ALERT MEMORANDUM

New HSR Thresholds Announced as February 10 Go Live Date for New HSR Rules Looms: Will Congress or the Courts Intervene and What You Can Do Now

January 14, 2025

On January 10, the FTC announced new thresholds that will apply to filings under the Hart-Scott-Rodino Act from late February as well as new *de minimis* thresholds for interlocking directorates under Section 8 of the Clayton Act.

Meanwhile, the fate of the new HSR Rules (see our prior alert for more details), which are currently set to take effect on February 10, still remains an open question. There is some momentum in Congress toward abrogating the new rules altogether and several business groups have filed a lawsuit seeking to enjoin the new rules. It is also possible the new rules will be at least delayed after the new administration takes over on January 20.

New Size-of-Transaction Threshold Will Be $126.4 Million

The HSR Act requires that the various size thresholds and filing fee thresholds be adjusted annually to reflect changes in U.S. Gross National Product. The 2025 adjustments, which will become effective thirty days after publication in the Federal Register (which typically brings them into

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effect in late February), will increase the minimum-size-of-transaction threshold to **$126.4 million**. The higher size-of-transaction threshold that applies to certain transactions involving smaller parties will be **$505.8 million**.

The filing fee amounts and thresholds will likewise be adjusted as follows:

Filing Fee	Size-of-Transaction Range
$30,000	Less than $179.4 million
$105,000	$179.4 million but less than $555.5 million
$265,000	$555.5 million but less than $1.111 billion
$425,000	$1.111 billion but less than $2.222 billion
$850,000	$2.222 billion but less than $5.555 billion
$2,390,000	$5.555 billion or more

The FTC also announced revised thresholds for the *de minimis* exemption to the Clayton Act Section 8's prohibition against interlocking directorates. Once published in the Federal Register, the exemption will apply if the combined "capital, surplus, and undivided profits" of each company are below $51,380,000 (the prior threshold was $48,559,000) or if aggregate sales in which the corporations compete are less than $5,138,000 (the prior threshold was $4,855,900). The exemptions that apply if competitive sales are (2) less than 2% of either corporation's total sales, or (3) less than 4% of each corporation's total sales will not change.

Update on the New HSR Rules

As previously reported, late last year the FTC issued "final rules" that will substantially increase the information and documents to be provided with HSR filings, thereby adding more time and expense for HSR filing parties.

As things currently stand, the new HSR rules remain on schedule to apply to any filing made on or after February 10, 2025.

The FTC has provided some limited technical guidance on the new rules, accompanied with a warning that, if the FTC finds that the descriptive narratives that will be required to be submitted with an HSR filing under the new rules "are directly contradicted by other information submitted with the notification" it "may request supplementary information to explain the contradictions," and that in such circumstances, the HSR waiting period "could be restart[ed]." Whether restarting waiting periods—and the attendant delay—will become commonplace in merger reviews is uncertain, although the agencies have increasingly asked filers to "pull" and "refile" HSR filings in recent years, which in effect extends the initial HSR Act waiting period by 30 days.

Meanwhile, as the February 10 implementation date for the new rules looms, there are several movements afoot that may result in the new rules being abrogated, significantly curtailed, or, at the very least, delayed.

Congressional Review Act. Under the Congressional Review Act, new regulations like the new HSR Rules can be vacated via a resolution passed by both houses and signed by the president. Unlike most ordinary legislation, resolutions of disapproval are not subject to filibuster in the Senate, which means that the Republican-controlled Congress could pass a disapproval resolution without any support from Democrats.

Congressional allies of the incoming administration have indicated that multiple regulations may be invalidated using this procedure, including the new HSR Rules. Whether Congress will actually follow though, and what the timing will be, remain uncertain.

Temporary Delay in Implementation. It is also possible that the implementation of the new HSR rules will be paused after the change of administration on January 20. In the past, new administrations have routinely paused the implementation of new regulations for sixty days, although the ability to do so as to rules promulgated by an "independent" agency like the FTC is not clear. The administration could not itself abrogate or change the rules without a new rulemaking procedure.

Litigation. Finally, the Chamber of Commerce and other business groups have brought suit against the

new rules in litigation filed in the Eastern District of Texas. The 104-page complaint provides detailed facts and arguments about why the new rules, both in their entirety and in respect of numerous particular provisions, are arbitrary and capricious and not in accordance with the Administrative Procedures Act. The suit seeks an injunction against enforcement of the new rules, as well as an order "setting aside the Final Rule in its entirety or insofar as the Court finds it in excess of statutory authority, arbitrary, capricious, or otherwise contrary to law."

What You Can Do Now

Even with these potential roadblocks to the new rules, merging parties should nonetheless be prepared for them as February 10 is fast approaching and a number of the changes require some planning. Here are some steps filing parties can take now to be prepared for the new requirements:

1. **Supervisory deal team lead.** The new rules require the submission of documents from the "supervisory deal team lead," defined as "the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer." It may be advisable to determine how these new requirements will be handled in practice. For example, companies may want to identify the supervisory deal team lead(s) across their different businesses to ensure their files are sufficiently collected at the time of filing.
2. **Subsidies/countervailing duties.** The new rules require filers to disclose certain subsidies and countervailing duties. Regardless of what happens with the rest of the new rules, these disclosure requirements were specifically mandated by Congress in 2023 and some version of them are therefore likely to come into force. The disclosure requirements will apply to all reportable transactions. It may therefore be advisable to gather the relevant information.
3. **Business description.** The description of the acquiring person's business operations will be required regardless of whether there is an overlap between the parties or what type of deal is being reported. Particularly given the FTC's recent warning about the need to provide accurate narratives, it may be advisable to develop such a description now so that it is consistently used in filings going forward.
4. **Officer and director information.** The new rules will impose significant new requirements to disclose officers and directors who serve as officers or directors of unaffiliated entities. Obtaining this information may require revamping of existing reporting mechanisms and requirements. It may therefore be advisable to at least design (if not implement) these mechanisms now.
5. **Defense/Intelligence contracts.** Although defense/intelligence contracts will only need to be disclosed in certain circumstances (generally where there are product overlaps), it may make sense now to ascertain what contracts exist and what products they cover, or at least to investigate how this information will be gathered should the need arise.
6. **Controlled entities.** The new rules require that the traditional list of "controlled" entities be organized by "top-level" entity and that an organizational chart be provided in certain instances. It may be advisable to determine whether such an organizational chart exists (creating one is not required) and to investigate how it is maintained. In addition, it may be advisable to develop a compliant list of controlled entities and develop a mechanism for keeping it current.
7. **Minority holders.** The new rules will impose new disclosure requirements as to minority holders of the parties involved in the transaction. It may be advisable to develop this information now and to ensure there is a mechanism in place to keep it current.

In addition ,where possible it may be advisable to accelerate any HSR filings ahead of the new rules being implemented, even where a definitive agreement

has not been executed. In general filings may be made on the basis of a non-binding letter of intent, so long as it is executed by both parties.

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Should you have any questions about the new thresholds or the new HSR rules, please contact any of your usual Cleary contacts or any of the individuals on the first page.

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