

HART-SCOTT-RODINO REPORT SHOWS INCREASE IN MERGER ENFORCEMENT AS MERGER FILINGS DECLINE

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During his 2008 presidential campaign, then-Senator Obama promised to undo eight years of what he referred to as “the weakest record of antitrust enforcement of any administration in the last half century.” While it is too early to gauge the impact of the recent elections, it appears that the Obama Administration is now delivering on that promise. Recent actions taken by the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) indicate a growing trend of increased merger antitrust enforcement. In particular, as premerger filings have declined during the economic crisis, the agencies are paying more attention to transactions that are not reportable under the Hart-Scott-Rodino Act (HSR Act), even breaking up mergers that have already been consummated.

As background, the HSR Act requires companies to provide information about their businesses to the FTC and DOJ in connection with certain mergers and acquisitions prior to closing the proposed transaction. The current thresholds generally require pre-closing notifications if the value of the acquisition is greater than \$63.4 million. When the U.S. agencies request additional information and documentary material, commonly referred to as a “Second Request,” this signifies that a major investigation is underway.

On October 1, 2010, the FTC and the DOJ released their Annual Report on the Hart-Scott-Rodino Act for Fiscal Year 2009 (HSR Report). It indicates that, while the overall number of filings dropped nearly 60 percent between 2008 and 2009, the percent of transactions resulting in Second Requests more than doubled from 2.5 percent of all filings in fiscal 2008 to 4.5 percent in fiscal 2009. Additionally, the HSR Report shows that over the past two years, almost every transaction receiving a Second Request resulted in a consent decree (usually a divestiture of assets), a court challenge, or abandonment or restructuring of the merger in some major way.

The HSR Report also confirms a noticeable enforcement trend by the FTC and DOJ – to investigate consummated transactions that were non-reportable because they fell below the \$63.4 million threshold. As the number of merger filings declines due to the slow economy, the FTC and DOJ have more time and attention to scrutinize already combined companies, even relatively small deals. By way of example, after an investigation, the DOJ required Election Systems & Software to

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divest all associated intellectual property as well as other assets in its \$5 million acquisition of Premier Election Solutions. The DOJ also required Microsemi Corporation to divest all of the assets that it had acquired for \$25 million from Semicoa Inc. in order to “assure that competition is substantially restored.” Meanwhile, the FTC sued to undo Ovation Pharmaceuticals’ January 2006 acquisition of a competing drug, as well as Dun and Bradstreet’s \$29 million acquisition of its nearest rival in the education data provider business. While the Ovation case is still pending, the FTC required Dun & Bradstreet to divest certain key assets as part of a settlement designed to address the competitive harm resulting from the acquisition.

These recent cases are important for middle-market companies. The HSR Report suggests that in non-reportable transactions where there are antitrust competition concerns, transaction parties would be wise to involve antitrust counsel early to assess the risks so as to avoid potentially expensive post-merger litigation or a forced divestiture of assets at fire-sale prices. Transaction parties should also remember that challenges to a consummated merger are not subject to a “statute of limitations” and, indeed, the U.S. agencies may be in a better position after closing to gather evidence to support a claim that the acquisition hurts competition. Especially in these times of financial uncertainty, when the agencies have more time and resources to analyze all types of deals, transaction parties must take care to behave in a pro-consumer and pro-competitive manner well after the merger has been consummated.

The HSR Report is available at <http://www.ftc.gov/os/2010/10/101001hsrreport.pdf>

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