

2012 Threshold Revisions Announced For HSR Act And Clayton Act Section 8 Prohibition On Interlocking Directorates

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The Hart-Scott-Rodino Antitrust Improvements Act, commonly known as the HSR Act, requires parties to certain mergers, acquisitions, and other transactions to notify the Federal Trade Commission and Department of Justice prior to consummation. The HSR Act enables antitrust regulators to review transactions and investigate and address potential antitrust violations prior to consummation.

Each year, the FTC adjusts the dollar thresholds that trigger the obligation to make HSR filings based on changes in the gross national product. This week, the FTC announced the new thresholds for 2012. *Effective 30 days after publication, the basic notification threshold will be adjusted upward from \$66 million to **\$68.2 million**.*

Unless otherwise exempt, an entity that directly or indirectly acquires assets or voting securities (or interests in an unincorporated entity) in excess of \$68.2 million may be required to file notification under the Act and to observe the applicable waiting period before consummating the transaction. In each instance where an acquiring person files under the Act, the acquired person is also required to submit a filing. Subsequent transactions involving the acquisition of additional interests in the same issuer are typically exempt from further notification unless a *subsequent notification threshold* is exceeded.

Transactions valued at **\$272.8 million** or less are not subject to the HSR Act unless the parties also meet the size-of-person thresholds. Under the revised thresholds, the size-of-person threshold is met where a person with annual net sales or total assets of **\$136.4 million** acquires a person with annual net sales or total assets of **\$13.6 million**, or vice-versa.

The following charts provide a summary of the HSR Act's threshold adjustments:

SIZE-OF-TRANSACTION		Old Threshold	New Threshold
Jurisdictional Threshold	Basic Notification Threshold	\$66.0 Million	\$68.2 Million
		\$131.9 Million	\$136.4 Million
	Subsequent Notification	\$659.5 Million	\$682.1 Million

25% (if value exceeds \$1.319 billion)	25% (if value exceeds \$1.3641 billion)
50% (where value exceeds \$66.0 million)	50% (where value exceeds \$682.1 million)

SIZE-OF-PERSON		Old Threshold	New Threshold
Jurisdictional Threshold	Size-of-Person Thresholds	\$13.2 Million	\$13.6 Million
		\$131.9 Million	\$136.4 Million
	Size-of-Person Inapplicable Where Transaction Exceeds	\$263.8 Million	\$272.8 Million

The dollar amount of the filing fees payable to the Federal Trade Commission with HSR Act filings is not subject to indexing; however, the thresholds applicable to the statutory filing fees do adjust with indexing. The revised schedule of filing fees will be as follows:

Transaction Size	Filing Fee
Greater than \$68.2 million but less than \$136.4 million	\$45,000
\$136.4 million or greater but less than \$682.1 million	\$125,000
\$682.1 million or greater	\$280,000

Recent antitrust enforcement activity with respect to M&A and Hart-Scott-Rodino highlights the need to remain mindful of other areas under the jurisdiction of the antitrust agencies, including the prohibition on interlocking directorates under Clayton Act Section 8.

Section 8 of the Clayton Act is a statutory prohibition on interlocking directorates between competing corporations. The prohibitions are designed to prevent the facilitation of anticompetitive coordination and information exchanges through simultaneous officer or board membership between competing corporations.

The issue is particularly relevant for investment funds that have separate but competing companies in a portfolio under common management. Under the statute, no person, or representatives of the same person or entity, is permitted to serve simultaneously as a director or officer of competing corporations (with some exceptions) where the elimination of competition by agreement between them would constitute a violation of the antitrust laws. The prohibitions of Section 8 are limited to cases in which each of the companies has, under the revised thresholds, capital, surplus, and undivided profits of more than \$27,784,000.

Because of the minimal impact on competition likely to flow from interlocks where the competitive sales of the companies are sufficiently small, Section 8 does not apply where the total competitive sales of either represent less than 2 percent of total sales, or less than \$2,778,400; or where the competitive sales of each company represent less than 4 percent of its total sales. The statute also permits directors and officers whose appointment was not prohibited at the time of appointment to continue to serve for up to one year after the Section 8 thresholds are exceeded.

Fund managers face Clayton Act Section 8 issues when investing in competing companies in a sector and then appointing common board members or officers, or board members or officers that are affiliated with a common investment manager. The antitrust enforcement agencies have taken the position that separate individual directors or officers representing the same person or entity can trigger a violation of the statute, and at least one court has taken a similar view. The typical successful challenge to a prohibited interlock by the antitrust agencies or a private plaintiff results in a consent decree eliminating the interlock, though damages are available as well.

In this period of active antitrust enforcement, the agencies are strictly applying the requirements of the HSR Act and other antitrust statutes, as demonstrated by recent enforcement actions. Correct application of the HSR Act and Clayton Act Section 8 can be complex and typically requires a detailed and careful analysis. Proskauer's antitrust practice group has extensive experience with the issues presented under these statutes and the entire range of antitrust compliance and enforcement. If you have any questions concerning a particular issue, please contact one of the lawyers identified in this publication.

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Partner