

## New HSR Filing Fee Structure for 2023

January 5, 2023

### Key Points

- On December 29, 2022, President Biden signed the Fee Modernization Act into law as part of the \$1.7 trillion omnibus government spending bill.
- The Fee Modernization Act substantially increases HSR filing fees for large transactions (particularly those in excess of \$2 billion), and also creates new disclosure obligations for entities that receive economic support from certain foreign states.
- The omnibus spending bill also includes a provision titled the State Antitrust Enforcement Venue Act, which exempts antitrust cases brought by state attorneys general from being transferred.
- Additionally, the omnibus spending bill includes increases to enforcement budgets of the FTC and the Antitrust Division of the DOJ.

### The Fee Modernization Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) requires parties to mergers and acquisitions, and certain other transactions, that exceed statutory thresholds to do the following: make a pre-merger notification filing (HSR filing) to the Federal Trade Commission (FTC) and the Department of Justice (DOJ), pay a filing fee based on the transaction’s value and observe a statutory waiting period before closing.

The Merger Filing Fee Modernization Act of 2022 (“Fee Modernization Act”) decreases filing fees for smaller transactions, but increases fees for all transactions valued at \$500 million or greater. The Act is expected to greatly increase the total sum of filing fees, with the Congressional Budget Office estimating an additional \$1.4 billion in fees over the 2023-27 period.<sup>1</sup> The Act also provides that filing fees will increase each year in accordance with the Consumer Price Index and increases the number of fee tiers from three to six. Below are tables comparing the old and new tiers and fees, which could take effect as early as January 6, 2023.<sup>2</sup>

### HSR Filing Fees (2022)

### Contact Information

**If you have any questions concerning this alert, or if you have any questions or concerns about antitrust compliance, please contact:**

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<b><i>Size of Transaction</i></b>	<b><i>Filing Fee</i></b>
< \$202 million	\$45,000
\$202 million – \$1.0098 billion	\$125,000
≥ \$1.0098 billion	\$280,000

### **HSR Filing Fees (2023)**

<b><i>Size of Transaction</i></b>	<b><i>Filing Fee</i></b>
< \$161.5 million	\$30,000
\$161.5 million – \$499.999 million	\$100,000
\$500 million – \$999.999 million	\$250,000
\$1 billion – \$1.999 billion	\$400,000
\$2 billion – \$4.999 billion	\$800,000
≥ \$5 billion	\$2,250,000

In addition to the changes in filing fees, the Act also requires the FTC and DOJ to issue an annual report on premerger notification filing fees and the FTC to issue a report listing the actions decided by a 3-2 vote among the Commissioners.

### **Foreign Subsidy Disclosure Requirements**

In addition to the change in filing fees, the Fee Modernization Act requires every entity that receives a subsidy from a “foreign entity of concern”<sup>3</sup> to include a detailed accounting of each subsidy as part of its HSR filing. The Act defines “subsidy” to include direct subsidies, grants, loans, loan guarantees, tax concessions, preferential government procurement policies and government ownership or control. The Act also requires the FTC and DOJ to collaborate with the Committee on Foreign Investment (CFIUS) to engage in rulemaking to define the scope of the required subsidy disclosures, which we expect will likely begin shortly.

### **State Antitrust Enforcement Venue Act**

Also incorporated in the omnibus spending bill is the State Antitrust Enforcement Venue Act (“State AG Venue Act”), which will entitle state attorneys general to pursue antitrust enforcement in their venue of choice. Under previous law, when civil actions involving common questions of fact are pending in different districts, the actions may be transferred to a single court for consolidated trial proceedings. The State AG Venue

Act extends the exception to antitrust cases brought by state attorneys general, which will prevent the transfer of state antitrust cases out of the states' chosen courts.

We have seen increasing state enforcement of antitrust laws over the past five years. At times, multiple suits have been filed against a single defendant based on the same or very similar alleged conduct. For instance, Google was sued in New York and Texas (as well as D.C.) for violations of the Sherman Act and state antitrust laws. At Google's request, the action filed in Texas by the attorneys general of ten states was transferred to New York. The State AG Venue Act will allow future attorneys general to avoid such transfers and will leave companies to fight actions based on similar or the same conduct in multiple jurisdictions.

We have also seen states being increasingly willing to challenge transactions even where the federal government declines to bring suit (such as in T-Mobile/Sprint). Companies now face the specter of defending their mergers and acquisitions in multiple, simultaneous actions brought by the federal government, multiple different states and/or private parties in different courts across the country even though they arise from the same conduct, increasing the costs and complexity of clearing strategic transactions.

Notably, the State AG Venue Act applies only to matters filed after enactment and does **not** apply retroactively to matters pending before the courts.

### Increased Enforcement Budget

The omnibus spending bill also provides a greater enforcement budget for the FTC and DOJ, with the former being granted approximately \$50 million for fiscal year 2023 and the latter approximately \$35 million. Although modest in terms of the overall scope of the spending bill, these increases provide both agencies over 10 percent more than their prior budgets. This will enable the agencies to hire additional staff attorneys and provide greater funding for economic experts—both of which will enable the agencies to bring more cases.

For more information on the Fee Modernization Act, see prior alert [here](#).

<sup>1</sup> Congressional Budget Office, "S. 228, Merger Filing Fee Modernization Act of 2021" (Sept. 28, 2022), available at <https://www.cbo.gov/publication/58537>.

<sup>2</sup> The text of the Act suggests that the filing fees could take effect as soon as five business days after President Biden signed the Omnibus bill, but the Premerger Notification Office has instructed HSR counsel to continue using current thresholds until it publishes new guidance (which we expect to be soon).

<sup>3</sup> "Foreign entities of concern" include any entity owned by, controlled by or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation (as defined by 10 U.S.C. §2533(c)), which currently includes China, Iran, North Korea and Russia, as well as many entities and individuals that are covered pursuant to Section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. §18741(a)). The language also provides flexibility to add entities that are engaged in "unauthorized conduct that is detrimental to the national security or foreign policy of the United States."

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