

Memorandum

FTC Proposes Major Overhaul to HSR Merger Notification Process— New Rules Would Substantially Expand Scope and Extend Preparation Time for HSR Filings

June 28, 2023

The Federal Trade Commission has proposed sweeping changes to the HSR Notification Process that—if adopted—drastically expand the scope and substance of the HSR Form.¹ Published in draft form on June 27, 2023, this proposed “redesign of the premerger notification process” would represent the first major overhaul of the HSR reporting rules since the Hart-Scott Rodino Act premerger notification program was established 45 years ago.

The proposed changes are consistent with and reflect a further commitment to the ambitious enforcement agenda of President Biden and FTC Chair Lina Khan. As the draft Notice explains, “the Commission believes that the limited information currently available to the Agencies in the HSR Filing is no longer sufficient to conduct an effective initial screening of the transaction for all types of competitive harm that may result from [a] transaction.”² While Chair Khan has noted that many of the planned updates to the HSR Form are “consistent with data already collected by antitrust authorities around the world”³, in many respects the proposal exceeds the requirements of even the most comprehensive regimes (such as the EU and U.K.). Indeed, the FTC has projected that in transactions involving overlaps (accounting for 45% of filings in the past 5 years by the FTC’s own count⁴) the new requirements could increase the average amount of preparatory legal work from 37 hours to 259 hours *for each filing*.

¹ The draft proposal is available here:

https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf

² In a statement accompanying the draft proposal, FTC Chair Khan echoed the view that “the information currently collected by the HSR form is insufficient for our teams to determine . . . whether a proposed deal may violate the antitrust laws” and criticized the current “voluntary” nature of the HSR process, which “can leave key gaps.” *See*

https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_115p.pdf.

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⁴ These percentages were computed based on NAICS code overlaps, which are substantially broader than a substantive overlap and frequently do not correspond to antitrust markets.

The FTC's proposed changes to the HSR Form will require the submission of substantial additional details including:

- Extensive transaction-related information, including timelines, structure charts, discussion of rationale, additional transaction documentation, and more;
- The identity of certain co-investors (holding 5% or more of any entity involved in the transaction) and lenders (lending 10% or more of the overall target value);
- A comprehensive discussion of competitive overlaps between the merging parties, including both horizontal and vertical relationships;
- A vastly expanded document production, including a broadened definition of "Item 4(c) documents" that now includes both *ordinary course* documents and *draft* deal-related documents, from a wider audience within the parties including deal team leads (no longer limited to Officers and Directors);
- A listing of prior acquisitions undertaken by either party in the preceding 10 years;
- Various data relevant to labor market considerations, such as information about employee activities and locations;
- Information regarding current and contemplated Board composition of the parties, for purposes of facilitating a Clayton Act Section 8 interlocking directorates analysis; and
- A host of other information previously not required touching on foreign investment, defense industry impacts, document retention, and more.

One thing the draft Notice does *not* do is amend the HSR waiting periods, which are imposed by law and not subject to amendment through the FTC rulemaking process. Following publication of the proposal in the Federal Register (expected soon), the proposal is subject to a 60-day public comment period (unless extended), at which time the FTC may issue a final rule (amending the proposed rule at its discretion), which must be published 60 days before going into effect, suggesting that any change to the form could be effective as soon as the end of 2023.

The full effect of the proposal remains to be seen, but in transactions involving complex structures or presenting competitive overlaps the time taken to prepare and file HSR, once measured in days or weeks, may require 1-2 months or more. Transaction agreements will need to allow for much more time for preparation and filing than is the current practice. Companies would also be well-advised to implement more rigorous oversight and adopt best practices for document creation and retention, recordkeeping, and data collection to avoid headaches during the HSR process.

A more complete discussion of the proposal follows, including the proposal's requirements, a comparison to the premerger notification regimes of "peer" jurisdictions, and the implementation process for a final rule change.

Discussion of the New Proposed HSR Requirements

The proposed updates to the HSR filing process are exhaustive, leaving virtually no aspect of the existing notification form untouched. The most significant proposed updates include the following:

Entities Involved and Organization Structures: The proposed HSR Form would require identifying information regarding individuals and entities that may have influence over the business decisions of either party or access to relevant business information, but are not captured by existing requirements to identify controlling entities and General Partners, including:

- Certain minority shareholders and limited partners (5% or more of voting securities or non-corporate interests) up and down the chain of control of the acquirer (*i.e.*, directly or indirectly controlled by or controlling the acquiring entity or any transaction-specific special purpose vehicles);
- Other interest holders up and down the chain of control of the acquirer that may exert influence, including those who (i) provide credit (10% or more of the value of the entity in question); (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction; and
- Officers, directors, and board observers (or their equivalents) of entities up and down the chain of control of the acquirer and the acquired entity, and other entities for which they serve or have served as officers, directors, board observers, or their equivalents.

Transaction Details: The proposed HSR Form would require a detailed description of various attributes of the transaction including a transaction diagram and projected timeline, a comprehensive list of the strategic rationales for the transaction, and a list of the closing conditions of the transaction, as well as the following business and transaction documents, to be provided by each filing party:

- For transactions that have not yet signed (*i.e.*, filing on a Letter of Intent), copies of the most recent draft of the transaction agreement reflecting the parties' negotiations or a detailed term sheet (more than an indication of interest or non-binding LOI only);
- Copies of all agreements between the filing persons, including agreements not related to the transaction, and all schedules and exhibits to the agreements;

Expanded Document Submissions: The proposal significantly expands the document submission requirements of the HSR Form, by both broadening what is captured as an Item 4 document and adding a new ordinary course document component. The proposal would require parties to include:

- Item 4(c) documents, which have been expanded to include (1) *documents created by or for the supervisory deal team leads* (rather than just Officers or Directors) and (2) *and all drafts* (rather than just final versions)—*i.e.*, parties must now submit all *draft or final* studies, surveys, analyses and reports which

were prepared by or for any Officer or Director (or their equivalents) or *supervisory deal team leads* for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic market;

- Item 4(d) documents, including confidential information memoranda (CIMs), bankers' books and other third party consultants' materials, and synergies documents;
- Various *ordinary course documents unrelated to the transaction*, including high-level semi-annual or quarterly strategic business plans and reports and all plans and reports submitted to the Board of Directors (or its equivalent), within one year from the HSR Filing, that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity (*i.e.*, any area of competitive overlap); and
- An organizational chart identifying all authors of the above documents as well as the individuals searched for responsive documents.

Competition and Overlaps: The proposal also provides for a new “Competition Analysis” section that includes a thorough discussion of the competitive overlaps between the parties. Each party must include a description of its own business activities and a discussion of whether and how those products or services compete with the other filing person. This reflects the approach taken by most other major jurisdictions in their own notification forms.

- For any horizontal overlaps or actual or potential vertical overlaps, the Form must also include supplemental information such as sales data and top 10 customer information (including contacts).
- The Form requires expanded information on “controlled entity overlaps”, which would capture other operative companies or entities owned by the acquirer that may overlap with the target (such as other controlled portfolio companies, in the case of private equity buyers).
- There is little precedent available to guide parties in defining product and geographic markets for purposes of determining whether “overlaps” exist. This provides some discretion to drafting parties in determining whether overlaps are present and may present future challenges for both parties and the FTC and DOJ in completing this section.

Prior Acquisitions: Each party (including the target) must identify all prior acquisitions—of any size—in the prior 10 years for any targets active in an area in which the buyer and target have horizontal overlaps.

Labor Force Analysis: Each party must provide employee categorizations based on Bureau of Labor Statistics segmentations, along with geographic market information.

Foreign Subsidies and Defense Contracts: Each party must provide descriptions of subsidies (including direct subsidies, grants, loans, tax concessions, preferential government procurement policies, or government ownership or control) from foreign countries and entities and products made in countries designated as “foreign entities of concern” (*see* 42 USC 18741(a)(5)(C)), as well as any contracts with defense or intelligence agencies.

Document Retention Certification and Waivers: Each party must provide a certification that the company has taken steps towards document preservation, and is encouraged to provide voluntary waivers permitting the FTC and/or DOJ to discuss the matter with international competition authorities and state attorneys general.

Comparison With Peer Jurisdictions

Today the U.S. HSR Form requires less detail than its EU and U.K. counterparts, and in many ways the updates adopt an EU- and U.K.-style approach. For example, both EU and U.K. filings have for years required the parties to identify and provide a narrative discussion regarding competitive overlaps between the merging parties. In certain transactions, the EU and U.K. also require the submission of various documents and data designed to provide greater insight into the parties' activities and competition between them.

However, while Chair Khan described the proposed updates as “consistent with” the format of these jurisdictions, in many ways it exceeds the level of detail required abroad. For instance, the customer contact information and document requirements that will be required in the U.S. for transactions involving any overlaps at all are reserved for only those transactions presenting substantial overlaps in EU and U.K. filings (*e.g.*, 20% combined share or more). And when documents are required to be submitted, the new requirement to go beyond Officers and Directors also exceeds the typical EU and U.K. approach.

Further, HSR requires notification of hundreds of non-merger transactions annually. While the EU and most other jurisdictions globally only require filings for acquisitions of “control,” or a substantial minority position, HSR can be triggered by any acquisition of shares valued in excess of the statutory thresholds, even if the shareholding represents a small minority position in the company.

As a result, in multi-jurisdictional transactions, U.S. filings may now routinely take as much or more time to prepare as their EU and U.K. counterparts.

Overview of the Implementation Process

Following publication of the proposal in the Federal Register (expected soon), the proposal is subject to a 60-day public comment period, which may be extended depending on public response. Given the sweeping nature of the proposal, we anticipate significant public comment. The FTC may, but is not required to, make changes to the proposal based on public comments or its own further analysis, after which it is expected to issue a final rule. For “significant” rules (as this one would be), the final rule must also be published at least 60 days before going into effect.

There is no explicit language requiring retroactive application (*i.e.*, to transactions currently notified), and we would expect the final rule to apply only to those transactions notified after the final rule is in effect.

Practical Implications

It is clear that if the new HSR Form is implemented, the HSR preparation process will be more involved and that merging parties will need to allow for much more time from signing a transaction to compile and submit the HSR notification.

Less clear are the other collateral effects that the new rules could have over time. Merging parties will now need to consider additional factors around topics such as required investor disclosures, the implications of prior acquisition disclosures, and document creation and retention.

These could have material implications for transaction structures and investment formats. They also place an emphasis on taking care to ensure that even ordinary course documents do not, *e.g.*, exaggerate or overstate a party's competitive significance or competitive practices.

Related Materials

The FTC's press release can be found [here](#). The Q&A posted to the Federal Register can be found [here](#). The Statement of FTC Chair Lina Khan can be found [here](#). The proposed text of the Federal Register publication can be found [here](#).

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