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FTC Rings in the New Year with HSR Enforcement and Penalties Front and Center for Investors

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The FTC has announced penalties in two separate enforcement actions totaling almost $2 million for alleged violations of the HSR Act. The matters: *U.S. v. Clarence L. Werner c/o Werner Enterprises, Inc.;* and *U.S. v. Biglari Holdings Inc.* include claims of failures to file notification under the HSR Act and failures to observe the required waiting period prior to acquiring certain voting securities.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, commonly known as the HSR Act, requires parties to certain transactions to notify the Federal Trade Commission and Department of Justice, and to observe a waiting period prior to completing the transaction. The minimum threshold for reporting under the HSR Act is currently $92.0 million (adjusted annually). The HSR Act enables antitrust regulators to review transactions, investigate and address potential competitive concerns prior to completion, and carries annually adjusted monetary penalties for failure to comply – presently set at $43,792 per day. The requirement can sometimes become a trap for investors – not realizing that filing requirements under the HSR Act may apply in unexpected contexts, including acquisitions of minority holdings. 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.

Werner Enterprises, Inc. founder Clarence L. Werner agreed to a $486,900 civil penalty to settle claims that he violated the HSR Act by acquiring Werner Enterprises stock in a series of open market purchases without filing under the HSR Act and observing the required waiting period. Notably, the agency alleged that several of the purchases were made after Mr. Werner became aware that prior purchases violated the Act.

Separately, investment fund operator Biglari Holdings Inc. agreed to a $1.4 million civil penalty in settlement of claims that acquiring Cracker Barrel Old Country Store, Inc. violated the HSR Act. According to the agency, the acquisitions, together with the firm's prior holdings in the company, triggered a reporting requirement as a result of exceeding a notification threshold beyond the 5 year period allowable under the firms' earlier filing. Biglari had previously been required to pay $850,000 for HSR violations-related to purchases of Cracker Barrel in 2012.[1] According to the complaint in the matter, FTC's Premerger Notification Office contacted the firm and asked why no filing had been made with respect to certain March 2020 share acquisitions, likely indicating continuous monitoring by the agency with respect to acquirers that have previously failed to file.

While the penalties imposed in the matters do not represent the maximum available in either case, they attest to the potential risk of failures to file under the HSR Act. The enforcement actions are a reminder not only that the HSR Act is strictly enforced, with dozens of enforcement actions under the agency's belt, but that the application of the HSR rules is not always intuitive or clear-cut.

Consider HSR filing obligations in all types of transactions, including smaller transactions, minority investments, follow-on investments, joint ventures, asset acquisitions and exercises of warrants or options. HSR enforcement extends, for instance, to company executives acquiring stock in their employers. Under the rules, when a company employee or director acquires company stock that results in an aggregate holding that is valued above the HSR reporting threshold, filing obligations can arise – as in the Werner case. The most common form of "corrective filing" relates to this very scenario. Also consider the current value of previously acquired minority positions to plan accordingly for potential HSR filing and waiting period requirements when participating in follow-on offerings and investments. Review minority holdings that may have appreciated above the HSR threshold and plan for future incremental purchases that may trip the initial or subsequent notification thresholds.

Any transactions where shares or other securities are being acquired should be reviewed by antitrust counsel to evaluate potential reporting obligations and ensure strict compliance with the HSR Act.

[1] Family Dining Meets Value Investing – Proxy Battle Spills Over into Antitrust Arena and Lands Investor $850,000 Penalty

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