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What You Should Know: Q&A Covering the Hart-Scott-Rodino Antitrust Improvements Act Of 1976, 15 U.S.C. § 18a

What is the Hart-Scott-Rodino (HSR) Act?

The HSR Act revamped the Federal government's review of mergers and acquisitions to require premerger notification of transactions of a certain size and character and implemented a waiting period prior to consummating the transactions. Under the HSR Act, the Federal agencies that jointly enforce the antitrust laws (the Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (DOJ)) are provided with information about certain transactions prior to their consummation, which allows the agencies to analyze the transactions at the outset and provide greater certainty to the parties regarding potential antitrust concerns.

When are companies or individuals required to file under the Act?

In general, a transaction is subject to the HSR Act premerger notification requirements only if that transaction satisfies three statutory tests (the "commerce test," the "size-of-transaction test," and the "size-of-person test") and if no exemptions apply. All of these tests are governed by specific regulations and interpretations issued by the FTC, which Akerman can help apply to transactions. The threshold levels for the size-of-transaction and size-of-person tests are revised annually based on changes in gross national product.[1]

What does the HSR Act require?

If a transaction is subject to the HSR Act, both the acquiring and the acquired parties must submit a prescribed form and any responsive documentary attachments to both the FTC and the DOJ. The information included in the form provides the Federal antitrust enforcement agencies with an overview of each entity, including its revenues broken down by specific categories, shareholders, investments, previous acquisitions, public filings, financial records, role in the current transaction, and other relevant information.

In most cases, the HSR Act filing is deemed complete, and the waiting period begins, only after both parties have submitted their filings and paid the filing fee.

Commerce Test

A transaction satisfies the "commerce test" if either of the parties to a transaction is engaged in commerce or in any activity affecting commerce. As used in the HSR Act, the term "commerce" means trade or commerce among the states, with foreign nations, or between the District of Columbia or any territory of the United States and any state, territory, or foreign nation. It would be extraordinary for an otherwise reportable transaction not to satisfy this test.

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1 The HSR Act thresholds were last updated January 22, 2024, effective March 6, 2024. *See* https://www.akerman.com/en/perspectives/2024-adjustments-to-hsr-thresholds-and-filing-fees.html

Size-of-Transaction Test

The "size-of-transaction test," as its name suggests, is concerned with the value of what is being acquired. As of March 6, 2024, the size-of-transaction test is satisfied if, as a result of the transaction, the acquiring person would hold voting securities, assets, or non-corporate interests (such as LLC or partnership interests), or a combination of them, of the acquired person valued at **$119.5 million** or more. Note that the transaction value for HSR purposes can vary significantly from the agreement price. For example, in certain circumstances, assumed liabilities may count toward the transaction value, and previous acquisitions may need to be aggregated with the current transaction value. Akerman can help determine the transaction value for HSR purposes of specific transactions.

Size-of-Person Test

As of March 6, 2024, the "size-of-person test" does not apply if the value of the transaction exceeds $478 million, and as a result the transaction is subject to the HSR Act unless it qualifies for an exemption.

If the transaction value is less than **$478 million**, then the size-of-person test first requires the parties to determine the annual net sales and total assets of their ultimate parent entities (UPEs). [2] Once the UPEs have been determined, the size-of-person test is satisfied if the larger UPE has **$239 million** or more in annual net sales or total assets, and the smaller parent entity has **$23.9 million** or more in annual net sales or total assets.

There is one exception to the size-of-person test. If the acquired entity is not engaged in manufacturing and is the smaller entity, the size-of-person test is only satisfied if the acquired entity's UPE has sales in excess of **$239 million** or assets in excess of **$23.9 million**.

Generally, a UPE's annual net sales are as stated on its last annual report and its total assets are as shown on the last regularly prepared balance sheet. These financial statements must have been prepared in accordance with procedures normally used by the filing person and must cover a period ending within 15 months of the date of filing or consummation, but do not need to have been audited.

Exemptions

Certain exemptions do exist to the filing requirements, including those for transactions involving unproductive real property, financial institutions, passive investments, acquisitions of foreign securities or assets, and other areas. Akerman can provide information about the applicability of such exemptions for specific transactions.

What information is needed for an HSR filing?

In order to provide all the details the HSR Act filing requires, a variety of information needs to be located or compiled. Some, such as balance sheets, annual reports, and SEC filings, may be easy to locate. Others, such as asset calculations and revenue breakdowns by specific North American Industrial Classification System (NAICS) or North American Product Classification System (NAPCS) codes, may be more difficult to assemble. Many calculations, such as those regarding ownership percentages, previously acquired entities, entities considered within the control of the filer, and cross-border operations, also involve unique definitions under the HSR Act rules and regulations, all of which Akerman can explain and provide additional details. The HSR Act also requires certain information be provided about organizations not controlled by the filing party but considered "associate entities" under common management with the filing party.

It is especially important to locate documents prepared by or for officers or directors of the company regarding the competitive aspects of the current transaction (called "Item 4(c) and 4(d) documents" or "competitive analysis documents"),

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2 "Ultimate parent entity" or UPE means an entity that is not controlled by any other entity. "Control" means the following: (1) holding at least 50 percent of the outstanding voting securities of an issuer; or (2) in the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or (3) having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation. Note, however, special rules apply to trusts.

which have been the subject of recent enforcement initiatives. Competitive analysis documents can include pitch books, offering circulars, other investment banker offering materials, internal memoranda, e-mails, or handwritten notes of the officers or directors of the client. The HSR rules make it clear that documents concerning transaction synergies and/or synergies, as well as offering memoranda and materials prepared by third parties, must be provided to the agencies. The HSR form also must be accompanied by a sworn declaration and signature page executed by a representative of the filer.

After we have determined that a filing is necessary, we can provide a preliminary memorandum listing the initial documents and information required for an HSR Act filing.

What is the filing fee under the HSR Act?

The HSR Act requires a non-refundable filing fee at the time of filing. It can be paid by check, but it is more efficient to pay by electronic wire transfer. Akerman can provide the necessary wiring information. The filing fee varies depending on the size of the transaction:

- $30,000 for transactions valued at **$119.5 million** or more, but less than **$173.3 million**;
- $105,000 for transactions valued at **$173.3 million** or more, but less than **$536.5 million**;
- $260,000 for transactions valued at **$536.5 million** or more, but less than **$1.073 billion**;
- $415,000 for transactions valued at **$1.073 billion** or more, but less than **$2.146 billion**;
- $830,000 for transactions valued at **$2.146 billion** or more, but less than **$5.365 billion**; and
- $2.335 million for transactions valued at **$5.365 billion** or more.

The filing fees are revised annually along with the filing thresholds.

Do others have to file in addition to the primary acquiring and acquired parties?

If another person or business, typically a large shareholder of an HSR Act filer, is a large enough entity/person and is obtaining enough assets, securities, or non-corporate interests as a result of the primary transaction, the entity may have to submit a separate filing. This is especially a common concern in stock for stock transactions. Many technical questions should be confirmed before completing such a filing, such as whether the entity's holdings (as defined by the FTC) actually meet the size requirements and whether the entity can take advantage of any exemptions (such as being a passive investor).

How long do filers have to wait after they submit their filings?

The waiting period will expire automatically roughly 30 days from the completion of the HSR Act filing (or in the case of a cash tender offer, 15 days) unless the Federal antitrust enforcement agencies (1) request additional information about the transaction (a "second request") or (2) grant early termination of the waiting period.

How do I get early termination?

The Federal antitrust enforcement agencies currently have suspended all grants of early termination of the waiting period. There has been no guidance regarding when (or if) the agencies may resume granting early termination.

Early termination can be requested by checking a box on the HSR form. The benefit is that the filing may get expedited consideration by a weekly review committee. Thus, the parties may be free to close in two to three weeks instead of 30 days. The decision to grant early termination rests solely with the Federal antitrust enforcement agencies.

Please note, if early termination is granted, then the names of the filing parties become public information.

Early termination is actually received in a telephone call from the FTC, which is followed by a confirmatory letter soon thereafter and posting a notice on the FTC's website and in the Federal Register.

Can a deal close before the waiting period ends or early termination is granted?

No. The government can impose penalties of $51,744 per day on each party and seek broad equitable relief if the parties seek to close a transaction or improperly coordinate the businesses of the parties before receiving HSR Act approval (also known as gun-jumping). Akerman can provide guidance on the level of activity that may be seen as violating the HSR Act, and parties should approach such issues carefully.

How can I assess whether my transaction is likely to lead to Federal antitrust investigation?

Generally, the revenue data will provide the Federal antitrust enforcement agencies with essential information about the businesses in which the parties to a transaction engage. If they engage in the same businesses, the form requires information about the geographic areas in which the filer does business or receives revenues. These pieces of information can be predictors about the level of antitrust scrutiny received, since parties that do not operate in the same industry are often of less concern to the agencies. Akerman can assist with analyzing the data to uncover potential concerns.

Similarly, the contents of the competitive analysis or Item 4(c) documents may shed light on whether there are any competition issues raised by the transaction. Documents that suggest that the parties are competitors are more likely to draw the agencies' attention. The more competitors that are identified and discussed in the competitive analysis documents, the less likely that the agencies will have antitrust concerns. Any suggestion that the buyer and seller are the only competitors in a given space is likely to raise competition concerns. Early consultation before documents evaluating the transaction are drafted can reduce the risk of creating documents that raise competition concerns.

Many transactions do not raise any antitrust concerns because of the lack of geographic overlap or the characteristics of the industry. Vertical acquisitions are also less likely to raise antitrust issues unless the transaction forecloses competition or access to certain markets.

Are the contents of the HSR Act filing and its attachments public information?

Generally, no. Unless early termination is granted, or one of the Federal antitrust enforcement agencies moves to block the transaction, none of the information included in the HSR form or any of the documentary attachments is publicly disclosed by the Federal agencies. Except in very limited circumstances related to potentially illegal conduct, the HSR form and documentary attachments are also not shared with any other government agency beyond the DOJ or the FTC.

If early termination is granted, then the date of the early termination and the parties involved become public information published in the Federal Register and on the FTC website.

If one of the Federal antitrust enforcement agencies moves to block the transaction, information and documents that were previously confidential could become public as part of the litigation or administrative proceeding. No other information from the HSR form or any of the documentary attachments is ever publicly disclosed by the Federal agencies.

What are the logistics for preparing and filing under the HSR Act?

Akerman can provide counseling about when a proposed or actual transaction will meet the filing thresholds for the HSR Act and any desired substantive antitrust analysis. If a filing is needed, we can work with knowledgeable in-house officials (typically a general counsel, CFO, vice president, or comptroller) and the other side's attorneys (who can coordinate with us about the timing of the filings, overlapping NAICS codes, and transaction descriptions when appropriate) in assembling the required documents and information and answering relevant questions.

Akerman can prepare the filing, which often involves a good deal of communication with the in-house official and preparation of documents, and will handle delivery of the forms and exhibits to the FTC and DOJ. It is preferable to contact us as soon as possible if there is a chance that a filing may be needed to allow sufficient time for all information to be gathered, processed, and delivered to the FTC and DOJ.

If I go through the HSR process, or my transaction is not reportable, am I exempt from antitrust challenges?

No. While the Federal antitrust enforcement agencies are less likely to challenge transactions that have completed the HSR process or that were not reportable, the parties should not assume that completing the HSR process or being exempt from the HSR process immunizes the transaction from antitrust liability. The Federal agencies and, separately, several states' Attorneys General have recently challenged transactions that were previously cleared by the Federal agencies or were not reportable under the HSR Act.

In addition, regardless of the HSR status of the transaction, parties can violate the Sherman Act if they engage in coordinated conduct prior to the closing of the transaction. As previously mentioned, Akerman can provide guidance on the level of activity that may be seen as violating the HSR Act, and parties should approach such issues carefully.

How long is the HSR notification valid, once clearance is obtained?

Once a transaction receives early termination or the waiting period expires, the acquiring party has exactly one year from that date in which to cross the filed-for HSR threshold. The one-year period ends on the same date, one year later, regardless of whether it falls on a weekday, weekend or holiday. If the filed-for threshold is crossed within the one-year period, the acquiring party may acquire additional voting securities, assets, or non-corporate interests from the same acquired party, up to the next applicable HSR threshold, for up to five years without making another HSR filing. However, after the five-year period ends on the same date, five years after early termination was granted or the waiting period expires, any additional acquisitions will require a new HSR filing. In addition, if any of the additional acquisitions during the five-year period would result in the acquiring party holding, in the aggregate, voting securities, assets, or non-corporate interests valued in excess of the next HSR threshold, including as a result of an increase in the value of the previous acquisitions, the parties will need to make a new HSR filing.

Are there any related filings to consider?

Yes. It often is wise in conjunction with an HSR Act analysis and/or filing to consider other related filings. These may include pre-merger clearances in various states or foreign jurisdictions (which Akerman can coordinate with experienced counsel in those jurisdictions) and, if a foreign-controlled entity is acquiring a U.S. entity, a filing with the Committee on Foreign Investment in the United States (CFIUS).

Who can I contact about an HSR Act filing?

Please contact Austin A.B. Ownbey at (202) 824-1734 or Austin.Ownbey@Akerman.com for more information or if you need any assistance with the HSR process.