

THOUGHT LEADERSHIP

LEGAL UPDATES

PUBLISHED: JANUARY 25, 2023

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Heads Up HSR Filers: FTC Updates 2023 Thresholds and Filing Fees

The Federal Trade Commission (FTC) recently announced an increase to the annual adjustment of the monetary thresholds that apply to mergers, acquisitions, and joint ventures per the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). The HSR Act governs the transactions that must be reported to the FTC and U.S. Department of Justice (DOJ) prior to their consummation. The FTC also summarized the new HSR filing fee structure that was signed into law by President Biden on December 29, 2022, as part of the omnibus spending bill. These changes will apply to transactions that will be consummated 30 days after the FTC's publication of the notice in the Federal Register.

The minimum transaction value (also known as the size-of-transaction threshold) that determines reportability under the HSR Act is increasing to \$111.4 million, and the size-of-person thresholds are increasing to \$22.3 million and \$222.7 million. Transactions in which the acquirer will hold voting securities, non-corporate interests, or assets valued above \$111.4 million but below \$445.5 million will be reportable if the size-of-person thresholds are satisfied and no exemptions apply. If a transaction is valued at \$445.5 million or above (the “alternative size-of-transaction” value), a filing will be required without regard to whether the size-of-person thresholds are met unless an exemption applies.

HSR Notification Thresholds Increase

The HSR Act thresholds are adjusted annually based on changes to the gross national product and determine whether companies or individuals are required to notify the FTC and the U.S. Department of Justice Antitrust Division (DOJ) of a proposed merger, acquisition, joint venture, or other combination. Transactions falling below the applicable thresholds are not reportable; however, if the thresholds are met, the parties must submit their

respective HSR Act premerger notification forms to the FTC and the DOJ, pay the applicable filing fee, and wait to close the transaction until the 30-day waiting period expires, or it is otherwise terminated.

The chart below sets forth the revised HSR Act thresholds that affect jurisdictional requirements and impact whether an exemption to HSR Act reportability may apply. The 2022 HSR Act thresholds remain in effect until the revised 2023 thresholds go into effect 30 days after publication in the Federal Register.

HSR Threshold	Current 2022 Threshold	New 2023 Threshold
Size-of-Transaction	\$101 million	\$111.4 million
Alternative Size-of-Transaction	\$403.9 million	\$445.5 million
Size-of-Person	\$20.2 million and \$202 million	\$22.3 million and \$222.7 million

New HSR Act Filing Fee Structure and Foreign Subsidy Disclosure Requirements

The Merger Filing Fee Modernization Act of 2022 includes several provisions, including a significantly revised HSR filing fee structure which lowers the filing fee for smaller transactions but increases fees for larger transactions. Fees will be adjusted annually, and the amount of the filing fee that the acquirer (unless otherwise agreed to by the parties) must pay is tied to the following transaction values:

HSR Filing Fee	Transaction Value
\$30,000	Greater than \$111.4 million but less than \$161.5 million
\$100,000	At least \$161.5 million but less than \$500 million
\$250,000	At least \$500 million but less than \$1 billion
\$400,000	At least \$1 billion but less than \$2 billion
\$800,000	At least \$2 billion but less than \$5 billion

\$2.25 million	\$5 billion or more
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Also new this year, parties are required to provide information regarding any “subsidies” received from a “foreign entity of concern,” subject to further rulemaking regarding specifics of the disclosure. A foreign entity of concern includes countries or entities that are economic threats to the United States, including China, Iran, North Korea, Russia, entities controlled by those countries, as well as any entities that are designated as foreign terrorist organizations or included on the U.S. Department of Treasury’s Specially Designated Nationals list. A subsidy includes direct subsidies, grants, loans, tax concessions, and preferential government procurement policies.

State Antitrust Enforcement Venue Act

The omnibus spending bill also included the State Antitrust Enforcement Venue Act (State Venue Act) which provides state attorneys general (AGs) the authority to pursue future antitrust actions in the venue of their choice. The practical implication of the State Venue Act is that companies will be forced to defend various state AG antitrust cases, including merger challenges, in different courts across the country even if they arise from the same conduct. The State Venue Act allows AGs to avoid having their case transferred out of their chosen court.

Penalties for Noncompliance

Determining whether the HSR Act, Clayton Act, and potential exemptions apply to a transaction involves knowledge and interpretation of the laws, regulations, and the FTC’s informal guidance. Noncompliance with the HSR Act may result in significant penalties. The FTC increased civil penalties of up to \$50,120 per day which have been in effect since January 11, 2023.

Contact us

If you have any questions relating to the HSR Act thresholds, including whether a transaction is reportable to the FTC and DOJ under the HSR Act, please contact Wendy Arends, Victoria Sitz, Mark Tobey, Julia Banegas or your Husch Blackwell attorney.