

Updates

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New Legislation Affects Antitrust Venue and Foreign Subsidy Disclosures

President Biden signed into law H.R. 2617, the Consolidated Appropriations Act, 2023 on December 29, 2022. This new legislation includes the Merger Filing Fee Modernization Act of 2022 (MFFMA), which amends the amounts and tiers for Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) filing fees as discussed [in a prior Update](#). However, it also includes two important amendments to antitrust laws. First, the MFFMA expands the exemption to avoid the consolidation of federal antitrust cases brought by states into one federal court by the Judicial Panel on Multidistrict Litigation (JPML). Second, the law establishes a foreign subsidy disclosure requirement for notifications required to be filed with the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).

Expansion of Choice of Venue for States

The MFFMA gives state attorneys general greater latitude and deference on their choice of venue in multidistrict antitrust litigations. Previously, civil antitrust actions that spanned multiple districts could be "transferred to any district for coordinated or consolidated pretrial proceedings" under 28 U.S.C. § 1407(a). A transfer could be initiated by the JPML or by any party. The only cases not subject to JPML transfer were certain antitrust actions where DOJ was a complainant.

Under the MFFMA, however, this procedure for transferring and consolidating multidistrict antitrust actions no longer applies where a state is a plaintiff. In this way, the MFFMA strips the JPML of its power to consolidate and transfer antitrust cases involving state attorneys general. However, it is important to note that the MFFMA applies only to cases brought after enactment. It does not apply retroactively and will not affect litigation that was pending before the bill was signed into law.

The most obvious consequence of this change is that it will increase litigation costs for companies that now must defend their conduct or mergers in several different courts. Often, these litigations will be concurrent and require significant coordination across the defense team. Relatedly, there is now a greater possibility of conflicting or inconsistent results in different courts before different judges. Companies should consider engaging with local counsel early to more effectively coordinate and cater their defense strategies across multiple districts with different case law and local rules.

Disclosure of Foreign Subsidies in HSR Filings

The MFFMA requires the FTC to promulgate a rule requiring parties that have received a subsidy from a "foreign entity of concern" to include information about such subsidy in any notification they are required to make under the HSR Act. Congress noted in the legislation 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 the incentives of the firm in ways that undermine competition following an acquisition" and "are particularly problematic when granted by countries or entities that constitute a strategic or economic threat to United States interests."

A "foreign entity of concern," which is defined in 42 U.S.C. § 18741(a), includes foreign entities who qualify as any of the following:

- Designated as a foreign terrorist organization.
- Included on the list of specially designated nationals and blocked persons (commonly referred to as the SDN list) maintained by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury (USDOT).
- Owned or controlled by or subject to the jurisdiction or director of a "covered nation" (I.e., North Korea, China, Russia, and Iran).
- Alleged by the U.S. attorney general to have been involved in activities for which a conviction was obtained under the Espionage Act, the Economic Espionage Act, 18 U.S.C. § 951 (which requires agents operating under the control of foreign governments or foreign officials, other than diplomats, to notify the attorney general before acting in the United States), the Computer Fraud and Abuse Act (CFAA), the Arms Export Control Act (AECA), the Atomic Energy Act (AEA), the Export Control Reform Act (ECRA), or the International Economic Powers Act (IEPA).
- Determined to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.

The MFFMA does not define "subsidy" but notes that the term is intended to cover a broad range of subsidies, including direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential government procurement policies, as well as government ownership or control. It would be reasonable to expect increased scrutiny over transactions involving foreign subsidies, especially if there is a competitive relationship between the parties.

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