

FTC and DOJ Propose Dramatic Expansion of HSR Filings' Scope

07 / 06 / 23

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

On June 27, 2023, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (collectively, the Agencies) jointly released a Notice of Proposed Rulemaking (NPRM) proposing sweeping changes to the premerger filings required under the Hart-Scott-Rodino (HSR) Act.¹ According to the Agencies, these proposals are a result of the first “top-to-bottom” review of the HSR form in 45 years, and are motivated by the Agencies’ determination that information currently required to be submitted with HSR filings is “insufficient ... to conduct an effective and efficient initial evaluation of a transaction’s likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers.”²

If implemented, the proposed changes would massively expand the scope of data, documents and other information required by the filing, greatly increasing the disclosure burden, time required to prepare filings and expenses for the parties early on in the transaction — regardless of whether the transaction raises any competition issues. The proposed rules remain subject to a 60-day public comment period, after which the Agencies will consider whether to adopt, amend or reject the proposed rules or to extend the comment period. Therefore significant uncertainty remains regarding the final scope and timing of these changes.³ However, the Agencies appear determined to substantially overhaul the HSR filing in some form, so companies contemplating transactions should consider ways to proactively organize and maintain the kinds of information identified by the NPRM. Depending on the scope of the final rule, steps to establish regularly updated internal data sets may significantly mitigate new burdens.

Significant Changes Contemplated by the Proposed Rules

While the NPRM proposes to eliminate a small number of items currently required to be reported, the majority of the proposed changes will require the collection and submission of additional information.⁴ Key changes that would impose significant incremental burdens are summarized below.

Information Regarding the Transaction and Parties

The NPRM proposes substantially expanding the information that entities must submit relating to the transaction and the parties. While the current HSR form requires basic information about the proposed transaction and the parties (*e.g.*, subsidiaries, shareholders, etc.), the Agencies propose reorganizing and expanding these requirements to include:

- Identifying all minority shareholders (including limited partners) holding more than 5% of the acquiring entity, any entity that controls or is controlled by the acquiring entity, or any entity that has been or will be created for completing the transaction.
- For the acquiring entity and any entity it controls or is controlled by, identifying individuals or entities that (i) provide credit exceeding 10% of the entity’s value, (ii) hold options, warrants or nonvoting securities exceeding 10% of the entity’s value, (iii) are board

¹ FTC release “FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review” (June 27, 2023).

² Antitrust Improvements Act — Notification for Certain Mergers and Acquisitions — General Instructions and Information (p. 113-133).

³ For example, in January 2022, the FTC and the DOJ announced a joint public inquiry and comment period aimed at revising the Horizontal Merger Guidelines, and as of July 2023 have yet to announce revised guidelines.

⁴ For example, the NPRM proposes to eliminate specific estimates of revenue by North American Industry Classification System (NAICS) codes and the separate reporting of manufacturing revenues by 10-digit North American Product Classification System (NAPCS) codes.

FTC and DOJ Propose Dramatic Expansion of HSR Filings' Scope

members/observers or have nomination rights for those positions and (iv) have agreements to manage entities related to the transaction.

- Identifying all officers, directors and board observers of all entities within the organizational structures of the filer (*i.e.*, any controlled subsidiary entities) for the past two years, and for each such individual, identifying any other entities for which the individual has served in such roles within the last two years.
- Narratives describing the business of the acquiring person, strategic rationales for the transaction, a diagram of the deal structure and a timeline of key dates and conditions to closing.

Documents Regarding the Transaction and Overlaps

The current HSR form requires the submission of a limited set of documents that is typically well-defined and straightforward to collect — the transaction agreement between the parties (including any draft noncompete agreements), annual reports and final “Item 4c and 4d” documents reviewed or prepared by a party’s officers or directors analyzing the transaction with respect to competition, competitors, markets, market shares, potential for sales growth or expansion, and synergies or efficiencies. The NPRM would significantly expand the set of documents required to be submitted with an HSR filing to include:

- All agreements relating to the transaction, including noncompete and nonsolicitation agreements and all exhibits and schedules, even if both parties are not signatories.
- All other agreements between any entity within the buyer and any entity within the target company that is in effect within one year of filing, including licensing agreements, supply agreements, noncompetition or nonsolicitation agreements, purchase agreements, distribution agreements and franchise agreements.
- All “Item 4c and 4d” documents, including all drafts, that were reviewed or prepared not only by an officer or director but alternately by a “supervisory deal team lead” — a term that is not well-defined in the proposal.
- Where the parties offer overlapping products or services, ordinary-course plans and reports within the past year provided to the CEO, the CEO’s direct reports, or the board of the acquiring or acquired entities or any entity that those entities control or are controlled by, if such plans or reports analyze market shares, competition, competitors or markets relating to those products or services — a requirement that would be analogous to those found in filings made before the European Commission (EC) and U.K. Competition and Markets Authority (CMA).
- English translations of all non-English documents submitted with a filing.
- A detailed draft agreement or term sheet. This last requirement represents a major shift from the present rules that permit parties

to file their notifications based on a basic executed letter of intent or indication of interest.

Information Regarding Competitive Overlaps and Vertical Relationships

The current HSR form identifies horizontal “overlaps” between the filing parties where both parties report revenues with the same NAICS codes. For such codes, both parties are required to submit additional information (i) regarding the geographic areas where they derive such revenue and (ii) regarding minority investments in companies that derive revenue in those codes, and the buyer is required to submit information regarding acquisitions in the past five years of companies or assets that derived revenue in those codes. In addition, if the buyer is a private equity fund, it must report specific information about the holdings of affiliate funds with investments that overlap with the target. In an effort to more efficiently identify traditional product/service overlaps, as well as potential harm arising from transactions involving competing purchasers of labor or companies operating at different levels of the same or adjacent supply chains, the NPRM seeks to require both parties to provide a significant amount of additional information, including:

- Identifying prior acquisitions involving overlapping NAICS codes from the past ten years (rather than the past five years, as is current practice), including transactions previously not required to be reported (acquisitions of entities with annual sales or total assets less than \$10 million and acquisitions of assets valued below the size-of-transaction threshold at the time of acquisition).
- Narratives describing the principal categories of products and services offered by each party, identifying any horizontal overlaps between current or planned products or services of the parties, and identifying any product or service the parties have procured from or sold to each other or the other’s competitors. For each such overlap or vertical product or service, the filing company must also provide data about sales or purchases and top customers/suppliers (including contact information).
- Information about employees including: (i) the five largest categories of workers based on their occupational categories as defined by the Bureau of Labor Statistics; (ii) the five largest Standard Occupational Classification codes in which both parties employ workers; (iii) overlapping geographical commuting zones; and (iv) any penalties incurred by, or findings by U.S. labor agencies against, the acquiring or acquired entities in the five years prior to filing.
- Identifying which specific entity derives revenue in each NAICS code reported, and NAICS codes for products or services not yet generating revenue if such products or services would overlap with current or future products of the other party.

FTC and DOJ Propose Dramatic Expansion of HSR Filings' Scope

- Detailed geographic information about the parties' overlapping operations, including franchisees' locations, additional industry codes requiring "street-level" reporting and related geo-location data.

National Security and Document Retention

Finally, the NPRM adds new requirements relating to (i) subsidies received from countries or entities "of concern" as defined by other statutes, (ii) sales to U.S. defense or intelligence customers and (iii) document creation and retention. In 2022, Congress passed a law requiring HSR filers to disclose subsidies from "foreign entities of concern," as defined in the Infrastructure Investment and Jobs Act (IIJA). Document retention obligations have also become an increasing concern. Under the NPRM, HSR filers would be required to:

- Identify any "subsidies," as defined in the Tariff Act, they received in the last two years from "foreign entities of concern" and "governments (and their agencies) of foreign countries" that are countries of concern, as well as any products that filers produce in a country of concern that are the subjects of countervailing duties or a countervailing duty investigation in any jurisdiction.
- Report whether they have existing or pending defense or intelligence procurement contracts valued over \$10 million, and provide information about the award and relevant personnel.
- Identify all communications systems and messaging applications used by the acquiring or acquired companies that could be used to store or transmit information relating to the business operations, and certify that the filer has taken steps to prevent the destruction of documents and information relevant to the transaction.

A New Horizon

The initial HSR filing and review process was intended to be a reasonable process to collect information and documents, informing the Agencies of the parties and the transaction and focusing on key transactional elements.⁵ The process is structured to give the Agencies the authority and tools to investigate transactions that raise potential concerns, and includes a Second Request process, which requires the relevant parties to respond to extensive requests for information and documents, including organizational charts and economic data analyses regarding

⁵ "The form is designed to provide the Commission and the Assistant Attorney General with the information necessary and appropriate for an initial evaluation of the potential anticompetitive impact of an acquisition. Its completion by all parties required to file will ordinarily permit both agencies to determine whether the waiting period should be allowed to expire, or whether a request for additional information should be made under section 7A(e) and § 803.20, potentially leading to a preliminary injunction or administrative proceeding challenging the acquisition, or to an enforcement action under section 7A(g)." (43 Fed. Reg. 33,450, 33,520 (July 31, 1978)).

overlaps and other subjects.⁶ Parties to transactions that raise no competitive concerns have not typically been subject to the burden and expense of the Second Request process. In the past, the Agencies have proposed updates to the HSR form requesting additional information to reflect evolving transaction structures and enforcement priorities (such as the 2011 filing amendments to request data about "associates" of filing parties).⁷ These amendments have generally represented a reasonable balance between providing needed information to the Agencies and the burden and cost of production imposed on all filing parties, particularly considering the small number of transactions that advance to the Second Request phase.⁸ However, the amendments proposed by the NPRM represent a departure from that balance, imposing significant new burdens on filing parties with little added benefit for the large number of transactions that raise no competitive issues. Perhaps ironically, the Agencies have reportedly made these expansive proposals under the premise that officials do not have enough time to obtain all the information they need during the initial HSR review period, but it is unclear whether the Agencies would have enough time to review, process and analyze everything the new proposals would require in the initial waiting period, even for transactions that raise no competition risks. The NPRM essentially reshapes the initial filing process into a "mini Second Request" process and subjects all parties and transactions to this heightened level of burden and expense without first identifying any specific potential concerns. Several of the changes would create similarities with, and in some cases extend beyond, aspects of merger control rules used by the European Commission and U.K.'s CMA. While the Agencies have acknowledged the breadth and burden that the new requests would impose on filing parties, the Agencies seem to suggest that the added load is not excessive and is lightened because some of the expanded requests are similar to those practiced by other competition jurisdictions, with which many filing parties would be familiar. Though there may be similarities in the information sought, far fewer transactions are notified in other jurisdictions compared to the number notified in the U.S., meaning the NPRM would impose substantial burden on parties not already preparing other expansive filings. For example, in financial year 2021-2022, the CMA received 55 merger inquiries and the EC received 403 merger filings, while 3,520 transactions were reported in the U.S.⁹ Moreover, by the

⁶ *Id.*

⁷ FTC release "FTC, DOJ Announce Changes to Streamline the Premerger Notification Form" (July 7, 2011).

⁸ According to the latest HSR Annual Report, during the last 10 fiscal years ending September 30, 2021, Second Requests have been issued for approximately 2-4% of all filed transactions. See [HSR Annual Report \(Fiscal Year 2021\)](#).

⁹ [UK Merger Inquiry Outcome Statistics](#), see financial year 2021-2022 measures from April 1, 2021, through March 31, 2022; Directorate General for Competition, "Merger Cases Statistics"; [HSR Annual Report](#) (in the U.S., FY 2021 is measured October 1, 2020, through September 30, 2021).

FTC and DOJ Propose Dramatic Expansion of HSR Filings' Scope

Agencies' own estimation, the new requests will likely add, on average, about 107 hours to a filing party's preparation of its notification, increasing the estimated average time to prepare an HSR filing from 37 hours to 144 hours (with 45% of filings requiring an additional 222 hours to prepare).¹⁰ This increase is not insignificant and would place a substantial burden on every filer regardless of competitive concerns.

The NPRM suggests the Agencies want to use the HSR program to enhance enforcement in areas identified during the Biden administration as priorities or as having historically received underenforcement. For example, the collection of information about boards of directors and officers will support investigations of competitive interlocks, which the DOJ recently announced will be a focus going forward.¹¹ Notably, this same information is now commonly requested in Second Requests as well. Similarly, the collection of labor data reflects the keen interest the Agencies have taken in competition for employees, with the DOJ recently seeking criminal convictions in no-poach cases (but so far losing four in a row) and the FTC announcing a separate proposed rulemaking to ban noncompete restrictions at the national level. The NPRM's inclusion of information regarding document retention policies and expanded nonreportable deal requirements also suggest the Agencies intend to use the HSR process to address Agency concerns related to document preservation habits and private equity roll-ups or serial transactions.¹² Finally, it also is

worth noting that Second Requests have become more burdensome under the Biden administration, and the proposed HSR rules seem to be another data point suggesting that the Agencies are deploying strategies to deter large strategic transactions.¹³

Regardless of whether parties are familiar with some of the expansive proposed requests, if some or all the NPRM becomes final, parties will need to adjust their transaction timelines for 2024 to factor in additional time and costs to prepare their HSR notifications. Given the magnitude of the proposals and the current timeline for comments and further consideration, any new rules are unlikely to take effect before 2024.

Outside counsel can assist companies as they consider how they would meet the new requirements if implemented. Companies should devise plans for capturing the proposed data, operational and other tracking requests and should assess the best practices for identifying relevant documents and related information, creating and maintaining databases or data sets and managing the process of collecting information to prevent delay in completing transactions. We will track the changes, meaning and impact as the NPRM process continues and the Agencies and public evaluate the need, practicality, reasonableness, burden and expense of providing responses to the proposed requirements.

¹⁰ Antitrust Improvements Act — Notification for Certain Mergers and Acquisitions — General Instructions and Information (p. 113-133).

¹¹ Skadden Insights, "DOJ Antitrust Division Ramping Up Enforcement Efforts Against Interlocking Directorates"; (Nov. 23, 2022); DOJ, "Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit" (April 4, 2022).

¹² DOJ memo "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions With Corporate Crime Advisory Group" (September 15, 2022) at p. 11; *Financial Times*, "Crackdown on Buyout Deals Coming, Warns Top US Antitrust Enforcer" (May 19 2022); FTC consumer alert "Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding JAB Consumer Fund/SAGE Veterinary Partners" (June 13, 2022).

¹³ The Biden administration has applied a "whole-of-government" approach in his Executive Order on Promoting Competition in the American Economy. Aligned with this executive order, in September 2021, the FTC announced changes to the Second Request process designed "to ensure our merger reviews are more comprehensive and analytically rigorous" and provided a new "Model Second Request" in October 2021. Specifically, the FTC announced that Second Requests could include how a proposed merger could impact additional cross-market effects including labor markets. The FTC also limited companies' ability to make requests for modification, required additional information on e-discovery use and discontinued use of partial privilege logs. See the FTC's September 28, 2021, consumer alert "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave."

Contacts

Joseph M. Rancour

Partner / Washington, D.C.
202.371.7532
joseph.rancour@skadden.com

Kenneth B. Schwartz

Partner / New York
212.735.2731
ken.schwartz@skadden.com

Rita Sinkfield Belin

Counsel / New York
212.735.2308
ritasinkfield.belin@skadden.com

F. Joseph Ciani-Dausch

Counsel / Washington, D.C.
202.371.7125
joseph.ciani-dausch@skadden.com

Jessica N. Schneider

Associate / New York
212.735.3482
jessica.schneider@skadden.com

Summer associates
Grayson Kuehl and **Anne Kettler**
contributed to this article.