

FTC Proposes Enhanced Information in HSR Filing Requirements

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On June 27, 2023, the Federal Trade Commission (“FTC”) announced that it is proposing changes to the premerger notification rules that implement the Hart-Scott-Rodino (“HSR”) Act and to the HSR form and instructions (together, the “Proposed Rules”). These changes would bring HSR filings more in line with the filings required in other jurisdictions around the world. While the changes will increase the upfront requirements on merging parties, the FTC has said they are intended to enhance the FTC’s and the U.S. Department of Justice’s (“DOJ”) (together, the “Agencies”) ability “to complete the review of a reportable transaction in a short period of time.”

The changes are unlikely to be implemented before the fourth quarter of 2023. The Notice of Proposed Rulemaking describing these proposed changes (“NPRM”) was published in the Federal Register on June 29, 2023, and the public will have 60 days, until August 28, 2023, to comment. Proposed changes to the process include requests for additional data, documents, and narrative material, particularly regarding lines of business in which the parties overlap.

The HSR Form

Under the HSR Act, transactions over certain thresholds require a premerger notification filing with the Agencies. The current HSR form requires information about the parties and the transaction, including industry-specific revenue and information about the buyer’s prior acquisitions in industries where the parties overlap, as well as documents that analyze the potential competitive impact of the transaction. After the parties file the notification, the DOJ or the FTC typically has 30 days to investigate whether the transaction may have anticompetitive effects. During these 30 days, the parties cannot consummate the transaction. At the end of the waiting period, the FTC or DOJ may either extend the period by issuing a request for additional information, *i.e.* a Second Request, or take no action, which allows parties to close the deal.

Additional Information Required by New Rules

The FTC is proposing these changes because it believes that the current HSR form is insufficient to allow the Agencies to determine in the initial 30 days whether a transaction warrants further investigation.¹

¹ Press Release, Federal Trade Commission, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

According to the FTC, the Proposed Rules are intended to “improve the efficiency and effectiveness of the Agencies’ initial review process and reduce the need to rely on the voluntary submission of additional information by the parties and third-party industry sources during the initial waiting period.” The FTC notes that despite filings increasing in number and complexity since the original HSR Act was passed, the HSR form has not significantly changed.⁴

Key additional requirements in the Proposed Rules include:

- Additional details about the parties’ organization structure, officers, directors and board observers², shareholders (including certain limited partners), other non-controlling entities, and other types of interest holders that may exert influence;
- A narrative on the transaction rationale with cites to supporting documents, along with a diagram of the deal structure and a chart explaining the relevant entities and individuals involved in the transaction;
- Narrative responses on the parties’ basic business lines and products/services, and current and potential future horizontal overlaps and supply relationships between the parties—including, notably, top customer lists with contact information;
- Information that screens for labor market issues by classifying employees based on current Standard Occupational Classification system categories;
- Internal high-level periodic strategic business documents describing market conditions or competitors;
- Details regarding both parties’ prior acquisitions within the past ten years regardless of size;
- Draft agreements or term sheets that reflect more detail about the proposed transaction;
- English translations of foreign language documents submitted; and
- Disclosure of subsidies from foreign entities or governments of concern⁶.

² Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023). All cites are to the NPRM unless otherwise noted.

³ Fed. Trade Comm’n, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules Commission File No. P239300* (June 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_comms_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf.

⁴ *Id.*

⁵ The NPRM notes this information allows the Agencies to assess any potential violations of Section 8 of the Clayton Act, which addresses representation on the boards of competing companies, and is in line with the Agencies’ recent focus on Section 8 as discussed here: <https://www.cohengresser.com/app/uploads/2022/12/FTC-and-DOJ-Signal-Increased-Scrutiny-of-Private-Equity-Firms-1.pdf>.

The Proposed Rules would remove the requirement to submit certain information deemed outdated in today's environment, such as revenue by specific dollar amounts by specific industry codes; manufacturing revenues at a granular level; and identification of most minority investors in target entities.

Notably, the Proposed Rules require certification that the filing party has taken all necessary steps to preserve documents related to the proposed transaction "before the expiration of any waiting period." This requirement, in combination with others, seems to signal a concern about document destruction, particularly on chat platforms or other non-email platforms.

Impact of Changes

The Proposed Rules will likely have both positive and negative impacts on mergers, should they take effect.

Some commentators have expressed alarm about these proposed changes. The U.S. Chamber of Commerce has said: "The FTC and DOJ's new merger notification form will make it more difficult for U.S. companies to raise capital and be competitive. These disclosure requirements will mire every merger in government red tape. With more than 2,000 mergers filed in a typical year, the vast majority of which presenting no antitrust concerns, this new form is not about enhancing merger enforcement but controlling mergers beyond the scope and intent of the law."³

The time and cost to prepare an HSR filing will increase, and the FTC acknowledges that some changes "would be significant and impose additional burden on some filing parties." The FTC estimates it takes an average of 37 hours to prepare a filing under the current rules, and the Proposed Rules will add an average of 107 hours per filing, meaning the time it would take for a filing would increase four-fold on average. But the ultimate impact of the requirement will be transaction-specific and depend on many factors, such as overlaps between the two parties, the complexity of the transaction, and the structural complexity of the parties. For example, the FTC arrived at the 107 additional hours estimate by estimating 12 additional hours per filing if there are no reported overlaps, and 222 additional hours per filing if there are reported overlaps.

At the same time, these new rules could lead to a more efficient process overall. The FTC and pro-enforcement organizations such as the American Economic Liberties Project argue that the HSR form is currently insufficient to provide the Agencies with a fulsome understanding of competition, and that additional information can help the Agencies focus on the right issues and transactions. In addition, providing the Agencies with this information upfront may ultimately help them conclude there are no concerns during the waiting period, which would speed approvals overall.

Even in deals involving overlaps--which according to the FTC, accounted for about 45% of filings in the past 5 years--the Agencies under the current rules often request the same or similar information to what the Proposed Rules contemplate but through Voluntary Access Letters and/or interviews of company personnel. This suggests that the Proposed Rules may simply shift effort from during the waiting period to before the filing for certain transactions. Complex transactions may also require approval from multiple jurisdictions, so some of the additional information sought by the Agencies may already be required in

⁶ This requirement implements a provision from the Merger Filing Fee Modernization Act of 2022

⁷ Bryan Koenig, *FTC Proposes Dramatic Overhaul Of Merger Filings*, Law360, June 27, 2023, at <https://www.law360.com/articles/1693568/ftc-proposes-dramatic-overhaul-of-merger-filings?copied=1>.

another jurisdiction, minimizing any additional burden. Further, the Agencies' discretion in interpreting the requests will also influence the Proposed Rules' impact.

The public now has until August 28 to submit comments to the FTC, including "comments on the burden associated with and the appropriate balance of having to provide information in the form of revenues, documents, and narratives as part of the proposed changes in this NPRM." After the 60 days have elapsed, the FTC will file a final version of the Proposed Rules and respond to comments submitted. As such, any transaction in the near future will not be impacted by the Proposed Rules. The final version of the changes may also differ from the Proposed Rules.

Conclusion

The proposed changes to the HSR rules are undeniably significant, and they may well impact the timing and structure of deals. However, they do not differ greatly from what is required of multi-national companies in many other jurisdictions. Ultimately, the impact of these new Proposed Rules will depend on the transaction. Once changes are implemented, entities preparing for a transaction should be on alert for additional developments and take into consideration the additional information required and additional time needed to collect documents when negotiating deals.

Over the coming months, the Agencies will provide a final version of the Proposed Rules, and over time the Agencies will provide guidance on how to interpret the final rules. We will be monitoring developments closely and will provide further updates on the practical impact of any rules changes that are ultimately adopted. If you have any questions, please contact any of the authors of this alert.

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