



THE REGULATORY FUNDAMENTALS GROUP LLC

## Federal Reports All Investors Must File

September 2016

### ABOUT RFG

RFG helps endowment investment offices and other clients develop cost-effective, enterprise-focused solutions to identify, and stay current with, the complex laws, regulations and transaction terms that impact their day-to-day operations. RFG represents clients which have more than \$100 billion in assets under management, including a consortium of the nation's leading endowment investment offices.

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# Introduction

The U.S. Government requires investors to file many different types of reports, and these requirements apply to charitable organizations. Different types of investments will affect what reports need to be filed and which regulators receive the filings. If reports are not made in a satisfactory manner, fines may result.

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## What Reports Do Non-Profits Need to Submit?

Non-profit organizations may need to submit reports to the U.S. government when they hold financial assets, make certain types of investments, or engage in other financial activities. These reports are required of all investors, and charitable organizations are not excluded.

Also of note, the reports are often required to be filed on an aggregated basis, across investments and staff silos. For this reason, a process for the filing of required reports (and the calculation of initial filing thresholds) needs to incorporate both direct investments and managed accounts, regardless of how or where an organization holds the assets (i.e., in its endowment or in another asset account). Complicating the issue, many managed account agreements fail to address the issue of how information a charity needs to complete a required report is to be furnished to the charity organization.

In general the required reports fall into the following categories:

- Federal securities requirements including those that apply when an organization has beneficial ownership of a specified level of a publicly-traded security.
- Requirements imposed by the U.S. Treasury Department.

- Requirements imposed by the Commerce Department.
- Forms imposed by the Commodity Futures Trading Commission that apply to swaps, as well as other commodities.
- Requirements imposed under the Hart-Scott-Rodino Act.

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## How to Follow Reporting Instructions

The reports and their instructions can be complex and difficult to understand. To illustrate this we discuss below a filing required by the Hart-Scott-Rodino Notification and Report Form.

If Charity X acquires \$78.5 million of voting securities of Corporation A, which is 8% of the outstanding voting securities of that corporation, it may need to do a HSR filing. This may be the case even if the securities are purchased in a managed account for which an investment adviser has investment discretion.

Considerations include, but are not limited to:

1. That the charity has passed the threshold for the “Size of the Transaction Test”<sup>1</sup> in the HSR analysis.
2. Whether the charity may rely on the “solely for investment purposes” exception since its holdings are less than 10% of Corporation A’s outstanding voting securities. However, this exception will only be available if the investor has “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>2</sup> (Note that actions concerning the issuer may subject an investor to scrutiny and render the exception unavailable: In an October 2016 informal interpretation from the FTC’s Premerger Notification Office, the FTC advised it would be inconsistent with “passive intent” for an investor to submit a letter to the target of a publicly announced merger expressing concern about the terms of the merger agreement and highlighting various alternative transaction structures.)

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<sup>1</sup> This threshold is adjusted annually. For 2016 it is \$78.2 million.

<sup>2</sup> Rule 801.1(i)(1).

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## The “Broken Window” Policy

In recent years, regulators have been pursuing a policy of prosecuting “broken windows” and reporting failures have steep fines. As of July 2016, failure to comply with the HSR Act can lead to a civil penalty of up to \$40,000 per day, for each day between consummation of the reportable transaction and the expiration of the HSR waiting period on the corrected filing. This can rapidly add up to a very significant number. With some types of reports, willful failure to file can result in imprisonment for up to one year in addition to criminal and civil fines.

***Regulators use a policy of prosecuting “broken windows,” and HSR reporting failures can lead to fines up to \$40,000 per day.***

As noted above, the Hart-Scott-Rodino filing discussed above is only one of numerous potential filing requirements a charitable organization may need to satisfy. RFG has created a chart for its clients which summarizes reporting requirements, *“Endowment Regulatory Reporting Requirements at a Glance”* and has substantial additional information on the reports discussed in the guide.

## Conclusion

Many federal reports exist and steep consequences may result when there is failure to report. Nonprofits need to understand what investment activities trigger reports and make sure required reports are filed in an accurate manner.

*If you are interested in a further discussion of these issues, please reach out to us:*

*The Regulatory Fundamentals Group LLC  
1115 Broadway, 11<sup>th</sup> Floor  
New York, NY 10010  
[Information@RegFG.com](mailto:Information@RegFG.com)  
212-537-4058 x 1*

*The following page provides information about how RFG supports your peers.*



## Regulatory Risk Management for Endowments and Foundations

Did you know that your investment activities are subject to multiple U.S. and foreign regulations?

### Are You Comfortable That...

- Your compliance program is in line with peer group standards?
- You have fully satisfied all federal filing and reporting requirements?
- Managers you allocate to have kept up-to-date with applicable regulatory requirements?

### If Not, Here is Your Solution

Join a consortium of your peers, the leading U.S. endowments and foundations, already using RFG Pathfinder®, and receive:

- **A baseline** of regulatory requirements.
- **Weekly thought leadership alerts** that provide insights on developments and future trends.
- **Peer-to-peer communications** through webinars and conferences, which allow you to share questions and knowledge.

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- “We have **gotten a lot** out of our partnership with RFG, and we think others can too.”
- “As a new client, so far, **you have exceeded expectations.**”
- “The forum you provide is **HUGELY beneficial...**”
- “Your work on reporting requirements has been **outstanding.**”
- “The summaries you prepared on the Congressional inquiry...were circulated to our CFO and others in the organization...**they were just what we needed.**”