

Is this Deal Reportable?: HSR Reportability Thresholds Increase

by Michael A. Lindsay and Jaime Stilson

On January 19, 2017, the Federal Trade Commission 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 FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors. The new premerger reporting thresholds will become effective thirty calendar days after publication of notice in the Federal Register and will remain in effect until the 2018 adjustment. In a separate Federal Register notice on January 24, the FTC also announced an inflation-based increase to the maximum civil penalties for noncompliance with the HSR Act (which take immediate effect).

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).

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. Transactions that do not exceed the thresholds are not reportable, but the FTC and DOJ can—and do—investigate nonreportable transactions

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that raise antitrust concerns and will challenge any transaction that they conclude is anticompetitive, even if the transaction has already closed.¹

Basic Size Tests

The most significant effect of the annual indexing is to increase the “size of transaction”² and “size of persons”³ tests:

- Transactions resulting in holdings valued at or below \$80.8 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 \$323 million are reportable (unless exempted) regardless of the size of persons.
- Transactions resulting in holdings valued at more than \$80.8 million but less than \$323 million are reportable (unless exempted) if the “size of persons” test is satisfied.
 - A person with \$161.5 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$16.2 million in total assets or annual net sales; or
 - A person with \$161.5 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$16.2 million in total assets; or
 - A person with \$16.2 million in total assets or annual net sales acquires (or acquires from) a person with \$161.5 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 \$80.8 million but less than \$161.5 million;
- An aggregate total amount of voting securities of the acquired person valued at \$161.5 million or greater but less than \$807.5 million;
- An aggregate total amount of voting securities of the acquired person valued at \$807.5 million or greater;
- Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than \$1.615 billion; or
- Fifty percent of the outstanding voting securities of an issuer if valued at greater than \$80.8 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 \$80.8 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 \$80.8 million but less than \$161.5 million.
- For transactions valued at more than \$161.5 million but less than \$807.5 million, the filing fee is \$125,000.
- For transactions valued at more than \$807.5 million, the filing fee is \$280,000.

Civil Penalties for HSR Violations

The maximum daily penalty for HSR violations has increased from \$40,000 to \$40,654.

Interlocking Directorates

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 \$32,914,000 for Section 8(a)(1) and competitive sales of more than \$3,291,100 for Section 8(a)(2)(A). These updated thresholds are effective immediately upon publication.

On January 23, 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). Director Feinstein offers 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. For example, the Justice Department challenged Bazaarvoice's acquisition of a competing firm shortly after the transaction closed, even though the parties had not been required to report the transaction. DOJ prevailed at trial, and Bazaarvoice had to divest—at a significant loss—the assets it had acquired. *United States v. Bazaarvoice, Inc.*, Case 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.

2. 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.

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