

Hart-Scott-Rodino Annual Report for Fiscal Year 2017: Increases in Filings, Decreases in Second Requests and Challenged Deals

The [Hart-Scott-Rodino Annual Report Fiscal Year 2017](#), published earlier this year by the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ), summarizes FTC and DOJ actions conducted under the Hart-Scott-Rodino Antitrust Improvements Act, or HSR Act, in fiscal year 2017, the period from October 1, 2016, through September 30, 2017.

Noteworthy findings of the report published April 11, 2018, include:

- The total number of HSR filings increased 12% in fiscal 2017, compared to fiscal year 2016. The percentage of transactions investigated increased 3.5%. The percentage of investigated transactions leading to Second Requests decreased 18.9%, and the percentage of challenges to reported deals decreased 26.2%.
- The agencies continue to enforce the HSR Act's notification and waiting period requirements in "failure to file" situations.

This update provides key highlights of the annual report and offers practical advice.

Decreases in Second Requests and Challenged Deals During 2017

In fiscal 2017, a total of 2,052 transactions were reported under the HSR Act, which is a 12% increase over the 1,832 transactions reported in fiscal 2016. In 2017, the FTC and the DOJ investigated about 14% of reported transactions in which a Second Request could be issued, a 3.5% increase from those investigated in fiscal 2016. Of the transactions investigated, just 18% resulted in the issuance of Second Requests, a nearly 19% decrease from the 23% reported in fiscal 2016. Where Second Requests were issued, there was also a decrease in the number of transactions which resulted in an abandoned or restructured deal, a consent decree requiring the parties to divest assets, or litigation in federal district court, just 77% in fiscal 2017 compared to 87% in 2016.

	2013	2014	2015	2016	2017
Reported Transactions for Which Second Requests Could Be Issued	1,286	1,618	1,754	1,772	1,992
Percentage of Preliminary Investigations	17%	17%	15%	13%	14%
Percentage of Preliminary Investigations Leading to Second Requests	22%	19%	18%	23%	18%
Percentage of Second Requests Leading to Challenged Transaction	81%	65%	89%	87%	77%

2013 2014 2015 2016 2017

Percentage of Reportable Transactions That Are Challenged 2.95% 2.04% 2.39% 2.65% 1.96%

Practice Tip: Address antitrust concerns early in the process

A company considering an acquisition that is likely to raise agency concerns should confer with its antitrust counsel early in the negotiation process. To avoid a Second Request, a company should address potential anti-competitive concerns with counsel during the preparation and filing of reports under the HSR Act and engage with antitrust authorities as soon as possible in the waiting period.

Corrective Filings. The statistics cited above do not include agency actions taken in connection with post-consummation "corrective filings." During fiscal year 2017, 50 corrective filings for violations were received, and the agencies brought four enforcement actions resulting in \$2.2 million in civil penalties. While this is an increase in the number of corrective filings and enforcement actions from 2016, when 47 such filings were made and three enforcement actions were brought, civil penalties assessed in the three 2016 enforcement actions were significantly greater, totaling \$12.1 million.

The antitrust agencies examine the circumstances of each violation to determine whether penalties should be sought. Where the agencies are convinced the failure to file was inadvertent, and the parties file corrective filings shortly after discovering the missed filing obligation, the agencies have been less likely to seek civil penalties for the violation—this is generally known as the "one free bite of the apple" approach. However, once a party has received its "one free bite," a subsequent failure to file will result in civil penalties being assessed.

Prompt Corrective Filings May Help Companies Avoid Penalties. When the parties inadvertently fail to file, the enforcement agencies generally do not seek penalties if the parties

1. promptly make corrective filings after discovering the failure to file;
2. submit an acceptable explanation for their failure to file; and
3. have not previously violated the HSR Act.

Post "One Free Bite of the Apple" Failures to File Can Be Costly. Although two of the four 2017 corrective filing enforcement actions involved inadvertent failures to file, in each case, the parties involved had previously filed corrective filings for inadvertent failures to file and were therefore assessed civil penalties of \$720,000 and \$180,000.

Failures to File Often Involve Corporate Executives or Directors Who Exercised Stock Options or Whose Restricted Stock Units Vested. Although there are many different circumstances under which a failure to file may occur, one of the most common scenarios involves corporate executives or members of the company's board of directors acquiring a very small number of shares of their company's stock by exercising options or warrants to purchase their company's stock or by the vesting of restricted stock units (RSUs).

The failure to file often results in such a situation for a reason. Although the purchase price of the stock acquired through the exercise of the option or warrant typically falls well below the size-of-transaction threshold (currently \$80.8 million), or in the case of RSUs, the units simply vest, the executives or directors fail to aggregate the value of those shares with their existing holdings when determining whether an HSR filing is necessary.

Practice Tip: HSR Warning System

To avoid these problems, companies who offer their executives stock options or restricted stock units should implement an HSR warning system that reminds the company and the executive to confer with counsel about the HSR implications of the acquisition well in advance of the date of exercise or vesting.

You Don't Have to Write a Check to Trigger an HSR Filing Obligation. Most situations in which an HSR filing is required involve the acquiring person making a payment or writing a check to the acquired person. However, there are certain types of acquisitions in which no money changes hands but which may require an HSR filing. Examples of "cashless" acquisitions in which an HSR filing may be required include the exchange of one type of interest in a company for another, such as the conversion of non-voting securities for voting securities or when one corporation buys another and the consideration to the selling shareholders comes in the form of voting securities of the buyer.

Other potentially HSR-reportable acquisitions include consolidations of two or more companies into a "Newco" and the issuance of Newco shares to shareholders of the consolidated companies, reorganizations in which a non-corporate entity such as a partnership or an LLC reorganizes into a corporation or vice versa.

These situations demonstrate the need for an HSR compliance program that not only tracks the companies in which interests are held but which also takes into account how those interests may change or grow over time. As the FTC itself has noted, "[l]imiting an HSR analysis to situations where a check will cross the table can result in the failure to file for reportable acquisitions and substantial penalties."

This update was quoted in *deallawyers.com* "[Antitrust: HSR Second Requests & Deal Challenges Decline in 2017](#)," on 09.05.2018.

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