

Federal Trade Commission Announces 2013 Threshold Revisions for HSR Act and for Clayton Act Section 8 Prohibition on Interlocking Directorates

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The Hart-Scott-Rodino Antitrust Improvements Act of 1976, commonly known as the HSR Act, requires parties to certain corporate transactions to notify the Federal Trade Commission and Department of Justice, and to observe a waiting period prior to consummation. The HSR Act enables antitrust regulators to review transactions, and investigate and address potential competitive concerns prior to consummation.

Revised HSR Thresholds

Each year, the FTC adjusts the dollar thresholds that trigger the obligation to make HSR filings based on changes in the gross national product. The FTC has announced the new thresholds for 2013, and effective *February 11, 2013, the basic notification threshold will be adjusted upward from \$68.2 million to \$70.9 million.*

Unless otherwise exempt, an entity that directly or indirectly acquires assets or voting securities (or interests in an unincorporated entity) in excess of the HSR threshold may be required to file notification under the Act and to observe the applicable waiting period before consummating the transaction. Subsequent transactions involving the acquisition of additional interests in the same issuer typically are exempt from further notification unless a *subsequent notification threshold* is exceeded.

Under the revised thresholds, transactions valued at **\$283.6 million** or less will be subject to the HSR Act if the parties also meet the size-of-person thresholds. Under the revised thresholds, the size-of-person is generally met where a person with annual net sales or total assets of **\$141.8 million** acquires a person with annual net sales or total assets of **\$14.2 million**, or vice-versa. Transactions valued at **\$283.6 million** or more are subject to the HSR Act without reference to the size of the person.

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

SIZE OF TRANSACTION		Current Thresholds	New Thresholds (as of February 11, 2013)
Jurisdictional Threshold	Basic Notification Threshold	\$68.2 Million	\$70.9 Million
		\$136.4 Million	\$141.8 Million
	Subsequent Notification	\$682.1 Million	\$709.1 Million

25% (if value exceeds 1.3641 billion)	25% (if value exceeds \$1.4181 billion)
50% (where value exceeds \$68.2 million)	50% (where value exceeds \$70.9 million)

SIZE OF PERSON		Old Threshold	New Threshold
Jurisdictional Threshold	Size-of-Person Thresholds	\$13.6 Million	\$14.2 Million
		\$136.4 Million	\$141.8 Million
	Size-of-Person Inapplicable Where Transaction Exceeds	\$272.8 Million	\$283.6 Million

Filing Fees

The dollar amount of the filing fee 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 \$70.9 million but less than \$141.8 million	\$45,000
\$141.8 million or greater but less than \$709.1 million	\$125,000
\$709.1 million or greater	\$280,000

Revised Clayton Act Section 8 Thresholds

Antitrust enforcement 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 certain 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 with separate but competing companies in a portfolio under common management. Under the statute, no person, or representative of the same person or entity, is permitted to serve simultaneously as a director or officer of competing corporations (with some exceptions). 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 \$28,883,000.

The restrictions do not apply where the total competitive sales of either company represents less than 2 percent of total sales, or less than \$2,888,300; 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 appointments were not prohibited at the time of appointment to continue to serve for up to one year after the Section 8 thresholds are exceeded.

Correct application of the HSR Act and Clayton Act Section 8 can be complex and requires a detailed and careful analysis. Proskauer's Antitrust Group has extensive experience with the issues presented under these statutes and the entire range of antitrust compliance and enforcement. If you have questions concerning a particular issue, please contact one of the lawyers identified in this publication.

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