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REVISED AND REVIVED: MANDATORY NOTIFICATIONS FOR M&A TRANSACTIONS IN 2015

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This article highlights two recent developments in mandatory federal merger notifications.

U.S. Federal Trade Commission Increases Merger Notification and Interlocking Directorates Thresholds

The U.S. Federal Trade Commission has issued the 2015 adjustments to the Hart-Scott-Rodino (“HSR”) Act thresholds, which are used to determine when a transaction triggers premerger reporting requirements. The new HSR Act thresholds will take effect on February 20, 2015. The FTC adjusts the thresholds based on the change in the gross national product from year to year.

Adjusted HSR Jurisdictional Thresholds

Size-of-Transaction threshold. An HSR filing may be required if the acquirer will hold, as a result of a transaction, voting securities, non-corporate interests and assets of the acquired person valued in excess of \$76.3 million. (The 2014 threshold was \$75.9 million.) If the Size-of-Transaction is between \$76.3 million and \$305.1 million, the transaction also must satisfy the Size-of-Person threshold. Transactions valued in excess of \$305.1 million may require a filing without regard to the Size-of-Person threshold.

Size-of-Person threshold. A transaction meets the Size-of-Person threshold if either the acquired or acquiring person has annual net sales or total assets of at least \$152.5 million and the other party to the transaction has at least \$15.3 million in annual net sales or total assets.

Parties to each transaction requiring an HSR Premerger Notification must pay a filing fee, which is calculated based on the value of the transaction. (The acquirer is responsible for the fee, but parties often arrange to split the fee or to make other arrangements for remitting the required funds.) While the amount of the fee has not changed in many years, the thresholds associated with the fees are adjusted annually.

Size of Transaction	Filing Fee
Greater than \$76.3 million but less than \$152.5 million	\$45,000
Greater than \$152.5 million but less than \$762.7 million	\$125,000
\$762.7 million or greater	\$280,000

Following the required notification, in most cases, the parties may not consummate the acquisition for 30 days. The HSR Act's premerger notification and reporting requirements are designed to give the agencies time to assess the likely competitive effects of the proposed transaction and to allow the agencies, if they deem it necessary, to enjoin the transaction. In most cases, the

waiting period begins the day after both the acquiring and acquired persons have submitted the required notification to the agencies. The waiting period may be shorter in certain bankruptcy and tender offer situations. The parties may request early termination of the waiting period, but granting early termination is entirely within the discretion of the agencies.

The Federal Register notice containing a complete list of these and additional related thresholds contained in the HSR rules (16 C.F.R. Parts 801-803) were published in the Federal Register,¹ and also can be found on the Federal Trade Commission's website.²

Department of Commerce Bureau of Economic Analysis Reinstates Survey of New Foreign Direct Investment

On November 26, 2014, the Department of Commerce, Bureau of Economic Analysis (“BEA”) reinstated reporting requirements for its “Survey of New Foreign Direct Investment in the United States,” which had been mothballed in 2008. The reporting requirements were made retroactive to cover all transactions closing in 2014. The filing requirement remains in effect in 2015 and applies to foreign direct investment where the transaction involves either a foreign entity or the U.S. affiliate of a foreign entity. Specifically, the survey must be submitted when (1) a foreign direct investment in the United States relationship is created or (2) an existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise.

Filing is mandatory, whether the transaction meets the thresholds set by the regulations or the transaction is exempt, and must be made by the U.S. entity or U.S. affiliate of the foreign party to the transaction. A BEA survey form must be submitted within 45 days of the completion of the transaction for any of the following types of investments that meet or exceed the \$3 million threshold:

- An acquisition (Form BE-13A) or merger (Form BE-13C) that results in a foreign person owning or controlling, whether directly or indirectly, 10 percent or more of the voting securities (or other voting interests) of a U.S. business (or the equivalent for unincorporated businesses);
- An existing U.S. affiliate of a foreign parent acquires another U.S. business (Form BE-13A), establishes a new legal entity (Form BE-13B), or expands its U.S. operations (Form BE-13D); or
- A previously reported establishment or expansion of any U.S. business operations is still under construction (Form BE-13E). In these cases, this report must be filed on an annual basis until construction is complete. (As of the publication date, Form BE-13E has not been published on the BEA website.)

Parties to transactions that otherwise satisfy the filing requirements, but do not meet the \$3 million threshold, must file a BE-13 Claim for Exemption form. Exemptions to the filing requirements are not self-executing but must be submitted and accepted by BEA.

Failure to complete the required report in a timely manner and on the appropriate form is subject to criminal (up to \$10,000 per violation and/or imprisonment of not more than one year) and civil penalties (between \$2,500 and \$32,500 for each violation), plus injunctive relief.

Links to the forms and other details about the Surveys of Foreign Direct Investment can be found on the BEA's website: <http://bea.gov/surveys/fdiusurv.htm>.

Footnotes

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1 <http://www.gpo.gov/fdsys/pkg/FR-2015-01-21/pdf/2015-00933.pdf>.

2 <http://www.ftc.gov/news-events/press-releases/2015/01/ftc-announces-new-thresholds-clayton-act-antitrust-reviews-2015>.

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