

Alert | Antitrust Litigation & Competition Regulation



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Revised Jurisdictional Thresholds Under HSR Act and for Prohibition of Interlocking Directorates

On Jan. 23, 2023, the Federal Trade Commission (FTC) **approved** publication of two separate notices in the Federal Register, one which revises the premerger notification thresholds for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act), and a second which, for the first time in over two decades, pursuant to the Merger Filing Fee Modernization Act of 2022 (“Fee Modernization Act”) as a part of the 2023 Consolidated Appropriations Act, updates filing fees. Congress first amended the HSR Act in 2000 to require the annual adjustment of notification thresholds based on the change in gross national product (GNP).

The Fee Modernization Act replaced the prior three-tier filing fee system with corresponding size of transaction thresholds with a six-tier filing fee system based on transaction value. As was the case with the prior filing fee tiers, the new tiers set forth below will also be adjusted annually based on a change in GNP. The first such adjustment will occur in early 2024, as that adjustment will reflect the percentage change in GNP between the fiscal year ended Sept. 30, 2023, and Sept. 30, 2022.

The fees themselves also will be increased, based on the consumer price index (CPI), if the percentage increase in the CPI for the prior year as compared to the CPI for the fiscal year ended on Sept. 30, 2022, is greater than 1%. Adjusted amounts will be published no later than January 31 of each year, beginning in January 2024.

The FTC also published revisions to the thresholds that trigger, under Section 8 of the Clayton Act, a prohibition preventing companies from having interlocking memberships on their corporate boards of directors. These revisions represent the annual adjustment of thresholds based upon changes in the GNP.

Revised HSR Act Thresholds

The initial threshold for a notification under the HSR Act will increase from \$101 million to **\$111.4 million**. For transactions valued between \$111.4 million and \$445.5 million (increased from \$403.9 million), the size of the person test will continue to apply. That test will make the transaction reportable only where one party has sales or assets of at least \$222.7 million (increased from \$202 million), and the other party has sales or assets of at least \$22.3 million (increased from \$20.2 million). All transactions valued in excess of \$445.5 million are reportable without regard to the size of the parties.

The new thresholds will apply to any transaction that will close on or after Feb. 23, 2023.

The following is a summary chart of the threshold adjustments:

PRIOR THRESHOLD	REVISED THRESHOLD
Size of the transaction test	
in excess of \$101 million	in excess of \$111.4 million
Size of the person test	
\$20.2 million/\$202 million	\$22.3 million/\$222.7 million
Transaction value above which size of the person test is inapplicable	
\$403.9 million	\$445.5 million

The amendments will adjust all notification thresholds as follows:

NOTIFICATION LEVELS	
in excess of \$50 million	in excess of \$111.4 million
\$100 million	\$222.7 million
\$500 million	\$1,113.7 million
25% of total outstanding shares worth more than \$1 billion	25% of total outstanding shares worth more than \$2,227.4 million
50% of total outstanding shares worth more than \$50 million	50% of total outstanding shares worth more than \$111.4 million

These notification threshold adjustments also adjust upward thresholds applicable to certain exemptions, such as those involving the acquisition of foreign assets or voting securities of foreign issuers.

Revised HSR Filing Fee Thresholds

Below is the new filing fee schedule, which will also **apply to any transaction that will close on or after Feb. 23, 2023.**

NEW FILING FEE LEVELS	
Size of Transaction*	Fee**
in excess of \$111.4 but less than \$161.5 million	\$30,000
\$161.5 million or greater but less than \$500 million	\$100,000
\$500 million or greater but less than \$1 billion	\$250,000
\$1 billion or greater but less than \$2 billion	\$400,000
\$2 billion or greater but less than \$5 billion	\$800,000
\$5 billion or greater	\$2,250,000

* To be adjusted annually based on GNP

** *To be adjusted annually based on the consumer price index (CPI), if the percentage increase in the CPI for the prior year as compared to the CPI for the fiscal year ended on Sept. 30, 2022, is greater than 1%.*

Revised Section 8 Thresholds

The FTC also published revisions to the thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors under Section 8 of the Clayton Act. **These revised thresholds are effective as of Jan. 24, 2023.**

Section 8 prohibits a “person,” which can include a corporation and its representatives, from serving as a director or officer of two “competing” corporations, unless one of the following exemptions applies:

- either corporation has capital, surplus, and undivided profits of less than \$45,257,000 (increased from \$41,034,000);
- the competitive sales of either corporation are less than \$4,525,700 (increased from \$4,103,400);
- the competitive sales of either corporation amount to less than 2% of that corporation’s total sales; or
- the competitive sales of each corporation amount to less than 4% of each corporation’s total sales.

“Competitive sales” means “the gross revenues 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.” “Total sales” means “the gross revenues for all products and services sold by one corporation over that corporation’s last completed fiscal year.”

Authors

This GT Alert was prepared by:

- **Andrew G. Berg** | +1 202.331.3181 | berga@gtlaw.com
- **Stephen M. Pepper** | +1 212.801.6734 | peppers@gtlaw.com

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