

## **FTC AND DOJ PROPOSES EXPANSIVE OVERHAUL TO PRE-MERGER NOTIFICATION RULES AND REPORT FORM**

On June 27, 2023, the Federal Trade Commission ("**FTC**") announced that, in concurrence with the Department of Justice ("**DOJ**"), it was proposing sweeping changes to the pre-merger notification that parties to certain transactions must submit under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("**HSR notifications**"). The Notice of Proposed Rulemaking ("**NPRM**"), detailing the proposed changes, was published in the *Federal Register* on June 29, 2023, commencing a 60-day comment period. If approved, the changes would dramatically expand filing requirements and impose a higher burden on parties, requiring that all HSR notifications contain more expansive documents and information that ordinarily would only be requested for transactions that raise antitrust issues. The FTC itself estimates that the new requirements could result in an additional 222 hours of work to prepare a notification.

While the NPRM contains numerous changes to the HSR notification requirements, this alert focuses on the most sweeping and potentially burdensome proposals that parties should begin to consider.

### **DETAILS OF CURRENT AND PAST OFFICERS, DIRECTORS, AND BOARD OBSERVERS**

The new HSR notification form would require that the acquiring person, meaning the ultimate parent entity of the entity making the acquisition and all entities that it controls, disclose the names of all current officers, directors, and board observers, as well as any other individuals holding those roles in the past two years. The

acquiring person must provide this information for itself as well as every other entity that it controls.

For each individual listed, the HSR notification must also disclose any other entities those persons have served as an officer, director, or board observer in the previous two years.

Importantly, particularly for financial investors, the requirement could mean disclosing details regarding officers, directors, and board observers of entities wholly unrelated to the transaction. It would also increase the burden on parties to carefully track and update each of their officers and board members, including any other entities in which these individuals may be involved.

### **IDENTIFYING ENTITIES THAT MAY "EXERT INFLUENCE"**

In addition to details regarding the acquiring person's ultimate parent entity and the acquiring entity, the NPRM makes clear that the FTC and DOJ are interested in receiving more information regarding other entities that may influence the target following the transaction. The acquiring person would be required to report in the HSR notification entities that may "exert influence" over the acquiring entity, any entity the acquiring entity controls, and any entity that controls the acquiring entity, which includes any person or entity that:

- provides credit in an amount above 10% of the value of the entity;
- holds non-voting securities, options, or warrants valued at more than 10% of that entity;
- is a board member or board observer; or
- has an agreement to manage the entity.

Pursuant to the proposed changes, the acquiring person would need to report in the HSR notification minority investors in not only itself, but also in the acquiring entity and entities in between them related to the transaction. For example, if a co-investor is entering an investment at a level in between TopCo and BuyCo, the HSR notification would need to disclose information regarding this co-investor.

### **ADDITIONAL DOCUMENTS**

The NPRM suggests sweeping changes to the types of documents parties must submit with their HSR notifications. If the changes are approved, parties would now need to also include documents that were created by or for any "deal team leads" that were used to analyze the transaction with regards to the market, market shares, competition, competitors, or opportunities for growth or expansion. Also, parties would be required to submit all drafts of required documents, not just final versions.

The revised HSR notification would also call for the submission of certain ordinary course documents. These include semi-annual or quarterly plans provided to the CEO of the acquiring or acquired entity, as well as anyone reporting directly to the CEO, that discuss any product or service that is also offered or under development by the other side. Parties would also need to submit plans or reports provided to the board of the acquiring or acquired entity that discuss any product or service that is also offered or under development by the other side.

The NPRM's changes would require filing parties to provide complete and accurate translations of any documents containing a foreign language, which may result in substantial work and delays for non-US parties.

## **COMPETITIVE ANALYSIS**

The NPRM calls for the modified HSR notification to require the acquiring person – which, again, includes the ultimate parent entity and each entity that it controls – and the acquired entity, to describe its categories of products and services. To the extent any of these products or services compete, or there is competition for planned products or services, the HSR notification form would need to include certain:

- sales data;
- customer information;
- licensing arrangements; and
- descriptions of any non-compete or non-solicitation agreements with employees in that area of the business.

The acquiring person and the acquired entity must also describe whether they have any vertical relationships (such as supplier or distributor), or any vertical relationships with competitors of the other side. If any of these relationships exist, the NPRM's proposal would require the parties to disclose further sales and customer information.

The new competitive analysis section also focuses in part on the transaction's potential effects on "labor markets" and would require the acquiring person and acquired entity to disclose information about their largest categories of workers, their locations, and any occupational and geographic overlaps between the parties' labor pools. Filing parties would also be required to disclose workplace safety violations.

## **SUBSIDIES FROM FOREIGN ENTITIES OR GOVERNMENTS OF CONCERN**

Pursuant to the Consolidated Appropriations Act of 2023, the NPRM includes a new requirement within the HSR notification for the acquiring person and the acquired entity to disclose subsidies received in the last two years from any foreign entity or government of concern. Rather than providing definitions of a "subsidy" or what constitutes a "foreign entity or government of concern," the NPRM cites to other federal statutes, namely the Infrastructure Investment and Jobs Act and the Tariff Act of 1930.

## **OTHER PROPOSED CHANGES**

Other changes to the HSR notification requirements that are noteworthy would include:

- reporting existing or pending defense or intelligence contracts valued above USD 10 million;
- describing the deal rationale(s), and citing to any documents that support the rationale(s);

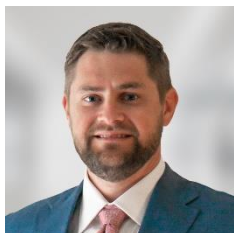
- identifying communications and messaging systems used on any devices used by the filing person;
- identifying all expected antitrust filings required for the transaction; and
- expanding the types of prior transactions the acquiring person, and now the acquired entity, must disclose.

## **NEXT STEPS**

The NPRM was published in the *Federal Register* on June 29, 2023, and will be open for public comment for a sixty (60) day period expiring on August 28<sup>th</sup>. Following that period, the FTC can address comments and concerns raised during the comment period; thereafter, the FTC can publish the final rule implementing its proposed changes, possibly accounting for feedback that it has received, in the *Federal Register*. However, as we have seen with the FTC's proposed rule regarding non-competition agreements, the period can also become more drawn-out. Interested parties are encouraged to submit comments during the 60-day comment period as this period is likely the only opportunity for public input before the Commissioners vote on a final rule.

Please contact us regarding any questions or if we can assist with submission of comments regarding the NPRM.

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