

CLIENT ALERT

# US Antitrust Agencies Propose Sweeping Overhaul of Merger Notification – Comments Due by August 28

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## AUTHORS

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On June 27, 2023, the Federal Trade Commission (the “FTC”) and U.S. Department of Justice (the “DOJ”) published a 133-page notice of proposed rulemaking (the “HSR Rulemaking”), outlining amendments to the premerger notification form and instructions under the Hart-Scott-Rodino Act of 1978 (“HSR”), and changes to corresponding rules.<sup>1</sup> The proposed amendments will not take effect until after a 60-day notice and comment period, which ends August 28, 2023. If the rule changes are adopted as proposed, they would constitute the first major revision of the HSR form since the HSR rules were enacted 45 years ago.

The agencies’ stated goal in proposing these changes is to better understand, upon initial submission of the HSR form, “deal rationale,” “how a particular investment vehicle is structured,” and other “key aspects of competition.”<sup>2</sup> The HSR Rulemaking would require filing parties to provide expanded disclosure on many competition issues, some of which have

<sup>1</sup> *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178 (June 29, 2023) (initially proposed by the FTC on June 27, 2023, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p239300\\_proposed\\_amendments\\_to\\_hsr\\_rules\\_form\\_instructions\\_2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf)).

<sup>2</sup> FTC, *Statement of Chair Lina M. Khan Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules* (June 27, 2023), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement\\_of\\_chair\\_khan\\_joined\\_by\\_commrs\\_slaughter\\_and\\_bedoya\\_on\\_the\\_hsr\\_form\\_and\\_rules\\_-\\_final\\_115p.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_115p.pdf).

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been at the forefront of the Biden administration’s antitrust enforcement efforts, such as vertical business relationships among the filing parties and their affiliates, potential impact on labor, and effects on potential competition.

The changes would require a substantially more comprehensive merger filing that resembles the European practice, though the HSR changes notably do not provide a lighter burden for transactions that are unlikely to raise competitive concerns, as the EU merger regime does with its simplified procedures ([which will be expanded as of September 2023 when the “Simplification Package” applies](#)). We agree with many initial reports that the new HSR rules would burden transactions, even those by financial buyers, with longer HSR preparation periods and would require considerably more detailed transaction descriptions and transaction-related document productions. The HSR Rulemaking itself estimates that the new requirements will increase the time required to prepare an HSR filing by 107 hours on average (to a total of 144 hours), and the workload will increase to 222 hours for deals that present competitive overlaps.<sup>3</sup> This likely understates the increased burden and cost on filing parties.

The proposed HSR changes are subject to modification at the discretion of the FTC and DOJ following the comment period. We list below some of the more significant features of the proposal and will provide a more detailed bulletin in the coming weeks.

- More information about a partnership buyer would be required, including the disclosure of passive limited partners that hold a significant partnership interest;
- The “strategic rationale” for the transaction would need to be included;
- More documents concerning the transaction would need to be produced, including superseded drafts, as well as other agreements between the parties beyond the primary acquisition agreement and restrictive covenant agreements;
- The obligation to supply documents discussing the competitive landscape would be enlarged, as to both the subject matter of such documents, and the custodians that would have an obligation to provide documents:
  - The scope of the covered custodians would be expanded beyond “officers and directors” to also include the “deal team lead”;
  - The document production obligation would expand to include certain ordinary-course periodic strategic business documents that relate to the products, services or markets involved in the transaction, and that were circulated (but not created) in connection with the reported transaction;

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<sup>3</sup> 88 Fed. Reg. 42178, 42207-08.

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- The document production obligation would be expanded to include superseded drafts of documents that were shared with officers, directors, or deal team leads;
- The form would require (for the first time, and in an effort to align more closely with typical merger control filings outside of the U.S.) a narrative “Competition Analysis,” which would include:
  - A “horizontal overlap” narrative, that would require the parties to list current or planned products or services that compete (actually or potentially) with a product or service of the other party, along with somewhat granular details on sales, customers (including contact information), licensing arrangements, and relevant restrictive covenants applicable to employees or business units;
  - A “supply relationships” narrative, describing existing or potential “vertical” relationships between the filing parties, as well as between a transaction party and a third party that uses a filing person’s products, services, or assets to compete with the other filing person;
  - Information about the workforce of each reporting person, with an obligation to classify their workers into occupational categories based on the Bureau of Labor’s “SOC” system, and to provide certain “geographic” market information and information concerning worker and workplace safety (as the agencies have had concerns about a transaction’s impact on the applicable labor markets);
- The current “NAICS” and “NAPCS” revenue disclosure rules would be modified in a number of ways, including (but not limited to) the following:
  - If multiple NAICS codes could apply to a product line or revenue stream, a reporting person must list all codes that could apply (rather than using good faith to select the best code);
  - The filing person must identify the specific business units that relate to a particular NAICS code;
  - An acquiring person would need to identify NAICS codes that would apply to certain pipeline or pre-revenue products or services, if that future product or service is likely to overlap with a product or service of the acquired entity;
- The obligation to provide basic information for “prior acquisitions” (where the acquiring person previously acquired an entity that generated revenue in an “overlapping” NAICS code) would be broadened as follows:
  - The obligation would extend to acquisitions that were consummated in the past ten years (the current look-back is five years);

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- The obligation to limit the disclosure to acquisitions of equity of entities that meet a certain sales or asset threshold would be removed (thereby bringing into scope small acquisitions that heretofore could be omitted);
- The obligation would be extended to the “acquired person” as well (currently, only the “acquiring person” reports “prior acquisitions”);
- The parties would need to identify any non-U.S. jurisdiction that is, or will be, conducting a competition review (this is currently a voluntary request), and the form would provide a voluntary “waiver check-box” that, if checked, would permit the U.S. agencies to confer with other agencies on a more transparent basis.

Willkie attorneys are well situated to assist clients with drafting comments on the proposed changes and to help clients navigate these significant changes should they be adopted. We are happy to discuss the proposed rule changes and the impact they may have for both private and public transactions.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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