

FTC revises HSR thresholds; minimum size for reportable transactions increases to \$94 million

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On January 27, 2020, the Federal Trade Commission (FTC) announced the latest annual revision to the size thresholds governing premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, Section 7A of the Clayton Act, 15 U.S.C. § 18a (the "HSR Act").¹

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The new thresholds will apply to transactions consummated on or after the effective date, which is February 27, 2020.²

THE SIZE-OF-TRANSACTION THRESHOLD

The minimum transaction size test has increased from \$90 million to \$94 million (an approximate 4.4 percent increase).

Thus, under the revised thresholds, HSR Act filings will be required (unless otherwise exempted) for a transaction that results in the acquiring person holding more than \$94 million of the acquired person's voting securities, noncorporate interests or assets (assuming the size-of-person thresholds are also met).

THE SIZE-OF-PERSON THRESHOLDS

The size-of-person thresholds have increased by a similar percentage.

While the HSR Act size-of-person rules are complex, under the new thresholds an HSR Act filing is generally not required for transactions valued at more than \$94 million but less than \$376 million, *unless* one party to the transaction has \$188 million

in annual net sales or total assets and the other party has \$18.8 million in annual net sales or total assets.

Persons who fail to file and observe the waiting period when required to do so face civil penalties of up to \$43,280 per day.

Any transaction that is valued at more than \$376 million will be reportable under the HSR Act (unless otherwise exempted) without application of the size-of-person test.

In other words, the potential exemption afforded by the size-of-person test will be inapplicable to transactions valued at more than \$376 million.

HSR ACT FILING FEE THRESHOLDS

The FTC has also adjusted the tiered filing fee structure as follows:

Parties contemplating merger or acquisition activity are strongly encouraged to consult antitrust counsel to determine whether premerger notification is required.

The rules governing the calculation of the relevant filing thresholds and the applicability of particular exemptions to all or part of a transaction are very complex.

Persons who fail to file and observe the waiting period when required to do so face civil penalties of up to \$43,280 per day.³

Notes

¹ Revised Jurisdictional Thresholds for Section 7A of the Clayton Act (<http://bit.ly/2Sdlv1n>).

² In addition to the size thresholds highlighted in this alert, most other HSR Act thresholds (for example, relating to various exemptions) have increased as well. For instance, on January 17, 2020, the FTC announced the annual revisions to the interlocking directorate thresholds under Section 8 of the Clayton Act, which prohibits an individual from serving as an officer or director of two competing corporations, with certain exceptions, provided the corporations meet certain thresholds. The new thresholds, effective January 21, 2020, are now \$38,204,000 for Section 8(a)(1) and \$3,820,400 for Section 8(a)(2)(A). <http://bit.ly/2RSSyc4>.

³ On January 13, 2020, the FTC announced the maximum daily civil penalty has been adjusted for inflation to \$43,280, effective January 14, 2020. <http://bit.ly/395M9QM>

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Key points

- The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires parties that meet certain transaction size and other tests to file premerger notification forms with both the Federal Trade Commission and Department of Justice Antitrust Division.
- The minimum transaction size test has increased from \$90 million to \$94 million. The new size thresholds will apply to transactions consummated on or after February 27, 2020.
- Parties contemplating merger and acquisition activity are strongly encouraged to consult antitrust counsel to determine whether premerger notification is required.

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