

DOJ Allegations that KKR Systematically Failed to Comply With the HSR Act – Highlights Importance of DOJ Corporate Compliance Guidelines



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The Department of Justice (“DOJ”) has alleged in a [complaint](#) filed in the Southern District of New York on January 14, 2025 that KKR & Co. Inc. and certain of its investment advisors and funds (collectively, “KKR”) “systematically flouted the [notification and reporting] requirements of the [Hart-Scott-Rodino Act](#)[1] (“HSR Act” or “Act”) by: (1) failing to make an HSR filing for two transactions; (2) altering documents in HSR filings for eight transactions; and (3) “systematically omitting required documents” in HSR filings for ten transactions. The maximum civil penalty for these violations, according to the DOJ, is greater than \$650 million. DOJ has also reportedly opened a criminal investigation. KKR responded by filing its own complaint against DOJ the same day, seeking a court ruling that it did not violate the HSR Act.

Firms and persons – particularly “serial acquirers” – should not rely on the agencies’ enforcement discretion in seeking civil penalties when evaluating and managing their HSR Act compliance risk. A comprehensive good faith HSR compliance program can be developed within the framework of existing DOJ and FTC guidance.

“Serial” HSR Filers Should Look to Recent DOJ Guidance on Evaluation of Criminal Compliance Programs for Development of HSR Compliance Programs

DOJ alleges that KKR “failed to maintain sufficient controls over its HSR filing practices” and that:

- It provided inadequate training to employees involved in collecting responsive documents and certifying HSR filings;
- Deal teams failed to search the files of certain directors or officers for relevant documents for the HSR filings; and
- Senior executives who were responsible for certifying under penalty of perjury that each HSR filing was true, correct and complete and prepared under that executive’s supervision failed to review complete and final versions of the filings prior to signing the certifications.

DOJ’s [Evaluation of Corporate Compliance Programs](#) (“*Evaluation of Criminal Compliance Programs*”) and [Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#) (“*Evaluation of Antitrust Compliance Programs*”) (collectively “*Compliance Guidance*”) is relevant for designing and implementing an effective HSR compliance program. KKR’s course of conduct (as alleged) appears to fail the three “fundamental questions” DOJ considers in evaluating a corporate compliance program: (1) is it well designed; (2) is the program being applied earnestly and in good faith; that is, is it adequately resourced and empowered to function effectively; and (3) does it work in practice? *Evaluation of Criminal Compliance Programs* at 1-2.

The Compliance Guidance “assist[s] prosecutors in making informed decisions as to whether, and to what extent, [a] corporation’s compliance program was effective.” It is relevant to the investigation, evaluation and settlement of civil antitrust matters and provides a framework for the design of an effective compliance

program. Counsel – whether in-house or outside counsel – may wish to consult it to design and implement an effective compliance program.

The Compliance Guidance identifies nine elements of an effective compliance program: (1) design and comprehensiveness; (2) culture of compliance; (3) responsibility for the compliance program; (4) risk assessment; (5) training and communication; (6) periodic review, monitoring and auditing; (7) confidential reporting structure and investigation process; (8) incentives and discipline; and (9) remediation and role of the compliance program in the discovery of the violation. We [previously discussed](#) each of these nine factors in the December Quorum newsletter.^[2]

Identification and Adoption of Possible Best Practices for the Serial Acquirer

A “serial acquirer” may consider adopting the following practices to better align its HSR compliance efforts with the Compliance Guidance:

- a comprehensive, written HSR compliance program/manual;
- introductory and annual training for personnel with transaction related responsibilities, including personnel who identify and evaluate transaction targets, and who negotiate transactions;
- designation of an internal legal counsel (who reports to the General Counsel or Chief Legal Officer) with responsibility for HSR compliance, with early access to deal-team members, the ability to do (or request) an early evaluation of (a) the structure of the transaction, (b) whether and under what conditions the transaction will be reportable, (c) the substantive antitrust issues associated with the transaction, and (d) the ability and responsibility to manage and oversee the creation, distribution and collection of deal-related documents within the company and among third-party advisors on the transaction;
- a consistent process for the collection and evaluation of documents for possible inclusion with the HSR filing, including procedures for confirming documents have not been missed because of a failure to identify relevant individuals, locations, or mere oversight;
- guidelines to distinguish “draft” documents from final documents, the identification and description of proper document creation principles, and the identification of a central repository for deal-related documents;
- guidelines on the destruction of deal-related documents, including when it is appropriate, when it is not, and what approvals must be sought prior to destruction;
- identification of non-company channels that create opportunities for creation and distribution of documents; *g.*, personal emails, personal devices, and identification of a plan for prohibiting the use of non-company channels, or a process for review of and collection from such channels;
- use of software and AI tools to identify documents, and modifications to documents, as they are circulated within or outside the company;
- one-on-one discussions with deal-team members who may self-search or self-pull documents to confirm their understating of the scope of the request for documents and scope of HSR compliance requirements with respect to the transaction being notified;
- post-transaction, post-filing review and evaluation of HSR compliance efforts;
- confidential, internal reporting channels to HSR compliance designee or General Counsel of intentional disregard of HSR compliance;
- process to monitor potential and/or upcoming filing obligations;
- process to quickly identify and remediate misidentified missed HSR filings; and,

- a process for reviewing and monitoring adherence to the HSR compliance guidelines, and the identification and imposition of penalties for intentional efforts to act in violation of the guidelines.

These suggestions draw from the DOJ's Compliance Guidelines framework, and the FTC's evaluation of post-consummation filings and are suggestions for, and not necessarily requirements of, an effective HSR compliance program. A company may tailor its HSR compliance program to its more general operations and broader legal and regulatory compliance efforts, but the Compliance Guidelines set out a framework against which any such compliance program will likely be evaluated. Deviations from the general framework may require explanation, if a compliance issue comes to the government's attention.

[1] Under the HSR Act, parties involved in proposed mergers, acquisitions of voting securities, unincorporated interests or assets, or other business combinations (e.g., joint ventures, exclusive license deals) that meet certain thresholds must report the proposed transaction to the Antitrust Agencies unless an exemption applies. The parties to a proposed transaction that requires notification under the HSR Act must observe a statutorily prescribed waiting period (generally thirty days) before closing. The jurisdictional thresholds are adjusted on an annual basis. [FTC Announces 2025 Thresholds for Merger Control Filings Under HSR Act and Interlocking Directorates Under the Clayton Act](#) (Jan. 13, 2025). A failure to comply with the HSR Act is subject to a civil penalty for each day a person is not in compliance; at present, the maximum daily civil penalty is slightly over \$53,000. [Adjustments to Civil Penalty Amounts](#), 90 FR 5580 (Jan. 17, 2025).

[2] Bilal Sayyed, *Corporate Compliance Programs: Updated DOJ Guidance in Antitrust Investigations* (Quorum Newsletter, Dec. 2024).