

On October 10, 2024, the Federal Trade Commission ("FTC") issued its long-awaited Final Rule modifying the reporting requirements under the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act. The Final Rule is the result of the first top-to-bottom review of the HSR form conducted by the FTC and Department of Justice Antitrust Division in over 40 years.

While the Final Rule abandons or scales back several of the more burdensome requirements included in the FTC's [proposed rule](#) issued in June 2023, the rule will nevertheless substantially increase the time and cost associated with the HSR filing process. The FTC estimates that the average HSR filing will require 68 more hours to prepare. Unless challenged, the Final Rule is set to take effect in mid-January 2025.

In announcing the Final Rule, the FTC also indicated that it would lift the suspension of grants of early termination under the HSR Act and announced the creation of a new online portal through which any member of the public can submit feedback on proposed transactions.

Below we summarize the key changes most likely to impact transacting parties.

Expanded Deal-Related Information

The final rule will require filers to provide substantially more information about the proposed transaction, including:

- **Deal Rationale** – The acquiring party will be required to identify and explain each strategic rationale for the transaction discussed or contemplated by it or any of its officers, directors, or employees.
- **Ordinary Course Documents** – Parties will be required to submit ordinary course documents shared with their CEO or Board of Directors that analyze market shares, competition, competitors, or markets pertaining to any product or service of the party that is also produced, sold, or known to be under development by the other party to the transaction.
- **Competitive Overlaps** – Parties will be required to list and describe current or known planned products or services of the party that compete with (or could compete with) current or known planned products or services of the other party. For each such product or service, parties will need to provide sales data and certain information about their top customers.
- **Supply Arrangements** – Parties will be required to list and describe each product, service, or asset (including data) that the party has sold, licensed, or otherwise supplied (and which represented at least \$10 million in revenue) to the other party to the proposed transaction, as well as to any other business that uses such product or service to compete with the other party. For each such product or service, parties will need to provide certain sales and customer information.

Scope of 4(c) Documents Expanded

Currently, Item 4(c) of the HSR form requires filers to submit certain documents prepared by or for any officer or director of the company that evaluate or analyze the transaction with respect to competition, competitors, markets, market shares, potential for sales growth, or expansion into product or geographic markets. The Final Rule also requires production of such documents when prepared by or for a "supervisory deal team lead," 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.

Prior Acquisitions

Parties will be required to produce information on related prior acquisitions valued at or above \$10 million that closed within the previous five years. FTC Chair Lina Khan indicated that this change was meant to address the increase in strategies by private equity firms and others to consolidate a segment through a series of smaller deals that would not otherwise be subject to agency review.

Translations Required

Filers will need to include "accurate and complete" translations for all foreign-language documents submitted with the HSR filing. General summaries of those documents will not be allowed.

Officer and Director Information

For transactions that involve a product overlap or an existing supply arrangement between the parties, the acquiring party will be required to provide certain information about its officers and directors, including positions held in other companies.

In addition, where the prior rule required only disclosure of the acquiring entity and its ultimate parent entity, the Final Rule requires disclosure of other entities and individuals that will have the ability to influence decision-making post-merger.

Filing on Simplified Letter of Intent No Longer Allowed

The FTC will continue to require filers to submit an executed agreement but, if that agreement does not describe with specificity the scope of the transaction that the parties intend to consummate, filers must submit an additional dated document, such as a term sheet or draft definitive agreement, that does contain sufficient details about the transaction that the parties intend to consummate. The types of detail the FTC is likely to require in the supplemental documentation includes: (i) the identity of the parties; (ii) the structure of the transaction; (iii) the scope of what is being acquired; (iv) calculation of the purchase price; (v) an estimated closing timeline; (vi) employee retention policies, including with respect to key personnel; (vii) post-closing governance; and (viii) transaction expenses or other material terms.

Early Termination Reinstated

Once the Final Rule is in effect, the FTC plans to lift the suspension of grants of early termination of the HSR waiting period that has been in place since February 2021. Since the suspension was put in place in the wake of COVID-19 restrictions, merging parties have been unable to request that the agencies terminate the 30-day waiting period before its expiration. This should result in some deals that raise no competition concerns receiving early clearance from the agencies. Prior to being suspended, grants of early termination would often occur within 10-14 days after filing.

New Online Portal

The agencies also announced the introduction of a new online portal for members of the public to submit views on proposed transactions that are under review. This will potentially broaden the information the agencies have available to them from consumers, customers, suppliers, and others who may be affected by a proposed transaction.

What's Not in the Final Rule

Notably, several of the more burdensome requirements found in the FTC's proposed rule were abandoned in the Final Rule, including:

- The proposed rule contemplated requiring parties to provide significant information regarding the filing parties' workers, including their occupational categories based on current Standard Occupational Classification system categories, and the geographic areas where employees are based. No such information is required under the final rule.
- The proposed rule would have required parties to submit drafts of all responsive documents. Under the Final Rule, only drafts provided to any member of the party's Board of Directors will need to be submitted with the HSR filing, which is largely consistent with the existing rule.
- The proposed rule would have required detailed information regarding prior acquisitions going back ten years (with no size threshold), and would have required the merging parties to produce any and all other existing agreements between them. Those provisions were substantially scaled back in the Final Rule as described above.

Key Takeaways

Companies contemplating transactions that will require an HSR filing after the effective date of the Final Rule should keep the following in mind:

- Preparing the HSR filing will require significantly more time and likely involve more company resources than under current practice. Parties will need to account for this additional time when assessing deal timing, even for transactions where there are minimal competitive overlaps or the parties have only a minimal market position. Antitrust counsel should be involved early in the deal process to avoid unnecessary delays.
- Companies will need to become more sensitive to how they describe their business and the markets in which they compete in their ordinary course documents, which now may need to be submitted as part of the HSR process.
- Companies will potentially need to develop a strategy for customer outreach early in the deal process, including whether and when to contact customers whose information will be included with the HSR filing.

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