

## **FTC Announces 2021 Changes to HSR and Clayton Act Thresholds, Temporarily Suspends Early Termination**

The U.S. Federal Trade Commission (FTC) recently announced reporting thresholds under Section 7A of the Clayton Act, known as the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 (the Act), [will decrease](#). The Act requires all parties to certain transactions, including mergers and acquisitions that meet or exceed the Act's jurisdictional thresholds, to notify the FTC and the Antitrust Division of the U.S. Department of Justice (DOJ) of their intentions and to wait a designated period of time before consummating those transactions. The amendments to the Act, passed in 2000, require the FTC to revise the Act's jurisdictional and filing fee thresholds annually, based on the change in gross national product. Certain related thresholds and limitation values in the HSR rules will also be adjusted. The modified thresholds apply to all transactions closing on or after March 4, 2021.

Also, the DOJ and FTC announced the temporary suspension of early termination.

This update summarizes the key elements of the revised thresholds.

### **HSR Reporting Thresholds**

Certain transactions, including acquisitions of voting securities or assets, acquisitions of noncorporate interests, and the formation of joint venture corporations or other entities, are subject to the reporting requirements of the Act if the transaction meets a two-part test based on the size of the transaction and the size of the parties.

- The size-of-transaction test is met if the transaction is valued at more than \$92 million (decreased from \$94 million).
- The size-of-parties test is met if the ultimate parent entity of one of the parties to the transaction has \$18.4 million (decreased from \$18.8 million) in total assets or annual net sales, and the ultimate parent entity of another party to the transaction has \$184 million (decreased from \$188 million) in total assets or annual net sales.
- The threshold at which the size-of-parties test does not apply is to transactions valued in excess of \$368 million (decreased from \$376 million).

### **Early Termination Temporarily Suspended**

On February 4, 2021, the DOJ and FTC [announced](#) that early termination of the HSR Act's waiting period will be temporarily suspended during "the transition to the new Administration and given the unprecedented volume of HSR filings" so far this fiscal year. While the agencies anticipated the suspension would "be brief," they have not provided any additional information since making the announcement last month.

The FTC reports HSR filing [statistics](#) and, as shown below, HSR filings are up *significantly* this fiscal year, even compared to pre-pandemic filing levels.

February 2021 304

January 2021 210

December 2020 192

November 2020 424

October 2020 233

September 2020 177

August 2020 182

July 2020 112

June 2020 111

May 2020 73

April 2020 79

March 2020 138

February 2020 140

January 2020 162

December 2019 172

November 2019 209

October 2019 146

## Filing Fees

The transaction values on which the tiered HSR filing fee schedule is based will also be [revised](#), as shown in the chart below. The previous thresholds were \$188 million and \$940.1 million.

### Filing Fee Transaction Value (effective March 1, 2021)

\$45,000 Less than \$184 million

\$125,000 \$184 million to \$919.9 million

\$280,000 \$919.9 million or more

## New Clayton Act Section 8 Thresholds

The FTC also announced revisions to the thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors under Section 8 of the Clayton Act. Under Section 8, a person is barred from serving as a director or officer of two competing corporations if two thresholds are met. As enacted, the statute applies if each competitor corporation has capital, surplus, and undivided profits of more than \$10 million, except that no prohibition against interlocking directorates or officers applies if the competitive sales of either corporation are less than \$1 million. There is also an exception for interlocking directorates in which the competitive sales of either corporation are less than 2% of that corporation's total sales, or the competitive sales of each corporation are less than 4% of that corporation's total sales. The monetary thresholds are subject to annual revision.

The thresholds in [effect](#) as of January 21, 2021, are \$37,382,000 and \$3,738,200 (down from \$38,204,000 and \$3,820,400), respectively. Thus, if each of the competing companies has capital, surplus, and undivided profits of over \$37,382,000, the interlock is unlawful unless (1) the competitive sales of either firm are under \$3,738,200 or represent less than 2% of that firm's total sales, or (2) the competitive sales of each firm are less than 4% of that firm's total sales.

## Civil Penalty

Effective January 13, 2021, the maximum civil penalty amount for violations of the Act was [increased](#) from \$43,280 to \$43,792 per day, based on changes in inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the FCPIAA). The FCPIAA as amended directs agencies to implement annual inflation adjustments based on a prescribed formula.

## Is Your Transaction Reportable Under the HSR Act?

This update is intended for general guidance. Parties contemplating a transaction should consult antitrust counsel to determine whether any particular transaction is reportable under the Act and to evaluate any antitrust concerns raised by the transaction.

Parties should also keep in mind that a transaction that is not reportable because it does not meet the Act's reporting thresholds is not exempt from agency scrutiny of the potential anticompetitive effects of the transaction. The FTC, the DOJ, and state attorneys general (as well as private parties) may challenge a transaction as anticompetitive even when no HSR filing is required for the transaction. Therefore, all transactions should be reviewed for compliance with Section 7A of the Clayton Act prior to closing.

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