M&A | Reporter

2017







HUNTON & WILLIAMS



DEAR CLIENTS AND FRIENDS,

We are pleased to present to our clients and friends the *Hunton & Williams 2017 M&A Reporter*. Our M&A team had a very active and successful 2016, thanks to the innovation and creativity of our clients. In the pages that follow, we share some highlights of our work during 2016, as well as our insights into M&A market trends for 2017.

Providing M&A and corporate governance advice is a mainstay of our business. Our M&A team comprises more than 140 lawyers firm-wide who support the transactional needs of our clients around the globe, completing more than 350 M&A transactions valued at more than $237 billion in the past five years. Our M&A and corporate governance lawyers are recognized as leaders in their fields, and they bring to our M&A practice a depth of industry-specific knowledge in four key market sectors – **energy, financial services, retail and consumer products, and real estate investment and finance.**

We advise clients on virtually every form of M&A transaction and related corporate governance matters. Our M&A lawyers draw on the firm's extensive resources to form interdisciplinary teams with subject matter expertise that is essential to complete complex transactions, including counsel from our tax, securities, antitrust and trade regulation, labor and employment, employee benefits, intellectual property, regulated industry, bankruptcy, real estate, environmental and administrative law practices.

Our approach to M&A matters is built entirely around client service and client success. We focus on energetic responsiveness when and where clients need us worldwide; seamless integration with client teams; technical excellence; creative, practical solutions informed by industry-specific knowledge; and — most important — completed transactions.

We look forward to another exciting year, and thank you again for your continued confidence in the work we do together.

Wally Martinez
Managing Partner



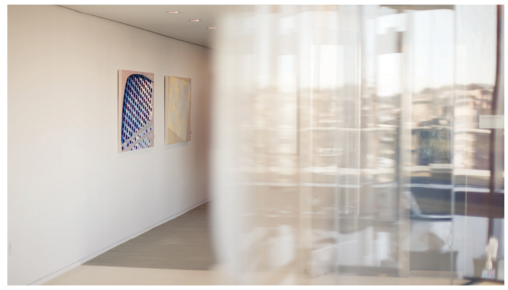


TABLE OF CONTENTS

2017 M&A FORECAST

Steven M. Haas
Partner, Corporate Finance and Mergers & Acquisitions, Richmond

Brian L. Hager
Partner, Corporate Finance and Mergers & Acquisitions, Richmond

Scott H. Kimpel
Partner, Corporate Finance and Mergers & Acquisitions, Washington

Charles L. Brewer
Associate, Corporate Finance and Mergers & Acquisitions, Richmond




There is an old Wall Street adage that "the market abhors uncertainty." This certainly seemed to be the case in the M&A market for much of last year, which saw global M&A volume drop from a record $4.4 trillion in 2015 to $3.6 trillion in 2016, according to Thomson Reuters. And yet, the fourth quarter of 2016 yielded $1.27 trillion of transactions—roughly a third of the year's total—and October 2016 was the busiest month ever for the US M&A market. In our view, the question of whether 2017 M&A activity continues the rebound we saw from October to December or returns to the downward year-over-year trend from 2015 to 2016 will largely depend on whether we experience the same level of uncertainty in 2017 as we did in 2016.

I. Sources of Uncertainty

The uncertainty of 2016 and the beginning of 2017 has come largely from political events. First, Brexit, the vote by British citizens in June to exit the European Union, stunned the world and will have wide-ranging implications for international businesses and cross-border M&A activity. Most notably for US companies, Theresa May, the prime minister tasked with steering Britain through the exit process, has called for a clean break with the European Union. That means Britain would not remain a part of the EU common market. As a result, an easy gateway to Europe could soon disappear for US companies.

Britain's separation from the EU common market cannot occur immediately, but look for companies to begin evaluating how to address the soon-to-be dual markets in Britain and Europe. In particular, after Britain fully exits the EU common market, US companies that have established outposts in Britain may need to consider other ways to access the continent. Different regulations and restrictions on the flow of goods may cause companies to enter or leave one market or the other, which may drive acquisitions, divestitures and general corporate restructuring and M&A activity.

Although not as dramatic as the Brexit vote, global markets will closely watch the two-round French presidential election scheduled for April and May 2017. Marine Le Pen, the leader of France's far-right National Front party, recently released plans to abandon the euro and possibly follow Britain out of the EU common market. If Ms. Le Pen succeeds in reinstating the franc, the continued vitality of the euro, and possibly even the European Union itself, will be in serious doubt. While Ms. Le Pen is not expected to win the election, as the US presidential election so recently demonstrated, election results do not always follow expectations.

Notwithstanding the political upheaval in Europe, we expect that the election of President Trump will have the greatest impact on US and global M&A markets in 2017. As we discuss in greater detail below, President Trump's unexpected victory has the potential to spur M&A volume to new heights if he follows through on his business-friendly proposals. In particular, deregulation of financial institutions and increased spending in the defense sector could spark additional M&A transactions. If President Trump fails to implement many of his proposals, however, or if he adopts protectionist policies that reduce global trade, we may see the M&A market slow as a consequence of dealmakers' uncertainty.

II. Taxes and Trade

From an M&A perspective, the most fundamental policy difference between the Obama administration and the Trump administration is with regard to taxes and the effects they may have on investment and trade. What the exact differences will be, however, remains uncertain. M&A activity may be greatly helped or hindered depending on which of several possible changes in tax policy ultimately occur.

A. Corporate Tax Rate

A very positive change for M&A activity—and one that seems likely to occur—is a lower US corporate tax rate. Lower corporate taxes would increase cash flow for US companies, which would result in more buying power in the M&A market. Lower taxes also could make US targets more attractive to foreign buyers, while simultaneously making US buyers more competitive when bidding against foreign companies. Setting aside all the other tax and policy possibilities discussed below, expect lower corporate tax rates to be a key consideration in companies' evaluation of whether to engage in M&A activity.

B. Repatriation Tax Holiday

Another potential change that seems likely to increase M&A activity is a so-called "tax holiday" on the repatriation of foreign assets held by US companies. Most estimates place the overseas assets of US companies at more than $2 trillion. Those assets are not subject to US taxes until companies return them to the United States from abroad. When companies repatriate their foreign assets, however, they must pay the full amount of US corporate income tax on those assets—currently 35 percent for most companies. President Trump has suggested lowering the repatriation tax to 10 percent, which would almost certainly result in a flood of cash back into the United States. Companies would no doubt use some of that cash to fund increased M&A activity.

C. Border Tax

One possible deterrent of M&A activity would be the implementation of a "border tax." A border tax would impose taxes on imports but not on exports, with the goal of increasing domestic manufacturing and the volume of exports. The effects of such a tax are difficult—if not impossible—to predict, which, from an M&A perspective, is the problem. There would be winners (*e.g.*, domestic manufacturers) and losers (*e.g.*, retailers that sell large quantities of imported goods) under a border tax regime, but until the details of any potential tax become clear, the effects on a particular business will be difficult to calculate. As a result, buyers might delay acquisitions until the uncertainty is resolved.

D. Tariffs

Although not necessarily M&A-specific, the potential imposition of tariffs could result in less M&A activity, particularly for larger targets with significant exposure to international trade. President Trump has promised to "get tough" on China, Mexico and other US trading partners, which seems to mean tariffs on imports from those countries. Most economists agree that tariffs or other protectionist trade policies are likely to result in reduced trade and lower economic growth. Unless and until President Trump eliminates that possibility from consideration, we may see buyers hesitant to acquire companies that depend on foreign inputs for their products or are affected generally by the global economy.

III. Deregulation

Other than taxes, we expect deregulation to have the greatest effect on M&A activity. Early signs—like President Trump's executive order requiring the rescission of two existing federal regulations before federal agencies enact each new regulation—point to the Trump administration's easing regulation in many areas. From an M&A perspective, however, loosening certain securities laws, rollback of the Dodd-Frank Act, the possible repeal of the Affordable Care Act and a general shift from the promotion of renewable energy to the continued exploitation of low-cost fossil fuels should have the greatest impact.

A. Securities Laws

The nomination of Jay Clayton, a securities and M&A lawyer, to chair the Securities and Exchange Commission is widely believed to indicate that the Trump administration will emphasize ease of capital raising over continuing to increase regulation. Mr. Clayton's experience in business transactions departs from that of many previous SEC chairs, whose background was in enforcement. Furthermore, although the Senate has not yet confirmed Mr. Clayton, the SEC has already taken steps to eliminate certain controversial regulations. The SEC first announced that it will reconsider its requirements of annual reporting concerning the use of conflict minerals, which the SEC's acting chairman, Michael Piwowar, recently characterized as "misguided." Mr. Piwowar then announced that he is seeking public comment on difficulties companies may have faced in implementing a rule that requires disclosure of the difference in pay between the CEO and an average worker. The SEC will reconsider implementing the rule in light of comments it receives. And Congress and the president used the Congressional Review Act, for the first time in 16 years, to overturn an SEC rule requiring companies to disclose payments made to foreign governments in connection with the commercial development of oil, natural gas or minerals. It seems likely that enforcement of securities laws and regulations will continue to become less strict. This trend should have a generally positive effect on M&A activity, as companies will have an easier time accessing capital markets and consummating transactions.

B. Dodd-Frank

President Trump has called the Dodd-Frank Act a "disaster," and Steve Mnuchin, the new Secretary of the Treasury, has promised to "kill" parts of the law. President Trump took the first step towards paring back Dodd-Frank in early February when he signed an executive order directing Secretary Mnuchin and other financial regulators to prepare a report on existing financial laws and regulations. That report is virtually certain to conclude that financial regulations are unnecessarily stringent and should be trimmed back. In the short term, at least, loosening the regulations on banks and other financial companies will likely reduce their compliance costs and costs of capital and improve their financial performance. A reduction in regulations might also boost lending, which would allow both strategic buyers and financial sponsors to finance acquisitions more easily.

C. Affordable Care Act

The Affordable Care Act (commonly referred to as Obamacare) may or not be repealed fully, replaced, or undergo significant changes. Because of the complexity

"I would wholeheartedly recommend Hunton & Williams to anyone in corporate America." – Daniel Feehan, Chairman, FirstCash

of the health care industry, however, it seems unlikely that buyers will aggressively target health care companies until the industry's future regulatory structure becomes more clear. Potential buyers surely also noted President Trump's comments about "astronomical" drug prices and criticism of overseas manufacturing, which rattled pharmaceutical stocks and may result in fewer acquisitions by the large drug companies. Furthermore, the recent, widely publicized breakups of the Aetna/Humana and Anthem/Cigna mergers on antitrust grounds may curb the appetite of industry participants to engage in large-scale M&A. At least for now, the health care industry seems likely to see less M&A activity as a result of political and regulatory uncertainty.

D. Energy

President Trump has not been as vocal about the specific changes he intends to make in energy policy, but deregulation appears likely. Most importantly, the Clean Power Plan is out, which will be seen as a positive change for power and utility companies. Next, the subsidies received by renewable energy likely will be eliminated, which, combined with the elimination of the Clean Power Plan, will help make coal competitive again. Finally, domestic fossil fuel production and transportation will have greater support from the new administration. Against this backdrop of deregulation, however, remains the fact that renewable energy technology continues to improve and will place increasing competitive pressure on the traditional fossil fuel industry. As a result, large energy companies may focus on developing alternative energy sources—including through M&A activity—even without regulations or subsidies that incentivize them to do so.

IV. Conclusion

Notwithstanding the political uncertainty described above, we believe the global economic environment is generally favorable for M&A. Growth continues to be low and stable, monetary policy remains loose and inflation does not appear to be an imminent issue. This economic environment will encourage companies to seek expansion through acquisitions rather than just through organic growth, and they should have little difficulty financing those acquisitions. The 2017 M&A outlook could change in an instant, but for now, however, we are broadly optimistic and look forward to an active year in both the US and global markets.

ENERGY

ELECTRIC UTILITY M&A

Michael J. Madden, Jr.
Partner, Energy and Infrastructure, New York

Mergers and acquisitions in the electric utility industry have been measurably more active over the past several years — particularly in the consolidation of such utilities and the acquisition of gas assets by electric utilities. Moreover, Canadian companies made some noteworthy acquisitions of US-regulated electric utilities in calendar year 2016 — continuing a trend from prior years.

Our power and energy capital markets group recently has been involved in approximately $30 billion worth of mergers and acquisitions-related financings.

Consolidation of Electric Utilities

M&A activity in the electric utility industry has precipitously ramped up over the past several years. Transactions announced in 2016 include the acquisition by Great Plains Energy Incorporated of Westar Energy, Inc., for $12.2 billion and the combination of Exelon Corporation and Pepco Holdings, Inc.

While the strategic objectives and motivations may vary, slowing electricity demand, competition and greater regulatory costs have caused many utilities to look beyond their service territories for growth and operational efficiency through scale. Also, a number of regulated utilities have publicly expressed a desire to implement growth plans principally through their regulated assets instead of their unregulated or merchant assets. These shifting strategies have spurned further M&A activity such as the recent announcement by American Electric Power Company that it will sell four competitive power plants totaling approximately 5,200 megawatts to a joint venture between Blackstone Group LP and ArcLight Capital Partners LLC.

Acquisition of Gas Assets

In addition to the consolidation of electric utilities in order to achieve scale and the recalibration of priorities back to regulated assets, electric utilities are looking to acquire gas assets (midstream and distribution assets rather than exploration and production). This is often viewed as a diversification play to help offset waning electricity demand.

Recent transactions include the acquisition by DTE Energy Company of the midstream natural gas assets from M3 Midstream LLC and Vega Energy Partners; by Consolidated Edison, Inc., of a 50 percent equity interest in a new entity that includes certain gas pipeline and storage assets of Crestwood Equity Partners LP; and by Dominion Resources Inc. of Questar Corporation, an integrated natural gas company. Another representative transaction includes the joint venture between the Southern Company and Kinder Morgan, Inc., relating to natural gas pipeline assets held by Southern Natural Gas Company.

O Canada!

Despite the strong US dollar, Canadian companies continue to purchase American utilities. In February of 2016, Fortis Inc. announced it would acquire ITC Holdings Corp. for approximately $11.3 billion. The transaction closed in October of 2016. Also in February of 2016, Algonquin Power & Utilities Corp. announced it would acquire Empire District Electric Co. The transaction closed on January 1, 2017. While it is difficult to prognosticate future activity by Canadian companies, their interest in the US electricity industry could continue or accelerate if favorable federal policy changes manifest, such as on corporate income taxes or environmental regulation.

2016 ENERGY INDUSTRY M&A HIGHLIGHTS

Sample energy industry representations in 2016 include:

Representation of Cleco Board of Directors in Completion of $4.7B Sale

Cleco Corporation, a publicly traded utility company based in Louisiana, completed its $4.7 billion sale to an investors consortium led by Macquarie Infrastructure and Real Assets and British Columbia Investment Management Corporation. Cleco operates a regulated electric utility company, Cleco Power, and also an unregulated wholesale power business. The merger agreement was signed in October 2014. The transaction was ultimately approved by Louisiana regulators. **Jeff Jones** and **Steven Haas** represented the independent directors of Cleco throughout the sale process. **Ed Fuhr**, **Eric Feiler** and **John Schronce** represented Cleco and its directors in related shareholder litigation, including successfully defeating a shareholder's attempt to enjoin the shareholder meeting to vote on the merger. The representation showcased the firm's M&A and board advisory practices in the energy industry.

Empire Gen Acquisition

We advised Tyr Energy, Inc., an affiliate of Itochu Corporation (Tyr), in the acquisition of the 635-megawatt dual-fuel combined-cycle power generation facility in Rensselaer, New York (Empire). The transaction closed on March 3, 2017. Tyr acquired Empire from funds managed by Energy Capital Partners. Empire sells merchant energy, capacity and ancillary services to the NYISO competitive wholesale markets. Participating in the transaction with Tyr was Tokyo Gas Co., Ltd., and Kansai Electric Power Co., Inc.

Our multidisciplinary team included **Greg Lang**, **Michael Madden** and **Doug Dua** on energy M&A matters, **Jeff Blair** on tax matters and **Jay Ritter** and **Ryan Glasgow**, respectively, on benefits and labor matters.

ExxonMobil and Sunoco Logistics Combine Key Crude Oil Logistics Assets

In late 2016, subsidiaries of our client Exxon Mobil Corporation, as well as Sunoco Logistics Partners L.P., entered into a strategic joint venture to form Permian Express Partners LLC. Pursuant to the joint venture transaction, the companies will ultimately combine some of their key crude oil logistics assets — Sunoco will contribute its Permian Express 1, Permian Express 2 and Permian Longview and Louisiana Access pipelines while ExxonMobil will contribute its Longview to Louisiana and Pegasus pipelines, Hawkins gathering system, an idle pipeline in southern Oklahoma and its Patoka, Illinois, terminal. Sunoco will have an 85 percent ownership interest in the new venture, while ExxonMobil will own the remaining 15 percent interest.

"Our Hunton deal team consistently delivers a blend of practical advice and efficient service that is integral to the success of our transactions and portfolio companies." – Tom Willingham, Managing Director, Turning Basin Capital

Our experienced M&A team comprises more than 140 lawyers firmwide and has handled 350+ transactions worth more than $237 billion in the past five years.

This joint venture establishes a stronger crude oil logistics network to meet market demand, provides additional takeaway opportunities for shippers and expands ExxonMobil's options to supply its network of refineries.

Our legal team for ExxonMobil was led by **Mike McCann** and included **Lawton Way**, **Austin Maloney** and **Remington Shepard** on corporate matters; **Eric Murdock** and **Carter Clements** on environmental law matters; **Dan Campbell**, **J. C. Chenault** and **A. J. Carroll** on real estate issues; and **Alex McGeoch** on tax questions.

Turning Basin Capital Acquisitions

In April, we advised Turning Basin Capital on its platform acquisition of BBB Tank Services, Inc., a leading provider of maintenance and construction services for above ground storage tanks. BBB is headquartered in Houston, Texas, and serves oil and gas markets in Texas, Oklahoma, New Mexico, Louisiana and Florida. The firm also advised on the acquisition financing for the transaction, which included a senior secured loan and equity co-investments from institutional investors. Our team was led by **Wyatt Deal**, and included **Jim Seevers**, **Felicity Lewis**, **Jeff Blair**, **J. C. Chenault**, **Paul Jay**, **Dan Jordanger** and **Natalie Mariani**. The financing team was led by **Kim MacLeod**, and included **Jess Tobin**, **John Badman** and **Alex Waszilycsak**.

In December, we advised Turning Basin Capital portfolio company Basin Energy Group LLC on its add-on acquisition of Appalachian Production Services, Inc. (APS). APS provides production and midstream services for the natural gas and oil industry throughout the Appalachian Basin, including Virginia, Kentucky, West Virginia, Pennsylvania, New York, Tennessee and Ohio. With the addition of APS, Basin Energy and its subsidiaries now have more than 170 employees operating out of seven offices covering seven states. Our team was led by **Wyatt Deal**, and included **Jim Seevers**, **Alex Lurie**, **Jeff Blair**, **Caitlin Sawyer**, **Ryan Glasgow**, **Natalie Mariani**, **Alex Waszilycsak** and **Rhonda Piper**.

Tom Willingham, managing director at Turning Basin Capital, said, "Hunton & Williams has been a trusted advisor since our firm's inception. Our Hunton deal team consistently delivers a blend of practical advice and efficient service that is integral to the success of our transactions and portfolio companies."

7-Eleven Buys Biscayne Petroleum and Everglades Petroleum

We advised Biscayne Petroleum, LLC, and Everglades Petroleum LLC on their acquisition by 7-Eleven, Inc., and its wholly owned subsidiary, SEI Fuel Services, Inc.

The acquisition of Miami-based Biscayne Petroleum, LLC, and Everglades Petroleum LLC's assets, all of which were sold as part of the transaction, included convenience stores and gas stations owned and operated throughout Miami-Dade, Broward and Palm Beach counties; and a mix of 102 high-volume company-operated, commission marketer, lessee dealer and supply-only stores, as well as the majority of the stores' real estate owned by Biscayne Petroleum and Everglades Petroleum.

Our team was led by **David Yates** in Atlanta and included **Bob Rausch**, **Fernando Alonso** and **Rail Seoane** in Miami, and **Daniel Uyesato** in Raleigh.

FINANCIAL SERVICES

2016 M&A YEAR IN REVIEW FOR BANK MERGERS

Peter Weinstock
Partner, Financial Institutions Corporate and Regulatory, Dallas

2016 was a down year for bank M&A activity in the US Both the number of transactions and the median book value multiple per transaction were lower than in 2015. The reasons for such decline include an extremely challenging operating environment. The cost of regulation, squeezed net interest margins and spotty, if not anemic, lending opportunities limited the synergies available to buyers from transactions. Instead, the focus of deals became almost entirely on assurance of cost savings. The headwinds in banking also translated into lower valuations for publicly traded financial institutions and, thus, limits on their ability to use stock as a currency for deals without suffering significant dilution to their existing shareholders.

The lower premiums, however, enhanced the possibilities for strategic combinations, and even the elusive "merger of equals." Of the 15 transactions we worked on that were announced or consummated in 2016 were three mergers of equals. We represented Wilshire Bancorp, a $5 billion LA-based bank, in its merger with $8 billion BBCN Bancorp, resulting in the largest Korean-American bank in the US Wilshire kept the chairman of the board position and designated seven of the 16 directors. We represented Xenith Bankshares, Inc., a $1 billion Richmond, Virginia-based bank holding company, in its merger with Hampton Roads Bankshares, Inc. Xenith's strong management team was a draw for the transaction and, as a result, Xenith maintained the top three management positions.

We represented Lapeer County Bank & Trust, a $350 million bank, that merged with Capac Bancorp, Inc., a $250 million bank. The banks rebranded as Lakestone Bank & Trust under the leadership of Lapeer's chairman and CEO. The low takeover premiums in the market incentivized stock-for-stock transactions, as would-be sellers recognized that 2016 may have been the wrong time to take their "chips off the table" by selling out for cash.

The winds of change are certainly upon us. The election of President Trump started the stock market on a 36-hour meltdown. Quickly, however, market pundits looked at President Trump's proposed economic plan. The combination of reduced regulation and the prospect for growth, higher interest rates and tax reform looked to give businesses, and financial institutions in particular, some true help.

An analysis performed by Sandler O'Neill indicated that bank earnings could be helped by as much as 39 percent from such changes. Investors started bidding up the price of bank stocks as a result. Stock prices for publicly traded financial institutions ended the year up 21.56 percent — the third best performance of any sector.

It is too early to see if the president will have success in implementing his agenda, and whether such success will convince bankers to remain independent. After all, the operating difficulties in banking were a significant motivation for some sellers to join up with their larger brethren over the last couple of years.

2016 FINANCIAL SERVICES INDUSTRY M&A HIGHLIGHTS

Sample financial services industry representations in 2016 include:

Cash America International Completes Merger of Equals with First Cash Financial Services

On September 1, **Cash America International, Inc.**, completed its successful $2.4 billion merger of equals with First Cash Financial Services. At the time of the combination, Cash America and First Cash Financial were two of the world's leading operators of retail pawn stores. The all-stock transaction created the largest combined retail pawn store operator in Latin America and the United States, with total annual revenues of approximately $1.8 billion and more than 2,000 locations across four countries. The newly merged company, FirstCash (NYSE: FCFS), provides significant scale and a unified platform for leadership in the pawn industry while keeping the established brands from both companies.

Our cross-office, multidisciplinary transaction team was led by **Steve Leshin** and included **Lindsay Ferguson**, **Steven Haas, Katie Hull** and **Patrick Quine**; **Jeff Blair** and **Mark Melton** for tax; **Bruce Hoffman** and **Amanda Wait** for competition matters; **Baker Rector** for employee benefits; **Alan Marcuis** for labor and employment; **Ed Fuhr**, **Joel Sharp**, **Allison Acker** and **John Schronce** for litigation; **Ryan Logan** for privacy; and **Bob King** for intellectual property.

Leshin began representing Cash America during its initial public stock offering in 1987, and in the following 30 years represented Cash America as it grew to the largest US operator of pawnshops, including in follow-on public stock offerings, acquisitions, public and private debt issuances and its spin-off of its subsidiary Enova International, Inc. (NYSE: ENVA) to the Cash America shareholders in 2014.

Daniel Feehan, the former chairman of Cash America and current chairman of FirstCash, commented that "[t]he service provided to Cash America by

"Hunton & Williams' greatest transactional strength is its pragmatic approach toward assisting clients in negotiating deals to actually get something done." – Daniel Feehan, Chairman, FirstCash

Hunton & Williams partner Steve Leshin and his entire team over the past 30 years has simply been outstanding. Obviously major public companies do not maintain decades-long professional relationships without receiving exceptional advice and counsel. Hunton & Williams' greatest transactional strength is its pragmatic approach toward assisting clients in negotiating deals to actually get something done. The firm works to facilitate a deal, not hinder it. They have consistently provided Cash America with not only sound legal advice but with valuable strategic insights as well. I would wholeheartedly recommend Hunton & Williams to anyone in corporate America."

Promerica Financial Corporation Acquires Banco Citibank de Guatemala and Affiliates

We advised Promerica Financial Corporation (Promerica) in its acquisition of Banco Citibank de Guatemala, S.A., and affiliate Cititarjetas de Guatemala Limitada.

The deal, which closed on October 31, increases Banco Promerica Guatemala's total assets in Guatemala to US$1.7 billion and 98 banking branches, resulting in the bank's leading position in the Guatemalan credit card and consumer banking business. Banco Promerica Guatemala is among the banks with the highest rates of growth and profitability in the Guatemalan financial sector. We also advised Promerica in obtaining a syndicated credit facility to fund a portion of the acquisition.

Our team was led by **Fernando Alonso** and **Fernando Margarit** in Miami and **David Yates** in Atlanta, and included Miami lawyers **Carlos Garcia**, **Stefano D'Aniello**, **Rail Seoane** and **Cary Tolley**; **Mark Melton** in Dallas; and **Eric Hanson** in Atlanta.

Our Financial Institutions Corporate & Regulatory team ranked #2 in the number of deals in SNL's league tables with 15, representing more than six percent of all community bank mergers that occurred in 2016

M&A in 2016: Although M&A activity was slow in the first three quarters of 2016, October was a record

RETAIL AND CONSUMER PRODUCTS

2016 YEAR IN REVIEW: M&A IN THE RETAIL SECTOR

Scott Kimpel
Partner, Corporate Finance and Mergers & Acquisitions, Washington

Page Hubben
Associate, Corporate Finance and Mergers & Acquisitions, Washington

month and M&A activity showed signs of acceleration through the end of the year and into 2017. According to Dealogic, M&A activity during the first nine months of 2016 was down to $2.55 trillion from $3.27 trillion for the same period in 2015. Global market volatility driven by uncertain political and economic factors may have contributed to the slow beginning of the year, and these forces continue to present a potential obstacle to deal activity. In the last few months of 2016, however, a number of megamergers contributed to an upswing in activity. Deal volume in October reached approximately $489 billion, the highest monthly total in at least 12 years.

In the retail sector, while M&A activity failed to meet some expectations, there was positive momentum in the second half of the year. Deal value in the retail sector declined 53 percent in 2016 compared with 2015, and deal volume dropped in the third quarter of 2016 to its lowest level since 2014. Despite the slowdown, the retail sector remained active throughout the year, with significant contributions from the food and beverage and internet/e-commerce subsectors. Consumer trends across the market continue to influence deals, as retailers look to technology, digital consumer engagement and online acquisitions.

Our 2017 outlook is cautiously optimistic about retail and consumer products M&A activity. While continued global economic uncertainty and volatility in the capital markets may present obstacles, other factors work in favor of M&A activity growth, such as high consumer confidence and an increase in consumers' relative purchasing power. Trend forecasts indicate that strategic acquisitions of technology assets will continue in 2017 and that divestitures will see an uptick in activity. The prospect of a new presidential administration that will be less focused on regulation and more focused on job growth also has the potential to accelerate M&A activity in 2017.

2016 RETAIL AND CONSUMER PRODUCTS INDUSTRY M&A HIGHLIGHTS

Sample retail and consumer products industry representations in 2016 include:

Smithfield Foods Acquires Farmer John, Saag's Specialty Meats and Three Farm Operations

In 2016 we represented Smithfield Foods, Inc., in its acquisition of Clougherty Packing LLC from Hormel Foods, adding the Farmer John® and Saag's Specialty Meats® brands to the company's lineup.

Clougherty is based in Southern California and is a leading integrated producer and processor of a full line of branded pork products. Founded in 1931, Farmer John is the No. 1 bacon and sausage brand in Southern California, including the famous Dodger Dog® hot dogs. Saag's Specialty Meats is a San Leandro, California-based manufacturer of premium deli meats and specialty sausages. Along with two California-based processing facilities, Smithfield also acquired three farms located in Arizona, California and Wyoming.

In discussing the acquisition, Ken Sullivan, president and CEO of Smithfield, said, "With this one acquisition, we've created a more efficient supply chain coast-to-coast and expanded our operations and product portfolio, as well as our customer and consumer base. By folding Farmer John into our operations, we are better positioned to take advantage of our long-term strategic growth goals, which include an increasingly diversified customer and consumer base and greater supply chain efficiency."

Michael Cole, Smithfield's chief legal officer and secretary, said, "As we have come to expect, the experienced Hunton team assisting us with the Farmer John acquisition, led by Richmond partners Gary Thompson and Rich Warren, did an outstanding job in all facets of the transaction, leading to one of the smoothest closings I've experienced. We look to our Hunton team for their responsiveness, sound business judgment and practical solutions to challenging deal issues."

Smithfield is a $14 billion global food company and the world's largest pork processor and hog producer, committed to providing good food in a responsible way. The firm has represented Smithfield on various matters for more than 40 years, including assisting the company on its strategic M&A program, comprising more than 20 transactions, since 2001.

Our team, led by **Gary Thompson** and **Rich Warren**, also included **Charlie Brewer**, **Cam Hill**, **Robert Johnson**, **Chris Hasbrouck**, **Kate Bryan**, **Kevin Finto**, **Tim McHugh**, **Jay Ritter**, **Mike Alexander**, **Jeff Blair**, **Ryan Glasgow**, **David Baker** and **Paul Nyffeler**.

Shentel Acquires NTELOS Holdings Corp.

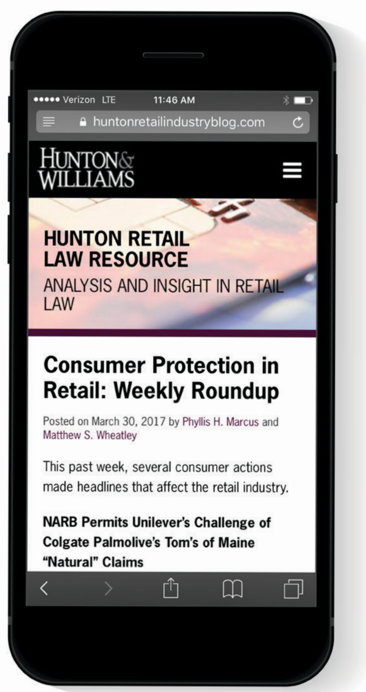
We represented Shenandoah Telecommunications Company (Shentel) in its successful $640 million acquisition of wireless services provider NTELOS Holdings Corp. through a complex four-party

"We look to our Hunton team for their responsiveness, sound business judgment and practical solutions to challenging deal issues."

– Michael Cole, Chief Legal Officer and Secretary, Smithfield Foods transaction. Immediately after the closing, certain of NTELOS's assets were sold to Sprint. Shentel operates as a Sprint affiliate and now offers wireless services in NTELOS's former service areas throughout Virginia, West Virginia, Maryland and Kentucky. The transaction involved a cash-out merger of NTELOS' public stockholders and required numerous regulatory approvals. We also represented Shentel in a related $960 million credit financing, the proceeds of which were used to consummate the merger.

The transaction was led by M&A partner **Steven Haas** and included corporate lawyers **Jeff Jones** and **James Kennedy** with additional support from **Charlie Brewer** and **Lawton Way**, employee benefits lawyer **Jay Ritter**, labor and employment lawyer **Ryan Glasgow**, state regulatory lawyers **Rick Gary** and **Tim Biller**, and corporate litigators **Ed Fuhr** and **John Schronce**, among others. Finance partner **Eric Nedell** led the financing with support from **Carolyn Aiken, Noopur Garg, John Badman** and **Alex Waszilycsak**.

Named by *Corporate Board Member* magazine as one of "America's Best Corporate Law Firms."



HUNTON RETAIL LAW RESOURCE BLOG

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Written by members of our firm's experienced team of lawyers who serve retailers from factory floor, to retail outlet, to online store, Hunton Retail Law Resource blog helps you stay abreast of the legal and regulatory issues facing your company and helps you minimize risk in this highly competitive and ever-changing industry. With a regular digest of breaking legal news and information delivered to your desktop, our blog reports cover topics including corporate law, FTC and SEC consumer protection and antitrust matters, labor law, litigation, retail class actions, and privacy and cybersecurity.

Subscribe now to the Hunton Retail Law Resource blog for the latest legal updates, developments and business trends that affect your retail business.

Hershey Acquires barkTHINs Chocolate Company

We represented **The Hershey Company** (NYSE: HSY) in its acquisition of barkTHINS from its founder and private equity partner. Launched in 2013, barkTHINS sells thin snacking chocolates sold in resealable bags. The products are marketed with a brand identity based on using simple ingredients, fair trade cocoa, non-GMO certification and no artificial flavors or preservatives.

The transaction was led by **Steven Haas**, while the firm's relationship with Hershey is led by **Steve Patterson**, with key support from **Scott McKinney**, **Candace Moss** and **Charlie Brewer** from the M&A team; **Amanda Wait** and **Phyllis Marcus** for antitrust and advertising; **Jay Ritter** for employee benefits; **Alex McGeoch** for tax; **Eric Nedell** for finance; **John Gary Maynard** for IP; and **Lindsay Velarde** for labor/employment.

Branch Brook Acquires Reliance Vitamin

Jay Moore and **Brian Hager** led a team that represented Branch Brook Holdings, LLC, in its acquisition of Reliance Vitamin, whose Plant Fusion brand is a leader in the plant-based protein segment. Branch Brook Holdings, LLC, is a partnership among Swander Pace Capital, Jefferson Capital Partners and United Natural Foods, Inc. (NASD: UNFI), that invests in organic and natural foods. We have advised Branch Brook since its inception, including in its acquisitions of Kicking Horse Coffee, the leading organic and fair-trade coffee roaster in Canada, and Oregon Ice Cream, a leading manufacturer of organic ice cream and frozen novelties.

Our lawyers have received awards, including the 2017 Client Choice Award (*Lexology*), the 2016 Lawyer of the Year (*Best Lawyers*), the 2015 Antitrust and M&A Trailblazer (*National Law Journal*), the 2014 US Dealmaker of the Year (*Finance Monthly*), the 2012 M&A Lawyer of the Year – Americas Middle Markets (*Atlas M&A*) and several "40 Under 40" awards from the M&A Advisor, *Law360* and regional publications.

REAL ESTATE

2016 REAL ESTATE INDUSTRY M&A HIGHLIGHTS

Sample real estate industry M&A representations in 2016 include:

Hersha Sale of Seven Manhattan Hotels

In the second quarter of 2016, we represented long-time client Hersha Hospitality Trust (NYSE: HT) in the sale of seven Manhattan hotels to a newly formed joint venture between Hersha and Cindat Capital Management Limited, a China-based investment management platform with offices in Beijing, Shanghai and New York, for a total purchase price of approximately $571.4 million.

The transaction required a variety of our lawyers across different practices. **Jim Seevers** led the deal team and, along with **James Davidson**, represented Hersha on the joint venture. **Rori Malech** led the group handling seven separate hotel purchase and sale transactions, as well as the team working on the $335 million debt financing for the transaction, which included a senior credit facility and mezzanine financing. **Patrick Mitchell** and **Kendal Sibley** advised on the structuring and tax aspects of the transaction.

The collaboration among these practices was facilitated by the firm's real estate investment and finance industry group, in which real estate, financing, capital markets, tax and private equity lawyers regularly collaborate on industry trends, developments and transactions. The transaction allowed us to showcase the firm's deep industry knowledge of New York City real estate, real estate M&A, REITs, tax and private joint ventures.

The transaction also represents the latest chapter in a long relationship between Hersha and Hunton & Williams, which started with the client's formation and IPO in 1998 and has continued across a series of major public and private capital markets transactions over nearly 20 years. This full-service, relationship-driven approach is a hallmark of our real estate industry work.

Altisource Residential Corporation $652M Acquisition of Rental Portfolio

We represented Altisource Residential Corporation (NYSE: RESI) in its acquisition of a portfolio of 4,262 single-family rental properties for an aggregate purchase price of $652.3 million in a seller-financed transaction. The assets were acquired from investment funds sponsored by Amherst Holdings, LLC. The transaction resulted in Altisource more than doubling its then-current portfolio of properties.

The transaction, which closed on September 30, was accomplished by an equity acquisition of the owner of about 3,600 properties, a simultaneous acquisition of title to an additional 600 or more properties from another fund operated by Amherst, and the closing of seller financing for the entire acquisition.

Our team was led by **Bob Hahn**, with **Andrew Blanchard**, **Matt Mannering** and **Charles Matthews**, and included **Mike McCann** and **Lawton Way** on M&A and securities law aspects; **Mark Vowell** for real estate matters; **J. R. Smith** for bankruptcy-related matters; and **Kendal Sibley** and **Allison Stelter** on tax issues.

We advised on nearly $20 billion worth of real estate mergers and acquisitions in 2016, placing the firm among the top 10 advisors for deals announced in 2016 according to Dealogic.

UPDATES AND TRENDS

M&A LITIGATION UPDATE



Matthew Bosher
Partner, Corporate and Securities Litigation, Richmond

Eric Feiler
Partner, Corporate and Securities Litigation, Richmond

Ed Fuhr
Partner, Corporate and Securities Litigation, Richmond

M&A litigation in 2016 was largely defined by a shift away from the Delaware Court of Chancery and towards other forums, including the federal courts.

This trend is a result of the January 2016 *In re Trulia, Inc. Stockholder Litigation* decision in which the Court of Chancery rejected a disclosure-only settlement of a stockholder class action challenging an acquisition. That decision, which was the culmination of a series of earlier rulings during 2015, ended the practice of routine approval of disclosure-only settlements in Delaware, *i.e.*, settlements in which stockholders agree to broad releases in exchange for supplemental disclosures and a payment of some portion of plaintiffs' attorneys' fees.

The change of practice in Delaware has driven plaintiffs' firms to seek alternative forums, primarily in federal court. According to Cornerstone Research, M&A filings in federal courts increased 167 percent from the second half of 2015 to the first half of 2016 while, during the same period, significantly fewer cases were filed in Delaware. Plaintiffs will face challenges litigating M&A claims pursuant to the federal securities laws, including the heightened pleading requirements under the securities laws. Moreover, federal judges may begin to push back on disclosure-only settlements as well. In an August 2016 decision, influential Judge Richard Posner of the Seventh Circuit Court of Appeals adopted the standards of *Trulia* in requiring that supplemental disclosures in disclosure-only settlements be "plainly material" in order to pass muster. To the extent more federal courts adopt this approach, and as more Delaware companies add exclusive forum bylaws, M&A litigation may eventually shift back to the Delaware Court of Chancery.

In the meantime, plaintiffs' attorneys are searching for potentially friendly district courts, and the Eastern District of Virginia has emerged as a candidate. In 2016, the court approved a disclosure-only settlement in a shareholder class action against **Kraft Foods Group** arising from its merger with H.J. Heinz Holding Corp., and awarded attorneys' fees despite objections from several shareholders based on the *Trulia* decision. More recently, the court ordered a shareholder class action challenging the merger of **Genworth Financial, Inc.**, and China Oceanwide into mediation before a motion for preliminary injunction could be decided. The rapid pace of proceedings in the "Rocket Docket" may actually encourage plaintiffs, serving to expedite cases that might not otherwise be expedited in the Delaware Court of Chancery or in other federal courts. Likewise, last month an appeals court in New York reversed a lower court's rejection of the disclosure-only settlement, which suggests that New York courts may not follow the tougher new standards in Delaware.

The firm's corporate and securities litigation team has been involved in numerous M&A matters this past year, and continues to be involved in several ongoing matters, including: defending certain former directors of **Cleco Corp.** against claims related to the sale of Cleco to an investor group led by Macquarie Infrastructure and Real Assets, a unit of Macquarie Group Ltd.; assisting in the defense of **Genworth** and its directors in a series of lawsuits relating to the sale of the company; and defending the board of directors of **Cascade Bancorp** against claims relating to Cascade's proposed merger with First Interstate BancSystem, Inc.

ANTITRUST MERGER ENFORCEMENT

Amanda Wait
Partner, Competition, Washington

Mark Weiss
Associate, Competition, Washington

Gearing Up for Change in Antitrust Merger Enforcement

"Litigation readiness" was the unofficial theme of antitrust enforcement at the Antitrust Division of the US Department of Justice and the Federal Trade Commission over the past eight years. Although determining whether this "litigation readiness" actually resulted in the two antitrust enforcement agencies' bringing more merger cases than we might have otherwise seen is a complicated question, the practical effect was that deal review took longer, faced increased scrutiny, involved more nonparties, was more expensive and faced more uncertainty than in prior administrations. These effects were evident in the recent number of large-scale, high-profile litigated deals across many industries, including the FTC's challenges to the proposed mergers of Staples/Office Depot, Sysco/US Foods, a number of hospital deals and Dollar Tree/Family Dollar, as well as the Antitrust Division's challenge to GE/Electrolux, Comcast/Time Warner and Applied Materials/Tokyo Electron.

Looking forward, President Trump has provided some insight through his public statements regarding the future of antitrust policy. For example, he has indicated a willingness to use the federal antitrust laws to prevent the proposed tie-up between AT&T and Time Warner and to revisit (and potentially break up) Comcast's 2011 acquisition of NBC Universal.

Despite President Trump's ambiguous rhetoric, his antitrust advisers for the transition suggest a merger antitrust climate that likely will be generally less interventionist than that of the Obama administration. Our partner David Higbee is advising the president with respect to the Antitrust Division transition. Mr. Higbee is a veteran of the George W. Bush Department of Justice, where he served as the chief of staff and deputy assistant attorney general in the Antitrust Division from 2004 to 2005. Mr. Higbee is currently the vice chair of our competition practice and the managing partner of our Washington, DC, office. Joshua Wright, a former FTC commissioner and current professor at Antonin Scalia Law School at George Mason University, has also been reported as working on the antitrust transition. Together, these advisers suggest a more market-oriented approach to antitrust enforcement.

President Trump's Attorney General, Jeff Sessions, indicated in Senate hearings that he thinks merger remedies should be based solely on applicable competitive concerns rather than remedies that are not directly related to antitrust problems. Then-Senator Sessions stated that he has "no hesitation to enforce antitrust laws," but emphasized that he thinks "certain mergers should not occur" and that "there will not be political influence in that process."

Hunton & Williams partner David Higbee is advising the president with respect to the Antitrust Division transition.

The one certainty is that the Trump administration will bring new leadership to both the Antitrust Division and the FTC. With the resignation of Commissioner Edith Ramirez effective February 10, 2017, the FTC has three open Commissioner spots for Republican nominees who may bring new approaches and who will flip the political balance of power from the Democrats to the Republicans. FTC Commissioner Ohlhausen has been named as acting FTC chairwoman. She recently announced that she will seek to streamline second requests to speed up the review process and reduce costs on businesses. This sort of policy is likely emblematic of the kind of changes we can expect from the incoming administration in antitrust.

Similarly, the DOJ will see a new front office, including a new assistant attorney general, and likely several new deputies and the chief of staff.

2016 Antitrust Merger Highlights

2016 brought a multitude of mergers and acquisitions reviewed by the FTC and Antitrust Division across many industries. Many of these deals were cleared without significant review, including Cash America/First Cash, Marriott/Starwood, ADT/Protection 1, Columbia Pipeline Group/TransCanada, Tyco International/Johnson Controls, Microsoft/LinkedIn and Hunter Douglas/Levolor.

Other deals, however, received significant scrutiny and faced lengthy investigations that ended in negotiated consent decrees or litigation. We describe a few of the highlights below.

AB InBev/SAB Miller: In October, Anheuser-Busch InBev (InBev) completed its acquisition of SABMiller in a deal exceeding $100 billion. Numerous brands were involved in the deal including InBev's Bud Light and Budweiser brands and SABMiller's Fosters. The deal was reviewed by the Antitrust Division, which demanded significant divestitures, including the sale of SABMiller's entire US business and ownership in MillerCoors. The Miller brands were previously controlled by a joint venture with Molson Coors, which will now have exclusive ownership of those brands. The Antitrust Division's review spanned 10 months. The Antitrust Division also sought commitments from the merging companies aimed at protecting small and independent brewers. The merging parties agreed to a prohibition on the use of exclusive distribution contracts used to limit the sale and promotion of rival brands by smaller beer distributors. US approval also came with an extension of InBev's requirement to inform the Antitrust Division of any future acquisitions of beer distributors or brewers even if they do not meet the threshold requirements of the Hart-Scott-Rodino Act.

Staples/Office Depot: In 2016, the FTC successfully blocked a merger of Staples and Office Depot for a second time. The two office supply megastores had previously attempted to merge in the 1990s and had been prevented by a successful challenge by the FTC. This time around, the FTC's suit alleged harm to competition in the sale of consumable office supplies (excluding ink and toner) to large business customers with more than $500,000 in annual sales. Judge Emmet Sullivan for the US District Court for the District of

Columbia rejected Staples' defense that the exclusion of ink and toner was fatal to the FTC's case because it is subject to significantly different competitive dynamics than other consumable office supplies. The merging parties decided not to put on a defense, hedging on the judge's apparent skepticism of many of the FTC's initial arguments. This failure to present evidence was admonished by the judge who noted in his opinion that Staples' positions were hard to justify absent supporting expert testimony. The judge also rejected Staples' position that Amazon's developing office supply business was yet sufficient to vigorously compete with the two established market players or that future entry would take the place of any lost competition due to barriers to entry. After the decision was entered, the parties abandoned the transaction and Staples paid a $250 million termination fee to Office Depot.

Halliburton/Baker Hughes: Oil field service company Halliburton sought to purchase competitor Baker Hughes for approximately $34 billion. The DOJ reviewed the deal and filed a lawsuit challenging the merger on April 6, 2016. The DOJ alleged that the merger would eliminate competition in the US markets for 23 products or services used in oil exploration and production. The allegations further expressed concern over the acquisition of market power by the merger of two of the three largest oil field services companies in the world. DOJ officials issued a press release expressing strong opposition to the deal. Attorney General Loretta E. Lynch stated that "[t]he proposed deal between Halliburton and Baker Hughes would eliminate vital competition, skew energy markets and harm American consumers[.]" Assistant Attorney General Bill Baer of the department's Antitrust Division was even more direct in his criticism, arguing that "[t]his transaction is unprecedented in the breadth and scope of competitive overlaps and antitrust issues it presents."

While the merging parties presented a large divestiture package as an attempt to remedy the perceived competitive harms, the DOJ was clear that this offering did not resolve its competitive concerns. DOJ's press release criticized the divestiture proposal because it contained only limited assets rather than full business units and the proposal allowed the merged firm to retain certain "facilities, employees, contracts, intellectual property, and research and development resources that would put the buyer of those assets at a competitive disadvantage."

Less than a month after the US filed its lawsuit, the two parties abandoned their merger. Attorney General Lynch hailed the news as a "victory for the US economy and for all Americans."

Named to BTI "Client Service A-Team" for 15 years in a row.

Danone/WhiteWave: Danone S.A., a French dairy conglomerate, announced its plans to acquire the WhiteWave Foods Company in July 2016. WhiteWave manufactures consumer food and beverage products including plant-based foods, coffee creamers, and premium dairy and organic products while Danone owns numerous dairy brands including Activia and Dannon. Importantly, the deal would bring WhiteWave's Horizon brand, currently the largest US organic dairy brand, under the control of Danone. The combined firm is estimated to be the largest purchaser of organic milk and will further expand its lead in US yogurt sales over its biggest rival, General Mills. The deal is valued at $12.5 billion and is being reviewed by the DOJ in the United States. The European Commission has already approved the deal.

The deal has been targeted by some consumer watchdog groups, such as the Cornucopia Institute, which are concerned about concentration in the organic dairy market. Further concerns have been raised over Danone's increased buyer power among dairy farmers.

The parties have been touting hundreds of millions of dollars in efficiencies resulting from the deal. Cecile Canais, the CFO of Danone, pointed to cost synergies resulting from "scaling sourcing and supply chain and fixed cost optimization."

AT&T/Time Warner: AT&T is the nation's second largest wireless carrier and, after its acquisition of DirecTV, now the largest US cable and satellite provider, just edging Comcast in numbers of subscribers. Time Warner is one of the world's largest television networks and TV entertainment companies. The proposed $85 billion merger would combine AT&T's television subscribers with Time Warner's content including popular television stations, including HBO, TNT, news-provider CNN and Warner Brothers. The merging parties filed HSR on November 4 and received a second request from the DOJ on December 8.

The deal has been the subject of much discussion revolving around President Trump who stated in October on the campaign trail that the merger is "a deal we will not approve in my administration because it's too much concentration of power in the hands of too few." Although legally Trump cannot meddle directly in the deal, he does have appointment power (with Senate approval) of key positions at the DOJ. Any challenge from the DOJ could also be fought in federal court, putting the merger's final verdict in the hands of a judge, although most challenged mergers are abandoned by the parties. Since winning the election, President Trump has softened his stance, stating that he has not "seen any of the facts." The *Financial Times* reported that AT&T met with the Trump transition team, which promised that the deal will receive a fair review. President Trump has also recently spoken with the CEO of AT&T although it is reported that the merger was not discussed.

The deal may also face an FCC review due to the potential need to transfer or sell Time Warner's US FCC licenses. At this stage, the review is likely to take at least a few more months before the deal reaches any kind of final disposition.

Multiple Agricultural Deals:
Significant change is underway in the seed and pesticide agro-chemical industry with multiple deals announced and subject to DOJ and FTC review. A key question for the DOJ and FTC in reviewing agricultural deals is whether the combination would enable the parties to wield market power over agricultural customers in the United States. Often state Attorneys General and, sometimes foreign competition enforcement agencies participate in the review. In some larger deals, the investigations can span a year or more.

PRIVACY AND DATA SECURITY DUE DILIGENCE IN M&A TRANSACTIONS

Lisa Sotto
Partner, Global Technology, Outsourcing and Privacy, New York

Ryan Logan
Counsel, Global Technology, Outsourcing and Privacy, New York

Privacy and data security issues have become the subject of critical focus in corporate mergers, acquisitions, divestitures and related transactions. In 2016, several large transactions, especially those involving telecommunications, entertainment and technology companies, were impacted by either concerns about the collection and use of personal information or significant information security breaches. The Federal Trade Commission has sharpened its focus on the use of personal information as a factor in evaluating the competitive effects of a given corporate transaction, and the Securities and Exchange Commission is now closely scrutinizing privacy and data security representations made to investors in public filings connected to transactions. More broadly, privacy and data security problems that are not timely discovered before entering into an M&A transaction can become significant liabilities post-closing and also lead to litigation.

The Importance of Thorough Due Diligence

Because of this heightened concern, it is imperative that companies conduct thorough due diligence about privacy and data security issues before entering into a transaction. The goals of the due diligence process should be to help the parties in a transaction understand (1) what promises and representations a company has made with respect to privacy and data security; (2) whether a company needs to obtain any consents from consumers, employees or others post-transaction to be able to use the personal information previously collected; (3) how the parties' information security programs are structured; (4) how the company has responded or could potentially respond to significant data breaches; and (5) the buyer's potential liability for privacy and data security issues post-closing.

To accomplish these goals, companies should prepare a comprehensive privacy and data security due diligence checklist that it can use for a variety of transactions. The checklist should (1) ask specific questions about privacy and data security issues, such as the types of personal information collected, the parties that may access such information and how such information is transferred within and outside the organization, and (2) request relevant privacy- and security-related materials such as privacy notices, information security policies and procedures, incident response plans, privacy and information security training materials, contracts with third-party service providers and any internal and external privacy compliance reviews, assessments or audits.

The due diligence checklist should be customized based on the profile of the target entity and the industry in which it operates. If personal information is at the heart of a transaction, the checklist will usually be quite granular and may involve the provision of ancillary documents such as data flow maps. In addition, certain types of companies such as health care providers and financial institutions must consider sector-specific rules that may impact the nature and structure of the transaction. Finally, the due diligence should also reflect scope, risk tolerance and timing considerations.

Any limitations on due diligence will need to be addressed, such as via the inclusion of more stringent privacy and data security provisions, in the transaction documents. This may include specified indemnities and an escrow account to address potential post-closing liabilities. Limited due diligence also raises the importance of disclosure schedules — inadequate or incomplete disclosure schedules make it difficult for companies to evaluate the risks associated with a transaction.

Lessons Learned

Companies that fail to conduct proper due diligence into privacy and data security issues in advance of a transaction may run into significant problems following the transaction. These problems may create financial liabilities or prohibit the buyer from using or disclosing customer personal information. Even more impactful, companies may be saddled with material costs related to privacy and data security, such as costs associated with data breach class action litigation, shareholder derivative litigation or government investigations. These post-closing costs often have the potential to destroy any cost-saving synergies that were the impetus for doing the deal in the first place.

PRIVACY & INFORMATION SECURITY LAW BLOG

www.huntonprivacyblog.com

Hunton & Williams' Privacy & Information Security Law blog focuses on global privacy and cybersecurity legal issues. This award-winning and top-ranked blog features current information and legal commentary on a broad range of related topics in the news, including the latest cybersecurity events, updates with respect to the EU General Data Protection Regulation, legislative activities and enforcement actions, EU-US Privacy Shield and other privacy issues.

BANKRUPTCY AND DISTRESSED TRANSACTIONS

J.R. Smith
Partner, Bankruptcy, Restructuring and Creditors' Rights, Richmond

Peter Partee
Partner, Bankruptcy, Restructuring and Creditors' Rights, New York

Justin Paget
Associate, Bankruptcy, Restructuring and Creditors' Rights, Richmond



The past year saw a continued wave of M&A activity in bankruptcy, with a pronounced focus on sales under Section 363 of the Bankruptcy Code and debt-for-equity swaps to preserve going concern value. Several years removed from the deep financial crises of the past decade, the unique features of the Chapter 11 bankruptcy process remain a proven driver of M&A activity, not solely an option of last resort for distressed companies. To be sure, liquidity constraints and financial distress remain key factors in corporate bankruptcies, but many companies today view Chapter 11 as a broader vehicle for pursing an acquisition, negotiating with holders of funded debt or deleveraging a balance sheet to attract new financing.

In 2016, particularly in the oil and gas and coal industries where distressed M&A activity was highly concentrated, many companies sought Chapter 11 protection with sufficient liquidity to fund the bankruptcy process, including in some instances without the need for post-petition financing. Another theme that emerged this past year was the prominent use of plan support agreements negotiated prior to the bankruptcy filing. In many instances, holders of funded debt and the debtor corporation reach agreement key terms of a reorganization plan or a sale of the company's assets prior to filing Chapter 11. The combined flexibility afforded companies entering bankruptcy with higher levels of liquidity and the support from key constituents resulted in a high success rate in preserving going concern value in Chapter 11. Compared to years past, distressed companies in today's market that seek Chapter 11 spend less time in bankruptcy and experience higher post-bankruptcy survival rates.

Lawyers in our bankruptcy, restructuring and creditors' rights practice represented debtors and creditors in many of the largest and most complex corporate restructurings in 2016. This included representing one of the four largest domestic coal companies in successfully selling part of its business and confirming a reorganization plan around its remaining mining operations. We also played key roles in three other coal bankruptcies since 2014, in addition to representing a midstream service provider in the bankruptcy of an oil and gas exploration and production company. Our work in this space was recognized with the M&A Advisor Restructuring Deal of the Year awards in both the "under $100 million" and "over $100 million" categories.

Nine of the Fortune 10 are current clients. More than one third of the current Fortune 100 are among our clients.

Industry Outlook

Fossil fuel industries saw a sharp uptick in bankruptcy filings and distressed transactions during 2016 as a result of persistent pricing weakness of the underlying commodities. Three of the five largest domestic coal producers filed bankruptcy within the last two years. In that same time period, more than 100 exploration and production companies and midstream service providers in the oil and gas industry sought bankruptcy protection, including in Texas, Delaware, New York and Virginia courts. Many of these cases resulted in assets sales within a few months of the bankruptcy filing, while the larger and more complex cases often concluded with a consensual restructuring of secured and unsecured debt within six months to a year. Those coal and oil and gas companies that avoided bankruptcy filings typically did so through an out-of-court restructuring of their debt.

Despite slow, but steady, overall economic expansion, the retail industry also endured an uptick in store closings, debt restructurings and bankruptcy filings. In the past year, numerous prominent retailers and household names sought Chapter 11 relief. These filings come on the heels of the slew of 2015 bankruptcies in the industry that included RadioShack (reportedly returning to bankruptcy in second quarter 2017), Quiksilver, American Apparel (having now filed again in 2016) and Wet Seal. Many of these companies encountered difficulties stemming from industrywide shifts in consumer preferences away from traditional brick-and-mortar retailers towards online sellers. Unlike the fossil fuel industry, retail companies have had considerably less success in reorganizing or pursuing an asset sale in bankruptcy court.

With commodities prices rebounding from their early 2016 levels, bankruptcy filings in the oil and gas sector have likely peaked. Coal prices also have stabilized and most outlooks for 2017 see a further rise in prices and a potential easing of regulations from the new administration. Conversely, the trend of retail bankruptcy filings likely will continue, as a Fitch Ratings report published in 2016 indicates that seven major retailers have a high risk of filing for bankruptcy within the next two years. Many retailers continue to struggle with the high cost base associated with a large real estate footprint. Compounding this problem is the potential for rising interest rates and the resulting inability of many of these companies to refinance debt on favorable terms. The health care, insurance and pharmaceutical sectors also could see an uptick in distressed transactions and bankruptcy filings in 2017. Some insurers have pulled coverage from state-level health insurance exchanges and there is much uncertainty surrounding the financial impact of the new administration's promise of repealing and replacing the Affordable Care Act.

2016 BANKRUPTCY AND DISTRESSED TRANSACTIONS M&A HIGHLIGHTS

Sample representations by our bankruptcy, restructuring and creditors' rights practice in 2016 include:

O.W. Bunker Holding North America, Inc. – Restructuring Deal of the Year over $100 million

We received the **M&A Advisor's Restructuring Deal of the Year (over $100 million)** in recognition of our representation of the Official Committee of Unsecured Creditors in the Chapter 11 bankruptcy of O.W. Bunker Holding North America, Inc., and affiliates in the District of Connecticut. Before abruptly filing for bankruptcy after the discovery of a massive internal fraud, O.W. Bunker was one of the largest international traders of bunker fuel, with operations in 29 countries. Led by lawyers **Peter S. Partee, Sr.**, and **Michael P. Richman**, the firm was able to negotiate a complex Chapter 11 plan that elicited the full cooperation of the company's secured creditor and resolved multiple conflicts between bankruptcy and maritime principles and proceedings, resulting in substantial distributions to unsecured creditors.

Health Diagnostic Laboratory, Inc. – Restructuring Deal of the Year under $100 million

We also received the **M&A Advisor's Restructuring Deal of the Year (under $100 million)** in recognition of our representation of Health Diagnostic Laboratory, Inc. (HDL) and affiliates in their Chapter 11 bankruptcy cases filed in the US Bankruptcy Court in Richmond, Virginia. The firm put HDL, a Richmond-based blood testing laboratory, into Chapter 11 bankruptcy to save the business following news of a Department of Justice investigation that saw its revenues drop precipitously. Led by **Tyler Brown** and **Jason Harbour**, our team's ingenuity ultimately helped to engineer HDL's sale to True Health Diagnostics, a Texas-based health care services company, and preserve more than 450 jobs.

Alpha Natural Resources, Inc.

We represented **Alpha Natural Resources, Inc.**, which filed for Chapter 11 protection in August 2015, in the US Bankruptcy Court in Richmond, Virginia. Alpha, the nation's fourth-largest coal producer, successfully emerged from bankruptcy in July 2016 as a smaller, privately held company operating 18 mines and eight preparation plants in West Virginia and Kentucky. Alpha's larger and more valuable properties were sold during the reorganization to Contura Energy, a new company formed by Alpha's first-lien lenders. A multidisciplinary team led by **Tyler Brown** and **Toby Long** helped achieve this result. **Greg Robertson** also represented Alpha in union negotiations that facilitated the sale of operating assets to Contura Energy.

Xinergy Ltd.

We represented a Central Appalachian coal producer in successfully completing its financial restructuring and emergence from Chapter 11. Xinergy, now **White Forest Resources, Inc.**, entered bankruptcy as a low-cost producer with an overleveraged balance sheet of more than $200 million in unsecured debt. Led by **Tyler Brown** and **Justin Paget**, the company restructured its debt through a debt-to-equity conversion and emerged with a new exit facility providing additional liquidity and a significantly deleveraged balance sheet.

Grand Large Yachting

A multidisciplinary team, led by **J.R. Smith** and **Kevin Georgerian**, represented **Grand Large Yachting**, a leading French custom yacht manufacturer, in its acquisition of the assets of Gunboat International out of its bankruptcy pending in the Bankruptcy Court for the Eastern District of North Carolina. Gunboat International was a world-renowned, blue-water catamaran yachting company. By utilizing a claim purchase acquisition strategy, Grand Large Yachting added a US brand and presence to its market-leading, French-based operations. The team continues to assist Grand Large Yachting with its US market rollout.

KEY CONTACTS

STEVE PATTERSON

Partner, Washington

+1 202 419 2101 | spatterson@hunton.com

GARY THOMPSON

Partner, Richmond

+1 804 788 8787 | gthompson@hunton.com