

HSR Thresholds Lower for 2021

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Yesterday, the Federal Trade Commission (FTC) announced the annual changes to the thresholds for Sections 7A (Hart-Scott-Rodino Antitrust Improvements Act) and 8 (interlocking directors) of the Clayton Act. For only the second time in history, the thresholds will be lower than they were the preceding year. The new thresholds apply to any transaction that closes on or after March 4, 2021. Highlights include:

Hart Scott Rodino

The Hart-Scott-Rodino Antitrust Improvements Act, Section 7A of the Clayton Act (HSR Act), requires individuals and companies proposing a merger or acquisition to notify the FTC and Department of Justice if the size of the parties involved and the value of the transaction exceed certain monetary thresholds, absent an applicable exemption. For the HSR Act, the new threshold for the HSR Act's size of transaction test decreases from \$94 million to \$92 million; and the new thresholds for the HSR Act's size of person test will be \$18.4 million and \$184 million, respectively. In addition, when the transaction size exceeds a certain threshold (decreasing from \$376 million to \$368 million), the HSR Act can apply to a transaction regardless of the size of the parties.

Under the HSR Act, the size of transaction test refers to the purchase price or the fair market value of the voting securities, assets, or noncorporate interests acquired. The size of transaction test also can be triggered by forming a new entity or converting a nonvoting security (such as stock options or nonvoting preferred stock) into a voting security. The new \$18.4 million and \$184 million thresholds for the size of person test refer to the total assets or annual net sales of each of the acquiring and acquired parties (in general, one side must have total assets or annual net sales satisfying the larger threshold and the other satisfying the smaller threshold).

Interlocking Directors

For Section 8, the "\$10 million" threshold in the statute will be \$37,382,000 and the "\$1 million" threshold will be \$3,738,200. For Section 8's prohibition on interlocking directors to apply, the competing corporations must have capital, surplus, and undivided profits in the aggregate of more than \$37,382,000, AND the extent of competitive overlap between the two corporations must satisfy one of three tests: (1) Each company has competitive sales of at least \$3,738,200; or (2) each company has competitive sales of at least 2% of its respective total sales; or (3) the competitive sales of either of the two companies is at least 4% of its total sales.

If you have any questions, please contact Dan Anziska, Megan Morley, Mitch Portnoy, Barbara Sicalides, or Dennie Zastrow.

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