

## Updates

January 25, 2022

### FTC Announces 2022 Changes to HSR and Clayton Act Thresholds

The Federal Trade Commission (FTC) recently [announced](#) that the reporting thresholds under Section 7A of the Clayton Act, known as the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 (the Act), will be increased. Certain transactions that meet the Act's jurisdictional thresholds require parties to notify the FTC and the Antitrust Division of the U.S. Department of Justice (DOJ) of the transaction and observe a statutory waiting period before consummating those transactions. Amendments to the Act, passed in 2000, require the FTC to revise the Act's jurisdictional and filing fee thresholds annually, based on the change in gross national product. Certain related thresholds in the HSR rules will also be adjusted. The modified thresholds apply to all transactions closing on or after February 23, 2022.

This update summarizes the key elements of the revised thresholds.

### **HSR Reporting Thresholds**

Certain transactions, including acquisitions of voting securities or assets, acquisitions of noncorporate interests that confer control of a noncorporate entity, and the formation of joint venture corporations or other entities, are subject to the reporting requirements of the Act if the transaction meets the following size-of-transaction test and, if applicable, the size-of-person test, unless an exemption applies:

- The size-of-transaction test is met if the value of voting securities, noncorporate interests, assets, or combination thereof held as a result of the transaction is valued in excess of \$101 million (increased from \$92 million).
- The size-of-person test is met if the ultimate parent entity of one of the parties to the transaction has \$20.2 million (increased from \$18.4 million) or more in total assets or annual net sales, and the ultimate parent entity of another party to the transaction has \$202 million (increased from \$184 million) or more in total assets or annual net sales.
- The size-of-person test is not applicable if the transaction is valued in excess of \$403.9 million (increased from \$368 million).

### **Filing Fees**

The transaction values on which the tiered HSR filing fee schedule is based will also be revised, as shown in the chart below:

#### **Filing Fee Transaction Value (effective February 23, 2022)**

\$45,000	In excess of \$101 million, but less than \$202 million
\$125,000	\$202 million or more, but less than \$1.0098 billion
\$280,000	\$1.0098 billion or more

### **Early Termination Temporarily Suspended**

On February 4, 2021, the FTC and DOJ [announced](#) that early termination of the HSR Act's waiting period would be temporarily suspended during "the transition to the new Administration and given the unprecedented volume

of HSR filings." While the agencies anticipated the suspension would "be brief," the suspension continues to remain in effect with some limited exceptions. On March 12, 2021, the agencies [clarified](#) that they will consider granting early termination after the investigating agency has issued a Second Request in at least two circumstances. The first is when the investigating agency has received sufficient information to close its investigation without the parties substantially complying with the Second Request. The second is when the parties negotiate a consent agreement with the investigating agency to remedy the competition concerns.

## Record Number of Filings

Last year, the agencies received a record number of filings since the HSR size-of-transaction threshold increased on February 1, 2001, from \$15 million to the \$50 million (annually adjusted) size-of-transaction threshold in effect today. In November 2021 alone, 607 transactions were notified to the FTC and DOJ, smashing the previous monthly record of 494, which was hit in each of November 1986 and June 2000. The table below shows the record annual number of notified transactions before and after the \$50 million (as adjusted) threshold went into effect.

Record	Number of Transactions Notified <sup>[1]</sup>	
	Fiscal Year <sup>[2]</sup>	Calendar Year
Highest all time	4,926 (FY 2000)	4,828 (CY 1999)
Lowest all time	716 (FY 2009)	788 (CY 2009)
Highest under \$50M (as adjusted) threshold	3,644 (FY 2021)	4,130 (CY 2021)
Second highest under \$50M (as adjusted) threshold	2,201 (FY 2007)	2,192 (CY 2018)

## New Clayton Act Section 8 Thresholds

The FTC also announced revisions to the thresholds that trigger a prohibition on interlocking memberships on corporate boards of directors under Section 8 of the Clayton Act. Under Section 8, a person is barred from serving as a director or officer of two competing corporations if two thresholds are met. As enacted, the statute applies if each competitor corporation has capital, surplus, and undivided profits of more than \$10 million (as adjusted), except that no prohibition against interlocking directorates or officers applies if the competitive sales of either corporation are less than \$1 million (as adjusted). There is also an exception for interlocking directorates in which the competitive sales of either corporation are less than 2% of that corporation's total sales, or the competitive sales of each corporation are less than 4% of that corporation's total sales. The monetary thresholds are subject to annual revision.

The thresholds in [effect](#) as of January 24, 2022, are \$41,034,000 and \$4,103,400 (up from \$37,382,000 and \$3,738,200, respectively). Thus, if each of the competing companies has capital, surplus, and undivided profits of over \$41,034,000, the interlock is unlawful unless (1) the competitive sales of either firm are under \$4,103,400 or represent less than 2% of that firm's total sales, or (2) the competitive sales of each firm are less than 4% of that firm's total sales.

## Civil Penalty

Effective January 10, 2022, the maximum civil penalty amount for violations of the Act was [increased](#) from \$43,792 to \$46,517 per day, based on changes in inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the FCPIAA). The FCPIAA, as amended, directs agencies to

implement annual inflation adjustments based on a prescribed formula.

## **Is Your Transaction Reportable Under the HSR Act?**

This update is intended for general guidance. Parties contemplating a transaction should consult antitrust counsel to determine whether any particular transaction is reportable under the Act and to evaluate any antitrust concerns raised by the transaction.

Parties should also keep in mind that a transaction that is not reportable because it does not meet the Act's reporting thresholds is not exempt from agency scrutiny of the potential anticompetitive effects of the transaction. The FTC, DOJ, and state attorneys general (as well as private parties) may challenge a transaction as anticompetitive even when no HSR filing is required for the transaction and even after a transaction is consummated. Therefore, all transactions should be reviewed for compliance with Section 7A of the Clayton Act prior to closing.

### **Endnotes**

[1] These figures are based on preliminary data posted on the FTC's [website](#) and in the agencies' [HSR annual reports](#).

[2] The federal fiscal year runs from October 1 of one calendar year through September 30 of the next calendar year.

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