

# Congress Enacts Changes to HSR Act, Significantly Increasing Filing Fees for Larger Transactions and Introducing New Foreign Subsidy Disclosure Requirements

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Parties that are required to file a premerger notification form under the Hart-Scott-Rodino (“HSR”) Act are set to face significantly higher filing fees for large transactions. On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 into law, which included the Merger Filing Fee Modernization Act of 2022.<sup>1</sup> As its name implies, the Merger Filing Fee Modernization Act reflects Congress’s first significant revision to the filing fees in 20 years, raising the highest fee to \$2.25 million for transactions valued at \$5 billion or greater. The largest filing fee is currently capped at \$280,000.

In addition to the filing fee changes, the recent legislation also includes two other changes to existing antitrust laws: first, parties will eventually be required to disclose in HSR filings whether the filing party receives subsidies from “foreign entities of concern”; and second, federal antitrust actions brought by state attorneys general will now be excepted from multidistrict litigation consolidation, increasing the odds that state enforcers’ original choice of venue sticks. While the antitrust venue change is now in effect, the updated HSR filing fees and foreign subsidies disclosure requirements will not become effective until the federal antitrust agencies take further actions at a still-to-be-determined time.

## FORTHCOMING UPDATES TO THE HSR ACT PREMERGER FILING FEES

The Merger Filing Fee Modernization Act creates a six-tier structure for HSR filing fees ranging from \$30,000 to \$2,250,000, replacing the existing three-tier system. The change will result in reduced filing fees for the lowest value transactions (down to \$30,000 from the previous \$45,000). However, larger transactions will see significant increases as outlined in the existing and amended filing fee tables below.

These updated filing fees will not be effective until the Federal Trade Commission’s Premerger Notification Office (the “PNO”), which administers the HSR Act, posts a

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<sup>1</sup> Merger Filing Fee Modernization Act of 2022, Title I, H.R. 3843.

notice of the changed fee. The PNO has not specified when it will make such posting, although it is reasonable to anticipate the agency is acting swiftly given the current administration's focus on increasing antitrust enforcement. Until the PNO posts the change, the current filing fees remain in effect.

#### Current HSR Act Filing Fee Schedule

Transaction Valued at:	Current Filing Fee
>\$101.0 million but <\$202.0 million	\$45,000
\$202 million or more but <\$1,009.8 million	\$125,000
\$1,009.8 million or more	\$280,000

#### New HSR Act Fee Schedule (Pending Posting of Change by FTC PNO)

Transaction Valued at:	New Filing Fee
>\$101.0 million but <\$161.5 million	\$30,000
\$161.5 million or more but <\$500 million	\$100,000
\$500 million or more but <\$1 billion	\$250,000
\$1 billion or more but <\$2 billion	\$400,000
\$2 billion or more but <\$5 billion	\$800,000
\$5 billion or more	\$2,250,000

Under this revised structure, the HSR filing fees will also be adjusted annually based on the percentage increase, if any, in the Consumer Price Index.

#### NEW DISCLOSURE REQUIREMENTS OF FOREIGN SUBSIDIES

The newly enacted legislation will also require that parties making an HSR filing disclose any subsidies received from foreign entities of concern, as defined in 42 U.S.C. 18741(a).<sup>2</sup> The intent of this new disclosure obligation is to flag subsidies by countries that the U.S. government has deemed to be strategic or economic threats, given that foreign subsidies “can distort the competitive process by enabling the subsidized firm to submit a bid higher than other firms in the market, or otherwise change incentives of the firm in ways that undermine competition following an acquisition.”<sup>3</sup> “Subsidies” can

<sup>2</sup> Currently, “foreign entities of concern” includes entities owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation, which currently includes Russia, Iran, China, North Korea, and other entities and individuals outlined pursuant to Section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)).

<sup>3</sup> Foreign Merger Subsidy Disclosure Act, Title II, H.R. 3843.

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take the form of direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential procurement policies, and/or government ownership or control.

This new foreign subsidies disclosure requirement will not take effect until the FTC and the Department of Justice Antitrust Division promulgate rules outlining the documents and manner in which such information needs to be disclosed.

### **FEDERAL ANTITRUST ACTIONS BROUGHT BY STATE ATTORNEYS GENERAL EXEMPT FROM MDL CONSOLIDATION**

The Consolidated Appropriations Act, 2023 also adds federal antitrust suits brought by state attorneys general to the exceptions from consolidation into multidistrict litigation under 28 U.S.C. 1407(g).<sup>4</sup> This shift puts state enforcers on equal footing with federal antitrust enforcers, and will increase the odds that state enforcers' original venue selections stick.

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Please do not hesitate to contact us with any questions.

*We would like to thank associate Brian Desmarais for his contribution to this Debevoise Update.*

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<sup>4</sup> State Antitrust Enforcement Venue Act, Title III, H.R. 3843.