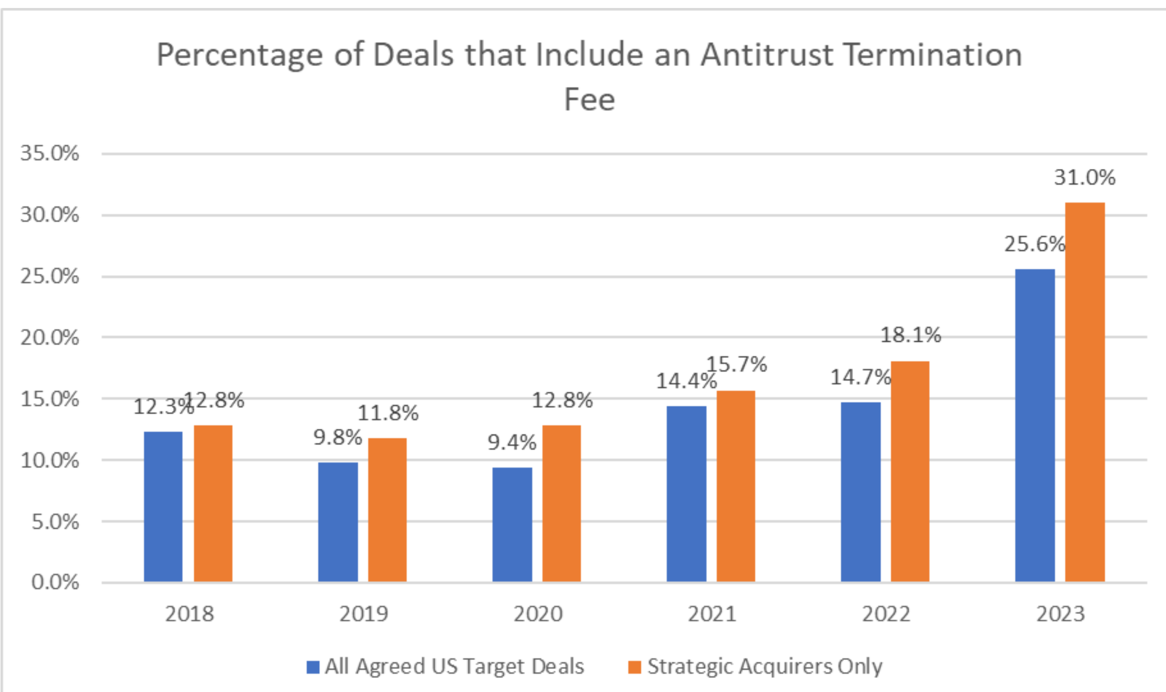
Latest Trends in Antitrust Termination Fees

April 19, 2023

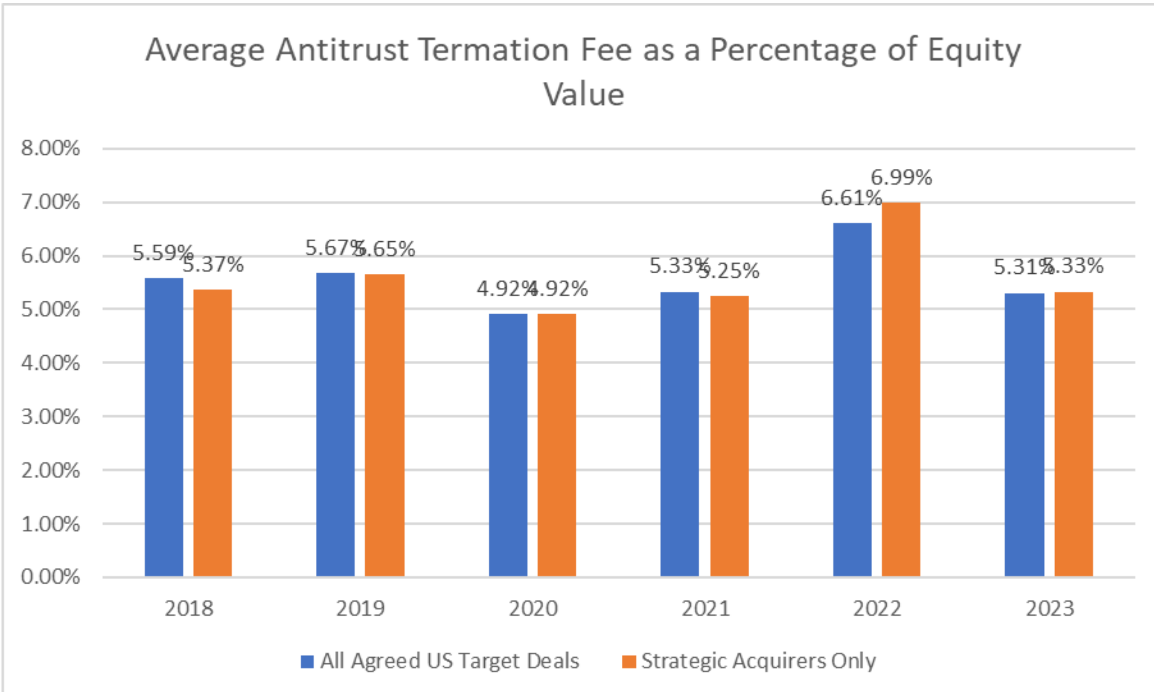
As the M&A regulatory environment has tightened over the last few years, we have seen a significant increase in the inclusion of antitrust termination fees in definitive M&A agreements. An antitrust termination fee is a termination fee potentially payable by the acquirer if the transaction cannot close due to lack of regulatory approval. Essentially, if the deal is blocked by a regulatory agency then the acquirer would be required to pay the antitrust termination fee to the target.

The following data is based on two sets of transactions announced since 2018 and through April 18, 2023. The first set are public target deals announced where the target was headquartered in the US and the parties reached a definitive agreement. The second set of transactions is based on the first but further narrows the inclusion criteria to just those deals involving strategic acquirers.

As the chart below indicates, for agreed deals with targets headquartered in the US, the percentage of deals with an antitrust termination fee stayed relatively consistent between 2018 and 2020. However, the percentage began to trend upward in 2021 and there has been a significant increase for deals announced thus far in 2023 to over 25%. The disparity is even more pronounced for deals involving strategic acquirers as there was a small increase from 15.7% to 18.1% between 2021 and 2022, but the percentage of deals with an antitrust termination fee has jumped to over 31% for deals announced thus far in 2023.



While we have observed a marked increase in the inclusion of antitrust termination fees, the average size of the antitrust termination fees as a percentage of equity value has remained relatively constant in the last several years as the chart below indicates, regardless of the set of transactions we reviewed.



Given the current M&A regulatory environment we would continue to expect to see an increase in the inclusion of antitrust termination fees, particularly among deals involving strategic acquirers given those deals have the highest likelihood of potential business overlap.