

LEGAL DEVELOPMENTS

March 11, 2005

FTC CHALLENGES MERGER PARTY'S CLAIM OF SECOND REQUEST COMPLIANCE; SEEKS COURT ORDER EXTENDING THE HART-SCOTT-RODINO WAITING PERIOD

On March 4, the Federal Trade Commission ("FTC") demonstrated that it takes seriously compliance with its Requests for Additional Information (known as "Second Requests") issued in connection with its review of acquisitions reported under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"), seeking judicial intervention when necessary. The FTC asked a United States District Court for a temporary restraining order, injunction, and order enjoining Blockbuster Inc.'s ("Blockbuster") acquisition of Hollywood Entertainment Corp. ("Hollywood") until Blockbuster has substantially complied with the Second Request, despite Blockbuster having certified that it had substantially complied.

The FTC issued its Second Request to Blockbuster on January 12, 2005. On February 4, Blockbuster certified that it had substantially complied with the Second Request. Once a party certifies its compliance, the parties may not complete the transaction for 30 days (or 15 in the case of a cash tender offer). The FTC uses this 30-day window to determine whether it will seek to enjoin the transaction before it is consummated.

When the FTC began its review of the material produced by Blockbuster, it discovered certain information it deemed essential to its econometric analysis was not produced. Blockbuster acknowledged that certain data were missing due to a programming error and, on February 22, provided the correct data. Other missing data were not produced until March 1.

Blockbuster refused to recertify its substantial compliance to reflect the date that it had provided the missing information. Instead, it claimed that the 30-day clock nevertheless continued to run from February 4, despite its late submission of the data. Blockbuster ultimately capitulated, and the Court entered a consent order extending the waiting period until March 21.

This case demonstrates that the timing of your deal could be derailed due to your failure to ensure that the documents and data provided to the agencies in response to a Second Request are complete and accurate. The data are crucial to the econometric analyses that often are essential to the agencies' decision and without accurate data, they cannot properly evaluate the

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deal. Given the many terabytes of data that are now produced in response to Second Requests, special care must be taken that the programs properly capture and organize the requested data and that the data are readable by the software used by the agencies. Otherwise, as happened with Blockbuster, your deal could be delayed due to avoidable programming or copying errors. It is rare for either the FTC or the Department of Justice to challenge a certification of substantial compliance. But the FTC's action puts parties on notice that governmental enforcers will not hesitate to seek court intervention to extend HSR waiting periods if they believe that their ability to fairly evaluate a transaction has been compromised.