

Alert | Antitrust Litigation & Competition Regulation



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Revised Jurisdictional Thresholds under the HSR Act and For the Prohibition of Interlocking Directorates

On Feb. 1, 2021, the Federal Trade Commission (FTC) released a [notice](#), to be published in the Federal Register Feb. 2, revising the premerger notification thresholds for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). The FTC also recently published revisions to the thresholds that trigger, under Section 8 of the Clayton Act, a prohibition preventing companies from having interlocking memberships on their corporate boards of directors. These revisions represent the annual adjustment of thresholds based upon changes in the gross national product (GNP).

Atypically, these thresholds have been **lowered** for 2021. Congress amended the HSR Act in 2000 to require the annual adjustment of notification thresholds based on the change in GNP. Prior to this year, the HSR thresholds have only been lowered once since 2000 – in 2010.

Revised HSR Act Thresholds

The initial threshold for a notification under the HSR Act will decrease from \$94 million to **\$92 million**. For transactions valued between \$92 million and \$368 million (lowered from \$376 million), the size of the person test will continue to apply. That test will now make the transaction reportable only where one party has sales or assets of at least \$184 million (lowered from \$188 million), and the other party has sales

or assets of at least \$18.4 million (lowered from \$18.8 million). All transactions valued in excess of \$368 million are reportable without regard to the size of the parties. **The new thresholds will apply to any transaction that will close on or after March 4, 2021.**

The following is a summary chart of the threshold adjustments:

PRIOR THRESHOLD	REVISED THRESHOLD
Size of the transaction test	
in excess of \$94 million	in excess of \$92 million (filing fee remains \$45,000)
Size of the person test	
\$18.8 million/\$188 million	\$18.4 million/\$184 million
Transaction value above which size of the person test is inapplicable	
\$376 million	\$368 million

In addition to adjusting downward the initial threshold for HSR notification, the amendments will adjust all subsequent notification thresholds as follows:

NOTIFICATION LEVELS	
in excess of \$50 million	in excess of \$92 million (filing fee remains \$45,000)
\$100 million	\$184 million (filing fee remains \$125,000)
\$500 million	\$919.9 million (filing fee remains \$280,000)
25% of total outstanding shares worth more than \$1 billion	25% of total outstanding shares worth more than \$1,839.8 million
50% of total outstanding shares worth more than \$50 million	50% of total outstanding shares worth more than \$92 million

These notification threshold adjustments also adjust downward thresholds applicable to certain exemptions, such as those involving the acquisition of foreign assets or voting securities of foreign issuers.

Revised Section 8 Thresholds

The FTC also published revisions to the thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors under Section 8 of the Clayton Act. **These revised thresholds are effective as of Jan. 21, 2021.**

Section 8 prohibits a “person,” which can include a corporation and its representatives, from serving as a director or officer of two “competing” corporations, unless one of the following exemptions applies:

- either corporation has capital, surplus, and undivided profits of less than **\$37,382,000** (lowered from \$38,204,000);
- the competitive sales of either corporation are less than **\$3,738,200** (lowered from \$3,820,400);

- the competitive sales of either corporation amount to less than two percent of that corporation's total sales; or
- the competitive sales of each corporation amount to less than four percent of each corporation's total sales.

“Competitive sales” means “the gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year.” “Total sales” means “the gross revenues for all products and services sold by one corporation over that corporation's last completed fiscal year.”

Authors

This GT Alert was prepared by:

- **Andrew G. Berg** | +1 202.331.3181 | berga@gtlaw.com
- **Stephen M. Pepper** | +1 212.801.6734 | peppers@gtlaw.com

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