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FTC Revises Thresholds for HSR Filings and Interlocking Directorates

HSR Size-of-Transaction Threshold Increased to $76.3 million

The FTC has announced new notification thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act" or the "Act"), which will be effective as of February 20, 2015. The current thresholds continue to apply to all transactions closed prior to the effective date. Of particular note, the initial threshold for notification under the HSR Act will increase slightly from $75.9 million to $76.3 million.[1]

The principal changes to the notification thresholds, which will apply to all transactions that are consummated on or after February 20, 2015, are as follows:

1. The initial size-of-transaction threshold will increase from $75.9 million to $76.3 million.[2]
2. The size-of-person test will apply to transactions valued at $305.1 million or less (increased from $303.4 million).
    - Under the size-of-person test, a transaction is reportable only where one party has sales or assets of at least $152.5 million (currently $151.7 million), and the other party has sales or assets of at least $15.3 million (currently $15.2 million).
3. The notification thresholds – for stock transactions, the highest threshold that will be crossed as a result of the transaction – will also increase as follows:
    - The $75.9 million notification threshold will increase to $76.3 million.
    - The $151.7 million notification threshold will increase to $152.5 million.
    - The $758.6 million notification threshold will increase to $762.7 million.

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[1] Transactions that are not subject to the HSR Act reporting requirements are still subject to the substantive antitrust laws (principally, Section 7 of the Clayton Act) and may still be investigated by the Federal Trade Commission, the Antitrust Division of the Department of Justice, or state attorneys general. The federal agencies, in particular, have been quite active in investigating and seeking antitrust enforcement actions relating to non-reportable transactions raising competitive concerns, including consummated transactions.

[2] The HSR Act's reference to "size-of-transaction" is a misnomer. Because the HSR Act considers the aggregate holdings resulting from a transaction, the threshold may be crossed even if the transaction itself is less than the "size-of-transaction" threshold.

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- The 25 percent notification threshold, currently applicable to acquisitions of stock valued in excess of $1,517.1 million, will apply to acquisitions of stock valued in excess of $1,525.3 million.

4. The foreign commerce exemption thresholds, currently $75.9 million and $166.9 million, will increase to $76.3 million and $167.8 million, respectively. Under the revised thresholds,

   - Acquisitions of voting securities of a foreign issuer by a U.S. person are exempt unless the foreign issuer either: (i) holds assets in the United States valued in excess of $76.3 million (currently $75.9 million), or (ii) made sales in or into the United States in excess of $76.3 million (currently $75.9 million) in the last fiscal year.

   - Acquisitions of voting securities of a foreign issuer by a foreign person are exempt unless the transaction confers control over the issuer and the foregoing thresholds are met.

   - Acquisitions of foreign assets are exempt if the assets did not generate sales in or into the United States in excess of $76.3 million (currently $75.9 million) in the last fiscal year.

   - Acquisitions by a foreign person of either (a) voting securities of a foreign issuer where control is conferred, or (b) foreign assets, are also exempt if: (i) the aggregate total sales of both the acquiring person and the acquired person in or into the United States are less than $167.8 million (currently $166.9 million) in the last fiscal year; (ii) the aggregate total assets of the acquiring person and acquired person in the United States are less than $167.8 million (currently $166.9 million); and (iii) the value of the transaction does not exceed $305.1 million (currently $303.4 million).

5. The filing fee thresholds, currently $75.9 million, $151.7 million, and $758.6 million, will increase to $76.3 million, $152.5 million, and $762.7 million, respectively. The filing fees themselves – of $45,000, $125,000, and $280,000 – will not change.

Revised Thresholds for Prohibition on Corporate Interlocks

Section 8 of the Clayton Act prohibits any person from serving as a director or officer of two or more competing corporations unless the sales of competing products or services of the two companies are less than certain *de minimis* thresholds. Under the revised thresholds, which are effective immediately, simultaneous service as director or officer of two corporations, each with capital, surplus, and undivided profits in excess of $31,084,000 and "competitive sales" of $3,108,400 or more, is prohibited, subject to several exceptions.[3] The FTC's announcement of the revised thresholds serves as a useful reminder that effective Section 8 compliance requires corporations annually to review the outside affiliations of their directors and officers to assess whether, for example, sales growth or entry into new product areas may trigger potential issues under the statute.

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[3] In particular, if the "competitive sales" of either corporation are less than two percent of that firm's total sales, or less than four percent of each firm's total sales, the interlock is exempt under the statute. Section 8 provides a one-year grace period for an individual to resolve an interlock issue that arises as a result of entry into new markets through acquisition or expansion.

Authors:

Bernard A. Nigro Jr.

Nathaniel L. Asker

Alyson L. Redman

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Contacts:

Washington, D.C.

Bernard A. Nigro Jr.	+1.202.639.7373	barry.nigro@friedfrank.com
Richard C. Park	+1.202.639.7064	richard.park@friedfrank.com

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
801 17th Street, NW
Washington, DC 20006
Tel: +1.202.639.7000
Fax: +1.202.639.7003

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Paris
75, boulevard Haussmann
Paris 75008
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Hong Kong
1601, Chater House
8 Connaught Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

Shanghai
Unit 537, East Wing
Shanghai Centre
1376 Nanjing Road West
Shanghai 200040
Tel: +86.21.6289.8962
Fax: +86.21.6289.8963

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