

May 5, 2022

## **U.S. FTC PREVEWS POTENTIALLY SIGNIFICANT CHANGES TO THE HSR FILING FORM**

To Our Clients and Friends:

According to recent statements of agency officials, the Federal Trade Commission (FTC) is looking to revise the Premerger Notification and Report Form (the “HSR Form”) “to conform to changing market realities and global standards.”<sup>[1]</sup> The FTC has not released details of the proposed changes, but recent statements from agency leadership provide some indication as to how the agency may expand the filing requirements. FTC Chair Lina Khan recently announced that the agency is exploring “ways to collect on the front end information that is more probative of whether parties are proposing an unlawful deal.”<sup>[2]</sup> And FTC Bureau of Competition Director Holly Vedova explained that the FTC wants, as part of the HSR filing, “overlap information, customers, things like that.”<sup>[3]</sup> The Bureau Director amplified that, under the proposed changes, the parties would “do that work ahead of time, and come in with that information, so that we don’t spend ten, twenty, thirty days trying to collect all that information.”<sup>[4]</sup>

Generally, M&A transactions are reportable under the HSR Act if, as a result of the transaction, (i) the buyer will hold stock, non-corporate interests, and/or assets of the seller valued at more than \$101 million as a result of the deal (the “size-of-transaction” test) and, if the transaction is valued at \$403.9 million or less, (ii) one party to the deal has assets or annual sales of \$202 million or more, and the other party has assets or annual sales of \$20.2 million or more (the “size-of-person” test). Certain exemptions and additional thresholds may apply.

While any changes to the HSR Form likely would not affect these filing thresholds or other rules relating to whether a transaction must be reported under the HSR Act, they would affect the information and documents that must be supplied to the FTC and DOJ in connection with those filings. To the extent that the changes require HSR forms to include the type of detailed information about the marketplace and industry participants that are often required in other jurisdictions, the changes would potentially impose substantial increased costs and potential delays in making HSR filings, including those that have no plausible competitive concerns.

The FTC has not yet expanded on Chair Khan and Bureau Director Vedova’s statements or floated, formally or informally, any specific proposed changes to the HSR Form. However, based on Bureau Director Vedova’s reference to “overlap information,” the new form might require additional information, including top customer lists and contact information for those customers, only where the filing parties report an “overlap” which, for purposes of the HSR Form, means that both parties produced revenues in the same 6-digit North American Industrial Classification System (NAICS) code in the most recent year. However, because the NAICS codes define broad industry sectors, parties that report an overlap are often not competitors. Beyond that, it is premature to speculate on the precise scope of the

changes to the HSR Form or the magnitude of incremental cost, burden, and delays that such changes would impose on filing parties.

Such changes to the HSR Form are not likely to be adopted and implemented immediately. Although minor or administrative changes to the HSR Form have been made over the years without notice and comment, substantive changes would require the FTC to go through the notice and comment process under the Administrative Procedure Act (“APA”). The scope of changes previewed by the FTC would likely be considered “substantive,” as they were in 2011 when the concept of “associates” was added to the Rules and Items 4(d), 6(c)(ii) and 7(d) were added to the Form “in order to capture additional information that would significantly assist the Agencies in their initial review.”<sup>[5]</sup> The 2011 changes took just over a year from first publication to the final changes taking effect. While the changes contemplated by the FTC will likely not be as complex as the “associate” changes, the APA’s notice and comment period would still likely take many months. The HSR Act provides the FTC with discretion to determine the scope of the Form “as is necessary and appropriate” to enable the FTC and Department of Justice “to determine whether such acquisition may, if consummated, violate the antitrust laws.”<sup>[6]</sup> If the FTC makes changes that do not appear linked to the legality of the transaction under the antitrust laws, or otherwise appear to be “arbitrary and capricious”, then such changes might be subject to challenge. Although changes to the Form would not require new legislation, a three-Commissioner majority must vote in favor of the changes.

We will continue to keep you posted as developments on this front occur.

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[1] David Hatch, *FTC Wants More Upfront Merger Information*, The Deal, April 12, 2022.

[2] 70th American Bar Association Antitrust Law Section Spring Meeting, Enforcers Roundtable, April 8, 2022.

[3] David Hatch, *FTC Wants More Upfront Merger Information*, The Deal, April 12, 2022.

[4] *Id.*

[5] 76 Fed. Reg. 42,471 (July 19, 2011). The “associate” changes were first published by the Commission on August 13, 2010, in a Notice of Proposed Rulemaking and Request for Public Comment available on its website. The final change to the Rules and Form and Instructions did not become effective until August 18, 2011.

[6] 15 U.S.C. § 18a(d)(1).



# GIBSON DUNN

*The following Gibson Dunn lawyers prepared this client alert: Andrew Cline, Rachel Brass, and Stephen Weissman.*

*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 or Mergers and Acquisitions practice groups, or the following:*

***Antitrust and Competition Group:***

*Rachel S. Brass – Co-Chair, San Francisco (+1 415-393-8293, rbrass@gibsondunn.com)*

*Stephen Weissman – Co-Chair, Washington, D.C. (+1 202-955-8678, sweissman@gibsondunn.com)*

*Ali Nikpay – Co-Chair, London (+44 (0) 20 7071 4273, anikpay@gibsondunn.com)*

*Christian Riis-Madsen – Co-Chair, Brussels (+32 2 554 72 05, criis@gibsondunn.com)*

***Mergers and Acquisitions Group:***

*Eduardo Gallardo – Co-Chair, New York (+1 212-351-3847, egallardo@gibsondunn.com)*

*Robert B. Little – Co-Chair, Dallas (+1 214-698-3260, rlittle@gibsondunn.com)*

*Saeed Muzumdar – Co-Chair, New York (+1 212-351-3966, smuzumdar@gibsondunn.com)*

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