

## Antitrust Law Blog

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### [Antitrust Division "Hogties" Smithfield Foods with a \\$900,000 Civil Penalty for Gun-Jumping](#)

The Antitrust Division of the U.S. Department of Justice recently demonstrated that the antitrust agencies continue to deal sternly with companies who fail to comply with the premerger reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). On January 21, 2010, the Division announced a proposed settlement with Smithfield Foods and Premium Standard Farms requiring the companies to pay \$900,000 in civil penalties for "gun-jumping" in connection with Smithfield's May 2007 acquisition of Premium Standard.

According to the Government's Complaint, Smithfield is the largest pork packer and processor and the largest hog producer in the U.S. Premium Standard was the sixth-largest pork packer and processor and the second-largest hog producer. On September 17, 2006, Smithfield and Premium Standard entered into a Merger Agreement and the parties filed the premerger notification and report forms required by the HSR Act on October 6th. The Initial 30-day waiting period under the HSR Act was extended on November 6, 2007 when the Antitrust Division served the parties with requests for additional information, commonly referred to as "Second Requests." The waiting period expired on March 7, 2007 and the acquisition closed on May 7, 2007.

The Government's complaint noted that the Merger Agreement contained certain customary interim conduct of business provisions regarding such matters as the assumption of new debt or financing, issuing new securities and selling assets. The Antitrust Division had no problem with such provisions, nor with provisions requiring Premium Standard to carry on its business in the ordinary course and conditioning the closing on the absence of any material adverse effect. In fact, the Division characterized them as protecting "Smithfield's legitimate interests in maintaining Premium Standard's value without impairing Premium Standard's independence."

What did incur the wrath of the Antitrust Division was that, beginning about three days after the signing of the Merger Agreement, Premium Standard starting submitting for Smithfield's consent each of its contracts for hog purchases from independent hog producers. This included providing Smithfield with the proposed contract terms, including the price to be paid, quantity to be purchased, and length of the contract.

According to the Complaint, Premium Standard needed to continue purchasing hogs in order to

continue to carry on its business in the ordinary course. By seeking Smithfield's consent, Premium Standard stopped exercising its independent business judgment and turned over operational control over that significant segment of its business to Smithfield. As a result, Smithfield acquired beneficial ownership of that segment of Premium Standard's business prior to the expiration of the waiting period in violation of the HSR Act.

Authored By:

[Robert L. Magielnicki](#)

(202) 218-0002

[RMagielnicki@sheppardmullin.com](mailto:RMagielnicki@sheppardmullin.com)