

Hart-Scott-Rodino Thresholds to Rise Again Based on Annual Indexing

Updated thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) (HSR) were published in the Federal Register on January 27, 2012. The threshold adjustments are mandated by the major HSR amendments in 2000 that require annual indexing of the thresholds based upon changes in gross national product (GNP) for each fiscal year beginning after September 30, 2004. Based on this indexing, the thresholds are increasing. As the annual adjustments are based on changes in GNP, the thresholds also can go down; however, such a decrease has only happened once, with the adjustments that went into effect on February 22, 2010. **The new thresholds will become effective on February 27, 2012 for transactions that close on or after that date.**

Size-of-Transaction Test

(Original: \$50 million; Current: \$66 million; New: \$68.2 million)

The 2000 HSR amendments raised the size-of-transaction test to \$50 million. This figure is currently \$66 million based upon last year's annual adjustment and soon will increase to **\$68.2 million**. Accordingly, as of February 27, 2012, for transactions that close on or after that date, no HSR filing will be required unless the acquisition will result in an acquiring person holding an aggregate total amount of voting securities, non-corporate interests, and/or assets of the acquired person in excess of **\$68.2 million** (up from the current \$66 million threshold).

Change in Size-of-Transaction Test

\$50 million as of February 1, 2001
 \$53.1 million as of March 2, 2005
 \$56.7 million as of February 17, 2006
 \$59.8 million as of February 21, 2007
 \$63.1 million as of February 28, 2008
 \$65.2 million as of February 12, 2009
 \$63.4 million as of February 22, 2010
 \$66 million as of February 24, 2011
\$68.2 million as of February 27, 2012

Size-of-Parties Test

(Original: \$10 million/\$100 million; Current: \$13.2 million/\$131.9 million; New: \$13.6 million/\$136.4 million)

Under the current thresholds, acquisitions valued above \$263.8 million are reportable regardless of the size of the parties, and acquisitions valued at greater than \$66 million (to become \$68.2 million) but less than or equal to \$263.8 million are reportable only if the size-of-parties test is met. The current \$263.8 million threshold will adjust upward to **\$272.8 million**.

The current size-of-parties test typically is met if the acquiring or acquired person has annual net sales or total assets of \$131.9 million or more and the other person has annual net sales or total assets of \$13.2 million or more. The current \$13.2 million/\$131.9 million test will adjust to **\$13.6 million/\$136.4 million**.

Notification Thresholds

An acquiring person in a reportable acquisition of voting securities files for the highest applicable among five notification thresholds. The notification threshold may determine, for example, whether a subsequent acquisition of additional voting securities from the same acquired issuer will require another HSR filing. The new notification thresholds that will become effective with the forthcoming adjustments are:

- An aggregate total amount of voting securities of the acquired person valued at greater than **\$68.2 million**, but less than **\$136.4 million**
- An aggregate total amount of voting securities of the acquired person valued at **\$136.4 million** or greater, but less than **\$682.1 million**

- An aggregate total amount of voting securities of the acquired person valued at **\$682.1 million** or greater
- Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than **\$1,364.1 million**
- Fifty percent of the outstanding voting securities of an issuer if valued at greater than **\$68.2 million**

Filing Fee Thresholds

The filing fee amounts are not changing. In fact, the HSR filing fee amounts have not been adjusted for inflation in more than a decade. However, the thresholds for application of the fees are increasing.

- The filing fee currently is \$45,000 if the aggregate amount of assets, non-corporate interests, and voting securities to be held as a result of the acquisition is more than \$66 million (to become **\$68.2 million**), but is less than \$131.9 million (to become **\$136.4 million**)
- The filing fee currently is \$125,000 if the aggregate amount of assets, non-corporate interests, and voting securities to be held as a result of the acquisition is from \$131.9 million (to become **\$136.4 million**) to less than \$659.5 million (to become **\$682.1 million**)
- The filing fee currently is \$280,000 if the aggregate amount of assets, non-corporate interests, and voting securities to be held as a result of the acquisition is \$659.5 million (to become **\$682.1 million**) or more

Most, although not all, of the dollar amounts in the HSR rules will be adjusted upward based upon the threshold indexing discussed above. It remains important for parties to be very careful in determining if a threshold is met given that the process can be very complex, the rules are highly technical, and failure to comply with HSR can result in significant civil penalties.

Finally, in analyzing a potential past failure to file under HSR, it remains necessary to look at the thresholds in place at the time of closing.

Legal News Alert is part of our ongoing commitment to providing up-to-the-minute information about pressing concerns or industry issues affecting our clients and colleagues. If you have any questions about this update or would like to discuss this topic further, please contact your Foley attorney or the following:

Alan D. Rutenberg

Washington, D.C.

202.672.5491

arutenberg@foley.com

Benjamin Dryden

Washington, D.C.

202.945.6128

bdryden@foley.com

ABOUT FOLEY

Foley & Lardner LLP provides award-winning business and legal insight to clients across the country and around the world. Our exceptional client service, value, and innovative technology are continually recognized by our clients and the legal industry. In a recent survey of *Fortune* 1000 corporate counsel, conducted by The BTI Consulting Group (Wellesley, Massachusetts), Foley received a top five ranking out of 300 firms for delivering exceptional client service. In addition, Foley received 19 national first-tier rankings on the 2011 – 2012 U.S. News – Best Lawyers® “Best Law Firms” list, and *CIO* magazine named Foley to its prestigious CIO-100 list in 2011 for technological innovation that enhances business value. At Foley, we strive to create legal strategies that help you meet your needs today — and anticipate your challenges tomorrow.

Foley & Lardner LLP Legal News is intended to provide information (not advice) about important new legislation or legal developments. The great number of legal developments does not permit the issuing of an update for each one, nor does it allow the issuing of a follow-up on all subsequent developments. If you do not want to receive further issues of Legal News, please email info@foley.com or contact Marketing at Foley & Lardner LLP, 321 N. Clark Street, Suite 2800, Chicago, IL 60654 or 312.832.4500.