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WHITE PAPER

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DOJ/FTC Propose Massive Changes to HSR Premerger Filings: What You Need to Know

The Federal Trade Commission ("FTC") and U.S. Department of Justice Antitrust Division ("DOJ") have proposed to expand dramatically the scope and burden of preparing a merger filing in the United States. The proposed changes to the Hart-Scott-Rodino ("HSR") Act rules and filing form would: (i) introduce obligations to address substantive antitrust issues in the HSR Form; (ii) require submission of data that could expand the scope of HSR investigations; and (iii) add significant administrative burdens in the form of information requests related to corporate organization, deal structure, financial disclosures, and day-to-day business operations. The proposed new filing form includes information requests designed to help DOJ and FTC identify and investigate issues consistent with their recently released draft merger guidelines.

These FAQs are offered as practical advice on the HSR filing developments.

WHAT HAVE THE U.S. ANTITRUST ENFORCERS PROPOSED?

The Hart-Scott-Rodino ("HSR") Act[1] requires parties to certain mergers and acquisitions to make premerger notification filings with DOJ and FTC, and to observe statutory waiting periods, prior to consummating their transaction. The usual HSR Act waiting period is 30 calendar days, unless the government issues a Request for Additional Information and Documentary Material ("Second Request"). The Second Request extends the waiting period for an additional 30 days (in most cases) after the parties respond, a process that typically takes several months.

FTC, with the concurrence of DOJ, published in the Federal Register a Notice of Proposed Rulemaking ("NPRM") to amend the premerger notification rules that implement the HSR Act, as well as the Premerger Notification and Report Form ("HSR Form") and Instructions. The proposed amendments, if adopted, will significantly alter the HSR filing process for filings by strategic and financial buyers, and inject new procedural and substantive elements into the merger review process.

Since its inception in the late 1970s, the HSR Act and accompanying HSR Form have required merging parties that are subject to the Act's notification requirements to provide both DOJ and FTC with particular details about their transaction, basic corporate organizational information, certain transaction-related documents that analyze competition, and certain financial information, among other details. In most cases, the requirements of the Form are reasonably straightforward and often can be completed within about two weeks (or sometimes even less).

The proposed rule would significantly expand the scope and detail of the information required to be included with the HSR Form. In their statement accompanying the announcement, the FTC Commissioners observed that "[m]any of the updates in the proposal are consistent with data already collected by antitrust authorities around the world." But realistically, the proposed requirements, if adopted, would be among the most onerous merger filing requirements of any antitrust enforcer in the world, and would apply to the larger number of transactions that parties file in the United States compared to many other jurisdictions.

WHAT ARE THE KEY CHANGES?

The proposed HSR Form: (i) introduces obligations to address substantive antitrust issues in the HSR Form; (ii) requires submission of data that could expand the scope of HSR investigations; and (iii) adds significant administrative burdens in the form of information requests related to corporate organization, deal structure, financial disclosures, and day-to-day business operations.

Substantive Antitrust Issues

Horizonal Overlaps. The proposed HSR Form would require merging parties to describe the "principal categories" of products and services they offer, "as defined in the day-to-day operations" of the company. In addition, parties must list and describe current or planned products or services that compete or "could compete" with the other party to the transaction. In some cases, identifying whether products compete (or could compete) is a straightforward exercise; in other cases, it is not.

For each competitive or potentially competitive product or service, parties would be required to provide sales in units and dollars, projected volume or revenue for planned products, and other metrics for products "whose performance is not measured by revenue in the ordinary course of business." Parties also would be required to provide a description of categories of customers that use the product or service, estimates of "how much" of the product or service the customer purchased or used monthly for the last fiscal year, and for planned products, a description of developments, testing and regulatory approvals, product launch dates, and other information. The proposed Form also would oblige parties to supply contact information for the top 10 customers in units and dollars, the top 10 customers for each customer category, a description of licensing arrangements, and a description of non-compete or non-solicit agreements.

Non-Horizontal Relationships. The proposed HSR Form would require merging parties to list and describe: (i) sales to the other party or (ii) sales to any other business that uses its products, services, or assets to compete with that other party or as an input for a product or service that competes or is "intended to compete" with the other party's product or

service. That description would capture both deals in the vertical supply chain and so-called "diagonal mergers."[2]

For products or services identified above, parties must provide sales in units and in dollars to the other party, and sales to any other business that competes or "intends to compete" with the other party's products or services. Parties also must identify and provide contact information for the top 10 customers or suppliers, measured in units or dollars, for the associated products or services, and a description of any supply or licensing agreements.

In addition, the parties must describe their strategic rationale for entering into the transaction.

Additional Substantive Descriptions and Document Submissions. The proposed HSR Form would require submission of more so-called 4(c) and 4(d) documents, which analyze the transaction with respect to competition issues. In addition, the parties must describe their strategic rationale for entering into the transaction and submit supporting documentation. DOJ and FTC also plan to require submission of semiannual or quarterly business plans provided to the CEO and certain other senior executives analyzing competitive or potentially competitive products or services over the year prior to the filing.

Expanded Scope of Antitrust Issues Raised in the HSR Form

The proposed HSR Form requires disclosure of information that expands the scope of potential antitrust (and non-antitrust) issues that could arise from an HSR filing, as detailed in the table below. Although the risk of such investigations always existed, disclosure in the HSR Form increases the risk of a secondary investigation or an inquiry that slows approval of the main deal.

The proposed HSR Form requires companies to:

Disclosure Obligation	Purported Antitrust Concern
Provide data on employees and certain labor penalties or pending decisions	Impact on labor markets
Describe certain licensing arrangements, non-competes, and non-solicits	Impact on labor markets; coordination of competitive activity
Identify creditors in certain circumstances, board members, board observers, and other parties with nominating rights	Information sharing, coordination of competitive activity, interlocking directorates
Identify other entities for which individual officers, directors, and board observers serve as an officer, director, or board observer	
Disclose more information about minority investments	
Identify subsidies from any "foreign entity or government of concern"	Change in competitiveness of the target business due to foreign subsidies
Report consummated transactions for a longer period than required in the current HSR Form (10 years instead of five years), and with no de minimis threshold	Certain anticompetitive non-reportable acquisitions (or serial acquisitions) were missed

Administrative Burdens

Companies will have to provide a long list of new documents and data to DOJ and FTC with HSR filings, in addition to those requirements described above. Most of the documentation is not likely to lead to increased deal risk, and in many cases this additional information is not the kind of information that an agency would factor into its review.

Here are some of the new demands:

- Provide translations for all foreign language documents.
- Include "doing business as" and "formerly known as" (or "d/b/a" and "f/k/a") names for all entities in the last three years.
- Organize legal entities by operating company or operating business/unit.
- Identify entities or individuals that provide or will provide credit to the buyer.
- Identify holders of nonvoting securities valued at 10% or more of that entity.
- Describe the business operations of each party.
- Submit a transaction diagram.
- Submit all exhibits and schedules to the transaction agreement.
- Provide a detailed transaction timetable.
- Provide an org chart for authors and recipients of all business documents submitted.
- Provide the number of employees for each of the largest five occupational categories and location information based on ERS commuting zones.
- Identify any penalties or findings issued by the Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration in the last five years.
- List North America Industry Classification ("NAICS") codes for products in development (currently, the NAICS code obligations apply only to products or services earning revenue in the United States).
- List multiple NAICS codes if more than one code applies.
- List each entity that derives revenue from overlap NAICS codes.
- List all communications systems or messaging applications.
- Identify pending or active procurement contracts with the Department of Defense or any member of the U.S. intelligence community valued at $10 million or more, and provide information about those contracts.
- Identify non-U.S. antitrust merger control filings.
- Provide an Excel log of all documents submitted and the portion of the HSR Form to which the document responds.
- Certify in the HSR Form the company has preserved documents related to the proposed transaction.

WHEN WILL THESE CHANGES TAKE EFFECT?

The proposed rule is subject to a 60-day public comment period that ends August 28, 2023. The enforcers will then review and address comments before adopting the final rule. If DOJ and FTC make significant changes to the proposed Form, they may have to issue a revised form for another round of public comment.

For reference, after Congress passed the HSR Act in 1976, it took nearly two years for the implementing regulations to take effect, and that occurred only after DOJ and FTC received hundreds of public comments on several substantial revisions of the rules. To take a more recent example, the enforcers announced changes in August 2010 that were far less consequential than the ones currently proposed. Only 11 comments were submitted during the public comment period. In that case, the final rule did not take effect until August 2011.

Although the proposed HSR Form is not likely to take years to finalize, given the breadth and impact of the proposed changes and in light of the timing of past rulemaking efforts, we anticipate that the proposed Form will not take effect until at least next year, and perhaps not even until mid-to-late 2024.

We also anticipate that commenters will recommend that DOJ and FTC adopt a grace period after issuance of the final HSR Form but before it takes effect.

WHAT ARE THE KEY IMPLICATIONS TO COMPANIES?

1. **Allow More Time to Prepare HSR Filings.** Today, most HSR filings can be prepared within about two weeks, and many within a week. Under the proposed HSR Form, filings are likely to take longer to prepare. The incremental burden will not be as significant for deals with no overlap or vertical relationships. By comparison, some transactions may require much more time and effort to draft if there are numerous and/or complex horizontal and/or vertical relationships to explain. FTC estimates that, if adopted, the new Form may increase the number of hours required to prepare HSR filings by between 32% and 600%, depending on various factors.
2. **Be Prepared.** The proposed new HSR Form calls for detailed information, perhaps in a format the merging parties may not ordinarily maintain that information. To minimize HSR preparation time, regular filers should consider how best to identify and maintain the new information required to prepare filings. For example, companies may wish to keep an up-to-date list of officers and directors for every legal entity within the organization, the external boards on which those individuals serve, and the d/b/a and f/k/a names for all legal entities.
3. **Expect More Investigations.** With additional information on horizonal overlaps and vertical relationships, the agencies may open more preliminary investigations to determine if further inquiry is required. In some cases, upfront information might help DOJ and FTC come to quick conclusions that no issues exist. However, in other cases, faced with additional upfront information to sort through, enforcers may require more time to reach preliminary conclusions about a given transaction. Relatedly, merging parties may be required to chase down answers to more questions during the initial waiting period. A consequence may be that more deals require parties to voluntarily "pull and refile" their HSR Forms to provide regulators additional time to resolve questions in hopes of avoiding a Second Request. In other cases, parties may see less benefit to pulling and refiling because they may conclude that there are fewer "new" materials to submit that could convince enforcers not to issue (or to reduce the scope of) a Second Request. While more preliminary investigations are likely to lead to more in-depth reviews, because few deals are challenged today, it is unlikely that any investigatory uptick will lead to significantly more enforcement.[3]
4. **Expect a Higher Rate of "Secondary" Non-Merger Investigations.** For a number of years, merger reviews have served as a growing source of non-merger antitrust conduct investigations. The proposed new HSR Form likely will further that trend because it calls for information relevant to labor markets, interlocking directorates, information sharing, foreign subsidies, non-competes, non-solicits, minority investments, and consummated non-reportable transactions, among other issues. Companies should get a handle on their antitrust risk profile well before they file.
5. **Maintain Consistency.** Although the disclosure obligations for horizontal overlaps and non-horizontal supply relationships increase both burden and antitrust risk, parties have long had to navigate those issues in antitrust reviews, particularly outside the United States. The proposed new HSR Form, however, places a premium on global coordination of merger filings, consistency in those filings over time, and ensuring that filings are drafted in a way that corresponds to the company's day-to-day business operations. Accordingly, companies should carefully evaluate the positions they take over time and across jurisdictions.

WHY HAVE DOJ AND FTC PROPOSED CHANGES TO THE HSR FORM?

According to DOJ and FTC, the information provided on the HSR Form today is insufficient for the enforcers "to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all those who might be affected, including consumers, small businesses, and workers." In particular, the enforcers claim that changes to the HSR Form are necessary because:

- Deal volume has increased (although that is less true today than it was in recent years);
- The growth in technology and digital platforms and the dynamic nature of those markets present unique challenges when assessing potential competitive impact during the initial HSR waiting period; and
- Corporate structures have become more complex, with investors of related entities that are not involved in the transaction allegedly being able to assert influence over the parties to the transaction, including, for example, lenders or board observers.

DOJ and FTC also released proposed new merger guidelines, which delineate how the enforcers review mergers. The enforcers' proposed merger guidelines and proposed HSR Form highlight their shifting focus on different antitrust theories of harm. Although DOJ and FTC continue to enforce the antitrust laws in deals involving horizontal overlaps (95% of historic M&A enforcement), the current administration has focused greater attention on vertical transactions, other non-horizontal transactions, and serial acquisitions, including in the private equity space. The proposed form includes information requirements designed to help DOJ and FTC investigate those theories.

DOJ and FTC also lament the fact that during the initial HSR waiting period, they currently must rely on *voluntary* cooperation from the parties, third parties, and public information to learn about the markets in which the merging parties operate.

IN THE PAST, MERGING PARTIES COULD FILE ON A BASIC LETTER OF INTENT. IS THAT STILL THE CASE?

Yes, but only if the merging parties provide more detail about the transaction compared to the existing requirement. The HSR regulations require that merging parties submit an affidavit attesting the parties have executed a contract, letter of intent ("LOI"), or agreement in principle, and have the good-faith intent to complete the transaction. Currently, a simple non-binding LOI will suffice. That option has become more important in some deals since FTC "temporarily" ceased granting early termination of the HSR waiting period in February 2021 and has yet to lift the suspension.

The enforcers propose an amendment to the HSR regulations that would require submission of a term sheet or draft agreement with sufficient detail about the proposed transaction to allow the enforcers to understand the scope of the transaction and confirm that it is "more than hypothetical." Although the proposed HSR Form increases the detail that would be required in a non-binding agreement to make an HSR filing, it does not eliminate the possibility of filing before parties reach a definitive agreement.

SOME OF THE REQUESTED INFORMATION MAY BE DIFFICULT FOR ME TO OBTAIN. WHAT DO I DO IF I DO NOT HAVE ACCESS TO REQUESTED INFORMATION (E.G., INFORMATION FROM AFFILIATE ENTITIES)?

Historically, where information is unavailable, the HSR rules have required filing parties to provide reasonable best estimates (where possible), along with a "Statement of Reasons for Noncompliance" explaining why such information is unavailable (and the basis for any estimates given). In the NPRM, the enforcers clarified that this is likely to be the case going forward to the extent additional information is practically unavailable to the filing party. Should FTC conclude, however, that missing information is in fact reasonably available to the filing party, FTC could reject the filing as incomplete. Accordingly, filing parties should use reasonable best efforts to obtain information that they do not already possess.

AS A SELLER, IS MY BURDEN LOWER THAN THE BUYER'S?

While the buyer and seller each will have to complete its own HSR Form (as is true today), and while those Forms will have some distinct questions, the additional administrative burdens are likely to be similar for buyers and sellers. The key exception is that we expect the buyer will lead in drafting the competition narratives for the HSR Forms, as is the case in other jurisdictions such as the European Union and China, but both parties will need to provide input.

DID DOJ AND FTC REDUCE ANY FILING BURDENS?

Yes. DOJ and FTC propose eliminating reporting of North American Product Classification System ("NAPCS") codes and revenue earned in those codes. The proposed HSR Form also would simplify how companies need to report revenue by NAICS code. Today, companies must report revenue to the nearest $100,000. If adopted, the HSR Form will require reporting at five levels: pre-revenue, less than $10 million, between $10 million and $100 million, between $100 million and $1 billion, and more than $1 billion.

DOJ and FTC also would eliminate the requirement to provide updated financials in connection with a pull and refile procedure, which are rarely needed.

IN EUROPE, THE FILING PROCESS FOR A FORM CO IS AN ITERATIVE PROCESS WITH A NUMBER OF DRAFTS SUBMITTED TO THE EUROPEAN COMMISSION BEFORE THE FILING IS DEEMED "FINAL." WILL THE U.S. PROCESS BE SIMILAR?

Historically, FTC rarely rejected HSR filings as incomplete, and typically only if there was a material problem with the filing, for example, a missed or incomplete Item 4(c) document or failure to identify overlap product codes. Although the proposed HSR Form calls for more information that is narrative and potentially subjective, nothing in the NPRM suggests that the enforcers will take a similar approach to the European Commission and reject HSR filings until the descriptions of overlaps and supply relationships are "complete," in their view. The potential exists for the enforcers to contest whether the parties' HSR filings are truly comprehensive or accurate "enough" in describing horizontal overlaps and whether those judgment calls were the correct ones. Because filing parties will still need to execute a certification and affidavit as they do today, however, they still will have an incentive to provide comprehensive and accurate filings to ensure that the waiting period runs and the enforcers cannot reject the filing.

WILL I STILL BE ABLE TO "PULL AND REFILE"?

Yes, parties will still have the option to pull and refile. As is currently the case, under the proposed rules, parties that refile within two days of pulling their HSR filings will not have to pay a new filing fee but will need to refresh certain filing information, such as the Item 4(c) and 4(d) document collection.

A pull and refile normally is used either to avoid the issuance of a Second Request or to narrow the scope of any eventual Second Request. During the additional time afforded by a pull and refile, parties often provide ordinary-course documents and other information to DOJ or FTC to aid the investigation—for example, internal strategy documents showing competition from several other firms in the overlap areas.

WHAT IS REQUIRED REGARDING FOREIGN SUBSIDIES?

The new HSR Form will implement changes passed by Congress in late 2022 as part of the Merger Filing Fee Modernization Act. That Act requires parties to disclose subsidies received during the prior two years from foreign entities and governments of concern that threaten U.S. strategic or economic interests. The Tariff Act of 1930 defines "subsidies," which includes any financial contribution, income, or price support provided or directed to be provided by a government authority.

In addition to disclosing the subsidies themselves, parties must identify whether any of their products are produced in a

country that is a foreign entity of concern and that are subject to countervailing duties in any jurisdiction, as well as whether any such products are the subject of an investigation by any jurisdiction for potential countervailing duties.

The proposed HSR Form will require parties to identify whether they have existing or pending defense or intelligence procurement contracts valued at $10 million or more, and parties must provide identifying information about the award and relevant Department of Defense or intelligence community personnel. That requirement is not limited by any areas of horizontal overlap or vertical relationships between the parties to the transaction and does not appear to contain an exception for classified information.

The subsidy reporting in the proposed HSR Form is part of a global trend of increased scrutiny of offshore M&A investments. As detailed in our July 2023 *Commentary*, "EU Adopts Reporting Requirements for Transactions and Public Bids Under the Foreign Subsidies Regulation," the European Union recently adopted a new regulatory regime requiring prenotification of certain large M&A transactions and public bids involving companies that receive subsidies from governments outside the European Union. Under the EU Foreign Subsidies Regulation, a company cannot close such a deal or receive a bid award until it receives clearance from the European Commission.

WHAT DO I NEED TO BE DOING TODAY?

Since the proposed HSR Form is unlikely to take effect this year, parties with transactions that are HSR reportable and will be filed in 2023 can proceed as normal. The NPRM also should serve as a reminder that parties should institutionalize best practices for document creation, given that HSR productions under the final HSR Form are likely to sweep in a much larger volume of documents, including those created in the ordinary course of business that historically would not be disclosed with the initial filing (e.g., semiannual or quarterly plans provided to the CEO and certain other senior executives). As always, companies should avoid creating documents that could be misconstrued to suggest less competition than actually exists in a particular industry.

Once a clearer picture emerges about the scope of the final HSR Form, however, companies active in M&A or with complex organizational structures may want to identify where relevant information—e.g., subsidies, Department of Defense contracts, labor force data—is housed within the company and establish processes to collect and maintain that information, just like companies do today with NAICS codes and legal entity information. Preparing in advance, even in the absence of a specific transaction, is likely to save time down the road.

Even with those efforts, however, companies should anticipate and build into their deal timelines that HSR filings are likely to take significantly longer to prepare once DOJ and FTC adopt the final HSR Form.

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ENDNOTES

1 15 U.S.C. § 18a (2023).

2 Diagonal mergers combine an input supplier and a downstream rival of the input supplier that does not use the input; for example, a manufacturer of gasoline-powered automobiles acquires a manufacturer of electric-car batteries.

3 FTC also may extend its practice, started in August 2021, of issuing "close at your own peril" letters. In those letters, FTC informs the parties that although the HSR waiting period has expired and the HSR Act no longer bars closing, "Commission's investigation remains open and ongoing." The letter advises that "if the parties consummate [their] transaction before the Commission has completed its investigation, they would do so at their own risk."