

Mergers and Acquisitions Alert:

New HSR Thresholds for 2009

JANUARY 7, 2009

Fenwick
FENWICK & WEST LLP

The dollar thresholds for pre-acquisition filings under the Hart-Scott-Rodino Act will increase mid-February (exact date still pending), due to an annual adjustment mechanism that was created in the last round of amendments to the HSR Act. All transactions closing on or after the effective date will be governed by the new thresholds.

Under the new thresholds, the parties to an acquisition or merger will in most cases need to file pre-acquisition notifications with the FTC and the Department of Justice and observe the Act's waiting periods before closing if the transaction will result in either of the following:

(a) The acquiring person will hold *more than \$65.2 million* worth of voting securities and assets of the acquired person and the parties meet the "size-of-person" requirements below; **or**

(b) Regardless of the parties' sizes, the acquiring person will hold *more than \$260.7 million* worth of voting securities and assets of the acquired person.

Meeting any one of the following three subtests satisfies the "size-of-person" test:

(1) A person with *\$130.3 million or more* of total assets (on its most recent regularly-prepared balance sheet) or annual net sales (from its most recently completed fiscal year) proposes to acquire voting securities or assets of a person engaged in manufacturing (note that software is not considered manufacturing) with *\$13 million or more* of annual net sales or total assets;

(2) A person with *\$130.3 million or more* of total assets or annual net sales proposes to acquire voting securities or assets of a person **not** engaged in manufacturing with *\$13 million or more* of total assets (net sales test does not apply); **or**

(3) A person with *\$13 million or more* of total assets or annual net sales proposes to acquire voting securities or assets of a person with *\$130.3 million or more* of annual net sales or total assets.

For the purposes of applying the thresholds, "person" means the ultimate parent entity of the party engaged in the transaction.

Note that certain exemptions may apply depending on the nature of the transaction and the nature and location of the assets and entities involved. Consequently, additional analysis is often required before making a final determination regarding the need for a filing.

Filing fee thresholds also have been adjusted: (i) \$45,000 for transactions below \$130.3 million, (ii) \$125,000 for transactions of \$130.3 million or more but below \$651.7 million, and (iii) \$280,000 for transactions of \$651.7 million or more.

For additional information, please contact Mark Ostrau, Co-Chair, Antitrust Group at mostrau@fenwick.com or 650-335-7269.

©2009 Fenwick & West LLP. All Rights Reserved.

THIS ALERT IS INTENDED BY FENWICK & WEST LLP TO SUMMARIZE RECENT DEVELOPMENTS IN THE LAW. IT IS NOT INTENDED, AND SHOULD NOT BE REGARDED, AS LEGAL ADVICE. READERS WHO HAVE PARTICULAR QUESTIONS ABOUT THESE ISSUES SHOULD SEEK ADVICE OF COUNSEL. IRS CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT ANY U.S. FEDERAL TAX ADVICE IN THIS COMMUNICATION (INCLUDING ATTACHMENTS) IS NOT INTENDED OR WRITTEN BY FENWICK & WEST LLP TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING, MARKETING, OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.