

CLIENT ALERT

FTC Revises HSR Thresholds, Filing Fees, and Section 8 Thresholds

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AUTHORS

Jonathan J. Konoff | Agathe M. Richard

The Federal Trade Commission (the “FTC”) has announced revised thresholds for merger notifications under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). As statutorily mandated, the various thresholds incorporated into the HSR Act and its rules and regulations are revised annually based on the change in the U.S. gross national product. The FTC has also announced an entirely new HSR filing fee structure under the 2023 Merger Filing Fee Modernization Act (the “MFFMA”), with new filing fees ranging from \$30,000 to \$2,250,000. The MFFMA will also require supplemental disclosure concerning “foreign subsidiaries” in the HSR notification. In addition, the FTC has revised the thresholds relating to the application of Section 8 of the Clayton Act, which prohibits certain interlocking directorates and officerships. The FTC notice concerning these revisions can be accessed [here](#).

HSR Act Thresholds

The new HSR Act notification thresholds will become effective 30 days after publication in the Federal Register, which we expect to occur on January 26, 2023. The minimum notification threshold under the HSR Act will increase from \$101 million to \$111.4 million. Thus, an acquisition may trigger an HSR reporting obligation only if, as a result of an acquisition, an acquirer would hold voting securities, noncorporate interests (but only where “control” of a noncorporate entity would pass to the acquiring person as a result of the acquisition), and/or assets of an acquired person, that are valued in excess of \$111.4 million. The following table sets forth the principal threshold adjustments applicable to the HSR Act.

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Threshold	Original Threshold	2022 Adjusted Threshold	2023 Adjusted Threshold
Minimum Size of Transaction	\$50 million	\$101 million	\$111.4 million
Minimum Size of Transaction (above which the Size of Person Test does not apply)	\$200 million	\$403.9 million	\$445.5 million
Size of Person Test ¹ (applicable to transactions valued at not more than \$445.5 million)	Person 1: \$10 million	\$20.2 million	\$22.3 million
	Person 2: \$100 million	\$202 million	\$222.7 million
Notification Thresholds	\$50 million	\$101 million	\$111.4 million
	\$100 million	\$202 million	\$222.7 million
	\$500 million	\$1.0098 billion	\$1.1137 billion
	25% or more of an issuer's voting securities if valued in excess of \$1 billion	25% or more of an issuer's voting securities if valued in excess of \$2.0196 billion	25% or more of an issuer's voting securities if valued in excess of \$2.2274 billion

Any monetary or limitation value included in a rule or regulation promulgated under the HSR Act that includes the term “(as adjusted)” (for example, the exemption that may be available for certain acquisitions of foreign assets or stock of foreign issuers where the exemption is dependent upon the nexus to U.S. commerce) has also been adjusted and will become effective on the same date.

¹ Generally speaking, the “size of person test” is based on annual net sales and total assets of the relevant “acquiring” and “acquired” persons as stated on ordinary course financial statements.

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Filing Fee Thresholds

The following table sets forth the new filing fee thresholds, which will also become effective 30 days after publication in the Federal Register. While the filing fees are reduced for certain smaller transactions, they are significantly increased for larger transactions (from \$280,000 to \$2.25 million for a transaction with a \$5 billion or greater valuation). These filing fees will be revised annually based on the change in the U.S. consumer price index.

Filing Fee	Size of Transaction
\$30,000	Greater than \$101 million but less than \$161.5 million
\$100,000	At least \$161.5 million but less than \$500 million
\$250,000	At least \$500 million but less than \$1 billion
\$400,000	At least \$1 billion but less than \$2 billion
\$800,000	At least \$2 billion but less than \$5 billion
\$2.25 million	\$5 billion or more

Additionally, the MFFMA also requires the parties to include in their HSR notification information concerning “foreign subsidies” they receive from countries or entities that constitute a “strategic or economic threat” to the United States. According to the MFFMA, these subsidies can enable “the subsidized firm” to submit a higher bid or “otherwise change the incentives of the firm in ways that undermine competition following an acquisition.” The “foreign entities of concern” include entities owned or controlled by, or subject to the jurisdiction of, certain “covered nations,” such as China, Russia, Iran, and North Korea, as well as entities involved in unauthorized conduct detrimental to the national security or foreign policy of the United States.

The new MFFMA disclosure requirement is similar to the European Union’s new Foreign Subsidies Regulation (which will become effective in mid-2023). The FTC and DOJ will define the required subsidy disclosures in consultation with other interested entities, including the Chairperson of CFIUS, in a subsequent administrative rulemaking.

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Section 8 Thresholds

Section 8 of the Clayton Act prohibits a person from serving as a director or officer of competing corporations if certain thresholds are met and an exemption does not apply. Pursuant to the new thresholds, which will be effective immediately upon their publication in the Federal Register, competing corporations are covered by Section 8 if each corporation's capital, surplus, and undivided profits exceed in the aggregate \$45,257,000, unless one or more of the following exemptions apply: (i) one of the corporations has competitive sales of less than \$4,525,700; (ii) the competitive sales of either corporation are less than 2% of that corporation's total sales; or (iii) the competitive sales of each corporation are less than 4% of that corporation's total sales.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Jonathan J. Konoff

212 728 8627

jkonoff@willkie.com

Agathe Richard

212 728 8190

arichard@willkie.com

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