

FTC Announces Increases to HSR Act, Clayton Act Section 8 Thresholds, and Significant Increases in HSR Filing Fees for Largest Transactions

January 26, 2023

The Federal Trade Commission (the “FTC”) has announced its annual revisions to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”) premerger notification thresholds, the Clayton Act Section 8 thresholds for interlocking directorates and the maximum civil penalty for violations of the HSR Act. These figures are revised annually based on changes in the gross national product.

The FTC has also announced new filing fees based on the size of the transaction, which include significantly higher fees for large transactions. Congress had adopted these new filing fees with the passage of the Merger Filing Fee Modernization Act of 2022 (part of the Consolidated Appropriations Act, 2023, which President Biden signed on December 29, 2022). With the FTC’s announcement, the filing fees are expected to come into effect on February 27, 2023.

UPDATED HSR ACT PREMERGER NOTIFICATION THRESHOLDS

On January 23, 2023, the FTC announced the revised HSR premerger notification thresholds, which govern whether a proposed merger or acquisition must be reported to the antitrust agencies prior to its consummation. These thresholds are expected to come into effect on February 27, 2023 and apply to transactions closing on or after that date.

The base size-of-transaction threshold will increase from US\$101.0 million to **US\$111.4 million**. Acquisitions resulting in total holdings below this threshold will not be reportable. Transactions resulting in the acquirer holding voting securities, controlling interests in noncorporate entities or assets valued above the US\$111.4 million threshold may be reportable in either of the two following circumstances:

- The transaction will result in total holdings between US\$111.4 million and **US\$445.5 million** (formerly US\$403.9 million) and the size-of-persons test is met, which occurs when either the acquiring or acquired person has **at least US\$222.7 million** (formerly US\$202.0 million) in gross assets or annual net sales and the other person

has at least **US\$22.3 million** (formerly US\$20.2 million) in gross assets or annual net sales;

or

- The transaction will result in total holdings above **US\$445.5 million** (formerly US\$403.9 million), as in this case the size-of-persons test does not apply.

Under the HSR Act, an acquiring person that makes incremental acquisitions of voting securities of a particular issuer may be required to file a notification each time its holdings cross one of these thresholds.¹ The HSR Act creates five notification thresholds, which have also been increased: **US\$111.4 million** (formerly US\$101.0 million), **US\$222.7 million** (formerly US\$202.0 million), **US\$1,113.7 million** (formerly US\$1,009.8 million), 25% of voting securities if greater than **US\$2,227.4 million** (formerly US\$2,019.6 million), and 50% of voting securities.

To summarize:

Threshold	2022 Threshold (in USD)	2023 Threshold (in USD)
Size-of-Transaction	\$101.0 million	\$111.4 million
Size-of-Persons	\$20.2 million and \$202.0 million	\$22.3 million and \$222.7 million
Value at Which Size-of-Persons Does Not Apply	\$403.9 million	\$ 445.5 million
Incremental Voting Securities Acquisition Notification Thresholds	\$101.0 million \$202.0 million \$1,009.8 million 25% if > \$2,019.6 million 50%	\$111.4 million \$222.7 million \$1,113.7 million 25% if > \$2,227.4 million 50%

Even if a transaction appears reportable based on the thresholds above, it may qualify for an HSR Act exemption. Assessment of HSR reportability is complex and requires a thorough understanding of the statute and implementing regulations. We recommend consulting with a lawyer experienced in HSR matters to determine whether your transaction is reportable.

¹ This alert updates our [prior client alert](#) from January 5, 2023, which previewed these proposed increases as outlined in the Merger Filing Fee Modernization Act. Now that the FTC has officially noticed the changes, the new filings fees are expected to come into effect on February 25, 2023.

UPDATED HSR ACT PREMERGER FILING FEES

Parties that are required to file a premerger notification form under the HSR Act will also face significantly higher filing fees for large transactions. These new filings fees are expected to come into effect on February 27, 2023. The Consolidated Appropriations Act, 2023, which President Biden signed into law at the end of last year, tasked the FTC with implementing substantial changes to the HSR filing fee schedule. The update included creation of a six-tier structure for HSR filing fees ranging from \$30,000 to \$2,250,000, replacing the existing three-tier system. The change will also result in reduced filing fees for the lowest value transactions (down to \$30,000 from the previous \$45,000). However, larger transactions will see significant increases as outlined in the existing and amended filing fee tables below.

PRIOR HSR ACT FILING FEE SCHEDULE

Transaction Valued at:	Prior Filing Fee
>\$101.0 million but <\$202.0 million	\$45,000
\$202 million or more but <\$1,009.8 million	\$125,000
\$1,009.8 million or more	\$280,000

NEW HSR ACT FEE SCHEDULE (EXPECTED TO COME INTO EFFECT ON FEBRUARY 27, 2023)

Transaction Valued at:	New Filing Fee
>\$101.0 million but <\$161.5 million	\$30,000
\$161.5 million or more but <\$500 million	\$100,000
\$500 million or more but <\$1 billion	\$250,000
\$1 billion or more but <\$2 billion	\$400,000
\$2 billion or more but <\$5 billion	\$800,000
\$5 billion or more	\$2,250,000

Under this revised structure, the HSR filing fees will also be adjusted annually based on the percentage increase, if any, in the Consumer Price Index.

UPDATED CLAYTON ACT SECTION 8 THRESHOLDS FOR INTERLOCKING DIRECTORATES

On January 20, 2023, the FTC announced revisions to the Clayton Act Section 8 thresholds, which became effective on that date. Section 8 prohibits, with certain

exceptions, a person from serving as a director or officer of two competing corporations. Section 8 may apply if each competitor corporation has capital, surplus and undivided profits of more than **US\$45,257,000** (formerly US\$41,034,000). One exemption from this prohibition applies if the “competitive sales” of either corporation are less than **US\$4,525,700** (formerly US\$4,103,400), while other exemptions are based on percentages of a corporation’s total sales. Because the application of the “competitive sales” concept and other aspects of Section 8 can be complex, we recommend consulting with a lawyer experienced in Section 8 matters to determine if the prohibition applies.

UPDATED MAXIMUM CIVIL PENALTY AMOUNT FOR HSR VIOLATIONS

On January 11, 2023, the FTC announced that the maximum civil penalty for violations of the HSR Act has increased from US\$46,517 to **US\$50,120** per day. This increase applies to civil penalties assessed after January 11, 2023, even if the underlying violation preceded the effective date.

HOW DEBEVOISE CAN HELP

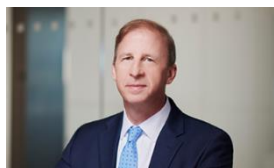
Debevoise lawyers are well-versed in the HSR Act and its reporting requirements. We are available to advise parties regarding the applicability of their transactions, as well as guide clients through the reporting process and any government investigation and/or litigation that may follow the HSR filing. We are also available to assist in evaluating the application of Clayton Act Section 8.

* * *

Please do not hesitate to contact us with any questions.

We would like to thank associate Brian Desmarais for his contribution to this Debevoise Update.

WASHINGTON, D.C.



Ted Hassi
thassi@debevoise.com



Leah Martin
lmartin@debevoise.com

NEW YORK



Michael Schaper
mschaper@debevoise.com



Erica S. Weisgerber
eweisgerber@debevoise.com



Kyra K. Bromley
kkbromley@debevoise.com