

Antitrust Law Blog

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Lower Filing Thresholds for HSR Act Premerger Notifications and Interlocking Directorates Announced

1. Lower Thresholds For HSR Filings

On January 19, 2010, the Federal Trade Commission announced revised, **lower** thresholds for premerger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The filing thresholds are revised annually, based on the change in gross national product. **For the first time, the thresholds have been reduced.** They will be effective thirty days after publication in the Federal Register. Publication is expected to occur this week. Thus the new thresholds will most likely become effective late February 2010. Acquisitions that have not closed by the effective date will be subject to the new thresholds. Filing persons must wait a designated period of time, usually 30 days, before completing their transactions. The HSR Act imposes premerger notification and waiting period obligations on transactions over a certain size, where the parties are over a certain size, before those transactions may be completed. Each "person" who is a party to an HSR-reportable deal must file an HSR notification with the Department of Justice Antitrust Division and the Federal Trade Commission.

The thresholds include a Size of Transaction test and a Size of Person test. The Size of Transaction test includes the value of the assets, stock or noncorporate interests (such as partnership or membership interests) being acquired in the deal, and the value of assets, voting securities or noncorporate interests of the target that the acquiring person already holds. In asset deals, the value of the assets is either the acquisition price or the fair market value of the assets, whichever is higher. In stock deals, the value of the stock is determined by the acquisition price or market price, whichever is higher.

The Size of Person test measures the size of the "ultimate parent entity" of the buyer and seller, and the entities the "ultimate parent entity" controls directly or indirectly. The "ultimate parent entity" is an entity or natural person that controls the buyer or seller and is not itself controlled by anyone else, e.g., the entity or natural person that has 50% or more of the voting securities of the buyer or seller. The Act defines "control" in a special way: (1) holding 50 percent or more of the outstanding voting securities of an issuer; (2) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or (3) having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

The new thresholds are:

Size of Transaction Test	Notification is required if the acquiring person will acquire and hold certain assets, voting securities, and/or interests in non-corporate entities valued at more than \$63.4 million .
Size of Person Test (Transactions valued at more than \$253.7 million are not subject to the Size of Person Test and are therefore reportable)	Generally one "person" to the transaction must have at least \$126.9 million in total assets or annual net sales, and the other must have at least \$12.7 million in total assets or annual net sales.

While the filing thresholds have changed, the filing fees have not. If the value of the transaction is more than \$63.4 million but less than \$126.9 million, the filing fee is \$45,000. The filing fee is \$125,000 if the value of the transaction is \$126.9 million or more but less than \$634.4 million. If the value of the transactions is \$ 634.4 million or more, the filing fee is \$280,000.

The above rules are general guidelines only and their application may vary depending on the particular transaction.

2. Lower Thresholds For the Prohibition Against Interlocking Directorates

Also on January 19, 2010, the FTC announced new, **reduced** thresholds for the prohibition in Section 8 of the Clayton Act against interlocking directorates. Section 8 prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations if two thresholds are met. Applying the new thresholds, competitor corporations are covered by Section 8 if each one has capital, surplus and undivided profits aggregating more than \$25,841,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than \$2,584,100. As with HSR thresholds, the FTC is required to revise Section 8 thresholds annually based on gross national product. Section 8 thresholds become effective upon publication in the Federal Register, which is expected later this week.

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