Proskauer

Question of the Week:

What do companies need to know if the Federal Trade Commission's proposed merger review changes are implemented?

August 10, 2023

“Merger review is about to get thornier. While the FTC and DOJ have been tightening the merger review process incrementally over the course of the Biden administration, the newly proposed HSR rule changes represent a wholesale rethinking of how merger transactions are notified and filed. The new filing requirements, if implemented, would essentially trigger a significant antitrust investigation for *every* transaction valued above the HSR reporting threshold (currently $111.4 million) – without regard to substantive overlap or potential impact on competition. That, along with the expanded new disclosures aimed squarely at private equity firms and their investors, will make for frank conversations about the requirements and potentially will have a real chilling effect on transactions. Whether this is a wish list meant to be pared down, or something the agency will hold firm on remains to be seen.”

John Ingrassia, Antitrust, Washington, D.C.

“The proposed changes to the HSR notification mirror the increasing time and resource commitment required for merger filings internationally. If implemented, the U.S. will no longer be an exception to the more time-consuming merger notification process we already have in many other jurisdictions. Those merger regimes which require more substantive information to be provided upfront often have a practice of prenotification review to determine completeness, and may offer a simplified notification for clearly no-issues transactions. These processes help parties to comply with the information requirements or minimize them in appropriate cases, but neither of these practices appear to be contemplated for the revised HSR notification form at this stage, despite the significant increase in the proposed information requirements. If these changes are implemented, parties contemplating transactions will need to plan accordingly to optimize U.S. and international merger review timing and outcomes.”

Mary Wilks, Mergers & Acquisitions, London

"The FTC's proposed rule changes, in their current form, would have a significant impact on the dealmaking landscape moving forward. The sweeping changes to the HSR reporting rules call for significantly increased disclosures, including with regard to prior mergers, transaction negotiations, and, for the first time, how workers will be impacted. These changes will make for a significantly longer merger filing process and increase deal costs, which will ultimately impact a deal's ROI and may chill future dealmaking. If the proposed rules are adopted, we would expect to see a rush of transactions as companies look to take advantage of the current filing and reporting requirements prior to the effective date of the new rules."

Ben Orlanski, Mergers & Acquisitions, Los Angeles

"The proposed changes to the HSR filing requirements and Merger Guidelines will have the biggest impact on deals that don't raise any real antitrust concern. It will be more expensive for deals that would otherwise sail through the process to prepare their filings. And it may take a few more weeks to prepare the initial filing, but it won't impact the deadlines thereafter because they are set by statute and are not impacted by the rule changes. There will, of course, be some deals that might have gotten overlooked under the old rules but will now receive more scrutiny if there are troubling documents. But by and large, those deals were going to be reviewed anyway."

Colin Kass, Antitrust, Washington, D.C.

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- **John R. Ingrassia**
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