

Alert

HSR Update: New Federal Law Substantially Increases Filing Fees for Large Deals and Imposes Foreign Subsidy Disclosure Requirements

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On Dec. 29, 2022, President Joe Biden signed into law the Consolidated Appropriations Act of 2023 (also known as the Omnibus Funding Bill), which includes the [Merger Filing Fee Modernization Act of 2022](#). The Merger Filing Fee Modernization Act significantly alters the framework for filing fees under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), lowering the filing fees for smaller deals but significantly increasing the filing fees for larger deals, with fees reaching \$2.25 million for transactions valued at \$5 billion or more. The Federal Trade Commission (“FTC”) has not yet disclosed the effective date of the new fees. In addition, the Merger Filing Fee Modernization Act adds disclosure requirements to HSR notification filings for companies receiving subsidies from certain foreign entities.

New HSR Filing Fee Framework

Unless an exemption applies, the HSR Act requires parties to acquisitions of voting securities, assets or non-corporate interests meeting certain thresholds to submit premerger notifications to the FTC and the Antitrust Division of the Department of Justice (“DOJ”), pay a filing fee (currently ranging from \$45,000 to \$280,000), and observe a waiting period before consummating their transactions.

The filing fees applicable to premerger notifications filed under the HSR Act have not changed in over two decades. Under Sections 2(c)(1)-(2) of the Merger Filing Fee Modernization Act, the filing fees will be divided into six tiers (instead of three) depending on transaction size. Deals valued less than \$500 million will have modestly lower filing fees, but billion-dollar transactions will see significant fee increases, with the highest fee of \$2.25 million being almost 10 times greater than the highest fee of \$280,000 under the current framework.

The new HSR filing fees will be as follows:

Size of Transaction	Filing Fee
Greater than \$50 million (as adjusted, currently \$101 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
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*Beginning in Fiscal Year 2024, the filing tiers will be adjusted annually in accordance with changes in U.S. gross national product, and filing fees will be adjusted annually based on the Consumer Price Index as determined by the Department of Labor.

We expect the new filing fees will take effect in 2023, but the FTC has not yet announced the effective date. In the meantime, parties should proceed under [the current fee framework](#).

New Foreign Subsidy Disclosure Requirement

The Merger Filing Fee Modernization Act also imposes new disclosure requirements on parties that receive subsidies from foreign entities that are considered strategic or economic threats to the United States.

Defined in Section 40207 of the [Infrastructure Investment and Jobs Act](#), these “Foreign Entities of Concern” include:

- Entities owned by, controlled by or subject to the jurisdiction of China, Russia, Iran or North Korea;
- Entities designated as foreign terrorist organizations;
- Entities on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of the Department of Treasury;
- Entities alleged by the DOJ to have been involved in activities for which a conviction was obtained under the Espionage Act, Economic Espionage Act of 1996, the Arms Export Control Act, the Atomic Energy Act, the Export Control Reform Act or the International Emergency Economic Powers Act; and
- Entities determined to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.

“Subsidy” is defined broadly and includes direct subsidies, grants, loans, loan guarantees, tax concessions, preferential government procurement policies and government ownership or control. The new disclosure obligations will take effect after new rules are issued and revisions are made to the HSR form and instructions.

Key Takeaways

- *Larger filing fees may impact negotiation strategies.* The acquirer generally is responsible for the filing fee unless the parties negotiate otherwise. Parties to larger deals may more actively negotiate who will pay the increased filing fees. In addition, filing on letters of intent may decrease as parties may prefer to wait for the certainty of an executed and definitive agreement before submitting their HSR notifications.
- *Consult experienced counsel regarding potential exemptions and accurate valuation.* With significantly increased fees, it is critical for parties to accurately assess whether a filing is in fact required and, if so, the value of the transaction for HSR purposes (which can depend on a variety of factors, some industry-specific) in order to determine the relevant filing fee.

- *Greater agency resources will enable increased antitrust scrutiny.* The federal regulators have struggled to keep up with the pace of merger filings in recent years and to also fulfill the Biden administration's [promise of heightened antitrust scrutiny](#). The higher filing fees are expected to increase funding to the FTC and DOJ by about \$1.4 billion over five years and could enable more staff to investigate more transactions.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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