FTC ANNOUNCES INCREASED HSR AND INTERLOCKING DIRECTORATE THRESHOLDS – 2020

Valerie Stevens
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HSR Act Thresholds

The Federal Trade Commission (FTC) recently announced the revised transaction thresholds that trigger the requirement to file a premerger notification and report form under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). The FTC revises the thresholds annually based on changes in the gross national product. The new thresholds will be published this week in the Federal Register, and will be effective for all transactions closing on or after February 27, 2020.

With these recent adjustments to the HSR thresholds, the parties to a transaction must file an HSR notification if a deal meets one of two tests:

1. The total value of a proposed transaction exceeds **$376 million**; or

2. The total value of a proposed transaction exceeds **$94 million**, and one party has at least **$18.8 million** in total assets or annual sales, and the other party has at least **$188 million** in total assets or annual sales.

The HSR Act requires parties engaged in certain transactions (including certain mergers, acquisitions, asset sales, joint ventures, and exclusive license deals) to file a notification and report form with both the FTC and Department of Justice, Antitrust Division (DOJ) prior to closing. Reportable transactions cannot be consummated until after a designated period of time (usually 30 days). Although there are certain exemptions to the HSR filing requirements, the $94 million threshold is a key threshold to keep in mind. Any transaction that falls below that threshold is exempt from the filing requirements. However, transactions falling below the HSR Act threshold are routinely challenged by the antitrust authorities both before and after closing; parties should always consider the competitive effect of a proposed transaction, regardless of whether it is reportable.

The filing fees under the HSR Act remain the same, but with the following adjusted transaction value thresholds:

Attorneys

Matthew Scherer

Valerie Stevens

Practices & Industries

Corporate & Business

Value of Transaction

Filing Fee

More than $94 million, but less than $188 million

$45,000

$188 million or greater, but less than $940.1 million

$125,000

$940.1 million or greater

$280,000

Interlocking Directorate Thresholds

The FTC also announced revised thresholds for the prohibition on interlocking directorates under Section 8 of the Clayton Antitrust Act of 1914 (the Clayton Act). Under the revised thresholds, which became effective on January 28, 2020, a single person cannot serve as an officer or director of two competing corporations if each corporation has capital, surplus, and undivided profits in excess of $38,204,000. This prohibition does not apply if the competitive sales of either corporation is less than (a) $3,820,400, or (b) 2% of such corporation's total sales, or the competitive sales of both corporations are under 4% of that corporation's total sales. The terms "competitive sales" and "total sales" have specific meanings pursuant to the Clayton Act.

Civil Penalties

In a separate announcement, the maximum civil penalty amount for violations of the HSR Act will increase from $42,530 to $43,280 per day, effective upon publication in the Federal Register. The new penalty levels apply to penalties assessed after January 14, 2020, regardless of whether the associated violation occurred in advance of such date.

If you have any questions relating to the HSR Act, the Clayton Act, or other antitrust issues, please contact Valerie Stevens (646-218-7614; vstevens@hodgsonruss.com).

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