

# KIRKLAND ALERT

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## FTC Challenges Magnesium Elektron's Five-Year-Old Non-Reportable Acquisition of Revere Graphics

On Monday, October 15, 2012, the Federal Trade Commission (“FTC”) issued a complaint and proposed decision and order settling the case and imposing a remedy to address the alleged anticompetitive effects of Magnesium Elektron’s acquisition of Revere Graphics.<sup>1</sup> This action is notable for two reasons. First, it addresses a transaction consummated in 2007,<sup>2</sup> demonstrating once again the willingness of the federal antitrust authorities to review the competitive impact of closed deals even several years after the fact. Second, the deal value was \$15 million, a sum well below the reporting thresholds imposed by the Hart-Scott-Rodino Act, serving as a prime illustration of the oft-repeated maxim: “there is no *de minimis* exception to the antitrust laws.”

The FTC’s complaint alleges that the transaction violated the FTC Act and Section 7 of the Clayton Act by harming competition in the market for magnesium plates for photoengraving. According to the FTC, the companies were the only two manufacturers and sellers of magnesium plates for photoengraving in the world at the time of the merger, making the transaction a merger to monopoly. Photoengraving is a process used to produce printing plates to foil-emboss printed products including greeting cards, folders, brochures, and packaging materials.

The proposed consent order requires Magnesium Elektron to sell technology and know-how used to manufacture magnesium plates for photoengraving to Universal Engraving, allowing Universal Engraving quickly to enter the market. Universal Engraving does not currently manufacture or sell magnesium plates, but the FTC believes it can be an effective competitor because it sells other metals used in the photoengraving process and shares customers with Magnesium Elektron and Revere.

This action is in keeping with the FTC’s long-standing willingness to challenge consummated mergers that it views as having imposed harm to consumers, regardless of size of the market or HSR reportability.<sup>3</sup> Other FTC challenges to closed deals include its 2008 challenge of Polypore International’s acquisition of Microporous Products,<sup>4</sup> its 2004 challenge of Evanston Northwestern Healthcare Corporation’s acquisition of Highland Park Hospital in 2000,<sup>5</sup> and its 2001 challenge of Chicago Bridge & Iron’s acquisition of certain divisions of Pitt-Des Moines.<sup>6</sup>

Of course, the FTC is not alone in its willingness to challenge already-consummated transactions. In 2011, the Department of Justice, Antitrust Division (“DOJ”) challenged George’s \$3 million acquisition of Tyson’s Foods’ chicken processing complex in Harrisonburg, Virginia;<sup>7</sup> in 2010, it challenged Election Systems & Software’s \$5 million acquisition of Premier Election Services from Diebold, Inc.<sup>8</sup> and Dean Foods’ acquisition of the Consumer Products Division of Foremost Farms USA;<sup>9</sup> and in 2008 it challenged Microsemi Corporation’s acquisition of Semicoa.<sup>10</sup>

As these various post-consummation challenges demonstrate, a deal that potentially raises competitive concerns is not insulated from antitrust scrutiny by virtue of the fact that it affects only a small volume of commerce or is otherwise not reportable under the HSR Act. When contemplating smaller deals that raise competitive concerns, we suggest engaging antitrust counsel to identify ways to alleviate or lessen the risk of post-closing scrutiny.

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- <sup>1</sup> Materials related to the *Magnesium Elektron* case are available at <http://www.ftc.gov/os/caselist/0910094/index.shtm>.
  - <sup>2</sup> Magnesium Elektron Press Release, Luxfer Agrees to Acquire Revere (Sept. 6, 2007), *available at* <http://www.magnesium-elektron.com/news-article.asp?ID=35>.
  - <sup>3</sup> *See generally* Remarks of J. Thomas Rosch, Commissioner, Federal Trade Comm'n, "Consummated Merger Challenges – The Past Is Never Dead," before the ABA Section of Antitrust Law Spring Meeting (March 29, 2012), *available at* <http://www.ftc.gov/speeches/rosch/120329springmeetingspeech.pdf>; *see also* Remarks of Timothy J. Muris, Chairman, Federal Trade Comm'n, "Antitrust Enforcement at the Federal Trade Commission: In a Word — Continuity," before the American Bar Association Antitrust Section Annual Meeting (Aug. 7, 2001) ("We are quite prepared to go after consummated mergers or mergers that are too small to require an HSR filing."), *available at* <http://www.ftc.gov/speeches/muris/murisaba.shtm>.
  - <sup>4</sup> Materials related to the *Polypore* case are available at <http://www.ftc.gov/os/adjpro/d9327/index.shtm>.
  - <sup>5</sup> Materials related to the *Evanston* case are available at <http://www.ftc.gov/os/adjpro/d9315/index.shtm>.
  - <sup>6</sup> Materials related to the *Chicago Bridge* case are available at <http://www.ftc.gov/os/adjpro/d9300/index.shtm>.
  - <sup>7</sup> Materials related to the *George's* case are available at <http://www.justice.gov/atr/cases/georgefood.html>.
  - <sup>8</sup> Materials related to the *Election Systems* case are available at <http://www.justice.gov/atr/cases/ess.htm>.
  - <sup>9</sup> Materials related to the *Dean Foods* case are available at <http://www.justice.gov/atr/cases/deanfoods.htm>.
  - <sup>10</sup> Materials related to the *Microsemi* case are available at <http://www.justice.gov/atr/cases/microsemi.htm>.

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