

Alert

FTC Publicizes Change in Policy Regarding Valuation of Publicly Traded Securities Under the Hart-Scott-Rodino Act

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The Premerger Notification Office (“PNO”) of the Federal Trade Commission (“FTC”) recently published a blog post regarding a policy change relating to valuations under the Hart-Scott-Rodino (“HSR”) Act that affects certain categories of acquisitions, in particular the acquisition of voting securities on a national securities exchange or through an interdealer quotation system registered with the Securities and Exchange Commission. Previously, the PNO advised that parties seeking to acquire additional shares of an issuer could “lock in” the value of any shares previously held at the lowest per share closing price within 45 days prior to an HSR filing. The PNO now takes the position that, for valuation purposes, the share price should not be “locked in” but should be re-valued at the time of each acquisition (using the actual acquisition date, rather than the filing date, for the 45-day lookback), even when an HSR filing has already been made.

The HSR Act requires parties to acquisitions of voting securities, assets or non-corporate interests meeting certain annually adjusted thresholds to make a premerger notification to the FTC and the Antitrust Division of the Department of Justice, and to observe a waiting period, prior to consummating such acquisitions. The various thresholds, which are to include the aggregate of current and anticipated holdings, are currently set at:

- \$76.3 million;
- \$152.5 million;
- \$762.7 million;
- 25 percent of outstanding voting securities (if valued greater than \$1.5253 billion); and
- 50 percent of outstanding voting securities or non-corporate interests (if valued greater than \$76.3 million).

The value of an acquisition of voting securities held as a result of the transaction includes the value of the voting securities already held by the acquiring person prior to the acquisition plus the value of the voting securities to be acquired. With respect to publicly traded voting securities, the voting securities already held are valued at the “Market Price,” which is generally defined as “the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 calendar days prior to” a certain reference date. The value of the publicly traded voting securities to be acquired

is the greater of the acquisition price or the Market Price. The reference date depends on the nature of the acquisition, but for open market purchases and other specific categories of transactions,¹ the HSR Act rules specify that the applicable reference date for the Market Price is either the date of receipt of the notice required by 16 C.F.R. Section 803.5(a) (typically, on or immediately prior to the filing date) or the date the acquisition is consummated.

Once an HSR Act filing has been made, the acquiring person has one year from the date the statutory waiting period ends or early termination has been granted to make an acquisition that crosses the threshold indicated in the filing. If an acquisition is made within that time and the threshold is crossed, whether through an acquisition or by an appreciation in value during the first year,² the acquiring person is exempt from filing for subsequent acquisitions of the same issuer's voting securities for a period of five years from the date the statutory waiting period ends or early termination has been granted, so long as a higher threshold is not crossed. If the filed-for threshold is not crossed within the first year, then the five-year exemption is only available for subsequent acquisitions up to the limit of the highest threshold that was crossed within the first year.

Based on the PNO's prior interpretation regarding the determination of Market Price, where parties have made an HSR filing, the "Market Price" of their current holdings could be locked in as of the filing date for many transactions (including open market purchases), for up to one year after the filing. Therefore, if, prior to the consummation of the acquisition, the stock price rose, this allowed parties filing at a certain threshold to be able to buy more shares because the value of their current holdings would be locked in at the lower Market Price. Conversely, if the stock price dropped, the locked-in Market Price meant that parties would not have to acquire as many shares to ensure that the filed-for threshold was crossed within the first year.

The PNO has now changed its view in a manner that does away with the locked-in Market Price. Therefore, in order to assess whether a particular transaction has crossed an HSR Act threshold, the appropriate reference date for the Market Price should be the date of each planned acquisition, whether or not an HSR filing has been made. It appears then that the date of the receipt of the required notice that is mentioned in the HSR Act rule is only relevant for purposes of making the initial determination as to whether to file, and for stating the value of the acquiring person's holdings in their HSR filing.

There are many complex and technical coverage requirements and exemptions under the HSR Act. Accordingly, the advice of counsel must be sought to determine the applicability of the HSR Act's filing requirements to particular situations.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

¹ In addition to acquisitions made on securities exchanges, these categories include acquisitions of acquirer stock by offerees in non-cash tender offers, tender offers, indirect non-controlling acquisitions of voting securities of an issuer through a change of control of the entity holding such voting securities (so-called "secondary acquisitions"), conversions and the exercise of options or warrants that are the subject of a currently effective registration statement.

² Note, however, that an appreciation in value alone, without any further acquisition, will not require any HSR filing.

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