



## Antitrust / Mergers & Acquisitions ADVISORY ■

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### 2023 Brings Major Changes to HSR Merger Review Process

The new year has ushered in significant regulatory developments that will impact how the U.S. antitrust enforcement agencies review proposed mergers and acquisitions in 2023.

- For the first time in 20 years, at the direction of Congress, the agencies have revised the filing fees that must be paid by merging parties under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR Act), with transactions valued at over \$500 million facing significantly higher fees.
- Thresholds that impact which transactions must be reported under the HSR Act are adjusted upward by 10.3%, effective February 27, 2023.
- Civil penalties for violations of certain antitrust laws have also been increased, as have the applicable thresholds for violations of Section 8 of the Clayton Act.
- The Federal Trade Commission (FTC) has asserted broad enforcement authority under Section 5 of the FTC Act, with potential implications for M&A.
- The FTC's controversial proposal to ban noncompete agreements contains a limited sale-of-business exception but could still impact other deal-related employment agreements.
- In the coming months, the FTC and the Antitrust Division of the Department of Justice (DOJ) are expected to jointly unveil tough new enforcement guidelines to govern the agencies' analysis of mergers and acquisitions.

All this occurs as Congress has significantly increased the enforcement budgets at both competition agencies, setting the stage for increased hiring and continued aggressive merger enforcement.

### **FTC Implements Merger Filing Fee Modernization Act, Significantly Raising HSR Filing Fees for Large Transactions**

On December 29, 2022, President Biden signed into law the Consolidated Appropriations Act of 2023, an omnibus spending bill that also contained the Merger Filing Fee Modernization Act (MFFMA). The MFFMA significantly changes, for the first time in 20 years, the filing fees for mergers reportable under the HSR Act and further requires that filing fees be increased in future years to match the percentage increase in the consumer price index.

On January 26, 2023, the FTC formally [published](#) these revisions to the filing fees that must be submitted in connection with HSR filings. The new HSR filing fees top out at \$2.25 million for transactions valued at more than \$5 billion – a significant increase over the current maximum fee of \$250,000. On the other hand, filing fees for the smallest transactions fell modestly from \$45,000 to \$30,000:

Size of the Transaction	Filing Fee
At least \$111.4 million but less than \$161.5 million	\$30,000
At least \$161.5 million but less than \$500 million	\$100,000
At least \$500 million but less than \$1 billion	\$250,000
At least \$1 billion but less than \$2 billion	\$400,000
At least \$2 billion but less than \$5 billion	\$800,000
\$5 billion or more	\$2.25 million

The revised fees are set to take effect for all filings made on or after **February 27, 2023**.

## HSR Act Pre-Merger Notification Thresholds Revised

On January 23, 2023, the FTC [announced](#) the annual adjustments of the jurisdictional thresholds that determine when pre-merger notification filings are required under the HSR Act. The new thresholds, which increase by approximately 10.3%, will [go into effect](#) on **February 27, 2023**.

The HSR Act requires companies contemplating mergers or acquisitions of voting securities or assets that meet or exceed certain monetary thresholds to file notification forms with the FTC and DOJ and to wait a designated period (generally 30 days) before consummating the contemplated transaction. For transactions closing after February 27, 2023, companies will generally need to comply with the HSR Act pre-merger notification and waiting period requirements if *either* of the following is true:

- The size of the transaction is more than **\$111.4 million (up from \$101 million)** and the parties to the deal meet minimum “size of person” criteria (generally one party to the transaction must have total assets or annual net sales of \$222.7 million or more and the other party to have total assets or net sales of at least \$22.3 million).
- The size of the transaction (as defined by the HSR Act and applicable regulations) is more than **\$445.5 million**, regardless of size-of-person criteria.

These requirements are subject to various exemptions and exceptions, and it is important to consult with experienced antitrust counsel to determine whether a filing is required. We note that the agencies have given no indication that they plan to revisit the decision, [announced](#) in early 2021, to suspend the discretionary practice of granting “early termination” of the HSR waiting period for transactions that don’t raise antitrust concerns.

## Section 8 “Interlocking Directorates” Thresholds Increased

The FTC also announced on January 23, 2023, an increase to the thresholds for violations of Section 8 of the Clayton Act, which prohibits competitor companies from having interlocking relationships among their directors or officers. Now, absent certain exceptions, one person may not serve simultaneously as a director or officer of competing corporations if each “interlocked”

corporation has capital, surplus, and undivided profits aggregating more than \$45,257,000. The revisions also increased the statutory “safe harbor” for “competitive sales” to \$4,525,700. A corporate interlock is not in violation of Section 8 if the competitive sales in the United States of either interlocked corporation are below that threshold.

## Antitrust Civil Penalty Amounts Adjusted Upward for Inflation

On January 6, 2023, the FTC [announced](#) adjustments to various maximum civil penalty levels for certain laws it enforces, which became effective upon [publication](#) in the *Federal Register* on January 11, 2023. Of note, the maximum civil monetary penalty for violations of the HSR Act and Section 5 of the FTC Act (concerning unfair methods of competition and unfair or deceptive acts or practices) increased by approximately 7.7%, from \$46,517 to \$50,120 per day.

## FTC Asserts Broad Enforcement Authority to Challenge “Unfair Methods of Competition,” Including in the M&A Context

Late last year, the FTC issued a new [“Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act.”](#) The statement, which passed by a 3–1 party-line vote on November 10, 2022, formally declared that the FTC’s “unfair methods of competition” authority under Section 5 of the FTC Act extends to a vast array of allegedly “unfair” practices that don’t violate other antitrust laws. In particular, the statement noted the FTC’s plans to use its Section 5 authority to pursue “incipient violations of the antitrust laws” as well as acts that violate “the spirit of the antitrust laws.”

In the M&A context, this might include (1) a pattern of serial mergers, acquisitions, or joint ventures that tend to bring about the harms the antitrust laws were designed to prevent, even if each individually may have not violated the antitrust laws; or (2) acquisitions of a potential or nascent competitor that may tend to lessen future competition, even if not barred under prevailing interpretations of U.S. merger law.

Notably, Commissioner Christine Wilson, the FTC’s lone “no” vote, issued a [dissenting statement](#) declaring that the FTC was abandoning “bedrock principles of antitrust that long have been accepted by the Commission” and was granting itself the authority to “summarily... condemn essentially any business conduct it finds distasteful.”

## M&A Partially Exempted from Controversial FTC Proposal to Ban Noncompetes

The FTC made waves on January 5, 2023, when it issued a [Notice of Proposed Rulemaking](#) that would significantly curtail the use of noncompete provisions in employment agreements. The Proposed Rule would ban all post-termination employee noncompete clauses, including requiring employers to rescind existing ones. Importantly for M&A practitioners, however, the Proposed Rule contains a narrow sale-of-business exception that would exempt agreements where the party restricted by the noncompete clause is an owner, member, or partner holding at least a 25% ownership interest in a business entity.

However, other employment agreements entered in connection with M&A activities would be subject to the proposed ban. For more information about the broader implications of the proposal, including commentary on likely legal challenges to its implementation, please look for our forthcoming advisory on the Proposed Rule.

## On the Horizon: Major Revisions to the Agency Guidelines on Mergers Expected in 2023

On January 18, 2022, asserting that industries are becoming more concentrated and less competitive, the FTC and DOJ [announced](#) that they would begin a joint review of the agencies’ merger guidelines, with the goal of strengthening enforcement. At the time of the announcement, FTC Chair Lina Khan said that the goal was to ensure that the merger guidelines, which had not been updated since 2010, “accurately reflect modern market realities and equip [the FTC and DOJ] to forcefully enforce the law against unlawful deals.” The revised guidelines, which were originally expected to be released by the end of 2022, are now expected in the coming months.

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