

Increase in HSR Reportability Thresholds and Other HSR Developments

by Michael A. Lindsay

On January 26, 2018, 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. Both notices were published in the Federal Register on January 29. The new premerger reporting thresholds will become effective thirty calendar days after publication of notice in the Federal Register (that is, on February 28) and will remain in effect until the 2019 adjustment. The FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors.

Background

The HSR Act requires parties to give advance notice to the Federal Trade Commission and Department of Justice 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

Related People

- Michael A. Lindsay

Related Capabilities

- Antitrust & Competition Law
- Mergers & Acquisitions

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

- Transactions resulting in holdings valued at or below \$84.4 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 \$337.6 million are reportable (unless exempted) regardless of the size of persons.
- Transactions resulting in holdings valued at more than \$84.4 million but less than \$337.6 million are reportable (unless exempted) if the “size of persons” test is satisfied.
 - A person with \$168.8 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$16.9 million in total assets or annual net sales; or
 - A person with \$168.8 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$16.9 million in total assets; or
 - A person with \$16.9 million in total assets or annual net sales acquires (or acquires from) a person with \$168.8 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 \$84.4 million but less than \$168.8 million;
- An aggregate total amount of voting securities of the acquired person valued at \$168.8 million or greater but less than \$843.9 million;
- An aggregate total amount of voting securities of the acquired person valued at \$843.9 million or greater;
- Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1.688 billion; or
- Fifty percent of the outstanding voting securities of an issuer if valued at greater than \$84.4 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 \$84.4 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 \$84.4 million but less than \$168.8 million.

- For transactions valued at more than \$168.8 million but less than \$843.9 million, the filing fee is \$125,000.
- For transactions valued at more than \$843.9 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 Items 4(c) and 4(d) of the HSR Notification Form) and observing the waiting period are subject to civil penalties. On January 22, the FTC announced an increase in the annually indexed maximum daily civil penalty from \$40,654 to \$41,484.

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, a transaction that closed in September 2017.³ In *Otto Bock*, the FTC alleged that the leading manufacturer of microprocessor prosthetic knees acquired its closest competitor, eliminating direct and substantial competition between the dominant firm and its "most significant and disruptive competitor."⁴ The Complaint states that the relief sought may include "[d]ivestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products as Respondent Otto Bock and Freedom were offering and planning to offer prior to the Merger."⁵

Filing a Complete Notification Form

Item 3(b) of the HSR Notification Form requires submission of "all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities or non-corporate interests are to be acquired." This includes all "agreements not to compete and other agreements between the parties" but excludes "schedules and the like" – "unless they contain agreements not to compete, other agreements between the parties, or other important terms of the transaction."⁶

In December, the Director of the FTC's Bureau of Competition reminded the practicing bar that "all means all."⁷ Apparently some practitioners have advised their clients not to submit agreements that "reflect the parties' antitrust review obligations, risk-sharing commitments, and potential remedial measures." The presence of antitrust risk allocation provisions might (at least in some circumstances) signal the parties' concerns about a transaction, and in any event, they will reveal the bottom line to which the parties are already committed in future negotiations with the FTC over remedies. Nevertheless, the FTC has now clearly rejected the argument that these agreements are protected

under the common interest doctrine or joint defense privilege or that the documents can be withheld as ancillary.

Interlocking Directorates – Increased Thresholds and Other Issues

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 \$34,395,000 for Section 8(a)(1) and competitive sales of more than \$3,439,500 for Section 8(a)(2)(A). These updated thresholds are effective immediately upon publication.

In January 2017, the Director of the FTC's Bureau of Competition posted a blog on compliance with Section 8. The FTC generally relies on self-policing but occasionally opens investigations (for example, the Apple-Google interlock). Then-Director Feinstein offered some practical pointers on identifying new products or market developments that might warrant considering whether a company with which a director is affiliated has become a "competitor" for Section 8 purposes. Her blog post is available [here](#).

¹ The test includes the value of all of the voting securities (and certain assets of the acquired person) 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 Press Release, FTC Challenges Consummated Merger of Companies That Make Microprocessor Prosthetic Knees (Dec. 20, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor>. For other recent examples, see *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133, 2014 U.S. Dist. LEXIS 180347 (N.D. Cal. Dec. 2, 2014); see also James K. Nichols, *United States v. Bazaarvoice, Inc.: What In-House Counsel Need to Know*, THE ANTITRUST COUNSELOR, June 2014, at 4.

⁴ Complaint [redacted public version] at 1, *In the Matter of Otto Bock HealthCare North America, Inc.*, FTC Dkt. No. 9378 (filed Dec. 20, 2017), available at https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf.

⁵ *Id.* at 15.

⁶ Antitrust Improvements Act Notification and Report Form, Instructions at V (Aug. 8, 2016), https://www.ftc.gov/system/files/attachments/premerger-notification-program/hsr_form_instructions_090116.pdf.

⁷ Bruce Hoffman, "All" Means All: Submit Side Agreements with an HSR Filing (Dec. 20, 2017), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/12/all-means-all-submit-side-agreements-hsr-filing>.