

# M&A Client Alert

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## QUALCOMM Settles Department of Justice Charges that it Violated the HSR Waiting Period Requirement in Connection with its Acquisition of Flarion

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On April 13, 2006, the Antitrust Division of the Department of Justice announced a settlement with QUALCOMM Incorporated and Flarion Technologies, Inc. of claims that QUALCOMM and Flarion violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") in connection with QUALCOMM's acquisition of Flarion in January 2006 for approximately \$600 million in cash and QUALCOMM stock. The Antitrust Division alleged that QUALCOMM acquired operational control of Flarion prior to the expiration of the HSR Act waiting period (i.e. gun jumping).

Generally, the HSR Act requires that parties to an acquisition file a notification with the Department of Justice and the Federal Trade Commission and wait for the expiration of the waiting period when voting securities or assets having a value in excess of \$56.7 million<sup>1</sup> are acquired or are to be held (meaning consolidated with other previous holdings) as a result of an acquisition. Certain size of party tests apply unless the transaction is valued in excess of \$226.8 million<sup>2</sup>. The HSR Act requires that the parties to a subject transaction must wait for the expiration of the 30-day waiting period before consummating

the underlying transaction. During such waiting period, the Antitrust Division and the Federal Trade Commission have an opportunity to investigate the transaction. At the end of such initial 30-day waiting period, the antitrust agencies are permitted to request additional information and materials (generally referred to as a "second request"), which effectively prohibits the parties to the transaction from consummating it until substantial compliance with the second request and the ultimate expiration of the waiting period.

On July 25, 2005 QUALCOMM and Flarion entered into a merger agreement. The parties filed their HSR Act notification during August 2005, and a second request was issued in September 2005. The waiting period under the HSR Act expired on December 23, 2005.

According to the Antitrust Division's Complaint, the merger agreement between QUALCOMM and Flarion imposed on Flarion negative covenants that restricted Flarion from taking certain actions without first obtaining QUALCOMM's consent. For example, the Antitrust Division alleged in the Complaint that,



*“Flarion could not, without QUALCOMM’s consent: enter into agreements to license its intellectual property to third parties; enter into agreements involving the obligation to pay or receive \$75,000 or more in a year or \$200,000 or more in the aggregate; enter into agreements relating to the disposition or acquisition of intellectual property rights, except for “shrinkwrap” software licenses with purchase prices of less than \$10,000; or present business proposals to customers or prospective customers.”*

In addition to the allegation that QUALCOMM improperly gained certain control over Flarion through the negative contractual covenants, the Antitrust Division also alleged that Flarion permitted QUALCOMM to have significant control over its operations with respect to:

- the hiring of new employees even in the ordinary course of business;
- the marketing of products and services to customers and potential customers including price quotations and potential discounts to existing customers;
- the pursuit of customer proposals; and
- certain new contracts.

As a result of the negative covenants and operational control provided to QUALCOMM, the Antitrust Division alleged in the Complaint that QUALCOMM and Flarion violated the HSR Act by QUALCOMM effectively taking control of Flarion prior to the expiration of the waiting period under the HSR Act, and that as a result QUALCOMM had acquired Flarion in violation of the HSR Act.

<sup>1</sup>The threshold was \$53.1 million at the time of the QUALCOMM/Flarion transaction. It is adjusted annually based on the percentage change in the gross national product.

In its press release announcing the settlement, the Antitrust Division warned parties to subject transactions:

*“Merging parties must continue to operate independently until the end of the premerger waiting period,”* said Thomas O. Barnett, Assistant Attorney General in charge of the Department’s Antitrust Division. *“The Antitrust Division will vigorously enforce this requirement against any company that assumes operational control of a business that it is acquiring.”*

The Antitrust Division’s action against QUALCOMM and Flarion does not seem to be a departure from the antitrust agencies’ philosophy with respect to coordination between parties during the waiting period. Rather, it should be viewed as a reminder that, while legitimate reasons may exist for negative covenants in acquisition agreements (e.g. preservation of assets and the business during the pendency of the transaction), coordination with respect to ongoing business activity versus coordination with respect to post-closing integration must be considered carefully. There exists no bright line test for determining when the violation of the HSR Act has occurred with regard to unlawful coordination, but parties must consider this issue carefully. The failure to comply with the HSR Act carries with it significant potential fines and other penalties (\$11,000 per day for each violation), making compliance with it critical.

*For more information about the Antitrust Division’s action or other Hart-Scott-Rodino matters, please contact Jeffrey M. Shapiro, Member of the Firm, or Michael J. Hahn, Associate at (973) 597-2500.*

<sup>2</sup>The threshold was \$212.3 million at the time of the QUALCOMM/Flarion transaction. It is adjusted annually based on the percentage change in the gross national product.