

## Antitrust Alert

### M&A Antitrust Surprise: FTC Challenges \$15 Million Merger Consummated in 2007

October 22, 2012

In a stark reminder that non-HSR-reportable transactions are fully subject to the antitrust laws—even after they have closed—the Federal Trade Commission (FTC), on October 12, 2012, filed a complaint and accompanying consent agreement attacking Magnesium Elektron North America, Inc.’s (MEL) 2007 acquisition of competitor Revere Graphics Worldwide, Inc.<sup>1</sup> The \$15 million acquisition was too small to be reportable under the Hart-Scott-Rodino Premerger Notification Act of 1976, as amended (“HSR Act”).<sup>2</sup> While the government’s antitrust authority to challenge already-consummated transactions is unquestioned, it is very unusual for the FTC (or the Justice Department Antitrust Division) to reach back this far in time.

#### Transaction

In September 2007, MEL, a division of the Luxfer Group, acquired the worldwide assets of Revere for approximately \$15 million.<sup>3</sup> At the time of the transaction, MEL specialized in the manufacture of magnesium products, including photoengraving magnesium plates.<sup>4</sup> Revere also manufactured magnesium photoengraving plates, in addition to zinc, copper and brass plates.<sup>5</sup>

In its three-page complaint, the FTC alleged that the transaction was an unlawful merger-to-monopoly in the worldwide market for photoengraving magnesium plates. The FTC stated that the transaction “[e]liminated actual, direct, and substantial competition between MEL and Revere,” “[s]ubstantially increased the level of concentration in the relevant market” and “[i]ncreased MEL’s ability to exercise market power unilaterally in the relevant market.”<sup>6</sup> The complaint did not allege that any anticompetitive price increase had actually occurred. However, it is certainly reasonable to surmise that the FTC would not have been motivated to challenge a small, five-year-old transaction without evidence of substantial price increases—accompanied by customer complaints.

#### Consent Order

The agreed consent order is designed to create a new competitor in the market—Universal Engraving, Inc., a manufacturer in an adjacent market—that would be as strong as the acquired company Revere had been prior to the

<sup>1</sup> Press Release, FTC Order Restores Competition in Market for Magnesium Plates for Photoengraving, Oct. 12, 2012, available at <http://www.ftc.gov/opa/2012/10/magelektron.shtm>.

<sup>2</sup> 15 U.S.C. § 18a. Each year, the filing thresholds are adjusted, and the current minimum threshold is \$68.2 million. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 77 Fed. Reg. 4323 (Jan. 27, 2012).

<sup>3</sup> [3] Complaint, In the matter of Magnesium Elektron North America, Inc., File No. 091 0094 (F.T.C. Oct. 12, 2012) (available at <http://www.ftc.gov/os/caselist/0910094/121012magelektroncmpt.pdf>).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



2007 transaction. The order requires MEL to provide Universal with “the intellectual property and know-how used to roll and coat magnesium plates for photoengraving applications,” as well as customer lists and certain customer contracts.<sup>7</sup> Additionally, MEL is required to supply Universal with finished product and certain chemicals to permit Universal to compete in the marketplace prior to getting its own production up and running.

## Consummated Transaction Challenges

The FTC’s challenge to the MEL/Revere transaction is the latest in a long line of FTC and Antitrust Division attacks on non-HSR-reportable consummated transactions, following in the wake of the 2001 increase in the HSR size-of-transaction filing threshold from \$15 million to \$50 million. (The threshold, which adjusts annually, is currently \$68.2 million.<sup>8</sup> Since 2001, the antitrust agencies have challenged more than 30 consummated transactions, and about half of these have occurred since 2009. While the government occasionally attacks HSR-reportable transactions after they have closed, most post-consummation challenges involve deals falling beneath the HSR minimum-size threshold. At \$15 million, the MEL/Revere transaction fell well below the \$59.8 million threshold in effect in September 2007. The agencies have recently challenged non-reportable consummated transactions as small as \$3.1 million.<sup>9</sup>

## Lessons

The FTC’s action against the five-year-old MEL/Revere merger serves as yet another warning that, in the M&A antitrust world, the past may never be dead. Non-reportable transactions of any size may still face antitrust scrutiny—and potential enforcement action—years after a deal is announced and consummated. (As noted, HSR-reportable transactions can also theoretically be attacked after consummation, but such attacks are very infrequent.) Mergers-to-monopoly, as in the MEL/Revere deal, are particularly tempting FTC targets. However, any horizontal mergers involving high market shares, significant post-transaction price increases and customer complaints could be vulnerable.

Thus, firms contemplating an acquisition must remember that “no Hart-Scott filing” does not mean “no antitrust concern.” Both in the planning stage and in the post-consummation market-behavior stage, firms involved in an acquisition presenting a substantial horizontal competitive overlap need to be aware of potential antitrust risks.

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<sup>7</sup> Analysis of Agreement containing Consent Orders to Aid Public Comment, In the matter of Magnesium Elektron, File No. 091-0094 (F.T.C. Oct. 12, 2012) (available at <http://www.ftc.gov/os/caselist/0910094/121012magelektronanal.pdf>).

<sup>8</sup> 2000 Amendments to Section 7A(a) of the Clayton Act, 15 U.S.C. 18a(a), Pub. L. 106-553. The current \$68.2 million threshold became effective in February 2012. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 77 Fed. Reg. 4323 (Jan. 27, 2012).

<sup>9</sup> See Competitive Impact Statement, *United States v. George’s Foods, LLC*, 5:11-cv-00043 (W.D. Va. June 23, 2011) (available at <http://www.justice.gov/atr/cases/f272500/272501.pdf>).