

# Clients & Friends Alert

## **FTC Announces 2014 Thresholds for Merger Control Filings Under HSR Act and Interlocking Directorates Under the Clayton Act**

**January 21, 2014**

The Federal Trade Commission (“**FTC**”) has announced its annual revisions to the dollar jurisdictional thresholds in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “**HSR Act**”); the revised thresholds will become effective 30 days after the date of their publication in the Federal Register. These changes increase the dollar thresholds necessary to trigger the HSR Act’s premerger notification reporting requirements. The FTC also increased the thresholds for interlocking directorates under Section 8 of the Clayton Act.

### **Revised HSR Threshold**

Under the HSR Act, parties involved in proposed mergers, acquisitions of voting securities, unincorporated interests or assets, or other business combinations (e.g., joint ventures, exclusive license deals) that meet certain thresholds must report the contemplated transactions to the FTC and the Antitrust Division of the U.S. Department of Justice (“**DOJ**”) unless an exemption applies. The parties to a proposed transaction that requires notification under the HSR Act must observe a statutorily prescribed waiting period (generally 30 days) before closing. Under the revised thresholds, transactions valued at **\$75.9 million** or less are not reportable under the HSR Act.

A transaction closing on or after the date the revised thresholds become effective may be reportable if it meets the following revised criteria:

<p><b>Size of Transaction Test</b></p>	<p>The acquiring person will hold, as a result of the transaction, an aggregate total amount of voting securities, unincorporated interests, or assets of the acquired person valued in excess of <b>303.4 million</b>;</p> <p><i>or</i></p> <p>The acquiring person will hold, as a result of the transaction, an aggregate total amount of voting securities, unincorporated interests, or assets of the acquired person valued in excess of <b>\$75.9 million</b>, <u>and</u> the Size of Person thresholds below are met.</p>
<p><b>Size of Person Test</b></p>	<p>Either the acquiring or the acquired person has at least <b>\$15.2 million</b> in assets or sales, and the other person has at least <b>\$151.7 million</b> in assets or sales.</p>

The full list of the revised thresholds is as follows:

Original Threshold	2013 Threshold	Revised Threshold <i>(Effective 30 days after publication in Federal Register)</i> <sup>1</sup>
\$10 million	\$14.2 million	\$15.2 million

<sup>1</sup> As of the date of this publication, the Federal Register had not yet published the revised thresholds. Based on prior practice, we expect the revised thresholds to be published in the coming days and to take effect some time in mid to late February 2014.

\$50 million	\$70.9 million	\$75.9 million
\$100 million	\$141.8 million	\$151.7 million
\$110 million	\$156.0 million	\$166.9 million
\$200 million	\$283.6 million	\$303.4 million
\$500 million	\$709.1 million	\$758.6 million
\$1 billion	\$1,418.1 million	\$1,517.1 million

The filing fees for reportable transactions have not changed, but the transaction value ranges to which they apply have been adjusted as follows:

Filing Fee	Revised Size of Transaction Thresholds
\$45,000	For transactions valued in excess of \$75.9 million but less than \$151.7 million
\$125,000	For transactions valued at \$151.7 million or greater but less than \$758.6 million
\$280,000	For transactions valued at \$758.6 million or more

Note that the HSR dollar thresholds are only part of the analysis to determine whether a particular transaction must be reported to the FTC and DOJ. Failure to notify the FTC and DOJ under the HSR Act remains subject to a statutory penalty of up to \$16,000 per day of noncompliance.

**Revised Thresholds for Interlocking Directorates**

After the revised thresholds take effect, Section 8 of the Clayton Act prohibits one person from simultaneously serving as an officer or director of two corporations if: (1) the “interlocked”

corporations each have combined capital, surplus, and undivided profits of more than \$29,945,000 (up from \$28,883,000); (2) each corporation is engaged in whole or in part in commerce; and (3) the corporations are “by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”<sup>2</sup>

Section 8 provides several exemptions from the prohibition on interlocks for arrangements where the competitive overlaps “are too small to have competitive significance in the vast majority of situations.”<sup>3</sup> After the revised thresholds take effect, a corporate interlock does not violate the statute if: (1) the competitive sales of either corporation are less than \$2,994,500 (up from \$2,888,300); (2) the competitive sales of either corporation are less than 2 percent of that corporation’s total sales; or (3) the competitive sales of each corporation are less than 4 percent of that corporation’s total sales.

The revised dollar thresholds for interlocking directorates of \$29,945,000 and \$2,994,500 will be effective upon publication in the Federal Register; there is no 30 day delay, like there is for the HSR thresholds.

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If you have any questions about this memorandum or any HSR reportability questions, please feel free to contact any of the following attorneys from Cadwalader’s Antitrust Group:

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<sup>2</sup> 15 U.S.C. § 19(a)(1)(B).

<sup>3</sup> S. REP. NO. 101-286, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4100, 4103-04.