

FTC Proposes Sweeping Changes to HSR Rules and Filing Notification Requirements

June 29, 2023

On June 27, 2023, the U.S. Federal Trade Commission (the “FTC”) and the U.S. Department of Justice’s Antitrust Division (“DOJ”), released a Notice of Proposed Rulemaking (“Notice”) that would make sweeping changes to the rules, instructions and filing form for premerger notification filings under the Hart-Scott-Rodino (“HSR”) Act.¹ The proposal would greatly increase the time, burden and expense of HSR filings by broadening the scope of information, data, and documents parties are required to submit in HSR-reportable transactions.

The Notice includes several different updates, which are further detailed below. Some of the proposed changes merely codify or slightly modify existing premerger practice. The balance of the proposed changes, however, reflects a robust list of upfront requests about the deal, its structure, and its effects on competition and labor. The proposal subsumes much of the information currently requested in the small fraction of deals that present some antitrust issues where the parties receive requests for information (known as Voluntary Access Letters) during the 30-day waiting period, and even some information now associated with the more fulsome investigation of transactions with significant antitrust issues through a “Second Request.” It is striking that the new rules would require such substantial information on all deals, even those without any substantive antitrust issues. The proposed rules also include updated requests aimed at identifying board interlocks that are potentially impermissible under Section 8 of the Clayton Act, as well as new requests, such as for information about loans and foreign subsidiaries

FTC leadership cited exponential deal volume growth and increasing complexity of transactions as justification for the proposed overhaul of the HSR premerger notification form, which, if implemented, would be the first such wholesale change in 45 years.² They consider that materially broadening the required information would in

¹ Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements (June 27, 2023) (the “June 27, 2023 NPRM”), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf

² Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding Proposed Amendments to the Premerger Notification and the Hart-Scott-Rodino Rules

many ways also bring the U.S. merger control filing process closer in line with the requirements of other jurisdictions, including the European Union standard merger notification form (“Form CO”). The FTC in its Notice, stated that “[a]s compared to the [HSR] Form, most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis.”³ However, many of the proposed changes by the FTC would go well beyond the requirements imposed by the EU’s Form CO, for example.

While it is correct that most international jurisdictions, including the EU, do require the parties to provide more information currently than the United States, the Notice goes significantly beyond what is typically requested. The Form CO, as a representative example, focuses on evaluating the extent of any substantive competitive overlaps and therefore largely only requires information supporting that assessment. Indeed, transactions that are unlikely to raise competitive issues are eligible for a shortened notification form. The Form CO therefore has (for example) no requirement to provide employee information or detailed information on revenue streams of individual and potentially unrelated subsidiaries, and has more limited document disclosure than is contemplated by the Notice. Likewise, detailed minority investor information and information about defense contracts etc. is not typically included in a merger control filing, but is reported under separate foreign direct investment regimes comparable to CFIUS.

If the proposed changes are adopted substantially as drafted, we anticipate that the time and resources needed to prepare an HSR filing would greatly increase. The FTC acknowledges the same in its Notice, estimating that HSR filings would require an average of 144 hours to prepare in comparison to the current average of 37 hours. “Complex” filings, a description the FTC ascribes to approximately 45% of total filings, are estimated to require approximately 259 hours to complete if the proposed changes are adopted. The FTC justifies these changes by citing to deal volume growth and transaction complexity but only a small fraction of those transactions raise issues worthy of additional investigation. In fiscal 2021, a record-breaking 3,520 transactions were reported to both antitrust agencies, but the FTC only issued 65 second requests. Collecting the newly required information will add significant time to preparing the filing. Once the amended HSR form is effective, we encourage parties to work with antitrust counsel well in advance of filing to begin collecting the necessary information. For parties that anticipate regular acquisition activity that may be reportable, such as

Commission File No. P239300, *available at*:

https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_b edoya_on_the_hsr_form_and_rules_-_final_115p.pdf

³ June 27, 2023 NPRM.

private equity sponsors, establishing a method of tracking the proposed new information on a regular basis may be advantageous.

The FTC's Notice is expected to be formally published in the Federal Register this week. Publication triggers a 60-day public comment period. The agencies thereafter finalize the new rules, taking into account the public comments. The scope of final changes and updates to the HSR Notification Form, as compared to the FTC's current proposal, is yet to be determined. However, any changes are not likely to come into effect for several months.

SUMMARY OF THE PROPOSED CHANGES AND ADDITIONAL REQUESTS FOR INFORMATION COMPARED TO THE CURRENT HSR NOTIFICATION FORM, RULES AND INSTRUCTIONS:

- Additional detail on deal structure, including diagrams, and narratives describing rationales and timetable for the transaction.
- Additional detail on party structure, including diagrams (in particular for funds and master limited partnerships), d/b/a and f/k/a information, and lists of 5%+ minority holders at various levels of the structure (including limited partners).
- Identification of “other individuals and entities that may have influence over business decisions or access to confidential business information,” including officers, directors and board observers (and those who can nominate them), certain 10%+ creditors, 10%+ holders of non-voting securities, and those having managing agreements.
- For deals with signed agreements, submission of all agreements, schedules, exhibits, annexes, etc., as well as “other agreements between the parties” even if they are unrelated to the deal (e.g., licensing, supply, non-compete, purchasing, distribution, franchise).
- For deals without signed agreements, parties would be required to submit term sheets and draft agreements. This proposed change would be a significant update to current practice that permits filing on a letter of intent, and appears to be aimed at curtailing filing HSR very early in the deal timeline “before the parties have done diligence on rationales or justification for the transaction” and when “the parties

have often not yet undertaken a robust analysis of the transaction and therefore have drafted few, if any [4(c)(d) documents].”⁴

- The requirement that parties submit certain transaction-related documents, also known as Item 4(c)(d) requirements, would be expanded to include (i) drafts of such documents if they went to officers, directors, or supervisory deal team leads,⁵ (ii) certain periodic strategic business plans not created in connection with the deal, and (iii) more information about authors and recipients, including org charts. Foreign language documents would also need to be translated.
- Detailed narrative/data sections on sales not only by NAICS code as currently required, but also describing business lines and operations, and identifying which subsidiaries and operations generate which revenues. This section would also require reporting of certain pipeline/pre-revenue products.
- Detailed narrative sections addressing competitive impact, including horizontal overlaps and vertical/supply and other relationships between the parties, as well as overlap-related sales data, customer lists and contacts, descriptions of any licensing arrangements between the parties, and non-compete and non-solicit agreements applicable to the relevant product or service. Overlap data would be expanded to include much more granular detail on geographies and franchises.
- A new Labor Markets section, including pre- and post-closing worker data by occupational categories and geographies, as well as workplace and safety information.
- Expansion of the Prior Acquisitions section to include the target as well as the buyer, 10 years’ data instead of five years, and without any size limitation on acquired companies.
- Information about loans and foreign subsidies.
- Information about contracts with defense or intelligence agencies.
- Certification regarding prevention of destruction of relevant information, and lists of communication systems or messaging applications used by the parties.

⁴ June 27, 2023 Notice.

⁵ The current rules do not require submission of drafts. Expanding to “supervisory deal team leads” would also be a significant change to current rules that generally are limited to documents prepared by or for an office or director.

- Lists of filings being made in other jurisdictions, and voluntary waiver check-box to allow the agencies to discuss the transaction with state AGs or foreign regulators.

How Debevoise Can Help

Debevoise lawyers are well versed in the HSR Act and its reporting requirements, as well as all matters of international merger control. We are available to advise parties regarding the applicability of their transactions, as well as guide clients through the reporting progress and any government investigation and/or litigation that may follow the HSR filing.

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Please do not hesitate to contact us with any questions.

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