



# A Robinson+Cole Legal Update

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## The New Hart-Scott-Rodino Filing Thresholds: The FTC and Congress Join Forces to Further President Biden's Antitrust Agenda

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On January 23, 2023, the Federal Trade Commission (FTC) enacted the most radical change to Hart-Scott-Rodino Act (HSR) filing thresholds in decades. Pursuant to the Merger Filing Fee Modernization Act of 2022, which was signed into law as part of the Consolidated Appropriations Act on December 29, 2022, the new HSR filing fees are determined using a tiered system that decreases the financial burden on smaller businesses combining that are trying to establish a presence in the market and imposes a "tax" in the form of significantly higher fees on larger companies. The new structure is consistent with other antitrust legislative efforts to rein in Big Tech that have been percolating in Congress for years.

### When Does a Transaction Trigger an HSR Filing?

Not all mergers and acquisitions require pre-merger notification to government agencies under the HSR Act; there is a three-prong test to determine whether a filing is necessary.

1. *Commerce Test*: Determine whether either party is engaged in commerce or an activity affecting commerce.
2. *Size-of-Transaction Test*: As described below, if a transaction is below a certain value, the parties do not need to make an HSR filing. If the transaction is above a certain a value, an HSR filing is automatically required.
3. *Size-of-Person Test*: Transactions between these lower and upper thresholds require an HSR filing depending on the size-of-person test. Specifically, if the Ultimate Parent Entity (UPE) of the buyer or seller, defined as the entity, has a certain amount of annual net sales or total assets, then the transaction is reportable.

### New Filing Thresholds and Fees

The new filing thresholds and fees which take effect on February 27, 2023, are as follows:

Filing Thresholds	HSR Filing Required?
The transaction is below \$111.4 million	No HSR filing required
The transaction is above \$445.5 million	An HSR filing automatically required
The transaction is between \$111.4 million and \$445.5 million	An HSR filing may be required depending on the size of the parties' respective UPEs. If one UPE has sales or assets of at least \$222.7 million and the other UPE has sales or assets of at least \$22.3 million, an HSR filing is required.

Transaction Value	Filing Fees
Greater than \$111.4 million but less than \$161.5 million	\$30,000
Between \$161.5 million and \$500 million	\$100,000
Between \$500 million and \$1 billion	\$250,000
Between \$1 billion and \$2 billion	\$400,000
Between \$2 billion and \$5 billion	\$800,000
\$5 billion or more	\$2.25 million

### The FTC Picks Up the Congressional Mantle

For years, Congress has considered legislation to “update” the Sherman Act so that, from the vantage point of the legislators sponsoring the bills, federal antitrust law is better equipped to deal with the challenges in modern markets. Among the bills in play were the Competition and Antitrust Law Enforcement Reform Act (S. 225) (CALERA), sponsored by Amy Klobuchar (D-MN), that sought to increase agency enforcement resources and curtail monopoly power. To date, sweeping overhauls like CALERA have stalled in Congress because bill sponsors are unable to attract the necessary support. Passing the Merger Filing Fee Modernization Act is a small but significant victory. First, the tiered-fee structure favors nascent competitors that are trying to gain a foothold in the market to take on bigger rivals, while “taxing” bigger companies allegedly seeking to further consolidate market power. Second, the FTC is expected to invest the hefty HSR filing fees back into the agency—essentially leveraging big transactions to increase its own enforcement capabilities.

If you have any questions about the Merger Filing Fee Modernization Act, please contact us.

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