WHAT TO EXPECT IN 2020 MERGER ENFORCEMENT: TRENDS AND DEVELOPMENTS FROM 2019

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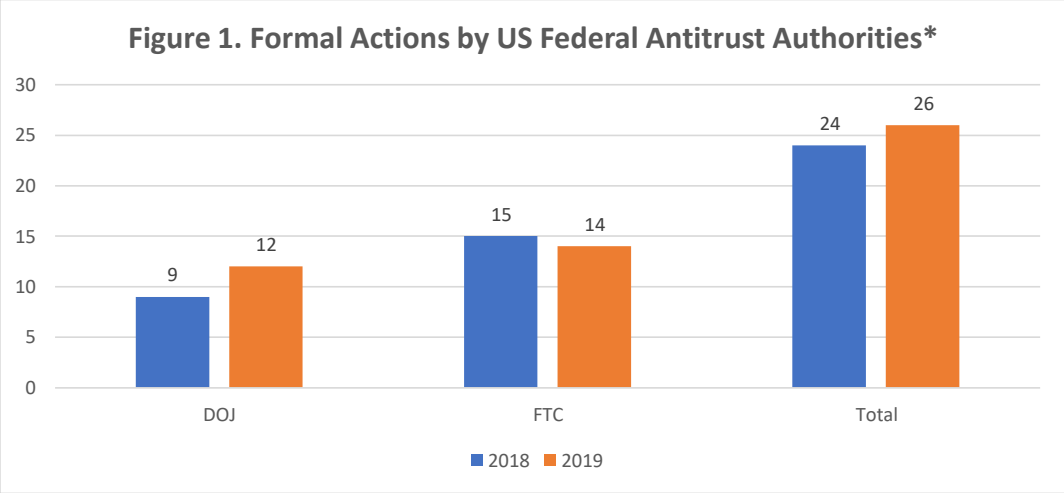
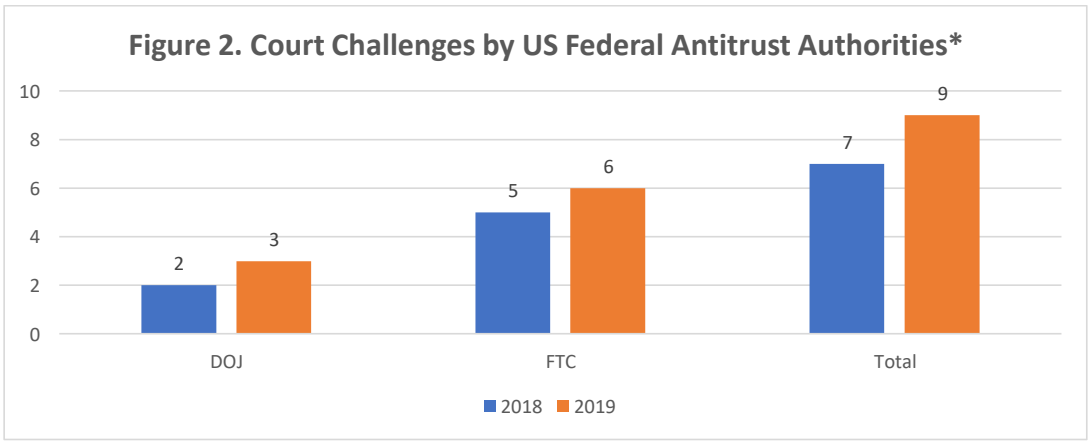
Overview

The U.S. antitrust authorities remained active and aggressive in 2019—challenging more transactions than in 2018.



* Includes all completed merger-related court actions by FTC and DOJ in federal district court (both litigated complaints and consent decrees), federal appellate court, and in FTC administrative proceedings, as well as mergers abandoned under threat of litigation. Excludes litigations pending at the end of the year (including *Post Holdings/Tree House Foods*), HSR violations, consent decree enforcement, and challenges pursued by other enforcers or private parties.



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Key Issues for 2020

The authorities have already signaled that aggressive antitrust enforcement is likely to continue in 2020, with a number of challenges already within the first few weeks of the new year.[1] In the face of public questioning of whether there has been sufficient enforcement in technology transactions involving nascent competitors, FTC announced an industry-wide study under the FTC's study authority into the acquisition strategies of some of the largest technology companies.[2]

In this enforcement climate, it is even more critical to understand enforcement priorities and key issues being considered by the antitrust authorities in order to position a transaction for the best possible chance at success. This past year in antitrust merger enforcement offers a number of key insights:

1. **Increased Activity of State Attorneys General in Merger Review.** State attorneys general may—and do—challenge transactions. Although it is not uncommon for state AGs to challenge transactions alongside federal antitrust authorities, the states have become increasingly active. As they demonstrated in *Sprint/T-Mobile* and *United Health/DaVita*, they are not afraid to challenge a transaction that has already been cleared by the federal antitrust authorities.

2. **FTC Commissioners Rethinking Certain Traditional Views.** Substantively, a number of FTC Commissioners appear to be questioning certain aspects of traditional merger analysis. For example, Commissioner Chopra, in *Staples/Essendant* and *United Health/DaVita*, continued to express concerns with the effectiveness of divestitures involving private equity buyers. Similarly, in *Bristol Myers/Celgene*, Commissioners Slaughter and Chopra argued for a more expansive view of the merger's competitive effects to focus on industry-wide competitive dynamics and innovation incentives, and critiqued the traditional analysis of focusing on individual product overlaps. And, in *Nexus/Generation Pipeline*, although all the Commissioners agreed on the decision, Commissioners Wilson, Chopra, and Slaughter each filed separate statements to debate the general competitive threat of non-compete clauses.

3. **FTC's Continued Preference for Administrative Proceedings Over Federal Court Where Available.** Under the Federal Trade Commission Act, FTC has the ability to challenge a transaction in an administrative proceeding, and to go to federal court either to obtain a preliminary injunction pending that administrative proceeding or a permanent injunction. Typically, FTC files simultaneously in both fora. This year, when there was no need to seek a preliminary injunction because there was no imminent threat that the parties would consummate the transaction, FTC filed first (and in one case *only*) in the administrative forum. In *Otto Bock/Freedom Innovations*, FTC challenged a consummated transaction, and in *Tronox/Cristal* it did not file a simultaneous federal action where EU merger approval was pending. However, early in 2020, one defendant in an FTC administrative action has challenged the forum itself on constitutional grounds,[3] and we will continue to monitor this case.

4. **Potential for More Active Involvement By Courts in DOJ Consent Decrees.** Settlements with DOJ to resolve concerns related to transactions are subject to the Tunney Act, which empowers courts to review DOJ consent decrees to ensure that the settlement is in the public interest. Historically, courts have approved consent decrees without significant scrutiny. This year, however, in CVS/Aetna, Judge Leon in the U.S. District Court for the District of Columbia stated "no court should rubberstamp a consent decree" just because the government has requested it, and held an evidentiary hearing where the merging parties, government, and third-party amicus filers were permitted to make arguments. Although Judge Leon eventually approved the settlement, Judge Leon's handling of the *CVS/Aetna* consent decree may lead some judges to take more active roles in the Tunney Act process.

5. **DOJ's Process Changes.** In 2018, DOJ announced that it was attempting to streamline and speed the merger review process by concluding investigations within six months of an Hart-Scott-Rodino (HSR) filing.[4] Assistant Attorney General Delrahim has stated that DOJ is meeting its goal of completing investigations within six months, with the average time from an HSR filing to DOJ notifying the parties of its position being only 5.4 months.[5] However, because the timeline ends when DOJ notifies parties of its position, the actual time to conclusion of a matter is much longer. In another process change, for the first time, DOJ employed the Administrative Dispute Resolution Act of 1996, referring the core issue of market definition to arbitration where the parties agreed the result would be dispositive in the case. While DOJ has not used this procedure previously and has not employed it since, parties should consider whether their case might be appropriate for such treatment.

6. **Continued Monitoring and Enforcement of HSR Reporting Requirements.** DOJ and FTC continue to take HSR compliance very seriously. HSR rules require that companies file a notification with the antitrust authorities and wait a statutory period before closing certain transactions. Failures to report reportable transactions and observe the statutory waiting period can be costly. The enforcement actions brought against Canon and Toshiba this past year serve as an important reminder that FTC and DOJ are monitoring transactions for both substance and reportability.

7. **DOJ Reaffirmed Its Commitment to Enforcing Consent Decrees.** Assistant Attorney General Makan Delrahim's statements in 2018 emphasized the enforcement of existing consent decrees and DOJ made changes to consent decree language to reduce the difficulty of enforcing the decrees. In 2019, DOJ brought an action against Live Nation alleging it violated the 2010 consent decree regarding the Ticketmaster acquisitions, which resulted in a new settlement that clarified the conditions that apply, extended the consent decree for an additional five years, and included an automatic fine mechanism going forward.

8. **Potential for Private Litigation.** While it likely will remain rare, private plaintiffs can and occasionally do bring their own challenges to transactions. In one such private case, *JELD-WEN/Craftmaster*, DOJ filed an amicus brief defending the position that private challenges to a consummated merger should not be uniformly prohibited. This case is still on appeal at the Fourth Circuit.

9. **Focus on Nascent Competition and Start-Up Acquisitions in Technology Sector.** Jeffrey Wilder, DOJ's Acting DAAG for Economics, indicated that concerns related to nascent competition and acquisitions of a start-ups, by an incumbent platform company may be a particular focus of scrutiny in the technology sector.[6] This statement parallels a year of increased enforcement attention focused on the technology sector. DOJ, FTC, and a bipartisan group of state AGs have opened broad investigations into digital and technology companies' conduct and acquisitions.[7] FTC in particular has initiated a retrospective review of transactions by five large technology companies.[8] Moreover, enforcers are also suggesting that the agencies may increasingly use Section 2 of the Sherman Act to investigate and challenge serial acquisitions of nascent competitors in platform industries—i.e., analyze mergers as part of a broader pattern of conduct, as opposed to reviewing each transaction in isolation.[9]

10. **Proposals for Merger Enforcement Reform.** As the 2020 election approaches, politicians have taken aim at antitrust policy and in particular have suggested reforms to merger enforcement. In addition to rhetoric from a number of candidates, such as Senators Elizabeth Warren and Bernie Sanders, Democratic candidate and Senator Amy Klobuchar, who is currently the Ranking Member of the Antitrust Subcommittee, submitted legislation to modify the Clayton Act to allow transactions to be blocked if they "materially lessen competition,"[10] which is intended to be a lower requirement than the current "substantially lessen competition" standard. Senator Klobuchar's proposal would also shift the burden of proof for what she calls "mega-mergers"[11] to require that the merging parties prove their transactions do *not* harm competition.[12] The proposed legislation also would modify the Clayton Act to prohibit transactions that tend to create a monopsony in a specific line of commerce. Senator Klobuchar has introduced another bill to authorize civil monetary penalties for Section 2 violations.[13] The penalties could be as high as 15% of the defendant's total US revenues or 30% of their revenues in the relevant markets.[14]

Litigations and Challenges to Deals

Although most transactions are cleared without challenge, federal and state enforcers have demonstrated a willingness to go to court to prevent a transaction they view as anticompetitive. In 2019, most of the challenged cases featured traditional horizontal concerns between competitors, but DOJ did pursue one vertical transaction on appeal—*AT&T/Time Warner*.

Numerous Transactions Were Abandoned in the Face of a Challenge

FTC and DOJ challenged a number of transactions, resulting in the parties abandoning the transaction before reaching a court decision. In fact, no federal challenges made it to trial in federal court in 2019.

Securus Technologies/Inmate Calling Solutions

On June 12, 2018, Securus Technologies, majority owned by Platinum Equity LLC, proposed to acquire Inmate Calling Solutions from HIG Capital LLC.[15] Both companies provide telecommunications services for inmates. DOJ stated "Securus and ICS have a history of competing aggressively to win state and local contracts by offering better financial terms, lower calling rates, and more innovative technology and services. This merger would have eliminated that competition, plain and simple."[16] The transaction was also subject to review by the Federal Communications Commission (FCC), where FCC Chairman Ajit Pai stated that the "deal posed significant competitive concerns and would not be in the public interest."[17] On April 3, 2019, DOJ announced that the parties abandoned their transaction after both DOJ and FCC independently informed them of their concerns.[18]

Republic National/Breakthru Beverage

On November 20, 2017, Republic National Distributing Company, LLC, and Breakthru Beverage Group, LLC, announced their proposed transaction to combine Republic, a distributor and broker of premium wine and spirits, with Breakthru, a distributor and broker of beer, wine, and spirits.[19] On April 5, 2019, after a protracted FTC investigation, the parties decided to abandon their proposed transaction.[20] In a closing statement on the matter, FTC stated that "this transaction likely would have resulted in higher prices and diminished service in the distribution of wine and spirits in several states."[21]

QuadGraphics/LSC Communications

On October 31, 2018, Quad/Graphics, Inc. (Quad) agreed to acquire LSC Communications, Inc. (LSC) for approximately $1.4 billion.[22] Both companies offer printing services for magazines, catalogs, and books, as well as related services. DOJ filed a complaint challenging the transaction on June 20, 2019 that alleged the transaction would eliminate head-to-head competition between LSC and Quad in printing services for magazines, catalogs, education books, and one-color trade books.[23] DOJ alleged that "Quad and LSC dominate the magazine, catalog, and book printing services markets, and each views the other as its primary, and often only, competitor."[24] Quad and LSC argued that the transaction would allow the combined company to service customers more efficiently, especially in the face of digital competition and the "ongoing media disruption" of the printing industry.[25] However, on July 23, 2019, Quad and LSC announced they were abandoning the proposed transaction, citing the cost to continue in the lawsuit and the Court's litigation schedule, which would not result in a decision until 2020.[26]

Fidelity National Financial/Stewart Information Services Corporation

On March 19, 2018, Fidelity National Financial, Inc. announced an agreement to acquire Stewart Information Services Corporation.[28] Fidelity and Stewart are title insurance companies, which underwrite residential and commercial real estate transactions and provide title information services.[29] FTC issued an administrative complaint on September 6, 2019, and simultaneously filed for a temporary restraining order and preliminary injunction to stop the transaction.[30] FTC argued that Fidelity and Stewart are two of only four title insurance underwriters for large commercial transactions,[31] and that the transaction would reduce competition among title insurance underwriters for large commercial transactions in 45 states and the District of Columbia.[32] FTC also alleged the transaction would result in increased prices or decreased quality in the provision of title information services in at least 14 local markets.[33] On September 10, 2019, the parties announced the decision to terminate the proposed merger in response to FTC's complaint.[34]

Illumina/PacBio

On December 17, 2019, FTC issued an administrative complaint challenging Illumina Inc.'s proposed acquisition of Pacific Biosciences of California (PacBio).[35] The two companies, which offer DNA sequencing systems to scientists, announced the transaction on November 1, 2018.[36] In its complaint, FTC alleged that Illumina has a monopoly in U.S. and global markets for "next-generation sequencing" (NGS) technology that enables researchers to quickly and accurately identify the order of component blocks in a DNA sample.[37] FTC explained that PacBio "has managed to gain a foothold in the NGS market" by offering a sequencing system that, though currently slower and more expensive than Illumina's system, is preferable to some customers because it can read longer DNA sequences.[38] The parties argued that the acquisition would allow them to combine PacBio's long-read sequencing capabilities with Illumina's short-read sequencing systems "to provide integrated workflows and novel innovations that bring together the best of both technologies to help researchers advance their discoveries faster and clinicians offer new tests economically."[39] However, FTC alleged that the transaction would allow Illumina to maintain its monopoly power by eliminating the "increasing competitive threat" posed by PacBio.[40] FTC relied on Illumina's documents, which showed Illumina monitoring PacBio, to demonstrate that Illumina expected PacBio to become a close competitor as it improved its product and decreased costs.[41] On January 2, 2020, Illumina and PacBio jointly announced that they decided to end the proposed merger.[42] Under the purchase agreement, Illumina paid PacBio a $98 million termination fee.[43]

Post Holdings/TreeHouse Foods

On May 2, 2019, TreeHouse Foods, a manufacturer of private label packaged foods and beverages, announced its agreement to sell its private label ready-to-eat (RTE) cereal business to Post Holdings, a consumer packaged goods holding company that also was a manufacturer of private label RTE cereal.[44] FTC filed suit seeking a temporary restraining order and preliminary injunction in the United States District Court for the District of Columbia, as well as an administrative complaint on December 19, 2019 to enjoin the transaction.[45] FTC alleged that Post and TreeHouse are two of only three significant manufacturers of private label RTE cereal in the U.S.[46] FTC further alleged the proposed transaction would lead to lower-quality and higher-priced private label RTE cereal because the sale would eliminate the head-to-head competition between Post and TreeHouse, which FTC characterized as the first and second choices RTE manufacturers for most retailers.[47] The companies argued that the transaction would lead to substantial cost savings and other efficiencies that would provide stronger competition by helping Post "compete more aggressively" in the broader RTE cereal category, which in the parties' view included branded and private label cereals.[48] The companies further argued that the RTE cereal market is already highly competitive and currently "declining as a category as consumers move to other breakfast options."[49] FTC, however, alleged that although private label RTE cereals offer "equivalents" or "emulations" of the national brand-name RTE cereals, private label RTE cereals are not interchangeable with branded RTE cereals due to significant price differences and other unique benefits to retailers gained only by selling private label RTE cereals, such as promotion of the retailer's brand.[50] The district court granted a temporary restraining order on December 27, 2019.[51] On January 13, 2020, with an administrative trial scheduled for May 27, 2020,[52] the parties announced that they had abandoned the transaction.[53]

FTC Found Success in Administrative Actions

Under the Federal Trade Commission Act, Congress has authorized FTC to challenge a transaction before an FTC Administrative Law Judge (ALJ), whose decisions are reviewed by the full panel of FTC Commissioners. Therefore, FTC has the ability to bring challenges in either (or both) an administrative proceeding or federal district court, depending on the circumstances of the given case. DOJ, on the other hand, has the ability to bring cases only in federal district court. Although the administrative venue operates under somewhat different procedures than a federal district court, and some have argued that this can create substantive divergences in adjudication, the same substantive antitrust principles apply in both forums.

Otto Bock/Freedom Innovations

FTC filed an administrative complaint on December 20, 2017 to challenge the acquisition of Freedom Innovations by Otto Bock, which closed in September 2017.[54] FTC did not file for a preliminary injunction because the transaction was already consummated. After an administrative trial, the ALJ decided in favor of FTC on May 7, 2019.[55] On November 6, 2019, FTC Commissioners unanimously upheld the ALJ's decision requiring Otto Bock to undo its acquisition of Freedom Innovations, citing concerns that the transaction would reduce competition in the U.S. market for microprocessor prosthetic knees.[56]

The transaction sought to combine Otto Bock and Freedom Innovations, two manufacturers of lower-limb prosthetics used by amputees.[57] The parties argued that the market for microprocessor

prosthetic knees would remain competitive, in part because (1) there were a number of other microprocessor prosthetic knee competitors with the ability to expand in the future,[58] and (2) the insurance reimbursement system facilitates substitution among microprocessor prosthetic knee providers and serves as a "price cap."[59] The parties also argued that, but for the merger, Freedom's financial difficulties would have caused the company to fail.[60] Finally, the parties argued that any alleged competitive harm would be resolved by a divestiture they proposed after discovery concluded in the administrative trial.[61]

FTC was not satisfied with the divestiture proposal in part because it could not resolve competitive harm that occurred between the consummation and the date of divestiture, despite the parties' insistence that the businesses had been held separate in the interim.[62] The Commission, moreover, found that the merger already had produced anticompetitive effects, even with a hold-separate agreement in place, citing internal company documents that suggested the parties sought to decrease marketing and promotions against one another and a product slated to be upgraded was placed "on hold."[63] The Commission concluded that Otto Bock's proposed divestiture of only Freedom's microprocessor prosthetic knee assets would not resolve the alleged competitive harms, because a divestiture buyer would need other foot products to compete as effectively as Freedom Innovations.[64] Like the ALJ, the Commission found that Freedom's financial status improved in late 2016 and early 2017 and the company failed to consider viable alternative options for acquisition rather than focusing on the highest possible offer.[65] Therefore, the Commission ordered Otto Bock to divest all of Freedom's assets, including some that did not overlap, because Freedom often sold microprocessor prosthetic knee and foot products as a package, and FTC concluded that the divestiture buyer would need to sell a similar portfolio to be competitive.[66] On December 30, 2019, Otto Bock filed a petition for review of FTC's ruling in the D.C. Circuit.[67] FTC and Otto Bock engaged in settlement discussions after FTC's November divestiture order,[68] and, on January 29, 2020, the D.C. Circuit granted the parties' joint motion for a 30-day abeyance to allow the parties to continue those discussions.[69]

Tronox/Cristal

On December 5, 2017, FTC filed an administrative action to block Tronox's proposed acquisition of Cristal.[70] Originally announced on February 21, 2017, the deal sought to combine two titanium dioxide (TiO2) producers.[71] FTC alleged that the transaction would combine two of the three largest manufacturers of TiO2, increasing Tronox's incentive and ability to restrict the supply of TiO2 to the market and enhancing the likelihood of coordinated effects among the remaining providers.[72] In January 2018, Tronox sought, unsuccessfully, to move the litigation to federal court.[73] The transaction also was under review in the European Union, which prevented it from closing; therefore, FTC did not file for a preliminary injunction at the outset. However, on July 3, 2018, the European Union cleared the merger with conditions.[74] At that point, FTC sought a preliminary injunction in federal district court to prevent the parties from consummating the transaction prior to the resolution of the administrative suit.[75] On September 12, 2018, the district court found that FTC showed the proposed transaction would likely substantially lessen competition in the North American market for chloride-process TiO2.[76] Despite the parties' arguments that the post-merger company would face significant competition from large Chinese entrants and that the merger created significant synergies and efficiencies, the District Court granted a preliminary injunction.[77] In the administrative proceedings, the ALJ issued an initial decision to permanently enjoin the acquisition on December 14, 2018.[78] Following that decision, the parties agreed

to divest two manufacturing plants along with related intellectual property, an R&D center, and an option to use licensed IP outside the United States.[79] The final consent order was issued on May 28, 2019,[80] and the parties announced the closing of their transaction on April 10, 2019.[81]

Appellate Courts Upheld Lower Court Federal Court Decisions

While cases were still pending in federal court as of the end of 2019, the only merger-related cases decided in federal court this year were decided on appeal: (1) the Eighth Circuit upheld FTC's victory enjoining a transaction between two physician groups in North Dakota and (2) the D.C. Circuit affirmed the district court's denial of DOJ's challenge to AT&T's acquisition of Time Warner.

Sanford Health/Mid Dakota

On June 13, 2019, the Eighth Circuit upheld the District of North Dakota's decision to preliminarily enjoin a merger between Sanford Health and Mid Dakota Clinic (MDC), two physician groups in North Dakota.[82] Litigation commenced almost two years earlier, when FTC and the Attorney General of North Dakota filed for a preliminary injunction pending an administrative proceeding.[83] FTC alleged that Sanford Health and MDC were each other's closest rivals in the four-county Bismarck-Mandan region of North Dakota and that the merger would create a physician group with at least 75% to 85% share in the provision of adult primary care, physician care, pediatric services, and OB/GYN services, as well as a monopoly in general surgery.[84] On December 13, 2017, the District Court granted FTC's request for a preliminary injunction,[85] and the parties subsequently appealed the order.[86] On June 13, 2019, the Eighth Circuit issued an opinion upholding the District Court's findings.[87] Although the merging parties argued, in part, that any post-merger price increases could be defeated by the "dominant buyer" in the geographic area (Blue Cross Blue Shield of North Dakota), the Eighth Circuit agreed with the District Court's rejection of this argument, citing contrary testimony from Blue Cross representatives and the history of contract negotiations between the parties.[88] Further, the Eighth Circuit agreed with the District Court that four of five anticipated transaction efficiencies were not merger-specific, crediting FTC's expert testimony that many of the parties' claimed efficiencies could be achieved without the transaction.[89] On July 9, 2019, FTC announced that the parties had abandoned the transaction.[90]

AT&T/Time Warner

On February 26, 2019, the D.C. Circuit affirmed the D.C. District's denial of a permanent injunction against AT&T's proposed acquisition of Time Warner.[91] The transaction combined the distribution assets of AT&T/DirecTV with the programming assets of Time Warner.[92] The district court ruled in favor of the merging parties on June 12, 2018.[93] After DOJ declined to seek an injunction pending appeal, the parties closed their transaction on June 15, 2018.[94] On appeal, DOJ argued that the District Court (1) misapplied antitrust economic principles, (2) used internally inconsistent logic when evaluating industry evidence, and (3) erred in rejecting DOJ's quantitative model of harm.[95] DOJ also claimed that the District Court discounted the testimony of third-party distributors due to potential self-interest while failing to acknowledge that the testimony of Time Warner executives could potentially suffer from the same bias.[96] The D.C. Circuit ruled that the District Court had properly applied economic principles and had reached fact-specific conclusions based on real-world evidence that contradicted DOJ's arguments.[97] The court also rejected DOJ's argument regarding third party evidence, noting that the District Court found the third-party distributor witness testimony "of little probative value" for a number

of reasons, including a lack of analysis underpinning the testimony.[98] Finally, the D.C. Circuit determined that DOJ's expert's economic model failed to account for real-world facts, such as long-term contracts that constrained the ability of the post-merger firm to raise prices.[99] Notably, the D.C. Circuit also critiqued DOJ's economic analysis for failing to take into account the merging parties' offer to arbitrate future programming disputes with third-party distributors.[100] Given these omissions, the D.C. Circuit held that the District Court did not clearly err in rejecting the expert's model.[101] Subsequently, DOJ announced that it did not intend to appeal the decision.[102]

Additional Challenges Pending in Federal Court

The authorities also brought a number of merger challenges in 2019 that remained pending as the year closed.

Evonik/PeroxyChem

On August 2, 2019, FTC filed an administrative complaint,[103] and sought a preliminary injunction in federal court,[104] to prevent a merger between Evonik Industries AG and PeroxyChem Holding Company. Evonik agreed to acquire chemical company PeroxyChem for $625 million on November 7, 2018.[105] FTC alleged that the parties competed for hydrogen peroxide customers in two regional markets: (1) the Pacific Northwest and (2) the Southern and Central United States.[106] FTC alleged the transaction "would create a firm with a dominant share and significantly increase market concentration in each regional market."[107] Evonik and PeroxyChem, however, argued that FTC based its analysis on a faulty market definition that included all hydrogen peroxide and ignored the difference between Evonik's focus on "standard grade" applications and PeroxyChem's focus on "specialized" grades and applications.[108] The parties further argued that FTC improperly rejected the proposed divestiture of a PeroxyChem manufacturing facility in British Columbia when analyzing the potential anticompetitive effects in the Pacific Northwest.[109] In federal court, the parties stipulated to a temporary restraining order while FTC's motion for preliminary injunction was pending.[110] The four-day preliminary injunction hearing concluded on December 13, 2019.[111] In anticipation of the court's ruling, Evonik and PeroxyChem promised to abandon the proposed acquisition if the federal court granted FTC's motion for preliminary injunction, or move to withdraw or dismiss FTC's administration challenge to the proposed acquisition if the federal court denied the motion.[112] Evonik also filed a sealed motion on January 15, 2020, asking the court to take notice of an apparent divestiture agreement that the company had recently signed with the Canadian Competition Bureau.[113] On January 24, 2020, the court denied FTC's motion for a preliminary injunction, marking the agency's first merger challenge loss since 2015.[114] The denial of the preliminary injunction hinged on FTC's failed attempt to argue for a single market for all "non-electronics" hydrogen peroxide—an "oversimplification [that] all but preclude[d] the Court from siding with [the FTC]."[115] After the court's ruling, Evonik closed the acquisition of PeroxyChem on February 3, 2020.[116] The parties also filed a motion with FTC for withdrawal of the matter from administrative adjudication, which FTC did not oppose. Subsequently, the Commission withdrew the matter from adjudication and stayed proceedings before the ALJ on February 11, 2020.[117] An agency spokesperson said FTC has not yet decided to formally abandon its challenge altogether.[118]

Sabre/Farelogix

On November 14, 2018, Sabre Corporation agreed to acquire Farelogix, Inc. in a transaction valued at approximately $360 million.[119] Both companies offer technology used in the distribution of airline

tickets. DOJ alleged that Sabre is one of three global distribution systems (GDSs) and the largest GDS in the U.S.[120] GDSs are computerized systems that allow airlines to market and sell tickets to consumers through travel agencies.[121] Farelogix offers a product called "Open Connect" that "provides technology and support services to certain airline customers."[122] DOJ challenged the transaction on August 20, 2019, alleging that Sabre is "the dominant provider" of booking services for airlines in the United States and that Farelogix is a "significant and growing threat to Sabre's dominance."[123] Sabre publicly committed to extending existing Farelogix contracts on the same terms for at least three years and continuing to support and invest in Farelogix's products.[124] Trial began on January 27, 2020, in Delaware.[125] Witnesses painted contrasting pictures of Farelogix. DOJ witnesses testified that Farelogix is a disruptor in the industry, allowing travel services like airlines to bypass GDS operations and fees.[126] Sabre presented testimony that Farelogix is small and becoming outdated, but would be able to grow internationally as a result of the merger.[127] Importantly, Sabre's attorneys argued that DOJ mischaracterized the merger as horizontal when the companies actually occupy different places in the distribution chain for airline services.[128] After closing arguments finished on February 6, 2020, Judge Leonard P. Stark asked questions of both sides.[129] He suggested that, while Farelogix is a one-sided platform focusing on airlines, Sabre is a two-sided platform, at least some of the time, because it operates with airlines on one side and ticket agents and travel services on the other. Judge Stark asked DOJ what he should make of this difference in the two platforms in light of the Supreme Court's statement in *Ohio v. America Express* that only two-sided platforms can compete with two-sided platforms.[130] Judge Stark has ordered post-trial briefs and taken the case under advisement.[131]

DOJ's Use of Arbitration in Merger Litigation

Little discussed or used by DOJ under prior leadership, the Administrative Dispute Resolution Act of 1996 enables federal agencies, including the DOJ Antitrust Division, to "use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding."[132]

Novelis/Aleris

On July 26, 2018, Novelis Inc. announced that it had agreed to acquire Aleris Corp. for approximately $2.6 billion.[133] Both companies are providers of aluminum products.[134] In announcing the transaction, Novelis asserted it would obtain a number of benefits through the acquisition, including a more diverse product portfolio, better integration of complementary assets to serve the Asian market, a broader automotive business that will enable it to meet growing demand, and a stronger ability to compete against steel suppliers.[135] DOJ, however, filed suit to enjoin the transaction on September 4, 2019, alleging that Novelis and Aleris are two of only four suppliers of aluminum automotive body sheet (ABS) and that the relevant product market consists exclusively of aluminum ABS.[136] Although Aleris only recently established facilities in the United States, DOJ alleged that Aleris's entry had already compelled Novelis to offer lower prices and to provide better customer service.[137] In its complaint, DOJ cited internal Novelis documents suggesting the transaction was motivated by a desire to prevent a new market entrant from acquiring Aleris, which Novelis feared would cause "less disciplined pricing" in the industry.[138] In response to DOJ's suit, Novelis claimed that DOJ's theory was "completely divorced from commercial reality" and that, because "aluminum ABS is in constant and evolving competition with steel ABS," the relevant product market must include both steel and aluminum ABS.[139] Notably, DOJ agreed to refer the issue of product market definition to binding arbitration.[140]

In exercising the Antitrust Division's authority under the Administrative Dispute Resolution Act of 1996 for the first time, Assistant Attorney General Makan Delrahim stated that the arbitration would "resolve the dispositive issue of market definition in this case efficiently and effectively, saving taxpayer resources."[141] By invoking arbitration, Assistant Attorney General Delrahim hopes to decrease timing uncertainty relative to challenging the transaction in court.[142]

Enforcement by State Attorneys General

Historically, state attorneys general rarely challenged transactions without the participation of either FTC or DOJ. However, 2019 saw state attorneys general challenge two transactions after federal enforcers declined to take action.

Sprint/T-Mobile

On July 26, 2019, DOJ conditionally approved T-Mobile's acquisition of Sprint, another mobile telephone network operator offering prepaid and postpaid retail mobile wireless telecommunications services.[143] DOJ alleged that the combined company would control a third of the national retail mobile wireless service market and eliminate head-to-head competition between T-Mobile and Sprint.[144] To resolve these concerns, the parties agreed to divest Sprint's prepaid mobile wireless business (including the Boost and Virgin wireless businesses) to DISH Network Corp. (including retail locations).[145] The merging parties agreed to make at least 20,000 cell sites and 400 retail locations available to DISH within five years of closing the transaction.[146] And, to further support DISH as an independent competitor, T-Mobile agreed to enter into a "commercially reasonable" mobile virtual network operator agreement with DISH, allowing the company to access the T-Mobile system for a seven year period, while DISH builds its own 5G mobile network.[147] Finally, the terms of the proposed final judgment prohibit the combined company from "unreasonably discriminat[ing]" against DISH.[148] FCC also reviewed this deal and provided conditional approval on November 5, 2019, touting the potential efficiencies of the transaction and the proposed divestiture as a method to restore any competition lost post-merger.[149]

Despite approval from DOJ and FCC, on June 11, 2019, nine states and the District of Columbia sued to prevent the combination,[150] with nine additional states joining the litigation. Prior to trial, four states settled with the parties.[151] The remaining 14 states alleged that the combined firm would have more than 40% market share in a number of the top 50 cellular market areas (including more than 50% market share in the New York City metropolitan area),[152] and that the parties' settlement with DOJ and FCC was insufficient.[153] On the last day of trial, December 20, 2019, DOJ and FCC filed a statement of interest arguing that the settlement was sufficient to replace any potential loss of competition and the transaction would provide benefits for all American consumers, especially those in rural areas.[154] On February 11, 2020, the district court "conclude[d] that the [p]roposed [m]erger is not reasonably likely to substantially lessen competition" in the retail mobile wireless telecommunications services markets.[155] The court observed that despite the fact that the states' prima facie case "might well suffice to warrant injunction of merger in more traditional industries… a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry."[156] The court determined that T-Mobile was a "maverick," spurring pro-consumer innovation in the market, whereas Sprint "is falling farther and farther short of the targets it must hit to remain relevant as a significant competitor."[157] Moreover, the court was persuaded that DISH would compete aggressively.[158] As a result, the court declined to enjoin the transaction.

Franciscan Health/WestSound Orthopaedics & The Doctors Clinic

On March 18, 2019, Franciscan Health System, WestSound Orthopaedics, and The Doctors Clinic settled with the State of Washington to end the state's suit challenging both Franciscan's acquisition of WestSound and WestSound's pricing arrangement with The Doctors Clinic.[159] About a year and a half earlier, on August 31, 2017, the State of Washington filed suit in federal court, alleging that Franciscan's July 2016 acquisition of WestSound's assets had reduced price competition, quality of care, and consumer choice in the orthopedic care market in Washington (specifically on the Kitsap peninsula).[160] In its response, WestSound argued that (1) the resulting merger-specific efficiencies would far outweigh any alleged anticompetitive effects, (2) new entry and expansion by competitors would be sufficient to prevent harm to competition, and (3) WestSound was a "weakened competitor" prior to the acquisition and therefore was not a competitive constraint.[161] In the same suit, Washington also alleged that Franciscan's acquisition of ancillary services from The Doctors Clinic, a medical group with seven locations in Kitsap County, amounted to price fixing because Franciscan shut down The Doctors Clinic outpatient facilities in order to transfer those operations to Franciscan's hospital facility, which charges higher rates.[162] In February 2019, a federal judge dismissed the weakened competitor defense raised by Franciscan and The Doctors Clinic, finding that no discrete weakened competitor defense applies to restraint of trade claims under the Sherman Act.[163] A month later, the parties reached a settlement under which the companies were required to pay monetary relief to the state up to $2.5 million, but could remain affiliated with each other.[164]

Notable Transactions Closed without Conditions

Despite the authorities continuing to be aggressive and challenging a number of transactions in 2019, most transactions do not raise antitrust issues and are allowed to proceed without enforcement actions, including a number of notable transactions this past year.

Louisiana/Vantage

On June 18, 2019, DOJ issued a closing statement explaining that it would not challenge Blue Cross Blue Shield of Louisiana's proposed acquisition of a majority stake in Vantage Holdings, another health insurance provider.[165] After a seven-month investigation, DOJ determined that the merger was unlikely to harm consumers purchasing individual health insurance plans both on and off the public exchanges established by the Affordable Care Act.[166] In addition to a substantial (and increasing) price differential between the two insurers' plans (suggesting that Vantage does not appear to have a competitive impact on Blue Cross pricing), DOJ found that Vantage's enrollment of individual plans "has been rapidly declining in recent years."[167] Accordingly, DOJ closed its investigation without imposing any conditions. Blue Cross closed the transaction to acquire a majority stake of Vantage in July 2019.[168]

IBM/Red Hat

On May 3, 2019, DOJ granted early termination of the HSR waiting period to IBM and Red Hat for IBM's $34 billion acquisition of Red Hat, Inc. without imposing any conditions.[169] IBM provides cloud services, while Red Hat makes and distributes open source software for enterprise customers, focusing on data centers.[170] The companies had filed their HSR forms on November 20, 2018 and received a second request from DOJ on March 4, 2019.[171] DOJ consulted with the Department of Defense in its review (11% of Red Hat revenue is derived from the federal government).[172] While both companies provided middleware (software that is used between the server and the end user), DOJ found the parties competed in fewer than ten out of 20,000 bids.[173] The parties consummated the transaction on July 9, 2019.[174]

Fiserv/First Data

Fiserv, Inc. announced its $22 billion acquisition of First Data Corp. on January 16, 2019.[175] First Data handles payment processing for approximately 45% of all U.S. credit and debit card transactions,[176] while Fiserv provides financial services technology from electronic bill payments to mobile banking

and risk management services, with both companies providing processing services for PIN-based debit transactions.[177] On July 17, 2019, DOJ cleared the transaction with no conditions and without making a public statement, likely due to the companies' limited combined presence in PIN-based debit transaction processing.[178] Fiserv completed its acquisition of First Data on July 29, 2019.[179]

Roche/Spark Therapeutics

On December 17, 2019, F. Hoffmann-La Roche AG (Roche) closed its $4.8 billion acquisition of Spark Therapeutics, Inc. (Spark), a biotech company focusing on gene therapy, after a nearly 10-month FTC investigation.[180] While Spark has only one commercialized product, Luxturna, which is used as a treatment for retinal disease, it has four products in clinical trials, including a hemophilia treatment.[181] One of Roche's subsidiaries, Genentech, Inc, also has a product used to treat hemophilia, Hemlibra.[182] In its closing letter, FTC stated that it did not find Roche would have the incentive to delay or terminate Spark's developmental effort for its hemophilia gene therapy, but rather, Roche would be incentivized to accelerate development to compete with the several other companies developing similar treatments.[183] The parties consummated the transaction on December 17, 2019.[184]

Consent Decrees

Although the U.S. antitrust authorities have shown a willingness to challenge transactions in court, most transactions that present antitrust issues are resolved by a consent decree in which the merging parties agree to divestitures or submit to certain behavioral conditions to ameliorate agency concerns about harm to competition.

Tunney Act Review

Under the Tunney Act,[185] any antitrust settlement with DOJ must be approved by a federal court. While most settlements are approved by the court without significant briefing and hearings, this year, Judge Richard Leon stated in the *CVS/Aetna* matter that: "If the Tunney Act is to mean anything, it surely must mean that no court should rubberstamp a consent decree approving the merger of 'one of the largest companies in the United States' and 'the nation's third-largest health-insurance company,'… simply because the government requests it!"[186] Judge Leon decided to hold an evidentiary hearing to better understand the transaction and proposed settlement and eventually approved the consent decree.

CVS/Aetna

On October 10, 2018, DOJ conditionally approved the acquisition of Aetna, Inc. (Aetna) by CVS Health Corporation (CVS).[187] CVS offers retail pharmacy and pharmacy benefit management services, while Aetna is a health insurance provider.[188] Both companies offer individual prescription drug plans (PDPs).[189] DOJ alleged that the merger would harm competition between Aetna and CVS in the sale of individual PDPs in 16 of 34 Medicare Part D prescription plan regions.[190] To proceed with the merger, DOJ required the parties to divest Aetna's individual PDP business to WellCare Health Plans, Inc.[191] As part of the standard Tunney Act proceedings, DOJ filed its complaint and the proposed settlement with the United States District Court for the District of Columbia.[192] The Court raised concerns regarding the merger and proposed remedy and convened an evidentiary hearing, allowing witnesses for the merging parties and interested amici curiae groups to testify.[193] DOJ and the merging parties defended the transaction and proposed settlement. The amici curiae groups argued that the proposed divestiture would fail to remedy the alleged harms presented by the transaction and would create additional competitive harms by consolidating individual prescription drug providers.[194] In evaluating these arguments, the Court found that, although the amici "raised substantial concerns that warranted

serious consideration," the proposed settlement was "well within the reaches of the public interest" and approved the settlement on September 4, 2019.[195]

Vertical Mergers

In recent years, the U.S. antitrust authorities have placed increased scrutiny on the potential competitive effects of vertical transactions (i.e., those transactions involving different levels of the supply chain). This past year offered three transactions where FTC addressed vertical concerns.

Staples/Essendant

On September 14, 2018, Staples agreed to acquire Essendant.[196] FTC alleged Essendant was the "largest wholesale distributor of office products in the United States" and Staples was the "largest vertically integrated reseller of office products in the United States."[197] FTC's analysis focused on sales to "midmarket business-to-business customers in local areas" and alleged that integration would provide the Staples business with access to competitively sensitive information about Essendant customers, who act as resellers and compete with Staples, and thereby harm competition among resellers to midmarket business-to-business customers.[198] To resolve these concerns, the parties agreed to establish a firewall between the Essendant wholesale business and Staples' business-to-business sales operation.[199] After analyzing both horizontal and vertical concerns, FTC stated that the proposed settlement remedied all likely anticompetitive effects of the merger by limiting access to Essendant's competitively sensitive information.[200] Commissioner Slaughter filed a separate statement. She argued generally that "vertical mergers that integrate trading partners can be just as pernicious in sapping our economy's vitality" and called for the Commission to commit to a retrospective study of *Staples/Essendant*.[201] Commissioner Chopra also wrote separately to (1) argue that FTC should have required stronger protections than a firewall to address abuse of data concerns, (2) join Commissioner Slaughter's concerns regarding vertical mergers, and (3) reiterate his previously stated concerns with the incentives of private equity.[202] Chairman Simons along with Commissioners Phillips and Wilson issued a statement responding to their dissenting colleagues arguing that the risk of Staples gaining competitively sensitive information from Essendant was "the only competitive concern arising out of this transaction that is supported by the evidence" and that the firewall adequately prevents that potenial abuse.[203] Commissioner Wilson also published a separate statement to express her "grave concerns about [her] dissenting colleagues' enthusiasm for treating all vertical mergers with skepticism."[204]

UnitedHealth/DaVita

On December 5, 2017, UnitedHealth Group Inc. agreed to a $4.3 billion acquisition of the DaVita Medical Group (DMG), a division of DaVita Inc.[205] UnitedHealth operates two wholly owned subsidiaries: UnitedHealthcare, which offers commercial and Medicare Advantage Organization ("MAO") health insurance plans, and Optum, Inc., which runs managed care provider organizations (MCPOs).[206] DMG also operates MCPOs.[207] MCPOs are medical groups of physicians that coordinate patient care and control costs on behalf of MAOs.[208] FTC alleged that the transaction would have both horizontal and vertical anticompetitive effects in the area around Las Vegas, Nevada,[209] and, as a result, the transaction would "eliminate direct and substantial" horizonal competition between the parties in the market for MCPO services sold to MAOs near Las Vegas.[210] FTC also alleged vertical concerns, arguing that the combination of DMG's Las Vegas MCPO business and United's strong MAO position

would allow the combined firm to deny MCPO services to United's competitors.[211] To resolve these concerns, the parties agreed on June 19, 2019 to divest DaVita's Las Vegas MCPO to Intermountain Healthcare.[212] FTC also analyzed similar vertical concerns in Colorado, but Commissioners Phillips and Wilson agreed that "the evidence would not have convinced a judge that the proposed acquisition was likely, on balance, to harm consumers in Colorado."[213] The Colorado Attorney General disagreed, however, and in a self-described "unprecedented move," challenged the transaction and secured additional conditions in a separate settlement.[214] Commissioners Slaughter and Chopra ultimately joined Phillips and Wilson in approving the federal settlement. Commissioners Slaughter and Chopra wrote a joint concurring statement, however, to explain that they shared the Colorado AG's concerns about vertical integration in Colorado, but were satisfied that the AG's settlement would resolve their concerns.[215] Chairman Simons recused himself from this matter.

Fresenius/NxStage

On August 7, 2017, Fresenius agreed to a $2 billion acquisition of NxStage.[216] Fresenius and NxStage both offer bloodline tubing sets for open architecture hemodialysis machines for renal failure patients.[217] FTC alleged the transaction would result in higher prices and reduced innovation because the companies were two of only three bloodline tubing suppliers in the United States and would have a combined market share of 82% post-transaction.[218] To resolve these concerns, the parties agreed on February 19, 2019 to divest NxStage's bloodline tubing business to an up-front buyer, B. Braun Medical Inc.[219] While the complaint alleged only horizontal concerns,[220] Commissioner Slaughter's dissenting statement addressed vertical issues.[221] Specifically, she stated that "in addition to having a significant share of hemodialysis treatment clinics, the merged entity would have a monopoly or near-monopoly position for the manufacturing and sale of both in-clinic and in-home hemodialysis machines."[222] In light of her view that there were barriers to entry and high levels of concentration, Commissioner Slaughter expressed concern that the post-merger company would have the incentive and ability to foreclose competition or raise the cost of its rivals.[223] Slaughter also rejected the argument that Fresenius's incentive to improve the adoption of in-home dialysis was a merger-specific efficiency sufficient to outweigh these negative effects.[224] Commissioner Chopra also wrote separately to dissent on similar grounds, arguing that "vertical mergers can choke off entry by innovators by shrinking the potential market to a point where it doesn't make economic sense for a new business to launch."[225] Specifically, Chopra stated that potential new entrants backed by venture capital and other private equity investors might be dissuaded from entering the market.[226] Chopra also questioned whether the claimed efficiencies were merger-specific.[227] Chairman Simons and Commissioners Phillips and Wilson found that FTC's analysis "showed that Fresenius likely would continue to sell . . . in-home machines to competitors and potentially would increase the use of in-home machines dramatically," and cited the fact that "many market participants—including some of Fresenius's direct competitors—agreed with this conclusion."[228]

Up-Front Buyers

In many transactions, the parties may close the transaction subject to a divestiture without having a definitive agreement signed with a particular buyer. In those instances, the reviewing authority retains the right to approve the purchaser of the divested assets in order to ensure the buyer has the financial and operational capability to compete effectively. However, in certain transactions—for example, when the authorities want to make sure that there is a buyer for the assets or that the scope of the assets is

sufficient to restore competition, or when there is risk of the assets not staying competitive—FTC and DOJ may require that the parties have a definitive agreement with an "upfront buyer" (i.e., a specific purchaser that has been approved by the reviewing authority).[229]

Symrise / ADF & IDF

Symrise AG, owner of chicken-based food ingredient providers Diana Food and Diana Pet Food, agreed on January 31, 2019 to purchase chicken-based food ingredient manufacturers American Dehydrated Foods (ADF) and International Dehydrated Foods LLC (IDF).[230] DOJ alleged that ADF and IDF are together "the largest supplier of chicken-based food ingredients in the United States," with 54% of the market's capacity,[231] and that the combined company would control more than 75% of the manufacturing capacity for chicken-based food ingredients given Symrise's recent entry into the U.S. in 2019 when it opened a plant in Georgia.[232] On October 30, 2019, DOJ approved the transaction, conditioned on Symrise divesting its new Georgia plant to an upfront buyer, Kerry, Inc. "a global manufacturer of ingredients and recipe solutions for the food and beverage industry."[233] The transaction closed on November 4, 2019.[234]

Quaker Chemical/Houghton

Quaker Chemical Corporation agreed to acquire Global Houghton Ltd. in a transaction valued at $172.5 million on April 4, 2017.[235] However, on July 23, 2019, FTC filed a complaint alleging that Quaker and Houghton are: (1) the only two commercial suppliers of aluminum hot rolling oil (AHRO) in North America and (2) the two largest commercial suppliers of steel cold rolling oil (SCRO) in a highly concentrated North American market.[236] To obtain FTC approval Quaker agreed to divest Houghton's AHRO and SCRO businesses, including related products, to an up-front buyer, Total S.A.[237]

Amcor/Bemis

Amcor Limited agreed to acquire Bemis Company Inc. for $6.8 billion on August 6, 2018.[238] DOJ filed suit to enjoin the acquisition on May 30, 2019. DOJ alleged that the parties are "two of only three significant suppliers of three medical packaging products . . . in the United States," which are "critical" for the transportation and use of medical devices.[239] DOJ alleged that the transaction would eliminate competition between Amcor and Bemis in three product markets for heat-sealed medical-grade packaging materials,[240] potentially increasing prices, reducing quality, and/or reducing technical support offered by the companies.[241] To address DOJ's concerns, the parties and DOJ entered into a consent decree in which the parties agreed to divest three Amcor manufacturing centers and related assets to an up-front buyer, Tekni-Plex Inc.[242]

Nascent & Future Competition

In addition to scrutinizing potential competitive issues with products that are on the market today, the U.S. antitrust authorities also analyze whether the parties have any products in development that might compete in the future.

Bristol-Myers Squibb/Celgene

On November 15, 2019, FTC conditionally approved Bristol-Myers Squibb Company's (BMS) $74 billion acquisition of Celgene Corporation, another pharmaceutical and biologic company.[243] FTC alleged that the transaction would reduce competition in oral drugs for moderate-to-severe psoriasis,[244] because BMS had the "most advanced oral treatment for moderate-to-severe psoriasis in development" and this pipeline drug was expected to directly compete with Celgene's Otezla—"the most significant oral prod-

uct to treat moderate-to-severe psoriasis in the United States."[245] FTC alleged that other oral drugs for moderate-to-severe psoriasis available in the U.S. were not as effective with worse side effects compared to Otezla and the expectations for BMS' pipeline drug.[246] FTC also alleged that development and FDA approval delays made timely entry of another comparable psoriasis drug unlikely.[247] The parties agreed to divest Otezla to another pharmaceutical and biologic company, Amgen, Inc.[248] Commissioners Chopra and Slaughter published dissenting statements to express concerns about the adequacy of FTC's "status quo approach" to pharmaceutical mergers—specifically, that FTC focused too heavily on product overlaps and divestitures of individual products, rather than taking a broader approach to the impact on innovation.[249] Commissioner Chopra specifically stated that "[s]ome evidence shows that [pharmaceutical] mergers have choked off innovation."[250] Similarly, Commissioner Slaughter offered that "recent studies suggest mergers may inhibit research, development, or approval in this changing environment," and emphasized the rising prices of prescription drugs in the United States as a reason to focus on pharmaceutical competition.[251]

Boston Scientific/BTG

On August 7, 2019, FTC approved Boston Scientific Corporation's (BSC) $4.2 billion acquisition of BTG, plc. subject to a divestiture.[252] FTC alleged that the companies "are the two leading suppliers of DEBs [drug-eluting beads] in the United States"[253] As a result, the parties agreed to divest BSC's bead business to Varian Medical Systems.[254]

Defense Sector & Security Industry

Mergers in the security and defense sectors can offer unique considerations for federal antitrust agencies, especially where the Department of Defense is a large customer. Although defense mergers remain within the jurisdiction of FTC and DOJ review, DOD will internally assess the effect of a transaction on the military industrial base and coordinate closely with the antitrust agencies' review of the transaction's potential effect on competition.[255]

Harris/L3

On June 20, 2019, DOJ cleared, subject to divestiture, Harris Corporation's merger with L3 Technologies.[256] DOJ alleged the transaction would eliminate competition because Harris and L3 were the only two suppliers to the Department of Defense of night vision devices and image intensifier tubes (an essential component in night vision devices).[257] Moreover, DOJ alleged that DOD was not likely to purchase from other competitors, as DOD requires U.S. military-grade image intensifier tubes and would not consider substituting less-capable technologies or foreign producers in response to price increases because of national security concerns.[258] DOJ "cooperated closely" with DOD, which conducted a detailed review.[259] On June 20, 2019, the parties agreed to divest Harris's night vision business, including a manufacturing center, to a buyer approved by DOJ.[260]

Thales/Gemalto

Thales announced its agreement to acquire Gemalto for $5.64 billion on December 17, 2017.[261] In its investigation, DOJ found that "Thales and Gemalto are each other's closest competitors" in the market for general purpose hardware security modules (components in data security systems), with shares of 30% and 36%, respectively.[262] As a result, DOJ alleged the transaction would reduce quality and increase prices. [263] On February 28, 2019, the parties agreed to divest Thale's general purpose hardware security modules business to a buyer approved by DOJ.[264]

Local Markets

Defining a relevant geographic market is a critical aspect of merger investigations and a number of transactions in 2019 demonstrate that where competition is local, the authorities will define the geographic markets around regional and even smaller markets.

US Foods/Services Group of America

On July 30, 2018, US Foods Holding Corp. announced that it agreed to acquire five operating companies from Services Group of America (SGA) for $1.8 billion in cash.[265] According to FTC, US Foods is the second-largest distributor of food and food-related products in the United States and operates distribution centers throughout the country,[266] while SGA operates one of the largest regional broadline food distribution companies in the United States, active in 16 western and midwestern states.[267] On September 11, 2019, FTC approved the transaction, subject to divestitures, citing two main concerns associated with the transaction.[268] First, FTC alleged that the combination would reduce competition in broadline food distribution to local customers in four geographic markets:[269] Eastern Idaho, Western North Dakota, Eastern North Dakota, and the Seattle Area.[270] Second, FTC alleged that the transaction would reduce competition nationwide for multi-regional and national customers. Although SGA is only a regional operator, it is a member of Distribution Market Advantage (DMA), a supply chain and marketing cooperative that competes against US Foods for national/multi-regional customers.[271] FTC alleged that SGA covers an important geography within the DMA network, and therefore DMA's ability to compete for national customers against US Foods would be "significantly reduced" if SGA were owned by US Foods.[272] To resolve FTC's concerns, USF agreed to divest three SGA distribution centers to three up-front buyers, each of which is a DMA member.[273] FTC believes this will allow DMA to retain its overall national footprint.[274]

Tribune/Nexstar

On July 31, 2019, DOJ conditionally approved Nexstar Media Group Inc.'s $6.4 billion acquisition of Tribune Media Company.[275] Both companies operate broadcast television stations.[276] DOJ alleged that the transaction would reduce competition in 13 local markets where both parties operated, resulting in higher prices for both advertising and retransmission.[277] As a result, the parties agreed with DOJ to divest stations in these markets—Davenport, Iowa; Des Moines, Iowa; Ft. Smith, Arkansas; Grand Rapids, Michigan; Harrisburg, Pennsylvania; Hartford, Connecticut; Huntsville, Alabama; Indianapolis, Indiana; Memphis, Tennessee; Norfolk, Virginia; Richmond, Virginia; Salt Lake City, Utah; and Wilkes-Barre, Pennsylvania.[278] FCC also reviewed the transaction and approved the sale with the divestitures already part of DOJ's divestiture agreement.[279]

Bank Merger Review by DOJ and the Federal Reserve

FTC and DOJ are not the only authorities in the U.S. with jurisdiction to review transactions in certain industries. For example, FCC reviews telecommunications mergers under the Federal Communications Act and the Federal Reserve reviews certain bank mergers under the Bank Holding Company Act. These agencies often cooperate with FTC and DOJ in the review of a transaction. This past year, DOJ reviewed two bank mergers that were also subject to approval by the Federal Reserve. Rather than filing traditional consent decrees, DOJ worked with the Federal Reserve to review the transaction and ultimately signed letters of agreement with the merging parties that outlined divestiture commitments, which were then incorporated into the Federal Reserve's conditional approval of the transaction.

BB&T/SunTrust

On February 7, 2019, BB&T and SunTrust Banks, Inc. announced their agreement to merge into the sixth-largest bank in the United States in a deal valued at $66 billion.[280] BB&T operates in 15 states primarily in the Southeast, Mid-Atlantic, and Washington D.C.,[281] while SunTrust operates in 10 states in the Southeast, Mid-Atlantic, and Washington D.C.[282] The parties had an overlapping presence in multiple areas, and while DOJ found significant competition from other banks, credit unions, and thrift organizations in some areas, DOJ required divestitures of 28 SunTrust branches in seven local markets across Virginia, North Carolina, and Georgia.[283] DOJ entered into a letter of agreement with the merging parties on November 8, 2019, regarding these divestitures.[284] SunTrust and BB&T entered into a sale agreement with First Horizon Bank on the same day.[285] The Federal Reserve and FDIC approved the transaction on November 19, 2019,[286] and the Federal Reserve incorporated DOJ's analysis and divestitures into its order.[287]

First Citizens/Entegra

On April 24, 2019, First Citizens BancShares, Inc. announced its agreement to acquire Entegra Financial Corp. for $219.8 million.[288] First Citizens Bank is headquartered in Raleigh, North Carolina, with more than 550 branches in 19 states.[289] Entegra, based in Franklin, North Carolina, is a state-chartered, full-service commercial bank with 18 locations and two loan production offices throughout portions of North Carolina, South Carolina, and Georgia.[290] DOJ found that both companies were present in six local banking markets in Virginia, North Carolina, Georgia and Florida, but no divestitures were necessary because sufficient competition remained, including competition from credit unions. However, DOJ found that the parties would control 54% of deposits in Jackson County, North Carolina and would control 35.8% of deposits in Macon County, North Carolina, resulting in a loss of competition in both banking markets.[291] As a result, the parties and DOJ entered into a letter of agreement on December 2, 2019, committing to divest three Entegra branches in western North Carolina.[292] The Federal Reserve subsequently issued its order on December 16, 2019, which incorporated DOJ's analysis and the agreed upon divestitures.[293] The parties closed their transaction on January 1, 2020.[294]

Non-Compete Clauses

When reviewing a proposed transaction, FTC and DOJ generally will scrutinize the transaction agreements underlying an acquisition to ensure the agreement itself does not contain provisions that are potentially anticompetitive. This past year, FTC imposed conditions in one merger to address concerns that a non-compete clause would harm competition.

Nexus/Generation Pipeline

In January 2019, Nexus Gas Transmission LLC sought to acquire Generation Pipeline LLC, which owns and operates a 23-mile pipeline serving the Toledo, Ohio area.[295] As part of the transaction sale agreement, one of Generation Pipeline LLC's former owners agreed to refrain from competing to provide natural gas transportation in certain Ohio regions for three years following the close of the transaction.[296] FTC alleged that the non-compete clause was not "reasonably limited in scope to protect a legitimate business interest."[297] In particular, FTC expressed concerns that the non-compete clause did not appear to be necessary to protect Nexus's investment in Generation Pipeline. In September 2019, the parties entered into a consent decree in which they committed to execute a

revised agreement that eliminated the non-compete clause.[298] Nexus (and its parent companies) were further prohibited from entering into any other non-compete clauses that might restrict competition among natural gas pipeline competitors in the Ohio area.[299] Commissioners Chopra and Slaughter issued statements encouraging the Commission to "continue to closely scrutinize" non-compete agreements.[300] Commissioner Wilson issued a concurring statement, noting that although she agreed that the Nexus non-compete clause was overbroad, "many non-compete clauses are lawful and enforceable."[301]

Enforcement of Consent Decrees

In recent years, DOJ has emphasized its authority to ensure that parties are complying with the obligations of their consent decrees, and in 2019, DOJ sought to extend certain consent decree provisions of the *Live Nation/Ticketmaster* consent decree because DOJ concluded that Live Nation had violated the decree.

Live Nation/Ticketmaster

In January 2010, DOJ and seventeen state attorneys general approved a settlement that allowed Live Nation Entertainment, Inc. to acquire Ticketmaster Entertainment, Inc.[302] Live Nation is a live entertainment company hosting shows and festivals, and Ticketmaster is a ticketing service for live entertainment (now a wholly owned subsidiary of Live Nation Entertainment, Inc.).[303] The 2010 settlement included a ten-year prohibition against the combined entity threatening or retaliating against concert venues that use a ticketing company other than Ticketmaster.[304] On December 19, 2019, DOJ alleged that "Live Nation repeatedly and over the course of several years engaged in conduct that, in the Department's view, violated" the 2010 settlement.[305] DOJ specifically laid out six examples of venues where Live Nation conditioned the provision of live shows on venues agreeing to contract with Ticketmaster for their ticketing services, and/or withheld shows from venues that chose not to contract with Ticketmaster.[306] Live Nation and DOJ have agreed to extend the consent decree by five and a half years into 2025. The parties further agreed to modify the settlement by clarifying that any time Live Nation withholds (or threatens to withhold) any concerts from a venue that has chosen a ticketing services other than Ticketmaster, it would violate the consent decree, and Live Nation would be subject to an automatic penalty of $1 million.[307] DOJ will appoint an independent monitor to investigate and report on Live Nation's compliance.[308] Live Nation will appoint an internal antitrust compliance officer, train its employees, and provide notice to current and potential venue customers of the new consent decree.[309] Additionally, Live Nation agreed to pay DOJ's costs and fees for this investigation and enforcement.[310]

Enforcement of HSR Violations

Under the Hart-Scott-Rodino (HSR) Act, if a transaction meets certain thresholds and no exemption applies, the parties must notify the federal authorities and refrain from closing the transaction until the statutory waiting period expires or is terminated early. Importantly, during that waiting period, the parties must continue to operate independently. Both failure to file the required premerger notification documents and so-called "gun jumping" (e.g., any joint operation of the two businesses before the deal is allowed to close) can result in the imposition of substantial civil money penalties and delay closing.

Canon and Toshiba Settle Claims of Alleged HSR Violation for $5 Million

In a complaint filied on June 10, 2019, DOJ alleged that Canon and Toshiba circumvented the HSR waiting period for the sale of Toshiba Medical Systems Corporation (TMSC) to Canon.[311] DOJ alleged that Canon obtained beneficial ownership of TMSC when voting rights were transferred to a merger vehicle for a "nominal" fee—before Canon exercised a $6.1 billion option for TMSC voting shares.[312] DOJ alleged that the first transaction was designed to avoid an HSR filing and thus violated the HSR waiting period and reporting rules.[313] Canon and Toshiba agreed to pay $2.5 million each to resolve the matter.[314]

Third Point Funds Fined for Self-Reported Violations

Third Point LLC and three of its managed funds entered into a settlement with FTC on August 28, 2019, agreeing to pay $609,810 to resolve three separate alleged HSR filing violations.[315] According to FTC, each fund received shares of the newly merged DowDuPont Inc. in exchange for its Dow Chemical Company shares in amounts over the HSR Act reporting threshold. Each fund faced separate potential reporting obligations because each fund was its own "ultimate parent entity."[316] FTC credited Third Point with promptly self-reporting the violations roughly two months after the acquisitions, determined that the violations were inadvertent, and noted that the funds had properly complied with the HSR Act for their initial acquisitions of Dow shares.[317] Although there is an exemption under the HSR regulations to allow for certain additional acquisitions of shares of the same issuer for which an HSR filing has been made previously,[318] FTC alleged that this exemption did not apply to the Third Point funds because the funds acquired shares in the merged DowDuPont, a new entity distinct from Dow.[319] FTC further cited the funds' prior non-monetary settlement for a previous alleged violation of the HSR Act in 2015 as further reason to seek financial penalties in this case.[320]

Private Merger Litigation

While federal and state antitrust enforcers are the primary parties that challenge transactions in the U.S., private parties also may seek to challenge a transaction under the antitrust laws. Although challenges by private parties are rare, over the past few years, one notable private merger challenge has been litigated.

JELD-WEN/Craftmaster International

On February 2, 2018, a jury found that JELD-WEN, Inc., a manufacturer of molded interior doors and doorskins, violated antitrust laws by merging in June 2012 with its competitor, Craftmaster Manufacturing, Inc. (CMI). The case was brought by Steves & Sons, Inc. after the transaction had closed, asking for either damages or an equitable remedy. After trial, the jury awarded damages for future lost profits. On October 5, 2018, the District Court for the Eastern District of Virginia ordered JELD-WEN to divest a doorskin facility as an equitable remedy, instead of what the jury awarded.[321] JELD-WEN's motion to overturn the ruling was denied in March 2019.[322] JELD-WEN then filed an appeal with the Fourth Circuit Court of Appeals in August 2019. JELD-WEN argued that private party challenges to consummated mergers should be barred because they are too late, and that private challenges should be considered only before the consummation of a merger.[323] DOJ filed an amicus brief in support of the plaintiff, opposing JELD-WEN's arguments.[324] DOJ recommended that private challenges to a consummated merger should not be uniformly prohibited by the doctrine of laches, but rather the reviewing court should consider whether the plaintiff reasonably delayed filing its own case because it instead cooperated with the government's initial investigation and/or because antitrust harms may not have been apparent before consummation.[325] The case remains pending before the Fourth Circuit.

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263 *Id.* ¶ 31

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268 Press Release, Fed. Trade Comm'n, FTC Requires Divestitures and Imposes Conditions on US Foods Holding Corp.'s Acquisition of Services Group of America, Inc. (Sep. 11, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/09/ftc-requires-divestitures-imposes-conditions-us-foods-holding.

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270 *US Foods* Complaint, *supra* note 263, ¶¶ 8-11.

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289 FCB Release, *supra* note 8; Federal Reserve, Order Approving the Acquisition of a Bank Holding Company, FRB Order No. 2019-17 at 2 (Dec. 16, 2019), *available at* https://www.federalreserve.gov /newsevents/pressreleases/files/orders20191216a1.pdf [hereinafter FRB First Citizens Order].

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293 FRB First Citizens Order, *supra* note 9, at 13-14 ("The DOJ conducted a review of the potential competitive effects of the proposal and has advised the Board that consummation of the proposal with the proposed divestitures of branches in the banking markets, as discussed above, would not likely have a significantly adverse effect on competition in those markets or in any other relevant banking market."), n. 26 ("As a condition of consummation of the proposed merger, First Citizens has committed that it will execute, before consummation of the proposed merger, a sales agreement with a competitively suitable banking organization. First Citizens has provided a similar commitment to the DOJ.").

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297 *Id.*

298 Decision, *In the matter of DTE Energy Company et al.*, No. C-4691 (F.T.C. Nov. 21, 2019), https://www.ftc.gov/system/files/documents/cases/191_0068_c-4691_dte-enbridge_decision_and_order_public_version.pdf.

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300 Statement of Comm'rs Rohit Chopra and Rebecca Kelly Slaughter, *In the Matter of DTE Energy Company, Enbridge Inc.*, at 2, File No. 191-0068 (Sep. 12, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1544138/joint_statement_of_chopra_and_slaughter_dte_energy-generation_pipeline_9-13-19.pdf.

301 Concurring Statement of Christine S. Wilson, *In the Matter of DTE Energy Company, Enbridge Inc., and NEXUS Gas Transmission LLC*, File No. 191-0068 (Sep. 12, 2019), *available at* https://www.ftc.gov/system/files /documents/public_statements/1544152/wilson_concurring_statement_dte_9-13-19.pdf.

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303 *We Are Live Nation*, Live Nation, https://www.livenationentertainment.com/ (last visited Dec. 20, 2019).

304 Live Nation Release, *supra* note 302.

305 *Id*;. Unopposed Mot. to Reopen Proceedings, *United States v. Ticketmaster Entertainment*, No. 1:10-cv-00139-RMC (D.D.C. Dec. 19, 2019), ECF No. 16.

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317 Competitive Impact Statement at 3-4, *United States v. Third Point Offshore Fund, LTD*, 1:19-cv-02593 (D.D.C. Aug. 28, 2019), *available at* https://www.justice.gov/opa/press-release/file/1198306/download.

318 16 C.F.R. § 802.21 (2019). The § 802.21 exception allows a person or entity that acquired voting securities from a specific issuer, filed a notification under the HSR act, and observed the waiting period to then "acquire additional voting securities of the same issuer for five years after the end of the waiting period," so long as the combined voting shares do not exceed a higher specified HSR threshold than the one that has already been notified. Here, FTC argued that Third Point's later acquisition of DowDuPont shares did not came from the same issuer as its earlier Dow shares, as DowDuPont is a different entity under the HSR rules (such as by competing in additional lines of business compared to Dow), and therefore the § 802.21 exception does not apply. *Third Point* Complaint, *supra* note 319, at 8.

319 *Third Point* Complaint, *supra* note 319, at 8.

320 Peter G. Danias et al., *Third Point Settles with the FTC over Improper Reliance upon the "Investment-Only" Exemption*, Arnold & Porter (Sep. 2, 2015), https://www.arnoldporter.com/en/perspectives/publications/2015/ 09/20150902_corporate_alert_third_point_rea_12193.

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322 JELD-WEN, Inc.'s Renewed Mot. For Judgment As A Matter Of Law Against Steves & Sons, Inc., *Steves & Sons, Inc., v. JELD-WEN, Inc.*, No. 3:16-cv-00545 (E.D. Va. Jan. 11, 2019); Karen M. Koenig, *Jeld-Wen's Bid to Overturn Antitrust Verdict Denied*, Woodworking Network (Mar. 15, 2019), https://www.woodworking network.com/news/woodworking-industry-news/jeld-wens-bid-overturn-antitrust-verdict-denied.

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324 Brief for The United States Of America as Amicus Curiae in Support of Appellee Steves and Sons, Inc., at 9, *Steves & Sons, Inc., v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. Aug. 23, 2019), *available at* https://www.justice.gov/atr/case-document/file/1197696/download.

325 *Id.*, at 9-10.