

Client Alert

Antitrust

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HSR Final Rule

Major New Requirements

On October 10, 2024, the Federal Trade Commission (“FTC”) approved new rules for reporting mergers and acquisitions to the FTC and the Department of Justice (DOJ) under the Hart-Scott-Rodino (“HSR”) Act (the “HSR Rules”). The new HSR Rules come over a year after the FTC originally proposed a draft version of the rules for public review and comment on July 27, 2023 (“Draft Rules”) and while they will require substantially more information for strategic transactions (i.e., those with a competitive overlap or a vertical relationship between the parties), they are less burdensome in many respects than the Draft Rules. The new HSR Rules are set to go into effect in mid-January 2025, and as a result, parties should allot more time for preparation than the current HSR form for certain transactions involving overlapping products or services between the parties. Below, find a summary of key changes and their implications.

KEY CHANGES UNDER NEW HSR RULES

- **Transaction Agreement/Structure**
 - **HSR filing on a bare bones letter of intent (“LOI”) will no longer be possible.** If the parties have not executed a definitive purchase agreement, they may continue to file on a non-binding LOI, **but** the LOI must include: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms. If an LOI does not describe with specificity the scope of the transaction that the parties intend to consummate, filers must also submit an additional dated document, such as an agreement in principle, or term sheet, or the most recent draft agreement, that does contain sufficient details about the transaction that the parties intend to consummate.



- **The Buyer (or the “Acquiring Person”) must identify other contractual arrangements with the target**, including whether the Acquiring Person has, or had within one year of filing, any contractual agreement(s) with the target entity. If so, the Buyer must indicate which type(s) of agreements exist (e.g., agreements with non-compete or non-solicitation terms; leases, licensing agreements, master service agreements, operating agreements, or supply agreements).
- **Revival of early termination**
 - The new Rules have revived the early termination of filings, which had been suspended for the last three years. The FTC will once again use its discretion to terminate early the 30-day waiting period for transactions that it determines do not raise competitive issues.
- **Additional transaction descriptions required from both parties**
 - **Each party will need to provide additional detail about the Transaction Rationale.** Both parties must identify and explain each strategic rationale for the transaction discussed and contemplated. The parties must also cite to documents produced with the filing that support these rationales.
 - **If one exists (no need to create), a Transaction Diagram must be submitted by the Acquiring Person.**
 - **The Transaction Description will now need to also describe the business operations of the Acquiring Person.**
- **Competitive relationships between the parties**
 - **The below rule changes apply only where there are competitive overlaps or supply relationships.**
 - **Each party will now need to provide information about the Competitive Overlaps between them, known in the new form as the “Overlap Description.”** This includes a brief description of the principal categories of the products and services of the Acquiring Person, and a brief description of the current or known planned products or services of the Acquiring Person that competes with (or could compete with) a current or known planned product or service of the target. For each overlap product or service listed, the parties must provide (i) sales data for the most recent year, (ii) a description of all categories of customers of the Acquiring Person that purchase or use that product or service, and (iii) the top 10 customers in the most recent year for each customer category identified (but not contact information for these customers).
 - **The parties will need to provide information about the Supply Relationships between them,** including a brief description of any relevant products or services, as well as sales and customer data (but not contact information for these customers).
- **Expanded document production requirements**
 - **The Item 4(c)/(d) document collection (now named “Competition Related Documents”) expands the search and collection for documents to documents prepared by or for the Supervisory Deal Team Lead.** “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 of the company.” The Supervisory Deal Team Lead is a single individual. Note that author identification is only required where there is a competitive overlap or a supply relationship.

- **Clarifies that any Competition Related Document that was shared with any member of the board of directors is responsive and should not be considered a draft;** rather, it should be treated as a final version and submitted with the HSR Filing as a Competition Document. Otherwise, only the final draft/version of a responsive document is required to be submitted.
- **Additionally, certain Ordinary Course Plans and Reports provided to the CEO or Board of Directors must now be produced.** This includes all regularly prepared plans and reports that were provided to the CEO within one year of the HSR filing analyzing market shares, competition, competitors, or markets. This requirement only applies where there is competitive overlap or supply relationships. For the Board, any **ordinary Course Plans and Reports** analyzing market shares, competition, competitors, or markets must be submitted.
- **More information required about your structure and shareholders/investors**
 - **The acquiring person will now need to describe its ownership structure,** including by providing an organizational chart for transactions where a fund or master limited partnership is the ultimate parent entity (“UPE”).
 - **The Acquiring Person will now need to provide information for certain Officers and Directors if there are Interlocks with Competitors of the Target.** This information is only necessary where there is a competitive overlap or supply relationship.
 - **Limited partnerships will now need to disclose more information than just its general partner.** Under the new HSR Rules, for Acquiring Persons, parties must provide the “doing business as” or “street name” of minority investors that are related to master limited partnerships, funds, or investment groups. In addition, parties need to disclose certain minority holders holding between 5% and 50% of entities between the acquiring UPE and acquiring entity. For limited partnerships, parties only need to identify the general partner and limited partners that have or will have between 5 and 50% of the limited partnership interests and possess certain board nomination and/or management rights.
- **Serial Acquisition History will now be visible in the HSR form**
 - **Both parties will now have to provide more detailed information about prior acquisitions of entities/businesses that compete/overlap with the Target.** Previously, this requirement was only for the Acquiring Person. This is limited to a five-year lookback period, and is not a requirement if there is no competitive overlap or supply relationship.
- **Non-material changes to NAICS Revenue Reporting**
 - **Some of the burden from the old rules has been removed.** Instead of providing specific revenues for the most recent year by NAICS code, only estimated revenues are now required by applicable range: less than \$10 million; \$10 million or more but less than \$100 million; \$100 million or more but less than \$1 billion; or \$1 billion or more. NAICS codes are no longer required for manufacturer parties.
 - **In certain cases, there are more detailed revenue requirements.** For overlap revenues (the previous Item 7 information), the parties are now required to identify the “doing business as” names of entities at



the time of filing. NAICS revenue information is also now required to be separately reported by operating entity.

- **The Acquiring Person will now need to identify foreign filings**
 - The Acquiring Person will now need to identify the jurisdictions where a foreign merger control filing has been made or being prepared in connection with the proposed transaction as well as a list of the jurisdictions where it has a good faith belief it will file.
- **New forms**
 - The new HSR Rules have created two separate forms, one for acquiring entities and one for acquired entities.

CHANGES BETWEEN THE DRAFT RULES AND THE FINAL RULES

The new HSR Rules, as approved, are much less onerous on filers than the proposed Draft Rules. Requirements in the Draft Rules that are ***not*** found in the new HSR Rules include requiring filers to:

- Provide a closing timeline, with key dates and conditions;
- Create organization charts, including organizational charts for authors and recipients;
- Submit drafts of all filed Competition Related Documents;
- Provide financial projections and similar documents;
- Provide “formerly known as” information for relevant entities;
- Identify prior acquisitions involving entities with less than \$10 million in sales or revenues, or consummated more than 5 years prior to filing;
- Provide additional information about other interest holders that may exert influence over a company, including board observers;
- Provide geolocation information for certain locations;
- Provide multiple classes of labor market-related information; and
- Provide information about document preservation or usage of messaging systems.

LOOKING AHEAD: PREPARING FOR HSR FILINGS UNDER THE NEW RULES

Since the new HSR Rules will require significantly more information from both filing parties, there are proactive steps that can be taken to help minimize the burden, including:

- **Proactive Due Diligence:** Implement comprehensive pre-deal competitive analyses, including potential vertical and horizontal effects.
- **Regulatory Strategy Integration:** Incorporate antitrust considerations and assessment into early-stage deal structuring and valuation models.
- **Document Management:** Develop and enforce strict protocols for creating and managing competitively sensitive documents related to strategic growth and throughout the deal process. Counsel should be involved as early as



possible, particularly for documents that will be reviewed by senior management. Appropriate training regarding document creation protocols should be provided for Supervisory Deal Team Leads and business personnel on transaction teams.

- **Narrative Development:** Craft compelling, evidence-based stories of pro-competitive effects and efficiencies of proposed transactions that are tailored to the new informational requirements of the HSR Rules.
- **Cross-Functional Collaboration:** Foster closer cooperation between corporate development, legal, and operational teams to ensure alignment in disclosures and strategic narratives that will be required for the HSR filing.
- **Investor Relations:** For public companies, prepare communication strategies to address potential market reactions to longer deal timelines and increased regulatory uncertainty.

CONCLUSION

We can expect some additional changes in the M&A space due to these new HSR Rules. We may see an increase in minority investments, joint ventures, or strategic alliances as alternatives to full acquisitions. We can also expect increased post-closing scrutiny of sub-HSR threshold deals, as agencies apply insights gained from enhanced HSR disclosures. As a direct result of the richer dataset provided by new HSR requirements, we may also see an acceleration of the use of advanced analytics in merger reviews, potentially leading to more nuanced competitive assessments. Parties contemplating a merger or transaction that is subject to the HSR Act should expect to invest more time and resources into the HSR process than before, and King & Spalding is prepared and ready to help.

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