

# WHAT TO EXPECT IN 2024 MERGER ENFORCEMENT: TRENDS AND DEVELOPMENTS FROM 2023

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# Overview and Key Issues From 2023

During 2023, M&A activity in the United States showed some signs of rebounding from the post-pandemic cooldown. Meanwhile merger enforcement remained the subject of intense public and political focus. The Federal Trade Commission (FTC or Commission) and the Department of Justice (DOJ) continued to press an aggressive enforcement agenda, featuring envelope-pushing litigations and a decline in settlements. Yet, government enforcers continue to have an inconsistent record in front of the courts and appear willing to consider settlements to resolve already-filed litigations. The push and pull of 2023 provides several takeaways for parties considering strategic transactions in 2024:

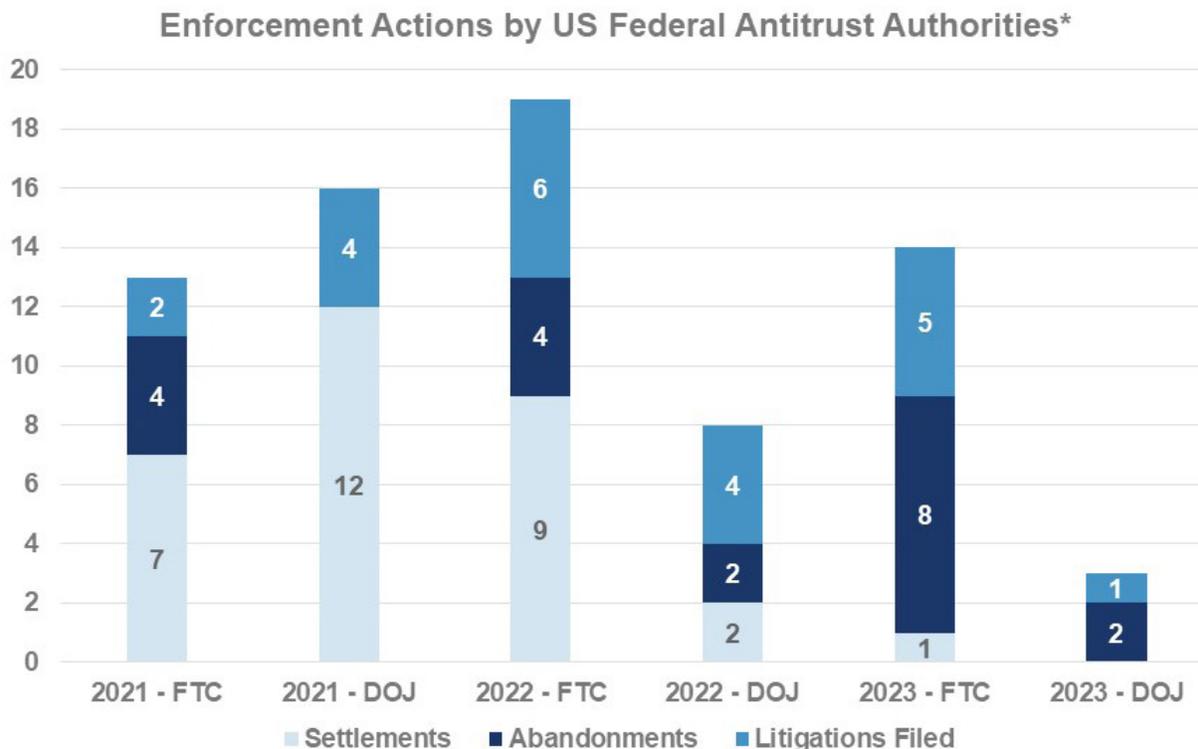
- 1. Revised Merger Guidelines.** On December 18, 2023, DOJ and FTC published revised Merger Guidelines. These guidelines replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, which FTC (but not DOJ) had previously repealed. The guidelines reinforce the authorities' stated intention to aggressively investigate transactions they believe may substantially lessen competition, and unlike prior guidelines, offer no "safe harbors" or categories of transactions that are unlikely to raise competitive concerns (even, for example, in unconcentrated industries). The final guidelines reflect some changes from the draft guidelines released in mid-2023 — for example, while the draft guidelines set out the authorities' view that a merger should not "further a trend toward concentration," the final guidelines note that a trend towards consolidation is merely a "factor" that will be considered. The guidelines are not law and are not binding on courts; indeed, a number of ideas the guidelines advance draw upon theories that were tested and rejected by courts in prior merger challenges. It remains to be seen how courts will consider the new guidelines. In any event, the guidelines provide a picture into how the enforcers will analyze a merger and will remain important for parties wishing to avoid the cost and risk of federal litigation.
- 2. The Authorities Saw Limited Success in Court and Accepted Settlements To Resolve Pending Litigation Challenges.** FTC and DOJ saw a number of high-profile losses this year. Most notably, district courts rejected FTC and DOJ's challenges to the Meta/Within, Microsoft/Activision, and UnitedHealthcare/Change transactions. Notably, however, both FTC and DOJ appeared to be willing to accept settlements to resolve ongoing litigations, as shown in DOJ's settlement to resolve Assa Abloy/Spectrum Brands and FTC's settlements to resolve Intercontinental Exchange/Black Knight and Amgen/Horizon, discussed below. The Assa Abloy/Spectrum brands settlement was the first merger consent decree that the DOJ accepted since Assistant Attorney General Jonathan Kanter's January 2022 speech in which he expressed skepticism towards settlements to resolve competition issues. FTC did notch a high-profile win in a case filed before the beginning of this year when the Fifth Circuit agreed that the consummated Illumina/Grail merger substantially lessened competition — discussed in greater detail below.<sup>2</sup>

3. **Settlements *in Advance* of Litigation Continue To Be Limited.** In prior administrations, most antitrust concerns with transactions were resolved through consent decrees and negotiated divestitures. However, current antitrust enforcers have publicly expressed skepticism of such resolutions. In Assistant Attorney General Jonathan Kanter’s September 2023 speech, for example, the AAG claimed that “complex merger consent decrees ... often fail to protect the harm to competition from an otherwise anticompetitive merger.”<sup>3</sup> Since that time, DOJ has not resolved **any** merger challenges prior to litigation by consent decree. And this year, FTC only resolved **one** challenged transaction (Quantum/EQT) without litigation.
4. **New Proposed HSR Rules.** This year, the authorities also announced proposed revisions to the Hart-Scott-Rodino merger notification filing process. These proposals have the potential to substantially expand the universe of ordinary course document submissions and analyses required for the filings.<sup>4</sup> The HSR rules have not yet been finalized, although more details on the proposed rules can be found in our client [Advisory](#).<sup>5</sup>
5. **FTC Leadership Changes.** Several FTC staffing changes also took place this year. Commissioner Wilson stepped down from her position on March 31, 2023. When she announced her intent to resign on February 14, 2023, she expressed her concern about the direction of FTC and Chair Khan’s participation in FTC’s challenges involving Facebook, given Chair Khan’s prior work and public statements.<sup>6</sup> Since her resignation, FTC has been led by three Democratic Commissioners. The president nominated two Republican Commissioners, Melissa Holyoak and Andrew Ferguson, on July 3, 2023, but they have not been confirmed by the Senate. FTC Bureau of Competition Director Holly Vedova retired in August 2023. Shortly thereafter, FTC announced the appointment of its new Bureau of Competition Director, Henry Liu, a former partner at Covington & Burling LLP.<sup>7</sup>
6. **FTC’s Ability To Bring Cases Was Under Attack on Multiple Fronts.** This past year, the Supreme Court heard the *Axon* case and ruled, in a 9-0 decision, that parties may raise collateral attacks on FTC administrative procedures without exhausting that administrative procedure.<sup>8</sup> The merits of Axon’s challenge will not proceed in court, however, as FTC abandoned its challenge to the merger.<sup>9</sup> Axon was not alone in raising constitutional challenges. The FTC scored a win in the Fifth Circuit, which rejected challenges to the FTC’s structure and in-house proceedings, concluding that “Illumina’s constitutional challenges to the FTC’s authority are foreclosed by binding Supreme Court precedent.”<sup>10</sup> Other attacks remain pending in the district courts or were left unresolved. Meta challenged the constitutionality of FTC Commissioners’ adjudication of a unilaterally reopened proceeding from 2020,<sup>11</sup> and U.S. Anesthesia Partners filed a motion to dismiss in the District of Texas challenging the FTC’s ability to bring a standalone enforcement action in federal court without first initiating an administrative proceeding.<sup>12</sup> Intercontinental Exchange also raised constitutional challenges to FTC’s structure and proceedings in its affirmative defenses when responding to FTC’s motion for a preliminary injunction, and FTC moved to strike Intercontinental’s “constitutional defenses” as “immaterial and impertinent.” The FTC’s challenge was settled before the court decided the motion to dismiss.<sup>13</sup> Meanwhile, challenges to the structure of SEC’s administrative forum, which are broadly similar, are proceeding before the Supreme Court, and oral arguments were held on November 29, 2023.<sup>14</sup> Needless to say, if one or more of these actions are successful on the merits, FTC may be substantially hindered from enforcing the antitrust laws without legislative changes.

## 2023 by the Numbers

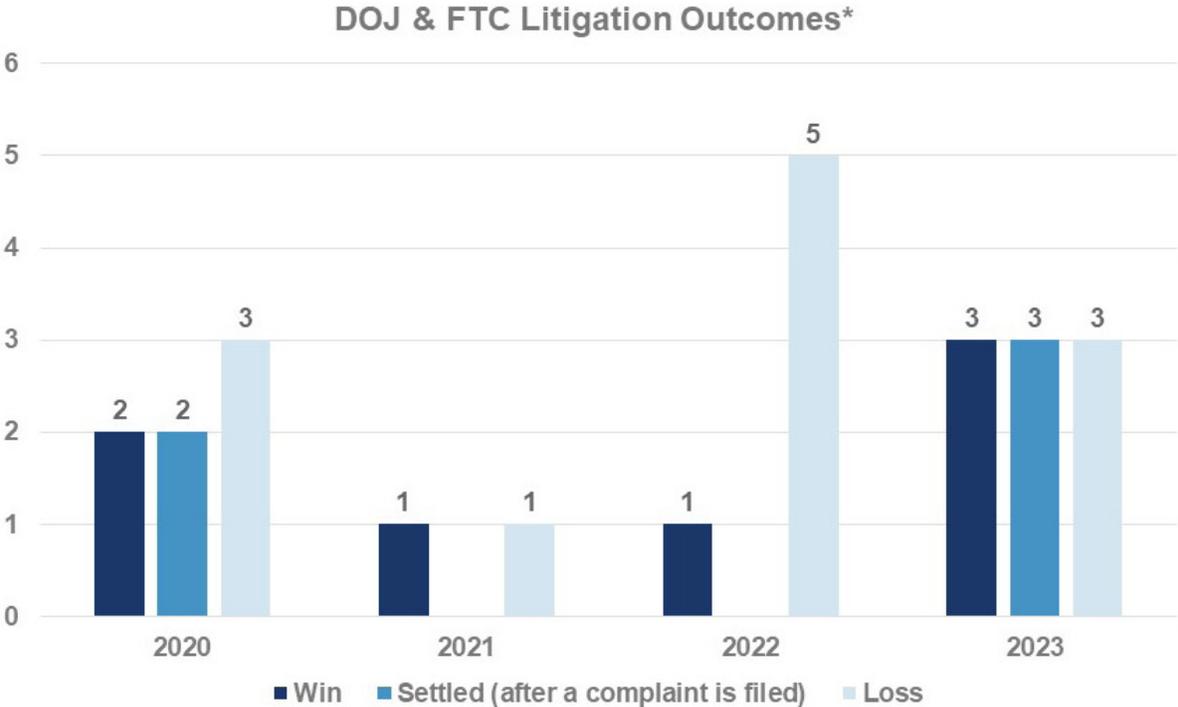
Industry sources have observed that merger and acquisition activity in 2023 was down globally, but showed some signs of a rebound in the United States, following a spike in 2021 and a subsequent drop in 2022.<sup>15</sup> Overall, M&A activity translates imperfectly to merger review activity, but we know that the Premerger Notification Office has received about 152 HSR filings per month in 2023 through November.<sup>16</sup> This is slightly lower than monthly figures in 2020 and 2021.

Merger enforcement actions (litigations, forced abandonments, and settlements by consent decree) have likewise continued to decrease year-over-year. This decrease in enforcement actions may be attributable to a number of causes including ordinary variance from year to year and the possibility that lengthier investigations are creating a “lag” between deal announcement and court challenge.



\* Includes all merger-related actions taken by FTC and DOJ (including consent decrees, litigation in federal district court, and FTC administrative proceedings), as well as mergers abandoned due to agency concerns or abandoned non-public mergers which FTC credited to the agencies’ investigations. Excludes matters pending from the prior year, HSR violation enforcement, enforcement of prior consent decree, CID enforcement, and challenges pursued by other enforcers or private parties.

FTC and DOJ saw mixed results in court last year. Although a number of transactions were abandoned under the pressure of litigation (either before or after a complaint was filed), only a handful of cases were litigated. In 2023, courts issued six substantive decisions resulting in three victories and three losses for enforcers. A substantive decision by a court is, for example, the grant or denial of a temporary restraining order, preliminary injunction, or motion to dismiss. Three cases were settled without a substantive decision. Two cases were abandoned after a complaint was filed.



\* Outcomes are tracked based on the date of a substantive decision by the district court or FTC administrative law judge; they are not based on the filing date of the complaint. A “win” includes decisions by district courts and administrative law judges favorable to the agencies such as the grant of a temporary restraining order or preliminary injunction, or a denial of a motion to dismiss. Decisions favorable to the parties are counted as “losses.” “Settled” cases include cases resolved by the parties after litigation is underway; this number does not include cases in which a settlement is reached without litigation and is then filed contemporaneously with the complaint. Pending cases, abandonments before a substantive decision was made, and appeals are not included.

Last year underscored the authorities' willingness to pursue novel claims in merger challenges, and might also suggest that such an approach might simultaneously embolden parties to continue to litigate to defend their transactions. But, as you can see in the following tables, it is difficult to quantify this trend. The number of deals abandoned *after* a complaint appears to ebb and flow year-to-year, while the number of transactions settled has fallen, and the number of transactions abandoned has risen again after a two-year lull.

<b>Deals Abandoned</b>			
<i>After a complaint is filed, as a percentage of all complaints filed</i>			
2020	2021	2022	2023
4 (33.33%)	1 (16.67%)	5 (50%)	2 (33.33%)

<b>Settlement Timing</b>				
<i>As compared to complaint filing, as a percentage of all settlements that year</i>				
<b><i>Before or contemporaneously with</i></b> complaint	2020	2021	2022	2023
	22 (91.67%)	19 (100%)	11 (100%)	1 (25%)
<b><i>After</i></b> complaint or arbitration filed	2 (8.33%)	0 (0%)	0 (0%)	3 (75%)

# Litigated Challenges



## DOJ

In 2023, DOJ filed one new case, notching a victory early in 2024.

- On March 7, 2023, DOJ, along with the Massachusetts, New York, and Washington, D.C. attorneys general, sued to block JetBlue's proposed acquisition of Spirit Airlines.<sup>17</sup> The complaint alleged that the acquisition would harm customers by reducing competition and make price coordination easier among remaining airlines.<sup>18</sup> JetBlue had agreed to deals with Allegiant Airlines and Frontier to divest certain gates, ground facilities, routes, and takeoff and landing slots in an attempt to alleviate DOJ's concerns with the merger.<sup>19</sup> DOJ argued that Spirit Airlines provides "competitive discipline" as the only ultra-low cost carrier that directly competes with higher cost airlines with multiple routes per day, providing a unique benefit to consumers that would be eliminated with the proposed merger.<sup>20</sup> DOJ critiqued the proposed divestiture as uncertain and unlikely to replace the competitive intensity of Spirit.<sup>21</sup> In contrast, the parties argued that the merger would allow JetBlue to more effectively compete with the big four (United, Delta, American, and Southwest) and that the proposed route and slot divestiture would allow entry by other ultra-low cost carriers into new areas.<sup>22</sup> Trial began on October 31, 2023.<sup>23</sup> On January 16, 2024, the District of Massachusetts blocked the deal. The court concluded the transaction would "further consolidate an oligopoly" in the airline industry and eliminate Spirit as a disruptor in the industry.<sup>24</sup> The parties are appealing to the First Circuit.

DOJ pursued several more challenges brought in prior years. These resulted in one government victory, one settlement, and one dropped appeal.

- On September 15, 2022, DOJ filed a lawsuit to block the proposed acquisition by Assa Abloy, a door security solutions provider, of the Hardware and Home Improvement division of Spectrum Brands.<sup>25</sup> DOJ alleged that the combined company would control 65% of sales in premium mechanical door hardware and more than 50% of smart locks.<sup>26</sup> Although the parties proposed to divest select Assa Abloy assets, DOJ continued to express concerns, alleging that "significant risks that the divestiture would fail to preserve the intensity of existing competition," noting that the proposal would "split up existing business units, cutting off the divested assets from the organization, resources, and efficiencies" that made Assa Abloy a "leading competitor."<sup>27</sup> On December 2, 2022, Fortune Brands Home & Security Inc. (Fortune), agreed to purchase the assets Assa Abloy planned to divest.<sup>28</sup> On May 5, 2023, in the middle of trial, DOJ and the parties settled, with Assa Abloy agreeing to divest its entire main entrance and apartment building smart locks businesses to Fortune.<sup>29</sup> The parties also agreed to a monitoring trustee, which has the ability to petition the court to seek additional

divestitures if “Fortune or an alternative acquirer has [not] replicated the competitive intensity in the residential smart locks business that was lost.”<sup>30</sup>

- On February 24, 2022, DOJ, together with attorneys general in Minnesota and New York, sued to block health insurance company UnitedHealth Group’s (UHG) proposed acquisition of Change Healthcare (a healthcare technology company).<sup>31</sup> UHG had offered DOJ a divestiture of a business to resolve concerns, but DOJ rejected it. The court, however, considered it as part of the transaction.<sup>32</sup> On September 19, 2022, a D.C. federal district judge rejected the challenge, and on October 3, 2022, the deal was completed.<sup>33</sup> DOJ originally appealed the decision, but dropped the appeal on March 20, 2023.<sup>34</sup>
- On September 21, 2021, DOJ filed a lawsuit challenging the “alliance” formed by American Airlines and JetBlue to jointly operate flights from New York and Boston. DOJ alleged the alliance would reduce head-to-head competition between the two airlines.<sup>35</sup> A bench trial was held in Fall 2022, with the companies arguing that the alliance would make the airlines a stronger competitor to United and Delta,<sup>36</sup> while DOJ warned that the alliance, if approved, “opens a Pandora’s box” whereby “Delta and United will follow in American’s footsteps by seeking to co-opt their own [low cost carrier] or [ultra-low cost carrier].”<sup>37</sup> Trial concluded on November 18, 2022.<sup>38</sup> On May 19, 2023, the District Court of Massachusetts enjoined the agreement, holding that the so-called alliance between JetBlue and American “substantially diminishes competition in the domestic market for air travel” by “allocating markets between them and replacing full-throated competition with broad cooperation.”<sup>39</sup> Although Judge Sorokin permanently enjoined the Northeast Alliance, he did not bar the parties from participating nor did he “impose a prior-notice and waiting-period” for future joint ventures.<sup>40</sup> JetBlue withdrew from its alliance with American effective July 21, 2023.<sup>41</sup> Despite JetBlue’s withdrawal from the agreement, American filed a notice of appeal on September 25, 2023.<sup>42</sup>

## FTC

FTC notched a victory in one case filed in 2021 when the Fifth Circuit upheld the FTC’s order that the Illumina/Grail merger substantially lessened competition and another district court win in a case filed in 2023 challenging the IQVIA/Propel Media merger. But it also suffered two losses in federal district court in 2023 in cases filed in 2022 to block mergers in the technology sector.

- On March 30, 2021, FTC sued to block DNA sequencing company Illumina’s acquisition of Grail, a biotechnology company that develops early cancer screening tests using DNA sequencing. FTC alleged that the transaction would allow the merged firm to foreclose or disadvantage Grail’s rivals in the creation of multi-cancer early detection tests.<sup>43</sup> FTC Chief Administrative Law Judge (ALJ) D. Michael Chappell dismissed FTC’s complaint in an initial decision, but in April 2023, the Commission reversed Judge Chappell’s dismissal and ordered Illumina to divest Grail.<sup>44</sup> The parties appealed the decision and the Fifth Circuit vacated and remanded the Commission’s order, holding that the Commission did not appropriately evaluate Illumina’s commitment to make Illumina products available to Grail’s competitors.<sup>45</sup> However, the Fifth Circuit also found substantial evidence supporting the Commission’s factual finding that the merger was likely to substantially lessen competition, and rejected the parties’ constitutional arguments.<sup>46</sup> In particular, the Fifth Circuit supported the Commission’s definition of a relevant market based on research and development efforts rather than existing commercialized products, at least where internal documents indicate that the company understood itself as competing with other developers.<sup>47</sup> With regard to competitive

effects, the Fifth Circuit agreed that evidence supported that the merged entity would have the ability and incentive to foreclose rivals from competing in the relevant market. Illumina had argued that as it “was already established as the monopoly supplier of a key input,” the Commission could not “show that the merger would increase Illumina’s ability to foreclose,” but the Fifth Circuit concluded that FTC did not need to find that the merger would *increase* the party’s ability to foreclose in order to find anticompetitive effect.<sup>48</sup> The Fifth Circuit also cited Illumina’s internal documents as substantial evidence in support of its incentive to foreclose.<sup>49</sup> Two days later, Illumina announced it would divest Grail.<sup>50</sup>

- By a 3-0 vote, FTC filed suit to block IQVIA, a health care data provider, from acquiring Propel Media, which owns an advertising technology company used to market drugs to doctors and patients, in the Southern District of New York on July 17, 2023.<sup>51</sup> FTC claimed that the transaction would eliminate competition between IQVIA and Propel, allegedly “two of the top three providers of programmatic advertising” targeted to healthcare professionals.<sup>52</sup> FTC further alleged that the transaction would incentivize IQVIA to withhold its data from other potential providers of healthcare professional programmatic advertising, harming other competitors.<sup>53</sup> In response, the parties argued, in part, that FTC’s proposed market was “arbitrarily narrow,” excluding much larger demand side platforms on which advertisers can target HCP audiences.<sup>54</sup> The district court granted FTC’s motion for preliminary injunction on December 29, 2023. The parties terminated their merger on January 5, 2024.<sup>55</sup> The court issued its full opinion and order on January 8, 2024, which relied in part on internal business records and testimony of other market participants to establish that the merger would consolidate two of the three “prominent players” “in the relatively young HCP programmatic advertising industry.”<sup>56</sup> The court did not reach FTC’s vertical theories having already agreed with the FTC on market definition and the horizontal theory of harm.<sup>57</sup>
- On July 27, 2022, FTC sued in the District Court for the Northern District of California to challenge the proposed acquisition by Meta of Within Unlimited, a virtual reality studio that develops apps on the grounds that but for the acquisition Meta would have entered the market and compete against Within. On January 31, 2023, the district court denied FTC’s request for a preliminary injunction and the parties closed eight days later.<sup>58</sup> The court held that FTC did not show there was a “reasonable probability” that Meta would have otherwise entered the market and that it was unlikely that the merger would harm potential competition.<sup>59</sup> On February 24, 2023, FTC withdrew its administrative complaint, dropping its challenge to the merger.<sup>60</sup>
- On December 8, 2022, FTC filed an administrative complaint to prohibit Microsoft’s US\$68.7 billion proposed acquisition of Activision Blizzard Inc., a video game developer.<sup>61</sup> FTC alleged that this vertical transaction would “create a monopoly in multiple markets” including (1) “high-performance consoles,” (2) content library subscription services (i.e., a service that provides access to multiple video games for a monthly fee), and (3) cloud-based gaming subscription services by allowing Microsoft to foreclose its competitors from Activision games.<sup>62</sup> On June 12, 2023, FTC filed a complaint for a temporary restraining order and preliminary injunction in the District Court for the Northern District of California.<sup>63</sup> On June 13, 2023, the district court granted FTC’s request for a temporary restraining order, enjoining the transaction while considering FTC’s motion for a preliminary injunction.<sup>64</sup> After a five day evidentiary hearing, the court denied FTC’s motion for a preliminary injunction, holding that FTC failed to show the transaction would substantially lessen competition, noting commitments that Microsoft had made to ensure the availability of certain

Activision Blizzard gaming titles on competitor gaming consoles.<sup>65</sup> FTC appealed the decision to the U.S. Court of Appeals for the Ninth Circuit and, on September 26, returned its administrative case to the administrative law judges for adjudication, requiring the start of an evidentiary hearing 21 days after the Ninth Circuit opinion on FTC's appeal.<sup>66</sup> On October 13, 2023, the parties closed the transaction.<sup>67</sup>

In addition to the IQVIA matter, FTC filed four new merger challenges in 2023, leading to two settlements and two abandonments.

- By a 3-0 vote, FTC sued to block Amgen Inc. (Amgen) from acquiring Horizon Therapeutics plc. (Horizon) in the Northern District of Illinois on May 18, 2023. On June 22, 2023,<sup>68</sup> attorneys general from six states joined FTC's suit.<sup>69</sup> FTC sought a temporary restraining order and preliminary injunction to enjoin Amgen from completing its nearly US\$28 billion acquisition of Horizon.<sup>70</sup> The Commission alleged that the transaction would enable Amgen to use bundled rebates to pressure insurance companies and pharmacy benefit managers into favoring Horizon's Tepezza and Krystexxa products, allegedly insulating these products from competition once rival drugs were approved by the FDA.<sup>71</sup> On September 1, 2023, the parties agreed to a settlement with FTC and six attorneys general.<sup>72</sup> The settlement prohibited Amgen from bundling Amgen products with Tepezza or Krystexxa, and prohibited Amgen from conditioning any product rebate or contract term related to an Amgen product on the sale or positioning of either of the Horizon products.<sup>73</sup> The parties closed the transaction on October 6, 2023.<sup>74</sup>
- By a 4-0 vote, FTC filed suit to block Intercontinental Exchange Inc.'s (a provider of market-related data, technology, and infrastructure) proposed acquisition of Black Knight Inc. (a housing finance-related software, data, and analytics company). FTC issued an administrative complaint on March 9, 2023, alleging that the proposed deal would "reduce competition in key areas of the mortgage process, ultimately raising costs for lenders and homebuyers."<sup>75</sup> Specifically, FTC alleged that the transaction would eliminate competition between the two companies in loan origin systems software, mortgage product pricing and eligibility engines, as well as other various ancillary add-ons to loan origination software.<sup>76</sup> FTC filed for a preliminary injunction in the Northern District of California on April 10, 2023.<sup>77</sup> After making "significant progress towards a potential resolution," the parties jointly agreed to postpone the preliminary injunction hearing, and ultimately jointly dismissed the complaint.<sup>78</sup> The parties agreed to divest Black Knight's Empower and Optimal Blue businesses, both of which "provide critical services in the mortgage origination process," to Constellation Web Solutions Inc., a provider of mortgage-related technology.<sup>79</sup>
- On December 11, 2023, the FTC challenged an exclusive license from Maze Therapeutic Inc. to Sanofi for an investigational treatment of Pompe disease that completed Phase 1.<sup>80</sup> Following the challenge, Sanofi agreed to terminate its proposed acquisition.<sup>81</sup> In response, Sanofi noted that it disagreed with the action by the FTC, which would delay potential advancements that could benefit patients, and that it would not be in the best interest of patients to continue the litigation.<sup>82</sup>
- By a 3-0 vote, FTC voted to block John Muir Health, a Northern California health system, from acquiring San Ramon Regional Medical Center, a hospital in Northern California.<sup>83</sup> FTC's administrative complaint alleges that the transaction would give the combined company over 50% share of the inpatient general acute care hospital services in Northern California's I-680 corridor.<sup>84</sup>

Weeks after FTC filed its complaint, John Muir announced its decision to abandon its transaction with San Ramon Regional Medical Center and FTC filed to dismiss their case.<sup>85</sup>

- Additionally, FTC dismissed its complaint against Altria and Juul, vacating its ALJ's initial decision and dismissing its complaint against Altria Group Inc. challenging its purchase of 35% of Juul Labs Inc.<sup>86</sup> While vacating that initial decision and removing it as precedent for future cases, FTC purported to clarify several matters of law raised by the ALJ's initial decision. Among other points, FTC clarified that a company should be evaluated as an actual competitor if there is a "reasonable probability" it can compete, and innovation efforts should be considered when evaluating loss of competition from a transaction.<sup>87</sup>



## Transactions Resolved by Settlements

Transactions resolved by settlement were down again in 2023. Indeed, between both agencies, only one consent decree was approved without the parties first going to court:

- The FTC challenged the US\$5.2 billion investment by Quantum Energy Partners, a private equity firm, in EQT Corporation, a natural gas producer with production in the Appalachian Basin.<sup>88</sup> Because Quantum also holds investments in additional natural gas production in the Appalachian Basin,<sup>89</sup> the FTC argued that the transaction, as contemplated, represented (1) a violation of Section 8 of the Clayton Act by creating a board interlock between competitors — assuming that a Quantum-designee joined the EQT Board — and similarly, (2) a violation of Section 5 of the FTC Act as “facilitat[ing]” a violation of the antitrust laws through the exchange of non-public, competitively sensitive information between the parties and Quantum’s simultaneous exercise of influence over both companies.<sup>90</sup> The parties agreed to a consent decree whereby Quantum surrendered a seat on EQT’s board, divested shares, agreed to restrictions on information exchange, and unwound a separate joint venture between the two companies.<sup>91</sup> FTC touted this consent decree as “ground-breaking structural relief” and the “FTC’s first case in 40 years that enforces Section 8 of the Clayton Act.”<sup>92</sup> The parties closed the deal on August 16, 2023.<sup>93</sup>

However, as noted above, DOJ and FTC did accept a few settlements in 2023 to resolve transactions in active litigation, including the combinations of Assa Abloy/Spectrum Brands, Amgen/Horizon, and Intercontinental/Black Knight.



## Industry Overviews

### Technology and Platforms

This year, the authorities — especially FTC — continued to focus on merger enforcement in the technology space. As described above, a number of FTC merger challenges touched on the tech sector, including virtual reality (Meta/Within Unlimited), video games (Microsoft/Activision), and programmatic advertising (IQVIA Holdings Inc./Propel Media Inc.). Looking forward, we expect scrutiny in this space to continue: FTC has indicated that it anticipates ongoing enforcement scrutiny over M&A which might “consolidate market power” in artificial intelligence systems, as just one example.<sup>94</sup> DOJ was also active in the technology sector. Citing pushback from the European Union, Adobe abandoned its US\$20 billion proposed acquisition of Figma, a web-based collaborative design platform. DOJ released a statement on that decision, which claimed that “the decision to abandon this acquisition ensures that designers, creators, and consumers continue to get the benefit of the rivalry between the two companies going forward.”<sup>95</sup>

### Life Sciences

The authorities continued their enforcement focus in the life sciences space, including challenging the Amgen/Horizon, Sanofi/Maze Therapeutics, and Illumina/Grail transactions, mentioned above. After FTC filed suit, Sanofi and Maze abandoned their transaction.<sup>96</sup> Illumina and Grail also abandoned their merger after the Fifth Circuit determined the merger substantially lessened competition and remanded.<sup>97</sup> This year, two medical device transactions were restructured to ameliorate FTC concerns. In May 2023, Boston Scientific restructured its proposed acquisition of M.I. Tech Co. to address FTC concerns, purchasing a 10% stake of M.I. Tech Co. rather than acquiring a majority stake.<sup>98</sup> Similarly, in August 2023, CooperCompanies called off its intended purchase of Cook Medical’s reproductive health business, which manufactures “minimally invasive medical devices focused on the fertility, obstetrics and gynecology markets”<sup>99</sup> in the face of FTC concerns.<sup>100</sup>

### Healthcare

M&A in the healthcare industry also received a fair share of scrutiny. In addition to filing suit to block the John Muir Health/San Ramon Regional Medical Center transaction, as discussed above, FTC took a number of additional actions in the industry. On October 7, 2022, FTC staff submitted a public comment to New York State Health Department opposing the Certificate of Public Advantage (COPA) submitted by SUNY Upstate Medical University for its proposed acquisition of Crouse Health System Inc.<sup>101</sup> Though FTC did not formally review the transaction, FTC expressed concerns that, post-merger, the parties would have a combined share of more than 45% of “commercially insured inpatient hospital services” in the primary service area around SUNY Upstate-Crouse and a combined share of 67% of those services in Onondaga County.<sup>102</sup> On February 16, 2023, the parties withdrew their COPA application and abandoned

the merger, which FTC celebrated.<sup>103</sup> Similarly, FTC, on June 5, 2023, submitted a comment to the North Carolina House Health Committee opposing North Carolina legislation that would exempt UNC Health Care System from certain violations of federal antitrust law under the state action legal doctrine.<sup>104</sup> This would include, “cooperative agreements with any other entity for the provision of health care.”<sup>105</sup> FTC complained that the law would “shield mergers and conduct that would violate the antitrust laws by depriving patients and workers of the benefits of competition without efficiencies or quality improvements.”<sup>106</sup>

This year, FTC credited their investigations as leading to the abandonment of two unidentified non-public mergers in the healthcare space.<sup>107</sup> Additionally, on September 21, 2023, FTC filed a lawsuit against private equity firm Welsh Carson and U.S. Anesthesia Partners Inc.<sup>108</sup> FTC’s complaint was filed in the Southern District of Texas and involves allegations concerning serial acquisitions and the market for anesthesia services in Texas.<sup>109</sup>

Enforcers will likely continue focusing on the healthcare industry. Deputy Assistant Attorney General Andrew Forman explained that, for enforcers, there was “no more important question than what can we do to safeguard competition in the healthcare industry” and that competition in the healthcare sector is “broken.”<sup>110</sup> Particularly, DAAG Forman cited “provider and payer consolidation,” more “concentrated” healthcare companies that are vertically integrated, and the effects of “a few players” controlling “massive [health] data reservoirs.”<sup>111</sup>

## **Banking and Finance**

In addition to FTC’s suit against — and ultimate settlement resolving — the Intercontinental Exchange/Black Knight combination, discussed above, there was significant attention in 2023 on the mergers in the banking/finance area. Most notably, on June 20, 2023, Assistant Attorney General Jonathan Kanter announced that the DOJ Antitrust Division was revising the 1995 Bank Merger Guidelines.<sup>112</sup> He first highlighted the importance of competition in the banking industry for Americans, noting that “[b]ank competition affects the interest you earn on your savings account, the monthly payment on your mortgage or car loan, the fees you pay to withdraw cash from an ATM, the variety of financial products you can choose from, and whether your business can get an affordable loan.”<sup>113</sup> He then announced that the new guidelines would reflect a broader analysis of competitive effects, break down merger analysis to reflect market realities of differences among banks and customers, disfavor divestiture agreements, and consider risks of coordination and multi-market contacts in bank merger analysis.<sup>114</sup> There is not yet an expected date for the release of the revised guidelines, but we anticipate that scrutiny in this space will continue into the new year.

## **Energy**

Agencies were also active in the energy sector this year. Beyond the FTC’s challenge to Quantum/EQT discussed above, Infineum (a specialty chemicals company) abandoned its effort to acquire Entegris’ pipeline and industrial materials business,<sup>115</sup> a development that the FTC credited to its investigation.<sup>116</sup> DOJ was also active in investigating transactions in this space. On February 10, 2023, for example, Tenaris S.A., a global manufacturer of steel pipes and other industrial piping-related equipment, abandoned its proposed acquisition of Benteler Steel & Tube Manufacturing’s North America company<sup>117</sup> in the face of DOJ concerns.<sup>118</sup> Following the abandonment, AAG Kanter noted that “[a] competitive oil and gas industry is vital to the U.S. economy,” potentially foreshadowing future attention to M&A in this sector.<sup>119</sup> FTC is also investigating several oil and gas “megadeals,” issuing requests for additional information in Exxon/Pioneer and Occidental/CrownRock.

## Infrastructure

Enforcers were also active in investigating deals in the infrastructure space. On July 1, 2022, CalPortland (a west coast building materials company) agreed to purchase Martin Marietta's (construction materials company) assets in California.<sup>120</sup> On April 28, 2023, the parties abandoned the transaction after "an in-depth investigation" by FTC, which asserted "the transaction would have reduced the number of cement suppliers in Southern California from five to four."<sup>121</sup>

## Transportation

In 2024, we also anticipate continued enforcement in the transportation sector. This year saw two challenges to airline transactions, including JetBlue/American's "Northeastern Alliance" and the JetBlue/Spirit proposed combination. As to the JetBlue/Spirit combination, the Department of Transportation (DOT) issued a statement in support of DOJ's lawsuit, opposing the combination pending DOJ review.<sup>122</sup> This contrasts with DOT's review of the Northeastern Alliance, where DOT accepted the parties' slot divestiture offer,<sup>123</sup> later clarifying that the agreement "did not address all of the Department's concerns ... but instead sought concessions from the carriers that were intended to mitigate some of the anticompetitive harm...."<sup>124</sup>

On January 24, 2023, DOJ submitted a comment to the Surface Transportation Board regarding the board's review of the merger between Canadian Pacific Railway and Kansas City Southern Railway Company, two railways that, combined, connect Canada to Mexico on a single line.<sup>125</sup> In a Surface Transportation Board hearing, the parties argued that DOJ's lack of comment on the merger implied that DOJ did not have concerns with the transaction.<sup>126</sup> In its comment, DOJ corrected the record to reflect that this was not the case, that it supported the Surface Transportation Board's review process, and that many of the public comments on the merger reflected concerns similar to those DOJ would have in its own antitrust investigations.<sup>127</sup> Notwithstanding DOJ's comment, the Surface Transportation Board authorized the merger on March 15, 2023, and the deal closed on April 14, 2023.<sup>128</sup>



## Enforcement Against 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. This past year, FTC took the position that HSR requirements apply in any merger that is not statutorily exempted from the HSR Act, even if the merger itself might be exempt from antitrust scrutiny.<sup>129</sup>

On April 20, 2023, FTC sued Louisiana Children’s Medical Center (LCMC) in the U.S. District Court for Washington, D.C. over its US\$150 million purchase of three HCA Healthcare Inc. hospitals. FTC alleged that the parties violated the HSR Act by closing their transaction under a COPA and not filing with FTC prior to closing.<sup>130</sup> After the case was transferred to the Eastern District of Louisiana, a judge granted summary judgement for LCMC, holding that the state action doctrine allowed Louisiana’s COPA law to exempt the parties from HSR requirements.<sup>131</sup>

### **FTC Enforcement of Prior Notice Provisions in Consent Orders**

FTC continues to include “prior notice” provisions in consent orders resulting from its merger investigations. These provisions require notice for further transactions in the relevant market, even if not otherwise reportable under the HSR Act. FTC is enforcing these provisions by bringing civil suit against alleged violators. In December of 2023, FTC sued 7-Eleven in D.C. district court for allegedly failing to give prior notice of its purchase of a Florida fuel outlet, allegedly in violation of a 2019 consent order.<sup>132</sup> FTC alleged that 7-Eleven filed incomplete reports to the Commission that omitted this acquisition, despite the fact that 7-Eleven brought the omission to the FTC’s attention.<sup>133</sup> FTC is seeking a maximum civil penalty of \$77,535,640.<sup>134</sup> These prior notice provisions were foreshadowed by the FTC’s 2021 policy statement on prior approval provisions.<sup>135</sup> Since then, such provisions have consistently appeared in FTC’s negotiated merger settlements which, according to FTC reduce “the risk that the Commission will not learn of harmful mergers that do not trigger federal antitrust reporting requirements.”<sup>136</sup>

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