BLOG

DOJ Files Unprecedented Suit Challenging Allegedly Deficient HSR Filings

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On January 14, the Antitrust Division of the Department of Justice (DOJ) filed a lawsuit against private equity firm KKR & Co. (KKR), alleging KKR repeatedly violated the Hart-Scott-Rodino (HSR) Act and seeking unprecedented civil penalties of hundreds of millions of dollars. In response, on the same day, KKR filed a countersuit against the DOJ and Federal Trade Commission (FTC), attacking the motivation and basis behind the DOJ's suit and arguing that the requested penalties are unconstitutional because the FTC's interpretations of the HSR Act are unconstitutionally vague and the requested fines unconstitutionally excessive.

BACKGROUND

Under the HSR Act, merging parties reporting covered transactions (currently typically transactions valued at $119.5 million) must submit an HSR form, which obligates the merging parties to disclose information and documents about themselves and the transaction prior to the merger. The antitrust agencies—the FTC and DOJ's Antitrust Division—use the HSR filing to conduct a preliminary review to decide whether the transaction requires a more in-depth investigation to determine if it runs afoul of antitrust law. Item 4(c), for example, is one of the key parts of the current HSR form because it requires merging parties to turn over documents that evaluate the transaction's competitive implications.

DOJ ALLEGES MULTIPLE HSR VIOLATIONS

KKR, one of the largest private equity firms in the United States, repeatedly engages in transactions that require HSR notifications. In 2022, the DOJ initiated two parallel investigations—one civil and one criminal—into KKR's disclosures to determine whether the disclosures satisfied the HSR Act's requirements.

After a nearly three-year investigation and extensive settlement negotiations, the DOJ filed a civil suit against KKR, alleging KKR and its executives failed to meet their HSR obligations despite routinely certifying compliance with the Act and purporting to submit complete HSR filings. Specifically, the DOJ alleges:

- In at least ten transactions, KKR certified it had complied with the HSR Act, but failed to submit required Item 4(c) business documents with its HSR filings, such as documents reflecting market shares, competitive analyses, and other types of assessments that illuminate the competitive impacts of a transaction.

- For at least eight transactions, KKR altered documents before submitting them in the HSR filing, including in some instances, altering information about the competitive implications of the proposed transaction.
- In at least two transactions, KKR failed to make a required HSR filing before closing the transaction.

DOJ alleges the violations were systemic, stemming from KKR's failure to maintain sufficient controls over its HSR filing practices. These inadequate controls, DOJ claims, resulted from inadequate training given to employees, failures by KKR deal teams to search all relevant files when preparing HSR filings, and failures by senior executives to sufficiently review final versions of HSR filings prior to certifying the filings were correct. DOJ contends these were not harmless violations, but rather that, in at least two instances, KKR allegedly closed transactions that were potentially anticompetitive after having submitted HSR filings that "omitted and altered documents" KKR was required to submit to antitrust agencies.

KKR ALLEGES NO WILLFUL VIOLATIONS AND POLITICAL MOTIVATIONS

Within hours of the DOJ's suit, KKR filed a countersuit attacking the DOJ's motivation and basis for bringing suit.

In the complaint, KKR alleges the DOJ only filed suit to further its political goal of reducing merger and acquisition activity. KKR contends the DOJ is doing so by imposing "strict liability" for alleged non-willful violations of "confusing and contradictory" FTC rules. KKR asks the court to declare that KKR did not violate the HSR Act and that the FTC and DOJ's interpretations of the Act are unconstitutionally vague. KKR also challenges the penalty sought by DOJ—$51,000 per day for the filing errors "in perpetuity"—as untethered to the language of the HSR Act and excessive, seeking a declaration from the court that the fines sought are unconstitutional under the Fifth and Eighth Amendments.

TAKEAWAY

In bringing this suit for an unprecedented amount in civil penalties, DOJ is making it clear that antitrust agencies continue to take perceived HSR Act violations seriously, especially with respect to documents required to be included in the HSR form addressing the parties' views of competition and the transaction's impact on competition. In complying with HSR disclosure requirements, close attention and review are necessary not only for the finalized HSR filings themselves, but to ensure all necessary documents are collected and responsive documents produced. Please involve antitrust counsel early to avoid or minimize risk of noncompliance with HSR rules and regulations. Reach out to the authors of this post with any questions.

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