

ANTITRUST ALERT

DEPARTMENT OF JUSTICE OBTAINS \$550,000 SETTLEMENT FOR FAILURE TO PRODUCE “4(C) DOCUMENTS” WITH HART-SCOTT-RODINO FILING



On October 15 the Department of Justice Antitrust Division (DOJ) announced that Iconix Brand Group (Iconix) had agreed to pay \$550,000 to settle charges that it failed to produce all required “Item 4(c)” documents in connection with a Hart-Scott-Rodino filing, in violation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The DOJ alleged that Iconix consummated a Hart-Scott reportable transaction when it acquired certain assets of Rocawear Licensing LLC (Rocawear) in March 2007 for \$204 million. The DOJ further alleged that Iconix failed to produce documents required under the HSR Act prior to completing the acquisition. The Justice Department filed its Complaint in the U.S. District Court for the District of Columbia contemporaneously with a proposed settlement that requires court approval.

This case provides a valuable reminder of the importance of conducting a diligent search for all responsive documents and information in connection with an HSR Act filing.

BACKGROUND

The facts discussed below are as alleged by the DOJ in their Complaint against Iconix. Iconix, which owns a diversified portfolio of fashion brands, agreed to acquire from Rocawear certain assets related to the business of licensing and managing the Rocawear brands worldwide for \$204 million. The parties signed an asset purchase agreement on March 6, 2007, and the transaction was completed on March 30, 2007.

Under the HSR Act, parties to transactions meeting certain size thresholds must file notifications with the Federal Trade Commission (FTC) and the DOJ and observe a waiting period prior to consummating the transaction. The notification and waiting period are intended to allow the agencies an opportunity to investigate the transaction prior to closing to determine if the deal threatens a substantial reduction in competition.

Among other items, the HSR Act notification requires that parties produce certain documents (known as “4(c) documents” because they are responsive to Item 4(c) of the form) to the FTC and DOJ. These documents include—

all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) 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. Parties failing to comply with the HSR Act are subject to civil penalties of up to \$11,000 per day.

The parties to the Iconix-Rocawear transaction submitted their HSR filings, but both parties reported that they had no responsive 4(c) documents. During the HSR Act waiting period, FTC staff contacted counsel for Iconix, who again stated that Iconix had no responsive documents. The agencies granted early termination of the HSR Act waiting period, and the acquisition was completed on March 30, 2007.

Following the grant of early termination, the Justice Department initiated an investigation in April 2007 into the parties' stated lack of 4(c) documents. During the investigation, Iconix produced several documents that would have been responsive under Item 4(c), including e-mails, presentations, and other documents prepared for Iconix's officers and directors that analyzed Rocawear's market position and potential for growth. Among these documents was a market share presentation charting Rocawear's growth during the previous three years and comparing Rocawear's market share with that of its competitors.

Iconix was required to submit a revised version of its original HSR form. More significantly, Iconix faced more than \$900,000 in civil penalties for its failure to fully satisfy its HSR filing obligations, and entered into a consent agreement with the DOJ for \$550,000.

LESSONS

This case highlights at least two important principles:

(1) *The agencies vigorously enforce HSR Act compliance, even in deals that do not raise substantive underlying antitrust issues.* The fact that an acquisition poses no significant competitive concerns does not mean a company can be less diligent with regard to the requirements of the HSR Act. In announcing the settlement, Thomas O. Barnett, assistant attorney general of the Justice Department's Antitrust Division, stated: "Compliance with Hart-Scott-Rodino Act filing obligations is fundamental to the agencies' ability quickly and accurately to evaluate a transaction's competitive impact. Filing parties must understand that the Division will vigorously enforce filing requirements *even if we conclude that the transaction poses no threat to competition or consumers.*"

http://www.usdoj.gov/atr/public/press_releases/2007/226778.htm (DOJ Press Release) (emphasis added);

see also <http://www.usdoj.gov/atr/cases/f226700/226782.htm> (DOJ Complaint).

(2) *He who represents facts to the government in haste repents at leisure.* It bears emphasis: Parties must be truthful and complete when they provide information to the government. The temptation to give the government the "easy" answer in hopes that a matter will go away may seem great, but inevitably leads to greater trouble down the road.

CONTACT INFORMATION

If you have questions about this case or other Hart-Scott-Rodino Act matters, please contact:

Paul B. Hewitt 202.887.4120 phewitt@akingump.com Washington, D.C.

Anthony W. Swisher 202.887.4263 aswisher@akingump.com Washington, D.C.

Austin	Beijing	Dallas	Dubai	Houston	London	Los Angeles	Moscow
New York	Philadelphia	San Antonio	San Francisco	Silicon Valley	Taipei	Washington, D.C.	