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HSR Proposed Rulemaking – Comprehensive Redesign of the Premerger Notification Process

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By: Jennifer R.M.C. Watson

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The Federal Trade Commission (“Commission”) published a proposed rulemaking to amend the premerger notification rules (“Rules”) that implement the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”). The proposed Rules will change the premerger notification process and information to be provided to the Commission in the HSR premerger notification filing form (“Form”).

While numerous revisions to the Form are proposed, as the Commission’s goal for the proposed Rule is to provide its staff with more information about a transaction, such as the filers’ business and individuals or entities that influence the relevant business lines, this snapshot will focus on one material new reporting item in the Form concerning subsidies from foreign entities of concern, followed by a bullet point list of some of the other proposed changes.

In the Rules, the Commission is implementing legislation passed in the US Infrastructure and Jobs Act, where “Congress determined that foreign subsidies can distort the competitive process or otherwise change the incentives of the firm in ways that undermine competition following an acquisition and are particularly problematic when provided by entities or countries that are strategic or economic threats to the United States.” Thus, the Form will be revised, and parties must report subsidies from “foreign entities of concern.”

A “subsidy” to be reported is as defined in the Tariff Act of 1930 (19 U.S.C. 1677(5)(B)), but generally takes the “form of direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control.”

A “foreign entity of concern” is as defined in 42 U.S.C. 18741(a)(5)(C). The definition of a “foreign entity of concern” is slightly complex but includes subsidies from Russia, China, North Korea, and Iran. However, the definition could consist of other subsidies as well because it is not limited to those nations but also includes subsidies from (1) those designated as a foreign terrorist organization, (2) anyone on the Specially Designated Nationals List administered by OFAC, (3) owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation, (4) those alleged by the U.S. Attorney General to have been involved in activities that a conviction was obtained pursuant to various laws, such as the Espionage Act, the Arms Export Control Act, or Export Control Reform Act of 2018 among others, or (5)

determined by “the Secretary, in consultation with the Secretary of Defense and the Director of National Intelligence, to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.”

Other proposed revisions to the Form include the following, which the Commission believes will provide their staff with complete information to evaluate the effects of the proposed deal on competition:

- A narrative identifying and explaining “each strategic rationale for the transaction.”
- Providing a transaction structure diagram and a corresponding chart explaining the entities and individuals involved.
- Currently, the Form permits filing based on a letter of intent or other contract for the transaction (including the definitive agreement), whereas the proposed Rules would now require (if not filing based on the definitive agreement) a draft of the agreement or term sheet describing in “sufficient detail” the scope of the transaction that will be consummated.
- In addition, the proposed Rules require filers to “produce all agreements, including schedules, exhibits, and the like, that relate to the transaction, regardless of whether both parties to the transaction are signatories.”
- Filers must provide verbatim English translations with all foreign-language materials submitted.
- Creates a new “Labor Markets” section requiring the filer to provide information about its top 5 largest categories of employees to permit the Commission to evaluate the impact of the deal on labor markets.
- Additional narratives will be required, including: (1) a complete description of the business of the filers, their various lines of business and product and service information, and (2) identifying “current and potential future horizontal overlaps and supply relationships between the filing persons”.

The Commission estimates, depending upon the parties to a deal and its complexity, that the completion of the Form by each party could result in 12 to 222 additional hours to prepare the Form under the proposed Rules compared to the current Form.