Insight

Changes to Hart-Scott-Rodino Act a Boon for Lawyers, Not for Competition

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Executive Summary

- The Federal Trade Commission and the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice have proposed changes to the rules and instructions used to enforce the provisions of the nearly 50-year-old Hart-Scott-Rodino Act, which established the federal premerger notification program.
- The proposed overhaul of the federal premerger notification system would mandate far more extensive reporting requirements, dramatically raising the regulatory burden of firms intending to undergo mergers and acquisitions.
- While the proposed changes promise to be a boon to antitrust lawyers, there is little evidence the changes will promote competition; they would, however, almost certainly delay deals or simply cause them to be abandoned.

Introduction

The Federal Trade Commission (FTC) and the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice (DOJ) recently proposed amendments to the rules and instructions that enforce the provisions of the nearly 50-year-old Hart-Scott-Rodino Antitrust Improvements Act (HSR).

The HSR, enacted in 1976, established the federal premerger notification program, which requires certain businesses planning mergers and acquisitions to notify the antitrust agencies before consummating the transaction. The current premerger filing threshold is for deals valued at more than $111.4 million. The law also mandates a waiting period of 30 days to afford the antitrust agencies time to determine if the deal violates the antitrust laws, including Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition or tend to create a monopoly.

Firms subject to the premerger notification program would need to submit significantly more information than previously required by the agencies. This burdensome regulatory barrier, while a boon to antitrust lawyers, would likely delay deals and threaten legitimate merger activity, and would increase paperwork burdens by hundreds of thousands of hours and compliance costs by hundreds of millions of dollars. Furthermore, transactions that are contingent on market conditions could be disrupted or simply abandoned.

Hart-Scott-Rodino Act

The Hart-Scott-Rodino Act established the federal premerger notification program, which requires companies involved in mergers of a certain value to fill out a form providing details of the merger to the antitrust agencies,

as well as pay an associated filing fee. The law also mandates a waiting period of 30 days from filing before the merger can be consummated, which is intended to provide the antitrust agencies time to review the material and determine whether the deal violates antitrust laws, including Section 7 of the Clayton Act.

The agencies, noting that this is the first overhaul of the rules implementing the law in 45 years, assert that the "proposed changes stem from a top-to-bottom review of the information collected in the HSR Form," and that the new information required will "improve the efficiency and efficacy of the premerger review."

Proposed Changes

The antitrust agencies argue that the information provided in the current premerger filing documents is insufficient to conduct a thorough investigation in the 30-day waiting period. They assert that "transactions ha[ve] become more complex over time," and thus require more information through the premerger filing process.

There are several significant proposed changes to the information that must be reported on the HSR form, including information on foreign subsidies, details of the firms involved, and specifics of the transaction.

The new reporting form will require that parties attempting to merge "provide information on subsidies received from certain foreign government or entities that are strategic or economic threats to the United States." This requirement stems from amendments in 2022 to the HSR Act included in the Consolidated Appropriations Act of 2023, in which Congress asserted that "foreign subsidies…'can distort the competitive process…or otherwise change the incentives of the firm in ways that undermine competition.'"

The antitrust agencies will also require additional information about the specifics of the proposed deal. The FTC alleges that preliminary agreements, which include "indication of interest, non-binding letter of intent, or agreement in principle," and which are often submitted to satisfy current reporting requirements, lack sufficient detail. The agencies propose replacing these preliminary documents with draft agreements or term sheets that describe "with sufficient detail the scope of the entire transaction." Moreover, any initial HSR filing would be required to include a verbatim translation of all foreign language documents, rather than just a summary.

The FTC and DOJ also propose adding a new requirement that filers "provide a narrative that would identify and explain each strategic rationale for the transaction." Expected information would include "competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other reporting person, expansion into new markets, hiring the sellers' employees…obtaining certain intellectual property, or integrating certain assets into new or existing products, services or offerings." The new requirement is designed to check for consistency among the newly required narrative and other HSR documents, and to ensure it is "not mere advocacy designed to portray a favorable view of the transaction."

Furthermore, the agencies will require that businesses now disclose workplace-related safety violations by both the acquiring firm and the acquired firm during the five-year period before filing to merge. The agency asserts that such measures "may be indicative of a concentrated labor market where workers do not have the ability to easily find another job."

Item 8 on the current HSR form requires the acquiring firm to disclose prior acquisitions made within the last five years based on certain criteria. The agencies plan to expand the scope of this section by requiring the

acquired entity to disclose this information, as well and extend the time frame from five to 10 years.

A complete list of changes to the HSR filings can be found here.

The proposed changes promise to be a boon for antitrust lawyers, but there is little evidence that additional reporting requirements would promote competition. After reviewing the HSR filing, the FTC or DOJ can ask for additional information through a "second request." This second request affords the agencies time to seek additional information, and the HSR Act prohibits firms from closing mergers until they have complied. Data from the FTC and DOJ's Hart-Scott-Rodino Annual Report for Fiscal Year 2021 showed that while 3,520 transactions were reported in that year, only 65 of those transactions involved a second request. Therefore, the vast majority of transactions did not immediately raise antitrust concerns. Moreover, 417 of the transactions were granted early termination, meaning the firms did not have to wait the full 30-day waiting period before consummating the merger. Subjecting all firms to such a regulatory burden that could require a second request, even when most transactions pose no threat to competition, wastes valuable resources and time for firms seeking to merge and for the agencies reviewing the material.

Cost Estimates

The FTC provided a cost estimate of its proposed overhaul in the proposed amendments document:

- Time spent preparing current form: 37 hours
- Forty-five percent of filings may require an additional 222 hours to prepare
- Fifty-five percent of filings may require an additional 12 hours to prepare
- Totaling: 107 additional hours on average
- New total: 144 hours per filing (nearly four times as long)

The FTC projects in fiscal year 2023 that 7,096 filings will be affected. This would come to an additional 759,272 hours required to complete the form (107 hours/filing x 7,096 filings).

In dollar terms, the FTC assumed an hourly wage of $460 for executive and attorney compensation. Using that dollar amount, and the estimated 759,272 additional hours required to complete the form, firms seeking to merge would need to spend an additional $350,000,000 in labor costs.

The FTC's cost estimate does not consider the additional cost of delaying a transaction, another effect of the added paperwork burden. Delaying mergers and acquisitions, specifically those that are contingent on market conditions, risks lowering the value of the planned transactions or abandoning them altogether.

When firms evaluate potential mergers and acquisitions, revenue and profit projections are part of the process. Firms expect that synergies will enable the merged firm to lower costs, increase output, and even create new products or services. The increased compliance burden as proposed in the HSR rule and form changes threatens to postpone the projected timetable of when these increased revenue and profit streams will be realized, likely by several months. This presents an additional economic cost.

For example: A newly merged firm projected that the synergies of its transaction would yield an additional $1 million in revenue per month. If the increased compliance burden postpones the consummation of the merger for three months, the firms would lose $3 million in foregone revenue.

Furthermore, lengthening the time to close a merger introduces additional risks. Changes in valuations, new market opportunities, or new buyers can all contribute to deals being abandoned. Often, merger and acquisition deals include a termination fee paid to compensate the purchaser for costs associated with the deal if it is abandoned. This fee typically ranges from 1–3 percent of the deal's value. An abandoned deal valued at $1 billion would have an associated termination fee of $30 million.

Excluding these costs from the total cost estimate understates the full effect of the overhaul's increased paperwork and time burdens.

Conclusion

While the FTC and DOJ's proposed overhaul of the premerger notification filing form and rules implementing the HSR Act promise to be a boon to antitrust lawyers, there is no evidence it will promote competition. It will, however, likely delay deals and threaten legitimate merger activity, as well as increase paperwork burdens by hundreds of thousands of hours and compliance costs by hundreds of millions of dollars. Furthermore, transactions that are contingent on market conditions could be disrupted or simply abandoned.