

Notification Threshold Under Hart-Scott-Rodino Act Increased to \$66 million

January 25, 2011

Increased reporting thresholds apply to pre-merger notifications filed on or after February 24, 2011.

The Federal Trade Commission (FTC) recently announced revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) and 2011 thresholds for determining whether parties trigger the prohibition against interlocking directors under Section 8 of the Clayton Act.

Notification Threshold Adjustments

Pursuant to the amendments passed by the U.S. Congress in 2000, the FTC published the revised thresholds for HSR pre-merger notifications in the Federal Register on January 25, 2011. These revised thresholds will become effective on February 24, 2011. Any transaction completed and any HSR pre-merger notifications filed on or after February 24, 2011, must comply with these new thresholds.

As required, the FTC adjusted the notification thresholds based on the change in the gross national product (GNP) for the fiscal year ending September 30, 2010. Most notably, the base filing threshold of \$50 million, which frequently determines whether a transaction requires filing of an HSR notification, will increase to \$66 million following this revision. The changes also will affect other dollar-amount thresholds:

- The alternative statutory size-of-transaction test, which captures all transactions valued above \$200 million regardless of the “size-of-persons,” will be adjusted to \$263.8 million.
- The statutory size-of-person thresholds (applicable to transactions now valued at less than \$263.8 million but above \$66 million) will increase from \$12.7 million to \$13.2 million and from \$126.9 million to \$131.9 million.

The adjustments will affect parties contemplating HSR notifications in various ways. Parties may be relieved from the obligation to file a notification for transactions closed after February 24, 2011, that fall below the adjusted base threshold. For example, a transaction resulting in the acquiring person holding voting securities or assets valued at less than \$66 million would not be reportable on or after the effective date. The adjustments will also affect various exemptions under the HSR rules. For example, acquisitions of foreign assets and voting securities of foreign issuers will now be exempt unless they

generated U.S. sales in excess of \$66 million, or in the case of foreign voting securities, the issuer has assets in the United States valued in excess of \$66 million.

Parties may also realize a benefit of lower notification filing fees for transactions that just cross current thresholds. Although filing fees for HSR-reportable transactions will remain unchanged, the applicable filing fee tiers will shift upward as a result of the GNP-indexing adjustments:

- Transactions valued at or in excess of \$66 million but less than \$131.9 million require parties to pay a \$45,000 filing fee.
- Transactions valued at or in excess of \$131.9 million but less than \$659.5 million require parties to pay a \$125,000 filing fee.
- Transactions valued at or above \$659.5 million require parties to pay a \$280,000 filing fee.

Interlocking Directorate Thresholds Adjustment

On January 25, 2011, the FTC announced revised thresholds for interlocking directorates, which are effective immediately upon publication in the Federal Register. The FTC revises these thresholds annually based on the change in the level of GNP. Section 8 of the Clayton Act prohibits a person from serving as a director or officer of two competing corporations if certain thresholds are met. The prohibition against interlocking directors applies if each corporation has more than \$10 million (as adjusted) in capital, surplus and undivided profits; however, the prohibition does not apply if either corporation has less than \$1 million (as adjusted) in competitive sales. Pursuant to the recently revised thresholds, Section 8 of the Clayton Act applies to corporations with more than \$26,867,000 in capital, surplus and undivided profits, while it does not apply where either corporation has less than \$2,686,700 in competitive sales.

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