

FTC INCREASES HSR ACT THRESHOLDS

“Size of Transaction” Test Increased by 2.5% to \$78.2 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 made annually based on changes in the U.S. gross national product for the fiscal year ending September 30, 2015. The revisions were published in the *Federal Register* on January 26, 2016 and take effect on February 25, 2016. The new thresholds will remain in effect until the next annual adjustment, expected in early 2017.

General Threshold to Determine Initial HSR Filing Obligation. Effective February 25, 2016, the minimum notification threshold under the HSR Act will increase from \$76.3 million to \$78.2 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 \$78.2 million. The complete revised 2016 initial thresholds are as follows:

Threshold Type	2015 Threshold	2016 Threshold (Effective for transactions closing on or after February 25, 2016)
Minimum “Size-of-Transaction” test	\$76.3 million	\$78.2 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$15.3 million Person #2: \$152.5 million	Person #1: \$15.6 million Person #2: \$156.3 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$305.1 million	\$312.6 million

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

Transaction Size	HSR ACT Reporting Obligation?
\$78.2 million or less	No
Greater than \$78.2 million and less than \$312.6 million	Yes, but only if one person’s net sales or total assets exceed \$156.3 million and the other person’s net sales or total assets exceed \$15.6 million
\$312.6 million or more	Yes

Filing Fees. Although the dollar amounts of the three filing fees under the HSR Act have not changed for almost 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 25, 2016)
\$78,200,000 to less than \$156,300,000	\$45,000
\$156,300,000 to \$781,500,000	\$125,000
Transactions in Excess of \$781,500,000	\$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 25, 2016, the new thresholds for determining the applicable filing fee are effective for all filings first **made** on or after February 25, 2016.

Additional Notification Thresholds. As stated above, effective February 25, 2016, an acquisition that results in an acquirer holding more than \$78.2 million worth of the assets, stock or non-corporate interests of an acquired person will cross 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	2015 Additional Notification Thresholds	2016 Additional Notification Thresholds
\$100 million	\$152.5 million	\$156.3 million
\$500 million	\$762.7 million	\$781.5 million
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$1.525 billion).	(if the 25% stake is valued at greater than \$1.563 billion).
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$76.3 million)	(if the 50% stake is valued at greater than \$78.2 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 26, 2016, 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 \$31,841,000 (up from \$31,084,000 for 2015) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than \$3,184,100 (up from \$3,108,400 for 2015) in competitive sales. The revised dollar thresholds became effective immediately upon publication in the *Federal Register* on January 26, 2016.

What to Do?

Companies 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 25, 2016. First, parties may be relieved from the obligation to make an HSR Act filing for a transaction closing on or after February 25, 2016 that falls just under the revised \$78.2 million initial filing threshold. In addition, for HSR Act filings made on or after February 25, 2016, 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, as non-reportable deals are increasingly challenged by the FTC and the Department of Justice. For example, the U.S. District Court for the Northern District of California ruled in favor of the DOJ and concluded that Bazaarvoice’s 2012 acquisition of PowerReviews violated U.S. antitrust law even though the transaction was not reportable under the HSR Act because PowerReviews did not satisfy the “size of person” threshold. Similarly, in March 2012, the FTC ordered ProMedica Health Systems to divest St. Luke’s Hospital, the 2010 purchase of which also fell below the reporting thresholds then in effect.

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/2016/01/ftc-announces-new-clayton-act-monetary-thresholds-2016>

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