

Guilty Plea for Altering HSR Documents

August 22, 2011

The U.S. Department of Justice (DOJ) has provided a jarring reminder of the penalties for dishonesty in Hart-Scott-Rodino (HSR) filings. On August 15, the DOJ announced that Nautilus Hyosung Holdings Inc. (NHI) agreed to plead guilty to criminal obstruction of justice for altering documents submitted with an HSR filing. NHI agreed to pay a \$200,000 fine, but the DOJ can still pursue criminal prosecution—and potential incarceration—of an NHI executive.

Companies must make HSR filings with the DOJ and Federal Trade Commission (FTC) and observe a waiting period before closing to enable the agencies to evaluate the likely impact of the transaction on competition. Item 4(c) of the HSR notification form requires parties to provide copies of “all studies, surveys, analyses and reports which were prepared by or for any officer or director . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.” Such “4(c) documents” provide the agencies with their first insight into the potential impact of a transaction on competition.

NHI, a manufacturer of automated teller machines (ATMs), made a filing in August 2008 in connection with its proposed acquisition of Trident Systems of Delaware (Trident), a rival ATM manufacturer. According to the plea agreement filed in the U.S. District Court for the District of Columbia, an unnamed NHI executive altered 4(c) documents to “misrepresent and minimize the competitive impact of the proposed acquisition on markets in the United States and other statements relevant and material to analyses . . . by the FTC and DOJ.”

Despite the altered documents, the DOJ initiated a merger investigation and requested additional documents from NHI, including copies of preexisting business plans and strategic plans relating to the sale of ATMs for the years 2006–2008. The company submitted the requested materials in early September 2008. According to the plea agreement, an NHI executive altered the business and strategic plans to misrepresent statements concerning NHI’s business and competition among vendors of ATMs.

In early 2009, NHI told the DOJ that an executive had altered 4(c) and other documents produced to the government. NHI and Trident abandoned the proposed transaction shortly thereafter. According to the plea agreement, NHI provided substantial cooperation with the DOJ’s obstruction of justice investigation.

According to the DOJ, the recommended fine of \$200,000—\$100,000 for each count—takes into account the nature and extent of the company’s disclosure and cooperation. NHI could have faced a maximum fine of up to \$500,000 per count of obstruction of justice under 18 U.S.C. § 1512(c). The plea agreement reserves the DOJ’s right to pursue criminal prosecution of the executive involved in the alterations.

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