Notification Threshold Under the Hart-Scott-Rodino Act Increased to $68.2 million

January 27, 2012

The Federal Trade Commission recently announced higher reporting thresholds for pre-merger notifications filed on or after February 27, 2012.

The U.S. Federal Trade Commission (FTC) recently announced revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) and 2012 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 revised thresholds for HSR pre-merger notifications in the *Federal Register* on January 27, 2012. These revised thresholds will become effective on February 27, 2012. Any transaction completed and any HSR pre-merger notifications filed on or after February 27, 2012, 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, 2011. Most notably, the base filing threshold of $50 million, which frequently determines whether a transaction requires filing of an HSR notification, will increase from $66.0 million to $68.2 million. 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 $272.8 million.
- The statutory size-of-person thresholds (applicable to transactions valued at less than $272.8 million, but more than $68.2 million) will increase from $13.2 million to $13.6 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 on or after February 27, 2012, that result in holdings below the adjusted base threshold. For example, a transaction resulting in the acquiring person holding voting securities or assets valued at less than $68.2 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 $68.2 million or, in the case of foreign voting securities, the issuer has assets in the United States valued in excess of $68.2 million.

Parties may also realize a benefit of lower notification filing fees for transactions that just cross current thresholds. Under the rules, the acquiring person must pay a filing fee, although the parties may allocate that fee amongst themselves. Filing fees for HSR-reportable transactions will remain unchanged for now (although the FTC is pursuing filing fee increases). However, the applicable filing fee tiers will shift upward as a result of the GNP-indexing adjustments:

- Transactions valued at or in excess of $68.2 million, but less than $136.4 million require a $45,000 filing fee.
- Transactions valued at or in excess of $136.4 million, but less than $682.1 million require a $125,000 filing fee.
- Transactions valued at or above $682.1 million require a $280,000 filing fee.

Interlocking Directorate Thresholds Adjustment

On January 27, 2012, the FTC published revised thresholds for interlocking directorates, which are effective immediately. 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 $27,784,000 in capital, surplus and undivided profits, while it does not apply where either corporation has less than $2,778,400 in competitive sales.

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