

U.S. FEDERAL TRADE COMMISSION ANNOUNCES ANNUAL ADJUSTMENTS TO THE HSR THRESHOLDS AND INTERLOCKING DIRECTORATE THRESHOLDS

On January 22, 2024, 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 preclosing notifications ("**HSR filings**") to the U.S. antitrust authorities and abide by a mandatory waiting period. The FTC also announced its annual revision to the HSR filing fees and filing fee thresholds.

The new jurisdictional thresholds under the HSR Act take effect 30-days after they are published in the Federal Register which occurred on February 5, 2024. As a result:

- The new filing fee thresholds apply to filings made on or after March 6, 2024; and
- The jurisdictional thresholds will apply to any transaction closing on or after March 6, 2024.

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 "size-of-transaction test")¹ and the parties are a particular size based on sales or

¹ 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. The nuance means that, in some instances, the parties must aggregate the voting securities, non-corporate interests, or assets of the acquired person already held from previous transactions with the value of voting securities, non-corporate interests, or assets in the current transaction.

assets (the "size-of-person test"²); 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:

	2023 Thresholds	Revised Thresholds for 2024
Size of Transaction Test	\$111.4 million	\$119.5 million
Size of Person Test	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	Party 1 – annual net sales or total assets at or above \$23.9 million; and Party 2 – annual net sales or total assets at or above \$239.0 million
Size of Transaction Threshold at which the Size of Person Test is inapplicable	\$445.5 million	\$478.0 million

HSR FILING FEE THRESHOLDS AND FEES

In addition to the size-of-transaction test and size-of-person test thresholds, the FTC announced the annual adjustments to the HSR filing fees and the filing fee thresholds which are adjusted by a percentage equal to changes in the consumer price index as mandated by the 2023 Consolidated Appropriations Act. The new filing fee thresholds and fee schedule, are as follows:

2024 Filing Fees	2024 Size of Transaction
\$30,000	Less than \$173.3 million
\$105,000	Not less than \$173.3 million but less than \$536.5 million
\$260,000	Not less than \$536.5 million but less than \$1.073 billion
\$415,000	Not less than \$1.073 billion but less than \$2.146 billion
\$830,000	Not less than \$2.146 billion but less than \$5.365 billion
\$2,335,000	\$5.365 billion or more

HSR CIVIL PENALTIES

On January 11, 2024, the FTC announced that the maximum civil penalties for violations of the HSR Act, which are assessed per day for each violation, were

² 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 \$23.9 million in annual net sales or total assets and the UPE of the other party has at least \$239.0 million in annual net sales or total assets. If the UPE of the acquiring person satisfies the higher \$239.0 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 \$23.9 million in total assets or at least \$239.0 million in annual net sales.

increasing to \$51,744 from \$50,120. This change became effective upon publication in the Federal Register on January 10, 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 ("Section 8"). Section 8 generally 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 \$48,559,000 (previously \$45,257,000). Corporations are exempt from this prohibition if either corporation has "competitive sales" below \$4,855,900 (previously \$4,525,700). "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, which took effect immediately upon publication on January 22, 2024, are particularly relevant as the antitrust agencies continue to pursue violations of Section 8.

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