

FTC Revised Antitrust Thresholds: HSR Pre-Merger Reporting Threshold Increased to \$84.4 Million

The Federal Trade Commission (“FTC”) announced its annual revision to the thresholds for the premerger reporting of proposed acquisitions to the United States antitrust authorities under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”).¹ The HSR thresholds are adjusted annually, based on the change in gross national product. The minimum size-of-transaction threshold will be \$84.4 million, effective February 28, 2018.²

Under the new thresholds, transactions that will result in one person holding more than \$84.4 million (originally \$50 million) 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 satisfy the size-of-transaction and size-of-person thresholds in the Act, to notify the FTC 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) 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 or a negotiated schedule 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. The HSR Act and rules may require notification for acquisitions of minority holdings of voting securities, and the antitrust agencies may fine investors who do not make required notifications.³ Therefore, the rules should be carefully reviewed with respect to any particular transaction.⁴

¹ 15 U.S.C. § 18a.

² 83 Fed. Reg. 4051 (Jan. 29, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-01-29/pdf/2018-01579.pdf>. 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 In two separate actions announced last year, two investors agreed to pay \$180,000 and \$720,000, respectively, to settle charges that the investors violated the HSR Act by failing to report purchases of voting securities. Press Release, Federal Trade Commission, *In Two Separate Actions, FTC Charges Investors with Violations of U.S. Premerger Notification Requirements* (Jan. 17, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/01/two-separate-actions-ftc-charges-investors-violations-us>.

⁴ The civil penalties for premerger filing notification violations under the HSR Act are \$41,484 per day. 83 Fed. Reg. 2902 (Jan. 22, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-01-22/pdf/2018-00979.pdf>. The FTC must adjust these penalties for inflation annually each January. *Id.*

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The FTC also revised thresholds for restrictions on interlocking directorates under Section 8 of the Clayton Antitrust Act of 1914, as amended, which prohibits 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 of more than \$34,395,000 (originally \$10,000,000), with the exception that no corporation is covered if the competitive sales of either corporation are less than \$3,439,500 (originally \$1,000,000).⁵

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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 Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

⁵ 83 Fed. Reg. 4048 (Jan. 29, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-01-29/pdf/2018-01578.pdf>.

Appendix A

| HSR TEST | HOW APPLIED ⁶ (as of February 28, 2018) |
|---------------------------|---|
| 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 \$84.4 million (originally \$50 million). |
| Size-of-person | Test is satisfied if transaction is valued in excess of \$84.4 million (originally \$50 million) but is \$337.6 million (originally \$200 million) or less, and either the acquiring or acquired person has annual net sales or total assets of at least \$168.8 million (originally \$100 million) and the other has annual net sales or total assets of at least \$16.9 million (originally \$10 million). If acquired person is not engaged in manufacturing, test applies only if acquired person has total assets of at least \$16.9 million (originally \$10 million). |
| Size-of-person | Nonexempt transactions are reportable, regardless of whether size-of-person test is satisfied, if transaction is valued in excess of \$337.6 million (originally \$200 million). ⁷ |
| Assessment of Filing Fees | <p>\$45,000 filing fee required for transactions valued at more than \$84.4 million (originally \$50 million) but less than \$168.8 million (originally \$100 million).</p> <p>\$125,000 filing fee required for transactions valued at \$168.8 million (originally \$100 million) or more but less than \$843.9 million (originally \$500 million).</p> <p>\$280,000 filing fee required for transactions valued at \$843.9 million (originally \$500 million) or more.</p> |

⁶ Original threshold shown for reference. As adjusted threshold will apply as of February 28, 2018.

⁷ Nonexempt transactions valued at or less than \$337.6 million (originally \$200 million), but more than \$84.4 million (originally \$50 million) are reportable if both the size-of-person and the size-of-transaction tests are satisfied. Nonexempt transactions valued above \$337.6 million (originally \$200 million) are reportable even if the size-of-person test is not met.