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Given the many opportunities and challenges that come from integrating two companies following a strategic transaction, including unlocking significant synergies and cost savings as a result of the combination, it is unsurprising that merging parties are often enthusiastic about moving forward with the process as soon as possible. Equally, it is natural that an acquiring party may be eager to maintain the value of the transaction that it bargained for. However, engaging in pre-merger coordination—prematurely transferring control or integrating business operations before the proper antitrust hurdles are cleared—in furtherance of these objectives can have dire consequences, both for the proposed merger itself and for the would-be merging parties.

Case in point—see DOJ's recent enforcement action against Flakeboard and SierraPine, following the abandonment of their proposed deal. Several weeks after the parties announced that they were walking away from their proposed transaction in the face of serious DOJ antitrust concerns, the DOJ alleged that during the pendency of its investigation, both parties had engaged in illegal "gun jumping" in violation of the Hart–Scott–Rodino (HSR) Act and illegal conduct that rose to the level of a *per se* antitrust violation of the Sherman Act.

The parties agreed to settle DOJ's allegations through a Consent Settlement, under which Flakeboard and SierraPine each agreed to pay $1.9 million in civil penalties for "jumping the gun." Even more extraordinary, the settlement requires Flakeboard to disgorge $1.15 million in "ill-gotten gains," the approximate amount of profits that Flakeboard allegedly obtained by illegally coordinating with SierraPine, marking only the second time that the DOJ has demanded disgorgement as a remedy.

Overview of applicable laws and penalties

Under the HSR Act, parties must not transfer control of the target's operations or consummate their transaction until expiration of a mandatory waiting period. The Sherman Act prohibits agreements between competitors to reduce output and/or allocate customers (among other things). Importantly, merging parties must be mindful that the Sherman Act applies to the conduct of the parties during the period prior to closing, just as it would apply to competitors in the absence of a proposed transaction.

Civil penalties for gun jumping can be substantial, with maximum fines up to $16,000 for each day in violation, which can be applied to both the buyer and the seller. Separate penalties for a violation of the Sherman Act are also significant, including behavioral injunctive relief as well as potential disgorgement of illegally obtained profits.

Pre-merger conduct gone wrong

Flakeboard and Sierra are manufacturers of several varieties of particleboard and medium density fiberboard. In January 2014, Flakeboard announced its intention to acquire three Sierra mills, and filed the required notifications under the HSR Act. Shortly after the announcement of the transaction, a labor dispute arose at one of the Sierra mills, located in Springfield, Oregon. The transaction agreement contemplated that Sierra would shutter the Springfield mill before closing the transaction, but only after the expiration of the HSR waiting period; a plan which changed following the labor dispute.

Sierra allegedly consulted with Flakeboard regarding how it should deal with the labor dispute, and ultimately reached an illegal agreement with Flakeboard that involved Sierra closing the Springfield mill within a matter of weeks (during the pendency of the DOJ's review under the HSR Act) and transferring the mill's customers to a nearby Flakeboard mill following the closure. Specific alleged coordinated conduct that culminated in the transgression included:

- Agreeing on the content of a press release, and timing the release to give Flakeboard an opportunity to reach out to affected Sierra customers in advance of the press release.
- Sierra told affected customers that Flakeboard would match all current Sierra prices.
- Sierra supplied Flakeboard's sales force with competitively sensitive customer information such as contact details and volumes purchased.
- Sierra did not try to retain business by transitioning any customers to one of its other mills, and instead directed business to Flakeboard.
- Sierra relayed messages from Flakeboard to key employees that they should direct business to Flakeboard, along with assurances of future employment.

The DOJ viewed these coordinated activities as not reasonably necessary to the underlying transaction and that they were taken without any assurance that the transaction would ultimately be consummated, thereby condemning this conduct as *per se* unlawful under the antitrust laws, as well as a gun jumping violation under the HSR Act. Notably, had Sierra made its own *unilateral* decision to close the Springfield mill early, without taking the coordinated actions outlined above, this enforcement action may have been avoided altogether.

Not just the money

Successful advocacy before the DOJ or FTC is, in many cases, what makes the difference between a transaction that clears relatively quickly and efficiently and one that draws an expensive, time-consuming, and distracting investigation and/or a potentially deal-killing challenge by antitrust enforcers. Consequently, the risks of gun jumping include not only millions in civil fines, and the potential for disgorgement, but also the souring of the parties' relationship with the same government attorneys whom they are trying to persuade that the transaction does not raise serious antitrust concerns.

Avoiding perils—staying safe

Due diligence and integration planning are vital to ensure that the combined business is ready to hit the ground running on Day One following consummation of the transaction. As the Flakeboard case vividly illustrates, parties need to be careful not to stray from what is reasonably necessary to achieve this goal, and consult counsel to avoid the potentially dire consequences of gun jumping allegations.

While some cases are clear, most gun jumping issues are extremely fact-specific—employees, officers, and directors should be encouraged to contact counsel if there is any doubt at all as to whether a contemplated communication or action is permissible.

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