Vinson&Elkins

2024 Chemicals & Energy

# Antitrust Report

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# What to Expect in the Trump Administration

The re-election of former President Donald J. Trump is poised to significantly alter the landscape of antitrust enforcement, particularly within the energy and chemical industries. While the incoming administration has yet to articulate a clear stance on these issues, many anticipate a more permissive approach to dealmaking, with less stringent antitrust scrutiny compared to the Biden administration.

## Focus on Expanding Oil & Gas Production

President-elect Trump's campaign emphasized boosting energy production, signaling potential support for transactions in the oil and gas sector. Proposals included rolling back clean energy initiatives from the Biden administration and increasing fossil fuel development. The 2024 GOP Platform echoes these priorities with a call for "Energy Independence and Dominance." However, antitrust enforcement policies remain notably absent from both the platform and Trump's campaign rhetoric, leaving key questions unanswered.

## A Softer Stance on Energy Mergers

The incoming Trump administration is expected to scale back the aggressive approach to energy mergers adopted under President Joe Biden. Historically, the Federal Trade Commission ("FTC") has rarely challenged horizontal mergers involving energy exploration and production companies, in recognition that these companies compete in increasingly global commodity markets. However, under the Biden administration, the FTC initiated in-depth investigations into at least six major oil and gas mergers and expanded its focus to labor market concerns. It is anticipated that under Trump, the FTC will return to prior practices, characterized by fewer merger reviews that are focused on more traditional theories of harm.

Many expect the incoming administration to also return to a less aggressive stance on structural remedies. The Biden administration has favored blocking mergers rather than entering into consent decrees that require divestitures by the merging parties. The U.S. Department of Justice ("DOJ") has not entered into a consent decree requiring an initial divestiture as an alternative to merger litigation since November 2021. The FTC has continued to accept structural remedies through consent decrees in some instances under the Biden administration. However, the FTC has mandated "prior approval" provisions in all consent decrees, which require parties to obtain the agency's approval for future acquisitions in relevant markets. Under Trump, DOJ and the FTC may be more willing to accept consent decrees and may no longer seek "prior approval" provisions.

## Driving Change through Political Appointees

One of the most direct ways that a president can influence antitrust enforcement is through appointments at DOJ's Antitrust Division and the FTC. While the agencies have extensive career staff, enforcement priorities hinge on the leadership of these agencies, whose heads require Senate confirmation—a process that often takes several months. Jonathan Kanter, Biden's nominee to lead the Antitrust Division, was nominated nearly six months after Biden took office and was confirmed by the Senate on November 16, 2021, nearly ten months after Biden's inauguration. Biden nominated Lina Khan for Chair of the FTC over two months after he took office. She was confirmed on June 15, 2021. Trump's rapid pace of nominations and Republican control of the White House and Senate may expedite the confirmation process, but leadership changes at the agencies likely will take months to implement after Trump takes office.

Trump has nominated Gail Slater to replace Assistant Attorney General Jonathan Kanter as the head of DOJ's Antitrust Division. Kanter has taken an aggressive stance on enforcement and touted an "unprecedented record of action" in challenging mergers and market dominance. Slater is expected to maintain DOJ's aggressive stance against large technology companies, but her views on the energy and chemical industries are not as readily apparent. Slater served as an economic advisor to Vice-President-elect JD Vance and on the White House's National Economic Council during Trump's first administration. Prior to that, she was an FTC attorney for over ten years, where she worked on a range of cases.

Trump has named current Republican Commissioner Andrew Ferguson as his choice for FTC Chair, and Trump can designate Ferguson as Chair either on a permanent or acting basis on January 20, 2025. In addition, Trump has nominated Mark Meador as the FTC's third Republican commissioner. Meador is a former deputy chief counsel to Senator Mike Lee of Utah. Most recently, Meador has worked in private practice, where he filed an action alleging that Google monopolized key digital advertising tools. FTC Chair Lina Khan's term expired in September 2024, and she likely will step down when Trump takes office in January. Until the Senate confirms Meador, the Republican commissioners will not be able to bring an enforcement action or make significant policy changes without the support of at least one Democratic commissioner.

# Signals from Current Republican FTC Commissioners

The enforcement views of Commissioner Ferguson and the second current Republican FTC commissioner, Melissa Holyoak, provide insight into how enforcement priorities may evolve. While they supported expanding Hart-Scott-Rodino ("HSR") premerger filing requirements, they have criticized novel theories of harm advanced during Khan's tenure as Chair.

For example, Commissioners Holyoak and Ferguson dissented in recent enforcement actions against Exxon Mobil Corporation and Chevron Corporation (discussed in greater detail in Chapter 5). They argued that these cases relied on speculative coordination theories rather than demonstrable competitive harms. These perspectives suggest a Republican-led FTC will prioritize traditional antitrust principles, favoring predictability and reliance on the consumer welfare standard over novel and non-competition considerations in enforcement.

Commissioner Holyoak has also endorsed reversals of significant antitrust policies put in place under the Biden administration. For instance, Holyoak stated that she would support revising the 2023 Merger Guidelines, which signaled a more aggressive and wholistic approach toward merger enforcement by the agencies. Holyoak has argued that the guidelines downplayed economic evidence and were not appropriately directed at preventing only anticompetitive deals. As such, we may see new Merger Guidelines issued that reflect evidence-based enforcement standards and more widely accepted economic views.

# Legislative Changes to FTC Authority

In addition to changing enforcement priorities, the incoming administration could bring significant legislative changes to the antitrust enforcement landscape. Among the most notable proposals is the *One Agency Act*, which would consolidate antitrust enforcement authority solely within the DOJ. Originally introduced by Senator Mike Lee in 2020, the bill has gained renewed momentum with Republican control of Congress and Trump's creation of a so-called Department of Government Efficiency ("DOGE"). Proponents say that the bill would promote predictability and transparency in antitrust enforcement and eliminate jurisdictional disputes between the FTC and DOJ.

Another legislative initiative likely to receive consideration during the incoming administration is Senator Lee's *Standard Merger and Acquisition Reviews Through Equal Rules Act* ("SMARTER Act"). This measure would require the FTC to litigate merger challenges in federal courts rather than its internal administrative tribunal. This change would raise the FTC's evidentiary burden to challenge mergers and potentially curtail its ability to block mergers based on speculative harms.

## Inflation & Consumer-Centric Enforcement

Despite an expected move toward lighter antitrust scrutiny, the incoming administration's commitment to curbing inflation may spur targeted enforcement in consumer-facing segments of the energy market. Campaign promises to "defeat inflation and quickly bring down all prices" suggest scrutiny of mergers that could lead to higher prices, particularly in retail fuel outlets, terminals, and refineries. These segments saw numerous enforcement actions under both Trump and Biden, and similar interventions likely will continue in Trump's second administration.

## Balancing Innovation with Energy Policy

In addition to traditional energy concerns, the incoming administration may confront challenges at the intersection of technological growth and energy availability. The rise of artificial intelligence and cryptocurrency sectors, industries that Trump supports, has increased demand for energy-intensive data centers, straining power grids. Trump's political appointees to the FTC and DOJ may play a pivotal role in navigating these complex issues, including by assessing whether potential consolidation in natural gas production, power generation, or data infrastructure could harm these nascent technologies or lead to higher prices for consumers.

In sum, much remains to be seen about how the incoming administration will enforce the antitrust laws, including with respect to the energy and chemical industries. Companies should not expect an absence of scrutiny under the incoming administration, particularly in the midstream and downstream areas, but new leadership at the FTC and DOJ are likely to focus on more traditional theories of harm in both merger and non-merger enforcement, give greater weight to economic evidence, and tone down recent rhetoric aimed at the energy industry.

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# Summary of Developments

## Merger Policy & Enforcement

- The Federal Trade Commission ("FTC") completed its comprehensive overhaul of the Hart-Scott-Rodino ("HSR") form and related materials, issuing a final rule in October 2024. The new rule goes into effect on February 10, 2025 and significantly expands the scope of information and documents required for HSR-reportable transactions. The new rule also mandates disclosures on foreign subsidies and defense or intelligence agency contracts, reflecting a broader push for transparency.

- Both the U.S. Department of Justice ("DOJ") and FTC intensified their scrutiny of serial acquisitions and roll-ups, launching a public inquiry into companies using small, non-HSR-reportable acquisitions to consolidate market power. This inquiry targets industries including housing, agriculture, and health care.

- In 2024, the FTC investigated six major mergers in the U.S. exploration and production (E&P) sector. Those investigations collectively highlight the FTC's focus on novel theories of harm based on the actions of individual executives, "entanglements" between firms, and labor market impacts of mergers. The FTC also investigated concerns regarding "trends towards consolidation" in the industry and alleged anticompetitive conduct between industry participants.

- The FTC challenged Exxon Mobil Corporation's ("Exxon") acquisition of Pioneer Natural Resources Company ("Pioneer"). Instead of focusing on traditional concerns like the combined market power of the two firms, the FTC's challenge focused on the proposed appointment of Scott Sheffield, Pioneer's founder, to Exxon's Board of Directors. The FTC alleged that Sheffield had previously attempted to coordinate output reductions among U.S. producers and OPEC. The investigation culminated in a consent decree prohibiting Sheffield from serving on Exxon's Board or in any advisory capacity and barring Exxon from appointing any Pioneer representative to its Board for five years.

- The FTC challenged Chevron Corporation's ("Chevron") proposed acquisition of Hess Corporation ("Hess") on similar grounds. That challenge also resulted in a consent decree barring the appointment of John B. Hess, CEO of Hess, to Chevron's Board of Directors. Combined with the Exxon challenge, this action reflects the FTC's concerns about board appointments facilitating anticompetitive behavior based on the past actions of individual board members rather than the general characteristics of the merging companies.

## Non-Merger Enforcement

- The FTC proposed a groundbreaking rule that bans all non-compete agreements in employment contracts. The rule was blocked by a federal district court judge in the Northern District of Texas, in a sweeping order declaring that the FTC lacks the authority to create substantive rules regarding unfair methods of competition. That ruling is now on appeal to the Fifth Circuit and will be a case to watch with implications for both labor markets and the scope of the FTC's power.
- Congressional scrutiny on the oil and gas industry intensified following allegations of price-fixing conspiracies involving U.S. oil companies and OPEC leaders. The FTC and DOJ continue to target collusion and price-fixing in adjacent industries like construction and natural disaster relief, emphasizing the need for companies to evaluate their business practices to avoid regulatory scrutiny.
- Enforcers have shown a growing interest in artificial intelligence ("AI") and its implications for antitrust enforcement. Regulators are particularly concerned about the use of AI-based pricing algorithms that could facilitate collusion and price manipulation.

## State & Private Litigation

- New cases were brought by private plaintiffs in multiple energy and chemical sectors, making 2024 one of the most active years for antitrust litigation in recent memory. Significant putative class actions were filed in federal courts around the country.
- In New Mexico and Nevada, plaintiffs initiated antitrust claims against independent shale oil producers, claiming the producers met with representatives of OPEC during an industry conference and could have coordinated their production decisions.
- In Illinois, PVC pipe manufacturers were accused of using industry pricing news publications to signal their pricing and production plans.
- In Texas, a group of Republican state attorneys general sued the nation's largest asset managers, claiming that their acquisitions of shares in publicly traded coal producers and their alleged support for various "ESG" or emissions-reducing goals led to reduced coal production and higher prices.
- In the oil sector, defendants settled long-running class actions related to drilling activity in Wyoming and refinery shutdowns in California. The power sector saw mixed results at the courthouse, with a Hawaiian utility fending off claims that it was excluding a new generator from the marketplace, while a North Carolina transmission provider will have to face claims that it used predatory pricing to exclude a new entrant.

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# Merger Enforcement Policy Developments

2024 was a significant year for merger enforcement policy. In October, the Federal Trade Commission ("FTC") finalized an overhaul of the Hart-Scott-Rodino ("HSR") form and related materials. These changes, which will come into effect on February 10, 2025, will greatly increase the scope of information and documents companies must collect and submit in connection with HSR-reportable transactions. In May, the agencies launched a public inquiry into serial acquisitions and roll-ups as part of a broader push to challenge these business practices. Finally, 2024 saw one of the first FTC prior approval processes play out since the agency revived a policy in 2021, requiring prior approval as part of all consent orders.

# FTC Final Rule Will Bring Significant Changes to HSR Filing Process

## Background and New HSR Form

In October, the FTC, with the Department of Justice ("DOJ") Antitrust Division's concurrence, issued its Final Rule containing the most significant updates to the HSR Notification Form (the "HSR Form") since the Hart-Scott Rodino Act was passed in 1976. The changes to the HSR Form and filing process contained in the Final Rule will, once effective, impose more burdensome requirements on filing parties, particularly buyers. The Final Rule requires filers to provide more documents concerning the deal, give greater details into buy-side structures and minority shareholders, and describe the transaction rationale and the relationships between the buyer and target. That said, the Final Rule is procedural in nature and will not affect reportability thresholds (which are revised annually), substantive antitrust law, or theories of harm agencies use to analyze proposed transactions.

The Final Rule revises the HSR Form to require more information from filers, including on transaction rationale, competitive overlaps, and buy-side structures. Prior to the Final Rule, the agencies would typically only receive this information upon the issuance of a Voluntary Request Letter ("VRL") or Second Request, if they still had questions or concerns after reviewing the HSR filing. In the agencies' view, this information is often readily available to the filers and important to a competition analysis, and, accordingly, should be provided by the filers at the start of the process. To better align this reporting burden with transaction risk, the HSR Form uses a conditional reporting structure that only requires filers to complete certain sections of the HSR Form, such as narrative "Competition Descriptions" and information on buyer officers and directors, if the filers also identify a competitive overlap or customer-supplier relationship. Still, several new requirements apply to all reportable transactions, including an expanded document collection process and, for private equity filers, information regarding intermediate-level and minority ownership in the buy-side structure.

At the same time, the Final Rule brings several changes that filers will welcome. First, the agencies announced that the Final Rule will be accompanied by a restoration of the early termination process, a policy that allows the FTC or DOJ to terminate the 30-day waiting period early for transactions with limited antitrust risk. (The early termination policy has been suspended since February 2021.) Second, the Final Rule does not require sell-side filers to respond to several new portions of the HSR Form, such as requests for information on minority shareholders, ownership structures, international antitrust notifications, transaction diagrams, and the identification of other agreements between the filers. Third, the Final Rule does not contain any proposed changes related to labor markets, which would have been among the most burdensome new requirements. Finally, the Final Rule no longer requires filers to report exact revenues; filers can instead report revenues by certain threshold ranges.

Filers may still submit HSR notifications on non-definitive agreements such as letters of intent or term sheets; however, they may no longer rely on a barebones version. The Final Rule requires the transaction document to describe a combination of the identity of the filers, the structure of the transaction, the scope of what is being acquired, calculation of the purchase price, an estimated closing timeline, certain employee retention policies post-closing governance, and transaction expenses or other material terms.

Finally, the Final Rule implements disclosure requirements for foreign subsidies, as required by the Merger Filing Fee Modernization Act of 2022. Filers must now identify and describe any subsidies given by a "foreign entity or government of concern," a term of art the Department of Energy uses to define foreign actors that may pose a threat to the U.S. security or economy. The Final Rule also requires filers to identify any pending or active defense or intelligence agency contracts.

## Key Changes to the HSR Form

The Final Rule changes many existing reporting requirements and creates some entirely new reporting requirements.

- **Transaction Information.** The Final Rule adds a new section to the HSR Form requiring filers to draft a transaction rationale and provide any existing diagrams or structure charts illustrating both party and transaction structure. The Final Rule does not make clear the amount of detail filers are expected to provide in the rationale, but encourages filers to cite information contained in responsive documents submitted with the filing.

- **Business Documents.** The Final Rule greatly increases the scope of strategic documents that filers must submit (commonly known as "Item 4 documents"). Filers must now identify and collect documents from not only officers and directors, but also from a "supervisory deal team lead," defined as the individual who has primary responsibility for supervising the strategic assessment of the deal, and who may not otherwise qualify as a director or officer. In transactions with overlapping products or services, filers must also now submit certain ordinary course "Plans and Reports" discussing market shares, competition, competitors, or markets and that were provided to the company CEO or Board of Directors. Filers without a Board, such as limited liability companies or partnerships, must provide any such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead.

- **Ultimate Parent Entity Information.** In keeping with the Final Rule's focus on transparency and structure, buyers will be required to identify minority shareholders throughout the entire chain of control above and below the acquiring entity, as well as minority shareholders of any entity within the acquiring person created in connection with the transaction. Buyers currently must report minority shareholders only of the acquiring entity and its ultimate parent entity, not of intermediate entities. Of particular importance to private equity funds and other investment firms, the Final Rule will require disclosure of the name and headquarters mailing address of limited partners of 5% or more and that have certain Board appointment rights. The Final Rule will also require the buyer's ultimate parent to identify all current officers and directors of controlled entities that have a competitive, supply, or customer relationship with the target.

- **Competition Descriptions.** The Final Rule will require filers to provide a narrative description of (a) any overlapping products or services and (b) any supply or customer relationships between the acquiring person and target or relevant third parties. Filers must provide a range of information about these overlaps, including annual sales figures and top customers. The requirement is also forward-looking—filers must identify and describe planned overlapping products or services referenced in the documents. Previously, the agencies would only have access to this kind of information through the VRL or Second Request process.

- **Prior Acquisitions.** The new form expands the information filers must provide concerning prior acquisitions and requires both the buyer and target to report prior acquisitions.

- **Revenue and Overlaps.** The Final Rule will require filers to provide a separate revenue by NAICS code breakdown for each operating entity under its control, whereas before they could aggregate revenues by NAICS code across all entities. Filers will also be required to provide more detailed geographic overlap information for certain NAICS codes; although codes commonly reported in energy and chemical transactions largely remain unchanged.

# DOJ and FTC Increase Efforts to Address Serial Acquisitions

In May 2024, the DOJ Antitrust Division and FTC jointly launched a new public inquiry into serial acquisitions, roll-ups, and other consolidation strategies by which companies grow through a series of small, non-HSR-reportable acquisitions in the same or related business sectors. Because these types of acquisitions often fall under the HSR reporting thresholds, it is harder for enforcers to identify these deals and analyze their effects on competition. The FTC statement announcing the public inquiry pointed specifically to private equity firms, claiming that these firms and other corporate actors had used serial acquisition strategies to "amass significant control over key products, services, or labor markets" without triggering HSR filings and the agency review process. As part of the inquiry, the agencies issued a Request for Information for Public Comment ("Request for Public Comment") seeking assistance from the public to identify sectors affected by serial acquisitions. The Request for Public Comment focuses on a wide range of industries, including housing, agriculture, defense, cybersecurity, distribution, construction, and health care. The public comment period closed in late September. The agencies have not yet published or made any public statement regarding the results of their inquiry.

The FTC has sought to address roll-up acquisitions in court, albeit with limited success. In 2023, the FTC filed a complaint in federal court against U.S. Anesthesia Partners, Inc. ("USAP"), a provider of anesthesia services in Texas, and its private equity backer Welsh, Carson, Anderson & Stowe ("Welsh Carson"). The FTC alleged that both companies engaged in a yearslong strategy to "consolidate and monopolize the anesthesiology market in Texas" through a roll-up scheme, in violation of Section 5 of the FTC Act (which prohibits unfair competition) and Section 7 of the Clayton Act (which prohibits mergers that may lessen competition). Welsh Carson held a controlling interest in USAP since the latter's inception in 2012, but in 2017, sold down its position to a minority, noncontrolling 23% interest.

In May of 2024, the court granted Welsh Carson's motion to dismiss, finding that the FTC's injunctive powers under FTC Act Section 13(b) do not extend to minority, non-controlling shareholders. Section 13(b) allows the FTC to enjoin conduct that "is violating" or "about to violate" the antitrust laws. In dismissing the case against Welsh Carson, the court refused to impute the actions of a company (here, USAP) to a minority, noncontrolling investor merely because of that investor's economic ties to the alleged violator. The court also rejected the notion that Welsh Carson was "about to violate" the antitrust laws, finding that general allegations of past anticompetitive conduct failed to rise to the required level of specificity for inherently forward-looking injunctive relief. The Fifth Circuit subsequently upheld this decision. The court's limits against derivative liability and narrow application of intent, at least in the context of injunctive relief, should give some comfort to minority investors across industries.

# FTC Prior Approval Policy in Practice

The Biden administration's FTC expanded the scope of consent orders with an aim toward preventing future anticompetitive transactions. Pursuant to a 2021 policy statement, the FTC returned to its pre-1995 practice of requiring that all merger consent orders contain "prior approval" provisions requiring the buyer to obtain the FTC's affirmative approval before acquiring companies or assets in the same relevant market for a specified period, usually ten years.

The prior approval process itself is relatively nebulous compared to the HSR filing process and lacks many of the guardrails that provide some certainty with respect to timing and expectations. Unlike HSR filings, prior approval applications have no specified format or objective set of information that must be included; there are no timelines set forth for when the application should be made or how long the FTC has to review and act on the application; and the FTC must take affirmative action on the application, unlike the HSR process where filers are free to close upon expiration of a 30-day waiting period.

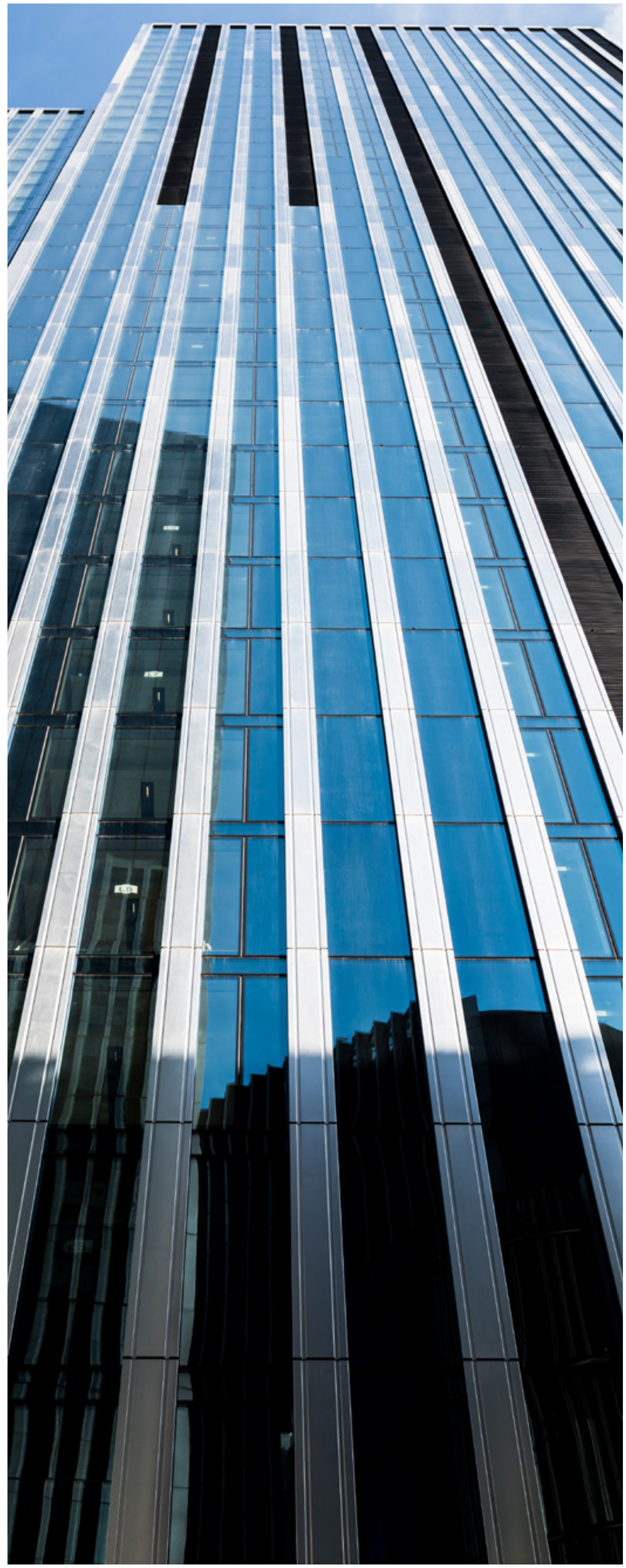
2024 saw the first prior approval process since the FTC implemented the 2021 policy requiring that all merger-related consent decrees contain prior approval provisions. The timeline for those parties to receive prior approval suggests that the process can take several months to complete, even in cases that do not garner negative comments during the comment period.

In 2022, EnCap Energy ("EnCap") acquired EP Energy Corp. subject to an FTC consent order containing the first prior approval provision applicable to the buyer since 1995. The consent order addressed FTC concerns that the transaction would negatively affect competition for the sale of waxy crude oil in Utah's Uinta basin. The prior approval provision required EnCap's affiliate XCL Resources ("XCL") to obtain the Commission's approval before acquiring any waxy crude oil producer whose output exceeds 2,000 barrels per day in several Utah counties. In March 2024, XCL requested the FTC's prior approval of its proposed acquisition of Altamont Energy, a Uinta Basin exploration and production company ("Altamont").

The *Federal Register* published XCL's prior approval application on March 15, 2024. There were seven comments received during the comment period. Two comments were withdrawn, and the remaining five comments expressed support for the transaction.

On August 7, 2024, Northern Oil and Gas, Inc. ("NOG") announced that it, together with SM Energy Company, was acquiring the Altamont assets simultaneously with other Uinta Basin assets from XCL. The press release suggests that the FTC granted prior approval of XCL's Altamont acquisition as of August 2024 or that it would be granted by Q4 2024 (the expected closing date of NOG and SM Energy's acquisition of the Altamont assets). Assuming that the FTC granted prior approval soon before the press release, it appears that the prior approval process took at least five months to complete even without negative public comments, far longer than the typical 30-day review period for unproblematic deals reported under the HSR Act.

Notably, the DOJ Antitrust Division has not endorsed or implemented a prior approval policy. The DOJ Antitrust Division has entered into just three consent decrees since October 2021 (compared to the FTC's fifteen consent orders), none of which impose forward-looking prior approval requirements on the buyer. DOJ has instead focused on either requiring the parties to remedy potentially anticompetitive aspects before closing their deal (the "fix-it-first" approach) or litigating cases in court.



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# Merger Enforcement Data & Trends

The FTC and DOJ received 1,805 Hart-Scott-Rodino Act (HSR) filings in fiscal year 2023, marking a return to normalcy after a surge of filings in 2021 and 2022 not seen since the late 1990s. The energy sector remained busy, representing 7% of all reported transactions compared to just over 4% in recent years. Chemical transactions represented 4.8% of total reported transactions, in line with the industry's historical average.

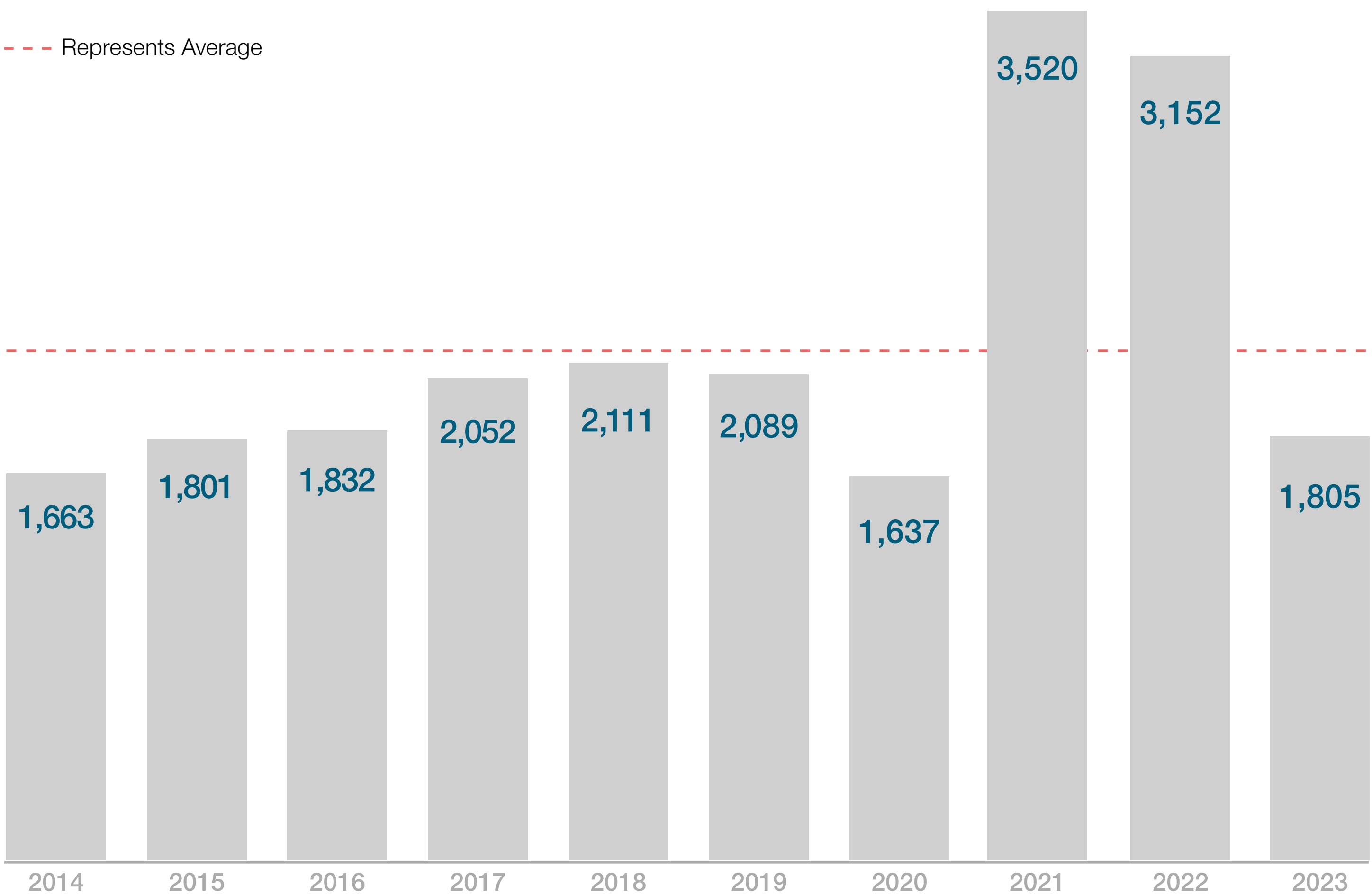
The agencies' merger enforcement rate slightly increased in 2023, to near-historical averages. The FTC and DOJ opened preliminary investigations in 10.2% of reported transactions and issued second requests in 2% of total transactions. The rate at which agencies issued a second request after opening a preliminary investigation ticked up from 16% in 2022 to 20% in 2023, but remained below the trailing ten-year average of 21%. The agencies brought an enforcement action securing some kind of remedy in just 59% of second request investigations in 2023, well under the ten-year average of 75%.

Enforcers were active in the energy industry, with 10.9% of reported deals (fourteen) leading to an initial investigation. Six of these fourteen investigations, or 43%, led to second requests, a rate more than twice the industrywide average. All of these deals, however, eventually cleared.

While chemical deals typically lead to initial investigations at a higher-than-average rate (18% on average over the last decade), agency activity beyond those preliminary investigations continued a downward trend in 2023. Just 7% of initial investigations led to a second request in 2023, which represents a single second request. There were no chemical industry enforcement actions in 2023.

## Total Number of Reported Transactions

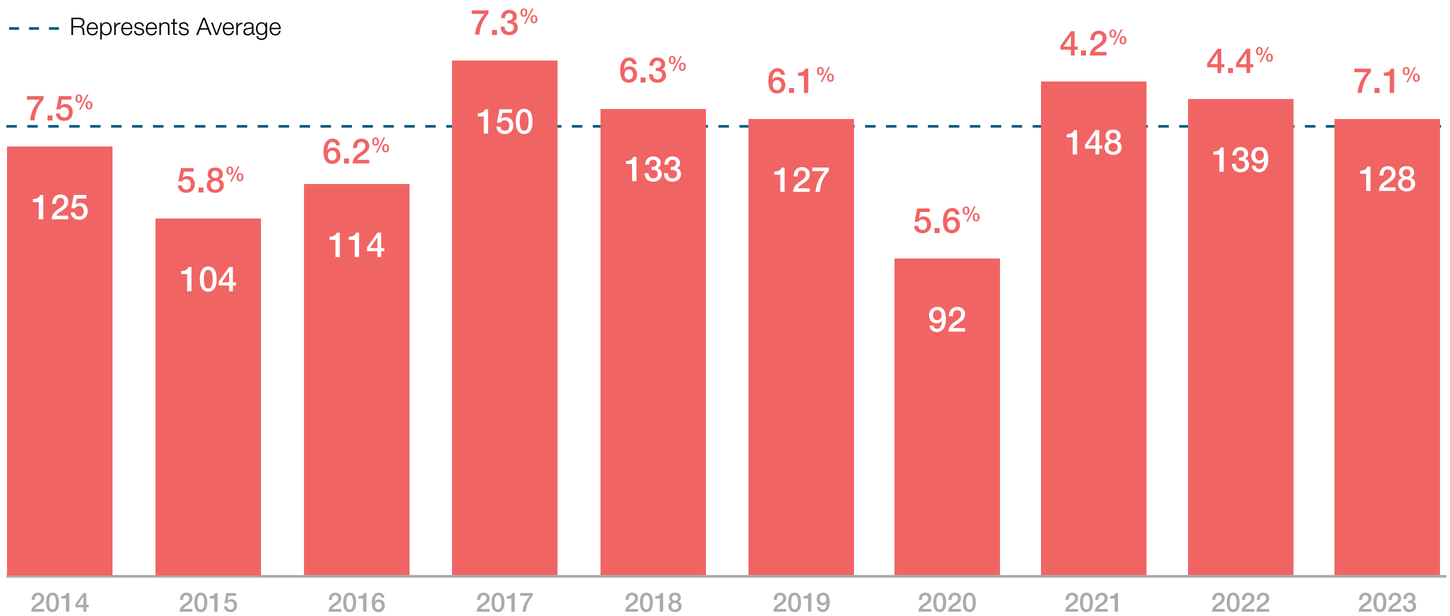
From 2014 to 2023, there were a total of **21,662** transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act. There were **1,805** transactions reported in 2023, a decrease of just over **40%** from the **3,152** reported transactions in 2022 and slightly below the ten-year average of **2,166** filings per year.[1]




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

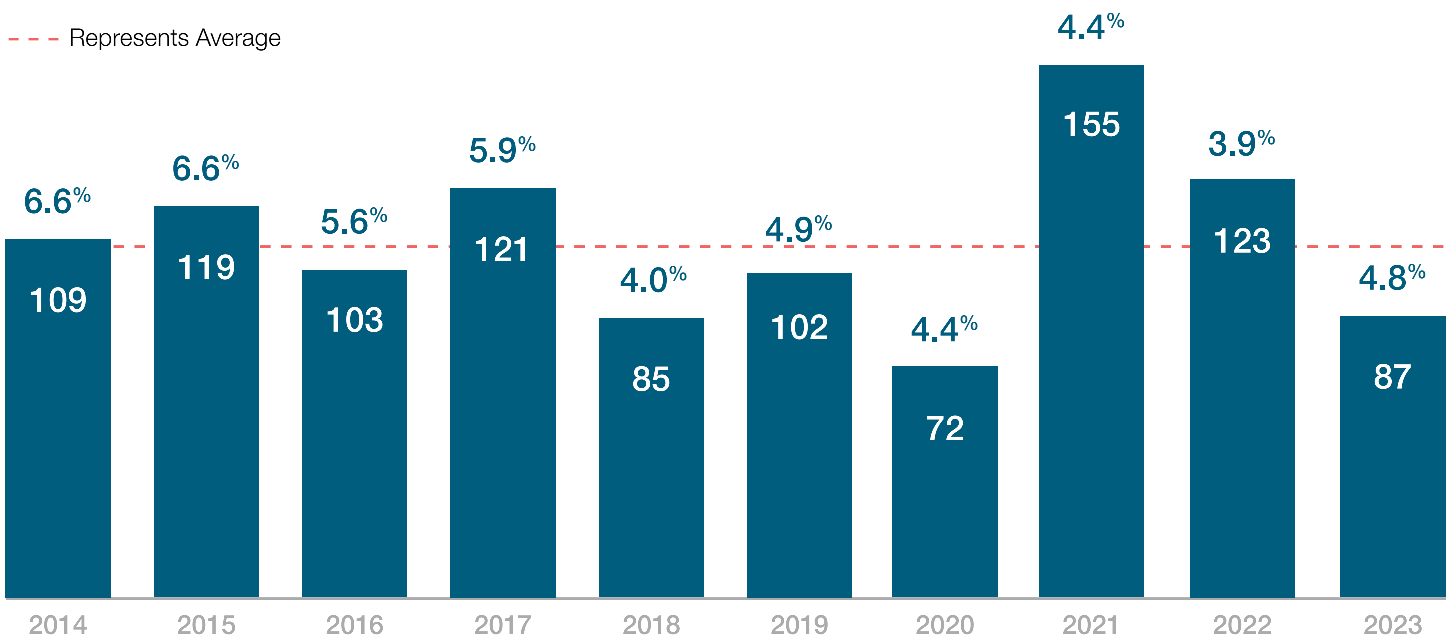
## Energy Transactions

From 2014 to 2023 there were a total of **1,260** reported energy and natural resources transactions, representing on average just under **6%** of total transactions reported during that time period. The number of reported transactions in this industry sector reached **7.1%** in 2023, reversing a steady decline since 2017 (**7.3%**).




## Chemical Transactions

From 2014 to 2023 there were a total of **1,076** reported chemical and pharmaceutical transactions, representing on average **5%** of total transactions. The number of reported transactions in this industry as a percentage of total transactions was **4.8%** in 2023, the first uptick in over a decade after reaching just **3.9%** in 2022.



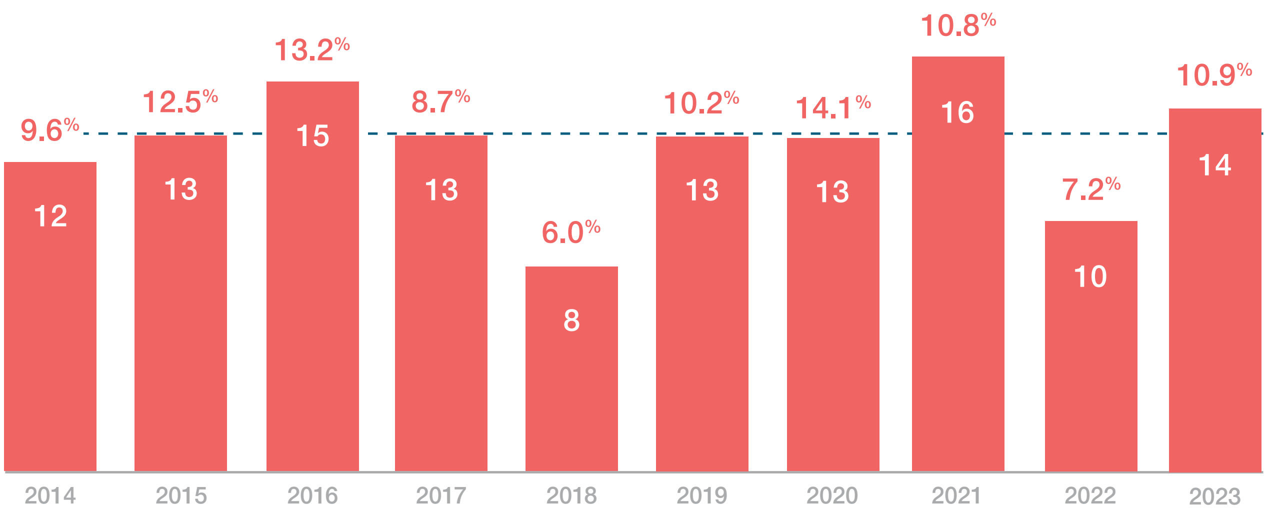
## Initial Investigations

On average, from 2014 to 2023, the FTC and DOJ opened an initial investigation in **10.3%** of reported energy transactions and **18.3%** of reported chemical transactions, while the average across all industries during this time period was **12%**. Initial investigation rates in 2023 were in line with historical averages in both the energy and chemical sectors.

The federal agencies tend to investigate energy sector transactions at a slightly lower-than-average rate over the past decade, comprising on average **5.8%** of reported transactions but **5.1%** of total investigations. Chemical industry transactions, in contrast, have been investigated at a higher-than-average rate, comprising on average **5%** of total transactions but **7.9%** of total investigations.

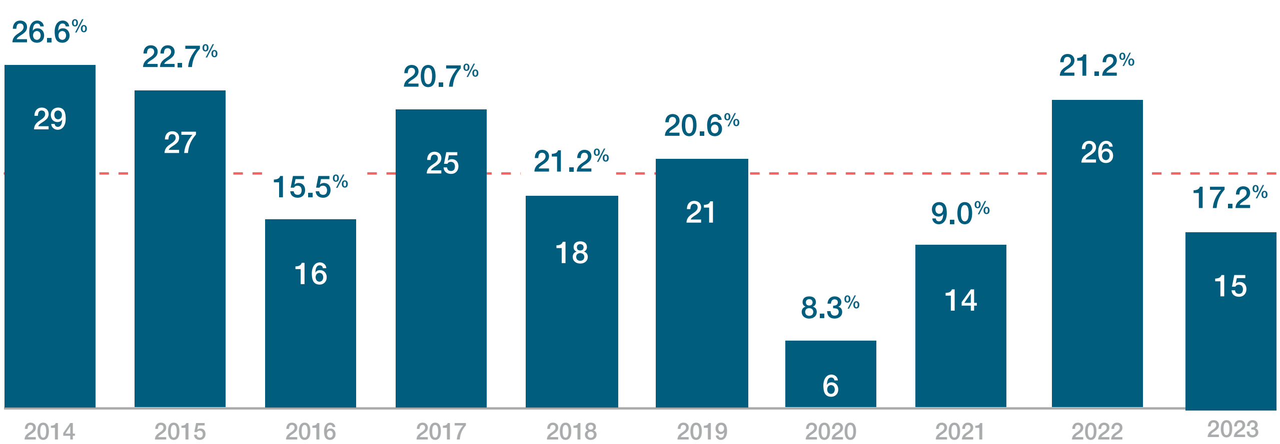
Energy Transactions Subject to Initial Investigation (Including Percentage of Total Energy Transactions)[2]

- - - Represents Average




Chemical Transactions Subject to Initial Investigation (Including Percentage of Total Chemical Transactions)[3]

- - - Represents Average




[2] Unless otherwise noted, whether a transaction or investigation is Energy- or Chemical- related is determined based on the industry group of the target entity. Specifically, the 3-digit NAICS codes for the acquired person, as reported in the 2021 Annual Report. The 3-digit industry NAICS codes for the energy transactions reported are: 211 - Oil and Gas Extraction; 213 - Support Activities for Mining; 221 - Utilities; 324 - Petroleum and Coal Products Manufacturing; 425 - Wholesale Electric Markets and Agent and Brokers; 447 - Gasoline Stations; 486 - Pipeline Transportation; 493: Warehousing and Storage (including petroleum stations and terminals).

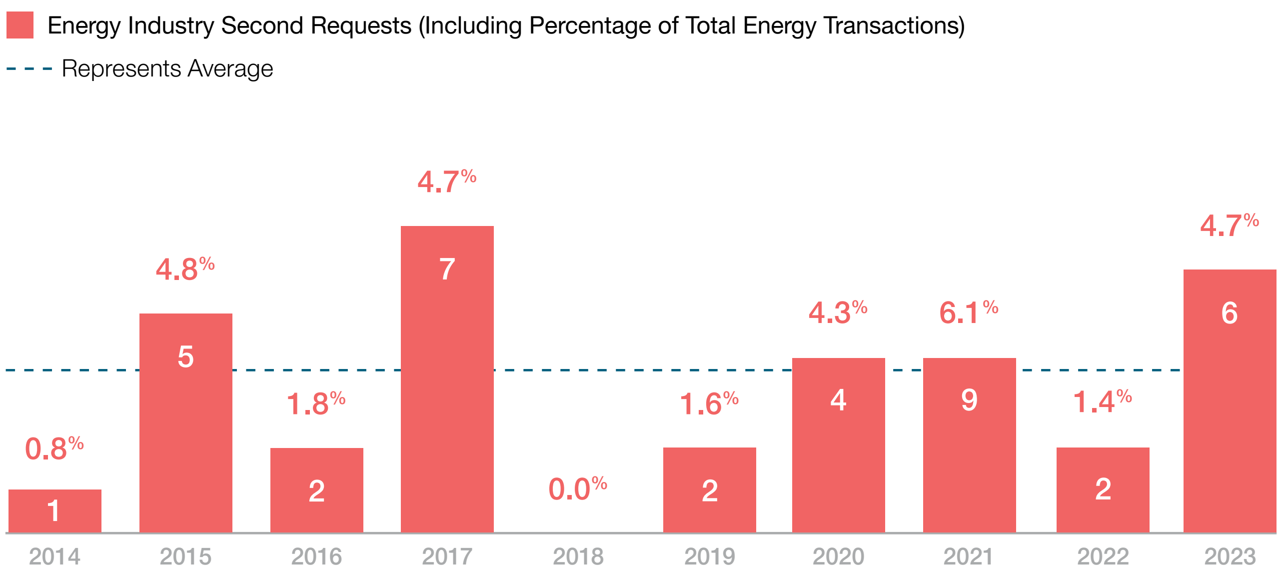
[3] Unless otherwise noted, whether a transaction or investigation is Energy- or Chemical- related is determined based on the industry group of the target entity. Specifically, the 3-digit NAICS codes for the acquired person, as reported in the 2021 Annual Report. The 3-digit industry NAICS codes for the chemical transactions reported is: 325 - Chemical Manufacturing.

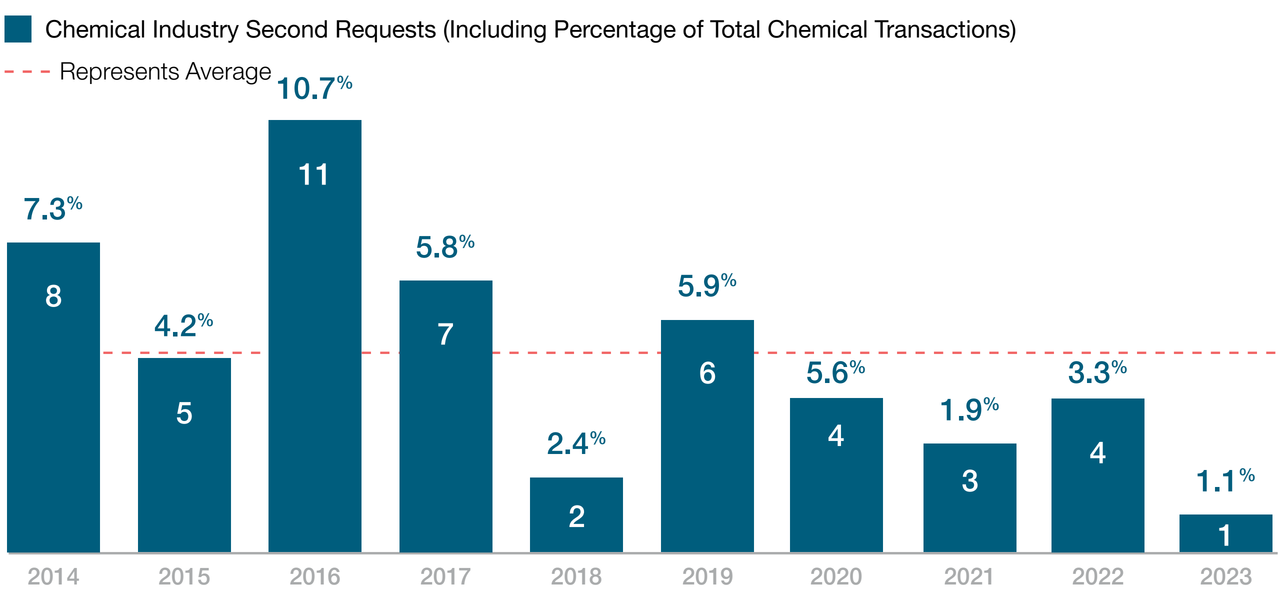
## Second Requests

The FTC and DOJ issued second requests in **2%** of reported transactions across all industries in 2023. Seven second requests were issued to energy and chemical transactions in 2023, accounting for **19%** all second requests for the year.

In 2023, **4.7%** of reported energy transactions led to a second request, above the ten-year historical average of **3%** and last year's low of **1.7%**. Notably, this figure does not include FTC investigations stemming from the E&P wave of consolidation, which began in late 2023 after the federal government's fiscal reporting year ended. Just **1.1%** of reported chemical industry transactions led to a second request in 2023, the lowest second request rate over the past decade and well below the historical average of **4.7%**.

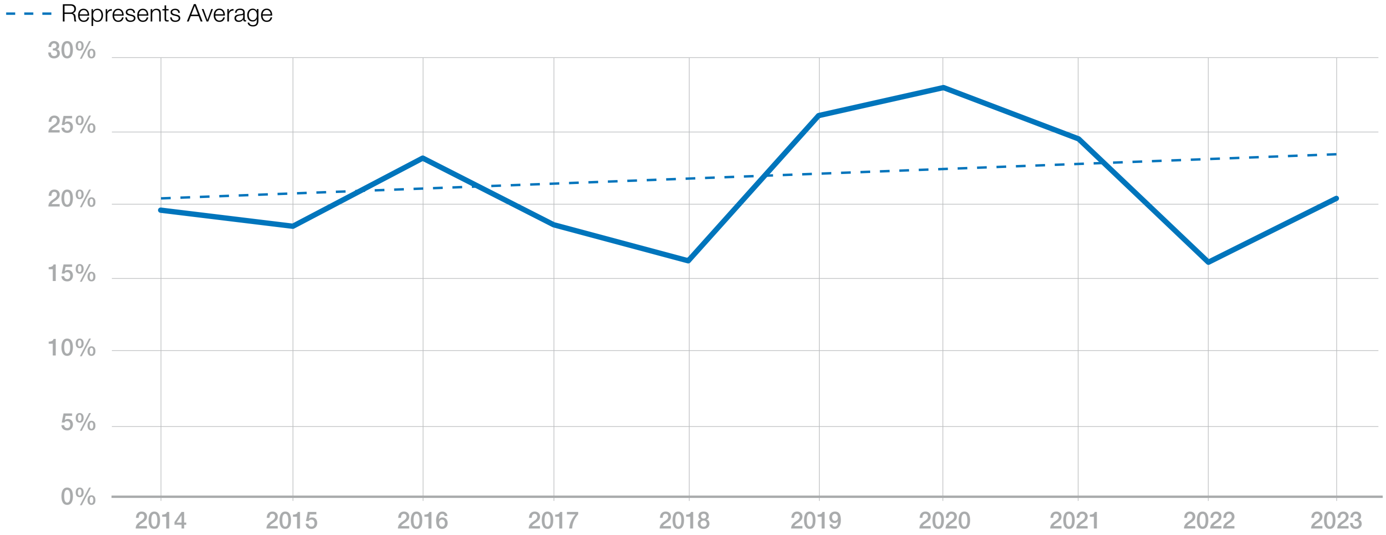
An important metric when evaluating the FTC and DOJ's enforcement tendencies is the "yield" rate of initial investigations that lead to second requests. In 2023, **20%** of initial investigations led to second requests across all industries. The energy industry's yield in 2023 was **43%**, meaning that once an investigation is opened, the agencies were more than twice as likely to issue a second request than they were on average across all industries. The agencies' average yield rate in the energy industry has doubled over the last ten years, from just under **20%** in 2014 to just under **40%** in 2023. Yield rates in the chemical industry have experienced the opposite trend, falling from an average of just under **40%** in 2014 to just under **20%** in 2023, and saw a decade low **7%** yield in 2023.




[4] The second request data in this section is tallied from the data provided in all HSR Annual Reports at Exhibit A, Table XI, titled: "Fiscal Year 2021 Industry Group of Acquired Person."

## Initial Investigation to Second Request Yield Rate - All

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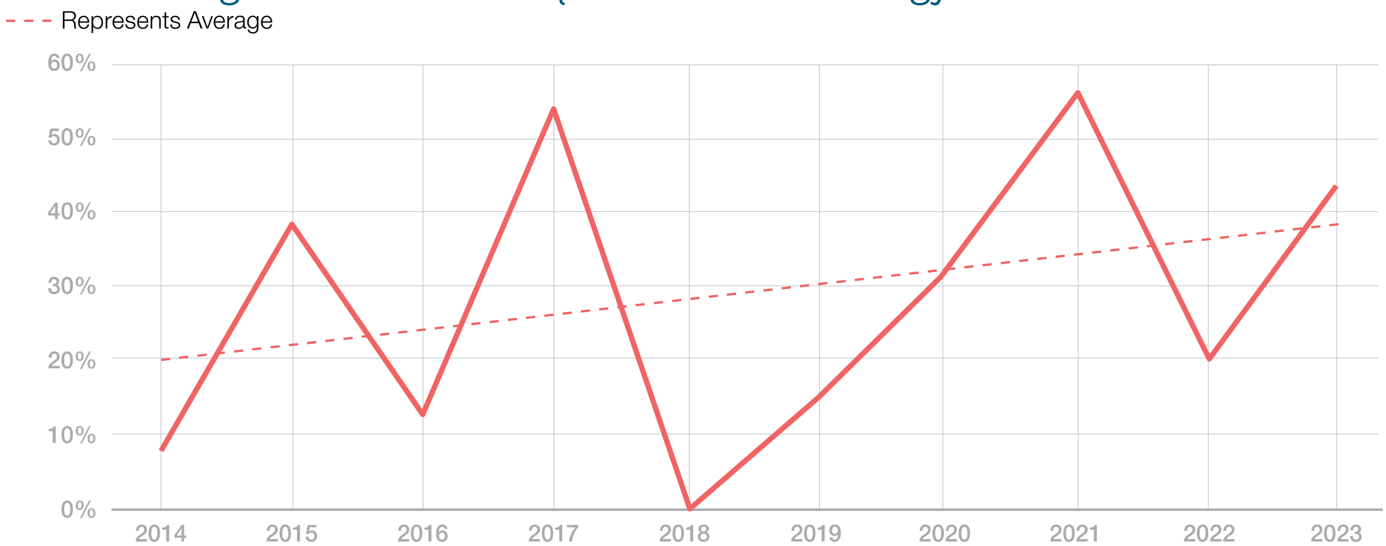


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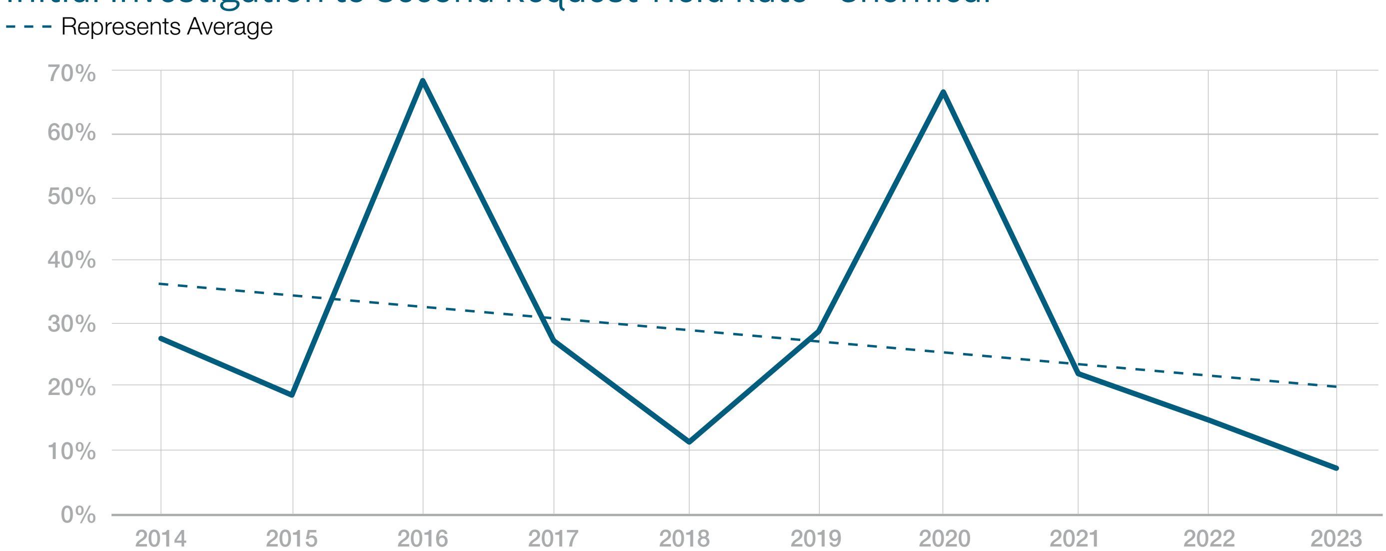
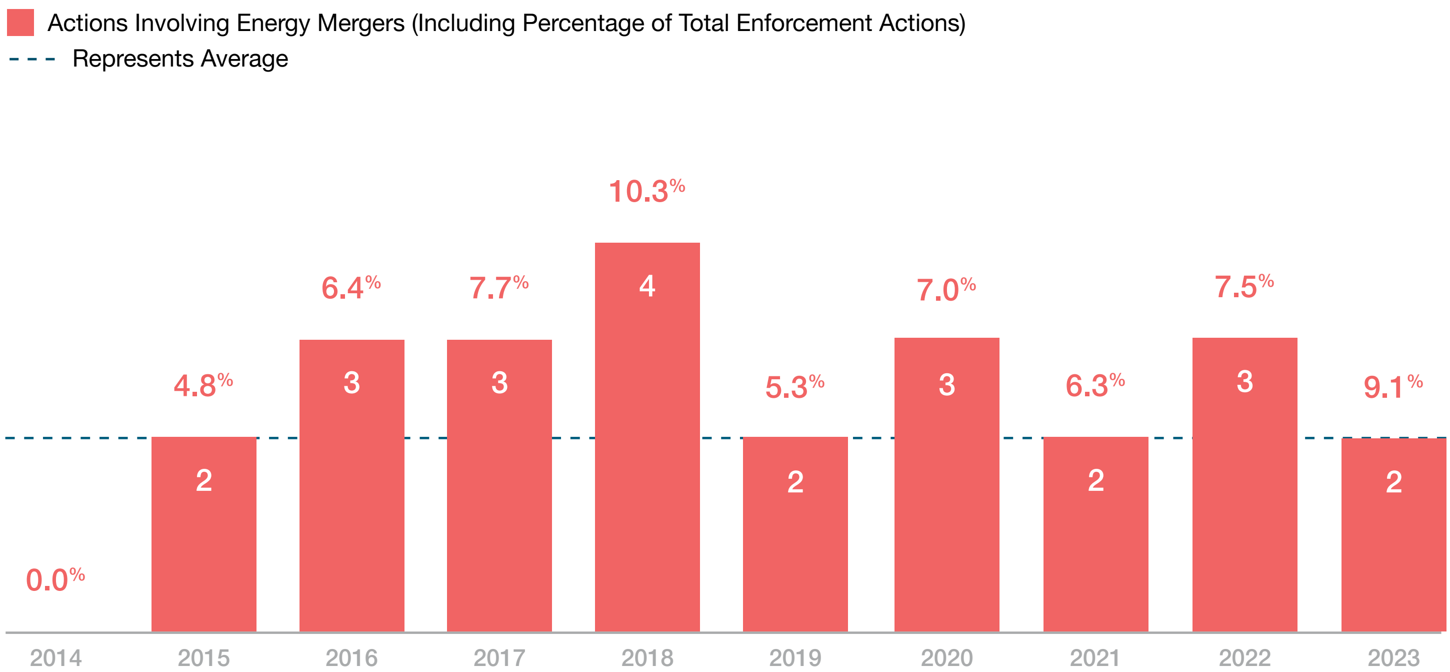


## Merger Enforcement Actions

**Overall**: From 2014 to 2023 (the latest year for which agency enforcement data is available at the time of this publication), the FTC and DOJ brought a total of **375** merger enforcement actions across industries, an average of **38** per year. Of this total, the FTC brought **211** and the DOJ brought **164**. These figures include consent decrees, abandoned transactions, and court challenges. During this period, the agencies brought a total of **24** actions involving energy mergers (**6%** of all actions), and **28** actions involving chemical mergers (**7%** of all actions). The agencies brought enforcement actions against **2%** of energy transactions and **3%** of chemical transactions on average since 2014, although figures vary significantly year-to-year. In 2023, the rate of enforcement actions in the energy industry was **1.6%** of total industry transactions. The chemical industry saw no enforcement actions for the first time in the last fifteen years, the nadir of a steady decline since 2018 when the enforcement rate hit a decade-high **12.8%**.

The FTC and DOJ brought **16** enforcement actions in 2023. **7** deals closed subject to divestitures or other remedies, **6** deals were abandoned by the parties, **2** deals were blocked after a trial on the merits, and FTC is appealing an adverse court ruling in **1** case. The FTC and DOJ each oversaw one energy industry enforcement action in 2023: QEP Partners/EQT Corp. (FTC) and Vistra/Energy Harbor Corp (DOJ). Both transactions closed subject to consent decrees requiring divestitures among other remedies.

The agencies' rate of enforcement actions stemming from initial investigations in 2023 was **12%** across all industries, slightly below the ten-year average of **15%**. The agencies' rate in the energy industry varies year-to-year, but has trended up over the last ten years to an average rate of **20%**. The chemical industry has again seen the opposite enforcement trend, with the average rate declining from over **20%** in 2014 to just **5%** in recent years.


Actions Involving Energy Mergers (Including Percentage of Total Enforcement Actions)
Represents Average
0.0%
4.8%
2
6.4%
3
7.7%
3
10.3%
4
5.3%
2
7.0%
3
6.3%
2
7.5%
3
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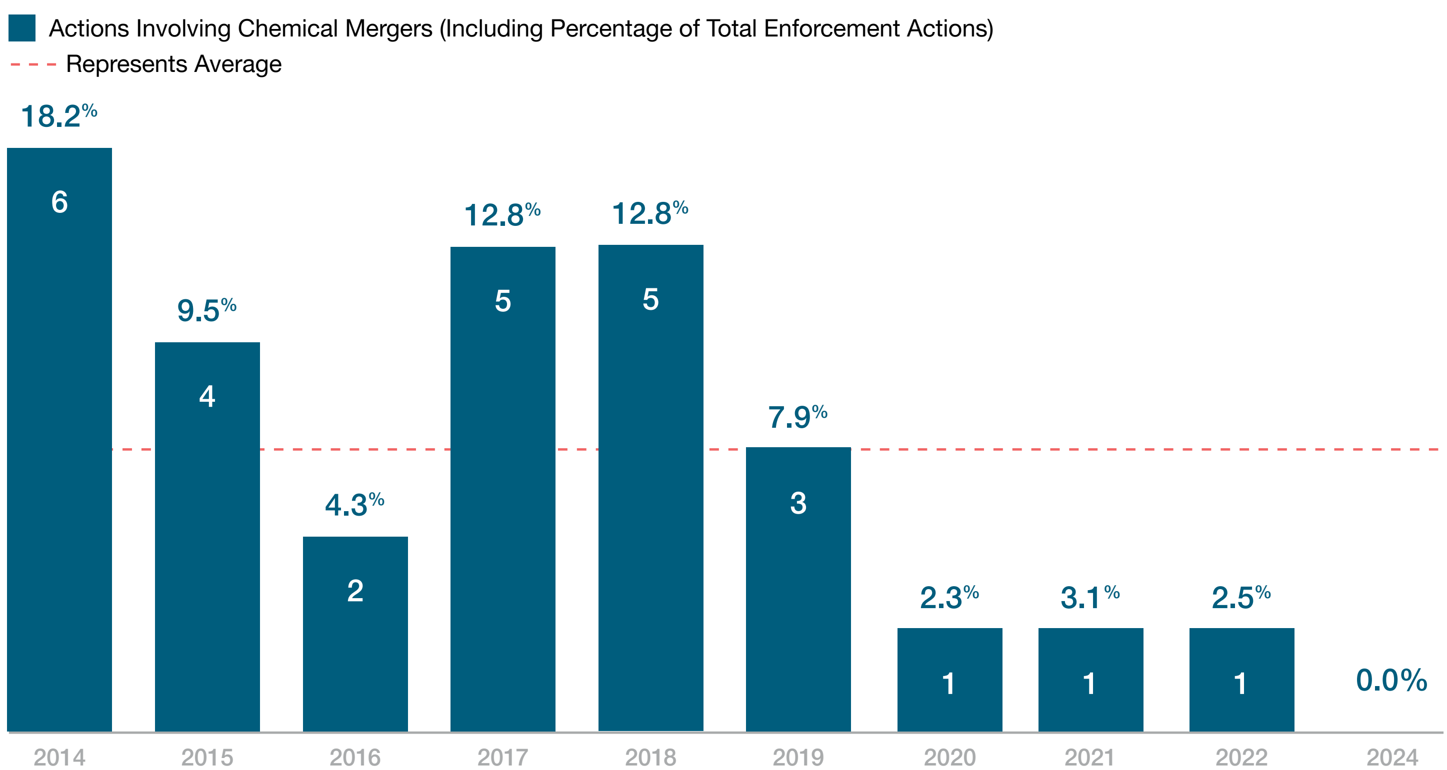
Actions Involving Chemical Mergers (Including Percentage of Total Enforcement Actions)
Represents Average
18.2%
6
9.5%
4
4.3%
2
12.8%
5
12.8%
5
7.9%
3
2.3%
1
3.1%
1
2.5%
1
0.0%
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# Merger Enforcement Cases

The Federal Trade Commission ("FTC") focused much of its attention in 2024 on investigating a wave of consolidations among U.S. exploration and production ("E&P") companies. The FTC opened investigations into six such mergers, raising novel theories of harm. All of these transactions have either closed or survived agency scrutiny, with two subject to a consent order eliminating certain board appointment rights. The FTC also investigated one midstream transaction, which closed without agency action after the parties amended their agreement to address the FTC's concerns. The U.S. Department of Justice ("DOJ") did not bring any energy-related enforcement actions in 2024, and neither agency brought any chemical industry enforcement actions in 2024.

# FTC Investigates the E&P Wave of Consolidation

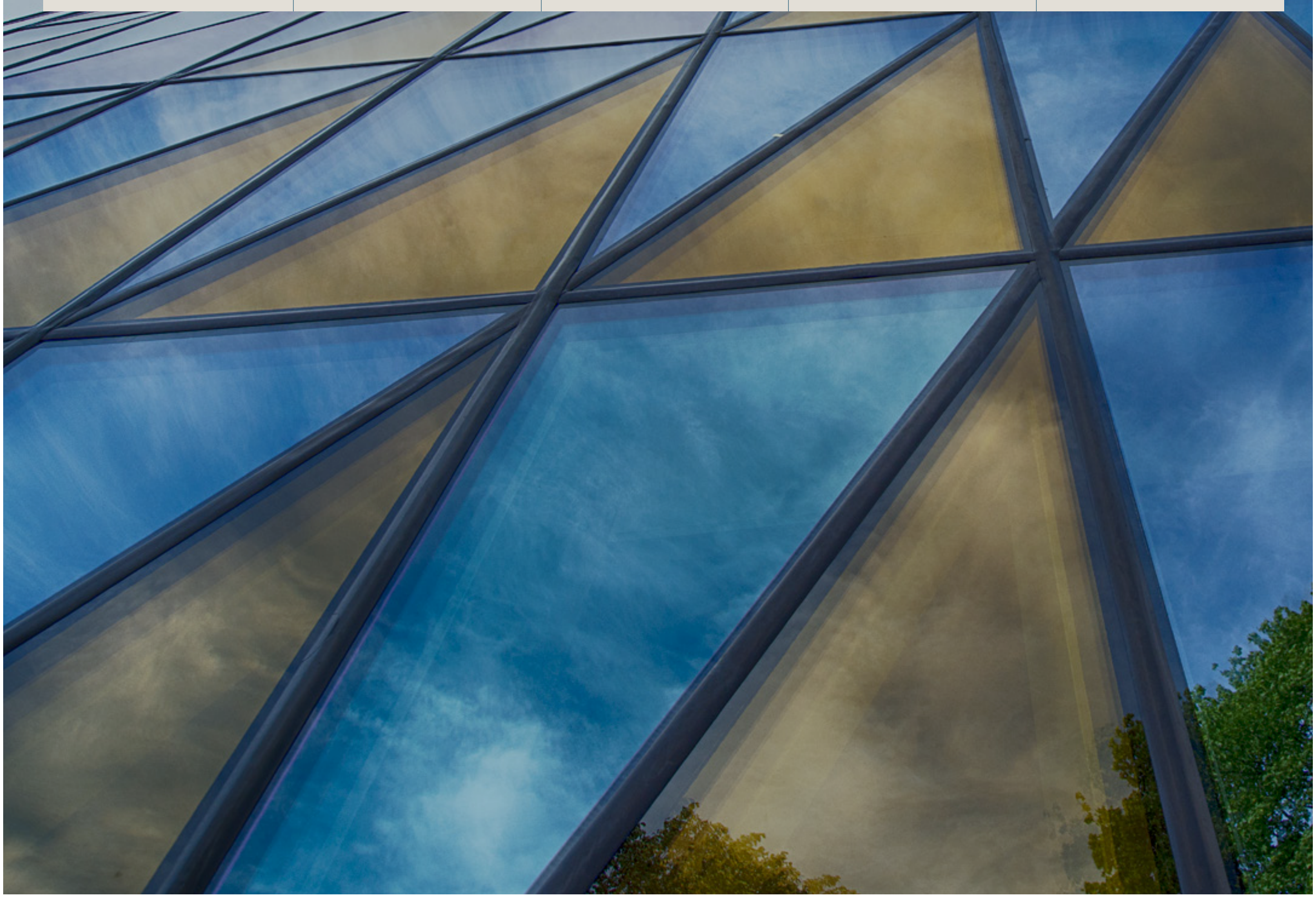
In December 2023, the FTC opened Second Request investigations into Exxon Mobil Corporation's ("Exxon") acquisition of Pioneer Natural Resources Company ("Pioneer") and Chevron Corporation's ("Chevron") acquisition of Hess Corporation ("Hess"). The FTC subsequently opened Second Request investigations into Diamondback Energy's ("Diamondback") acquisition of Endeavor Endeavor Energy Resources, L.P. ("Endeavor"), Chesapeake Energy Corporation's ("Chesapeake") acquisition of Southwestern Energy Company ("Southwestern"), Occidental Petroleum Corporation's ("Occidental") acquisition of CrownRock LP ("CrownRock"), and ConocoPhillips Company's ("ConocoPhillips") acquisition of Marathon Oil Corporation ("Marathon Oil").

Just two of these investigations, *Exxon-Pioneer* and *Chevron-Hess*, led to enforcement actions. All six investigations, however, reflect the FTC's concern with "trends towards consolidation," a 2023 Merger Guidelines plus factor when assessing whether a transaction is likely to substantially lessen competition. These investigations also reflect the FTC's focus on several other theories of harm that gained prominence under the Biden administration:

- **OPEC ++:** In both the *Exxon-Pioneer* and *Chevron-Hess* investigations, the FTC pursued a novel coordinated effects theory of harm focused on the actions of individual executives at each target company. Specifically, the FTC alleged that the proposed appointment of Scott Sheffield to Exxon's Board of Directors and John B. Hess to Chevron's Board of Directors would each increase anticompetitive coordination in the global market for crude oil because each individual had allegedly encouraged output restrictions between U.S. producers, the Organization of Petroleum Exporting Countries ("OPEC"), and a related cartel of other oil-producing countries known as OPEC+—the so-called "OPEC ++" theory of harm. The FTC typically alleges coordinated theories of harm based on structural concentration levels, not the prior actions of individual executives.
- **Entanglements:** The FTC has, in recent years, grown increasingly focused on "entanglements," which generally refers to officers/directors of one firm serving in a leadership capacity at a competing firm. The FTC has argued that such entanglements may create unlawful interlocking directorates under Section 8 of the Clayton Act or constitute unfair competition under Section 5 of the FTC Act (as reflected in *Exxon-Pioneer*, Complaint at ¶ 9; *Chevron-Hess*, Complaint at ¶ 10) and used the E&P investigations as an avenue to explore how board appointment rights in particular may influence information sharing and competition between companies.
- **Labor Issues:** The FTC frequently probes a merger's effects on labor markets pursuant to the 2023 Merger Guidelines, which cite high switching costs, search frictions, and geographic limitations as potential difficulties for employees post-merger. The FTC explored these concerns in the E&P transactions but did not obtain any labor-focused remedies.

Below is a timeline of key milestones in each deal.

| Parties | Merger Announcement | Consent Decree | Transaction Closed | Merger Announcement to Closing |
|---|---|---|---|---|
| **Exxon/Pioneer** | Oct. 11, 2023 | May 1, 2024 | May 3, 2024 | ~7 months |
| **Chevron/Hess** | Oct. 23, 2023 | Sept. 30, 2024 | Pending | 14 months / Ongoing |
| **Occidental CrownRock** | Dec. 11, 2023 | N/A | Aug. 1, 2024 | ~8 months |
| **Diamondback/ Endeavor** | Feb. 12, 2024 | N/A | Sept. 10, 2024 | ~7 months |
| **Chesapeake/ Southwestern** | Jan. 11, 2024 | N/A | Oct. 1, 2024 | ~9 months |
| **Marathon Oil/ ConocoPhillips** | May 29, 2024 | N/A | Nov. 22, 2024 | ~6 months |





Prior results do not guarantee a similar outcome.

## Exxon/Pioneer

Exxon is a vertically-integrated oil and gas company with operations across the globe, including E&P operations in the Permian Basin. Pioneer is a domestic oil and natural gas producer that, at the time of its proposed transaction with Exxon, was the largest crude oil producer in the Permian Basin. On October 11, 2023, Exxon and Pioneer announced Exxon's proposed acquisition of Pioneer in an all-stock transaction valued at $59.5 billion. The agreement also obligated Exxon to "take all necessary actions" to appoint Sheffield, Pioneer's founder and former CEO, as a member of its Board of Directors.

Following a six-month Second Request investigation, the FTC filed an administrative complaint on May 1, 2024, seeking to block the proposed merger on the grounds that it violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Unlike traditional merger challenges that focus on a loss of competition due to the combination of the merging companies' businesses, the FTC relied on a theory of harm based on Sheffield's proposed appointment to Exxon's Board of Directors. Citing news articles and several redacted text threads, the FTC alleged that Sheffield "campaigned to organize anticompetitive coordinated output reductions between and among U.S. crude oil producers," OPEC, and a related group of other oil-producing countries known as OPEC+ – the so-called "OPEC ++" theory of harm. In light of Sheffield's alleged history of attempting to coordinate oil prices, the FTC claimed that his Exxon board appointment would give him "a larger platform from which to pursue his anticompetitive schemes" with OPEC and OPEC+ member states, in violation of Section 7 of the Clayton Act. The FTC separately alleged that Sheffield's appointment to the Exxon Board would violate Section 5 of the FTC Act's prohibition on interlocking directorates, given Sheffield's membership on the Board of The Williams Companies.

Exxon and Pioneer closed their transaction in May 2024, subject to an FTC consent decree prohibiting Sheffield from serving on Exxon's Board or in any other advisory capacity to the company. The consent decree also prohibited Exxon from nominating or appointing any Pioneer representative to Exxon's Board for five years. During the public comment period prior to finalizing the consent decree, Sheffield filed a 23-page public comment forcefully refuting numerous allegations in the case and requesting that the FTC withdraw its complaint and vacate the proposed consent order.

The FTC voted in favor of the consent decree; although, the Commissioners split over whether a merger investigation was the proper forum for such allegations. Republican Commissioners Melissa Holyoak and Andrew N. Ferguson issued a dissenting statement, conceding that Sheffield's conduct warranted scrutiny but that a standalone conduct investigation (under a different FTC statute), not a merger investigation, would have been the proper means to investigate that conduct. Democratic Commissioner Slaughter voted in favor of the consent decree but made a similar point in her concurring statement. In her view, conduct investigations could, and in this case should, exist alongside merger investigations, in part because they are unencumbered by the "strict statutory deadlines" of the Hart-Scott-Rodino Act.

The *Exxon/Pioneer* case is remarkable for several reasons.

- The FTC did not allege that the combination of the parties' businesses would harm competition, but instead that a single individual's appointment to the buyer's board would.
- It is difficult to square the FTC's case with legal precedent or standard economic analysis. Sheffield's detailed public rebuttal also raises questions about the accuracy of the factual allegations in the FTC's complaint.
- The case reflects the FTC's interest in addressing non-merger conduct as part of a merger investigation, something both antitrust agencies have generally avoided.
- The FTC alleged a global market for crude oil. In doing so, the FTC implicitly acknowledged the highly competitive nature of the upstream energy industry.

## Chevron/Hess

Chevron is a vertically integrated energy and chemicals company and conducts global E&P operations. Hess is also a vertically integrated energy company engaged in the domestic and international E&P of crude oil. On October 23, 2023, Chevron and Hess announced Chevron's proposed acquisition of Hess in an all-stock transaction valued at $53 billion. Similar to the *Exxon/Pioneer* agreement, the merger agreement obligated Chevron to "take all actions necessary" to appoint John B. Hess, CEO of Hess, to Chevron's Board of Directors.

Following a nine-month Second Request investigation, the FTC filed an administrative complaint on September 30, 2024, seeking to block the proposed merger on the grounds that it violated Section 7 of the Clayton Act and Section 5 of the FTC Act. The FTC brought allegations similar to those in *Exxon/Pioneer*, claiming that John Hess publicly and privately encouraged OPEC representatives to stabilize oil production and raise prices. According to the FTC, John Hess's appointment to Chevron's Board would "amplify" his support for OPEC and thereby meaningfully increase the risk of industry coordination. As it did in *Exxon/Pioneer*, the FTC pointed to John Hess's Board appointment clause, rather than the underlying transaction, as the source of merger-specific harm.

Chevron resolved the FTC's investigation with a consent order prohibiting John Hess from serving on Chevron's Board or in any other advisory capacity to Chevron. At the time of this writing, the transaction has not yet closed.

The FTC's consent orders in *Exxon/Pioneer* and *Chevron/Hess* have caused considerable ripple effects in other parts of government. In May 2024, Representative Frank Pallone, Jr. (D-NJ), Ranking Member of the House Committee on Energy and Commerce, wrote to Committee Chair Representative Cathy McMorris Rodgers (R-WA), calling on her to schedule a hearing with Sheffield and inquire about the potential impact of alleged collusion between crude oil producers and OPEC. Committee Democrats launched their own investigation that same month and sent letters to BP America, Shell USA, Chevron, Occidental, Devon Energy, Hess, and Exxon, expressing "deep concern" and "demand[ing] answers about the behaviors of certain crude oil producers" following the FTC's probe of Sheffield. Citing the FTC's proposed consent order, many Democratic senators promptly urged the DOJ to investigate price fixing in the U.S. oil industry and prosecute when necessary.

Echoing Pallone's concerns, Democrats on the U.S. House Natural Resources Committee wrote in July to the Honorable Deb Haaland, Secretary of the U.S. Department of the Interior, seeking information on the Department's plans for companies sued in a recent class action lawsuit alleging similar collusion (discussed below in Chapter 7). In September 2024, Pallone wrote a second letter to Committee Chair McMorris Rodgers, criticizing her perceived lack of action regarding the allegations in the FTC's complaint.

## Additional E&P Investigations

The FTC investigated several other significant E&P transactions in 2023–2024, none of which resulted in enforcement actions: Occidental's proposed acquisition of CrownRock, Diamondback's proposed acquisition of Endeavor, Chesapeake's proposed acquisition of Southwestern and ConocoPhillips' proposed acquisition of Marathon Oil. In each of these cases, the FTC focused on many of the same novel theories of harm (e.g., "entanglements," labor markets, and the alleged collusion with OPEC+) that animated its investigations of *Exxon-Pioneer* and *Chevron-Hess*. All of these deals, however, closed within six to nine months of the merger announcement without any lawsuits or public allegations of wrongdoing by company executives.

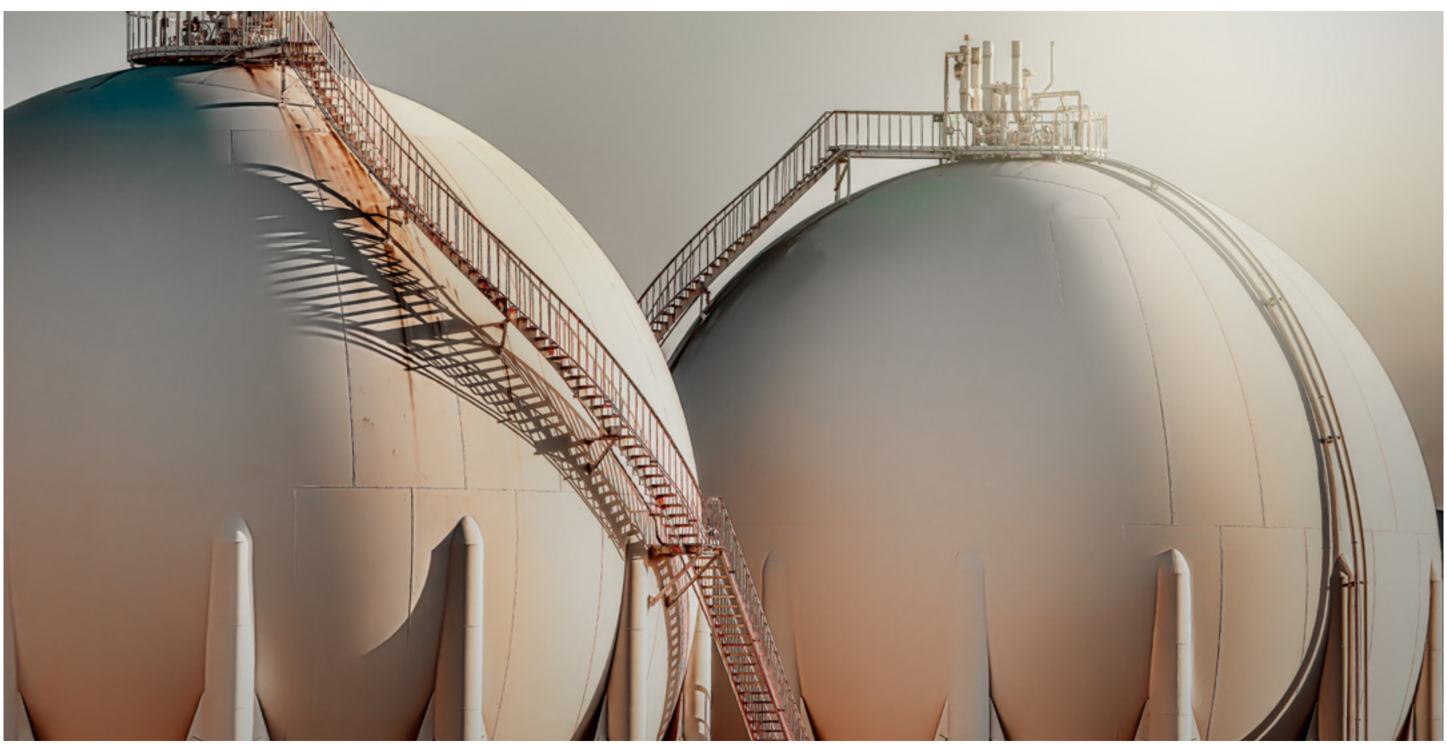
As discussed in Chapter 1, we expect enforcement priorities will change with the incoming administration. The FTC is unlikely to continue pursuing the novel theories of harm seen in the *Exxon-Pioneer* and *Chevron-Hess* complaints, but the extent of this shift remains to be seen.

# Midstream Enforcement Actions

## Global Partners/Gulf Oil

The FTC obtained relief in one midstream transaction in 2024: Global Partners LP's ("Global Partners") acquisition of Gulf Oil LP ("Gulf Oil"). Both Global Partners and Gulf Oil own and operate light petroleum product terminals and related supply chains throughout the United States, including in the New England area. On December 15, 2022, Global Partners and Gulf Oil entered into a purchase agreement by which Global Partners would acquire five Gulf Oil petroleum terminals in the Northeast for $273 million.

The FTC issued a Second Request in March 2023. Shortly thereafter, the Office of the Maine Attorney General joined the investigation. The parties ultimately agreed to carve out Gulf Oil's Portland, Maine terminal from the transaction to address FTC concerns that the deal would limit competition for heating oil and diesel fuel in and around Portland, Maine. The FTC took no action following the "fix-it-first" remedy, and the parties closed on September 9, 2024.



2024

# Non-Merger & Other Enforcement Developments

Federal and state antitrust enforcers continue to push their enforcement initiatives outside of the merger context. Revelations regarding potential collusion in the oil and gas industry resulted in a flurry of attention from Congress as various representatives and committees called for antitrust regulators to protect consumers from high gas costs. The FTC and DOJ brought several enforcement actions in adjacent industries, such as construction, asphalt and concrete, and natural disaster relief. The FTC continues to pursue its efforts to combat non-compete agreements, despite challenges which have halted the implementation of its rule that would ban such agreements. Both federal agencies withdrew their Collaboration Guidelines, which had provided helpful guidance on competitor collaborations. States have also taken action this year.

# Congressional Scrutiny of Oil & Gas Industry

Congress has been increasingly vocal regarding the competitiveness of the oil and gas industry. These concerns largely come in the wake of Exxon Mobil Corporation's ("Exxon") acquisition of Pioneer Natural Resources ("Pioneer"). In November 2023, Democrats urged the FTC to investigate the merger, and in March 2024 Republicans responded with their own letter in support of the merger, which they argued could result in increased oil production, lower energy prices, and less reliance on foreign sources for energy production.

As discussed further above in Chapter 5, the FTC claims that its review of the merger uncovered evidence of a price-fixing conspiracy in which Pioneer's former CEO Scott Sheffield allegedly colluded with OPEC and OPEC+ leaders to suppress oil output from the Permian Basin to raise crude oil prices. (Sheffield has vigorously disputed these claims.) In May 2024, the FTC approved a consent order and complaint preventing Sheffield from gaining a seat on Exxon's board of directors or serving in an advisory capacity at Exxon following the acquisition. FTC Chair Lina Khan's July 2024 testimony before the House Committee on Energy and Commerce highlighted the FTC's consent order as part of its effort to "protect competition in energy markets."

Although the merger was approved and completed, the specter of a global antitrust conspiracy attracted significant attention from Congress, which generated numerous calls for further investigation into potential collusion in the oil and gas industry:

- In May 2024, Democratic members of the Committee on Energy and Commerce opened an investigation into potential collusion in the oil industry and issued letters seeking further information from seven oil and gas companies. Days later, Committee Ranking Member Frank Pallone, Jr. wrote a letter to the Chair of the Committee, Cathy McMorris Rodgers, urging her to hold a hearing with Sheffield regarding the recent FTC allegations that he was colluding with competitors to suppress oil production and drive up prices for consumers. In September 2024, Pallone wrote a follow-up letter to Chair Rodgers criticizing the perceived lack of action that had been taken regarding the FTC's allegations.

- In June 2024, members of the House Judiciary Committee wrote to Attorney General Merrick Garland and Assistant Attorney General Jonathan Kanter expressing similar concerns. The letter posed questions regarding the DOJ's ability to investigate and prosecute the alleged price fixing, and whether the DOJ was coordinating with the FTC to enforce antitrust laws in the oil and gas industry.

- In July 2024, members of the House Natural Resources Committee ("NRC") wrote to the Secretary of the Department of the Interior echoing similar concerns, but questioning whether more companies besides Pioneer were involved in the conspiracy. The letter cited to a civil lawsuit alleging that at least eight oil companies were involved in market manipulation. The NRC members asked whether civil or criminal liability might bar these companies from holding future oil and gas leases, stop them from operating on public lands and waters, or warrant adding them to suspension, debarment, or disqualification lists.

# Non-Compete Rulemaking

In January 2023, the FTC proposed a new rule to prohibit almost all non-compete agreements, and in April 2024 the rule was finalized by a 3-2 vote along political lines. The rule makes it a violation for a business to enter into or seek to enforce a non-compete clause with any worker, with two exceptions. First, the final rule preserves existing non-compete agreements with respect to "senior executives," who make at least $151,164 annually and are in a "policy-making position." Second, the rule permits non-compete clauses entered into by a person pursuant to a bona fide sale of a business entity. This is one area in which the FTC made the final rule somewhat more business friendly than its proposed rule, which would have required the seller to be a substantial owner holding at least a 25% ownership interest in a business entity.

However, on August 20, 2024, the U.S. District Court for the Northern District of Texas struck down the rule, which was set to take effect on September 4, 2024. The court ruled that the FTC does not have the power to create substantive rules regarding unfair methods of competition. The court also concluded that the rule was arbitrary and capricious, as it imposed a blanket ban on non-compete agreements without providing sufficient evidence or justification for such a sweeping prohibition. Furthermore, the court criticized the rule for disregarding the potential benefits of non-compete agreements and relying on flawed empirical data.

On October 18, 2024, the FTC filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit, challenging the Texas district court's August ruling. This appeal remains pending at the time of publication.

# Competitor Collaboration Guidelines Rescinded

On December 11, 2024, the FTC and DOJ jointly issued a statement withdrawing their Antitrust Guidelines for Collaborations Among Competitors ("Collaboration Guidelines"). The Collaboration Guidelines were first issued in April 2000 and are a frequently cited authority on navigating competitor collaborations. Although the agencies' statement argues that intervening case law has rendered the Collaboration Guidelines out-of-date, the agencies' statement does not provide details as to how these intervening cases changed the law. At a minimum, many of the key principles in the Guidelines were based on court cases that remain good law.

Companies may be particularly interested in the fate of the Guidelines' 20% market share "antitrust safety zone" within which the agencies would not "challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected." While the Safety Zone has been revoked, the case law and economic logic supporting that threshold remain valid. Importantly, none of the cases that the agencies cite in their withdrawal statement involve the condemnation of a collaboration between competitors with less than 20% market share.

## Contracting & Procurement Enforcement

Regulators continue to target bid-rigging and price-fixing practices in the asphalt and concrete industries. In January, August, and October 2024, the DOJ secured additional guilty pleas from asphalt paving companies and executives in connection with the government's long-running investigation into collusion in Michigan's asphalt paving industry. The scheme involved multiple companies coordinating bids, with designated "losing companies" submitting intentionally non-competitive bids to create a false impression of competition. Four executives and a corporation were also sentenced in connection with their participation in a long-running conspiracy to fix prices, rig bids, and allocate jobs for ready-mix concrete in the Savannah, Georgia area.

In May 2024, an individual who owned several companies providing fuel truck services to the U.S. Forest Service pleaded guilty to two conspiracies. First, the owner admitted to conspiring with others to rig bids and allocate territories for wildfire services from 2015 to 2023. He and others also conspired to monopolize the same market from 2020 to 2023.

These companies and individuals all face severe penalties under Section 1 of the Sherman Act, which allows up to 10 years imprisonment and millions in criminal fines.

## Continued Use of Competition Strike Forces

On August 1, 2024, the FTC held its first public meeting for the newly established Strike Force on Unfair and Illegal Pricing. This initiative aims to uncover private sector practices that artificially inflate consumer prices, particularly in markets that affect every day Americans, like gasoline and other energy-related products. A key focus is on how companies in the energy sector might exploit their market power to manipulate prices.

The DOJ's Procurement Collusion Strike Force also expanded its reach, announcing four new national law enforcement partners, bringing the total to 38 agencies and offices committed to deterring, detecting, investigating, and prosecuting antitrust crimes related to government procurement, grants, and program funding at all levels. The strike force targets collusion and fraudulent practices in procurement processes, which are particularly pertinent for energy companies involved in large-scale infrastructure projects.

## Focus on Artificial Intelligence

AI continues to be a hot topic across all industries and antitrust regulators want to ensure that their enforcement measures keep pace with the rapidly developing technology. In addition, regulators have focused on combatting the use of algorithmic or AI-based software to improperly set prices. Over the past several years, companies have increasingly turned to software to help analyze market conditions and determine optimal pricing strategies. Today's technology enables companies to constantly evaluate and change pricing in real time using complex algorithms or AI.

Regulators argue that this technology can make it easier for competitors to adopt common pricing strategies designed to maximize revenue through increased prices. At the same time, this technology removes the "human" element from such collusion which may make it more difficult to detect. The FTC has emphasized that "your algorithm can't do anything that would be illegal if done by a real person." In 2024, the DOJ and FTC filed a lawsuit, filed multiple amicus briefs (see here and here), and issued orders seeking information regarding companies that may be using this technology to coordinate illegally.

This growing focus on algorithmic pricing is likely to extend across all sectors—including energy and chemicals—where similar software could potentially be used to help companies determine prices.

# Focus on Natural Disaster Responses

As natural disasters and severe weather events become more common, regulators are paying attention to protecting consumers and competition in the wake of such events. For example, in August 2024, the former interim president of a Puerto Rican steel distributor pleaded guilty to an eight-year conspiracy to fix the price of rebar during reconstruction after Hurricanes Irma and Maria. In October 2024, the FTC, DOJ, and Consumer Financial Protection Bureau issued a warning regarding potential scams and price gouging after hurricanes.

# FTC Improvements on EnergyGuide Labeling Rule

In January 2024, the FTC announced that it is seeking public comments on proposed improvements to the Energy Labeling Rule, which requires manufacturers to label major home appliances and other products to help consumers compare the energy usage and costs of competing models. The FTC is focused on three basic categories, including (1) new product labels for air cleaners, clothes dryers, miscellaneous refrigeration products, and portable electric spas, (2) changes to labels for several existing products, and (3) revisions to the current requirements for affixing labels on showroom models.

# FTC Annual Report on Ethanol Market Concentration

In 2005, Congress passed the Energy Policy Act, which requires the FTC to issue an annual report to Congress and the Environmental Protection Agency ("EPA") on ethanol market concentration. The purpose of the report is to determine whether there is sufficient competition in the ethanol production industry to avoid price-setting and other anticompetitive behavior. On December 2, 2024, the FTC issued its 2024 report. As in prior years, the report concluded that the "level of concentration and number of market participants in the U.S. ethanol production industry continue to suggest that the exercise of market power to set prices, or coordinate on price or output levels, is unlikely on a nationwide basis." In addition, the report concludes that no single ethanol producer or marketer has market power at a national level, that any nationwide coordination among competitors is unlikely, and that imports and new market entrants would impede any exercise of market power.

2024

# State & Private Litigation Developments

2024 saw the commencement of major antitrust actions with far-reaching implications, in addition to the resolution of several long-simmering class actions by settlement or dismissal. In Texas, eleven state attorneys general sued institutional investors, claiming that “ESG” policies or “decarbonization” goals reduced coal production; in New Mexico and Nevada, putative classes sued independent shale oil producers alleging coordination with OPEC to reduce oil production; and in Illinois, putative classes alleged PVC pipe manufacturers coordinated their activity through industry pricing news publications. In the appeals courts, the Fourth Circuit revived an upstart power company’s antitrust challenge to an incumbent transmission provider, while the Ninth Circuit affirmed the dismissal of claims that shale producers conspired with the White House to end the 2020 Russia-Saudi Arabia oil price war.

# Power

## Eleven States Claim Institutional Investors' Coal Stakes Harm Competition

***State of Texas, et al. v. Blackrock, Inc., et al.*, No. 6:24-cv-00437 (E.D. Tex.)**

In November 2024, a group of eleven Republican state attorneys general filed Clayton Act and Sherman Act claims against three of the nation's largest asset managers, alleging their overlapping stakes in Wyoming coal producers and their public commitments to reduce carbon emissions led to depressed coal production and higher prices.

The States of Alabama, Arkansas, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, Texas, West Virginia, and Wyoming sued BlackRock, State Street, and Vanguard Group, claiming that the three collectively own between 8% and 34% of the outstanding shares in nine publicly traded coal producers, which producers are alleged to collectively account for 63% of South Powder River Basin coal production and 46% of U.S. thermal coal production.

Contending each institutional investor violated Clayton Act Section 7 by increasing its stakes in coal producers between 2020 and 2024, the States argue that "partial acquisitions of the shares of these horizontal competitors in the coal industry" reduces the incentives of those coal producers to compete against one another. The States note that the investors are also the top three shareholders of major energy companies like ExxonMobil and Chevron.

The States contend that the investors' alleged commitment to various emission reduction goals, such as the "International Energy Agency Roadmap to Net Zero" and "Climate Action 100+," each of which call for reductions in coal emissions, constituted a restraint of trade. The States allege coal production in the South Powder River Basin declined 29% from 2019 to 2022, with prices climbing 21% over the same period, boosting profits for the publicly traded coal producers. The States claim that, in contrast, some privately-held coal producers expanded production over the time period.

The States challenge the institutional investors' acquisitions of stock under Section 7 of the Clayton Act. The States also bring Sherman Act Section 1 claims, asserting the investors agreed to coerce producers to reduce output and exchange information about those output reductions, as well as certain state law claims.

## Fourth Circuit Revives Interconnecting Producer’s Antitrust Suit Against Incumbent Provider

***Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337 (4th Cir. 2024)**

In August 2024, the Fourth Circuit found NTE Carolinas II, LLC (“NTE”) had demonstrated genuine issues of material fact as to whether Duke Energy Corporation’s (“Duke”) operations in the wholesale power market in the Carolinas amounted to unlawful anticompetitive conduct. Vacating an earlier summary judgment, the Fourth Circuit remanded the matter for further proceedings.

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

The district court denied Duke's motion as to whether Duke had "monopoly power," concluding that a reasonable jury could find either way. However, the district court granted summary judgment for Duke on the issue of whether Duke engaged in "exclusionary conduct," finding that the specific instances of conduct alleged by NTE were not individually unlawful and declining to consider them anticompetitive taken as a whole. NTE subsequently filed an appeal.

On appeal, the Fourth Circuit first addressed the parties' disagreement over how to analyze allegedly related acts. NTE, contending Duke engaged in multiple, simultaneous actions to prevent NTE from competing, argued the district court erred by analyzing Duke's actions in isolation. Duke argued NTE "flunk[ed]" the specific tests applicable to each form of conduct at issue, and maintained that individually lawful acts cannot be considered unlawful in combination. The appeals court agreed with Duke, observing that the Supreme Court has set forth specific tests to analyze claims like refusals to deal, predatory pricing, or price fixing, and holding that the method relied upon by the district court—"that 0 + 0 = 0"—was the proper approach for alleged exclusionary conduct falling within well-established categories.

The appeals court then turned to NTE's claims that Duke maintained a monopoly based on the "combined effect" of its alleged interference with NTE's effort to obtain business with FPWC and its alleged disruption of NTE's interconnection efforts.

As to the alleged interference with the FPWC opportunity, the appeals court held there was a fact dispute as to whether Duke's pricing qualified as predatory. NTE argued that the district court's analysis of the predatory pricing issue "missed the central exclusionary feature of Duke's renewal offer—namely, Duke's massive up-front discount, designed to prevent Fayetteville from choosing NTE despite its lower prices in the renewal period." The court concluded Duke's strategy was more akin to a "package discount" than to ordinary predatory pricing, but found there was a genuine fact dispute as to whether Duke's approach was exclusionary.

The appeals court rejected Duke's defense that FERC had approved its rates with the public works commission as "reasonable." The court noted that FERC was not asked to consider the exclusionary effects of Duke's pricing structure and had not been given information on the features of the power supply agreement that NTE argued were exclusionary. The court concluded that, because FERC conducted only a limited review of whether Duke's pricing level fell within a "zone of reasonableness," the filed-rate doctrine did not preclude NTE's allegations. The court, reasoning that FERC review protects ratepayer customers from discriminatory rates but not competitor interests, held the doctrine inapplicable to preclude competitor suits.

As to Duke's alleged interference with NTE's efforts to interconnect with Duke's transmission lines, the appeals court concluded that a reasonable jury could find Duke's conduct was meant to achieve anticompetitive ends notwithstanding Duke's argument that there were legitimate business justifications behind its decision to terminate the interconnection agreement.

NTE also challenged the district court judge's decision to hear the case after initially reassigning the case based on Duke's retention of his former law partners. The Fourth Circuit, relying on a bright-line rule articulated by *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899 (4th Cir. 1983), held that once a judge is recused from a matter, he or she should not take any further action affecting the outcome of the case—even when the conflict prompting recusal is later resolved—to eliminate "any question about the integrity of the judicial process."

The case has since been reassigned to Judge Susan C. Rodriguez. A trial date has not been set.

## Disappointed Bio Power Provider Fails To Allege Antitrust Injury In Suit Over Terminated Power Purchase Agreement

***Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus., Inc.*, No 16-00634 JMS-KJM (D. Haw. Sept. 12, 2024)**

In September 2024, a district court in Hawaii found Hu Honua Bioenergy, LLC's ("Hu Honua") failed to establish antitrust standing in its suit against Hawaiian Electric Company, Inc. ("HELCO") over HELCO's termination of an agreement to purchase power from Hu Honua.

In 2012, HELCO entered into a Power Purchase Agreement ("PPA") with Hu Honua, but later terminated it, citing construction delays and labor issues. Hu Honua, claiming these issues were merely a pretext for HELCO's termination of the PPA, asserted that HELCO intended to turn instead to a power plant in Hamakua—a plant that was soon to be acquired by Florida-based utility holding company NextEra Energy Inc. as part of a series of transactions to acquire both HELCO's parent company (Hawaiian Electric Company, or "HECO") and the Hamakua plant's owners, Hamakua Energy Partners, L.P. ("HEP").

In November 2016, Hu Honua filed suit against HELCO, NextEra, and HEP, claiming the termination of the PPA was anti-competitive, but Hu Honua and HELCO settled in 2017 and entered into an amended PPA, which was contingent on approval by the State of Hawaii Public Utilities Commission ("PUC"). NextEra and HEP moved to dismiss the suit, arguing that Hu Honua lacked antitrust standing. The court agreed and dismissed the complaint. In January 2018, Hu Honua filed a second amended complaint. Hu Honua and HEP then settled, but NextEra chose to continue litigating and again moved to dismiss. The court, finding Hu Honua's antitrust claims speculative, again dismissed the claims against NextEra. Meanwhile, the amended PPA was rejected by the PUC in a decision ultimately affirmed by the Hawaii Supreme Court, voiding the prior settlements. As a result, Hu Honua resumed pursuit of its breach of contract and antitrust claims and moved for leave to file a third amended complaint.

In April 2024, a magistrate judge denied leave to amend, holding that Hu Honua's new claims under the Clayton Act were time-barred and did not relate back to prior complaints, and that all of Hu Honua's claims failed to allege antitrust injury. The district court agreed, holding that Hu Honua failed to establish antitrust standing, and as such, the amendment would be futile.

Hu Honua had claimed that HECO had strengthened its monopoly to distribute power on the island through the acquisition of the Hamakua plant and excluded competitors, including Hu Honua, from the relevant market. But the district court determined that Hu Honua failed to plausibly allege that its foreclosure from the market stemmed from the defendants' acquisition of the Hamakua plant. HELCO, as the only utility authorized by the PUC to purchase power on Hawaii Island, has a statutorily authorized monopsony. Thus, to sell power for downstream distribution, Hu Honua must first enter into a PUC-approved PPA with HELCO. Because the PPA had been rejected by the PUC, Hu Honua was not in a position to compete.

Neither could Hu Honua argue that defendants were to blame for the rejection of the PPA. The district court noted that, according to the Hawaii Supreme Court's findings, the amended PPA was rejected because both Hu Honua and HELCO provided unsatisfactory carbon emissions figures for the planned power sale. Because "a regulatory or legislative bar can break the chain of causation in an antitrust case" and Hu Honua failed to obtain the necessary approval of the amended PPA, the district court concluded that Hu Honua's alleged injury was not caused by the Hamakua acquisition, but rather from PUC regulation and the Supreme Court's rejection of the amended PPA. The court reasoned that, but for the PUC, "Hu Honua would not have been foreclosed," and as such, the nexus between the NextEra acquisition and Hu Honua's alleged exclusion was too attenuated to satisfy the antitrust injury requirement.

The order permitted Hu Honua to file a third amended complaint with proposed amendments on other issues that were not contested. Hu Honua filed a third amended complaint including contract claims and state and federal antitrust claims, but the court held at a November status conference that those attempted antitrust amendments had not been permitted.

## Renewables Company Claims New England Utility Used Delay Tactics To Preserve Monopoly

***Avangrid, Inc. v. NextEra Energy, Inc.*, No. 3:24-cv-30141 (D. Mass.)**

In December 2024, renewable energy producer Avangrid sued electric utility NextEra in Massachusetts federal court for allegedly monopolizing the markets for wholesale electricity, wholesale electric capacity, and access to the New England electrical power grid.  Avangrid claims NextEra sought to "sabotage" Avangrid's development of transmission lines that would connect Canadian hydroelectric power production to New England markets.

Avangrid alleges that its New England Clean Energy Connect (NECEC) project, a project to construct a 145-mile transmission line from Hydro-Québec power generation facilities to a connection point in Maine, was chosen in 2018 by the Massachusetts Department of Energy Resources as a clean energy generation project that would compete with NextEra's existing nuclear and oil-fired power plants and reduce prices.  Avangrid alleges that NextEra sought to delay and block the NECEC project through regulatory challenges to Avangrid's permits, the initiation of voter referenda in Maine through shell political committees, and the refusal to allow Avangrid to install a new circuit breaker for a NextEra nuclear plant that would create capacity needed to accommodate NECEC's connection to the ISO-New England grid.  Avangrid, claiming these tactics delayed the NECEC project by three years, seeks declaratory, injunctive, and damages relief.

At the time of publication, NextEra had not yet answered Avangrid's complaint.

## New Retail Energy Supplier Claims Pennsylvania Utility Blocked Market Access

***Inova Energy LLC v. Pike County Light & Power Company et al.*, Case 2:24-cv-5999 (E.D. Pa.)**

In November 2024, Inova Energy LLC filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania, alleging that Pike County Light & Power Company ("PCLP") and its parents companies, Corning Energy Corporation and Corning Natural Gas Holding Corporation, are excluding Inova from the market for electricity supply in Pike's northeastern-Pennsylvania electric distribution service territory.

PCLP, a public utility, owns electric distribution facilities and is designated an Electric Distribution Company under Pennsylvania's Electricity Generation Customer Choice and Competition Act. Inova holds a license granted by the Pennsylvania Public Utility Commission in 2021 to operate as an Electric General Supplier in PCLP's service territory. Under the Competition Act, distributors are required to unbundle electric utility services, tariffs, and customer bills to separate the charges for generation, transmission, and distribution and allow customers to choose their electricity suppliers. Inova alleges that PCLP has obstructed Inova's efforts to compete by delaying or refusing to provide necessary enrollment forms to Inova and by failing to provide necessary customer information and coordination, all of which PCLP is required to do under its Electric Generation Supplier Coordination Tariff, which sets forth the basic requirements for interactions and coordination between suppliers and PCLP. Inova further alleges that PCLP informs customers on its website that there are no third-party power suppliers available in its territory, thereby directing them to PCLP for electric power. Inova argues that PCLP's conduct constitutes an attempt to monopolize the market for electricity supply in its service territory in violation of Sherman Act Section 2, and that its refusal to comply with the Tariff unreasonably restrains trade under Section 1 of the Act. Inova seeks damages, injunctive relief, and attorney's fees under federal antitrust law, Pennsylvania unfair-trade-practice law, and common-law tortious interference. At the time of publication, PCLP had not responded to the complaint.

# Oil & Gas

## Shale Oil Price-Fixing Claims Consolidated

***In re Shale Oil Antitrust Litigation*, 1:24-md-03119 (D.N.M.)**

Between January and May 2024, multiple gasoline purchasers and consumers filed putative class actions against eight major American shale oil producers in the U.S. District Courts for the Districts of New Mexico and Nevada. Plaintiffs alleged that defendants entered into a conspiracy with OPEC and the OPEC+ nations to restrict the production of crude oil and increase prices.

According to the plaintiffs, the emergence of hydraulic fracturing (or "fracking") in the early 2000s caused U.S. oil production to skyrocket between 2008 and 2015, eroding OPEC's market share and pricing power. Plaintiffs claim that OPEC instigated price wars against U.S. oil producers over time but eventually sought to adopt a collaborative approach and "cartelize" the defendants by working with them on a common plan to reduce oil production. Plaintiffs claimed these efforts began at meetings between OPEC representatives and defendants in 2017 occurring during an industry conference in Houston. Plaintiffs allege that by 2021, the defendants had agreed to cut production significantly, causing price increases.

On August 1, 2024, the U.S. Judicial Panel on Multidistrict Litigation centralized five cases into a single multidistrict litigation in the District of New Mexico before U.S. District Judge Matthew Garcia. Those complaints and others that followed involve a combination of federal and state antitrust, unfair competition, and consumer protection claims. At the time of publication, the plaintiffs have indicated a consolidated amended complaint will be forthcoming after the court appoints leadership for the plaintiffs and sets a schedule.

## Ninth Circuit Affirms Dismissal Of Claims That Producers Lobbied White House To Limit Shale Oil Production

***D'Augusta v. American Petroleum Institute*, 117 F.4th 1094 (9th Cir. 2024)**

In September 2024, the Ninth Circuit affirmed a decision by the U.S. District Court for the Northern District of California dismissing claims that oil producers worked with the White House to limit oil production and stabilize prices in 2020.

Plaintiffs alleged on behalf of consumers that, in April 2020, independent oil and gas producers conspired to restrict production to offset a March 2020 price war between Russia and Saudi Arabia, who had boosted supply and sent oil prices tumbling. Plaintiffs claimed the defendants engineered a lobbying scheme involving President Donald Trump, and urged him to make a deal with Russia and Saudi Arabia to reduce production and increase oil prices. According to plaintiffs, President Trump brokered a deal between those two nations, defendants agreed to cut production as part of the arrangement, and oil and gas prices rose in response.

Defendants moved to dismiss, arguing that even if the lobbying allegations were true, the First Amendment afforded them the right to lobby the U.S. Government to do something about the Russia-Saudi price war—collectively or individually—and the *Noerr-Pennington* doctrine insulates coordinated lobbying from antitrust liability. The defendants further argued any governmental actions in this sphere would be subject to the political question and act of state doctrines, both of which would exempt any purported arrangement from judicial scrutiny. The district court agreed and dismissed the case.

On appeal, the Ninth Circuit affirmed. The court held it lacked subject matter jurisdiction to second-guess the President's decision to broker a deal involving Russia and Saudia Arabia, which was a foreign policy decision that Article II of the Constitution commits firmly to the Executive Branch. The opinion referenced the "Pacificus-Helvidius Debates," a series of written debates between Alexander Hamilton (writing as "Pacificus") and James Madison (writing as "Helvidius") published from 1793 to 1794 in the *Gazette of the United States*. Quoting Hamilton, the court explained the judiciary is "ill-suited for 'pronouncing upon the government's external political relations' as such a task would be 'foreign' to it." The correctness of any alleged actions by President Trump to negotiate an end to an international price war—a decision the plaintiffs claimed necessarily required the defendants to cut production—would be a political question. The court held political questions are not subject to judicial review, much less antitrust scrutiny.

Plaintiffs argued in the alternative that even if the political question, state action, and *Noerr-Pennington* doctrines insulated the defendants' interactions involving the Government, their claims were salvageable because they also alleged that the defendants conspired privately to restrict supply. The court rejected this argument, holding that plaintiffs' allegations of a private conspiracy were too bare-bones to plausibly infer a Section 1 violation, and that, at best, plaintiffs had alleged parallel conduct between defendants.

## Court Dismisses Claims That Producers Conspired To Boost Gathering Deductions From Royalty Checks

***A&B Campbell Fam. LLC v. Chesapeake Energy Corp.*, No. 3:15-CV-00340, 2024 WL 4009633 (M.D. Pa. Aug. 30, 2024)**

On August 30, 2024, the United States District Court for the Middle District of Pennsylvania dismissed a complaint alleging four oil and gas producers conspired to reduce royalties paid to mineral owners through excessive post-production deductions.

In 2015, a group of Pennsylvania royalty interest holders sued producers under Sections 1 and 2 of the Sherman Act, RICO, and contract law, alleging the producers engaged in multiple "separate but related" schemes to inflate gathering services fee deductions and reduce mineral owners' royalty payments, including the use of areas of mutual interest to allocate geographic markets for mineral leasing, joint development efforts for wells, and joint development of gathering systems.

After a lengthy stay arising from mediation efforts and a bankruptcy proceeding involving one defendant, the court took up the defendants' motions to dismiss and found the plaintiffs had not suffered antitrust injury and therefore lacked antitrust standing. The claim that producers in the region coordinated their gathering system development after they had acquired mineral interests did not allege a harm to competition. A mineral owner, after all, does not directly participate in the market for gathering services, either as a consumer or a competitor—the producer does. The court found inapplicable Supreme Court precedent recognizing antitrust standing for plaintiffs whose injuries are "inextricably intertwined" with an alleged antitrust conspiracy because Third Circuit precedent limits that exception to injuries that are a "necessary step in effecting the ends of the alleged illegal conspiracy." The court found plaintiffs had not alleged that reducing their royalties was a necessary means for defendants to reduce competition in any relevant market. The court further held that the alleged reduction in competition for gathering services was itself tenuous. The court deemed plaintiffs merely alleged defendants had "transfer[red] an existing monopoly," since from the perspective of the mineral owner, their mineral lessee already held sole control over the mineral owners' receipt of post-production gathering services, and any divestiture or acquisition of entities providing gathering services simply altered the identity of the sole provider rather than reducing the competition available to the mineral owner. The court further held that plaintiffs failed to allege either an anti-competitive agreement among defendants.

The court allowed the plaintiffs an opportunity to amend. Though the plaintiffs filed an amendment, the defendants contend the plaintiffs missed the court-imposed deadline to do so and failed to show cause for delay. At the time of publication, a motion to strike is pending.

## Court Approves Settlement Of Landowners' Claims That Producer Prevented Nearby Drilling

***Black v. Occidental Petroleum Corp.*, No. 19-CV-0243-F, 2024 WL 1741085 (D. Wyo. Mar. 11, 2024)**

On March 11, 2024, the United States District Court for the District of Wyoming approved a $12 million class action settlement between 2,300 landowner-plaintiffs and Anadarko Petroleum Corporation. The settlement resolved antitrust claims against Anadarko following the company's unsuccessful motions to dismiss and for summary judgment.

In 2019, a group of Wyoming landowners sued Anadarko under Section 2 of the Sherman Act and Wyoming antitrust statutes. Plaintiffs alleged Anadarko monopolized, and attempted to monopolize, the market for leasing and selling oil and gas rights in Laramie County, Wyoming, through various strategies. Plaintiffs contended Anadarko acquired thousands of drilling permits from the Wyoming Oil and Gas Conservation Commission ("WOGCC") in a checkerboard-patterned fashion, which effectively granted Anadarko exclusive drilling rights over minerals they owned and over neighboring sections, even when Anadarko did no drilling. Plaintiffs further contended that Anadarko's subsidiaries executed "collusive leases," under which a mineral-rights-owning subsidiary leased its rights to a permit-owning subsidiary at an unreasonably high royalty rate. Plaintiffs contended these "collusive" leases forced landowners who own neighboring minerals to accept significantly reduced royalty rates from the permit-owning subsidiary or its successors. Plaintiffs claimed these strategies collectively stifled competition in the county by preventing other oil and gas producers from drilling in plaintiffs' lands.

Anadarko originally attempted to dismiss the claim by invoking antitrust immunity under the "state action" and *Noerr-Pennington* doctrines. The state action doctrine shields from antitrust liability acts taken by state governments or private actors "where the state actor is the effective decision maker with respect to the conduct on which the plaintiff's claims are based." The *Noerr-Pennington* doctrine exempts from antitrust liability "any legitimate use of the political process by private individuals, even if their intent is to eliminate competition." Under both doctrines, Anadarko argued that it could not be faulted for acquiring permits from WOGCC and exercising the exclusive rights granted under those permits. The court denied Anadarko's motion to dismiss in 2020. While agreeing that acquiring permits from WOGCC does not subject Anadarko to antitrust liability, the court found that the execution of the intracompany lease was not exempt under either doctrine and found the State of Wyoming "does not exercise active supervision over the terms of oil and gas leases," which would be necessary to immunize a private party's conduct under state regulation. Subsequently, the district court certified a class to pursue antitrust claims. The certification was affirmed by the Tenth Circuit in summer 2023, setting up the spring 2024 settlement.

# Chemicals

## New Suit Alleges Petrochemical Companies Boosted Prices By Misleading Consumers About Plastic Recycling

***Rodriguez, et al. v. Exxon Mobil Corporation, et al*., No. 4:24-cv-00803 (W.D. Mo.)**

In December 2024, four individuals filed a putative class action against leading petrochemical companies and the American Chemistry Council, alleging that they conspired to mislead the public about the recyclability of plastics, purportedly leading to higher plastic prices and environmental harm.

The plaintiffs allege that among widely used plastics, only polyethylene terephthalate (PET) and high-density polyethylene (HDPE) have viable markets for the purchase of recycled materials, and that technical and practical barriers make recycling of many plastics difficult and expensive, resulting in only 5% to 6% of plastic materials making their way into recycling processes.  The plaintiffs contend that industry trade groups promoted recycling beginning in the 1980s as a solution to growing concerns about landfill usage and environmental degradation, despite alleged doubts about its effectiveness, and thereby encouraged consumers to purchase more plastics than they otherwise would have.

Pleading a Sherman Act Section 1 claim, Plaintiffs contend Defendants conspired to "artificially increase the demand for plastics in the United States," which allegedly has the effect of restraining price competition and causing artificially high plastics prices.  Plaintiffs also assert claims under the consumer protection laws of fourteen states and the District of Columbia, as well as under state antitrust law.  The plaintiffs seek certification of an indirect purchaser class of consumers who purchased any plastic products since 1990 to obtain unspecified damages and injunctive relief.

At the time of publication, Defendants had not yet answered the Plaintiffs' complaint.

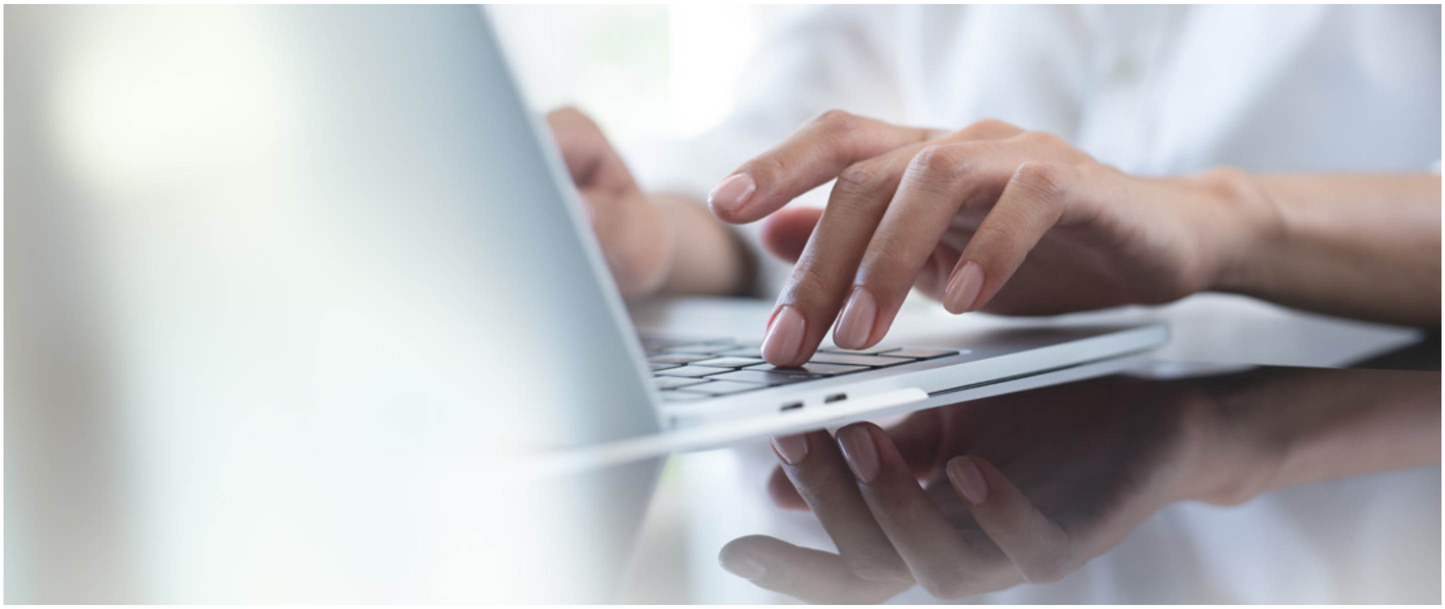
## PVC Pipe Manufacturers Accused Of Using Industry Publication To Fix Prices

***In re PVC Pipe Antitrust Litigation*, Case No. 1:24-cv-07639 (N.D. Ill.)**

In August 2024, an electrical contractor filed a class action lawsuit on behalf of individuals and entities who purchased plastic polyvinyl chloride ("PVC") pipes from leading U.S. manufacturers Atkore, Cantex, Diamond Plastics Corporation, IPEX USA, JM Eagle, National Pipe and Plastics, Otter Tail, Prime Conduit, Southern Pipe, and Westlake. The plaintiff brought claims against those manufacturers (known as "converters") as well as publisher Oil Price Information Service ("OPIS"). Other plaintiffs, including direct and indirect purchasers of PVC water pipes and PVC electrical conduit pipes, soon followed.

Plaintiffs allege defendants exploited supply chain disruptions caused by the COVID-19 pandemic and conspired to fix, raise, maintain and stabilize the price of PVC municipal water pipes and PVC electrical conduit pipes in the United States, leading to inflated costs for consumers and businesses reliant on PVC products. Plaintiffs contend that prices of pipes made from PVC were relatively stable before the pandemic, but rose rapidly between late 2019 and mid-2022. Plaintiffs allege that after supply chain issues eased and PVC resin prices began to normalize, the defendants continued to maintain "artificially" high prices for PVC pipes. Plaintiffs contend defendants, who allegedly account for more than 90% of PVC pipe sales volume in certain applications, exchanged price signaling statements and sensitive competitive information through the OPIS publication *PVC & Pipe Weekly*, which offers pricing information and market analysis to subscribers. The complaint seeks injunctive relief and damages under federal antitrust laws and various state laws.

Multiple related cases have been consolidated in Judge LaShonda A. Hunt's court. Initial motions practice is expected in early 2025.



## Court Dismisses Claims That Agricultural Chemical Sellers Boycotted E-Commerce Platforms

***In re Crop Inputs Antitrust Litig.*, No. 4:21-MD-02993 SEP, 2024 WL 4188654 (E.D. Mo. Sept. 13, 2024)**

In September 2024, a federal district court in Missouri dismissed claims by a putative class of seed and crop protection chemical purchasers that fifteen manufacturers, wholesalers, and retailers collectively blocked the emergence of e-commerce platforms. The decision, coming after two attempts to amend the complaint, brought the three-year-old multidistrict litigation to a close.

The plaintiff purchasers accused the defendants of collectively refusing to deal with certain e-commerce platforms that plaintiffs claimed would have increased price transparency for so-called "crop input" chemicals. Plaintiffs alleged a "group boycott" including behaviors such as a retailer defendant sending a warning letter to farmers to discourage purchasing from e-commerce platforms; a manufacturer defendant forming an internal task force to study the competitive impact of e-commerce platforms; three manufacturer defendants' adoption of contractual provisions with retailers allowing the manufacturers to audit the retailers' books and records to ensure there were no purchases from e-commerce platforms; and the initiation of such an audit. The plaintiffs noted the Canadian Competition Bureau launched an investigation into some manufacturer defendants' purported boycott of electronic platforms in Canada.

The court ruled that, because the purchasers sued multiple entities across different levels of the distribution chain, they were required to plausibly plead a "web of horizontal and vertical agreements," including horizontal boycott agreements between all wholesaler defendants, all retail defendants, and all manufacturer defendants, as well as vertical boycott agreements between each of the defendants at all three levels of distribution. The court, finding this standard had not been met, held that purchasers' allegations did not even plausibly plead "conscious parallelism" by the defendants. First, the court criticized purchasers for engaging in "impermissible group pleading," by attempting to infer collective action from a single entity's conduct without clear indicia of agreement by others to the conduct. Second, the court found that each individual manufacturer, wholesaler, and retailer had an independent motivation from the outset to deter competition from e-commerce platforms, such that their conduct was "not indicative of an illicit agreement" among them. Third, the court found the audit-related allegations lacking because purchasers alleged no specific punishments from these audits and did not explain how such audits or audit provisions were not ordinary in the industry. Finally, while recognizing that an investigation conducted by a foreign authority might serve as a "plus factor" in finding collusion from parallel conduct, the court found plus-factor analysis was unnecessary because purchasers had not alleged parallel conduct requiring explanation.

## Pesticide Manufacturers Seek To Dismiss Claims They Blocked Generic Competitors

***In re Crop Protection Products Loyalty Program Antitrust Litigation*, MDL No. 3062 (M.D.N.C.)**

In a separate matter, pesticide manufacturers Syngenta Crop Protection AG and Corteva, Inc. are seeking dismissal of farmers' class action claims that major manufacturers sought to delay the entry of generic competitors through a loyalty pricing program. Their motion to dismiss is pending before the U.S. District Court for the Middle District of North Carolina, where those cases were consolidated in a multi-district litigation in 2023.

In a consolidated class action complaint, farmers in eight states alleged that defendants entered into illegal exclusive dealing arrangements, violating Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, and several state antitrust laws. The farmers contend the manufacturers sought to extend the exclusivity afforded by patent law for the "active ingredients" ("AIs") they invented for their pesticide products by ousting new generic entrants from retail markets. Specifically, the plaintiffs complain the defendants created and rigorously enforced "loyalty programs" for distributors and retailers, under which they would pay those dealers substantial rebates if the dealers bought a high percentage of their purchases of key AIs from the defendants. Farmers claimed that by focusing on the share of purchasing rather than the volume of purchases, the program forced dealers to avoid generic competitors. The plaintiffs also contend the defendants agreed not to enter the market to produce each other's AIs. Plaintiffs contend these actions hindered price competition and lifted pesticide prices by as much as 40%.

The manufacturers, who are defending a similar FTC case which survived a motion to dismiss challenging market definition and anticompetitive effect allegations, advanced different arguments in the private class case. First, the manufacturers argued farmers are indirect purchasers and are therefore barred from pursuing their claims under the Supreme Court's *Illinois Brick* doctrine. The defendants argue the distribution pricing conduct at issue took place in the wholesale market, while the farmers engaged only in the downstream retail market. Similarly, the manufacturers argue that farmers also failed to plausibly plead proximate causation because of the multiple layers of distributors and retailers between the alleged anticompetitive conduct and any injury they allegedly suffered. The farmers argue the retailers from whom they made direct purchases were co-conspirators in the alleged scheme, giving them direct purchaser status. The motion remains pending at this time.

# Refined Products

## California and Traders Settle Gasoline Market Manipulation Claims

***State of California v. Vitol Inc., et al.*, Case No. CGC-20-584456 (San Francisco Superior Ct.)**

In July 2024, California Attorney General Rob Bonta announced a $50 million settlement with gas trading firms Vitol, Inc., and SK Energy Americas, Inc., resolving allegations the firms manipulated spot market prices for California gasoline.

In May 2020, the State of California brought a civil lawsuit in California state court against major traders in California's spot market for refined gasoline and gasoline blending components, including Vitol Inc., SK Energy, SK Trading, and certain company employees. By state law, California requires use of specific blending components in gasoline that are nearly unique to California, and nearly all gasoline used in California is produced from California refineries. The State alleged that after a February 2015 explosion at a California refinery reduced production of blending components and squeezed supplies, lead traders at the defendant companies exploited the shortage. The State claimed traders inflated the price of gasoline by manipulating published index prices in the spot markets during key time periods that would influence longer-term contract pricing. Among the tactics alleged were selective reporting of transactions; entering into small uneconomic trades to set the first trade or high trade during a trading day; or entering into "spiking" trades in thinly traded markets, sometimes offset by unreported trades to set up a "wash trade" or "round-trip trade." The State also alleged traders agreed to jointly import refining component cargoes and share profits on those cargoes, which the State contends was "merely a pretext for unlawful cooperation" that aligned ostensible counterparties in a pursuit of higher prices. The State alleged this scheme to raise prices violated state antitrust and unfair competition laws.

The defendants filed nine motions for summary judgment between March and April of 2023, raising due process challenges and asserting that liability under California's Cartwright Act was precluded due to a lack of standing. The parties agreed to mediate, and after extensive negotiations, the parties signed a final settlement, which was announced on July 10, 2024.

Without admitting liability, the defendants agreed to pay $50 million, including $37.5 million for the Cartwright Act claim and $12.5 million for the Unfair Competition Law claim, to California residents who purchased gas in Southern California during 2015. A final approval hearing is scheduled for February 2025. Distribution will rely on a claims-made process.

In announcing the deal, the Attorney General noted that if the defendant firms resumed operations in California, they would be required to comply with new transparency and oversight regulations implemented under SBX1-2, which went into effect in June 2023. Aimed at preventing market manipulation and price gouging in the petroleum industry, the law requires California refiners to submit daily reports to the California Energy Commission (CEC), detailing spot market transactions and authorizing the CEC to collect comprehensive data related to refinery operations, including monthly costs, profits, and refinery maintenance reports, and to require additional reporting and transparency measures during certain emergencies.

A parallel class action on the 2015 refinery events brought on behalf of retailer-purchasers of gasoline remains pending.

2024

# Overview of Antitrust Laws & Enforcers

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

# Merger Review Process

Over the past 40+ years, energy markets have featured two notable trends. First, the industry has undergone a major shift from traditional price regulation to competitive markets. Second, vast technological improvements have changed the competitive landscape, particularly for extraction and production. Up to and throughout the 1990s, the United States became increasingly dependent on foreign oil, whereas in the last decade, that trend has reversed, and the United States has now become the largest oil producer in the world thanks to innovations and efficiencies in horizontal drilling and hydraulic fracturing. In 2019, U.S. total energy exports exceeded imports for the first time 67 years. In 2023, U.S. total energy exports increased about 8 percent from 2022 and exceeded total energy imports by the largest margin on record. Efficiency improvements in natural gas and oil well drilling and production techniques and increases in natural gas production have contributed to generally declining U.S. natural gas prices and upticks in consumption by various sectors. U.S. natural gas exports reached a record high in 2023 and comprised about 26 percent of total U.S. energy exports. Each of these trends has affected the way that the U.S. antitrust agencies approach potential mergers and acquisitions in this industry.

Over the last decade, the chemical industry has undergone significant consolidation, a trend that is likely to continue in the future. This increased consolidation has led to greater scrutiny of, and more frequent challenges to, chemical company mergers.

## What Is Merger Review & Who Does It?

Antitrust enforcers scrutinize mergers and acquisitions to determine whether the market will remain competitive or whether the merger will allow the merged firm to exercise market power. Close scrutiny of a transaction by the antitrust agencies can add months of delay and uncertainty, as well as significant costs, to the transaction. U.S. merger review is a case-specific and fact-intensive inquiry that attempts to make predictions about how the market will behave if the proposed transaction is completed.

For mergers and acquisitions above certain annually adjusted thresholds, the merger review process begins when the merging parties file a Hart-Scott-Rodino, or "HSR," notification of the transaction with the Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ"). The notification includes facts about the merger and the industry in which the merging parties operate. (For non-reportable transactions, the agencies can investigate either based on a complaint or on their own initiative.)

In December 2023, the DOJ and FTC jointly released revised Merger Guidelines (the "Guidelines"), which updated the factors and frameworks the agencies consider when deciding whether to attempt to block a merger. The Guidelines give the agencies more flexibility to intervene against mergers they believe will have anti-competitive effects. In October 2024, the agencies adopted new rules to govern the pre-merger notification process required by the Hart-Scott-Rodino Antitrust Improvement Act ("HSR") by making the HSR Form considerably more detailed and burdensome for merging entities.

HSR filings go through a "clearance" process where each is assigned to a particular agency. The FTC and DOJ typically allocate merger reviews by industry based on their historical experience. The FTC is primarily responsible for analyzing mergers in the chemical industry, as well as in oil and gas. The DOJ has primary responsibility for reviewing electricity and oilfield services mergers. Electricity mergers are subject to concurrent review by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act.

Once they receive HSR notifications for a transaction, the agencies typically have 30 days to decide whether to allow the merger to close or to issue a "Second Request," which initiates a significantly longer, more burdensome review. Parties can also "pull and refile" their notification, which resets the 30-day clock, in the hopes of avoiding a Second Request.

Second Request investigations typically last 6 to 18 months and involve the agency collecting and reviewing voluminous business documents, conducting interviews of competitors and customers, and deposing executives from the merging parties. Once the parties have "substantially complied" with the Second Request, the agency then has another 30 days to either close its investigation or initiate a suit to block the merger.

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

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

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

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

## How The FTC Approaches Oil & Gas Mergers

The FTC's approach to oil and gas mergers largely has depended on where in the production and supply chain the merging firms operate. Oil and gas mergers frequently encompass a large number of relevant markets, such that the FTC has said they "may require an extraordinary amount of time to ascertain whether anticompetitive effects are likely."

The FTC typically has defined upstream exploration and production markets as global, encompassing large numbers of competitors, which has led to few challenges in this area. For example, in Exxon/Pioneer, the FTC alleged a global market for the "development, production, and sale of crude oil." As the FTC noted in 2004, "[r]ecent large mergers among major oil companies have had little impact on concentration in world crude oil production and reserves." The same is true for natural gas. The few challenges have been limited to isolated geographic regions that limited the potential for competitive entry (e.g., the BP/ARCO merger, which involved both crude and natural gas production on the Alaskan North Slope and EnCap/EP Energy, which involved waxy crude from the Unita Basin).

The FTC has been more active in challenging midstream and downstream operations, such as refineries, pipelines, terminals, and wholesale/retail operations.

**Refineries.** The FTC has generally focused on how refinery acquisitions affect the bulk supply of refined petroleum products, but has also identified narrower product markets for specialized types of fuels required in particular regions (like CARB-formulated gas for California) or for particular customers. The agency defines geographic markets based on practical alternative sources of supply in light of transportation costs and any capacity constraints. As a result, the FTC has sought and obtained divestitures in a number of refinery mergers, including Exxon/Mobil, Chevron/Texaco, and Conoco/Phillips.

**Pipelines.** The FTC has required divestitures or behavioral remedies (usually contractual supply commitments) for transactions involving crude, refined product, or natural gas-related pipelines. Examples include Valero/Kaneb, Shell/Texaco, and Exxon/Mobil. Similarly for natural gas, the FTC has sought remedies for gathering services as in Conoco/Phillips, in producing areas as in Enbridge/Spectra Energy, and in large-diameter pipelines as in Energy Transfer/Williams (which was subsequently abandoned). Markets in these cases are typically defined based on the origin or destination of the relevant pipelines. In 2019, in DTE Energy Company/NEXUS Gas Transmission, the FTC approved a consent decree requiring the parties to remove a non-compete clause that would have prevented competition for natural gas transportation within a three-county area of Ohio for three years from the agreement. In 2023, the FTC and Quantum Energy Partners ("Quantum") agreed to a consent order, under which Quantum was barred from appointing a member to the board of EQT Corporation ("EQT") and ordered to divest all shares in EQT. The order barred Quantum executives, employees, and board members from serving "as an officer or director of any entity that is one of the top 7 natural gas producers" in the Appalachian Basin.

**Terminals.** The FTC has sought remedies in several mergers of terminal operators, including ArcLight/Gulf Oil, Exxon/Mobil, and Conoco/Phillips. Markets in these cases tend to vary by geography, based on which alternative terminals purchasers could turn to for supply, after factoring in transportation costs and capacity constraints. The FTC has also drawn distinctions between proprietary and independent terminals, with the latter forming a critical part of the market.

**Wholesale/Retail.** The FTC has considered whether a merger will allow brand owners to raise retail prices after the merger, considering the level of concentration in the local markets, the ability of station owners to switch to other brands or unbranded products, and the likelihood of new entry. Retail gasoline markets tend to be very localized and may be limited to an area of just a few miles, with factors such as commuting patterns, traffic flows, and outlet characteristics playing roles in determining the scope of the geographic market. For example, in the Circle K/Jet-Pep acquisition, the FTC required divestitures of several stations in three small towns in Alabama, and in Tri Star Energy/Hollingsworth Oil, it required divestitures in two cities in Tennessee. Likewise, the FTC has sought divestitures in the case of mergers among one of a few gas local distribution companies in an area, as in Equitable/Dominion.

## How The DOJ & FERC Approach Electricity Mergers

The DOJ's review of electricity mergers largely focuses on generation, where competition among different types of generating assets (e.g., baseload versus peak generation) and different locations can pose difficult and fact-specific market definition questions. Rather than competitive entities, downstream transmission and distribution operations are usually run by regulated entities.

Geographic markets generally are defined based on transmission constraints—that is, where wholesale or retail buyers can practically turn for additional supply given the design of the electrical grid. The DOJ also considers "shift factors," that is, the effectiveness of a generating unit in responding to a supply constraint. The DOJ typically looks at the merged party's ability and incentive to raise prices by withholding generation supply after the merger, as it did in Exelon/PSEG and Exelon/Constellation. When the DOJ finds competitive concerns, it typically requires divestitures of generating facilities to qualified buyers, as well as a "hold separate" agreement that seeks to preserve the facilities' competitive position pending a divestiture.

By contrast, FERC reviews mergers of electrical utilities subject to its jurisdiction under a broader "public interest" standard, which considers both the effect on competition and other effects on the public. FERC does not possess the same ability to compel production of information as the DOJ and typically relies on information provided by the merging parties to conduct its analysis. FERC also typically seeks conditions on approving mergers rather than prohibiting the transaction outright.

## How The FTC Approaches Chemical Mergers

In general, enforcers tend to draw product markets in the chemical industry narrowly. For example, in its recent challenge to the merger of Cristal and Tronox, the FTC alleged a market limited to "chloride process" titanium dioxide (TiO2) that excludes "sulfate process," on the theory that the primary customers—paint and coatings companies—rely on the brighter and more durable coatings produced from the chloride process, and therefore could not switch to sulfate process TiO2 in response to a post-merger price increase. Other product markets defined in recent chemicals mergers have included "super phosphoric acid" and "65-67% concentration nitric acid" (PotashCorp/Agrium), the pesticides paraquat, abamectin, and chlorothalonil (CNCC/Syngenta), "hydrogen peroxide," (Evonik/PeroxyChem), and "aluminum hot rolling oil" and "steel cold rolling oil" and associated technical services (Quaker/Houghton).

Geographic markets vary based on commercial realities of where customers are located and where they need and can feasibly obtain supply. In Wilhelmsen/Drew, for example, the FTC alleged a global market to provide water treatment chemicals to shipping fleets, which by their nature operated globally and required global suppliers. In Cristal/Tronox, the FTC alleged a geographic market for North America, as TiO2 is largely shipped by truck or rail. That definition excludes the possibility of parties turning to supply from China and other overseas sources, a distinction the FTC drew based on evidence that overseas sources do not currently pose a competitive check in North America. Similarly, in Quaker/Houghton, the FTC alleged a geographic market of North America, as the relevant products are typically shipped by tanker truck and shipping "from outside North America is cost- and supply-prohibitive." In Evonik/PeroxyChem, the FTC alleged narrower geographic markets—(1) the Pacific Northwest and (2) the Southern and Central United States—again noting the high transportation costs and that "hydrogen peroxide producers deliver from plants that are relatively nearer to customers."

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

# Non-Merger Antitrust Enforcement

The principal federal antitrust statute governing non-merger conduct is the Sherman Act (the "Act"). Section 1 of the Act prohibits anticompetitive agreements affecting interstate commerce. Section 2 of the Act prohibits monopolization, attempted monopolization, and conspiracy to monopolize. Violations of the Act can carry monetary fines of up to $100 million for corporations (or more if there is a larger impact on U.S. commerce), up to $1 million for individuals, and up to 10 years imprisonment for individuals. Furthermore, collusion among competitors can also result in violations of other federal statutes subject to prosecution by the Antitrust Division, including mail or wire fraud statutes and false statement statutes.

State attorneys general offices enforce state antitrust laws, and they may pursue federal antitrust claims to the extent they affect the state or its residents. States have occasionally taken the lead on major investigations and may coordinate with one another when bringing enforcement actions. Some state attorneys general actively investigate and enforce state antitrust laws. Many states have their own laws prohibiting anticompetitive conduct, such as California's Cartwright Act and New York's Donnelly Act, and some of these state statutes are broader than the federal antitrust laws in certain respects. State agencies may also monitor the energy or chemical industries for potential violations. For example, California maintains a Division of Petroleum Market Oversight within the California Energy Commission, which is charged with monitoring the petroleum industry to identify illegal behavior and referring violations to the California Attorney General for prosecution. In addition, many countries have comparable statutes and coordinate some of their investigations with U.S. antitrust authorities.

In addition to the risk of significant fines and prison time for criminal antitrust violations, follow-on civil suits can result in lengthy and expensive litigation for companies, even where a company has been cleared of liability for criminal violations. As the Supreme Court noted, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases." So long as they are able to meet certain standing requirements, private plaintiffs are allowed to bring civil suits for violations of federal antitrust laws. In order to bring suit, private plaintiffs must demonstrate that the anticompetitive behavior has resulted in an "antitrust injury," the type of injury that antitrust laws were intended to prevent. The Act creates a significant incentive for private plaintiffs by providing for treble damages and the award of attorneys' fees and costs to prevailing parties. Private plaintiffs can be either consumers or rival businesses harmed by anticompetitive arrangements.

## Illegal Agreements

Certain types of agreements between competitors are considered per se violations of antitrust law and are deemed illegal once collusion has been established without any assessment as to whether the prices or behavior were reasonable or the conduct had valid business justifications. Price fixing, bid rigging, and market division or allocation are examples of antitrust violations that are typically viewed as *per se* violations.

**Price Fixing.** Price fixing is an agreement between competitors to raise, fix, hold firm, establish minimums, or any other activity to otherwise coordinate their prices. Price fixing agreements can include limits on supply, eliminating or reducing discounts, and fixing credit terms. Agreements to establish resale prices were considered *per se* illegal under the Act until the Supreme Court's 2007 *Leegin* decision, but resale price maintenance continues to be *per se* illegal under some state antitrust statutes.

**Bid Rigging.** Bid rigging occurs where an entity (such as federal, state, or local governments) solicits competing bids, but competitors have agreed in advance on who will win the bid or a means of predetermining who will win the bid.

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

Concerted action can be established either by direct evidence or circumstantial evidence. Mere parallel conduct is not sufficient for a finding of an unlawful conspiracy, even in a concentrated industry. Accordingly, as the Supreme Court explained in *Monsanto Co. v. Spray-Rite Services Corp.*, "there must be evidence that tends to exclude the possibility of independent action."

The Antitrust Division has identified industry conditions that are conducive to collusion, some of which are prevalent in certain energy and chemical markets, such as where there are fewer sellers, where products are fungible, where sellers are located in the same geographic area, where products cannot be easily substituted because of restrictive specifications, where there are economic or regulatory barriers to entry, and where sellers know each other through social contexts, such as trade associations, normal business contacts, and where employees shift between the companies in the same industry. Private plaintiffs have also alleged that the public announcements of future price increases, which are common in the chemicals industry, provide a potential vehicle for collusion.

Agreements that do not fall under the *per se* rule are analyzed under the rule of reason. The rule of reason involves a factual inquiry into whether the challenged activity results in unreasonable anticompetitive effects. The factual inquiry evaluates things such as the nature of the agreement, market circumstances (such as market share and barriers to entry), and whether the agreement has procompetitive benefits. The Supreme Court has applied a three-step burden-shifting framework in evaluating the rule of reason:

1. First, the plaintiff must demonstrate "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market";
2. Second, "the burden shifts to the defendant to [demonstrate] a procompetitive rationale";
3. Third, the burden shifts back to the plaintiff "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."

## Monopolization

Distinct from Section 1 violations of the Act, which involve agreements between competitors, Section 2 violations occur where an individual company, or multiple companies acting in concert, harm competition through monopolization. In order for a violation to occur, a company must possess monopoly power in a relevant market and engage in exclusionary conduct. For decades, monopolization cases have only been pursued on a civil basis, but in March 2022, then-Deputy Assistant Attorney General Richard Powers signaled that the Antitrust Division intended to pursue criminal violations of Section 2. In late October 2022, the DOJ announced its first Section 2 guilty plea under the new policy, and in October 2023, the DOJ updated its antitrust primer for law enforcement personnel, which includes references to criminal prosecution of "conspiracies to monopolize," as well as situations in which attempts or solicitations to fix prices or rig bids could be charged as "attempted monopolization" under Section 2.

Monopoly power can be established either through direct evidence, such as actual effect on prices, or indirect evidence, such as the company's market share, barriers to entry, and market concentration. Many courts have found that a market share of over 70 percent combined with significant barriers to entry establishes a prima facie case of monopoly power; courts rarely conclude that a company has monopoly power where its market share is less than 50 percent.

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

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

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

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

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

## Exemptions & Immunities

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

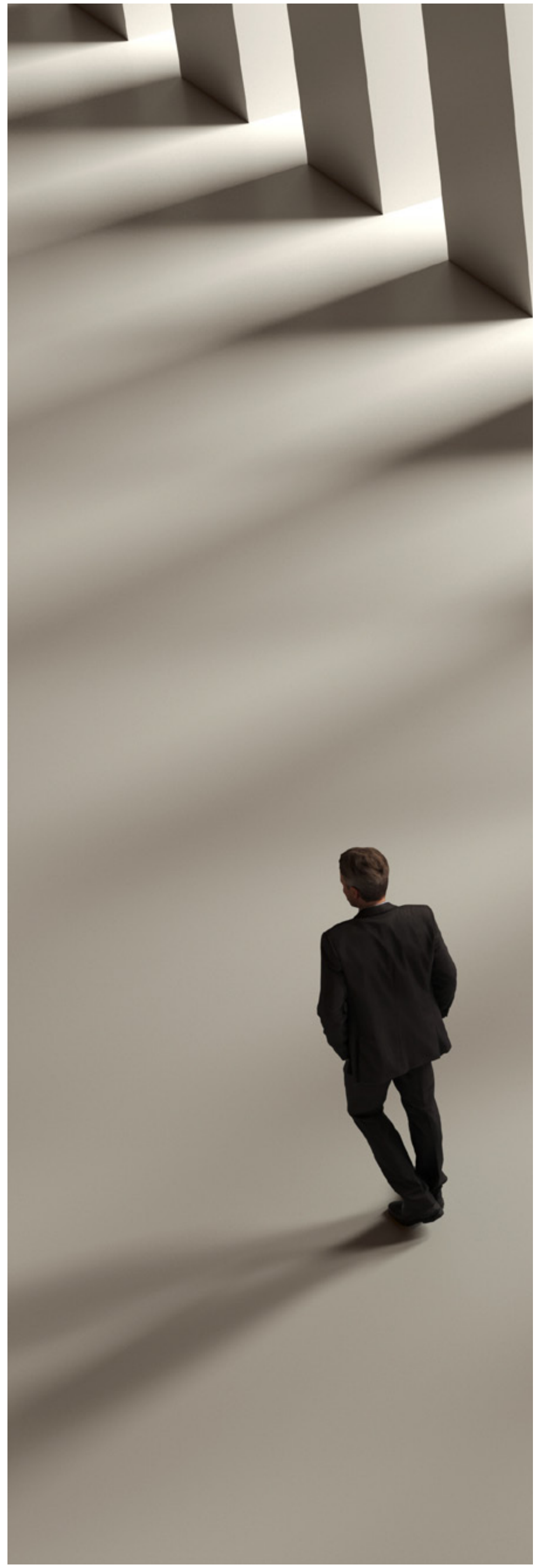
First articulated by the Supreme Court in 1922, the judicially created filed-rate doctrine bars private antitrust damage claims for alleged overcharges if the rate charged was approved by a regulatory agency with exclusive jurisdiction over the reasonableness of the rate, such as FERC. The purpose of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

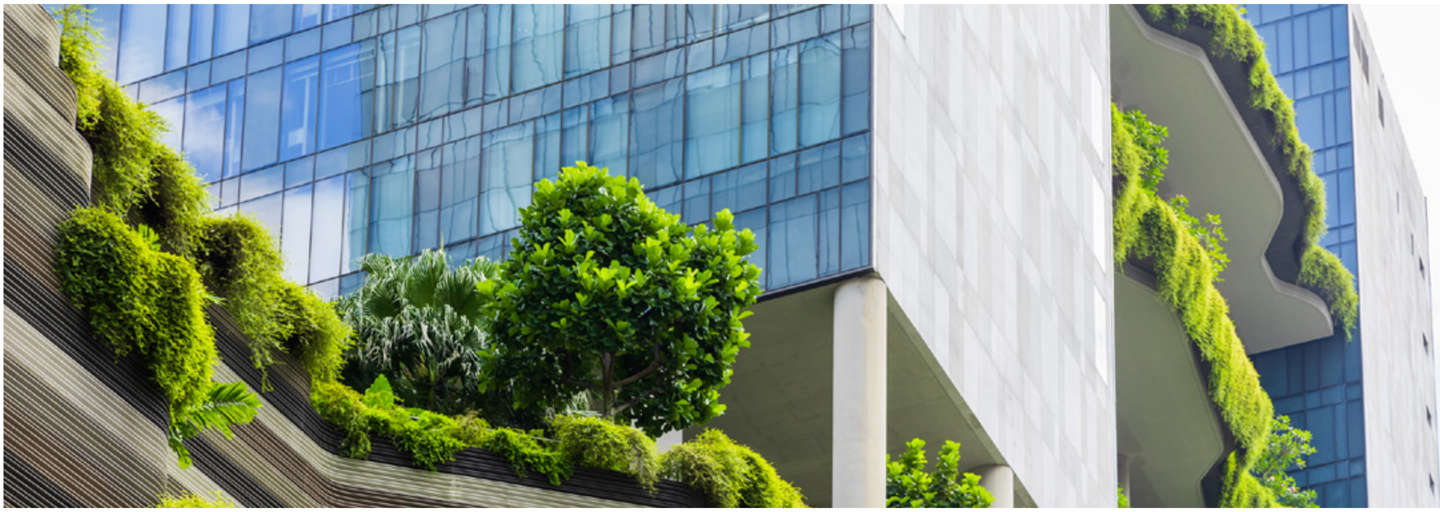
The filed-rate doctrine does not, however, provide complete immunity from liability in certain circumstances. For example, some regulatory agencies will sometimes approve an "up-to" rate. An "up-to" rate is one where a regulator sets an approved maximum price that a utility can charge rather than a fixed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

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

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

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





# Federal Antitrust Agencies

There are two federal agencies that enforce these laws: the DOJ's Antitrust Division and the FTC. While the federal agencies have extensive career staff, political appointees determine the enforcement priorities. Each agency has responsibility for particular industries and, as a result, has developed a sophisticated understanding of the businesses under their purview. The Antitrust Division handles all criminal enforcement, such as conduct involving price fixing and bid rigging, while the agencies share responsibility for merger investigations and civil non-merger investigations. The FTC typically handles civil enforcement involving oil and gas pipelines, terminals, and retailing, as well as chemicals, while the DOJ typically handles electricity and oilfield services.

## FTC

The FTC has both a competition and a consumer protection mission. It is chiefly organized around three Bureaus: the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. Other offices also play key roles in supporting the FTC's mission, such as the Office of the General Counsel, which typically prepares amicus briefs and position statements to other agencies, including on issues affecting the energy and chemical industries.

Five presidentially nominated commissioners head the FTC and serve seven-year terms. By law, no more than three commissioners can be members of the same political party.

Two Republican Commissioners—Melissa Holyoak and Andrew Ferguson—took office on March 25, 2024 and April 2, 2024, respectively. Prior to joining the FTC, Holyoak served as Solicitor General with the Utah Attorney General's Office and with a variety of public-interest law firms, and Ferguson served as Solicitor General of the Commonwealth of Virginia, and previously served as chief counsel to U.S. Senator Mitch McConnell of Kentucky, the Republican leader, and as a Republican counsel on the U.S. Senate Judiciary Committee. President-Elect Donald Trump has indicated that he will nominate Commissioner Ferguson to be Chair, replacing the outgoing Lina Khan, and Mark Meador to as a Republican Commissioner. Meador is a partner at law firm Kressin Meador Powers and former antitrust counsel to Republican U.S. Senator Mike Lee.

Upon confirmation, they will serve with the remaining Democratic Commissioners. Alvaro Bedoya, was sworn in as a Commissioner on May 16, 2022. Bedoya was the founding director of the Center on Privacy & Technology at Georgetown University Law Center and, before joining the FTC, he focused on research and policy involving privacy, civil liberties, and civil rights. The second Democratic appointee, Rebecca Kelly Slaughter, served as Chief Counsel to U.S. Senator Charles Schumer of New York before joining the commission.

The FTC's Mergers II Division oversees the coal and chemical industries, among others. The Mergers III Division handles the oil and gas industries, including pipelines, terminals and retailing, among others.

## Mergers II

**Peggy Bayer Femenella** Assistant Director

**James Abell** Deputy Assistant Director

**Abby Dennis** Deputy Assistant Director

**Michael Lovinger** Deputy Assistant Director

Peggy Bayer Femenella

The FTC's Mergers II group oversees a wide variety of industries, including coal mines, chemicals, entertainment, and computer hardware and software. A significant recent case Mergers II handled was the challenge to a proposed joint venture between Peabody Energy and Arch Coal, which would have combined the parties' Southern Powder River Basin coal mining and sales operations. The challenge resulted in the U.S. District Court for the Eastern District of Missouri granting the FTC's request for a preliminary injunction, causing the parties to abandon the joint venture. Mergers II also was responsible for the FTC's investigation of the Cristal/Tronox merger, which resulted in a significant divestiture. The division has also reviewed and obtained consent orders in a number of high-profile mergers in the chemical industry, including Keystone/Compagnie de Saint-Gobain, Dow/Rohm & Haas, Owens/Corning, Occidental Petroleum/Vulcan, Bayer/Aventis, and Dow Chemical/Union Carbide.

There are approximately 35 individuals in Mergers II. Femenella became Assistant Director in 2022, after having served as Acting Director and deputy in the group. Prior to that, Femenella served as Counsel to the Director of the Anticompetitive Practices Division, following a long career in the agency, having joined the FTC in 2000. Femenella is joined by James Abell, Abby Dennis, and Michael Lovinger in Deputy Assistant Director roles.

## Mergers III

**Peter Richman** Assistant Director

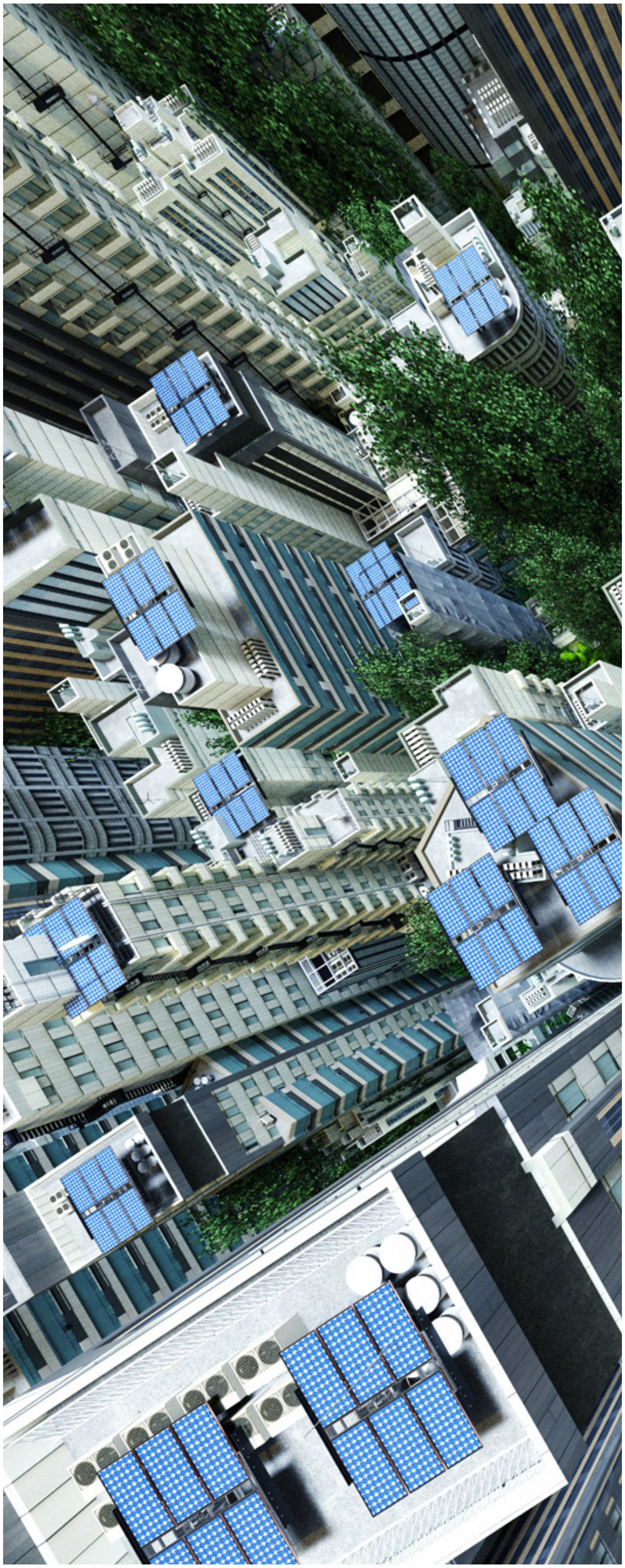
**Jessica Drake** Deputy Assistant Director

**Brian Telpner** Deputy Assistant Director

Brian Telpner, Peter Richman, and Jessica Drake

The FTC's Mergers III group focuses on enforcement across multiple levels of the oil and gas industry, including refining, pipeline transport, terminal operations, marketing, and retail sales. In addition to oil and gas, Mergers III focuses on real estate and property-related products and services, digital database and information services, industrial manufacturing and distribution, hotel franchising, and title insurance. Mergers III has reviewed hundreds of mergers in the energy industry, including Exxon/Pioneer and Chevron/Hess, and secured divestitures in connection with some high-profile mergers, including Irving Oil/ExxonMobil, Exxon/Mobil, BP/Amoco, Chevron/Texaco, Chevron/Unocal, Conoco/Phillips, and Shell/Texaco. Examples of Merger III activity in the natural gas industry include securing a divestiture in the KinderMorgan/El Paso transaction and entering into a consent agreement in the Enbridge/Spectra Energy merger.

There are approximately 25 individuals in the group. Richman has led Mergers III since 2016, following a long career at the FTC, having joined directly out of law school in 1990 and serving as a deputy for over a decade. Richman has been involved in numerous merger investigations in the energy industry, including Marathon/Ashland, Exxon/Mobil, BP/ARCO, Valero/UDS, Chevron/Texaco, Chevron/Unocal, and Valero/Kaneb. Richman also supervised several investigations into national and regional gasoline pricing practices. Drake and Telpner joined the FTC in 2009 and 2004, respectively.



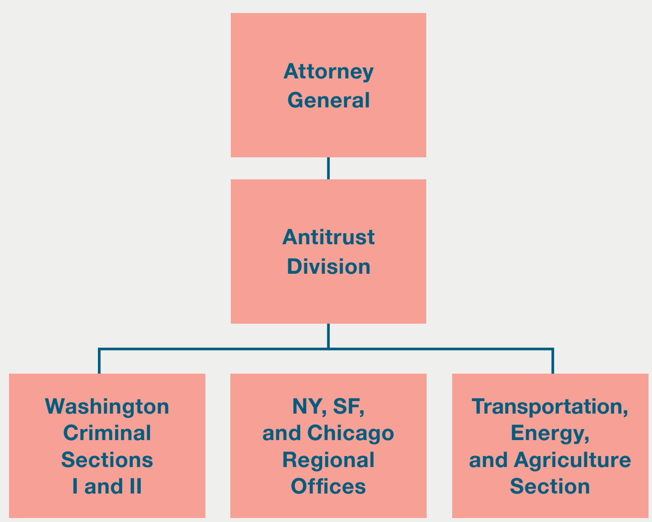
## DOJ Antitrust Division

Trump intends to nominate Gail Slater to serve as Assistant Attorney General ("AAG") of the DOJ. Ms. Slater served during Trump's first term as tech policy adviser at the National Economic Council, and most recently worked as policy adviser for Vice President-elect JD Vance. If confirmed, Ms. Slater will succeed President Biden's AAG, Jonathan Kanter. The AAG will have the ability to designate the Deputy Assistant Attorneys General, who serve under the AAG and oversee the Division's sections.

The Antitrust Division's litigating components handle both criminal and civil enforcement. The Division's criminal enforcement functions are not organized by industry—any of the criminal sections (including the two criminal sections located in Washington and the Chicago, New York, and San Francisco regional offices) can investigate criminal violations of the antitrust laws. The civil sections of the Antitrust Division are organized around specific sectors. The Transportation, Energy, and Agriculture Section ("TEA") is predominantly responsible for civil enforcement in the energy industry, including electricity and oil field services, among others. The Defense, Industrials, and Aerospace Section also handles some energy-related industries, including metals and mining.

DOJ Antitrust Division

(highlighting offices with principal energy and chemical enforcement responsibilities)



## Transportation, Energy, & Agriculture

**Patricia Corcoran** Acting Section Chief

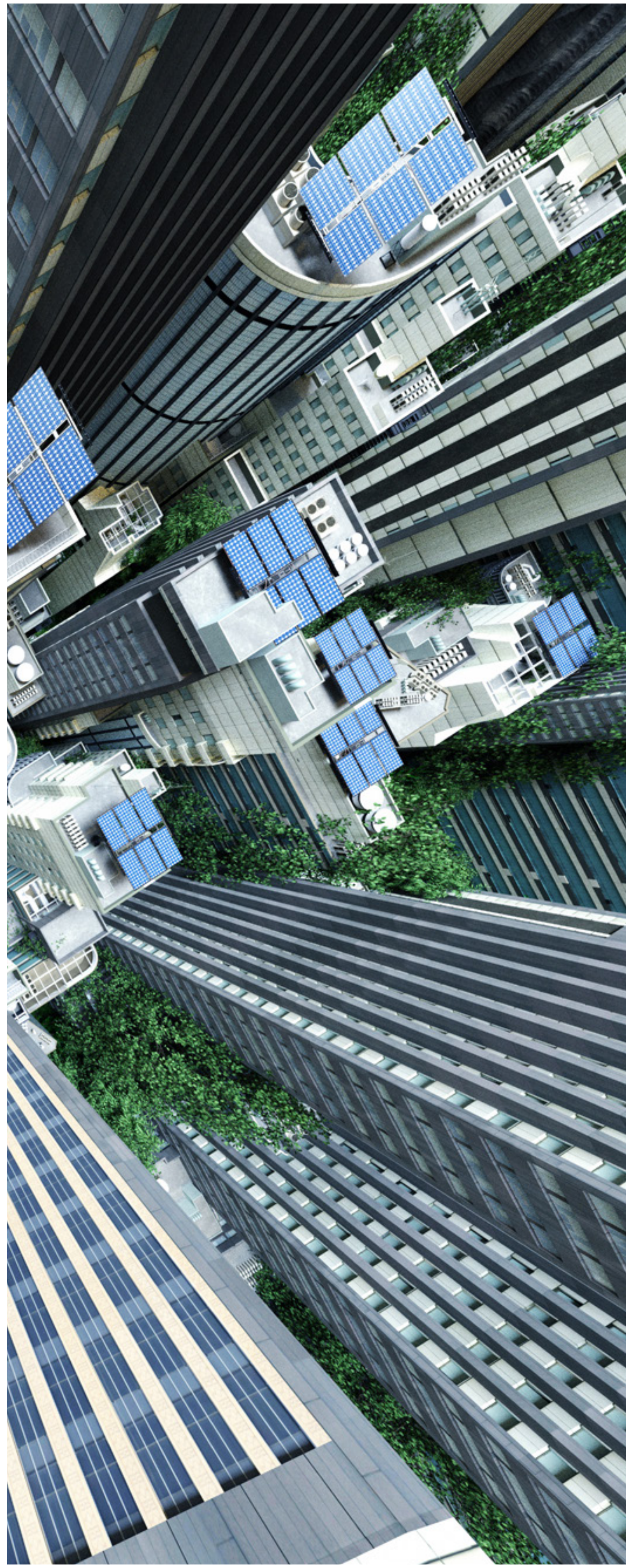
**Katherine Speegle** Assistant Chief

**Catherine Reilly** Acting Assistant Chief

TEA is responsible for civil antitrust enforcement, competition advocacy, and competition policy in the areas of electricity; oil field services; domestic and international aviation; business and leisure travel; railroads, trucking, and ocean shipping; hotels, restaurants, and travel services; food products, crops, seeds, fish, and livestock; and agricultural biotech. TEA consults on policy issues with, and engages in formal proceedings before, various other federal agencies, including the U.S. Department of Energy and the FERC. Recent high-profile cases for the section include the review of Halliburton Company's proposed acquisition of Baker Hughes Inc., in which the DOJ sued to block after proposed divestitures were seen as insufficient, resulting in the eventual abandonment of the deal, and reaching a consent decree requiring General Electric Co. and Baker Hughes to divest GE's Water & Process Technologies business in order to proceed with their merger.

Patricia Corcoran

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



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# Nationally Recognized Antitrust Practice

V&E’s antitrust and competition law practice includes more than 40 antitrust-focused lawyers collaborating across offices to provide seamless efficiency and capabilities. Our antitrust lawyers are seasoned trial lawyers — experienced, willing, and able to protect our clients’ rights in court. We represent energy, chemical, and other companies in cases across the spectrum of antitrust and competition laws, including cases alleging price fixing, bid rigging, monopolization, boycotts, exclusive dealing, tying, and unfair trade practices.

Our lawyers frequently appear before and have insight into the FTC, DOJ, state AGs, and other agencies with antitrust enforcement authority. Among our ranks are a number of former federal prosecutors from the DOJ as well as those who have held senior positions at the FTC. V&E’s extensive experience with both former government officials and seasoned practitioners provides insight into the substantive arguments most likely to persuade a government enforcer to close its investigation.



Prior results do not guarantee a similar outcome.

# World's Leading Energy Firm

Since 1995, Euromoney has ranked V&E the world's leading energy law firm based on the number of lawyers named in the Guide to the World's Leading Energy & Natural Resources Lawyers, a publication of Euromoney Institutional Investor PLC's Legal Media Group. Additionally, the team is ranked nationally, in Washington, D.C., and in Texas by Chambers Global (2019-present) and Chambers USA (2018-present) as well as by Legal 500 U.S. (2018-present) for our antitrust work. V&E's Antitrust practice is also recognized in the GCR 100 as an outstanding antitrust practice in Washington, D.C. and in Texas by Global Competition Review (2015-present). V&E has worked with corporations and individuals in nearly every sector within the energy value chain, and we are particularly experienced in handling investigations and litigation in the energy sector around the world. The scope and depth of our antitrust practice, coupled with our rich knowledge and experience in the energy sector, particularly in petrochemicals, pipelines (natural gas, refined petroleum products and others), and gasoline marketing enables us to provide comprehensive representation to our clients, combining an ability to identify and understand the issues faced, to draw upon our firm's extensive experience in energy law, and to create solutions that are right for our clients.

We offer a multidisciplinary team that represents a mix of chemical manufacturers, suppliers, and investors on the unique technical and commercial issues affecting the industry. V&E's commitment to understanding the technology, manufacturing processes, and feedstock/ off-take markets involved in the chemical sector sets us apart from competitors. With regard to antitrust, chemical companies call on V&E when they experience allegations of monopolization and other anticompetitive behavior in order to defend against investigations by the DOJ and FTC, potential class action suits, and multi-district litigation.

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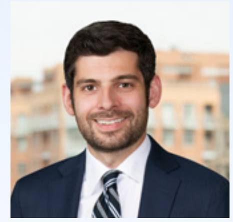

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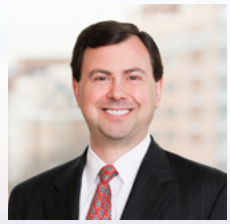

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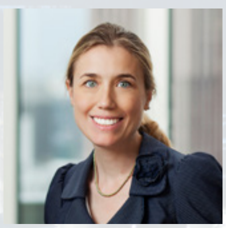

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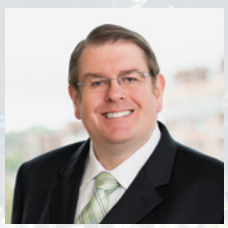

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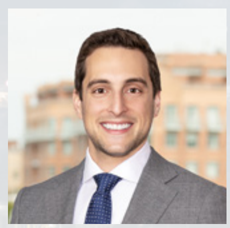

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