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FTC Plans Massive Revamp of HSR Act Reporting Requirements

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Big changes appear to be in store for the premerger notification program under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”). The HSR notification process currently requires parties to transactions valued in excess of statutory thresholds (including a deal value of \$111.4 million), to submit a relatively straightforward form (the “HSR Form”) putting the Federal Trade Commission and Department of Justice Antitrust Division on notice that the deal is coming. The filing gives the agencies a 30-day waiting period to determine if investigating or challenging the deal is warranted on antitrust grounds. On June 27, 2023, the FTC issued a 133-page Notice of Proposed Rulemaking, outlining major changes to this process.

The overall effect of the proposed changes would be a substantial burden-shifting from the government to the filing parties. Presently, the HSR system supports deal activity through a straightforward filing that leaves the antitrust agencies to determine which deals warrant in-depth review. The proposed changes place much of the burden for the initial investigation on the parties instead. The FTC argues that this would streamline the review of all transactions, ensuring that competitive concerns are not missed and that agency staff are able to quickly identify potential violations. At the same time, the changes would mean that all transactions would now face increased scrutiny of potential competitive effects, whereas that scrutiny has historically been triggered only after the DOJ or FTC identified concerns worthy of further investigation.

The impact on filing parties can be seen most clearly in the estimated hours required for a standard HSR Filing. According to the FTC, the current HSR Form is estimated to take each party approximately 37 hours to complete on average. Under the proposed rule changes, that number would jump to 144 hours per party—a nearly four-fold increase. The burden for so-called “complex” filings is estimated to rise to 222 hours, even before any agency-led investigation.

For companies, one of the key takeaways from the Notice of Proposed Rulemaking is that the newly-described HSR filing regime would substantially impact the vast majority of deals that pose no discernable anticompetitive threat. Of note, in the most recent HSR Act Annual Report, the FTC and DOJ reported receiving 3,520 filings in Fiscal Year 2021. Of those, 1.9% triggered a thorough investigation (a “Second Request”). That suggests that a substantial percentage of transactions will be impacted by these new filing obligations, in spite of posing no threat to the economy.

The timing for any HSR changes is uncertain. The Notice of Proposed Rulemaking will be subject to public comment for 60 days, and then the FTC will be in a position to issue a Final Rule. However, it

seems plausible that the FTC is seeking to have the new filing requirements in place by the end of the year. The FTC is also working on a new e-filing system that may be rolled out in tandem with the proposed changes.

Without further ado, below are some of the most significant changes that filing parties can expect if the proposed rules are adopted as stated in the Notice of Proposed Rulemaking. Time will tell whether the notice and comment period results in meaningful deviations from these proposals.

Greater Detail Regarding Acquiring Parties

Currently, the HSR Form requires acquiring parties to identify shareholders of 5% or more of the equity of their ultimate parents. Partnerships are required to identify a general partner, but not limited partners. The FTC now seeks to obtain more information on ownership structures, including asking for information on minority investments in other entities within the purchaser's structure, information on limited partners, and diagrams of ownership structure. In addition, acquirers would need to identify creditors, holders of options, warrants, and non-voting securities, board members and observers, and management agreements. Information on board members would be specifically intended to be used to screen for potential interlocking directorates, which could violate Section 8 of the Clayton Act.

Litigation-Style Discovery Obligations

The proposed rules would place increased obligations on filing parties consistent with an expectation of future litigation. This is somewhat surprising given that very few HSR Filings result in detailed investigations, let alone litigation with the government. Nevertheless, the FTC proposes to, among other things, require filing parties to identify all communications systems or messaging applications on any device that could be used to store or transmit information or documents related to the party's business operations. They would also require filers to certify that materials relevant to a potential challenge to the deal are being preserved – basically placing a litigation hold on business documents. While such requirements have in the past accompanied the opening of an investigation by one of the agencies, this new proposal would impose those requirements on all deals, at least temporarily, irrespective of competitive dynamics.

Expanded Transaction Details

In addition to the basic description of the transaction currently required in the HSR Form, the FTC seeks to add a requirement to submit "a narrative describing all strategic rationales for the transaction," along with identification of any 4(c) and 4(d) documents that support the stated rationale. Parties would also need to submit a diagram of the steps involved in the transaction and delimitate the timeline for key milestones and conditions to closing.

Narrative Descriptions of Key Deal Issues

The current HSR Form does not require parties to define markets or explain competitive overlaps beyond what they state in their 4(c) and 4(d) materials. The FTC proposes to substantially change this by requiring several detailed narrative sections. First, parties would need to provide an overview of any horizontal overlaps between the parties' businesses. Second, any supply relationships between the parties would need to be described. And third, the parties would need to describe impacts on labor markets. The labor market narrative would include, among other things, classification of employees into occupational categories, identifying relevant commuting zones, and summarizing workplace safety information.

Additional Document Attachments

The parties' obligations to submit 4(c) and 4(d) documents would be expanded to cover, among other things, (i) documents prepared by or for the deal team leads (even if not an officer); (ii) inclusion of financial models; and (iii) drafts of 4(c) and 4(d) materials that were provided to an officer, director, or deal team lead. In addition, the FTC proposes to require submission of ordinary course business plans and reports that address competition-related issues. Organizational charts would also be required showing where document authors sit within the filing party. Finally, foreign-language documents will need to be translated into English.

Expanded Identification of Prior Acquisitions

Currently, the acquiring party is required to list acquisitions that it has made in the last five years of companies using the same NAICS revenue classification as the current acquisition target and which were valued above \$10 million. The FTC proposes to expand this to cover all acquisitions of both the buyer and the target, irrespective of NAICS classification and deal size, for the past 10 years.

Limitations on Filings Based on Letters of Intent and Term Sheets

The FTC has proposed precluding parties from making HSR notifications until a detailed term sheet or draft agreement is available "to allow the agencies to understand the scope of the transaction and to confirm that the transaction is more than hypothetical." Currently, many parties elect to submit HSR notifications early in the deal process—potentially based on a short Letter of Intent or Term Sheet that has only the basic deal terms that have been agreed to at that stage. This is more common where no HSR review is anticipated but where clearing the HSR waiting period will simplify the deal negotiation and terms of the definitive agreement. The FTC contends that this may unduly tie up resources reviewing transactions that may not occur or that are not sufficiently clear to allow for effective review of potential competitive issues. Depending on the scope of this change, it will potentially make it more challenging for parties to manage timing for deals that have particular time constraints because they will need to wait longer before sufficient details have been negotiated to allow for a filing.

Information on U.S. and Foreign Government Connections

Based on provisions in the Merger Filing Fee Modernization Act of 2022, the FTC will begin requiring submission of information on foreign subsidies from governments of concern to the U.S., as well as identification of products that are sold in countries that impose countervailing duties. Parties would also need to identify any contracts that they have with the defense or intelligence agencies.

Uncertainty Over Filing Acceptance

Given the substantial changes to the merger filing form and inclusion of more subjective requests, including narrative descriptions of business rationale and competitive dynamics, it would seem likely that additional procedures will need to be adopted to allow the FTC and DOJ to review and "accept" filings as complete, adding additional uncertainty to timing, particularly for deals involving competitive dynamics. In comparison, the filing process today is relatively straightforward and most filings are confirmed as complete in a day or two.

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