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Reforming HSR Treatment Of Partial Acquisitions: Part 1

By **Jack Sidorov**

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The Hart-Scott-Rodino Act requires pre-acquisition notification to the Federal Trade Commission and U.S. Department of Justice of certain acquisitions of voting securities, assets and noncorporate (e.g., LLC) interests so as to enable the agencies to conduct pre-acquisition antitrust review. Acquisitions of minority interests of voting securities ("partial acquisitions") may trigger HSR, and the rules that have been in effect since the inception of the HSR program in 1978 are complex and can require parties to make multiple HSR filings over time and at different ownership levels even if a 50 percent or greater interest is never reached.

With a working group within the International Competition Network having recently advised that "[a]cquisitions of a minority interest should not be included in the scope of merger review if they are unlikely to be competitively significant"[1] and with an administration focused on deregulation, this is a good time to revisit the HSR treatment of partial acquisitions in order to see whether HSR coverage can be narrowed without sacrificing the usefulness of HSR as an antitrust enforcement tool.

This article comes in two parts. Part one outlines HSR treatment of partial acquisitions and suggests three major changes. Part two describes the rationale for and implementation of those changes.

HSR Treatment of Partial Acquisitions

The United States' approach to voting securities acquisitions under HSR differs from that of most other jurisdictions' premerger notification regimes in that it in the first instance focuses on the value of the shares to be held as a result of the acquisition rather than on percentage interest, "control," "competitively significant influence," or some similar concept.[2]

Thus, where other requirements (including size of the parties) are met, an acquisition of voting securities triggers HSR if greater than $50 million (as adjusted)[3] will be held "as a result of" the acquisition unless an exemption applies. The exemptions that may apply are technical and complex, and sophisticated investors and their counsel with some frequency have failed to recognize the need to file.

"As a Result of" and Sequential Notification Thresholds

The HSR rules deem voting securities held "as a result of" an acquisition to be all those held after consummation (i.e., those already held plus those being acquired). The drafters of the 1978 HSR rules

implementing the statute recognized that absent an exemption, once the size-of-transaction threshold (then $15 million) was reached, every subsequent acquisition of even $1 of stock could thus trigger another filing. Accordingly, they set out to exempt from HSR (using their authority to exempt classes of transactions unlikely to violate the antitrust laws[4]) all subsequent partial acquisitions except those that resulted in holdings reaching certain percentage levels (15 percent, 25 percent or 50 percent).[5]

After the HSR Act amendments in 2000 introduced a three-tiered filing fee structure tied to the dollar value of voting securities held as a result of the acquisition — $50 million (as adjusted), $100 million (as adjusted) and $500 million (as adjusted) — the agencies via rulemaking[6] revised the intermediate notification thresholds between the size-of-transaction threshold (then $50 million) and 50 percent, replacing the 15 percent and 25 percent thresholds with thresholds matching the new filing fee thresholds of $100 million (as adjusted) and $500 million (as adjusted).[7]

The agencies justified these dollar-based intermediate notification thresholds on two grounds: (1) that it would avoid administrative difficulties for parties and the agencies that would be created by having one set of thresholds for filing fees and another for notification obligations; and (2) that the tiered fee structure appeared to reflect a congressional view that there is a positive correlation between dollar value of a transaction and agency resources devoted to investigating it, and "that there is some significance to the $100 million and $500 million levels."[8]

The notification thresholds work so as to enable an acquiring person who meets (within one year) the threshold for which it has filed to acquire up to but not beyond the next threshold for a period of five years from the end of its HSR waiting period. An acquiring person who files for the $50 million (as adjusted) threshold would thus generally need to make another HSR filing before undertaking (1) any additional acquisitions of the issuer's voting securities that would result in crossing the $100 million (as adjusted) threshold; and (2) any additional acquisitions more than five years later.

Several of the HSR civil penalty enforcement cases brought by the agencies in recent years have involved failure to take account of these limitations — either crossing a higher notification threshold within five years of a prior filing[9] or making additional acquisitions beyond five years of the prior filing.[10]

There doubtless are many more HSR violations with regard to these technical requirements involving partial acquisitions that do not result in civil penalty enforcement cases, as cases are generally not brought for first-time inadvertent violations.[11] During fiscal year 2015, 39 post-consummation corrective filings were made.[12] Although the agencies do not categorize these corrective filings, it is likely that the vast majority pertained to partial acquisitions.

The "Solely for the Purpose of Investment" HSR Exemption

The HSR Act exempts acquisitions of voting securities solely for the purpose of investment that result in holding 10 percent or less of the voting securities of the issuer. The agencies construe this exemption narrowly, as the HSR rules require that the acquiring person has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."[13]

Unlike most of HSR law and lore that applies objective tests in determining whether a filing is required, this exemption turns on the subjective intent of the acquiring person. In addition, there are still unresolved questions as to the meaning of "no intention ...", "to participate in ..." and "basic business decisions."[14] Thus, determining whether HSR filing is required for a partial acquisition that results in holding 10 percent or less of an issuer's voting securities can be difficult and risky, particularly with the

maximum HSR civil penalty having recently been increased more than twofold to $40,654 per day. Several of the agencies' HSR civil penalty cases in recent years have hinged on this exemption being unavailable.[15]

The agencies in 1988 proposed exempting all transactions resulting in holdings of 10 percent or less of an issuer's voting securities, ultimately taking no action after encountering congressional opposition. Commentators subsequently have suggested such as exemption, or one not quite as broad but broader than the current exemption.[16] Recently, two then-FTC commissioners, including the current acting chairwoman of the FTC, again suggested the possibility of exempting all 10-percent-and-under transactions.[17]

The Pro Rata Exemption

Another HSR exemption that may apply to partial acquisitions is the so-called pro rata exemption, which can enable investors to make additional investments as long as they don't increase their percentage ownership of voting securities.

This exemption is easier to state than to apply, as HSR's unique formula for calculating percentage of voting securities held must be applied in instances where different classes of voting securities confer different rights to vote for directors.

A successful venture investor, for example, may have seen its initial $40 million minority investment grow in value to $90 million. If it now wishes to acquire even one additional share, it would be required to make an HSR filing unless its percentage ownership of voting securities would not increase, even marginally.[18]

Three Steps toward a Hugely Simpler (HSR) Regime for Partial Acquisitions

The agencies, using their rulemaking authority to exempt classes of acquisitions that are not likely to violate the antitrust laws, could take three steps that would greatly simplify and narrow the applicability of HSR to partial acquisitions without causing competitively problematic transactions to escape HSR review.

1. Require HSR filings at only one point for partial acquisitions, and again at the 50 percent level, eliminating the intermediate notification thresholds between those points.
2. Eliminate the five-year limit for the effectiveness of HSR filings for partial acquisitions.
3. Exempt all acquisitions resulting in holding 10 percent or less of an issuer's voting securities, without regard to investment intent.[19]

The rationale for and implementation of these steps is discussed in part two of this article.

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[1] ICN Recommended Practices for Merger Notification and Review Procedures, I.A., Comment 3 (May 2017), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf.

[2] See generally http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf.

[3] HSR thresholds are adjusted annually for changes in gross national product. The current "as adjusted" thresholds are roughly 62% higher than the statutorily-stated thresholds; this threshold is currently $80.8 million.

[4] 15 USC 18a(d)(2)(B).

[5] "The 15 percent . . . and 25 percent thresholds give the enforcement agencies adequate opportunities to assess the ability of a significant minority shareholder to influence or direct management. . . . . The final 50 percent threshold is appropriate because that level represents veto power, if not actual control . . . ." 43 Fed. Reg. 33450, 33465 (July 31, 1978), available at https://www.ftc.gov/sites/default/files/documents/hsr_statements/43-fr-33450/780731fr43fr33450.pdf.

[6] 66 Fed. Reg. 8680 (February 1, 2001), available at https://www.ftc.gov/sites/default/files/documents/hsr_statements/66-fr-8680/010201premergernotifications.pdf.

[7] Once the $500 million (as adjusted) threshold is met, there is an additional intermediate threshold of 25% if valued at greater than $1 billion (as adjusted). If 25% is valued at less than that figure, then the next notification threshold after $500 million (as adjusted) is 50%.

[8] 66 Fed. Reg. 8680, 8681 (February 1, 2001). Congress was indeed presented with testimony by the Antitrust Section of the American Bar Association that "[r]equiring a larger filing fee for bigger deals appears to be most equitable since review of larger transactions generally requires greater Agency resources . . . ." http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-comments/2000/04-00/hsr_antitrust_improvements_act.authcheckdam.pdf at 9. But the author is not aware of Congress having been presented with any evidence that antitrust enforcement interest was likely to be greater for partial acquisitions valued above $100 million or $500 million, or of any indication that Congress deemed it useful to require additional notifications for partial acquisitions at those levels.

[9] https://www.justice.gov/atr/case/us-v-ahmet-h-okumus (2016); https://www.justice.gov/atr/case/us-v-valueact-capital-partners-lp (2007).

[10] https://www.justice.gov/atr/case/us-v-caledonia-investments-plc (2016); https://www.justice.gov/atr/case/us-v-berkshire-hathaway-inc (2014); https://www.justice.gov/atr/case/us-v-macandrews-forbes-holdings-inc (2013); https://www.justice.gov/atr/case/us-v-brian-l-roberts (2011); https://www.justice.gov/atr/case/us-v-esl-partners-lp-and-zam-holdings-lp (2008); https://www.justice.gov/atr/case/us-v-william-h-gates-iii (2004).

[11] For inadvertent failures to file, “the agencies generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.” https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf n. 14.

[12] Id. at 8.

[13] 16 CFR 801.1(i)(1).

[14] See generally https://www.lowenstein.com/files/Publication/f7401328-5f91-4760-a8d4-7937671b0877/Presentation/PublicationAttachment/3a28ddc8-e1a3-45ac-9384-87ffac8a50a3/BNAInsights_DOJsValueAct%20HSR_2016.pdf .

[15]E.g., https://www.justice.gov/atr/case/us-v-va-partners-i-llc-et-al (2016); https://www.justice.gov/atr/case/us-v-third-point-offshore-fund-ltd-third-point-ultra-ltd-third-point-partners-qualified-lp (2015); https://www.justice.gov/atr/case/us-v-barry-diller (2013); https://www.justice.gov/atr/case/us-v-biglari-holdings-inc (2012); https://www.justice.gov/atr/case/us-v-smithfield-foods-inc (2004); https://www.justice.gov/atr/case/us-v-william-h-gates-iii (2004); https://www.justice.gov/atr/case/us-v-manulife-financial-corp (2004).

[16] See, e.g., S. Sher and C. Williams, Rethinking the Investment –Only Exemption, ABA Antitrust Section Threshold Fall 2014 40, available at https://www.wsgr.com/publications/PDFSearch/sher-1214.pdf; B. Sayyed, A “Sound Basis” Exists for Revising the HSR Act’s Investment-Only Exemption, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_sayyed.authcheckdam.pdf; M. Pfunder, Shareholder Activism and the Hart-Scott-Rodino Act Exemption for Acquisitions of Voting Securities Solely for the Purpose of Investment (2006), available at http://www.gibsondunn.com/fstore/documents/pubs/Pfunder-ShareholderActivism-Antitrust07.06.pdf .)

[17] https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioners-maureen-k-ohlhausen-joshua-d-wright.

[18] See https://blogs.wsj.com/accelerators/2015/05/29/weekend-read-little-triggers-private-ipos-and-the-hsr-act/.

[19] Although doing all three reforms is optimal, these reforms are not dependent on each other, and the Agencies could opt to do some combination of them or to do some only partially (e.g., the “investment only” exemption could be broadened in some manner without exempting all 10%-and-under acquisitions). Note that the pro rata exemption would be left unchanged under the proposed reforms, but would need to be applied less often.

Reforming HSR Treatment Of Partial Acquisitions: Part 2

By **Jack Sidorov**

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Part one of this article suggested three significant changes to Hart-Scott-Rodino coverage of partial acquisitions of voting securities. Taken together, these changes would require HSR filings for partial acquisitions only at the 10 percent level and again at the 50 percent level. The three changes suggested are all justifiable (and can be implemented smoothly) under the rulemaking authority of the Federal Trade Commission and U.S. Department of Justice to exempt classes of transactions not likely to violate the antitrust laws.

Discussion

It is widely recognized that a partial acquisition can cause competitive harm. It can lessen competition by: (1) giving the acquiring firm the ability to influence the competitive conduct of the target; (2) reducing the incentive of the acquiring firm to compete aggressively; and (3) giving the acquiring firm access to nonpublic, competitively sensitive information from the target.[1] The agencies have accordingly brought cases involving partial interests.[2]

The data that is available from the agencies indicates, though, that partial acquisitions filed under HSR have been relatively unlikely to generate significant antitrust interest (when compared to what could be termed “full acquisitions”: voting securities acquisitions at the 50 percent level and asset acquisitions). For fiscal years 2011-2015, 0.7 percent of filings for partial acquisitions resulted in second requests. During that same time period, 3.9 percent of “full acquisitions” resulted in second requests.[3]

The particular types of partial acquisitions proposed to be exempted appear to be especially unlikely to generate significant antitrust interest. Of the eight partial acquisitions during this five-year period that resulted in second requests (out of 1,213 filed), publicly available information does not indicate how many (if any) were for filings for transactions that were reportable under HSR only because (1) the acquiring person did not qualify for “solely for the purpose of investment” exemption despite holding 10 percent or less; (2) a higher notification threshold was being reached during the five-year period covered by a prior filing; or (3) that five-year period had passed. The author is not aware of a substantive antitrust challenge during this time period (or any other) relating to any of these three types of HSR-reportable transactions.

If the agencies have an opportunity for premerger review at some point with regard to a partial acquisition and clear the acquisition at that point, it is unlikely that subsequent acquisitions (whether inside or outside of five years) that continue to result in holding below 50 percent will be problematic to them. Assuming that the initial filing is for a level of holdings that could be competitively significant (and no filing should be required if not), agency review at that point seems likely to be premised on the extent of competition between the parties and not on the notion of getting a chance to look later if there is greater ability (short of 50 percent ownership) to influence the issuer.

Further, while it may have been reasonable for the drafters of the HSR rules in 1978 in implementing the first premerger notification system to put a five-year limit on partial acquisitions because “the business of the acquiring and acquired person, the market or the product may have changed”[4], there is no indication that this limitation has proven useful to antitrust enforcement. If the business of the acquiring or acquired person has changed as a result of any significantly sized transactions, the agencies will have

had opportunity to learn that via HSR and intercede if appropriate. Indeed, the 2011 HSR form changes, by introducing the "associate" concept, better enable the agencies to learn of overlaps between the target and entities related to the acquiring person but not under its (within the meaning of HSR) "control." And particularly in the technology markets that are more likely to be at issue today than in 1978, market and product changes are likely to be much more rapid than five years.

The third suggested step — creating an exemption for acquisitions resulting in holding 10 percent or less of an issuer's voting securities without regard to intent — has been widely discussed by commentators and considered by the agencies for many years.[5] Taking this step together with eliminating intermediate notification thresholds and eliminating the five-year expiration for effectiveness of HSR filings would result in a much simpler regime for partial acquisitions: reporting would be required at the 10 percent level and at the 50 percent level and nowhere/no time in between.

Canada's premerger notification treatment of partial acquisitions[6] can be viewed as a model for this simplified approach. Canada requires premerger notification for partial acquisitions at only one juncture — 20 percent for publicly traded voting shares and 35 percent for voting shares not publicly traded — and again at 50 percent.[7] It does not impose a time limitation on the effectiveness of the filing with regard to subsequent acquisitions between 20 percent (or 35 percent, as applicable) and 50 percent. Interestingly, when Canada in 2009 revised its premerger notification regime to more closely mirror HSR, it did not follow HSR's approach with regard to partial acquisitions of having (1) intermediate notification thresholds short of 50 percent; (2) a five-year limit on the effectiveness of premerger filings; or (3) an exemption that hinges on the intent of the acquiring person. The three-step reform suggested here, while conceptually consistent with Canada's treatment of partial acquisitions, is more stringent in that it sets the initial filing level at 10 percent instead of 20 percent (public companies) or 35 percent (nonpublic) as Canada does.

Canada's system appears to be working well. Acquisitions in Canada, like those in the U.S., can be challenged even if not subject to premerger notification, and the author is not aware of the Canadian enforcement authorities having challenged a partial acquisition that was not notified in advance to the authorities. Thus, it does not appear that any anti-competitive partial acquisitions have escaped premerger review.

Note also that HSR does not require any notification of partial acquisitions with regard to noncorporate interests (LLCs and partnerships). Only those acquisitions resulting in "control" (50 percent or more of noncorporate interests) are covered by HSR.

If the agencies moved forward with the three steps suggested here, they would need to mesh that streamlining with regard to partial acquisitions with the requirements of the filing fee statute. That statute[8], taken together with the operative section of the HSR Act[9], bases the filing fee on the "aggregate total amount of the voting securities and assets of the acquired person" that the acquiring person would hold "as a result of such acquisition." The language of that section of the HSR Act suggests that "such acquisition" is the acquisition that triggers the obligation to make HSR filings and observe the HSR waiting period.

Applying the filing fee statute to the simplified approach suggested herein does not present insurmountable problems. The best approach appears to be to base the filing fee on the applicable tier that would be met, based on the acquisition triggering HSR and the current, good-faith intention of the acquiring person.

Example 1: An acquiring person making open market purchases that would result in it holding greater than $80.8 million (corresponding to 10 percent or greater) of voting securities of an issuer (the current HSR threshold) but not having a current, good-faith intention to cross a higher filing fee threshold would pay a $45,000 filing fee even though that filing would enable it to acquire up to 50 percent later on, regardless of value. In this instance, as a result of the acquisition triggering HSR ("such acquisition"), the acquiring person would not hold voting securities valued at or above the next highest filing fee tier, currently $161.5 million. The acquiring person would not be required to pay a higher fee ($125,000 or $280,000) even if its intent included the possibility that the value of its holdings as a result of additional acquisitions sometime in the future would exceed $161.5 million, and even if it actually did later exceed that value. If, however, the acquiring person had the current, good-faith intention to cross the $161.5 million threshold, it would pay a $125,000 filing fee.

Example 2: An acquiring person that currently holds no voting securities of the issuer plans to acquire for $200 million a 15 percent voting security interest of the issuer from another person. While it believes that it may in the future acquire additional voting securities of the issuer, it does not currently have a good-faith intention to do so. In this instance, the acquiring person would pay the $125,000 filing fee because as a result of such acquisition, it would be in the middle tier for HSR filing fees.

This approach to applying the filing fee statute appears to be both fair and reasonably administrable. It is also somewhat analogous to the current HSR treatment for filing fee purposes of acquisitions of assets where the acquisition price is not determined and consideration is dependent on future events and cannot be reasonably estimated (e.g., the acquisition of a to-be-developed product). In that situation, valuation is based upon a good-faith estimate of fair market value by the board of directors of the acquiring person (or its designee).[10] Thus, if the good-faith estimate of fair market value was $90 million, the filing fee ($45,000) would be based on that; there would not be a higher fee even if the contingent payments ultimately brought the total consideration paid into the highest filing fee tier (currently at or above $805.7 million).

Conclusion

The FTC and DOJ should consider streamlining the HSR treatment of partial acquisitions by creating HSR exemptions that would require HSR filings for acquisitions of voting securities (that otherwise meet HSR thresholds) only at the 10 percent level, and require an additional filing only at the 50 percent level, thus eliminating the need to assess whether an acquisition is being made "solely for the purpose of investment" as well as the intermediate notification thresholds and the five-year limit on the effectiveness of HSR filings. Doing so is within the agencies' notice-and-comment rulemaking authority to exempt classes of transactions unlikely to violate the antitrust laws.

Although it is difficult to estimate from the publicly available data the number of transactions for which HSR notification would be eliminated, the FTC may be able to provide some historical data in its notice of proposed rulemaking. Even assuming that it is not many transactions, these changes would greatly simplify HSR reporting obligations for investors and their counsel, reducing the burden on them and resulting in fewer inadvertent failures to file. A further benefit is that the agencies would be able to focus their HSR enforcement efforts on the types of HSR violations most likely to affect competition (such as gun jumping[11] and failure to submit significant documents during the HSR process[12]) instead of violations of technical requirements regarding types of transactions that are very unlikely to raise antitrust issues.

We can observe a lot just by watching[13] both the HSR experience with partial acquisitions and that of

Canada with a system similar to that suggested here. We have come to a fork in the road and should take it.[14]

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[1] 2010 Horizontal Merger Guidelines (https://www.justice.gov/atr/file/810276/download) Section 13.

[2] See, e.g., https://www.ftc.gov/enforcement/cases-proceedings/141-0141-c-4510-c-4498/novartis-ag-matter-glaxosmithkline (2015); https://www.ftc.gov/enforcement/cases-proceedings/0610197/tc-group-llc-riverstone-holdings-llc-carlyleriverstone-global (2007); https://www.justice.gov/atr/case/us-v-univision-communications-inc-and-hispanic-broadcasting-corp (2003).

[3] This data is based on Table V of the HSR Annual Report for each year from FY 2011 through FY 2015 (the most recent annual Report), available at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

[4] 43 Fed. Reg. 33450, 33493 (July 31, 1978).

[5] See Part 1, n. 16-17 and accompanying text.

[6] The author thanks Ian Macdonald, a partner in Gowling WLG's Toronto office, for sharing his expertise regarding the Canadian premerger notification system.

[7] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03768.html. Dividing the world of partial acquisitions into three parts (below 20% (or 35% for non-public issuers); above that percentage up to 50%; and beyond) may have been inspired by Canada's national sport, which is divided into three zones of ice and three periods of play.

[8] Pub. L. 101–162, title VI, §605, Nov. 21, 1989, 103 Stat. 1031 , as amended by Pub. L. 101–302, title II, May 25, 1990, 104 Stat. 217 ; Pub. L. 102–395, title I, Oct. 6, 1992, 106 Stat. 1847 ; Pub. L. 103–317, title I, Aug. 26, 1994, 108 Stat. 1739 ; Pub. L. 106–553, §1(a)(2) [title VI, §630(b)], Dec. 21, 2000, 114 Stat. 2762 , 2762A-109.

[9] 15 U.S.C. 18a(a).

[10] See ABA Antitrust Section Premerger Notification Practice Manual (5th ed. 2015), Interpretation 54.

[11] See, e.g., https://www.justice.gov/atr/case/us-v-flakeboard-america-limited-et-al (2014); https://www.justice.gov/atr/case/us-v-gemstar-tv-guide-international-inc-and-tv-guide-inc (2003).

[12] See, e.g., https://www.justice.gov/atr/case/us-v-hearst-trust-and-hearst-corp (2001);

https://www.justice.gov/atr/case/us-v-automatic-data-processing-inc (1996).

[13] Y. Berra, https://www.brainyquote.com/quotes/quotes/y/yogiberra125285.html .

[14] Y. Berra, https://www.brainyquote.com/quotes/quotes/y/yogiberra105761.html .
