

### § 1.03 Executive Summary of the Act

The Act requires certain parties that intend to merge, purchase, or sell voting securities, unincorporated interests, or assets or engage in other acquisition transactions to provide the FTC and the Antitrust Division with detailed information regarding their operations and the proposed transaction.<sup>1</sup> In general, the Act also stays the consummation of covered mergers and acquisitions for a minimum of thirty days and cash tender offers for a minimum of fifteen days.<sup>2</sup> Of at least equal importance is the government's unfettered ability to obtain at least one extension of the initial waiting period simply by requesting additional information regarding the proposed transaction.<sup>3</sup> By contrast, where the government has no concerns over the effect of a transaction on competition, it may (and usually does) grant early termination of the initial waiting period when it is requested.

The FTC has significantly amended the Act through its continuing authority, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division, to promulgate rules and regulations defining the terms used in the Act<sup>4</sup> and exempting from the requirements of the Act transactions "which are not likely to violate the antitrust laws."<sup>5</sup> The FTC also has implemented and modified the Act through formal and informal interpretations of the Act and its underlying Rules, as well as by modifications to the Form.

The following is an abbreviated summary of the significant highlights of the Act and Rules. Each of the points is discussed in much greater detail in subsequent chapters.

#### [1]—When Does the Act Apply?

##### [a]—Jurisdictional Requirements

The Act will apply to a transaction only if all three of the following jurisdictional tests are met:

(1) *The Commerce Test*: Either the acquiring person<sup>6</sup> or the acquired person is engaged in United States commerce or in some activity affecting United States commerce.

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<sup>1</sup> 15 U.S.C. §§ 18a(a)(1) through 18a(a)(3).

<sup>2</sup> 15 U.S.C. § 18a(b)(1).

<sup>3</sup> 15 U.S.C. §§ 18a(e)(1) and 18a(e)(2).

<sup>4</sup> 15 U.S.C. § 18a(d)(2)(A). See § 1.01 N. 5 *supra* for a list of Federal Register citations to amendments to the HSR Rules. These cites may also be found at Appendix B(2) *infra*.

<sup>5</sup> 15 U.S.C. § 18a(d)(2)(B).

<sup>6</sup> See text at N. 9 *infra* for a definition of "person" under the HSR Act.

(2) *The Size-of-Transaction Test*: As a result of the acquisition, the acquiring person will hold voting securities, unincorporated interests, or assets of the acquired person valued in excess of \$50 million (as adjusted).<sup>7</sup>

(3) *The Size-of-Person Test*: For transactions valued in excess of \$50 million (as adjusted) but not in excess of \$200 million (as adjusted), (a) a person with total assets or net sales of \$100 million (as adjusted) or more is acquiring voting securities, unincorporated interests, or assets of a person with total assets, or net sales if a manufacturer, of \$10 million (as adjusted) or more or is acquiring voting securities, unincorporated interests, or assets of a person not engaged in manufacturing with total assets of \$10 million (as adjusted) or more, or (b) a person with total assets or net sales of \$10 million (as adjusted) or more is acquiring voting securities, unincorporated interests, or assets of a person with total assets or net sales of \$100 million (as adjusted) or more. The Act applies to all transactions valued in excess of \$200 million (as adjusted), without regard to the size of the persons.<sup>8</sup>

Applying these jurisdictional tests requires familiarity with the definitions of the essential terms. The Act speaks in terms of an acquiring or acquired “*person*,” which is defined as an “ultimate parent entity” and all other “entities” which it controls directly or indirectly.<sup>9</sup>

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<sup>7</sup> 15 U.S.C. § 18a(a). Since 2004, the thresholds are adjusted annually based on the percentage change in the gross national product (“GNP”) for the fiscal year. 15 U.S.C. § 18a(a)(2)(A). All references in the Rules and in this treatise will henceforth be accompanied by the phrase “(as adjusted)” so as not to be rewritten each year. The annual adjustment usually occurs toward the end of January. The most recent adjustment for 2008 appeared at 73 Fed. Reg. 5191 (Jan. 29, 2008).

<sup>8</sup> 15 U.S.C. § 18a(a)(2)(A). The addition of the \$200 million (as adjusted) ceiling was added to the Act in the 2001 amendment. At that time, there had been many large acquisitions, primarily in the so-called “dot.com” industry that were not reportable because the target’s principal assets were intellectual property which did not appear as an asset on a balance sheet. In order to provide the opportunity for review of these types of transactions, Congress amended the HSR Act to cover all transactions above a certain size, no matter what the Size-of-Person. Ironically, the dot.com boom ended at approximately the same time as the amendment became effective, with the unintended consequence that other types of transactions also became reportable which had not been so and which had no antitrust issues, such as the so-called “LBO” or pass-through exemption which had provided that newly formed companies which were not controlled by any other person and whose only asset was cash used to make an acquisition would not meet the Size-of-Person test. Beginning with the 2001 amendment, if the transaction were greater than \$200 million (as adjusted), a filing would now be necessary.

<sup>9</sup> 16 C.F.R. § 801.1(a)(1) (2008).

“Control” is defined as beneficial ownership, directly or indirectly, of 50% or more of the outstanding securities that may presently be voted for the election of directors of an issuer, or the power presently to appoint one-half or more of the directors, or in the case of an unincorporated entity that does not issue voting securities, the right to 50% or more of the profits of the entity, or 50% or more of its assets upon dissolution.<sup>10</sup>

An “entity” is defined as a natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, wherever located and of whatever citizenship.<sup>11</sup> However, a group of individuals or entities is not an entity. A foreign state, foreign government, or agency thereof (other than a corporation engaged in commerce) is also not an entity.

The “ultimate parent entity” is “an entity which is not controlled by any other entity.”<sup>12</sup> An entity can have more than one ultimate parent entity, each of which would be required to file separately with respect to a particular transaction. A natural person is always his or her own ultimate parent entity.

Thus, in transactions where the Size-of-Person test is applicable, it is necessary to consolidate the sales and assets of all controlled entities in determining whether a person meets the test of having either \$10 million (as adjusted) or \$100 million (as adjusted) in annual sales or total assets. In doing so, all indirect holdings in a single issuer must be aggregated to determine whether that issuer is controlled. Annual sales are determined by reference to the last annual income statement, whereas total assets are those shown on the most recent regularly prepared balance sheet.<sup>13</sup>

Applying the jurisdictional tests requires calculating the value of the proposed acquisition transaction. The method of valuing an acquisition depends upon the type of acquisition involved. In an asset acquisition, the value will be the acquisition price or the asset’s fair market value (as determined in good faith by the acquiring person’s board of directors) if the latter is greater than the acquisition price or if the acquisition price has not been determined and includes the value of all assumed liabilities.<sup>14</sup> For a voting securities transaction,

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<sup>10</sup> 16 C.F.R. § 801.1(b) (2008).

<sup>11</sup> 16 C.F.R. § 801.1(a)(2) (2008).

<sup>12</sup> 16 C.F.R. § 801.1(a)(3) (2008).

<sup>13</sup> A person with no regularly prepared balance sheet must prepare one only if a balance sheet is necessary to determine whether the Size-of-Person test is met.

<sup>14</sup> 16 C.F.R. § 801.10(b) (2008).

if the security is traded on a national securities exchange or is authorized to be quoted in an interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission, such as NASDAQ, the value is the greater of the acquisition price or the market price.<sup>15</sup> For securities not publicly traded, the value is the acquisition price or, if that has not been determined, the fair market value as determined in good faith by the Board of Directors (or designee) of the acquiring person.<sup>16</sup> The market price is generally calculated as the lowest closing price in the forty-five calendar days prior to consummation of the acquisition.<sup>17</sup>

Finally, certain transactions receive special treatment under the Act and Rules. For example, in the formation of a corporate joint venture or unincorporated entity, the contributors are all considered to be acquiring persons and the joint venture itself is considered to be the acquired person. A proposed corporate joint venture or the formation of an unincorporated entity will thus be reportable (although the joint venture itself will not have to submit a Form) if it meets specific jurisdictional tests which are similar to those for mergers and other acquisition transactions.<sup>18</sup>

A secondary acquisition, which occurs whenever an acquiring person obtains control of an issuer that holds voting securities of other issuers not within the same person, may be reportable even if the primary acquisition is exempt.<sup>19</sup> Special Rules also apply to acquisition of the voting securities of the acquiring person in the merger<sup>20</sup> and to the acquisition of voting securities of the offeror in an exchange offer.<sup>21</sup>

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<sup>15</sup> 16 C.F.R. § 801.10(a)(1) (2008).

<sup>16</sup> 16 C.F.R. § 801.10(a)(2) (2008).

<sup>17</sup> 16 C.F.R. § 801.10(c)(1) (2008).

<sup>18</sup> 16 C.F.R. §§ 801.40 and 801.50 (2008).

<sup>19</sup> 16 C.F.R. § 801.4 (2008).

<sup>20</sup> 16 C.F.R. § 801.2(e) (2008).

<sup>21</sup> 16 C.F.R. § 801.31 (2008).