

DOJ Brings Rare Criminal Antitrust Charges for False HSR Documents

In a rare action this week, the Antitrust Division of the Department of Justice (“DOJ”) filed felony charges against Nautilus Hyosung Holdings Inc. (“Nautilus”), a leading manufacturer of automated teller machines (“ATM”), in connection with Nautilus’ submission of allegedly falsified premerger documents for its 2008 proposed acquisition of competing ATM manufacturer, Triton Systems of Delaware Inc. (“Triton”). Nautilus agreed to plead guilty to obstruction of justice and to pay a \$200,000 fine. This case appears to be the first time criminal charges have been brought against a defendant solely for falsifying premerger documents.

In its two-count felony charge filed on August 15 in the U.S. District Court in the District of Columbia, DOJ alleged that “Executive A,” acting on behalf of Nautilus, altered and directed others to alter business and strategic plans for 2006 through 2008 so as to “misrepresent and minimize” the apparent competitive impact of a proposed transaction between Nautilus and Triton. The falsified documents were included in Nautilus’ Hart-Scott-Rodino (“HSR”) filings made to the Federal Trade Commission (“FTC”) and DOJ in August 2008, as well as in subsequent document submissions to DOJ in its civil merger investigation of the proposed transaction.

In early 2009 while the civil merger investigation was ongoing, Nautilus and its parent disclosed to DOJ that numerous documents had been altered. Nautilus then agreed to cooperate with DOJ in a criminal obstruction of justice investigation. The resulting plea agreement between DOJ and Nautilus filed this week provides that, in return for the company’s cooperation and guilty plea, Nautilus executives and employees will not be criminally charged as individuals — with the exception of one named individual who was “carved out” of the plea agreement and therefore remains individually susceptible to criminal charges.

DOJ’s criminal enforcement action in this context raises several important points:

- Nautilus and Triton abandoned their transaction in 2009 before DOJ decided whether to challenge the proposed transaction, but investigation of the criminal allegations continued nonetheless.
- DOJ brought criminal charges without alleging that the falsified documents actually hindered its investigation in any way — the mere filing of false documents was sufficient.
- Both the Federal Trade Commission and DOJ jealously guard the effectiveness of HSR and merger investigation processes and will go to great lengths to protect the statute’s continued effectiveness.

Companies must exercise extreme caution to make certain its government submissions under HSR or any other statute are timely, accurate and complete. As with the action just filed against Nautilus, repercussions to companies that allow false or incomplete information to be filed with federal officials may extend beyond on ongoing civil investigation and lead even to criminal penalties as well.

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