Rival Manufacturers Reach $5 Million Settlement with DOJ for Illegal Premerger Coordination

Flakeboard America Limited ("Flakeboard") and SierraPine will pay a $3.8 million penalty and disgorge $1.15 million in profits to settle charges that they engaged in improper coordination of business decisions and "gun-jumping" prior to obtaining antitrust approval of their planned merger in violation of the Hart-Scott-Rodino Act and Section 1 of the Sherman Act. The two particleboard manufacturers coordinated the closure of a mill and transfer of its customers during the pendency of regulatory review and subsequently abandoned the proposed merger in the face of antitrust concerns, according to a complaint filed by the Antitrust Division of the Department of Justice ("DOJ").[1]

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"), requires parties contemplating mergers or acquisitions at or above certain thresholds to notify the agencies and observe a waiting period before completing those transactions. The HSR Act prohibits an acquiring party from attaining beneficial ownership of the acquired company by taking operational control of its business before the end of the waiting period, often referred to as gun-jumping.[2] Violations carry a maximum fine of $16,000 a day.[3]

Improper coordination of competitive business conduct between rivals can also amount to a violation of the Sherman Act because merging firms remain separate entities until closing.

Flakeboard and SierraPine are competitors in the sale of wood products. In January 2014, Flakeboard agreed to purchase three SierraPine mills,[4] and the companies submitted premerger notification filings. After complying with the DOJ's request for additional information ("second request") about the transaction, the waiting period expired on August 27, 2014. In September 2014, Flakeboard and SierraPine abandoned the acquisition after the DOJ expressed concerns about the transaction's likely anticompetitive effects in the sale of medium-density fiberboard.

According to the DOJ's complaint, Flakeboard and SierraPine violated the HSR Act and Section 1 of the Sherman Act by coordinating the closure of SierraPine's Springfield, Oregon mill and moving its customers to a Flakeboard mill in March 2014, well before the waiting period ended.[5] A labor issue at the mill prompted SierraPine to announce the closure while the DOJ was still reviewing the transaction, although the companies did not initially expect to close the mill until after the HSR waiting period expired. SierraPine then facilitated the closure and its announcement in concert with Flakeboard. Allegedly at Flakeboard's request, SierraPine also instructed its own sales employees to tell existing customers that Flakeboard would supply them and match SierraPine's prices.[6] The Springfield mill remains closed; many of its customers have switched to Flakeboard.[7]

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[1] *United States v. Flakeboard America Limited, et al.*, Complaint, 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014), available at http://www.justice.gov/atr/cases/f309700/309788.pdf.

[2] 15 U.S.C. §18a; 16 C.F.R. § 801(c).

[3] 16 C.F.R. § 1.98.

[4] *United States v. Flakeboard America Limited, et al.*, Complaint ¶ 1, 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014), available at http://www.justice.gov/atr/cases/f309700/309788.pdf.

[5] *Id.* ¶¶ 27-35.

[6] *Id.* ¶¶ 21-25.

[7] *Id.* ¶ 4.

This settlement illustrates the severity of repercussions for gun-jumping and impermissible premerger coordination among competitors. The DOJ sought a relatively uncommon remedy – disgorgement of profits - to ensure Flakeboard was not unjustly enriched from closing the Springfield mill and moving the mill's customers to Flakeboard and because injunctive relief—reopening the Springfield mill—would be impractical.[8] Furthermore, the DOJ argued that disgorgement is necessary to prevent unjust enrichment and serves as a deterrent to prevent anticompetitive conduct in the context of pending transactions.

While evaluating the legality of such conduct generally requires fact specific analysis, the DOJ has provided helpful guidance in the settlement documents for activity that may constitute gun-jumping or impermissible coordination between competitors. Conduct that the DOJ identified may be unlawful while a transaction is pending includes:

- Agreements that set price or output for competing products or that allocate customers
- Agreements that involve the disclosure of competitively sensitive information
- The closure of a production facility that produces a competing product (without giving prior written notice to and obtaining written approval from the regulators)

Permissible conduct between two firms during a pending transaction, according to the DOJ's guidance, includes:

- Agreements requiring a seller to operate its business in the ordinary course of business
- Agreements preventing the seller from materially changing how it conducts business
- Sharing of competitive information necessary to the due diligence process

This settlement serves as a reminder for companies to consult with antitrust counsel regarding any coordinated conduct prior to closing or the expiration of the waiting period under the HSR Act.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

[8] *United States v. Flakeboard America Limited, et al.*, Competitive Impact Statement at p. 11, 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014), available at http://www.justice.gov/atr/cases/f309700/309790.pdf.