FTC Revises Thresholds for HSR Filings and Interlocking Directorates

HSR Size-of-Transaction Threshold Increased to $84.4 million

The Federal Trade Commission announced new notification thresholds under the Hart-Scott-Rodino Act, effective as of February 28, 2018. 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 from $80.8 million to $84.4 million.[1]

I. The new notification thresholds will apply to all transactions that are consummated on or after February 28, 2018. The principal changes are as follows:

HSR Rule	New 2018 Threshold	2017 Threshold
Minimum size-of-transaction for which an HSR notification is required[2]	$84.4 million	$80.8 million
Size-of-person test	Sales or assets of $168.8 million for one party and $16.9 million for the other party	Sales or assets of $161.5 million for one party and $16.2 million for the other party
Size-of-transaction above which size-of-person test does not apply	$337.6 million	$323.0 million

1 Transactions that are not subject to the HSR Act reporting requirements remain subject to the substantive antitrust laws (principally, Section 7 of the Clayton Act) and may still be investigated by the FTC, the Antitrust Division of the Department of Justice, or state attorneys general. The federal agencies, in particular, have been active in investigating and challenging 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 incremental acquisition itself is less than the "size-of-transaction" threshold. In addition, even if an HSR notification is made for the acquisition of voting securities in excess of the minimum threshold, additional HSR notifications may be required before crossing the thresholds of (i) $168.8 million, (ii) $843.9 million, (iii) 25% of voting securities of an issuer, if valued in excess of $1,687.8 million, or (iv) 50% of the voting securities of an issuer.

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II. The filing fee thresholds will also increase but the filing fees themselves remain unchanged.

2017 Filing Fee Thresholds	Fee
Transactions valued at greater than $84.4 million but less than $168.8 million	$45,000
Transactions valued at $168.8 million or greater but less than $843.9 million	$125,000
Transaction valued at $843.9 million or greater	$280,000

III. The exemption thresholds for acquisitions of foreign issuers and assets will increase as well. 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 $84.4 million (currently $80.8 million), or (ii) made sales in or into the United States in excess of $84.4 million (currently $80.8 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 thresholds above are met.
- Acquisitions of foreign assets are exempt if the assets did not generate sales in or into the United States in excess of $84.4 million (currently $80.8 million) in the last fiscal year.
- Acquisitions by a foreign person of either voting securities of a foreign issuer or foreign assets are also exempt if: (i) the aggregate total sales of the parties in or into the United States are less than $185.7 million (currently $177.7 million); (ii) the aggregate total assets of the parties in the United States are less than $185.7 million (currently $177.7 million); and (iii) the value of the transaction does not exceed $337.6 million (currently $323.0 million).

Revised Thresholds for Prohibition on Corporate Interlocks

Section 8 of the Clayton Act prohibits any person from serving as a director or officer of competing corporations unless sales of the competing products or services of the two corporations are below certain *de minimis* thresholds. Under the revised thresholds, which are effective immediately, simultaneous service as a director or officer of two corporations, each with capital, surplus, and undivided profits in excess of $34,395,000 and "competitive sales" of $3,439,500 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, entry into new markets, or a decline in sales or exit from a non-competing business may trigger potential issues under the statute.[4]

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[3] In particular, if the "competitive sales" of either corporation during the last completed fiscal year are less than two percent of that firm's total sales, or less than four percent of each corporation's total sales, the interlock is exempt under the statute.

[4] Section 8 provides a one-year grace period to resolve an interlock issue that arises as a result of changes in a corporation's business. For additional guidance on antitrust compliance, see Fried Frank Antitrust & Competition Law Alert, 4 Steps to Refresh Your Antitrust Compliance Program for the New Year (Jan 20, 2016).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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