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The General Counsel's Cheat Sheet to the Hart-Scott-Rodino Act

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The Hart-Scott-Rodino Antitrust Improvements Act ("HSR") requires that certain transactions be reported to the Department of Justice and Federal Trade Commission before they are allowed to close. The government enforces these requirements vigorously, with the Department of Justice bringing three challenges under the Hart-Scott-Rodino Act this year alone. Last year, the government increased the potential penalties for failing to follow the HSR Act to up to $40,000 for every day of noncompliance. This article will help readers understand the major requirements of the HSR Act and will answer frequently asked business and legal questions about HSR.

Part One: The Three Things Every Officer or Director Should Know About HSR

Until the Hart-Scott-Rodino Antitrust Improvements Act of 1976 came around, parties to large mergers would sometimes close on a big deal, only to have the government challenge the deal on antitrust grounds months or years later. This system created issues for the business community, the government, and consumers. And it created bad incentives: it led some businesses to pursue hasty, "midnight" mergers in order to quickly get a deal past the government. In 1976, Senators Philip Hart and Hugh Scott joined with Congressman Peter Rodino to find what they regarded as a better way. With that, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (or "HSR") was born.

The HSR Act has a number of important ramifications both for companies and for individuals who serve as corporate officers or directors. Above all, there are three basic things that every person who serves as a corporate officer or director should know about the HSR Act.

1. HSR Creates A "Waiting Period" Before Certain Deals Can Go Forward

First, every corporate officer or director should know that the HSR Act requires certain mergers and acquisitions to be reported to the FTC and DOJ before the transactions are allowed to close. For those transactions that are "HSR-reportable," the parties must observe a "waiting period" between the time that the transaction is reported to the government and the time that the transaction may close. The purpose of the waiting period is to allow the FTC or DOJ to learn about the transaction and, potentially, open an antitrust investigation to decide whether to bring a challenge or potentially try to negotiate a remedy. In other words, HSR-reportable transactions are not permitted to close (and cannot begin integrating, as opposed to appropriately structured integration planning) until after the waiting period expires.

Now, to be clear, the fact that a transac-

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tion is subject to the HSR Act does not in any way mean that the transaction might raise substantive antitrust concerns. In fact, the vast majority of HSR-reportable transactions raise no antitrust issues whatsoever, and in these cases the HSR waiting period is essentially a formality. And by the same token, transactions can raise serious antitrust concerns, and be subject to investigation and challenge, even if they do not require an HSR filing or waiting period.

The initial HSR statutory waiting period for most types of transaction is thirty days, although for cash tender offers and certain acquisitions out of bankruptcy, the waiting period is just fifteen days. The waiting period can be shortened if the government determines that the transaction raises no competitive concerns. However, the FTC and DOJ also have certain powers to extend the waiting period—and impose a number of requirements on the parties to the merger—if they decide to investigate or oppose the transaction for antitrust reasons.

2. The Current HSR Reporting Threshold is $80.8 Million

Second, every corporate officer or director should have some ballpark sense for when a Hart-Scott-Rodino filing might be necessary. This is important because there are serious ramifications for failure to comply with the HSR Act. Large civil penalties (up to $40,000 per day) can be levied against parties for failures to comply with the HSR Act. These fines are typically levied against the corporate or natural-person parents, but the agencies also have the ability to fine officers and directors. Further, a failure to timely comply with HSR could lead to deal delay or a subsequent enforcement action.

Unfortunately, the rules for determining whether a transaction is HSR-reportable are complicated, as there are dozens of different ways that a deal can be HSR-reportable or not. But, at their simplest, every executive or director should know that:

> *Whenever an acquisition arguably may result in the acquirer holding assets, voting securities, or non-corporate interests (like LLC or partnership units) that are plausibly worth more than $80.8 million in the aggregate, then somebody in your organization should consult with HSR counsel.*

In more formal terms, the "threshold" for HSR filings is $80.8 million, an amount that is adjusted every year for inflation. (And to be clear, this "size of the transaction" requirement is only one of several requirements that determine whether the HSR requirements apply, but it is the one that is easiest to remember and is the one that is most likely to be determinative in the majority of cases.)

One implication of this rule is that HSR filings can be required for transactions involving non-controlling (<50%) interests in corporations where the acquirer's total post-acquisition interest will be worth more than $80.8 million. For example, incremental open-market purchases of stock, stock option exercises, and even passive reinvestments of dividends can all trigger HSR based on the need to aggregate in the value of the acquirer's existing holdings. There also are complex aggregation rules in other contexts that may require including the value of prior or pending acquisitions involving the same parties or their broader corporate groups.

Importantly, the value for HSR purposes can be substantially different than how the deal value may be perceived for other purposes. For example, in an asset deal, the acquisition price includes the value of liabilities being assumed—thus, if an acquiring party paid $45 million for a group of assets and assumed $45 million in liabilities, the acquisition price would be $90 million. It also is necessary to take into consideration earn outs and post-close adjustments in valuing deals for HSR purposes. The bottom line is that, given the complexities of the HSR rules and the substantial risks for non-compliance, parties should check with HSR counsel whenever there is any question whether HSR may apply.

3. Officers and Directors Must Turn Over Certain Documents to the FTC and DOJ

The third primary point that corporate officers and directors should know is that the HSR reporting form includes two broad document requests: "Item 4(c)" and "Item 4(d)." Generally speaking, Items 4(c) and 4(d) require parties to HSR-reportable transactions to give the FTC and DOJ copies of certain documents prepared in connection with the deal, or with other efforts to buy or sell the business, if those documents were prepared by or shared with a corporate officer

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or director. Specifically, the company needs to submit any such documents that, in whole or in part, analyze:

- Competition
- Competitors
- Markets
- Market shares
- Potential for sales growth
- Expansion into product or geographic markets
- Synergies
- Efficiencies

The Items 4(c) and 4(d) document requests are complex and have a number of important limitations. For one, "draft" documents can stay out of the filing so long as (1) the drafts were not shared with the board or with a board subcommittee, and (2) the final (or last-in-time) versions of the documents are included in the HSR filing. A second limitation is that privileged documents can be withheld from the filing on grounds of privilege—although in these cases, some basic facts about the privileged documents need to be disclosed, such as the privileged documents' authors, recipients, and general subject matter.

However, in very broad strokes, any document that a corporate officer or director receives or prepares in connection with an HSR-reportable deal may end up being submitted or disclosed to the FTC and DOJ before the deal is allowed to close. Therefore, officers and directors should be mindful that every document that they prepare or receive in connection with an HSR-reportable transaction may end up being reviewed by a federal antitrust regulator before the transaction is allowed to close.

The FTC and DOJ take Items 4(c) and 4(d) very seriously and have obtained significant penalties for failures to comply with these requirements. Additionally, it is worth noting that documents that do fall within the scope of Items 4(c) and 4(d) might still be subject to potential production down the line if there is an investigation or challenge following the initial HSR filing.

Conclusion

In sum, there are three things that every corporate officer and director should know about the HSR Act:

1. HSR-reportable deals must be reported to the FTC and DOJ and observe a waiting period before the deal can close. For non-problematic deals, the waiting period is typically thirty days or less.
2. Whenever a deal may result in the acquirer holding assets, voting securities, or non-corporate interests that are arguably worth more than $80.8 million in the aggregate, somebody in your organization should consult with HSR counsel.
3. Whenever a deal is HSR-reportable, the FTC and DOJ may end up reviewing many of the documents that you prepare or receive related to the deal.

There are obviously many other aspects to the HSR Act that impact businesses. In Part Two, which follows, we offer answers to a number of the most frequently asked questions about HSR.

One last point to keep in mind is that there are special rules for when somebody qualifies as an "officer" or "director" for HSR purposes. An "officer" for HSR purposes means an individual whose position either (1) is designated by the company's bylaws or articles of incorporation or (2) was appointed by the board of directors. You can be an "officer" or "director" for HSR purposes even if the company for which you hold that position is not directly a party to the transaction. For instance, a transaction involving one legal entity can impose Item 4(c) or 4(d) obligations on the officers or directors of that entity's parent and all entities controlled directly or indirectly by that parent. And in the case of an unincorporated entity like an LLC or limited partnership that might not technically have "officers" or "directors," individuals who exercise similar functions count as "officers" or "directors" for HSR purposes. If you are in doubt whether you qualify as an "officer" or "director" for HSR purposes, you should consult with Hart-Scott-Rodino counsel.

Part Two: HSR FAQs

Your company is on the verge of signing a major deal. You are walking into the key meeting where the Board will decide whether to go forward or not. The CEO sends you a note to be prepared to answer questions about "HSR." Quick: what do I need to know about HSR to advise my Board?

There are about a dozen things that the

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General Counsel might be asked to explain to their Boards about the Hart-Scott-Rodino Antitrust Improvements Act of 1976, or "HSR." We covered the three most fundamental ones in Part One, above.

1. That "HSR-reportable" deals cannot close (or begin to be integrated) until the end of a statutory waiting period, to allow the FTC and DOJ the chance to review the transaction for antitrust concerns. The waiting period for non-problematic deals is most typically thirty days or less, but can be much longer for a deal that prompts a formal investigation.
2. That whenever a deal may result in the acquirer holding assets, voting securities, or non-corporate interests that are arguably worth more than $80.8 million in the aggregate, the deal is potentially HSR-reportable.
3. That when a deal is HSR-reportable, the FTC and DOJ will end up reviewing some of the documents that the companies' officers or directors prepare or receive in connection with the deal, to help assess whether the transaction may raise any antitrust concerns.

But apart from these three fundamental concepts, there are some other frequently asked questions that you can also be prepared to answer.

4. How Much Time Will This Take? For transactions that do not raise any substantive antitrust concern, the HSR waiting period itself is most often thirty days or less. The timing can take substantially longer for deals that may potentially raise serious antitrust issues (more on that below). However, some time is needed to gather the information required for the HSR filing, even if the deal itself raises no substantive antitrust concerns. Also, from time to time the determination whether a filing is even necessary may be complicated, and might even require an informal consultation with the FTC. Therefore, it is best to get started with HSR as early in the process as you realistically believe a deal is moving forward. For a straightforward, non-problematic transaction, a conservative rule of thumb is that you should aim to get HSR counsel started on the filing preparation several weeks before you could expect to file HSR.

More broadly, beyond the HSR filing itself, it is advisable to consult with antitrust counsel early on in the deal process. Particularly for a deal that may raise substantive antitrust concerns, you should loop in antitrust counsel as soon as you can. Even for deals that do not raise antitrust concerns, early involvement of antitrust counsel can be valuable to confirm reportability and likely timing under the HSR Act and any foreign antitrust filings, to provide input on purchase agreement provisions, and to provide guidance on antitrust rules that govern information-sharing and coordination of activities.

5. Is There Any Way to Shorten the Waiting Period? Actually, yes! For transactions that are not likely to raise any substantive antitrust issues, there is an option to request "early termination" of the HSR waiting period. This means that if the government in its sole discretion determines early on that your deal doesn't pose any antitrust issues, then the government can give you the green light to close the deal a little early. You cannot rely on this option as a guarantee, since the government sometimes has a backlog of deals to review such that the full waiting period might be required even if there is no substantive antitrust concern. Therefore, if your transaction has a drop-dead deadline for closing, then it is advisable file HSR with enough time to allow the entire waiting period to run its course before the deadline. But more often than not, an early termination request ("ET" for short) likely will let you close a non-problematic transaction a week or two earlier than you otherwise would.

The government will not give you ET unless a party affirmatively requests it, but a request is costless to make—it is literally as simple as checking a box on the front of the HSR form. As a rule, you should always check this box on the form unless your deal needs to remain confidential. As an HSR-specific "sunshine rule," whenever the government grants early termination, the names of the parties to the deal and the date of ET are posted on the FTC website and in the Federal Register. Therefore, if your deal needs to remain confidential, then you should decline the early termination option.

6. When's the Earliest We Can File HSR? You can file HSR so long as two conditions are met. First, some written documentation or notice must be executed about the transaction. For most types of negotiated, consensual transactions, HSR requires an executed transaction document to file

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HSR, but the final, definitive agreement isn't necessary—rather, an executed, non-binding letter of intent or MOU will suffice. Second, for most transactions, a high-ranking representative of each party to the deal must also sign an affidavit saying that his or her company has a good-faith intention of going forward with the deal. The policy reason for these limitations is that the government does not want to spend its resources reviewing a deal unless the deal has gotten past the "hypothetical" stage.

7. Why Don't We Just File ASAP? Even if you know for certain that you are going forward with an HSR-reportable deal, there are five possible downsides to filing HSR earlier rather than later. First, if you don't yet know all the parameters of the deal—such as who the buyer is, or which assets are being included in the sale—then you may need to wait until those questions are answered before you are ready to file. Second, if your deal is going to be made public shortly, then you might want to wait until closer to that point to file HSR so you can request early termination without fear of losing confidentiality. Third, if your deal poses substantive antitrust issues, then you might want to wait to file HSR until you are fully prepared for a rigorous regulatory review. (This is especially true if your transaction is not yet public, since the potential agency investigation (e.g., calls to customers) may reveal the pending deal.) Fourth, if there's a chance that you aren't going to be able to close your transaction for another twelve months—for instance, if the FCC needs to approve your deal, or there is a state certificate of need approval required—then you might need to wait until you are closer to the finish line before you file HSR to avoid a need to refile. And last but not least, all else equal, you don't want to have to shell out the HSR filing fees and incur related expenses until doing so is necessary.

8. Wait, What Kinds of Filing Fees Are We Talking About? Big ones. The fee depends on the size of the transaction, but the smallest possible HSR filing fee is $45,000. The largest is $280,000. The money goes to the United States Treasury and generally is paid by wire transfer. Unless the parties agree between themselves to split or otherwise share the filing fee expense, the general, default rule is that the filing fee is paid by the buyer.

9. Who Do We Need to Get Involved in the HSR Filing? This can be a tricky one, and to some extent it depends on your corporate structure and whether you are on the buying side or on the selling side. But broadly speaking, any direct or indirect parent companies will likely need to get involved to some extent in the HSR filing. A "parent" for HSR purposes generally means an entity with a 50% or greater interest in another entity. Therefore, if your company is the wholly owned subsidiary of a holding company that is 60% owned by a private equity fund, and that private equity fund in turn has two separate 50% investors, then each of the holding company, the private equity fund, and the two separate 50% investors will need to be involved in some capacity in the HSR filing. Specifically, any officers or directors of those entities may be implicated in the Item 4(c) and 4(d) document searches, and depending on the transaction some corporate information might also be needed from those entities. The filing will need to be certified by the top-level parent entity (or entities), unless the parent delegates the authority to make the filing down to a subsidiary. Moreover, depending on how many people know about the deal, you may also need to go to officers or directors of subsidiaries, sister companies, or other commonly controlled companies for documents.

One other issue to know about is that, when you are on the buying side to a deal, some information about minority (<50%) interests and "associates" (meaning, entities that are commonly managed but not commonly owned) might also need to be collected if the minority interests or associates operate in the same industry as the business being acquired. In the case of complex organizations like private equity funds or MLP families, this information can sometimes take a fair amount of effort to figure out.

10. Will Our Information Be Kept Confidential? Yes, with some caveats. By statute, any document or information that is submitted to the FTC or DOJ as part of an HSR filing is kept confidential. Your filing will not be published or accessible to the public, and there is a specific statute that prevents members of the public from accessing HSR filings through Freedom of Information Act requests. In fact, subject to the caveats below, unless you request early termination (see #5 above), the public will never know that a transaction was even reported.

There are three caveats to the HSR confidentiality rules. First, if there is a judicial or adminis-

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trative challenge to block the merger, or if there is a Congressional investigation into the merger, then the FTC or DOJ may be required to disclose information or documents from an HSR filing. Second, your company may be forced (or may choose) to disclose the HSR filing to a third party, such as to a state antitrust enforcer or to a litigation adversary in response to a civil discovery request. A third caveat is that, if the government opens an investigation into your merger, one of the first steps it will take will be to set up calls with your customers and other industry stakeholders to find out if they have any concerns about the deal. The government is not supposed to tell these third parties that an HSR filing has been made, but it is generally clear from the agency questions what potential combination they are investigating. Therefore, if your deal has not been made public, you should be aware that the HSR regulatory process could lead to word about it getting out.

A related question that often comes up is: will I have to share my internal documents with the other side? The answer is: not if you don't want to. Although custom and prudence dictate that there will be some coordination between both sides' HSR teams to make sure that the document searches are complete and consistent, there is no obligation to share any information about one's internal documents with the other side, unless an agreement to the contrary is negotiated. Indeed, even when this sharing is done voluntarily it is recommended that any commercially sensitive information be redacted or kept on an "outside counsel only" basis to safeguard each side's proprietary information.

11. What Happens If The Government Has Antitrust Concerns? If the FTC or DOJ have potential antitrust concerns about your deal, then somebody from the FTC or DOJ will likely reach out to the parties' attorneys within a week or two of receiving the HSR filing. The government may ask the parties some factual questions, it may request certain key documents like strategic plans and market studies, and it may ask to speak with your customers and potentially others about the deal. If the government still has questions or concerns at the end of the statutory waiting period, then it can issue a formal request for additional information. This is called a "second request" (as the HSR filing is the "first" request). When the government issues a second request, the HSR waiting period typically is extended for a period until after the parties substantially comply with the second request. A second request can be very time-consuming and burdensome to comply with, so these types of investigations can really complicate a deal.

If the FTC or DOJ believes that a transaction raises serious substantive antitrust concerns, the agency may ultimately seek to negotiate a consent decree mandating a divestiture or other relief to preserve competition, or it may ask a federal court to enjoin the transaction from closing, although such cases generally occur only where an agency has serious unresolved antitrust concerns.

Some additional HSR trivia: sometimes, the FTC or DOJ might need just a little more time than the initial statutory waiting period (thirty days for most types of deals) to be able to resolve its antitrust concerns. In such cases, the buyer can elect to "pull" its HSR filing and "refile" it within two business days, without having to pay a new filing fee. "Pulling and refiling" (as the practice is known) gives the government a fresh waiting period to resolve its concerns without issuing a second request. Whether a "pull and refile" may be a helpful strategy tends to be context-specific, and is an area where antitrust counsel can provide guidance.

12. Do We Have to Hire An Economist?, or **Does This Mean That the Agencies Will Try to Block Our Deal?** This question can take several different forms, but it boils down to whether your deal will run into any trouble because of the HSR process. The answer for most deals is a resounding no. In some countries, the only transactions that need to be reported are ones that involve some sort of meaningful increase in market concentration. But the United States does not take this approach. Instead, the United States's merger notification regime has objective, bright-line tests for when a transaction needs to be reported or not, and these tests are based on things like the dollar value of the transaction that often have no correlation to whether the deal actually raises antitrust concerns. This means that a large number of HSR-reportable transactions pose no antitrust concerns whatsoever, but rather just need to go through the administrative hurdles of making a filing to the government and observing the required waiting period.

Therefore, do not assume that the fact that a

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transaction is HSR-reportable means that any effort needs to be made to develop an affirmative strategy to address the antitrust substance of a deal. But that said, some deals do pose real antitrust concerns, and in appropriate cases, you certainly should engage antitrust counsel, and generally the earlier in the process the better, to evaluate the substantive merits and develop an antitrust strategy for the deal.

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With the answers to these questions, you are officially prepared to answer a number of the principal questions the Board might care to ask you about HSR. Good luck!

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