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Implications of Recent Antitrust Developments and Trends for M&A

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The recovery in mergers and acquisitions activity from the global financial crisis so far has occurred in fits and starts rather than a sustained rebound. By contrast, antitrust merger enforcement, including litigated challenges to both proposed and already-consummated acquisitions, has been taking place at an almost frantic pace. This heightened enforcement activity follows on the heels of significant developments in antitrust merger law and policy, including new Horizontal Merger Guidelines (HMGs) issued by the FTC and DOJ Antitrust Division, as well as changes to the Hart-Scott-Rodino (HSR) filing requirements. The antitrust agencies have also been actively pursuing those who violate the HSR rules. Important legal and practical lessons can be gleaned from these cases.

Increase in Merger Litigation

The antitrust agencies recently have brought a string of lawsuits opposing M&A transactions in a variety of industries. Several of these challenges have been resolved, while the outcome of others is pending. For example:

- In October 2011, the DOJ successfully obtained an injunction to stop H&R Block from acquiring TaxAct, a competing provider of digital do-it-yourself (DDIY) tax preparation software.[1] This was the DOJ's first fully litigated merger challenge since its 2004 loss in Oracle/PeopleSoft[2] and its first contested merger victory in nine years.
- In December 2011, in another high-profile win for the DOJ, AT&T abandoned its proposed $39 billion acquisition of T-Mobile from Deutsche Telekom, four months after the DOJ filed a complaint seeking to block the deal. AT&T paid $4 billion in break-up fees to Deutsche Telekom in the form of cash and wireless assets.

1 *United States v. H&R Block, Inc.*, No. 11-00948, 2011 WL 5438955 (D.D.C. Nov. 10, 2011) (*H&R Block*).
2 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (*Oracle*).

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- In January of this year, the FTC challenged Omnicare's hostile tender offer for rival long-term care pharmacy provider PharMerica, causing Omnicare to abandon the transaction.
- In March 2012, the FTC ruled that ProMedica Health System's already-consummated acquisition of St. Luke's Hospital in the Toledo, Ohio area was anticompetitive and ordered ProMedica to divest St. Luke's Hospital to an FTC-approved buyer, upholding a decision issued three months earlier by an Administrative Law Judge.
- In April, the FTC successfully obtained a preliminary injunction from a federal court blocking the proposed merger of two Illinois hospitals, OFS Healthcare System and Rockford Health System, with the hospitals subsequently abandoning the transaction.
- In June, the Supreme Court granted certiorari in the matter of *FTC v. Phoebe Putney Health System, Inc.*, in which the FTC, acting through the Solicitor General of the United States, petitioned for review of a federal appeals court ruling concerning Phoebe Putney Health System's acquisition of Palmyra Park Hospital in Albany, Georgia.[3]

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What do these cases mean for deal makers? At a macro level, these recent challenges lay to rest any lingering doubts regarding the willingness of the antitrust agencies (especially the DOJ) to litigate a merger in court and their ability to win. In her last major speech before leaving the DOJ, the former Acting Assistant Attorney General for the Antitrust Division, Sharis Pozen, made this point bluntly, declaring that "the Antitrust Division isn't afraid to litigate, and when it does, it wins."[4] This highlights the critical importance for potential buyers and sellers of considering carefully and as early as possible the antitrust risk when contemplating a transaction.

These cases also reaffirm that deals of any size and scope, in any industry, are potentially open to intense and costly antitrust scrutiny and challenge in court. While the AT&T/T-Mobile transaction would have been a megamerger of two large telecommunications companies with national presence, H&R Block/TaxAct was a more modest $287.5 million deal, and the challenged hospital mergers were local in scope, each covering just a single metropolitan area. (Conversely, not all large horizontal mergers will be challenged even in the current enforcement environment, as shown by the FTC's decision to close its lengthy investigation of Express Scripts' $29 billion acquisition of Medco Health Solutions in the face of significant opposition to the deal.)[5]

There are also a number of more granular takeaways:

Market Definition is Alive and Well

Despite the extensive debate, sparked by language in the 2010 HMGs regarding a possible de-emphasis on the role of market definition in favor of direct evidence of competitive effects,[6] it is

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3 The core issue in this case involves the scope of the state action doctrine, which immunizes anticompetitive conduct that is the intentional or foreseeable result of state or local government policy. See Petition for a Writ of Certiorari, *FTC v. Phoebe Putney Health System, Inc.*, No. 11-1160 (U.S. Mar. 23, 2012*), available at* http://www.ftc.gov/os/caselist/1110067/120323phoebeputneypetition.pdf; see also Press Release, FTC, FTC Seeks U.S. Supreme Court Review of Appeals Court Ruling in Phoebe Putney / Palmyra Park Hospital Case (Mar. 23, 2012), *available at* http://www.ftc.gov/opa/2012/03/phoebeputney.shtm.

4 Sharis A. Pozen, Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers, Remarks as Prepared for the Brookings Institution, April 23, 2012, available at http://www.justice.gov/atr/public/speeches/282515.pdf.

5 Press Release, FTC, "FTC Closes Eight-Month Investigation of Express Scripts, Inc.'s Proposed Acquisition of Pharmacy Benefits Manager Medco Health Solutions, Inc.", April 2, 2012, *available at* http://www.ftc.gov/opa/2012/04/medco.shtm.

6 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.").

clear that the government will continue to define a relevant market in litigated merger cases and courts will continue to require market definition as an essential element of a transaction's competitive assessment.[7]

The continued vitality of market definition is directly connected to market structure, which looks at the number of participants, their market shares, and market concentration. The recent DOJ and FTC challenges all involved transactions that were characterized by the government as involving four or fewer competitors in markets with high barriers to entry. The court in *H&R Block* followed prior judicial precedent in rejecting a three-to-two merger, even though the merging parties were the second and third largest players and the combined firm would still have been significantly smaller than the industry's largest firm.[8]

From a litigation strategy perspective, market structure remains critical, despite the other more sophisticated analytical tools described in the 2010 HMGs. In mergers involving markets with few participants and high concentration, the resulting presumption of anticompetitive effects provides the government with a significant tactical advantage, posing a high hurdle for transaction parties seeking to rebut the presumption. On the other hand, the likelihood of a (successful) merger challenge decreases substantially when there are at least five or six participants in a relatively fragmented market.[9]

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Don't Forget the Geographic Market

In many merger cases, much time is spent discussing the relevant product market, while the geographic dimension of the market is taken as a given or addressed only in a cursory fashion. Defining geographic markets can be just as important as product market definition in assessing the number of competitors and the level of market concentration.

Also, it should not be assumed that a broader geographic market will always be helpful to the merging parties. In some cases a larger geographic market can bring more firms into the picture, thereby making the elimination of a competitor through merger seem less problematic, but in other cases it can be a deal killer. In AT&T/T-Mobile, for example, the DOJ considered the competitive effects of the transaction not only in local geographic markets (consistent with its analytical approach in prior mergers of mobile wireless providers), but also at a national level. The DOJ argued that, "from a seller's perspective, the Big Four carriers compete against each other on a nationwide basis" and "enterprise and government customers generally require a mobile wireless provider with a nationwide network." By defining a national market, the DOJ in effect removed the many regional and local competitors from the analysis, reducing the number of meaningful players to four, including AT&T and T-Mobile.[10]

Documents Will Usually Trump Other Forms of Evidence

The 2010 HMGs introduced a new section titled "Evidence of Adverse Competitive Effects," describing the types and sources of evidence that the agencies find most informative in predicting whether a merger may substantially lessen competition.[11] The section notes that the agencies typically obtain substantial information from the merging parties and that such information can take the form of documents, testimony, or data.[12] More controversially, the 2010 HMGs place greater

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7 In *H&R Block*, Judge Beryl Howell acknowledged the argument that market definition may be superfluous if market power can be directly measured or estimated reliably. However, he then pointed out that a market definition may be legally required by Section 7 of the Clayton Act and that no modern Section 7 case has dispensed with the requirement to define a relevant product market. *H&R Block,* at *40 n.35.

8 See, for example, *F.T.C. v. Heinz*, 246 F. 3d 708 (D.D.C. 2001), where the FTC won an injunction to block a merger of the second and third largest manufacturers of jarred baby food.

9 For mergers in a few specific industries, such as oil and gas, the agencies have historically taken enforcement action at lower levels of concentration.

10 *United States v. AT&T Inc*., Second Amended Complaint at ¶¶ 14, 19-21, Civil Action No. 11-01560 (D.D.C. September 30, 2011).

11 2010 HMGs § 2.

12 *Id*. at § 2.2.1.

emphasis than prior versions on economic theories and tests, some of which, such as the hotly debated upward pricing pressure or "UPP", are not yet widely accepted by antitrust practitioners or economists.

Despite the enhanced role of economic analysis suggested by the 2010 HMGs, the recent agency challenges demonstrate that the merging parties' own business documents, in particular those prepared in the ordinary course, are still the most probative evidence, with fact witness testimony also given substantial weight. The agencies and the courts (especially the latter) continue to believe that the best predictor of a merger's likely impact on competition is the views of the merging parties themselves as expressed in the ordinary course of business. For example, the DOJ in AT&T/T-Mobile and the FTC in Omnicare/PharMerica cited heavily in their complaints to statements in the merging parties' documents as support for the agencies' proposed market definitions and theories of competitive harm. Similarly, the court in H&R Block gave significant weight to ordinary course business documents and the testimony of key fact witnesses versus expert economic evidence (although it did also consider the latter). Economic tools and expert testimony may be used to support, but are unlikely to supplant, documents and fact testimony.

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The Merging Parties' Products Need Not Be Closest Substitutes

Although the *H&R Block* court's findings on unilateral effects were not essential to its conclusion that the merger was anticompetitive, the court's discussion of that topic is notable in two respects. First, Judge Howell rejected the *Oracle* court's assertion that for the government to prevail on a unilateral effects claim involving differentiated products, the merging parties must have a monopoly or dominant position in the relevant market, as evidenced by a high combined market share.[13] The court in *H&R Block* declined to impose a minimum market share threshold for proving a unilateral effects claim.[14] This approach is consistent with the 2010 HMGs, which removed the prior 1992 version's 35% combined share threshold for a presumption of anticompetitive effects in differentiated products markets.

Second, the court in *H&R Block* endorsed the position of the agencies, as expressed in the 2010 HMGs and argued by the DOJ in that case, that unilateral effects can exist even if the merging parties' products are not each other's closest substitutes, so long as they compete head-to-head.[15] The evidence in H&R Block showed that Intuit, the largest provider of DDIY tax preparation software, was the closest competitor for both H&R Block and TaxACT.

Everyone Loves a Maverick

In both *AT&T* and *H&R Block* the DOJ went to considerable lengths to describe the target companies, T-Mobile and TaxAct, as "maverick" competitors that played a unique disruptive role in their markets, thereby increasing the likelihood of anticompetitive coordinated effects from those mergers. The concept of a "maverick" firm is specifically discussed in the 2010 HMGs, which state that "[a]n acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects" and provide several examples of firms that may be industry mavericks.[16]

The court in *H&R Block* was unimpressed by the "maverick" label, finding that the government had failed to "set out a clear standard, based on functional or economic considerations, to distinguish a maverick from any other aggressive competitor."[17] However, the court did attribute weight to the fact that TaxAct had an impressive history of innovation and competition in the DDIY market and

13 *Oracle*, 331 F. Supp. 2d 1098, 1123.
14 *H&R Block*, 2011 WL 5438955 at *40. The merging parties' combined share of the DDIY market was 28%.
15 *Id*. at *39. The 2010 HMGs state that "[a] merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner." 2010 HMGs § 6.1.
16 2010 HMGs §§ 2.1.5, 7.1.
17 *H&R Block* 2011 WL 5438955 at *36.

played a special role in the market that constrained prices, for example, by introducing a free-for-all offer.[18]

The decision in *H&R Block* suggests that an acquisition target need not meet some amorphous definition of a "maverick" in order for the government to prove coordinated effects are likely, so long as the target is an aggressive price competitor or innovator.

Efficiencies Claims Continue to be a Losing Battle

Despite the addition of a section on efficiencies to the HMGs in 1997 and the retention (with revisions) of that section in the 2010 HMGs, the government has viewed claims of merger efficiencies with significant skepticism, especially in highly concentrated markets. This already tall hurdle may have been raised even higher following *H&R Block*. The court dismissed most of the merging parties' claimed efficiencies as not merger-specific and not independently verifiable, holding that cost savings and other efficiencies premised on management's estimation and judgment rather than objective data analysis should not be credited.[19]

As a practical matter, however, it can be very difficult for an acquirer to develop a detailed efficiencies case for a proposed acquisition of a direct competitor, given the considerable legal and business constraints on pre-merger information sharing and integration planning. Ironically, those strategic combinations of competitors can often generate the greatest efficiencies, which can result in lower prices to consumers if cost savings are passed through.

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Heightened Activity on the HSR Front

New HSR Filing Requirements

On August 18, 2011, significant changes to the HSR mandatory reporting requirements took effect. The agencies' stated purpose for these changes was to streamline the HSR Form and capture new information to help the agencies conduct their initial review of a proposed transaction's competitive impact. The changes have not altered the substantive standard of antitrust review of transactions that are reportable under the HSR Act. However, the new HSR rules have had real, practical consequences for businesses contemplating transactions.

The HSR Form requires the submission of information and data regarding the transaction and the parties, together with various documents. Some of the new amendments have indeed simplified the HSR Form, such as removal of the requirement to report revenues for a "base year" in Item 5 of the HSR Form, eliminating the need for companies to dig into old financial records.[20] Other amendments, however, require new, additional information and documents to be submitted with HSR filings. For example, under new Item 4(d) of the HSR Form, parties are now required to submit with their HSR filing, subject to certain exceptions and other parameters, confidential information memoranda and materials prepared by investment bankers and other consultants relating to the target business, as well as documents evaluating or analyzing synergies or efficiencies associated with the transaction in question. These items were not always included by filing parties in Item 4(c) under the old HSR Form.

The new rules also call for more details regarding the HSR filer's corporate structure, including additional information about "associates" -- entities that are commonly managed with the acquiring party. Examples of associated entities include the general partners of a limited partner, other partnerships with the same general partner, other investment funds whose investments are managed by a common entity, and investment managers of funds. This change resulted from the antitrust agencies' perception that, under the old HSR Form, they were not receiving all of the

18 *Id.*

19 *Id*. at *45-46.

20 However, Item 5 has been expanded to require more detailed revenue information about the most recent fiscal year's revenues, including the reporting of revenue for products manufactured abroad and sold into the U.S.

information necessary for an initial antitrust review, in particular information regarding the buyer's affiliated portfolio companies (because an acquiring person previously only had to report information pertaining to entities it "controls"). This has frequently been an agency concern in transactions involving families of private equity funds or hedge funds, as well as master limited partnerships (MLPs) which are prevalent in the energy industry.

To assist the public with interpreting the new HSR rules, the FTC has conducted multiple informal training and information sessions over the past several months. During these sessions, the FTC has recognized that the burden has increased in some respects for filing parties, but also has noted that it is now easier to satisfy certain HSR requirements. The FTC has also explained that the additional information and documents mandated by the HSR changes have assisted it and the DOJ in their analyses of deals and even expedited the review process in some cases.

The FTC also has published on its website a number of helpful resources for assistance in filing the new HSR Form, including "Tip Sheets," in which the FTC addresses specific issues related to individual Items of the HSR Form, and an Interactive Associate Decision Tree, which illustrates how to identify an entity's associates.[21] Additionally, the FTC website includes many new informal interpretations providing answers to questions concerning the new rules. For those with questions beyond the scope of these resources, the staff of the FTC's Premerger Notification Office has repeatedly emphasized their willingness to answer questions via phone or email (although they have expressed a preference for email).

As a result of the new rules, businesses contemplating reportable transactions should consider whether additional time will be needed for their HSR document collection and review process. Additionally, the new concept of "associate" and its application to the HSR Form is particularly significant for businesses with complex partnership structures. In addition to allowing ample time to collect this information, it may be prudent to keep this information up-to-date after an initial filing under the new HSR rules to decrease the burden for future filings.

Recent HSR Enforcement Actions

While the agencies have been assisting filing parties with understanding and interpreting the new HSR rules, they have also been actively pursuing violators of the rules. In December 2011, the agencies assessed the first HSR Act penalty for failing to file where the HSR threshold was triggered by shares received as executive compensation. Then in May of this year, the DOJ charged a senior corporate executive with criminal obstruction of justice for tampering with existing company documents before they were submitted to the antitrust agencies in conjunction with an HSR merger review.

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U.S. v. Brian L. Roberts

On December 16, 2011, the DOJ, at the request of the FTC, filed a complaint against Brian L. Roberts, Chairman of the Board and Chief Executive Officer of Comcast Corporation (Comcast), alleging that Mr. Roberts violated the HSR Act for receiving stock of Comcast as executive compensation and acquiring additional shares through his 401(k) plan without first making a notification filing and observing the statutory waiting period. Simultaneously with the filing of the complaint, a proposed settlement was submitted, whereby Mr. Roberts agreed to pay a $500,000 civil penalty to settle the charges against him.[22]

Although Mr. Roberts had made an HSR filing to acquire Comcast stock in 2002, he failed to realize that the 2002 filing permitted the acquisition of stock for at most a five-year period following the filing (so long as he did not exceed the notification threshold). As part of his compensation as

[21] For a listing of the FTC's Tip Sheets and other available resources, see http://www.ftc.gov/bc/hsr/hsrwhatsnew.shtm. The Interactive Associate Decision Tree is available at http://www.ftc.gov/bc/hsr/decision-tree.pdf .

[22] Press Release, FTC, FTC Obtains $500,000 Penalty for Pre-Merger Reporting Act Violations (Dec. 16, 2011), *available at* http://www.ftc.gov/opa/2011/12/brianroberts.shtm [hereinafter FTC (Dec. 16, 2011)].

Chairman and CEO, Comcast issued restricted stock units (RSUs), rights to receive voting securities at a fixed time in the future, to Mr. Roberts. After the five-year period following his 2002 HSR filing expired, Mr. Roberts acquired a total of 339,560 shares as a result of the vesting of his RSUs, as well as 3,700 shares of Comcast voting securities acquired via reinvestment of dividends and short-term interest earned by his 401(k) account. As a result of these acquisitions, Mr. Roberts crossed then-current notification thresholds set by the HSR Act. Mr. Roberts did not file notification under the HSR Act to observe the waiting period prior to consummating these acquisitions.[23] As part of the backdrop to this enforcement action, it is worth noting that, prior to 2002, Mr. Roberts twice made corrective filings relating to Comcast transactions that were not reported in a timely fashion under the HSR Act. The FTC did not seek civil penalties for those earlier violations, however it did notify Mr. Roberts that he would be "accountable for instituting an effective program for all of the entities he controls to ensure full compliance with the HSR Act's requirements."

The $500,000 penalty assessed on Mr. Roberts was significantly less than the maximum allowable penalty under the HSR Act. The FTC noted that the amount of the civil penalty was limited due to a number of factors, including "that the violation was inadvertent and technical; that it was apparently due to faulty advice from outside counsel; that [Mr.] Roberts did not gain financially from the violation; and that he reported the violation promptly once it was discovered."[24]

Counsel should educate company executives who acquire stock from their employer, whether through the vesting of RSUs or other forms of compensation, that they may need to comply with the notification and waiting period requirements of the HSR Act prior to receiving the stock.

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U.S. v. Kyoungwon Pyo

Counsel should also note that the antitrust agencies take very seriously their obligation to maintain the integrity of the merger investigation process and the importance placed on company documents submitted in connection with an HSR merger review. In addition to the $16,000 per day penalty available for violations of the HSR Act, in egregious situations the agencies will not limit consequences to civil penalties or the delay of a transaction.

On May 3, 2012, the DOJ announced a plea agreement with Kyoungwon Pyo, a senior executive with Hyosung Corporation (Hyosung), in which Mr. Pyo pleaded guilty to criminal obstruction of justice and agreed to serve five months in U.S. prison.[25] According to the charges filed against him, Mr. Pyo altered and directed subordinates to alter existing corporate documents before submission to the FTC and DOJ as part of HSR filings in connection with the proposed acquisition by Nautilus Hyosung Holdings Inc. (NHI), a Hyosung affiliate, of Triton Systems of Delaware, Inc. (Triton), a rival manufacturer of automated teller machines.[26] The altered documents included those discussing market shares, competition, competitors, markets and potential for sales growth or expansion into product or geographic markets (documents responsive to Item 4(c) of the HSR Form). The alterations allegedly misrepresented and minimized the competitive impact of the proposed acquisition.[27]

After the DOJ opened a routine civil investigation into the proposed acquisition, it requested additional documents from NHI. According to the DOJ, Mr. Pyo made, and directed other persons

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23 *United States v. Brian L. Roberts*, Complaint for Civil Penalties for Failure to Comply with the Premerger Reporting and Waiting Requirements of the Hart-Scott-Rodino Act, at ¶19, Civil Action No. 11-02240 (D.D.C. Dec. 16, 2011).

24 *Supra*, note 22.

25 Press Release, DOJ, Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation (May 3, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/282873.htm..

26 The plea agreement involving Mr. Pyo comes after NHI pleaded guilty in 2011 to two counts of obstruction of justice and agreed to pay a $200,000 fine. *See U.S. v. Nautilus Hyosung Holdings, Inc*., Plea Agreement, at ¶8, Criminal Action No. 11-00255 (D.D.C. Aug. 15, 2011). The maximum penalties for obstruction of justice are a $500,000 criminal fine for corporations and twenty years in prison and a criminal fine of $250,000 for individuals.

27 *Id*.

to make, material changes to pre-existing business and strategic plans, which misrepresented statements concerning NHI's business and competition among vendors of ATMs that were relevant and material to the DOJ's analysis of the proposed acquisition of Triton.[28]

Antitrust lawyers normally do not associate merger reviews with potential criminal charges. The DOJ has upped the ante, sending a clear signal that tampering with documents or failing to comply with HSR production obligations will be punished severely, even if such conduct does not adversely affect the government's substantive review of a transaction.[29] Acting Assistant Attorney General Joseph Wayland has stated that "[m]aintaining the integrity of the merger review and investigation process is one of [the DOJ's] highest priorities."[30] The DOJ's actions in the Hyosung case also reaffirm the critical role of documentary evidence in antitrust merger review.

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When preparing HSR filings under the new rules and making judgments regarding the responsiveness of specific documents to Items 4(c) and 4(d) of the HSR Form, companies and their counsel should be mindful of the potentially serious consequences of failing to comply with HSR obligations, both in the initial filing and subsequent document productions.

Conclusion

Given the current merger enforcement climate, including the rash of recent litigated merger challenges, firms are well advised not to wait for a specific transaction to materialize before paying attention to antitrust issues. For example, they should keep in mind that company documents, whether prepared in connection with a particular deal or in the ordinary course of business, can play a key role in the antitrust review of transactions and have a dramatic impact on the assessment of a transaction's likely competitive effects. Companies therefore should be sensitive to the implications that the content and phrasing of business documents, including emails, may have for proposed transactions. They should take basic precautions to avoid creating documents that convey misleading and inaccurate impressions and that would increase the likelihood of an antitrust investigation or challenge. Ensuring personnel are educated regarding these matters can help avoid complications in the future.

Companies also need to be mindful of the notification and waiting period requirements of the HSR Act and comply with those requirements. This includes producing responsive, non-privileged documents in HSR filings. Finally, corporate executives who intend to acquire voting stock of their employer as part of their compensation, whether through conversion of options, vesting of RSUs or other means, should consult with counsel prior to receiving such shares.

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28 *United States v. Kyoungwon Pyo*, Information, at ¶7, Criminal Action No. 12-00118 (D.D.C. May 3, 2012).

29 The DOJ did not allege that the conduct of NHI or Mr. Pyo impacted its investigation of the proposed acquisition of Triton. The parties abandoned the deal before the DOJ completed its review.

30 Press Release, DOJ, Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation (May 3, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/282873.htm.