FTC AND DOJ PROPOSE SIGNIFICANT CHANGES TO US MERGER REVIEW PROCESS

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US Policy and Regulatory Alert

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INTRODUCTION

On 27 June 2023, the Federal Trade Commission (FTC) and the Department of Justice–Antitrust Division (DOJ) (collectively, the Agencies) announced sweeping proposed changes to the US-premerger notification filing process. The proposed changes mark the first significant overhaul of the federal premerger notification form since its original release in 1978 and would require parties to reportable transactions to collect and submit significantly more information and documentation as part of the premerger review process. If finalized, the proposed rule changes would likely delay deal timelines by months, requiring significantly more time and effort by the parties and their counsel in advance of submitting the required notification form.

In this alert, we:

- Provide an overview of the current merger review process in the United States;
- Describe the proposed new rules announced by the Agencies;
- Explain the Agencies' rationale for the new proposed rules;
- Predict how the proposed new rules could impact parties' premerger filing obligations, including deal timelines; and
- Explain what companies should expect over the next several months.

BACKGROUND ON THE HSR MERGER REVIEW PROCESS

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the HSR Act or “HSR”) requires certain persons making acquisitions of assets, voting securities, and non-corporate interests (i.e., interests in partnerships and limited liability companies) to:

a. File premerger notifications with the FTC and DOJ; and

b. Wait until the expiration or termination of a waiting period (usually 30 days) before consummating the acquisition.

Most mergers and acquisitions valued in excess of USD$111.4 million fall under the HSR Act subject to size-of-party thresholds in certain cases. Additionally, there are several exemptions that may apply to an otherwise reportable transaction.

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The FTC or the DOJ reviews the parties' HSR filings during the waiting period to determine whether the transaction may substantially lessen competition in violation of the antitrust laws. If, at the end of the waiting period any concerns have not been placated, the reviewing agency may issue a Request for Additional Documents and Information (commonly referred to as a Second Request), a very broad subpoena-like document seeking documents, data, and interrogatory responses from the filers. This tolls the waiting period until both parties substantially comply with the Second Request. The reviewing agency then has an additional 30-day period to decide whether to challenge the transaction in court.

WHAT ARE THE PROPOSED CHANGES?

On 27 June 2023, the FTC and DOJ announced a number of significant changes to the HSR notification form and filing process, the first such overhaul in almost 45 years. The Agencies released the proposed changes and rationale for the same in a 133-page Notice of Proposed Rulemaking (Notice) that will be published in the Federal Register later this week. While antitrust practitioners are still digesting the full extent of all of the proposed changes, it is clear that they would require parties to submit significantly more information and documentation to the Agencies as part of their HSR notification form. The most notable additional information and documentation includes:

- Submission of additional deal documents, including draft agreements or term sheets (as opposed to just the preliminary agreement), where a definitive transaction agreement has not yet been executed; draft versions of all deal documents (as opposed to just the final versions); documents created by or for the deal team lead(s) (as opposed to just officers and directors); and verbatim translations of all foreign language documents;
- Details about acquisitions during the previous 10 years;
- Identification of and information about all officers, directors, and board observers of all entities within the acquiring person, including the identification of other entities these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer;
- Identification of and information about all creditors and entities that hold non-voting securities, options, or warrants totaling 10% or more;
- Disclosure of subsidies (e.g., grants and loans), by certain foreign governments, including North Korea, China, Russia, and Iran;
- Narrative description of the strategic rationale for the transaction (including projected revenue streams), a diagram of the deal structure, and a timeline and narrative of the conditions for closing;
- Identification and narrative describing horizontal overlaps, both current and planned;
- Identification and narrative describing supply agreements and relationships;
- Identification and narrative describing labor markets, as well as submission of certain data on the firms' workforce, including workforce categories, geographic information on employees, and details on labor and workplace safety violations;

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- Identification of certain defense or intelligence contracts; and
- Identification of foreign jurisdictions reviewing the deal.

WHY ARE THESE CHANGES BEING PROPOSED?

In its press release announcing the proposed new rules, the FTC stated that "[t]he proposed changes to the HSR Form and instructions would enable the Agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period, which is typically 30 days."[1] The FTC further explained:

> Over the past several decades, transactions (subject to HSR filing requirements) have become increasingly complex, with the rise of new investment vehicles and changes in corporate acquisition strategies, along with increasing concerns that antitrust review has not sufficiently addressed concerns about transactions between firms that compete in non-horizontal ways, the impact of corporate consolidation on American workers, and growth in the technology and digital platform economies. When the Agencies experienced a surge in HSR filings that more than doubled filings from 2020 to 2021, it became impossible to ignore the changes to the transaction landscape and how much more complicated it has become for agency staff to conduct an initial review of a transaction's competitive impact. The volume of filings at that time also highlighted the significant limitations of the current HSR Form in understanding a transaction's competitive impact.[2]

Finally, the FTC also cited certain Congressional concerns and the Merger Fee Filing Modernization Act of 2022, stating that the "proposed changes also address Congressional concerns that subsidies from foreign entities of concern can distort the competitive process or otherwise change the business strategies of a subsidized firm in ways that undermine competition following an acquisition. Under the Merger Filing Fee Modernization Act of 2022, the agencies are required to collect information on subsidies received from certain foreign governments or entities that are strategic or economic threats to the United States."

HOW WILL THESE CHANGES POTENTIALLY IMPACT PARTIES' HSR FILINGS?

The proposed changes, as currently drafted, would require significantly more time and effort by the parties and their counsel to prepare the parties' respective HSR notification forms. For example, the proposed new rules require the identification, collection, and submission of more deal documents and strategic documents; significantly more information about the parties, their officers, directors and board observers, minority investments, and financial interests; and narrative analyses and descriptions of horizontal and non-horizontal relationships, markets, and competition. Gathering, analyzing, and synthesizing this information into narrative form will require significantly more time and resources from both the parties and their counsel to comply.

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Under the current filing rules, it typically takes the merging parties about seven to ten days to collect the information needed for and to complete the HSR notification form. Under the proposed new rules, the time to gather such information and complete an HSR notification form could be expanded by multiple months.

WHAT IS NEXT?

The Notice will be published in the Federal Register later this week. The public will then have 60 days from the date of publication to submit comments. Following the comment period, the Agencies will review and consider the comments and then publish a final version of the new rules. The new rules will not go into effect until after the Agencies publish the final version of the new rules. This process will likely take several months to complete, and the new rules–or some variation of them–will not come into effect until that time.

While the final form of the proposed rules are not likely to take effect for several months, the Agencies' sweeping proposed changes to the notification form and filing process are in line with the type of information that the Agencies have been increasingly requesting from parties during the merger review process. Accordingly, parties required to submit HSR filings over the next several months should be prepared to receive similar requests from the Agencies, either on a voluntary basis (e.g., during the initial 30-day waiting period) or through issuance of a Second Request, and they should build into their deal timeline (either pre- or post-signing) sufficient time to comply with these requests.

FOOTNOTES

[1] "FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review," FTC Press Release, June 27, 2023, *available at* FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review | Federal Trade Commission.

[2] "Q and A on the Notice of Proposed Rulemaking for the HSR Filing Process," FTC Proposed Text of Federal Register Publication, *available at* 16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements | Federal Trade Commission (ftc.gov).

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