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Countdown to 2025: New HSR Premerger Disclosure Rules

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The Federal Trade Commission ("FTC" or the "Commission") has announced a final rule (the "Final Rule") significantly expanding the premerger notification and reporting requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The changes do not impact the scope of transactions that are subject to reporting, but will dramatically expand the disclosure requirements with respect to HSR filings. The changes fundamentally alter the HSR reporting landscape, inching closer to becoming more of a "white paper" approach, similar to that of ex-U.S. jurisdictions like the EU.

The HSR Act provides a mechanism for advance notification to the antitrust authorities of certain mergers prior to consummation and gives these authorities procedural tools to facilitate review and, where appropriate, potentially enjoin mergers before they are consummated."[1] Congress was careful to limit the pre-consummation review to "very large mergers" and not impose "undue and unnecessary burden on business,"[2] and charged the Agencies with promulgating rules under the HSR Act to collect only materials and information "relevant to a proposed acquisition as is necessary and appropriate to enable the [Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws."[3]

In June 2023, the FTC released a notice of proposed rulemaking (the "NPR") on the basis that the current HSR premerger notification process does not provide sufficient information for the Agencies to sufficiently determine whether further review of a notified transaction is necessary. The proposed changes were aimed at enhancing the Agencies' initial screening process by requiring filing parties to disclose additional details surrounding transactions and the transacting parties. In response, multiple legal practitioner groups, including the American Bar Association Antitrust Law Section, voiced doubts on both legality and practicality of the Agencies' proposal. The public comment period on the proposed rules closed on September 27, 2023, and the Commission worked to take the commentators' feedback into account and modify the proposed amendments.

Although not *as* onerous and expansive as initially proposed last year, the Final Rule nonetheless represents the most significant changes to the reporting rules since the enactment of the HSR Act in 1976. Aligned with the Agencies' goal of promoting competition and consumer choice, the Final Rule and revised premerger notification and report form (the "Form") require heightened information disclosure for all reporting parties whose contemplated transactions exceed the HSR reporting thresholds.

Rejected: Labor Market and Employee Information

Of the many proposals initially set forth on the NPR that were rejected in their entirety, the most noteworthy is the NPR's attempt to introduce a labor market section to the Form, which would have required the filers to, among other things, categorize employees into the Bureau of Labor Statistics' Standard Occupational Classification system codes, provide market information for geographic areas in which the parties employ workers, and report any penalties, findings, and pending matters with the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration. Although this proposal reflected the administration's objective of viewing potential competitive harm to labor markets as a violation of antitrust laws — a view not widely shared in the antitrust community — proposed changes to the Form to collect labor information were excluded from the Final Rule.[4]

In addition to removal of the labor market and employee information from the Final Rule, the Commission also excludes from the Final Rule, among other things, the NPR's proposed requirements for the filers to create certain *new* documents (e.g., organizational charts and transaction diagrams), which do not already exist in the ordinary course of business. The proposal to collect as part of initial HSR filing information on "other interest holders that may exert material influence on the management or operations of the acquiring person" (i.e., certain debtholders) was likewise excluded from the Final Rule.

Modified: Expansion of Business Documents

"Drafts" of Transaction-Related Documents. The proposed requirement to disclose drafts of transaction-related documents has been scaled back. Relevant transaction-related documents include 4(c) documents ("all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) 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") and 4(d) documents (confidential information memoranda, bankers' books and other materials by third-party consultants prepared for the purpose of evaluating or analyzing the acquisition and its expected synergies).

The Final Rule modifies the scope on drafts that are subject to disclosure to those shared with *any* member of the filing party's board of directors or similar body, on the reasoning that such document is considered "sufficiently reliable" and should be submitted with the initial HSR filing.[5] Under current practice, draft 4(c) and 4(d) documents are required to be included in filings only if shared with the *entire* board.

"Supervisory Deal Team Lead" Documents. In the NPR, the Commission proposed expanding the required documents to be disclosed under Item 4(c) of the Form — which, under the current HSR rules, are transaction-related documents prepared by or for officers and directors for the purpose of evaluating the competitive aspects of the transaction — to include such documents generated by the "supervisory deal team lead(s)," even where such leads are not officers or directors of the filing party. The Final Rule modifies this expansion to limit the increased scope to *one* "supervisory deal team lead" and clarify its definition: "individual who has primary responsibility for supervising the strategic assessment of the deal."[6]

If such individual is an officer or director, no additional supervisory deal team lead need be identified to satisfy the new requirement. However, where someone other than an officer or director leads the deal team, their documents may be subject to disclosure.

Ordinary Course Plans and Reports. The Final Rule accepts and adopts the NPR's proposed requirement of submission of all plans and reports submitted to the board of directors (or individuals exercising those functions in unincorporated entities) within one year of 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."[7] However, the Final Rule modifies the NPR's related proposal to require submission of all periodic plans and reports provided within one year of HSR filing to the chief executive officer and certain lower-ranked executives who report directly to the chief executive officer if such ordinary course plans and reports discuss overlapping products or services. In response to concerns of over-broadness and potential burdens, the Commission dropped the required disclosure of all ordinary course plans and reports on overlapping products or services shared with lower-ranked executives. The Final Rule now only requires that such plans and reports be shared with the chief executive officer within one year of HSR filing. The Final Rule also exempts filers of certain non-consensual transactions (e.g., takeovers, open market purchases, etc.) from this requirement.[8]

Modified: Minority Shareholders and Other Interest Holders

Added transparency into the parties' ownership structures, particularly those of acquiring parties, is one of the signature updates set forth on the Final Rule. Whereas the current HSR rules require minority ownership reporting only with respect to the acquiring entity and its ultimate parent, the Final Rule expands the disclosure requirement for buy-side filers to identify minority shareholders throughout the entire chain of control. The expanded disclosure will also require the acquiring party's ultimate parent entity to identify all officers and directors of its controlled entities that have supply or competitive relationships with the target.

For private equity filers (and other filers with fund ownership structures), identity of 5% limited partners is required for those that have certain power to influence business decisions (e.g., board rights). Even though the Final Rule eliminates the NPR's proposed requirement to create an organizational chart for private equity and other investment fund filers, the acquiring party must provide an organizational chart, if already in existence, that illustrates the relationships among the fund sponsor's affiliates and associates.

Modified: Prior Acquisitions by Both Parties

Unlike the current HSR rules, which require information on prior acquisitions from the acquiring party only, the Final Rule requires both parties to the acquisition transaction to disclose prior acquisitions of entities or assets, within five years of the HSR filing, from which the filing party derived revenue for the overlapping products or services, as set forth on the filer's "Overlap Description" or in an overlapping North American Industry Classification System ("NAICS") code. The Final Rule also expands the scope of prior acquisitions that are subject to disclosure.

Modified: More Granular Revenue and Overlap Reporting

In one of the more burdensome changes, the Final Rule requires filers with more than one operating company or unit to (i) identify which of its controlled entities derive revenue in each overlapping NAICS code; and (ii) provide separate revenue ranges for each NAICS code at the operating entity level. Under the current HSR rules, filers report their revenue by NAICS code on a consolidated basis. This expansion of the revenue reporting requirement underscores the Commission's efforts to further scrutinize any "underreported" potential overlaps.[9] Furthermore, each filing party must now identify operating entities within its chain of ownership that derive revenue in the overlapping NAICS codes and also provide any names by which its controlled entities have done business in overlapping NAICS codes within the last three years.

New: Subsidies Received from "Foreign Entity or Government of Concern"

The Final Rule will require the filing parties to disclose any subsidies they have received from any "foreign entity or government of concern" within the past two years of the HSR filing.[10] However, because the definition of "foreign entity or government of concern" is not separately defined within the Final Rule (the Final Rule refers to 16 C.F.R. § 801.1(r)(1), which cites to 42 U.S.C. § 18741(a)(5), which in turn cites several other statutes, including the Infrastructure Investment and Jobs Act for the exact definition), the exact list of foreign nations that constitute "foreign entities or governments of concern" may shift with changes to the referenced statutes. This term is generally understood as foreign actors that may pose a threat to the U.S. security or economy. The current definition identifies China, Iran, North Korea and Russia.[11]

New: Transaction Rationale

An important added requirement for both the acquiring and acquired parties is a submission of a “Transaction Rationale,” a brief description that explains the primary strategic rationale for the contemplated transaction, which statement should also identify, and be supported by, transaction-related documents that the filing party submits with the HSR filing. Any transaction diagrams, if already in existence, must also be presented for agency review. Because the buy-side parties tend to have more documents and strategic analysis prepared that demand disclosure for purposes of HSR filing, the burden of preparing transaction rationales is likely to weigh more heavily on the acquiring parties than on the acquired parties.

New: Competition Descriptions

The Final Rule introduces two Forms — one for the acquirer and the other for the acquiree. Both Forms ask for the filer’s descriptions of overlapping products or services and supply relationships:

Overlap Description. The Final Rule adopts a new “Overlap Description” section to the Form and will now require each filing party to provide (i) a description of principal categories of products or services (current and planned) that compete with the other party’s products or services (current and planned), regardless of overlaps in NAICS code; (ii) sales figures in dollars for each identified overlapping product or service for the most recent fiscal year; (iii) categories of customers for such overlapping products or services; and (iv) names of top customers within each customer category for overlapping products or services. The Final Rule exempts filers of select 801.30 transactions from this new requirement.

Supply Relationship Description. The Final Rule also adopts a new “Supply Relationship Description” section to the Form and will require each filing party to provide (i) a description of products, services or assets (including data) that the filer sold, licensed or otherwise supplied to the other filing party (or to any third party that uses such supplied products, services or assets to compete with the other filing party’s products or services); (ii) sales figures in dollars of such sales for the most recent fiscal year; and (iii) names of top purchasers that use the supplied products, services or assets to compete with the other filing party.

It is notable that both revised Forms mandate that the acquirer and the acquiree "should not exchange information for the purpose of answering this item."[12] This will put added encumbrance on the filers to thoughtfully draft these newly required descriptions and transaction rationale, ensuring consistency with other document submissions, as such descriptions are likely to impact advocacy of the transaction during the course of agency review.

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The Final Rule will take effect 90 days after its publication in the Federal Register. Given that it typically takes one to two weeks post-announcement for the Federal Register to publish rules of significance, the exact effective date will likely be in mid-to-late January 2025.

In light of the Final Rule and its extended list of requirements, those contemplating acquisition transactions should analyze antitrust risks early in transaction planning and allocate additional time to prepare HSR filings. It would also be advisable to identify the supervisory deal team lead as early in the transaction process as possible and be mindful of accuracy of competition-related topics in the business documents created, as these can be expected to get swept up by the Final Rule to be reviewed by the Agencies as part of the expanded HSR filing requirements.

Proskauer is prepared to support transactions in this new era of premerger filings in the U.S. 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 rule changes and navigating the new HSR landscape.

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[1] S. Rep. No. 94-803 at 61.

[2] S. Rep. No. 94-803 at 66.

[3] 15 U.S.C. § 18A(d)(1).

[4] Filing parties should still expect labor market and employee questions on future requests for additional information ("second requests") issued by the Agencies.

[5] Final Rule, pp. 272-73 (“[I]f a document is shared with the board of directors, it is sufficiently reliable to be submitted with the HSR Filing. [. . . A]ny Transaction-Related Document (currently referred to as 4(c) and 4(d) documents) that was shared with any member of the board of directors (or similar body) is responsive and should not be considered a draft; rather, it should be treated as a final version and submitted with the HSR Filing as a Competition Document.”).

[6] Final Rule, pp. 204.

[7] Final Rule, pp. 274.

[8] The Final Rule creates a new category of “select 801.30 transactions,” which include tender offers, open market purchases and certain other non-negotiated acquisitions. The Commission determined that these transactions have minimal antitrust risk and thus limited the HSR reporting requirements for this category.

[9] Final Rule, pp. 339.

[10] Final Rule, pp. 355.

[11] 10 U.S.C. § 4872(d)(2).

[12] Final Rule, pp. 436 and 452.

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