For any company looking to enter into a merger or acquisition, the laundry list of necessary pre-closing tasks can start to add up. But, just as companies must complete due diligence and identify negotiation strategies, it is equally important that they remember to address certain antitrust issues from the outset of any potential deal. Failure to identify and analyze antitrust issues can have a number of consequences, including, for example:

- Challenges by the federal antitrust agencies, state attorneys general, and private plaintiffs.
- Antitrust investigations that can delay closing a deal.
- Antitrust violations that can block a deal or unwind a deal after closing.
- Significant fines or rescission of a transaction caused by failure to comply with reporting requirements.

Antitrust counsel can help a company navigate antitrust law requirements and work to minimize these risks and any involvement or investigation by the Department of Justice or Federal Trade Commission. The following summary describes the types of antitrust issues that should be considered as part of any deal and the reporting compliance necessary to avoid fines, rescission, or closing delays.

A. Federal Antitrust Law As Applied To Mergers.

The competitive effects of mergers and acquisitions are governed by Section 7 of the Clayton Act which prohibits transactions where “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be to substantially lessen competition, or to tend to create a monopoly” (emphasis added). There are also separate prohibitions related to interlocking directorates.

Whether a merger will “substantially lessen competition” under Section 7 depends on an assortment of facts and assumptions that are unique to each industry and situation. The most important factor will be market definition: what constitutes a relevant market for purposes of analyzing whether there is a substantial lessening of competition within that market. Next it will be important to identify the market participants, the relative concentration of the market, and where the acquiring and acquired firms place in that market.

The economic analysis necessitated by Section 7 will differ depending on the potential theory of economic harm. Merger analysis has evolved from a formulaic, structural analysis to an analysis of the competitive effects of a transaction, based largely on economic analysis. The analysis is very fact dependent. For example: Is the challenged transaction a horizontal merger of competitors, nonhorizontal merger of potential competitors, or vertical merger that has potential to foreclose competition or facilitate collusion? How many participants are in the market? How is the market defined? Are there barriers to entry? Sometimes attorneys can provide analysis on each of these issues and at other times, expert economists should be hired to complete the analysis, depending on the nature and complexity in an industry or deal, to perform an analysis of competition within an industry.
While most antitrust issues in mergers and acquisitions arise under the Clayton Act, several other federal antitrust laws could be implicated by a deal, including, for example: Section 1 or 2 of the Sherman Act, which prohibits restraints of trade and monopolization attempts, or Section 5 of the Federal Trade Commission Act, which prohibits unfair competition.

As a recent example of how antitrust law can impact a merger transaction, in December of 2013, Sysco Corp. and US Foods, Inc. announced their proposed $3.8 billion merger. The deal attracted close antitrust scrutiny, as the FTC and Florida regulators investigated whether the merged entity would gain a dominant position in the food distribution market that could pose a threat to competition. While the parties hope to close the deal by the end of 2014, sources have reported that the FTC is considering whether to institute an antitrust suit to block the merger or require the companies to unload some of their assets to their competitors in order to minimize antitrust concerns. The case shows the need to thoroughly assess and minimize, as possible, antitrust risk in any transaction and the delays and potential litigation risk that can arise from any deals that draw the interest of the FTC or DOJ.

B. Premerger Notification Requirements.

Parties to a merger or acquisition transaction that meets a certain size threshold are required to file premerger notification reports with the FTC and DOJ. These reports are frequently called “HSR” filings, after the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a, that created the premerger notification requirements. The HSR Act notifies the government of an intended acquisition and gives the agencies time to review the proposed transaction and, if necessary, to challenge the transaction under the antitrust laws discussed above.

The HSR Act’s reporting requirements are triggered when two tests are satisfied: the “size of the persons” test and the “size of the transaction” test. The “size of the persons” test refers to the size of the parties to the transaction and mandates reporting if the size of one party to the transaction has $151.7 million or more in annual sales or total assets and the other has $15.2 million or more in annual sales or total assets. The “size of the transaction” test refers to the value of the securities or assets at issue in a transaction and requires reporting if, as a result of the transaction, the buyer will acquire securities or assets of the seller valued in excess of $75.9 million. Regardless of the outcome of the “size of the persons” test, HSR filing is always required if the buyer will acquire securities or assets in excess of $303.4 million. Please note that these threshold amounts are adjusted on a yearly basis; therefore, current threshold amounts should be confirmed prior to any deal. Generally, when both of these tests are met, both parties to the transaction must file HSR reports, though there are several exceptions to the HSR Act.

HSR filings require parties to disclose various company and financial information, such as details about the transaction, copies of SEC filings, yearly audit reports and balance sheets, revenue figures, geographic scope of the businesses, shareholder and subsidiary information, and any competitive analysis prepared. The filings also require a filing fee, which varies depending on the size of the transaction. Filings are kept confidential, and information provided is protected from both the other party and from FOIA disclosure.

HSR filings require that the parties wait 30 days after both parties have filed their reports to close the deal. These waiting periods may be terminated early if the government agrees that there are no antitrust issues. However, if a party receives Early Termination from the FTC, the deal will be posted on the FTC’s website. In deals that are particularly sensitive, some parties do not seek Early Termination for this reason. If DOJ or the FTC would like more in-depth information regarding the transactions, the agencies may extend the waiting period by issuing a “second request” for information. These second requests function similar to a document subpoena, and compliance can take from months to years. Therefore, sometimes, when the parties have been able to narrow the remaining antitrust issues during an initial 30-day waiting period and believe that all remaining issues can be resolved in a subsequent 30-day waiting period, the parties will withdraw their initial application and refile, rather than receiving a second request.

Parties to mergers and acquisitions should seek antitrust counsel early in any deal discussions in order to determine whether a filing is necessary under the HSR Act. Because the Act contains at least a 30-day wait period, late filing can significantly delay the closing of a transaction. More importantly, failure to file required reports can subject a party to a penalty of up to $16,000 per day. In a recent example of the significant fees that can be assessed for failure to comply with the HSR Act, in a settlement with the FTC earlier this year, Berkshire Hathaway was required to pay a civil penalty of $896,000 for failure to report an acquisition of voting shares of USG Corporation. This penalty was imposed simply for failing to report; the FTC did not have any issue or complaint regarding the competitive effects of the acquisition under antitrust law.

C. Considerations for Non-Reportable Transactions.

Even if your company’s acquisition does not require government notification under the HSR Act, a deal may still
be challenged by DOJ, FTC, state attorneys general, or private parties with standing to sue under the antitrust laws. Investigations of non-reportable transactions can at times cause more problems than those that are reportable, as the government may not learn about the deal until long after closing. The government or private plaintiffs may learn of the deal from many sources including:

- customer or investor complaints;
- third-party complaints, such as from competitors or suppliers;
- trade group reports;
- knowledge of industries that are frequently subject to antitrust scrutiny; or
- any necessary involvement/notification of foreign competition agencies.

Thus, regardless of whether a transaction is reportable under HSR, proper precautions and antitrust analysis should be undertaken early in the process. With early analysis, a company can determine the best strategy for handling the transaction, which could include working to close the deal in the ordinary course of business, anticipating issues and preparing a defense to use as necessary, strategically analyzing targets for merger or acquisition, or proactively engaging the government with the company’s procompetitive case prior to closing. There can be costs and benefits to each strategy depending on circumstances of a particular deal or industry. Moreover, the ability to minimize the potential of government notifications (for example, by minimizing complaints) may also be positively impacted by early detection of potential issues.

Investigation procedures for non-reportable deals are similar to HSR investigations. Unfortunately, however, while investigations initiated under HSR must adhere to strict time periods, non-HSR investigations are not held to such a strict timeframe.

A 2011 investigation into a small ($3 million) non-reportable deal between Tyson Foods, Inc. and George’s Foods, LLC demonstrates increasing government willingness to intervene even in acquisitions that fall far under the HSR reporting thresholds and the importance of addressing antitrust risk pre-closing when possible. In that deal, George’s Foods acquired a Tyson chicken processing plant. Because the deal did not trigger reporting requirements, the government did not learn about the transaction until just before closing. With the government’s investigation pending, the parties closed the deal without complying with the government’s request for more information. The government then sued, seeking to block the deal and claiming that the acquisition was likely to have the anticompetitive effect of reducing prices paid to chicken farmers in the area surrounding the plant. While the parties were ultimately able to settle the suit through a consent decree requiring improvements to the processing plant that would increase production at the facility, the parties to the transaction were not able to resolve the matter until months after the closing of the deal. Failure to settle could have resulted in costly litigation and even rescission of the deal. The George’s Foods antitrust matter is yet another example of the importance of preliminary and careful consideration of antitrust issues and compliance with agency requirements, regardless of the size of an acquisition.

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