

FTC Publishes Decreased Hart-Scott-Rodino Thresholds for 2021

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On February 2, 2021, the Federal Trade Commission (FTC) published its adjusted reporting thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) in the Federal Register. The revised thresholds, which track with year-over-year changes in gross national product (GNP), represent an approximate 2.13% decrease over last year's thresholds, and they will become effective for all transactions closing on or after March 4, 2021 (30 days after their initial publication). Reductions in GNP for 2020 relate to economic contractions caused by the global pandemic, but large companies that are still awash with cash may find that more of their deals are subject to premerger notification requirements (and potential antitrust scrutiny) than in previous years.

The HSR Act requires parties to certain large mergers, acquisitions, and other transactions to make premerger notification with the FTC and the Department of Justice Antitrust Division (DOJ), and observe a statutory 30-day waiting period (with some exceptions) before consummation, if their transaction meets or exceeds certain monetary thresholds. While both enforcement agencies have jurisdiction to review any reportable transaction, either the FTC or the DOJ typically will take primary responsibility for each deal. When necessary, the parties must cooperate with the agency's investigation into their proposed transaction's competitive effects. In rare circumstances, the agencies have brought lawsuits against deal parties in federal court seeking to completely enjoin or at least limit the scope of proposed transactions that may have anticompetitive consequences.

Adjusted Threshold for Size of Transaction Test

The minimum size of transaction requiring an HSR filing has decreased from \$94 million to \$92

million. For most purposes, the size of the transaction is calculated as the greater of the purchase price or the fair market value of the assets being acquired. If the purchase price or value of the acquired assets is below \$92 million, there is no requirement to make an HSR filing even if the parties meet the size of parties test described below.

Adjusted Threshold for Size of Parties Test

Where the size of transaction test is met, generally one party to a transaction also must have assets or annual revenues of at least \$184 million (down from \$188 million) and the other must have assets or annual revenues of at least \$18.4 million (down from \$18.8 million) to trigger an HSR filing. The only exceptions are:

- If the size of the transaction is \$368 million or more (down from \$376 million), there is no size of parties test and the parties will need to file regardless of the assets or annual revenues of the parties involved.
- If the buyer meets the \$184 million size of parties test and the target is a non-manufacturer, the target's annual sales are disregarded so that the target will meet the test only if its assets exceed \$18.4 million.

Adjusted Filing Fees

The filing fees for parties making premerger notification are not indexed to the GNP, and they have not been revised in over a decade. However, the thresholds used to determine the fees have been adjusted downward for 2021.

- For transactions valued above \$92 million and below \$184 million (down from between \$94 million and \$188 million), the filing fee is \$45,000.
- For transactions valued above \$184 million and below \$919.9 million (down from between \$188 million and \$940.1 million), the filing fee is \$125,000.
- For transactions valued above \$919.9 million (down from \$940.1 million), the filing fee is \$280,000.

Adjusted Civil Penalties

Violating the HSR Act may subject businesses and individuals to monetary penalties. For example, failing to make a required HSR filing or consummating a reportable merger without observing the statutory waiting period may subject a party to a civil penalty for each day during which the party is in violation of the HSR Act. Gun jumping, in which parties share competitively sensitive information or otherwise engage in a "de facto" merger (transferring ownership or control) before formal consummation takes place, also is a violation of the HSR Act (as well as a violation of Section 1 of the Sherman Act, which carries its own potential criminal penalties). For 2021 the maximum penalty for an HSR Act violation will increase from \$43,280 to \$43,792 per day and will apply to any new penalties assessed after January 13, 2021, regardless of when the prohibited conduct occurred.

Failure to comply with the HSR Act and other antitrust laws may have serious consequences for businesses and individuals. Companies contemplating a merger, acquisition or other large transaction should review the new thresholds and consult with counsel to determine whether their transaction would require clearance from the federal antitrust authorities prior to consummation.

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