

FTC Announces *Lower* 2021 Revised Jurisdictional Thresholds for Hart-Scott-Rodino Act Filings

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The Federal Trade Commission (FTC) recently published the annual changes to the jurisdictional thresholds for Section 7A of the Clayton Act. These changes affect the notification thresholds for Hart-Scott-Rodino Act (HSR Act) premerger notifications and will apply to all transactions that close on or after March 4, 2021. In a change reflecting the unusual year, the FTC this year *lowered* the HSR Act notification thresholds. Parties accustomed to a fairly steady upward trend in the notification thresholds should therefore be on alert that slightly smaller transactions will be subject to the HSR Act in 2021 than in 2020. The thresholds were revised downward because they are tied to the gross national product, which decreased year-over-year.

The HSR Act requires all persons or entities contemplating certain mergers or acquisitions that meet or exceed the jurisdictional thresholds of the Act to file notifications of that transaction with the FTC and the Department of Justice. Once both parties have submitted their HSR filings, the enforcement agencies have up to 30 days to decide whether to seek additional information – a process commonly known as a “Second Request.” The parties also have the option to request “Early Termination,” which, if granted, will shorten the 30-day waiting period. If the 30-day waiting period expires without the issuance of a Second Request, or if Early Termination is granted, the parties are free to close the transaction. If a Second Request is issued, under the HSR Act, the government has 30 days from the date the parties substantially comply with the request to decide whether to let the transaction proceed or attempt to block it in court.

The HSR Act thresholds are adjusted annually, based on changes to the gross national product. Due to the pandemic’s effect on the economy, the “size of transaction” threshold has been reduced from \$94 million to \$92 million. With very limited exceptions, any transactions valued below \$92 million need not be reported. For transactions valued between \$92 million and \$368 million (down from \$376 million), the “size of person” test further determines whether a filing need be made. For an HSR filing to be required in this range, one party must have annual net sales or total assets of at least \$184 million (down from \$188 million) and the other party must have annual net sales or total assets of at least \$18.4 million (down from \$18.8 million). If a transaction is valued above \$368 million, the “size of person” test is not applicable.

Set forth below is a table displaying the original dollar amount thresholds of the HSR Act and new 2021 thresholds, which will become effective on March 4, 2021:

2021 Jurisdictional Thresholds

ORIGINAL THRESHOLD ^[1]	2021 THRESHOLD
\$10 Million 7A(a)(2)(B)(ii)(I) 7A(a)(2)(B)(ii)(III)	\$18.4 Million
\$50 Million 7A(a)(2)(B)(i) § 801.1(h)	\$92 Million
\$100 Million 7A(a)(2)(B)(ii)(I) 7A(a)(2)(B)(ii)(II) 7A(a)(2)(B)(ii)(III) § 801.1(h)	\$184 Million
\$500 Million § 801.1(h)	\$919.9 Million
\$1 Billion § 801.1(h)	\$1,839.8 Million

The filing fee amounts the parties must pay have not changed, although they are tied to the new thresholds:

2021 Filing Fee Thresholds

FILING FEE	GREATER THAN	LESS THAN
\$45,000	\$92 Million	\$184 Million
\$125,000	\$184 Million	\$919.9 Million
\$280,000	\$919.9 Million	

Failure to file an HSR Notification and Report Form is subject to a statutory penalty of up to \$43,792 per day for noncompliance. The HSR thresholds are only one part of the analysis to determine whether an HSR filing is

required. Please contact one of the authors with any questions regarding the reportability of a transaction. Winston lawyers regularly advise parties regarding the reportability of transactions, as well as guide clients through the reporting process and any government investigation that may follow.

^[1] These are the thresholds that appear in the statute. The statute contains the language “as adjusted” after these thresholds to indicate the yearly adjustment based on GDP.

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Authors

[Richard Falek](#)

[Conor Reidy](#)

[Patrick Hogan](#)

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[Richard Falek](#)



Conor Reidy



Patrick Hogan

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