

FTC ANNOUNCES 2023 HART-SCOTT-RODINO REPORTING THRESHOLDS FOR QUALIFYING MERGERS, ACQUISITIONS AND OTHER TRANSACTIONS

January 30, 2023

On January 26, 2023, the U.S. Federal Trade Commission (“FTC”) published the 2023 annual adjusted monetary thresholds to trigger reporting obligations for certain mergers, acquisitions and other qualifying transactions 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 the effective date of the notice, 30 days after publication 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 2023 for most kinds of transactions 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 or assets of the target in excess of \$445.5 million (increased from \$403.9 million in 2022) *or* (c) as a result of the transaction, the acquirer would hold voting securities or assets of the target in excess of \$111.4 million (increased from \$101.0 million) but not in excess of \$445.5 million *and* (i) either the acquirer or target has total assets or annual net sales of at least \$222.7 million (increased from \$202.0 million) *and* (ii) the other party has total assets or annual net sales of at least \$22.3 million (increased from \$20.2 million).

It is important to realize that relatively small M&A transactions can qualify for mandatory HSR reporting under the foregoing thresholds: a very small or mid-market asset or stock acquisition that resulted in tipping the \$111.4 million threshold – *inclusive of target voting securities or assets already held by acquirer* - could be a mandatory reportable transaction. It’s doubly important because failure to report reportable transactions is front and center on the FTC’s radar screen: in 2021, the FTC issued a warning to M&A parties not to seek to avoid HSR filings by structuring deals to retire seller/target debt rather than pay cash consideration that would exceed the reporting thresholds; also in 2021, the FTC issued a report analyzing 616 tech sector transactions valued at \$1 million or more that were not reported under HSR, finding that 94 of them should have been reported. The September 15 Report also found that assumption of debt and deferred or contingent compensation to sell-side founders was a significant component of acquisition consideration in the non-reported deals. (see, “FTC Sets Ambitious M&A Enforcement Agenda,” September 29, 2021; and “FTC Warns on Use of Debt Retirement,” September 17, 2021, both available with other M&A resources at [Kurtin PLLC Mergers & Acquisitions](#)).

The qualification “voting securities” in the HSR thresholds 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 assets 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% or greater ownership of voting rights or rights to distribution. The present contractual right to appoint at least half of the board of directors or equivalent governing body also establishes “control” for HSR purposes – convertible securities not conferring a present right to vote do not count. “Assets” include only exclusive licenses for purposes of triggering HSR filing obligations, although rules and regulations governing license territoriality, expiration, and reversionary rights to licensor may also come into play in assessing whether a given transaction is subject to HSR reporting.

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 JV 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 requirements 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 by an institutional investor of 15% or less of an issuer’s voting securities that is made strictly for investment purposes (the purchaser has no intention of participating in the issuer’s business decisions). A pending FTC rulemaking may affect some of the foregoing exemptions. The FTC or DoJ may request from the parties additional documentation and extensions of the waiting period.

Filing fees for transactions that must be reported range from \$30,000 (for transactions valued at less than \$161.5 million, underscoring the potential mid-market applicability of HSR reporting); \$100,000 (for transactions

valued not less than \$161.5 million but less than \$500 million); \$250,000 (for transactions valued not less than \$500 million but less than \$1 billion); \$400,000 (for transactions valued not less than \$1 billion but less than \$2 billion); \$800,000 (for transactions valued not less than \$2 billion but less than \$5 billion); to \$2.25 million (for transactions valued at \$5 billion or more). The maximum civil penalty for non-compliance with the notification and waiting period is \$46,517 per day.

Once documentation requests have been fully complied with and during the mandatory waiting period (including as extended), the FTC or DoJ may move for 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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