

## **U.S. FEDERAL TRADE COMMISSION ANNOUNCES ANNUAL REVISIONS TO THE HSR ACT'S THRESHOLDS AND THRESHOLDS PERTAINING TO THE PROHIBITION AGAINST INTERLOCKING DIRECTORS**

On February 15, 2019, the U.S. Federal Trade Commission ("FTC") announced the annual revisions to the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). Barring an exemption, parties to a transaction exceeding specified dollar thresholds must make pre-closing notifications ("HSR filings") to the U.S. antitrust authorities and abide by a mandatory waiting period. The revised thresholds also affect the relevant HSR filing fee parties must pay when notifying their transaction. The HSR Act's new thresholds are applicable to any transaction closing 30-days after the new thresholds are published in the Federal Registrar, meaning the thresholds are likely to take effect mid-March. Along with revisions to the HSR Act's thresholds, the FTC also announced an increase to the jurisdictional thresholds of Section 8 of the Clayton Act, which places restrictions on interlocking directors between corporations with capital, surplus, or assets above a specified dollar value.

The HSR Act mandates that parties to certain transactions must each make an HSR filing and adhere to a mandatory waiting period (typically 30-days, although some transactions may qualify for a 15-day waiting period) before closing the transaction if: (a) the transaction is valued at or above a certain threshold ("size-of-transaction test")<sup>1</sup> and the parties are a particular size based on sales or assets

---

<sup>1</sup> It is important to note that the HSR Act often looks to the value that the acquiring person will hold post-transaction, rather than simply examining the value of voting securities, non-corporate interests, or assets being acquired at that specific time. 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.

("size-of-person test"); or, (b) the transaction is valued at an even higher threshold, regardless of the size-of-person test. Some transactions meeting these requirements may, nevertheless, qualify for one or more statutory exemptions allowing the parties to forego making the necessary HSR filings and abiding by the waiting period. The HSR Act itself requires the U.S. antitrust authorities to adjust these thresholds annually based on the gross national product. The newly announced thresholds, as compared to last year's, are:

	<b>2018 Thresholds</b>	<b>Revised Thresholds for 2019</b>
Size-of-transaction test	\$84.4m	\$90.0m
Size-of-person test	Party 1 – sales or assets at or above \$16.9m; and  Party 2 – sales or assets at or above \$168.8m	Party 1 – sales or assets at or above \$18.0m; and  Party 2 – sales or assets at or above \$180.0m
Size-of-transaction test at which the size-of-person test is inapplicable	\$337.6m	\$359.9m

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 2018's thresholds, are:

	<b>2018 Thresholds</b>	<b>Revised Thresholds for 2019</b>
Filing fee of \$45,000	Value of the transaction is below \$168.8m	Value of the transaction is below \$180.0m
Filing fee of \$125,000	Value of the transaction is at or greater than \$168.8m, but less than \$843.9m	Value of the transaction is at or greater than \$180.0m, but less than \$899.8m
Filing fee of \$280,000	Value of the transaction is greater than \$843.9m	Value of the transaction is greater than \$899.8m

These new HSR Act thresholds will apply to any transaction that closes 30-days after the revisions are published in the Federal Registrar. The revised thresholds are likely to take effect mid-March. These revised thresholds will apply to all transactions 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 2018 thresholds.

In addition to revising the HSR thresholds, on February 15, 2019, 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 \$36,564,000 (previously \$34,395,000). However, corporations are exempt from this prohibition if either has "competitive sales" below \$3,656,400 (previously \$3,439,500). "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 Register. Parties should expect this to occur within a few weeks, if not days.

## CONTACTS

**Timothy Cornell**  
Partner

**T** +1 202 912 5220  
**E** timothy.cornell  
@cliffordchance.com

**Brian Concklin**  
Associate

**T** +1 202 912 5060  
**E** brian.concklin  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 2001 K Street NW,  
Washington, DC 20006 USA

© Clifford Chance 2019

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing •  
Brussels • Bucharest • Casablanca • Dubai •  
Düsseldorf • Frankfurt • Hong Kong • Istanbul •  
London • Luxembourg • Madrid • Milan •  
Moscow • Munich • Newcastle • New York •  
Paris • Perth • Prague • Rome • São Paulo •  
Seoul • Shanghai • Singapore • Sydney •  
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement  
with Abuhimed Alsheikh Alhagbani Law Firm  
in Riyadh.

Clifford Chance has a best friends relationship  
with Redcliffe Partners in Ukraine.