
HSR Pre-Merger Reporting Threshold Increased to \$101 Million

The Federal Trade Commission (“FTC”) announced its annual revision to the thresholds for premerger reporting of proposed acquisitions to the United States antitrust authorities under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”).¹ Effective February 23, 2022, the minimum size-of-transaction threshold will increase to \$101 million.² The FTC and the U.S. Department of Justice (“DOJ” and, together with the FTC, the “agencies”) have not yet reinstated their practice of granting early termination of the 30-day waiting period under the HSR Act.

The HSR Act thresholds are adjusted annually, based on the change in gross national product, and unlike the lower thresholds last year, this year the thresholds increased substantially. Under the new thresholds, transactions that will result in one person holding more than \$101 million (originally \$50 million) of another person’s assets, voting securities or non-corporate interests may be subject to the HSR Act’s premerger reporting requirements.³

The HSR Act requires all persons contemplating mergers or acquisitions of voting securities, non-corporate interests, or assets that satisfy the size-of-transaction and size-of-person thresholds to notify the FTC and DOJ, pay a filing fee of \$45,000 to \$280,000 (depending on the size of the transaction) and observe a waiting period before completing the transaction. Once the agencies receive the required HSR Act forms and the filing fee, a 30-day waiting period commences (in most cases) and the transaction cannot close until the expiration or early termination of the waiting period or, in the event the waiting period is extended by issuance of a “Second Request” for additional materials because significant antitrust concerns exist, expiration of an additional 30-day waiting period or a negotiated schedule following substantial compliance with the Second Request.

The HSR Act and rules are complex. They include many exemptions and exceptions and at times require the aggregation of pre-acquisition holdings and reporting of various transactions, including (i) acquisitions of minority holdings of voting securities, (ii) subsequent acquisitions when a secondary threshold is crossed, and (iii) acquisitions of additional voting securities from the same issuer after more than five years, among other scenarios. The antitrust agencies may impose fines for failure to make required notifications, and the rules should be carefully reviewed with respect to any particular transaction.⁴

¹ 15 U.S.C. § 18a.

² Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-01-24/pdf/2022-01214.pdf>.

³ Attached as Appendix A to this memorandum is a table indicating the adjusted filing thresholds and related filing fees.

⁴ The civil penalties for premerger filing notification violations under the HSR Act are now \$46,517 per day. Adjustments to Civil Penalty Amounts, 87 Fed. Reg. 1070 (Jan. 10, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-01-10/pdf/2022-00213.pdf>. The FTC must adjust these penalties for inflation annually each January. *Id.*

The FTC also revised thresholds for restrictions on interlocking directorates under Section 8 of the Clayton Antitrust Act of 1914, as amended, which prohibits the same person from serving as a director or officer of two competing corporations whose combined sales exceed certain thresholds. Competing corporations are covered if each one has capital, surplus, and undivided profits in aggregate of more than \$41,034,000 (originally \$10,000,000), with the exception that no corporation is covered if the competitive sales of either corporation are less than \$4,103,400 (originally \$1,000,000).⁵

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at 212.701.3039 or ekatz@cahill.com; Lauren Rackow (counsel) at 212.701.3725 or lrackow@cahill.com; or email publications@cahill.com.

⁵ Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, 87 Fed. Reg. 3540 (Jan. 24, 2022), *available at* <https://www.govinfo.gov/content/pkg/FR-2022-01-24/pdf/2022-01215.pdf>.

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Appendix A

HSR ACT TEST	HOW APPLIED ⁶ (as of February 23, 2022)
Size-of-transaction	Test is satisfied if, as a result of the transaction, the acquiring person would hold voting securities or assets of the acquired person in excess of \$101 million (originally \$50 million).
Size-of-person	Test is satisfied if the size-of-transaction is in excess of \$101 million (originally \$50 million) but is \$403.9 million (originally \$200 million) or less, and either the acquiring or acquired person has annual net sales or total assets of at least \$202 million (originally \$100 million) and the other has annual net sales or total assets of at least \$20.2 million (originally \$10 million). If the acquired person is not engaged in manufacturing, test applies only if acquired person has total assets of at least \$20.2 million (originally \$10 million) or annual net sales of at least \$202 million (originally \$100 million).
Size-of-person	Nonexempt transactions are reportable, regardless of whether size-of-person test is satisfied, if the size-of-transaction is in excess of \$403.9 million (originally \$200 million). ⁷
Assessment of Filing Fees	<p>\$45,000 filing fee required if the size-of-transaction is in excess of \$101 million (originally \$50 million) but less than \$202 million (originally \$100 million).</p> <p>\$125,000 filing fee required if the size-of-transaction is \$202 million (originally \$100 million) or more but less than \$1.0098 billion (originally \$500 million).</p> <p>\$280,000 filing fee required if the size-of-transaction is \$1.0098 billion (originally \$500 million) or more.</p>

⁶ Original thresholds shown for reference. As adjusted thresholds will apply to all transactions closing on or after February 23, 2022.

⁷ Nonexempt transactions valued at or less than \$403.9 million (originally \$200 million), but more than \$101 million (originally \$50 million) are reportable if both the size-of-person and the size-of-transaction tests are satisfied.