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# Review Session for Units 1-6

## HSR Reportability

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Merger Antitrust Law

Fall 2018 Georgetown University Law Center

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# Reportable transactions

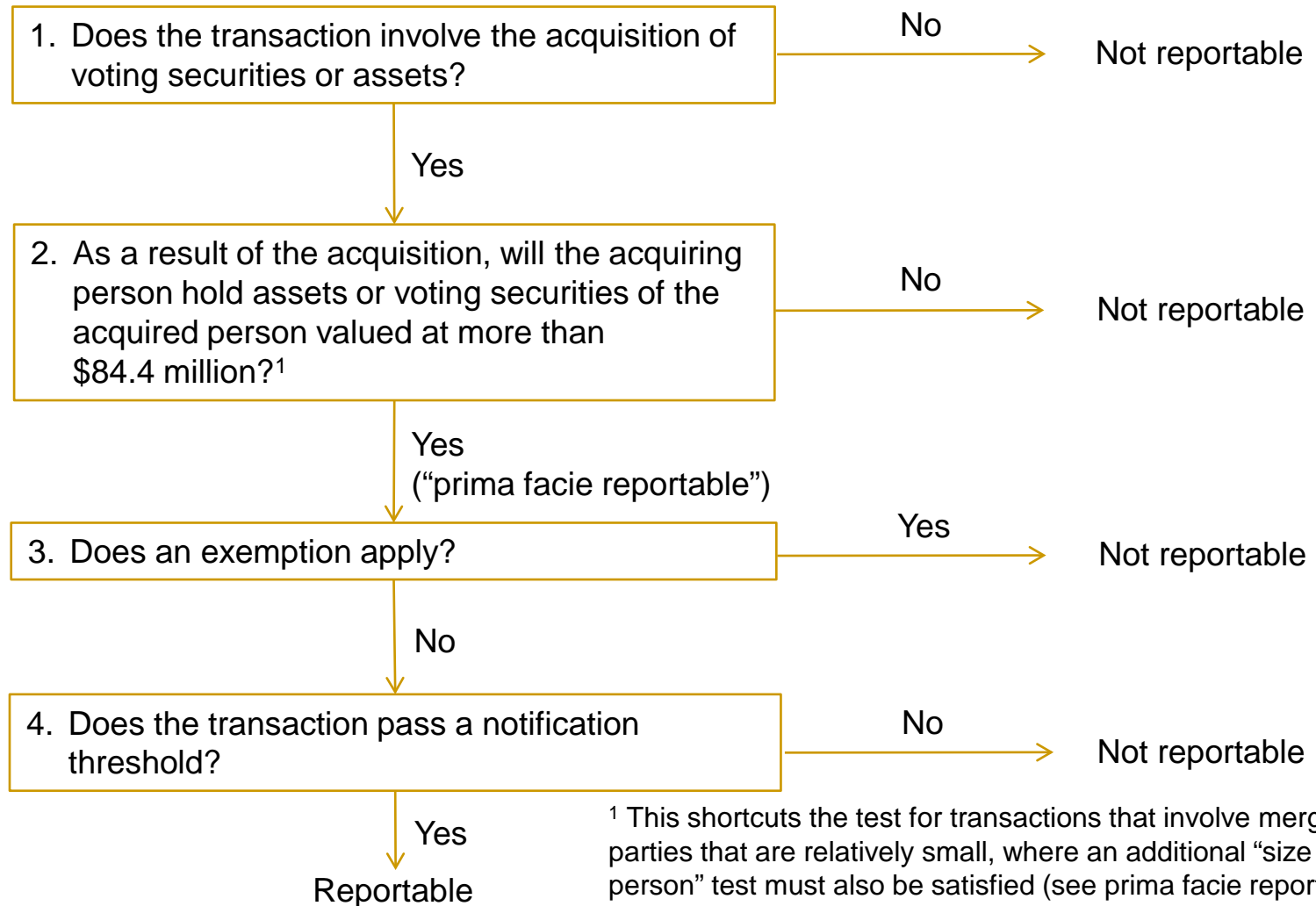
- Section 7A(a)

[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . and the waiting period . . . has expired . . . .<sup>1</sup>

- A reportable transaction is one that—
  - Involves the acquisition of voting securities or assets
  - Satisfies the thresholds for prima facie reportability
  - Does not fall into one of the exemptions
  - Crosses a notification threshold

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

# HSR reportability flowchart



<sup>1</sup> This shortcuts the test for transactions that involve merging parties that are relatively small, where an additional “size of person” test must also be satisfied (see prima facie reportability slide below).

# 1. Acquisition of voting securities or assets

- The HSR Act applies only to acquisitions of voting securities or assets
- Definition: “Voting securities”
  - “[S]ecurities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer”<sup>1</sup>
- Definition: “Assets”
  - No special definition
  - The acquisition of a 50% or greater ownership interest in a non-corporate entity (such as a partnership or LLC) is regarded as an acquisition of the entity’s underlying assets
  - An exclusive license is regarded as an asset

<sup>1</sup> 16 C.F.R. § 801.1(f)(1)(i).

# 1. Acquisition of voting securities or assets

- Definition: “Acquisition”
  - Obtaining the “beneficial ownership” in the underlying voting securities or assets<sup>1</sup>
  - Does not require a formal transfer of legal title
    - *Example:* Company A has a signed purchase agreement to acquire the voting securities of Company B from its parent company. Although the transaction has not yet closed, Company A is influencing the operational management decisions of Company B. Given this influence, the agencies will view Company A as having obtained a beneficial interest in Company B and hence to have acquired Company B for HSR Act purposes.

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<sup>1</sup> See 16 C.F.R. § 801.1(c)(1) (defining “hold” as “beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means”).

# Prima facie reportability<sup>1</sup>

Size of transaction*	Prima Facie Reportability																			
Up to and including \$84.4 million	Not reportable																			
Above \$84.4 million up to and including \$337.6 million	Reportable if : (1) satisfies the “size of person” test, and (2) no exemption applies  <div style="text-align: center;">Size of person test</div> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%; text-align: center;"><i>Acquiring person</i></td> <td style="width: 34%;"></td> <td style="width: 33%; text-align: center;"><i>Acquired person</i></td> </tr> <tr> <td style="text-align: center;">\$337.6 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$16.9 million (in total assets or annual net sales of a person engaged in manufacturing)</td> </tr> <tr> <td colspan="3" style="text-align: center;"><i>Or</i></td> </tr> <tr> <td style="text-align: center;">\$337.6 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$16.9 million (in total assets of a person not engaged in manufacturing)</td> </tr> <tr> <td colspan="3" style="text-align: center;"><i>Or</i></td> </tr> <tr> <td style="text-align: center;">\$16.9 million (in total assets or annual net sales)</td> <td style="text-align: center;">and</td> <td style="text-align: center;">\$337.6 million (in total assets or annual net sales)</td> </tr> </table>		<i>Acquiring person</i>		<i>Acquired person</i>	\$337.6 million (in total assets or annual net sales)	and	\$16.9 million (in total assets or annual net sales of a person engaged in manufacturing)	<i>Or</i>			\$337.6 million (in total assets or annual net sales)	and	\$16.9 million (in total assets of a person not engaged in manufacturing)	<i>Or</i>			\$16.9 million (in total assets or annual net sales)	and	\$337.6 million (in total assets or annual net sales)
<i>Acquiring person</i>		<i>Acquired person</i>																		
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<i>Or</i>																				
\$16.9 million (in total assets or annual net sales)	and	\$337.6 million (in total assets or annual net sales)																		
In excess of \$337.6 million	Reportable absent an exemption																			

\* Based on the value of voting securities and assets the acquiring person will hold as a result of the acquisition, including the value of any previously acquired voting securities.

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 83 Fed. Reg. 4050 (Jan. 29, 2018) (effective Feb. 28, 2018) .

# Selected exemptions

- **Intraperson**
  - Acquired and acquired person are the same
- **Investment**
  - Hold no more than 10% of target's outstanding voting securities
    - 15% for certain institutional investors
  - Acquirer must have a purely passive investment intention
    - Any membership on the board of directors or other involvement in the management of the company (other than voting shares) voids exemption
- **Convertible voting securities**
  - Acquired securities have no present voting rights
- **Acquisitions of non-U.S. assets**
  - Must not generate sales in or into the U.S. of more than \$84.4 million
- **Acquisitions of non-U.S. voting securities by non-U.S. persons that either**
  - Do not confer control over the target, or
  - Do not involve assets in the U.S., or sales in or into the U.S., over \$84.4 million

## 4. Notification thresholds

- An otherwise reportable transaction is not subject to the reporting and waiting period requirements of the HSR Act if—
  1. The reporting and waiting period requirements were satisfied within the last five years for a prior acquisition, *and*
  2. The pending acquisition will not cause the acquiring person to cross a notification threshold

Notification thresholds <sup>1</sup>
\$84.4 million
\$168.8 million
\$843.9 million
25% of the voting securities if their value exceeds \$1,687.80 million
50% of the voting securities if their value exceeds \$84.4 million
<b>Expiration of prior notifications</b>
1 year for notifications for which the reported threshold was not crossed
5 years for notifications for which the reported threshold was crossed
Time begins to run with the expiration of the waiting period for the notification

<sup>1</sup> See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 83 Fed. Reg. 4050 (Jan. 29, 2018) (effective Feb. 28, 2018) .