019), *available at* https://www.reuters.com/article/us-lsc-communications-m-a-quad/lsc-quad-graphics-abandon-1-4-billion-merger-after-u-s-antitrust-suit-idUSKCN1UI18Q.

[78] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Sabre's Acquisition of Farelogix* (Aug. 20, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

[79] Complaint ¶ 2, *United States* v. *Sabre Corp.*, No. 1:99-MC-09999 (D. Del. Aug. 20, 2019), *available at* https://www.justice.gov/opa/press-release/file/1196816/download.

[80] *Id.* ¶ 4.

successfully used the threat of switching to Farelogix's booking services solutions to negotiate better rates and terms with Sabre and the other GDSs for bookings through both traditional and online travel agencies."[81] In addition, according to the DOJ, competition from Farelogix "has driven Sabre to finally begin improving its own outdated technology."[82] Finally, the DOJ alleges that the "transaction will likely tighten Sabre's grip on the online travel agency market, where airlines have been most successful using competition from Farelogix to erode Sabre's market position."[83] The DOJ found that there were no countervailing factors that would prevent or remedy these anticompetitive effects. New entry or expansion by existing competitors is unlikely to be effective. The complaint asserted that: (1) there are high barriers to building out next-generation booking services solutions; (2) the GDS's contracting practices—particularly provisions that inhibit airlines' use of alternative booking services providers—further heighten the barriers to entry; and (3) in-house airline solutions, sponsored entrants, and alternative next-generation booking services providers are unlikely to replace the competitive constraints imposed by Farelogix.

d. *DOJ Sues to Block Novelis's Acquisition of Aleris and Invokes Arbitration Proceeding*

The DOJ filed a PI action in the Northern District of Ohio seeking to block Novelis Inc.'s ("Novelis") proposed acquisition of Aleris Corporation ("Aleris"). The DOJ asserted that Novelis and Aleris were two of only four aluminum automotive body sheet ("ABS") suppliers in North America and, combined, account for approximately 60% of total production capacity and the majority of uncommitted capacity with Novelis. Aleris is, according to the DOJ, "a new [established facilities in the United States in 2016] and [a] disruptive rival" that is "poised for transformational growth."[84] The complaint asserted that by "acquiring Aleris, Novelis would lock up a large share of available aluminum ABS capacity for the foreseeable future, which would immediately and negatively impact competition in this market."[85] The DOJ projected that there would be a shortage of aluminum ABS in North America soon, that additional capacity cannot be readily brought online to meet growing demand, and, due to transportation costs and supply chain risks, that importing ABS will not be a primary sourcing strategy for most automakers in North America. The DOJ cited to the price gap between North America and other geographic regions for aluminum ABS as support for a North American relevant geographic market.

In a very unusual procedural move, the DOJ and defendants agreed to refer the matter to binding arbitration pursuant to the Administrative Dispute Resolution Act of 1996 (5 U.S.C. Section 571) to resolve the issue of product market definition. Also, on October 1, 2019, the EC approved the transaction after the parties agreed to divest Aleris' ABS business in Europe, eliminating the entire overlap created by the proposed acquisition in Europe.

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[81] *Id.* ¶ 32.

[82] *Id.* ¶ 38.

[83] *Id*. ¶ 54.

[84] Complaint at 1–2, *United States* v. *Novelis, Inc.*, No. 1:19-cv-02033 (N.D. Ohio Sept. 4, 2019), *available at* https://www.justice.gov/opa/press-release/file/1199441/download.

[85] *Id.*

2. DOJ Consents

In FY 2019, the DOJ entered into consents resolving concerns in seven proposed transactions: (1) CVS Health Corporation/Aetna Inc. (Medicare Part D);[86] (2) Gray Television Inc./Raycom Media Inc. (broadcast television stations);[87] (3) Thales S.A./Gemalto N.V. (General Purpose Hardware Security Modules);[88] (4) Amcor Ltd./Bemis Co. Inc. (medical flexible packaging);[89] (5)

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[86] Press Release, U.S. Dep't of Justice, *Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger* (Oct. 10, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d.

The DOJ required CVS to divest Aetna's Medicare Part D prescription drug business for individuals to WellCare Health Plans, Inc., an experienced health insurer focused on government-sponsored health plans, including Medicare Part D plans, in order to proceed with its acquisition. CVS, the nation's largest retail pharmacy chain, and Aetna, the nation's third-largest health insurance company, competed in the sale of Medicare Part D plans, combined serving 6.8 million members nationwide. The DOJ found that the combination would have caused anticompetitive effects, including increased prices, inferior service, and decreased innovation in 16 Medicare Part D regions covering 22 states. The divestiture was nationwide, however, to provide WellCare the business assets and national scale that the DOJ believed WellCare would require to replicate the competition that would be lost as a result of the merger. Aetna must also provide WellCare with (1) the opportunity to hire employees who are currently associated with the business and (2) the data related to its plans, including its contracts with brokers and pharmacies. This information enabled WellCare to negotiate with brokers and retail pharmacies on the same footing as Aetna. The divestiture will allow WellCare to enhance its existing business so that it can compete vigorously post-acquisition. The DOJ also considered whether the merger would raise the cost of (1) CVS/Caremark's PBM services or (2) retail pharmacy services to Aetna's health insurance rivals (vertical theories). The DOJ indicated that it had determined that the merger was unlikely to cause CVS to increase costs to Aetna's health insurance rivals due to competition from other PBMs and retail pharmacies. In addition, the DOJ stated that the evidence showed that CVS was unlikely to be able to profitably raise its PBM or retail pharmacy costs post-merger because it would lose customers and Aetna would not be able to offset those losses by capturing additional health insurance customers.

The case was assigned to Judge Richard Leon, who undertook an unprecedented level of review of the consent under the Tunney Act. On September 29, 2019—almost a year after the DOJ filed the case—Judge Leon issued a 22-page decision that approved the consent on the basis that the merger was unlikely to negatively impact PBM competition.

[87] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures to Resolve Antitrust Concerns in Gray's Merger With Raycom* (Dec. 14, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-resolve-antitrust-concerns-gray-s-merger-raycom. The DOJ conditioned clearance on the divestiture of broadcast television stations in nine local markets by the later of (1) 90 days of the filing of the Complaint or (2) five calendar days after entry of the Final Judgment. The divestiture timelines are tolled to the extent that FCC action is required and the FCC has not taken such action by the time of the deadline. The DOJ has determined that certain companies were acceptable purchasers for designated stations. In each of these markets, the DOJ asserted that, absent the divestiture, the transaction would increase the number of "Big Four" affiliate stations owned by Gray, leaving Gray with two or more Big Four stations in each area. As a result, the DOJ alleged, the company would have then likely charged cable and satellite companies higher retransmission fees, which would have resulted in higher monthly bills for consumers. In addition, the Complaint alleges that the company would have been able to charge local businesses and other advertisers higher prices for spot advertising in the divestiture markets.

[88] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Thales' General Purpose Hardware Security Module Business in Connection With its Acquisition of Gemalto* (Feb. 28, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-thales-general-purpose-hardware-security-module. The DOJ alleged that Thales and Gemalto are the world's leading providers of General Purpose Hardware Security Modules ("GP HSMs"), together accounting for 66% of U.S. sales. They are purportedly each other's closest competitors and compete head to head in the development, marketing, servicing, and sale of GP HSMs. Without the divestiture, the proposed acquisition would result in higher prices, lower quality, reduced innovation, and fewer choices of GP HSMs. GP HSMs are secure encryption processing and key management devices that are most frequently included as components of complex encryption solutions used by government and private organizations to safeguard their sensitive data. The proposed settlement required Thales to divest its GP HSMs Products

Harris Corp./L3 Technologies Inc. (night vision devices);[90] (6) T-Mobile/Sprint (wireless carriers);[91] and (7) Nexstar/Tribune (broadcast TV stations).[92]

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business, including certain intellectual property and research capabilities for products under development. No divestiture buyer was named in the consent.

[89] Press Release, U.S. Dep't of Justice, *Justice Department Requires Amcor to Divest Medical Flexible Packaging Assets in Order to Proceed with Bemis Acquisition* (May 30, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-amcor-divest-medical-flexible-packaging-assets-order-proceed. The DOJ conditioned its approval of the transaction upon the divestiture of three manufacturing facilities and related assets used to produce medical flexible packaging products that are needed for safe transportation and use of medical devices to Tekni-Plex, Inc., an international producer of flexible films and medical supplies. The DOJ alleged that, absent the divestiture, the transaction would have eliminated competition between two of only three significant suppliers of heat-seal, coated medical packaging products. The complaint also alleged that medical care providers have benefitted from the head-to-head competition between the transaction parties.

[90] Press Release, U.S. Dep't of Justice, *Justice Department Requires Harris and L3 to Divest Harris's Night Vision Business to Proceed with Merger* (June 20, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-harris-and-l3-divest-harris-s-night-vision-business-proceed. The DOJ conditioned approval of Harris Corporation's ("Harris") acquisition of L3 Technologies Inc. ("L3") on the divestiture of Harris's night vision business. The DOJ alleged that, without the divestiture, the proposed acquisition would have eliminated competition between the only two suppliers of U.S. military-grade image intensifier tubes, which are the key component in night vision devices, including for goggles and weapon sights purchased by the Department of Defense ("DOD"). Image intensifier tubes amplify visible light to increase situational awareness, threat detection, and mission performance when operating in low-light environments. The complaint alleges that competition between the parties has resulted in lower prices, higher quality, shorter delivery times, and has fostered innovation. The consent requires that Harris's entire night vision business, including its manufacturing facility in Roanoke, Virginia, be divested to an acquiror approved by the DOJ within the later of 45 days after the entry of the hold separate order or 15 days after regulatory approvals (which include potentially CFIUS) have been received. The DOJ noted that it had cooperated closely with the DOD throughout its investigation.

[91] Press Release, U.S. Dep't of Justice, *Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish* (July 26, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package. The DOJ and AGs for five states (Kansas, Nebraska, Ohio, Oklahoma, and South Dakota) reached a settlement with T-Mobile and Sprint to resolve their concerns that there would continue to be four national facilities-based wireless competitors following the merger. According to the complaint, T-Mobile and Sprint both operate mobile networks and offer nationwide coverage to consumers, and they are particularly close competitors to each other for the 30% of retail subscribers who purchase prepaid mobile wireless service. The combination would allegedly have eliminated head-to-head competition between the companies and have threatened the benefits that customers would have realized from that competition in the form of lower prices and improved service.

The consent required the parties to divest Sprint's prepaid businesses, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp., a satellite TV provider. The consent also required divestiture of additional spectrum assets to Dish, and that the parties make available to Dish at least 20,000 cell sites and hundreds of retail locations, as well as access to the T-Mobile network for a period of seven years while Dish builds out its own 5G network. Finally, the parties agreed to extend existing MVNO agreements on their existing terms for the seven-year term of the consent decree unless the parties demonstrate to the monitoring trustee that doing so will result in a material adverse effect, other than as a result of competition, on the parties' ongoing business. The consent also included certain behavioral conditions as well, including an agreement to support eSim technology on smartphones, not discriminating against devices if they use remote SIM provisioning and eSim technology or multiple active profiles that allow automatic switching between those profiles, making their network plans available to consumers who use on-screen selection software or applications from devices capable of being remotely provisioned, and adhering to certain prescribed unlocking principles for phones.

The DOJ's press release recognized that its remedies were in addition to commitments the parties had already made to the Federal Communications Commission ("FCC"). These commitments included certain network build commitments.

The transaction, however, could not close immediately, despite the DOJ and FCC approvals. On June 11, 2019 (*i.e.*,

3. *Abandoned Transactions*

On April 2, 2019, Securus Technologies Inc. ("Securus") abandoned its plans to acquire Inmate Calling Solutions LLC ("ICS").[93] The DOJ had previously informed the parties that it had significant concerns that the merger would eliminate important competition in the market for inmate telecommunications services ("ITS"). According to the DOJ, Securus and ICS are two of the four major ITS providers in the United States. The DOJ indicated that the parties had a history of competing aggressively to win state and local contracts and that the combination would have eliminated that competition. The FCC and several State AGs cooperated with the DOJ in this investigation.

4. *Closing Statements*

a. *Cigna/ExpressScripts*

On September 17, 2018, the transaction parties announced that the DOJ had cleared Cigna's proposed acquisition of Express Scripts, Inc. ("ESI"). Although the DOJ did not, at the time, issue a closing statement, in connection with its public statements in the CVS/Aetna deal, the DOJ provided information on its decision in the Cigna/ESI merger. The DOJ indicated:

> The CVS/Aetna and Cigna/ESI mergers presented some common issues. For instance, both involved the vertical integration of a PBM with a health insurance company. Our investigation showed that neither merger was likely to substantially reduce competition because of this vertical integration.

An important difference between these mergers, however, is that CVS and Aetna are two of the country's leading sellers of individual PDPs, and their merger would likely substantially reduce

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before the DOJ and the FCC had finished their reviews), the State of New York, eight other states and the District of Columbia brought an action in the Southern District of New York seeking to enjoin the merger ("AG Complaint"). *See* Complaint, *State of New York* v. *Deutsche Telekom AG*, No. 1:19-cv-5434-VM (S.D.N.Y. June 11, 2019), ECF No. 2. The AG Complaint alleged harm to mobile subscribers nationwide, particularly in the lower-income and minority communities.

The transaction parties responded on July 9, 2019. *See* Answer of Defendants T-Mobile US, Inc. and Deutsche Telekom AG and Answer of Defendants Sprint Corp. and Softbank Grp. Corp., *State of New York* v. *Deutsche Telekom AG*, No. 1:19-cv-5434-VM (S.D.N.Y. July 9, 2019), ECF Nos. 102, 103. The answer indicated that the combined network will be better and faster, and will deliver more advanced mobile wireless services to more Americans at lower prices than any network either Sprint or T-Mobile could deploy on its own. These lower prices, in turn, will drive more intense competition, which will benefit all consumers. The merger would enable the combined firm to deliver the nation's first robust, nationwide 5G service and would create a new competitor for in-home broadband services. In addition, the parties refute claims that Sprint would likely play a meaningful competitive role as a stand-alone company in the years to come. Sprint has steadily lost subscribers, its free cash flow has been overwhelmingly negative, and it is struggling with its huge debt load and interest expense that last year was greater than its operating income.

The AG Complaint was amended on August 15, 2019 to add additional AGs and to assert that the DOJ's remedy does not eliminate the competitive harm. *See* Second Amended Complaint, *State of New York* v. *Deutsche Telekom AG*, No. 1:19-cv-5434-VM-RWL (S.D.N.Y. Aug. 15, 2019), ECF No. 197.

[92] Press Release, U.S. Dep't of Justice, *Justice Department Requires Structural Relief to Resolve Antitrust Concerns in Nexstar's Merger with Tribune* (July 31, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-structural-relief-resolve-antitrust-concerns-nexstar-s-merger.

[93] Press Release, U.S. Dep't of Justice, *Securus Technologies Abandons Proposed Acquisition of Inmate Calling Solutions After Justice Department and the Federal Communications Commission Informed Parties of Concerns* (Apr. 3, 2019), *available at* https://www.justice.gov/opa/pr/securus-technologies-abandons-proposed-acquisition-inmate-calling-solutions-after-justice.

competition for that product. Cigna and ESI did not have significant horizontal overlaps in the sale of individual PDPs or any other products.[94]

b. *Blue Cross Blue Shield of Louisiana/Vantage Holdings, Inc.*

On June 18, 2019, the DOJ issued a statement announcing the closing of its seven-month investigation of the proposed acquisition of a majority interest of Vantage Holdings, Inc. ("Vantage") by Louisiana Health Service & Indemnity Co. d/b/a Blue Cross Blue Shield of Louisiana ("Blue Cross").[95] In December 2018, the Louisiana Department of Insurance held a public hearing and approved the transaction. The DOJ indicated that its investigation had analyzed whether the merger would substantially lessen competition in the sale of health plans sold to individuals on the public exchange established by the Affordable Care Act or health plans sold to individuals through the public exchange. The DOJ cited to Vantage's rapidly declining membership in these products and its significantly higher premiums for comparable products as to why it did not appear that Vantage had a competitive impact on Blue Cross product pricing. As a result, the DOJ determined that the transaction is unlikely to harm consumers.

1-III. Enforcement Trends and Issues

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

Pharma/healthcare continues to be a very active area in 2019, 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.[96]

The FTC's consents in 2019 involving pharmaceutical transactions applied the same methodology as in the last decade. The life cycle stage of a particular drug treatment determines the FTC's focus. Some pharma deals involve overlaps at the development stage, *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.[97] Until the first generic product is introduced into the market, competition

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[94] Closing Statement, U.S. Dep't of Justice, *Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger* (Sept. 17, 2018), *available at* https://www.justice.gov/atr/closing-statement; Press Release, U.S. Dep't of Justice, *Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger* (Oct. 10, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d; Public Q&A, U.S. Dep't of Justice, *United States* v. *CVS and Aetna: Questions and Answers for the General Public* (Oct. 10, 2018), *available at* https://www.justice.gov/opa/press-release/file/1099806/download.

[95] Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Louisiana Health Service & Indemnity Co.–Vantage Holdings Inc. Merger* (June 18, 2019), *available at* https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-closing-its-investigation-louisiana-health.

[96] *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 enforcement activity.

[97] Ilene Knable Gotts & Richard T. Rapp, *Antitrust Treatment of Mergers Involving Future Goods*, ANTITRUST SOURCE at 100 (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 (Mar. 2005), *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/06_mar05_abrametz323.authcheckdam.pdf.

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 one 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.

Starting in 2016, with the *Teva/Allergan* merger,[98] the FTC also considered 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 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 FY 1996,[99] the Commission considered whether the transaction would discourage development of new generic products.

The FTC sued to unwind a merger involving two medical device companies in FY 2018—Otto Bock, the North American subsidiary of a German prosthetic knee maker, and Freedom. The FTC successfully argued before the ALJ that the acquisition eliminated existing competition in the market for MPK products.[100] Together, Otto Bock and Freedom comprise 70% of MPK sales, with the remaining four competitors each operating on a significantly smaller scale. According to the FTC, the transaction would not only eliminate competition between the transaction parties, but also result in higher prices, lower quality and less innovation. The parties unsuccessfully appealed the ALJ's decision to the Commission. In another matter involving medical devices in FY 2018, the FTC also required remedies. In *Fresenius/NxStage*,[101] the FTC alleged that the acquisition would likely result in substantial competitive harm to consumers in the U.S. market for bloodline tubing sets used in hemodialysis treatment, since Fresenius and NxStage were two of only three significant suppliers of bloodline tubing sets used in open architecture hemodialysis machines in the United States. Commissioners Chopra and Slaughter issued dissenting statements, raising concerns on the vertical aspects of the transaction as well. Fresenius was one of the two largest providers of in-clinic and in-home dialysis treatment and a manufacturer of dialysis equipment;

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[98] 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.

[99] 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.

[100] *See* 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.

[101] *See supra* note 38.

NxStage manufactures SystemOne, which Commissioner Slaughter indicated is the only competitively significant in-home hemodialysis machine in the market. Commissioner Slaughter further stated that, as a result of the transaction, the merged entity would have a monopoly or near-monopoly position for the manufacturing and sale of both in-clinic and in-home hemodialysis machines. Commissioner Slaughter was concerned that Fresenius would have the profit incentive to foreclose or raise the costs of its rivals when it acquired and controlled access to SystemOne, especially given its position as the dominant supplier of in-clinic dialysis machines and a significant supplier of other products used by competing dialysis clinics.

The FTC has been very active in challenging hospital system/physician group combinations. These challenges are often protracted, with trials and appeals to federal circuit courts.[102] 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. In addition, given the country's focus on healthcare reform, it is not surprising that hospitals have tried to assert quality and cost-saving objectives as defenses to a transaction. AGs are often involved in these investigations and challenges. Not all such investigations, however, result in challenges, with states being more flexible in the remedies they will accept to resolve concerns. For instance, in the proposed *CareGroup, Inc./BIDCO* combination,[103] the FTC staff and the Massachusetts AG investigated whether the proposed combination of the involved hospitals and physicians in eastern Massachusetts would lessen competition. The AG accepted price caps. Although a "close call," the FTC then voted to close its investigation.

Combinations of physician groups, particularly in rural areas, can raise concerns. In 2016, for example, one of the consents involved a consummated combination of six independent orthopedic practices in Berks County, Pennsylvania. In *United Health Group/DaVita Medical Group*,[104] the FTC took a somewhat different approach, limiting the product market to MCPOs providing physician services to MA insurers in the Las Vegas area. MCPOs are defined as "medical groups that employ or affiliate with a significant number of primary care physicians and specialists to ensure the coordination of patient care and control the costs of delivering proper care to patients, including MA members."[105] The proposed acquisition would have resulted in common control of the two MCPOs that cover over 80% of MA lives in the Las Vegas area.[106] The transaction would have also put under common ownership the largest MCPO and the largest MA insurer in the area.

The DOJ typically reviews insurance company mergers. 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. In contrast, in the *Blue Cross/Vantage* transaction, the DOJ closed its investigation due to Vantage's rapidly declining share and non-competitiveness.

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[102] *See, e.g.*, Sanford Health/Mid Dakota Clinic discussed *infra*.

[103] *See supra* note 49.

[104] *See supra* note 36.

[105] Complaint ¶ 7, *In the Matter of UnitedHealth Group Inc.*, FTC Docket No. C-4677 (June 19, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/181_0057_c4677_united_davita_complaint_6-19-19.pdf.

[106] *Id.* ¶ 15.

As discussed above, the DOJ required CVS to divest Aetna's Medicare Part D prescription drug business for individuals to WellCare Health Plans, Inc. CVS, the nation's largest retail pharmacy chain, and Aetna, the nation's third-largest health insurance company, competed in the sale of Medicare Part D plans, combined serving 6.8 million members nationwide. The DOJ found that the combination would have caused anticompetitive effects, including increased prices, inferior service, and decreased innovation in 16 Medicare Part D regions covering 22 states. The divestiture is nationwide, however, to provide WellCare the business assets and national scale that the DOJ believed WellCare required to replicate the competition that would be lost as a result of the merger. The DOJ also considered whether the merger would raise the cost of (1) CVS/Caremark's PBM services or (2) retail pharmacy services to Aetna's health insurance rivals (vertical theories). The DOJ indicated that it had determined that the merger was unlikely to cause CVS to increase costs to Aetna's health insurance rivals due to competition from other PBMs and retail pharmacies. In addition, the DOJ stated that the evidence showed that CVS was unlikely to be able to profitably raise its PBM services or retail pharmacy costs post-merger because it would lose customers and that Aetna would not be able to offset those losses by capturing additional health insurance customers. Similarly, the DOJ closed its investigation of the *Cigna/Express Scripts* transaction, which involved the vertical integration of PBM services and a health insurance plan.

B. Vertical Theories of Harm in the Limelight

Vertical mergers—*i.e.*, ownership of some combination of inputs, production, and distribution—can raise concerns to the extent that they enable the merged firm to raise rivals' costs or foreclose access to an input (input foreclosure), reduce rivals' revenues by foreclosing access to customers (distribution foreclosure), or otherwise create barriers to entry by forcing potential entrants to enter both the upstream and downstream markets simultaneously.[107] In addition, a vertical merger can potentially increase the likelihood of coordination among competitors due to access to competitively sensitive information regarding a competitor. Under the traditional "Chicago School" doctrine, these theories rarely resulted in an enforcement action, with vertical mergers typically viewed favorably because of their efficiency-enhancing potential through the reduction of double marginalization.[108] In fact, during the entire George W. Bush Administration, only a few transactions raised vertical concerns that required relief.

Enforcement activity involving vertical merger concerns during the Obama Administration increased some. For instance, in the combination of Comcast and NBC Universal ("NBCU"), the DOJ was concerned that Comcast could disadvantage its rivals in the provision of cable, as well as handicap its nascent online competitors, by withholding or raising the price of NBCU content, so it required Comcast to agree to license the content on similar or better terms than distributors had negotiated with NBCU's competitors, to refrain from unduly limiting NBCU content owners' ability to negotiate creative arrangements with Comcast competitors, and to refrain from retaliating against any broadcast network, affiliate, cable programmer, production studio, or content provider for licensing content to Comcast competitors.[109] The consent also required

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[107] *See* James Langenfeld, *Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up?*, 16 GEO. MASON L. REV., 851, 857–61 (2009), *available at* http://www.georgemasonlawreview.org/wp-content/uploads/2014/03/16-4_Langenfeld.pdf.

[108] *Id.*

[109] Final Judgment, *United States* v. *Comcast Corp.*, No. 1:11-CV-00106-RJL (D.D.C. Sept. 1, 2011), *available at*

Comcast to adhere to the FCC's Open Internet provisions, even though such provisions no longer have the effect of law.

Similarly, when Google acquired ITA Software, an aggregator and provider of airline flight information used by travel companies, the DOJ was concerned that Google would withhold the critical input from rivals like Orbitz. To address those concerns, the DOJ required the merged firm to continue to license the software to other flight search companies on fair, reasonable, and nondiscriminatory ("FRAND") terms, to make any upgrades available to other flight search services, and to refrain from entering into any agreements with airlines that would inappropriately restrict the airlines' right to share information with competing flight search companies.[110]

Antitrust agency interest in vertical mergers has increased substantially during the Trump Administration. As discussed in detail above, the DOJ brought the first court challenge based on vertical theories to block the proposed *AT&T/TW* transaction.[111] Publicly available data suggests that there were at least 14 significant investigations involving vertical issues from 2016 to 2018. In addition, as mentioned in this article, both the DOJ and the FTC have investigated a number of transactions on vertical theories in 2019, and have even required remedies in some.[112] Many of the vertical transactions arose in the healthcare sector, which is not surprising, given the significant pressure among industry participants to cut costs. This increased attention may be due in part to the increased rhetoric in the political arena pointing to the lack of vertical merger enforcement as being troubling.

Both the economic theories and modeling and the law are still evolving in the vertical merger context. The presumptions of harm applied in horizontal mergers do not apply in vertical transactions, and efficiencies are more likely to be counted, thereby requiring a balancing of the benefits of the transaction with the potential harm. As seen in *AT&T/TW*, Nash bargaining models are used by the agencies as part of the evidence of likely harm. Parties often counter with retrospective analyses negating the likelihood of foreclosure post-transaction. Third-party evidence is often mixed in nature. As a result, enforcers can reach different outcomes regarding whether an enforcement action should be taken in a particular matter, as has occurred at the FTC in three recently reported matters discussed above—*Staples/Essendant*, *Fresenius/NxStage* and *UHG/DMG*.

Another part of the debate is whether to resolve vertical concerns with conduct remedies. As discussed above, part of the DOJ's objections to the *AT&T/TW* transaction was the belief that conduct remedies should not be accepted even in vertical mergers. Conduct remedies have been used frequently in the past to resolve concerns in vertical mergers. As Obama Administration Deputy AAG Jon Sallet explained, however:

> 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 rivals' access to

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https://www.justice.gov/atr/case-document/file/492196/download.

[110] *See* Final Judgment, *United States* v. *Google Inc. and ITA Software, Inc.*, No. 1:11-cv-00688-RLW (D.D.C. Oct. 5, 2011), *available at* https://www.justice.gov/atr/case-document/file/497636/download.

[111] *See* 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.

[112] *See, e.g.*, UHG/DMG, *supra* note 39.

> 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.[113]

The current DOJ leadership has indicated that although it has not ruled out behavioral remedies entirely, the standard for proving that any such remedy will cure the anticompetitive harm is high. Thus, the DOJ will typically require structural relief—rather than behavioral remedies—to remedy antitrust concerns. In a keynote speech at the ABA Antitrust Fall Forum on November 16, 2017, AAG Makan Delrahim explained that behavioral remedies are "fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market."[114] Such regulatory schemes "require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market."[115] In addition, such remedies are challenging to enforce, presuming "that the Justice Department 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."[116] Finally, AAG Delrahim indicated that "as 11 Senators wrote to the Attorney General earlier this year, the 'lack of enforceability and reliability of such conditions [can] render them insufficient' to protect consumers. As we reduce regulation across the government, I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer."[117] However, the above-stated position was prior to the D.C. Circuit's decision in *AT&T/TW*, in which the Court appeared to be endorsing the district court's

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[113] Jon Sallet, U.S. Dep't of Justice, Deputy Ass't Att'y Gen. of the Antitrust Div., *The Interesting Case of the Vertical Merger*, Remarks at the American Bar Association Fall Forum (Nov. 17, 2016), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

[114] Makan Delrahim, U.S. Dep't of Justice, Ass't Att'y Gen. of the Antitrust Div., 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 ("November 16, 2017 Delrahim"). *See also* Makan Delrahim, U.S. Dep't of Justice, Assistant Attorney Gen. of the Antitrust Div., *Improving the Antitrust Consensus*, Remarks Delivered at the New York State Bar Association (Jan. 25, 2018), *available at* https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar.

[115] November 16, 2017 Delrahim, *supra* note 114.

[116] *Id.*

[117] *Id.* Examples of transactions with vertical concerns in which the DOJ has required a divestiture during the Trump Administration include *Danone/WhiteWave* (*see* 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) (supply contract with CROPP, WhiteWave's rival could facilitate collusion; required divestiture of Stonyfield business that had the supply contract); *Bayer/Monsanto* (*see* Press Release, U.S. Dep't of Justice, *Justice Department Secures Largest Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto* (May 29, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened) (Monsanto's potential foreclosure of seed competitors from accessing Bayer's seed treatments at competitive prices resolved with divestiture of Bayer's seed treatment business); *CRH/Pounding Mill* (*see* Press Release, U.S. Dep't of Justice, *Justice Department Requires CRH to Divest Rocky Gap Quarry in Order to Proceed with Pounding Mill Acquisition* (June 22, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-crh-divest-rocky-gap-quarry-order-proceed-pounding-mill) (potential foreclosure of CRH's asphalt rivals' ability to get aggregate materials from Pounding Mill at competitive prices resolved with divestiture of a Pounding Mill quarry). *But see AMC/Carmike* (*see* 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) (potential foreclosure of Screenvision at Carmike theaters and potential collusion between Screenvision and AMC's NCM subsidiary that competes with Screenvision); resolved by requiring

consideration of the arbitration provision in deciding that the combination was unlikely to harm competition. It remains uncertain whether this decision will impact the DOJ's enforcement decisions.

It is also unclear to what extent the FTC will diverge from the DOJ in accepting conduct remedies in the future.[118] Then FTC Competition Bureau Director Bruce Hoffman indicated that "the FTC prefers structural remedies to structural problems, even with vertical mergers."[119] At the same time, however, the FTC recognized that:

> in some cases . . . a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration . . . if 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.[120]

Moreover, in *Northrop Grumman/Orbital ATK*, the FTC recently accepted behavioral—rather than imposing structural—remedies, noting that it "typically disfavors behavioral remedies," but permitted their use in this transaction "given the special characteristics of the defense industry."[121] The more recent enforcement decisions this year show a split among the Commissioners on the extent to which structural remedies will be presumptively imposed. As seen in the *Staples/Essendant* matter, for instance, where the concern related to access to information from customers, a firewall may be sufficient to address concerns.[122]

1-IV. HSR Enforcement and Procedural Developments

A. Premerger Notification Violations

On June 4, 2019, the DOJ announced having settled charges that Canon Inc. ("Canon") and Toshiba ("Toshiba") violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") when Canon acquired Toshiba Medical Systems Corporation ("TMSC") from Toshiba in 2016.[123] The complaint alleged that the

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AMC to eliminate certain governance rights in NCM and requiring Carmike and some AMC theaters to join Screenvision's network).

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

[119] *Id.* at 7.

[120] *Id.* at 8–9.

[121] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.* (June 5, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket.

[122] *See also* 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 (FTC's concerns that transaction would provide Brocade access to rival Cisco's information due to Broadcom's vertical relationship with Cisco resolved with a firewall).

[123] *See* Press Release, Fed. Trade Comm'n, *Canon Inc., Toshiba Corporation Agree to Pay $5 Million for Violating Federal Antitrust Laws* (June 10, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/06/canon-inc-toshiba-corporation-agree-pay-5-million-violating.

parties admitted that Canon could not acquire the company outright before the end of Toshiba's fiscal year (March 2016) due to the review periods under the various merger control laws, so the parties devised a scheme to avoid observing the waiting period by not delivering formal control of the voting shares until December 2016, and at a nominal value. Specifically, Toshiba and Canon created MS Holding, a special purpose company. Toshiba rearranged corporate ownership of TMSC to create new classes of voting shares, a single non-voting share with rights custom-made for Canon, and share options convertible into ordinary voting shares. Toshiba sold Canon TMSC's single non-voting share and the newly created options in exchange for $6.1 billion, and at the same time transferred the voting shares of TMSC to MS Holding in exchange for a nominal payment of $900. Canon and MS Holding filed an HSR Act notification on April 26, 2016 for the exercise of the options. On July 22, 2016, each party amended, under protest, the original HSR filings made by Canon and MS Holding to substitute Toshiba as the acquired person in the sale of TMSC. The waiting period on the amended filings expired on August 22, 2016. In December 2016, after the HSR Act notification waiting period had expired, Canon exercised its options and obtained formal control of TMSC's voting shares.[124] The risk of loss, benefits of gain, and any decrease or increase in TMSC's value were not borne by MS Holding, but, rather, Canon, and MS Holding merely served to hold temporarily TMSC's voting securities for Canon's benefit.

The settlement calls for Canon and Toshiba to each pay $2.5 million in civil penalties, a discount from the $12.72 million that could have been assessed.[125] As AAG Delrahim explained: "The HSR Act is an essential tool for antitrust enforcement because it allows federal antitrust enforcers to review proposed acquisitions for potential anticompetitive effects before they occur. Canon and Toshiba structured their transaction for the purpose of avoiding the HSR Act's requirements . . . . *An acquiring person may not enlist a third party to make an acquisition on its behalf to evade the HSR Act*."[126]

B. Third Point Settles HSR Act Violation Charges

Third Point LLC, an investment advisor, and three funds it controls, agreed to settle FTC charges that the funds violated the HSR Act when the shares of Dow Inc. owned by the funds converted to shares in the newly formed DowDuPont Inc. on August 31, 2019.[127] The parties had made a corrective HSR notification filing on November 8, 2017 and the waiting period for the corrective filing expired on December 8, 2017. Therefore, the FTC alleged that each defendant fund was in violation of the HSR Act each day between August 31, 2017 and December 8, 2017.

The settlement requires a payment of $609,810 (a steep discount from the total that could have been imposed under the HSR Act). The funds and Third Point LLC are subject to a 2015 court order for having previously violated the HSR Act in connection with acquisitions of voting

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[124] *See* Complaint, *United States* v. *Canon Inc.*, No. 1:19-cv-01680 (D.D.C. June 10, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/canon-toshiba_complaint_6-10-19.pdf.

[125] The EC is reportedly conducting its own investigation into whether the actions also violated its merger control law.

[126] Dep't of Justice, *Canon Inc., Toshiba Corporation Agree to Pay $5 Million for Violating Federal Antitrust Laws* (June 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/06/canon-inc-toshiba-corporation-agree-pay-5-million-violating (emphasis added).

[127] *See* Press Release, Fed. Trade Comm'n, *Three Third Point Funds Agree to Pay $609,810 in Civil Penalties for Violating the Hart-Scott-Rodino Act* (Aug. 28, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/08/three-third-point-funds-agree-pay-609810-civil-penalties.

securities of Yahoo! Inc. and for relying on the investment-only exemption. The FTC does not claim that the defendants' conduct in the current complaint violated the 2015 court order.

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

The major Democratic Presidential candidates have all embraced the need for antitrust policy reform as a cure for various societal concerns.[128] Not surprisingly, this is consistent with initiatives of the Democratic congressional leadership to introduce significant legislative changes. On September 14, 2017, U.S. Senator Amy Klobuchar (Ranking Member of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights) introduced two bills that, if enacted, would substantially change the process and substantive standards for antitrust merger review in the United States.[129] The proposals, which have been endorsed by several other Democratic Senators, were the most definitive legislative expression of a desire for tougher merger enforcement in recent years. Sentiment against large companies and "megamergers," 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 2017, entitled "A Better Deal: Better Jobs, Better Wages, Better Future."[130] The first of these bills,[131] 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,[132] annual reports by parties to consent decrees detailing consumer benefits, agency investigations into holdings by institutional investors,[133] the effectiveness of merger settlements, and the impact of mergers on wages, innovation, and new business formation.

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[128] Victoria Graham, *Dem Presidential Candidates Seize on Antitrust as Campaign Issue*, BLOOMBERG (Mar. 9, 2019), *available at* https://news.bloomberglaw.com/mergers-and-antitrust/dem-presidential-candidates-seize-on-antitrust-as-campaign-issue-1.

[129] *See* Eric Kroh, *Sen. Klobuchar Unveils Bills To Beef Up Merger Enforcement*, LAW360 (Sept. 14, 2017), *available at* https://www.law360.com/articles/964180/sen-klobuchar-unveils-bills-to-beef-up-merger-enforcement.

[130] 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* House Democratic Policy & Commc'ns Comm., *A Better Deal: Better Jobs, Better Wages, Better Future* (July 24, 2017), *available at* https://dpcc.house.gov/abetterdeal.

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

[132] For transactions valued at $5 billion or more, the HSR Act filing fee would increase to $2.25 million. *Id.*

[133] 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 C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, JOURNAL OF FINANCE 73(4) (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*, WALL ST. J. (Jan. 11, 2017), *available at* https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781.

The second bill, the Consolidation Prevention and Competition Promotion Act of 2017, S.1812, would change the substantive injunction 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 "megamergers,"[134] 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.

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 may become a potential source of divergence between the U.S. agencies and other mature antitrust enforcement agencies.

In addition, some of the Democratic Presidential candidates have focused on prior M&A activity of high technology companies, calling for investigations and possible breakups of these companies.[135] The Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights has held hearings focusing on acquisitions of nascent or potential competitors by dominant digital platforms.[136] Subcommittee Co-Chair Klobuchar (who is running for President) has indicated that "the series of acquisitions that have propelled tech giants' rapid growth over the years raise 'serious competition issues.'" In addition, Senator Klobuchar is cited as saying that "Big technology companies have become some of the most powerful organizations in the world. They face little competition and there are numerous examples of the companies purchasing startup competitors in various lines of business."[137]

1-VI. Conclusion

Antitrust policy and enforcement is currently in the political limelight. Even absent passage of the pending legislation to alter materially the merger review standards, the DOJ and the FTC have been very active in investigating and undertaking enforcement actions in mergers. In addition, the

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[134] Eric Kroh, *Sen. Klobuchar Unveils Bills To Beef Up Merger Enforcement*, LAW360 (Sept. 14, 2017), *available at* https://www.law360.com/articles/964180/sen-klobuchar-unveils-bills-to-beef-up-merger-enforcement; Consolidation Prevention and Competition Promotion Act of 2017, S.1812, 115th Cong. (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 "megamerger." The extra scrutiny would apply to transactions in which the value of the acquired business exceeds $5 billion.

[135] *See* Sheelah Kolhatkar, *How Elizabeth Warren Came Up With a Plan to Break Up Big Tech*, THE NEW YORKER (Aug. 20, 2019), *available at* https://www.newyorker.com/business/currency/how-elizabeth-warren-came-up-with-a-plan-to-break-up-big-tech; Kevin Roose, *A Better Way to Break Up Big Tech*, N.Y. TIMES (Mar. 13, 2019), *available at* https://www.nytimes.com/2019/03/13/technology/elizabeth-warren-tech-companies.html.

[136] *US: Senate antitrust panel to hold hearing on tech mergers*, COMPETITION POLICY INT'L (Sept. 3, 2019), *available at* https://www.competitionpolicyinternational.com/us-senate-antitrust-panel-to-hold-hearing-on-tech-mergers/.

[137] Harper Neidig, *Senate antitrust panel to hold hearing on tech mergers*, THE HILL (Sept. 3, 2019), *available at* https://thehill.com/policy/technology/459736-senate-antitrust-panel-to-hold-hearing-on-tech-mergers.

FTC has held hearings on a broad array of topics that include the underlying fundamental principles applied during merger review. High technology mergers have gotten special attention. This heightened activity is likely to continue throughout 2020, as Presidential candidates continue to raise antitrust legislation as both the problem and the solution for a wide variety of societal issues.