



## Hart-Scott 2023 Premerger Filing Fees Increase Substantially

By Glenn Davis on February 9, 2023  
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It's that time again—sort of like Punxsutawney Phil on Groundhog Day. The antitrust agencies have again increased the filing fees for premerger review of sizable transactions. This year is a good news/bad news story. The fees have increased substantially for large transactions but lowered for smaller ones. Also, the size threshold for transactions requiring premerger filings has increased. This means fewer transactions will be subject to review.

On January 26, 2023, the Federal Trade Commission (“FTC”) announced its annual adjusted reporting thresholds for application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”). The FTC also announced implementation of the revised filing fee structure mandated by the Merger Filing Fee Modernization Act of 2022. The new thresholds and filing fee structure are effective February 25, 2023.

The HSR Act requires parties to certain mergers, acquisitions of assets or voting securities, or joint ventures valued at more than \$111.4 million to complete premerger notification with the FTC and the Antitrust Division of the Department of Justice (“DOJ”) and to observe a statutory waiting period (normally 30 days) before closing the deal. Both agencies have concurrent jurisdiction to review any reportable transaction, and either the FTC or DOJ may conduct a preliminary review of each HSR filing. If an agency opens an investigation into a proposed transaction's competitive effects or issues a second request (formal request for extensive data), the parties typically must cooperate if they want to consummate the transaction.

In recent years, the agencies have been more aggressive in challenging transactions in federal court by seeking to enjoin the closure of transactions that may have anticompetitive consequences. Further, the agencies have also demonstrated a willingness to challenge non-reportable transactions.

### Adjusted Threshold for Size-of-Transaction Test

The minimum size of transaction requiring an HSR Act filing has been increased from \$101 million to \$111.4 million. While there are nuances under the rules, for most purposes the size of the transaction is calculated as the greater of the purchase price or the fair market value of the assets, voting securities, or noncorporate interests being acquired. If the purchase price or value of such acquired assets, voting securities, or noncorporate interests is below \$111.4 million, there is no requirement to make an HSR Act filing—even if the parties meet the size-of-parties test described below.

## Adjusted Thresholds for Size-of-Parties Test

When the size-of-transaction test is met, generally one party to a transaction must also have assets or annual revenues of at least \$222.7 million (previously \$202 million), while the other party must have assets or annual revenues of at least \$22.3 million (previously \$20.2 million) to trigger an HSR Act filing.

However, if the size of transaction is \$445.5 million or more (previously \$403.9 million), the size-of-parties test does not apply, and the parties will need to file an HSR Act filing regardless of the value of the assets or annual revenues of the transaction parties.

## Implementation of Filing Fee Restructuring

The Merger Filing Fee Modernization Act restructures the filing fee thresholds for premerger notifications under the HSR Act by lowering fees for smaller transactions and implementing three new tiers of fees for transactions larger than \$1 billion. The new tiers will be as follows:

### *Filing Fee*

#### *Thresholds*

#### **\$30,000**

Transaction value is at least \$111.4M, but less than \$161.5M

#### **\$100,000**

Transaction value is at least \$161.5M, but less than \$500M

#### **\$250,000**

Transaction value is at least \$500M but less than \$1 billion

#### **\$400,000**

Transaction value is at least \$1 billion, but less than \$2 billion

#### **\$800,000**

Transaction value is at least \$2 billion, but less than \$5 billion

#### **\$2,250,000**

Transaction value is at least than \$5 billion

In addition to the annual increase in size-of-transaction and size-of-party thresholds, the FTC will also adjust the new filing fees annually. For each fiscal year beginning after September 30, 2023, the filing fees will be increased by an amount equal to the percentage increase, if any, in the Consumer Price Index for that year over the level established for the year ended September 30, 2022. The FTC will publish the annual adjustments by January 31 each year.

## Adjusted Thresholds for Interlocking Directorates

Section 8 of the Clayton Act prohibits an individual from simultaneously serving as an officer or director of two competing corporations if each corporation has capital, surplus, and undivided profits of more than \$45,257,000 (previously \$41,034,000). Section 8 provides for several exceptions when competitive overlaps are “too small to have competitive significance.” For example, the parties will not violate Section 8 where: (1) the competing sales of either corporation are less than \$4,525,700 (previously \$4,103,400), (2) the competitive sales of either corporation are less than 2% of the corporation’s total sales, or (3) the competing sales of each corporation are less than 4% of the corporation’s total sales.

The FTC announces these annual revised Section 8 thresholds in the *Federal Register* each January, and they are effective immediately upon publication.

## Conclusion

Failure to comply with the HSR Act premerger notification requirements (and other antitrust laws) risks serious consequences for businesses and individuals. The fines for non-compliance with HSR requirements also increased substantially: from \$46,517 to \$50,120 per day for each day of non-compliance.

Determination of premerger notification obligations is a fact-intensive process, that requires experience and a thorough understanding of HSR Act and accompanying regulations. Companies contemplating a merger, acquisition, or other large transaction should review the new thresholds and consult with antitrust counsel to determine if a proposed deal requires clearance from federal antitrust authorities before consummation.

**Tags:** Acquisitions, Antitrust Division, Clayton Act, DOJ, Federal Trade Commission, FTC, Hart-Scott-Rodino, HSR Act, Joint Ventures, Merger Filing Fee Modernization Act, Mergers