

## HSR Developments -- \$550,000 Fine for Failure to Produce 4(c) Documents

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The Justice Department announced yesterday that the fashion brand licensor Iconix Brand Group has agreed to pay a \$550,000 fine for failure to produce internal competitive materials, known as "4(c) documents," with its premerger clearance filing for its acquisition of the Rocawear clothing brand.

The Hart-Scott-Rodino Act (HSR Act) requires that all parties to transactions meeting certain size thresholds notify the US Department of Justice (DOJ) and Federal Trade Commission (FTC) and abide by certain waiting periods before consummating their transactions. The HSR Act further requires that all notifications include certain documents by or for officers or directors of the filing party that analyze the transaction in certain aspects, including markets, market shares, competition and prospects for sales growth. These materials are called "4(c) documents" because they are called for by Item 4(c) of the HSR notification form.

Iconix's HSR filing, made on March 14, 2007, did not include any 4(c) documents. The FTC and DOJ did not investigate the transaction, and granted early termination to the parties, who closed the transaction on March 30, 2007. The FTC did contact Iconix while the filing was pending and inquired about the lack of 4(c) documents, but was told that, in fact, a thorough search had been made and no documents discovered.

Despite clearing the transaction, which presumably raised no substantive antitrust issues, on April 6, 2007, DOJ opened an investigation into whether the filings had violated the HSR Act, and, on May 1, 2007, it issued a civil investigative demand to Iconix for relevant documents as part of its investigation to determine whether the \$200 million transaction had in fact been negotiated and financed without the creation of any 4(c) material.

According to the DOJ's complaint, the investigation turned up at least three responsive 4(c) documents, including two internal presentations containing market share charts for Rocawear and its competitors, and one internal email describing Rocawear as "a leader in the urban lifestyle category," and stating that this acquisition is "a great opportunity to expand into this market segment. . . . as well, we see upside opportunities in new categories . . . , plus international tie-ins."

Fines for failure to produce responsive 4(c) materials with HSR filings may be as high as \$11,000 per day per violation. Iconix filed a revised HSR notification and report form on May 23, 2007, for which the 30-day waiting period expired on June 22, 2007. The DOJ's complaint stated that Iconix was in continuous violation of the HSR Act for 91 days, from March 30, 2007 (the date of closing), to June 22, 2007 (the last day of the waiting period for the revised HSR filing).

Individuals and entities making HSR filings need to be aware that the US antitrust agencies take the provision of 4(c) documents very seriously. These documents often provide the agencies their primary source of information as to whether a transaction raises substantive antitrust questions; thus, the agencies view them as vital to their review process. As this case demonstrates, the agencies are prepared to pursue the failure to produce 4(c) documents even in instances where the underlying transaction does not raise any concerns under the antitrust laws. Therefore, parties who do not undertake a thorough search for such documents before filing place themselves in peril, regardless of the competitive impact of the transaction.

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## *Authors*



**Leon B. Greenfield**

**PARTNER**

✉ [leon.greenfield@wilmerhale.com](mailto:leon.greenfield@wilmerhale.com)

☎ +1 202 663 6972