

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

On February 2, 2021, 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 maximum civil penalty amounts for premerger notification violations under the HSR Act increased, effective on January 13, 2021. The FTC also announced on January 21, 2021 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")¹ and the parties are a particular size based on sales or

¹ 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.

assets (the "size-of-person test"²); 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 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 as follows:

	2020 Thresholds	Revised Thresholds for 2021
Size-of-transaction test	\$94.0 million	\$92.0 million
Size-of-person test	Party 1 – annual net sales or total assets at or above \$18.8 million; and Party 2 – annual net sales or total assets at or above \$188.8 million	Party 1 – annual net sales or total assets at or above \$18.4 million; and Party 2 – annual net sales or total assets at or above \$184.0 million
Size-of-transaction test threshold at which the size-of-person test is inapplicable	\$376.0 million	\$368.0 million

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 last year's, are as follows:

	2020 Thresholds	Revised Thresholds for 2021
Filing fee of \$45,000	Value of the transaction is below \$188.0 million	Value of the transaction is below \$184.0 million
Filing fee of \$125,000	Value of the transaction is at or greater than \$188.0 million, but less than \$940.1 million	Value of the transaction is at or greater than \$184.0 million, but less than \$919.9 million
Filing fee of \$280,000	Value of the transaction is greater than \$940.1 million	Value of the transaction is greater than \$919.9 million

These new HSR Act thresholds will apply to any transaction that closes 30 days after the revisions are published in the Federal Register, regardless of when the transaction was agreed or signed. The revised thresholds will take effect March 4, 2021, as they were published in the Federal Register on February 2, 2021.

² Generally, the size of person test is satisfied if the Ultimate Parent Entity ("UPE") of one party (either the acquiring or acquired person) has at least \$18.4 million in annual net sales or total assets and the UPE of the other party has at least \$184.0 million in annual net sales or total assets. If the UPE of the acquiring person satisfies the higher \$184 million prong of the "size-of-person test," and if the UPE of the acquired person is not engaged in manufacturing, the size-of-person threshold test would be satisfied only if the UPE of the acquired person has at least \$18.4 million in total assets or at least \$184.0 million in annual net sales.

Transactions that close prior to the effective date will still be subject to the 2020 thresholds.

The maximum civil penalty amount for premerger filing notification violations under the HSR Act have increased from \$43,280 to \$43,792, effective January 13, 2021. Such violations include failure to submit an HSR filing or failure to submit certain responsive documents with an HSR filing.

In addition to revising the HSR thresholds, the FTC also recently updated the thresholds applicable to Section 8 of the Clayton Act ("Section 8"), which prohibits certain interlocking directorates. 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 \$37,382,000 (previously \$38,204,000). However, corporations are exempt from this prohibition if either has "competitive sales" below \$3,738,200 (previously \$3,820,400). "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 take effect once they are published in the Federal Register, which occurred on January 21, 2021.

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