

## FTC INCREASES HSR ACT THRESHOLDS

### *“Size of Transaction” Test Raised to \$68.2 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. The revisions were published in the *Federal Register* on January 27, 2012 and take effect on February 27, 2012. The new thresholds will remain in effect until the next annual adjustment, expected in the first quarter of 2013.

**General Threshold to Determine Initial HSR Filing Obligation.** Effective February 27, 2012, the minimum notification threshold under the HSR Act will increase from \$66 million to \$68.2 million. Thus, an acquisition will potentially trigger an HSR 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 \$68.2 million. The complete revised 2012 initial thresholds are as follows:

Threshold Type	2011 Threshold	2012 Threshold (Effective for transactions closing on or after February 27, 2012)
Minimum “Size-of-Transaction” test	\$66 million	\$68.2 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$13.2 million Person #2: \$131.9 million	Person #1: \$13.6 million Person #2: \$136.4 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$263.8 million	\$272.8 million

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

Transaction Size	HSR Reporting Obligation?
\$68.2 million or less	No
Greater than \$68.2 million and less than \$272.8 million	Yes, but only if one person’s net sales or total assets exceed \$136.4 million and the other person’s net sales or total assets exceed \$13.6 million
\$272.8 million or more	Yes

**Filing Fees.** Although the amounts of the three filing fees under the HSR Act have not changed, as a result of the GNP-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 27, 2012)
\$68,200,000 to less than \$131,900,000	\$45,000
\$131,900,000 to \$682,100,000	\$125,000
Transactions in Excess of \$682,100,000	\$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 27, 2012, the new thresholds for determining the applicable filing fee are effective for all filings first *made* on or after February 27, 2012.

**Additional Notification Thresholds.** As stated above, effective February 27, 2012, an acquisition that results in an acquirer holding more than \$68.2 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	2011 Additional Notification Thresholds	2012 Additional Notification Thresholds
\$100 million	\$131.9 million	\$136.4 million
\$500 million	\$659.5 million	\$682.1 million
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$1.319 billion)	(if the 25% stake is valued at greater than \$1.3641 billion)
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$66 million)	(if the 50% stake is valued at greater than \$68.2 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***

Also on January 24, 2012, the FTC announced revised dollar thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors for interlocking directorates. Section 8 of the Clayton Act 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 \$27,784,000 in capital, surplus and undivided profits; however, the prohibition does not apply if either company has less than \$2,778,400 in competitive sales. The revised dollar thresholds became effective immediately upon publication in the *Federal Register* on January 27, 2012.

### **What to Do?**

Companies should be mindful of the increased dollar thresholds in assessing filing obligations under the HSR Act -- particularly for deals with either a filing date or closing date that straddles February 27, 2012. First, parties may be relieved from the obligation to make an HSR Act filing for a transaction closing on or after February 27, 2012 that falls just under the revised \$68.2 million initial filing threshold. In addition, for filings made on or after February 27, 2012, parties may realize the benefit of a lower filing fee for a transaction that just crosses over one of the current thresholds.

The FTC’s announcement of the above HSR Act and interlocking directorate changes is located on the FTC’s website at [www.ftc.gov/opa/2012/01/hsr.shtm](http://www.ftc.gov/opa/2012/01/hsr.shtm).

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