Updates
January 30, 2018

FTC Increases HSR and Clayton Act Thresholds

The Federal Trade Commission (FTC) last week announced that the reporting thresholds under Section 7A of the Clayton Act, known as the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 (the Act), will be increased. The Act requires all parties to certain transactions, including mergers and acquisitions that meet or exceed the Act's jurisdictional thresholds, to notify the FTC and the Antitrust Division of the U.S. Department of Justice of their intentions and to wait a designated period of time before consummating those transactions. The amendments to the Act, passed in 2000, require the FTC to revise the Act's jurisdictional and filing fee thresholds annually, based on the change in gross national product. Certain related thresholds and limitation values in the HSR rules will also be adjusted. The increased thresholds apply to all transactions closing on or after February 28, 2018.

This update summarizes the key elements of the revised thresholds.

HSR Reporting Thresholds

Current Reporting Thresholds. Certain transactions, including acquisitions of voting securities or assets, acquisitions of noncorporate interests and the formation of joint venture corporations or other entities, are subject to the reporting requirements of the Act if the transaction meets a two-part test based on the size of the transaction and the size of the parties. The size-of-transaction test is met if the transaction is valued at more than $80.8 million. The size-of-parties test is met if the ultimate parent entity of one of the parties to the transaction has $16.2 million in total assets or annual net sales, and the ultimate parent entity of another party to the transaction has $161.5 million in total assets or annual net sales. However, the size-of-parties test does not apply to transactions valued at more than $323 million.

Increased Reporting Thresholds. Under the new thresholds, the size-of-transaction test is met if the transaction is valued at more than $84.4 million. The size-of-parties test is met if the ultimate parent entity of one of the parties to the transaction has $16.9 million in total assets or annual net sales, and the ultimate parent entity of another party to the transaction has $168.8 million in total assets or annual net sales. The threshold at which the size-of-parties test does not apply is increased to transactions valued in excess of $337.6 million.

Filing Fees

The transaction values on which the tiered HSR filing fee schedule is based will also be revised, as shown in the chart below.

Filing Fee	Transaction Value (existing)	Transaction Value (revised)
$45,000	Less than $161.5 million	Less than 168.8 million
$125,000	$161.5 million to <$807.5 million	$168.8 million to < $843.9 million
$280,000	$807.5 million or more	$843.9 million or more

New Clayton Act Section 8 Thresholds

The FTC also announced revisions to the thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors under Section 8 of the Clayton Act. Under Section 8, a person is barred from serving as a director or officer of two competing corporations if two thresholds are met. As enacted, the statute applies if each competitor corporation has capital, surplus and undivided profits of more than $10 million, except that no prohibition against interlocking directorates or officers applies if the competitive sales of either corporation are less than $1 million. There is also an exception for interlocking directorates in which the competitive sales of either corporation are less than 2% of that corporation's total sales, or the competitive sales of each corporation are less than 4% of that corporation's total sales.

The monetary thresholds are subject to annual revision. The thresholds in effect as of January 29, 2018, are $34,395,000 and $3,439,500, respectively. Thus, if each of the competing companies has capital, surplus and undivided profits of over $34,395,000, the interlock is unlawful unless (1) the competitive sales of either firm are under $3,439,500 or represent less than 2% of that firm's total sales, or (2) the competitive sales of each firm are less than 4% of that firm's total sales.

Civil Penalty

Effective January 22, 2018, the maximum civil penalty amount for violations of the Act was also increased from $40,654 to $41,484 per day, based on changes in inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the FCPIAA). The FCPIAA as amended directs agencies to implement annual inflation adjustments based on a prescribed formula.

Is Your Transaction Reportable Under the HSR Act?

This update is intended for general guidance. Parties contemplating a transaction should consult antitrust counsel to determine whether any particular transaction is reportable under the Act and to evaluate any antitrust concerns raised by the transaction.

Parties should also keep in mind that a transaction that is not reportable because it does not meet the Act's reporting thresholds is not exempt from agency scrutiny of the potential anticompetitive effects of the transaction. The FTC, the Department of Justice and state attorneys general (as well as private parties) may challenge a transaction as anticompetitive even when no HSR filing was required for the transaction. Therefore, all transactions should be reviewed for compliance with Section 7A of the Clayton Act prior to closing.

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