



Strasburger
ATTORNEYS AT LAW

Business & Law Newsletter

[BUSINESS & LAW NEWSLETTER](#) • MAY 28, 2008 • [STRASBURGER & PRICE, LLP](#)

PREPARED BY



[Tom Burton](#)

901 Main Street
Suite 4400
Dallas, Texas 75202
214.651.2035 Direct
tom.burton@strasburger.com

EDITORS

[Paul Myers](#)
[Billy Leonard](#)

Strasburger Antitrust Contacts

[Mark Andrews](#)
[Judith R. Blakeway](#)
[Thomas W. Burton](#)
[Carol Glendenning](#)
[Daniel Webb Lanfear](#)
[John R. Riddle](#)

THE IMPACT OF THE HART-SCOTT-RODINO ("HSR") ACT ON YOUR TRANSACTION

On February 28, 2008, the Federal Trade Commission made its annual adjustments to the jurisdictional and filing fee thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). As you will see below, the HSR Act can "sneak up" on those involved in a business transaction, and failure to take its requirements into account at the beginning of a transaction can have an adverse impact on the deal and the parties involved.

Background of the HSR Act




The HSR Act established the Federal Premerger Notification Program to provide the Federal Trade Commission (the "FTC") and the Department of Justice (the "DOJ") with information about "large" mergers and acquisitions before they occur. Each of the parties to an affected transaction must submit a separate **Notification and Report Form for Certain Mergers and Acquisitions** (the "HSR Form") containing information about their respective businesses and the transaction to the FTC and DOJ and wait a specified period of time, typically 30 days, before consummating the transaction.

During that waiting period, the FTC and DOJ review the HSR Form and other information to analyze the likely anti-competitive effects of the proposed transaction. If either agency believes that further information is needed in order to complete the competitive analysis, then it may request additional information and documentary materials from the parties. Such an issuance of a "second request" by an agency extends the waiting period for a specified period, usually for an additional 30 days after the parties have fully complied with the second request. The additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If either agency believes that the proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the acquisition.

Tests to Determine If HSR Act Applies to a Transaction

The HSR Act applies to a particular transaction if the following three tests are satisfied: (a) the Commerce Test, (b) the Size-of-Person Test, and (c) the Size-of-Transaction Test.

An acquisition will satisfy the Commerce Test if either of the parties to a transaction is engaged in interstate commerce or in any activity affecting commerce. This test is broadly construed such that any party to a

-  [Printer friendly page](#)
-  [View as Acrobat PDF](#)
-  [Subscribe: RSS Feed](#)

transaction is likely to meet this test.

The Size-of-Person Test is generally met if the “ultimate parent entity” (see below) of one of the parties has sales or assets of at least \$126.2 million and the ultimate parent entity of the other party has sales or assets of at least \$12.6 million.

The Size-of-Transaction Test is met if, as a result of the transaction, the acquiring person will hold stock and/or assets of the acquired person having an aggregate value of more than \$63.1 million. In many cases, the target’s debt is included in the aggregate value of the transaction, which means that a transaction with a stated consideration of less than \$63.1 million can trigger filing requirements for the parties. Additionally, if the Size-of-Transaction is over \$252.3 million, the transaction is subject to the HSR Act, notwithstanding the satisfaction of the Size-of-Person Test above.

Determination of Ultimate Parent Entity

Under the HSR Act, the obligation to report depends on the size of the ultimate parent entity (the “UPE”) of the buyer or seller. A UPE is the entity or individual that “controls” (defined below) a party to the transaction and is not itself controlled by anyone else. For example, the UPE may be a corporate parent of a subsidiary that has signed a contract to purchase stock or assets, or it could be a partnership or an individual that owns a majority of the stock of the acquiring company. The UPE may be separated from the entity which is a party to the transaction agreement by many layers of controlled subsidiaries, or the UPE may actually be entering into the transaction in its own name. Identifying the UPE involves tracing the chain of “control,” which generally means the holding of 50% or more of the outstanding voting securities of an entity. Control is also deemed to exist by having the contractual power to designate 50% or more of the board of directors of a corporation.

Filing Fees

As of February 28, 2008, the filing fees for a transaction that is reportable under the HSR Act are :

Size-of-Transaction	Filing Fee
>\$63.1 million – <\$126.2 million	\$ 45,000
\$126.2 million – <\$630.8 million	\$ 125,000
\$630.8 million or more	\$ 280,000

Summary

The applicability of the HSR Act often surprises parties to a transaction. Failure to report transactions can have serious consequences, including very significant fines and penalties. Please consult with your legal advisors about the HSR Act in the event you are considering a significant transaction.

PUBLICATIONS:

- To view past issues of the Business & Law Newsletter, please visit [Business & Law Newsletter](#)
- To subscribe to other Strasburger publications, please visit [Strasburger Publications](#)

DISCLAIMER: Articles contained within this newsletter provide information on general legal issues and are not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel. Any tax advice contained in this communication and any attachments was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under applicable tax laws, or (ii) promoting, marketing, or recommending to another party any transaction or tax-related matter.

ADVERTISEMENT NOTICE: This e-mail may constitute a commercial electronic mail message subject to the CAN-SPAM Act of 2003. If you do not wish to receive further commercial electronic mail messages from the sender, please send an e-mail to Strasburger@Strasburger.com and request that your e-mail address be removed from future mailings. To update your address, please send an email to Strasburger@Strasburger.com including the updated information. Strasburger & Price, LLP, 901 Main Street, Suite 4400, Dallas, TX 75202.

