

## Mergers & Acquisitions/Antitrust ADVISORY

February 13, 2009

### What the New Year Holds for Mergers: New Filing Thresholds, New Penalties and Continued Enforcement Activity

While observers continue to speculate about how antitrust priorities may change under the Obama administration, federal antitrust enforcement agencies took steps within the past few months that affect merger filing requirements and reinforce the importance of adhering to the antitrust laws in 2009. Parties considering transactions will want to take note of the following recent developments: (1) the Federal Trade Commission's (FTC) announcement of newly increased thresholds and penalties applicable to pre-merger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR), (2) FTC enforcement actions against two parties for failing to comply with HSR and (3) FTC and Department of Justice (DOJ) challenges to already-consummated deals.

#### I. FTC Increases HSR Thresholds and Penalties

##### *HSR Pre-merger Notification Thresholds*

On January 6, 2009, the FTC announced its annual adjustment of the jurisdictional thresholds for pre-merger notification filings under HSR. The revisions account for changes in the U.S. gross national product and represent an increase of approximately three percent.

HSR requires companies (or private investors) contemplating mergers or acquisitions of voting securities or assets that meet or exceed certain monetary thresholds to file notification forms with the FTC and DOJ, and to wait a designated period of time before consummating the transaction. For transactions closing on or after February 12, 2009, parties generally will need to comply with the HSR pre-merger notification and waiting period requirements if the following revised thresholds are met and no exemptions apply:

1. The size of the transaction is in excess of \$260.7 million.

**OR**

2. (a) The size of the transaction is in excess of \$65.2 million, (b) the total assets or annual net sales of one party to the transaction equals \$130.3 million or more and (c) the total assets or annual net sales of the other party to the transaction equals \$13 million or more.

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Although the HSR filing fee amounts will not increase, these adjustments do affect the filing fee schedule:

Size of the transaction	Filing Fee
In excess of \$65.2 million but less than \$130.3 million	\$45,000
\$130.3 million or more but less than \$651.7 million	\$125,000
\$651.7 million or more	\$280,000

These adjustments constitute the primary changes to HSR regulations resulting from the FTC's January 6 annual adjustment of the jurisdictional thresholds. Other regulations governing the methodology for calculating the size of party and size of transaction tests, as well as exemptions from the HSR, remain unchanged.

### ***Fines for Violations***

On December 23, 2008, the FTC also provided notice, pursuant to other statutory authority, that the penalty for violating HSR will go from \$11,000 to \$16,000 per day, an increase of almost 50 percent. This new fine level, along with others announced by the FTC, was effective February 8, 2009. HSR fines can quickly add up — especially in situations where parties discover failures to file years after the fact. This significant increase in per day fines, which is periodically reviewed by the FTC, serves as a reminder of the importance of careful HSR compliance.

### ***Interlocking Directorates Thresholds***

Finally, when the FTC revised the HSR thresholds, it also announced the annual adjustment to the test for interlocking directorates under Section 8 of the Clayton Act. That statute prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations. Under the adjusted thresholds, which were effective January 13, 2009, a person may not serve as a director or officer of two competing corporations if the combined capital, surplus and undivided profits of each of the corporations exceeds \$26,161,000, and if one or more of the corporations has competitive sales above \$2,616,100.

## **II. FTC Penalizes Two Investment Funds for Failing to Comply with HSR**

As an example of the federal antitrust agencies' continued scrutiny of investment funds, the FTC fined two investors a total of \$800,000 late last year for failure to comply with HSR reporting obligations.

On December 15, 2008, ESL Partners, L.P. (ESL) and ZAM Holdings, L.P. (ZAM) agreed to pay \$525,000 and \$275,000, respectively, to settle FTC charges that the two companies did not file pre-merger notification forms or observe the HSR waiting period when they increased their holdings of a publicly traded company's securities.

According to the government's complaint, ESL filed an HSR notification and received FTC clearance in conjunction with its initial acquisition of the target company's stock in August 1999. Under HSR regulations, this clearance permitted ESL to purchase additional stock of the target company for a period of five years, so long as the holding did not cross another HSR threshold. After the five-year period expired, ESL acquired additional shares of the target company through several transactions without making another HSR filing, as was required.

ZAM, which owned the target company's stock through a majority interest in another entity, also failed to pursue HSR clearance when it increased its holdings in the company. ZAM's initial investment acquisition was exempt from HSR, but a subsequent acquisition triggered a reporting requirement.

ESL and ZAM were both actively involved in the target company's business decisions through representatives on the board of directors. Thus, neither company qualified for the "investment only" exemption, a common exemption used by investment companies that exempts passive investments of up to 10 percent of a company's voting securities.

After the FTC discovered the funds' failure to submit required HSR filings, both companies completed the submissions and negotiated a settlement with the FTC, representing a discount off the then-applicable fine level of \$11,000 per day. The target company was not accused of any failure to comply with HSR.

These cases, although somewhat complicated and technical, serve as an important reminder that all parties, including open-market investors, must comply with HSR.

### **III. FTC and DOJ Continue to Initiate Post-Consummation Challenges**

Ordinarily, HSR clearance, or the determination that no pre-merger HSR filing is needed, concludes the parties' concerns about merger enforcement. However, the antitrust laws provide that transactions may be challenged as anticompetitive at any time, regardless of whether an HSR process was initially required, or even whether HSR clearance was granted. In recent years, the antitrust agencies have continued to make a number of "post-consummation" challenges, including two in December, involving deals that had not originally required HSR filings.

On December 16, 2008, the FTC challenged Ovation Pharmaceuticals, Inc.'s acquisition of the drug NeoProfen from Merck & Co. Despite the fact that the transaction was closed nearly three years ago, the FTC claims that the acquisition of the drug was anticompetitive because it eliminated Ovation's only competitor in the treatment of a serious heart condition that affects some premature babies. The FTC filed suit in the U.S. District Court for the District of Minnesota and seeks to unwind the entire transaction.

In a similar case, the DOJ filed a complaint against Microsemi Corporation, alleging that its July 2008 acquisition of Semicoa Inc. was anticompetitive. The complaint, filed in the U.S. District Court for the Eastern District of Virginia on December 18, 2008, also seeks to unwind the entire transaction and argues that the acquisition harmed competition in the development, manufacture and sale of

certain semiconductor devices that are used by the military and in the space program. Because the transaction was consummated so recently, the DOJ also moved for a temporary restraining order (TRO) to prohibit Microsemi from selling, dismantling or otherwise impairing any of the assets it purchased from Semicoa. The Court granted the DOJ's motion for TRO in December 2008, and the parties are now preparing for trial.

These recent enforcement actions — along with the FTC's successful challenge in 2007 to the consummated acquisition of Highland Park Hospital by Evanston Northwestern Healthcare Corporation, even after HSR clearance — serve as reminders that, regardless of HSR compliance, the risk of antitrust scrutiny after closing is real and must be considered.

#### **IV. Conclusion**

As has been widely reported, the Obama administration has promised to step up review of merger activity, among other areas of antitrust enforcement. Economic conditions and personnel appointments will no doubt affect the degree to which transactions are investigated and sought to be blocked by the FTC and DOJ. Regardless, the actions outlined in this advisory show that maintaining regulatory compliance remains vitally important.

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