

Fines Imposed for Failure to Make HSR Filings

Two recent enforcement actions demonstrate that U.S. antitrust authorities can and do fine individuals and entities — especially repeat offenders — for failure to comply with U.S. antitrust premerger notification requirements. Fines may be levied even when the acquisition does not raise competitive concerns. Biglari Holdings Inc. (“Biglari”), a restaurant chain owner and investment fund operator, and Clarence L. Werner, founder of a Nebraska-based truckload carrier, agreed to pay \$1.4 million and \$486,900,¹ respectively, to resolve allegations that they violated premerger filing rules by failing to report acquisitions of stock in public companies before closing those transactions.²

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”),³ requires persons contemplating mergers or acquisitions of voting securities, non-corporate interests, or assets that satisfy the size-of-transaction and size-of-person thresholds to notify the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”) and together with the FTC, the “antitrust authorities”) and observe a waiting period before completing those transactions. The HSR Act covers many types of transactions, and its reach is far broader than mergers and acquisitions conferring control. The exercise of options or minority acquisitions of stock on the open market, for example, may be covered if they satisfy these thresholds. For many notifications, buyers must aggregate their current holdings with those to be acquired to determine whether size-of-transaction thresholds have been met. Minority acquisitions that meet the relevant thresholds and are not exempt⁴ require notification under the HSR Act not only for crossing the minimum size-of-transaction threshold — currently \$92 million (\$50 million, adjusted annually) — but also when subsequent thresholds — currently \$184 million (\$100 million, adjusted annually)

¹ Proposed Final Judgment, *United States v. Biglari Holding Inc.*, No. 1:21-cv-03331 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/atr/case-document/file/1458336/download>; Proposed Final Judgment, *United States v. Clarence L. Werner*, No. 1:21-cv-03332 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/atr/case-document/file/1458436/download>.

² Complaint, *United States v. Biglari Holding Inc.*, No. 1:21-cv-03331 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/atr/case-document/file/1458321/download>; Complaint, *United States v. Clarence L. Werner*, No. 1:21-cv-03332 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/opa/press-release/file/1458201/download>.

³ 15 U.S.C. § 18a.

⁴ For example, the HSR Act rules exempt acquisitions resulting in the buyer holding not more than 10% of outstanding voting securities of an issuer if they are made solely for the purpose of investment. 16 C.F.R. § 802.9. However, the antitrust authorities interpret this exemption narrowly and interpret “solely for the purpose of investment” to mean an acquisition when “the person holding or acquiring such voting securities has no intention of participating in the formation, determination, or direction of the basic business decisions of the issuer” (16 C.F.R. § 801(i)(1)), and the issuer is not a competitor. This exemption is not available for directors or officers of the issuer.

Neither Biglari nor Werner qualified for the exemption, according to the complaints. For example, Biglari had previously requested two seats on the Cracker Barrel board of directors. See Complaint, *United States v. Biglari Holding Inc.*, No. 1:21-cv-03331 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/atr/case-document/file/1458321/download>.

and \$919.9 million (\$500 million, adjusted annually)⁵ — are crossed.⁶ These values will increase to \$101 million, \$202 million, and \$1.0098 billion, respectively, effective February 23, 2022.⁷

I. Biglari Fine

The antitrust authorities alleged in the Biglari complaint that, in March 2020, two entities controlled by Biglari acquired 55,141 Cracker Barrel Old Country Store, Inc. (“Cracker Barrel”) voting securities. When aggregated with the Cracker Barrel voting securities Biglari already held (2,000,000, valued at approximately \$155.1 million), Biglari’s holdings of Cracker Barrel equaled approximately \$159.4 million and exceeded the minimum threshold, then \$94 million. Biglari would have been required to file under the HSR Act for acquisitions of additional voting securities from Cracker Barrel most likely because more than five years passed from the date of its previous HSR notification. Biglari admitted that it had not sought advice from HSR counsel prior to the transaction,⁸ even though Biglari had already been fined \$850,000 in September 2012 for failure to comply with premerger reporting laws.⁹ The antitrust authorities emphasized that Biglari had “committed to seeking advice from HSR counsel prior to making future acquisitions of any issuer’s voting securities” that could result in its holdings crossing the HSR thresholds.¹⁰

II. Werner Fine

The antitrust authorities alleged in the Werner complaint that Mr. Werner made several acquisitions of Werner Enterprises, Inc. (“Werner Inc.”) voting securities — from May 2007 through February 2020 — in violation of the HSR Act. On more than five occasions during this timeframe, Werner made acquisitions of voting securities that exceeded the \$100 million, as adjusted threshold.¹¹ Werner made these acquisitions through exercising options, the vesting of restricted stock, and open market purchases. Additionally, Werner made two of these acquisitions in February 2020 after his counsel had already informed the FTC that Werner would likely need to make multiple post-consummation filings.¹²

⁵ Acquirers of minority voting securities may also need to make a notification pursuant to the HSR Act for acquiring more than 25% of the voting securities of an issuer, if the value of voting securities to be held is greater than \$1 billion, as adjusted — currently \$1.8398 billion and to be \$2.0196 billion effective Feb. 23, 2022.

⁶ *Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, 86 Fed. Reg. 7870 (Feb. 2, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-02-02/pdf/2021-02110.pdf>.

⁷ *Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, 87 Fed. Reg. 3541 (Jan. 24, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-01-24/pdf/2022-01214.pdf>.

⁸ Complaint, *United States v. Biglari Holding Inc.*, No. 1:21-cv-03331 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/atr/case-document/file/1458321/download>.

⁹ Press Release, *Biglari Holdings, Inc., to Pay \$850,000 Penalty to Resolve FTC Allegations That it Violated U.S. Premerger Notification Requirements*, Federal Trade Commission (Sept. 25, 2012), available at https://www.ftc.gov/news-events/press-releases/2012/09/biglari-holdings-inc-pay-850000-penalty-resolve-ftc-allegations?utm_source=govdelivery.

¹⁰ Complaint, *United States v. Biglari Holding Inc.*, No. 1:21-cv-03331 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/atr/case-document/file/1458321/download>.

¹¹ Complaint, *United States v. Clarence L. Werner*, No. 1:21-cv-03332 (D.D.C. Dec. 22, 2021), available at <https://www.justice.gov/opa/press-release/file/1458201/download>. On five occasions from 2007 to 2020, Werner acquired Werner Inc. voting securities — through open market purchases or the vesting of awards — that crossed HSR thresholds without making HSR filings.

¹² *Id.*

FTC Bureau of Competition Director Holly Vedova emphasized that “[s]everal of Mr. Werner’s acquisitions were large open-market purchases,”¹³ and that Werner, as director of Werner Inc., “should have realized that he might have regulatory obligations and sought legal advice.”¹⁴ According to Vedova, “[e]ven more concerning is the fact that he made some of his acquisitions after he learned that some of his prior purchases violated the antitrust laws.”¹⁵

III. Implications

The penalties for technical violations of the HSR Act reaffirm that the antitrust authorities will not hesitate to fine individuals and entities who fail to make required premerger filings — especially repeat violators — even when the authorities do not bring accompanying charges alleging that the acquisition is likely to lessen competition or tends to create a monopoly.¹⁶ Acquisitions of voting securities, including on the open market or through an executive compensation plan, should be carefully monitored to determine whether purchasing, exercising, granting, or vesting of such instruments crosses an HSR Act threshold and requires a notification. The HSR Act and related rules are complex, include many exemptions and exceptions, and at times require the aggregation of pre-acquisition holdings (as demonstrated by these fines) and reporting of subsequent acquisitions when a secondary threshold is crossed. Therefore, counsel should be consulted with respect to any particular transaction.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (Partner) at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow (Counsel) at 212.701.3725 or lrackow@cahill.com; or Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; or email publications@cahill.com.

¹³ The Werner complaint also highlighted this concern, stating that “in particular for very large open market acquisitions, it is not excusable negligence to be unaware of HSR Act legal requirements.” *Id.*

¹⁴ Press Release, *FTC Fines Clarence L. Werner, Founder of the Truckload Carrier Werner Enterprises, Inc. for Repeatedly Violating Antitrust Laws*, Federal Trade Commission (Dec. 22, 2021), available at https://www.ftc.gov/news-events/press-releases/2021/12/ftc-fines-clarence-l-werner-founder-truckload-carrier-werner?utm_source=govdelivery.

¹⁵ *Id.*

¹⁶ The civil penalties for premerger filing notification violations under the HSR Act are now \$46,517 per day. *Adjustments to Civil Penalty Amounts*, 87 Fed. Reg. 1070 (Jan. 10, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-01-10/pdf/2022-00213.pdf>.

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