

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2025

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins
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CLASS 3 HOMEWORK ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email no later than 3:30 pm on Tuesday, September 2
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 3
Calls for a memorandum of law to the client

Assignment

You are an associate at Able & Baker LLP working with partner Margaret Chen. Elaine Porter, General Counsel of Stonebridge Technologies, Inc., has requested that the firm prepare a memorandum of law outlining the reporting and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). The client has not asked for an analysis of substantive antitrust issues.

The client explained that it has agreed to purchase additional common stock of another company for an acquisition price equal to its market price of approximately \$100 million. The client also already holds common stock valued at over \$50 million at current prices. The target company is an industrial company operating solely in the United States. Its common stock, which is publicly traded on the New York Stock Exchange, is the only stock with current voting rights. The target company has annual net sales exceeding \$800 million. Chen tells you that the client itself has annual net sales of approximately \$3.5 billion.

The client asks that the memorandum be tailored to these facts.

If you have any questions, send me an email.

THE INSTRUCTOR'S ANSWER FOLLOWS:

Note: This would be a typical assignment given to an associate in a law firm. The instructor's answer follows the form of a reasoned memorandum of law that a partner in the firm would expect. It does the analysis "by the numbers," with each requirement unpacked using the definitions and tests of the HSR Act and its implementing regulations. It also contains the essential privilege legend at the top, claiming both attorney-client privilege and attorney opinion work product protection. You should have been able to write a similar memorandum using the Unit 2 primary source materials and the class notes, with two exceptions. First, I did not give you the citations to the specific implementing rules, so you could not have included those footnotes. Second, I did not give you a complete list of the exemptions, so you could not conclude that, in addition to the exemptions listed in the class notes, no other exemption would apply to the transaction.

ABLE & BAKER LLP

To: Elaine Porter, Esq.
General Counsel, Stonebridge Technologies, Inc.
FROM:
DATE: September 5, 2025

Application of the HSR Act

You have asked us to prepare a memorandum of law describing the reporting and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act)¹ for the following contemplated transaction. The client is considering purchasing approximately \$100 million of the common stock of another company, in which the client already holds common stock valued at over \$50 million at current prices. The target company is an industrial company operating solely in the United States. Its common stock is the only stock with current voting rights. The target company has annual net sales exceeding \$800 million. The client itself has annual net sales of approximately \$3.5 billion.

The HSR Act requires parties to certain mergers and acquisitions to notify the Federal Trade Commission (FTC) and the Department of Justice (DOJ) and to observe a statutory waiting period before closing, so the agencies can assess potential competitive concerns. The initial waiting period is 30 calendar days, except for cash tender offers or certain bankruptcy transactions, where the initial waiting period is 15 calendar days. The initial waiting period can expire due to the passage of time, may be terminated early at the agency's discretion, or be extended if the reviewing agency issues the transacting parties a Request for Additional Information and Documentary Material (commonly known as a "second request").²

The HSR Act's reporting and waiting period requirements apply to an acquisition if three conditions are satisfied:

¹ Clayton Act § 7A, 15 U.S.C. § 18a.

² A "second request" is a formal demand that the acquiring and acquired persons produce additional materials that the reviewing agency can issue when the agency requires more information to evaluate the competitive effects of a proposed reportable acquisition. The agency must issue any second request prior to the expiration of the initial waiting period, or it loses the opportunity to do so. When the agency issues a second request, the HSR Act extends the waiting period until 30 days—or 10 days in the case of a cash tender offer or certain bankruptcy transactions—after all transacting parties have made a proper response to their respective second requests. Second requests are typically extensive, often requiring the production of hundreds of thousands of documents, data compilations, and written responses to detailed interrogatories covering topics such as market definition, competitive dynamics, efficiencies, and the business rationale for the transaction. The second request process can add four to ten months or more to the merger review timeline and represents a significant escalation in the government's investigation of the proposed deal. A second request is not compulsory process: the parties do not have to submit the requested materials. However, unless and until all parties comply with their respective second requests, the HSR Act waiting period does not expire and the reportable transaction cannot be closed.

1. The transaction meets the size-of-transaction test and, where required, the size-of-person test
2. No statutory or regulatory exemption applies
3. For acquisitions of voting securities, the acquiring person will, as a result of the acquisition, hold an amount sufficient to cross a notification threshold specified in the rules.

The dollar values in these tests are adjusted annually.³ The analysis applies the HSR aggregation and valuation rules to what the acquirer will hold, using the valuation date specified by the rules. Parties usually perform this at the time of filing, but reportability ultimately turns on whether the applicable tests are met at the time of consummation.

For the reasons stated below, the contemplated transaction will be subject to the HSR Act's reporting and waiting period requirements before Stonebridge can purchase the stock.⁴

I. Size of Person/Size of Transaction Test

The law. The HSR Act requires premerger notification for transactions that satisfy the "size of transaction" test, which is met when the acquiring person will hold voting securities, assets, or non-corporate interests of the acquired person valued in excess of \$126.4 million for 2025.⁵ The HSR Act defines "voting securities" as any securities that, at present or upon conversion, entitle the holder to vote for the election of directors of the issuer (or, if the issuer is not a corporation, of individuals exercising similar functions).⁶ Under the HSR Rules, the value of the voting securities that an acquiring person will hold as a result of an acquisition is calculated by adding the value of the voting securities to be acquired to the value of the voting securities of the same issuer that the acquiring person already holds.⁷ The value of the voting securities to be acquired, if they are publicly traded, is the greater of their acquisition price (if determinable) or their market price (defined by the HSR Rules as the lowest closing quotation within the prescribed 45-day period); if the acquisition price has not been determined, the value is the market price.⁸ The value of publicly traded voting securities already held is their market price (as defined above), or if a market price is not available, their fair market value.⁹

In 2025, for transactions valued between \$126.4 million and \$505.8 million, the size of person test must also be satisfied, which generally requires that one party have annual net sales or total

³ Beginning in FY 2005, the HSR Act reporting thresholds are adjusted annually by the percentage changes in the gross national product during the prior fiscal year compared to the gross national product for the fiscal year ending September 30, 2003. Pub. L. No. 106-553, § 630(b), 114 Stat. 2762, 2762A-109-10 (effective February 1, 2001) (codified at 15 U.S.C. § 18a(a)(2)).

⁴ All dollar thresholds cited in this memorandum reflect the HSR Act values in effect for calendar year 2025. Each January, the FTC publishes inflation-adjusted thresholds for the year, typically with an effective date in late January or early February. If the contemplated acquisition closes after the 2026 thresholds take effect, those values will govern. Given the size of the transaction and the parties, and the expected rate of inflation during 2025, the acquisition almost certainly will remain reportable under the 2026 thresholds.

⁵ Clayton Act § 7A(a)(2), 15 U.S.C. § 18a(a)(2) (original thresholds); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 Fed. Reg. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025).

⁶ 15 U.S.C. § 18a(a)(2); *see* HSR Rule 801(f), 16 C.F.R. § 801.1(f)(1).

⁷ HSR Rule 801.13(a)(1), 16 C.F.R. § 801.13(a)(1).

⁸ HSR Rules 801.10(a)(1), 801.10(c), 16 C.F.R. §§ 801.10(a)(1), 801.10(c).

⁹ HSR Rules §§ 801.13(a)(2), 801.10(c), 16 C.F.R. §§ 801.13(a)(2), 801.10(c).

assets of at least \$252.9 million and the other party have annual net sales or total assets of at least \$25.3 million.¹⁰ Transactions valued in excess of \$505.8 million are reportable regardless of the size of the parties, subject to applicable exemptions.¹¹

A transaction that satisfies the size-of-transaction test and, where applicable, the size-of-person test is called *prima facie reportable* under the HSR Act.

Application to the contemplated transaction. Both the shares already held and the additional shares to be acquired are the issuer's common stock with present voting rights, so they are voting securities for HSR purposes. The issuer's common stock is listed on the New York Stock Exchange, a national securities exchange, so it is publicly traded and the valuation rules for publicly traded securities apply. Under those rules, the value of the block to be acquired is the greater of its determinable acquisition price or its market price as defined by the rules, and the value of the block already held is its market price (or fair market value if no market price is available). Here, the facts indicate that the acquisition price is equal to the market price of approximately \$100 million, so the value of the to-be-acquired block is also \$100 million. The already-held block is valued at market price under the rules and is over \$50 million. Aggregating those amounts, Stonebridge Technologies will hold about \$150 million of the target's voting securities as a result of the acquisition. This value exceeds the 2025 size-of-transaction threshold of \$126.4 million but is below \$505.8 million, so the size-of-person test also applies. With Stonebridge at approximately \$3.5 billion in annual net sales and the target at over \$800 million, both parties exceed the applicable size-of-person thresholds.

On these facts, the transaction is *prima facie* reportable.

II. Exemptions

The law. Even if a transaction meets the HSR Act's size-of-transaction and, where applicable, size-of-person tests, the HSR Act and its implementing rules specify several exemptions that exempt the transaction from the Act's reporting and waiting period requirements. The most commonly invoked exemptions are:

1. *Intraperson transactions.* An acquisition is exempt if the acquiring and acquired persons are the same ultimate parent entity. In other words, transfers of assets or voting securities wholly within a corporate family are not reportable.
2. *Investment-only acquisitions.* An acquisition of 10 percent or less of an issuer's outstanding voting securities (15 percent for certain institutional investors) is exempt if the acquirer has a purely passive investment intent. The exemption is voided if the acquirer has any role in the management of the issuer, such as serving on the board of directors.
3. *Convertible voting securities.* The acquisition of convertible securities is exempt so long as they do not carry present voting rights. They become relevant only when converted into voting securities with present voting power.

¹⁰ Clayton Act § 7A(a)(2)(B), 15 U.S.C. § 18a(a)(2)(B).

¹¹ Clayton Act § 7A(a)(2)(A), 15 U.S.C. § 18a(a)(2)(A).

4. *Acquisitions of non-U.S. assets.* Acquisitions of assets located outside the United States are exempt unless those assets generated sales in or into the United States exceeding \$126.4 million (2025 threshold) in the most recent fiscal year.
5. Acquisitions of non-U.S. voting securities by non-U.S. persons. Such acquisitions are exempt if they do not confer control over a U.S. issuer and do not involve U.S. assets or sales in or into the United States above \$126.4 million (2025 threshold).

Application to the contemplated transaction. None of these exemptions applies to the contemplated transaction. The acquisition is not intraperson because Stonebridge and the target are not part of the same corporate family. It is not an investment-only acquisition because Stonebridge will hold well over 10 percent of the target's outstanding voting securities and therefore does not qualify even if its investment is for purely passive purposes. The shares to be acquired are common stock with present voting rights, not convertible securities. The target is an industrial company operating solely in the United States, so neither the exemption for non-U.S. assets nor the exemption for non-U.S. voting securities by non-U.S. persons is implicated.

We have also examined the less common exemptions, and none of them apply.

III. Notification Thresholds

The law. Even if a transaction satisfies the size-of-transaction and size-of-person tests and no exemption applies, an acquisition of voting securities triggers the HSR Act's reporting and waiting period requirements only if it will cause the acquiring person to cross a notification threshold. The 2025 thresholds are \$126.4 million, \$252.9 million, and \$1.264 billion in value, as well as 25 percent of an issuer's voting securities if that stake is valued above \$2.539 billion and 50 percent of an issuer's voting securities if valued above \$126.4 million. After the HSR Act waiting period has expired or been terminated, the acquiring person has one year to cross the threshold specified in that filing.¹² If the filed-for threshold is not crossed within one year, the clearance lapses, and a new filing is required before crossing that threshold for which the original filing was made. If the threshold is crossed within that one-year window, the acquirer has an exemption, for the five years from the expiration of the waiting period, to acquire additional voting securities of the same issuer up to but not beyond the next threshold without a new filing.¹³ After five years, the purchase of *any* additional voting securities of the issue will require the filing of a new HSR form at whatever threshold the acquiring person would cross as a result of the acquisition (including the threshold of the original filing).

Application to the contemplated transaction. Applying these rules, Stonebridge Technologies will hold approximately \$150 million of the target's publicly traded voting securities as a result of the contemplated acquisition. This total exceeds the \$126.4 million notification threshold, so the transaction requires an HSR filing at that threshold level. After the waiting period expires, Stonebridge will have one year to complete the acquisition and cross the \$126.4 million threshold. Once Stonebridge crosses that threshold, it will then have five years from the expiration of the waiting period to acquire additional voting securities of the same issuer without making a new HSR filing, provided its aggregate holdings do not reach or exceed the next notification threshold of \$252.9 million (as adjusted annually for inflation). The 25% voting

¹² HSR Rule 803.7(a), 16 C.F.R. § 803.7(a).

¹³ HSR Rule 802.21(a), 16 C.F.R. § 802.21(a).

securities threshold does not apply here because it only becomes relevant when the resulting holdings are valued at more than \$2.539 billion (as adjusted).

IV. Conclusion

Because Stonebridge will hold approximately \$150 million of the target's voting securities as a result of the contemplated acquisition, the transaction exceeds the 2025 \$126.4 million notification threshold and, given the size of both parties, is prima facie reportable under the HSR Act. No statutory or regulatory exemptions apply. Accordingly, the transaction requires the parties to file premerger notification and to observe the applicable waiting period before Stonebridge can purchase the securities. After clearance of this filing, Stonebridge will have one year to consummate the acquisition at the \$126.4 million threshold and, once crossed, will have five years to acquire additional voting securities of the same issuer without a further filing, provided its aggregate holdings remain below the next notification threshold of \$252.9 million (as adjusted for inflation).

Should you have any questions or wish to discuss this matter in greater detail, please feel free to contact us.