Introduction

• This is a hyperlink-enhanced presentation that was developed as a preliminary guide to help companies understand the basics about the HSR filing process.

• To advance through the guide, answer the question on the screen by clicking on the appropriate hyperlinked object or by clicking the “Next” button at the bottom.

• To return to the initial “What is Being Acquired” screen at any point, click the “Start Over” button on the bottom.

• To return to the previous screen at any point, press the “Alt” and left arrow keys on your keyboard at the same time.

• This resource is for general informational purposes only. It should not be construed as legal advice, nor should it be used a substitute for legal counsel.

• If you need any additional information or have any questions regarding the HSR filing process, please contact Scott Perlman (sperlman@mayerbrown.com; 202-263-3201) or Meytal McCoy (mmccoy@mayerbrown.com; 202-263-3898).
What Is Being Acquired?

- Voting Securities
- Assets
- Interests in Non-Corporate Entities (LLCs, Partnerships)
- Acquisition in Relation to the Formation of a Corporation
Valuing Voting Securities

First, you must determine whether the size-of-the-transaction test has been met. The size-of-the-transaction test is based on: (1) the value of the voting securities that will be acquired; PLUS (2) the value of any voting securities of the same corporation that you already hold.
Valuing Voting Securities

Has the Price Been Set By Agreement?

- **YES**
- **NO**

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Valuing Voting Securities

The Value Is the Greater of the Market Price or the Agreed Upon Price
Valuing Voting Securities

The Value Is the Market Price
Valuing Voting Securities

The Value Is the Agreed Upon Price
Valuing Voting Securities

The Value Is Fair Market
Value of the Voting Securities

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Is an HSR Filing Required?

Add the value of any voting securities of the corporation that are held already to the value of the voting securities being acquired (CALCULATION HELP)

- **Total Value Exceeds $305.1 Million?**
- **Total Value Is Less Than or Equal to $305.1 Million and More than $76.3 Million?**
- **Total Value Is $76.3 Million or Less?**

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Calculating The Value of Voting Securities Already Held

• To calculate the value of voting securities already held, first ascertain if the voting securities are publicly traded or non-publicly traded.
  – Publicly traded voting securities already held are valued at the publicly traded market price.
  – Non-publicly traded voting securities are valued at fair market value.
HSR Filing Required?

HSR Filing Is Required Unless an Exemption Applies

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
HSR Filing Required?

HSR Filing Is Required if the Size-of-the-Persons Test Is Met

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
HSR Filing Required?

No HSR Filing Is Required

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Valuing Assets

First, you must determine whether the size-of-the-transaction test has been met. The size-of-the-transaction test is based on: (1) the value of the assets that will be acquired; PLUS (2) the value of any assets acquired from the same person within the last 180 days.

Is the Acquisition Price Set by Agreement?

YES  NO

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Valuing Assets

The Value Is the Greater of the Acquisition Price or the Fair Market Value of the Assets
Valuing Assets

If the Acquisition Price Is Not Set by the Agreement, or if Acquisition Price Is Uncertain (e.g. Because of Future Payment Amounts Based on Performance), then the Value Is the Fair Market Value of the Assets
Valuing Assets

• To determine the acquisition price:
  – Start with the consideration being paid;
  – Add the value of any accrued liabilities of the Acquired Person that will be assumed by the Acquiring Person;
  – Add the value of any assets that the Acquiring Person has acquired from the Acquired Person within the last 180 days; and
  – Add the value of any assets for which in the last 180 days, the Acquiring Person has executed a letter of intent or agreement in principle to acquire those assets from the Acquired Person

• Fair market value must be determined in good faith by the board of directors of the Acquiring Person or the board’s designee; any reasonable method can be used (e.g., discounted cash flow)
Is an HSR Filing Required?

1. **Total Value of the Assets Exceeds $305.1 Million?**
2. **Total Value of the Assets Is Less than or Equal to $305.1 Million and more than $76.3 Million?**
3. **Total Value of the Assets Is $76.3 Million or Less?**

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Acquiring Interests in Non-Corporate Entities

First, you must determine whether the size-of-the-transaction test has been met. The size-of-the-transactions is based on: (1) the value of the non-corporate interests that will be acquired; PLUS (2) the value of any non-corporate interest of the same entity that you already hold.

Will One Acquiring Person Acquire a Controlling Interest (50% Or Greater) in the Non-Corporate Entity?

- YES
- NO

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
If the Acquiring Person Will Acquire a Controlling Interest in the Non-Corporate Entity:

Does the Agreement Set a Price for the Non-Corporate Interests Being Acquired?

Yes  No

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
If the Acquiring Person Will Not Acquire a Controlling Interest in the Non-Corporate Entity:

No HSR Filing Is Required
If the Agreement Sets a Price for the Non-Corporate Interests Being Acquired:

The Value Is the Agreed Upon Price
If the Agreement Does **Not** Set a Price for the Non-Corporate Interests Being Acquired:

**The Value Is the Fair Market Value of the Interests**
Is an HSR Filing Required?

Add the fair market value of any non-corporate interests of the same entity already held by the Acquiring Party to the value of any non-corporate interests being acquired:

Total Value Exceeds $305.1 Million?

Total Value Is Less than or Equal to $305.1 Million and More than $76.3 Million?

Total Value Is $76.3 Million or Less?

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
HSR Filing Required?

HSR Filing Is Required Unless an Exemption Applies

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
HSR Filing Required?

HSR Filing Is Required if the Size-of-the-Persons Test Is Met

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
HSR Filing Required?

No HSR Filing Is Required

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Size-of-the-Persons Test

Based on Fully Consolidated Financials, Does the Acquired Person Have Total Assets or Annual Net Sales of $152.5 Million or More and Does the Acquiring Person have Total Assets or Annual Net Sales of $15.3 Million or More?

[YES] [NO]
Size-of-the-Persons Test Met?

The Size-of-the-Persons Test Is Met, and an HSR Filing Is Required Unless an Exemption Applies
Size-of-the-Persons Test

Is the Acquired Person Engaged in Manufacturing Operations?

YES  NO

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Size-of-the-Persons Test Met?

The Size-of-the-Persons Test Is Met, and an HSR Filing Is Required Unless an Exemption Applies.
Size-of-the-Persons Test Met?

Size-of-the-Persons Test Is Not Met; No HSR Filing Is Required

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
If Acquired Person Is Engaged in Manufacturing Operations:

Based on Fully Consolidated Financials of Each Person, Does the Acquired Person Have Total Assets or Annual Net Sales of $15.3 Million or More and Does the Acquiring Person Have Total Assets or Annual Net Sales of $152.5 Million or More?

YES  NO

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
If Acquired Person Is Not Engaged in Manufacturing Operations:

Based on Fully Consolidated Financials of Each Person, Does the Acquired Person have Total Assets of $15.3 Million or More and Does the Acquiring Person Have Total Assets or Annual Net Sales of $152.5 Million or More?

START OVER

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Size-of-the-Persons Test Met?

The Size-of-the-Persons Test Is Met, and an HSR Filing Is Required Unless an Exemption Applies.
Size-of-the-Persons Test Met?

Size-of-the-Persons Test Is Not Met; No HSR Filing Is Required

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Formation of Corporation: Size-of-the-Persons Test

**DOES:**

- The Acquiring Person Have Annual Net Sales of $15.3 Million or more;
- The Newly Formed Corporation Have Total Assets of $152.5 Million or more (CALCULATION HELP); and
- At Least One of the Acquiring Persons Have Annual Net Sales or Total Assets of $15.3 Million or more?
Calculating Total Assets of the Newly-Formed Corporation

• To calculate total assets of newly-formed corporation, include:
  – (1) All of the assets that the parties have agreed to contribute; and
  – (2) Any amount of credit or any obligation of the newly-formed corporation that any contributing person has agreed to extend or guarantee
HSR Filing Required?

HSR Filing Is Required
Unless an Exemption Applies

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Formation of Corporation: Size-of-the-Persons Test

**DOES:**

- The Acquiring Person Have Annual Net Sales or Total Assets of $152.5 Million or more;
- The Newly Formed Corporation Have Total Assets of $15.3 Million or more ([CALCULATION HELP]); and
- At Least One of the Acquiring Persons Have Annual Net Sales or Total Assets of $15.3 Million or more?

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Calculating Total Assets of the Newly-Formed Corporation

• To calculate total assets of newly-formed corporation, include:
  – (1) All of the assets that the parties have agreed to contribute; and
  – (2) Any amount of credit or any obligation of the newly-formed corporation that any contributing person has agreed to extend or guarantee
HSR Filing Required?

No HSR Filing Is Required

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Commonly-Used Exemptions from the HSR Act

§ 802.1 – Acquisitions of Goods and Realty in the Ordinary Course of Business

• Exempts certain acquisitions made in the ordinary course of business

• Covers acquisitions of new goods, current supplies, and used durable goods in certain situations (e.g., certain leased used durable goods), and acquisitions relating to certain outsourcing transactions

• Does not apply if the Acquired Person is selling all the assets of an operating unit
Commonly-Used Exemptions from the HSR Act

§ 802.2 – Certain Acquisitions of Real Property

• Exempts certain acquisitions of:
  – New facilities
  – Used facilities
  – Unproductive Real Property
  – Office and residential property
  – Hotels and motels
    • Does not include casinos, trade marks, or management companies that manage third-party properties
  – Recreational Land
  – Agricultural Property
  – Retail rental space and warehouses

• Parties must value separately any non-exempt assets that are being acquired
Commonly-Used Exemptions from the HSR Act

§ 802.3 – Acquisitions of Carbon-Based Mineral Reserves

• Exempts acquisitions of reserves of oil, natural gas, shale or tar sands, or the rights thereto, valued at $500 million or less

• Also exempts acquisitions of reserves of coal, or rights thereto, valued at $200 million or less

• Includes associated exploration and production assets

• Parties must value separately any non-exempt assets that are being acquired
Commonly-Used Exemptions from the HSR Act

§ 802.4 – Acquisition of Corporations or Unincorporated Entities that Hold Exempt Assets

• Exempts the acquisition of voting securities in corporations or controlling interests in unincorporated entities if the corporation or unincorporated entity only holds assets that are otherwise exempt from the HSR Act

• Parties must value separately any non-exempt assets to determine whether the value of such assets exceeds the size-of-transaction test ($76.3 million). If so, an HSR filing is required.
Commonly-Used Exemptions from the HSR Act

§ 802.9 – Acquisitions Solely for the Purpose of Investment

• Exempts passive investments in corporations, regardless of dollar amount, if the Acquiring Person will hold 10% or less of the voting securities of the issuer

• Does not apply if the Acquiring Person takes actions that are inconsistent with an investment-only acquisition, such as:
  – Nominating a candidate for the board of directors;
  – Proposing corporate action requiring shareholder approval;
  – Soliciting proxies;
  – Having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the Acquired Person;
  – Being a competitor of the Acquired Person;
  – Doing any of the above with an entity directly or indirectly controlling the Acquired Person

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Commonly-Used Exemptions from the HSR Act

§ 802.50 – Acquisition of Foreign Assets

• Exempts the acquisition of assets located outside of the U.S. if:
  – Any sales into the U.S. attributable to those assets were $76.3 million or less in the Acquired Person’s most recent fiscal year; or
  – Both the Acquiring and Acquired Persons are foreign, the aggregate sales of both the Acquiring and Acquired Persons in or into the U.S. are less than $167.8 million in their respective most recent fiscal years, the aggregate total assets of the Acquiring and Acquired Persons located in the U.S. have a fair market value of less than $167.8 million, and the transaction value does not exceed $305.1 million
Commonly-Used Exemptions from the HSR Act

§ 802.51 – Acquisitions of Voting Securities of a Foreign Issuer

- Exempts acquisitions of the voting securities of a foreign issuer by a U.S. person if:
  - Any assets of the issuer and all of the entities it controls located in the U.S. have a fair market value of $76.3 million or less; and
  - The sales in or into the U.S. of the issuer and all of the entities it controls do not exceed $76.3 million in its most recent fiscal year

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Commonly-Used Exemptions from the HSR Act

§ 802.51 – Acquisitions of Voting Securities of a Foreign Issuer

• Exempts acquisitions of the voting securities of a foreign person by a foreign person if:
  – The Acquiring Person does not acquire control of the issuer; or
  – Any assets of the issuer and all of the entities it controls located in the U.S. have a fair market value of $76.3 million or less; and the sales in or into the U.S. of the issuer and all of the entities it controls do not exceed $76.3 million in its most recent fiscal year; or
  – Both the Acquiring and Acquired Persons are foreign, the aggregate sales of both the Acquiring and Acquired Persons in or into the U.S. are less than $167.8 million in their respective most recent fiscal years; the aggregate total assets of the Acquiring and Acquired Persons located in the U.S. have a fair market value of less than $167.8 million; and the transaction value does not exceed $305.1 million
Formation of Corporation: Size of Transaction Test

Has the Price Been Set by Agreement?

- YES
- NO

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously
Formation of Corporation: Size of Transaction Test

The Value Is Agreed Upon Price
Formation of Corporation: Size of Transaction Test

The Value Is the Fair Market Value of the Voting Securities
Formation of Corporation: Size of Transaction Test

FOR EACH SHAREHOLDER FORMING CORPORATION:

Does the Total Value Exceed $305.1 Million?

Is the Total Value Less than or Equal to $305.1 Million and More than $76.3 Million?

Is the Total Value $76.3 Million or Less?

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Formation of Corporation:

HSR Filing Is Required
Unless an Exemption Applies

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Formation of Corporation:

HSR Filing Is Required if the Size-of-the-Persons Test Is Met
Formation of Corporation:

No HSR Filing Is Required

To go back to the previous screen, press the Alt and Left Arrows buttons simultaneously.
Check Back With Us For Updated Hart-Scott-Rodino Thresholds in February 2016

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