

# **Minimizing Antitrust Risks in Non-Reportable Acquisitions**

## **Lessons Learned from Agency Challenges of Consummated Deals**

### **A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

#### **Today's panel features:**

Joseph G. Krauss, Partner, **Hogan & Hartson**, Washington, D.C.

Robert Bell, Partner, **Kaye Scholer LLP**, Washington, D.C.

Robert Schlossberg, Partner, **Freshfields Bruckhaus Deringer**, Washington, D.C.

**Wednesday, May 19, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

You can access the audio portion of the conference on the telephone or by using your computer's speakers.  
Please refer to the dial in/ log in instructions emailed to registrations.

For CLE purposes, please let us know how many people are listening at your location by

- closing the notification box
- and typing in the chat box your company name and the number of attendees.
- Then click the blue icon beside the box to send.

For live event only

- If the sound quality is not satisfactory and you are listening via your computer speakers, please dial **1-866-873-1442** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.
- If you dialed in and have any difficulties during the call, press \*0 for assistance.

**Strafford Webinar**  
**May 19, 2010**  
**1:00pm – 2:30 pm EDT**

**Minimizing Antitrust Risks in Non-Reportable Acquisitions**  
**Lessons Learned from Agency Challenges of Consummated Deals**

**Robert Bell**  
**Kaye Scholer**

**Joe Krauss**  
**Hogan Lovells**

**Bob Schlossberg**  
**Freshfields Bruckhaus**  
**Deringer**

## Challenges to Non-Reportable Transactions FY 2008

Acquiring Party	Value	Industry	Result
Polypore International Inc.	\$76 million	Battery Separators	Complete divestiture ordered following administrative law trail, appeal pending
TALX Corporation	Six separate transactions with a total value of \$230.5 million	Unemployment Compensation Management Services	Consent order – TALX may not enforce non-compete and non-solicitation agreements and must allow customers with contracts longer than one year to terminate on 90-days notice

## Challenges to Non-Reportable Transactions FY 2009

Acquiring Party	Value	Industry	Result
Inverness Medical Innovations, Inc.	\$175 million	Consumer pregnancy tests	Consent order – divestiture and prohibition against asserting patent claims
Ovation Pharmaceuticals, Inc.	Below the HSR filing threshold	Drug for congenital heart defect	Pending in D. Minn.
The Lubrizol Corp.	\$15.6 million	Chemical rust inhibitors	Consent order – divestiture
Carilion Clinic	\$20 million	Outpatient clinics	Consent order – complete divestiture
Microsemi Corp	\$25 million	Small signal transistors	Consent order – complete divestiture

## Challenges to Non-Reportable Transactions FY 2010

Acquiring Party	Value	Industry	Result
Election Systems and Software, Inc.	\$5 million	Voting equipment	Consent decree; divestiture of assets and software license
Cameron International Corp.	\$8.25 million	Electrostatic refinery desalters	Consent decree; divestiture of assets and technology license
Dean Foods	\$35 million	Dairy processing	Pending in E.D. Wisconsin
Dunn & Bradstreet	\$29 million	K-12 educational marketing databases	Administrative complaint filed

## Common Situations Where The Price Is Below \$63.4 Million But A Hart-Scott-Rodino Filing Is Required

- In an asset acquisition, the assumption of liabilities must be included in the acquisition price at face value (16 C.F.R. §801.10(c)(2); *Premerger Notification Practice Manual* (4<sup>th</sup> ed.) ¶114).
- In the formation of a joint venture, any credit or other obligation of the joint venture which a joint venturer extends or guarantees must be included as an acquired asset (16 C.F.R. §801.40).
- Where the price is not “determined” for Hart-Scott-Rodino purposes, such as when some of the consideration is contingent, the fair market value of the transaction must be determined, and it may be greater than the acquisition price (16 C.F.R. §801.10(c)(3)).



## Ways the Agencies Find Out About Non-Reportable Transactions

- Reviewing the trade press, the internet, and other public sources
- Customer and competitor complaints
- Complaints from other sources – employees, labor unions, etc.
- Non-U.S. filings
- In the course of other investigations in the same industry, in the course of other investigations that include one of the parties to the transaction

## Risks of Notifying DOJ/FTC about a Non-reportable Transaction

- An investigation is highly likely; without voluntary notification the agencies may not learn about the transaction.
- The closing will be delayed because the agencies will insist on an agreement not to close until an investigation has been completed.

## Risks of Not Notifying DOJ/FTC about a Non-reportable Transaction

- Agencies may learn about the transaction post-closing.
- Post-closing investigations tend to be lengthy and expensive – no HSR time limits.
- If one of the agencies decides to challenge transaction, there are no good alternatives
  - Litigate against the government
  - Sell the assets at a fire sale price

## Benefits of Voluntarily Notifying DOJ/FTC about a Non-reportable Transaction

- Ability to negotiate a timetable for an investigation that is similar to an HSR timetable
- Voluntary notification creates goodwill with the agencies
- For the buyer, ability to walk away from the transaction if the agency says it is going to challenge it.

## Considerations in Drafting Agreement Provisions

- Pre-closing: what will trigger walk-away rights?
  - injunction
  - compulsory process
  - knock on the door
  - level of Agency discussions
  - which jurisdictions – US; States; foreign countries
- Pre-closing: traditional “fix” obligations
- Post-closing
  - Seller cooperation
  - Expenses
  - Purchase price refund/holdback

## Sample Clause 1

If within 30 days after issuance of the press release announcing the transaction, an Assistant Director or Deputy Assistant Director of the United States Federal Trade Commission, or a Section Chief or Assistant Section Chief at the Antitrust Division of the United States Department of Justice, have not stated to the parties an intention to recommend a challenge to block the transaction from closing, the transaction will close on the following (i.e., the 31<sup>st</sup>) day. If during the 30-day period following issuance of the press release announcing the transaction, either an AD or DAD of the FTC or SC or ASC of the DOJ states to the parties an intention to recommend a challenge to block the transaction from closing, either party can terminate the agreement. The transaction may be closed at any time by agreement of the parties, or after either an FTC AD or DAD, or a DOJ SC or ASC, state to the parties they will recommend not to challenge the transaction.

## Sample Clause 2

Either party shall have the right to terminate this agreement if either party has been notified (i) that the Assistant Attorney General for Antitrust at the U.S. Department of Justice or a vote of the Federal Trade Commission has authorized staff to seek a preliminary injunction; or (ii) that any other Authority intends to make a decision prohibiting consummation of the transactions contemplated by this agreement; or (iii) that the DOJ or FTC has determined otherwise to challenge or take action to prohibit the consummation of the transactions contemplated by this agreement. The Buyer shall have the right to postpone the closing if at the time closing would have occurred, either party has learned by communication with the DOJ or FTC that an investigation relating to competition matters is pending or threatened at the DOJ or FTC or any other Authority.

## Sample Clause 3

Each of the undersigned parties agrees that it will execute and consummate the attached agreement on X date, provided that as of such date and time, neither the Antitrust Division of the Department of Justice, the United States Federal Trade Commission, nor the chief law enforcement officer of any U.S. state, has informed the undersigned parties or their counsel that they will seek to block consummation of the transaction or intend to continue their investigation of the transaction.



## Risk of Recission

- *FTC v. Elders Grain*, 868 F.2d 901, 907 (7<sup>th</sup> Cir. 1989) (recission granted where seller agreed to restructure the transaction to avoid HSR filing and accelerated closing despite notice the FTC would challenge the transaction).
- *United States v. Coca-Cola Bottling Co.*, 575 F.2d 222, 232 (9<sup>th</sup> cir. 1978) (if equities of the case demand, courts are not precluded as a matter of law from ordering recission).
- *Arnett v. Gerber Scientific Inc.*, 575 F.Supp. 770 (S.D.N.Y. 1983) (recission is within the power of the court to remedy conduct prohibited by the antitrust laws).

## Risk of Disgorgement

- *FTC v. Ovation Pharmaceuticals, Inc.*, (complaint filed Dec. 16, 2008, D. Minn.) (seeking divestiture and disgorgement of unlawfully obtained profits).
- *FTC v. Hearst Trust*, No. 1:01 CV00734 (D.D.C. 2001) (Hearst settled case by agreeing to divest acquired business and pay \$19 million as disgorgement of unlawful profits).
- FTC Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003) (Commission will consider three factors in determining whether to seek disgorgement or restitution: (1) clarity of the underlying violation; (2) availability of a reasonable means of calculating the remedial payment, and (3) other remedies available, including private actions.).