NEW YORK CITY BAR

REPORT ON FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE DRAFT HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT IMPLEMENTATION RULES, AND PREMERGER NOTIFICATION AND REPORT FORM AND INSTRUCTIONS

BY THE ANTITRUST & TRADE REGULATION COMMITTEE

DOJ & FTC Draft HSR Act Implementation Rules and Premerger Notification Form and Instructions

Pursuant to Section 7A(d) of the Clayton Act, the Federal Trade Commission ("FTC"), with the concurrence of the Department of Justice ("DOJ", together the "Agencies"), is proposing amendments to the premerger notification rules ("Rules") that implement the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") and to the Premerger Notification and Report Form ("Form") and Instructions ("Instructions"). These proposed changes would result in a redesign of the premerger notification process through both a reorganization of the information currently required and the addition of new information and document requirements. In addition, these changes would implement the Merger Filing Fee Modernization Act of 2022. The proposed amendments would involve changes to both the Rules and the Instructions, and the FTC proposes explanatory and ministerial changes to the Rules as well as necessary amendments to the Instructions to effect the proposed changes.

THESE DRAFT RULES ARE DISAPPROVED

The New York City Bar Association ("City Bar") does not support the draft HSR Act Rules ("Draft Rules"),[1] which set forth changes to the current Form that has been substantially unchanged since 1978. We suggest that any gains obtained by the Draft Rules will be dwarfed by the costs. At the least, any revision of the current Form that is adopted to require material beyond that requested in the current Form—and the Merger Filing Fee Modernization Act of 2022—

[1] Press Release, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review?utm_source=govdelivery; *see also* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements; 16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements - Q and A on the Notice of Proposed Rulemaking for the HSR Filing Process (June 29, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

should be applied only to the small minority of notified transactions that warrant additional scrutiny under Clayton Act §7. The remaining supermajority of clearly unproblematic transactions should continue to report only lesser amounts of information, consistent with that required under the current Form. Otherwise, the net result of the Draft Rules would be a tax on transactions, deterring pro-competitive transactions and leading to a less vibrant and competitive market for transactions.

It is unclear that much of the additional material that is required in the Draft Rules will significantly advance enforcement of Clayton Act §7. The changes will also potentially create uncertainty as to whether or when the agencies will accept filings as complete. Beyond the agencies' recent policy decision not to grant early termination of the HSR waiting period, the Draft Rules create additional unnecessary uncertainty for deals that do not raise material concerns, and treat all deals as likely warranting requests for additional information.

I. A SIMPLIFIED FORM SHOULD BE RETAINED FOR THE VAST MAJORITY OF TRANSACTIONS THAT DO NOT RAISE COMPETITIVE CONCERNS

The Agencies state that they "are responding to evidence that the U.S. economy is becoming increasingly concentrated overall."[2] The Draft Rules are needed because "despite the Agencies' efforts to prevent market consolidation through merger enforcement, many markets suffer from a lack of robust competition and mergers continue to cause harm."[3] In her statement joined by the two sitting commissioners, FTC Chair Khan stated "the information currently collected by the HSR form is insufficient for our teams to determine, in the initial 30 days, whether a proposed deal may violate the antitrust laws."[4]

However, only 2-3% of transactions notified over the past decade have led to requests for additional information.[5] The FTC states that:

> In the past five years, approximately 45% of filings had reported overlaps. To estimate an average number of additional hours, the Commission conservatively assumes that 45% of the filings may require an additional 222 hours to prepare and 55% may require an additional 12 hours to prepare. Thus, the Commission estimates an average of 107 additional hours (rounded to the nearest hour) will be allocated to non-index filings. Added to the current estimate 37 hours, the total estimated hours would be 144 per filing."[6]

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2 88 Fed. Reg. at 42179 (footnote omitted).

3 Id.

4 Statement of Chair Lina M. Khan, joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300 at 3 (June 27, 2023), 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_130p_1.pdf.

5 HSR Annual Report FY2021, Appendix A, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

6 88 Fed. Reg. at 42208 (footnotes omitted).

Presumably, the 2-3% of transactions that warrant closer scrutiny are within the 45% of notifications requiring 222 additional hours to complete. Therefore, by the FTC's own calculations, over 40% of notifications will require 222 additional hours for no apparent gain in enforcement of Clayton Act §7. For the other 55%, the FTC estimates parties would waste 12 additional hours per notification, for no reason at all.

Moreover, some of the new requirements in the Draft Rules may be burdensome or difficult for parties to practically administer in deals that do not raise material concerns. For example, parties would be required to submit a much broader range of documents than is required for Items 4(c) and 4(d) of the current Form. The Draft Rules would require production of documents prepared by or for the "supervisory deal team lead" (in addition to officers and directors). The Draft Rules would also capture documents not prepared for the transaction and draft documents (in addition to final versions). It would require detailed information including customer contact details for all putative overlapping products and services. This is a significant departure from the current, more practical, approach taken in the initial waiting period under the HSR Act, where the parties consult with the Agencies' staff under a voluntary access letter to narrow the scope of such requests to the principal areas of concern.

Therefore, the City Bar urges the Agencies to reconsider requiring such in-depth disclosures from notifying parties for the supermajority of notified transactions that do not raise significant competitive concerns. In particular, the Agencies should consider retaining a simplified form applicable to the vast majority of transactions that do not raise significant competitive issues. Retaining a simplified form for no or low-issue transactions that reduces information or documentary requirements based on objective thresholds would be consistent with other jurisdictions that allow for such a procedure, such as the EU, China, and Brazil.[7] In Canada, parties may choose to submit a more detailed competitive analysis in a request for an Advance Ruling Certificate in lieu of or in addition to a standard review form in deals that raise significant substantive considerations.[8] These approaches would reduce the burden on both the filing parties and the Agencies without significant adverse effect on the Agencies' work under §7.

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[7] For example, the European Commission allows for a "Short Form CO" for certain transactions not meeting specified thresholds, such as joint ventures within the European Economic Area that have turnover and assets below €100m, combinations where there is no horizontal or vertical overlap between the parties (or where a horizontal overlap exists but no combined market share equals or exceeds 20%), or combinations where neither party has a market share equal to or exceeding 30% in a market upstream or downstream of another party. A Short Form CO requires significantly less market information from the parties and in general is less burdensome for filing parties. *See* Commission Implementing Regulation (EU) 2023/914 of 20 April 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0914&qid=1693684514393. Likewise, Brazil allows for a "fast-track" procedure, with similar thresholds for qualification. CADE Resolution No. 33/2022, https://www.in.gov.br/web/dou/-/resolucao-cade-n-33-de-14-de-abril-de-2022-394063356. China also allows for a simplified procedure, applied to almost 90% of unconditionally cleared deals in 2021. Interim Provisions on Applicable Standards for Simple Cases of Concentration of Undertakings (promulgated by the Anti-Monopoly Bureau of the Ministry of Commerce, Feb. 13, 2014), http://www.mofcom.gov.cn/article/b/c/201402/20140200487038.shtml.

[8] See Competition Bureau Canada, Overview of the Merger Review Process, https://ised-isde.canada.ca/site/competition-bureau-canada/en/mergers-and-acquisitions/overview-merger-review-process.

II. THE DRAFT RULES IMPOSE SUBSTANTIAL COSTS THAT DWARF ANY GAINS TO CLAYTON ACT §7 ENFORCEMENT

The Draft Rules include far greater disclosure requirements on notifying parties than the current Form. These proposed changes include requiring narratives on the competitive assessment of each proposed transaction, historical data covering issues such as directors and labor violations, and other requirements that may be difficult for parties to satisfy. The City Bar appreciates the desire for changes due to factors such as increasingly complex markets and for aligning the U.S. merger control process with other jurisdictions' requirements. However, if applied universally to all transactions subject to notification under the HSR Act, the costs of these changes far exceed their likely benefits, because, historically, under 5% of all notified transactions have received a request for additional information.

A. The Draft Rules Require Substantial Market Information with Little Guidance on their Relevance or Scope

The City Bar respectfully suggests the FTC consider providing more detailed guidance on the requisite upfront market information needed from parties, and including more detail on the Agencies' decisional practice that could inform the parties on their information gathering.

Unlike the Agencies' current practice of relying on the parties' existing internal documents, the Draft Rules would require parties to include substantial narrative information on the relevant markets at issue in the transaction. This information is potentially relevant to the assessment of a transaction's competitive effects. However, the requirement as drafted creates significant uncertainty as to the appropriate scope of the narrative. It appears to require a subjective analysis by parties and their counsel as to what would be responsive. This potentially enables the Agencies to deem a filing incomplete if they disagree with the narrative provided.

The Draft Rules do not require the parties to define the relevant markets and provide market shares. However, it requires parties to include information on the relevant markets in the proposed transaction and suggests that parties must conduct an analysis of their "market presence."[9] The required horizontal overlap narrative asks each party to provide overviews of its "principal categories of products and services (both current and planned)" and identify where those products/services compete or could compete with the other parties. The parties are then required to provide their respective sales and customers in the categories identified in the narrative. The Draft Rules similarly require the parties to provide narratives on the existing or potential vertical (or supply) relationships between them. Parties are required to provide information on "sales to the other filing person and to any other business that, to the best of the filing person's knowledge, uses its product, service, or asset as an input for a product or service that competes or is intended to compete with the other filing person's products or services."

This requirement for the parties to describe the "principal categories" of competitive products and services provides little context for how putative markets should be determined. Since the Draft Rules do not expressly require the parties to identify a relevant antitrust market, parties may not have the benefit of established competition law principles to guide the scope of their

[9] 88 Fed. Reg. at 42196.

narratives. Moreover, in those jurisdictions that require parties to define relevant markets in their notification, this definition is often an iterative process requiring prenotification with the relevant authorities and incorporating multiple alternative putative markets. The process provided under the HSR Act does not allow for such an iterative process. In addition, an iterative process is ill-suited to the vast majority of transactions subject to notification under the HSR Act, which raise no significant competitive concerns.

Therefore, the City Bar urges the Agencies to: (1) provide clearer guidance on how to satisfy the new narratives requirements, such as on defining the relevant scope of competition in the narratives;[10] and (2) publish ongoing guidance on their approach to market assessment, and/or on specific industries, so that parties may provide more meaningful input on market definition.[11] For example, the European Commission publishes all final decisions from both Phase I and Phase II reviews on its competition website.[12] This guidance assists future notifying parties in determining market definition, because parties have in-depth market definition precedent at their disposal.

B. The FTC Should Eliminate the Requirement for Historical Information Irrelevant to the Assessment of a Transaction's Competitive Effects

The Draft Rules also require notifying parties to provide increased amounts of historical information on their businesses, including as to directors, agreements, and labor violations. The relevance of much of this information to the forward-looking assessment under §7 of the competitive impact of the proposed transaction is unclear in many cases. The burden on the parties in collecting this historical information significantly outweighs the potential materiality.

For example, the Draft Rules require historical information on all current officers, directors, and board observers of any entity within the notifying entity, as well as those who have served in the position within the past 2 years.[13] For each officer, director and board observer identified, parties are directed to list all other entities for which the individual serves, or has served within the last two years, as an officer, director, or board observer. This historical information is burdensome for parties to compile, particularly without limitations (e.g., restrictions to competing products or services, or limitations on entities outside the United States). Its value for the assessment of the future competitive effect of the transaction is de minimis.

The Draft Rules also expand the scope of other historical information required. For example, the Draft Rules (1) expand the time frame for reporting prior acquisitions in competitively relevant lines of business, from five to ten years before the notification, (2) eliminate the $10 million reporting threshold, which required only prior acquisitions of entities that had $10

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[10] For example, the European Commission is in a consultation to revise its 1997 notice on market definition, which sets out the EC's approach to the basic principles of defining a market, the evidence used to define markets, the process of gathering evidence, and the considerations in calculating market shares. Review of the Commission Notice on the definition of relevant market for the purposes of Community competition law (Nov. 8, 2022), https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice_en.

[11] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

[12] Commission Policy: Search Competition Cases https://ec.europa.eu/competition/elojade/isef/index.cfm.

[13] 88 Fed. Reg. at 42212.

million in revenue or assets in the year pre-acquisition to be reported, and (3) extend the requirement to the acquired entity.[14] The fact that a business was acquired more than 5 years ago has limited if any relevance to the potential competitive effects of the current transaction, especially if the acquisition was by the acquired entity.

In addition, the Draft Rules require information on labor violations, requiring identification of any findings against the parties by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration during the five-year period before the notification.[15] Parties are also required to affirmatively disclose non-solicit terms in existing agreements with employees.[16] The burden of compiling this information is potentially significant for companies with a large workforce, and the additive value of this historical information is de minimis to the assessment of the impact of the transaction on competition for labor (even if it may reveal prior bad acts relating to labor).

The Agencies do not give clear guidelines on how this historical information is to be used and should either eliminate requests for this historical information or provide more clarity as to why this information is needed to assess the potential competitive impact of the notified transactions. If the Agencies take the latter approach, then they should reduce the scope of the historical information covered by the Draft Rules (particularly as to directors and labor violations).

The HSR Rules (and thus the Draft Rules) were intended under the HSR Act to "strengthen the enforcement of [§7 of the Clayton Act] by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated."[17] Premerger review enables the Agencies to challenge acquisitions on competition grounds before they are consummated. The HSR Act is not intended for identifying and addressing past harms. Requiring this historical information in the Draft Rules is an inappropriate mechanism for enforcement of other laws, such as against historical interlocking directors in potential violation of Clayton Act §8. The HSR Act is not intended to give the Agencies leverage to negotiate commitments to address historical violations of laws unrelated to the future competitive effect of the transaction. The use of the suspensory mechanism of the HSR Act to incentivize settlements as to historical conduct is ultra vires.

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[14] Id. at 42203.

[15] Id. at 42198.

[16] "For each such overlapping product or service, the filing person would provide … any non-compete or non-solicitation agreements applicable to employees or business units related to the product or service." Id. at 42196. It is unclear how such agreements, if pre-existing, are relevant to the potential competitive impact of the notified transaction. And if such agreements are entered into in connection with the transaction, they would be included in the transaction documents in the HSR notification without any need for separate disclosure. Moreover, even in jurisdictions where such agreements are restricted, there are exceptions for agreements in the context of the sale of a business.

[17] H.R. Rep. No. 94–1373 at 5 (1976).

Antitrust & Trade Regulation Committee
Yee Wah Chin, Chair
Rachel Webb, Secretary

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