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FTC Announces 2023 Thresholds Under HSR Act and Clayton Act New Filing Fee Schedule Implemented

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Primary HSR filing threshold will be increased to $111.4 million

The Federal Trade Commission has announced revisions to HSR Act and Clayton Act Section 8 thresholds, which are indexed annually in alignment with prior year economic activity. As is our annual practice, this alert identifies the adjustments that are likely to be the most relevant to our clients, and reiterates several important practice tips.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, commonly known as the HSR Act, requires parties to certain transactions to notify the Federal Trade Commission and Department of Justice, and to observe a waiting period prior to completing the transaction. The HSR Act enables antitrust regulators to review transactions, investigate and address potential competitive concerns prior to completion, and carries monetary penalties for failure to comply — adjusted for 2023 to **$50,120** per day.

Section 8 of the Clayton Act prohibits certain overlaps in officers or directors between competing companies -- to guard against anti-competitive coordination and information exchanges that can arise from simultaneous board membership. Thus, as a general rule a person cannot serve on the boards of two competing companies. This has been an area of stepped up enforcement for the FTC in 2022.

Effective February 27, *the basic* ***HSR notification threshold will be increased to $111.4 million****.*

Unless exempt, a person or entity that directly or indirectly acquires assets or voting securities (or LP or LLC interests) in excess of the HSR threshold may be required to file notification under the Act and to observe the applicable waiting period before completing the transaction. Subsequent transactions involving the acquisition of additional interests in the same company typically are exempt from further notification — unless a S*ubsequent Notification Threshold* is exceeded (see chart below).

Under the revised thresholds, transactions valued at $445.5 million or less will be subject to the HSR Act only if the parties also meet the size-of-person thresholds. The size-of-person threshold is generally met where a person with annual sales or total assets of $222.7 million makes an acquisition where the target or the target’s parent has annual sales or total assets of $22.3 million. The size-of-person threshold is also met where the smaller entity acquires the larger — though less common. Transactions valued at more than $445.5 million are subject to the HSR Act without regard to the size of the person, unless exempt.

Summary of the HSR Act's threshold adjustments:

Jurisdictional Threshold	$20.2 million	$22.3 million
	$202.0 million	$222.7 million
	$403.9 million	$445.5 million

Filing Fees

The FTC has now also published the new merger filing fee schedule in accordance with the Consolidated Appropriations Act, passed in December of 2022. Beginning February 27th, the revised adjusted HSR filing fees will be as follows:

Practice Tip 1 – Officers and Directors can have HSR Filing Obligations:

Consider HSR filing obligations in all types of transactions, including smaller transactions, minority investments, follow-on investments, joint ventures, asset acquisitions and exercises of warrants or options. HSR enforcement extends, for instance, to company executives acquiring stock in their employers. Under the rules, when a company employee or director acquires company stock that results in an aggregate holding that is valued above the HSR reporting threshold, filing obligations can arise. The most common form of "corrective filing" relates to this very scenario, *so now is a good time to review executive holdings and employee stock ownership plans to make sure HSR notification triggers are properly accounted for and tracked.*

Practice Tip 2 – Consider Incremental Acquisitions:

Also consider the current value of minority positions to plan accordingly for potential HSR filing and waiting period requirements when participating in follow-on offerings and investments. Review minority holdings that may have appreciated above the HSR reporting threshold and plan for future incremental purchases that may trip the initial or subsequent notification thresholds.

Practice Tip 3 – Patent Licensing Transactions May be Subject to HSR Reporting:

Always consider HSR reporting in patent licensing transactions, even where the up-front payments may be below the reporting threshold. The HSR valuation rules with respect to these types of transitions take numerous other factors into account, including the current fair market value of a hypothetical fully-paid, royalty-free license.

Practice Tip 4 – Directorships in Competing Companies can create an Antitrust Violation — Revised Clayton Act Section 8 Thresholds:

Always consider Clayton Act Section 8 when installing board members of potentially competing portfolio companies that are not under common control. Section 8 enforcement has become an area of focus for both the FTC and the Department of Justice. Last year, the DOJ announced that seven directors resigned from corporate boards in response to investigations into potential violations of Section 8. This is a good time to examine whether violations exist and to cure them, ideally within the one-year grace period.

Clayton Act Section 8 is particularly relevant for investment funds taking minority positions in competing companies and seeking board representation. Under the statute, no person, or representative of the same person or entity, is permitted to serve simultaneously as a director or officer of competing companies, but there are carve-outs and exceptions.

The prohibitions of Section 8 are limited to cases in which each of the companies has, under the revised thresholds, capital, surplus, and undivided profits of more than $45,257,000. Even where the threshold is met, however, the restrictions do not apply where the competitive sales of *either* company represent less than 2 percent of its total sales, or are less than $4,525,700 -- or where the competitive sales of *each* company represent less than 4 percent of its total sales. The statute also permits directors and officers whose appointments were not prohibited at the time of appointment to continue to serve for up to a year after the Section 8 thresholds are exceeded; thus, the revised Clayton Act Section 8 thresholds can potentially eliminate an existing violation, which is not the case with the HSR threshold revisions.

Correct application of the HSR Act and Clayton Act Section 8 can be complex, and requires careful analysis. Proskauer's Antitrust Practice Group has extensive experience with the issues presented under these statutes and the entire range of antitrust compliance and enforcement.

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