

The parties are required to remain separate during the statutory waiting period and to preserve their status as independent economic actors during the antitrust investigation. The legislative history of section 7A underscores Congress' desire that competition existing before the merger should be maintained to the extent possible pending review by the antitrust enforcement agencies and the court.

The Complaint alleges that the Defendants violated section 7A by, in effect, merging their IPG decision-making and by giving Gemstar significant control over TV Guide's IPG business before the expiration of the statutory waiting period, thus accomplishing a *de facto* acquisition of assets under section 7A. Whether a *de facto* acquisition has occurred depends on the facts of each particular case. Courts have recognized that the execution of an acquisition agreement, combined with the assumption of significant operational or decision-making influence over the to-be-acquired business, can amount to an "acquisition" under section 7 of the Clayton Act, even if the parties have not formally consummated the transaction. Similarly, once parties have entered into an executory agreement subject to section 7A's requirements, they may not effectuate the acquisition by, for example, merging their operations or otherwise transferring significant operational, management or decision-making control over the to-be-acquired assets. In other words, once section 7A is triggered, parties to a merger agreement must, at a minimum, avoid combining prematurely in a way that would constitute an acquisition under section 7.<sup>4</sup>

conduct, the post filing waiting period was either 30 days after filing or if the enforcement agency requested additional information, 20 days after the parties complied with the enforcement agency's request. 15 U.S.C. 18a(b). The enforcement agency may grant early termination of the waiting period, 15 U.S.C. 18a(b)(2), and often does so when a merger poses no competitive problems.

<sup>4</sup> This conclusion accords with the FTC regulations, which define an "acquiring person" as one who will "hold" voting securities or assets directly or indirectly through third parties. 16 CFR 801.2(a). "Hold" is further defined to mean "beneficial ownership," 16 CFR 801.1(c). In its "Statement of Basis and Purpose" ("SBP"), 43 FR 33450 (July 31, 1978), which accompanied the regulations, the FTC stated that the existence of "beneficial ownership" was to be determined "in the context of particular cases" with respect to the person enjoying the "indicia of beneficial ownership." *Id.* at 33459. The execution of a reportable agreement, combined with the assumption of significant influence over the to-be-acquired securities or assets, transfers sufficient "indicia of beneficial ownership" to amount to "holding" the securities or assets under the regulations. See William J. Baer, Report from the [FTC] Bureau of Competition (April 15, 1999) ("In

Such premature combination of operations and assets significantly undermines the statutory scheme, which is designed to give the antitrust agencies the opportunity to conduct an investigation before the parties have combined their operations or acquired significant assets. It can contaminate the antitrust agencies' investigation by, among other things, providing a skewed picture of the competitive landscape and making it difficult or impossible to obtain meaningful relief should the antitrust agencies successfully enjoin a transaction.

### III. Explanation of the proposed Final Judgment

The proposed Final Judgment contains equitable relief designed to prevent future violations of section 1 of the Sherman Act and section 7A of the Clayton Act, addresses the effects of the Defendants' conduct, and secures a monetary civil penalty for Gemstar's and TV Guide's violation of section 7A. The proposed Final Judgment sets forth required and prohibited conduct, a compliance program the Defendants must follow, and procedures available to the United States to determine and ensure compliance with the Final Judgment. Section IX provides that these conditions will expire ten years after the entry of the Final Judgment.

#### A. Prohibited Conduct

Section IV(A) of the proposed Final Judgment is designed to prevent future Clayton Act violations of the sort alleged in the Complaint. During the "pre-consummation period"—after executing an agreement subject to the reporting requirements of section 7A and until the expiration of the statutory waiting period—the Defendants are prohibited from entering into any agreement with the other contracting parties to combine, merge, or transfer, in whole or in part, any operational or decision-making control over the marketing or distribution of any to-be-acquired product, service, or technology. This injunction applies to all transactions subject to the reporting requirements of section 7A, regardless of the particular products involved or whether the other party to the transaction competes with the

the jargon of [section 7A], signing the contract transfers some indicia of beneficial ownership. By itself, that transfer is entirely lawful. But the transfer of additional indicia of ownership during the waiting period—such as assuming control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence inquiries—are inconsistent with the purposes of [section 7A] and will constitute a violation."

Defendants. The injunction also applies to partial assumptions of control over the marketing or distribution of any to-be-acquired asset.

Section IV(B) is designed to prevent future violations of Sherman Act. It enjoins the Defendants from entering into various agreements with competitors between the beginning of negotiations until the consummation or abandonment of certain specified types of transactions. Specifically, this provision covers any agreement between the Defendants and any firm offering a competing product to acquire assets or securities, form a joint venture, settle litigation, or license intellectual property. During this period, the Defendants may not reach agreements with the other party affecting price or output, allocating markets or customers, or eliminating or delaying competition. Section IV(B) also enjoins the Defendants from disclosing, or seeking the disclosure of, competitively sensitive information during this period.

In addition, Section IV(C) of the proposed Final Judgment requires GTV to permit specified service providers, those that signed IPG agreements conforming to the agreed-upon prices and terms during the period between June 10, 1999, and July 12, 2000, the option to terminate, without penalty, those agreements. The decision to terminate those agreements rests solely with the service provider.

#### B. Permitted Conduct

Section V of the proposed Final Judgment identifies certain agreements and conduct that are permitted by the Judgment. Sections V(A) and V(B) ensure that the decree will not be interpreted to forbid certain "conduct-of-business" covenants that are typically found in merger agreements. Section V(A) permits the use of agreements obligating the to-be-acquired person generally to operate its business in the ordinary course of business consistent with past practices. Section V(B) permits the use of "material adverse change" provisions, which give the acquiring person certain rights to prevent material changes in the way a to-be-acquired firm conducts its business. These are customary provisions found in most merger agreements and are intended to protect the value of the transaction and prevent a to-be-acquired person from wasting assets.

Section V(D) recognizes a narrow exception to the prohibition on the exchange of competitively sensitive information. As a general rule, competitors should not obtain prospective customer-specific price