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The Federal Trade Commission recently announced a consent agreement with a specialty software developer, requiring it to divest a business that it had acquired more than a year earlier for $8.7 million. The challenge to an acquisition that was so small that it did not have to be reported under the Hart-Scott-Rodino Act is the most recent in a growing number of government challenges to consummated non-reportable deals. It is a reminder that mergers, no matter how small, are subject to antitrust attack and may not fly under the enforcement radar.

The DOJ and FTC have already challenged five non-HSR reportable deals in 2013, which is as many as the agencies have challenged collectively in any previous year, as shown in the chart below. That the agencies focused attention on non-reportable deals during the recession, when fewer reportable deals were taking place, was not surprising. The continuing scrutiny of non-reportable transactions is, however, noteworthy.

Non-HSR Reportable Transaction Challenges

Focus on High-Tech Mergers and Acquisitions

Two of the five challenges to non-reportable deals this year have been in the tech industry: Solera Holdings, Inc.'s acquisition of Actual Systems of America, Inc. and Bazaarvoice, Inc.'s acquisition of PowerReviews, Inc.

Antitrust enforcement in the tech sector has been a priority of the Obama Administration. Obama's first Assistant Attorney General for Antitrust identified antitrust issues "arising in high-tech and Internet-based markets" as an area of focus in her first speech. And in March 2013 when President Obama named Edith Ramirez to head the FTC, a White House official emphasized that "[o]ver the past few years, Ramirez has been instrumental in ensuring there is robust competition and innovation in the high-tech marketplace."

Solera / Actual Systems: FTC Challenges $8.7 Million Acquisition

On July 22, the FTC announced that it had reached agreement with Solera, a provider of software and services to the automobile insurance claims processing industry, to divest assets to resolve FTC charges that Solera's May 2012 acquisition of rival Actual Systems violated antitrust law.

According to the FTC, Solera and Actual Systems were close competitors and two of only three meaningful competitors providing yard management systems software for the automotive recycling industry in North America. The complaint alleged that the market for such software is concentrated and that the acquisition would allow Solera to exercise market power but did not allege any actual post-merger price increases. Solera agreed to sell the U.S. and Canadian yard management systems software business that it acquired from Actual Systems to settle the FTC's allegations.

Bazaarvoice / PowerReviews: DOJ Files Suit to Unwind Non-Reportable Acquisition

Earlier this year, the DOJ filed suit to challenge Bazaarvoice's June 2012 non-reportable acquisition of PowerReviews. That case is set to go to trial in September in federal court in California.

The DOJ alleges that Bazaarvoice's acquisition is likely to lessen competition for product rating and review platforms used to

collect and display consumer-generated online product feedback. The DOJ supported its complaint with extensive quotes from company documents. The complaint, for example, quotes a company co-founder stating that the acquisition would "[e]liminat[e] [Bazaarvoice's] primary competitor" and provide "relief from [] price erosion." Bazaarvoice has taken issue with the quotes, which it alleges are "taken out of context," and what it asserts is an "overly narrow" product market.

Challenges to Other Non-Reportable Acquisitions

The FTC has filed three other suits against non-reportable mergers to date during 2013. Each challenged transaction was consummated several years earlier; indeed, one challenged acquisition was consummated in 2005.

Acquisition	Purchase Price	Industry	Acquisition	FTC Challenge
Oltrin Solutions' acquisition of JCI Jones Chemicals' customer list	$5.5 m	Bleach used in municipal water treatment	2010	January 2013
Charlotte Pipe and Foundry's acquisition of Star Pipe's cast iron soil pipe business	$19 m	Cast iron soil pipe	2010	April 2013
Graco's separate acquisitions of Gusmer and GlasCraft	$65 m (Gusmer) $35 m (GlasCraft)	Fast set equipment used by contractors to apply polyurethane foams and polyurea coatings	2005 (Gusmer) 2008 (GlasCraft)	April 2013

Hallmarks of Post-Consummation Antitrust Enforcement

The HSR Act requires most mergers and acquisitions valued above $70.9 million to be reported to the DOJ and FTC, allowing the government to investigate whether deals may lessen competition before they are consummated. History suggests that because it is difficult to "unscramble the eggs" and restore competition after a deal is consummated, the agencies have generally challenged a consummated transaction only when they thought the evidence was especially strong that the deal was anticompetitive. The recent record shows that the agencies are perhaps increasingly willing to challenge consummated transactions.

Post-merger price increases are the factor most likely to lead to a post-closing investigation. The government's Horizontal Merger Guidelines take the position that "evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight [and] can be dispositive." Thus, it was not surprising that the FTC sued Ovation Pharmaceuticals in December 2008 for its non-reportable acquisition of a drug that was awaiting regulatory approval and that the FTC alleged was expected to take sales from an Ovation drug used to treat congenital heart defects in babies born prematurely. The FTC, while it ultimately lost its challenge in federal court on product market grounds, alleged that once Ovation "eliminat[ed] [the] competitive threat, [Ovation] promptly raised the price of [its drug] nearly 1,300 percent, from approximately $36 to approximately $500 per

vial."

Customer complaints also often lead the government to investigate consummated transactions. The agencies rely heavily on customers' views of the market and the transaction's likely impact.

Documents uncovered during an investigation that suggest a transaction was expected to, or has, resulted in anticompetitive effects increase the likelihood of a challenge to a transaction. As in Bazaarvoice / PowerReviews, the agencies often rely heavily on documents that discuss direct competition or suggest that a deal will eliminate competition or lead to higher prices in challenging a transaction.

The government will, of course, only challenge a merger when it believes affected markets are heavily concentrated, with few players with high market shares. Transactions that combine the only two competitors in a market (2-to-1 mergers) are particularly likely to attract challenges. The Solera/Actual Systems challenge (a 3-to-2 transaction), though, shows that the government will also challenge deals where competitors remain in the market post-transaction, even when they are consummated and were not reportable.

What Companies Can Do to Avoid Antitrust Challenges

There are steps that companies can take to reduce the likelihood of an investigation and challenge to a non-reportable transaction.

- **Announce and close the deal simultaneously**. Because the agencies are less likely to attempt to unwind a consummated acquisition than to prevent closing of an acquisition, announcing a non-reportable deal after or simultaneous with closing makes it less likely the agencies will investigate.
- **Don't raise prices after closing a deal**. The agencies are likely to investigate if they learn of prices increasing after a deal.
- **Carefully consider other actions that may lead to complaints**. Terminating distributors, pulling products from the market, or eliminating support for products can also lead to complaints to the government.
- **Don't overstate the impact of the deal**. Statements to the press or analysts may also come to the government's attention and lead to an investigation.
- **Take care when preparing documents that analyze the transaction**. As is made clear by the Bazaarvoice litigation, inartfully worded documents can lead the agencies down an enforcement path. Even when a transaction does not have to be reported to the government, companies should avoid creating documents that may lead antitrust authorities to challenge a transaction in case they have to be turned over in a post-consummation investigation.

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