

FTC Decreases Thresholds for HSR Filings for First Time Since 2010, Also Decreases Interlocking Directorates Thresholds and Increases Civil Penalties

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On February 1, 2021, the Federal Trade Commission (FTC) announced its annual adjustment of the jurisdictional thresholds for pre-merger notification filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The revisions account for changes in the level of the U.S. gross national product. For only the second time ever, and the first time since 2010, the HSR thresholds were decreased from last year. The decreased HSR thresholds were announced just weeks after the FTC also announced decreases in thresholds for interlocking directorates under Section 8 of the Clayton Act and increases to the maximum civil monetary penalties for violations of 16 statutory provisions that the FTC enforces.

HSR Act Pre-Merger Notification Thresholds

The HSR Act requires companies contemplating mergers or acquisitions of voting securities, non-corporate interests or assets that meet or exceed certain monetary thresholds to file notification forms with the FTC and U.S. Department of Justice (DOJ) and to wait a designated period of time before consummating the contemplated transaction. The new thresholds will go into effect for transactions closing on or after March 4, 2021 and represent more than a 2.1% decrease from last year's thresholds. The key adjusted thresholds are summarized below:

| Test | 2020 Threshold | 2021 Adjusted Threshold |
|--|----------------|-------------------------|
| Size of Transaction | \$94 million | \$92 million |
| Size of Party (smaller) | \$18.8 million | \$18.4 million |
| Size of Party (larger) | \$188 million | \$184 million |
| Size of Transaction (when Size of Party Threshold is Not Satisfied) | \$376 million | \$368 million |

Although the HSR Act filing fees will not increase, these adjustments do affect the filing fee schedule as follows:

- \$45,000 for transactions valued at more than \$92 million, but less than \$184 million;
- \$125,000 for transactions valued at \$184 million or more, but less than \$919.9 million; and
- \$280,000 for transactions valued at \$919.9 million or more.

The regulations governing the methodology for calculating the size of party and size of transaction tests, as well as exemptions from the HSR Act, remain unchanged.

Interlocking Directorates

In addition, the FTC revised the Section 8 thresholds, which prohibit a person from serving as a director or officer of two competing corporations (known as an interlocking directorate or interlock). The prohibition is now triggered if each corporation has capital, surplus, and undivided profits aggregating more than \$37,382,000 (down from \$38,204,000 last year), and each corporation's competitive sales are at least \$3,738,200 (down from \$3,820,400 last year), unless an exception applies. The new thresholds became effective upon

publication in the Federal Register on January 21, 2021.

Inflation-Adjusted Civil Penalty Amounts

Finally, the FTC also announced adjustments to various maximum civil penalty levels for certain laws it enforces. The action was required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which significantly increased penalty levels in 2016 and required annual indexing of those levels for inflation.

Of most interest, the maximum civil monetary penalty for violations of the HSR Act and Section 5 of the FTC Act (concerning unfair methods of competition and unfair or deceptive acts or practices) increased from \$43,280 to \$43,792 per day. The new maximum civil penalties became effective immediately upon publication in the Federal Register on January 11, 2021. The new penalty levels apply to civil penalties assessed after they went into effect, including civil penalties imposed for violations that predated the increased penalty levels.

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All of the revised thresholds will remain in effect until the next adjustment issued by the FTC, which generally occurs in the first quarter of each year.

It is important to keep in mind that a transaction will not escape antitrust scrutiny simply because the HSR Act's thresholds are not satisfied or because the HSR waiting period has expired. Indeed, the DOJ and FTC each regularly file suits seeking to unwind previously consummated mergers, including small transactions with purchase prices well below the thresholds, in situations where they believe the transactions are anticompetitive.

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If you have questions about this or any other antitrust matter, please be in touch with [Austin Ownbey](#) or [Lisa Wood](#), or your attorney contact at Foley Hoag.

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