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M&A Antitrust Update: HSR Filing Thresholds Increase and U.S. Antitrust Agencies Finalize Merger Guidelines

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) (collectively, the agencies) prior to their consummation. 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 \$119.5 million, and the size-of-person thresholds are increasing to \$23.9 million and \$239 million. Transactions in which the acquirer will hold voting securities, non-corporate interests, or assets valued above \$119.5 million but below \$478 million will be reportable if the size-of-person thresholds are satisfied and no exemptions apply. If a transaction is valued at \$478 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 agencies 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 agencies, pay the applicable filing fee, and wait to close the transaction until the 30-day waiting period expires, or 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 2023 HSR Act thresholds remain in effect until the revised 2024 thresholds go into effect 30 days after publication in the Federal Register.

HSR Threshold	Current 2023 Threshold	New 2024 Threshold
Size-of-Transaction	\$111.4 million	\$119.5 million
Alternative Size-of-Transaction	\$445.5 million	\$478 million
Size-of-Person	\$22.3 million and \$222.7 million	\$23.9 million and \$239 million

Revised HSR Act filing fees

The HSR filing fee structure has also been revised per the HSR Act. The amount of the filing fee that the acquirer (unless otherwise agreed to by the parties) must pay in connection with a HSR filing is tied to the following transaction values:

2024 HSR Filing Fee	2024 Transaction Value
\$30,000	At least \$119.5 million but less than \$173.3 million
\$105,000	At least \$173.3 million but less than \$536.5 million
\$260,000	At least \$536.5 million but less than \$1.073 billion
\$415,000	At least \$1.073 billion but less than \$2.146 billion
\$830,000	At least \$2.146 billion but less than \$5.365 billion
\$2.335 million	\$5.365 billion or more

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 announced increased civil penalties of up to \$51,744 per day of noncompliance, effective January 10, 2024.

Final Merger Guidelines reflect increased scrutiny of M&A

The agencies recently issued the final version of the 2023 Merger Guidelines. Although there have been some changes to the final Merger Guidelines, they do not differ significantly from the draft issued in July 2023, and the key takeaways remain the same. The bottom line is that these guidelines underscore the agencies' focus on and commitment to increased merger enforcement across all industries.

The final Merger Guidelines contain the following 11 guidelines, instead of the original 13:

1. Mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market.
2. Mergers can violate the law when they eliminate substantial competition between firms.
3. Mergers can violate the law when they increase the risk of coordination.
4. Mergers can violate the law when they eliminate a potential entrant in a concentrated market.
5. Mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete.
6. Mergers can violate the law when they entrench or extend a dominant position.
7. When an industry undergoes a trend toward consolidation, the agencies consider whether it increases the risk a merger may substantially lessen competition or tend to create a monopoly.
8. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
9. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
10. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers, creators, suppliers, or other providers.
11. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

Draft Guideline 6 relating to vertical mergers was incorporated into final Guideline 5, and draft Guideline 13 (a catchall stating that mergers should not otherwise substantially lessen competition or tend to create a monopoly) was deleted from the final version. In addition, the agencies dropped the 30% market share threshold in draft Guideline 7 (now Guideline 6) that would identify whether a merger creates or extends a dominant position.

What this means to you

For companies evaluating growth and expansion opportunities, the agencies' more complex Merger Guidelines will increase deal timelines, the merging parties' time and expense, and the potential risk that the transaction will be reviewed by the agencies.

Contact us

If you have any questions relating to the Merger Guidelines or the HSR Act thresholds, including whether a transaction is reportable to the agencies under the HSR Act, please contact Wendy Arends, Mark Tobey, Tori Sitz, Blake Heyer, or your Husch Blackwell attorney.