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Proskauer Hedge Fund Trading Guide

Chapter 4: Stock Acquisitions: Key Requirements and Timing Considerations of Hart-Scott-Rodino

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Proskauer's **Practical Guide to the Regulation of Hedge Fund Trading Activities** offers a concise, easy-to-read overview of the trading issues and questions we commonly encounter when advising hedge funds and their managers. It is written not only for lawyers, but also for investment professionals, support staff and others interested in gaining a quick understanding of the recurring trading issues we tackle for clients, along with the solutions and analyses we have developed over our decades-long representation of hedge funds and their managers.

The Hart-Scott-Rodino Act and Section 8 of the Clayton Act may not receive the same level of focus and attention in the context of Hedge Fund investing as other reporting regimes, but they should. They impose a mandatory filing regime on hedge funds and their managers that carries significant civil penalties for non-compliance, and apply to investments in various forms, including for example, through joint ventures, minority investments, non-strategic transactions, stock grants and conversions, warrant and option exercises, incremental purchases, IP licenses and asset acquisitions. In **Chapter 4: Stock Acquisitions: Key Requirements and Timing Considerations of Hart-Scott-Rodino**, we discuss key aspects of the Hart-Scott-Rodino (HSR) Act under newly-revised rules, as it relates to hedge fund investments, including filing obligation triggers and what specific factors determine the need to file. We also cover common exemptions such as the "passive investor" exception, special rules applicable to tender offers, and the required contents of an HSR filing.

Chapter 1: When Passive Investors Drift into Activist Status

Chapter 2: Insider Trading: Focus on Subtle and Complex Issues

Chapter 3: Special Issues under Sections 13(d) and 16 for Hedge Funds

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HSR Act Basics: Your Investments May Trigger a Filing Obligation

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") can become a trap for the unwary as hedge fund managers focus their attention on requirements under the Sections 13(d) and 16 of the Securities Exchange Act of 1934 ("Exchange Act"), not realizing that filing requirements under the HSR Act may also apply. The HSR Act requires investors, *and their targets*, to make a premerger notification filing (the "HSR Act Notification") and observe a 30-day waiting period (15 days in the case of a cash tender offer) prior to making certain voting share acquisitions, including acquisitions of minority holdings. The investor may not acquire the shares prior to observing the full waiting period, or prior to the early termination of the waiting period ("Early Termination") by the Federal Trade Commission ("FTC"). Effective February 21, 2025, the minimum threshold for reporting under the HSR Act is $126.4 million (the thresholds adjust annually). The threshold applies to the current market value of the investor's aggregate holding after giving effect to the planned upcoming investment, including shares previously acquired. There are exceptions to the notification requirement discussed below under "Common HSR Act Exemptions."

HSR Act Filing Thresholds (which adjust annually):

Value of Aggregate Holding*	**Notification Requirement (Unless Exempt as provided below)**

$126.4 million or less	Filing not required
Above $126.4 million but not more than $505.8 million	Required only if “size-of-person” test met: • The investor has total balance sheet assets (as of its most recent balance sheet) or annual sales/revenue (as of its most recently completed fiscal year) of $252.9 million or more (prior to giving effect to the planned acquisition), and the target has $25.3 million or more in (i) total balance sheet assets (as of its most recent balance sheet) or annual net sales/ revenue from manufacturing (as of its most recently completed fiscal year), or (ii) total balance sheet assets if not engaged in manufacturing (as of its most recent balance sheet); or • The investor has total balance sheet assets (as of its most recent balance sheet) or annual sales/revenue (as of its most recently completed fiscal year) of $25.3 million or more (prior to giving effect to the planned acquisition), and the target has $252.9 million or more in total assets (as of its most recent balance sheet) or annual net sales/revenue (as of its most recently completed fiscal year).
Above $505.8 million	Filing required unless an exemption is available

*Current holdings are valued at the lowest closing price in last 45 days. Newly acquired holdings are valued at the acquisition price.

Practice Point: Carefully monitor transaction values, in order to know when a threshold is about to be crossed. The HSR Act may require that a HSR Act Notification be made and that a waiting period be observed prior to acquiring certain voting shares, including follow-on share acquisitions.

HSR Act Statistics

The filings of HSR Act Notifications in the general corporate context are routine and common. The Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") reported receiving 1,805 HSR Act Notifications during fiscal year 2023 (October 1, 2022 through September 30, 2023), down almost 40 percent from fiscal year 2022, which was close to an all-time high along with FY 2021. Agency antitrust challenges to filed transactions, however, are the exception and not the rule. The early termination program, suspended during the Biden administration and now back online, results in the overwhelming majority of transactions clearing in less than the full waiting period.

Under the HSR Act, HSR Act Notifications (including their contents and documents submitted with the filings) are confidential, not subject to public disclosure, and exempt from Freedom of Information Act ("FOIA") request requirements. Even the mere fact that a party has made an HSR Act notification is confidential. However, in transactions where Early Termination is granted, the FTC publishes a notice on its website, which notices are regularly tracked by the investment community. The publication of the Early Termination notice does not disclose the contents of the filing or details about the investment, other than the names of the investor and the target. Accordingly, investors typically do not request Early Termination, and instead observe the full HSR Act waiting period when maintaining confidentiality is important.

Practice Point: Do not request Early Termination of the HSR Act waiting period when confidentiality is an issue.

What Triggers the HSR Act Filing Requirement?

Though typically thought of as a pre-merger requirement, the HSR Act's broad reach captures many other types of investments and other transactions. These can include joint ventures, minority investments, non-strategic transactions, stock grants and conversions, warrant and option exercises, incremental purchases, formations, IP licenses and asset acquisitions.

The general rule is that a person or entity that is an "Ultimate Parent Entity" under the HSR Act (discussed below) may be required to make an HSR Act Notification and observe the applicable waiting period before consummating an acquisition. The HSR Act potentially applies where, as a result of the acquisition, the acquiring Ultimate Parent Entity would hold assets, equity interests in a limited partnership or limited liability company, or voting securities of a corporation, if valued in an aggregate amount in excess of the reporting threshold. Structure matters, however, and the concept of an "acquiring person or entity" in the HSR Act context will often be different than it is under other regulatory regimes.

There is no “group” concept in the HSR Act or context, so acting in concert with another firm typically does not impact the filing obligation – though it may have other implications under the antitrust laws more generally (and may have impact under the Securities Exchange Act of 1934). The filing person in the HSR Act Notification context is the “Ultimate Parent Entity” under HSR Act rules. The application of the Ultimate Parent Entity concept is unique to the HSR Act in that it does not typically require the aggregation of multiple funds under common management. In the case of a hedge fund structured as a limited partnership (or limited liability company) where no single limited partner has a 50 percent or greater economic interest in the fund, the fund is typically treated as its own Ultimate Parent Entity and the fund would be the filing entity under the HSR Act. This stems from the HSR rule addressing control with respect to limited liability companies and limited partnerships. Under the rule (16 CFR 801.1(b)(1)(ii)), control is defined as “having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity”. The rules for non-U.S. entities turn on whether the entity issues securities that allow the holders to vote for the election of a supervisory board of directors. If the answer is yes, then the entity is treated as a corporate entity for HSR purposes – meaning that control is based on holding 50 percent or more of the voting stock. If the answer is no, then the entity is treated as a non- corporate entity for HSR purposes and the control rule discussed above for limited liability companies and limited partnership applies.

The implications of this can be substantial, as it may mean that investments by multiple commonly managed funds, acting side-by-side, can be disaggregated when assessing whether the HSR Act thresholds are exceeded. This will sometimes mean that aggregate positions exceeding the HSR Act threshold are not subject to reporting at all but can also result in *multiple filings* wherein more than one fund will exceed the filing threshold. Another implication of the silos of interests under the HSR Act is that movement of positions *between* funds under the same manager potentially could trigger filing obligations.

For example, consider a hedge fund manager with funds I, II and III, where each fund is a limited partnership and no fund has a limited partner with a 50 percent or greater interest. Each of funds I, II and III is its own Ultimate Parent Entity under the HSR Act, and each fund's investment is analyzed separately to determine its filing obligation. If the hedge fund manager decided to cause the funds to invest a total of $600 million in a new target, there would be several potential filing outcomes to consider, depending on how the $600 million investment is allocated among the funds. If the investment were evenly split among the three funds, there would be a separate filing obligation for each fund's $200 million acquisition, and a total of three filings would be required. If the $600 million were split between two funds, then two filings would be required; and if allocated to just one fund, only one filing would be required. In the same structure, a hypothetical $150 million total investment could result in a single filing if made by one fund, but also could result in no filing if allocated evenly among the three funds such that each fund's acquisition would be below the HSR Act reporting threshold. Consider also the case where a single $100 million investment in an issuer results in no HSR Act Notification obligation, but, as a result of the aggregation rules, HSR Act Notification would be required prior to a follow-on investment of $50 million or more by the same fund. Note that the rules contain a prohibition on devices to avoid HSR Act filing obligations, and therefore structural decisions should be HSR Act agnostic.

In each transaction where an entity submits an HSR Act Notification, the target must also submit a filing,[1] though the start of the waiting period is not dependent on the target's filing. The HSR Act waiting period typically begins to run on the day that the investor submits its HSR Act Notification. The HSR Act filing enables the antitrust enforcement agencies (FTC and DOJ) to review the transaction, and investigate and address potential antitrust violations before the transaction closes. The HSR Act requires all persons or entities that make an HSR Act Notification as an acquiring person or entity to pay a filing fee to the FTC based on the following transaction values (as adjusted annually):

- More than $126.4 million but less than $179.4 million -- $30,000
- At least $179.4 million but less than $555.5 million -- $105,000
- At least $555.5 million but less than $1.111 billion -- $265,000
- At least $1.111 billion but less than $2.222 billion -- $425,000
- At least $2.222 billion but less than $5.555 billion -- $850,000

???At least $5.555 billion -- $2,390,000

Special rules apply to the acquisition of interests in limited liability companies and limited partnerships (as in primary fund interest acquisitions and secondary transactions). Acquisitions of such interests are subject to an HSR Act Notification only where the acquisition results in the acquirer having the right to 50 percent or more of the profit distributions of the target limited liability company or limited partnership, or 50 percent or more of the target limited liability company or limited partnership's assets upon its dissolution.

Special rules also apply to the acquisition of non- voting securities such as options, warrants and swaps. As HSR Act's coverage does not extend to non-voting securities of a corporation, the acquisition of other types of securities or other interests does not often trigger a reporting obligation - absent an unusual feature such as the right to vote for the election of directors. Conversion of such securities into voting stock may be a triggering event, so consider the HSR Act prior to conversions.

Practice Point: Carefully consider the Ultimate Parent Entity and aggregation rules to determine whether the investment has crossed HSR Act notification triggers. An understanding of the application of the rules is necessary to monitor properly the HSR Act triggering thresholds. Also, consider the HSR Act when converting to voting stock from a convertible security, as doing so may increase your applicable holdings.

The "Passive Investor" and other Common HSR Act Exemptions

The HSR Act exempts investments made "solely for the purpose of investment" that remain below 10 percent of the target corporation's outstanding voting stock.[2] The FTC takes a narrow view of the passive investor exemption and has said that any intent at the time of the acquisition to influence the basic business decisions of the company or to participate in management renders the exemption inapplicable, without regard to actions taken or not taken and without regard to the investor's actual ability to influence.

Absent extenuating circumstances, Schedule 13D filers will be unlikely to successfully claim passive investor status under the HSR Act. Schedule 13G filers should make an independent determination of whether their intent is sufficiently passive to qualify for passive investor treatment under the HSR Act, as the 13G filing is not controlling on the FTC. The FTC does not consider the mere voting of the issuer's stock to be inconsistent with the passive investor exemption, but actions that go beyond this level of participation often will remove the availability of the exemption. Such acts may include:

- ???Nominating a candidate for the board of directors;
- ???Proposing corporate action requiring shareholder approval;
- ???Soliciting proxies;
- ???Having a director, officer or employee serve as an officer or director of the issuer; and
- ???Being a competitor of the

The FTC staff has generally considered some or all of the following factors in investigations relating to the passive investor exemption:

- ???Closeness in time of the purchase to the announcement of the company's offer for control;
- ???Dollar amount of the total investment;
- ???Adoption of anti-takeover defenses by the company;
- ???Approaches to potential lenders for financing an acquisition of control; and
- ???Preparation of analyses and pro forma financials of a combination of the buyer and the target company – for instance, where a strategic investor acquires a minority interest in a competitor with an intent to gain control.

Of course, many of these scenarios would also put the investor on a Schedule 13D. (See **Chapter 1: When Passive Investors Drift into Activist Status**) Enforcement actions for failure to file HSR Act Notification due to improper reliance on the passive investor exemption are not uncommon. In one enforcement action, the FTC alleged that the investor contacted senior management with suggestions to improve shareholder value and made requests to be appointed to the board of directors. In an earlier matter, a company was considering a combination with a competitor, and thus its intent in acquiring the competitor's shares was not "solely" for the purpose of investment. In that case, the companies were competitors who had previously discussed the possibility of combining. In another enforcement action, a company's acquisition of stock in a competitor similarly did not qualify under the passive investor exemption, because the companies were competitors and were considering and taking steps towards a possible business combination.

In another matter, a hedge fund invested in Yahoo relying on the HSR Act passive investor exemption and made an Exchange Act Schedule 13D filing. The fund also sent a letter to management demanding changes in both the board of directors and company leadership; contacted individuals to gauge their interest and willingness to become CEO of the company or a potential board candidate; assembled an alternate slate for the board; and internally discussed the possible launch of a proxy battle for directors of the company. Notably, there was no indication that the hedge fund succeeded in placing representatives on the board or otherwise exercised control or influence over the company.

In finding that this conduct turned the hedge fund into an active investor, the Director of the FTC's Bureau of Competition said "the test for the investment-only exemption is the acquirer's intention, and that determination may not turn on any particular conduct." The enforcement action is a reminder of the agency's narrow view of the passive investor exemption, and the challenge of creating a strong evidentiary record weighing in favor of the applicability of the exemption given that the agency will look not only at steps taken post-investment, but also at evidence of the investor's plans at the time of or prior to the investment, in making its assessment.

Consider the scenario wherein an investor makes a protective Schedule 13D filing, and arguably could have filed a Schedule 13G, but there may have been potential risks based on, for example, conversations with management relating to operational issues. Relying on the HSR Act's passive investor exemption in the Schedule 13D context is potentially risky, as, absent other factors, the FTC is likely to construe a Schedule 13D filing in any context, even as a protective measure, as presumptive evidence that the investor's intent is not consistent with the HSR Act passive investor exemption.

Consider further an investor that acquires voting shares of a corporation whose aggregate value exceeds the HSR Notification threshold but is not subject to the HSR Act Notification requirements because of its reliance on the passive investor exemption. The investor's subsequent change in intent and its acts demonstrating an intent other than passive (such as suggesting board action) do not retroactively negate the availability of the exemption. Such acts do not require an HSR Act Notification (provided the investor's intent was in fact passive at the time it took advantage of the passive investor exemption). However, any subsequent voting share acquisitions following non-passive acts would mean that the investor would no longer qualify for the passive investor exemption. For instance, a 9 percent position acquired under the passive investor exemption would not require a filing, even if the investor later changes its investment intent and becomes active. The filing obligation would not arise unless and until the investor acquires additional shares, as it is the acquisition of voting shares that is the HSR triggering event in this context.

The HSR Act rules also exempt acquisitions of businesses that do not have sufficient ties to the U.S. Generally, an investment in a non-U.S. business is not subject to HSR Act reporting unless the business has sales or assets in the U.S. above the HSR Act reporting thresholds.

Practice Point: Passive means passive – avoid strained interpretations of the exemption. If you have filed a 13D, as a practical matter the HSR Act passive investor exemption may not be available. 13G filers should make an independent determination of whether their intent is sufficiently passive to qualify for passive investor treatment under the HSR Act, as the 13G filing would not be controlling on the FTC.

Special HSR Act Rules for Tender Offers

As stated above, cash tender offers (but not stock- for-stock exchange offers), including non-U.S. tender offers, are afforded a shortened 15-day waiting period, versus the standard 30-day waiting period for most transactions. The investor may make the HSR Act Notification immediately after it has made public – in news or other media – its intention to make a tender offer. The investor does not need to wait until filing its registration and tender offer statements.

In the case of a privately held company, a letter to shareholders can satisfy the public announcement requirement. The target of the tender offer must prepare and submit its own HSR Act filing within ten days of the investor's submission; however, as with open market purchases, the start of the waiting period is not dependent on the target's filing. The HSR Act waiting period begins to run on the day that the investor submits its HSR Act Notification. A tender offer for HSR Act purposes may be a public or private tender offering but must qualify as a "tender offer" under Section 14 of the Exchange Act, or under the laws of the jurisdiction in which the offer was made.

Practice Point: Cash tender offers have shorter HSR Act waiting periods.

HSR Act Filing Contents

In October 2024, the FTC and the Department of Justice (DOJ) finalized new HSR reporting rules that went into effect February 10, 2025 and fundamentally alter the HSR reporting landscape. The new rules expand the scope of transaction-related documents required to be submitted, expand the reporting requirements regarding minority shareholders and require additional information regarding the transaction rational and competitive overlaps. Expect the filing process to take longer and be more rigorous and costly. The HSR Act Notification now includes information and documents relating to the planned acquisition and the parties involved, including the transaction agreement if there is one, revenue data classified under a classification system used by the FTC (the North American Industrial Classification System), ownership structure and directors of the reporting person, certain prior acquisitions, and information relating to certain controlled entities, shareholders and investments.

The HSR Act Notification and its contents are confidential, are not subject to FOIA requests, and may not be shared with other agencies. Unless Early Termination is requested by either party, and granted, the fact of the filing of HSR Act Notification also remains confidential. However, if Early Termination is requested and granted, the grant is reported on the FTC website and in the Federal Register, with the names of the parties appearing in the notice.

Practice Point: HSR Act filings are confidential and not subject to public disclosure or FOIA requests, but Early Termination grants are made public.

HSR Act Investigations

While antitrust/HSR Act investigations of minority positions in public companies are not common, both the FTC and DOJ have the authority to conduct such investigations where warranted and will consider, for instance, the extent of holdings in competitors and the potential for coordinated action or information flow between competitors. This is especially the case where there is board representation with respect to two or more competitors in an industry (see the section below on interlocking directorates). If the FTC or DOJ requests and receives clearance to investigate a transaction, it will open a preliminary investigation and begin to investigate through voluntary requests for information to the parties and interviews of customers, competitors and other knowledgeable or interested persons. At the conclusion of the preliminary investigation, the reviewing agency may:

- ???grant Early Termination;
- ???allow the waiting period to expire without action;
- ???request the acquirer to withdraw/re-submit the HSR Act filing to restart the waiting period; and/or
- ???if unresolved issues remain, issue a Request for Additional Information and Documentary Material, commonly referred to as a “Second Request” or phase two investigation.

Practice Point: While FTC investigations of minority investments are not common, be aware to “red flag” factors that could result in an FTC investigation. Most filings clear in 30 days or less.

Failures to Make the Required HSR Act Notification

The HSR Act Notification requirements are not always clear or obvious, and sometimes are missed. The reasons for missed filings include the complexity of the coverage rules, the ambiguity that sometimes exists in valuations as applied against the threshold, and the various exemption and aggregation rules. Investors sometimes miss filing obligations triggered by scenarios outside the traditional M&A context, including incremental acquisitions (coupled at times with substantial increases in stock price), subsequent notification thresholds, conversions, and stock acquisitions made by a company's officers or directors.

There are numerous examples of inadvertent failures to make an HSR Act Notification for warrant exercises and stock conversions, including with respect to executive compensation plans.

Other examples include fund managers committing their funds to investments outside the scope of the firm's typical investment strategy and that exceed the reporting thresholds – possibly for the first time and with no prior experience with the requirements of the HSR Act. One common scenario that leads to missed filings is when an investor that relied on the passive investor exemption HSR Act Notification (i.e., where it holds 10 percent or less of the voting shares of the issuer) becomes an active investor or increases its voting position above 10 percent without filing before acquiring the additional shares.

There is a long history of enforcement for missed filings under the HSR Act, sometimes with significant penalties: a missed filing comes with a maximum fine of $51,744 per day (adjusted annually). Fines can be substantial, and in some cases, have exceeded a million dollars. More commonly, the parties correct missed filings by submitting a corrective filing with no resulting penalty or enforcement action, though this type of leniency is not always available. The FTC historically has followed the "one-free-bite" approach – whereby a first-time inadvertent failure to file results in a stern warning, but no fines if the filer comes forward voluntarily and promptly after discovering the missed filing. In many cases of a first time, inadvertent failure to file, the FTC will not recommend a penalty, but will insist that the offender put a policy in place to ensure compliance with future filing obligations. Both conditions must be met for the leniency to apply.

The agency often seeks civil penalties for repeat offenders though. To avoid incurring a fine, managers should keep their lawyers involved and remember that many kinds of investments can trigger the requirement to file a HSR Act Notification. Intentional failures to file are met typically with strong enforcement and significant penalties. Repeated inadvertent failures to file are likewise typically the subject of enforcement actions – on the basis that the first failure should have resulted in a more careful approach going forward.[3]

In the case of a missed filing, the FTC will investigate the transaction and violation with an eye toward potential enforcement. When determining whether to take action, the FTC will consider a number of factors. These include whether the violation resulted from simple negligence or something more; whether there have been multiple missed filings; whether the parties submitted the corrective filing promptly within a reasonable time after discovering the violation; whether the parties realized a benefit from their failure to file; and whether the parties have implemented adequate measures to prevent future violations.[4]

Practice Point: Filing triggers are not always obvious. Consider potential HSR Notification requirements in all trades to avoid potential enforcement actions. Build in systems to timely spot filing triggers (factoring in the waiting period). Compliance Manuals should account for the HSR Act.

HSR Act Compliance Programs and Enforcement

While no compliance program is perfect, more safeguards historically have reduced not only the likelihood of a violation but also the likelihood that the FTC would seek a steep penalty. Note though that there are questions around the current state of the FTC's leniency policy with the prior administration relying more heavily on enforcement. Nevertheless, best practices include implementation of training programs with antitrust counsel; monitoring of company dealings for HSR Act purposes; establishing HSR Act compliance personnel with strict sign-off authority before executing trades; and inclusion of HSR Act provisions in Compliance Manuals and on acquisition checklists. HSR Act Notification must be submitted, *and the 15- or 30-day waiting period (as applicable) must be observed*, before the trade may be executed. If a trade is executed before the waiting period runs (even if not settled), there may be an HSR Act violation if the resulting aggregate holding is valued above the reporting threshold.

In one notable enforcement action, the DOJ settled with an investment firm for an agreed $720,000 penalty for failing to comply with the HSR Act. The case involved the HSR Act filing rules applicable when a company acquires the stock of the same company at two or more different times. The rules permit investors to make subsequent voting stock acquisitions of the same issuer for up to five years while relying on a previously filed HSR Act notification. The government alleged that the firm made two reportable acquisitions of Scientific Games Corporation voting stock: one in 2007 and a second one in 2012. Although a filing was made in 2007 for the first acquisition of Scientific Game Corporation voting stock, the five-year grace period expired in February 2012, several months prior to the second reportable transaction. Under the rules, a second filing was required.

The FTC settled a matter relating to an investor that acquired shares of Coca Cola on numerous occasions and as a result held voting securities valued in excess of the reporting threshold without having filed under the HSR Act. Based on the violations, the investor agreed to pay a civil penalty of $480,000.

When an investor acquired voting securities of Symetra Financial Corporation by exercising warrants without first submitting the required HSR Act Notification, the FTC's Premerger Notification Office did not recommend a civil penalty. However, when shortly thereafter the investor converted USG Corporation notes into voting securities valued in the aggregate with prior holdings at more than $950 million, the agency brought an enforcement action and imposed the maximum civil penalty, totaling $896,000. The requirements to file a HSR Act Notification are not always obvious or easy to spot – there are very few cases of intentional violations of the HSR Act. The investor acquired the convertible notes in 2008, five years prior to conversion in a non- reportable transaction, and not all conversions are reportable.

Practice Point: HSR Act enforcement is active. Avoid inadvertent failures to file by having effective HSR Act compliance policies and procedures in place. If you missed a filing deadline, discuss with counsel.

Director Overlaps and Clayton Act Section 8

As part of a Clayton Act Section 8 enforcement initiative, no person or representative of the same person or entity may serve simultaneously as a director or officer of competing companies, and the FTC and DOJ have recently brought challenges related to the makeup of corporate boards. In September 2024, the FTC announced a consent order related to Chevron Corporation's acquisition of rival oil producer, Hess Corporation, prohibiting Chevron from appointing Hess CEO John B. Hess to its board of directors. The FTC alleged that Mr. Hess had improper communications with OPEC. The DOJ likewise has continued its stepped-up enforcement relating to Clayton Act Section 8, resulting in high-profile director resignations.

Section 8 thus has significant import for advisers and funds taking minority positions in competing companies while seeking board representation. As noted above, under the Clayton Act, no person or representative of the same person or entity may serve simultaneously as a director or officer of competing companies, though there are carve-outs and exceptions. The prohibitions under Section 8 are limited to cases in which each of the companies has, under the revised thresholds for 2025, capital, surplus, and undivided profits of more than $51,380,000. The statute also permits directors and officers whose appointments were not prohibited at the time of appointment to continue to serve for up to a year after the Section 8 thresholds are exceeded. The revised Clayton Act Section 8 thresholds can potentially eliminate an existing violation, which is not the case with the HSR Act threshold revisions.

To account for the minimal impact on competition likely to flow from interlocking directorates wherein the competitive sales of the companies are sufficiently small, Section 8 does not prohibit interlocks where the total competitive sales are below certain de minimis levels.[6]

In a matter implicating the prohibition on director overlaps, Tullett Prebon PLC and ICAP PLC restructured their proposed transaction in response to the DOJ's concerns.[7] Both are UK interdealer brokers that are also active in the U.S., and the transaction as originally envisioned would have resulted in ICAP obtaining the right to appoint a member to Tullett Prebon's board of directors after Tullett Prebon acquired ICAP's voice brokerage business. Because ICAP and Tullett Prebon would remain competitors post-transaction with respect to ICAP's remaining businesses, the proposed board seat constituted an interlocking directorate – or common directorship between competing companies – in violation of Clayton Act Section 8.

The consideration for the acquired business was stock of the buyer – Tullett Prebon – and thus ICAP would have had a 19.9 percent interest in Tullett Prebon while also having the right to nominate a member of Tullett Prebon's board post- transaction. This, according to the DOJ, constituted an interlocking directorate between competitors in violation of Clayton Act Section 8. To satisfy the DOJ's concerns, the parties agreed with the DOJ that all of the Tullett Prebon shares issued in the transaction would go directly to ICAP's existing shareholders rather than to ICAP.

In a matter involving the merger of Andrew into CommScope brought in 2007, the DOJ employed Section 8 to prohibit interlocks that would have resulted from the merger. The merger would have brought along Andrew's 30 percent minority interest in Andes Industries – a third-party competitor to CommScope. CommScope and Andes were competitors with respect to drop cable (i.e., coaxial cable used to connect television transmission systems to customers' premises and equipment). To resolve the DOJ's concern the parties agreed that, as part of the merger, CommScope would divest Andrew's minority holding in Andes.

In a high-profile matter in 2009, a member of the boards of Google and Apple agreed under pressure from the FTC to resign the Google post. This issue arose amid concerns that the arrangement violated Section 8 because of competition between the companies with respect to a variety of services. [8]

Practice Point: Consider Section 8 when accepting board positions – this should be part of your standard checklist. Consider the Clayton Act Section 8 prohibition against interlocking directorates in all cases that could result in board membership between competitors, such as overlapping board membership either by an individual *or by representatives of the same investment firm*.

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[1] The fund/investor is required under the rules to provide notice to the target of the fact that an HSR Act Notification is being submitted for the acquisition of its securities. The target is required to submit its own HSR Act filing in response to receiving the required notice.

[2] As discussed earlier, acquisitions of minority interests in limited liability companies and partnerships are not subject to HSR reporting.

[3] Common Failure to File Scenarios | Federal Trade Commission

[4] Ryan Cohen, US v. | Federal Trade Commission
Procedures For Submitting Post-Consummation Filings | Federal Trade Commission.

[5] Under the current thresholds in effect as of January 2025, the carve-out is available where the competitive sales of either company represent less than 2 percent of its total sales, or are less than $5,138,000; or where the competitive sales of each company represent less than 4 percent of its total sales.

[6] Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates: https://www.justice.gov/opa/pr/tullett-prebon-and-icap-restructure-transaction-after-justice-department- expresses-concerns.

[7] Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board; https://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding.

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