

U.S. Antitrust Agencies Finalize Expanded HSR Notification Rules and Requirements

October 11, 2024

On October 10, 2024, the U.S. Federal Trade Commission (the “FTC”), with the collaboration and concurrence of the U.S. Department of Justice’s Antitrust Division (the “DOJ”), released long-awaited new HSR rules that implement sweeping changes to the instructions and requirements for premerger notification under the Hart-Scott-Rodino (“HSR”) Act.¹ As expected, the final rules greatly increase the time, burden and expense of HSR filings by broadening the scope of information, data, and documents parties are required to submit for reportable transactions.

Significant changes introduced by the final rules include: (i) requiring the submission of information about buyer ownership structure and entities and individuals with the ability to influence decision-making post-merger; (ii) new descriptive and documentary requirements intended to reveal existing or future horizontal and vertical business relationships; (iii) information requests about products and services under development that are not yet generating revenues; and (iv) an expanded definition of “final” documents that requires the submission of draft competition-related documents provided to any member of the board of directors or similar body. In addition, the agencies announced a new online portal where stakeholders, market participants and the general public can submit comments to proposed transactions, including “how [the transaction] may affect competition from consumers, workers, suppliers, rivals, business partners, advocacy organizations, professional and trade associations, local, state, and federal elected officials, academics, and others.”²

The rule changes were originally proposed back in June 2023 and generated considerable concern from the antitrust bar and industry groups due to the onerous nature of the proposed obligations. These voices were clearly heard by the agencies: Of the 29 primary

¹ <https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form>. The U.S. Department of Justice (DOJ) concurred with the final rule changes. See <https://www.justice.gov/opa/pr/justice-department-concurs-federal-trade-commissions-changes-premerger-notification-form>.

² FTC Finalizes Changes to Premerger Notification Form, FTC Press Release (October 10, 2024). Available here: <https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form>

proposals announced in 2023, 10 were rejected entirely and only two were finalized without any modification.³ The final rule changes are scaled back from the original proposals but nonetheless will require a significant increase in time, filing, complexity and expenditure by parties seeking merger clearance.

In justifying these rule changes—the most significant since the HSR Act was enacted in 1976—the FTC cited the need to respond to “several factors that make today’s economic reality more challenging for conducting a premerger assessment with the limited information required by the current rules. . . . [I]n light of changing market dynamics, [the new rules make] adjustments that are necessary and appropriate to allow the agencies to detect and prevent illegal mergers prior to consummation.” The FTC also noted that changes to M&A activity, investment strategies, and modern corporate structures have rendered the current HSR form ineffective.

The final rule changes notably apply to all reportable deals, even those without any substantive antitrust issues. We anticipate that the time and resources needed to prepare an HSR filing will substantially increase as parties now need to gather substantial amounts of information about the deal, its structure, and its effects on competition. The FTC acknowledges this in the final rules, estimating that HSR filings will require an average of 105 hours to prepare in comparison to the current average of 37 hours. Filings involving competitive overlaps or supply relationships, which the FTC expects in 45% of total filings, are estimated to require an average 158 hours to complete. These figures may still underestimate the additional burden for some filings.

Barring any delays, the new rules are expected to go into effect in January 2025, 90 days after publication in the Federal Register. However, similar to the FTC’s [recently finalized noncompete rules](#), the agencies may face legal challenges that could delay implementation. It is also unclear whether the results of November’s presidential election could impact when or whether the new rules go into effect.

Lastly, the agencies announced they will lift suspension of “early termination” (the potential termination by the agencies of the HSR waiting period before it expires) when the final HSR rules take effect. The suspension has been in place for over three years, but the FTC explained that the additional information required by the new rules will allow regulators to more accurately assess if a transaction is suitable for early termination.

³ Statement of Commissioner Melissa Holyoak (October 10, 2024), available here: https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf

Summary of Key Rule Changes

- Filers will be required to describe the rationale for the transaction and to identify the documents confirming or discussing the stated rationale. Filers must also submit a description of the business lines of each filer to reveal existing areas of competition between the merging firms, including for products or services that are in development.
- Parties will be required to submit detailed information on horizontal overlaps and vertical relationships, including known planned products or services and information on customers and suppliers. Filers with a competitive overlap or supply relationship must submit one year's worth of plans and reports that address markets and competition, if they were provided to a CEO or a Board of Directors.
- A buyer will need to provide a description of its ownership structure and relationship to affiliates and associates, and to disclose officers and directors, as well as entities or individuals with a 5% or greater minority stake, including for limited partnerships to the extent holders have certain management rights that give them the ability to influence decision-making post-merger. For targets, the 5% holders requirement will apply only to the extent the investor will roll over its interest post-closing.
- Continuing the agencies' effort to target [roll-up or serial acquisition strategies](#), there are expanded disclosure requirements concerning prior acquisitions, which will apply to the target as well as the buyer.
- All transaction agreements will need to be submitted to the extent they will be in effect on and after closing (excluding clean team agreements), including all schedules, exhibits, side letters and non-compete or non-solicit agreements, as well as a transaction diagram if one exists. Buyers also must indicate the existence of certain types of existing agreements with the target.
- Parties will be required to submit additional "Transaction Related Documents" (currently known as Item 4(c) and (d) documents) from the supervisor of each merging party's deal team. (Under the current Item 4, only documents prepared by or for an officer or director are required to be submitted). The "supervisory deal team lead" is defined as the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer, even if the individual does not have ultimate decision-making authority over the deal.

- While drafts of Transaction Related Documents are not required (see below), the agencies expanded their view on what drafts should be treated as “final.” Currently, a draft is treated as final if it is sent to the full board of directors or equivalent body. The final rules state that a draft is final if it is sent to *any* member of the board (or similar body). For any firm where board or investment committee members are closely involved in transaction planning, this may require the submission of many drafts.
- Filers will be required to provide information about foreign subsidies and contracts with defense or intelligence agencies.
- Foreign-language documents included with HSR filings must include verbatim English translations.
- In an effort to temper the potential disparate impact of the new requirements across all transaction types, the FTC is creating a new category, “select 801.30 transactions,” for which the information requirements are substantially limited. This applies to transactions that do not result in the acquisition of control, where the seller(s) does not control the target, and where there is no agreement or contemplated agreement between the acquiring person and target—e.g., share purchases on the open market, or acquisitions resulting from traditional executive compensation agreements. This will not apply where the buyer will get rights relating to the board of directors, general partner or management company of the target.

Notable Proposed Changes Absent from the Final Rules

- Submission of all drafts of Transaction Related Documents delivered to officers, directors, or supervisory deal team leads. As noted above, however, the scope of what constitutes a “final” document has been broadened to include drafts that are delivered to any member of the board or similar body.
- Submission of labor data including Standard Occupational Classification codes, pre- and post-closing worker data by occupational categories and geographies, and workplace and safety information—information that many companies do not keep in the ordinary course. FTC Chair Lina Khan noted, however, that even without labor-specific information, the new rules will require enough detail “to identify whether a proposed deal risks undermining competition for workers.”⁴

⁴ Statement of Chair Lina M. Khan Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules (October 10, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/khan-slaughter-

- Submission of organizational charts and a timeline of key dates for closing the proposed transaction.
- Submission of granular geolocation information and information related to board observers, creditors or holders of non-voting securities.
- Information on prior acquisitions consummated more than five years prior to filing.

Implications

- We encourage firms to review their current data collection procedures and seek advice on necessary updates to comply with the new HSR rules.
- Consult with antitrust counsel earlier in the diligence process to ensure proper document management and related compliance.
- Parties should work with antitrust counsel well in advance of filing to begin collecting the voluminous information required under the new rules and start drafting the newly required narrative descriptions of the potential competitive effects of the transaction.
- Parties that anticipate regular acquisition activity that may be HSR reportable, such as private equity sponsors, should establish data repositories for the information and documents called for in the new rules.

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Debevoise lawyers are well versed in the HSR Act and its reporting requirements. We are available to advise parties regarding the applicability of their transactions, as well as guide clients through the reporting progress and any government investigation and/or litigation that may follow the HSR filing.



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