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Dramatic Overhaul Proposed to Hart-Scott-Rodino Pre-Merger Form

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The Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”) have proposed the most significant changes to the rules of the Hart-Scott-Rodino Antitrust Improvements (“HSR”) Act since they were first implemented in 1978. The proposed changes will greatly expand the volume of information that parties must submit with their HSR notifications and make HSR filing preparation significantly more time-consuming and burdensome.

The proposed rules are subject to the notice and comment process. Any new rules would not become effective until after the expiration of the notice and comment period on September 27, 2023 (extended from the originally proposed August 28, 2023 date) publication of a final rule by the FTC and DOJ, and then the establishment of the effective date. The soonest these rules could be implemented is fall 2023, though prior significant changes to the HSR rules have commonly taken between six and 18 months to become final.

Key Takeaways

While it is too early to predict how closely any final rules (if adopted) will follow the proposed rules, it is clear that leadership at both the FTC and DOJ envision adopting very substantial changes to the notification process. If adopted as is, you should be aware that:

- **HSR preparation will take significantly longer.** Today HSR notifications commonly are submitted within ten business days after a deal is signed, while many non-U.S. antitrust filings for the same deals (where required) take many weeks or even multiple months to prepare. The proposed rules would make the burden and time

required to prepare a U.S. filing equal to or greater than what is required in most non-U.S. jurisdictions. This is likely to lengthen the period between signing and closing for most HSR reportable deals, especially those that are not subject to foreign filing requirements.

- **The FTC and DOJ will get to see more of your internal documents with the initial HSR filing.** Under current rules, parties must submit the final version of any document that went to or from an officer or director that discusses competition or synergy issues in the transaction. The proposed rule would require production of all drafts of such documents, as well as any such documents and drafts that went to or from “supervisory deal team leads.” In addition, certain types of ordinary course documents that go to the CEO or her direct reports will need to be produced. Further, the proposal effectively requires a litigation hold because parties must certify that they have taken necessary steps to prevent the destruction of transaction-related documents.
- **You will need to explain competitive overlaps early in the review process.** Among countries that have merger reporting regimes, the U.S. HSR process has been somewhat of an outlier in not requiring parties to provide a narrative description of the rationale for the transaction and to identify each competitive overlap. The proposed rules would require parties to include such narrative descriptions.
- **Agencies will get a bigger “peek” at your operations.** Some of the new information requests focus on issues more often seen in antitrust “conduct” investigations than merger investigations. These include requests for information about non-compete agreements, interlocking directorships and labor market issues.

Comments will be accepted until late August. To the extent you have a viewpoint on these proposals, you may want to consider providing comments to help the FTC appreciate and assess the impact of these proposed changes.

Double-Clicking on the Proposed Rule

The proposed rule is dense and detailed. Below we explore some of the additional information and documents parties would be required to provide:

- **Expansive information about horizontal overlaps:** Each party would be required to describe each of its products or services that competes (or could compete) against those of the other party. For such products or service, each party would be

required to provide information about its top customers (including contacts at each), licensing agreements and any applicable non-compete or non-solicitation agreements.

- **Significant information about vertical relationships:** Each party would be required to identify and provide information about any products or services that it supplies to the other party, or that are used by third parties to compete with the other party's product or services.
- **Expanded document production requirements:** The HSR notification currently requires parties to provide the final version of each transaction-related document discussing competition, synergies or market issues if the document was prepared by or for an officer or director.
 - The proposed rules would also capture such documents if they were prepared by or for a "supervisory deal team lead," or drafts that went to an officer, director or supervisory deal team lead.
 - Parties would be required to produce all ordinary course semi-annual or quarterly plans for the last year that went to the CEO or her direct reports if such plans discuss market shares, competition, competitors or markets pertaining to any product or service where the parties compete.
 - Other requirements include the provision of organization charts, the identification of the individuals whose files were searched for responsive documents, and a list of all communications systems or messaging applications used on any device to transmit information and documents for its business operations. Finally, the parties must certify that they have taken "the necessary steps to prevent the destruction of documents and information related to the proposed transaction."
- **Additional information about the transaction, including antitrust-risk allocation provisions:** Parties will need to provide the rationale for the transaction and detailed timelines about the transaction and its terms. The information required will include descriptions of certain provisions related to antitrust risk allocation, such as termination fees and termination dates (and extensions thereof). If the HSR notification is made on a letter of intent rather than a definitive executed agreement, the parties must provide the most recent draft of the definitive agreement or term sheet.
- **Information about employees:** Each party will be required to classify each of its employees by six-digit Standard Operating Classification ("SOC") codes, disclose the five SOC categories in which it has the largest number of employees and identify each of the ERS Commuting Zones (of which there are 700+) in which both parties have employees that are classified in at least one of these five codes.

- **Identification of minority owners:** The HSR notification currently requires certain information about minority holders of 5% or more of the buyer, its ultimate parent entity and the acquired entity. Limited partnerships have only been required to identify their general partners. The new rules would expand the disclosure requirements to cover each 5% minority holder in a limited partnership and all 5% minority holders of direct and indirect subsidiaries of the buyer's ultimate parent entity.
- **Extensive information about board members and board observers:** The parties will be required to identify the officers, directors or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of each entity within the acquiring person and acquired entity for the past two years. For each such officer, director or board observer, the party would need to list all of the other entities for which these individuals have served in the last two years as an officer, director or board observer.
- **Prior acquisitions:** Under the expanded disclosure obligations of the new rules, parties must provide information related to the acquiring party's and acquired entity's prior acquisitions for the last 10 years, regardless of the value of such acquisitions. At present, only the acquiring person needs to report prior acquisitions (and those are limited to those over a threshold amount) for the last five years. The reporting requirement continues to be limited to acquisitions of entities or assets where the parties report overlapping NAICS codes in the notified transaction.
- **Foreign subsidies:** Each party must provide information on any subsidies received from certain foreign governments or entities that are strategic or economic threats to the U.S. The parties must also provide information on certain countervailing duties.
- **Defense and intelligence contracts:** Each party must disclose all pending or active defense or intelligence procurement contracts with the U.S. Department of Defense and any member of the U.S. intelligence community valued at \$10 million or more.
- **Worker and workplace safety:** Each party must identify all penalties or findings made against it by the U.S. Department of Labor's Wage and Hours Division, the National Labor Relations Board, and the Occupational Safety and Health Administration in the last five years, and any matters pending before these agencies.

Transactions subject to HSR notification requirements cannot close until both parties to the transaction have submitted their HSR notification and the HSR waiting period has been terminated or expired. For most transactions, the waiting period is 30 days, which can be extended by the FTC or DOJ by issuing a formal request for additional information (a "Second Request"). What is clear is that the additional burden and time

required to prepare HSR notifications will lead to longer lags between signing and closing unless parties start preparing their HSR filings substantially ahead of the signing of the transaction. If you would like to discuss the rulemaking and its potential impact on your filings, please reach out to any member of the Kirkland antitrust team.

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Suggested Reading

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- 31 July 2023 Press Release Kirkland Advises BC Partners on the Sale of IMA Group to BDT & MSD Partners
- 25 July 2023 Press Release Kirkland Represents BC Partners on Apollo Investment in PetSmart

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