

## U.S. Federal Trade Commission Announces Annual Revisions to the Thresholds of the HSR Act and Prohibition Against Interlocking Directors

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"), parties to an acquisition or merger meeting certain annually adjusted thresholds must make a pre-closing notification ("HSR filing") to the U.S. antitrust authorities and abide by a mandatory waiting period, barring the applicability of one of numerous exemptions. These adjusted thresholds also determine the HSR filing fee that the parties must pay. On January 19, 2017, the U.S. Federal Trade Commission ("FTC") announced this year's revised thresholds for the HSR Act. The new thresholds will apply to any transaction that closes on or after a currently unspecified date, which we expect to likely be mid-February 2017. As is traditional practice, the announcement also included the annual revision to the thresholds applicable to Section 8 of the Clayton Act, which prohibits interlocking directors.

The HSR Act mandates that parties to certain transactions, which do not otherwise qualify for one of numerous statutory exemptions, must each make an HSR filing and adhere to the mandatory 30-day waiting period before closing the transaction if: (a) the transaction is valued at or above a certain threshold ("size-of-transaction test") and the parties are a particular size based on sales or assets ("size-of-person test"); or, (b) the transaction is valued at an even higher threshold, regardless of the size-of-person test. As required by the HSR Act itself, these thresholds are updated annually by the FTC based on changes to the gross national product. The newly announced thresholds, as compared to last year's, are:

	2016 Thresholds	Revised Thresholds for 2016
<b>Size-of-transaction test</b>	\$78.2m	\$80.8
<b>Size-of-person test</b>	Party 1 – sales or assets at or above \$15.6m; and Party 2 – sales or assets at or above \$156.3m	Party 1 – sales or assets at or above \$16.2m; and Party 2 – sales or assets at or above \$161.5m
<b>Size-of-transaction test at which the size-of-person test is inapplicable</b>	\$312.6m	\$323.0m

Because the size-of-person test is rather low, it will frequently be the case that transactions resulting in the acquiring person holding voting securities, non-corporate interests, or assets of the acquired person valued at or above \$80.8m will require notification and adherence to the HSR Act's mandatory waiting period.<sup>1</sup> This is, unless the parties satisfy one of numerous exemptions, including transactions conducted in the ordinary course of business or acquisitions of a foreign entity with limited contact with the U.S. These exemptions are extremely fact specific, so it is important that parties to a transaction subject to the HSR Act's filing and waiting period requirements under these revised thresholds work closely with their legal counsel to determine what, if any, exemptions may apply.

In addition to the size-of-transaction test and size-of-person test thresholds, the FTC also updated the filing fee thresholds. The filing fees themselves, however, have not changed. The new filing fee thresholds, as compared to 2016's thresholds, are:

	2016 Thresholds	Revised Thresholds for 2017
<b>Filing fee of \$45,000</b>	Value of the transaction is below \$156.3m	Value of the transaction is below \$161.5m
<b>Filing fee of \$125,000</b>	Value of the transaction is at or greater than \$156.3m, but less than \$781.5m	Value of the transaction is at or greater than \$161.5m, but less than \$807.5m
<b>Filing fee of \$280,000</b>	Value of the transaction is greater than \$781.5m	Value of the transaction is greater than \$807.5m

All of these new HSR Act thresholds will apply to any transaction that closes 30-days after the revisions are published in the Federal Registrar – which will likely mean that the new thresholds will be effective mid-February 2017. These revised thresholds will apply to all transaction that close on or after that date, regardless of when the transaction agreement was executed. Transactions that close prior to the effective date will still be subject to the 2016 thresholds.

In addition to revising the HSR thresholds, on January 19, 2017, the FTC also updated the thresholds applicable to Section 8 of the Clayton Act ("Section 8"), which prohibits certain interlocking directors and officers. Under the revised thresholds, Section 8 prohibits any person from acting as an officer or director of two competing corporations if each corporation has capital, surplus, or profits in excess of \$32,914,000 (previously \$31,841,000). However, corporations are exempt from this prohibition if either has "competitive sales" below \$3,291,400 (previously \$3,184,100). "Competitive sales," as used in Section 8, means "gross revenue for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year."

Unlike the effective date for the HSR Act's thresholds, the new thresholds for Section 8 shall take effect once they are published in the Federal Registrar. Parties should expect this to occur within a few weeks, if not days.

<sup>1</sup> It is important to note that the HSR Act looks to the value that the acquiring person will hold post-transaction rather than simply the value of voting securities, non-corporate interests, or assets being acquired. This nuance means that, in some instances, the parties must consider what voting securities, non-corporate interests, or assets of the acquired person the acquiring person holds from previous transactions.

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