



ANTITRUST, DISTRIBUTION & FRANCHISE PRACTICE GROUP  
**NEW PRE-MERGER FILING THRESHOLDS**

On January 18, 2008, the Federal Trade Commission (“FTC”), by a 5-0 vote, authorized revised thresholds for pre-merger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”).

The reporting requirements under the HSR Act serve as an opportunity for the FTC and the Department of Justice-Antitrust Division (“DOJ”) to determine whether a proposed acquisition or formation of a joint venture could create an antitrust concern. Generally, both the acquiring person and the acquired person file the reporting form and the proposed transaction may not be consummated until the expiration of a 30-day waiting period, unless the waiting period is terminated early by the FTC, additional information is requested by the FTC or DOJ thereby extending the waiting period, or the FTC or DOJ raises a concern and requires a restructuring of the transaction or imposes some condition or restriction on the transaction. Importantly, the FTC and DOJ are not necessarily prohibited from later raising an antitrust concern merely because no concern has been raised, the waiting period has expired and the transaction has been consummated.

The HSR Act provides that transactions valued at in excess of \$200 million (as adjusted) are reportable regardless of the size of the parties. Transactions valued at in excess of \$50 million (as adjusted) are reportable only if the acquiring and acquired persons meet the “size-of-person” test – either the acquiring or acquired person must have annual net sales or total assets exceeding \$100 million (as adjusted) and the other party must have annual net sales or total assets exceeding \$10 million (as adjusted). Acquired persons not engaged in manufacturing relying on the \$10 million (as adjusted) test must meet it on the basis of assets alone.

The fact of filing and the information provided in or with the filing are generally confidential and not subject to The Freedom of Information Act. The information can be disclosed in connection with congressional proceedings or as relevant in any administrative or judicial proceeding. If early termination of the 30-day waiting period is requested

and granted; however, the termination of the waiting period is announced on the FTC’s website (<http://www.ftc.gov/bc/earlyterm/index.html>).

There are substantial penalties for failure to file a required pre-merger notification, including fines up to \$10,000 per day on any person or officer, director or partner for failure to comply. In recent years the U.S. Antitrust Agencies have vigorously pursued HSR Act violations by acquiring persons, including investment firms. Most recently, on December 19, 2007, the FTC secured a \$1.1 million civil penalty to resolve an enforcement action against Value Act Capital Partners, L.P. for failing to file three required HSR Act notifications.

The HSR Act notification thresholds are adjusted annually to reflect changes in the U.S. gross national product. They will remain in effect until the next annual adjustment, expected in the first quarter of 2009. The new thresholds will become effective February 28, 2008:

HSR Act or Rule Provision	Indexed Value
\$50 million size-of-transaction test	\$63.1 million
\$200 million size-of-transaction test	\$252.3 million
\$100 million size-of-person test	\$126.2 million
\$10 million size-of-person test	\$12.6 million
\$50 million notification threshold	\$63.1 million
\$100 million notification threshold	\$126.2 million
\$500 million notification threshold	\$630.8 million
25% of voting securities valued at \$1 billion notification threshold	\$1,261.5 million

Note that certain exemptions may apply depending on the nature of the transaction and the nature and location of the assets and entities involved. Consequently, additional analysis is often required before making a final determination regarding the need for a filing.

The thresholds do not affect the HSR Act filing fees, but the applicable filing fee will be based on the new thresholds, as follows: \$45,000 for transactions valued at less than \$126.2 million; \$125,000 for transactions valued from \$126.2 million up to \$630.8 million; and \$280,000 for transactions valued at \$630.8 million or more.

The FTC also authorized revised thresholds for Section 8 interlocking directorates under Section 8 of the Clayton Act, as amended. The amendment establishes jurisdictional thresholds that trigger the Act's prohibition on interlocking directorates. The new thresholds are \$25,319,000 for Section 8(a)(1) and \$2,531,900 for Section 8(a)(2)(A).

Section 8 of the Clayton Act generally prohibits a person from serving simultaneously as a director or officer of competing corporations engaged in commerce if each competing corporation has capital, surplus, and undivided profits aggregating more than \$10 million (as adjusted).

The interlocking directorate prohibition does not apply if either corporation's "competitive sales" – gross revenues for all products and services sold by one corporation in competition with the other – are less than \$1 million (as adjusted). As with the HSR threshold, the FTC must annually revise the interlocking directorate thresholds based on the change in the gross national product.

Copies of the FTC's release on these adjustments are available at <http://www.ftc.gov> or by toll free telephone: (877)-FTC-HELP.

If you have any questions about pre-merger notification requirements and their application to your business, or any other antitrust planning, compliance, or litigation issues, we would welcome the opportunity to discuss these issues with you in more detail. Please feel free to contact any member of our Antitrust, Distribution and Franchise Practice Group.

**For more information, please contact your regular Armstrong Teasdale lawyer or:**

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