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Adjusted Hart-Scott-Rodino Thresholds Announced

By Robin Sampson

Merger control and antitrust review are essential services. The Department of Justice and Federal Trade Commission staffs continued to keep the premerger review process afloat during the recent partial federal government shutdown: Hart-Scott-Rodino (HSR) notifications were accepted, and second requests were issued. With reduced staff, however, some services and activities were curtailed: no grants of early termination, no responses to inquiries to the HSRHelp site, no rulemaking and no announcement of new HSR filing thresholds.

The staffs at both agencies are now back at work and tending to the accumulated backlog in merger reviews and related matters. Last week the agencies published the annual HSR filing threshold changes, about a month later than those thresholds are usually published. The new thresholds will become effective in mid-March, 30 days after publication in the Federal Register.

HSR notifications in both agencies are required for transactions that meet a “size of transaction” test and (in most cases) a “size of parties” test. Such transactions may include asset purchases, stock purchases, mergers, certain licensing transactions and the formation of certain joint ventures. Under the just-announced new thresholds, a transaction may be notifiable if it is valued at more than \$90 million **and** one party has assets or annual sales greater than \$180 million and another party has assets or annual sales greater than \$18 million. There are a number of exemptions that may relieve the parties of notification obligations, and a number of tricky interpretive issues that could trip up the unwary. For example, although most transactions must meet both “size of party” and “size of transaction” tests, transactions valued at more than \$359.9 million may be reportable even if one of the parties fails the “size of parties” test.

The previous thresholds and the newly revised thresholds, as well as the original baseline thresholds introduced in 2000, are set forth below.

Original Threshold	2018 Threshold	Revised 2019 Threshold
\$10 million	\$16.9 million	\$18 million
\$50 million	\$84.4 million	\$90 million
\$100 million	\$168.8 million	\$180 million
\$200 million	\$337.6 million	\$359.9 million
\$500 million	\$843.9 million	\$899.8 million

HSR notifications can be a significant gating item in closing a deal, as there is a waiting period (usually 30 calendar days, but sometimes less) between the time the agencies receive the notification and the time the parties are allowed to proceed with the transaction. The cost of getting the HSR analysis wrong can be costly, too; the agencies are entitled to impose significant fines on parties who fail to make a required filing. Those fines can accrue at a daily rate of nearly \$43,000 for each day of noncompliance – fines in the hundreds of thousands of dollars are not unknown.

Last week’s announcement also updates the filing fee thresholds for HSR notifications:

- \$45,000 for transactions valued in excess of \$90 million but less than or equal to \$180 million;
- \$125,000 for transactions valued in excess of \$180 million but less than or equal to \$899.8 million; and
- \$280,000 for transactions valued in excess of \$899.8 million.

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