

FTC Significantly Revises Its Premerger Notification Requirements, While Departing from Original Proposal

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Introduction

On October 10, 2024, the Federal Trade Commission (FTC or Commission) announced that it had unanimously adopted a Final Rule codifying numerous changes to the premerger notification form and premerger notification rules under the Hart-Scott-Rodino (HSR) Act. The new rule was preceded by the release of an initial proposal and an active notice-and-comment period, and the Final Rule reflects substantial changes that were made in response to significant pushback from commenters on many of the initially proposed reporting requirements. The new rule is the most significant change to the premerger notification requirements under the HSR Act since its passage in 1976, and adds additional requirements for companies that must file in advance of a proposed transaction.

The Final Rule will be effective 90 days after its publication in the Federal Register, going into effect no earlier than January 15, 2025, and the FTC anticipates providing future compliance guidance in advance of the Final Rule's effective date.

HSR Act Requirements and the 2023 NPRM

The HSR Act directed the FTC to implement rules, coordinating with the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice (DOJ), creating a premerger notification process. This premerger process is designed to screen out potential mergers that may potentially violate antitrust laws prior to the consummation of a transaction. To accomplish this, the rules

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implementing the HSR Act require that companies that meet certain thresholds submit information about the proposed transaction to the FTC and enter a waiting period, typically 30 days, before consummating the transaction. The primary threshold for reporting is the size of the transaction, though the size of the parties transacting is also relevant for certain mergers.

During this waiting period, the FTC reviews the proposed deal to determine any potential competition issues that may violate antitrust laws. Based on the Commission's findings, it can generally: (1) terminate the waiting period and allow parties to consummate their transaction (this action, typically referred to as "early termination," was suspended by the FTC in February 2021; this suspension will be lifted when the new rule goes into effect); (2) let the waiting period expire, allowing the parties to consummate the transaction; or (3) extend the review period and request further information from the parties if competition issues were raised in the initial review (a "second request").

On June 27, 2023, the FTC released its draft rule and notice of proposed rulemaking (*2023 NPRM*) modifying premerger disclosures under the HSR Act and opened the comment period for interested parties. The Final Rule released on October 10 contains significant revisions to the *2023 NPRM* based on comments submitted during the notice-and-comment period.

New Requirements

The Final Rule implements changes that the FTC states will address "critical gaps" in HSR Act filings.

Key changes in the Final Rule include:

- The disclosure of additional transaction documents from the supervisor of each merging party's deal team, as well as high-level business plans related to competition;
- A description of the business lines of each filer to reveal existing areas of competition between the merging firms, including products and services still in development and supply relationships; and
- Disclosure of investors in the buyer, including those with management rights.

Additionally, the FTC is creating a new online portal where market participants, stakeholders, and the general public can submit comments on proposed transactions that may be actively under review by the FTC.

Significant Changes from the Proposed Rules

The Final Rule contains significant changes from the proposed rule, omitting several of the more controversial proposals. In her concurring statement, Commissioner Melissa Holyoak specifically noted the "substantial outcry" from commenters, and most of her statement outlines her own opposition to the *2023 NPRM* and the changes in the Final Rule that led to her support. She explained that of the 29 primary proposals in the *2023 NPRM*, 10 were entirely rejected, and only 2 of the remaining 19 proposals were unmodified in the Final Rule.

Commissioner Holyoak highlighted several of the *2023 NPRM*'s proposed disclosures as particularly problematic. Those proposals, not contained in the Final Rule, are discussed below.

Labor Market Disclosures – The *2023 NPRM* proposed to require filers to disclose various information related to their labor markets, including geographic information of commuting employees.

Draft Transaction-Related Document Disclosures – The *2023 NPRM* proposed to require drafts of responsive documents to be produced in filings, in addition to the final documents themselves. Commenters highlighted this proposal's potential to dramatically increase the time required to prepare HSR Act filings.

Prior Acquisitions – The *2023 NPRM* also sought to change the requirements for filers to disclose prior acquisitions, including expanding the period of time requiring disclosure of prior acquisitions from 5 to 10 years and eliminating the *de minimis* exception for prior acquisitions worth less than \$10 million.

Key Takeaways

The modifications from the *2023 NPRM* to the Final Rule reflect a vigorous notice-and-comment period, and the Commission's statement announcing the rule addressed the impact that commenters had: "In response to these comments, the Commission substantially modified its proposals, resulting in a final rule that is tailored to the potential antitrust risk of a reported transaction." Both Commissioner Holyoak and Commissioner Andrew Ferguson characterized their ultimate support as contingent on the significant modifications from the *2023 NPRM*.

Although the Final Rule is pared down from the rule proposed in the *2023 NPRM*, businesses should still take note of the new reporting requirements, which the FTC estimates will add, on average, an additional 68 hours to the time needed to prepare HSR Act filings – in total, 105 hours. For transactions with competitive overlaps or supply relationships, the estimated average additional time to file rises to 121 hours. The FTC cautions, however, that estimates may vary and filings that are more "likely to raise antitrust risk" will require more hours. Companies should be aware of the increased time and burden of the finalized changes to the HSR Act filing process, as well as the increased scrutiny from the FTC in the premerger process, and adjust their estimated deal timelines to reflect these changes.

Additionally, the creation of a public portal for commenting on mergers and acquisitions under review will create new considerations for some mergers that may attract significant attention from not only market participants and stakeholders, but also the general public.

Wiley attorneys have extensive experience representing a wide array of companies in complex transactions and navigating FTC, DOJ, and other regulatory requirements (including export controls, CFIUS, Team Telecom, and classified matters, among others). For more information about the new HSR Act reporting rules, please contact one of the authors listed on this alert.

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