

December 30, 2022

**Congress Enacts Significant Funding Increases and
Other Changes to Antitrust Merger Review**

Included in the 2023 Omnibus Appropriations Bill [signed](#) into law yesterday are the Merger Modernization Act of 2022 and the State Antitrust Enforcement Venue Act, which enact large funding increases and other significant changes to the U.S. antitrust merger enforcement regime. The Merger Modernization Act — first [introduced](#) in 2021 — increases premerger filing fees for most transactions valued at \$500 million or more, and also includes a new requirement that companies disclose information regarding subsidies they receive from a “foreign entity of concern.” The State Venue Act provides state attorneys general greater choice over the venues in which they pursue antitrust enforcement litigation. The Appropriations Bill also allocates significant additional funding to the Federal Trade Commission and Department of Justice for the 2023 fiscal year.

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, parties to most mergers and acquisitions valued in excess of \$101 million must notify the FTC and DOJ’s Antitrust Division and observe a mandatory waiting period before closing. While the new legislation does not change the HSR Act’s reportability thresholds, it does — for the first time in more than two decades — change the HSR filing fees for reportable mergers as follows:

Size of Transaction	Current Filing Fee	New Filing Fee
\$101 million to \$161.5 million	\$45,000	\$30,000
\$161.5 million to \$500 million	\$45,000 or \$125,000	\$100,000
\$500 million to \$1 billion	\$125,000 or \$280,000	\$250,000
\$1 billion to \$2 billion	\$280,000	\$400,000
\$2 billion to \$5 billion	\$280,000	\$800,000
\$5 billion or greater	\$280,000	\$2,250,000

We expect the FTC to implement the revised filing fees later in 2023, and filings submitted on or after the effective date will be subject to the new filing fees. Going forward, the FTC will annually adjust both the filing fees and the size-of-transaction fee thresholds based upon the Consumer Price Index and changes in the Gross National Product, respectively. The FTC and DOJ will also report annually through 2027 the total revenue generated from each fee tier.

The new law also requires merging parties to disclose in their HSR Notification and Report Forms any subsidies received from a “foreign entity of concern” as defined in 42 U.S.C. § 18741(a)(5). Such foreign entities include, among other things, countries determined by the Secretary of Energy, in consultation with the Secretary of Defense and the Director of

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National Intelligence, “to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.” China, Russia, Iran, and North Korea are among the countries currently identified as “foreign entities of concern.” Pursuant to the new law, the FTC and DOJ, in consultation with other government agencies, will promulgate rules that specify the information that affected parties must include in their HSR Forms and when such changes will take effect. Once effective, filing parties should expect increased scrutiny of any disclosed foreign subsidiaries, even if such subsidiaries are unrelated to the transaction being notified.

The State Venue Act, also included in the Omnibus Bill, affords states the same choice of venue currently enjoyed by the United States when bringing enforcement actions under federal antitrust laws. State attorneys general may now bring federal antitrust enforcement actions in venues of their choice, without risk that the individual state action could be consolidated into a different jurisdiction under the rules for multidistrict litigation. *See* 28 U.S.C. § 1407(g). The change gives state attorneys general greater flexibility in bringing federal antitrust claims, and increases the likelihood that parties could face simultaneous antitrust enforcement actions in multiple federal jurisdictions.

Collectively, the changes portend more antitrust scrutiny — by both federal and state authorities — and more injunctive challenges to proposed mergers and acquisitions. As the FTC and DOJ deploy additional resources and initiate these changes to the merger review process, transacting parties should anticipate longer investigations and increased risks of merger remedies or litigation.

Nelson O. Fitts
Emily E. Samra