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DOJ Imposes $4.95 Million Fine for Pre-Closing U.S. Antitrust Violations

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Pre-closing integration violations in United States v. Flakeboard & SierraPine provide a reminder of practical rules for handling pre-closing activities without hitting antitrust landmines.

On November 7, the **Antitrust Division of the U.S. Department of Justice (DOJ) announced a proposed settlement imposing fines** of $4.95 million **on Flakeboard America Limited, SierraPine Limited, and their affiliates** (collectively, the parties). The fines were assessed in connection with Sherman Act and Hart-Scott-Rodino Act (HSR Act) violations relating to Flakeboard's intended acquisition of three U.S. wood product plants from SierraPine.

The DOJ alleged that, prior to obtaining HSR Act approval for Flakeboard's proposed acquisition of the SierraPine plants, the parties closed one of the plants that competed with Flakeboard, began to transfer all of the plant's customers to Flakeboard, and exchanged competitively sensitive information about the plant's customers, which Flakeboard distributed to its sales employees. The parties ultimately abandoned the transfer of the plant's customers in light of the DOJ's concerns about resulting anticompetitive effects. The DOJ complaint indicated that, but for the transaction, SierraPine would have continued to compete against Flakeboard from this plant. The DOJ was concerned that SierraPine would not reopen its plant after the transaction was abandoned, given the significant expense and time needed to do so.

Unlawful Conduct and Fines

The HSR Act prohibits a buyer from taking over any aspect of the operations of a target prior to the expiration of the HSR Act waiting period, a so-called "gun jumping" violation. The idling of plant capacity and exchange of competitively sensitive information between competitors' sales forces, which could (or did) affect pricing or other competitive indicia, prior to obtaining HSR Act approval clearly falls within this prohibition. The DOJ imposed fines on the parties of $1.9 million each, representing a substantial discount to the available statutory fines.[1]

The Sherman Act prohibits agreements between rivals that may harm competition, i.e., agreements that would harm customers. An agreement to reduce output by idling plant capacity prior to closing, thus denying customers a competitive option (i.e., an independent price), falls within this prohibition.

The DOJ alleged a per se violation (i.e., one that is inherently harmful) and sought civil fines of $1.15 million for disgorgement of any profits earned by Flakeboard.

In addition to the DOJ remedy, the parties have potentially exposed themselves to follow-on damages actions by injured indirect and direct purchasers.

Practical Lessons and Guidance

While the Flakeboard/SierraPine conduct, as alleged, certainly was egregious, it would be a mistake to allow this DOJ enforcement action to dampen necessary and lawful pre-closing conduct. Here are some practical, general guidelines on how best to approach pre-closing activities without risking violations for transactions involving direct competitors:

- **Prohibited Conduct:** Discussions, agreements, understandings, or information exchanges that would eliminate or reduce competition between the parties before the transaction is completed.
- **Information Exchanges and Datarooms:** Absent consultation with counsel, "clean teams" (i.e., individuals with no direct sales/marketing or HR responsibilities) should be used by strategic buyers, i.e., a competitor of the target, to view the following categories of nonpublic "competitively sensitive information":
    - Current and future customer specific prices/other commercial terms
    - Details regarding competitive customer bids/negotiations
    - Details regarding costs at the product level
    - Details regarding capacity and capacity utilization rates
    - Employee-specific compensation (depending on the industry)
    - Product development plans/strategies
- Integration planning should not be started without consultation with counsel.

Do	Do Not
• Continue to compete vigorously with each other and all other competitors • Consult with counsel prior to exchanging or discussing any potential competitively sensitive information • Share documents prepared in connection with the acquisition with counsel in draft	• Absent consulting with counsel, jointly approach or deal with customers or suppliers • Try to coordinate marketing, personnel, strategy, pricing, litigation, or other operations • Directly or indirectly exercise or attempt to

• Be aware that any document (e.g., email, PowerPoint presentation, handwritten notes, or other document) may be reviewed by the antitrust/competition authorities	exercise influence or control over the conduct of the other party (including capacity utilization and pricing) • Implement any management or personnel changes at the suggestion of the other party • Merge or integrate any of your systems • Change competitive activity based on information received through the valuation/due diligence process

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