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The demands of premerger notifications — 2024

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Antitrust premerger reviews have been and are undergoing a substantial change. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) (collectively, the Agencies) recently completed their first "top to bottom" review of the Premerger Rules since they were adopted nearly 45 years ago.

The recent and planned changes make it critical that merging parties anticipate their premerger filing and notification requirements even as they negotiate, plan, and construct their deal. From the beginning, merging parties must get all their records in order and preserve information responsive to any future investigation, including ephemeral data.

Failure to "get it right" may result in costly and potentially deal-killing delays as the parties ward off compliance reviews and answer hard questions about possible spoliation of evidence, or worse.

Under the Hart-Scott-Rodino (HSR) Act, merging parties are required to report certain transactions to both Agencies before they are consummated. Parties must then wait 30 days (15 days in the case of cash tender offers (CTOs)) so the Agencies can review their agreement(s) for antitrust concerns.

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If the Agencies decide to investigate a transaction, they can issue a "Second Request" requiring the companies to submit additional information. The parties must then wait until 20 days (10 days in the case of CTOs) after they have complied with the Second Request before they may consummate.

Although this reporting and review process has been in place since the premerger law and regulations went into effect years ago, the landscape of the reporting and review process in 2024 is markedly different.

Implications of future changes started to become apparent when Lina Kahn became Chair of the FTC in June 2021 and expressed her concerns about anticompetitive transactions that either were not challenged or that were resolved with inadequate remedies.[1] Jonathan Kanter, Assistant Attorney General for the DOJ Antitrust Division, said very much the same thing when he took on his new role in the DOJ in November 2021.

Shortly after Kahn's statement, in September 2021, the FTC announced changes to its Model Second Request to make the process "more streamlined and efficient." Henceforth, parties could expect Second Requests demanding information about, among other things, labor market effects, cross-market effects, and the involvement of investment firms and their effect on market incentives.

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FTC staff were instructed not to grant modifications of any Second Request without first securing certain "foundational information." The FTC also abandoned its practice of allowing parties to submit truncated privilege logs relating to documents held by certain key custodians.[2]

A single statistic illustrates the impact of these changes. In 2022, the first full year under Kahn's and Kanter's leadership, the Agencies granted early termination in five transactions. In contrast, the Agencies granted early termination to 1,107 transactions in 2019 and 861 transactions in 2020, the last two full years before Kahn and Kanter took their respective posts.[3]

Fewer early terminations and more robust Second Requests, however, are not the entire story. The number of Second Requests appears also to have declined. Traditionally, only a small percentage of transactions triggered Second Requests.

In 2022 (the most recent year for which statistics are published), only 1.6% of transactions warranted further inquiry, and most (55.3% of all Second Requests) involved transactions valued at over $1 billion. This is a smaller percentage than in 2019 and 2020 (3% and 3.1%, respectively) or, for that matter, in any prior year since at least 2013.[4]

The 2022 statistics show the Agencies are looking at initial premerger filings more closely but forgoing Second Requests more frequently. But even if the reduced ratio of Second Requests is a long-term phenomenon and not just a one-year blip, that is not necessarily good news for merging parties. As part of the "amped up" scrutiny of mergers, in June 2023, the Agencies proposed the most significant revision of the premerger notifications rules ever.[5]

Simply put, the proposed rule amendments (the Proposed Rules) and accompanying explanations take up nearly 120 columns (40 pages) in the Federal Register. The new Proposed Rules, even if adopted in modified form, will require companies to submit more detailed and expansive information than has been required in the past.

The FTC asserts that it is prepared to seek monetary penalties, which accrue daily, for inadequate filings that are uncovered (perhaps in the context of a later matter) well after the review process has concluded.

According to the Agencies' estimation, the new requirements will require some parties to expend an additional 382 hours of time and resources to prepare the initial filing alone.[6]

The need for increased time and resources is not only because of the additional details that must be provided with the initial filing, but it also relates to the expanded focus of the Second Request process mentioned earlier in this article. The Proposed Rules will move much of this work to the initial premerger notification report.

Parties may likely need to submit detailed information about their market analyses (including drafts), research and development activities, prior acquisitions, their board members, the cross-market effects of their transaction, the role of investment firms in the market, and their employees and the labor markets from which they draw talent, including information about overlapping employee geographic commuting zones and any findings and penalties that U.S. labor agencies have made or imposed against the parties.

With the additional information, the Agencies will examine transactions that once flew under the radar more closely before deciding whether to issue a Second Request. Accordingly, merging parties planning reportable transactions must be fully prepared even before they file their initial premerger notifications with the Agencies. The ramifications for merging parties are substantial, costly, and potentially deal-killing.

Even prior to the Proposed Rule, compliance with a premerger investigation was a daunting task. In the past, the Agencies sought detailed information about products and services, competitors, customers, suppliers, production and sales costs, company plans, entry barriers, and many other components of company data.

In 2024, they still request all that information and more. Merging parties need to be prepared to produce their data retention policies as well as detailed data maps, along with providing masses of electronic files and communications — including ephemeral communications — and obtain data and information, not only from the corporate entities but from a broad range of individual custodians within the entities.

Considering the volume of electronic data requested by the Agencies, it is nearly impossible, in the absence of skilled reviewers and highly qualified service providers, to do a timely comprehensive assessment of documents and sort those that are responsive to any likely government demand from the irrelevant and the privileged from the non-privileged.

These complexities of review multiply dramatically when ephemeral communications are added to the mix, and the reviewers are required to assess threads of communications from myriad custodians and data sources.

Some merging parties, typically those who frequently use the premerger program, have been able to anticipate premerger investigations. Therefore, they have kept a current library of core records and documents readily accessible to facilitate reasonably prompt responses to Second Requests.

This approach can be good practice because responses to Second Requests can be time-consuming, resource-demanding, and expensive. But even with such advanced preparations, those same companies are finding it increasingly difficult to anticipate the full scope and depth of antitrust scrutiny that will confront their transactions.

Keeping tabs on all the information the Agencies may demand has become a more complex effort, and companies often find that the requests reach beyond their preparation. Nonetheless, they continue to try to stay ahead.

Any delay in the merger investigation process runs the risk of undermining the value of a transaction. High-quality employees may seek alternative employment, and customers facing uncertainty and concerns about post-merger supply and pricing may look for alternative suppliers.

In periods of economic uncertainty and fluctuating interest rates, financing for a transaction may be unstable, and relatedly, the tax implications — and, therefore, the timing — of a transaction can be critical.

In 2024, all merging parties, including small and mid-sized firms, need to be able to prepare their premerger filings expeditiously and, most important, correctly to complete their transactions and not be delayed or blocked by compliance questions from the Agencies.

They must review and understand where all of a company's data resides, be prepared to institute an appropriate legal hold over all relevant data, including ephemeral communications, and ensure that data retention policies are current, complete, and followed.

Any doubt about the correctness of this view should be set aside in light of the FTC's reminder in March 2023 that inadequate premerger notifications may be "bounced," even after a Second

Request has been issued, and parties will be forced to restart the process.

Similarly, the FTC asserts that it is prepared to seek monetary penalties, which accrue daily, for inadequate filings that are uncovered (perhaps in the context of a later matter) well after the review process has concluded.[7]

More recently, in a joint statement that amplifies the seriousness of efforts to get all the information they may demand, no matter the context, the FTC and the DOJ warned that they "expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges."[8] To be blunt, few things could be much worse for a company than having a carefully planned transaction die at the hands of a wholly ancillary criminal inquiry.

The new demands facing merging parties paint a simple and obvious conclusion: before filing any premerger documents, parties planning mergers need to have all their records in order, accounted for, and readily accessible. Merging parties also need to have a solid idea about which of their communications are privileged and, therefore, free from disclosure, and which are not.

Further, merging parties need to be able to identify privileged documents and clearly explain why they are privileged. In 2024, with the increased demands of the Agencies, small failures of merging parties can have significant consequences. Implementing approaches to get one's house in order, however, can result in a more efficient and successful merger process.

Notes:

[1] *See* Letter from Lina M. Khan, FTC Chair, to Hon. Elizabeth Warren, U.S. Sen. (Aug. 6, 2021), https://bit.ly/3PHUUrP.

[2] *See* H. Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, FTC (Sept. 28, 2021), https://bit.ly/3TWfh6b.

[3] Hart-Scott-Rodino Annual Report Fiscal Year 2022, Appendix A, https://bit.ly/3TUlsIP ("HSR Rpt."). Also, in early February 2021, the FTC with the concurrence of the Department of Justice temporarily suspended the grant of early terminations in merger cases. *See, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination*, FTC (Feb. 4, 2021), https://bit.ly/43BCoHj. The 2022 statistics should therefore reflect the period following any "temporary" suspension.

[4] HSR Rpt. at App. A.

[5] 88 FR 42178 (June 29, 2023).

[6] *Id*. at 42218.

[7] H. Vedova, *Spring Meeting updates*, FTC (Mar. 31, 2023), https://bit.ly/3vD2IEn.

[8] Office of Public Affairs FTC and DOJ Update Guidance Collaboration — Ephemeral (01.26.24)(DOJ); FTC and DOJ Update Guidance Collaboration — Ephemeral (01.26.24)(FTC).

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