

U.S. antitrust agencies implement overhaul of HSR filing requirements

October 11, 2024 | Client Update

Yesterday, the FTC issued a final rule making significant changes to the content of HSR filings. The new rule will require filing parties to provide substantially more documents and information upfront regardless of competitive concerns, although it is meaningfully less burdensome than the original draft rule. The agencies estimate the new rule will more than double average preparation time. Absent a litigation-related delay, the rule will apply to all filings as of early January 2025.

1. What HSR rule did the FTC issue?

On October 10, 2024, the Federal Trade Commission (FTC) issued a final rule implementing significant changes to the Hart-Scott-Rodino Act (HSR) Form and Instructions.¹ The FTC vote to issue the final rule was 5-0, and the U.S. Department of Justice issued a press release announcing its concurrence with the new rule. The new rule does not, however, include all of the changes proposed in the agencies' June 27, 2023 Notice of Proposed Rulemaking.² Nonetheless, the new rule expands the information and documents merging parties need to submit in their initial HSR filings, even when a reportable transaction does not pose competitive concerns. In particular, the new rule includes in the HSR filing some of the information that the agencies historically requested either in post-filing voluntary access letters³ or in Second Requests,⁴ issued only when a transaction prompts substantive questions. The new rule does not eliminate voluntary access letters or Second Requests, but does frontload some data and documents that previously have not been provided until later in the process.

The key changes to the HSR requirements fall broadly into three categories: (1) submission of "brief" descriptive responses on topics including the parties' transaction rationales, competing products or services (including planned pipeline products or services), and any vertical supplier relationships between the parties; (2) submission of a broader set of transaction and business documents relating to industry competitive dynamics, both specific to the transaction and as prepared in the ordinary course of business; and (3) general corporate information, including expanded information on ownership structure, officer and director activities, subsidies from foreign entities or governments, and defense or intelligence contracts. Certain information is required only when the parties are in a competitive relationship. Under the new rule, these requirements will be triggered when the parties have not only a horizontal relationship but also a vertical relationship or even a *potential* horizontal or vertical relationship.

According to FTC's accompanying press release, the final rule seeks to "respond[] 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

¹ Final Rule, Premerger Notification; Reporting and Waiting Period Requirements ("Final Rule"), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.

² Press Release, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

³ See FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents>.

⁴ See FTC, Model Second Request (Rev. Jan. 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024.pdf.

transactions subject to mandatory premerger review.”⁵ Many of the expanded requirements in the final rule reflect the agencies’ recent investigative and enforcement priorities including, for example, non-horizontal transactions, “serial” or sequential acquisitions, private equity acquisitions, harm to nascent competition, and interlocking directorates.

The FTC also announced the creation of a new online portal to allow “market participants, stakeholders, and the general public to directly submit comments on proposed transactions that may be under review by the FTC.”⁶ Notably, although the Form and Instructions have been updated, the FTC is not making any change in the method for accepting filings at this time. Thus, electronic filings will not be required until after the FTC has issued a separate rulemaking in the future that provides instructions and access to the new e-filing platform.

2. When does the new rule go into effect? What transactions are subject to the new rule?

The new rule, absent litigation, will become effective 90 days after publication of the final rule in the Federal Register (which has not yet occurred) – meaning on or after January 9, 2025. The new requirements will affect all HSR notifications filed on or after that date.

While the information required to be included in the HSR form will change, neither the threshold HSR jurisdictional requirements (e.g., the “size of transaction” and “size of person” tests) nor any HSR exemptions were changed by the new rule, so the same universe of transactions will trigger HSR filing obligations.

Because of the expanded nature and scope of information required to be submitted, merging parties may need to consider new strategies for their antitrust advocacy before the agencies, as discussed in the commentary on Question #6 below.

3. As a practical matter, how will HSR filings change?

As explained below, the new rule generally expands the types of information and documents required to be submitted by all filing parties in transactions reportable under the HSR Act. Parties in a competitive or vertical relationship will be required to submit additional information on certain topics. The final rule will also create separate forms for the acquiring person and acquired person to reflect different filing requirements.

Key changes that apply to all filings, regardless of competitive relationship:

Chart 1 below is a reference guide that summarizes the key changes that apply to all filings across all transactions.

Most significantly, all filing parties will be required to submit written responses beyond those required under the current HSR Instructions. The additional required responses include descriptions of the strategic rationales for the transaction, identification of principal categories of current and planned products and services and whether they compete with the other filing person, and disclosure of existing or potential vertical or supply relationships between the filing parties, among other things. Notably, the description required is limited to a business assessment, **not** an antitrust analysis.

All filing parties will also need to submit a more expansive set of documents than required under the current HSR rules. For example, the new rule includes submission of documents analyzing competitive dynamics of the transaction prepared by or for a single “supervisory deal team lead” (in addition to those documents prepared by or for officers or directors). The new rule, however, abandons the draft rule proposal to require submission of draft versions of such documents. The rule also mandates submission of ordinary course strategic plans relating to overlap products from the year prior to filing that were provided to the party’s Chief Executive Officer or Board of Directors.

Parties to a transaction will still be able to file HSR prior to executing definitive agreements based on a letter of intent or term sheet. However, under the new rule, such documents will need to provide specific details about the proposed transaction including, for example, the scope of what is being acquired, purchase price, estimated closing timeline, employee retention policies and post-closing governance or other material terms.

⁵ Press Release, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-khan-slaughter-bedoya-final-premerger-notification-form-hsr-rules-fy2023-hsr-report>.

⁶ *Id.*

In some transactions this additional specificity may impact the parties' ability to file prior to execution of the transaction agreement.

As for reporting of revenues, parties will be required to report only a range of revenue by six-digit North America Industry Classification System (NAICS) code. Manufacturing revenues will need to be reported only at the NAICS code level, not the 10-digit North American Product Classification System (NAPCS) code level.

Key changes that apply when filing parties have a (1) current or potential competitive relationship or (2) vertical relationship:

Chart 2 below is a reference guide that summarizes the additional key changes that apply when filing parties have a competitive or vertical relationship.

For any horizontal overlapping products or services between the filing parties, both filing parties will need to identify sales, categories of customers, and top customers overall and by category. For any vertical supply relationships between the parties, filing parties will need to provide sales or purchases to or from the other filing party and to or from competitors to the other filing party. This requirement is limited to products that represented at least \$10 million in revenue in the prior year. Likewise, both filing parties will be required to report prior acquisitions in overlapping industries. Previously, this requirement applied only to the acquiring party.

“Select 801.30” transactions:

The final rule defines a new category of “Select 801.30” transactions. 801.30 acquisitions generally refer to non-negotiated transactions, such as open-market purchases. The newly created category of “Select 801.30” transactions refers to 801.30 transactions that do not confer control or director rights and where there are no agreements between any entity within either party governing any aspect of the transaction. Select 801.30 acquisitions are exempt from certain of the new requirements, such as a description of transaction rationale, description of overlapping products or services, and production of regularly prepared business plans or reports.

Early termination:

Once effective, the final rule will also lift the agencies' current suspension of grants of early termination, which has been in place since February 2021. Early termination refers to the agencies' practice of terminating their investigation of a transaction prior to the conclusion of the 30-day statutory waiting period. Reinstating early termination will allow transactions that do not present competitive concerns to close earlier, thereby reducing delays and costs for parties.

4. Do the final rules differ from the draft rules the agencies announced in June 2023?

While the final rule implements significant changes to the HSR Form, it differs in many key respects from the proposed rule the agencies announced in June 2023, almost always paring back or eliminating elements of the draft rule.

Most notably, the final rule omits requirements to disclose labor market or employee information, a potentially onerous aspect of the draft rule that would have required submission of detailed information on employee data by Standard Occupational Code and on penalties issued by federal labor and workplace regulatory agencies. In addition, the final rule removes the requirement to submit all drafts of transaction-related documents, a requirement that would have greatly expanded the scope of required document collections for filing parties. In that connection, documents from “supervisory deal team leads” are now limited to documents from solely one deal team lead, and not all deal team leads, as required by the draft rule.

The final rule also eliminates or limits several other aspects of the proposed rule. For example, under the final rule, filing parties will not need to submit information regarding certain types of “interest holders” (e.g., board observers, major creditors) and will only need to identify directors of subsidiaries operating in overlapping industries, rather than all directors of subsidiaries, as originally proposed. The final rule also

reduces the narrative requirements for product overlaps, exempts certain requirements for “select 801.30” transactions, and establishes *de minimis* thresholds for reporting of vertical relationships.

5. What should active acquirors do now to prepare for the new requirements?

Active acquirors can take several steps to prepare for the new requirements, including implementing or updating annual director surveys, assembling descriptions of pipeline information for each business unit, or identifying or creating existing summaries of vendor contracts. **Chart 3** below is a reference guide with key steps active acquirors can take to prepare for the new requirements.

6. What impact will the new HSR form have on merging parties’ advocacy strategies?

We expect to publish a separate alert addressing how the new rule may affect parties’ advocacy strategies. For now, we have two observations: (1) the new HSR form moves closer to the European approach of asking parties to address competitive effects in their upfront filings (although far less burdensome than a full Form CO filing in Europe), and (2) the new HSR form may allow the agencies to compare how deal documents analyze competition with how ordinary course strategy documents do so.

As in some jurisdictions, such as the European Union, parties in the United States will need to strategize about how to present the competitive effects of their deals upfront. For example, although the new HSR form does not expressly ask for parties to identify relevant antitrust markets, it does ask the parties to take positions in written responses on key issues, including any areas where the parties believe they compete horizontally and any vertical relationships they have. It is not yet clear to what degree parties will be able to take alternative or conditional positions on market definition and competitive dynamics in completing responses to these questions. Further, parties will be asked to address potential competitive implications of a transaction – and identify their top customers or suppliers – before they have the opportunity to gauge marketplace reactions to a deal announcement.

Parties will also be required to submit more documents in an HSR filing than under the current rules, including certain ordinary course strategic analyses that were not previously required. Parties will need to make sure that their written submissions and their deal documents are consistent with the broader set of ordinary course strategy files that will be produced.

7. Are there particular implications for private equity firms? Others?

Some changes required by the new rule, such as those requiring additional information on ownership structure and prior acquisitions, may have distinct implications for certain types of filers, such as private equity firms. We expect to address sector-specific requirements and effects of the new rule in the near future.

8. Is there a chance the new rule will not be implemented?

The final rule could potentially be challenged in court, as was recently the case for the FTC’s [now-enjoined rule barring non-competes](#). The final rule could be challenged on the basis that it constitutes “arbitrary and capricious” agency action, for example, on the basis that the FTC did not properly consider evidence and comments regarding the potential burdens on merging parties or any alternative proposals.⁷ The length and detail of the final rule is likely an attempt by the FTC to shield the final rule from invalidation on this basis. The final rule could also be challenged on the basis that it exceeds the FTC’s rulemaking authority, but the HSR Act gives the FTC rulemaking authority to implement the statute so such a challenge would face significant hurdles. While litigation could potentially delay or complicate implementation of the new rule, nonetheless, we advise parties to proceed on the assumption that the rule will go into effect in early January 2025.

Key takeaways

⁷ 5 U.S.C. § 706.

The changes required by the new rule are extensive and expand the types of information and documents that filing parties must provide to the antitrust agencies in their initial HSR filings.

Accordingly, the new rule will increase the burden on transacting parties to prepare HSR filings, particularly where the parties have complex corporate structures or where the proposed transaction gives rise to competitive overlaps and customer/supplier relationships. The upfront time and collection burden will be increased on all filing parties. This change is likely to result in extended transaction timelines as transacting parties will need more time to prepare their filings. While transaction agreements today often contemplate HSR filing timelines of five to ten business days, deal teams often will need to consider incorporating more time for HSR filings, which could double or triple depending upon the specifics of the transaction at issue. After the new rule goes into effect, we would expect parties to begin preparing HSR filings much earlier in the deal negotiation process to mitigate, to the extent possible, any incremental filing delays.

We are continuing to monitor the reception and impact of the new HSR rule and expect to issue additional alerts, including on sector-specific issues, in the near future.

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Chart 1
Select New HSR Requirements for Transactions, Regardless of Competitive Relationship

	Current Requirements	New Requirements
Transaction Rationale	Provide a brief description of the transaction, not the rationale.	Identify and explain each strategic rationale for the transaction. Identify each document produced with the HSR filing that confirms or discusses the stated rationales and provide specific page citations where available.
Transaction Diagram	No similar requirement.	The acquiring person must provide a diagram of the transaction, if one already exists. Select transactions under 16 C.F.R. § 801.30 (such as open market purchases) are exempt from this requirement.
Ownership Structure	Provide percentage of voting securities or non-corporate interests held by filing person in acquiring or acquired entity.	The acquiring person must describe the ownership structure of the acquiring entity. For funds or master limited partnerships, provide an organizational chart showing all affiliates and associates, if one already exists.
Product Descriptions	No similar requirement.	Describe current and planned products and services.
Other Agreements Between the Acquiring Person and Target	No similar requirement.	Acquiring person must indicate, by checking a box, the existence and type of agreements between the parties currently in effect or entered into within last year within six categories.
Transaction-Related Documents – Competition Documents	Produce final versions of documents prepared by or for officers or directors for the purpose of evaluating or analyzing the proposed acquisition with respect to competitive dynamics.	In addition to current requirements, produce documents prepared by or for <u>supervisory deal team lead</u> . The supervisory deal team lead is 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.”
Plans and Reports	No similar requirement.	Provide all regularly prepared plans and reports provided to (1) the Chief Executive Officer or (2) the Board of Directors within one year of the date of filing that relate to analyzing competition of any overlap product or service as described in the Overlap Description.
Officers and Directors	No similar requirement.	For the acquiring person only, identify current officers and directors (or functional equivalents) within the filer and those who

	Current Requirements	New Requirements
		served in such a position within three months before filing – as well as those likely to serve in such a position post-transaction – that also serve as an officer or director of another entity that derives revenues in the same NAICS codes as target. For each, provide the name of all such entities. Non-profit entities organized for a religious or political purpose are exempted from disclosure.
Minority Shareholders or Interest Holders	If the filing person is a limited partnership, identify the name of the general partner.	For the acquiring person, identify 5-49% minority holders of the acquiring entity, any entity within the control chain of the acquiring entity, and any entity within the acquiring person that has been or will be created pursuant to the transaction. For the acquired person, identify any minority holders that will continue to hold an interest post-transaction. For limited partnerships, identify (1) the general partner; or (2) limited partners that have or will have certain management rights.
Transactions Subject to International Antitrust Notification	Indication whether transaction is subject to notification to foreign-jurisdiction competition authorities voluntary for all filing parties.	Identification of foreign jurisdictions in which transaction is notifiable is mandatory for Acquiring Person.
Transaction-Specific Agreements	Parties must file a signed transaction agreement and may file on a non-definitive agreement (e.g., Term Sheet).	If filing on a non-definitive agreement, filing parties must file a document that describes with specificity the scope of the proposed transaction (e.g., sufficiently detailed term sheet or draft definitive agreement), including, for example, scope of what is being acquired, purchase price, estimated closing timeline, employee retention policies, and post-closing governance.
Voluntary Waivers to Other Governmental Authorities	No provision for voluntary waivers in current form.	Filing parties may provide voluntary waivers for international competition authorities and state attorneys general.
Business Documents	Filing parties must provide author(s) for submitted business (i.e., “Item 4”) documents. For business documents prepared by a third party, the name of the third party is sufficient.	Filing parties must provide author(s) of Item 4 documents. For Item 4 documents prepared by a third-party entity, filing parties must provide the name of the third party, and the name, title, and company name for the individual within the filing party who supervised the creation of the document or for whom the document was prepared.
NAICS Revenues	Provide revenues by 6-digit NAICS and 10-digit NAPCS codes to closes hundred million dollars and mark overlaps.	Provide revenues by 6-digit NAICS codes within dollar ranges and mark overlap.

Chart 2
Select New Additional Requirements for Filing Parties in a Competitive or Vertical Relationship

	Current Requirements	Proposed Changes
Overlap Description	No similar requirement.	Briefly describe each of the principal categories of products and services offered by the acquiring person. This is limited to a business assessment, not a formal antitrust analysis. List and describe all current or known planned products or services of the acquiring person that compete with a product or service of the target (i.e., horizontal overlaps). For each such competing product or service, identify sales (or similar metrics measuring performance), a description of all categories of customers that purchase or use the product or service, and the top 10 customers in the most recent year and the top 10 customers for each customer category identified.
NAICS Revenue Reporting	If reporting an overlap, provide state or street level geographic detail, depending on industry	If reporting an overlap, provide street level detail for additional industries, identify the entities generating the overlap, and include operations as of closing as opposed to year end.
Supply Relationships Description – Related Sales	No similar requirement.	List and describe each product, service, or asset the acquiring person has supplied to (1) the target or (2) any company that competes with the target (i.e., a vertical sales relationship). This requirement is limited to products that represented at least \$10 million in revenue in the most recent year. For each product, service, or asset listed, provide sales to the target or the target's competitors for the most recent year. Provide the top 10 customers for any product, service, or asset listed and describe the supply or licensing agreement for each.
Supply Relationships Description – Related Purchases	No similar requirement.	List and describe each product, service, or asset the acquiring person has acquired from (1) the target or (2) any company that competes with the target (i.e., a vertical purchaser relationship). This requirement is limited to products that represented at least \$10 million in revenue in the most recent year. For each product, service, or asset listed, provide amounts purchased from the target and the target's competitors for the most recent year. Provide the top 10 suppliers for any product, service, or asset listed and describe the purchase or licensing agreement for each.

	Current Requirements	Proposed Changes
Geographic Market Information	Provide information on states or other geographic locations in overlapping NAICS codes (varies by NAICS code).	Additional sectors have been added to subset of sectors for which street address-level information is required.
Prior Acquisitions	If overlap, acquiring person must identify all prior acquisitions in the same industry over \$10 million made during the past five years.	If overlap, acquiring party <u>and</u> target must identify all prior control acquisitions in the same industry or that provided or produced a competitive overlap product or service made during the past five years.
Minority-held Entities	Identify entities that generate revenues in any overlapping NAICS code in which filing person holds a minority interest (or, alternatively, list all minority entities).	Identify entities that generate revenues in any overlapping NAICS code in which filing person holds a minority interest. Parties may no longer list all minority entities.
Defense and Intelligence Contracts	No similar requirement.	Identify proposals and contracts valued at \$100 million or more if they generated revenue in a NAICS overlap or involve an overlap product or service.

Chart 3
Steps to Prepare for Forthcoming HSR Changes

	New HSR Rules	What to Do Now
Transaction Rationale	Describe all strategic rationales for transaction, including those related planned products, services, or expansion.	Consider theme or long-term focus, and how specific transactions fit in.
Pipeline	Describe planned products and services.	Consider who would have pipeline information for each business unit.
Vertical Relationships	Describe existing or potential vertical or supply relationships between the filing parties; describe all current agreements between the parties and those from the past year.	Consider who would have the relevant vendor contracts and contact information for each business unit; consider whether summaries of these contracts exist for other purposes.
Officers and Directors	Identify officers, directors, or board observers of all controlled entities, and identify for what other entities these individuals have served as officer, director, or board observer in last 2 years.	Consider including relevant inquiries in annual director surveys. Consider whether the information (or similar) is being tracked for other purposes (i.e., SEC reporting).
Defense or Intelligence Contracts	Identify proposals and contracts valued at \$100 million or more if they generated revenue in a NAICS overlap or involve an overlap product or service.	Consider who would have this information and how to address confidentiality concerns.
Other Agreements Between the Acquiring Person and Target	Acquiring person must indicate, by checking a box, the existence and type of agreements between the parties currently in effect or entered into within last year within 6 categories.	Consider who would have this information and how it can be accessed and sorted.

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