



## Prepare For Antitrust Risk In Nonreportable Transactions

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The [U.S. Department of Justice](#) recently reached a settlement with Coach USA Inc. and City Sights LLC, breaking up their joint venture. The DOJ also employed the rarely used remedy of disgorgement to recover \$7.5 million in profits from the defendants. This case demonstrates the aggressive posture the antitrust agencies are taking to challenge and impose harsh remedies upon transactions that are not reportable under the Hart-Scott-Rodino Act. It also highlights the need to properly evaluate and prepare for the antitrust implications of nonreportable transactions under the HSR Act.



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### DOJ Obtains Disgorgement

In 2009, two operators of hop-on, hop-off bus tours in New York City formed a joint venture, Twin America LLC. Prior to the formation of Twin America, Coach USA and City Sights were the two largest companies in the alleged hop-on, hop-off bus tour market in New York City, with a combined 99 percent share of the market. The DOJ alleged that the two companies' joint venture created an unlawful monopoly and enabled them to increase prices by approximately 10 percent. The DOJ filed an antitrust complaint challenging the deal in December 2012, well after it was consummated in 2009. The case was proceeding toward trial when the parties agreed to a settlement, which they announced on March 16, 2015.

Under the terms of the settlement, the defendants must take several steps to restore competition allegedly lost through the formation of the venture. Twin America must divest all 50 of City Sight's valuable Manhattan bus stop authorizations. The divestiture will eliminate a significant barrier to entry, as the bus stop authorizations are required by the New York City Department of Transportation to operate bus tours, and little capacity for new authorizations exists. Coach USA and Twin America must also establish antitrust training programs and provide the government with advance notice of any future acquisition in the alleged market. Coach USA must pay \$250,000 in attorney's fees to the United States in connection with claims that it spoliated evidence and did not meet its document preservation obligations.

Most noteworthy, the settlement requires the defendants to pay \$7.5 million to disgorge what the DOJ viewed as excess profits obtained as a result of the combination. Prior to this settlement, the

defendants had already agreed to pay \$19 million to settle a related class action. One criticism of disgorgement as a remedy in antitrust matters is that disgorgement may excessively punish defendants that are also subject to potential civil litigation in which they may pay additional damages. Here, the DOJ concluded that the defendants were unjustly enriched by an amount greater than the \$19 million settlement, and the additional \$7.5 million disgorgement was intended to divest the defendants of additional ill-gotten profits and deter similar conduct in the future.

This disgorgement is significant. It is a remedy that the [FTC](#) and DOJ have used very infrequently, particularly in merger cases. To the extent the Twin America case creates a precedent for the use of that remedy, it increases the risks associated with completing problematic transactions without an antitrust review.

### **Antitrust Enforcers Frequently Investigate and Challenge Nonreportable Transactions**

Nonreportable transactions, such as the Twin America LLC joint venture, present a unique set of challenges to antitrust enforcers who must investigate and potentially seek to unwind a completed transaction. The HSR Act was implemented, in part, to provide regulators with the opportunity to investigate transactions before consummation. Regulators then use their authority under the antitrust laws to try to enjoin the completion of transactions that they find anti-competitive. The agencies also have the authority to challenge deals that are already consummated, regardless of whether the deal was reportable under the HSR Act. The agencies may not even identify a nonreportable transaction that raises competitive concerns until after the deal has been consummated. Nonreportable transactions likewise create unique risks for parties, because the review may commence after the deal is completed, and the remedies sought or imposed may be particularly harsh.

Regulators have clearly expressed that nonreportable transactions can cause significant harm to consumers. The agencies dedicate resources to monitoring nonreportable transactions in various industries, and they have been aggressive in challenging them. Almost 20 percent of recent DOJ merger investigations involved nonreportable transactions, and at the FTC, roughly 20 percent of all recent merger and acquisition challenges have involved nonreportable deals.

No transaction is too small to be scrutinized. For example, in 2011, the DOJ challenged the acquisition of a chicken-processing complex worth approximately \$3.1 million. In 2013, the FTC required a divestiture of a software developer acquired for only \$8.7 million.

### **Consummated Transactions and Remedies**

When the agencies challenge completed transactions, they seek severe remedies, typically including divestitures of assets or businesses. This creates unique transaction risks, especially for buyers. The buyer will normally have completed the deal and paid the seller before the investigation commences and any relief is sought or obtained. The buyer may have to divest the business it recently acquired, possibly at a price well below its initial investment. Even worse, to the extent the buyer has integrated the acquired business with its own or eliminated certain assets or redundancies, the government may require the buyer to recreate the acquired business to

ensure two viable stand-alone businesses that will compete going forward. The merged firm may be forced to sell additional assets beyond what it acquired in the initial transaction in order to “unscramble the eggs” and create an effective competitor. A buyer may also be forced to license its key products and technologies to competitors if the agencies believe that is necessary to restore competition.

As demonstrated in the tour bus settlement, regulators also may require disgorgement of profits resulting from the combination. Both the DOJ and FTC have sought disgorgement of profits when the defendant would otherwise retain unlawful profits. This remedy is unique to consummated mergers in which monopoly profits can actually be measured.

### **Practical Considerations for Nonreportable Deals**

Because of the drastic remedies that a nonreportable or consummated deal may eventually face, parties must be sensitive to the level of risk antitrust issues pose throughout the transaction planning process. Most importantly, parties should not assume that a deal does not create antitrust risks because it does not require an HSR filing. In fact, the risks may be more acute in the case of a nonreportable deal — especially for the buyer — and may ultimately caution against consummating a transaction. Alternatively, parties can try to manage that risk through various methods, including creatively allocating antitrust risk in the transaction agreement.

Another strategy is to preemptively bring the transaction to the agencies’ attention prior to closing to try to gain some comfort that they will not seek to challenge the deal later, although this strategy has its own risks (including delay in deal timing). Buyers may also want to consider how to approach customers to mitigate the risk that customers will be unhappy and complain; simply observing a moratorium on raising prices will not be sufficient to convince the agencies or a court that a transaction is unlikely to lessen competition. Ultimately, counsel can advise parties on managing the antitrust risk profile throughout the deal-making process, including prior to initiating or receiving offers for the business, through closing and beyond.

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