Stevens & Lee

White Paper

Compare and Contrast: Key Differences Between the FTC's Proposed Rule and Final Rule Amending Premerger Notification Requirements

This white paper details the significant differences between the Federal Trade Commission's Proposed Rule and recently issued Final Rule with respect to various premerger reporting requirements under the Hart-Scott-Rodino Act.

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On Oct. 10, 2024, the Federal Trade Commission (Commission), with the concurrence of the Antitrust Division of the Justice Department (the Agencies), issued its long-awaited Final Rule making major changes to the premerger notification rules that implement the Hart-Scott-Rodino Act (HSR Act), including the Premerger Notification and Report Form (HSR Form) and accompanying instructions. The rulemaking changes will take effect 90 days from the date the Final Rule is published in the Federal Register.

Much like the proposed rule issued in June 2023, the Final Rule requires parties to transactions that are reportable under the HSR Act to provide in the filing of the HSR Form much more extensive and detailed information and materials than has been the case. This will undoubtedly result in the parties expending significantly more time in preparing the form. In fact, the Commission estimates the range at 10 to 121 additional hours, or approximately an additional $5,830 to $70,500 per filing with the highest costs borne by the acquiring person in a transaction with overlapping products or supply relationships in the target's industry.

The Agencies have explained that this is necessary for them to effectively conduct their initial assessment (the 30-day review) to determine whether a transaction may violate the law and whether to issue a request for additional information commonly known as a Second Request[1].

In issuing the Final Rule, the Commission explains that, while it has administered the HSR Act's premerger notification program for over 45 years and has regularly updated the rules, in making these comprehensive changes, it is responding to factors that make today's economic reality more challenging for conducting a premerger assessment with only limited information especially during the condensed 30-day review period.

Upon the issuance of the proposed rule, the Commission solicited comments from the public, and prior to the issuance of the Final Rule received more than 700 comments.

The Final Rule with commentary runs to more than 400 pages and provides a detailed discussion of the manner in which it differs from the proposed rule.

What follows is a detailed description of some of the significant differences between the proposed rule and the Final Rule.

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[1] The HSR Act and its implementing rules require the parties to certain mergers and acquisitions to submit premerger notification to the Agencies, which involves completing and filing the HSR Form, and then waiting a specified period of time (generally 30 days) before consummating their transaction. There has been a process whereby parties can request an early termination, which process has been suspended but will resume once the Final Rule takes effect.

If the 30-day waiting period expires or is terminated, the parties are free to close their transaction. If the Commission determines that it needs more information to assess the transaction, it sends both parties a Second Request and this extends the waiting period.

I. Requiring Detailed Letters of Intent, Draft Agreements or Term Sheets

A significant issue often presented in transactions subject to HSR reporting concerns at what point in the negotiations are the transaction documents sufficiently complete that the parties can make the HSR filing and start the 30-day waiting period. This is especially an issue when the parties have not yet executed a definitive agreement.

In the proposed rule, the Commission requires filers who have not executed a definitive transaction agreement to submit a draft agreement or term sheet describing the transaction with sufficient detail to permit accurate analysis. Currently, filers can file on the basis of preliminary agreements, such as an indication of interest, letter of intent, or agreement in principle.

In the Commission's experience, a small but significant minority of filings made on the basis of preliminary agreements do not contain enough information to permit the Agencies to conduct an accurate determination of whether the contemplated acquisition may violate the antitrust laws if consummated, particularly given the compressed 30-day waiting period.

In addition, such filings may be made prior to significant negotiations or due diligence and can be so lacking in specifics that they could force the Agencies to expend resources on transactions too uncertain to merit review.

The Commission received numerous comments on this proposed requirement focusing on the increased burden and delay for filing parties.

Under the Final Rule, if the executed agreement is not the definitive agreement, filers must submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, term sheet, or the most recent draft agreement.

Such document should include information regarding some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

The Commission notes that these examples are meant to be illustrative and not exhaustive. In contrast, indications of interest or other agreements that merely indicate that the parties will commence negotiations or begin diligence will not be sufficient.

II. Supervisory Team Leads

The proposed rule requires that, in addition to needing documents prepared by or for officers and directors in response to current Item 4(c)[2] of the HSR Form, filing persons must also submit transaction-related documents prepared by or for supervisory deal team lead(s). This proposal targeted documents authored by or for the person who functionally led the deal team even if not an officer or director. In the Agencies' experience with Second Request responses, these documents often include information that would have been highly relevant to the Agencies' analysis of the transaction during the initial waiting period to determine whether Second Requests should be issued and what additional information they should seek.

According to the Commission, the identification of any supervisory deal team lead(s) would not be based upon title alone and that this addition requires the filing person to determine the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue. A supervisory deal team lead need not have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in communicating with the individuals, such as officers or directors, who have the authority to authorize the transaction.

The Commission received many comments on its proposal to require current 4(c) documents from the supervisory deal team lead(s). Several comments noted that the proposed Instructions do not offer a definition of supervisory deal team lead(s) and that the proposed rule's description of the term was vague, ambiguous, and subjective, leaving filers uncertain as to the individuals who must be searched in addition to officers and directors.

As a result of the comments, the Commission in the Final Rule adopts a new definition for "supervisory deal team lead" as *the individual* who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer. According to the Commission, this definition, by focusing on the one person who oversees the strategic assessment of the transaction, should mitigate the concerns of some commenters that the term is so vague that it might introduce uncertainty as to when the initial HSR waiting period begins.

III. Additional Acquiring Person Information

The proposed rule requires additional information about the acquiring and acquired person. These proposals include a description of the ownership structure of the acquiring person and acquiring entity as well as an organizational chart if the acquiring person (ultimate parent entity) is a master limited partnership or fund, information about other types of interest holders that

[2] 4(c) documents are "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets."

may exert influence over the acquiring person, and the identification of officers, directors and board observers of the acquiring person and acquired entity.

Ownership Structure

With respect to ownership structure, the proposed rule requires that acquiring persons provide a description of the ownership structure of the acquiring entity and, for fund or master limited partnership ultimate parent entities, an organizational chart sufficient to identify and show the relationship of all the entities that are affiliates or associates. It also proposes that acquired persons describe the ownership structure of the acquired entity.

The Final Rule requires the acquiring persons to provide this information. However, because this information is less relevant from the acquired entity, the Final Rule does not adopt the proposal for the acquired person.

For transactions where a fund or master limited partnership is the ultimate parent entity, any existing organizational chart that shows the relationship of any entities that are affiliates or associates is required.

Other Types of Interest Holders That May Exert Influence

In the proposed rule, the Commission requires the acquiring person to identify certain individuals or entities that may have a material influence on the acquiring entity and entities related to it. These include 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.

While acknowledging that these relationships can be very important in assessing the competitive effects of certain transactions, the Commission in the Final Rule elects not to adopt proposals (i), (ii) and (iv) at this time.

Officers and Directors

The proposed rule adds a section that requires 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.

Further, the proposed rule requires for those individuals, the identity of other entities for which they 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).

The Commission received many comments. After consideration of the comments, the Commission narrows this requirement in the Final Rule.

First, the Commission eliminates the requirement to identify officers or directors of acquired entities; the requirements of the Final Rule related to reporting information for officers and directors will apply to the acquiring person only.

Second, the Commission limits the entities within the acquiring person to certain specified entities that (i) have responsibility for the development, marketing or sale of products or services or (ii) directly or indirectly control or are controlled by the acquiring entity.

Further, if any of these entities are a nonprofit entity organized for a religious or political purpose, even if that entity carries on substantial commerce, no reporting is required for individuals serving as officers or directors.

Third, the Commission limits the lookback periods contained in the proposed rule. For entities in category (i) filers will report officers and directors serving within three months prior to the HSR Filing. For category (ii) there is no requirement to lookback to any individual who is no longer serving as an officer or director at the time of the HSR filing, but filers must consider individuals who have not yet officially taken the relevant positions.

Fourth, the acquiring person is only required to report the names of officers and directors of these entities if those individuals also serve as an officer or director of an entity that derives revenue in the same North American Industry Classification Code (NAICS Code) or is in the same industry as the target at the time of filing.

IV. Minority Shareholders or Interest Holders

The Commission proposes a Minority Shareholders or Interest Holders section to require additional information about the identity of minority holders, as well as identification of additional minority interest holders by the acquiring person, but potentially fewer by the acquired person.

First, the proposed rule requires disclosure of the "doing business as" or "street name" of minority investors that are related to a master limited partnership, fund, investment group or similar entity. In the Final Rule, the Commission adopts this proposal.

Second, the Commission next proposes two changes that could increase the number of minority investors the acquiring person would need to identify:

- It proposes that the acquiring person be required to report holders of 5% or more but less than 50% of (i) the acquiring entity, (ii) any entity directly or indirectly controlled by the acquiring entity, (iii) any entity that directly or indirectly controls the acquiring entity, and (iv) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction.
- It proposes that filing persons report holders of 5% or more but less than 50% of limited partnerships, in addition to the general partner.

Because the Commission in the Final Rule concludes that information that reveals whether there are existing investment relationships between the acquiring person and the target is necessary and appropriate for the Agencies' initial antitrust review, the Commission adopts the first change as proposed.

As to the second proposed change, after considering the comments received regarding this proposal, the Commission adopts a modified requirement to identify only the general partner

and limited partners that have certain rights related to the board of directors (or similar bodies) of entities related to the acquiring entity, i.e., focusing only on those with the ability to participate in management or control. Filers can exclude limited partners who serve as passive investors, who are essentially the "customers" of the private investment firm. To the extent that these limited partners do not participate in the management of the filing person, they need not be disclosed as a minority holder.

Third, the proposed rule limits the minority interest holders that acquired persons need to identify. It limits this requirement to minority holders of the acquired entity that would hold an interest after consummation or would receive an interest in another entity within the acquiring person as a result of the transaction. In the Final Rule, the Commission adopts this proposal with modification to reflect the modification made with respect to limited partners described above.

V. Transaction Information

Transaction Rationale

The proposed rule requires the acquiring and acquired person to describe all strategic rationales for the transaction. These rationales would include those related to, for example, 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 reporting person, expansion into new markets, hiring the seller's employees, obtaining certain intellectual property or integrating certain assets into new or existing products, services or offerings.

The proposed rules also requires that the filing person identify which documents submitted with the HSR Form support the rationale(s) described in the narrative.

While the Commission in the Final Rule adopts the requirement as proposed, it notes that a brief description of the transaction rationale is sufficient so long as it is accurate and does not conflict without explanation with stated rationales in documents submitted with the HSR Form.

Additionally, the Instructions clarify that each filing party is required to submit a description of its strategic rationales.

The Commission states that it understands that rationales may change throughout the diligence process. The parties are not required to wait to file their notification until they have settled on a single or predominant rationale.

Transaction Diagrams

The proposed rule imposes a new requirement that filing persons provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction.

In response to comments received, the Commission in the Final Rule adjusts the proposal to require only the acquiring person in non-select 801.30 transactions to provide a diagram of the

deal structure and only if one exists.[3] That is, filers are not required to create a diagram or a chart solely for the purposes of submitting an HSR Form.

VI. Transaction-Related Documents

Competition Documents

In the proposed rule, the Commission proposes expanding the documents currently required by Item 4(c) of the HSR Form, which are prepared by or for officers and directors for the purpose of evaluating or analyzing the transaction.[4] The Commission proposes requiring the filing person to submit such documents prepared by or for supervisors of the team of individuals working to complete the transaction, i.e., the supervisory deal team lead(s).

In response to comments that the proposal was not clear about whom the Commission intends for filers to search for responsive documents and information in addition to officers and directors, as explained above, in the Final Rule the Commission clarifies that the term "supervisory deal team leads" refers to just the one individual who has primary responsibility for supervising the strategic assessment of the deal and who would not otherwise qualify as a director or officer.

Drafts

In the proposed rule, drafts of responsive transaction-related documents are required to be submitted if they were provided to an officer, director, or supervisory deal team lead. The Commission does not adopt the proposal in the Final Rule.

Importantly, however, in light of concerns that the Agencies are receiving documents edited to remove candid assessments of the transaction and market competition, the Commission now clarifies that any Transaction-Related Document, which would include competition documents, confidential information memoranda, third-party studies, surveys, analyses and reports, and synergies and efficiencies surveys, analyses and reports (i.e., Item 4(c) and 4(d) documents) and that was shared with any member of the board of directors (or similar body), is responsive

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[3] The Final Rule creates a new category of "select 801.30 transactions" for which the cost of complying with the information requirements has been limited because of the low risk that the transaction may violate the antitrust laws. An 801.30 transaction generally refers to tender offers and acquisitions of voting securities from third parties and a "select 801.30 transaction" refers to an 801.30 transaction that does not give the acquirer control or director rights, and there are no agreements between the parties.

[4] Since the beginning of the premerger notification program, these transaction-related documents have been a key screening tool for the Agencies in determining whether the transaction may violate the antitrust laws because they discuss the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

and should not be considered a draft. Rather, it should be treated as a final version and submitted with the HSR Filing as a Competition Document.

Synergies and Efficiencies

The proposed rule requires a Synergies and Efficiencies section to collect the information currently required by Item 4(d)(iii) of the Instructions, with a proposed modification to clarify that forward-looking analyses are responsive.

In light of the comments and to reduce the overall cost of the Final Rule as compared to the benefit this information would provide to the Agencies, the Commission in the Final Rule does not adopt the proposed modification.

However, the Commission declines to repeal the requirement to provide documents that reflect expected synergies and efficiencies, as the Agencies find these analyses to be relevant to understanding any such expected benefits of the transaction.

VII. Plans and Reports

The proposed rule requires filers to submit two sets of plans and reports not created specifically for analyzing the filed-for transaction.

First, it proposes requiring the submission of periodic 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 acquired entity, if those documents were shared with a chief executive officer of an entity involved in the transaction, or with certain individuals who report directly to such a CEO.

Second, the proposed rule requires the submission of all such plans and reports submitted to the board of directors (or, in the case of unincorporated entities, individuals exercising those functions) irrespective of whether they were prepared on a periodic basis.

As modified from the proposed rule, the Final Rule requires that, except for select 801.30 transactions, filers are required to provide all regularly prepared plans and reports (i.e., not just those related to the transaction) that were:

(i) Provided to the CEO (but not also to individuals who report directly to the CEO) of the acquiring entity or any entity that it controls or is controlled by it, and/or

(ii) Provided to the board of directors of the acquiring entity or any entity that it controls or is controlled by it, and if they,

(iii) Analyze market shares, competition, competitors or markets pertaining to any product or service of the acquiring person also produced, sold or known to be under development by the target, as identified in the Overlap Description (see below). Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

VIII. Timeline

The Commission proposed that filing persons provide a narrative timeline of key dates and conditions for closing. After consideration of concerns raised by commenters, the Commission does not adopt this proposal.

IX. Labor Markets Information

In the proposed rule, the Commission proposes creating a new Labor Markets Information section that would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction.

As noted in the proposed rule, the Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets. Yet, the HSR Form does not collect information from filers about their employees or the type of work that their employees do that would allow the Agencies to identify the parties as competitors for certain labor services, raising challenges for the effective enforcement of Section 7 of the Federal Trade Commission Act to protect competition that benefits workers.

In light of the comments received, as well as the Agencies' recent experience in identifying and investigating transactions that may harm competition for workers, the Final Rule does not require specific information about employees at this time.

X. Prior Acquisitions

The proposed rule requires the creation of a Prior Acquisitions section within the Instructions to collect information required by Item 8 of the current HSR Form, as well as additional information.

First, the Commission proposes requiring both the acquiring person and the acquired entity to provide information about prior acquisitions, expanding the current requirement that is limited to the acquiring person.

Second, the Commission proposes extending the time frame to report prior acquisitions from five years to 10 years.

Third, the Commission proposes eliminating the dollar threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than $10 million in the year prior to the acquisition.

Fourth, the Commission proposes treating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests.

Fifth, the Commission proposes requiring filers to report whether all or substantially all of the acquired voting securities, non-corporate interests or assets are still held at the time of filing.

In the Final Rule, the Commission does not adopt most of the expansions contained in the proposed rule, including the extension of the lookback period from five to 10 years and the elimination of the $10 million exception. Instead, the Commission adopts modest adjustments to the current requirements and extends the reporting requirement to prior acquisitions of the target.

The Final Rule does not require reporting on all prior acquisitions, only those in business lines which the parties have identified as areas of overlapping current or future competition, either on the basis of NAICS Code reporting or in the description elsewhere on the HSR Form.

XI. Supply Relationships

The proposed rule requires each filing person to provide information about existing or potential purchase or supply relationships between the filing persons. This description requires filers to describe each product, service or asset (including data) that the filer sold, licensed or otherwise supplied, to the other party or to any other business that, to the filer's knowledge or belief, uses its product, service or asset to compete with the other party's products or services, or as an input for a product or service that competes with the other party's products or services. Similar information is required for purchases from the other party.

In the Final Rule, the Commission includes a de minimis exclusion to reduce the cost of collecting information related to competitively insignificant sales or purchases. The Final Rule excludes reporting unless the product, service or asset (including data) represents at least $10 million in revenue.

The Final Rule also limits the reporting period to the most recent fiscal year and requires reporting for sales only in dollars, not also in units. It also eliminates the requirement for contact information for individuals at customers or suppliers, requiring only the identity of the company to limit the risk of inadvertent disclosure.

XII. Overlaps

The proposed rule includes a new Overlap Narrative section that imposes extensive reporting requirements on filing parties. Specifically, it requires, among other things, that each filing person provide an overview of its principal categories of products or services (current and planned) as well as information on whether it currently competes with the other filing person.

For each identified overlapping product or service, the filing person must also provide sales, customer information (including contacts), a description of any licensing arrangements and a description of any noncompete or non-solicitation agreements applicable to the employees or business units related to the product or service.

In light of concerns about the cost this requirement places on all filers, the Commission in the Final Rule modifies its proposal in several ways to reduce the cost on the filer.

First, it limits the requirement to report planned or future products to those referenced in another document submitted with the HSR Filing.

Second, it eliminates the requirement to provide an estimate of how much of the product or service each customer category purchased or used monthly for the last fiscal year.

Third, rather than require reporting for the two most recent fiscal years, reporting is limited to the most recent fiscal year.

Fourth, it eliminates the requirement to describe licensing agreements and noncompete or non-solicitation agreements in this section.

Fifth, it does not to require Overlap Descriptions for select 801.30 transactions.

XIII. Geolocation

The proposed rule requires filers to report latitude and longitude information for street addresses. In the Final Rule, the Commission does not adopt this proposal.