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RECENT ANTITRUST ENFORCEMENT IN THE ENERGY AND CHEMICAL INDUSTRIES

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AGENDA

- Merger Enforcement
 - Effect of Partial Government Shutdown
 - Policy Developments
 - Data and Trends
- Non-merger Enforcement
- Private Litigation

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EFFECT OF PARTIAL GOVERNMENT SHUTDOWN

- The FTC's Premerger Notification Office (PNO) and the DOJ's Premerger Office remain open during the shutdown to receive and process Hart-Scott-Rodino (HSR) filings.
- Early termination of the HSR waiting period is not available during the shutdown. A 30-day initial review period applies to all filings (15 days for cash tender offer or bankruptcy sale).
- Agency staff are not working on second request investigations, unless the parties have certified substantial compliance or a timing agreement is in effect.
- Non-merger investigations are also suspended during the shutdown.
- Agency attorneys are requesting suspensions of dates for trials, hearings and other court matters.

Implications:

- ✓ **HSR filings: 30 day review; no early termination**
- ✓ **Most second request investigations: On hold**
- ✓ **Most other investigations: On hold**

MERGER ENFORCEMENT: POLICY DEVELOPMENTS

- In 2018, both the DOJ and FTC announced changes aimed at streamlining and shortening the timeline for merger reviews, including revisions to both agencies' model timing agreements.
 - In September 2018, the DOJ announced a series of reforms aimed at shortening the time to complete most merger investigations to within six months of filing.
 - In connection with these reforms, the DOJ withdrew the 2011 merger review guidelines, making the 2004 Policy Guide operative.
 - The 2004 Guide reflects a strong preference for structural remedies over behavioral or conduct remedies.
 - In August 2018, the FTC took its own steps to streamline the merger review process, including releasing an updated Model Timing Agreement.

OTHER POLICY DEVELOPMENTS

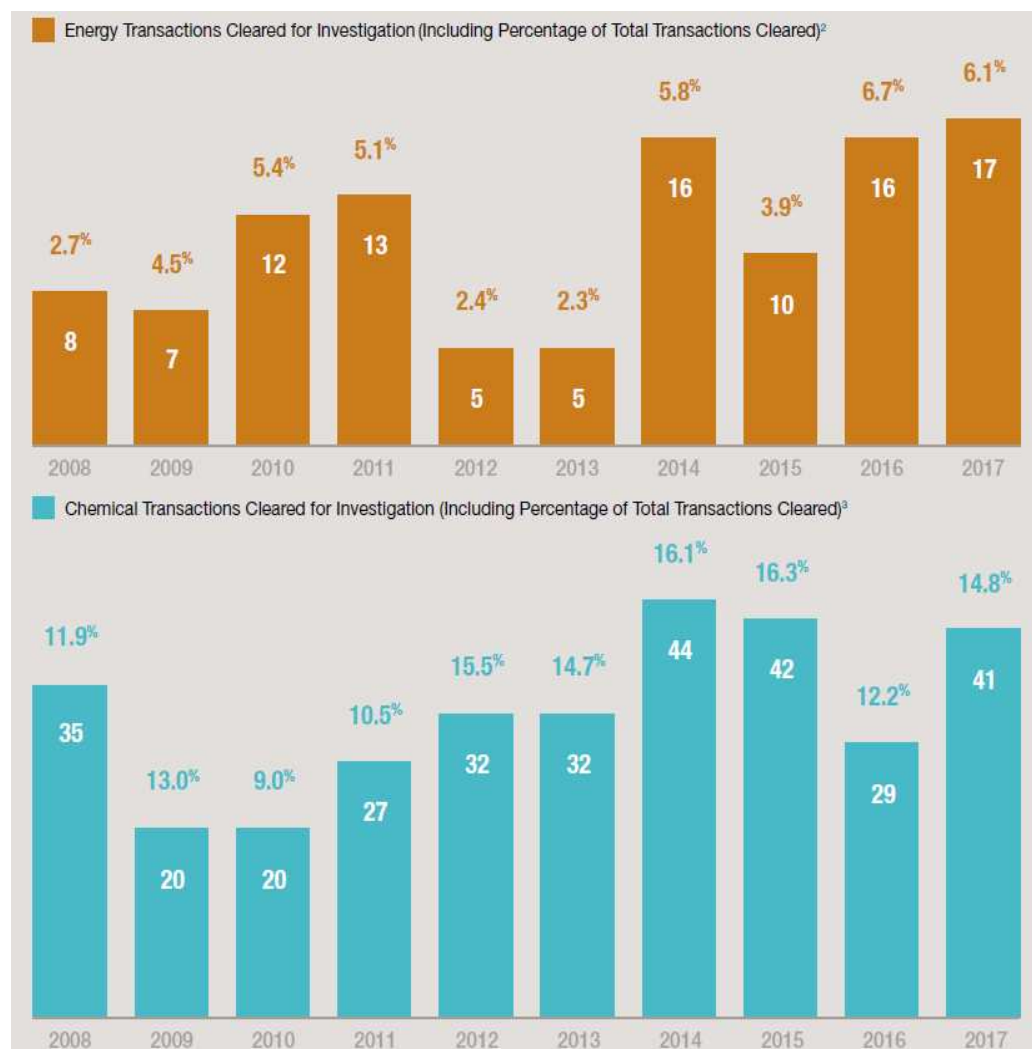
- In 2018 the DOJ took steps to strengthen its ability to enforce consent decrees, announcing a series of changes to consent decree terms aimed at strengthening the government's leverage over settling parties, including:
 - Creating a lower evidentiary standard for proving civil contempt;
 - Requiring defendants to agree to pay the government's attorneys' fees, expert fees, and other costs incurred for any successful consent decree enforcement brought by the government; and
 - Provisions addressing extending and terminating consent decrees.
- The DOJ also announced an initiative to review certain legacy judgments in order to assess their continued applicability and to recommend termination for those judgments deemed to no longer serve a procompetitive purpose.
- FTC began a series of public hearings on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement priorities and policy.

2018 MERGER ENFORCEMENT HIGHLIGHTS

- 2018 was an active year for DOJ and FTC merger enforcement in the energy and chemical industries.
 - The FTC successfully challenged two chemical industry mergers (*Tronox/Cristal* and *Wilhelmsen/Drew Marine*) in federal court.
 - The DOJ negotiated a record divestiture package valued at approximately \$9 billion in the *Bayer/Monsanto* combination.
 - The FTC also was active in challenging acquisitions of retail fuel locations, requiring divestitures for three transactions.
 - In 2018, a record 31% of second request investigations covered these industries.

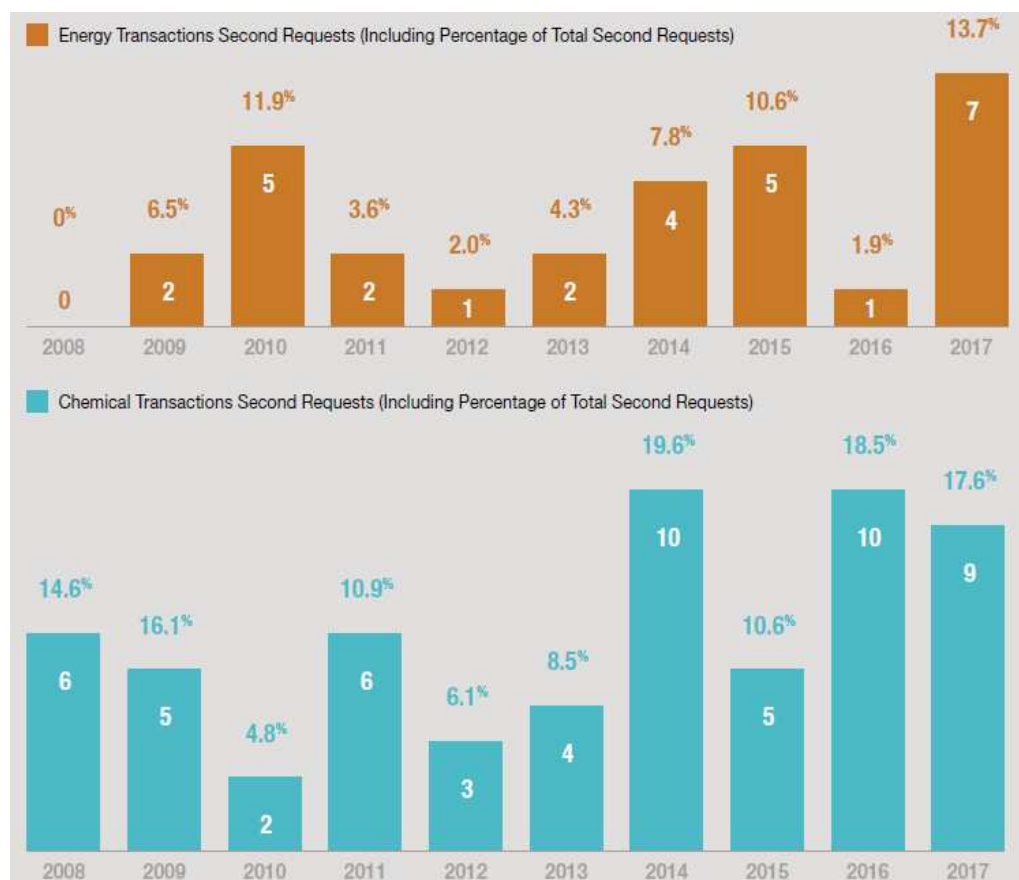
MERGER ENFORCEMENT: DATA AND TRENDS

- In recent years, the energy and chemical industries have been overrepresented as a percentage of DOJ/FTC merger investigations.
- From 2008 to 2017, the agencies opened an initial investigation in **10%** of reported energy transactions and **35%** of reported chemical transactions, despite transactions in these industries only accounting for an average of 7% and 6% of all reported transactions, respectively, in this period.



MERGER ENFORCEMENT: DATA AND TRENDS

- While the rate of second requests has declined—in 2017 the agencies issued second requests in **2.6%** of reported transactions, the lowest percentage issued in a single year since 2008—the energy and chemical industries account for an increasing portion of all second requests:
 - From 2008 to 2017, there were a total of 89 second requests for transactions in the energy and chemical industries, out of a total 468 second requests (**19%**).
 - In 2017, second requests for the energy and chemical industries constituted **31%** of all second requests, a ten-year high.
 - From 2008 to 2017, the agencies issued a second request in **3%** of reported energy transactions; i.e. **27%** of initial investigations in the energy sector resulted in a second request.
 - From 2008 to 2017, the agencies issued a second request in **7%** of reported chemical transactions; i.e. **19%** of initial investigations in the chemical sector resulted in a second request.



MERGER ENFORCEMENT: DATA AND TRENDS



- It took an unusually long time (17 months on average) from deal announcement to resolution of enforced transactions in the chemical industry in 2018, due in large part to the time needed to litigate two matters.
- The time to resolve merger enforcement matters in the energy industry (10 months on average) was more in line with other industries.

2018 MERGER ENFORCEMENT HIGHLIGHTS

- Chemical markets in which the DOJ and FTC sought relief:
 - Polyethylene terephthalate (PET) and purified terephthalic acid (PTA)
 - Titanium dioxide manufactured through the chloride process
 - Foundational herbicides and nematicidal seed treatments for corn, soybeans, and cotton
 - Superphosphoric acid
 - Nitric acid at concentrations between 65%-67%
 - Marine water treatment chemicals and services for global fleets of trading vessels
- Industrial gas markets in which the DOJ and FTC sought relief:
 - Bulk liquid oxygen, nitrogen, argon, carbon dioxide, hydrogen, helium; excimer laser gases; and on-site hydrogen and carbon monoxide
- Retail fuel markets in which the DOJ and FTC sought relief:
 - Retail gasoline and diesel (3 deals)

MERGER ENFORCEMENT – SPOTLIGHT: *TRONOX*

TRONOX LIMITED/CRISTAL

- In December 2017, the FTC challenged the proposed \$1.7 billion combination of two titanium dioxide (TiO₂) firms, Tronox Limited and the Cristal group.
- FTC alleged that a post-merger Tronox and one other competitor, Chemours, would control the vast majority of North American sales of TiO₂ and over 80% of TiO₂ production capacity in North America.
- In an unusual move, the FTC filed administrative litigation (Dec. 2017) prior to seeking a preliminary injunction (July 2018) in federal court.
- In September 2018, the district court granted the FTC's request for a preliminary injunction enjoining the parties from consummating the deal until the conclusion of the administrative litigation.
- In December 2018, Administrative Law Judge Michael Chappell ruled in the FTC's favor, finding that Tronox's proposed acquisition of Cristal would substantially lessen competition "by creating a highly concentrated market and increasing the likelihood of coordinated effects."
- The parties are seeking to resolve the FTC's concerns through a negotiated consent decree.

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NON-MERGER ENFORCEMENT

- The number of new criminal antitrust cases publicly filed by the DOJ in 2018 was well below historical levels.
 - This was in part attributable to several major investigations winding down.
 - Senior DOJ officials have said that there are a number of non-public investigations under way.
- DOJ disclosed two new cartel investigations in the energy and chemical industries in 2018.
- No new developments regarding DOJ's previously-disclosed investigation into leasehold interests in Oklahoma.

NON-MERGER ENFORCEMENT: CARTEL ENFORCEMENT

METHYLENE DIPHENYL DIISOCYANATE:

- A June 2018 news report claimed that isocyanate producers received grand jury subpoenas in February 2018, in connection with a price-fixing investigation by the DOJ.
- In connection with the report, multiple producers acknowledged the existence of an investigation, with one statement revealing the focus of the investigation to be on methylene diphenyl diisocyanate (MDI).
- Several lawsuits were filed following the announcement, alleging price fixing of both MDI and a second isocyanate, toluene diisocyanate (TDI).
 - The complaints allege that manufacturers conspired to fix, raise, maintain, or stabilize the price of MDI and TDI sold in the United States, through various agreements between defendants to limit supply of MDI and TDI, including through planned manufacturing shutdowns at plants worldwide and by implementing coordinated price increases.
- In a filing in the civil litigation last week, the defendants disclosed that:
 - The DOJ closed the grand jury investigation late last year without bringing any charges against any party
 - No defendant had sought corporate amnesty pursuant to the Antitrust Division's Leniency Program.

NON-MERGER ENFORCEMENT: CARTEL ENFORCEMENT

KOREAN FUEL SUPPLY CONTRACTS:

- In November 2018, the DOJ disclosed an investigation into a decade-long bid-rigging and price-fixing conspiracy that targeted fuel supply contracts to United States military bases in South Korea.
- Defendants were two South Korean oil companies and one South Korean transportation and logistics company.
- DOJ alleged that the defendants met and communicated in secret with other large South Korean oil refiners and logistics companies, and pre-determined which conspirator would win each supply contract. The companies allegedly then submitted collusive bids to the U.S. military.
- The companies agreed to plead guilty to criminal antitrust charges and to pay a total of approximately \$82 million in criminal fines as well as approximately \$154 million to the United States to settle civil antitrust and False Claims Act violations related to the conspiracy.

Under its Section 4A authority, DOJ can seek treble damages when the government itself is the victim.

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LITIGATION DEVELOPMENTS

- Trading market manipulation
- Collusion in physical product markets
- Collusion for leasing in hot plays
- Emerging issues

TRADING MARKET MANIPULATION

- Harry v. Total Gas & Power North America, Inc.
- Merced Irrigation District v. Barclays
- In re Western States Wholesale Natural Gas Antitrust Litigation

COLLUSION IN PHYSICAL PRODUCT MARKETS

- Persian Gulf Inc. v. BP West Coast Products LLC
- Bartlett v. BP West Coast Productions
- In re Diisocyanates Antitrust Litigation
- PNE Energy Supply LLC v. Eversource Energy
- In re Liquid Aluminum Sulfate Antitrust Litigation

COLLUSION IN HOT PLAYS

- Encana Oil & Gas (USA) Inc. v. Zaremba Family Farms, Inc.
- Branta, LLC v. Newfield Production Co.
- Thieme v. Chesapeake Energy Corp.
- Koppitz v. Chesapeake Energy Corp.

EMERGING ISSUES

- Arandell Corp. v. Centerpoint Energy Services, Inc.
- Fuentes v. Royal Dutch Shell et. al.
- SolarCity v. Salt River Project Agricultural Improvement & Power District

SPEAKER BIOGRAPHY



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Jason focuses primarily on controversies between businesses, especially disputes relating to joint ventures and the joint development of business opportunities through strategic contracts and investments. Disputes over failed joint ventures often present formidable challenges, as they frequently involve management changes, complex accounting issues, a dearth of available witnesses and business records, and parallel investigations. These cases also embrace a wide-ranging body of law, including antitrust, securities, business torts, and contracts. Jason brings to bear more than a decade of experience handling cases in each of these substantive areas and overcoming the obstacles these cases present.

Select Recognition

- *Legal 500 U.S.*, Antitrust: Civil Litigation/Class Actions, 2017 and 2018
- *Euromoney's Benchmark Litigation*, "Future Litigation Star" in Texas, 2009, 2012–2018
- *Who's Who Legal* (Law Business Research Ltd.); Competition, 2016
- "Partner to Know," Global Arbitration Review's *GAR 100*, 2009
- Selected to the Texas Rising Stars list, *Super Lawyers* (Thomson Reuters), 2004–2006 and 2008–2012

SPEAKER BIOGRAPHY



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Education

- University of Pennsylvania Law School, J.D., 1998
- The College of William and Mary, B.A., 1995

Recognition

- Selected to *Super Lawyers* (Thomson Reuters), 2018
- *The Best Lawyers in America*® (Woodward/White, Inc.), Antitrust Law, 2019
- Recognized as a "Future Leader" for being one of the top antitrust lawyers under the age of 45, *Global Competition Review* and *Who's Who Legal*, 2017
- *Legal 500 U.S.*, Antitrust – Cartel, Antitrust - Civil Litigation/Class Actions, and Antitrust – Merger Control, 2016 and 2017

Darren Tucker is a partner in the Antitrust Group in Washington, DC. Darren has two decades of experience handling the largest, most complex merger and non-merger antitrust investigations, with a focus on the technology, energy, and pharmaceutical sectors.

Darren has played key roles in many of the most prominent antitrust cases involving the U.S. agencies, including two trials against the U.S. government (*FTC v. Arch Coal* (D.D.C) and *FTC v. CCC* (D.D.C.)) and the settlement of a leading gun jumping case (*US v. Gemstar* (D.D.C.)). He has helped obtain clearance for approximately 100 mergers and acquisitions.

Darren also has extensive experience on competition matters outside the U.S., having counseled clients on merger and non-merger antitrust matters in Europe, Canada, Japan, China, South Korea, Taiwan, Russia, and Australia.

In 2017, *Global Competition Review* recognized Darren as one of the leading antitrust lawyers under the age of 45. Other credentialing groups recognizing Darren as a leading antitrust lawyer include *The Legal 500* and *Super Lawyers*. He has been part of the leadership of the American Bar Association's Section of Antitrust Law for over a decade, where he currently serves on the section's governing Council.

Darren regularly speaks and writes on antitrust issues relevant to technology, energy, and life science companies, as well as on competition agency practice and procedure. He recently served as the editorial chair of *Antitrust Law Developments*, the leading antitrust treatise for practitioners. He previously served as the editorial chair of the ABA's *Antitrust Source* and as a member of the *Law360 Competition* editorial advisory board. He has taught an advanced antitrust seminar as an adjunct professor at Antonin Scalia Law School at George Mason University.

From 2009-2013, Darren served as an attorney advisor to Commissioners Joshua D. Wright and J. Thomas Rosch at the FTC. In that role, he advised the commissioners on staff enforcement recommendations, litigation strategy, and policy matters, including the 2010 Merger Guidelines. This experience allows Darren to provide valuable insights to clients regarding competition enforcement and policy issues. Darren is co-head of the Antitrust practice.

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