

## CLIENT ALERT

### Impact of New FTC Thresholds on Investment Funds

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We previously reported on the Federal Trade Commission's increased jurisdictional thresholds applicable to both the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and Section 8 of the Clayton Act. For investment managers, consider the following issues going forward:

- HSR compliance must be monitored by investment managers, particularly those who are "activist," acquiring substantial parts of public companies, and/or joining boards of directors. The checklist that includes federal and state securities law compliance should also include the antitrust laws. Failure to comply with HSR can lead to significant financial penalties and adverse reputational consequences.
- If the HSR thresholds are triggered, a filing is not automatically required. One exemption that managers may use is the "investment only" exemption, which provides that an acquisition of voting securities is exempt if made solely for the purpose of investment – i.e., if the investor has no present intent to participate in the management or otherwise influence the basic business decisions of the issuer – and if, as a result of the acquisition, the acquiring person will hold ten percent or less of the total outstanding voting securities of the issuer. The FTC continues its long-standing practice of construing this exemption narrowly, and we encourage managers to seek expert counsel before relying on it when the underlying investment is large and the manager is engaged in activism (e.g., board seats, observer seats, noisy interactions with management and the like).
- Small holdings, that is investments with an aggregate value of less than \$75.9 million (new 2014 threshold), continue to be exempt from filing, even where the investment manager is on the board of directors and/or owns more than 10 percent of a company. This is particularly relevant for those managers investing in the micro-cap and small-cap spaces.
- As managers take on board seats, remember that the law prohibits persons from serving as a director or officer of two or more competing corporations where certain size and other criteria are satisfied.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Shawn R. Johnson**

Partner – Washington, D.C.

Phone: +1 202.624.2624

Email: [srjohnson@crowell.com](mailto:srjohnson@crowell.com)