

CLIENT ALERT

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FTC ANNOUNCES ANNUAL JURISDICTIONAL THRESHOLD ADJUSTMENTS TO HSR ACT AND INTERLOCKING DIRECTORATES UNDER SECTION 8 OF CLAYTON ACT

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On January 24, 2022, the Federal Trade Commission (“FTC”) published to the Federal Register the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) merger-reporting thresholds for 2022. Each year, the FTC is required to adjust the thresholds under the HSR Act to correspond with changes in gross national product. Following an unusual decrease in the thresholds in 2021, the thresholds for 2022 will increase by approximately 9.78%. The adjustments will take effect on February 23, 2022. In addition, the FTC announced increases to the maximum civil penalty for violations of the HSR Act and adjustments to jurisdictional thresholds for interlocking directorates and officers under Section 8 of the Clayton Act.

ADJUSTMENTS TO MERGER-REPORTING THRESHOLDS

The HSR Act requires all persons or entities contemplating certain transactions that meet or exceed merger-reporting thresholds to file notifications of that transaction with the FTC and Department of Justice (“DOJ”). The first threshold concerns the Size-of-Transaction test, which is satisfied if the value of holdings an acquirer will obtain, as a result of the transaction, exceeds \$101 million. If the Size-of-Transaction test is satisfied, an HSR filing may be required if the Size-of-Persons test is also met. The Size-of-Persons test is satisfied if either the acquired or acquiring party has at least \$202 million in annual net sales or total assets, and the other party to the transaction has at least \$20.2 million in annual net sales or total assets. Note, however, for large transactions an HSR filing may be required regardless of whether the Size-of-Person thresholds are met. Where the Size-of-Transaction test shows the transaction’s size will exceed \$403.9 million, the Size-of-Persons test is disregarded.

The table below summarizes the annual merger-reporting thresholds from 2021 to 2022:

Year	Size-of-Transaction Threshold	Size-of-Person Threshold (Larger Person)	Size-of-Person Threshold (Smaller Person)	Size-of-Transaction “Cap” Threshold
2022	\$101 Million	\$202 Million	\$20.2 Million	\$403.9 Million
2021	\$92 Million	\$184 Million	\$18.4 Million	\$368 Million

FILING FEES:

Although the filing fees are fixed, the thresholds triggering fees are also indexed to the gross national product. The table below summarizes the filing fee for a transaction valued within the relevant Size-of-Transaction range, as well as the 2022 adjustments:

Year	\$45,000 Filing Fee	\$125,000 Filing Fee	\$280,00 Filing Fee
2022	\$101 Million to \$202 Million	\$202 Million to \$1.0098 Billion	More than \$1.0098 Billion
2021	\$92 Million to \$184 Million	\$184 Million to \$919.9 Billion	More than \$919.9 Million

ADJUSTMENT TO CIVIL PENALTY AMOUNTS

On January 10, 2022, the FTC published to the Federal Register adjustments to the maximum civil penalty amount for violations of the HSR Act. The maximum civil penalty amount will increase from \$43,792 to \$46,517 per day. Unlike the adjustments to the merger-reporting thresholds, the adjustment to the civil penalty amounts took effect upon publication.

JURISDICTIONAL THRESHOLDS APPLICABLE TO INTERLOCKING DIRECTORATES AND OFFICER

Under Section 8 of the Clayton Act, individuals generally cannot simultaneously serve as a director or officer of two sizable competing corporations. Relevant jurisdictional thresholds are subject to annual adjustments and are indexed to the gross national product. Following the 2022 adjustments, to warrant scrutiny under Section 8, both competing corporations must have capital, surplus, and undivided profits aggregating more than \$41.034 Million. However, if either corporation’s “competitive sales”—that is, the gross revenues for all products and services sold by one corporation in competition with the other—are less than \$4.1034 Million, Section 8’s prohibition against an interlocking officer or director does not apply.

Dickinson Wright will continue to monitor all developments, including pending legislation that would raise HSR filing fees, and provide analysis. Companies should be aware that large mergers and acquisitions of either voting securities or assets may carry filing obligations. Dickinson Wright attorneys can assist in determining how the summarized adjustments will affect the reporting responsibilities for any potential transaction under the HSR Act.

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