Legal Update Article

FTC Proposes Amendments to Hart-Scott-Rodino Disclosures, With Changes Focusing on Workplace Issues

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The Federal Trade Commission (FTC), with "concurrence" of the assistant attorney general for the Antitrust Division of the U.S. Department of Justice (DOJ), has issued a Notice of Proposed Rulemaking (NPRM) proposing significant amendments to the Premerger Notification and Report Form filed by parties in connection with the antitrust review of mergers and acquisitions (M&A) above a certain monetary threshold (currently, $111.4 million). The proposed amendments add new — and onerous — disclosure requirements concerning the workforce composition of the transaction parties.

The proposed amendments also require disclosures of labor and employment-related administrative actions in which the transaction parties have been involved in the prior five-year period.

Hart-Scott Rodino Act and FTC and DOJ's Role in M&A Review

The FTC and DOJ jointly enforce the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR). HSR requires parties to a covered transaction to disclose information about the transaction and its impact on competition and to wait to close the transaction for a certain period of time while the Antitrust Division or FTC reviews that information. If either agency has antitrust concerns, then it may issue a "Second Request" seeking far-more-detailed information and extending the period before the transaction can close.

Workforce-Related Inquiries in Amended Form Proposed by NPRM

The amended Form proposed by the NPRM would require parties to a qualifying transaction to disclose the following workforce information:

1. The aggregate number of employees of the filing party (the Form must be filed by both the acquiring party and the acquired entity) for each of the five largest occupational categories. The occupational categories are to be identified by the Standard Occupational Classification (SOC) code published by the U.S. Bureau of Labor Statistics.

2. The five largest SOC codes in which both parties employ workers. These are referred to in the proposed amended Form as "overlapping employee classifications."

3. For each overlapping employee classification, each ERS commuting zone (a classification developed by the U.S. Department of Agriculture) in which both parties employ workers and the aggregate number of employees in each ERS commuting zone with that SOC job classification.

4. Any "penalties or findings" issued, in the prior five years, against the filing party by the Wage and Hour Division of the U.S. Department of Labor's (DOL), including the: (i) decision or issuance date; (ii) case number; and (iii) a description of the penalty or finding.

5. Any "penalties or findings" issued, in the prior five years, against the filing party by the National Labor Relations Board (NLRB); including the: (i) decision or issuance date; (ii) case number; (iii) JD number; and (iv) a description of the penalty or finding.

6. Any "penalties or findings" issued, in the prior five years, against the filing party by the Occupational Safety and Health Administration (OSHA), including the: (i) decision or issuance date; (ii) case number; and (iii) a description of the penalty or finding.

The FTC explains that these requirements are intended to provide it and the DOJ greater insight into the labor-market effects of the proposed transaction, particularly "whether the transaction may substantially lessen competition for buyers of labor services." The FTC's rationale for the requirement of disclosing agency "findings and penalties" is that "[i]f a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job."

Ambiguity in the Term "Findings"

The labor inquiries in the proposed amended Form are ambiguous in their use of the terms "findings." This terminology does not match the procedural terminology used by the relevant agencies, which could create confusion in attempting to comply with the disclosure obligation.

For example, OSHA issues Citations and Notifications of Penalties (CNPs). Those CNPs contain allegations, which may be contested by an employer. Therefore, employers should be concerned about this FTC requirement because it may require disclosure of CNPs that are the subject of litigation or even CNPs that have been withdrawn by OSHA or dismissed by the Occupational Safety and Health Review Commission.

FTC and DOJ's Interest in Focusing on Labor Market Impacts

This NPRM follows a pattern of increasing interest by the FTC and DOJ in labor and employment.

On March 10, 2022, the DOJ and DOL signed a memorandum of understanding to facilitate collaboration, information sharing, and coordinated investigations and enforcement activities. On July 19, 2022, the FTC and NLRB signed a similar memorandum of understanding to, among other things, engage in "information sharing and cross-agency consultation on an ad hoc basis for official law enforcement purposes[.]" It was clear at the time that a primary focus of both interagency agreements was to increase scrutiny of labor and employment practices as part of the antitrust review of M&A transactions.

The NPRM also reflects FTC Chairperson Lina Khan's well-documented view that the legal framework for antitrust analysis should extend beyond consumer pricing, its focus since the 1960s. As Chair Khan has made clear in her published works and speeches, she believes that consumer pricing is just one criterion among many that should be considered in reviewing mergers and acquisitions for antitrust concerns. This new NPRM proposes to bring several of those additional criteria into play, particularly the labor-market effects of such transactions.

This is the second significant proposed rule published by the FTC this year purporting to target labor market abuses. The FTC's proposed rule on non-competes was published in January. The comment period on that controversial proposed rule has closed, and the

FTC is in the process of reviewing more than 25,000 comments submitted.

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It is difficult to overstate the additional burdens the FTC's proposal would impose on transaction parties. Much of this burden flows from new requirements to disclose workforce information. Even if the Form is amended as the FTC proposes, it remains to be seen how FTC and DOJ will use the disclosed labor-market information and what weight they will place upon it in deciding whether to subject a transaction to a Second Request or to challenge a transaction. Interested clients are encouraged to submit comments to the FTC during the comment period, which closes on August 28, 2023.

Please contact a Jackson Lewis attorney with any questions.