

FTC Finalizes Major Rewrite of HSR Filing Requirements

Update

October 17, 2024 | 4 minute read

Last week, the Federal Trade Commission (FTC) voted unanimously to issue a [final rule](#) that implements significant changes to the Hart-Scott-Rodino (HSR) premerger notification form and accompanying instructions. While the final rule includes numerous modifications from the draft proposal that was announced in June 2023 (see our [previous client alert](#)), this still represents the most substantial change to the HSR filing requirements in decades, and will require parties to HSR-reportable transactions to gather and provide considerably more information and documents than under the current rules. The final rule will take effect 90 days after publication in the Federal Register (unless there is a successful court challenge in the interim).

Under the HSR Act, parties to certain mergers and acquisitions are required to submit premerger notification forms that disclose information about their proposed deal and business operations. The FTC and the Antitrust Division of the US Department of Justice (DOJ) use this information to conduct a competitive impact assessment within the statutory HSR waiting period, which is typically 30 calendar days. According to the FTC's [press release](#) accompanying the final rule, the new requirements are a necessary response "to changes in corporate structure and deal-making, as well as market realities in the ways businesses compete, that have created or exposed information gaps that prevent the agencies from conducting a thorough antitrust assessment of transactions subject to mandatory premerger review."

Key Changes to HSR Filing Requirements

Some of the main changes will require the following:

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- A description of each party's strategic rationales for the transaction, with cross-references to documents submitted with the HSR filings that support the stated rationales.
- A new Overlap Narrative section that will require the buyer and target to identify and provide (i) a written description of current or planned products or services where they compete (or could compete) with each other, (ii) actual or projected revenues for each such product or service, (iii) a description of all categories of customers that purchase or use the product or service, and (iv) the top 10 customers for each customer category (e.g., retailer, distributor, broker, national account, local account, etc.).
- A narrative describing supply relationships between the transaction parties or between the buyer and any other business that competes with the target, including the amount of revenue involved and the top 10 customers or suppliers.
- In addition to requiring documents discussing the competitive aspects of the proposed transaction that were prepared by or for officers and directors (current Item 4(c)), filing persons must also submit (i) transaction-related documents prepared by or for a "supervisory deal team lead", and (ii) ordinary course business plans and reports about overlapping products and services that were provided to the CEO or Board of Directors within a year prior to filing.
- Buyers must list all current and recent officers and directors (or in the case of unincorporated entities, individuals exercising similar functions) in cases where those individuals hold similar positions in entities that have overlapping operations with the target.
- Identification of minority holders of additional entities related to the transaction parties, as well as more information about minority interest holders, including limited partners in partnerships where the limited partner has certain rights related to the board (or similar bodies) of the acquiring entity and its related parties, and in some cases, the target. (Currently, the HSR form only requires disclosure of the general partner.)
- Additional information regarding certain prior acquisitions by both the buyer and the target. (Currently, only buyers must provide information regarding prior acquisitions.)
- If an HSR filing is being made based on an executed letter of intent or term sheet rather than a definitive agreement, the filing must include a dated document containing sufficient details about the transaction.
- Parties must submit the entirety of all agreements related to the transaction (not just the principal transaction agreement).
- All foreign-language documents must be accompanied by English-language translations.

- Filing parties must disclose economic subsidies received from certain foreign governments or entities of concern to the United States.
- Information related to certain contracts with defense or intelligence agencies.

It is worth noting that a few particularly onerous or controversial proposals from the initial draft rule were not adopted, including the proposal to require collection and production of all drafts of responsive documents (rather than just final versions), as well as specific information about labor markets and each filing party's workers.

Related Changes to the Merger Review Process

Significantly, the FTC announced that, following the final rule coming into full effect, it will lift its suspension on early termination of the waiting period for HSR filings involving transactions that clearly raise no competitive issues. According to the FTC, "[b]ecause the final rule will provide the agencies with additional information necessary to conduct antitrust assessments, the rule will help inform the processes and procedures used to grant early terminations."

The FTC also stated that it is introducing a new online portal for market participants, stakeholders, and the general public to directly submit comments on proposed transactions that may be under review by the FTC (it is unclear if the DOJ will follow suit). According to its press release, the FTC "welcomes information on specific transactions and how they 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."

Practical Implications for Deals

The final rule issued by the FTC marks a sea change in the preparation of filings for HSR-reportable transactions. The new requirements will significantly increase the time, effort and cost of preparing all HSR filings, with the impact likely to be magnified for deals where the buyer and target are competitors or operate within the same supply chain. Transaction parties will need to account for this new reality in their deal timelines and budgets. Transaction agreements will need to allow for more time to file HSR, and it may be advantageous for some parties to begin filing preparations much earlier in the deal process. In addition, the new transaction agreement requirements mean that key terms of deals will need to be more fully fleshed out before parties can file HSR and start the 30-day clock.

Also, since filing parties will now have an affirmative obligation to disclose competitive overlaps as well as supplier-customer relationships, careful consideration will need to be given to how those are described, since

statements made in the HSR filing could later be used against the parties in an in-depth investigation (if the reviewing agency issues a “Second Request”) or in litigation (if the agency challenges the deal). Moreover, for serial acquirors, descriptions of products and overlaps in one filing could have consequences for future HSR-reportable transactions.

Additionally, the new obligation on filers to provide customer and/or supplier information in the HSR filing may cause parties to re-evaluate their approach towards third party outreach regarding proposed transactions, given the possibility of earlier and more frequent FTC/DOJ calls to those customers and suppliers.