

THE JOURNAL OF FEDERAL AGENCY ACTION

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In this article, the authors discuss the proposal by the Federal Trade Commission and Department of Justice that, if adopted, would make extensive changes to the Hart-Scott-Rodino Act premerger notification rules.

The U.S. Federal Trade Commission (FTC), with the concurrence of the Antitrust Division of the Department of Justice (DOJ) (together, the Agencies), has issued a Notice of Proposed Rulemaking (the Notice)¹ that proposes extensive changes to the Hart-Scott-Rodino (HSR) Act premerger notification form and associated instructions, as well as to the rules implementing the Act. The proposed changes represent the most significant revisions to the requirements that HSR filing persons must satisfy in the nearly 50 years since the inception of the HSR notification process.

If the changes proposed by the Agencies are enacted—changes that the Agencies intend to apply to all reportable acquisitions, regardless of size or whether the acquisition raises competition issues—parties to reportable transactions will face a significant increase in the time, burden, and costs necessary to prepare an HSR filing, which could have an effect on deal timing.² In particular, the FTC estimates that, if the proposed changes take effect, the average HSR filing would require 144 hours to prepare—nearly four times the 37 hours that the FTC estimates it takes under the current system. The FTC also estimates that for parties with more complex transactions/filings—which it says constitute 45% of all filings—the proposed changes would result in an HSR filing taking 259 hours to prepare, which is seven times the current

average. Assuming that the FTC's estimates are correct, parties to HSR-reportable transactions will require significantly more time to prepare their filings than the typical 10 business days that many merger agreements contemplate.

In a press release,³ the FTC stated that the Notice—issued pursuant to a 3-0 Commission vote—was published in the Federal Register in June 2023. Comments were due 60 days following publication, after which the FTC will evaluate the comments it receives and decide whether and when to issue a Final Rule. The proposed changes have no impact on HSR filings submitted in the interim (i.e., before the Commission issues a Final Rule).

The remainder of this article provides a high-level overview of the notable proposed changes.

Summary of Notable Proposed Changes

The Agencies proposed the following notable changes to the HSR filing process:

- *Significantly Expanded Document Production Requirements.* The proposed changes would require substantially broader document productions as part of an HSR filing. New categories of required documents include “transaction-related documents from supervisory deal team members; business documents that relate to competition topics but were not produced specifically for the transaction; drafts of responsive [4(c) and 4(d)] documents; [and] other agreements between the acquiring and acquired persons,” as well as a requirement that the parties produce a “log” identifying “the request to which documents are responsive.”
- *Narratives.* The proposed changes would require parties to provide narrative responses as part of the HSR form, including:
 - “[A] narrative that would identify and explain each strategic rationale for the transaction.”
 - “[A] narrative timeline of key dates and conditions for closing.”
 - Narratives concerning potential horizontal overlaps, including “an overview of [the filer’s] principal categories of products and services (current and planned) as

well as information on whether it currently competes with the other filing person.”

- Narratives concerning the filer’s supply relationships, including the vertical relationship between the filing parties, such as “information about existing or potential vertical, or supply, relationships between the filing persons.”
- Narratives concerning “certain information about [the filer’s] workers in order to screen for potential labor market effects arising from the transaction.”
- *Officers, Directors, and Board Observers.* The proposed changes would require filers to identify all “officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity, *as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions).*”⁴
- *Prior Acquisitions.* The proposed changes would require that filers provide more information relating to their prior acquisitions (although they would retain the limitation of such reporting to business lines where the acquiring and acquiring persons’ revenue codes, as reported in the filing, overlap). The changes include:
 - Requiring “both the acquiring person and the acquired entity to provide information about prior acquisitions.” The current requirement applies only to acquiring persons.
 - “[E]xtending the time frame to report on prior acquisitions from five to ten years.”
 - “[E]liminating the threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than \$10 million in the year prior to the acquisition.”
 - “[T]reating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests.”

- *Diagram of the Transaction.* The proposed changes include a new requirement that filers “provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction.”
- *Foreign Investment and Defense Contracts.* The new filing instructions would require filers to identify and describe subsidiaries “received or that are anticipated to be received by any entity within its person from a foreign entity or government of concern,” “identify any of its products produced in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are subject to countervailing duties in any jurisdiction,” and identify “any of its products produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are the subject of an investigation by any jurisdiction for potential countervailing duties.” (This proposal appears to be intended to fulfill the requirements of the Merger Filing Fee Modernization Act of 2022, contained within the Consolidated Appropriations Act, 2023 (Pub. L. 117-328, 136 Stat. 4459), which also included \$430 million in funding for the FTC, an increase of \$53.5 million above fiscal year 2022.) The filing instructions would also require filers to identify “whether they have existing or pending defense or intelligence procurement contracts” and to “provide identifying information about the award and relevant [Department of Defense] or [intelligence community] personnel.”
- *Other Items Increasing Burden on Filers.* Many of the other proposed changes also have the potential to prove onerous for filers, for example:
 - The requirement to submit “English-language translations for all foreign-language documents submitted with the initial HSR Filing.”
 - The requirement to “identify and list all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations.”

- The requirement to “list [the filer’s] five largest categories of workers by the relevant 6-digit SOC [Standard Occupational Classification] classification and to provide the total number of employees for each 6-digit code identified.”
- The requirement to provide “significant information from investment entities, such as funds and master limited partnerships, for which organizational structures are often more complex.”

Notes

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1. https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf.

2. The Notice states that “[m]any of the proposed changes would increase the burden on all filers,” and in a Q&A on the Notice of Proposed Rulemaking for the HSR Filing Process, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements>, the Agencies “acknowledge[d] that the proposed changes require a significant amount of additional information.”

3. https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review?utm_source=govdelivery.

4. Emphasis added.

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