Vinson&Elkins

2023 Chemicals & Energy

Antitrust Report

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Why Antitrust Matters to Energy & Chemical Firms

The antitrust laws exist to ensure that economic activity in the United States is characterized by a fair and open competitive process, including in the energy and chemicals industries. Contrary to common misconceptions, antitrust law does not exist to guarantee that markets will see a certain level of competition, ensure the success of certain competitors, or reduce the size of large companies. Antitrust is about preserving the opportunity for competition; the rest is up to the market.

Antitrust laws exist at both the federal and state levels. The federal government has passed three main antitrust laws. The Sherman Act prohibits unreasonable restraints of trade (including price-fixing, bid-rigging, group boycotts, market allocation, and tie-in agreements) and monopolization, attempted monopolization, or conspiracy to monopolize. The Clayton Act establishes pre-merger notification requirements for certain transactions and regulates directors' and officers' ability to serve on the boards of competing corporations. The Federal Trade Commission Act empowers the Federal Trade Commission ("FTC") to enforce the substantive provisions of the antitrust laws. State antitrust statutes typically mirror the Sherman Act, with some minor variations.

Antitrust enforcement can arise in a variety of ways. There are two federal agencies that enforce these laws: the U.S. Department of Justice's ("DOJ") Antitrust Division and the FTC. Each has responsibility for particular industries and, as a result, has developed a sophisticated understanding of the businesses under their purview. The FTC is primarily responsible for analyzing mergers in the chemical industry, as well as in oil and gas. The DOJ has primary responsibility for reviewing electricity and oilfield services mergers, as well as all criminal enforcement.

While the federal agencies have extensive career staff, enforcement priorities are determined by political appointees. At the DOJ, the top antitrust official is the Assistant Attorney General in charge of the Antitrust Division, a position currently held by Jonathan Kanter. The FTC is governed by five commissioners, only three of whom can come from the same party. There are currently three Democratic commissioners, Lina Khan (Chair), Rebecca Slaughter, and Alvaro Bedoya. There are currently vacancies in the other two seats.

State attorneys general offices enforce state antitrust laws. States have occasionally taken the lead on major investigations and may coordinate with one another when bringing enforcement actions. State agencies may also monitor the energy or chemical industries for potential violations. For example, California recently created a Division of Petroleum Market Oversight within the California Energy Commission, which is charged with monitoring the petroleum industry to identify illegal behavior and referring violations to the California Attorney General for prosecution.

Finally, companies and individuals that believe they have been harmed by antitrust violations can bring private litigation, which is notoriously protracted and expensive. As the Supreme Court noted, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases." The Sherman Act creates a significant incentive for private plaintiffs by providing for treble damages and the award of attorneys' fees and costs to prevailing parties. Private plaintiffs can be either consumers or rival businesses harmed by anticompetitive arrangements.

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

Acquisitions & Other Transactions

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

The Biden administration has been actively increasing the scrutiny applied to mergers and acquisitions. In July 2023, the DOJ and FTC jointly released revised draft Merger Guidelines (the "Guidelines") for public comment. If adopted, the Guidelines will update the factors and frameworks the agencies consider when deciding whether to attempt to block a merger. They are expected to give the agencies more flexibility to intervene against mergers they believe will have anti-competitive effects. The agencies have also issued a proposed rulemaking that would redesign the pre-merger notification process required by the Hart-Scott-Rodino Antitrust Improvement Act ("HSR") by making the HSR Form considerably more detailed and burdensome for merging entities.

As discussed in more detail below, the enforcement agencies have established frameworks for how they look at energy and chemicals transactions. For example, mergers in oil and gas exploration have historically attracted relatively little scrutiny, since the market is viewed as worldwide and there are myriad sources of potential supply. By contrast, chemical, pipeline and retail fuel mergers have seen much greater scrutiny, and the agencies have challenged a number of these mergers or required divestitures to address their concerns.

Collusion & Other Coordinated Conduct

Antitrust law prevents companies that should be competing on price, quality, or innovation from agreeing among themselves not to compete. In the chemicals sector, class action allegations against caustic soda manufacturers saw a breakthrough when the U.S. subsidiary of Formosa Plastics Corp. agreed to pay $7.5 million and cooperate in ongoing litigation against non-settling defendants. Cases against major pesticide manufacturers alleging that they block market entry of generic rivals were also consolidated in the Middle District of North Carolina.

In the energy sector, cases involving price-fixing trading continued to feature prominently in the litigation landscape. A federal district court approved a settlement of natural gas buyers' claims that certain The Williams Companies, Inc. entities conspired to fix the price of natural gas in the early 2000s. The Seventh Circuit heard from plaintiffs in a dispute alleging the manipulation of ethanol price indices who wanted their claims reinstated. Predatory pricing claims against Costco for allegedly selling gas below cost were also dismissed in the Eastern District of Wisconsin.

Unilateral Conduct

When a single entity accounts for a significant portion of sales or purchases in a market, its conduct alone can impact the market by foreclosing competitors. Recently, unilateral conduct cases involving energy and chemicals markets have been relatively rare. Specialty chemical manufacturers continue to face challenges over alleged monopolistic practices, including manufacturers of railcar merchant chlorine and calcium silicate. In the energy section, a circuit court affirmed certification of a class of landowners who allege that Anadarko monopolized oil and gas drilling in Wyoming. The battle over whether and how antitrust law constrains municipal utilities as they react to distributed power generation systems also continues.

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Biden Administration Enforcement Personnel & Priorities

President Joseph R. Biden Jr. first announced his administration's focus on spearheading a progressive antitrust agenda in 2021, and the "Biden Antitrust Revolution" continues to rumble forward. In his February 2023 State of the Union address, President Biden again highlighted his desire for reform, primarily targeting big tech. Though not critiqued in his address, the energy and chemical sectors have received no shortage of attention either. While it is too early to comment on the success of the reform efforts, both the Federal Trade Commission (the "FTC" or "Commission") and the U.S. Department of Justice's Antitrust Division (the "DOJ" or the "Division") are moving their agendas forward in creative ways, including expansive interpretations of statutory authority, resurrections of abandoned theories of competitive harm, new merger guidelines, and a proposed overhaul of the Hart-Scott-Rodino Act ("HSR") rules.

Proposed New Federal Trade Commission Leadership

Since the swearing in of Commissioner Alvaro Bedoya in May 2022, a Democratic majority has led the FTC, which only grew in strength with the resignations of Republican Commissioner Noah Joshua Phillips in the fall of 2022 and Republican Commissioner Christine Wilson in the spring of 2023. While the vacancies will be filled by Republicans per the FTC's partisan balance rules, the Democratic majority is expected to push forward the antitrust reform agenda that has so far come to define the agency since FTC Chair Commissioner Lina Khan's confirmation in June 2021. Under her leadership, the FTC has expanded its definition of anticompetitive conduct and continues to advance policy and procedure changes that have caused a slowdown in the merger review process.

In July 2023, President Biden nominated Andrew N. Ferguson ("Ferguson") and Melissa Holyoak ("Holyoak") to serve on the Commission, but, as of now, the two Republican seats remain unfilled.

Ferguson, the current Solicitor General of the Commonwealth of Virginia, former Chief Counsel to Senate Minority Leader Mitch McConnell, and former clerk to Supreme Court Justice Clarence Thomas, has been involved in several antitrust matters, including the Virginia Attorney General's lawsuit against Google for alleged Sherman Act violations related to Google's advertising technology. Despite his participation in other high-profile cases, little is known about Ferguson's views on antitrust theory and policy. There is little doubt, however, that Ferguson would not share some of the current Commission's more expansive positions on enforcement.

The same likely is true for Holyoak. Prior to her appointment as Utah's Solicitor General in 2020, she served as President and General Counsel of the Hamilton Lincoln Law Institute, which "stands for free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking." Despite that, Holyoak has supported the broad application of antitrust laws to big tech. While serving as the Solicitor General of Utah, she filed an amicus brief supporting Epic Games in its lawsuit against Apple and argued that Section 1 of the Sherman Act applies to "unilateral contracts."

With Democrats in control, Ferguson and Holyoak are not expected to materially alter the FTC's enforcement policies or priorities even if ultimately appointed.

Agency Merger Enforcement

Assistant Attorney General (AAG) Jonathan Kanter ("Kanter") and FTC Chair Khan have pursued novel and innovative merger enforcement theories, starting with a sharpened focus on mergers, private equity, and interlocking directorates.

Increased Scrutiny of Energy Industry Mergers

Before 2021, enforcement in the energy space had not been a topic of discussion among senior FTC officials for a number of years. But an August 2021 letter from Chair Khan to the director of the White House's National Economic Council presenting a detailed plan to investigate retail gas prices for illegal conduct signaled a renewed interest in energy sector enforcement.

The FTC has continued to signal the need for aggressive enforcement in the energy industry since then. In her September 2022 testimony before the Senate Committee on the Judiciary's Subcommittee on Antitrust, Competition Policy and Consumer Rights, Chair Khan twice touched on the energy sector and highlighted it as a critical economic sector within which the FTC has "moved to challenge major transactions." Chair Khan again mentioned challenging energy industry consolidation in her July 2023 Congressional testimony and reiterated her concern regarding historical underenforcement in this sector.

Many Democrats in Congress share Chair Khan's concern regarding the "already too concentrated" oil and gas industry. In a November 2023 letter to Chair Khan, 23 senators expressed concern about two "blockbuster oil-and-gas deals": ExxonMobil's ("Exxon") proposed $60 billion acquisition of Pioneer Natural Resources ("Pioneer") and Chevron's proposed $53 billion acquisition of Hess Corporation ("Hess"). The senators asserted that an Exxon-Pioneer combination "could produce a staggering 1.2 million barrels per day—more than twice the amount of the next competitor" and urged the FTC to consider how each transaction would further lead both companies to vertically integrate. The senators also called for FTC to engage in a retrospective to consider Exxon's and Chevon's past mergers and acquisitions that allowed them to grow to their current sizes, similar to the retrospective that the FTC performed on Meta's prior acquisitions of Instagram and WhatsApp—now a decade old—that led the FTC to sue to reverse those deals. The following month, the FTC issued second requests to both pairs of energy companies.

To be sure, the vast majority of energy mergers continue to receive clearance to close, and publicly reported FTC actions (such as challenges and consent decrees) were unusually low in 2023. But publicly reported matters do not tell the full story of change at the Commission. 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 in higher-profile matters or matters that touch on enforcement priorities.

Increased Focus on Private Equity

The FTC continues to focus on the private equity industry as an enforcement priority. In 2023, the FTC issued a complaint and consent order in connection with EQT Corporation's ("EQT") acquisition of gas production and midstream companies in the Appalachian Basin from energy-focused Quantum Capital Partners ("Quantum"). The FTC did not object to the underlying transaction but rather focused on Quantum's acquisition of EQT's stock as consideration for the sale. The consent order required Quantum to act as a passive investor, divest the shares over an undisclosed period of time, and agree to certain other restrictions.

The FTC also sued a private equity firm alleging that the firm had "executed a roll-up scheme, systematically buying up nearly every large anesthesia practice in Texas to create a single dominant provider with the power to demand higher prices" and entered into price-setting and market allocation agreements with its competitors.

Increased Focus on Interlocking Directorates

Section 8 of the Clayton Act prohibits directors and officers from serving simultaneously on the boards of competitors, subject to limited exceptions. This is often referred to as an "interlocking directorate." In 2022, the DOJ announced its intent to "reinvigorate Section 8 enforcement," and across 2022 and 2023, has caused multiple companies and directors to unwind interlocks or forgo board seats that would create interlocks.

The FTC similarly adopted Section 8 as an enforcement priority and, in 2023, brought its first Section 8 case in 40 years in connection with EQT's acquisition (discussed above) of gas production and midstream businesses in the Appalachian Basin from Quantum. As part of the original deal, Quantum would have received the right to appoint a director to EQT's board. Less than two months after the deal was announced, and "out of an abundance of caution and to ensure compliance with Section 8," Quantum agreed to forgo appointing a director at closing while reserving its right to appoint a director in the future. Pursuant to a consent decree between the parties and the FTC, Quantum agreed to remove the board seat right from the deal altogether. Interestingly, the FTC adopted the position that the mere right to take a board seat without more was sufficient to violate Section 8, and interpreted Section 8 to apply to non-corporate entities, such as limited partnerships and limited liability companies, when the text of Section 8 only refers to corporations. Relatedly, the FTC took the position that FTC Act Section 5 permits the FTC to extend Clayton Act Section 8's bar on interlocking directors to non-corporate entities even if the text of Section 8 is more limited. Companies should expect the FTC to use this case as a jumping-off point for more enforcement against deals that involve rights to board seats.

Greater Range of Concerns in Merger Enforcement

In 2021, FTC leadership signaled its intention to move away from the consumer welfare standard, the well-established lodestar of antitrust analysis, to consider a wider range of concerns beyond factors traditionally considered relevant to protecting competition. This "broader range of relevant market realities" swept in more nebulous considerations, such as the effect of a transaction on workers and independent businesses, the cross-market effects of a transaction, and the impact of investment firm involvement in transactions. In 2022 and 2023, the FTC reached agreement with the National Labor Relations Board and the Department of Labor, respectively, to combat labor market concentration, restrictive contract provisions, and protect "gig economy" workers.

As of this writing, the FTC has not provided written guidance defining the range of, or weight to be given to, these alternative considerations. That has not stopped the FTC from inquiring into them: practitioners have fielded FTC requests for information on ESG-related issues, for example. Their impact so far, however, does not appear to be outcome-determinative. According to a speech by former Commissioner Wilson, as of June 2022, no theories of harms or complaints have been grounded in these non-traditional factors. But Chair Khan made clear at the 2023 Spring Meeting that merging companies' supposed ESG synergies will not immunize them from antitrust scrutiny.

Limited Litigation Success

Heightened Enforcement, Little Courtroom Success

While 2022 brought a significant uptick in litigation—"more merger trials . . . than any fiscal year on record" for DOJ—and a number of abandoned transactions that came about as a result of threatened litigation or second requests, both the FTC and DOJ have struggled to find success in the courtroom. For example, in its highly anticipated no-poach trial in *United States v. Patel*, the U.S. District Court for the District of Connecticut entered a directed verdict on behalf of the defendants before the case went to the jury.

But little success is better than no success. Since the end of last year, the Division has made good on its promise to revitalize enforcement under Section 2 of the Sherman Act. In October 2022, the DOJ secured its first monopolization conviction in over 40 years against a paving and asphalt company executive for pursuing a geographic market allocation scheme with a competitor. And now, DOJ looks ahead to trial in a far bigger Section 2 criminal case,

involving "transmigrantes" who transport goods from the United States through Mexico for resale in Central America. There, DOJ alleges that a group of transmigrante agencies "operated as a single entity" and used "threats and acts of violence" to fix prices and dominate the market. Though an unusual set of facts, this case reinforces DOJ's commitment to Section 2 enforcement.

In keeping with the trend from recent years, however, DOJ did not bring any merger enforcement actions involving energy or chemical companies in 2023.

DOJ's Hostility Towards Divestitures in Mergers

This litigious approach aligns with a speech Kanter gave before the New York State Bar Association Antitrust Section in January 2022, during which Kanter made clear his distaste for behavioral or structural remedies in merger transactions. In keeping with this promise to block rather than negotiate around concerning transactions, the DOJ filed a complaint in late summer of 2022 to prevent a proposed transaction in which the agency argued that the proposal of a divestiture is in itself an indicator of the transaction's anticompetitive nature as a whole.

In the context of corporate criminal resolution, however, the DOJ *required* a divestiture, in addition to monetary penalties, for the very first time. For example, after reaching a deferred prosecution agreement with Teva and Glenmark, DOJ required the companies to pay a $225 million (plus a $50 million drug donation to humanitarian organizations) and $30 million, respectively, and to divest a key medicine that was central to the alleged price-fixing conspiracy.

Guidelines, Policy Statements, and Procedural Changes

Expansive Reinterpretation of Merger and Non-Merger Enforcement Powers

After nearly two years of the FTC withdrawing—without replacing—several bedrock enforcement policy statements, the Commission, together with the Antitrust Division of the Department of Justice, issued new merger guidelines in December 2023.

These guidelines, like the FTC's Section 5 policy statement from November 2022, take a broadened and highly discretionary view of its statutory authorities, breaking with decades of jurisprudence and leaving many questions unanswered.

1. 2023 Merger Guidelines

In December 2023, the FTC and DOJ released much anticipated merger guidelines, covering both vertical and horizontal conduct in an apparent attempt to better reflect modern market dynamics. The 11 guidelines rely on older case law and new structural presumptions, illustrating the agencies' view that far more transactions will be seen as substantially reducing competition. Moreover, the guidelines also prioritize digital platforms and a concern for labor markets.

Despite Chair Khan's assertions that the guidelines were designed to "faithfully reflect the full scope of the laws that Congress passed and prevailing legal precedent," many view the guidelines as a significant departure from both case law and prior agency policy on merger enforcement. Additional key points are highlighted below:

- The guidelines lower the threshold for what constitutes a "highly concentrated" market.
- Under the guidelines, the agencies view as presumptively illegal a horizontal transaction that results in a combined market share of 30% or more and a modest increase in market concentration.
- Under the guidelines, the agencies view the elimination of substantial competition between the merging parties as potentially violating antitrust laws, and will evaluate a merger's effect on competition between the parties separate from the market as a whole.
- The guidelines state that mergers can violate the law when they increase the risk of coordination, and that the agencies will infer, subject to rebuttal evidence, that a merger may substantially lessen competition if the market is already concentrated or has a history of prior coordination.
- The guidelines note a particular concern with the elimination of a potential new entrant and scrutiny of multi-sided platforms, both of which reinforce the agencies' focus on industries with rapid innovation and their collective distaste for big tech deals.
- The guidelines take a tougher stance on roll-up or serial acquisitions strategies and state that a firm may violate antitrust law when they engage in an anticompetitive pattern or strategy of multiple acquisitions in a particular market.

While the guidelines mark a substantial departure from times past, as AAG Kanter recognized in September 2023, "the guidelines are not the law." Still, merging companies will face agency investigations and lawsuits—informed by the guidelines—even though case law remains unchanged.

2. Section 5 Statement

Though overshadowed by the merger guidelines, the FTC's 2022 Section 5 Policy statement remains a significant development as well. In addition to its consumer protection provision, Section 5 of the FTC Act prohibits "[u]nfair methods of competition." The FTC has long viewed Section 5—sometimes described as a "gap-filler"—as reaching conduct beyond what is prohibited by the Sherman Act and Clayton Act. The FTC's new policy statement, however, breaks new ground.

In November 2022, more than one year after withdrawing the standing Section 5 policy statement, the FTC issued a replacement policy, announcing that it had "restore[d] [r] igorous [e]nforcement of law" prohibiting unfair methods of competition. The policy rejects the "rule of reason" benchmark framework historically used to apply the antitrust laws and, instead, vows to use Section 5 to go beyond

practices that violate those laws and stop anticompetitive conduct that "constitutes an incipient violation of the antitrust laws or that violates the spirit of antitrust laws."

Both of these categories of conduct represent novel forms of enforcement. Incipient violations include: invitations to collude, transactions that have "the tendency" to eventually violate antitrust laws; a series of transactions that separately may not have violated the antitrust laws but that together "tend to" bring about anticompetitive harm; and the use of loyalty rebates, tying, bundling, or exclusive dealing arrangements that have "the tendency" to eventually violate antitrust laws by virtue of industry conditions or a party's position within the industry.

Conduct deemed to violate the spirit of the antitrust laws is meant to be a catchall category for practices that "tend[] to cause potential harm similar to antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a 'gap' in those laws." Examples include de facto tying, bundling, exclusive dealing, or loyalty rebates that leverage market power to further consolidate power or prevent competition in the same or a related market; transactions that "may tend" to lessen current or future competition with a potential or nascent competitor; and conduct that does not rely on market definition but that results in direct evidence of harm, or likely harm, to competition.

In sum, under the FTC's policy statement, a wide swath of business conduct previously understood to be innocuous or pro-competitive may violate Section 5. At the same time, the policy statement offers little guidance for companies that wish to ensure compliance with the law. The FTC applied an expansive interpretation of Section 5 in the Quantum/EQT transaction discussed above and in the merger enforcement cases chapter.

Merger Process Reforms Slow Merger Reviews

The FTC introduced several procedural changes in 2021 that have slowed down the merger review process. For example, the FTC's "temporary" suspension of HSR Early Terminations ("ETs"), which previously allowed the FTC to terminate the HSR waiting period early for low-risk deals, has been in effect for nearly three years now. In fact, statements by Holly Vedova, Former Director of the FTC's Bureau of

Competition in April 2022 suggest ETs will not be making a return without drastic changes in the Bureau's congressional funding. As another example, after withdrawing the 1995 Policy Statement on Prior Approval and Prior Notice Provisions, which put an end to the practice of incorporating provisions requiring parties to seek approval for any future transaction over a *de minimis* threshold within specified markets for a minimum of 10 years, the Commission issued a new prior approval policy in late October 2021 reinstating the pre-1995 practice while upping the ante a bit (*e.g.,* prior approvals may be required even if parties abandon a deal, a new addition).

Another process change is the issuance of "warning letters" for deals that clear HSR. First announced in August 2021, these "close-at-your-own-peril" letters, as former Commissioner Phillips called them, warn parties that although the FTC will allow the HSR waiting period to expire, the FTC may continue investigating a transaction and reserves the right to challenge the deal post-closure. Notably, the FTC has always had the ability to do this, such that the primary purpose of these letters is thought to be a chilling effect. Former Commissioner Phillips criticized the use of these letters, noting that a portion of these letters were sent prior to an investigation being conducted and, in other cases, after an investigation had concluded, the outcome of which was a lack of reasonable basis to challenge a merger.

On par with prior years, the FTC in 2023 continued to make demands for 120 days (as opposed to the statutory 30 days or the established historic 60 days) from the date parties certify substantial compliance with a second request to finish its investigation. While practitioners have seen the FTC back down from its 120-day timing agreement demands during negotiations, the wider window often means longer second request timelines than ever before.

In June 2023, the FTC, with DOJ's concurrence, announced that it was proposing extensive changes to the premerger notification form, instructions, and implementing regulations under the HSR. With these changes, the agencies intend to improve and streamline their review of transactions within the initial 30-day waiting period. These proposed changes create new information and document requirements that, if implemented, will substantially increase the burden on filing parties. The comment period for the FTC's proposed changes closed in September 2023, and the FTC is expected to announce the final changes in 2024.

Compliance Initiatives

Increased Barriers to Leniency Remain

In April 2022, the Division announced several changes to its Leniency Program, which provides prosecutorial immunity to first reporters in a criminal antitrust conspiracy. The revised version of the policy and the accompanying FAQs complicate the attractiveness of the self-reporting in conspiracy cases. For example, being the first to self-report is no longer sufficient: applicants must also be "prompt" in their disclosure, though what does and does not constitute promptness is left undefined. Leniency applicants must also satisfactorily remediate and improve their compliance programs as a prerequisite to receiving a conditional leniency letter. No material changes were made to the leniency program in 2023.

New M&A Safe Harbor Policy Encourages Self-Reporting

Self-reporting in the context of M&A, however, likely became more attractive in 2023. On October 4, Deputy Attorney General ("DAG") Lisa O. Monaco announced the upcoming release of a new M&A Safe Harbor Policy designed to "incentivize the acquiring company to timely disclose misconduct uncovered during the M&A process." Under the new policy, acquiring companies must voluntarily self-report criminal conduct discovered at the acquired company within six months of closing to obtain a declination of criminal charges. And while DOJ generally expects acquiring companies to "fully remediate" misconduct within one year of closing, DAG Monaco signaled that this timeline could be shortened—if national security is implicated, for example—or lengthened, depending on a transaction's particulars. And, naturally, to receive the full benefit of the safe harbor, companies must cooperate with DOJ throughout any investigation.

If aggravating factors—like high-level executive involvement, extraordinarily high profits, or geographically or operationally pervasive wrongdoing—exist at the acquired entity, that will not affect the acquiring company's ability to receive a declination. DAG Monaco made clear that this framework was unique in the M&A context. Consistent with this policy, DAG Monaco explained that the "last thing the Department wants to do is discourage companies with effective compliance programs from lawfully acquiring companies with ineffective compliance programs and a history of misconduct."

Summary of Developments

Heightened scrutiny on antitrust issues from government enforcers and private litigants alike continued in 2023. Despite this, the federal enforcement agencies brought only one case involving energy markets in 2023 and zero involving chemicals—a sharp decline from previous years. Nevertheless, wide-reaching changes to government policies (*e.g.*, revised HSR forms, new Merger Guidelines, and more aggressive enforcement postures) will inevitably affect these industries, and we end 2023 with two major energy deals under review by the FTC.

Merger Enforcement

- The Federal Trade Commission ("FTC") challenged Quantum Energy Partners' acquisition of Tug Hill and XcL Midstream from EQT Corporation. This challenge is notable in that the FTC did not allege a violation of its traditional merger-enforcement authority found in Section 7 of the Clayton Act, but instead brought the action under Section 5 of the FTC Act, which prohibits unfair methods of competition, and Section 8 of the Clayton Act, which prohibits interlocking directorates.
- In 2023, the FTC proposed transformative changes to the Hart-Scott-Rodino Act ("HSR") pre-merger filing form. These are anticipated to significantly increase the amount of information merging entities must submit to the government. Filing fees will also increase for larger transactions.
- The FTC and U.S. Department of Justice ("DOJ") issued new Merger Guidelines that revise the standards that the agencies use to analyze proposed mergers and acquisitions. The revisions would move merger analysis toward a more expansive multi-factor approach and away from the standards the courts apply in litigated merger challenges. Far more transactions will be considered presumptively unlawful under the new guidelines.
- The most recent year for which merger enforcement data is available, 2022, saw declines in the number of transactions reported to the agencies and in the number of the second requests from the previous year. Nevertheless, the agencies took credit for enforcement actions against 40 transactions, an increase over prior years.
- Energy and chemical transactions as a percentage of total reported transactions continued to fall in 2021, reaching their lowest levels in the past 10 years (4.2% and 4.4%, respectively).

Non-Merger Enforcement

- In January 2023, the FTC proposed a new rule to prohibit almost all non-compete agreements on a nationwide basis. Enforcement actions against companies utilizing non-compete agreements continued in both the civil and criminal context.
- Artificial intelligence emerged as a top concern of antitrust enforcers in 2023. A group of enforcers released a joint statement concerning the anticompetitive dangers of AI tools in April. President Biden issued an Executive Order in October calling for safe and responsible development of artificial intelligence ("AI") and directing federal agencies to study ways AI can improve the supply of energy.
- In November 2022, the FTC issued a new policy statement regarding Section 5 of the FTC Act, which prohibits "unfair methods of competition in or affecting commerce," signaling an intent to take a broader view of its authority beyond traditional antitrust issues.
- The DOJ secured guilty pleas from an asphalt paving company and several current or former executives of the company in connection with a conspiracy to rig bids for asphalt paving contracts in the Michigan area.
- The FTC's Annual Report on Ethanol Market Concentration concluded that the level of concentration in the U.S. ethanol production did not pose a risk of nationwide price-setting power by any of its participants.

State and Private Litigation

- Perhaps reflecting on regulators' increased interest in competition law issues, antitrust claims seemed to play a larger role in private litigation as well in 2023.
- Antitrust claims played a significant role in disputes between competitors, including specialty chemical manufacturers accusing one another of monopolizing particular products in Virginia federal court, and monopolization claims between insulation manufacturers in the Tenth Circuit and between power generators in the Fourth Circuit.
- Class actions and multi-district litigation show no signs of slowing down. The crop protection chemical antitrust litigation is now consolidated in North Carolina federal court, and caustic soda purchaser plaintiffs entered into what may be a significant ice-breaker settlement in antitrust litigation in New York federal court. Meanwhile, the Tenth Circuit affirmed certification of a class of landowners pursuing monopolization claims against an exploration and production company, and a class of Wisconsin natural gas buyers obtained a settlement in a long-standing market manipulation case.

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Merger Enforcement Policy Developments

2023 saw a number of notable developments in the merger enforcement policy context. In June, the Federal Trade Commission ("FTC") proposed a series of transformative changes to the Hart-Scott-Rodino Act ("HSR") filing form. These changes, which have not yet taken effect, would require parties to provide a large amount of information and documents up front, in many cases significantly increasing the time, expense and effort required to submit an HSR filing. In December, the FTC and U.S. Department of Justice ("DOJ") published revisions to the Merger Guidelines, the framework by which the agencies consider the competitive effects of mergers, acquisitions, and joint ventures. The agencies have also sought to expand their enforcement powers over interlocking directorates and labor market issues as part of the merger review process.

FTC and DOJ Propose Significant Changes to HSR Filing Process

Revamped HSR Form

In June 2023, the FTC, with the concurrence of the Assistant Attorney General of the Antitrust Division of DOJ, proposed wide-ranging changes to the HSR notification form, instructions, and implementing regulations. The changes are intended to modernize the agency review of transactions during the 30-day HSR waiting period, during which the parties may not close the proposed transaction. Although the changes are not yet finalized at the time of this writing, as proposed they would be among the most significant changes to the HSR process since the law's inception in 1976.

The proposed changes will in many cases greatly increase the time, effort, and expense required to complete an HSR filing. Current HSR rules provide for a notice-style filing, meaning that parties submit basic information and documents up front, while leaving more detailed information, narratives, and documents for deals where the agencies identify issues or concerns. The new form shifts toward the style of notification popular in the European Union ("EU") and many other foreign merger control jurisdictions: it would require parties to submit much more information up front regardless of the nature of the underlying transaction, and emphasizes narrative responses describing the transaction, the parties, competition, and relevant markets.

Among the FTC's "key proposals" are requirements that the filing parties:

- Provide greater details around the buyer's corporate structure, board, and minority shareholders (including for limited partnerships), changes aimed in large part at penetrating private equity fund structures
- Collect and submit a broader array of documents, including ordinary course documents, and draft agreements and strategic documents
- Draft additional narratives explaining the transaction structure, timeline, and rationale
- Draft narratives explaining the parties' business, horizontal overlaps, and non-horizontal business relationships such as supply agreements, and provide greater detail about any such overlaps
- Provide information related to labor market issues and the classification of employees
- File on a definitive agreement, meaning parties will no longer be able to file HSR notification on a letter of intent or term sheet

The FTC says these changes are needed to combat information asymmetries between the parties and the government, and to allow the government to conduct a robust review of the transaction within the initial 30-day waiting period. The public comment period on the proposed changes expired in late September. The FTC is anticipated to issue final rules in 2024, but it remains unclear to what extent the final rules will differ from the draft rules and to what extent the FTC will incorporate public comments into the final rule.

Restructured Filing Fees

In January 2022, Congress passed the Merger Filing Fee Modernization Act of 2022, which restructured the HSR Act's filing fee thresholds parties pay to file HSR notification. The new fee structure took effect in late February 2022. While the new law lowers the filing fee for smaller transactions, it greatly increases the fees for larger ones. The FTC has publicly stated that this change is intended to increase funding for U.S. antitrust regulators, a drum the agencies have continued to beat since suspending early termination in 2021 citing resource constraints.

Prior to the restructuring, the HSR Act set forth three different filing fees based on the transaction size. Until 2023, the largest HSR filing fee was $280,000, for deals valued at approximately $1 billion or greater. The new fee structure sets forth six filing fees tied to annually-adjusted valuation tiers. Although filing fees are reduced for deals in the lowest tiers, filing fees for the largest deals—those valued at $5 billion or more—jumps to $2.25 million dollars, a 700% increase over the previous maximum fee.

Old Size of Transaction Thresholds (2022)	Old Filing Fees (2022)
< $202 million	$45,000
$202 million to $1.0098 billion	$125,000
$1.0098 billion or greater	$280,000

New Size of Transaction Thresholds (2023)	New Filing Fees (2023)
< $161.5 million	$30,000
$161.5 million to $499.9 million	$100,000
$500 million to $999.9 million	$250,000
$1 billion to $1.9 billion	$400,000
$2 billion to $4.9 billion	$800,000
$5 billion or greater	$2.25 million

FTC/DOJ Draft Merger Guidelines

On December 18, 2023, the FTC and DOJ published new Merger Guidelines (the "2023 Merger Guidelines" or "Guidelines") setting forth the analytical framework the agencies use to review proposed mergers and acquisitions. The 2023 Merger Guidelines consolidate and update the agencies' 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines into a single document—continuing the agencies' push to dissolve the line between horizontal and vertical mergers. The agencies' stated goal of this update to the merger guidelines is to more accurately reflect how agencies determine a transaction's effects on competition and evaluate those transactions under the law. The changes also aim to broaden the scope of analysis and better assess the risk that proposed combinations will substantially harm competition. The 2023 Merger Guidelines reflect the most significant revision to agency merger guidelines in decades.

The Guidelines, which are not legally binding, do not replace antitrust statutes or caselaw precedent. They instead are intended to provide clarity and transparency into the agencies' methods to analyze transactions and markets. FTC Chair Lina Khan, in her comments on the proposal, explained that the changes "reflect the new realities of how firms do business in the modern economy." The changes, intended to address changes in the marketplace, demonstrate an expansion into new areas of analysis, and reflect the agencies' shift away from the traditional consumer welfare standard towards a more holistic "market structure" standard considering how mergers may affect competition for labor, the increasing prevalence of "serial acquisitions," and competition among and within platforms. The Biden-Harris Administration's White House economist also weighed in with a statement on the new Guidelines, noting that the changes aim to better address the modern economy, where "consolidation has meant big corporations getting bigger, giving them the power to raise prices for Americans and provide consumers with fewer options." As a practical matter, however, the 2023 Merger Guidelines largely reflect existing merger enforcement policy, which has become more aggressive and wide-ranging in recent years.

The 2023 Merger Guidelines are built around a set of 11 specific "guidelines" used to analyze transactions. Some of the more notable changes are explained below:

- The 2023 Merger Guidelines set forth a bright line 30% combined market share threshold for when a merger raises a presumption of illegality. The Guidelines also take a stricter view of what constitutes a concentrated market, meaning the agencies will challenge deals in industries with more competitors and/or lower market shares than they historically would. Using the Herfindahl-Hirschman Index ("HHI") as a measure of concentration, the agencies now view markets with HHIs of 1,800 points (instead of 2,500 points) as "highly concentrated." This 700-point decrease from the prior guidelines essentially means that an industry with five firms of equal size (each possessing a 20% market share) will be considered "highly concentrated," regardless of other competitive conditions or effects.
- The Guidelines apply greater scrutiny to transactions involving "dominant" companies that may entrench or extend a dominant position through exclusionary conduct, a concept with roots in EU competition law. For dominant companies, the agencies will consider whether the transaction extends or entrenches that position even if the merger is neither horizontal nor vertical. The agencies enumerate several examples of such behavior, including increasing barriers to entry or switching costs, depriving rivals of economies of scale or network effects, and eliminating nascent competitive threats, all of which will give the FTC and DOJ greater flexibility to challenge any transaction involving large players.
- The Guidelines take a tougher stance on rollup or serial acquisition strategies, defined as a pattern or strategy of multiple acquisitions in the same or related business lines. Although the agencies have historically evaluated transactions on case-by-case basis, when a merger is part of a series of multiple acquisitions, the agencies will now examine the series as a whole to evaluate the cumulative effect on competition. The agencies will also review the firm's past transactions and strategic incentives for the pattern of transactions. These changes reflect the Guidelines' push towards a broader, more holistic evaluation of the competitive dynamics in any given transaction.
- Although the concept of potential competition is not new, the 2023 Merger Guidelines give this concept greater weight in a competitive analysis by stating that mergers can violate the law "when they eliminate a potential entrant in a concentrated market." This focus, which applies to mergers that would either eliminate a potential entrant or eliminate current "competitive pressure" from a potential entrant, is intended to capture "killer acquisitions," where an existing firm acquires an innovative or maverick target to preempt potential future competition. Although this policy likely will primarily affect technology companies, the FTC has voiced potential competition in recent energy and chemical-related transactions, and will likely continue finding ways to voice these concerns going forward.
- The Guidelines also discuss several other less common theories of harm: assessing whether mergers increase the risk that a firm will limit access to or degrade the quality of a product or service important to competition; assessing competition between platforms, on a platform, or to displace a platform, when examining multisided platform mergers; assessing effects on workers, creators, suppliers, or other providers when examining mergers involving buyers; and increasing scrutiny of minority interests and partial control.

In sum, the 2023 Merger Guidelines mark a departure from analysis grounded in traditional, quantitative metrics for competitive harm towards softer, more flexible indicia of anticompetitive harm. This shift will increase uncertainty around whether and the extent to which a given transaction will draw agency scrutiny.

Focus on Labor Markets in the Merger Context

The merger review process is increasingly focused on labor markets and other labor-related issues. The FTC and the U.S. Department of Labor in September announced a new agreement to increase collaboration and to promote competitive U.S. labor markets. The agreement increases collaboration between the FTC and Labor Department, helping the agencies share information on labor markets, organize combined training sessions for staff at both agencies, and partner on investigations. The FTC stated in its announcement of the agreement that the agency has made it a "priority" to investigate mergers that may harm competition in U.S. labor markets.

The extent to which agency review of transactions ought to consider effects on labor markets, in addition to effects on consumers, has been an important talking point for several years. Chair Khan, in remarks given in December of 2021, stated that "We've witnessed over the last few years a remarkable evolution in both the policy debate and broader public understanding of how declining levels of competition and the conduct it enables can hurt us not just as consumers—who buy products from a shrinking number of large firms—but also as workers, who are especially vulnerable when subject to the whims of a boss they can't easily or practically escape." Since then, agencies have organized workshops, panel discussions, and taken other actions related to labor markets and competition, such as proposing a blanket ban on non-compete agreements.

The 2023 Guidelines align with the Biden-Harris administration's increased focus on labor issues, and encourage the agencies to evaluate the impact of a merger on labor as a "stand-alone basis" to challenge a transaction. In cases where parties to a transaction compete for labor, the agencies will evaluate whether the consolidation reduces competition for particular workers and may challenge the deal on that basis, regardless of the transaction's effect on classic product or geographic markets (Guideline 11).

While this focus on theory surrounding labor issues is not new, it has increasingly crept into practice. Parties in 2023 have seen firsthand the increased focus on labor markets by antitrust regulators at all stages of merger review. Agencies now include standard questions and document requests related to how a transaction might affect labor markets in both voluntary request letters and second requests.

Merger Enforcement Data and Trends

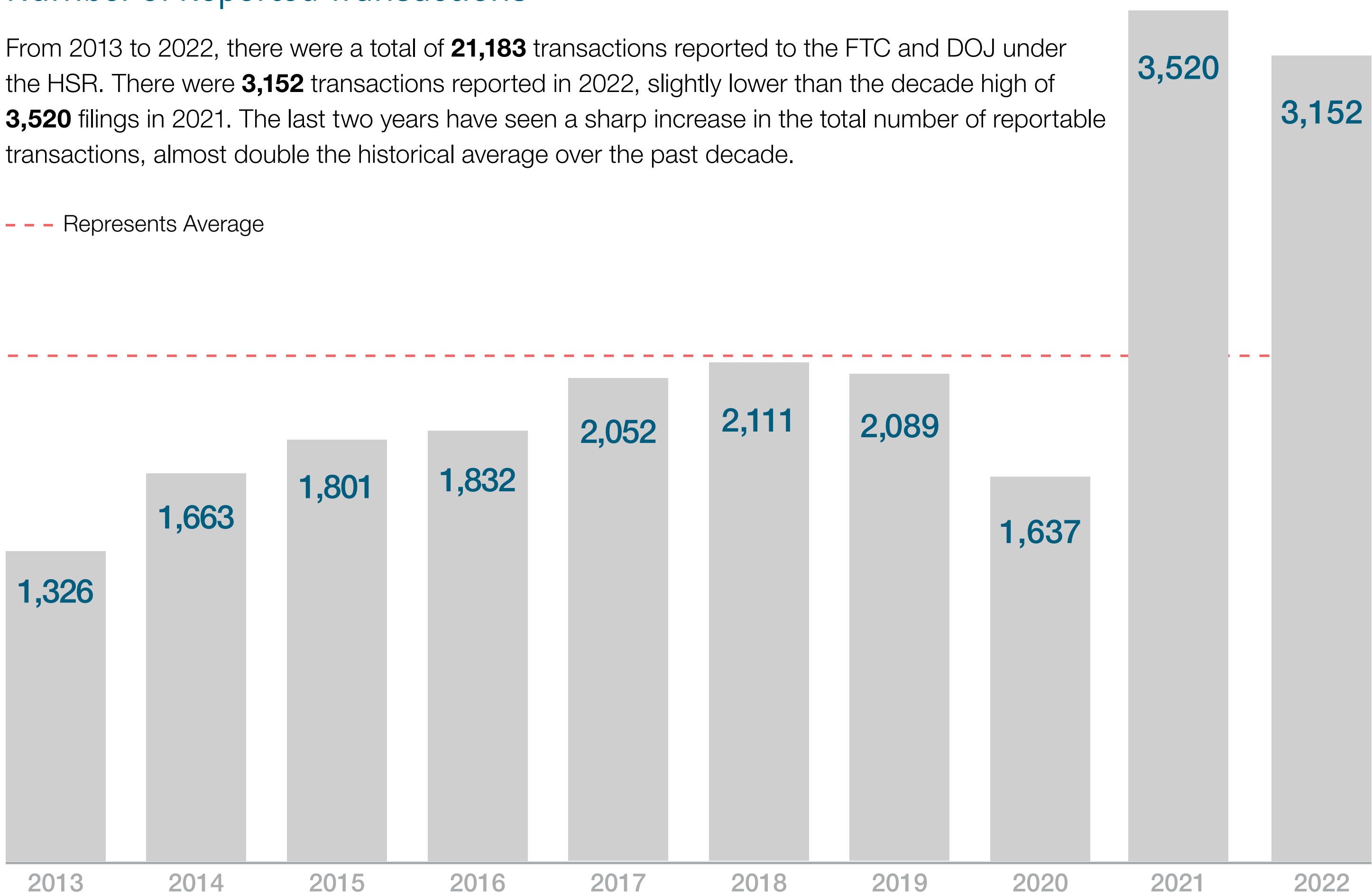
In 2022, the Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") received 3,152 Hart-Scott-Rodino Act (HSR) filings, well above the 10-year historical average of about 2,000 filings a year.[1] This follows an all-time record number of filings in 2021 (3,520). The number of reported energy and chemical transactions as a percentage of total reported transactions, however, remained at or near decade lows of 4.4% and 3.9% respectively.

The merger enforcement rate slightly declined. The FTC and DOJ opened preliminary investigations in 9.2% of reported transactions (below the 10-year historical average of 12%) and issued second requests in 1.5% of total investigations (below the 10-year historical average of 2.4%). Further, the rate at which agencies issued a second request after opening an investigation reached a decade low in 2022: just 16% of initial investigations led to second requests. This decline applied to the energy and chemical industries as well. The agencies opened initial investigations in 7% of reported energy transactions (below the 9% historical average) and issued second requests in 20% of those investigations. Enforcers were more active in the chemical space in 2022, opening initial investigations in 21% of reported chemical transactions (above the 19% historical average) and issued second requests in 15% of those investigations. However, the agencies obtained some kind of relief in 85% of second request investigations, slightly above the ten-year historical average rate of 77% and far above 2021's rate of 49%.

Together, these figures suggest that the agencies continue to investigate deals at a high rate, even when they may not raise competitive concerns warranting a second request. Once the agencies do issue a second request however, they have a high likelihood of seeking relief. All energy or chemical enforcement actions in 2022 cleared with divestitures, among other remedies.

Number of Reported Transactions

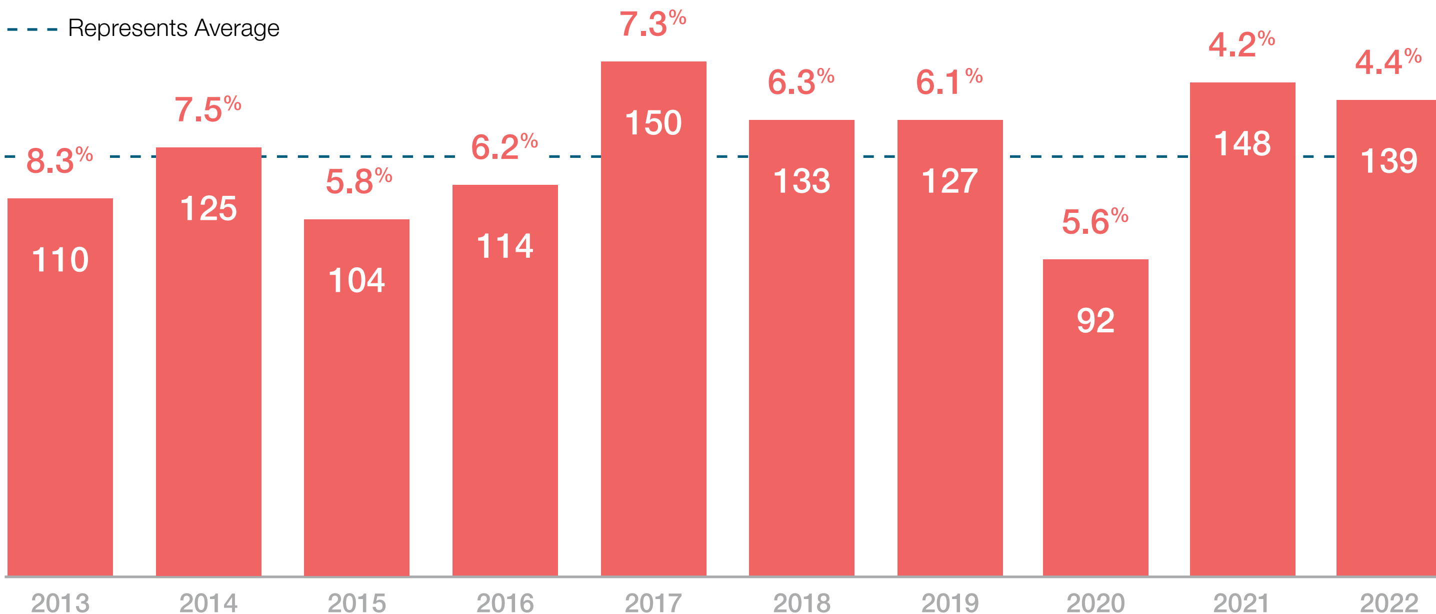
From 2013 to 2022, there were a total of **21,183** transactions reported to the FTC and DOJ under the HSR. There were **3,152** transactions reported in 2022, slightly lower than the decade high of **3,520** filings in 2021. The last two years have seen a sharp increase in the total number of reportable transactions, almost double the historical average over the past decade.



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

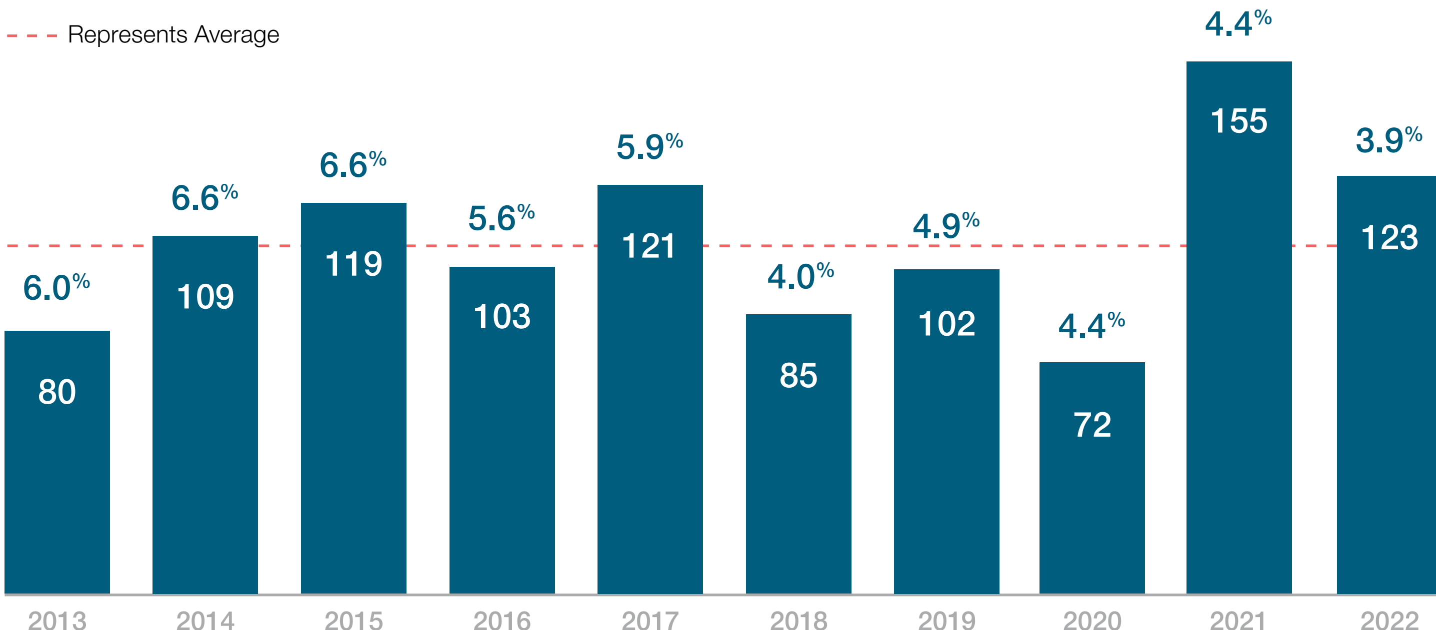
Energy Transactions

From 2013 to 2022, there were a total of **1,242** reported energy and natural resources transactions, representing on average just under **6%** of all reported transactions reported during that time period. After hitting a ten-year high in 2017 (**7.3%**), the number of reported transactions in this industry sector has steadily fallen, to just **4.4%** in 2022.



Chemical Transactions

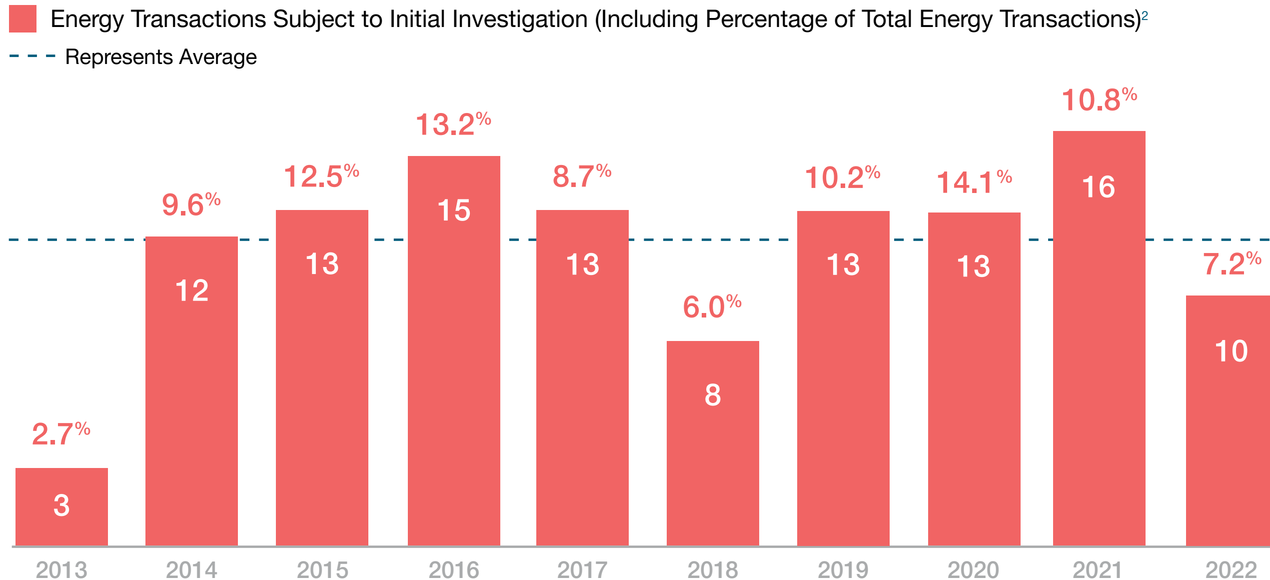
From 2013 to 2022, there were a total of **1,069** reported chemical and pharmaceutical transactions, representing on average **5%** of total transactions. The number of reported transactions in this industry as a percentage of total transactions has steadily declined from a 2015 high of **6.6%**, to just **3.9%** in 2022.

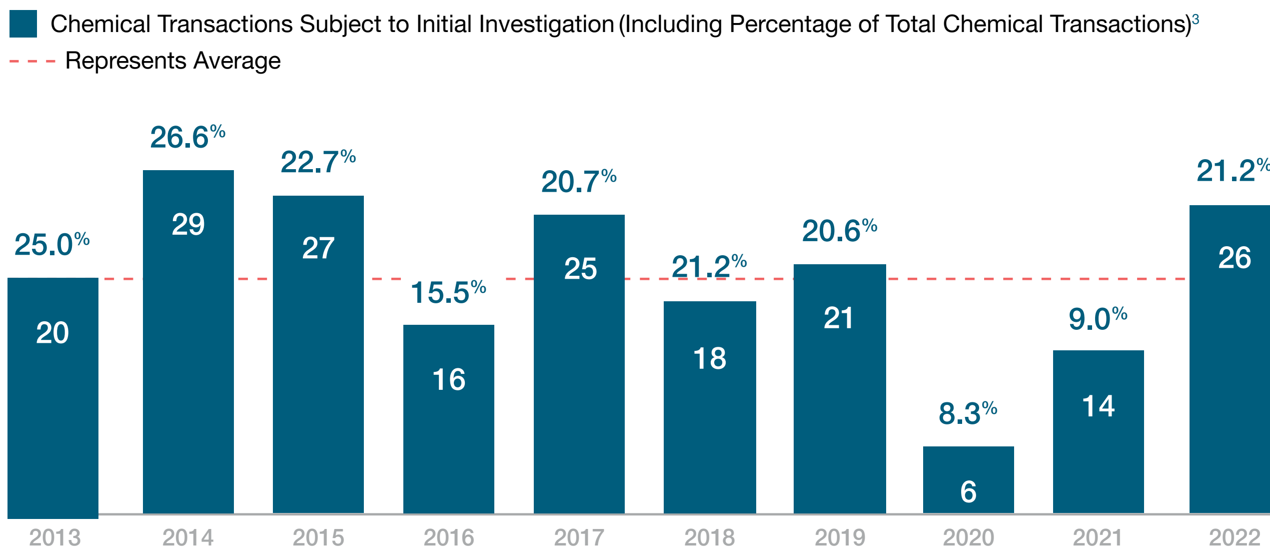


Initial Investigations

On average, from 2013 to 2022, the federal agencies opened an initial investigation in **9%** of reported energy transactions and **19%** of reported chemical transactions, while the average across all industries during this time period was **13%.**

Except for 2020 and 2021, energy energy transactions have been investigated at a slightly lower-than-average rate over the past decade, comprising on average **6%** of reported transactions but just **4.6%** of total investigations. Chemical industry transactions, in contrast, have been investigated at a higher-than-average rate, comprising on average **5%** of total transactions but **8%** of total investigations. The agencies investigated **21%** of chemical transactions in 2022, in line with the historical average and reversing a lull in 2020–2021, when the agencies investigated less than **10%** of chemical transactions.





[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 2021 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).

[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 2021 Annual Report. The 3-digit industry NAICS codes for the chemical transactions reported is: 325 - Chemical Manufacturing.

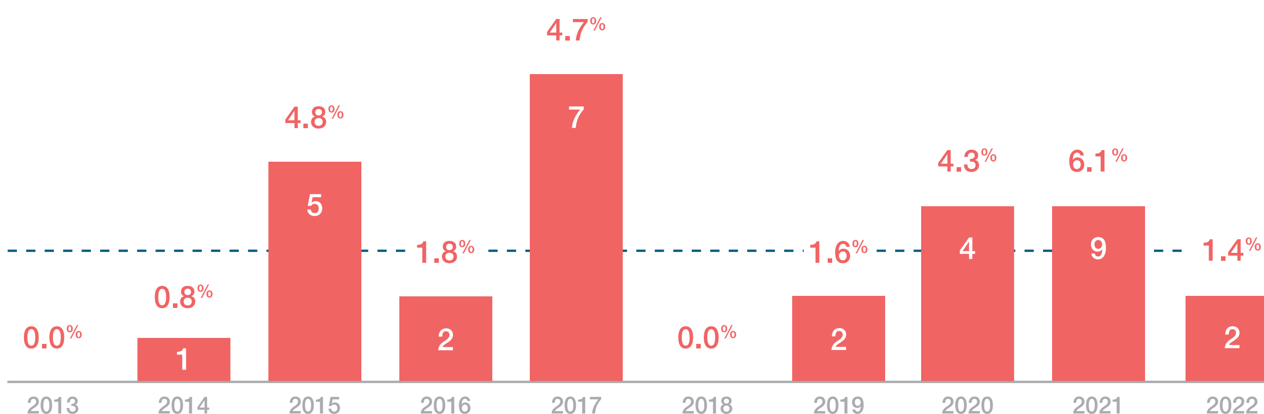
Second Requests

In 2022, the agencies issued second requests in **1.5%** of reported transactions across all industries. Just **16%** of agency investigations led to second requests in 2022, one of the lowest "yields" in the past decade and well below the historical average of **21%**.) Second requests for the energy and chemical industries constituted **13%** of all second requests in 2022.[4]

The agencies' yield of second requests stemming from initial investigations remained well below average in the energy and chemical industries, consistent with this decade low. After reaching all-time highs in 2021, second request rates in the energy industry dropped below historical averages in 2022: just **1.4%** of energy transactions resulted in a second request (below the 10-year average of **2.6%**) and **20%** of energy investigations resulted in a second request (below the historical average of **31%**). The chemical industry second request rate was **3.3%** in 2022, a slight increase from a decade-low **1.9%** in 2021 but still below the historical average of **5%**. Across all industries, just **16%** of agency investigations led to second requests in 2022, one of the lowest yields in the past decade and well below the historical average of **31%**.

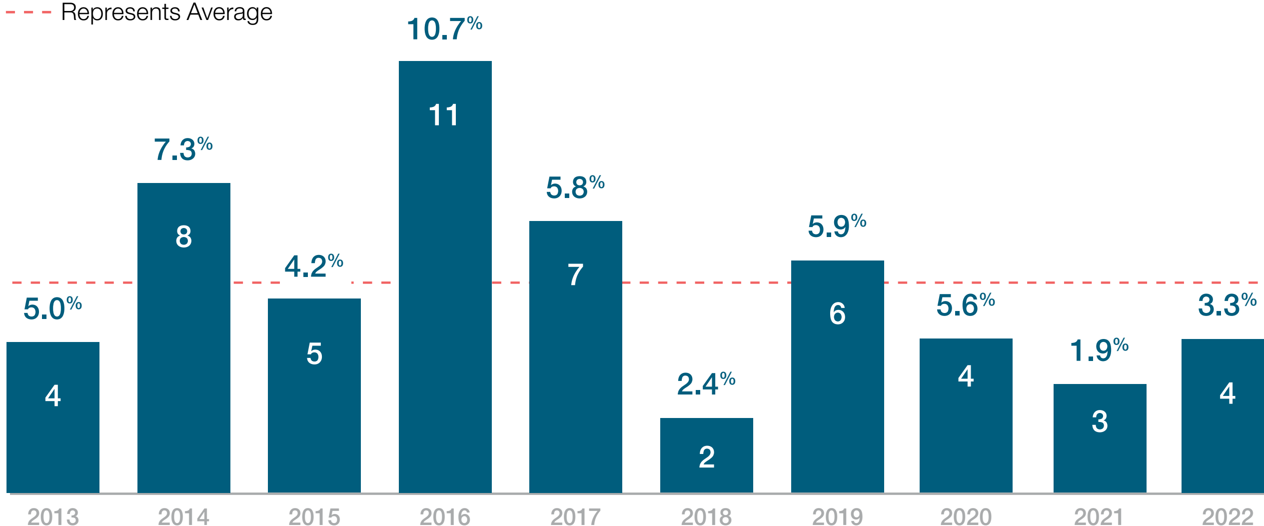
Energy Industry Second Requests (Including Percentage of Total Energy Transactions)

- - - Represents Average



Chemical Industry Second Requests (Including Percentage of Total Chemical Transactions)

- - - Represents Average



[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 2021 Industry Group of Acquired Person."

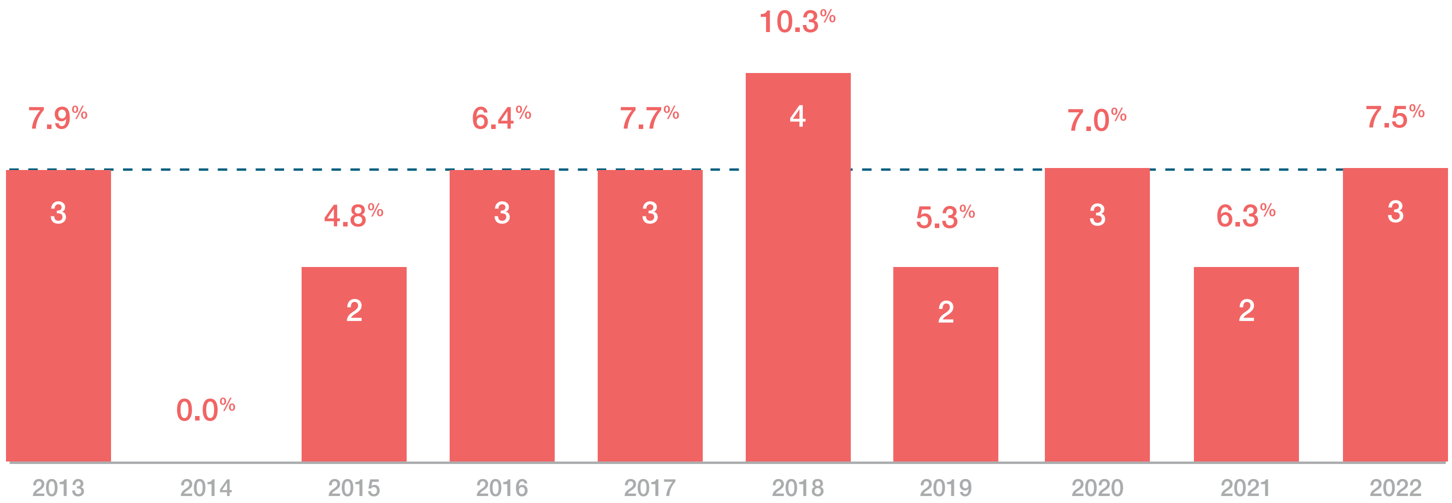
Merger Enforcement Actions

Overall: From 2013 to 2022, the Federal Trade Commission and U.S. Department of Justice's Antitrust Division brought a total of **391** merger enforcement actions, an average of almost **40** per year. This includes consent decrees, abandoned transactions, and court challenges. During this time period, the FTC brought **218** actions and the DOJ brought **173** actions. From 2013 to 2022, the agencies brought a total of **25** actions involving energy mergers (**6%** of all actions), and **32** actions involving chemical mergers (**8%** of all actions). The agencies brought enforcement actions against **2%** of energy transactions and **3%** of chemical transactions on average since 2013, although figures vary significantly from year to year. In 2022, the rate of enforcement actions in the energy industry, **2.2%** of total industry transactions, was the highest since 2018 and among the highest rates in the past decade. On the other hand, the chemical industry's enforcement rate of **2.5%** continues a low-yield trend; from 2013 to 2018, the average enforcement rate was over **11%**, but has since dropped to an average of **4%**.

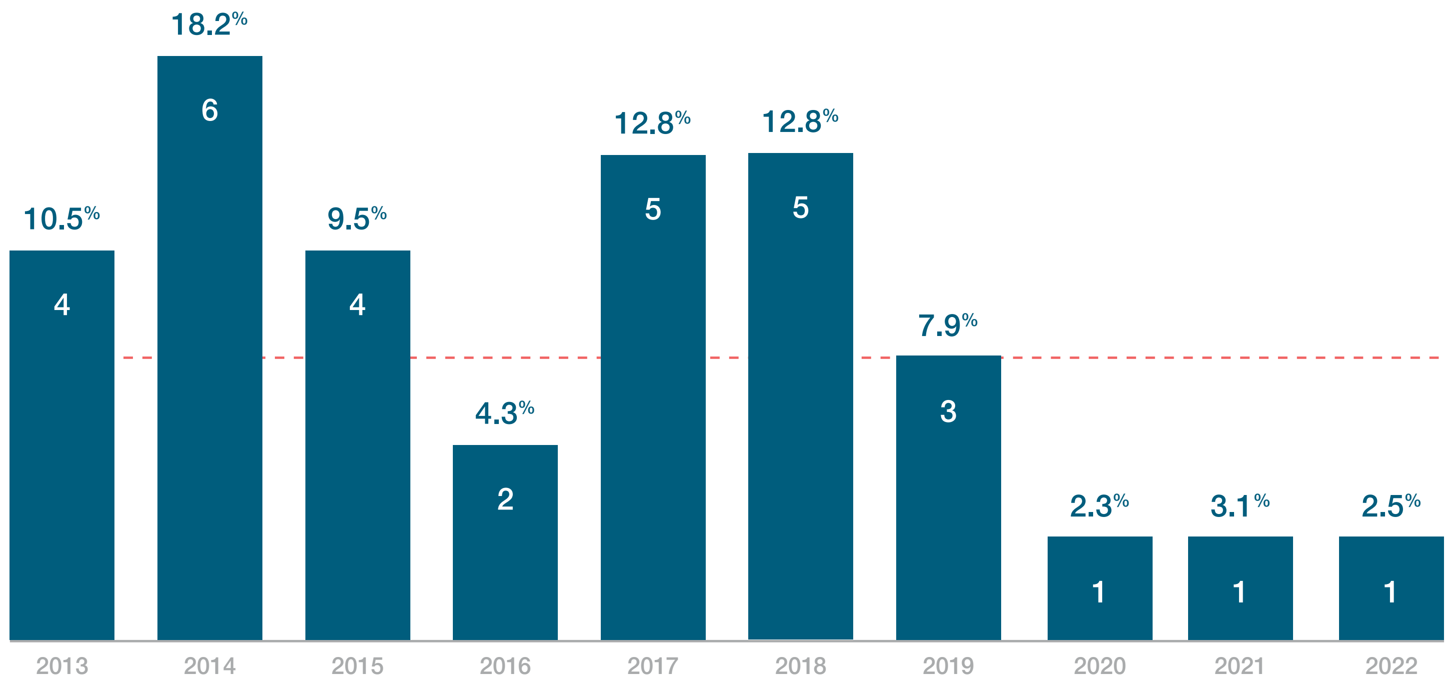
In 2022, the federal agencies challenged **12** mergers in federal or administrative court. In **17** cases, the parties abandoned the deal after the agencies voiced concern. In **15** cases, the parties accepted some form of settlement or consent decree to address agency concerns. Finally, in at least six deals, the parties changed the structure of the transaction to address agency concerns. The three energy and one chemical enforcement actions in 2022, all in front of the FTC, ultimately cleared with a consent decree requiring divestitures among other remedies.

From 2013 to 2022, the federal agencies brought merger enforcement actions in **77%** of second request investigations, on average. After dropping to at least a ten-year low of **49%** in 2021, the agencies' yield in 2022 rose to **85%**, more in line with prior years. This is consistent with the agencies requiring some kind of remedy in many cases and includes abandoned transactions as an enforcement "win" for the agencies.

Actions Involving Energy Mergers (Including Percentage of Total Enforcement Actions)
--- Represents Average



Actions Involving Chemical Mergers (Including Percentage of Total Enforcement Actions)
--- Represents Average



2023

Merger Enforcement Cases

In a break from the last few years, the Federal Trade Commission ("FTC" or "Commission") sought relief to address competitive concerns in just one transaction in the energy industry and no transactions in the chemical industry in 2023. In prior years, the FTC typically secured relief in three or four transactions between these industries.

Enforcement in the energy and chemicals industries was unusual not only in the number of cases but also in the theories of harm in the one case the FTC did bring. But that challenge revealed the FTC's willingness to enforce non-merger antitrust statutes in the context of mergers, even when the Commission's investigation of the transaction does not find a violation of Section 7 of the Clayton Act, the statute expressly addressing anticompetitive mergers. Specifically, the FTC moved to unwind a transaction, as well as past business dealings between the parties, for alleged violations of Section 5 of the Federal Trade Commission Act and Section 8 of the Clayton Act.

Continuing the trend from recent years, the U.S. Department of Justice ("DOJ") did not bring any merger enforcement actions involving energy or chemical companies in 2023.

EQT Corporation/Quantum Energy Partners

Quantum Energy Partners is a private equity firm with significant holdings in the natural gas industry, including a number of subsidiaries and joint ventures that operate in the Appalachian Basin. EQT Corporation is the largest natural gas producer in the Appalachian Basin.

The Purchase Agreement

In September 2022, Quantum and EQT negotiated a purchase agreement under which Quantum agreed to sell Tug Hill and XcL Midstream, both natural gas subsidiaries operating in the Appalachian Basin, to EQT in exchange for shares in EQT. Following the proposed transaction, Quantum would hold 11% of the equity in EQT, making it one of EQT's largest shareholders. Quantum also received a right to one seat on the EQT board of directors if other conditions were met.

The FTC filed its administrative complaint challenging the transaction on August 16, 2023. The complaint alleged that the purchase agreement was an unfair method of competition in violation of Section 5 of the FTC Act by giving Quantum a minority position in EQT and creating an interlocking directorate. The complaint also alleged that the interlock violated Section 8 of the Clayton Act, despite the fact that Quantum is not a corporation and Section 8 only applies to interlocking corporate boards. The complaint did not allege a violation of Section 7 of the Clayton Act, the principal merger enforcement statute. The FTC alleged that the natural gas industry, especially in the Appalachian Basin, was "characterized by a high degree of observable behavior and interrelationships between producers," a dynamic creating "substantial risks to competition." According to the complaint, "publicly traded natural gas producers have proclaimed an interest in exhibiting 'capital discipline,'" in which those producers minimize their spend on drilling and exploration so as to not "overproduce" and unnecessarily drive down prices.

The FTC asserted that it was an "unfair method of competition" for Quantum to have the option to occupy an EQT board seat because, even after the sale of Tug Hill and XcL Midstream, Quantum would still manage or control several companies that "compete with EQT in the production and sale of natural gas in the Appalachian Basin and elsewhere." Through its board representation, Quantum would thus stand to receive "confidential, competitively sensitive information from" and have "influence over competitive decisions" of a competitor. The FTC further asserted that Quantum becoming one of the largest shareholders of EQT "creates opportunities and a threat that competitors will directly communicate, solicit, or facilitate the exchange of competitively sensitive information with the purpose, tendency, and capacity to facilitate collusion or coordination." The two companies' existing joint venture in the Appalachian Basin, The Mineral Company ("TMC," a firm that acquired land and gas drilling rights), posed the same threat of collusion, according to the FTC.

Consent Order

The parties agreed to a consent order, filed simultaneously with the complaint, under which Quantum is barred from appointing a member to the board of EQT, ordered to divest all shares in EQT over an undisclosed period of time, required to appoint a trustee to vote its shares in EQT until divestiture was complete, and barred from installing any of its executives, employees, or board members "as an officer or director of any entity that is one of the top 7 natural gas producers" in the Appalachian Basin, including entities wholly unrelated to EQT. EQT and Quantum also agreed not to enter into "any agreement or transaction with each other related to the acquisition of mineral rights or natural gas exploration or production in the" Appalachian Basin without prior approval by either the FTC or its appointed monitor. The FTC did not require prior approval for certain ordinary course transactions between the parties, such as land swaps, mineral leases, and structured financing. Finally, EQT and Quantum agreed to dissolve their joint venture TMC, which had been formed years before the challenged merger.

FTC Statement

FTC Chair Lina Khan, together with Commissioners Slaughter and Bedoya, issued a statement announcing that the FTC was "revitalizing" the long dormant Section 8 of the Clayton Act. Section 8 prohibits interlocking directorates, which are situations where one person sits on the boards of two competing companies. The statement acknowledged that Section 8 has not been enforced in the merger context in many years, but declared that the Justice Department had "effectively put market participants back on notice" when it announced a renewed focus on Section 8.

The statement also announced a new focus on "standalone Section 5 enforcement." Claiming that the Commission regularly brought standalone cases up until the late 1970s, the statement declared that it would now pursue "unfair methods of competition" even when the conduct at issue "would not necessarily run afoul of the Sherman or Clayton Acts." This conduct, according to the statement, includes "invitations to collude; price discrimination claims against buyers not covered by the Clayton Act; de facto bundling; exclusive dealing; and many other practices."

Implications of Case

While the stock-sale portions of the order are significant, the FTC press release focused on Section 8, exclaiming that the "finalized consent decree resolves the FTC's first case in 40 years that enforces Section 8 of the Clayton Act, which prohibits interlocking directorates." Notably missing from any of the Commission's statements or filing in EQT/Quantum are any allegations that the merger would cause a substantial lessening of competition, the usual enforcement standard for acquisitions. Instead, the FTC looked at the transaction and relationship between the parties using a wide lens, and ultimately issued a sweeping order that not only ordered structural changes to the transaction, but also unwound prior business dealings between the parties and barred Quantum from future conduct wholly unrelated to the transaction.

Enforcement of 2018 Seven & i Holdings Co., Ltd. Consent Order

In 2018, 7-Eleven agreed to acquire 1,100 retail fuel outlets from Sunoco. The FTC challenged that transaction, and the parties ultimately agreed to a consent order requiring 7-Eleven to divest 26 fuel stations to Sunoco and abstain from acquiring 33 additional stations that Sunoco would have otherwise sold to 7-Eleven. That consent order also contained a list of fuel stations that 7-Eleven was barred from acquiring without giving prior notice to the Commission.

On December 4, 2023, the FTC sued 7-Eleven in the U.S. District Court for the District of Columbia for allegedly violating that prior notice requirement. In a heavily redacted complaint, the FTC alleged that 7-Eleven's acquisition of a single fuel station was "a blatant and undisputed violation of a Commission order" by a "serial acquirer." According to the FTC, 7-Eleven's internal controls for compliance with the consent order were "wholly inadequate" because 7-Eleven both failed to notify its employees of the requirements of the consent order and failed to adequately monitor for and report acquisitions to the FTC. The Complaint alleges that 7-Eleven acquired the fuel station in question, held it for 1,547 days, and then re-sold it. Accordingly, the FTC contends that 7-Eleven was out of compliance with the consent order for the entire time it held the fuel station, and is liable for a maximum civil penalty of $77,535,640.

Major Upstream Merger Investigations

The FTC is investigating two major upstream deals. In October 2023, Exxon Mobil agreed to acquire Pioneer Natural Resources in a $59.5 billion deal that would make it the largest oil producer in the Permian Basin. That same month, Chevron inked a $53 billion deal to acquire Hess. The Chevron deal is headlined by Hess's major stake in a what has been described as a "generational" oil find in Guyana, but it does not appear that the two companies' assets substantially overlap in any single region.

The FTC has issued second requests in each of these deals. The Exxon second request became public on December 5, 2023, and news of the Chevron investigation broke three days later on December 8. In a second request, the FTC requires the merging entities to respond to detailed document requests and interrogatories before they can close their transaction.

2023

Non-Merger Enforcement

Federal antitrust regulators continue to push their enforcement initiatives outside of the merger context. As in past years, their efforts were focused predominantly on other industries like tech, pharmaceuticals, and labor markets. However, many of the enforcement trends in those sectors could affect companies and individuals across other industries. For example, regulators continue to expand their enforcement efforts to cover "unfair" methods of conduct that historically might have fallen outside of the Sherman Act. There is continued focus on non-compete agreements, which while historically commonplace, have attracted scrutiny in recent years for their potential to suppress competition in labor markets. And, the U.S. Department of Justice ("DOJ") continues to incentivize companies to self-report antitrust violations, including a new policy which creates a safe harbor for the disclosure of violations discovered during the M&A process. However, enforcement efforts show no sign of slowing down, as exemplified by recent criminal convictions against asphalt paving companies and executives that could carry hefty fines and potential imprisonment. Regulators are also grappling with emerging Artificial Intelligence ("AI") technology and are considering the kinds of competition concerns that it may introduce.

Continued Expansive Section 5 Enforcement

In November 2022, the Federal Trade Commission ("FTC" or "Commission") issued a new policy statement regarding principles for the enforcement of Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in or affecting commerce." The policy laid out the Commission's position that "Section 5 was designed to extend beyond the reach of the antitrust laws." The FTC explained that "unfair" conduct included conduct that (1) was coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature, and (2) tended to negatively affect competitive conditions. In 2023, enforcement officials' testimony and other public remarks have signaled their intention to use Section 5 to combat unfair conduct that would otherwise lie outside the boundaries of the Sherman Act. An example of the FTC's expansive use of Section 5 in the merger context is discussed in the chapter discussing 2023 merger enforcement cases.

Continued Focus on Non-Compete Agreements

The FTC proposed a new rule in January 2023 to prohibit almost all non-compete agreements. The new rule would implement a nationwide, almost blanket ban on non-compete agreements, which are currently regulated at the state level. The FTC argues that non-competes limit worker mobility, exploit the unequal balance of power between employers and employees, and are exploitative and coercive when they prevent employees from accessing other jobs. The FTC invited public comment on the proposed rule and its Notice of Proposed Rulemaking ("NPRM").

The proposed rule is broad in scope. It defines the term "non-compete clause" as any contractual term between an employer and worker that would prevent the worker from searching for or accepting employment with a new entity, or operating a new business, after the conclusion of their employment. The ban would apply to existing non-compete clauses, requiring employers to both terminate any prohibited non-compete clauses and inform workers individually that those clauses are no longer effective. This proposal is notable for its ability to affect non-competes at every level of business; it will apply to both lower-level employees and C-suite executives.

The proposed rule provides only one exception to the ban: it would allow for non-compete agreements by a person selling a business entity, an ownership interest in a business entity, or all or almost all of a business entity's assets, provided that the restricted party is an owner, partner, or member holding at least a 25% ownership stake in the entity.

FTC Chair Lina Khan, in a statement on the NPRM, noted that non-compete clauses currently bind an estimated one in five American workers and that these restrictions can "undermine core economic liberties," including the ability to switch jobs freely. The FTC issued the NPRM and proposed rule in January by a 3 to 1 vote. The one no vote included a forceful dissent from then-Commissioner Christine Wilson, who characterized the change as a "radical departure from hundreds of years of legal precedent" and called into question the Commission's claim that it has rulemaking authority. (Wilson resigned in March 2023).

In addition to the proposed policy, the FTC and U.S. Department of Labor also signed a memorandum of understanding in September 2023 to formalize their collaboration on efforts to promote competitive U.S. labor markets. The agreement outlines ways in which the two agencies will work together to address issues such as "labor market concentration, one-sided contract terms, and labor developments in the 'gig economy.'" The agreement contemplates that the agencies will coordinate investigations and enforcement actions, and share training resources.

In addition to announcing these new policies and agreements, the FTC took action against several companies that imposed non-compete restrictions on employees. For example, in January 2023, the FTC entered into separate consent orders with a security company and two of the largest manufacturers of glass food and beverage containers. The orders required each company to drop noncompete restrictions that were impacting thousands of workers. In March, the FTC took similar action against another glass container manufacturer.

The DOJ also continues to bring criminal prosecutions against individuals who engage in no-poach agreements—although the DOJ suffered additional setbacks to its efforts this year. In March, following a two-week trial, a jury in Maine federal district court acquitted owners and managers of home healthcare staffing agencies whom the DOJ had accused of fixing wages and agreeing not to hire each other's caretakers. In April, a federal district court judge granted defendants' motion for judgment of acquittal—effectively ending the DOJ's case alleging that aerospace companies had conspired to suppress competition by allocating employees amongst each other. It remains to be seen whether these setbacks will deter the DOJ from continuing to bring these types of cases.

DOJ Secures Guilty Pleas From Asphalt Paving Company & Executives for Bid Rigging

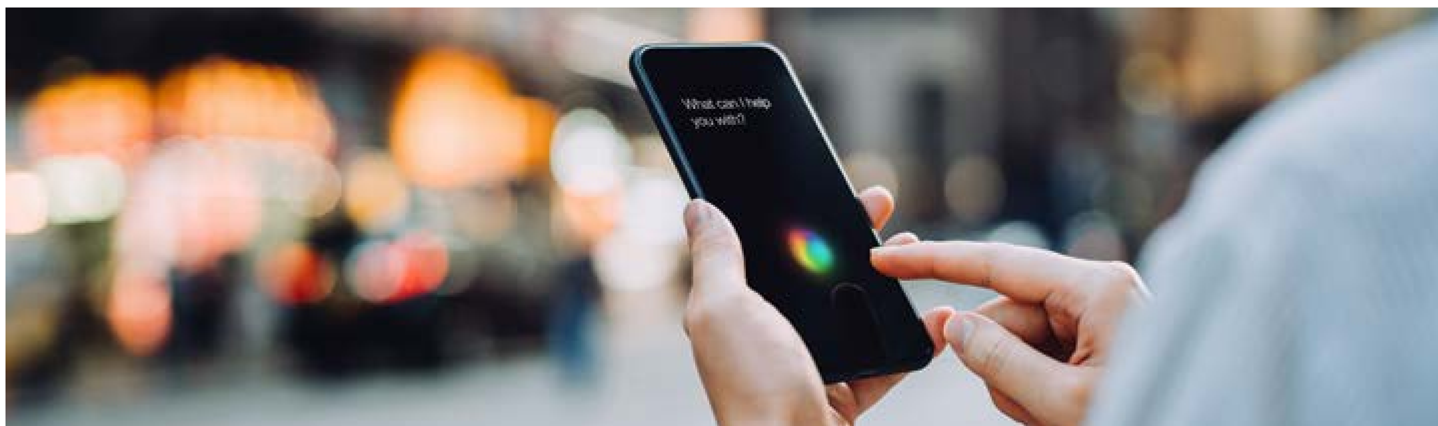
In a more traditional enforcement action, in August and September the DOJ secured guilty pleas from an asphalt paving company and its president, as well as from a senior executive and the former president of the same company, in connection with a conspiracy to rig bids for asphalt paving services contracts in the Michigan area. According to the DOJ, several asphalt paving companies and their employees participated in multiple conspiracies from 2013 to 2021 in which they would coordinate bids so that an "agreed-upon losing company would submit intentionally non-competitive bids," thus giving the false impression of competition. The company and individuals all pled guilty to violations of Section 1 of the Sherman Act. The maximum penalty for individuals is 10 years in prison and a $1 million criminal fine. The maximum penalty for corporations is a $100 million criminal fine. The fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime if either amount is greater than the statutory maximum fine. The ultimate sentences will be determined by a federal district court judge.

No Updates to DOJ Antitrust Leniency Program

In 2022, the DOJ Antitrust Division announced the first significant changes to its Leniency Program since 1993. Frequently described by the Antitrust Division as one of its most important tools in detecting criminal antitrust conspiracies, the Leniency Program provides immunity from prosecution to the first organization, or individual, to self-report participation in a criminal antitrust conspiracy and cooperate fully with the Antitrust Division's investigation. When the revised guidelines were first announced, many in the defense bar were concerned that the changes would create uncertainty and complicate the analysis of when and whether to seek leniency. There were no significant developments regarding the new guidelines in 2023 as the Antitrust Division will likely wait to see the impact of the changes before taking any further action.

DOJ Announces "Safe Harbor" for Self-Reporting in M&A Context

Although there were no significant changes to the DOJ's 2022 Antitrust Leniency Program, a broader DOJ initiative may provide incentives to self-report any type of misconduct uncovered in the M&A process. On October 4, 2023, in remarks delivered at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute, Deputy Attorney General Lisa O. Monaco announced a new M&A Safe Harbor Policy designed to "incentivize the acquiring company to timely disclose misconduct uncovered during the M&A process." Under the policy, companies that disclose criminal conduct to DOJ within six months of closing on an acquisition may be eligible for a declination, provided other conditions are met. Those other conditions include fully remediating the misconduct within one year from the closing date, fully cooperating with any DOJ investigation, and disgorgement of profits. The announcement appears to be an effort to further incentivize due-diligence and disclosure, and to add more clarity and uniformity to the DOJ's enforcement efforts.



Artificial Intelligence ("AI") Developments

Antitrust regulators are interested in examining potential competitive challenges and concerns posed by increased artificial intelligence developments. In April 2023, FTC Chair Khan and other officials from the DOJ, CFPB, and EEOC released a joint statement reiterating concerns that although AI tools may "offer the promise of advancement" they also have the potential to produce harmful outcomes that regulators are committed to protecting against. Among other things, the statement warned that AI tools can be inaccurate, can be skewed by biased data sets, can be "black boxes" that make it difficult to know whether an automated system is fair or not, and may improperly rely on data that should not have been collected.

In June, the FTC's Bureau of Competition & Office of Technology published a joint blog post that outlined competition concerns surrounding the emerging generative AI sector. For example, the FTC highlighted concerns that access to data, talent, and computational resources could present high barriers to entry for new entrants to the AI market, and also outlined possible unfair methods of competition that it viewed as particularly relevant in the AI context.

In addition, global competition regulators have expressed concern about the degree to which AI algorithms may "collude" or facilitate unlawful agreements, either by design or autonomously. Indeed, DOJ officials stated that investigators would inquire whether companies enabled their AI to fix prices, whether they enabled the AI to communicate with competitors to abuse its monopoly power, and whether the companies included training on their AI to prevent the fixing of prices.

In October 2023, President Biden issued an expansive Executive Order ("Order") signaling the administration's commitment to governing the safe and responsible development and deployment of AI. The Order requires the Department of Energy, along with a number of other climate and energy-focused agencies, most notably the Federal Energy Regulatory Commission, to issue a report detailing the ways AI can improve electric system planning, permitting, investment, and operations. The Order also calls for increased public-private partnerships and industry-focused coordination efforts to better utilize new applications of AI to increase preparedness for climate-related risks, decrease permitting delays for clean energy and renewable resources, and enhance grid reliability and resiliency. In addition, the Order addresses competition issues raised by surging AI usage across industries. The Order requires the head of each agency developing policies and regulations related to AI to "promote competition in AI and related technologies," and specifically encourages the FTC to consider whether it should exercise its authority to "ensure fair competition in the AI marketplace and to ensure that consumers and workers are protected from harms that may be enabled by the use of AI."

Signaling its intent to regulate AI, on November 21, the FTC unanimously approved a resolution authorizing the use of compulsory process in nonpublic investigations involving AI-related products and services. Compulsory process refers to information or documents requests that are enforceable by courts. Typically, FTC staff must seek a resolution from the Commission before they can issue such requests. With this resolution, which is in place for 10 years, that process will be streamlined, making it easier for the FTC to obtain information in connections with its AI-related investigations.

FTC Seeks Public Comments on Review of Labeling Requirements for the Alternative Fuels Rule

In October, the FTC announced that it was seeking public comments on the "costs, benefits, necessity, and regulatory and economic impact of its Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles (AFVs), also called the Alternative Fuels Rule." The Alternative Fuels Rule was first published in 1995 as directed by the Energy Policy Act of 1992 and requires informative labels on fuel dispensers for non-liquid alternative fuels, such as electricity, compressed natural gas, and hydrogen, so that consumers can make informed buying decisions. In light of the proliferation of electric vehicles ("EVs") the Commission is seeking comments on labeling requirements for EV charging stations. Currently, the Rule requires labels on EV charging stations that disclose "(1) the commonly used name of the fuel (*e.g.*, electricity); (2) the system's kilowatt ('kW') capacity; (3) voltage; (4) whether the voltage is alternating current ('ac') or direct current ('dc'); amperage; and (5) whether the system is conductive or inductive." The FTC propounded several questions specifically related to the usefulness of EV charging labels and how they might be improved.

FTC Annual Report on Concentration in the Ethanol Industry

In 2005 Congress passed the Energy Policy Act which requires the FTC to issue an annual report to Congress and the Environmental Protection Agency ("EPA") 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. On December 1, 2023, the FTC issued its 2023 Report on Ethanol Market Concentration ("2023 Ethanol Report"). As in prior years, the 2023 report concluded that the "level of concentration and large number of market participants in the U.S. ethanol production industry continue to suggest that the exercise of market power to set prices, or coordinate on price or output levels, is unlikely on a nationwide basis." Further, the report notes that "imports and the possibility of entry would likely impede the exercise of market power by any group of domestic firms."

In addition, since 2005, Congress has required that the national transportation fuel supply must contain a minimum annual volume of renewable fuels, including ethanol fuel. This mandate is known as the Renewable Fuel Standard ("RFS") and it has historically increased each year through 2022. In prior years the annual use of renewable fuels did not keep pace with the statutory RFS requirements, which led the EPA to decrease the annual requirements below statutory volumes in 2020, 2021, and 2022. However, as noted in the 2023 Ethanol Report, the market consensus is that "demand for ethanol was more stable" in 2023 as compared to 2022.

State & Private Antitrust Litigation Developments

2023 was a busy year at the courthouse for energy and chemical companies facing antitrust claims, both on the class action front and in disputes between individual competitors. On the class front, farmers' challenges to pesticide manufacturers' loyalty-pricing programs were consolidated into a multi-district litigation (MDL) in North Carolina; a major defendant in the caustic soda MDL agreed to settle and cooperate with the plaintiffs; and the Tenth Circuit affirmed certification of a class of mineral owners alleging monopolization over certain drilling activity in Wyoming. In competitor cases, the Tenth Circuit revived an insulation manufacturer's monopolization claim against its leading competitor; an independent power generator asked the Fourth Circuit to revive its claim that an incumbent grid operator abused its position to box out new competition; and a wholesale club fought back predatory pricing claims brought by competing gas sellers. In Commerce Clause jurisprudence, the Sixth Circuit struck down a Kentucky statute that effectively favored in-state coal sellers over out-of-state sellers, while a Michigan district court—also in the Sixth Circuit—turned back challenges to power grid reliability rules requiring providers to maintain local generating capacity.

Chemicals

Major Specialty Chemicals Manufacturers Accuse One Another of Monopolizing Specific Products

***Albemarle Corporation v. Olin Corporation*, 1:23-cv-00600 (E.D. Va.)**

In May 2023, Albemarle Corporation sued Olin Corporation—both major specialty chemicals manufacturers—in federal district court for the Eastern District of Virginia, alleging Olin exploited monopoly power over railcar merchant chlorine production in North America to restrict supply and charge chlorine buyers like Albemarle higher prices.

Albemarle claimed that, since at least 2020, Olin, the largest producer of chlorine in North America, had unilaterally and intentionally restricted supply. Relying heavily on public statements by Olin's CEO, Albemarle contended Olin shut down substantial production capacity; used pretextual *force majeure* declarations to suspend further production; and withdrew from third-party trade organizations to avoid reporting statistics on its chlorine production and pricing levels. Albemarle also alleged Olin attempted to coerce Albemarle to renegotiate a long-term supply contract between the parties, and when Albemarle refused to acquiesce to Olin's demands, filed a retaliatory lawsuit against Albemarle for breach of the contract. Asserting monopolization and attempted monopolization claims under Section 2 of the Sherman Act, Albemarle requested treble damages for the elevated prices it paid, both under the long-term supply contract between the parties and a supply contract with another supplier that Albemarle contended it was forced to renegotiate on short notice due to Olin's supply restrictions.

Olin moved to dismiss for failure to state a claim, but the court denied the motion without a written opinion. Olin filed a motion for more definite statement or for reconsideration, asserting the court's succinct order left it unable to adequately answer Albemarle's complaint. The court denied this motion as well.

Olin then answered, asserting both federal and Virginia state-law counterclaims for Albemarle's alleged monopolization of the global market for supplies of a flame retardant chemical—Tetrabromobisphenol A ("TBBPA")—that can be imported and used in the EU. Olin alleged Albemarle had (1) engaged in a conspiracy with other TBBPA producers to eliminate competition with Albemarle; (2) declared *force majeure* events to restrict supply of TBBPA; and (3) unlawfully tied Olin's supply of TBBPA to receipt of chlorine from Olin on preferential terms.

Albemarle moved to dismiss Olin's counterclaims. Albemarle contended Olin lacked standing to complain about the TBBPA purchases, made by one of Olin's European subsidiaries from one of Albemarle's European subsidiaries, and that any claims over that extraterritorial contract must be dismissed under the Foreign Trade Antitrust Improvements Act, or alternatively, under the *forum non conveniens* doctrine, because the TBBPA supply contract mandated that the exclusive forum for disputes related to TBBPA was Frankfurt, Germany. The Court denied Albemarle's motion to dismiss, and the parties filed a joint stipulation of dismissal as to all claims shortly after.

Tenth Circuit Revives Antitrust Suit Between Thermal Pipe Insulation Producers

***Chase Mfg., Inc. v. Johns Manville Corp.*, No. 22-1164, 2023 WL 7007305 (10th Cir. Oct. 25, 2023)**

On October 25, 2023, the Tenth Circuit found Chase Manufacturing, Inc. (doing business as Thermal Pipe Shields, Inc. ["TPS"]) had demonstrated a genuine issue of material fact as to whether Johns Manville Corporation had unlawfully maintained a monopoly over calcium silicate (or "calsil") after TPS's market entry. Reversing an earlier summary judgment, the Tenth Circuit remanded the matter for further proceedings.

The dispute concerns the U.S. market for calsil—a type of thermal pipe insulation. TPS contends Johns Manville has long been the sole domestic manufacturer and supplier of calsil, which it sells under the brand name Thermo-1200. In March 2018, TPS introduced a competing product, TPSX-12, manufactured in China for import. Per the summary judgment record, TPSX-12 was stronger and more flexible than Thermo-1200, and 20 to 25% cheaper. Both Johns Manville and TPS sold their calsil products to various distributors for sale throughout the United States.

In March 2019, TPS sued Johns Manville, alleging Johns Manville had violated the Lanham Act and antitrust law. TPS asserted Johns Manville: (1) threatened to refuse to supply distributors with calsil; (2) used a rebate program to exclude TPS; (3) disparaged TPSX-12; and (4) tied purchases of non-calsil products to its calsil products. TPS voluntarily dismissed its Lanham Act claim, and Johns Manville moved for summary judgment on TPS's Sherman Act claims, which the district court granted as to each of the alleged forms of exclusionary conduct.

On appeal, the Tenth Circuit reversed the summary judgment on TPS's monopolization claim, but affirmed summary judgment on the tying claim. As to monopolization, the appeals court concluded genuine issues of material fact existed as to Johns Manville's monopoly power in the domestic calsil market, whether Johns Manville had engaged in exclusionary conduct, and injuries. The Tenth Circuit held that where alleged exclusionary conduct involves threats to refuse to supply distributors, the district court should not have applied a refusal-to-deal-with-rivals standard, which sets a relatively high bar to find exclusionary conduct. The appeals panel held the district court instead should have adopted a case-by-case approach that evaluated "the reality of the calsil market and the practical effect of [Johns Manville's] conduct." The court further declined to adopt the exclusive-dealing framework suggested by Johns Manville, explaining that a genuine issue of material fact would still exist under that framework.

As for TPS's Section 1 tying claim, the appeals court affirmed the district court, holding that no genuine issue of material fact existed as to whether Johns Manville conditioned sales of its non-calsil products on distributors' refusal to buy calsil from TPS. The Court concluded TPS had not (1) sufficiently specified the tying product—*i.e.*, the product that is sold only if the distributors did not purchase calsil from TPS; (2) demonstrated Johns Manville's market power over the tying product; or (3) shown that Johns Manville maintained an unlawful tying arrangement.

TPS's remanded Section 2 monopolization claim remains pending in the U.S. district court for the District of Colorado.

Major Chemicals Maker Reaches "Ice-Breaker" Settlement in Caustic Soda Case

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

In August 2023, the U.S. subsidiary of Formosa Plastics Corp. agreed to pay $7.5 million to direct purchasers of caustic soda and agreed to cooperate with plaintiffs in their ongoing litigation against non-settling defendants.

The case dates to March 2019, when chemical manufacturers and other plaintiffs filed multiple class-action suits against caustic soda manufacturers, alleging defendants conspired to restrict domestic supply and fix prices of caustic soda (sodium hydroxide) in violation of Section 1 of the Sherman Act. In May 2019, the court consolidated these suits 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.

The remaining non-settling defendants have denied any wrongdoing. At this stage, no direct purchaser class has yet been certified, and a trial date has not been set.

Cases Against Major Pesticide Manufacturers Consolidated Into Middle District of North Carolina

***In re: Crop Protection Products Loyalty Program Antitrust Litigation*, MDL No. 3062**

Multiple farmers have brought individual suits against major pesticide manufacturers Sygenta AG, Corteva Inc., and BASF SE, accusing them of paying distributors to block cheap generic pesticides in violation of the Sherman Act and state antitrust and consumer protection laws. The farmers claim that defendants' so-called "loyalty programs" with distributors and retailers promise rebates and discounts to distributors if they limit their purchases of comparable generic pesticides. The farmers claim these programs limit the availability of generic pesticides and block entry by competitors, forcing farmers to buy brand-name pesticides at higher prices.

Plaintiffs in multiple Southern District of Indiana cases moved to centralize the litigation in that district, or in the alternative, in the Middle District of North Carolina, where other plaintiff actions were. Defendants supported centralization in the Middle District of North Carolina.

The U.S. Judicial Panel on Multidistrict Litigation selected the Middle District of North Carolina. The Panel rejected the argument advanced by many plaintiffs that, because the Seventh Circuit had a more developed body of case law concerning antitrust standing of purchasers in certain conspiracy cases, Indiana was a preferable home for the cases. The Panel reasoned that convenience and efficiency, not the laws of the different transferee courts, were the relevant considerations.

Moreover, the Panel noted that the Federal Trade Commission's similar and related suit against Syngenta and Corteva was filed in the Middle District of North Carolina. The Panel further concluded that this location would be more convenient because the decisionmakers for the rebate programs were all in North Carolina and all of the relevant employees and documents would likely be found in North Carolina.

Power

Court Dismisses Antitrust Claims Against Electric Utility Twice

***Southern California Electrical Firm v. Southern California Edison Company*, 2023 WL 2629893 (C.D. Cal. Jan. 10, 2023) and 2023 WL 4317362 (C.D. Cal. Apr. 7, 2023)**

In January 2023, the district court for the Central District of California dismissed, largely without prejudice, Plaintiffs Southern California Electrical Firm ("SCEF") and its owners (collectively, "Plaintiffs") complaint against Southern California Edison Company ("Edison"), alleging antitrust and other claims. In April, after an amendment and renewed motion to dismiss, the court largely dismissed the complaint a second time. Although the court once again dismissed the Section 2 claim without prejudice, it warned Plaintiffs that a third dismissal would likely be with prejudice.

In June 2022, Plaintiffs sued Edison, Southern California's largest utility, alleging that Edison exercised market dominance and restricted competition for new line connection services.

Plaintiffs allege Edison, a utility serving fifteen Southern California counties, prevents customers from exercising their right to design and install distribution lines and service lines on their properties, forcing customers to pay Edison for design and installation services. Plaintiffs claim Edison has adopted a policy excluding individuals who have been terminated from Edison from acting as designers or installers for electric line extensions. SCEF's owners, three former Edison employees, were terminated by Edison in or around April 2017 and then undertook electrical contracting work in Southern California. Plaintiffs contend Edison instructed property owners not to use SCEF services, informed them Edison would not acknowledge SCEF's work, and refused SCEF's requests to serve as installers or designers. Plaintiffs allege they were forced to hire additional employees and subcontractors to handle projects within Edison's territory, giving rise to business losses.

Plaintiffs, in their original complaint, asserted six claims: (1) violation of Section 2 of the Sherman Act; (2) intentional interference with prospective economic relations; (3) negligent interference with prospective economic relations; (4) intentional interference with contractual relationship; (5) violation of California's Unfair Competition Law (UCL); and (6) declaratory relief. Plaintiffs sought monetary damages and injunctive relief preventing Edison from blocking designers and installers. In September 2022, Defendant filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction over Plaintiffs' claims due to their preemption by the California Public Utilities Code, that Plaintiffs failed to state a claim, and that Plaintiffs' claims were barred by the relevant statutes of limitations.

In January 2023, the court held most of Plaintiffs' claims were not preempted or barred by limitations, but dismissed Plaintiffs' claims for other reasons. As to Plaintiffs' Section 2 claim, the court found that Plaintiffs' alleged product market—the business of generating, transmitting, and distributing electricity and other related services—was facially overbroad because it framed the entire field of electrical services as a product market. The court found Plaintiffs had not sufficiently stated their intentional interference claims and dismissed Plaintiffs' Unfair Competition Law claim due to its dismissal of the other underlying claims. Only Plaintiffs' negligent interference with prospective economic relations and declaratory relief claims were dismissed with prejudice.

After Plaintiffs amended their complaint, Edison again moved to dismiss. In an April 7, 2023 order, the court denied the motion as to Plaintiffs' claim for intentional interference with contractual relationship and Plaintiffs' UCL claim with respect to unlawful business acts or practices, but dismissed two other claims. The court dismissed Plaintiffs' intentional interference with prospective economic relations claim with prejudice, and dismissed Plaintiffs' Section 2 claim and their UCL claim with respect to unfair business acts or practices without prejudice. As to Plaintiffs' Section 2 claim, the court once again found that the amended complaint did not state a viable product market, finding that Plaintiffs now alleged a product market for two separate products, *i.e.*, design services and installation services related to new distribution lines and extensions. The court observed that while Plaintiffs appeared to be asserting a Section 2 refusal-to-deal claim, the amended complaint had not overcome the relatively high bar for stating such a claim under current Supreme Court precedent.

The district court required any amendments to the complaint to be filed fourteen (14) days after its dismissal order. No further amendments to the complaint were filed, and the case is currently set for trial in September 2024.

Oklahoma Supreme Court Narrows Utility Territory Law, Allows More Competition for Large Industrial Users

***Okla. Gas & Elec. Co. v. State ex rel. Okla. Corp. Comm'n*, 2023 OK 33 (Okla. Apr. 4, 2023)**

The Oklahoma Supreme Court vacated an Oklahoma Corporation Commission blocking a public electric utility from extending its service to a large industrial user in a neighboring utility's territory.

In 2018, ONEOK Arbuckle II Pipeline, LLC began construction of a natural gas liquid pipeline. The pipeline required electricity to operate a series of pump stations, including the Binger II Pump Station, which was located in the exclusive territory of CKenergy Electric Cooperative Inc. Another public electric utility, OG&E, submitted a bid to provide service to the Binger II, which ONEOK accepted. CKEnergy appealed the contract to the Oklahoma Corporation Commission, asserting it violated CKEnergy's exclusive electricity provision rights under the Retail Electric Supplier Certified Territory Act (RESCTA). When the Commission enjoined the contract, OG&E and ONEOK appealed.

The RESCTA divides Oklahoma's unincorporated areas into territories served by retail electric suppliers with the exclusive right to serve electric-consuming facilities within each territory. However, RESCTA allows retail electric suppliers to enter another certified territory to serve its own property and facilities in an unincorporated area, or an electric-consuming facility in an unincorporated area if the connected load for initial operation of the facility is at least 1,000 kilowatts. The latter exception is known as the "large-load" or "one megawatt" exception.

The issue before the court was whether, under the statutory language, the large-load exception required OG&E to physically extend its own distribution lines to CKE's certified territory, as opposed to utilizing open-access transmission lines. The court agreed with OG&E's interpretation allowing such service, finding the interpretation was consistent with the statutory intent to reduce duplication of distribution facilities, avoid encumbering the Oklahoma landscape, and prevent the waste of materials. The court found the Commission's interpretation would encourage duplication of distribution lines and create higher costs for customers. The court vacated the Commission's order enjoining OG&E from furnishing retail electric service to the Binger II.

Independent Generator Seeks To Revive Predatory-Pricing Claim

***Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC,* No. 2022-02168 (4th Cir.)**

A North Carolina power generator is seeking to revive antitrust claims it brought against Duke Energy, arguing that the district court judge disregarded evidence of exclusionary conduct and ought to have recused himself.

In June 2022, a federal district court in North Carolina held Duke did not engage in anti-competitive conduct by terminating NTE's interconnection agreement or targeting NTE's prospective customer.

Duke had sued NTE for breach of a large-generator interconnection agreement, or "LGIA," prompting NTE to bring antitrust counterclaims against Duke. NTE alleged Duke held nearly 90% of the relevant power market when NTE began developing natural gas plants in the area. NTE required a connection to Duke's transmission networks to connect its plants to the interstate transmission grid. FERC, which regulates the market for wholesale power, requires a power provider with a transmission network like Duke to allow independent power producers like NTE to connect to its network. Duke and NTE entered into a standard FERC-approved LGIA form contract for the interconnection, covering one such NTE plant. Subsequently, Duke and NTE competed to contract to provide power to the Fayetteville Public Works Commission ("FPWC"). Duke, the incumbent power provider to FPWC, won out and amended its contract with FPWC to give FPWC certain discounts. FERC accepted the filed rates. In the same year, NTE suspended work on the plant covered by the LGIA and failed to make required payments under the LGIA. Duke terminated the LGIA and filed claims against NTE for breach of contract, unjust enrichment, negligent misrepresentation, and unfair trade practices. NTE counterclaimed, asserting claims of monopolization under the Sherman Act, as well as state law claims of unfair trade practices and unfair competition. Duke moved for summary judgment on NTE's monopolization claims under section 2 of the Sherman Act, claiming that Duke did not have "monopoly power" and did not engage in "exclusionary conduct."

The court denied Duke's motion with respect to the issue of whether Duke had "monopoly power," concluding that a reasonable jury could find either way, based on Duke's substantial market share or on the constraints imposed by FERC on Duke's ability to control prices and exclude competitors.

However, the court granted summary judgment for Duke on the issue of whether Duke engaged in "exclusionary conduct." The court agreed with Duke that FERC regulations compelled Duke to allow competitors to access its transmission systems, barring an antitrust claim. The court also found Duke could not be held liable for a refusal to deal, where NTE did not allege either that Duke had changed its past practices to cut NTE off (unilaterally terminating a prior voluntary course of dealing) or that Duke was refusing to make transmission services available to NTE at a retail price, two factors sometimes used to determine whether a refusal to deal with a competitor constitutes exclusionary conduct. The court then turned to NTE's predatory pricing claims. While the court assumed, without deciding, that the filed-rate doctrine would not bar a competitor's claim like NTE's (a theory on which circuits are split), the court decided that NTE's predatory pricing claim could not stand because NTE had not demonstrated Duke's prices offered to FPWC were below its costs. The court acknowledged that neither the United States Supreme Court nor the Fourth Circuit have decided the appropriate measure of costs for predatory pricing claims in this context, the court concluded that under any of the typical measures—incremental, marginal, or variable costs—NTE's claim failed. The court reasoned Duke's price to FPWC contributed to Duke's fixed costs above its variable or marginal costs, and thus could not be considered a predatory price.

The case proceeded on Duke's claims and NTE's remaining counterclaims, including a breach of contract claim against Duke. In October 2022, the parties settled those remaining claims against each other, and both parties voluntarily dismissed the remaining claims with prejudice.

NTE appealed to the Fourth Circuit, seeking reversal of the district court's summary judgment dismissing NTE's monopolization claim. NTE argued that the district court's analysis of the predatory pricing issue "missed the central exclusionary feature of Duke's renewal offer—namely, Duke's massive up-front discount, designed to prevent Fayetteville from choosing NTE despite its lower prices in the renewal period." NTE further argued that, had the court examined the issue under the appropriate standard, it would have determined that NTE had presented competent evidence that the discounts Duke offered FPWC caused Duke's total costs to exceed its prices. Finally, NTE argued the judge "improperly refused to recuse" himself from the case. The judge originally recused himself in 2019 because his former law partners represented Duke in the matter, but in 2021 returned to the case, labeling his initial withdrawal as merely "prophylactic." NTE maintained that Judge Bell should have abided by a "once recused, always recused" rule.

Duke responded by arguing that granting a discount to FPWC did not amount to refusal to deal or predatory pricing under federal antitrust law. Duke further argued that the judge had not recused himself in the case, but had only administratively reassigned the matter. Duke also argued there was no reason to recuse and the judge had not shown bias. Oral argument was to take place in December 2023.

Sixth Circuit Holds Commerce Clause Bars Kentucky Statute Directing Utilities to Favor Local Coal

***Foresight Coal Sales, LLC v. Chandler*, 60 F.4th 288 (6th Cir. 2023)**

In February 2023, the Sixth Circuit invalidated a Kentucky statute requiring Kentucky utilities to disregard the cost of severance taxes paid by local coal producers, finding the statute disadvantaged out-of-state producers.

An Illinois coal producer sued the Kentucky Public Service Commission over "S.B. 257," a statute affecting the PSC's policies on how utility companies can impose fuel adjustments on their ratepayers. Under PSC rules, utilities are directed to buy coal competitively, considering cost as a factor, and have limited rights to adjust rates in the short term based on coal cost fluctuations. Kentucky coal producers were less competitive in that evaluation because of Kentucky's severance tax on coal extracted within the state, which contributes to the cost of coal. The Kentucky legislature enacted a law that required the PSC to disregard severance taxes in assessing coal costs, and "evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any coal severance tax imposed by any jurisdiction."

The plaintiff sought a preliminary injunction to prevent them from enacting any regulations based on the new statute. The district court denied the preliminary injunction, reasoning that the state agency was not discriminating against interstate commerce in violation of the Commerce Clause. The U.S. Court of Appeals for the Sixth Circuit disagreed.

The Sixth Circuit found the new law facially discriminated against interstate commerce and placed an undue burden on interstate commerce. As to facial discrimination, the Sixth Circuit found the law required PSC to treat coal from states without a severance tax (*e.g.*, Illinois) differently than the severance-taxed Kentucky coal. As the Sixth Circuit put it, the inclusion of "the severance tax is [] a near perfect proxy for the coal's state of origin" and thus was facial discrimination against interstate commerce. Further, the Sixth Circuit noted that the stated purpose of the new law was to "level the playing field" for Kentucky coal producers, who had felt at a disadvantage compared to out-of-state coal producers from states with no severance tax.

The Sixth Circuit further found that, even if the new law were not facially discriminatory, it placed an undue burden (or, as the court put it, "any economic disadvantage") on out-of-state coal producers. The Sixth Circuit noted that the PSC would artificially discount the cost of coal from Kentucky while not artificially discounting coal from states without a severance tax. Thus, coal producers from states without a severance tax were at an economic disadvantage and would necessarily lose out on bids to Kentucky coal producers, given that cost was the most substantial factor utilities accounted for when choosing bids.

The Sixth Circuit remanded the case to the district court for further proceedings. Kentucky petitioned for a writ of certiorari from the U.S. Supreme Court, which was denied in October.

District Court Holds Michigan's Local Clearing Requirement for Electricity Suppliers Does Not Violate Commerce Clause

***Energy Michigan, Inc. v. Scripps*, No. 20-12521, 2023 WL 2207998 (E.D. Mich. Feb. 24, 2023)**

After a bench trial, the Southern District of Michigan held in February that the Michigan Public Service Commission's local clearing requirement did not violate the Commerce Clause. The court found that the regulation did not discriminate against out-of-state electricity suppliers because it burdened in-state and out-of-state suppliers equally and that the Commission's legitimate interest in grid reliability could not have been adequately served by reasonable nondiscriminatory alternatives.

Associations representing alternative electric suppliers sued the Michigan PSC seeking a declaration that a local clearing requirement, which mandated electricity suppliers own or acquire a set amount of locally generated electricity, violated the Commerce Clause.

To reduce the risk of blackouts in the electric grid network in Michigan, the Michigan PSC implemented a local clearing requirement that prescribed the amount of capacity that an electricity supplier must obtain from generating facilities within certain zones, requiring them to demonstrate they could generate capacity locally. Energy providers that failed to abide by the local-generation requirements were required to pay a steep penalty.

The district court held that the local clearing requirement did not violate the Commerce Clause. First, the court found that the plaintiff electric suppliers failed to establish that local electric suppliers were favored by the local clearing requirements, as witness testimony established that the requirements imposed the same burden on in-state electric suppliers as out-of-state ones.

Second, the court held the burdens imposed by the regulation were not excessive in relation to the local benefits of the regulation. The court found that the plaintiffs' witnesses failed to refute the reliability benefit of local generation during periods of high demand and credited the PSC testimony that the new regulation helped ensure that local grid zones were able to meet customer demand during peak utilization. The court found the price burdens to the electric suppliers of local generation were only incidental, as the plaintiffs had not shown how much out-of-state capacity they would have acquired and at what price.

Third, the court held that, even if the local clearing requirements discriminated against out-of-state suppliers, the new regulation advanced a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory means. The court considered alternatives suggested by the plaintiffs, but found they did not demonstrate how grid reliability could be achieved more efficiently than the new regulation could.

The plaintiffs filed an appeal to the U.S. Court of Appeals for the Sixth Circuit, and while arguments were heard in December 2023, the Sixth Circuit has yet to release its opinion.

Oil & Gas

Court Approves Settlement In Decades-Old Gas Market Manipulation Claims

***Arandell Corp. v. Xcel Energy, Inc.*, No. 07-CV-076-WMC (W.D. Wis. 2023)**

In July 2023, a federal district court in Wisconsin approved a settlement with certain Williams entities resolving long-pending claims.

In June 2022, the district court certified a class of commercial and industrial natural gas buyers alleging traders conspired to fix the price of natural gas in the early 2000s. The buyers allege the traders conspired to manipulate published natural gas price indices used in purchase contracts, and on which buyers routinely relied in making purchasing decisions. The case relates to prior claims that various defendants had manipulated prices in gas futures contracts traded on the New York Mercantile Exchange (NYMEX), which claims had ultimately resulted in settlements of claims based on financial trading of such contracts.

After a years-long effort to resolve the question of whether physical purchases were covered by the prior settlements, the district court certified a class of industrial and commercial purchasers of natural gas buying gas in Wisconsin between January 1, 2000 and October 31, 2002. The court found the plaintiffs had alleged a single conspiracy to manipulate natural gas prices that affected a single, nationwide, and interrelated national marketplace for natural gas, creating commonality and typicality notwithstanding differences in how the thousands of class members purchased their natural gas and individualized damages inquiries that would be required to resolve their claims.

In July 2022, the defendants petitioned for immediate appellate review of the court's class certification decision and moved to recuse the district court judge. The court granted the defendants' motion to stay all proceedings until their petition for review and recusal request are resolved, and stayed class notice in the interim.

In October 2022, the Williams defendant group entered into a settlement agreement with the Wisconsin class plaintiffs. Per the terms of the agreement, Williams would pay the Wisconsin class $12 million for a release of all claims. The settlement funds would be allocated on a pro rata basis within the Wisconsin class based on the volume of each class member's purchase of natural gas in proportion to the total volume filled by all members in the Wisconsin class. No objections were filed to the settlement. Claims against the other defendants remain pending.

Walker Process & Sham Litigation Claims Allowed To Proceed

***LiquidPower Specialty Products Inc. v. Baker Hughes Holdings LLC*, 4:15-cv-2915, 2023 WL 5534198 (S.D. Tex. July 27, 2023) – July 27, 2023 Report and Recommendation (adopted by district court on August 25, 2023)**

On August 25, 2023, the United States District Court for the Southern District of Texas adopted a Magistrate Judge's recommendation to deny Plaintiff LiquidPower's motion for summary judgment seeking dismissal of Defendant Baker Hughes' sham litigation counterclaim.

LiquidPower's original complaint alleged Baker Hughes infringed on four of its patents concerning "treatment and efficient pipeline transport of heavy, asphaltenic crude oils." Baker Hughes asserted defenses and counterclaims focused on the unenforceability of the patents due to inequitable conduct, and added antitrust counterclaims for *Walker Process* fraud, sham litigation, and attempted monopolization. The Patent Office later determined the patents to be invalid, leaving only the antitrust counterclaims in dispute.

LiquidPower moved for summary judgment as to the sham litigation claim, arguing that, as a matter of law, the *Walker Process* claim and the sham litigation claim are independent claims that could not be based on the same conduct and therefore could not be considered together. LiquidPower argued that, because the two claims could not be considered simultaneously, dismissal of the sham litigation claim was proper despite the fact that discovery had not yet closed. The court disagreed, ruling that sham litigation and Walker Process claims can not only be considered simultaneously, but also can be based on the same conduct. The court determined that it was "probable that further discovery will be necessary for the sham litigation claims," and denied LiquidPower's motion. Discovery remains ongoing.

Tenth Circuit Affirms Class Certification of Mineral Owners Allegedly Foreclosed From Drilling In Wyoming

***Black v. Occidental Petroleum Corp.*, 69 F.4th 1161 (10th Cir. 2023)**

In June 2023, a Tenth Circuit panel affirmed a district court decision certifying a class of landowners alleging that Anadarko's leasing of Wyoming oil and gas properties blocked them from drilling.

In 2019, a group of landowners in Laramie County, Wyoming sued Anadarko Petroleum Corporation and its subsidiaries, under the Sherman Act, Clayton Act, and Wyoming state law. Plaintiffs accused Anadarko of monopolizing drilling by entering into oil and gas leases with its subsidiaries that contain a higher-than-market royalty rate. According to plaintiffs, these outsized royalty rates reduced the value of plaintiffs' mineral interests to such an extent that plaintiffs were unable to lease their interests for drilling.

The district court certified the plaintiffs' proposed class to determine liability for the alleged antitrust violations, finding the plaintiffs had established predominance of common questions as to Anadarko's alleged market power and the impact of the alleged antitrust violations on plaintiffs. But it held that the plaintiffs had not established predominance as to the plaintiffs' damages theory. Agreeing with Anadarko, the district court found that the plaintiffs' aggregate damages model was inconsistent with their theory of antitrust liability. On one hand, the liability theory posited that the alleged competitive royalty rates in Anadarko's intracompany leases delayed, but did not foreclose, competitors from entering into leases with other mineral owners. The plaintiffs' damages model, however, did not calculate damages resulting from the deferral of revenue. Therefore, the district court held that individual issues would predominate as to damages and declined to certify the class for that purpose.

Anadarko appealed. Affirming the district court's decision, the U.S. Court of Appeals for the Tenth Circuit held the district court did not abuse its discretion. On the issue of market power, the Tenth Circuit affirmed the district court's adoption of plaintiffs' two proposed relevant markets in Laramie County, rejecting Anadarko's argument that each of the five-hundred leases represented distinct relevant markets. On the issue of antitrust impact, the Tenth Circuit rejected Anadarko's contention that, to establish predominance, the plaintiffs had to prove that there were no uninjured class members at the certification stage. The Tenth Circuit reasoned that the presence of class members who experienced varying degrees of injury, including some who may be totally uninjured, did not bar class certification.

Refined Products

Seventh Circuit to Decide Whether Ethanol Index Manipulation Claims Proceed

***Green Plains Trade Group LLC v. Archer Daniels Midland Company*, No. 23-1185; *United Wisconsin Grain Producers LLC et al. v. Archer Daniels Midland Company*, No. 22-2993 (7th Cir.)**

In September 2023, the Seventh Circuit heard arguments from plaintiffs pursuing claims against Archer Daniels Midland Company for alleged manipulation of ethanol price indices.

In August 2021, Plaintiff Green Plains Trade Group LLC filed claims against Archer Daniels Midland Company ("ADM"), alleging ADM had shipped ethanol to Argo Terminal when prices at the terminal were already lower than those at other terminals to depress prices and realize larger profits on derivatives contracts. Plaintiffs allege ADM's conduct manipulated the benchmark price of ethanol in violation of the Commodities Exchange Act ("CEA") and tortiously interfered with their contracts, but the court dismissed the claim on the grounds that traders of physical commodities are not authorized to sue under the CEA and because, under Nebraska law, a tortious interference claim requires the existence of a specific contract between the parties, which did not exist in this instance.

In September 2021, the court also dismissed plaintiffs' complaint in the related case *United Wisconsin Grain Producers LLC v. ADM*. There, plaintiffs allege ADM manipulated and artificially depressed the price of ethanol in violation of Section 2 of the Sherman Antitrust Act, Sections 4 and 16 of the Clayton Act, and multiple state antitrust, consumer fraud, and deceptive practices laws. 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. The court further 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.

Both Green Plains and the Wisconsin Grain Producers appealed, asking the Seventh Circuit to reverse the district court decisions tossing their lawsuits. Green Plains argues the alleged manipulation forced it to sell physical ethanol at a lower price than it otherwise would have, while the WGP plaintiffs say ADM's conduct allowed it to try to monopolize sales under the Chicago Price Indexes, which in turn allowed it to control pricing for 70% of all ethanol nationwide. ADM argued to affirm, including urging that the WGP had failed to allege ADM could impose supracompetitive pricing on the U.S. market. As of this writing, the appeal remains undecided.

Court Refuses to Take Up Gas Stations' Attempt to Form a Subclass In Credit Card Interchange Fee Litigation

***In re Payment Exchange Interchange Fee and Merchant Discount Antitrust Litig.*, 05-MD-1720 (MKB), 2023 WL 2403615 (Mar. 6, 2023)**

In March 2023, a federal district court turned away a request by two gas stations seeking to intervene in a credit card interchange fee class action to raise issues unique to gasoline retailers. The court found it lacked jurisdiction to entertain the intervention motion while its class certification decision is on appeal.

On January 24, 2019, the United States District Court for the Eastern District of New York granted preliminary approval of a Rule 23(b)(3) Plaintiff Class settlement agreement that resolved and terminated antitrust claims against the Visa and Mastercard networks and various issuing and acquiring banks. Jack Rabbit, LLC ("Jack Rabbit") objected to the settlement agreement and gave notice of its intention to appear at the final class settlement fairness hearing, and subsequently filed a motion to intervene along with 280 Station, LLC, which the court denied. In December 2019, the court approved the class settlement agreement. The court's approval orders are currently pending before the United States Court of Appeals for the Second Circuit.

Following the issuance of the approval orders, Jack Rabbit filed an appellate brief in the Second Circuit, "arguing that the Court erred in: (1) ignoring that Class Counsel's interests are adverse to those of the appellants and that the appellants have Article II standing and are a subclass of cost-plus direct purchasers under Illinois Brick; (2) finding that Rule 23(A)(4)'s adequacy requirements were satisfied because class membership is not ascertainable and the class definition fails to require that the class members suffered an injury; and (3) breaching its fiduciary duty by

failing to create a subclass of retail gas station owners, not appointing the subclass counsel, and delegating the court's decision making responsibility to a special master." Jack Rabbit and 280 Station, LLC then filed renewed motions to intervene in the trial court. The proposed intervenors argued that the court maintained jurisdiction over the renewed motion to intervene despite the ongoing appeal, claiming that the issues raised in the pending motion to intervene are not duplicative of the issues before the Second Circuit and that the trial court had regained jurisdiction over the entirety of the case because the Second Circuit had partially remanded the case to decide whether certain matters addressed in the district court's rulings were final and subject to appeal.

The district court denied the proposed intervenors' motion. The court determined that the proposed intervenors were "impermissibly raising the same issues previously before the Court and now before the Second Circuit—whether the Proposed Intervenors have suffered harm, have standing, and are adequately represented by the settlement class." The court further determined that the Second Circuit's partial remand did not restore the district court's jurisdiction over the matter, reasoning that the "disposition of the dispute between the service stations and oil companies is still before the Second Circuit and the Court does not have jurisdiction to decide issues involved in this dispute. Until the Second Circuit either decides this dispute or holds that the Court's disposition of this dispute is not final and issues an ordinary remand, the Court cannot address these issues raised by Proposed Intervenors."

Gas Stations' Predatory Pricing Claims Poured Out

Pit Row Inc. v. Costco Wholesale Corp., 2023 WL 3143815 (E.D. Wisc. Mar. 30, 2023)

In March 2023, a Wisconsin federal district court granted a summary judgment dismissing claims brought by competing gas stations against Costco for allegedly selling gasoline below cost.

The owners and operators of gas stations and convenience stores in Wisconsin filed an action asserting Costco violated the Unfair Sales Act over 263 days between October 1, 2019 and December 31, 2020 at a Bellevue location by selling regular unleaded motor vehicle fuel below the cost to the retailer. Costco asserted that it did not violate the statute on any of the alleged violation dates because its pricing conformed with the express terms of the Act, and moved for summary judgment. The plaintiffs moved for class certification.

The court found that Costco did not violate the Unfair Sales Act because, for each of the 263 dates in dispute, it either sold gas at or above the minimum markup price as set forth in the statute or set its price by matching the "existing price of a competitor" in accordance with one of the statute's nine exemptions, the "meeting-competition defense." Costco specifically matched the price being offered by a BP gas station located in Kaukauna, Wisconsin and two Marathon gas stations located in Green Bay, Wisconsin. While the plaintiffs alleged that the Kaukauna BP is not Costco's direct competitor because they are geographically far apart from each other, the court concluded the plain-language meaning of "direct competitor" is not limited to gas stations within a certain distance of the retailer, and therefore concluded that Costco properly price-matched against Kaukauna BP. For the Marathon gas stations, the plaintiffs challenged Costco's matching discounted prices being offered by the gas stations because Costco's price was lower than the price displayed on Marathon's signage. The court held that the statute only requires that a retailer match "a price" being offered by a competitor; it does not require the retailer to match the competitor's "street price," "posted price," or "advertised price."

In addition, the plaintiffs asserted that, to satisfy the "meeting-competition defense," Costco had to establish that it set gas prices in good faith to match the prices of its competitors and rebut the presumption that it priced with the intent to injure its competitors. The court held the statute creates no separate obligation of rebuttal, and held that even if Costco had not matched the prices of its direct competitors, Costco still acted with a reasonable, good-faith belief that its conduct was lawful.

Finally, Costco asserted it was entitled to summary judgment because there was no evidence that any of the plaintiffs were injured or threatened with injury as a result of Costco's challenged pricing practices. The court found speculative the plaintiffs' "general observations" and subjective "belief" that their declining sales and profits from 2017 to 2020 resulted from Costco's "low gas pricing." The court granted Costco's motion for summary judgment and denied the plaintiffs' motion for class certification as moot.

Overview

Antitrust Laws & Enforcers

Merger Review Process

Over the past 40+ years, energy markets have featured two notable trends. First, the industry has undergone a major shift from traditional price regulation to competitive markets. Second, vast technological improvements have changed the competitive landscape, particularly for extraction and production. Up to and throughout the 1990s, the United States became increasingly dependent on foreign oil, whereas in the last decade, thanks to innovations and efficiencies in horizontal drilling and hydraulic fracturing, that trend has reversed and the United States has now become the largest oil producer in the world. In 2019, U.S. total energy exports exceeded imports for the first time 67 years. In 2022, U.S. total energy exports increased about 9.3% from 2021 and exceeded total energy imports by the largest margin on record. Efficiency improvements in natural gas and oil well drilling and production techniques and increases in natural gas production have contributed to generally declining U.S. natural gas prices and upticks in consumption by various sectors. U.S. natural gas exports reached a record high in 2022 and comprised about 25% of total U.S. energy exports. 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, chemical Mergers.

What is Merger Review & Who Does It?

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

For mergers and acquisitions above certain annually adjusted thresholds, the merger review process begins when the merging parties file a Hart-Scott-Rodino, or "HSR," notification of the transaction with the Federal Trade Commission ("FTC") and U.S. Department of Justice ("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 30 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 30-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 30 days to either close its investigation or initiate a suit to block the merger.

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

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

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

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

How the FTC Approaches Oil & Gas Mergers

The FTC's approach to oil and gas mergers largely has depended on where in the production and supply chain the merging firms operate. Oil and gas mergers frequently encompass a large number of relevant markets, such that the FTC has said 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. In 2023, the FTC and Quantum Energy Partners agreed to a consent order, under which Quantum was barred from appointing a member to the board of EQT and ordered to divest all shares in EQT. The order barred Quantum executives, employees, and board members from serving "as an officer or director of any entity that is one of the top 7 natural gas producers" in the Appalachian Basin.

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 local distribution companies in an area, as in Equitable/Dominion.

How the DOJ & 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 (TiO2) that excludes "sulfate process," 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 TiO2 in response to a post-merger price increase. Other product markets defined in recent chemicals mergers have included "super phosphoric 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 TiO2 is largely shipped by truck or rail. That definition excludes the possibility of parties turning to supply from China and other overseas sources, a distinction the FTC drew based on evidence that overseas sources do not currently pose a competitive check in North America. Similarly, in Quaker/Houghton, the FTC alleged a geographic market of North America, as the relevant products are typically shipped by tanker truck and shipping "from outside North America is cost- and supply-prohibitive." In Evonik/Peroxychem, the FTC alleged narrower geographic markets — (1) the Pacific Northwest and (2) the Southern and Central United States — again noting the high transportation costs, and that "hydrogen peroxide producers deliver from plants that are relatively nearer to customers."

In CNCC/Syngenta, the agency alleged a market limited to the United States because regulatory approvals required to sell pesticides in the United States would preclude turning to foreign sources. The FTC has also alleged more narrow regional markets when shipping constraints or other factors limit customers' ability to switch to more distant suppliers, as was the case for certain bulk atmospheric gases in the Linde/Praxair transaction.

Non-Merger Antitrust Enforcement

The principal federal antitrust statute governing non-merger conduct is the Sherman Act (the "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 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 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 predetermining who will win the bid.

Market Division or Allocation

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

Concerted action can be established either by direct evidence or circumstantial evidence. Mere parallel conduct is not sufficient for a finding of an unlawful conspiracy, even in a concentrated industry. Accordingly, as the Supreme Court explained in *Monsanto Co. v. Spray-Rite Services Corp.*, "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 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. For decades monopolization cases have only been pursued on a civil basis, but in March 2022, then-Deputy Assistant Attorney General Richard Powers signaled that the Antitrust Division intended to pursue criminal violations of Section 2. In late October 2022, the DOJ announced its first Section 2 guilty plea under the new policy, and in October 2023, the DOJ updated its antirust primer for law enforcement personnel, which includes references to criminal prosecution of "conspiracies to monopolize," as well as situations in which attempts or solicitations to fix prices or rig bids could be charged as "attempted monopolization" under Section 2.

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 of over 70% combined with significant barriers to entry establishes a prima facie case of monopoly power; courts rarely conclude that a company has monopoly power where its market share is less than 50%.

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

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

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

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

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

Exemptions & Immunities

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

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

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

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

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

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

Federal Antitrust Agencies

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 first 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. President Biden's second nominee, Alvaro Bedoya, was sworn in as a Commissioner on May 16, 2022. Bedoya was the founding director of the Center on Privacy & Technology at Georgetown University Law Center, and before joining the FTC, he focused on research and policy involving privacy, civil liberties, and civil rights. Khan and Bedoya presently serve with Rebecca Kelly Slaughter (also a Democrat appointee). Christine S. Wilson (a Republican appointee) stepped down from appointment in March 2023, two years before her term would have expired. Noah Joshua Phillips (a Republican appointee), ended his term on October 14, 2022. Both Republican seats remain vacant.

In August 2023, FTC Chair Lina Khan appointed Henry Liu to serve as Director of the FTC's Bureau of Competition. Liu jointed the FTC from a career in private practice.

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

Mergers II

Peggy Bayer Femenella Assistant Director

James Abell Deputy Assistant Director

Abby Dennis Deputy Assistant Director

Michael Lovinger Deputy Assistant Director

Peggy Bayer Femenella

The FTC's Mergers II group oversees a wide variety of industries, including coal mines, chemicals, entertainment, and computer hardware and software. A significant recent case Mergers II handled was the challenge to a proposed joint venture between Peabody Energy and Arch Coal, which would have combined the parties' Southern Powder River Basin coal mining and sales operations. The challenge resulted in the U.S. District Court for the Eastern District of Missouri granting the FTC's request for preliminary injunction, causing the parties to abandon the joint venture. 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. Femenella became Assistant Director in 2022, after having served as Acting Director and deputy in the group. Prior to that, Femenella served as Counsel to the Director of the Anticompetitive Practices Division, following a long career in the agency, having joined the FTC in 2000. Femenella is joined by James Abell, Abby Dennis, and Michal Lovinger in Deputy Assistant Director roles.

Mergers III

Peter Richman Assistant Director

Jessica Drake Deputy Assistant Director

Brian Telpner Deputy Assistant Director

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, Conoco/Phillips, 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 group. Richman has led Mergers III since 2016, following a long career in at the FTC, 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.

Brian Telpner, Peter Richman, and Jessica Drake

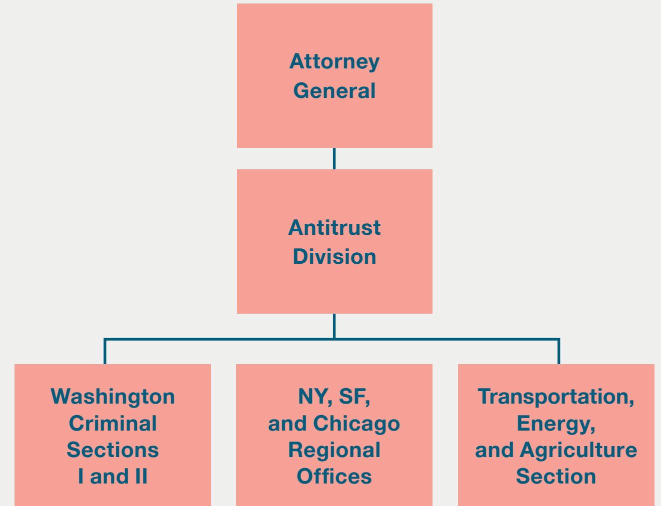
DOJ Antitrust Division

On October 16, 2021, the Senate approved President Biden's nominee, Jonathan Kanter, to serve as Assistant Attorney General ("AAG") of the DOJ. 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. 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 Section ("TEA") is predominantly responsible for civil enforcement in the energy industry, including electricity and oil field services, among others. The Defense, Industrials, and Aerospace Section also handles some energy-related industries, including metals and mining.

DOJ Antitrust Division

(highlighting offices with principal energy and chemical enforcement responsibilities)



Prior results do not guarantee a similar outcome.

Transportation, Energy, & Agriculture Section

Patricia Corcoran Acting Section Chief & Assistant Chief

Katherine Speegle Assistant Chief

TEA 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.

Patricia Corcoran

There are approximately 35 individuals in the TEA Section, which is currently led by Acting Section Chief & Assistant Chief Patricia Corcoran and Assistant Chief Katherine Speegle. Corcoran took on the Acting Section Chief role in December 2023. Corcoran has served as Assistant Chief in TEA since 2019, having previously held other positions at DOJ and a career in private practice.

Nationally Recognized Antitrust Practice

V&E's antitrust and competition law practice includes more than 40 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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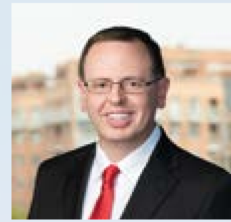

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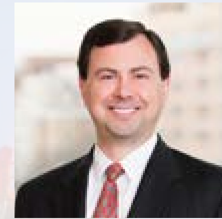

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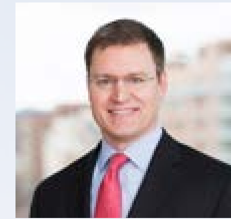

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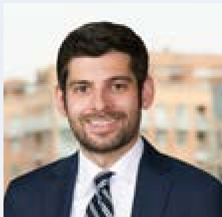

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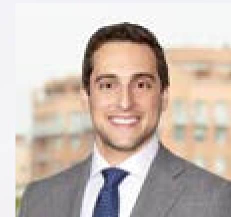

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