U.S. FEDERAL TRADE COMMISSION IMPLEMENTS NEW FILING FEE AMOUNTS AND INCREASES HSR AND INTERLOCKING-DIRECTORATE THRESHOLDS

On January 23, 2023, the U.S. Federal Trade Commission (the "FTC") announced its annual revisions to the jurisdictional thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). Barring an exemption, parties to a transaction meeting these thresholds must make pre-closing notifications ("HSR filings") to the U.S. antitrust authorities and abide by a mandatory waiting period. The FTC also announced that it is implementing the new HSR filing fees established by the Consolidated Appropriations Act of 2023.[1] The new jurisdictional thresholds will apply to any transaction that closes 30 days after the new thresholds are published in the *Federal Register*, while the new filing fees will take effect 30 days after they are published in the *Federal Register*. Publication is expected to occur any day now; therefore, the new filing fees will apply February 23, 2023, or shortly thereafter. The FTC's announcement also increased the jurisdictional thresholds for Section 8 of the Clayton Antitrust Act of 1914 ("Section 8"), which restricts interlocking directorates.

HSR FILING THRESHOLDS

The HSR Act mandates that parties to certain transactions must each make an HSR filing and adhere to a mandatory waiting period (typically 30 days, although some transactions may qualify for a 15-day waiting period) before closing the transaction if: (a) the transaction is valued at or above a certain threshold (the

1 H.R. 2617, 117th Cong. (2022).

"size-of-transaction test")[2] and the parties are a particular size based on sales or assets (the "size-of-person test")[3]; or (b) the transaction is valued at an even higher threshold, regardless of whether the size-of-person test is satisfied. Some transactions meeting these requirements may, nevertheless, qualify for one or more statutory exemptions allowing the parties to forego making HSR filings and abiding by the waiting period. The HSR Act itself requires the U.S. antitrust authorities to adjust these thresholds annually based on the gross national product. The newly announced thresholds, as compared to last year's, are as follows:

	2022 Thresholds	Revised Thresholds for 2023
Size-of-transaction test	$101 million	$111.4 million
Size-of-person test	Party 1 – annual net sales or total assets at or above $20.2 million; and Party 2 – annual net sales or total assets at or above $202.0 million	Party 1 – annual net sales or total assets at or above $22.3 million; and Party 2 – annual net sales or total assets at or above $222.7 million
Size-of-transaction test threshold at which the size-of-person test is inapplicable	$403.9 million	$445.5 million

HSR FILING FEE THRESHOLDS

In addition to the size-of-transaction test and size-of-person test thresholds, the 2023 Consolidated Appropriations Act required the FTC to revise both the filing fee thresholds and the filing fees themselves. The new filing fee thresholds and fee schedule, are as follows:

2 Note that the HSR Act often looks to the value that the acquiring person will hold post-transaction, rather than simply examining the value of voting securities, non-corporate interests, or assets being acquired at that specific time. This nuance means that, in some instances, the parties must consider what voting securities, non-corporate interests, or assets of the acquired person the acquiring person holds from previous transactions.

3 Generally, under the new thresholds, the size-of-person test is satisfied if the Ultimate Parent Entity ("UPE") of one party (either the acquiring or acquired person) has at least $22.3 million in annual net sales or total assets and the UPE of the other party has at least $222.7 million in annual net sales or total assets. If the UPE of the acquiring person satisfies the higher $222.7 million prong of the "size-of-person test," and if the UPE of the acquired person is not engaged in manufacturing, the size-of-person threshold test would be satisfied only if the UPE of the acquired person has at least $22.3 million in total assets or at least $222.7 million in annual net sales.

New Filing Fees	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
$2,250,000	$5 billion or more

Another new change in the Act requires that the filing fees be increased annually by an amount equal to the percentage increase, if any, in the consumer price index, as determined by the Department of Labor. Going forward, the FTC will publish the annually adjusted fee schedule no later than January 31st of each year, beginning in January 2024.

CLAYTON ACT SECTION 8 THRESHOLDS

In addition to revising the HSR thresholds and filing fees, the FTC also updated the thresholds applicable to Section 8 of the Clayton Act, which prohibits any person from acting as an officer or director of two competing corporations if each corporation has capital, surplus, or profits in excess of $45,257,000 (previously $41,034,000). However, corporations are exempt from this prohibition if either corporation has "competitive sales" below $4,525,700 (previously $4,103,400). "Competitive sales," as used in Section 8, means "gross revenue for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year." Section 8 also has *de minimis* exemptions where the competitive sales of either corporation are less than 2% of one corporation's total sales, or the competitive sales of each corporation are less than 4% of each corporation's total sales.

The revisions to Section 8 are particularly relevant as the Department of Justice ("DOJ") continues its "efforts to reinvigorate enforcement and deter violations of Section 8 of the Clayton Act."[4] In October 2022, the DOJ announced that seven directors had resigned from the boards of five corporations following concerns from the DOJ about potential violations of Section 8 (previous client alert can be found here).

[4] Press Release, Dep't of Justice, *Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates* (Oct. 19, 2022), available at https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially

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