

FTC and DOJ Propose Drastic Overhaul of HSR Requirements: New Form, New Frontier

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On June 27, 2023, the Federal Trade Commission (FTC) announced that it will issue a 132-page Notice of Proposed Rulemaking^[1] drafted in concurrence with the U.S. Department of Justice (DOJ) that, if implemented, would bring sweeping changes to the U.S. merger review process. The proposed changes would require merging parties reporting transactions under the Hart-Scott-Rodino Act (HSR) to collect and submit to the FTC and DOJ significantly more information than is currently reported in the HSR form, likely significantly lengthening the time and expense associated with reporting transactions under the HSR Act. Indeed, the FTC's own estimate is that the number of hours required to prepare an average HSR filing will increase nearly four-fold from 37 to 144 hours. Although the FTC states in its press release that the purpose of the proposed changes is to improve the efficiency and effectiveness of merger reviews, the additional burden on merging parties will be substantial.

According to the FTC, the proposed changes are geared toward enhancing and modernizing the FTC and DOJ's ability to identify potential anticompetitive concerns, evaluate market dynamics, and make informed decisions regarding proposed mergers and acquisitions. For example, as has been the practice in many foreign jurisdictions, for the first time, HSR filings will require a narrative describing overlapping products and services offered by the parties to the reported transaction and supply relationships between the parties. "This marks the first time in 45 years that the agencies have undertaken a top-to-bottom review of the form that businesses must fill out when pursuing an acquisition that must be notified in accordance with the HSR Act," remarked FTC Chair Lina M. Khan in a statement on the FTC's proposed amendments that was joined by Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya.

According to the FTC, these extraordinary changes to the HSR Form and instructions "seek to fill key gaps that [the FTC and DOJ] staff most routinely encounter, such as inadequate information about deal rationale or the details of how a particular investment vehicle is structured."^[2] Companies and private equity firms should be aware that disclosure requirements and transaction details will be more robust under these proposed changes, will require additional disclosures, and will lengthen the time required to prepare an HSR filing. Importantly, all information and materials submitted in an HSR filing are considered confidential and are protected from disclosure to third parties by the government. They are also exempt from requests under the Freedom of Information Act (FOIA). However, these materials may be presented in court proceedings if a transaction faces a legal challenge.

Proposed Changes to the HSR Form

Notable proposed changes to the HSR form include:

- **Competition Analysis**

- Narratives describing horizontal overlaps
- Narratives describing supply relationships between the parties
- More granular geographic information at the street-address level for certain overlaps
- More expansive information regarding acquisitions in the last 10 years of businesses that offer a product that overlaps with the other party
- Provision of projected revenue streams for pre-revenue companies
- Information regarding customers for overlapping products and services, including customer contact information
- Mandatory disclosure (currently voluntary) of required foreign merger control filings

- **Business Documents Required to Be Submitted**

- Expanded scope of so-called “Item 4(c) and (d) documents” that analyze the transaction from a competitive perspective to include:
 - Documents prepared by or for deal team leads in addition to officers and directors; and
 - Drafts (not just final versions) of responsive documents
- Full English translations of all foreign-language documents submitted with the HSR filing
- Certain ordinary course (i.e., non-transaction) documents

- **Information about the Ultimate Parent and Controlled Entities**

- Submission of an organization chart for all funds and master limited partnerships
- Identification of all officers and directors (including board observers) who have held such positions for the past two years and those who are likely to serve in such positions as a result of the transaction
- Identification of others who may exert influence within the acquired person or acquired entity, including significant creditors, holders of non-voting securities (e.g., options, warrants) and board members or board observers with rights to appoint a board member
- Expansion of the existing requirement to disclose information regarding minority shareholders to include limited partners and minority investors in all entities controlled by the ultimate parent entity

- **Information About the Transaction**

- Provision of details about the transaction rationale and details surrounding investment vehicles or corporate relationships
- Provision of a detailed transaction timeline and diagram depicting the relationship between all entities and persons involved in the transaction
- Submission of all agreements between the acquired and acquiring persons that were in effect at the time of filing or one year previous (e.g., supply or licensing agreements)

- **Labor Markets**

- Disclosure of information that helps identify labor market issues by classifying employees based on current Standard Occupational Classification system categories

- Disclosure of certain worker and workplace safety information, including past penalties or findings issued by the Department of Labor, the National Labor Relations Board, or the Occupational Safety and Health Administration
- **Subsidies From Foreign Entities or Governments of Concern**
 - Provision of data to fulfill the statutory requirement of the Merger Filing Fee Modernization Act of 2022, which requires that merging firms provide data about any subsidies they have received from certain foreign governments and other entities of concern^[3]
 - Requirement to provide information about subsidies received from foreign entities of concern

TAKEAWAYS

The proposed rule will be published in the Federal Register later this week. The announced changes to the HSR form, if implemented, will bring about significant changes to the merger review process, requiring more corporate disclosures. Interested parties, such as parties frequently engaging in mergers and acquisitions, should consider submitting comments, which are due 60 days after publication, which is expected on June 29, 2023. After receiving comments, the FTC may finalize the rule as is or make changes in response to comments. Additionally, given the significance of the proposed rule change and the departure from decades of precedent, the FTC may decide to extend the comment period beyond the initial 60 days. After the comment period, the FTC typically provides 30 days before the new rule takes effect, unless “otherwise provided by the agency for good cause found and published with the rule.”^[4]

Companies involved in mergers and acquisitions should also proactively monitor these developments and take necessary steps to ensure compliance with the revised reporting requirements. For transactions subject to the new HSR regime, ensuring that sufficient time is available to prepare the filing will be critical.

All companies involved in mergers and acquisition should also consider whether changes are needed to the antitrust provisions of their deal documents to account for the additional time necessary to prepare an HSR filing.

Winston & Strawn attorneys frequently prepare HSR filings and prepare advocacy before the FTC and DOJ and are positioned to assist in advising on the impact of the proposed rule and preparing HSR filings.

^[1] 16 C.F.R. Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements, Unpublished Text of Federal Register Publication, <https://public-inspection.federalregister.gov/2023-13511.pdf>.

^[2] 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.

^[3] For more information about the new disclosure requirements in the Merger Filing Fee Modernization Act of 2022, see our prior Competition Corner post at <https://www.winston.com/en/competition-corner/year-end-bill-to-avert-government-shutdown-includes-significant-changes-to-antitrust-law.html>.

^[4] 5 U.S.C. § 553(d)(3).
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