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FTC Announces Decreased Hart-Scott-Rodino and Clayton Act Section 8 Thresholds for 2021, but Increased Per Diem Penalties

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Executive Summary

The Federal Trade Commission (“FTC”) announced on February 1 its 2021 jurisdictional and filing fee thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). The thresholds determine whether parties involved in proposed mergers, consolidations or other acquisitions of voting securities, assets or unincorporated interests must notify the FTC and the Antitrust Division of the Department of Justice (“DOJ”) of a proposed transaction and comply with a mandatory waiting period before the transaction can be consummated. The FTC is required to revise HSR Act thresholds annually based on changes in the gross national product and this year’s changes reflect a 2.1% decrease, the first decrease since 2010. The new thresholds will go into effect March 4, 2021. The FTC also has announced an increase in the maximum civil penalty for non-compliance with the HSR Act, as well as revised thresholds for prohibited interlocking directorates under Section 8 of the Clayton Act. A *brief summary* of the changes is as follows:

- The Size of Transaction Threshold under the HSR Act has decreased to **\$92 million** (down from \$94 million).
- Acquisitions that do not exceed **\$368 million** in value (down from \$376 million) must also meet the Size of Person Threshold to require notification to the FTC and DOJ under the HSR Act. This threshold requires that one of the parties to the transaction has total assets or annual net sales of **\$184 million** (down from \$188 million) or more and the other party has total assets or annual net sales of **\$18.4 million** (down from \$18.8 million) or more.
- HSR Act Filing Fee Thresholds have been revised as follows:

<u>Transactions Valued at:</u>	<u>Filing Fee:</u>
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more than \$92 million (down from \$94 million) but less than \$184 million (down from \$188 million)	\$45,000
\$184 million or more but less than \$919.9 million (down from \$940.1 million)	\$125,000
\$919.9 million or more	\$280,000

- HSR Act filing thresholds for acquisitions that result in ownership of less than 50 percent of the outstanding voting securities of a corporation also have decreased (based upon value and percentage of the issuer's voting securities).
- Additionally, the FTC announced an increase in the Maximum Civil Penalty for noncompliance with the HSR Act of **\$43,792 per day** (up from \$43,280 per day).
- The FTC also has revised the thresholds for prohibited interlocking directorates under Section 8 of the Clayton Act, which became effective January 21, 2021. Section 8 generally prohibits companies that compete with each other from having interlocking memberships on their corporate boards.
 - Section 8(a)(1) prohibits a person from serving as a director or board-elected or board-appointed officer of two or more corporations if the combined capital, surplus, and undivided profits of each of the corporations exceeds **\$37,382,400** (down from \$38,204,000).
 - Section 8(a)(2)(A) of the Clayton Act exempts interlocks for which the competitive sales of either corporation are less than **\$3,738,200** (down from \$3,820,400).

The above is only a general summary. Any number of exceptions may apply. Please contact us if you have questions or desire additional details.