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FTC Proposal for New HSR Rules Will Dramatically Increase Time and Cost of Premerger Filings

On June 28, 2023, the Federal Trade Commission (FTC), with the concurrence of the Department of Justice (DOJ), published proposed rules aimed at radically expanding the information that goes into a Hart-Scott-Rodino (HSR) filing. By the FTC's estimate, the time required to complete an HSR filing will increase, on average, by 107 hours. Most likely, the increase will be much more.

There will be vigorous opposition to the FTC proposal. Nonetheless, a substantial portion of the proposed changes are likely to go into effect. Most practitioners predict the FTC will make some adjustments and then the final rule will arrive in a few months, perhaps in Q1 2024.

Deals that are in the pipeline now may need to comply with the proposed new rules, and buyers and sellers should start planning for them. Below, we identify some of the most important proposed changes and the likely consequences if they go into effect.

Information Collection

- *Prior Acquisitions* – In any transaction where the buyer and the seller have a horizontal overlap, both sides will be required to report information about prior acquisitions over the past ten years.
 - The FTC is seeking to identify roll-ups. The FTC and DOJ have expressed hostility toward roll-ups.
- *Labor Market Information* – Parties must classify their employees based on a Standard Occupational Classification 6-digit system.
 - The FTC seems to believe that mergers have reduced employees' ability to bargain for better compensation. It is looking for cases where the transaction parties compete for employees.
- *Strategic Plans and Market Reports* – Parties will need to provide to the FTC/DOJ their strategic plans and market analysis reports.

Transaction Details and Documents

- *Expanded Scope of 4(c) and 4(d) Documents* – Parties are currently required to provide documents about competition that rise to the level of officers and directors. The new proposal will also require the submission of documents that are prepared by or for "supervisory deal team leads." These are the individuals who functionally lead or coordinate the day-to-day process for a transaction, and could include multiple people.
- *Drafts will be Required* – Moreover, the deal team will be required to submit not only the final version of documents, but also drafts that reached the supervisory leads. Some teams write multiple drafts and all of them may be required.
 - Consultants pitching for a deal and parties working on a deal often write provocative statements in an effort to build excitement. In some cases, a single provocative document may lead the FTC/DOJ to conduct an investigation.
 - Before anyone starts to write the rationale for a transaction, the deal team should understand whether it has pros and cons for the competitive process.

- *Organizational Structure* – The FTC expresses concern that minority owners may influence strategic decisions of the combined company, or may have access to its competitively sensitive information.
 - The buyer will be required to identify anyone who will have at least a 5% stake. Where a private equity fund acquires an operating company, for example, the fund will need to list any limited partners that have a 5% or greater stake.
 - The buyer will also be required to identify its major creditors, including the lender that provides debt financing for the transaction.
 - Both sides will be required to list the individuals who served as officers, directors, and board observers for the prior two years, and to identify any other companies for which those individuals served similar roles.
 - The FTC is aiming to find interlocking directorates. Under Section 8 of the Clayton Act, interlocking directorates are illegal where the same person serves as an officer or director of two competing firms (subject to specified exceptions).
- *Horizontal Overlap/Customer Contact Information* – Parties must identify each current or planned product or service that competes with (or could compete with) a current or planned product of the other side. For any overlapping product or service, both sides must provide, among other items, a list of top customers (including contact information, so that the FTC/DOJ can reach out to speak with the customers).

Deal Strategy and Timing

- *Transaction Rationale* – Parties must submit a narrative describing all strategic rationales for the transaction. Identified rationales must be tied back to the transaction-related documents that are submitted with the HSR filing.
 - Buyers and sellers should consult their counsel very early in the process if they are considering a transaction that may be controversial.
- *Confidentiality* – The HSR Act provides that the filing is confidential. A transaction may not remain confidential, however, once the FTC/DOJ start calling customers. In transactions with horizontal overlaps, the FTC and DOJ will have customer contact information as soon as they receive the HSR filing. Thus, in every such case parties will need to consider whether to inform customers in advance.
- *Limits to Filing on the Basis of an LOI* – Parties will no longer be allowed to file on the basis of a bare bones preliminary agreement; they will need to provide a draft agreement or term sheet that sets out in detail the scope of the transaction.
- *Timing and Cost to Prepare HSR Filing* – Based on the FTC's conservative estimates, there could be a four-fold increase in the time and expense to prepare an HSR filing if there are no competition issues. More time and expense will be needed if the transaction involves a horizontal overlap or some other substantive issue.

Time, Cost, and Uncertainty

These new burdens tend to confirm that the current FTC leadership would like to slow down the pace of transactions in general. The FTC and DOJ have stated hostility toward private equity, and especially toward private equity roll-ups in healthcare.

The FTC and DOJ are also preparing to issue new Merger Guidelines, which will attempt to expand the law beyond where the law now stands. Therefore, it will be harder to predict which transactions the FTC/DOJ will investigate.

Where the FTC/DOJ do wish to investigate, the new HSR rules will require a larger and more amorphous set of information, and so the agencies will have a greater ability to assert that a filing is incomplete. This will result in greater uncertainty about the timeline.

Buyers and sellers should begin thinking about gathering the historical and current information that will be required. In addition, buyers and sellers should begin to think about how deal strategy and timing may be affected. If a deal has any potential to provoke concern at the FTC/DOJ, each side should discuss it with counsel very early in the process.

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