

FTC Raises Hart-Scott-Rodino Thresholds and Increases the Penalties for Violations

January 14, 2009

The Federal Trade Commission (FTC) has announced that it will raise the Hart-Scott-Rodino Act (HSR Act) jurisdictional and filing fee thresholds. The new thresholds are expected to become effective February 12, 2009. The new rules include an increase in the size-of-transaction test from greater than \$63.1 million to greater than \$65.2 million, meaning that under the new threshold, acquisitions valued for HSR Act purposes at \$65.2 million or less will not require preclosing filing and approval. The FTC has also announced that, starting on February 8, 2009, the penalties for HSR violations will increase from \$11,000 a day to \$16,000 a day.

New Jurisdictional Thresholds

As a general rule, the HSR Act requires both acquiring and acquired persons to file notifications if the following *postadjustment* jurisdictional thresholds are met:

1. One person has net sales or total assets of at least \$130.3 million;
 2. The other person has net sales or total assets of at least \$13 million; and
 3. As a result of the transaction, the acquiring person will hold an aggregate amount of stock and assets of the acquired person valued at more than \$65.2 million;
- or-
4. As a result of the transaction, the acquiring person will hold an aggregate amount of stock and assets of the acquired person valued at more than \$260.7 million, regardless of the sales or assets of the acquiring and acquired persons.

Conditions 1 and 2 are generally referred to as the “size-of-person” test, while conditions 3 and 4 are commonly described as the “size-of-transaction” test. Any transaction closing as of February 12, 2009 will be subject to the revised thresholds.

The HSR Act rules relating to acquisitions of partnership interests and membership interests in a limited liability company (LLC) remain the same. Only acquisitions of economic control in an LLC or partnership may be reportable. “Control” is defined as having a right to 50% or more of the profits of a partnership or LLC or 50% or more of the assets upon the dissolution of such entity.

New Filing Fee Thresholds

Filing fees are also determined by a threshold test relating to the size of the transaction; while the thresholds have been adjusted, the fees themselves have not changed:

Valuation of Transaction	Filing Fee
\$65.2 million or greater, but less than \$130.3 million	\$45,000
\$130.3 million or greater, but less than \$651.7 million	\$125,000
\$651.7 million and greater	\$280,000

The figures above represent the new “as adjusted” threshold figures. The table below illustrates the changes.

Current Threshold (in millions)	“As Adjusted” Threshold (in millions)
\$12.6	\$13.0
\$63.1	\$65.2
\$126.2	\$130.3
\$252.3	\$260.7
\$630.8	\$651.7

These changes are being implemented pursuant to the 2000 amendments to Section 7A of the Clayton Act. Section 7A(a)(2) requires the FTC to revise the jurisdictional thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). The revised thresholds will apply to all transactions that close on or after the effective date.

New Penalties for Violations

The FTC is required to consider adjusting for inflation the penalties for statutes under its jurisdiction, including the HSR Act, every four years. Under Section 7A(g)(1) of the Clayton Act, violations of the HSR Act are subject to fines for each day that the violation continues. On February 8, 2009, these penalties will increase from \$11,000 to \$16,000 per day. Penalties can be imposed for any HSR Act violation, ranging from failure to file to failure to submit Item 4(c) documents (documents prepared in connection with the proposed transaction that address any aspect of competition, sales growth, or entry into new product or geographic markets, if seen by an officer or director). Recently, for example, the FTC fined ESL Partner, L.P. and ZAM Holdings, L.P. \$800,000 because they failed to make an HSR Act filing before acquiring additional stock in a company in which they were already invested. This increase in fines highlights the financial risk of ignoring HSR Act obligations.

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