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New M&A Filing Thresholds and Recent Enforcement Actions

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This alert discusses the new HSR Act notification thresholds, recent HSR Act penalties, and European Commission pre-merger prohibitions.

New HSR Filing Thresholds Announced

On January 18, 2008, the Federal Trade Commission, the agency charged with administering the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and its filing requirements, approved the new annual HSR Act notification thresholds. The new thresholds will be published in the Federal Register within a few days and will become effective 30 days after publication.

- The "size of transaction" threshold will increase from $59.8 million to $63.1 million. No HSR Act notification will be required if the value of voting securities and assets held as a result of the transaction is below this threshold.
- The "size of parties" thresholds of $119.6 million in annual sales and $12.0 million in total assets will increase to $126.2 million and $12.6 million, respectively. For transactions valued at more than $63.1 million but less than $252.3 million, no HSR Act notification will be required if the ultimate parent entities of one or both parties to the transaction do not satisfy the applicable "size of parties" thresholds.
- Transactions valued at more than $252.3 million (previously $239.2 million) will be reportable regardless of the size of the parties, unless an HSR Act exemption applies.

The new HSR Act thresholds also apply to certain other thresholds and exemptions.

The new thresholds do not affect the HSR Act filing fees, but the applicable filing fee will be based on the new thresholds, as follows: $45,000 for transactions valued at less than $126.2 million; $125,000 for transactions valued from $126.2 million up to $630.8 million; and $280,000 for transactions valued at $630.8 million or more.

The HSR Act notification thresholds are adjusted annually to reflect changes in the U.S. gross national product. The new thresholds will remain in effect until the next annual adjustment, expected in the first quarter of 2009.

$1.1 Million FTC Penalty Assessed Against Investment Firm for Failure to File HSR Notification

In a further sign of the U.S. antitrust agencies' effort to crack down on HSR Act violations by investment firms, the FTC on December 19, 2007, announced it had settled a federal district court action against ValueAct Capital Partners, L.P. for failure to file an HSR Act notification in connection with three earlier acquisitions by ValueAct. In settling the complaint, ValueAct agreed to pay civil penalty of $1.1 million.

The FTC had warned ValueAct in connection with previous failures to file HSR Act notifications. In

October, 2003, ValueAct filed corrective filings in connection with its acquisitions of voting securities of three companies – Gartner, Inc., Martha Stewart Living Omnimedia, and Mentor Corp. At that time, the FTC did not impose penalties, and the company outlined the steps it planned to take to ensure its compliance with the law in the future.

On June 13, 2005, however, ValueAct submitted corrective filings in connection with three additional acquisitions of voting securities, this time in connection with acquisitions of Gartner, Catalina Marketing Group and Acxiom Corp.

The penalty imposed upon ValueAct demonstrates the U.S. antitrust agencies' continuing commitment to enforce the HSR filing requirements against firms who close HSR reportable transactions without filing and observing the waiting period, particularly where the acquiring party has previously violated the HSR Act. Companies that enter into transactions that satisfy the HSR filing thresholds discussed above should carefully consider whether an HSR notification may be required for their transaction.

European Antitrust Authorities Increase Enforcement of Pre-Merger Integration Prohibitions

Finally, competition authorities in Europe appear to be increasing enforcement of laws against premature implementation of M&A transactions. During December, 2007, the European Commission carried out "dawn raids" on two PVC manufacturers in the UK for violations of the prohibition on pre-clearance implementation of M&A transactions, often described as "gun jumping." News reports suggest that the two merging parties may have improperly shared information and engaged in other potentially illegal pre-merger activities. This represents the first time that the European Commission has taken action against gun-jumping activities since the 1990s, and the first time the Commission has ever used its dawn raid authority in connection with a suspected merger violation.

Competition laws in both the U.S. and Europe prohibit companies from consummating a proposed transaction – or otherwise combining or coordinating their business activities or operations – prior to receiving clearance from the antitrust enforcement authorities. Thus, under the HSR Act and the Sherman Act in the United States and under Article 7(1) of the EC Merger Regulation, the companies must remain separate and independent economic actors until they receive such clearance and close the transaction. In both the U.S. and Europe, a range of behavior, from actual combination of the parties' operations to merely the exchange of competitively-sensitive confidential information, could constitute gun jumping. While European antitrust enforcers historically have not brought as many enforcement actions in connection with these restrictions as their U.S. counterparts, this case may signal a change in that policy.

The potential penalties for gun jumping in both the United States and Europe are substantial. U.S. law provides for penalties of up to $11,000 per day for each day the companies are not in compliance. European law provides for penalties of up to 10% of the aggregate worldwide turnover of the merging parties.

Because of these and related restrictions, companies negotiating M&A transactions should consult legal counsel before engaging in any activity that could be construed as implementation of the deal or coordination of competitive conduct before receiving antitrust clearance. While U.S. enforcement of these restrictions has been robust, prudence now requires similar vigilance for transactions in Europe.