HART-SCOTT-RODINO NOTIFICATION THRESHOLDS TO INCREASE

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U.S. Antitrust Alert

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Beginning on February 27, 2020, transactions valued at more than $94 million may require filing with the antitrust agencies of a Premerger Notification and Report under the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, as amended. This is about a 4.4 percent increase from the current filing threshold of $90 million.

Legislation adopted in 2000 requires the dollar values in the tests used to determine which mergers and acquisitions must be filed with the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") to be adjusted annually based on changes in the gross national product. The same adjustment factors are also applied to the transaction-size criteria that determine the amount of the filing fee paid in transactions for which a filing is required.

THE NEW FILING THRESHOLDS

The HSR Act requires certain persons making acquisitions of assets, voting securities, and noncorporate interests (i.e., interests in partnerships and limited liability companies) to: (a) file premerger notifications with the FTC and the DOJ, and (b) wait until the expiration or termination of a waiting period (usually 30 days) before consummating the acquisition.

After the effective date of the amendment to the rules, the following transactions will generally be subject to the HSR Act's notification and waiting period requirements:

- Transactions between parties of any size in which the acquirer will acquire or hold voting securities, assets, and noncorporate interests of the target company that have an aggregate value in excess of $376 million[1].
- Transactions in which the acquirer will acquire or hold voting securities, assets, and noncorporate interests of the target company with an aggregate value in excess of $94 million but not more than $376 million, provided that either the acquiring or the acquired person has net sales or total assets of $188 million or more and the other person in the transaction has net sales or total assets (total assets only for the acquired person if not a manufacturer) in excess of $18.8 million.

All transactions valued at $94 million or less need not be filed under the HSR Act. However, in determining the "value" of a transaction, the acquiring person must include the value of certain voting securities, assets, or noncorporate interests of the target company that the acquiring person may have acquired in one or more prior transactions. Conversely, acquisitions at a price above $94 million will typically require a filing; however, there are many exemptions under HSR regulations, and parties are strongly encouraged to seek the advice of HSR counsel to determine whether a filing will be required in any individual transaction.

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Although a premerger notification may be required prior to the acquisition of as little as $94 million in voting securities, a person who files a notification for an acquisition at that base level would have to file additional notifications for future acquisitions crossing any of the following higher thresholds: (a) $188 million, (b) $940.1 million, (c) 25 percent or more of the voting securities if the entity is worth $1,880.2 million or more, and (d) 50 percent or more of voting securities of the entity.

THE NEW FEE THRESHOLDS

The thresholds for the various levels of filing fees will also change:

Fee	Size of Transaction
$45,000	If the size of transaction is valued at more than $94 million but less than $188 million
$125,000	If the size of transaction is valued at $188 million or more but less than $940.1 million
$280,000	If the size of transaction is valued at $940.1 million or more

The thresholds discussed in this alert will apply for about one year and be recalculated in early 2021 based upon the 2020 gross national product.

PENALTIES FOR FAILURE TO FILE WHEN REQUIRED

Anyone who fails to submit an HSR filing and observe the required waiting period for a reportable acquisition may be subject to civil fines in an amount adjusted annually by the FTC. For 2020, the fine for failure to comply with HSR reporting requirements is $43,280 per day.

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[1] For a premerger notification filing to be required under the HSR Act for the acquisition of noncorporate interests, an acquiring person must obtain as a result of the acquisition the right to 50 percent or more of the profits of the noncorporate entity or the right in the event of a dissolution to 50 percent or more of its assets after the payment of its debts.

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