

Rules for acquisitions

The basics of Hart-Scott-Rodino and how to avoid potential pitfalls

Hart-Scott-Rodino Antitrust Improvements Act (HSR) compliance is typically associated with transactions involving mergers, stock or asset acquisitions, joint ventures and acquisitions of a controlling interest in a non-corporate entity. Pitfalls can arise, however, for individuals and companies who are unfamiliar with the coverage of the HSR Act.

HSR also applies to the acquisition of voting securities by individuals, including officers and directors, if the acquisition exceeds the HSR's threshold amounts, regardless of whether the voting securities were acquired through a stock market purchase, as equity compensation or through the exercise of options or warrants.

"Individuals may not be cognizant of these rules and could unknowingly violate the HSR filing obligations," says Jill Bellak, a member of Semanoff Ormsby Greenberg & Torchia, LLC. "Under the aggregation rules, each new acquisition of voting securities is aggregated with existing holdings. Once the value of the existing holdings plus the newly acquired voting securities exceeds the HSR thresholds, a filing is required prior to acquisition of the new securities. If the voting securities merely appreciate in value, but no new acquisition is made, a filing is not triggered."

Smart Business spoke with Bellak about the thresholds under HSR, the applicable filing fees, the filing parties and the penalties for failure to comply with the filing requirements.

What are the current thresholds under HSR?

A filing may be triggered through the act's size of transaction test if acquisitions of voting securities or assets have a value in excess of \$78.2 million. If this threshold

is reached, the size of person test must be analyzed.

The size of person test is satisfied if one party to the transaction, including the party's parent and subsidiaries, has annual net sales or total assets of at least \$156.3 million and the other party to the transaction has \$15.6 million or more in annual net sales or total assets.

A filing under HSR is required if both the size of transaction and size of person tests are met and no exemptions are available. If the acquisition of voting securities or assets has a value in excess of \$312.6 million, HSR applies and a filing is required, regardless of the size of person test.

These thresholds are adjusted annually. The relevant date for determining value is the closing date of the transaction, not the date the acquisition agreement is signed.

What are the filing requirements and review period?

Under HSR, a notification and report form, together with the acquisition agreement and other relevant documents, is required to be filed with the Federal Trade Commission and the Department of Justice.

Once a filing is made, the regulators have a 30 calendar day period in which to review the transaction and request additional information or documentation. Early termination of this 30-day waiting period



JILL M. BELLAK

Member
Semanoff Ormsby Greenberg & Torchia, LLC

(215) 887-0200
jbellak@sogtlaw.com

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is usually requested by the filing party and often granted by the regulators.

What are the filing fees under HSR?

The filing fees payable under HSR are quite steep, ranging from \$45,000 for acquisitions with a value exceeding \$78.2 million to \$280,000 for acquisitions with a value of \$781.5 million or more. Typically, the buyer pays the fee, but it may be the subject of negotiation between the buyer and seller.

Who are the filing parties?

Both the buyer and the seller must file. Typically, the filings are made contemporaneously by their respective counsel. The filing person, referred to as the Ultimate Parent Entity (UPE), may be an individual or an entity, depending upon a detailed analysis of who controls the buyer and seller parties, respectively. For this purpose, the holdings of a spouse and minor children are aggregated with the holdings of an individual UPE.

What are the penalties for failure to file?

The penalty imposed for failure to comply with the filing obligations is \$16,000 per day for each day that the filing is delinquent. If a violation has occurred, it is important to notify experienced counsel immediately and take steps promptly to rectify the failure to file. ●