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New Hart-Scott-Rodino Act Thresholds and Filing Fees Announced

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The Hart-Scott-Rodino (HSR) Act thresholds, which govern when acquisitions must be reported to the Department of Justice and Federal Trade Commission, will increase slightly more than 10% in February 2023. The minimum "size-of-transaction" threshold will increase from $101 million to $111.4 million. The increases, which are based on changes in the US gross national product, will go into effect on February 27, 2023.

The new six-tiered HSR filing fee structure passed by Congress last December will go into effect at the same time, raising filing fees to as high as $2.25 million for transactions valued at $5 billion or more (compared to a filing fee for an equivalent transaction of $280,000 in the past). The new filing fee scheme is expected to significantly boost DOJ and FTC antitrust enforcement funding.

The HSR Act requires that parties to acquisitions, including acquisitions of voting securities and assets, notify the DOJ and the FTC, and observe a statutory waiting period if the acquisition meets specified "size-of-person" and "size-of-transaction" thresholds – and does not fall within an exemption to the HSR Act.

The waiting period, which is 30 days for most transactions, historically has been terminated early when transactions do not present substantive issues, but the Biden administration has stopped granting early terminations for almost all transactions since February 2021.

In addition to adjustments to the minimum "size-of-transaction" threshold, the most significant adjustments are the following:

- The "size-of-person" test will increase from $20.2 million to $22.3 million and from $202 million to $222.7 million, with respect to the required level of annual net sales or total assets.
- The larger "size-of-transaction" threshold, which is applicable even if the "size-of-person" test is not met, will increase from $403.9 million to $445.5 million, meaning that acquisitions of more than $445.5 million will be reportable regardless of whether the "size-of-person" threshold is met (unless an exemption applies).

The newly adopted HSR filing fee structure will be as follows:

The FTC also announced revised dollar thresholds applicable to the size criteria applied under Section 8 of the Clayton Act, which governs the legality of interlocking directorates. Under the updated thresholds, competitor corporations are covered by Section 8 if each one has capital, surplus and undivided profits aggregating more than $45,257,000, with an exception if the competitive sales of either corporation are less than $4,525,700 (as adjusted). The revised levels for these thresholds were effective as of January 20, 2023, upon publication in the Federal Register.

Finally, earlier this month, the FTC also announced an adjustment to the maximum daily civil penalty for HSR violations, which is adjusted for inflation (unlike the HSR thresholds, which are adjusted based on changes in the gross national product). The current maximum daily civil penalty is now $50,120 per day, effective as of January 11, 2023.

HSR filing analyses – and determinations of which interlocking directorates may violate Section 8 of the Clayton

Act – are highly technical. If you have any questions, please reach out to a member of your Cooley corporate or antitrust team.

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