

●●●● NOVEMBER 2014

DOJ Settles Gun Jumping Charges with Flakeboard and SierraPine

On November 7, 2014, the United States Department of Justice Antitrust Division (DOJ) announced the settlement of charges it brought against Flakeboard America Limited (Flakeboard), along with Flakeboard's parent companies, and SierraPine for alleged illegal premerger coordination in violation of both 15 U.S.C. § 18a (the HSR Act) and 15 U.S.C. § 1 (the Sherman Act). In order to settle the DOJ's charges of illegal premerger coordination, commonly referred to as "gun jumping," the parties were required to pay \$3.8 million in civil penalties plus \$1.15 million in disgorgement of illegally obtained profits.

Allegedly Improper Conduct

According to the DOJ's complaint, Flakeboard and SierraPine entered into an Asset Purchase Agreement on January 13, 2014, in which Flakeboard agreed to acquire multiple mills from SierraPine. As the transaction exceeded the applicable thresholds, the parties filed the required premerger notifications with the Federal Trade Commission (FTC) and DOJ on January 22, 2014 in compliance with the HSR Act.

Once the parties have made their premerger notification filings, the HSR Act requires them to observe a waiting period before the buyer can obtain beneficial ownership. According to DOJ's complaint, such waiting periods exist "to ensure that the parties to a proposed transaction are preserved as independent entities while the reviewing agency... investigates the transaction and determines whether to challenge it." See DOJ Complaint ¶ 3. In this instance, the DOJ alleged that instead of properly maintaining their independence, the parties instead coordinated during the waiting period to close a SierraPine facility and move its customers to a Flakeboard facility.

As the parties were still competitors during the mandatory period, the DOJ alleged two distinct violations. First, the coordination between competitors to close one SierraPine facility and allocate its former customers to a Flakeboard facility was alleged to have been an illegal agreement to restrain trade in violation of Section 1 of the Sherman Act. Separately, the premature transfer of operational control (i.e. beneficial ownership) before expiration of the mandatory waiting period was a violation of the HSR Act. Bill Baer, Assistant Attorney General of the Antitrust Division said of the challenged conduct: "they closed a plant and allocated customers when they should have been competing vigorously. As a result both companies are paying substantial civil penalties and Flakeboard is being forced to surrender the ill-gotten profit it gained from violating the antitrust laws."

Advice Moving Forward

The Flakeboard - SierraPine matter serves as a stark reminder that parties remain competitors unless and until they receive HSR clearance and close their transaction. Entities considering an HSR reportable transaction should consult counsel to ensure that any communications and integration activities undertaken during the mandatory waiting period are within the bounds of acceptable premerger activities.

For more information, please contact:
Richard Falek (rfalek@winston.com)
Ted Farrell (tfarrell@winston.com)
Jeffrey Kessler (jkessler@winston.com)
Oscar David (odavid@winston.com)
or your usual Winston & Strawn attorney.

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