



## Mergers & Acquisitions/Antitrust ADVISORY ■

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### FTC Revises Thresholds for HSR Filings and Interlocking Directorates

On January 19, 2017, the Federal Trade Commission (FTC) **announced** its annual adjustment of the jurisdictional thresholds for pre-merger notification filings under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR Act) and for interlocking directorates under Section 8 of the Clayton Act. The revisions account for changes in the level of the U.S. gross national product and constitute an increase of about 3 percent. They were announced just days after federal antitrust agencies secured approximately \$1.5 million in fines from three parties accused of violating the HSR Act, underscoring the importance of compliance with this law by companies and investors.

#### **HSR Act Pre-Merger Notification Thresholds**

The HSR Act requires companies contemplating mergers or acquisitions of voting securities or assets that meet or exceed certain monetary thresholds to file notification forms with the FTC and Department of Justice (DOJ) and to wait a designated period of time before consummating the contemplated transaction. The new thresholds will go into effect for transactions closing on or after February 27, 2017. For transactions closing on or after this date, companies generally will need to comply with the HSR Act pre-merger notification and waiting period requirements if the following is true:

1. The size of the transaction (as defined by the HSR Act and applicable regulations) is more than \$323 million; or
2. The size of the transaction is more than \$80.8 million, the total assets or annual net sales of one party to the transaction (as defined by the HSR Act and applicable regulations) equal \$161.5 million or more, and the total assets or annual net sales of the other party to the transaction equal \$16.2 million or more.

Although the HSR Act filing fee amounts will not increase, these adjustments do affect the filing fee schedule as follows:

Size of the Transaction	Filing Fee
More than \$80.8 million, but less than \$161.5 million	\$45,000
\$161.5 million or more, but less than \$807.5 million	\$125,000
\$807.5 million or more	\$280,000

These adjustments constitute the primary changes to the HSR Act regulations adopted by the FTC on January 19, 2017. Additional regulations governing the methodology for calculating the size of party and size of transaction tests, as well as exemptions from the HSR Act, remain unchanged.

#### **Interlocking Directorates Thresholds**

Section 8 of the Clayton Act prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations. Under the FTC's revised Section 8 thresholds, which became effective upon publication in the *Federal Register* on January 26, 2017, a person may not serve as a director or officer of two competing corporations if each corporation has capital, surplus and undivided profits aggregating more than \$32,914,000, unless one or more of the corporations has competitive sales under \$3,291,400 or other exceptions apply. The FTC this year also issued a [blog post](#) reviewing the importance of complying with Section 8 and providing compliance tips.

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## Recent Enforcement Action for Failure to Comply with the HSR Act

The FTC and DOJ also provided strong reminders last month that failure to comply with the HSR Act can result in hefty penalties. Violations of the HSR Act are susceptible to civil penalties of up to \$40,654 per day following similar indexing for inflation that became effective on January 24, 2017.

On January 17, 2017, the FTC announced that Mitchell P. Rales, a Maryland investor and entrepreneur, agreed to pay a \$720,000 civil penalty following allegations that he violated the HSR Act by failing to report purchases of shares by either himself or his wife in two industrial companies, Colfax Corporation and Danaher Corporation, for periods of at least five years. That same day, the FTC also announced that a New York hedge fund founder, Ahmet H. Okumus, agreed to pay \$180,000 in civil penalties to resolve allegations that he violated the HSR Act for approximately three weeks by failing to report his purchases of voting securities in the Internet services company Web.com Group Inc. Significantly, although both parties' violations were inadvertent, the agency sought penalties from both individuals because each had been involved in alleged HSR violations in previous years.

Finally, on January 18, 2017, the DOJ reached a settlement with Duke Energy for violating the HSR Act's premerger notification and waiting period requirements. The HSR Act requires filers to observe a mandatory waiting period during which the acquirers are prohibited from obtaining "beneficial ownership" of the assets they seek to acquire. According to the DOJ, Duke, which agreed to purchase the Osprey Energy Center, took control of Osprey's business before filing required HSR Act notifications and waiting for the expiration of the mandatory waiting period. The company agreed to settle the charges for \$600,000.

These enforcement actions underscore the importance of maintaining strict compliance with the HSR Act and demonstrate the substantial penalties that the government may seek from both individuals and companies that fail to comply.

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