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FTC Proposes New HSR Filing Requirements that Significantly Expand Reporting Obligations

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On June 29, 2023, the Federal Trade Commission (FTC) published proposed amendments to the Hart-Scott-Rodino Act (HSR) premerger notification program in the Federal Register.[1] If implemented, the new rule would require the acquiring and acquired parties to provide significantly more information and documents pertaining to the competitive impact of transactions—blurring the line between a straightforward HSR filing and the Second Request process where the antitrust agencies conduct a thorough review of market effects before approving the transaction. As a result, companies pursuing acquisitions that require an HSR filing[2] may face expanded disclosure requirements necessitating far greater investments in time, effort, and planning—possibly as early as the end of the year. We have summarized the proposed changes that may have the most impact on R+C clients and offer our takeaway at the conclusion of this update.

1. *New Disclosures Concerning the Ultimate Parent and Controlled Entities*

Currently, Items 2, 6(a) and 6(b) of the HSR form require the filing parties to simply identify the Ultimate Parent Entity (UPE), *i.e.*, the topmost entity or individual of the acquiring and acquired parties, and controlled entities.[3] Under the proposed rule, filing parties must provide significantly more detail about the UPE and controlled entities so that the FTC can assess whether there are entities and individuals within the UPEs and controlled entities that may influence business decisions, access confidential business information, or otherwise affect a transaction's competitive impact.

The amended HSR form would require filing parties to identify and provide information about, among other things, (i) officers and directors (including board observers) who have held their positions for two or more years and those who will hold these positions as a result of the transaction; (ii) limited partners and minority investors; and (iii) any other interest holders, such as creditors and board members/observers who have the right to appoint board members that may exert influence within the UPE.

2. *Transaction Information and Documentation*

Item 3 of the HSR form asks for a brief description of the transaction's business operations and whether assets, voting securities, and/or non-corporate interests are being acquired. Under the proposed rule, the filing parties must provide a more fulsome narrative of the description of the transaction, including a narrative that identifies and explains each strategic rationale for the transaction, such as (i) those related to products or services that could compete with a product or service of the other reporting person; (ii) expansion into new markets; (iii) hiring the seller's employees; (iv) obtaining certain intellectual property; and/or (v) integrating certain assets into new or existing products, services, or offerings.

3. *New Categories of Information Required: Labor Markets, Supplier Relationships, and Foreign Subsidies*

The proposed rule also introduces entirely new categories of required information. For example, the revised HSR would add a new section to obtain (i) employee classifications based on the Department of Labor's Standard Occupational Classification System; and (ii) geographic market information for any overlapping employee classifications so that the antitrust agencies can determine whether there would be adverse effects in the relevant labor market.

A proposed new "competition analysis" section would require the acquiring and acquired parties to provide narratives that would, among other things, identify and describe existing or potential supply relationships between them, including those created by diagonal mergers, to enable the antitrust agencies to quickly identify those transactions that raise concerns about non-horizontal competitive effects.

The proposed rule would also require the filing parties to disclose any subsidies from foreign governments or entities that have been identified as strategic or economic threats to the U.S. This new requirement's rationale is that a party receiving such subsidies—which would include not only direct subsidies but also grants, loans, loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control—may be able to submit a higher bid than those of other firms in the market, thereby distorting or undermining the competitive process.

R+C Takeaways

If implemented, the proposed rule will require parties to provide more information and documents at the initial stage of the HSR process, regardless of whether the transaction poses a significant competitive risk in the relevant market(s). The filing parties may wish to consider building additional time into their filing preparation, ranging from a few weeks to a few months depending on the size and complexity of the transaction. They may also wish to involve outside counsel in the planning stages of an HSR filing to streamline the process of gathering information and documents, and ensure compliance with the additional new requirements.

For additional information on changes made to HSR thresholds, made earlier in 2023please click here.

ENDNOTES

[1] The proposed rule can be viewed at https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf.

[2] For an acquisition to be reportable under the HSR, both the size-of-transaction and size-of-person notification thresholds must be met (unless an exemption applies). For 2023, the minimum size-of-transaction notification threshold is $111.4 million, and the minimum size-of-person notification threshold is $222.7 million in total assets or annual net sales for one party and $22.3 million for the other. Acquisitions exceeding $445.5 million are reportable regardless of the size of the parties.

[3] For purposes of the HSR, control exists when an acquired or acquiring party has 50 percent or more of (i) the outstanding securities; (ii) right to profits; or (iii) assets in the event of dissolution; and the contractual power to name 50 percent or more of the directors.

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