

HSR Filing Fees Increase Substantially for Large Transactions, Boost FTC and DOJ Antitrust Enforcement Funding

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On December 29, 2022, President Joe Biden signed a funding bill into law that includes provisions that significantly change the filing fees for mergers & acquisitions notifiable under the Hart-Scott-Rodino (HSR) Act.

For transactions valued at more than \$5 billion, HSR filing fees are set to jump approximately 800% – from \$280,000 to \$2.25 million – and will be adjusted for smaller transactions. Notably, the funds are earmarked to provide additional resources to antitrust enforcers, which may lead to increased enforcement efforts.

The date for implementation of the new fees is not yet set. The Federal Trade Commission (FTC) is expected to announce an effective date soon.

The HSR Act requires that parties to mergers & acquisitions notify the Department of Justice (DOJ) and FTC if proposed acquisitions meet certain “size-of-person” and “size-of-transaction” thresholds. Parties are required to pay a fee, which currently ranges from \$45,000 to \$280,000, to the government based on the value of the transaction, and observe a statutory waiting period before consummating the transaction to allow the government to investigate whether the transaction may lessen competition.

The Merger Filing Fee Modernization Act (MFFMA), which is included in the funding bill, alters the fee tiers for the first time in 20 years. The new law establishes a six-tier scheme, with filing fees of up to \$2,250,000. For some smaller transactions, however, the filing fee will be reduced from \$45,000 to \$30,000.

The MFFMA also provides that the fees will be adjusted annually based on changes in the consumer price index. Previously, filing fee thresholds have been indexed but not the fees themselves.

The new fee structure is as follows:

Deal value thresholds	HSR filing fees
\$101 million to 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

Deal value thresholds	HSR filing fees
\$2 billion to less than \$5 billion	\$800,000
\$5 billion or more	\$2,250,000

The fee increases are projected to boost funding to the FTC and DOJ by about \$1.4 billion over five years, according to Congressional Budget Office estimates.

Democratic Sen. Amy Klobuchar of Minnesota, chair of the Senate Judiciary Committee Subcommittee on Competition Policy, Antitrust, and Consumer Rights, heralded the MFFMA, saying it will “enable Congress to get much-needed resources to our antitrust enforcers so they can protect competition.”

In addition to impacting HSR filing fees, the MFFMA 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.” The MFFMA 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 DOJ and FTC are expected to issue new rules and instructions for HSR filers to implement this requirement. The agencies may roll those out along with other revisions to the HSR rules that FTC Chair Lina Khan has indicated will require more substantive disclosures.

The funding bill signed into law also provides state attorneys general who bring suit under federal antitrust law greater power to control where such cases will be tried. Under the newly adopted provision, states that bring antitrust cases will receive the same exception as the federal government to avoid consolidation into multidistrict litigation in a different venue from where the state originally sued.

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