

NEW 2018 HSR ACT THRESHOLDS TAKE EFFECT

“Size of Transaction” Test Increased by almost 5% to \$84.8 Million

The Federal Trade Commission has revised the filing and other dollar-denominated thresholds contained in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“*HSR Act*”). These adjustments are required to be made annually based on changes in the U.S. gross national product for the fiscal year ending September 30. The revisions were published in the *Federal Register* on January 29, 2018 and became effective on February 28, 2018. The new thresholds will remain in effect until the next annual adjustment, expected in early 2019.

General Threshold to Determine Initial HSR Filing Obligation. Effective February 28, 2018, the minimum notification threshold under the HSR Act has increased from \$80.8 million to \$84.8 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 \$84.8 million. The complete revised 2018 initial thresholds are as follows:

Threshold Type	2017 Threshold	2018 Threshold (Effective for transactions closing on or after February 28, 2018)
Minimum “Size-of-Transaction” test	\$80.8 million	\$84.8 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$16.2 million Person #2: \$161.5 million	Person #1: \$16.9 million Person #2: \$168.8 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$323 million	\$337.6 million

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

Transaction Size	HSR ACT Reporting Obligation?
\$84.8 million or less	No
Greater than \$84.8 million and less than \$337.6 million	Yes, but only if one person’s net sales or total assets exceed \$168.8 million and the other person’s net sales or total assets exceed \$16.9 million
\$337.6 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 February 28, 2018)
\$80,800,000 to less than \$161,500,000	\$45,000
\$161,500,000 to \$843,900,000	\$125,000
Transactions in Excess of \$843,900,000	\$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 February 28, 2018, the new thresholds for determining the applicable filing fee became effective for all filings first **made** on or after February 28, 2018.

Additional Notification Thresholds. As stated above, effective February 28, 2018, an acquisition that results in an acquirer holding more than \$84.8 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	2017 Additional Notification Thresholds	2018 Additional Notification Thresholds
\$100 million	\$161.5 million	\$168.8 million
\$500 million	\$807.5 million	\$807.5 million
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$1.615 billion).	(if the 25% stake is valued at greater than \$1.615 billion).
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$80.8 million)	(if the 50% stake is valued at greater than \$84.8 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.

“Interlocking Directorate” Thresholds Also Adjusted

On January 29, 2018, the FTC also 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 \$34,395,000 (up from \$32,914,000 for 2017) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than \$3,439,500 (up from \$3,291,400 for 2017) in competitive sales. The revised dollar thresholds became effective immediately upon publication in the *Federal Register* on January 29, 2018.

Enforcement & Civil Penalties

Failure to comply with HSR Act notification requirement can result in substantial civil and other penalties. Although there has been much speculation about the antitrust enforcement posture of the Trump administration, in the past year the Department of Justice and the FTC have enforced the HSR with vigor, as 2016 was a record year for civil penalties.

Violations of the HSR Act can result in substantial penalties because each day of non-compliance is deemed a separate violation and results in a separate penalty that can be up to the maximum civil penalty. Prior to 2016, the maximum daily penalty amount had not been adjusted since 2009, when the maximum daily penalty was \$11,000 per day.

On January 23, 2018, the FTC separately announced that the maximum civil penalty amount for violations of the HSR Act increased to \$41,484 per day, effective January 29, 2018. Additional annual inflation increases to the maximum daily civil penalty are expected, as such adjustments are now required to be made each January.

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, patent or other IP licensing activities, initial and follow-on investments, joint ventures and exercises of options or other convertible securities.

Companies and their investors should be mindful of the increased dollar thresholds in assessing HSR Act filing obligations -- particularly for deals with either a filing date or closing date that straddles February 28, 2018. First, parties may be relieved from the obligation to make an HSR Act filing for a transaction closing on or after February 28, 2018 that falls just under the revised \$84.8 million initial filing threshold. In addition, for HSR Act filings made on or after February 28, 2018, parties may realize the benefit of a lower filing fee for a transaction that just crosses over one of the current thresholds.

Finally, parties should keep in mind that a transaction will not escape antitrust scrutiny simply because an HSR Act filing is not required. Although antitrust enforcement priorities were predicted to change under the Trump Administration, non-reportable deals are still challenged by the FTC and the Department of Justice.

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/news-events/press-releases/2018/01/ftc-announces-annual-update-size-transaction-thresholds-premerger>.

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