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Antitrust Alert

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FTC finalizes premerger notification changes

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Parties considering reportable transactions should file before changes go into effect or prepare to devote more time and effort to meeting the new filing requirements.



What's the impact?

- The final rule requires a variety of new or additional information and documents about the parties to, and the rationale for, reportable deals.
- The FTC predicts that the average time required to complete HSR filings will more than double.
- Entities involved in reportable deals should plan now to minimize unnecessary delays and complications in future filings.

On October 10, 2024, the Federal Trade Commission (FTC) announced a final rule with major changes to the information and documents required for premerger notification under the Hart-Scott-Rodino (HSR) Act. The final rule was approved by a unanimous and bipartisan vote of the five FTC commissioners and with the concurrence of the Department of Justice (DOJ). The changes, which will likely go into effect in January 2025, constitute the most significant attempt to revamp the HSR form and instructions in more than 45 years.

Why now?

In June 2023, the FTC proposed many changes for HSR filings based on its conclusion that information and documents currently required were insufficient to allow the FTC and DOJ to efficiently and effectively evaluate the competitive impact of many transactions within the typical 30-day waiting period after submission of filings. The proposed rule generated a substantial volume of public commentary, with many criticizing the increased time and burden of complying with the proposed changes. After considering public comments, the FTC scaled back many of its proposals, but the changes in the final rule remain significant.

What's changing?

Among other changes, the final rule requires new or more information about:

- / the filing parties' ownership structures;
- / the scope of, and rationale for, the proposed transaction;
- / competitive overlaps and supply relationships between the deal parties, including information about planned future products or services and top customers in overlapping products or services;
- / minority shareholders and other corporate relationships;
- / the identity of officers and directors of the acquiring party who are also officers or directors at the target or other businesses in the same industry;
- / analyses of the deal as it relates to competition, competitors, markets, market shares, and sales growth or expansion into new products or geographies;
- / regularly prepared plans and reports submitted to a CEO or the Board of Directors; and
- / subsidies from foreign entities or governments of concern.

The new rule also expands the scope of individuals from whom some documents will need to be collected and produced, by requiring documents from a "supervisory deal team lead," if that person is not an officer or director. Verbatim translation of documents into English must also be provided for any foreign language documents.

How will the changes affect new deals?

As a result of the changes, the FTC estimates that, on average, work on HSR filings will increase by 68 hours per filing, from the current estimated average of 37 hours to 105 hours. For deals that involve competitive overlaps, which account for nearly half of reportable transactions, the average work for acquiring parties will increase by 121 hours per filing.

To avoid unnecessary delays and complications, parties to reportable transactions should:

- / consider whether they can complete an HSR filing for their deal before the new rule takes effect;
- / start HSR planning, including gathering the required information and documents, earlier in the deal process;
- / consult antitrust counsel earlier to evaluate antitrust risk and identify options to mitigate risk;
- / consider adding time, or more flexibility, in agreements to complete HSR filings after signing;
- / consider carefully who will be the “supervisory deal team lead” for their deal; and
- / be mindful of the content of documents they create that must be submitted with HSR filings.

On a positive note, the FTC announced that it will lift its categorical suspension on early termination of the normal 30-day waiting period. The return of early termination will likely speed up the process for deals that do not raise any material competition issues.

We will continue to monitor updates about implementation of the final rule and new guidance from the FTC. Please reach out to us if you have questions about how the new rule may affect your M&A plans.

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