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The Hart-Scott-Rodino Act Impact on Your Healthcare Transaction

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act), can “sneak up” on those involved in a healthcare or any other transaction, and failure to take its requirements into account at the beginning of a transaction can have an adverse impact on the timing and eventual consummation of your deal.

Background of the HSR Act

The HSR Act established the Federal Premerger Notification Program to provide the Federal Trade Commission (FTC) and the Department of Justice (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* (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 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 the proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the acquisition.

Healthcare Industry

The regulators at the FTC and DOJ are very interested in preventing anti-competitive effects of transactions and arrangements in the healthcare industry. You need to consider the applicability of the HSR Act when you are in the planning stages of possible mergers, acquisitions or joint ventures.

Tests to Determine If HSR Act Applies to a Transaction

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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 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 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 (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 who owns a majority of the stock of the acquiring company. The UPE may be separated from the entity that 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 percent or more of the outstanding voting securities of an entity or having the contractual power to designate 50 percent or more of the board of directors of a corporation.

Filing Fees

The current filing fees for a transaction that are 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.

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