

Year-End Omnibus Bill Includes First HSR Filing Fee Increases in More Than Twenty Years, Larger Agency Budgets, and New Foreign Subsidy Reporting Requirements

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On December 29, 2022, President Biden signed into law the Consolidated Appropriations Act of 2023 (“Omnibus Bill”).¹The “Merger Filing Fee Modernization Act of 2022” substantially changes the filing fee schedule (with decreases for some transactions and dramatic increases for others) and requires premerger notifications to disclose foreign subsidies that the filing person has received. The Omnibus Bill also augments the federal antitrust enforcement agencies’ budgets.

Premerger Notification Filing Fees

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) requires parties to certain M&A transactions to notify the Federal Trade Commission (FTC) and Department of Justice (DOJ), pay a filing fee, and wait a specified period before closing on their transaction. The filing obligation is triggered if the transaction value exceeds certain dollar-based size thresholds. Those thresholds are adjusted each year to reflect annual percentage increases or decreases in Gross National Product. (The minimum size of transaction that can trigger an HSR filing is currently \$101 million.) The size-of-transaction thresholds are adjusted every year, but the amount of the filing fee payable at each threshold level has not increased since 2001.

Here are the current filing fees payable on transactions valued at the thresholds in place since February 23, 2022:

Current Size-of-Transaction Thresholds	Current Filing Fee
Greater than \$101 million but less than \$202 million	\$45,000
\$202 million or more but less than \$1.0098 billion	\$125,000

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\$1.0098 billion or more	\$280,000
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The Merger Filing Fee Modernization Act *reduces* filing fees for many small and medium-sized reportable transactions (dropping from \$45,000 to \$30,000 for transactions valued at between \$101 million and \$161.5 million, and from \$125,000 to \$100,000 for transactions valued at between \$202 million and \$500 million). Filing fees for all other reportable transactions will increase substantially—filing fees for very large transactions (those valued at \$5 billion or more) will increase more than eightfold:

New Size-of-Transaction Thresholds	New Filing Fee
Greater than \$101 million but less than \$161.5 million	\$30,000
\$161.5 million or more but less than \$500 million	\$100,000
\$500 million or more but less than \$1 billion	\$250,000
\$1 billion or more but less than \$2 billion	\$400,000
\$2 billion or more but less than \$5 billion	\$800,000
\$5 billion or more	\$2.25 million

The statute does not specify an effective date for the new filing fee schedule,² but we expect that it will be implemented sometime in 2023, perhaps as early as February.

Only the buyer is required to pay a filing fee, but parties sometimes contractually allocate the fee between themselves. For smaller transactions, allocating the filing fee will become less important, but for larger transactions, more important.

HSR filing fees will now change yearly. The new law requires the FTC to adjust the filing fees annually to track inflation based on changes to the Consumer Price Index as determined by the Department of Labor.

Agency Budgets – and More Enforcement

The Congressional Budget Office estimates that the new HSR filing fee structure will raise an additional \$1.4 billion to fund the FTC and DOJ's antitrust enforcement efforts over the first five years. In the meantime, the Omnibus Bill also increases the FTC's budget by \$48 million in 2023 compared to 2022, and it increases the DOJ's budget by \$35 million in 2023 compared to 2022. That will enable both agencies to hire additional

lawyers and bring additional enforcement actions.

New Foreign Subsidy Disclosure Requirement

The Merger Filing Fee Modernization Act also introduces a new requirement that parties submitting HSR pre-merger notifications must disclose any subsidies that they have received from “foreign entities of concern.” This includes (i) entities controlled by the governments of China, Iran, North Korea, or Russia; (ii) entities designated by the U.S. Secretary of State as a foreign terrorist organization; (iii) entities included on the Specially Designated Nationals list; (iv) entities alleged by the Attorney General to have been involved in activities for which a conviction was obtained under certain espionage, arms dealing, or export control laws; and (v) entities involved in conduct determined to be detrimental to the national security or the foreign policy of the United States. The statute uses “subsidy” broadly to include any grant, loan, loan guarantee, tax concession, preferential government procurement policy, or government ownership or control.

The statute directs the FTC to develop rules to implement the statute’s new reporting requirements. As is typical with the HSR rulemaking process, the statute requires “concurrence” from the Assistant Attorney General for Antitrust, but it also requires “consultation” with the Chair of the Committee on Foreign Investment in the United States, the Secretary of Commerce, the chair of the U.S. International Trade Commission, and other “appropriate” federal agency heads. The subsidy-reporting requirement will take effect on the date specified in the rulemaking.

The new disclosure requirement is similar to disclosure requirements recently added to the merger control process in Europe. Starting in mid-2023, the European Union’s Foreign Subsidies Regulation will require that parties to transactions that meet certain monetary thresholds must notify the European Commission if the parties have benefited from subsidies from governments outside of the European Union.

¹ The final text of the enrolled Act is available at <https://www.govinfo.gov/content/pkg/BILLS-117hr2617enr/pdf/BILLS-117hr2617enr.pdf>.

² See *Merger Filing Fee Modernization Act of 2022*, National Law Review (Friday, December 30, 2022) (“Questions remain, including when the new filing fees will go into effect.”).