

SENATE JUDICIARY COMMITTEE APPROVES BILL TO OVERHAUL HSR FILING FEES

On May 13, 2021, the Senate Judiciary Committee unanimously approved a bill that would drastically change the fee structure for pre-merger notification filings made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). The bill, titled the *Merger Filing Fee Modernization Act of 2021*,¹ would dramatically increase some filing fees, including raising fees to \$2.25 million for transactions valued at \$5 billion or more. The bipartisan bill, which passed by a voice vote, was co-sponsored by Senator Amy Klobuchar, D-MN, the head of the Senate Judiciary Subcommittee on Antitrust, and Senator Chuck Grassley, R-IA, the Ranking Member on the Senate Judiciary Subcommittee. The bill would also increase the annual budgets of the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") Antitrust Division.

If the new bill is passed by Congress and signed into law by the President, six new filing fee thresholds would replace the current three thresholds. The current fees are as follows:

Current Filing Fees (as of May 2021)	Size of Transaction
\$45,000	valued in excess of \$92 million but less than \$184 million
\$125,000	valued at \$184 million or greater but less than \$919.9 million; or
\$280,000	valued at \$919.9 million or greater

¹ S. 228, 117th Cong. (2021).

The bill's new fee structure would create the following six thresholds:

New Proposed Filing Fees	Size of Transaction
\$30,000	\$92 million or greater but is less than \$161.5 million ²
\$100,000	\$161.5 million or greater but is less than \$500 million
\$250,000	\$500 million or greater but is less than \$1 billion
\$400,000	\$1 billion or greater but is less than \$2 billion
\$800,000	\$2 billion or greater but is less than \$5 billion
\$2,250,000	\$5 billion or greater

These changes would take effect immediately upon passage of the bill. In addition, for each fiscal year after September 30, 2022, filing fees will increase by an amount equal to the percentage increase of the Consumer Price Index ("CPI"), as determined by the U.S. Department of Labor for the preceding year, so long as the CPI increases by one percent or more.

The bill also increases the DOJ Antitrust Division's budget from \$184.5 million to \$252 million and the FTC's budget from \$330.2 million to \$418 million for fiscal year 2022.

Parties should consult with their antitrust and M&A counsel to determine the potential impact this bill may have on their transactions, particularly as to deal structure, allocation of the fee payment between the buyer and the seller, and sourcing adequate funding to accommodate for filing fees that could be as high as \$2.25 million. And while this proposed legislation affects HSR filing fees in the United States, the change could spur other competition agencies around the world to seek higher filing fees as a way to increase funding. Parties should continue to monitor updates to merger control regimes to ensure compliance and prepare the necessary filing fees for their transactions.

Bipartisan Support for Change

After making it through the 22 member Senate Judiciary Committee without amendment, Senator Klobuchar released the following statement: "Our competition enforcers don't have enough resources to effectively take on multi-billion dollar, much less trillion-dollar, companies. The Federal Trade Commission and Department of Justice Antitrust Division shouldn't have to fight some of the largest monopolies in history with duct tape and Band-Aids, which is why we need to provide them with more funding. With strong bipartisan support, the *Merger Filing Fee Modernization Act* has moved out of committee and onto the floor, bringing us one step closer to securing much needed additional resources for our enforcers without relying on taxpayer dollars."³

² The \$161.5 million threshold in the bill may be a drafting error if Congress meant this threshold to match the current \$184 million threshold for transactions that pay a \$45,000 filing fee.

³ <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=BD26C825-CF4C-4489-BBA6-8438D9CE5FE3>

Republican Senator Ted Cruz also welcomed the bill, noting that he was "quite disappointed by the lax antitrust enforcement we saw in the previous administration." Signaling his expectations that the agencies take a tougher stance on merger review moving forward, Senator Cruz stated, "Democrats have historically been more vigorous on antitrust than Republicans, and so perhaps that instinct, which at times can be harmful, will be positively directed towards the monopolists we have in Silicon Valley."⁴

The *Merger Filing Fee Modernization Act* would mark the first update to the HSR filing fees since 2001. Whereas in 2019 a previous version of the bill failed to make it out of the Senate Judiciary Committee, this updated version is moving through Congress at a time when there is greater bipartisan support to equip the U.S. antitrust agencies with additional funding. Also on the table are other legislative proposals, such as the *Competition and Antitrust Law Enforcement Reform Act* ("CALERA") introduced by Senator Klobuchar in February, which would arm the agencies with more financial resources and relaxed legal standards. And important vacancies remain at the agencies, including the posts of Assistant Attorney General for the Department of Justice, Antitrust Division, and Chair of the Federal Trade Commission. Updated merger filing fees may just be the starting point of more changes to come.

⁴ <https://www.reuters.com/article/us-usa-antitrust-fees/bipartisan-u-s-bill-to-raise-merger-fees-for-big-deals-passes-senate-panel-idINKBN2CU1U7?edition-redirect=in>

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