

2024 ANTITRUST M&A LAW DEVELOPMENTS

HSR Act “Size of Transaction” Test Increases by \$8.1 Million to \$119.5 Million

The Federal Trade Commission, the agency which administers the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“*HSR Act*”), has announced a number of rule changes to the HSR Act, including annual adjustments to its jurisdictional, filing fee and other dollar-denominated thresholds. The HSR Act applies to mergers, asset and stock acquisitions and other transactions that satisfy specified “size-of-transaction” and “size-of-person” dollar thresholds. If triggered, the HSR Act requires companies to make pre-closing filings with both the Federal Trade Commission (“*FTC*”) and Department of Justice (“*DOJ*”) (the two federal agencies responsible for U.S. antitrust enforcement) and to provide detailed information about the proposed transaction. The HSR Act’s jurisdictional 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 2024 revisions were published in the *Federal Register* on February 5, 2024, and become effective on March 6, 2024. The new thresholds will remain in effect until the next annual adjustment, expected early next year.

Revised Dollar Thresholds to Determine Initial HSR Filing Obligation

Effective March 6, 2024, the minimum notification threshold under the HSR Act will increase to \$119.5 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 \$119.5 million. The complete revised 2024 initial thresholds are as follows:

Threshold Type	2023 Threshold	2024 Threshold (Effective for transactions closing on or after March 6, 2024)
Minimum “Size-of-Transaction” test	\$111.4 million	\$119.5 million
“Size-of-Person” Test (applicable only to transactions valued at less than the “Alternative Size-of-Transaction” test below)	Person #1: \$22.3 million Person #2: \$222.7 million	Person #1: \$23.9 million Person #2: \$239 million
Alternative “Size-of-Transaction” test (requiring HSR filing regardless of “Size-of-Person” test above)	\$445.5 million	\$478 million

Until March 6, 2024, the current \$111.4 million “size-of-transaction” threshold remains in effect.

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

Transaction Size	HSR Act Reporting Obligation?
\$119.5 million or less	No
Greater than \$119.5 million and less than \$478 million	Yes, but only if the above “Size-of-Person” test is satisfied
\$478 million or more	Yes, without regard to the above “Size-of-Person” test

Annual Update to HSR Act Filing Fees

The HSR Act now employs a multi-tiered filing fee structure, based on the size of the transaction. Effective March 6, 2024, the new filing fee structure is as follows:

Transaction Ranges	Filing Fees
Transactions less than \$173.3 million	\$30,000
\$173.3 million to less than \$536.5 million	\$105,000
\$536.5 million to less than \$1.073 billion	\$260,000
\$1.073 billion to less than \$2.146 billion	\$415,000
\$2.146 billion to less than \$5.365 billion	\$830,000
Transactions of \$5.365 billion or more	\$2,335,000

This fee schedule remains subject to annual adjustment based on changes in the Consumer Price Index. The new thresholds for determining HSR Act filing requirements are effective for all transactions *closing* on or after March 6, 2024, and the new thresholds for determining the applicable filing fee become effective for all filings first *made* on or after March 6, 2024.

Additional Notification Thresholds

As stated above, effective March 6, 2024, an acquisition that results in an acquirer holding more than \$119.5 million worth of the voting securities 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	2023 Additional Notification Thresholds	2024 Additional Notification Thresholds
\$100 million	\$222.7 million	\$239 million
\$500 million	\$1.1137 billion	\$1.1195 billion
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than \$2.2274 billion)	(if the 25% stake is valued at greater than \$2.39 billion)
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than \$111.4 million)	(if the 50% stake is valued at greater than \$119.5 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.

Once parties have made their required 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 to take no action and allow the 30-day waiting period to automatically terminate. Before February 4, 2021, filing parties 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 30-day waiting period to approximately 10 to 14 days. However, the enforcement agencies’ “temporary” suspension of early termination grants, first announced by the FTC three years ago due to the historically high volume of HSR Act transactions and in order to allow the agencies to adjust to the enforcement priorities of the Biden administration, largely remains in place. Moreover, the FTC and DOJ increasingly advise merger parties that, despite the expiration of the HSR Act’s waiting period, an agency investigation remains open and any consummation of the transaction is at the parties’ risk.

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. Effective January 11, 2024, the maximum civil penalty amount for violations of the HSR Act increased from \$50,120 per day to \$51,744 per day. Additional annual changes to the maximum daily civil penalty are expected, as such adjustments are required to be made each January.

Clayton Act Section 8 “Interlocking Directorate” Thresholds Also Increased

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 \$48,559,000 (up from \$45,257,000 for 2023) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than \$4,855,900 (up from \$4,525,700 for 2023) in competitive sales. The revised Clayton Act dollar thresholds became effective immediately upon publication in the *Federal Register* on February 5, 2024.

What all of this Means

Over the past several years, in light of the increasingly pro-enforcement posture of the FTC and DOJ, the suspension of early termination grants and the increase in second requests issuances, M&A and other deal makers have engaged in significantly more advanced HSR Act and antitrust law compliance planning, including conducting more thorough, detailed advance competitive review screens for proposed transactions and budgeting more time for HSR Act clearance to be obtained.

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 March 6, 2024. First, parties may be relieved from the obligation to make an

HSR Act filing for a transaction closing on or after March 6, 2024, that falls under the revised \$119.5 million initial filing threshold. In addition, for HSR Act filings made on or after March 6, 2024, parties may realize the benefit of a lower filing fee for smaller transactions that straddle one of the new filing fee dollar thresholds.

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, bankruptcy sales, real estate deals, patent or other IP licensing activities, initial and follow-on investment transactions (including non-controlling investments), joint ventures or other NewCo formations, transactions by nonprofits and tax-exempt entities, as well as the exercise, exchange or conversion of options or other convertible securities.

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. Even small transactions with a purchase price below the filing thresholds have been challenged. In fact, almost 20% of all merger challenges brought by the DOJ and FTC in recent years involved consummated transactions. Finally, over the past three years, the FTC and DOJ have increasingly issued “warning letters” notifying merger parties that, despite the expiration of the HSR Act’s waiting period, the agencies specifically retain the power to challenge both proposed and consummated transactions.

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This Alert has been prepared for general informational purposes and a service to our clients and friends. It has been prepared in a summary manner only and is not intended as legal advice. The HSR and Clayton Acts are highly technical and complex and readers are urged to consult their legal counsel concerning any particular situation and specific legal questions.

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