

FTC ANNOUNCES INCREASED HSR AND INTERLOCKING DIRECTORATE THRESHOLDS FOR 2023

Hodgson Russ Antitrust, Trade Regulation & Anticorruption Alert
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On January 23, 2023, the Federal Trade Commission (“FTC”) announced updated transaction thresholds that trigger the requirement to file a premerger notification form under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”). The FTC revises the thresholds annually based on changes in the gross national product. As with 2022, the thresholds have once again increased for 2023. The new thresholds were published in the Federal Register on January 24, 2023, and will be effective for all transactions closing on or after February 23, 2023.

With these recent adjustments to the HSR thresholds, the parties to a transaction must file an HSR notification if the transaction meets one of two tests:

1. The total value of a proposed transaction exceeds **\$445.5 million** (increased from \$403.9 million), regardless of the size of the parties; or
2. The total value of a proposed transaction exceeds **\$111.4 million** (increased from \$101 million) and one party has at least **\$22.3 million** in total assets or annual sales (increased from \$20.2 million) and the other party has at least **\$222.7 million** (increased from \$202 million).

The HSR Act requires parties engaged in certain transactions (including certain mergers, acquisitions, asset sales, joint ventures, and exclusive license deals) to file a notification and report form with both the FTC and Department of Justice, Antitrust Division (“DOJ”) prior to closing. Reportable transactions cannot be consummated until after a designated period of time (usually 30 days). Although there are certain exemptions to the HSR filing requirements, the \$111.4 million threshold is a key threshold to keep in mind. Any transaction that falls below that threshold is exempt from the filing requirements. However, transactions falling below the HSR Act threshold are routinely challenged by the antitrust authorities both before and after closing; accordingly, parties should always consider the competitive effect of a proposed transaction, regardless of whether it is reportable.

In addition to approving new HSR filing thresholds, the Commission approved new merger filing fees based on the size of the proposed transaction. Notably, the Merger Filing Fee Modernization Act, which became effective December 29, 2022, revised the filing fee structure for HSR filings into six different categories. The new filing fee

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thresholds, which take effect on February 23, 2023, are as follows:

- A **\$30,000 filing fee** for transactions valued at or above **\$111.4 million** but less than **\$161.5 million**;
- A **\$100,000 filing fee** for transactions valued at or above **\$161.5 million** but less than **\$500 million**;
- A **\$250,000 filing fee** for transactions valued at or above **\$500 million** but less than **\$1 billion**;
- A **\$400,000 filing fee** for transactions valued at or above **\$1 billion** but less than **\$2 billion**;
- An **\$800,000 filing fee** for transactions valued at or above **\$2 billion** but less than **\$5 billion**;
- A **\$2.25 million filing fee** for transactions valued at or above **\$5 billion**.

Interlocking Directorate Thresholds

The FTC also announced revised thresholds for interlocking directorates required by the 1990 amendment of Section 8 of the Clayton Antitrust Act of 1914. Under the revised thresholds, which become effective January 24, 2023, a single person cannot serve as an officer or director of two competing corporations if each corporation has capital, surplus, and undivided profits in excess of \$45,257,000 (increased from \$41,034,000). This prohibition does not apply if the competitive sales of either corporation are less than \$4,525,700 (increased from \$4,103,400), or (b) 2% of such corporation's total sales, or the competitive sales of each corporation are under 4% of each corporation's total sales. The terms "competitive sales" and "total sales" have specific meanings pursuant to the Clayton Act.

Civil Penalties

The maximum civil penalty amount for violations of the HSR Act will increase from \$46,517 per day to \$50,120 per day, effective January 11, 2023. The new penalty levels are effective upon publication in the Federal Register, and will apply to penalties assessed after the effective date of the adjustment, including penalties related to violations predating the effective date.

If you have any questions relating to the HSR Act, the Clayton Act, or other antitrust issues, please contact Valerie Stevens (646.218.7614) or Emily Florczak (716.848.1714).