FRIED FRANK ANTITRUST AND COMPETITION LAW ALERT™

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FEDERAL TRADE COMMISSION UNVEILS PROPOSAL FOR OPTIONAL ELECTRONIC HART-SCOTT-RODINO FILINGS

The Premerger Notification Office of the Federal Trade Commission informally presented a framework for its planned electronic Hart-Scott-Rodino filing option to the bar on Thursday, March 28.

Set to pilot in late Summer, and be running before the end of the year, the electronic filing option would ease the burden of making and separately hand delivering multiple paper copies of filings to the Federal Trade Commission and the Department of Justice. It is anticipated that the electronic filing system also will speed the issuance of receipt confirmations, which will be issued electronically for electronic filers. In addition, electronic filers will be able to check the status of a filing via a secure, password protected web site.

The voluntary program will co-exist with the current paper filing system, which would remain in place for the foreseeable future. Parties also would be given the option of making a combination electronic/paper filing. The electronic filing system would accept filings around the clock, 7 days a week, but filings received after 5:00 PM (or on a non-business day) would be credited for the next business day.

The system would require the download of file preparation software from the FTC's web site. Filings would then be completed using the specialized software package, and transmitted to the FTC upon completion. Attachments to the filing, notably 4(c) documents, would be presented in a yet-to-be determined electronic file format, most likely Adobe's Portable Document Format (PDF) or as graphic JPEG images. Corrections or amendments to electronic filings also will be possible using the software package. Aware of the confidentiality concerns presented by electronic transmission of sensitive business data, the FTC intends to implement several security layers to protect the integrity of the electronic filing system. Specific security measures have not yet been determined.

Several unresolved issues will need to be addressed before the program is implemented. One issue raised was whether to permit large attachments to be used in lieu of filling out certain data intensive parts of the form, such as the revenue information sections. Companies with wide-ranging business activities, especially those engaged in manufacturing, often must report large volumes of revenue data on a product line basis. The manner in which some companies currently keep and report this data may not be compatible with the electronic filing system as envisioned.

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Premerger Office personnel are considering this and other issues in an effort to make the electronic filing system practical and useful to filing parties and to the government. We will continue to timely report additional information related to this program and other relevant developments.

Fried, Frank's Criminal Antitrust Expert Hosts Training Event on Federal Criminal Investigations and Litigation

Tony Nanni, Fried Frank's recently arrived criminal antitrust expert, moderated a DC Bar-sponsored panel discussion held at the firm's Washington office March 21. The event, which included senior Antitrust Division officials, focused on criminal investigative techniques and litigation strategies used by the Department of Justice. Prior to joining Fried Frank, Nanni was the chief of the agency's key criminal enforcement section.

Officials discussed two recent international criminal cartel cases--the prosecutions of Mitsubishi Corporation for aiding and abetting the world-wide price-fixing of graphite electrodes, and the prosecution of Alfred Taubman, former chairman of Sotheby's for fixing the commissions of sellers in the art and antique auctions market. Scott Hammond, director of criminal enforcement at the Division, was joined by Robert Connolly, chief of the Philadelphia regional office and Ralph Giordano, chief of the New York regional office at the panel.

Hammond said that the Division's amnesty program has been highly successful in bringing prosecutions and instigating new investigations. In part because of that continued success, the European Community has recently revised its own leniency program to model it more closely on that of the United States. Hammond opined that more firms will now seek leniency in Europe under the new program, and will be more likely to disclose information concerning related criminal activity in the United States. At the instigation of American antitrust regulators, Interpol has also added fugitives facing antitrust indictments in the U.S. to Interpol's "Red Notice Watch List." Foreign nationals traveling internationally can be detained or even extradited and forced to submit to U.S. jurisdiction, Hammond informed the group.

Hammond also explained that the amnesty program is effective today primarily because a corporation that cooperates with the government can significantly reduce, or even eliminate, both corporate fines and jail time of key corporate individuals. In the *Mitsubishi* case recently tried in Philadelphia, Mitsubishi Corporation paid a fine of $134 million. A codefendant that qualified for the government's amnesty program paid *no* fines. Similarly, in the matter that resulted in the Taubman prosecution, Sotheby's co-defendant, Christie's, received amnesty, and was not fined. Sotheby's paid a $45 million fine, one executive plead guilty and another, Taubman, was convicted after a December trial. His sentencing is scheduled for next month.

The *Taubman* case sought to put the government's amnesty program on trial by arguing that it effectively bought the

testimony of key witnesses. But New York office chief Giordano noted that the defense's attack on the credibility of trial witnesses who cooperated with the prosecution was not effective. The combination of evidence from those witnesses, together with important documents discussing meetings between Taubman and his counterpart at Christie's, were too powerful for the defense to overcome.

The *Mitsubishi* case represented a significant advance for the Government, according to Philadelphia office chief Connolly, since it was the first trial in which a defendant was convicted of aiding and abetting a price-fixing conspiracy. When Nanni asked why the Government chose that theory and undertook the added burden of showing specific intent, Connolly said that the aiding and abetting charge was the most effective way to describe the role of Mitsubishi to a jury, in encouraging and facilitating, but not directly participating in, the cartel activity. Yet Mitsubishi's fine far surpassed that of some cartel participants.

Connolly disclosed that the *Mitsubishi* case was also an example in which the Government began investigating a cartel in one product area was able to expand the investigation into other product areas. When asked about the use of amnesty to further the graphite electrode investigation, Connolly said the government, on its own initiative, approached a small firm in the cartel and encouraged it to cooperate. That evidence provided the means necessary for the government to obtain search warrants for the other conspirators.

Because of the continued aggressiveness of the Department of Justice in prosecuting antitrust offenses, Nanni urged corporate counsel to evaluate any cooperative arrangements or meetings that could be perceived by investigators as opportunities for setting or maintaining prices. Antitrust counsel should be consulted regarding any potential criminal investigations.

Senior DOJ & FTC Attorneys Discuss Inner Workings of the Agencies

Barry Nigro and Jonathan Kanter, both of Fried Frank, moderated a panel discussion with senior government officials on the merger review process at the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). At the DC Bar-sponsored event held at Fried Frank's Washington office May 14, DOJ Director of Operations and Merger Enforcement, Constance K. Robinson, and FTC Bureau of Competition Associate Director, D. Bruce Hoffman, provided members of the antitrust bar with an insider's view of the merger review process and practical ways counsel can better represent their clients.

Internal Agency Deadlines Affect When and How to Represent Clients' Interests

The panelists emphasized that parties fail to appreciate how the agencies' internal deadlines affect the Hart-Scott-Rodino ("HSR") merger review process and may wait too long to provide the staff with information that can be helpful in avoiding completely or easing the burden of a "second request" for additional documents and information.

Most importantly, merging companies should not assume that they have a full thirty days to convince the agency not to

issue a second request. Instead, because of internal procedures, it is important to communicate with staff in the first half of the initial 30-day waiting period. Specifically, Hoffman explained that once an investigation has been cleared to the FTC (rather than DOJ) to investigate[1], the investigating staff has only seven to ten days to recommend to the Bureau of Competition Director's Office whether to issue a second request. Hoffman stressed that the most effective advocates are those who provide hard facts that can be confirmed during the 30-day waiting period. He also suggested that in some circumstances parties may consider withdrawing and re-filing their HSR notifications in order to give staff more time to review relevant information outside the second request process.

Robinson explained that DOJ's process and timeline are similar. Once a transaction has been cleared to DOJ to investigate, the investigating staff has approximately a week to review the matter and recommend whether to issue a second request. She urged parties to provide pertinent and verifiable facts early in the 30-day waiting period, to promptly respond to staff's questions, to provide customer lists with specific contact information, and to be candid with staff about any time constraints relating to the proposed deal. She emphasized the importance of educating staff by arranging meetings with knowledgeable company employees. Robinson also advised that parties who choose to submit a white paper to the staff prior to a meeting should do so at least 72 hours before the meeting to provide staff with adequate time to read the paper.

The officials' remarks highlight the importance of consulting with counsel, if possible, well before filing HSR notification so that any questions from staff can be answered as quickly and persuasively as possible. The goal is to avoid completely or significantly narrow the scope of any second request for additional documents and information, which otherwise could be quite burdensome and result in significant delay to closing a deal. Of course, the specific strategy for communicating with the staff can vary from deal to deal.

Private Parties Should Narrow the Scope of the Second Request

The panelists also offered their thoughts on the most effective techniques in negotiating the scope of the second request.

Robinson recommended that parties educate agency staff about the company's corporate structure in order to limit the number of individuals whose electronic and paper files must be searched for responsive information. She suggested that merging companies should provide staff with samples of the types of documents that they want to exclude from the document production (e.g., because they are voluminous and cumulative or otherwise not material). She explained that unless parties take the time to educate staff about the industries in which they operate and the way they do business and maintain records, the reviewing attorneys will want a broad request to ensure they do not miss obtaining pertinent information.

Note: 1. The merger clearance process and the recent Merger Screening Agreement entered into between the FTC and DOJ are described in the Antitrust Alert sent March 22, 2002. *See* http://www.ffhsj.com/antitrust/pdf/alert_032202v2.pdf.

Hoffman suggested that in appropriate circumstances, merging companies may negotiate with staff to initially provide certain types of documents so that staff can review them early in the investigation and possibly determine, based on that review of a limited set of documents, that the transaction presents no significant competitive issue. Such an approach can save companies both time and money by avoiding production of the remaining documents called for in the second request.

Both agencies allow parties to appeal specific parts of a second request if an agreement cannot be reached with staff (see http://www.ftc.gov/os/2000/04/secrequest.htm, http://www.usdoj.gov/atr/public/8430.pdf). Appeals are not frequent and parties win about half of them, the officials said. Hoffman added that staff does not penalize or prejudice parties for using the procedure.

The Production of Electronic Documents Requires Special Attention Early in the Process

Kanter, a Fried Frank associate, asked how the agencies plan to deal with the increasingly large volume of electronic documents that are called for in a second request, particularly given the high cost to companies of printing and reviewing such documents.

Both Robinson and Hoffman acknowledged that issues associated with the production of electronic documents require further study. There is internal agency debate on whether companies should be required to produce electronic documents in digital format, whether word searches of digital documents are an appropriate way to identify responsive documents and thereby to limit the size of the production, and whether companies should be required to produce electronic mail or other backup tapes. Hoffman explained that while electronic files are searchable, authenticity problems arise when an electronic document is "reopened" by DOJ or FTC staff. He also said that FTC staff is skeptical about using word searches to identify responsive electronic documents because of concern about whether word searches can be crafted to capture all materially relevant documents. Both agency representatives recommended that attorneys involve the merging companies' information technology managers in negotiations with staff and communications with the agencies' own information technology personnel.

Hoffman advised that the FTC has announced plans to conduct public workshops on the merger review process to address, among other issues, the search and production of electronic documents. Participants will include corporate personnel, outside and in-house attorneys, economists, consumer groups, and others who have participated in the FTC's or DOJ Antitrust Division's merger review process (see http://www.ftc.gov/opa/2002/03/bcfaq.htm).

When Should You Talk Settlement?

Hoffman and Robinson stressed that staff needs time to carefully consider any proposals by the companies to address competitive concerns (such as divestitures or licensing agreements, for example). If the companies have substantially complied with the second request, the investigating staff typically will seek an agreement to effectively extend the second 30-day period (by agreeing not to close the transaction

before a certain date without providing certain advance notification) before the staff will engage in discussions about a possible "fix" to competitive concerns. Robinson and Hoffman opined that such discussions are most productive if they begin prior to when the companies declare substantial compliance or after a timing agreement is in place.

Companies should consult with counsel about the best strategy and time to negotiate with the agency concerning settlement. It is also advisable, of course, to consult with counsel early concerning potential issues and fixes, which may significantly impact the value and timing of the deal.

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