

Iconix Fined \$550,000 for Failure to Comply with the Hart-Scott-Rodino Act

Iconix Brand Group, Inc. (Iconix), has agreed to pay a fine of \$550,000 to settle a claim brought on October 15, 2007, by the Department of Justice's Antitrust Division (DOJ). In its complaint and proposed final judgment, the DOJ alleged that Iconix violated the Hart-Scott-Rodino (HSR) Act by failing to submit certain required documents with its HSR filing. *U.S. v. Iconix Brand Group, Inc.*, no. 1:07-CV-01852 (D.D.C. Oct. 15, 2007).

The HSR Act requires parties to transactions meeting certain monetary thresholds to notify both the DOJ and the Federal Trade Commission (FTC) of the transaction and to observe a 30-day waiting period before closing the transaction. Among other things, the HSR notification form requires the parties to submit any documents prepared by or for officers or directors of the company that analyze the proposed transaction with respect to competitive issues. These documents are requested in item 4(c) of the form and therefore are frequently referred to as "4(c) documents." Failure to comply with the HSR Act, including a failure to provide 4(c) documents, can result in fines of up to \$11,000 per day.

According to the complaint, Iconix, which licenses fashion brands to various retailers and manufacturers, entered into an agreement to buy certain assets from Rocawear Licensing LLC in March 2007. Both Iconix and Rocawear made HSR filings on March 14, 2007. In their filings, Iconix and Rocawear stated that no 4(c) documents existed. When the FTC staff questioned Iconix's counsel regarding the lack of 4(c) documents, Iconix's counsel confirmed that a search for 4(c) documents had been performed and that no 4(c) documents existed. Based on the information in the parties' filings, the DOJ and FTC decided not to investigate the transaction, and therefore granted early termination of the HSR waiting period. The transaction was consummated on March 30, 2007.

The DOJ doubted, however, that Iconix would undertake an acquisition requiring more than \$200 million in financing without its officers or directors having prepared or reviewed 4(c) documents. Therefore, on May 1, 2007, the DOJ served a Civil Investigative Demand (CID) on Iconix requesting the production of documents relating to the Rocawear acquisition. Iconix responded to the CID with several documents, including: an email to Iconix's directors discussing the potential of the Rocawear acquisition to expand Iconix into new markets; a presentation to Iconix's Executive Vice President comparing Rocawear's market share to that of its competitors; and documents prepared for an Iconix board of directors meeting also showing market shares of Rocawear and its competitors. Iconix amended its HSR application to include these documents, restarting the waiting period on May 23, 2007.

The DOJ's complaint alleged that these documents were "readily accessible" to Iconix and that Iconix knew or should have known that it was required to file these documents with its HSR filing. By not submitting these documents, the DOJ asserted, Iconix failed to comply with the requirements of the HSR Act before closing its transaction. According to the DOJ, Iconix was in violation of the HSR Act from March 30, 2007, the date on which it closed the acquisition, until June 22, 2007, when the second HSR waiting period expired. To settle the allegations, Iconix consented to a Final Judgment in which it agreed to pay a fine of \$550,000.

This case demonstrates important issues that parties must keep in mind when making an HSR filing:

- Even if a transaction does not raise competitive issues, the parties must comply fully with the HSR Act. The antitrust authorities take HSR Act compliance seriously and will prosecute violations regardless of whether the transaction poses a threat to competition.
- Emails can be 4(c) documents. Item 4(c) does not focus on any specific form, e.g., presentations or memoranda. So long as the three touchstones of 4(c) are met – 1) prepared by or for an officer or director of the company; 2) for purposes of analyzing the transaction; 3) in terms of competition, market shares, or the potential for sales growth or expansion into product or geographic markets – the document must be filed.
- Before making an HSR filing, make sure that all likely sources of 4(c) documents have been searched. This would include all directors, all officers involved in the transaction, all other employees involved in the transaction, and any outside bankers or consultants advising on the transaction.
- HSR Act violations can ensnare a company in a costly and distracting investigation by the antitrust authorities. In addition to legal fees and possible fines, an investigation concerning the HSR Act can delay a transaction's closing date and possibly jeopardize the transaction altogether.

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