

Client Alert

Antitrust & Litigation Practice Group

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DOJ Settles with Flakeboard and SierraPine for Gun-Jumping Action

On November 7, 2014, the Department of Justice Antitrust Division (“DOJ”) announced it had settled an enforcement action for improper premerger coordination (commonly referred to as “gun-jumping”) with Flakeboard America Limited (“Flakeboard”) and SierraPine regarding Flakeboard’s proposed acquisition of three SierraPine mills. Among other things, the proposed settlement requires the parties to pay \$3.8 million in civil penalties for violating the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), \$1.15 million disgorgement in illegally obtained profits for violation of the Sherman Act—an exceedingly rare remedy for gun-jumping violations—and to establish antitrust compliance programs. The proposed settlement must be approved by a federal court under the Tunney Act.

Legal Background

Under the HSR Act, parties may not consummate their transaction, or transfer control from the seller to the buyer (either directly or indirectly), until the HSR waiting period expires. A transfer of beneficial control occurs where, for example, the buyer makes business decisions for the seller, whether under the express interim operating covenants contained in the acquisition agreement or through consensual cooperation between the parties. Gun-jumping arises when there has been a transfer of such control prior to the expiration of the HSR waiting period. The penalty for violating the HSR Act is up to \$16,000 for each day of the violation, and it can be applied to both the buyer and the seller.

Under the Sherman Act, an agreement between competitors to reduce output and allocate customers is a per se unlawful agreement. Importantly, the Sherman Act applies to companies even in a premerger period and violations include the DOJ’s seeking disgorgement of illegally obtained profits.

Company Actions

According to the DOJ’s complaint, Flakeboard and SierraPine, competitors in the production and sale of particleboard, entered into an asset purchase agreement on January 13, 2014. The HSR notification was originally filed on January 22, 2014. The DOJ’s complaint alleges that Flakeboard and

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SierraPine coordinated to close, and closed, SierraPine's Springfield mill on March 13, 2014, and they moved the mill's customers to Flakeboard. This occurred months before the HSR waiting period would expire. The parties abandoned the proposed transaction several weeks ago, allegedly due to DOJ's antitrust concerns.

Bill Baer, Assistant Attorney General of the Department of Justice's Antitrust Division stated, "Companies proposing to merge must remain separate and independent during the government's investigation. These two competitors did not. Instead they closed a plant and allocated customers when they should have been competing vigorously. As a result both companies are paying substantial civil penalties and Flakeboard is being forced to surrender the ill-gotten profit it gained from violating the antitrust laws."

Takeaways & Practical Advice

The *Flakeboard* settlement serves as a strong reminder that there are severe consequences for independent parties who engage in joint activities prior to clearing the pre-transaction notification process under the HSR Act. It also highlights that certain pre-merger coordination can trigger liability under the Sherman Act, including disgorgement, for both the buyer and the seller.

Parties to a transaction must carefully balance the buyer's legitimate interest in ensuring that the post-execution business maintains its value and viability prior to closing, as well as the otherwise legitimate goal of a quick and effective integration of the acquired operations post-consummation, against the HSR prohibition of premature transfer of control from the seller to the buyer. This balancing process is often an intensely fact-specific assessment aided by few objective "rules of thumb" and typically turns on a detailed consideration of the totality of the deal circumstances.

In our experience, coordination between competitors prior to closing can have a significant antitrust risk not just because it can result in civil penalties, like the *Flakeboard* settlement, but also because it may unnecessarily broaden the scope of the government's HSR investigation by creating additional issues for the government to consider, which can potentially impact the timing and execution of the transaction. This can be an important risk to consider, particularly where the timing of closing impacts the viability of the business being acquired, or when delay occurs, business or financing market conditions can deteriorate, and financing commitments can expire or adjust to terms less favorable to the buyer. Parties to a transaction must therefore pay special attention to coordination and integration issues during the pendency of the HSR review.

Documents

The Department of Justice's press release is available at http://www.justice.gov/atr/public/press_releases/2014/309786.htm

The complaint, stipulation, competitive impact statement, and explanation of consent-decree procedures are available at <http://www.justice.gov/atr/cases/flakeboard.html>



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