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I. INTRODUCTION

In 2012, the U.S. antitrust agencies fulfilled their mission of reestablishing themselves as aggressive antitrust enforcers. Second Request investigations have increased by more than 50 percent, and the percentage of merger challenges has more than doubled during the Obama administration. Recent developments in the last quarter of 2012 are a testament to this era of heightened scrutiny and active litigation efforts. In October, for example, the parties in *3M/Avery Dennison* abandoned their transaction after being informed that the Department of Justice planned to block the deal.

Looking ahead, while the leadership of the agencies is transitioning—a new Assistant Attorney General (William Baer), a new FTC Commissioner (Joshua Wright), and possibly a new FTC Chairman in the near future—we do not expect any major policy shifts. The trend of tougher and broader enforcement will continue in 2013. Moreover, we expect that certain industries—high-tech and healthcare in particular—will continue to receive significant antitrust attention in 2013. Accordingly, it remains paramount that parties involved in strategic transactions consider and prepare for addressing the potential antitrust implications early on in the process.

Following are some notable highlights and takeaways from the agencies' most recent activity.

II. THE GOVERNMENT IS LITIGATING TO WIN

Both agencies have bolstered their litigation capabilities and demonstrated an increased willingness to engage the courts. On the heels of successful litigation efforts blocking deals in *AT&T/T-Mobile* and *H&R Block/TaxACT*, DOJ now has within its arsenal a credible threat and weapon. In September 2012, Acting Assistant Attorney General Joseph Wayland noted that the DOJ is “prepared to go to court to block mergers that may potentially lessen competition . . . And when we file a lawsuit, we litigate to win . . . People have to understand that we are willing to litigate cases. People shouldn't think that going up against DOJ trial lawyers is [a cakewalk].” This has led companies and their counsel to recalibrate antitrust risk levels in deals and, according to DOJ, to abandon questionable transactions.

In October, for example, shortly after DOJ decided to file a complaint to block 3M Company's proposed \$550 million acquisition of competing sticky notes and labels manufacturer Avery Dennison Corporation—a combination that would have given 3M more than an 80 percent share of both the U.S. sticky note market and label market—the parties abandoned their transaction.

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Similarly, on the FTC front, in the face of an FTC administrative suit announced in late December 2012 challenging IDT Inc.'s \$330 million proposed acquisition of PLX Technology, Inc., the parties quickly abandoned their transaction. According to the FTC, the parties had over 80 percent combined market share for certain complex integrated computer circuits.

Among other notable developments on the litigation front last quarter were the Federal Trade Commission's arguments before the Supreme Court—which has not issued a decision in a merger case since 1974—in *FTC v. Phoebe Putney*. The Supreme Court is considering whether Phoebe Putney, which is operated by a hospital authority system established by the Georgia legislature, is immune from antitrust law pursuant to the “state action exemption,” which exempts certain state sanctioned conduct from the antitrust laws. Absent the “state action exemption,” the transaction would have created an unlawful monopoly.

The *Phoebe Putney* case also illustrates the FTC's tough enforcement in health care matters, particularly hospital mergers where the Obama FTC has challenged ten hospital mergers, including two this quarter (*Renown Health/Reno Heart Physicians*; *United Health Services/Ascend Health*).

The agencies' litigation efforts will continue to be a key component of their merger enforcement agenda. Indeed, just ten days into 2013, DOJ filed suit challenging Bazaarvoice Inc.'s acquisition of PowerReviews Inc.—two rivals in an alleged market for product ratings and reviews platforms. The DOJ suit challenges a non-HSR-reportable transaction—as discussed below, enforcement against such deals is another common theme of this administration.

III. CONSUMMATED MERGER CHALLENGES ON THE RISE

As illustrated by *Bazaarvoice/PowerReviews*, the agencies have demonstrated an increased interest in non-reportable and consummated transactions, including transactions as small as \$3 million in value. The agencies have challenged 17 such mergers since 2009, two during this past quarter alone—*Renown Health/Reno Heart Physicians* and *Magnesium Elektron/Revere Graphics*. In *Magnesium Elektron*, for example, the FTC challenged a \$15 million transaction—Magnesium Elektron's acquisition of Revere Graphics Worldwide, Inc.—almost five years after it was consummated. *Magnesium Elektron* reflects the FTC's interest in challenging transactions it believes raise competitive concerns no matter how large or small.

IV. SPECIAL ATTENTION IS BEING PAID TO HIGH-TECH

The antitrust agencies continue to focus on high-technology markets. One hot button issue receiving significant attention is patent portfolios. As intellectual property is a key component in most high-tech deals, parties should expect the agencies in 2013 to closely consider the effect the parties' patent portfolios may have on competition. These issues can also trigger separate investigations (and challenges) even after the transaction has closed.

In these matters, there is a potential concern about the ability of patent owners to “hold up” market competitors by requiring higher royalties and stricter licensing terms. This has been a key issue in a number of recent cases, including the recent *Google/Motorola Mobility* transaction, and the acquisition of Nortel Networks' significant patent portfolios for wireless devices by Apple, Inc., Microsoft Corp., and Research in Motion, Ltd., but those deals were ultimately cleared without DOJ taking any action. However, in November, for the first time, the FTC

required a buyer, Robert Bosch GmbH to license to its competitors certain patents on fair, reasonable, and non-discriminatory terms and to abandon litigation against licensees of such patents based on alleged “hold up” concerns. In the \$1.15 billion *Bosch/SPX* acquisition, Bosch had acquired patents used in implementing industry standards relating to the service and repair of automobile air conditioning systems.

Outside the merger context, as part of the FTC’s investigation of Google, the FTC similarly required that Google license to its competitors patents to critical standard technologies for cellular, video codec, and wireless LAN standards, and to refrain from pursuing patent challenges against willing licensees as part of a controversial settlement of their broader 19-month investigation of Google.

V. CONCLUSIONS

This past quarter the antitrust agencies have maintained their momentum in compiling a broad and aggressive enforcement record. They have also exhibited increased confidence in their litigation capabilities. Even with changes in management, we do not expect any major policy shifts.

William Baer, a former Director of the FTC’s Bureau of Competition, was sworn in as DOJ’s Assistant Attorney General on January 3, 2013. During his tenure at the FTC in the 1990’s, Baer was responsible for the FTC’s successful challenge of the *Staples/Office Depot* transaction—a three-to-two merger of office supply stores. Thus, we do not expect DOJ’s litigation efforts to diminish.

At the FTC, economist and professor Joshua Wright (Republican) was sworn in as Commissioner on January 11, 2013. Commissioner Wright replaces Commissioner Thomas Rosch, an often independently minded Commissioner—including in his concurrence in *FTC v. Lundbeck, Inc.* where he argued that the FTC also could have challenged a preceding transaction based on the transaction’s elimination of certain “reputational constraints” even though there were no horizontal overlaps. As an economist and academic, Wright can be expected to closely consider empirical methods of merger analysis.

With the Obama administration’s policies in place for four more years, we believe the agencies will have a lasting impact on merger enforcement.