

PUBLICATION

FTC and DOJ Propose Sweeping Changes to Pre-Merger Notification Filings

Authors: Katherine I. Funk, Alexander M. McIntyre, Jr., Alexander S. Lewis

July 05, 2023

Last week, the Federal Trade Commission and the Department of Justice Antitrust Division (together, the Agencies) issued a Notice of Proposed Rulemaking (NPRM) that if implemented would fundamentally change the Hart-Scott-Rodino Act's (HSR) premerger review process. The proposed rule changes would substantially increase the information provided to the Agencies in the initial HSR notification and report, adding weeks – and costs – to the time required to prepare the filings, including those for transactions that objectively raise no competitive concerns.

- Interested parties have until August 28, 2023, to submit comments on the proposed changes.
- Importantly, the proposed changes will not become effective until after the Agencies have reviewed and responded to the public comments and issued a final rulemaking, likely in late 2023 or early 2024. Final implementation could be delayed by court challenges.

Background

Under the HSR Act and its implementing rules, parties to a transaction which meets or exceeds certain jurisdictional thresholds are each required to submit a premerger notification with the Agencies, which jointly administer the HSR review process. Submission of the filing starts the 30-day statutory Waiting Period, during which time either DOJ or FTC staff review the filing and determine if further investigation into the potential competitive effects of the proposed transaction is required. If so, the reviewing Agency will issue a Request for Additional Information, or "Second Request," which tolls the waiting period. During the Waiting Period, the parties cannot lawfully close the transaction.

Proposed Changes

The NPRM proposes significant changes, which the Agencies state are necessary to enable them to fully screen transactions and transaction structures that have become increasingly complex since the current HSR Act rules were promulgated almost 45 years ago. According to the Agencies, the proposed changes and increased information requirements will provide them with a more complete picture of a proposed transaction's competitive impact and enhance their ability to identify potentially problematic transactions within the initial Waiting Period. Some observers have suggested that the proposed changes would bring the U.S. transaction review process more in line with the requirements of other major jurisdictions, including the European Commission, that require detailed, narrative submissions.

The Agencies acknowledge that the new rules would impose significant burdens on transactions, estimating that the proposed rules would require parties to spend an additional 12-122 hours depending on deal complexity, preparing the filings if the changes are enacted. Additionally, the "qualitative" nature of many of the new requirements will potentially allow the Agencies to reject filings as incomplete, thereby adding additional time to the transaction timeline.

The new rules would require parties to submit documents and information that currently are typically obtained through a Voluntary Access Letter during the Waiting Period or as part of a Second Request. Notable amendments include requiring parties to submit:

- Agreement(s) or detailed term sheet(s) describing the deal – ***no longer would companies be permitted to file only a simple Letter of Intent***
- Draft versions of all deal documents
- Documents created by or for upper management, officers and/or entity Boards
- List of foreign jurisdictions reviewing deal
- Narrative labor market analysis, including identifying workforce categories, geographic information, and details on labor or workplace safety violations
- Narrative responses identifying potential horizontal overlaps, current or planned
- Narrative responses detailing the strategic rationale for the transaction and a requirement that parties provide a diagram of deal structure
- Detailed information on the deal timeline and conditions for closing
- Verbatim translations of all foreign language documents
- Detailed information on acquisitions within the past 10 years
- List of creditors and entities that hold non-voting securities, options, or warrants totaling 10% or more
- Details on all officers, directors, and board observers, if any
- Subsidies, such as grants and loans provided by certain foreign governments

Takeaways

The Agencies request input from the public during the notice-and-comment period, specifically regarding:

1. Whether the proposed collection of information is necessary for the proper performance of the functions of the Agencies, including whether the information will have practical utility;
2. The accuracy of the Agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Ways to enhance the quality, utility, and clarity of the information to be collected; and,
4. Ways to minimize the burden of these information collections on respondents.

Interested parties have until August 28, 2023 to provide comments either online at <https://www.regulations.gov> by following the instructions on the web-based form, or on paper by mailing comments to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610, (Annex H), Washington, DC 20580.

HSR filings require knowledge of, and experience with, complicated rules and exemptions. For more information about the proposed HSR rule changes discussed within or other HSR or antitrust related questions, please contact [Katherine I. Funk](#), [Alexander M. McIntyre Jr.](#), [Alex S. Lewis](#), or any member of Baker Donelson's [Antitrust](#) group.