

ALERTS

FTC Increases 2023 Thresholds for HSR Filings and Interlocking Directorates

January 25, 2023

On Jan. 23, 2023, the Federal Trade Commission (“FTC”) announced increased reporting thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”); the revised HSR thresholds apply to all transactions closing on or after Feb. 27, 2023. The minimum size-of-transaction threshold was increased from \$101 million to \$111.4 million. Acquisitions below this threshold will not be reportable.

The FTC also raised the thresholds for interlocking directorates under Section 8 of the Clayton Act, effective as of Jan. 20, 2023, and the maximum civil penalty amounts for HSR violations were increased to \$50,120 per day of noncompliance, effective Jan. 11, 2023.

Revised HSR Act Thresholds

Generally, the HSR Act requires parties to acquisitions of voting securities, assets or non-corporate interests meeting certain thresholds to make a premerger notification to the FTC and the Antitrust Division of the Department of Justice unless an exemption applies. The HSR Act thresholds are adjusted annually in accordance with changes in U.S. gross national product. The parties to a reportable transaction must observe a waiting period (generally 30 days) before closing.

Under the revised thresholds, transactions valued up to and including *\$111.4 million* are not reportable under the HSR Act. Transactions valued at more than \$111.4 million may be reportable if they meet the following criteria and no exemption applies:

Size-of-transaction The acquiring person will hold voting securities, non-corporate interests or assets of the acquired person valued at more than \$445.5 million;

or

The acquiring person will hold voting securities, non-corporate interests or assets of the acquired person valued more than \$111.4 million but less than \$445.5 million, *and* the size-of-person test is met.

Size-of-person test* One party has at least \$222.7 million in total assets or annual sales, and the other has at least \$22.3 million in total assets or annual sales. If the acquired party is “not engaged in manufacturing,” then the test applied to the acquired person specifies annual sales of \$222.7 million or total assets of \$22.3 million.

*For the size-of-person test, a “party” includes its ultimate parent entity (“UPE”) and the UPE’s controlled subsidiaries.

HSR Notification Thresholds for Acquisitions of Voting Securities. After an HSR filing has been made, and the applicable waiting period has expired or been terminated, any additional acquisitions by the same acquiring person of the same issuer’s voting securities will be exempt from notification, so long as:

- The acquiring person’s holdings crossed the notification threshold with respect to which the premerger notification was made within one year of the expiration or early termination of the HSR Act waiting period; *and*
- The subsequent acquisition is consummated within five years following the expiration or early termination of the HSR Act waiting period;

unless a higher notification level is met or exceeded. The various notification levels are set forth below:

HSR Act Original Threshold	2023 Adjusted Threshold
\$50 million	\$111.4 million
\$100 million	\$222.7 million
\$500 million	\$1.1137 billion
25 percent if value of voting securities to be held is greater than \$1 billion	25 percent if value of voting securities to be held is greater than \$2.2274 billion

50 percent if value of voting securities to be held is greater than \$50 million	50 percent if value of voting securities to be held is greater than \$111.4 million
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Any subsequent acquisition would be subject to the adjusted thresholds in effect when such subsequent acquisition is consummated.

HSR Filing Fees. The HSR filing fee structure recently was overhauled, with a six-tier framework replacing the three-tiered one in place for over two decades. The transaction value ranges for each tier have been adjusted as follows for filings beginning Feb. 27, 2023:

Filing Fee	Size-of-Transaction (as adjusted for 2023)
\$30,000	Greater than \$111.4 million but less than \$161.5 million
\$100,000	\$161.5 million or more but less than \$500 million
\$250,000	\$500 million or more but less than \$1 billion
\$400,000	\$1 billion or more but less than \$2 billion
\$800,000	\$2 billion or more but less than \$5 billion
\$2,250,000	\$5 billion or more

The filing fees will be adjusted annually based on the Consumer Price Index as determined by the Department of Labor.

HSR Penalties. Any person (including the company and any of its officers, directors or partners) failing to comply with the HSR Act may be subject to a civil penalty for each day during which such person is in violation of the Act. The maximum civil penalty was increased from \$46,517 per day to \$50,120 per day of noncompliance, effective as of Jan. 11, 2023. The civil penalty amounts are adjusted by the FTC annually based on the percentage change in the Consumer Price Index.

Revised Thresholds for Interlocking Directorates

Under certain circumstances, Section 8 of the Clayton Act prohibits one person from simultaneously serving as a director or officer of two competing corporations if each corporation has capital, surplus and undivided profits aggregating more than \$45,257,000 (up from \$41,034,000).

The Clayton Act does not prohibit the interlock if: (1) the competitive sales of either corporation are less than \$4,525,700 (up from \$4,103,400); (2) the competitive sales of either corporation are less than two percent of that corporation's total sales; or (3) the competitive sales of each corporation are less than four percent of that corporation's total sales.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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