# 2017 US MERGER ENFORCEMENT YEAR IN REVIEW

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# Overview — 2017 Merger Enforcement Year in Review

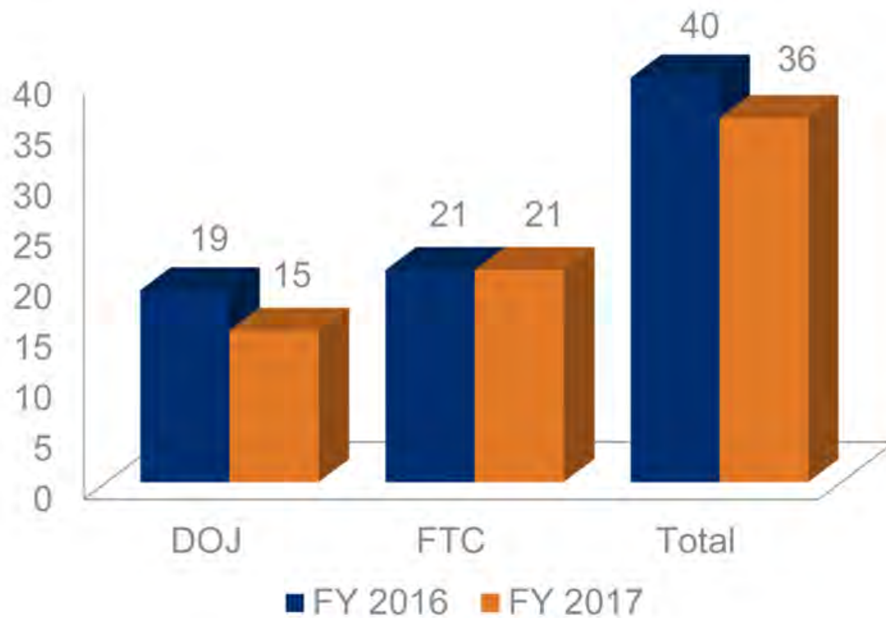
2017 was a year of transition for the antitrust agencies with new leadership for the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). These leadership changes took time with DOJ spending most of the year without a confirmed Assistant Attorney General until Makan Delrahim was confirmed on September 27, 2017. While Commissioner Maureen Ohlhausen took over as acting Chair of the FTC shortly after the inauguration, President Trump nominated the permanent Chair and three Commissioners only recently. As of the time of publication, the FTC still is operating with only two sitting Commissioners.

However, these transitions did not mean inaction. Antitrust enforcers have remained vigilant—through 2017 both the FTC and DOJ closely scrutinized transactions and intervened in an attempt to stop multiple transactions. States, like California and Washington, also exerted their antitrust enforcement authority, attempting to block transactions that the FTC chose not to take action against. And, the new leadership at DOJ has signaled an increased aggressiveness in evaluating vertical transactions and skepticism in accepting conduct remedies. While we likely need to wait until later this year to see if this represents a true policy shift, what else the new leadership at DOJ and the FTC have in store, and whether states will become more aggressive against transactions to fill any perceived voids by the federal authorities, 2017 provided a number of clues as to the future of antitrust policy in the coming years.

## 2017 By the Numbers

Merger activity continued to be strong and, as a result, 2017 remained a busy year for both the FTC and DOJ. While there was a slight drop-off in formal actions this past year, 2017 still saw near-record enforcement activity.

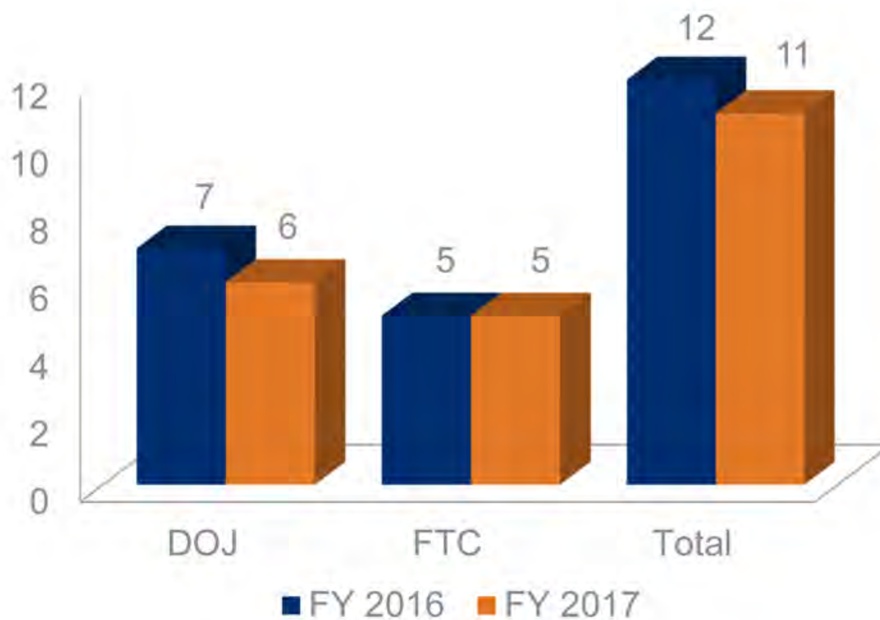
**Figure 1. Formal Actions Taken by U.S. Federal Antitrust Authorities 2017***




* These figures exclude filings made in opposition to mergers under review by other authorities (e.g., state attorneys general or FCC), one gun jumping challenge brought by the DOJ, and two challenges by the DOJ (acting on behalf of the FTC) enforcing the Hart-Scott-Rodino Act's filing requirements.

In 2017, the DOJ and FTC litigated six transactions and resolved an additional five merger challenges that were pending at the start of the year, for a total of eleven active litigations through the course of the year.

**Figure 2. Federal Court Challenges***




* These figures exclude filings made in opposition to mergers under review by other authorities (e.g., state attorneys general or the FCC), one gun jumping challenge brought by the DOJ, and two challenges by the DOJ (acting on behalf of the FTC) enforcing the HSR Act's filing requirements. These figures include one FTC district court victory currently under appeal.

# Litigations and Challenges to Deals

After years of vigorous merger enforcement by the Obama administration, we continued to see much of the same in 2017. The DOJ and FTC continued to challenge deals in court—and win. Transactions abandoned in the face of litigation provided additional victories for the authorities. Notably, the DOJ and FTC challenged several consummated deals (including one that received HSR approval), demonstrating the aggressiveness and seriousness with which the authorities are pursuing transactions they believe are likely to substantially lessen competition. Even the states got in on the action by independently challenging mergers in the hospital and energy sectors. While investigations for many of these transactions began under the Obama administration, most of these cases were filed by the Trump administration, which demonstrates that current authorities are just as serious about merger enforcement as their predecessors.

## The Authorities Challenged Several Consummated Transactions

Enforcement actions after a transaction has closed are relatively rare. But, 2017 saw a number of such challenges—including cases brought by new leadership at the DOJ and FTC. Importantly, these cases also highlight that even the expiration of the HSR waiting period may not mean the end of antitrust scrutiny.

***Otto Bock HealthCare/Freedom Innovations***

On December 20, 2017, roughly three months after the parties closed the transaction, the FTC issued an administrative complaint challenging the acquisition of Freedom Innovations, a manufacturer of lower limb prosthetics, by Otto Bock, a global provider of limb prosthetics, orthotics, mobility solutions, and medical care.[1] The FTC alleged that the acquisition reduced competition in the US market for microprocessor prosthetic knees, which adapt stiffness or positioning of the knee in response to different walking patterns and ground conditions.[2] In particular, the FTC claimed that the merger eliminated a significant and disruptive competitor in Freedom Innovations, which offered significant discounts and product upgrades that benefit amputees.[3] Moreover, the FTC claimed that timely entry by other competitors was unlikely because development of a microprocessor knee can take longer than two years.[4] While the case is pending, Otto Bock agreed to stop integration of the two companies and hold separate the Freedom Innovations business.[5]

***Parker-Hannifin/Clarcor***

Nearly nine months after the HSR waiting period expired and seven months after Parker-Hannifin Corporation closed its $4.3 billion acquisition of Clarcor Inc., DOJ challenged the transaction in the District of Delaware alleging that the acquisition substantially lessened competition for aviation fuel filtration systems.[6] While the

reason for the delayed challenge was not publicly disclosed, it is possible that customer complaints arose after HSR clearance.[7] In bringing its challenge, DOJ alleged that the parties were the only two domestic suppliers of the products at issue and that the transaction would result in higher prices, lower quality of service, and less innovation.[8] DOJ further alleged new and foreign entry was unlikely to mitigate any competitive issues due to the rigorous qualification process mandated in US aviation.[9] DOJ buttressed these allegations by pointing to internal Parker-Hannifin documents stating that there was a "notable area of overlap" between the two companies and stating that Parker-Hannifin was "preparing for the possibility" that it may have to "divest Clarcor's aviation ground fuel filtration" business.[10] Parker-Hannifin filed an answer on October 18, 2017 arguing that the acquisition was procompetitive and entry was likely.[11] Shortly thereafter Parker-Hannifin agreed to divest the business unit that included Clarcor's aviation fuel filtration assets.[12]

### *TransDigm Group Incorporated/Takata Corporation*

On February 22, 2017, TransDigm Group Incorporated acquired two Takata Corporation subsidies, SCHROTH Safety Products GmbH and Takata Protection Systems, Inc. (collectively "SCHROTH"), for $90 million.[13] The transaction was not reportable under the HSR Act due to the structure of the deal.[14] Ten months after the deal closed, the DOJ filed suit to force a divestiture alleging that prior to the merger, TransDigm's AmSafe subsidiary was the only meaningful competitor to SCHROTH in the market for commercial aviation restraint systems.[15] The DOJ also pointed to high barriers preventing new competitors from entering the market, such as technical expertise and complex certification requirements.[16] To resolve the DOJ's concerns, TransDigm agreed to divest the entirety of SCHROTH to a consortium of private equity funds.[17]

### *Mallinckrodt ARD Inc./Novartis AG*

In January 2017, Mallinckrodt paid $100 million to settle FTC allegations that it illegally maintained a US pharmaceutical monopoly by acquiring the US rights to a potential entrant's product.[18] Mallinckrodt has long sold Synacthen, the only US adrenocorticotropic hormone (ACTH) drug used to treat infantile spasms, nephrotic syndrome, and other disorders.[19] Outside the U.S., Novartis AG sold a synthetic ACTH drug at a lower price point.[20] Novartis accepted bids for the US rights to its ACTH drug in 2013[21] and Mallinckrodt won the bidding process, beating several competitors. The FTC alleged under a monopolist theory that these other bidders were interested in bringing the drug into the US to compete with Mallinckrodt and that Mallinckrodt's purchase harmed competition by preventing such entry.[22] "Even without alleging that Synacthen was 'likely' to clear all regulatory and other hurdles to reaching the market, the Commission nevertheless alleged that the acquisition violated Section 2 of the Sherman Act."[23] Mallinckrodt settled the dispute by paying $100 million and agreeing to license the US rights to synthetic ACTH to an approved licensee.[24] The FTC originally approved Marathon Pharmaceuticals, but Marathon spun off its ACTH business to West Therapeutic Development over the course of 2017.[25] The FTC approved West as a replacement sublicensee on July 14, 2017.[26]

## A Number of Transactions Were Abandoned in the Face of Litigation

Protracted antitrust investigations and litigation can add significant burdens and delays to closing a transaction. After long investigations and the threat of litigation, a number of parties abandoned their merger when confronted with the possibility of litigation to enjoin the transaction.

### *DraftKings/FanDuel*

DraftKings and FanDuel, which both offer daily, weekly, and season-long sports fantasy contests in various sports, announced their merger in November of 2016.[27] The FTC filed suit to block the transaction in June 2017, alleging that the combined firm would have controlled more than 90% of the US market for paid "daily fantasy sports" (DFS) contests.[28] The parties argued that neither company was profitable at the time of the

merger[29] and the businesses competed with "many fantasy sports, sports entertainment, and other gaming and recreation companies."[30] However, the FTC's challenge hinged upon the distinction between paid DFS contests where customers build a new fantasy team each day as opposed to paid season-long fantasy sports (SLFS) contests.[31] The FTC alleged that DFS consumers are unlikely to view SLFS contests as a meaningful substitute to paid DFS, due to differences in contest duration, limitations on the number of entrants, athlete exclusivity in SLFS contests, and differences in entry fees and other financial incentives.[32] For instance, the FTC alleged that SLFS participants play primarily for social reasons whereas DFS participants are more motivated by instant gratification and large prizes.[33] Moreover, with respect to the parties' arguments about their lack of profits, the FTC noted that they were "relatively young companies…striving toward profitability."[34] Further, the FTC's complaint used internal DraftKings documents to describe the company's strategy as trying to "fight tooth and nail to attract customers" and to "put a 'foot on [FanDuel's] throat and press down hard,' and 'don't let up until they stop breathing.'"[35] Just about a month after the FTC and the Attorneys General of California and DC filed for a preliminary injunction, the parties abandoned the transaction.[36]

### *Deere/Precision Planting*

On August 31, 2016, the DOJ filed suit to enjoin Deere & Company's (Deere) proposed acquisition of Precision Planting LLC, a subsidiary of Monsanto Company (Monsanto), despite having previously cleared the transaction under the HSR Act.[37] Deere manufactured a broad line of heavy equipment, including planters, while Precision Planting manufactured precision equipment components to retrofit conventional planters and other agricultural equipment.[38] DOJ alleged that Deere and Precision Planting both sold "high-speed precision planting systems" (HPPS)[39] with a post-transaction US market share of 86%.[40] The complaint alleged the transaction could lead to higher prices and less innovation in precision planting technology.[41] Although the parties contended that HPPS was not an appropriate relevant market and that the parties' products were different in terms of "price, compatibility, features, and grower demand"[42] such that they were not significant competitors, they abandoned the transaction on May 1, 2017 before the case went to trial.[43] Later in 2017, Monsanto sold Precision Planting to AGCO, a global agricultural equipment manufacturer, after obtaining necessary regulatory clearances.

## Authorities Continued to Win in Court

As in prior years, the authorities continued to notch substantial victories in the courtroom, with the FTC and DOJ each winning a case at trial as well as a case on appeal for a total of four victories in 2017.

### *Sanford Health/Mid Dakota*

On June 22, 2017, the FTC and North Dakota filed a complaint seeking a temporary restraining order and preliminary injunction to block Sanford Health's proposed merger with Mid Dakota Clinic, P.C. (MDC).[44] The FTC alleged that Sanford Health and MDC are each other's closest rivals in the four-county Bismarck-Mandan region of North Dakota and would create a group of physicians with at least 75 to 85 percent share in the provision of adult primary care, physician care, pediatric services, obstetrics, and gynecology and a monopoly in general surgery.[45] On December 14, 2017, the Court granted a preliminary injunction, temporarily blocking Sanford Health's proposed acquisition of Mid Dakota Clinic.[46] The Court concluded that the proposed transaction was anticompetitive, relying heavily on the FTC's expert witness testimony that the transaction would increase concentration in the provision of the four medical services in the Bismarck-Mandan region.[47] The two hospital networks argued that the transaction would allow the combined entity to add new services in the areas of reproductive medicine, urogynecology, pediatric endocrinology, pediatric gastroenterology, and pediatric neurology, as well as increased clinical trials.[48] However, the Court was not persuaded the

claimed efficiencies would offset the potential price increase predicted by the FTC's expert.[49] The parties have appealed the district court order.[50]

### *Energy Solutions/Waste Control Specialists*

On June 21, 2017, the US District Court for the District of Delaware enjoined the proposed $367 million acquisition of Waste Control Specialists (WCS), a domestic provider of low-level radioactive waste disposal services, by EnergySolutions, a global nuclear services company.[51] DOJ challenged the transaction, alleging that EnergySolutions and WCS were the only two providers of low-level radioactive waste disposal in 36 states,[52] with entry highly unlikely because of regulatory barriers.[53] The District Court agreed with DOJ and found that the parties offer "reasonably interchangeable" services and products, such that the acquisition would substantially lessen competition.[54] The parties attempted to demonstrate that WCS was a failing firm by showing that it never made an operating profit due to high fixed costs associated with regulatory mandates, a reduction in the volume of low-level radioactive waste, and rising costs.[55] However, DOJ argued that WCS had not defaulted on its debt, was current on lease payments and payroll, had executed several long-term contracts, invested in future growth opportunities, and had a revolving credit facility with its parent company, Valhi.[56] Without reaching the question of whether WCS was actually failing, the Court rejected the defense when it agreed with DOJ's argument that WCS did not demonstrate EnergySolutions was the only available purchaser (especially in light of the fact that WCS engaged with only one other potential bidder, did not actually inform that bidder of the sales process, and ended discussions with that potential bidder before a bid was made).[57] Following the court decision, EnergySolutions and WCS abandoned the acquisition, and WCS continues to seek a new buyer.[58]

### *Anthem/Cigna*

On April 28, 2017, almost two years after the merger was announced, the DC Circuit Court of Appeals upheld the District Court's decision to enjoin the merger between health insurance providers Anthem and Cigna.[59] The DOJ filed suit to block the merger, alleging that the transaction would lessen competition in (1) national health insurance accounts, (2) at least 35 local commercial markets, and (3) public exchanges in several locations.[60] The District Court blocked the merger on February 8, 2017, finding—without reaching the other claims—that the merger would likely reduce competition in the health insurance markets for national accounts and for large group employers in Richmond, Virginia.[61] Anthem appealed this decision and argued that the District Court failed to adequately consider the parties' efficiencies defense, which claimed that the merger would result in $2.4 billion of medical cost savings, 98% of which would be passed on to customers.[62] The Court of Appeals rejected this argument and concluded that Anthem's cost saving calculations were speculative —they assumed the combined company would actually succeed in renegotiating for lower provider rates, and pass the savings from lower provider rates along to customers.[63] Therefore, the Court of Appeals held that it was not an abuse of discretion for the District Court to fail to credit Anthem's efficiencies argument.[64] On May 12, 2017, Anthem terminated the proposed transaction.[65]

### *Advocate/NorthShore*

While the US District Court for the Northern District of Illinois originally denied the preliminary injunction sought by the FTC to stop the merger of two hospital systems in the Chicago area, the FTC appealed that decision to the Seventh Circuit and eventually prevailed on remand.[66] This fight centered on the geographic definition for inpatient hospital services.[67] 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.[68] While the District Court was troubled that the FTC's expert witness excluded from the proposed geographic market nearby "destination hospitals" to which some patients from the Chicago area would travel, the Seventh Circuit

found that the geographic market definition should focus on insurers rather than patients, because "insured patients are usually not sensitive to retail hospital prices, while insurers respond to both prices and patient preferences."[69] Thus, the Seventh Circuit focused on testimony by insurers that supported the FTC's argument that Advocate and NorthShore hospitals were necessary for insurance networks to compete for employer plan contracts in the Chicago area.[70] On remand, the District Court applied the Circuit Court's reasoning regarding an insurer-centric analysis and upheld the FTC expert's market definition.[71] While the defendants had argued that the FTC expert still relied upon measures of patient substitution, the District Court concluded that the Circuit Court decision did not mean that patient choices are irrelevant, but that the data must be interpreted through the lens of an insurer.[72] Advocate and NorthShore abandoned their attempted merger after the adverse ruling, and the FTC dismissed the administrative complaint on March 20, 2017.[73]

### *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.[74] Over a year later, the DOJ filed suit in the District Court for the District of Columbia to block the merger.[75] 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.[76] The DOJ also alleged that the merger would reduce competition on the public healthcare exchanges in at least a hundred counties.[77] 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.[78]

## State Enforcement Agencies Also Challenged Transactions

Even where the FTC or DOJ declines to take action, state attorneys general, as well as private litigants, may bring claims that a transaction violates the antitrust laws. While it is not common for states to go it alone, these cases serve as an important reminder that companies should consider whether a transaction raises state-specific issues and whether there are risks that a state may bring a challenge (even if the federal authorities do not).

### *Franciscan Health System/WestSound Orthopedics & The Doctors Clinic*

On August 31, 2017, the State of Washington filed suit in federal court to force contract rescission and profit disgorgement, along with other penalties, in connection with Franciscan Health System's July 2016 acquisition of WestSound Orthopedics.[79] Washington alleged that the acquisition of WestSound's assets had reduced price competition, quality of care, and consumer choice in the orthopedic care market in Washington (specifically on the Kitsap peninsula)[80] and presented evidence that Franciscan described the merger as "eliminat[ing]…the competitive threat" of WestSound.[81] In the complaint, Washington also challenged as per se price fixing a separate agreement between Franciscan Health System and a second medical practice, The Doctor's Clinic (TDC),[82] under which Franciscan acquired ancillary surgical imaging and lab services in exchange for TDC receiving Franciscan's negotiated reimbursement rates with healthcare payers.[83] Washington treated the TDC transaction as a conspiracy to fix prices rather than a merger because it argued that TDC remained an independent entity, with separate liability insurance, protocols, directors, employers, and records whereas WestSound did not.[84] Washington cited internal emails from Franciscan executives that appear to acknowledge that customers will be harmed by the TDC agreement.[85] Notably, neither of the agreements was HSR reportable, and the FTC has not weighed in on the matter.[86] The case is scheduled for trial on March 19, 2019.

### *Valero/Plains All American Pipeline, L.P.*

While the FTC investigated Valero Energy Corporation's proposed acquisition of two northern California bulk petroleum terminals from Plains All American Pipeline, L.P., and took no action,[87] the State of California filed suit on July 10, 2017. Valero, a diversified energy company that refines crude oil,[88] was attempting to acquire what California alleged was the "only independent terminal owner in the Bay Area."[89] As a result, California argued the transaction would allow Valero to restrict access to the terminals or coordinate with other vertically integrated refiners to increase fuel prices.[90] The US District Court for the Northern District of California, while rejecting the state's motions for a temporary restraining order and preliminary injunction against the acquisition, stated that California had raised "serious questions" about the possible anticompetitive effect of the transaction.[91] The parties subsequently abandoned the transaction, and on October 12, 2017, a federal court in the Northern District of California entered a stipulated order that enjoined Valero from seeking to acquire these terminals for a period of ten years.[92]

## More Challenges are Pending

Two additional transactions were challenged in the latter half of 2017 in cases that remain pending. While the outcomes are yet to be determined, these cases demonstrate that the new administrations at the FTC and DOJ are just as willing as their predecessors to litigate.

### Tronox/Cristal

On December 5, 2017, the FTC filed an administrative action to enjoin Tronox Limited's $1.67 billion acquisition of Cristal.[93] The FTC did not, however, seek a preliminary injunction. In a separate federal court complaint alleging that the FTC has not sought a preliminary injunction in order to exhaust the remaining time before the underlying agreement expires,[94] Tronox claimed that the FTC stated it was waiting for the EU to finish its review of the transaction.[95] On the substance, the FTC alleged that the acquisition would merge two of the three largest manufacturers of titanium dioxide (TiO2), and result in a combined 80% share of the North American "chloride process" TiO2 market.[96] In its complaint, the FTC alleged not only that the transaction would enhance the likelihood of coordinated effects, but also that Tronox would be able to restrict supply of TiO2, which the FTC argues Tronox already does and would do more effectively given the market power it would have post-transaction.[97] Trial is scheduled to begin on May 8, 2018.[98]

### *AT&T/Time Warner*

On November 20, 2017, DOJ filed suit to enjoin AT&T's $108 billion acquisition of Time Warner Inc.[99] Although AT&T and Time Warner do not compete with each other, the DOJ has claimed that this vertical transaction would lead to increased prices for Time Warner's networks to video distribution providers that compete with AT&T and to slow the adoption of new distribution models.[100] The case is pending before the District Court of the District of Columbia, with trial set for March 2018.

# Notable Mergers Closed Without Conditions

Vigorous antitrust enforcement does not mean that all transactions will be blocked or require conditions. In 2017, the antitrust authorities cleared many transactions unconditionally, several of which are discussed below.

***Walgreens/Rite Aid***

In October of 2015, Walgreens announced its intent to acquire the entire Rite Aid business for $17.2 billion.[101] After over a year of the FTC investigating, in an apparent attempt to satisfy the FTC's concerns, Walgreen's and Rite Aid announced the divestiture of 865 Rite Aid stores to Fred's Pharmacy.[102] The parties subsequently increased the divestiture package to 1,200 Rite Aid locations in early 2017.[103] However, the FTC appeared skeptical about the financial health of Fred's and concerned that the divestiture package would not allow Fred's to become a viable national competitor.[104] In the face of FTC opposition, in September 2017 the parties abandoned the original transaction and announced a new agreement in which Walgreens would acquire only 1,900 stores and three distribution centers.[105] In an unusual one-to-one vote that was insufficient to authorize a Second Request on the restructured transaction, the transaction was allowed to proceed without remedies. In her statement on the matter, Acting Chairwoman Ohlhausen wrote that the revised transaction preserved Rite Aid's independence in those local markets where Rite Aid had a "meaningful presence," the transaction allowed Walgreens to acquire stores only where "competition between the two firms is not significant," and no further information could be gathered by launching a second investigation.[106] Commissioner McSweeny, on the other hand, issued a statement objecting to the FTC's allowing the waiting period to expire without issuing a Second Request or requiring remedies for the revised transaction.[107]

***Amazon/Whole Foods***

On August 23, 2017, the Acting Director of the Bureau of Competition of the FTC (in an unusual step) issued a statement announcing the closing of the investigation of Amazon's acquisition of Whole Foods.[108] The deal generated a significant amount of interest, and numerous senators and advocacy groups raised concerns related to the transaction that extended beyond the competitive implications of the specific transaction.[109] However, the FTC focused its analysis on whether there would be anti-competitive effects from the transaction and concluded there would not, granting the merging parties early termination for the HSR waiting period only a few months after the acquisition was announced.

### *JAB/Panera Bread Company*

JAB Consumer Fund and JAB Holding Company (collectively JAB) acquired bakery/cafe Panera Bread Company on July 18, 2017 for $7.5 billion.[110] JAB holds controlling stakes in Peet's Coffee & Tea and fast-casual restaurant chain Einstein Bagels.[111] A competitor café company, Great Harvest Bread, which serves Peet's branded coffee, expressed concerns to the FTC and DOJ that the combined company might restrict Great Harvest Bread's access to Peet's branded coffee in an effort to benefit Panera Bread Company.[112] Despite this complaint, the authorities ultimately determined that the transaction did not raise competitive concerns and let the HSR waiting period expire. The merger closed in July 2017.[113]

# Divestitures & Consent Decrees

The vast majority of transactions that raise antitrust issues are resolved with a remedy—typically divestiture—that allows the transaction to proceed. These negotiated resolutions often can provide valuable insight into what the agencies will require to resolve the competitive concerns raised by a transaction.

## Minority Interests

Minority interests held in competing companies may raise competitive concerns. In particular, the antitrust analysis involving minority interests typically will examine whether (1) the acquirer will have influence over the conduct of the target firm; (2) there will be reduced incentives to compete; and (3) there will be access to competitively sensitive information.

### *Red Ventures/Bankrate Inc.*

Bankrate Inc., the owner of Caring.com, and Red Ventures Holdco announced their intended $1.4 billion merger on July 2, 2017.[114] General Atlantic, LLC and Silver Lake Partners, LP owned approximately 34% of Red Ventures with each having the right to one board seat and approval rights over two additional seats.[115] As a result of the transaction, General Atlantic and Silver Lake, which already owned A Place For Mom (APFM), would also own a stake in Caring.com. APFM and Caring.com are two of the largest internet-based third-party paid referral services for senior living facilities.[116] The FTC alleged that Caring.com and APFM are each other's closest competitors for national referral business,[117] with only "a fringe of small regional and local companies,"[118] each with a "negligible share of the relevant market."[119] The FTC alleged that because General Atlantic and Silver Lake "are both active investors with board representation on, and other substantial rights over, Red Ventures," the firms would be able to "exercise influence or control" over Caring.com post-merger,

in order to benefit the firms' wholly owned APFM.[120] The parties agreed with the FTC to divest Caring.com no later than six months after the acquisition and provide transitional services to the acquirer.[121] The transaction closed on November 8, 2017.[122]

## The Failing Firm Defense

Under the Horizontal Merger Guidelines, a transaction that raises some antitrust concern may be allowed to go forward if the facts demonstrate that the target is failing and would exit the market absent the transaction. The FTC and DOJ have a high bar for such a defense and require a showing of the following three elements: (1) the target must be financially failing in the short term; (2) it cannot successfully reorganize through bankruptcy; and (3) a good faith effort has been made to find less anticompetitive buyers.[123]

This past year saw a number of cases where the parties claimed their financial challenges weighed in favor of their merger. The EnergySolutions litigation (discussed above) illustrated some of the difficulty for merging parties in making this argument. And a number of other transactions discussed below provide additional insight related to the difficulty of successfully arguing this defense.

### Chicago Sun-Times/ST Acquisition Holding

On May 15, 2017, DOJ announced that it was investigating the non-HSR reportable proposed acquisition of Chicago Sun-Times by tronc, Inc., the owner of the Chicago Tribune.[124] Given that Chicago Sun-Times was losing approximately $4.5 million per year even after being saved from bankruptcy in 2009, DOJ's investigation focused primarily on whether the Sun-Times was a "failing firm."[125] However, before DOJ had finished review of the proposed acquisition by tronc, Inc.,[126] an alternative buyer emerged. ST Acquisition Holdings LLC, which does not own an interest in any other newspaper,[127] agreed to buy Chicago Sun-Times for $1, after raising $11 million to cover the projected losses for the next thirty months.[128] DOJ subsequently closed its investigation on July 12, 2017[129] and stated that it "encourages firms whose non-reportable transaction relies on a failing firm defense to: (i) inform the Division about the proposed transaction prior to consummation; (ii) allow for sufficient time for the Division to conduct a thorough investigation, which may decrease the possibility of a precipitous enforcement action; and (iii) plan in advance for the costs of undergoing such an investigation."

### *CentraCare Health/St Cloud Medical Group*

On January 9, 2017, the FTC approved a final order with respect to the acquisition of St. Cloud Medical Group (SCMG), a physician-owned, multi-specialty practice group, by CentraCare Health, a non-profit health system in central Minnesota.[130] The FTC's complaint alleged that the planned acquisition of SCMG would have combined the two largest providers of adult primary care, pediatric, and OB/GYN services in the St. Cloud area and increased CentraCare's bargaining power over commercial health plans, allowing it to raise reimbursement rates and secure more favorable terms.[131] The FTC, however, accepted the parties' arguments regarding St. Cloud's financial state and its inability to find an alternative acquirer. It therefore allowed the transaction to proceed provided that CentraCare: (1) release up to fourteen adult primary care, pediatric, and OB/GYN physicians from "non-compete" contract clauses and (2) make sizeable departure payments to the first five physicians who leave either to create a new medical practice or join a small third-party medical practice in the St. Cloud area.[132] The FTC stated that allowing the transaction to go forward with these provisions was premised "on the fact that SCMG is a financially failing physician practice group that has been unable to find an alternative purchaser for the entire practice as well as concerns regarding disruptions to patient care and possible physician shortages."[133] Commissioner Ohlhausen issued a concurring statement conceding that the merger was necessary given the company's financial challenges and physician

attrition. However, Commissioner Ohlhausen ultimately did "not believe SCMC meets the stringent failing firm criteria set forth in the Horizontal Merger Guidelines...."[134]

## Entry Considerations

Parties often make arguments that new entry will replace any lost competition. And while such arguments can be effective, they are potentially complicated in some industries by high barriers to entry, such as specific customer qualification requirements or even required government certifications.

### *SGL/SDK*

On October 20, 2016, Showa Denko K.K. (SDK) entered into a $264.5 million agreement to acquire SGL Carbon SE (SGL).[135] SDK and SGL both produce graphite electrodes, which are used to melt scrap steel in electric arc furnaces at steel mills.[136] DOJ alleged that SDK and SGL were two of only three primary sellers of large ultra-high power graphite electrodes in the US, and that the transaction would result in an entity with 56 percent of the US market for graphite electrodes.[137] DOJ also alleged that there were high barriers to entry in the US market, preventing global competitors from replacing competition lost through the merger.[138] In particular, the DOJ noted the high barrier to entry in terms of cost and time required to build a manufacturing center, acquire the technical expertise, and develop the local infrastructure for reliable delivery and deployment, as well as pass the lengthy qualification process for customers.[139] As a result, DOJ required SDK to divest SGL's entire US graphite electrode business.[140]

### *Emerson Electric Co.& Westlock (Pentair plc)*

In order for Emerson Electric Co. to complete its $3.15 billion acquisition of the valves and control business of Pentair plc, the FTC required the parties to divest Pentair's Westlock subsidiary.[141] Emerson and Pentair are both manufacturers of industrial valves and control products, including switchboxes used to monitor and control valves that regulate the flow of industrial liquids and gases.[142] The FTC alleged that the proposed acquisition would combine the two largest and most widely accepted switchbox suppliers in the United States to create an entity with approximately 60 percent of the switchbox market.[143] Additionally, the FTC noted that it was concerned that new entrants into the market were unlikely due to the rigorous product testing and customers' demand for an established and trustworthy brand for such a critical component.[144] Ultimately, Emerson agreed to divest Pentair's Westlock subsidiary to Crane Co., a supplier in the US industrial valves market[145] with "substantial US infrastructure and customer base, including many of the same customers as Westlock, and pre-existing relationships with many of Westlock's distributors."[146]

### *Smiths/Morpho*

Smiths is a global technology company that designs, manufactures, and sells products for healthcare, energy, and telecommunications industries (including threat and contraband detection products).[147] Morpho designs, manufactures, and sells two types of threat and contraband detection products: computed tomography explosive detection systems and desktop explosive trace detection (ETD) devices.[148] On April 20, 2016, Morpho agreed to Smith's $710 million acquisition.[149] DOJ investigated the transaction and concluded that Smiths and Morpho were two of only three significant providers of desktop ETD products and services used to detect traces of explosives or drugs during airport screenings or at other high-risk locations in the US.[150] Moreover, DOJ found entry into this market is particularly difficult because it requires TSA qualification, which can take up to two years.[151] As a result, the parties agreed to divest Morpho's ETD business in order for the transaction to proceed.[152]

## Information Sharing Concerns

In certain cases, the antitrust authorities may be concerned that a transaction provides a company access to certain competitively sensitive information that could lead to competitive issues. For example, an increased flow of competitively sensitive information might increase the risk of collusion in the impacted industry. Or, a company might obtain access to a competitor's confidential information if it acquires the competitor's supplier. Merger settlements this year illustrated that there are several ways the authorities may seek to limit antitrust risk associated with information sharing concerns, ranging from behavioral remedies (such as firewalls or information restrictions) to divestitures.

### *Broadcom Limited/Brocade Communications Systems, Inc.*

On November 2, 2016, Broadcom announced its proposed $5.9 billion acquisition of Brocade Communications System.[153] The FTC alleged that Brocade, along with Cisco Systems (not involved in the transaction), are the only two worldwide competitors for fibre channel switches.[154] Broadcom supplied both companies with application specific integrated circuits (ASICs) to make those switches.[155] As a result of the transaction, the FTC believed that Brocade would now have access to Cisco's competitively sensitive information given the supply relationship with Broadcom such that Brocade could increase prices for fibre channel switches.[156] To address the FTC's concerns, Broadcom agreed to conditions that required it to "implement firewalls preventing the flow of Cisco's confidential business information outside a group of relevant Broadcom employees."[157] Specifically, the order requires "Broadcom's business group responsible for developing, producing, selling and marketing fibre channel ASICs for Cisco to have separate facilities and a separate information technology system with security protocols that allow access only to authorized individuals, and provides for other information firewall protections."[158] The FTC also appointed a monitor to assure compliance.[159] The deal closed on November 17, 2017.[160]

### *Danone/WhiteWave*

On July 7, 2016, Danone S.A. agreed to acquire WhiteWave Food Company Inc. for $12.5 billion.[161] Danone is a leading US manufacturer of organic yogurt, and WhiteWave is a leading US manufacturer of fluid organic milk.[162] Danone also had a strategic partnership with CROPP Cooperative, another organic milk manufacturer that was a competitor of WhiteWave, involving two long-term agreements: (1) an agreement to supply Danone's organic yogurt subsidiary, Stonyfield, with almost all of its organic milk needs and (2) an exclusive license agreement whereby CROPP produces and sells Stonyfield branded milk.[163] In what the DOJ believed to be a highly concentrated organic milk market, the DOJ alleged that Danone-WhiteWave and CROPP would have reduced incentives to compete because of their aligned interests regarding the Stoneyfield brand and the supply agreement.[164] Moreover, DOJ believed that the transaction would provide increased opportunity for Danone and CROPP to strategize and coordinate marketing, exchange confidential information, and provide incentives for less aggressive competition in the recruitment and retention of organic farmers and customers, in much the same way that Danone previously coordinated with CROPP.[165] As a result, for the transaction to proceed, DOJ required Danone to divest its Stonyfield business, which resulted in severing Danone's strategic partnership with CROPP.[166] The merger closed on April 12, 2017.[167]

### *Enbridge Inc./Spectra Energy Corp.*

On September 5, 2016, Enbridge agreed to acquire Spectra Energy Corp., a competing energy infrastructure company, for $28 billion.[168] The FTC alleged that the merger would give Enbridge an ownership interest in the two closest and lowest-cost pipelines that transport oil and gas from many Deepwater Outer Continental Shelf oil and gas leasing exploration blocks.[169] Enbridge was the owner and operator of the Walker Ridge

Pipeline in the Gulf of Mexico, while Spectra indirectly owned a 40% interest in the Discovery Pipeline,[170] also located in the Gulf of Mexico. The FTC believed that Enbridge's acquisition of the minority ownership interest in the Discovery Pipeline would (1) give Enbridge the incentive and ability to reduce the competitiveness of the Discovery Pipeline through its voting rights, and (2) increase the likelihood of coordination between the Walker Ridge Pipeline and the Discovery Pipeline by allowing Enbridge to access Discovery Pipeline's competitively sensitive information.[171] As a result, Enbridge agreed to establish firewalls to limit its access to non-public information about the Discovery Pipeline as well as to have board members of the Spectra-affiliated companies that hold a 40 percent share in the Discovery Pipeline recuse themselves from any vote involving the pipeline.[172] The FTC also appointed a monitor to oversee the firewall provisions.[173]

## Local/Regional Competitive Impact

The FTC and DOJ remain focused not only on transactions with national implications, but also on matters that may impact competition in local or regional areas.

### *Alimentation Couche-Tard (ACT)/CST Brands*

Gasoline and diesel fuel retailers Alimentation Couche-Tard (ACT) and CST Brands announced their $4.4 billion merger on August 22, 2016.[174] The companies operated in many of the same areas, and the FTC found that the transaction would result in significantly increased market concentration in 71 local markets, including a monopoly in ten markets, and leave only two or three competitors remaining in a number of additional markets.[175] As a result, the FTC contended that ACT could raise price unilaterally in markets where CST is ACT's closest competitor and/or there would be an increased likelihood of coordinated efforts where only a handful of competitors would remain.[176] To resolve these concerns, ACT agreed to divest up to 70 CST fuel stations in Arizona, Colorado, Florida, Georgia, Louisiana, New Mexico, Ohio, and Texas to Empire Petroleum Partners, and provide Empire the option to acquire an additional storm-damaged location in Albany, Georgia.[177] If Empire declines to exercise the option, ACT is prohibited for ten years from restricting the use of the Albany, Georgia property as a retail fuel outlet in any future sale.[178]

### *Alimentation Couche-Tard Inc. (ACT)/Jet-Pep, Inc.*

Three months later, on November 22, 2017, ACT agreed to divestitures related to its $72 million acquisition of Jet-Pep, another operator of fuel outlets with convenience stores.[179] Even though the acquisition was not reportable under the HSR Act, the FTC required divestitures in three local areas in Alabama where the transaction would reduce the number of competitors in the retail sale of gasoline and diesel to three or fewer.[180]

### *Alimentation Couche-Tard (ACT)/Holiday Companies*

In yet another transaction, on December 15, 2017, ACT agreed to divestitures in order to proceed with its acquisition of Holiday Companies.[181] Holiday Companies was an operator of about 380 retail fuel stations with attached convenience stores in ten states.[182] The FTC found that the acquisition would reduce competition in 10 local areas in Minnesota and Wisconsin, and required divestitures of 10 locations to resolve the competitive concerns.[183]

### *CenturyLink/Level 3*

On October 3, 2017, CenturyLink, Inc. agreed to divestitures to allow its $34 billion acquisition of Level 3 Communications to proceed.[184] CenturyLink and Level 3 are both US wireline telecommunications companies that compete in the wholesale and enterprise market for high quality fiber-optic-based connectivity services. DOJ found that in Albuquerque, Boise, and Tucson, the combined firm would have shares of 90%, 80%, and 70%, respectively.[185] DOJ also expressed concern that CenturyLink and Level 3 are, in many cases, the only two providers of dark fiber that connects dozens of city pairs.[186] To gain approval, CenturyLink

agreed to divest Level 3's telecommunications networks in Albuquerque, Boise, and Tucson,[187] and offer long-term indefeasible rights-of-use contracts for dark fiber on 30 city pair routes, which will give the holder the exclusive right to use certain fiber optic strands for a stated period of time.[188] On October 30, 2017, the FCC also approved the acquisition with other local price conditions.[189]

### *Mars, Incorporated/VCA Inc.*

On January 9, 2017, Mars proposed to acquire fellow specialty and emergency veterinary service provider VCA for $9.1 billion.[190] The FTC alleged that, if consummated, the acquisition would substantially increase concentration, often creating a monopoly, in ten local markets for particular services in nine different states.[191] To allow the acquisition to proceed, Mars was required to divest twelve clinics in ten local areas.[192] As part of the divestiture, Mars was also required to provide reasonable financial incentives to certain employees to continue in their positions, including guaranteeing a retention bonus for specialty veterinarians and continuing employee benefits.[193] The parties successfully completed the transaction on September 12, 2017.[194]

### *DaVita, Inc./Renal Ventures Management LLC*

Outpatient kidney-dialysis operator DaVita, Inc. agreed to acquire Renal Ventures Management, LLC, a dialysis clinic operator, for $358 million on August 17, 2015.[195] The FTC concluded that, because "most patients must visit a clinic as often as three times per week for treatment, for three to five hours at a time, to obtain the life-sustaining therapy," the competitive alternatives are limited to a local travel radius for any individual patient.[196] In analyzing the local areas for kidney-dialysis treatment, the FTC found either a monopoly or duopoly in five New Jersey areas (Brick, Clifton, Somerville, Succasunna, and Trenton) and in two areas around Dallas, TX (Denton and Frisco).[197] DaVita ultimately agreed to divest seven clinics in these areas to PDA-GMF Holdco, LLC, a joint venture between Physicians Dialysis and GMF Capital LLC.[198]

## Pharmaceuticals & Medical Devices

The FTC required remedies in a number of pharmaceutical and medical device transactions in 2017.

### *Becton Dickinson and Company (BD)/C.R. Bard, Inc.*

On April 23, 2017, Becton Dickinson announced its $24 billion acquisition of rival medical device company, C.R. Bard. (Bard).[199] The FTC alleged that the acquisition would harm competition by combining the top two suppliers in the US markets for (i) tunneled home drainage catheter systems (used to treat recurrent fluid build-up in the lungs and abdomen) resulting in 98 percent share and (ii) soft tissue core needle biopsy devices (used by medical clinicians to remove small samples of tissue from soft tissue organs) resulting in a 60 percent share.[200] To move forward with the acquisition Becton Dickinson agreed to divest Bard's tunneled home drainage catheter system business and BD's soft tissue core needle biopsy device business to Merit Medical Systems, Inc., a Utah-based medical device supplier.[201] The acquisition closed on December 29, 2017.[202]

### *Integra LifeSciences Holdings Corp./Codman (Johnson & Johnson)*

After an eight-month review, Integra LifeSciences Holdings Corp. agreed to divest five neurosurgical medical device product lines to complete its $1 billion acquisition of Johnson & Johnson's Codman Neuro division.[203] The FTC alleged that the acquisition would harm competition in the US for the following products where the parties' combined share ranged from 38-94 percent: (i) intracranial pressure monitoring systems, (ii) cerebrospinal fluid collection systems, (iii) non-antimicrobial external ventricular drainage catheters, (iv) fixed pressure valve shunt systems, and (v) dural grafts.[204] To address the FTC's concerns, Integra agreed to divest the five product lines and Integra's manufacturing facility, and to supply the divestiture buyer with

cranial access kits (which “provide tools used during cranial surgery and are often sold with the divestiture assets”) until the divestiture buyer was able to secure its own supply.[205]

**Baxter International Inc./Claris Lifesciences Limited**

Pharmaceutical company, Baxter International Inc. agreed to purchase rival pharmaceutical company Claris Injectables for $625 million.[206] FTC alleged Baxter and Claris are two of only four significant competitors selling fluconazole in saline intravenous bags and had a combined estimated market share of nearly 60%.[207] The FTC also found that Baxter and only two other companies currently sold intravenous milrinone in the United States, but Claris was expected to begin selling in the US once its pending application at the FDA was approved.[208] As a result, the FTC required Baxter to divest all of Claris’s right to fluconazole in saline intravenous bags and milrinone in dextrose intravenous bags.[209]

## Industrial Transactions

The antitrust authorities closely scrutinized a number of industrial transactions.

***Agrium Inc./Potash Corporation (Nutrien Ltd.)***

On December 27, 2017, Canadian fertilizer and chemical companies Potash Corporation (PotashCorp) and Agrium Inc. agreed with the FTC to divest two US production facilities in order to proceed with their proposed merger to form Nutrien Ltd.[210] PotashCorp and Agrium manufactured superphosphoric acid (SPA), a form of phosphoric acid used to produce liquid phosphate fertilizer sold to farmers, as well as 65-67 percent concentration nitric acid, which is used for making nitrogen-based fertilizers and explosives sold for industrial uses.[211] The FTC alleged that the transaction would have eliminated head-to-head competition between the parties, enhanced the new firm’s ability to raise prices for SPA and increased the likelihood of coordination of competitors in the SPA market.[212] To remedy the FTC’s competitive concerns, the parties agreed to divest two of Agrium’s US production facilities and related assets.[213]

***China National Chemical Corporation/Syngenta AG***

On June 16, 2017, the FTC required China National Chemical Corporation (ChemChina) to divest three pesticides as a condition to allow ChemChina’s $43 billion acquisition of the Swiss global agricultural company Syngenta AG to proceed.[214] The FTC had concerns that the proposed merger would reduce competition in the US for the herbicide paraquat (used to clear fields prior to the growing season); the insecticide abamectin (used to protect citrus and tree nut crops by killing mites, psyllid, and leaf miners); and the fungicide chlorothalonil (used mainly to protect peanuts and potatoes).[215] The FTC alleged that without divestitures, the combined company would have controlled over 60% in formulated crop protection products with the active ingredient paraquat, 80% for abamectin, and 40% for chlorothalonil.[216] Under the agreement, ChemChina was required to divest its paraquat, abemectin, and chlorothalonil crop protection businesses in the United States to AMVAC Chemical Corporation.[217] The divestiture also included a “nurturing provision,” requiring Syngenta to remove crop protection products containing any one of the three at-issue active ingredients from Syngenta’s loyalty program to allow AMVAC Chemical Corporation to “step into the shoes of [ChemChina] and ultimately retain its competitiveness and scale.”[218]

***Dow/DuPont***

On June 15, 2017, Dow and DuPont agreed to divestitures to resolve DOJ’s year-and-a-half investigation into the companies’ $130 billion merger.[219] Both Dow and DuPont manufacture numerous chemicals, including pesticides and ethylene derivatives.[220] DOJ, along with the states of Iowa, Mississippi, and Montana, found that that the merger would reduce competition between DuPont and Dow in the development and sale of

broadleaf herbicides for winter wheat and chewing pest insecticides.[221] Moreover, for ethylene derivatives, and in particular for acid copolymers and ionomers, Dow and DuPont were the only producers such that the transaction was viewed as a merger to monopoly.[222] Thus, the parties agreed to divest DuPont's Finesse herbicide and Rynaxypyr insecticide products, as well as divesting parts of Dow's US ethylene derivatives business.[223] The merger closed on August 31, 2017.[224]

### *GE/Baker Hughes*

On October 31, 2016 , GE announced an agreement to merge its Oil and Gas operations with Baker Hughes in a transaction valued at $7.4 billion.[225] GE, among its vast array of businesses, supplied refinery process chemicals and services to the oil and gas industry through GE's Water & Process Technologies business.[226] Baker Hughes similarly supplied the oil and gas industry with refinery process chemicals and services. DOJ believed the transaction would reduce competition for such products and services because the merged firm would control over 50 percent of such products and services. DOJ therefore required GE to divest its Water and Process Technologies business to Suez, an international water and waste management company.[227] The merger closed on July 3, 2017,[228] and roughly 90% of GE's Water and Process Technologies has already been transferred to Suez, including all US assets. However, because local permitting issues in a number of international jurisdictions have delayed the transfer of the remaining part of the business,[229] DOJ is requiring GE to make daily payments of $1,500 per jurisdiction starting January 1, 2018 until the divestiture is complete.[230]

### *The Sherwin-Williams Company/The Valspar Corporation*

Sherwin-Williams, which sells paints, coatings and related products,[231] announced its acquisition of Valspar on March 20, 2016.[232] The FTC expressed concern that the combined entity would have a combined share of over 40% of the market for industrial wood coatings in America.[233] The FTC distinguished industrial wood coatings from consumer wood coatings, noting that industrial coatings not only provide special abrasion and water resistance, but are typically sold with on-site technical assistance.[234] To resolve these concerns and restore competition, Sherwin-Williams agreed to divest Valspar's North American Industrial Wood Coatings business—namely two Valspar industrial wood coatings plants in High Point, North Carolina and Cornwall, Ontario—to Axalta Coating Systems Ltd.[235] Axalta will also acquire "certain Valspar research and development facilities, warehouses and testing facilities, as well as customer contracts, intellectual property, inventory, accounts receivable, government licenses and permits, and business records."[236] Sherwin-Williams announced on June 1, 2017 that it had completed the divestiture of the assets to Axalta for $420 million.[237]

## New Standard for Enforcing Final Judgments

An interesting development in 2017 is the new language DOJ is including in Final Judgments setting forth the standard of proof for DOJ to bring a civil contempt action against the companies for violations of the Final Judgment.[238] It first appeared in the Entercom/CBS Radio matter, with additional language seeming to allow DOJ to enforce such settlements more easily appearing in Vulcan/Aggregates USA. Similar language has been included in subsequent settlements.

### *Entercom/CBS Radio*

On February 2, 2017, Entercom Communications Corp. announced an agreement to acquire all of CBS's broadcast radio stations.[239] Entercom owned and operated 126 broadcast radio stations in 28 metropolitan areas, while CBS owned and operated 116 broadcast radio stations in 26 metropolitan areas.[240] The combined entity would have allegedly controlled 50%, 40%, and 55% of the advertising sales on English-language broadcast radio stations in Boston, San Francisco, and Sacramento, respectively.[241] On November 1, 2017, DOJ filed a proposed settlement in the US District Court of the District of Columbia where Entercom agreed

to divest 13 radio stations in Boston, San Francisco, and Sacramento.[242] Notably, the settlement also stated that in any potential civil contempt action that the DOJ might bring against a future violation of the consent decree, DOJ's claims "shall be evaluated under a ***preponderance of the evidence standard***."[243] Such language had not been included in prior DOJ merger settlements.

### *Vulcan Materials Company/Aggregates USA*

On December 22, 2017, DOJ announced that it had reached a settlement with Vulcan Materials Company that would allow Vulcan's $900 million acquisition of Aggregates USA to proceed.[244] Vulcan and Aggregates USA are both producers of coarse aggregate, a material used in paving roads and other types of construction.[245] The DOJ alleged that the acquisition would eliminate competition in the market for state Department of Transportation-qualified coarse aggregate in Knoxville, Tennessee, the Tri-Cities area (Washington, Sullivan, Carter, and Unicoi counties) in Tennessee, and Abingdon, Virginia.[246] To alleviate these concerns, the parties agreed to divest Aggregates USA's quarries, plants, and yards in the three local markets at issue.[247] The divested assets were sold to Blue Water Industries LLC for $290 million, and Vulcan's acquisition of Aggregates USA subsequently closed on December 29, 2017.[248] Notably, the consent decree in Vulcan/Aggregates added additional language to provide the DOJ the ability to enforce potential consent decree violations. In addition to setting forth a preponderance of the evidence standard, as part of the consent decree, the merging parties also agreed to "waive any argument that a different standard of proof should apply" in a contempt proceeding.[249] Additionally, the consent decree sets out that, in the event of a violation, the DOJ will be permitted to apply for an extension to the decree, with attorney and expert fees to be paid by the combined company.[250]

## The Authorities Actively Enforced the Hart-Scott-Rodino Rules

The Hart-Scott-Rodino (HSR) Act requires parties to transactions meeting certain thresholds to file notifications with the FTC and DOJ and comply with the statutory waiting period.[251] Moreover, during that waiting period companies must continue to operate independently—i.e., the acquiring party cannot exert control over the business of the target company. Both failure to file and "gun jumping" are taken seriously by the US antitrust authorities. Violations can not only result in civil money penalties, but also delay closing.

### Duke Energy/Osprey Energy Centers

On January 18, 2017, Duke Energy Corporation agreed to pay $600,000 to resolve DOJ allegations that the company violated HSR requirements.[252] On August 25, 2014, Duke, a wholesale seller of electricity, entered into

an agreement to purchase Osprey, a "combined-cycle natural gas-fired electrical generating plant" in Florida.[253] Duke did not submit HSR notification to the government of its proposed acquisition until months after the tolling agreement was executed.[254] Instead, the parties entered into a "tolling agreement" on September 30, 2014 under which the DOJ alleges Duke immediately began to exercise control over Osprey by directing the purchase of fuel by the Osprey plant, relaying detailed daily instructions on the amount of power to be generated there, and receiving profits.[255] While tolling agreements are common in this industry, DOJ claimed that the sole purpose of the tolling agreement was to allow Duke's acquisition of the Osprey plant.[256] In fact, DOJ alleged that Duke used the tolling agreement as a means to ensure FERC approval of the acquisition—if FERC considered the companies to already be essentially one entity, then FERC would be less likely to be concerned about the increased concentration as a result of the acquisition.[257] Ultimately, DOJ let the HSR waiting period expire without a substantive challenge on February 27, 2015.[258]

### *Mitchell Rales*

Individual investor Mitchell Rales paid $720,000 to resolve DOJ and FTC allegations that he failed to comply with the HSR notification requirements for two separate acquisitions.[259] The first acquisition was Mr. Rales' purchase of stock of Danaher Corporation in January 31, 2008 that exceeded the HSR filing threshold.[260] The second acquisition was the purchase of stock in Colfax Corporation on October 31, 2011 by Mr. Rales' spouse.[261] Mr. Rales already held 20% of the voting shares of Colfax and under the HSR rules his spouse's subsequent purchases were aggregated with his existing shares, such that the aggregated value exceeded a filing threshold.[262] Although Mr. Rales made corrective filings for both acquisitions on February 25, 2016, he was deemed to be in continuous violation of the HSR Act from January 2008 and October 2011, respectively.[263] In part, the penalty that Mr. Rales paid may be due to it not being his first offense; the complaint noted that prior complaints were filed in 1988 and 1991 against an equity group for which Mr. Rales was the ultimate parent entity.

### *Ahmet Okumus*

An individual investor, Ahmet Okumus, paid $180,000 to resolve DOJ and FTC allegations that he failed to comply with the HSR notification requirements when he purchased voting shares in Web.com Group Inc.[264] Mr. Okumus made several purchases of stock that over time cumulatively exceeded the $156.3 million HSR filing threshold.[265] Although Mr. Okumus exceeded the threshold for only a few weeks between the June 27, 2016 acquisition and a July 14, 2016 sale,[266] DOJ sought civil penalties for violation of the HSR Act during that time period.[267] This also was not Mr. Okumus' first violation; he made a corrective filing in 2014 for a different purchase of Web.com shares that had exceeded the threshold in force at the time (where no action was taken).

# Takeaways from 2017 and Expectations

Despite a year of transition with the change in administration and both US antitrust authorities operating most of the year without officially confirmed leadership, antitrust enforcement remained vigilant in 2017. And, while there are a number of cases pending that likely will provide greater insight into the new administration's priorities, 2017 has provided a number of clues as to where antitrust enforcement in the Trump era may be heading.

- First, the US authorities have signaled increased skepticism of behavioral remedies. While structural remedies have been enforcers' preferred remedy option, prior administrations had accepted behavioral remedies in certain instances, such as vertical transactions. AAG Delrahim described behavioral remedies as a "regulatory approach" that should be avoided in favor of the traditional antitrust law enforcement regime. Similarly, FTC Bureau Director Bruce Hoffman said that the FTC's views were in lockstep with DOJ on the issue. To what extent the antitrust authorities will abandon the use of conduct remedies entirely, especially in vertical cases, remains to be seen.
- Second, DOJ's challenge to AT&T's acquisition of Time Warner may foreshadow a new aggressiveness with regard to vertical transactions. The outcome of that litigation may affect the antitrust authorities' treatment of future vertical transactions.
- Third, the US antitrust authorities will continue to enforce the HSR Act—to ensure both that companies and individuals make required filings, and that such individuals and entities wait the statutory waiting periods before exercising beneficial control. As a result, individuals and entities must carefully consider whether filings are required and obey the waiting period.
- Fourth, as the Franciscan Health System and Valero matters demonstrate, individual states can bring merger challenges even if the federal authorities do not. Any perceived void by the federal authorities may be filled by individual states, especially in transactions that may have local competitive effects. Thus, merging parties should be careful to consider and plan for the potential involvement of states in merger enforcement.

- Finally, while the FTC has appeared to adjust to just two sitting Commissioners, it is important to remember that the make-up of the FTC will change in 2018 and that may bring further changes in terms of policy and priorities—with a possibility of slightly higher acceptance of arguments of pro-competitive effects that has in the past been typical from Republican-appointed leadership.

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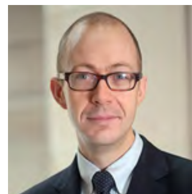


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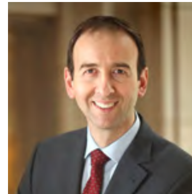


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