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Final Form of New HSR Rules Will Substantially Increase Time and Cost of Premerger Filings

The Federal Trade Commission (FTC) has published the final Rules that will govern Hart-Scott-Rodino (HSR) filings starting early next year. The new HSR Rules will go into effect ninety days after they are published in the Federal Register. We expect the effective date will be in the middle of January 2025. By the FTC's own estimate, for the acquiring party in a transaction with overlaps or supply relationships, the time required to complete an HSR filing will increase by 121 hours on average.

The FTC leadership published its initial proposal for these rules more than a year ago, in July 2023. The proposed rules drew vigorous opposition, both inside and outside the FTC. It appears that the FTC leadership compromised in order to protect the final Rules from a litigation challenge. The most dramatic proposals were eliminated — the Final HSR Rules do not require the parties to submit drafts of deal planning documents, and do not require the submission of labor market information. Nonetheless, the new Rules require substantially more work and information.

Deals that are in the pipeline now may need to comply with the new HSR Rules, and buyers and sellers should start planning for them. Below, we identify some of the most important proposed changes and their likely consequences.

Deal Strategy

- **Time and Cost to Prepare HSR Filing** – Even if there are no competition issues, it will take more work than before to prepare an HSR filing under the new Rules. If the transaction does involve a horizontal overlap or some other substantive issue, the work for the buyer will increase by more than 120 hours (on average), by the FTC's own estimate.
- **Transaction Rationale** – Each party must "identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees." The rationale must be tied back to the transaction-related documents that are submitted with the HSR filing.
  - Directors and officers (and everyone involved with transaction planning) should not spend time on provocative claims.
  - Buyers and sellers should consult their counsel very early in the process if they are considering a transaction that has the potential to be controversial.
- **Overlap Description** – Each party must submit a brief description of its products and services. The parties must then describe any known competitive overlap. This requirement extends to products in development.
- **Supply Relationship** – If one party buys from the other — or buys from one of its rivals — the parties must describe the supply relationship. This requirement extends to any such relationship that amounted to $10 million within the past year.
- **Customer Contact Information** – In any transaction where the parties have competing products or services, both sides must provide, among other items, a list of top customers, including contact information. The FTC/DOJ may reach out to interview these customers without prior notice.
- **Confidentiality** – Thus in transactions with a horizontal overlap, the FTC/DOJ could reach out to customers at any time. The HSR Act provides that the filing is confidential. The FTC does not make a commitment that it will keep the transaction secret from customers, however. The FTC says: "when contacting customers or other market participants, Agency staff may disclose that the agency is conducting a nonpublic investigation of the proposed transaction, but Agency staff will not disclose any information contained in an HSR Filing without a waiver."

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Limits to Filing on the Basis of an LOI

- Parties will no longer be allowed to file on the basis of a bare bones preliminary term sheet. According to the FTC, where parties have filed on the basis of a letter of intent in the past, about 10% of the filings lacked information that the FTC wanted to receive. Under the new Rules, the parties may still choose to file before a definitive agreement has been signed, but in that event, they must identify, among other things: "an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses." In our experience this information often is not included in a LOI.
  - When you consider these new requirements — plus the risk that the FTC/DOJ will start contacting customers, plus other requirements set out below — we expect that most parties will wait to sign the definitive agreement first and submit their HSR filings afterwards.

Information Collection

- **Strategic Plans and Market Reports** – For any transaction where there is a horizontal overlap, the parties will need to submit copies of existing strategic plans and market analysis reports. These are limited to reports and plans within the past year. They are further limited to reports and plans that were provided to the CEO or the Board.
- **Prior Acquisitions** – In addition, for any transaction where there is a horizontal overlap, the parties will be required to report information about prior acquisitions. This requirement extends back over the past five years and covers acquisitions where the target had a value above $10 million. For buyers, this requirement exists already, but it is a completely new requirement for sellers, and it is important in the current enforcement climate.
  - The expanded requirement is aimed to identify more roll-ups. The FTC and DOJ have expressed hostility toward roll-ups. In some cases, the FTC/DOJ could consider challenging prior transactions, rather than the transaction that is the subject of the HSR filing.

Transaction Details and Documents

- Transaction Diagram – If a transaction diagram exists, the parties must submit it.
- Expanded Scope of Item 4(c) and 4(d) Documents – Parties are currently required to provide documents about competition that rise to the level of officers and directors. The new Rules also require the submission of documents that are prepared by or for the "supervisory deal team lead." This is defined as the individual (one on each side) "who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer."
- Organizational Structure and Minority Holders – The FTC expresses concern that minority owners may influence strategic decisions of the combined company or may have access to its competitively sensitive information.
  - If an organizational chart exists, the buyer will be required to submit the chart if its Ultimate Parent Entity is a fund.
  - A buyer must report the name, address, and approximate percentage held by minority holders (i.e., holders of 5% or more but less than 50%) of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity that will be created to effectuate the transaction (each a "covered entity"). If a covered entity is a limited partnership, it will be required to provide this information (a) for its general partner, and (b) for any limited partner (holding 5% or more but less than 50%) that will have management or board rights.
  - This minority interest reporting requirement is deal-specific. This requirement applies to the acquiring entity and up the chain to the fund that controls the acquiring entity. This requirement does not apply to other portfolio companies of the same fund.
  - Where the identity of minority investors or percentages is not finalized at the time of filing, buyers must "provide good faith estimates and explain in an endnote."
- Officers And Directors – In any transaction where there is a horizontal overlap, the buyer will be required to list all individuals who serve as officers and directors; and the buyer will also be required to disclose whether these same individuals filled similar roles in any other companies that report the same NAICS codes.
  - The FTC is aiming to find interlocking directorates. Under Section 8 of the Clayton Act, interlocking directorates are illegal where the same person serves as an officer or director of two competing firms (subject to specified exceptions).

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Summary of Key Changes

	CURRENT	NEW
Transaction Rationale	Not required.	A brief statement must be submitted and must tie back to the transaction-related documents.
Overlap Description	Not required.	Each party must submit a brief description of its products and services; and must describe any known competitive overlap, including for products in development.
Confidentiality in Practice	Filings are confidential. If the FTC/DOJ have questions, they may ask the parties for customer contact information and then reach out to customers.	Customer contact information is required in filings where there is an overlap. The FTC/DOJ could then reach out to customers at any time.
Filing on an LOI	Only basic information about the parties and size of transaction is required.	Parties must set out, among other things, "an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses".
Item 4(c)/(d)	Both sides must provide documents about competition that were prepared by or for officers or directors.	In addition, both sides must also provide documents about competition that were prepared by or for the "supervisory deal team lead."
Strategic Plans and Market Reports	Only required if responsive to Item 4(c)/(d) and provided to officers or directors for the purpose of analyzing the transaction.	Where there is a horizontal overlap, the Parties must submit copies of existing strategic plans and market analysis reports. Extends to reports and plans created within the past year and provided to the CEO or the Board.
Officer, Director, and LP Information	Not required to provide information on officers or directors generally. Must provide information on direct minority shareholders of the acquired entity and the acquiring entity and its UPE.	Where there is a horizontal overlap, the buyer must list all individuals who serve as officers and directors; and state whether they fill similar roles in any other companies that report the same NAICS codes. The buyer must identify any entity that will have at least a 5% stake (in the case of a corporation or LLC) and the right to participate in management or the board (in the case of a limited partnership).
Prior Acquisitions	Buyer must report prior acquisitions over the past five years where there is an overlap.	In addition, the seller must also report prior acquisitions over the past five years where there is an overlap.

Logistics

The FTC has created entirely new Forms to be used for HSR filings after the effective date. Moreover, going forward the FTC will require different Forms for the Acquiring Person and the Acquired Person, whereas in the past both sides used the same Form.

Some transactions have been set aside for a lesser information burden under the new HSR Rules. These include, for example, transactions where an executive receives stock as part of his/her compensation. There is no actual competition issue in such transactions, ordinarily. Nonetheless, an HSR filing is required if the size thresholds and other tests are met.

Early Termination will become available again, after it was turned off in 2020. The FTC/DOJ may grant early termination of the HSR waiting period (before 30 days have run out) if they have completed their review and find no issues to explore. This is entirely at their discretion.

Conclusion

Do the new HSR Rules change which transactions will require an HSR filing? No.

Will the FTC/DOJ challenge more mergers than before? Probably not. Likely the number of Second Requests and lawsuits will stay roughly the same, so long as the resources of the FTC/DOJ stay roughly the same. But the FTC and DOJ adopted new Merger Guidelines in December 2023, and these aim to address a broader range of issues, so it is harder to predict which transactions will be scrutinized.

Do the new HSR Rules change the amount of work needed to prepare the filing? Yes, very much so. In the past a minority of cases drew questions from the FTC/DOJ, and in those cases the parties provided information on a voluntary basis during the waiting period. In effect, the FTC is now requiring much of the same information, at the outset, in all cases where there is a horizontal overlap or a supply relationship. All of these HSR filings will need substantial antitrust work.

Buyers and sellers should consider the following:

- When you write strategic planning documents and market reports, remember that the FTC/DOJ will read them in the context of your next deal.
- Once a potential deal has been identified, people should consider whether the transaction has a procompetitive rationale, and this should be an important part of the assessment whether to go forward.
- If a transaction has the potential to be provocative, each side should discuss the transaction with its own counsel early in the process.

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