

HSR Filing Thresholds and New Reporting Requirements for Foreign Investments in U.S. Entities

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Companies contemplating U.S. acquisitions or with existing U.S. investments should be aware of two recent regulatory developments involving notifications to U.S. authorities. The Federal Trade Commission (“FTC”) has published a notice to revise the premerger notification thresholds for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”). In a separate development, the U.S. Bureau of Economic Analysis has reinstated rules requiring U.S. entities that are 10% owned by foreign persons to file reports following the closing of new investments.

Revised HSR Act Thresholds

The HSR Act requires pre-acquisition notification of significant acquisitions involving U.S. business to the U.S. antitrust authorities. It requires parties to an acquisition of assets, voting securities (for example, mergers, acquisitions, joint ventures, asset purchase agreements), and non-corporate interests (for example, partnership and limited liability corporation (LLC) interests) to notify the FTC and the U.S. Department of Justice and wait the statutory period (30 days (or 15 days for a cash tender offer), unless early termination is granted or a “second request” for additional information is issued) before completing the transaction if the deal meets a value (“size-of-the-transaction”) threshold and the parties meet a minimum size (“size-of-the-person”) threshold. The FTC is required to revise the thresholds annually based on the change in gross national product.

The FTC has recently announced that the “size-of-the-transaction” threshold for a notification under the HSR Act will increase modestly from \$75.9 million to \$76.3 million. If the transaction value is at or below this threshold no filing is required. For transactions valued between \$76.3 million and \$305.1 million (up from \$303.4 million), the “size-of-the-person test” will continue to apply. That test makes a transaction reportable only where one party has sales or assets of at least \$152.5 million (up from \$151.7 million), and the other party has sales or assets of at least \$15.3 million (up from \$15.2 million). All transactions valued in excess of \$305.1 million are reportable without regard to the size of the parties.

The new thresholds will apply to any transaction that will close on or after the date which is 30 calendar days after the date of official publication of the new thresholds in the Federal Register. Official publication is expected in the next few business days.

The following is a summary chart of the threshold adjustments:

Prior Threshold	Revised Threshold
Size-of-the-transaction	
in excess of \$75.9 million	in excess of \$76.3 million
Size-of-the-person test	
\$15.2 million/\$151.7 million	\$15.3 million/\$152.5 million
Transaction value above which size-of-the-person test is inapplicable	
\$303.4 million	\$305.1 million

The applicable filing fees remain unchanged but will be based on the new thresholds. As such filing fees are now as follows: \$45,000 for transactions valued at between \$76.3 million and \$152.5 million; \$125,000 for transactions valued from \$152.5 million to \$762.7 million; and \$280,000 for transactions valued at \$762.7 million or more.

Reporting Requirements for Foreign Investments in U.S. Entities

The Bureau of Economic Analysis (“BEA”) is an agency of the U.S. Department of Commerce which provides economic statistics in the U.S., including the tracking of foreign direct investment in the United States. With effect from 24 November 2014, the BEA has reinstated rules requiring the reporting of new foreign investments in U.S. entities within 45 days of the occurrence of those investments. This is in addition to the existing BEA rules requiring quarterly and annual reporting from entities contacted individually by the BEA, but unlike quarterly and annual reports, the current reports are required in respect of all qualifying investments, whether or not the BEA contacts the entity. **Non-U.S. persons should be aware of the requirement for their U.S. investees to file the appropriate BE-13 Form within 45 days of a relevant investment (including an expansion of the U.S. business).**

The BEA’s revised “BE-13, Survey of New Foreign Direct Investment in the United States” will collect data on both new acquisitions of U.S. businesses by foreign investors and expansions of existing U.S. affiliates of foreign companies. If the BEA becomes aware of potentially reportable transactions, notifications will be mailed to respondents but, unlike other BEA surveys, persons subject to the reporting requirements of the BE-13 are required to report whether or not they are contacted by BEA. Therefore, while entities that are already BEA survey respondents are likely to have already been notified by the BEA of the new BE-13 survey, entities that are not already survey respondents will need to conduct an independent analysis.

Reporting thresholds

From 24 November 2014, a U.S. entity is required to complete a BE-13 Survey if:

- A “foreign direct investment” relationship in the United States is created, i.e. as a result of a transaction, a non-U.S. person (including a company) acquires, directly or indirectly, 10% or more of the voting securities of a U.S. incorporated business, or an equivalent interest of an unincorporated U.S. business enterprise, including a branch. The U.S. entity is referred to as the “U.S. affiliate” of the “foreign parent”,
- An existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations to include a new facility, or acquires a U.S. business enterprise, or
- A U.S. business enterprise that previously filed a BE-13 report on a newly established or expanded entity, indicating that the established or expanded entity is still under construction and construction is ongoing.

Potential penalties for failing to file reports include civil penalties and injunctive relief, with wilful failure leading to criminal fines and/or imprisonment.

Survey forms are due within 45 days after the investment is completed. Although the new rule became effective in November 2014, the survey will collect data retroactively back to 1 January 2014. Copies of the reports and instructions are available at www.bea.gov/fdi and electronic filing is available through www.bea.gov/efile. The information contained in the survey is used to measure the amount of new foreign direct investment in the U.S., and will help the BEA identify U.S. entities that are required to make ongoing quarterly, annual and five-yearly “benchmark” reports. The reports to the BEA are confidential and may be used only for analytical or statistical purposes. They cannot be presented without the respondent’s consent in any manner that allows the respondent to be individually identified, and the reports cannot be used for purposes of taxation, investigation or regulation.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Will Pearce	+44 20 7418 1448	will.pearce@davispolk.com
Joanna Valentine	+44 20 7418 1323	joanna.valentine@davispolk.com
Stephen M. Pepper	+1 212 450 4108	stephen.pepper@davispolk.com
John Reynolds	+1 202 962 7143	john.reynolds@davispolk.com
Mutya Fonte Harsch	+1 212 450 4289	mutya.harsch@davispolk.com
Britt Mosman	+1 202 962 7151	britt.mosman@davispolk.com

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