

HSR Pre-Merger Reporting Threshold Increased to \$65.2 Million

The thresholds for the premerger reporting of proposed acquisitions to United States antitrust authorities under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended (the “HSR Act”), will be increased effective February 12, 2009.¹ The minimum size-of-transaction threshold will be \$65.2 million.² In addition, the civil penalties for premerger filing notification violations under the HSR Act will be increased from \$11,000 to \$16,000 per day effective February 9, 2009.³

The HSR Act requires all persons contemplating certain mergers or acquisitions of voting securities or assets, which meet or exceed the size-of-transaction and size-of-person thresholds in the Act, to notify the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice and observe a waiting period before completing such transactions. Pursuant to the 2000 amendments to the Act, the HSR thresholds are adjusted annually, based on the change in gross national product.

Under the new thresholds, transactions that will result in one person holding \$65.2 million (originally \$50 million) or more of another person’s assets, voting securities or non-corporate interests may be subject to the HSR Act’s premerger reporting requirements.

The HSR rules are complex. They include many exemptions and exceptions and at times require the aggregation of pre-acquisition holdings and reporting of subsequent acquisitions when a secondary threshold is crossed. Therefore, the rules should be carefully reviewed with respect to any particular transaction.

In addition, the agencies have brought HSR enforcement actions even in situations that do not raise substantive antitrust concerns, including acquisitions of minority positions by investment firms and financial institutions. For example, the FTC recently settled charges alleging that two investment funds failed to comply with filing requirements under the HSR Act prior to acquiring voting securities of a corporation.⁴ The commission stated that the funds did not qualify for the HSR Act’s investment-only exemption because one fund had indirect representation on the corporation’s board and the other fund held over 10 percent of the corporation’s voting securities.

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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, please do not hesitate to call or e-mail Elai Katz at (212) 701-3039 or ekatz@cahill.com; Laurence T. Sorkin at (212) 701-3209 or lsorkin@cahill.com; or Lauren Rackow at (212) 701-3725 or lrackow@cahill.com.

¹ 74 Fed. Reg. 1687 (Jan. 13, 2009).

² Attached as Appendix A is a table indicating the adjusted threshold figures for the size-of-transaction and size-of-person filing thresholds and related filing fees.

³ 74 Fed. Reg. 857 (Jan. 9, 2009).

⁴ *United States v. ESL Partners, L.P. and ZAM Holdings, L.P.*, No. 1:08-cv-02175 (D.D.C. Dec. 15, 2008), available at www.ftc.gov. The two investment funds agreed to pay penalties totaling \$800,000 to settle the FTC’s charges. Our Firm Memorandum dated December 17, 2008 discussing this case is available at http://www.cahill.com/news/memoranda/000135/_res/id=sa_File1/Investment%20Funds%20Fined%20For%20Violating%20HSR%20Act.pdf.

Appendix A

TEST	HOW APPLIED ⁵	ORIGINAL THRESHOLD	ADJUSTED THRESHOLD (as of February 12, 2009)
Size-of-transaction	Test is satisfied if, as a result of the transaction, the acquiring person would hold voting securities or assets of the acquired person in excess of \$50 million (as adjusted).	\$50 million	\$65.2 million
Size-of-person	Test is satisfied if transaction is between \$50 million (as adjusted) and \$200 million (as adjusted), and either the acquiring or acquired person has annual net sales or total assets of at least \$100 million (as adjusted) and the other has annual net sales or total assets of at least \$10 million (as adjusted). If acquired person is not engaged in manufacturing, test applies only if acquired person has in excess of \$10 million (as adjusted) of assets.	\$10 million \$100 million	\$13 million \$130.3 million
Size-of-person	Nonexempt transactions are reportable, regardless of whether size-of-person test is satisfied, if transaction is valued in excess of \$200 million (as adjusted). ⁶	\$200 million	\$260.7 million
Assessment of Filing Fees	\$45,000 filing fee required for transactions valued at less than \$100 million (as adjusted). \$125,000 filing fee required for transactions valued at \$100 million (as adjusted) or more but less than \$500 million (as adjusted). \$280,000 filing fee required for transactions valued at \$500 million (as adjusted) or more.	\$100 million \$500 million	\$130.3 million \$651.7 million

⁵ Original threshold shown for reference. As adjusted threshold will apply as of February 12, 2009.

⁶ Nonexempt transactions valued at or less than \$200 million (as adjusted) are reportable if both the size-of-person and the size-of-transaction tests are satisfied. Nonexempt transactions valued above \$200 million (as adjusted) are reportable even if the size-of-person test is not met.