

JANUARY 2009

## FTC Announces New HSR Reporting Thresholds for 2009

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”) requires parties to transactions meeting certain size thresholds to make notification filings with the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice and observe a waiting period before closing. On January 6, 2009, the Federal Trade Commission announced increases in the reporting thresholds under HSR. These changes are made each year as a result of HSR amendments enacted in 2000 that require the FTC to adjust reporting and exemption thresholds annually based on changes in the Gross National Product. The increases will be effective for transactions that close on or after **February 12, 2009**. (If, as some economists predict, GNP decreases in the fiscal year ending September 30, 2009, the HSR thresholds would adjust downward early in 2010.)

HSR applies to acquisitions of assets, voting securities and non-corporate interests (such as limited liability company membership interests), and may also apply to the formation of joint ventures, corporations and non-corporate entities (such as LLCs or limited partnerships).

### Revised HSR Reporting Thresholds

Under the new thresholds:

- The basic HSR threshold applicable to most acquisitions is \$65.2 million (up from \$63.1 million).

- Transactions valued at more than \$65.2 million but less than \$260.7 million (up from \$252.3 million) are reportable if the ultimate parent entity of one party to the transaction, together with all entities it controls, has sales or assets of at least \$130.3 million (up from \$126.2 million), and the ultimate parent entity of the other party, together with all entities it controls, has sales or assets of at least \$13 million (up from \$12.6 million).
- Transactions valued at more than \$260.7 million (up from \$252.3 million) are reportable without regard to the size of the parties.

Even if a transaction is reportable based on these thresholds, it may qualify for one of a number of HSR exemptions. For example, exemptions are available for acquisitions of non-U.S. assets and voting securities. Many of the dollar amounts that relate to these exemptions have also increased.

### HSR Filing Fees

HSR filing fees, which did not change as a result of the annual reporting threshold adjustments, are as follows:

- Transactions valued between \$65.2 million and \$130.3 million pay \$45,000.
- Transactions valued between \$130.3 million and \$651.7 million pay \$125,000.
- Transactions valued at \$651.7 million or more pay \$280,000.

## **Penalty for Failure to Make an HSR Filing**

Companies considering transactions should seek legal advice to determine if an HSR filing will be required. Complex rules govern transaction valuation and the availability of exemptions under HSR. Failure to make a required HSR filing before closing is a violation of federal law and can subject parties to significant penalties. On January 9, 2009, the FTC announced that the penalty that could be imposed for HSR violations will increase from \$11,000 per day to \$16,000 per day for each day of noncompliance. The increased penalty applies to violations occurring after February 8, 2009. Penalties can be imposed on parties who submit incomplete filings (even if the filing was made timely).

If you have questions about the new HSR thresholds or how to apply HSR to a specific transaction, please contact Martin Brinkley (919-821-6702; [mbrinkley@smithlaw.com](mailto:mbrinkley@smithlaw.com)) or the Smith Anderson lawyer with whom you work.

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