

## FTC-DOJ Annual HSR Report Confirms Increase in Merger Enforcement

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In early June the Federal Trade Commission and the Department of Justice Antitrust Division issued a joint report detailing their recent enforcement activities in the merger area. The Report provides detailed data on the number of pre-merger filings submitted to the Agencies under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") for the Agencies' most recent fiscal year, which ended September 30, 2011. The Report also highlights the enforcement actions taken by the Agencies during that time period. Rather surprisingly, the Report reflects that the weak economy has not chilled the Agencies' enthusiasm for merger enforcement. In fact, the Agencies have significantly stepped up their enforcement efforts in the last year, and the increased activity has not been limited to a few highly publicized proposed mergers.

### The HSR Pre-Merger Reporting Requirements

The HSR Act requires that proposed acquisitions over a certain size (currently \$68 million) be reported to the FTC and the DOJ prior to consummation so that they can be reviewed by the Agencies for possible anticompetitive effects. If either Agency concludes that the competitive implications of the deal warrant consideration, it will seek "Clearance" from the other Agency to start an investigation, and can subsequently issue a "Second Request" to the parties for additional information to assist the Agency in making its assessment. Until approved by the Agencies, the parties are not permitted to close on their deal.

Typically, only a small percentage of all reported transactions result in a request for Clearance, and only a very small percentage of transactions (less than 5%) result in a Second Request being issued. The Agencies usually can assess the competitive implications of a proposed deal – even a large deal – within the initial 30-day waiting period and approval is granted without delay. This is good, because a Second Request imposes significant costs on the parties and requires them to further delay their deal. Due to this added expense and delay (and a belief that the Second Request may indicate the Agencies oppose the deal), a Second Request often leads the parties to abandon a proposed transaction. Accordingly, an increased number of Clearances sought or Second Requests issued are clear signs of heightened merger enforcement.

For a deal that survives the issuance of a Second Request, the Agencies examine the additional materials received from the parties and assess the competitive implications of the deal. They then either close their investigation without taking any action or seek an injunction in federal court to prohibit the parties from consummating the deal. An increase in the number of litigated matters, therefore, is another sign of increased merger enforcement.

### A Significant Uptick in Enforcement

The recent Report confirms that there has been a significant increase in merger enforcement. The data reflects that over 250 filings resulted in a Clearance request by either the FTC or DOJ, a 15% increase in the number of requests from 2010. Even more significantly, the Agencies issued Second Requests in 58 transactions in 2011, a 25% increase from 2010. This was also the second highest number of Second Requests in the last ten years. In addition, the percentage of Second Requests during each of the last three years is greater than at any time since 2002. Accordingly, by any measure, the Agencies have been aggressive in merger enforcement despite a down economy.

The Report also confirms that certain industry sectors appear to be very popular with the Agencies. The Report confirms that a sizable percentage of the total number of Agency requests for Clearance, Second Requests or litigated merger challenges involve transactions in the healthcare, financial services, food, publishing, or chemical industries.

Finally, the Report demonstrates that, with respect to merger challenges, the DOJ and the FTC have been quite aggressive as well. Over the last year, the DOJ Antitrust Division challenged 20 merger transactions, prevailing in all of them. In addition to its successful challenge to AT&T's proposed acquisition of T-Mobile, the DOJ also obtained a trial court victory in its challenge to H&R Block's proposed acquisition of TaxAct. The H&R Block matter is the DOJ's first fully-litigated merger success in many years. Another notable success for the DOJ was its challenge to the acquisition of Tyson Foods' Harrisonburg, Virginia chicken processing complex by George's Inc. This challenge is significant because the deal was too small to trigger HSR reporting requirements, but apparently not too small for the DOJ to believe it was worth challenging. The case settled with the defendants agreeing to certain conditions intended to preserve competition in that market.

The FTC was also quite active, challenging 17 transactions. These efforts resulted in nine consent agreements, five transactions abandoned or restructured in response to Agency concerns, and three court challenges. While the FTC was not as successful in the courts as the DOJ, losing two of its three court challenges, their actions were notable in several other respects. First, the Report reflects that the FTC challenged several relatively small transactions. While one such matter – Lab Corp.'s acquisition of Westcliff Medical Labs – ended in loss, with the District Court refusing to grant an injunction, the challenge confirms that merger enforcement can be an issue regardless of deal size. In addition, the FTC successfully challenged consummated transactions (ProMedica's acquisition of St. Luke's hospital), an increasingly common phenomenon that was rarely seen a recently as five years ago. Finally, the FTC sought to enjoin Phoebe Putney Health System from acquiring Palmyra Park Hospital, despite some uncertainty about whether the transaction was immune from challenge based upon the "state action" doctrine. The Northern District of Georgia held that the transaction was immune from challenge by the FTC, and the ruling was affirmed by the Eleventh Circuit in December, 2011. The FTC, however, has recently sought Supreme Court review of the decision – again demonstrating an aggressive approach to merger enforcement.

### What Lies Ahead?

When President Obama took office he pledged that he would have an Antitrust Division that "enforces the antitrust laws," which he claimed had not been the case during the prior administration. For better or worse, the most recent merger enforcement statistics suggest an increase in activity. The increase can be seen in the number of challenges, the types of cases challenged and the willingness of the Agencies to test their views in the District Courts – and even on appeal when not successful. Coupled with a marked increase in merger enforcement from state enforcers as well, the possibility that merger partners may face a potential antitrust challenge – or at least a Second Request -- has never been greater. Plan accordingly.

### FOR MORE INFORMATION CONTACT:

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