FTC revamps antitrust clearance process to address evolved deal practice

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After more than 15 months of delay, significant proposed changes to the U.S.-antitrust review process seem headed for implementation as early as January 2025 with the Oct. 10, 2024, adoption of the Final Rule (https://bit.ly/4h0ptoR). Parties filing premerger notification and report forms under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 will have to provide substantially more information about their businesses, their competitors, and — potentially — their customers and suppliers.

Under the new rules, the acquiring party and the acquired party will complete different forms, which the Federal Trade Commission estimates could take a filer up to 121 more hours to complete than the current form for particularly complex transactions, and on average is projected to take over 40 more hours to complete.

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Viewed from a different prism, the current form can generally be completed in less than a week, but the new form is expected to take filers more than a month to complete. Parties should consider the additional time it will take to prepare and collect information when planning for their HSR filings.

The FTC issued a Notice of Proposed Rulemaking (NPRM) to revamp the HSR process in June 2023, which proposed extensive changes, transforming a straightforward, well-understood process. The NPRM drew over 700 comments, nearly all negative, generally focused on the disruption to the transaction process and the significantly increased burden to filing parties. Deal certainty is expected to be reduced as practitioners and antitrust officials work through the new process.

Other significant changes

The new forms, for both the acquiring party and the acquired party, will require narrative descriptions about the transaction; the filer's strategic rationale for the transaction; and information about overlapping products and services. In certain cases, the acquiring party must provide a narrative description about officers, directors, and its ownership structure, including any minority investors or investors with management rights. In light of the requirement for more subjective information, it is possible that more filings will be rejected as inadequate.

Experienced filers have historically filed their deals on a signed letter of intent (LOI) before a formal agreement is negotiated and signed to start the 30-day waiting period. This process was especially attractive to parties who wished to have a sign-and-close deal structure. The new rules mandate subjects that must be included in an LOI for it to be the basis of filing.

The LOI must include the identity of all parties, the transaction structure, the assets being acquired, and a precise calculation of the purchase price. Also, employee retention policies, the expected closing timeline, post-closing governance, and "other material terms" may be required in the LOI to trigger the waiting period.

In addition to the enhanced information about "horizontal overlaps" — information about competition between the parties — which has been required from the beginning, in some instances parties will be required to disclose information about their supply chain and customers, including the names of top 10 customers, which the FTC calls a "vertical overlap."

The new rules have expanded criteria triggered by overlapping businesses that would require the parties to provide more information about prior transactions, reaching back five years instead of the acquiring party's current one-year look back. Also, in some circumstances involving potential restrictions on competition, including potential indirect restrictions on supply chains, a party can be required to provide information about non-transaction-related contracts. Finally, foreign language documents must be translated.

For transactions that obviously have no anticompetitive overlap, early termination — grants of which have been suspended for more than three years — will resume when the rules become effective.

The FTC is introducing a new online portal for stakeholders, market participants, and the general public to comment on mergers and acquisitions that are being reviewed by the FTC.

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The new rules will go into effect 90 days after publication in the Federal Register. Publication is anticipated in early November 2024, as more than two weeks have passed since the FTC announced the rules.

Once published, there are several paths through which implementation could be delayed or sidelined. Legal challenges to the rules could delay their becoming effective, as with the Corporate Transparency Act. In addition, Congress could overturn the new rules by exercising the review powers granted under the Congressional Review Act. To do so, each body of Congress must vote to overturn the new rules within 60 legislative days of the rules having been published in the Federal Register.

In a twist, because the rules were passed late in the current legislative session, the session is likely to adjourn before the 60 days pass. If that happens, then the new Congress also will have an opportunity to repeal the rules.

The new rules are a thoughtful effort to reshape the antitrust clearance process to reflect modern deal practice, with the heaviest burden tending to fall on the most sophisticated deal practitioners. However, the changes will inevitably slow filings as parties and regulators adapt long-standing practice to new requirements.

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