

Alert | Antitrust Litigation & Competition Regulation



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Revised Jurisdictional Thresholds Under HSR Act and for Prohibition of Interlocking Directorates

On Jan. 24, the Federal Trade Commission (FTC) published a **notice** in the Federal Register revising the premerger notification thresholds for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). Also on Jan. 24, the FTC 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).

Congress amended the HSR Act in 2000 to require the annual adjustment of notification thresholds based on the change in GNP.

Revised HSR Act Thresholds

The initial threshold for a notification under the HSR Act will increase from \$92 million to **\$101 million**. For transactions valued between \$101 million and \$403.9 million (increased from \$368 million), the size of the person test will continue to apply. That test will make the transaction reportable generally only where one party has sales or assets of at least \$202 million (increased from \$184 million), and the other party has sales or assets of at least \$20.2 million (increased from \$20.2 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 Feb. 23, 2022.**

The following is a summary chart of the threshold adjustments:

PRIOR THRESHOLD	REVISED THRESHOLD
Size of the transaction test	
in excess of \$92 million	in excess of \$101 million (filing fee remains \$45,000)
Size of the person test	
\$18.4 million/\$184 million	\$20.2 million/\$202 million
Transaction value above which size of the person test is inapplicable	
\$368 million	\$403.9 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 \$101 million (filing fee remains \$45,000)
\$100 million	\$202 million (filing fee remains \$125,000)
\$500 million	\$1,009.8 million (filing fee remains \$280,000)
25% of total outstanding shares worth more than \$1 billion	25% of total outstanding shares worth more than \$2,019.6 million
50% of total outstanding shares worth more than \$50 million	50% of total outstanding shares worth more than \$101 million

These notification threshold adjustments also adjust upward 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. 24, 2022.**

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 **\$41,034,000** (increased from \$37,382,000);
- the competitive sales of either corporation are less than **\$4,103,400** (increased from \$3,738,200);
- the competitive sales of either corporation amount to less than 2% of that corporation’s total sales; or
- the competitive sales of each corporation amount to less than 4% 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.”

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