

## FTC and DOJ Propose More Demanding and Lengthy HSR Filing Process

***The agencies' proposed rulemaking would add significant complexity, substance, and time to US antitrust premerger notifications.***

On June 27, 2023, the Federal Trade Commission (FTC) in collaboration with the US Department of Justice (DOJ) announced a Notice of Proposed Rulemaking consisting of dozens of amendments to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the Act or HSR) as well as to the HSR filing instructions. If adopted, the FTC's proposed rulemaking would dramatically change the notification procedures that parties in the United States have been following for decades. Under the new process, parties to transactions that exceed the HSR thresholds must submit a broader range of substantive documents; more detailed information about corporate structure, capitalization, and management of the parties; and narrative advocacy about the deal and competition itself. In effect, the FTC has proposed changing the HSR reporting process from today's relatively simple notice-filing format to a much more substantive and involved filing process as seen in Europe, the United Kingdom, China, and other jurisdictions.

Interested parties have 60 days to comment on this proposed rulemaking following publication in the *Federal Register*. It will take a minimum of three months for these proposed changes to go into effect, though given the materiality of these proposed changes, the earliest time that any of these proposals are officially implemented will likely be late 2023 or early 2024. It is too early to say whether the proposed changes will be enacted in largely the same form as proposed, but significant changes to the HSR filing requirements appear likely at this point, absent congressional intervention.

### Implications

- **Longer Prep Time:** If the new rules go into effect, it will take considerably more time and effort to complete an HSR filing, as significant additional information and documents will be required. Expect a minimum of four to six weeks to have a filing ready for submission, though this time will likely shorten somewhat for companies that become repeat filers under the new rules.
- **Additional Information:** Parties to a transaction will need to build in sufficient time up front to collect the additional required information, including labor market data and details on subsidiaries and certain government subsidies. Parties will also need to develop a narrative explaining the rationale for the deal and the nature of competition for any product or service overlaps. Plan on at least a one-month

HSR filing preparation period, similar to the process in Europe, the United Kingdom, China, and other jurisdictions.

- **Up-Front Advocacy for Strategic Deals:** Strategic acquirors will need to work with counsel to prepare advocacy-related narrative submissions as part of the HSR filing process. No longer will such submissions only arise if requested by one of the agencies following filing. Instead, parties to a deal will be required to (i) describe the transaction rationale (with citations to the documents as applicable), (ii) identify horizontal and vertical overlaps (including those involving pipeline products), and (iii) discuss the nature of competition for any overlaps, among other topics.
- **Additional Documents:** A major component of the expanded HSR filing preparation process will be document collection and production. The amendments seek to require numerous categories of documents previously considered not responsive under items 4(c) and 4(d) of the current filing form, including drafts and ordinary-course-of-business documents and require collection from additional deal team members.
- **Term Sheet, Draft Agreement, or Final Agreement:** More detail will be required within the document that serves as a basis for the transaction agreement. Currently, a relatively bare-bones Letter of Intent (LOI) or term sheet is acceptable as long as it accurately describes the transaction. Going forward, parties will be required to submit a more developed term sheet, draft agreement, or final agreement that reflects “sufficient detail” about the deal and confirms the transaction is “more than hypothetical.”
- **Disclosing Board Member Information:** Expect to work with third parties who haven’t previously been involved in HSR processes, and expect to disclose information not directly related to the transaction. For example, directors will need to supply information about their other board affiliations, and prospective officers or board members may need to be identified and notified.
- **Disclosing Investor and Portfolio Company Information:** The proposed amendments might be particularly burdensome for private equity companies. More information will be needed on the limited partners and other minority investors of the acquiring entity, the relevant fund, and other companies in the chain of control between those entities. Furthermore, the information collected will need be organized in the filing on more of a portfolio-company basis — which will require a shift from current data collection practices.

## Background

### The HSR Act

The HSR Act is the federal premerger notification program that allows the FTC and DOJ to consider the competitive effects of proposed mergers and acquisitions and, if appropriate, challenge and enjoin transactions under the antitrust laws before they are completed. Absent an exemption, the HSR Act requires that persons or entities must notify the FTC and DOJ before making certain acquisitions valued at over \$111.4 million. Parties cannot consummate transactions subject to the Act until they have complied with the Act’s notification and waiting period requirements. The Act subjects buyers who fail to comply with these requirements to fines of up to \$50,120 per day for the period of non-compliance.

### Proposed Rulemaking Process

A Notice of Proposed Rulemaking announces and describes an agency’s proposal to address an issue or achieve an objective. All such notices must be published in the *Federal Register* to both alert the public

and give interested parties an opportunity to submit comments. Interested parties can file comments to this notice online at <https://www.regulations.gov>, by mail to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610, (Annex C), Washington, DC 20580, or by delivery to: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610, Washington, DC 20024. Comments must be received 60 days after the publication of the Notice of Proposed Rulemaking in the *Federal Register*.

## Overview of Proposed Changes

### Proposed Changes to the HSR Rules

As part of the Notice of Proposed Rulemaking, the agencies have proposed certain rule changes intended to implement the more substantive changes in the information being required as part of the HSR filing. Three rule changes in particular will be of interest to filers.

*First*, the Merger Filing Fee Modernization Act, which passed last year, requires HSR filers to provide information on subsidies received from certain foreign governments or entities that are strategic or economic threats to the United States. To help implement this new statutory requirement, the agencies propose to add new defined terms for “foreign entity or government of concern” and “subsidy.” The proposal is to adopt the definition of “foreign entity of concern” from the Infrastructure Investment and Jobs Act (IIJ Act)<sup>1</sup> as well reporting subsidies received from governments (and their agencies) of foreign countries that are covered nations under the IIJ Act. For “subsidy,” the proposal is to adopt the same definition used in Title VII of the Tariff Act of 1930 (Tariff Act)<sup>2</sup>.

*Second*, the proposed rule changes add permanency to the electronic filing process that the agencies implemented in light of the COVID-19 pandemic when physical or DVD-based filings were halted. In addition, the agencies make clear in the proposed rulemaking that a new e-filing system is being developed in which filers will input the required information directly into an online form. However, this system is still under development, and whether the portal will be available when any of the proposed rules go into effect is unclear. In any case, it is clear that e-filing will be the way forward, and the agencies will no longer accept physical filings.

*Third*, the agencies are proposing a rule change that seeks to eliminate the ability of filers to submit an HSR filing on any preliminary agreement, such as an executed LOI, without providing a term sheet or draft agreement that reflects sufficient detail about the proposed transaction. Section 803.5(b) currently allows filers in any non-§ 801.30 acquisition to file on the basis of “a contract, agreement in principle or letter of intent to merge or acquire [that] has been executed.” Often these LOIs are completed in the early stages of negotiation prior to any diligence on the transaction — and even prior to the determination of the ultimate transaction structure. While the proposed rulemaking is not entirely clear on what will be considered “sufficient detail,” the agencies are no doubt seeking to curb the number of filings that are made prior to the filing parties actually engaging in more substantive negotiation and diligence.

### Proposed Changes to the HSR Filing Content

One critical change to the HSR process is that the agencies will longer use the standardized, sanctioned HSR form that has been the basis of HSR filings for decades. Instead, as noted above, the agencies plan to move to a wholly online portal where filers will directly input the information required to make an HSR filing. We understand this portal has been under development for some time. Should the new rulemaking be approved and go into effect before this portal is ready for use, the agencies have explained that they

contemplate filers will submit the proposed requests for information and narratives via uploads in a standard format such as PDF and Excel.

HSR filings will now be organized using the following structure, which integrates familiar information that HSR filings have always included, expands the information sought for some categories, and adds new requests for information not previously required. This summary does not cover all the changes, but instead focuses on those that will likely increase the resources and time burden to collect and complete HSR filings after the new rules are implemented.

- **Ultimate Parent Entity / Organizational Structure Information**

- In addition to the standard information that has always been required to identify the ultimate parent entity (UPE) of the filing party, filers will need to provide greater detail on the structure of the entities involved in the transaction and a great deal more information on “interested parties.” For example, the proposed changes require that if a limited partnership is involved in a transaction, filers need to identify minority holders of LP interests (5% to 50%). This is the case not just for the UPE or the acquiring entity, but also any entity that sits within the chain of control between the two. In addition, for this item and throughout the filing, legal entity names are no longer sufficient, and filers will need to provide any “dba” or “street names” used in the prior three years for any entities that are provided in the filing.
- Subsidiary lists will now need to be organized by operating company or unit rather than simply alphabetically.
- Filers will be required to provide information about certain individuals or entities that (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. Credit relationships will be limited to creditors that have, or will have, in conjunction with or result of the transaction, provided credit totaling 10% or more of the value of the entity in question. Holders of non-voting securities, warrants, or options will be limited to those the value of which equals or exceeds 10% of the entity or could be converted to 10% or more of the voting securities or non-corporate interests of the company.
- The proposed Officers, Directors, and Board Observers section will require the identification of the officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity, as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions). This item reflects the agencies’ attempt to capture any lurking interlocking directorate issue.

- **Transaction Information**

- In addition to information regarding the transaction that has always been required, filers will now need to “briefly describe the business operations of all entities within the acquiring person to provide a clear overview of all aspects of the acquiring person’s pre-transaction business.”
- The agencies are adding a requirement to provide a narrative that identifies and explains each strategic rationale for the transaction, including those related to competition for current or known

planned products or services that would or could compete with a current or known planned product or service of the other filing person, expansion into new markets, hiring the sellers' employees, obtaining certain IP, or integrating certain assets into new or existing products, services, or offerings. For each strategic rationale identified, filers must also identify which documents it is submitting with the HSR support the rationale(s) described in the narrative.

- Under the proposed rules, filers will be required to provide a transaction diagram of the deal structure as well as a chart that explains the relevant entities and individuals involved in the transaction.
- Filers have always been required to provide an executed agreement along with any executed side agreements between the parties that are part of the transaction documents, including any non-competition agreements or restrictive covenants for retained employees/executives. Under the new rules, filers will be required to produce all portions of the agreement, including any schedules and exhibits. In addition, if any existing contractual relationships exist between the filing parties, all existing contracts between them must be produced, including any licensing agreements, supply agreements, non-competition or non-solicitation agreements, purchase agreements, etc., regardless of whether those agreements have any relevance to the transaction itself.

- **Competition and Overlaps**

- The proposed rules change the scope of what we traditionally call the "Item 4 document" requirement, which requires the productions of all final documents prepared by or for an officer or director of the company that were used to evaluate the transaction with respect to various aspects of competition. Instead of limiting the requirement to documents prepared by or for officers and directors, filers will now also be required to also produce documents that were prepared by or for "supervisory deal team lead(s)." This includes the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue. Previously, only final versions of documents were required, but the proposed rules expand this to include any drafts as well.
- The proposed rules expand the document universe beyond just those used to evaluate the transaction and require submission of semi-annual and quarterly plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and the acquired entity, if those documents were shared with a chief executive of an entity involved in the transaction, or with certain individuals who report directly to a chief executive.
- In addition, for each such document produced, filers will need to not only identify the author by name and title, but also provide organizational charts for such authors.
- HSR filers have always been required to provide a summary of US revenue broken down by North American Industry Classification System (NAICS) codes, and that requirement will remain a feature of the filing. However, the proposed rules impose a few changes to the scope. First, filers are no longer required to provide precise revenue amount for each code. Instead, filers will provide one of five levels met for each code: pre-revenue; less than \$10 million; between \$10 million and \$100 million; between \$100 million and \$1 billion; and more than \$1 billion.

- In addition, acknowledging that selecting the most accurate code(s) to describe a filing party's revenues is an imperfect science, the proposed rules require filers to, when more than one code may apply, list all codes that could apply and clarify as needed. In other words, if the acquiring and acquired parties report in similar but different codes but could report in the same codes, all codes that could apply to describe the revenue must be identified.
  - If the filer has more than one operating company or unit, they must break down the codes by the company/unit rather than aggregate across those companies or units. In addition, the filer must report codes for certain pipeline or pre-revenue products that would overlap with the other filing party if they were marketed.
  - Today, when parties show a revenue overlap in the same NAICS code, the acquiring party is required to provide certain information about any prior acquisitions of entities or assets it has made in the five years prior. The proposed rules expand this to 10 years and also apply this requirement to the acquired party as well. They also eliminate the de minimis revenue threshold that currently excludes certain acquisitions from the disclosure requirements.
  - The proposed rules add three new narrative requirements. First, in a Competition Analysis narrative, filers will need to describe basic business lines and provide product or service information for all related entities; identify current and potential future horizontal overlaps and supply relationships; and disclose information about employees and services they provide. Second, in a Horizontal Overlaps narrative, filers will need to provide an overview of principal categories of products and services (current and planned) and whether any given product or service competes with the other filing person, and if so, how. If there is an overlap, filers will be required to provide sales, customer information (including contacts), descriptions of any licensing arrangements, and any non-competes or non-solicitation agreements applicable to employees or business units. In a third narrative section called Supply Relationships, filers will need to outline their supply relationships and provide information for related sales and purchases between the filing persons or with other companies that use the filing person's products, services, or assets that compete with the other filing person.
  - In a new Labor Markets Section, the agencies will require filers to provide certain data about its employees. In the Largest Employee Classifications subsection, filing persons will classify their workers into occupational categories based on the SOC system, a widely used system for reporting worker statistics. Filers must list the five largest categories of workers by the relevant 6-digit SOC classification and provide total number of employees for each code. If there is an overlap in codes used by the filing parties, they will be required to provide geographic information regarding overlaps using certain geographic codes relating to commuter zones. In addition, filers must provide information on any penalties or findings that were issued against the acquiring or acquired person by the Department of Labor's Wage and Hour Division, the National Labor Relations Board, or OSHA during the five-year period prior to filing.
- **Additional Information**
    - To implement the disclosure of subsidies by a foreign entity or government of concern as part of the Merger Filing Fee Modernization Act, filers will now be required to response to three questions related to such subsidies:

- *First*, the acquiring and acquired person must identify and describe certain subsidies, as defined by proposed § 801.1(r)(2), that are received or that are anticipated to be received by any entity within its person from a foreign entity or government of concern, as defined by proposed § 801.1(r)(1). Given the complexity of subsidies, the FTC proposes stating that the question should be answered upon the knowledge or belief of the filing person. This will relieve the filing person of the obligation to conduct a complex legal analysis, but must conduct good-faith diligence to respond.
- *Second*, the acquiring or acquired person must identify any of its products produced in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are subject to countervailing duties in any jurisdiction and list the countervailing duty imposed and the jurisdiction that imposed the duty.
- *Third*, the acquiring or acquired person must identify, to its knowledge or belief, any of its products produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are the subject of an investigation by any jurisdiction for potential countervailing duties and list the jurisdiction conducting the investigation.
- The agencies proposed a new requirement that filing persons must report certain contracts with defense or intelligence agencies, as defined by 10 U.S.C. 101(a)(6) and 50 U.S.C. 3033(4), valued at \$10 million or more, and provide identifying information about the award and relevant Department of Defense or Intelligence Community personnel involved.
- Whereas it was previously voluntary for filers to identify where they are making other merger control filings in other non-US jurisdictions, the proposed rules now make this a requirement. In addition, filing parties will have the option to proactively waive the right for the agencies reviewing the transaction to coordinate or communicate with other jurisdictions' competition authorities or state Attorneys General that may also be investigating the transaction.
- **Certifications/Affidavits**
  - Filing parties will still need to execute a certification and affidavit as they do today, but the proposed rules add a new requirement to the existing certification that will require the filing person to certify that it has taken necessary steps to prevent the destruction of documents and information related to the transaction, and includes language acknowledging there are criminal penalties involved for failure to do so. In addition, filers will have to provide a list of all messaging systems that the filing party's employees may use in the ordinary course that could be used to store or transmit documents related to its business operations.

## Recommendations

- Companies should begin considering how these new timing and substantive requirements of the US process could impact their currently contemplated and future transactions. It is highly possible that in the next few months, companies will need to build additional time for HSR into their deal timelines.
- As early as possible in the deal process, companies should institutionalize best practices for document creation and collection.

- Companies may wish to evaluate potential tactical and strategic implications of this more aggressive agency enforcement paradigm. These requirements, while burdensome, could provide an opportunity to engage with and respond to the antitrust agencies sooner than under the current filing system.

A link to the FTC's press release can be found [here](#), and a link to the Notice of Proposed Rulemaking can be found [here](#).

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If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**[Lindsey S. Champlin](#)**

[lindsey.champlin@lw.com](mailto:lindsey.champlin@lw.com)  
+1.202.637.2122  
Washington, D.C.

**[Ian R. Conner](#)**

[ian.conner@lw.com](mailto:ian.conner@lw.com)  
+1.202.637.1042  
Washington, D.C.

**[Jason D. Cruise](#)**

[jason.cruise@lw.com](mailto:jason.cruise@lw.com)  
+1.202.637.1033  
Washington, D.C.

**[Makan Delrahim](#)**

[makan.delrahim@lw.com](mailto:makan.delrahim@lw.com)  
+1.424.653.5421  
+1.202.637.2102  
Century City / Washington, D.C.

**[Alan J. Devlin](#)**

[alan.devlin@lw.com](mailto:alan.devlin@lw.com)  
+1.202.637.1071  
Washington, D.C.

**[Michael G. Egge](#)**

[michael.egge@lw.com](mailto:michael.egge@lw.com)  
+1.202.637.2285  
Washington, D.C.

**[Kelly Fayne](#)**

[kelly.fayne@lw.com](mailto:kelly.fayne@lw.com)  
+1.415.646.7897  
San Francisco

**[Joshua N. Holian](#)**

[joshua.holian@lw.com](mailto:joshua.holian@lw.com)  
+1.415.646.8343  
San Francisco

**[Hanno F. Kaiser](#)**

[hanno.kaiser@lw.com](mailto:hanno.kaiser@lw.com)  
+1.858.509.8458  
San Diego / San Francisco

**[Farrell J. Malone](#)**

[farrell.malone@lw.com](mailto:farrell.malone@lw.com)  
+1.202.637.1024  
Washington, D.C.

**[Amanda P. Reeves](#)**

[amanda.reeves@lw.com](mailto:amanda.reeves@lw.com)  
+1.202.637.2183  
Washington, D.C.

**[Katherine A. Rocco](#)**

[katherine.rocco@lw.com](mailto:katherine.rocco@lw.com)  
+1.212.906.1215  
New York

**[E. Marcellus Williamson](#)**

[marc.williamson@lw.com](mailto:marc.williamson@lw.com)  
+1.202.637.2200  
Washington, D.C.

**[Jason L. Daniels](#)**

[jason.daniels@lw.com](mailto:jason.daniels@lw.com)  
+1.415.646.7857  
San Francisco

**[Britton Dale Davis](#)**

[britton.davis@lw.com](mailto:britton.davis@lw.com)  
+1.202.654.7103  
Washington, D.C.

**[Patrick C. English](#)**

[patrick.english@lw.com](mailto:patrick.english@lw.com)  
+1.202.637.1030  
Washington, D.C.

**[Joseph A. Simei](#)**

[joseph.simei@lw.com](mailto:joseph.simei@lw.com)  
+1.202.637.2147  
Washington, D.C.

**[Peter M. Todaro](#)**

[peter.todaro@lw.com](mailto:peter.todaro@lw.com)  
+1.202.637.2380  
Washington, D.C.

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**Endnotes**

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<sup>1</sup> 42 U.S.C. 18741(a).

<sup>2</sup> 19 U.S.C. 1677(5)(B).