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EXECUTIVE SUMMARY

MERGER ENFORCEMENT

- While overall deal activity has continued at record levels, both the energy and chemicals industries saw a slight reduction in the number of reportable transactions, with a corresponding reduction in the number of transactions investigated.
- Although the DOJ brought no energy or chemical merger enforcement actions in 2019, the FTC successfully secured divestitures in three cases, and challenged one chemical company transaction in federal district court which remains pending.
- The FTC also successfully challenged a noncompete agreement between two natural gas pipeline companies, and the agency signaled that noncompetes ancillary to transactions may be a future focus area for the FTC.
- Two Democratic FTC Commissioners have continued advocating for more aggressive FTC merger enforcement policies, and several presidential candidates have made increased antitrust enforcement key parts of their campaign, suggesting the 2020 election could lead to greater scrutiny in the future.
- New regulations expected to take effect in early 2020 are likely to expand the number of foreign inbound transactions subject to CFIUS review.

NON-MERGER ENFORCEMENT

- The DOJ announced an important policy shift regarding consideration of and mitigation credit for corporate antitrust programs and released inaugural guidance for the assessment of corporate compliance programs in criminal antitrust investigations.
- The DOJ closed, without any charges, its investigation into producers of methylene diphenyl diisocyanate (MDI). Follow-on private litigation remains ongoing.

- In March 2019, two South Korean petroleum and refinery companies agreed to plead guilty and pay \$75 million in criminal fines for engaging in a bid-rigging and price-fixing conspiracy that targeted fuel supply contracts for U.S. military bases in South Korea. The companies also agreed to pay \$52 million to settle related civil antitrust and False Claims Act violations.
- The DOJ's Antitrust Division announced a new "strike force" to target collusion in public procurement activities.

PRIVATE LITIGATION

- The rate of private antitrust litigation in the U.S. energy and chemicals industries remains robust. Most notably, plaintiffs brought a significant new series of cases alleging price fixing in the sale of caustic soda.
- Long-running cases involving wholesale natural gas and liquid aluminum sulfate concluded with eightfigure settlements.
- Plaintiffs appear to have continued learning the lessons of Twombly no reported case involving the energy or chemicals industries was dismissed for plaintiffs' failure to adequately allege facts supporting a conspiracy.
 Defendants did, however, obtain dismissal of several prominent cases under the filed rate doctrine, antitrust standing rules, and the statute of limitations.
- After protracted proceedings, the D.C. Circuit upheld denial of class certification in the Rail Freight Fuel Surcharge litigation. Many large energy and chemicals firms have brought their own suits in the wake of this decision.



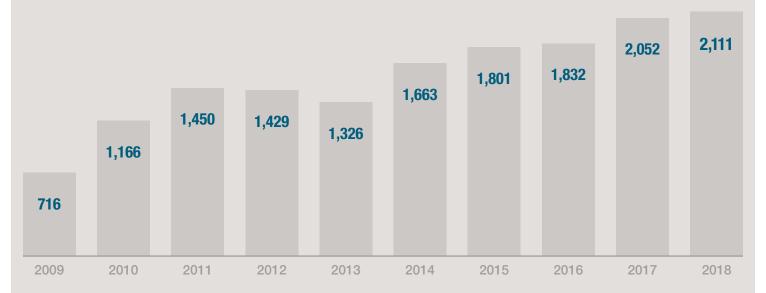
MERGER ENFORCEMENT DATA AND TRENDS

The overall merger enforcement environment in 2019 largely continued prior trends. Hart-Scott-Rodino (HSR) filings have steadily increased from a ten-year low of 716 in 2009 to over 2,100 in 2018, the most recent year for which data is available. The rate of Second Requests has continued to decline over the same period, dipping to a decade-low 2.2% of reported transactions.

2018 saw a notable drop in the number of reported energy and chemicals industry transactions, and a corresponding drop in the number of initial investigations and second requests. The DOJ and FTC did, however, bring slightly more enforcement actions in both industries than in 2017, indicating that the agencies continue to focus resources on energy and chemical transactions.

NUMBER OF REPORTED TRANSACTIONS

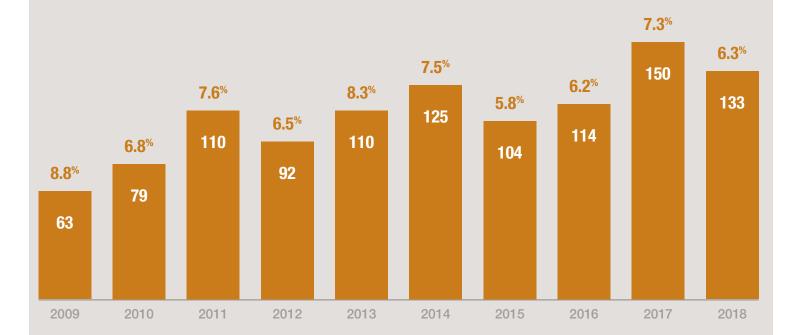
From 2009 to 2018, there were a total of **15,546** transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act. The number of transactions has increased in all but two years since 2009. There were **2,111** transactions reported in 2018.¹



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

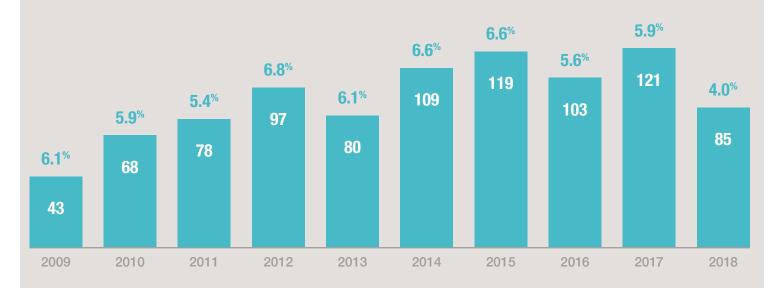
ENERGY TRANSACTIONS

From 2009 to 2018 there were a total of **1,080** reported energy and natural resources transactions, representing on average just under **7%** of total transactions. The number of reported transactions in this industry sector hit a ten-year high in 2017, and dropped slightly in 2018.



CHEMICAL TRANSACTIONS

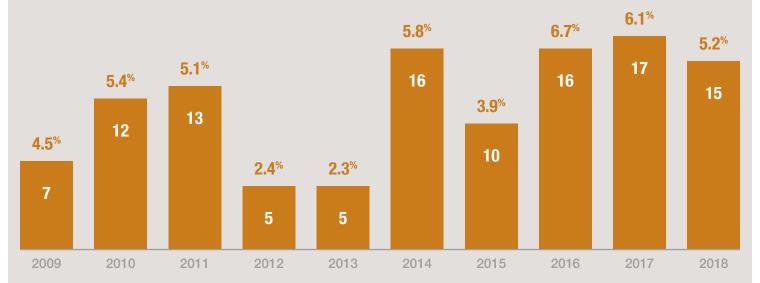
From 2009 to 2018 there were a total of **905** reported chemical and pharmaceutical transactions, representing on average just under **6%** of total transactions. After hitting a ten-year high in 2017, the number of reported transactions in this industry sector dropped almost 30% to the lowest level since 2013.



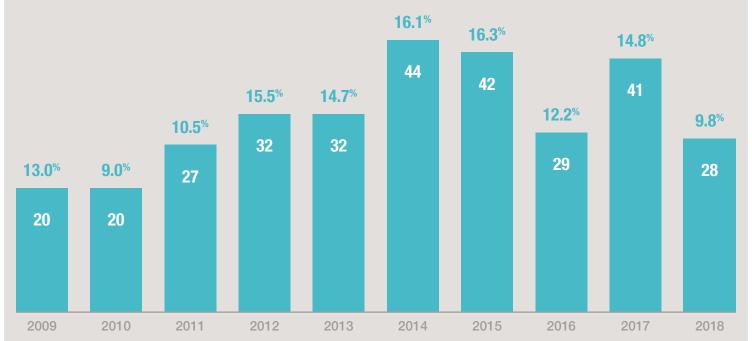
INITIAL INVESTIGATIONS

On average, from 2009 to 2018, the federal agencies received clearance to open an initial investigation in **15%** of reported transactions. Energy and chemical transactions made up **18%** of the total number of transactions cleared for an initial investigation from 2009 to 2018. Although in recent years energy and chemical deals have accounted for an increasing percentage of transactions undergoing an initial investigation, the number of chemical industry investigations in 2018 saw a significant drop in both absolute numbers and percentage of total transactions cleared for investigation. Statistics in the energy industry saw a slight drop, but stayed roughly the same.

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).

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

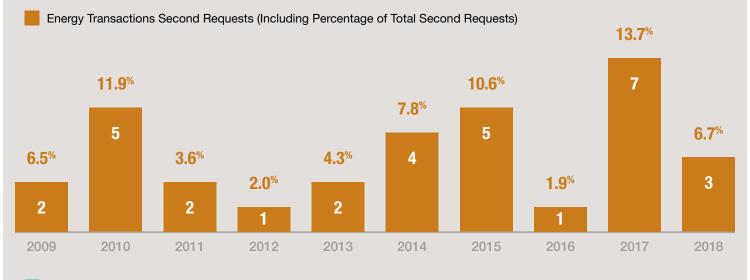
SECOND REQUESTS

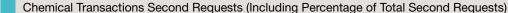
From 2009 to 2018, there were a total of **92** second requests for transactions in the energy and chemical industries, out of a total **464** second requests **(20%)**.

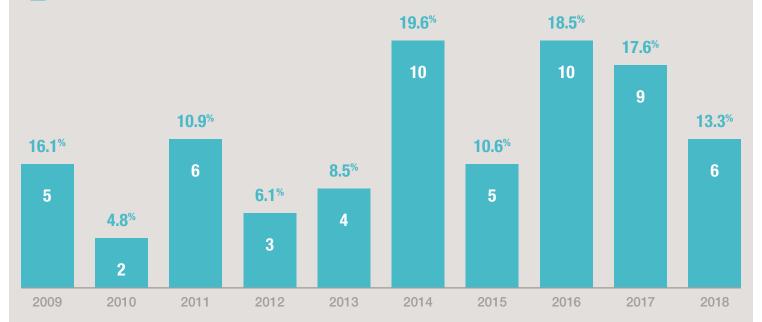
In 2018, second requests for the energy and chemical industries constituted **20%** of all second requests. Both industries saw a reduction in absolute numbers — the energy industry by over 50% and the chemical industry by a third — corresponding with an overall decrease in second requests issued. In 2018, the agencies issued second requests in **2.2%** of reported transactions, consistent with a downward trend since 2016 and reaching the lowest percent of second requests issued in a single year in the past decade.⁴

From 2009 to 2018, the agencies issued a second request on average in 3% of reported energy transactions; put another way, 27% of initial investigations in the energy sector resulted in a second request.

From 2009 to 2018, the agencies issued a second request on average in 7% of reported chemical transactions; put another way, 19% of initial investigations in the chemical sector resulted in a second request.





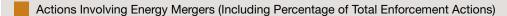


⁴ The second request data in this section is tallied from the data provided in all HSR Annual Reports at Exhibit A, Table X, titled: "Fiscal Year [Year] Industry Group of Acquiring Person."

MERGER ENFORCEMENT ACTIONS

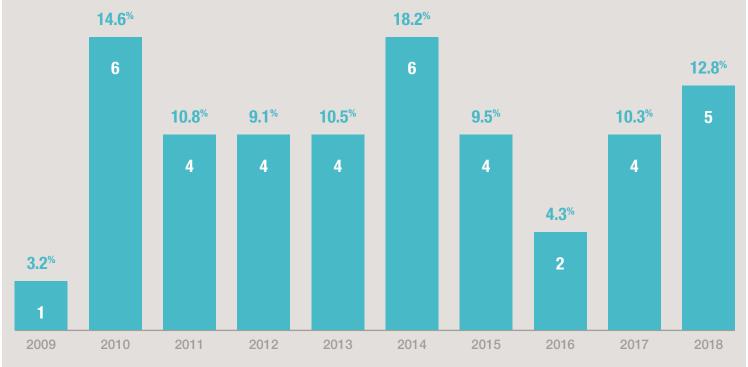
Overall: From 2009 through 2018, the enforcement agencies have brought a total of **391** merger enforcement actions, an average of **39** per year. This includes consent decrees, abandoned transactions, and court challenges. The rate of merger enforcement actions has remained relatively stable over the past ten years, and unchanged from 2017. During this time period, the FTC has brought **210** actions and the DOJ has brought **181** actions. From 2009 to 2018, the agencies brought a total of **25** actions involving energy mergers (6% of all actions), and **40** actions involving chemical mergers (10% of all actions).

Merger Enforcement Remedies: From 2009 through 2018, the federal agencies obtained the following remedies in merger enforcement actions: structural and behavioral remedies in **208** cases, structural remedies alone in **13** cases, and behavioral remedies alone in **25** cases. 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 Chemical Mergers (Including Percentage of Total Enforcement Actions)



MERGER ENFORCEMENT POLICY DEVELOPMENTS

In 2019, the DOJ and FTC took steps to advance prior initiatives and began work on several new policy initiatives. The FTC concluded its long-running series of hearings on antitrust enforcement and clarified certain aspects of the HSR reporting requirements. DOJ made substantial progress in clearing legacy compliance obligations from court dockets around the country, and both agencies launched major initiatives in the technology sector. However, difficulties between the agencies regarding tech industry conduct investigations threaten to spill over into merger enforcement and potentially beyond the tech space, risking what had been a fairly predictable division of responsibilities between the agencies.

FTC ZEROES IN ON NON-COMPETE CLAUSES

In September, the FTC took action against NEXUS Gas
Transmission, LLC (a joint venture of two large energy
companies) with respect to an acquisition of a gas pipeline
that, the agency alleged, contained overbroad non-compete
clauses ancillary to the acquisition. Commissioners Rohit
Chopra and Rebecca Kelly Slaughter issued a blunt statement
on the matter, saying "too many firms impose non-compete
clauses to avoid the discipline of a functioning marketplace."
Commissioner Christine Wilson joined them in the decision
but wrote a more limited concurring statement, noting that
"many [non-compete] agreements will continue to be lawful."
The Bureau of Competition followed the decision with a blog
post entitled "Just because it's ancillary doesn't make it legal,"
signaling continued interest in the issue.

PARTISAN SPLIT ON VERTICAL ENFORCEMENT ACTIONS

In addition to the *NEXUS* matter, the two Democratic commissioners (Rohit Chopra and Rebecca Kelly Slaughter) have taken aggressive enforcement positions in several other recent mergers, resulting in 3-2 splits among the

commissioners. These two commissioners were on the losing side of the 3-2 votes approving a settlement in the <u>Staples/Essendant</u> vertical merger, which followed on their dissenting votes in the 2018 <u>Fresenius/NxStage</u> matter.

In all cases, the dissenting commissioners took more strongly pro-enforcement stances than those ultimately chosen by the Commission as a whole. The continuing nature of the split suggests that, at least for the foreseeable future, parties engaged in vertical transactions may need to consider that their transactions will likely face heavy scrutiny from at least two of the commissioners.

SPRING MEETING SPEECHES LAY OUT ENFORCER POLICY VIEWS

At the 2019 ABA Antitrust Section Spring Meeting, enforcers from the DOJ, FTC, and state attorneys general discussed recent developments and priorities. The DOJ noted a desire to revise the 1984 vertical merger guidelines while also lauding decreased turnaround times for Second Requests. The FTC discussed the creation of the Technology Task Force (now the Technology Enforcement Division), and several state attorneys general pointed out that, while they often work together with federal agencies, their enforcement actions sometimes target cases and types of conduct emphasized less by federal officials.

DOJ AGREES TO ARBITRATE MERGER CASE

In September, the DOJ <u>agreed for the first time to arbitrate</u> aspects of a merger challenge rather than resolving it before a federal court. The choice, available under the Administrative Dispute Resolution Act of 1996 (<u>5 U.S.C.</u> § 571 et seq.) and the Antitrust Division's implementing regulations (<u>61 Fed. Reg. 36,896 (July 15, 1996)</u>), allows the parties in the *Novelis/Aleris* matter to avoid federal court on the issue of product market definition, potentially speeding resolution of the case.

DOJ AND COURTS TERMINATE LEGACY JUDGMENTS

In early 2018, the DOJ announced an <u>initiative</u> to review certain legacy antitrust judgments to assess their continued applicability and to recommend termination for those judgments deemed to no longer serve a procompetitive purpose. The initiative continued through 2019 as the Division worked through a process of moving to terminate many of the nearly 1,300 legacy judgments, most of which date to the 1970s or earlier. 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.

In 2019, courts in several dozen judicial districts granted motions to terminate filed by DOJ, with some orders covering twenty or more cases. A small number of these concerned energy or chemicals companies, such as a 1959 decree regarding the contracting practices of the Sun Oil Company that the Eastern District of Pennsylvania terminated in March, just short of its sixtieth anniversary.

FTC ENFORCEMENT HEARINGS CONCLUDE

The FTC's concluded its series of public hearings focused on bringing together antitrust regulators, academics, business and legal experts, and others to discuss how broad changes in the economy may necessitate adjustments to competition and consumer protection law, enforcement, and policy. The final hearings took place in the first half of 2019. The most recent hearings focused on the FTC's role overall, consumer privacy, and working with state-level regulators.

Perhaps most germane to energy and chemicals industry participants was April's session on merger retrospectives. One of the participants singled out mergers between companies that provide similar portfolios of services as worthy of further scrutiny, using "oil field services" as an example industry that may merit retrospective review. The hearings could lead to a variety of other changes to merger and nonmerger enforcement practices, although there is no indication any of these will be specific to the energy or chemicals spaces.

AGENCIES SQUABBLE OVER TECH INVESTIGATIONS

A series of Capitol Hill hearings in September revealed rifts between the FTC and DOJ regarding the handling of the well-publicized investigations into major technology companies. Prominent antitrust practitioners at both agencies noted that there were inefficiencies and difficulties in the process, and the FTC even took the unusual step of sending an interagency letter to the DOJ regarding the challenges.



Nonetheless, there are signs that the agencies' investigations of digital platforms are moving forward. The FTC's <u>statement</u> for the September hearings noted the litany of tools available to the agencies at present, while also hinting at potential future developments. These might potentially include new commentary or guidelines with respect to digital platforms.

Recent interagency squabbles seem confined for the present to the technology industry. However, if the relationship between the agencies and understanding as to regulatory spheres erodes further, it could threaten what had previously been settled boundaries and introduce uncertainty for merging parties as to which agency will be handling their filings and lead to delays in merger reviews.

FTC ISSUES WARNING REGARDING COMPLIANCE REPORTS

In March, the Bureau of Competition issued a lengthy blog post reminding parties of the requirements of periodic reporting following consent orders. Most merger settlements that include divestitures require annual compliance reports from one or more parties to the agreement. The Bureau noted that "in future orders, Respondents should expect to see new language requiring more detail in compliance reports" and that "where necessary, the Bureau will continue to require the production of documents, initiate compliance investigations, and seek enforcement and the imposition of penalties if Respondents fall short of their obligations."

The blog post also noted that companies should "plan ahead to file detailed compliance reports" and that the Commission would require supplemental reporting if a respondent "submits a conclusory, unsupported, or otherwise deficient report."

The blog post did not signal any official change to FTC policy. Rather, it is a reminder that parties to consent orders often have long-running obligations to report to the agency and that the FTC actively tracks compliance.



NEW HSR RULES

In June, the FTC and DOJ <u>approved amendments</u> to the Hart-Scott-Rodino (HSR) rules and the instructions for filling out the HSR notification form. The changes update the industry codes used by the agencies to track revenue by industry on several items on the form. The new codes, which include the new 10-digit North American Product Classification System (NAPCS) and updated 6-digit North American Industry Classification System (NAICS), are now being used on all new notifications. As a result, the relevant codes have changed in many industries, including within oil and gas.

Another proposed update to the HSR rules in November would alter how to determine whether a business entity is "foreign" for filing purposes. Under the new proposed rule, an entity will be considered to have its principal offices in the United States if 50 percent or more of its officers or directors reside in the United States or 50 percent or more of the company's assets are in the United States. This departs from the prior rule, which relied on a subjective determination of where the entity's principal office is. For overseas energy and chemicals (as well as other) companies with significant U.S. assets or significant numbers of American resident officers or directors, the proposed rule could result in the loss of the HSR exemption available to certain transactions involving non-U.S. parties.

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CFIUS ENFORCEMENT DEVELOPMENTS

In an important development for companies engaged in inbound foreign investment in the United States, the Committee on Foreign Investment in the United States (CFIUS) proposed new regulations in September 2019. These regulations would implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), a statute that greatly expanded CFIUS' jurisdiction to review acquisitions or investments by foreign firms (including minority investments) in certain U.S. businesses. One type of business covered under the new regulation is "critical infrastructure" (defined in an Appendix published by the Treasury Department) which covers many significant energy and chemical assets (e.g., "Any crude oil storage facility with capacity to hold 30 million barrels or more of crude oil").

CFIUS reviews often run in parallel with antitrust reviews by the DOJ and FTC. The regulations increase the number of mandatory filings, although many transactions covered by CFIUS will remain subject to voluntary filings. Because the new regulations cover a wider array of potential transactions than past CFIUS practice, it is likely that the committee will expect more deals to be notified than in the past. The full scope of the change likely will not become clear until shortly before the new regulations come into effect.

CFIUS is expected to release a revised, proposed final version of the regulations in early February, which is expected to become effective by February 13, 2020.

MERGER ENFORCEMENT CASES

The FTC sought relief to address competitive concerns for a number of transactions in the energy and chemical industries in 2019. The FTC secured divestitures in three cases, and challenged one chemical company transaction in federal district court. It also successfully challenged a non-compete agreement between two natural gas pipeline companies and penalized shareholders of a chemicals company for failing to file a pre-merger notification. In contrast, the DOJ did not bring any merger enforcement actions involving energy or chemical companies in 2019.

The FTC challenged mergers involving the following alleged product markets:

- Titanium dioxide manufactured through the chloride process
- Hydrogen peroxide
- Aluminum hot rolling oil (AHRO) and steel cold rolling oil (SCRO)
- Natural gas pipeline transportation

CHEMICAL MARKETS

Tronox Limited/Cristal

In December 2017, the FTC challenged the proposed \$1.7 billion combination of two titanium dioxide (${\rm TiO_2}$) firms, Tronox Limited and the Cristal group, both of which produce ${\rm TiO_2}$ via a chloride-based production process. According to Tronox's press release announcing the deal in February 2017, "the combination of the ${\rm TiO_2}$ businesses of Tronox and Cristal creates the world's largest and most highly integrated ${\rm TiO_2}$ 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 ${\rm TiO_2}$ and over 80% of ${\rm TiO_2}$ 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.

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 sided with the FTC on the definition of the relevant market, deciding that chloride ${\rm TiO_2}$ and sulfate ${\rm TiO_2}$ belonged in separate markets, and limiting the relevant market to North America. Judge Chappell's decision was on appeal before the Commission, but was withdrawn from adjudication to allow for the parties to negotiate a settlement.

The Commission unanimously approved the negotiated settlement on April 10, 2019. According to the FTC's press release announcing the settlement, Tronox and Cristal are required to divest to Ineos (a multinational chemicals company), two chloride ${\rm TiO}_2$ plants and related assets, customer contracts, and certain research and development and intellectual property assets to allow Ineos to continue to produce chloride ${\rm TiO}_2$ in North America and potentially abroad.

Evonik Industries AG/Peroxychem Holding Company

On August 2, 2019, the FTC issued an <u>administrative</u> <u>complaint</u> alleging that Evonik Industries AG's acquisition of PeroxyChem Holding Company would substantially lessen competition in the market for hydrogen peroxide in the Pacific Northwest and the Southern and Central United States. The complaint alleges that the acquisition would increase the likelihood of coordination in a market "already vulnerable to coordination" due to transparency among rival firms, and long-term, stable customer-supplier relationships with low elasticity of demand. The FTC also cited a "history of price-fixing" within the hydrogen peroxide industry (two hydrogen peroxide companies pleaded guilty to price-fixing in 2006).

The FTC alleged that the acquisition would eliminate significant head-to-head competition between Evonik and PeroxyChem in the Pacific Northwest, where it would leave only one other hydrogen peroxide producer, and in the Southern and Central United States, where it would leave three other producers. According to the FTC's complaint, entry of new competitors or expansion by existing firms is unlikely to be timely or sufficient to offset anticompetitive harm due to the large investment of resources necessary to build a new hydrogen peroxide plant. The merging parties offered to divest a plant in Washington state, but the FTC did not find this proposal sufficient to resolve the competition concerns raised by the deal.

The FTC also filed a complaint in the United States District Court for the District of Columbia seeking a temporary restraining order and preliminary injunction blocking the deal. At the time of publication, the district court had not yet ruled on the FTC's complaint.

Quaker Chemical Corp./Houghton International Inc.

On April 5, 2017, Quaker Chemical Corporation and Houghton International Inc. announced the acquisition of Houghton International Inc. for \$1.4 billion. On July 23, 2019, more than two years after the parties filed HSR, the FTC filed a complaint alleging that the deal would substantially lessen competition and simultaneously announced a proposed settlement that would require Quaker to divest certain product lines, which represent approximately 3% of the combined company's revenue, prior to consummating the proposed merger.

The FTC alleged that the acquisition would harm competition in the North American market for aluminum hot rolling oil (AHRO) and steel cold rolling oil (SCRO) and associated technical support services. Under the proposed settlement agreement, Quaker must divest Houghton's North American AHRO and SCRO product lines and related assets, as well as related product lines including steel cleaners and AHRO compatible hydraulic fluids to Total S.A., a French oil and gas company. The FTC <u>unanimously approved</u> the final settlement on September 12, 2019.

Praxair, Inc./Linde AG

On October 22, 2018, the FTC issued a complaint challenging the proposed merger of Praxair, Inc. and Linde AG, two industrial gas companies. The FTC alleged that the proposed merger would eliminate direct competition between the parties and leave limited alternative sources of supply for industrial 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. Further, according to the FTC, the proposed merger could enhance the risk of collusion or coordination because of the reduced number of competitors and market structure. The FTC simultaneously announced a proposed settlement that would require Praxair and Linde to divest significant assets, including to a joint venture between an industrial gas company and a private equity firm.

In February 2019, following public comment, and in response to concerns raised by one Commissioner that the private equity firm involved in the divestiture may not want to stay in the business long term, the FTC issued a modified final order that gives the Commission the right of prior approval if the industrial gas company's stake in the joint venture falls below 50 percent or if the parties decide to sell their combined interest in the joint venture to a third party. In total, Praxair and Linde AG were required to divest assets in nine industrial gas product markets to four divestiture buyers.

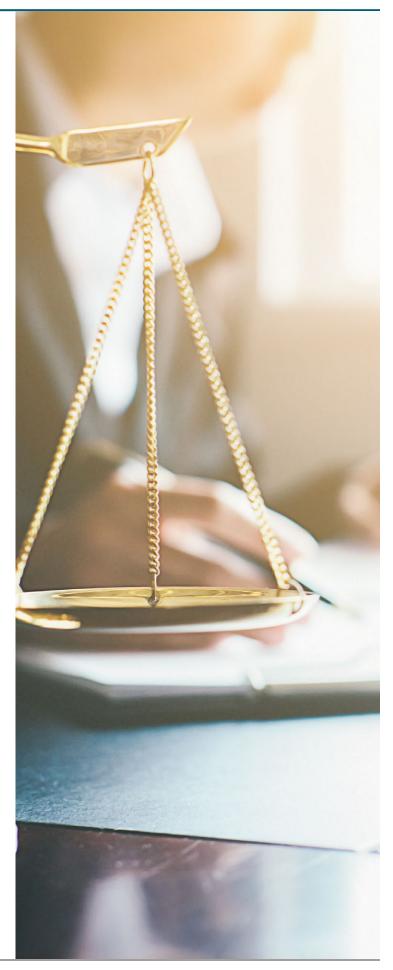
ENERGY MARKETS

DTE Energy Company/Nexus Gas Transmission, LLC

On September 13, 2019, the FTC issued a complaint and settlement proposal in connection with NEXUS Gas

Transmission LLC's proposed acquisition of Generation

Pipeline LLC, the owner and operator of a natural gas pipeline serving the Toledo, Ohio area. The FTC's complaint alleged that the acquisition agreement included an overly broad non-compete clause that would have prevented North Coast Gas Transmission LLC (NCGT) (an owner of Generation Pipeline) from competing to provide natural gas transportation within a three-county area of Ohio for three years. Following the transaction, NCGT would continue to own and operate North Coast Pipeline, which runs through the same area as Generation Pipeline. The consent decree requires the parties to remove the non-compete clause from the agreement.



HSR ACT ENFORCEMENT

The HSR Act imposes notification and waiting period requirements for transactions subject to antitrust review. Premature integration, such as exercising substantial operational control or obtaining "beneficial ownership" before filing notification or allowing the waiting periods to expire, may lead to penalties. In the government's view, the parties to a transaction should continue to operate independently until the deal closes. Recent HSR Act enforcement actions have involved failing to file the required pre-merger notification, and acquiring voting, or controlling shares, taking control of the target's operations, or directing the target's employees prior to the expiration of the HSR waiting period. Penalties can add up quickly — the maximum civil penalty, adjusted annually, was \$42,530 per day in 2019.

In 2019, the FTC imposed more than \$600,000 in civil penalties on an investment advisor and three funds to settle charges that the funds violated the HSR Act by acquiring voting securities of DowDuPont Inc., a chemicals company, without first filing with the FTC and observing the required HSR waiting period. The penalty amount reflects the government's position that the defendant funds were in violation of the HSR Act between August 31, 2017 and December 8, 2017.

Penalties for violating the

HSR Act can add up

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NON-MERGER ENFORCEMENT

Continuing a trend from 2018, the number of new criminal antitrust cases publicly filed by the DOJ in 2019 was below historical levels. Senior DOJ officials insist that a number of non-public investigations are under way.

Additional guilty pleas, fines, and civil settlements were announced in an ongoing investigation into a price-fixing and bid-rigging conspiracy targeting fuel supply contracts for U.S. military bases in South Korea. These enforcement actions are consistent with the DOJ's new investigative focus on collusion in public procurement, including the creation of a related "strike force" to combat such conduct.

The DOJ announced a new policy for criminal antitrust enforcement and issued guidance for implementing a robust and effective corporate antitrust compliance program.

NEW DOJ CRIMINAL ANTITRUST COMPLIANCE POLICY AND GUIDELINES

In July 2019, Assistant Attorney General Makan Delrahim, head of DOJ's Antitrust Division, announced a significant change to the Division's policy regarding criminal antitrust compliance. Going forward, companies under investigation for criminal antitrust violations will have the opportunity to avoid prosecution if they had a strong, comprehensive antitrust compliance program in effect at the time of the alleged misconduct. Offering mitigation credit for compliance efforts is a notable shift for the Division, which historically has taken the position that the only two ways to avoid criminal antitrust penalties are to either

deter all criminal antitrust violations through robust compliance activity, or to win the race for leniency under the Division's Corporate Leniency Program if a violation does occur. Under the new policy, however, a company may be able to obtain a deferred prosecution agreement if it self-reports misconduct and demonstrates that a "robust and effective" antitrust compliance program had been implemented and was in effect when the wrongdoing occurred. With this new approach, the Division recognizes that even gold standard compliance efforts may not deter all misconduct.

In conjunction with the announcement of the new policy, the Division released its first public <u>guidance</u> outlining the criteria by which corporate compliance programs will be assessed. Merely having a corporate compliance program in place will not guarantee a deferred prosecution agreement. The new guidance directs Division prosecutors to conduct fact-specific inquiries into whether an individual company's program "is adequately designed for maximum effectiveness in preventing and detecting wrongdoing." To be eligible for mitigation credit, a company almost certainly will have to first self-report the misconduct. Participation in the wrongdoing (or willful blindness) by senior executives likely will be disqualifying; in the government's view, compliance efforts are inadequate if misconduct occurs at the highest levels.

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Corporate compliance programs will be evaluated under the following categories, with the guidance outlining targeted inquiries for each:

- Design and comprehensiveness of the program;
- Culture of compliance within the company;
- Responsibility for, and resources dedicated to, antitrust compliance;
- Antitrust risk assessment techniques;
- Training and communication to employees (and tailored based on an employee's position and relative antitrust risk);
- Monitoring and auditing techniques (including continued review, evaluation and revision);
- Reporting mechanisms;
- Compliance incentives and discipline; and
- Remediation methods.

Notably, the guidance does not impose a "one size fits all" approach to compliance, instead recognizing "that a company's size affects the resources allocated to antitrust compliance and breadth of the company's compliance program."

CARTEL ENFORCEMENT

Korean Fuel Supply Contracts

In 2018, DOJ investigated a decade-long bid-rigging and price-fixing conspiracy targeting fuel supply contracts to United States military bases in South Korea. The DOJ

alleged that the defendants, South Korean-based oil refiners and transportation and logistics companies, engaged in a conspiracy to pre-determine which company would win each supply contract. The companies then submitted collusive bids to the U.S. military. In 2018, three companies pleaded guilty to the charges. In 2019, two additional petroleum and refinery companies <u>agreed to plead guilty</u>.

A total of five companies have pled guilty to criminal antitrust charges to date and have agreed to pay a total of more than \$350 million in criminal fines and civil penalties to resolve the criminal investigation and to settle civil antitrust claims and False Claims Act violations related to the conspiracy. The DOJ has been particularly vocal about its use of Section 4A of the Clayton Act to extract civil damages from the defendants, on top of criminal fines. Section 4A allows the United States to obtain treble damages when the government itself is the victim.

In addition to the corporate targets, the DOJ has <u>unsealed</u> indictments against seven individuals — all executives or employees of the defendant companies. To date, no individual plea agreements have been announced.

DOJ Focus On Collusion In Public Procurements

Consistent with the Korea fuel supply contracts prosecution, the Antitrust Division is prioritizing investigations of criminal antitrust violations in the public procurement process. In November 2019, the Division announced the creation of a new Procurement Collusion Strike Force. Described as a "coordinated national response to combat antitrust crimes and related schemes in government procurement, grant and program funding," the strike force partners Antitrust Division

resources with prosecutors from thirteen U.S. Attorney Offices around the country and additional investigative support from a number of federal agencies. The new initiative strengthens the federal government's ability to detect and investigate conduct that deprives federal, state, and local agencies of fair competition. In its quest to root out bidrigging, price-fixing, and market allocation in the procurement process, and the misuse of taxpayer funds dedicated to public programs, the strike force will use data analytics to mine bid data for indications of possible collusion in specific procurements or industries.

Training for government contracting officials, including red flags for possible collusion in the bidding process, reportedly is an important feature of the new initiative. The Antitrust Division released a new training video aimed at agency contracting officers and procurement officials, with members of the strike force teaming up to also provide additional education and bolster awareness regarding how to spot potentially anticompetitive behavior in the procurement process. Additionally, the strike force's website encourages members of the public to report suspected antitrust violations and offers an electronic complaint form that can be completed and submitted online.

LABOR AND EMPLOYMENT ISSUES

The DOJ and certain state attorneys general continue to focus on anticompetitive conduct affecting labor markets and employment opportunities. In September 2019, the DOJ hosted a day-long workshop focused on the intersection of competition law and labor. Generally, federal enforcement interest in this area has focused on mutual no-hire agreements between employers, also referred to as "no-poach" agreements. Joint guidance issued by the Antitrust Division and FTC in October 2016 clarified their position 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 fix other terms of compensation and warned that so called "wage-fixing" and "no-poach" agreements between competing employers would be subject to criminal investigation and prosecution.

To date, DOJ has not announced any criminal investigations, but <u>comments</u> by DOJ leadership indicate that grand jury investigations in this area are under way. Industries at particular risk for exposure include fields in which highly specialized employees with unique training may be in short supply and high demand.

In addition, DOJ intervened in several private class actions filed by employees challenging agreements between employers to not compete with one another for employees. For example, DOJ <u>filed statements</u> of interest in two separate class actions, arguing that the *per se* standard should apply unless the agreements not to compete are ancillary to an otherwise legitimate business arrangement. In one of these actions alleging that Duke University and the University of North Carolina agreed not to recruit or hire one another's medical faculty, antitrust prosecutors <u>joined</u> the parties' settlement agreement for the purpose of "<u>obtaining</u> the right to enforce an injunction designed to prevent the maintenance or recurrence of any unlawful no-poach agreements" by the defendants.

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.

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

OTHER AGENCY DEVELOPMENTS

Federal regulators continue to closely monitor the energy and chemicals markets due to the direct impact they can have on consumers' wallets. However, in 2019, as in recent years, antitrust regulators rarely discussed the energy and chemicals industries, as more hot-topic issues in healthcare, pharmaceuticals, and high-tech garnered more attention.

ENFORCER SPEECHES AND TESTIMONY

Public statements given by federal antitrust regulators over the past year suggest that the energy and chemicals industries are not currently at the top of either the FTC or DOJ Antitrust Division's agenda. None of Assistant Attorney General Makan Delrahim's speeches or those of his deputies have touched on these industries in a substantive manner. Similarly, none of the speeches given by FTC commissioners and senior agency officials over the past year focused on either industry.

While officials from the FTC and DOJ testified before Congress on several occasions, they rarely discussed substantive policy initiatives regarding the energy or chemicals industry, and Congress did not express specific concerns about antitrust regulation in those industries. However, regulators did highlight some of their recent enforcement initiatives in the industries. For example, in FTC Chairman Simons' testimony before the Senate Judiciary Committee's Antitrust, Competition Policy and Consumer Rights Subcommittee, he highlighted the Commission's efforts to block Evonik Industries AG's proposed \$625 million acquisition of PeroxyChem Holding company (discussed in Merger Enforcement above). He stated that the merger of the chemical companies would substantially reduce competition for the production and sale of hydrogen peroxide in the Pacific Northwest and the Southern and Central United States.

FTC ANNUAL REPORT ON CONCENTRATION IN THE FTHANOL INDUSTRY

In 2005 Congress passed the Energy Policy Act, which requires the national transportation fuel supply to contain a minimum annual volume of renewable fuels, including ethanol fuel. This mandate is known as the Renewable Fuel Standard (RFS) 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 purpose of the report is to determine whether there is sufficient competition in the ethanol production industry to avoid price-setting and other anticompetitive behavior.

The FTC noted that the ethanol industry is currently experiencing "overcapacity, flat or reduced demand, reduced production levels, low margins, and the idling or closure of marginal plants." Still, most market participants believe that the U.S. ethanol industry will meet the revised RFS requirement.

In its most recent report, as in all its previous reports, the FTC concluded that there is a "low level of concentration and large number of market participants in the U.S. ethanol production industry," suggesting that "the exercise of market power to set prices or coordinate on price or output levels, is unlikely." In addition, the FTC noted that the annual use of renewable fuels did not keep pace with the statutory RFS requirements, which prompted the EPA to reduce the requirements. The FTC noted that the ethanol industry is currently experiencing "overcapacity, flat or reduced demand, reduced production levels, low margins, and the idling or closure of marginal plants." Still, most market participants believe that the U.S. ethanol industry will meet the revised RFS requirement. The report notes that ethanol usage in the U.S. is still limited because most gas stations in the U.S. only offer "E10" gasoline — which has a 10% ethanol content. While there is an increasing number of gas stations offering gasoline with higher ethanol content, its availability is still limited on a national scale. Furthermore, even though the EPA finalized regulatory changes to allow "E15" gasoline to be sold year-round, the demand for gasoline blends with higher ethanol content has not changed significantly.

PROPOSED LEGISLATION AND REGULATIONS

There were only a handful of competition-related rule-makings and proposed legislation relevant to the energy and chemicals industries in 2019.

Anti-OPEC Legislation

In February 2019, the U.S. Senate and House of Representatives again introduced the No Oil Producing and Exporting Countries Act of 2019 (NOPEC) to amend the Sherman Act to make oil-producing and exporting cartels illegal. (See S.370 & H.R.948). The legislation would allow the government to bring lawsuits against OPEC members for antitrust violations.

These legislative proposals are essentially identical to unsuccessful bills that were introduced last year. Various versions of the bill have been discussed as far back as 2000. Earlier efforts were unsuccessful because both President Bush and President Obama indicated that they would veto any such bills. President Trump has not indicated whether he would sign such legislation if it made it through Congress.



Amendments To FTC Energy Labeling Rule

On October 25, 2019, the Federal Trade Commission completed its <u>amendments</u> to the Energy Labeling Rule, following a period of public comment. The 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 "<u>range for comparing the highest and lowest energy costs for all similar models</u>."

The amendments do not affect the Rule's substantive requirements, but instead attempt to improve its organization and remove obsolete references in order to make it easier for stakeholders to navigate.

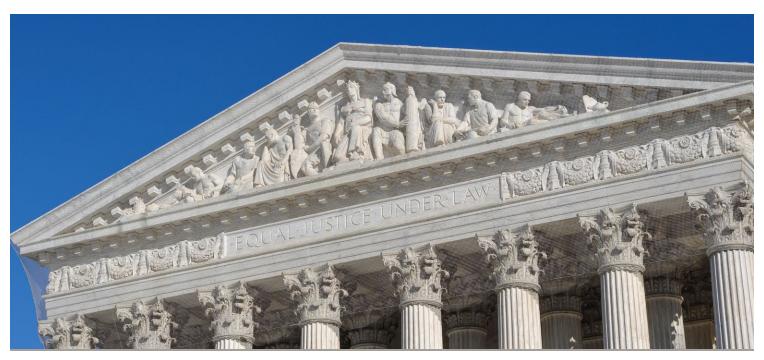
Commissioner Wilson issued a <u>dissenting statement</u> in opposition to the Rule. She stated that while the amendments likely improve the clarity of the Rule, she believes that the current Rule "goes far beyond [the FTC's] statutory mandate to issue a rule governing the energy labeling of appliances." She noted that the Rule prescribes the specific weight and adhesiveness of the paper a manufacturer must use when printing the EnergyGuide label. She said that the Commission should be able to "provide guidance on labeling requirements without dictating such minutiae."

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 has sought to promote competition for electricity transmission by opposing state efforts to protect incumbent providers from out-of-state competition.

DOJ Statements In Litigation Challenging Minnesota Electric Grid Statute

The DOJ filed an <u>amicus curiae brief</u> in 2018 urging the Eighth Circuit to invalidate a Minnesota law giving preference to incumbent utilities for new electric grid projects. In October 2019, the DOJ requested and was granted permission to <u>participate in oral arguments</u> as amicus curiae "in order to advance its distinctive position and to dispel any confusion about the government's stand on [right-of-first-refusal] laws." The court heard oral arguments on October 16, 2019. The case remains pending as of publication.





PRIVATE LITIGATION

Both plaintiffs and defendants saw bright spots in energy-and-chemical-related antitrust litigation in 2019. As always, in an environment where the liability risks and litigation expenses can put pressure on defendants to resolve serious claims through early settlement, the initial pleadings battle is crucial, as this year's results remind us. Plaintiffs in several significant cases survived *Twombly* review and won meaningful settlements, suggesting that the requirement to plead facts giving rise to a plausible inference of conspiracy has not shut the courthouse doors to legitimate claims. Defendants, on the other hand, could take heart that courts were willing to dismiss or partially dismiss complaints in 2019 based on legal defenses like the filed-rate doctrine, statutes of limitations, or antitrust standing. Especially for defendants who have been the subject of regulatory investigations into credible claims of wrongdoing, early consideration of legal defenses may be the best tool available to block or limit bandwagon claims brought by claimants who articulate plausible conspiracy facts but whose injuries are dubious.

Private antitrust litigation in recent years has fallen into a handful of broad categories, and 2019 was no exception, with significant cases (1) alleging collusion for product sales; (2) alleging market manipulation in derivatives or other trading markets; (3) alleging collusion for lease or mineral rights interests in "hot plays"; and (4) challenging government intervention under the dormant commerce clause or antitrust laws, which implicate the state action doctrine. We discuss the significant developments in each category below.

CASES INVOLVING ALLEGED COLLUSION FOR PRODUCT SALES

DISMISSAL: Breiding v. Eversource Energy, 939 F.3d 47 (1st Cir. 2019); PNE Energy Supply Co. v. Eversource Energy, 396 F. Supp. 3d 200 (D. Mass. 2019)

In a pair of cases brought by wholesale and retail electricity purchasers, plaintiffs alleged that defendants manipulated pipeline capacity for natural gas transmission, artificially inflating the price of natural gas and electricity in New England.

The U.S. District Court of Massachusetts granted defendants' motions to dismiss in both cases. As of this writing, the First Circuit has affirmed the dismissal of *Breiding*, while the appeal in *PNE Energy Supply* remains pending.

In Breiding, retail electricity consumers alleged that defendants violated Section 2 of the Sherman Act by strategically reserving excess capacity along the Algonquin Gas pipeline without using or reselling it, thus constraining New England's gas supply and raising prices. Specifically, plaintiffs claimed defendants, possessors of a large number of "no-notice" transmission contracts, regularly reserved more pipeline capacity than they knew they needed, cancelled portions of their reservations at the last minute, and did not release that capacity so that others could take advantage of it. The district court held the filed-rate doctrine barred plaintiffs' claims, and the First Circuit affirmed. While plaintiffs tried to allege effects on downstream natural gas spot markets, the First Circuit held that the alleged violation occurred in the natural gas transmission market, which was subject to a FERC-approved tariff. Because plaintiffs alleged no conduct outside the bounds of the "detailed and reasonably comprehensive" tariff, the First Circuit held that the filed-rate doctrine applied and barred plaintiffs' suit.

In PNE Energy Supply, PNE sued on behalf of a putative class of wholesale electricity purchasers. PNE acknowledged that its claims arose from the same conduct considered in *Breiding* but attempted to distinguish its allegations, pointing out (1) PNE was a purchaser in the wholesale electricity market, i.e., the market defendants targeted, and (2) the *Breiding* court did not address how defendants' conduct occurred in the "secondary capacity market," which purportedly includes the natural gas spot market and the "excess capacity release market." The district court did not find these distinctions convincing. "At bottom," the court said, "PNE requires the Court to question the reasonableness of wholesale electric rates and conduct that FERC mandated as part of no-notice contracts," and therefore, as in *Breiding*, the filed-rate doctrine barred the inquiry.

Alternatively, the court held plaintiffs failed to demonstrate antitrust standing, as PNE alleged the artificial restriction of supply in the secondary capacity market, but PNE was neither a customer nor a competitor in that market.

DISMISSAL DENIED AND SETTLEMENTS: In re Liquid Aluminum Sulfate Antitrust Litigation, No. 16-MD-2687 (JLL) (D.N.J.)

In March of 2019, a federal district court in New Jersey denied motions to dismiss claims against chemical companies accused of conspiring to suppress and eliminate competition in the sale and marketing of liquid aluminum sulfate ("alum").

The plaintiffs, municipal water utilities and pulp and paper companies who purchase alum from manufacturers for use in water treatment, allege that the defendants fixed prices, rigged bids, and allocated customers to boost prices. Plaintiffs brought their claims in the wake of a defendant executive's guilty plea to conspiracy to eliminate competition. Plaintiffs claim defendants agreed to trade information about prices and customers, submit sham bids or withdraw winning low bids, and "stay away" from each other's historical customers. Plaintiffs claim defendants discussed these plans at face-to-face meetings and used private cell phones and special email addresses to conceal their communications.

After some early filed claims were resolved by settlement in 2018, additional defendants moved to dismiss in late 2018, arguing plaintiffs failed to plausibly claim the existence of an agreement to restrain trade. The district court denied these



motions in March 2019. The district court found inferences of conspiracy could be fairly drawn from the alleged behavior, including meetings and communications, anomalous bidding behavior, and policing and enforcement efforts, and concluded the plaintiffs stated a prima facie cause of action for violation of Section 1 of the Sherman Act.

Since the time of the decision, the court gave final approval to several major settlements. Under the deals, two separate classes were certified: one for indirect purchasers and another for direct purchasers. The indirect-purchaser class settlement, which provides for a settlement fund of nearly \$30 million, encompasses a settlement already reached by the indirect purchaser class against GEO Specialty Chemical in 2018. The direct-purchaser settlement funds total more than \$90 million, the majority of which is funded by Chemtrade.

In each case, the court approved the payment of class administration costs, reimbursement of class counsel's out-of-pocket expenses, and certain incentive awards to the class representatives out of the settlement funds, with class counsel thereafter receiving one-third of the funds distributed to the class members.

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More than a dozen municipalities and water authorities have opted out of the classes and continue to pursue their own claims.

PARTIAL DISMISSAL: Bartlett v. BP W. Coast Prods. LLC, No. 18-CV-01374-L-AGS (S.D. Cal. May 17, 2019)

A putative class of California retail fuel purchasers sued several California refiners, accusing them of conspiring to artificially inflate gas prices in the state. Plaintiffs allege the refiners shared pricing data and met to coordinate pricing, leading to price spikes in 2012 and 2015, while publicly blaming the spikes on operational disruptions at certain refineries. Plaintiffs allege that the disruptions were a sham, as defendants had sufficient production at other refineries to compensate for any disrupted refineries, continued to operate refineries during announced shutdowns, failed to use available inventories and reserves to meet demand, and shipped fuel out-of-state while idling tankers that could have brought fuel into California if it were needed.

In May 2019, the district court partially granted defendant oil refiners' motions to dismiss on statute of limitations grounds, but denied the refiners' motions to dismiss more recent claims on *Twombly* grounds.

On the statute of limitations, plaintiffs argued the alleged conduct was continuous and therefore tolled limitations. but the court found plaintiffs' claims were presented as "discrete, successive price spikes," not a continuous course of conduct. The court also rejected plaintiffs' argument that defendants fraudulently concealed their wrongdoing by blaming operational disruptions for price spikes, finding plaintiffs both "failed to allege when and how they discovered defendants' misconduct" and failed to explain why it took them years longer than plaintiffs in a similar case (Persian Gulf Inc. v. BP W. Coast Prods. LLC) to discover the same facts. The court dismissed claims relating to pre-2014 purchases, but granted plaintiffs leave to amend to further allege fraudulent concealment. The court denied the remainder of defendants' motions to dismiss, finding plaintiffs alleged sufficient facts as to defendants' post-2014 conduct to state a plausible conspiracy claim.

DISMISSAL DENIED: In re Pre-Filled Propane Tank Antitrust Litigation, 4:14-md-02567 (W.D. Mo.)

Putative class actions alleging price-fixing in the sale of propane tanks will proceed in part in a consolidated multidistrict litigation after a federal district court in Missouri dismissed certain state law claims as time-barred.

Plaintiffs, retailer-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, but the Eighth Circuit, sitting *en banc*, reversed and found the claims were timely under the "continuing violation" doctrine, holding that each sale of a tank at a conspiratorially fixed, supra-competitive price inflicted a new injury and would be subject to its own limitations period.

In August 2019, after the U.S. Supreme Court denied certiorari, the district court dismissed some of plaintiffs' remaining state-law claims after determining which states would be likely to adopt the "continuing violation" doctrine. In October 2019, the defendants filed answers to the complaint for the remaining claims and the case is moving forward.

In November 2019, the district court preliminarily approved a class action settlement totaling \$12.56 million, of which Blue Rhino will pay \$6.25 million and Americas will pay \$6.31 million.

SETTLEMENT: In re Western States Wholesale Natural Gas Antitrust Litigation, No. 2:03-cv-01431 (D. Nev.)

In August 2019, a federal district court in Nevada gave final approval to settlements of the last remaining classes in a multidistrict litigation proceeding (MDL) involving natural gas market manipulation and price fixing. Under the deals, the defendant natural gas companies will pay an additional \$41 million to the plaintiff classes.

In the early 2000s, multiple groups filed class-action lawsuits around the country, in both state and federal courts, alleging an arrangement to manipulate the prices of natural gas sold to industrial and commercial users in Kansas, Missouri,



Wisconsin, and Colorado between 2000 and 2002. These actions were eventually consolidated into an MDL in the District of Nevada as *In re Western States Wholesale Natural Gas Antitrust Litigation*. Between 2017 and 2019, multiple classes settled claims in deals totaling more than \$60 million.

The largest remaining class, the "Wisconsin class," alleged that Reliant Energy and its family of companies conspired with others to fix retail natural gas prices in Wisconsin. In August 2019, the district court approved settlements totaling \$29.25 million, of which CES, a Reliant subsidiary, will pay the class \$14.75 million, while El Paso Corporation and related companies will pay \$14.5 million.

The other classes, the "Kansas class" and the "Missouri class," comprised retail buyers alleging 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. In August 2019, the district court approved settlements for the Kansas and Missouri classes totaling \$11.75 million. Dynegy will pay \$4.5 million, the Williams Companies, Inc. and related companies will pay \$4.5 million, and Xcel Energy and related companies will pay \$2.75 million.

CLASS CERTIFICATION DENIED: In re Rail Freight Fuel Surcharge Antitrust Litigation, 934 F.3d 619 (D.D.C. 2019)

In August 2019, the D.C. Circuit unanimously affirmed the district court's denial of Rule 23(b)(3) class certification of price-fixing claims against four major railroads, where the railroad-shipper plaintiffs failed to show their statistical damage model would assure common issues predominated over injury-in-fact questions affecting individual class members.

Seeking to represent more than 16,000 railroad shippers, plaintiffs (including chemical manufacturers, metal producers, and others) allege that, starting in 2003, defendants conspired

to fix prices by agreeing to impose fuel surcharges that exceeded the railroads' additional fuel costs and led to billions of dollars in additional revenues for the defendants.

After protracted proceedings, in October 2017, the district court denied plaintiffs' class certification motion based on inadequacies in their regression-based damages model. The appeals court affirmed, noting first that plaintiffs' model calculated damages for shipments made under pre-conspiracy contracts, suggesting that the model was generating false positives and was, therefore, unreliable.

The model also showed 12.7% of the class suffered "negative overcharges," demonstrating that a significant portion of the class was uninjured by defendants' alleged conduct. While plaintiffs argued a class could be certified in spite of a "de minimis" number of uninjured members, the appeals court concluded that "the outer limits of a de minimis number" under existing precedent would be 5% to 6% of the putative class. The appeals court concluded that plaintiffs would not be able to prove injury-in-fact and causation on a class-wide basis, such that they failed to meet Rule 23(b)(3)'s predominance requirement.

Since the ruling, more than thirty-five shippers have filed individual suits against defendants in districts across the country, including energy and chemical companies such as Dow, CF Industries, Union Carbide, Entergy, Exelon, Dominion Energy, Talen Energy Supply, Phillips 66, Duke Energy Carolinas, and Eastman Chemical Company. Motions to consolidate the cases into an MDL are pending before the Judicial Panel on Multidistrict Litigation, which is considering whether to consolidate the newly-filed individual cases into the existing MDL in the District of Columbia or a new MDL in the Southern District of Texas. Vinson & Elkins represents certain plaintiffs in these cases.

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DISMISSAL: *PDVSA v. Lukoil Pan Americas LLC*, No. 1:18-cv-20818 (S.D. Fla.)

In March 2019, a U.S. district court in Florida dismissed pricefixing claims brought on behalf of PDVSA, Venezuela's stateowned oil company, on standing grounds.

PDVSA accused more than a dozen oil companies of participating in a decade-long bribery scheme to obtain information about future crude oil tenders before they were on the market, allegedly depressing bid prices by billions of dollars.

The nominal plaintiff in the case was the PDVSA U.S. Litigation Trust, to which PDVSA had purportedly assigned its interest in the claims asserted via a litigation trust agreement. Defendants moved to dismiss the Trust's claim for lack of standing because the Venezuelan legislature had not approved PDVSA's pursuit of the claims.

The district court dismissed. Although the court recognized bona fide assignees have standing to bring antitrust claims, the court deemed PDVSA's purported assignment to be of questionable authenticity and legality. The only individuals that could attest to its authenticity were unavailable to testify; the Venezuelan National Assembly apparently declared the Trust Agreement invalid; and the court concluded the trust agreement violated New York's law banning champerty. Plaintiff's appeal is pending as of publication.

NEW CASE: In re Caustic Soda Antitrust Litigation, 1:19-cv-00385-EAW-MJR (W.D.N.Y.) (lead case)

In March 2019, plaintiffs, including multiple chemical manufacturers, filed five class-action suits against several manufacturers of sodium hydroxide, commonly known as caustic soda. Plaintiffs allege defendants conspired to "restrict domestic supply" and "to fix, raise, maintain, and stabilize the price at which Caustic Soda was and continues to be sold," in violation of Section 1 of the Sherman Act. Plaintiffs seek damages and injunctive relief.

Plaintiffs allege that, from 2012 to 2015, caustic soda prices were either declining or flat, but beginning in 2015, defendants "announced Caustic Soda price increases in a coordinated fashion and began increasing Caustic Soda prices despite sluggish demand, stable or declining costs, and excess capacity." Plaintiffs also claim that defendants falsely claimed supply was scarce and refused to supply customers. Plaintiffs allege that this conspiracy was conducted via covert supply

agreements, the sharing of pricing data, and agreements not to actually compete on pricing. Plaintiffs further allege that defendants falsified or omitted information from reports they provided to IHS Markit, publisher of a key industry pricing index for caustic soda. Plaintiffs argue that due to defendants' conduct, "prices have increased more than 50%" since the fourth quarter of 2015.

In July 2019, defendants moved to dismiss for failure to state a claim. Defendants argued that their parallel price announcements and attendance at trade association meetings were insufficient to demonstrate a conspiracy, and that the IHS Markit index had fallen in recent periods even as the conspiracy continued, per plaintiffs' allegations. Specific defendants also disputed whether plaintiffs had identified the correct producing entities, or whether the court had personal jurisdiction over the named defendants. The motions remain pending as of publication.

CASES INVOLVING ALLEGED TRADING MARKET MANIPULATION

DISMISSAL: Prime Int'l Trading, Ltd. v. BP P.L.C., 784 F. App'x 4 (2d Cir. 2019)

In August 2019, the Second Circuit affirmed the dismissal of financial traders' price-fixing claims against oil producers for lack of antitrust standing.

A group of futures and derivatives traders alleged that defendants, as producers, refiners, and sellers of Brent crude oil, manipulated the price of Brent crude traded in the North Sea to affect the Dated Brent Assessment, thereby boosting defendants' profits on derivatives linked to that assessment.

The district court found the plaintiffs had insufficiently alleged an antitrust injury. The court defined the relevant markets as the market for physical Brent crude and the market for derivative instruments that directly incorporated the Dated Brent Assessment as a benchmark or pricing element. Plaintiffs admittedly did not participate in the physical market for Brent crude, and they could not show that they had participated in the market for derivative instruments directly pegged to the Dated Brent Assessment. At most, the operative pricing benchmark for Brent futures and derivatives that the plaintiffs had traded, the ICE Brent Index, "closely correlate[d]"

with the Dated Brent Assessment. The court held that such allegations of "close correlation" were insufficient to show the required direct participation in the relevant market.

Affirming the district court's dismissal, the Second Circuit stated that "plaintiffs could not have suffered an antitrust injury if they dealt in products that were not linked to the benchmark they complain of, for they would not be a 'participant in the very market that is directly restrained.'" And because plaintiffs did not allege that they dealt in products directly linked to the Dated Brent Assessment, they did not have antitrust standing.

CASES INVOLVING ALLEGED COLLUSION FOR LEASING IN "HOT PLAYS"

SETTLEMENT: Thieme v. Chesapeake Energy Corp., 5:16-CV-00209 (W. D. Okla. 2018)

In April 2019, the district court gave final approval to a \$6.95 million settlement between an exploration and production company and a class of mineral owners allegedly impacted by the collusive allocation of leasing opportunities in the Mississippi Lime play.

The 2016 suit, which followed the DOJ's indictment of Chesapeake's then-CEO, alleged a conspiracy involving Chesapeake and others to rig bids and artificially depress prices for the purchase of leasehold interests in Oklahoma and Kansas mineral estates between 2007 and 2012. The class notice process sent notice to more than 13,000 class members and resulted in just over 900 claims, with no objections and no requests for exclusion. The settlement fund will cover class claims, as well as reimbursement of expenses, incentive awards to the class representatives, and attorney's fees of one-third of amounts distributed to class members.

DISMISSAL DENIED: Anadarko Petroleum Corp. v. Pennsylvania, 206 A.3d 51 (Pa. Commw. Ct. 2019)

In March 2019, a Pennsylvania appeals court allowed the Pennsylvania AG to proceed with a lawsuit contending that Chesapeake Energy and Anadarko Petroleum's mineral leasing and royalty payment practices violated state consumer protection law, but reversed a decision that alleged market division in the acquisition of leases could be challenged as a deceptive trade practice.

The suit claims that Chesapeake deceived landowners by deducting inflated costs from royalty checks and colluded with Anadarko to (1) divide the northeastern Pennsylvania market for mineral rights and (2) not compete with one another for leases in that area. The Commonwealth argues these acts violated Pennsylvania's consumer protection statute. Defendants moved to dismiss, arguing that the consumer protection law was not intended to be an antitrust statute, and in any event, since they were buyers and not sellers in these transactions, consumer protection law did not apply.

The court agreed that Pennsylvania's consumer protection statute did not cover the market division allegations. It held a prohibition on monopolistic behavior, joint ventures, or market division could not be deemed "unfair" practices when they had not been listed by either the General Assembly (in statute) or the Attorney General (in regulations). The Attorney General's claim that joint ventures and market division agreements limited landowner choice and competition was not sufficient to demonstrate that the limitation was intrinsically deceptive or otherwise fit within an explicit prohibition of the statute. The court did, however, allow the claim that defendants misled landowners by misrepresenting or omitting information about whether their offers to lease represented competitive, fair, or market-value terms, as such conduct could fit the law's bar on unfair, deceptive, fraudulent, or confusing practices.

The court also rejected Chesapeake's argument that its "buyer" status left it outside the consumer protection statute altogether. The court found the solicitation of oil and gas leases fit within the scope of "trade or commerce" under the consumer protection law, and that the Attorney General is empowered by the statute to challenge unfair and deceptive acts and practices in commerce by "any person," not just by sellers, when it is in the public interest to do so.

On October 30, 2019, the Pennsylvania Supreme Court granted defendants' petition to appeal on two issues: whether Pennsylvania's claims for deceptive, misleading, and unfair trade practices were cognizable under the consumer protection statute; and whether antitrust remedies may be pursued under that law. A date for argument has not been set as of this writing.

DORMANT COMMERCE CLAUSE AND STATE ACTION CASES

INJUNCTION DENIED: Ammex, Inc. v. Gordon Wenk, 936 F.3d 355 (6th Cir. 2019)

In August 2019, the Sixth Circuit declined to enjoin enforcement of a Michigan gasoline-volatility standard as violating the dormant commerce clause.

In 2004, EPA designated eight Michigan counties as "nonattainment areas" under the National Ambient Air Quality Standards for ozone. In response, Michigan enacted a law limiting gasoline volatility during the summer months in those eight counties. EPA then approved the incorporation of the law into Michigan's state implementation plan, concluding the revised standards were "necessary" for attainment of national ozone standards.

Plaintiff, a Michigan gas retailer, sought a declaratory judgment that the law was unconstitutional under the dormant commerce clause. The district court dismissed Ammex's claim, holding that the law did not violate the dormant commerce clause.

The Sixth Circuit affirmed on the alternative basis that Michigan's gas volatility law constituted federal law. The court reasoned that because EPA found the only practical and feasible means of lowering Michigan's ozone levels was to enact a more stringent volatility standard, it forced Michigan to pass the law in dispute. Furthermore, the increased standard could only be enacted with EPA's approval; could not be changed without EPA approval; and if not properly enforced, would subject the state to EPA sanctions. Under the circumstances, the Sixth Circuit concluded that the gasoline volatility law was in effect federal law, not a state law subject to dormant commerce clause review. The Sixth Circuit later denied Ammex's petition for a rehearing en banc.

DISMISSAL: Gelita USA, Inc. v. Hammond Water Works Dep't, 392 F. Supp. 3d 901 (N.D. III. 2019)

In June 2019, a federal district court in Illinois granted judgment on the pleadings dismissing claims that a municipally owned water utility had violated the dormant commerce clause by charging higher rates to its only out-of-state customer.

Hammond Water Works Department, a municipally owned utility, operated a water filtration plant in northwest Indiana. In 2012 the Department tried to significantly raise the rates it charged its only out-of-state customer, Gelita, an Illinois gelatin manufacturing factory. After the parties failed to negotiate a mutually agreeable rate, Gelita sued, alleging the efforts to charge an increased rate ran afoul of the dormant commerce clause.

The court found the dormant commerce clause did not apply because the Department was acting as a market participant, not a regulator. The Department charged fees in exchange for providing services to customers, a paradigmatic example of market participation. It found the state could have a proprietary interest in water it captures itself, and that the market participant exception applies to municipal entities as well as the state itself. It also found the fact that Indiana holds water in a public trust does not preclude it from acting as a market participant in the market for water. Finally, it refused Gelita's invitation to fashion an exception to the market participant

doctrine when the market involves natural resources, reasoning such an exception would be "inconsistent with the [market participant] doctrine's theoretical foundation." Gelita is appealing the decision.

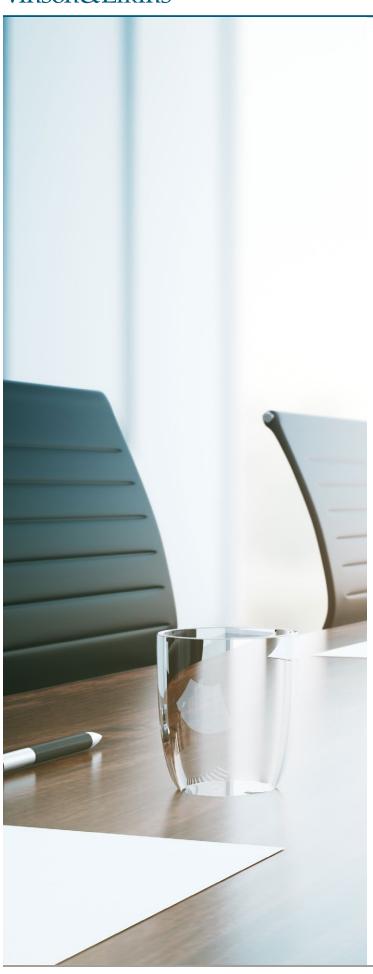
DISMISSAL DENIED: Diverse Power, Inc. v. City of LaGrange, Ga., 934 F.3d 1270 (11th Cir. 2019)

In August 2019, the Eleventh Circuit affirmed the denial of defendant City of LaGrange, Georgia's motion to dismiss, holding that the defendant's alleged tying actions fell outside of the scope of state-action immunity.

LaGrange owns and operates water and natural gas utilities serving the municipality and unincorporated areas of Troup County, Georgia. Plaintiff Diverse Power competes with the City utility in providing electricity to retail energy customers in the unincorporated areas of Troup County. After LaGrange passed an ordinance conditioning permanent water service to new construction projects in the unincorporated areas on the installation of natural gas hook-ups, Diverse Power alleged LaGrange had created an unlawful tying arrangement to extend its water service monopoly to create a monopoly in natural gas service.



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Affirming the district court's determination that LaGrange was not immune from suit, the Eleventh Circuit noted that political subdivisions are immune only when they act "pursuant to a clearly articulated and affirmatively expressed state policy to displace competition," and further observed that such a state policy is sufficiently expressed when "the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." The court concluded Georgia law empowered LaGrange to operate a utility and to refuse service to unannexed county areas, but tying water and gas services together was not the "inherent, logical, or ordinary result" of Georgia's legislative scheme. The court held "it is safe to say that the tying of an unrelated service in a different market to the provision of water service falls outside the statute's grant of immunity."

LaGrange has since repealed the ordinance and moved to dismiss the case as moot. That motion remains pending as of this writing.

In the case, *Gelita USA*, *Inc. v. Hammond Water Works Dep't*, a federal district court in Illinois granted judgment on the pleadings dismissing claims that a municipally owned water utility had violated the dormant commerce clause by charging higher rates to its only out-of-state customer.



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. The U.S. Energy Information Administration **projects** that in 2020 the U.S. will become a net energy exporter. Each of these trends has affected the way that the U.S. antitrust agencies approach potential mergers and acquisitions in this industry. Over the last decade, 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 DOFS 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 and oilfield services mergers. 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 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 <u>said</u> 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 <u>BP-ARCO</u> 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.

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PIPELINES. The FTC has occasionally required divestitures 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 local distribution companies 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/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 and 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.

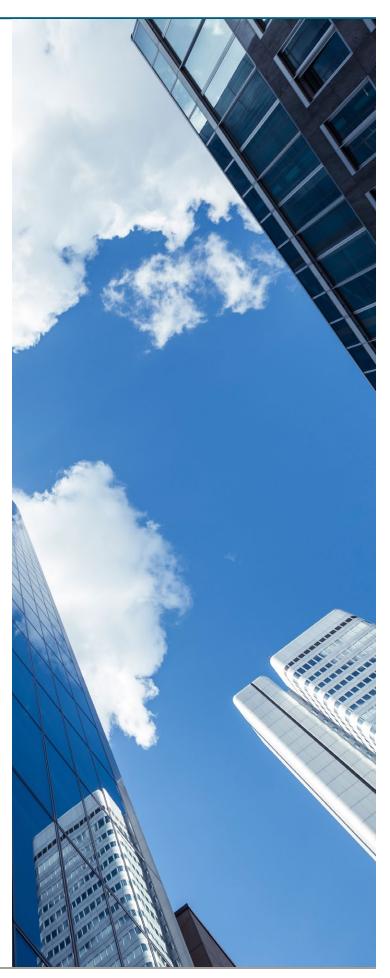
HOW THE FTC APPROACHES CHEMICAL MERGERS

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 <u>Cristal and Tronox</u>, 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 ${\rm TiO_2}$ 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), the pesticides paraquat, abamectin, and chlorothalonil (CNCC/Syngenta), "hydrogen peroxide" (Evonik/Peroxychem), and "aluminum hot rolling oil" and "steel cold rolling oil" and associated technical services (Quaker/Houghton).

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_a 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. Similarly, in Quaker/ Houghton, the FTC alleged a geographic market of North America, as the relevant products are typically shipped by tanker truck and shipping "from outside North America is cost- and supply-prohibitive." In Evonik/Peroxychem, the FTC alleged narrower geographic markets — (1) the Pacific Northwest and (2) the Southern and Central United States again noting the high transportation costs, and that "hydrogen peroxide producers deliver from plants that are relatively nearer to customers."

In <u>CNCC/Syngenta</u>, 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 <u>Linde/Praxair</u> 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 <u>has applied</u> a three-step burden-shifting framework in evaluating the rule of reason:

 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.

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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.

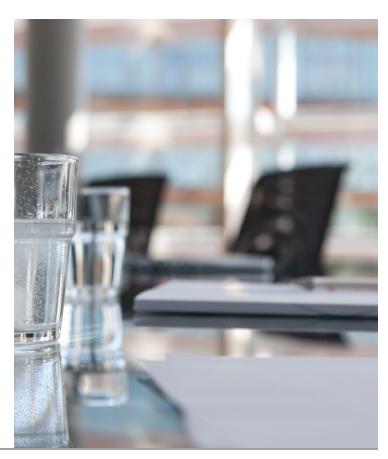
First articulated by the Supreme Court in 1922, the judicially created filed-rate doctrine bars private antitrust damage claims for alleged overcharges if the rate charged was approved by a regulatory agency with exclusive jurisdiction over the reasonableness of the rate, such as FERC. The purpose of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

Five presidentially nominated Commissioners head the FTC and serve seven-year terms. <u>Joseph J. Simons</u> 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.

As of December 20, 2019, Ian Conner has assumed the position of Director of the Bureau of Competition, replacing D. Bruce Hoffman, who headed the Bureau since August 2017. Conner previously served as Deputy Director of the Bureau, where he supervised multiple litigations and consent matters, including Wilhelmsen/Drew Marine.

The FTC's Bureau of Competition is organized into seven litigation divisions, including the newly formed Technology Enforcement Division, 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. The Mergers III Division handles the oil and gas industries, including pipelines, terminals and retailing.



MERGERS II

DOMINIC VOTE Assistant Director **PEGGY BAYER FEMENELLA** Deputy Assistant Director **JAMES RHILINGER** Deputy Assistant Director



James Rhilinger, Dominic Vote, and Peggy Bayer Femenella

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. In 2018, Mergers Il successfully challenged two chemical industry mergers (Tronox/Cristal and Wilhelmsen/Drew Marine) in federal court.

There are approximately 30 individuals in Mergers II. Vote, who joined the agency in 2006, became Assistant Director in 2018 after having served as a deputy since 2015. Rhilinger has served as a deputy since May 2014 and Femenella recently joined Mergers II as a deputy after having previously served as Counsel to the Director of the Anticompetitive Practices Division.

MFRGFRS III

PETER RICHMAN Assistant Director **JESSICA DRAKE** Deputy Assistant Director **BRIAN TELPNER** Deputy Assistant Director



Brian Telpner, Peter Richman, and Jessica Drake

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 Kinder Morgan/El Paso transaction and entering into a consent agreement in the Enbridge/Spectra Energy merger.

There are approximately 20 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. Drake and Telpner joined the FTC in 2009 and 2004, respectively.

Longtime deputy Patricia Galvan departed Mergers III in early 2019 to lead the Bureau of Competition's Technology Task Force, which became the permanent Technology Enforcement Division in the fall of 2019.

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 positions (though one is vacant as of publication). 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) **ATTORNEY GENERAL ANTITRUST DIVISION** WASHINGTON TRANSPORTATION, NY, SF, AND **CRIMINAL CHICAGO ENERGY, AND REGIONAL AGRICULTURE SECTIONS** I AND II **OFFICES SECTION**

TRANSPORTATION, ENERGY, AND AGRICULTURE SECTION

ROBERT LEPORE Acting Chief
PATRICIA CORCORAN Assistant Chief
KATHERINE CELESTE Acting 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., in 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.

There are approximately 35 individuals in the TEA Section, which is currently led by Acting Chief Robert Lepore, Assistant Chief Patricia Corcoran, and Acting Assistant Chief Katherine Celeste. Lepore joined the Antitrust Division directly out of law school in 2010. Lepore had a leading role on 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. He also handled the Section's gun-jumping action against Duke Energy Corp. in connection with its acquisition of the Osprey Energy Center from Calpine Corporation. Lepore took over as Acting Chief following the August 2019 departure of Kathleen O'Neill, who served as TEA Chief since 2015. O'Neill was elevated to Senior Director of Investigations and Litigation — serving in the division's front office as the senior-most career civil antitrust attorney, with responsibility over all civil merger and conduct investigations and litigation.

V&E'S NATIONALLY RECOGNIZED ANTITRUST PRACTICE (A.A.)

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 involved in persuading a government enforcer to close its investigation.

WORLD'S LEADING ENERGY FIRM¹

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 multidisciplinary 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.

¹ Based upon the number of lawyers named in the Guide to the World's Leading Energy & Natural Resource Lawyers.





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