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FTC Proposes Sweeping Changes to HSR Reporting Obligations

In a notice of proposed rulemaking published this week, the Federal Trade Commission unveiled significant changes to the reporting obligations under the Hart-Scott-Rodino Act. If adopted as final rules, those changes will materially increase filing burdens and hinder parties' ability to file and close quickly, even in non-problematic transactions. The changes would upend 45 years of HSR Act practice and impose significant cost and delay on reportable U.S. merger and acquisition activity.

Under the HSR Act, parties to merger and acquisition transactions meeting certain size thresholds must notify the FTC and the Antitrust Division of the Department of Justice, and observe a statutory waiting period before closing. The purpose of the Act is to give federal antitrust authorities notice of certain transactions and, if appropriate, an opportunity to challenge deals in federal court under the Clayton Act. Since its implementation in 1978, the HSR notification form has been straightforward and efficient, requiring basic information about parties, their operations, and the proposed transaction, as well as the production of relevant documents. Most companies can prepare and file HSR notifications within two weeks of signing, consistent with Representative Peter Rodino's contemporaneous vision "that the premerger data sought by the Government can be compiled rapidly, and that premerger 'discovery' can be satisfactorily compressed into a few week's time."

Offering no empirical support, the FTC now "believes that the information currently reported in an HSR Filing is insufficient," and proposes a complete redesign of the HSR notification process. Among many new requirements, filing parties would provide:

- Deal-related documents, including all drafts, prepared by or for the "supervisory deal team leads," in addition to such documents prepared by or for officers or directors;
- Regular reports prepared in the ordinary course of business that discuss market shares, competition, competitors, or markets;
- A narrative description and documentary support of the transaction rationale;
- Narrative descriptions of all existing or potential horizontal overlaps *and* vertical or supply relationships between the filing parties, accompanied by extensive sales data, customer contact information, licensing or supply arrangements, and related non-compete or non-solicitiation agreements;
- Lists of prior transactions for 10 years prior to the notification;
- Lists of all current and prospective officers, directors and board observers, identifying all other entities such individuals currently serve, or within the two years prior to notification have served, as an officer, director, or board observer;

- Information regarding foreign government subsidies, as now prescribed by the Merger Filing Fee Modernization Act of 2022;

- Existing or pending procurement contracts from the Department of Defense or the intelligence community; and

- Details of workforce "overlaps" and disclosure of penalties or findings issued against the filing entity by the Labor Department's Wage and Hour Division, the NLRB, or OSHA, consistent with the agencies' emphasis on labor competition and a "whole-of-government" approach to antitrust enforcement.

In defense of these new demands, the FTC's proposed rulemaking looks to foreign jurisdictions, such as the European Commission and China, as model merger review regimes "that ask filers to provide significantly more information." That comparison ignores fundamental differences between merger "approval" regimes like the EC and China and the HSR Act's notice process. Under the HSR Act, the FTC and Antitrust Division do not "approve" transactions; they review notified transactions to make law enforcement decisions.

The proposed changes reflect a paradigm shift in the antitrust agencies' historical review and investigatory practices, placing the burden on filing parties to advocate affirmatively why a proposed transaction does not violate the U.S. antitrust laws. The agencies may also use data and documents collected to build enforcement databases for review of future transactions, officer and director interlocks, and non-merger activity. Considered alongside the current FTC's refusal to grant early termination of the HSR waiting period under any circumstances, the proposed rule changes reflect an attitude that all mergers should be taxed and delayed, even though the agencies issue Second Requests to only 3% of deals filed under the HSR Act—meaning only a small minority of notified transactions merit extensive investigation.

The proposed changes are by no means certain: Following a 60-day notice and comment period, the FTC must consider all "relevant matter presented" prior to issuing a final rule, after which the new rules may still be subject to challenge in federal court. Nevertheless, we anticipate many of the proposed new rules, including some of the more burdensome requirements described above, will be adopted. The changes could take effect later this year or in early 2024.

Transacting parties should be aware of the antitrust agencies' desire to collect and obtain far more information and data from filing parties during the initial HSR waiting period across *all* transactions. If adopted, HSR notifications will require more time and resources of transacting parties, and dealmaking companies will need to redevelop and implement HSR notification readiness and general compliance programs well in advance of any contemplated transaction.

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