



## FTC Proposed Changes to M&A: Navigating Middle-Market Deals

The recent FTC proposed changes to merger and acquisition (M&A) filing requirements have the potential to directly influence your middle-market M&A strategies. If the changes become law, the demand for detailed transaction information and the need for ongoing compliance would present significant new hurdles for large- and mid-sized transactions. Company executives and dealmakers may need to reassess the regulatory risk profile of deals and be more strategic about how they are structured. It is important to be informed about how each transaction aligns with the evolving antitrust perspectives to ensure that your M&A strategies are resilient and adaptable to regulatory changes.

### FTC Proposed Changes to M&A Filing Requirements

In June 2023, the Federal Trade Commission (FTC) released a set of proposed changes to the Hart-Scott-Rodino (HSR) Act premerger notification form that would drastically increase the filing requirements for large M&A transactions.<sup>1</sup> These changes are still pending. However, if they are adopted into law, they would impact M&A deals with transaction values equal to or above the current reporting threshold of \$111.4 million, as well as those below the threshold that may become subject to review. Under the current HSR Act, companies proposing these deals are required to submit a premerger notification form and wait at least 30 days for approval before closing.

FTC Chair Lina Khan's stated aim is to update the filing requirements to reflect the realities of the modern economy where M&A transactions have become much more complex. Khan believes that under the current filing requirements, the 30-day waiting period is not enough time for the FTC to screen complex deals.<sup>2</sup> She argues that to accurately detect anticompetitive mergers and properly address antitrust concerns within this timeframe, the FTC needs much more information from the companies involved. Essentially, companies would bear the responsibility of not just informing the FTC about the deal, but also convincing them that the deal is not anticompetitive.

The proposed changes would require that companies submit detailed information on all aspects of the intended deal. Companies would have to explain the scope of the transaction, the deal structure, and the strategic rationale for the deal. The FTC wants to examine the deal in the context of the companies' deal histories and would require them to report on all of their mergers in the last decade. The parties would need to turn over information that typically remains confidential, such as the identity of private equity fund limited partners, or that may not be readily available. They would also need to report on the current state of the market and their position within that market. Following the acceptance of the premerger notification form, the FTC would expect further submission of drafts of certain transaction-related documents and regular market updates to ensure FTC compliance.<sup>3</sup>

## **The Potential Effects of the FTC's Proposed Changes on Middle-Market M&A**

The FTC's desired changes to merger filing requirements and other M&A regulations threaten to heavily burden middle-market M&A transactions that require HSR filing by making the process more time-consuming, expensive, and uncertain. The FTC estimates that if the new filing requirements are implemented, the average time to complete the premerger notice would increase from 37 hours to 144 hours. This could add weeks if not months to the approval process.<sup>2</sup> Cross-border mergers could face even greater delays by increasing the number of documents that must have English translations.<sup>3</sup>

In negotiating interim operating covenants that govern what companies can and cannot do between signing the purchase agreement and closing the transaction, companies would need to consider the possibility of working under those terms for 12 to 18 months while the mountain of paperwork is being completed. This increased amount of time and work would lead to higher costs to complete the process and a greater risk of something going wrong. Companies already have to pay a fee to file HSR forms, which ranges from \$30,000 to \$2.25 million depending on the size of the deal, plus the cost of legal and other advisors.<sup>4</sup> Adding extra costs to complete additional paperwork on top of this expensive filing fee would significantly burden mid-sized companies.

The FTC also wants to implement these new rules to more closely scrutinize M&A transactions. More scrutiny may lead to more opposition to deals. If the FTC challenges more transactions, the risk that buyers will incur additional costs to defend their applications, suffer "dead deal costs," or even pay an antitrust reverse termination fee (ARTF) to the sellers will increase. This piles on yet more potential expense. Compared to larger corporations, middle-market companies do not have as many resources, which may limit their ability to do certain deals if the proposed changes are enforced.

Beyond the additional filing requirements, the FTC is also considering broadening the scope of what it deems to be anti-competitive. Under Lina Khan, the FTC has been promoting a shift in the focus of antitrust law beyond the scope of consumer welfare to encompass other threats to competition.<sup>4</sup> The exact parameters of this broadened focus have not been clearly defined. How the FTC plans to enforce this also remains vague and unclear. Since revising its enforcement policy in 2022, the FTC no longer must provide clear evidence of anti-competitive harm, but instead may simply find that the companies' actions are "anti-competitive."<sup>5</sup> Uncertain definitions and enforcement of antitrust law make it difficult to predict whether a merger will raise antitrust concerns. In combination with the proposed changes to the merger filing process, the unpredictability of whether the FTC will oppose a deal may discourage middle-market companies from doing mergers above the government threshold.

## **Navigating M&A Regulations and Antitrust Concerns**

Understanding and adapting to regulatory changes in the M&A landscape is crucial to completing successful M&A transactions. Companies can benefit immensely from the guidance of investment banking firms during the process. M&A professionals possess the insight and experience necessary to help identify potential antitrust concerns and use proactive M&A strategies to help clients navigate regulatory hurdles. If the FTC challenges a deal, investment bankers can explore strategic alternatives that align with the client's goals.

With our focus on middle-market M&A, Balmoral Advisors is uniquely positioned to guide middle-market companies through changing M&A regulations. At Balmoral Advisors, we effectively navigate and address concerns, regulations, and hurdles; and balance our clients' key priorities to facilitate successful transactions. This comprehensive approach ensures that our clients are not only compliant with the latest M&A regulations but are also positioned to succeed in the years to come.

In a recent pivotal role, Balmoral Advisors demonstrated our experience advising on a critical divestiture as part of a larger M&A transaction. In that assignment, the FTC and other nations' merger authorities had challenged a proposed acquisition (\$1+ billion value) on anti-competitive grounds. In discussions with the authorities, the Buyer and Seller were able to narrow down the concern to a specific set of product lines. After multiple iterations, the Buyer consolidated the product lines into a specific facility and group of manufacturing assets and engaged Balmoral Advisors to complete the divestiture. Besides the significant challenge of selling assets that had been carved out and pieced together from other business units, we were also constrained by what kind of buyer would be accepted by the merger authorities. The acquiror had to satisfy the authorities that the carved-out business would remain competitive. Facing a short list of qualified buyers and mounting pressure from the Buyer and Seller to expedite the transaction, we ran an accelerated process. In the end, we successfully located a buyer who met the approval of the merger authorities, enabling the closing of the larger transaction.

For middle-market companies seeking a knowledgeable and reliable partner, Balmoral Advisors offers the expertise, support, commitment, and strategic approach needed to navigate M&A regulations with confidence to achieve long-term success.

### Let's Talk

Contact us for a discrete consultation to explore how Balmoral Advisors can help you reach your goals.

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<sup>1</sup> [FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review](#)

<sup>2</sup> [Khan Rewrites the Merger Rulebook](#)

<sup>3</sup> [M&A Deals Face Additional Scrutiny under the FTC's New HSR Reporting Rules](#)

<sup>4</sup> [Lina Khan's rise was heralded as an antitrust revolution. Now she has to pull it off](#)

<sup>5</sup> [It's time Congress break up Lina Khan's monopoly over antitrust reform](#)