

Increase in HSR Reportability Thresholds and Other HSR Developments

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In January 2022, the Federal Trade Commission (FTC) made two important announcements for M&A practitioners. First, on January 24, the FTC announced the annual adjustment of the thresholds that trigger premerger reporting obligations under the Hart-Scott-Rodino (HSR) Act. The new thresholds will apply to transactions closing after February 23, 2022. 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). This article summarizes the HSR Act's requirements and reports on several relevant developments in 2021.

On January 24, the FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors. These new thresholds became effective immediately on publication in the Federal Register. Both these and the HSR Act thresholds will remain in effect until the 2023 adjustments.

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 where the value exceeds certain dollar-based size thresholds. If the transaction is reportable, the parties must observe a mandatory waiting period (typically 30 days). 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).

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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 increases or decreases 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:

- Transactions resulting in holdings valued at or below \$101 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 \$403.9 million are reportable (unless exempted) *regardless* of the size of persons.
- Transactions resulting in holdings valued at more than \$101 million but less than \$403.9 million are reportable (unless exempted) *if* the "size of persons" test is satisfied.
 - A person with \$202 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$20.2 million in total assets or annual net sales; or
 - A person with \$202 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$20.2 million in total assets; or
 - A person with \$20.2 million in total assets or annual net sales acquires (or acquires from) a person with \$202 million in total assets or annual net sales.

Notification Thresholds

In addition to these basic tests, the HSR Act provides five separate "notification thresholds." 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 \$101 million but less than \$202 million;
- An aggregate total amount of voting securities of the acquired person valued at \$202 million or greater but less than \$1.0098 billion;
- An aggregate total amount of voting securities of the acquired person valued at \$1.0098 billion or greater; twenty-five percent of the outstanding voting securities of an issuer (if valued at greater than \$2.0196 billion); or fifty percent of the outstanding voting securities of an issuer (if valued at greater than \$101 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 \$101 million.

Filing Fees

The HSR filing fees have not changed, but the levels that trigger larger filing fees have increased.

- The basic filing fee remains \$45,000 and is payable on transactions valued at more than \$101 million but less than \$202 million.
- For transactions valued at more than \$202 million but less than \$1.0098 billion, the filing fee is \$125,000.
- For transactions valued at more than \$1.0098 billion, the filing fee is \$280,000.

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 6, 2022, the maximum daily penalty is \$46,517.

On December 22, 2021, the FTC announced civil penalties (totaling nearly \$2 million) that parties in two matters agreed to pay to settle charges of failing to submit notifications required under the HSR Act.

- Werner Enterprises, Inc. founder Clarence L. Werner will pay a \$486,900 civil penalty to settle allegations for failure to file. According to a complaint filed by DOJ on the FTC's behalf, over the course of more than a decade, Mr. Werner made several acquisitions of stock that should have been reported under the HSR Act, including several large open-market purchases. The complaint alleges that he also made additional reportable acquisitions *after* learning that he was in violation of the HSR Act.³
- Biglari Holdings Inc.—a restaurant chain owner and investment fund operator—will pay a \$1.4 million civil penalty to settle allegations arising from two March 26, 2020 acquisitions of Cracker Barrel Old Country Store, Inc. stock. According to a complaint filed by DOJ on the FTC's behalf, the combination of Biglari's two acquisitions of Cracker Barrel shares (coupled with its pre-acquisition holdings in Cracker Barrel) caused it to exceed the HSR filing threshold. Biglari claimed that it did not know that it had to aggregate its existing holdings when calculating the size of the transaction. As the complaint further alleged, Biglari had previously been required to pay \$850,000 in civil penalties for failure to make required HSR filings.⁴

Early Termination Still Suspended

The statutory HSR waiting period is generally 30 days (with shorter periods for cash tender offers and bankruptcy sales), but historically the FTC and DOJ were willing to grant "early termination" of the waiting period where they could easily determine that the transaction presented no competitive issues.

In February 2021, the FTC announced that because of the "unprecedented volume" of HSR filings, it would impose a "temporary suspension" of this practice of granting early termination. The FTC stated that it expected this suspension to be "brief."⁵

As of January 25, 2022 (nearly one year after the announcement), this suspension is still in effect.

The FTC's Reinstatement of Prior Approval

On October 25, 2021, the FTC announced reinstatement of its policy of including in FTC consent orders a provision requiring the acquiring person to receive prior FTC approval before closing any future transaction affecting any relevant market for which the FTC alleged a violation, for a minimum of ten years, regardless of the size of the future transaction. The FTC had eliminated a mandatory prior approval requirement in 1995. The FTC stated that it will now weigh several factors when evaluating whether a prior approval provision in a consent order should apply to future acquisitions in broader markets, such as “the nature of the transaction, the level of market concentration and degree to which the transaction increases market concentration, the degree of pre-merger market power, the parties’ history of acquisitiveness, and evidence of anticompetitive market dynamics.” The FTC may even seek a prior approval provision where the parties abandon a transaction. In announcing the reinstatement of a prior approval requirement, the FTC stated that it “will protect consumers and deter merging parties from pursuing anticompetitive deals.”⁶

The FTC's Issuance of Close-at-Your-Own-Risk Letters

In 2021, the FTC took action to address the increased number of HSR filings it was receiving. The HSR Act gives the FTC and DOJ thirty days to review a transaction. At the end of that period, the agency must issue a “second request” or let the waiting period expire. If another 30 days would allow the agency to close its inquiry (or at least narrow the scope of a second request), then an acquiring party may voluntarily withdraw its notification and re-start the 30-day clock.

On August 3, the FTC announced that where it was not able to “fully investigate within the requisite timelines,” it had begun sending “standard form letters alerting companies that the FTC’s investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful.” Whether or not the FTC sends such a “close at your own risk” letter, nothing stops the FTC from investigating a transaction that has already closed.⁷

Interlocking Directorates – Increased Thresholds and Other Issues

On January 24, 2022, the FTC also updated the 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 \$41,034,000 for Section 8(a)(1) and competitive sales of more than \$4,103,400 for Section 8(a)(2)(A). These updated thresholds are now in effect.

On June 21, 2021, DOJ announced that two senior executives from Endeavor Group Holdings Inc. had resigned their positions on the Live Nation Entertainment Inc. Board of

Directors after DOJ had “expressed concerns” that their positions on the Live Nation Board created an illegal interlocking directorate. DOJ found that the two companies compete directly in many markets to promote and sell tickets and packages associated with sports and entertainment events and that the resignations would “ensure that Endeavor and Live Nation will compete independently.”⁸

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 complete, 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 FTC Fines Clarence L. Werner, Founder of the Truckload Carrier Werner Enterprises, Inc. for Repeatedly Violating Antitrust Laws (Dec. 22, 2001).

⁴ FTC Fines Biglari Holdings Inc. for Repeatedly Violating Antitrust Laws (Dec. 22, 2021).

⁵ FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021).

⁶ FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021).

⁷ Adjusting Merger Review to Deal with the Surge in Merger Filings | Federal Trade Commission (ftc.gov) (Aug. 3, 2021).

⁸ Endeavor Executives Resign from Live Nation Board of Directors after Justice Department Expresses Antitrust Concerns (Jun. 21, 2021).