

Settlement Proves US Antitrust Authorities Expect "Gun-Jumpers" to Bite the Bullet

The U.S. Department of Justice ("DOJ") announced that it has reached a settlement with manufacturers of medium-density fiberboard ("MDF") for alleged illegal pre-merger coordination, often referred to as "gun-jumping," in violation of the U.S. Hart-Scott-Rodino Act ("HSR Act") and U.S. Sherman Act. The investigation and subsequent settlement highlights that the U.S. antitrust authorities are keen on ensuring that parties to a proposed transaction remain separate and continue to compete against one another until a transaction receives the necessary antitrust clearance and the parties close the transaction.

The matter stems from Flakeboard America Limited's ("Flakeboard") proposed acquisition of three MDF plants owned by a competitor, SierraPine ("SierraPine"). After receiving concerns about the anticompetitive effects of the transaction, SierraPine and Flakeboard eventually abandoned the transaction. However, according to the DOJ, after the deal was signed but before the expiration of the mandatory waiting period required by the HSR Act and before abandoning the deal, Flakeboard and SierraPine coordinated to close one of SierraPine's MDF plants and to transition customers from that plant to one of Flakeboard's existing MDF mills. The DOJ alleged that such conduct constituted an illegal agreement in violation of Section 1 of the Sherman Act and also an unlawful transfer of beneficial ownership of SierraPine's business prior to expiration of the applicable waiting period in violation of the HSR Act. To resolve the matter, Flakeboard, its parent companies, and SierraPine agreed to pay a total of \$3.8 million in civil penalties, forfeit \$1.15 million in illegally gained profits, and to establish antitrust compliance programs.

This settlement highlights the importance of avoiding gun-jumping and the seriousness with which the U.S. antitrust authorities take such conduct. It is imperative that even after an agreement is signed, parties to the transaction continue to conduct business as usual, including vigorously competing against each other. While there is a certain amount of integration planning that may occur after parties reach a transaction agreement, it is wise to discuss what conduct is permissible with counsel before exchanging any information with the other party.

If you would like further details of the case or general guidance on avoiding gun-jumping, please do not hesitate to contact us.

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