Cooley

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.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Megan Browdie Washington, DC	mbrowdie@cooley.com +1 202 728 7104
Sharon Connaughton Washington, DC	sconnaughton@cooley.com +1 202 728 7007

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.