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NEW LEGISLATION WILL LEAD TO INCREASED HSR MERGER FILING FEES FOR LARGER DEALS IN 2023

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On December 29, 2022, President Biden signed into law the Merger Filing Fee Modernization Act of 2022 (the MFFMA), which will modify the current structure of merger filing fees payable under the Hart-Scott-Rodino (HSR) Act and increase HSR merger filing fees primarily for larger transactions.

The HSR Act requires that parties involved in M&A transactions notify the Department of Justice (DOJ) and Federal Trade Commission (FTC) if a transaction meets certain "size of person" and "size of transaction" thresholds and observe a statutory waiting period prior to closing such transaction to allow the government to investigate anti-competition risks and pay associated filing fees to the government. Fees currently range from \$45,000 to \$280,000, based on size-of-transaction values which are adjusted annually based on changes in the gross national product. The fee structure based on the current as-adjusted transaction thresholds is as follows:

Transaction Value

Current Filing Fee

\$101 million to less than \$202 million

\$45,000

\$202 million to less than \$1.0098 billion

\$125,000

\$1.0098 billion or more

\$280,000

The MFFMA establishes a new, six-tier fee structure as outlined below, with filing fees of up to \$2,250,000. For certain smaller transactions, filing fees will be reduced.

Transaction Value**New Filing Fee**

\$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

\$2 billion to less than \$5 billion

\$800,000

\$5 billion or more

\$2,250,000

Additionally, under the MFFMA, filing fees will be adjusted annually based on changes in the consumer price index (a measure of inflation) beginning in 2024. Previously, filing fee transaction value thresholds were indexed, but not the fees themselves. The additional revenue that the MFFMA will raise is intended to fund antitrust enforcement.

The effective date for the fee changes has not yet been announced, although the changes will go into effect sometime during 2023. The FTC is expected to announce the effective date soon.

In addition to the filing fee changes, the MFFMA mandates that filing parties will be required to include in their HSR filings information regarding subsidies and other backing received from any "foreign entity of concern." Currently, this would include entities controlled by the governments of China, Russia, Iran and North Korea and specifically designated nationals and others. Implementation of the new disclosure requirements remain subject to rules that will be promulgated by the antitrust agencies, in consultation with the Committee on Foreign Investment in the United States (CFIUS) and other appropriate agencies. The implementation process is lengthy and subject to public comment, so the new rules are not anticipated to go into effect in the near term.

If you have questions about HSR filing fees or the HSR reporting process, please contact Miranda Miller or Lindsay Avagliano, or the Smith Anderson lawyer with whom you currently work.

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