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Federal Antitrust Agencies Act: Raising HSR Filing Thresholds and Issuing Final Guidelines for International Enforcement and IP Licensing

Carrie Mahan and Vadim Brusser

The final days of the Obama Administration saw a flurry of official announcements from the U.S. Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), including increases in the HSR Thresholds for reportability of transactions, as well as Section 8's interlocking directorate provisions. The Agencies also reported the issuance of final updates to both the Antitrust Guidelines for International Enforcement and Cooperation and the Antitrust Guidelines for the Licensing of Intellectual Property – neither of which have been updated since their original issuance decades ago in 1995.

Agencies Report Annual HSR Threshold Increases

On January 19, 2017, the antitrust agencies announced revisions to the jurisdictional thresholds of the Clayton Act. The revisions included not only an increase to the jurisdictional size of transaction and size of person thresholds under the HSR Act, but also an increase to the threshold for interlocking directorates prohibited by Section 8 of the Clayton Act.

Revised Antitrust Guidelines for International Enforcement and Cooperation Issued by FTC and DOJ

The DOJ and FTC issued final updated Antitrust Guidelines for International Enforcement and Cooperation on January 13, 2017. The revision is intended to reflect the impact of globalization on antitrust enforcement over the past two decades and evolving case law affecting international antitrust enforcement.

FTC and DOJ Finalize Revised Antitrust Guidelines for the Licensing of Intellectual Property

The DOJ and FTC issued final updated Antitrust Guidelines for the Licensing of Intellectual Property on January 12, 2017. While a broad range of comments were received, the final Guidelines were substantially similar to the proposal issued for public comment in August 2016.

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Agencies Report Annual HSR Threshold Increases

By Vadim Brusser and Jonathan Cheng

On January 19, 2017, the FTC announced revisions to the jurisdictional thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), which will become effective on February 27, 2017 and apply to transactions consummated on or after the effective date. The HSR Act requires the FTC to revise the thresholds annually based on changes in the gross national product.

The current revision increases the “size of transaction” threshold from \$78.2 million to \$80.8 million.

Consequently, the HSR Act notification and waiting requirements will now apply to acquisitions resulting in the acquiring person holding assets and/or voting securities of the acquired person valued in excess of \$80.8 million. The HSR Act requirements also will apply to purchases of partnership interests and membership interests of a limited liability company provided that (i) the acquiring person obtains control and (ii) the interests held by the acquiring person are valued in excess of \$80.2 million.

Acquisitions that do not exceed \$323 million in value (previously \$312.6 million) also have to meet the “size of person” threshold to trigger the HSR Act requirements. The increased thresholds now require one of the parties to have total assets or annual net sales of \$161.5 million or more (up from \$156.3 million) and the other party to have total assets or annual net sales of \$16.2 million or more (up from \$15.6 million).

In addition, acquisitions that result in the ownership of less than 50 percent of the outstanding voting securities of a corporation require HSR notification when certain dollar thresholds are reached. Under the revisions, a premerger filing is now required for such acquisitions when the value of the total voting securities acquired and held reaches each of the following dollar thresholds: (a) \$80.8 million, (b) \$161.5 million, (c) \$807.5 million and/or (d) 25 percent of an issuer’s outstanding voting securities if valued in excess of \$1.615 billion.

Summary of threshold changes

2016 threshold	2017 Adjusted threshold
\$10 million	\$16.2 million
\$50 million	\$80.8 million
\$100 million	\$161.5 million
\$200 million	\$323 million
\$500 million	\$807.5 million
\$1 billion	\$1.615 billion

The HSR Act filing fee thresholds also have been revised as shown in the following chart.

Transaction value	HSR Act Filing Fee
More than \$80.8 million but less than \$161.5 million	\$45,000
\$161.5 million or more but less than \$807.5 million	\$125,000
\$807.5 million or more	\$280,000

Revisions in Thresholds for Section 8 of the Clayton Act

The FTC also has revised the thresholds for interlocking directorates prohibited by Section 8 of the Clayton Act. The FTC is required to revise the Section 8 thresholds annually based on changes in the gross national product. The revised thresholds became effective as of January 26, 2017.

Section 8 of the Clayton Act prohibits, with certain exceptions, one person serving as a director or officer of two competing corporations if certain thresholds are met. As revised, Section 8 now covers situations where each corporation has capital, surplus, and undivided profits aggregating \$32,914,000 or more, unless either corporation has competitive sales of less than \$3,291,400.

Further information regarding these revisions to the HSR Act and Section 8 of the Clayton Act are available on the FTC website at: https://www.ftc.gov/news-events/press-releases/2017/01/ftc-announces-annual-update-size-transaction-thresholds-premerger?utm_source=govdelivery.

Revised Antitrust Guidelines for International Enforcement and Cooperation Issued by FTC and DOJ

By Carrie Mahan, Chad Squitieri and Sarah Segal

On January 13, 2017, the DOJ and FTC jointly issued final updated Antitrust Guidelines for International Enforcement and Cooperation (Updated International Guidelines), which replace the 1995 Antitrust Enforcement Guidelines for International Operations.¹ The Updated International Guidelines are intended to “provide updated guidance to businesses engaged in international activities on questions that concern the Agencies’ international enforcement policy as well as the Agencies’ related investigative tools and cooperation with foreign authorities.”²

The FTC noted that the “agencies’ enforcement of the U.S. antitrust laws now frequently involves activity outside the United States, increasingly requiring collaboration with international counterparts.”³ The updates are intended to “reflect the growing importance of antitrust enforcement in a globalized economy and the agencies’ commitment to cooperating with foreign authorities on both policy and investigative matters.”⁴ According to the DOJ, the Updated International Guidelines “provide important, up to date guidance to businesses engaged in international operations on our enforcement policies and priorities” and “reflect developments in the department’s practices and in the law over the last 22 years.”⁵

Among the key changes to the Updated International Guidelines are the following additions: (1) a new chapter on international cooperation; (2) an updated discussion of the application of U.S. antitrust law to conduct involving foreign commerce, including the Foreign Trade Antitrust Improvements Act and other domestic and international law; and (3) practical illustrative hypotheticals of issues commonly encountered.

New Chapter on International Cooperation

The Updated International Guidelines introduce a new chapter on international cooperation, covering

the investigative tools available to the Agencies, the issues surrounding confidentiality, the legal bases for cooperation, the types of information exchanged and waivers of confidentiality, and remedies available to those harmed by anticompetitive behavior. The Updated International Guidelines note that “[w]hen either Agency reviews a case that raises possible competitive concerns in jurisdictions outside of the United States, it may consult with the relevant foreign authorities about the matter and coordinate and cooperate with those authorities conducting parallel investigations.”⁶

While clarifying that the Agencies neither conduct “joint investigations” with foreign authorities, nor exercise control over foreign authorities regarding foreign investigations, or accept direction from foreign authorities regarding U.S. investigations, the Updated International Guidelines emphasize that the Agencies do cooperate with foreign authorities conducting parallel investigations.⁷ Such cooperation can “include a broad range of practices, from initiating informal discussions and informing cooperating authorities of the different stages of their investigations, to engaging in detailed discussions of substantive issues, exchanging information, conducting interviews at which two or more agencies may be present, and coordinating remedy design and implementation, as relevant and appropriate.”⁸

The chapter includes a discussion of the Agencies’ commitment to confidentiality safeguards:⁹ Recognizing they “benefit greatly from access to sensitive, nonpublic information from businesses and consumers,”¹⁰ as well as from foreign authorities, the chapter outlines the protections afforded to confidential materials under statutes (such as the HSR Act, the FTC Act, and the Antitrust Civil Process Act), as well as the limits on disclosure under the Freedom of Information Act and other rules and statutes. Within this legal structure, however, the Agencies can and do share information with cooperating foreign authorities and the chapter provides detail as to when non-public information can be shared, such as “the existence of an open investigation and the Agencies’ staff views as to the merits of a case, market definition, competitive effects, substantive theories of harm, and remedies.”¹¹

The new chapter also includes a discussion of the investigative tools available to the Agencies, and the limits of using those tools in an international context.¹² Among the tools discussed are:

- Compulsory investigative demands, which can be used to collect documents and information located outside of the United States that are within the “possession, custody, or control” of an individual or entity subject to U.S. jurisdiction, and not otherwise protected under the attorney-client privilege or work product doctrine.¹³
- “Second Requests” under the HSR Act, compliance with which, the Agencies assert, “requires production of all responsive documents and information, no matter where located.”¹⁴
- Mutual Legal Assistance Treaty, under which signatories agree to “assist one another in criminal law enforcement matters.”¹⁵

The new chapter recognizes that the use of these tools can sometimes be complicated or even prevented by foreign laws. For example, a foreign statute might prohibit the disclosure of documents or information located in their countries for use in U.S. proceedings. While the Updated International Guidelines note that such a foreign statute alone may not suffice to excuse noncompliance, the new chapter acknowledges the importance of the Agencies avoiding unilateral action when it “can adversely affect law enforcement relationships with foreign countries.”¹⁶

How U.S. Antitrust Law Is Applied Abroad In the Modern Economy

The Updated International Guidelines also contain a discussion of the application of U.S. antitrust law abroad in the modern global economy. Specifically, the Updated International Guidelines address how U.S. antitrust law affects foreign conduct, and which foreign doctrines are considered in antitrust enforcement.

The Updated International Guidelines discuss situations when foreign commerce may be subject to U.S. antitrust laws, even if the conduct occurred wholly outside of the United States. For example, the Updated International Guidelines suggest that U.S. antitrust laws should apply to foreign corporations

who sell foreign price-fixed goods to U.S. customers, even if U.S. sales were a “relatively small proportion” of the price-fixed goods sold worldwide.¹⁷

Other hypothetical examples demonstrate situations where U.S. antitrust laws may not apply – reflecting legal precedent shaped by the courts over the past twenty years to protect foreign entities from U.S. antitrust laws. For example, when a foreign sovereign compels a firm in its jurisdiction to issue cutbacks on a commodity, and attaches penalties for noncompliance, the compelled entity likely will receive immunity from the jurisdiction of U.S. courts under the foreign sovereign compulsion doctrine.¹⁸ Another example discusses the case of a foreign entity that petitions a local government to close down its competitor’s facility for health violations. The Updated International Guidelines confirm that the entity would be protected under principles similar to the *Noerr-Pennington* doctrine,¹⁹ even if such closure created a monopoly in the industry.²⁰

In addressing how antitrust law is applied in the modern globalized economy, the Updated International Guidelines contain the Agencies’ gloss on some arguably unsettled issues, resulting in the Updated International Guidelines expressing a pro-Agency view. Notably, the Updated International Guidelines expressly take a side in a circuit split about the meaning of the FTAIA’s “direct, substantial and reasonably foreseeable” test. The Agencies disagree with the Ninth Circuit’s stricter standard, and support the lower proximate cause standard advanced by other circuits.²¹ The Updated International Guidelines also provide only a short description as to how the FTAIA’s “give rise to” prong applies differently to private actors than to the Agencies themselves.²² And even this brief reference to private actors was incorporated into the Updated International Guidelines only in response to public comments.

Public Comments

As required, the Agencies’ proposed Revised International Guidelines were released for public comment in November 2016²³ for a relatively brief 30-day comment period.²⁴ The Agencies revised their proposed guidelines to incorporate a few concepts

from public comments, while declining to incorporate others. Among those ultimately accepted were:

- One comment that expressed concern with “several dated Supreme Court cases” cited to by the Agencies “in an effort to identify instances where the FTC’s Section 5 authority in principle goes beyond the Sherman or Clayton Act.²⁵ The comment stated that the cases “did not align with the current FTC statement of principles” which endorse “consumer welfare while expressly stating an intent to avoid using Section 5 authority to enforce non-competition factors.”²⁶ Seemingly in response to this comment, the Updated International Guidelines no longer include a citation to the “dated” Supreme Court cases referred to in the public comment.²⁷
- A joint comment from the ABA Sections of Antitrust and International Law suggested that the proposed guideline’s interpretation of the FTAIA’s “gives rise to” clause should address the Seventh Circuit’s 2014 opinion in *Motorola Mobility LLC v. AU Optronics*.²⁸ In *Motorola*, the Seventh Circuit held that although injuries suffered by a private indirect purchaser did not “give rise to” a claim, this decision did not mean that the Agencies could not seek “criminal and injunctive” remedies themselves.²⁹ The Updated International Guidelines include a reference to *Motorola*, making this distinction clear.³⁰

Among the comments that the Agencies seemingly declined to address or incorporate were:

- A comment by the International Bar Association that recommended clarifying that foreign authorities would “adequately” maintain the confidentiality of information provided to it by the Agencies.³¹ The word “adequately,” they suggested, would “indicate that minimum standards on treatment of confidential information are necessary for the information to be provided.”³² The Agencies ultimately decided against including the word “adequately,” instead opting to only state that foreign authorities “will maintain the confidentiality” of such information.³³

- The Agencies also declined a suggestion to use the Updated International Guidelines as an opportunity to replace the Herfindahl-Hirschman Index (“HHI”) as a method of calculating market concentration.³⁴

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1. U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for International Enforcement and Cooperation (“Updated International Guidelines”) (Jan. 13, 2017), available at https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.
 2. *Id.* at 1.
 3. Press Release, Federal Trade Commission, “Federal Trade Commission and Department of Justice Announce Updated International Antitrust Guidelines,” Jan. 13, 2017, available at https://www.ftc.gov/news-events/press-releases/2017/01/federal-trade-commission-department-justice-announce-updated?utm_source=govdelivery.
 4. *Id.*
 5. *Id.*
 6. Updated International Guidelines at 38.
 7. *Id.* at 38, n.139.
 8. *Id.* at 38.
 9. *Id.* at 40–42.
 10. *Id.* at 40.
 11. *Id.* at 44.
 12. *Id.* at 38–40.
 13. *Id.* at 39.
 14. *Id.*
 15. *Id.* at 49.
 16. *Id.* at 40.
 17. *Id.* at 20 (Example A).
 18. *Id.* at 34 (Example E).
 19. The *Noerr-Pennington* doctrine grants immunity to private entities that petition the government to pass or enforce laws, even if those laws have anticompetitive effects. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); see also *Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

20. Updated International Guidelines at 36-37 (Example F).
21. *Id.* at 21-22 n.93.
22. *Id.* at 26 n.101.
23. Press Release, Federal Trade Commission, "FTC and DOJ Seek Public Comment on Proposed Revisions to International Antitrust Guidelines," Nov. 1, 2016, *available at* <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-doj-seek-public-comment-proposed-revisions-international>.
24. In comparison, proposed updates to other jointly issued guidelines have allowed for a longer period of public comment. *See, e.g.*, Press Release, Department of Justice, "DOJ and FTC Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property," Aug. 12, 2016 (public comment period of approximately one and a half months); Press Release, "FTC Seeks Public Comments on Proposed Amendments to the Premerger Notification Rules Related to the Withdrawal of HSR Filings," Feb. 1, 2013 (approximate two and a half month public comment period); Press Release, Federal Trade Commission, "FTC Seeks Public Comments on Proposed Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry," Aug. 13, 2012 (approximately two and a half months for public comment); Press Release, Federal Trade Commission, "FTC, DOJ Seek Public Comment on Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations," Mar. 31, 2011 (two month public comment period).
25. Chamber of Commerce of the United States of America, Comment Letter on Proposed Revisions to Antitrust Guidelines for International Enforcement and Cooperation (Dec. 1, 2016), <https://www.justice.gov/atr/page/file/915791/download>.
26. *Id.*
27. Updated International Guidelines at 6 n.20.
28. 775 F.3d 816 (7th Cir. 2014).
29. *Id.* at 820-25.
30. Updated International Guidelines at 26 n.101.
31. International Bar Association, Comment Letter on Proposed Revisions to Antitrust Guidelines for International Enforcement and Cooperation (Nov. 30, 2016), <https://www.justice.gov/atr/page/file/915776/download>.
32. *Id.*
33. Updated International Guidelines at 45.
34. Kenneth H. Thomas, Ph.D., Comment Letter on Proposed Revisions to Antitrust Guidelines for International Enforcement and Cooperation (Nov. 2, 2016), <https://www.justice.gov/atr/page/file/915761/download>.

FTC and DOJ Finalize Revised Antitrust Guidelines for the Licensing of Intellectual Property

By Carrie Mahan and Lisa Madalone

On January 12, 2017 the DOJ and FTC jointly issued final updated Antitrust Guidelines for the Licensing of Intellectual Property (Updated IP Guidelines).¹ Acting Assistant Attorney General Renata Hesse of the DOJ explained that the Updated IP Guidelines “continue to apply an effects-based analysis that puts the focus on evaluating harm to competition, not on harm to any individual competitor, and support procompetitive intellectual property licensing that can promote innovation.”²

The IP Guidelines were originally published in 1995, and the DOJ and FTC released the proposed update in August 2016,³ on which we reported on August 31, 2016 (“DOJ, FTC Issue Proposed Update of Antitrust-IP Guidelines, available at <https://antitrust.weil.com/doj-ftc-issue-proposed-update-of-antitrust-ip-guidelines/>).

The Agencies provided 45 days for public review and received twenty-four comments from a wide range of academics, including bar associations, practitioners and former government officials, private businesses, and other academic and legal organizations.⁴ Notably, many commenters took issue with the breadth of the substantive revisions to the proposed Updated IP Guidelines, calling for a more fulsome update to the guidelines and expressing concern “that issuing such a minor update to the IP Guidelines will delay or forestall the issuance of a much-needed major update, and that it might be interpreted as a departure from guidance that the Agencies have previously offered.”⁵

Certain commenters also emphasized what they perceived to be as the glaring absence of guidance in the Updated IP Guidelines regarding standard essential patents (“SEPs”) and fair, reasonable, and non-discriminatory licensing terms—some of the most controversial topics at the intersection of antitrust and IP. Commenters suggested that “a revision of the [IP] Guidelines that ignores these areas might be seen as a retreat from the Agencies’ policy statements and enforcement actions in these areas.”⁶

After nearly six months, the FTC and DOJ finalized the proposed Updated IP Guidelines, with only minimal revisions to the proposed draft issued in August. The Agencies seemingly acknowledged the public comments seeking a more expansive revision in their press release and responded by noting “that the flexible effects-based enforcement framework set forth in the IP Licensing Guidelines remains applicable to all IP licensing activities.”⁷ The DOJ and FTC also referred the public to the “wide body of DOJ and FTC guidance available” on these topics.⁸

1. U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 12, 2017), available at <https://www.justice.gov/atr/IPguidelines/download>.
2. Press Release, U.S. Dep’t of Justice, “DOJ and FTC Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property,” (Jan. 13, 2017), available at <https://www.justice.gov/opa/pr/doj-and-ftc-issue-updated-antitrust-guidelines-licensing-intellectual-property>.
3. U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (Aug. 12, 2016), available at https://www.ftc.gov/system/files/documents/reports/antitrust-guidelines-licensing-intellectual-property-proposed-update-1995-guidelines-issued-us/ip_guidelines_published_proposed_update.pdf.
4. All comments received are available at <https://www.justice.gov/atr/guidelines-and-policy-statements-0/2017-update-antitrust-guidelines-licensing-intellectual-property>.
5. Joseph Farrell, Richard Gilbert, Carl Shapiro, “Proposed Update of DOJ/FTC IP Licensing Guidelines” (Sept. 7, 2016), available at <https://www.justice.gov/atr/file/890491/download>.
6. *Id.* at 2. On the contrary, several public commenters praised the agencies’ decision not to address SEPs independently in the guidelines. See, e.g., “Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University, on the U.S. Antitrust Agencies’ Proposed Update of the Antitrust Guidelines for the Licensing of Intellectual Property” (Sept. 2016), available at <https://www.justice.gov/atr/file/893866/download> (“[T]he Agencies correctly reject the invitation to adopt a special brand of antitrust analysis for SEPs in which effects-based analysis is replaced with unique presumptions and burdens of proof.”).
7. *Supra* note 2.
8. *Id.*

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