Vinson&Elkins

2018 ENERGY AND CHEMICALS ANTITRUST REPORT

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EXECUTIVE SUMMARY

MERGER ENFORCEMENT

- 2018 was an active year for DOJ and FTC merger enforcement in the energy and chemical industries. The FTC successfully challenged two chemical industry mergers (*Tronox/Cristal* and *Wilhelmsen/ Drew Marine*) in federal court, while the DOJ negotiated a record divestiture package valued at approximately $9 billion in the *Bayer/Monsanto* combination.
- The FTC also was active in challenging acquisitions of retail fuel locations, requiring divestitures for three transactions.
- Enforcers closely scrutinized mergers in the energy and chemical industries even when they did not result in enforcement actions. In 2018, a record 31% of second request investigations covered these industries.
- Notwithstanding this active enforcement, antitrust enforcers very rarely discussed enforcement efforts or policies relating to energy or chemicals in 2018.

NON-MERGER ENFORCEMENT

- The DOJ initiated a cartel investigation against manufacturers of a chemical used in the polyurethane industry, and private lawsuits have been filed against several producers.
- In November 2018, three Korean companies pled guilty to a decade-long bid-rigging and price-fixing conspiracy that targeted fuel supply contracts for U.S. military bases in South Korea, agreeing to pay $236 million in criminal and civil penalties. DOJ leadership has indicated a desire to bring more cases where the United States is the victim of anticompetitive conduct.

PRIVATE LITIGATION

- Private antitrust litigation directed at energy and chemical firms continued apace in 2018, with a continued focus on alleged collusion.
- Plaintiffs continue to bring claims alleging that energy traders engaged in market manipulation through trading activities or reporting, particularly where traders have influence over industry benchmark or index prices.
- The courts continue to work through cases in which plaintiffs contend that exploration and production companies colluded to rig bids or depress prices in the pursuit of oil and gas leasehold or mineral estates.
- In capacity-constrained markets, plaintiffs have accused energy firms of conspiring to withhold or withdraw production capacity from the market at times of increased demand.
- Finally, the much-publicized *Solar City* case involving the state action doctrine settled prior to potential review by the U.S. Supreme Court, depriving the Court of a chance to explain whether and how antitrust law constrains municipal utilities as they react to the emergence of distributed power generation systems and connect those systems to existing power grids.

2018 FEDERAL ANTITRUST ENFORCEMENT IN ENERGY AND CHEMICAL INDUSTRIES

MERGER ENFORCEMENT DATA AND TRENDS

The overall merger enforcement environment in 2018 largely continued existing trends. Hart-Scott-Rodino (HSR) filings have steadily increased from a ten-year low of 716 in 2009 to over 2,000 in 2017. The rate of Second Requests has declined over the same period, dipping to 2.6% of reported transactions in 2017.

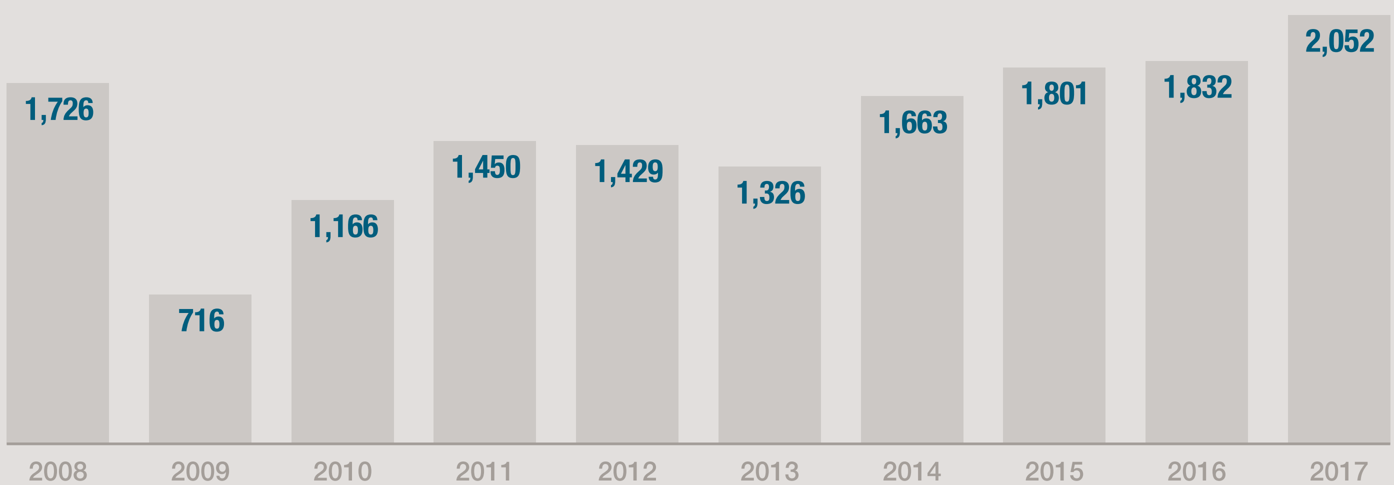
The installation of new leadership at the DOJ and FTC in late 2017 and mid-2018, respectively, has not affected the overall level of enforcement at either agency. Both agencies continue to scrutinize transactions across industries and have not hesitated to challenge transactions in court when they believe parties' offers to resolve competitive concerns are inadequate.

One area where enforcement practices may be evolving are vertical merger remedies. Agency leadership, particularly at the DOJ, has signaled a desire to seek divestitures to resolve vertical merger concerns rather than through behavioral remedies that involve long-term government oversight of the combined firm. The FTC's hearings on competition enforcement and policy, which will continue into 2019, may lead to other changes in merger and non-merger enforcement.

Second Request investigations continue to take longer, frequently lasting twelve months or more, up from the historical norm of seven to eight months. Some of this longer timeframe is attributable to increased scrutiny of proposed divestitures, including diligence into proposed divestiture buyers and assets. In 2018, DOJ leadership announced a series of reforms aimed at reversing this trend and shortening the time to complete most merger investigations to within six months of filing.

NUMBER OF REPORTED TRANSACTIONS

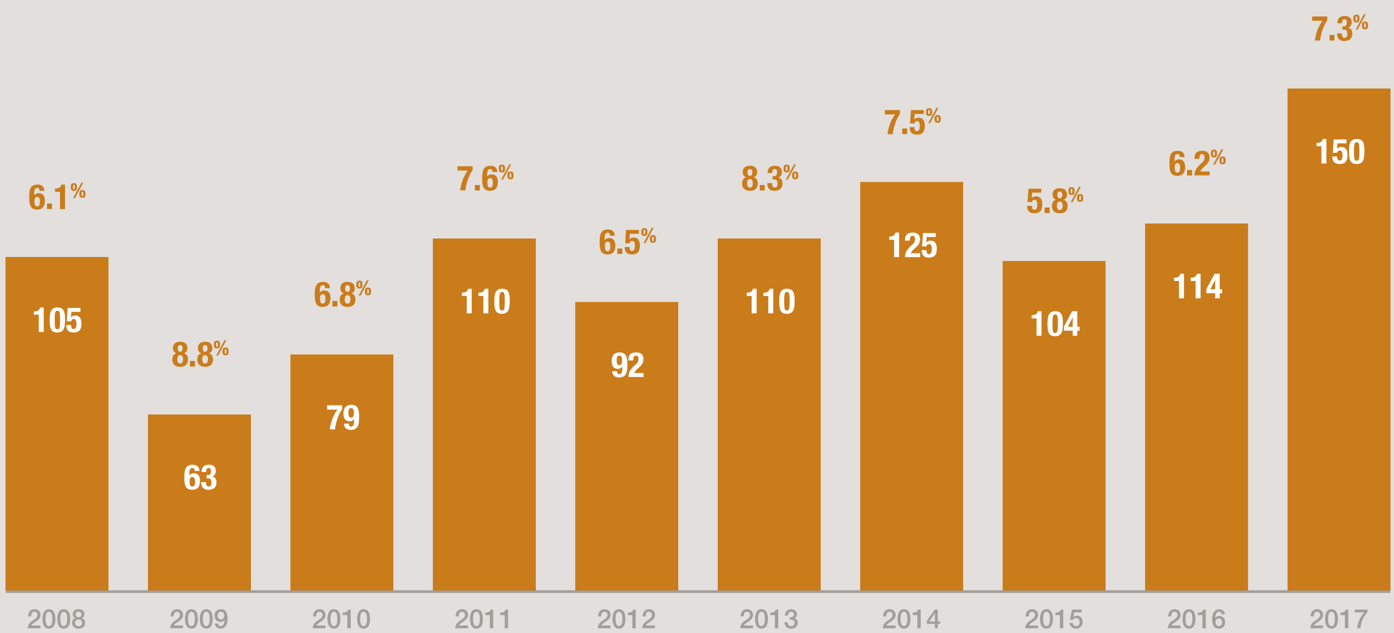
From 2008 to 2017, there were a total of **15,161** transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act. The number of transactions has increased in all but two years since 2009. There were **2,052** transactions reported in 2017.[1]



[1] All annual data is reported by the U.S. Government's fiscal year, which runs from October 1 through September 30.

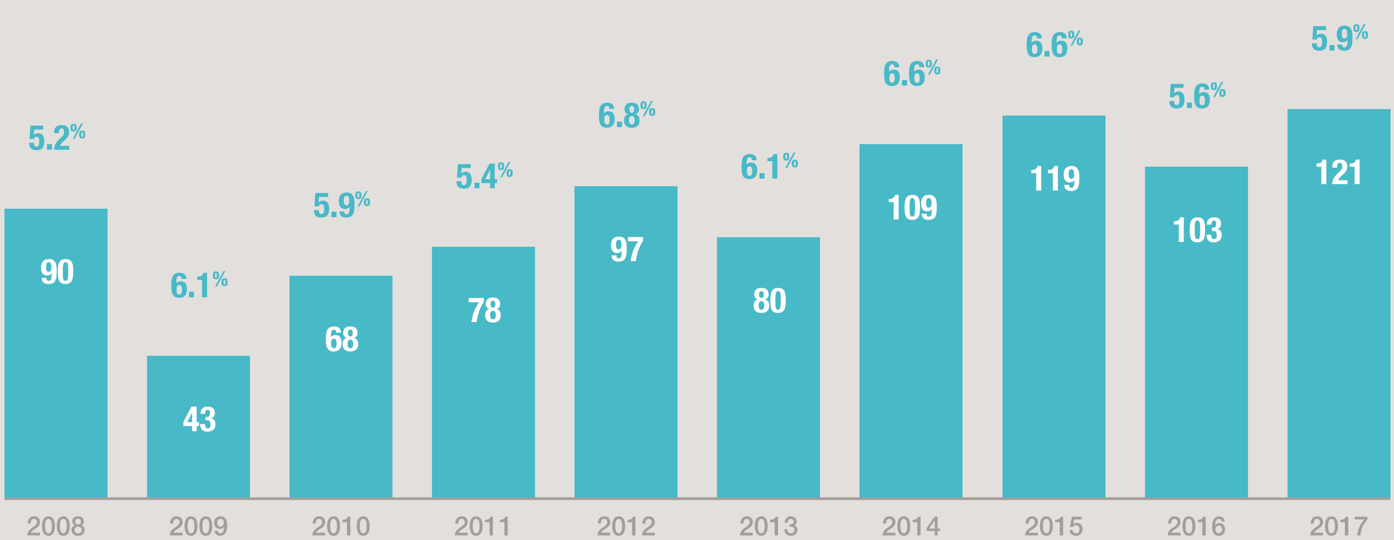
ENERGY TRANSACTIONS

From 2008 to 2017, there were a total of **1,053** reported energy and natural resources transactions, representing on average **7%** of total transactions. The number of reported transactions in this industry sector hit a ten-year high in 2017.



CHEMICAL TRANSACTIONS

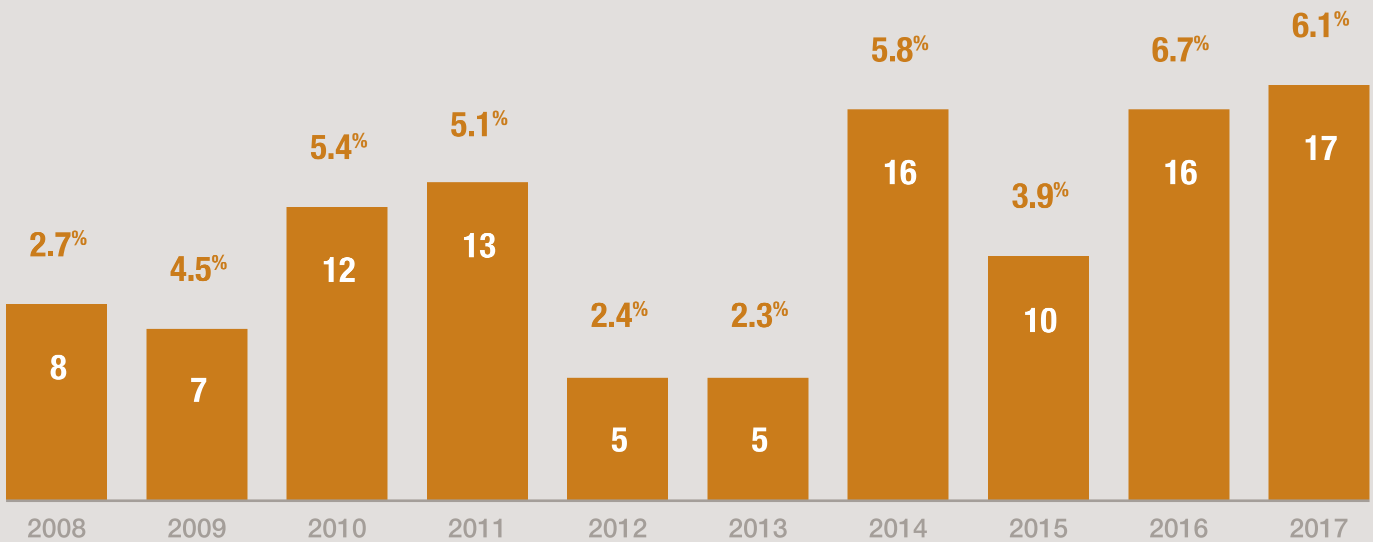
From 2008 to 2017, there were a total of **911** reported chemical and pharmaceutical transactions, representing on average **6%** of total transactions. The number of reported transactions in this industry sector hit a ten-year high in 2017.



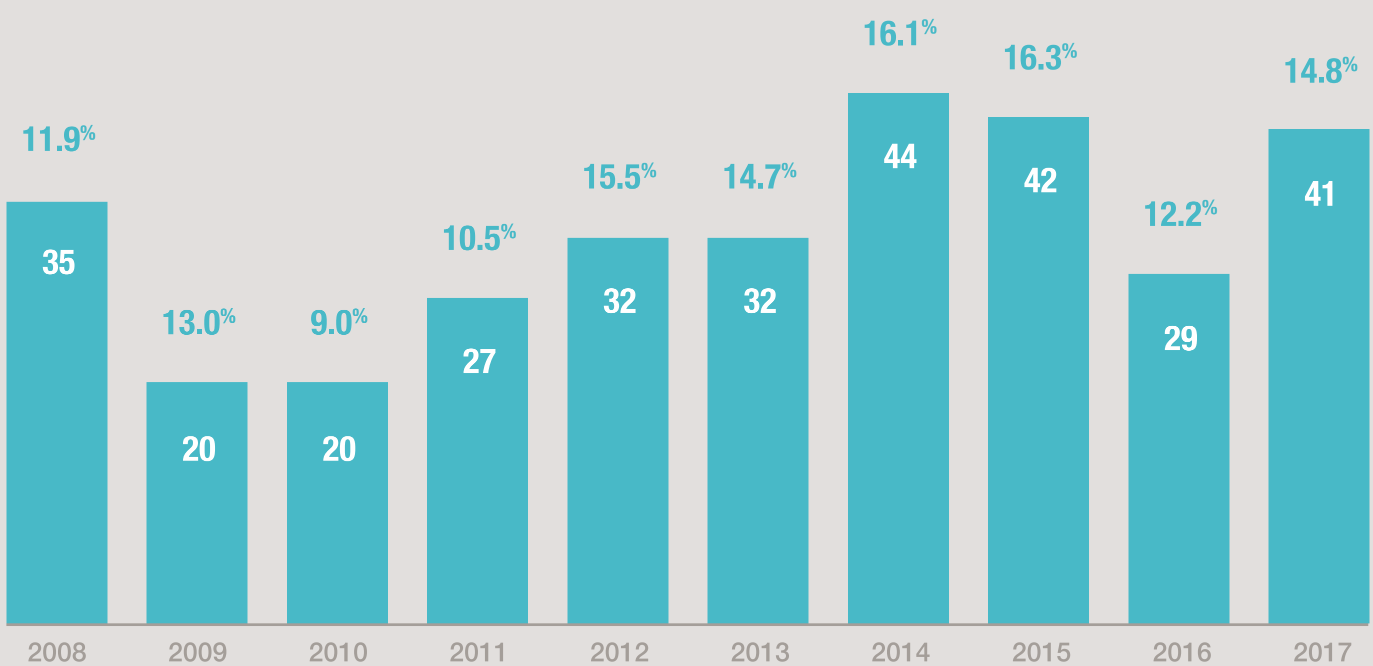
INITIAL INVESTIGATIONS

On average, from 2008 to 2017, the federal agencies received clearance to open an initial investigation in **17%** of reported transactions. Energy and chemical transactions made up **18%** of the total number of transactions cleared for an initial investigation from 2008 to 2017. In recent years, energy and chemical deals have accounted for an increasing percentage of transactions undergoing an initial investigation. From 2008 to 2017, the agencies opened an initial investigation in **10%** of reported energy transactions and **35%** of reported chemical transactions.

Energy Transactions Cleared for Investigation (Including Percentage of Total Transactions Cleared)[2]



Chemical Transactions Cleared for Investigation (Including Percentage of Total Transactions Cleared)[3]



[2] The 3-digit industry NAICS codes for the energy transactions reported here are: 211: Oil and Gas Extraction; 213: Support Activities for Mining (this code is primarily comprised of oil and gas well drilling, and support activities for oil, gas, and coal mining); 221: Utilities; 324: Petroleum and Coal Products Manufacturing; 425: Wholesale Electric Markets and Agent and Brokers; 447: Gasoline Stations; 486: Pipeline Transportation; 493: Warehousing and Storage (including petroleum stations and terminals).

[3] The 3-digit industry NAICS code for the chemical transactions reported here is: 325: Chemical Manufacturing (including pharmaceutical manufacturing).

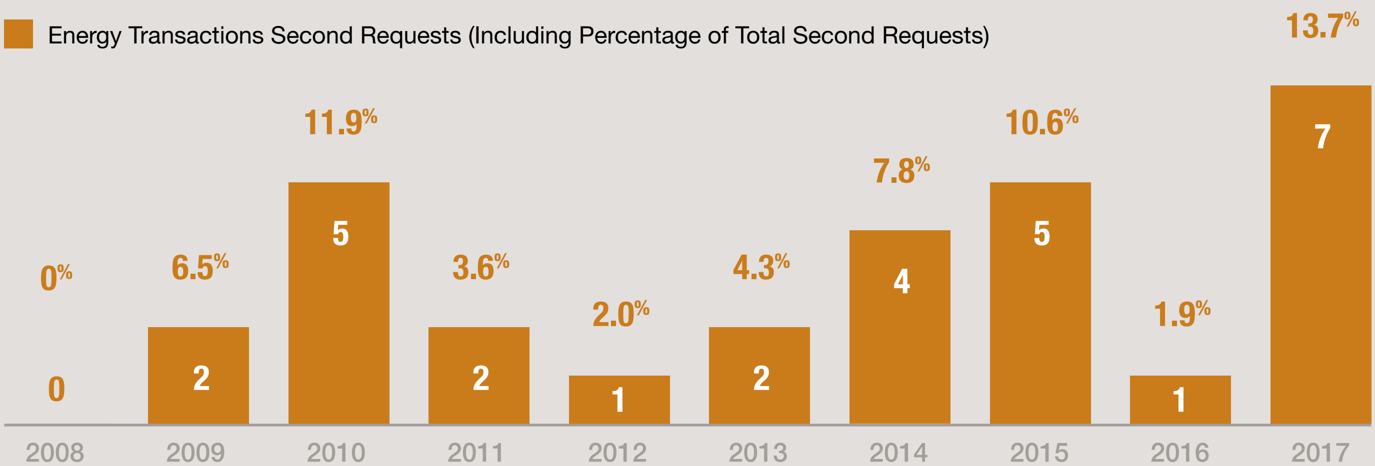
SECOND REQUESTS

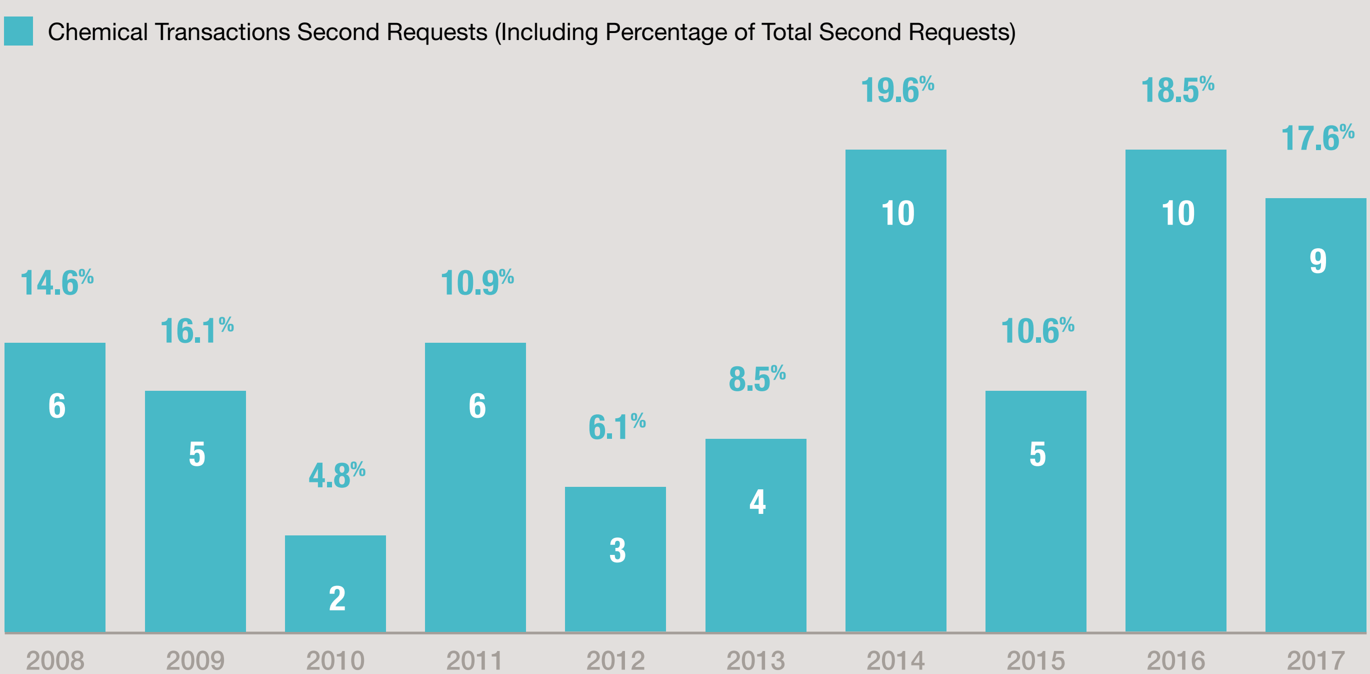
From 2008 to 2017, there were a total of **89** second requests for transactions in the energy and chemical industries, out of a total **468** second requests **(19%)**.

In 2017, second requests for the energy and chemical industries constituted **31%** of all second requests, a ten-year high. This increase does not correspond to an overall increase in total number of second requests issued; in 2017 the agencies issued second requests in **2.6%** of reported transactions, the lowest percent of second requests issued in a single year since 2008.[4]

From 2008 to 2017, the agencies issued a second request in **3%** of reported energy transactions; put another way, **27%** of initial investigations in the energy sector resulted in a second request.

From 2008 to 2017, the agencies issued a second request in **7%** of reported chemical transactions; put another way, **19%** of initial investigations in the chemical sector resulted in a second request.





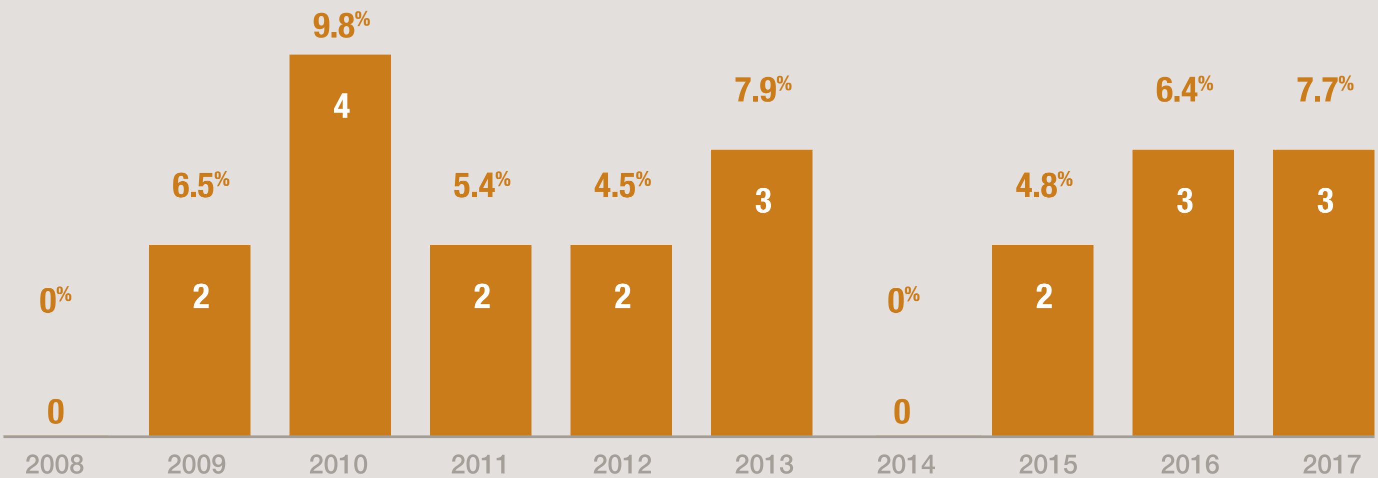
[4] The second request data in this section is tallied from the data provided in all HSR Annual Reports at Exhibit A, Table X, titled: "Fiscal Year [Year] Industry Group of Acquiring Person."

MERGER ENFORCEMENT ACTIONS

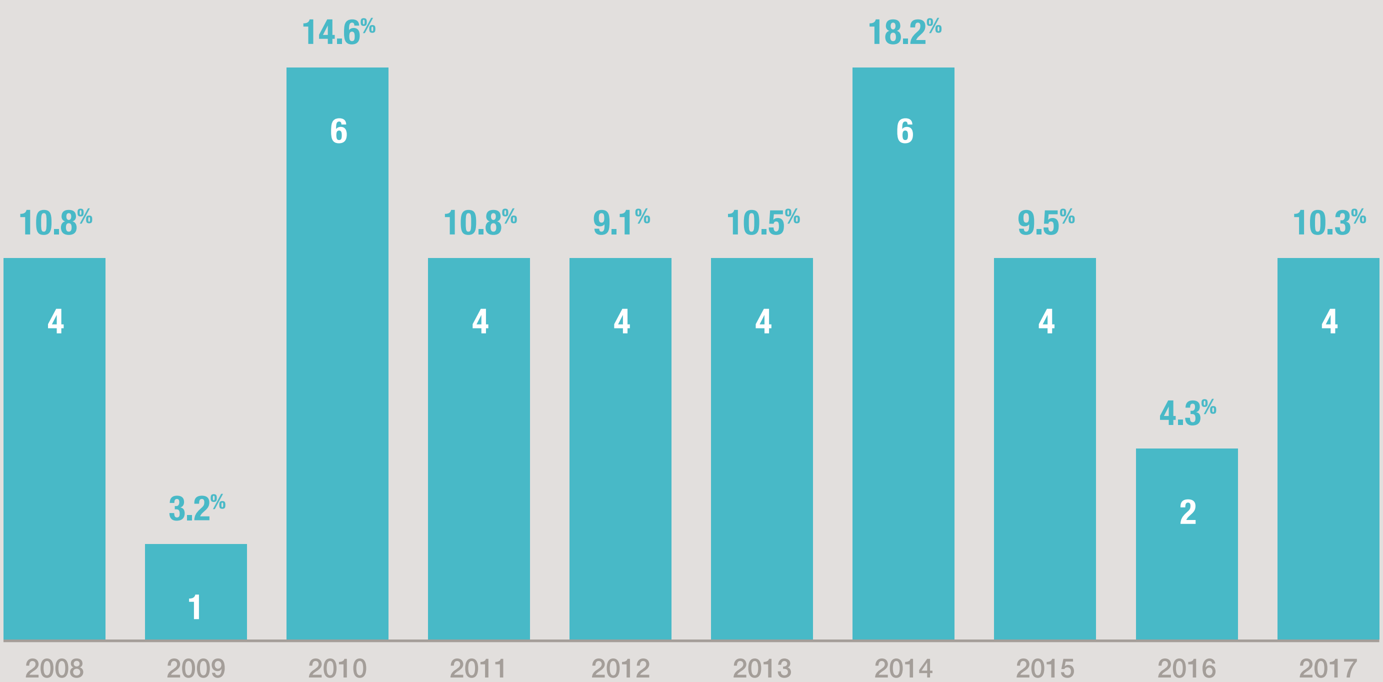
Overall: Since 2008, the enforcement agencies have brought a total of **389** merger enforcement actions, an average of **39** per year. This includes consent decrees, abandoned transactions, and court challenges. The rate of merger enforcement actions has remained relatively stable over the past ten years. During this time period, the FTC has brought **209** actions and the DOJ has brought **180** actions. From 2008 to 2017, the agencies brought a total of **21** actions involving energy mergers (**5%** of all actions), and **39** actions involving chemical mergers (**10%** of all actions).

Merger Enforcement Remedies: From calendar year 2008 to 2018, the federal agencies have obtained the following remedies in merger enforcement actions: **220** cases in which structural and behavioral remedies were obtained, **18** cases in which only structural remedies were obtained, and **25** cases in which only behavioral remedies were obtained. In all other cases, the remedy was unspecified, the parties abandoned the deal, the parties litigated the case, or the agencies closed the investigation without imposing any remedies.

Actions Involving Energy Mergers (Including Percentage of Total Enforcement Actions)



Actions Involving Chemical Mergers (Including Percentage of Total Enforcement Actions)



MERGER ENFORCEMENT POLICY DEVELOPMENTS

In 2018, both the DOJ and FTC announced changes aimed at streamlining and shortening the timeline for merger reviews, including revisions to both agencies' model timing agreements. Additionally, the DOJ took steps to strengthen its ability to enforce consent decrees, announced a process for reviewing and recommending termination of certain legacy judgments, and withdrew its 2011 merger review guidelines in favor of prior guidelines that prioritize structural remedies over behavioral remedies.

DOJ PROMISES TO SHORTEN MERGER REVIEW TIME

The time needed to complete the merger review process has increased in recent years, making the process more expensive and burdensome and causing uncertainty and delay in the closing and executing of transactions. In September 2018, Assistant Attorney General Makan Delrahim announced a series of reforms aimed at shortening the time to complete most merger investigations to within six months of filing. He emphasized that cooperation from the merging companies will be critical to successfully reducing the review timeline. In announcing the revisions, Delrahim noted that significant merger reviews conducted by U.S. antitrust enforcers in 2017 "took an average of 10.8 months to resolve," a 65% increase from 2013.

Under the revised review process, the Division will seek fewer documents from fewer custodians and fewer depositions and will require "expeditious cooperation and compliance of the merging parties." The HSR Act sets a 30-day deadline for the DOJ to reach a decision after the parties certify compliance with a second request; yet the decision process currently takes considerably longer than 30 days. Part of the reforms will be to shorten the decision time to 60 or fewer days after the parties' certification of compliance. Other anticipated reforms include publishing a model voluntary request letter, maximizing additional time for the DOJ when companies pull and refile their HSR notifications, and improved coordination with multi-jurisdictional reviews. The DOJ also will encourage third parties to comply more quickly with CIDs. In November, the DOJ released an updated Model Timing Agreement containing revisions consistent with the changes announced in September.

While efforts to shorten merger review time may be welcome news for companies considering a merger, the expedited process likely will also result in more pressure on the companies under review to produce materials and comply with Division requests quickly. Moreover, there may be deals for which the parties prefer to give the DOJ more, rather than less, time to consider the evidence and facts before making a decision.

DOJ PULLS 2011 MERGER REVIEW GUIDELINES

In connection with the merger review reforms discussed above, the DOJ also announced it withdrew the 2011 Policy Guide to Merger Remedies, which was released under the prior administration. The Policy Guide outlines remedies that the government will accept to address competitive concerns from mergers and acquisitions. Until the DOJ issues an updated policy, the 2004 Policy Guide will be in place. The 2004 guidelines reflect a strong preference for structural remedies over behavioral or conduct remedies — a position for which Delrahim has advocated repeatedly since taking office, including during a DOJ public roundtable and in October 2018 testimony before a Senate subcommittee. The DOJ website on Merger Enforcement now directs parties to the 2004 guidelines and states that the 2011 guidelines have been "superseded."

FTC UPDATES MODEL TIMING AGREEMENT

The FTC separately took its own steps to streamline the merger review process, including releasing an updated Model Timing Agreement in August 2018. As with the DOJ, the FTC's Model Timing Agreement establishes certain deadlines and obligations for each side, including data and document production deadlines, notification requirements and timing for agency review, and builds in more time for the agency's decision than the 30 days contemplated by statute.

Indeed, the FTC's Model Timing Agreement reflects that the agency will have 60 to 90 days after substantial compliance with a second request to reach a decision and close the transaction. The Model Timing Agreement further establishes a 30-day pre-notification period before both certifying compliance and closing the transaction. While the pre-notification period itself is not new, the new Model Timing Agreement's 30 days is three times longer than the ten days' notice the FTC historically has requested. The FTC expects future timing agreements to substantially comply with the new Model Timing Agreement.

DOJ INCREASES ENFORCEABILITY OF CONSENT DECREES

Most DOJ merger and civil non-merger investigations in which the Division finds an antitrust violation are resolved through consent decrees. For example, merging parties may commit to making a divestiture within a certain timeframe in order to resolve a merger challenge. Failure to comply with the obligations of a consent decree can subject parties to civil contempt proceedings in which the government seeks to enforce the terms of the settlement agreement. In early 2018, the Antitrust Division announced a series of changes to consent decree terms aimed at strengthening the government's leverage over settling parties.

LOWER EVIDENTIARY STANDARD FOR PROVING CIVIL CONTEMPT

The default standard for proving a violation of a consent decree is clear and convincing evidence, which is greater than the usual preponderance of evidence standard. Going forward, the DOJ will require consent decrees to include an agreement that, should the defendant violate the terms of the consent decree, the government's standard for proving civil contempt will be preponderance of the evidence. Thus, with this new required term in consent decrees, the United States is contracting around the default standard to lower the burden for enforcing the terms of its consent agreements.

FEE-SHIFTING PROVISIONS

Another change requires defendants to agree to pay the government's attorneys' fees, expert fees, and other costs incurred for any successful consent decree enforcement brought by the government. This too is an example of contracting around a default rule. Absent other agreement between the parties, the default is that the United States bears the cost of decree enforcement investigations and proceedings, even where the proceedings prove a violation. With this new fee-shifting term, settling companies face increased potential costs for failing to comply with consent decree obligations.

EXTENDING AND TERMINATING CONSENT DECREES

The other two new consent decree terms deal with the length of consent decrees. One provision allows the government to apply for a one-time extension of the term of the consent decree if a court finds a violation. The other allows the government, after a certain number of years from the date of entry, to terminate the consent decree upon notice to the court and the defendants. Termination may be appropriate if market circumstances have changed or the terms of the decree no longer are necessary or make sense for the parties.

DOJ SEEKS TO TERMINATE LEGACY JUDGMENTS

In early 2018, the DOJ announced an initiative to review certain legacy judgments in order to assess their continued applicability and to recommend termination for those judgments deemed to no longer serve a procompetitive purpose. The Division defines "legacy judgments" as those "that do not include an express termination date and that a court has not terminated by order." The Division estimates that there are nearly 1,300 legacy judgments in effect, some of which date back half a century or more. (Beginning in 1979, DOJ settlements generally have included sunset provisions to automatically terminate the judgments after a set number of years.) Reasons for terminating judgments include that the defendants no longer exist, the products at issue no longer are produced, changes in industries or laws render the obligations imposed unnecessary, or the settlement obligations (including divestitures and other remedies) were long-ago satisfied.

To date, the DOJ has moved to terminate legacy judgments in 20 cases in federal court in the District of Columbia and six in the Eastern District of Virginia. None of these involves the energy or chemical industries. The DOJ has proposed termination of judgments in 42 additional federal districts.

FTC HEARINGS

One of the FTC's largest recent policy undertakings has been its series of public hearings focused on bringing together antitrust regulators, academics, business and legal experts, and others to discuss broad changes in the economy that may necessitate adjustments to competition and consumer protection law, enforcement, and policy. Eight of the nine hearings took place in 2018 with one final hearing scheduled for February of 2019. The 2018 hearings focused on the application of competitive principles to issues such as privacy, big data, artificial intelligence, intellectual property, multi-sided markets, technology, and labor markets.

While none of the hearings specifically addressed the energy or chemical industry, some topics may be relevant to these industries. For example, the hearings have considered how to protect and encourage the innovation that new market entrants often bring to an industry. While this concern is raised most often in the technology sector, it has equal applicability to other industries. The hearings could also lead to a variety of changes to other merger and non-merger enforcement practices.

INCREASED SCRUTINY FOR PRIVATE EQUITY?

Recent comments by one FTC commissioner suggest that private equity may encounter greater antitrust scrutiny going forward. Rohit Chopra, sworn in as a Commissioner in May 2018, has lamented what he views as capital moving into private equity and hedge funds, resulting in fewer companies trading in public markets and reduced competition in the financial sector. In his view, these shifts may warrant attention from U.S. antitrust enforcers.

Chopra's concerns about the impact of private equity on competition appear to be two-fold. He fears the purchase of a company or group of companies by a private equity buyer may depress competition in the relevant industry. By acquiring small companies valued below HSR mandatory notification thresholds, a private equity investor may acquire a company in a market that includes a limited number of competitors and either shut down the asset's services or output in that industry to boost profitability, or sell the acquired asset to another competitor in the same market.

Chopra also has expressed concern about the suitability of private equity funds or groups as divestiture buyers on the view that a private equity buyer may not prioritize keeping the acquired asset in business — or in business in the same industry. Either outcome reduces competition and consumer choice.

These comments by a single Commissioner do not appear to reflect the consensus view at the FTC. Notably, FTC chairman Joseph Simons declined to concur with Chopra's private equity sentiments, stating that it would be "a mistake to condemn private equity buyers" categorically rather than evaluate funds as potential buyers on a case-by-case basis. Simon noted that he would be particularly reluctant to entirely exclude from consideration "really large, well-run, well-financed, private equity firms."

MERGER ENFORCEMENT CASES

The DOJ and FTC sought relief to address competitive concerns for a number of transactions in the energy and chemical industries in 2018. The FTC successfully challenged two chemical company transactions in federal district court, and the DOJ negotiated the largest divestiture settlement ever, valued at approximately $9 billion. The FTC was particularly active in challenging acquisitions involving retail fuel companies, negotiating divestitures in three transactions. Of the six enforcement actions that resulted in the divestiture of assets, all but one had an up-front buyer.

In 2018, the DOJ and FTC challenged mergers involving the following alleged product markets:

- Polyethylene terephthalate (PET) and purified terephthalic acid (PTA)
- Titanium dioxide manufactured through the chloride process
- Foundational herbicides and nematicidal seed treatments for corn, soybeans, and cotton
- Superphosphoric acid
- Nitric acid at concentrations between 65%-67%
- Marine water treatment chemicals and services for global fleets of trading vessels
- Bulk liquid oxygen, nitrogen, argon, carbon dioxide, hydrogen, helium; excimer laser gases; and on-site hydrogen and carbon monoxide
- Retail gasoline and diesel

As reflected in the graphic to the right, it took an unusually long time (17 months on average) from deal announcement to resolution of enforced transactions in the chemical industry in 2018, due in large part to the time needed to litigate two matters. The time to resolve merger enforcement matters in the energy industry (10 months on average) was more in line with other industries.

Tronox/Cristal
2.21.17 • 22+ months
Ongoing Litigation

Bayer/Monsanto
9.14.16 • 5.29.18 20 months
Consent Decree – up front buyer

Potash/Agrium
9.11.16 • 2.17.18 17 months
Consent Decree – up front buyer

Praxair/Linde
6.1.17 • 10.22.18 17 months
Consent Decree – up front buyer

Wilhelmsen/Drew Marine
4.27.17 • 7.21.18 15 months
Blocked in Court

Seven & i Holdings Co., Ltd./Sunoco
4.6.17 • • • • • • • • • • • • • • • • 3.29.18 12 months
Consent Decree – up front buyer

PET Resin Joint Venture
3.28.18 • • • • • • • • • • • • 12.21.18 9 months
Consent Decree – behavioral relief

Marathon/Petr-All
4.16.18 • • • 10.25.18 6 months
Consent Decree – up front buyer

Alimentation Couche-Tard Inc./Jet-Pep, Inc.
8.4.17 • • • 1.9.18 5 months
Consent Decree – divestiture within 120 days of closing

CHEMICAL MARKETS

POTASH CORPORATION OF SASKATCHEWAN INC./AGRIUM

In December 27, 2017, the FTC issued a complaint seeking to block the merger between Potash Corporation of Saskatchewan Inc. and Agrium Inc., both fertilizer and agricultural chemical companies, alleging that the merger would eliminate direct competition between the parties, increase the likelihood that the merged entity would unilaterally exercise market power, and increase the likelihood of coordinated interaction among the merged company and the one remaining supplier of superphosphoric acid in North America. On February 7, 2018, the FTC approved a final order requiring the merged entity to divest its North Bend, Ohio facility to Trammo, Inc. and its Conda, Idaho facility to Itafos Conda LLC to alleviate competition concerns.

BAYER AG/MONSANTO COMPANY

On May 29, 2018, the DOJ filed a complaint and proposed settlement in the United States District Court for the District of Colombia regarding Bayer AG's proposed $66 billion acquisition of the Monsanto Company. The DOJ alleged that, if allowed to proceed, the transaction would result in higher prices, lower quality, less choice, and less innovation. Specifically, the DOJ alleged that the transaction would eliminate direct competition between Bayer and Monsanto for the development and sale of vegetable seeds and genetically modified seeds in cotton, canola, and soybeans. The DOJ also alleged that the merger would lessen competition "by combining Monsanto's strong position in seeds with Bayer's dominant position in certain seed treatments." The settlement, the largest of its kind, required Bayer to divest businesses collectively worth approximately $9 billion to BASF.

WILHELMSEN MARITIME SERVICES/ DREW MARINE GROUP

On February 22, 2018, the FTC issued an administrative complaint alleging that Wilhelmsen Maritime Services' proposed $400 million acquisition of Drew Marine Group would substantially lessen competition in the market for marine water treatment chemicals and services. Specifically, the FTC argued that the defendants are each other's closest and only realistic competitors for supplying these chemicals and services on a global scale.

On May 4, 2018, the FTC filed a complaint in the United States District Court for the District of Colombia seeking a temporary restraining order and preliminary injunction blocking the deal. On July 21, 2018, the district court granted the FTC's request for a preliminary injunction, siding with the agency's arguments that the proposed transaction could lead to anticompetitive effects. The court concluded, for example, that the post-merger entity would have the ability to engage in price discrimination against global fleet customers. A short time after the district court's decision, the parties elected to abandon their proposed transaction, which also had been blocked by competition authorities in Singapore.

TRONOX LIMITED/CRISTAL

In December 2017, the FTC challenged the proposed $1.7 billion combination of two titanium dioxide (TiO_2) firms, Tronox Limited and the Cristal group, both of which produce TiO_2 via a chloride-based production process. According to Tronox's press release announcing the deal in February 2017, "the combination of the TiO_2 businesses of Tronox and Cristal creates the world's largest and most highly integrated TiO_2 pigment producer." The FTC alleged that a post-merger Tronox and one other competitor, Chemours, would control the vast majority of North American sales of TiO_2 and over 80% of TiO_2 production capacity in North America. The parties argued their case before Administrative Law Judge Michael Chappell during a month-long trial that started in May 2018.

Before and during the trial, the FTC raised concerns about increased concentration in the TiO_2 industry, citing prior civil litigation regarding alleged price fixing and industry characteristics indicating the potential for future coordination. In defense of the transaction, Tronox and Cristal argued that the purpose of the merger was to increase output of TiO_2 through vertical integration. Additionally, Tronox argued that the FTC erred in defining the product market by failing to consider TiO_2 produced via the alternate sulfate production method as a competitive constraint against output restrictions or price increases on chloride TiO_2.

The Tronox/Cristal transaction proceeded along an unusual path to litigation. Typically, the FTC seeks to enjoin a deal in federal court prior to an administrative trial, so the parties cannot close the transaction before the administrative trial completes. In practice, preliminary injunction hearings are usually much quicker than full administrative trials, apply a standard favorable to the FTC, and often serve to fully resolve cases. In this case, however, the parties had been unable to close prior to administrative litigation because the European Commission was still reviewing the transaction. Thus, the FTC waited until *after* the administrative trial to file a complaint asking the United States District Court for the District of Columbia for a temporary restraining order and preliminary injunction. Tronox objected to this approach, even suing unsuccessfully for an injunction in federal court in Mississippi, alleging that proceeding with administrative litigation prior to a federal court ruling inappropriately delayed Tronox's opportunity to defend the transaction.

In December 2018, Judge Chappell ruled in the FTC's favor, finding that Tronox's proposed acquisition of Cristal would substantially lessen competition "by creating a highly concentrated market and increasing the likelihood of coordinated effects." Judge Chappell's decision is subject to automatic review by the full Commission.

JOINT VENTURE AMONG PET RESIN PRODUCERS

On December 21, the FTC issued a complaint and settlement proposal in connection with the proposed acquisition of an under-construction polyethylene terephthalate (PET) and purified terephthalic acid (PTA) production facility by three PET producers. The FTC's complaint argues that the acquisition of the production facility by Corpus Christi Polymers LLC – a joint venture between Alpek S.A.B de C.V., Ventures Plc, and Far Eastern New Century – would result in a highly concentrated market for PET resin products in North America. According to the FTC's complaint, the three parties to the joint venture currently control nearly 90% of North American PET capacity, and the under-construction production facility will account for approximately 20% of North American PET capacity. Additionally, as a necessary input for PET, access to PTA production would give two of the joint venture parties an advantage over other, non-integrated PET producers. The terms of the proposed consent order would prohibit the parties of the joint venture from sharing competitively sensitive information not necessary for the operation of the joint venture and from using the production facility to exercise market power.

The FTC was **2 for 2** in securing preliminary injunctions in energy cases in 2018.

Wilhelmsen Maritime Services/Drew Marine Group (marine water treatment chemicals and services)

Tronox Limited/Cristal (chloride TiO_2)

NATURAL GAS MARKETS

PRAXAIR, INC./LINDE AG

On June 1, 2017, Praxair, Inc. and Linde AG, industrial gas companies, entered into an $80 billion merger agreement. On October 22, 2018, less than one week before the deal's contractual deadline, the FTC filed a complaint alleging that the deal would substantially lessen competition and simultaneously announced a proposed settlement that required Praxair and Linde to divest significant assets prior to consummating their proposed merger.

The FTC's complaint alleged that the proposed merger would eliminate direct competition between the parties, leaving only limited alternative sources of supply for industrial natural gas in the United States. The FTC also alleged that the merged firm would have the ability to exercise market power unilaterally because, for many customers, the merging firms were the best or only supply options. According to the FTC, the proposed merger also could enhance the risk of collusion or coordination because of the reduced number of competitors and market structure.

The FTC issued a complaint and proposed settlement on a vote of 4-1 with Commissioner Rohit Chopra dissenting. In his dissent, Commissioner Chopra expressed a concern that the proposed divestitures did not go far enough and that one of the proposed divestiture buyers was a joint venture between a natural gas company and a private equity firm. Commissioner Chopra believed that private equity buyers are not ideal divestiture purchasers because they typically are short-term focused and seek to sell the assets again soon, which could create additional antitrust issues.

RETAIL FUEL MARKETS

Over the past fifteen years, the FTC has more strictly scrutinized transactions that combine retail fuel outlets, including seeking divestitures in deals without competitive concerns at the refining level. In 2018, the FTC brought three enforcement actions involving mergers in retail fuel markets. The FTC noted that retail fuel stations compete on price, convenience store format, product offerings, and location, and that operators pay close attention to nearby competitors. The FTC also stated that markets for retail fuel are highly localized — generally ranging from a few blocks to a few miles — because few consumers are willing to travel great distances to purchase fuel.

ALIMENTATION COUCHE-TARD INC./ JET-PEP, INC.

On January 9, 2018, the FTC approved a final order settling charges that Alimentation Couche-Tard Inc.'s (ACT) proposed acquisition of Jet-Pep, Inc. violated antitrust laws. Specifically, the FTC argued that ACT's acquisition of Jet-Pep, Inc. would reduce independent participants in retail fuel markets in multiple areas of Alabama to three or less. The FTC argued that this high market concentration would increase the likelihood of coordination among the remaining competitors and the likelihood that ACT would unilaterally exercise market power. The settlement requires ACT to divest three fuel stations within 120 days of the close of the transaction.

SEVEN & I HOLDINGS CO., LTD./ SUNOCO

On April 6, 2017, Seven & i Holdings, 7-Eleven's parent company, agreed to acquire 1,100 retail fuel outlets from Sunoco for $3.3 billion. In a press release announcing the complaint and settlement on January 19, 2018, the FTC alleged that the acquisition would "increase the likelihood either that 7-Eleven could unilaterally raise prices or that the small number of remaining competitors could increase prices by coordinating actions." The consent agreement requires 7-Eleven to sell 26 retail fuel outlets to Sunoco, and Sunoco is required to retain 33 fuel outlets that 7-Eleven otherwise would have acquired. The outlets acquired or retained by Sunoco will become commission agent sites, as opposed to company-operated sites. Under the commission-agent model, Sunoco pays an independent agent a fixed per-gallon commission, but retains full control over fuel pricing and supply. Typically, the seller in the main transaction is not party to the consent decree. In this case, however, the FTC explained that including Sunoco in the consent decree "would preserve competition as it is today, ensure that the divestiture assets go to a viable, large-scale competitor, and reduce the risks and costs associated with asset integration." Vinson & Elkins represented Sunoco in the transaction and divestiture process.

MARATHON PETROLEUM CORPORATION/PETR-ALL PETROLEUM CONSULTING CORPORATION

On April 16, 2018, Marathon Petroleum Corporation announced the signing of an agreement for the purchase of 78 store locations operating under the Express Mart brand held by Petr-All Petroleum Consulting Corporation. The stores are primarily located in New York State. On October 25, 2018, the FTC issued a complaint, alleging that the transaction would harm competition for both retail gasoline and retail diesel in five local markets in New York State. The FTC worked with the New York Attorney General's office to conduct its investigation. As part of a settlement to the FTC's complaint, Marathon agreed to divest five retail fuel and convenience stores to Sunoco.

NON-MERGER ENFORCEMENT

The number of new criminal antitrust cases publicly filed by the DOJ in 2018 was well below historical levels. This was in part attributable to several major investigations winding down, including one into the auto parts industry. Senior DOJ officials have said that there are a number of non-public investigations under way. It remains to be seen whether the smaller number of public investigations may also reflect a change in the current administration's antitrust policies and priorities.

In 2018, the DOJ initiated a criminal investigation into the supply of a chemical used to make polyurethane-based products, leading to the filing of a number of class action lawsuits against producers of this substance. The DOJ also announced guilty pleas, fines, and civil settlements in an ongoing investigation into a price-fixing conspiracy targeting fuel supply contracts for U.S. military bases in South Korea. There were no public developments in 2018 related to a previously disclosed and much-watched DOJ criminal investigation into certain oil and gas leasehold interests in Oklahoma. In addition, federal and state enforcers continued to investigate and bring actions across industries involving agreements among employers not to solicit or hire each other's employees.

CARTEL ENFORCEMENT

METHYLENE DIPHENYL DIISOCYANATE

A June 2018 news report claimed that isocyanate producers were targets of a price-fixing investigation by the DOJ. The report stated that the DOJ had sent grand jury subpoenas in late February 2018. In connection with the report, multiple producers acknowledged the existence of an investigation, with one statement revealing the focus of the investigation to be on methylene diphenyl diisocyanate (MDI). As is often the case when a DOJ investigation is revealed, civil complaints followed. Several lawsuits were filed, alleging price fixing of both MDI and a second isocyanate, toluene diisocyanate (TDI). The complaints, which have been consolidated in the Western District of Pennsylvania, allege that manufacturers conspired to fix, raise, maintain, or stabilize the price of MDI and TDI sold in the United States, from as early as 2015 through the present. The plaintiffs allege various agreements between defendants to limit supply of MDI and TDI through planned manufacturing shutdowns at plants worldwide and by implementing coordinated price increases.

KOREAN FUEL SUPPLY CONTRACTS

In November 2018, the DOJ disclosed an investigation into a decade-long bid-rigging and price-fixing conspiracy that targeted fuel supply contracts to United States military bases in South Korea. The DOJ alleged that the defendants — two South Korean oil companies and one South Korean transportation and logistics company — met and communicated in secret with other large South Korean oil refiners and logistics companies, and pre-determined which conspirator would win each supply contract. The companies allegedly then submitted collusive bids to the U.S. military. The companies agreed to plead guilty to criminal antitrust charges and to pay a total of approximately $82 million in criminal fines as well as approximately $154 million to the United States to settle civil antitrust and False Claims Act violations related to the conspiracy. The three defendants have agreed to cooperate in the DOJ's ongoing investigation. The case was noteworthy for its use of Section 4A of the Clayton Act, which enables the United States to obtain treble damages when the government itself is the victim.

LIQUID ALUMINUM SULFATE

On January 3, 2018, Brian C. Steppig, a former GEO Specialty Chemicals executive, pleaded guilty for his role in a conspiracy to eliminate competition by rigging bids, allocating customers, and fixing the price of liquid aluminum sulfate sold to municipalities and pulp and paper companies in the United States. Liquid aluminum sulfate is a coagulant used by municipalities to treat drinking and waste water and by pulp and paper companies in their manufacturing processes. According to the guilty plea, from approximately 2005 until February 2011, Steppig agreed with competitors to not pursue each other's historical customers by submitting intentionally losing bids to favor the intended winner. In April, Steppig was sentenced to probation for a term of two years and was ordered to pay a $20,000 fine.

Following the disclosure of the DOJ investigation, a series of putative class actions were filed alleging price fixing of water treatment chemicals, and the cases were consolidated in the United States District Court for the District of New Jersey. A proposed class settlement with GEO Specialty Chemicals was recently announced. For additional information about this litigation, see the Private Antitrust Litigation chapter.

According to a recent motion to dismiss in related private litigation, DOJ attorneys stated on the record in a May 22, 2018 hearing before Special Master Faith S. Hochberg that the DOJ had completed its criminal investigation and did not plan on bringing any additional charges in the case.

OIL AND GAS LEASES AND PRODUCING PROPERTIES

There were no developments in 2018 in a much-watched DOJ investigation into alleged bid-rigging in the oil and gas industry. In 2016, the DOJ indicted Chesapeake Energy's former CEO Aubrey McClendon for bid rigging in Oklahoma. According to the DOJ, from 2007 to 2012, McClendon orchestrated a conspiracy between two large oil and gas companies to rig bids for certain oil and gas leasehold interests and producing properties in Northwest Oklahoma. McClendon died shortly after the indictment was returned and the case against him was subsequently dismissed. (See also the Private Antitrust Litigation chapter regarding related civil litigation.) Though a 2016 DOJ press release notes an "ongoing federal antitrust investigation into price fixing, bid rigging and other anticompetitive conduct in the oil and natural gas industry," the DOJ has not provided a more recent update nor have new charges been filed.

PRICE MONITORING EFFORTS

The FTC actively monitors oil and gasoline prices to identify unusual price activity that may signal potentially anticompetitive conduct. The agency reviews daily price data from the Oil Price Information Service, which is a private data collection agency, and also receives weekly information from the Department of Energy's public gasoline price hotline. With this information, the FTC can monitor price movements in 20 wholesale regions and approximately 360 retail areas across the country. Using an econometric model, FTC staff examine whether current retail and wholesale prices are anomalous in comparison to historical trends. If the FTC detects any unexpected price changes it will investigate potential causes by consulting with state attorneys general, state energy agencies, and the Department of Energy's Energy Information Administration.

Along with analyzing regular pricing information, the FTC also investigates gasoline price complaints submitted to the Commission's Consumer Response Center and similar information provided by state and local officials. The agency investigates these complaints to assess whether any price movement is the result of potentially anticompetitive conduct.

Beyond these ongoing price monitoring efforts, the FTC often investigates industry conduct during periods of substantial gas price increases. For example, in the wake of Hurricane Katrina, Congress called on the FTC to investigate whether market manipulation led to higher gasoline prices and to determine whether price gouging had occurred after the storm. The investigation did not uncover evidence of price manipulation and found only limited instances of price gouging.

These monitoring efforts resulted in little publicity in the past year — perhaps a reflection of the fact that petroleum prices are well below their historic highs.

LABOR AND EMPLOYMENT ISSUES

The DOJ and certain state attorneys general brought a number of enforcement actions in 2018 focused on anticompetitive conduct affecting labor markets and employment. The DOJ announced several settlements in this area and certain states announced negotiated resolutions and lawsuits targeting agreements that allegedly harmed employment opportunities. Generally, federal enforcement activity has focused on illegal mutual no-hire agreements between employers, also referred to as "no-poach" agreements. Meanwhile, the states have targeted similar restrictions in franchise arrangements.

FEDERAL GUIDANCE AND ENFORCEMENT ACTIVITY

Federal antitrust activity in the area of employment was foreshadowed by the October 2016 release of Antitrust Guidance for Human Resource Professionals, issued jointly by the DOJ and FTC (Antitrust HR Guidance). Emphasizing that Human Resource professionals "often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws," the Antitrust HR Guidance clarified that it is *per se* unlawful for companies to agree (expressly or implicitly) not to compete with one another for employees or to agree on wages or other terms of compensation. The Guidance warned that so called "wage-fixing" and "no-poach" agreements between competing employers would be subject to criminal investigation and prosecution going forward.

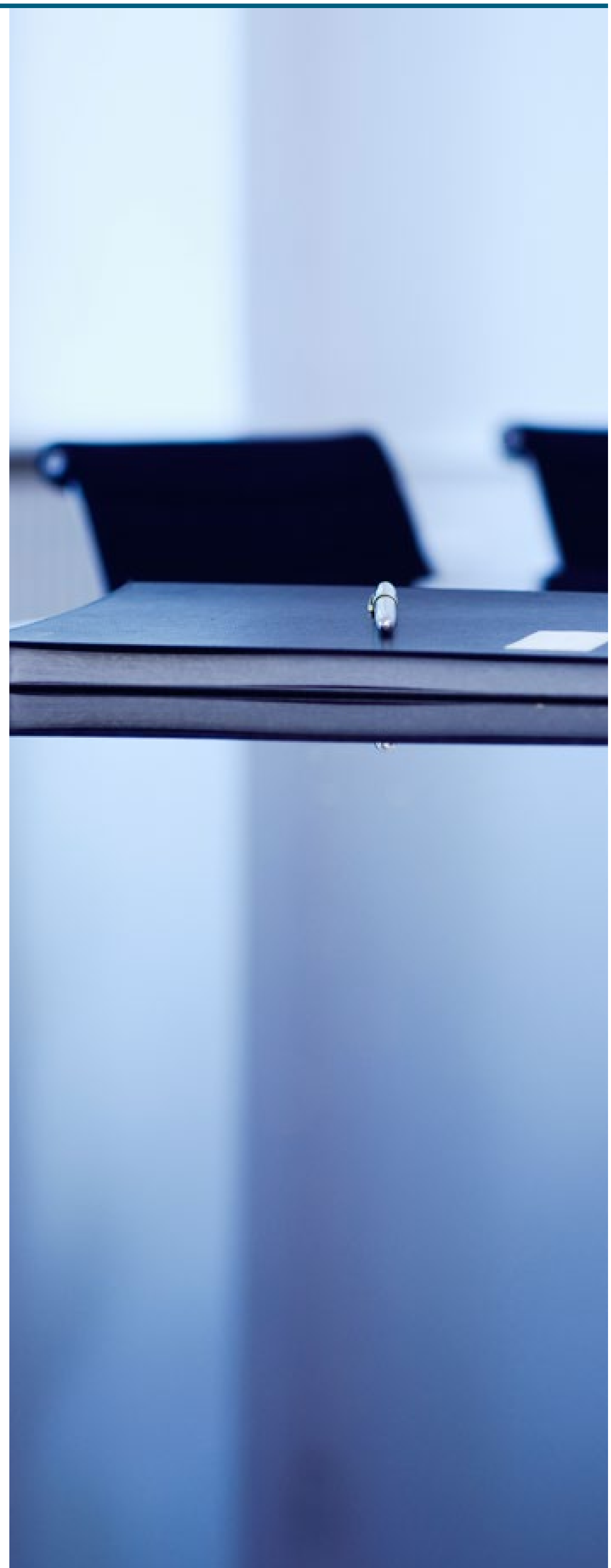
Notwithstanding frequent warnings that conduct that started or continued after the issuance of the 2016 Antitrust HR Guidance will be subject to criminal prosecution, to date, the Antitrust Division has not announced any criminal prosecutions in this area. There has, however, been some civil enforcement activity, including an April 2018 complaint and consent judgment against two of the world's largest rail equipment suppliers resolving allegations that the companies maintained long-standing agreements not to compete for employees. Civil lawsuits followed the announcement of the DOJ consent judgment with rail equipment suppliers. The Antitrust Division reiterated its commitment to investigate no-poach and wage-fixing agreements in its Spring 2018 update.

Industries at particular risk for exposure in this area include fields in which highly specialized employees with unique training may be in short supply and high demand. In the 2010 high tech cases, for example, the anticompetitive conduct largely targeted software engineers, digital animators, computer scientists — employees with similar specialized skillsets who would be difficult to replace if lured away to a competitor employer. Similarly, the DOJ's civil complaint against rail suppliers Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (known as Wabtec) noted that skilled employees with rail experience were in high demand and low supply and that vacancies in critical positions often remained open for months, making the employees who held those positions attractive subjects of no-poach agreements. Similar realities pervade the energy and chemical industries, which depend on engineers, chemists, and other specialized employees.

STATE ENFORCEMENT AGAINST NON-COMPETE AND NO-POACH RESTRICTIONS

The 2016 Antitrust HR Guidance stated that it did not address "the legality of specific terms contained in contracts between employer and employee, including non-compete clauses." Recently, however, several state attorneys general have taken aim at those restrictions.

Washington State was particularly active in 2018, with Attorney General Bob Ferguson challenging no-poach clauses in several nationwide fast-food franchise contracts that prevented employees from moving between different locations of the same corporate chain. As a result of Washington's enforcement efforts, more than 30 corporations have signed agreements to remove such clauses from their franchise contracts at more than 85,000 locations worldwide. Attorneys general in at least ten other states and the District of Columbia reportedly have opened similar investigations. Energy companies with franchises, such as service stations, could face similar investigations if their agreements contain no-poach clauses. As noted in the Private Antitrust Litigation chapter, Jiffy Lube and its parent Shell were sued in November 2018 for anti-poaching clauses in their franchise agreements.



AGENCY TESTIMONY, REPORTS, REGULATIONS, AND AMICUS BRIEFS

In 2018, antitrust regulators outlined enforcement goals and initiatives in a variety of contexts but very rarely expressed specific views on enforcement in the energy and chemical industries. Likewise, neither the DOJ nor FTC issued any important policy statements in 2018 specifically related to the energy or chemical industry. The agencies did file amicus briefs and other position statements in a number of energy or chemical cases in 2018 but did so primarily on issues of general application. In contrast, enforcers frequently discussed antitrust issues specific to the technology and pharmaceutical industries. Still, energy and chemical markets have historically been, and will continue to be, closely monitored by federal regulators due to the direct impact they can have on consumers' wallets.

ENFORCER SPEECHES AND TESTIMONY

Senior officials at both the FTC and DOJ rarely discussed the energy or chemical industry in a substantive manner in speeches and Congressional testimony in 2018. Likewise, members of Congress did not press antitrust regulators on issues related to these industries.

- All five current FTC commissioners were nominated and confirmed in 2018, and in the process testified before the Senate Committee on Commerce, Science, and Transportation. At the two hearings at which the Commissioners were questioned (February 14, Simons, Wilson, Phillips, and Chopra; April 11, Slaughter), none of the nominees talked about energy or chemicals in their written submissions, and none was asked about energy or chemicals by the Senators conducting the hearing.
- In his testimony before the Senate Appropriations Committee regarding the FTC's 2019 budget request, Simons only obliquely referenced the FTC's enforcement efforts in industries, such as energy, that "directly affect consumers and their pocketbooks." Similarly, Simons' testimony before the House Committee on Energy and Commerce's Subcommittee on Digital Commerce and Consumer Protection lacked any substantive discussion of FTC policy regarding the energy industry.
- Both Delrahim and Simons testified before the Senate Judiciary Committee's Antitrust, Competition Policy and Consumer Rights Subcommittee in October. However, neither mentioned any specific concerns or policies related to the chemical or energy industries. Likewise, none of the subcommittee members asked any questions specific to either industry.

That is not to say, however, that enforcers are unconcerned about conduct in these markets. The FTC has historically considered energy and chemical markets to be important economic sectors and has shown particular concern for "pocketbook issues" such as conduct with the potential to raise consumer energy prices. As noted in the Enforcement Statistics chapter, a greater proportion of Second Requests have been in energy and chemical industries in recent years.

FTC ANNUAL REPORT ON CONCENTRATION IN THE ETHANOL INDUSTRY

In 2005, Congress passed the Energy Policy Act which requires that the national transportation fuel supply contain a minimum annual volume of renewable fuels, including fuel ethanol. This mandate is known as the Renewable Fuel Standard and increases each year. Additionally, the Act requires the FTC to issue an annual report to Congress and the Environmental Protection Agency on ethanol market concentration. The FTC is required to measure concentration in the ethanol market using the Herfindahl Hirschman Index and must consider all marketing arrangements among industry participants.

In its 2018 report, as in previous reports, the FTC concluded that "the low level of concentration and large number of market participants in the U.S. ethanol production industry continue to suggest that the exercise of market power to set prices, or coordinate on price or output levels, is unlikely." The FTC noted that market participants believe the U.S. ethanol industry will meet the Renewable Fuel Standard mandate for 2018 but that U.S. ethanol usage remains limited by the E10 "blendwall," the industry's limited ability to consume fuel blends containing more than 10% ethanol. Market participants reported no significant change in the demand for E15 and E85 gasoline. Domestic ethanol production from July 2017 through June 2018 increased approximately 2.5%, while exports increased 23%.

PROPOSED LEGISLATION AND REGULATIONS

There were several competition or consumer protection-related rule makings and legislative proposals relevant to the energy and chemical industries in 2018.

ANTI-OPEC LEGISLATION

In May 2018, the No Oil Producing and Exporting Cartels Act (NOPEC) (H.R. 5904) was introduced in the House of Representatives and referred to the House Committee on the Judiciary. The bill would amend the Sherman Act to make oil-producing and exporting cartels illegal and would allow the government to bring lawsuits against OPEC members for antitrust violations. In July 2018 a similar version of the bill was introduced in the Senate (NOPEC, S.3214).

These legislative proposals are very similar to bills that the House and Senate passed in 2007. Various versions of the bill have been discussed as far back as 2000. Those efforts were unsuccessful because both President Bush and President Obama indicated that they would veto any such bills.

AMENDMENTS TO FTC R-VALUE RULE

In October, the FTC concluded a two-year review of its so-called R-value Rule and implemented amendments to clarify the rule's requirements, reduce regulatory burdens associated with the rule, and make it easier to enforce violations of the rule. "R-value" is a measure of an insulation product's ability to restrict heat flow and thus reduce energy costs. The R-value Rule, initially promulgated in 1979, "requires home insulation manufacturers, professional installers, new home sellers, and retailers to provide R-value information, based on the results of standard tests, to help inform customers."

After seeking comments on the rule in 2016, the FTC proposed amendments in 2017. After a final round of comments on the amendments, in October 2018 the FTC approved a final rule adopting the amendments. Specifically, the amendments:

- Exempt advertisements that are space-constrained from including energy savings claims disclosures;
- Clarify that commercial products sold for residential use are subject to the Rule;
- Require that R-value claims for non-insulation products must be substantiated by the Rule's "ASTM" standards, which are commonly used tests for measuring R-value;
- Emphasize the importance of air sealing and proper insulation installation to consumers' energy costs; and
- Require insulation retailers to post product labels and fact sheets on their websites for covered products sold directly to consumers online.

The Commission unanimously voted to authorize publication of the final rule in the Federal Register, and the Rule will become effective one year after that publication.

AMENDMENTS TO FTC ENERGY LABELING RULE

The FTC's Energy Labeling Rule requires that certain appliances and other products display yellow EnergyGuide labels, which provide consumers with an estimate of the annual energy cost of the product, an energy consumption rating, and a "range for comparing the highest and lowest energy costs for all similar models." In 2017 the FTC requested public comment on updates to the Rule and in February 2018 amended the Rule by updating the comparability range and cost information for several products such as dishwashers, furnaces, pool heaters, and room air conditioners. The amendments went into effect on May 23, 2018, with the exception of room air conditioner boxes, which have a compliance date of October 1, 2019. Additionally, the FTC proposed amending the Rule to make the Rule easier to use by reorganizing several sections, amending language to increase clarity, and eliminating several obsolete provisions. Comments on these technical amendments are due on February 19, 2019.

RECYCLED OIL RULE

In July 2018, the FTC completed its regulatory review of the Test Procedures and Labeling Standards for Recycled Oil. The Rule allows manufacturers to market used engine oil as "substantially equivalent to new oil" so long as they substantiate those claims using certain guidelines provided by the American Petroleum Institute. With one minor exception (a change to an outdated reference in the Rule), the Commission retained the Rule in its current form.

FTC AND DOJ POSITION STATEMENTS TO COURTS AND OTHER AGENCIES

The DOJ and FTC have authority to file amicus briefs and statements of interest in pending lawsuits and regulatory proceedings. The antitrust agencies typically do this to ensure that the federal antitrust laws are consistently enforced, even when the United States is not a party to the case. As discussed below, the DOJ and FTC filed position statements in a number of recent cases involving the energy or chemical industries, generally when issues of federalism arose.

DOJ SUPREME COURT AMICUS BRIEF IN SALT RIVER LITIGATION

SolarCity Corporation, recently renamed Tesla Energy Operations, Inc., sued Salt River Project Agricultural Improvement and Power Distribution alleging in part violations of Sections 1 and 2 of the Sherman Act. SolarCity alleged that Salt River's new electricity rate plan imposed a penalty on self-generation that was so significant that consumers would have no choice but to buy electricity from Salt River, effectively excluding competition and preserving Salt River's monopoly. The district court dismissed the Section 1 claims but allowed the Section 2 claims to proceed, denying Salt River antitrust state-action immunity. Salt River appealed. The primary issue on appeal was whether denials of antitrust state-action immunity are immediately appealable under the collateral-order doctrine. The Ninth Circuit dismissed Salt River's appeal for lack of jurisdiction, and the U.S. Supreme Court granted certiorari to resolve a circuit split. On February 20, 2018, the DOJ submitted a Brief for the United States as Amicus Curiae Supporting Respondents arguing that denials of state-action immunity are not immediately appealable under the collateral-order doctrine because the question of whether a defendant's conduct is a state action beyond the reach of the Sherman Act is not completely separate from the merits of the Sherman Act claim. The parties settled, and the case was dismissed before oral argument. Additional information regarding the Salt River litigation is in the Private Antitrust Litigation chapter.

FTC COMMENT ON PENNSYLVANIA RETAIL ELECTRICITY PRICING RULEMAKING

On May 22, 2018, the FTC submitted a comment to the Pennsylvania Public Utility Commission (PUC) on a proposed rulemaking designed to provide retail electricity pricing transparency to residential and small commercial electricity customers. The FTC favored the PUC's proposed rulemaking because it would allow these customers to choose dynamic pricing plans and make more informed decisions in choosing such plans. PUC would require electricity providers to provide their customers with accurate and clear information regarding these plans.

DOJ STATEMENTS IN LITIGATION CHALLENGING MINNESOTA ELECTRIC GRID STATUTE

On April 13, 2018, the DOJ submitted a statement of interest supporting the plaintiff in *LSP Transmission Holdings, LLC v. Nancy Lange*, a case pending in the U.S. District Court for Minnesota. LSP Transmission Holdings, LLC, an independent transmission developer, alleged that a Minnesota statute violated the dormant commerce clause by discriminating against interstate commerce. The statute provided incumbent electrical transmission owners with a right of first refusal to build new high-voltage lines that connect to their existing facilities. The complaint alleged that 87% of the incumbent electrical transmission owners were headquartered in Minnesota. The DOJ urged the court to invalidate the state law giving preference to incumbent utilities for new electric grid projects. The judge declined to consider the DOJ's statement of interest because it was filed almost three months following the conclusion of briefing. The judge dismissed the complaint and LSP appealed.

On October 19, 2018, the DOJ submitted a Brief for the United States as Amicus Curiae in Support of Neither Party in *LSP Transmission Holdings, LLC v. Nancy Lange*, No. 18-2559, now pending before the U.S. Court of Appeals for the Eighth Circuit. The DOJ filed the amicus curiae brief to "promote sound dormant Commerce Clause analysis," arguing that the district court made three discrete errors: 1) it erroneously looked at the firms' headquarters, rather than their in-state physical presence, to measure discriminatory effects, and it mistakenly believed that state laws favoring some in-state entities are necessarily consistent with the Commerce Clause; 2) it misapplied *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), which the DOJ argued was inapplicable; and 3) contrary to the district court's assertion, the federal government had neither authorized nor approved Minnesota's right of first refusal law.

2018 PRIVATE ANTITRUST LITIGATION DEVELOPMENTS IN ENERGY AND CHEMICAL INDUSTRIES

PRIVATE ANTITRUST LITIGATION

2018 was an active year for private antitrust litigation involving energy and chemical firms. Consistent with historical trends, the majority of private cases focused on alleged collusion among competing firms.

Claims that players in energy markets have manipulated price benchmarks — similar to claims that financial institutions have manipulated benchmarks like LIBOR — have become more common in recent years, with plaintiffs alleging that traders have violated the Sherman Act by manipulating markets through collusive trading activity or reporting practices. Plaintiffs also have alleged that companies pursuing mineral rights have conspired to rig bids or depress the prices that landowners and other sellers receive in mineral rights auctions or transactions. Plaintiffs continue to charge that capacity withdrawal decisions in tight product markets may be the result of anticompetitive agreements to try to increase prices or the improper sharing of information among sellers.

Multiple defendants succeeded in defeating antitrust claims such as these by challenging plaintiffs' allegations of injury in fact from the alleged conduct. But energy companies and other market participants should not assume that these cases always will be brought by individuals or businesses who lack a nexus with allegedly affected markets. Participants in constrained markets should continue to exercise caution and document their unilateral reasons for business decisions that may appear suspicious or coordinated to those outside of the industry (such as taking a plant offline or withdrawing from an auction process).

DECISIONS

HARRY v. TOTAL GAS & POWER NORTH AMERICA, INC.

889 F.3D 104 (2D CIR. 2018)

In May 2018, the Second Circuit affirmed a district court's holding that plaintiff investors had failed to state an antitrust claim against traders for monopolization and trading manipulation, where the investors failed to allege a connection between the defendant's conduct and their trading activity.

Several investors who traded commodities derivatives brought a putative class action against Total Gas & Power North America for alleged monopolization of markets for natural gas at regional hubs and manipulation of natural gas prices in violation of the Commodity Exchange Act and antitrust laws. Drawing from the CFTC's and FERC's conclusions that Total Gas had engaged in an ongoing strategy to manipulate the price of natural gas commodities at certain regional hubs, investors sued for damages resulting from Total Gas's alleged manipulation of natural gas trading.

While the court noted that defendants "without a doubt" repeatedly manipulated the market, Plaintiffs failed to show any injury as a result of defendants' actions. Plaintiffs traded natural gas derivatives that were not indexed to the natural gas traded at the hubs affected by defendants' manipulation. Observing that "there are no citizens' arrests for commodities fraud," the court upheld the district court's ruling that the plaintiffs failed to state a claim under the Commodity Exchange Act or under antitrust law.

ENCANA OIL & GAS (USA) INC. v. ZAREMBA FAMILY FARMS, INC.

736 F. APP'X 557 (6TH CIR. 2018)

In May 2018, the Sixth Circuit affirmed a summary judgment holding that a landowner had not presented evidence that it had been affected by an alleged conspiracy to depress mineral lease prices.

Encana Oil & Gas originally brought suit against Zaremba Family Farms for breach of contract, after negotiations for the sale of mineral rights to Encana fell through and Zaremba refused to return earnest money to Encana, as allegedly required by a letter of intent. But a few months into the case, when Encana was implicated in press accounts regarding alleged collusion with Chesapeake Energy to depress mineral lease prices, Zaremba counter-claimed against Encana for antitrust violations and fraud. The district court granted Encana summary judgment, dismissing Zaremba's antitrust counter-claims, but put both Zaremba's fraud claim and Encana's contract claims to trial. Neither party recovered at trial: Encana failed to recover the earnest money under its contract claim, and Zaremba failed to prove its fraud claim.

Both parties appealed the trial outcomes, and Zaremba appealed the dismissal of its antitrust claims. Zaremba argued that Encana violated the Sherman Act and the Clayton Act by engaging in bid rigging with other companies, and by engaging in illegal "market allocation" to split up the Michigan mineral-rights market.

The Sixth Circuit upheld the district court's decision. While there was sufficient evidence to suggest that Encana and Chesapeake had discussed agreeing to reduce their competition with one another in order to lower prices for leases, Zaremba failed to show any evidence that it suffered an injury related to the alleged conspiracy. The court noted that antitrust plaintiffs must do more than merely show that a "defendant was up to no good." Zaremba filed a petition for certiorari in the U.S. Supreme Court in October 2018, which remains pending at the time of publication.

BRANTA, LLC v. NEWFIELD PRODUCTION CO.

310 F. SUPP. 3D 1166 (D. COLO. 2018)

In April 2018, after a bench trial, a federal district court in Colorado found no evidence to support allegations that an oil and gas producer had engaged in bid rigging in mineral rights auctions conducted by the plaintiff.

In 2011, Branta, an oil and gas exploration and production company, conducted an auction for the sale of mineral rights in the Uinta Basin in Utah. Branta alleged that Newfield Production Company, a potential buyer Branta had contacted to participate in the auction, engaged in unlawful bid rigging, breach of contract, tortious interference, and civil conspiracy relating to the auction. Newfield submitted the highest bid among auction participants while another company, Ute Energy, was initially interested in buying, but ultimately did not submit a bid.

Branta alleged that Newfield communicated with Ute Energy and persuaded it to refrain from bidding. Though the court recognized bid rigging would violate Section 1 of the Sherman Act, the court found no evidence, direct or circumstantial, to show that Newfield and Ute Energy agreed to bid-rig. Further, the court found that Branta showed no injury or non-speculative damages as a result of the alleged bid rigging, as Branta produced no evidence to suggest an additional bidder would have increased the final price for the assets. Accordingly, the court entered judgment in favor of Newfield. Branta filed a notice of appeal in July of 2018, which was dismissed by the Tenth Circuit in September 2018.

SIGNIFICANT SETTLEMENTS

SOLARCITY v. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT

NO. 2:15-CV-00374 (D. ARIZ.)

A March 2018 settlement between Arizona's largest utility and solar panel provider SolarCity, recently renamed Tesla Energy Operations, Inc., ended the utility's quest for Supreme Court review of state-action immunity issues. The parties' settlement agreement provides that Salt River Project will purchase a new battery energy storage system from Tesla and will implement certain programs to incentivize its customers to use at-home energy storage systems.

In 2016, SolarCity filed a federal antitrust suit alleging Salt River Project set prices that disfavored solar-power providers, leading to an alleged 96% drop in applications for solar systems in the Phoenix area. SolarCity's complaint detailed Sherman Act Section 1 and 2 claims and Clayton Act claims that Salt River's newly set rates effectively imposed a penalty on customers choosing to generate their own power, allowing Salt River Project to maintain a monopoly over power generation in the district.

Salt River moved to dismiss on the basis of sovereign immunity, arguing that the power district is a state entity. The district court granted the motion to dismiss in part, dismissing the Section 1 claims, but denied both the motion to dismiss and a requested interlocutory order on the issue of state-action immunity. The district court stayed the underlying monopolization suit in 2016, pending appeal.

Salt River appealed to the Ninth Circuit pursuant to the collateral order doctrine, which allows immediate appeals when an order (1) is conclusive, (2) addresses a separate question from the underlying merits of the case, and (3) raises "some particular value of a high order" on a question that will "evade effective review if not considered immediately." The court found that the collateral-order doctrine does not permit intermediate appeal on the issue of state-action immunity, citing the Supreme Court's emphasis on the narrowness of the doctrine. In so ruling, it joined the Fourth and Sixth Circuits, and split with the Fifth and Eleventh Circuits. Salt River then sought review by the Supreme Court, which dismissed the certiorari petition so the parties could pursue settlement negotiations.

The parties settled in March 2018. Under the agreement, Salt River will purchase a 25-megawatt/100-megawatt battery energy storage system from Tesla at market pricing for its Glendale, Arizona facility, to be installed in 2021. It also will implement programs to collect information on residential-solar users and incentivize customers to purchase home energy storage systems, including those sold by Tesla. These plans include a three-year pilot program to limit demand spikes on billing for customers generating their own energy, and an up-to-$1,800 residential credit for up to 4,500 customers to purchase and install storage systems on a first-come-first-served basis. The district court entered the joint stipulation of dismissal on March 20, 2018.

MERCED IRRIGATION DISTRICT v. BARCLAYS

NO. 1:15-CV-04878 (S.D.N.Y)

In April 2018, the Southern District of New York approved a $29 million settlement between a California irrigation district and Barclays related to a claim that Barclays manipulated electricity futures prices in 2006-2008.

A 2012 FERC report concluded that Barclays traded day-ahead fixed-price electricity to increase the bank's Intercontinental Exchange fixed-for-floating financial swap positions. Determining that Barclays had violated FERC's "Prohibition of Energy Market Manipulation" rule, the Commission ordered Barclays to pay a $435 million fine, the largest civil penalty ever imposed by the Commission. That fine is currently on appeal.

Merced Irrigation District sought to represent a proposed class of purchasers who bought peak or non-peak power at three trading hubs in the Western United States between November 2006 and December 2008 at artificially-inflated prices. Alleging these purchasers were damaged by the movements in index prices caused by Barclays' manipulation in violation of Sections 1 and 2 of the Sherman Act, Merced sought damages of $100-$200 million.

In 2016, the district court dismissed Merced's Section 1 claim, citing Merced's inability to show that other parties in Barclay's trades were known participants in the scheme, but permitted the Section 2 monopolization claim to proceed.

Merced and Barclays reached a mediated settlement of $29 million in early April 2018, to be allocated among class members submitting claims in proportion to the contract volumes those class members can prove were physically or financially settled against the affected indices.

THIEME v. CHESAPEAKE ENERGY CORP.

NO. 5:16-CV-00209 (W.D. OHIO)

In September 2018, a group of six plaintiffs, oil and gas royalty owners, asked the Western District of Oklahoma to certify a settlement class and approve a $6.95 million settlement agreement with Chesapeake Energy Corporation.

Plaintiffs filed the suit in March 2016, shortly after the late Aubrey McClendon, Chesapeake's then-CEO, was indicted by the DOJ in connection with a bid-rigging conspiracy. (This investigation is described in greater detail in the FTC and DOJ Non-Merger Enforcement chapter.) The proposed class includes owners of oil and gas royalties in the Mississippi Lime Play area, a geological formation located in Kansas and Oklahoma. Plaintiffs allege that Chesapeake conspired with SandRidge Energy, Inc. and SandRidge Exploration and Production, LLC to "fix, stabilize, and artificially suppress prices paid to plaintiffs" in the purchasing of mineral rights and leasehold interests between December 2007 and March 2012. SandRidge's entities were originally also included as defendants, but have since declared bankruptcy. The court has not yet ruled on the settlement.

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

CASE NO. 1:05-MD-01720 (E.D.N.Y.)

In December 2018, the Eastern District of New York expressed an intention to issue preliminary approval on a $6.2 billion settlement, which would end over ten years of credit card fee litigation between major credit card providers and a group of merchants and trade groups, pending changes to the class member notice.

The plaintiffs, merchants and trade groups, originally filed a class action against Visa, MasterCard, and several banks in 2005, alleging that the companies conspired to charge artificially high fees for credit card payments. The Second Circuit declined to approve a previously agreed settlement of $7.25 billion, but the court set aside a portion of the settlement monies, $5.3 billion, to be held in escrow for future settlements. The new agreement would add $900 million to the escrowed settlement funds.

There remains to be decided an objection filed in November 2018 by the National Association of Shell Marketers, the Petroleum Marketers Association of America, and the Society of Independent Gasoline Marketers of America. These objectors argue that branded gasoline outlets, such as gas stations and convenience stores, would be treated as class members and precluded from making their own claims as a result of the settlement even if they received no relief under the settlement. They also contend that major oil refiners would assert the right to relief arising out of transactions occurring at branded gasoline outlets, foreclosing the outlets from recovery on transactions conducted in their stores. Class attorneys responded that these concerns amounted to "intra-class conflicts" that should be resolved separately. While the court awaits updates to the class member notice, it says it will likely approve the settlement once the notice is updated.

DEVELOPMENTS IN PENDING LITIGATION

IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIGATION

860 F.3D 1059 (8TH CIR. 2017)

In January 2018, the Supreme Court denied certiorari to review the Eighth Circuit's reversal of a district court's order dismissing price-fixing allegations against propane tank distributors

Plaintiffs, purchasers of propane tanks, brought a putative class action against two tank distributors, Blue Rhino and AmeriGas Cylinder Exchange, alleging that they conspired to reduce the amount of propane they put in each tank sold in 2008 while maintaining consistent pricing, creating an "effective price increase of 13%." The district court dismissed plaintiffs' claims as barred by the statute of limitations.

The Eighth Circuit initially affirmed, but on rehearing en banc, reversed. The court applied the "continuing violation" doctrine, an exception to the applicable statute of limitations that restarts limitations with each overt act committed by the defendant, where the overt act (1) is a new act, not merely a reaffirmation of a previous act, and (2) inflicts new injury on the plaintiff. The court held that each sale of the tanks at supracompetitive prices inflicted a new injury and would be subject to its own limitations period. Defendants submitted a petition for writ of certiorari to the Supreme Court, which was denied.

KOPPITZ v. CHESAPEAKE ENERGY CORP.

421 P.3D 319 (OK. CIV. APP. 2018)

In March 2018, the Oklahoma Civil Appeals Court ruled that the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) preempts Oklahoma antitrust law regarding the recovery of state antitrust treble damages.

The plaintiff alleges a conspiracy on the part of Chesapeake and the other defendants to rig bids and artificially depress prices for the purchase of leasehold interests in Oklahoma mineral estates. He seeks to represent a class of oil and gas lessors in Oklahoma who sold leasehold interests to defendant energy companies between February 1, 2007 and March 31, 2012.

In 2018, defendants moved to dismiss on the basis of federal preemption, stating that they had cooperated with the DOJ's investigation of the matter and were therefore entitled to leniency under the ACPERA, which limits potential recovery to "single" actual damages in exchange for a defendant's cooperation. (A discussion of this investigation is in the FTC and DOJ Non-Merger Enforcement chapter.) Plaintiff responded that the class members were entitled to seek treble damages under Oklahoma antitrust law. The state district court granted Chesapeake's motion to dismiss, and the appeals court confirmed "that to the extent the ACPERA single damage limitation conflicts with the treble damage provision of [the Oklahoma statute], the doctrine of conflict preemption clearly applies and proscribes the recovery of state antitrust treble damages from an ACPERA participant." The appeals court nevertheless remanded the case to the trial court, stating that despite the unavailability of treble damages, conflict preemption did not prevent the trial court from ruling on the alleged ACPERA claims. The case is currently pending in the Oklahoma District Court of Woods County.

PERSIAN GULF INC. v. BP WEST COAST PRODUCTS LLC

NO. 3:15-CV-01749 (S.D. CAL.)

In June 2018, a federal district court denied a motion to dismiss a suit brought by a gas station owner alleging that major oil refiners conspired to manipulate wholesale gas prices in California, leading to historic high prices in 2012 and 2015.

The gas station owner contends that the group of refiners — including Chevron, BP, ExxonMobil, and many others — violated the Sherman Act and California antitrust statutes by restricting supply, causing the plaintiff and the alleged class to pay increased prices for gas. Seeking to represent "hundreds or thousands" of class members who purchased gasoline directly from any of the defendant refiners from February 1, 2012 to the present, the plaintiff claims the refiners uniformly failed to publicly disclose operations information, such as output plans and refinery shutdowns, while effectively exchanging such operational information among themselves under agreements to trade petroleum products at agreed-upon rates when supplies were short. The plaintiff argues that the refiners spread misleading information to the public, manipulating the market and causing price spikes during 2012 and 2015. The refiners countered that the complaint, though filed on behalf of wholesalers, only alleged price increases at the retail level.

The court held that the station owner plaintiff presented a cognizable claim, concluding that plaintiff had established that increases at the wholesale level quickly spread to retail. Moreover, under the *Twombly* test, the plaintiff was only required to show that the conspiracy was plausible, not probable, and they did so. The plaintiff's complaint also rose above the level of "conscious parallelism" because it alleged certain "extreme" conduct by the defendants, including allegations that defendants ran on the market after advance notice of a power failure, that one defendant chose not to repair a refinery after an accident in order to increase prices, and that it allowed a tanker to sit idle instead of importing gasoline into California as a reasonable party would have done in the absence of conspiracy. The case is set for trial in late 2019.

ARANDELL CORP. v. CENTERPOINT ENERGY SERVICES, INC.

900 F.3D 623 (9TH CIR. 2018)

In August 2018, the Ninth Circuit reversed and remanded a summary judgment dismissing claims against a natural gas supplier's subsidiary in a suit alleging price fixing.

Plaintiffs, seeking to represent a class of "industrial and commercial purchasers of natural gas," allege that ten large natural gas companies and their subsidiaries colluded to fix gas prices in Wisconsin and engaged in other anticompetitive conduct. The district court awarded summary judgment to one of the defendants, CenterPoint Energy Services, Inc. (CES), ruling that there was no evidence that CES knowingly conducted any activity "in conspiracy with" its parent company for "the purpose of increasing the price of natural gas." Plaintiffs appealed, arguing that CES made a critical contribution to the price-fixing efforts by buying overpriced gas from its parent company, Reliant Energy, and then selling the gas to Wisconsin businesses at inflated prices and sending revenue back to the parent company.

The Ninth Circuit evaluated whether there was sufficient evidence to raise triable issues regarding (1) whether CES had the intent and purpose to restrain trade, and (2) whether CES took actions to further the alleged conspiracy. The court treated the case as a kind of inverse application of the *Copperweld* doctrine. Just as a parent and its wholly owned subsidiary are treated as a single "economic unit" with a shared intent (which is therefore incapable of "conspiring" with "itself"), a wholly owned subsidiary that participates in "coordinated activity" as part of the "anticompetitive scheme of its parent" participates in such activities with the purposes of the overall "economic unit." In other words, the court concluded that when a parent and subsidiary are alleged to be participants in an anticompetitive conspiracy, the purposes of the parent company are fully passed on to the subsidiary. Further, the court found that there was a genuine issue of material fact as to whether CES knowingly acted in furtherance of the anticompetitive purpose of its parent, Reliant. The Ninth Circuit reversed summary judgment and remanded the case against CES for further proceedings. On November 27, 2018, the Ninth Circuit approved an order to suspend appellate proceedings pending final settlement approval. No settlement has been reached at the time of writing.

IN RE WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION,

NO. 17-16925, 2018 WL 3639516 (9TH CIR. AUG. 1, 2018)

In August 2018, the Ninth Circuit reversed a district court order dismissing market-manipulation claims, narrowly construing a class action settlement agreement between plaintiff natural gas retail buyers and defendant traders to allow plaintiffs to raise state antitrust claims on related facts.

The plaintiffs were retail buyers who alleged that a group of natural gas traders conspired to manipulate natural gas futures prices on the NYMEX by engaging in wash sales and reporting false price and volume information to industry publications between 2000 and 2002. After various parties' state and federal claims were consolidated into a multidistrict litigation proceeding, the district court entered summary judgment in 2011 on most of the state law claims at issue, concluding they were preempted by the Natural Gas Act. In 2013, the Ninth Circuit reversed the district court's summary judgment, holding that "federal preemption doctrines do not preclude state law claims arising out of transactions outside of FERC's jurisdiction." Subsequently, the parties reached a $42.8 million general settlement in 2017.

Thereafter, one of the plaintiff class members, Sinclair Oil, brought separate state antitrust claims against the same group of defendants, contending the state claims were not prohibited by the settlement agreement. In March 2017, the district court for the District of Nevada issued summary judgment on these claims, holding that the settlement agreement released the state antitrust claims. The appeals court reversed. Speaking from the bench, Judge Hurwitz of the Ninth Circuit said that "the NYMEX release essentially covered the trading of gas futures contracts, but not physical natural gas," as alleged in Sinclair's state law claims. The case is currently on remand in the district court.

IN RE RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION

NO. 07-489 (D.D.C.)

In 2018, plaintiffs appealed to the D.C. Circuit to reverse the denial of class certification in antitrust litigation over railroad fuel surcharges. The issue on appeal concerns the use of statistical damages models to prove injury-in-fact across disparate antitrust class action plaintiffs.

Plaintiffs are a group of railroad shippers who allege that in 2003 four major railroads conspired to impose revenue-increasing fuel surcharges in violation of Section 1 of the Sherman Act and Section 4 of the Clayton Act. They allege that defendants' executives met regularly in 2003 and agreed to begin charging identical rates. Plaintiffs allege that defendants then created a new cost index, which removed fuel charges from the previous cost escalation index, and applied similar fuel surcharges to shippers on their respective railroads. Plaintiffs allege that these surcharges were higher than the cost of actual fuel and led to billions of dollars in increased revenue for the railroads. The current iteration of the case is a multidistrict litigation pending before the District Court of the District of Columbia.

In October 2017, the district court denied the plaintiffs' request for class certification under Federal Rule of Civil Procedure 23 because of flaws in their damages model. The court concluded that the model allowed uninjured shippers to remain in the class and failed to explain certain overcharges with respect to legacy shippers. This 2017 ruling came on the heels of the Supreme Court's decision in *Tyson Foods* in 2016, which permitted certain uses of "representative evidence," such as averages or statistical analyses, to show commonality and predominance between disparate class members. The D.C. Circuit granted a Rule 23(f) petition to permit an interlocutory appeal, and the appeal was argued in September 2018. The parties await a decision.

OXBOW CARBON & MINERALS LLC v. UNION PACIFIC RAILROAD COMPANY

NO. 1:11-CV-01049 (D.D.C)

In October 2018, the district court for the Distric of Columbia granted a motion to stay this case, an opt-out from the *Rail Fuel Surcharge Antitrust Litigation* case described immediately above, pending the outcome of the class certification appeal in the MDL.

While the putative class action was under way, in 2011, five affiliated companies that mine and sell coal and petroleum coke filed their own separate lawsuit against Union Pacific and BNSF Railway Co., making substantially the same allegations that the railroads colluded to fix fuel surcharges, as well as allegations that the railroads established a monopoly over coal shipping in the Western United States. Plaintiffs, alleging they were forced to pay more than $50 million in illegal fuel surcharges between 2004 and 2012, seek treble damages and "lost business and profits" totaling more than $150 million. After the initial complaint was dismissed, the district court denied a motion to dismiss an amended complaint. In 2017, the parties engaged in a well-publicized discovery battle related to documents held by Oxbow's chief executive officer.

On October 1, 2018, the district court granted the defendants' motion to stay the Oxbow suit pending the outcome of the appeal of the denial of class certification in *In re Rail Fuel Surcharge Antitrust Litigation.*

IN RE LIQUID ALUMINUM SULFATE ANTITRUST LITIGATION

NO. 16-MD-2687 (D.N.J.)

In 2018, the District Court for the District of New Jersey denied a motion to dismiss Sherman Act claims against chemical companies accused of rigging bids for sales of a water treatment chemical. It also approved a settlement between the class and one defendant for $10.7 million.

Beginning as early as 1997, plaintiffs in dozens of suits alleged that a group of chemical companies fixed prices and rigged bids related to the sale of water treatment chemicals to business and municipal consumers. In 2016, these suits were consolidated into a single multidistrict litigation before the District of New Jersey. The consolidated complaint asserts that from 1997 to 2010, several companies, including General Chemical and Reichl, violated Section 1 of the Sherman Act by conspiring to raise the price of the chemical aluminum sulfate by trading information with each other and intentionally submitting artificially inflated bids to municipalities and paper companies to drive up prices.

In February 2018, the court denied a motion to dismiss, finding that the complaint alleged particular instances of bid coordination and communication between the defendants, which injured plaintiffs by leading to an increased price in aluminum sulfate over the class period. In December 2018, the court approved a final $10.7 million settlement between plaintiffs and one of the defendants, GEO Specialty Chemicals. Discovery continues in the remaining litigation. A related DOJ cartel investigation is described in the FTC and DOJ Non-Merger Enforcement chapter.

NEW FILINGS IN 2018

PDVSA v. LUKOIL PAN AMERICAS LLC

NO. 1:18-CV-20818 (S.D. FLA.)

On April 9, 2018, Venezuela's state-owned oil company (PDVSA) accused a group of American oil companies of participating in a decade-long bribery scheme to get information about future crude oil tenders before they were on the market.

PDVSA filed a complaint against Lukoil Pan Americas and more than a dozen other oil companies, claiming that the defendants participated in a scheme set up by two Venezuelan nationals to bribe PDVSA employees for information by using money funneled through shell companies ostensibly for the purpose of "market research" or "business intelligence." In addition to relaying information to the companies, PDVSA argues that the men would instruct PDVSA employees to change tenders to make sure the defendant companies would secure winning bids.

In July 2018, the defendants moved to dismiss the complaint on two grounds: lack of standing, because the Venezuelan legislature has not approved PDVSA's pursuit of the claims, and alleged bad faith, based on the alleged actions of PDVSA and Venezuela government officials, including President Nicolas Maduro, to prevent the defendants from taking depositions of key figures in the case. The court has not yet ruled on the motion to dismiss at the time of publication.

BARTLETT v. BP WEST COAST PRODUCTIONS

NO. 3:2018-CV-01374 (S.D. CAL.)

In June 2018, plaintiffs filed a class action against several oil and gas companies alleging a conspiracy to "manipulate and maintain" gas prices in California at "supracompetitive prices," in violation of both California's Unfair Competition Law and the Cartwright Act. Plaintiffs seek damages resulting from the alleged unlawful conduct, treble damages, and attorneys' fees, as well as an injunction against the conduct in question.

Plaintiffs allege that the oil industry capitalized on a 2015 explosion in Torrance, California that temporarily put a refinery offline and caused gasoline prices to spike. According to the complaint, California gas prices stayed elevated continuously in the last three years, well after the refinery recovered. They describe similar price spikes in California in 2012, at times when the rest of the country experienced a decrease in gas prices. Plaintiffs cite research and data purporting to show that these price increases were unnecessary, and the result of a conspiracy between defendant companies to "create a false impression of a shortage in order to force prices up and reap windfall profits."

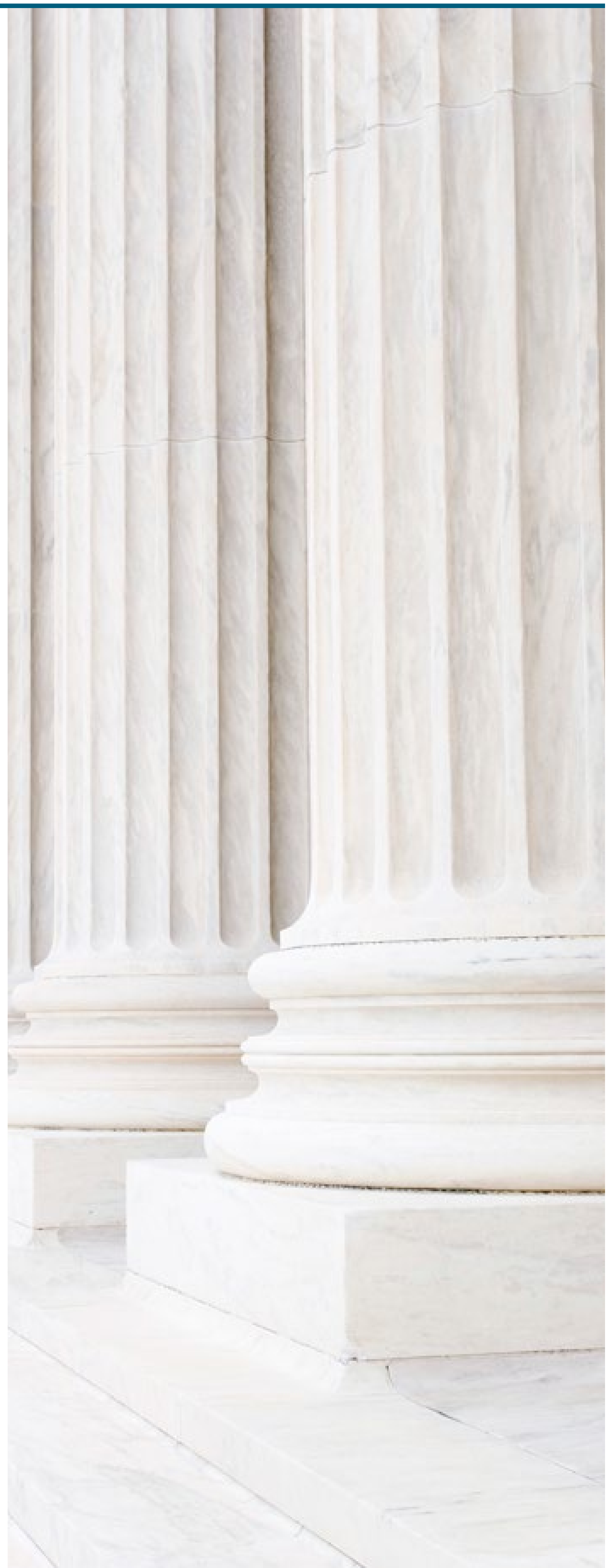
Defendants have filed a series of dismissal motions, arguing that some claims are barred by the statute of limitations and that plaintiffs have failed to state a claim. Some defendants have also accused plaintiffs of piggybacking on another case described above, *Persian Gulf Inc. v. BP West Coast Products LLC*. Under an order issued in early August, the two cases will be coordinated for discovery and other pretrial purposes.

PNE ENERGY SUPPLY LLC v. EVERSOURCE ENERGY

NO. 1:18-CV-11690 (D. MASS.)

In August 2018, a small electricity retailer brought a putative antitrust class action against two New England energy companies for allegedly exploiting a lack of regulation to drive up prices.

The plaintiff, PNE, alleges that Eversource Energy and AVANGRID, Inc. manipulated pipeline capacity to inflate



natural gas and electricity prices in New England states. PNE seeks to represent a class of purchasers in the ISO-NE electricity market who bought wholesale electricity in the day-ahead and real-time energy market from December 1, 2012 to present. PNE contends that the defendants limited the amount of natural gas in the market, which drove up fuel costs for gas-fired generators, forcing smaller electricity retailers like PNE to pay above-market prices for generated electricity.

The defendants moved to dismiss on September 28, 2018 on the basis that PNE has no standing to complain of FERC-authorized prices for wholesale electricity prices, because the wholesale market is regulated by FERC. There will be a hearing on the motion to dismiss in January 2019.

IN RE DIISOCYANATES ANTRITRUST LITIGATION

MDL NO. 2862 (U.S. JUD. PAN. MULT. LIT. OCT. 3, 2018)

In October 2018, the Judicial Panel on Multidistrict Litigation approved the pretrial consolidation of cases against various chemical companies over an alleged conspiracy to fix the price of two chemicals used in the manufacture of polyurethane consumer and industrial products. (The DOJ investigation that precipitated this litigation is described in the FTC and DOJ Non-Merger Enforcement chapter.)

Twelve plaintiffs across five districts allege that between 2015 and 2016, several chemical companies, including Bayer, Dow Chemical Company, and BASF, conspired to fix the price of methylene diphenyl diisocyanate (MDI) and toluene diisocyanate (TDI) by agreeing among themselves to limit supply through planned manufacturing shutdowns and coordinated price increases.

In 2018, a plaintiff in the Western District of Pennsylvania moved to consolidate the cases for pretrial purposes into an MDL in that court. No defendant opposed consolidation, and the JPML chose the Western District of Pennsylvania based on its proximity to six defendants' corporate headquarters. The plaintiffs' consolidated amended class action complaint is expected on February 1, 2019. Vinson & Elkins represents Wanhua Chemical Group in this litigation.

FUENTES v. ROYAL DUTCH SHELL

CASE NO. 2:18-CV-05174-AB (E.D. PA.)

In November 2018, a former Jiffy Lube employee filed an antitrust suit in the Eastern District of Pennsylvania against Royal Dutch Shell, alleging that the company conspired to suppress wages by including "no-poaching" clauses in its standard-form franchise agreements.

The named plaintiff seeks to represent a class of current and former Jiffy Lube employees from at least 2010 forward. He alleges that in 2010 Jiffy Lube violated Section 1 of the Sherman Act by adopting a standard clause in its franchise agreements prohibiting franchisees from employing workers who previously worked for another franchise for a period of six months. These so-called "no-poaching" clauses allegedly inhibited competition among the franchisees for talent.

OVERVIEW OF ANTITRUST LAWS AND ENFORCERS

MERGER REVIEW PROCESS

Over the past 40+ years, energy markets have featured two notable trends. First, the industry has undergone a major shift from traditional price regulation to competitive markets. Second, vast technological improvements have changed the competitive landscape, particularly for extraction and production. Up to and throughout the 1990s, the United States became increasingly dependent on foreign oil, whereas in the last decade, thanks to innovations and efficiencies in horizontal drilling and hydraulic fracturing, that trend has reversed and the United States has now become the largest oil producer in the world. Each of these trends has affected the way that the U.S. antitrust agencies approach potential mergers and acquisitions in this industry. During the same period, the chemical industry has undergone significant consolidation, a trend that is likely to continue in the future. This increased consolidation has led to greater scrutiny of and more frequent challenges to chemicals mergers.

WHAT IS MERGER REVIEW AND WHO DOES IT?

U.S. merger review is a case-specific and fact-intensive inquiry that attempts to make predictions about how the market will behave if the proposed transaction is completed.

For mergers and acquisitions above certain annually-adjusted thresholds, the merger review process begins when the merging parties file a Hart-Scott-Rodino, or HSR, notification of the transaction with the FTC and DOJ. The notification includes facts about the merger and the industry in which the merging parties operate. (For non-reportable transactions, the agencies can investigate either based on a complaint or on their own initiative.)

HSR filings go through a "clearance" process where each is assigned to a particular agency. The FTC and DOJ typically allocate merger reviews by industry based on their historical experience. The FTC is primarily responsible for analyzing mergers in the chemical industry as well as in oil and gas. The DOJ has primary responsibility for reviewing electricity mergers and oilfield services. Electricity mergers are subject to concurrent review by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act.

Once they receive HSR notifications for a transaction, the agencies typically have thirty days to decide whether to allow the merger to close or to issue a "Second Request," which initiates a significantly longer, more burdensome review. Parties can also "pull and refile" their notification, which resets the thirty-day clock, in the hopes of avoiding a Second Request.

Second Request investigations typically last six months or longer (the most recent year's average is 10.8 months), and involve the agency collecting and reviewing voluminous business documents and conducting interviews with executives from the merging parties, competitors, and customers. Once the parties have “substantially complied” with the Second Request, the agency then has another thirty days to either close its investigation or initiate a suit to block the merger.

In conducting their reviews, the agencies try to determine whether the merger will result in the combined firm being able to exercise market power — that is, the ability to raise prices or reduce product output or quality to the detriment of consumers. The HSR process is a forward-looking inquiry that allows agencies to challenge mergers before they are consummated, rather than trying to “unscramble the eggs” after a deal has closed.

This analytical process usually starts with market definition, a foundational tool for competition analysis. Market definition breaks down into a product dimension — what other products can consumers turn to? — and a geographic dimension — from where can they purchase those products? Market definition is critical to, and often outcome determinative for, merger review. A broader product or geographic market usually pulls in more competitors for the merged parties and blunts any potential exercise of market power, whereas narrower markets tend to make the exercise of market power more likely.

Once a product market is established, the agencies attempt to measure the competitive effects in that market from the proposed transaction. This requires identifying the actual and potential competitors in the market, what shares the merging parties and others in the market hold, the barriers to entry (by new firms) and expansion (by existing firms), how closely the merging parties compete, the bargaining strength of customers, and any history of anticompetitive conduct in the industry. The key question is whether an attempt by the merged parties to increase their prices (or decrease quality or output) would be successful or whether it would be thwarted by competitive response from others actually or potentially in the market and consumers switching their purchasing behavior. The agencies also attempt to account for the consumer benefits from any countervailing efficiencies generated by the merger.

If an agency determines that a transaction would cause competitive harm, it can seek an injunction in federal district court prohibiting the transaction from closing. Because litigation can lead to lengthy delays and the potential for a deal to be blocked, merging parties frequently try to resolve competitive concerns through settlement, with the agencies typically insisting on divestitures of overlapping assets to a qualified buyer.

HOW THE FTC APPROACHES OIL AND GAS MERGERS

The FTC's approach to oil and gas mergers largely has depended on where in the production and supply chain the merging firms operate. Oil and gas mergers frequently encompass a large number of relevant markets such that the FTC has said that they "may require an extraordinary amount of time to ascertain whether anticompetitive effects are likely."

The FTC typically has defined upstream exploration and production markets as global, encompassing large numbers of competitors, which has led to few challenges in this area. As the FTC noted in 2004, "[r]ecent large mergers among major oil companies have had little impact on concentration in world crude oil production and reserves." The same is true for natural gas. The few challenges have been limited to isolated geographic regions that limited the potential for competitive entry (e.g., the BP-ARCO merger, which involved both crude and natural gas production on the Alaskan North Slope).

The FTC has been more active in challenging midstream and downstream operations such as refineries, pipelines, terminals, and wholesale/retail operations.

REFINERIES. The FTC has generally focused on a product market for bulk supply of refined petroleum products, but has also identified narrower product markets for specialized types of fuels required in particular regions (like CARB formulated gas for California) or for particular customers. It defines geographic markets based on practical alternative sources of supply in light of transportation costs and any capacity constraints. As a result, the FTC has sought and obtained divestitures in a number of refinery mergers, including Exxon/Mobil, Chevron/Texaco, and Conoco/Phillips.

PIPELINES. The FTC has occasionally required divestitures of or behavioral remedies (usually contractual supply commitments) in both crude and refined transportation pipelines, to prevent the risk that the merging parties might raise prices or exclude competitors from those pipelines after the merger. Examples include Valero/Kaneb, Shell/Texaco, and Exxon/Mobil. Similarly for natural gas, the FTC has sought remedies both for gathering services as in Conoco/Phillips and in producing areas as well as large-diameter pipelines, as in Energy Transfer/Williams (which was subsequently abandoned). Markets in these cases are typically defined based on the origin and destination of the relevant pipelines.

TERMINALS. The FTC has sought remedies in several mergers of terminal operators, including ArcLight/Gulf Oil, Exxon/Mobil, and Conoco/Phillips. Markets in these cases tend to vary by geography, based on which alternative terminals purchasers could turn to for supply, after factoring in transportation costs and capacity constraints. The FTC has also drawn distinctions between proprietary and independent terminals, with the latter forming a critical part of the market.

WHOLESALE/RETAIL. The FTC has considered whether a merger will allow brand owners to raise retail prices after the merger, considering the level of concentration in the local markets, the ability of station owners to switch to other brands or unbranded products, and likelihood of new entry. Retail gasoline markets tend to be very localized and may be limited to an area of just a few miles, with factors such as commuting patterns, traffic flows, and outlet characteristics playing roles in determining the scope of the geographic market. For example, in the recent Circle K/Jet-Pep acquisition, the FTC required divestitures of several stations in three small towns in Alabama. Likewise, the FTC has sought divestitures in the case of mergers among one of a few gas LDCs in an area, as in Equitable/Dominion.

HOW THE DOJ AND FERC APPROACH ELECTRICITY MERGERS

The DOJ's review of electricity mergers largely focuses on generation, where competition among different types of generating assets (for example, baseload versus peak generation) and different locations can pose difficult and fact-specific market definition questions. Rather than competitive entities, downstream transmission and distribution operations are usually run by regulated entities.

The geographic markets generally are defined based on transmission constraints — considering, given the design of the electrical grid, where wholesale or retail buyers can practically turn for additional supply. The DOJ also considers "shift factors," that is, the effectiveness of a generating unit in responding to a supply constraint. The DOJ typically looks at the merged party's ability and incentive to raise prices by withholding generation supply after the merger, as it did in Exelon/PSEG and Exelon/Constellation. When the DOJ finds competitive concerns, it generally requires divestitures of generating facilities to qualified buyers, as well as a "hold separate" agreement that seeks to preserve the facilities competitive position pending a divestiture.

By contrast, FERC reviews mergers of electrical utilities subject to its jurisdiction under a broader "public interest" standard, which considers both the effect on competition but also other effects on the public. FERC does not possess the same ability to compel production of information as the DOJ and typically relies on information provided by the merging parties to conduct its analysis. FERC also typically seeks conditions on approving mergers rather than prohibiting the transaction outright.

HOW THE FTC APPROACHES CHEMICAL MERGERS

In general, product markets in the chemical industry tend to be drawn quite narrowly and focus on the commercial reality of potential substitution. For example, in its recent challenge to the merger of Cristal and Tronox, the FTC alleged a market limited to "chloride process titanium dioxide" which excludes "sulfate process titanium dioxide," on the theory that the primary customers — paint and coatings companies — rely on the brighter and more durable coatings produced that result from the chloride process, and therefore could not switch to sulfate process TiO_2 in response to a post-merger price increase. Other product markets defined in recent chemicals mergers have included "superphosphoric acid" and "65-67% concentration nitric acid" (PotashCorp/Agrium), and the pesticides paraquat, abamectin, and chlorothalonil (CNCC/Syngenta).

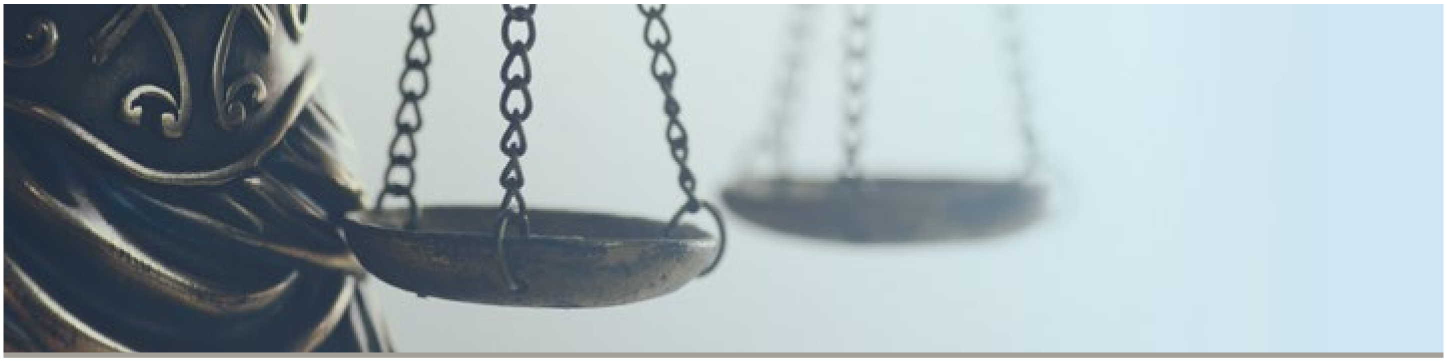
Geographic markets also vary based on commercial realities of where customers are located and where they need and can feasibly obtain supply. In Wilhelmsen/Drew, for example, the FTC alleged a global market to provide water treatment chemicals to shipping fleets, which by their nature operated globally and required global suppliers. In Cristal/Tronox, the FTC alleged a geographic market for North America, as TiO_2 is largely shipped by truck or rail. That definition excludes the possibility of parties turning to supply from China and other overseas sources, a distinction the FTC drew based on evidence that overseas sources do not currently pose a competitive check in North America. In CNCC/Syngenta, the agency alleged a market limited to the United States because regulatory approvals required to sell pesticides in the United States would preclude turning to foreign sources. The FTC has also alleged more narrow regional markets when shipping constraints or other factors limit customers' ability to switch to more distant suppliers, as was the case for certain bulk atmospheric gases in the Linde/Praxair transaction.

NON-MERGER ANTITRUST ENFORCEMENT

The principal federal antitrust statute governing non-merger conduct is the Sherman Act. Section 1 of the Act prohibits anticompetitive agreements affecting interstate commerce. Section 2 of the Act prohibits monopolization, attempted monopolization, and conspiracy to monopolize. Violations of the Sherman Act can carry monetary fines of up to $100 million for corporations (or more if there is a larger impact on U.S. commerce), up to $1 million for individuals, and up to 10 years imprisonment for individuals. Furthermore, collusion among competitors can also result in violations of other federal statutes subject to prosecution by the Antitrust Division including mail or wire fraud statutes, false statement statutes, or other federal statutes.

Some state attorneys general actively investigate and enforce state antitrust laws, and they may pursue federal antitrust claims to the extent they affect the state or its residents. Many states have their own laws prohibiting anticompetitive conduct such as California's Cartwright Act and New York's Donnelly Act, and some of these state statutes are broader than the federal antitrust laws in certain respects. In addition, many countries have comparable statutes and coordinate some of their investigations with U.S. antitrust authorities.

In addition to the risk of significant fines and prison time for criminal antitrust violations, follow-on civil suits can result in lengthy and expensive litigation for companies, even where a company has been cleared of liability for criminal violations. So long as they are able to meet certain standing requirements, private plaintiffs are allowed to bring civil suits for violations of federal antitrust laws. In order to bring suit, private plaintiffs must demonstrate that the anticompetitive behavior has resulted in an "antitrust injury," the type of injury that antitrust laws were intended to prevent.



ILLEGAL AGREEMENTS

Certain types of agreements between competitors are considered *per se* violations of antitrust law and are deemed illegal once collusion has been established without any assessment as to whether the prices or behavior were reasonable or the conduct had valid business justifications. Price fixing, bid rigging, and market division or allocation are examples of antitrust violations that are typically viewed as *per se* violations.

PRICE FIXING. Price fixing is an agreement between competitors to raise, fix, hold firm, establish minimums, or any other activity to otherwise maintain their prices. Price fixing agreements can include limits on supply to increase price, eliminating or reducing discounts, and fixing credit terms. Agreements to establish resale prices were considered *per se* illegal under the Sherman Act until the Supreme Court 2007 *Leegin* decision, but resale price maintenance continues to be *per se* illegal under some state antitrust statutes.

BID RIGGING. Bid rigging occurs where an entity (such as federal, state, or local governments) has solicited competing bids, but competitors have agreed in advance on who will win the bid or a means of who will win the bid.

MARKET DIVISION OR ALLOCATION. Market division or allocation occurs where competitors divide markets among themselves, which can take the form of allocating geographic locations, customers, types of products, etc. In this type of scheme, competitors often agree on which company will serve which location, customer, or product and then will agree not to sell for certain others or quote artificially high prices on others.

Concerted action can be established either by direct evidence or circumstantial evidence. Mere parallel conduct is not sufficient for a finding of an unlawful conspiracy, even in a concentrated industry. Accordingly, as the Supreme Court explained in *Monsanto*, “there must be evidence that tends to exclude the possibility of independent action.”

The Antitrust Division has identified industry conditions that are conducive to collusion, some of which are prevalent in certain energy and chemical markets, such as where there are fewer sellers, where products are fungible, where sellers are located in the same geographic area, where

products cannot be easily substituted because of restrictive specifications, where there are economic or regulatory barriers to entry, and where sellers know each other through social contexts such as trade associations, normal business contacts, and where employees shift between the companies in the same industry. Private plaintiffs have also alleged that the public announcements of future price increases that are common in the chemicals industry provide a potential vehicle for collusion.

Agreements that do not fall under the *per se* rule are analyzed under the rule of reason. The rule of reason involves a factual inquiry into whether the challenged activity results in unreasonable anticompetitive effects. The factual inquiry evaluates things such as the nature of the agreement, market circumstances such as market share and barriers to entry, and whether the agreement has procompetitive benefits. The Supreme Court has applied a three-step burden-shifting framework in evaluating the rule of reason:

1. First, the plaintiff must demonstrate "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market";
2. Second, the burden shifts to the defendant to demonstrate a procompetitive rationale;
3. Third, the burden shifts back to the plaintiff "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."

MONOPOLIZATION

Distinct from Section 1 violations of the Sherman Act which involve agreements between competitors, Section 2 violations occur where an individual company, or multiple companies acting in concert, harm competition through monopolization. In order for a violation to occur, a company must not only possess a monopoly power in a relevant market, it must also engage in exclusionary conduct.

Monopoly power can be established either through direct evidence (such as actual effect on prices) or indirect evidence, such as the company's market share, barriers to entry, and market concentration. Many courts have found that a market share over 70% combined with significant barriers to entry establishes a prima facie case of monopoly power; courts rarely conclude that a company has monopoly power where its market share is less than 50%.

Examples of exclusionary conduct that the courts have found to violate Section 2 when combined with monopoly power include tying, exclusive dealing agreements, predatory pricing, and refusals to deal.

TYING occurs where a seller conditions the sale of one service or product on the purchase of another service or product. Tying can arise in cases of public utilities offering "all-or-none" services. Tying has also been prosecuted where a gas company required customers to purchase its meter installation system in addition to the company's gas-gathering system.

EXCLUSIVE DEALING agreements are where a buyer has agreed to exclusively obtain a product or service from a particular seller for a given amount of time. Not all exclusive dealing agreements are unlawful though, and the Supreme Court has instructed lower courts to look at not just how much of the market is foreclosed by the agreement but also to conduct an inquiry into the state of the market and the competitive effects of the agreement.

PREDATORY PRICING occurs where a company attempts to drive competitors out of the marketplace by artificially lowering pricing below cost with an expectation of raising the prices again once other competitors have exited the market.

REFUSALS TO DEAL involve not doing business with a disloyal customer or supplier, or a rival, to the detriment of competition. Due to deregulation and the unbundling of the electric and natural gas industries, companies often rely on transmission services and infrastructure of other companies, which can lead to objections about refusals to allow competitors to use a facility.

EXEMPTIONS AND IMMUNITIES

Congress and the courts have developed a number of exemptions and immunities to the antitrust laws. Two of these particularly relevant to the energy and chemical industries are the filed-rate doctrine and the state action doctrine.

First articulated by the Supreme Court in 1922, the judicially created filed-rate doctrine bars private antitrust damage claims for alleged overcharges if the rate charged was approved by a regulatory agency with exclusive jurisdiction over the reasonableness of the rate, such as FERC. The purpose of the filed-rate doctrine is to prevent private parties from second guessing rates approved by regulatory agencies with exclusive jurisdiction.

The filed-rate doctrine does not, however, provide complete immunity from liability in certain circumstances. For example, some regulatory agencies will sometimes approve an "up-to" rate. An "up-to" rate is one where a regulator sets an approved maximum price that a utility can charge rather than a fixed rate. Where a federal agency only sets a ceiling on prices, the company is left with ultimate decision-making authority over the rate it charges, thus leaving open the potential for antitrust liability where competitors reach an agreement on a rate to charge below or even at the "up-to" rate.

A number of courts have also recognized the filed-rate doctrine with respect to rates filed with state administrative agencies; however, there is significant debate around the circumstances in which it should apply, such as the level of agency approval or regulatory review required to trigger the doctrine. Some courts require meaningful regulatory review by the state agency before the doctrine can be invoked whereas some only require that the rate be filed.

The state action immunity, established in *Parker v. Brown*, 317 U.S. 341 (1943), applies to private parties acting under state authority. In order to receive state action immunity, the state must have a clearly articulated policy that demonstrates the intention of displacing competition in that particular field, and the state must actively supervise the conduct.

Even where energy companies have acted under state authorization, some have struggled to succeed when raising the state action immunity because of the lack of evidence of the state's intent to displace competition. For example, in Kay Electric Cooperative v. City of Newkirk, the Tenth Circuit rejected state action immunity for a city electrical provider where Oklahoma's Electric Restructuring Act demonstrated "an unmistakable policy preference for competition in the provision of electricity."

FEDERAL ANTITRUST AGENCIES

U.S. antitrust laws are enforced by both the FTC's Bureau of Competition and the DOJ's Antitrust Division. The agencies divide their authority according to a mixture of tradition, liaison agreements, and statutory authority. The Antitrust Division handles all criminal enforcement, such as conduct involving price fixing and bid rigging, and the agencies share responsibility for merger investigations and civil non-merger investigations. Within merger and non-merger civil enforcement, the agencies use an interagency clearance procedure under which each agency handles matters falling within certain industries. The FTC typically handles civil enforcement involving oil and gas pipelines, terminals, and retailing, as well as chemicals, while the DOJ typically handles electricity and oilfield services.

FTC

The FTC has both a competition and a consumer protection mission. It is chiefly organized around three main Bureaus: the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. Other offices also play key roles in supporting the FTC's mission, such as the Office of the General Counsel, which typically prepares amicus briefs and position statements to other agencies, including on issues affecting the energy and chemical industries.

The FTC is headed by five presidentially-nominated Commissioners who each serve a seven-year term. Joseph J. Simons currently serves as Chairman of the Commission. Sworn in on May 2, 2018, Simons previously co-chaired the antitrust group of a national law firm, after serving in a number of positions in the Bureau of Competition, including Director from 2001 to 2003.

D. Bruce Hoffman has headed the Bureau of Competition since August 2017, first as Acting Director then as Director beginning in May 2018. Prior to rejoining the Commission in 2017, Hoffman was in private practice where he handled antitrust litigation, counseling, and mergers and acquisitions. Hoffman previously served as Deputy Director of the Bureau from 2003-2004, and Associate Director from 2001-2003.

The FTC's Bureau of Competition is organized into six litigation divisions, three regional offices, the Premerger Notification Office, the Compliance Division, and the Office of Policy and Coordination. Among the litigation divisions, the Mergers II Division oversees the coal and chemical industries, among others. The Mergers III Division handles the oil and gas industries, including pipelines, terminals and retailing, among others.

MERGERS II

VACANT Assistant Director
(Vacant as of December 2018. Formerly, Benjamin Gris)

JAMES RHILINGER Deputy Assistant Director

DOMINIC VOTE Deputy Assistant Director

Dominic Vote, Benjamin Gris, and James Rhilinger

The FTC's Mergers II group oversees a wide variety of industries including coal mines, chemicals, entertainment, and computer hardware and software. In the coal and chemical context, one of the major cases Mergers II handled was the review of Arch Coal's acquisition of Triton Coal Company, which resulted in the U.S. District Court for the District of Columbia denying the FTC's request for a preliminary injunction to prevent Arch Coal from acquiring Triton. The division has also reviewed and obtained consent orders in a number of high-profile mergers in the chemical industry, including Keystone/Compagnie de Saint-Gobain, Dow/Rohm & Haas, Owens/Corning, Occidental Petroleum/Vulcan, Bayer/Aventis, and Dow Chemical/Union Carbide.

There are approximately 35 individuals in Mergers II. Gris recently departed the division after serving in the role of deputy since 2015. Rhilinger and Vote have been deputies in Mergers II since May 2014 and November 2015, respectively.

MERGERS III

PETER RICHMAN Assistant Director

PATRICIA GALVAN Deputy Assistant Director

BRIAN TELPNER Deputy Assistant Director

Brian Telpner, Peter Richman, and Patricia Galvan

The FTC's Mergers III group focuses on enforcement across multiple levels of the oil and gas industry, including refining, pipeline transport, terminal operations, marketing, and retail sales. In addition to oil and gas, Mergers III focuses on real estate and property-related products and services, digital database and information services, industrial manufacturing and distribution, hotel franchising, and title insurance. Mergers III has reviewed hundreds of mergers in the energy industry and secured divestitures in connection with some high-profile mergers including Irving Oil/ExxonMobil, Exxon/Mobil, BP/Amoco, Chevron/Texaco, Chevron/Unocal, Phillips/Conoco, and Shell/Texaco. Examples of Merger III activity in the natural gas industry include securing a divestiture in the KinderMorgan/El Paso transaction and entering into a consent agreement in the Enbridge/Spectra Energy merger.

There are approximately 35 individuals in the division. Richman has led Mergers III since the summer of 2016, following a long career in the division, having joined directly out of law school in 1990 and serving as a deputy for over a decade. Richman has been involved in numerous merger investigations in the energy industry, including Marathon/Ashland, Exxon/Mobil, BP/ARCO, Valero/UDS, Chevron/Texaco, Chevron/Unocal, and Valero/Kaneb. Richman also supervised several investigations into national and regional gasoline pricing practices. Galvan has served as a deputy for over a decade and Telpner has served since the summer of 2016.

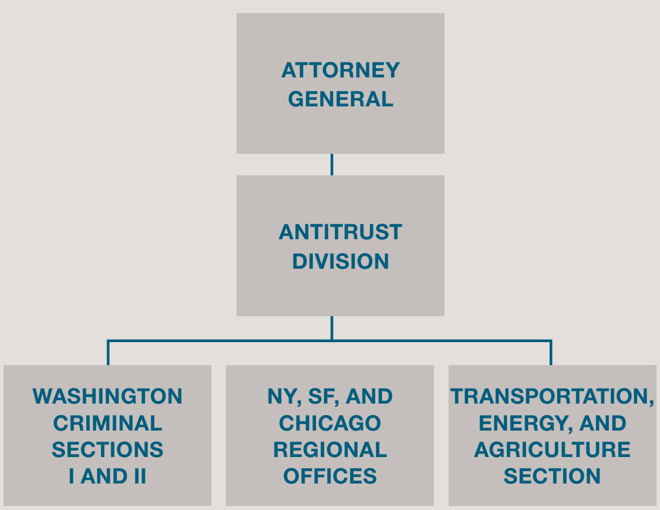
DOJ ANTITRUST DIVISION

Assistant Attorney General Makan Delrahim has headed the Antitrust Division of the Department of Justice since September 27, 2017. Delrahim previously served as Deputy Assistant to the President and Deputy White House Counsel. Delrahim is a former partner in the Los Angeles office of a national law firm, and he previously served in the Antitrust Division from 2003 to 2005 as a Deputy Assistant Attorney General, overseeing the Appellate, Foreign Commerce, and Legal Policy sections.

The DOJ's Antitrust Division is organized into several sections, covering the Division's various activities, which are organized under six Deputy Assistant Attorneys General. The Division's criminal enforcement functions are not organized by industry — any of the criminal sections (including the two criminal sections located in Washington and the Chicago, New York, and San Francisco regional offices) can investigate criminal violations of the antitrust laws. The civil sections of the Antitrust Division are organized around specific sectors. The Transportation, Energy, and Agriculture (TEA) Section is predominantly responsible for civil enforcement in the energy industry, including electricity and oil field services, among others. The Defense, Industrials, and Aerospace Section also handles some energy-related industries, including metals and mining.

DOJ ANTITRUST DIVISION

(highlighting offices with principal energy and chemical enforcement responsibilities)



TRANSPORTATION, ENERGY, AND AGRICULTURE SECTION

KATHLEEN S. O'NEILL Chief

CAROLINE LAISE Assistant Chief

ROBERT LEPORE Assistant Chief

The Transportation, Energy, and Agriculture (TEA) Section is responsible for civil antitrust enforcement, competition advocacy, and competition policy in the areas of electricity; oil field services; domestic and international aviation; business and leisure travel; railroads, trucking, and ocean shipping; hotels, restaurants, and travel services; food products, crops, seeds, fish, and livestock; and agricultural biotech. TEA consults on policy issues with, and engages in formal proceedings before, various other federal agencies including the Department of Energy and the Federal Energy Regulatory Commission. Recent high profile cases for the section include the review of Halliburton Company's proposed acquisition of Baker Hughes Inc., which the DOJ sued to block after proposed divestitures were seen as insufficient, resulting in the eventual abandonment of the deal, and reaching a consent decree requiring General Electric Co. and Baker Hughes to divest GE's Water & Process Technologies business in order to proceed with their merger.


KATHLEEN S. O'NEILL

There are approximately 40 individuals in the TEA section, including the management team, led by O'Neill, who has served in the role since 2015. O'Neill served in the Division for a number of years prior to becoming Chief. O'Neill had a leading role in the DOJ's challenge to Halliburton's proposed acquisition of Baker Hughes. O'Neill also led the team that obtained a record fine and injunctive relief against activist investor ValueAct for violating premerger notification requirements in connection with the abandoned Baker Hughes/Halliburton merger. O'Neill previously served as an assistant attorney general for the New York State Attorney General, as an attorney advisor for the Federal Communications Commission, and in private practice.

V&E'S NATIONALLY RECOGNIZED ANTITRUST PRACTICE

V&E's antitrust and competition law practice includes more than 35 antitrust-focused lawyers collaborating across offices to provide seamless efficiency and capabilities. Our antitrust lawyers are seasoned trial lawyers — experienced, willing, and able to protect our clients' rights in court. We represent energy, chemical, and other companies in cases across the spectrum of antitrust and competition laws, including cases alleging price fixing, bid rigging, monopolization, boycotts, exclusive dealing, tying, and unfair trade practices.

Our lawyers frequently appear before and have insight into the FTC, DOJ, state AGs, and other agencies with antitrust enforcement authority. Among our ranks include a number of former federal prosecutors from the DOJ as well as those who have held senior positions at the FTC. V&E's extensive experience with both former government officials and seasoned practitioners provides insight in the substantive arguments most likely to persuade a government enforcer to close its investigation.

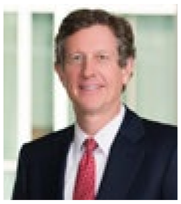
WORLD'S LEADING ENERGY FIRM*

Since 1995, *Euromoney* has ranked V&E the world's leading energy law firm. V&E has worked with corporations and individuals in nearly every sector within the energy value chain, and we are particularly experienced in handling investigations and litigation in the energy sector around the world. The scope and depth of our antitrust practice, coupled with our rich knowledge and experience in the energy sector, particularly in petrochemicals, pipelines (natural gas, refined petroleum products and others), and gasoline marketing enables us to provide comprehensive representation to our clients, combining an ability to identify and understand the issues faced, to draw upon our firm's extensive experience in energy law, and to create solutions that are right for our clients.

We offer a multi-disciplinary team that represents a mix of chemical manufacturers, suppliers, and investors on the unique technical and commercial issues affecting the industry. V&E's commitment to understanding the technology, manufacturing processes, and feedstock/offtake markets involved in the chemical sector sets us apart from competitors. With regard to antitrust, chemical companies call on V&E when they experience allegations of monopolization and other anticompetitive behavior in order to defend against investigations by the DOJ and FTC, potential class action suits, and multi-district litigation.

* Based upon the number of lawyers named in the *Guide to the World's Leading Energy & Natural Resource Lawyers*.

ANTITRUST TEAM



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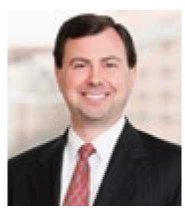

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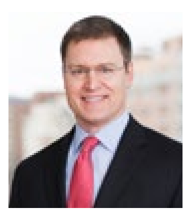

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