WILMER CUTLER PICKERING LLP

Antitrust and Competition Law Update

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Agencies Send a Strong Message on HSR Filing Requirements to Bill Gates and Others

The Federal Trade Commission and Department of Justice's Antitrust Division last week each announced enforcement actions against and settlements with parties that alleged failed to make required notifications of transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. Each case resulted in a significant fine (one of $800,000 and one of $1 million) and signaled the agencies' intent to pursue vigorously parties that fail -- intentionally or negligently -- to meet their obligations under the HSR Act. Moreover, both cases address the scope of the HSR Act's "investment only" exemption and show that the agencies construe it strictly to apply only when the acquiror's interest and intent concerning the acquired firm is truly passive. Finally, these cases serve as a reminder that the Act's filing requirements apply not only to purchases of an entire company or all of its assets, but also to *any* purchase of voting securities so long as certain thresholds are met -- whether or not the purchaser obtains any significant percentage ownership interest in the acquired firm.

The "investment only" exemption of HSR Rule § 802.9 exempts acquisitions of voting securities worth more than $50 million that are made solely for the purpose of investment. This exemption is limited to holdings of up to 10 percent of any given issuer's outstanding voting securities. It is available only to investors who have no current intention of participating in or influencing the day-to-day management decisions of the issuer. The FTC takes the position that the exemption is not available to anyone who (a) is a direct competitor of the issuer, (b) holds a seat on the issuer's board of directors, or (c) has a present intention to acquire the issuer sometime in the future. Violations of the HSR Act, including failure to file violations of the sort discussed here, are subject to fines of up to $11,000 per day.

Bill Gates

Bill Gates inadvertently violated the "investment-only" rule for the first time in November 2001, when he acquired more than 10 percent of the interests in Republic Services, Inc. (Although he held Republic's stock purely for investment purposes, the percentage of his ownership interest made him ineligible for the exemption.) Mr. Gates did the right thing in this situation: he promptly notified the FTC of his failure to file and made a corrective filing just two weeks after making the acquisition. In such circumstances,

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the FTC typically forgives first-time, inadvertent failures to file, and it did not fine Mr. Gates.

Six months later, however, Mr. Gates again fell afoul of the HSR regulations when he acquired voting securities in ICOS Corporation without making an HSR filing. Mr. Gates could not avail himself of the "investment-only" exemption here because he held a seat on the ICOS board of directors, and thus played a role in managing the company. The FTC, not surprisingly, was far less forgiving of this second violation. On May 3, the Department of Justice ("DOJ") filed a complaint on behalf of the FTC seeking an $800,000 civil penalty against Mr. Gates for failure to make an HSR filing. Mr. Gates has agreed to pay the penalty.

Manulife

In a separate action, the Department of Justice alleged that Manulife Financial Corporation, a Canadian insurer and financial services provider, wrongfully failed to file an HSR notification for its acquisition of more than $50 million of John Hancock common stock in Spring 2003. Manulife has agreed to pay a $1 million civil penalty to settle the charges; this represents a reduction from the maximum possible fine, based on Manulife's cooperation with the Department's investigation.

In this case, Manulife made a series of acquisitions of John Hancock stock throughout Spring 2003, ultimately acquiring about 1.5 percent of John Hancock's issued and outstanding voting securities (valued at about $150 million). Manulife and John Hancock later agreed to merge. The DoJ's complaint alleges that Manulife was already contemplating its merger with John Hancock when it made its initial acquisition of Hancock stock, making the "investment only" exemption unavailable for those purchases. Although not cited by DoJ, Manulife's status as a direct competitor of John Hancock should also have prevented it from making use of the "investment only" exemption.

The Manulife fine is reminiscent of the $5.478 million civil lawsuit that DoJ filed in February 2003 against Smithfield Foods Inc. Smithfield, the nation's largest hog producer and pork packer, allegedly made certain acquisitions of stock in its competitor, IBP Inc., the nation's second largest pork packer, while contemplating a merger with IBP. Smithfield and IBP were direct competitors; but in that case also, the Department sought a civil penalty based on Smithfield's intent to acquire IBP, not on Smithfields status as a direct competitor. Smithfield has announced that it will litigate rather than settle the lawsuit.

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These cases illustrate the antitrust enforcement agencies' commitment to pursue HSR violations for failure to file, especially those relating to acquisitions of minority share holdings. Parties making such investments should consult closely with counsel to determine whether they trigger any HSR reporting requirements or other antitrust issues. Please feel free to contact any of us at (202) 663-6000 for further information about HSR requirements and exemptions.

William J. Kolasky
Robert Bell
James W. Lowe
Leon B. Greenfield
A. Douglas Melamed
Veronica Kayne
Ali Stoeppelwerth
Janet Ridge