

Clients & Friends Memo

FTC Announces 2023 Thresholds for Merger Control Filings under HSR Act and Interlocking Directorates under the Clayton Act

Multiple Filing Fee Tiers Introduced

January 23, 2023

The Federal Trade Commission (“FTC”) has [increased](#) the dollar jurisdictional thresholds necessary to trigger the reporting requirements in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”); the revised thresholds will become effective 30 days after the date of publication in the Federal Register. The FTC also [increased](#) the thresholds for interlocking directorates under Section 8 of the Clayton Act, effective 30 days after the date of publication in the Federal Register. Additionally, the FTC is [amending](#) the HSR Premerger Notification Rules to conform to the new filing fee tiers enacted by the Merger Filing Fee Modernization Act of 2022, effective 30 days after the date of publication in the Federal Register.

Revised HSR Thresholds

Under the HSR Act, parties involved in proposed mergers, acquisitions of voting securities, unincorporated interests or assets, or other business combinations (e.g., joint ventures, exclusive license deals) that meet certain thresholds must report the contemplated transactions to the FTC and the Antitrust Division of the U.S. Department of Justice (“DOJ”), unless an exemption applies. The parties to a proposed transaction that requires notification under the HSR Act must observe a statutorily prescribed waiting period (generally 30 days) before closing. Under the revised thresholds, transactions valued at **\$111.4 million** or less are not reportable under the HSR Act.

A transaction closing on or after the date the revised thresholds become effective may be reportable if it meets the following revised criteria:

Size-of-Transaction Test	<p>The acquiring person will hold, as a result of the transaction, an aggregate total amount of voting securities, unincorporated interests, or assets of the acquired person valued in excess of \$445.5 million;</p> <p><i>or</i></p> <p>The acquiring person will hold, as a result of the transaction, an aggregate total amount of voting securities, unincorporated interests, or assets of the acquired person valued in excess of \$111.4 million but not more than \$445.5 million, <u>and</u> the Size-of-Person thresholds below are met.</p>
Size-of-Person Test	<p>One party (including the party's ultimate parent entity and its controlled subsidiaries) 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.</p>

The full list of the revised thresholds is as follows:

Original Threshold	2022 Threshold	2023 Revised Threshold
\$10 million	\$20.2 million	\$22.3 million
\$50 million	\$101 million	\$111.4 million
\$100 million	\$202 million	\$222.7 million
\$110 million	\$222.2 million	\$245 million
\$200 million	\$403.9 million	\$445.5 million
\$500 million	\$1,009.8 million	\$1,113.7 million
\$1 billion	\$2,019.6 million	\$2,227.4 million

The filing fees for reportable transactions have been updated into six tiers as follows:

Filing Fee	Size of Transaction Under the Act
\$30,000	For transactions valued in excess of \$111.4 million but less than \$161.5 million
\$100,000	For transactions valued at \$161.5 million or greater but less than \$500 million
\$250,000	For transactions valued at \$500 million or greater but less than \$1,000 million
\$400,000	For transactions valued at \$1,000 million or greater but less than \$2,000 million
\$800,000	For transactions valued at \$2,000 million or greater but less than \$5,000 million
\$2.25 million	For transactions valued at \$5,000 million or more

Beginning in Fiscal Year 2024, the filing tiers will be adjusted annually to reflect changes in the GNP for the previous year.

Note that the HSR dollar thresholds are only part of the analysis to determine whether a particular transaction must be reported to the FTC and DOJ. Failure to notify the FTC and DOJ under the HSR Act remains subject to a statutory penalty of up to **\$46,517** per day of noncompliance.

Revised Thresholds for Interlocking Directorates

Section 8 of the Clayton Act prohibits one person from simultaneously serving as an officer or director of two corporations if: (1) the “interlocked” corporations each have combined capital, surplus, and undivided profits of more than **\$45,257,000** (up from \$41,034,000); (2) each corporation is engaged in whole or in part in commerce; and (3) the corporations are “by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”¹

Section 8 provides several exemptions from the prohibition on interlocks for arrangements where the competitive overlaps “are too small to have competitive significance in the vast majority of situations.”² After the revised thresholds take effect, a corporate interlock does not violate the statute if: (1) the competitive sales of either corporation are less than **\$4,525,700** (down from \$4,103,400); (2) the

¹ 15 U.S.C. § 19(a)(1)(B).

² S. REP. NO. 101-286, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4100, 4103-04.

competitive sales of either corporation are less than 2 percent of that corporation's total sales; or (3) the competitive sales of each corporation are less than 4 percent of that corporation's total sales.

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If you have any questions about this memorandum or any HSR reportability questions, please feel free to contact Joel Mitnick from Cadwalader's Antitrust Group.

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