

FTC REVISES HSR JURISDICTIONAL THRESHOLDS

The Federal Trade Commission has recently issued two important changes relating to the reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”).¹ These changes will affect fundamentally the manner in which companies both analyze proposed acquisitions to determine if an HSR Act filing is required and, if a filing is required, report revenues in the HSR Act Notification and Report Form itself.

First, as required by statute, the various filing and other dollar thresholds in the HSR Act have been revised again based on annual changes in the U.S. gross national product. These adjusted thresholds will take effect for all transactions that will close on or after February 17, 2006.

Second, effective for all HSR filings submitted on or after January 30, 2006, the required “base year” for reporting revenue information in the HSR Notification Form will change from 1997 to 2002. Additionally, reporting persons will be required to use the 2002 NAICS code system for all revenue disclosure, rather than the previously-utilized 1997 NAICS system.

Increased Jurisdictional Thresholds

Effective for all transactions closing on or after February 17, 2006, the minimum notification threshold under the HSR Act will increase from \$53.1 million to \$56.7 million. Thus, an acquisition may only potentially trigger an HSR filing if, as a result of an acquisition, the acquirer would hold assets, voting securities and/or non-corporate interests of the acquired person valued in excess of \$56.7 million. The precise 2006 notification thresholds are as follows:

Transaction Size Threshold	Pre-2005 Threshold	2005 Threshold	2006 Threshold (Effective for transactions closing on or after February 17, 2006)
Minimum Size-of-the-Transaction	\$50 million	\$53.1 million	\$56.7 million
Minimum Size-of-the-Transaction (above which the Size-of-Person Test will no longer apply)	\$200 million	\$212.3 million	\$226.8 million
Size-of-Person Test (applicable to transactions valued at less than \$226.8 million)	Person 1: \$10 million	\$10.7 million	\$11.3 million
	Person 2: \$100 million	\$106.2 million	\$113.4 million
25% of Voting Securities transaction valuation test	Transactions in excess of \$1,000,000,000	Transactions in Excess of \$1,061,300,000	Transactions in Excess of \$1,134,000,000

¹ Section 7A of the Clayton HSR Act, 15 U.S.C. §18a, et seq. (additional provisions are located in 11 U.S.C. §363(b)(2) and Pub. L. No. 101-62, §605 (1989)(the “HSR Act”). The premerger notification rules are codified at 16 C.F.R. Parts 801, 802, 803 (1990)(the “Rules”).

The above changes to the thresholds also affect the calculation of the HSR filing fees as follows:

Transaction Size Notification Thresholds	HSR Filing Fees (Effective for filings made on or after February 17, 2006)
\$56,700,000 to \$113,400,000	\$45,000
\$113,400,000 to \$567,000,000	\$125,000
Transactions in Excess of \$567,000,000	\$280,000

Note that while the new threshold for determining the requirement to file are effective for all *transactions closing* on or after February 17, 2006, the new threshold for determining the filing fee are effective for all *filings made* on or after February 17, 2006.

Changes in Revenue Disclosure

Effective January 30, 2006 the FTC is also implementing significant changes relating to the disclosure of “base-year” revenue in Item 5 of the HSR Notification and Report Form, as well as the precise NAICS codes to be utilized throughout Item 5 for reporting both “base year” and “most recent year” revenue.

Specifically, reporting persons will need to disclose 2002 revenue as the “base year” revenue rather than the 1997 base year previously required.

Moreover, when reporting revenue for both the “base year” and the “most recent year,” parties will be required to utilize codes published under the 2002 NAICS code system rather than the 1997 NAICS codes previously utilized. The 2002 system substantially revises the 1997 system for certain industries. Thus, to the extent a company needs to report revenue at the 6-digit NAICS code level, it will need to use the 2002 NAICS codes, published by the Office of Management and Budget (available at www.census.gov/epcd/www/naics.html). This site also contains links to sites containing conversion tables that will allow the 1997 and 2002 codes to be compared and converted.

To the extent manufacturing code revenue is disclosed at the 10-digit product code level for 2002 and at the 7-digit product class level for the “most recent year,” filers will be required to utilize the 10-digit and 7-digit NAICS codes published in the 2002 Numerical List of Manufactured and Mineral Products rather than the similar 1997 codes published in the 1997 Numerical List of Manufactured and Mineral Products (available at www.census.gov/prod/ec02/02numlist/m31r-nl.pdf).

What to Do?

Advance planning is key. Companies should consider taking immediate steps to ensure that all needed 2002 revenue information applicable to its U.S. operations is readily available if they anticipate needing to submit an HSR filing quickly, as they will not be able to refer to a recent HSR Notification Form filed in connection with a prior acquisition. The assembly of

these 2002 revenue figures can be particularly challenging for acquisitive companies, given the somewhat counter-intuitive requirement to include therein the revenues attributable to post-2002 acquisitions. The FTC's announcement concerning these changes in revenue disclosure can be accessed via www.ftc.gov/opa/2005/12/fyi0588.htm.

Companies should also be mindful of the new larger dollar thresholds in assessing the need to file in the first place, so as to avoid making a filing that is no longer required under the Act's new thresholds. Also, since the practical effect of the new thresholds also is to reduce significantly the filing fee for many transactions, application of the old thresholds will result in paying an incorrect and artificially inflated filing fee.

Finally, the 1997-2002 NAICS conversion charts should be consulted so that any filing is made utilizing the proper codes.

For more information on this Alert, please contact Frank S. Jones, Jr. (410-347-8707; fjones@wtplaw.com), Gustav P. Chiarello, III (202-659-6780; gchiarello@wtplaw.com) or Damian J. Mark (410-347-8777; dmark@wtplaw.com).

*

*

*

This Alert has been prepared for general informational purposes only and is not intended as legal advice. Antitrust counsel should be consulted both prior to consummating any transaction to insure that the appropriate HSR filing thresholds have been considered and prior to filing any HSR Notification Form to insure that all technical and other aspects of the HSR Act are satisfied.