



## 2022 HSR ACT THRESHOLDS ANNOUNCED

### ***“Size of Transaction” Test Increases by Almost 10% to \$101 Million Still no “Early Termination” Grants***

On January 21, 2022, the Federal Trade Commission, the agency charged with administering the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“*HSR Act*”), announced adjustments to the filing and other dollar-denominated thresholds contained in the HSR Act. The HSR Act notification requirements apply to mergers, asset and stock acquisitions and an array of other transactions that satisfy specified “size of transaction” and “size of person” dollar thresholds. These thresholds, however, change from year to year, based on changes in the U.S. gross national product for the government’s fiscal year ending September 30. The 2022 revisions were published in the *Federal Register* on January 24, 2022 and become effective on February 23, 2022. The new thresholds will remain in effect until the next annual adjustment, expected early next year.

***General Threshold to Determine Initial HSR Filing Obligation.*** Effective February 23, 2022, the minimum notification threshold under the HSR Act will increase from \$92 million to \$101 million. Thus, an acquisition will potentially trigger an HSR Act filing only if, as a result of the acquisition, the acquirer will hold assets, voting securities or non-corporate interests of the acquired person valued in excess of \$101 million. The complete revised 2022 initial thresholds are as follows:

Threshold Type	2021 Threshold	2022 Threshold (Effective for transactions closing on or after February 23, 2022)
Minimum “Size-of-Transaction” test	\$92 million	\$101 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$18.4 million Person #2: \$184 million	Person #1: \$20.2 million Person #2: \$202 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$368 million	\$403.9 million

To summarize, applying these new thresholds results in the following reporting obligations:

Transaction Size	HSR Act Reporting Obligation?
\$101 million or less	No
Greater than \$101 million and less than \$403.9 million	Yes, but only if the above “Size-of-Person” test is satisfied
\$403.9 million or more	Yes, without regard to the above “Size-of-Person” test

**Filing Fees.** Although the dollar amounts of the three-tiered filing fees under the HSR Act have not changed for over 20 years, as a result of the indexing adjustments outlined above, new break points will be used in calculating the filing fee as follows:

Transaction Size	Filing Fees (Effective for filings made on or after February 23, 2022)
\$101 million to less than \$202 million	\$45,000
\$202 million to \$1.0098 billion	\$125,000
Transactions in Excess of \$1.0098 billion	\$280,000

Note that while the new thresholds for determining HSR Act filing requirements are effective for all transactions **closing** on or after February 23, 2022, the new thresholds for determining the applicable filing fee become effective for all filings first **made** on or after February 23, 2022.

**Additional Notification Thresholds.** As stated above, effective February 23, 2022, an acquisition that results in an acquirer holding more than \$101 million worth of the assets, stock or non-corporate interests of an acquired person crosses the first of five staggered “notification thresholds.” The rules identify four additional thresholds that determine whether a subsequent acquisition of voting securities from the same acquired person will require additional HSR filings. These additional notification thresholds have been revised as follows:

Original Additional Notification Thresholds	2021 Additional Notification Thresholds	2022 Additional Notification Thresholds
\$100 million	\$184 million	\$202 million
\$500 million	\$919.9 million	\$1.0098 billion
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$1.839.8 billion)	(if the 25% stake is valued at greater than \$2.0196 billion)
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$92 million)	(if the 50% stake is valued at greater than \$101 million)

In effect, these staggered thresholds are designed to act as exemptions to relieve parties of the burden of making additional filings each time additional shares of the same person are acquired. Once a filing is made, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing; if it reaches the stated threshold within that period, it may continue acquiring shares up to the next threshold for five years from the end of the waiting period. These additional notification thresholds apply only to acquisitions of voting securities.

### ***Still no “Early Termination” Available for the HSR Act’s 30-Day Waiting Period***

Once the parties have made their HSR Act filings, the enforcement agencies have up to 30 days to decide whether to seek additional information -- an unwelcome and taxing process commonly known as a “second request” -- or take no action and allow the 30-day waiting period to automatically terminate. Additionally, the filing parties historically have had the option at the time of filing to request an “early termination” of the 30-day waiting period which, if granted by the agencies, shortened the waiting period to approximately 10 to 14 days.

However, the enforcement agencies’ suspension of early termination grants, first announced by the FTC on February 4, 2021, remains in place. Although the stated reason for last year’s suspension was to address “the transition to a new Administration,” the “unprecedented volume” of HSR Act filings, as well as the “unprecedented times” posed by COVID-19, no near-term lifting of the suspension is anticipated.

### ***Supercharged Enforcement & Increased Civil Penalties***

While President Biden exhibited a moderate, centrist stance on transactional antitrust issues before becoming President, his administration has adopted a decidedly pro-enforcement posture over the past year with the stated goal of promoting competition and protecting consumers in the U.S. economy.

Failure to comply with HSR Act requirements can result in substantial civil and other penalties. Violations of the HSR Act can result in substantial penalties because each day of non-compliance is an independent violation and can result in a separate penalty up to the maximum civil penalty. On January 6, 2022, the FTC also announced an increase in the maximum civil penalty amount for violations of the HSR Act from \$43,792 to \$46,517 per day for all penalties assessed on or after January 10, 2022. Additional annual changes to the maximum daily civil penalty are expected, as such adjustments are required to be made each January.

### ***“Interlocking Directorate” Thresholds Also Adjusted***

The FTC also recently announced revised dollar thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors. Section 8 of the Clayton Act generally prohibits, with certain exceptions, a person from serving as a director or officer of two competing companies if certain dollar thresholds are met. As revised, the prohibition against interlocking directors applies if each company has more than \$41,034,000 (up from \$37,382,000 for 2021) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than \$4,103,400 (up from \$3,738,200 for 2021) in competitive sales. The revised dollar

thresholds became effective immediately upon publication in the *Federal Register* on January 24, 2022.

### ***What this Means***

In the past year, in light of the increasingly pro-enforcement posture of the agencies, the suspension of early termination grants and the increase in second requests issuances, deal makers have engaged in significantly more advanced HSR Act and antitrust law compliance planning, including conducting more thorough, detailed advance competitive reviews screens for proposed transactions and budgeting more time for HSR Act clearance to be obtained.

Companies and others should be mindful that HSR Act filing obligations are often triggered by a wide variety of non-M&A or “merger” transactions, including asset acquisitions, initial and follow-on investment transactions, joint ventures and other “strategic alliances,” patent or other IP licensing activities, NewCo formations, and the exercise, exchange or conversion of options or other convertible securities.

Companies and their investors and advisors should pay particular attention to the increased dollar thresholds in assessing HSR Act filing obligations -- particularly for deals with either a filing date or closing date that straddles February 23, 2022. First, parties may be relieved from the obligation to make an HSR Act filing for a transaction closing on or after February 23, 2022 that falls just under the revised \$101 million initial filing threshold. In addition, for HSR Act filings made on or after February 23, 2022, parties may realize the benefit of a lower filing fee for a transaction that just crosses over one of the revised filing dollar thresholds.

Finally, deal parties should be ever mindful that a transaction will not escape antitrust scrutiny because either an HSR Act filing is not required or, even if a filing is required and made, a transaction receives HSR Act clearance. Non-reportable deals are still challenged by the FTC and the DOJ, as each of those agencies regularly file suit seeking to unwind previously-consummated mergers. In fact, almost 20% of all merger challenges brought by the DOJ and FTC in recent years involved consummated transactions, including one transaction for which HSR Act clearance had been previously obtained. Even small transactions with a purchase price below \$10 million have been challenged.

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