

Year-end Bill to Avert Government Shutdown Includes Significant Changes to Antitrust Law

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On Friday, December 23, 2022, the House of Representatives passed the Consolidated Appropriations Act, 2023 (the “Act”) after the Senate had passed the Act on Thursday with bipartisan support. President Biden is expected to sign the Act shortly, averting a potential government shutdown. In addition to 12 separate fiscal year 2023 appropriations bills, the Act includes a host of non-funding related legislation, including three separate antitrust bills: (1) the Merger Filing Fee Modernization Act, (2) the State Antitrust Enforcement Venue Act, and (3) the Foreign Merger Subsidy Disclosure Act. Not included in the Act were several more sweeping and substantive changes to antitrust law that Congress has considered, including the [American Innovation and Choice Online Act](#) (which aimed to limit tech companies from preferencing their own products) and the Open App Markets App (which aimed to impose additional regulations on certain large app stores). Nonetheless, the included antitrust legislation will substantially increase the filing fees for large transactions and direct those additional funds to fund antitrust enforcement, give greater enforcement power to state attorneys general who bring suit under federal antitrust law, and require the promulgation of rules that require disclosure of subsidies received by merging parties from “foreign entit[ies] of concern.” The bill also increases the agencies’ fiscal year 2023 antitrust enforcement budget with an additional \$48 million for the Federal Trade Commission (“FTC”) and \$35 million for the Antitrust Division of the Department of Justice (“DOJ”).

Merger Filing Fee Modernization Act of 2022

The Merger Filing Fee Modernization Act alters the filing fee structure for transactions reportable under the Hart-Scott-Rodino (“HSR”) Act, substantially increasing the filing fees for large transactions while decreasing such fees for smaller transactions. Additional revenues raised by the increased fees for large transactions will help fund antitrust enforcement by the DOJ and the FTC.

The FTC has indicated that the current fees will remain in place until it publishes guidance regarding the new fee structure established by the Act. Once the new fees go into effect, the top HSR filing fee will increase from \$280,000 to \$2,250,000 and filing fees will significantly increase for all transactions valued at \$1 billion or more. Currently, although the FTC [annually updates](#) the filing fee thresholds based on changes to Gross National Product

(“GNP”), the fees themselves do not adjust from year to year and have not changed since 2001. The Merger Filing Fee Modernization Act not only changes the filing fee thresholds, but also changes the fee structure itself by requiring a year-by-year adjustment tied to the Consumer Price Index (“CPI”). A comparison of the current filing fee structure (fees range from \$45,000 to \$280,000) to the structure under the Merger Filing Fee Modernization Act (fees range from \$30,000 to \$2,250,000) can be found below.

Current HSR Filing Fees

| SIZE OF TRANSACTION | FILING FEE |
|--|------------|
| Values in excess of \$50 million (as adjusted, currently \$101 million) but less than \$100 million (as adjusted, currently \$202 million) | \$45,000 |
| Valued at \$100 million (as adjusted, currently \$202 million) or greater but less than \$500 million (as adjusted, currently \$1,009.8 million) | \$125,000 |
| Valued at \$500 million (as adjusted, currently \$1,009.8 million) or greater | \$280,000 |

HSR Filing Fees for 2023 (to take effect after publication of FTC guidance)

| SIZE OF TRANSACTION | FILING FEE |
|--|------------|
| Valued at less than \$161.5 million | \$30,000 |
| Valued at \$161.5 million or greater but less than \$500 million | \$100,000 |
| Valued at \$500 million or greater but less than \$1 billion | \$250,000 |

| SIZE OF TRANSACTION | FILING FEE |
|--|-------------|
| Valued at \$1 billion or greater but less than \$2 billion | \$400,000 |
| Valued at \$2 billion or greater but less than \$5 billion | \$800,000 |
| Valued at \$5 billion or greater | \$2,250,000 |

Starting on September 30, 2023, the new filing fees will tie valuation adjustments based on GNP to a base date of September 30, 2022, rather than the current base date of September 30, 2003. The Act also requires the FTC to publish the annual adjustments by January 31 each year but prohibits the FTC from making any adjustments that would be less than 1 percent and requires rounding all amounts to the nearest multiple of \$5,000.

Venue for State Antitrust Enforcement

The Act also provides greater power over venue to state attorneys general who bring suit under federal antitrust law. As described in prior Competition Corner posts ([here](#) and [here](#)), the State Antitrust Enforcement Venue Act will allow states bringing antitrust cases to receive the same exception as the federal government to avoid consolidation into multidistrict litigation. This will prevent state antitrust cases from being consolidated into a multidistrict litigation panel that may potentially be in a different venue from where the state originally sued. This provision applies only to matters filed after enactment of the Act and does not apply retroactively to matters that are now pending before courts.

Disclosure of Subsidies by Foreign Adversaries

Based on Congressional findings that foreign subsidies can distort competition in the United States, the Act also requires merging parties to disclose in HSR filings, subsidies received from “foreign entit[ies] of concern.” Under the Act, such foreign entities of concern include those that are strategic or economic threats to the interests of the United States as defined in 42 U.S.C. 18741(a)(5). The provision requires the FTC and DOJ, in consultation with the Committee on Foreign Investment in the United States, the Department of Commerce, the International Trade Commission, the United States Trade Representative, and any other appropriate agencies, to promulgate rules requiring relevant documentary material and information in HSR filings regarding such subsidies. The requirements will not take effect until the FTC and DOJ promulgate the new rules.

Parties contemplating HSR reportable transactions should be aware that the cost of HSR filings will soon increase for many transactions and that additional disclosure requirements for foreign subsidies will be forthcoming. Please contact one of the authors with any questions about the reportability and required fees for a transaction. Winston lawyers regularly advise parties on the reportability of transactions, as well as guide clients through the reporting process and any government investigation and litigation that may follow.

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