

PRESIDENT BIDEN SIGNS OMNIBUS SPENDING BILL CONTAINING TRIO OF ANTITRUST BILLS

On December 29, 2022, President Biden signed the Consolidated Appropriations Act of 2023 (the "Act"),¹ which contains a trio of previously introduced antitrust proposals: the Merger Filing Fee Modernization Act,² the State Antitrust Enforcement Venue Act,³ and the Foreign Merger Subsidy Disclosure Act.⁴ The passage of the Act makes substantial changes for parties filing notifications required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") and for federal antitrust cases brought by state attorneys general. While these changes are significant, they are not as sweeping as other legislation proposed this term, such as the American Innovation and Choice Online Act⁵ and the Open App Markets Act.⁶

MERGER FILING FEE MODERNIZATION ACT

The Merger Filing Fee Modernization Act overhauls the existing filing fee structure for premerger notifications made pursuant to the HSR Act. Prior to passage of the Act, filing fees were divided into three tiers, with transaction values updated annually by the Federal Trade Commission ("FTC"). For 2022, the thresholds were:

- \$45,000 for transactions valued in excess of \$101 million but less than \$202 million,
- \$125,000 for transactions valued at \$202 million or greater but less than \$1,009.8 million, and

¹ H.R. 2617, 117th Cong. (2022).

² H.R. 3843, 117th Cong. (2022).

³ H.R. 3460, 117th Cong. (2022).

⁴ H.R. 5639, 117th Cong. (2022).

⁵ S.2992, 117th Cong. (2022).

⁶ S.2710, 117th Cong. (2022).

- \$280,000 for transactions valued at \$1,009.8 million or greater.

The new thresholds include six filing fee tiers. While providing for smaller fees for lower valued deals, filing fees will be substantially higher for transactions valued at over one billion dollars. At this time, it is unclear when the changes will take effect. The Premerger Notification Office at the FTC has advised that transacting parties should proceed under the previous fee structure until the FTC posts a notice of change to the fee schedule. Therefore, parties should be prepared to immediately pay the new filing fee amounts, but it is possible that the FTC may need additional time to implement the changes necessary to support the new filing fee tiers.

New Filing Fees	Size of Transaction
\$30,000	\$101 million or greater but is less than \$161.5 million
\$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

For each fiscal year commencing after September 30th, 2023, the filing fees will be increased by an amount equal to the percentage increase, if any, in the Consumer Price Index as determined by the Department of Labor.

The Act also requires the FTC and Department of Justice, Antitrust Division ("DOJ") to publish an annual joint report to Congress for fiscal years 2024-2027 detailing:

- The amount of funds made available to the FTC and DOJ from premerger notification filing fees as compared to the filing fees currently in place.
- The total revenue derived from premerger notification filing fees, by tier, for the FTC and DOJ.
- The gross cost of operations of the FTC and DOJ.

The FTC must also include in the report actions on the record based on a 3 to 2 vote and what percentage of actions were decided by a 3 to 2 vote.

STATE ANTITRUST ENFORCEMENT VENUE ACT

The State Antitrust Enforcement Venue Act prevents federal antitrust lawsuits brought by state attorneys general in U.S. district court from being transferred to other venues by the U.S. Judicial Panel on Multidistrict Litigation, which is charged with consolidating complex cases to promote judicial efficiency—a protection already afforded to the federal government when bringing a federal antitrust claim. Now, state attorneys general bringing federal antitrust cases are able to stay in the

venue of their choosing, preventing defendants from seeking a more preferable venue.

FOREIGN MERGER SUBSIDY DISCLOSURE ACT

The Foreign Merger Subsidy Disclosure Act requires companies filing premerger notifications under the HSR Act to include in their notifications information regarding subsidies the filing party has received from a "foreign entity of concern." Countries implicated include China, Russia, Iran, and North Korea.

The Act comes in response to several findings made by Congress, including that foreign subsidies, which can take the form of grants, loans, tax concessions, and other measures, "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 Congressional findings also cite the Made in China 2025 plan, and the 2020 report to Congress from the bipartisan U.S.-China Economic and Security Review Commission, which together highlighted China's support of mergers and creating "Chinese national champions."

The FTC, DOJ, Chairperson of the Committee on Foreign Investment in the United States ("CFIUS"), the Secretary of Commerce, the Chair of the United States International Trade Commission, the United States Trade Representative, and the heads of other appropriate agencies, must promulgate rules pursuant to the Act to ensure relevant documents and information are available to the FTC and DOJ to determine if a transaction violates the antitrust laws. The Foreign Merger Subsidy Disclosure Act will not take effect until these rules are final.

KEY TAKEAWAYS

First, in the past 24 months, a plethora of antitrust legislation aimed at reigning in big tech platforms was proposed, such as the American Innovation and Choice Online Act and Open App Markets Act. However, these proposals were left pending with no action in this Congress. Instead, this trio of antitrust bills were tucked into in the Act. While these three bills are not particularly drastic, except perhaps the new filing fees for transactions over five billion dollars, it shows Congress' willingness to change the antitrust laws and could open the door to more legislation in the future.

Second, the new merger filing fees will substantially increase funding for the FTC and DOJ at a time when the agencies have been urging lawmakers to increase their funding to take on companies that have a significant advantage in terms of resources. Firms should expect more vigorous antitrust enforcement of the antitrust laws by both the FTC and DOJ.

Finally, companies contemplating mergers and acquisitions should take notice of disclosures that will be required in HSR filings under the Foreign Merger Subsidy Disclosure Act. Companies that receive subsidies, grants, loans, loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control, from countries such as China and Russia will now have to disclose these relationships to the DOJ and FTC. It is unclear how reportable subsidies will impact a merger review, but it is a new factor transacting parties will need to weigh when considering deal timing and risks.

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