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Antitrust and Competition Law Update: HSR Filing Thresholds Increased for Inflation Acquisitions Unreportable Up to \$53.1 Million Effective March 2, 2005

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Antitrust and Competition Law Update: HSR Filing Thresholds Increased for Inflation Acquisitions Unreportable Up to \$53.1 Million Effective March 2, 2005

Ulrich Quack, James Burling, Claus-Dieter Ehlermann, John Ratliff, Suyong Kim, Douglas Melamed, William Kolasky, and Janet Durholz Ridge

Abstract

For the first time since the passage of the HSR Act in 1976, the Federal Trade Commission has published new HSR thresholds adjusted for inflation, slightly reducing the overall number of transactions that will require premerger notification filings. The new, higher thresholds will become effective on March 2, 2005. See 70 F.R. 5020 (January 31, 2005). These threshold raises match changes in the gross national product, and will be readjusted annually going forward, as required by the 2000 amendments to the Hart-Scott-Rodino Antitrust Act of 1976. As of the effective date, acquisitions will be reportable under the HSR Act only if the acquiring person will hold as a result voting securities or assets worth more than \$53.1 million.



ANTITRUST AND COMPETITION LAW UPDATE

February 9, 2005

HSR Filing Thresholds Increased for Inflation Acquisitions Unreportable Up to \$53.1 Million Effective March 2, 2005

For the first time since the passage of the HSR Act in 1976, the Federal Trade Commission has published new HSR thresholds adjusted for inflation, slightly reducing the overall number of transactions that will require premerger notification filings. The new, higher thresholds will become effective on March 2, 2005. See 70 F.R. 5020 (January 31, 2005), available at <http://a257.g.akamaitech.net/7/257/2422/01jan2005/1800/edocket.access.gpo.gov/2005/pdf/05-1684.pdf>. These threshold raises match changes in the gross national product, and will be readjusted annually going forward, as required by the 2000 amendments to the Hart-Scott-Rodino

Antitrust Act of 1976. As of the effective date, acquisitions will be reportable under the HSR Act only if the acquiring person will hold as a result voting securities or assets worth more than \$53.1 million.

The 6.2-percent increase applies not only the long-familiar HSR \$50 million size-of-transaction test, but also to thresholds throughout the HSR regulations, such as size-of-person tests, exemption thresholds, including thresholds for foreign transactions, and to the indexing of filing fees. The primary notification threshold changes are summarized here¹:

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Application of Threshold	Original Threshold	Adjusted Threshold
Size-of-transaction test (value of assets and/or voting securities held as a result of the transaction)	\$50 million	\$53.1 million
Size of transaction beyond which size-of-person tests become irrelevant	\$200 million	\$212.3 million
Size-of-person test (1) (total assets or annual net sales of one party to the transaction)	\$100 million	\$106.2 million
Size-of-person test (2) (total assets or annual net sales of another party to the transaction)	\$10 million	\$10.7 million

1. For a complete table of the affected regulatory provisions, see the FTC's press release on the changes at <http://ftc.gov/os/2005/01/050125revised7aclaytonactfrn.pdf>.

A lesser-known aspect of HSR law is that for voting security acquisitions in particular, there are actually a total of five

size-of-transaction thresholds established by the 2000 HSR amendments. These thresholds are summarized here:

Original Notification Threshold	Adjusted Notification Threshold
(i) \$50 million	(i) \$53.1 million
(ii) \$100 million	(ii) \$106.2 million
(iii) \$500 million	(iii) \$530.7 million
(iv) 25% of an issuer's voting securities, if the value of the holdings exceeds \$1 billion	(iv) 25% of an issuer's voting securities, if the value of the holdings exceeds \$1,061.3 million
(v) 50% of an issuer's voting securities, if the value of the holdings exceeds \$50 million	(v) 50% of an issuer's voting securities, if the value of the holdings exceeds \$53.1 million

The graduated HSR filing fees will remain the same, but the thresholds at which higher fees are due will also

be adjusted for inflation. The filing fee schedule will change as follows:

Acquisition Value	Filing Fee
More than \$53.1 million, but less than \$106.2 million	\$45,000
At least \$106.2 million, but less than \$530.7 million	\$125,000
At least \$530.7 million	\$280,000

Although the 2000 HSR amendments mandated most of the foregoing changes, the FTC has taken this opportunity to make inflationary adjustments to other thresholds and references to dollar thresholds throughout the text of the HSR Rules and explanatory examples. The

most important of these changes affect the thresholds applicable to HSR exemptions for acquisitions of foreign entities or assets, and for certain voting security acquisitions principally involving real estate or other exempt assets, as summarized here:

Exemption	HSR Rule	Threshold Requirement for Exemption
Acquisition of non-US assets	§802.50(a)	The assets did not generate more than \$53.1 million in sales in or into the US in the last fiscal year
Acquisition of non-US voting securities	§802.51(a) and §802.51(b)(1)	The issuer (i) does not hold US assets valued at more than \$53.1 million, and (ii) did not generate sales in or into the US exceeding \$53.1 million in the last fiscal year. (A foreign buyer is also exempt if not acquiring control, or at least 50%, of the foreign issuer)

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Exemption (cont.)	HSR Rule	Threshold Requirement for Exemption
Alternative exemption for transactions between foreign person involving foreign assets or foreign voting securities	§802.50(b) and §802.51(b)(2)	Buyer and seller (i) are both foreign, and (ii) do not collectively hold aggregate US assets valued at \$116.8 million or more, and (iii) did not collectively generate aggregate sales in or into the US exceeding \$116.8 million in the last fiscal year
Acquisition of an issuer whose assets would be exempt in an assets acquisition	§802.4	Issuer's total assets – excluding those exempt under HSR exemptions for real estate, carbon mineral reserves, or investment rental property – have a value not exceeding \$53.1 million

Transactions in Transition

Some pending transactions are reportable under the present threshold and exemption levels, but will become nonreportable or exempt if they do not close before March 2, 2005. The parties to such a transaction closing on or after that date have no obligation to comply with the reporting requirements of the HSR Act. Such transactions that have already been notified and are in the HSR waiting period or under review by the agencies will cease to be governed by the HSR Act as of the effective date, meaning the parties will be free to withdraw their filings and close immediately. However, in such a situation, the parties' filing fees will not be returned, because the FTC does not refund filing fees for transactions that

were notifiable at the time of filing. Nor do we expect that parties to transactions qualifying for a lower filing fee threshold will receive reimbursements from the higher filing fees that they have already paid.

With respect to acquisitions of voting securities, transactions that have been filed and cleared, but have not yet reached the threshold stated in the HSR notification, will still have one year from the end of the HSR waiting period to reach the threshold for which the transaction was originally filed. For instance, if the original filing notified an intention to cross the \$50 million threshold, the acquiring party will only be obligated to acquire \$50 million worth of voting securities, not \$53.1 million, within the year after filing.

ANTITRUST AND COMPETITION LAW UPDATE

Please contact any of us if you have any questions about these developments.

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