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FTC Proposes Dramatic Expansion and Revision of HSR Merger Notification Form

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On June 27, 2023, the Federal Trade Commission, with the concurrence of the Antitrust Division of the Department of Justice, announced proposed changes to the Premerger Notification and Report Form (the "HSR Form") and associated instructions, as well as to the premerger notification rules implementing the Hart-Scott Rodino ("HSR") Act. The 133-page Notice of Proposed Rulemaking (NPRM) represents the first major overhaul of the HSR premerger notification requirements since the HSR program was established 45 years ago.

The FTC's sweeping proposal, which we expect to be adopted and become effective within four to six months, would dramatically change the current merger filing process in the United States for HSR-reportable deals. Companies seeking U.S. merger clearance would need to expend considerably more effort preparing their HSR filings, including by collecting a broader set of business documents and financial data. Merging parties would also be required to prepare written responses to questions related to the transaction, bringing the U.S. more into line with filing requirements in certain foreign merger control regimes like the EU. The additional volume and scope of information contained in merging parties' HSR filings would also allow the antitrust agencies to potentially apply more rigorous scrutiny of proposed transactions at an earlier stage because the information provided likely will take considerable time for the agency to review. As a result, the proposed rules raise the possibility of enhanced, or at least delayed, scrutiny of transactions that may previously have not triggered additional questions given their benign nature, including increases in the number of occasions when parties need to pull-and-refile their HSR forms to provide the agency additional time to review the contents of the HSR forms.

Key changes under the proposal include:

- **Transaction Details and Draft Item 4(c) Documents**. Under the proposed rules, filing companies would be required to make a comprehensive disclosure of the details of their transaction, including submission of a transaction diagram, a projected closing timeline, and a detailed description of the strategic rationale for the transaction. Most significantly, the proposed rules would require the submission of *drafts* of so-called "Item 4" documents (i.e., documents analyzing the deal as it relates to competition-related issues) where such drafts are provided to an officer, director, or deal team lead or supervisor. The FTC noted that this new requirement is designed to prevent filing companies from submitting only the final, "sanitized" versions of Item 4 documents.
- **Competition Narratives.** The proposed rules would require filing companies to provide narrative responses describing the competitive landscape and the supply chain, as well as certain information pertaining to labor markets and employees. For example, the proposed rules would require disclosing any labor law violations by the filing companies from the past five years. According to the FTC, a history of labor law violations may be indicative of "a concentrated labor market where workers do not have the ability to easily find another job." This requirement underscores the U.S. antitrust agencies' current spotlight on labor conditions and

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use of antitrust law to regulate conditions for employees.

- **Prior Acquisitions.** The proposed rules would create new disclosure requirements related to the parties' prior acquisitions. Under the proposal, the acquiror and target would be required to identify all prior acquisitions of any size for the previous ten years in any line of business where there is a potential overlap. The FTC noted that this change is aimed to address the antitrust agencies' competitive concerns about "roll-up strategies."
- **Periodic Plans and Reports.** The proposed rules would expand the document submission requirements to cover certain strategic documents and reports created in the ordinary course of business, even if they do not relate to the proposed transaction. Documents called for under this new requirement would include semi-annual and quarterly plans that discuss markets and competition and that were shared with certain senior executives, as well as other similar plans or reports if they were shared with one of the filing companies' Boards of Directors.
- **Organizational Structure**. The proposed rules would require the identification of individuals and entities that may have influence over business decisions or access to confidential business information. On the buyer side, this could include certain minority shareholders and limited partners holding 5% or more of the voting securities or non-corporate interests in the acquiring company or entities controlling or controlled by it.

In light of the significant proposed changes detailed above, firms considering transactions should continue to proactively consult with antitrust counsel to develop appropriate antitrust risk mitigation strategies. Most importantly, merging parties should ensure that they build in considerably more time to prepare their HSR filings, including by not over-committing in Merger Agreements regarding filing deadlines. Currently, it is customary for parties to commit to making HSR filings in Merger Agreements within 7 to 10 business days, a timeframe that likely will be challenging if and when the new filing requirements are adopted. The FTC itself estimates that the proposed new rules could extend the time required to prepare an HSR filing from about 37 hours to 144 hours.

The proposed rules also suggest that firms should pay greater attention to the antitrust risks posed by non-reportable transactions. These transactions, while not reportable at the time they occur, would need to be disclosed in connection with any future HSR-reportable transaction involving a similar line of business. Those prior transactions could come under scrutiny at that time or enhance risk for the larger transaction under review.

Finally, if the proposed rules are adopted, document creation and retention policies – already critical components of any firm's antitrust compliance program – will become more important than ever. The types of documents that would need to be submitted with the HSR filing would include not just transaction-specific materials but also ordinary course strategic plans and reports related to the relevant businesses. We will continue to keep you posted as developments occur.

The following Gibson Dunn lawyers prepared this client alert: Steve Weissman, Sophia Hansell, Jamie France, Chris Wilson, Steve Pet, and Emma Li.*

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition, Mergers and Acquisitions, or Private Equity practice groups, or the following:

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