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2023 ANTITRUST M&A LAW DEVELOPMENTS

HSR Act "Size of Transaction" Test Increases by 10.3% to $111.4 Million New Multi-tiered Filing Fees & Enhanced Enforcement Resources

The Federal Trade Commission, the agency which administers the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("***HSR Act***"), has announced a number of changes to the HSR Act, including adjustments to its jurisdictional, filing fee and other dollar-denominated thresholds. The HSR Act applies to mergers, asset and stock acquisitions and other transactions that satisfy specified "size-of-transaction" and "size-of-person" dollar thresholds. If triggered, the HSR Act requires companies to make pre-closing filings with both the Federal Trade Commission ("***FTC***") and Department of Justice ("***DOJ***") (the two federal agencies responsible for U.S. antitrust enforcement) and to provide detailed information about the proposed transaction. The HSR Act's jurisdictional thresholds, however, change from year to year, based on changes in the U.S. gross national product for the government's fiscal year ending September 30. The 2023 revisions were published in the *Federal Register* on January 26, 2023, and become effective on February 27, 2023. The new thresholds will remain in effect until the next annual adjustment, expected early next year.

Other notable recent changes to antitrust law are contained in "The Merger Filing Fee Modernization Act" ("***Merger Fee Act***") and the State Antitrust Enforcement Venue Act ("***State Venue Act***"), each of which was enacted as part of the $1.7 trillion omnibus spending package signed into law on December 29, 2022. These changes include:

- Dramatic increases to HSR Act filing fees for large transactions
- Mandated disclosure in all HSR Act filings of any "subsidy" received by deal participants from certain foreign entities
- Significant increased enforcement resources for the FTC and DOJ
- Substantial enhancements to the ability of state attorneys general to choose and control the venue in which to pursue antitrust enforcement actions

Revised Dollar Thresholds to Determine Initial HSR Filing Obligation

Effective February 27, 2023, the minimum notification threshold under the HSR Act will increase from $101 million to $111.4 million. Thus, an acquisition will potentially trigger an HSR Act filing only if, as a result of the acquisition, the acquirer will hold assets, voting securities or non-corporate interests of the acquired person valued in excess of $111.4 million. The complete revised 2023 initial thresholds are as follows:

Threshold Type	2022 Threshold	2023 Threshold *(Effective for transactions closing on or after February 27, 2023)*
Minimum "Size-of-Transaction" test	$101 million	$111.4 million
"Size-of-Person" Test (applicable only to transactions valued at less than the "Alternative Size-of-Transaction" test below)	Person #1: $20.2 million Person #2: $202 million	Person #1: $22.3 million Person #2: $222.7 million
Alternative "Size-of-Transaction" test (requiring HSR filing regardless of "Size-of-Person" test above)	$403.9 million	$445.5 million

To summarize, applying these new thresholds results in the following reporting obligations:

Transaction Size	HSR Act Reporting Obligation?
$111.4 million or less	No
Greater than $111.4 million and less than $445.5 million	Yes, but only if the above "Size-of-Person" test is satisfied
$445.5 million or more	Yes, without regard to the above "Size-of-Person" test

Major Changes to HSR Act Filing Fees

The Merger Fee Act includes significant changes to the filing fee structure of the HSR Act. Notably, its HSR Act filing fee changes are the most significant changes in over 20 years and are expected to reduce the filing fee for smaller transactions (under $500 million) and increase filing fees significantly for larger transactions (over $1 billion). The additional funds from these increased fees are earmarked to provide additional resources to antitrust enforcers (CBO estimate: $1.4 billion over five years), which is expected by most to lead to still further increased and rigorous enforcement efforts.

Specifically, effective February 27, 2023, the new filing fee structure is as follows:

Transaction Ranges	Filing Fees
Transactions less than $161.5 million	$30,000
$161.5 million to less than $500 million	$100,000
$500 million to less than $1 billion	$250,000
$1 billion to less than $2 billion	$400,000
$2 billion to less than $5 billion	$800,000
Transactions of $5 billion or more	$2,250,000

In a change from the previous structure (where the filing fee amounts remained fixed from year to year), this new fee schedule will be adjusted annually based on the Consumer Price Index. The new thresholds for determining HSR Act filing requirements are effective for all transactions ***closing*** on

or after February 27, 2023, the new thresholds for determining the applicable filing fee become effective for all filings first ***made*** on or after February 27, 2023.

Additional Notification Thresholds

As stated above, effective February 27, 2023, an acquisition that results in an acquirer holding more than $111.4 million worth of the assets, stock or non-corporate interests of an acquired person crosses the first of five staggered "notification thresholds." The rules identify four additional thresholds that determine whether a subsequent acquisition of voting securities from the same acquired person will require additional HSR filings. These additional notification thresholds have been revised as follows:

Original Additional Notification Thresholds	2022 Additional Notification Thresholds	2023 Additional Notification Thresholds
$100 million	$202 million	$222.7 million
$500 million	$1.0098 billion	$1.1137 billion
25% of the Voting Securities of an issuer	(if the 25% stake is valued at greater than $2.0196 billion)	(if the 25% stake is valued at greater than $2.2274 billion)
50% of the Voting Securities of an issuer	(if the 50% stake is valued at greater than $101 million)	(if the 50% stake is valued at greater than $111.4 million)

In effect, these staggered thresholds are designed to act as exemptions to relieve parties of the burden of making additional filings each time additional shares of the same person are acquired. Once a filing is made, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing; if it reaches the stated threshold within that period, it may continue acquiring shares up to the next threshold for five years from the end of the waiting period. These additional notification thresholds apply only to acquisitions of voting securities.

Supercharged Enforcement, Disclosure of Contributions from "Foreign Entities of Concern" & Increased Civil Penalties

In addition to impacting filing fees as discussed above, the Merger Fee Act requires filers to disclose whether they have received subsidies from a "foreign entity of concern," which includes "countries or entities that are strategic or economic threats to the United States" (*e.g.*, China, Russia, North Korea, Iran and entities included on the Specially Designated Nationals list). The Merger Fee Act defines "subsidy" broadly to include not only direct subsidies but also grants, loans, loan guarantees, tax concessions, preferential government procurement policies, and government ownership or control. The Merger Fee Act asserts that "foreign subsidies … can distort the competitive process by enabling the subsidized firm to submit a bid higher than other firms in the market, or otherwise change the incentives of the firm in ways that undermine competition following an acquisition."

The FTC and DOJ are expected to issue new rules and instructions for HSR filers to implement this requirement.

The State Venue Act exempts from transfer and consolidation into related federal proceedings, certain civil antitrust actions brought by individual states (usually the state's attorney general) and grants the attorney generals powers to dictate the venue in which they pursue antitrust suits under federal law. This is expected to complicate efforts by defendants to manage and defend multi-state federal litigation and will likely mean that plaintiffs can keep antitrust suits in their home states.

Once parties have made their required HSR Act filings, the enforcement agencies have up to 30 days to decide whether to seek additional information – an unwelcome and taxing process commonly known as a "second request" – or to take no action and allow the 30-day waiting period to automatically terminate. Before February 4, 2021, filing parties had the option at the time of filing to request an "early termination" of the 30-day waiting period which, if granted by the agencies, shortened the 30-day waiting period to approximately 10 to 14 days. However, the enforcement agencies' "temporary" suspension of early termination grants, first announced by the FTC two years ago due to the historically high volume of HSR Act transactions and in order to allow the agencies to adjust to the enforcement priorities of the Biden administration, largely remains in place. Moreover, the FTC and DOJ increasingly advise merger parties that, despite the expiration of the HSR Act's waiting period, an agency investigation remains open and any consummation of the transaction is at the parties' risk.

Failure to comply with HSR Act requirements can result in substantial civil and other penalties. Violations of the HSR Act can result in substantial penalties because each day of non-compliance is an independent violation and can result in a separate penalty up to the maximum civil penalty. On January 11, 2023, the FTC announced an increase in the maximum civil penalty amount for violations of the HSR Act from $46,517 per day to $50,120 per day for all penalties assessed on or after January 11, 2023. Additional annual changes to the maximum daily civil penalty are expected, as such adjustments are required to be made each January.

Clayton Act Section 8 "Interlocking Directorate" Thresholds Also Increased

The FTC also recently announced revised dollar thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors. Section 8 of the Clayton Act generally prohibits, with certain exceptions, a person from serving as a director or officer of two competing companies if certain dollar thresholds are met. As revised, the prohibition against interlocking directors applies if each company has more than $45,257,000 (up from $41,034,000 for 2022) in capital, surplus and undivided profits; however, the prohibition generally does not apply if either company has less than $4,525,700 (up from $4,103,400 for 2022) in competitive sales. The revised Clayton Act dollar thresholds became effective immediately upon publication in the *Federal Register* on January 26, 2023.

What all of this Means

Over the past several years, in light of the increasingly pro-enforcement posture of the FTC and DOJ, the suspension of early termination grants and the increase in second requests issuances, M&A and other deal makers have engaged in significantly more advanced HSR Act and antitrust law compliance planning, including conducting more thorough, detailed advance competitive review screens for proposed transactions and budgeting more time for HSR Act clearance to be obtained.

Companies and their investors and advisors should pay particular attention to the increased dollar thresholds in assessing HSR Act filing obligations – particularly for deals with either a filing date or closing date that straddles February 27, 2023. First, parties may be relieved from the obligation to make an HSR Act filing for a transaction closing on or after February 27, 2023, that falls just under the revised $111.4 million initial filing threshold. In addition, for HSR Act filings made on or after February 27, 2023, parties may realize the benefit of a lower filing fee for a smaller transaction that straddles one of the new filing fee dollar thresholds.

Companies and others should be mindful that HSR Act filing obligations are often triggered by a wide variety of non-M&A or "merger" transactions, including asset acquisitions, initial and follow-on investment transactions, joint ventures and other "strategic alliances," patent or other IP licensing

activities, NewCo formations, and the exercise, exchange or conversion of options or other convertible securities.

Finally, deal parties should be ever mindful that a transaction will not escape antitrust scrutiny because either an HSR Act filing is not required or, even if a filing is required and made, a transaction receives HSR Act clearance. Non-reportable deals are still challenged by the FTC and the DOJ, as each of those agencies regularly file suit seeking to unwind previously-consummated mergers. Even small transactions with a purchase price below the filing thresholds have been challenged. In fact, almost 20% of all merger challenges brought by the DOJ and FTC in recent years involved consummated transactions. Finally, over the past two years, the FTC and DOJ have increasingly issued "warning letters" notifying merger parties that, despite the expiration of the HSR Act's waiting period, the agencies specifically retain the power to challenge both proposed and consummated transactions.

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