Good News/Bad News for M&A and Antitrust: Transactions on the Rise But So is Aggressive Enforcement, Including Prospect of Jail Time for Altering Documents Required in Hart-Scott-Rodino (HSR) Filing

The Department of Justice (DOJ) and Federal Trade Commission (FTC) recently issued their Hart-Scott-Rodino (HSR) Annual Report, documenting a significant increase both in the number of transactions reported and the number encountering antitrust enforcement. HSR requires pre-closing filing and antitrust review of transactions meeting a fairly low "size" threshold of $68.2 million and not otherwise qualifying for an exemption.

The number of transactions filed in 2011 was up 24 percent over 2010, and more than double the number filed in 2009. The statistics on "clearance" and "second requests" also reflect a significant increase in antitrust enforcement against transactions filed. Unlike many jurisdictions (including Europe) where "clearance" is a positive confirmation of surpassing antitrust hurdles, in the U.S. "clearance" represents a negative to the merging parties, because it signifies that one of the agencies has secured the right to investigate a transaction. The number of transactions in which clearance was requested (and thus some form of investigation conducted) was up 15.7 percent from 2010 to 2011. The number of formal "second request" investigations - the process by which closing is delayed indefinitely, pending the parties' substantial compliance with detailed discovery demands - was also up by 26 percent from 2010 to 2011. Approximately 64 percent of the transactions receiving second requests in 2011 were the subject of formal challenges, as to which the agencies claim a combined success rate of over 90 percent, factoring in consent decrees and transactions abandoned or restructured to resolve agency concerns.

Striking an even more sobering note, in an unprecedented move, the DOJ recently obtained a plea agreement sentencing a South Korean executive to 5 months imprisonment for alteration of documents required to be submitted with a HSR filing. *United States v. Kyoungwon Pyo*, Case 1:12 cr-00118-RLW (D.D.C). Although failure to abide by so-called "Item 4(c)" document requirements previously has been the subject of fines reaching almost $3 million, it has never resulted in criminal sanctions until now, and longstanding HSR precedents allow for exclusion of "drafts" from Item 4 production in some instances. In this case the executive crossed a line by not simply failing to disclose - but instead physically altering - documents submitted under Item 4 to reduce the appearance of a competitive impact from the transaction. DOJ prosecuted the action as obstruction of justice, carrying a maximum criminal penalty for individuals of 20 years in prison and a $250,000 fine. The corporate employer also pleaded guilty for its role and agreed to a $200,000 fine (for two counts), against potential exposure of $1 million ($500,000 per count).

The case is an important reminder that (i) the ability to exclude "drafts" has important limitations, and (ii) failure to abide by HSR's strict requirements - including as to Item 4, which was just expanded in 2011 (click here to read Antitrust Practice Group Co-chair Michael Jahnke comments on the 2011 changes in *Hart-Scott-Rodino Overhaul*, The Deal (July 8, 2011)) - can be discovered in multiple ways, and have serious consequences. The fines imposed in this case were actually relatively low, given that HSR penalties can run up to $16,000 per day of violation. In any event, the prospect of jail time for executives likely presents a far more significant deterrent against HSR violations than the risk of fines.

For more information about the content of this alert, please contact Michael W. Jahnke or any other member of our Corporate Department.

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