

## U.S. antitrust agencies propose extensive overhaul of HSR filing requirements

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The U.S. antitrust authorities have proposed extensive changes to the Hart-Scott-Rodino filing requirements. If implemented, these changes will obligate filing parties to provide substantially more documents and information upfront regardless of competitive concerns—resembling or exceeding the requirements in other jurisdictions. The agencies estimate that the proposal will almost quadruple average preparation time, but some commentators suggest they will considerably prolong review timelines.

### The FTC’s Notice of Proposed Rulemaking

On June 27, 2023, the Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking (NPRM) to amend the Hart-Scott-Rodino Act (HSR) Form and Instructions.<sup>1</sup> According to FTC Chair Lina Khan’s accompanying statement, the NPRM is the result of the antitrust agencies’ first “top-to-bottom” review of the HSR Form in 45 years and seeks to fill gaps in the HSR Form, which she states currently hinder FTC staff’s ability to understand and assess the competitive impact of reportable transactions within the initial waiting period.<sup>2</sup> Moreover, antitrust authorities in other nations (including such major antitrust jurisdictions as the European Union and Brazil) already require narrative responses in upfront filings. In all, the NPRM estimates that an HSR filing will be nearly four times more burdensome to file than under the current scheme,<sup>3</sup> though some media commentators have stated that the agency’s estimate of impact “in all likelihood, is a severe underestimation.”<sup>4</sup> In aggregate, the NPRM estimates that this will cost businesses subject to the HSR rules \$350 million per year—but the burden could go much higher if the NPRM has underestimated hours or hourly costs.

### Key proposals

The FTC’s proposed changes are extensive and significantly expand the types of information and documents that filing parties must provide to the antitrust agencies. Unsurprisingly, many of the proposed additions reflect the agencies’ recent investigative and enforcement priorities including, but not limited to, non-horizontal acquisitions, “serial” or sequential acquisitions, private equity acquisitions, harm to nascent competition, harm to labor markets, and interlocking directorates. The NPRM also proposes to incorporate into the HSR filings for all transactions, even those that pose no antitrust issues, many items that today are now commonly requested by the agencies when they have questions, pursuant to post-filing voluntary access letters<sup>5</sup> and Second Requests.<sup>6</sup> Historically, prior to the current administration, only two to three percent of transactions typically result in a Second Request,<sup>7</sup> and many transactions pose no competitive concern and receive nothing or little in the way of initial review. The FTC’s proposed new requirements will, however, apply to every HSR filing regardless of the review it will receive by the FTC or DOJ.

Some of the most significant proposed additions to the HSR Form and Instructions include:

### Narrative responses and competitive information

- **Transaction rationale:** Both filing parties would be required to submit a written submission describing all strategic rationales for the transaction, including those related to competition for current or planned products or services, expansion into new markets, hiring, and intellectual property. The parties would also need to provide a narrative description of key dates and conditions for closing. Currently, parties are only required to provide a brief description of the transaction, not the rationale.
- **Horizontal overlaps:** Both filing parties would be required to submit a written submission identifying their principal categories of current and planned products and services and explaining whether they compete with the other filing person. For any overlapping products or services, both filing parties would need to identify sales, top customer contacts, any licensing arrangements, and any non-compete or non-solicitation agreements applicable to employees related to that product or service. No similar requirement exists under the current rules.
- **Non-horizontal relationships:** Both filing parties would need to submit a written submission providing information about existing or potential vertical or supply relationships between the filing parties, including sales and contact information for any other businesses that use one of the filing party's products, services, or assets as an input for a product or service that competes with the other filing party's product or service. No similar requirement exists under the current rules.
- **Labor market information:** The filing parties would need to provide certain information about their workers, including category classification codes, geographic market information for overlapping employee classifications, and information on penalties or findings issued by the Department of Labor, National Labor Relations Board, or Occupational Safety and Health Administration in the five-year period prior to filing. No similar requirement exists under the current rules.
- **Prior acquisitions:** The filing parties would need to provide information about prior acquisitions in any overlapping industries in the past ten years, as opposed to the current five-year requirement. Moreover, the current threshold for prior acquisitions that need to be reported (i.e., acquisitions of entities with annual net sales or total assets greater than \$10 million in the year prior to the acquisition) would be removed, requiring parties to provide information on all prior acquisitions regardless of size.

## Document requests

- **Transaction agreements:** In a departure from current requirements, both filing parties would need to produce *all* agreements relating to the transaction, including schedules and exhibits (even where only one party is a signatory). Notably, filing parties would not be able to submit an HSR filing on a letter of intent without an additional term sheet or draft agreement that reflects "sufficient detail about the scope of the entire transaction."
- **Prior agreements between filing parties:** Both filing parties would be required to produce all agreements between any entity within the acquiring person and any entity within the acquired person in effect at the time of filing or within a year prior to the date of filing. This obligation could capture such agreements as supply agreements, licensing agreements, purchase agreements, franchise agreements, distribution agreements, and non-competition or non-solicitation agreements.
- **Transaction evaluations or analyses:** Currently, the HSR Form requires submission of final or latest-in-time documents addressing competitive dynamics supplied to officers or directors. Here, the FTC proposes to expand the scope of the HSR Form's current request for documents evaluating the transaction by requiring that parties submit:
  - documents prepared by or for the *supervisory deal team leads*, in addition to those documents prepared by or for officers or directors. Supervisory deal team leads are described as those individuals "who functionally lead or coordinate the day-to-day process for the transaction at issue" and they do not need to have "ultimate decision-making authority but would have responsibility for preparing and supervising the assessment of the transaction"; and
  - *drafts* provided to an officer, director, or supervisory deal team lead. Under the current HSR Instructions, parties only submit the latest version of the document and any draft that went to the Board of Directors.

In combination, these two proposed changes have the potential to significantly increase the universe of documents that would be responsive to items 4(c) and 4(d) of the HSR Form and, in some cases, could potentially require custodial collection of documents in advance of an HSR filing.

- **Regularly prepared strategic plans:** Both filing parties would need to submit high-level strategic business documents prepared in the ordinary course, which contain information relevant to the antitrust analysis and were prepared or modified within one year of the HSR filing. The FTC acknowledges in the NPRM that this obligation has the potential to result in large document submissions for complex or large transactions. No similar requirement exists under the current rules.

- **Translations:** The parties would be required to submit English language translations for all foreign-language documents submitted with the initial HSR filing, rather than only providing such translations if they already exist. Given the potential increase in the scope of documents to be submitted with the HSR filing (see above), this requirement could create substantial additional burden for certain filing parties.
- **Organization charts:** The FTC proposes that filing parties provide organization charts that identify and provide additional information regarding the authors of responsive documents submitted with the HSR filing. The FTC also proposes requiring the filing parties to identify the individuals who searched for responsive documents. No similar requirement exists under the current rules.

## Other information requests

- **Minority owners and other types of interest holders that may exert influence:** The acquiring person would need to provide information about minority holders of all entities within it that are related to the transaction as well as identify certain limited partners. Notably, in the NPRM, the FTC acknowledges these requirements may require significant additional information from investment entities, such as funds and master limited partnerships. Moreover, the FTC proposes that the acquiring person identify other interest holders that might exert influence (e.g., creditors that are permitted to exert influence similar to equity holders pursuant to credit arrangements).
- **Officers and directors:** The NPRM includes a proposed requirement that filing parties identify the officers, directors, or board observers (or individuals exercising similar functions at unincorporated entities) of all entities within the acquiring person and acquired entity, as well as identify 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 a similar role, if within an unincorporated entity). The NPRM explicitly acknowledges this information is to assess any interlocking directorates. No similar requirement exists under the current rules.
- **Subsidies from foreign entities or governments:** Implementing changes mandated by the Merger Filing Fee Modernization Act of 2022, the FTC proposes that filing parties identify and describe, among other things, certain subsidies received or anticipated to be received by any entity within them from a foreign entity or government of concern, such as China, Iran, North Korea, or Russia. No similar requirement exists under the current rules.
- **Communications systems:** The filing parties would need to identify and list all communications and messaging systems used by the parties that could be used to store or transmit information or documents relating to their business operations. No similar requirement exists under the current rules.

## Takeaways

The FTC's proposed changes to the HSR Form and Instructions are unlikely to go into effect for many months, as they are subject to a 60-day public comment period, which will be followed by a period of additional antitrust agency review before a final rule is published. Because the rule imposes significant information demands on the public, it must also go through Office of Management and Budget (OMB) review under the Paperwork Reduction Act. The final rule would also be subject to judicial review under the Administrative Procedure Act should it be challenged in court. As such, deals that are currently being signed and notified are not subject to the proposed regime announced this week.

If implemented, these changes will increase the burden on transacting parties to prepare HSR filings, particularly where the parties have complex corporate structures or where the proposed transaction gives rise to a number of horizontal overlaps and non-horizontal relationships. The proposed changes introduce several requests that are currently made during the waiting period or as part of a second request, and therefore, the upfront time and collection burden will be substantially increased. This requirement, in turn, is likely to result in increased transaction timelines as parties will need more time to prepare their filings. While transaction agreements today often contemplate HSR filing timelines of five to ten business days, deal teams should be aware that future agreements may need to incorporate significantly more time for these U.S. antitrust filings. We would expect that parties would take the new rules into account and begin preparing HSR filings earlier in the deal negotiation process to mitigate, to the extent possible, any incremental filing delays.

As noted, the FTC points to other international jurisdictions, where it is standard practice to make extensive upfront disclosures in initial filings, to support the proposed changes to the HSR Form and Instructions. It is important to note, however, that many of these international jurisdictions do not have the same procedural regime where detailed information requests are permitted once the filing has been accepted by the reviewing authority. Moreover, there are a number of aspects of the FTC's proposal that go beyond the requirements in initial filings in other jurisdictions, including the EU and UK (for example, document requests concerning ordinary course business documents and drafts of documents and information requests regarding minority interests and other types of interest holders).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- <sup>1</sup> Press Release, FTC, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review* (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.
- <sup>2</sup> Statement of Chair Lina M. Khan Re: Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239200, at 1, 3 (June 27, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement\\_of\\_chair\\_khan\\_joined\\_by\\_commr\\_slaughter\\_and\\_bedoya\\_on\\_the\\_hsr\\_form\\_and\\_rules\\_-\\_final\\_115p.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commr_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_115p.pdf).
- <sup>3</sup> The NPRM suggests that existing filings take an average of 37 hours to prepare, and the new filing would take 144 hours to prepare, an increase of 389%. Premerger Notification; Reporting and Waiting Period Requirements, at 104 (Proposed Text of Federal Register Publication, released June 27, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p239300\\_proposed\\_amendments\\_to\\_hsr\\_rules\\_form\\_instructions\\_2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf).
- <sup>4</sup> PaRR Global, *Morning Flash: Lionsgate adds exit experience to boardroom, FTC/DoJ propose changes for merger reviews, Flat Footed picks up Diversified Healthcare shares ahead of record date* (June 28, 2023); see also Leah Nysten, *U.S. merger Review Revamp Set to Delay Deals by Months*, Bloomberg Law (June 27, 2023, 4:29 PM), <https://news.bloomberglaw.com/antitrust/merger-review-revamp-by-us-agencies-set-to-delay-deals-by-months>.
- <sup>5</sup> See FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents>.
- <sup>6</sup> See FTC, Model Second Request (Rev. Oct. 2021), [https://www.ftc.gov/system/files/attachments/hsr-resources/model\\_second\\_request\\_-\\_final\\_-\\_october\\_2021.pdf](https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf).

<sup>7</sup> See, e.g., FTC & DOJ, Hart-Scott-Rodino Annual Report: Fiscal Year 2021, at 5, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p110014fy2021hsrannualreport.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf).