

Increase in HSR Reporting Thresholds and Filing Fees; Other HSR Developments

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In January 2024, the Federal Trade Commission (FTC) made three important announcements for M&A practitioners.

- First, on January 22, 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 thirty days after publication of the announcement in the Federal Register (that is, not earlier than February 21, 2024).
- Second, the FTC announced the annual adjustment in filing fees and filing fee thresholds for HSR notifications. The FTC's press release states that the new schedule will apply to transactions closing thirty days after publication of the fee schedule in the Federal Register (that is, not earlier than February 21, 2024).
- Third, 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).

The FTC also announced adjusted thresholds that trigger prohibitions on certain interlocking memberships on corporate boards of directors. These new thresholds are now in effect. Both these and the HSR Act thresholds will remain in effect until the 2025 adjustments.

This eUpdate summarizes the HSR Act's requirements and reports on relevant developments in 2023.

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

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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 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. Here are the new thresholds:

- Transactions resulting in holdings valued at or below \$119.5 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 \$478 million are reportable (unless exempted) *regardless* of the size of persons.
- Transactions resulting in holdings valued at more than \$119.5 million but less than \$478 million are reportable (unless exempted) *if* the "size of persons" test is satisfied.
 - A person with \$239 million in total assets or annual net sales acquires (or acquires from) a manufacturing person with \$23.9 million in total assets or annual net sales; or
 - A person with \$239 million in total assets or annual net sales acquires (or acquires from) a non-manufacturing person with \$23.9 million in total assets; or
 - A person with \$23.9 million in total assets or annual net sales acquires (or acquires from) a person with \$239 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 \$119.5 million but less than \$239 million;
- An aggregate total amount of voting securities of the acquired person valued at \$239 million or greater but less than \$1.195 billion;
- An aggregate total amount of voting securities of the acquired person valued at \$1.195 billion or greater;
- Twenty-five percent of the outstanding voting securities of an issuer (if valued at greater than \$2.39 billion); or
- Fifty percent of the outstanding voting securities of an issuer (if valued at greater than \$119.5 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 \$119.5 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 \$119.5 million but less than \$173.3 million	\$30,000	\$30,000
\$173.3 million or more but less than \$536.5 million	\$100,000	\$105,000
\$536.5 million or more but less than \$1.073 billion	\$250,000	\$260,000
\$1.073 billion or more but less than \$2.146 billion	\$400,000	\$415,000
\$2.146 billion or more but less than \$5.365 billion	\$800,000	\$830,000
\$5.365 billion or more	\$2.25 million	\$2.335 million

New Merger Guidelines

Since 1992, the FTC and DOJ have issued joint Merger Guidelines that describe the agencies’ approach in reviewing proposed transactions. On December 18, 2023, the FTC and DOJ published the 2023 Merger Guidelines. The new guidelines replace both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, and they reflect the agencies’ expanded views of merger-related injuries to competition that signal more aggressive merger control enforcement. For more detail on the new Merger Guidelines, 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 11, 2024, the maximum daily penalty increased to \$51,744.

On December 4, 2023, the FTC sued 7-Eleven, Inc. for allegedly violating a 2018 FTC consent order by acquiring a fuel outlet in St. Petersburg, Florida without providing prior notice to the FTC.^[3] 7-Eleven had agreed to the consent order as a condition for completing its \$3.3 billion acquisition of more than 1,000 retail fuel outlets with attached convenience stores from Sunoco in 2018. The consent order required 7-Eleven to provide the FTC with advance notice before acquiring any interest in certain retail fuel outlets in many local markets, including the Tampa, Florida metropolitan area (which includes St. Petersburg), for a period of ten years. The FTC's complaint alleges that 7-Eleven did not provide prior notice of its intent to acquire the St. Petersburg outlet. The complaint also alleges that 7-Eleven submitted false compliance reports following the acquisition. The FTC is seeking civil penalties for a four-year violation period starting from the date of the acquisition, for a total of more than \$77 million, as well as imposition of a monitor and additional compliance reporting obligations for up to 15 years.

Other HSR Enforcement Actions

On April 20, 2023, the FTC sued to block Louisiana Children's Medical Center (LCMC) from integrating three competing hospitals in the New Orleans area that it had recently acquired. The FTC alleged that LCMC and the acquired hospitals had violated the HSR Act by consummating the transaction without reporting it and observing the mandatory HSR waiting period.^[4] One day earlier, LCMC had sued the FTC and DOJ, seeking a declaratory judgment that the transaction was immune from HSR scrutiny under the "state action" doctrine because the Louisiana state legislature had reviewed the proposed transaction and the state Attorney General had issued a Certificate of Public Advantage following a public notice-and-comment period and a public hearing. On September 27, 2023, the United States District Court for the Eastern District of Louisiana found that the state action doctrine applied, granted the hospitals' motion for summary judgment, and dismissed the FTC's case. The FTC did not appeal the court's decision.

Interlocking Directorates – Increased Thresholds and Other Issues

On January 12, 2024, 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 \$48,559,000 for Section 8(a)(1) and competitive sales of more than \$4,855,900 for Section 8(a)(2)(A).

In August 2023, the FTC challenged Quantum Energy Partners' proposed investment of \$5.2 billion in competing natural gas producer EQT Corporation, which would include a seat on EQT's board of directors. The FTC and the parties resolved the case with a

consent order that blocked the acquisition, prohibited Quantum from gaining the board seat, and prevented some information exchanges between the parties. This was the FTC's first Section 8 enforcement action in four decades.^[5]

DOJ had challenged other interlocking directorates in 2023:

- In August 2023, DOJ announced that two directors from social-networking site Nextdoor had resigned after DOJ raised concerns about their overlapping membership on Pinterest's board of directors.^[6]
- In March 2023, DOJ announced that five directors had resigned from four corporate boards and another company declined to exercise contractual board appointment rights in response to DOJ's concerns.^[7]

These were the latest announcements in DOJ's enforcement initiative, first publicly announced in 2022, focused on interlocking directorates. Through that initiative, DOJ has now secured the resignations of fifteen directors from eleven boards of directors.

[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 Sues 7-Eleven for Anticompetitive Acquisition in Violation of 2018 Consent Order (December 4, 2023).

[4] FTC Sues to Stop the Potentially Illegal Integration of New Orleans Area Hospitals Over Failure to Follow Federal Reporting Law (April 20, 2023).

[5] FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (August 16, 2023).

[6] Office of Public Affairs | Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates | United States Department of Justice (August 16, 2023).

[7] Office of Public Affairs | Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates | United States Department of Justice (March 9, 2023).