

2023 Updates to HSR and Interlocking Directorate Thresholds

The Federal Trade Commission (FTC) recently [announced](#) its annual adjustments to the pre-merger notification thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) and interlocking directorate thresholds under Section 8 of the Clayton Act. The FTC also announced the implementation of the new HSR filing fee schedule set forth in the Merger Filing Fee Modernization Act of 2022 (MFFMA), which was enacted as part of the Consolidated Appropriations Act, 2023.

Annual Adjustments to HSR Thresholds

The HSR Act requires parties to notify certain transactions to the FTC and the Antitrust Division of the U.S. Department of Justice (DOJ) and observe a waiting period prior to consummation of the transaction if it meets the HSR Act's jurisdictional tests. The statute requires the FTC to annually adjust the jurisdictional and filing fee thresholds based on the change in gross national product (GNP). The FTC recently [published](#) the revised jurisdictional, filing fee, and related HSR-rule thresholds, which will become effective on February 27, 2023.

Revised Jurisdictional 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 and waiting requirements of the HSR Act if the transaction meets the 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 a combination thereof held as a result of the transaction is valued in excess of **\$111.4 million** (increased from \$101 million).
- The size-of-person test is met if the ultimate parent entity of one of the parties to the transaction has **\$22.3 million** (increased from \$20.2 million) or more in total assets or annual net sales, and the ultimate parent entity of the other party to the transaction has **\$222.7 million** (increased from \$202 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 **\$445.5 million** (increased from \$403.9 million).

Below is a summary of the changes to the jurisdictional thresholds and an HSR analysis decision tree with the new thresholds.

Jurisdictional Tests and Thresholds

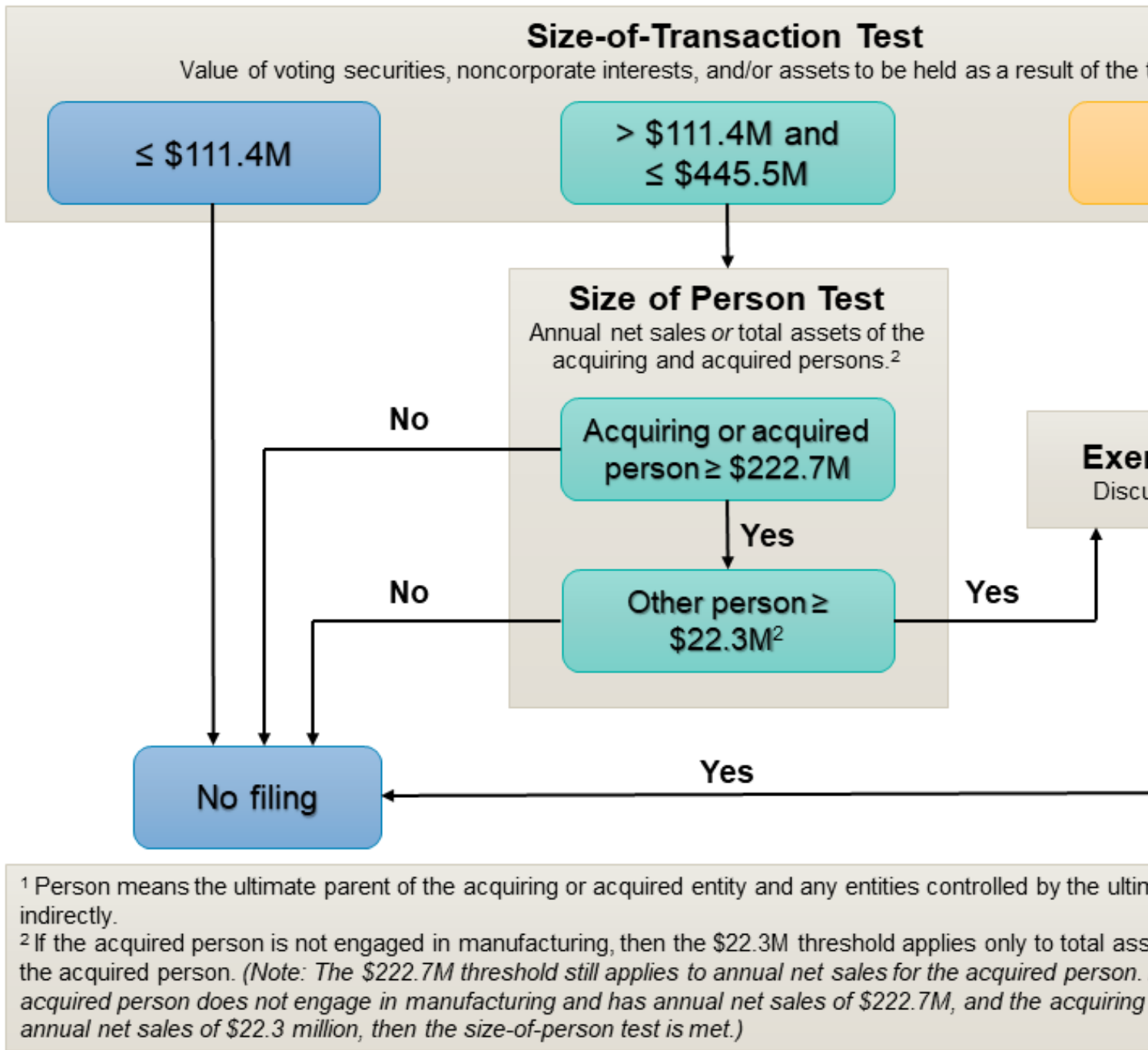
Original	Current	New
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Minimum Size of Transaction Threshold
(size-of-person test must be met) > \$50 million > \$101 million > \$111.4 million

Lower Size of Person Threshold ? \$10 million ? \$20.2 million ? \$22.3 million

Higher Size of Person Threshold ? \$100 million ? \$202 million ? \$222.7 million

Large Size of Transaction Threshold
(size-of-person test is not applicable) > \$200 million > \$403.9 million > \$445.5 million



Revised Notification Thresholds

Section 802.21 of the HSR rules exempts the acquisition of voting securities of a corporation for five years after the expiration or termination of the waiting period of a prior HSR filing if the acquiring person meets **all** of the following requirements:

- It completed the acquisition that was the subject of the filing within one year of the expiration or termination of the waiting period.
- It crossed the applicable notification threshold within one year of the expiration or termination of the waiting period.

- It will not meet or exceed the next notification threshold as a result of acquiring additional shares of voting securities.

Below are the original, current, and new notification thresholds, which become effective for transactions closing on or after February 27, 2023.

Notification Thresholds

Original (fiscal year 2003 base year)	Current (effective until February 26, 2023)	New (effective on February 27, 2023)
> \$50 million	> \$101 million	> \$111.4 million
? \$100 million	? \$202 million	? \$222.7 million
? \$500 million	? \$1.0098 billion	? \$1.1137 billion
? 25% if > \$1 billion	? 25% if > \$2.0196 billion	? 25% if > \$2.2274 billion
? 50% if > \$50 million	? 50% if > \$101 million	? 50% if > \$111.4 million

In 2001, the FTC amended the notification thresholds to be consistent with the tiered filing fee structure that was enacted by the 2000 amendments to the HSR Act, which required a filing fee of (1) \$45,000 for transactions valued in excess of \$50 million (as adjusted) but less than \$100 million (as adjusted), (2) \$125,000 for transactions valued at \$100 million (as adjusted) or more but less than \$500 million (as adjusted), and (3) \$280,000 for transactions valued at \$500 million (as adjusted) or more.

The FTC has not yet proposed to change the notification thresholds to comport with the new filing fee schedule enacted by the MFFMA (discussed below), but it would not be surprising if the agency proposes a rule change along these lines in the near future, which is consistent with prior practice. Such a change would increase compliance risk for noncontrolling acquisitions of voting securities and likely increase the number of filings required compared to the current notification threshold structure.

New Filing Fee Schedule

On December 29, 2022, President Biden signed H.R. 2617, the Consolidated Appropriations Act, 2023, into law. The new legislation included the MFFMA, which amended the amounts and tiers for HSR filing for the first time since 2001. The new filing fee schedule is provided below.

Filing Fee Tiers (Size-of-Transaction, 2002 Base Fiscal Year)

\$30,000 Less than \$161.5 million

\$100,000 \$161.5 million or greater but less than \$500 million

\$250,000 \$500 million or greater but less than \$1 billion

\$400,000 \$1 billion or greater but less than \$2 billion

\$800,000 \$2 billion or greater but less than \$5 billion

\$2,250,000 \$5 billion or greater

Beginning in 2024, the FTC is required to annually (1) adjust the filing fee tiers to reflect the percentage change in GNP for the prior fiscal year compared to the fiscal year that ended on September 30, 2022, and (2) increase the filing fee amounts annually by the Consumer Price Index (CPI) for the prior fiscal year compared to the fiscal year that ended on September 30, 2022, if the percentage increase is greater than 1%. Adjustments to the filing fees will be rounded to the nearest \$5,000.

Compared to last year, the new filing fee thresholds will increase significantly for transactions valued in excess of \$500 million (i.e., from fees ranging from \$125,000 to \$280,000 to fees ranging from \$250,000 to \$2.25 million) and decrease for transactions valued at less than \$161.5 million (i.e., from \$45,000 to \$30,000). The new filing fee structure is expected to raise additional revenue to fund DOJ and FTC antitrust enforcement efforts.

Civil Penalty

Effective January 11, 2023, the maximum civil penalty amount for violations of the HSR Act was [increased](#) from \$46,517 to \$50,120 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.

Revised Section 8 Thresholds and Renewed Enforcement

As required by statute, the FTC [published](#) its annual revisions to the interlocking directorate thresholds under Section 8 of the Clayton Act, effective as of January 20, 2023. Section 8 prohibits a "person" from serving as a director or officer of two competing corporations if each has capital, surplus, and undivided profits of more than \$45,257,000 (increased from \$41,034,000) unless **one** of the following de minimis exemptions is met:

- The competitive sales of either corporation are less than \$4,525,700 (increased from \$4,103,400).
- The competitive sales of either corporation are less than 2% of its total sales.
- The competitive sales of each corporation are less than 4% of its total sales.

The DOJ has [expressed](#) renewed interest over the past year in expanding enforcement of the prohibition on interlocking directorates outside of the merger review process where its enforcement has traditionally been detected. On October 19, 2022, the DOJ [announced](#) that seven directors resigned from the boards of five public companies in response to DOJ inquiries into Section 8 violations. At least one of the public companies listed another as a competitor in the Annual Report on Form 10-K, which is likely how the DOJ discovered the alleged interlocks.

Notably, two of the directors who resigned were representatives of a private equity firm that did not sit on the board of the company in which another representative of the same private equity firm served. This demonstrates that the DOJ has taken the position that the definition of "person" includes not only individuals but also representatives from the same entity.

The DOJ noted that these inquiries were "the first in a broader review of potentially unlawful interlocking directorates." Therefore, it would not be surprising if the DOJ announces additional Section 8 enforcement, especially for companies that make director information public.

Shortly after these enforcement actions, the FTC [expressed](#) that it interprets Section 5 of the FTC Act to apply to "interlocking directors and officers of competing firms not covered by the literal language [of Section 8] of the Clayton Act." Arguably, this could include enforcement against interlocks of boards of noncorporate entities (e.g., limited liability companies), board observers, and interlocks involving companies that are below the de minimis thresholds or potential competitors.

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