

Vinson&Elkins

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2019 ANTITRUST DEVELOPMENTS IN THE ENERGY AND CHEMICAL INDUSTRIES

V&E ENERGY SERIES

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AGENDA

- Merger Enforcement
 - What the Authorities Enforce Against
 - Risk of Enforcement, by Industry
 - 2018-2019 Developments
 - Data and Trends
 - Policy Changes/Evolution
 - Cases
- Non-merger Enforcement
- Private Litigation

BACKGROUND: WHAT THE AUTHORITIES ENFORCE AGAINST

- Deals* above a threshold must be pre-filed and subject to a waiting period, under the Hart-Scott-Rodino Act – thus, the “HSR process”
 - Threshold is \$90 million for 2019-2020 (adjusts annually)
- Authorities look for “merger specific harm” – tendency of deal to raise price, reduce quality, or reduce output, harming customers (or sometimes, suppliers too)
- Authorities define “markets” narrowly, using a substitution test
 - Product market – are customers unable to economically substitute to another product?
 - Geographic market – how far can customers go to obtain a product; alternatively, over how far a distance do competitors for a given product constrain each others’ prices?

* Mergers, acquisitions, joint ventures, investments, and other combinations

BACKGROUND: HOW OFTEN ARE INDUSTRY DEALS CHALLENGED?

Oil & gas

- Reserves and production – rare
- Midstream – moderate
- Terminals – occasional
- Refineries – frequent
- Oilfield services – frequent
- Wholesale & retail – frequent

Chemicals

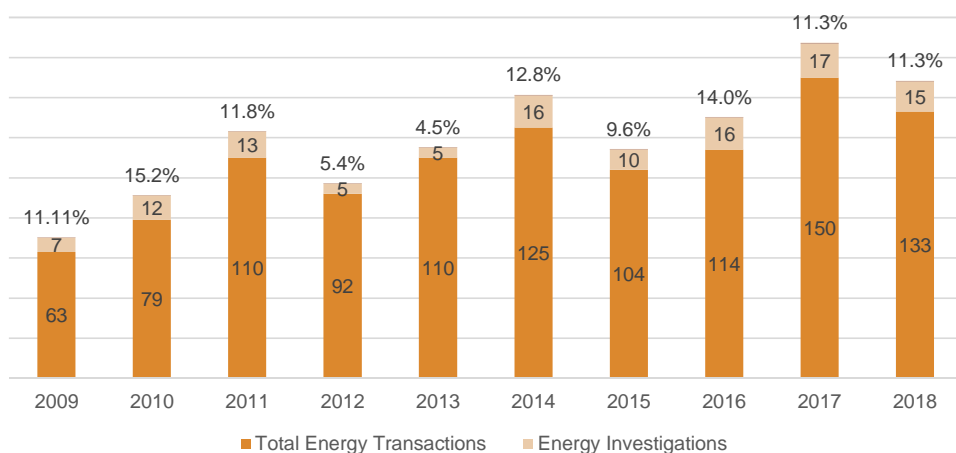
- Globally-traded commodities – rare
- Specialty and defense chemicals – frequent

Electricity

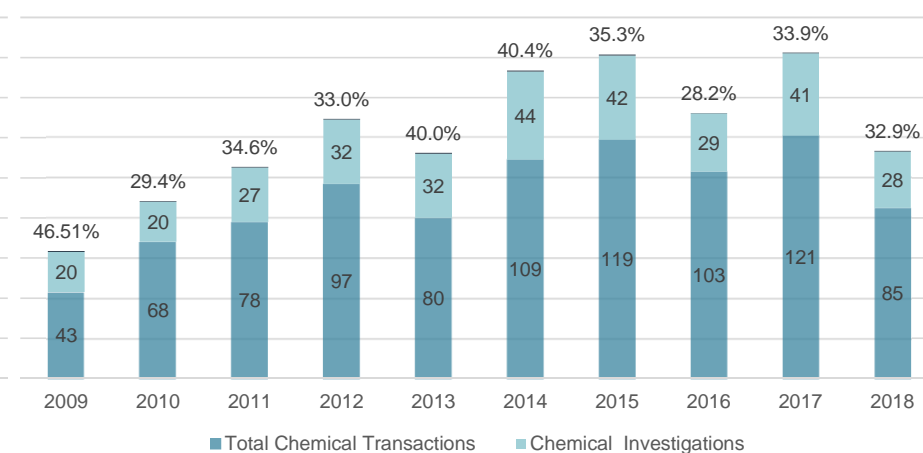
- Generation – moderate
- Transmission – rare
- Is “clean energy” different? (so far, no)

DATA AND TRENDS – INITIAL INVESTIGATIONS

Preliminary Investigations - Energy Industry
(% of Total Energy Transactions)



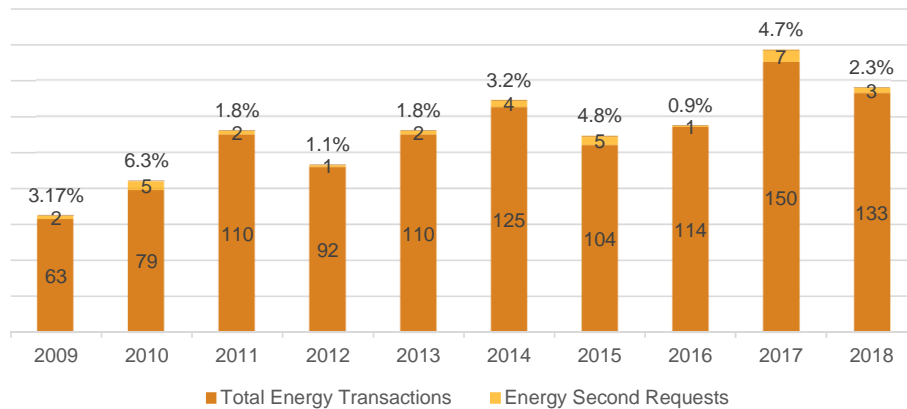
Preliminary Investigations - Chemical Industry
(% of Total Energy Transactions)



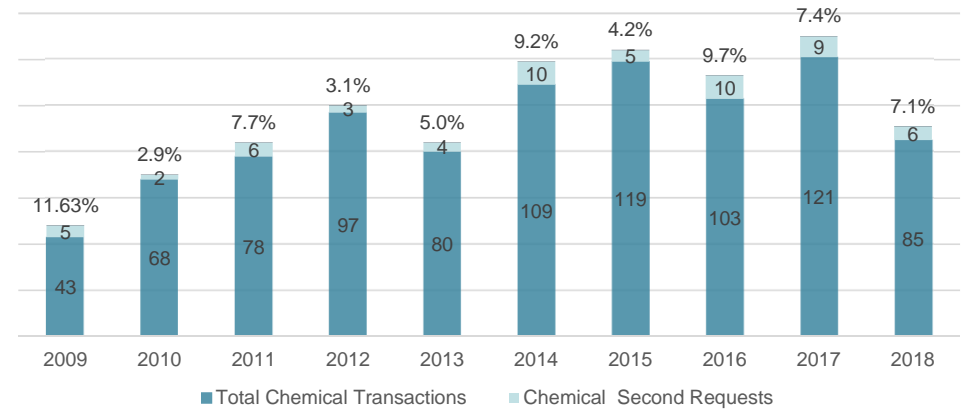
- In recent years, the chemical industry has been overrepresented as a percentage of DOJ/FTC merger investigations, while the energy industry has been slightly underrepresented.
- From 2009 to 2018, the agencies opened an initial investigation in **11%** of reported energy transactions and **35%** of reported chemical transactions. The average across all industries was **16%**.

DATA AND TRENDS – SECOND REQUESTS

Second Requests - Energy Industry
(% of Total Energy Transactions)



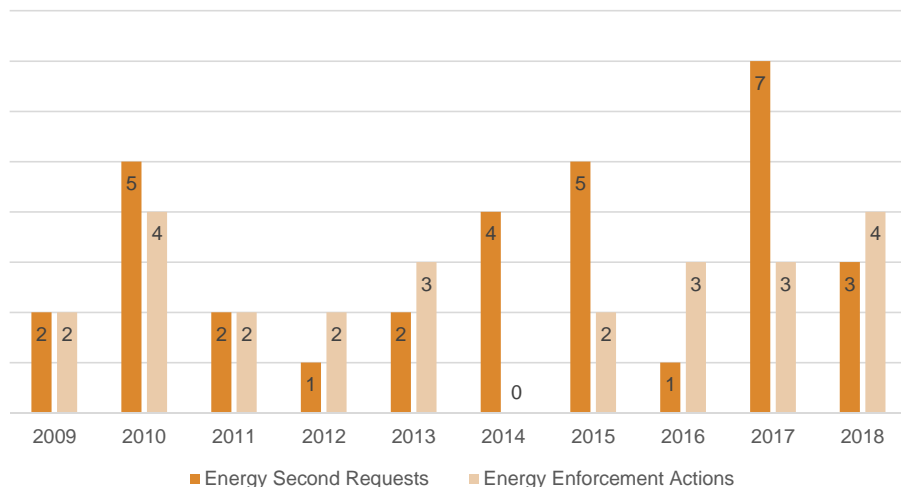
Second Requests - Chemical Industry
(% of Total Energy Transactions)



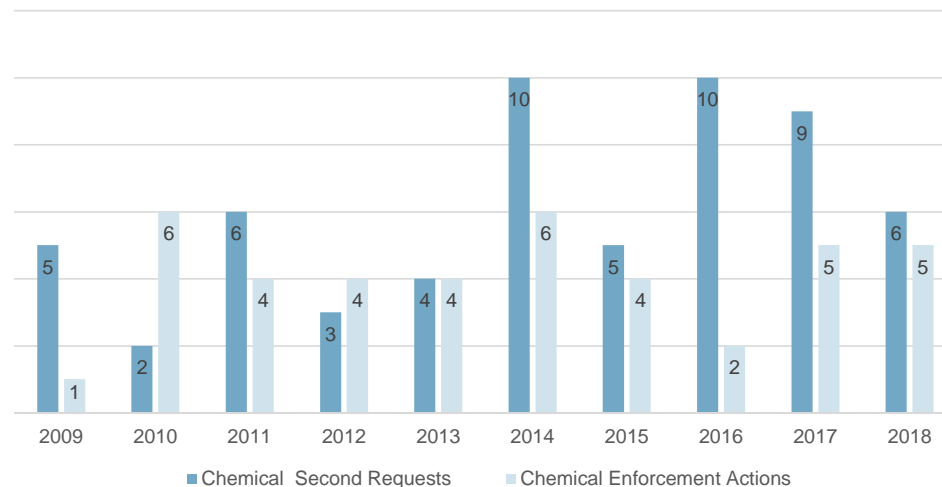
- In 2018 (and this appears to be true for 2019 as well), the rate of general Second Requests continued a decade-long decline; the agencies issued Second Requests in **2.2%** of reported transactions across all industries, the lowest percentage issued in a single year since 2009. But the rate has been fairly stable in energy and chemicals, which now account for a large portion of the total.
 - In 2018, Second Requests for transactions in the energy and chemical industries constituted **20%** of all Second Requests. The 10-year high was **31%** in 2017.
 - From 2009 to 2018, **3%** of total transactions in the energy industry resulted in a Second Request (**27%** of initial investigations) .
 - From 2009 to 2018, **6.8%** of total transactions in the chemical industry resulted in a Second Request (**19%** of initial investigations).

DATA AND TRENDS – MERGER ENFORCEMENT ACTIONS

Merger Enforcement Actions - Energy Industry



Merger Enforcement Actions - Chemical Industry



- From 2009 to 2018, **81%** of Second Requests resulted in a merger enforcement action by the agencies. The energy and chemical industries fared slightly better on average. Energy industry Second Requests resulted in an enforcement action on average **72%** of the time, and **66%** of the time for chemical industry deals.*

* Enforcement action numbers sometime exceed Second Request numbers because the relevant Second Request occurred in the prior year, or because the challenged deal was not reported under HSR.

MERGER ENFORCEMENT: POLICY DEVELOPMENTS

- In 2019, both the FTC and DOJ took steps to advance existing merger enforcement initiatives and began work on new ones.
 - The two Democrats on the FTC Commission continue to advocate for more aggressive FTC merger enforcement policies, and several presidential candidates have made increased antitrust enforcement key parts of their campaign, suggesting the 2020 election could lead to greater scrutiny in the future.
 - DOJ continued its 2018 initiative to review certain legacy antitrust judgments. DOJ worked through a process of moving to terminate many of the nearly 1,300 legacy judgments dating back to the 1970s or earlier, including a 1959 decree regarding the contracting practices of Sun Oil Company.

CASES ILLUSTRATED THE RISK PROFILES & TRENDS

Tronox Ltd/Cristal (titanium dioxide TiO₂)

- Both firms produced TiO₂ via chloride-based process
- FTC said firms would have 80% of this “market” in the US
- Parties argued that sulfate-process TiO₂ was in the same product market; judge disagreed, sided with the FTC
- Parties then settled, divesting two chloride-based TiO₂ plants

Lessons:

- Beware narrow, customer-centric product market definitions. Paint/coatings customers expressed a strong preference for chloride-process TiO₂.

CASES ILLUSTRATED THE RISK PROFILES & TRENDS

Evonik Industries/Peroxychem (peroxide)

- FTC alleged the deal would leave only one other large peroxide producer in Pacific Northwest, and only two others in Central and Southern US
- FTC pointed to “history of price fixing” (a cartel in 2006), high cost of entry, and low elasticity of demand as factors making the industry prone to effects

Lessons:

- Again, customer-centric market definitions—this time, by geography—are key
- Scrutiny increases if past problems have occurred (even long past)

CASES ILLUSTRATED THE RISK PROFILES & TRENDS

Quaker Chemical/Houghton International (metal forming oil)

- Companies produced various industrial fluids and lubricants
- FTC demanded and obtained a divestiture of Houghton's aluminum hot rolling oil and steel cold rolling oil product lines (and associated lines)
- Divested lines were only 3% of the combined companies' revenues

Lesson:

- Even a small, specialty area of harm can hold up your deal

CASES ILLUSTRATED THE RISK PROFILES & TRENDS

DowDuPont Gun Jumping Fine

- FTC accepted \$609,810 as a settlement from Third Point LLC and three associated investment funds to resolve charges for failing to file HSR
- Dow and Du Pont merged in 2017 (which was reported under HSR); investors later converted their shares in the original companies into shares of the newly formed DowDuPont Inc. This conversion was separately reportable under HSR but Third Point failed to timely notify the FTC or DOJ.

Lesson:

- HSR rules apply to what is “held” as the result of a deal, not just “acquired”
- Have an HSR checklist / compliance program. The agencies take their rules seriously, and can fine you over \$42,000 per day for noncompliance.

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NON-MERGER ENFORCEMENT

- DOJ's new criminal cartel cases in 2019 were well below historical levels
 - Continues a trend from 2017
 - But DOJ insists that non-public investigations are under way; may mature soon
- The FTC now appears to be looking very closely at non-compete clauses
 - Two recent cases, one against pipeline companies
 - FTC Workshop on non-competes in employment contracts in early January
 - Multiple discussions in speeches and other policy statements

NON-MERGER POLICY DEVELOPMENTS

- In July 2019, the DOJ Antitrust Division announced an important policy shift regarding consideration of and mitigation credit for corporate antitrust programs, and released inaugural public guidance for the assessment of corporate compliance programs in criminal antitrust investigations.
 - Merely having in place a robust corporate compliance program is insufficient. To be eligible for credit, companies must self-report the misconduct.
 - Participation in wrongdoing by senior executives likely will be disqualifying.
- In November 2019, DOJ announced the creation of a new Procurement Collusion Strike Force, which partners Antitrust Division resources with prosecutors from thirteen U.S. Attorney Offices around the country to detect and investigate bid-rigging, price-fixing, and market allocation in the procurement process.
- The FTC continues to actively monitor oil and gasoline price data from the Oil Price Information service to identify unusual price activity that may signal potentially anticompetitive conduct. The FTC can monitor price movements in 20 wholesale regions and approximately 360 retail areas.

NON-MERGER ENFORCEMENT: CARTEL ENFORCEMENT

KOREAN FUEL SUPPLY CONTRACTS:

- In 2018, DOJ investigated a decade-long bid-rigging and price-fixing conspiracy targeting fuel supply contracts to United States military bases in South Korea. In 2018, three companies pled guilty to charges that they submitted collusive bids. In 2019, two additional petroleum and refinery companies agreed to plead guilty.
- A total of **five companies** have pled guilty to criminal antitrust charges to date and have agreed to pay a total of **more than \$350 million** in criminal fines and civil penalties to resolve the criminal investigation and to settle civil antitrust claims and False Claims Act violations related to the conspiracy.
- DOJ also unsealed indictments against **seven individuals** — all executives or employees of the defendant companies. To date, no individual plea agreements have been announced.

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

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LITIGATION DEVELOPMENTS

- **Collusion in product sales and mineral leasing**
- **Market manipulation**
- **Dormant commerce clause**
- **State action immunity**

COLLUSION IN PRODUCT SALES

- **New England natural gas and electricity cases**
 - *Breiding v. Eversource* (1st Cir.)
 - *PNE Energy Supply v. Eversource* (D. Mass.)
- **Alum bid-rigging and allocation**
 - *In re Liquid Aluminum Sulfate Antitrust Litigation* (D.N.J.)
- **California refineries**
 - *Bartlett v. BP West Coast Products* (S.D. Cal.)
- **Propane tank retailing**
 - *In re Pre-Filled Propane Tank Antitrust Litigation* (W.D. Mo.)

COLLUSION IN PRODUCT SALES AND MINERAL LEASING

- **Rail shipping price-fixing claims**
 - *In re Rail Freight Fuel Surcharge Antitrust Litigation* (D.D.C.)
- **Sodium hydroxide**
 - *In re Caustic Soda Antitrust Litigation* (W.D.N.Y.)
- **Mississippi Lime leasing**
 - *Thieme v. Chesapeake Energy* (W.D. Okla.)
- **Pennsylvania Attorney General**
 - *Chesapeake v. Commonwealth, Anadarko v. Commonwealth* (Pa. Commw. Ct.)

MARKET MANIPULATION

- **Industrial and commercial natural gas sales**
 - *In re Western States Wholesale Natural Gas Antitrust Litigation* (D. Nev.)

- **Standing fights**

Dated Brent Assessment benchmark manipulation

- *Prime International Trading v. BP* (2nd Cir.)

State-owned oil company claims

- *PDVSA v. Lukoil Pan Americas* (S.D. Fla.)

DORMANT COMMERCE CLAUSE & STATE ACTION IMMUNITY

- **Michigan gasoline-volatility standard**
 - *Ammex, Inc. v. Gordon Wenk* (6th Cir.)
- **Discriminatory rates charged by municipal utility**
 - *Gelita USA v. Hammond Water Works Dep't* (N.D. Ill.)
- **Municipal utility tying natural gas services to water services**
 - *Diverse Power v. City of LaGrange, Calif.* (11th Cir.)

SPEAKER BIOGRAPHY



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Education

- University of Virginia School of Law, J.D., 1995
- Dartmouth College, B.A., 1992

Recognition

- *Chambers USA*, Antitrust Litigation (District of Columbia), 2011–2019
- *The Best Lawyers in America*® (Woodward/White, Inc.), Antitrust Law and Litigation – Antitrust, 2016–2018, 2020
- *Legal 500 U.S.*, Antitrust: Cartel, Civil Litigation/Class Actions, and Merger Control 2017 and 2019

Hill Wellford heads the firm's Antitrust Government Investigations team and is co-head of its HSR and CFIUS groups. Since leaving the DOJ Antitrust Division for private practice, he has focused on matters in the energy, technology, pharmaceutical and media industries, both in the U.S. and internationally. *Chambers USA* calls him "very strong" in antitrust and "one to watch" (2019).

Hill's antitrust practice includes matters in the Americas, Asia and Europe. He files dozens of "merger control" notifications yearly under the U.S. Hart-Scott-Rodino Act (HSR Act) and parallel international laws, and his non-deal work includes cartel and criminal investigations, civil conduct challenges, and jury, bench, and administrative trials. He also counsels third parties involved in merger divestitures and has been appointed by the U.S. Federal Trade Commission (FTC) as counsel for agency-installed divestiture monitors and trustees.

In Hill's work with the Committee on Foreign Investment in the United States (CFIUS), he assesses the deal risks of a national security review and makes voluntary and mandatory CFIUS filings, in compliance with the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) and the new, expanded CFIUS regulations effective February 2020.

Hill is a longtime leader in the American Bar Association's Section of Antitrust, where he serves on the International Comments Task Force, after concluding a three-year term on the section's governing Council. His government service included several positions in the U.S. Department of Justice (DOJ) Antitrust Division in Washington, DC, including Chief of Staff, trial attorney, investigator and Legal Policy counsel. He obtained the highest security clearances for classified information and restricted data (nuclear weapons and energy), including TS/RD. At DOJ, he also worked with the OECD, ICN, and foreign agencies, particularly focused on Asia and on matters of international trade.

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Education

- The University of Texas School of Law, J.D. *with high honors*, 1998 (Associate Editor, *Texas Law Review*; Chancellors; Order of the Coif)
- The University of Texas, B.B.A. *with highest honors*, 1995 (Business Honors Program)
- The University of Texas, B.A. *with highest honors*, 1995 (Plan II Honors Program; Phi Beta Kappa; Alpha Lambda Delta; Phi Eta Sigma)

Jason Powers is a commercial and business litigator who handles large-scale controversies between businesses, including disputes relating to joint ventures and the joint development of business opportunities. Energy related litigation, especially litigation concerning the financial side of the oil and gas industry, makes up a large part of his work. Jason also focuses on matters related to antitrust law and trade regulation, including class actions.

Jason's practice often involves collaborating with economists and other experts to develop sophisticated market analyses or damages models on behalf of his clients. In addition to antitrust, he has extensive experience in securities disputes, business torts, and contracts cases spanning a variety of industries, such as energy, transportation, chemicals, retail, and technology.

Jason is the former Chairman of the Houston Bar Association Antitrust & Trade Regulation Section and served on the Editorial Board of *The Antitrust Practitioner*, the publication of the ABA Section of Antitrust Law Civil Practice & Procedure Committee. He is also on the Board of Directors of the Houston Urban Debate League, a nonprofit organization that champions interscholastic debate programs in inner-city schools.

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