



August 8, 2011

Acting Assistant Attorney General Sharis A. Pozen
Attention Lowell Stern
Anti-Trust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20503

Re: Merger of Waste Management, Inc., and Oakleaf Global Holdings
Statement in Opposition and Request for Merger Review

Dear Assistant Attorney General Varney:

The purpose of this letter, on behalf of the Center for a Competitive Waste Industry (CCWI),¹ is to request the Justice Department to conduct a Clayton Act merger review of Waste Management's (WM's) acquisition of Oakleaf Global Holdings (Oakleaf) and to pursue the appropriate judicial remedies, including, as the public record presently suggests is indicated, the dissolution of this combination that will substantially lessen competition in the market for multi-location large commercial consumers of waste services.

Furthermore, because, from what is publically known, this merger appears to have gone forth without a Hart-Scott-Rodino pre-notification, and because it seems likely to have immediate and irreversible anticompetitive impacts, we believe a temporary injunction should be sought in order to prevent the premature release of sensitive pricing information that would cause irreparable harm to both local haulers and large commercial customers.

¹ The Center for a Competitive Waste Industry is an independent non-profit organization, based in Madison, Wisconsin, with its mission to encourage restoration of competition in the waste industry, and to oppose any further erosion of competition in the industry. See www.competitivewaste.org.

Pre-Merger Review Threshold

On July 28, 2011, WM announced in its press release that it had “closed” on the acquisition of Oakleaf for \$425 million, subject to working capital and other adjustments. On information and belief, this was done without first submitting the transaction to the Department for prior review under the Hart-Scott-Rodino (H-S-R) amendments to the Clayton Act.

Waste Management, with \$12.5 billion in 2010 revenues, is the largest publicly traded waste service company, and Oakleaf, with \$580 million in reported 2010 revenues, is the largest privately owned waste firm in the U.S.

Inasmuch as both sides of the transaction have more than the H-S-R thresholds of \$126.2 million in assets and sales, and the transaction is valued at more than \$63.1 million, this combination appears to have required pre-notification, although, from what is now publicly known, this was not done.

Description of Merging Firms

Waste Management provides collection, disposal, and recycling solid waste services to residential, commercial and industrial customers across the U.S. with approximately 20 million municipal, commercial, industrial, and residential customers through a network of 390 collection operations, 294 transfer stations, 271 active landfill disposal sites, 17 waste-to-energy plants, and 98 recycling facilities.

Oakleaf is a waste broker, and the only one with a full national reach and density. Brokers assume the role of negotiating jointly for waste service on behalf of many customers. Oakleaf’s clients are primarily large commercial customers for waste services, focused on multi-location retail, restaurant, hotel, manufacturing, property management and mall companies, such as United Technologies, Kmart and TGIFridays.

Specifically, Oakleaf –

- Conducts waste audits to determine its clients needs for disposal and recycling services and how best to meet those needs;
- Aggregates substantial volumes in local markets, using its buyer power to bypass the duopoly in the waste industry (see the next section) and negotiate more favorable prices for waste services for its clients through a network of 2,500 preferred haulers; and
- Provides centralized billing to its multi-location clients.

Of especial note in a H-S-R review, the second function served by Oakleaf distinguishes it from the traditional broker role, in that, here, Oakleaf's market activities are not limited to that of a downstream wholesaler. Oakleaf also acts as a direct and critical horizontal competitor of WM by also predominately subcontracting with its large network of independent haulers in, essentially, every local market, where they compete with WM.

Without an independent national broker willing to directly subcontract with them, local haulers would not be able to compete for these customers' business because, individually, they are not able to provide the centralized contracting and billing that national companies with many local operations require. Moreover, Oakleaf's independent subcontracting to serve the large commercial sector serves to strengthen independent competitors to WM and Republic generally for all waste services, not just the large commercial clients of Oakleaf.

The Market

After 20 years of rollups of small privately-held firms following WM's 1971 IPO, and the last 20 years of mega-mergers among publicly traded firms, the market for waste services has become extremely concentrated in the hands of a very small number of vertically integrated national firms.

Most important to competition is the specific impact of that consolidation on the concentration of landfill ownership in the hands of just two firms. There are near insurmountable barriers to entry into the market for landfills, which act as a bottleneck in the industry because permitting obstacles are extremely high and competing independent providers of waste services have to tip their collection vehicles at a landfill by day's end. To the extent that a tight oligopoly controls a substantial part of that local disposal market, that oligopoly can leverage market power from their control over landfills in the area by price-squeezing any non-cooperating independent haulers.

After the acquisition of second ranked Allied Waste by third ranked Republic Services in 2009, a new and larger number two ranked firm was created to rival WM. At the same time, the two waste giants left the far smaller firms far behind. By the following year, WM had revenues of \$12.5 billion, and Republic, \$8.1 billion. The distant third ranked firm, Veolia Environmental, only reported \$1.9 billion.

In addition to the national waste firms' mounting landfill-led market power, and 50 year history of persistent allegations of anticompetitive conduct, since 2004, Waste Management, followed by the other national firms, has ramped up a "stealth pricing" strategy to extract even higher margins from the commercial sector than can be extorted from its control over landfills. The presence of stealth pricing in this industry, and the difficulties it raises for comparing rival service proposals, is one reason that brokers independent of the oligopoly are considered to be vitally important by Oakleaf's clients.

Stealth pricing is the term used for such pricing tactics as the well-known above-cost baggage checking and other fees imposed by the airline industry, the overdraft charges and plethora of other account fees in the banking industry, or the unreasonable parking fee and long distance phone charges in the hotel industry. Because stealth pricing makes it exceedingly difficult if not impossible for the consumer to compare the total effective price for a commodity service, and because, in oligopoly markets, the practice is often imposed on an industry-wide basis, these hidden fees have become unavoidable to the consumer and a major share of earnings to the seller. By raising the transaction costs for an individual company to compare offers, stealth pricing allows competition to move away from pricing. The intervention of a knowledgeable broker can undermine this obfuscatory strategy.

Here is how WM CEO, David Steiner explained the company's thinking on its more aggressive stealth pricing strategy to the Raymond James 27th Annual Institutional Investors Conference in 2006:

“We went into our ‘pricing excellence’ program. And pricing excellence can best be shown by one of my favorite examples, which is two hotels. You go to two hotels that you think are pretty much identical. You ask one hotel how much is your room? They say \$110. You say thank you. You call the next hotel you say how much is your hotel room? They say its \$100. You say book me the room. Never thinking that your total cost of stay at that \$100 hotel room might actually be more than it was at the \$110 hotel room because you never asked how much is it to park? How much does it cost to make a long distance phone call? How much does it cost to have my shirt pressed? How much does it cost to buy a candy bar at the concession stand downstairs? You never asked those questions. So your total cost of staying at that \$100 hotel might actually be higher, but you didn't pay any attention to it because all you paid attention to was the base pricing.”

The waste industry is reported to have long “put its finger on the scale” by wrong-sizing dumpsters and pulling partially filled boxes from commercial customers. More recently, as stealth pricing became the norm in the economy, “pricing excellence” in the waste industry has reached new peaks with such things as “environmental surcharges.” On its website, WM conceded this surcharge is intended “to cover costs –

“associated with operating in a safe and environmentally responsible manner and *to achieve an acceptable operating margin...* The amount or percentage of the environmental charge is *not tied to any specific, direct or indirect, costs* to service your account, but to Waste Management's overall costs on a company-wide basis.” (Emphasis added.)

In essence, "environmental surcharges" permit the waste giants, which dominate the market, to impose any price increase they choose without any justification during the term of a contract, just because – in the absence of national brokers – the commercial class all too often has nowhere else to shop.

Wall Street waste analysts, such as Merrill Lynch in its 2008 Industry Overview, soon took note of this new profit center:

“The largest waste companies continued to achieve price increases on contract renewals over the past month as Republic Services led the way with an 82% hike on one contract and 30-40% gains on another agreement. Allied Waste was the most active...as the company successfully achieved price increases of 6-36% in eight different communities over the past month. Waste Management [was] also granted higher rates that represented as much as a 23% increase over prior levels.”

For a national company that generates substantial waste, there are compelling advantages in utilizing a national broker. Had there been no Oakleaf, most of the broker’s clients would have been too busy running their core businesses to take care that they were not overcharged by stealth pricing and other abusive conduct for a cost item that is a minor part of their total expenses. The transaction costs of negotiating hundreds or thousands of local waste management contracts would also have been a challenge to management. However, by serving effectively as a broker for its clients, aggregating them together by market to control significant volumes, and negotiating market-based contracts with its alternative stable of local haulers, Oakleaf has largely prevented Waste Management and Republic from extracting supra-market earnings out of the large commercial sector.

Section 7 Issues

As previously discussed under Description of Merging Firms, the WM takeover of Oakleaf is primarily a horizontal merger because Oakleaf’s stable of 2,500 haulers, who provide service to many of WM’s former commercial customers, directly compete horizontally with WM. The fact that those 2,500 local haulers act essentially as franchisees of Oakleaf, rather than being directly owned by Oakleaf, is immaterial for a market analysis, because, in the market, they collectively act as a horizontal competitor of Waste.

As a horizontal merger case, among the several antitrust concerns are the severe harm that will be inflicted on the remaining base of independent haulers – whose continued vitality is essential to maintain competitive local markets in the residential and small commercial sectors as well as in the large commercial sector – once their short term contracts with Oakleaf expire.

After this period, WM will have no significant economic incentive to not internalize the service Oakleaf had provided and terminate much of the subcontracting that Oakleaf had done. Whether or not WM formally absorbs these independents, WM will be capable of exerting undue informal control due to its access to their confidential pricing information and its control in many cases of a significant fraction of their accounts they may need to be financially viable over time.

Of course, eventually another independent national waste broker will arise to replace Oakleaf. There can be little doubt but that Oakleaf's clientele selected the broker to avoid the abusive pricing they associate with WM, and will be looking for a successor. How likely this is or when it would likely occur we cannot say. In all likelihood, it would take several years, and, in the meanwhile the multi-location national firms will, in most cases, be forced to pay above-market prices for waste services. It is also a matter of concern how many of the local firms will survive until a new and truly national brokerage with the reach of Oakleaf emerges.

Oakleaf is currently the dominant waste broker on the national scene. The rest of that industry is highly fragmented, and no other broker has anywhere near the reach and density of Oakleaf. The difficulties in re-establishing Oakleaf's market breadth are suggested by the fact that the company took nearly 10 years to achieve true national scope, during which it ran through three different sets of financial backers from Morgan Joseph to Charterhouse to New Mountain. Presumably, were Oakleaf removed as a competitive force, another several years may be required before any of the other, considerably smaller brokers, such as Environmental Waste Services, Environmental Waste Solutions or WIH Resources, will be able to offer the commercial sector the same level of brokerage the multi-location customers need in order to restore free markets to the large commercial sector.

Clearly, competition in the market for waste services by multi-location large national commercial customers will be significantly lessened by this acquisition for a considerable number of years.

In passing, WM has not put forward any merger-specific economies under ¶4 of the Horizontal Merger Guidelines that might otherwise justify this transaction notwithstanding its demonstrable harms. CEO Steiner's only reference in the press release to broader benefits is:

“Acquiring Oakleaf advances our growth and transformation strategies of knowing more about our customers and how best to serve them, extracting more value from the material that we manage, and optimizing our operations. We substantially increase our national accounts customer base and further enhance our ability to provide comprehensive, best-in-class environmental solutions. In addition, Oakleaf's vendor hauler network expands our service footprint to new geographies and *enhances customers' one-stop shopping for environmental solutions.*” (Emphasis added.)

This is sophistry. Presumably, none of Oakleaf's clients were unaware of the availability of Waste Management's services when it signed on with Oakleaf. By previously opting for Oakleaf instead, they have already chosen to reject Waste Management, and therefore there is no valid claim that a benefit is accorded by forcing them to return to the same company, that they have eschewed in no small part due to its abusive monopoly and stealth pricing practices.

Finally, Oakleaf possesses extremely valuable proprietary market information about the confidential pricing strategies of almost every independent hauler in the country and of the commercial customers' contact information and waste profiles. Once WM accesses this data, the genie will be out of the bottle and the waste giant will have an unfair advantage competing with the independent haulers.



In conclusion, because of the unique role that Oakleaf has played to preserve competition in the market for waste services to large commercial customers, and because this merger is likely to undermine the viability of many of the remaining independent haulers, this merger appears to be highly injurious to competition, without any clearly compensating benefits. A merger review should be undertaken, and, based upon what is known now, a court order should be sought to dissolve this transaction that, from what is now known, appears to substantially lessen competition in violation of the Clayton Act.

In addition, because of the imminent threat of irreparable harm to the 2,500 haulers in Oakleaf's stable, and the unknown number who submitted unsuccessful bids to Oakleaf, as well as the valuable proprietary data about the waste profiles and contact information for almost all large commercial customers in the U.S., a temporary restraining order should be sought to seal that key market data forthwith.

Sincerely,

CENTER for a COMPETITIVE WASTE INDUSTRY

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