

Increase in HSR Reportability Thresholds and Other HSR Developments

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In January 2023, the Federal Trade Commission (FTC) made three important announcements for M&A practitioners.

- First, on January 23, the FTC announced the annual adjustment of the thresholds that trigger premerger reporting obligations under the Hart-Scott-Rodino (HSR) Act. The new thresholds will apply to transactions closing thirty days after publication of the announcement in the Federal Register (that is, not earlier than February 24, 2023).
- Second, the FTC announced the annual adjustment for maximum daily civil penalties for noncompliance with the HSR Act's requirements (failure to file, failure to observe the mandatory waiting period, or failure to make a complete filing).
- Third, the FTC announced an effective date for the new filing fees established in the Merger Filing Fee Modernization Act, which was signed into law on December 29, 2022. We discussed this new fee schedule in an [earlier update](#) and summarize it below. The new schedule will apply to filings made starting 30 days after publication of the fee schedule in the Federal Register.

The FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors. These new thresholds are now in effect. Both these and the HSR Act thresholds will remain in effect until the 2024 adjustments.

This article summarizes the HSR Act's requirements and reports on relevant developments in 2022.

Background

The HSR Act requires parties to notify the FTC and U.S. Department of Justice (DOJ) before closing on an acquisition of voting securities, assets, or non-corporate interests where the value exceeds certain dollar-based size thresholds. If the transaction is reportable, the parties must observe a mandatory waiting period (typically 30 days). The waiting period allows the agencies to review the proposed transaction and determine whether the transaction raises antitrust issues that require further investigation. Either

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agency can investigate (although only one agency will do so). If the investigation is not completed during the initial waiting period, then the waiting period may be extended. Ultimately, the investigating agency must decide whether to challenge the transaction (or, potentially, reach a compromise that addresses the agency's antitrust concerns but permits the parties to proceed with their transaction).

Basic Size Tests

The HSR Act's dollar-based thresholds (including the size thresholds that trigger the reporting obligation) are adjusted each year to reflect annual percentage increases or decreases in Gross National Product. The most significant effect of the annual indexing is on the "size of transaction"¹ and "size of persons"² tests. Here are the new thresholds:

- Transactions resulting in holdings valued at or below \$111.4 million in voting securities and/or assets of the seller are *not* reportable (subject to the rules on aggregation).
- Transactions resulting in holdings valued at more than \$445.5 million are reportable (unless exempted) *regardless* of the size of persons.
- Transactions resulting in holdings valued at more than \$111.4 million but less than \$445.5 million are reportable (unless exempted) *if* the "size of persons" test is satisfied.
 - A person with \$222.7 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$22.3 million in total assets or annual net sales; or
 - A person with \$222.7 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$22.3 million in total assets; or a person with \$22.3 million in total assets or annual net sales acquires (or acquires from) a person with \$222.7 million in total assets or annual net sales.

Notification Thresholds

In addition to these basic tests, the HSR Act provides five separate "notification thresholds" that are also adjusted each year to reflect annual percentage increases or decreases in Gross National Product. If an acquisition would cause an acquiring person to cross a new threshold, the parties must file HSR notifications before closing their transaction. After indexing, the notification thresholds will be:

- An aggregate total amount of voting securities of the acquired person valued at greater than \$111.4 million but less than \$222.7 million;
- An aggregate total amount of voting securities of the acquired person valued at \$222.7 million or greater but less than \$1.1137 billion;
- An aggregate total amount of voting securities of the acquired person valued at \$1.1137 billion or greater;
- Twenty-five percent of the outstanding voting securities of an issuer (if valued at greater than \$2.2274 billion); or
- Fifty percent of the outstanding voting securities of an issuer (if valued at greater than \$111.4 million).

Exemptions

The increases also affect some of the exemptions from reporting requirements. For example, the “foreign assets” exemption (16 C.F.R. § 802.50) exempts the acquisition of assets located outside the United States “unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million (*as adjusted*) during the acquired person's most recent fiscal year” (emphasis added). With the most recent adjustment, this exemption applies unless the assets generated sales in or into the U.S. of more than \$111.4 million.

Filing Fees

This year, pursuant to the Merger Filing Fee Modernization Act, which President Biden signed into law on December 29, 2022, the HSR filing fees are changing for the first time in more than 20 years. The new fee schedule will be as follows:

Transaction Value	Old Fee	New Fee
More than \$111.4 million but less than \$161.5 million	\$45,000	\$30,000
\$161.5 million or more but less than \$500 million	\$45,000 or \$125,000 ³	\$100,000
\$500 million or more but less than \$1 billion	\$125,000	\$250,000
\$1 billion ⁴ or more but less than \$2 billion	\$280,000	\$400,000
\$2 billion or more but less than \$5 billion	\$280,000	\$800,000
\$5 billion or more	\$280,000	\$2.25 million

For more detail on these changes, see [our previous article](#).

Civil Penalties for HSR Violations

Parties who close a reportable transaction without filing complete notifications (including all documents required to be included under Items 4(c) and 4(d) of the notification form) and observing the waiting period are subject to civil penalties. As of January 11, 2023, the maximum daily penalty increased to \$50,120.

Interlocking Directorates – Increased Thresholds and Other Issues

On January 23, 2023, the FTC also announced the updated thresholds for the Clayton Act Section 8's prohibition on interlocking directorates. The Clayton Act prohibits one person from serving as an officer or director of two competing companies when each company has capital, surplus, and undivided profits of more than \$45,257,000 for Section 8(a)(1) and competitive sales of more than \$4,525,700 for Section 8(a)(2)(A).

In September 2022, DOJ issued letters to several publicly-traded companies and investors, stating that it may file lawsuits against them for maintaining interlocking directorates in violation of Section 8. This action followed statements that DOJ made earlier in the year regarding its intent to more aggressively challenge interlocks.⁵ Then, on October 19, 2022, DOJ announced that seven directors had resigned from five different companies in response to DOJ's concerns. In that same announcement, DOJ stated that this would be "the first in a broader review of potentially unlawful interlocking directorates."⁶

¹ The test includes the value of all of the voting securities (and certain assets) of the acquired person that the acquiring person will hold after the transaction is complete, including voting securities of the acquired person that the acquiring person owned *before* the transaction.

² "Person" means the ultimate parent of the legal party to a transaction (including all entities controlled by the ultimate parent).

³ The basic \$45,000 filing fee applied for transactions valued at more than \$101 million but less than \$202 million. For transactions valued at \$202 million or more, but less than \$1.0098 billion, the filing fee was \$125,000.

⁴ We have simplified this a bit. The \$125,000 fee (rather than the \$280,000 fee) applied to transactions valued at up to \$1.0098 billion.

⁵ See Jonathan Kanter, Assistant Attorney General, Dept. of Justice, *Opening Remarks at 2022 Spring Enforcers Summit* (Apr. 4, 2022) ("For too long, our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates."); see also Richard A. Powers, Deputy Assistant Attorney General, Dept. of Justice, *Speech: Effective Antitrust Enforcement: The Future Is Now* (June 3, 2022) ("Section 8, which prohibits interlocking directorates, helps prevent antitrust crimes before they occur. That's because interlocking directorates can facilitate the exchange of competitively sensitive information and coordination between competing companies.").

⁶ Dept. of Justice, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates* (Oct. 19, 2022).