

FTC announces decreased 2021 HSR filing thresholds and temporary suspension of early termination



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This week, the U.S. antitrust agencies—the Federal Trade Commission (FTC) and Department of Justice Antitrust Division (DOJ)—made two important announcements for dealmakers. These include:

1. Setting the 2021 filing thresholds under the Hart-Scott-Rodino Act (HSR Act), which, unusually, are lower than in 2020
2. Immediately, but temporarily, suspending the availability of “early termination” to reduce the HSR waiting period

2021 HSR filing thresholds

The HSR Act requires that parties to certain mergers, acquisitions and other transactions notify the FTC and DOJ of the deal and then wait a specified period before closing (usually 30 days) so that the agencies can evaluate whether the transaction may substantially lessen competition. On Feb. 2, 2021, the FTC, the agency tasked with administering pre-merger notification requirements under the HSR Act, announced **decreased** notification thresholds for 2021. The FTC is required by law to revise the jurisdictional thresholds annually, based on the change in gross national product. A declining U.S. economy has led to the atypical decrease of the thresholds from 2020 to 2021. These new monetary thresholds will take effect on March 4, 2021.

Transactions resulting in aggregate holdings of voting securities, non-corporate interests or assets exceeding the size-of-transaction and size-of-person thresholds set forth below may be reportable to the U.S. antitrust authorities, unless otherwise exempt.

	2020 threshold	New 2021 threshold
Size-of-transaction threshold where size-of-person thresholds met	\$94 million	\$92 million
Size-of-transaction where size-of-person thresholds not required	\$376 million	\$368 million
Size-of-person thresholds	\$18.8 million \$188 million	\$18.4 million \$184 million

Transactions valued at more than \$92 million but \$368 million or less must also meet the “size of person” test. Transactions valued at more than \$368 million will be reportable regardless of the size of person, unless an exemption applies. The size of person test will be satisfied where the ultimate parent entity (UPE) of one party to the transaction has total assets or annual net sales of \$184 million or more and the UPE of the other party has total assets or annual net sales of \$18.4 million or more.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

The HSR Act filing fees have not changed. The applicable fees will be based on the new thresholds, as follows:

Transaction value	Filing fee
Less than \$184 million	\$45,000
\$184 million and higher but less than \$919.9 million	\$125,000
\$919.9 million and higher	\$280,000

Noncompliance with the HSR Act can result in significant penalties. Any person, including any officer, director or principal thereof who fails to comply with any provision of the HSR Act may be subject to a civil penalty of up to \$43,792 *for each day* in violation.

Temporary discontinuation of granting early termination

On Feb. 4, 2021, the FTC and the DOJ [announced](#) that they will temporarily suspend the common practice of granting early termination of the statutory waiting period associated with HSR filings, when deals raise no antitrust concerns. In a joint statement, the agencies stated that they are reviewing the procedure and process used to grant early terminations for merger reviews under the HSR Act. During this review, the agencies will not grant any early terminations, but stated that they “anticipate that this temporary suspension will be brief.”

The agencies also briefly suspended early termination at the start of the pandemic in March 2020 and have suspended early termination previously during government shutdowns. In this case, the agencies cited “the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic” as reasons for reviewing the procedure. For example, the FTC’s website reports more than 800 reportable transactions from November 2020 to January 2021. In the short term, at least, dealmakers should make note that truncation of the HSR Act waiting period will be unavailable.

For more information on the HSR Act or to learn how Godfrey & Kahn can help, contact a member of our Antitrust Practice Group.