U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

AUG 18 2021

The Honorable Amy Klobuchar
Chairwoman
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Madam Chairwoman:

The Department of Justice (Department) is encouraged by the bipartisan support in the House and Senate Committees on the Judiciary for modernizing the filing fee structure for premerger review and writes today to express support for Senate bill S. 228, the "Merger Filing Fee Modernization Act of 2021".

The Bill, if enacted, would modernize the merger filing fee regime to account for increases over the last several decades in the size and complexity of mergers the Antitrust Division must review, and authorizes appropriations for the Antitrust Division. As a result, it will both create a fairer and more modern merger filing regime and support enforcement that protects economic liberty for American consumers, workers, and businesses.

Merger Filing Fees

The Hart-Scott-Rodino (HSR) Act (15 U.S.C. § 18a), as amended in 2000, requires the parties to merger transactions that meet overall size thresholds (and certain other requirements) to file a notification and report form with the Antitrust Division and the Federal Trade Commission, and then wait 30 days while the agencies assess the transaction and decide whether to request more information. This notification process is the genesis of the vast majority of the Division's merger matters and requires the submission of a filing fee prior to the start of the Division's premerger review. The HSR filing fees are determined based on the size tier into which the transaction falls, with larger value deals paying higher fees.

The 2000 amendment to the HSR Act devised three filing fee tiers that have not kept pace with an increase in recent decades in the size and complexity of the largest merger transactions, which tend to consume the largest proportion of Antitrust Division resources. While the top filing tier currently includes all transactions over $500 million (as adjusted), more than half of the Division's significant investigations involve deals over $1 billion, and many of the most resource-intensive involve mergers over $5 billion. The current filing fee tiers are as follows:

- $45,000 filing fee for transactions valued in excess of $92 million but less than $184 million;
- $125,000 filing fee for transactions valued in excess of $184 million but less than $919.9 million; and
- $280,000 filing fee for transactions valued at $919.9 million or greater.

These thresholds are adjusted annually based on the percentage change in the gross domestic product.

The Bill, if enacted, would create the following six filing fee tiers with revised filing fee amounts:

- $30,000 filing fee for transactions valued less than $161.5 million (as adjusted);
- $100,000 filing fee for transactions valued not less than $161.5 million (as adjusted) but less than $500 million (as adjusted);
- $250,000 filing fee for transactions valued not less than $500 million (as adjusted) but less than $1 billion (as adjusted);
- $400,000 filing fee for transactions valued not less than $1 billion (as adjusted) but less than $2 billion (as adjusted);
- $800,000 filing fee for transactions valued not less than $2 billion (as adjusted) but less than $5 billion (as adjusted); and
- $2,250,000 filing fee for transactions valued not less than $5 billion (as adjusted).

These filing fees would be adjusted annually based on the percentage increase, if any, in the Consumer Price Index, while the thresholds would continue to be adjusted annually based on the percentage change in the gross domestic product.

The Department supports the proposed filing fee structure of this bill. By lowering fees on the smaller transactions that typically require more limited review and increasing fees on the largest mergers that often require extensive reviews, the system is fairer and better targeted. Adjusting fees based on the Consumer Price Index should future-proof the legislation and limit the need for further reform. At the same time, it is highly unlikely that the larger fees collected for mergers larger than $5 billion will deter companies from engaging in such transactions.

Appropriations Authorization

This Bill, if enacted, would also authorize appropriations of $252 million for the Department's Antitrust Division in FY 2022. The authorized appropriation would reflect an approximately $67.5 million increase over the Antitrust Division's FY 2021 appropriation.

The Department supports this increase as the merger filing fee changes proposed in this Bill. They are projected to result in an annual net revenue increase to the Treasury of $186 million (and total annual revenue in excess of $436 million), some of which the bill authorizes for appropriation to the Antitrust Division and Federal Trade Commission. Given the anticipated increase in filing fee revenue, the Department supports a corresponding increase in appropriations to account for the evolving needs of the Antitrust Division.

The full $252 million authorized in FY 2022 would allow Congress to fund the Antitrust Division at a level that would allow it to rebuild its staffing and technology infrastructure, including litigation support requirements, to the levels needed to carry out the Division's mission of protecting American consumers, workers, and businesses through vigorous antitrust enforcement. As the President explained in Executive Order 14036, signed July 9, 2021, "[t]he American promise of a broad and sustained prosperity depends on an open and competitive economy," but "excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers." The Order affirmed that "it is the policy of [the Biden] Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony." The increased authorization level would allow Congress to provide the resources needed to support the Antitrust Division's work of reviewing and blocking potentially anticompetitive mergers; investigating and litigating civil conduct that violates the antitrust laws; and investigating and prosecuting criminal antitrust violations, which are among the most complex prosecutions undertaken by the Department.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance to you.

Sincerely,

Helaine Greenfeld

Helaine Greenfeld
Deputy Assistant Attorney General