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FTC and DOJ Propose Major Overhaul of HSR Premerger Notification Process

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On June 27, 2023, the Federal Trade Commission ("FTC") – with the concurrence of the Antitrust Division of the Department of Justice ("DOJ") (together the "Agencies") – announced a Notice of Proposed Rulemaking ("NPRM") (available here) proposing major changes to the Hart-Scott-Rodino ("HSR") Form and Instructions. The NPRM was issued pursuant to a 3-0 Commission vote. If implemented, the changes would significantly increase the scope of information and documents that must be submitted with an HSR filing, resulting in substantial additional time, cost, and burden to parties with reportable transactions in the U.S.

Agency Rationale and Background for Proposed Rule Changes

In a statement accompanying the announcement (available here and here), FTC Chair Lina Khan asserts that the information currently required in the HSR form is insufficient for the Agencies to properly assess the potential competitive impact of a transaction, particularly in light of increasingly complex transactions, deal structures, and industries. According to Chair Khan, the proposed changes seek to address key gaps and inadequacies of the current HSR form by requiring the submission of additional information and documents critical to the Agencies' analysis of the competitive effects of a proposed transaction that would "enable the Agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period."

Chair Khan also argues that the proposed changes are consistent with the type and scope of information required by other global antitrust agencies in premerger notification filings.

This is the first comprehensive re-evaluation of the HSR Form by the Agencies since the HSR Act went into effect in 1976.

Summary of Major Proposed Rule Changes

Below is a summary of the most significant changes proposed in the NPRM.

- Expanded Scope of Item 4(c)/4(d) Documents – The scope of responsive "Item 4(c)/4(d)" documents that must be submitted with HSR filings would be expanded to include those prepared by or for "supervisory deal team lead(s)" (who may not be an Officer or Director). Filing parties would also be required to submit drafts of responsive Item 4(c)/4(d) documents that are shared with Officers, Directors, or Supervisory Deal Team Lead(s), as well as organizational chart(s) identifying the authors of such documents and all employees searched for potentially responsive Item 4(c)/4(d) documents.
- Submission of Certain Ordinary Course Business Plans – Filing parties would be required to submit certain ordinary course business plans that discuss "market shares, competition, competitors, or markets" for any overlapping product(s) or service(s). The scope of this proposed requirement is under consideration by the Agencies.
- Identification of Horizontal and Vertical Overlaps – Filing parties would be required to submit narrative responses describing their principal categories of products and services, and identify any existing or potential horizontal overlaps, as well as any existing or potential supply or other non-horizontal business relationships between the parties.
- Identification of Additional Transaction Details – Filing parties would be required to provide additional details regarding the proposed transaction, including a description of the transaction rationale, a diagram of the transaction structure and relevant entities, all transaction-specific agreements (including all schedules and exhibits to the transaction agreement), and a description of the transaction timeline and conditions to closing.
- Submission of Detailed Employee Info – Filing parties would need to submit detailed information relating to employee classifications and geographic locations.
- Identification of Officers, Directors, and Board Observers – Filing parties would be required to identify all Officers, Directors, and Board Observers of all entities within the acquiring person or acquired entity – as well as identify any other entities for which those persons currently serve or have previously served in the last two years.
- Expanded Disclosures of 5% or Greater Minority Holders – Filing parties that are limited partnerships would be required to disclose 5% or greater limited partners, as opposed to simply disclosing the general partner as is the case now. Also, acquiring persons would be required to disclose minority holders (including limited partners) of any entities within the control chain below the acquiring person down to the acquiring entity.
- Expanded Disclosures of Prior Transactions – The current requirement to provide information relating to certain prior transactions would be expanded to cover both the acquiring person and now also the acquired entity, the relevant time period would be extended from five years to ten years, and the requirement would be expanded in scope to apply to past transactions of *any* size involving an area of horizontal overlap identified in the HSR filing.
- Revised NAICS/NAPCS Code Revenue Reporting – Multiple changes would be implemented to the NAICS/NAPCS Code and revenue reporting requirements, including requiring only the reporting of revenue ranges (not precise revenue figures) by NAICS code, eliminating the requirement to report manufacturing related 10-digit NAPCS codes, and requiring the reporting of NAICS codes for pipeline and pre-revenue products.

- Additional Requirements for Filings Based on Agreement in Principle – Parties that have not executed a definitive transaction agreement and are seeking to file on a preliminary agreement (e.g., a letter of intent or indication of interest) would need to submit a draft agreement or term sheet that describes the proposed transaction in sufficient detail. The purpose of this change according to the Agencies is to prevent parties from filing HSR for hypothetical transactions that are in early phases of negotiations and have not undergone a complete substantive analysis, and also to ensure the submitted documents provide the Agencies with "sufficiently definitive information" to understand and analyze the proposed transaction.
- Identification of information Relating to Foreign Subsidies and Defense Contracts – Parties would be required to disclose information relating to subsidies received from "countries or entities that threaten U.S. strategic or economic interests" and also report any contracts with defense or intelligence agencies valued at $10 million or more.

In addition to the changes above, the NPRM includes various other proposed requirements that are likely to increase the burden on parties submitting HSR filings, including, for example, requiring that the filing party certify that it has taken the necessary measures to ensure preservation of documents and information related to the transaction, identify all internal communication systems or messaging applications that could be used to store or transmit business documents, and submit translations of all foreign language documents.

Procedural Steps to Implement the Rule Changes

The NPRM was published in the federal register on June 29, commencing a 60-day public comment period. This public comment period is scheduled to end on August 28, though the FTC can extend the deadline if, for example, requested by interested third parties or to invite additional comments. After the public comment period ends, the FTC will consider whether to amend the proposed rule based on the feedback received during the public comment period. The FTC will then vote on the final rule, which, if approved, would likely take effect 30-60 days later. Depending on the volume of comments received during the public comment period and the time required for the FTC to consider these comments and implement any further revisions, the final rule and proposed changes to the HSR process may not take effect for a number of months, potentially extending into late 2023 or 2024.

If and when a final rule is adopted, it may be challenged in court under the Administrative Procedure Act by an affected third party. A challenge would likely be mounted by a company subject to the new rule or a trade association whose members include such companies. A court challenge could include the Commission's substantive authority to adopt the rule, whether it appropriately considered the costs and benefits of the new rule, and whether the Commission complied with the procedural requirements for formal rulemaking. Affected parties or organizations suing to set aside the new rule could also seek preliminary relief to stay the rule's implementation or enforcement nationwide. An order granting or denying preliminary injunctive relief would be immediately appealable, and could expedite further review by a circuit court of appeals or the Supreme Court.

Implications of the Proposed Rule Changes

The proposed rule would meaningfully increase the time, burden, and cost of completing transactions that are reportable under the HSR Act, even for transactions that raise no plausible antitrust concerns. Beyond the time and cost of preparing HSR filings, the proposed rule also may lead to longer HSR reviews (e.g., more pre-filing engagement, pull-and refiles, and/or Second Requests), as the Agencies may take more time to review the broader set of information that would need to be provided with the HSR filing, again regardless of whether the transaction raises issues. These proposed changes require careful consideration of a range of issues, including deal financing, transaction end dates, interim operating covenants, antitrust risk-shifting provisions, employee and customer retention issues, and more. Although the proposed changes may be altered through the rule making process and will not take effect for months, we recommend working with counsel now to evaluate and prepare for the new HSR regime to ensure your legal and deal teams are well-advised on strategies to mitigate these burdens and potential delays.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Antitrust/Competition practice group or Appeals and Strategic Counseling group, please speak to your regular contact at Weil or to an author listed below.

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