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FTC's Proposed HSR Changes Will Complicate Merger Filings

By **William Stallings, Gail Levine and Kathryn Lloyd** (August 9, 2023, 5:26 PM EDT)


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The sweeping revisions proposed by the Federal Trade Commission to the Hart-Scott-Rodino Act premerger notification rules would be the most significant change in the 45-year history of the program.[1]

Assuming the revisions are implemented, parties making filings will need to:

- Provide significantly more data on many issues — including data on their employees — and troves of internal strategic plans, reports and deal-related documents;
- Write detailed narratives about the transaction, including its rationale and synergies, as well as the parties to the deal and the markets in which they operate;
- Dedicate significant additional resources to preparing the required HSR filing; and
- Lengthen their expected time frame to obtain merger clearance.

All of this serves to increase the complexity, risk and uncertainty of the merger review process.

Of course, while these changes make the premerger process more burdensome, they do not alter substantive antitrust doctrine. For the government to block a deal, it still must prove in court that a merger or acquisition is likely to result in a substantial lessening of competition.

We provide below a summary of the proposal, the FTC's rationale for it, and considerations for what the new rules, once implemented, will mean for deal teams.

The Scope of the Proposed Rules

The proposed rules affect all aspects of the HSR initial notification process.

The proposal does not and cannot alter the statutory mandates for the types of transactions that must be reported — i.e., those subject to certain size of person and size of transaction tests. It also does not alter the applicable waiting periods — i.e., typically 30 days for the initial review. However, practically everything else is fair game.

The proposal affects the HSR Form itself, the information that must be submitted and the process for submission. The details are daunting — 40 single-spaced, small-font Federal Register pages — and, once implemented, the proposed rules will cause a sea change in the traditional HSR premerger process.

Moreover, given the subjectivity of many of the new requirements, it will likely take years of give-and-take between the antitrust bar and the FTC Premerger Notification Office for there to be a practical understanding of the true metes and bounds of what the new rules do and do not require.

The most salient features of the proposal would require merging parties to provide:

- Details about the structure of the transaction, its business rationale and the entities involved in it, including minority and private equity investors and "entities or individuals that may have material influence on the management or operations" of the acquirer, such as certain creditors, board observers and management service providers;

- Narrative descriptions of the parties' products and services, the markets in which they are offered, and assessments of "horizontal" overlaps and any nonhorizontal business relationships between the parties, such as supply agreements;

- A vastly expanded set of Item 4(c) and (d) competition-related documents, including all draft documents, instead of just the final version, and documents prepared by or for the supervisory deal team leads, regardless of whether the leads are officers or directors of the company, as well as ordinary-course strategic plans;

- Details regarding prior acquisitions, especially any nonreportable deals;

- Names and contact information of officers and board members as well as other companies for which those individuals have served in comparable positions, as well as names of prospective officers and directors;

- Disclosure of employee-related information including job categories and commuting zones in which both parties employ workers, as well as information on any past worker and workplace safety violations;

- Identification of all communications systems or messaging applications on any device used in business operations;

- Certain foreign subsidy information, as required by Congress; and

- Certification under penalty of perjury that a litigation hold has been put in place.

The changes will require significant additional work, with the FTC predicting that conformity to the proposed rules would result in approximately 12 to 222 additional hours per filing.

Such predictions appear conservative. Moreover, these changes apply to all HSR filings, not just ones involving competitors.

Reasons for Changes

The FTC states that the new disclosure requirements are to enable the FTC and the Antitrust Division of the U.S. Department of Justice "to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period" by filling "key gaps that our staff most routinely encounter.[2]

Of course, the agencies can obtain such information under the current rules by asking the parties to provide it voluntarily during the initial waiting period.

Most parties work to expeditiously answer any questions an agency, the FTC or DOJ, may have and to respond to requests for information.

The agencies can also access public information, reach out to third parties and receive complaints from those who are concerned about the deal.

In the highly unlikely event that an agency misses a competitive issue raised by a transaction and fails to issue a second request, it still has the ability to investigate and challenge a deal, even after it closes.

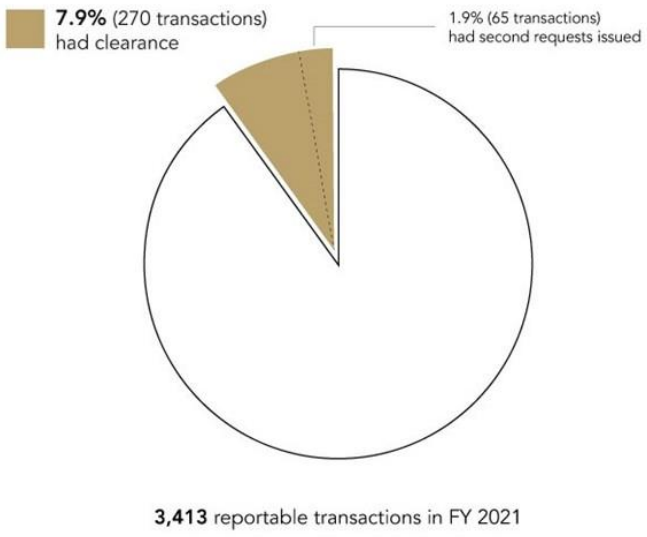
To be sure, the proposed rules will provide more up-front information for agency staff to consider, but is the extra work that will now be required for all HSR-reportable transactions worth the cost to the parties, as well as the time for agency staff to review this information for each filing?

The FTC notes that 45% of HSR filings check the box for an overlap, according to North American Industry Classification System, or NAICS, code revenue, thereby implying a competitive relationship between the parties.

But NAICS codes are notoriously imprecise. The percentage of HSR filings raising competition issues is most likely much lower than 45%. For example, the agencies submit Annual Competition Reports to Congress with detailed data on HSR filings.[3]

Fiscal year 2021 — Oct. 1, 2020, through Sept. 30, 2021 — was a high-water mark for HSR-reportable transactions, with HSR filings for 3,413 transactions filed that year.

Of those, the FTC or the Antitrust Division sought clearance — stating an interest in looking into a specific deal[4] — for 270, or 7.9% of transactions; and the agencies ultimately issued second requests for 65 transactions, or 1.9%.[5]



It is safe to assume that the other reported transactions — 3,143 of 3,413, or 92% of the FY 2021 total — therefore raised no competition issues. The figures for other years are comparable.

Yet, under the new rules, the parties making filings in those 3,143 transactions would have to incur the significant costs to provide the newly requested detailed information.

Affected Parties

All entities involved in HSR-reportable transactions will be affected. The proposed rules are generally applicable and cover all reportable transactions.

The FTC asserts that the impact may be less than what it first appears to be because "[m]any of the updates in the proposal are consistent with data already collected by antitrust authorities around the world."[6]

Indeed, in a sense, the proposed rules basically transform the U.S. from a notice-filing jurisdiction into one with requirements more like what is typical in the European Union and other comparable merger regimes.[7]

So, for transactions requiring such foreign filings, the parties may have some synergies. And firms that make frequent HSR filings will surely develop templates and protocols to be able to efficiently track the additional data required by the new rules.

But reliance on foreign filings to minimize the impact of the proposed rules misses two important qualifications.

First, only a limited number of HSR-reportable transactions also require foreign filings. Rather, most HSR

filings reflect transactions between US companies in which the HSR is the only premerger filing that must be made.

Second, the proposed rules go much farther in certain respects than what is required by other countries at the initial stages of notification. The proposed rules mandate the up-front production of an inordinate number of documents that do not have to be provided in initial foreign filings.

The rules also call for types of information that are not at issue in foreign reviews. For example, the requirement for labor market information is absent from the competition assessment by the European Commission and most other competition authorities worldwide.

Rather, review of this type of granular employee information is more common in regimes where public interest considerations are balanced with competition considerations during the substantive assessment.[8]

Moreover, from the inception of the EU merger control regime, a practice developed of the European Commission granting waivers from the strict requirements of the notification form, and over time a short form procedure was introduced for notifiable transactions that were unlikely to raise substantive issues. The proposed rules have no such provisions.

What the Rules Mean for Deals

The short answer is that the proposed rules will make HSR filing and preparation take longer and cost more, thereby introducing more uncertainty and risk into the deal process.

Timing

Under current practice, most HSR forms are prepared and filed between five and 10 business days following deal signing. Parties can also file a letter of intent before the deal is signed, but the proposed rules place further burdens on that practice as well.[9]

Under the proposed rules, parties will need more time to compile the requested information, draft narrative responses, and otherwise complete the filing. Each deal is unique, but the time for such tasks could easily add weeks to the timeline.

But there is an even further timing risk: The HSR statute mandates the length of the initial waiting period, typically 30 days; the FTC cannot change that requirement.

However, could the FTC bounce filings that they deem deficient for failure to meet the subjective requirements of the new rules, such as overlap descriptions and deal rationale?

If so, it is foreseeable that the U.S. will turn into more of an EU-like system where the parties engage in significant prefiling consultations with the FTC, providing iterative drafts of the filing until the agency is satisfied.

There would be little predictability for when the 30-day clock would begin to run.

Costs

The new rules will significantly increase the costs associated with compiling the required information, producing the requested documents and drafting the filing. But the costs are much more than monetary.

The rules will place an increased burden on the deal team. For example, by requiring all drafts of competition-related deal documents to be produced — including from the head of the deal team — the rules significantly expand the scope of documents to be produced.

The FTC states that obtaining drafts is necessary, given that deliberative documents are sanitized by the time drafts become final versions.

But such a suggestion misses the point that the final versions of documents instead reflect the considered judgment of those involved in reaching the ultimate determination rather than preliminary thoughts that lack solid analytical value but make for good sound bites in government complaints.

Conclusion

The unequivocal result of the proposed rules will be increased burden. Even simple no-issue transactions — for example, transactions involving a private equity acquirer where there are no overlaps between the portfolio of the acquirer and the activities of the target firm — will require a substantial investment in filing preparation and will add extra time to the merger clearance process.

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[1] The proposed rules are published at 68 Fed. Reg. 42178 (June 29, 2023).

[2] FTC, Press Release (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review & Statement of Chair Lina M. Khan Joined by Commissioners Slaughter and Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules (June 27, 2023) ["Statement"], https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioners-slaughter-bedoya-regarding-proposed-amendments

[3] Available at https://www.ftc.gov/policy/reports/annual-competition-reports.

[4] "Clearance" is the internal process the Agencies use to determine which Agency (the FTC or the Antitrust Division) will conduct any inquiry into a particular deal. An Agency only seeks clearance when it is interested in a transaction, as the vast number of HSRs do not raise meaningful issues. See generally,

Antitrust Division Manual (legacy) at III-35 (describing the use of the "no-interest" memorandum for filings raising no competition issues versus the use of the clearance process for deals that require Agency attention), available at https://www.justice.gov/sites/default/files/atr/legacy/2015/05/13/chapter3.pdf.

[5] FTC & DOJ, "Annual Competition Report FY 2021" at Exh. A, Table 1 ("Data Profiling Hart-Scott-Rodino Premerger Notification Filings and Enforcement Interests"), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

[6] Statement, supra n.4.

[7] The information required for a European Commission filing is set out in Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 Implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004, available at available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0914&qid=1688034412362 (Commission Implementing Regulation – Control of Concentrations).

[8] Jurisdictions that include public interest considerations as part of their legal test include China, sub-Saharan African countries and the Common Market for Eastern and Southern Africa (COMESA).

[9] The proposed rules would require parties filing on a letter of intent to "submit a draft agreement or term sheet that describes with sufficient detail the scope of the entire transaction" and to confirm that such transaction "is more than hypothetical."