

Antitrust | January 13, 2009

FTC Revises HSR Notification Thresholds and Civil Penalty Amounts for 2009

Revised HSR Act Thresholds

The U.S. Federal Trade Commission (“FTC”) has announced revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). The HSR Act requires that parties to proposed stock or asset acquisitions exceeding certain thresholds file premerger notification reports to the FTC and the Antitrust Division of the U.S. Department of Justice and then observe statutorily prescribed waiting periods (usually 30 days) prior to closing the transaction.

The announced changes are mandated by the 2000 amendments to Section 7A of the Clayton Act, which require that the FTC revise the HSR Act thresholds annually, beginning in 2005, based on the change in the gross national product.

The new thresholds were published in the Federal Register on January 13, 2009 and will go into effect on February 12, 2009.

The primary changes are increases in the “size-of-transaction” and “size-of-person” tests under the HSR Act and Rules. Currently, an acquisition of voting securities or assets may be reportable if such securities or assets are valued in excess of \$63.1 million (“size-of-transaction test”), and either the acquiring or acquired party has annual net sales or total assets of at least \$12.6 million and the other party has annual net sales or total assets of at least \$126.2 million (“size-of-person test”). The size of the parties is irrelevant if the value or size of the transaction exceeds \$252.5 million.

Under the new thresholds, an acquisition may be reportable if valued in excess of \$65.2 million and the parties to the transaction have annual net sales or total assets of at least \$13.0 million and \$130.3 million under the size-of-person test. If the transaction is valued at greater than \$260.7 million, the size-of-person test is not applicable.

The revisions will also increase notification thresholds for acquisitions of additional voting securities from the same party. As a result, notifications will be required at each of the following thresholds: \$65.2 million; \$130.3 million; \$651.7 million; 25% of the voting securities if their value exceeds \$1,303.4 million; and 50% of the voting securities if their value exceeds \$65.2 million.

Filing fees remain the same, but the thresholds that determine the fees have been revised. Under the new thresholds, acquiring persons in transactions valued above \$65.2 million up to \$130.3 million must pay a fee of \$45,000. For transactions valued at \$130.3 million up to \$651.7 million, a \$125,000 fee is required. A \$280,000 fee is applied to transactions valued at or above \$651.7 million.

Finally, the dollar amounts used for determining the applicability of certain exemptions under the HSR Act have also been adjusted to reflect the threshold changes.

Adjustments to Civil Penalty Amounts

The FTC is making adjustments to certain civil penalty amounts in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 to reflect inflation since the penalty amounts were last adjusted. Among other increases, the civil penalties for premerger notification violations under the HSR Act will be increased from \$11,000 to \$16,000. The effective date of the increase is February 9, 2009.

Revised Thresholds for Interlocking Directorates

The FTC also announced revised dollar thresholds for evaluating interlocking directorates under Section 8 of the Clayton Act. Under certain circumstances, Section 8 prohibits one person from serving as a

director or officer of two competing corporations if each corporation has capital, surplus, and undivided profits aggregating more than \$10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than a *de minimis* threshold of \$1,000,000. The aggregate capital, surplus, and undivided profits of each corporation at the end of its last full fiscal year controls for Section 8 purposes. Section 8(a)(5) requires the Federal Trade Commission to revise these thresholds annually, based on the change in gross national product. The new thresholds, which will take effect on January 13, 2009, are \$26,161,000 for Section 8(a)(1), and \$2,616,100 for Section 8(a)(2)(A).

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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