



Avoid Hart-Scott-Rodino (HSR) Filing Mistakes:

8 tips for preparing a watertight HSR Act Notification and Report Form

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) dictates that qualifying mergers, acquisitions, and joint venture formations be reported to the US federal antitrust agencies before they can close. Failure to file under the HSR Act or submission of an inaccurate HSR form can result in civil penalties of up to \$42,530 for each day of violation.

Typically, the buyer and seller must each submit their own HSR form, at which point the waiting period begins to run. Parties generally coordinate filing submissions to avoid delays, but if any transacting party submits a deficient HSR form, the expiration or termination of the HSR waiting period and the transaction closing may be delayed.

Give your transaction the best chance of closing promptly by following these 8 tips for preparing a watertight form.

TIP 1:

DON'T ASSUME

you know your client's parent company

Ensure you use the HSR control rules for conducting the ultimate parent entity (UPE) analysis to accurately determine both merging parties' UPEs.



TIP 2:

\$90M ➔ \$359.9M



Value the transaction under the HSR rules and determine if the size-of-person threshold is met (if applicable). The size-of-person test applies when the size-of-transaction is between \$90 million and \$359.9 million. Additional conditions apply (for example, fair market value must be determined in good faith by the acquiring UPE's board of directors or its delegee).

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TIP 3:



ENSURE

a complete search is performed for documents responsive to Items 4(c) and 4(d). To be responsive, documents submitted generally must have been prepared or received by officers or directors. Ensure that a list of directors and Item 4(c) officers is prepared so the proper individual's files are searched.

TIP 6:



HSR EXEMPTIONS

Determine if HSR exemptions apply and properly apply those exemptions, including when using the narrowly available investment-only exemption. Certain activities, such as nominating someone for the target's board of directors and soliciting proxies, among others, render the exemption unavailable.

TIP 7:



Ensure the appropriate HSR filing fee is paid

For example, the acquiring UPE must pay the lowest current filing fee of \$45,000 for a transaction valued in excess of the current minimum threshold of \$90 million but less than \$180 million. Refer to [Practical Law Toolkit, HSR Valuation](#) for further guidance.

TIP 4:



Communicate with HSR counsel

for the other merging party to ensure filings are submitted at the same time so as not to delay start of the waiting period. Pay particular attention to the status of the other party's collection and review of Item 4(c) and 4(d) documents, which are documents that evaluate or analyze the acquisition and discuss certain topics. Be prepared to navigate delays that can arise if one party has substantially more documents to review than the other in response to Items 4(c) and 4(d).

TIP 5:



UP TO \$42,530

for each day of violation

Check, double-check, and triple-check your filing! If the form is not accurate or complete, the agencies generally reject the filing and restart the HSR waiting period. Failure to file or submission of an inaccurate HSR form can also result in civil penalties of up to \$42,530 for each day of violation.



TIP 8:



Fines for violations have been as high as

\$4 MILLION

Having trouble getting your client to provide the necessary information? Review recent HSR Act enforcement actions and advise your client on the risks of not submitting complete and accurate documentation.

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For more information on the HSR Act, see *Practical Law Practice Notes, Hart-Scott-Rodino Act: Overview and Determining Hart-Scott-Rodino Applicability*.

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