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LEGAL DEVELOPMENTS

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ANTITRUST REGULATORS CLAMP DOWN ON PRE-MERGER "GUN JUMPING"

For many years, antitrust regulators and savvy defense counsel have been warning parties to horizontal mergers that pre-merger coordination could lead to big trouble. Now the Government has actually brought a case against Computer Associates International Inc. and Platinum technology International inc. for an injunction and $1.27 million in civil penalties in order to drive the point home.

On September 28, 2001 the Department of Justice filed a civil antitrust lawsuit against two leading software vendors for violating pre-merger waiting period requirements and price-fixing laws by exchanging competitively sensitive information and engaging in coordination of their businesses during the mandatory pre-merger waiting period. This conduct, known as "gun jumping" violates Section 1 of the Sherman Act, as well as the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended ("HSR").

The Department of Justice's Complaint

On March 1999, Computer Associates International, Inc., a Delaware corporation engaging in software development and marketing, announced a $3.5 billion cash tender offer for Platinum, a leading software vendor and a *direct competitor* of Computer Associates in numerous software markets.

The acquisition required a HSR filing. The HSR Act prohibits pre-mature consummation of the merger transaction prior to the expiration of the waiting period. The purpose of the waiting period is to give the antitrust agencies an opportunity to investigate proposed transactions and to determine whether to seek an injunction to prevent any such mergers that violate the antitrust laws.

The merger agreement signed between Computer Associates and Platinum and filed as an exhibit to the HSR filing contained a somewhat extraordinary clause that prevented Platinum from undertaking certain competitive activities during the HSR waiting period without Computer Associates' approval. Specifically, Platinum could not, without Computer Associates' approval, offer discounts greater than twenty percent from its price list, vary the terms of consumer contracts or offer certain consulting services. The Government alleges that during the HSR waiting period, a Computer Associates' Vice President was actually stationed at Platinum's headquarters to approve Platinum's customer contracts. In addition, the Government alleges that Computer

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Associates reviewed and distributed to its own staff competitively sensitive information about Platinum's customers and business strategies, and made day-to-day management decisions concerning Platinum's business.

The complaint seeks a total penalty of $1.27 million, to be paid by both companies and a prohibition on Computer Associates from engaging in similar conduct in the future.

The Problem

It is natural for acquirors to seek to control the business of a company they have contractually bound themselves to acquire. It is all the more natural when that company happens to be a competitor since competition between the two companies is likely to terminate as soon as the transaction is consummated, and since the management of the acquiring company is typically very familiar with the operations and issues faced by the acquired company. Moreover, there are often important personnel issues that must be dealt with prior to closing when two competitors merge since there will often be substantial post-merger resignations or discharges of redundant employees.

However, our antitrust laws prohibit co-ordination between competitors when it unreasonably restrains competition, regardless of whether the parties have decided to merge. Antitrust authorities have long taken the position that until consummation, merging companies are viewed as separate and independent entities. Thus, even though they plan to merge, until the closing, the two companies must refrain from coordinating on competitively sensitive matters. Indeed, FTC officials have argued in the past that even subsequent to the expiration of the HSR waiting periods, the parties may not coordinate on sensitive competitive matters pre-closing, since there is always a chance that the merger will fall through for reasons unrelated to the antitrust laws.

At the same time, it is well-recognized that a good deal of pre-merger integration coordination must and does take place for a smooth transition. Unhappily, there is no bright line outlining the scope of permissible coordination between merging parties prior to consummation. A distinction can be made, however, between two general types of pre-merger communications -- first, exchanges of competitively sensitive information and second, coordinated pre-merger integration.

What We Should Do Now

If you are engaged in a merger that involves competing entities, here are some "gun jumping" rules that must be observed in order to stay out of trouble:

- Do not include contractual provisions that entitle the buyer to review or approve the seller's ordinary course of business activities in the areas in which the companies compete.
- Carefully instruct top management, sales and marketing people in both organizations --in writing-- to refrain from coordinating with their counterparts in the other company and to report to the General Counsel any attempts by others to engage in communications or conduct that could constitute a breach of this wall of separation. And get the key management people in both organizations to buy on to that policy.
- In reviewing documents either in pre-contract due diligence or any other time prior to consummation, insure that competitively sensitive documents such as pricing and marketing documents are not disclosed to the line management of the other merging party.
- When dealing with sales prospects or mutual customers, insure that all company representatives refrain from discussing post-merger conduct of either party.