Cooley

FTC Proposes Sweeping Changes to HSR Rules That Could Substantially Increase Burden, Time to Prepare Filings

June 30, 2023

On June 27, 2023, the Federal Trade Commission (FTC) announced a proposal for a radical overhaul to the Hart-Scott-Rodino (HSR) premerger notification program that, if adopted, would dramatically increase costs, burden and the time required to prepare filings for transactions that must be notified to the government. Under the HSR Act, parties to transactions are required to notify the FTC and the Department of Justice (DOJ) of most transactions valued above the size-of-transaction threshold – currently $111.4 million – and observe a waiting period before closing.

The HSR premerger notification program allows the FTC and DOJ to review transactions that meet the statutory thresholds to determine whether to investigate any particular transaction that may substantially reduce competition. For transactions that raise serious substantive antitrust concerns, the government may request additional information by issuing a "second request," which extends the waiting period before the deal can close, allowing the agencies to complete their review and challenge the transaction, if warranted.

FTC Chair Lina Khan indicated in a statement accompanying the announcement that the changes are intended to "fill key gaps that our staff most routinely encounter, such as inadequate information about deal rationale or the details of how a particular investment vehicle is structured." The changes also are intended to "capture information about key aspects of competition, such as labor markets or research and development activity."

The current rules require notifying parties to provide a basic description of the transaction, as well as information about their subsidiaries and affiliates and certain revenue data used to identify competitive overlaps. The HSR form also requires submission of certain deal-related documents created by or for officers or directors that address competition-related issues. This information is used by the FTC and DOJ to determine whether further investigation is warranted, or to allow the transaction to close within the initial waiting period.

The FTC's proposed overhaul of the HSR program takes an "everything but the kitchen sink" approach, effectively requiring transacting parties to produce documents and information that today are only required if the agencies issue a second request for additional information. Currently, second requests are issued in only about 2% to 3% of all transactions notified.

Indeed, historically, the FTC and DOJ granted "early termination" in 80% to 90% of notified transactions, indicating that the vast majority of notified transactions do not raise competitive concerns – though the Biden administration ceased granting early termination.

The new rules, if implemented, would impose a substantial burden on transacting parties, even for deals that do not raise substantive antitrust issues. The FTC estimates that adoption of the new rules will increase the time filers need to prepare the form by 12 to 222 additional hours per filing, depending on the complexity of the filing.

Among other requirements, the FTC's proposal would require filing parties to submit the following additional information and documents:

- Narrative descriptions of the strategic rationales for the transaction and information regarding the key dates and conditions for closing.
- Narrative descriptions of the horizontal overlaps and supply relationships between the filing persons.
- Details about investment vehicles, corporate relationships and the structure of entities involved (such as private equity investments) that could require private equity and venture capital firms, in particular, to disclose additional holdings.
- A more extensive disclosure of minority holdings, including limited partners in partnerships and minority holders of any

entities within the control chain of the acquiring entity.

- A more extensive production of transaction-related documents (including drafts) and ordinary course business documents (e.g., describing market conditions) collected from a broad range of individuals at each notifying party.
- Details regarding previous acquisitions (including transactions that were not required to be notified to the agencies under the HSR Act).
- Identification of all officers, directors and board observers of the acquiring person and acquired entity to assist the agencies in identifying interlocking directorates.
- Information to assess the potential impact of the transaction on labor markets, including questions about the merging parties' employees and the services employees perform.
- Identification of penalties or findings issued against the filer by the Department of Labor, National Labor Relations Board or the Occupational Safety and Health Administration (OSHA) during the previous five years.
- Identification of pipeline or pre-revenue products and overlaps for such products anticipated to have annual revenue totaling more than $1 million within two years.

The changes to the HSR form also would implement provisions of the Merger Filing Fee Modernization Act adopted by Congress in December 2022. That statute requires filers to disclose whether they have received subsidies from a "foreign entity of concern," which includes "countries or entities that are strategic or economic threats to the United States."

While the HSR rules and the form have undergone numerous changes throughout the HSR Act's history, the FTC calls this the "first time" that the government has undertaken a "top-to-bottom" review of the HSR form since the act became law in 1976. Khan argues that "much has changed in the 45 years since the HSR Act was passed," justifying these new rules.

In particular, Khan maintains that Congress estimated the statute would require notification of the largest 150 mergers annually, and the agencies often now receive more than 150 filings each month. But rather than raise the filing thresholds to reduce the number of notified transactions back to 150, Khan is proposing to increase the burden on a huge number of transactions.

Khan also argues that "many of the updates in the proposal are consistent with data already collected by antitrust authorities around the world." But those jurisdictions typically require only a small number of transactions to be notified. The European Commission, for example, receives only approximately 10% of the number of filings made in the US every year. In the US, there were 3,250 HSR notifications submitted in FY2021, all of which would be subject to the increased costs and burdens associated with the proposed changes.

Other jurisdictions also often allow submission of a "short form filing" for transactions that meet the statutory thresholds but do not raise substantive concerns. The FTC's proposed changes do not allow for a short form filing – the new rules would apply equally to all transactions.

While timing for implementation of the HSR changes is uncertain, it is not expected until the end of 2023. The FTC's Notice of Proposed Rulemaking, issued with the concurrence of the DOJ, will be subject to public comment for 60 days after it is published in the Federal Register. Following that, the FTC will evaluate the public comments and issue final rules.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Megan Browdie Washington, DC	mbrowdie@cooley.com +1 202 728 7104
Sharon Connaughton Washington, DC	sconnaughton@cooley.com +1 202 728 7007

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.