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Proposed Amendments Aim to Transform HSR Review Process: Practical Implications for Your Transaction

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On June 29, 2023, the Federal Trade Commission (FTC), in concurrence with the Antitrust Division of the US Department of Justice (DOJ) (collectively, "antitrust agencies"), issued a Notice of Proposed Rulemaking to amend the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) Rules, Form and Instructions. Under the HSR Act, the FTC and DOJ must be notified before mergers, acquisitions and other transactions that meet certain monetary thresholds are consummated. The proposed amendments, which reflect the FTC's first top-to-bottom review of the HSR Form and Instructions since the 1970s, would substantially increase the amount of information companies would need to submit to the antitrust agencies. The FTC conservatively estimates that 45% of HSR filings would require an additional 222 hours to prepare and 55% may require an additional 12 hours.

Most of the proposed amendments are expected to survive the 60-day comment and review period, which will end on August 28, 2023. The revisions will place the HSR filing requirements on par with neighboring jurisdictions, including the European Commission. Details about key proposed amendments follow.

Transaction and Party Details

Current practice – Parties are required to provide only limited details about the proposed transaction, including the parties involved, the acquisition price, whether assets, voting securities or noncorporate interests (or some combination) are to be acquired, and the business operations being acquired. Parties are not required to provide significant details describing their business operations.

Proposed change – Parties will be required to provide substantial information regarding the proposed transaction and their respective business operations, including (i) an explanation of "all strategic rationales for the transaction," including competition-related concerns, current or planned products and services, and the integration of certain assets into new or existing products or service offerings, among other details; (ii) information regarding any product or service where the filing parties currently or could potentially compete, including customer contact information for each product or service, as well as a description of any licensing, noncompete or nonsolicitation agreement relating to those products or services; (iii) a description of any supply relationships or other "vertical" relationships between the parties, including details about sales, customers and competition; and (iv) information regarding the filing parties' workers, including their occupational categories based on current Standard Occupational Classification system categories, and the geographic areas where employees are based.

Takeaway – The proposed changes will require parties to submit information similar to that already required under merger control regimes in Europe and certain other jurisdictions and will add significant time to preparing the HSR form. Parties will need to account for this additional time when assessing deal timing, even for transactions where there are minimal competitive overlaps or the parties have only a minimal market position.

The proposed changes will force parties to engage in a much more thorough review of the markets in which they both compete so that they can appropriately define those markets for the agencies and minimize unnecessary deal risk, and parties will need to navigate the process of whether and when to contact customers whose information will be included with the HSR filing. Deal confidentiality could also be put at greater risk to the extent government outreach to customers becomes more commonplace, and companies might be forced to expand their internal deal teams (also presenting a risk to deal confidentiality) in order to obtain the types of additional information that will now be required for the HSR filing.

Document Production

Current practice – In response to Item 4(c) of the HSR form, parties are required to provide all studies, surveys, analyses and reports that were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. In response to Item 4(d), parties must provide any confidential information memoranda prepared for the transaction, certain materials prepared by third-party advisers, and certain synergies and efficiencies analyses relating to the transaction. Parties must also submit financial statements and an executed copy of the agreement.

Proposed change – The proposed amendments would vastly increase the types of documents that filing parties would need to produce with the HSR filing. These documents include, among others:

- Transaction-related documents prepared by or for supervisory deal team lead(s)
- Non-transaction strategic business documents that analyze markets, market shares, competition or competitors of any competing product
- Organizational charts of authors and recipients
- Projected revenue streams
- Diagrams of the transaction(s)
- Organizational structures of entities involved, including private equity investments
- Drafts of any responsive document provided to an officer, director or supervisory deal team lead(s)

Takeaway – The volume of additional documents that will need to be searched for, reviewed and potentially submitted with the HSR filing will significantly expand the amount of time needed to prepare the filing, as well as increase the burden on the parties who, for many transactions, may have a larger universe of custodial files to review in order to identify responsive documents.

Companies will need to become more sensitive to how they describe their business and the markets in which they compete in their ordinary course documents, which now could be subject to HSR requirements. Business personnel preparing early-stage drafts of transaction-related documents will need to be sensitive to antitrust issues to avoid preparing documents that present an inaccurate picture of market dynamics or their company's position in the market. Assigning a lower-level employee to put together a preliminary market analysis of a proposed transaction without proper antitrust training could result in documents being produced with the HSR filing that are inconsistent with positions taken by the parties elsewhere in the filing, in turn resulting in unnecessary questions and concerns from the agencies that could have been avoided with proper planning.

Timing of the Filing

Current practice – Parties can file under the HSR Act once they have an executed agreement. This can include a short, nonbinding letter of intent, memorandum of understanding or some similar document that provides limited details about the transaction. Neither an executed nor draft definitive agreement is required to make an HSR filing.

Proposed change – Parties will be required to submit a "term sheet or draft agreement that reflects sufficient detail about the proposed transaction to allow the agencies to understand the scope of the transaction and to confirm that the transaction is more than hypothetical."

Takeaway – Parties often file on a letter of intent to facilitate obtaining regulatory approval while they negotiate the terms of a definitive agreement. This strategy can allow for a simultaneous signing and closing, which benefits both parties by eliminating transaction risks during the intervening period. In some cases, parties may file on a letter of intent to obtain an early assessment of potential antitrust risks before expending time and cost on negotiating a definitive agreement. The proposed changes will complicate this strategy and, in all cases, require the parties to reach consensus on a sufficient number of deal terms before they can submit their HSR filing.

Other Amendments

- **Prior acquisitions** – Parties will be required to report on prior acquisitions made in industry overlap areas dated 10 years prior to filing. Current practice requires only the buyer to provide information about certain, large acquisitions made in the last five years.
- **Foreign subsidies** – Parties will have to disclose information about subsidies received from certain foreign entities that are considered a strategic or economic threat to the US.
- **Minority shareholders and other noncontrolling entities** – The parties will be required to provide a narrative describing their ownership structure. Parties will also need to list all minority shareholders within the acquiring entity, including any legal entity directly or indirectly controlled. For buyers that are private equity funds or master limited partnerships, an organization chart will be required.
- **Other interest holders** – The buyer will be required to identify certain interest holders in the transaction, including large creditors, board members, managers and certain holders of nonvoting securities.
- **Current and prospective board members** – Parties will be required to list all current and prospective officers, directors and board members within the past two years, as well as all other entities for which each member has served in a similar function.
- **Transaction timeline** – Parties will now be required to provide a projected transaction timeline of key dates and conditions for closing.
- **NAICS codes** – Parties will be required to list all possible NAICS codes that describe their current US operations and will be required to list NAICS codes for certain products and services under development.
- **Intelligence and defense contracts** – Parties will need to identify large pending or active procurement contracts with the US Department of Defense or any member of the US intelligence community.
- **Communication and messaging systems** – Parties will need to list all communication systems or messaging apps that could be used to store and transmit information/documents related to its business operations.
- **Foreign jurisdictions** – Parties will need to report non-US antitrust or competition authorities that have or will be notified of the transaction.

Conclusion

The proposed amendments are robust and reflect the Biden administration's strong antitrust enforcement attitude. FTC Chair Lina Khan stated that the amendments "seek to fill key gaps that [FTC] staff most routinely encounter" and "are consistent with data already collected by antitrust authorities around the world." The amendments, if passed, would significantly increase the time and costs associated with the submission of HSR filings. The types of information that will now be submitted with the filing should also make detection of problematic transactions easier and could potentially increase the likelihood that parties to less problematic transactions must respond to government inquiries and requests for information. The amendments could also increase a company's potential exposure to other government investigations due to the types of disclosures required.

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