Vinson&Elkins

2021 Energy & Chemicals

Antitrust Report

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Biden Administration Enforcement Personnel and Priorities

The "Biden Antitrust Revolution," as one *New Yorker* article refers to the current administration's attempts to shake up American antitrust enforcement, has captured the attention of many in the last few months. President Biden promised a progressive antitrust agenda, and his selections to lead the nation's most important antitrust agencies and advisory bodies follow through on the promise.

Many of the changes we have seen so far both at the Federal Trade Commission ("FTC") and the Department of Justice's Antitrust Division ("DOJ" or the "Division") are consistent with President Biden's July 2021 "Executive Order on Promoting Competition in the American Economy," which set forth 72 initiatives intended to enhance competition across dozens of industries. The Order attempts to present a holistic, government-wide approach to elevate competition as a key principle in all business-related matters, and seeks to harness the administrative strength of more than a dozen agencies, signaling the extent to which promotion of competition (and with it, antitrust reform) is a centerpiece of the Biden administration. Pressure for an antitrust shake-up is also coming from Congress. Over a half-dozen antitrust reform bills have been introduced since mid-2021 and are each at various stages of the lawmaking process.

The Federal Trade Commission

In June 2021, President Biden appointed 32-year old Lina Khan as Chair of the FTC. Khan, a 2017 graduate of Yale Law School currently on leave from her position as an Associate Professor at Columbia Law School, is renowned among progressive antitrust proponents for her concern about business concentration in general and her hostility to Big Tech in particular. She became famous for a law review article she published while in law school, in which she argued the consumer welfare standard in antitrust analysis is fundamentally flawed because, she said, it focuses on price effects and therefore is poorly equipped to deal with online platforms that provide services at low cost or for free. Since Khan's appointment, the FTC has made several changes to its policies and procedures, many of which are causing a slowdown in the merger review process, even while the agency is facing an uptick in the number of merger filings. We highlight below some of the changes implemented by the FTC under Khan's direction as well as the impact these changes might have on parties before the FTC.

Increased Scrutiny of Energy Industry Mergers

No senior enforcement official had discussed antitrust enforcement in the energy space for a number of years before 2021. In 2021, both Khan and the head of the FTC's Bureau of Competition ("Bureau"), Holly Vedova, have indicated energy mergers are currently a top agency focus.

In an August 2021 letter from Khan to Brian Deese, the director of the White House's National Economic Council, Khan presented a detailed plan to investigate retail gas prices for illegal conduct. Khan noted the FTC's plans, where possible, to impose "prior approval" requirements to deter illegal merger proposals, including in the retail gas market. She noted plans to identify additional legal theories to challenge retail fuel deals "where dominant players are buying up family-run businesses." Khan also stated that the FTC will be taking a "close look" at the divestiture process to ensure that the FTC's approach to merger remedies is not encouraging further consolidation or enabling dominant firms to exercise market power. Khan expressed particular interest in ways by which large national chains may "restore" higher prices through collusive practices. She promised to direct her staff to investigate whether such chains are able to force their franchisees to sell gasoline at higher prices to benefit the chain over the franchisee.

In addition, the FTC cited the abandonment of Berkshire Energy's proposed acquisition of Dominion Energy's Questar Pipeline as an example of the need to rescind a 1995 policy statement on "prior approval" and "prior notice" requirements in July of 2021. Earlier that same month, the Bureau had issued a press release applauding the abandonment, noting that the FTC had blocked a very similar transaction back in 1995: Questar Pipeline's attempted purchase of a 50% share in Berkshire Hathaway's Kern River Pipeline. In the same press release, the Bureau's then Acting Director chided the parties: "Given our prior action, and the even closer competition that developed between the pipelines since then, this is representative of the type of transaction that should not make it out of the boardroom."

The vast majority of energy mergers continue to receive clearance to close, and publicly reported FTC actions (such as challenges and consent decrees) remain unusual. But publicly reported matters do not tell the full story of change at the agency. For energy deals in general and for larger, more high-profile energy transactions in particular, investigations are becoming more frequent and longer on average. The FTC appears to be applying lower standards for the issuance of second requests, and FTC leadership appears to be increasingly overruling staff attorneys' recommendations to close investigations, and is instead directing the staff to issue second requests.

Less Transparency in Merger and Non-Merger Investigations

Starting in the second half of 2021, the FTC has withdrawn several enforcement policy statements — some recent, some longstanding — without replacing them with new guidance documents. The result has been greater uncertainty as to the standards by which the FTC analyzes business conduct. This uncertainty has been compounded by indications (discussed next) that the FTC has introduced new considerations into the review of merger and non-merger conduct.

1. Withdrawal of FTC Act Section 5 Statement

Section 5 of the FTC Act prohibits "unfair methods of competition," a concept that courts have largely interpreted as co-extensive with the standards for illegal restraint of trade, monopolization, and illegal mergers, as set forth in Sherman Act sections 1 and 2 and Clayton Act section 7, respectively. There have been periodic calls to make the FTC Act something more than or different from antitrust law, but the FTC issued a bipartisan policy statement in 2015 largely rejecting those calls. In that policy statement, the Commission committed to the consumer welfare standard and noted that it was "less likely" to challenge acts not otherwise captured under the Sherman and Clayton Acts.

The FTC now has changed course. In July 2021, the FTC withdrew the policy, saying that the 2015 statement "abrogate[d] the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute." The FTC did not issue new guidance; instead, after seven pages of criticizing the 2015 statement, the FTC provided only a paragraph of forward-looking language, under the heading, "Looking Ahead":

> Withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets. Section 5 is one of the Commission's core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition. In the coming months, the Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under this provision. In the meantime, the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, consistent with legal precedent.

As a result, as of this writing at the beginning of 2022, there is no current guidance on the limits (if any) to the FTC leadership's view of the reach of FTC Act section 5, beyond a promise to use "prosecutorial discretion." It is also worth noting that while the 2015 statement was bipartisan, the 2021 withdrawal was along party lines. The three Democratic commissioners voted in favor while the two Republican commissioners opposed. The opposing commissioners issued an unusually long 9-page dissent, which stated that "Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy — the opposite of what Congress intended when it created the FTC."

2. Withdrawal of the 2020 Vertical Merger Review Guidelines

On September 15, 2021, the FTC announced in a press release that it had voted to withdraw the 2020 FTC & DOJ Vertical Merger Guidelines issued during the Trump administration. (The withdrawal does not affect the DOJ Antitrust Division, for which the Guidelines remain in force.) While the majority statement acknowledged the 2020 guidelines were a "substantial improvement" over their predecessor, which was published in 1984, it found that the 2020 Guidelines included "unsound economic theories" unsupported by the law or market realities. The majority was particularly critical of the treatment of efficiencies in the 2020 Guidelines, suggesting that such considerations will play little role going forward, and suggested a preference for a "structural" analysis, which (to oversimplify) means presuming harmful effects from highly concentrated markets. The following passage gives a good flavor of the majority commissioners' views:

> In particular, our review will enable consideration of key economic evidence that has been developed about the impact of market structure on the likely competitive effects of a merger. It will also provide an opportunity to directly analyze mergers affecting critical areas of our modern economy, such as digital gatekeepers and labor markets. Until new guidance is issued, the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers. In any merger, the FTC will consider all relevant facts, including but not limited to market structure, to determine whether a merger may lessen competition or tend to create a monopoly.

As of this writing, the FTC has not issued new guidance for vertical mergers. Again, the withdrawal was along party lines, with the two Republican commissioners issuing a vigorous dissent. Among other statements, the dissenting commissioners observed that:

Contrary to decades of established case law, the Majority claim that the 2020 Guidelines "contravene the text of the statute" by recognizing the "procompetitive effects, or efficiencies, of vertical mergers." The Majority commits two flaws in [their] analysis. First, they conflate procompetitive effects of a merger with merger efficiencies. Second, they ignore the burden shifting framework adopted by the circuit courts recognizing that procompetitive effects may render a competition-eliminating merger procompetitive on the whole. Similarly, a successful efficiency defense, i.e., that the proposed merger's efficiencies would likely offset the merger's potential harm to consumers, is sufficient to save a merger. That said, Guidelines have long counseled skepticism, which is routinely applied. But the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers. As such, they require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them.

Greater Range of Concerns

The new FTC leadership repeatedly has signaled that it no longer considers protecting competition to be its only antitrust mandate. The agency foreshadowed its efforts to broaden its focus when it withdrew its Section 5 statement. In addition, prior statements by Chair Khan and Commissioner Slaughter indicated an intent to move away from the consumer welfare standard, which has been the lodestar of antitrust decisions for several decades, and to consider a wider range of concerns.

On September 28, 2021, Competition Bureau Director Holly Vedova posted a blog entry that cited concerns about how "an unduly narrow approach" created historical "blind spots" in the agency's merger analysis framework. Vedova stated that heightened scrutiny would be applied "to a broader range of relevant market realities" as a result. The practical effect of this change is that the FTC may consider non-traditional factors in its second request reviews, including how a proposed merger may affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete.

The blog post came on the heels of an internal memorandum, addressed to FTC staff and commissioners, in which the FTC Chair laid out her strategic approach, policy priorities, and operational objectives for the agency. Khan's memorandum advocates for a "holistic approach" to harms and includes workers and independent businesses, in addition to consumers, in that calculation. These non-traditional considerations have already begun appearing in FTC merger investigation queries, including questions about unionization, franchising, and ESG issues, such as the inclusion of women in the workforce.

The FTC has not provided guidance as to what extent these non-competition-related considerations will play a role in agency investigations, including decisions whether to issue a second request or to seek to block or obtain remedies in connection with a proposed merger. The agency has also not provided guidance as to how these non-traditional considerations fall within Section 7 of the Clayton Act or the other statutes the agency enforces.

Merger Process and Rulemaking Reforms

In addition to the broad policy shifts discussed above, the FTC has adopted a series of more focused procedural changes, the net effect of which has been to slow the merger review process. This provides more time for the FTC staff to consider the implications of a deal, but it also increases uncertainty and costs for merging parties.

1. No Early Termination

Under the Hart-Scott-Rodino ("HSR") Act, parties to certain mergers and acquisitions must submit premerger notification filings and wait 30 days before consummating the transaction (15 days for cash tender offers or certain bankruptcy transactions). A party may request early termination of the waiting period for any deal, and traditionally the FTC has granted early termination (usually in about ten days as opposed to the full 30) for most run-of-the-mill transactions, which are not likely to raise

competition concerns. The FTC suspended the use of early termination in February of 2021. Although the FTC in its press release described the suspension as "temporary," there is as of yet no indication as to when the moratorium on early termination requests will be lifted. The decision was along party lines, with the two Republican commissioners expressing "concern" about "an indefinite suspension of the ET process—with no clarity regarding when and under what circumstances it will resume." As we approach the one-year anniversary of the "temporary" suspension, that concern appears prescient.

2. Withdrawal of 1995 Prior Approval Statement

At its July 21 open meeting, the Commission voted along party lines to rescind a bipartisan policy from 1995 that generally eliminated "prior approval" and "prior notice" requirements in Commission orders resolving anticompetitive mergers.

As a result of the policy's withdrawal, future merger consent orders will require respondents to seek the Commission's prior approval for any future acquisition over a de minimis threshold within markets affected by the transaction. Consequently, the repeal of the 1995 policy statement may increase the costs and reduce the attractiveness of FTC consent orders for merging parties, which may lead parties to pursue more "fix-it-first" remedies.

3. "Warning Letters" for Deals that Clear HSR

On August 3, 2021, the FTC's Bureau of Competition Director Vedova (at that time in an Acting capacity) announced in an FTC blog post that, due to the "tidal wave" of merger filings the FTC was experiencing, the agency would begin sending letters warning deal parties that, although the FTC was allowing the HSR waiting period to expire (and thus their deal was clear to close), the FTC would continue to investigate the transaction and reserved the right to challenge it, so that the parties would close at their peril. These became known as "warning letters," which generally take the form explained in the blog post.

This statement—which seemed formal, despite appearing in a blog post—struck many observers as odd, since the FTC always has had the ability to investigate and challenge reported transactions (as the agency is currently doing with Facebook/Instagram). The exact number of warning letters issued by the FTC is unknown but they are frequent enough for practitioners to have developed some experience with them. That experience, to date, suggests that they are not likely to lead to challenges.

4. 120-Day Demands in Timing Agreements

Under the HSR Act merger review process, if an agency finds substantial competition concerns during its initial 30-day review, the agency may extend the review and ask the parties to turn over more information so it can take a closer look at how the transaction will affect competition. This action is referred to as a "second request." This review triggers a second waiting period, which lasts until 30 days after the parties certify their substantial compliance with agency's information request. The agency and the parties will enter a timing agreement to cover various aspects of the second request investigation, and historically the FTC has asked for 60 days (or sometimes more) following substantial compliance, as opposed to the statutory 30 days. Now, however, the FTC has begun asking for 120 days. Deal parties are commonly pushing back on this longer request.

5. Potentially Burdensome Changes to Second Request Discovery Process

Vedova's September blog post made note of several changes affecting merger review information and document collections, including:

- No second request modifications permitted before (1) parties explain the duties of employees and agents responsible for the line of business relevant to a transaction or involved in the proposed transaction or (2) the FTC receives basic information from parties about how they maintain data that is responsive to the second request;
- A second request requirement to provide information about intended use of e-discovery tools before applying those tools to identify responsive materials; and
- Discontinuation of the option to submit partial privilege logs, which, as previous guidance explains, allowed companies to submit an abbreviated, relatively bare-bones list of documents withheld on a claim of privilege rather than provide a complete log for all custodians.

The DOJ Antitrust Division

In July of 2021, President Biden nominated Jonathan Kanter for the position of Assistant Attorney General for the DOJ Antitrust Division. The U.S. Senate confirmed Kanter on November 16, 2021. Kanter began his career in 1998 as a staff attorney for the FTC during the Clinton administration before later transitioning to private practice. He has extensive experience defending antitrust investigations and also has represented complainants against Big Tech (the complainants themselves were often other Big Tech companies). While it is still early days for Kanter as AAG, we can look to the Division's messaging under the recent former Acting AAG, Richard Powers, and to Kanter's confirmation hearing for insight into how the FTC's sister agency intends to enforce the antitrust laws.

Antitrust Division Under Acting Assistant Attorney General Richard Powers

During Richard Powers' time as Acting AAG from February to November of 2021, changes at the Division were modest and in line with prior changes in administrations. Notably, the Division did not join the FTC's decision to discontinue using the 2020 Vertical Merger Guidelines. The day the FTC announced a vote to withdraw from the 2020 Vertical Merger Guidelines, the Division issued a statement promising to review the same, along with its Horizontal Merger Guidelines, in coordination with the FTC. It declined, however, to withdraw the guidelines in the interim.

The Division indicated it would seek public comment on certain concerns about the Guidelines, but its decision not to withdraw the Guidelines suggested a more cautious approach than that taken by the FTC. It is important to note that, so far, the Division has not suggested moving away from the consumer welfare standard, nor are there any indications that it is considering a wider array of factors in its investigations.

Still, the agency is not shying away from shifting gears in certain cases. Last fall, the Division's Economics Director of Enforcement, Jeffrey Wilder, spoke on the Biden administration's approach to the intersection between antitrust and Standards-Essential Patents ("SEPs"). Wilder's speech suggests the new administration intends to reverse the Trump administration's policy that some considered to favor SEP holders more than Standards Development Organizations and patent licensees. Wilder, for example, noted the Division is currently reviewing the 2019 SEP Remedies Statement, which reduced antitrust concerns for SEP holders seeking injunctive or exclusionary relief to remedy SEP infringement, and which was criticized as favoring patent holders. Wilder's comments also suggested that the Biden administration disagrees with the notion that a patent owner's breach of a commitment to license on fair, reasonable, and non-discriminatory terms can never constitute an antitrust violation.

In early July of 2021, the Division also moved to withdraw its consent to a proposed settlement with the National Association of Realtors ("NAR"), the leading trade association in the real estate industry. In a press release, the Division explained its reasons for stepping back from the enforcement deal negotiated in November of 2020 during the Trump administration, citing concerns about the Division's ability to challenge additional NAR rules and policies and carry out a broader investigation than encompassed in the original complaint and settlement proposal.

Jonathan Kanter's Confirmation Hearing

On October 6, 2021, Kanter underwent his confirmation hearing before the U.S. Senate Judiciary Committee. Kanter did not reveal plans to bring about a dramatic shift in enforcement strategy of the Division and generally distanced himself from some of the more progressive views expressed by FTC Chair Khan. He also avoided taking a position on pending antitrust reform legislation. Kanter did signal plans for aggressive enforcement across several industries including big tech, agriculture, and pharmaceuticals. He also supported increased Division funding, noting a need for additional trial attorneys and more substantive expertise, and indicated his support for extending whistleblower protection from the criminal to the civil context.

The committee pressed the nominee for his thoughts on topics such as the viability of the consumer welfare standard, the role of ESG considerations in merger review, interoperability in the technology sector, and anticompetitive conduct in the protection of intellectual property rights. His responses indicated that Kanter appears to be inclined to

take an approach to enforcement similar to prior Democratic heads of the Division.

1. Consumer Welfare Standard & Big Tech

Kanter's testimony suggested he does not see a need to depart from the consumer welfare standard, which antitrust enforcers and courts alike have applied to antitrust cases for decades. He noted that the consumer welfare approach encompasses, in addition to price, quality, innovation, and consumer choice. Kanter stated that he does not object to the standard itself, though he has disagreed with how judges have historically applied the standard. Kanter's post-hearing written responses echoed his oral testimony and stressed the importance of developing more effective investigatory tools to better analyze market realities.

Kanter did echo at least some of Khan's concerns around policing Big Tech. For instance, Kanter remarked on the changing landscape of anticompetitive harms in the last two to three decades, which have expanded to include privacy, the marketplace of ideas, the distribution of information, and political discourse. Kanter asserted his belief that antitrust law must adapt to these evolving realities and stressed that even while promoting competition is the goal, there are secondary benefits to antitrust enforcement, including the protection of free flow of information and democracy. In his written responses, Kanter, in response to a question about data as currency in online platform markets, also pushed back on the notion that the current antitrust regulatory scheme cannot be applied to markets offering consumers free products and again stressed the need for better tools.

2. ESG Considerations in Merger Review

Kanter appeared to disagree with the FTC's emerging practice of asking merger parties about ESG policies, stating that he did not "see situations where ESG policies that are unrelated to competitive issues are relevant to antitrust enforcement." Kanter also declined to express a view on the impact of antitrust enforcement on communities of color and related topics, further suggesting he may be skeptical of using antitrust law for the purpose of social justice and labor reform. Kanter did discuss the importance of competition in labor markets in the more conventional antitrust context of overly broad non-compete clauses in labor contracts.

2021

Summary of Developments

Following 2020's historic drop in HSR filings, 2021 brought various changes in merger and non-merger enforcement policies and priorities that signal increased scrutiny in chemical and energy industry transactions. In response to calls from the White House, FTC Chair Lina Khan announced that the agency will be examining various aspects of the oil and gas industry, with Khan noting her concern that in recent years the FTC has enabled "significant consolidation." State and private litigation in these industries continued apace, though competition claims were trimmed in several ongoing cases.

Merger Enforcement

- Fiscal 2020 witnessed a significant drop in Hart-Scott-Rodino (HSR) filings from the previous year, falling to the lowest level since 2013. The downturn was underscored in chemical and energy and chemical industry transactions, which hit multi-year lows.
- In calendar 2021, the FTC obtained divestitures in three cases involving retail gasoline and diesel fuel markets. As in 2020, the DOJ did not bring any merger enforcement actions involving energy or chemical companies in 2021.
- The antitrust agencies implemented a series of significant changes to their merger review processes in 2021, including the suspension of the early termination program, the initiation of pre-consummation warning letters in some transactions reported under the HSR Act, expansion of the FTC's information requests in merger reviews to include topics relating to unionization and ESG policies, and other procedural changes.
- The FTC voted to withdraw from the Vertical Merger Guidelines only a year after adopting them; however, the DOJ continues to rely on them.

Non-Merger Enforcement

- DOJ's Procurement Collusion Strike Force continued to grow, and it obtained a number of additional indictments and guilty pleas, including a new indictment related to its investigation of procurement associated with the Department of Energy's Strategic Petroleum Reserve program.
- Retail gasoline markets were under the microscope as President Biden called for an immediate FTC investigation due to unexplained high prices at the gas pump. Earlier in the year, FTC Chair Lina Khan explained that FTC staff would look into several aspects of the oil and gas industry, including the notion that national chains may "restore" higher prices through collusive practices.
- In December 2020, the new Criminal Antitrust Anti-Retaliation Act came into force. It protects whistleblowers as antitrust enforcement authorities continue to enlist the help of individuals to identify anticompetitive practices across industries.
- The FTC approved updated energy efficiency descriptors for central air conditioning units under the Energy Labeling Rule.

State & Private Litigation

- Private and state antitrust litigation activity in the energy and chemical sectors remained robust, highlighted by a leading chemical manufacturer's winning an $85 million damages verdict in a case alleging monopolization of components used in motor vehicle fuel vapor capture systems.
- Antitrust class actions remain active as well. In a new group of cases consolidated as *In re Crop Inputs Antitrust Litigation*, retail purchasers of herbicides and other crop protection chemicals sued manufacturers, distributors, and retailers over conduct allegedly designed to raise prices by squeezing out new online distribution platforms.
- Defendants succeeded in trimming back some class actions on procedural grounds, such as the *In re Caustic Soda* cases in New York, where numerous state law claims were dismissed for failure to follow state procedures, or in the California refinery explosion cases, where federal injunctive relief claims were dismissed.
- Courts continued resisting the application of antitrust law to alleged market manipulation conduct by financial traders, leaving plaintiffs to pursue remedies available under federal and state commodities trading laws.

Federal Antitrust Enforcement in Energy and Chemical Industries

The Biden administration has made antitrust regulation one of its top priorities in order to promote competition and protect the interests of U.S. consumers. Federal competition regulators have responded by ramping up enforcement in the oil and gas industry, among others. The FTC obtained relief in several retail fuel transactions in 2021, for example. Even before the calls for greater enforcement from the Biden administration, the rates of second requests had increased in the energy and chemical industries. In addition, several significant procedural changes to the merger review process at the FTC and the FTC's decision to withdraw the recently issued Vertical Merger Guidelines have created uncertainty for filing parties and may result in more costly and prolonged merger reviews. The FTC's withdrawal of its 2015 policy statement regarding "unfair methods of competition" under Section 5 of the FTC Act could lead to similar uncertainty in non-merger civil enforcement. The DOJ's Procurement Strike Force continued to expand, and DOJ continued to target wage-fixing and no-poach agreements.

Merger Enforcement Policy Developments

Amidst an unprecedented volume of merger filings, 2021 saw DOJ and FTC further advance their policy priorities. In conjunction with the Biden administration, the FTC placed retail fuels transactions and possibly other energy transactions near the top of its enforcement priorities. Additionally, significant procedural changes to the HSR compliance process and the FTC's about-face on the recently-issued Vertical Merger Guidelines have added newfound uncertainty for filing parties. While DOJ's shifts have been less seismic in 2021, that agency's future may hold reforms that better align it with the procedural shifts at the FTC.

Administration Prioritizes Oil and Gas Merger Enforcement

In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy, which aims to enhance competition across dozens of industries in order to "promote the interests of American workers, businesses, and consumers." As part of that initiative, White House National Economic Council Director Brian Deese issued a letter to the FTC on August 11 raising concerns about "divergences between oil prices and the cost of gasoline at the pump" during the 2021 summer season. Deese urged the FTC to use "all of its available tools to monitor the U.S. gasoline market and address any illegal conduct that might be contributing to price increase for consumers at the pump." The letter echoed concerns raised in President Biden's remarks on the Build Back Better Agenda, which asserted that falling oil prices were not correlating to savings for consumers, and also urged OPEC to reverse production cuts that were made during the pandemic to lower prices for consumers.

In response to Director Deese's letter, FTC Chair Lina Khan issued a letter echoing the White House's concerns, and also raising the additional concern that the FTC's "approach to merger review in recent years has enabled significant consolidation," which may have created "conditions ripe for price coordination and other collusive practices." The Chair's letter outlined several specific actions the FTC would take:

- The FTC will seek to "identify additional legal theories to challenge retail fuel station mergers where dominant players are buying up family-run businesses."
- The FTC will re-examine its approach to merger divestitures, to ensure that they do not encourage further consolidation or enable dominant firms or groups of firms to exercise market power. Khan's letter said she was "especially interested in ways that large national chains may 'restore' higher prices through collusive practices."
- The FTC will "tak[e] steps to deter unlawful mergers in the oil and gas industry," including by imposing "prior approval" requirements to deter companies from proposing "illegal mergers" in the first place.
- The FTC will ask staff to "investigate abuses in the franchise market," with a specific focus on determining "whether the power imbalance favoring large national chains allows them to force their franchisees to sell gasoline at higher prices, benefitting the chain at the expense of the franchisee's convenience store operations."

In a September blog post, the FTC repeated that it is "redoubling its commitment to police unfair methods of competition in wholesale and retail gasoline and diesel sales." The post noted the FTC's concern with posted gasoline prices — particularly when controlled by large national chains with multiple stations in a particular area — which the FTC claims "offer opportunities for retail gasoline chains to signal price changes to their competitors." It said that "retail fuel chains may use specialized software across their networks to set their own retail prices and monitor competitors." Chains may attempt to "restore" gas prices in the market by signaling their competitors via a "significant price increase at every single one of a chain's stations across a city area," and then monitoring its competitors' prices to see if they follow the price increase. The post also asserts that FTC staff has "observed common restoration behavior among major chains, leading to a concern that consolidation may have led to a world more conducive to signaling behavior — making restorations more likely to increase prices, and maintain higher levels for longer." Finally, the post notes that the FTC will scrutinize mergers or consolidation involving larger regional and national chains for their effect on price signaling behavior "wherever the buyer overlaps in any metro area with the seller, even if no local retail fuel station overlaps present concern."

President Biden jumped into the fray with his [own letter] on November 17. This letter, which follows on the earlier correspondence with Chair Khan, notes that the price of unfinished gasoline was down more than five percent in the preceding month, while retail gas prices were up three percent over the same period. It also claims that market capitalizations of the two largest oil and gas companies are on pace to double by end of 2021. While noting that Chair Khan has already directed the FTC staff to investigate mergers more aggressively, the November 17 letter asks Chair Khan to scrutinize the rise in oil and gas prices and urges the FTC to investigate "anti-consumer behavior by oil and gas companies."

The concerns expressed by the White House and Khan do not appear to be shared by all of the FTC commissioners. In his remarks delivered at Dartmouth College on October 27, 2021, Commissioner Noah Phillips warned that the "reflexive resort to competition themes will lead us, and other policy-makers, to get basic facts wrong — leading to formulating bad policy." He noted Chair Khan's response to the White House's concerns about rising gas prices, and challenged her claim that rising fuel prices were attributable to gas station mergers that involved purchases of family-run business or power imbalances between large chains and "little guys." Commissioner Phillips countered that there are "a number of drivers for rising prices at the pump, but nothing I am aware of suggests that mergers are the culprit." He continued, "at a time when gas prices are at a seven year high, Americans cannot afford for policy to be fashioned on such thin gruel."

On November 23, the two Republican FTC commissioners, Noah Phillips and Christine Wilson, further expanded on their positions when they jointly released a letter to Director Deese. The Republican Commissioners ask Deese to share with the FTC evidence supporting the president's assertion that oil and gas companies are acting anticompetitively to the detriment of American consumers. The two reference past allegations by presidents of legal violations related to oil pricing and state that "we are not aware of any in recent memory that have uncovered evidence that laws have been broken." The letter also states that the rise in oil prices could potentially be attributed to a number of factors, and references past studies by the FTC regarding oil prices.

In light of the president's November 17 letter to Chair Khan and earlier correspondence, oil and gas companies should expect heightened FTC scrutiny. The Biden administration may be particularly skeptical of acquisitions of smaller local fuel retailers by larger national chains. Moreover, investigations are also taking longer than ever before. Unless the recent changes are a temporary blip on the radar — which the letter suggests is unlikely — large oil and gas companies and their counsel may need to adjust expectations on transaction timing and the range of issues investigated for matters that go before the FTC.

Changes to the Merger Review Process

The agencies implemented a number of significant changes to their merger review processes in 2021. Although the changes at the FTC outpace those at the Justice Department to date, DOJ may catch up in early 2022 following the recent confirmation of Jonathan Kanter as Assistant Attorney General of the Antitrust Division. The changes are often couched in terms of needing more administrative time and flexibility to address the burden posed by increased numbers of Hart-Scott-Rodino ("HSR") filings, but most of the changes leave merging companies with greater uncertainty about their deals.

Suspension of Early Termination

In February 2021, the FTC and DOJ announced the suspension of the process by which the typical 30-day HSR review period (both following initial filings and following compliance with a Second Request) can be terminated early. Early termination grants had previously allowed parties in transactions presenting no substantive competitive issues to close without having to wait out a full 30-day review period.

The suspension of early termination means that all filing parties must wait the full 30-day period before completing their transactions. While the agencies originally characterized the Early Termination suspension as "temporary" when announced in February 2021, the suspension remains in place with no signs of early termination notices resuming.

Pre-consummation Warning Letters

In August 2021, the FTC announced that it would begin sending pre-consummation warning letters in some transactions reported under the HSR Act. The letters caution their recipients that they are proceeding at their own risk and that the Commission may continue to investigate, even though the statutory waiting period has expired. The letters provide no specifics regarding the status of any investigation, but merely state that "[a]ny inaction by the Commission before the expiration of the waiting period should not be construed as a determination regarding the lawfulness of the transaction."

The FTC does have the authority to challenge already-consummated mergers. In practice, transactions that received no response from the agency during the initial 30-day were considered low-risk. The FTC's new practice of issuing the "pre-consummation warning letters" disrupts this conventional wisdom, though it remains to be seen to what extent the Commission will actually investigate or challenge consummated mergers that have received these warning letters. Initial experience suggests the FTC is issuing warning letters relatively sparingly and that most recipients of these letters are "closing over" these letters without any adverse impact.

Revisions to HSR Regulations Stalled

As noted in last year's report, the FTC sought public comments in 2020 on a Notice of Proposed Rulemaking ("NPRM") and Advanced Notice of Proposed Rulemaking ("ANPRM"). The ANPRM sought information regarding seven topics the FTC would use to determine whether additional amendments to the HSR program were warranted. The NPRM proposed two amendments to existing HSR rules which (1) would broaden HSR filing requirements to include holdings of affiliates of the acquirer, and (2) 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 FTC also held a series of three Q&A sessions in November 2020 and opened a comment period until February 1, 2021. V&E submitted comments advocating for an expansion of the current exemption for the acquisition of reserves of oil, natural gas, shale or tar sands, or related rights that do not exceed $500 million. (V&E advocated for the threshold to be increased from $500 million to $5 billion on the basis that the threshold has failed to keep pace with inflation and the vast increase in proven U.S. reserves and production since the exemption was promulgated fifteen years ago.)

The FTC has not indicated when the rulemaking process will be completed, but in December 2021 did state that that agency expects to propose another rulemaking in the first quarter of 2022 to update the HSR Form and Instructions for a new cloud-based, e-filing system, which will eliminate paper filings.

Expansive Information Requests

The FTC recently expanded its information requests from merging parties to include information relating to unionization, and environmental, social, and governance ("ESG") topics. Although the FTC has not provided any justification or explanation for its expanded inquiries, the expanded inquires correspond with the new Agency leadership's desire to move antitrust law beyond the consumer welfare standard. For example, in a September 22, 2021 memorandum, Chair Khan referenced "broadening" the Agency's framework to include a focus on "power asymmetries" and viewing harms to "workers and independent businesses as well as consumers."

Other FTC Procedural Changes

The FTC implemented several other process reforms related to its merger review program. On July 1, 2021, the FTC approved a "Resolution Directing Use of Compulsory Process Regarding Consummated Merger and Acquisition Investigations." The Resolution directs Commission staff to use subpoenas and civil investigative demands to investigate consummated mergers. While the agency has always had the ability to investigate and challenge consummated transactions, the resolution will make it easier for the Bureau of Competition to open investigations of these transactions. The resolution may also signal a desire by the agency's leadership to devote more resources to reviewing consummated transactions.

Other, smaller changes to the Second Request process include more limited consideration of requests for modifications, requests for extended (120 days) post-Second Request compliance review timing via timing agreements, more burdensome privilege log requirements, and vetting e-discovery tools and procedures used by companies in responding to Second Requests. Each of these changes adds incremental burden to an already labor-intensive compliance process for transaction parties that receive Second Requests.

Federal Trade Commission Withdraws Vertical Merger Guidelines

On September 15, 2021, the FTC voted 3-2 to withdraw the Vertical Merger Guidelines (Guidelines), which it had issued jointly with the DOJ in June 2020. The Guidelines detail how the agencies analyze business combinations between companies at different levels of the supply chain.

The FTC's press release on the withdrawal details reasons for the change. The release asserts that the Guidelines looked too favorably on potential efficiencies associated with vertical mergers, which, according to the release, "are not recognized by the [Clayton Act] as a defense to an unlawful merger." Similarly, the FTC stated that the Guidelines adopted a flawed theory on the vertical mergers' procompetitive benefits, which the release says "hav[e] no basis of support in the law or market reality."

The DOJ issued a statement respecting the FTC's withdrawal of the Guidelines but confirming that it continues to rely on the Guidelines. The DOJ's statement does not take a position beyond noting agreement that there are "aspects of the guidelines that deserve close scrutiny" and stating that the DOJ is willing to work with the FTC to update the Guidelines.

The FTC indicated it is going to update and re-release vertical merger guidance, focusing in particular on: (1) characteristics of likely unlawful transactions, (2) improving remedies to unlawful mergers, and (3) expansion of the types of harms considered beyond price effects. No timeline has been given. In the meantime, there may be a divergence in how the FTC and DOJ examine vertical mergers, as well as uncertainty about the FTC's standards in this area.

FTC Reinstates Prior Notification Requirements in Consent Decrees

In July, the FTC voted 3-2 to rescind its 1995 policy against the use of "prior approval" requirements in merger consent decrees. The pre-1995 policy required that companies subject to merger consent decrees obtain prior approval from the FTC for any future transaction in the same product and geographic market as the consent decree. This type of provision effectively expanded coverage of the HSR Act for such parties, as it required them to notify the FTC even of transactions that would otherwise be under the size of transaction threshold or exempt from notification for other reasons.

In its press release announcing the reversion to old norms, the Commission noted that it has "on numerous occasions" been forced to re-review the same transaction. It cited examples in several industries, including several (retail gasoline, gasoline import terminals, natural gas pipelines, and industrial chemicals) related to the energy and chemicals industries. The Commission noted that these reconstituted transactions required the agency to "initiate a whole new investigation and block the deal anew," absorbing valuable time from the "significantly under-resourced" staff. (Notably, however, at least the vast majority of the deals the FTC cited in justifying the prior notice requirement were already subject to the HSR Act, meaning the agency was not failing to notice transactions, but rather desired a different intake mechanism for administrative convenience.)

It is not clear yet how the prior-notice provisions will play out in practice. Broader provisions would capture significantly more transactions and further exacerbate staff workloads, potentially leading to follow-on effects on unrelated deals. Narrower provisions may still present substantial chilling effects on M&A activity in certain sectors or on certain parties. Until a more substantial body of practice evolves, significant uncertainty will remain for parties facing Second Requests — the most common entry points to merger consent decrees — as to the potential impact of future prior notice requirements.

Both Republican commissioners objected to the policy change. In a October 7 keynote address, Commissioner Wilson said that "the new FTC majority envisions using [prior approval requirements] frequently and punitively to increase the cost of future deals." Commissioner Wilson criticized the approach as "particularly inappropriate when the Commission has created such uncertainty about the standards it will use to assess the legality of both horizontal and vertical mergers."

European Commission Invites Additional Referrals Under Article 22

The European Commission ("EC") took steps to expand its scrutiny of mergers involving early-stage companies when it issued Policy Guidance inviting referrals from Member States under Article 22 of the European Union Merger Regulation.

As background, the EC typically has exclusive jurisdiction over transactions that reach certain combined turnover thresholds within the EC's territory. But this use of turnover-based thresholds alone, according to the EC, allows firms with little or no turnover — but with significant competitive positions in the market — "to escape review by both the Commission and the Member States." Most often, these transactions involve technology companies that may have significant user bases but have not begun generating large enough revenue from those users to trigger the filing thresholds. (Some Member States, such as Germany and Austria, have introduced or adjusted national-level thresholds to attempt to capture such transactions.)

In March 2021, the EC issued Policy Guidance seeking to close this gap by inviting Member States to refer mergers to the EC under Article 22. Article 22 provides that Member States may refer mergers to the EC for enforcement if the merger (1) affects trade between Member States and (2) threatens to significantly affect competition within the territory of the Member State making the request. Both of these elements are interpreted liberally, and the latter of the two incorporates the EC's Horizontal and Non-Horizontal Merger Guidelines. Moreover, in its March Policy Guidance, the EC took the position that Member States may make Article 22 referrals even where the state itself would not have enforcement jurisdiction under its own laws.

Notably, in addition to the tech and pharma sectors, the Policy Guidance also calls out companies with "competitively valuable assets, such as raw materials, intellectual property rights, data or infrastructure." This focus, in conjunction with the Policy Guidance's embrace of Article 22's application "to all concentrations" means that energy and chemicals companies will also be susceptible to referrals to the EC by Member States, especially when a transaction involves dormant or non-producing assets.

Merger Enforcement Data and Trends

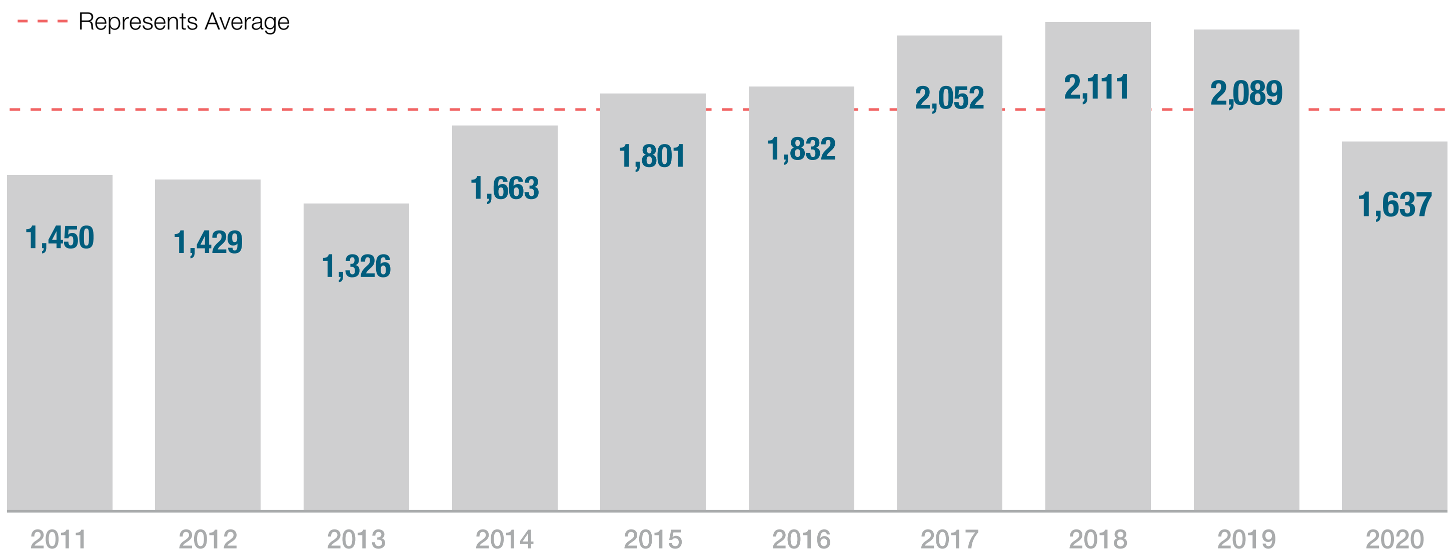
The number of Hart-Scott-Rodino (HSR) filings dropped significantly in 2020 from the previous year, to its lowest level since 2013. Much of this decrease is likely due to the 2020 economic slowdown as a result of the COVID-19 virus. Merger enforcement remained steady, however. Although the FTC and DOJ initiated preliminary investigations into only 10% of reported transactions—the lowest rate in at least the past ten years—the second request rate remained steady at 2.9% of all transactions.

The energy industry saw the lowest percentage of reported transactions across all industries (5.6%) in at least ten years continuing a downward trend since 2017. Reported transactions in the chemical industry also dropped to 4.4% of all reported transactions, remaining well below their ten year average of 5.6%.

That said, the agencies continue to focus resources on energy and chemical transactions. The rates of initial investigations and second requests increased in the energy industry both increased. In the chemical industry, although the rate of initial investigations sharply decreased, the likelihood of those investigations leading to a second request jumped dramatically from 29% to 67%.

Number of Reported Transactions

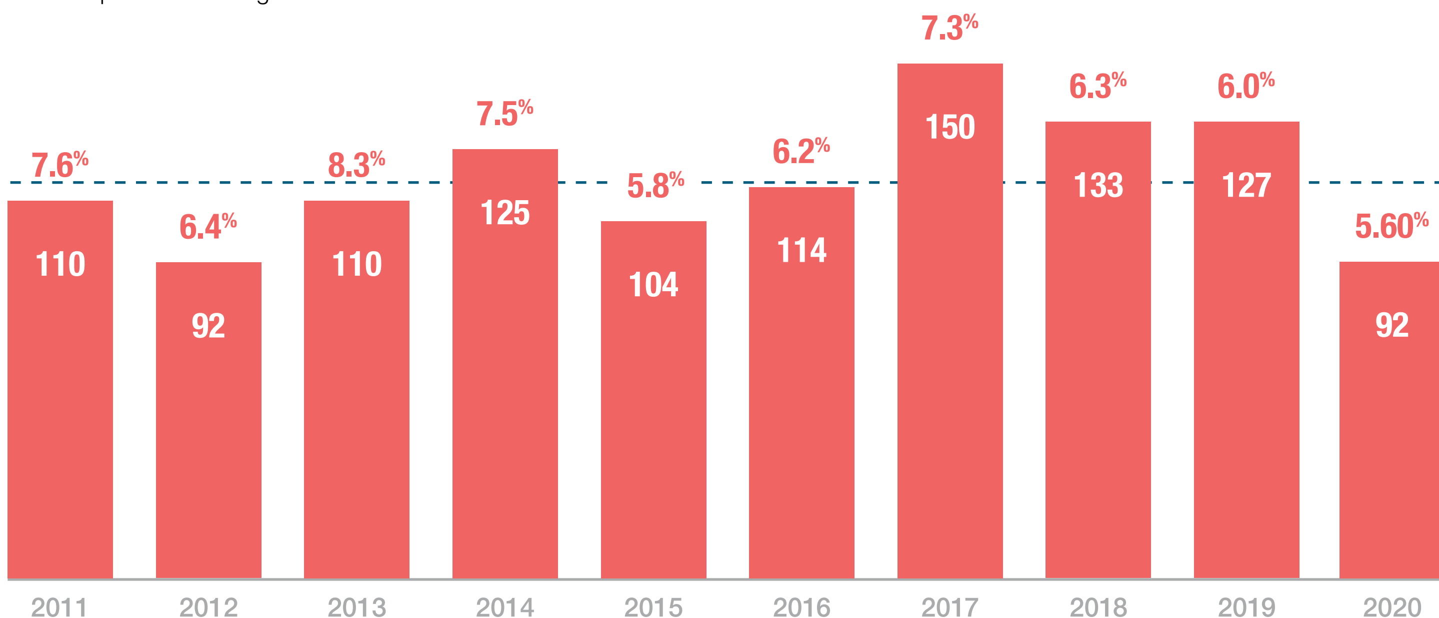
From 2011 to 2020, there were a total of **17,390** transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act. There were **1,637** transactions reported in 2020. Although the total number of transactions has generally increased or stayed the same every year since 2011, the number of filings decreased **22%** between 2019 to 2020, the largest single-year decrease in this time period.



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

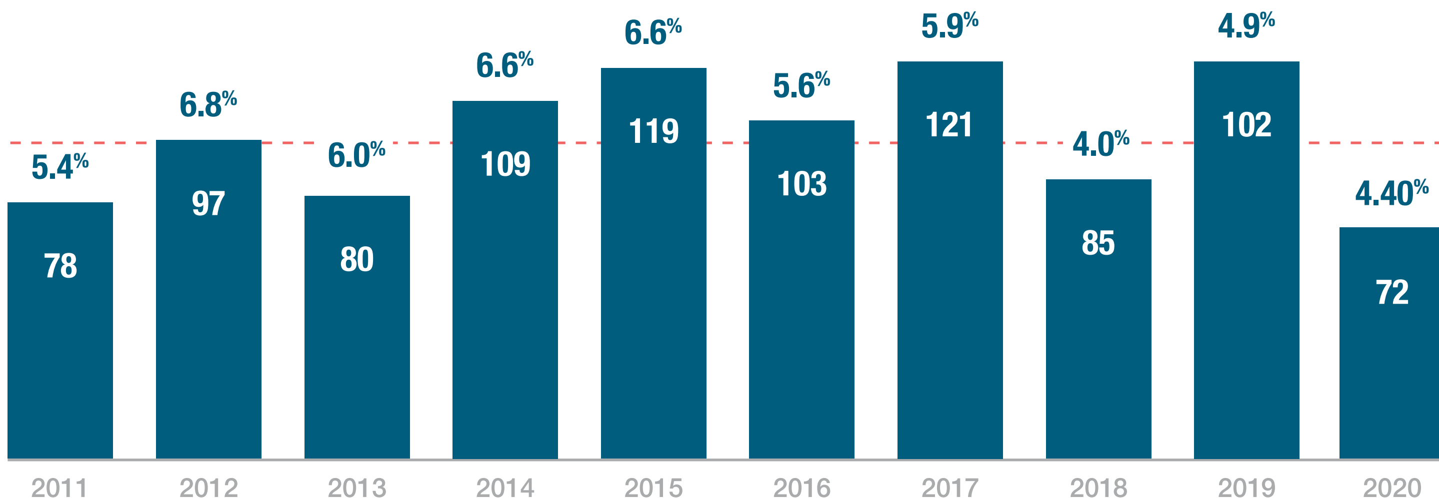
Energy Transactions

From 2011 to 2020 there were a total of **1,157** 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 has since slightly declined year-over-year.



Chemical Transactions

From 2011 to 2020 there were a total of **966** reported chemical and pharmaceutical transactions, representing on average just under **6%** of total transactions. The number of reported transactions in this industry as a percentage of total transactions has generally declined since 2015, representing under **5%** of total transactions for the past three years.

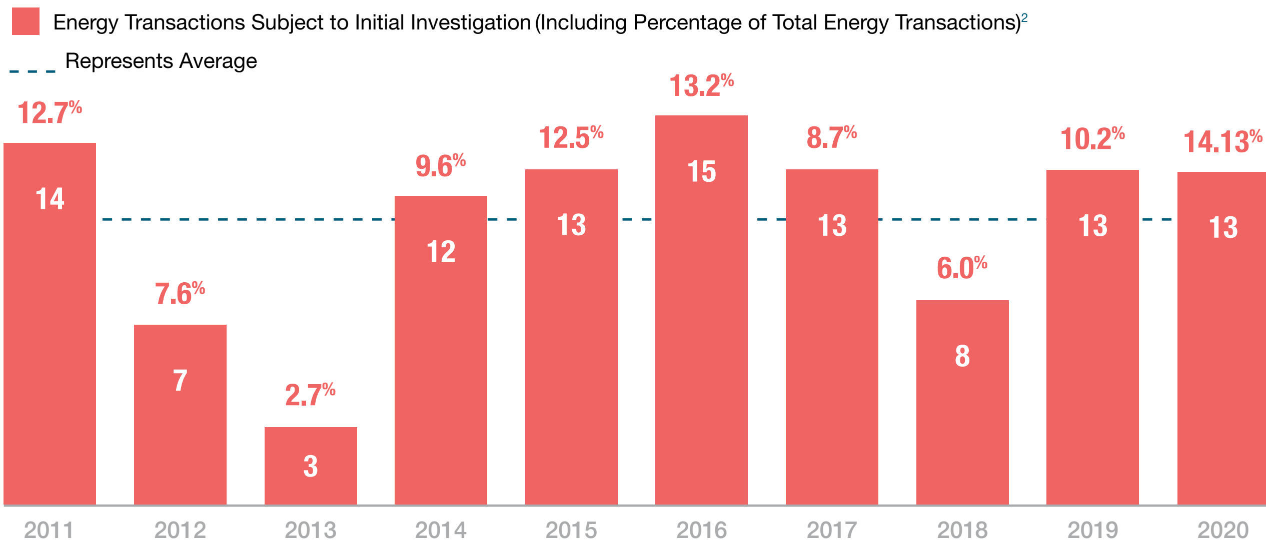


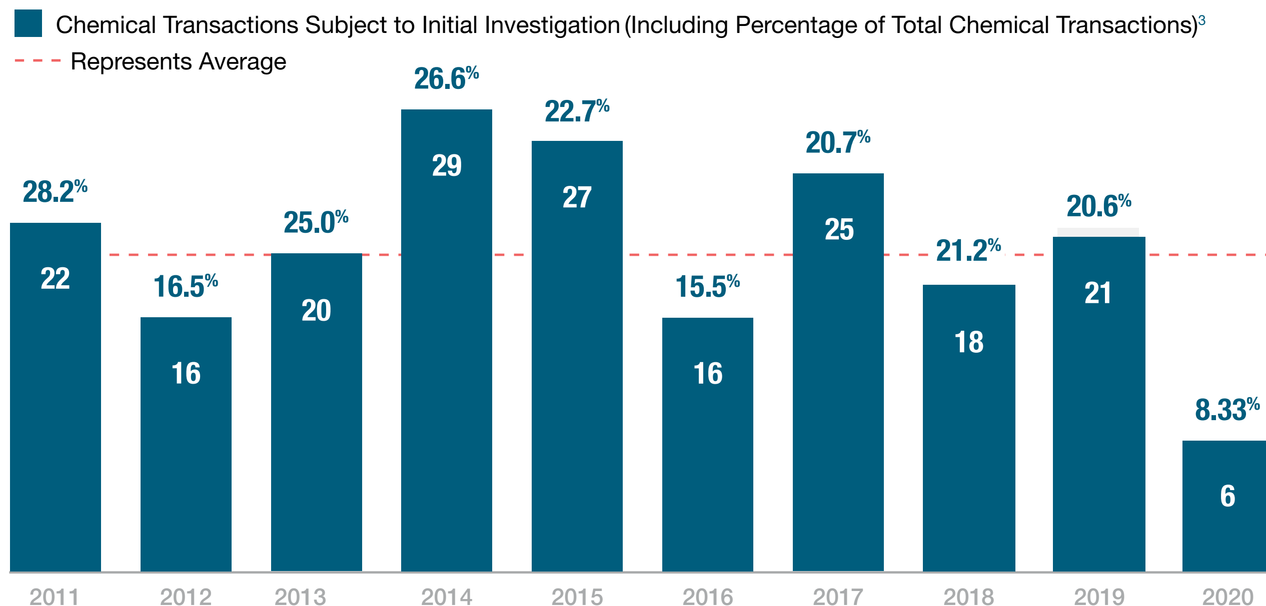
Initial Investigations

On average, from 2011 to 2020, the federal agencies opened an initial investigation in **9.6%** of reported energy transactions and **20.5%** of reported chemical transactions, while the average across all industries during this time period was **14.1%**.

In recent years the energy industry has been slightly underrepresented as a percentage of agency investigations (**6.7%** of reported transactions but only **4.6%** of total investigations, on average since 2011), while the chemical industry has been overrepresented (**5.6%** of reported transactions but **8.3%** of total investigations, on average since 2011).

The rate of initial investigations in reported energy industry transactions saw an uptick between 2019 and 2020, from **10.2%** to **14.1%**, though this rate varies significantly year-to-year. By contrast, the rate of initial investigations in reported chemical transactions has generally held steady in the **20-30%** range since 2011, but saw a steep drop in 2020, where only **8.3%** of reported chemical transactions garnered an initial investigation. This is by far the lowest rate since 2011; the previous low was **15.5%** in 2016.





[2] Unless otherwise noted, whether a transaction or investigation is Energy- or Chemical- related is determined based on the industry group of the target entity. Specifically, the 3-digit NAICS codes for the acquired person, as reported in the 2020 Annual Report. The 3-digit industry NAICS codes for the energy transactions reported are: 211 - Oil and Gas Extraction; 213 - Support Activities for Mining; 221 - Utilities; 324 - Petroleum and Coal Products Manufacturing; 425 - Wholesale Electric Markets and Agent and Brokers; 447 - Gasoline Stations; 486 - Pipeline Transportation; 493: Warehousing and Storage (including petroleum stations and terminals). The 3-digit industry NAICS codes for the chemical transactions reported is: 325 - Chemical Manufacturing.

[3] Unless otherwise noted, whether a transaction or investigation is Energy- or Chemical- related is determined based on the industry group of the target entity. Specifically, the 3-digit NAICS codes for the acquired person, as reported in the 2020 Annual Report. The 3-digit industry NAICS codes for the chemical transactions reported is: 325 - Chemical Manufacturing.

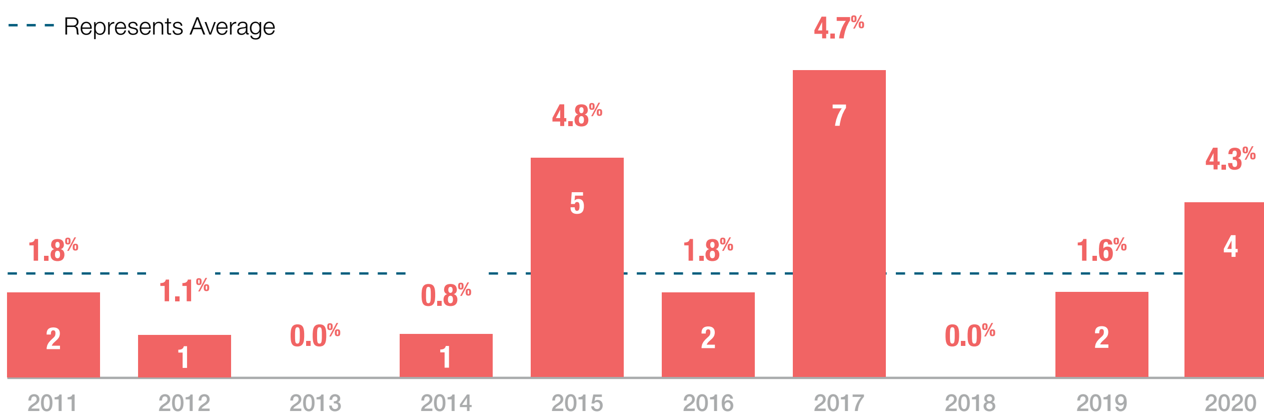
Second Requests

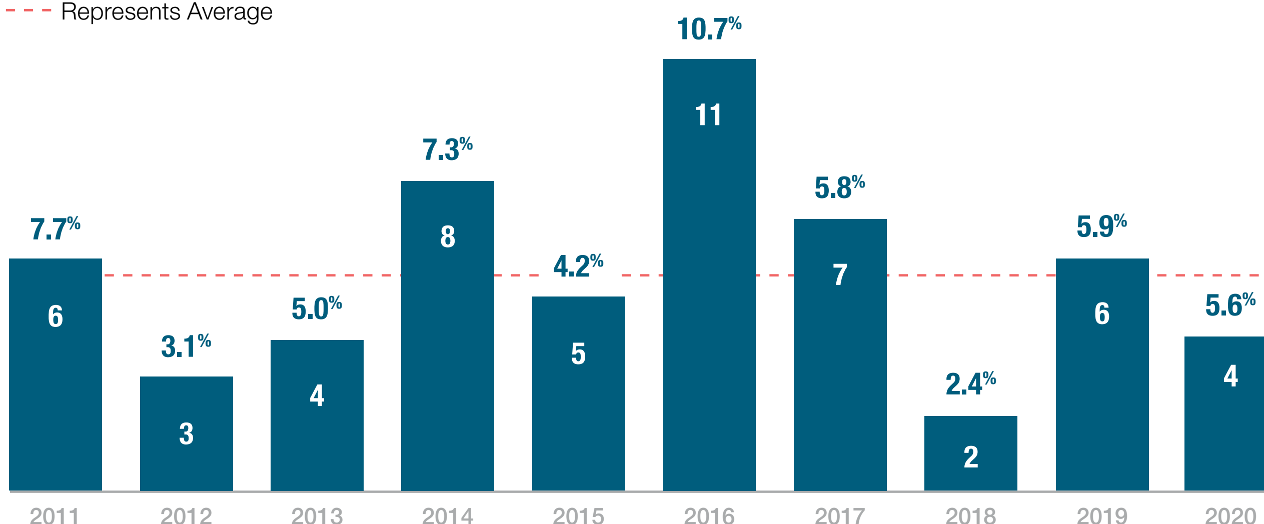
In 2020 the agencies issued second requests in **2.9%** of reported transactions across all industries, the same rate as in 2019. From 2011 to 2020, there were a total of **24** second requests in the energy industry and **56** second requests in the chemical industry, out of a total of a total **511** second requests (**5%** and **11%**, respectively).

In 2020, second requests for the energy and chemical industries constituted **16%** of all second requests, slightly higher than in 2019. [FN] Although chemical industry second request rate stayed about the same in 2020 at **6%** of all reported chemical transactions, four of the six chemical industry initial investigations — or **67%** — garnered a second request. The energy industry also saw four second requests in 2020, representing just **4.3%** of all reported energy transactions and **31%** of initial investigations.

From 2011 to 2020, the agencies issued a second request on average in **2.4%** of reported energy transactions (**22%** of initial investigations).

From 2011 to 2020, the agencies issued a second request on average in **5.6%** of reported chemical transactions (**28%** of initial investigations).



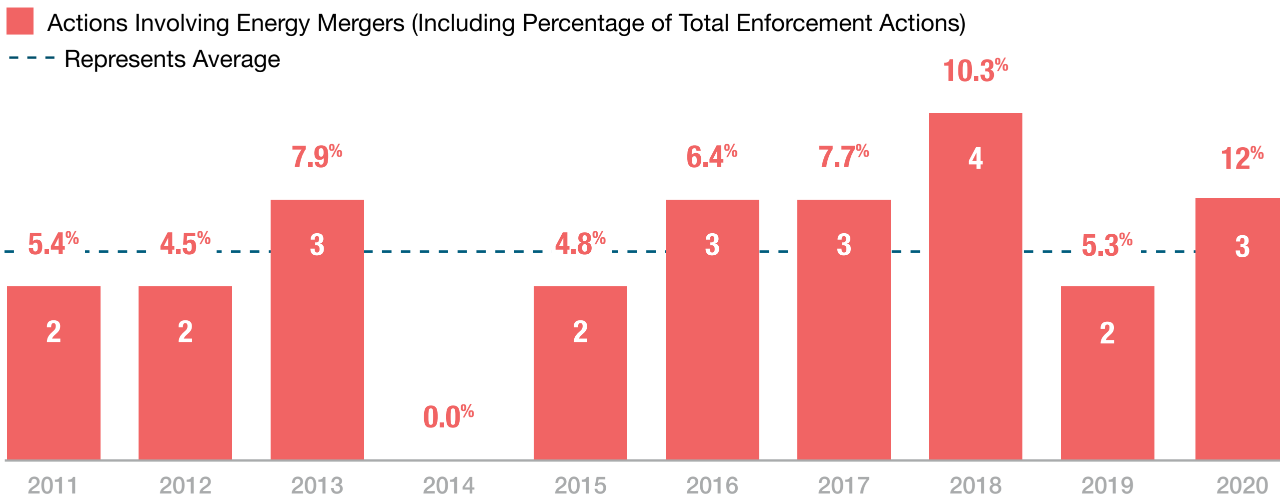


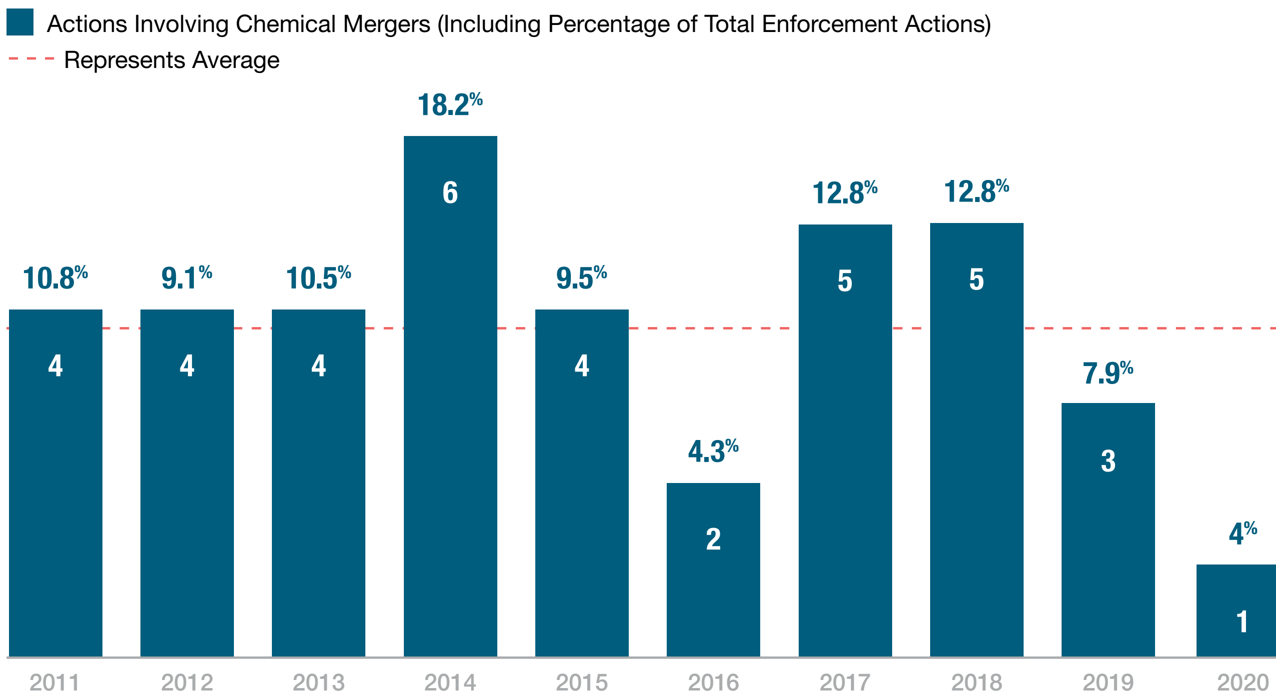
[4] The second request data in this section is tallied from the data provided in all HSR Annual Reports at Exhibit A, Table XI, titled: "Fiscal Year [Year] Industry Group of Acquired Person."

Merger Enforcement Actions

Overall: Since 2011, the enforcement agencies have brought a total of **382** merger enforcement actions, an average of **38** per year. This includes consent decrees, abandoned transactions, and court challenges. During this time period, the FTC has brought **218** actions and the DOJ has brought **182** actions. From 2011 to 2020, the agencies brought a total of **24** actions involving energy mergers (**6%** of all actions), and **38** actions involving chemical mergers (**10%** of all actions). The agencies brought enforcement actions against **2%** of energy transactions and **4%** of chemical transactions on average since 2011, although figures vary significantly year-to-year. In 2020, the rate of enforcement actions in the energy industry, **12%**, was the highest in at least ten years. On the other hand, the chemical industry saw one enforcement action, its lowest rate in at least ten years.

Merger Enforcement Remedies: From calendar year 2011 through 2020, the federal agencies have obtained the following remedies in merger enforcement actions: structural and behavioral remedies in **200** cases, structural remedies alone in **11** cases, and behavioral remedies alone in **22** 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.





 Prior results do not guarantee a similar outcome.

Merger Enforcement Cases

In 2021, the FTC sought relief to address competitive concerns for three transactions in the energy and chemical industries. In all three cases, the FTC obtained divestitures. As in 2020, however, the DOJ did not bring any merger enforcement actions involving energy or chemical companies in 2021.

Each of the FTC's merger challenges alleged retail gasoline and diesel fuel as the relevant product markets.

Casey's General Stores / Buck's Intermediate Holdings

On April 28, 2021, the FTC issued an administrative complaint and proposed consent order in connection with the acquisition of retail fuel outlets and other interests from Steven Buchanan and Buck's Intermediate Holdings, LLC (collectively, "Buck's") by Casey's General Stores, Inc. ("Casey's"). The complaint alleged that the acquisition would substantially lessen competition in the markets for the retail sale of gasoline and diesel fuel in Council Bluffs, Iowa, Omaha, Nebraska, and Papillion, Nebraska. The complaint alleged that the acquisition would reduce the number of independent retail gasoline competitors in seven local markets, and the number of independent retail diesel fuel competitors in four of those local markets. The complaint emphasized that geographic markets for retail gasoline and diesel fuel are highly localized, ranging up to a few driving miles, and dependent on facts such as traffic flows. For both product markets, the complaint alleges that the acquisition would result in highly concentrated markets and that, as a result, Casey would be more likely to unilaterally exercise market power and that the remaining competitors would be more likely to engage in collusive or coordinated conduct.

Under the terms of the proposed consent order, Casey's agreed to divest six retail fuel outlets, comprising three Casey's outlets and three Buck's outlets — addressing each of the local markets affected, with one of the divested retail fuel outlets covering two local markets — to Western Oil II, LLC within 10 days after Casey's completes the acquisition. Additionally, the parties are required to provide the Commission notice before acquiring retail fuel assets within 5 driving miles of any Casey's or Buck's outlet in one of the seven local markets for a period of ten years. On June 9, 2021, the Commission approved the proposed consent order by a vote of 4-0.

Seven & I Holdings Co., Ltd / Marathon Petroleum Corporation

On May 14, 2021, Seven & i Holdings Co., Ltd's ("7-Eleven") acquired substantially all of Marathon's Speedway LLC's ("Speedway") business following the expiration of the waiting period under the Hart-Scott-Rodino Act without the FTC taking action. 7-Eleven had previously entered into a proposed consent agreement with FTC staff to divest 293 retail fuel outlets, but the FTC failed to approve that agreement due to a disagreement among the commissioners as to whether the agreement was sufficient to resolve competitive concerns. When the parties closed the transaction, they announced that they would honor the previously agreed-to divestiture commitment. That same day, then-Acting Chairwoman Rebecca Kelly Slaughter and Commissioner Rohit Chopra issued a public statement condemning the parties for closing the transaction prior to reaching a final agreement with the FTC, indicating that the parties' decision to close the transaction under these circumstances was "highly unusual" and "troubling." The agency's leadership faced significant criticism from the Hill and former FTC officials for its unorthodox handling of the matter.

On June 25, 2021, the FTC issued an administrative complaint alleging that the acquisition substantially lessened competition in the markets for the retail sale of gasoline and the retail sale of diesel fuel in 293 local markets in 20 states. The proposed consent order, issued the same day as the complaint, memorialized the previous settlement agreement requiring 7-Eleven to divest 293 retail fuel outlets to various buyers. Additionally, the consent order requires 7-Eleven and Speedway, for a period of five years, to obtain prior approval before purchasing any of the divested assets, and for a period of 10 years, to provide period notice of future acquisitions of the divested assets and other assets identified by the Commission within the 293 local markets and three others.

Global Partners LP / Richard Wiehl

On December 20, 2021, the FTC issued an administrative complaint and proposed consent order in connection with the acquisition of Wheels-branded retail fuel outlets from Richard Wiehl ("Wiehl") by Global Partners LP ("Global"). The complaint alleged that the acquisition would harm competition for the retail sale of gasoline in and around the Connecticut towns and cities of Fairfield, Bethel, Milford, Wilton, and Shelton. Specifically, the complaint alleged that the acquisition would reduce the number of independent market participants from three to two in three local markets for the retail sale of gasoline and in four local markets for the retail sale of diesel fuel. In two other local markets, the complaint alleged that the transaction would reduce the number of market participants for the retail sale of gasoline from four to three. Consistent with the FTC's complaints in other retail fuel cases, the complaint emphasized that geographic markets for retail gasoline and diesel fuel are highly localized, ranging up to a few driving miles, and dependent on facts such as traffic flows. For both product markets, the complaint alleged that the acquisition would result in highly concentrated markets and that, as a result, Global would be more likely to unilaterally exercise market power and that the remaining competitors would be more likely to engage in collusive or coordinated conduct.

Under the terms of the proposed consent order, Global and Wiehl agreed to divest seven retail fuel outlets, comprising six Global outlets and one Wheels outlets—addressing each of the local markets affected—to Petroleum Marketing Investment Group ("PMI") within 10 days after Global completes the acquisition. For 10 years, Global must obtain prior approval from the FTC before acquiring retail fuel assets within two driving miles of any divested outlet. Additionally, PMI is required to obtain prior approval from the FTC before transferring any of the divested stations to any buyer for a period of three years, and to any buyer with an interest in a retail fuel outlet within two driving miles of that divested station.

In addition to the three complaints discussed above, the FTC's investigation of at least two mergers resulted in the abandonment of the proposed transactions. First, Tronox Holding plc. abandoned its proposed acquisition of TiZIr Titanium and Iron, one of a few global producers of chloride slag, a key input used to make the titanium dioxide pigment manufactured by Tronox. The parties abandoned their transaction after FTC staff recommended that the Commission challenge the transaction. The FTC reportedly focused on the merger's potential for vertical harm, stating in a press release that the proposed deal "threatened to cut competitors off from the supply of a key input, which would have resulted in higher prices for a widely used industrial pigment." The FTC said the merger would have impacted the same market as the one at issue in its 2017 case against Tronox's acquisition of rival pigment manufacturer Cristal.

Second, Berkshire Hathaway abandoned its proposed $1.7 billion acquisition of Dominion Energy, Inc.'s Questar Pipeline in central Utah, which the FTC said "would have eliminated the close competition" between the two companies' pipelines — the only two that serve the region. According to the FTC, the parties own the only two pipelines that bring natural gas from the Rocky Mountain production basins to central Utah. The FTC previously filed suit in 1995 to block the same combination of pipelines.

Additionally, the FTC approved DTE Energy's request to modify a 2019 order arising from the acquisition of Generation Pipeline LLC by NEXUS Gas Transmission, LLC, a natural gas joint venture formerly between DTE Energy Company and Enbridge. The order prohibited the parties from participating in any agreement that restricted competition with another provider of natural gas transportation in parts of Ohio. DTE has since spun off its non-utility natural gas pipeline, storage, and gathering business, including its interest in Nexus, to a separate corporate entity, DT Midstream. Acknowledging that DT Midstream agreed to be bound by the order and that DTE no longer owns any natural gas assets in the relevant geographic area, the FTC voted 4-0 to modify the order by removing DTE.

Non-merger Enforcement

At the end of 2020, Congress passed the Criminal Antitrust Anti-Retaliation Act, which offers protection from retaliation for antitrust whistleblowers who come forward to report possible criminal violations. DOJ's Procurement Collusion Strike Force continues to grow, bringing its first enforcement action abroad, implementing a Data Analytics Project to help identify suspicious patterns in procurement data indicative of collusion, and obtaining additional indictments and guilty pleas related to procurement, including for the Department of Energy's Strategic Petroleum Reserve program. Criminal enforcement in labor and employment in 2021 targeted wage-fixing and no-poach agreements in the healthcare industry, with conduct in other industries reportedly also under investigation.

With respect to civil non-merger enforcement, a key development was the withdrawal of the FTC's 2015 policy statement regarding enforcement against "unfair methods of competition" under Section 5 of the FTC Act. The removal of this guidance gives the FTC more discretion in enforcement and suggests a possible departure from the consumer welfare standard that the FTC previously applied.

Criminal Antitrust Enforcement Developments

The Criminal Antitrust Anit-retaliation Act Provides Protection for Antitrust Whistleblowers

A new antitrust whistleblower protection statute, the Criminal Antitrust Anti-Retaliation Act ("CAARA"), became law on December 23, 2020. The law protects from retaliation employees, contractors, subcontractors and agents of an employer who report possible antitrust violations internally, or assist a federal investigation into a criminal antitrust violation. The Department of Justice Antitrust Division lauded CAARA's passage as consistent with the continued importance of cooperation from individuals in antitrust enforcement efforts.

Additional Indictment in Procurement Collusion Related to the United States Strategic Petroleum Reserve

In 2020, subcontractor Cajan Welding & Rentals, Ltd. ("Cajan") pleaded guilty to conspiring to defraud the U.S. and violating the Procurement Integrity Act for unlawfully using non-public pricing information to obtain contracts to provide equipment and services to the Strategic Petroleum Reserve ("SPR"). Cajan paid a $400,000 fine in conjunction with its plea. In February 2021, the DOJ's Procurement Collusion Strike Force ("PCSF") obtained an indictment against an individual as part of the same investigation. The indictment charged Johnny Guillory, Sr., an employee of the prime contractor responsible for managing the SPR, on charges of conspiracy to defraud the United States and to violate the Procurement Integrity Act, as well as for making false statements to federal agents. Mr. Guillory allegedly provided non-public pricing information and cost estimates to Cajan that translated to $15 million in subcontracts to be awarded to Cajan. The case is scheduled to go to trial in January 2022.

Procurement Collusion Strike Force Obtains Indictment and Plea Agreement for Collusion Abroad and Increases Focus on Data Analytics

The PCSF seeks to detect and prosecute collusion in the procurement and government contracting process. In June 2021, PCSF announced its first international prosecution, which resulted in several guilty pleas and indictments relating contracts to provide defense-related security services to U.S. operations in Belgium.

Another PCSF focus in 2021 is the use of data analytics to initiate and corroborate cases. Through the Data Analytics Project, PCSF leadership is working with agencies throughout the federal government to encourage and train those agencies to more effectively harness available procurement data to identify suspicious patterns that may indicate collusion.

Looking ahead, PCSF expects to ramp up scrutiny in the areas in which federal spending is on the rise, including disaster relief, infrastructure, and COVID-19-related programs.

Detecting Fraud in Federal Procurement Programs Intended for Service-Disabled Veteran-Owned Small Businesses

Conspiracies to defraud the federal government through procurement and contracting programs for Service-Disabled Veteran-Owned Small Businesses ("SDVOSB") are a continued focus for DOJ's Antitrust Division. In March 2021, DOJ secured another guilty plea in its ongoing investigation of SDVOSB fraud in the construction industry. Michael Wibracht — former owner of several companies in the construction industry that were not eligible for such contracts — pleaded guilty to participation in a conspiracy that allegedly secured over $250 million in contracts set aside for SDVOSBs over a span of more than ten years. Following Mr. Wibracht's guilty plea, a grand jury indicted a third individual on March 17, 2021, Michael Angelo Padron. Both Messrs. Wibracht and Padron were charged with counts of conspiracy to commit wire fraud and to defraud the United States. Ruben Villareal pleaded guilty in the same conspiracy in November 2020, to one count of conspiracy to defraud the United States.

A range of federal agencies including the General Services Administration, Veterans Affairs, and the Department of Defense's Criminal Investigative Services team are partnering to strengthen identification and eradication of fraud related to U.S. Small Business Administration procurement.

DOJ Brings First Ciminal No-poach Case

The Antitrust Division brought its first ever criminal no-poach enforcement action in 2021, on the heels of its first criminal wage-fixing case near the end of 2020. In January 2021, a grand jury indicted Surgical Care Affiliates LLC ("SCA"), an operator of outpatient surgical facilities, on criminal antitrust charges for allegedly conspiring with two competitor healthcare companies to not poach each other's senior-level employees. Six months later, DOJ announced charges against another healthcare company, DaVita Inc., and its former CEO, for allegedly participating in the SCA conspiracy. In federal court in Nevada, a healthcare staffing company faces charges for wage-fixing and no-poach agreements regarding wages and hiring of school nurses in Clark County, NV. While public indictments so far have focused on the healthcare industry, non-public investigations are purportedly underway in additional industries. The DOJ and FTC are actively working together to promote competitive labor markets and worker mobility. These efforts date back to joint guidance issued by the agencies in 2016, which announced that no-poach conduct would be subject to criminal enforcement going forward. The Biden administration's July 9, 2021 Executive Order Promoting Competition in the American Economy doubled down on labor markets as an enforcement priority.

FTC Expands Criminal Referral Program

In November 2021, the FTC voted to expand its criminal referral program "so that corporations and their executives are held accountable for criminal behavior." Although the FTC's enforcement authority is limited to civil enforcement, the FTC issued a policy statement outlining new measures to ensure that possible criminal misconduct is promptly referred to local, state, federal, and international criminal law enforcement agencies.

The FTC's enhanced referral measures include:

- Developing guidelines to ensure that criminal law violations identified by FTC staff are expeditiously referred to criminal law enforcement agencies; and
- Highlighting criminal prosecutions by publicly reporting on the FTC's criminal referral efforts;
- Conducting regular meetings with criminal enforcement authorities to facilitate coordination and to build on the FTC's ongoing partnerships.

Increased Efforts to Detect Unlawful Conduct Related to Natural Disaster Relief

Natural disasters disrupted multiple energy markets in 2021. Notable examples are the Texas blackouts from a massive electricity generation failure in February 2021 and catastrophic damage from Hurricane Ida in August 2021 shutting down local utility transmission systems along the Gulf Coast. In the wake of Hurricane Ida, the FTC and DOJ spoke out jointly to denounce any businesses or individuals who prey upon hurricane victims or corrupt relief efforts. Acting Assistant Attorney General Richard A. Powers said, "[i]n the aftermath of Hurricane Ida, the division's Procurement Collusion Strike Force will leverage every tool in its arsenal to root out collusion, corruption and fraud targeting disaster relief."

Civil Non-merger Antitrust Developments

FTC Withdraws Section 5 Enforcement Policy Statement

Under the Biden administration, the FTC is actively working to increase its investigatory and enforcement discretion. On July 9, 2021, for example, the Commission issued a statement withdrawing a 2015 policy titled "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." Under the bipartisan 2015 Statement, the FTC would interpret the FTC Act's prohibition on "unfair methods of competition" under a "framework similar to the rule of reason," effectively bringing Section 5 into lockstep with the consumer welfare-based standard applicable under the Sherman and Clayton Acts.

The FTC's action — on the same day as President Biden's sweeping Executive Order on Promoting Competition — signals a potential departure from the consumer welfare standard, and introduces further uncertainty to agency enforcement. The withdrawal announcement notes that Congress passed the FTC Act, including the Section 5 prohibition on "unfair methods of competition," to go beyond the Sherman Act in the wake of the Supreme Court's 1911 decision in *Standard Oil*. (Section 5 differs from Sherman Act enforcement mechanisms in that there are no criminal penalties, no private lawsuits, and no treble damages under Section 5.)

An FTC press release describes the 2015 Statement as shortsighted, and as a constraint on the agency's use of its authority to stop anticompetitive business tactics under Section 5. The FTC has yet to provide any policy or guidance to replace the 2015 Statement, leaving the agency's current interpretation of "unfair methods of competition" unknown.

Congress Considers Legislation to Overturn Supreme Court Decision Halting FTC's Ability to Obtain Restitution in Civil Actions

On April 22, 2021, the Supreme Court unanimously rejected the FTC's claim that section 13(b) of the Federal Trade Commission Act authorized the agency to obtain restitution — or any equitable monetary relief — through judicial enforcement actions. The opinion in AMG Capital

Management, LLC v. Federal Trade Commission, 141 S. Ct. 1341 (2021) held that section 13(b), as written, focuses purely on injunctive relief. The FTC has used section 13(b) since the late 1990s to recover billions of dollars to repay consumers for violations of consumer protection laws. But the Supreme Court said that neither the structure of the statutory scheme nor the plain language of section 13(b) allows the FTC to continue to pursue equitable monetary relief through the courts.

Congress and the FTC are attempting to reverse the effects of AMG Capital Management. First, the House of Representatives passed H.R. 2668, the "Consumer Protection and Recovery Act," on July 20, 2021, to amend section 13(b) to provide express authority for the agency to obtain both injunctive and equitable monetary relief for all violations of the laws the FTC enforces. The Biden administration issued a statement applauding the Act "authoriz[ing] the FTC to. . .ensure that the cost of illegal practices falls on bad actors, not consumers targeted by illegal scams." The Senate took no action to advance H.R. 2668, but rather introduced a new bill on December 16, 2021, the "Consumer Protection And Due Process Act"—while similar to the House bill, this version has a shorter (3-year) statute of limitations and claims to set an appropriate balance. Lawmakers are seeking alternative measures to restore FTC remedies through the 2021 budget reconciliation legislation. Proposed provisions in the Build Back Better Act would amend the FTC Act to bolster enforcement authority by broadening Section 5(m)(1)(A). It would extend beyond violations of enumerated FTC rules to reach cases involving knowing violations of Section 5's general prohibition against "Unfair, Deceptive, or Abusive Acts or Practices."

FTC Approved Updated Energy Descriptors for Central Air Conditioning Units under the Energy Labeling Rule

As noted in last year's report, 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 received comments from various trade associations advocating 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 time for stakeholders to implement revisions in time for new Department of Energy efficiency metrics going into effect in 2023. In late December 2020, the FTC approved final amendments to the Rule which establish EnergyGuide labels for portable air conditioners, update the energy efficiency descriptors for central AC units, and require manufacturers to label portable AC units produced after October 1, 2022. On October 6, 2021 the FTC approved final amendments to the Rule which update the comparability ranges and sample labels for central air conditioning units. Commissioner Wilson voted against the rule and issued a dissenting statement citing concerns about over prescriptive labeling requirements and suggesting that the Commission should go further to reduce the burden of such labeling by allowing companies to use QR codes or online information.

Commissioner Chopra issued a statement in which he praised the Rule for helping to address the costs that inefficient appliances pose on consumers, and criticized the Department of Energy for delaying issuing updated efficiency standards. Chopra said that Department of Energy "will need to play catch-up on many other energy-intensive appliances found in American homes," and that both departments should "take further steps to reduce the considerable energy burdens for families and to lower carbon emissions." Specifically, Commissioner Chopra outlined three "opportunities for additional FTC action":

1. Protect consumers from unlawful "cramming and slamming." Chopra said that the FTC should protect consumers from "unscrupulous energy suppliers that employ deceptive marketing practices to entice consumers to switch from their local distribution company's services." He claimed that some suppliers engage in "cramming" whereby they push undisclosed fees on to customer bills, and also offer teaser rates to lock consumers into long-term contracts that later significantly increase their rates. He also criticized the practice of "slamming" whereby customers are switched over to a different supplier without their knowledge or consent, who then charge additional fees and make it difficult and expensive for customers to cancel their contracts.
2. Deter greenwashing and deceptive environmental

claims. Commissioner Chopra urged the FTC to take enforcement actions against entities that make misleading energy efficiency and environmental claims, especially since many consumers are willing to pay a premium for environmentally friendly options and also consider efficiency claims when making purchases.

3. Condemn anticompetitive mergers and conduct in the energy sector. Commissioner Chopra echoed the White House and Chair Khan's concerns about consolidation in the energy industry, and said that the FTC "plays a key role in maintaining competition and increasing innovation in energy markets, so that companies cannot excessively squeeze household energy budgets."

No Changes to FTC's Prohibition of Energy Market Manipulation Rule

As noted in last year's report, 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 Federal Trade Commission Act. The FTC's request for comments was part of its routine review of all current FTC rules and guides. Only one substantive comment was submitted, and in March 2021 the FTC determined to retain the Rule in its present form.

FTC Annual Report on Concentration in the Ethanol Industry

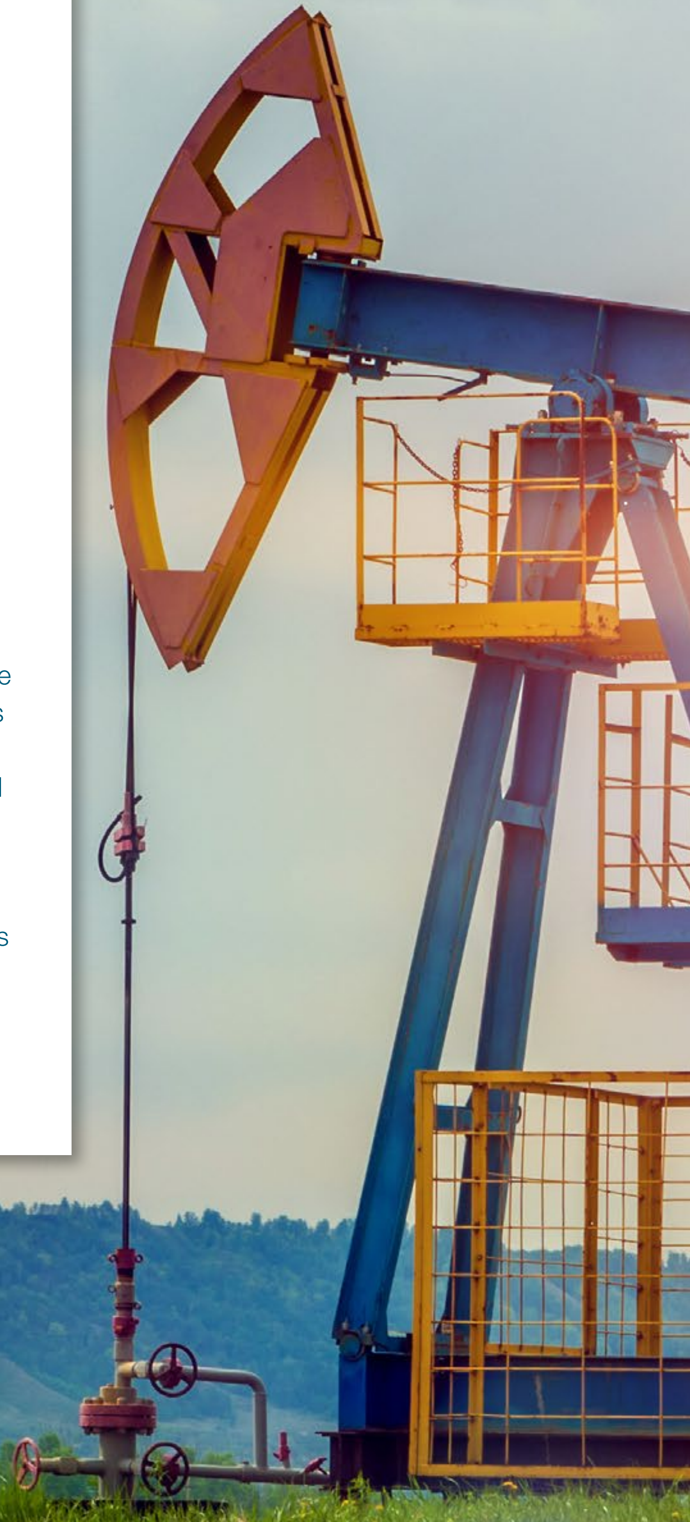
In 2005 Congress passed the Energy Policy Act which requires the national transportation fuel supply to contain a minimum annual volume of renewable fuels, including ethanol fuel. This mandate is known as the Renewable Fuel Standard ("RFS") and increases each year. Additionally, the Act requires the 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.

The FTC released its 2020 report on March 3, 2021, and its 2021 report on December 1, 2021. Consistent with prior reports, the FTC concluded in both reports 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 on a nationwide basis." However, the 2021 report did note "an increase in concentration since last year" in both producer and marketer based measures of concentration. Like previous reports, the FTC also 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 in 2020. The 2021 report notes that the final RFS requirements for 2021 are forthcoming. In 2020, market participants interviewed by the FTC characterized the U.S. ethanol industry as either "currently experiencing oversupply," or "in a fragile equilibrium regarding supply and demand." The 2020 report noted that the COVID-19 pandemic caused demand for ethanol to decline during the first half of 2020, which somewhat recovered during the second half of the year. Some ethanol producers shifted production to ethanol for hand sanitizer during the pandemic, which took ethanol out of the gasoline pool and reduced an oversupply of ethanol. The 2021 report notes that most market participants characterize the industry as having "excess capacity," while some say it has "sufficient" capacity. Most market participants stated that the demand for ethanol "substantially recovered to a more normal level" in 2021, after previously declining due to the COVID pandemic.

2021

State & Private Antitrust Litigation Developments

If industry players were troubled by prognostications of more active antitrust enforcement by federal and state governments in 2021, they could take solace in a smattering of bright spots in private antitrust litigation. Plaintiffs who missed deadlines, failed to disclose damages models, or bungled class certification requirements faced federal courts willing to enforce rules, even when doing so meant tossing potentially valuable claims out of court or sending plaintiffs back to the drawing board. State courts in Pennsylvania and Texas policed the boundaries between antitrust law and other substantive law, with Pennsylvania resisting the extension of its consumer protection statute to oil and gas leasing activity, and Texas applying its citizen participation law to dismiss claims that included competition law allegations. Federal courts continued a trend of treating claims over the manipulation of commodities markets for financial trading purposes as being a matter for securities and trading law, rather than competition law. But 2021 also saw a new group of class actions against chemical industry marketing practices as well as the most significant antitrust jury verdict in the chemical industry in years. The automatic trebling of a Delaware jury's multi-million-dollar verdict was a vivid reminder of the powerful lure of antitrust law for private litigants. Below, we discuss decisions, settlements, and new case filings in the oil and gas, refined products, power, and chemical sectors.



Oil and gas

Pennsylvania consumer protection statute held inapplicable to alleged market allocation for oil and gas lease buying

Commonwealth v. Chesapeake Energy Corp., 247 A.3d 934 (Pa. 2021)

In March 2021, the Supreme Court of Pennsylvania heard claims brought by the Commonwealth of Pennsylvania under that state's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") on behalf of private landowners against natural gas exploration and production companies for alleged deceptive, misleading, and unfair practices in obtaining natural gas leases.

The defendants, affiliates of Chesapeake and Anadarko, were alleged to have formed a joint venture including an oral market allocation agreement whereby the companies allotted the territories in which they would acquire oil and gas leases, and then each company would partner on the leases secured by the other. The commonwealth, contending the companies' arrangement was not disclosed to potential lessors, sued the defendants for "impair[ing] the competitive process" and engaging in unfair and deceptive acts under the UTPCPL.

The Supreme Court of Pennsylvania first addressed whether the claims of the commonwealth were cognizable under the UTPCPL. Noting that the UTPCPL prohibits unfair and deceptive practices in "the advertising, offering for sale, sale or distribution" of goods, the court held that the definition of trade and commerce in the UTPCPL encompasses only acts of selling. The court held that because the defendant was "in the position of a buyer" purchasing rights to mineral estates, the company was not acting as a seller, and therefore was not conducting trade and commerce for the purposes of the UTPCPL.

The court then concluded that whether the commonwealth was empowered under the UTPCPL to pursue antitrust remedies was a moot question. The court held, based on its conclusion that the commonwealth could not bring UTPCPL claims based on conduct as a purchaser, the commonwealth could not pursue UTPCPL antitrust remedies either.

Court denies class certification in Wyoming leasing dispute, but leaves door open

Black v. Occidental Petroleum, Case No. 2:19-cv-00243 (D. Wyo.)

In 2019, a group of landowners in 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 accused Anadarko of obtaining and hoarding drilling permits for mineral interests that, under Wyoming spacing and permitting rules, effectively blocked neighboring landowners from undertaking any leasing of their own to potential drillers. Plaintiffs, claiming Anadarko had not drilled a well in the area since 2013, sought to represent a class of Wyoming mineral interest owners whose development was allegedly blocked by the Anadarko leases and permits.

On November 29, 2021, a Wyoming federal district court denied without prejudice plaintiffs' bid for class certification. Plaintiffs initially moved to certify a class of all owners of "Class Minerals," defined to include unleased mineral rights in certain formations, within a certain proximity to Anadarko drilling sections. After filing their motion for class certification, the plaintiffs revised their definition of "Class Minerals" in a reply brief, narrowing the definition to focus on minerals closest to Anadarko leases, where the leases contained higher royalty rates allegedly impeding drilling. In addition to narrowing their definition of "Class Minerals," plaintiffs also filed expert declarations and reports with their reply.

The court ultimately denied class certification and vacated the hearing on the motion, concluding plaintiffs improperly used their reply brief to "do over" their class certification motion via a narrower definition of Class Minerals and new expert testimony. The court reasoned that "[f]airness dictates that if or when plaintiffs have a class certification request, that it be the subject of a motion and memorandum with attached exhibits, rather than an evolving set of docket filings which require reconciling a variety of requests, arguments, declarations, reports, supplemental declarations and supplemental reports."

Negative-price crude traders can stay anonymous for now in antitrust case

Mish Int'l Monetary Inc. v. Vega Capital London, Ltd. et al., Case No. 20-04577 (N.D. Ill.)

In August 2020, commodity trader Mish International brought antitrust claims arising out of the "negative price" for crude oil that energy markets experienced during the early days of the COVID-19 pandemic. The suit accused defendant Vega Capital London Ltd. and its traders of dumping certain May 2020 oil futures contracts at a loss in an allegedly coordinated scheme to drive down the cost of "trading at settlement" contracts. Defendant Vega has moved to dismiss that case for failure to allege an unreasonable restraint on trade, and as of this writing, that motion remains pending.

In May 2021, defendants filed a joint motion asking the district court for leave to keep the names of the accused traders in this case, currently identified as Vega Traders 1-12, under seal. Defendants argued that the individual traders could be subjected to harassment and would fear for their personal safety and that of their families. Though plaintiff Mish International disputed the scope of the protective order, the plaintiff chose not to oppose the request for sealing, conceding that keeping the traders anonymous would help move the case forward. The district court entered a protective order providing that the identities of the traders, for purposes of public filings, will remain redacted or masked and sealed unless and until such time as the court finds that plaintiff's complaint survives a motion to dismiss either in whole or in part. The court noted its ruling was "without prejudice to any party or nonparty" that may seek to unseal their identities before that time.

Federal Circuit declines jurisdiction over follow-on competition litigation relating to invalid fracking patent

Chandler v. Phoenix Servs. LLC, Case No. 20-1848 (Fed Cir.)

In June 2021, the U.S. Court of Appeals for the Federal Circuit determined that it lacked subject matter jurisdiction over an appeal from a standalone *Walker Process* antitrust claim and transferred the appeal to the Fifth Circuit Court of Appeals. In declining to exercise jurisdiction, the Federal Circuit held that the *Walker Process* antitrust claims did not come under its exclusive jurisdiction because the claims did not "arise under" the patent laws of the United States, but instead arose under the Sherman Act.

The case arose from a 2019 suit filed in the U.S. District Court for the Northern District of Texas by an oilfield services provider group. The defendant Phoenix Services had once owned patent rights for a water-heating process used in hydraulic fracturing, but the patent in question had been declared invalid in prior patent litigation, affirmed by the Federal Circuit in 2018. After the Phoenix patent had been declared invalid, Phoenix allegedly continued advertising its technology as patent-protected and sending cease-and-desist letters to the service providers asserting they were using patented technologies without a license.

Ronald Chandler, Chandler MFG, Newco Enterprises and Supertherm Heating Services, competing oilfield service providers, alleged that they lost business as a result of Phoenix's attempts to enforce the invalid patent and brought a "stand-alone" *Walker Process* antitrust claim. Often brought as counterclaims in patent infringement lawsuits, *Walker Process* claims (named for *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp*., 382 U.S. 172 (1965)) are claims that a patent holder obtained a patent by fraud on the U.S. Patent and Trademark Office (PTO) and attempted to use that fraudulently obtained patent to monopolize a relevant market.

The Federal Circuit held that a stand-alone *Walker Process* claim was not within the Federal Circuit's jurisdiction. Although the Federal Circuit can take up *Walker Process* claims, the court held that it only does so when there is a patent dispute under which there is at least a preliminary determination that the relevant patent was "live." In the *Chandler* case, however, the enforceability of the defendant's patent was no longer at issue. The remaining disputes in the case concerned the nature of the defendant's relationship to the original inventor's inequitable conduct, rather than on the validity of the patent or the inventor's conduct before the patent office. Because the claims did not depend on resolution of a substantial question of patent law, and because appellants failed to raise any patent law questions not already addressed in prior litigation, the Federal Circuit decided to transfer the case to the Fifth Circuit rather than exercising jurisdiction merely because a patent had once been involved in the dispute.

Refined products

Monopoly claim based on vapor capture patent license terms returns $85 million jury verdict

Ingevity Corp. & Ingevity South Carolina, LLC v. BASF Corp., Case No. 18-01391 (D. Del.)

In September 2021, a federal jury awarded $28 million in actual damages, trebled to nearly $85 million, to BASF Corporation over claims that Ingevity Corporation sought to monopolize and restrain trade in the market for vehicle fuel vapor capture components.

Ingevity produces inserts for vehicle fuel vapor capture canisters, known as “honeycombs” or “scrubbers,” for manufacturers of carbon adsorbents. As a condition of buying its honeycomb-style scrubbers, Ingevity required manufacturers to license a key patent for the canisters from Ingevity and agree to Ingevity’s license terms. BASF also produces honeycomb-style scrubbers, and claims its scrubbers are less expensive than Ingevity’s products. However, BASF alleged it was unable to sell its product because, under the terms of Ingevity’s patent license, manufacturers must purchase their full requirements of the inserts exclusively from Ingevity. BASF alleged the Ingevity licenses effectively blocked BASF’s scrubbers from the market.

Originally, in September 2018, Ingevity sued BASF in U.S. District Court in Delaware, alleging infringement of Ingevity’s honeycomb technology patent, which discloses a method for reducing fuel vapor emissions in automotive evaporative emissions control systems. BASF responded that Ingevity’s patent was invalid in light of prior art using honeycomb structures to reduce emissions. The district court, granting summary judgment to BASF on the patent claims, noted that the prior inventions anticipated the Ingevity honeycombs even if the prior inventors had not made a patent claim relating to the particular adsorption requirements specified by Ingevity in its patents.

BASF also countersued Ingevity for monopolization of honeycomb scrubber technology and tortious interference with BASF's prospective business relations. BASF claimed prospective customers refrained from placing initial orders of its honeycomb scrubbers due to Ingevity's licensing practices, resulting in lost sales and profits to BASF. That claim went to trial, and on September 15, 2021, a jury agreed with BASF. The jury found damages of $28,285,714, automatically trebled to $84.85 million, plus attorney's fees and costs.

A final judgment awaits decisions on various post-trial motions. Ingevity has announced that it plans to appeal the judgment.

Antitrust claims arising out of alleged ethanol market manipulation dismissed for now

Midwest Renewable Energy LLC v. Archer Daniels Midland Company, Case No. 2:20-cv-02212 (C.D. Ill) and related Argo Terminal cases

In July 2020, Midwest Renewable Energy filed a putative class action against Archer Daniels Midland (ADM), alleging ADM manipulated the market for ethanol and attempted to monopolize that market at the benchmark trading hub, Argo Terminal. In October 2020, ADM moved to dismiss plaintiff's complaint, arguing plaintiff (1) failed to adequately plead anti-competitive effects, (2) failed to define a legally cognizable market that ADM allegedly dominated, and (3) failed to plead antitrust injuries, because plaintiff's alleged injuries arose out of an excess of low-price competition, not out of any efforts to limit competition.

In August 2021, the court granted ADM's motion to dismiss. The court agreed plaintiff's injury from low-price competition was not an antitrust injury. According to the court, "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." The court also found the complaint failed to allege plaintiff "ha[d] been knocked out of the market or is in imminent danger of leaving," or that ADM's competitors had tried and failed to enter the marketplace or had already exited the market. The court noted plaintiff alleged it was still making ethanol sales, just at depressed prices.

Midwest Renewable Energy amended its complaint, and in September 2021, ADM again moved to dismiss. ADM, arguing plaintiff's amended complaint fails to state a predatory pricing claim, contends plaintiff did not allege competitors had exited the market due to unprofitability. ADM also argues the amended complaint does not allege any of the ethanol producers participated in an adequately pleaded market, or that there were barriers to entering the relevant market. ADM further argues plaintiff's allegation that ADM hiked prices in early 2020 is conclusory and counters that ethanol prices, in fact, hit a multi-year low in early 2020 due to reduced demand for driving, gasoline, and ethanol caused by the COVID-19 pandemic. ADM's motion to dismiss is pending as of this writing.

In August 2021, the court dismissed plaintiffs' complaint in the related case *Green Plains Trade Group LLC v. Archer Daniels Midland Company.* There, plaintiffs alleged ADM had uneconomically shipped ethanol to Argo when prices at the terminal were already lower than those at other terminals and sacrificed profits on physical ethanol sales to leverage larger profits on derivatives contracts. Plaintiffs allege this conduct manipulated the benchmark price of ethanol in violation of the Commodities Exchange Act (CEA), but the court dismissed the claim on the grounds that traders of physical commodities are not authorized to sue under that statute.

In September 2021, the court also dismissed plaintiffs' complaint in the related case *United Wisconsin Grain Producers LLC v. Archer Daniels Midland Company*. There, plaintiffs allege ADM manipulated and artificially depressed the price of ethanol, thus violating Section 2 of the Sherman Antitrust Act, Sections 4 and 16 of the Clayton Act, and multiple state law claims, including antitrust, consumer fraud, and deceptive practices claims. Although the court found plaintiffs adequately pleaded that ADM pursued the willful acquisition of monopoly power and a relevant market for their antitrust claims, the court found plaintiffs failed to adequately allege antitrust injury on reasoning similar to the *Midwest Renewable Energy* result. The court concluded plaintiffs could not rely on alleged violations of the CEA in related cases to allege antitrust injury sufficient to support its claims under the Clayton and Sherman Antitrust Acts. The plaintiffs have filed an amended complaint, which ADM has moved to dismiss. That motion is pending.

Diesel fuel damages struck from California refinery disruption cases

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

In *Bartlett*, a putative class of California retail fuel purchasers sued several California refiners, alleging the refiners conspired to artificially inflate gas prices in California in 2012 and 2015. Plaintiffs accused the refiners of publicly blaming price spikes on operational disruptions at certain refineries and allege these disruptions were actually a sham cover for defendants' alleged anti-competitive conduct.

Last year, defendants jointly moved to strike portions of plaintiffs' expert reports for including new and undisclosed theories of liability. While the court denied the bulk of defendants' motion to strike, it did, in December 2020, grant the defendants' motion relating to the diesel-fuel damages in an expert report. The court found plaintiffs improperly introduced a new theory of liability without fair notice as diesel price-fixing was not alleged in the complaint and plaintiffs never mentioned diesel in their interrogatory responses. The court struck the diesel portion of one of plaintiff's damages expert's reports which had calculated damages of around $15 billion, including $4.6 billion in the diesel-fuel market alone.

In April 2021, defendants filed multiple motions for summary judgment. In a joint motion, defendants argue the plaintiffs' allegations involve an implausible, "convoluted" scheme requiring "the knowledge and participation of hundreds—if not thousands—of Defendants' employees," and that the evidence in fact shows each defendant independently responded to the 2015 supply disruptions. The defendants' motions are pending at this time.

Federal antitrust claims dismissed in ongoing California refinery explosion cases

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, Case No. 3:20-cv-03131 (N.D. Cal.)

Putative class actions alleging manipulation of gasoline and gasoline blending component prices in California will proceed in both state and federal court after partial dismissals in March and September of 2021.

In May 2020, the State of California and 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, specifically under the Cartwright Act (California's antitrust law), the Sherman Act, and California's Unfair Competition Law ("UCL"). The plaintiffs and defendants agreed to 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.

In March 2021, the court dismissed plaintiffs' claims under the Sherman Act and California's UCL. The Sherman Act claims were dismissed due to lack of standing. The plaintiffs had alleged a per se violation of the Sherman Act, but sought only injunctive relief as a remedy; and because plaintiffs did not allege any ongoing illegal activity, the court concluded the plaintiffs lacked standing to pursue an injunction. The court also dismissed plaintiffs' UCL claim with leave to amend because plaintiffs failed to allege that they lacked an adequate remedy at law, a requirement under UCL precedent. Plaintiffs' damages claims under the Cartwright Act were not dismissed, the court having concluded plaintiffs had alleged sufficient facts regarding an unlawful agreement to restrain trade, causation, and injury.

In September 2021, the court granted SK Trading's motion to dismiss for lack of personal jurisdiction. SK Trading did not engage in any of the alleged trades, but plaintiffs argued SK Energy (an SK Trading subsidiary) acted as SK Trading's agent. While plaintiffs were able to show the parent company closely monitored and supervised the subsidiary's hiring practices, they were unable to show sufficient day-to-day control over the subsidiary's operations to support their agency theory. The case is moving forward on plaintiffs' Cartwright Act claims against SK Energy and Vitol Inc.

Antitrust claim over exclusive distribution deal for lubricants dismissed

Penthol LLC v. Vertex Energy Operating, LLC, Case No. 4:21-cv-00416 (S.D. Tex.)

In August 2021, a federal district court in Texas dismissed claims that sales restrictions in an exclusive distribution deal became anti-competitive after the downstream distributor decided to enter the market itself and use the agreed distribution restrictions to lock its former supplier out of the market.

The plaintiff, Penthol LLC, is a foreign distributor of Group III base oil, a refined oil product used in a broad spectrum of lubricant applications. In 2016, Penthol entered into a contract with Vertex Energy Operating, LLC, a refiner and marketer of used motor oil, whereby Vertex would become an exclusive independent sales representative for Penthol's products in North America. The agreement contained a "non-circumvention" provision that blocked Penthol from engaging any additional sales representatives and blocked Vertex from manufacturing or selling any base-oil product that competed directly or indirectly with Penthol's product. At the time, Vertex was allegedly not manufacturing or selling Group III base oil, but Penthol alleges that, after entering into the distribution agreement with Penthol, Vertex began manufacturing and selling its own Group III base oil in competition with Penthol's products.

In February 2021, Penthol sued Vertex. Penthol argued that the non-circumvention provision in the parties' distribution agreement restrained trade in violation of Section 1 of the Sherman Act once Vertex entered the Group III base oil market itself. Penthol contended that the contract removed Penthol as a competitor for Vertex, reducing competition and increasing prices.

The court dismissed Penthol's Sherman Act claim. The court held that adopting the non-circumvention provision in the parties' distribution agreement could not represent a concerted action to restrain trade, since when the parties entered into the agreement, Vertex was not selling a competing product and the parties were not allegedly agreeing to an unlawful objective of blocking competition. As for Vertex's decision to sell its own products after the agreement with Penthol was formed, any anti-competitive intent behind that decision would have been unilateral action, and thus also would lack the conspiratorial, collaborative element required for a Sherman Act Section 1 claim.

In September 2021, Penthol filed a motion for reconsideration of the dismissal of its Sherman Act claim in light of new Fifth Circuit authority. Penthol relies on *Quadvest, L.P. v. San Jacinto River Authority*, a case in which the district court held that a party could bring a Section 1 challenge to an agreement even if it was a party to that agreement and did not share the defendant's anti-competitive intent. In that case, a private utility entered into a contract to purchase water from a government entity, but later filed suit, claiming the government entity was attempting monopolize the supply of water in Montgomery County, Texas. 2020 WL 5034155, at *1, *8 (S.D. Tex. Aug. 14, 2020). The district court, denying a motion to dismiss, held there was a plausible inference of concerted action in violation of Section 1. *Id*. The Fifth Circuit affirmed, but only addressed the government entity's state immunity defense. 7 F.4th 337 (5th Cir. 2021). The motion is pending at this writing.

Regardless of the motion to reconsider the antitrust ruling, Penthol's case is moving forward on its remaining breach of contract, business disparagement, and misappropriation of trade secrets claims. The case is presently set for trial in 2023.

Antitrust claims arising out of competitor's alleged business disparagement dismissed

Western Mktg., Inc. v. AEG Petroleum, LLC, 616 S.W.3d 903 (Tex. App.—Amarillo 2021), opinion modified on reh'g, 621 S.W.3d 88 (Tex. App.—Amarillo 2021, no pet.)

In January 2021, the Amarillo Court of Appeals dismissed claims of antitrust, conspiracy, and Lanham Act violations lodged against a petroleum product distributor and its employee.

In *Western Marketing*, the plaintiff sued the two defendants over their alleged efforts to harm the plaintiff's business interests by defaming the plaintiff and attempting to restrain trade with the plaintiff. The defendants allegedly told plaintiff's current and potential customers that the plaintiff sold counterfeit bulk lubricant products and was unreliable. The defendants moved to dismiss the lawsuit under the Texas Citizens Participation Act ("TCPA"). The trial court denied the defendants' motion.

On appeal, the court held the plaintiff's claims indeed related to the defendants' right of free speech under the TCPA. Under the TCPA, an "exercise of the right of free speech" is a communication made in connection with a matter of public concern, which includes communications related to "a good, product, or service in the marketplace." Because the defendants' communications about the plaintiff's goods, products, or services formed the basis of the plaintiff's claims against the defendants, the court held those communications "fell within the penumbra of TCPA's provisions pertaining to the right of free speech," at least when made to companies who dealt with the plaintiff but had no commercial relationship with the defendants. However, the court held certain of the defendants' statements — those made to defendants' customers or potential customers — fell within the TCPA's commercial speech exemption, which exempts from the statute statements made by sellers to potential customers arising out of a sale of the seller's goods or services.

The court then considered whether the exempted statements were sufficient to state an antitrust conspiracy claim. Though the plaintiff claimed it lost suppliers due to the defendants' disparaging statements, the court held the plaintiff did not present clear evidence establishing a prima facie case (as required to survive a TCPA motion to dismiss)

on the question of conspiracy. The court held the suppliers' "opting to forgo business dealings with someone after being told falsehoods" was not "clear and specific evidence from which a rational fact-finder could reasonably infer an agreement to restrain trade." The appeals court therefore reversed the trial court's denial of the defendants' motion to dismiss in part, and rendered an order of dismissal as to the plaintiff's antitrust and conspiracy claims, as well as certain other claims.

Damages judgment affirmed in gas station predatory-pricing case

Westmoreland v. Midwest St. Louis, LLC, 623 S.W.3d 618 (Mo. App. E.D. 2021)

In 2012, a price war broke out between two gas stations in Missouri located directly across the street from one another near a busy interstate exit. While one of the stations was new and modern, the other was older and more dated. The older gas station lowered prices to draw customers exiting the interstate, setting off a series of price cuts.

The owner of a third gas station, located about a mile away from the two warring stations, sued the owner of the older station, alleging that during this price war, the defendant sold fuel below cost in violation of Missouri's Motor Fuel Marketing Act ("MFMA"). The third station's owner claimed he had been unable to match the price cuts, costing him profits, rendering him unable to pay his fuel supplier, and leading his bank to repossess the station, ultimately resulting in the sale of the station at a depressed price.

Following a 2018 trial, a jury awarded the plaintiff $1.8 million in damages based on the plaintiff's alleged business and property losses, which were trebled pursuant to the MFMA. The defendant, claiming that the plaintiff lacked standing under the MFMA, appealed the judgment.

In a February 2021 opinion, the court of appeals affirmed judgment for the injured station owner. The court held the plaintiff satisfied the standing requirement to bring a private action under the MFMA because he proved he was a "person ... injured in his business or property in the relevant geographic market." More specifically, the plaintiff proved that "the 'injury to his business or property' was 'inextricably intertwined' with the injury [the defendant] sought to inflict on the relevant motor fuel market." Finding the damages award

not excessive in light of the evidence, the appeals court affirmed judgment on the verdict.

Another partial settlement approved in propane tank case

In re Pre-Filled Propane Tank Antitrust Litigation, Case No. 4:14-md-02567 (W.D. Mo.)

Putative class actions alleging price-fixing in the sale of propane tanks will proceed in part in a consolidated multidistrict litigation after partial settlements in June 2020 and March 2021.

Plaintiffs, purchasers of propane tanks, brought a putative class action against two tank distributors, Blue Rhino and AmeriGas Cylinder Exchange, alleging that they conspired to reduce the amount of propane they put in each tank sold in 2008 while maintaining consistent pricing, creating an “effective price increase of 13%.” 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 reversed after rehearing en banc. 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 the claims survived 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 agreed to pay the class $6.25 million, while AmeriGas and related companies agreed to pay $6.31 million.

Similarly, defendant AmeriGas and related companies and the indirect purchaser class agreed on settlement terms in late 2020. In March 2021, the district court gave final approval for a settlement totaling $6.5 million.

In September 2021, the court held a hearing on the indirect purchasers’ motion for class certification against the remaining defendants, Blue Rhino and related companies, but has yet to rule. The case is moving forward and is set for trial in May 2022.

Power

Connecticut power distribution bid evaluations held exempt from state FOIA disclosure

Allco Renewable Energy Ltd. v. Freedom of Info. Comm’n, 205 Conn. App. 144, 257 A.3d 324 (2021)

In an opinion issued June 8, 2021, a Connecticut appeals court affirmed the dismissal of a solar development company’s request for documents related to a state bid process. The court rejected an argument that the state’s Freedom of Information Act required the Connecticut Department of Energy and Environmental Protection to disclose information related to its evaluation of competitive bids.

The case arose out of the Department’s 2015 request for proposals from electric distribution companies regarding making renewable energy available at scale to state residents. In the bid process, the Department informed bidders it would publicly disclose some information when making its final determination but would take reasonable steps to protect some confidential information. On December 1, 2016, after six other companies received long-term energy contracts, plaintiff Allco submitted a request to the Department for disclosure of certain information related to the bids,

including information about a market simulation model the Department used to evaluate the cost and benefits of bids. The Department denied Allco's request, invoking the Act's "trade secret" exception. After Allco narrowed its request to focus on the market simulation model results, Allco appealed the determination that the model qualified as a trade secret.

The appeals court agreed with the conclusion that the Department's model, created to analyze developers' responses to the Department's request for proposals, required confidentiality and constituted a "trade secret" under the Connecticut Freedom of Information Act. The court reasoned that the Department was engaged in trade by coordinating the request for proposals and analyzing those proposals, and that because the purpose of the request for proposals was to obtain savings to ratepayers through competitive bidding, the Department's information qualified as valuable confidential information even though the Department was not one of the competing bidders itself. Moreover, the court concluded that if the model results were made public, bidders could have extracted pricing information from those models that would result in adverse consequences to ratepayers. Finding the information had been obtained on a confidential basis and the confidentiality of the information had been maintained, the court affirmed the dismissal of Allco's request for that information.

Chemicals

Agricultural chemical producers accused of boycotting online distributors

In re Crop Inputs Antitrust Litigation, Case No. 4:21-md-02993 (E.D. Mo.)

In February 2021, retail purchasers of seed and crop protection chemicals like herbicides (called "crop inputs") brought multiple suits against major manufacturers, wholesalers, and retailers of such chemicals, accusing them of conspiring to raise prices in the wholesale and retail market by restricting public access to pricing information.

The plaintiffs claim that over the past decade, third-party electronic platforms like Farmers Business Network and AgVend began competing with manufacturers' existing networks of authorized retailers and offering more transparent pricing. These platforms purchased crop inputs from the defendants and offered those products directly to chemical consumers online, bypassing the existing distribution system and allegedly charging lower prices than did many authorized retailers. The plaintiffs assert that defendants discussed these new competitors at trade association meetings and collectively agreed not to sell products to these platforms, blocking the platforms' access to crop inputs and insulating distributors and retailers from competition. Plaintiffs also assert that defendants sought to protect their networks by canceling contracts with Yorkton Distributors after Farmers Business Network bought that retailer in an attempt to circumvent the alleged boycott and obtain access to crop inputs.

The named defendants include manufacturers, such as Bayer AG and its relevant subsidiaries, Corteva Inc., BASF Corporation, and Syngenta Corporation; wholesalers, such as Cargill, Inc., Winfield Solutions, LLC, and Univar Solutions; and retailers including CHS Inc., Nutrien Ag Solutions, Inc., Growmark, Inc., Tenkoz Inc., Simplot AB Retail Sub, Inc., and Federated Co-operatives Ltd.

Plaintiffs allege defendants engaged in a conspiracy to restrain trade in violation of the Sherman Act and similar laws in various states and engaged in unfair competition in violation of various state laws. The various class actions were consolidated in a multi-district litigation in Missouri in June.

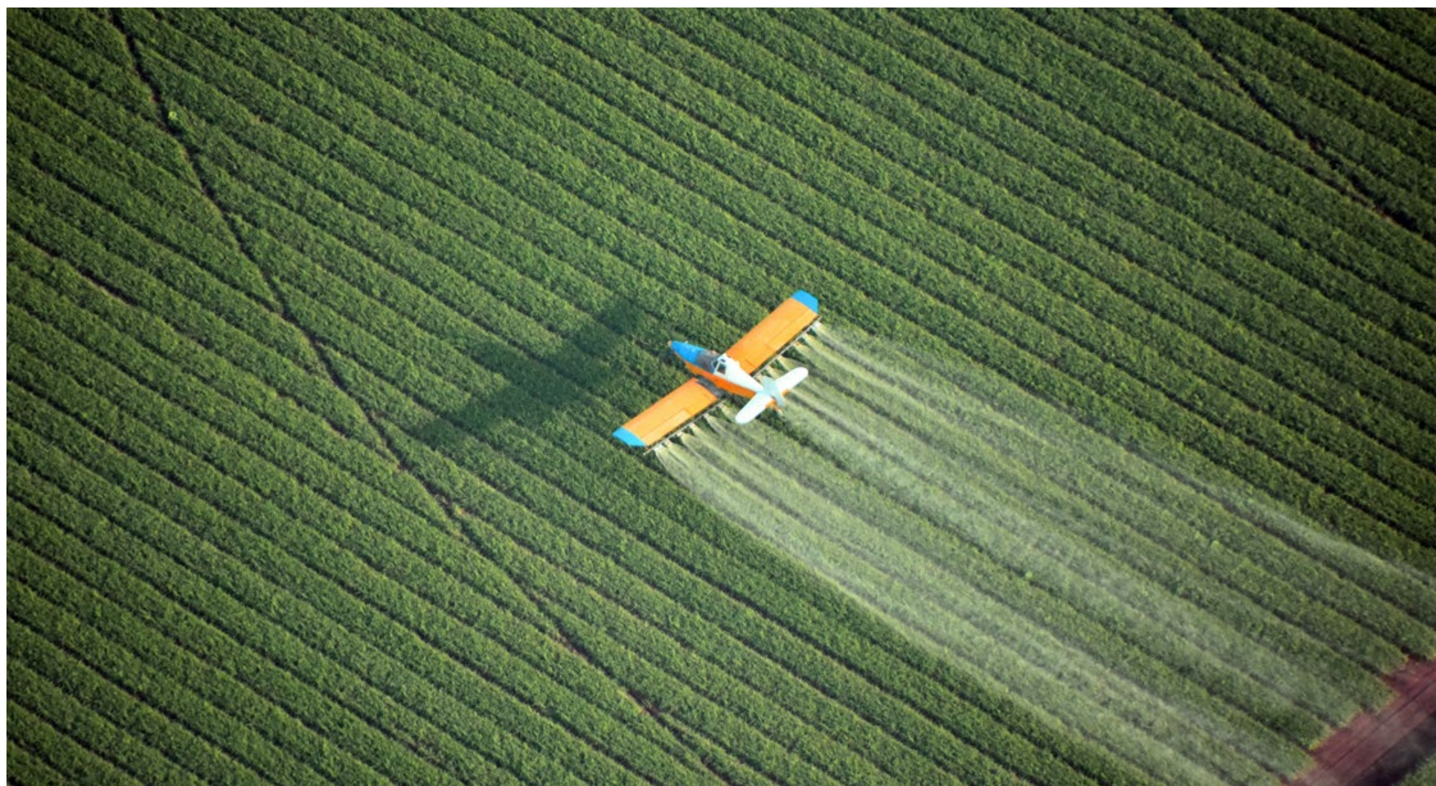
State law claims narrowed in caustic soda case on procedural and standing grounds

In re Caustic Soda, Case No. 1:19-cv-00385 (W.D.N.Y.)

In March 2019, chemical manufacturers and other plaintiffs filed multiple class-action suits against caustic soda manufacturers, alleging defendants conspired to restrict domestic supply and to fix prices of caustic soda (sodium hydroxide), thus violating Section 1 of the Sherman Act. In May 2019, the court consolidated these suits into a single class action.

In June 2021, the court granted in part and denied in part defendants' motion to dismiss against a group of indirect purchaser plaintiffs, ultimately dismissing various state consumer protection and antitrust claims. The court agreed with defendants that the indirect purchaser plaintiffs were required to allege competitive effects or affected sales of caustic soda in each state as to which they pursued antitrust claims. The court, declining to assume the existence of such sales, remarked, "this is not a case involving a high-volume consumer good with many thousands of purchasers, such that a factfinder could reasonably assume that sales had been made in every state." The court therefore dismissed claims pertaining to states in which no relevant sales had been alleged. The court also dismissed indirect purchaser claims under Montana and Utah law, on the grounds that Montana state antitrust law follows the prohibition on indirect purchaser claims in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and that Utah antitrust law requires a named plaintiff to be a Utah citizen or resident. The court rejected other state law procedural grounds for dismissal, finding that plaintiffs had complied with the relevant state law procedures or that the procedures did not apply in federal court. In all, the court dismissed antitrust claims asserted under the laws of sixteen states and the District of Columbia, but denied the motion as to claims under the laws of Illinois, Kansas, Nevada, and Tennessee.

Plaintiffs subsequently amended their complaint, and in October 2021, defendants again sought partial dismissal. Defendants' motion is pending as of this writing.



Antitrust Laws and Enforcers

The Biden administration has started to make its mark within the antitrust agencies, with a new FTC Chair, Assistant Attorney General at the DOJ Antitrust Division, and third FTC nominee pending before the Senate – all poised to implement a new, more aggressive antitrust agenda. 2021 also witnessed higher levels of turnover at the career staff level and several new Chiefs, Assistant Chiefs, and Assistant Directors, including in the sections that focus on energy and chemicals.

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 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 and Who Does It?

U.S. merger review is a case-specific and fact-intensive inquiry that attempts to make predictions about how the market will behave if the proposed transaction is completed. For mergers and acquisitions above certain annually adjusted thresholds, the merger review process begins when the merging parties file a Hart-Scott-Rodino, or HSR, notification of the transaction with the FTC and DOJ. The notification includes facts about the merger and the industry in which the merging parties operate. (For non-reportable transactions, the agencies can investigate either based on a complaint or on their own initiative.)

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

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

Second Request investigations typically last six months or longer and involve the agency collecting and reviewing voluminous business documents and conducting interviews with executives from the merging parties, competitors, and customers. Once the parties have "substantially complied" with the Second Request, the agency then has another thirty days to either close its investigation or initiate a suit to block the merger.

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

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

Once a product market is established, the agencies attempt to measure the competitive effects in that market from the proposed transaction. This requires identifying the actual and potential competitors in the market, what shares the merging parties and others in the market hold, the barriers to entry (by new firms) and expansion (by existing firms), how closely the merging parties compete, the bargaining strength of customers, and any history of anticompetitive conduct in the industry. The key question is whether an attempt by

the merged parties to increase their prices (or decrease quality or output) would be successful or whether it would be thwarted by competitive response from others actually or potentially in the market and consumers switching their purchasing behavior. The agencies also attempt to account for the consumer benefits from any countervailing efficiencies generated by the merger.

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

How the FTC Approaches Oil and Gas Mergers

The FTC's approach to oil and gas mergers largely has depended on where in the production and supply chain the merging firms operate. Oil and gas mergers frequently encompass a large number of relevant markets such that the FTC has 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 required divestitures or behavioral remedies (usually contractual supply commitments) for transactions involving crude, refined product, or natural gas-related pipelines. 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 or 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. 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 from the chloride process, and therefore could not switch to sulfate process TiO_2 in response to a post-merger price increase. Other product markets defined in recent chemicals mergers have included "superphosphoric acid" and "65-67% concentration nitric acid" (PotashCorp/Agrium), 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 operated globally and required global suppliers. In Cristal/Tronox, the FTC alleged a geographic market for North America, as TiO_2 is largely shipped by truck or rail. That definition excludes the possibility of parties turning to supply from China and other overseas sources, a distinction the FTC drew based on evidence that overseas sources do not currently pose a competitive check in North America. 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 and false statement statutes.

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

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

Illegal Agreements

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

Price Fixing. Price fixing is an agreement between competitors to raise, fix, hold firm, establish minimums, or any other activity to otherwise 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. 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 Allocations. 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 and Immunities

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

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

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

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

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

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

Federal Antitrust Agencies

Both the FTC's Bureau of Competition and the DOJ's Antitrust Division enforce the U.S. antitrust laws. 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, while the agencies share responsibility for merger investigations and civil non-merger investigations. The FTC typically handles civil enforcement involving oil and gas pipelines, terminals, and retailing, as well as chemicals, while the DOJ typically handles electricity and oilfield services.

FTC

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

Five presidentially nominated Commissioners head the FTC and serve seven-year terms. By law, no more than three Commissioners can be members of the same political party. President Biden's nominee, Lina M. Khan, was sworn in as Chair of the Commission on June 15, 2021. Prior to joining the FTC, Khan was an associate professor of antitrust law at Columbia Law School, and also served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, where she was noted as a key architect of a 2019 report on competition in digital markets. Chair Khan presently serves with Rebecca Kelly Slaughter (a Democrat appointee) and Noah Joshua Phillips and Christine S. Wilson (both Republican appointees). As of press time, President Biden's nomination of Georgetown Law professor Alvaro Bedoya remains pending before the Senate, leaving the Commission with a 2-2 partisan split.

Holly Vedova has officially headed the Bureau of Competition since September 2021 (and had been the acting Chief since June). Vedova has served in various roles at the FTC since joining the agency in 1990, including as attorney-advisor to five different commissioners and as a staff attorney in the Mergers III Division, which is the FTC unit tasked with reviewing oil and gas industry transactions. Vedova has played a key role in implementing the Commission's enforcement priorities and developments under its new leadership. Many of these developments have been announced in agency blog posts under her byline. For example, she published a blog post announcing the Bureau's renewed focus on retail gasoline, specifically calling out alleged price monitoring and signaling behavior by large national gasoline chains. The piece also states that the Bureau will give enhanced scrutiny to and seek harsher remedies against mergers in the wholesale and retail gasoline sectors.

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
Mika Ikeda, Deputy Assistant Director

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. Mergers II also was responsible for the FTC's investigation of the Cristal/Tronox merger, which resulted in a significant divestiture. The division has also reviewed and obtained consent orders in a number of high-profile mergers in the chemical industry, including Keystone/Compagnie de Saint-

Gobain, Dow/Rohm & Haas, Owens/Corning, Occidental Petroleum/Vulcan, Bayer/Aventis, and Dow Chemical/Union Carbide.

There are approximately 35 individuals in Mergers II. Vote, who joined the agency in 2006, became Assistant Director in 2018 after having served as a deputy since 2015. Femenella joined Mergers II as a deputy after having previously served as Counsel to the Director of the Anticompetitive Practices Division, and Ikeda was named to a deputy role in 2021.

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

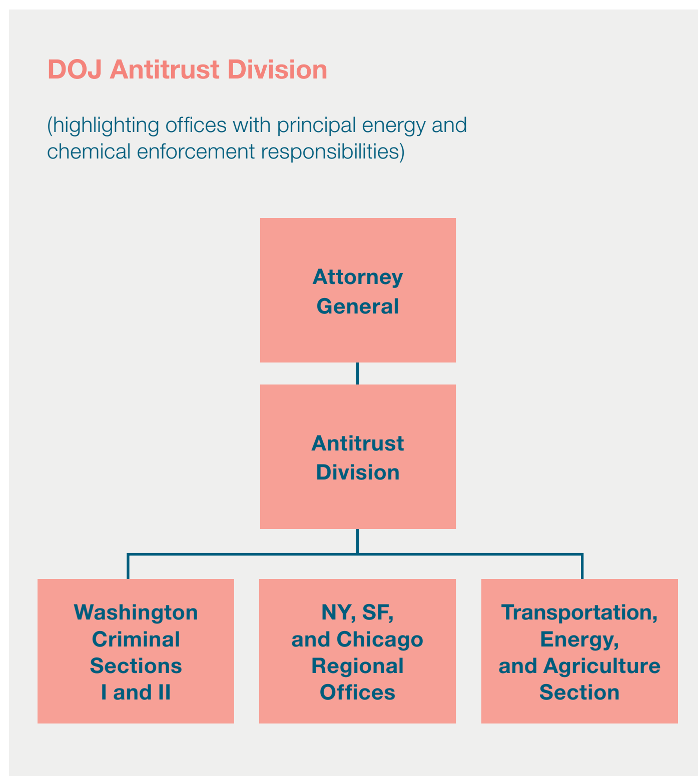
There are approximately 25 individuals in the division. Richman has led Mergers III since the summer of 2016, following a long career in the division, having joined directly out of law school in 1990 and serving as a deputy for over a decade. Richman has been involved in numerous merger investigations 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

On October 16, 2021, the Senate approved President Biden's nominee, Jonathan Kanter, to serve as Assistant Attorney General (AAG) of the Department of Justice. After a stint at the FTC from 1998-2000, Kanter worked for a variety of national law firms, prior to starting his own firm in 2020. Primarily known as a critic of "big tech" companies, in his confirmation hearings, Kanter pledged "vigorous enforcement of the antitrust laws" across industries. Kanter was not, however, asked any questions specific to the energy or chemicals industries, and most of his work in the private sector involved the technology industry. 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.



Transportation, Energy, and Agriculture Section

Robert Lepore, Chief
Patricia Corcoran, Assistant Chief
Katherine Speegle, Assistant Chief
Souyoung Choe, Acting Assistant Chief
Caroline Laise, Acting Assistant Chief

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

Robert Lepore

There are approximately 35 individuals in the TEA Section, which is currently led by Chief Robert Lepore, Assistant Chiefs Patricia Corcoran and Katherine Speegle and Acting Assistant Chiefs Soyoung Choe and Caroline Laise. Lepore joined the Antitrust Division directly out of law school in 2010. Lepore had a leading role on the team that obtained a record fine and injunctive relief against activist investor ValueAct for violating premerger notification requirements in connection with the abandoned Baker Hughes/Halliburton merger. He also handled the Section's gun-jumping action against Duke Energy Corp. in connection with its acquisition of the Osprey Energy Center from Calpine Corporation.

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. Additionally, the team is ranked nationally, in Washington, D.C., and in Texas by Chambers Global (2019-present) and Chambers USA (2018-present) as well as by Legal 500 U.S. (2018-present) for our antitrust work. V&E's Antitrust practice is also recognized in the GCR 100 as an outstanding antitrust practice in Washington, D.C. and in Texas by Global Competition Review (2015-present). 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/off-take 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.

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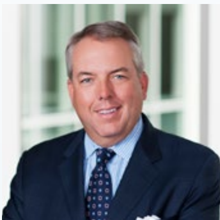

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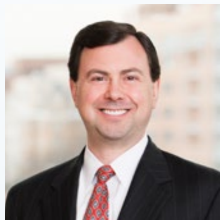

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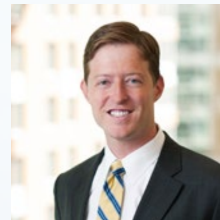

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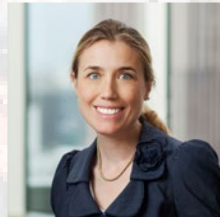

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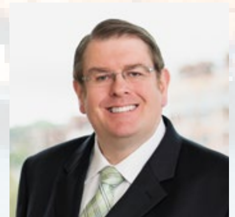

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