

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

On January 28, 2020, the U.S. Federal Trade Commission (the "FTC") announced the annual revisions to the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). Barring an exemption, parties to a transaction meeting these 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 dictate the relevant filing fee the parties must pay when submitting their HSR filings. The new thresholds will apply to any transaction that closes 30 days after the new thresholds are published in the Federal Register. The FTC's announcement also included revisions to the jurisdictional thresholds of Section 8 of the Clayton Antitrust Act of 1914, which places restrictions on interlocking directorates.

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 (the "size-of-transaction test")<sup>1</sup> and the parties are a particular size based on sales or assets (the "size-of-person test"); or, (b) the transaction is valued at an even higher threshold, regardless of whether the size-of-person test is satisfied. Some transactions meeting these requirements may, nevertheless, qualify for one or more statutory exemptions allowing the parties to forego making the necessary

<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.

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:

	2019 Thresholds	Revised Thresholds for 2020
Size-of-transaction test	\$90.0m	\$94.0m
Size-of-person test	Party 1 – sales or assets at or above \$18.0m; and  Party 2 – sales or assets at or above \$180.0m	Party 1 – sales or assets at or above \$18.8m; and  Party 2 – sales or assets at or above \$188.0m
Size-of-transaction test threshold at which the size-of-person test is inapplicable	\$359.9m	\$376.0m

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 2019's thresholds, are:

	2019 Thresholds	Revised Thresholds for 2020
Filing fee of \$45,000	Value of the transaction is below \$180.0m	Value of the transaction is below \$188.0m
Filing fee of \$125,000	Value of the transaction is at or greater than \$180.0m, but less than \$899.8m	Value of the transaction is at or greater than \$188.0m, but less than \$940.1m
Filing fee of \$280,000	Value of the transaction is greater than \$899.8m	Value of the transaction is greater than \$940.1m

These new HSR Act thresholds will apply to any transaction that closes 30 days after the revisions are published in the Federal Register. The revised thresholds will take effect February 27, 2020, as they were published in the Federal Register on January 28th. 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 2019 thresholds.

In addition to revising the HSR thresholds, on January 28, 2020, 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 \$38,204,000 (previously \$36,564,000). However, corporations are exempt from this prohibition if either has "competitive sales" below \$3,820,400 (previously \$3,656,400). "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, which occurred on January 21, 2020.

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