

Hart-Scott-Rodino Act Thresholds Decrease for 2021

February 1, 2021

Baseline HSR threshold now \$92 million

The Hart-Scott-Rodino Act requires that parties to certain transactions, including mergers and acquisitions, acquisitions of voting securities, and assets and minority investments, file notifications with the Department of Justice Antitrust Division and the Federal Trade Commission and observe a statutory waiting period if the transaction meets specified size-of-person and size-of-transaction thresholds and does not fall within an exemption.

Filing thresholds under the HSR Act will decrease by approximately 2.1% for 2021, based on the change in the US gross national product (GNP) during 2020. This is the first time since 2010 that the thresholds have fallen, and only the second time since 2004, when the thresholds started to adjust annually.

The critical size-of-transaction threshold, which often determines whether a filing is required, will decrease from \$94 million to \$92 million.

In addition to adjustments to the minimum size-of-transaction threshold, the most significant adjustments are the following:

- The size-of-person test will decrease from \$188 million to \$184 million and from \$18.8 million to \$18.4 million, with respect to the required level of annual net sales or total assets;
- The larger size-of-transaction threshold, which is applicable even if the size-of-person test is not met, will decrease from \$376 million to \$368 million. This means that acquisitions of more than \$368 million will be reportable regardless of whether the size-of-person threshold is met (unless an exemption applies).

The FTC also updated the filing fee tier thresholds, though the filing fees themselves will not change.

The filing fee levels will be adjusted as follows:

- A \$45,000 filing fee will be required for transactions valued in excess of \$92 million but below \$184 million;
- A \$125,000 filing fee will be required for transactions valued from \$184 million but below \$919.9 million; and
- A \$280,000 filing fee will be required for transactions valued at or above \$919.9 million.

The revised HSR thresholds will go into effect 30 days after they are published by the FTC in the Federal Register. The publication is expected to happen on February 2, 2021, and the new thresholds should therefore go into effect on March 4, 2021. Because the FTC is an independent administrative agency and not an executive department or agency, the new thresholds are not impacted by President Joe Biden's temporary freeze on pending regulations.

The FTC has also recently announced revised dollar thresholds applicable to the size criteria applied under Section 8 of the Clayton Act, governing the legality of interlocking directorates. Competitor corporations are covered by Section 8 if each one has capital, surplus and undivided profits aggregating more than \$10,000,000 (as adjusted), with the exception that no corporation is covered if

the competitive sales of either corporation is less than \$1,000,000 (as adjusted). The revised levels for these thresholds also decreased slightly and currently are \$37,382,000 and \$3,738,200. These thresholds took effect on January 21, 2021, upon publication in the Federal Register.

Finally, the FTC also recently adjusted the maximum daily civil penalty for HSR violations, which, unlike the HSR thresholds, increased slightly. This is because, unlike the HSR thresholds, which are adjusted based on changes in GNP, the civil penalty amount is adjusted annually for inflation. The current maximum daily civil penalty increased from \$42,530 per day to \$43,792 per day, effective January 13, 2021, upon publication in the Federal Register.

HSR filing analyses, and determinations of which interlocking directorates may violate Section 8 of the Clayton Act, are highly technical. If you have any questions, please reach out to a member of your Cooley corporate or antitrust teams.

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