

# FTC/DOJ Propose Expanded Pre-Transaction Reporting Requirements

On June 27, the Federal Trade Commission (FTC), joined by the Department of Justice (DOJ), announced its proposal to amend pre-merger reporting rules that implement the Hart-Scott-Rodino (HSR) Act of 1976. The new rules would require entities seeking to merge to provide more information and details on their transaction. This latest move by the federal antitrust enforcement agencies is consistent with ongoing efforts to promote competition in the U.S. and may act to slow down consolidation trends in the healthcare industry.

## What is the Existing Reporting Process

The original rules were promulgated in 1978 pursuant to the [Hart-Scott-Rodino \(HSR\) Antitrust Improvements Act of 1976](#), which requires transactions meeting a certain threshold value (adjusted annually based on gross national product) to be reported to the FTC and DOJ using the HSR form and wait at least 30 days before closing (see [15 U.S.C. § 18a](#)). In 2023, the threshold value is currently set at [\\$111.4 million](#).

The [current HSR form](#) adopted under existing rules asks for only short responses regarding the entities and the transaction and does not require any market analysis. This initial or first filing is required of all transactions meeting the threshold and allows the agencies to conduct an initial review for 30 days. At the end of that initial review period, the agencies could allow the transaction to proceed or issue a second request if it is

determined that more documents and information are necessary for further investigation. According to [FTC report](#), from 2012 to 2021, second requests occurred in about 2-4% of the transactions reported, often due to lack of resources.

If a second request is issued, the parties to the transaction must submit documents and data relating to market conditions and competitive effects of the transaction. Upon submitting all required information, the FTC/DOJ have another 30 days to conduct a final review. However, the typical review time is [closer to a year](#), as the agencies may reset the waiting period at any time during the investigation if any information is deemed missing.

### **Why Is it Being Updated**

In amending the rules, the FTC noted that the current rules were promulgated 45 years ago, and the merger and acquisition landscape has changed significantly since then. In recent decades, new investment vehicles and changes in corporate acquisition strategies such as private equity have garnered increasing scrutiny. At the same time, the proliferation of various forms of consolidation is further complicated by the development of digital platform and information technology. Moreover, there is increasing concern that existing antitrust review does not sufficiently address competitive concerns in non-horizontal consolidation including vertical and [cross-market mergers](#).

President Biden's [Executive Order](#) issued in 2021 also called for enforcement agencies to strengthen their antitrust guidance and to create and enforce new rules. Since then, the FTC and DOJ have shown that they are willing to go to new lengths in their enforcement agenda, including [unwinding consummated mergers](#) and

challenging vertical and [cross-market mergers](#) that are sweeping through the nation. In early 2022, the agencies announced their agenda to [update merger enforcement guidelines](#) and requested public comments. In February this year, the DOJ [withdrew](#) decades-old antitrust enforcement guidance that allowed antitrust safety zones for certain healthcare agreements, with recognition that healthcare markets are much more concentrated than when the guidelines were originally written in 1993. The FTC [followed suit](#) on July 14. The amendment of the premerger rules is another step forward to strengthen federal antitrust enforcement in the slew of updates.

## **What are the Proposed Changes**

This proposed update would collect more in-depth information relating to all aspects of the transaction at the initial stage. Rather than requiring only short responses on the HSR form as part of the first filing, the new reporting rules require narrative summaries that include competitive effect of the transaction. The proposed new rules are published at [88 FR 42178](#) as of June 29 and would require additional reporting that include:

- [Draft forms of documents](#): for all agreements and deal documents including term sheets;
- [Information about the entities](#): including all acquisitions involving the entity within past 10 years, information on all officers, directors, creditors that hold non-voting securities, options, and other non-controlling entities and interest holders that may exert influence;
- [Description of transaction](#): explanation of reason for transaction, structure of deal and entities involved such as private equity investment, corporate relationship,

timeline and conditions for closing, any foreign jurisdiction that may review the deal;

- Analyses of market impact: potential overlap in the market, both horizontal and non-horizontal, labor market analysis.

Essentially, the updated rules would require entities to provide all relevant documents and information about the transaction upfront, rather than supplying them only when the agencies determine they are required for further investigation by second request.

## **What Does it Mean and What's Next**

Given limited agency resources, most current HSR filings provide only limited information and do not result in second requests for detailed information. Under the new proposed rules, the additional disclosure of information at the initial stage would provide the FTC and DOJ with a better overall picture of the transaction and its potential effect, allowing the agencies to more effectively evaluate the transaction. It would also reduce the need to request additional information, which could delay the review process. In particular, the requirement to provide detailed entity information including [organization structure](#) and ultimate parent entity would help enforcement agencies better capture new consolidation trends involving private equity investment, which has been structuring deals to try to avoid review.

While the new rules are unlikely to change the number of transactions being reported, they may lengthen the amount of time it takes entities to prepare their filings for review. Currently, the FTC estimated it takes about 37 hours for entities to complete and submit their filings pursuant to

reporting requirements. The new requirements may add another 100 hours to the existing amount of time. This requirement could potentially slow down the reporting process as entities take longer to compile more comprehensive materials for submission. This longer and more onerous process, along with the ability for enforcement agencies to better review and challenge deals for antitrust violation, could in turn curtail consolidation trends.

The FTC and DOJ will take public comments on the proposed changes for 60 days since the publication date, which ends on August 28. The new rules won't go into effect until after the FTC and DOJ publish a final version, which may take several months to complete. Be sure to stay tuned to The Source [Litigation and Enforcement Highlights](#) for the latest developments.