

SIGNIFICANT CHANGES TO CURRENT FILING FEES REQUIRED BY HART-SCOTT-RODINO ACT INCLUDED IN OMNIBUS FUNDING BILL

As a part of a broad omnibus spending bill passed by Congress, President Biden signed into law the Merger Filing Fee Modernization Act on December 29, 2022. The Merger Filing Fee Modernization Act includes the first changes to the merger filing fees required by the **Hart-Scott-Rodino Act** (“HSR Act”) in over twenty years. While the changes include significant increases to the filing fee for large transactions, smaller transactions, including many of those valued at under \$1 billion, will see decreases in the filing fees required by the HSR Act. The updates to the filing fees included in the Act have been published in the Federal Register and will become effective on February 27, 2023.

HSR FILING FEES GO UP FOR BIGGER TRANSACTIONS AND DOWN FOR SMALLER TRANSACTIONS

The HSR Act requires all persons contemplating certain mergers or acquisitions that meet or exceed the “size of transaction” and “size of person” jurisdictional thresholds to file a premerger notification (“HSR Filing”) with the Federal Trade Commission (“FTC”) Premerger Notification Office and the Department of Justice (“DOJ”) Antitrust Division, and to wait a period of time before consummating the transaction.

Historically, the HSR filing fee, which is based upon the “size of transaction,” included only three ranges with three fee amounts as shown in the table below. While the “size of transaction” and the “size of person” thresholds changed every year based on inflation, the HSR filing fees stayed the same.

2022 Size of Transaction Range	Filing Fee
\$101 million < X < \$202 million	\$45,000
\$202 million < X < \$1.0098 billion	\$125,000
X ≥ \$1.0098 billion	\$280,000

The passage of the Merger Filing Fee Modernization Act brings significant changes to both the amount of the filing fee and the thresholds with which to determine the filing fee due. The new “size of transaction” structure includes six ranges and six corresponding filing fee amounts. While smaller transactions—those less than \$161.5 million, or those between \$202 million and \$500 million—will see decreases in their filing fees, all other transaction ranges will see an increase. Transactions valued at greater than \$500 million will see significant increases, with the greatest increases seen by those transactions valued at \$5 billion or greater.

In addition, starting in 2024 the HSR filing fee will now increase every year to the nearest multiple of \$5,000 based on inflation.

New Size of Transaction Range	New Filing Fee
\$101 million < X < \$161.5 million	\$30,000

\$161.5 million < X < \$500 million	\$100,000
\$500 million < X < \$1 billion	\$250,000
\$1 billion < X < \$2 billion	\$400,000
\$2 billion < X < \$5 billion	\$800,000
X ≥ \$5 billion	\$2,250,000

The dramatic increases in HSR filing fees for the largest transactions are designed to provide the FTC and DOJ with more robust financial resources to pursue their strong antitrust enforcement agenda under President Biden’s administration. But parties faced with filing fees that are up to eight times greater than those of the 2022 thresholds should prepare for the increased financial burden and the potential for changes that increase may bring to the negotiation of the transaction.

The omnibus spending bill also included two other competition-related measures: An update to disclosure requirements for merging companies that receive subsidies from a “foreign entity of concern,” and the State Antitrust Enforcement Venue Act, which will prevent antitrust lawsuits brought by state attorneys general from being transferred to other districts by the Judicial Panel on Multidistrict Litigation.

PRACTICAL TAKEAWAYS

- Given many health care transactions are valued at less than \$500 million, the changes included in the Merger Filing Fee Modernization Act may actually be a good thing as it brings decreased HSR filing fees.
- However, for those large health care transactions valued at \$500 million or greater, the parties need to be aware of and plan for the significant increase in the required HSR filing fee.
- In a significant change, the HSR filing fees will now increase every year to the nearest multiple of \$5,000 based on inflation. So while the HSR filing fees for smaller transactions will initially go down from current levels, the fees will likely be higher in upcoming years as the fees increase with inflation. Over time, this increase could end up being substantial.
- This is another example of antitrust enforcement being front and center at the federal level. While the FTC and DOJ have been steadfast in pursuing a more aggressive antitrust enforcement agenda over the last few years, this fee increase will provide more financial resources to the federal antitrust agencies to continue to pursue an aggressive enforcement agenda.

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