

From the minute it was announced in March 2011, AT&T Inc.'s \$39 billion bid for T-Mobile USA Inc. was the biggest M&A deal of the year. It hung on to that status until the day in December when it fell apart amid opposition from antitrust regulators, leaving AT&T on the hook for a \$4 billion breakup fee.

During its nine-month life, the proposed merger of the nation's number two and number four cellular telephone carriers generated plenty of work. Sullivan & Cromwell's Joseph Frumkin and Eric Krautheimer were lead deal lawyers for AT&T. Wachtell, Lip-

ton, Rosen & Katz's Adam Emerich and Steven Cohen advised Deutsche Telekom AG, T-Mobile's parent. Arnold & Porter and Crowell & Moring provided regulatory advice to AT&T, while Cleary Gottlieb Steen & Hamilton and Wiley Rein did the same for Deutsche Telekom.

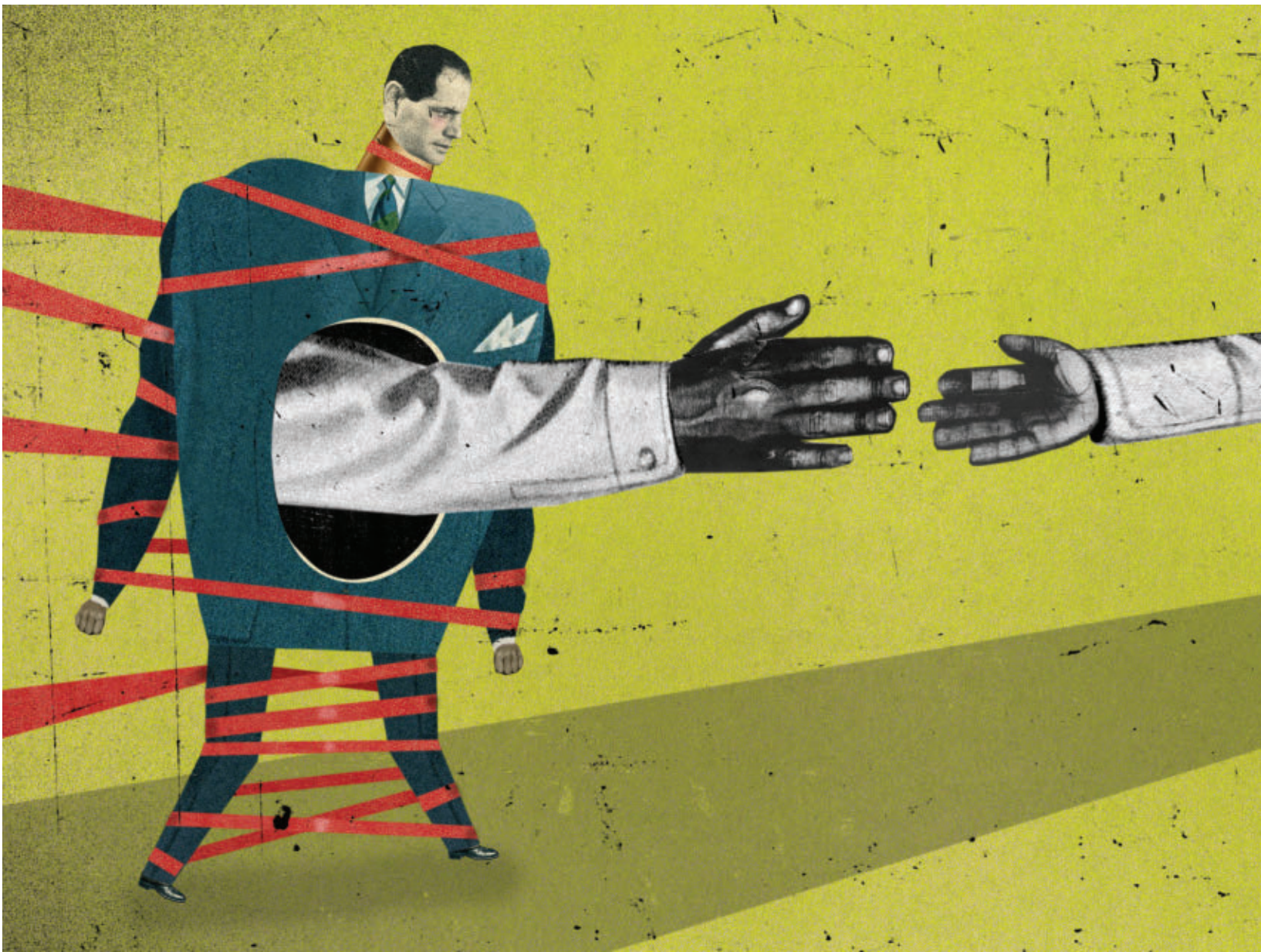
Although the AT&T/T-Mobile train wreck got most of the press, it was far from the only deal that failed under regulatory scrutiny in 2011. The Nasdaq OMX Group, Inc., and IntercontinentalExchange, Inc., which made an \$11.3 billion offer in April to take over NYSE Euronext, abruptly

abandoned its bid after U.S. regulators indicated that the proposed merger would violate antitrust laws. NYSE Euronext's next suitor, Germany's Deutsche Börse AG, got approval from American regulators for its \$7.4 billion acquisition of the exchange, only to see European regulators give it the

WITH STRINGS ATTACHED

Are regulators blocking more deals, or does it just seem that way?

••••• *By Victor Li*



thumbs-down. In November, U.S. regulators succeeded in blocking H&R Block, Inc.'s planned \$287 million acquisition of 2SS Holdings, Inc., which sells the TaxACT line of tax preparation software.

All of which raises the question: Has the U.S. become a regulatory minefield under the Obama administration, or are soured deals just getting more attention? The answer, it turns out, is a little of both.

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The numbers show an increase in challenges under Obama. In fiscal year 2008, the last full year of the Bush admin-

istration, the U.S. Department of Justice challenged 16 deals and issued consent decrees on 15. In fiscal 2010, the first full year of the Obama administration, the Justice Department challenged 19 deals and issued consent decrees on ten. (Federal fiscal years run from October 1 to September 30; the numbers are taken from Hart-Scott-Rodino annual reports.)

But the biggest change involves the strings that are attached to those consent decrees. Under Christine Varney, the Obama administration's first antitrust chief, the Justice Department became more willing to impose "behav-

ioral remedies"—arrangements in which companies agree to such conditions as modifications to business practices, divestiture of assets, and long-term compliance obligations to obtain merger approval. Several deals in 2011 were approved only after lengthy investigations and the imposition of such remedies. Comcast Corporation made its \$30 billion acquisition of NBC Universal, Inc., official in January 2011, for instance, but only after it agreed to give up day-to-day management of its video streaming Web site, Hulu, assuaging the Justice Department's concerns about the combination's potential impact on the online video streaming business. Regulators okayed Google Inc.'s \$700 million purchase of travel software company ITA Software, Inc., in April 2011, but only after Google agreed to continue licensing the software to other companies, among other concessions. And in August, VeriFone Systems, Inc., was allowed to proceed with its \$485 million purchase of rival Hypercom Corporation, but only after divesting Hypercom's point-of-sale terminals business.

Varney says that her use of behavioral remedies was meant to save deals that otherwise might have been blocked. "In every instance where there was a behavioral remedy, I was prepared to sue to block the deal" had the behavioral remedy not been employed, says Varney, who now chairs the antitrust practice at Cravath, Swaine & Moore. "I strongly believed that if you could cure the deficiency and keep the deal alive, then the government had an obligation to do it."

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Varney's predecessors in the Bush administration say that perceptions aside, increased reliance on behavioral remedies is the only difference between the Bush and Obama administrations' approaches to antitrust enforcement. Several big horizontal mergers

were rejected under Bush, including the proposed United Airlines, Inc.–U.S. Airways Group, Inc., deal in 2001 and the proposed EchoStar Corporation–DirecTV deal in 2002.

"It's clear to me that the Obama [Justice Department] has been more aggressive in forcing companies to sign deals [for behavioral remedies], and are recently somewhat more willing to go to court to challenge a deal," says Kirkland & Ellis of counsel Timothy Muris, who chaired the Federal Trade Commission from 2001 to 2004. "However, the vast majority of challenges lead to consent

decrees; there is no significant differences in the number of mergers actually stopped or abandoned."

Varney's predecessor as assistant attorney general for antitrust enforcement, Covington & Burling partner Thomas Barnett, disputes the notion that his antitrust department was less vigilant than Varney's. "[When I was at Justice] we would look at whether there was a problem and, if so, decide if the deal could be fixed," he says. "If not, then we'd seek to block it. That has been the consistent enforcement approach of the [Justice Department] across administrations."

Still, the heightened profile surrounding regulatory issues has started to affect merger agreements. Increasingly, sellers want to be compensated for loss of customers or employees or a diminution in value if a deal fails to close for regulatory reasons, says Steven Goldberg, cochairman of Baker & Hostetler's transactions practice group. Reverse breakup fees, litigation covenants covering which party has to pay if the government sues, and divestiture agreements will become more common, as companies seek to reduce their exposure, he says. After all, no client wants to follow in AT&T's footsteps as a cautionary tale.

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