

Compliance Today – December 2019 Compliance with items 4(c) and 4(d) of the Hart-Scott-Rodino Antitrust Improvements Act

By E. John Steren and Patricia Wagner

E. John Steren (esteren@ebglaw.com) and Patricia M. Wagner (pwagner@ebglaw.com) are both Members of the firm and located in the Washington, DC, offices of Epstein Becker & Green.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) requires that certain proposed acquisitions of voting securities, noncorporate interests, or assets be reported to the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) prior to consummation.^[1] The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction.

Whether a particular acquisition is subject to the requirements of the HSR Act depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. At present, any transaction valued above \$899.8 million is reportable. In addition, transactions valued between \$90 million and \$899.8 million may also be reportable if an acquiring party with assets or annual net sales at or above \$180 million is making an acquisition from a party not engaged in manufacturing that has total assets at or above \$18 million. Thresholds are updated annually and can be found on the FTC's website (<https://bit.ly/2pIzpxP>).^[2]

Compliance with the HSR Act is expensive. In addition to the cost of collecting the required materials and otherwise fulfilling the reporting obligations, the current filing fees stand at:

- \$45,000 for transactions valued between \$90 million but less than \$180 million;
- \$125,000 for transactions valued at \$180 million but less than \$899.8 million; and
- \$280,000 for transactions valued at \$899.8 million or greater.^[3]

The fine for failing to comply with the HSR Act is currently \$42,530 per day of noncompliance. Although initial offenses may not result in a monetary penalty, repeat and egregious offenders have received fines in the millions of dollars.

The Notification and Report form

Transactions are reported to the FTC and DOJ through the use of a Notification and Report form (the form). The form seeks eight categories or items of information from the ultimate parent of each (or all) of the transacting parties.^[4] The "ultimate parent" is defined as an entity that is not controlled by any other entity. The eight categories include detailed financial information, geographic locations of all operations of the transacting parties, and the identification of geographic and service overlaps between the parties. A copy of the form and instructions can be found at <https://bit.ly/2Bz6Mpu>.^[5]

All of the requested information is important, but the item that garners the most interest from the enforcement agencies, and the one that requires the greatest effort to comply with in terms of both time and resources, is Item

4, and more specifically Items 4(c) and 4(d)—also referred to as 4(c) and 4(d) documents. These documents help the FTC and DOJ understand the competitive impact of the acquisition.

Under the HSR Act requirements, 4(c) documents include “all studies, surveys, analyses and reports prepared by or for any officer(s) or director(s) (or in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.” Similarly, 4(d) documents include “all studies, surveys, analyses, and reports prepared by investment bankers, consultants, or other third party advisors for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) ... for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate” to the acquisition.

Compliance with the technical requirements of Items 4(c) and 4(d) necessitates an understanding, as explained below, of the following: (1) what types of documents might be responsive, (2) who might have responsive documents, and (3) what was created for “the purpose of evaluating or analyzing the acquisition.”

Importantly, a failure to fully comply with Item 4 is tantamount to a failure to comply with the HSR Act and can result in significant fines.

This document is only available to members. Please log in or become a member.

[Become a Member Login](#)