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Significant Changes to Hart-Scott-Rodino Premerger Filing Requirements: What Businesses Need to Know

In a landmark development for U.S. antitrust law, on October 10 the commissioners of the Federal Trade Commission (the "FTC") unanimously adopted a final rule (the "Final Rule") that significantly revises the implementing regulations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"). The Final Rule represents the most comprehensive update to the Act's requirements in nearly five decades. Scheduled to take effect in January 2025, the Final Rule will reshape the disclosure landscape by expanding both the scope and depth of required information, demanding additional preparation time and supporting documentation from the parties to reportable transactions.

Historical Context of the Act

Since its enactment, the Act has required parties involved in covered transactions to submit premerger filings to the FTC and the Department of Justice (collectively, the "Agencies") for antitrust review. The review process has historically focused on identifying competitive risks by examining overlapping products, services and markets between merging entities. Each party that is required to file must submit an HSR Form detailing key aspects of the transaction and its business operations, initiating a mandatory 30-day waiting period during which the Agencies determine whether the transaction presents any antitrust risks.

Traditionally, the core framework of the Act has remained stable. However, the recent overhaul introduces substantial changes, reflecting the Agencies' aim to secure more comprehensive disclosures and earlier access to critical data. The Final Rule expands the scope of required information to include new subject areas not covered in previous filings, enabling regulators to apply more rigorous scrutiny throughout the review process.

Key Changes Under the Final Rule

1. *Expanded Disclosure Requirements for Business Relationships*

   The new HSR Form introduces detailed disclosure of product and service overlaps between the parties to the transaction. This includes:

- A description by each party of its principal categories of products and services, including products and services not yet offered and still in the development stage.
- Identification and disclosure of any competitive overlap or supply relationship between the parties.
- Where overlaps or supply relationships exist, disclosure of sales data for such overlapping products and services, including the categories of customers, the top ten customers, and a description of the supply relationship.

2. *Enhanced Reporting on Prior Acquisitions*
   The Final Rule requires both acquirers and targets to disclose acquisitions from the five years before the filing, whereas the existing rules place this responsibility only on acquirers. This change reflects the Agencies' focus on potentially anti-competitive "roll-up" strategies by private equity firms and other repeat acquirers.

3. *Foreign Subsidies and Defense Contracts Disclosure*

   Filers must disclose subsidies received from foreign entities or governments of concern, including China, Russia and Iran. Additionally, parties must detail any current or expected procurement contracts with U.S. Department of Defense or intelligence agencies valued at $100 million or more if these contracts involve products or services with competitive overlap or supply relationships.

4. *Changes to Disclosures of Deal-Related Documents*

- Business Documents: The Final Rule recasts the so-called "4(c) and 4(d)" documents as "business documents" and broadens their scope. While the focus remains on materials prepared for or by officers or directors, the Final Rule now also covers documents from supervisory deal team leads—individuals responsible for the strategic evaluation of the transaction, even if they do not hold official officer or director titles. The Final Rule also mandates submission of plans and reports shared with the CEO or board within the past year that address overlapping products, competition, competitors or market shares—this now includes ordinary course documents. Any foreign-language documents must include a verbatim English translation.

- Non-Definitive Agreements: As before, the definitive agreement or agreements for the transaction must be provided to the Agencies. In the absence of definitive agreements, letters of intent and similar documents must contain sufficient specificity on the structure and scope of the transaction, including the total amount of consideration, governance and key personnel retention, among other material terms.

5. *Revival of Early Termination Option*

   The FTC will reinstate the early termination option for the statutory 30-day waiting period, potentially speeding up transaction timelines for deals where the Agencies have completed their review and determined they will not take any enforcement action during the waiting period.

6. *Officer and Director Affiliations; Minority Holdings*

   The Final Rule introduces heightened requirements for disclosing the affiliations of officers and directors. Acquirers must disclose any board or corporate affiliations held by their officers and directors with entities in the same industry as the target. This includes a lookback period of three months for affiliations that recently ended, excluding affiliations with non-profits having political or religious purposes. While the existing rules require disclosure of all minority ownership holdings between 5% and 50%, the Final Rule requires disclosure of only minority holdings in entities that have a competitive overlap with the parties.

Implications for Businesses

With the expanded filing requirements, businesses must anticipate longer lead times for preparation. The FTC estimates that each party may require up to 121 hours of preparation for complex transactions involving competitors or pre-existing supply relationships, highlighting the importance of early planning and thorough antitrust risk assessments.

Notably, while the revised rules increase filing burdens, they are less onerous than initially proposed. The FTC abandoned some features that were contained in the proposed regulations such as geolocation information and expansive narrative disclosures.

To mitigate the compliance burden, businesses involved in M&A transactions should engage antitrust counsel early to assess the reporting obligations and allocate sufficient time to meet the heightened compliance demands under the Final Rule.

Conclusion

The changes to the Act's implementing regulations reflect the Agencies' goal of securing greater insight into transactions at earlier stages. While the reinstatement of early termination will offer some relief in uncontroversial transactions, the increased scrutiny and documentation requirements necessitate careful planning. Proactive engagement with experienced antitrust counsel will be critical to navigating these changes and minimizing potential risks.

A complete copy of the FTC release regarding the Final Rule can be found here. The FTC press release announcing the Final Rules can be found here. Our team will continue to monitor developments in this area and provide updates as necessary. If you have any questions, feel free to contact any member of the Corporate & Securities practice group.

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