Vinson&Elkins

2020 Energy & Chemicals

Antitrust Report

Table of Contents

Summary of 2020 Developments

Merger Enforcement

- 2019 witnessed the first year-over-year drop in total merger activity since 2012. The energy industry saw a corresponding reduction in the number of reportable transactions, but an increase in the number of transactions investigated. The chemical industry saw slight increases in both the number of transactions and investigations.
- Although the U.S. Department of Justice ("DOJ") brought no energy or chemical merger enforcement actions in 2020, the Federal Trade Commission ("FTC") was substantially more active. It secured divestitures in two cases, challenged two transactions in federal court — succeeding in one and losing in the other — and sued a company for failing to comply with a divestiture order.
- The DOJ and FTC launched new Vertical Merger Guidelines that clarify the agencies' enforcement approach with respect to vertical transactions — those involving companies at different levels of the supply chain. The DOJ also released a new merger remedies document, which confirms its strong preference for structural remedies like divestitures.

Non-Merger Enforcement

- Congress reauthorized a key statute that provides incentives in civil actions to companies that self-report anticompetitive conduct under the Antitrust Division's Corporate Leniency program.
- The DOJ obtained an additional settlement in its investigation into Korean fuel supply contracts and secured a guilty plea in a joint investigation into collusion impacting bids for work supporting the Department of Energy's Strategic Petroleum Reserve.
- The Antitrust Division's Procurement Collusion Strike Force ("Strike Force") — unveiled in late 2019 to prioritize the detection and prosecution of collusion in the public procurement process — had a busy inaugural year, including securing its first indictment. The Strike Force's work reportedly makes up an increasingly large portion of the Antitrust Division's open cases, but the overall number of new criminal antitrust cases publicly filed by the DOJ in 2020 remains below historical levels.
- The DOJ opened and closed, without charges, an investigation into several car manufacturers' agreement with the State of California regarding fuel emissions standards.
- The Supreme Court announced that it will review the FTC's authority to pursue restitution in civil enforcement actions.

State & Private Litigation

- The rate of private antitrust litigation in the U.S. energy and chemical industries continued to be robust. Notably, the State of California and retail gasoline purchasers launched new suits against major traders of gasoline and gasoline blending components, accusing them of colluding to manipulate the spot market price of gasoline, in violation of federal and state antitrust laws.
- Courts continued to grapple with (1) whether alleged market manipulation was sufficient to cause antitrust injury sufficient to support private litigation, and (2) the intersection between antitrust and regulation (in cases dealing with the state action and filed rate doctrines).
- Consistent with its expanded focus on competition advocacy, the DOJ's Antitrust Division submitted amicus curiae briefs in several matters involving the energy industry.
- On the chemicals side, the caustic soda price-fixing case launched last year survived a motion to dismiss, while the long-running liquid aluminum sulfate litigation concluded with a variety of settlements.

Why Antitrust Matters to Energy and Chemical Firms

The antitrust laws play an important role in regulating the activities of firms in the energy and chemicals industries. These laws exist to ensure that the market is governed by a fair and open competitive process, which in turn should lead to the greatest benefit to consumers. Contrary to misconceptions by some, antitrust law does not exist to guarantee that a market will see a certain level of competition, ensure the success of certain competitors, or reduce the size of large companies. Antitrust is about the opportunity for competition; the rest is up to the market.

Antitrust enforcement can arise in a variety of ways. There are two federal agencies that enforce these laws: the U.S. Department of Justice's ("DOJ") Antitrust Division and the Federal Trade Commission ("FTC"). Each has responsibility for particular industries, and as a result, has developed a sophisticated understanding of the businesses under their purview. 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, as well as all criminal enforcement.

While the federal agencies have extensive career staff, enforcement priorities are determined by political appointees (at the DOJ, the Assistant Attorney General in charge of the Antitrust Division, and the individual commissioners at the FTC). Political appointments will give the incoming Biden administration the opportunity to make its mark on antitrust enforcement. While the Biden transition team has not spoken specifically about its plans as they relate to antitrust and energy or chemicals, it has signaled that it is likely to support a more aggressive enforcement agenda than its predecessors. That view is consistent with the fact that, as noted in last year's report, the minority Democratic commissioners have been vocal advocates for more enforcement.

These changes, however, are not likely to be immediate. At the DOJ, a nominee requires Senate confirmation, which normally takes several months. For reference, President Trump's nominee, Makan Delrahim, was confirmed on September 27, 2017, about eight months after Inauguration Day. At the FTC, where commissioners serve fixed, staggered terms, the picture is more complicated. At present, Republicans nominated by President Trump hold a 3-2 majority, and unless one chooses to resign prior to the end of their term, a Republican vacancy will not occur until 2023.

While the federal enforcement agencies see the lion's share of antitrust attention, state attorneys general play a less prominent, but often equally important, role in enforcing antitrust laws, particularly with respect to issues that uniquely impact local markets. Finally, companies and individuals who believe they have been harmed by antitrust violations can bring private litigation, which is notoriously protracted and expensive to confront. As the Supreme Court noted, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases."

What are these various enforcers looking for in energy and chemicals markets? In general, antitrust enforcement focuses on three ways in which the competitive process can become distorted, and energy- and chemicals-specific issues have come up with respect to each.

Acquisitions & Other Transactions

Antitrust enforcers scrutinize mergers and acquisitions to determine whether the market will remain competitive or whether the merger will allow the merged firm to exercise market power. When a transaction faces close scrutiny by the antitrust agencies, it can add months of delay and uncertainty, as well as significant costs, to the transaction.

As discussed in more detail below, the enforcement agencies have established frameworks for how they look at energy and chemicals transactions. For example, mergers in oil and gas exploration have attracted relatively little scrutiny, since the market is viewed as worldwide and there are myriad sources of potential supply. By contrast, pipeline and retail fuel mergers have seen much greater scrutiny, and many mergers have either resulted in agency challenges or significant divestitures to satisfy enforcer concerns.

Collusion & Other Coordinated Conduct

Antitrust prevents companies that should be competing by lowering prices or improving services from agreeing among themselves not to compete. In the energy sector, most recent cases have focused on allegations of market manipulation. Companies (usually through derivatives traders) are alleged to have colluded to manipulate a market to influence an industry pricing benchmark to benefit their own positions at the expense of those who buy products tied to that benchmark. Several cases have alleged that companies pursuing mineral rights have conspired to rig bids or depress the prices that landowners and other sellers receive in mineral rights auctions or transactions. Plaintiffs and enforcers also continue to charge that capacity withdrawal decisions in tight product markets may be the result of anticompetitive agreements to try to increase prices or the improper sharing of information among sellers.

Participants in such markets should continue to exercise caution and document their unilateral reasons for business decisions that may appear suspicious or coordinated to those outside of the industry (such as taking a plant offline or withdrawing from an auction process). In the chemicals space, recent cases have focused on traditional claims of price-fixing and market allocation, as many chemical markets bear certain features (like fungible products and price transparency through reporting services) that can make the market more susceptible to collusion.

Unilateral Conduct

When a single entity controls a key part of the market, its conduct alone can impact the market by foreclosing competitors. Recently, unilateral conduct cases involving energy and chemicals markets have been relatively rare, with one exception: the ongoing battle over whether and how antitrust law constrains municipal utilities as they react to the emergence of distributed power generation systems and connect those systems to existing power grids.

2020 Federal Antitrust Enforcement

Energy and Chemical Industries

Merger Enforcement Policy Developments

Despite unprecedented challenges imposed by the COVID-19 crisis, 2020 saw DOJ and the FTC continuing to develop their enforcement policies and priorities. The FTC launched initiatives to examine past acquisitions by major technology firms, proposed a set of changes to the Hart-Scott-Rodino (HSR) Act's implementing rules, and expanded its Merger Retrospective Program. The DOJ issued a new Merger Remedies Manual, gained a sought-for statutory re-authorization, and reorganized its civil enforcement personnel. The agencies together launched a new set of Vertical Merger Guidelines and also deepened their cooperation with overseas agencies. While some of these initiatives will likely not bear fruit for some time, they demonstrate continued adaptability of the agencies in the face of change.

FTC and DOJ Issue Vertical Merger Guidelines

In June 2020, the FTC and DOJ released new Vertical Merger Guidelines ("Guidelines"), which explain how the agencies assess mergers and acquisitions involving companies at different levels of the supply chain. This represents the first time the two agencies have issued joint guidelines on vertical mergers — the prior 1984 guidance regarding vertical mergers having been issued by DOJ alone.

The new Guidelines do not represent a significant shift in policy: rather, they seek to explain the agencies' present enforcement approach with respect to vertical transactions. As such, they take a generally positive view of vertical transactions and reflect existing enforcement patterns that suggest the agencies view vertical transactions as less likely to be anticompetitive than horizontal ones. Nonetheless, the Guidelines do reiterate the situations in which the agencies will seek remedies, including a summary of their potential theories of harm in such cases.

While there is some question as to the level of regulatory alignment regarding the new Vertical Merger Guidelines going forward — the two Democratic FTC commissioners dissented from issuing the Guidelines — the document remains useful at least as a reminder of recent agency practice.

In December, the FTC supplemented the new Guidelines with a Commentary on Vertical Merger Enforcement. The Commentary provides numerous summaries of prior FTC vertical analyses and theories of harm for each.

DOJ Releases New Merger Remedies Manual

September 2020 saw DOJ release a new Merger Remedies Manual, which replaces the 2004-vintage Policy Guide to Merger Remedies. In many ways, it retains the content and goals of that earlier document, while also adding and adjusting to reflect more recent agency practice. For example, it adds sections regarding how upfront buyer remedies are evaluated and DOJ's approach to remedies in consummated transactions.

As reflects recent practice and prior public statements by DOJ officials, the Merger Remedies Manual demonstrates a strong commitment to structural remedies, spelling out the narrow circumstances in which DOJ believes conduct remedies may be appropriate. It also provides transparency into the process with respect to potential divestiture buyers and how such transactions are conducted and monitored. The latter point is shown strongly by an expanded focus on remedy compliance and enforcement, which has been a recent point of emphasis for both agencies.

FTC Expands and Updates Merger Retrospective Program

The FTC's economics arm announced an updated [Merger Retrospective Program] in September 2020. The Bureau of Economics has long engaged in occasional analyses of prior mergers with a dual goal of (1) determining whether the agency's threshold for challenging mergers is set at the correct level and (2) evaluating the agency's performance in predicting competitive effects prospectively. The new program aims to be an expanded version of those ad hoc studies, which are often aimed at an academic (rather than practitioner-heavy) audience.

In announcing the new program, the FTC noted both the successes of prior retrospective studies and some shortcomings it hopes to fix, such as a lack of focus on vertical transactions and also on certain types of competitive harm, such as changes in innovation, output levels, or in other non-price attributes like product quality. The FTC apparently intends to produce a new annual report summarizing the lessons learned from recent retrospective studies. In the future, such reports may provide some hint of coming shifts in enforcement that may be of interest to practitioners and industry participants.

Agencies Continue International Cooperation Efforts

Throughout the year, the agencies announced several new or updated cooperation agreements with overseas authorities, including those from Australia, Canada, New Zealand, the United Kingdom, Nigeria, and South Korea. The first four countries' competition agencies entered into a [multilateral framework agreement] with both U.S. agencies that includes a model agreement governing mutual assistance on pending investigations. According to DOJ, the framework agreement will serve as a template for later agreements covering both criminal and non-merger civil matters.

In October 2020, the FTC signed an updated [Memorandum of Understanding] with the Nigerian Federal Competition and Consumer Protection Commission (FCCPC) and Economic and Financial Crimes Commission. While the FTC may cooperate initially with Nigerian authorities primarily on consumer protection matters, the Nigerian antitrust regime is poised to become more active with the FCCPC's expanded powers under updated Nigerian law. To the extent that this cooperation extends to antitrust matters, it is likely to have an outsized impact in oil and gas matters.

DOJ also signed an antitrust-centric [Memorandum of Understanding] with the Korean Prosecution Service. While DOJ's cooperation with Korean authorities has thus far focused on technology and manufacturing companies, this deeper relationship could bear fruit in terms of widened criminal investigations in other economic sectors.

DOJ Shuffles Civil Enforcement Organization

In August 2020, DOJ [announced] that the Antitrust Division's civil sections would reallocate resources to better handle changing needs. The agency also announced the formation of a new Office of Decree Enforcement to enforce judgments and consent decrees, as well as the formation of a Civil Conduct Task Force to coordinate across DOJ's sections and field offices to identify conduct investigations requiring additional resources.

The restructuring of the component units will result in re-grouping of staff and perhaps different personnel handling certain types of matters. Energy transactions within DOJ's ambit are less likely to be affected than some other industries, however, because they traditionally have been squarely within its Transportation, Energy, and Agriculture unit.

FTC Proposes HSR Rules Changes, Including New Exemption

On September 21, 2020, the FTC, with the concurrence of the DOJ, announced that the agencies are seeking comments on their Notice of Proposed Rulemaking (NPRM) and Advanced Notice of Proposed Rulemaking (ANPRM). The NPRM proposes two significant amendments to existing HSR rules:

- The first amendment would broaden HSR filing requirements to include holdings of affiliates of the acquirer, such that investors and other buyers would need to add their stakes together across commonly managed funds to determine whether they need to report a transaction (the "aggregation provisions").
- The second amendment is a new rule that would exempt transactions involving "the acquisition of 10% or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer" (the "exemption provisions").

The ANPRM seeks information regarding seven topics that the FTC will use to determine whether additional amendments to the HSR program are warranted. The areas for future study include potential changes to the size of transaction tests, as well as to coverage of non-corporate entities (such as LLCs), influence on firms' operations other than through stock ownership, and several other areas.

The vote on the NPRM was 3 to 2, with Commissioners Rohit Chopra and Rebecca Kelly Slaughter voting no and releasing separate statements on the reasoning behind their vote. Commissioners Chopra and Slaughter both praised the proposed aggregation provisions, which would "help prevent acquirers from splitting up transactions into small slices across multiple investment vehicles under their control to avoid reporting." However, they expressed concerns with the exemption provisions because they would "reduce the FTC's visibility into a large set of transactions involving non-controlling stakes." Commissioner Phillips issued his own statement explaining that acquisitions of less than 10 percent are "extremely unlikely to raise competition concerns" and therefore do not warrant the cost and burden associated with HSR filing requirements. These developments could affect HSR filing obligations in future mergers and acquisitions in the energy and chemicals industry, particularly for firms using MLP structures.

The notices were published in the Federal Register on December 1, 2020, and the comment period will end on February 1, 2021. While the FTC has not indicated when the rulemaking process will be completed, during a Q&A session FTC officials said there would be, as is typical, a delay between the publication of the final rules and their implementation.

FTC Launches Retrospective Analysis of Technology Transactions

Early in the year, the FTC announced it would require five large technology firms to provide information on prior acquisitions not subject to HSR reporting for the purpose of analyzing trends in acquisitions and deal structure and to assess whether these non-reportable transactions may pose competitive concerns. While not directly applicable to energy and chemicals industry participants, this retrospective analysis may hint at future FTC studies in other industries, especially given the expanded Merger Retrospective Program announced later in the year. In addition, these studies may portend changes in how the agencies consider acquisitions that are not reportable under the HSR Act, which comprises a significant number of deals in the E&P space due to existing HSR exemptions. Thus, any suggested changes resulting from the current technology study will be worth following.

Merger Enforcement Data and Trends

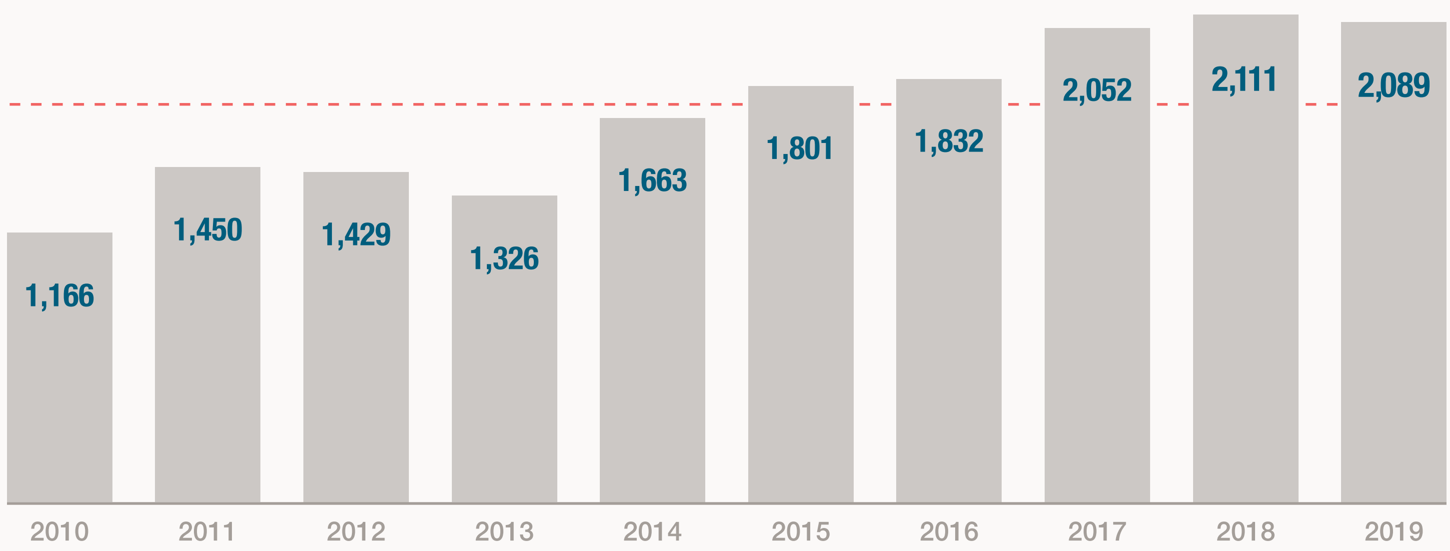
Merger enforcement was relatively active in 2019, the most recent year for which detailed enforcement data is available. The number of Hart-Scott-Rodino (HSR) filings dropped slightly in 2019 from the previous year for the first time since 2013, but the number of second requests increased by **32%**, to approximatly **3%** of all transactions after reaching a decade-low of **2.2%** in 2018.

The energy industry saw the lowest percentage of reported transactions across all industries (**6%**) since 2015, and the second-lowest percentage in ten years. Reported transactions in the chemical industry increased slightly to **4.9%** of all reported transactions, but remained well below their ten-year average. The agencies continue to focus resources on energy and chemical transactions, however, as initial investigations and second requests were up in both industries. The chemical industry received particularly close scrutiny in 2019, with initial investigation rates and second request rates both almost double the industry-wide average.

Number of Reported Transactions

From 2010 to 2019, there were a total of **16,919** transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act, an average of **1,692** per year. The number of transactions has increased in all but two years since 2010, including a slight decrease in 2019. There were **2,089** transactions reported in 2019.[1]

- - - Represents Average

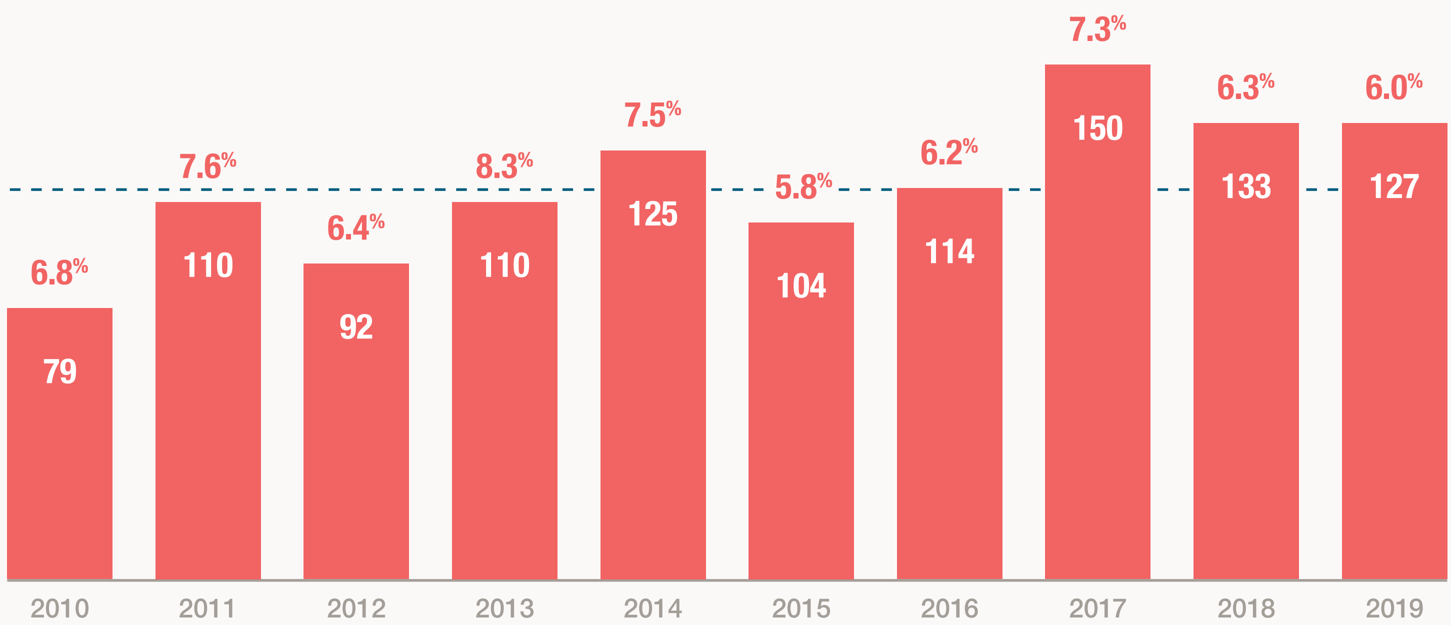


[1] All annual data is reported by the U.S. government's fiscal year, which runs from October 1 through September 30.

Energy Transactions

From 2010 to 2019, there were a total of **1,144** 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 and 2019.

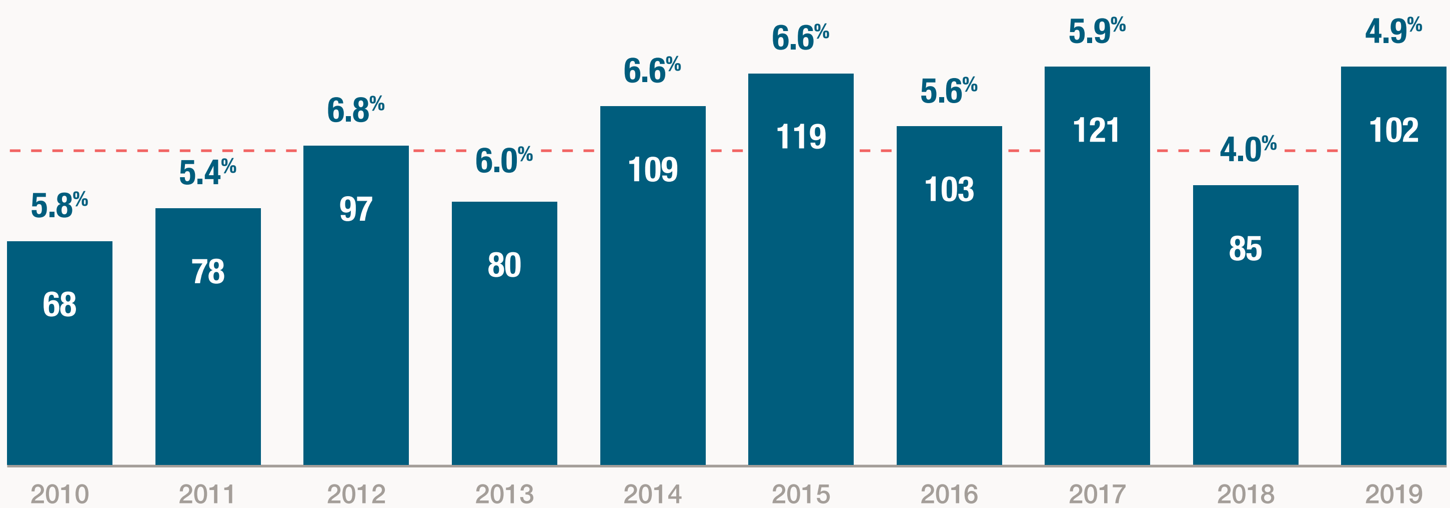
- - - Represents Average



Chemical Transactions

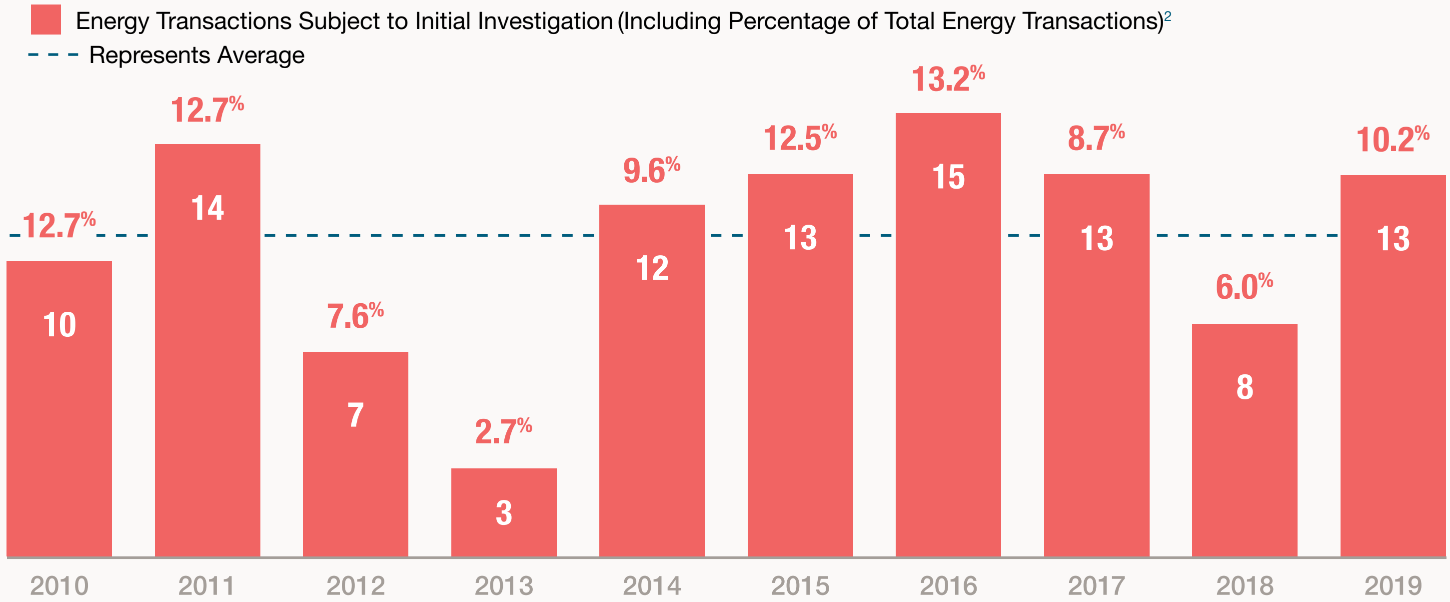
From 2010 to 2019, there were a total of **962** reported chemical and pharmaceutical transactions, representing on average just under **6%** of total transactions. The number of reported transactions in this industry sector increased sharply last year, from a five-year low in 2018.

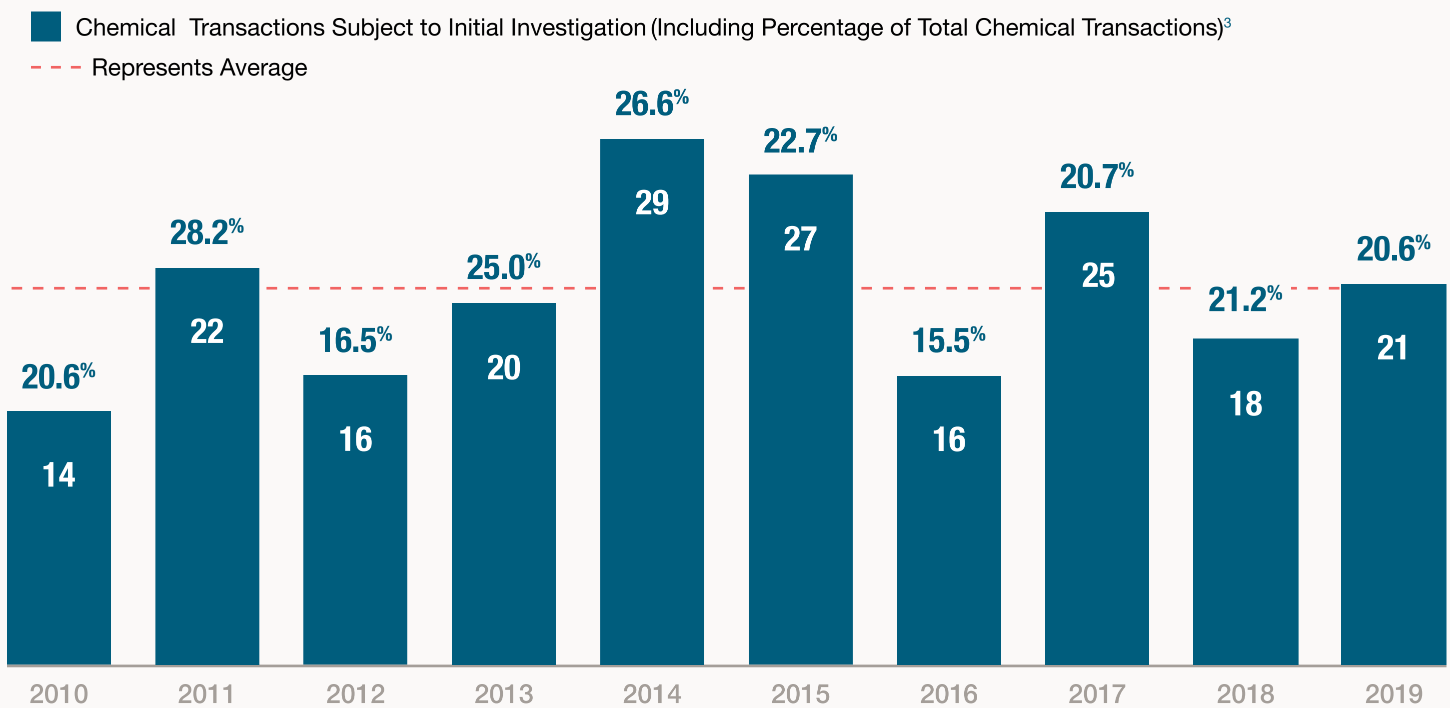
- - - Represents Average



Initial Investigations

On average, from 2010 to 2019, the federal agencies opened an initial investigation in **9.6%** of reported energy transactions and **21%** of reported chemical transactions, while the average across all industries was **15%**. In recent years, the energy industry has been slightly underrepresented as a percentage of agency investigations (**6.7%** of reported transactions but only **4.4%** of total investigations, on average since 2010), while the chemical industry has been overrepresented (**5.7%** of reported transactions but **8.4%** of total investigations, on average since 2010). The rate of initial investigations in reported chemical industry transactions stayed the same from 2018 to 2019 (**21%**). By contrast, the rate of initial investigations in reported energy industry transactions jumped from 6% in 2018 to 10% in 2019.





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

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

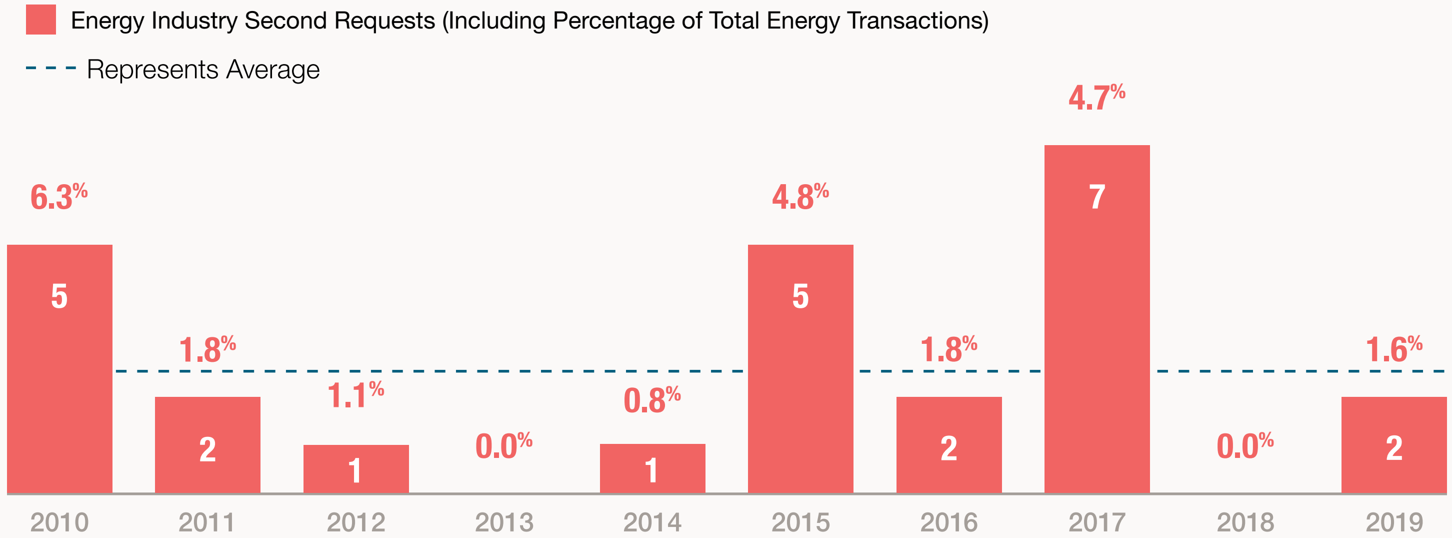
Second Requests

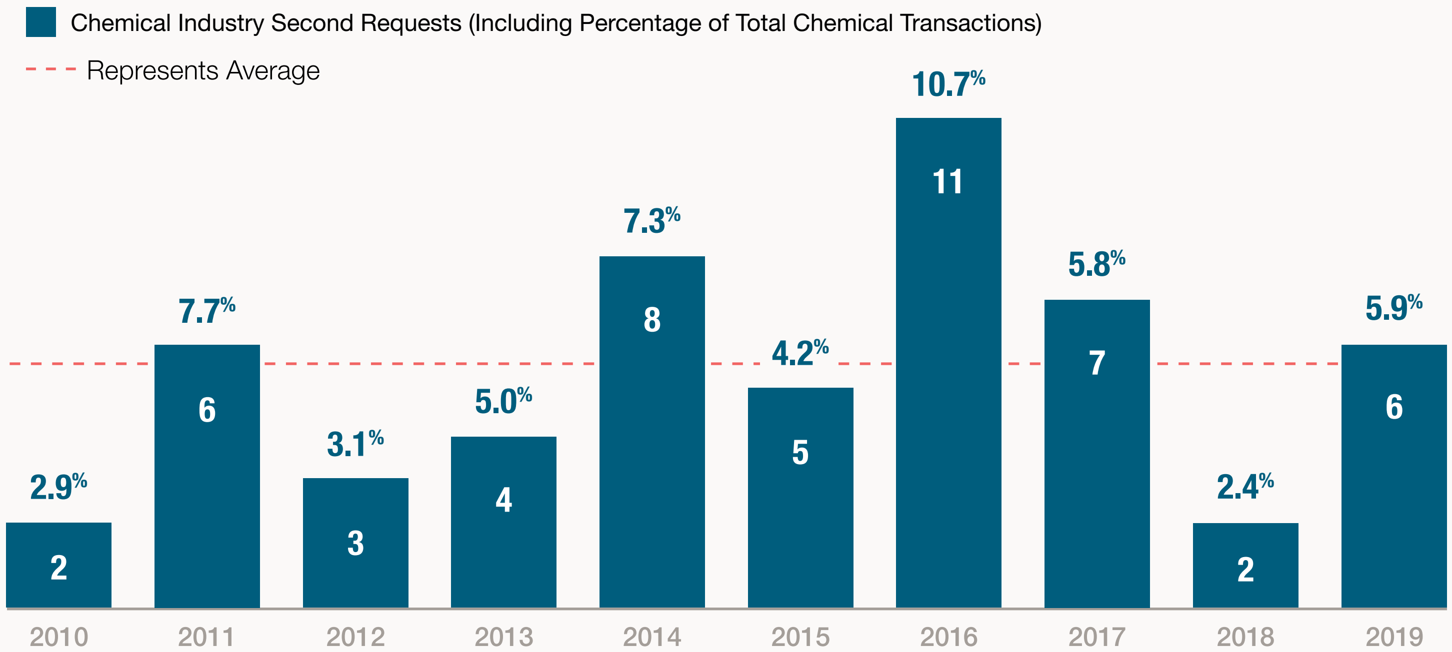
In 2019, the agencies issued second requests in **2.9%** of reported transactions across all industries, an increase of almost **32%** from a ten-year low of **2.2%** in 2018. From 2010 to 2019, there were a total of **25** second requests in the energy industry and **54** second requests in the chemical industry, out of a total of **509** second requests (**5%** and **11%**, respectively).

In 2019, second requests for the energy and chemical industries constituted **13%** of all second requests.[4] The chemical industry saw **6** second requests in 2019, representing **6%** of all reported chemical transactions, while the energy industry saw **2** second requests in 2019, representing just **1.6%** of all reported energy transactions.

From 2010 to 2019, the agencies issued a second request on average in **2.3%** of reported energy transactions (**23%** of initial investigations).

From 2010 to 2019, the agencies issued a second request on average in **5.5%** of reported chemical transactions (**26%** of initial investigations).



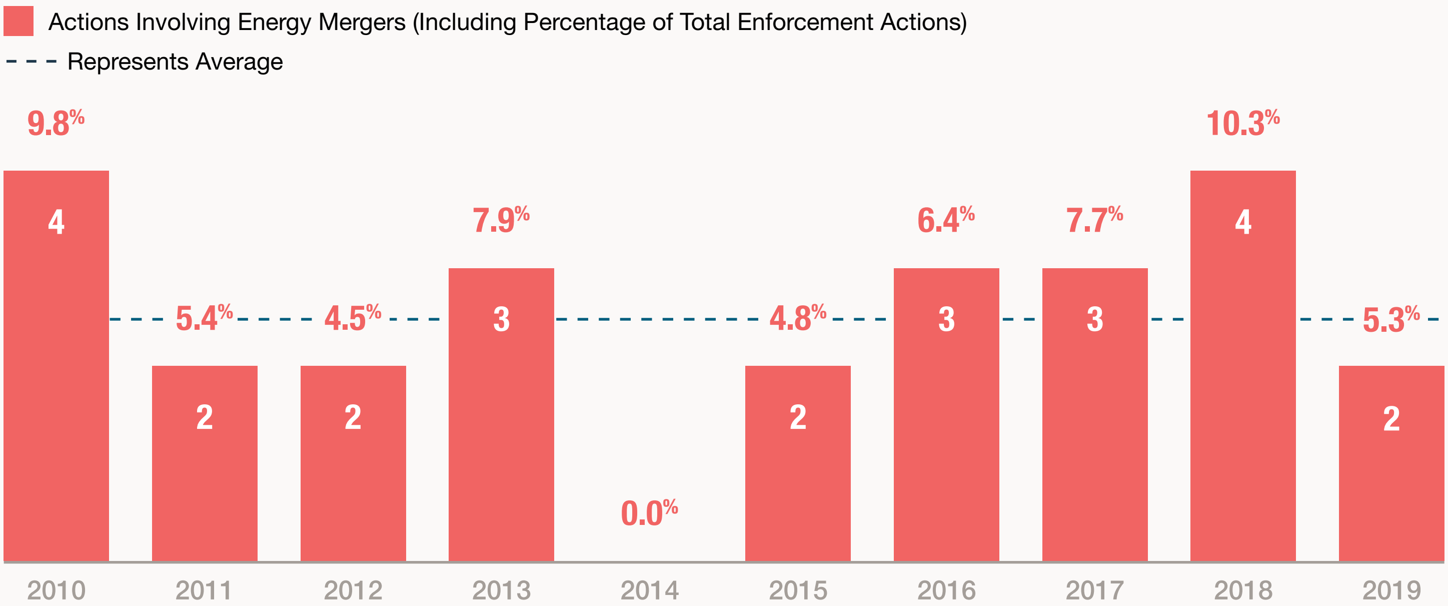


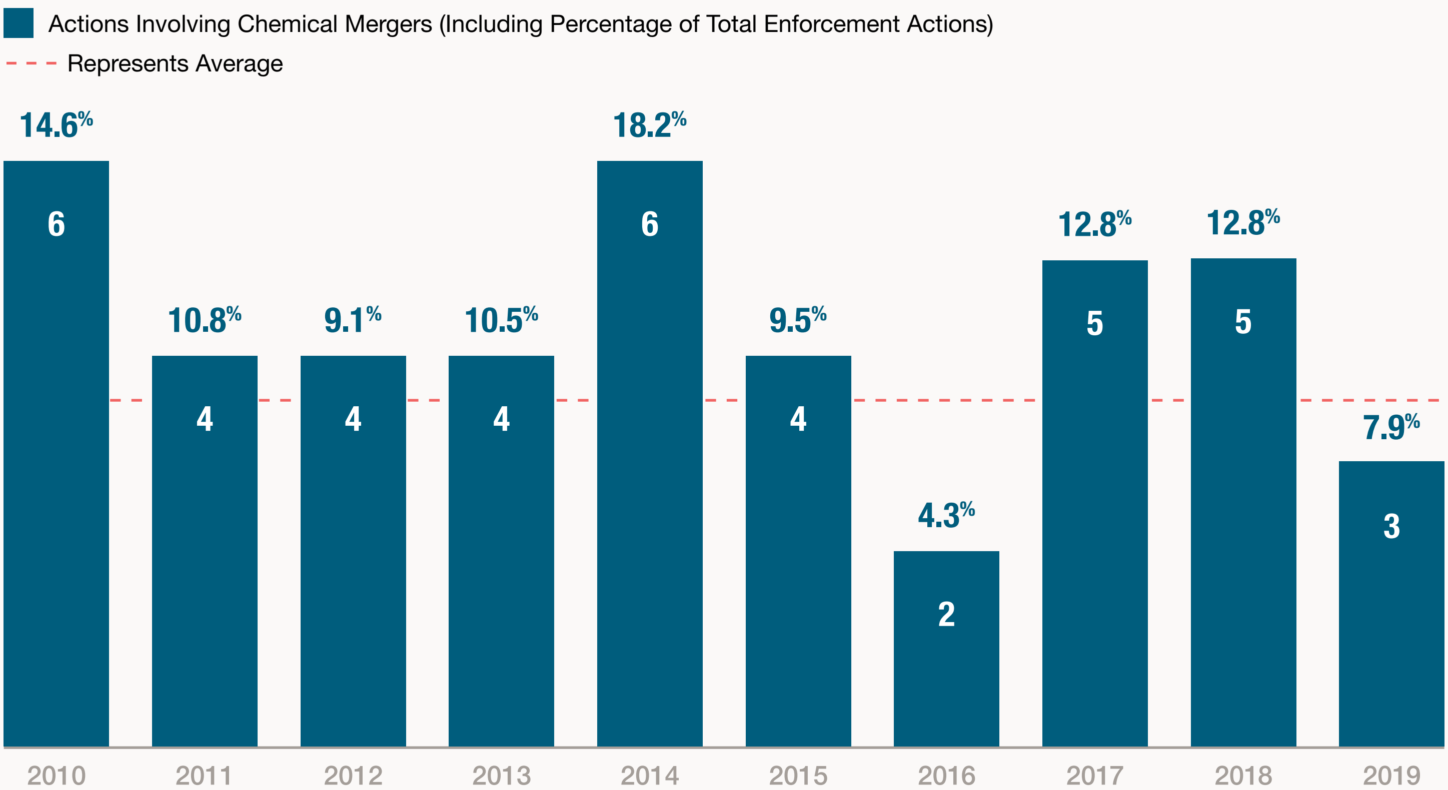
[4] The second request data in this section is tallied from the data provided in all HSR Annual Reports at Exhibit A, Table XI, titled: "Fiscal Year [Year] Industry Group of Acquired Person."

Merger Enforcement Actions

Overall: Since 2010, the enforcement agencies have brought a total of **398** merger enforcement actions, an average of **40** 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 virtually unchanged since 2017. During this time period, the FTC has brought **212** actions and the DOJ has brought **186** actions. From 2010 to 2019, the agencies brought a total of **25** actions involving energy mergers (**6%** of all actions), and **35** actions involving chemical mergers (**9%** of all actions). From 2010 to 2019, the agencies brought enforcement actions in just over **2%** of all energy transactions and nearly **4%** of all chemical transactions.

Merger Enforcement Remedies: From calendar year 2010 through 2019, the federal agencies have obtained the following remedies in merger enforcement actions: structural and behavioral remedies in **196** cases, structural remedies alone in **14** 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.





Merger Enforcement Cases

In 2020, the FTC sought relief to address competitive concerns for a number of transactions in the energy and chemical industries. The FTC obtained divestitures in two cases, challenged two transactions in federal court — succeeding in one and losing in the other — and sued a company for failing to comply with a divestiture order. As in 2019, however, the DOJ did not bring any merger enforcement actions involving energy or chemical companies in 2020.

The FTC challenged mergers involving the following alleged product markets:

- Hydrogen peroxide
- Retail sale of gasoline and diesel fuel
- Coal

Chemical Markets

Evonik Industries Ag/Peroxychem Holding Company

On August 2, 2019, the FTC issued an administrative complaint 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 alleged 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 simultaneously 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. On January 24, 2020, the district court denied the FTC's request for preliminary injunction. The district court concluded that the FTC failed to prove its relevant product market because it combined all hydrogen peroxide products in a single market without evidence supporting the substitutability of hydrogen peroxide products across a variety of end uses. The court also found that the FTC's proposed geographic market, which included 35 states, was similarly overbroad because it was not tailored to separate product markets for specific end uses of hydrogen peroxide. As to the transaction's effect on competition, the district court concluded that industry characteristics like long-term contracts, blind bidding, and sophisticated buyers make it unlikely that the transaction would increase the risk of coordination among suppliers. The lack of evidence showing that the companies would raise prices post-merger and the existence of other suppliers that could constrain post-merger pricing also led the district court to deny the FTC's preliminary injunction motion. Finally, the district court concluded that Evonik already resolved some of the issues raised by the FTC by agreeing with the Canadian Competition Bureau to divest a small plant in western Canada. On April 29, 2020, the FTC dismissed its complaint.

Energy Markets

Tri Star Energy/Hollingsworth Oil

On June 24, 2020, the FTC issued a complaint and proposed consent agreement in connection with Tri Star Energy, LLC's acquisition of retail fuel outlets from Hollingsworth Oil Company and related entities. The FTC's complaint alleged that the transaction would substantially lessen competition in the local retail fuel markets for Whites Creek and Greenbrier, Tennessee. Specifically, the FTC alleged that the acquisition "would create a merger to monopoly," leaving Tri Star Energy free to raise prices in those areas. The FTC's proposed settlement required Tri Star to divest retail fuel assets in Whites Creek and Greenbrier to Cox Oil Company, Inc. within ten days after Tri Star completed the acquisition. On August 14, 2020, the FTC announced that it had approved the final consent order by a vote of 3-0-2, without participation by Commissioners Rebecca Kelly Slaughter and Christine S. Wilson.

Arko Holdings/Empire Petroleum Partners

On August 25, 2020, the FTC issued an administrative complaint and proposed consent agreement relating to Arko Holdings Ltd.'s $400 million acquisition of retail fuel outlets and other interests from Empire Petroleum Partners, LLC. The FTC's complaint alleged that the acquisition would substantially lessen competition for the retail sale of gasoline and diesel fuel in seven local markets across Texas, Michigan, Indiana, and Maryland. It alleged that these fuel markets are often small and highly localized, and that the number of competitors post-transaction in all local markets would be three or fewer. In one local market for gasoline and in one local market for diesel fuel, the transaction would allegedly reduce the number of suppliers from two to one.

Under the terms of the proposed consent order approved the same day as the complaint, the parties committed to divesting one retail station to an independent buyer in each of the seven local markets within twenty days after finalizing the acquisition. The parties are also required to provide transitional services to the divestiture buyers for up to fifteen months. The Commission approved the proposed consent order by a vote of 3-0-2, without participation by Commissioners Rebecca Kelly Slaughter and Christine S. Wilson.

Peabody Energy/Arch Coal

On February 26, 2020, the FTC issued an administrative complaint challenging a joint venture between Peabody Energy Corporation and Arch Coal, Inc. that would combine the coal mining and sales operations of the parties' coal mines located in the Southern Powder River Basin (SPRB). The FTC argued that the parties were the two largest producers of SPRB coal and that "the joint venture would create a single entity with a dominant share of SPRB coal reserves, and a dominant share of sales to SPRB customers." The FTC estimated the parties' combined share of both SPRB coal reserves and coal production would total more than 60% and that the joint venture would not face any significant competition. The FTC also argued that competition from fuels other than SPRB coal would not replace the competition lost between Peabody and Arch because suppliers of natural gas, uranium, and renewable energy "do not bid against SPRB coal suppliers in [requests for proposal] or other competitive opportunities to supply SPRB coal-fired power generation units at all."

Simultaneously with the administrative complaint, the FTC filed a complaint in the United States District Court for the Eastern District of Missouri seeking a temporary restraining order and preliminary injunction blocking the deal. On September 29, 2020, the district court granted the FTC's request for preliminary injunction, recognizing that although coal producers face competition from other energy producers, competition between coal companies remains and that the proposed joint venture was likely to substantially lessen this head-to-head competition. The parties abandoned the joint venture that same day. The FTC's success in challenging the joint venture stands in contrast to the courts' rejection of the FTC's effort to block another SPRB transaction in 2004.

Alimentation Couche-Tard Inc./Crossamerica Partners LP

On July 6, 2020, the FTC filed a complaint in the United States District Court for the District of Columbia alleging that Alimentation Couche-Tard Inc. (ACT) violated the terms of a February 2018 order requiring it to divest retail fuel stations in Minnesota and Wisconsin to approved buyers no later than June 15, 2018. The FTC had previously settled allegations against ACT that its acquisition of almost 400 retail fuel stations across ten states from Holiday Companies would substantially lessen competition in ten local markets. The FTC's original complaint alleged that without divestitures, the acquisition would reduce the number of competitors in each relevant market to three or fewer, thus increasing the likelihood of both unilateral and coordinated anticompetitive effects. In settling the charges, ACT agreed to divest fuel stations in Minnesota and Wisconsin.

The FTC's 2020 complaint alleged that ACT violated the 2018 order by failing to complete any of the required divestitures by the deadline and failing to provide complete information about its divestiture efforts in March through May of that year. In a settlement filed on the same day as the complaint, ACT agreed to pay a $3.5 million civil penalty pursuant to Section 5(l) of the FTC Act, which imposes fines for violations of a prior FTC order. The FTC's final judgment motion asserts that the $3.5 million civil penalty is "a significant amount considering the relatively short duration of the core divestiture violations, coupled with the fact that defendants did eventually divest all of the retail fuel assets," and states that the fine would "serve the desired deterrent effect" by signaling to defendants and other industry participants that they must comply with the FTC's orders.

In an August 2020 blog post discussing the settlement, the Assistant Director for Compliance of the FTC Competition Bureau's compliance division warned that the case shows that "[a]ny deadline in a Commission order is a 'real' deadline, and failure to meet the deadline can have real consequences." The post explains that failure to meet a divestiture deadline constitutes a *per se* violation of an FTC order, and that although the FTC has discretion to grant a party an extension, merely seeking an extension does not guarantee that it will be approved.

Non-Merger Enforcement

DOJ has exclusive jurisdiction to bring charges for criminal antitrust violations, while both the DOJ and FTC investigate civil antitrust offences. The overall number of new criminal antitrust cases publicly filed by the DOJ in 2020 remains below historical levels. Significant developments in 2020 involving the energy and chemicals industries include:

- Congress reauthorized a key statute that provides incentives in civil actions to companies that self-report anticompetitive conduct under the Antitrust Division's Corporate Leniency program.
- DOJ obtained an additional settlement in its investigation into Korean fuel supply contracts.
- The Antitrust Division's Procurement Collusion Strike Force — unveiled in late 2019 to prioritize the detection and prosecution of collusion in the public procurement process — had a busy inaugural year, including securing its first indictment and adding new national partners. The Strike Force's work reportedly makes up an increasingly large portion of the Antitrust Division's open cases.
- DOJ obtained a guilty plea for a scheme to defraud Department of Energy's Strategic Petroleum Reserve program.
- The Antitrust Division opened and closed, without charges, an investigation into several car manufacturers' agreement with the State of California regarding fuel emissions standards.
- The Supreme Court announced that it will review the FTC's authority to pursue restitution in civil enforcement actions.

Cartel Enforcement

Congress permanently re-authorizes Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)

In 2020, Congress permanently reauthorized the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA). Originally passed in 2004, ACPERA provides powerful incentives for companies considering whether to self-report possible antitrust misconduct to the Antitrust Division and to cooperate in exchange for leniency under the Division's Corporate Leniency program. The Corporate Leniency program is a key tool in the Antitrust Division's enforcement arsenal. A successful corporate leniency applicant may receive full immunity for itself and may also obtain leniency for employees who also cooperate with DOJ. Prior to ACPERA's passage, companies considering self-reporting had to consider the likelihood of subsequent civil lawsuits involving statutorily enhanced damages of up to three times the harm caused by the conspiracy. Additionally, civil antitrust defendants face joint and several liability for damage inflicted by co-conspirators. ACPERA mitigates these civil liability threats by de-trebling potential damages and removing joint & several liability for the successful leniency applicant, thereby removing these key disincentives to self-reporting.

To qualify for the limitation on damages, ACPERA requires a leniency applicant to provide satisfactory cooperation to the civil claimants. Such cooperation typically requires providing a full account of all facts known to the applicant regarding the conduct at issue, usually in the form of attorney proffers and/or

witness interviews, as well as documents and other evidence. The original Act passed in 2004 included a sunset provision, meaning that the statute would expire if not periodically renewed. Congress's 2020 renewal is significant because it removes the sunset provision, making the reauthorization permanent.

Additional settlement in Korean fuel supply contracts investigation

In 2018 and 2019, DOJ investigated a decade-long bid-rigging and price-fixing conspiracy targeting fuel supply contracts to U.S. military bases in South Korea. In 2018, three companies pleaded guilty to antitrust and fraud-related charges. Two additional companies pleaded guilty in 2019. At least seven individuals have been indicted. In 2020, a South Korea-based logistics services company and its president (who, with his family, is the company's majority owner) entered into a civil settlement to resolve civil antitrust and False Claims Act violations related to the conspiracy. The settling defendants will pay $2 million to compensate the United States for losses sustained as the primary victim of the conspiracy. Section 4A of the Clayton Act allows the United States to obtain treble damages when the government itself is a victim. In recent years, the Antitrust Division has been particularly vocal about its use of Section 4A to extract civil damages on top of criminal fines for antitrust violations. The DOJ has obtained more than $200 million in civil penalties from the Korean fuel supply contracts investigation and approximately $150 million in criminal fines.

Antitrust Division's Procurement Collusion Strike Force expands

In November 2019, the Antitrust Division announced the creation of a new Procurement Collusion Strike Force to combat antitrust crimes and related schemes in government procurement, grant and program funding. Now embarking on its second year, the Strike Force announced eleven new national partners in November 2020. The U.S. Attorney Offices in nine jurisdictions, as well as the Office of Inspector General at the Department of Homeland Security and the Air Force Office of Special Investigations, have now joined the Strike Force, bringing to 29 the total number of federal agencies and offices dedicated to prioritizing investigations of criminal antitrust violations in the public procurement process. That number jumps to 46 when state and local partners are included. In 2020, the Division also announced the appointment of the Strike Force's first permanent director, Daniel Glad, and assistant director, Sandra Talbott — both of whom hail from the Antitrust Division's Chicago Office.

During its inaugural year, the Strike Force trained more than 2,000 investigators, data scientists, and procurement officials on how to identify red flags in the procurement process that may indicate collusion. More than fifty federal, state, and local government agencies have contacted the Strike Force seeking opportunities to partner on procurement investigations, request training, and ask for input on how to improve procurement policies and practices. Going forward, the Strike Force plans to mine and analyze procurement bid and award data to proactively identify possible red flags of collusion — both to provide further evidence of alleged conspiracies already under investigation and to develop leads to open new investigations.

Strike Force investigations now comprise a significant portion of the Antitrust Division's enforcement docket, with more than one-third of the Division's open investigations reportedly relating to conduct affecting public procurement. Multiple grand jury investigations have been opened in connection with the Strike Force's work. The COVID-19 pandemic presents unprecedented conditions for companies to contract with the government to provide emergency-related manufacturing, goods, and services, often on short notice. Recognizing that such "emergency" conditions may be conducive to attempts to shortcut the procurement process, the Strike Force claims to be on "high-alert" for collusive conduct related to government contracting and procurement connected with COVID-19 initiatives. Conduct giving rise to criminal antitrust violations may also be the basis for parallel False Claims Act claims if prosecutors uncover evidence of an intent to defraud one or more government agencies.

Strike Force brings first indictment

In October 2020, the Strike Force announced its first criminal indictment, charging a North Carolina-based engineering firm and a former executive with conspiring to rig bids for aluminum structure projects to be funded by the United States and the North Carolina Department of Transportation. In addition to antitrust crimes, the defendants also were charged with fraud for allegedly submitting bids that falsely certified they were competitive and free of collusion.

Guilty plea in connection with Department of Energy's Strategic Petroleum Reserve

In September 2020, Louisiana-based Cajan Welding & Rentals Ltd. (Cajan Welding) pleaded guilty to conspiring to defraud the United States and to violating the Procurement Integrity Act. Cajan Welding obtained from unnamed co-conspirators non-public pricing and cost information not disclosed in official bid solicitation packages for contracts to provide maintenance services and equipment rentals to the U.S. Department of Energy for the Strategic Petroleum Reserve (SPR). Court documents reveal that Cajan Welding improperly used the non-public information to gain an unfair competitive advantage in the bidding process and was awarded more than 50 subcontracts and received more than $15 million in payments from the Department of Energy during the course of the nearly 15-year scheme.

Investigation regarding California emission standards agreement

In August 2019, the State of California announced voluntary framework agreements with several automakers regarding commitments to support continued reduction of vehicle emissions. Under the agreements, the automakers, which together represent more than a quarter of the U.S. auto market, commit to increasing their average fuel economy to about 51 miles per gallon by 2026 — which is roughly on pace with federal standards previously rolled out by the Obama administration. In September 2019, less than a month after the California announcement, the Trump administration took steps to revoke California's authority to set its own vehicle emissions rules.

Around the same time, DOJ reportedly opened an antitrust investigation to probe whether the participating automakers violated federal antitrust laws by working together to reach the emissions deal with California. Civil subpoenas reportedly were issued to the car makers in late 2019. DOJ's probe was heavily criticized from the outset, and one career antitrust prosecutor testified to Congress that the investigation circumvented the normal decision-making procedures within the Antitrust Division. DOJ closed the inquiry, without charges, in February 2020.

Supreme Court takes up challenge to FTC's power to pursue restitution

In July 2020, the Supreme Court granted certiorari in AMG Capital Management v. FTC to consider the FTC's authority under Section 13(b) of the FTC Act to obtain restitution in a civil enforcement action. The FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices, and permits the FTC to pursue enforcement through administrative proceedings and issue cease and desist orders to violators. In addition, Section 13(b) authorizes the FTC to seek injunctions in federal court.

The Supreme Court will consider whether a federal court's authority to issue an injunction under Section 13(b) also includes the authority to award restitution and other forms of monetary equitable relief. In the decision below, the Ninth Circuit upheld a district court order requiring AMG to pay the FTC more than a billion dollars in restitution. Oral argument is scheduled for January 13, 2021.

In July, the Court also granted certiorari for FTC v. Credit Bureau Center, a companion case from the Seventh Circuit raising the same question about the scope of the FTC's authority to seek restitution under Section 13(b). In *Credit Bureau Center*, however, the Seventh Circuit found that the FTC did not have restitution authority. Although not a member of the three-judge panel that decided the case, then-Circuit Judge Amy Coney Barrett was a member of the Seventh Circuit Court of Appeals when the matter was heard and decided in 2019. The Supreme Court vacated its prior order granting certiorari for the Seventh Circuit case in November 2020, shortly after Justice Barrett was seated.

Other Agency Developments

Antitrust regulators' public comments in 2020 understandably focused on the COVID-19 pandemic and other hot-topic issues like privacy, data security, digital markets, and tech. Nevertheless, DOJ and FTC activity demonstrates that federal regulators continue to closely monitor the energy and chemical industries given their direct impact on consumers' wallets.

Enforcer speeches & testimony

None of Assistant Attorney General Makan Delrahim's speeches or those of his deputies touched on the energy or chemicals industry in a substantive manner. Similarly, none of the speeches given by FTC commissioners or senior agency officials over the past year focused on either industry. Agency congressional testimony rarely delved into the energy or chemicals industry, and Congress did not express specific concerns about antitrust enforcement in those industries.

Proposed legislation & regulations

There were a handful of competition-related rule-makings relevant to the energy and chemicals industries in 2020. In addition to the developments described below, the FTC and DOJ proposed changes to the rules implementing the Hart-Scott-Rodino Act; these proposed amendments are described in the merger enforcement policy developments chapter.

FTC sought comments on prohibition of Energy Market Manipulation Rule

In May 2020, the FTC announced that it was seeking comments on whether to make changes to its Prohibition of Energy Market Manipulation Rule. The rule prohibits fraudulent or deceptive conduct in connection with wholesale purchases or sales of crude oil, gasoline, or petroleum distillates. The FTC can sue violators of the rule in federal court, which can lead to civil penalties of up to $1 million a day for each violation, in addition to other remedies available under the FTC Act. The FTC's request for comments was part of its routine review of all current FTC rules and guides. The comment period ended in September 2020. Only one substantive comment was submitted, which advocated for withdrawing the Rule given that the Commodity Futures Trading Commission has authority to prohibit fraud and manipulation in the wholesale petroleum markets.

FTC sought comments on proposed changes to the Energy Labeling Rule

In March 2020, the FTC announced that it was seeking comments on proposed changes to its Energy Labeling Rule. 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 range for comparing the highest and lowest energy costs for all similar models. The FTC's proposed changes would not affect the Rule's substantive requirements, but instead would apply them to additional products, such as portable air conditioners. Commissioner Wilson previously criticized the Rule for its highly prescriptive labeling requirements, including the specific weight and adhesiveness of the paper a manufacturer must use when printing the EnergyGuide label. In response, the FTC sought comments as to whether a more flexible approach to such labeling requirements would be sufficient. The comment period ended in June 2020. Comments from various trade associations advocated for transitioning away from physical labels in favor of providing label information online. Others criticized the FTC's proposal to delay mandatory labeling for portable air conditioners until 2025 and urged the FTC to issue a final rule in advance of new Department of Energy efficiency metrics going into effect in 2023.

On December 22, 2020, the FTC announced its final amendment to the Rule, which adopted proposals from the public comments, including moving up the final compliance date to October 1, 2022 and conforming the Rule with new DOE energy descriptors for central AC units.

FTC & DOJ Position Statements to Courts & other agencies

FTC Commissioner Slaughter comments on FERC's proposed rulemaking regarding the Public Utilities Regulatory Policy Act

In November 2019, FTC Commissioner Slaughter provided a comment on FERC's Notice of Proposed Rulemaking regarding sections 201 and 210 of the Public Utilities Regulatory Policies Act of 1978 (PURPA). PURPA requires electric utilities to purchase renewable energy and was enacted at a time when Congress was concerned about fossil fuel scarcity and cost overruns at incumbent utility facilities.

In her comment, Commissioner Slaughter urged FERC to "help foster the transition to low-cost, renewable energy sources by promoting competition," and expressed her concern that "some proposed PURPA reforms may tip the competitive balance in favor of incumbent utilities and against independent renewable power producers that provide clean energy alternatives for consumers." Specifically, Commissioner Slaughter advocated for FERC to establish competitive bidding guidelines for stakeholders to use to oversee competitive solicitations for energy needs. She explained that a competitive bidding process could result in renewable energy's rapidly decreasing cost putting "maximum pressure on both new and pre-existing fossil fuel-based sources of electricity."

Commissioner Slaughter also expressed concern regarding the proposal to replace long-term contracts in favor of short-term rates prevailing at the time energy is delivered. She explained that such long term contracts "help facilitate financing for renewable energy-based developments," and therefore their removal would hamper renewable-energy based firms' ability to compete. Finally, she questioned whether there was adequate support for the proposal to reduce the threshold at which power producers are presumed not to have non-discriminatory market access in competitive markets.

On July 16, 2020, FERC issued its final rule that largely adopted the initial proposed rulemaking.

FTC annual report on concentration in the ethanol 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.

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." 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. Most market participants believe that the U.S. ethanol industry will meet the revised RFS requirement. As in previous reports, the 2019 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, and the demand for gasoline blends with higher ethanol content has not changed significantly.

Other notable developments

As noted in our 2018 Report, the FTC implemented amendments to its R-value Rule, which requires businesses to provide information to customers regarding an insulation product's ability to restrict heat flow (indicated by the product's "R-value"). In July 2020, the FTC published a blog post regarding its enforcement actions against several companies that allegedly made deceptive R-value claims pertaining to their architectural coatings products. The blog post indicates that the cases "serve as a reminder for companies to substantiate their R-value, energy-savings, and money-savings claims."

In addition, the FTC published two working papers related to the energy and chemicals market. The first, published in July 2020, examined "the change in relative retail gasoline prices after refiners exited gasoline retailing beginning in the mid-2000s." The paper found that "the average retail price of gasoline was effectively unchanged as the result of vertical separation." The second paper, also published in July 2020, studied the effects of the 2018 merger of Agrium and PotashCorp, which created the world's largest manufacturer of potash, from which potassium is extracted and used as a key ingredient in agricultural fertilizer. The paper found that the firms were not able to impose anticompetitive price increases after the merger.

2020 State & Private Antitrust Litigation Developments

The litigation decisions of 2020 address disputes and facts that emerged over the previous decade, long before the unprecedented market dislocations of the pandemic and the severe impacts those dislocations had on energy and chemical market participants. But this year's decisions may nevertheless hold an important lesson for the disputes that will undoubtedly filter through the courts in the years to come: not every market manipulation or intervention necessarily implicates competition law. 2020 saw courts and litigants grappling with questions of antitrust injury and standing arising from alleged market manipulation, with notable examples of claims failing when the plaintiffs did not directly participate in markets affected by coordinated conduct, or when the plaintiffs alleged harm by unilateral conduct that, even if manipulative in some fashion, was not necessarily anticompetitive. The 2020 decisions also reveal ongoing skirmishes at the borders of regulatory/state-action immunity, with defendants getting a filed-rate doctrine win in the First Circuit but plaintiffs holding the line on the scope of the immunity afforded by state drilling permit processes. The U.S. Department of Justice also made its presence felt in private litigation this year, filing amicus briefs on commerce clause and monopolization issues. Below, we discuss decisions, settlements, and new case filings in the oil and gas, power, refined products, and chemical sectors.

Oil & Gas Industry

Supreme Court declines certiorari for Brent futures manipulation claims that failed to allege antitrust injury

Prime International Trading, LLC v. BP, PLC, 784 F. App'x 4 (2d Cir. 2019), cert. denied, 141 S. Ct. 113 (2020)

In June 2020, the United States Supreme Court denied certiorari in the appeal from the Second Circuit's affirmance of dismissal in *Prime International Trading, LLC v. BP, PLC*, 784 F. App'x 4 (2d Cir. 2019).

In *Prime International*, 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.

Claims that strategic gas trading raised prices not enough to plead antitrust injury

City of Long Beach v. Total Gas & Power North America, Inc., 465 F. Supp. 3d 416 (S.D.N.Y. 2020)

In June 2020, the District Court for the Southern District of New York dismissed a putative class action brought by the City of Long Beach, California. Long Beach alleged that Total Gas & Power North America (Total Gas), Total S.A., and Total Gas & Power, Ltd. (Total Ltd.) had manipulated indices used to price natural gas contracts traded at four hubs in the southwestern United States. This manipulation allegedly inflated prices for natural gas Long Beach purchased. Total S.A. and Total Ltd. moved to dismiss for lack of personal jurisdiction; Total Gas moved to dismiss for failure to a state an antitrust claim. The court granted both motions.

Long Beach asserted claims against Total Gas for monopolization and attempted monopolization under Section 2 of the Sherman Act. Long Beach alleged Total Gas influenced the price for natural gas, and thereby increased its profits on derivatives trading, by manipulating index prices through bid-week transactions. Allegedly, Total Gas traded large volumes of futures and swaps using floating rates based on index prices at the hubs, and then, during bid week, traded large volumes of natural gas futures using fixed rate prices. These bid-week trades shifted the index prices in directions favorable to its positions on its pre-bid-week trades, thus netting Total Gas over $9 million. However, as the court observed, the market manipulation effect was allegedly derived not from Total Gas's size or market power, but from strategically timed trades that any other participant in the market could have made. Because that strategic trading did not necessarily involve the willful attainment, maintenance, or exercise of monopoly power, the court concluded the trading was not anticompetitive. Without an allegation of anticompetitive conduct, Long Beach did not have antitrust standing to pursue claims based on the manipulation of prices at the hubs.

Long Beach appealed the district court's dismissal to the Second Circuit Court of Appeals, where the appeal remains pending as of this writing.

State action on drilling permits does not immunize underlying leases from antitrust scrutiny

Black v. Occidental Petroleum, 2:19-cv-00243 (D. Wyo.)

In May 2020, a federal district court in Wyoming, denying a motion to dismiss claims that the defendants monopolized oil and gas exploration and production, concluded that

Wyoming's state permitting process was not enough to clothe the defendants' alleged monopoly with state action immunity.

In November 2019, a group of landowners in east Laramie County, Wyoming, sued Occidental Petroleum Corporation and its subsidiary Anadarko Petroleum Corporation for monopolization, attempted monopolization, and restraint of trade under Section 2 of the Sherman Act, Wyoming antitrust law, and the Wyoming Constitution. Plaintiffs allege Anadarko obtained drilling permits for Anadarko-owned mineral interests that, under Wyoming spacing and permitting rules, necessarily covered neighboring landowners' mineral interests and effectively foreclosed those landowners from leasing to potential drillers. Plaintiffs further allege that Anadarko entered into unreasonable inter-affiliate lease arrangements, allegedly including leases with above-market 30% royalty rates between Anadarko's mineral-owning subsidiary and its drilling subsidiary. Plaintiffs allege that as a result of the permits and leases, Anadarko has not drilled a well in the area since 2013 and has no intention of doing so.

In December 2019, defendants moved to dismiss under the state-action doctrine and the *Noerr-Pennington* doctrine. Specifically, defendants argued the drilling permits at issue were issued by the state of Wyoming, and thus the state authorized defendants' conduct. Defendants further argued plaintiffs failed to adequately allege a cognizable geographic market, anticompetitive conduct, or antitrust conduct, and disputed standing on the theory that plaintiffs' injuries were not redressable.

The court denied defendants' motion to dismiss, finding the motions "fail[ed] to embrace a critical component of Plaintiffs' argument." The court reasoned that although defendants enjoy state-action immunity for acquiring drilling permits, defendants' leases may still "give rise to liability because the State of Wyoming does not exercise active supervision over the terms of oil and gas leases." Because the leasing process and the permitting process are distinct processes, the court concluded the "active supervision" element of the state action doctrine must be satisfied as to both processes where the allegedly anti-competitive conduct embraced both processes. The court explained the purpose of the state-action doctrine is to "protect the sovereignty of '***actual*** state involvement,' not to protect 'private price-fixing arrangements under the general auspices of state law,'" quoting *FTC v. Ticor Title Ins. Co.,* 504 U.S. at 633 (1992) (emphasis added). Similarly, the court disagreed with defendants' *Noerr-Pennington* argument, and concluded that even if Anadarko acquired an alleged monopoly via permits issued by the State of Wyoming, defendants could still be "liable as private parties for anticompetitive leasing practices conducted without state supervision."

As to the remaining arguments, the court found plaintiffs plausibly alleged injury and anticompetitive conduct, and agreed with plaintiffs that injunctive relief against enforcement of supra-competitive royalty terms could redress plaintiffs' alleged harm. And while the court agreed with defendants that plaintiffs' definition of the relevant geographic market affected by the alleged anticompetitive conduct was lacking, the court found the deficiency was insufficient to warrant dismissal of the case. Discovery in the case is proceeding.

Trader claims investors manipulated crude futures during pandemic shock

Mish International Monetary Inc. v. Vega Capital London, Ltd., 1:20-cv-04577 (N.D. Ill.)

In August 2020, a commodity trader brought antitrust claims arising out of the widely-publicized "negative price" for crude oil that energy markets experienced as they adjusted to the shock of the pandemic.

Commodities trader Mish International filed a purported class action against Vega Capital and 100 John Doe investors, alleging violations of the Commodity Exchange Act and the Sherman Act. In particular, Mish alleges that the defendants "combined, conspired, and agreed to manipulate and fix NYMEX WTI crude oil futures prices during at least the Class Period" in violation of the Sherman Act. That purported Class Period — April 20th through 21st, 2020 — was the day when, for the first time, WTI light sweet crude oil futures traded at negative prices, ultimately settling at negative \$37.63/bbl. According to the complaint, at least a dozen traders combined with Vega Capital to sell May 2020 WTI futures contracts at "uneconomical" prices in order to depress the price of the May 2020 contract. The plaintiff alleges that prior to their coordinated, "aggressive" sell-off, these traders had purchased large volumes of Trading at Settlement (TAS) May 2020 contracts. By combining to depress the May 2020 contract price, these traders therefore stood to gain substantially on their TAS contracts. Per the complaint, the defendants' combination netted them as much as \$500 million.

Vega Capital has moved to dismiss for insufficiency of the pleadings. Vega argues the plaintiffs failed to allege facts plausibly demonstrating Vega entered into an agreement, failed to allege an unreasonable restraint on trade, and failed to allege a causal connection between Vega's actions and the class representative's alleged harm. As of this writing, the motion remains pending.

Power

First Circuit affirms filed-rate dismissal of gas-price manipulation claims

PNE Energy Supply, LLC, et al. v. Eversource Energy, 974 F.3d 77 (1st Cir. 2020)

In September 2020, the First Circuit affirmed a district court ruling that the filed-rate doctrine required dismissal of wholesale electricity purchasers' antitrust claims. In *PNE Energy Supply*, the District Court of Massachusetts dismissed putative class claims that the defendant natural gas retailers coordinated the activities of their member companies to restrict natural gas supply and drive up prices. The plaintiffs alleged defendants, using "no-notice" contracts for transmission capacity on the Algonquin Pipeline pursuant to Algonquin's FERC-approved tariff, overscheduled and then withheld transmission capacity from the market.

In 2019, the First Circuit affirmed dismissal of an electricity-consumer suit based on the same conduct and on the same legal grounds in *Breiding v. Eversource Energy*, 939 F.3d 47 (1st Cir. 2019). PNE Energy attempted to distinguish its suit from *Breiding* with arguments that (1) the challenged activity took the form of a "refusal to deal" in the short-term secondary capacity market, a market not addressed in *Breiding* and not regulated by the FERC tariffs, and (2) defendants manipulated a price index, the Algonquin Citygate Price, purportedly rendering the filed-rate doctrine inapplicable.

Neither of the arguments swayed the First Circuit. First, the appeals court reasoned that a "refusal to deal" in the secondary capacity market was simply a different way of describing reservation of excess capacity under FERC-approved tariffs without using or reselling that capacity. The court concluded that, given the market's limited transmission capacity, the balancing of competition and reliability of the natural gas supply was squarely within FERC's regulatory ambit and was thus covered by the filed rate. Second, the alleged price-index manipulation was alleged to be the result of defendants' refusal to release or sell transmission capacity (which allegedly drove up the average price of natural gas, and thus increased the index price). But again, the court said, the reservation of unused pipeline capacity was covered by the filed rate, regardless of the specific secondary impact alleged. Because neither argument distinguished the case from the logic of *Breiding*, the First Circuit held that the filed-rate doctrine applied and affirmed dismissal.

Texas statute favoring line construction by incumbent utilities found constitutional; DOJ urges reversal

NextEra Energy Capital Holdings, Inc. v. Paxton, No. 20-50160 (5th Cir.)

In 2019, NextEra Energy Inc., a Florida-based producer of wind and solar energy, sued the state of Texas over S.B. 1938, a recently passed state law that gives incumbent utilities a right of first refusal for Texas Public Utility Commission approval to construct new electricity transmission lines that would connect to existing service lines. NextEra alleges that S.B. 1938 discriminates against out-of-state energy providers trying to enter the Texas market by giving favorable treatment to in-state utility providers. In March 2020, a federal district judge in the Western District of Texas dismissed NextEra's complaint for failure to state a claim, holding that the law was primarily intended to regulate utility lines within the state of Texas, not the transmission of electricity in interstate commerce, and thus did not implicate the commerce clause. The district court also held that the law did not discriminate against out-of-state providers, since an incumbent utility could be owned or acquired by an out-of-state provider. NextEra appealed to the Fifth Circuit, and the Antitrust Division of U.S. Department of Justice filed an amicus brief on the commerce clause issue, arguing that the district court's decision should be vacated and remanded for reevaluation of the motion to dismiss. Arguments in the case were heard before a Fifth Circuit panel in June, and a decision is pending

Solar users appeal dismissal of utility monopolization claims; DOJ urges reversal

Ellis v. Salt River Project, No. 20-15301 and 20-15476 (9th Cir.)

In February, plaintiffs asked the Ninth Circuit to reverse a district court dismissal in favor of Salt River Project Agricultural Improvement and Power District (SRP), a public utility company in Arizona that charged different rates and additional fees to electricity customers who also used solar energy to supply some of their own electricity. The plaintiffs, Arizona residents who self-generate some of their electricity through the use of solar energy systems they privately own, allege that SRP set higher rates for solar-generating customers as a way to stamp out competition from solar energy producers and maintain monopoly power over electricity generation.

The district court dismissed the case for failure to state a claim, finding that while plaintiffs properly alleged SRP possessed monopoly power and engaged in exclusionary conduct by adopting a fee structure to deter a competitive threat from solar, the plaintiffs had not alleged an antitrust injury because their injuries did not stem from a restraint of competition. The court reasoned that, because plaintiffs pleaded households could not economically shift fully from SRP-generated power to self-generated solar either before or after SRP adopted its rate structure, the anticompetitive nature of SRP's conduct was not itself injuring the plaintiffs. Instead, the use of an "uneconomical" solar product was the source of the plaintiff's injury. The court concluded that SRP's higher prices for solar customers would actually encourage alternative energy providers to compete with SRP and serve solar-generating households.

The plaintiffs appealed the decision to the Ninth Circuit in February, and the Antitrust Division of the U.S. Department of Justice filed an amicus brief supporting the plaintiffs in July. The Division argued that the SRP is using its monopoly power to "penalize" customers for seeking to obtain energy from a rival power source, discouraging investment in SRP's rivals, and violating antitrust law. Argument is scheduled for February 2021.

The Ninth Circuit has already weighed in on a similar case, ruling in 2017 that SRP could not immediately appeal a federal district court order denying a motion to dismiss based on the state-action immunity doctrine. This previous case was brought by SolarCity Corp., a solar energy provider owned by Tesla, Inc., and alleged antitrust violations for similar SRP actions. SRP appealed the Ninth Circuit's decision to the U.S. Supreme Court, which granted certiorari, but did not decide the case because it settled before oral argument. However the Ninth Circuit decides the current appeal, the Supreme Court may finally have a chance to weigh in on the legality of SRP's pricing approach.

Refined Products

Faulty market definition sinks Kentucky AG's gasoline price manipulation case

***Commonwealth of Kentucky v. Marathon Petroleum Company LP*, 3:15-cv-00354 (W.D. Ky.)**

In June 2020, a Kentucky district court dismissed a state Attorney General's market manipulation claims against a petroleum refiner after excluding the State's sole expert witness.

In May 2015, the Attorney General of Kentucky brought a civil antitrust lawsuit against Marathon Petroleum Corporation and its subsidiaries, alleging that they illegally manipulated and attempted to manipulate the market for reformulated gasoline in Louisville and Northern Kentucky by controlling the influx into the region of reformulated blend-stock for oxygenate blending, which for practical reasons must be blended into gasoline near the point of final sale. In Kentucky, Marathon and its subsidiaries operate as petroleum refiners, marketers, and transporters. Additionally, Marathon was alleged to be the largest supplier of gasoline in Kentucky with a wholesale market share approximating 90 to 95 percent in the Louisville and Northern Kentucky markets. The State argued that Marathon entered into supply agreements with horizontal competitors that reduced incentives for competitors to enter the market, allowing Marathon to inflate the price of gasoline relative to prices in comparative competitive markets.

In 2020, the district court granted defendants' motion to exclude the State's only expert witness. The State had retained an economics professor to testify as an expert about the relevant market and the State's antitrust injury. Defendants did not challenge the State's expert's qualifications but argued that the methodology he employed was deficient. The court agreed. The court determined that the expert failed "to identify a reliable geographic market" because he failed to employ the hypothetical-monopolist or SSNIP ("small but significant and non-transitory increase in price") test to define a geographic region in which a sole seller could raise prices without customers defecting to competitive supplies. The court further observed the expert failed to account for sources of reformulated blend-stock outside Kentucky trucked into the proposed market by Marathon's refiner/retailer competitors, which demonstrated that the true relevant market for reformulated gasoline components included suppliers outside the expert's proposed market. The court also found the expert's damages calculations did not establish injury. The expert employed a regression analysis to compare Kentucky gas prices to prices in allegedly comparable cities selected by counsel, but failed to control for extraneous factors that might affect gas prices in the three regions, like population, proximity to supplies of refined gasoline, or demand for gasoline.

The court concluded that the State, left without a testifying expert, had not presented any triable issues of fact and therefore granted defendants' motion for summary judgment on the State's antitrust claims. With the antitrust claims having been dismissed, the court declined to exercise supplemental jurisdiction over the State's remaining state law claims, and dismissed those claims without prejudice.

Fact errors in collusion complaint not enough to earn sanctions for refiners

Bartlett v. BP West Coast Products, Lead Case No. 3:18-cv-01374 (Consolidated with Case No. 3:18-cv-01377) (S.D. Cal.)

A district court denied gas refiners' motions seeking sanctions against putative class action plaintiffs for including factually incorrect allegations in a cartel complaint.

In Bartlett, a putative class of California retail fuel purchasers is suing several California refiners, accusing them of conspiring to artificially inflate gas prices in the state in 2012 and 2015. Plaintiffs accuse defendants of publicly blaming these spikes on operational disruptions at certain refineries, and allege these disruptions were a sham cover for defendants' alleged anti-competitive conduct. In May 2019, the district court granted defendant oil refiners' motion to dismiss in part, dismissing certain claims on statute of limitations grounds, but allowing more recent claims to go forward despite the defendants' Twombly arguments.

In January 2020, defendant Tesoro Refining and Marketing Company moved for Rule 11 sanctions against plaintiffs. The plaintiffs' complaint included discussion of comments made by Tesoro's CEO on an earnings call regarding Tesoro's ability to operate a specific refinery during a disruption, but Tesoro stated the publicly available transcript of the call showed the CEO had not said the words attributed to him, and argued the allegations acted as a fraud on the court. The plaintiffs argued their allegations accurately described the CEO's statements. In April 2020, the court denied Tesoro's motion for sanctions, deeming plaintiffs' allegation to be a mere characterization of the CEO's statements. The court further reasoned an inaccuracy on the subject would not warrant Rule 11 sanctions in any event, since — contrary to Tesoro's claim that the specific refinery shutdown at issue was a "central claim" in the case — the allegation related to just one of ten refinery shutdowns discussed in the complaint.

Shortly thereafter, the court denied an October 2019 motion for sanctions by defendant Alon USA. Alon argued plaintiffs failed to conduct a reasonable inquiry into their claims and as a result made two false accusations about Alon in their complaint: first, that Alon planned a 2012 shutdown of its Bakersfield refinery (which was included in a chart describing "suspicious plant closings in 2012"), and second, that each defendant participated in the California refinery market. The plaintiffs conceded the error about the refinery shutdown but said it was a mere "scrivener's error," and plaintiffs denied the second allegation was false. In May 2020, the court denied Alon's sanctions motion. The court agreed with the plaintiffs, reasoning that while the first allegation was inaccurate, Alon failed to show plaintiffs' complaint was factually baseless. As to the second allegation, the court found Alon failed to show it was false, and failed to show plaintiff's counsel's inquiry into the allegation was less than reasonable. Discovery in this case is proceeding.

Narrowed propane tank class action proceeds after partial settlements

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 multi-district litigation after a partial settlement in June 2020.

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%." There are two separate plaintiff classes: direct purchasers and indirect purchasers. The direct purchaser class comprises retailers who purchased or exchanged propane tanks directly from defendants for resale; the indirect purchaser class comprises individual consumers that purchased propane tanks from the direct-purchaser retailers.

The district court dismissed plaintiffs' claims as barred by the statute of limitations. The Eighth Circuit initially affirmed but, on rehearing en banc, reversed. The en banc court applied the "continuing violation" doctrine, under which a new limitations period commences as to each overt act committed by the defendant, where the overt act (1) is a new act, not merely a reaffirmation of a previous act, and (2) inflicts new injury

on the plaintiff. The en banc court held that each sale of propane tanks at a conspiratorially-fixed, supra-competitive price inflicted a new injury and would be subject to its own limitations period, unlike elevated-price injuries that result only from the "unabated inertial consequences" of pre-limitations conduct like a merger, which would be time-barred even as to recent purchases. On remand, the district court dismissed some of the revived claims in August 2019, making an "Erie guess" as to which states would be likely to adopt the "continuing violation" doctrine under relevant state law, and dismissing claims related to consumers in the states that had not adopted it and would be unlikely to do so.

After failing to dismiss the claims through pre-trial motions, defendants and the direct purchaser class agreed on settlement terms in late 2019. In June 2020, the district court gave final approval for a settlement totaling $12.56 million, of which Blue Rhino and related companies will pay the class $6.25 million, while AmeriGas and related companies will pay $6.31 million.

In September 2020, the indirect purchaser class reached a proposed settlement with defendant AmeriGas and related companies for a currently undisclosed amount. A fairness hearing is set for March 2021. In October 2020, the indirect purchaser class filed its motion for class certification as a single class against the remaining defendants, Blue Rhino and related companies, and the case is moving forward.

California AG and plaintiffs allege 2015 collusion in California gasoline components

California v. Vitol Inc., SK Energy Americas, Inc., SK Trading International Co. Ltd., and Does 1-30; In Re California Gasoline Spot Market Antitrust Litigation, 3:20-cv-03131 (N.D. Cal.)

In May 2020, the State of California and retail purchasers of gasoline brought separate suits against major traders of gasoline and gasoline blending components, accusing them of inflating the price of gasoline in violation of federal and state antitrust laws.

In May 2020, the State of California brought a civil lawsuit in California state court against major traders in California's spot market for delivery of refined gasoline and gasoline blending components, including Vitol Inc., SK Energy, SK Trading, and certain company employees. By state law, gasoline used in California requires specific blending components that are nearly unique to California, and nearly all gasoline used in California is produced from California refineries. In February

2015, a third-party refinery in California reduced production of blending components due to an explosion, resulting in a supply shortage. The State alleges that lead traders at the defendant companies exploited the shortage and entered into horizontal agreements to restrain competition in the spot market for gasoline and gasoline blending components between 2015 and 2016, inflating the price of gasoline by manipulating published index prices in the spot markets during key time periods that would influence longer-term contract pricing. Among the tactics alleged are selective reporting of transactions, entering into small uneconomic trades to set the first trade or high trade during a trading day, or entering into "spiking" trades in thinly traded markets, sometimes offset by unreported trades to set up a "wash trade" or "round-trip trade." The State also alleges that traders agreed to jointly import refining component cargoes and share profits on those cargoes, which agreement the State contends was "merely a pretext for unlawful cooperation" that aligned ostensible counterparties in a pursuit of higher prices. The State alleges this scheme to raise prices violated state antitrust and unfair competition laws.

Simultaneously, numerous retailer-purchasers of gasoline filed putative class actions against the same defendants in federal court alleging violations of state and federal antitrust law. Though not consolidated as a multi-district litigation, the current plaintiffs and defendants agreed to a traditional consolidation of the pending related actions, with the action brought by the State remaining separate. The plaintiffs seek recovery on behalf of putative classes of businesses and out-of-state purchasers, while the State seeks separate recovery on behalf of only individual California consumers. Plaintiffs filed a consolidated putative class action complaint in September 2020 and the case is moving forward.

ADM accused of monopolizing ethanol to manipulate prices, boost derivatives gains

Midwest Renewable Energy LLC v. Archer Daniels Midland Company, 2:20-cv-02212 (C.D. Ill.)

In July 2020, a putative class action was filed against ethanol producer Archer Daniels Midland (ADM) over allegations of monopolization and market manipulation at the benchmark trading hub for ethanol.

Plaintiff Midwest Renewable Energy, LLC, seeking to represent a class of ethanol sellers, sued ethanol producer ADM for allegedly violating Section 2 of the Sherman Act

by manipulating ethanol prices at the Argo, Illinois ethanol terminal. Plaintiff alleges from November 2017 to September 2019, ADM "intentionally acted uneconomically to divert and ship large supplies of ethanol into Argo, flood Argo with ethanol supplies, and to aggressively reduce its offers and aggressively hit bids in the Argo sales market" and "repeatedly ignored and refused to sell ethanol at the higher prices available in markets other than Argo." Plaintiff claims that by depressing prices at Argo, ADM depressed the amount of revenues which plaintiff and class members received for ethanol sales made at Argo or under sales contracts priced according to Argo-benchmarked formulae.

According to the plaintiff, ADM had historically been an ethanol purchaser at Argo, but then shifted gears and became the leading seller at Argo with the intention of obtaining and maintaining a monopoly so it could depress prices in the Argo market and on related benchmarks. The plaintiff claims Argo nominated barges of ethanol to Argo and filled storage tanks at Argo despite higher-priced ethanol markets being available elsewhere. The plaintiff alleges "ADM's total selling volume in 2018 was seven times larger than the next largest seller at the Argo Terminal," and at many times, ADM was "the sole seller at the Argo Terminal." The plaintiff contends the resulting collapse in prices at Argo allowed ADM to reap "illicit gains" on short positions in derivatives priced based on Argo-related benchmarks. The plaintiff further alleges ADM's alleged anticompetitive conduct raised a barrier to entry by other ethanol sellers. The plaintiff's complaint notes that similar allegations were raised in a September 2019 suit filed by AOT Holding AG in the Central District of Illinois, pursuing claims under the Commodity Exchange Act.

In October 2020, ADM moved to dismiss plaintiff's complaint. ADM argues the plaintiff fails to adequately plead anti-competitive effects, fails to define a legally cognizable market that ADM allegedly dominates, and fails to plead antitrust injury, because the plaintiff alleges it has been injured by an excess of low-price competition, not by efforts to limit competition. ADM further argues that the plaintiff fails to plead a predatory-pricing theory of monopolization, because it does not allege that ADM intends to force competitors out of the market so it can later raise prices to monopoly levels. Absent such allegations, ADM contends that the plaintiff's suit runs counter to the purpose of the capacity-increasing, price-reducing aim of antitrust law.

As of the date of this publication, the motion to dismiss remains pending while discovery and other pretrial matters proceed.

Chemicals

Caustic soda cartel complaint survives motion to dismiss

***In re Caustic Soda*, 1:19-cv-00385 (W.D.N.Y.)**

In March 2019, chemical manufacturers and other plaintiffs filed multiple class-action suits against multiple caustic soda manufacturers, accusing them of conspiring to restrict domestic supply and fix prices of caustic soda (sodium hydroxide) in violation of Section 1 of the Sherman Act. In May 2019, the court consolidated these suits, and plaintiffs consolidated their complaints into a single class action complaint.

Later that year, defendants moved to dismiss for failure to state a claim. In March 2020, a federal district court in the Western District of New York denied defendants' joint 12(b)(6) motion to dismiss, as well as various individual motions to dismiss, finding plaintiffs' claims were sufficiently pleaded.

In their joint motion to dismiss, defendants argued plaintiffs failed to adequately allege parallel conduct, and argued that even if parallel conduct was sufficiently alleged, plaintiffs failed to allege the "plus factors" required to show conspiracy as opposed to independent conduct. While plaintiffs alleged certain defendants announced similar price increases at similar times on thirteen occasions in a three-year period, defendants argued such conduct was consistent with "normal responses to market forces," and the fact that price increases generally followed trade association meetings was insufficient to allege conspiracy. Defendants also argued plaintiffs' allegations regarding supply reductions were insufficient to show parallel conduct.

The court disagreed, concluding that taken together, plaintiffs' allegations plausibly suggested an inference of conspiracy. The court reasoned plaintiffs adequately alleged parallel conduct by alleging a "pattern of frequent price increases in similar intervals and amounts" that were sometimes accompanied by pretextual justifications, such as supposed supply constraints that appeared to be either temporary or illusory. The court further reasoned that the defendants' alleged participation in trade meetings, "where Defendants had opportunities to exchange information or make agreements,

coupled with allegations of parallel conduct" occurring shortly thereafter, constituted a "plus factor" that helped the parallel conduct allegations cross the line into plausible conspiracy allegations. The court observed that other factors alleged by plaintiffs, such as allegedly confidential supply agreements and swaps between defendants, public comments about market supply, and alleged gaming of public pricing indices might have each been insufficient standing alone to establish a conspiracy claim, but still contributed to a totality of conduct and "plus factors" rendering plaintiffs' conspiracy claim plausible.

The court did grant one motion to dismiss on an affiliate entity issue, albeit without prejudice. Defendant Occidental Petroleum Corporation, the parent company of co-defendant Occidental Chemical Corporation, sought dismissal on the grounds that plaintiffs had neither alleged that the parent company participated in the alleged conspiracy (either directly or through an agent) nor that the corporate veil should be pierced. The plaintiffs had generally alleged Occidental Petroleum was a member of the common trade association of defendants (the "Chlorine Institute"), had increased earnings during the relevant period, and had entered into covert supply agreements with one of the co-defendants, Olin Corporation. The court found these allegations did not plausibly allege the parent company had participated in the conspiracy or helped execute the conspiracy, as the parent company did not itself manufacture, sell, or distribute caustic soda, and plaintiffs made no veil-piercing allegations.

In May 2020, defendants filed additional partial Rule 12(b)(6) motions to dismiss certain claims asserted on behalf of a putative indirect purchaser class. The indirect purchaser class, alleged to be a nationwide class, alleges more than a hundred distinct claims under the Sherman Act, the Clayton Act, twenty-eight states' antitrust laws, forty states' consumer protection laws, and equitable and injunctive relief. In the motions to dismiss, defendants challenge many of the state law claims, contending certain claims are barred under state law, have been insufficiently pleaded (often in connection with satisfying statutory elements on the geographic scope of the activity in question), or that certain states' requirements for notice to their Attorneys General have not been satisfied.

Defendants' motions to dismiss remain pending while discovery proceeds.

Water treatment chemical producers settle remaining price-fixing claims

In re Liquid Aluminum Sulfate Antitrust Litigation (D.N.J.)

After several years of nationwide aluminum sulfate litigation consolidated in a multi-district litigation in the District of New Jersey, 2020 saw the final resolution and settlement of the last remaining cases. The plaintiffs in each of the cases were municipal water utilities and pulp and paper companies who purchased liquid aluminum sulfate for use in connection with water treatment. The MDL plaintiffs alleged the defendants, chemical companies that sold the liquid aluminum sulfate as well as individual officers and employees of those companies, communicated with one another to fix prices, rig bidding processes, and allocate customers. After the MDL court denied the defendants' motions to dismiss in March 2019, many parties began settlement negotiations.

On November 7, 2019, the court entered an order granting final approval of settlements for a class of all persons or entities who indirectly purchased liquid aluminum sulfate, not for resale, from a defendant during the class period. This order was followed several weeks later by another order granting final approval of settlements for a class of all persons who directly purchased liquid aluminum sulfate from a defendant during the class period. A number of plaintiffs opted out of these settlements, and continued to pursue their claims against various subsets of defendants.

Over the remainder of 2019, and throughout 2020, the defendants entered into a series of settlements with the remaining opt-out plaintiffs. In July 2020, the district judge asked any party with remaining claims to submit a letter describing the outstanding claims, and no letters were submitted, indicating that all matters had been resolved. The district judge terminated the case as to all parties in December 2020, though the district judge retains jurisdiction to resolve disputes regarding the disbursement of funds or otherwise related to the class settlements.

Overview of

Antitrust Laws & Enforcers

Merger Review Process

Over the past 40+ years, energy markets have featured two notable trends. First, the industry has undergone a major shift from traditional price regulation to competitive markets. Second, vast technological improvements have changed the competitive landscape, particularly for extraction and production. Up to and throughout the 1990s, the United States became increasingly dependent on foreign oil, whereas in the last decade, thanks to innovations and efficiencies in horizontal drilling and hydraulic fracturing, that trend has reversed and the United States has now become the largest oil producer in the world. In 2019, U.S. total energy exports exceeded imports for the first time in 67 years. 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 & who does it?

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

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

HSR filings go through a "clearance" process where each is assigned to a particular agency. The FTC and DOJ typically allocate merger reviews by industry based on their historical experience. The FTC is primarily responsible for analyzing mergers in the chemical industry as well as in oil and gas. The DOJ has primary responsibility for reviewing electricity 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 & gas mergers

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

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

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

Refineries

The FTC has generally focused on how refinery acquisitions affect the 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. The agency defines geographic markets based on practical alternative sources of supply in light of transportation costs and any capacity constraints. As a result, the FTC has sought and obtained divestitures in a number of refinery mergers, including Exxon/Mobil, Chevron/Texaco, and Conoco/Phillips.

Pipelines

The FTC has occasionally required divestitures or behavioral remedies (usually contractual supply commitments) for both crude and refined transportation pipelines, to prevent the merging parties from raising prices or excluding 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 for gathering services as in Conoco/Phillips, in producing areas as in Enbridge/Spectra Energy, and in 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. In 2019, in DTE Energy Company/NEXUS Gas Transmission, the FTC approved a consent decree requiring the parties to remove a non-compete clause that would have prevented competition for natural gas transportation within a three-county area of Ohio for three years from the agreement.

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 Circle K/Jet-Pep acquisition, the FTC required divestitures of several stations in three small towns in Alabama, and in Tri Star Energy/Hollingsworth Oil, it required divestitures in two cities in Tennessee. Likewise, the FTC has sought divestitures in the case of mergers among one of a few gas LDCs in an area, as in Equitable/Dominion.

How the DOJ and FERC approach electricity mergers

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

Geographic markets generally are defined based on transmission constraints — that is, where wholesale or retail buyers can practically turn for additional supply given the design of the electrical grid. The DOJ also considers "shift factors," that is, the effectiveness of a generating unit in responding to a supply constraint. The DOJ typically looks at the merged party's ability and incentive to raise prices by withholding generation supply after the merger, as it did in Exelon/PSEG and Exelon/Constellation. When the DOJ finds competitive concerns, it typically 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, enforcers tend to draw product markets in the chemical industry narrowly and to focus on the commercial reality of potential substitution. For example, in its recent challenge to the merger of Cristal and Tronox, the FTC alleged a market limited to "chloride process titanium dioxide" that 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 TiO2 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 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 operate globally and require global suppliers. In Cristal/Tronox, the FTC alleged a geographic market for North America, as TiO2 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 CNCC/Syngenta, the agency alleged a market limited to the United States because regulatory approvals required to sell pesticides in the United States would preclude turning to foreign sources. The FTC has also alleged more narrow regional markets when shipping constraints or other factors limit customers' ability to switch to more distant suppliers, as was the case for certain bulk atmospheric gases in the Linde/Praxair transaction.

Non-Merger Antitrust Enforcement

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

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

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

Illegal Agreements

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

Price fixing is an agreement between competitors to raise, fix, hold firm, establish minimums, or any other activity to otherwise coordinate their prices. Price fixing agreements can include limits on supply, 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's 2007 *Leegin* decision, but resale price maintenance continues to be *per se* illegal under some state antitrust statutes.

Bid rigging occurs where an entity (such as federal, state, or local governments) solicits 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 occurs where competitors divide markets among themselves, which can take the form of allocating geographic locations, customers, types of products, etc. In this type of scheme, competitors often agree on which company will serve which location, customer, or product and then will agree not to sell for certain others or quote artificially high prices on others.

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

The Antitrust Division has identified industry conditions that are conducive to collusion, some of which are prevalent in certain energy and chemical markets, such as where there are fewer sellers, where products are fungible, where sellers are located in the same geographic area, where products cannot be easily substituted because of restrictive specifications, where there are economic or regulatory barriers to entry, and where sellers know each other through social contexts such as trade associations, normal business contacts, and where employees shift between the companies in the same industry. Private plaintiffs have also alleged that the public announcements of future price increases that are common in the chemicals industry provide a potential vehicle for collusion.

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

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

Monopolization

Distinct from Section 1 violations of the Sherman Act which involve agreements between competitors, Section 2 violations occur where an individual company, or multiple companies acting in concert, harm competition through monopolization. In order for a violation to occur, a company must possess monopoly power in a relevant market and 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%.

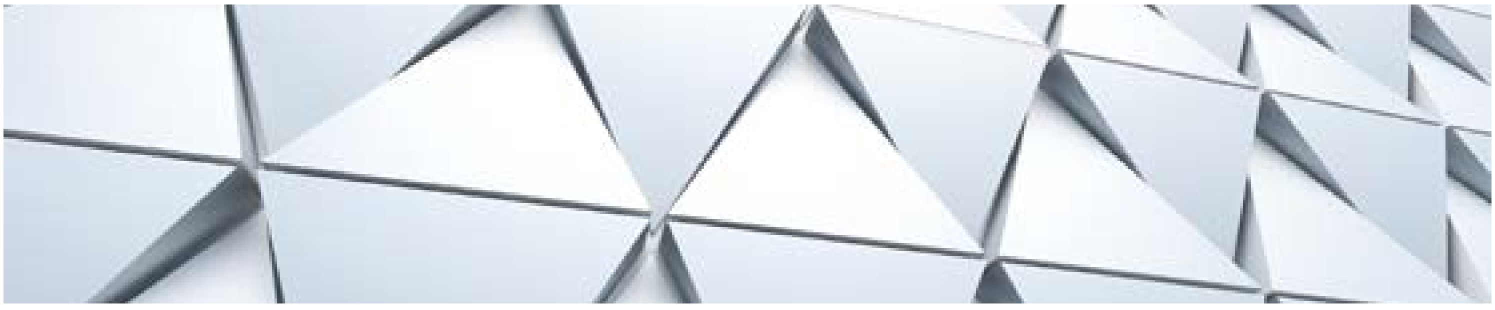
Examples of exclusionary conduct that the courts have found to violate Section 2 when combined with monopoly power include tying, exclusive dealing agreements, predatory pricing, and refusals to deal.

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

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

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



Exemptions & 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 for other agencies, including on issues affecting the energy and chemical industries.

Five presidentially nominated Commissioners head the FTC and serve seven-year terms. Joseph J. Simons currently serves as Chairman of the Commission. Sworn in on May 2, 2018, Simons previously co-chaired the antitrust group of a national law firm, after serving in a number of positions in the Bureau of Competition, including Director from 2001 to 2003. Upon taking office in January 2021, President Biden will be able to designate one of the two Democratic commissioners as Chair or Acting Chairman. Under the staggered appointment system, however, the Republican Commissioners will retain majority control of the Commission until 2023, absent an earlier resignation by one of the Republican Commissioners.

Ian R. Conner has headed the Bureau of Competition since December 2019, after serving as Deputy Director since 2017. Conner joined the Bureau from private practice, following previous roles in government, including as a trial attorney in the Transportation, Energy and Agriculture Section of the U.S. Department of Justice, Antitrust Division.

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

MERGERS II

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. A significant recent case Mergers II handled was the challenge to a proposed joint venture between Peabody Energy and Arch Coal, which would have combined the parties' Southern Powder River Basin coal mining and sales operations. The challenge resulted in the U.S. District Court for the Eastern District of Missouri granting the FTC's request for preliminary injunction, causing the parties to abandon the joint venture. 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 II successfully challenged two chemical industry mergers (Tronox/Cristal and Wilhelmsen/Drew Marine) in federal court.

There are approximately 35 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 joined Mergers II as a deputy after having previously served as Counsel to the Director of the Anticompetitive Practices Division.

Mergers 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 Mergers III activity in the natural gas industry include securing a divestiture in the KinderMorgan/El Paso transaction and entering into a consent agreement in the Enbridge/Spectra Energy merger.

There are approximately 25 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.

DOJ Antitrust Division

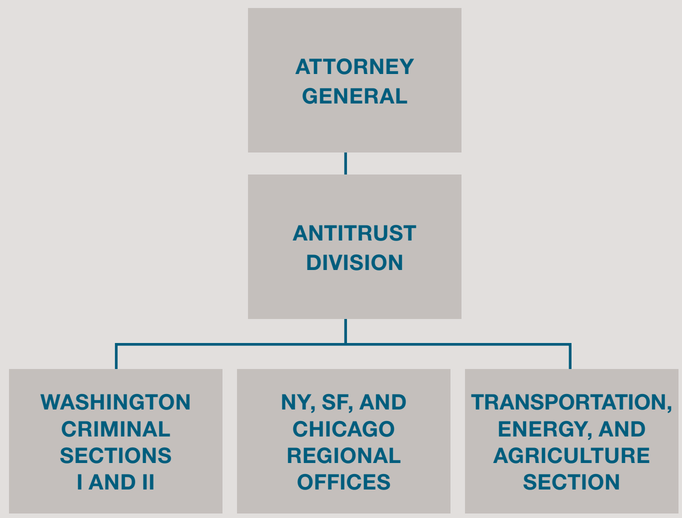
Assistant Attorney General (AAG) Makan Delrahim has headed the Antitrust Division of the Department of Justice since September 27, 2017. Delrahim previously served as Deputy Assistant to the President and Deputy White House Counsel. Delrahim is a former partner in the Los Angeles office of a national 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. Delrahim and several of his deputies are expected to resign in January 2021. Upon taking office, President Biden will appoint new leadership, which may not be fully in place for a significant portion of 2021. The AAG position is a presidential appointment, which requires Senate confirmation. The Deputy Assistant Attorneys General, who serve under the AAG and oversee the Division's sections, may be either career or politically-appointed employees. Traditionally the Deputy Assistant Attorney General for Criminal Enforcement has been a career employee.

The Antitrust Division's litigating components handle both criminal and civil enforcement. 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.

In August 2020, the Antitrust Division announced changes that are designed to increase the emphasis on non-merger civil enforcement. The Division created an Office of Decree Enforcement and Compliance, which will have primary responsibility for enforcing judgments and consent decrees in civil matters. The Division also established a Civil Conduct Task Force, which will feature a dedicated group of attorneys, working across all of the Division's civil sections and field offices, to identify conduct investigations that require additional focus and resources. The task force will have dedicated resources and a mandate to investigate and, ultimately, prosecute civil conduct violations of the antitrust laws.

DOJ ANTITRUST DIVISION

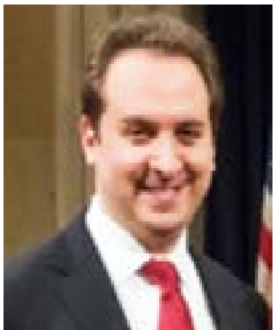
(highlighting offices with principal energy and chemical enforcement responsibilities)



Transportation, Energy, And Agriculture Section

Robert Lepore Chief
Patricia Corcoran Assistant Chief
Katherine Celeste 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.



Robert Lepore

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 in connection with the acquisition by Duke Energy 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

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 are 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 into the substantive arguments most likely to persuade a government enforcer to close its investigation.

World's Leading Energy Firm

Since 1995, Euromoney has ranked V&E the world's leading energy law firm based on the number of lawyers named in the *Guide to the World's Leading Energy & Natural Resources Lawyers*, a publication of Euromoney Institutional Investor PLC's Legal Media Group. 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.

Key Contacts

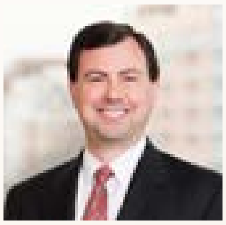
Alden Atkins
Partner
Washington Office
+ 1.202.639.6613
aatkins@velaw.com

Matt Jacobs
Partner
San Francisco Office
+1.415.979.6990
mjacobs@velaw.com

Jason Powers
Partner
Houston Office
+1.713.758.2522
jpowers@velaw.com

Harry Reasoner
Partner
Houston Office
+1.713.758.2358
hreasoner@velaw.com

Craig Seebald
Partner
Washington Office
+1.202.639.6585
cseebald@velaw.com



Darren Tucker
Partner
Washington Office
+1.202.639.6553
darrentucker@velaw.com

Hill Wellford
Partner
Washington Office
+1.202.639.6571
hwellford@velaw.com

Brian Schnapp
Counsel
Washington Office
+1.202.639.6619
bschnapp@velaw.com

David Smith
Counsel
Washington Office
+1.202.639.6763
davidsmith@velaw.com

Lindsey Vaala
Counsel
Washington Office
+1.202.639.6523
lvaala@velaw.com

Stacey Vu
Counsel
Houston Office
+1.713.758.2542
svu@velaw.com

Greg Wells
Counsel
Washington Office
+1.202.639.6516
gregwells@velaw.com

Vinson&Elkins

Join Us on LinkedIn
Vinson & Elkins

Follow Us on Twitter
@vinsonandelkins

Vinson & Elkins LLP Attorneys at Law Austin Dallas Dubai Houston
London New York Richmond Riyadh San Francisco Tokyo Washington

velaw.com