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FTC Warns That Money Doesn't Have to Change Hands to Trigger HSR Filing

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In a recent ***blog posting***, the Federal Trade Commission (FTC) issued an important reminder that companies and individuals may have reportable transactions under the Hart-Scott Rodino (HSR) Act even if no payment changes hands. This highlights the need for antitrust/HSR compliance programs to track and analyze not only deals that involve a payment, but also non-payment transactions, or else risk liability and fines for a failure to file.

Under the HSR Act, transactions that meet certain dollar thresholds for size must be reported to the FTC and the U.S. Department of Justice (unless an exemption applies) and a waiting period must be observed before the transaction can close. Most transaction parties know to consider whether a notification under the HSR Act is required before paying to purchase voting securities, non-corporate interests (e.g., partnerships, LLCs), or assets. However, several types of non-payment transactions can also require an HSR filing and observance of a waiting period prior to closing.

"Backside" acquisitions, where some or all of the purchase consideration is paid to the seller in the form of voting securities of the buyer, must be separately analyzed to determine if HSR thresholds are met and a notification is required for the seller's acquisition of buyer stock, irrespective of whether the buyer has to separately file HSR for its acquisition.

Similarly, a notification requirement can be triggered where a party exchanges one type of interest in a company (such as a debt instrument or non-voting equity interest) for another interest in the same company (such as a voting interest). The FTC's blog post points to Berkshire Hathaway's 2013 exchange of convertible notes of USG Corporation for voting securities of USG Corporation as an example. Berkshire Hathaway failed to file notification of the conversion under the HSR Act, and paid a civil penalty of $896,000 for the violation.

In a consolidation, where two companies combine under a Newco and the shareholders receive voting shares of Newco in exchange for their shares in the combining companies, the receipt of Newco shares must be analyzed to determine whether an HSR filing is required, as should corporate reorganizations, even if no money changes hands and shareholders took no direct action to effect the consolidation or reorganization.

The FTC's warning applies to individuals as well, and includes employee compensation arrangements. Executives who receive a portion of their compensation in the form of voting securities or restricted share awards (RSAs) of their employer should first confirm whether they

have to file and observe the HSR waiting period before receiving the shares. The HSR notification requirement also can be triggered by the vesting of restricted stock units (RSUs).

Interests and investments can change or grow through the years, and the potential penalties for failures to file HSR are steep (currently up to $41,484 per day). Parties should ensure that they have compliance procedures in place to identify all types of HSR reportable transactions before those transactions are completed.