

January 2017

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

Yesterday, the Federal Trade Commission (FTC) published a notice to revise 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 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 GNP.

I. Revised HSR Act Thresholds

The initial threshold for a notification under the HSR Act will increase from \$78.2 million to **\$80.8 million**. For transactions valued between \$80.8 million and \$323 million (up from \$312.6 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 \$161.5 million (up from \$156.3 million), and the other party has sales or assets of at least \$16.2 million (up from \$15.6 million). All transactions valued in excess of \$323 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 the date that is 30 calendar days after the date of official publication of the new thresholds in the Federal Register. Official publication is expected in the next few business days.**

The following is a summary chart of the threshold adjustments:

PRIOR THRESHOLD	REVISED THRESHOLD
Size of the transaction test	
in excess of \$78.2 million	in excess of \$80.8 million (filing fee remains \$45,000)
Size of the person test	
\$15.6 million/\$156.3 million	\$16.2 million/\$161.5 million
Transaction value above which size of the person test is inapplicable	
\$312.6 million	\$323 million

In addition to adjusting upward 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 \$80.8 million (filing fee remains \$45,000)
\$100 million	\$161.5 million (filing fee remains \$125,000)
\$500 million	\$807.5 million (filing fee remains \$280,000)
25% of total outstanding shares worth more than \$1 billion	25% of total outstanding shares worth more than \$1,615 billion
50% of total outstanding shares worth more than \$50 million	50% of total outstanding shares worth more than \$80.8 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.

II. 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 upon publication in the Federal Register, expected on the next business day.**

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 **\$32,914,000** (up from \$31,841,000);
- > the competitive sales of either corporation are less than **\$3,291,400** (up from \$3,184,100);
- > 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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