

## FEDERAL TRADE COMMISSION ANNOUNCES 2017 HART-SCOTT-RODINO THRESHOLDS

January 25, 2017

On January 19, 2017, the U.S. Federal Trade Commission (“FTC”) announced the 2017 monetary thresholds for certain qualifying transaction notifications under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR” or the “Act”) (§ 7A of the Clayton Act, codified at 15 U.S.C. §18a), effective for transactions closing on or after 30 days after publication of the new thresholds in the Federal Register. HSR requires the parties to certain qualifying acquisitions of any voting securities or assets of the acquired party to notify the FTC and Department of Justice (“DoJ”) of the transaction and await the expiration of a mandatory waiting period (30 days generally, 15 days in the case of a cash tender offer) prior to the closing. HSR reporting obligations for 2017 will arise when: (a) either the acquiring party (“acquirer”) or the acquired party (“target”) is engaged in U.S. commerce or in any activity affecting U.S. commerce; *and either* (b) as a result of the transaction, the acquirer would hold voting securities and assets of the target in excess of **\$323 million** or (c) as a result of the transaction, the acquirer would hold voting securities and assets of the target in excess of **\$80.8 million** but not in excess of **\$323 million** and (i) either the acquirer or target has total assets or annual net sales of at least **\$16.2 million** and (ii) the other party has total assets or annual net sales of at least **\$161.5 million**. *It is important to realize that the transaction itself need not be of substantial size to require notification; even a small transaction is subject to mandatory notification if its effect would be to push past one of the relevant thresholds.*

Depending on the size of transaction, filing fees for transactions that must be notified will range from \$45,000.00 to \$280,000.00.

The qualification “voting securities” exempts bonds, notes, mortgages, and similar instruments and is limited to securities allowing the owner or holder to vote for directors, or analogous persons in the case of unincorporated entities. Also, rules and regulations assess the total asset and annual net sales thresholds with reference not only to the party to the transaction, but to the total assets or annual net sales of companies or individuals under an “ultimate parent entity” with “control” established by 50% ownership of voting rights or rights to distribution.

A joint venture (“JV”) in which a corporation, limited liability company (“LLC”), partnership or limited partnership (“LP”) is formed to embody the joint venture can activate HSR’s reporting requirements, because the Act treats each JV participant as an acquirer and the joint venture entity that is formed as a target. The formation of a general partnership or an LP or transfer of less than all of the interests in a partnership ordinarily does not require a HSR filing, subject to the rule concerning acquisition of the voting securities for any issuer included in the partnership.

By contrast, transfer of all of a partnership’s interests is considered an asset acquisition and is reportable under the Act. The formation of an LLC may trigger HSR reporting obligations if two or more pre-existing, separately controlled businesses are contributed and at least one of the members controls the LLC, in that it has a 50% “membership interest” or a right to 50% of the LLC’s assets on dissolution. Post-formation acquisitions of LLC interests are not reportable except in certain circumstances in which the acquisition is treated as a new LLC formation.

Exemptions from the HSR filing requirement exist, notably for transactions in the ordinary course of business, acquisitions of certain voting securities or non-U.S. assets of a non-U.S. entity, and in the case of an acquisition of 10% or less of an issuer's voting securities that is made strictly for investment purposes. The FTC or DoJ may request from the parties additional documentation and extensions of the waiting period.

Once documentation requests have been fully complied with and during the mandatory waiting period (including as extended), the FTC or DoJ may move a preliminary injunction to block the proposed acquisition. If no such action is taken and the mandatory waiting period has expired, the transaction is deemed to have passed HSR review and may proceed, subject to any other regulatory review that may be required.

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