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FTC Announces Revised HSR Filing Fees and Increased HSR Thresholds

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In February, the threshold for mandatory filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”) will be increasing, and filing fees are also being adjusted for the first time in decades. While increased thresholds benefit some who fall below the mandatory notice cutoff, many deals that do need to be filed will end up paying increased fees to the government (for a smaller number, fees will also decrease). The filing fee adjustments are intended to provide additional revenue for the Federal Trade Commission (“FTC”) and the Department of Justice Antitrust Division (“DOJ”), which are tasked with, among other things, investigating potential deals for antitrust concerns.

Specifically, the new Size of Transaction threshold will jump from \$101 million currently to **\$111.4 million**. Several other associated thresholds will increase as well, as detailed below. Penalties for violations will also increase. In addition, the FTC approved a new merger filing fee structure, as required by the Merger Filing Fee Modernization Act passed in December, which provides for increasing filing fee tiers ranging from \$30,000 to \$2.25 million.

The revised thresholds and fee schedule are scheduled for publication in the Federal Register on January 26, 2023, and become effective in 30 days. They will apply to all transactions that close on or after February 25, 2023.

Background: The Hart-Scott-Rodino Antitrust Improvements Act of 1976

The HSR Act provides that, where certain jurisdictional thresholds are met, parties intending to merge or make acquisitions must (absent any applicable exemptions) furnish the FTC and DOJ with prescribed information regarding their respective businesses and the proposed transaction. They must also wait a specified period of time before consummating the transaction. The statutory “waiting period” stays consummation of the transaction for a minimum of 30 days (15 days in the case of bankruptcy or cash tender offers), absent a grant of early termination. However, the agencies have not been granting early terminations in the ordinary course since February 2021, when the FTC announced the procedure suspended indefinitely in light of an “unprecedented volume” in HSR filings. As a result, even transactions raising no competitive concerns are required to observe the full 30-day waiting period if the HSR Act notification thresholds are met.

The 2000 amendments to Section 7A of the Clayton Act mandate annual adjustments of the HSR Act thresholds each year, based on changes in the gross national product. Due to U.S. GNP growth in 2022, the revised jurisdictional and filing fee thresholds for this year increase the dollar amount limits for the Size of Transaction and the Size of Person at which parties to a transaction are required to make an

HSR filing, as well as the filing fee thresholds. Many of the other filing requirements related to dollar amounts in the HSR Act have similarly been increased to remain consistent with the revised jurisdictional and filing fee thresholds. Any transactions that were expected to trigger HSR notification requirements based on the 2022 thresholds should be reevaluated if closing may occur on or after February 25, 2023.

Significant Changes to HSR Filing Fees

The Merger Filing Fee Modernization Act, which was signed by President Biden on December 29, 2022 under the 2023 Consolidated Appropriations Act, provided revised HSR filing fees as a means of increasing FTC and DOJ revenue. This new legislation increases the number of filing fee tiers from three to six. The filing fees for some smaller transactions are being lowered—with the bottom filing fee tier dropping from \$45,000 to \$30,000. The fees for many larger deals, particularly those valued at over \$1 billion, will increase significantly, potentially up to a high of \$2.25 million. The Act requires the FTC to publish annual inflation-based adjustments by January 31 of each year.

The revised fees are expected to support significant increases in FTC and DOJ staffing, and consequently increased enforcement efforts. Like the revised HSR thresholds, the new fee schedule is expected to take effect for all transactions closing on or after February 25, 2023.

An overview of the updated thresholds for the most common HSR filing issues is included below.

New Jurisdictional Thresholds

	Revised 2023 Thresholds	2022 Thresholds
Size of Transaction Test	The Acquiring Person will hold, as a result of the transaction, an aggregate total amount of voting securities, assets and/or interests in non-corporate entities of the Acquired Person valued at in excess of \$111.4 million .	\$101 million
Size of Person Test	Transactions valued at more than \$445.5 million are reportable, regardless of the size of person test above.	\$403.9 million
	One party has annual net sales or total assets of \$222.7 million or more, and the other party has annual net sales or total assets of \$22.3 million or more.*	\$202 million \$20.2 million
Subsequent Acquisitions of Voting Securities	Voting securities valued at \$222.7 million or more;	\$202 million
	Voting securities valued at \$1.1137 billion or more;	\$1.0098 billion
	Voting securities constituting 25% of the issuer's securities if valued at more than \$2.2274 billion ; and	\$2.0196 billion
	Voting securities constituting 50% of the issuer's securities if valued at more than \$111.4 million .	\$101 million

*Where the target is not engaged in manufacturing, it must have total assets of \$22.3 million or annual net sales of \$222.7 million to satisfy the lower Size of Person threshold.

New HSR Filing Fee Ranges

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

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