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Memorandum

FTC's HSR Updates Will Require Substantially More From Filing Parties, but Less Burdensome Than Initially Proposed

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In a unanimous vote, the Federal Trade Commission has announced a final rule (Final Rule) that represents the first major overhaul of the premerger notification form (the HSR Form) since its introduction in 1978. This comes 16 months after the FTC initially proposed sweeping changes to the HSR Form in a Notice of Proposed Rulemaking (NPRM). While the Final Rule imposes significant new obligations for filing parties, it reflects a bipartisan consensus on necessary updates to address significant information gaps perceived to impede the antitrust agencies' premerger review. Unlike the NPRM, which one of the sitting Republican commissioners characterized as a "nonstarter" and another as "just plain bad policy,"[1] the Final Rule is more likely to withstand any political or procedural challenges.

The Final Rule will be effective 90 days after publication in the Federal Register, which will be **no earlier than January 14, 2025**.

Material updates to the HSR Form include:

- **Expanded definition for Item 4(c) documents** to include deal team supervisors and documents in draft form shared with a director.
- **Disclosures of horizontal overlaps and supply relationships.**
    - For transactions involving a horizontal overlap, the acquiring person and acquired entity[2] must describe the overlap, and for each overlap: (i) produce certain high-level ordinary course documents about the products and services, (ii) list material acquisitions during the prior five years, and (iii) identify the top 10 customers, among other things.

[1] *See* Concurring Statement of Commissioner Andrew N. Ferguson In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803 | Federal Trade Commission (ftc.gov) at 1; Statement of Commissioner Melissa Holyoak Regarding Final Premerger Notification Form and the Hart-Scott-Rodino Rules | Federal Trade Commission (ftc.gov) at 1.

[2] A note on terminology. The Ultimate Parent Entity ("UPE") is the entity that controls a party to a transaction that is not itself controlled by any other party. The UPE is also referred to as the "acquiring person" or "acquired person." This note uses the term "acquiring person" or "acquired person" throughout for consistency. The "acquiring entity" is what is traditionally thought of as the "buyer." The Final Rule uses "acquiring entity," and we adopt that terminology here. The "acquired entity" is the target company. The Final Rule uses "acquired entity" and "target" interchangeably; we use the term "acquired entity" for consistency.

- The acquiring person must also disclose certain officers and directors of entities within the acquiring person where such persons *also* serve as officers or directors of another entity that presents an overlap with the acquired entity.

- With some limited exceptions, **the identity of investors holding 5% or more in the acquiring person** and certain intermediary entities between the acquiring person and the acquiring entity.
- **Additional deal-related information**, including strategic rationale and additional deal documentation.

In conjunction with the announcement of the Final Rule, the FTC announced that its ban on granting early termination of the HSR waiting period will be lifted once the Final Rule goes into effect. We expect that, at least initially, the granting of early termination will be limited to transactions where there are no supplier relationships or horizontal overlaps.

Discussion of the New Proposed HSR Requirements

The final revisions to the HSR filing process are extensive, but significantly pared back from the NPRM. The most significant updates include the following:

EXPANDED DOCUMENT SUBMISSIONS

While the Final Rule does not require the submission of *all* drafts of documents, there are three key areas where additional documentation must be provided as compared to the existing practice: Item 4(c) documents prepared by or for a deal team supervisor, documents in draft form shared with a director, and ordinary course documents about overlapping products and services.

- ***First***, the Final Rule requires parties to submit all Item 4(c) documents prepared by or for the "Supervisory Deal Team Lead," which is defined as "the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer." Item 4(c) documents are "studies, surveys, analyses, and reports" created "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets." This new requirement can effectively expand the potential custodians for Item 4(c) documents beyond officers and directors to include one deal team supervisor.

  If the only individuals supervising the strategic assessment are officers or directors, no additional individual must be identified. The Final Rule acknowledges that there may be some uncertainty in who should be identified as the supervisory deal team lead. At any point there is only one supervisory deal team lead, but this may cover multiple individuals if they successively hold this role.

- ***Second***, documents in draft form submitted to one or more members of the board of directors (or a similar body) will be treated as a final version and must be submitted with the filing. While this does not capture all drafts, the FTC has clarified that any transaction-related document shared with a member of the board of

directors automatically becomes final (and therefore must be submitted) even if a later version of that document is also submitted.

- ***Third***, the filing parties must also submit ordinary course documents if they fall into the new "Plans and Reports" category defined as "regularly prepared plans and reports" that were provided to the Chief Executive Officer (CEO) or the board of directors of the acquiring / acquired entity (or any entity that it controls or is controlled by it) "that analyze market shares, competition, competitors, or markets pertaining to any product or service" of one party also produced, sold, or known to be under development by the other party.

  These plans and reports are limited to documents prepared or modified within one year of the filing, and certain tender offers and acquisitions from third parties are excluded from the requirement. For plans and reports provided to the CEO, only those plans that are produced at certain specific regular intervals (i.e., annually, semi-annually, and quarterly, but not monthly or weekly) must be submitted.

COMPETITION AND OVERLAPS

In the new "Competition Description" section, each party is required to provide descriptions of their own products and services, as well as descriptions of horizontal overlaps and vertical links with the other party.

- Horizontal overlaps, defined as "Overlaps" in the new HSR Form, include "current or known planned products or services of the acquiring person that competes with (or could compete with)" the other party.
- Vertical links, defined as "Supply Relationships" in the new HSR Form, include sales, products, services, and assets (including data) supplied or licensed to, or purchases from, the other party and its competitors.
- For any identified Overlaps or Supply Relationships, the HSR Form must also include supplemental information such as sales data and top 10 customer information.

While the NPRM contemplated a detailed narrative / antitrust analysis of the Overlaps and Supply Relationships, the Final Rule only requires a "brief" factual description. Further, the Final Rule, unlike the NPRM, does not require disclosure of sales between the parties where those sales are de minimis (below $10 million) and does not require customer contact information.

ENTITIES INVOLVED AND ORGANIZATION STRUCTURES

The Final Rule requires broader and more detailed information about minority investors. Currently, parties are only required to disclose minority investors holding 5% or more in the acquiring person and the acquiring entity. The Final Rule provides for the following:

- Investors holding 5% or more in the acquiring person, certain transaction-related entities, and specific existing subsidiaries must be disclosed.

- Limited partners (LPs) with certain management rights, such as a board seat, as well as general partners, must also be disclosed. Purely passive LPs need not be disclosed. This is a significant reduction in the burden from the NPRM, which proposed requiring information for all 5% or greater LPs regardless of management rights.
- Similar minority investors in the acquired entity must also be disclosed if such investors will remain invested after closing, including, for example, rollover investors and certain existing minority holders in controlled subsidiaries or joint ventures.

In requiring such disclosure, the FTC reasoned that minority investors, particularly those with management rights, can still influence competitive dynamics. By focusing on LPs with management rights, the FTC seeks to capture situations in which minority investors can actively shape corporate governance or decision-making, which could raise antitrust concerns.

In addition to expanding the set of investors that needs to be disclosed, the Final Rule also requires the submission of transaction diagrams, to the extent that such diagrams already exist. While the Final Rule does not require the creation of diagrams, filers may choose to prepare simplified versions, rather than submit existing detailed structuring slides.

TRANSACTION DETAILS

The Final Rule requires additional information about the various attributes of the transaction, including a comprehensive list of the strategic rationales for the transaction (with citations to documents submitted with the filing), as well as updates to the documentation required:

- For transactions not yet signed, the parties must provide a dated document providing sufficient detail about the scope of the transaction, such as an agreement in principle, a copy of the most recent draft of the transaction agreement, or a detailed term sheet.
- The Final Rule still allows parties to file based on a Letter of Intent (LOI), but it must contain certain baseline information. The FTC provided illustrative criteria that should be covered in the LOI, which include: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

PRIOR ACQUISITIONS

The Final Rule requires *both parties* to provide information on certain prior acquisitions where the parties overlap (either via a NAICS code overlap or competitive overlap identified in the Overlap Description) subject to a $10 million de minimis threshold. This is in contrast to the current HSR Form, which requires only the acquiring

person to report, and limits overlaps to NAICS code overlaps only. Similar to the current HSR Form, the Final Rule includes a lookback period of five years.[3]

DISCLOSURE OF OFFICERS AND DIRECTORS

The Final Rule adds a new requirement to disclose certain officers and directors (or persons likely to serve as officers or directors) of entities within the acquiring person where such persons *also* serve as officers or directors of another entity that records revenues in the same NAICS code as the target (or industry where NAICS codes are not available). The requirement includes a lookback provision of three months.[4]

The FTC indicated it believes this information is relevant to ensure that parties are complying with the requirements of the HSR Act to hold their operations separate and continue to compete until the expiration of the waiting period (i.e., they are not engaging in so-called "gun-jumping"). Perhaps more relevant is the visibility this information could provide into potential violations of Section 8 of the Clayton Act regarding interlocking directorates, which has been an enforcement priority of the Biden Administration.

OTHER CHANGES AND PROCEDURES TO BE IMPLEMENTED

In addition to the substantial revisions outlined above that are likely to affect nearly all filers, there are a few additional changes that will impose additional burdens on strategic transactions.

- Mandatory Identification of Foreign Jurisdiction Reporting: The Final Rule will now require the acquiring person to indicate whether a non-US antitrust or competition authority has been or will be notified of the transaction (and to list each such authority) and date of notification.
- Voluntary Waivers for State AGs and International Enforcers: The Final Rule provides filing parties the option to waive disclosure exemptions for international competition authorities and/or state attorneys general. In each, the filing person will list the jurisdictions to which the waiver applies. In the case of state attorneys general, the filing person can choose to waive the fact of filing and waiting period or the information and documents of the filing, or both. The Final Rule makes no mention of confidentiality protections for such waivers.
- New Merger Comments Website: In conjunction with the Final Rule, the FTC is launching a new website where consumers, workers, suppliers, business partners, or other interested parties can provide comments on a proposed merger. The site will provide an opportunity to comment on how a transaction will affect competition and the industry or market and geographic area affected by the transaction. Providing a name

[3] While the Final Rule expands upon current filing requirements (including capturing acquisitions of assets that would not otherwise be disclosed), it also significantly scales back the requirements envisioned in the NPRM by including the de minimis threshold and limiting the lookback period to 5, rather than 10, years.

[4] These requirements have also been significantly scaled back from the NPRM, which, among other things, encompassed board observers (in addition to officers and directors), officers and directors of the acquired person, and a lookback of two years. The NPRM also did not limit disclosure to those officers and directors of entities that derive revenues in the same NAICS code (or industry where NAICS code is unavailable).

and contact information will be optional. Allowing for anonymity may accelerate complaints about potential transactions, which may ultimately lead to increased scrutiny.

Key Proposals From NPRM That Are Rejected in Final Rule

LABOR

The NPRM proposed a new "Labor Markets Information" section in the HSR Form to assist the agencies in evaluating a transaction's potential effect on employers' competition for labor. The Labor Markets Information section would have required each party to provide various information about the labor markets in which they participated as well as identifying any historical labor-related penalties. The Labor Market Information section has been left out of the Final Rule, and no other labor-related requirements have been put in its place. In the Final Rule, the FTC notes that it will instead use information produced in response to the new documentary and narrative requirements to evaluate labor market effects.

OTHER

The Final Rule also excludes obligations on the filing parties to implement litigation holds, submit a deal timeline or organizational charts of authors and recipients of transaction-related documents, or identify the messaging systems it uses.

Practical Implications

While much remains to be seen as the Final Rule comes into effect, what is clear is that the HSR preparation process will be more involved and that merging parties will need to plan accordingly.

- Parties will need to allow for more time from signing a transaction to compile and submit the HSR notification. Parties will want to consider including additional days in time-to-file provisions in merger agreements.
- Acquiring parties will want to develop processes for tracking minority investors that trigger the new thresholds.
- To accelerate the filing process, parties will want to incorporate new systems for collecting transaction-related documents to capture the collection of any documents (1) sent to anyone on the board of directors, (2) shared with the deal team supervisor that were not shared with an officer or director, and (3) that constitute regularly prepared "Plans and Reports" shared with the CEO.
- For strategic transactions, parties will need to identify and collect well in advance of filing:
  - Regularly prepared Company plans/reports;
  - Company materials required to respond to Overlaps and Supply Relationships;

- Prior acquisition details; and
- Officer and director details.

We also expect, at least initially, companies will need to prepare for more engagement with the antitrust agencies to address questions about the competitive merits, even where the Overlaps and Supply Relationships appear to be limited.

Related Materials

The FTC's press release can be found here. The Statement of FTC Chair Lina Khan can be found here. The Commissioners' concurring statements can be found here (Holyoak), here (Ferguson), and here (Bedoya).

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