Proskauer

M&A Deals Face Additional Scrutiny under the FTC's New HSR Reporting Rules

July 11, 2023

On June 29, 2023, the Federal Trade Commission published a Notice of Proposed Rulemaking that would dramatically expand HSR reporting requirements. The historic changes fundamentally alter the HSR reporting landscape, shifting to more of a “white paper” approach, similar to that of ex-U.S. jurisdictions like the EU. The change though brings new expansive reporting requirements to nearly sixfold the number of transactions seen in the EU (the EU took in about 400 ECMR filings last year, versus nearly 2,500 HSR filings at the FTC). The move would substantially increase the burden on reporting parties, and impact deal timing and certainty.

While not unexpected, the proposal is striking in its breath and scope. It also brings in typically ‘off-limits’ reporting such as the identity of private equity fund limited partners – historically strongly opposed by the investment community. Other notable expansions include reporting related to: employees and labor issues, commercial relationships between the parties – including “information about existing or potential vertical, or supply, relationships between the filing persons,” officer and director interlocks with competitors, competition analyses and transaction rationale, prior iterations and drafts of transaction documents, ordinary course market related documents, prior acquisition history, PE fund structure and investment vehicle reporting, creditors/debt holders, and foreign subsidies.

The NPR comment period ends on August 28, 2023, after which we can expect a revised final set of proposed rules that would likely go into effect late this year or early 2024. While the impact will not be immediate given the timelines in the rulemaking process, it will be significant. We are likely to see a rush of transactions to take advantage of the current filing and reporting system before the new rules take effect. See below on the more notable changes:

A. **Deal Documents**

The new rules would expand the required set of transaction related documents that filers will be subject to disclosure. Filers that have not executed a definitive transaction agreement prior to filing would be required to submit a draft agreement or term sheet that describes the scope of the transaction. Additionally, as part of the proposed Transaction-Related Documents section of the new filing form, which will encompass current Item 4(c) and 4(d), filers will need to provide documents prepared by or for the supervisory deal team leads – expanding the scope beyond the current "Officers and Directors" requirement. Filers will also be required, for the first time, to submit document *drafts* if the draft was provided to an officer, director, or supervisory deal team lead. While the scope of what constitutes a draft is unclear, this requirement could drastically expand what documents will need to be provided in a filing and potentially raise privilege and compliance issues.

The proposed rules will also require filers to provide certain regular course plans and reports that discuss market shares, competition, competitors, or markets relating to competing products or services. Expect a significant increase in the volume of documents to be part of HSR filings, along with real impact on the document search and collection process.

B. **Company Information**

The second major category of changes pertains to company information. One significant expansion is to reporting on prior acquisitions – both the acquiring person and the acquired entity would be required to provide information about acquisitions in the last 10 years, without regard to the size of the transaction.

The proposed rules would also require reporting on "Organization Structure," including identification of entities within the acquiring person or acquired entity, minority shareholders, and other non-controlling entities, and create new requirements to identify certain other interest holders that may exert influence (i.e., creditors and other debt holders), as well as officers, directors, and board observers.

Accompanying the Organization Structure section would be a “Minority Shareholders and Other Non-Controlling Entities” section, which expand the current 5% shareholder reporting requirement to include identification of additional minority interest holders from all entities within the acquiring person that are related to the transaction and of certain limited partners. For example, entities affiliated with a limited partnership, fund, or investment group would identify minority holders that hold 5% or more of the voting securities or non-corporate interests of one of the identified entities. This is significant for limited partners that previously were not disclosed, and we can expect strong opposition to this requirement.

The proposed rules would also add an Officers, Directors, and Board Observers section which would require filers to identify all individuals that serve and have served in these roles for all entities controlled by the filer within the last two years. Filers would also be required to identify all the entities where those individuals currently serve or have served in similar roles – *information that may not readily be available to the parties*. Additionally, filers would provide the same information for any new entities created by the transaction. This change is clearly intended to assist the FTC with identifying potential interlocking directorates caused by, or related to, the transaction – an area of recent enforcement focus.

Information relating to certain pipeline or pre-revenue products would also be reported. The acquiring person would identify products/services under development and that would overlap with current or known pipeline products/services of the acquired entity(s).

In total, the scope and extent of new reporting relating to the parties and their respective operations is more akin to what would be disclosed in response to an investigated transaction, raising the question of whether the proposal remains consistent with the statutory mandate to collect “such documentary material and information relevant to a proposed acquisition as is *necessary and appropriate* to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws” 15 U.S. Code § 18a (d)(1).

C. **Transaction Details**

Among the more significant additions to the reporting requirements is additional information related to the transaction to facilitate the FTC's review. For example, acquiring persons would describe the business operations of all entities within the acquiring person, and both parties would submit a narrative describing all strategic rationales for the transaction. For example, expansion into new markets, and identify which documents submitted with the HSR filings support that rationale – again, reminiscent of certain interrogatory requests the agency employs for full "Second Request" investigations. Filers would also need to submit a diagram of the transaction structure and a corresponding chart that would explain the relevant entities and individuals involved in the transaction.

In addition to strategic rationales, filers would also provide additional narratives about the current state of the relevant markets. Filers would describe their basic business lines and provide product/service information for all related entities, identify current and potential future horizontal overlaps and supply relationships between filing persons, and provide information about their employees and what services these employees provide. While potentially burdensome, we can also view this as an opportunity for advocacy, and to present the transaction in a favorable light before the agency consistent with the available facts.

Another new section proposed would require filers to provide certain information about labor markets, specifically information about a filer's current workforce before the transaction and any plans that would affect workers post-transaction. This proposed change appears to continue the FTC and DOJ's increased focus on labor market effects in the antitrust space.

One additional noteworthy change is the creation of a new requirement that filers report any antitrust filings outside of the United States and add a voluntary waiver section to allow for the sharing of HSR information with foreign enforcers.

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When the last slate of HSR reporting expansions were proposed in 2000, they were shelved in the face of strong opposition from the business community and political pressure. Whether this is a wish list meant to be paired down, or something the agency will hold firm on remains to be seen.

Proskauer will be prepared to support transactions within whatever regulatory framework emerges, and to manage the clearance process to our clients' advantage. Please contact us with any questions, and we will be happy to assist you with understanding the FTC's proposed changes and navigating this new HSR landscape as it unfolds.

Related Professionals

- **John R. Ingrassia**
  Partner
- **Colin Kass**
  Partner
- **Timothy E. Burroughs**
  Associate