

FTC Announces Decreases to HSR Act and Clayton Act Section 8 Thresholds

February 3, 2021

The Federal Trade Commission (“FTC”) has announced its annual revisions to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”) premerger notification thresholds, the Clayton Act Section 8 thresholds for interlocking directorates, and the maximum civil penalty for violations of the HSR Act. These figures are revised annually based on changes in the gross national product. For the first time since 2010, the HSR Act and Clayton Act Section 8 thresholds have decreased.

Updated HSR Act Premerger Notification Thresholds. On February 1, 2021, the FTC announced the revised HSR premerger notification thresholds, which govern whether a proposed merger or acquisition must be reported to the antitrust agencies prior to its consummation. These thresholds will become effective on March 4, 2021 and apply to transactions closing on or after that date. The 2021 thresholds have decreased by approximately 2.1% over 2020.

The base size-of-transaction threshold will decrease from US\$94.0 million to **US\$92.0 million**. Acquisitions resulting in total holdings below this threshold will not be reportable. Transactions resulting in the acquirer holding voting securities, controlling interests in non-corporate entities, or assets valued above the US\$92.0 million threshold may be reportable in either of the two following circumstances:

- The transaction will result in total holdings between US\$92.0 million and **US\$368.0 million** (formerly US\$376.0 million) **and** the size-of-persons test is met, which occurs when either the acquiring or acquired person has **at least US\$184.0 million** in gross assets or annual net sales (formerly US\$188.0 million) and the other person has **at least US\$18.4 million** in gross assets or annual net sales (formerly US\$18.8 million);

or

- The transaction will result in total holdings above **US\$368.0 million** (formerly US\$376.0 million), as in this case the size-of-persons test does not apply.

Under the HSR Act, an acquiring person that makes incremental acquisitions of voting securities of a particular issuer may be required to file a notification each time its holdings cross one of these thresholds. The Act creates five notification thresholds, which also have been decreased: **US\$92.0 million** (formerly US\$94.0 million), **US\$184.0 million** (formerly US\$188.0 million), **US\$919.9 million** (formerly US\$940.1 million), 25% of voting securities if greater than **US\$1,839.8 million** (formerly US\$1,880.2 million), and 50% of voting securities.

To summarize:

Threshold	2020 Threshold (in USD)	2021 Threshold (in USD)
Size-of-Transaction	\$94.0 million	\$92.0 million
Size-of-Persons	\$18.8 million and \$188.0 million	\$18.4 million and \$184.0 million
Value at Which Size-of-Persons Does Not Apply	\$376.0 million	\$368.0 million
Notification	\$94.0 million \$188.0 million \$940.1 million 25% if >US\$1,880.2 million 50%	\$92.0 million \$184.0 million \$919.9 million 25% if >US\$1,839.8 million 50%

Even if a transaction appears reportable based on the thresholds above, it may qualify for an HSR Act exemption. Assessment of HSR reportability is complex and requires a thorough understanding of the statute and implementing regulations. We recommend consulting with a lawyer experienced in HSR matters to determine whether your transaction is reportable.

The HSR filing fees remain unchanged, but the breakpoints have shifted as follows:

2021 Size-of-Transaction Threshold (in USD)	Filing Fee (in USD)
More than \$92.0 million to less than \$184.0 million	\$45,000
\$184.0 million to less than \$919.9 million	\$125,000
\$919.9 million or more	\$280,000

These new thresholds and filing fee schedule will remain in effect until the next annual adjustment, expected in February 2022.

Updated Clayton Act Section 8 Thresholds for Interlocking Directorates. On January 21, 2021, the FTC announced revisions to the Clayton Act Section 8 thresholds, which became effective on that date. Section 8 prohibits, with certain exceptions, a person from serving as a director or officer of two competing corporations. Section 8 may apply if each competitor corporation has capital, surplus, and undivided profits of more than **US\$37,382,000** (formerly US\$38,204,000). One exemption from this prohibition applies if the “competitive sales” of either corporation are less than **US\$3,738,200** (formerly US\$3,820,400), while other exemptions are based on percentages of a corporation’s total sales. Because the application of the “competitive sales” concept and other aspects of Section 8 can be complex, we recommend consulting with a lawyer experienced in Section 8 matters to determine if the prohibition applies.

Updated Maximum Civil Penalty Amount for HSR Violations. On January 11, 2021, the FTC announced that the maximum civil penalty for violations of the HSR Act has increased from US\$43,280 to **US\$43,792 per day**. This increase applies to civil penalties assessed after January 19, 2021, even if the underlying violation preceded the effective date.

How Debevoise Can Help. Debevoise lawyers are well-versed in the HSR Act and its reporting requirements. We are available to advise parties regarding the reportability of their transactions, as well as to guide clients through the reporting process and any government investigation and/or litigation that may follow the HSR filing. We are also available to assist in evaluating the application of Clayton Act Section 8.

* * *

Please do not hesitate to contact us with any questions.

NEW YORK



Michael Schaper
mschaper@debevoise.com

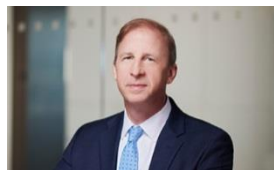


Kyra K. Bromley
kkbromley@debevoise.com



Erica S. Weisgerber
eweisgerber@debevoise.com

WASHINGTON, D.C.



Ted Hassi
thassi@debevoise.com



Leah Martin
lmartin@debevoise.com