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FTC Reminds Parties of HSR Obligations for Transactions Without Cash Consideration

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A recent blog post by the Federal Trade Commission's (FTC) Premerger Notification Office (PNO) reminds parties that the Hart-Scott-Rodino (HSR) Act may apply to many acquisitions where the buyer does not actually purchase voting securities, non-corporate interests, or assets for cash (link here). The PNO's advice is to carefully monitor for potentially reportable transactions even where the acquirer does not have to "write a check."

Many parties are aware that mergers, acquisitions, and open market stock purchases require HSR Act notification where these transactions meet the requisite HSR Act thresholds and no exemptions apply. However, there are many transaction types where HSR reportability is less obvious. The PNO identified five distinct transaction types where parties could miss a reporting obligation if not familiar with the HSR Rules:

- **Exchanging an interest in an entity for a different type of interest in the same entity can be reportable**. As an example, the PNO cited a transaction where Berkshire Hathaway exchanged convertible notes in a corporation for voting securities of the same corporation. That conversion required an HSR filing, but Berkshire Hathaway did not notify the deal and paid a civil penalty to settle the HSR violation (link here).
- **Receiving voting securities of the buyer as part of the transaction consideration can be reportable**. The situation arises where Corporation A acquires Corporation B for consideration consisting of both cash and A's voting securities. Referred to as a "backside acquisition," a receipt of A's shares as consideration for a sale of B could be reportable if a shareholder of B acquires sufficient voting securities of A to exceed the HSR thresholds.
- **Receiving shares of a new entity ("Newco") as part of a consolidation of two separate entities can be reportable**. The situation arises where Corporation A and Corporation B combine under a Newco that will be its own ultimate parent entity ("UPE"). Such a transaction could be reportable if a shareholder of A or B acquires sufficient voting securities or non-corporate interests of Newco to exceed the HSR thresholds.

- **A reorganization into a different corporate form can be reportable**. For example, reorganizing a partnership into a corporation could require an HSR filing where a partner receives voting securities of the new corporation that exceed the HSR thresholds. Note, however, that an acquisition of interests in a new entity in this scenario is exempt under the HSR Rules where the acquirer's ownership percentage in the new entity would not exceed the ownership percentage in the old entity.
- **Employee compensation in the form of a company's voting securities can be reportable**. An executive of a corporation that receives compensation in the form of voting shares could have a reporting obligation if the HSR thresholds are met. Further, although the acquisition of restricted stock units (RSUs) are typically not reportable, a filing could be required prior to the vesting of those RSUs. As an example, the PNO noted the acquisitions of Comcast voting securities by Comcast's CEO between 2007 and 2009 through the vesting of the CEO's RSUs. The CEO did not notify the acquisitions and paid a civil penalty to settle the HSR violation (link here). Note that with limited exceptions, acquisitions of options do not require an HSR filing, but a filing could be necessary prior to the exercise of the options.

In addition to the types of transactions raised by the PNO, there are other types of transactions where the buyer does not "write a check," but where the transaction could be reportable if it meets the HSR thresholds and is not subject to any exemptions:

- Converting non-voting securities into voting securities.
- Exchanging one class of voting securities for a different class of voting securities where the exchange increases the acquirer's voting percentage in the issuer.
- Exchanging one class of non-corporate interests for a different class of non-corporate interests where the exchange provides the acquirer with 50% or more of the rights to the non-corporate entity's profits or assets.
- In the private equity context, where one fund that is its own HSR UPE transfers all or a portion of a portfolio company to an affiliated fund that is also its own UPE.
- Where a seller of a target "rolls over" part of its interest in the target in exchange for voting securities in the entity that will hold the target, if the entity that will hold target holds companies or assets other than the target.
- A secondary acquisition: if, as the result of an acquisition (the "primary acquisition"), an acquiring person gains control of an entity that holds a minority stake in a corporation, the acquiring person's indirect acquisition of that minority stake is a "secondary acquisition" that could separately require an HSR filing.

Note, in most of the above cases, transactions are not reportable where the acquiring person holds 50% or more of the acquired entity prior to the transaction.

Key Takeaway

Although the PNO's blog post does not reflect any changes in applying the HSR Rules, it is a useful reminder that "cashless" deals could trigger HSR reporting requirements. All of the scenarios discussed above would require parties to make HSR filings and observe the applicable waiting periods before consummating the transaction. Missing these filings could lead to HSR violations and significant civil penalties. As a result, parties should keep these types of deals on their HSR radar.

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