

FTC Announces New Higher HSR Filing and Interlocking Directorate Thresholds, Higher Civil Penalties

January 25, 2022

Antitrust/Competition

Yesterday, the Federal Trade Commission (“FTC”) [published revised thresholds](#) for the Hart-Scott-Rodino (“HSR”) Act, which will take effect on February 23, 2022. Earlier, the FTC also announced [new thresholds for Section 8 of the Clayton Act](#), which governs interlocking directorates. Each of these thresholds is **higher** for 2022, than for 2021. The HSR Act and Section 8 thresholds are adjusted annually based on the change in gross national product. The [maximum daily civil penalty](#) for violations of the HSR Act, which is tied to inflation, has also increased.

HSR Act Thresholds

The HSR Act requires parties to certain mergers and acquisitions to notify the FTC and Antitrust division of the U.S. Department of Justice (“DOJ”) and observe a waiting period (usually 30 days) prior to consummating a reportable transaction. The jurisdictional thresholds are adjusted annually. Beginning February 23, 2022, acquisitions resulting in aggregate holdings of voting securities, assets, or controlling interests in non-corporate entities valued at more than **\$101 million** may be reportable (“size of transaction”).

For transactions that result in aggregate holdings valued at **more than \$101 million, but less than \$403.9 million**, the parties will also need to meet the “size of person” test for the Act to apply. This test will require one “person” to have annual net sales or total assets of at least **\$202 million** and the other “person” to have at least **\$20.2 million** in annual net sales or total assets. However, if the “acquired person” is *not* “engaged in manufacturing,” the smaller size of person test will only be met if it has assets valued at more than \$20.2 million.

The notification thresholds, which are used to determine whether a new filing is required for the acquisition of additional voting securities within five years of the expiration or early termination of a prior filing, will also increase, as shown below.

Threshold Type	Original Base	2021 Thresholds	2022 Thresholds (Effective February 23, 2022)
Minimum size of transaction threshold	\$50.0 million	\$92.0 million	\$101.0 million
Size of transaction under which the size of parties is relevant	\$200.0 million	\$368.0 million	\$403.9 million
Smaller size of person test	\$10.0 million	\$18.4 million	\$20.2 million
Larger size of person test	\$100.0 million	\$184.0 million	\$202.0 million
Threshold for certain transactions involving foreign issuers or assets	\$110.0 million	\$202.4 million	\$222.2 million
Notification threshold	\$50.0 million	\$92.0 million	\$101.0 million
Notification threshold	\$100.0 million	\$184.0 million	\$202.0 million
Notification threshold	\$500.0 million	\$919.9 million	\$1.0098 billion
Notification threshold	25%, if HSR value is at least \$1.0 billion	25%, if HSR value is at least \$1.8398 billion	25%, if HSR value is at least \$2.0196 billion
Notification threshold	50%, if HSR value is over \$50.0 million	50%, if HSR value is over \$92.0 million	50%, if HSR value is over \$101.0 million

The HSR filing fees will not be adjusted; however, the valuation thresholds that are used to determine the filing fee that applies to a specific acquisition will each be increased. Legislation to change the HSR filing fees has been proposed but, as of this writing, has not yet been passed.

Filing Fee	Value of Transaction
\$45,000	More than \$101 million but less than \$202 million
\$125,000	\$202 million to less than \$1.0098 billion
\$280,000	\$1.0098 billion or more

Section 8 Thresholds (“Interlocking Directorates”)

With certain exceptions, Section 8 of the Clayton Act prohibits one person from serving as a director or officer of two competing corporations at the same time, if each competitor corporation has capital, surplus and undivided profits above an annually adjusted threshold. Effective January 24, 2022, this threshold is **\$41,034,000**.

However, this prohibition does not apply if:

- the “competitive sales” (as defined by the statute) of *either* corporation are less than 2 per centum of that corporation’s total sales;
- the “competitive sales” of *each* corporation are less than 4 per centum of that corporation’s total sales; or
- the “competitive sales” of *either* corporation are less than an annually adjusted threshold. Effective January 24, 2022, this threshold is **\$4,103,400**.

Civil Penalties

Finally, the FTC has announced [the maximum daily civil penalty amount for HSR violations](#). The amount increased from \$43,792 **to \$46,517 per day of the violation**. The new maximum applies to civil penalties assessed on or after January 10, 2022, regardless of when the underlying violation occurred.

How Covington Can Help

Application of Section 8 of the Clayton Act and the HSR Act and its implementing rules can be complex. Our antitrust practice group includes attorneys, including several who served at the Federal Trade Commission or the Antitrust Division of the U.S. Department of Justice, with decades of experience in advising on HSR matters. Our team can provide detailed and practical insight into how these rules apply to various types of entities and transactions.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our [Antitrust/Competition](#) practice:

<u>James Dean</u>	+1 202 662 5651	idean@cov.com
<u>Ross Demain</u>	+1 202 662 5994	rdemain@cov.com
<u>James O'Connell</u>	+1 202 662 5991	joconnell@cov.com
<u>Stacy Kobrick</u>	+1 202 662 5675	skobrick@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2022 Covington & Burling LLP. All rights reserved.