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More Leveraged Buy-Outs to Face HSR Scrutiny as Agency Expands Reporting Requirements

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The Federal Trade Commission's Premerger Notification Office has expanded the Hart-Scott-Rodino (HSR) reporting requirements for certain leveraged buyouts. M&A practitioners generally are familiar with the HSR premerger notification regime. Most are also familiar with the fact that determining whether a transaction is or is not subject to reporting is not always straightforward. The HSR reporting rules require that before certain transactions can close, typically M&A deals but other types of transactions can be captured as well, the antitrust enforcement agencies – FTC and DOJ – must be notified and a 30 day waiting period must be observed. In transactions likely to result in competitive harm, the agencies can investigate, which can further delay closing. In the most extreme cases the agencies can impose restrictions, order divestitures, or block a transaction from closing altogether. Therefore, any expansion in reporting requirements merits close attention.

The basic threshold for reporting under the HSR Act, known as the "Size-of-Transaction", presently is $78.2 million, and adjusts annually. Size-of-Transaction is a bit of a misnomer though because as calculated under the HSR rules it does not always also reflect the transaction value the parties have agreed. It also can include the value of certain prior acquisitions. The rules provide that asset acquisitions include the value of prior asset acquisitions from the same seller in the prior six months, and that asset acquisitions also include the value of assumed liabilities. Prior acquisitions of stock, on the other hand, are *always* aggregated with new acquisitions of stock in the same company for determining the Size-of-Transaction, but valuing the stock in those transactions can be tricky. The value of stock previously held, for instance, is based on the current value of the stock at the time of the new acquisition rather than its original acquisition price.

In stock acquisitions, existing debt is not included in the Size-of-Transaction analysis, and this is true whether the existing debt is being paid off at closing or is being refinanced. The rule aims to align reportability in this context with the equity value of the company rather than its full enterprise value.

The agency recently reversed its position though with respect to Leveraged Buy-Out, or LBO, transactions where *new* debt is taken on to finance the transaction. Prior guidance tied reportability in the LBO context to which party incurred the new debt. Where the buyer incurred the debt, it was included in the Size-of-Transaction calculation, and where the target incurred the debt, it was not. Under the new guidance, however, the agency has squarely reversed its position -- "new debt used to finance an LBO transaction, whether taken on by the buyer or the target, is to be included in the size of transaction".

Thus, the Size-of-Transaction for stock deals under the new guidance will most closely align with the pre-transaction equity value of the company, rather than the company's post-closing equity value. The change will mean more transactions will be subject to HSR reporting, particularly in the private equity arena where debt financing is common.

As the new guidance is effective immediately, it will also mean transactions presently underway that would not have been subject to reporting under the prior guidance will now need to be reevaluated – potentially resulting in additional costs and delaying closing. If you are involved in an LBO transaction that has not yet closed and that was exempt from HSR reporting under the prior agency interpretations, please feel free to contact one of our attorneys listed below to discuss how the new guidance will impact reportability.

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