

## "I Have to File for That?" — Why Investors Should Remain Attentive to HSR Reporting Obligations

October 29, 2018

### Introduction to the HSR Act

An important part of the U.S. antitrust regime is the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR Act)<sup>1</sup>, a procedural statute that prescribes a "file-and-wait" notification system, designed to give the U.S. government an opportunity to review certain M&A transactions for potential competitive issues before the transactions are consummated. The HSR Act applies to acquisitions of assets, non-corporate interests, and importantly, voting securities that meet certain jurisdictional thresholds that are revised yearly based upon changes in the gross national product. Under the HSR Act, transactions that exceed "size-of-transaction" and (in most cases) "size-of-person" thresholds must be reported to the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) before they may be consummated, unless an exemption applies.

The size of transaction is determined by the value of voting securities, non-corporate interests, or assets to be held by the acquiring person as a result of an acquisition.<sup>2</sup> The size-of-person test looks to the size of both the acquiring and acquired persons, and is determined by their respective gross assets or annual net sales. Unless the transaction value is above the \$200 million threshold, as adjusted, the size-of-transaction and size-of-person thresholds both must be met for the transaction to be subject to HSR.<sup>3</sup> While companies readily anticipate HSR filing requirements for certain kinds of transactions, including consolidations and other change-of-control transactions, the HSR Act is broad, and companies should be aware that other types of transactions may fall within the scope of the HSR rules, such as:

- certain patent licensing deals;
- transfers between affiliated entities that are not the same "person" under the HSR Act;
- executive compensation;
- stock as transaction consideration;
- secondary acquisitions (where an entity that holds voting securities in another entity, not within the acquired person, is acquired); and
- stock redemptions and other conversions.

Importantly, the HSR Act applies regardless of any substantive antitrust issues and can apply even where a single investor is acquiring voting securities of an issuer. As such, HSR compliance programs must account for transactions involving any reportable interest, beyond just those that require a payment, including, for example, a conversion of shares resulting from a consolidation.<sup>4</sup> Failure to file HSR notifications can result in substantial fines, as it has in recent years. Under the HSR Act, a violation is subject to a fine of \$41,484 per day in violation of the act, adjusted annually.<sup>5</sup>

### Recent Failure to File Settlements

Although failures to file occur in many different circumstances, the FTC has highlighted two specific scenarios that occur frequently.<sup>6</sup> The first involves company executives who exercise a very small number of options or warrants with a value well below the size of transaction threshold, but fail to aggregate the value of the converted shares with prior holdings, as required under the HSR rules.<sup>7</sup>

The second common scenario arises when a passive investor, which has relied on the investment-only exemption in Section 802.9 of the HSR Rules<sup>8</sup>

<sup>1</sup> 15 U.S.C. §18a.

<sup>2</sup> 16 C.F.R. §801.13.

<sup>3</sup> 16 C.F.R. §801.11.

<sup>4</sup> Press Release, Fed. Trade Comm'n, You Don't Have to Write a Check to Acquire an HSR-Reportable Interest (May 15, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/05/you-dont-have-write-check-acquire-hsr-reportable>.

<sup>5</sup> Press Release, Fed. Trade Comm'n, FTC Publishes Inflation-Adjusted Civil Penalty Amounts (Jan. 23, 2018), <https://www.ftc.gov/news-events/press-releases/2018/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts>.

<sup>6</sup> Fed. Trade Comm'n, *Common Failure to File Scenarios*, [www.FTC.gov](http://www.FTC.gov), <https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations/common-failure>, (last visited September 25, 2018).

<sup>7</sup> 16 C.F.R. 801.13(a).

<sup>8</sup> 16 C.F.R. 802.9.

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because it holds 10 percent or less of the voting shares of the target, becomes an active investor or increases its holdings in the target above 10 percent without filing. See our previous [passive investment client alert](#) for more information on the “investment-only” exemption. Below are two recent enforcement actions that capture these scenarios, and Appendix A that follows identifies other recent cases.

- In April 2017, entrepreneur Mitchell P. Rales agreed to pay \$720,000 to resolve charges that he violated the HSR Act<sup>9</sup> by failing to report his purchases of shares in amounts above the applicable filing thresholds when he and his wife purchased shares in Colfax Corporation and Danaher Corporation in 2008 and 2011.<sup>10</sup> Rales contended that the violations were inadvertent, but the FTC, in seeking penalties, noted that Rales had paid already civil penalties to settle an HSR enforcement action in 1991.
- Also in April 2017, hedge fund founder Ahmet H. Okumus agreed to pay \$180,000 to resolve charges that he violated the HSR Act by failing to report his purchases of voting securities in Web.com Group Inc., an internet services company, through a hedge fund.<sup>11</sup> Though the FTC determined that Okumus had inadvertently violated the HSR Act—under the mistaken belief his investments qualified for the investment-only exemption—it sought penalties because it was Okumus’s second HSR violation in as many years regarding Web.com.<sup>12</sup>

Clients seeking to buy or sell voting securities should seek advice of counsel and proceed with caution. Buyers and sellers should bear in mind that the HSR rules look to the value of voting securities held as a result of an acquisition (i.e., if an investor already holds voting securities valued at \$100 million and acquires voting securities worth \$1, an HSR-reportable transaction may have occurred). Acquisition of even one voting security could, therefore, result in a reportable acquisition, and failure to report could lead to substantial fines. Recent failure to file cases are noted in the Appendix that follows.

For more information on the DOJ complaint or the HSR Act in general, please contact a member of the firm’s antitrust practice.

<sup>9</sup> Proposed Final Judgement at 2, *United States v. Rales*, 2017 U.S. Dist. LEXIS 102966 (D.D.C. Apr. 12, 2017)

<sup>10</sup> Complaint at 6-7, *United States v. Rales*, 2017 U.S. Dist. LEXIS 102966 (D.D.C. Apr. 12, 2017).

<sup>11</sup> *United States v. Okumus*, No. 17-104 (RMC), 2017 U.S. Dist. LEXIS 102965 (D.D.C. Apr. 20, 2017).

<sup>12</sup> Fed. Trade Comm’n, *In Two Separate Actions, FTC Charges Investors with Violations of U.S. Premerger Notification Requirements* <https://www.ftc.gov/news-events/press-releases/2017/01/two-separate-actions-ftc-charges-investors-violations-us> (January 17, 2017)

Case	Fine	Description	Case Files
<i>United States v. Ahmet H. Okumus</i> , No. 1:17-cv-00104 (D.D.C. 2017).	\$180,000	The FTC alleged that Okumus had violated the notice and waiting period requirements of the HSR Act, with respect to the acquisition of voting security of Web.com Group, Inc. Though the government determined that Okumus’s failure to file was inadvertent, it sought charges because the violation was his second in as many years.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/161-0189/ahmet-h-okumus">https://www.ftc.gov/enforcement/cases-proceedings/161-0189/ahmet-h-okumus</a>
<i>United States v. Mitchell P. Rales</i> , No. 1:17-cv-00103 (D.D.C. 2017).	\$720,000	The FTC alleged that Rales violated the HSR Act by failing to report purchases of shares in two industrial companies, Colfax Corp. and Danaher Corp. Rales’ first violation sprung from his wife’s purchase of Colfax shares in 2011, which were attributable to Rales under HSR. The FTC’s complaint also alleged that Rales failed to file for a 2008 purchase of Danaher Corp shares. Though Rales contended that the violations were inadvertent, the FTC sought penalties because Rales had already faced civil penalties to settle a third HSR enforcement action brought by the DOJ in 1991.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/161-0135/mitchell-p-rales">https://www.ftc.gov/enforcement/cases-proceedings/161-0135/mitchell-p-rales</a>
<i>United States v. Faye Sarofim</i> , No. 1:16-cv-02156-RC (D.D.C. 2016).	\$720,000	The FTC alleged that Faye Sarofim failed to report stock purchases between 2001 and 2012 in violation of the HSR Act. The HSR Act exempts acquisitions of up to 10 percent of voting securities if they are made solely for investment purposes, but this exemption is not available to individuals who serve on the board of directors of the issuer at the time the shares are acquired. From 2001 to 2012, Sarofim acquired voting shares of energy infrastructure company Kinder Morgan, Inc., crossing three different filing thresholds without making the filings required under the HSR Act. In 2007, he acquired voting shares in insurance holding company Kemper Corporation and did not file as required under the HSR Act.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/151-0064/united-states-federal-trade-commission-v-faye-sarofim">https://www.ftc.gov/enforcement/cases-proceedings/151-0064/united-states-federal-trade-commission-v-faye-sarofim</a>

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Case	Fine	Description	Case Files
<i>United States v. VA Partners I, LLC</i> , No. 3:16-cv-01672-WHA (N.D. Cal. 2016).	\$11,000,000 ValueAct was also enjoined from relying on the "investment-only" exemption when it intends to influence, or is considering influencing, certain basic business decisions, including those relating to merger and acquisition strategy, corporate restructuring, and the company's pricing, production capacity, or production output.	The DOJ alleged that certain of ValueAct's entities violated the reporting and waiting period requirements of the HSR Act. According to the DOJ's complaint, ValueAct acquired substantial stakes in Halliburton and Baker Hughes in the midst of government antitrust review of the companies' proposed merger, and used its position to try to influence the outcome of that process and certain other business decisions by leveraging access to high-level executives at both companies. Such conduct precluded ValueAct from relying on the passive investor exemption. ValueAct agreed to pay \$11 million to settle claims.	<a href="https://www.justice.gov/atr/case/us-v-va-partners-i-llc-et-al">https://www.justice.gov/atr/case/us-v-va-partners-i-llc-et-al</a>
<i>United States v. Caledonia Investments PLC</i> , No. 1:16-cv-01620 (D.D.C. 2016).	\$480,000	The FTC alleged that Caledonia failed to report a 2014 purchase of voting shares in the helicopter services company, Bristow Group, Inc. According to the complaint, Caledonia first acquired voting shares in Bristow in 2008. Caledonia reported this purchase to U.S. antitrust authorities, as required. Subsequently, Caledonia made additional non-reportable purchases of Bristow Group. During that same timeframe, however, two Caledonia employees were designated to serve on Bristow's board. Bristow awards restricted-stock voting securities to its board members, and by agreement, Bristow set aside the securities for the two Caledonia board members for purchase by Caledonia. In February 2014, these voting shares vested, and Caledonia acquired them. The FTC argued that Caledonia was required under the HSR Act to report this purchase. The HSR Act allows a company that has reported an initial purchase of voting shares to purchase additional voting shares from the same issuer—as long as those purchases do not cause the company's total holdings to cross a higher reporting threshold over a five-year period following the initial purchase. Although Caledonia argued this violation was inadvertent, and made a corrective filing in February 2015, the FTC sought civil penalties because Caledonia had previously violated the HSR Act in 1996.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/151-0123/caledonia-investments-plc">https://www.ftc.gov/enforcement/cases-proceedings/151-0123/caledonia-investments-plc</a>
<i>United States v. Len Blavatnik</i> , No. 1:15-cv-01631 (D.D.C. 2015).	\$656,000	The FTC alleged that Blavatnik was required to report a purchase of shares of TangoMa, which brought the total value of his share to roughly \$288 million. According to the complaint, Blavatnik eventually made a filing for the acquisition, acknowledging that the acquisition was reportable and that his failure to report the transaction in a timely fashion was inadvertent. The FTC sought civil penalties, however, because Blavatnik had previously violated the HSR Act in 2010. In that 2010 case, Blavatnik had escaped fines by filing a corrected form and representing that he would discuss purchases with HSR counsel prior to any future acquisitions.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/151-0060/len-blavatnik-care-access-industries">https://www.ftc.gov/enforcement/cases-proceedings/151-0060/len-blavatnik-care-access-industries</a>
<i>United States v. Leucadia National Corporation</i> , No. 1:15-cv-01547 (D.D.C. 2015).	\$240,000	The FTC alleged that the defendant, a holding company, failed to report a conversion of its ownership interest in the financial services company, Knight Capital Group, Inc. In 2013, Knight Capital consolidated with another financial services company, GETCO Holding Company, LLC, to become KCG Holdings, Inc. That transaction converted Leucadia's ownership interest in Knight Capital into nearly 16.5 million voting shares of the new entity, KCG Holdings, worth approximately \$173 million. Even though Leucadia relied on the advice of counsel (which erroneously advised Leucadia need not report), the FTC sought civil penalties because Leucadia had previously violated the HSR Act in 2007.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/151-0015/leucadia-national-corporation-kcg-holdings-inc">https://www.ftc.gov/enforcement/cases-proceedings/151-0015/leucadia-national-corporation-kcg-holdings-inc</a>

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Case	Fine	Description	Case Files
<i>United States v. Third Point Offshore Fund, LTD</i> , No. 1:15-cv-01366-KBJ (D.D.C. 2015).	\$0 The agencies determined not to seek civil penalties based on several factors, including that the violation was inadvertent and short-lived, and this was the defendants' first violation of the HSR Act. The agencies imposed behavioral remedies prohibiting defendants from relying on the investment-only exemption when certain factors are met.	The FTC alleged that at the time of the defendant's purchases of Yahoo stock, defendant Third Point LLC, which made investment decisions on behalf of the other defendant investment funds, was taking actions inconsistent with an investment-only intent: the defendants contacted certain individuals to gauge their interest in becoming CEO or a potential board candidate of Yahoo; took other steps to assemble an alternate slate of board of directors for Yahoo; internally deliberated the possible launch of a proxy battle for directors of Yahoo; and made public statements that they were prepared to propose a slate of directors at Yahoo's next annual meeting.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/121-0019/third-point-llc">https://www.ftc.gov/enforcement/cases-proceedings/121-0019/third-point-llc</a>
<i>United States v. Berkshire Hathaway Inc.</i> , No. 1:14-cv-01420 (D.D.C. 2014).	\$896,000	The FTC alleged that Berkshire Hathaway changed convertible notes it owned in USG into 21.4 million voting securities on December 9, 2013. As a result of the conversion, the value of its USG holdings exceeded \$283.6 million, the premerger reporting threshold under the HSR Act at the time. The company subsequently made a corrective filing, and acknowledged that the transaction should have been reported under the HSR Act. The final judgment settling the complaint required Berkshire Hathaway to pay a civil penalty of \$896,000, based on the period it was in violation of the HSR Act (December 2013 when it acquired the shares via the conversion through February 2014, the end of the waiting period for the corrective filing). This action fell just months after a June 2013 acquisition of \$41 million of voting securities in Symetra Financial Corporation, a transaction that resulted in Berkshire Hathaway holding Symetra voting securities valued at more than \$283.6 million, and which the company did not report under HSR. The FTC did not take action against Berkshire Hathaway following that first HSR Act violation, relying on the firm's assurances that it would implement appropriate HSR monitoring procedures going forward.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/141-0095/berkshire-hathaway-inc">https://www.ftc.gov/enforcement/cases-proceedings/141-0095/berkshire-hathaway-inc</a>
<i>United States v. MacAndrews &amp; Forbes Holdings Inc.</i> , No. 1:13-cv-00926 (D.D.C. 2013).	\$720,000	The FTC alleged that MacAndrews & Forbes violated the HSR Act with respect to the acquisition of voting securities of Scientific Games Corporation (SG) in 2012. Based on a previous acquisition, in February 2007, MacAndrews & Forbes could acquire voting securities of SG for five years (until February 9, 2012) without making a new HSR filing. The defendants failed, however, to make a new HSR filing prior to its June 4 and 5, 2012, acquisitions of 800,000 shares of SG. Since this acquisition occurred outside the grace period, the FTC sought fines.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/121-0203/macandrews-forbes-holdings-inc">https://www.ftc.gov/enforcement/cases-proceedings/121-0203/macandrews-forbes-holdings-inc</a>
<i>United States v. Barry Diller</i> , No. 1:13-cv-01002-GK (D.D.C. 2013).	\$480,000	The FTC alleged that between 2010 and 2012, Diller made a series of unreported acquisitions of Coca-Cola shares resulting in his holding voting securities exceeding the HSR reporting threshold. Diller subsequently made corrective filings, but the commission sought penalties nonetheless because Diller had committed prior violations of the HSR Act in connection with a 1998 acquisition of voting securities in CitySearch Inc.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/121-0179/diller-barry-us">https://www.ftc.gov/enforcement/cases-proceedings/121-0179/diller-barry-us</a>
<i>United States v. Biglari Holdings, Inc.</i> , No. 1:12-cv-01586-RJL (D.D.C. 2012).	\$850,000	The FTC alleged that, at the time of Biglari's acquisitions of more than \$66 million of Cracker Barrel shares, Biglari intended to actively participate in the management of Cracker Barrel, including seeking a seat on the company's board of directors. Note: Biglari only <i>requested</i> representation on the board of directors of Cracker Barrel.	<a href="https://www.ftc.gov/news-events/press-releases/2012/09/biglari-holdings-inc-pay-850000-penalty-resolve-ftc-allegations">https://www.ftc.gov/news-events/press-releases/2012/09/biglari-holdings-inc-pay-850000-penalty-resolve-ftc-allegations</a>

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Case	Fine	Description	Case Files
<i>United States v. Brian L. Roberts</i> , No. 1:11-cv-02240 (D.D.C. 2011).	\$500,000	The FTC alleged that Brian Roberts, the CEO of Comcast, failed to file required notices before acquiring Comcast shares. In 2002, in connection with a merger agreement between Comcast and AT&T Corp., Roberts made an HSR filing, which allowed him to acquire additional voting securities of Comcast through September 16, 2007. Roberts continued to acquire shares into October 2007, but failed to notify the FTC and DOJ. Roberts continued to receive Comcast securities without notifying the agencies through April 2009, at which point he made a corrective filing with the agencies. According to the FTC, Roberts admitted to inadvertent violations of the HSR filing requirements previously, in 1999 and 2000, a factor impacting fine amounts.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/1010034/roberts-brian-l">https://www.ftc.gov/enforcement/cases-proceedings/1010034/roberts-brian-l</a>
<i>United States v. John C. Malone</i> , No. 1:09-cv-01147 (D.D.C. 2009).	\$1,400,000	The FTC alleged that Malone failed to observe the HSR waiting period regarding his acquisition of additional Discovery voting securities in violation of the HSR Act. In May 2005, Malone made a premerger filing with the FTC before acquiring voting securities of Liberty Media Corporation, which at the time was the parent of Discovery Holding. On August 9, 2005, Malone acquired voting securities of Discovery (a different issuer), without making a premerger filing and without observing the required waiting period. He then made additional acquisitions of Discovery voting securities through May 2008. On June 12, 2008, Malone made a corrective filing under the HSR Act in connection with the 2005 Discovery acquisitions. The complaint alleges that on June 14, 2008, just two days after making the corrective HSR filing, and well before the waiting period expired, Malone exercised two options to acquire additional Discovery voting securities.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/0810219/liberty-media-corpora">https://www.ftc.gov/enforcement/cases-proceedings/0810219/liberty-media-corpora</a>
<i>United States v. ESL Partners, L.P. and ZAM Holdings, L.P.</i> , No. 1:08-cv-02175-JDB (D.D.C. 2008).	\$800,000	The FTC alleged that the defendants failed to file prior to acquiring blocks of AutoZone, Inc.'s shares. The investor acquired the target's shares through an investment fund that was managed and directed by an individual with representation on the target's board of directors.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/0510091/esl-partners-lp-zam-holdings-lp-united-states-america-federal">https://www.ftc.gov/enforcement/cases-proceedings/0510091/esl-partners-lp-zam-holdings-lp-united-states-america-federal</a>
<i>United States v. ValueAct Capital Partners, L.P.</i> No. 1:07-cv-02267 (D.D.C. 2008).	\$1,100,000	The FTC alleged that ValueAct failed to file a series of reportable acquisitions between 2003 and 2005. In 2005, ValueAct failed corrective notification forms to report acquisitions of stock of Gartner, Inc., Catalina Marketing Group, and Axiom Corp. In October 2003, ValueAct filed a notification to acquire more than \$50 million, but less than \$100 million, of the voting securities of Gartner. In October 2004, ValueAct and other entities formed Master Fund, which combined their holdings in a non-reportable transaction, but resulted in that entity having more than \$100 million worth of Gartner shares. On February 7, 2005, Master Fund—whose ultimate parent entity was ValueAct—purchased additional Gartner shares in a reportable transaction that brought its total holdings to a value of approximately \$248 million. The second and third alleged violations relate to Master Fund acquisitions of a greater than 10 percent interest in shares of voting securities of Catalina and Axiom. On April 28, 2005, Master Fund made purchases that resulted in it holding more than 10 percent of the outstanding voting securities of both Catalina and Axiom. Neither ValueAct—as the ultimate parent entity of the Master Fund—nor Master Fund filed notice as required by the HSR rules.	<a href="https://www.ftc.gov/enforcement/cases-proceedings/0510204/value-act-partners-lp-united-states-america-ftc">https://www.ftc.gov/enforcement/cases-proceedings/0510204/value-act-partners-lp-united-states-america-ftc</a>



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650 Page Mill Road | Palo Alto, CA 94304-1050 | Tel: (650) 493-9300 | Fax: (650) 493-6811 | email: [wsgr\\_resource@wsgr.com](mailto:wsgr_resource@wsgr.com) | [www.wsgr.com](http://www.wsgr.com)

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