

The Pre-Merger Notification Office of the FTC Updates the Size of the Transaction Test for Leveraged Buyouts (LBOs)

The Pre-Merger Notification Office ("PNO") of the Federal Trade Commission ("FTC"), which administers the pre-merger notification program under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") (together with the notification program "HSR filing"), has updated its position on how parties must consider new debt in leveraged buyout ("LBO") transactions when determining the size of a transaction for HSR filing purposes. The size of the transaction test excludes certain transactions from the HSR Act's reporting requirements if they are valued below the annually adjusted dollar threshold. The current size of the transaction threshold is \$78.2 million.

Previously for LBO transactions, the PNO had advised that parties only needed to include new debt when calculating the size of transaction if such debt was incurred, provided or guaranteed by the buyer. As a result of the PNO's new position, parties must now include LBO debt incurred by either the buyer or target itself. This change is almost certain to result in an uptick in HSR filings.

This new interpretation reflects the PNO's reasoning that regardless of whether the LBO debt used to fund the transaction is taken on by the buyer or the target, the new debt serves the same purpose of financing the transaction and, in most circumstances, is distributed to shareholders. According to the PNO, this debt must always be included in the calculation. The new policy does not change the fact that retiring pre-existing debt and transaction expenses are still deductible from the size of the transaction.

The PNO has provided some examples of how to calculate the size of the transaction using the new approach. One example is where a PE Fund seeks to acquire 100% of the target's non-corporate interests for \$500 million. The PE Fund has \$100 million cash to finance the transaction. The target takes on a new \$400 million loan. In addition, the target has \$150 million of pre-existing debt, which will be retired in connection with the acquisition, along with \$10 million of transaction expenses expected to be incurred. Here, the size of the transaction is \$340 million: \$100 million of the PE Fund's cash + \$400 million of the target's loan - \$150 million of the target's retired debt - \$10 million in transaction expenses.

This official policy is effective immediately and continues the recent trend of the PNO closing the loop on ways in which parties had previously been able to forego HSR filings either based upon the method of calculating the size of transaction or interpreting the statutory exemptions. Given the FTC's recently announced increase in fines for violations of the HSR Act from \$16,000 to

\$40,000 per day, it is even more important that parties carefully consider the HSR Act's reporting requirements for all transactions.

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