

FTC and DOJ Propose Overhaul of U.S. Merger Review Process

by Michael A. Lindsay, Anthony P. Badaracco, and Alyssa Schaefer

Earlier this week, the Federal Trade Commission (“FTC”) issued a Notice of Proposed Rulemaking¹ for a major overhaul of the U.S. merger control reporting process. Among other things, the FTC’s proposed changes would require parties to a proposed transaction to submit many more documents, along with narrative submissions that would bring the U.S. process closer to the relatively more onerous requirement of European and Asian merger control regimes. For now, this is a proposal only, and no immediate action is required – except submission of comments from anyone interested in doing so.

Under the Hart-Scott-Rodino (“HSR”) Act, parties to certain mergers and acquisitions must provide advance notice to the FTC and U.S. Department of Justice Antitrust Division (“DOJ”). Each acquiring person and acquired person must provide information about the parties and the proposed transaction, using the prescribed HSR Notification Form, and wait a specified period of time (typically 30 days) before closing the transaction. The process and the Notification Form have been tweaked over the years, but as the FTC acknowledged, the proposed rulemaking “marks the first time in 45 years that the agencies have undertaken a top-to-bottom review” of the HSR Notification Form.²

The FTC’s announcement cites a number of reasons for the timing and content of its proposal: the increased number of transactions reported in recent years under the HSR Act, the increased complexity of the transactions, and their potential competitive impact. The changes, if implemented, would “fill key gaps”³ that FTC/DOJ staff face when reviewing transactions, and the changes would allow staff to “more effectively and efficiently screen transactions”⁴ within the 30-day review period. The revisions also implement new information requests that the Merger Filing Fee Modernization Act of 2022 required.

Key proposed changes include requiring submission, identification, or disclosure of:

Related People

- Michael A. Lindsay
- Anthony P. Badaracco
- Alyssa Schaefer

Related Capabilities

- Antitrust & Competition Law
- Mergers & Acquisitions

- A draft agreement or detailed term sheet outlining the transaction contents (if the parties have not yet finalized and signed a definitive transaction agreement);
- Any foreign jurisdictions that must review the deal (the current voluntary request is made mandatory);
- Organization charts and disclosure of additional details regarding the parties, their ultimate parent entities, and key investors and other entities within the parties' corporate structure;
- Details related to "interest holders that may exert influence" over the transacting parties, including officers, directors, and board observers;
- Transaction diagrams;
- A narrative description of the transaction rationales, any competitive or supply relationships between the parties, the ownership structure of the transacting parties, and the labor markets in which the transacting parties operate, including employee, geographic market, and worker and workplace safety information;
- Certain documents created in the ordinary course of business (*i.e.*, not only those created in connection with the proposed transaction) with information about relevant products and markets;
- All agreements between the transacting parties (not just transaction-specific agreements);
- An increased breadth of transaction-related documents that discuss competition topics, including not only drafts provided to board members but drafts that were provided to "an officer, director, or supervisory deal team lead(s)";
- More information related to minority-held entities and prior acquisitions;
- English translations of any foreign-language documents;
- Communications and messaging systems used by the transacting parties;
- Defense or intelligence contracts; and
- Information related to subsidies from foreign entities or governments of concern.

The proposed overhaul would significantly increase the amount of time needed to prepare and file the HSR notification and Form. The FTC estimates that the time it would take parties to prepare an average HSR notification would increase from 37 to 144 hours. Transacting companies should therefore consider and prepare for the increased time and related costs of the HSR notification.

Moreover, companies should take heed of the fact that the notice of proposed rulemaking has been published in the Federal Register and will allow for public comments until August 28, 2023.⁵ Dorsey & Whitney LLP is happy to assist clients who may have an interest in submitting comments during the public comment period.

¹Fed. Trade Comm'n, Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements (June 27, 2023). See [Proposed Amendments to HSR Rules Form Instructions \(ftc.gov\)](#). The FTC conducts the rulemaking process, but rulemaking requires DOJ concurrence.

²Statement of Chair Lina M. Khan Joined by Commissioners Slaughter and Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules. See [Statement of the Chair Slaughter Bedoya \(ftc.gov\)](#).

³*Id.*

⁴Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023). See <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

⁵Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (June 29, 2023) (to be codified at 16 CFR 801, 803). See <https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements>.