Hart Scott Rodino Update

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On January 15, 2015, the Federal Trade Commission (FTC) announced its annual revisions to the jurisdictional thresholds in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). These changes, which will become effective thirty days after their publication in the Federal Register, increase the dollar thresholds to prompt the HSR Act's premerger reporting requirements. Under the HSR Act, parties involved in certain proposed transactions, including mergers, asset acquisitions and acquisitions of voting securities, must notify the FTC and the Antitrust Division of the Department of Justice if the size of the parties involved and the value of the transaction exceed a certain threshold, absent an exemption. These thresholds are revised annually based on the change in gross national product.

A transaction closing on or after the effective date of the revised thresholds is reportable if it meets both the size of transaction test and the size of person test, absent an applicable exemption. Under the revised HSR thresholds, the transaction is reportable if, after the transaction:

1. the acquiring person or entity will hold an aggregate amount of assets, unincorporated interests, or voting securities of the acquired entity in excess of $305.1 million; or
2. the acquiring person or entity will hold an aggregate amount of assets, unincorporated interests, or voting securities of the acquired entity, in excess of $76.3 million and the size of person test is satisfied. Under the size of person test, a transaction is reportable if either the acquiring or acquired person or entity has at least $15.3 million in assets or sales, and the other person or entity has at least $152.5 million in assets or sales.

Of course, these thresholds are only part of the test for reportability, and noncompliance with reporting obligations can result in up to $16,000 per day in fines. Thus, if the merger or acquisition is less than $76.3 million, the transaction is non-reportable. Even if a transaction is non-reportable, it still may be challenged by the government.

Additionally, the FTC announced the 2015 thresholds for the prohibition on interlocking boards of directors or officers under Section 8 of the Clayton Act. Under this rule, a person may not simultaneously serve as a director or officer of two corporations if:

1. the "interlocked" corporations both have combined capital, surplus, and undivided profits of more than $31,084,000 (up from 2014's threshold of $29,945,000);
2. each corporation is engaged in whole or in part in commerce; and
3. the corporations are competitors such that an agreement to eliminate competition between them would violate antitrust laws.

There are several exceptions to this rule, including if the competitive overlap between the interlocking corporations is too small to be competitively significant. A corporate interlock will not violate the statute under the revised threshold if:

1. the competitive sales of either of the interlocking corporations are less than $3,108,400 (up from 2014's threshold of $2,994,500);
2. the competitive sales of either corporation are less than 2% of the corporation's gross sales; or

3. the competitive sales of each corporation are less than 4% of the corporation's gross sales.

These thresholds are also adjusted annually based on the year-over-year change in gross domestic product and will take effect upon publication in the Federal Register.

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