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Inside The HSR Annual Report On Merger Review

Law360, New York (June 03, 2014, 10:07 AM ET) -- The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires that proposed acquisitions of voting securities, assets or noncorporate interests meeting certain criteria be reported to the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. Whether a particular acquisition must be reported depends upon the value of the acquisition and the size of the persons involved, as measured by their sales or assets.

At present, acquisitions generally are reportable if one person involved in the acquisition has total assets or annual net sales of $151.7 million or more and another person involved in the acquisition has total assets or annual net sales of $15.2 million or more, and the acquisition is valued at $75.9 million or more. However, if the transaction is valued at $303.4 million or more, it is reportable regardless of the total assets or annual net sales of the persons involved. (These reporting thresholds are adjusted every year on the basis of the change in the gross national product and new thresholds usually go into effect in February.)

After filing, the parties must observe a waiting period, usually 30 days, before they may complete the transaction. The waiting period may be shortened by a grant of early termination by the agencies. However, the waiting period may be extended by service of a request for additional information or documentary material by one of the agencies (a “second request”). In the event of a second request, the waiting period is extended until the 30th day after compliance with the second request.

The primary purpose of the HSR Act is to provide the agencies with the opportunity to review reportable mergers and acquisitions and assess their potential competitive consequences before they are consummated. On May 21, 2014, the agencies issued their Hart-Scott-Rodino annual report for fiscal year 2013. The report contains interesting data regarding the review of HSR notifications filed during FY 2013 (i.e., Oct. 1, 2012, through Sept. 30, 2013).

During FY 2013, 1,326 transactions were reported under the HSR Act, down 7.2 percent from 1,429 the previous year. Of these, 1,286 transactions were actually subject to HSR review. (The other reported transactions were not subject to HSR review because (1) the notification was incomplete; (2) it was subject to review by another government agency; (3iii) it was not reportable; or (4) it was withdrawn.)

Of these 1,286 transactions, 217 (or approximately 16.9 percent) were "cleared" to one of the agencies for further inquiry because of competitive questions; 145 were cleared to the FTC and 72 were cleared to the DOJ. Also, 89 of the 217 transaction that were cleared to one of the agencies (41 percent) were transactions valued at $500 million or more. The remaining 1,069 transactions either were granted early termination or were allowed to close at the expiration of the initial waiting period. (In fact, early termination was requested in 990 filings and granted in 797, which means early termination was granted 80 percent of the time it was requested.)

Second requests were issued in 47 transactions (25 by the FTC and 22 by the DOJ) or in 3.7 percent of notified transactions. This also means that more than 88 percent of the 217 "cleared" transactions subject to further inquiry by one of the agencies did not involve a second request. Although the DOJ issued fewer second requests than the FTC, it is interesting that the DOJ issued a significantly higher percentage of second requests than did the FTC. The DOJ issued second requests in 30.5 percent of the transactions it reviewed (22 out of 72), while the FTC issued second requests in 17.2 percent of its reviewed transactions (25 out of 145).

During FY 2013, 38 merger enforcement actions were brought by the agencies, 23 by the FTC and 15 by the DOJ, although these include several transactions that were not subject to the HSR reporting requirements. Of the 23 enforcement actions brought by the FTC, 16 resulted in consent orders; two of the transactions were abandoned or restructured; in one, the FTC filed a complaint seeking a permanent injunction; and in four, it commenced administrative actions, two of which resulted in consent orders requiring divestitures and, in the other two, the parties abandoned the transactions.

Interestingly, one of the FTC's notable challenges was not the result of an HSR filing. In FTC v. Saint Luke's Health System, the FTC challenged Saint Luke's completed acquisition of the largest independent, multispecialty practice group in Idaho. After a four-week bench trial, the district court permanently enjoined the transaction and ordered Saint Luke's to divest the group.

Of the DOJ's 15 mergers challenges, seven involved complaints filed in a federal court. Among the notable challenges was the suit brought to block the merger betweenU.S. Airways and American Airlines, which resulted in a settlement requiring the parties to divest key assets at capacity-constrained airports around the country. Another notable challenge was the DOJ's suit to stop Anheuser-Busch In Bev's ("ABI") proposed acquisition of Grupo Modelo. The lawsuit was settled by ABI agreeing to divest Grupo Modelo's entire U.S. business to Constellation Brands.

As was the case with the FTC, one of the DOJ's noteworthy challenges was to a consummated acquisition. The DOJ challenged Bazaarvoice's acquisition of Power Reviews, its closest rival in the market for internet product ratings and reviews platforms. After the DOJ prevailed at trial, the parties entered into a consent decree requiring Bazaarvoice to divest the assets it had acquired from Power Reviews.

Of the remaining four court cases, three were resolved by settlements filed simultaneously with the complaint and one case remains pending. As to the eight challenges that did not involve court actions, in three instances the parties abandoned the transactions; in three cases they restructured the transactions; and in two cases they changed their conduct to avoid the competitive problems. In addition, the agencies brought two enforcement actions for failure to comply with the HSR Act's premerger notification requirements, resulting in $1.2 million in civil penalties.

In sum, less than 17 percent of notified transactions received any further inquiry from one of the agencies and only 3.7 percent received second requests. Thus, more than 96 percent of reported transactions either received early termination or were allowed to close at the expiration of the initial waiting period. At the same time, the agencies did not hesitate to investigate and challenge acquisitions that they considered to present competitive problems.

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