

## FTC Increases Thresholds for HSR Filings and Interlocking Directorates and Adjusts Civil Penalties

Written by Austin Ownbey, Lisa C. Wood

January 30, 2020

On January 28, 2020, the Federal Trade Commission (FTC) announced its annual increase of the jurisdictional thresholds for pre-merger notification filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) and for interlocking directorates under Section 8 of the Clayton Act. The revisions account for changes in the level of the U.S. gross national product and represent an increase of more than 4.4% from last year. The increased thresholds were announced two weeks after the maximum civil monetary penalties were increased for violations of 16 statutory provisions 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 February 27, 2020. For transactions closing on or after this date, companies generally will need to comply with the HSR Act pre-merger notification and waiting period requirements if the size of the transaction (as defined by the HSR Act and applicable regulations) is either:

1. More than \$376 million (up from \$359.9 million last year); or
2. More than \$94 million (up from \$90 million last year), and both of the following are true:
  - Total assets or annual net sales of one party to the transaction equals \$188 million or more, and
  - Total assets or annual net sales of the other party to the transaction equals \$18.8 million or more.

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 \$94 million, but less than \$188 million;
- \$125,000 for transactions valued at \$188 million or more, but less than \$940.1 million; and
- \$280,000 for transactions valued at \$940.1 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 \$38,204,000 (up from \$36,564,000 last year), and each corporation's competitive sales are at least \$3,820,400 (up from \$3,656,400 last year), unless an exception applies. The new thresholds became effective upon publication in the Federal Register on January 28, 2020.

## Inflation-Adjusted Civil Penalty Amounts

Earlier, on January 13, 2020, 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 \$42,530 to \$43,280 per day. The new maximum civil penalties became effective upon publication in the Federal Register on January 14, 2020.

\* \* \*

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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