

Revised Hart-Scott-Rodino Act Thresholds and Increased Penalties

Revised Thresholds

The Federal Trade Commission (“FTC”) recently announced revisions to the Hart-Scott-Rodino (“HSR”) Act filing thresholds. The HSR Act requires annual adjustment of the jurisdictional thresholds based on the change in the U.S. gross national product.

Effective February 12, 2009, subject to certain exemptions, an HSR Notification and Report Form must be filed when, as a result of an acquisition, the buyer will hold voting securities and/or assets valued in excess of \$65.2 million, and the transaction involves parties with net annual sales or total assets valued at \$13 million or more and \$130.3 million or more, respectively. If the value of the voting securities and/or assets exceeds \$260.7 million, then — again, subject to certain exemptions — the size of the parties is irrelevant and an HSR Notification and Report Form must be submitted. The revised thresholds will apply to all transactions that close on or after the February 12, 2009 effective date.

The chart below summarizes the original thresholds set forth in the HSR Act and regulations, as well as last year’s and the new thresholds.

	Original Thresholds	2008 Thresholds	New Thresholds
Size of Transaction	\$50 million \$200 million	\$63.1 million \$252.3 million	\$65.2 million \$260.7 million
Size of Person	\$10 million \$100 million	\$12.6 million \$126.2 million	\$13.0 million \$130.3 million

Filing fees have not changed and apply to the new thresholds as follows:

Transaction Value	Filing Fee
Greater than \$65.2 million but less than \$130.3 million	\$45,000
Greater than or equal to \$130.3 million but less than \$651.7 million	\$125,000
\$651.7 million or more	\$280,000

Increased Civil Penalties

The FTC also has announced an increase in the maximum civil penalty amounts for HSR violations from \$11,000 per day to \$16,000 per day, effective February 8, 2009 — an increase of nearly fifty percent. The

FTC is required by law to make adjustments to the HSR penalty amounts and various other civil penalty amounts at least once every four years based on increases in the Consumer Price Index.

Investment Firms' \$800,000 Fine for Failure to File HSR Highlights Importance of Proper Application of HSR Aggregation Rules

On December 15, 2008, two related investment funds, ESL Partners L.P. ("ESL Partners") and ZAM Holdings, L.P. ("ZAM"), agreed to pay civil penalties of \$525,000 and \$275,000 respectively, for failing to submit timely Hart-Scott-Rodino ("HSR") Act premerger notification filings prior to increasing their respective holdings of voting stock in AutoZone, Inc. ("AutoZone"). This enforcement action highlights the importance of closely scrutinizing subsequent acquisitions of voting stock in the same company — even where the prior acquisition was the subject of a timely HSR filing or exempt from HSR reporting obligations.

An HSR filing is required for certain acquisitions of voting stock, assets, or non-corporate interests valued in excess of \$63.1 million (current threshold, adjusted annually) where the parties meet certain asset and revenue thresholds and the transaction is not otherwise exempt. In an acquisition of voting stock, the size-of-transaction threshold is based on the value of all voting stock of that issuer that will be held by the purchaser after the acquisition — including, under certain circumstances, the value of any voting stock held prior to the pending acquisition. What triggered this enforcement action was ESL Partners' and ZAM's failure to take into account AutoZone voting stock they already held in determining the HSR size-of-transaction.

ESL Partners had made an HSR filing in August of 1999 that allowed it to acquire shares in AutoZone without making another HSR filing for a five-year period that expired on September 1, 2004. At the end of the five-year period, ESL Partners held approximately \$775 million of AutoZone voting stock. Subsequently, on September 28, September 30, October 12, and October 14, 2004, ESL Partners made additional acquisitions of AutoZone stock without submitting the required HSR filing. These acquisitions were not covered by the prior HSR filing

and, combined with the pre-September 2004 acquisitions, were reportable under HSR.

ZAM, through a controlled entity, held approximately \$270 million of AutoZone voting stock as of September 1, 2004. Due to certain HSR rules in effect at the time, ZAM was not required to make an HSR filing in connection with these holdings. On October 12 and 14, 2004, ZAM, through a controlled entity, made additional purchases of AutoZone voting stock which, combined with its prior holdings, exceeded the HSR threshold. ZAM did not submit the required HSR filing prior to these acquisitions.¹

In early 2005, in response to inquiries from the Premerger Notification Office of the Federal Trade Commission regarding the absence of HSR filings, ESL Partners and ZAM both filed belated HSR notifications. According to the government, ESL Partners and ZAM each were in violation of the HSR Act from the time of the initial improper acquisitions through the expiration of the appropriate HSR Act waiting period — a period of approximately five months.

This case is an important reminder that the antitrust agencies demand strict compliance with the HSR reporting obligation and expect companies to be sufficiently informed regarding the complex requirements of the HSR Act. As highlighted by these enforcement actions, application of the HSR rules, especially with regard to the aggregation of prior acquisitions of voting securities of the same issuer, are extremely complex and require the guidance and advice of experienced counsel.

¹ In its complaint, the government asserted that neither ESL Partners nor ZAM was entitled to rely on the exemption for acquisitions solely for the purpose of investment. According to the government, the exemption was not applicable because ESL Partners held more than ten percent of the outstanding voting securities of AutoZone as a result of the September 28, 2004 acquisition and ZAM intended "to participate in the formulation, determination or direction of the basic business decisions of AutoZone" by virtue of the fact that the individual who managed the partnership that made the investment decisions for the ZAM-controlled entity that acquired the AutoZone stock served on the AutoZone board of directors.

Application of the HSR thresholds to a transaction involves detailed knowledge of the HSR Act and its implementing regulations. If you have questions regarding the HSR Act or its revised thresholds, please contact the following individuals or your regular Kirkland contact:

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