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HSR Enforcement Continues Swiftly: $240K Settlement Announced with FTC for Failure to File

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On the heels of the FTC's recent HSR passive investor exemption enforcement action comes another reminder that HSR compliance is not always clear, and that it is not always easy. The Federal Trade Commission has announced a settlement involving improper reliance on an exemption sometimes used by institutional investors to acquire up to 15% of a company without triggering the HSR filing and waiting period requirements.

The HSR Act requires parties to certain acquisitions to file notice with federal antitrust enforcers before completing transactions. A number of exemptions, though, permit parties to proceed without HSR filing and waiting period requirements. We reported in September 2015 how the passive investor exemption is applied, which allows certain investors to acquire up to 10% of a company without triggering a filing obligation, and how parties have been subject to enforcement for over-application of the exemption (see here).

An enforcement action on a related exemption available only to certain "Institutional Investors" has now been announced. The rule, 802.64, allows certain Institutional Investors to acquire up to 15% of a company without having to file if made solely for the purpose of investment, but, only if the company acquired is not also an Institutional Investor "of the same type" as the buyer.

In its complaint, the agency alleged that Leucadia National Corporation, through its subsidiary Jeffries, LLC, acquired, through a conversion transaction, voting securities of KCG Holdings valued in excess of the $76.3 million HSR reporting threshold. The agency alleged that the company improperly relied on the institutional investor exemption because although the holding did not exceed the 15% threshold, both companies were broker-dealers within the meaning of the HSR rules. The complaint alleges that the company improperly relied on the exemption upon the view that KCG was not a broker-dealer within the meaning of the HSR rules. The rules point to 15 U.S.C. 78c(a)(4) and (a)(5), which, broadly, define a broker as "any person engaged in the business of effecting transactions in securities for the account of others", and a dealer as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise".

Though the company appears to have relied on the exemption in good faith, made a corrective filing with the agency upon discovery of the violation, and the agency did not allege that the failure to file was an intentional, a civil penalty was nonetheless imposed based on the fact that the company previously failed to file for an acquisition in 2007. The agency did not impose a penalty for the 2007 failure to file, in part, because it was inadvertent and represented the company's first failure to file.

It has been the unwritten policy of the agency for some time to exercise its prosecutorial discretion and not impose penalties for first time inadvertent failures to file, but to act more firmly in the case of repeat offenders, even where inadvertent. While the $240,000 penalty imposed represents only a small fraction of maximum penalty available under the statute for the 15 month period the company was in violation of the HSR Act prior to its corrective filing, it serves nevertheless as a stark reminder of the potential risk of failures to file under the HSR Act – up to a maximum of $16,000 per day for each day the violation remains in effect.

Application of the HSR Act's filing requirement and exemptions requires a thorough understanding not only of the rules, but of the agency's formal and informal interpretations on the application of the rules, and thus must be undertaken with the advice of experienced counsel in all cases.

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