

Hart-Scott-Rodino Act Thresholds Jump in 2022

January 24, 2022

Basic ‘size-of-transaction’ threshold now \$101 million

The Hart-Scott-Rodino Act thresholds, which govern when mergers and acquisitions must be reported to the US Department of Justice and Federal Trade Commission, will jump 9.8% in February 2022. The basic “size-of-transaction” threshold will increase from \$92 million to \$101 million.

The FTC announced the annual revisions on January 21, 2022, based on the change in the US gross national product (GNP) in the government’s last fiscal year. The increases will go into effect on February 23, 2022.

This is the largest annual increase in the HSR thresholds since they became subject to annual adjustment in 2004 and follows a 2.1% decrease from 2020 to 2021.

The HSR Act requires that parties to mergers and acquisitions, including acquisitions of voting securities and assets, notify the DOJ and the FTC, and observe a statutory waiting period if the acquisition meets specified “size-of-person” and “size-of-transaction” thresholds and doesn’t fall within an exemption to the HSR Act. The waiting period, which is 30 days for most transactions, historically has been terminated early when transactions don’t present substantive issues, but the Biden administration has at least “temporarily” stopped granting early termination.

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

- The size-of-person test will increase from \$184 million to \$202 million and from \$18.4 million to \$20.2 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 isn’t met, will increase from \$376 million to \$403.9 million, which means that acquisitions of more than \$403.9 million will be reportable regardless of whether the size-of-person threshold is met (unless an exemption applies).

In addition to adjustments to the jurisdictional thresholds, the FTC updated the filing fee tier thresholds and certain exemption thresholds applicable to HSR’s mandatory reporting regime. The filing fee levels will be adjusted as follows:

- A \$45,000 filing fee will be required for transactions valued in excess of \$101 million but below \$202 million.
- A \$125,000 filing fee will be required for transactions valued from \$202 million but below \$1.0098 billion.
- A \$280,000 filing fee will be required for transactions valued at or above \$1.0098 billion.

The FTC also announced revised dollar thresholds applicable to the size criteria applied under Section 8 of the Clayton Act, which governs 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 million (as adjusted), with the exception that no corporation is covered if the competitive sales of either corporation is less than \$1 million (as adjusted). The revised levels for these thresholds also increased to \$41.034 million and \$4.103 million, effective January 24, 2022.

Finally, the FTC earlier this month announced an adjustment to the maximum daily civil penalty for HSR violations, which is adjusted for inflation (unlike the HSR thresholds, which are adjusted based on changes in the GNP). The current maximum daily civil penalty is now \$46,517 per day, effective January 10, 2022, 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 team.

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