OPINION

■ 4(c) DISCLOSURE

Don't hold anything back

By Gordon Schnell SPECIAL TO THE NATIONAL LAW JOURNAL

UNDER THE Hart-Scott-Rodino Act, the Federal Trade Commission or the Department of Justice reviews most mergers and acquisitions involving at least $50 million worth of assets or voting securities. A transaction subject to the act may not close until the parties have satisfied their Hart-Scott-Rodino reporting obligations, one of which is the submission of "4(c) documents"—basically, documents that address the competitive attributes of the deal.

Unfortunately, the government has offered little in the way of formal analysis or explanation as to what exactly qualifies as a 4(c) document, and what steps parties must take to find them. So, merging parties and their lawyers are left to their own devices to determine how they will comply with the 4(c) requirement.

Thanks to its recent enforcement action against Hearst Corp., however, the government has made this antitrust puzzle a lot easier to figure out: Just empty your files—or else.

Hobson's choice

Without formal government direction, parties have faced a Hobson's choice when deciding exactly what qualifies as a 4(c) document. Withholding certain documents under a narrow 4(c) reading risks serious regulatory backlash if the government later discovers them and concludes they were improperly withheld. Alternatively, too sweeping a production risks raising questions or concerns the government might not have otherwise had.

Adding further to the 4(c) conundrum is the question of just how far parties need to go in searching for responsive documents. On this, too, the government has offered little guidance. Clearly, the safest route is to have outside counsel personally search the files of all company staff with knowledge of the proposed transaction. Such an exercise, however, may be too expensive and time-consuming to be feasible, or it may face resistance from executives who don't like outside lawyers rummaging through their files.

Rather than deal with these issues, many parties use the elusiveness of the 4(c) question as an excuse to take a relaxed attitude toward their 4(c) obligations. Some simply fail to perform an exhaustive 4(c) search. Others limit their production to those documents that fall only within a very narrow 4(c) reading. Still others, the boldest of the lot, withhold any documents that frame the proposed transaction in an unfavorable competitive light.

Future Hart-Scott-Rodino filers beware. With its unprecedented enforcement action against Hearst, the government has fired a powerful warning shot: It will not tolerate anything less than strict adherence to the 4(c) rules.

The action against Hearst centered around its January 1998 acquisition of Medi-Span through First DataBank, a wholly owned subsidiary of Hearst and Medi-Span's principal competitor. Hearst produced only one 4(c) document with its Hart-Scott-Rodino filing for the deal. Relying on this 4(c) production, the government "cleared" the deal without challenge or question.

During the next two years, the FTC received numerous complaints that First DataBank had dramatically increased its prices soon after the merger. These complaints prompted an FTC investigation, which uncovered several documents it believed Hearst should have produced as 4(c) documents with its original Hart-Scott-Rodino filing. The government ultimately sued Hearst, complaining that by withholding key 4(c) documents, Hearst had duped the antitrust authorities into countenancing a merger to monopoly.

The relief sought and ultimately obtained by the government included not only a $4 million penalty for Hearst's alleged 4(c) violation, but also the extraordinary remedies of divestiture of Medi-Span and disgorgement of $19 million in post-merger profits. The FTC has trumpeted that the $4 million penalty is the most ever paid for a Hart-Scott-Rodino violation, and that this is the first time the agency has ever sought either divestiture or disgorgement in a federal action challenging a completed merger. [See "FTC takes profits, lawyers take sides," NLJ, Jan. 28.]

The government's full-force attack against Hearst is all the more notable because it was based on a transaction that was valued at only $38 million—too small to even be covered by Hart-Scott-Rodino since last February's rule changes. This means that Hearst would have had no 4(c) obligation if the Medi-Span acquisition had occurred at the time the government initiated its lawsuit. Clearly, the government wanted to make a point. And it has.

So, Hart-Scott-Rodino practitioners are advised to forget about any Hobson's choice in their 4(c) compliance efforts. The government has made it clear that the potential consequences resulting from an underinclusive 4(c) production are far more threatening than those resulting from an overinclusive one.

Although the government's action against Hearst does little to resolve the many questions surrounding the 4(c) riddle, it does provide a powerful antidote to the inclination by some to take a lackluster approach in their 4(c) endeavors. Teach your clients well. The moral of the story: Don't fool around with 4(c). NLJ

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