US Competition Law – Merger Enforcement

2016 Year in Review

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Overview

2016 Merger Enforcement Year in Review

2016 marked another year of robust M&A activity and another year of active merger enforcement in the United States. In many ways, 2016 continued the trends seen in 2015, in particular, greater scrutiny of certain transactions and a continued willingness by the authorities to litigate to stop transactions perceived as anticompetitive.

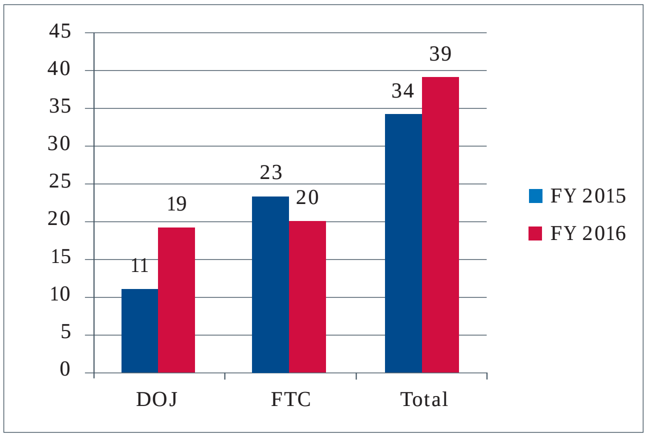
Despite this atmosphere of aggressive enforcement, the Federal Trade Commission (FTC) and Department of Justice (DOJ) continued to carefully scrutinize each transaction, analyzing the individual facts and potential antitrust risks. The DOJ and FTC permitted the vast majority of deals to proceed either unconditionally (such as the sale of GE Appliances to Haier Group and Marriott International's acquisition of Starwood Hotels & Resorts), or with conditions to remedy the competitive concerns.

2017 brings a change in administration. That could mean a shift in the authorities' enforcement priorities, but because merger control is mainly an apolitical process, the past year's enforcement actions still offer valuable guidance regarding the trends and keys areas of jurisprudence for parties contemplating transactions in 2017 and beyond.

Summary

Merger activity over the past few years has continued at a brisk pace. And, with an increased number of transactions to review in recent years, it is not surprising that the number of formal actions taken by the FTC and DOJ to either block or place conditions on transactions has also increased. In fact, 2016 saw a 14.7% increase in formal actions from 2015.

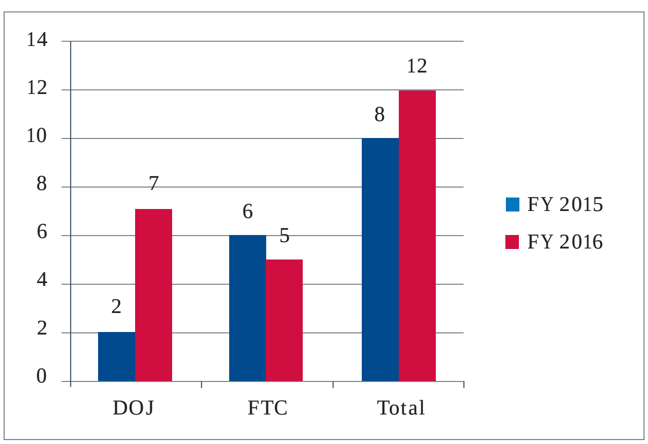
Figure 1 - Formal Actions brought by U.S. Antitrust Authorities*



* Includes transactions abandoned due to expected formal action.

Furthermore, similar to 2015, the authorities have shown that they are willing to go to court to enjoin transactions viewed as anticompetitive. Reflecting on the Obama Administration's merger enforcement, Bill Baer, former Acting Associate Attorney General (April 17, 2016 to January 20, 2017) and former Assistant Attorney General for Antitrust (January 3, 2013 to April 17, 2016), commented that "[b]oth agencies have taken on the tough challenges; shown they're prepared to go to court when necessary and they're going to act to enforce the antitrust laws vigorously on the facts."[1]

Figure 2 - Court Challenges*



* Excludes filings made in opposition to mergers under review by other authorities (e.g., state healthcare authorities); excludes deals abandoned at threat of court challenge. In FY 2016, the DOJ and FTC brought seven new litigations and resolved five that were pending at the start of the year.

Litigation and Authorities' Challenges to Deals

Antitrust enforcement in 2016 probably will be remembered for the number of merger challenges by the U.S. authorities. The authorities brought seven new litigations in 2016 and resolved five additional litigations that were pending at the start of the year. By year end, the authorities had notched five court victories, forced four transactions to be abandoned because of litigation or the threat of litigation, and expressed opposition to two additional deals where other agencies had jurisdiction to review the transaction. On the other hand, the FTC abandoned one merger challenge—in the healthcare industry—after the state regulatory board approved the transaction. Finally, three challenges were pending at the end of the year.

The Authorities Showcased Their Ability to Win in Court

Much like last year, DOJ and FTC continued their winning streak. Although the FTC lost two cases at the district court level, the FTC won both of those matters on appeal. The FTC's appellate victories demonstrate that the authorities will continue to pursue litigation in matters where they believe they hold the winning position. This brought the authorities' total victory count to five.

- ***Aetna/Humana***
  Aetna and Humana, two of the nation's largest health insurance providers, entered a merger agreement on July 2, 2015 for $37 billion.[2] Over a year later, the DOJ filed suit in the District Court for the District of Columbia to block the merger.[3] DOJ alleged that the merger would reduce competition in the Medicare Advantage market, arguing that Humana is the second largest and Aetna is the fourth largest insurer in that market.[4] The DOJ also alleged that the merger would reduce competition on the public healthcare exchanges in at least a hundred counties.[5] The trial began on December 5, 2016 and on January 23, 2017, the District Court granted an injunction to prevent the merger, finding that the transaction would likely harm competition in both the Medicare Advantage market and in the individual market on the exchanges.[6]

- ***Advocate/NorthShore***
  On October 31, 2016, the FTC secured an appellate victory in its challenge to the proposed merger between Advocate and NorthShore, two hospital systems operating in the Chicagoland area. Advocate

agreed to acquire NorthShore for $2.2 billion on September 11, 2014.[7] On December 17, 2015, the FTC brought suit in administrative court[8] and the U.S. District Court in the Northern District of Illinois.[9] The FTC alleged that the transaction would allow Advocate to control more than half of the general acute care inpatient hospital services in northern Cook County and southern Lake County, Illinois.[10] The Northern District of Illinois denied the preliminary injunction on June 14, 2016, because it was troubled that the FTC's expert witness excluded "destination hospitals" (academic medical hospitals) and certain non-local hospitals from the proposed geographic market.[11] However, on October 31, 2016, the Seventh Circuit reversed and remanded to the District Court. The Seventh Circuit focused on testimony that supported the FTC's argument that Advocate and NorthShore hospitals were distinct from academic medical centers and non-local hospitals.[12] The Circuit Court also determined that the FTC's expert analysis properly excluded these hospitals from the proposed geographic market.[13] After this adverse ruling, the hospital systems vowed to continue to litigate the matter.[14]

Interestingly, this was not NorthShore's first transaction challenged by the FTC. Previously, the FTC challenged a transaction between Evanston Hospital and NorthShore's Highland Park Hospital,[15] which was ultimately resolved by requiring the merging hospital systems to set up independent contract negotiation teams to restore competition between the two hospital systems.[16]

- ***Hershey/PinnacleHealth***
  In December 2015, the FTC filed an administrative complaint and a motion for preliminary injunction in the Middle District of Pennsylvania to prevent the merger of two Harrisburg, Pennsylvania health systems, Hershey and PinnacleHealth. The FTC characterized these companies as "the two largest health systems in the greater Harrisburg, Pennsylvania area," and alleged that the post-merger entity would own all but one small community hospital in the area.[17] On May 9, 2016, the District Court ruled against the FTC, finding that the agency's proposed four-county geographic market was too narrow, as some patients travel significant distances for healthcare.[18] The FTC appealed on May 10, 2016, and the decision was stayed on May 24, 2016.[19] The Third Circuit overturned the lower court's decision on September 27, 2016, and criticized the District Court's geographic market, which was based on patient flow into the relevant area.[20] The Third Circuit also noted that the lower court misunderstood hospital market competition, improperly ignoring the role that insurance companies play in the industry.[21] Ultimately, on October 14, 2016, the parties abandoned their proposed merger.[22]

- ***Staples/Office Depot***
  On May 10, 2016, the FTC secured an injunction against the merger of Staples and Office Depot, two of the largest office supply companies. After almost a year of review, on December 7, 2015, the FTC filed suit in the District Court for the District of Columbia, as well as an administrative complaint, to enjoin the merger.[23] The FTC alleged that the parties were the only two nationwide companies capable of providing office supplies, services, and logistics to other large, national companies.[24] The FTC's complaint focused on these "business-to-business" sales,[25] which distinguished this transaction from Office Depot's 2013 acquisition of Office Max, in which the FTC focused mainly on the sale of office supplies to consumers and cleared the transaction without conditions.[26] While the parties offered to divest more than $1.25 billion in contracts, technology, and transition services to office supply wholesaler Essendant,[27] the FTC rejected this divestiture as "wholly inadequate" to replace competition lost by the merger, noting that Essendant did not currently serve any business-to-business customers.[28] During the trial, the parties argued that online and regional competitors would be able to serve national customers' needs, replacing any competition lost post-merger. The FTC disagreed, alleging that regional and online retailers would be unable to replace Office Depot's customer service, distribution footprint, private label products, and consistency in volume, pricing, and products. After

a two-week trial, in which the merging parties rested without putting on a case, the District Court ruled in favor of the FTC and granted a preliminary injunction on May 10, 2016.[29] Shortly thereafter, the companies agreed to terminate the transaction.[30]

- ***Tribune Publishing/Freedom Communications & Digital Media First/Freedom Communications***
  On March 17, 2016, DOJ filed suit in the Central District of California to prevent Tribune Publishing from acquiring the assets of another California-based newspaper company, Freedom Communications,[31] at a bankruptcy auction.[32] Tribune owns the *Los Angeles Times, the Riverside Press-Enterprise, the San Diego Union-Tribune, and other newspapers nationwide. Freedom Communications owns the Orange County Register. According to the DOJ, the Los Angeles Times and Orange County Register "are the only English-language local daily newspapers with significant circulation in Orange County."*[33] Moreover, the DOJ asserted that the *Press-Enterprise, Los Angeles Times, and Register are the top three newspapers by circulation in Riverside County with the San Diego Union-Tribune in fifth place.*[34] This would mean, the DOJ alleged, that after the acquisition, Tribune would account for 98% of newspapers in Orange County and 81% of English-language newspapers in Riverside County, by sales.[35] The DOJ also alleged that the transaction would allow Tribune to increase subscription prices and raise advertising rates for its Orange County and Riverside newspapers.[36] The Central District of California granted the temporary restraining order the following day[37] and Tribune subsequently abandoned the transaction.[38]

Transactions Abandoned in the Face of Government Opposition

Litigation and protracted investigations can add significant costs and delay to merger review. In several cases, merging parties were unwilling to litigate against the authorities or continue with the proposed merger in the face of regulator opposition.

- ***Lam Research/KLA-Tencor***
  On October 6, 2016, nearly a year after the transaction had been announced, Lam Research, a semiconductor manufacturer, and KLA-Tencor, a supplier to semiconductor manufacturers, announced that they abandoned their $10.6 billion transaction after the DOJ expressed antitrust concerns about the transaction.[39] In DOJ's announcement that the parties abandoned the transaction, DOJ stated that the transaction would have allowed Lam Research to harm competitors by foreclosing their access to KLA-Tencor's metrology and inspection services.[40]

- ***Superior Plus/Canexus***
  Sodium chlorate producers Superior Plus and Canexus abandoned their attempted merger on June 30, 2016, after the FTC filed an administrative complaint[41] and a complaint and motion for a temporary restraining order in federal district court on June 27, 2016, to block the deal.[42] Both parties produce sodium chlorate, a chemical used to bleach wood pulp for paper, tissues, and other products.[43] The FTC alleged that after the merger, the combined company would control 50% of sodium chlorate production, leaving 80% of the North American sodium chlorate capacity in the hands of just two large competitors.[44] The FTC further alleged that the acquisition of Canexus would "remov[e]…a uniquely disruptive, low-cost competitor" from the market.[45]

- ***Halliburton/Baker Hughes***
  On May 1, 2016, Halliburton and Baker Hughes abandoned their proposed merger in the face of DOJ opposition.[46] Halliburton and Baker Hughes both offer a variety of oilfield services, including well and drilling evaluation, well completion and production services, and integrated operations for exploration and production companies.[47] On April 6, 2016, DOJ filed suit to prevent the merger, alleging that horizontal competition in "oilfield services" would be eliminated in 23 product markets in the oil and gas exploration and production industry.[48] Although Halliburton and Baker Hughes offered significant divestitures, DOJ rejected the package, characterizing the remedy proposal as one of the "the most complex and riskiest remedies ever contemplated."[49] DOJ found the remedies inadequate because they (1) did not include entire business units that could compete on an equal playing field with the combined entity, (2) preserved "numerous ongoing entanglements" between the post-merger company and the divestiture buyer, and (3) would not restore pre-merger competition.[50]

- ***United Airlines/Delta (Newark slots)***
  On July 16, 2015, United agreed to purchase from Delta 24 takeoff and landing slots at Newark Airport for $14 million.[51] "Slots" are operational authorizations for takeoffs and landings issued by the Federal Aviation Administration (FAA) to manage congestion and delay at certain airports.[52] On November 10, 2015, DOJ filed a lawsuit in the District of New Jersey to prevent the acquisition,[53] alleging that United already controlled 902 (73%) slots at Newark and would control 75% of the slots following the acquisition. On April 1, 2016, the FAA issued a Notice[54] which removed slot controls at Newark based on its assessment of "operational performance, demand, and capacity" at the airport.[55] With the removal of the slot controls, United subsequently abandoned the transaction on April 6, 2016.[56]

Three Challenges Are Ongoing

Although the authorities achieved significant victories in 2016, some of the authorities' work is still unfinished—the year ended with three merger cases still in litigation.

- ***EnergySolutions/Waste Control Specialists***
  On November 11, 2016, the DOJ filed suit in the District of Delaware to enjoin EnergySolutions' acquisition of Waste Control Specialists (WCS).[57] EnergySolutions offers a wide range of services to nuclear power plant operators, such as remediation of nuclear facilities, management of spent nuclear fuel, and disposal of low-level radioactive waste.[58] The DOJ alleged that EnergySolutions sought to acquire WCS to eliminate competition in low-level radioactive waste disposal services, as WCS was the only other company licensed to provide such services in 36 states.[59] The DOJ argued that new entrants were unlikely to provide competition to the combined company, as the regulatory and licensing barriers make entry into the market particularly onerous and time consuming.[60] On

November 23, 2016, the parties filed a motion to move the case to the Western District of Texas.[61] The court denied the transfer motion on December 21, 2016,[62] the defendants answered the complaint on January 6, 2017, and discovery is underway.

- ***Deere/Precision Planting***
  On August 31, 2016, DOJ challenged Deere's proposed acquisition of Precision Planting.[63] Precision Planting, a subsidiary of Monsanto Company, designs and sells "precision agriculture" equipment,[64] while Deere & Company manufactures and sells agriculture, construction, and forestry equipment.[65] The DOJ alleged that the transaction would eliminate competition between Deere and Precision Planting in the sale of "high-speed precision planting systems," such as Precision Planting's retrofit kit and certain of Deere's planters.[66] The DOJ further alleged that post-transaction, Deere would be able to abuse its discretion under Precision Planting's existing supply agreements to harm two of Deere's planter competitors—CNH Industrial and AGCO—who offer high-speed planters integrated with the Precision Planting technology.[67] Fact discovery finished December 16, 2016,[68] with trial scheduled for June 5, 2017.[69]

- ***Anthem/Cigna***
  In July 2016, the DOJ filed suit in the District Court for the District of Columbia to block the merger of health insurance providers Anthem and Cigna.[70] DOJ alleged that the merger would reduce health insurance competition in (1) the market for "national accounts," where insurers provide nationwide commercial networks, (2) 35 local markets for large-group employer plans, and (3) the public Exchanges established by the Affordable Care Act in 22 counties.[71] Ultimately, the DOJ did not pursue the third theory at trial. The DOJ further alleged that the merger would reduce competition in the market for purchasing healthcare services, which DOJ alleged could reduce provider reimbursement rates, access to care, quality, and value-based collaborations.[72] The District Court blocked the merger on February 8, 2017,[73] which Anthem promptly appealed.

Sometimes the Authorities Change Course Based on Changed Circumstances

Just as the FTC and DOJ are practical in deciding which cases to pursue, they are also practical about which cases to drop. For instance, in 2016, the FTC dismissed its complaint against a hospital merger after the state regulatory board approved the merger.

- ***Cabell Huntington Hospital/St. Mary's Medical Center***
  On July 6, 2016, the FTC dismissed its complaint against the proposed merger between Cabell Huntington Hospital and St. Mary's Medical Center, deferring to the Application of Cooperative

Agreement approved by the West Virginia Health Care Authority.[74] The FTC had originally filed an administrative action to enjoin the merger on November 6, 2015, alleging that the merger would allow the combined company to control over 75% of the market for general acute care inpatient hospital services in areas of West Virginia and Ohio.[75] In March 2016, West Virginia passed Senate Bill 597, "exempting certain actions of the Health Care Authority from state and federal antitrust laws; setting forth intent to immunize cooperative agreements approved and subject to supervision by the Health Care Authority."[76] Accordingly, the West Virginia Health Care Authority and the West Virginia Attorney General approved a cooperative agreement among Cabell Huntington Hospital and St. Mary's Medical Center on June 22, 2016.[77] The FTC subsequently withdrew its complaint, "in light of the passage of West Virginia Senate Bill 597…and the West Virginia Health Care Authority's decision to approve Cabell's cooperative agreement with St. Mary's."[78] Cooperative agreement laws such as the one enacted by West Virginia seek to replace federal antitrust enforcement with state regulation and supervision[79]—potentially shielding mergers from DOJ and FTC scrutiny under the state action doctrine.[80] The FTC characterized these developments as "another example of healthcare providers attempting to use state legislation to shield potentially anticompetitive combinations from antitrust enforcement."[81] The FTC also noted that although it dismissed the complaint in this case, it would not always be willing to accept state-level regulatory approval of mergers in the future, noting that: "[o]ur decision to dismiss [this] complaint without prejudice does not necessarily mean that we will do the same in other cases in which a cooperative agreement is sought or approved."[82]

FTC and DOJ May Become Involved With Transactions Where Other Agencies Have Jurisdiction

The FTC and DOJ do not have authority to review all transactions—mergers in some industries may be reviewed by other agencies or authorities. In these situations, although the FTC or DOJ may have a more limited role because they do not have jurisdiction to review the transaction, they still may become involved if they believe that a merger may threaten competition. For example, where the Surface Transportation Board (STB) had exclusive jurisdiction to review a railroad merger, the DOJ filed statements in opposition to a proposed combination.[83]

This also occurred in several 2016 hospital mergers. As discussed above, FTC withdrew its complaint in opposition to the Cabell/St. Mary's combination—in light of new West Virginia regulations, which approved the merger under a new process by which the state would regulate and supervise hospital mergers.[84] This theoretically insulated the merger from FTC review under the state action doctrine, which holds that federal antitrust laws do not apply to anticompetitive conduct resulting from an actively supervised state policy.[85] But, as discussed below, even where a state has a enacted a process by which certain approved hospital mergers might be insulated from federal review, the authorities have demonstrated a willingness to participate in the state-level review process in an attempt to convince the state regulatory agency to not approve certain transactions.

- ***Canadian Pacific Railway/Norfolk Southern Railway***
  In Spring 2016, Canadian Pacific announced an intention to acquire a competing railroad, Norfolk Southern. In connection with this acquisition, Canadian Pacific sought approval from the Surface Transportation Board (STB), which has exclusive jurisdiction to review railroad mergers,[86] for a pre-merger voting trust structure between itself and Norfolk Southern.[87] On April 8, 2016, the DOJ filed a reply, urging the STB to reject the voting trust.[88] DOJ argued that the voting trust would effectively pass control of Norfolk Southern to Canadian Pacific in advance of the merger review.[89] The DOJ

further argued that unwinding this voting trust would be very difficult in the event the merger was not approved.[90] Three days later, on April 11, 2016, Canadian Pacific announced that it had terminated the underlying merger agreement.[91]

- ***Mountain States Health Alliance/Wellmont Health System***
  The FTC is actively opposing the proposed merger of Mountain States Health Alliance and Wellmont Health System that would operate under a certificate of public advantage (COPA) issued by the State of Tennessee. On June 25, 2015, the Commissioner of the Tennessee Department of Health requested an advisory opinion from the FTC regarding the effect of this merger.[92] Several FTC officials testified in opposition to the transaction at Tennessee Department of Health hearings,[93] and the FTC staff submitted a comment on November 21, 2016. The FTC alleged that the two hospital systems "operate the only hospitals in 12 of the counties" of Northeast Tennessee and Southwest Virginia.[94] In response, the parties argued, first, that the state law is specifically designed to provide "immunity from state and federal antitrust law to the fullest extent possible," so that the FTC's anticompetitive analysis is irrelevant to the state COPA statute analysis.[95] Second, the parties argued that because the geographic area has such few patients and high levels of uncompensated and low-cost care, the hospitals are unsustainable without the synergies anticipated from the merger.[96] Tennessee's COPA review is ongoing.

Notable Cases Cleared Without Conditions

Despite an uptick in the number of merger challenges, in 2016 the DOJ and FTC still cleared a number of mergers without challenges or conditions, including several notable transactions.

- ***Marriott/Starwood***
  In September 23, 2016, Marriott International completed its acquisition of Starwood for $12.2 billion.[97] The combination created the world's largest hotel company,[98] and as a Marriott executive noted, Marriott has "competed with Starwood for decades."[99] Despite competition between the parties, the transaction received unconditional clearance in the U.S. on March 1, 2016.[100] Estimates suggested that the combined company would control only 15% of total hotel rooms in the US (and in more localized areas, e.g., New York City, the parties' share would only rise to 25%).[101]

- ***Comcast/DreamWorks***
  On June 20, 2016, Comcast acquired DreamWorks in a $3.8 billion deal that was cleared without conditions.[102] Comcast, which also owns NBCUniversal, operates in the cable television, broadcast television, motion picture production, and theme park industries.[103] DreamWorks is an entertainment

company that produces motion pictures, television, and live entertainment.[104] Despite the fact that Comcast owns NBCUniversal, "one of the world's leading media and entertainment companies" and DreamWorks is "one of the world's leading suppliers of high-quality family programming," the antitrust authorities did not challenge the transaction. A transaction such as this could have raised horizontal concerns (as DreamWorks might compete with Comcast's NBC Universal studios) or even vertical concerns (as Comcast might be able to foreclose DreamWorks content from competing distributors). However, the merger was cleared without conditions, perhaps because the agencies recognized that there are a variety of competing production companies, including 20th Century Fox, Sony, Paramount, Disney, MGM, and Lionsgate.[105]

- ***Haier/General Electric Appliances***
  In June 2016, the Haier Group, a Chinese manufacturer of home appliances, completed its acquisition of GE's appliances unit for $5.6 billion.[106] Previously, Swedish manufacturer Electrolux had agreed to acquire the appliances division. The DOJ filed suit to enjoin the Electrolux acquisition, and the parties abandoned the transaction after a four-week trial.[107] Although both the Haier Group and Electrolux sell home appliances to US consumers, the agencies likely perceived Electrolux to be a much more significant competitor to GE compared to Haier.

Majority of Cases with DOJ or FTC Concerns are Settled with Divestitures

Despite the rise in merger litigation, the majority of deals that raise concerns at the DOJ or FTC are resolved with a settlement between the merging parties and the reviewing authority that imposes remedies to alleviate the competitive concerns. In past mergers as well as more recent deals, the FTC and DOJ favor structural remedies (e.g., divestiture of certain business units), rather than behavioral remedies (e.g., restrictions on conduct) that need to be monitored. These cases can offer a roadmap to parties considering a merger with antitrust issues and what sorts of divestitures might ameliorate agency concern.

Divestitures That Extend Beyond the Original Overlap May Be Required to Ensure the Divestiture Buyer Is Viable and Competition is Restored Post-Transaction

In some cases, the authorities require divestitures beyond the overlap of concern to ensure that the divestiture buyer will be able to replace any competition lost following the merger.

- ***Air Liquide/Airgas***
  On May 13, 2016, merging industrial gas companies Air Liquide and Airgas agreed to divestitures that allowed their $13.4 billion merger to proceed.[108] After a six-month review, the FTC found that the merger would lessen regional, nationwide, and North American competition in certain bulk gases, dry ice, and packaged gases for welding.[109] To resolve these issues, the FTC required the parties to "divest sixteen air separation units, four vertically integrated dry ice and liquid carbon dioxide plants, two separate liquid carbon dioxide plants, two nitrous oxide plants, and three retail packaged welding gas and hard goods stores."[110] The FTC required that the divested air separation units include the pipeline oxygen and nitrogen businesses and contracts at each site, noting that although the parties did not overlap in these areas, these businesses would be "critical to the viability, efficiency, and competitiveness" of each divested plant. The FTC did not require an upfront buyer. The parties were given 120 days to complete the divestiture, ultimately selling assets to several other gas producers.[111]

- ***Ball/Rexam***
  On June 28, 2016, Ball and Rexam agreed to divestitures to appease FTC concerns about their merger.[112] Ball and Rexam both manufacture standard 12-ounce and specialty aluminum beverage cans.[113] The FTC challenged the combination of the first and second largest beverage can manufacturers,[114] alleging that the combination would reduce competition for standard cans in three regional markets and for specialty aluminum cans nationwide.[115] The FTC required the parties to divest five standard can manufacturing plants (spread across the three regions) and two specialty can plants to Ardagh.[116] To ensure Ardagh would be able to effectively compete with the merged party, the FTC also required the parties to divest a plant in Indiana necessary for Ardagh to manufacture can lids.[117] Beyond the FTC's stated concerns about the U.S. and North American markets, the parties also agreed to divest fourteen plants across Europe and Brazil, in addition to an innovation and support center in Germany, ameliorating the FTC's concern that a "a single, global [divestiture] buyer" would be important to "preserve competition for many multinational customers."[118]

Divestitures Alone May Not Be Sufficient

There were a couple of cases in 2016 that demonstrated that in some instances, the FTC and DOJ may require conditions in addition to a divestiture to ensure competition or prevent collusion post-merger.

- ***AMC Entertainment/Carmike Cinemas***
  On December 20, 2016, AMC Entertainment agreed with DOJ to conditions that would allow it to complete its $1.2 billion acquisition of Carmike Cinemas. Both AMC and Carmike operated movie theaters across the United States, and the DOJ alleged that the transaction would reduce competition in fifteen local markets.[119] The parties agreed to divest a minimum of fifteen theaters in these local markets to alleviate DOJ concerns.[120] In addition to local competition issues, the DOJ also raised concerns related to the competition for preshow services and cinema advertising.[121] Both AMC and Carmike held minority interests and Board of Director seats on cinema advertising networks: 17% in NCM advertising network and 19% of Screenvision advertising network, respectively.[122] To ameliorate the DOJ's additional concerns, AMC agreed to reduce its equity interest in NCM to 4.99% (which in turn eliminated AMC's right to appoint an NCM director), impose firewalls to prevent AMC from obtaining or sharing competitively sensitive information from either NCM or Screenvision,[123] and transfer certain theaters to the Screenvision pre-show network, to ensure that it remained a strong competitor to NCM.[124]

- ***Anheuser-Busch InBev/SABMiller***
  On July 20, 2016, the DOJ cleared with conditions the merger between two brewing companies, Anheuser-Busch InBev (ABI) and SABMiller after an eight-month review.[125] ABI operates 19 breweries and 40 major beer brands in the United States.[126] SABMiller does business in the United States through its MillerCoors joint venture with Molson Coors, which operates 12 breweries and 40 major brands of beer in the United States.[127] The DOJ expressed further concerns that the global combination of ABI and SABMiller would decrease competition in the U.S. beer industry.[128] The parties anticipated that the authorities would require divestitures, and proposed a divestiture package upfront (a "fix-it-first"). Specifically, the parties agreed that SABMiller's interest in the MillerCoors joint venture would be divested entirely to Molson Coors.[129] The DOJ also alleged that the transaction would enable the combined company to influence beer distribution (to the exclusion of smaller competitors) and would increase the likelihood of collusion in the global beer industry.[130] As a result, in addition to the divestiture, the DOJ imposed several post-merger restrictions on ABI. These controls include prohibitions on (1) using the transaction or divestiture as a basis to renegotiate distributor contracts,

(2) expanding the ABI-owned distributor network, (3) imposing certain downstream incentives or controls on distributors, or (4) purchasing third-party brewers without providing advance notice to the DOJ, even if below HSR thresholds.[131] The DOJ intended these conditions to prohibit ABI from forcing distributors to exclude ABI's competitors or from acquiring craft breweries without providing DOJ with an opportunity to investigate any competitive effects.[132]

The Authorities Sometimes Impose Conduct Remedies

Although, as discussed above, the authorities typically prefer structural remedies (such as divestitures), in some cases the authorities will impose conduct-based remedies to ameliorate competitive concerns.

- ***Alaska Air/Virgin America***
  On December 6, 2016, the DOJ cleared Alaska Air's purchase of Virgin Airlines, with certain conditions.[133] Although the DOJ noted that the combined company would only be the fifth-largest airline, the DOJ expressed concerns regarding Alaska Air's commercial relationships (codeshare agreements) with the largest US airline, American Airlines.[134] The codeshare agreement allowed Alaska and American Airlines to market certain flights on each other's networks. The DOJ noted that "although the codeshare agreement effectively extends Alaska's geographic reach…it also creates an incentive for Alaska to cooperate rather than compete with…American."[135] Accordingly, the parties committed to reducing the codesharing agreements between Alaska and American by about 50% and agreed to not sell certain takeoff and landing rights to American in the future.[136] Specifically, the parties agreed to prohibit Alaska from codesharing on routes where Virgin was previously a competitor, in addition to reducing reliance on codesharing overall.[137]

- ***Charter Communications/Time Warner Cable/Bright House Networks***
  On May 10, 2016, after almost a year-long review, the DOJ cleared the merger among three cable companies, Charter, Time Warner Cable (TWC), and Bright House Networks (BHN), with conditions.[138] DOJ alleged that the merger would bring together the second (Charter), third (TWC), and sixth (BHN) largest cable companies, who were also the sixth, fourth, and ninth largest multi-channel video programming distributors, respectively.[139] DOJ was concerned that the post-merger company would have the incentive and ability to harm online video distributors by forcing video programmers to accept restrictive contract provisions that limited their ability to license content to online video distributors.[140] Accordingly, the DOJ imposed behavioral conditions that prohibited the new company from entering or enforcing agreements with programmers that prohibited, limited, or disincentivized the licensing of television content to online video distributors.[141] The FCC also separately imposed conditions on the transaction, for example, requiring that the combined company make internet interconnections available on a non-discriminatory basis.[142]

DOJ Focus on Minority Interests and Governance Rights

The authorities will carefully scrutinize whether minority interests acquired as the result of a transaction have the potential for anticompetitive effects. In addition, acquiring rights to board seats or to nominate board members may raise issues under Section 8 of the Clayton Act, which prohibits a company's officers or directors from sitting on a competitor's board (also called interlocking directorates) in most cases. In one case from the past year (discussed below), the parties restructured their deal to eliminate both of these concerns.

Over the past year, some economists have posited a theory that overlapping minority holdings in the same industry by common owners may lead to competitive concerns.[143] While former DOJ Assistant Attorney General Bill Baer has said that DOJ is just beginning to consider whether current antitrust laws can reach these overlapping minority interests,[144] the *AMC Entertainment/Carmike Cinemas* remedy discussed above suggests that the risk of competitive harm from common ownership is being considered by DOJ. In that case, post-transaction AMC would have held minority interests and board seats on competing cinema advertising networks: 17% in NCM and 19% of Screenvision. DOJ alleged that AMC would potentially have had the incentive to reduce competition between NCM and Screenvision by seeing that one does not win contracts at the expense of the other or by having the opportunity to pass competitively sensitive information between the two.[145]

- ***Tullett Prebon/ICAP***
  On July 14, 2016, the DOJ conditionally cleared a transaction between Tullett Prebon and ICAP, two British securities brokers. Announced November 11, 2015, the transaction contemplated that Tullett Prebon would acquire ICAP's voice brokerage business, and in exchange, ICAP would receive a 19.9% stake in Tullett Prebon and the right to nominate one member of the Tullett Prebon board of directors.[146] In addition, ICAP shareholders were to receive a 36.1% stake in Tullett Prebon with existing Tullett shareholders owning 44 percent.[147] The DOJ alleged that the transaction would violate the Clayton Act § 8 prohibition against interlocking directorates, as the two companies would continue to compete against each other to offer electronic brokerage services while one would be empowered to appoint a member of the other's board.[148] The deal was restructured so that ICAP would not hold the right to a Tullett Prebon board seat and ICAP shareholders acquired the entire 56.1% stake in Tullett Prebon, with no shares to be held by ICAP itself.[149] This restructuring helped to resolve DOJ concerns regarding the potentially "cozy relationship among competitors."[150] In particular, the DOJ may have been concerned that ICAP's share in Tullett Prebon might have enabled ICAP to influence Tullett Prebon's competitive conduct, potentially have allowed Tullett Prebon to encourage ICAP to compete less vigorously against Tullett Prebon, or potentially permitted ICAP to access Tullett Prebon's competitively sensitive information.[151]

The Authorities Continue to Scrutinize Consummated Transactions

Antitrust issues can arise at any point in the life of a deal, including after it is consummated. While challenging a closed transaction is not a common occurrence, the authorities have challenged at least one consummated transaction in each of the last three years.[152]

- ***Valeant/Paragon Holdings** & **Valeant/Pelican Products, LLC***
  In May 2015, Valeant, the parent company of Bausch + Lomb, completed an acquisition of Paragon.[153] Both companies manufacture and sell gas permeable (GP) buttons, used to make rigid GP contact lenses.[154] In December 2015, Valeant also completed an acquisition of Pelican Products LLC,[155] the only producer of FDA-approved vials for wet-shipping finished orthokeratology lenses, a type of GP lens.[156] The FTC alleged that the combined Valeant/Paragon would control between 65-80% of the market for certain types of GP lenses.[157] On November 15, 2016, Valeant agreed to divest Paragon.[158] Valeant further agreed to divest the Pelican business, to ensure that Paragon would have access to FDA-approved vials for shipping GP lenses.[159]

Local and Regional Markets

The FTC and DOJ remain focused not only on mergers with a national impact, but also those that may reduce competition in local or regional markets.

- ***Clear Channel/Fairway Media***
  On December 22, 2016, the DOJ conditionally cleared an asset swap transaction between Clear Channel Outdoor and Fairway Media Group related to outdoor advertising displays in Atlanta and Indianapolis.[160] Both companies own and operate outdoor advertising displays across the United States.[161] The DOJ required the parties to divest 57 outdoor billboard assets in the Indianapolis and Atlanta metropolitan areas to ameliorate the alleged loss of competition in each area.[162]

- ***Koninklijke Ahold/Delhaize Group***
  On October 31, 2016, the FTC cleared the merger of grocery store operators Koninklijke Ahold and Delhaize Group after the parties agreed to divest 81 stores in 46 local markets.[163] The stores were divested to seven different buyers, identified by the FTC as "highly suitable purchasers that are well positioned to enter the relevant geographic markets."[164] The parties were required to complete the divestitures within a range of 60 to 360 days, which took into account the number of stores acquired by a particular divestiture buyer, and whether the buyer planned to make structural changes to the store locations.[165]

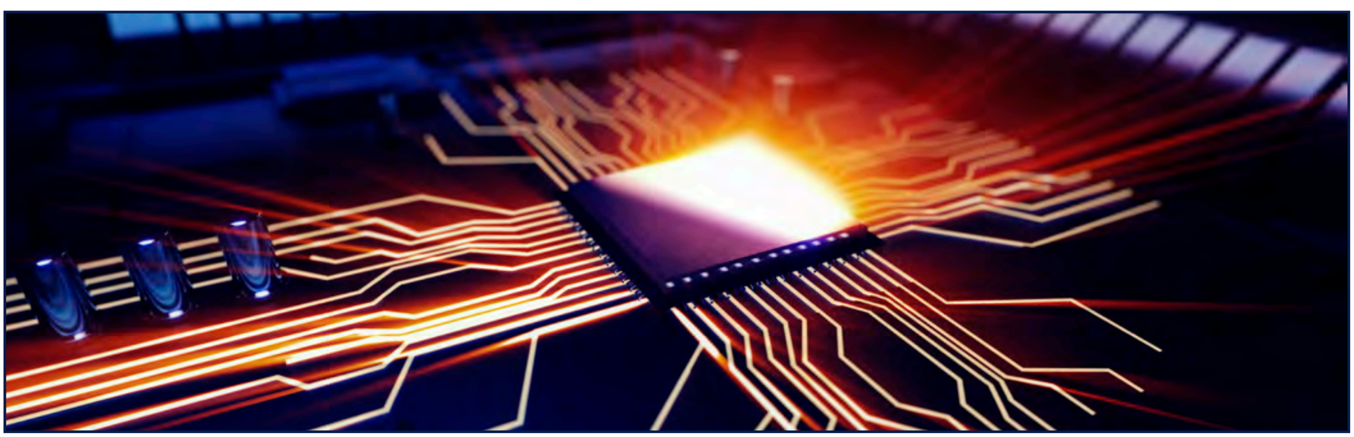
- ***Huntington Bancshares/FirstMerit***
  On July 13, 2016, the DOJ permitted the merger of two regional banks, Huntington Bancshares and FirstMerit, to proceed with conditions. Huntington is a diversified regional bank holding company based in Ohio with branches in Ohio, Michigan, Pennsylvania, Indiana, West Virginia, and Kentucky.[166] FirstMerit is a bank holding company based in Ohio with branches in Ohio, Michigan, Wisconsin, Illinois and Pennsylvania.[167] The DOJ required the parties to divest 13 bank branches in Northeast Ohio to competitor First Commonwealth Bank to restore competition.[168] Moreover, the DOJ required that any branches closed within two years of the transaction must be sold or leased to other FDIC-insured depository institutions that provide savings and loan services to small businesses.[169] This merger is also subject to approval by the Federal Reserve Board.[170]

- ***KeyCorp/First Niagara Financial Group***
  In another regional banking merger—this time in the upstate New York area—KeyCorp agreed to acquire First Niagara Financial Group for $4.1 billion to become the 13th largest US commercial

bank.[171] On April 28, 2016, after a six month review, KeyCorp/First Niagara agreed with the DOJ to divest 18 First Niagara branches near Buffalo, New York.[172] Just as in Huntington/First Merit, any branches that closed during the first two years post-transaction must be sold or leased to other depository institutions.[173] The DOJ touted the settlement as ensuring that Buffalo residents would "continue to enjoy the benefits of competition among banks with retail branch networks."[174]

- ***BBA Aviation/Landmark Aviation***
  On September 23, 2015, BBA Aviation agreed to acquire Landmark Aviation for $2.065 billion.[175] Both companies offered fix-based operator (FBO) services for private charter aircraft.[176] In particular, the DOJ noted that the transaction would eliminate FBO competition between the two parties at three airports (Dulles-IAD, Scottsdale-SDL, Fresno-Yosemite-FAT) and reduce the number of FBO competitors to only two at several other airports (Jacqueline Cochran Regional in Riverside County California-TRM, Westchester County Airport in New York-HPN, Anchorage-ANC).[177] Accordingly, the parties agreed to divest Landmark's FBO business at those six airports on February 3, 2016.[178] DOJ expressed the belief that these divestitures would preserve competition at the six airports.[179]

- ***HeidelbergCement/Italcementi***
  On June 17, 2016, the FTC cleared HeidelbergCement's acquisition of Italcementi with divestitures.[180] Both parties are engaged in the manufacture, import, and sale of portland cement.[181] The FTC alleged that the acquisition would reduce portland cement competitors from three to two in five municipal areas (Baltimore-Washington, Richmond, Virginia Beach-Norfolk-Newport News, Syracuse, and Indianapolis).[182] The FTC also noted that the local cement markets were "vulnerable to coordination," and that the transaction would "enhance the likelihood of coordinated interaction" among competitors.[183] On June 17, 2016, the parties agreed to divestitures consisting of (1) Italcementi's cement plant in Martinsburg, West Virginia, (2) Italcementi's cement distribution terminals and related assets across Maryland, Virginia, Pennsylvania, Ohio, and in Indianapolis, and (3) Heidelberg's distribution terminal near Syracuse.[184] The FTC also required the parties to divest, at the option of the divestiture buyer, two terminals in Ohio which historically were part of Italcementi's West Virginia cement operations.[185]



Communications & Technology Deals

As in 2015, the agencies closely scrutinized several mergers in the telecommunications industry and high-tech industries in 2016, approving several with divestitures and other remedies.

- ***Nexstar/Media General***
  On September 9, 2016, the DOJ cleared the merger of two broadcast television station owners, Nexstar and Media General, with conditions.[186] The DOJ alleged that the merger would eliminate competition between Nexstar and Media General for the sale of broadcast television spot advertising and the

retransmission of broadcast programming to television subscribers. In particular, the DOJ focused on six local markets, where the DOJ alleged the parties would have a combined market share of anywhere from 41-100%.[187] The parties agreed to divest seven television stations in six local markets to ameliorate the DOJ's concerns.[188]

- ***ON Semiconductor/Fairchild Semiconductor***
  ON Semiconductor and Fairchild Semiconductor were granted conditional approval by the FTC on August 25, 2016. The two companies manufacture insulated-gate bipolar transistors (IGBTs) used in automotive ignition systems for gasoline engines.[189] The FTC alleged that the combined sales of ON and Fairchild amounted to 60% of the IGBT market worldwide.[190] The merging parties agreed to divest ON's IGBT business to Littelfuse Inc., along with a variety of intellectual property rights, commercial contracts, and manufacturing support, and to provide Littelfuse the option of requesting a secondment of ON personnel to assist with the transition.[191]

Pharmaceuticals & Healthcare

And, as in years past, there were a number of healthcare and pharmaceutical transactions that required remedies.

- ***Boehringer Ingelheim/Sanofi***
  On December 28, 2016, the FTC cleared with conditions the $13.53 billion asset swap between pharmaceutical companies, Boehringer Ingelheim and Sanofi.[192] The companies agreed to exchange Sanofi's animal care subsidiary (Merial) for Boehringer Ingelheim's consumer health care unit and $5.54 billion in cash.[193] The swap would allow Boehringer Ingelheim to combine its existing animal health division (Vetmedica), which the FTC estimated as the sixth-largest animal health pharmaceutical supplier in the world, with Sanofi's animal health subsidiary (Merial), which is described as the fourth-largest animal health pharmaceutical supplier. The FTC alleged the transaction would reduce competition in the U.S. markets for canine vaccines, feline vaccines, rabies vaccines, parasiticides for cows, and parasiticides for sheep.[194] Boehringer Ingelheim agreed to divest its canine, feline, and rabies vaccines to Elanco (a global animal health company), and to divest its parasiticides to Bayer (a supplier of parasite control products to cattle and sheep farmers).[195]

- ***Mylan/Meda***
  The FTC, on September 7, 2016, cleared with conditions Mylan's acquisition of Meda, a fellow pharmaceutical company for $7.2 billion.[196] The FTC alleged that the transaction would harm competition for two generic drugs: generic felbamate, an epilepsy treatment, and generic carisoprodol, a muscle relaxer.[197] Specifically, the FTC alleged that post-merger, there would be only three manufacturers of generic felbamate.[198] The FTC also alleged that the transaction would eliminate

future competition between Mylan and Meda in the market for carisoprodol, as Mylan was poised to begin marketing carisoprodol in the United States.[199] The parties agreed to divest felbamate to Alvogen Pharma US and carisoprodol to Indicus Pharma.[200]

- ***Teva/Allergan***
  On July 27, 2016, pharmaceutical companies Teva and Allergan reached an agreement with the FTC regarding remedies that would permit their transaction to go forward.[201] Both companies manufacture generic drugs and active pharmaceutical ingredients (APIs), which are used by other companies to manufacture pharmaceuticals.[202] The FTC alleged that the merger would reduce current or future competition for 79 generic pharmaceutical products.[203] The FTC also alleged that the merger would increase Teva's incentive to withhold eight specific APIs from other manufacturers, to benefit fifteen newly acquired Allergan drugs.[204] The parties committed to divesting the rights and assets related to the 79 pharmaceuticals to 11 other companies.[205] Teva also agreed to offer its API customers long-term supply contracts for the eight APIs used to make drugs which would compete with Teva's newly acquired pharmaceuticals.[206]

- ***Lupin/Gavis Pharmaceuticals and Novel Laboratories***
  On February 19, 2016, the FTC permitted Lupin's acquisition of Gavis Pharmaceuticals and Novel Laboratories to proceed with certain conditions.[207] The FTC focused on generic doxycycline monohydrate capsules, an antibiotic used to treat bacterial infections, and generic mesalamine extended release capsules, used to treat ulcerative colitis.[208] The FTC alleged that the transaction would eliminate competition between Gavis and Lupin in generic doxycycline, and future competition between Lupin and Gavis in mesalamine capsules.[209] To ameliorate these concerns, the parties agreed to divest both drugs to G&W Laboratories.[210]

The Authorities Remain Focused on Future Competition and Innovation

The authorities have continued to focus on potential *future* competition between merging parties as innovation remains a key element of antitrust analysis.

- ***Abbott Laboratories/St. Jude Medical***
  On December 27, 2016, the FTC and Abbott Laboratories agreed to divestitures for Abbot's acquisition of St. Jude Medical to proceed.[211] The two medical device companies agreed to a $25 billion merger on April 28, 2016.212 The FTC alleged that the merger would harm competition in the U.S. market for vascular closure devices (which close holes in arteries created during the insertion of catheters)

and "steerable sheaths" (used to guide catheters during insertion).[213] To resolve the FTC's concerns, the parties agreed to divest Abbott's steerable sheath business and St. Jude's vascular closure devices to Terumo Corporation.[214] The FTC also alleged that the transaction would eliminate potential competition in the market for lesion-assessing ablation catheters, used to treat heart arrhythmias, as St. Jude is one of only two manufacturers of lesion-assessing ablation catheters, and Abbott had recently entered a strategic partnership with Advanced Cardiac Therapeutics (ACT) to develop a competing product. Accordingly, the FTC required Abbott to provide advance notice to the agency if it intends to acquire the catheter assets from ACT.[215]

- ***Energy Transfer Equity/Williams Corporation***
  On August 18, 2016, the FTC cleared the $37.7 billion combination of pipeline operators Energy Transfer Equity (ETE) and Williams Corporation with certain divestitures. The FTC alleged the transaction would result in consolidation of two of the three interstate pipelines servicing Peninsular Florida, and required ETE to divest ownership in a central and south Florida pipeline.[216] Additionally, one segment of Williams pipeline will be the sole access point for a pipeline planned for 2017 that will be operated by Sabal Trail, another competitor of ETE. The FTC alleged that following the transaction, ETE would have the incentive to forestall Sabal Trail's future capacity expansions in that segment, in order to benefit ETE's own pipelines.[217] Accordingly, the FTC further required that ETE extend Sabal Trail's capacity lease agreement, allowing Sabal Trail to request capacity expansions for an additional eight years, on top of the twelve years already contemplated by the lease agreement.[218] Despite reaching this agreement with the FTC, ETE terminated the transaction before the settlement and transaction were finalized.[219]

- ***Faiveley/Wabtec***
  On July 27, 2015, Westinghouse Air Brake Technologies Corporation (Wabtec) agreed to acquire Faiveley Transport and Faiveley Transport North America for $1.8 billion.[220] Faiveley (through a joint venture with Amsted Rail Company) and Wabtec both offer freight car brake components in the U.S. The DOJ alleged that the combined parties would control a market share of 41-96% in various freight car brake components, including hand brakes, slack adjusters, truck-mounted brake assemblies, empty load devices, and brake cylinders.[221] The DOJ further alleged that the transaction would eliminate future competition between the two parties in the market for freight brake control valves. Specifically, the DOJ characterized the market for brake control valves as a "century-old duopoly" between Wabtec and another supplier.[222] The DOJ noted that following a "lengthy and expensive development process," Faiveley had obtained conditional approval to sell its brake control valves, [223] and expected to fully commercialize the product in the next seven years.[224] Accordingly, on October 26, 2016, the parties agreed to divest Faiveley's interest in the U.S. freight car brakes business and rights in the brake control valve development project to Amsted Rail Company.[225]

- ***Hikma/Ben Venue & Hikma/Roxane***
  In February 2016, the FTC cleared Hikma's acquisition of drug assets from Ben Venue Laboratories and Roxane Laboratories (both owned by Boehringer Ingelheim Corporation) provided that Hikma divest a number of drug products, including several products where the FTC alleged that the transactions would eliminate future competition between the parties. For example, the FTC alleged that the transaction between Hikma and Ben Venue would lessen future competition in the markets for five injectable drugs, and required Hikma to divest Ben Venue's rights to these injectable drugs to preserve future competition.[226]

Similarly, the FTC alleged that the transaction between Hikma and Roxane would eliminate future competition for generic flecainide tablets, used for the treatment of bipolar disorder.[227] Roxane is currently one of four producers of generic flecainide.[228] Hikma owns the U.S. marketing rights to a generic flecainide product being developed by a third company, making it "one of the few suppliers that can enter the United States market in the near future," according to the FTC.[229] Accordingly, the FTC required Hikma to divest its future marketing rights for generic flecainide tablets to its drug development partner, Indian manufacturer Unimark Remedies, to maintain future competition in generic flecainide.[230]

The Authorities Aggressively Enforced the Hart-Scott-Rodino Filing Requirements

The Hart-Scott-Rodino (HSR) Act requires parties to a transaction meeting certain requirements to file notifications with the FTC and DOJ and comply with the statutory waiting-period requirements before closing.[231] In 2016, the antitrust agencies levied civil penalties against companies and individuals who failed to comply with the HSR Act, even in transactions that did not present substantive antitrust issues, in one case collecting a record $11 million. A few of last year's notable civil penalties include:

- ValueAct paid $11 million to resolve DOJ allegations that the company failed to comply with the HSR notification requirements when it purchased voting shares in Halliburton and Baker Hughes.[232]
- Investor Fayez Sarofim paid a civil penalty of $720,000 to resolve FTC allegations that he failed to file HSR notifications related to his acquisitions over the last ten years of stock of companies where he served on the board of directors.[233]
- Caledonia Investments paid a civil penalty of $480,000 after the company self-reported a failure to comply with HSR requirements in the acquisition of voting securities.[234]

Take-Aways from 2016 & Expectations for 2017

Antitrust enforcement in the United States during the Obama administration was active and aggressive. The DOJ and FTC demonstrated that they will carefully review transactions and use all available tools where they believe it is necessary to protect competition. The election of President Donald Trump will reshape the leadership at both the DOJ's Antitrust Division and the FTC, but antitrust merger enforcement has largely avoided the fray of politics in recent administrations. While Republican-led DOJ and FTC are likely to have a higher threshold for challenging deals than under the Obama administration, the same general approach and principles will apply. The antitrust authorities will continue to closely scrutinize transactions that present potential competitive concerns. Therefore, despite the change in leadership, the learnings of the past year can provide useful context as companies consider transaction in 2017 and beyond.

- The antitrust authorities take the HSR filing obligations seriously. In 2016, the authorities levied civil penalties against parties that failed to comply with the HSR filing requirements, including a record $11 million in one case, and there is no reason to expect that enforcement will decline in 2017.
- As the DOJ challenge to Halliburton/Baker Hughes demonstrated, the Obama administration closely scrutinized divestiture proposals and was willing to challenge transactions where it deemed the parties' proposals insufficient to quickly restore lost competition. While the new administration's approach to remedies is yet to be seen, parties should continue to expect scrutiny of divestiture packages and be prepared to defend their proposed remedies as sufficient to fully and effectively replace lost competition.
- 2016 saw a continuation of the antitrust authorities' willingness to litigate transactions that the merging parties were unwilling to remedy in a way that met the authorities demands, or that the authorities thought were unremediable. The agencies' success in court is likely to embolden the authorities to pursue tough cases regardless of the change in administration.
- The Trump administration has not identified many specific competition policy objectives, however President Trump has indicated an interest in promoting competition in the pharmaceutical and telecommunication industries.[235]

Endnotes

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38 Press Release, Dep't of Justice, Justice Department Files Antitrust Lawsuit to Stop L.A. Times Publisher from Acquiring Competing Newspapers (Mar. 17, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-la-times-publisher-acquiring-competing. Following this, the bankruptcy court approved the runner-up bid, by Digital First Media on March 21, 2016, and the DOJ did not challenge this sale. *See*, e.g., Status Report, *United States v. Tribune Publishing*, No. 2:16-cv-01822 (C.D. Cal. Apr. 1, 2016); Plaintiff's Notice of Bankruptcy Court's Selection of Alternative Purchaser, *United States v. Tribune Publishing*, No. 2:16-cv-01822 (C.D. Cal. Mar. 21, 2016); Press Release, Dep't of Justice, Bankruptcy Court Approves Alternative Purchaser of Orange County Register and Riverside Press-Enterprise (Mar. 21, 2016), *available at* https://www.justice.gov/opa/pr/bankruptcy-court-approves-alternative-purchaser-orange-county-register-and-riverside-press.

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208 *Id.*

209 Lupin Ltd., Gavis Pharmaceuticals LLC, and Novel Laboratories, Inc.; Analysis of Agreement Containing Consent Orders to Aid Public Comment, 81 Fed. Reg. 9467, 9469 (Feb. 25, 2016), *available at* https://www.ftc.gov/system/files/documents/federal_register_notices/2016/02/160225lupinfrn.pdf.

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