

# FTC ISSUES FINAL HSR RULES TRANSFORMING THE MERGER REVIEW PROCESS

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## US Policy and Regulatory Alert

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On 10 October 2024, the Federal Trade Commission (FTC) issued final changes to the rules implementing the Hart-Scott-Rodino Act (HSR). In [announcing](#) the final rule, the FTC stated that it is “responding 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” hindering the agencies’ ability to conduct premerger review. According to the FTC, the new rules will “create a more efficient review process” that “will improve the ability of the [agencies] to detect illegal mergers and acquisitions prior to consummation.”

Spanning 460 pages, the new rules transform the US premerger notification process, requiring parties to provide several new categories of documents and information in their HSR filings. While the final rules scrap some of the more onerous elements of the [FTC’s June 2023 Notice of Proposed Rulemaking](#) (NPRM),<sup>1</sup> they nonetheless represent a significant overhaul that will increase the time and cost required for most HSR filings, especially for transactions involving overlaps or vertical relationships. The new rules were approved unanimously by the FTC Commissioners with the concurrence of the Antitrust Division of the US Department of Justice. They will likely take effect in January 2025, 90 days after publication in the Federal Register, although legal challenges loom on the horizon.

## WHAT ARE THE KEY CHANGES TO THE HSR FILING PROCESS?

The most significant changes to the HSR filing process under the new rules are summarized below. Some requirements vary depending on the filing party (buyer or seller), the type of transaction, and whether the transaction involves a horizontal overlap or vertical relationship.

### Organization Structure

The acquiring person must describe its ownership structure and, where a fund is the ultimate parent entity (UPE), submit an organization chart reflecting relevant entities in the fund family, if such a chart exists.

### Minority Shareholders

The acquiring person must identify minority shareholders holding more than 5% of any entity up and down the chain of control from the acquired entity, and of any entity controlled by the UPE created for the transaction, providing the name, address, percentage of interests held, and d/b/a or “street name”. For limited partnerships (LPs), the information can be limited to the general partner and LPs that have or will have board rights. Acquired persons only need to provide this information for rollover shareholders.

## **Governance**

The acquiring person must list all current officers and directors of certain entities it controls who also serve as an officer or director of any company that overlaps with the target, and identify all such companies.

## **Transaction Documents and Information**

The parties must explain the strategic rationale for the transaction and identify corresponding documents in the filing. The acquiring person must submit a transaction diagram if one exists. The parties must submit all agreements relating to the transaction, including exhibits, schedules, and side letters. Short-form letters of intent (LOIs) can no longer form the basis of HSR filings. If the executed agreement does not describe the transaction with enough specificity, parties must submit an additional dated document (e.g., an agreement in principle, term sheet, or draft agreement) providing sufficient details, including the parties, structure, what is being acquired, purchase price, closing timeline, employee retention policies, post-closing governance, and transaction expenses.

## **Global Merger Control Filings**

The acquiring person must list each non-US competition authority that has been or will be notified of the transaction.

## **Overlaps and Related Sales and Customer Information**

The parties must describe their principal categories of products and services. Each party must identify any current or planned products or services that compete, or could compete, with current or planned products or services of the other party. For each overlap, the parties must provide (1) sales for the most recent year (projected revenue and sales volume for products or services in development); (2) a description of categories of customers that purchase or use the product or service (details regarding the R&D life cycle for products or services in development); and (3) top 10 customers in the most recent year, overall and broken out by customer category.

## **Supply Relationships and Related Sales and Customer Information**

Parties must provide similar sales and customer information for each product, service, or asset representing at least US\$10 million in sales (including internal transfers) that they have sold, licensed, or provided (or purchased, licensed, or obtained) in the most recent year (1) to/from the other party or (2) to/from any business that uses such product, service, or asset to compete with the other party.

## **Transaction and Competition-Related Analyses**

Item 4(c) of the current HSR Form requires parties to submit documents prepared by or for officers or directors analyzing the transaction with respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets (Competition Issues). Parties will now also need to submit such documents prepared by or for the “supervisory deal team lead” with primary responsibility for overseeing strategic assessment of the deal. Additionally, parties must produce business plans created within one year of filing, which were provided to the CEO or board and analyze Competition Issues with respect to overlap products.

## **Prior Transactions**

The acquired person must now provide information regarding prior acquisitions in overlap areas for the last five years.

### **Foreign Subsidiaries and Defense or Intelligence Contracts**

The acquiring person must disclose and describe any subsidiaries received or promised from a “foreign entity or government of concern” in the two years prior to filing. It must also list any products it produced in a “covered nation” under the National Defense Authorization Act (NDAA) that are subject to countervailing duties or an investigation thereof, indicating the jurisdiction and duty. Both parties must disclose pending requests for proposals or procurement contracts with the US Department of Defense or any member of the US intelligence community valued at US\$100 million or more, which involve an overlap or supply relationship.

### **Additional Changes**

The new rules contain several additional changes to the filing process including, (1) separate HSR Forms and Instructions for acquiring and acquired persons; (2) a category of “select 801.30 transactions” (i.e., non-consensual acquisitions of minority interests that do not confer board rights) excused from certain reporting obligations; (3) requiring English-language translations of all foreign-language documents submitted with the filing; (4) establishing ranges for parties to report revenues by North American Industry Classification System (NAICS) code; (5) requiring parties to indicate the operating business(es) that derived revenues in each NAICS code; (6) requiring parties to organize their subsidiary listings by operating company or business; and (7) a new platform for e-filing.

## **WHAT IS NOT GOING TO CHANGE?**

The [HSR notification thresholds \(adjusted annually\)](#), filing fee schedule, waiting periods, exemptions, and most of the filing requirements under the prior HSR regime remain in place.

## **WHAT WAS LEFT OUT OF THE FINAL RULE—IS THERE A SILVER LINING?**

After considering over 700 comments to the NPRM, the FTC ultimately decided not to adopt several proposed requirements, including the following:

- Detailed transaction timeline;
- Organizational charts (even if not maintained in the ordinary course of business);
- Draft transaction analyses;
- Detailed labor market information;
- Disclosure of board observers;
- Geolocation coordinates within NAICS overlaps;
- 10-year lookback for prior acquisitions;
- 3-year lookback for officer and director cross-affiliations; and

- Information regarding document preservation and messaging systems.

One potential silver lining for dealmakers is that, once effective, the new rules will lift the agencies' suspension of grants of early termination of the 30-day HSR waiting period for competitively benign transactions. The suspension has been in place since February 2021. While this is undoubtedly a positive development for merging parties, the extent to which the FTC Premerger Notification Office (PNO) will exercise its discretion to grant early termination remains to be seen, particularly given the volume of additional documents and information agency staff will need to review under the new HSR regime.

## HOW WILL THE CHANGES IMPACT THE TIME AND COSTS ASSOCIATED WITH HSR FILINGS?

For most transactions, the new rules will significantly increase the time and cost associated with preparing HSR filings. The FTC projects that the average number of additional hours required to prepare an HSR filing will be 68 hours, rising to as much as 121 hours for filings by acquiring persons in transactions involving horizontal overlaps or vertical relationships (45% of all filings by the agency's estimates). While the new rules have yet to be tested in practice, the FTC's projections may actually underestimate the additional time required. In its comments to the NPRM, the US Chamber of Commerce stated that despite the agency "predicting a nearly 400% increase in the hours needed to complete the HSR filing ... the true cost of the proposed changes may be nearly five times greater than the NPRM suggests."<sup>2</sup> The burden of the new rules may be especially acute for transactions involving private equity, complex investment funds, or pharmaceutical companies with robust R&D pipelines.

## WILL THE NEW RULES BE CHALLENGED?

The new rules could face challenges on several fronts. Plaintiffs might challenge the agency's rulemaking in court under the Administrative Procedure Act (APA) as arbitrary and capricious, an improper exercise of agency authority, and/or implicating the Major Questions Doctrine, among other claims.<sup>3</sup> Congress could overturn the new rules under the seldom-used Congressional Review Act (CRA), which would require the House and Senate to pass a joint resolution disapproving the rule within 60 legislative days, signed by the President. The rules could also be undone and superseded by a subsequent agency rulemaking under different agency leadership. Each of these pathways could face significant legal, procedural, and political hurdles. Moreover, the final rule (and [concurring statement from FTC Commissioner Andrew Ferguson](#)) anticipates potential legal challenges and methodically outlines a detailed factual and legal predicate supporting the agency's actions.

## WHAT ARE THE KEY TAKEAWAYS, AND WHAT SHOULD I DO NOW?

Companies should move quickly to understand the new requirements and implement internal processes to be in a position to comply once the new rules become effective in early 2025. Specifically, companies should consider the following:

### Time Required for HSR Filing Preparation

The new rules will significantly increase the time required to prepare most HSR filings. Deal teams should account for this in transaction timelines and relevant provisions in merger agreements. Companies should engage with antitrust counsel early in the transaction process to ensure compliance and avoid delays.

### **Cross-Border Coordination**

For transactions triggering ex-US merger control filings, companies should ensure that the HSR time horizon is synchronized with timelines in other jurisdictions and that data and narratives (e.g., describing deal rationales, product/service lines, overlaps, and vertical relationships) are consistent across filings.

### **HSR Personnel and Document Compliance**

Companies should alert internal personnel involved with HSR filing preparation that changes are imminent, and coordinate with antitrust counsel, deal teams, executives, and potential supervisory deal team leads to reinforce best practices for document creation. Documents responsive to the new rules are being created now. In addition, companies should work with counsel to create internal compliance protocols to control document creation and distribution and facilitate efficient collection.

### **Increased Agency Scrutiny**

HSR filings under the new rules will provide more transparency into business relationships and competitive dynamics, potentially resulting in greater scrutiny from the antitrust agencies. Many of the new requirements track the agencies' enforcement priorities as outlined in the new Merger Guidelines released last year, including a focus on private equity transactions, minority investments, interlocking directorates, serial acquisitions, and nascent competition. Increased disclosure requirements could reduce the likelihood of transactions “flying under the radar.”

### **Uncharted Territory**

The new rules represent the first major overhaul of the HSR Form in 45 years. Many of the new requirements have not been tested in practice and are matters of first impression for the agencies, merging parties, and antitrust practitioners. Questions abound, ranging from the level of detail required in narrative descriptions to how agencies may handle alleged filing deficiencies. Companies should work closely with counsel and stay tuned as the precise contours of the new regime come into greater focus.

## **FOOTNOTES**

<sup>1</sup> FTC, Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023).

<sup>2</sup> See Comment of U.S. Chamber of Com., Doc. No. FTC-2023-0040-0684 at 56.

<sup>3</sup> See *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).

## KEY CONTACTS



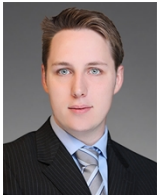
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