

# TRANSPORTATION, ENERGY & ANTITRUST

A publication of the  
Transportation and Energy Industries Committee of the Section of Antitrust Law,  
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## Message from the Chair

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Welcome to the Spring 2018 edition of the Transportation and Energy Industries Committee’s newsletter. As our name indicates, our committee’s charter embraces the fields of transportation and energy. Although home to familiar and traditionally regulated sectors—railroads, airlines, electric utilities—the transportation and energy landscape is undergoing dramatic and dynamic change. Spurred by technological advances, we are in the midst of an array of potentially revolutionary changes, from ride-sharing and solar energy to autonomous cars and trucks, energy storage solutions, and much



more. These changes bring business model disruption, challenges to regulated incumbents, and – inevitably – interesting antitrust issues.

The TEI Committee will be devoting increased attention to the “non-traditional” developments in the energy and transportation space in coming months. This Newsletter offers a taste, with an article by Brian Rafkin and Nick Passaro that insightfully surveys the antitrust litigation involving Uber, which has encountered resistance from traditionally-regulated transportation service providers. Next up is an article by Laura Collins that analyzes the state action issues raised in *Salt River v. SolarCity*, another example of antitrust as a lever against alleged resistance by a market incumbent to new forms of competition – here, in the form of electricity generated by rooftop solar panels.

Turning to the more traditional sectors, J.R. Hand takes an in-depth look at the unique regulatory regime for pipeline interconnections in Texas, and Nicole Sarrine summarizes the recent program hosted by the TEI Committee that examined instances where state and federal enforcers have diverged in their treatment of proposed mergers, including those in the energy sector.

And, of course, we continue to bring you our Case Updates/Matters to Watch feature, which tracks important and interesting developments in the fields of transportation and energy.

Noteworthy upcoming events for the Section include:

- Antitrust Section Spring Meeting, April 11-13
- Global Seminar Series Dusseldorf, Germany, May 8
- Antitrust in Asia, May 31-June 1

Our Committee looks forward to seeing you at these events, or to hearing from you on our Connect page or by email. Thank you for reading!

*David L. Meyer*

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Chair, Transportation and Energy Industries Committee  
2017-2018

## Program Summary: “When HSR Clearance Ain’t Closure – Key Takeaways from Recent Challenges and Settlements”

By Nicole Sarrine<sup>1</sup>

On January 9, 2018, the Transportation and Energy Industries Committee sponsored an in-person program featuring a panel discussion about the State of New York’s investigation into the Walgreens/Rite Aid merger and the State of California’s challenge of Valero/Plains All American Pipeline. The conversation on these cases led to an engaging and lively dialogue centered on the appropriate role of the states when the Department of Justice and Federal Trade Commission do not bring enforcement actions. While the panel was slated to provide insight into DOJ’s challenge of Parker-Hannifin/Clarcor and the FTC’s lawsuit against Tronox/Cristal, the clock ran out before the panelists could turn to these cases.

The panel, moderated by Karen Kazmerzak, a Partner at Sidley Austin LLP, featured panelists Beau Buffier, the Antitrust Bureau Chief at the New York State Attorney General’s Office; Mary Lehner, a Partner at Freshfields Bruckhaus Deringer LLP; and Jeffrey Oliver, a Senior Associate at Baker Botts LLP.<sup>2</sup>

### *Walgreens/Rite Aid*

The panelists began by discussing the Walgreens/Rite Aid merger and the State of New York’s investigation into the transaction. The merger was announced in October 2015 as a \$17.2 billion deal under which Walgreens would acquire all outstanding shares of Rite Aid and Rite Aid would be a wholly owned subsidiary of Walgreens.<sup>3</sup> As one of the panelists explained, the FTC was not satisfied that offers to divest Rite Aid stores to Fred’s, Inc.<sup>4</sup> would remedy the competitive harm. Accordingly, the parties

<sup>1</sup> Nicole Sarrine is an Associate in the Washington D.C. office of Hughes Hubbard & Reed LLP.

<sup>2</sup> As guests of the panel were asked to treat the contents of the information shared by panelists under the Chatham House Rule, this summary does not provide attributions to specific panelists. See Chatham House Rule description, <https://www.chathamhouse.org/about/chatham-house-rule>.

<sup>3</sup> Press Release, Walgreens Boots Alliance, Walgreens Boots Alliance to Acquire Rite Aid for \$17.2 Billion in All-Cash Transaction (Oct. 27, 2015), <http://www.walgreensbootsalliance.com/newsroom/news/walgreens-boots-alliance-to-acquire-rite-aid-for-172-billion-in-all-cash-transaction.htm>.

<sup>4</sup> Press Release, Walgreens Boots Alliance, Walgreens Boots Alliance and Rite Aid Reach Agreement to Sell 865 Rite Aid Stores to Fred’s Pharmacy (Dec. 20, 2016), <http://www.walgreensbootsalliance.com/newsroom/news/walgreens-boots-alliance-and-rite-aid-reach-agreement-to-sell-865-rite-aid-stores-to-freds-pharmacy.htm>; Press Release, Walgreens Boots Alliance and Rite Aid Enter into Amendment and Extension to Merger Agreement (Jan. 30, 2017),



abandoned this transaction and entered into a new agreement in June 2017 under which Walgreens would purchase 2,186 Rite Aid stores, three distribution centers, and inventory from Rite Aid,<sup>5</sup> refiling for this revised transaction under Hart-Scott-Rodino. The final transaction, which was cleared by the FTC in September 2017, included the purchase of 1,932 Rite Aid stores by Walgreens, along with the three distribution centers and inventory.<sup>6</sup>

After outlining the transaction in broad strokes, the panelists turned to the market definition issues. On the product side, it involved retail prescriptions. As to the geographic market, the FTC considered the national market (such as corporations looking for coverage for members), and the states focused on the regional impacts (e.g., in metropolitan areas). A key concern with the merger was the overlap of drugstores in particular regions and localities, and there were also possible geographic footprint and scale issues that were not included in the public filings. For both the FTC and the State of New York, the fact that this was not about direct consumer-facing competition was a central issue. The focal points instead concerned, for example, the fact that these major drugstore chains had unique qualities for payors, PBMs, and plan sponsors.

The panelists then shared their perspectives and analysis regarding different aspects of the merger. For example, one panelist expressed that, since the original deal of a complete merger for Walgreens to acquire the entirety of Rite Aid had been under investigation since October 2015, a pre-election time period, the states took a back seat to investigating it because they trusted that the FTC would “do the right thing.” Another panelist pointed out the weaknesses of the Fred’s, Inc. divestiture proposal, noting that Fred’s was not a pure drugstore chain and instead involved a combination of dollar stores and pharmacies, Fred’s had experienced declining sales for several years, and company leadership had made remarks indicating that Fred’s was not doing well financially. This led the panelist to conclude it “seemed more like a remedial package to save Fred’s from

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[https://www.riteaid.com/corporate/news?p\\_p\\_id=riteaidpressreleases\\_WAR\\_riteaidpressreleasesportlet&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-3&p\\_p\\_col\\_pos=2&p\\_p\\_col\\_count=3&riteaidpressreleases\\_WAR\\_riteaidpressreleasesportlet\\_action=getNewsRoomDetail&itemNumber=2025](https://www.riteaid.com/corporate/news?p_p_id=riteaidpressreleases_WAR_riteaidpressreleasesportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-3&p_p_col_pos=2&p_p_col_count=3&riteaidpressreleases_WAR_riteaidpressreleasesportlet_action=getNewsRoomDetail&itemNumber=2025).

<sup>5</sup> Press Release, Walgreens Boots Alliance, Walgreens Boots Alliance Enters into Agreement with Rite Aid to Buy 2,186 Rite Aid Stores and Related Assets (June 29, 2017), <http://www.walgreensbootsalliance.com/newsroom/news/walgreens-boots-alliance-enters-into-agreement-with-rite-aid-to-buy-2186-rite-aid-stores-and-related-assets.htm> (hereinafter Walgreens June 29, 2017 Press Release).

<sup>6</sup> Press Release, Walgreens Boots Alliance, Walgreens Boots Alliance Secures Regulatory Clearance for Purchase of Stores and Related Assets from Rite Aid (Sept. 19, 2017), <http://www.walgreensbootsalliance.com/newsroom/news/walgreens-boots-alliance-secures-regulatory-clearance-for-purchase-stores-and-related-assets-from-rite-aid.htm>.

bankruptcy” than a solution to the concerns arising from the Walgreens/Rite Aid transaction.

This conversation among the panel provided a natural segue back towards discussing the actions taken by the states and the FTC concerning the transaction. As one panelist noted, after the states and the FTC concluded that Fred’s was not an acceptable buyer, they geared up to file a complaint. However, the merging parties pulled their original HSR filing before the complaint was filed and announced their revised transaction, claiming the “new transaction address[ed] competitive concerns previously raised with respect to the prior transaction.”<sup>7</sup>

As a panelist explained, the “new transaction” still had Walgreens acquiring most of the Rite Aid stores in New York (456 out of 600 stores). Consequently, the State of New York issued subpoenas, investigated for over a year, and took depositions in case the FTC would not insist on changes to the deal. The panelist conveyed that the FTC staff shared the State of New York’s concerns, put pressure on the companies, and the merging parties recut the deal to leave a significant number of stores with Rite Aid in New York. The panelist remarked that, had that not been the outcome, the State of New York would have sought its own challenge.

In concluding the discussion of the Walgreens/Rite Aid merger, the panel mentioned that, besides New York, other states had an interest in the transaction. But in the recut deal, the merging parties took care of entire states to alleviate those concerns. The panelists noted that Walgreens did not take any stores in California, and issues that arose in Pennsylvania were also resolved in the final package.

### *Valero/Plains All American Pipeline*

The second transaction that the panelists discussed was Valero/Plains All American Pipeline, which involved the sale of two petroleum storage terminals in the Bay Area to Valero and a corresponding joint investigation by the FTC and the State of California. Though the FTC closed its investigation, the State of California sued to block the acquisition and early on was unsuccessful in its attempts to obtain a temporary restraining order<sup>8</sup> and a preliminary injunction.<sup>9</sup>

<sup>7</sup> Walgreens June 29, 2017 Press Release, *supra* note 5.

<sup>8</sup> Order Den. TRO, Setting Briefing Schedule for Prelim. Inj. Mot., and Granting Ltd. Disc., State of Cal. v. Valero Energy Corp., et al., No. 17-cv-3786 (WHA) (N.D. Ca. July 12, 2017), [http://www.mlex.com//Attachments/2017-07-12\\_USMW6579QQK16C35/order\\_tro.pdf](http://www.mlex.com//Attachments/2017-07-12_USMW6579QQK16C35/order_tro.pdf).

<sup>9</sup> Order re Mot. for Prelim. Inj., State of Cal. v. Valero Energy Corp., et al., No. 17-cv-3786 (WHA) (N.D. Ca. Aug. 23, 2017),





The panelists began by explaining the basics related to this transaction, as well as the concerns of the State of California as evidenced in court documents. In the Bay Area, the refineries and terminals connect to a hub for buyers and sellers, and Valero has a refinery there. In that mix, the terminals and refineries feed the hub, which in turn feeds downstream consumers. Thus, the case theory was a classic vertical one – California worried that by obtaining control of the independent terminals, Valero might squeeze input into the hub and gain pricing power in the downstream market (i.e., raise prices on the finished product).

The panel next outlined the relevant background. In 2005, as described in FTC documents from the time, Valero sought a deal involving assets in Northern California, Colorado, and Pennsylvania. A consent order from the FTC permitted the acquisition with a divestiture package that included divestitures in the Bay Area.<sup>10</sup> According to the FTC documents, Valero was acquiring four independent terminals, which comprised all of the independent terminals in the Bay Area. The FTC ordered divestiture of two of the terminals, and since then, Valero sold off the two terminals it was allowed to keep. In the present deal, Valero sought to buy back the two terminals it divested in 2005.

The panel then assessed the impact of the 2005 FTC order on the recent transaction. As one panelist noted, any time that there is enforcement history in a market with the same assets, it can create a hurdle to the present deal. As indicated in court documents from the recent case, the fact that the consent order expired in 2015 potentially left the impression that Valero was waiting to jump on the assets or “pounce at the right time” with the new transaction.

The panel concluded the discussion of Valero/Plains All American Pipeline by explaining how the matter was resolved. The FTC took no action after its investigation. The State of California filed a complaint in federal court seeking to block the transaction. Although Valero and Plains All American were successful in avoiding a temporary restraining order and a preliminary injunction, the parties abandoned the transaction as California pursued a permanent injunction.<sup>11</sup>

[https://www.oag.ca.gov/system/files/attachments/press\\_releases/ORDER%20re%20Motion%20for%20Preliminary%20Injunction.pdf](https://www.oag.ca.gov/system/files/attachments/press_releases/ORDER%20re%20Motion%20for%20Preliminary%20Injunction.pdf).

<sup>10</sup> See *In re Valero, L.P., Valero Energy Corp., et al.*, FTC Docket No. C-4141 (FTC Sept. 16, 2005), <https://www.ftc.gov/enforcement/cases-proceedings/0510022/valero-lp-valero-energy-corporation-et-al-matter>.

<sup>11</sup> Press Release, Valero Energy Corporation, Valero Energy Corporation and Plains All American Pipeline, L.P. Elect to Terminate Proposed Acquisition by Valero of Certain Plains Assets (Sept. 18, 2017), <http://www.investorvalero.com/phoenix.zhtml?c=254367&p=irol-newsArticle&ID=2301358>.

### *Panel Debate: The Proper Role of the States*

The discussions of the Walgreens/Rite Aid merger and the Valero/Plains All American Pipeline transaction led to a rousing debate over whether or not states should “pick up the slack” when the DOJ and the FTC do not bring enforcement actions. The panel deliberated all sides of this issue, and some of the main arguments put forth by the panelists included:

#### *In favor of state involvement –*

- States have certain expertise that federal agencies do not (*see* hospital merger cases);
- States have the authority to enforce the Clayton Act and injunctions separately from the federal government; and
- State interests may differ from the concerns held by federal agencies.

#### *Against state involvement –*

- It may be difficult for states to step into a merger review without it being perceived as political;
- Due process at the federal agency level cannot be replicated by states; and
- There is a likelihood of inconsistency if states pursue these actions.

These points raised by the panelists led some of the guests to contribute their own thoughts and opinions on the topic, which stirred a spirited conversation that engaged the room and took up the remainder of the time set aside for the event. Though time ran out before the panel could turn to the Parker-Hannifin/Clarcor and Tronox/Cristal cases, ending the event with a thought-provoking debate motivated guests to continue the dialogue over post-event networking.

