

House Passes Bipartisan Three-Bill Antitrust

October 3, 2022

Key Points:

- Legislation passed by the United States House of Representatives would: (1) increase HSR fees for larger transactions, (2) require disclosure of economic support from certain foreign states/foreign entities and an assessment of such as part of a transaction's antitrust review and (3) prevent the transfer of litigation brought by state attorneys general.
- The measure now heads to the Senate, where the bill or parts of it might be added to year-end legislation during the lame duck session after the November elections.

Introduction

On Thursday, September 29, 2022, the House passed a package of three bipartisan antitrust bills by a 242-184 vote.

A total of 39 Republicans voted to support the legislation. A total of 16 House Democrats, many from California, voted against the bill. Senate Antitrust Subcommittee Chair Amy Klobuchar (D-MN) has pledged to try to get the package passed in the Senate, where the bill or parts of it might be added to year-end legislation during the lame duck session after the November elections.

The following measures were included in the House-passed package:

- Merger Filing Fee Modernization Act, to modify, expand and increase the schedule for graduated merger filing fees and require that such fees be adjusted each year based on the Consumer Price Index (CPI).
- Foreign Merger Subsidy Disclosure Act, to require entities to disclose in their premerger notification filings to federal antitrust regulators a detailed accounting of any economic support they received from certain foreign states.
- State Antitrust Enforcement Venue Act, to exempt antitrust actions brought by states from the Judicial Panel on Multidistrict Litigation's processes regarding transfers and consolidations of cases.

The Merger Filing Fee Modernization Act, which served as the legislative vehicle for the bills, previously cleared the House Judiciary Committee in June 2021 (see prior

Contact Information

If you have any questions concerning this alert, please contact:

Ed Pagano

Partner

epagano@akingump.com

Washington, D.C.

+1 202.887.4255

Haidee L. Schwartz

Partner

hschwartz@akingump.com

Washington, D.C.

+1 202.887.4080

Casey Christine Higgins

Senior Counsel

cchiggins@akingump.com

Washington, D.C.

+1 202.887.4223

Taylor Daly

Policy Advisor

tdaly@akingump.com

Washington, D.C.

+1 202.416.5541

alert [here](#)). The Senate Judiciary Committee first passed its version of the measure ([S.228](#)) in May 2021 (see prior alert [here](#)), and the following month, the full Senate passed the bill as part of the United States Innovation and Competition Act (USICA), although the merger filing fee provisions were ultimately excluded from the narrowed CHIPS and Science Act enacted in August 2022.

Prior to this week's passage of the three-bill package, Republicans broadly voiced concern about the provision specifically related to the Merger Filing Fee Modernization Act during a House Rules Committee meeting, outlining the need to create transparency for the distribution of the revenue generated by increased filing fees, and specifically cautioning against the use of these funds for non-enforcement purposes.

Below, please find a summary of key provisions in each bill.

Merger Filing Fee Modernization Act (Title I of H.R. 3843)

The Merger Filing Fee Modernization Act, contained in Title I of the bill, would apply to all companies making Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR) transaction filings, substantially raising filing fees for high-value transactions.

The Act would decrease filing fees for smaller transactions, while increasing fees substantially for all transaction valued at \$1 billion or greater, including increasing HSR filing fees for acquisitions of \$5 billion or greater to \$2.25 million. It also would increase the number of threshold tiers and the filing fees for each year would increase in accordance with the CPI.

Below is a table with these proposed changes.

Deal Value Thresholds	HSR Filing Fees
Greater than \$101 million but less than \$161.5 million	\$30,000
\$161.5 million – Under \$500 million	\$100,000
\$500 million – Under \$1 billion	\$250,000
\$1 billion – Under \$2 billion	\$400,000
\$2 billion – Under \$5 billion	\$800,000
\$5 billion – Greater	\$2.25 million

While the previous version of the bill would have increased the Federal Trade Commission's (FTC) budget to \$418 million, and the Department of Justice (DOJ) Antitrust Division's budget to \$252 million for fiscal year (FY) 2022, those budget increases have since been removed as the agencies' budgets already were appropriated for FY 2022. The FTC's FY 2022 budget was approximately \$376.5 million, the DOJ's was approximately \$201 million. During debate, members indicated that the appropriations process will decide the agencies' future budgets. The Congressional Budget Office estimates that the legislation would increase HSR filing fees by a total of \$1.4 billion between 2023 and 2027.

The legislation also requires annual reporting on total revenue generated broken out by tier, and for the FTC to report on all actions in which the FTC took or declined action on a 3 to 2 vote.

Foreign Merger Subsidy Disclosure Act (Title II of H.R. 3843)

The Foreign Merger Subsidy Disclosure Act, located in Title II of the bill, aims to regulate mergers involving foreign government subsidies. The Act establishes additional obligations for those required to file a notification required by section 7A of the Clayton Act (i.e., a premerger notification form as required pursuant to the HSR Act).

The bill specifically requires that entities receiving a subsidy from a “foreign entity of concern” as defined by Section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)),¹ include a detailed accounting of each subsidy in the required notification, with the goal of ensuring the FTC and DOJ have the necessary documentary material and information to determine whether the acquisition would violate U.S. antitrust laws. This bill would take effect on the date on which the rule on this notification disclosure takes effect.

State Antitrust Enforcement Venue Act (Title III of H.R. 3843)

The State Antitrust Enforcement Venue Act, contained in Title III of the bill, exempts antitrust actions brought by states from the Judicial Panel on Multidistrict Litigation’s processes for case transfers or consolidation.

Under current law, when civil actions involving common questions of fact are pending in different districts, the actions may be transferred to a single court district for coordinated or consolidated trial proceedings. Antitrust actions from consolidation or transfers are only exempt if they are brought by the U.S.

As the bill’s sponsors have noted, the legislation aims to allow antitrust actions by state attorneys general to avoid the federal multidistrict litigation process in the same manner as federal agency antitrust actions, and encourage states to bring more federal antitrust cases against anticompetitive conduct and transactions. Every state attorney has publicly supported the legislation.

¹ “Foreign entities of concern” includes 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 in section 2533c(d) of title 10), 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 for the Secretary to add entities that are engaged in “unauthorized conduct that is detrimental to the national security or foreign policy of the United States.”