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Is Change in the Air? U.S. M&A Merger Enforcement During the Last Year of the Trump Administration and What We May See in 2021

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During the last year of the Trump Administration, the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "Commission") continued to memorialize their views regarding merger enforcement and remedies. As with prior administrations, the Trump Administration used consent orders to resolve agency concerns and to communicate policy.[1] In addition, the agencies continued to bring court challenges to block transactions, with mixed success at the federal trial court level.

Both agencies focused on innovation and nascent competition in their investigations and challenges.[2] Healthcare/pharma remained a key industry for agency scrutiny and challenge. Many enforcement actions were premised on narrow market definitions and a focus on unilateral efforts. In the litigated cases the government lost, the courts concluded that the economic evidence did not support the market definition asserted by the government. The agencies jointly issued vertical merger guidelines, which the FTC augmented with a vertical merger commentary; the DOJ released a remedies manual; and the FTC announced a new merger retrospective study and proposed changes to the Hart-Scott-Rodino ("HSR") rules that would impact minority interest acquisitions and include affiliate holdings.

Over the past few years, the political arena and the federal enforcement agencies have focused on antitrust enforcement policy as part of a broader industrial and societal policy. For instance, FTC Commissioner Rebecca Slaughter advocated that the FTC take steps to ensure greater equity in its enforcement decisions,[3] and FTC Commissioner Rohit Chopra supported unfair methods of competition and data security rule-making proceedings.[4] Each of the major Democratic Presidential candidates expressed views on the role of antitrust policy, with some advocating major changes in the law, particularly with respect to

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[1] *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—LIBER AMICORUM (Vol. 1) (Charbit et al. eds., Feb. 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] *See, e.g.*, *Illumina/PacBio* transaction (nascent competition in the market for next-generation DNA sequencing systems), Sabre/Farelogix (innovation competition) *Edgewell/Harry's* (nascent competition for direct-to-consumer ("DTC") men's razors), Visa/Plaid (innovation competition for payment platforms), *Procter & Gamble/Billie* (nascent competition for DTC women's razors), discussed *infra*.

[3] Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sept. 26, 2020, 10:45 AM), *available at* https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

[4] Rohit Chopra & Lina M. Khan, *The Case for 'Unfair Methods of Competition' Rulemaking*, 86 U. CHI. L. REV. 357 (2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1568663/rohit_chopra_and_lina_m_khan_the_case_for_unfair_methods_of_competition_rulemaking.pdf; Fed. Trade Comm'n, *Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter Regarding Data Security and the Safeguards Rule*, FTC File No. P145407 (Mar. 2, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1567795/final_statement_of_rchopra_re_safeguards.pdf.

agricultural and high technology firms. Some key members of the Democratic congressional leadership also advocated major changes to antitrust procedures and standards, all under the rubric of a "Better Deal." In addition, congressional committees held hearings on a wide range of topics, including the consumer welfare standard and enhanced enforcement tools for high technology companies. Although at this time it is not clear that the Republicans will retain a majority position in the Senate, there are some potential legislative changes that may gain bipartisan support. Moreover, regardless of whether new legislation passes, however, antitrust enforcement is likely to be as vigorous, if not more so, going forward. There will also be new leadership at both agencies at some point, likely starting in the Spring of 2021.

Transaction parties should, therefore, be cognizant of the heightened 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, the reviewing 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 focus on antitrust enforcement, however, are likely to have a greater overall impact on M&A enforcement than on specific transactions alone.

I. Agency Merger Enforcement Activities

A. FTC

As discussed below, during FY 2020, the FTC had a mixed litigation record in its challenges of proposed transactions: It won one challenge, lost one challenge, and the transaction parties abandoned another three transactions after the FTC filed its court challenge. One preliminary injunction ("PI") case remained pending at the end of the fiscal year. The FTC continued to pursue challenges to three consummated transactions in litigation as well. Proceedings continued in the *Jefferson Health*, *Axon*, and *Altria* litigation matters discussed below, with the FTC losing at the district court level in *Jefferson Health*. In addition, the FTC brought administrative actions and filed a district court case (1) in the Western District of Tennessee seeking to block the acquisition of two Memphis-area hospitals owned by Tenet and operating together as Saint Francis Hospital by Methodist Le Bonheur Healthcare;[5] (2) in the District of Columbia seeking to block the acquisition of bankrupt online rental property marketing company RentPath Holdings by CoStar

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[5] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Proposed Acquisition of Two Memphis-Area Hospitals* (Nov. 13, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-proposed-acquisition-two-memphis-area-hospitals. The complaint alleged that the proposed acquisition would substantially lessen competition in the Memphis area for a broad range of inpatient medical and surgical diagnostic and treatment services that require an overnight hospital stay, known as inpatient general acute care ("GAC") services, sold to commercial insurers and their insured members. The FTC found that there are only four hospital systems currently provide GAC services in the Memphis area, and, according to the FTC, the combined health system control would have approximately 60 percent of the Memphis-area market for GAC services. Moreover, the complaint alleged that only one other major hospital system, Baptist Memorial Health Care, would meaningfully constrain the combined health system, with the other system in the area, Regional One, being smaller and focusing on a different patient population.

The Commission vote was five-to-zero in favor of bringing the enforcement action. FTC Commissioners Christine Wilson and Noah Phillips issued a separate statement noting their concern about the barriers to robust hospital competition that exist in states, such as Tennessee, with Certificate of Need laws. Fed. Trade Comm'n, Statement of Commissioner Christine S. Wilson Joined by Commissioner Noah Joshua Phillips, *In the Matter of Methodist Hospital/Tenet St. Francis Hospital*, FTC File No. 191-0189 (Nov. 13, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1583210/d-9396_methodist_and_tenet_-_cw_and_np_statement.pdf. The administrative trial was originally scheduled to begin on May 18, 2021. *See supra* note 9.

Group Inc.;[6] (3) in the District of New Jersey seeking to block the Hackensack Meridian Health Inc.'s proposed acquisition of Englewood Healthcare Foundation;[7] and (4) in the District of Columbia to enjoin Procter & Gamble Company's acquisition of Billie, Inc.[8] On December 23, 2020, Methodist Le Bonheur announced the abandonment of its merger with St. Francis hospitals in Memphis.[9] On December 30, 2020, CoStar and RentPath abandoned their transaction.[10]

Outside of litigation, the FTC obtained remedies as a condition for clearance in 10 proposed transactions during the fiscal year. During the remainder of 2020, the FTC required consent

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[6] Press Release, Fed. Trade Comm'n, *FTC Sues to Block CoStar Group, Inc.'s Proposed Acquisition of Chief Competitor RentPath Holdings, Inc.* (Nov. 30, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-costar-group-incs-proposed-acquisition-chief. The FTC Commission voted four-to-one (FTC Commissioner Wilson dissenting) to challenge internet listing services provider CoStar Group Inc.'s proposed $587.5 million acquisition of competitor RentPath Holdings, Inc. CoStar operates a network of websites, including Apartments.com, ApartmentFinder.com, and ForRent.com, which are two-sided platforms that match prospective renters with available apartments. RentPath operates similar websites, including Rent.com and ApartmentGuide.com.

The complaint alleged that the acquisition would significantly increase concentration in the already highly concentrated markets for internet listing services advertising for large apartment complexes in 49 individual metropolitan areas across the United States. Internet listing services ("ILSs") provide free user-friendly interfaces for consumers to search for a place to live from a database of available units. According to the complaint, 70 percent of U.S. apartment complexes with 200 or more units, and approximately 50 percent of U.S. apartment buildings with 100 to 199 units, advertise on ILSs operated by either CoStar, or RentPath, or both. The acquisition will allegedly increase concentration in these markets even further.

The transaction parties argue that apartment ILS websites are not in their own unique market, and 93 percent of all renters go to Google to search for an apartment. In addition, Zillow and Facebook are also competitors. RentPath had entered Chapter 11 bankruptcy in February 2020.

The administrative trial was originally scheduled to begin on June 1, 2021. *See supra* note 10.

[7] Press Release, Fed. Trade Comm'n, *FTC Challenges Hackensack Meridian Health, Inc.'s Proposed Acquisition of Competitor Englewood Healthcare Foundation* (Dec. 3, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/12/ftc-challenges-hackensack-meridian-health-incs-proposed. The FTC alleged that the combined healthcare system would control three of the six GAC hospitals in Bergen County, New Jersey, and would eliminate the close competition that existed between the parties. The administrative trial is scheduled to begin on June 15, 2021.

[8] Press Release, Fed. Trade Comm'n, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc. According to the FTC's press release, "P&G sells women's and men's razors under various brands, including Gillette, Venus, and Joy" while "Billie sells a quality, mid-tier women's system razor targeted at Generation Z and Millennial women." The FTC noted that Billie's marketing effort "attack[s] the practice of pricing women's razors higher than comparable men's razors—otherwise known as the 'pink tax.'" The complaint emphasizes Billie's "female first" message, which "challenged traditional portrayal of women's razors." Further, "Billie targeted P&G from the start, with a vision to [d]ethrone Gillette Venus to become the number one women's razor brand in the U.S." The FTC further asserted that "P&G's CEO of Grooming viewed the 'big' value from this acquisition as the 'removal of the competitive threat.'" Complaint ¶¶ 4, 6, *In the Matter of Proctor & Gamble* Company, FTC Docket No. 9400 (Dec. 8, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09400_administrative_part_3_complaintpublic600214.pdf. The administrative trial was scheduled to begin on June 22, 2021. On January 5, 2021, the parties announced that they had mutually agreed to terminate their merger agreement. P&G, Billie Terminate Planned Merger After U.S. FTC Challenge, Reuters (Jan. 5, 2021 10:29 AM), available at https://www.reuters.com/article/us-billie-m-a-p-g/pg-billie-terminate-planned-merger-after-u-s-ftc-challenge-idINKBN29A1RA.

[9] Matthew Perlman, *Memphis Hospitals Ditch Deal in Wake of FTC Challenge*, Law360 (Dec. 23, 2020 8:27 PM), *available at* https://www.law360.com/articles/1340625.

[10] Press Release, *RentPath Terminates Agreement to Be Acquired by Costar Group*, RentPath (Dec. 29, 2020), *available at* https://www.rentpath.com/blog/rentpath-terminates-agreement-to-be-acquired-by-costar-group/.

decrees in another two proposed transactions. In several other transactions, the parties abandoned the transaction during the FTC's investigation due to antitrust concerns.

1. *FTC Litigation Challenges*

a. *FTC Unsuccessfully Challenged 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").[11] The FTC alleged that the merger would substantially reduce competition in the Pacific Northwest and in 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 asserted that, for most end uses, there are no effective substitutes, and, because of high transportation costs, customers prefer nearby suppliers.

The FTC alleged both coordinated effects (citing an oligopoly structure with a long history of price fixing) and unilateral effects (with only one other hydrogen peroxide producer in the Pacific Northwest and three other producers remaining in the Southern and Central United States). In addition, the complaint alleged that customers have benefitted from competition between Evonik and PeroxyChem in the form of lower prices. The administrative trial was scheduled for January 22, 2020.

The district court case was assigned to Judge Timothy J. Kelly. The court held a two-week evidentiary hearing in November 2019, during which it heard from 20 fact witnesses and two experts and received hundreds of exhibits. The companies argued that standard grade hydrogen peroxide, which Evonik focuses on, and specialty grades, which are the strength of PeroxyChem, represent distinct product markets. The FTC argued for a single market, under the theory that suppliers of a product have the ability to easily switch from one product grade to another, giving one firm the ability to monopolize an entire product market.

The district court denied the FTC's PI motion on January 24, 2020 and issued its opinion on February 3, 2020. The court rejected the FTC's "theory of supply-side substitution," calling it a "substantial departure from the typical way in which a product market is defined."[12] Judge Kelly, however, did not hold that a relevant market could *never* be defined based on supply substitution; instead, the court adopted a three-part inquiry into whether supply substitution is (1) nearly universal, (2) easy, and (3) profitable.[13] The court found that the FTC's market definition was an

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[11] 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.

[12] *FTC* v. *RAG-Stiftung*, 436 F. Supp. 3d 278, 292 (D.D.C. 2020). *See* Randy Chugh, Andrew J. Ewalt, and Nicholas Hill, *Supply Substitution and Market Definition: Lessons from FTC v. RAG-Stiftung*, THE ANTITRUST SOURCE, Oct. 2020, *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/oct-2020/oct2020_chugh_no_copyright.pdf.

[13] *RAG-Stiftung*, 436 F. Supp. 3d at 292–93.

"oversimplification," since switching from one grade of hydrogen peroxide to another is not a profitable or easy strategy.[14] Judge Kelly also found that the market had shown a tendency in just one direction, rather than swinging back and forth.[15] Based on the record, the court concluded that since the FTC had failed to meet its burden of proof, its "failure begins and ends" with its supply-side swing theory.[16]

The court also considered the appropriateness of the two regional relevant product markets asserted: It rejected the Southern and Central United States geographic market on the basis that the geographic market is useless to the FTC, since it has failed to delineate it properly as a separate cognizable relevant product market; and rejected the Pacific Northwest geographic market on the basis that any anticompetitive effects were resolved by PeroxyChem's proposed divestiture of its Prince George, British Columbia plant to United Initiators ("UI").[17]

Following the district court's decision, the Commission elected not to file a motion for an emergency injunction or any other relief pending appeal. The transaction parties completed the acquisition on February 3, 2020.[18] On February 7, 2020, the defendants filed a motion with the administrative court to have the FTC withdraw the matter from administrative adjudication and that motion was granted on February 11, 2020.[19] The parties closed on the plant servicing the Southern and Central United States and, as they had agreed to do prior to the court's decision, divested the plant servicing the Pacific Northwest.

b. *Parties Abandoned Illumina's Proposed Acquisition of PacBio after FTC Challenge*

On December 17, 2019, the FTC voted five-to-zero to challenge in an administrative proceeding Illumina Inc.'s ("Illumina") proposed acquisition of Pacific Biosciences of California ("PacBio").[20] The FTC alleged that Illumina is a monopolist that dominates DNA sequencing markets in the United States and worldwide, including for "next-generation DNA sequencing" ("NGS"), the technology that allows identification of the order of the component blocks in a DNA sample. The FTC attributed a share of over 90% to Illumina in these markets and indicated that Illumina has faced little competition for its NGS instruments and consumables (collectively, "systems"). The

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[14] *Id.* at 287.

[15] *Id.* at 295.

[16] *Id.* at 292.

[17] The Canadian Competition Bureau entered into a consent agreement with Evonik approving the merger, conditioned on the divestiture of the Prince George plant to UI. Press Release, Competition Bureau, *Competition Bureau Statement Regarding Evonik's Proposed Merger with PeroxyChem* (Jan. 28, 2020), *available at* https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04519.html.

[18] Press Release, Evonik, *Evonik Successfully Closes Acquisition of PeroxyChem* (Feb. 3, 2020), *available at* https://corporate.evonik.com/en/evonik-successfully-closes-acquisition-of-peroxychem-122808.html.

[19] Order Withdrawing Matter From Adjudication, *In the Matter of RAG-Stiftung*, FTC Docket No. 9384 (Feb. 11, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09384_commission_order_withdrawing_matter_from_adjudication.pdf.

[20] Press Release, Fed. Trade Comm'n, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio. The Commission also authorized filing a suit in federal district court seeking a temporary restraining order and a preliminary injunction, if necessary, to maintain the status quo pending the administrative proceeding. On October 24, 2019, the U.K. Competition and Markets Authority ("CMA") had provisionally blocked the transaction and issued a remedies notice.

FTC described PacBio as one of the few firms that has managed to gain a foothold in the NGS markets, with a system that offers substantial benefits over Illumina's systems, but has a lower throughput and is more expensive. PacBio recently had made advancements that reportedly brought down the cost of sequencing using its systems, which made PacBio a closer alternative to Illumina than before. Accordingly, the FTC alleged that the acquisition of PacBio would extinguish it as a competitive threat by eliminating competition between the two companies now and in the future and further insulate Illumina's monopoly. The FTC also alleged that the combination would reduce the incentive to innovate and develop new offerings.

The administrative trial was scheduled to begin on August 18, 2020. On January 2, 2020, the parties announced that they had mutually agreed to terminate their merger agreement, with Illumina paying PacBio a termination fee of $98 million in addition to continuation fees, which had been agreed to on December 18, 2019, when the parties extended the merger end date to March 31, 2020.[21]

c. *Parties Abandoned Post Holdings/TreeHouse Transaction after FTC Challenge*

On December 19, 2019, the FTC filed an administrative complaint challenging Post Holdings, Inc.'s ("Post") proposed acquisition of TreeHouse Food Inc.'s ("TreeHouse") private label ready-to-eat ("RTE") cereal business.[22] The FTC indicated that Post and TreeHouse are two of only three significant manufacturers and distributors of private label RTE cereal in the United States, and combined account for a 60% market share. In addition, the FTC contended that the companies are often the two best options for retailers and that the deal would eliminate such head-to-head competition. According to the FTC, the proposed acquisition would remove the competitive pressure that has driven higher-quality and lower-priced cereals. The Commission also authorized the staff to seek a temporary restraining order and PI, which it did on December 27, 2020, in federal district court and the District of Columbia.

An administrative trial was scheduled to begin on May 27, 2020. On January 13, 2020, however, the parties announced that they had abandoned the transaction.[23]

d. *Parties Abandoned Edgewell's Proposed Acquisition of Harry's after FTC Challenge*

On February 3, 2020, the FTC authorized the staff to file suit to enjoin Edgewell Personal Care Company's ("Edgewell") proposed acquisition of Harry's Inc. ("Harry's") in federal district court for the District of Columbia.[24] The FTC also issued an administrative complaint. The complaint alleged that: (1) historically, Procter & Gamble's ("P&G") Gillette brand and Edgewell's Schick brand have dominated the systems razors and disposable razors ("wet shave razors") industry; (2) razor manufacturers had enjoyed exceptionally high margins, and, as the 2010s progressed, P&G

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[21] *See* Form 8-K, Illumina, Inc. (Jan. 2, 2020), *available at* https://sec.report/Document/0001110803-20-000005/.

[22] Press Release, Fed. Trade Comm'n, *FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business Will Harm Competition* (Dec. 19, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse.

[23] Press Release, Post Holdings, Inc., *Post Holdings Terminates Agreement to Buy Ready-to-Eat Cereal Business from TreeHouse Foods, Inc.* (Jan. 13, 2020), *available at* https://www.postholdings.com/2020/01/13/post-holdings-terminates-agreement-to-buy-ready-to-eat-cereal-business-from-treehouse-foods-inc.

[24] Press Release, Fed. Trade Comm'n, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition.

and Edgewell had raised their prices even higher; (3) two firms—Harry's and Dollar Shave Club—saw an opportunity to disrupt the market by selling no-frills, value-priced system razor products on the Internet DTC at lower prices than the most comparable razors then available in brick-and-mortar retail stores; (4) the successful entry by Harry's and Dollar Shave Club with their online DTC models did not stop price increases by P&G and Edgewell; and (5) it was only when, in August 2016, Harry's made the successful leap from an online DTC platform into brick-and-mortar retail with an exclusive deal at Target that the pricing practices of P&G and Edgewell reportedly changed. In May 2018, Harry's launched at Walmart, which the FTC asserted resulted in Harry's taking shelf space and customers from Edgewell and Gillette.

According to the FTC, head-to-head competition between Harry's and Edgewell further intensified when, in October 2019, Harry's launched its first women's razor and Edgewell preemptively reduced prices on its Hydro Silk women's razors and ran aggressive promotions in anticipation of its launch into Target. Moreover, the FTC indicated that current market share statistics and concentration measures understated Harry's future competitive significance because Harry's continued to expand into additional retailers with its men's and women's products.

The FTC distinguished the competition from Dollar Shave Club, which was owned by Unilever plc, on the basis that Dollar Shave Club does not manufacture or sell disposable razors and that its razors are generally not available in brick-and-mortar retail stores. The FTC asserted that the timing, scope, and competitive impact of entry by others was speculative and likely would not counteract the proposed acquisition's competitive harm, especially when balanced against a fair projection of Harry's continued growth as a value-priced razor product already established in retail stores.

The FTC alleged as potential relevant markets the market for the manufacture and sale of wet shave razors, as well as the following narrower relevant markets: sale of wet shave razors at brick-and-mortar retailers; sale of system razors; sale of system razors at brick-and-mortar retailers; sale of men's wet shave razors; sale of men's wet shave razors at brick-and-mortar retailers; sale of men's system razors; sale of women's system razors; sale of men's system razors at brick-and-mortar retailers; sale of women's system razors at brick-and-mortar retailers; sale of women's wet shave razors; sale of women's wet shave razors at brick-and-mortar retailers; and a cluster market of sales of wet shave razors at retailers where Harry's was currently available.

Finally, the FTC alleged both unilateral and coordinated competitive effects and asserted that there were no countervailing market benefits. Edgewell announced on February 10, 2020 that it had terminated its agreement with Harry's.[25]

e. *FTC Successfully Challenged Proposed Peabody Energy/Arch Coal Joint Venture*

On February 26, 2020, the FTC voted four-to-one (FTC Commissioner Christine Wilson dissenting) to file an administrative complaint challenging a proposed joint venture between Peabody Energy Corporation ("Peabody") and Arch Coal that would combine their coal mining operations in the Southern Powder River Basin ("SPRB") in Northeastern Wyoming. The FTC

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[25] Press Release, Edgewell Personal Care Co., *Edgewell Personal Care to Pursue Standalone Value Creation Strategy* (Feb. 10, 2020), *available at* https://ir.edgewell.com/news-and-events/press-releases/2020/02-10-2020-111957575?sc_lang=en.

also authorized the staff to file a complaint for a PI in the Eastern District of Missouri (a venue where one of the largest concerned customers was located).[26]

Peabody and Arch Coal were alleged to be the two major competitors for thermal coal in the SPRB, and the two largest coal mining companies in the United States. The complaint attributed to Peabody and Arch Coal more than 60% of all SPRB coal mined and more than 60% of SPRB coal reserves. SPRB coal is reported to be attractive to electric power producers in the Central United States and the Upper Midwest and owners of power generation units designed to burn SPRB coal have high fixed costs and cannot readily replace SPRB with other energy sources.

The district court trial was scheduled to begin on June 1, 2020 and the administrative trial was scheduled to begin on August 11, 2020; both were delayed as a result of the COVID-19 pandemic, with the new commencement dates for the district court trial and administrative court trial being July 13, 2020 and December 1, 2020, respectively. Market definition was a gating issue: the transaction parties argued that natural gas from hydraulic fracking and renewable power from solar and wind generation are displacing the use of thermal coal, and, therefore, should be included in the market. Although thermal coal production in the SPRB has declined by over 50% since 2008, the FTC argued that the utilities that own plants that rely on SPRB coal would not reduce their purchases enough to defeat a price increase.

The district court held a nine-day hearing, with closing arguments on August 10, 2020.

On September 29, 2020, Judge Sarah E. Pityk ruled for the FTC, finding that even though the transaction parties offered evidence of meaningful competition with other fuels, that evidence "does not rebut the FTC's central claim that there is meaningful coal-on-coal competition that would be lost if the parties were allowed to consummate the JV."[27] An important issue at trial was what determines the price customers pay for SPRB coal.

After the district court issued its decision, the transaction parties abandoned the transaction.[28]

f. *FTC and Pennsylvania Attorney General Lose Jefferson Health/Einstein Hospital Challenge*

On February 27, 2020, in a four-to-zero vote (FTC Chairman Joseph Simons was recused), the FTC authorized an action to be filed in the Eastern District of Pennsylvania to block the proposed merger of Jefferson Health ("Jefferson") and Albert Einstein Healthcare Network ("Einstein").[29] The Pennsylvania Attorney General ("AG") joined the suit. In addition, the FTC issued an administrative complaint alleging that the proposed merger would eliminate robust competition

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[26] Press Release, Fed. Trade Comm'n, *FTC Files Suit to Block Joint Venture between Coal Mining Companies Peabody Energy Corporation and Arch Coal* (Feb. 26, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-joint-venture-between-coal-mining-companies.

[27] *FTC* v. *Peabody Energy Corp.*, No. 4:20-cv-00317-SEP, 2020 WL 5893806, at *40 (E.D. Mo. Sept. 29, 2020).

[28] Press Release, Peabody Energy Corp., *U.S. District Court Upholds FTC's Decision to Block Peabody and Arch's Joint Venture of PRB/Colorado Assets* (Sept. 29, 2020), *available at* https://peabodyenergy.investorroom.com/2020-09-29-U-S-District-Court-Upholds-FTCs-Decision-To-Block-Peabody-And-Archs-Joint-Venture-Of-PRB-Colorado-Assets; Press Release, Arch Resources, *Arch to Drive Forward with Strategic Pivot Towards Steel and Metallurgical Markets* (Sept. 29, 2020), *available at* https://news.archrsc.com/news-releases/news-release-details/arch-drive-forward-strategic-pivot-towards-steel-and.

[29] Press Release, Fed. Trade Comm'n, *FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems* (Feb. 27, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-commonwealth-pennsylvania-challenge-proposed-merger-two-major.

between the two leading providers of inpatient GAC services and inpatient acute rehabilitation services in Philadelphia County and Montgomery County, Pennsylvania, to the detriment of patients.

The complaint alleged that, post-transaction, the respondents would control at least 60% of GAC services in the Northern Philadelphia area (as measured by commercially insured patient admissions) and become the market leader in the Montgomery County area.[30] In addition, the respondents operate six of the eight inpatient rehabilitation services facilities in the Philadelphia area,[31] and would control at least 70% of inpatient acute rehabilitation services (as measured by commercially insured patient admissions) in the Philadelphia area.[32]

The FTC asserted that Jefferson and Einstein compete for inclusion in commercial insurers' hospital networks. Thus, according to the FTC, a commercial insurer would find it difficult to market a health plan to Philadelphia employers that excluded all of the GAC hospitals owned by Einstein and Jefferson; therefore, eliminating competition between the parties would likely increase the merged firm's bargaining leverage with commercial insurers.[33] In addition, Jefferson and Einstein have had a history of upgrading medical facilities, improving patient access, and offering more competitive reimbursement rates and terms to commercial insurers because of such competition.[34]

The administrative trial was originally scheduled to begin on September 1, 2020; due to the COVID-19 pandemic, however, the matter was stayed until July 6, 2020, and the trial was rescheduled to begin on January 5, 2021.[35]

On March 12, 2020, both respondents filed their respective Answers in the administrative proceeding. The transaction parties asserted that the alleged relevant product markets and geographic markets fail as a matter of law.[36] New entry and expansion by competitors would be timely, likely and sufficient to ensure that there will be no harm to competition, patients and consumers, and consumer welfare.[37] Insurers and other payors have a variety of tools to ensure that they receive competitive pricing and terms.[38] In addition, the parties contend that the combination "will be pro-competitive, and will result in substantial merger-specific pricing efficiency and synergies, and other pro-competitive effects, which will inure to the benefit of

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[30] Complaint ¶ 5, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Feb. 27, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09392_administrative_part_iii_complaint.pdf.

[31] *Id.* at ¶ 8.

[32] *Id.* at ¶ 10.

[33] *Id.* at ¶¶ 12, 13.

[34] *Id.* at ¶ 14.

[35] Third Order Regarding Scheduling in Light of Public Health Emergency, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (June 3, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09392_commission_third_order_regarding_scheduling_in_light_of_public_health_emergency.pdf.

[36] Answer of Thomas Jefferson Univ. ("Jefferson Answer") at 17, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Mar. 12, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09392_r_thomas_jefferson_u_answerpublic597914.pdf.

[37] *Id.* at 18.

[38] *Id.*

consumers of healthcare in the Greater Philadelphia area."[39] Furthermore, Einstein asserted that it is a weakened competitor and a failing firm.[40]

On September 11, 2020, a week-long combination of in-person and teleconference argument began before U.S. District Judge Gerald J. Pappert. On December 8, 2020, Judge Pappert denied the FTC's request for a PI on the basis that the government had improperly viewed the health care market in southeastern Pennsylvania.[41] The court rejected the testimony of the economists and insurers, finding that the testimony was "neither unanimous, unequivocal nor supported by the record as a whole."[42] In addition, the court rejected the alleged markets on the basis that they wrongly "focus more on patients" than the insurers that will feel the immediate impact of any price increase.[43] "The government's expert assumed that what matters for the economic analysis is how much demand there is from the plan's members for a particular provider without showing the insurers are "aligned with patient decisions about where to seek care. . . . As a matter of academic econometric analysis, [the government's economist] could be correct, but relying on that simple principle is insufficient . . . . Market definition can rest on a mathematical equation only if the variables used in the equation reflect the market's commercial realities."[44]

The opinion also distinguished the FTCs win in the Third Circuit in *Penn State Hershey Medical Center/PinnacleHealth System*,[45] where the appellate court reversed a lower court's denial of PI on the basis that in that case there was evidence that insurers could not market a plan to employers in the area without covering at least one of the merging hospitals. That case also had included a "natural experiment" where an insurer stopped covering both of the merging hospitals and lost half of its members despite offering lower prices than its competitors.

In the instant case, the court found that "[g]iven the numerous health care systems here, no insurer can credibly assert that there would be 'no network' without a combined Jefferson and Einstein. . . . [T]here are numerous health systems and many more hospitals within a far smaller radius [than in central Pennsylvania]."[46] The court also rejected the existence of a separate rehabilitation market on the same reasoning that it focused more on patients than their insurers.

On December 21, 2020, the Third Circuit denied the FTC's emergency request for an injunction pending appeal of the district court's decision.[47]

2. *Consent Decrees*

The FTC entered into 10 consents involving proposed transactions in FY2020: (1) Bristol-Myers Squibb Company/Celgene Corporation (psoriasis drug);[48] (2) Compassion-First Pet

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[39] Answer of Respondent Albert Einstein Healthcare Network ("Einstein Answer") at 12, *In the Matter of Thomas Jefferson Univ.*, FTC Docket No. 9392 (Mar. 12, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09392_r_einstein_answerpublic597913.pdf; Jefferson Answer at 1.

[40] Einstein Answer at 13; *see also* Jefferson Answer at ¶ 12.

[41] *FTC* v. *Thomas Jefferson Univ.*, Civil Action No. 20-01113, 2020 WL 7227250 (E.D. Pa. Dec. 8, 2020).

[42] *Id.* at *1.

[43] *Id.* at *13.

[44] *Id.* at *13, *15.

[45] *FTC* v. *Penn State Hershey Medical Center*, 838 F.3d 327 (3d Cir. 2016).

[46] *FTC* v. *Thomas Jefferson Univ.*, 2020 WL 7227250, at *16, *23.

[47] Order, *FTC* v. *Thomas Jefferson Univ.*, No. 20-3499 (3d Cir. Dec. 21, 2020).

[48] Press Release, Fed. Trade Comm'n, *FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to*

Hospitals/ National Veterinary Associates (specialty and emergency veterinary services);[49] (3) FXI Holdings, Inc./Innocor, Inc. (polyurethane foam);[50] (4) Danaher Corp./General Electric Co. biopharma business (inputs for biopharmaceutical drugs);[51] (5) Össur Hf/College Park Industries, Inc. (myoelectric elbows);[52] (6) AbbVie Inc./Allergan PLC (exocrine pancreatic insufficiency

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Divest Psoriasis Drug Otezla as a Condition of Acquisition (Nov. 15, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation. In what the FTC touts as the largest divestiture in a merger enforcement case, Bristol-Myers Squibb ("BMS") and Celgene Corporation ("Celgene") agreed to divest Celgene's Otezla, the most popular oral treatment in the United States for moderate-to-severe psoriasis, to Amgen, for $13.4 billion. The press release indicates that the Commission, in a three-to-two vote, had ordered BMS to divest Otezla to preserve BMS's incentive to continue developing its own oral product for treating moderate-to-severe psoriasis. BMS had a pipeline product under development that is considered the most advanced oral treatment for moderate-to-severe psoriasis and would compete directly with Otezla.

[49] Press Release, Fed. Trade Comm'n, *FTC Requires Veterinary Service Providers Compassion First and National Veterinary Associates to Divest Assets in Three Local Markets* (Feb. 14, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-requires-veterinary-service-providers-compassion-first. Compassion First and National Veterinary Associates ("NVA") provide various specialty and emergency veterinary services. The FTC alleged that the combination would harm competition in three local geographic markets—Asheville, NC/Greenville, SC (specialty veterinary services for internal medicine, oncology, ophthalmology, and surgery services, and emergency services); Norwalk, CT/Yonkers, NY (veterinary neurology and radiation oncology services); and Fairfax, VA/ Manassas, VA (emergency veterinary services) by eliminating close, head-to-head competition between them. In the first two of these markets, the FTC asserts that it would be a merger to monopoly. To remedy the proposed transaction's anticompetitive effects, the order requires the divestiture of three clinics to MedVet Associates, LLC, which operates specialty and emergency veterinary clinics in other geographic markets.

[50] Press Release, Fed. Trade Comm'n, *FTC Requires Polyurethane Foam Producers FXI Holdings, Inc. and Innocor, Inc. to Divest Assets in Three Regional Markets* (Feb. 21, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-requires-polyurethane-foam-producers-fxi-holdings-inc-innocor. FXI Holdings, Inc. and Innocor, Inc. agreed to divest polyurethane foam pouring plants in three regional markets—the Pacific Northwest (Oregon and Washington); the Midwest states of Indiana, Michigan, and Ohio; and Mississippi—to Future Foam, Inc. to settle charges that the merger would violate antitrust laws. The FTC alleged that the combination otherwise would have substantially lessened competition for low-density conventional polyurethane foam used in home furnishings in each of these regional markets. The complaint indicates that there are regional markets because the foam is bulky and expensive to ship relative to the value of the product. FXI and Innocor are the only suppliers in the Pacific Northwest, two of three major suppliers in the Midwest states, and two of four major suppliers in Mississippi.

[51] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Danaher Corporation's Acquisition of GE Biopharma* (Mar. 19, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/03/ftc-imposes-conditions-danaher-corporations-acquisition-ge. On March 19, 2020, the FTC, in a three-to-two vote, approved Danaher Corporation's ("Danaher") acquisition of General Electric's ("GE") biopharmaceutical business, conditioned on the divesture of certain assets relating to 10 products to Sartorius AG. The products to be divested include: (1) microcarrier beads; (2) conventional low-pressure liquid chromatography columns; (3) conventional low-pressure liquid chromatography skids; (4) single-use low-pressure liquid chromatography skids; (5) chromatography resins; (6) low-pressure liquid chromatography continuous chromatography systems; (7) single-use tangential flow filtration systems; and (8) label-free molecular characterization instruments. In three of these product areas, Danaher and GE were two of only three main suppliers; in three product areas, one of the two transaction parties was deemed "dominant" or "leading" and the other was one of only a few other significant suppliers; and in the remaining areas, the concerns appear to be on the direct competition between the transaction parties.

In addition to requiring the divesture of certain assets, the consent requires Danaher to supply the divested products to Sartorius for a limited time while Sartorius establishes its own manufacturing facilities. As indicated above, the Commission vote was split. Although no statements were issued by the dissenting Democratic Commissioners, this matter marked the fourth time that this current Commission has divided along partisan lines on a merger decision.

The FTC reports cooperating with the antitrust agencies in Brazil, China, the European Union and Israel.

[52] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Össur Hf's Acquisition of College Park*

drugs and IL-23 inhibitors);[53] (7) Tri Star Energy, LLC/Hollingsworth Oil Company, Inc./C&H Properties (retail fuel outlets);[54] (8) Eldorado Resorts, Inc./Caesars Entertainment Corporation (casinos);[55] (9) Elanco Animal Health, Inc./Bayer Animal Health GmbH (animal health products);[56] and (10) Arko Holdings Ltd./Empire Petroleum Partners, LLC (retail fuel outlets).[57]

Industries, Inc. (Apr. 7, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/04/ftc-imposes-conditions-ossur-hfs-acquisition-college-park. On April 7, 2020, the FTC, in a five-to-zero vote, conditioned clearance of Iceland-based Össur Hf's ("Össur") purchase of College Park Industries, Inc. ("College Park") on the sale of College Park's myoelectric elbow business to Hugh Steeper Ltd. The transaction was not reportable under the HSR Act. The FTC alleges that the U.S. market for myoelectric elbows is highly concentrated and College Park is a leading supplier in this market through its Espire brand and has only two competitors today. Myoelectric elbows are prosthetics maneuvered using battery-powered motors and electric signals generated by muscles. The FTC indicates that these devices have substantial advantages over other types of prosthetic elbows. Össur is reportedly developing a myoelectric elbow and, absent the acquisition, the FTC asserts, would likely compete with College Park in the United States. Due to the uncertainty surrounding COVID-19, the parties agreed to remain flexible on the closing dates for the transactions, hoping to close both within three months.

[53] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on AbbVie Inc.'s Acquisition of Allergan plc* (May 5, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc. In a three-to-two vote, the FTC cleared AbbVie Inc.'s ("AbbVie") acquisition of Allergan plc ("Allergan"), conditioned on the divestiture of (1) Allergan's Zenpep and Viokace drugs used to treat exocrine pancreatic insufficiency ("EPI"), that results in the inability to digest food properly, to Nestlé S.A.; and (2) Allergan's rights related to brazikumab, which is an IL-23 inhibitor that is in development to treat moderate-to-severe Crohn's disease and ulcerative colitis, to AstraZeneca, the drug's original developer.

According to the complaint, only four companies sell EPI treatments, with AbbVie and Allergan combined accounting for 95% of these sales. In IL-23, only J&J has an approved treatment, and only three companies—AbbVie, Allergan and Eli Lilly & Co.—have inhibitors in late-stage development. Otherwise, according to the three Republican Commissioners, the companies' portfolios are "largely complementary." Fed. Trade Comm'n, Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, *In the Matter of AbbVie Inc./Allergan plc*, FTC File No. 1910169 (May 5, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1574619/abbvie-allergan_majority_statement_5-5-20.pdf. The two Democratic Commissioners dissented, raising, among other things, concern about (1) Nestlé, which does not currently sell medications and was ill-equipped to replace the lost competition; and (2) AstraZeneca's incentives and commitment to the project over the long term. Fed. Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of AbbVie Inc./Allergan plc*, FTC File No. 1910169 (May 5, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf; Fed. Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of AbbVie Inc./Allergan plc*, FTC File No. 1910169 (May 5, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1574577/191_0169_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_in_the_matter_of_abbvie_and_0.pdf.

The FTC staff cooperated with antitrust agencies in Canada, EU, Mexico, and South Africa, as well as several state AGs. The European Commission had previously approved the deal, subject to the sale of brazikumab. Press Release, Euro. Comm'n, *Mergers: Commission Approves AbbVie's Acquisition of Allergan, Subject to Conditions* (Jan. 10, 2020), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_20_23.

[54] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition of Tri Star Energy, LLC's Acquisition of Certain Assets of Hollingsworth Oil Company, Inc., C & H Properties, and Ronald L. Hollingsworth* (June 24, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/06/ftc-requires-divestitures-condition-tri-star-energy-llcs. The FTC conditioned Tri Star's acquisition of Hollingsworth/C&H Properties fuel outlet and convenience stores upon the sales of retail fuel assets in Whites Creek, Tennessee and Greenbrier, Tennessee to Coxal Company, Inc. Absent these divestitures, the FTC alleged that the acquisition would result in a merger to monopoly in retail gasoline and retail diesel in these two local markets.

[55] Press Release, Fed. Trade Comm'n, *FTC Requires Casino Operators Eldorado Resorts, Inc. and Caesars Entertainment Corporation to Divest Assets in Two Local Markets as a Condition of Merger* (June 24, 2020), *available*

During the remainder of calendar year 2020, the FTC entered into an additional three consent decrees involving proposed transactions: (1) Mylan/Pfizer's Upjohn Division (10 generic drug markets);[58] (2) Stryker Corp./Wright Medical Group (total ankle replacements and finger joint implant products);[59] and (3) E. & J. Gallo Winery/Constellation Brands, Inc. (wine and spirits).[60]

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at https://www.ftc.gov/news-events/press-releases/2020/06/ftc-requires-casino-operators-eldorado-resorts-inc-caesars. In a three-to-one vote (Commissioner Slaughter not participating), the FTC required Eldorado to divest casinos in the South Lake Tahoe area of Nevada and the Bossier City-Shreveport area of Louisiana to Twin River Worldwide Holdings, Inc. The FTC alleged that the proposed acquisition would increase the likelihood that Eldorado would unilaterally exercise market power, leading to higher prices and reduced quality for consumers of casino services.

In addition, at the time of the Commission's vote, Eldorado had a pending sale of its Isle of Capri casino located in Kansas City, Missouri. The FTC consent indicated that if the sale was not complete within 60 days after the proposed acquisition of Caesars closes, the Commission may, at its discretion, require Eldorado to divest the casino to a Commission-approved buyer within 12 months.

Commissioner Chopra issued a dissent criticizing the majority opinion on the basis that the consent was overly complex and the divestiture buyer unsuitable. According to Commissioner Chopra, the merger had "no meaningful benefits, particularly given the financial uncertainties stemming from the COVID-19 crisis." Fed. Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra at 1, *In the Matter of Eldorado Resorts and Caesars Entertainment*, FTC File No. 191-0158 (June 26, 2020) *available at* https://www.ftc.gov/system/files/documents/public_statements/1577363/dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_eldorado-caesars_1910158.pdf.

[56] Press Release, Fed. Trade Comm'n, *FTC Requires Global Suppliers of Animal Health Products Elanco Animal Health, Inc. and Bayer Animal Health GmbH to Divest Assets in Three Product Markets, as a Condition of Merger* (July 15, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/07/ftc-requires-global-suppliers-animal-health-products-elanco. In a four-to-zero vote (Commissioner Slaughter not participating), the FTC requested divestitures in three markets: (1) low-dose prescription treatments for canine otitis externa, an inflammation of the outer ear in dogs; (2) fast-acting oral treatments that kill adult fleas on dogs; and (3) brand-name cattle pour-on insecticides. Elanco's Osurnia and Bayer's Claro are allegedly the only low-dose prescription products that treat canine otitis externa; the consent requires the divestiture of Osurnia to Dechra. Elanco's Capstar and Bayer's Advanta are allegedly the only fast-acting oral treatments to kill adult fleas on dogs; the consent requires divestiture of Capstar to PetIQ. Finally, the market for brand name cattle pour-on insecticides is already allegedly highly concentrated and this transaction combines the market leader and the third-largest firm; the consent requires divestiture of Elanco's StandGuard to Neogen Corp.

The FTC cooperated with antitrust agencies in Australia, New Zealand, the United Kingdom, Canada, and the European Commission when analyzing the proposed transaction and potential remedies.

[57] Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures as Condition of Arko Holdings Ltd.'s Acquisition of Empire Petroleum Partners, LLC* (Aug. 25, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/08/ftc-requires-divestitures-condition-arko-holdings-ltds. The FTC in a three-to-zero vote (Commissioners Slaughter and Wilson not participating) required divesture of fuel outlets in seven local markets in Indiana, Michigan, Maryland, and Texas, finding that in these local markets the acquisition would harm competition for the retail sale of gasoline. In three of these markets, competition for the retail sale of diesel fuel would also have been adversely impacted.

[58] Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on Combination of Pfizer Inc.'s Upjohn and Mylan N.V.* (Oct. 30, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/10/ftc-imposes-conditions-combination-pfizer-incs-upjohn-mylan-nv. In a three-to-two vote (along party lines) the FTC required Pfizer Inc. and Mylan N.V. to divest assets in ten generic markets as a condition to permitting the proposed transaction which involves Pfizer spinning off its Upjohn division—which includes Pfizer's authorized generic business Greenstone, LLC—and combining it with Mylan. The new entity will be called Viatris. The FTC alleges that the proposed combination would harm competition in seven product markets by reducing the number of existing suppliers of: (1) amlodipine besylate/atorvastatin calcium tablets, which combine a calcium channel blocker to treat hypertension with a lipid-lowering agent to treat high cholesterol; (2) eplerenone tablets, a diuretic prescribed in combination with other medications when treating hypertension or congestive heart failure after a heart attack; (3) phenytoin chewable tablets, which are used to prevent epileptic seizures; (4) prazosin HCl capsules, an alpha-adrenergic blocker that treats hypertension by relaxing the veins and arteries so that blood can more easily pass; (5) spironolactone HCTZ tablets, a

(Text continued on page 15)

diuretic used to treat hypertension; (6) gatifloxacin ophthalmic solution, an eye drop that treats bacterial conjunctivitis; and (7) medroxyprogesterone acetate injectable solution, an injectable solution used to treat certain types of dysfunctional uterine bleeding. In three additional product markets, the proposed combination would purportedly delay or eliminate a likely entrant, reducing the likelihood that *prices* would decrease in the future for: (1) levothyroxine sodium tablets, which treat hypothyroidism or are used in combination with other drugs to treat thyroid cancer; (2) sucralfate tablets, which are used to treat and prevent ulcers in the small intestines; and (3) varenicline tartrate tablets, which are a smoking cessation aid offered under Pfizer's Chantix® brand.

The proposed consent requires the transaction parties to divest to Prasco, LLC the rights and assets related to Upjohn's amlodipine besylate/atorvastatin calcium tablets, phenytoin chewable tablets, prazosin HCl capsules, spironolactone HCTZ tablets, gatifloxacin ophthalmic solution, and medroxyprogesterone acetate injectable solution. The parties must also divest the rights and assets related to Mylan's eplerenone tablets. The proposed order also requires prior Commission approval before Upjohn, Mylan, or Viatris may gain an interest in or exercise control over any third party's rights to levothyroxine sodium tablets, sucralfate tablets, and varenicline tartrate tablets. Under the consent, the generic drugs divested to Prasco will continue to be manufactured by Upjohn and Mylan's current suppliers, reducing the risk of any interruption in supply. In some instances, Pfizer will serve as Prasco's contract manufacturer.

Commissioners Chopra and Slaughter raised concerns regarding whether the merger would enhance the ability of Viatris to conspire and collude. Apparently, Rajiv Malik, who will be the president of the merged entity, is currently a named defendant in a multidistrict lawsuit brought by state attorneys general and private plaintiffs alleging market allocation and price-fixing violations. In addition, they raise concerns that the FTC's investigations in the pharmaceutical M&A arena are too narrow in scope and miss some of the fundamental elements of how firms compete in the industry.

The FTC reports that the staff worked cooperatively with their counterparts at the antitrust agencies in Australia, Canada, the European Union, and New Zealand to analyze the proposed transaction and potential remedies.

59 Press Release, Fed. Trade Comm'n, *FTC Requires Medical Device Companies Stryker Corp. and Wright Medical Group N.V. to Divest Assets to Preserve Competition* (Nov. 3, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/11/ftc-requires-medical-device-companies-stryker-corp-wright-medical. On November 3, 2020, the FTC conditioned approval of the proposed transaction upon the companies divesting Stryker's total ankle replacements and finger joint implants businesses to DJO Global, Inc. The FTC's complaint alleged that the transaction parties are close substitutes in the U.S. markets for total ankle replacement and finger joint implants and responded to competition from each other with improved products, better service, and lower prices. Therefore, the FTC asserts that by eliminating this direct and substantial head-to-head competition, the proposed acquisition likely would allow the combined firm to exercise market power unilaterally, resulting in less innovation and higher prices for consumers. In addition, Wright and Stryker are (1) the largest and the third-largest suppliers of total ankle replacements in the United States, with a combined share of approximately 75 percent of the U.S. market for total ankle replacements; and (2) two of only three significant suppliers for finger joint implants in the United States, together controlling more than half of the U.S. market for finger joint implants.

According to the FTC, divestiture buyer DJO Global has an established track record in the medical device industry and is well positioned to restore the competition that otherwise would be lost through the proposed acquisition. Under the proposed order, Stryker is required to supply DJO Global with transition assistance, and to act as an intermediary supplier until DJO Global obtains FDA approval to be the legal manufacturer of the divested products. The FTC indicated that it had worked closely with the U.K. CMA in analyzing the proposed transaction and the remedy.

60 Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on E. & J. Gallo Winery's Acquisition of Assets from Constellation Brands, Inc.* (Dec. 23, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/12/ftc-imposes-conditions-e-j-gallo-winerys-acquisition-assets. Following a 20-month investigation, the FTC conditioned approval of E. & J. Gallo Winery's ("Gallo") acquisition of certain assets of Constellation Brands, Inc. ("Constellation") on the divestiture (or retention by Constellation) of certain brands associated with six types of wine and spirits products: entry-level on-premise sparkling wine, low-priced sparkling wine, low-priced brandy, low-priced port, low-priced sherry, and high color concentrates ("HCCs"). Specifically: (1) Constellation will retain its entry-level on-premise sparkling wine brand, J Roget, for four years after the consent agreement is entered, to take all actions necessary to maintain the full economic viability, marketability, and competitiveness of J Roget; (2) Constellation will retain its low-priced sparkling wine brand, Cook's, and, for four years after the consent agreement is entered, to take all actions necessary to maintain the full economic viability, marketability, and competitiveness of Cook's. (3) Constellation will

3. *Consummated Merger Challenges*

a. *Pending D.C. Circuit Decision, Otto Bock Settles by Agreeing to Divestiture*

The FTC's challenge began in December 2017, when 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.[61] At issue were (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 was alleged to be very comparable to Freedom's. Together, Otto Bock and Freedom comprised 70% of MPK sales; the FTC claimed that there are only four additional competitors worldwide, all of which operate on a significantly smaller scale. According to the FTC, the transaction not only eliminated competition between the transaction parties, but also resulted in higher prices, lower quality and less innovation.[62]

The defendants contended that Freedom was in severe financial distress and was likely to have exited the market absent the transaction. In addition, defendants pointed 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 D. Michael 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.[63] An Initial Decision was scheduled to be issued on or before March 28, 2019. On March 18, 2019, the ALJ extended the decision 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.[64] 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 acquisition would substantially lessen competition. Under the Order, Otto Bock was required to

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divest its Paul Masson brandy business to Sazerac Company, Inc.; (4) Gallo will divest Sheffield Cellars and Fairbanks low-priced port and sherry brands to Precept Brands LLC; and (5) Constellation will divest its concentrates business, including HCCs, to Vie-Del Company.

[61] 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.

[62] 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.

[63] 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.

[64] Initial Decision, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (May 6, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/docket_9378_initial_decision_public_5-7-19.pdf.

divest the assets of Freedom no later than 90 days after the Order became final. On May 8, 2019, the parties filed a Notice of Appeal with the Commission.[65]

On November 1, 2019, the Commission unanimously affirmed the ALJ's decision.[66] The Commission adopted the ALJ's finding that MPKs represent a distinct market. The Commission also rejected the argument that Freedom would have failed absent the transaction, instead determining that the company was beginning to show improvement at the time of the acquisition. The Commission also rejected claims that there were no other options for Freedom other than a sale to Otto Bock. The Commission concluded that "anticompetitive effects have indeed already occurred," and that "the [a]cquisition is likely to cause future anticompetitive effects in the form of higher prices and less innovation for amputee patients and prosthetic clinic customers."[67] The Commission found that a divestiture of Freedom's MPK business might be inadequate to resolve competitive concerns, since the company bundles its MPK product line with its prosthetic foot business and both products may be needed by a buyer to effectively compete. This decision marked the first time the current Commission voted to unwind a consummated merger.

Otto Bock petitioned the D.C. Circuit Court to review the Commission's decision on December 30, 2019. In the following months, the parties filed joint motions to stay that proceeding in order to allow the continuation of ongoing discussions regarding the divestiture order and other related matters. On June 9, 2020, the parties jointly requested—for the fourth time—the court to hold the case in abeyance, citing complications and delays to discussions as a result of the COVID-19 pandemic.[68] Finally, almost three years after the FTC began its challenge, Otto Bock reached an agreement with the FTC staff to divest Freedom's MPK business to Proteor, a well-established and reputable worldwide manufacturer and supplier of lower-limb prosthetic devices.[69] Otto Bock said in its statement that the deal with Proteor does not include certain Freedom foot products, so its portfolio will still be stronger than it was before the transaction.[70] In addition to the MPK business, Proteor will acquire certain other foot prostheses and infrastructure assets from Freedom.

The FTC and Otto Bock also filed a Joint Motion with the D.C. Circuit asking for the case to be held in abeyance until the divestiture application is approved.[71] On December 1, 2020, the

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[65] 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.

[66] Opinion of the Commission, *In the Matter of Otto Bock HealthCare N. Am., Inc.*, FTC Docket No. 9378 (Nov. 1, 2019, entered Nov. 6, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf.

[67] *Id.* at 2.

[68] *See* Joint Motion to Hold Proceedings in Abeyance, *Otto Bock HealthCare N. Am., Inc.* v. *FTC*, No. 19-1265 (D.C. Cir. June 9, 2020).

[69] Press Release, Fed. Trade Comm'n, *FTC Requests Public Comment on Otto Bock HealthCare North America, Inc.'s Application to Approve Divestiture of Assets It Gained through Acquisition of FIH Group Holdings, LLC* (Oct. 9, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/10/ftc-requests-public-comment-otto-bock-healthcare-north-america.

[70] Press Release, Ottobock, *Ottobock Files Application to U.S. Federal Trade Commission to Resolve Future of Freedom Innovations* (Oct. 9, 2020), *available at* https://www.ottobock.com/en/newsroom/news/ottobock-files-application-to-u-s-federal-trade-commission-to-resolve-future-of-freedom-innovations.html.

[71] Joint Motion to Hold Proceedings in Abeyance, *Otto Bock HealthCare N. Am., Inc.* v. *FTC*, No. 19-1265 (D.C. Cir. Oct. 8, 2020).

Commission unanimously approved the divestiture[72] and Otto Bock moved to dismiss their Petition for Review.[73]

b. *FTC Challenges Axon/VieVu Merger*

On January 3, 2020, the FTC issued an administrative complaint challenging Axon Enterprise, Inc.'s ("Axon") May 2019 acquisition of VieVu, LLC ("VieVu").[74] The FTC alleged that Axon and VieVu were each other's closest competitors in the market for body-worn cameras ("BWCs") sold to large, metropolitan police departments. Accordingly, the acquisition had eliminated direct and substantial competition between the two firms, further entrenching Axon's position as the dominant supplier of BWC systems to large, metropolitan police departments.

The FTC complaint alleged that, post-merger, Axon began to tout its pricing power and raised its prices.[75] In addition, the FTC alleged that Axon limited the availability of VieVu BWC systems to customers and had stopped developing new generations of VieVu hardware and software. According to the FTC, new entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects and the barriers to entry are high because of substantial upfront capital investment requirements, switching costs, and the need for large, metropolitan police department referrals.

The FTC indicated that, as part of the merger, Safariland, the parent of VieVu, had entered into several non-compete and customer non-solicitation agreements covering products and services not related to the merger and that Axon and Safariland had entered company-wide non-solicitation agreements with a 10-or-more-year term. The parties also entered into a decade-long supply agreement whereby Safariland would develop and exclusively supply conducted electrical weapons ("CEW") holsters to Axon for its taser-branded CEW. The FTC deemed Axon to be the dominant supplier of CEWs by the FTC. The FTC asserted that these restraints were not reasonably limited to protecting a legitimate business interest.

Hours before the Commission filed its complaint on January 3, 2020, Axon filed an injunctive and declaratory judgment action in the District of Arizona.[76] The action alleged that the administrative proceeding had violated Axon's Fifth Amendment due process and equal protection rights by subjecting Axon to unfair procedures before an administrative body rather than a trial before a neutral federal judge and that the Commission's structure was unconstitutional. In addition, the case sought a declaratory judgment that Axon's acquisition did not violate any antitrust laws. On January 9, 2020, Axon moved the district court to preliminarily enjoin the Commission's administrative proceeding.[77] On January 10, 2020, Axon filed a motion to stay the

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[72] Press Release, Fed. Trade Comm'n, *FTC Approves Otto Bock HealthCare North America, Inc.'s Application to Divest Assets It Gained through Acquisition of FIH Group Holdings, LLC* (Dec. 1, 2020), *available at* link.

[73] Consent Motion for Voluntary Dismissal, *Otto Bock HealthCare N. Am., Inc.* v. *FTC*, No. 19-1265 (D.C. Cir. Dec. 1, 2020).

[74] Press Release, Fed. Trade Comm'n, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

[75] Complaint ¶¶ 5–6, *In the Matter of Axon Enter., Inc.*, FTC Docket No. D9389 (Jan. 3, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09389_administrative_part_iii_-_public_redacted.pdf.

[76] Complaint, *Axon Enter., Inc.* v. *FTC*, No. CV-20-00014-PHX-DWL (D. Ariz. Jan. 3, 2020).

[77] Plaintiff's Motion for Preliminary Injunction, *Axon Enter. Inc.* v. *FTC*, No. CV-20-00014-PHX-DWL (D. Ariz. Jan. 9, 2020).

administrative action until entry of the final judgment in Axon's federal action. Axon and Safariland filed their answers in the administrative action on January 21, 2020 and January 22, 2020, respectively. On February 27, 2020, the ALJ denied Axon's motion to stay proceedings. On April 8, 2020, the district court dismissed Axon's complaint due to a lack of subject matter jurisdiction and denied Axon's injunctive motion as moot.[78] On April 13, 2020, Axon appealed the decision to the Ninth Circuit, which heard oral arguments on July 17, 2020.

After the complaint was issued, Safariland and Axon rescinded the non-compete and non-solicitation provisions that the FTC complaint alleged were anticompetitive. On April 17, 2020, Safariland agreed to settle the FTC's allegations by entering into a consent that ensured that Safariland would not enter into new agreements with similar anticompetitive provisions with Axon.

The evidentiary hearing in the administrative proceeding was scheduled to begin on May 19, 2020, but the ALJ extended commencement until October 13, 2020 due to the COVID-19 pandemic. On October 2, 2020, the Ninth Circuit granted a request from Axon to pause the administrative trial proceedings while Axon challenges the Commission's merger review process. The panel indicated that it had granted a temporary stay of the order to preserve the status quo pending consideration of the appeal on the merits.[79]

c. *FTC Challenges Altria's Investment in JUUL*

On April 1, 2020, the FTC announced that it had filed an administrative complaint alleging that Altria Group, Inc. ("Altria") and JUUL Labs Inc. ("JUUL") had entered into agreements violating Section 1 of the Sherman Act, Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act.[80] The FTC alleged that: (1) Altria and JUUL were competitors in the market for closed-system e-cigarettes between 2013 and 2017; (2) Altria's Mark Ten e-cigarettes had achieved second place in the market by mid-2017; (3) JUUL had entered the retail market in 2015 and increased its market share rapidly after mid-2017 to 70% in October 2018; (4) instead of competing aggressively against JUUL, Altria entered into deal negotiations, with Altria's exit from the market being demanded by JUUL; and (5) Altria ceased competing in the e-cigarette market.

On December 20, 2018, the companies announced a purchase agreement pursuant to which Altria acquired a 35% nonvoting stake, convertible into voting stock upon receipt of HSR clearance. In addition, upon HSR clearance, Altria had the right to appoint three of nine members of JUUL's board of directors. The parties had certain other agreements, which the FTC notes contained a non-compete provision that ended Altria's development of a newly improved portfolio of products. The FTC contended that the transaction eliminated a threat to JUUL's market dominance and assured JUUL's dominance through the extensive resources that Altria would bring to it, including distribution capabilities and offering its premier shelf space at retailers.

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[78] *Axon Enter. Inc*. v. *FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020).

[79] Order, *Axon Enter. Inc*. v. *FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020), *available at* https://www.law360.com/articles/1316925/attachments/0.

[80] Press Release, Fed. Trade Comm'n, *FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL* (Apr. 1, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul. Democratic Commissioner Chopra issued a concurring statement joined by Democratic Commissioner Slaughter.

The parties argued that the non-compete at issue was ancillary to a legitimate business purpose. Furthermore, Altria's e-cigarette business had been struggling: the investment in JUUL provided it a more solid foothold in the e-cigarette category.[81]

The evidentiary hearing was originally scheduled to begin on January 5, 2021; due to the COVID-19 pandemic, however, the ALJ stayed the proceeding until July 6, 2020, with the hearing's start rescheduled to begin April 13, 2021.[82]

4. *Closing Statements*

Roche/Spark

On December 16, 2019, the FTC voted five-to-zero to close its investigation into Roche Holding AG's ("Roche") proposed acquisition of Spark Therapeutics, Inc. ("Spark").[83] The FTC had conducted a 10-month investigation into whether the transaction would lessen potential competition in the U.S. market for hemophilia A therapies. The FTC concluded that Roche would not have the incentive, post transaction, to delay or terminate Spark's development effort for its hemophilia A gene therapy, or that the acquisition would affect Roche's incentives for its hemophilia treatment drug, Hemlibra.

5. *Abandoned Transactions*

The FTC reports that eight transactions were abandoned during calendar year 2019 due to antitrust concerns.[84] In FY 2020, the transactions abandoned prior to the FTC's commencement of litigation included the four transactions discussed in this section:[85]

a. *Aveanna Healthcare/Maxim Healthcare*

On January 30, 2020, Aveanna Healthcare and Maxim Healthcare Services terminated their acquisition agreement in response to staff concerns about the transaction's potential anticompetitive effects. The staff investigated the proposed acquisition for several months, including its potential effects in multiple localities in the markets for nursing services and for private duty nursing care.[86]

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[81] Answer and Defenses of Respondent Altria Grp. Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (July 27, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09393_r_altria_answer_and_defenses_public599010.pdf; Answer and Defenses of Respondent JUUL Labs, Inc., *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (July 27, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09393_r_jli_answer_and_defenses_public599011.pdf.

[82] Third Order Regarding Scheduling in Light of Public Health Emergency, *In the Matter of Altria Grp., Inc.*, FTC Docket No. 9393 (June 3, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09393_commission_third_order_regarding_scheduling_in_light_of_public_health_emergency.pdf.

[83] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Closes Investigation of Roche Holding AG's Proposed Acquisition of Spark Therapeutics, Inc.* (Dec. 16, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/12/federal-trade-commission-closes-investigation-roche-holding-ags.

[84] *See* Fed. Trade Comm'n, *2019 Annual Highlights* 35 (Apr. 2020), *available at* https://www.ftc.gov/system/files/documents/reports/annual-highlights-2019/2019_annual_highlights_report.pdf.

[85] On July 8, 2020, the FTC indicated that seven deals had been abandoned so far in 2020.

[86] Press Release, Fed. Trade Comm'n, *Statement of the FTC Chairman Regarding Announcement that Aveanna Healthcare and Maxim Healthcare Services Have Terminated Their Acquisition Agreement* (Jan. 30, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/01/statement-ftc-chairman-regarding-announcement-aveanna-healthcare.

b. *Johnson & Johnson/TachoSil*

On April 20, 2020, the FTC voted five-to-zero to close its investigation of Johnson & Johnson's ("J&J") proposed acquisition of TachoSil from Takeda Pharmaceutical Company after the parties abandoned the transaction.[87] TachoSil is a surgical patch. The FTC investigation focused on the potential loss of competition between TachoSil and J&J's Evarrest—the only two fibrin sealant patches approved in the United States to stop bleeding during surgery. The transaction was not subject to HSR notification. Instead, the FTC staff served J&J with a civil investigative demand ("CID") that, among other things, required information about all of J&J's hemostat products, rather than being limited to Evarrest. J&J unsuccessfully sought to quash the CID at the Commission level, including the Commission's refusing to move the deadline for production. At the end of the investigation, the FTC staff recommended that the Commission block the transaction. The FTC staff cooperated with the EC, where J&J's product is not yet sold.

c. *Aurobindo/Novartis*

In April 2020, Novartis AG abandoned a planned $900 million sale of its U.S. Sandoz portfolio of oral solids and dermatology products to Aurobindo Pharma USA while the transaction was being reviewed by the FTC. In its press release, Novartis stated that "[t]his decision was taken as approval from the U.S. Federal Trade Commission, for the transaction was not obtained within anticipated timelines."[88]

d. *NextMed/HealthTronics*

According to press reports, the parties abandoned the merger between NextMed and HealthTronics, the two largest U.S. providers of lithotripsy treatment for kidney stones.[89] Seventeen months after filing their HSR notification, the parties had pulled and refiled their notification in February 2019 and had received a second request in March 2019. The FTC review reportedly focused on overlaps in lithotripsy services in particular geographic markets and vertical concerns stemming from Temasek's interest in NextMed and Advanced Medtech Holdings, which owns Dornier MedTech, a manufacturer of lithotripters.

B. U.S. Department of Justice

The DOJ began FY 2020 with three active litigation matters. During FY 2020, the DOJ brought one district court challenge to a proposed merger—which remains pending. In addition, on November 5, 2020, the DOJ brought suit in the Northern District of California seeking to block Visa Inc.'s proposed acquisition of Plaid Inc.[90]

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[87] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Closes Investigation of Johnson & Johnson's Proposed Acquisition of TachoSil from Takeda Pharmaceutical Company* (Apr. 10. 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-closes-investigation-johnson-johnsons.

[88] *See* Press Release, Novartis, *Novartis Announces Mutual Agreement to Terminate Sale of Sandoz US Generic Oral Solids, Dermatology Portfolio to Aurobindo* (Apr. 2, 2020), *available at* https://www.novartis.com/news/media-releases/novartis-announces-mutual-agreement-terminate-sale-sandoz-us-generic-oral-solids-dermatology-portfolio-aurobindo.

[89] Joshua Cisco, *Kidney Stone Treatment Providers Abandon Deal After 17 Months*, MLEX MARKET INSIGHT (June 11, 2020, 20:29 GMT).

[90] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid. The DOJ alleged that "Visa is a monopolist in online debit services, charging consumers and merchants billions of dollars in fees each year to process online payments," and that "Plaid, a successful fintech firm, is developing a payments

During FY 2020, the DOJ entered into consents to resolve concerns in eight proposed mergers; one additional transaction was reportedly abandoned due to the agency having raised antitrust concerns. In the remainder of 2020, the DOJ required consent decrees in another [three] transactions.

1. *Court Challenges*

a. *DOJ Loses Challenge of Sabre's Acquisition of Farelogix, but Parties Abandon Deal after U.K. Blocks Consummation*

On August 20, 2019, the DOJ filed a civil action in the federal district court for Delaware seeking to block Sabre Corporation's ("Sabre") acquisition of Farelogix, Inc. ("Farelogix").[91] The complaint alleged that (1) 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; (2) Sabre operated a global distribution system ("GDS"), which is a digital platform that provides booking services to airlines, in addition to other functionalities; (3) 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; (4) the GDS's outdated technology has limited airlines' ability to sell—and travelers' ability to choose from—airlines' entire suite of offerings";[92] and (5) "Farelogix has emerged as an innovator that threatens to erode Sabre's dominance."[93] The complaint also asserted that "[f]or over a decade, Farelogix's airline customers have 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."[94]

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platform that would challenge Visa's monopoly." Thus, the DOJ challenged the proposed acquisition on both Section 7 of the Clayton Act and Section 2 of the Sherman Act grounds.

According to the complaint, Plaid (1) powers some of the most innovative fintech apps. Plaid's technology allows developers to plug into consumers' various financial accounts, with consumer permission, to aggregate spending data, look up balances, and verify other personal financial data; and (2) connects to 200 million consumer bank accounts and 11,000 U.S. banks. As a result, the DOJ asserted that because it accesses data on behalf of so many fintech app customers, it has become the leading financial data aggregation company in the United States. In addition, Plaid is allegedly planning to leverage its connections to build a bank-linked payments network that would compete with Visa. Plaid's money movement platform would allow consumers to pay merchants directly from their bank accounts using bank credentials rather than a debit card. Finally, Plaid's established connections and technology purportedly uniquely positions it to enter the payments market and disrupt Visa's monopoly.

Interestingly, a week before filing its PI action to block the transaction, the DOJ filed in district court in Massachusetts an action to compel Bain & Company to provide documents specified in a CID it had issued that the agency claimed it needed to complete its review of the acquisition.

Trial was originally scheduled to begin on June 28, 2021. On January 12, 2021, the parties announced that they had mutually agreed to terminate their merger agreement and agreed with the DOJ to dismiss the pending litigation. *See* Press Release, U.S. Dep't of Justice, *Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block* (Jan. 12, 2021), *available at* https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

[91] 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.

[92] Complaint ¶ 2, *United States* v. *Sabre Corp.*, C.A. No. 19-1548-LPS (D. Del. Aug. 20, 2019), *available at* https://www.justice.gov/opa/press-release/file/1196816/download.

[93] *Id.* ¶ 4.

[94] *Id.* ¶ 32.

In addition, according to the DOJ, competition from Farelogix "has driven Sabre to finally begin improving its own outdated technology."[95] Finally, the DOJ alleged 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."[96] The DOJ found that there were no countervailing factors that would prevent or remedy these anticompetitive effects. New entry or expansion by existing competitors was 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.

Sabre rebutted that it and Farelogix offer complementary products, and that the combination would result in further innovation, to the benefit of airlines and travelers.[97]

An eight-day trial began on January 27, 2020. After the trial, both sides submitted detailed proposed findings of fact and opening and answering briefs.[98] On April 7, 2020, Judge Leonard Stark ruled for the defendants, denying the DOJ's motion to enjoin the transaction.[99] The court found that the preponderance of the evidence shows that Sabre and Farelogix view each other as competitors, although only in a limited fashion.[100] In addition, "[s]ome airlines view Sabre's GDS and Farelogix's OpenConnect as partial substitutes."[101] The court also rejected the defendants' portrayal of Farelogix "as a non-unique company floundering in the NDC API marketplace."[102] The court did not find Sabre's story of why it wants to acquire Farelogix credible. Even though the loss of an independent Farelogix would somewhat reduce airlines' leverage in the next round of negotiating with GDS.[103] Despite these factual conclusions, the court found that the DOJ had not met its burden of proof.

Central to the court's decision appears to have been the rejection of Dr. Aviv Nevo's, the DOJ's economic expert, analysis. According to the court, Dr. Nevo was unable to (1) provide a clear answer as to which Farelogix products are "booking services" products;[104] (2) determine a "value or price for either Sabre's or Farelogix's 'booking services' ";[105] and (3) persuade the court on the product market or geographic market definition.

In contrast, the court found defendants' economic expert, Dr. Kevin Murphy, to be persuasive in arguing that, for an airline, the closest alternative to distributing through an online travel agency

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[95] *Id.* ¶ 38.

[96] *Id.* ¶ 54.

[97] Answer of Defendants Sabre Corp. and Sabre GLBL Inc., *United States* v. *Sabre Corp.*, C.A. No. 19-1548-LPS (D. Del. Sept. 9, 2019).

[98] *United States* v. *Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020), *available at* https://www.ded.uscourts.gov/sites/ded/files/opinions/19-1548_0.pdf.

[99] *Id.*

[100] *Id.* at 118.

[101] *Id.*

[102] *Id.* at 119.

[103] *Id.* at 125.

[104] *Id.*

[105] *Id.*

is distributing through its own website.[106] The court found that the "DOJ failed" to identify "a proper relevant market. . . . Sabre, in a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform."[107] In the alternative, the court further concluded that defendants had rebutted the DOJ's *prima facie* case. The court found that the DOJ had not proven that the transaction would lead to an increase in prices or deter innovation.

The DOJ appealed the decision to the Third Circuit on April 8, 2020, and on April 15, 2020, indicated that it might seek an injunction pending the appeal. On April 9, 2020, however, the CMA blocked the merger on the grounds that it would stifle innovation and competition.[108] The CMA found that both companies were invested heavily in developing airline ancillary services for distribution to travel agencies, and that Sabre would be unlikely to continue to develop independently its own offerings. As a result, the CMA indicated that the purchase "could result in less innovation in their services, leading to fewer new features that may be released more slowly. Fees for certain products might also go up. As a result, airlines, travel agents and U.K. passengers would be worse off."[109] On May 1, 2020, Sabre and Farelogix announced the termination of their agreement.[110] Sabre appealed the CMA's decision on jurisdictional grounds to the U.K.'s Competition Appeal Tribunal. On July 20, 2020, the Third Circuit vacated the district court's decision on the grounds that the dispute was mooted when the companies abandoned the transaction.[111] The appeals court, however, did not take a position on the merits of the case.

b. *DOJ Sued to Block Novelis's Acquisition of Aleris and Won in 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") in September 2019. The DOJ asserted that Novelis and Aleris were two of only four aluminum automotive body sheet ("ABS") suppliers in North America, and combined, accounted for approximately 60% of total production capacity and the majority of uncommitted capacity with Novelis. Aleris had, according to the DOJ, "new [established facilities in the United States in 2016] and [is a] disruptive rival" that is "poised for transformational growth."[112] 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."[113] The DOJ projected that there

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[106] *Id*. at 127.

[107] *Id*. at 136. *See Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018).

[108] Final Report, Competition and Markets Authority, Anticipated Acquisition by Sabre Corporation of Farelogix Inc. (Apr. 9, 2020), *available at* https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.

[109] Press Release, Competition and Markets Authority, *CMA Blocks Airline Booking Merger* (Apr. 9, 2020), *available at* https://www.gov.uk/government/news/cma-blocks-airline-booking-merger.

[110] Press Release, Sabre Corp., *Sabre Corporation Issues Statement on Its Merger Agreement with Farelogix* (May 1, 2020), *available at* https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/.

[111] *United States* v. *Sabre Corp.*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

[112] 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.

[113] *Id.* at 2.

would be a shortage of aluminum ABS in North America soon, that additional capacity cannot be readily brought online to meet growing demand, and that, due to transportation costs and supply chain risks, 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. § 571) to resolve the issue of product market definition.[114] As contemplated in the plan to refer the matter to arbitration, fact discovery proceeded under the supervision of the district court. Following the close of fact discovery, the arbitration proceeding began. Eleven fact witnesses and three expert witnesses testified in the proceedings over a 10-day period. The parties dispensed with the need for post-trial briefing and agreed that the arbitrator would render a short decision of no more than five pages by March 13, 2020. Under the arbitration terms, if the DOJ prevailed, the DOJ was authorized to file a proposed final judgment that required Novelis to divest all of Aleris's North American aluminum ABS operations; if the defendants prevailed, then the DOJ agreed to seek to dismiss the complaint voluntarily.

On March 9, 2020, the arbitrator agreed with the DOJ's narrower market definition.[115] As a result, once the judge entered the Hold Separate Agreement, the transaction could proceed, conditioned on the previously specified divestitures and the payment of DOJ's fees and costs incurred in connection with arbitration. On October 1, 2019, the EC had approved the transaction after the parties agreed to divest Aleris's aluminum ABS business in Europe, eliminating the entire overlap created by the proposed acquisition in Europe. The transaction closed on April 14, 2020.

On August 18, 2020, the DOJ asked the court to appoint a trustee to oversee the divestiture. The proposed final judgment provided 90 days after the entry of the modified Hold Separate Stipulation Order to divest the divestiture[116] assets. The court entered the Stipulation and Order on May 19, 2020. The DOJ did not agree to extend the 90-day period. Thus, Novelis had until August 17, 2020 to complete the divestiture, which it failed to accomplish.

c. *DOJ Sues to Block Geisinger Health's Acquisition of Evangelical Community Hospital*

On August 5, 2020, the DOJ filed a lawsuit in the U.S. District Court for the Middle District of Pennsylvania to block Geisinger Health's ("Geisinger") partial acquisition of Evangelical Community Hospital ("Evangelical").[117] Geisinger is a large hospital system in Central and

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[114] On November 12, 2020, the DOJ issued updated guidance regarding the use of arbitration to resolve civil antitrust matters. Press Release, U.S. Dep't of Justice, *Justice Department Issues Guidance on the Use of Arbitration and Launches Small Business Help Center* (Nov. 12, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-issues-guidance-use-arbitration-and-launches-small-business-help-center.

[115] Press Release, U.S. Dep't of Justice, *Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation* (Mar. 9, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute; Arbitration Decision (Redacted Public Version), *United States* v. *Novelis, Inc.*, No. 1:19-cv-02033 (N.D. Ohio Mar. 9, 2020), *available at* https://www.justice.gov/atr/case-document/file/1257031/download.

[116] Final Judgment at ¶ IV(A), *United States* v. *Novelis, Inc.*, No. 1:19-cv-02033 (N.D. Ohio Aug. 26, 2020), *available at* https://www.justice.gov/atr/case-document/file/1309576/download.

[117] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Geisinger Health's Transaction with*

Northeastern Pennsylvania. Evangelical is an independent community hospital in Lewisburg, Pennsylvania, which the DOJ asserted is a close competitor of Geisinger for GAC services in a six-county area in Central Pennsylvania. The two hospitals together account for approximately 71% of GAC revenues in this region.

The complaint alleged that Geisinger had initially sought to acquire 100% of Evangelical but realized that such an acquisition would violate the antitrust laws.[118] Instead, the parties entered into a partial (30% ownership interest) acquisition agreement to avoid antitrust scrutiny. The DOJ asserted that the terms of the acquisition agreement would impose significant entanglements between Geisinger and Evangelical. The complaint alleged that the agreement would restrain trade through a variety of provisions, including agreements not to compete and market allocation. In addition, the DOJ asserted that the arrangement would violate Section 8 of the Clayton Act due to interlocking directorates.

2. *DOJ Consents*

In FY 2020, the DOJ entered into consents resolving concerns in eight proposed transactions: (1) Symrise/International Dehydrated Foods LLC and American Dehydrated Foods LLC (chicken-based food ingredients);[119] (2) BB&T/SunTrust (retail bank branches);[120] (3) ZF Friedrichshafen AG ("ZF")/WABCO Holdings Inc. ("WABCO") (steering system components);[121] (4) Olympus

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Evangelical Community Hospital (Aug. 5, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-geisinger-health-s-transaction-evangelical-community-hospital.

[118] Complaint, *United States* v. *Geisinger Health*, No. 4:20-cv-01383 (M.D. Pa. Aug. 5, 2020), *available at* https://www.justice.gov/opa/press-release/file/1301656/download.

[119] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture to Resolve Antitrust Concerns in Symrise's Acquisition of IDF and ADF* (Oct. 30, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-resolve-antitrust-concerns-symrises-acquisition-idf. The DOJ alleged that the transaction parties combined control over 75% of the domestic market for the manufacture and sale of chicken-based food ingredients. These ingredients are used in a variety of human and pet food products. The DOJ conditioned clearance of the transaction on Symrise selling its brand-new facility in Banks County, Georgia to Kerry Inc., a global manufacturer of ingredients and recipe solutions for the food and beverage industry.

[120] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger* (Nov. 8, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger. In the largest divestiture in a bank merger in over a decade, the parties agreed to divest 28 branches across North Carolina, Virginia, and Georgia, with approximately $2.3 billion in deposits. The DOJ indicated that the settlement was necessary to ensure that customers will continue to have access to competitively priced banking products, including loans to small businesses, while preserving the investments in innovation and technology that the merger is expected to generate.

[121] Press Release, U.S. Dep't of Justice, *Justice Department Requires ZF and WABCO to Divest WABCO's Steering Components Business to Proceed with Merger* (Jan. 23, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-zf-and-wabco-divest-wabcos-steering-components-business-proceed. The DOJ alleged that ZF and WABCO are the only two North American suppliers of steering gears used on large commercial vehicles. These gears are an essential steering system component and are used to direct the front wheels of trucks and buses, as well as a key component of advanced driver assistance system ("ADAS") steering features. ADAS steering features are already being implemented today and are expected to be of continued importance as companies develop autonomous vehicle operations. The proposed settlement requires the parties to divest the entirety of WABCO's R.H. Sheppard steering systems subsidiary, including its manufacturing facilities in Hanover, Pennsylvania, and Wytheville, Virginia, as well as other WABCO steering gear assets within 90 calendar days after the filing of the complaint or 30 days after regulatory approvals have been obtained.

Growth Fund VI L.P./DS Smith plc (bag-in-box packaging);[122] (5) United Technologies Corporation/Raytheon Company (military airborne radios; military GPS systems);[123] (6) Dairy Farmers of America, Inc./Prairie Farms Dairy, Inc./Dean Foods Company (fluid milk processing);[124] (7) Odyssey Investment Partners Fund V, LP/General Dynamics SATCOM Technologies, Inc.

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[122] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture in Order for Liqui-Box to Proceed with Acquisition of Plastics Division of DS Smith* (Feb. 19, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-order-liqui-box-proceed-acquisition-plastics-division.

[123] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Merger Between UTC and Raytheon to Address Vertical and Horizontal Antitrust Concerns* (Mar. 26, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-merger-between-utc-and-raytheon-address-vertical-and. The DOJ conditioned approval of the United Technologies Corporation ("UTC") and Raytheon Company ("Raytheon") merger on divesture of (1) Raytheon's military airborne radio business; (2) UTC's military global positioning systems ("GPS") and large space-based optical systems; and (3) UTC's optical systems business. The DOJ concluded that, without these divestitures, the combination would eliminate "competition [in] military airborne radios and military GPS systems to the Department of Defense ("DOD") and enable the merged firm to lessen competition for multiple components used in reconnaissance satellite sold to DOD and the wider U.S. intelligence community." *Id*. These horizontal and vertical concerns were resolved through the divestiture of the three specified business units. The Raytheon military airborne radio business and UTC's GPS business divestiture is to an upfront buyer, BAE Systems, and the parties have 90 days after entry of the Order by the Court, or 15 days after all regulatory approvals have been received, to divest the UTC optical systems business to a DOJ-approved acquirer. The DOJ cooperated with the DOD, the EC, and the Canadian Competition Bureau.

[124] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA Out of Bankruptcy* (May 1, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa. On May 1, 2020, the DOJ announced the closing of its investigation into proposed acquisitions by Dairy Farms of America ("DFA") and Prairie Farms Dairy, Inc. ("Prairie") of fluid milk processing plants from Dean Foods Company ("Dean") out of bankruptcy. The two largest fluid milk processors—Dean and Borden Dairy Company—were in bankruptcy at the same time, with the pandemic resulting in milk demand by schools and restaurants collapsing. Dean operated 57 fluid milk processing plants in 29 states; by November 12, 2019, it had filed for Chapter 11 bankruptcy and would cease to operate in May 2020.

DFA is a Kansas cooperative with nearly 14,000 farmer-members. It proposed to purchase 44 of Dean's plants. Prairie has over 700 farmer-members. Prairie would acquire the remainder of the plants.

The DOJ permitted the Prairie acquisition to proceed after finding that the plants likely would be shut down if not purchased by Prairie due to the lack of alternate operators who could timely buy the plants. The DOJ's findings for some of the plants to be acquired by DFA, however, raised concerns that the DOJ required to be resolved. During the investigation, the DOJ expressed concerns about a number of Dean's plants in the Upper Midwest, and DFA ceased its efforts to acquire the plants. At the end of the investigation, there remained some concerns: The DOJ estimated that DFA would post-acquisition control nearly 70% of the fluid milk market in northeastern Illinois and Wisconsin, and approximately 51% in New England. DFA and Dean competed head-to-head in these areas and the acquisition would decrease options available to fluid milk customers from three to two. The DOJ rejected the ability of smaller, fringe processors to provide competitive options.

DFA agreed to divest three fluid milk processing plants located in Harvard, Illinois, De Pere, Wisconsin, and Franklin, Massachusetts, within 30 days, extendable by the DOJ by up to an additional 60 days to DOJ-approved acquirers. The divestiture buyers will have certain trademark rights, including a non-exclusive royalty-free nationwide license to use "Dean's" brand name for all products for two years nationwide, and in Minnesota, Iowa and the Lower Peninsula of Michigan and, as applicable, an exclusive perpetual license in the states of Illinois, Wisconsin and Indiana, and the Upper Peninsula of Michigan. In addition, the divestiture includes a two-year license for the Tru Moo and DairyPure brands.

The lawsuit and proposed consent were filed in the Northern District of Illinois. The Massachusetts and Wisconsin AGs joined in the suit.

(geostationary satellite antennas);[125] and (8) Anheuser-Busch InBevSA/NV/Craft Brew Alliance, Inc. (beer).[126]

In the remainder of calendar year 2020, the DOJ entered into consent decrees in four additional proposed acquisitions: (1) Waste Management, Inc./Advanced Disposal Services, Inc. (waste collection and disposal services);[127] (2) Liberty Latin America/AT&T (Puerto Rico and U.S. Virgin Islands fiber-optic-based telecom services for enterprise customers);[128] (3) Intuit Inc./Credit

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[125] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture in Order for Communications and Power Industries to Proceed with Acquisition of General Dynamics Satcom Technologies* (May 28, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-order-communications-and-power-industries-proceed. The DOJ required Odyssey's portfolio company, Communications and Power Industries LLC ("CPI"), to divest its wholly owned subsidiary, CPI ASG Signal Division Inc. ("ASC"), in order to proceed with its acquisition of General Dynamics SATCOM Technologies, Inc. ("GD SATCom") from General Dynamics.

According to the DOJ, ASC and GD SATCom are two of only a few firms that design, manufacture, and sell large geostationary satellite antennas. These antennas are critical components in satellite networks that enable secure communications links in remote areas that lack access to the main telecommunications grid. The antennas are used in government, military, and commercial satellite communications networks. The DOJ asserted that the combination would have left customers, including the DOD, without a competitive alternative.

The proposed settlement required the divestiture of the entirety of ASC, including its facilities in Texas and Ontario, Canada, within 60 days of the court's entry of the Hold Separate Order, or 30 days after Regulation Approvals (including CFIUS and any other antitrust laws) has been received, subject to extension by the DOJ, in its sole discretion, for up to 90 days in total.

[126] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture in Order for Anheuser-Busch to Acquire Craft Brew Alliance* (Sept. 18, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-order-anheuser-busch-acquire-craft-brew-alliance. The DOJ required Anheuser-Busch InBevSA/NV ("ABI") to divest Craft Brew Alliance Inc.'s ("CBA") Kona brand breweries in the State of Hawaii and to license the Kona brand in Hawaii in order to acquire the remaining shares of CBA (it was already a minority shareholder). According to the complaint, absent the divestiture, ABI's acquisition would substantially lessen head-to-head competition in Hawaii between ABI's brands, such as Stella Artois and Michelob Ultra, and CBA's Kona brand. In Hawaii, ABI and CBA would have a combined share of 41%. The settlement required divestiture of Kona Brewing LLC to PV Brewing Partners, including the sale of its brewing facilities in Hawaii and the granting of a perpetual, exclusive license of the Kona brands in brewing, distribution and sale of Kona beer in Hawaii.

[127] Press Release, U.S. Dep't of Justice, *Justice Department Requires Waste Management to Divest Assets in Order to Proceed with Advanced Disposal Services Acquisition* (Oct. 23, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-waste-management-divest-assets-order-proceed-advanced-disposal. The DOJ required the parties to divest 15 landfills, 37 transfer stations, 29 hauling locations, over 200 waste collection routes, and other related assets, located in portions of 10 states, to GFL Environmental, Inc., or another buyer approved by the DOJ. Announced in April 2019, the DOJ conducted an 18-month investigation of the transaction. The transaction combines the largest and fourth-largest waste management companies in the country. Moreover, the DOJ alleged that the transaction parties are either the only two or two of only a few significant providers of small container commercial collection and municipal solid waste disposal services in the affected local markets.

[128] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture in Order for Liberty Latin America to Acquire AT&T's Telecommunications Operations in Puerto Rico and the U.S. Virgin Islands* (Oct. 23, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-order-liberty-latin-america-acquire-atts. The DOJ required divestiture of certain fiber-based telecommunications assets and customer accounts in Puerto Rico to WorldNet Telecommunications, Inc. Specifically, the DOJ posits that the merger would have eliminated competition for fiber-optic-based telecommunications services that businesses in Puerto Rico. The DOJ complaint, alleges that Liberty and AT&T are two of the three largest wireline telecommunications providers in Puerto Rico and own two of the three most extensive fiber-based network infrastructures on the island. Liberty and AT&T each use their extensive network infrastructures to provide fiber-based connectivity and telecommunications services to enterprise customers. Liberty acquired Cable & Wireless Communications Plc's operations in Puerto Rico in 2016 and is the

Karma Inc. (digital do-it-yourself tax preparation products);[129] and (4) Harvard Pilgrim/Tufts (commercial health insurance).[130]

In addition, the DOJ cleared Uber Technology Inc.'s acquisition of Postmates after Uber filed a letter on November 10, 2020 outlining commitments made in connection with the acquisition.[131] These commitments included: (1) removing exclusivity provisions in restaurant agreements for about 800 restaurants in 11 cities, including Los Angeles, Miami, and El Paso; and (2) not entering into any agreement with those restaurants that contains an exclusivity provision for six months following the transaction's closing.

3. *Abandoned Transactions*

On May 4, 2020, Cengage Learning Inc. ("Cengage") and McGraw-Hill Education, Inc. ("McGraw-Hill") abandoned their proposed merger, apparently due to the inability to agree to a divestitures package with the DOJ.[132] Cengage and McGraw-Hill are the second- and third-largest textbook publishers. The merger reportedly faced opposition from consumer advocacy groups,

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largest cable operator in the territory. AT&T entered Puerto Rico through its acquisition of Centennial Communications Corp. in 2009. AT&T retained its DirecTV customers and its network and service capabilities for first responders. The complaint alleges that competition between Liberty and AT&T has resulted in lower prices and higher-quality services for these customers. The divestiture is intended to create a strong competitor in the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico.

[129] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestiture of Credit Karma Tax for Intuit to Proceed with Acquisition of Credit Karma* (Nov. 25, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-credit-karma-tax-intuit-proceed-acquisition-credit. The DOJ conditioned its approval of the transaction with the divestiture of Credit Karma's digital do-it-yourself ("DDIY") tax preparation products business to Square Inc. According to the DOJ, Intuit's TurboTax has enjoyed a dominant position in the market for more than a decade. Since entering four years ago, Credit Karma Tax has allegedly become a disruptive competitor with a significant impact, which helps constrain TurboTax prices and pushes Intuit to improve TurboTax offerings. The DOJ's press release indicates that the "divestiture to Square, another highly successful and disruptive fintech company, ensures that taxpayers will continue to both benefit from this competition and benefit from new innovative financial service offerings from both Intuit and Square."

[130] Press Release, *U.S. Dep't of Justice, Justice Department Requires Divestiture of Tufts Health Freedom Plan in Order for Harvard Pilgrim and Health Plan Holdings to Proceed With Merger* (Dec. 14, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestiture-tufts-health-freedom-plan-order-harvard-pilgrim-and. The DOJ conditioned the merger of Harvard Pilgrim Health Care and Tufts Health Plan upon the sale of Tuft's commercial health insurance business in New Hampshire to UnitedHealth Group Inc. Absent the divestiture, the DOJ indicated that the combination would lead to higher prices, poorer quality and reduced choice for health insurance in the state of New Hampshire. Harvard Pilgrim and Tufts are apparently two of the top three providers of group health insurance plans in New Hampshire for employers with up to 50 full-time workers and those with between 50 and 100 workers. The DOJ further asserted that businesses had benefited from direct competition between the companies since Tufts entered the state in 2016. The Attorney General of New Hampshire joined in the enforcement action.

In addition to New Hampshire, the DOJ investigated potential issues in Massachusetts as well but found the combination was not likely to hurt competition there. Under the terms of the settlement, the companies will have to sell the Tufts Freedom business to UnitedHealth or another buyer approved by the agency.

[131] Levi Sumagaysay, *Uber's Purchase of Postmates Approved by U.S., with Some Conditions*, MARKETWATCH, (Nov. 10, 2020, 1:17 PM), *available at* https://www.marketwatch.com/story/ubers-purchase-of-postmates-approved-by-u-s-with-some-conditions-11605031451.

[132] Press Release, U.S. Dep't of Justice, *Cengage and McGraw-Hill Terminate Merger Agreement in Response to Antitrust Concerns* (May 4, 2020), *available at* https://www.justice.gov/opa/pr/cengage-and-mcgraw-hill-terminate-merger-agreement-response-antitrust-concerns.

students, and college bookstores. The two companies' portfolios overlapped in some categories, and some of the textbooks use digital learning platform and tools. McGraw-Hill indicated that "the required divestitures would have made the merger uneconomical."[133] The divestitures reportedly involved several dozen courses.[134]

Separately, on April 27, 2020, the CMA announced an extension of its deadline for issuing a final recommendation on the transaction until September 28, 2020, after the CMA indicated that the offered divestitures were unlikely to be sufficient and the companies responded that they would be considering their next steps.[135]

4. *Closing Statements*

a. *London Stock Exchange Group/Refinitiv*

On July 31, 2020, the DOJ issued a statement indicating that it would not challenge London Stock Exchange Group's ("LSEG") acquisition of Refinitiv.[136] The DOJ had conducted an eight-month investigation that included both horizontal and vertical theories. The horizontal analysis focused on similar products offered by the parties, such as financial indexes. In addition, the "[D]ivision considered how the proposed transaction could affect the ability and incentives of LSEG and Refinitiv to change the licensing terms for proprietary data feeds used by their rivals to supply products that compete against similar products from LSEG and Refinitiv."[137]

II. State Antitrust Enforcement

A court challenge by 16 AGs in the T-Mobile/Sprint merger marked a noteworthy departure from normal federal-state cooperation in the merger context; the court's denial of the injunction after the trial eliminated the most significant remaining obstacle for the deal and the parties closed on April 1, 2020.

The DOJ and AGs for five states (Kansas, Nebraska, Ohio, Oklahoma, and South Dakota) had 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.[138] According to the accompanying 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

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[133] Press Release, McGraw-Hill, *McGraw-Hill and Cengage Jointly Agree to Terminate Planned Merger of Equals* (May 4, 2020), *available at* https://www.mheducation.com/news-media/press-releases/mcgraw-hill-cengage-jointly-agree-to-terminate-planned-merger.html.

[134] Diane Bartz, *Textbook Companies Cengage, McGraw-Hill Scrap Merger*, REUTERS (May 4, 2020, 11:28 AM), *available at* https://in.reuters.com/article/mcgraw-hill-m-a-cengage/textbook-companies-cengage-mcgraw-hill-scrap-merger-idINKBN22G1YB.

[135] Notice of Extension of Inquiry Period Under Section 39(8A) of the Enterprise Act 2002, Competition and Markets Authority, Reference Relating to the Proposed Acquisition by McGraw Hill Education, Inc. of Cengage Learning Holdings II, Inc. (Apr. 1, 2020, Released Apr. 27, 2020), *available at* https://assets.publishing.service.gov.uk/media/5ea1a09fd3bf7f7b49a9f27a/MHE_Cengage_Notice_of_extension.pdf.

[136] Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of London Stock Exchange Group and Refinitiv* (July 31, 2020), *available at* https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-closing-its-investigation-london-stock.

[137] *Id.*

[138] 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.

retail subscribers who purchase prepaid mobile wireless service. The combination would allegedly have eliminated head-to-head competition between the companies and would 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 the 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 mobile virtual network operator ("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, 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 onscreen 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-out commitments.

The transaction, however, could not close immediately, despite DOJ and FCC approvals. On June 11, 2019 (*i.e.*, 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").[139] The AG Complaint alleged harm to mobile subscribers nationwide, particularly those in lower-income and minority communities.

The transaction parties responded on July 9, 2019.[140] 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, would drive more intense competition, which would 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 refuted claims that Sprint would likely play a meaningful competitive role as a stand-alone company in the years to come. Sprint had steadily lost subscribers, its free cash flow had been overwhelmingly negative, and it was struggling with its huge debt load and interest expense that in that last year was greater than its operating income.

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[139] *See* Complaint, *New York* v. *Deutsche Telekom AG*, No. 1:19-cv-5434-VM (S.D.N.Y. June 11, 2019).

[140] *See* Answer of Defendants T-Mobile US, Inc. and Deutsche Telekom AG, and Answer of Defendants Sprint Corp. and Softbank Grp. Corp., *New York* v. *Deutsche Telekom AG*, No. 1:19-cv-5434-VM (S.D.N.Y. July 9, 2019).

The AG Complaint was amended on August 15, 2019 to add additional AGs and to assert that the DOJ's remedy would not eliminate the competitive harm.[141] Before the AG case went to trial, four of the 16 AGs settled with the parties and/or joined the DOJ consent.[142]

The court held a bench trial from December 9 to December 20, 2019, and heard post-trial closing arguments from both sides on January 15, 2020. On February 10, 2020, Judge Victor Marrero denied the request for an injunction to restrain the proposed acquisition and entered judgment in favor of the defendants.[143]

The court found that the plaintiffs had correctly (1) delineated the relevant product market as retail wireless mobile telecommunications services ("RWMTS") in which the MVNOs are not independent competitors that could meaningfully restrain the anticompetitive behavior of MVNO, and (2) delineated both a national RWMTS market and local RWMTS markets; and that, within these markets, the market shares and HHIs are sufficiently high to satisfy plaintiffs' *prima facie* burden. Therefore, plaintiffs had established an initial presumption that, by reason of higher concentration in fewer firms in the relevant markets, and the combined firm's larger market share, the proposed merger would likely be anticompetitive. The burden then shifted to defendants to rebut the presumption. Defendants presented three categories of evidence that the court found sufficient to rebut the presumptions of harm: (1) that the efficiencies arising from the proposed merger would cause the combined firm to compete more vigorously with its rivals in the RWMTS markets; (2) that Sprint was a weakened competitor that was not likely to continue competing vigorously in the RWMTS markets; and (3) that the DOJ and FCC remedies (especially the divestitures and other support given to DISH) would provide substantial incentives to competition in the RWMTS markets.

The court discussed its role in a merger that has been reviewed by the DOJ and the FCC. Having been tasked with independently reviewing the legality of the proposed merger, the court noted that it was not bound by the conclusions of these regulatory agencies. The court clarified, however, that "[n]onetheless, mindful that the agencies are intimately familiar with this technical subject matter, as well as the competitive realities involves," the court treated their views and actions "as persuasive and helpful evidence in [analyzing] the competitive effect of this merger. . . ."[144] The court explained further that "[t]he deference that the Court accords to the DOJ and FCC turns on their familiarity with the telecommunications industry and their extensive condition of this

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[141] *See* Second Amended Complaint, *New York* v. *Deutsche Telekom AG*, No. 1:19-cv-5434-VM (S.D.N.Y. Aug. 15, 2019).

[142] Press Release, U.S. Dep't of Justice, *Justice Department Welcomes Florida Joining T-Mobile/Sprint Settlement*, (Oct. 2, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-welcomes-florida-joining-t-mobilesprint-settlement; Press Release, U.S. Dep't of Justice, *Justice Department Welcomes Colorado Joining T-Mobile/Sprint Settlement* (Oct. 28, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-welcomes-colorado-joining-t-mobilesprint-settlement; Press Release, U.S. Dep't of Justice, *Justice Department Welcomes Arkansas Joining T-Mobile/Sprint Settlement* (Nov. 8, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-welcomes-arkansas-joining-t-mobilesprint-settlement; Press Release, U.S. Dep't of Justice, *Justice Department Welcomes Texas Joining T-Mobile/Sprint Settlement* (Nov. 27, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-welcomes-texas-joining-t-mobilesprint-settlement.

[143] *New York* v. *Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

[144] *Id.* at 225 (quoting *United States* v. *Mfr's Hanover Tr. Co.*, 240 F. Supp. 867, 881, 886 (S.D.N.Y. 1965)).

particular transaction, rather than on any notion that they represent the national public interest more than any state."[145]

The court then considered the additional evidence that the plaintiffs introduced to show that: (1) the proposed merger would increase the likelihood that the three remaining MVNOs would be able to compete less strenuously and deliver fewer consumer benefits (*i.e.*, a coordinated effect); and (2) the lost competition between Sprint and T-Mobile would cause the combined company to charge higher prices than T-Mobile ordinarily would have without the merger (*i.e.*, a unilateral effect). The primary basis for these assertions was the economic modeling introduced by Dr. Carl Shapiro. Defendants countered Dr. Shapiro's testimony and results with the testimony and findings of Dr. Michael Katz. At the outset of the court's decision, Judge Marrero indicated that "the parties' costly and conflicting engineering, economic, and scholarly business models, along with the incompatible visions of the competitive future their experts' shades-of-gray forecasts portray, essentially cancel each other out as helpful evidence the Court could comfortably endorse as decidedly affirming one side rather than the other."[146] The court was persuaded "that a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry."[147] The proposed merger would allow the merged firm to continue T-Mobile's maverick business strategy. While Sprint "has made valiant attempts to stay competitive in a rapidly developing and capital-intensive market," Sprint would not "remain relevant as a significant competitor. . . . Finally, the FCC and DOJ have closely scrutinized this transaction and expended considerable energy and resources to arrange for the entry of DISH as a fourth nationwide competitor. . . ."[148]

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 FY 2020, 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.[149]

1. *Pharma/Medical Devices/Biologics*

The FTC's investigations in 2020 involving pharmaceutical transactions included 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 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.[150] Until the first generic is introduced into the market,

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[145] *Id.* at 225 n.21.

[146] *Id.* at 187.

[147] *Id.* at 248.

[148] *Id.*

[149] *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 at 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 (general overview of recent DOJ healthcare enforcement activity).

[150] Ilene Knable Gotts & Richard T. Rapp, *Antitrust Treatment of Mergers Involving Future Goods*, ANTITRUST 100

competition may exist among competing branded drugs for a particular therapeutic treatment. Next, the competition focus shifts to the branded product and its generic bioequivalent, which gets approved into the marketplace through an abbreviated new drug application ("ANDA") process. Many pharma deals involve a company without a commercially available product, but 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.[151]

Starting in 2016, with the *Teva/Allergan* merger,[152] 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,[153] the Commission considered whether the transaction would discourage development of new generic products.

Recent FTC enforcement action in the pharmaceuticals area has shown a fundamental rift between the Republican and Democratic Commissioners. The consent decrees in matters such as *BMS/Celgene* have followed the Commission's standard approach. FTC Commissioner Slaughter has expressed concern that this analytical approach is too narrow and that the Commission should more broadly consider whether any pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation. In addition, in matters such as *AbbVie/Allegan*, FTC Commissioners Slaughter and Chopra raised concerns about specific divestiture buyers and the adequacy of the divestiture package.

To some extent, the rift is overstated. After all, it has always been the case that in pharma matters the FTC has considered the impact of the transaction on pipeline and new drug offerings as well as portfolio effects. For instance, this year, in both the *AbbVie/Allegan* and *Pfizer/Mylan* acquisitions, the FTC required the divestiture of drugs under development to an upfront buyer. In addition, this focus on pipeline and new competition has impacted diagnostics and medical device

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(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*, THE ANTITRUST SOURCE, Mar. 2005, at 1, *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/06_mar05_abrametz323.authcheckdam.pdf.

[151] The FTC has also been active in applying this analysis to veterinary drugs. *See, e.g.*, *Elanco/Bayer*, discussed *supra* note 56.

[152] 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.

[153] 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.

matters as well. For example, just this year, the FTC successfully challenged Illumina's proposed acquisition of PacBio, alleging that the acquisition would extinguish PacBio as a competitive threat by eliminating competition between the two companies now and in the future and further insulate Illumina's monopoly. The FTC also alleged that the combination would reduce the incentive to innovate and develop new offerings.

The FTC continued to be very active in bringing enforcement actions in the medical devices area, including, as mentioned above, in matters involving new entrants. For instance, the FTC finally prevailed in its suit challenging the combination of two medical device companies—Otto Bock, the North American subsidiary of a German prosthetic limb maker, and Freedom. The FTC successfully argued before the ALJ that the acquisition eliminated existing competition in the market for MPK products.[154] Together, Otto Bock and Freedom comprised 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 would also result in higher prices, lower quality and less innovation. The parties unsuccessfully appealed the ALJ's decision to the Commission,[155] and finally offered a divestiture package that appears to have satisfied the FTC.

In another matter involving medical devices in FY 2018, *Fresenius/NxStage*,[156] the FTC required remedies: 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. FTC 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; NxStage manufactures SystemOne, which FTC 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. FTC 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.

This year, in the medical device area, there have been both consents to resolve concerns (*e.g.*, *Össur Hf/College Park*, *Striker/Wright*) as well as abandoned transactions (*e.g.*, *J&J/TachoSil*, *Aurobindo/Novartis*, *NextMed/HealthTronics*). We are likely to continue to see heightened scrutiny in this area as companies combine to achieve scale and innovation and the FTC seeks to preserve the number of competitors.

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[154] *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.

[155] *See supra* pp. 16–18.

[156] 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.

2. *Hospital Mergers*

The FTC has challenged a number of hospital mergers, often with the relevant AG as a co-plaintiff. These cases typically alleged as the relevant market inpatient GAC services in a specific local geographic area. Other service markets, including specialty services and rehabilitation services, have also been asserted. The complaints filed in this year's *Jefferson Hospital* and *Methodist Le Bonheur Healthcare* merger follows this tradition. Interestingly, the DOJ also brought a challenge of a hospital combination in the *Geisinger* case. The FTC has also been very active in challenging hospital system/physician group combinations. These hospital-related challenges are often protracted, with trials and appeals to federal circuit courts.[157] 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.

3. *Providers*

Combinations of physician groups, particularly in rural areas, can also 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*,[158] 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."[159] 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.[160] The transaction would have also put under common ownership the largest MCPO and the largest MA insurer in the area. This past year, *Aveanna Healthcare/Maxim* abandoned their transaction due to antitrust concerns. Both parties provide nursing services, including private duty nursing, in overlapping MSAs. In addition, the FTC has raised concerns in the provision of specialty and emergency veterinary services.[161]

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, 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.

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[157] *See, e.g.*, *FTC* v. *Sanford Health*, 926 F.3d 959 (8th Cir. 2019).

[158] 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.

[159] Complaint ¶ 7, *In the Matter of UnitedHealth Grp. 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.

[160] *Id.* ¶ 15.

[161] *See, e.g.*, *Compassion-First/National Veterinary Associates*, *supra* note 49.

4. *Health Insurance*

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.

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 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 a PBM 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.[162] 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.[163] 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. 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

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[162] *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.

[163] *Id.*

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.[164] The consent also required 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.[165]

Antitrust agency interest in vertical mergers increased substantially during the Trump Administration. The DOJ brought the first court challenge based on vertical theories to block the proposed *AT&T/TW* transaction.[166] Publicly available data suggest that there were at least 14 significant investigations involving vertical issues from 2016 to 2018. In addition, both the DOJ and the FTC investigated a number of transactions on vertical theories in 2019, and even required remedies in some.[167] In 2020, deals in which remedies were required raised vertical concerns.[168] 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 problematic.

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

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[164] Final Judgment, *United States* v. *Comcast Corp.*, No. 1:11-cv-00106-RJL (D.D.C. Sept. 1, 2011), *available at* https://www.justice.gov/atr/case-document/file/492196/download.

[165] *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.

[166] *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.

[167] *See, e.g.*, *United Health Group/DaVita Medical Group*, *supra* pp. 39.

[168] *See United Technologies/Raytheon*, *supra* note 123.

in three reported matters in the last few years—*Staples/Essendant*,[169] *Fresenius/NxStage*[170] and *United Health Group/DaVita Medical Group*.[171]

On June 30, 2020, the DOJ issued new Vertical Merger Guidelines (the "Guidelines")[172] that outline how the federal agencies will evaluate the likely competitive impact of mergers involving firms operating at different levels of the supply chain, and determine whether to challenge those mergers. The Guidelines, which represent the first major revision to guidance on vertical mergers in over 35 years, more accurately reflect the agencies' current enforcement approach.

The Guidelines describe the agencies' approach to defining one or more relevant markets for the purpose of evaluating a vertical merger. This approach largely conforms with the agencies' Horizontal Merger Guidelines, but also includes identification of one or more "related products" that are "supplied or controlled by the merged firm and are positioned vertically or are complementary to the products and services in the relevant market."[173]

In a significant departure from a draft published in January 2020, the Guidelines no longer suggest that vertical mergers involving companies with shares of less than 20% in their respective markets are unlikely to be anticompetitive. This quasi-safe harbor had drawn significant criticism from the FTC's two Democratic Commissioners.[174] As revised, the Guidelines state more generally that the agencies "may consider measures of market shares and market concentration" in analyzing competitive effects without making reference to any specific market share or concentration threshold. This decision likely reflects a compromise, as some had argued the 20% threshold was too low and others had argued it was too high. Both Democratic Commissioners nevertheless continued to oppose the issuance of the Guidelines, taking particular issue with their emphasis on the potential benefits of vertical mergers.[175]

The new Guidelines primarily focus on unilateral theories of harm that the agencies commonly consider in their review of vertical mergers, including the ability and incentive of a combined firm to raise its rivals' costs or foreclose their access to essential inputs, distribution channels, or complementary products (referred to as "diagonal mergers"). Vertical mergers may also raise unilateral concerns when they provide the combined firm with access to competitively sensitive information about its upstream or downstream rivals, or make entry by a potential competitor more

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[169] *See Staples/Essendant*, *infra* note 192.

[170] *See Fresenius/NxStage*, *supra* note 156.

[171] *See United Health Group/DaVita Medical Group*, *supra* pp. 36–37.

[172] U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020), *available at* https://www.justice.gov/atr/page/file/1290686/download.

[173] *Id*. at Section 3.

[174] *See* Fed. Trade Comm'n, Statement of Commissioner Rebecca Kelly Slaughter Regarding FTC-DOJ Draft Vertical Merger Guidelines at 3, FTC File No. P810034 (Jan. 10, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf (too high); Fed. Trade Comm'n, Concurring Statement of Commissioner Christine S. Wilson Regarding the Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment at n.10, FTC File No. P810034 (Jan. 10, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

[175] Fed. Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of the Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; Fed. Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter In Re FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

difficult by requiring entry at different levels of the supply chain or by foreclosing access to a necessary asset. Similarly, non-horizontal mergers may eliminate nascent competition by combining complementary products or an established firm with an emerging player in an adjacent market. The inclusion of these theories of harm in the Guidelines signals a convergence with other jurisdictions, such as by the EC, where they are often considered by antitrust regulators. In addition, the Guidelines discuss the ways in which a vertical merger may make coordinated interaction among firms more likely.

The Guidelines expressly recognize that, while "vertical mergers are not invariably innocuous," they may create significant efficiencies that "often benefit consumers." Accordingly, the Guidelines indicate that efficiencies are an important part of the agencies' review of vertical mergers, with a particular emphasis on the analysis of the elimination of double marginalization ("EDM") and contracting frictions between independent firms. The Guidelines also specify that the agencies will consider "*the likely net effect*" of the merged firm's unilateral conduct on competition and will consider countervailing effects, including EDM.[176] The agencies will balance each of these potential harms against any offsetting benefits, including evidence that the merged firm will achieve EDM and pass through some of the resulting cost savings. The Guidelines clarify that the transaction parties bear the burden of proof for any efficiencies claims.

C. Merger Remedies Remain a Focus

A part of the debate during the Trump Administration has been to what extent, if any, can vertical concerns be addressed 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 had 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 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.[177]

The Trump Administration's DOJ leadership in the Fall of 2017 indicated that, although it had not ruled out behavioral remedies entirely, the standard for proving that any such remedy will cure the anticompetitive harm is high. 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."[178] Such regulatory schemes "require centralized decisions instead of a free market

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[176] Guidelines, Section 4. The treatment of EDM is notably included as part of both the unilateral effects section and the procompetitive effects section. For a general discussion, see Koren Wong-Ervin & John Harkrider, *Assessment of the Vertical Merger Guidelines and Recommendations for the VMGs Commentary*, Law360 (July 6, 2020).

[177] 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.

[178] 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, Ass't Att'y Gen. of the Antitrust Div., Improving the Antitrust Consensus,

process. They also set static rules devoid of the dynamic realities of the market."[179] 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."[180] 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."[181] 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 consideration of the arbitration provision in deciding that the combination was unlikely to harm competition. As demonstrated by the *United Technologies/Raytheon* transaction, however, divestiture remains the preferred, if not exclusive, remedy for vertical concerns.

On September 3, 2020, the DOJ released a new Merger Remedies Manual (the "Manual")[182] outlining how it will structure and implement remedial relief in merger challenges. The Manual is the culmination of a two-year process that started when the DOJ withdrew the Obama Administration's merger remedies policy guidance in 2018.

The Manual articulates a default preference for structural remedies (*e.g.*, divestiture) over conduct or behavioral remedies. Reflecting AAG Delrahim's public statements, the Manual claims that behavioral remedies do not "effectively redress persistent competitive harm" and "substitute

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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.

[179] November 16, 2017 Delrahim, *supra* note 178.

[180] *Id.*

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

[182] U.S. Dep't of Justice, Antitrust Division, Merger Remedies Manual (Sept. 2020), *available at* https://www.justice.gov/atr/page/file/1312416/download.

central decision making for the free market."[183] The Manual leaves open the possibility of behavioral remedies only to facilitate structural relief, or where a divestiture would sacrifice significant merger-specific efficiencies and a behavioral remedy both "completely cures the anticompetitive harm" and "can be effectively enforced."[184] For instance, conduct relief, such as temporary supply agreements, is appropriate to facilitate structural relief; however, restrictions on the merged company's right to compete in the final output markets or against the divestiture buyer, even as a transitional term, will not be accepted. Firewall provisions to prevent information from being disseminated within a firm are also to be infrequently used, the DOJ asserted, because "no matter how well crafted, the risk of collaboration in spite of the firewall is great."[185] In weighing the benefits of a firewall, the Manual indicates that the DOJ will work to ensure that it fully walls off information and to establish a carefully designed enforcement mechanism.

The Manual discusses the DOJ's approach to consummated merger remedies, identifying and approving upfront buyers, and collaborating with other agencies when structuring remedies. In doing so, the Manual memorializes existing agency practice, including a preference for "divestiture of an existing standalone business" and an expectation "in most merger cases" that parties must negotiate, finalize, and execute a divestiture agreement with an approved "upfront" buyer before closing.[186] Contrary to recent agency experience, however, the Manual puts strategic and private equity divestiture buyers on an equal footing, even noting that "in some cases a private equity purchaser may be preferred."[187] The Manual also embraces the possibility, in certain cases, of "fix-it-first" remedies that would avoid formal proceedings under the Tunney Act.

It is unclear to what extent the FTC approach will differ from the DOJ, particularly in its concerns with conduct remedies in vertical transactions.[188] Then-FTC Competition Bureau Director Bruce Hoffman indicated that "the FTC prefers structural remedies to structural problems, even with vertical mergers."[189] 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.[190]

In contrast to the DOJ's *United Technology/Raytheon* decision involving defense sector products, in *Northrop Grumman/Orbital ATK*, the FTC accepted behavioral—rather than imposing

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[183] *Id*. at 4.

[184] *Id*. at 16–17.

[185] *Id*. at 15.

[186] *Id*. at 8–9, 22.

[187] On this point, the Manual is directly at odds with the position taken by FTC Commissioner Chopra. *See* Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of the Vertical Merger Guidelines, *supra* note 163.

[188] 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.

[189] *Id*. at 7.

[190] *Id*. at 8–9.

structural—remedies, noting that it "typically disfavors behavioral remedies," but permitted their use in this transaction "given the special characteristics of the defense industry."[191] The more recent FTC enforcement decisions show a split among the Commissioners on the extent to which structural remedies will be presumptively imposed. As seen in the *Staples/Essendant* matter,[192] for instance, where the concern related to access to information from customers, a firewall may be sufficient to address concerns.[193]

IV. HSR Enforcement and Procedural Developments

A. Consent Compliance

The FTC Bureau of Competition has had for decades a section focused on compliance that, among other things, has input on the draft of proposed consent decrees, monitors compliance with Commission orders, and periodically oversees merger retrospectives. On August 20, 2020, the DOJ announced its intentions to create an "Office of Decree Enforcement and Compliance."[194] Details on staffing and scope are pending, but the purpose of the office will be to ensure effective implementation of and compliance with consent agreements.

In addition, the DOJ and the FTC settled investigations involving noncompliance with consent terms in the following matters:[195]

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[191] 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.

[192] 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.

[193] *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 (the 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).

[194] Press Release, U.S. Dep't of Justice, *Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program* (Aug. 20, 2020), *available at* https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil.

[195] In addition, see the discussion, *supra* pp. 26–27, regarding Novelis's failure to meet divestiture deadline.

1. *Live Nation Enters into Revised Agreement*

On December 19, 2019, the DOJ and Live Nation agreed to modify the 2010 agreement[196] entered into by Live Nation in connection with its acquisition of Ticketmaster.[197] Specifically, the DOJ filed a petition asking the court to clarify and extend by five-and-a-half years the Final Judgment entered by the court. The 2010 Final Judgment prohibited Live Nation from retaliating against concert venues for using another ticketing company, threatening concert venues, or undertaking other specified actions against concert venues for 10 years. Despite the prohibitions in the Final Judgment, the DOJ alleges that Live Nation repeatedly and over the course of several years engaged in conduct that, in the DOJ's view, violated the Final Judgment. To put a stop to this conduct and to remove any doubt about defendants' obligations under the Final Judgment going forward, Live Nation agreed to modify the Final Judgment to make clear that such conduct is prohibited.

Live Nation is required to provide notice to current or potential venue customers of its ticketing services of the clarified and extended Final Judgment and agreed to be subject to an automatic penalty of $1,000,000 for each new violation of the Final Judgment. In addition, Live Nation agreed to pay costs and expenses related to the DOJ's investigation and enforcement.

2. *Alimentation Couche-Tard Inc. Pays Civil Penalty*

On July 1, 2020, Alimentation Couche-Tard Inc. agreed to pay $3.5 million in civil penalties to settle the FTC's allegations that it violated the Commission's order to divest 10 retail stations in Minnesota and Wisconsin to Commission-approved buyers.[198] The FTC believed that the firm had failed to divest the stations on time and to keep the FTC accordingly informed about its divestiture efforts.

3. *CenturyLink Enters into Revised Settlement Agreement*

On August 14, 2020, CenturyLink entered into a revised settlement agreement in connection with its 2017 acquisition of Level 3 Communications.[199] The revisions follow an investigation into CenturyLink's compliance with the original consent. The settlement includes an extension of the non-solicitation period by two years, the appointment of an independent monitoring trustee, and the payment to the DOJ for the cost of its investigation. In addition, the revised agreement contains the new terms that the DOJ had adopted in 2018 to enhance the DOJ's ability to enforce its settlements and to lower the evidentiary standards for proving a consent decree violation.

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[196] Final Judgment, *United States* v. *Ticketmaster Entertainment, Inc.*, No. 1:10-cv-00139-RMC (July 30, 2010).

[197] Press Release, U.S. Dep't of Justice, *Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster* (Dec. 19, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

[198] Press Release, Fed. Trade Comm'n, *Alimentation Couche-Tard Inc. and CrossAmerica Partners LP Agree to Pay $3.5 Million Civil Penalty to Settle FTC Allegations That They Violated 2018 Order* (July 6, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/07/alimentation-couche-tard-crossamerica-partners-agree-to-pay-civil-penalty. *See* Decision and Order, *In the Matter of Alimentation Couche-Tard Inc.*, FTC Docket No. C-4635 (Feb. 15, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/171_0184_c4635_act_crossamerica_holiday_do_redacted_public_version_2-16-18.pdf.

[199] Press Release, U.S. Dep't of Justice, *Justice Department Brings Enforcement Action Against Centurylink* (Aug. 14, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-brings-enforcement-action-against-centurylink.

B. High Tech Acquisition Study

On February 11, 2020, the FTC ordered five large technology companies—Alphabet, Amazon, Apple, Facebook and Microsoft—to produce information about potentially hundreds of acquisitions consummated between January 2010 and December 2019 that were not reportable under the HSR Act because they did not meet the applicable monetary reporting thresholds.[200] This initiative follows the FTC's 2018–2019 public hearings and the creation of a technology task force dedicated to monitoring competition in technology-related sectors, and is separate from the FTC's continuing antitrust investigations into big tech companies, but could inform those investigations.

If, during this study, the FTC uncovers transactions it believes substantially lessened competition, then it could initiate enforcement actions to challenge those deals. Generally, it is not unusual for one or two consummated transactions per year that were non-reportable under the HSR Act to be challenged by the federal agencies. Nor is this the first time that the FTC has focused on consummated transactions in a particular industry. In 2002, the FTC established a merger litigation task force and commissioned a retrospective study of consummated hospital mergers to develop new strategies for trying hospital merger cases. As a result of the study, the FTC identified, and challenged, some consummated hospital mergers that it concluded had had an anticompetitive impact, developed evidence for use in future challenges that would refute common substantive claims of merging parties, and adopted a new approach to demonstrating competitive harm.

On August 5, 2020, FTC Chairman Simons testified before the U.S. Senate Committee on Commerce, Science, and Transportation that the FTC had made great progress in its investigations into potentially anticompetitive acquisitions in the tech industry.[201] FTC Chairman Simons added that enforcement action is something that is definitely on the table, with staff at the FTC's Technology Enforcement Division being "incredibly busy" in investigating past and current antitrust conduct and acquisitions in the tech industry. Although, in his testimony, Simons did not confirm specific enforcement actions that the agency planned to take against the industry, he listed as a possibility a potential breakup of these past takeovers.

Whether or not the FTC's inquiry results in challenges to consummated transactions, the FTC will likely refine its approach to evaluating the competitive effects under a variety of substantive theories of harm, including, among other things, "killer acquisition" and "serial acquisition" concepts—*i.e.*, acquisitions pursued by leading technology companies of smaller rivals to eliminate potential or nascent competition. In addition, the FTC's findings could have implications beyond the technology sector. It is too early to tell what enforcement action, if any, will follow from this study.

C. FTC Expands Merger Retrospective Program

On September 17, 2020, the FTC Bureau of Economics announced its plans to expand its revamped merger retrospective program.[202] The new initiatives include evaluating the tools that

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[200] Press Release, Fed. Trade Comm'n, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[201] *Oversight of the Federal Trade Commission Before the S. Comm. on Commerce, Science, and Transportation*, 116th Cong. (2020) (statement of Joseph J. Simons, Chairman, Fed. Trade Comm'n), *available at* https://www.ftc.gov/system/files/documents/public_statements/1578975/simons_-_oral_remarks_hearing_on_oversight_of_ftc_8-5-20.pdf.

[202] Press Release, Fed. Trade Comm'n, *FTC's Bureau of Economics to Expand Merger Retrospective Program*

may be used to screen and assess the competitive effects. Specifically, the review will include whether mergers create monopsony power in the labor market.

D. DOJ to Update Bank Merger Review Analysis

On September 1, 2020, the DOJ announced that it was seeking public comments into whether the DOJ should revise the 1995 Bank Merger Competitive Review Guidelines to reflect trends in the banking and financial services sector and modernize its approach.[203] Public comments were due by October 15, 2020. Among the recommendations submitted were: (1) increasing the concentration screening thresholds to reflect non-bank competition and deposit data issues; (2) incorporating and clarifying informal analyses adopted since 1995 affecting retail and small-business banking markets; (3) clarifying the DOJ's analysis of middle-market banking; (4) reducing uncertainty in local geographic market definition; (5) offering more guidance to address recurring issues related to centrally booked deposits; and (6) expanding and clarifying the weakened competitor defense applicable to financially impaired banks.

E. Proposed HSR Rules Changes

On September 21, 2020, the FTC proposed significant amendments to the HSR rules that would aggregate and capture more information about holdings of investment funds, while at the same time exempt from the filing requirements certain minority acquisitions that "almost never present competition concerns."[204] Under the existing rules, investment funds and master limited partnerships managed by the same general partner or managing entity are generally treated as separate "persons" for HSR purposes. As a result, acquisitions made by different funds under common management are typically not aggregated, and are treated as separate transactions that may or may not individually trigger a filing requirement. The FTC's proposed amendment would close this "loophole" by requiring acquirers to aggregate the value of shares across all commonly managed funds. The proposed change would also require HSR filings to include detailed information for all commonly managed funds and their portfolio holdings.

Even if this first rule change is adopted, however, many activist investors would be able to accumulate equity positions up to 10% in public companies without filing with antitrust agencies because the second proposed rule change would introduce a sweeping new HSR exemption (Rule 802.15) for persons acquiring up to 10% of an issuer's voting securities. Unlike the existing passive investor exemption that applies narrowly to acquisitions made "solely for the purpose of investment," Rule 802.15 would exempt *all* acquisitions up to 10% so long as the buyer: (1) is not a competitor of the issuer, (2) does not hold 1% or more of the equity of any competitor of the issuer, (3) does not have a representative serving as an officer or director of the issuer or any of

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(Sept. 17, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program.

[203] Press Release, U.S. Dep't of Justice, *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis* (Sept. 1, 2020), *available at* https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.

[204] Press Release, Fed. Trade Comm'n, *FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking* (Sept. 21, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced. The DOJ concurred with the FTC's proposal. Press Release, U.S. Dep't of Justice, *Antitrust Division Supports Modernizing Merger Filing Exemptions for Certain Investments* (Sept. 21, 2020), *available at* https://www.justice.gov/opa/pr/antitrust-division-supports-modernizing-merger-filing-exemptions-certain-investments.

its competitors, and (4) has no vendor-vendee relationship with the issuer. The Commission's two Democratic Commissioners dissented from the decision to propose this new rule. When proposing these changes, the Commission understood that new Rule 802.15 would significantly reduce the HSR Act's utility as a stock accumulation warning system; in fact, FTC Commissioner Phillips stated that the HSR Act is "not supposed to be an early-warning system for tender offers and corporate takeovers."[205]

In addition to the proposed rule changes, the FTC als.o has issued an advance notice of proposed rulemaking ("ANPR") to gather information on seven topics to "determine the path for future amendments to the premerger notification rules" and interpretations of those rules.[206] The notice covers important aspects of HSR reportability, including, among others, existing exemptions for transactions involving real estate investment trusts, convertible securities, and acquisitions made "solely for the purpose of investment," as well as the potential application of the HSR reporting obligations to certain events that do not involve stock purchases, such as the right to appoint board observers. The public comment period for both the proposed rule changes and the ANPR ends on February 1, 2021.

Conclusion

Antitrust policy and enforcement are currently in the political limelight. Even absent passage of the legislation to alter materially the merger review standards and HSR rule changes, the DOJ and the FTC are likely to be very active in investigating and undertaking enforcement actions in mergers. Particularly hot areas will continue to be nascent/potential competition, particularly in high technology/pharma areas, vertical transactions, and digital/data sectors. The impact of the 2020 election will likely not occur immediately, but will evolve as the year progresses.

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[205] Fed. Trade Comm'n, Statement of Commissioner Noah Joshua Phillips Concerning Hart-Scott-Rodino Act Premerger Notification Notice of Proposed Rulemaking and Advanced Notice of Proposed Rulemaking at 2, FTC File No. P110014 (Sept. 21, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1580699/p110014hsrrulesphillipsstatement_0.pdf.

[206] Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77042 (proposed Dec. 1, 2020) (to be codified at 16 C.F.R. pts. 801–03), *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21754.pdf.