Department of Justice to Merging Parties: Altering 4(c) Documents May Land You in Jail

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A senior executive of a Korean manufacturer of Automated Teller Machines recently agreed to serve a five-month prison sentence in the United States for tampering with business documents during the Hart-Scott-Rodino (HSR) review of the proposed acquisition by his employer, Hyosung Corporation, of one of its US competitors.[1] The case is an important reminder of the significance of pre-existing documents in HSR merger review and sends a strong signal to the business community that the US antitrust agencies view unobstructed access to responsive party documents as a lynchpin of the integrity of the merger review process.

Pre-existing business documents in US merger review. Pre-existing business documents play a much greater role in the HSR pre-merger review process than in similar reviews in most other countries. The focus on documents begins with items 4(c) and 4(d) of the HSR reporting form, which requires merging parties to submit certain transaction-related business documents discussing competition, competitors, markets, the potential for sales growth or expansion into product or geographic markets, and other categories of information.[2] Collecting and submitting item 4(c) and 4(d) documents often is the most time-consuming and expensive aspect of completing an HSR pre-merger notification, which otherwise places relatively little burden on merging parties, especially compared to the European Commission's Form CO and notification forms in other jurisdictions modeled after it.

Once an HSR filing has been submitted, business documents remain an important element of the investigative process. In complex transactions, the US antitrust agencies routinely issue voluntary requests for information during the initial 30-day waiting period, which typically include requests for business or strategy plans of the merging parties.[3] And the issuance of a Second Request for information[4]—similar to opening a "Phase II" investigation in other jurisdictions—can exponentially increase the document production burden on the parties and, as a result, the significance of ordinary course business documents for the agencies' analysis of a deal.

There are several reasons why the US HSR process focuses intensively on documents. One is that the US antitrust agencies prepare for litigation if they wish to block a transaction: neither the

Department of Justice (DOJ) nor the Federal Trade Commission can block mergers by administrative decision; therefore, merger review by necessity is both an investigative process and a process of preparing to litigate in court if necessary, where documents are often one of the pillars of the government's case.[5]

Sanctions for failure to collect and produce responsive documents. In light of the significance of business documents in HSR merger review, the US antitrust agencies take very seriously failures to conduct a thorough search for documents responsive to Second Requests or other violations in connection with 4(c) and 4(d) submissions. Under applicable law, failure to produce 4(c) or 4(d) documents not only allows the agencies to restart the 30-day HSR clock, the company and individual officers or directors who withheld documents potentially also are liable for civil fines of up to $16,000 per day.[6] Failure to include significant responsive documents in a Second Request response, for its part, jeopardizes "substantial compliance" and therefore the parties' ability to close the transaction.[7]

The DOJ's recent enforcement action against the Hyosung executive starkly illustrates that sanctions for misconduct relating to documents in merger review are not limited to civil fines or transaction delay. Violations of document production obligations may also have criminal consequences and, in extreme cases, even land individuals in jail.

The case involved Hyosung's proposed—but later abandoned—acquisition of Triton Systems, a US-based manufacturer of ATMs. The defendant executive was involved in collecting documents for Hyosung's HSR filing and subsequent response to a DOJ voluntary request for additional documents during the initial waiting period. Based on the DOJ filings with the District Court for the District of Columbia,[8] the executive on at least two occasions falsified 4(c)[9] documents and materials responsive to the DOJ's request in ways that "misrepresented and minimized the competitive impact of the proposed acquisition."[10] He also instructed subordinates to do the same.

The DOJ charged both Hyosung's parent and the executive with criminal obstruction of justice, which carries a maximum penalty of 20 years in prison and a criminal fine of $250,000 for individuals and a maximum fine of $500,000 per count for corporations. In 2011, Hyosung's parent pleaded guilty and paid a $200,000 criminal fine for its role in the alleged conduct.[11] The executive has now agreed to plead guilty and serve a five-month prison term in the US for the charges against him.

Lessons for merging parties. The *Hyosung* investigation involves an egregious type of misconduct that rarely will be an issue in the ordinary course of preparing for an HSR filing or responding to later stage document requests. However, it sends at least two messages to merging parties:

- First, as Acting Assistant Attorney General Joseph Wayland noted, "maintaining the integrity of the merger review and investigation process is one of [the DOJ's] highest priorities."[12] This means that acts of falsification in HSR merger review may be prosecuted with the criminal enforcement tools ordinarily reserved for "hard core" antitrust violations such as

price fixing or bid rigging.

- Second, because the US antitrust agencies rely on business documents both to understand the parties' transaction goals and to prepare for potential litigation, other—less egregious—failures to comply with items 4(c) and 4(d) or production obligations are unlikely to be viewed leniently, even if they do not provide a basis for criminal prosecution. As noted above, the agencies can impose up to $16,000 per day for failure to provide 4(c) and 4(d) documents, and the procedural delay resulting from a "bounced" filing or failure to trigger the second 30-day waiting period for lack of substantial compliance with a Second Request ordinarily has serious negative consequences for the merging parties.

In summary, the *Hyosung* case is an important reminder that document production obligations in HSR merger review must be taken seriously. This does not mean that merging parties may not, with the help of counsel, make reasonable judgments as to whether specific documents are responsive to items 4(c) and 4(d) or a subsequent information request, or the scope of the search for such documents within the company. But the US antitrust agencies are not likely to view leniently failures to conduct reasonable searches or to produce documents that those searches reveal, let alone the deliberate falsification of responsive documents.

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[1] See United States Department of Justice, *Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation*, Press Release (May 3, 2012), available at www.justice.gov/atr/public/press_releases/2012/282873.htm. Hyosung's parent corporation agreed to plead guilty and pay a $200,000 criminal fine for its involvement in the alleged conduct in 2011. *See note* 11 *infra*.

[2] The Federal Trade Commission has published a "tip sheet" for item 4(c), available at www.ftc.gov/bc/hsr/4cTipSheet.pdf. Guidance on item 4(d) is available at www.ftc.gov/bc/hsr/item4d.shtm.

[3] A list of information typically requested in Access Letters is available on the DOJ website at www.justice.gov/atr/public/220237.htm.

[4] *See* 15 U.S.C. §18a(e).

[5] For example, the Federal Trade Commission famously relied on internal business documents in its challenge of the proposed acquisition of Wild Oats Markets by Whole Foods Markets, two organic grocery store chains. *See FTC v. Whole Foods Market and Wild Oats Market*, Plaintiff Federal Trade Commission's Proposed Findings of Fact (D.D.C. Aug. 3, 2007), available at http://www.ftc.gov/os/caselist/0710114/0710114ProposedFindingsofFactPV.pdf (citing the parties' contemporaneous business documents as evidence of "unique and intense competition" between

them).

[6] In 2001, for example, the Hearst Corporation and related entities agreed to pay a civil penalty of $4,000,000 for failure to submit 4(c) documents with the HSR notification of its proposed acquisition of Medi-Span, Inc. and Medi-Span International, Inc. *See United States v. The Hearst Trust and The Hearst Corporation*, www.justice.gov/atr/cases/indx330.htm.

[7] The court may also impose such other equitable relief as it deems necessary or appropriate. *See* 15 U.S.C. §18a(g)(2).

[8]Case 12-cr-118-RLW.

[9] At the time of the conduct at issue, item 4(d) of the HSR reporting form did not exist. It was introduced with the July 2011 revisions to the form.

[10] DOJ Press Release, note 1 *supra*.

[11]*See United States v. Nautilus Hyosung Holdings, Inc.*, www.justice.gov/atr/cases/nautilus.html.

[12]DOJ Press Release, note 1 *supra*.

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