

January 24, 2022

FTC Announces New Hart-Scott-Rodino and Clayton Act Section 8 Thresholds

The Federal Trade Commission (the “FTC”) has revised the jurisdictional and filing fee thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”) and the Premerger Notification Rules (the “Rules”), based on changes in the gross national product (“GNP”) as required by the 2000 amendments to the HSR Act. For 2022, the thresholds will increase as a result of the increase in the GNP and will apply to transactions that close on or after February 23, 2022.

The HSR Act requires parties intending to merge or to acquire assets, voting securities or certain non-corporate interests to notify the FTC and the Department of Justice, Antitrust Division, and to observe certain waiting periods before consummating the acquisition if certain filing thresholds are met. Notification and Report Forms must be submitted by the parties to a transaction if both the (1) size of transaction and (2) size of parties thresholds are met, unless an exemption applies.

1. Size of Transaction

The minimum size of transaction threshold which will be effective as of February 23, 2022, is \$101 million, increased from the 2021 threshold of \$92 million.

2. Size of Parties

The size of parties threshold is inapplicable if the value of the transaction exceeds \$403.9 million (\$368 million in 2021). For transactions with a value between \$101 million and \$403.9 million, the size of parties threshold must be met and will be satisfied in one of the following three ways:

	I	II	III
<i>Acquiring Person:</i>	\$202 million annual net sales or total assets	\$202 million annual net sales or total assets	\$20.2 million annual net sales or total assets
	and	and	and
<i>Acquired Person:</i>	\$20.2 million total assets	a manufacturer with \$20.2 million annual net sales or total assets	\$202 million annual net sales or total assets

The various jurisdictional thresholds, notification thresholds, filing fee thresholds and thresholds applicable to certain exemptions will also decrease, as summarized in Appendix A to this memorandum.

The FTC also announced the maximum civil penalty for HSR Act violations, raising the amount from \$43,792 per day to \$46,517 per day, effective as of January 10, 2022.

Finally, the FTC has increased, effective on January 24, 2022, the thresholds that prohibit, with certain exceptions, competitor companies from having interlocking relationships among their directors or officers under Section 8 of the Clayton Act. Section 8

provides that no person shall, at the same time, serve as a director or officer in any two corporations (not other business structures (*e.g.*, partnerships or LLCs)) that are competitors, such that elimination of competition by agreement between them would constitute a violation of the antitrust laws. There are several “safe harbors” which render the prohibition inapplicable under certain circumstances, such as when the size of the corporations, or the size and degree of competitive sales between them, are below certain dollar thresholds. Competitor corporations are now subject to Section 8 if each one has capital, surplus and undivided profits aggregating more than \$41,034,000, although no corporation is covered if the competitive sales of either corporation are less than \$4,103,400. Even when the dollar thresholds are exceeded, other exceptions preventing the applicability of Section 8 may be available. In particular, if the competitive sales of either corporation are less than 2% of that corporation’s total sales, or less than 4% of each corporation’s total sales, the interlock is exempt. In addition, Section 8 provides a one-year grace period for an individual to resolve an interlock issue that arises as a result of an intervening event, such as a change in the capital, surplus and undivided profits or entry into new markets.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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Appendix A

Summary of Revised Jurisdictional Thresholds of the HSR Act and Rules

Relevant Section of HSR Act or Rules	Original Thresholds	2021 Thresholds	2022 Thresholds
§ 7A(a)(2)(A) size of transaction test	\$200 million	\$368 million	\$403.9 million
§ 7A(a)(2)(B)(i) size of transaction test	\$50 million	\$92 million	\$101 million
§ 7A(a)(2)(B)(ii) size of parties test	\$10 million	\$18.4 million	\$20.2 million
§ 7A(a)(2)(B)(ii) size of parties test	\$100 million	\$184 million	\$202 million
§ 7A note – filing fee thresholds*	\$50 million \$100 million \$500 million	\$92 million \$184 million \$919.9 million	\$101 million \$202 million \$1.0098 billion
Thresholds and limitation values in the Rules (16 C.F.R. Parts 801-803)**	\$10 million \$50 million \$100 million \$110 million \$200 million \$500 million \$1 billion	\$18.4 million \$92 million \$184 million \$202.4 million \$368 million \$919.9 million \$1,839.8 million	\$20.2 million \$101 million \$202 million \$222.2 million \$403.9 million \$1.0098 billion \$2.0196 billion

* The filing fee amounts, which are currently \$45,000, \$125,000 and \$280,000, remain unchanged. For transactions valued at more than \$101 million, but less than \$202 million, the filing fee is \$45,000. For transactions valued at \$202 million or more, but less than \$1.0098 billion, the filing fee is \$125,000. For transactions valued at \$1.0098 billion or more, the filing fee is \$280,000.

** The \$200 million and \$500 million limitations set forth in Rule 802.3 for acquisitions of certain carbon-based mineral reserves remain unchanged.