The federal antitrust agencies have opened the New Year with vigorous enforcement of the Hart Scott Rodino Antitrust Improvements Act of 1976 ("HSR Act") by imposing several fines totaling $1.5 million. On January 17, 2017, the Federal Trade Commission ("FTC") settled allegations in two separate matters. The first settlement for $180,000 was against Ahmet Okumus for failure to comply with the HSR Act for an investment made in Web.com Group Inc. through his hedge fund. The second settlement for $720,000 was against Mitchell Rales for failing to comply with the HSR Act when his wife purchased shares in Cofax Corporation — an entity Rales had previously invested in — and for his own investment in Danaher Corporation. Then, on January 18, 2017, the Department of Justice ("DOJ") settled allegations against Duke Energy Corporation for taking operational control of Osprey Energy Center prior to complying with the HSR Act — a so-called "gun jumping" violation. Duke was fined $600,000. These substantial fines serve as a clear reminder of the importance of vigorous HSR compliance programs and monitoring for investment funds, large corporations, and individual investors.

**HSR Act**

The HSR Act requires parties engaged in certain transactions — including certain minority investments — to file a notification with the FTC and the Antitrust Division of the DOJ, and to observe a statutorily prescribed waiting period (usually 30 days) prior to closing, if the jurisdictional size thresholds are met. The purpose of the HSR Act is to maintain the competitive status quo during the waiting period while the federal antitrust agencies investigate whether the proposed transaction may substantially lessen competition in any relevant market in violation of the antitrust laws. The HSR Act is a procedural requirement that applies (if there are no applicable exemptions) regardless of the likely competitive impact of a transaction. The maximum civil penalty for violating the HSR Act requirements is $40,000 per day.

**The Okumus Violation**

The FTC alleged that Okumus inadvertently violated the HSR Act for 18 days for his purchase of voting securities of Web.com through Okumus Opportunistic Value Fund, Ltd. The hedge fund purchased the shares on June 27, 2016, at which point the HSR Act’s jurisdictional thresholds were exceeded, and then sold a sufficient number of the shares on July 14, 2016, at which point the thresholds were no longer exceeded. The antitrust agencies have discretion regarding whether to impose penalties for violations of the HSR Act, and often do not for inadvertent violations that are proactively rectified by the violator. However, this was the second violation in two years for Okumus in relation to investments in Web.com. In 2014, Okumus had acquired shares of Web.com, resulting in an investment of 13.5%. At the time, he did not file an HSR notification, incorrectly relying on an “investment only” exemption which only applies to investments of 10% or less. He later filed a corrective HSR notification. After that first violation, the FTC did not issue a civil penalty, but instead advised him that he was “accountable for instituting an effective program to ensure full compliance with the HSR Act’s requirements.” For the 18 days in violation of the HSR Act, the FTC fined Okumus $180,000.

**The Rales Violations**

Like Okumus, this was not Rales’s first violation. In 1991, Rales settled an enforcement action for $850,000 brought by the DOJ for violating the HSR Act through a company he controlled. The current enforcement action against Rales stems from investments in Cofax and Danaher in 2011 and 2008, respectively. Prior to Cofax’s initial public offering ("IPO") in 2008, Rales held more than 50% of its voting securities. As such, Rales would not have been required to file for any further acquisitions of Cofax’s shares because he already controlled the company. However, after the IPO, Rales’s share dropped to below 50%. Because he no longer controlled Cofax, he was required to file an HSR notification for any further investments if the appropriate jurisdictional thresholds were hit. In 2011, Rales’s wife acquired shares of Cofax on the open market that — when combined with Rales’s holding — exceeded the jurisdictional thresholds, but they failed to make the required notification. Under the HSR Act, holdings of spouses are attributable to each other and thus holdings of each spouse must be aggregated with the other’s holdings when determining whether the jurisdictional thresholds are exceeded. Separately, in 2008, Rales purchased shares of Danaher on the open market that exceeded the jurisdictional threshold and also failed to file the required notification. Rales claimed the violations were inadvertent, and filed corrective notifications for both in 2016. However, because of prior enforcement action against him, the FTC sought penalties, alleging continuous violation of the HSR Act from 2011 to 2016 for the Cofax transaction and from 2008 to 2016 for the Danaher investment. The significant time period and multiple violations account for the high fine of $720,000.

**The Duke Violation**

In 2014, Duke entered into an agreement to purchase Osprey from Calpine Corporation. Osprey is a combined-cycle, natural gas-fired, electrical generating plant. As part of the agreement, Duke also entered into a “tolling agreement” without filing an HSR notification. The tolling agreement gave Duke immediate control over Osprey’s output, including control over
purchasing of fuel for the plant, coordinating delivery of the fuel, and arranging for transmission of the generated energy — 
all activities that Calpine used to handle. Duke also immediately began receiving the benefits and risks of the plant’s profits 
and losses. This resulted in Osprey ceasing to be an independent competitor to Duke in the market for generating 
electricity.

Duke claimed it was not interested in the tolling agreement, but only the full purchase of Osprey. However, anticipating 
difficulty getting approval from the Federal Energy Regulatory Commission (“FERC”) for the transaction, the parties 
undertook the intermediate step of the tolling agreement with the goal of convincing FERC that the ultimate purchase would 
not result in any change to the market. In fact, Duke argued to FERC that the purchase posed no competitive threat and 
did not increase market concentration because Duke “already controls [Osprey] pursuant to the Tolling Agreement.”

Under the HSR Act, the transfer of “beneficial ownership” is deemed an acquisition, which is reportable if the jurisdictional 
thresholds are met. A purchaser who takes beneficial ownership of assets prior to obtaining HSR clearance is guilty of “gun 
jumping.” Here, the combination of the purchase agreement with the control transferred under the tolling agreement was 
deemed a transfer of beneficial control. Thus, the DOJ imposed a $600,000 fine on Duke for the gun jumping violation.

While the Duke matter involved a traditional M&A deal, the other two recent fines did not. Vigilant monitoring for potential 
HSR triggers is critical for all investment activity. Consistent with the requirements of the Tunney Act, these settlements 
are open for a 60-day public comment period, after which time the U.S. District Court for the District of Columbia may 
approve them upon finding them to be in the public interest.