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Insights

THE PERILS OF IGNORING THE HSR ACT: WHY "AVOIDANCE" TACTICS CAN COST YOU MILLIONS

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On July 13, the Federal Trade Commission announced it had levied $12 million in penalties on two companies, settling charges that the companies had intentionally structured an acquisition to avoid U.S. premerger antitrust review under the HSR Act.[1] The combined penalty is the largest ever imposed for failing to make an HSR Act filing. This action signals that HSR Act compliance remains a significant FTC enforcement priority, and that parties structuring potentially reportable transactions should carefully evaluate whether their deals trigger HSR Act reporting requirements and should avoid illegal "avoidance" tactics.

According to the FTC's complaint, Edwards Lifesciences Corp. sought to acquire each of the two companies conducting clinical trials for TAVR-AR devices,[2] JC Medical and JenaValve Technology. Edwards became worried this effort to buy up competing companies would create concerns under U.S. antitrust laws and that an antitrust review could potentially delay, or even thwart, the closing of the transactions. To avoid having to notify the antitrust agencies of the JC Medical transaction, Edwards sought to buy JC Medical from its owner Genesis MedTech for an amount less than the HSR Act "size of transaction" reporting threshold (then $119.5 million) even though Genesis valued JC Medical between $125 and $150 million dollars and wouldn't accept a deal for a lower sum.

Edwards' solution was to pay Genesis $115 million for JC Medical, and separately to make a direct $25 million investment in Genesis. The parties took the position that since these transactions were made separately, there would be no need to make an HSR Act filing for either one since both were under the HSR Act threshold. They closed the acquisition of JC Medical on July 22, 2024, and Edwards made the $25 million investment in Genesis on August 9, 2024.

Edwards also acquired JenaValve on July 23, 2024, a transaction that the FTC challenged in court. During the lawsuit against Edwards and JenaValve, the FTC discovered the transactions between Edwards and Genesis. In the process of investigating, the FTC found emails between Edwards and Genesis that made clear each party believed the JC Medical acquisition and Genesis investment transaction, while purportedly separate, were part of a single transaction. According to the FTC, the parties therefore violated the HSR Act by avoiding an HSR Act filing when one should have been made, leading to this settlement.

There are several important takeaways here for companies involved in merger and acquisition transactions:

FTC looks at substance not form. If your deal satisfies the applicable HSR Act thresholds and is not otherwise exempt, then you must submit an HSR Act filing. It is illegal under antitrust law to structure your transaction specifically to avoid or even to delay an HSR Act filing. In this case, the parties moved some consideration from the purchase price for the target, JC Medical, to an investment in the seller, Genesis, a change in deal form designed to bring the JC Medical acquisition below the HSR Act reporting threshold. As demonstrated by this settlement, the agencies are empowered to and will look through the "form" of a transaction to find its substance, and the consequences of such deliberate avoidance can be significant.

HSR penalties can be severe. The current penalty amount for violating the HSR Act is $53,088 per day. Here, the parties settled on a $10 million civil penalty for Edwards and a $2 million civil penalty for Genesis. The FTC noted that this was lower than the maximum penalty because the defendants were willing to resolve the matter by consent decree and avoid litigation. However, the consent decree also requires Edwards, over the next five years, to give the FTC notice any time it acquires a firm that sells or engages in clinical trials for TAVR-AR devices—even if the deal is far below the HSR Act threshold—as well as wait at least thirty days before closing such a deal.

Do not create documents showing intent to avoid HSR filing. Parties should be mindful of HSR Act reportability rules when discussing deals. The FTC's complaint cited documents showing both parties considered the acquisition and investment to be part of the same transaction, as well as an email from Edwards saying the deal was intentionally designed to be below the HSR Act threshold. The FTC has broad discretion as to when and how it pursues civil penalties for HSR Act violations, and it takes intent into account when deciding to act. Here, the parties' intent to deliberately avoid HSR Act filings was clear, and the FTC imposed the largest HSR Act avoidance-related penalty to date.

Antitrust violations are a priority for enforcement. This enforcement is unlikely to be a one-time occurrence. When discussing the Edwards violation, FTC Chairman Andrew Ferguson said parties attempting similar behavior "should take notice." Under the current administration, both the FTC and the Antitrust Division of the U.S. Department of Justice have attempted to quickly settle possible antitrust violations, with a stated goal of bringing "the best forms of relief available in the fastest form."

This case underlines the importance of getting experienced antitrust counsel involved early in any potentially reportable transaction. HSR Act rules are notoriously complex and experienced counsel such as our BCLP antitrust team can help clients analyze their transactions to avoid common pitfalls and accurately assess whether an HSR Act filing will be required.

**BCLP Summer Associate Harrison Friedman contributed to this client alert.*

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[1] The Hart-Scott-Rodino Antitrust Improvements Act of 1976.

[2] TAVRs are transcatheter aortic valve replacement devices, which use catheters and guidewires to treat heart disease. TAVR-AR is a new use of TAVR devices that allows treatment of aortic regurgitation (a heart condition where the aortic valve fails to close tightly) without surgery.

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