DEPARTMENT OF JUSTICE

Non-reportable Transactions and Antitrust Enforcement

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Thank you. I'm pleased to join you at this Colloquium to talk about the Antitrust Division's enforcement with respect to non-reportable and consummated transactions. Since I began serving at the division in July 2011, I've had the opportunity to work on a number of such matters, including several that resulted in enforcement action: *Bazaarvoice* (online product ratings and reviews platforms); *Blue Cross and Blue Shield of Montana* (commercial health insurance in several local markets), and the *Twin America* case (hop-on, hop-off bus tours in New York City), which we are litigating with our colleagues in the New York Attorney General's office.[1]

Today, I plan to explain how such transactions can significantly impact consumers, provide insight into how we approach enforcement for non-reportable and consummated transactions and offer suggestions as to how parties can constructively engage with the division.

I. NO ANTITRUST SAFE-HARBOR FOR NON-REPORTABLE DEALS

A. The HSR Act is Procedural

Since its enactment nearly four decades ago, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") – including its pre-merger reporting framework – has played a critical role in federal merger enforcement.[2] The HSR Act's procedural provisions provide the enforcement agencies the opportunity to investigate and remedy reportable transactions before they are consummated. This framework facilitates enforcement, reduces uncertainty and enables effective remedies by preventing the

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[1] U.S. v. Bazaarvoice, No.13-cv-00133 (N.D. Cal. Jan. 8, 2014); U.S. v. Blue Cross and Blue Shield of Montana Inc., No. 1:11-cv-00123 (D. Mont. March 15, 2012); U.S. v. Twin America LLC, No. 12-cv-8989 (S.D.N.Y. filed Dec. 11, 2012).

[2] *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. Law No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C § 18a); 16 C.F.R. Part 801 et seq. (implementing regulations).

scrambling of assets. Failure to comply with the HSR Act's notification and waiting period requirements can subject parties to stiff penalties for each day that the violation continues.[3]

The HSR reporting thresholds, however, are not synonymous with the contours of antitrust enforcement. Under Section 7, which was enacted decades before the HSR Act, the agencies can challenge transactions, before or after consummation, regardless of whether the transaction is subject to HSR notification. The ultimate question under Section 7 is whether the effect of a transaction "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce. [4]

B. Non-Reportable Transactions Represent a Significant Part of the Division's Merger Enforcement Activities

Between 2009 and 2013, the Antitrust Division initiated 73 preliminary inquiries into transactions that were not reportable under the HSR Act.[5] These investigations – including both consummated transactions and non-reportable deals that were brought to the division's attention before they closed – represented close to 20 percent of all the merger investigations opened by the Antitrust Division during that period. More than one in four of the division's investigations into these non-reportable deals resulted in a challenge. [6]

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[3] *See* 15 U.S.C. § 18a(g)(1). *See also, e.g.,* Press Release, Federal Trade Commission, Sara Lee Agrees to Pay Record Civil Penalty to Settle Charges Over Shoe-Care Product Acquisition (Feb. 6, 1996), *available at* http://www.ftc.gov/news-events/press-releases/1996/02/sara-lee-agrees-pay-record-civil-penalty-settle-charges-over-shoe. Civil penalties can and have been sought for violations of the HSR Act's notification requirements even if the underlying transaction is not anticompetitive.

[4] 15 U.S.C. § 18.

[5] The number of non-reportable transactions investigated annually has increased since 2000, partly as a result of the increased notification thresholds mandated by amendments made that year to the HSR Act.

[6] *See* Organisation for Economic Co-operation and Development, Investigations of Consummated and Non-Notifiable Mergers, Submission of the United States to the OECD Working Party No. 3 on Co-operation

C. Non-Reportable Transactions Can Substantially Harm Competition

This record of careful scrutiny is warranted. Potential harm to consumers can't be measured just in terms of the size of a transaction or the balance sheets of the merging parties. Also, some transactions are non-reportable for reasons other than the size of the deal or merging companies. Let me offer a few examples of ways that a non-reportable transaction can have a significant impact on consumers.

A non-reportable merger might pose a significant risk of antitrust harm to consumers in local or regional markets. For example, in *U.S. v. Blue Cross and Blue Shield of Montana*, the division and the state of Montana challenged a non-reportable agreement – valued at $26.3 million – that would have eliminated important competition between Blue Cross and Blue Shield of Montana and New West, which competed to provide commercial health insurance in four local markets in Montana.[7] The division's enforcement action effectively preserved competition, helping to restrain healthcare costs for thousands of consumers in those markets. In its public comment filed in support of the remedy obtained in that case, the American Medical Association noted that the deal would have "led to higher prices and lower quality service for consumers" and "applaud[ed] the DOJ for…fashioning a remedy that holds the promise of nurturing competition in Montana."[8]

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and Enforcement, at 3 (Feb. 25, 2014), *available at* http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)23&docLanguage=En.

[7] *See generally*, Complaint, U.S. v. Blue Cross and Blue Shield of Montana Inc, No. 1:11-cv-00123 (D. Mont. March 15, 2012) (filed Nov. 8, 2011), *available at* http://www.justice.gov/atr/cases/f277100/277177.pdf .

[8] American Medical Association, Comments to Proposed Consent Judgment in U.S. v. Blue Cross and Blue Shield of Montana, Inc., et al. [FR Doc. 2011-29656], Jan. 13, 2012, *available at* http://www.justice.gov/atr/cases/f280300/280388b.pdf.

Similarly, the loss of competition in a narrow product market may have a broad impact. One such example is *U.S. v. Election Systems and Software Inc*, the 2010 lawsuit by the division and nine states, challenging the consummated merger of the two largest providers of voting equipment systems in the United States. By requiring divestitures sufficient to equip an economically viable competitor, the settlement the division and nine attorneys general achieved helped restore the incentives for market participants to provide accurate, reliable and secure voting systems.[9] Although the transaction was priced at just $5 million, plus certain receivables, the issues at stake were significant. As noted in the complaint, the failure of voting equipment systems on election day could "affect the integrity of the democratic process."[10]

Furthermore, the practical impact of relatively small transactions can be magnified where the relevant product is a key input to, or used in the production of, a downstream product. For example, earlier this year the division challenged Heraeus' consummated acquisition of Minco. While that deal was valued at $42 million, it significantly reduced competition in the sale and service of single-use sensors and instruments, which are essential to the manufacture of millions of tons of steel annually. By restoring competition the acquisition eliminated, the division's enforcement action helped protect the continued quality, reliability and performance of these products, which are critical to a major manufacturing process. [11]

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[9] *See* Complaint ¶2, U.S. v. Election Systems and Software Inc., No. 1:10-cv-00380 (D.D.C. June 30, 2010) (filed March 8, 2010), *available at* http://www.justice.gov/atr/cases/f256200/256275.pdf.

[10] *Id.* ¶11.

[11] *See generally* Complaint, U.S. v. Heraeus Electro-Nite LLC, No. 1:14-cv-0005 (D.D.C. April 7, 2014) (filed Jan. 2, 2014), *available at* http://www.justice.gov/atr/cases/f302700/302724.pdf; Press Release, U.S. Dep't. of Justice, Justice Department Requires Heraeus Electro-Nite LLC to Divest Assets Acquired from

Similarly, in challenging Microsemi's 2008 acquisition of Semicoa –a company with $15 million in sales the prior year – the division concluded that the acquisition would likely result in reduced "quality of service" and increased "supply vulnerability", as well as higher prices, for customers of the companies' semiconductor devices.[12] The ramifications of such likely competitive harms were enlarged, because the Department of Defense and NASA relied on these devices for programs essential to our nation's security, including many of "the largest and most complex military applications ever designed, ranging from satellites to submarines."[13] The remedy the division obtained, including divestiture of all the assets Microsemi acquired from Semicoa, restored the competitive incentives for Microsemi and others to provide responsive service and timely delivery of these critical products to the Department of Defense, NASA, and other customers.

D. Identifying Non-Reportable Transactions that Raise Competitive Concerns

Merging parties should assume that, even if no HSR filing is required, a deal that presents competitive concerns is unlikely to escape agency attention.[14] We learn about potentially problematic non-reportable transactions in a number of ways.

Midwest Instrument Company Inc to Keystone Sensors LLC (Jan. 2, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/302701.htm.

[12] Press Release, U.S. Dep't. of Justice, Justice Department Files Antitrust Lawsuit Against Microsemi Corporation (Dec. 18, 2009), *available at* www.justice.gov/atr/public/press_releases/2008/240549.htm.

[13] Complaint ¶ 1, U.S. v. Microsemi, No. 1:08 CV 1311 (E.D.Va. Jan. 29, 2010) (filed Dec. 18, 2008), *available at* http://www.justice.gov/atr/cases/f240500/240537.htm.

[14] Our enforcement colleagues at the FTC leverage similar sources and methods to identify potentially problematic mergers that fall below the HSR reporting thresholds. *See* Interview with Chairwoman Edith Ramirez, The Threshold, Volume XIV, No. 2, A.B.A. Sec. of Antitrust Law (Spring 2014), ("[W]e typically learn about potentially problematic mergers from a variety of sources, including state attorneys general, commercial health plans, others in the marketplace, media reports, and our own monitoring.").

First, each of the division's six civil litigation sections has responsibility for enforcement and policy with respect to a set of industries or commodities.[15] Our lawyers – as well as our economists – actively monitor developments in their assigned areas. For example, the division's preliminary investigation into Bazaarvoice's consummated acquisition of PowerReviews was opened after a division attorney read about the deal in a trade publication.

Our staff have developed numerous contacts in the industries they monitor. We often learn about non-reportable transactions directly from marketplace participants. For example, the division opened its investigation into Heraeus' acquisition of Minco after steel producers approached the division to express concern that the deal would harm competition.[16]

Sometimes we learn about non-reportable transactions that raise competitive concerns from the merging parties themselves. For reasons I'll discuss further, such voluntary notification has benefits for the parties as well as for the division.

II. ANTITRUST REVIEW OF CONSUMATED TRANSACTIONS

A. No Separate Legal Standard for Consummated Transactions

Once identified, the division will review non-reportable transactions by applying well-established antitrust law and principles.[17] We will consider any reasonably

[15] A list of the commodities and industries assigned to each of the civil sections is available on the Antitrust Division's public website. *See, e.g.,* http://www.justice.gov/atr/about/lit1.html (Litigation 1 Section responsible for health care, insurance, pulp, paper, timber, appliances, food products, beer, cosmetics, health care, and bread.).

[16] *See* Heraeus Complaint, *supra* note 11, ¶ 6.

[17] The FTC has likewise recognized that the legal analysis of a consummated merger does not differ significantly. Fed. Trade Comm'n, Statement of Federal Trade Commission Bureau of Competition on

available and reliable evidence that addresses the central question of whether a merger may substantially lessen completion.[18]

Judge Orrick's decision in *U.S. v. Bazaarvoice*, is the latest decision to confirm that standard Section 7 principles apply to consummated deals. The court rejected Bazaarvoice's claim that the Ninth Circuit's decision in *U.S. v. Syufy* established an "alternative methodology" for assessing Section 7 cases involving consummated mergers.[19] Rather, the court said, the well-established methodology for reviewing Section 7 claims applies with equal force in pre- and post-acquisition cases.[20]

1. Proof of Post-Merger Anticompetitive Effects is Not Necessary

In particular, the court rejected Bazaarvoice's argument that "the government cannot carry its burden if post-merger evidence shows continued price competition and innovation or if 'affected customers have testified the merger is not harmful.'" [21] Quoting the Supreme Court opinion in *U.S. v. General Dynamics*, Judge Orrick explained that if the lack of post-merger effects constituted a permissible defense to a Section 7 case, then "violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending."[22] Noting clear

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Negotiating Merger Remedies, at 4 (Jan. 2012), *available at* http://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[18] *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 2 (Aug. 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[19] United States v. Bazaarvoice, No.13-cv-00133, slip. op. at 138 (N.D. Cal. Jan. 8, 2014), *available at* http://www.justice.gov/atr/cases/f302900/302948.pdf. As Judge Orrick noted, the dispositive factor in *Syufy* was the lack of meaningful barriers to entry there – a conclusion buttressed by significant evidence of post-acquisition entry into that market. Consideration of this evidence, Judge Orrick reasoned, was consistent with standard Section 7 precedent. *Id.* at 138-39.

[20] Bazaarvoice Slip Opinion, *supra* note 19, at 139.

[21] *Id.* at 138.

[22] *Id.* at 136 (*quoting* United States v. General Dynamics Corp., 415 U.S. 486, 504-05 (1974)).

evidence that Bazaarvoice was aware of the division's scrutiny of the merger, Judge Orrick concluded that the evidence regarding post-acquisition pricing was reasonably viewed as manipulatable by Bazaarvoice, and therefore entitled to little weight.[23]

This approach matches the guidance set forth in the 2010 Horizontal Merger Guidelines, which counsel that the agencies may find that a consummated merger may be anticompetitive even if post-acquisition effects have not yet been observed.[24] Like Judge Orrick, the Merger Guidelines recognize that the merged firm may well be moderating its conduct in light of post-merger antitrust review.[25]

2. Proof of Post-Merger Anticompetitive Effects Can be Highly Probative

On the other hand, post-acquisition evidence of anticompetitive effects – such as price increases or output reductions – is not subject to the same concerns about manipulation. For this reason, the division gives substantial weight to evidence of observed post-merger price increases or other changes adverse to customers. As the Merger Guidelines further note, the agencies evaluate whether such increases are the anticompetitive effects of the merger, and if so, that can be dispositive evidence.[26]

One matter in which we saw such evidence was the division's investigation of the Microsemi/Semicoa transaction. Our team learned that Microsemi moved quickly in the wake of the deal to raise prices and impose less favorable terms of service on its

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[23] Bazaarvoice Slip Opinion, *supra* note 19, at 108.

[24] *See* HMGs, *supra* note 18, § 2.1.1.

[25] *Id.*

[26] *Id.* The division will investigate other potential explanations for such price increases – including whether they may be justified by rising input costs.

customers.[27] Just one month after the acquisition, Microsemi warned the Department of Defense and NASA to expect future annual price increases in the "low teens." Microsemi also imposed a significant price increase on at least one major aerospace manufacturer and threatened to retaliate against that customer for cooperating with the division's investigation.[28]

3. Other Post-Merger Evidence that is Not Subject to Manipulation by the Parties Can be Probative

The division will also appropriately credit otherwise relevant and reliable post-merger evidence that is not arguably subject to manipulation by the merged firm. For example, evidence of actual entry post-merger might suggest that a merger is unlikely to significantly harm competition. Of course, as the Merger Guidelines explain, evidence of actual entry must show that entry barriers are sufficiently low that entry will be timely, likely and sufficient to deter or counteract any anticompetitive effects that would otherwise result from the transaction.[29]

B. Pre-Merger Evidence Remains Central to the Analysis of Consummated Transactions

Even in consummated mergers, the division often places significant weight on the pre-merger business records of the merging parties as well as other industry participants. As the Merger Guidelines recognize, documents created in the normal course are generally more probative than those prepared as advocacy materials in connection with a

[27] Microsemi Complaint, *supra* note 13, ¶38.

[28] Memorandum of United States in Support of Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, at 3, U.S. v. Microsemi, No. 1:08 CV 1311 (E.D. Va. Jan. 29, 2010) (filed Dec. 22, 2008), *available at* http://www.justice.gov/atr/cases/f240600/240668.htm#_1_1 .

[29] HMGs, *supra* note 18, §9.

merger review.[30] The division gives careful consideration to whether these documents reflect the view of employees with responsibility, expertise and experience over the subject matter.[31]

Company business records helped establish many of the key elements of the government's Section 7 case against Bazaarvoice. Emails, memos and presentations created by the company's senior executives showed that prior to the transaction, Bazaarvoice viewed PowerReviews as the company's only significant competitor.[32] They also demonstrated that pre-merger competition between Bazaarvoice and PowerReviews had resulted in lower prices and increased innovation. One Bazaarvoice executive wrote that PowerReviews was "an ankle-biter that cause[d] price pressure in deals" and described how customers used PowerReviews as a "lever to knock [Bazaarvoice] down on price."[33] Other documents directly addressed entry. In one Bazaarvoice document cited by Judge Orrick, a company executive recognized the existence of "significant barriers to entry," and noted that it "would be very difficult for a new company to enter our market organically or through M&A."[34]

While not necessarily outcome determinative, documents evidencing anticompetitive intent can be highly probative. The *Bazaarvoice* trial was notable for the extraordinary number of internal documents showing that the goal of the merger was to eliminate competition. As Judge Orrick described, "anticompetitive rationales infused

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[30] *Id.* § 2.2.1.

[31] *Id.*

[32] *See e.g.*, Bazaarvoice Slip Opinion, *supra* note 19, at 21.

[33] *Id.* at 23.

[34] *Id.* at 93.

virtually every pre-acquisition document describing the benefits of purchasing PowerReviews."[35] For example, one senior Bazaarvoice executive predicted that acquiring PowerReviews would "[e]liminat[e] [Bazaarvoice's] primary competitor" and enable the combined firm to "avoid margin erosion" caused by "tactical 'knife-fighting' over competitive deals."[36]

There are sound reasons to give substantial weight to these sorts of internal documents.[37] Executives of the merging parties are often knowledgeable about the markets in question. Where they are contemplating a major financial investment – such as a merger or acquisition – they may be motivated to accurately evaluate the likely impact of the transaction on pricing, profitability or output. The division will also appropriately credit normal course pre-merger business records that tend to substantiate a merged firm's arguments or defenses. For example the division may place weight on internal bidding records showing that pre-merger, one of the merging firms routinely cut prices in response to aggressive bidding by other competitors. Likewise, documents establishing that a company sought unsuccessfully to achieve certain efficiencies on its own may help establish that certain claimed efficiencies are truly merger-specific.

III. REMEDYING CONSUMATED TRANSACTIONS

The Antitrust Division applies the same remedial principles to consummated merger transactions that we do in all Section 7 cases. We look to remedy an unlawful consummated deal in a fashion that restores competition and deprives the acquirer of

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[35] *Id.* at 36. *See generally id.* at 29-36.

[36] *Id.* at 29.

[37] *See* HMGs, *supra* note 18, § 2.2.1.

unlawfully obtained market power.[38] Our approach is highly matter-specific, based on careful application of legal and economic principles to the particular facts involved.

A. Consummated Transactions Can Pose Unique Remedy Challenges

Crafting an effective remedy many months after a merger closes is often not a simple proposition, however. In fact, the challenges inherent in remedying consummated merger transactions were a key consideration when Congress enacted the HSR's pre-merger notification provisions.[39] As Congress recognized then, following a merger the acquired firm's assets may be sold or combined with those of the acquiring firm, and its personnel and management may be moved, retrained or simply discharged. In these ways, with the passage of time, the acquiring and acquired firms can become "scrambled."[40]

B. A Structural Remedy is Appropriate in the Vast Majority of Cases involving Horizontal Mergers

Notwithstanding these challenges, the division is committed to obtaining effective remedies in consummated merger cases. In the vast majority of horizontal mergers, including non-reportable matters, the division will pursue a structural remedy.[41] A

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[38] *See* Bill Baer, Asst. Att'y Gen., Antitrust Division, Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes, at 4, Remarks as prepared for the Georgetown Law 7th Annual Global Antitrust Enforcement Symposium, Sept. 25, 2013, *available at* http://www.justice.gov/atr/public/speeches/300930.pdf.

[39] As described in the legislative history, debate over the law took place in the wake of the government's long-running 1957 challenge to El Paso Natural Gas Company's consummated acquisition of Pacific Northwest Pipeline. In 1964, after seven years of litigation, the Supreme Court held that the acquisition violated Section 7 and directed the district court to "order divestiture without delay." United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964). Yet, it took another decade of litigation, and significant government and judicial resources, before the divestiture finally occurred. *See* H.R. Rep. No. 1373, Antitrust Premerger Notification Act, Committee on the Judiciary, 94th Cong., 2d Sess. 11, at 10 (1976) ("[T]he litigation spawned by the El Paso natural gas merger lasted seventeen years, and went to the Supreme Court six times, before the illegally-acquired firm was successfully divested. But the costs – to the firms, the courts, and the marketplace – were immense.").

[40] H.R. Rep. No. 1373, *supra* note 39, at 8.

[41] *See* U.S. Dept. of Justice, Antitrust Division Policy Guide to Merger Remedies, at 4-5, (June 2011) *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf ; *see also* Fed. Trade Comm'n,

divestiture should include all of the assets necessary for the purchaser to be an effective, long-term competitor. Experience has shown that a structural divestiture of an existing, stand-alone business – with the demonstrated ability to compete – is the surest way of preserving or restoring competition in an affected market.

Where the parties have already begun the integration of assets, the division will consider seeking an order requiring the merged firm to "unscramble the eggs" to create an effective, stand-alone competitor.[42] The FTC has effectively employed this approach to remedy a consummated merger.[43]

Remedying a consummated merger can also be more challenging if the acquired firm's assets have been rendered obsolete or insufficient by the passage of time. In those circumstances, a court can order a defendant to sell additional assets beyond those it acquired through the unlawful transaction.[44] The division took this approach to remedy the voting equipment systems merger. The division's remedy required that Election Systems & Software divest the assets it bought from Premier Election Solutions, as well as grant the divestiture buyer a "fully paid-up, non-exclusive, irrevocable license" to sell, modify and improve the acquirer's own ballot marking device, so the buyer could better

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Statement of Federal Trade Commission Bureau of Competition on Negotiating Merger Remedies, at 4 (Jan. 2012) ("The Commission's objective in all cases is to eliminate, to the extent possible, the anticompetitive effects that will result or have resulted from the merger, which most often requires divestiture."), *available at* http://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[42] *See* Baer, *supra* note 38, at 4.

[43] *See* Chicago Bridge & Iron Co. N.V. v. Federal Trade Commission, 534 F.3d 410, 441-42 (5th Cir. 2008) (upholding an FTC order requiring the defendant to reorganize itself into two separate businesses and allocate in-progress contracts between the two firms).

[44] *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 136-37 (1967) (directing the district court to craft a divestiture order that would require the defendant to sell new gas reserves the defendant developed after the merger); United States v. Alcoa, 247 F. Supp. 308 (E.D. Mo. 1962), *aff'd,* 86 S.Ct. 24 (1965) (requiring the defendant to sell a plant constructed after the acquisition).

serve voters with disabilities. The division found that this technology was critical to the competitive success of the divestiture buyer.[45]

An up-front buyer is another tool that can be useful in remedying consummated transactions where there is no longer an existing, stand-alone business unit to be divested. Identification of an up-front buyer allows the division the opportunity to carefully evaluate whether a proposed buyer will be able to compete effectively with the particular package of assets to be divested.[46] The division utilized an up-front buyer to resolve its competitive concerns in *U.S. v. Heraeus*. By the time the United States learned of that transaction, Heraeus had already begun to integrate Minco's assets and terminated key employees.[47] It was therefore impossible to divest an existing, intact business. The United States enhanced the structural remedy in that case by requiring sale to an up-front buyer with relevant industry experience, who is well positioned to compete using the divestiture assets.[48]

C. Division May Seek Conduct Remedies to Strengthen a Structural Fix

Where necessary to restore competition, the division may also seek to impose additional commitments on the defendant.[49] For example, in markets where experienced personnel are critical, the division may require the defendant to take steps to facilitate the

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[45] Competitive Impact Statement, at 11, U.S. v. Election Systems and Software Inc., 1:10-cv-00380 (D.D.C. June 30, 2010) (filed March 8, 2010), *available at* www.justice.gov/atr/cases/f256200/256273.pdf.

[46] Merger Remedies Policy Guide, *supra* note 41, at 8-9.

[47] Competitive Impact Statement, at 9, U.S. v. Heraeus Electro-Nite Co. LLC, No. 1:14-cv-0005 (D.D.C. April 7, 2014) (filed Jan. 2, 2014), *available at* http://www.justice.gov/atr/cases/f302700/302722.pdf.

[48] *Id.* at 10-11.

[49] Merger Remedies Policy Guide, *supra* note 41, at 18-19 (conduct relief may be necessary to "perfect structural relief" or to "effectuate or bolster a structural remedy").

hiring of key personnel by the divestiture buyer.[50] In *U.S. v. Heraeus*, the division required Heraeus to waive non-compete provisions in certain employment contracts so that the acquiring firm could hire experienced former employees with necessary skills.[51] Similarly, in *U.S .v. Elections Systems & Software*, the merged firm was required to waive non-competition and non-disclosure agreements for current and former Premier Election Solutions employees and prohibited from interfering with the divestiture buyer's efforts to recruit these employees.[52]

Likewise, restoring competition may require that the merged firm waive customer contracts that were negotiated without the benefits of competition, or which would inhibit a divestiture buyer from competing effectively. Customers who enter into supply or service contracts in the wake of an anticompetitive transaction may receive inferior terms, or have preferred to contract with the firm that was eliminated. And, these contracts may effectively lock-up a significant portion of customer demand – preventing the divesture buyer from obtaining the scale necessary to be an effective competitor. In appropriate circumstances, the division will consider requiring the merged firm to release some or all of its customers from their contracts.

D. Disgorgement

As the division's Policy Guide to Merger Remedies makes clear, the division also may consider seeking disgorgement in consummated merger challenges. Even where the division seeks divestiture, it may consider seeking disgorgement where a firm reaps the benefits of reduced competition during the period before the remedy takes effect,

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[50] *See id*.

[51] See Heraeus Press Release, *supra* note 11.

[52] ES&S CIS, *supra* note 45, at 12.

particularly where the defendant is otherwise likely to retain the unlawful profits.[53] The division will evaluate disgorgement on a case-by-case basis and will be mindful of relevant changes in the broader legal landscape, which could, for example, affect the likelihood of success of private damages suits.[54]

IV. THE BENEFITS OF SELF-REPORTING AND CONSTRUCTIVE ENGAGEMENT

With these issues in mind, I'll wrap up by offering a few steps that parties or their counsel can take to facilitate constructive engagement with the agency and to reduce the potential disruption caused by a remedy to an unlawful transaction.

First, company executives and lawyers evaluating possible non-reportable transactions should take potential antitrust issues seriously. Recent enforcement efforts illustrate the division's commitment to identifying and challenging non-reportable deals that are likely to harm competition. Though the vast majority of non-reportable mergers do not raise competitive concerns, caution may be warranted where, for example, the transaction involves a niche product or narrow geographic market. Indications that a contemplated merger is being viewed as an opportunity to end margin erosion, reduce pricing pressure, or eliminate a key competitor should also raise red flags. As Assistant Attorney General Bill Baer has noted, "[t]he business community, consumers, and antitrust enforcers all are better off if anticompetitive mergers die on the drawing board."[55]

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[53] Merger Remedies Policy Guide, *supra* note 41, at n9.

[54] Baer, *supra* note 38, at 10.

[55] *See* Bill Baer, Asst. Att'y Gen., Antitrust Division, Reflections on Antitrust Enforcement in the Obama Administration, at 13, Remarks as Prepared for Delivery to the New York State Bar Association, Jan. 30, 2014, *available at* http://www.justice.gov/atr/public/speeches/303269.pdf.

Second, if a deal does raise potential antitrust concerns, I encourage parties to consider approaching the division before closing. In a post-acquisition challenge, the acquirer may bear the risk of the remedy alone, rather than sharing it with the seller. Moreover, where assets have become scrambled, an effective remedy to an unlawful transaction may well necessitate disruption of the combined company's operations, might require divestiture of assets beyond those acquired in the underlying deal, and could even potentially entail disgorgement.

Third, once a transaction does come to the division's attention, constructive engagement is crucial. A strategy of delay is short-sighted; it may draw out the review process, but will not deter the division from taking action it deems necessary to protect consumers. We can work with parties to design a mutually agreeable investigative plan that gives the division reasonable time to investigate, but also provides the parties with predictability and the opportunity to provide evidence of any pro-competitive benefits. If a transaction is closed, we can enter a hold-separate or asset preservation agreement, which can benefit the merged firm as well as help facilitate the restoration of competition, should a divestiture ultimately be required.

Furthermore, think proactively about remedy. Delay does not correlate with quicker or more favorable outcomes for the merging parties.[56] As with all transactions, early and constructive engagement with the division often helps the parties to a non-reportable transaction resolve our competition concerns on terms and timing they find palatable. For example, in *Blue Cross and Blue Shield of Montana,* the division, along with the Montana Attorney General's office, obtained a settlement that preserved

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[56] *See* Baer, *supra* note 38, at 3.

competition, while enabling the deal to close in November 2011, just a few months after the parties' August 2011 letter of intent.

I appreciate your attention. Thanks also to Professor Spencer Weber Waller and the Institute for Consumer Antitrust Studies for the invitation to participate in the Colloquium.