

FTC Announces Increases to Hart-Scott-Rodino Act Notification Thresholds and Filing Fees

Corporate News: A Legal Update

By Vic Peterson on February 16, 2023

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) requires premerger notifications to be filed for larger transactions in order to prevent monopolies and other anti-competitive effects. Unless an exemption applies, acquisitions that exceed certain threshold amounts for the sizes of the transaction, the acquiring person, and the acquired person are subject to antitrust review by the U.S. Federal Trade Commission (the FTC) and/or the Antitrust Division of the Department of Justice.

On January 26, 2023, the FTC announced increases to HSR notification filing thresholds and changes to filing fees. The minimum size-of-transaction threshold was increased from \$101 million to \$111.4 million. Unless the acquiring person will hold more than \$111.4 million of the acquired person's voting securities, non-corporate interests, or assets as a result of the acquisition, no HSR notification is required.

The requirement to file an HSR notification may also depend on size-of-person thresholds. Both the size-of-transaction and size-of-person thresholds must be met for the notification filing to be required, unless the transaction size is more than \$445.5 million, in which case the size-of-person requirement does not apply. The size-of-person thresholds for the acquiring person and the acquired person have been increased to \$222.7 million in annual net sales or total assets of the ultimate parent entity of one party and \$22.3 million for the other party.

Filing fees for HSR notifications have been lowered from \$45,000 to \$30,000 for the smallest transactions that are subject to HSR, and filing fees have been increased significantly for larger transactions (previously, the highest filing fee was \$280,000), as follows:

Size of Transaction

Filing Fee

More than \$111.4 million, but less than \$161.5 million

\$30,000

\$161.5 million or more, but less than \$500 million

\$100,000

\$500 million or more, but less than \$1 billion

\$250,000

\$1 billion or more, but less than \$2 billion

\$400,000

\$2 billion or more, but less than \$5 billion

\$800,000

\$5 billion or more

\$2,250,000

These increased HSR notification filing thresholds and changes to filing fees apply to all transactions closing on or after February 27, 2023. In future years, filing thresholds will increase or decrease based on changes to the gross national product. Beginning in fiscal year 2024, filing fees will increase by the same percentage as any increase of more than one percent in the consumer price index for the prior fiscal year. HSR requires the acquiring person to pay the filing fee, although transaction parties may agree to share responsibility for payment.

The FTC also increased the maximum amount of civil penalties for HSR violations from \$46,517 to \$50,120 per day. The increased maximum amount applies to civil penalties assessed after the January 11, 2023, effective date of the adjustment, including for violations that occurred before the effective date.

Besides the size-of-transaction and size-of-person tests, the commerce test must also be satisfied for HSR notification to be required. The commerce test is met if any transaction party is engaged in commerce or in any activity affecting commerce.

Even if the size-of-transaction, size-of-person, and commerce tests are met, an exemption to the HSR notification requirement may be available. For example, the passive investor exemption applies to passive investors holding less than 10% of a company's securities. Also, the pro rata exemption applies when an investor's total ownership percentage will not increase as a result of acquiring additional equity interests, such as in a dilutive offering.

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When a notification is required under HSR, the parties must wait at least 30 days after filing the notification before consummating the transaction. The waiting period expires after 30 days unless the FTC or Department of Justice extends it by making a “Second Request” for additional information. In 2021 the FTC suspended its prior practice of permitting requests for early termination of the waiting period, and it has not yet reinstated this practice.

Acquisitions subject to HSR include not only mergers and acquisitions between companies, but also acquisitions of stock or other equity interests by investors, or even equity-based compensation. Determining whether an HSR notification is required to be filed – including whether the size-of-transaction and size-of-person thresholds are met and whether an exemption applies – and, if so, preparing the notification require guidance from experienced legal counsel.

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