Antitrust Agencies' Proposed Changes to the HSR Form Will Dramatically Increase the Burden on Filers

By **Corey W. Roush**, **Gorav Jindal**, **Brian Rafkin** and **Mitchell E. Khader**

July 11, 2023

Key Points

- For the first time in nearly 45 years, the Federal Trade Commission (FTC), with support from the Antitrust Division of the Department of Justice (DOJ) (collectively, the "Agencies"), proposed a complete redesign of the Premerger Notification and Report Form (the "HSR Form"), which, if made final, would dramatically expand the scope of information required of all filing parties. Some of the most significant changes include:
  - Broadening the scope of documents required by (1) requiring draft competitive analyses of the transaction (so-called "Item 4" documents), (2) expanding the scope of individuals to be searched to deal team leads and (3) requiring ordinary course business plans seen by the executive team and all reports discussing competition provided to the board of directors.
  - Requiring interrogatory-like narrative explanations for the rationale of the transaction, and the horizontal overlaps and vertical relationships between the parties.
  - Making it more difficult to file on the basis of an indication of interest (e.g., a letter of intent, term sheet or similar non-binding agreement) by requiring a description of the agreement that contains "sufficient detail"—and more than what is typically included in such documents—to demonstrate that the proposed transaction is more than "hypothetical."
  - Expanding the requirements for identifying minority investors, and sweeping new requirements to identify officers, directors, board observers and other "key interest holders."
  - Creating new categories of information relating to competition for labor, foreign subsidies, defense/intelligence contracts, and identification of the filer's communications and messaging systems.
  - Requiring all filing parties to identify all communications and messaging systems and to certify that each has taken steps to suspend ordinary document destruction practices for documents and information "related to the transaction," regardless of whether the transaction raises any substantive antitrust issues.
- The Agencies acknowledge that the proposed changes will significantly increase the burden on HSR filers and estimate that, depending on the complexity of the filing, the new requirements will increase the preparation time (and cost) by between four times and **seven times** the current average.
- The proposed changes will exact a high toll on PE firms and hedge funds because they will be required to report detailed information about each of their holdings, **regardless** of whether the proposed transaction raises any substantive antitrust issues. Depending on the firm's structure, firms may be required to submit hundreds or even thousands of pages of information in each HSR filing.
- These broad changes also amplify the risk that the Agencies will deem a filing deficient and "bounce" it, causing the waiting period to restart or even require preparing and submitting a new filing (with a new filing

fee). Even where the waiting period has expired, the failure to supply complete information could later result in the Agencies seeking civil penalties (which, currently, are $50,120 per day for each violation).

- Frequent filers should consider implementing processes to systematically track the information that will be required pursuant to the proposed rule changes. Now, more than ever, it will be important to engage antitrust counsel early on in the deal process and to build in time for the transacting parties to cooperate and collaborate to collect information and prepare the HSR Form and accompanying materials.

The Antitrust Agencies' Proposed Changes to the HSR Form Will Dramatically Increase the Burden on Filing Parties

On June 27, 2023, the FTC, with concurrence of the DOJ, proposed an overhaul of the HSR Form, associated instructions, and the premerger notification rules implementing the Hart-Scott-Rodino (HSR) Act (hereafter, the "Proposed Rulemaking"). The Agencies published the 133-page Proposed Rulemaking in the *Federal Register* on June 29, which would make August 28, 2023, the deadline for submitting comments.

The Proposed Rulemaking will significantly increase the burden on **all filers** regardless of whether any competitive relationship between them exists. Considerable information that previously would have been provided only after the Agencies believed investigation may be warranted will now be required upfront. Here are the most significant changes to the filing requirements in our view:

Category	Current Rule	Proposed Change
Item 4 Documents	Unless interim drafts are provided to the full board of directors, filers are required to provide only final versions of certain documents prepared by or for officers or directors that analyze the competitive aspects of the transaction or its potential to generate synergies.	The Proposed Rulemaking will require filers to provide additional Item 4 documents, including: • **Draft Item 4 documents** (not just the final version). • Item 4 documents that are prepared by or for "supervisory deal team leads." • Board reports and certain semi-annual and quarterly ordinary course business plans that evaluate the competitive aspects of any overlapping product or service.
Information About the Transaction	Filers must describe the nature of the assets, voting securities or non-corporate interests to be acquired by the acquired person and of the acquired entity.	The Proposed Rulemaking will also require: • A **narrative explanation of <u>each</u> strategic rationale** for the deal (apart from the Item 4 documents required to be produced), with citations to supporting documents. • A diagram of the deal structure with an explanation of all entities involved. • A description of each of the filer's businesses and products/services (which could be extensive for conglomerates and private equity (PE) funds).

Category	Current Rule	Proposed Change
		A narrative timeline of key dates and conditions for closing.
Competitive Overlaps	Filers are required to report revenue for overlapping NAICS codes, identify the overlapping entities, describe geographies in which the filing parties both derive revenue, and identify prior acquisitions. The scope of information required to be provided is limited to **horizontal** overlaps (i.e., the parties are competitors).	The Proposed Rulemaking will require much more detail about the competitive relationship between the parties, including: • Identifying **current** and **potential future** horizontal overlaps (i.e., perhaps even where one or both parties may not even generate revenue), and for each overlap, filers must provide sales, customer information (including contact information), describe licensing arrangements, and describe relevant non-competes and non-solicitation agreements. • Detailed narrative explanations of any **vertical relationships** between the parties, including descriptions and copies of any contracts between the parties, and contact information for relevant customers and vendors. • Detailed information about potential **labor overlaps** (discussed further below).
Filings Based on Indications of Interest (e.g., Letters of Intent (LOI))	Currently, filers are permitted to file on the basis of "a contract, agreement in principle or letter of intent to merge or acquire" and an affidavit attesting the good faith intention to complete the transaction. Filing on an LOI, which is a common practice, enables parties to file HSR on the general metes and bounds of a transaction while continuing to negotiate the finer points of an agreement. There currently is no obligation to file a draft or final agreement, either upon HSR filing or after the HSR filing is submitted.	The Proposed Rulemaking will require parties to provide a term sheet or draft agreement with "sufficient detail" about the proposed transaction (although the Proposed Rulemaking indicates that typical LOI and other indications of interest do not meet the Agencies' view of "sufficient detail," the Proposed Rulemaking does not define what "sufficient detail" means other than requiring, elsewhere, a description of the timeline of key dates and conditions for closing). **The Proposed Rulemaking, therefore, will make it more difficult to file strictly on indications of interest like an LOI**.
Minority Investors	The HSR Rules currently require each filer to disclose the minority shareholders (5% or greater but less than 50%) of the acquiring/acquired entity. However, for limited partnerships, only the general partner(s),	The Proposed Rulemaking will require significantly more information about minority investors, including: • The minority holders of **all entities within the chain** between the acquiring person and the acquiring entity.

Category	Current Rule	Proposed Change
	regardless of percentage held, needs to be listed. The acquiring entity must also disclose the minority shareholders of the acquiring person (the ultimate parent) and provide additional information for overlaps involving minority holdings.	• **The limited partners** (which may include individuals or institutions that wish to maintain their privacy) that hold 5% or greater but less than 50% of each entity within the chain.
Officers, Directors and Board Observers	The current rules do not require the identification of officers, directors or board observers.	The Proposed Rulemaking will impose sweeping new requirements to identify officers, directors and board observers, including: • The officers, directors and board observers (or in the case of unincorporated entities, individuals exercising similar functions) of **all entities** within each of the acquiring person and the acquired entity. • **Any other entities** for which these individuals currently serve, or within the two years prior to filing have served, as officers, directors or board observers. *Unlike the requirement to identify minority investors (discussed above) and "other types of interest holders" (discussed below), this requirement covers **all entities within the acquiring person** without regard to those entities' involvement in the transaction. In other words, the acquirer must disclose **all** officers, directors and board observers for **all of its majority holdings**, even those that are wholly unrelated to the transaction being reported.
"Other Types of Interest Holders that May Exert Influence"	The current rules do not require the identification of "other types of interest holders that may exert influence."	The Proposed Rulemaking creates new requirements to **identify other types of interest holders that may "exert influence"** over any entity within the chain between the acquiring person and the acquiring entity. This includes: 1. Providers of credit totaling 10% or more of the value of the entity. 2. Holders of non-voting securities, options or warrants the value of which equals or exceeds 10% of the entity or could be converted to 10% of the company. 3. Having nomination rights for board members or board observers.

Category	Current Rule	Proposed Change
		4. Having agreements to manage entities related to the transaction.
Labor and Employment	The current rules do not require any information about labor and employment from the filing parties.	The Proposed Rulemaking creates a new "Labor Markets" category of information to screen for potential adverse competitive effects on labor. Among other requirements, the Proposed Rulemaking will require filers to: • Identify their five largest employee categories by six-digit Standard Occupational Classification (SOC) code, an employee classification system developed by the Department of Labor Statistics. • For each of the top five overlapping SOC codes, provide overlapping geographies using the Employee Research Service's-defined commuting zones, which the Department of Agriculture developed.
Additional Information Not Required by the Current HSR Form	-	Other new requirements of the Proposed Rulemaking include: • Requiring the filing to certify that it has implemented a document hold at the time of filing **for every HSR-reportable transaction**, whether the transaction raises competitive issues or not. • Identification of the filer's communications and messaging systems. • Requiring information about foreign subsidies and defense/intelligence contracts. • Submission of full English-language translation for all foreign-language documents.

As the Agencies' investigative history demonstrates, the vast majority of HSR-reportable transactions do not raise any substantive antitrust issues. Data from fiscal year 2021 (the most recent published by the Agencies that breaks down its investigations) show that out of 3,520 HSR filings, the Agencies initiated about 300 preliminary investigations, issued 65 Second Requests and challenged (or obtained abandonment) of 32 deals.[1] In other words, nearly 92% of all HSR filings were cleared without any agency inquiry and over 98% of all HSR filings were cleared without a Second Request. In this respect, the current HSR Form struck a balance between requesting basic information for all merging parties while reserving the Agencies' more time-consuming and costly requests for transactions that their investigations suggested could raise competitive issues.

The Proposed Rulemaking changes this by frontloading requests for considerable documents and data as part of every HSR Form. (The Proposed Rulemaking contains no exemption for any category of transactions). The Agencies estimate that the average HSR filing under the new rules will take nearly **four times** the amount of time required to prepare the current HSR Form. For more complex transactions, which the Agencies estimate to be **nearly half** (45%) of all filings, the Agencies estimate that the Proposed Rulemaking could increase the time required to prepare HSR filings by **seven times** the current average.

As support for their sweeping reforms, the Agencies cite international jurisdictions that request considerably more information, including narrative responses, compared to what is required in the current HSR Form. Some of these jurisdictions, such as the European Commission (EC) and the United Kingdom, also often include "pre-notification" periods where the filing parties submit draft forms to the agencies as part of the review process. But these jurisdictions do not typically request the production of documents and the volume of pre-merger notification filings that are made in the United States substantially exceed those in Europe because, in part, the jurisdictional thresholds for premerger reporting in the United States are much lower. There were 2,496 HSR filings in fiscal year 2022 (down from 3,520 in fiscal year 2021), versus less than 1,000 for each of the U.K.'s Competition and Markets Authority and the German Federal Cartel Office,[2] and just 371 for the EC.[3]

The Proposed HSR Rules Will Impose a Particularly High Burden on Private Equity and Hedge Funds

The Proposed Rulemaking will disproportionately affect serial dealmakers with complex business structures like private equity firms and hedge funds. Changes such as requiring identification of minority investors; the identification of officers, directors and board observers; and the identification of other types of interest holders who may exert influence could capture an enormous amount of information. Filing parties will find it more difficult to start the HSR waiting period quickly and it will become a practical necessity for firms to systematize, track and frequently update this information. The Proposed Rulemaking may also cause PE and funds to work through privacy and other contractual issues if they must disclose the identities of relevant directors, officers, board observers and other individuals that may have a relationship with the firm.

Practical Considerations

- Parties to HSR reportable transactions will need to account for the additional time that will be required to prepare an HSR filing. Today, most transaction agreements provide for five or 10 business days (one to two weeks) to submit HSR filings. In some deals—especially simple deals with no competitive overlap or transactions for frequent filers—HSR filings can be submitted even more quickly. Under the Proposed Rulemaking, however, considerably more time will be necessary (~20 business days (four weeks)), or more for antitrust sensitive or complex deals.
- Companies that do frequent deals should consider implementing processes to systematically track the information that will be requested in the new HSR Form. Without adopting these processes, frequent filers may find it difficult to get on file and start the initial waiting period. These companies will also need to quickly implement appropriate document retention practices to comply with the new HSR reporting requirements.
- Filing parties should consider engaging antitrust counsel early. Given the volume of new information and documents requested, filing parties and their counsel will need to devote considerable resources and collaborate closely to identify and describe overlaps, vertical relationships and collect other materials that the new HSR Form will require. Indeed, the Agencies hail the importance of "information provided by the parties themselves and certified as a complete response" as a motivation for the proposed changes.[4] These changes, however, dramatically elevate the risk that the HSR filing could be found to be deficient, exposing the transacting parties to delay or significant penalties.

Email Banner Text Here

If you have questions about this client alert, please contact any Akin lawyer or advisor below:

Corey W. Roush
croush@akingump.com
+1 202.887.4115

Gorav Jindal
gjindal@akingump.com
+1 202.887.4234

Brian Rafkin
brafkin@akingump.com
mailto:email@akingump.com
+1 202.887.4158

Mitchell E. Khader
mkhader@akingump.com
+1 202.887-4585

[1] FY2021 HSR Annual Report.

[2] CMA Annual Report and Accounts 2021/22; Bundeskartellamt Annual Report 2021/22.

[3] EC Statistics on Mergers cases.

[4] Proposed Rulemaking, at 8-9.