

Not Just Mergers – FTC Highlights Commonly Missed HSR Reportable Transactions

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The Premerger Notification Office (the “PNO”) of the Federal Trade Commission (the “FTC”) recently issued a reminder about often overlooked “transactions” that may require notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). The HSR Act requires parties engaged in certain transactions that meet the **relevant jurisdictional thresholds**, if no exemptions apply, to file a notification with the FTC and the Antitrust Division of the Department of Justice, and to observe the statutorily prescribed waiting period prior to closing. Covered transactions may include mergers, joint ventures, exclusive licenses, and acquisitions of voting securities, assets, or noncorporate interests. Failure to file can result in significant financial penalties — currently up to \$41,484 per day of noncompliance. The PNO’s recent blog post highlights acquisitions that do not involve a traditional payment, but which may still be reportable.

Potentially Reportable Transactions Not Involving Payment

The PNO described five categories of transactions that may be reportable even though no payment is made at the time of the acquisition.

- **Exchange of One Type of Interest for Another.** The HSR Act covers acquisitions of voting securities of a corporation, but not acquisitions of non-voting securities of a corporation. Thus, the exchange of convertible notes of a corporation for voting securities of that same corporation is considered an acquisition of voting securities that is reportable if the relevant thresholds are met, and no exemptions apply. For example, in 2014, Berkshire Hathaway Inc. paid \$896,000 in civil penalties for failing to file a notification in connection with its 2013 exchange of convertible notes of USG Corporation for voting securities.
- **Backside Acquisitions.** Sometimes when one corporation buys another, part or all of the consideration consists of the voting securities of the buyer. The seller in the “main” transaction then acquires voting securities of the buyer in a “backside” transaction. If the relevant thresholds are met for the backside transaction, and no exemptions apply, the backside acquisition of the buyer’s voting securities is reportable. In fact, these types of transactions may require two notifications—one for the “main” transaction and one for the “backside” transaction.
- **Consolidations and Acquisition of Share in NewCo.** In a consolidation where two corporations combine under a NewCo that is its own ultimate parent entity, the shareholders of the original two corporations often receive voting securities of NewCo. Similar to a backside acquisition, the acquisition of shares of NewCo by the shareholders may be reportable if the relevant thresholds are met and no exemptions apply.
- **Reorganization.** When a noncorporate entity reorganizes into a corporation, or vice versa, there might be a reportable acquisition of voting securities or noncorporate interests if the relevant thresholds are met and no exemptions apply. Although there is an HSR exemption for certain reorganizations, it is only applicable if the following criteria are met: (i) no new assets are contributed to the new entity as a result of the conversion, and (ii) either the acquiring person does not increase its per centum holdings in the new entity relative to its per centum holdings in the original entity, or the acquiring person controlled the original entity.
- **Employee Compensation.** Some employees, particularly executives, may receive part of their compensation in the form of voting securities of their employer. If the compensation consists of voting securities or restricted share awards (“RSAs”) that entitle the holder to vote the shares and receive dividends, an HSR notification may be required if the relevant thresholds are met and no exemptions apply. In contrast, compensation in the form of restricted stock units (“RSUs”), which do not entitle the holder to the right to vote, does not create a reportable transaction. However, an HSR notification may be required prior to the RSUs vesting. For example, in 2011 Brian L. Roberts, the CEO of Comcast Corporation, paid a civil penalty of \$500,000 for failing to file a notification prior to his RSUs vesting.

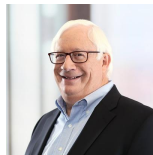
Other Easily Missed Transactions

In addition to the scenarios highlighted by the PNO, there are a couple of additional types of potentially HSR reportable transactions that are worth highlighting as they are also easily missed. The oversight with respect to these transactions is typically due to confusion over valuation. One of the HSR jurisdictional thresholds is the so-called “size of transaction” threshold that looks to the value of the voting securities to be held by the buyer “as a result of the acquisition.”

- **Aggregation and Subsequent Acquisitions of Voting Securities.** Under the HSR rules, the size of transaction for acquisitions of voting securities includes the value of any previously acquired voting securities of the same target aggregated with the current acquisition. Importantly, the value of the already held voting securities is based on their current value, not necessarily the purchase price at the time they were acquired.
- **Leveraged Buyouts.** Historically there was frequent confusion regarding how to calculate the size of transaction in leveraged buyouts in which new debt is used to finance the buyer’s acquisition of the target. Previously, the calculation depended on which party incurred, provided, or guaranteed the debt. However, the PNO updated its position a couple of years ago to require that all new debt used to finance a leveraged buyout be included in the size of transaction calculation, regardless of which party incurs the debt.

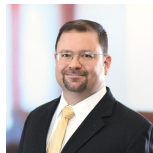
Developing an effective HSR compliance program is an essential component of a company’s legal compliance efforts. As highlighted by the PNO, a tracking mechanism designed to identify potentially HSR reportable transactions should not be limited to situations where traditional payments are made, but must include any scenario where voting securities, assets, or noncorporate interest change hands or are acquired.

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