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ALERT

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FTC Proposes Dramatic Overhaul of U.S. Merger Reporting

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On June 29, 2023 the Federal Trade Commission, in collaboration with the Antitrust Division of the U.S. Department of Justice, published in the Federal Register a 133-page notice of proposed rulemaking ("NPRM") that would overhaul merger reporting obligations in the U.S., representing the first large-scale change since the implementation of the Hart-Scott-Rodino Act of 1976 ("HSR Act"). Although the changes would not increase the range of reportable deals, they would dramatically increase the amount and type of information required for all filers, demanding substantially more documents, information and narrative responses than are required currently. Following a public comment period, the rules may become effective as early as late December 2023.

The most significant changes fall into two categories: (1) changes that apply to all filers and deals, and (2) changes that only apply to transactions in which there is an actual or potential horizontal or vertical antitrust issue.

The Most Significant Changes Applicable to All Filers and Deals

The changes would require substantially more information about the parties to a transaction and potentially related parties, to capture the potential influence or impact of any persons whose identities or other relationships need not be disclosed under the current regime. This includes:

- Substantially more detail about the ownership structure of the filer and related entities, including the identification of minority-interest-holders in controlled entities;
- Identification of any "Other Types of Interest Holders That May Exert Influence," including creditors, board observers, holders of nonvoting stock, and certain managers; and
- Disclosure of officers, directors and board observers of the acquired and acquiring entities (and entities within the acquiring person), for the prior two years, and for each individual, any other companies for which those individuals serve or have served during the prior two years as director, officer or board observer. This disclosure includes prospective officers, directors, or board observers of the acquired and acquiring entities post-transaction (as well as any for new entities resulting from the transaction).

The changes would require substantially more information about and **documents relating to the transaction**, including:

- A description of the transaction that includes timelines and strategic rationales with support from the Item 4(c) and 4(d) documents;
- Identification of non-director or non-officer Supervisory Deal Team Lead(s) (SDTL) (individual with day-to-day responsibility for leading the transaction) and disclosure of documents that would otherwise qualify as Item 4(c) and 4(d) documents if sent to officers and directors;
- Production of nonprivileged drafts of Item 4(c) and 4(d) documents may be required;
- Provision of organizational charts showing the identity and position of authors of Item 4(c) and 4(d) documents (including the identity and contact information of authors from other parties who wrote Item 4(c) or 4(d) documents); and
- Word-for-word translation of all foreign-language documents.

The changes also require **categories of information that are not part of the current form**, and not likely collected or centralized in the ordinary course of business:

- **Labor/Employment information**: Parties will be required to provide information about their top five categories of employees according to Standard Occupational Codes, as well as geographic market information for each overlapping employee classification (as defined by Economic Research Service's Commuting Zones). The new form also has a section requiring a variety of information about DOL's Wage and Hour Division, OSHA, NLRB and other government agency investigations and fines.

- **All communication systems and messaging applications used by the filer** and applicable entities, in conjunction with a certification upon filing that documents and information relating to the deal will be preserved upon filing.

- **Subsidies from foreign governments or entities** that Threaten the Economic or National Security of the U.S.: this portion of the changes implements 2022 legislation requiring the FTC to collect this information.

- **Defense and intelligence contracts**: Parties will be required to identify any relevant current or potential defense or intelligence contracts, presumably also concerning funding, even if there is no actual or potential competition issue relating to the products.

The Most Significant Changes for HSR-Reportable Transactions Involving Horizontal or Vertical Relationships

In any transaction involving products or services in which the parties are actual or potential competitors ("horizontal" deals), the proposed HSR changes would require the following:

- **A narrative discussion of horizontal overlaps**, akin to what some foreign competition authorities currently require, including the identification of each current or known planned product or service that competes with a current or known planned product of the other filer. Parties would need to take affirmative positions in their filing on the nature and extent of the competitive interaction.

- A significant **expansion of the required reporting of prior acquisitions**, including lists from both the acquiring and acquired parties of deals from the past ten years with no minimum sales or asset thresholds.

- **Production of strategic plans, business reviews and any other quarterly, semiannual or annual reports or presentations** to CEOs or direct reports to CEOs involving overlap products ("Periodic Reports"), as well as production of similar documents to boards of directors. The obligation is limited to such documents produced within the past year.

- **Names and contact information for top customers** of the filing party in areas of overlap.

- **Licensing arrangements** in areas of overlap, whether with the other party or others.

- **Descriptions of any non-compete or non-solicit arrangements** applicable to employees or business units related to overlap areas.

The FTC and DOJ would also dramatically increase the nature and type of information required in potential "vertical" deals, or those in which one of the deal parties sells products or services to the other party, or to its competitors, or both. This would include:

- **Listing each product, service or asset that either party has sold, licensed or otherwise supplied in the previous two fiscal years** (1) to the other party, or (2) to any other business that uses its product, service or asset to compete with (or as an input for) the other party's products or services. The parties would also need to provide sales data and the names and contact information for the top 10 customers of such product, service or asset along with a description of the agreement with the customer.

- Listing the same information above for **each product, service, or asset *purchased*** from (1) the other party, or (2) other businesses that competes with the other party in the development, product or sale of the relevant product, service or asset. This would include the identity and contact information of the top 10 suppliers of the relevant product, service or asset, as well as a description of the purchase or licensing agreement(s).

Companies likely to make HSR filings involving competitive deals may want to consider whether and how these expansive reporting obligations would affect not only their deal process, but also their process for generating and reviewing ordinary-course board and business documents that could be produced as part of the Periodic Report obligations.

Whereas current HSR filings require one to three weeks of work prior to submission, the proposed filing requirements will likely require substantially more time, especially among first-time filers, who will need to collect an extraordinary range of information that is not maintained or centralized in the ordinary course of business. Therefore, before the proposed rules become effective, companies need to work closely with deal and antitrust advisors to understand the nature and scope of these proposed changes, and the implications of such changes for their dealmaking process, document creation practices and flow, and HSR information and document collection practices.

If you have any questions about the NPRM or how the proposed rules may impact your business, please contact your Ropes & Gray attorney.