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FTC and DOJ announce final rule reshaping HSR filing requirements

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On October 10, 2024, the federal antitrust agencies finalized the most significant changes to the U.S. merger notification regime since the enactment of the Hart-Scott-Rodino ("HSR") Act in 1976.

The Final Rule will become effective 90 days after publication in the Federal Register, meaning that the expanded filing requirements will take effect no earlier than mid-January 2025.

The **Final Rule** (https://bit.ly/4h0ptoR) — which was issued by the U.S. Federal Trade Commission ("FTC") with the concurrence of the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies") — will significantly increase the burden on companies whose transactions must be notified to the Agencies pursuant to the HSR Act.

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Although the Agencies significantly scaled back the changes they originally proposed in **June 2023** (https://bit.ly/3UbCsKv), the Final Rule will still fundamentally reshape the HSR process. According to the Agencies themselves, filings in most cases will take additional time to prepare and become much more expensive, which could extend deal timelines.

Notable new requirements include:

- adding a "supervisory deal team lead" to the individuals from whom transaction-specific documents must be collected;
- requiring production of certain non-transaction specific documents that analyze competitive overlaps relevant to the Transaction that were provided to the CEO (or CEOs of subsidiaries involved in the transaction) or members of the board;
- submission of narrative descriptions of each strategic rationale for the transaction and of any horizontal overlaps or vertical relationships between the parties; and
- providing the most recent year's sales data for each overlapping product or service between the parties.

The FTC vote to issue the Final Rule was unanimous.

The **FTC** (https://bit.ly/3Y8Qe1D) and **DOJ** (https://bit.ly/4873Uik) each issued press releases to accompany the issuance of the Final Rule, FTC Chair Lina M. Khan issued a **statement** (https://bit.ly/4f1WXkM, joined by Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya), and Commissioners Andrew N. Ferguson (**here**: https://bit.ly/4f6Ty46) and Melissa Holyoak (**here**: https://bit.ly/4dObFL2) each issued a statement as well.

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Commissioner Holyoak's statement identifies many of the key differences between the Final Rule and the proposed rule.

Summary of notable changes

- **Expanded document production requirements:** The Final Rule will require substantially broader document productions as part of an HSR filing.

"Transaction-Related Documents" largely inherit the descriptions of what were previously referred to as "4(c) and 4(d) documents." However, under the Final Rule, the definition has been expanded to include any such documents prepared by or for not just officers or directors, but also the supervisory deal team lead, described as the individual with primary responsibility for supervising the strategic assessment of the deal, even if that person is not a director or

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officer. Also, while the Agencies have long interpreted Items 4(c) and 4(d) as requiring the submission of responsive drafts if sent to the board of directors, they will now require the submission of all Transaction-Related Documents — even drafts — that have been shared with *any individual* member of the board (or similar body). (The Final Rule notably does not include the requirement that filers submit all drafts of all responsive documents, as the Agencies had proposed in June 2023.)

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"Plans and Reports": Filers must now include certain regularly prepared ordinary course documents discussing competition-related topics related to any overlaps. Such documents prepared within one year of filing, if they were shared with the filer's CEO, CEOs of subsidiaries involved in the transaction, or a board member, will be considered responsive to this expanded requirement. This will necessitate a broader document collection process that is not limited to just documents created in connection with consideration of the transaction.

Verbatim English language translations of all foreign-language documents are now required. The Agencies declined to revise the instructions to state explicitly that machine translations are acceptable and noted that filers "must certify that translations are materially accurate," even if they do not identify how they were created.

A Transaction Diagram showing the deal structure must be submitted by the acquiring person, if such a diagram already exists.

- **Narratives:** The Final Rule requires filers to provide new narrative responses as part of the HSR form, including:

A description of each strategic rationale for the transaction, identifying documents that confirm or discuss the stated rationales.

Identification of the principal categories of products and services of the acquiring person, as well as horizontal overlaps with those of the acquired person (including overlaps with products in development).

Descriptions of the filer's supply relationships, including any vertical relationship between the filing parties.

- **Sales data and customer information:** Filers must provide sales data for the most recent year for *each* overlapping product or service — including both current and planned overlapping products and services. For each such overlap, the filer must also identify its top 10 customers for the most recent year, and the top 10 customers by category (*e.g.*, retailer, distributor, broker, national account, local account).
- **Preliminary agreements:** In the Final Rule, the Agencies clarified that parties filing on "preliminary agreements" (*e.g.*, letters of intent) will now be required to include "some combination of" additional information about the deal, such as: "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." The Agencies acknowledge that this will result in some parties being unable to file HSR and start the waiting period as soon as they otherwise could under the current rules.
- **Officers and directors:** An acquiring person will be required to identify: (a) all officers and directors of the acquiring person and its subsidiaries that have (or in the prior 3 months have had) responsibility for the development, marketing, or sale of overlapping products or products identified in the Overlap Description or Supply Relationships Description; and (b) all officers or directors of the entity making the acquisition as well as any entities within the acquiring person that have been or will be created as part of the transaction, including subsidiaries of such entity. In both cases, this is limited to individuals who also serve as an officer or director of another entity that derived revenue in the same NAICS codes as the target.
- **Revenues and overlaps:** Filers must continue to report revenue under NAICS codes, but under the Final Rule they will do so using estimated ranges under 2022 NAICS codes and they will be required to list the names of the operating businesses that derive revenue under each reported NAICS code.
- **Prior acquisitions:** Under the Final Rule, both acquiring and acquired persons are required to report information on certain prior acquisitions within the previous five years. Previously, that requirement was limited to the acquiring person.
- **Foreign investment and defense contracts:** The new filing instructions will require filers to identify and describe "any subsidy (or a commitment to provide a subsidy in the future) [received] from any foreign entity or government of concern." Parties are also required to identify, for products "produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C)" (*e.g.*, China, Russia, North Korea, and Iran), any product that is "subject to countervailing duties imposed by any jurisdiction" and any product that is "the subject of a current investigation for countervailing duties in any jurisdiction." Parties must also identify certain government contracts and bids, which are or will be the source of revenues in a NAICS industry overlap, or which involve or will involve an overlap product or service identified in the Overlap Description or Supply Relationships Description.
- **Select 801.30 transactions:** The Final Rule creates a new category of transactions that will have minimal reporting requirements, referred to as "Select 801.30 Transactions." This includes (i) certain minority acquisitions by investors without ties to the issuer; and (ii) certain executive compensation transactions. Select 801.30 transaction filers will not have to report the following: transaction rationale, transaction

diagram, plans and reports, transaction agreements, overlap description, supply relationships description, and defense and intelligence contracts.

Early termination & online comment portal

In its **press release** (https://bit.ly/3Y8Qe1D), the FTC announced that after the Final Rule goes into effect it will lift the existing "temporary" suspension of the Agencies' discretionary practice of granting parties' requests for early termination ("ET") of the HSR Act waiting period.

However, it is unclear whether this will have a meaningful effect on deal timelines, given the additional time that will now be required to prepare HSR filings and, presumably, for the Agencies to review them.

It is also not clear that the Agencies' current leadership will support grants of requests for ET. In her statement, Chair Khan noted that "[m]erging parties are not entitled to early termination, and I question the wisdom of using agency resources on a discretionary function while resource constraints impede our ability to fully execute on our mandatory functions."

The FTC also **announced** (https://bit.ly/3Y8Qe1D) a new **"online portal"** (https://bit.ly/4h5ddDw) that allows for comments on proposed transactions to be submitted directly to the Agencies by the general public.

The Commission is seeking 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."

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