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FTC Increases HSR Notification Thresholds for 2012

The U.S. Federal Trade Commission (“FTC”) has revised and, once again, raised the 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 new thresholds were published in the Federal Register on January 27, 2012 and will go into effect on February 27, 2012.

The 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 changes in the gross national product.

Revised HSR Act Thresholds

The primary revisions to the thresholds 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 \$66.0 million (“size of transaction test”), and either the acquiring or acquired party has annual net sales or total assets of at least \$13.2 million and the other party has annual net sales or total assets of at least \$131.9 million (“size of person test”). The size of the parties is irrelevant if the value of the transaction exceeds \$263.8 million.

Under the new thresholds, an acquisition may be reportable if valued in excess of \$68.2 million and the parties to the transaction have annual net sales or total assets of at least \$13.6 million and \$136.4 million under the size of person test. If the transaction is valued at greater than \$272.8 million, the size of person test is not applicable.

The revisions also increase the 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: \$68.2 million; \$136.4 million; \$682.1 million; 25% of the voting securities if their value exceeds \$1,364.1 million; and 50% of the voting securities if their value exceeds \$68.2 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 \$68.2 million up to \$136.4 million must pay a fee of \$45,000. For transactions valued at \$136.4 million up to \$682.1 million, a \$125,000 fee is required. A \$280,000 fee is applied to transactions valued at or above \$682.1 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.

Revised Thresholds for Interlocking Directorates

The FTC also revised the 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 of the corporations has capital, surplus, and undivided profits aggregating more than \$10,000,000, with an exception that an interlock is not 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 changes in gross national product. The new thresholds, which are effective as of January 27, 2012, are \$27,784,000 and \$2,778,400.

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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