

2021 HSR ACT THRESHOLDS ANNOUNCED

“Size of Transaction” Test Decreases by 2.13% to \$92 Million

On February 1, 2021 the Federal Trade Commission, the agency charged with administering the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“*HSR Act*”), announced adjustments to the filing and other dollar-denominated thresholds contained in the HSR Act. These adjustments are made annually based on changes in the U.S. gross national product for the government’s fiscal year ending September 30. These adjustments typically result in annual increases, but for 2021 yield decreases, due to depressed 2020 economic activity. In fact, 2021 represents only the second time -- 2010 was the first -- the thresholds have decreased since 2004 when the adjustments were first tied to annual changes in the GNP. The 2021 revisions were published in the *Federal Register* on February 2, 2021 and become effective on March 4, 2021. The new thresholds will remain in effect until the next annual adjustment, expected early next year.

General Threshold to Determine Initial HSR Filing Obligation. Effective March 4, 2021, the minimum notification threshold under the HSR Act will decrease from \$94 million to \$92 million. Thus, an acquisition will potentially trigger an HSR Act filing only if, as a result of the acquisition, the acquirer will hold assets, voting securities or non-corporate interests of the acquired person valued in excess of \$92 million. The complete revised 2021 initial thresholds are as follows:

Threshold Type	2020 Threshold	2021 Threshold (Effective for transactions closing on or after March 4, 2021)
Minimum “Size-of-Transaction” test	\$94 million	\$92 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$18.8 million Person #2: \$188 million	Person #1: \$18.4 million Person #2: \$184 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$376 million	\$368 million

To summarize, applying these new thresholds results in the following reporting obligations:

Transaction Size	HSR Act Reporting Obligation?
\$92 million or less	No
Greater than \$92 million and less than \$368 million	Yes, but only if one person’s net sales or total assets exceed \$184 million and the other person’s net sales or total assets exceed \$18.4 million
\$368 million or more	Yes

Filing Fees. Although the dollar amounts of the three filing fees under the HSR Act have not changed for over 20 years, as a result of the indexing adjustments outlined above, new break points will be used in calculating the three-tiered filing fee due as follows:

Transaction Size	Filing Fees (Effective for filings made on or after March 4, 2021)
\$92,000,000 to less than \$184,000,000	\$45,000
\$184,000,000 to \$919,900,000	\$125,000
Transactions in Excess of \$919,900,000	\$280,000

Note that while the new thresholds for determining HSR Act filing requirements are effective for all transactions *closing* on or after March 4, 2021, the new thresholds for determining the applicable filing fee become effective for all filings first *made* on or after March 4, 2021.

Additional Notification Thresholds. As stated above, effective March 4, 2021, an acquisition that results in an acquirer holding more than \$92 million worth of the assets, stock or non-corporate interests of an acquired person crosses the first of five staggered “notification thresholds.” The rules identify four additional thresholds that determine whether a subsequent acquisition of voting securities from the same acquired person will require additional HSR filings. These additional notification thresholds have been revised as follows:

Original Additional Notification Thresholds	2020 Additional Notification Thresholds	2021 Additional Notification Thresholds
\$100 million	\$188 million	\$184 million
\$500 million	\$940.1 million	\$919.9 million
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$1.8802 billion)	(if the 25% stake is valued at greater than \$1.839.8 billion)
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$94 million)	(if the 50% stake is valued at greater than \$92 million)

In effect, these staggered thresholds are designed to act as exemptions to relieve parties of the burden of making additional filings each time additional shares of the same person are acquired. Once a filing is made, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing; if it reaches the stated threshold within that period, it may continue acquiring shares up to the next threshold for five years from the end of the waiting period. These additional notification thresholds apply only to acquisitions of voting securities.

Increased Enforcement & Civil Penalties

Failure to comply with HSR Act notification requirements can result in substantial civil and other penalties. Although starting in 2016 there was much speculation about the Trump Administration's antitrust enforcement posture, the Department of Justice and the FTC enforced the HSR Act with vigor. While President Biden historically has demonstrated a moderate, centrist stance on antitrust issues, significant changes to antitrust law enforcement are not expected.

Violations of the HSR Act can result in substantial penalties because each day of non-compliance is an independent violation and results in a separate penalty that can be up to the maximum civil penalty. Effective January 13, 2021, the FTC also announced an increase in the maximum civil penalty amount for violations of the HSR Act from \$43,280 to \$43,792 per day. Additional annual changes to the maximum daily civil penalty are expected, as such adjustments are now required to be made each January.

“Interlocking Directorate” Thresholds Also Adjusted

The FTC also recently announced revised dollar thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors. Section 8 of the Clayton Act generally prohibits, with certain exceptions, a person from serving as a director or officer of two competing companies if certain dollar thresholds are met. As revised, the prohibition against interlocking directors applies if each company has more than \$37,382,000 (down from \$38,204,000 for 2020) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than \$3,738,200 (down from \$3,820,400 for 2020) in competitive sales. The revised dollar thresholds became effective immediately upon publication in the *Federal Register* on January 21, 2021.

What this Means

Companies and others should be mindful that HSR Act filing obligations are often triggered by a wide variety of non-M&A or “merger” transactions, including asset acquisitions, initial and follow-on investment transactions, joint ventures and other “strategic alliances,” patent or other IP licensing activities, NewCo formations, and the exercise or other conversion of options or other convertible securities.

Companies and their investors and advisors should pay particular attention to the decreased dollar thresholds in assessing HSR Act filing obligations -- particularly for deals with either a filing date or closing date that straddles March 4, 2021. First, parties may now face a filing obligation for a transaction closing on or after March 4, 2021 that falls just under the revised \$92 million initial filing threshold. In addition, for HSR Act filings made on or after March 4, 2021, parties may incur a higher filing fee for a transaction that just crosses over one of the revised filing fee breakpoints.

Finally, deal parties should always be mindful that a transaction will not escape antitrust scrutiny because either an HSR Act filing is not required or, even if a filing is required and made, a transaction receives HSR Act clearance. Non-reportable deals are still challenged by the FTC and the DOJ, as each of those agencies regularly file suit seeking to unwind previously-consummated mergers. In fact, almost 20% of all merger challenges brought by the DOJ and FTC in recent years involved consummated transactions, including at least one transaction for which HSR Act clearance was obtained. Even small transactions with a purchase price below \$10 million have been challenged.

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