

FTC ISSUES RULEMAKING FOR MAJOR REVISION OF HART-SCOTT-RODINO M&A REPORTING OBLIGATIONS

July 3, 2023

On June 27, 2023, the U.S. Federal Trade Commission (“FTC”) issued a Notice of Proposed Rulemaking (“NPRM”) to sharply revise and stiffen reporting obligations for Mergers & Acquisitions, Joint Ventures and other qualifying transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR” (§ 7A of the Clayton Act, codified at 15 U.S.C. §18a)). The proposed revisions constitute the most major overhaul of HSR reporting in 45 years. A copy of the NPRM can be found [Here](#).

HSR rules (16 CFR Parts 801 and 803) require the parties to certain qualifying acquisitions of any voting securities or assets of the acquired party to notify the FTC and Department of Justice (“DoJ”) of the transaction on the FTC’s “Premerger Notification and Report” (the “HSR Form”) and await the expiration of a mandatory waiting period (30 days generally, 15 days in the case of a cash tender offer) prior to the closing. The thresholds for reportable transactions under HSR are revised and published annually by the FTC. HSR reporting obligations for 2023 for most kinds of transactions arise when: (a) either the acquiring party (“Acquirer”) or the acquired party (“Target”) is engaged in U.S. commerce or in any activity affecting U.S. commerce; *and either* (b) as a result of the transaction, Acquirer would hold voting securities or assets of Target in excess of \$445.5 million (increased from \$403.9 million in 2022) *or* (c) as a result of the transaction, Acquirer would hold voting securities or assets of Target in excess of \$111.4 million (increased from \$101.0 million) but not in excess of \$445.5 million *and* (i) either the Acquirer or Target has total assets or annual net sales of at least \$222.7 million (increased from \$202.0 million) *and* (ii) the other party has total assets or annual net sales of at least \$22.3 million (increased from \$20.2 million). Transactions not exceeding the \$111.4 million threshold are not reportable under HSR. However, it is important to realize that relatively small M&A transactions can qualify for mandatory HSR reporting under the foregoing thresholds: a very small or mid-market asset or stock acquisition that resulted in tipping the \$111.4 million threshold – *inclusive of Target voting securities or assets already held by Acquirer* - could be a mandatory reportable transaction. Many mid-market M&A parties seem to believe that HSR reporting is strictly the preserve of mega-transactions and not to be worried about in the mid-market. They’re wrong; that is not the case.

HSR reporting has been on the FTC’s radar screen since the beginning of the Biden administration and Chairperson Lina M. Khan’s tenure as part of a more activist and restrictive M&A regulatory agenda, and we have reported on developments regularly: in 2021, the FTC issued a warning to M&A parties not to seek to avoid HSR reporting by structuring deals to retire Target debt rather than pay cash consideration that would

exceed the reporting thresholds; also in 2021, the FTC issued a report analyzing 616 tech sector transactions valued at \$1 million or more that were not reported under HSR, finding that 94 of them should have been reported (see, “FTC Sets Ambitious M&A Enforcement Agenda,” September 29, 2021; and “FTC Warns on Use of Debt Retirement,” September 17, 2021, both available with other M&A resources at [Kurtin PLLC Mergers & Acquisitions](#)).

In the June 27, 2023 NRPM, the FTC proposes to amend the HSR Form to require M&A parties to provide:

- reporting of market-distorting subsidies, including direct subsidies, grants, loans (including below-market loans), government ownership, guarantees and other devices granted to M&A parties by foreign (non-U.S.) entities to include foreign governments and agencies potentially posing a strategic threat to U.S. interests where those subsidies can allow the a higher and therefore more competitive bid than a non-subsidized bidder would be able to make;
- separate HSR Form filings by Acquirer and Target;
- draft deal documents and term sheets as well as all transaction-specific agreements;
- information on party ultimate parent entity structure, including organizational structure and related investment vehicles and corporate relationships;
- information on the type and details of the proposed transaction, business operations of Acquirer and Target, assets or voting securities to be acquired; a transaction organizational structure diagram;
- details about strategic transaction rationale, synergies, competitive overlaps, projected revenue streams, transactional analyses and internal documents describing market conditions, and structure of entities involved such as private equity investment vehicles;
- contracts (existing or pending) by a transaction party with the Department of Defense or intelligence community valued at \$10 million or more;
- details regarding related transactions and previous acquisitions; and
- labor markets information and disclosure of information that screens for labor market issues by classifying employees based on current Standard Occupational Classification system categories.

The proposals, if adopted, would severely increase the burden and time consumption of HSR reporting and likely increase the number of transactions contested, conditionally granted, or blocked by the FTC and DoJ. Comments on the NPRM are due 60 days following publication in the Federal Register.

Owen D. Kurtin

Kurtin PLLC is a New York City-based law firm focused on corporate, commercial and regulatory representation in the Biotechnology & Life Sciences, Communications & Media, Information Technologies, Blockchain & Internet, Satellites & Space and Venture Capital & Private Equity sectors. For further information, please visit our website at <https://kurtinlaw.com> and contact info@kurtinlaw.com.

The materials contained in this advisory have been prepared for general informational purposes only and should not be construed or relied upon as legal advice or a legal opinion on any specific facts and circumstances. The publication and dissemination, including on-line, of these materials and receipt, review, response to or other use of them does not create or constitute an attorney-client relationship.

To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

These materials may contain attorney advertising. Prior results do not guarantee a similar outcome.

Copyright © Kurtin PLLC 2018-2023. All Rights Reserved.