KIRKLAND **ALERT**

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DOJ Challenges Consummated Deal Months After HSR Waiting Period Expires

On September 26, 2017, the Antitrust Division of the U.S. Department of Justice filed a federal antitrust suit seeking to partially unwind the merger of Parker-Hannifin Corporation and Clarcor Inc. under Section 7 of the Clayton Act. The complaint itself is not particularly remarkable: Although it is the first antitrust merger complaint filed by the DOJ under the Trump administration, it does not demonstrate a shift in substantive merger policy or a novel application of the antitrust laws.[1] The timing of the complaint, however, is highly unusual. The DOJ filed the complaint several months after the expiration of the statutory waiting period under the HSR Act and after the merger had closed. It is unclear whether the DOJ conducted any meaningful preliminary investigation during the HSR Act waiting period, but the timing strongly suggests any investigation was brief, and the concerns outlined in the complaint were not apparent until after the transaction closed.[2] While publicly available information regarding the DOJ's investigation is limited, this alert explores the complaint, its timing and its implications for U.S. antitrust merger review.

Although there technically is no legal bar to an Agency challenging a transaction after the expiration of the HSR waiting period, the Agencies have rarely done so as a matter of policy and practice.

A Break from the Norm

The DOJ and the Federal Trade Commission (collectively, the Agencies) virtually never challenge consummated mergers where the parties have observed the statutory waiting period under the HSR Act and the Agencies have not contested the parties' HSR filings as deficient. (An HSR filing includes basic facts about the parties and transaction, as well as copies of certain documents created to analyze the deal, so-called "Item 4(c) documents.") One of the primary goals of the HSR Act is to enable the Agencies to assess whether a merger may harm competition and, if so, to seek an injunction or agreed remedies *before* the merger closes. And, although there technically is no legal bar to an Agency challenging a transaction after the expiration of the HSR waiting period,[3] the Agencies have rarely done so as a matter of policy and practice.

As with Parker-Hannifin/Clarcor, the rare examples of analogous Agency enforcement actions involve facts that, as described in the complaints, appear to warrant antitrust scrutiny under the Agencies' *Horizontal Merger Guidelines*. However, unlike Parker-Hannifin/Clarcor, in each prior example, the parties either submitted an allegedly deficient HSR filing, engaged in some type of alleged misconduct that limited the Agency's investigation, or closed over Agency objection.

When Automatic Data Processing, Inc. (ADP) acquired AutoInfo, Inc., for example, the parties failed to include all responsive Item 4(c) documents in their initial

HSR filings. Nine months after closing (which took place after the HSR waiting period applicable to the transaction had expired), ADP recertified its filing and submitted a correction with numerous additional Item 4(c) documents. Among the new materials were documents that the FTC alleged showed "an anticompetitive intent underlying the proposed acquisition," and "that ADP believed that the Acquisition would give ADP a monopoly or virtual monopoly in several product markets."[4]

This case provides a clear reminder that the expiration of the HSR Act waiting period does not immunize a transaction from antitrust scrutiny.

In Chicago Bridge & Iron's acquisition of Pitt-Des Moines, the parties closed after the HSR Act waiting period expired. The FTC opened an investigation into the merger after the waiting period expired, but before the parties had closed, and the FTC requested that the parties delay their closing while the FTC completed its investigation. The parties seem to have acceded to the FTC's request, but, before the FTC had completed its review, the parties decide to close the deal, apparently without notifying the FTC of their intent to close. The FTC ultimately challenged the deal, alleging that the merging parties were the only two (or two of a limited number of) competitors in several product markets, including LNG and LPG tanks and LNG import terminals, and likely should have expected the FTC's investigation would remain ongoing.[5] In both cases, the FTC challenge resulted in divestitures by the parties.

In Parker-Hannifin/Clarcor, the DOJ has not yet alleged that the parties' HSR filings were deficient or that the parties breached a commitment to the DOJ not to close. The DOJ has alleged in public comments that "during the pendency of the department's investigation, Parker-Hannifin failed to provide significant document or data productions in response to the Department's requests."[6] The DOJ has not described the significance of the information not provided or how it would affect the DOJ's analysis of the transaction. Speaking at a conference on September 28, the DOJ Antitrust Division's Director of Civil Enforcement Patty Brink noted that the DOJ had received a number of post-closing complaints from customers. In addition, Ms. Brink explained Parker-Hannifin's internal documents made clear that they were aware of the "notable overlap" and antitrust issue, but had failed to bring it to the government's attention. As summarized by Ms. Brink, "[t]he takeaway should be that if there's some really clear and obvious overlap it may behoove counsel to raise that."[7]

Practical Takeaways

Parker-Hannifin/Clarcor does not represent a significant departure from the Agencies' long-standing approach to merger review. The Agencies will continue to view expiration of the HSR Act waiting period as the end of the investigation in virtually all cases. However, this case provides a clear reminder that the expiration of the waiting period does not immunize a transaction from antitrust scrutiny, particularly if there is a direct head-to-head overlap in a small, but highly concentrated product area that the reviewing Agency did not uncover (for whatever reason) during the waiting period. Merging parties should keep the following points in mind:

- The Agencies have the authority to open a merger investigation after the HSR Act waiting period has expired, and may exercise that authority if significant areas of overlap are not identified during the waiting period.
  - Customers and other interested market participants often contact the Agencies to express concerns about mergers, including in the post-closing period.
  - Understanding and managing customer reaction and having an effective communications plan is key, particularly in strategic transactions.
- Refusing to cooperate with a post-closing investigation or enter into a hold separate agreement may give the Agencies no choice but to file a complaint.
  - In its complaint, DOJ also alleged that Parker-Hannifin would not agree to enter into a satisfactory agreement to hold separate its fuel filtration business during the pendency of the investigation.[8] The Agencies commonly request a hold-separate when investigating a closed transaction because it preserves the competitive status quo and prevents the parties from continuing to integrate. Without one, it is more difficult for the Agencies to identify a package of divestiture assets sufficient to replace the competition lost from the merger. Refusal to cooperate or enter into a hold-separate agreement therefore may force the Agencies' hand.
  - The Agencies are unlikely to be sympathetic to the business disruption and costs associated with a post-closing merger challenge where the parties elected not to make the Agencies aware of a material antitrust issue, even though the parties are under no legal obligation to do so. This is particularly true for transactions that, in the Agencies' view, result in a monopoly in one or more product areas.
- Absent specific contractual provisions not commonly included in purchase agreements, the risk of a post-closing investigation or challenge falls on the buyer, even if the seller remains an ongoing business concern.

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1 The complaint alleges that the $4.3 billion deal was essentially a "merger to monopoly" in Energy Institute-qualified airline fuel filtration systems in the U.S., and seeks the divestiture of assets to replace the competition lost due to the merger. Complaint at 1-3, *United States v. Parker Hannifin Corp.*, No. 1:17-cv-01354-UNA (D. Del. Sept. 26, 2017). The product market at issue accounts for only a small portion of the Parties' annual revenue; the parties' combined total U.S. sales in the relevant market were $20 million in 2016, whereas Clarcor's total annual sales were $1.4 billion and Parker-Hannifin's total annual sales were $11.4 billion. *Id.*

2 According to publicly available information, the parties executed the merger agreement on December 1, 2016. Subsequently, the parties announced that the HSR Act waiting period had expired on January 17, 2017 and closed the transaction on February 28, 2017.

3 There is no statute of limitations on FTC/DOJ enforcement of Section 7. In *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the Supreme Court allowed the FTC to bring a

Section 7 action 35 years after the parties completed their combination.

[4] Administrative Complaint at 2, I*n the Matter of Automatic Data Processing, Inc.*, No. 9289 (F.T.C. Nov. 13 1996), *available at* https://www.ftc.gov/sites/default/files/documents/cases/1996/11/d9282cmp_0.pdf. The FTC filed suit in March 1996 for failure to file documents in violation of the HSR Act. *See* Complaint for Civil Penalties, *United States v. Automatic Data Processing Inc.*, No. 1:96CV00606 (D.D.C. Mar. 27, 1996), *available at* https://www.justice.gov/atr/case-document/complaint-civil-penalties-failure-file-documents-violation-premerger-reporting. Subsequently on November 13, 1996, the FTC filed an administrative complaint seeking divestitures. *See* Final Judgment, *United States v. Automatic Data Processing Inc.*, No. 1:96CV00606 (D.D.C.), *available at* https://www.ftc.gov/sites/default/files/documents/cases/1996/03/960327adpjudgment.pdf.

[5] After the HSR Act waiting period had expired but before the deal was consummated, the FTC notified Chicago Bridge and Iron Co. ("CBI") that it had significant concerns about CBI's proposed acquisition of Pitt-Des Moines, Inc. and was conducting an investigation. *Chicago Bridge & Iron Co. v. Federal Trade Comm.*, No. 06-60192, at 3, note 2 (5th Cir., Jan. 25 2008), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080125opinion_0.pdf. The FTC issued an administrative complaint in October 2001, and an administrative judge ruled in June 2003 that a divestiture was the appropriate remedy. CBI appealed the decision to the Fifth Circuit, which upheld the Commission's decision in June 2008. *See* Initial Decision at 8-9, *In the Matter of Chicago Bridge & Iron Co.*, No. 9300 (F.T.C. Jun. 18 2003), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/06/cbiid_0.pdf; *Chicago Bridge & Iron Co. v. Federal Trade Comm.*, No. 06-60192 (5th Cir., Jan. 25 2008) (upholding the Commission's adjudication and remedy imposed).

[6] Department of Justice Staff, Press Release, "Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of Clarcor's Aviation Fuel Filtration Business," JUSTICE.GOV (Sept. 26, 2017), https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s.

[7] Richard Vanderford, "Parker-Hannifin 'anticompetitive and illegal' deal not shielded by HSR clearance, DOJ official says," MLEX.COM (Sept. 28, 2017, 19:13 GMT), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=923744&siteid=191&rdir=1.

[8] Department of Justice Press Release, *supra* note 5.

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