

Increase in HSR Reportability Thresholds and Other HSR Developments

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On February 15, 2019, 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 2020 adjustment.

Background

The HSR Act requires parties to give advance notice to the Federal Trade Commission 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).

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

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increase the “size of transaction”¹ and “size of persons”² tests:

- Transactions resulting in holdings valued at or below \$90.0 million³ 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 \$359.9 million are reportable (unless exempted) regardless of the size of persons.
- Transactions resulting in holdings valued at more than \$90.0 million but less than \$359.9 million are reportable (unless exempted) if the “size of persons” test is satisfied.
 - A person with \$180.0 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$18.0 million in total assets or annual net sales; or
 - A person with \$180.0 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$18.0 million in total assets; or
 - A person with \$18.0 million in total assets or annual net sales acquires (or acquires from) a person with \$180.0 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 \$90.0 million but less than \$180.0 million;
- An aggregate total amount of voting securities of the acquired person valued at \$180 million or greater but less than \$899.8 million;
- An aggregate total amount of voting securities of the acquired person valued at \$899.8 million or greater;
- Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1.7995 billion; or
- Fifty percent of the outstanding voting securities of an issuer if valued at greater than \$90.0 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 \$90.0 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 \$90.0 million but less than \$180.0 million.

- For transactions valued at more than \$180.0 million but less than \$899.8 million, the filing fee is \$125,000.
- For transactions valued at more than \$899.8 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 February 14, 2019, the annually indexed maximum daily penalty is \$42,530.

In December 2018, the FTC demonstrated its seriousness about these penalties when it fined New York Knicks / New York Rangers owner James Dolan \$609,810 for HSR violations.⁴ Dolan had periodically been awarded restricted stock units of Madison Square Garden Company. Dolan had filed an HSR notification when one of these periodic awards brought his holdings above the first threshold, but he did not file before his holdings crossed the second threshold. Upon discovering the error, he made a corrective filing. Dolan was in noncompliance for about 105 days, and the fine amounted to an effective rate of about \$6,800 per day.

Tips on Reportability of Not-For-Profit Combinations

Mergers and other combinations of not-for-profit corporations present their own unique issues because there are no shares to be exchanged or acquired. These transactions are reportable under the HSR Act if the assets or revenues of the combining organizations meet the size tests described above (and if no exemption applies). In October 2018, the FTC's Premerger Notification Office staff announced a change in the way it analyzes these transactions (particularly for hospital affiliations).⁵ Historically, the FTC has focused on whether the combination results in a change of "control" (where the "acquiring" entity acquires the right to appoint directors of the "acquired" entity). That analysis will still be relevant, but the FTC will now also consider whether "one party obtains the indicia of beneficial ownership over the assets of another party" through other means. Board control will be one way, but others might include becoming the corporate member of two affiliating hospital entities; having the right to authorize and/or approve the articles, bylaws, and other governance documents of the affiliating hospital entities; having the right to authorize and/or approve the sale or lease of the affiliating hospital assets; having the right to appoint and/or approve the senior officers of the affiliating hospital entities; or having the right to devise and/or approve the strategic plans, capital budgets and expenditures, and significant contracting of the affiliating hospitals.

Reminder on Nonreportable Transactions

The fact that a transaction is not reportable does *not* mean it is exempt from the antitrust laws. The FTC and DOJ can—and do—investigate nonreportable transactions that raise antitrust concerns and will challenge any transaction that they conclude is anticompetitive, even if the transaction has already closed. Indeed, in December 2017

the FTC underscored this point by filing an administrative complaint challenging Otto Bock's recent acquisition of FIH Group Holdings. The FTC sought to unwind the transaction, which closed in September 2017.⁶ That matter went to trial in the fall of 2018, and no decision has yet been announced.

Even when an acquisition *is* reported, and the 30-day waiting period has expired, the FTC and DOJ can still challenge the transaction. A recent example is the DOJ's September 2017 challenge to Parker-Hannifin's acquisition of CLARCOR, its only U.S. rival for sales of certain aviation fuel filtration products.⁷ Parker-Hannifin had publicly announced the deal and made timely HSR filings, and the 30-day statutory waiting period had expired with no investigation before the deal closed. The DOJ later learned of certain documents that Parker-Hannifin had not provided with its HSR filings—no HSR violation was alleged—and challenged the transaction on that basis. Parker-Hannifin settled three months later by agreeing to divest some of the assets it had acquired.

Furthermore, even where the FTC and DOJ decline to challenge an acquisition, private parties may still do so, even after closing. Six years ago, Jeld-Wen, Inc. (a producer of interior molded doorskins—a necessary component of finished doors) acquired one of its competitors. The parties filed their HSR notifications as required. The DOJ later confirmed that it had investigated the transaction but had not taken action to challenge the acquisition. Four years later, a third company that is both a competitor and a customer of Jeld-Wen filed a lawsuit alleging that the acquisition violated section 7 of the Clayton Act and seeking divestiture of certain assets. In 2018, a jury found that the 2012 acquisition had substantially reduced competition in violation of section 7. The DOJ filed a Statement of Interest regarding remedies. The DOJ took no position on the jury's verdict but expressed a strong preference for a structural remedy (such as divestiture of assets) instead of some other equitable remedy (regulating conduct). In December 2018, the court entered final judgment (a) ordering divestiture of the plant, and (b) alternatively awarding damages if the divestiture order is overturned on appeal.⁸ Jeld-Wen has announced that it will appeal.⁹

This decision is remarkable not only because of the amount of time that had passed between closing and the divestiture order but also because it is the first successful challenge brought after the closing under Clayton Act Section 16 by a private plaintiff. It also illustrates the influence on enforcers of customer complaints, which the federal enforcement agencies may take into account both during the HSR review period and afterward.¹⁰

Interlocking Directorates – Increased Thresholds and Other Issues

In its February 15 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 \$36,564,000 for Section 8(a)(1) and competitive sales of more than \$3,656,400 for Section 8(a)(2)(A). These updated thresholds are effective immediately upon publication.

In January 2017, the then-Director of the FTC’s Bureau of Competition published a blog post on compliance with Section 8. The [blog post](#) offered some practical pointers on circumstances (such as new product introductions) that might warrant considering whether a company with which a director is affiliated has become a “competitor” for Section 8 purposes. The FTC generally relies on self-policing but occasionally opens investigations (for example, the Apple-Google interlock). And in December 2018, Principal Deputy Assistant Attorney General Andrew Finch publicly 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 corporate forms that did not exist when the Clayton Act was passed in 1914, such as private equity firms or LLCs that may have board appointment rights.¹¹

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 The thresholds typically have not been round numbers, and we have retained the decimal designation to avoid any confusion as to whether the threshold really is *exactly* \$90 million (or, for the size of persons test, exactly \$18 million and \$180 million).

⁴ See Federal Trade Commission, Press Release, [FTC Charges Executive Whose Company Owns New York Knicks, New York Rangers with Violations of U.S. Premerger Notification Requirements](#) (Dec. 6, 2018). For further discussion, see our previous [HSR Reminder and Sporting News Update](#) (Dec. 11, 2018).

⁵ See Federal Trade Commission, Press Release, [Control No Longer Controlling for HSR Reporting of Not-for-Profit Combinations](#) (Oct. 26, 2018).

⁶ See [Complaint \[redacted public version\]](#), *In the Matter of Otto Bock HealthCare North America, Inc.*, FTC Dkt. No. 9378 (filed Dec. 20, 2017). See also James K. Nichols, *United States v. Bazaarvoice, Inc.: What In-House Counsel Need to Know*, THE ANTITRUST COUNSELOR, June 2014, at 4.

⁷ See U.S. Department of Justice, Press Release, [Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company’s Acquisition of CLARCOR’s Aviation Fuel Filtration Business](#) (Sept. 26, 2017).

⁸ See *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545 (E.D. Va. Dec. 14, 2018).

⁹ [JELD-WEN Announces Final Ruling in Steves & Sons Litigation; Appeal of Erroneous Ruling to Commence Imminently](#), BusinessWire (Dec. 15, 2018).

¹⁰ See U.S. Dep’t of Justice & Federal Trade Comm’n, [HORIZONTAL MERGER GUIDELINES](#) § 2.2.2 (Aug. 9, 2010).

¹¹ 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).