

Increase in HSR Reportability Thresholds and Filing Fees, and Other HSR Developments

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In January 2025, the Federal Trade Commission (FTC) made three important announcements for M&A practitioners.

- First, on January 10, 2025, the FTC announced the annual adjustment of the thresholds that trigger premerger reporting obligations under the HSR Act, as well as the schedule of filing fees and filing fee thresholds. The new thresholds and the new schedule will apply to transactions closing thirty days after publication of the announcement in the Federal Register (expected to be in mid-February 2025).
- Second, the FTC announced the annual adjustment for maximum daily civil penalties for noncompliance with the HSR Act's requirements (failure to file, failure to observe the mandatory waiting period, or failure to make a complete filing).
- Third, the FTC announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors. These new thresholds take effect immediately upon publication in the Federal Register. Both these and the HSR Act thresholds will remain in effect until the 2025 adjustments.

These announcements come alongside the impending overhaul of the Hart-Scott-Rodino (HSR) Act filing process scheduled to take effect on February 10, 2025—subject to potential delay based on President Trump's January 20, 2025 executive order. That order directed federal departments and agencies to "consider postponing for 60 days from the date of this memorandum the effective date for any rules that have been published in the Federal Register ... that ... have not taken effect." The adjustment for civil penalties became effective on publication, but some of the remaining effective dates may be affected by the executive order.

This eUpdate summarizes the HSR Act's requirements and reports on relevant developments in the last year.

Background

The HSR Act requires parties to notify the FTC and U.S. Department of Justice (DOJ) before closing on an acquisition of voting securities, assets, or non-corporate interests

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where the value exceeds certain dollar-based size thresholds. If the transaction is reportable, the parties must observe a mandatory waiting period (30 days for most transactions). The waiting period allows the agencies to review the proposed transaction and determine whether the transaction raises antitrust issues that require further investigation. Either agency can investigate, although only one agency will do so. If the investigation is not completed during the initial waiting period, then the waiting period may be extended. Ultimately, the investigating agency must decide whether to challenge the transaction (or, potentially, reach a compromise that addresses the agency's antitrust concerns but permits the parties to proceed with their transaction).

Basic Size Tests

The HSR Act's dollar-based thresholds (including the size thresholds that trigger the reporting obligation) are adjusted each year to reflect annual percentage changes in Gross National Product. The most significant effect of the annual indexing is on the "size of transaction"^[1] and "size of persons"^[2] tests. Here are the new thresholds:

- Transactions resulting in holdings valued at or below \$126.4 million in voting securities and/or assets of the seller are *not* reportable (subject to the rules on aggregation).
- Transactions resulting in holdings valued at more than \$505.8 million are reportable (unless exempted) *regardless* of the size of persons.
- Transactions resulting in holdings valued at more than \$126.5 million but less than \$505.8 million are reportable (unless exempted) *if* the "size of persons" test is satisfied.
 - A person with \$252.9 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$25.3 million in total assets or annual net sales; or
 - A person with \$252.9 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$25.3 million in total assets; or
 - A person with \$25.3 million in total assets or annual net sales acquires (or acquires from) a person with \$252.9 million in total assets or annual net sales.

Notification Thresholds

In addition to these basic tests, the HSR Act provides five separate "notification thresholds" that are also adjusted each year to reflect annual percentage increases or decreases in GNP. If an acquisition would cause an acquiring person to cross a new threshold, the parties must file HSR notifications before closing their transaction. After indexing, the notification thresholds will be:

- An aggregate total amount of voting securities of the acquired person valued at greater than \$126.4 million but less than \$252.9 million;
- An aggregate total amount of voting securities of the acquired person valued at \$252.9 million or greater but less than \$1.264 billion;
- An aggregate total amount of voting securities of the acquired person valued at \$1.264 billion or greater;
- Twenty-five percent of the outstanding voting securities of an issuer (if valued at greater than \$2.529 billion); or

- Fifty percent of the outstanding voting securities of an issuer (if valued at greater than \$126.5 million).

Exemptions

The increases also affect some of the exemptions from reporting requirements. For example, the “foreign assets” exemption (16 C.F.R. § 802.50) exempts the acquisition of assets located outside the United States “unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million (*as adjusted*) during the acquired person's most recent fiscal year” (emphasis added). With the most recent adjustment, this exemption applies unless the assets generated sales in or into the U.S. of more than \$126.4 million.

Filing Fees

This year, the HSR filing fees are increasing as required by the Merger Filing Fee Modernization Act of 2022. There will now be an annual adjustment to track inflation based on changes to the Consumer Price Index as determined by the Department of Labor. The new fee schedule will be as follows:

Transaction Value	Old Fee	New Fee
More than \$126.4 million but less than \$179.4 million	\$30,000	\$30,000
\$179.4 million or more but less than \$555.5 million	\$105,000	\$105,000
\$555.5 million or more but less than \$1.111 billion	\$260,000	\$265,000
\$1.111 billion or more but less than \$2.222 billion	\$415,000	\$425,000
\$2.222 billion or more but less than \$5.555 billion	\$830,000	\$850,000
\$5.555 billion or more	\$2.335 million	\$2.39 million

New HSR filing process

On November 12, 2024, the final FTC rule approving changes to the information that parties must provide with their HSR notifications was published in the Federal Register. The effective date for the new HSR filing form and rule is February 10, 2025. All filings submitted on or after that date must conform with the new requirements, which include the submission of new narrative statements, submission of additional deal-related

documents, submission of certain ordinary-course documents with information about relevant products and markets, disclosure of additional revenue detail, disclosure of certain foreign subsidies and pending or active defense or intelligence contracts, and more. The new rule also includes restoration of the "early termination" process, which can result in shortening of the 30-day waiting period.

On January 10, 2025, the U.S. Chamber of Commerce and other prominent business organizations filed a lawsuit against the FTC in Texas federal court challenging the new rule. The new rule will still go into effect February 10, 2025 unless the court enjoins it. For more detail on the new form and filing process, please see [our previous eUpdate](#).

Civil Penalties for HSR Violations

Parties who close a reportable transaction without filing complete notifications (including all documents required to be included under Items 4(c) and 4(d) of the notification form) and observing the waiting period are subject to civil penalties. As of January 17, 2025, the maximum daily penalty increased to \$53,088.

On January 7, 2025, the FTC announced a record \$5.68 million gun-jumping penalty against Verdun Oil Company II LLC, XCL Resources Holdings, LLC, and EP Energy LLC. The DOJ filed a complaint and proposed stipulated order stating that Verdun and XCL exercised unlawful, premature control of EP while acquiring EP in a \$1.4 billion transaction in 2021.^[3] The complaint alleges that Verdun and XCL exercised various consent rights under the merger agreement and coordinated sales and strategic planning with EP starting immediately after signing of the parties' definitive agreement and for a 94-day period before closing of the transaction. The civil penalty settlement provides for the largest penalty ever imposed for a gun-jumping violation under the HSR Act.

On January 14, 2025, the DOJ sued KKR & Co. Inc. and certain related investment advisors and funds, alleging repeated and systematic violations of the HSR Act on at least 16 separate transactions between 2021 and 2022.^[4] Specifically, the complaint alleges that KKR failed to submit an HSR notification at all for two transactions in which notification was required, failed to include required business documents related to competition in several transactions that were notified, failed to correct a deficient filing to include documents that its outside counsel had in their possession, and knowingly altered or omitted documents to evade merger scrutiny, even after KKR became aware of the DOJ investigation into its HSR Act compliance. The complaint alleges 16 counts of violating the HSR Act (one for each transaction). The maximum civil penalty for the alleged violations exceeds \$650 million. In addition to civil penalties, the DOJ seeks structural relief and imposition of additional compliance measures at KKR. On January 14, 2025, KKR filed a counterclaim seeking a declaratory judgment that the DOJ and FTC's interpretations of the HSR Act are unconstitutionally vague and that the penalties sought are excessive in violation of the Fifth and Eighth Amendments to the U.S. Constitution.

Other HSR Enforcement Actions

A recent Canadian decision warrants a brief comment. In May 2024, two lawsuits filed in the Cour Supérieure, Province de Québec, District de Montréal—both challenging a change-of-control director slate appointed by activist investor Browning West LP to Gildan Activewear Inc.’s board—were dismissed. One of the suits alleged that the investor had violated the HSR Act when it purchased a 5% share of Gildan’s voting securities. Browning West defended on the grounds that an exemption applied and also that there is no private right of action to enforce the HSR Act. The court’s decision is in French,^[5] but the key point is this: the court determined that only the U.S. Department of Justice can enforce the HSR Act.

Interlocking Directorates – Increased Thresholds and Other Issues

On January 10, 2025, the FTC announced the updated thresholds for the Clayton Act Section 8’s prohibition on interlocking directorates. The Clayton Act prohibits one person from serving as an officer or director of two competing companies when each company has capital, surplus, and undivided profits of more than \$51,380,000 for Section 8(a)(1) and competitive sales of more than \$5,138,000 for Section 8(a)(2)(A).

DOJ continued challenging interlocking directorates in 2024. In December 2024, DOJ announced that two directors from Epic Games Inc. who had been appointed by Tencent Holdings Ltd. had resigned after DOJ raised concerns arising from the fact that Tencent also is the parent company of Riot Games Inc.^[6]

This was the latest announcement in the DOJ’s enforcement initiative focused on interlocking directorates, which the DOJ first publicly announced in 2022. Through that initiative, DOJ now claims to have prevented interlocks or secured resignations of directors from more than two dozen boards of directors.

On January 10, 2025, the DOJ and FTC filed a joint statement of interest in *Musk v. Altman* regarding Elon Musk’s claim that OpenAI and Microsoft had interlocking boards of directors.^[7] Musk’s complaint includes allegations that OpenAI and Microsoft “had interlocking boards” in violation of Section 8 of the Clayton Act. Mr. Musk alleges that two individuals, Reid Hoffman and Deannah Templeton, illegally served on both OpenAI and Microsoft’s boards. Musk is seeking a preliminary injunction that would prevent the defendants from “directly or indirectly undertaking any action for the purpose of or tending to have the effect of, interlocking directorates or benefitting from wrongfully obtained competitively sensitive information or coordination via the Microsoft-OpenAI board interlocks.” The DOJ/FTC statement of interest focuses on three arguments. First, the exchange of competitively sensitive information might prevent a case from becoming moot even after a director resigns. Second, even an informal “observer” on a board may be considered a “director” for purposes of the statute. Third, Section 5 of the FTC Act fills in any gaps that Section 8 of the Clayton Act left open, and the interlock of two limited liability companies or other legal entities could be a violation of Section 5 of the FTC Act even though Section 8 of the Clayton Act specifically refers only to corporations.

[1] The test includes the value of all of the voting securities (and certain assets) of the acquired person that the acquiring person will hold after the transaction is completed, including voting securities of the acquired person that the acquiring person owned *before* the transaction.

[2] “Person” means the ultimate parent of the legal party to a transaction (including all entities controlled by the ultimate parent).

[3] Oil Companies to Pay Record FTC Gun-Jumping Fine for Antitrust Law Violation | Federal Trade Commission (January 7, 2025).

[4] Office of Public Affairs | Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law | United States Department of Justice (January 14, 2025).

[5] Décision (May 16, 2024).

[6] Office of Public Affairs | Tencent Removes Two Directors from Epic Games and Relinquishes Its Right to Unilaterally Appoint Directors or Observers in Response to Justice Department Scrutiny | United States Department of Justice (December 18, 2024).

[7] Statement of Interest (January 10, 2025).