

Locke Lord QuickStudy: HSR Act Update – Dramatic Proposed Changes to HSR Filing Preparation and Review Process Will Impact Deal Timing and Expense

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On June 27, 2023, the Federal Trade Commission (“[FTC](#)”), with the collaboration and concurrence of the Department of Justice’s Antitrust Division, issued a Notice of Proposed Rulemaking proposing dramatic amendments to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (the “[HSR Act](#)”), the Premerger Notification Report Form and the instructions thereto and a sweeping redesign of the premerger notification process.

The proposed amendments would require the filing parties to a proposed transaction to provide significantly more information than is currently required. This will result in a corresponding significant increase in the time, effort and expense required to procure, produce and provide that information with the initial filing. The proposals purportedly address the agencies’ position that the information currently provided with initial HSR filings is insufficient for the agencies to determine under the HSR Act’s initial 30-day review period whether a proposed transaction may violate the federal antitrust laws. In an accompanying statement, FTC Chair Lina Kahn stated that the proposed overhaul is the first “top-to-bottom” HSR review and reform in 45 years. The proposed amendments are in line with the FTC’s enhanced scrutiny of transactions of all kinds, not just strategic transactions.

Parties currently contemplating transactions should be aware that the enhanced disclosure, information and document requirements will be more burdensome and will lengthen the time required to prepare an HSR report and that they will need to allocate sufficient time to prepare the requisite filings. The FTC anticipates that, on average, the time required to prepare a filing will increase **fourfold** from 37 hours to 144 hours per filing, with filings presenting competitive overlaps estimated to require approximately 222 hours on average to prepare. Parties need to anticipate this increased time commitment in their transaction timelines and commence HSR filing preparation well in advance of a proposed closing date. These reforms will also significantly increase the cost of preparing an HSR report.

Likely Effective Date is Unknown, Could be This Year

There is a 60-day public comment period on the proposed rules, which commences after the proposed rules are published in the Federal Register. The FTC may finalize the proposed rules as is or make changes in response to comments. Given the significance and magnitude of the proposed changes, there is a chance the FTC could

extend the comment period beyond 60 days. The new rules will not go into effect until after the agencies publish the final version of the new rules. This process will likely take several months to complete.

Accelerate Filing Submissions for Transactions Currently Contemplated

Parties currently contemplating transactions that are possible to close prior to adoption of the new rules should consider submitting their HSR filings under the current rules. This could save months in the timeline to closing as opposed to filing under the new proposed rules. Nevertheless, parties should continue to be prepared to receive requests for additional documents and information from the agencies similar to what the agencies have been requesting currently and, accordingly, should build into their transaction timeline sufficient time to comply with these requests.

The enhanced disclosure requirements will result in more documents and information being submitted to the agencies, which may result in longer time periods for the agencies to complete their review. The protracted review may take longer than the typical 30-day waiting period and could result in the parties having to pull and resubmit their filings to permit the agencies additional time to review the filings by restarting a new 30-day waiting period.

Legality of Amendments/Submission of Comments

The proposed amendments create significant questions about the agencies' authority to expand the content of HSR filings to this extreme under the plain language of the HSR Act. Those questions are beyond the scope of this alert but are subject to ongoing review.

Clients interested in discussing these amendments with us further, and exploring the preparation and submission of comments to these amendments, should contact us. Our antitrust team will be prepared to engage with you immediately, and will be prepared to comply with the amendments as ultimately adopted.

Summary of New Requirements of Proposed Rules

Our antitrust team continues to review the 130+ page proposed rules. Examples of the most significant changes to the information filing parties would be required to provide include:

Ultimate Parent Entity ("UPE") Information and Controlled Entities

- Expand required information about how each UPE is organized and the identity of individuals or entities that may have influence over business decisions or access to confidential information.
- Require additional information about the reporting entities within the UPE, including all names under which the entities do business or have done business in the past three years.
- Disclosure of additional information regarding minority holders in all entities controlled by the target company and all entities controlled by the buyer's UPE that are related to the transaction.
- Preparation of a narrative description of the ownership structure of the target company and the buyer's UPE.
- Preparation of an organization chart (1) for the buyer's UPE if it is a fund or a master limited partnership and (2) that identifies and shows the relationship of all entities that are affiliates or associates.
- For each entity within the target company or buyer's UPE, identification of all current directors, officers and board observers (or individuals exercising similar functions), as well as those who have served in the position within the past two years; and, for each entity within buyer's UPE, identification of all individuals who will or are

likely to serve in any such capacity as a result of the transaction; and for each person so identified, list all other entities for which the individual serves, or has served within the last two years, in any such capacity.

- For the buyer's UPE only, identification of every entity or individual (other than employees) that (1) provides, has provided or will provide credit; (2) holds non-voting securities (including options and warrants); (3) is a board member or board observer or has the right to nominate or appoint a board member or board observer; or (4) has a management agreement.

Transaction Information

- Preparation of a narrative description of the business operations of all entities within buyer's UPE.
- Preparation of a narrative description and explanation of each strategic rationale for the transaction discussed or contemplated by each filing person and the identification of each document produced in the filing that confirms or discusses the stated rationales.
- Preparation of a transaction structure diagram and a chart explaining the relationship between all entities and/or natural persons involved in the transaction.
- Identification of all related transactions and related filings.

Agreements and Timeline

- Furnish copies of all agreements (including all schedules and exhibits) related to the transaction, including agreements between the filing parties and agreements with third parties. If a definitive agreement has not been executed, provide a copy of the most recent draft agreement or term sheet that provides sufficient detail about the scope of the transaction.
- Submission of all other agreements between any entity within the target company's UPE and buyer's UPE not related to the transaction currently in existence and those that have expired, have terminated or were canceled within one year of the filing.
- Provide a detailed narrative timeline of key dates and conditions for closing.

Business Documents

- Expanded submission of required Item 4(c) and 4(d) documents that analyze the competitive aspects of the transaction to include (1) documents prepared by or for the supervisory deal team leads (in addition to directors and officers); (2) drafts of the documents (in addition to the final versions thereof); and (3) forward-looking assessments of synergies or efficiencies.
- Provide copies of all semi-annual or quarterly plans and reports that were provided to the CEO or any person who reports directly to the CEO or provided to the board and were prepared in the ordinary course of business and not prepared solely for the purpose of evaluating the proposed transaction that discuss competitive factors.
- Provide an organizational chart that identifies the positions of all authors of all business documents submitted and indicates the individuals whose files were searched in identifying Item 4 materials.

Detailed Newly-Prepared Competition Analysis

- Preparation by each party of a narrative description of its principal categories of products and services (as defined in the day-to-day operations), as well as information as to whether it currently competes with the other party.
- Preparation of a narrative description and list of all current or known planned products or service horizontal overlaps and for each such product or service overlap (1) sales (units and dollars) for each of the past two fiscal years; (2) a description of all categories of customers and an estimate of the purchase or use for each customer monthly for the last fiscal year; (3) contact information for the top 10 customers in the last fiscal year and the top 10 customers for each identified customer category; (4) a description of any licensing agreements; and (5) a

description (including duration) of any non-compete or non-solicitation agreement applicable to any employee or business unit.

- Preparation of a narrative description of each product, service or asset sold, licensed or otherwise supplied in the last two years (1) to the other party or (2) any third party that uses the product, service or asset to compete with the other party's products or services or is used as an input for a product or service that competes or is intended to compete with the other party's products or services.
- Preparation of a narrative description of each product, service or asset that a party incorporates as an input into any product or service that such party has purchased, licensed otherwise obtained in the last two years (1) from the other party or (2) from any third party that competes with the other party to provide a substantially similar product, service or asset.
- Provision of information for projected revenue streams for pre-revenue companies.

Labor Market Information

- Disclosure of each party's workers classified into the five largest occupational categories and provide the total number of workers within each category.
- For the five largest categories in which both parties have workers, identify each commuting zone in which both parties employ workers and the aggregate number of workers in each commuting zone.
- Identification of any worker and workplace safety information, including penalties or fines issued in the five years before the filing.

Other Requirements

- Disclosure of information about prior acquisitions made by each of the target company and the buyer's UPE within the ten years prior to the filing.
- Full English translation of all foreign-language documents submitted with a filing.
- Disclosure of all required foreign antitrust notifications.
- Provide additional information regarding controlled entity overlaps.
- Identification of existing or pending defense or intelligence procurement contracts and identifying information regarding the contract and relevant government agency contact information.
- List of all communications systems and messaging applications or any device used that could be used to store and transmit information or documents related to business operations.

Foreign Subsidies

- Disclosure of the receipt of any subsidy from any foreign entity or government of concern within the two years prior to the filing.
- Identification of any products produced in whole or in part in a country that is a covered nation that are subject to any countervailing duties in any jurisdiction.
- Identification of any products produced in whole or in part in a country that is a covered nation that are the subject of a current investigation by any jurisdiction for potential countervailing duties.

For further information or to discuss the proposed rules and how they may affect a contemplated transaction, please contact the authors.

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