Cooley

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.

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.