The American Antitrust Institute

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SUMMARY OF HART-SCOTT-RODINO ACT

Until the mid-70s, there were no statutory schemes for the federal agencies (the DOJ and the FTC) to review merger transactions prior to their consummation, to determine whether they should challenge them under Section 7. Since merger transactions almost always proceed as secretly as possible, and tend to move quickly, the situation brought federal agencies serious problems to enforce Section 7.Moreover, it was difficult in practice "to unscramble the eggs" once a merger was completed. In 1976, responding to these problems, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act (HSR), adopted as Section 7A of the Clayton Act.[1]

The HSR requires premerger notification of certain relatively large mergers with a certain waiting period that permits the federal agencies to collect and evaluate information about proposed transactions. All parties to a covered transaction are required to submit "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s)…for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets."[2] Transactions are reportable if they meet three tests: (1) the "in commerce" test; (2) the "size-of-transaction" test; and (3) the "size-of-parties" test.[3] In general, the HSR requires a premerger notification filing and a filing fee[4] where the stock or assets held as a result of the acquisition are worth more than $50 million and, if the acquired stock and assets are worth less than $200 million, one of the parties to the transaction has at least $100 million annual net sales or total assets and the other party has at least $10 million annual net sales or total assets. These thresholds are adjusted annually to reflect changes in the gross national product.[5]

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[1] Hart-Scott-Rodino Antitrust Improvement Act of 1976, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a).

[2] 16 C.F.R. § 803, Ppp. Item 4(c).

[3] ANTITRUST DEVELOPMENTS, *supra* note 5, at 340.

[4] *See*, FED. TRADE COMM'N, FILING FEE INFORMATION (Feb. 11,2013), *available at* http://www.ftc.gov/bc/hsr/filing2.shtm

[5] As of 2013, the thresholds are $70.9 million, $283.6 million, $14.2 million, and $141.8 million respectively. FED. TRADE COMM'N, REVISED JURISDICTIONAL THRESHOLDS OF THE CLAYTON ACT (2013), *available at* http://www.ftc.gov/os/2013/01/130110claytonact7afrn.pdf

The ordinary waiting period after a filing is thirty days (fifteen days for the case of cash tender offers).[6] The initial waiting period generally ends up in one of three ways.[7] First, the agency grants early termination of the waiting period, and the parties are free to consummate their transaction.[8] Second, if the initial investigation has extended to the end of the initial waiting period, the initial period simply expires, and the parties can complete the deal.[9] Third, the agencies may issue a so called "second request" for additional information and documents.[10] During the waiting period, the proposed transaction cannot be consummated. If the second request is issued, the waiting period will be extended until thirty days (ten days for the case of cash tender offers) after the parties have substantially complied with the second request.[11] In such a case, a proposed transaction will be forestalled by the end of the extended waiting period unless the agency grants early termination of the second request.[12] Failure to comply with the HSR requirements can lead to penalties of up to $16,000 per day.[13]

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[6] 15 U.S.C. § 18a(b)(1)(B); 16 C.F.R. § 803.10(b)(1).

[7] MERGER REVIEW PROCESS, *supra* note 2, at 258.

[8] *Id.*

[9] *Id.*

[10] *Id*; 15 U.S.C. § 18a(e)(1); 16 C.F.R. § 803.20.

[11] 15 U.S.C. § 18a(e)(2); 16 C.F.R. § 803.20(c)(2).

[12] MERGER REVIEW PROCESS, *supra* note 2, at 258.

[13] 15 U.S.C. § 18a(g)(1); 16 C.F.R. § 1.98.