

# Antitrust Alert

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## FTC Revises HSR Thresholds; Minimum Size for Reportable Transactions Decreases to \$92 Million—First Decrease Since 2010

February 1, 2021

### Key Points

- The Hart-Scott-Rodino (HSR) 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 (FTC) and Department of Justice (DOJ) Antitrust Division.
- The minimum transaction size test has decreased from \$94 million to \$92 million. The new size thresholds will apply to transactions consummated on or after March 4, 2021.<sup>1</sup>
- This is the first time since 2010 that the HSR thresholds have declined and reflects a change in the gross national product from the prior year.
- Parties contemplating merger and acquisition activity are strongly encouraged to consult antitrust counsel to determine whether premerger notification is required.

On February 1, 2021, the FTC announced the latest annual revision to the size thresholds governing premerger notification requirements under the HSR Antitrust Improvements Act of 1976, as amended, Section 7A of the Clayton Act, 15 U.S.C. § 18a (the “HSR Act”). The HSR Act requires parties that meet certain transaction size and other tests to file premerger notification forms with both the FTC and the DOJ Antitrust Division, and to observe a mandatory waiting period prior to closing. The new thresholds will apply to transactions consummated on or after the effective date, March 4, 2021.<sup>2</sup>

### The Size-of-Transaction Threshold

The minimum transaction size test has decreased from \$94 million to \$92 million (an approximate 2.2 percent decrease). 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 \$92 million of the acquired person’s voting securities, noncorporate interests or assets (assuming the size-of-person thresholds are also met).

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## The Size-of-Person Thresholds

The size-of-person thresholds have decreased by a similar percentage. While the HSR Act size-of-person rules are complex, an HSR Act filing will generally now not be required for transactions valued at more than \$92 million but less than \$368 million, **unless** one party to the transaction has \$184 million in annual net sales or total assets and the other party has at least \$18.4 million in annual net sales or total assets. Any transaction that is valued at more than \$368 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 \$368 million.

## HSR Act Filing Fee Thresholds

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

Value of Transactions (\$ millions)	Filing Fee
More Than \$92 but less than \$184	\$45,000
\$184 to less than \$919.9	\$125,000
\$919.9 or more	\$280,000

This is only the second time that the HSR thresholds have declined since Congress amended the HSR statute in 2000 to require the HSR thresholds be adjusted annually based on the change in gross national product. The last time the threshold decreased was in 2010.

## Proposed HSR Rule Changes

In addition, in a [Notice of Proposed Rulemaking](#) (NPRM) the agencies have proposed significant HSR rule changes. The proposed rule would revise the definition of “person” and would require filers to report additional information on associates—entities under common investment management—and require that holdings by associates be aggregated for purposes of determining whether a filing is required and whether exemptions would be available. The changes would exempt acquisitions of 10 percent or less of an issuer’s voting securities from unless the acquiring person competes with the issuer; holds one percent or more of the voting securities of a competitor; has a vendor/vendee relationship worth \$10 million or more; or has an employee, agent or someone acting on its behalf serving as an officer or director of the issuer or a competitor of the issuer. See Proposed 16 CFR 802.15.<sup>3</sup> The passive investment exemption for investments of 10 percent or less would remain.

In addition, the agencies issued an [Advance Notice of Public Rulemaking](#) seeking comments on several topics that will inform potential future amendments to HSR rules and informal interpretations. The comment period for the notices closes today, February 1, 2021. Given the change in administration and the expected comments, we anticipate that before codified (if codified at all) the proposed revisions to the rules may change further.

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 43,792 per day.<sup>4</sup>

<sup>1</sup> Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, available [here](#).

<sup>2</sup> 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 19, 2021, 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, 2021, are now \$37,382,000 for Section 8(a)(1) and \$3,738,200 for Section 8(a)(2)(A). Click [here](#) for more detail.

<sup>3</sup> Press Release: [FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking, September 21, 2020](#).

<sup>4</sup> The FTC announced the maximum daily civil penalty has been adjusted for inflation to \$43,782, effective January 13, 2021. Click [here](#) for more detail.

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