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An executive of a South Korean company pled guilty on July 2 and agreed to serve five months in a U.S. prison for obstructing justice in connection with a merger investigation conducted by the U.S. Department of Justice. The DOJ had charged the executive with altering documents and directing subordinates to do the same, before submitting them to the government as part of a Hart-Scott-Rodino filing.

The jail term, expected to be imposed at a sentencing hearing in September, the first for falsifying documents submitted with an HSR filing, serves as a reminder to companies and executives that the government takes compliance with the HSR Act seriously. Incomplete searches for documents, false statements in HSR filings, and altered documents can all have serious consequences.

Executive pled guilty to altering documents in submissions to the government

The July 2 guilty plea stems from the alteration of documents submitted to the government in 2008 in connection with a proposed acquisition by Nautilus Hyosung Holdings, Inc. (NHH), a wholly-owned subsidiary of the Korean company, Nautilus Hyosung Inc. (NHI), of Triton Systems of Delaware, Inc., a competing manufacturer of ATMs.

NHI submitted an HSR filing in August 2008. The DOJ then commenced a preliminary inquiry, and asked for certain additional documents, including pre-existing business and strategic plans relating to the sale of ATMs, which NHI provided in September 2008.

During the course of DOJ's investigation, NHI voluntarily disclosed to DOJ that materially altered documents had been submitted. NHI and Triton then abandoned the proposed transaction, before the DOJ decided whether it would challenge the transaction as likely to lessen competition.

In May 2012, the DOJ charged Kyoungwon Pyo, senior vice president for corporate strategy of an NHI affiliate, Hyosung Corporation, who participated in and directed the identification, review, and collection of documents and information required for NHI's HSR filing, with two felonies for obstructing justice. DOJ charged that Pyo altered and directed others to alter:

- documents related to the transaction submitted with the HSR filing "with the intent to impair the objects' integrity and availability for use in an official proceeding"; and
- pre-existing business and strategic plans submitted in response to a voluntary request during the DOJ's preliminary inquiry with the same intent.

The maximum penalty for obstruction is 20 years of jail time per count. The DOJ agreed to recommend five months in prison, as part of a plea agreement.

In October 2011, NHH itself pled guilty and paid a $200,000 criminal fine for the conduct. While the company could have been fined up to $1 million, the DOJ pointed to "the company's disclosure of wrongdoing and its cooperation in the department's investigation" as key in the DOJ seeking a reduced fine.

The DOJ and FTC rely heavily on documents in HSR filings; incomplete searches, false statements, and altered documents all have serious consequences

The HSR Act and regulations require parties to reportable transactions to submit with their HSR Notification and

Report Forms: (1) documents prepared "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets" or "analyzing synergies and/or efficiencies" and (2) offering memoranda and documents from investment bankers, consultants, and other third-party advisors, relating to the business being sold. These "4(c)" and "4(d)" documents—so-called because they are responsive to Items 4(c) and 4(d) of the HSR Form—are critical to the government's analysis of proposed transactions.

The documents required were expanded last year, as explained in our *Alert,* "Major Revisions to Hart-Scott-Rodino Form Set to Go Effective in Early August."

The HSR form requires that an officer attest that the filing is, to the best of his or her knowledge, "true, correct, and complete" under penalty of perjury. Collecting and reviewing documents is often the most burdensome part of preparing the HSR filing. Companies must give sufficient attention to the process to ensure that a diligent search has been completed and that all relevant documents have been produced.

The DOJ used the announcement of the Pyo plea agreement to emphasize the critical importance of the integrity of the document collection process. The DOJ's press release quoted the Acting Assistant Attorney General for Antitrust, as saying "Maintaining the integrity of the merger review and investigation process is one of our highest priorities.… Senior corporate executives should understand that anyone who attempts to corrupt the process … will be held accountable for their actions."

Criminal charges will likely be reserved for extreme violations of the HSR process—including altering, destroying, and concealing documents, and making intentionally false statements.

The DOJ and the FTC have additional mechanisms to ensure parties are diligent in their document searches:

1. **Restart the HSR waiting period:** If the agencies learn that documents that should have been submitted with an HSR filing were omitted while the waiting period is still pending, the agencies may "restart the clock" that companies must observe before consummating proposed acquisitions. This can even mean issuance of a new Second Request when documents that should have been submitted with an initial filing are found in response to a Second Request. The resulting delay can be significant.
2. **Civil penalties:** If, post-consummation, the agencies determine that documents that should have been submitted with a party's HSR filing were omitted, the agencies may bring a case for civil penalties up to $16,000 per day for each day that the company was not in compliance.

The government typically seeks civil penalties from companies for failing to submit required documents when the DOJ or FTC uncovers documents in post-consummation investigations of transactions. Large fines have been imposed on such firms as Automatic Data Processing, Inc. ($2.97 million in 1996) and the Hearst Trust ($4 million in 2011).

Individual officers, however, have also been fined. In 1999, Blackstone Capital Partners II and Howard Andrew Lipson, the individual who certified that a Blackstone HSR filing was true, correct, and complete, agreed to pay $2.785 million and $50,000, respectively. Lipson was the author of one missing document, and the agencies concluded that he "knew or should have known" that the filing was inaccurate, and it was "appropriate that he pay a penalty for what was at a minimum his reckless disregard for his obligations under the HSR Act."

The agencies have investigated and obtained civil penalties even when there have been no substantive antitrust issues raised with respect to a notified transaction. For example, in 1997, the Iconix Brand Group and Rocaware Licensing LLC each filed for the acquisition by Iconix of the Rocawear brand, and neither submitted any 4(c) documents. After the FTC staff pointed out that it was odd that no documents had been produced, Iconix's counsel confirmed that a diligent search had been completed and no documents existed. The agencies terminated the HSR waiting period and the acquisition was consummated. The DOJ then issued a civil investigative demand to determine if any documents should have been submitted with the HSR filing. Several responsive documents were identified and Iconix was required to pay $550,000 in civil penalties.

The agencies may also rely on withheld documents in bringing a post-consummation challenge. For example, in 2001 the Hearst Trust agreed to divest an acquired business and pay $19 million to disgorge the profits it earned while operating the combined businesses. The FTC alleged that the Hearst Trust illegally acquired a monopoly, emphasizing that Hearst had "illegally omitted from its pre-merger filing several high-level corporate documents prepared to evaluate the acquisition and its competitive effects." In its 2003 policy statement on monetary equitable remedies, the FTC explained that the *Hearst* case was particularly well suited for disgorgement

because it was a "merger to monopoly aided by withholding key documents from the FTC."

Sending a senior executive to jail should be a warning to company executives, particularly those certifying that the HSR form is true, correct, and complete, that the HSR document collection process must be taken seriously. If not given proper attention, submission of an HSR filing can have serious consequences for both the company and for the individuals involved.

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