

# Antitrust Alert

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## FTC Updates HSR Filing Fees and Revises Thresholds for 2023; Minimum Size for Reportable Transactions Increases to \$111.4 Million

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### Key Points

- The HSR Act requires parties that meet certain transaction size and other tests to file premerger notification forms for mergers and other transactions with both the Federal Trade Commission and Department of Justice Antitrust Division.
- For 2023, the jurisdictional thresholds in the HSR Act will increase by slightly more than 10 percent, which means that the minimum size-of-transaction threshold for reporting proposed mergers and acquisitions will increase from \$101 million to \$111.4 million.
- The FTC has also formally announced the updated HSR filing fees for 2023, and they substantially increase the filing costs for large transactions (particularly those in excess of \$2 billion).
- In addition to the revised thresholds and filing fees, the 2023 thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors will also increase.
- These changes will go into effect 30 days after publication in the Federal Register, which we expect to occur in the coming days.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") requires all parties to transactions that meet certain transaction size and other tests to file premerger notification forms for mergers and other transactions with both the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division. The HSR Act also requires those parties to observe a mandatory waiting period prior to closing while the agencies consider the competitive effects (if any) of the transaction. The new thresholds and filing fees will apply to transactions consummated on or after the effective date, which is 30 days after publication in the Federal Register.

### The Size-of-Transaction Threshold

The size-of-transaction threshold is reviewed every year, and for 2023 the minimum transaction size has increased from \$101 million to \$111.4 million (an approximate 10

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percent increase). Under the revised thresholds, HSR filings will be required (unless otherwise exempted) for transactions that result in the acquiring person holding more than \$111.4 million of the acquired person's voting securities, non-corporate interests or assets.

## The Size-of-Person Thresholds

The size-of-person thresholds have increased by a similar percentage. While the HSR Act size-of-person rules are complex, under the new thresholds an HSR Act filing is generally not required for transactions valued at more than \$111.4 million but less than \$445.5 million, *unless* one party to the transaction has \$222.7 million in annual net sales or total assets and the other party has \$22.3 million in annual net sales or total assets. The potential exemption afforded by the size-of-person test is inapplicable to transactions valued at more than \$445.5 million; as a result, transactions valued at more than \$445.5 million will be reportable under the HSR Act regardless of the size of the parties to the transaction (unless otherwise exempted).

## HSR Filing Fees

Pursuant to the Merger Filing Fee Modernization Act signed into law at the start of 2023, HSR filing fees have been increased for all transactions valued at \$500 million or greater. Transactions valued at less than \$500 million will benefit from a modest decrease in filing fees. Below are tables comparing the new and old tiers and fees.

### HSR Filing Fees (2023)

Size of Transaction	Filing Fee
< \$161.5 million	\$30,000
\$161.5 million – \$499.999 million	\$100,000
\$500 million – \$999.999 million	\$250,000
\$1 billion – \$1.999 billion	\$400,000
\$2 billion – \$4.999 billion	\$800,000
≥ \$5 billion	\$2,250,000

### HSR Filing Fees (2022)

Size of Transaction	Filing Fee
< \$202 million	\$45,000
\$202 million – \$1.0098 billion	\$125,000
≥ \$1.0098 billion	\$280,000

There are many exemptions and exceptions to the HSR filing requirement, and parties contemplating merger and acquisition activity, as well as investments meeting the

HSR transaction size threshold, are strongly encouraged to consult antitrust counsel to determine whether HSR notification is required. Persons who fail to file and do not observe the waiting period when required to do so face civil penalties of up to \$50,120 per day, a recent increase from the prior maximum penalty of \$46,517.<sup>1</sup>

### Increased Thresholds for Interlocking Directorates

Section 8 of the Clayton Act prohibits a person from serving as a director or officer of two competing corporations. However, interlocks are exempt from Section 8 where either: (1) each corporation has capital, surplus and undivided profits aggregating less than \$10 million, as adjusted (“Amount of Capital”); (2) the competitive sales of either corporation are less than \$1 million, as adjusted (“Competitive Sales”); (3) the competitive sales of either corporation are less than two percent of that corporation’s total sales; or (4) the competitive sales of each corporation are less than four percent of each corporation’s total sales.

The first two exemptions are adjusted annually based on changes in gross national product, which for 2023 reflects an increase of slightly more than 10 percent. Below is a table comparing the old and new adjusted thresholds.

	2022	2023
Amount of Capital	\$41,034,000	\$45,257,000
Competitive Sales	\$4,103,400	\$4,525,700

Notably, the thresholds for Section 8 of the Clayton Act become effective immediately upon their publication in the Federal Register (not 30 days afterwards like the HSR changes).

For more information on the HSR Act, see prior alert [here](#).

<sup>1</sup> The current maximum penalty of \$50,120 per day became effective on January 11, 2023.