
HSR Reporting Threshold Increased to \$111.4 Million; HSR Fees and Interlocking Directorate Thresholds Updated

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 27, 2023, the minimum size-of-transaction threshold will increase from \$101 million to \$111.4 million.² The FTC also announced the new HSR filing fees, which become effective on February 27, 2023. 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 initial 30-day waiting period under the HSR Act.

The HSR Act thresholds are adjusted annually, based on the change in gross national product. This year the thresholds increased substantially. Under the new thresholds, transactions that will result in one person holding more than \$111.4 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 planning to acquire 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 (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 new HSR filing fees range from \$30,000 to \$2.25 million, depending on the size-of-transaction.⁴ Congress authorized these new fees at the end of last year.⁵ The new fees reflect an increase for larger transactions

¹ 15 U.S.C. § 18a.

² Revised Jurisdictional Thresholds, 88 Fed. Reg. 5004 (Jan. 26, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-26/pdf/2023-01533.pdf>.

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

⁴ Revised Jurisdictional Thresholds, 88 Fed. Reg. 5004 (Jan. 26, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-26/pdf/2023-01533.pdf>.

⁵ H.R. 2617, Consolidated Appropriations Act of 2023, 117th Cong. §§ 101 – 102 (2022), available at <https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf>.

and a decrease for medium to smaller transactions. The FTC will revise these fees yearly, based on the Consumer Price Index.

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 many of which do not involve mergers or acquisitions of control, 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.⁶

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 \$45,257,000 (originally \$10,000,000), with the exception that no corporation is covered if the competitive sales of either corporation are less than \$4,525,700 (originally \$1,000,000).⁷ The DOJ has stated that enforcement of Section 8 is a priority for the agency. We recommend that companies review their officers' and directors' positions on other boards, followed by an annual compliance check, to confirm that there are no problematic interlocking directorates.

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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, please do not hesitate to call or email authors Elai Katz at 212.701.3039 or ekatz@cahill.com; Lauren Rackow at 212.701.3725 or lrackow@cahill.com; or email publications@cahill.com.

⁶ The civil penalties for premerger filing notification violations under the HSR Act are now \$50,120 per day. Adjustments to Civil Penalty Amounts, 88 Fed. Reg. 1499 (Jan. 11, 2023), *available at* <https://www.govinfo.gov/content/pkg/FR-2023-01-11/pdf/2023-00382.pdf>. The FTC must adjust these penalties for inflation annually each January. *Id.*

⁷ Revised Jurisdictional Thresholds for Section 8 of the Clayton Act, 88 Fed. Reg. 3742 (Jan. 20, 2023), *available at* <https://www.govinfo.gov/content/pkg/FR-2023-01-20/pdf/2023-00996.pdf>.

Appendix A

HSR ACT TEST	HOW APPLIED ⁸ (as of February 27, 2023)
Size-of-transaction	Test is satisfied if, as a result of the transaction, the acquiring person would hold voting securities, controlling non-corporate interests or assets of the acquired person in excess of \$111.4 million (originally \$50 million). ⁹ If the size-of-transaction is in excess of \$445.5 million (originally \$200 million), all nonexempt transactions are reportable, regardless of whether size-of-person test is satisfied. ¹⁰
Size-of-person	Test is satisfied if the size-of-transaction is in excess of \$111.4 million (originally \$50 million) but is \$445.5 million (originally \$200 million) or less, and either the acquiring or acquired person has annual net sales or total assets of at least \$222.7 million (originally \$100 million) and the other has annual net sales or total assets of at least \$22.3 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 \$22.3 million (originally \$10 million) or annual net sales of at least \$222.7 million (originally \$100 million).
FILING FEE	SIZE OF TRANSACTION
\$30,000	less than \$161.5 million
\$100,000	not less than \$161.5 million but less than \$500 million
\$250,000	not less than \$500 million but less than \$1 billion
\$400,000	not less than \$1 billion but less than \$2 billion
\$800,000	not less than \$2 billion but less than \$5 billion
\$2.25 million	\$5 billion or more

⁸ Original thresholds shown for reference. As adjusted thresholds will apply to all transactions closing on or after February 27, 2023.

⁹ Subsequent thresholds of \$222.7 million (originally \$100 million), \$1.1137 billion (originally \$500 million), and acquiring 25% of a company if value exceeds \$2.2274 billion (originally \$1 billion) may apply to minority acquisitions.

¹⁰ Nonexempt transactions valued at or less than \$445.5 million (originally \$200 million), but more than \$111.4 million (originally \$50 million) are reportable if both the size-of-person and the size-of-transaction tests are satisfied.

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