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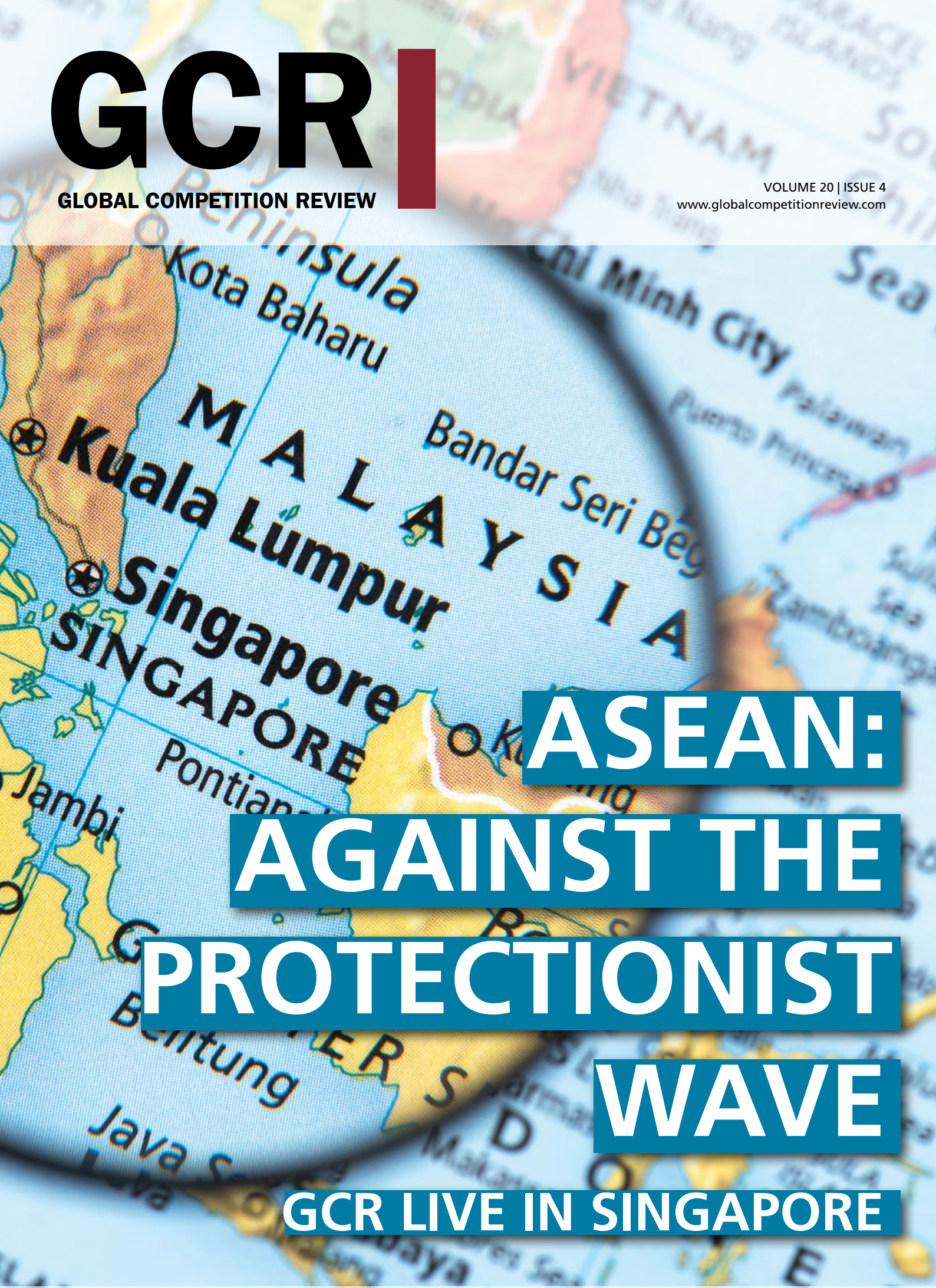

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A promise kept

When Barack Obama faced re-election in 2012, the media questioned whether he had kept his campaign promise to reinvigorate enforcement against anticompetitive deals. In his second term, the US antitrust agencies fulfilled that commitment with two dozen challenges in court. **David Gelfand** and **Grant Bermann** explain

During the 2008 presidential campaign, candidate Barack Obama promised to make antitrust enforcement, particularly in the area of mergers, a priority in his administration. "I will direct my administration to reinvigorate antitrust enforcement," he said in a statement to the American Antitrust Institute. "It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare."

After four years in office, however, some commentators suggested that President Obama's administration had failed to deliver. Professor Daniel Crane of the University of Michigan Law School, for example, observed in a 2012 *Stanford Law Review* essay that antitrust enforcement "looks much like enforcement under the Bush Administration". The *Washington Post* characterised President Obama's antitrust approach as "measured," and noted that the agencies "ultimately gave the green light to controversial mergers such as the Ticketmaster deal with Live Nation, Comcast's acquisition of NBCUniversal from General Electric, and Google's purchase of travel-software company ITA". As *Forbes* put it, enforcement in President Obama's first term "has fallen well short of the rhetoric of the president's campaign".

This criticism was undeserved, because much was accomplished during President Obama's first term. In 2010, the agencies released a major revision to the Horizontal Merger Guidelines. The update is widely recognised as an authoritative statement of modern merger enforcement principles and has guided subsequent decisions by the agencies and the courts. In 2011, after a seven-year period when the Department of Justice (DOJ) had no merger trials, the agency obtained an injunction blocking the H&R Block/TaxAct transaction. The same year, the DOJ challenged AT&T's acquisition of T-Mobile, prompting AT&T to abandon the transaction four months later. In the area of non-merger enforcement, the DOJ also pursued high-profile cases against Apple and American Express. The Federal Trade Commission (FTC), meanwhile, litigated merger cases such as *Polypore/Microporous* and *Ovation/Merck* during President Obama's first term, and also challenged pay-for-delay pharmaceutical settlements, culminating in the Supreme Court's *FTC v Actavis* decision.

But there can be no question that President Obama's vision was fully realised by the end of his second term, when the DOJ and FTC collectively had litigated 24 contested merger challenges. By "contested" challenges, we mean cases in which one agency or the other filed complaints without having reached settlements. Even more striking than the sheer number of merger challenges was the agencies' impressive record of success. Out of 24 contested cases, 16 transactions were enjoined or abandoned, five were settled on terms that were acceptable to the government, and only two were allowed to proceed as originally proposed. One is still in litigation.

Those were just the litigated cases. Other transactions were abandoned when the reviewing agency informed the parties that a challenge was likely. Prominent among these was the proposed merger of Comcast and Time Warner Cable, which would have placed almost 60% of high-speed broadband in the US in the hands of one company. In some instances, transactions that would have raised significant antitrust issues failed to materialise owing to the likelihood of enforcement action, as occurred when United Technologies rebuffed Honeywell's takeover attempt, citing "insurmountable regulatory obstacles".

In this article, we catalogue the 24 contested cases that were litigated during President Obama's second term. We hope that it will serve as a reference guide and also document the remarkable record of success that the agencies achieved during this period.

David Gelfand is a partner and Grant Bermann is an associate in the Washington, DC, office of Cleary Gottlieb Steen & Hamilton LLP. Gelfand served as Deputy Assistant Attorney General for Antitrust Litigation from 2013 to 2016. In that role, he participated in several DOJ cases discussed in this article. All discussions of DOJ cases are based on public information.

PHOTO: OFFICIAL WHITE HOUSE PHOTO BY PETE SOUZA

16 blocked, unwound or abandoned transactions

Of the 24 contested merger cases during President Obama's second term, the agencies blocked, unwound or forced parties to abandon 16 transactions.

Most recently, the DOJ obtained injunctions against two industry-transforming health insurance mergers. In *Aetna/Humana*, the DOJ charged that the merger would eliminate head-to-head competition between the firms, substantially lessening competition in individual Medicare Advantage plans in 364 counties and in individual commercial health insurance plans offered on the public exchanges. The companies argued that the relevant market should include not only Medicare Advantage plans, but also original Medicare plans. The court rejected this argument "[b]ased on the Brown Shoe factors and the parties' ordinary course of business documents". The health insurers also claimed that the transaction would generate $2.8 billion in annual efficiencies starting after 2020. However, the court was "unpersuaded" by the parties' efficiencies arguments because it had "serious concerns" that the efficiencies could be achieved and, even if they were, the court was sceptical that they would be passed on to consumers. The court also rejected the parties' claim that their proposal to divest 290,000 Medicare Advantage customers to Molina Healthcare would mitigate any competitive harm. The court concluded that the transaction was "likely to substantially lessen competition in Medicare Advantage in all 364 complaint counties and in the public exchanges in . . . three complaint counties in Florida", and enjoined the merger.

In *Anthem/Cigna*, the DOJ challenged the merger of the nation's second- and third-largest health insurance carriers, citing the parties' business documents stating that the industry is "very consolidated" and that Anthem is already "dominant in most of its markets". Although the parties argued that UnitedHealthcare, not Cigna, was Anthem's closest competitor, and that regional competitors were expanding, the court concluded that "the proposed combination is likely to have a substantial effect on competition in what is already a highly concentrated market" for the sale of health insurance to "national accounts". The parties contended that any anticompetitive effects would be outweighed by over $2 billion in general and administrative cost savings. But the court rejected the claimed efficiencies as not cognisable, "since they are not merger-specific, they are not verifiable, and it is questionable whether they are 'efficiencies' at all". The court enjoined the merger, which was affirmed by the US Court of Appeals for the DC Circuit in a 2-to-1 decision.

The challenge to *Staples/Office Depot*, a $6.3 billion transaction involving consumable office supplies, was the FTC's most recent trial success. The FTC argued that the merger would eliminate direct competition between the companies for business customers, and cited internal party documents conceding that they are the "only two real choices for customers". Staples and Office Depot argued that local vendors, new online entrants such as Amazon Business and customers' ability to move their purchases of adjacent products to other suppliers would restore competition and constrain the merged company's ability to raise prices. But the district court rejected these arguments, concluding that these alternatives would not "meet the needs of large B-to-B customers". The district court granted a preliminary injunction and the companies abandoned the transaction. The case is notable for the defendants' decision to rest their case without putting on witnesses.

The *Staples* case is notable for the defendants' decision to rest their case without putting on witnesses

In *Sysco/US Foods*, the FTC alleged and proved that the proposed merger would significantly reduce competition for national broadline food service distribution services by combining the top two companies in the market. The parties argued that the court should define the market more broadly to include regional and local distributors as well as suppliers other than broadline distributors. The court adopted the FTC's market definition, citing differences in offerings, pricing and customers. The companies also argued that the divestiture of 11 distribution centres to Performance Food Group, the country's third-largest broadline distributor by sales, would remedy any anticompetitive harm. The court rejected this argument, concluded that the proposed merger was "likely to cause the type of

Timeline of contested merger challenges during President Obama's second term

Date of Complaint	11 December 2012 (but litigated during second term)	10 January 2013 (but litigated during second term)	31 January 2013	26 March 2013	28 May 2013
Agency	DOJ	DOJ	DOJ	FTC	FTC
Parties	Coach USA/City Sights	Bazaarvoice/ PowerReviews	ABInBev/Modelo	St Luke's/Saltzer Medical	Pinnacle Entertainment/ Ameristar
Industry	Tour buses	Ratings and reviews	Beer	Hospitals	Casinos
Outcome	Settled	Found unlawful by district court	Settled	Blocked by district court; affirmed on appeal	Settled

industry concentration that Congress sought to curb at the outset before it harmed competition," and enjoined the transaction.

The FTC was active in challenging hospital mergers during President Obama's second term. It sought to block St Luke's Health System's acquisition of Saltzer Medical, Idaho's largest independent, multi-specialty physician practice group. According to the FTC, the combination would have given St Luke's the market power to demand higher rates for adult primary care physician services sold to commercial health plans near Nampa, Idaho. The district court acknowledged that the transaction could produce better patient outcomes, but concluded that "there are other ways to achieve the same effect that do not run afoul of the antitrust laws and do not run such a risk of increased costs". The district court found the transaction unlawful and ordered divestiture. The US Court of Appeals for the Ninth Circuit affirmed the decision in an opinion that is notable for its discussion of efficiency defences.

In *Advocate/NorthShore*, the FTC challenged the proposed merger of two leading providers of general acute care inpatient hospital services in the North Shore area of Chicago, charging that the transaction would "create by far the largest hospital system" in the area and "cause significant harm to consumers". While the district court rejected the FTC's motion for a preliminary injunction, concluding that "plaintiffs have not shouldered their burden of proving a relevant geographic market," the US Court of Appeals for the Seventh Circuit reversed, calling the district court's geographic market finding "clearly erroneous". The district court enjoined the transaction on remand, prompting the parties to abandon their transaction.

Similarly, in *Penn State Hershey/PinnacleHealth*, the FTC alleged that the combination would control approximately 64% of the market for general acute care inpatient services near Harrisburg, Pennsylvania, and substantially reduce competition in that market. The district court denied the FTC's request for a preliminary injunction on the basis that the government's alleged geographic market was too narrow and excluded the more than 40% of Hershey's patients from outside the Harrisburg area. The US Court of Appeals for the Third Circuit reversed, concluding that the FTC had defined the geographic market properly, and directed the district court to enjoin the merger.

The FTC was active in challenging hospital mergers during President Obama's second term

In *Bazaarvoice/PowerReviews*, the DOJ alleged that the consummated transaction eliminated Bazaarvoice's primary competitor in the market for product ratings and review platforms used by US retailers and manufacturers. The DOJ relied heavily on the parties' internal documents, which described PowerReviews as Bazaarvoice's "primary competitor" and noted that the alternatives were "scarce" and "low-quality". Following a three-week trial, the district court found that the transaction violated the antitrust laws and Bazaarvoice was forced to divest the assets it had acquired from PowerReviews.

In *Tribune Publishing/Freedom Communications*, the DOJ sought a temporary restraining order on the purchase through a bankruptcy auction of Freedom Communications by Tribune, the publisher of the *Los Angeles Times*. The DOJ alleged that the combination would allow Tribune to control 98% of newspaper sales in Orange County and 81% in Riverside County. The district court granted the temporary restraining order, noting that "consumer access to local news is at stake" and that "[n]ewspapers – indeed, local ones, are important to a healthy democracy". Freedom Communications was sold to another buyer instead.

In seven other cases, companies abandoned their transactions after litigation began. In *National Cinemedia/Screenvision*, the DOJ challenged the merger of the only two significant cinema advertising networks in the US; the parties abandoned the deal less than a month before trial. In *Verisk/EagleView Technology*, the FTC alleged that the transaction would "eliminate head-to-head competition between the only two meaningful providers of rooftop aerial measurement products to US insurance carriers"; the companies abandoned the transaction later that day. In *Electrolux/General Electric*, the DOJ sued to enjoin the combination of two of the three largest household appliance suppliers in the US, focusing on markets for cooking appliances; the companies abandoned the

28 June 2013	13 August 2013	3 November 2014	16 December 2014	19 February 2015	28 May 2015
FTC	DOJ	DOJ	FTC	FTC	FTC
Ardagh/Saint-Gobain	US Airways/American Airlines	National Cinemedia/ Screenvision	Verisk/EagleView Technology	Sysco/US Foods	Steris/Synergy
Glass containers	Airlines	Cinema advertising	Rooftop aerial measurement	Food distribution	Sterilisation
Settled	Settled	Abandoned	Abandoned	Blocked by district court	Allowed to proceed by district court, and decision not appealed

transaction after a month of trial. In *United/Delta*, the DOJ sued to enjoin United, which already held 73% of the takeoff and landing slots at Newark Liberty International Airport, from acquiring additional slots from Delta. While the case was pending, the Federal Aviation Administration announced that it would lift slot controls at Newark, which mooted the transaction and caused its abandonment. In *Halliburton/Baker Hughes*, the DOJ challenged the merger of two of the three leading suppliers of oilfield services and products, alleging anticompetitive effects in 23 separate product and service markets and detailing why the remedy proposed by the defendants was inadequate. The transaction was abandoned after less than one month of litigation. In *Superior Plus/Canexus*, the FTC alleged that the merger of Canadian chemical suppliers would reduce competition in the North American market for sodium chlorate, a chemical used to bleach wood pulp; the parties abandoned the transaction three days later. Finally, in *Deere/Precision Planting*, the DOJ challenged a transaction between what it alleged were "the only two meaningful providers of high-speed precision planting systems in the United States". The parties abandoned the transaction eight months later.

Five settlements

The agencies obtained significant settlements in five contested merger challenges – that is, cases where the agencies sued without having reached a settlement in advance. In *ABInbev/Modelo*, the DOJ alleged that the $20.1 billion transaction would reduce competition for beer nationwide and in 26 local markets. To remedy the DOJ's concerns, the companies proposed entering into a 10-year supply agreement to provide Modelo beer to a third party to import into the United States. The DOJ rejected that proposal as inadequate because it would make the divestiture buyer beholden to ABInbev for the supply of beer, and instead required ABInbev to divest Modelo's entire US business to a third party.

In *Ardagh/St Gobain*, the FTC charged that the $1.7 billion acquisition would harm competition in the markets for glass containers sold to beer brewers and spirit distillers, and concentrate more than 75% of the markets in the hands of the combined company. The FTC required Ardagh to divest six of its nine manufacturing plants to resolve the competitive concerns.

In *Pinnacle Entertainment/Ameristar*, the FTC argued that the $2.8 billion acquisition would reduce competition for casinos in the St Louis, Missouri area, where the parties compete directly, and the Lake Charles, Louisiana area, where Pinnacle already operated a casino and Ameristar was constructing a new casino to open the following year. To resolve the FTC's concerns, the parties agreed to divest two casinos, one in St Louis and another in Lake Charles.

In *US Airways/American Airlines*, the DOJ charged that the $11 billion merger would combine a large share of takeoff and landing slots at Ronald Reagan Washington National Airport and also substantially lessen competition for commercial air travel in the United States. The parties resolved these concerns by divesting slots, gates and ground facilities at key constrained airports throughout the country.

In *Coach USA/City Sights*, the DOJ alleged that the consummated joint venture between the companies, Twin America, violated the antitrust laws and resulted in higher prices for hop-on, hop-off bus tours in New York City. The case settled before trial, with the parties agreeing to relinquish City Sights' Manhattan bus stop authorisations and disgorge $7.5 million in ill-gotten profits.

> The agencies lost only one merger challenge on the merits during President Obama's second term

One loss, one moot case, and one pending case

The agencies lost only one merger challenge on the merits during President Obama's second term. In *Steris/Synergy*, a potential competition case, the FTC alleged that the $1.9 billion acquisition would harm future competition in regional markets for the sterilisation of products using radiation by eliminating the potential future competition provided by Synergy. The district court concluded that the FTC had failed to show that, absent the merger, Synergy "probably" would have timely entered the US contract sterilisation market. Accordingly, the district court denied the FTC's motion to block the merger. The FTC declined to appeal the decision and voluntarily dismissed its complaint.

Date of Complaint	1 July 2015	5 November 2015	10 November 2015	7 December 2015	7 December 2015	17 December 2015
Agency	DOJ	FTC	DOJ	FTC	FTC	FTC
Parties	Electrolux/GE	Cabell Huntington/St Mary's	United/Delta	Staples/Office Depot	Penn State Hershey/ PinnacleHealth	Advocate / NorthShore
Industry	Household appliances	Hospitals	Takeoff/landing slots	Office supplies	Hospitals	Hospitals
Outcome	Abandoned	Allowed to proceed after FTC's claim made moot by state legislation	Abandoned	Blocked by district court	Blocked. Allowed to proceed by district court, but reversed on appeal	Blocked. Allowed to proceed by district court, but reversed on appeal

One case was rendered moot by state action. In *Cabell Huntington Hospital/St Mary's*, the FTC alleged that the merger of two hospitals only three miles apart would harm competition in the market for general acute care inpatient hospital services and outpatient surgical services in the Huntington, West Virginia, area. The FTC ultimately dismissed the case after the state legislature enacted a statute that made the West Virginia Health Care Authority the sole arbiter of whether to approve or reject "cooperative agreements" among state healthcare providers, thus exempting the transaction from federal antitrust scrutiny.

One merger challenge filed during the Obama administration remains pending. In *EnergySolutions/ Waste Control Specialists*, the DOJ is challenging a transaction that would allegedly "combine the only two licensed commercial low-level radioactive waste disposal facilities" for 36 states, Puerto Rico and the District of Columbia.

President Obama entered office committed to vigorous merger enforcement, and his vision was fully realised by the end of the second term of his presidency. Some have downplayed this record, arguing that this was a period, for whatever reason, when companies attempted an exceptional number of transactions that carried a high degree of antitrust risk. For example, American Antitrust Institute president Diana Moss observed in a 2015 *Wall Street Journal* article, "Companies are in the middle of a merger wave, therefore the sheer number of deals increases the likelihood of more problematic deals." The *Financial Times* echoed this point, observing that "the absolute number of challenges depends on the type of transactions being attempted and the overall volume of deals occurring at any given time". Former Assistant Attorney General Bill Baer himself observed that some of the transactions challenged by the agencies were so problematic that they "never should have made it out of the boardroom".

But it would be an over-simplification to attribute the number of merger challenges and impressive record of success during this period solely to riskier deal-making. The agencies did not only bring obvious cases against problematic transactions. They took calculated litigation risks when they felt it necessary to enforce the law and protect consumers. They also rejected remedies that they deemed inadequate to address anticompetitive effects of proposed transactions and, in two cases – *Advocate/NorthShore* and *Penn State Hershey/PinnacleHealth* – the FTC persisted despite district court decisions denying its requests for preliminary injunctions, and eventually won each case on appeal.

Many practitioners believe that the new administration will trend toward less intervention

President Obama's appointees at both agencies brought a commitment to vigorous enforcement and showed confidence in trial teams consisting of career lawyers and economists. Under their leadership, the agencies took cases to trial against some of the best defence firms in the country and met head-on a range of defence arguments, including claims that the government had failed to meet its burden of proof on market definition; that efficiencies would mitigate any anticompetitive effects; that proposed divestitures would remedy harm to competition; that business documents were benign; and that the government's competitive effects theories lacked support. In the process, these challenges spawned a new generation of case law from federal courts around the country with extensive discussions and findings on all of these issues.

The Obama administration has now ended and many practitioners believe that the new administration will trend toward less intervention. This might be inevitable given the level of enforcement activity over the past four years, and certainly the pendulum at some point has to swing back from the litigation success discussed above. Regardless, President Obama's second term will go down as an important period of US merger enforcement and endure as a notable legacy of his presidency. GCR

Look out for GCR's upcoming book *The Obama Trials*, an in-depth examination of the mixed record of antitrust enforcement under the Obama administration.

17 March 2016	6 April 2016	27 June 2016	21 July 2016	21 July 2016	31 August 2016	16 November 2016
DOJ	DOJ	FTC	DOJ	DOJ	DOJ	DOJ
Tribune Publishing/ Freedom Communications	Halliburton/Baker Hughes	Superior Plus/ Canexus	Aetna/Humana	Anthem/Cigna	Deere/Precision Planting	Energy Solutions/ Waste Control
Newspapers	Oilfield services and products	Chemicals	Health insurance	Health insurance	Precision planting	Radioactive waste
TRO issued by district court	Abandoned	Abandoned	Blocked by district court	Blocked by district court; affirmed on appeal	Abandoned	Pending