

Increase in HSR Reportability Thresholds and Other HSR Developments

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On January 28, 2020, 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, which will apply to transactions closing 30 days after publication of the announcement in the Federal Register. The FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors, which will become effective immediately on publication in the Federal Register. Both sets of thresholds will then remain in effect until the 2021 adjustment. Earlier this month the FTC also announced the annual adjustment for maximum daily civil penalties for noncompliance with the HSR Act's requirements. Finally, 2019 also saw another failure-to-file penalty as well as another challenge to a transaction that had gotten through the waiting period without objection.

Background

The HSR Act requires parties to give advance notice to the FTC and Department of Justice (DOJ) 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 it 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).

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Related Capabilities

- Antitrust & Competition Law
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Basic Size Tests

The size thresholds that trigger the reporting obligation, and other dollar-based thresholds in the HSR Act, are adjusted (to reflect annual percentage increases in Gross National Product) each year. The most significant effect of the annual indexing is to increase the “size of transaction”¹ and “size of persons”² tests:

- Transactions resulting in holdings valued at or below \$94 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 \$376 million are reportable (unless exempted) regardless of the size of persons.
- Transactions resulting in holdings valued at more than \$94 million but less than \$376 million are reportable (unless exempted) if the “size of persons” test is satisfied.
 - A person with \$188 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$18.8 million in total assets or annual net sales; or
 - A person with \$188 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$18.8 million in total assets; or
 - A person with \$18.8 million in total assets or annual net sales acquires (or acquires from) a person with \$188 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. With the indexing, the notification thresholds will be:

- An aggregate total amount of voting securities of the acquired person valued at greater than \$94 million but less than \$188 million;
- An aggregate total amount of voting securities of the acquired person valued at \$188 million or greater but less than \$940.1 million;
- An aggregate total amount of voting securities of the acquired person valued at \$940.1 million or greater;
- Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1.8802 billion; or
- Fifty percent of the outstanding voting securities of an issuer if valued at greater than \$94 million.

Exemptions

The increases also affect some of the exemptions from reporting requirements. For example, 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 \$94 million.

Filing Fees

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

- The basic filing fee remains \$45,000 and is payable on transactions valued at more than \$94 million but less than \$188 million.
- For transactions valued at more than \$188 million but less than \$940.1 million, the filing fee is \$125,000.
- For transactions valued at more than \$940.1 million, the filing fee is \$280,000.

Civil Penalties for HSR Violations

Parties who close on 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 28, 2020, the current annually indexed maximum daily penalty is \$43,280.

The agencies continue their active enforcement of HSR compliance and do not hesitate to seek civil penalties for violations—especially for repeat offenders. On August 28, 2019, the FTC announced that it had reached a settlement with Third Point LLC and three related funds (“Third Point”) regarding FTC allegations that the funds had failed to comply with the HSR notification and waiting period for their acquisition of shares of DowDuPont Inc. Third Point agreed to pay \$609,810 in civil penalties.³ The FTC’s decision to seek civil penalties was likely based on the Third Point’s 2015 violation of the HSR Act by improperly relying on the investment-only exemption for an otherwise reportable acquisition of voting securities.

Expiration or Early Termination Is No Shield Against Enforcement Actions

The HSR notification process provides the FTC and DOJ an opportunity to review transactions before they close, but it is not an “approval” process. In 2019 the FTC demonstrated again that a transaction can be challenged even if the parties filed their HSR notifications and the waiting period expired. In July 2019, the FTC granted early termination for Post Holdings Inc.’s proposed acquisition of TreeHouse Foods Inc.’s private label cereal business, but in December 2019, the FTC announced that it was commencing an administrative challenge to the transaction.⁴ The parties later abandoned the transaction.⁵ This echoes the DOJ’s 2017 challenge of Parker-Hannafin’s acquisition of ClarCor Inc.—which DOJ filed six months after the waiting period had expired, and well after the parties had closed the transaction.⁶

Interlocking Directorates – Increased Thresholds and Other Issues

In its January 28 announcement, 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 \$38,204,000 for Section 8(a)(1) and competitive sales of more than \$3,820,400 for Section 8(a)(2)(A). These updated thresholds are effective immediately upon publication.

The leaders of the enforcement agencies have suggested over the last year or so that they are considering initiating new enforcement actions in this area. Specifically, in May 2019, Assistant Attorney General Makan Delrahim stated that an "area the Division is looking into is the law governing interlocking directorates and bringing it forward to account for modern corporate structures."⁷ A few months earlier, in December 2018, the then-Principal Deputy Assistant Attorney General Andrew Finch stated that the DOJ is "looking at common ownership and interlocking directorate issues more closely" and is "currently thinking about" whether Section 8 could apply to other entities such as private equity firms or LLCs that may have board appointment rights.⁸ Similarly, in a blog post dated June 26, 2019, the FTC's Bureau of Competition offered a reminder that "there are unexpected restructuring and acquisition circumstances through which companies and their boards can wake up one morning to find themselves in a potentially problematic interlock situation."⁹

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 already owns.

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

³ See Federal Trade Commission, Press Release, Three Third Point Funds Agree to Pay \$609,810 in Civil Penalties for Violating the Hart-Scott-Rodino Act (Aug. 28, 2019).

⁴ See Federal Trade Commission, Press Release, FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business Will Harm Competition (Dec. 19, 2019).

⁵ PR Newswire, TreeHouse Foods, Inc. Terminates Agreement to Sell Ready-to-Eat Cereal Business to Post Holdings; Announces Re-Marketing of the Business (Jan. 13, 2020).

⁶ Matthew Perlman, What To Know About Post-Closing Merger Challenges, Law360 (Oct. 10, 2017).

⁷ See Makan Delrahim, Don't "Take the Money and Run": Antitrust in the Financial Sector, at 4, *presented at* Fordham University School of Law's Conference on Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019).

⁸ See Andrew C. Finch, Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation, at 13–14, *presented at* Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference (December 13, 2018).

⁹ Michael E. Blaisdell, Interlocking Mindfulness, FTC: Competition Matters (June 26, 2019).

