

Client Alert: FTC Announces Increased Reporting Thresholds

Publications

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On January 23, 2023, the Federal Trade Commission (FTC) announced increased reporting thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the Act). The new thresholds will go into effect on February 27, 2023, and will apply to all transactions closing on or after that date.

The Act requires parties to report transactions for the purchase or sale of voting securities, non-corporate interests, and/or assets to submit premerger notification filings to the FTC and the Antitrust Division of the US Department of Justice. Upon filing an HSR notification, the parties then must observe a 30-day waiting period prior to finalizing the transaction, which may shorten if “early termination” is granted or extend if the government requests additional information.

In general, filing an HSR premerger notification is required when the value of the transaction reaches a certain threshold (the “Size-of-Transaction” test) and the parties are of sufficient size (the “Size-of-Person” test), and no statutory exemption is applicable. Under the Act, the FTC is required to update the jurisdictional thresholds annually, based on the change in gross national product.

Revised Thresholds

- Transactions valued up to and including \$111.4 million are not reportable.
- Transactions valued at more than \$111.4 million but less than \$445.5 million are reportable if they meet the “Size-of-Person” test.
 - Generally, the Size-of-Person test is met when:
 - The larger party to the transaction has total assets or annual net sales of \$222.7 million or more; and
 - The smaller party has total assets or annual net sales of \$22.3 million or more.

- There are nuances to the Size-of-Person test that must be considered for each transaction. For example, if the smaller party is the acquired person and does not engage in manufacturing, the test is met only if that person has total assets of \$22.3 million or more, or annual net sales of \$222.7 million or more.
- Transactions valued at more than \$445.5 million are reportable, regardless of the size of the parties (unless an exemption applies).

Test	2022 Threshold (\$USD)	Revised 2023 Threshold (\$USD) [Effective 2/27/2023]
<p>Size-of-Transaction Test</p> <p><i>Minimum transaction value that triggers reporting obligation, when Size-of-Person Test is also met (and no exemption applies)</i></p>	<p>> \$101 million</p>	<p>> \$111.4 million</p>
<p>Size-of-Person Test</p> <p><i>To satisfy the Size-of-Person test, one party to the transaction must meet the “larger” test and the other must meet the “smaller” test.</i></p>	<p>One party has at least \$202 million in assets or annual net sales (the larger test)</p> <p>AND</p> <p>The other party has at least \$20.2 million in assets or annuaed in manufacturing, has at least \$20.2 million in assets or \$202 million in annual net sales (the smaller test)</p>	<p>One party has at least \$222.7 million in assets or annual net sales (the larger test)</p> <p>AND</p> <p>The other party has at least \$22.3 million in assets or annual net sales; or, if the acquired party engaged in manufacturing has at least \$22.3 million in assets <i>or</i> \$222.7 million in annual net sales (the smaller test)</p>
<p>Size-of-Transaction Threshold at Which Size-of-Person Test Does Not Apply</p>	<p>> \$403.9 million</p>	<p>> \$445.5 million</p>

Filing Fees

The HSR filing fee amounts have changed for the first time in over a decade. The 2023 Consolidated Appropriations Act (the Act) requires the FTC to revise the HSR filing fee thresholds on an annual basis moving forward by an amount equal to the percentage increase, if any, in the consumer price index, as determined by the Department of Labor. The FTC will publish new filing fees no later than January 31 of each year.

New Size of Transaction under the Act (As adjusted by the Act) (\$USD)	New Filing Fee under the Act (As adjusted by the Act) (\$USD)
Less than \$161.5 million	\$30,000
Not less than \$161.5 million but less than \$500 million	\$100,000
Not less than \$500 million but less than \$1 billion	\$250,000
Not less than \$1 billion but less than \$2 billion	\$400,000
Not less than \$2 billion but less than \$5 billion	\$800,000
Not less than \$5 billion or more	\$2,250,000

Revised Civil Penalty.

On January 11, 2023, the maximum civil penalty amount for violations of the HSR Act increased from \$46,517 to \$50,120 (\$USD) per day.

Main Takeaway.

HSR notification filings involve complex rules regarding valuation and exemptions that change regularly, and noncompliance with the Act carries serious penalties. Parties should seek counsel specialized in HSR filings as early in the process as possible, to determine whether a transaction is reportable and to assess regulatory risk.

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Related Capabilities

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