

NEW 2019 HSR ACT THRESHOLDS FINALIZED

“Size of Transaction” Test Increases by 6.6% to \$90 Million

On February 15, 2019 the Federal Trade Commission, the agency charged with administering the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“*HSR Act*”), announced increases to the filing and other dollar-denominated thresholds contained in the HSR Act. These adjustments are required to be made annually based on changes in the U.S. gross national product for the government’s fiscal year ending September 30. Following several weeks of delay, the revisions were published in the *Federal Register* on March 4, 2019 and become effective on April 3, 2019. The new thresholds will remain in effect until the next annual adjustment, expected in early 2020.

General Threshold to Determine Initial HSR Filing Obligation. Effective April 3, 2019, the minimum notification threshold under the HSR Act will increase from \$84.8 million to \$90 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 \$90 million. The complete revised 2019 initial thresholds are as follows:

Threshold Type	2018 Threshold	2019 Threshold <i>(Effective for transactions closing on or after April 3, 2019)</i>
Minimum “Size-of-Transaction” test	\$84.8 million	\$90 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$16.9 million Person #2: \$168.8 million	Person #1: \$18 million Person #2: \$180 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$337.6 million	\$359.9 million

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

Transaction Size	HSR ACT Reporting Obligation?
\$90 million or less	No
Greater than \$90 million and less than \$359.9 million	Yes, but only if one person’s net sales or total assets exceed \$198 million and the other person’s net sales or total assets exceed \$18 million
\$359.9 million or more	Yes

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

Transaction Size	Filing Fees (Effective for filings made on or after April 3, 2019)
\$90,000,000 to less than \$180,000,000	\$45,000
\$180,000,000 to \$899,800,000	\$125,000
Transactions in Excess of \$899,800,000	\$280,000

Note that while the new thresholds for determining the requirement to file under the HSR Act are effective for all transactions *closing* on or after April 3, 2019, the new thresholds for determining the applicable filing fee became effective for all filings first *made* on or after April 3, 2019.

Additional Notification Thresholds. As stated above, effective April 3, 2019, an acquisition that results in an acquirer holding more than \$90 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	2018 Additional Notification Thresholds	2019 Additional Notification Thresholds
\$100 million	\$168.8 million	\$180 million
\$500 million	\$843.9 million	\$899.8 million
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$1.6878 billion).	(if the 25% stake is valued at greater than \$1.7995 billion).
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$84.8 million)	(if the 50% stake is valued at greater than \$90 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 in late 2016 there was much speculation about the antitrust enforcement posture of the Trump administration, over the past two years the Department of Justice and the FTC have enforced the HSR Act with vigor.

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. On February 15, 2019, the FTC also announced an increase in the maximum civil penalty amount for violations of the HSR Act from \$41,484 to **\$42,530 per day**. Additional annual inflation increases to the maximum daily civil penalty are expected, as such adjustments are now required to be made each January.

“Interlocking Directorate” Thresholds Also Adjusted

Also on February 15, 2019, the FTC 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 \$36,564,000 (up from \$34,395,000 for 2018) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than \$3,656,400 (up from \$3,439,500 for 2018) in competitive sales. The revised dollar thresholds became effective immediately upon publication in the *Federal Register* on March 4, 2019.

What to Do?

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, and the exercise or other conversion of options or other convertible securities.

Companies and their investors should pay particular attention to the increased dollar thresholds in assessing HSR Act filing obligations -- particularly for deals with either a filing date or closing date that straddles April 3, 2019. First, parties may be relieved from the obligation to make an HSR Act filing for a transaction closing on or after April 3, 2019 that falls just under the revised \$90 million initial filing threshold. In addition, for HSR Act filings made on or after April 3, 2019, parties may realize the benefit of a lower filing fee for a transaction that just crosses over one of the current thresholds.

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. Although antitrust enforcement priorities were predicted to change under the Trump Administration, 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.

The FTC's announcement of the above HSR Act and interlocking directorate changes is located on the FTC's website at <https://www.ftc.gov/policy/federal-register-notices/revised-jurisdictional-thresholds-section-7a-clayton-act-notice-1>

* * *

This Alert has been prepared for news and general informational purposes in a summary manner only and is not intended as legal advice. Readers are urged to consult their legal counsel concerning any particular situation and specific legal question.

© 2019 Whiteford, Taylor & Preston L.L.P.