

## **Alert | Antitrust Litigation & Competition Regulation**



**December 2022**

### **Merger Filing Fee Modernization Act of 2022**

#### **Go-To Guide:**

- The Consolidated Appropriations Act, 2023, which includes the Merger Filing Fee Modernization Act of 2022 was signed into law on Dec. 29.
- The Merger Filing Fee Modernization Act of 2022 introduces structural changes to the HSR filing fee tier system.
- HSR filing fees currently range from \$45,000 to \$280,000 and will soon range from \$30,000 to \$2,250,000.
- Questions remain, including when the new filing fees will go into effect.

On Dec. 22, 2022, and Dec. 23, 2022, the Senate and the House of Representatives, respectively, each passed the Merger Filing Fee Modernization Act of 2022 as a part of the Consolidated Appropriations Act, 2023 (the Act), which is the omnibus spending bill including all 2023 appropriations bills. President Biden signed the Act into law Dec. 29. The Act makes the first change to the HSR filing fee structure since it was modified in 2000.

#### **Revised HSR Filing Fee Thresholds**

HSR filing fees fund antitrust enforcement by the FTC and DOJ. Congress amended the Hart-Scott-Rodino Act (HSR Act), 15 U.S.C. § 18a. in 2000 to require the annual adjustment of HSR notification

thresholds and a three-tier filing fee system with corresponding size of transaction thresholds, based on change in gross national product (GNP), and a three-tier filing fee system based on transaction value corresponding to those thresholds. Since then, while the filing fee thresholds have been revised annually, the actual filing fees had not increased since 2000, or been similarly indexed, until now. The Act introduces a new six tier filing fee system based on transaction value, and requires that the HSR filing fees themselves will be adjusted annually.

As was the case with the prior filing fee levels, the new tiers set forth below will also be adjusted annually based on a change in GNP. The first such adjustment will occur in early 2024, as that adjustment will reflect the percentage change in GNP between the fiscal year ended Sept. 30, 2023, and Sept. 30, 2022.

In other words, both the filing fee thresholds and the fees themselves will be adjusted annually.

The following is a summary chart of the filing fee adjustments:

<b>PRIOR FILING FEE LEVELS</b>	
<b>Size-of-Transaction</b>	<b>Fee</b>
in excess of \$50 million (as adjusted annually, currently \$101 million) but less than \$100 million (as adjusted annually, currently \$202 million)	\$45,000
\$100 million (as adjusted annually, currently \$202 million) or greater but less than \$500 million (as adjusted annually, currently \$1,009.8 million)	\$125,000
\$500 million or greater (as adjusted annually, currently \$1,009.8 million)	\$280,000

<b>NEW FILING FEE LEVELS</b>	
<b>Size-of-Transaction</b>	<b>Fee*</b>
in excess of \$50 million (as adjusted annually, currently \$101 million) but less than \$161.5 million (as adjusted annually beginning in 2024)	\$30,000

\$161.5 million (as adjusted annually beginning in 2024) or greater but less than \$500 million (as adjusted annually beginning in 2024)	\$100,000
\$500 million (as adjusted annually beginning in 2024) or greater but less than \$1 billion (as adjusted annually beginning in 2024)	\$250,000
\$1 billion (as adjusted annually beginning in 2024) or greater but less than \$2 billion (as adjusted annually beginning in 2024)	\$400,000
\$2 billion (as adjusted annually beginning in 2024) or greater but less than \$5 billion (as adjusted annually beginning in 2024)	\$800,000
\$5 billion (as adjusted annually beginning in 2024) or greater	\$2,250,000

*\*To be adjusted annually based on the Consumer Price Index.*

Going forward, depending on the size of the deal, HSR filing fees could be lower in some instances, though higher in more instances, than under the previous three-tier system. For example, for transactions valued between \$101 million but less than \$161.5 million, HSR filing fees will decrease from \$45,000 to \$30,000. For transactions valued at \$161.5 million or greater, but less than \$202 million, filing fees will increase from \$45,000 to \$100,000. Transactions valued at \$202 million or greater, but less than \$500 million, will see a filing fee decrease from \$125,000 to \$100,000. Transactions valued at \$500 million or greater, but less than \$1 billion, will see a filing fee increase from \$125,000 to \$250,000. Transactions valued at \$1 billion or greater, but less than \$1.0098 billion, will see a filing fee increase from \$125,000 to \$400,000. Transactions valued at \$1.0098 billion or greater, but less than \$2 billion, will see a filing fee increase from \$280,000 to \$400,000. Transactions valued at \$2 billion or greater, but less than \$5 billion, will see a filing fee increase from \$280,000 to \$800,000. Finally, for transactions valued at \$5 billion or greater, filing fees will increase from \$280,000 to \$2,250,000.

Some questions remain. For example, under current HSR rules, Section 802.21, once an acquiror files HSR, and the filed-for waiting period ends or terminates, it can acquire voting securities of the same issuer, up to the next notification threshold over the next five years without filing again. We will have to wait to see if these successive notification thresholds remain the same or align with the new the filing fee bands. Amending the notification thresholds would require new rulemaking by the FTC.

In terms of deal negotiation, these filing fee changes may impact a calculus on whether to file on a letter of intent, as opposed to a fully executed agreement, as well as decisions by the parties on whether to split HSR filing fees.

It is unclear when the new filing fee thresholds will go into effect. The latest we have heard is to keep watching the FTC website, for the Premerger Notification Office to post a notice of changes to the filing fee schedule.

### Disclosure of Subsidiaries by Foreign Adversaries

In response to concerns that companies receiving foreign subsidies can affect competition (for example, by allowing the subsidy recipient to submit a higher bid than it would have been able to do otherwise), the Act also imposes a new reporting obligation within HSR filings, to provide information relating to foreign subsidies received from certain foreign governments “that are strategic or economic threats to the United States.” This new requirement will take effect after new rules are issued and revisions are made to the HSR form and instructions.

2023 looks to be a year of antitrust shake up. FTC Chair Lina Khan has said the antitrust agencies are also considering additional revisions to the HSR Form, such as requiring the parties to provide more customer and overlap information upfront. We also expect the agencies to release new Merger Guidelines shortly as well.

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