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FTC Proposes Major Changes to HSR Process

Proposed Changes Would Add Significant Cost and Threaten to Delay All Transactions Requiring Premerger Filings Under the HSR Act

On June 27, 2023, the Federal Trade Commission (“FTC”), in collaboration with the Antitrust Division of the U.S. Department of Justice, issued the proposed text of a Notice of Proposed Rulemaking (“NPRM”) (available [here](#)) that sets forth the first major proposed changes to the Hart-Scott-Rodino (“HSR”) Form and Instructions since 1978. The proposed changes are substantial, with the FTC itself estimating that its proposal would, on average, increase the time needed to prepare an HSR filing by 290%.

Key aspects of the FTC’s proposed revisions (which contain no exceptions for transactions that clearly raise no competition concerns) are summarized below; in short, the proposal would create a burdensome and costly exercise that requires significant work (potentially involving outside vendors) and focuses in part on issues unrelated to traditional competition concerns.

- ***Materially expanded requirement to produce documents, including those of “supervisory deal team leads.”*** The current HSR Form requires merging parties to submit documents prepared by or for any officer or director for the purpose of analyzing the competitive effects of a proposed transaction. In the NPRM, the FTC proposes to expand significantly the scope of this requirement, and mandate documents prepared by or for “supervisory deal team leads” with “responsibility for preparing or supervising the assessment of the transaction,” including drafts, as well as ordinary course business documents discussing areas in which the merging parties compete. The last addition is significant because such ordinary course documents will be much more difficult to identify, especially in large corporations. The FTC also proposes requiring filers to identify (i) all individuals whose files were searched for responsive documents and (ii) all communication or messaging applications that could be used in business operations, as well as to certify that filers have taken steps to prevent the destruction of any materials related to the proposed transaction. If unchanged, these proposals would transform the HSR filing process into substantial document productions requiring large-scale reviews of email and electronically stored documents.

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- **Detailed descriptions of the businesses of the filers, including identification of horizontal overlaps, supply relationships between the filers, and the latitudes and longitudes of business locations.** The FTC proposes requiring detailed descriptions of the filers' businesses, including identification of any areas in which the filers compete or are in a vertical supply relationship. Although the HSR form already requires filers to describe the transaction, the expansion to require narrative descriptions of all business lines would be burdensome, especially for companies with diverse business lines and complex supply chains. In addition, the proposed changes would require the submission of detailed sales data, customer contact information, and latitude and longitude locations of business units (rather than merely street addresses) even in situations in which the merging parties do not compete or have any vertical relationships.
- **Detailed description of the transaction rationale, with documentary support.** The FTC proposes requiring filers to submit a narrative that would identify and explain each strategic rationale for the transaction, including those related to competition, expansion into new markets, hiring the sellers' employees, obtaining intellectual property, or integrating assets into new or existing products or services. In addition, filers would be required to identify documents submitted with their HSR filings that support the rationales described in the narrative, which the FTC says will ensure that the filers' narrative is not "mere advocacy designed to portray a favorable view of the transaction."
- **Detailed employee information.** The FTC proposes requiring filers to submit a narrative description and detailed information about their employees to enable the antitrust agencies to evaluate proposed mergers' potential impact on labor markets. Data would need to be organized under the Standard Occupational Classification codes published by the United States Bureau of Labor Statistics and the Department of Agriculture's Economic Research Service Commuting Zones, classifications that are likely unfamiliar to many U.S. companies and almost certainly unfamiliar to non-U.S. companies. The FTC also proposes requiring filers to submit any "penalties or findings" imposed on filers by the Department of Labor's Wage and Hour Division, the NLRB, or OSHA in the five years before filing and HSR form.
- **Expanded information about non-controlling entities.** The FTC's proposal would require submitting significantly expanded information regarding minority shareholders and other non-controlling entities of the acquiring entity, including limited partners that hold 5% or more of a company, and entities that provide credit or hold options, warrants, or even non-voting securities. These requirements are likely to require significant additional information from investment entities, and would materially complicate preparing HSR filings for acquiring entities with complicated investment structures.
- **Expanded information about organizational structure.** The proposed revisions would require additional information about the organizational structure of the filer. Although some of this information is already required, the FTC proposes a material expansion, including organizing the list of the filer's controlled entities by operating company or business. Filers would also be required to identify all names by which entities have done business within the last three years, rather than merely the legal name.
- **Information about officers, directors, and board observers for any corporate entity within the filer's organization.** The FTC proposes requiring filers to identify all officers, directors, and board observers of all entities within its organizational structure (e.g., a partially owned subsidiary), as well as the identification of any other entities for which those individuals have served in the same roles within the last two years. The FTC justifies this requirement in part by invoking its responsibility to enforce Section 8 of the Clayton Act, which in general prohibits a person from serving as an officer or director of competing corporations. For large corporations with hundreds of subsidiaries around the world, this could impose a significant burden.
- **Submission of organizational charts.** The FTC proposes requiring filers to submit organization charts identifying the positions of any authors of other documents submitted in the HSR filing. Assembling those charts in advance of the HSR filing may pose a significant burden, especially for large businesses that do not maintain comprehensive organization charts.
- **Overhaul of revenue reporting.** The HSR Form currently requires reporting revenue by industry and product codes developed by the U.S. Census (known as NAICS codes). The proposed revisions would

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overhaul those revenue reporting requirements, moving from a relatively quantitative measure based on ordinary course financial statements, to a descriptive approach. Under the new descriptive approach, among other things, “individuals familiar with the business operations” must review the NAICS classifications, select the most applicable ones (regardless of how the company actually tracks its revenue data in the ordinary course of business), provide estimated revenues by entity, and include NAICS codes for products still in development that have not yet generated any revenue if those products overlap with any products of the acquired company.

- **Expanded information regarding prior acquisitions.** The HSR form already requires filers to identify acquisitions that the acquiring entity made within the past five years and share NAICS codes with the acquiring and acquired entity in the notified transaction. In the NPRM, the FTC proposes expanding the requirement to the acquired entity as well, extending the time period to the past 10 years, and abandoning the previous limit of only identifying acquisitions of entities that had net sales or assets of \$10 million or more in the year before the acquisition. Doubling the length of the applicable period and removing a minimum threshold would require some serial filers to identify many more prior transactions.
- **Identification of information relevant to national security.** The FTC proposes adding requirements for filers to disclose information about foreign subsidiaries from countries or entities that “threaten U.S. strategic or economic interests” and to report contracts with defense or intelligence agencies valued at \$10 million or more.
- **Translations of all foreign language documents.** The current HSR Form does not require the translation of all foreign-language documents submitted as attachments to the form. Under the proposed amendments, translation of every document would be required.
- **Elimination of the ability to submit an HSR filing based on a preliminary agreement.** The FTC proposes eliminating the ability of parties to submit HSR filings on the basis of a letter of intent if the parties do not also include a “term sheet or draft agreement.” Requiring a more definitive document before permitting an HSR filing would be likely to result in a delay for completing transactions that do not pose any antitrust concern, which currently can be notified to the FTC based on a simple letter of intent.
- **Identification of international filings.** The HSR form currently allows, but does not require, filers to identify other jurisdictions in which premerger notifications may be required. The FTC now proposes making it mandatory to identify any jurisdictions in which the filer has a good faith belief that it will need to make a premerger notification filing. This requirement is likely to cause delays in HSR filings because it often takes parties longer to identify foreign jurisdictions in which they are likely to need to make premerger notification filings than it takes to prepare an HSR filing.

Observations. The FTC issued the original Form and Instructions in 1978 after a 19-month review process and multiple rounds of public comment. It is unclear what process lies ahead here. As a formal matter, after publication in the Federal Register, a 60-day period of public comment on the NPRM will open, and information submitted in response to the NPRM will be posted publicly. But in its NPRM, the FTC states that it drafted its proposal after “canvass[ing] current Agency staff who had previously prepared HSR filings while in private practice,” perhaps signaling that the impact of public comment may be limited. The FTC’s recent practice of requesting public comments after voting on the underlying issues may be instructive.

If adopted in its current form, the FTC’s proposal would substantially increase the burden and expense associated with all transactions reportable under the HSR Act, including those that pose no competitive concerns. The proposal threatens to push out both the submission date for HSR filings and the closing date for transactions unless the merging parties engage in significant pre-signing preparation, which may be difficult given the need to maintain the confidentiality of potential M&A transactions. Large multinationals

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with diverse business lines and private equity funds with many portfolio companies will be particularly disadvantaged. As a practical matter, the new rules are likely to require more involvement in the HSR filing process from companies' financial reporting groups, as well as the use of document-production tools more typically associated with a Second Request or the discovery process in litigation. Given the significance of the proposed changes, companies considering M&A transactions, particularly transactions that could be signed around the time when the proposal may go into effect—which could be as soon as the fall of this year—should consult with counsel about the impact of these changes and strategies for seeking to minimize the lengthened period of uncertainty that the FTC's proposed changes could create for not only merging parties and their shareholders but also their employees, customers, and communities.

Finally, and as noted above, the FTC's proposal provides further evidence that the current U.S. antitrust enforcement environment is expanding to include a range of issues that have not been a part of traditional competition analysis. Whether courts would accept challenges based on those concerns (for instance, a merger's potential to harm employees or concerns based on small minority investments) remains untested, but the proposal confirms that current leadership at the enforcement agencies continues to prioritize these non-traditional issues as a policy matter.

Sullivan & Cromwell is actively consulting with clients and other interested parties seeking to understand how the proposed revisions to the HSR Form might affect their interests. Parties that may be affected by the revisions to the HSR Form should consider submitting comments in response to the NPRM.

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