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1. Pre-merger notification regime

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6. Following are some examples of Agency challenges to consummated mergers that were not subject to HSR notification.

7. On January 10, 2013, DOJ filed a lawsuit in U.S. District Court for the Northern District of California challenging the June 2012 acquisition of PowerReviews, Inc. by Bazaarvoice Inc. The complaint alleged that Bazaarvoice's acquisition of PowerReviews eliminated the company's only significant rival in the market for product ratings and reviews platforms used by U.S. manufacturers and retailers to display product ratings and reviews on their websites. DOJ began investigating the transaction within days of its closing after it learned of the consummated deal. On January 8, 2014, following a three-

10. In December 2010, the FTC, in an administrative proceeding, found that Polypore International, Inc.'s consummated acquisition of Microporous Products likely harmed competition in several markets for battery separators (which are key components of lead-acid batteries) and was therefore unlawful. The Commission ordered Polypore to divest Microporous to an FTC-approved buyer, and ordered a variety of ancillary relief provisions in support of the divestiture.[7]

11. In September 2009, Election Systems & Software, Inc. ("ES&S") acquired Premier Election Solutions, Inc., combining the two largest providers of voting equipment systems in the U.S. DOJ learned of the acquisition after consummation, and sued in March 2010, simultaneously filing an Asset Preservation Stipulation and Order, and a proposed Final Judgment. Given the diminution and dismantling of the Premier assets since ES&S acquired the company, relief that replicated the condition of Premier prior to the acquisition was not available. The final judgment required ES&S to divest (1) all the assets needed for an acquirer to compete in the voting equipment systems market, including intellectual property related to the Premier systems it had purchased; (2) tooling and fixed assets used to manufacture those systems; and (3) existing inventory and parts related to the Premier systems. ES&S was also required to divest a fully paid-up, non-exclusive, irrevocable license to certain products previously licensed to Premier. Other conditions intended to facilitate the acquirer's ability to compete included a waiver by ES&S of non-competition agreements for employees, and contractual terms that might otherwise prevent customers from selecting the acquirer for voting equiphe (prev)s2conexclrem

authority under Section 7 of the Clayton Act to review and challenge the underlying transaction and have done so in several instances. As noted in the answer to Question 7 below, Section 7 contains no time limit on challenging the underlying transaction.[15]

> ***If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.***

18. The Agencies have authority to investigate and challenge in court under Section 7 a transaction that parties have failed to properly report in accordance with the HSR Act. The remedy available in such circumstances is the same as for any Section 7 matter. The Agencies have obtaien311(g)2ble in such

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

20. In the U.S., the Agencies do not "clear" or "approve" mergers. Although they may issue a public statement upon closing certain investigations without taking enforcement action,[20] this is not in any legal sense an official "approval" and the statement creates no rights for the parties. If the Agencies later conclude that a merger may have anticompetitive consequences, they can file a complaint challenging the transaction.

21. In 1957, the Supreme Court upheld a 1949 DOJ suit challenging stock acquisitions that occurred in 1917-19,[21] although Clayton Act challenges so many years after a transaction are exceptional. The FTC's challenge to Chicago Bridge & Iron Company's (CB&I) acquisition of certain Pitt-Des Moines, Inc. (PDM) assets provides a useful example.[22] In September 2000, the parties notified the Agencies of the proposed acquisition pursuant to HSR. More than 30 days later, but before the parties executed the

22. The Agencies or private parties can also sue a merged firm that later engages in anticompetitive unilateral conduct, if monopoly power has been unlawfully acquired or maintained, under Section 2 of the Sherman Act. In the case of a merger that has been consummated following an Agency challenge and settlement pursuant to a consent decree, the Agencies could in theory petition the court to modify the decree if it were still in effect and circumstances had changed to the point that the merger was later producing anticompetitive effects. The parties and court would have to agree to any changes to the decree. This is different from a failure by a party to comply with the terms of an existing consent decree; the Agencies can always bring such a violation to the court's attention and seek appropriate sanctions and relief.