

Death by a Thousand Paper Cuts: FTC and DOJ Proposed HSR Disclosure Requirements Pose Latest Antitrust Hurdle to M&A

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On June 27, 2023, the Federal Trade Commission and the Department of Justice announced extensive reforms to the US Hart-Scott-Rodino Notification and Report Form. If implemented, these reforms would fundamentally reshape the merger notification process in the United States, with profound and far-reaching implications.

- The reforms reflect several Biden Administration antitrust enforcement priorities, including heightened scrutiny of private equity transactions, overlapping minority holdings, “interlocking directorates,” board observers, and the impact of transactions on labor markets.
- The reforms would significantly increase the burden, time, cost, and intrusiveness of HSR compliance. Parties would need to produce additional information in connection with their filings. The FTC and DOJ would then need to review that additional information within the initial thirty-day period. Due to the time associated with reviewing the increased volume of information, some parties will likely face a heightened risk of a Second Request or a need to pull and refile their HSR form, adding further cost and delay to an already lengthy process.
- The reforms appear to be modeled after the expansive requirements of the “Form CO” in the European Union. Unlike the Form CO, however, the proposed reforms do not provide for an abbreviated notification process for transactions that pose no competitive concerns.
- The reforms are subject to a mandatory sixty-day comment period, which expires August 28, 2023. Given the scope of the proposed reforms and the costs they would impose on businesses in the United States, however, we expect the proposed changes to generate political backlash and legal challenges. This may delay the implementation of the reforms.

The Proposed Reforms Would Dramatically Expand the Information Required for the HSR Form

The proposed reforms would greatly expand the information that filing parties need to disclose about themselves and their transactions. The FTC estimates that the time required to prepare an [HSR filing will increase four-fold](#): from 37 hours to 144 hours. The FTC also expects the changes to cost businesses [\\$350 million per year](#) in additional compliance expenses. The burden associated with the proposed reforms may be far greater than those estimates.

- **Expanded Disclosures Related to the Filing Person/Ultimate Parent Entity:** The reforms vastly expand the disclosures parties must make, including by requiring (i) the identification of minority shareholders, such as co-investors and limited partners; (ii) information about other interest holders who may “exert influence” on a company, such as creditors, officers, directors, and board observers; and (iii) information about whether those individuals serve as officers or directors of other entities (i.e., potentially creating “interlocking directorates” violative of Clayton Act Section 8).
- **Broadened Document Production Requirements:** Item 4 of the current HSR form only calls for documents created “by or for” officers and directors. It allows parties to exclude from production draft documents (except those provided to the Board) and ordinary course documents that were not created to analyze the reported transaction. The proposed reforms, however, broaden the Item 4 disclosure requirements to include (i) materials prepared by or for “deal team leads”; (ii) draft versions of all responsive documents regardless of whether they were sent to the Board; and (iii) ordinary course materials that discuss competition in the markets in which the parties have horizontal (i.e., competitive) or vertical (i.e., supplier-customer) overlaps.
- **Identification of Horizontal and Vertical Overlaps:** The reforms would require the parties to provide information about horizontal and vertical overlaps. If overlaps exist, the parties will need to identify their top customers and suppliers, and to list prior acquisitions within the past ten years involving the overlapping products or services, regardless of whether those transactions were HSR-reportable.
- **New Transaction Rationale and Business Descriptions:** The reforms would require the parties to describe both parties’ businesses, explain the “strategic rationale” for the deal, and provide a diagram of the deal structure and an organizational chart showing the entities involved in the transaction.
- **Labor Market Information:** The reforms would require the parties to include data about their employees, and to disclose previous unfair labor practices and worker safety citations issued by other federal agencies.
- **Mandatory Disclosure of Foreign Merger Filings:** The reforms would require parties to identify other jurisdictions where the transaction is reportable.
- **Other Disclosures:** The reforms would require many other new disclosures, including the technologies the parties use to communicate (e.g., email, text, chat applications); a deal timetable; descriptions of any foreign subsidies received by each party; and existing contracts with US intelligence or defense agencies.

The Agencies’ Rationale for the Changes

The FTC has explained that the proposed reforms are intended to enable agency staff to assess the competitive effects of notified transactions more accurately and efficiently. It has also explained that “competition enforcers in other jurisdictions already require firms to provide narrative responses with information about business lines, the transaction’s structure and rationale, business overlaps, and vertical and other relationships.”

It is true that other jurisdictions have disclosure requirements similar to the proposed reforms, but many of those jurisdictions have higher notification thresholds. Those jurisdictions also provide streamlined procedures for uncontroversial deals. The European Commission, for example, has a short form filing

template (“Short Form CO”) for transactions that are not likely to raise significant competitive concerns. The Commission recently adopted changes to enable more transactions to qualify for that simplified treatment. Even in cases where parties cannot use the Short Form CO, they can request that certain information requirements be waived. The proposed reforms afford no such option to the filing parties.

It is far from clear whether the information called for by the proposed reforms will better enable the agencies to identify anticompetitive transactions. Some of the information required by the reforms appears to be of limited antitrust relevance. For example, the identity of board observers and the presence of credit arrangements rarely, if ever, raise antitrust concerns. In any event, the DOJ and FTC have always had the authority to request additional information about a transaction if they determine further investigation is warranted. The proposed reforms, however, impose significant burdens on all reportable transactions, regardless of substantive risk.

Implementation Timeline

Before the proposed reforms are implemented, they will be subject to a public notice and comment period that closes on August 28, 2023. They will also be submitted to the Office of Management and Budget for review under the Paperwork Reduction Act. Over the course of that review process, the proposed reforms may evolve further.

How Merging Parties Should Prepare

For now, the HSR process will not change. If the proposed reforms are ultimately implemented, however, parties should take the following steps:

- Engage antitrust counsel earlier in the deal negotiation process, given the greater amount of time it will take to complete the HSR Form.
- Work with antitrust counsel to mitigate the burdens associated with the new requirements. Parties can, for example, streamline the creation of responsive documents, and organize the information required by the proposed reforms in a centralized location. This can reduce the amount of information that needs to be gathered individually for each transaction. It can also reduce the volume of responsive information that needs to be disclosed in the first place.
- Draft documents relating to deals, competition, markets, research and development, or related topics with extreme care, and with the expectation that they may need to be disclosed to antitrust enforcers in the future. Even if the proposed reforms are not implemented, the DOJ and FTC may request ordinary course business documents during the HSR review process, either as part of a preliminary investigation or a Second Request. Such documents are typically given significant weight in the agencies’ review.

Parties should consider participating in the public comment process. We will continue to keep you apprised of developments regarding the proposed reforms.

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