# The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research

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This article was first published in The Mergers & Acquisitions Review - Edition 8
(published in August 2014 – editor Mark Zerdin).

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# The Mergers & Acquisitions Review

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# THE LAW REVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk


ISBN 978-1-909830-16-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ÆLEX

AGUILAR CASTILLO LOVE

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# EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be

filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

**Mark Zerdin**
Slaughter and May
London
August 2014

# Chapter 4

# US ANTITRUST

*Scott A Sher, Christopher A Williams and Bradley T Tennis*[1]

## I US COMPETITION OVERVIEW

As President Obama nears the midpoint of his second term, merger activity suffered a slight year-over-year dip but has still recovered moderately from the first years of the global economic downturn. The following charts[2] set out reporting and enforcement data for transactions reported to the US antitrust agencies – the Department of Justice, the Antitrust Division (DoJ) and the Federal Trade Commission (FTC) – over the past eight years.

The number of transactions receiving a second request remained steady in fiscal year 2013 at 47, even with a 7.2 per cent decrease in reported transactions. As the result, the overall rate of second requests rose slightly, continuing the trend of a significantly more active pre-challenge review in the Obama Administration compared with the last four years of the Bush Administration.

1 Scott A Sher is a partner and Christopher A Williams and Bradley T Tennis are associates at Wilson Sonsini Goodrich & Rosati, PC.

2 See Hart-Scott-Rodino Annual Reports for fiscal years ended 2013, 2012, 2011, 2010, 2009, 2008, 2007 and 2006, available at www.ftc.gov/bc/anncompreports.shtm. A 'second request' is a request by one of the US antitrust agencies for additional information and documentary material, which extends the initial waiting period. A second request is akin to a Phase II investigation in the European Union and other jurisdictions. A 'challenge' to a transaction is defined as: (1) resolution by consent decree; (2) an administrative complaint along with a request for a preliminary injunction; or (3) abandonment or restructuring of the transaction after the agency informs the parties of its antitrust concerns.

| *Fiscal year*[1] | *2006* | *2007* | *2008* | *2009* | *2010* | *2011* | *2012* | *2013* |
|---|---|---|---|---|---|---|---|---|
| Transactions reported[2] | 1,768 | 2,201 | 1,726 | 716 | 1,166 | 1,450 | 1,429 | 1,326 |
| Second requests[3] | 45 | 63 | 41 | 31 | 42 | 55 | 49 | 47 |
| DoJ | 17 | 32 | 20 | 16 | 22 | 31 | 29 | 25 |
| FTC | 28 | 31 | 21 | 15 | 20 | 24 | 20 | 22 |
| Second requests[4] | 2.6% | 3.0% | 2.5% | 4.5% | 3.7% | 3.9% | 3.5% | 3.7% |

1 The US government fiscal year runs from October 1 to September 30 of the following calendar year.
2 See Hart-Scott-Rodino Annual Report for Fiscal Year 2013, at Appendix A, available at www.ftc.gov/bc/anncompreports.shtm.
3 See id.
4 See id. at p. 6.

Although the percentage of transactions subject to a second request increased slightly over fiscal year 2012, enforcement activity was down substantially. The DoJ and FTC brought 15 and 23 challenges, respectively, to transactions in fiscal year 2013, a decrease of 13.6 per cent. Even with the drop, however, the Obama Administration continues to outpace the Bush Administration's enforcement efforts despite the weaker economy and lower merger and acquisition levels. The total of 38 challenges represents the second highest total since fiscal year 2001, perhaps validating President Obama's campaign promise to 'reinvigorate' antitrust enforcement.[3]

| *Fiscal year* | *2006* | *2007* | *2008* | *2009* | *2010* | *2011* | *2012* | *2013* |
|---|---|---|---|---|---|---|---|---|
| Challenges[5] | 32 | 34 | 37 | 31 | 41 | 37 | 44 | 38 |
| DoJ | 16 | 12 | 16 | 12 | 19 | 20 | 19 | 15 |
| FTC | 16 | 22 | 21 | 19 | 22 | 17 | 25 | 23 |

5 See Hart-Scott-Rodino Annual Reports for fiscal years ended 2013, 2012, 2011, 2010, 2009, 2008, 2007, and 2006, available at www.ftc.gov/bc/anncompreports.shtm.

The past year saw the conclusion of two major enforcement litigation proceedings (*Bazaarvoice* for the DoJ and *St. Luke's* for the FTC) at the district court level and one at the appellate level (*ProMedica* for the FTC), all three ending in victory for the government. In *Bazaarvoice*, the government successfully sued to unwind a consummated merger between Bazaarvoice and PowerReviews, both of which provided product reviews and ratings (PRR) platform software. The government successfully argued a product market confined to PRR platforms – excluding other online social commerce products such as blogs – and found that the combined entity would be able to price discriminate against certain classes of customers. The case was settled in April with an order to divest PowerReviews assets. In *St. Luke's*, the first fully litigated FTC challenge to an acquisition of a physician practice by a hospital, a federal judge ordered St. Luke's Health System to unwind its acquisition of Saltzer Medical Group. The decision is pending appeal in

3 Statement of Senator Barack Obama for The American Antitrust Institute (September 2007), available at www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

the Ninth Circuit. In *ProMedica*, the Sixth Circuit upheld the FTC's decision and order for the divestiture of St. Luke's Hospital in Lucas County, Ohio, accepting the FTC's 'clustering' approach to defining the relevant product markets. These three significant wins for the government are likely to encourage the government to continue its more aggressive antitrust enforcement stance under the Obama Administration.

Both antitrust agencies continue to struggle with novel questions posed by the increasing intrusion of online services into previously well-understood markets and the potential for the internet to bridge the gap between previously distinct markets. For instance, there is an interesting contrast in the approaches taken between the DoJ in *Gannett/Belo* and the FTC in *Nielson/Arbitron*. In the former, the DoJ continued its traditional practice of construing advertising markets very narrowly, finding that online advertising and even cable and satellite TV advertising were not effective substitutes for broadcast television spot advertising. By contrast, the FTC challenged the *Nielson/Arbitron* deal in order to avoid what it saw as a threat to the nascent development of cross-platform audience measurement tools that would allow advertisers to track media consumption across multiple distribution channels, such as television, radio and online services. The FTC's reasoning may indicate a greater willingness to accept arguments that advertising products are beginning to compete across platforms. The FTC's appreciation of the growing consumer trend of the interdependent use of multiple media platforms seems to confirm that it is only a matter of time before the DoJ will be forced to abandon its practice of focusing narrowly on individual distribution channels.

## II MERGER NOTIFICATION UNDER THE HSR ACT

### i Overview

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) provides notification and waiting requirements for certain transactions in order to provide the US antitrust agencies the opportunity to review these transaction prior to consummation.[4] Any acquisition of voting securities, non-corporate interests (e.g., LLC or partnership), or assets is subject to the HSR Act, including an acquisition of a majority or minority of a company's voting stock, the formation of a joint venture, or an acquisition of tangible or intangible assets (e.g., patents and certain exclusive licences).

Generally, parties to a transaction are required to file an HSR Premerger Notification and Report Form (the HSR Form) with the FTC and DoJ if one of the following thresholds is met:[5]

4 The DoJ and FTC also have the authority to investigate and challenge transactions that are not reportable under the HSR Act, whether or not such transactions have been consummated.

5 The notification thresholds are adjusted annually to reflect changes in the US Gross National Product (GNP). The thresholds listed in the main body took effect 24 February 2014. The 2013 thresholds (with corresponding 2014 thresholds following in parentheses) were: $14.2 (15.2) million; $70.9 ($75.9) million; $141.8 ($151.7) million; and $283.6 ($303.4) million. There are additional thresholds for more uncommon transactions, but the thresholds listed here cover the majority of reported transactions.

*a* the value of the aggregate total amount of voting securities, non-corporate interests and assets being acquired exceeds $75.9 million, and either the ultimate parent entity (UPE) of the acquired entity or the UPE of the acquired entity has at least $15.2 million in assets or sales, and the other UPE has at least $151.7 million in assets or sales; or

*b* the value of the aggregate total amount of voting securities, non-corporate interests and assets being acquired exceeds $303.4 million, regardless of the size of the parties.

The parties must wait 30 days (15 days for a cash tender offer or bankruptcy sale) after filing the HSR Form before consummating the transaction, unless the parties request and receive early termination of the waiting period from the antitrust agencies. At the end of the initial 30-day waiting period, the agency responsible for reviewing the transaction may issue a request for additional documentary material (a 'second request').[6] The responsible agency may extend the waiting period up to 30 days (10 days for a cash tender offer or bankruptcy sale) after all parties have substantially complied with the second request (or, in the case of a cash tender offer or bankruptcy sale, after the acquiring party complies).

### ii Recent developments

***Codification of 'pull-and-refile' procedure***

The FTC issued amendments to the HSR Rules to establish the procedures for the withdrawal and refiling of an HSR notification, which became effective on 9 August 2013.[7] The new rule largely codified the FTC's prior practice regarding the voluntary withdrawal and 'pull-and-refile' procedures. The FTC has always allowed parties to voluntarily withdraw filings. Moreover, for years, the FTC's Premerger Notification Office (PNO)[8] has informally allowed the acquiring person to voluntarily withdraw an HSR filing and resubmit it within two business days without paying an additional filing fee in order to restart the waiting period. Parties may decide to 'pull-and-refile,' and therefore restart the waiting period, in order to provide the reviewing agency with additional time to review a transaction with the hopes of avoiding, or at least narrowing the scope of, a second request. In addition to codifying prior practice, the FTC established a new rule whereby HSR filings are automatically withdrawn if an SEC filing is made announcing the expiration, termination or withdrawal of a tender offer (e.g., in a Schedule TO-T/A) or the termination of an agreement or letter of intent (e.g., in a Form 8K).

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6 See Section 7A(e) of the Clayton Act, 15 U.S.C. Section 18A(e).

7 See Final Rule, Final Rule Amendments to Provide a Framework For the Withdrawal of a Premerger Notification Filing under the Hart-Scott-Rodino Act, 78 Fed. Reg. 41293 (10 July 2013), available at www.ftc.gov/sites/default/files/documents/federal_register_notices/federal-register-notice-16-cfr-parts-801-802-and-803-premerger-notification-reporting-and-waiting/130628hsrfinalrulefrn.pdf.

8 The PNO is responsible for administering the HSR premerger notification programme, including providing informal interpretations on the application of the HSR Rules.

***Amendments to HSR Rules expand the scope of pharmaceutical licensing transactions subject to premerger notification***

On 6 November 2013, the FTC finalised amendments to the premerger notification rules that provide a framework for determining when a transaction involving the transfer of rights to a pharmaceutical patent is a potentially reportable asset acquisition under the HSR Act.[9] The final rule amendments, which became effective on 16 December 2013, in large part codified the long-standing position of the PNO that transactions involving the transfer of exclusive patent rights are treated as asset acquisitions under the HSR Act and thus are subject to premerger notification requirements. However, the 'all commercially significant rights' approach established by the new rule, which applies solely to the pharmaceutical industry, deviates from the existing PNO approach in its treatment of retained manufacturing rights and is expected to result in an increase in pharmaceutical licensing transactions that will require notification under the HSR Act.

Under the existing approach – which is reflected in guidance offered by the PNO in numerous 'informal interpretations' over the years – the exclusive transfer of rights to 'make, use and sell' under a patent is considered a potentially reportable transaction even if the transfer is limited to a particular field of use, period of time or geographic area. However, if the licensor retains the right to license the patent to others for the same field of use, geographic area and time period as granted to the licensee, then the licence is not considered sufficiently exclusive for HSR purposes, and thus not an asset acquisition. The licence may also not be considered sufficiently exclusive if the licensor retains for itself certain other rights to the patent. For example, the retention of manufacturing rights has generally been sufficient to render an otherwise exclusive licensing arrangement non-exclusive even if the grantor has no intention of manufacturing the product. On the other hand, merely retaining the right to co-develop, co-promote or co-market a product has in most instances not been sufficient in the PNO's view to render an otherwise exclusive licence non-exclusive for HSR purposes.

Under the new rule, a licence or other transfer of patent rights to a pharmaceutical product amounts to an asset acquisition if all commercially significant rights to the patent are conveyed by the transferor to the transferee. The transfer of all commercially significant rights means that the transfer of exclusive patent rights allows only the recipient of such rights to use the patent – whether as a whole or in part – in a particular therapeutic area or for a specific indication. Such a transfer will remain potentially reportable even if the licensor retains limited manufacturing rights (i.e., the right to manufacture the products covered by the patent solely for the licensee) or co-rights (i.e., shared rights retained by the licensor to assist the licensee in developing and commercialising the product covered by the patent, including rights related to co-development, co-promotion, co-marketing and co-commercialisation).

9 See Final Rule, Amendments to the Premerger Notification Rules for Determining the Reportability of a Transaction Involving the Transfer of Rights to a Patent in the Pharmaceutical (Including Biologics) and Medicine Manufacturing Industry, 78 Fed. Reg. 68705 (15 Nov., 2013), available at www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/11/131115premergerfrn.pdf.

The new rule applies only to transfers of patent rights in the pharmaceutical, biologics and medicine manufacturing industry. Exclusive licensing transactions relating to other types of products nevertheless remain potentially reportable asset acquisitions under the HSR Act. It is not clear whether the PNO will analyse exclusive licences in other industries under the 'make, use and sell' or 'all commercially significant rights' approach. Therefore, consultation with PNO staff may be required for such transactions.

***Pharmaceutical industry group challenges pharmaceutical licensing rule***

On 12 December 2013, the Pharmaceutical Research and Manufacturers of America (PhRMA) filed a complaint in the US District Court for the District of Columbia challenging the FTC's new pharmaceutical licensing rule. PhRMA argued that the new rule should be set aside because the FTC lacked statutory authority under the HSR Act to issue a rule applying only to the pharmaceutical industry rather than a rule of general application, failed to establish a rational basis for such an industry-specific rule and failed to include in the rulemaking record the factual basis for its decision, contrary to the procedure required by law. On 30 May 2014, the court rejected PhRMA's challenge, holding that the FTC has statutory authority to issue industry-specific rules under the HSR Act, articulated a rational justification for limiting the new rule to the pharmaceutical industry and observed the procedural requirements of the Administrative Procedures Act.[10]

## III MERGER ENFORCEMENT ACTIVITY

Section 7 of the Clayton Act prohibits acquisitions or mergers where the effect 'may be substantially to lessen competition, or tend to create a monopoly' in 'any line of commerce in any section of the country'.[11] The US antitrust agencies may enforce Section 7 by trying to block the merger or through resolution by consent decree. To enforce the Clayton Act, the DoJ must bring an action in a federal district court to permanently enjoin the merger.[12] By contrast, the FTC's merger enforcement procedure has both judicial and administrative elements. Prior to or during an administrative adjudicative proceeding, the FTC may bring a suit in a federal court to obtain preliminary injunctive relief against the merger or acquisition pending completion of the administrative proceeding.[13]

### i Department of Justice

Now that Bill Baer has completed his first full year at the helm of the DoJ, it is clear that he will continue to push to fulfil President Obama's promise of aggressive antitrust enforcement. The DoJ successfully concluded its litigation to block the

10 See *Pharmaceutical Research and Manufacturers of America v. FTC*, No. 13-CV-01974 (D.D.C. 30 May 2014).

11 15 U.S.C. Section 18.

12 Section 15 of the Clayton Act; 15 U.S.C. Section 25.

13 Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. Section 53(b).

*Bazaarvoice/PowerReviews* merger and only settled its challenge to the *US Airways/American Airlines* deal on the eve of trial after securing significant divestitures.

The DoJ's renewed focus on the parties' own view of the competitive impact of a merger (particularly the acquiring party) has influenced a number of recent cases. Both the DoJ's complaint in *Bazaarvoice* and the court's decision finding the merger violated the Clayton Act relied heavily on pre-merger internal Bazaarvoice documents purporting to characterise the deal as an anti-competitive merger to monopoly. In addition, although not as prominently as in *Bazaarvoice*, the DoJ highlighted remarks by US Airways executives in support of its complaint challenging the merger with American Airlines. Both cases provide a cautionary tale: internal documents and the public statements of executives can and do strongly influence the merger review process.

In the past year, the DoJ concluded challenges to two post-closing transactions, winning at trial to unwind the *Bazaarvoice/PowerReviews* merger and settling *Heraeus/Midwest Instrument Co*. Other notable post-closing challenges in recent years include the 2009 DoJ suit to undo Election Systems & Software's acquisition of Premier Election Services[14] and the 2012 FTC decision ordering ProMedica to divest St. Luke's hospital.[15] Merging companies should take these cases as a reminder that HSR filing thresholds are merely a notification requirement and not a safe harbour from the antitrust laws.

***US Airways/American Airlines***

In February 2013, US Airways announced an $11 billion deal to merge with American Airlines, which had filed for bankruptcy protection in November 2011.[16] The merger would create the world's largest airline by traffic and leave just three so-called legacy carriers – airlines that operated before deregulation of the US airline industry in the late 1970s – operating in the United States.[17] The DoJ, together with attorneys general from six states and the District of Columbia, filed a suit to block the merger on 13 August 2013.[18] The DoJ alleged that the merger would harm competition in the commercial air travel market, leading to substantially higher prices for consumers and reduced flight volume.[19] The DoJ was particularly concerned about the potential elimination of US Airways's 'Advantage Fares' programme, through which the company would attempt to compete with legacy carrier non-stop routes by offering heavily discounted one-stop fares.[20] The effect would be particularly acute for flights to and from highly concentrated airports such as Reagan National Airport in Washington, DC, where the combined company would control nearly 70 per cent of available slots.[21] The complaint quotes

14 www.justice.gov/opa/pr/2010/March/10-at-235.html.

15 www.ftc.gov/os/adjpro/d9346/120625promedicaopinion.pdf.

16 http://dealbook.nytimes.com/2013/02/13/american-and-us-airways-said-to-vote-for-merger/?_php=true&_type=blogs&_r=0.

17 www.justice.gov/iso/opa/atr/speeches/2013/at-speech-130813.html.

18 www.justice.gov/opa/pr/2013/August/13-at-909.html.

19 www.justice.gov/atr/cases/f299900/299968.pdf.

20 Id.

21 Id.

several public statements by US Airways executives describing both how consolidation could allow the company to pass on fare increases to consumers as well as the ability for both companies to survive as stand-alone firms.[22] This continues the recent trend of increased reliance on the parties' own assessment of the market and the impact of a transaction to support merger challenges.

The case was settled with a proposed consent decree filed 12 November 2013, just weeks before trial was set to commence.[23] The settlement, which was approved by the court in April 2014,[24] required both US Airways and American Airlines to divest slots in key constrained airports across the country to low-cost carriers. Specifically, the companies were required to divest 104 air carrier slots and related gates and facilities at Washington Reagan National Airport; 34 slots and related gates and facilities at New York LaGuardia Airport; and two gates and related facilities at each of five airports: Boston Logan, Chicago O'Hare, Dallas Love Field, Los Angeles International and Miami International.[25] JetBlue and Southwest will be given the opportunity to acquire slots they currently lease from American at Reagan National and LaGuardia, respectively.[26] Remaining slots and facilities will be grouped into bundles designed to ensure both commercial viability and competitive service patterns after divestiture.[27] The merged company is prohibited from reacquiring any of the divested assets during the term of the settlement.[28]

Whereas in the past, the DoJ has been resistant to the concept of a national market for air travel or to alleging nationwide competitive effects,[29] in this case the DoJ originally alleged that the merger would eliminate US Airways as a source of competition to legacy carriers nationwide through the elimination of US Airways's 'Advantage Fares'.[30] By contrast, the settlement is predominantly focused on just two airports – Reagan National in Washington, DC and LaGuardia in New York – and appears more readily squared with traditional airline merger analyses that focused primarily on individual city pairs. Critics argue that this narrowly tailored remedy, despite the size of the required divestitures, falls short of the sweeping allegations made in the DoJ's complaint and may fail to fully redress the competitive harm the merger could create.[31]

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22 Id.

23 www.justice.gov/opa/pr/2013/November/13-at-1202.html.

24 www.bloomberg.com/news/2014-04-25/american-airlines-settlement-over-us-airways-merger-approved.html.

25 www.justice.gov/opa/pr/2013/November/13-at-1202.html.

26 Id.

27 Id.

28 Id.

29 E.g., www.justice.gov/opa/pr/2010/August/10-at-974.html (DoJ declining to challenge merger of United Airlines and Continental Airlines on the basis of an agreement to transfer slots at Newark International Airport).

30 www.justice.gov/atr/cases/f299900/299968.pdf.

31 E.g., www.antitrustinstitute.org/content/antitrust-experts-question-dojs-remedies-mega-airline-merger-settlement.

***Bazaarvoice/PowerReviews***[32]

On 10 January 2013, the DoJ filed suit to challenge Bazaarvoice Inc's acquisition of PowerReviews Inc. Although the transaction was valued at $168.2 million, it did not need to be reported under the Hart-Scott-Rodino Act because the parties did not meet the Act's 'size-of-person' tests.[33] Consequently, the DoJ's investigation and subsequent challenge were initiated after the transaction had already closed.[34] The complaint alleged that Bazaarvoice is the dominant supplier of software platforms for collecting and displaying consumer-generated product ratings and reviews (PRR platforms) in the United States. By acquiring PowerReviews, its closest rival according to the DoJ's complaint, Bazaarvoice could allegedly insulate itself from meaningful competition for PRR platforms.[35]

The case proceeded to trial, and a three-week bench trial was held before Judge William Orrick of the US District Court for the Northern District of California beginning in late September 2013.[36] On 8 January 2014, the court issued a memorandum opinion and order finding that the merger violated Section 7 of the Clayton Act.[37] The DoJ's initial complaint relied heavily on alleged statements made by Bazaarvoice executives concerning the likely competitive effects of the acquisition, referencing a number of internal Bazaarvoice documents that purportedly indicated that Bazaarvoice believed the acquisition would eliminate its primary competitor, provide 'relief from price erosion' and 'create significant competitive barriers to entry'.[38] The court mirrored the emphasis placed on hot documents in the DoJ's complaint, referring frequently to pre-merger internal documents that the court believed undermined Bazaarvoice's litigation positions.[39]

The court further declined to broaden the market by including other social commerce products, such as social networks or blogs, and rejected Bazaarvoice's argument that potential rapid entrants, such as Facebook or Google, could easily unseat it if it attempted to raise prices.[40] Interestingly, the court spoke specifically to the application of antitrust laws to 'dynamic markets,' acknowledging that PRR platforms are a dynamic and rapidly evolving field.[41] In the end, however, the court was persuaded that the merger posed a significant risk of unilateral anti-competitive conduct harming customers preferring Bazaarvoice and PowerReviews as the most attractive PRR platform suppliers

32 Disclosure: The authors' firm, Wilson Sonsini Goodrich & Rosati, represents Bazaarvoice in this matter. The statements made in this article are based on publicly available information and do not necessarily reflect the views of Wilson Sonsini Goodrich & Rosati or Bazaarvoice.

33 www.justice.gov/opa/pr/2013/January/13-at-039.html.

34 Id.

35 www.justice.gov/atr/cases/f291100/291187.pdf.

36 www.justice.gov/opa/pr/2014/January/14-at-026.html.

37 www.justice.gov/atr/cases/f302900/302948.pdf.

38 www.justice.gov/atr/cases/f291100/291187.pdf.

39 www.justice.gov/atr/cases/f302900/302948.pdf.

40 Id.

41 Id.

and that Bazaarvoice had not shown that its market position was in serious danger of being disrupted by the entry of new technologies.[42]

A proposed consent decree was filed on 24 April 2014 to settle the case.[43] The decree would require Bazaarvoice to sell the PowerReviews assets it acquired to a divestiture buyer.[44] In addition, Bazaarvoice would be required to provide syndication services to the buyer for a period of four years to allow the buyer to develop its own syndication network.[45] In addition, Bazaarvoice would be required to waive breach of contract claims against customers switching to the divestiture buyer and to waive any trade secret claims against employees hired by the buyer so that the buyer can take advantage of post-merger research and development efforts.[46]

The *Bazaarvoice* case is notable for several reasons. First, Bazaarvoice's internal documents appear to have had a significant impact on the DoJ's decision to file a suit in the first place. These types of 'hot' documents can lead to increased agency scrutiny, and, the *Bazaarvoice* case shows, possibly even a merger challenge. Second, customer testimony played a somewhat unusual role in the case. Although in the past, antitrust agencies have often relied on customer complaints to press their case, here it was Bazaarvoice that made use of customer testimony to attempt to show that the merger did not have any anti-competitive impact.[47] However, the court was not persuaded that the customers had a sufficiently detailed and sophisticated view of the market to opine on its competitive conditions and gave the customer testimony offered by Bazaarvoice 'virtually no weight'.[48] Finally, the *Bazaarvoice* suit also highlights the risk of scrutiny under the antitrust laws notwithstanding exemption from the Hart-Scott-Rodino reporting requirements. Cases like *Bazaarvoice* highlight the fact that the antitrust agencies can and will challenge acquisitions that are not reportable under the HSR Act if they believe such acquisitions raise potential harm to competition.

***Heraeus Electro-Nite/Midwest Instrument Co***

In September 2012, Heraeus acquired Midwest Instrument Co in a transaction that did not meet the notification thresholds of the Hart-Scott-Rodino Act.[49] Nevertheless, the DoJ opened an investigation and in January 2014 filed its complaint in conjunction with a proposed consent order settling the case.[50] According to the complaint, the two companies 'competed head-to-head on price, service and innovation in supplying

42 Id.

43 www.justice.gov/atr/cases/f305300/305395.pdf.

44 Id.

45 Id.

46 Id.

47 See Sean P. Gates, 'Is the Customer Never Right? Bazaarvoice and Customer Testimony in Merger Litigation,' 28 *Antitrust* (Spring 2014) at 61.

48 Id. (citing *United States v. Bazaarvoice, Inc*, No. 13-cv-00133, 2014 WL 203966 at *61 (N.D. Cal. 8 January, 2014).

49 www.justice.gov/atr/public/press_releases/2014/302701.htm.

50 Id.

sensors and instruments to steel manufacturers'.[51] The settlement required divestiture of a package of assets to Keystone Sensors LLC that will allow it to rapidly enter the US market and establish itself as a competitor to the combined firm.[52] Heraeus was also required to waive non-compete provisions concerning certain former employees to allow Keystone to take advantage of the combined firm's technical expertise.[53] Like *Bazaarvoice*, this case demonstrates the DoJ's commitment to challenging transactions it believes pose a competitive harm, even if the transaction did not need to be reported under the HSR Act and had already closed.

***Gannett/Belo***

Both Gannett and Belo own and operate broadcast television stations in numerous media markets nationwide. Prior to the merger Gannett owned and operated 23 stations, 12 of which were in top-25 markets including KSDK-TV, the NBC affiliate in St. Louis.[54] Belo owned and operated 20 stations, nine of which were in top-25 markets including KMOV-TV, the CBS affiliate in St. Louis.[55] Under FCC regulations Gannett could not hold six of the Belo stations, including KMOV-TV, and so as part of the merger these stations were to be sold to Sander Media LLC.[56] However, the agreement to sell these six Belo stations included a number of provisions related to the KMOV-TV station that the DoJ believed would lessen incentives for Gannett and Sander to compete post-merger in the St. Louis market. Specifically, the agreements would have given Gannett the right to repurchase the station from Sander should the FCC relax its regulations, required Gannett to guarantee the loan Sander secured to finance its purchase of the KMOV-TV station, and provided various services to help Sander run the station.[57] The DoJ's proposed consent filed in December 2013 would the divestiture of KMOV-TV to a third party without the additional provisions of the original Gannett-Sander sale.[58]

The DoJ argued that the transaction, as structured, would have lessened competition in the market for broadcast television spot advertising in the St. Louis designated market area (DMA).[59] The DoJ continues to employ very narrow market definitions in advertising markets, despite the growing consumer shift from broadcast media to other channels, including cable and satellite television or online video distribution networks. In its complaint, the DoJ specifically rejected the idea that advertising on these alternative entertainment channels is a sufficient substitute for broadcast television spot advertising, focusing primarily on the reach of each distribution channel. For instance, the DoJ noted that broadcast media typically reach 90 per cent of homes in a DMA whereas cable and

51 Id.

52 www.justice.gov/atr/cases/f302700/302726.pdf.

53 Id.

54 www.justice.gov/atr/public/press_releases/2013/302344.htm.

55 Id.

56 Id.

57 Id.

58 www.justice.gov/atr/cases/f302500/302557.pdf.

59 www.justice.gov/atr/cases/f302500/302551.pdf.

satellite television networks typically reach only 50 per cent.[60] Similarly, it noted that online video advertising 'lacks the reach of broadcast television spot advertising'.[61] Given that the DoJ's market definition seems to rely on the relative share of various advertising channels, it is likely that the DoJ will eventually be forced to entertain broader market definitions. For the time being, however, this settlement makes it clear that the DoJ will continue to replace broadcast television mergers under close scrutiny.

### ii Federal Trade Commission

The composition of the FTC has changed markedly in the last year, with Edith Ramirez assuming the Chairwoman position with the departure of Chairman Jon Leibowitz. In addition, Joshua Wright replaced Commissioner Thomas Rosch, and Terrell McSweeny was recently confirmed by the Senate to fill the remaining vacant seat. The FTC also experienced staff turnover, including most significantly the appointment of Deborah Feinstein as the new head of the Bureau of Competition. Despite the changes in leadership, the FTC continued its high level of enforcement activity in 2013, particularly in the health-care and life sciences industries.

#### *In re Ardagh Group, SA*

In June 2013, the FTC issued an administrative complaint alleging that the $1.7 billion acquisition of Saint-Gobain Containers, Inc by Ardagh Group, SA would essentially amount to a merger to duopoly in the US market for beer and spirits glass containers. The Commission filed a complaint on 28 June 2013 and obtained an injunction preventing the merger from closing until the Commission's administrative process could be resolved.[62] The FTC's complaint alleged that after the merger the combined firm together with Owens-Illinois, Inc (the only other firm in the United States operating more than one factory for glass containers sold to brewers or distillers) would control roughly 85 per cent of the market for glass containers sold to brewers and 77 per cent of the market for distillers.[63] The complaint noted documentary evidence that Owens-Illinois, Ardagh, and Saint-Gobain already engage in parallel capacity rationalisation designed to maintain margins,[64] but that nonetheless customers are currently able to secure better prices by forcing the 'Three Majors' to bid against each other.[65] According to the complaint, eliminating this competition between Ardagh and Saint-Gobain would substantially impair the ability of customers to create a competitive bidding process and would lead to higher prices.[66]

60 Id. Paragraph 16.

61 Id. Paragraph 17.

62 www.ftc.gov/news-events/press-releases/2014/04/ardagh-group-sa-settles-ftc-litigation-charging-acquisition-rival.

63 www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.

64 Id. Paragraph 34.

65 Id. Paragraph 21.

66 Id. Paragraph 38-39.

The case was originally scheduled for an administrative hearing in December 2013, but just one day before the hearing the Commission ordered a four-month delay so that the parties could pursue settlement negotiations.[67] In April 2014, the parties reached an agreement whereby Ardagh would divest six of its nine US glass container plants, with the intention of recreating the competition lost by the incorporation of Saint-Gobain into Ardagh.[68] Finding that the market was highly concentrated with high barriers to entry and low demand growth, the Commission demanded proof of 'extraordinary efficiencies' to justify the merger and found that the parties had failed to make that showing.[69] In dissent, Commissioner Wright took issue with what he deemed an asymmetrical burden of proof, whereby efficiencies must be proven but the Commission was free to infer competitive harm from concentration, entry barriers and other factors.[70] Deboarh Feinstein, the FTC's new Director of the Bureau of Competition, stated that the case 'reflects the Commission's willingness to litigate on behalf of consumers until all competitive concerns have been addressed'.[71]

***In re Nielson Holdings NV***

Nielsen is a leading global provider of global media measurement and research services, including the famous Nielsen Box, and is the dominant provider of television audience measurement services in the United States.[72] Arbitron, also a media measurement and research services firm, provides a leading radio audience measurement service.[73] In December 2012, Nielsen proposed to acquire Arbitron for $1.26 billion.[74] At the time of the proposed merger, both companies were developing national syndicated cross-platform audience measurement services, which would allow for the measurement of audiences across multiple platforms (television, radio, online etc.), but neither company had yet gone to market.[75] Although the two companies did not compete in their core businesses – Nielsen's products were geared primarily toward television and Arbitron's toward radio – and neither company had yet entered the cross-platform measurement market, the FTC challenged the acquisition and filed a complaint in September 2013.[76]

Noting that media consumption of all kinds, including television and radio, is increasingly moving to a multi-channel distribution experience as audiences consume more media through tablets, smartphones and other online devices, the FTC noted that

67 www.ftc.gov/sites/default/files/documents/cases/131218ardaghorder.pdf.

68 www.ftc.gov/system/files/documents/cases/140411ardaghcommstmt.pdf.

69 Id. at 2.

70 www.ftc.gov/system/files/documents/cases/140411ardaghstmt.pdf.

71 www.ftc.gov/news-events/press-releases/2014/04/ardagh-group-sa-settles-ftc-litigation-charging-acquisition-rival.

72 www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsens-proposed-126-billion-acquisition.

73 Id.

74 Id.

75 Id.

76 www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncmpt.pdf.

advertisers were beginning to demand multi-channel measurement tools.[77] Interestingly, this conclusion seems to carry with it an implicit acknowledgement that advertisements are coming into increasingly close competition across different media distribution channels, at least in the minds of advertisers. In its statement announcing the complaint (and accompanying consent order), the FTC noted that there was broad consensus among media companies that Nielsen and Arbitron were best positioned to develop and market a cross-platform tool.[78] To remedy the loss of potential competition between the two companies' cross-platform products, the FTC entered into a consent order with the parties, which required Nielsen to sell and license sufficient panel data and intellectual property over a period of eight years to allow a buyer to replicate Arbitron's national cross-platform service.[79]

The decision to challenge a merger and require divestitures in a case where neither party (nor any other party) had entered the market at issue is noteworthy. Commissioner Wright issued a dissenting statement to that effect, stating that there was insufficient evidence to find that the merger would lessen competition in a future market.[80] In typical potential competition cases, Commissioner Wright argued, it is possible to identify the market because there exist at least some current buyers and sellers.[81] Citing both the uncertainties in each firm's individual capabilities absent the merger and the uncertainties in what features buyers would demand in a cross-platform measurement product, Commissioner Wright concluded that there was no reason to impose any conditions on the merger.[82]

***In re Office Depot***

This year also saw a notable decision by the FTC not to challenge a merger. On 1 November 2013, the FTC announced its unanimous decision to close its seven-month investigation of the *Office Depot/OfficeMax* merger, which combined the country's second and third-largest office supply superstores (OSSs) behind Staples.[83] In 1997, the Commission successfully blocked a merger between Staples and Office Depot (the number one and two OSSs at that time as well).[84] The Commission explained the difference in outcomes by pointing to changes in the way the sale of consumable office supplies has changed in the past 15 years.[85] Specifically, the FTC argued that the product market had become

77 www.ftc.gov/system/files/documents/cases/140228nielsenholdingstatement.pdf.

78 Id.

79 www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsens-proposed-126-billion-acquisition.

80 www.ftc.gov/system/files/documents/cases/140228nielsenholdingwrightstatement.pdf.

81 Id. at 2 & n.3.

82 Id. at 4-6.

83 www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./officemax-inc./131101officedepotofficemaxstatement.pdf.

84 *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

85 www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./officemax-inc./131101officedepotofficemaxstatement.pdf.

broader: whereas in 1997 it was appropriate to consider a product market consisting only of OSSs, today buyers are turning increasingly to non-OSS brick-and-mortar stores such as mass merchants like Wal-Mart or club stores like Costco.[86] Critically, the FTC also identified the growing role of online commerce as a competitive check on OSSs.[87] This case seems to represent a decreased focus on the specific channel through which products are sold as a differentiating factor in product market analysis, at least where the parties can demonstrate significant price competition with different types of retailers. In some respects, this case is analogous to *Nielsen* in that the FTC appears to be increasingly sensitive to competition between similar (or in this case the same) products distributed through sometimes dramatically different channels.

***The FTC continues to aggressively enforce antitrust laws in the health-care industry***

Enforcement of the antitrust laws involving mergers in the health-care industry has remained a top priority for the FTC. Over the past year, the FTC challenged six pharmaceutical acquisitions, one life sciences deal and one hospital merger. The threat of an FTC challenge also led to parties abandoning another hospital merger. The FTC also obtained two significant victories in hospital merger litigation during the past year, one at the district court level (*St. Luke's*) and the other in the Sixth Circuit (*ProMedica*).

***Hospitals and health-care services***

The FTC required Community Health Systems, Inc (CHS) to divest two hospitals as a condition for acquiring Health Management Associates, Inc (HMA).[88] Prior to the acquisition, CHS was the second-largest hospital system in the United States with 135 hospitals in 29 states and $13 billion in revenues in 2012. HMA was a for-profit health system with 71 hospitals in 15 states and $5.9 billion in revenues in 2012. The FTC alleged that CHS's acquisition of HMA would have substantially lessened competition in general acute care inpatient services sold to commercial health plans and provided to commercially insured patients in Etowah County, Alabama (leading to a near monopoly) and Darlington County, South Carolina (reducing the number of significant competitors from three to two). To settle the FTC's challenge to the merger, CHS agreed to divest HMA's Riverview Regional Medical Center and associated operations in Gadsden, Alabama, and HMA's Carolina Pines Regional Medical Center and associated operations in Hartsville, South Carolina.

On 27 June 2013, the FTC announced that Capella Healthcare had abandoned its plans to acquire Mercy Hot Springs, a rival health system in Hot Springs, Arkansas, after a lengthy FTC investigation and threat of the agency challenging the merger.[89]

86 Id.

87 Id.

88 See *In the Matter of Community Health Systems, Inc, and Health Management Associates, Inc*, FTC File No. 131-0202, available at www.ftc.gov/enforcement/cases-proceedings/131-0202/community-health-systems-health-management-associates-matter.

89 See Press Release, Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare That it Will Abandon its Plan to Acquire Mercy Hot

The Director of the FTC's Bureau of Competition commented that '[t]he fact that this acquisition will not proceed is a victory for local businesses and patients, as it will preserve access to low-cost, high-quality healthcare for the citizens of Hot Springs, Arkansas'.

On 24 January 2014, a federal judge ordered St. Luke's Health System (a hospital system) to unwind its acquisition of Saltzer Medical Group, an independent multispecialty physician group.[90] The FTC and state of Idaho filed a lawsuit in March 2013 requesting that the transaction be unwound, which was joined with an earlier action brought by two of St. Luke's competitors, Saint Alphonsus Health System and Treasure Valley Hospital. While the St. Luke's case is the first fully litigated antitrust challenge by the FTC or a state attorney general of an acquisition of a physician practice by a hospital, the FTC did not challenge the transaction on vertical grounds. The FTC challenged the merger, and the court found it unlawful, on a theory that the merger reduced competition between the parties in a horizontal market for adult primary care in Nampa, Idaho. Prior to the merger, St. Luke's employed eight primary-care physicians in Nampa and Saltzer 16. Combined, the parties account for nearly 80 per cent of the market for adult primary-care services in Nampa. St. Luke's has appealed the district court's decision to the Ninth Circuit.

On 22 April 2014, the Sixth Circuit upheld the FTC's decision that ProMedica Health System's acquisition of rival St. Luke's Hospital, a different hospital sytem with the same name as the acquiring hospital in the *Saltzer* case, would adversely affect competition and FTC's order for ProMedica to divest St. Luke's.[91] The court agreed with the FTC's 'similar-conditions' theory to clustering markets and rejected ProMedica's 'package-deal' theory, finding two separate relevant markets: primary (excluding obstetrical) and secondary services, for which the combined market was above 50 per cent; and obstetrical services, for which the combined market was above 80 per cent. The Sixth Circuit also rejected ProMedica's argument that the FTC's reliance on market-concentration data was misplaced, finding that merger 'blew through those barriers [for the presumption of illegality] in spectacular fashion' and that 'the record already shows a strong correlation between ProMedica's prices – i.e., its ability to impose unilateral price increases – and its market share.'[92] Finally, the court rejected ProMedica's efficiency claims, noting that ProMedica never attempted to argue that the merger would benefit consumers, and 'weakened competitor' argument, pointing out that this type of argument

Springs, 27 June 2013, available at www.ftc.gov/news-events/press-releases/2013/06/statement-ftc-competition-director-richard-feinstein-todays

90 See *FTC v. St. Luke's Health System, Ltd.*, No. 13-cv-00116 (D. Idaho, Jan. 24, 2014), consolidated with lead case *St. Alphonsus Medical Center-Nampa et al. v. St. Luke's Health System Ltd.*, No. 1:12-cv-00560 (D. Idaho, Jan. 24, 2014) available at www.ftc.gov/enforcement/cases-proceedings/121-0069/st-lukes-health-system-ltd-saltzer-medical-group-pa.

91 See *ProMedica Health Sys., Inc. v. FTC*, 12-3583, 2014 WL 1584835 (6th Cir. Apr. 22, 2014), available at www.ftc.gov/enforcement/cases-proceedings/promedica-health-system-inc.

92 Id. at 12, 14.

is 'probably the weakest ground of all for justifying a merger' and 'the Hail-Mary pass of presumptively doomed mergers—in this case thrown from ProMedica's own end zone'.[93]

***FTC challenges six acquisitions in the pharmaceutical industry***

The FTC continued to scrutinise acquisitions in the pharmaceutical industry, particularly those involving generics. In fact, all six of the transactions challenged over the past year involved competitive overlap in at least one generic product market: (1) *Mylan/Agila*[94] (11 generic injectable drugs); (2) *Endo Health Solutions/Boca Life Sciences*[95] (seven generic products, including four generic multivitamin drops and three other generic drugs); (3) *Akorn/Hi-Tech Pharmacal*[96] (five generic products); (4) *Actavis/Forest Laboratories*[97] (three generic products); (5) *Actavis/Warner Chilcott*[98] (one generic chewable oral contraceptive tablet); and (6) *Valeant/Precision Dermatology*[99] (generic Retin-A). The FTC's complaint in each of these transactions alleged that the parties were two of only a limited number of current or likely future suppliers in the relevant market. According to the FTC, 'the price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers likely would have a direct and substantial effect on pricing'.[100] In order to settle these transactions, the parties had to agree to divest these products to an FTC-approved buyer.

Three of the six transactions also involved competitive overlap between a branded and generic product. In *Actavis/Forest Laboratories*, Actavis was the only company to have

93 Id. at 18.

94 See *In the Matter of Mylan Inc., Agila Specialties Global Pte. Limited, Agila Specialties Private Limited, and Strides Arcolab Limited,* Docket No. C-4413, FTC File No. 131-0112, available at www.ftc.gov/enforcement/cases-proceedings/131-0112/mylan-inc-agila-specialties-global-ptelimited-agila.

95 See *In the Matter of Endo Health Solutions Inc., Boca Life Science Holdings, LLC, and Boca Pharmacal, LLC,* Docket No. C-4430, FTC File No. 131-0225, available at www.ftc.gov/enforcement/cases-proceedings/131-0225/endo-health-solutions-inc-boca-life-science-holdings-llc-boca.

96 See *In the Matter of Akorn, Inc. and Hi-Tech Pharmacal, Inc.*, Docket No. C-4452, FTC File No. 131-0221, available at www.ftc.gov/enforcement/cases-proceedings/131-0221/akorn-hi-tech-pharmacal-matter.

97 See *In the Matter of Actavis PLC and Forest Laboratories, Inc.*, FTC File No. 141- 0098, available at www.ftc.gov/enforcement/cases-proceedings/141-0098/actavis-plc-forest-laboratories-matter.

98 See *In the Matter of Actavis, Inc. and Warner Chilcott PLC*, Docket No. C-4414, FTC File No. 131-0152, available at www.ftc.gov/enforcement/cases-proceedings/131-0152/actavis-inc-warner-chilcott-plc-matter.

99 See *In the Matter of Valeant Pharmaceuticals International, Inc., and Precision Dermatology, Inc.,* FTC File No. 141-0101, available at www.ftc.gov/enforcement/cases-proceedings/141-0101/valeant-pharmaceuticals-international-precision-dermatology.

100 See Press Release, FTC Settles Charges that Actavis's Proposed $8.5 Billion Acquisition of Warner Chilcott Would be Anti-competitive, available at www.ftc.gov/es/node/152078.

received FDA approval for a generic version of the Lamictal ODT product manufactured by Forest and marketed by GlaxoSmithKline. Actavis agreed to sell its generic Lamictal ODT product to Impax Laboratories in order the settle the FTC's challenge. In *Actavis/ Warner Chilcott*, Actavis was the only company to have received FDA approval for a generic version of Warner Chilcott's Loestrin 24 FE oral contraceptive and one of a limited number of companies capable of developing and coming to market with a generic version of Warner Chilcott's Lo Loestrin FE and Atelvia products in the near future. Actavis agreed to sell all rights and assets to these products to Amneal Pharmaceuticals and to relinquish any claims it has to first-filer 180-day marketing exclusivity for generic Lo Loestrin FE and Atelvia.

The *Valeant Pharmaceuticals International/Precision Dermatology* transaction involved competition among branded and generic single-agent topical tretinoins for the treatment of acne. Valeant markets the branded topical tretinoins Retin-A, Retin-A Micro, and Atralin as well as generic versions of Retin-A and Retin-A Micro. Precision markets the branded topical tretinoin Tretin-X and a generic version of Retin-A. Valeant and Precision's market share of branded and generic single-agent topical tretinoin was 70 per cent and 12 per cent, respectively. The only other suppliers in the market are Mylan with its branded Avita product and Actavis with one strength of generic Retin-A. In order to settle the FTC's charges that the acquisition would likely reduce competition, Valeant agreed to sell Precision's assets related to Tretin-X to Actavis and Precision's assets related to generic Retin-A to Matawan Pharmaceuticals.

***FTC requires divesture of three businesses as a condition of Thermo Fisher's acquisition of Life Technologies***

The FTC challenged Thermo Fisher Scientific's proposed acquisition of Life Technologies, alleging that it would harm competition in the US and global markets for siRNA reagents, which are used to study gene function, and cell culture media and sera, which are used for in vitro cell growth.[101] According to the complaint, Thermo Fisher and Life Technologies were only two of four significant competitors in the market for siRNA reagents, with a combined share of more than 50 per cent and 90 per cent for siRNA reagents and libraries, respectively. The FTC alleged that acquisition would reduce the number of significant suppliers in the markets for cell culture media and sera from three to two, resulting in a combined market shares in excess of 50 per cent and 60 per cent in the markets for cell culture media and cell culture sera, respectively. To resolve the FTC's concerns with the transaction, Thermo Fisher agreed to divest its gene modulation business, Dharmacon, which includes its siRNA reagents business, and its cell culture media and sera business, HyClone, to GE Healthcare.

101 See *In the Matter of Thermo Fisher Scientific Inc.*, Docket No. C-4431, FTC File No. 131-0134, available at www.ftc.gov/enforcement/cases-proceedings/131-0134/thermo-fisher-scientific-inc-matter.

## Appendix 1

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Scott Sher is a partner in Wilson Sonsini Goodrich & Rosati's Washington, DC office, where his practice focuses on antitrust counselling and litigation. He represents technology clients in connection with antitrust issues that arise throughout the merger and acquisition process, from pre-merger counselling through investigations conducted by the Department of Justice, the Federal Trade Commission, and foreign regulatory agencies. In addition, Mr Sher has significant experience providing both day-to-day counselling and litigation representation to clients on issues pertaining to joint ventures, the Robinson-Patman Act, pricing and distribution, trade association and patent pooling matters, and the Sherman Act.

Mr Sher's representations have included a number of cutting-edge cases involving the intersection of antitrust and intellectual property law. He specialises in working with companies in the software, biotechnology, semiconductor, telecommunications, computer hardware, internet infrastructure and e-commerce industries.

Mr Sher currently serves as vice chair of the Intellectual Property Committee within the American Bar Association's Section of Antitrust Law, and previously served as vice chair of the Mergers and Acquisitions Committee. Mr Sher has also been editor of the *Antitrust Law Journal*, the flagship publication of the Section of Antitrust Law, and regularly contributes antitrust articles to law journals and industry-specific publications.

Prior to joining Wilson Sonsini Goodrich & Rosati, Mr Sher clerked for both the Honorable Joseph T Sneed III of the US Court of Appeals for the Ninth Circuit in San Francisco and the Honorable Charles A Legge of the US District Court for the Northern District of California.

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Bradley Tennis is an associate in the Washington, DC office of Wilson Sonsini Goodrich & Rosati, where he is a member of the firm's antitrust practice. His practice encompasses a wide variety of antitrust matters, including private litigation, mergers and acquisition notification and clearance, investigations by the Department of Justice and the Federal Trade Commission, criminal prosecutions, and business counselling. Mr Tennis has represented clients in a broad range of high-technology industries including software, internet and telecommunications infrastructure, social media, e-commerce, pharmaceuticals, and medical devices.

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