

Decrease in HSR Reportability Thresholds and Other HSR Developments

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On February 2, 2021, the Federal Trade Commission (FTC) announced the annual adjustment of the thresholds that trigger premerger reporting obligations (and the mandatory waiting period) under the Hart-Scott Rodino (HSR) Act. The new thresholds will apply to transactions closing on or after March 4, 2021 (that is, 30 days after publication of the announcement in the Federal Register). This year, for the first time in a decade, the thresholds *decreased*. Last month, the FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors, which became effective immediately on publication in the Federal Register. Both sets of thresholds will remain in effect until the 2022 adjustments. In January, the FTC also announced the annual adjustment for maximum daily civil penalties for noncompliance with the HSR Act's requirements.

Background

The HSR Act requires parties to notify the FTC and DOJ in advance of any acquisition of voting securities, assets, or non-corporate interests where the value exceeds certain dollar-based size thresholds. If the transaction is reportable, the parties cannot close until after a mandatory waiting period (typically thirty days, subject to early termination if the transaction does not present any antitrust issues). The waiting period allows the agencies to review the proposed transaction and determine whether the transaction raises antitrust issues that require further investigation. Either agency can investigate (although only one agency will do so), and if the investigation is not completed during the initial waiting period, then the waiting period may be extended. Ultimately, the investigating agency must decide whether to challenge the transaction (or, potentially, reach a compromise with the parties that addresses the agency's antitrust concerns but permits the transaction to go forward).

Basic Size Tests

The HSR Act's dollar-based thresholds (including the size thresholds that trigger the

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reporting obligation) are adjusted each year to reflect annual percentage increases or decreases in Gross National Product. The most significant effect of the annual indexing is on the “size of transaction”¹ and “size of persons”² tests:

- Transactions resulting in holdings valued at or below \$92 million in voting securities and/or assets of the seller are not reportable (subject to the rules on aggregation).
- Transactions resulting in holdings valued at more than \$368 million are reportable (unless exempted) regardless of the size of persons.
- Transactions resulting in holdings valued at more than \$92 million but less than \$368 million are reportable (unless exempted) if the “size of persons” test is satisfied.
 - A person with \$184 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$18.4 million in total assets or annual net sales; or
 - A person with \$184 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$18.4 million in total assets; or
 - A person with \$18.4 million in total assets or annual net sales acquires (or acquires from) a person with \$184 million in total assets or annual net sales.

Notification Thresholds

In addition to these basic tests, the HSR Act provides five separate “notification thresholds,” with a new report required before completing an acquisition that would result in crossing the next threshold. After indexing, the notification thresholds will be:

- An aggregate total amount of voting securities of the acquired person valued at greater than \$92 million but less than \$184 million;
- An aggregate total amount of voting securities of the acquired person valued at \$184 million or greater but less than \$919.9 million;
- An aggregate total amount of voting securities of the acquired person valued at \$919.9 million or greater; twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1.8398 billion; or fifty percent of the outstanding voting securities of an issuer if valued at greater than \$92 million.

Exemptions

The decreases also affect some of the exemptions from reporting requirements. For example, the “foreign assets” exemption (16 C.F.R. § 802.50) exempts the acquisition of assets located outside the United States “unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million (*as adjusted*) during the acquired person's most recent fiscal year” (emphasis added). With the most recent adjustment, this exemption applies unless the assets generated sales in or into the U.S. of more than \$92 million.

Filing Fees

The HSR filing fees have not changed, but the levels that trigger larger filing fees have decreased.

- The basic filing fee remains \$45,000 and is payable on transactions valued at more than \$92 million but less than \$184 million.
- For transactions valued at more than \$184 million but less than \$919.9 million, the filing fee is \$125,000.

- For transactions valued at more than \$919.9 million, the filing fee is \$280,000.

Civil Penalties for HSR Violations

Parties who close a reportable transaction without having filed complete notifications (including all documents required to be included under Item 4(c) and 4(d) of the notification form) and observing the waiting period are subject to civil penalties. As of January 11, 2021, the current annually indexed maximum daily penalty is \$43,792.

Changes in DOJ and FTC Procedures During the COVID-19 Pandemic

In response to the COVID-19 pandemic, FTC and DOJ adopted new procedures to allow for remote depositions, meetings, electronic filing, and more. The FTC had long required that HSR notifications be filed on paper or DVD, but in March 2020 the FTC implemented a “temporary” electronic filing system for HSR submissions. The FTC now *requires* electronic filing for *all* HSR notifications. The electronic filing system appears to be working smoothly, and many practitioners hope that it will be made permanent. DOJ also implemented a “temporary” electronic filing system in March for HSR submissions and announced at the same time that it will conduct all meetings and depositions by phone or videoconference. It also published an updated model timing agreement that gives DOJ an additional 30 days (now 90, rather than 60) to review parties’ documents after certification of compliance with a Second Request. Then, in April, DOJ began permitting parties in pending antitrust investigations to submit documents through the Justice Enterprise File Sharing System (JEFS) system that other DOJ divisions had already been using. Neither the FTC nor DOJ has announced whether their changes will be permanent.

The Updated DOJ Merger Remedies Manual

On September 3, 2020, DOJ announced an updated version of its Merger Remedies Manual, replacing the 2004 and 2011 versions. (The 2011 version had been withdrawn in 2018, and the 2004 version reactivated.)³ The new Manual continues the DOJ policy of emphasizing remedies that preserve competition (rather than protecting competitors), do not require ongoing government supervision, and put the risk of failure on merging companies rather than consumers. The updated version of the Manual expresses a strong preference for structural relief (as opposed to conduct relief) and includes policies for (i) ensuring that structural relief is effective, including preapproval of the asset package and the divestiture buyer before DOJ will agree to a settlement that includes divestiture, and (ii) requiring divestiture of assets sufficient to ensure that the buyer can compete effectively (even if some of the divested assets are not directly connected to the competitive harm that is to be remedied).

DOJ’s Use of Arbitration in Merger Reviews

On November 12, 2020, DOJ issued updated guidance explaining its use of arbitration and other alternative dispute resolution techniques in connection with merger reviews.⁴ The guidance includes DOJ’s criteria for identifying cases in which arbitration might be used, as well as information on arbitration agreements, selection of arbitrators, cost shifting, and training of DOJ staff on arbitration procedures. The document also discusses DOJ’s recent experience using arbitration to resolve a civil antitrust lawsuit challenging Novelis’s proposed merger with Aleris Corporation.

Interlocking Directorates – Decreased Thresholds and Other Issues

On January 21, 2021, the FTC also updated the thresholds for the Clayton Act Section 8's prohibition on interlocking directorates. The Act prohibits one person from serving as an officer or director of two competing companies when each company has capital, surplus and undivided profits of more than \$37,382,000 for Section 8(a)(1) and competitive sales of more than \$3,738,200 for Section 8(a)(2)(A). These updated thresholds are effective immediately upon publication.

Although DOJ and FTC had suggested in 2019 that there might be enforcement actions against interlocking directorates, none materialized in 2020—but that does not preclude enforcement in the future.

¹ The test includes the value of all of the voting securities (and certain assets) of the acquired person that the acquiring person will hold after the transaction is complete, including voting securities of the acquired person that the acquiring person owned *before* the transaction.

² "Person" means the ultimate parent of the legal party to a transaction (including all entities controlled by the ultimate parent).

³ See U.S. Department of Justice, Antitrust Division, Merger Remedies Manual (September 2020).

⁴ See Makan Delrahim, Memorandum, Updated Guidance Regarding the Use of Arbitration and Case Selection Criteria (November 12, 2020).