



Company agrees to pay \$550,000 civil fine for HSR Act violation

UNITED STATES V ICONIX BRAND GROUP

This briefing examines the civil fine of \$550,000 that the Iconix Brand Group has agreed to pay to settle charges that it failed to produce certain documents as required under US antitrust laws before completing a \$204m transaction. It also outlines the implications of this for other firms required to file under the HSR Act.

On 15 October, the Antitrust Division of the US Department of Justice (DOJ) announced that the Iconix Brand Group agreed to pay \$550,000 to settle charges that it failed to produce certain documents as part of its premerger notification filing for its \$204m acquisition of assets from Rocawear Licensing. Iconix owns a diversified portfolio of fashion brands and licenses those brands to retailers and manufacturers worldwide. Rocawear also licenses its fashion brands throughout the world.

HSR requirements: 4(c) documents

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), companies are required to file a Notification and Report Form with the DOJ and the Federal Trade Commission (FTC) and to observe a waiting period before consummating certain transactions. The parties to the transaction must also submit certain documents under Item 4(c) of the premerger notification form: 'all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into geographic or product markets.' These documents are commonly known as '4(c) documents' and their production is designed to enable efficient review of the hundreds of transactions filed each year with the US antitrust agencies. In particular, such documents are used to identify which transactions may harm competition and thus require further review by the agency staff.

Details of the case

In early 2007, Iconix began negotiations with Rocawear to acquire certain licensing rights relating to the Rocawear brand name. The parties signed an agreement in early March and subsequently filed a premerger notification form with the US antitrust agencies. When submitting its notification form, Iconix certified under penalty of perjury that it had no documents covered by Item 4(c). Finding this unusual, an FTC staff member contacted Iconix to confirm that an appropriate search had been conducted for such documents. Iconix's counsel reconfirmed that the company had indeed duly searched for 4(c) documents and that no such documents existed. In late March, the antitrust agencies notified the parties that neither agency intended to investigate the acquisition and granted the parties' request for early termination of the statutory waiting period. Shortly thereafter, Iconix and Rocawear completed the transaction.

On 6 April, however, the DOJ opened an investigation to determine whether the parties undertook a \$204m acquisition without creating any 4(c) documents. In the course of its investigation, the DOJ discovered and identified several such documents. For example, one email sent to Iconix directors and officers evaluated and analysed the proposed acquisition of Rocawear's assets with respect to expansion into other markets. In the wake of this discovery, Iconix recertified a revised version of its premerger notification form declaring the 4(c) documents. Thereafter, Iconix agreed to settle the case by paying \$550,000 in civil fines.

Other examples of failure to include 4(c) documents

This was not the first time that companies have come under scrutiny for failing to produce 4(c) documents.

The Hearst Corporation agreed to pay a \$4m civil fine in 2001 after the FTC determined in a subsequent investigation of the consummated merger that Hearst had failed to produce 4(c) documents with its premerger notification form.

Blackstone Capital Partners II Merchant Banking Fund agreed to pay \$2.78m in civil fines and an individual director agreed to pay \$50,000 in civil fines in 1999 when the FTC discovered the parties failed to submit a memorandum prepared for the investment committee that qualified as a 4(c) document. This document was discovered during a document production for an unrelated subsequent transaction.

Automatic Data Processing (ADP) agreed to pay \$2.97m in civil fines in 1996 for failing to produce 4(c) documents that were discovered in a subsequent investigation. The FTC specifically rejected ADP's argument that it should not pay a civil fine for inadequately conducting a 4(c) search. The FTC emphasised that there is no requirement to show intentional misconduct: negligence alone is sufficient to constitute a violation. The FTC also rejected ADP's argument that the FTC must show it was harmed by the failure to disclose.

Implications

Companies that are required to file a premerger notification form under the HSR Act should work closely with their antitrust counsel and be aware of the dangers of failing to search thoroughly their files for 4(c) documents. As was the case here, it does not matter if the transaction itself does not pose any risk of competitive harm; what matters is strict compliance with the HSR requirements. Moreover, even after the transaction is consummated there continues to be a risk that such documents may be discovered in either a subsequent investigation relating to the transaction or, as was the case with Blackstone, a subsequent, unrelated investigation or transaction. It is also important to consult with antitrust counsel at early stages of proposed

transactions to avoid creating misleading documents that may complicate the review of the transaction by the antitrust agencies.

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