ALERT MEMORANDUM

Sweeping Changes to Premerger (HSR) Process in the United States Proposed by Enforcement Agencies:

Changes Would Multiply Time, Burden, and Expense For All Filings, Even for Transactions With No Competition Concerns

June 30, 2023

The U.S. FTC and DOJ have proposed sweeping changes to the pre-merger process in the United States under the Hart-Scott-Rodino (HSR) Act.[1]

The changes would not affect whether a transaction is subject to the reporting requirements. But for those transactions where an HSR filing is required, the changes would, in a word, be massive.

If adopted—and significant pushback is expected—the proposals would increase the burden in each area where information is currently required and would add numerous additional burdensome requirements. In addition, the proposals would greatly expand the scope of documents that would need to be provided, extending to individuals who are not officers or directors and, in some cases, to documents prepared in the ordinary course by the filer.

Based on a reported survey of their own staff, the FTC and DOJ estimate that that the proposals may triple the amount of time needed to prepare a filing. The estimates suggest transactions with no overlaps may take an average of 144 hours to prepare, while preparation time for those with competitive overlaps could soar to 222 hours on average. If anything, these estimates are far too low. In terms of deal timing, should the proposals be adopted, parties should anticipate needing significantly more than the standard "10 business days" to prepare an HSR filing and should plan for several weeks or even months depending on the complexity of their operation.

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[1] FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review, (Press Release), 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. Premerger Notification; Reporting and Waiting Period Requirements; 88 FR 42218; June 29, 2023.

In addition, given the vagueness of the new requirements, the proposals if adopted could create a dynamic where the FTC rejects filings for purported technical non-compliance or encourages parties to extensively consult with staff prior to submitting filings or even to submit draft filings for "pre-filing review." This process is common in European merger control practice (and is encouraged by the European Commission), and often extends the process for several months.

The proposals are subject to a sixty-day public comment period, which will close on August 28, 2023 unless extended. The agencies will then respond to the comments they receive. It is expected that these proposals will not be adopted for some months at least, may be substantially modified before being finalized, and may be subject to court challenge.

Details on the Proposals

Below are highlights of the proposed requirements, grouped by category, with a focus on the most burdensome changes. The list is not exhaustive. It should also be noted that, by-and-large, the proposals require the disclosure of new or additional information or documents as compared to the current HSR Form.

The proposals would require filers to assemble and disclose extensive additional information about themselves, their operations, and their officers, directors, board observers, and employees.

— Much more extensive information about the parties would be required.

- This includes identifying any creditor to the acquiring entity and any upstream or downstream entity that provides credit that is 10% or greater of the entity's value, as well as any party that holds non-voting securities, options, or warrants in those entities (also subject to a 10% threshold). Board members, board observers, and parties with nominating rights will also be required to be identified, as well as any person or entity who has an agreement to manage any entities related to the transaction.
- Filers would also be required to provide a description of the ownership structure of the acquiring and acquired entities and, in some instances, an organizational chart of entities.
- For each officer, director, and board observer (or in the case of unincorporated entities, individuals exercising similar functions), filers would have to assemble and disclose a list of all *other* entities (including unaffiliated third parties) for which these individuals currently serve, or within the two years prior to filing have served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions).
- Filers would also be required to identify all communications systems or messaging applications on any device used by the filer that could be used to store or transmit information or documents related to its business operations. In other words, any messaging app used for business by any employee anywhere in the world would need to be identified and could be subject to disclosure.
- Filers would be required to certify that they have taken steps to preserve all documents that might be relevant to a future investigation.
- Additional information about minority investors would also need to be disclosed.

— Extensive information about employees would have to be disclosed.

- Filers would be required to categorize their employees by 6-digit SOC classification (an employee classification system developed by the Department of Labor Statistics) and identify the five largest categories, with the number of employees in each.
- For the five-largest overlapping SOC codes, filers would be required to identify the overlapping ERS-defined commuting zone(s)

from which the employees commute and the total number of employees within each commuting zone (based on the US Department of Agriculture's ERS system, which lists more than three thousand such zones).

- Filers would be required to provide worker safety violation information (penalties or findings issued against either party by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration) during the five-year period before the filing.

The proposals would require extensive additional information and documentation about the transaction being reported.

— All transaction-related agreements, even unexecuted drafts, would need to be provided. Although the agencies would still accept filings before the parties have signed a definitive agreement, the proposal would require the parties to submit a sufficiently detailed draft agreement or a term sheet "to allow the Agencies to understand the scope of the transaction and to confirm that the transaction is more than hypothetical." What this would mean in practice is not clear.

— A transaction "rationale" would need to be provided.

— A "detailed timetable" for the transaction would be required, including disclosure of deadlines as well as termination fees and similar arrangements.

— A "structure diagram" showing the deal structure and the relevant entities or individuals involved in the transaction would need to be provided.

— All non-U.S. merger control filings would need to be identified (previously this was voluntary).

— The existing requirements for transaction-related documents (so-called 4(c) and 4(d) documents) would be expanded to include all drafts and the scope of individuals whose documents would be subject to production would be expanded to include so-called "supervisory deal team leads."

— If there were any relationship (horizontal or vertical) between the filers' current or "planned" products or services, a detailed discussion of these products or services would be required, and would need to include, among other things:

- Revenue, customer contact details, and additional information (e.g., licensing agreements, non-compete or non-solicit obligations) for any overlap product or service;
- Revenue data and customer contact details for any product or service for which there is a vertical relationships between the parties; and
- In addition, the filer would be required to submit certain so-called "strategic planning documents" and other "periodic plans and reports" that discuss competition in any overlap product or service.

— Much more extensive information, including organizational charts, regarding the preparers of submitted documents would also be required. Those organizational charts would also have to cover any individual whose files were searched for potentially responsive 4(c) and 4(d) documents.

— Any document (or portion of document) that is not in English would need to be translated.

The proposals would require extensive new information about revenues, including new requirements to identify areas of future revenue for so-called "pipeline products."

— Filers would be required to report NAICS codes in which they anticipate revenue in the future. To the extent these overlap, additional information would be have to be provided.

— Revenue will need to be assigned to an entity within the filer.

— For overlapping NAICS codes, more extensive information regarding the location from which revenue is derived would be required, including in some cases "geolocation data."

The proposals would expand the scope of information that would need to be provided about prior acquisitions.

— The requirement would extend to ten years (from the current five).

— Acquired parties would need to report their own prior acquisitions (which they currently do not need to do).

The proposals would impose new disclosure requirements about interactions with U.S. and foreign governments on subsidies and defense and intelligence contracts.

— A description of subsidies received during the two years prior to the filing from countries or entities identified by strategic or economic threats to the United States (defined under 42 U.S.C. 18741(a)(5)(C)) would be required.

— Disclosure of all defense or intelligence contracts (e.g., contracts with the U.S. Department of Defense) would be required.

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