

Antitrust Regulators Continue Focus on HSR Compliance and Private Equity

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In recent months, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) have continued their focus on ensuring compliance with premerger notification and reporting requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”).

By way of brief background, the HSR Act requires parties to a transaction to notify the DOJ and the FTC, through submission of a Notification and Report Form, of mergers or acquisitions that meet a certain size threshold.¹ In connection with their filing obligation, parties must submit certain business documents that may inform regulators of the impact the proposed transaction could have on competition. The HSR form calls for the submission of certain documents “prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the [proposed transaction] with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets” (“item 4(c) documents”).² Certain confidential information

¹ 15 U.S.C. § 18(a).

² Appendix B to 16 C.F.R. Part 803.

memoranda, documents generated by investment bankers, consultants or other third-party advisors, and documents that evaluate or analyze synergies and/or efficiencies must also be provided (“item 4(d) documents”).³ Once parties certify that their premerger filings are complete and accurate, they must observe a 30-calendar day waiting period before the transaction can close.⁴ A company that fails to adhere to any notification provision may be hit with steep civil penalties of up to \$51,744 per day per violation.⁵

Recent HSR Notification Cases

In November 2024, the DOJ sued to block UnitedHealth Group Incorporated (“UnitedHealth”)’s proposed acquisition of Amedisys Inc. (“Amedisys”).⁶ The DOJ also sought civil penalties against Amedisys for several alleged deficiencies in its HSR filings. The DOJ claimed that Amedisys falsely certified that it had complied with its submission obligations under the HSR Act.⁷ Eight months after these deficiencies were raised by the DOJ, Amedisys provided an additional 2.5 million documents and ultimately recertified compliance.⁸ The DOJ claimed that Amedisys was in violation of the HSR Act each day of those eight months, and sought monetary relief for that time.⁹

In August 2024, the DOJ filed a lawsuit against Legends Hospitality Parent Holdings LLC (“Legends”) regarding its proposed acquisition of ASM Global Inc. (“ASM”).¹⁰ According to the DOJ, Legends engaged in illegal premerger coordination (also known as “gun jumping”) by exercising operational control over aspects of ASM during the HSR waiting period. The suit was ultimately settled with Legends agreeing to pay a \$3.5 million civil penalty.¹¹

In January 2025, the FTC announced that several crude oil producers – XCL Resources Holdings, LLC (“XCL”), Verdun Oil Company II LLC (“Verdun”), and EP Energy LLC (“EP”) – agreed to pay \$5.6 million in civil penalties for gun jumping.¹² Similar to the Legends case, the allegation was that the acquiring company assumed operational and decision-making control over the company to be acquired during the mandated waiting period.¹³

³ *Id.*

⁴ 15 U.S.C. § 18(b).

⁵ 16 C.F.R. § 1.98(a).

⁶ DOJ, “Justice Department Sues to Block UnitedHealth Group’s Acquisition of Home Health and Hospice Provider Amedisys,” (Nov. 12, 2024), <https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-groups-acquisition-home-health-and-hospice>.

⁷ Complaint, *United States, et al. v. UnitedHealth Group Incorporated*, No. 1:25-cv-03267-JKB (Nov. 12, 2024) at 30–32.

⁸ *Id.* at 31.

⁹ *Id.* at 7.

¹⁰ DOJ, “Justice Department Secures Settlement of Lawsuit Alleging Illegal Premerger Coordination by Legends Hospitality in Connection with its Acquisition of ASM Global,” (Aug. 5, 2024), available at <https://www.justice.gov/opa/pr/justice-department-secures-settlement-lawsuit-alleging-illegal-premerger-coordination>.

¹¹ Reuters, “DOJ Settles HSR Violation with Legends Hospitality for \$3.5 Million,” (Aug. 6, 2024), available at [https://content.next.westlaw.com/practical-law/document/I3f978b7b541011ef9a5f906d9a270520/DOJ-Settles-HSR-Violation-with-Legends-Hospitality-for-3-5-Million?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)](https://content.next.westlaw.com/practical-law/document/I3f978b7b541011ef9a5f906d9a270520/DOJ-Settles-HSR-Violation-with-Legends-Hospitality-for-3-5-Million?viewType=FullText&transitionType=Default&contextData=(sc.Default)).

¹² FTC, “Oil Companies to Pay Record FTC Gun-Jumping Fine for Antitrust Law Violation,” (Jan. 7, 2025), available at <https://www.ftc.gov/news-events/news/press-releases/2025/01/oil-companies-pay-record-ftc-gun-jumping-fine-antitrust-law-violation>.

¹³ A link to a prior Willkie client alert on the gun jumping cases is available [here](#).

The DOJ Files Case Against KKR

Most recently, on January 14, 2025, the DOJ filed a civil lawsuit in the U.S. District Court for the Southern District of New York against private equity firm KKR & Co. Inc. (“KKR”) for purportedly violating the HSR Act’s notification and reporting requirements.¹⁴ The action highlights the antitrust agencies’ continued focus on the adequacy of HSR filings and the possibility of steep fines for non-compliance, as well as the agencies’ ongoing scrutiny of private equity.¹⁵

The DOJ’s Complaint asserts that KKR failed to make accurate and complete premerger filings in at least sixteen transactions from 2021 to 2022, despite “routinely certifying” that it had done so.¹⁶ The alleged HSR Act violations specifically include:

- **The systematic omission of item 4 documents** – the DOJ alleges that in at least ten transactions, KKR withheld required business documents from its filings.¹⁷
- **The alteration of documents prior to submission to the DOJ** – in at least eight transactions, the DOJ alleges that KKR altered pertinent documents “to delete relevant information in ways that limited the ability of the antitrust agencies” to “assess the antitrust implications of KKR’s proposed transactions.”¹⁸
- **Failure to submit a premerger notification for qualifying transactions** – the DOJ asserts that KKR did not make premerger filings before the closing of two separate acquisitions; KKR claims these oversights were “inadvertent.”¹⁹

From the DOJ’s perspective, KKR’s violations of the HSR Act are systemic.²⁰ The DOJ asserts that KKR failed “to maintain sufficient controls” over its HSR filing practices, inadequately trained its employees, and failed to correct HSR filings even after inquiries were made by outside counsel about potential deficiencies.²¹

The DOJ is seeking monetary relief for the alleged HSR Act violations.²² The DOJ, however, does not currently appear to be seeking to undo any of the identified transactions.²³

¹⁴ DOJ, “Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law,” (Jan. 14, 2025), available at <https://www.justice.gov/opa/pr/justice-department-sues-kkr-serial-violations-federal-premerger-review-law>.

¹⁵ The increased scrutiny of the private equity sector is also evidenced by several actions taken by the agencies just last year, including its public inquiry on serial acquisitions by private equity firms as well as lawsuits filed challenging such actions. A prior Willkie client alert on the subject is available [here](#).

¹⁶ Complaint, *United States v. KKR & Co. Inc., et al.*, No. 1:25-cv-00343 (S.D.N.Y. Jan. 14, 2025) at 7.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 12.

²⁰ *Id.*

²¹ *Id.* at 12–13.

²² *Id.* at 22.

²³ *See id.* at 40.

KKR's Countersuit

KKR, in response, countersued Doha Mekki, the Acting Assistant Attorney General for the DOJ's Antitrust Division, the DOJ, and the FTC, in the U.S. District Court for the District of Columbia on January 14, 2025, arguing the agencies' actions here were representative of a broader pattern of "hostility" towards transactions involving private equity firms.²⁴ The "sole purpose" of the DOJ's lawsuit, KKR asserts, is to "make an example of KKR and thereby chill merger and acquisition activity by imposing strict liability for alleged non-compliance with a confusing and at times contradictory web of rules."²⁵

KKR argues that its alleged HSR Act violations are not violations, but trivial "filing errors" that were ultimately immaterial to any merger review.²⁶ The "vast majority" of transactions, according to KKR, involved either acquisitions in industries the company had no stake in or the selling of companies to another investment firm, "rather than to an industry participant[]."²⁷ KKR also calls attention to the DOJ's "unprecedented and unconstitutional" penalties against the company.²⁸ KKR is seeking declarations from the Court that it did not violate the HSR Act, that the DOJ's and FTC's interpretations of the HSR Act are unconstitutionally vague, and that the penalties sought by said agencies are excessive and violative of the Constitution.

Implications of the Lawsuits

The DOJ/KKR complaints highlight the antitrust agencies' focus – particularly under the Biden administration – on private equity transactions. Absent a significant change in approach under the incoming Trump administration, private equity firms, and other parties, can expect even more scrutiny as dealmakers and the agencies grapple with the more burdensome HSR rules set to go into effect on February 10, 2025.²⁹ The new rules significantly enlarge the obligation to provide item 4(c) and 4(d) documents for filing parties (access to a prior Willkie client alert summarizing the new rules is available [here](#)).

Willkie attorneys have extensive experience with government antitrust investigations and in serving the needs of private equity clients, and are well-positioned to help clients understand and navigate the government's current enforcement approach.

²⁴ Complaint, *KKR & Co. GP LLC, v. Doha Mekki, et al.*, No. 1:25-cv-00096 (D.D.C. Jan. 14, 2025) at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 6.

²⁹ FTC, "Planning for the New HSR Form," (Nov. 12, 2024), available at <https://www.ftc.gov/enforcement/competition-matters/2024/11/planning-new-hsr-form>.

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