FTC Announces Merger Filing and Director Interlock Thresholds for 2013

01.11.2013

BY: ERIC S. BERMAN & ROBERT S. ZUCKERMAN

On January 10, 2013, the Federal Trade Commission ("FTC") announced updated, slightly higher jurisdictional thresholds that determine whether merging parties must notify the FTC and U.S. Department of Justice ("DOJ") of their transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). The revised HSR thresholds will apply to all transactions that close on or after the effective date, which is expected to be in late February 2013 – thirty days after their publication in the Federal Register.

Merger Filings

The HSR Act requires that parties to certain mergers and acquisitions file a notification form and related documentation with the FTC and DOJ if the transaction value exceeds a prescribed dollar amount ("size of transaction test") and the parties' annual net sales or total assets exceed the Act's thresholds ("size of person test"). After notifying the agencies, the parties must wait 30 days – 15 days in the case of cash tender offers – before closing, unless the agencies either terminate this waiting period sooner or extend it by seeking additional information about the deal.

In 2013, parties may have to file notification if their transaction value exceeds $70.9 million, *and* they meet the size of person test. To meet this test, one party to the transaction must have annual net sales or total assets of at least $141.8 million and the other party must have annual net sales or total assets of at least $14.2 million. Note, however, that if the transaction value exceeds $283.6 million, the parties must file notification without regard to the size of person test.

Filing Fees Remain the Same

Whereas the FTC must revise the filing thresholds each year (such changes are keyed to the U.S. gross national product), for more than a decade it has not changed the filing fees that parties must pay with

their notification. Thus, parties to a notifiable transaction will continue to pay fees based on this schedule:

Value of Transaction ($millions)	*Fee ($)*
More than $70.9, up to $141.8	$45,000
More than $141.8, up to $709.1	$125,000
More than $709.1	$280,000

Interlocking Directorates

Section 8 of the Clayton Act generally prohibits a person from serving as a director or board-elected or board-appointed officer of two competing corporations (other than banks, banking associations, and trust companies), subject to certain thresholds and safe harbors. The FTC also announced changes to the thresholds that trigger this prohibition, which will take effect immediately upon publication in the Federal Register.

Under the new thresholds, director interlocks will generally be prohibited if both corporations have capital, surplus, and undivided profits of at least $28,883,000 and competitive sales of at least $2,888,300, subject to certain exceptions.

We encourage companies contemplating merger activity to consider the antitrust implications. HSR rules are complex, and both acquiring and acquired companies must file notifications when thresholds are met. Failure to do so properly can result in civil penalties and will delay consummation of the transaction. We note, too, that even smaller transactions that do not require an HSR filing are subject to antitrust scrutiny and should, therefore, be reviewed for potential risks.

Related People

Related Services

- Antitrust & Trade Regulation