

FTC Revised Antitrust Thresholds:
HSR Pre-Merger Reporting Threshold Increased to \$70.9 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”),¹ will be increased effective February 11, 2013.² Pursuant to amendments to the HSR Act adopted in 2000, the thresholds are adjusted annually, based on the change in gross national product. The minimum size-of-transaction threshold will be \$70.9 million.³

Under the new thresholds, transactions that will result in one person holding \$70.9 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 Act requires all persons contemplating mergers or acquisitions of voting securities or assets that meet or exceed the size-of-transaction and size-of-person thresholds in the Act, to notify the Federal Trade Commission and the Antitrust Division of the Department of Justice, pay a filing fee of \$45,000 to \$280,000 (depending on the size of the transaction)⁴ and observe a waiting period before completing those transactions. Once the agencies receive the required HSR forms and the filing fee, a 30-day waiting period commences (in most cases) and the transaction cannot close until the expiration or early termination of the waiting period—or, in the event the waiting period is extended by issuance of a “Second Request” for additional materials when significant antitrust concerns exist, expiration of an additional 30-day waiting period following substantial compliance with the Second Request.

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.⁵

The FTC also revised thresholds for interlocking directorates under Section 8 of the Clayton Antitrust Act of 1914, as amended, which prohibits, with certain exceptions, the same person from serving as a director or officer of two competing corporations whose combined sales exceed certain thresholds. Competing corporations are covered if each one has capital, surplus and undivided profits in aggregate more than \$28,883,000 (originally \$10,000,000), with the exception that no corporation is covered if the competitive sales of either corporation are less than \$2,888,300 (originally \$1,000,000).

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¹ 15 U.S.C. § 18a.

² 78 Fed. Reg. 2406 (Jan. 11, 2013), available at <https://federalregister.gov/a/2013-00378>.

³ 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.

⁴ The FTC noted that although the filing fee thresholds are revised annually, the actual filing fees are not similarly indexed and have not been adjusted for inflation in over a decade.

⁵ The civil penalties for premerger filing notification violations under the HSR Act remain at \$16,000 per day.

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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; or Laurence T. Sorkin at (212) 701-3209 or lsorkin@cahill.com; or Lauren Rackow at (212) 701-3725 or lrackow@cahill.com.

Appendix A

HSR TEST	HOW APPLIED ⁶ (as of February 11, 2013)
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 \$70.9 million (originally \$50 million).
Size-of-person	Test is satisfied if transaction is between \$70.9 million (originally \$50 million) and \$283.6 million (originally \$200 million), and either the acquiring or acquired person has annual net sales or total assets of at least \$141.8 million (originally \$100 million) and the other has annual net sales or total assets of at least \$14.2 million (originally \$10 million). If acquired person is not engaged in manufacturing, test applies only if acquired person has in excess of \$14.2 million (originally \$10 million) of assets.
Size-of-person	Nonexempt transactions are reportable, regardless of whether size-of-person test is satisfied, if transaction is valued in excess of \$283.6 million (originally \$200 million). ⁷
Assessment of Filing Fees	<p>\$45,000 filing fee required for transactions valued at \$70.9 million (originally \$50 million) or more but less than \$141.8 million (originally \$100 million).</p> <p>\$125,000 filing fee required for transactions valued at \$141.8 million (originally \$100 million) or more but less than \$709.1 million (originally \$500 million).</p> <p>\$280,000 filing fee required for transactions valued at \$709.1 million (originally \$500 million) or more.</p>

⁶ Original threshold shown for reference. As adjusted threshold will apply as of February 11, 2013.

⁷ Nonexempt transactions valued at or less than \$283.6 million (originally \$200 million) are reportable if both the size-of-person and the size-of-transaction tests are satisfied. Nonexempt transactions valued above \$283.6 million (originally \$200 million) are reportable even if the size-of-person test is not met.