HALL RENDER
KILLIAN HEATH & LYMAN

HEALTH LAW NEWS

JULY 20, 2023

FTC ISSUES PROPOSED RULE MAKING SUBSTANTIAL CHANGES TO THE PREMERGER HSR PROCESS

On June 29, 2023, the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") (together, the "Agencies") published a 133-page Notice of Proposed Rulemaking ("Proposed Rule") in the Federal Register to amend and overhaul the Hart-Scott-Rodino Form and Instructions ("HSR Form"), effectively redesigning the premerger notification process. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), as amended, requires all persons contemplating certain mergers or acquisitions that meet certain thresholds to file an HSR Form with the Agencies and wait at least 30 days before closing the transaction. The Proposed Rule will require a significant increase in the time and effort required to prepare an HSR Form.

BACKGROUND AND REASONING

According to Agencies, the current information provided in the HSR Form is insufficient to allow the Agencies to efficiently evaluate whether a proposed transaction will require further competitive review. Since the HSR Act was first ratified in 1976, transactions have become significantly more complicated and organizations have become more complex. The Proposed Rule, according to the Agencies, aims to ensure that the premerger review process keeps up with the evolving transactional landscape.

Specifically, the Agencies state that they currently receive an incomplete picture of a transaction, requiring reliance on additional information that can only be gained through voluntary cooperation with the relevant parties or other third parties. The Agencies believe that the Proposed Rule will allow for the collection of the most relevant information about a transaction and will facilitate a more efficient and effective review in order to decrease the need for submission or collection of additional information during the initial waiting period.

MAJOR CHANGES

While there are a vast number of changes in the Proposed Rule, below is a list of the key changes that will significantly increase the time and burden of preparing an HSR Form for health care providers:

1. **Officers, Directors, Board Observers.** Parties must list all current officers, directors, board observers and all individuals that have been in those positions in the last two years. Plus, for each individual identified, Parties must list all other entities for which they have served in the last two years as an officer, director, or board observer. This will allow the Agencies to identify whether there are any interlocking directorates that potentially violate Section 8 of the Clayton Antitrust Act.

2. **Written Narratives.** Parties must create written narratives as part of the filing. Some of these written narratives are akin to preparing and submitting white papers, which typically occurs after the HSR Form is submitted and only for transactions that have potential competitive concerns. These narratives will take a substantial amount of time to prepare and include:
   a. **Transaction Rationale Narrative.** Parties must provide a Transaction Rationale Narrative to explain the details and strategic rationale for the transaction, including:
      i. Current or planned products of a party that may compete with the current or planned products of the other party;
      ii. Expansion into new markets; and
      iii. Integration of certain assets into new or existing products, services, or offerings.

   b. **Horizontal Overlap Narrative.** Parties must submit a Horizontal Overlap Narrative, which must include a summary of the products and services offered by the parties, both current and planned, as well as details of any horizontal competition between the parties. For each existing or potential overlap, the parties will be required to provide sales, customer information (including contacts) and any non-competition or non-solicitation agreements applicable to employees or business units related to the overlapping products or services.

   c. **Supply Relationships Narrative**. Parties must submit a Supply Relationships Narrative. This narrative must include details regarding existing or potential vertical or supply relationships between the parties. Often, with sophisticated vertically integrated

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

health systems, there are many of these relationships between parties, so this narrative will likely take a substantial amount of time to prepare for health care providers.

d. **Transaction Timeline**. Parties must submit a timeline for the transaction, as well as a diagram of the deal structure with a corresponding chart to explain the relevant entities and individuals involved in the transaction.

3. **Ordinary Course Strategic Planning Documents**. Parties must provide ordinary course strategic planning documents that analyze market shares, competition, competitors, or markets. This will be a substantial expansion of documents that are required to be produced, as the current HSR Form does not require ordinary course documents to be submitted.

4. **Expanded Transaction Related Documents – More Custodians and Draft Versions**.
   a. Currently, the parties are required to provide documents prepared by or for an officer or director that analyze the transaction and include competition-type material (commonly known as Item 4 documents). The Proposed Rule expands the custodian scope from officers and directors to include the "supervisory deal team leads." In addition, the Proposed Rule requires all "draft" versions of documents to be provided. Currently, only "final" versions must be provided.

5. **Other Agreements between the Parties**. Parties must submit all agreements between the parties at the time of the filing, including licensing agreements, purchase agreements, and non-competition or non-solicitation agreements. For health systems, this could be an expansive list of agreements that could include clinical affiliation agreements, among others.

6. **Labor Market Information**. Parties must submit information about their labor force to allow the Agencies to estimate any potential effect the transaction will have on the relevant labor markets. The Agencies have recently enhanced their focus on competition in labor markets. This new section requires parties to provide information that will allow the Agencies to understand the overlap in labor markets.

7. **Expanded NAICS Code Revenue Reporting – Nascent Competition**. Parties must submit NAICS Code revenue for pipeline or pre-revenue products. Currently, parties only need to submit NAICS Code information for products or services that derived revenue in the last year. This change will allow the Agencies to understand overlaps for nascent competition, which has been another recent focus for the Agencies.

8. **Geolocation Data – Latitude/Longitude Information**. Currently, parties are required to provide street address information for physical locations. Under the Proposed Rule, parties will be required to provide latitude and longitude information for street addresses so the Agencies can populate mapping software.

9. **Expanded Prior Acquisition Information**. Parties must provide expanded information regarding prior acquisitions. Currently, only the buyer must report on prior acquisitions and only for those made in the last five years. The parties will both be required to report on prior acquisitions and for acquisitions made in the past ten years.

10. **Document Retention**. Parties must implement document holds to prevent the destruction of documents related to the proposed transaction before the expiration of the waiting period. This will likely require parties to think through and possibly update their document retention policies.

ADDITIONAL TIME/WORK BURDEN

According to the Agencies, the Proposed Rule will add an estimated average of 144 hours per HSR Form. Many practitioners believe this estimate is low and the additional requirements of the Proposed Rule will require far more work and time.

TIMING

The Proposed Rule was published in the Federal Register on June 29, 2023. A public comment period is now open until August 28, 2023. It is possible that the Agencies will extend the comment period, given the amount of interest. Once the Agencies review the comments, they will issue a final rule that may or may not include changes from the Proposed Rule. The final rule will become effective 60 days after publication in the Federal Register. Given the current resource limitations, high-interest levels will lead to high comment volumes and demands on the Agencies. As a result, we believe a final rule will not be published until sometime during 2024.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

PRACTICAL TAKEAWAYS

Once a final rule becomes effective, health care providers undertaking large transactions that are HSR reportable need to be prepared to start the HSR process sooner in the transaction and to put a significant amount of additional resources and effort into the HSR Form.

Additionally, increasing scrutiny and oversight of consolidation, particularly in health care, have been a top priority of both the Biden Administration and Congress. Both chambers of Congress have recently held hearings discussing consolidation's impact in health care resulting in bipartisan consensus to tackle this issue legislatively. With outspoken leadership in the Biden Administration keeping antitrust oversight front and center, expect more hearings and potential legislation coming out of Congress in the upcoming months.

These changes, especially when viewed in light of the Agencies' recent overhaul of the Merger Guidelines, signify that the bar for merging parties is rising significantly. Though both the updated Merger Guidelines and the Proposed Rule are not yet finalized, it is clear from both drafts that review of transactions by the DOJ and FTC, as well as HSR fillings themselves, are likely to become significantly more complex, and parties should expect to engage in more antitrust advocacy when undergoing mergers.

If you have any questions or would like to prepare and submit a comment, please contact:

- William Berlin at (202) 370-9582 or wberlin@hallrender.com;
- Michael Greer at (317) 977-1493 or mgreer@hallrender.com;
- John Bowen at (317) 429-3629 or jbowen@hallrender.com;
- Nathan Chubb at (202) 780-2991 or nchubb@hallrender.com;
- Abigail Kaericher at (202) 742-9674 or akaericher@hallrender.com;
- Hannah Clarke at (317) 429-3615 or hclarke@hallrender.com; or
- Your primary Hall Render contact.

Hall Render blog posts and articles are intended for informational purposes only. For ethical reasons, Hall Render attorneys cannot—outside of an attorney-client relationship—answer specific questions that would be legal advice.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.