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FTC Announces Increased Hart-Scott-Rodino and Clayton Act Section 8 Interlocking Directorate Thresholds for 2023

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Executive Summary

The Federal Trade Commission (“FTC”) announced on January 23 its 2023 jurisdictional thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). The thresholds determine whether parties involved in proposed mergers, consolidations or other acquisitions of voting securities, assets or unincorporated interests must notify the FTC and the Antitrust Division of the Department of Justice (“DOJ”) of a proposed transaction and comply with a mandatory waiting period before the transaction can be consummated. The FTC is required to revise HSR Act thresholds annually based on changes in the Gross National Product (“GNP”) and this year’s changes reflect an approximate 10.3% increase. Pursuant to the new Merger Filing Fee Modernization Act, the structure for HSR Act filing fees was overhauled, and there is now in place a six-tier structure. The new thresholds and fees are expected to go into effect on or about February 23, 2023, 30 days after official publication in the Federal Register on January 23, 2023. The FTC also has announced an increase in the maximum civil penalty for non-compliance with the HSR Act, as well as increased thresholds for prohibited interlocking directorates under Section 8 of the Clayton Act. A brief summary of the changes is as follows:

- The Size of Transaction Threshold under the HSR Act has increased to **\$111.4 million** (up from \$101 million).
- Acquisitions that do not exceed **\$445.5 million** in value (up from \$403.9 million) must also meet the Size of Person Threshold to require notification to the FTC and DOJ under the HSR Act. This threshold requires that one of the parties to the transaction has total assets or annual net sales of **\$222.7 million** (up from \$202 million) or more and the other party has total assets or annual net sales of **\$22.3 million** (up from \$20.2 million) or more.
- Pursuant to the Merger Filing Fee Modernization Act signed into law on December 29, 2022, HSR Act Filing Fee Thresholds expanded from three tiers to six tiers, with the broadened range of fees as follows:

| <u>Transactions Valued at:</u> | <u>Filing Fee:</u> |
|---|--------------------|
| Less than \$161.5 million | \$30,000 |
| \$161.5 million or more but less than \$500 million | \$100,000 |
| \$500 million or more but less than \$1 billion | \$250,000 |
| \$1 billion or more but less than \$2 billion | \$400,000 |
| \$2 billion or more but less than \$5 billion | \$800,000 |
| \$5 billion or greater | \$2,250,000 |

- Unlike the prior three-tier structure, the amounts of the six-tiered filing fees will be revised annually based on changes to the Consumer Price Index, rather than changes to GNP, as for the reportability thresholds.
- Additionally, the FTC announced an increase in the Maximum Civil Penalty for noncompliance with the HSR Act of **\$50,120 per day** (up from \$46,517 per day).
- The FTC also has revised the thresholds for prohibited interlocking directorates under Section 8 of the Clayton Act, which became effective January 23, 2023. Section 8 generally prohibits companies that compete with each other from having interlocking memberships on their corporate boards.
 - Section 8(a)(1) prohibits a person from serving as a director or board-elected or board-appointed officer of two or more corporations if the combined capital, surplus, and undivided profits of each of the corporations exceeds **\$45,257,000** (up from \$41,034,000).
 - Section 8(a)(2)(A) of the Clayton Act exempts interlocks for which the competitive sales of either corporation are less than **\$4,525,700** (up from \$4,103,400).

The above is only a general summary. Any number of exceptions may apply. Please contact us if you have questions or desire additional details.