



# DOJ Merger Review In An Economic Downturn

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# Current Statistics

- Decrease in the Number of Reportable Transactions
  - In FY'09 approximately 40% of the HSRs in FY'08
  - In FY'09, more than 6% of all HSR's resulted in merger investigations (4% in FY'08)
    - Not enough to call a trend
- Number of Second Requests
  - In FY'09 – slightly more than 2% of all HSR's
  - In FY'08 – slightly more than 1% of all HSR's
- Increase in Review of Consummated Transactions

# Enforcement Priorities

- Antitrust enforcement is policy-driven and practical
  - Undertake enforcement tasks with a view to the broader implications of each matter
  - Consider the best vehicle for advancing our mission
    - Straight-forward; we should sue to challenge an activity or transaction
    - Fostering an inter-agency discussion about the best way to address a competitive concern or supporting (or opposing) a legislative solution
    - Give a speech or publish an article and let the market police itself based on that message

# Enforcement Priorities

- AAG Varney has identified several industries of interest: agriculture, telecom, newspapers, financial institutions and technology
  - Does not mean automatic lawsuits – it means they are worth studying to understand the nature and consequence of the change taking place
  - Meet with industry participants and hear their concerns

# Enforcement Priorities

- Current Enforcement Policy
  - Taking a real world view of whether we can win a case
  - Working with parties to identify creative solutions to settlements and business obstacles to them
  - Trying to be responsive to business concerns based on financial conditions
    - Not holding back, but more flexibility on issues like timing of remedy implementation

# Antitrust Enforcement During Times of Financial Distress

- Vigorous antitrust enforcement must play a significant role in the Gov't's response to economic crises to ensure markets remain competitive
  - *See* Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era – Remarks as Prepared for the United States Chamber of Commerce (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711>.
- Keeping markets competitive is no less important during times of economic hardship
  - *See* Carl Shapiro, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Competition Policy in Distressed Industries (May 13, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245857>.
- The Division has and will continue to vigorously enforce the antitrust laws during tough economic times

# Bank Merger Review

- Application of antitrust analysis to merger of financially troubled institutions
- The Bank Merger Act and the Bank Holding Company Act provide two procedures for expedited review
  - Emergency Procedures 10/5
  - Probable failure

# Bank Merger Review

- Ability to conduct expedited and effective reviews
  - Availability of large volumes of information and data from public sources
  - Bank application screening process
  - Announced principles for the competitive review of bank mergers
  - These processes are employed even when bank transactions are classified as emergencies or probable failures

# Bank Merger Review

- Benefits to the Merging Parties
  - The transparency of the competitive review process
  - Availability of reliable public information
  - Close working relationship between DOJ and the bank regulatory agencies
  - As a result of these factors, antitrust review of U.S. bank mergers continues to be relevant and effective even in times of financial industry crisis

# Review of Banking Transaction PNC/National City

- National City was ailing, not failing or flailing
- PNC acquires National City for \$5 billion
- Competitive review was unchanged – just faster
  - Evaluated the transaction with the same banking “microscope”
  - No pass for financially distressed times
    - If transaction is anticompetitive, it is still viewed as anticompetitive
    - Financial distress is one of many factors that we look at in evaluating the transaction
- Still required divestitures
  - 61 branches with deposits of \$4 billion
  - Process and remedy the same as with previous bank transactions

# Review of Matter in Bankruptcy Sapa/Indalex

- Background
  - Proposed \$150 million transaction
  - Indalex was in bankruptcy
  - Manufacture and sale of aluminum sheathing (coiled extruded aluminum tubing) used in the manufacture of high frequency coaxial cable

# Review of Matter in Bankruptcy Sapa/Indalex

- Investigative Process
  - Still review transaction under Merger Guidelines
  - Bankruptcy does not affect the scope of the review, but it will affect the speed in which a review is conducted
    - Less time to engage the agency in substance of proposed transaction
    - Also less time to evaluate prospective assets
      - Still time to vet Acquirer
  - Ultimately resulted in a settlement where divestitures were ordered
  - Substantive process not different, just faster

# Investigation of a Consummated Transaction

## *U.S. v. Microsemi*

- Consummated, non-reportable transaction
  - Consummated on July 14, 2008
  - Sued to unwind on December 18, 2008
- Eliminated competition in small signal transistors and ultrafast recovery rectifier diodes
  - Used in critical military and aerospace applications
  - Small transaction, with large effects in significant programs

# Timing of Review

- Review process of consummated transactions vs. HSR
  - There are timing detriments and benefits to both the agency and the merged entity
  - The length of the investigation
    - If no timing agreement – length of review
    - Does agency have to be prepared sooner

# *U.S. v. Microsemi* conclusion

- Reached Settlement
- Filed on August 20, 2009
- Sell the Semicoa Assets