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Antitrust Challenges to Consummated Deals

Last week, the Federal Trade Commission challenged a consummated acquisition by Solera Holdings that had been exempt from the reporting and waiting period requirements of the Hart-Scott-Rodino Act. Requiring a clean sweep divestiture of the acquired company's assets, the FTC's action highlights a trend at both antitrust agencies to seek out and challenge HSR-exempt transactions. During the Obama administration, the FTC and Department of Justice have already challenged 20 consummated deals (13% of all Obama-era merger challenges), compared with just 15 such challenges during the entire Bush administration. These challenges underscore the antitrust risk facing buyers that make non-reportable acquisitions.

Most challenged consummated deals were exempt because they fell below the HSR Act reporting thresholds (e.g., Solera involved an $8.7 million deal). Since relatively little is at stake in smaller deals, buyers may be willing to take on the risk of a post-closing challenge. Other HSR Act provisions, however, can exempt much larger transactions, where the impact on the buyer of a post-closing challenge would be substantial. In particular, certain acquisitions by banks (e.g., loan portfolios, servicing rights), insurance companies (e.g., renewal rights, reinsurance) and real estate firms may be non-reportable under the "ordinary course" exemption and other HSR rule interpretations, and certain joint ventures may not trigger the HSR Act. These deals can nonetheless raise substantive antitrust concerns.

In HSR-exempt transactions, parties may operate under the impression that antitrust concerns are moot and that there is no need to allocate antitrust risk between the parties in the acquisition agreement. In fact, ignoring the issue effectively transfers "hell-or-high water" antitrust risk to the buyer upon consummation of the deal. Buyers can try to reallocate this risk, but all such efforts have practical drawbacks and will be resisted by sellers. For instance, parties can agree to notify the antitrust agencies of the prospective deal and to delay consummation, but this creates a potentially open-ended investigation, untethered by the normal constraints of the HSR process. Joint venture partners can seek a "business review" from the DOJ or an "advisory opinion" from the FTC, but these processes are similarly open-ended and are often impractical for other reasons. Finally, where the selling company continues to exist after closing, parties can define their respective pre- and post-closing obligations in their agreement, but the seller may resist such efforts given the hypothetical and open-ended nature of the risk.

In the face of seller resistance to these alternatives, buyers in non-reportable transactions frequently face the prospect of taking all the risk of a post-consummation challenge. Accordingly, before entering into such transactions, an acquirer should very thoroughly analyze the substantive antitrust issues raised by the transaction, the feasibility of remedies short of clean sweep divestitures, the practicality of unscrambling assets post-integration, and the impact on their business in the event of a future mandated divestiture. They should also estimate the likelihood that disappointed rival bidders for the target, disgruntled customers, or other media coverage will draw unwanted scrutiny to the consummated deal. Buyers should also be aware that the government will use post-merger actions, such as price increases, as evidence of a deal's anticompetitive effects.

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