

October 25, 2024

# New HSR Form Imposes Substantial Additional Burdens on Filing Parties

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## The Final Rule Eliminates Some Onerous Aspects of the Proposed Rule, but the New Form Broadens the Categories Of Required Information and Expands the Current Document Production Requirements for Transactions Requiring Premerger Filings Under the HSR Act

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### SUMMARY

On October 10, 2024, the Federal Trade Commission (“FTC”), with support from the Antitrust Division of the U.S. Department of Justice,<sup>1</sup> issued the final text of its rule (“Final Rule”) (available [here](#)) revising the Hart-Scott-Rodino (“HSR”) Form and Instructions. The Final Rule represents the first major change to the HSR Form since 1978. Absent judicial intervention, the Final Rule is set to take effect 90 days following its publication in the Federal Register, which is expected shortly.

Although the FTC scaled back aspects of what was proposed in the June 2023 Notice of Proposed Rulemaking (“NPRM”)<sup>2</sup> (available [here](#)), the Final Rule still expands significantly, for all HSR filings, the scope of information and documents beyond what is currently required. As a result, the Final Rule will increase the burden and expense associated with all transactions reportable under the HSR Act, including those that pose no competitive concerns. The FTC itself has estimated that the changes brought about by the Final Rule will increase the time needed to prepare an HSR filing by 68 hours on average—and the additional hours required for any particular filing may vary significantly based on the type of transaction at issue and whether the filer is the buyer or the target.<sup>3</sup>

Large multinational corporations with diverse business lines and private equity funds with many portfolio companies will be particularly impacted by the new requirements of the HSR Form. These entities and other

frequent HSR filers may wish to take steps now to assemble in advance—and outside the confines of a particular M&A transaction—a number of categories of information required by the new HSR Form.

We describe in detail below the additional information that will be required to be submitted under the new HSR Form, which, under the Final Rule’s timeline, would likely become effective in late January 2025.

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### I. CHANGES TO THE HSR FORM

#### A. NEW HSR REPORTING SCHEME BASED ON THE NATURE OF THE TRANSACTION

In a notable change from the current HSR Form, the Final Rule imposes different requirements for the scope of information to be provided based on the nature of the transaction. The Final Rule establishes three new categories of transactions, each of which involves different reporting requirements.

##### 1. “Select 801.30 transactions”

This category is defined to include executive compensation transactions and certain other transactions reportable under HSR Rule 801.30, in which the buyer is making open market purchases or acquiring voting securities or non-corporate interests from holders *other than the issuer* (such as secondary offerings and conversions of preferred to common stock), and will *not acquire control* of the target or board representation rights as a result, and which involve no agreement or contemplated agreement between any entity within the buyer and the seller.<sup>4</sup> The FTC estimates that 8% of future HSR filings will fall within this category.<sup>5</sup> Noting that the FTC anticipates that this category “will capture the transactions of many investors that do not seek to influence, direct, or manage the companies in which they invest,”<sup>6</sup> the Final Rule provides that filers in “select 801.30 transactions” need not provide the following categories of information (all of which are described in greater detail in Section I.C below):

- a transaction diagram (if one exists);
- ordinary course plans and reports;
- transaction agreements;
- a description of the transaction rationale;
- overlap and supply relationship descriptions; and
- disclosures of defense and intelligence contracts.<sup>7</sup>

##### 2. “No-overlap” filings

For certain transactions where the merging parties do not have overlapping business lines or pre-existing supply relationships, the Final Rule recognizes that the higher cost of collecting and reporting certain categories of new information required by the Final Rule is not justified. Exempting filers in no-overlap transactions from reporting certain categories of information is already a feature of Items 7 and 8 of the current HSR Form, and the Final Rule applies that same approach with regard to certain additional requirements of the new HSR Form.<sup>8</sup> The FTC estimates that 47% of future HSR filings will involve no

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reportable overlapping revenues and no pre-existing supply relationships.<sup>9</sup> Filers in no-overlap transactions need not provide the following types of information:

- ordinary course plans and reports;
- author information for submitted documents;
- overlap and supply relationship descriptions;
- certain geographic market information;
- identification of certain officers and directors;
- prior acquisitions; and
- disclosures of defense and intelligence contracts.<sup>10</sup>

### 3. “Overlap” filings

Transactions between parties that generate revenues in the same or similar business lines, or that have an existing supply relationship, will be subject to all of the new reporting requirements in the Final Rule. The FTC estimates that 45% of future HSR filings will fall within this category.<sup>11</sup> Filers for these types of transactions will experience most acutely the significant burdens involved in complying with the new reporting requirements.

## B. DIFFERENT REPORTING REQUIREMENTS FOR BUYER AND SELLER

Again mirroring a feature of the current HSR Form, the Final Rule acknowledges that competition regulators often seek more information from the buyer than from the seller in a transaction, given that the buyer “often will be operating the assets or business acquired post-consummation” and may have more information about the transaction’s structure.<sup>12</sup> As such, only the buyer needs to provide the following new categories of information:

- an ownership structure description and chart;
- a transaction diagram (if one exists);
- identification of other agreements between the parties;
- identification of minority shareholders, other than those rolling-over to the buyer;
- identification of certain officers and directors; and
- a listing of other international premerger notifications.<sup>13</sup>

## C. NEW REPORTING REQUIREMENTS

### 1. Expanded Document Collection

The Final Rule incorporates new document collection requirements—many of which apply to all three categories of transaction types—that collectively will increase the number of custodians whose documents must be reviewed and the scope of documents that must be collected and provided to the FTC along with the HSR Form. For some companies, these changes may significantly increase the effort required in preparing an HSR Form. Several of the more onerous requirements are discussed below.

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**Competition Documents.** The current HSR Rules require the collection of documents prepared by or for the filer’s officers and directors that evaluate the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets—the so-called “Item 4(c) documents.” The Final Rule expands this requirement to include documents prepared by or for the “supervisory deal team lead,” which is defined as the singular “individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.”<sup>14</sup>

**Plans and Reports.** For overlap filings, the Final Rule also requires that the parties submit all plans and reports (even ordinary course documents) prepared within one year of the filing date that were provided to the Board of Directors that “analyze market shares, competition, competitors, or markets” pertaining to any overlapping product or service currently produced, sold, or known to be under development by the parties.<sup>15</sup> Competition-related plans and reports provided to the CEO also must be submitted, but this requirement is limited to “regularly prepared” documents produced at annual, semi-annual, or quarterly intervals, while expressly excluding plans or reports that are provided to the CEO more frequently (*i.e.*, weekly or monthly reports).<sup>16</sup> Nonetheless, for many companies, this new requirement could meaningfully expand the scope of documents that must be reviewed in connection with the preparation of an HSR filing.

**Drafts of Item 4(c) and 4(d) Documents.** The FTC’s June 2023 NPRM proposed to require that drafts of Item 4(c) and 4(d) documents be submitted in addition to the final version.<sup>17</sup> In the Final Rule, the FTC claimed that it had “eliminated in toto” the proposed requirement to include “draft versions of submitted documents.”<sup>18</sup> But in the guidance issued in connection with the Final Rule, the FTC “clarifie[d]” its prior guidance such that under the new HSR form, a draft Item 4(c) or 4(d) document “that was shared with *any* member of the board of directors (or similar body) is responsive and should not be considered a draft; rather, it should be treated as a final version and submitted with the HSR Filing.”<sup>19</sup> For companies whose CEO also is a Board member—or that have a special committee of Board members involved in a transaction—the requirement to submit all drafts as “final” versions may significantly increase the burden of compliance and the volume of submitted documents.

**Transaction-Specific Agreements.** In addition to the principal transaction agreement, the Final Rule now requires parties to submit all other transaction-related agreements, “including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements.”<sup>20</sup> As written, this requirement could also encompass joint-defense agreements relating to a potential challenge to the transaction (which may be covered by a common interest privilege)—but the Final Rule indicates that the FTC intended to exclude “agreements such as clean team agreements” because “some parties might forgo using clean-team agreements entirely” if they were required to be submitted, and that logic could be applied to argue that joint-defense agreements should be excluded, too.<sup>21</sup>

***Filings Not Based on a Definitive Agreement.*** If an HSR filing is being made based on an executed term sheet or letter of intent, rather than a definitive agreement, the affidavit accompanying the filing “must attest that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has also been submitted.”<sup>22</sup> That document should include “some combination of the following terms: 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.”<sup>23</sup>

Requiring a more definitive document before permitting an HSR filing may delay some transactions that do not pose any antitrust concern, which currently can be notified to the FTC based on a simple letter of intent. Parties wishing to submit an HSR filing before a definitive agreement is signed should consult antitrust counsel to ensure they have a sufficiently detailed preliminary agreement that meets the Final Rule’s requirements.

***Translations.*** The Final Rule requires that all documents accompanying the HSR filing “must be submitted with verbatim English language translations,” and that “[a]ll verbatim translations must be accurate and complete.”<sup>24</sup> This requirement could add substantially to the time and costs of preparing HSR submissions on behalf of non-U.S. entities.

## 2. Descriptive Responses and Supporting Information

Whereas the current HSR rules generally require filers to provide a narrative description only of the transaction at issue, the Final Rule requires descriptive responses addressing a variety of new topics described below. Filers should work with counsel early on in the filing process to begin preparing these descriptive responses and to ensure that the descriptions accurately reflect the parties’ knowledge and purposes for entering into the transaction. The Final Rule indicates that if the agency staff identify discrepancies between the descriptive responses and other information contained in documents submitted with the HSR filing, the staff may request clarification, which could require restarting the waiting period.<sup>25</sup>

***Transaction Rationale.*** Except for select 801.30 transactions, the parties must “identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees” along with “each document produced in the filing that confirms or discusses the stated rationale(s).”<sup>26</sup> The Final Rule acknowledges that “there may be many goals for the transactions and that different perspectives within the filing person may be difficult to resolve,” and that rationales may change over time, which is why the Final Rule requires filers to point to specific documents supporting the stated rationale(s) to demonstrate which rationale(s) predominate.<sup>27</sup> The Final Rule also instructs that filers should address any inconsistencies between the stated rationales that appear in the documents.<sup>28</sup>

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Although this requirement will increase the burden involved in preparing an HSR submission, it also creates the opportunity for filers to include advocacy regarding the pro-competitive justifications for a transaction that involves overlapping business lines or a vertical relationship between the parties.

***Business Operations of the Acquiring Person.*** The Final Rule requires the buyer in all categories of transactions to briefly describe its principal business operations, including those of subsidiaries and portfolio companies.<sup>29</sup> For buyers that are investment companies or have many different business lines, providing this information will likely entail a significant effort for the first HSR filing under the new rules, but may be less burdensome for subsequent filings so long as the buyer's business lines do not change significantly.

***Overlapping Business Lines and Supply Relationships.*** Except for select 801.30 transactions, each party must describe each of its "current or known planned products or services" that compete with those of the other party.<sup>30</sup> The Final Rule explains that information about pre-revenue businesses is important for regulators "to determine if the transaction is likely to violate the antitrust laws by eliminating on-going innovation competition, a potential competitor, or a nascent competitive threat that has yet to make sales."<sup>31</sup> To limit the uncertainty in determining whether a given product still in development should be included in the response, the Final Rule provides that filers may limit their reporting their current and planned products or services to those that are reflected in documents submitted with the filing.<sup>32</sup> Despite that limitation, this requirement could still be very burdensome for filers in industries involving rapidly evolving technologies, such as pharmaceuticals, biotech, or artificial intelligence, which may have a large number of planned products under development at any given time.

For any self-reported overlapping product or service, the parties must provide:

- Either (i) sales revenue for the most recent year, or (ii) for "products or services not generating revenue or whose performance is not measured by revenue in the ordinary course, projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric" used to measure performance;
- A "description of all categories of customers" of the product or service or, if the product or service is still in development, "the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched"; and
- The top 10 customers in the most recent year, and the top 10 customers within each customer category.<sup>33</sup> (The June 2023 NPRM proposed to require the submission of contact details (including title, phone number, and email address),<sup>34</sup> but the FTC dropped this requirement in the Final Rule.<sup>35</sup>)

Filing parties must also describe any supply relationships between the buyer and target, or between the filer and the transaction counterparty's known competitors, and must provide information for the most recent year concerning: (i) the dollar amount of sales/purchases with the transaction counterparty and with its competitors, (ii) the top 10 customers/suppliers that compete with the transaction counterparty, and (iii) the terms of the supply agreements with those 10 customers/suppliers.<sup>36</sup>

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The Final Rule instructs that each party should provide information about the transaction counterparty's products and services and its supply relationships based solely on its own knowledge and belief, and that filers should not "exchange information for the purpose of answering this item," to respond to a perceived concern about "sharing of information between existing competitors that would inadvertently increase the risk of anticompetitive coordination."<sup>37</sup> In the light of the stated purpose for this requirement, we believe that HSR counsel for the filers can continue the common practice of coordinating their HSR Form responses, but those counsel need to be mindful not to expose their clients to competitively sensitive information. Thus, some redactions may need to be made when sharing draft responses, as is commonly done when descriptive information is shared for filings in other jurisdictions. As a result, even with coordination between outside counsel, the filers may end up reporting different areas of overlap based on differences in their respective knowledge.

### 3. Expanded Reporting of Corporate Organizational Structure

The Final Rule notes that an overhaul to the reporting requirements concerning minority investors and corporate governance was necessary in order to keep pace with recent developments—such as increasingly complex corporate ownership structures, the more prominent role of private equity investors in M&A transactions, and the evolving ways in which such investors can exert influence over management decision-making.<sup>38</sup> The new rules are intended to give the enforcement agencies information about previously unidentified limited partners and co-investors that may exert influence over the acquiring entity and may also have other investments in businesses that compete with the target business. These new requirements will increase the HSR filing burden for many entities, but the burden will land especially hard on private equity funds and other investment M&A buyers that may have dozens of portfolio companies and sub-funds in their ownership structure. To minimize the filing burden, these filers should consider putting information-gathering mechanisms in place now, in preparation for their first filing once the new HSR Form goes into effect.

***Minority Shareholders and Interest Holders.*** Under the current HSR Rules, the buyer must identify minority owners holding interests of 5% or more, for both the acquiring entity and its ultimate parent entity ("UPE"); the target must identify any minority owners holding 5% or more of the acquired entity only. If any of those entities is a limited partnership, it need only identify its general partner. The Final Rule expands these requirements in four respects.

*First*, the Final Rule requires the buyer to also identify known minority owners holding 5% or more of the acquiring entity and any entities that control or are controlled by, directly or indirectly, the acquiring entity, and all entities created to effectuate the transaction (collectively, so-called "covered entities").<sup>39</sup> *Second*, the buyer must "provide the doing business as or 'street name' of minority investors that are related to master limited partnerships, funds, or investment groups."<sup>40</sup> *Third*, for any covered entities that are limited partnerships, the Final Rule also requires the buyer to disclose "limited partners that (i) currently hold, or

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will hold as a result of the transaction, 5% or more” of the limited partnership and “(ii) have or will have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities” (“board rights”) of the limited partnership, its general partner, or its management company.<sup>41</sup> *Fourth*, if any minority holders of the acquired entity or any entity it controls “will continue to hold an interest” in such entity, or “will acquire an interest in” one of the buyer’s covered entities as a result of the transaction, then the target will need to identify (a) minority holders of 5% or more of such entities within the acquired person that are not limited partnerships, and (b) limited partners that (i) hold 5% or more of such entities within the acquired person that are limited partnerships and (ii) also have board rights in any of the buyer’s covered entities or a general partner or management company of a covered entity.<sup>42</sup>

These requirements are likely to require significant additional information from private equity funds and other investment entities, and will materially complicate HSR filings for acquiring entities that have complicated investment structures.

***Ownership Structure and Transaction Diagrams.*** Item 6(a) of the current HSR Form requires filers to list certain entities that they control. The Final Rule requires that filers, except in select 801.30 transactions, organize these lists of controlled entities by operating business and identify the “doing business as” names of those entities.<sup>43</sup>

Similarly, Item 6(c) currently requires acquiring entities and their associates and acquired entities to identify their minority holdings of between 5% and 50% that derive revenue in any NAICS codes that overlap with the transaction counterparty. Whereas the current HSR Form gives filers the option to list all minority holdings rather than just the overlapping ones, the Final Rule eliminates that option, and also requires filers to identify any known “doing business as” name for those entities.<sup>44</sup>

The Final Rule also requires the buyer to describe the acquiring and acquired entities’ ownership structure and, where the UPE is a fund or master limited partnership, to provide any existing organizational chart that identifies and shows the relationship of all entities that are affiliates or associates.<sup>45</sup> Finally, except in select 801.30 transactions, the buyer must provide a diagram showing the deal structure, if one already exists.<sup>46</sup>

***Officers and Directors.*** The Final Rule requires the buyer to identify officers and directors of certain entities (other than religious or political non-profits) that are within the acquiring person, including:

- Current officers and directors, or those serving within three months prior to the HSR filing, of entities that “have responsibility for the development, marketing, or sale of products or services” that are reported as overlaps with the target; and
- Current officers and directors only (with no lookback period) of entities that control or are controlled by, directly or indirectly, the acquiring entity.<sup>47</sup>

In both categories, officers and directors need only be identified if they “also serve as an officer or director of an entity that derives revenue in the same NAICS industry code (or is in the same industry) as the target



at the time of filing.”<sup>48</sup> For large corporations with hundreds of subsidiaries around the world, this requirement could impose a significant burden. Moreover, as the agencies may review this information to assess potentially unlawful “interlocking directorates” under Section 8 of the Clayton Act,<sup>49</sup> filing parties will want to vet this response very carefully, including by considering whether any of the statutory safe harbors available under Section 8 are applicable.

#### 4. Additional Requirements

**Overhaul of Revenue Reporting.** The current HSR Form requires reporting revenue on an aggregated basis according to the NAICS codes used in filers’ financial reporting. The Final Rule overhauls these revenue reporting requirements by requiring filers to report NAICS codes on a descriptive basis and then break out revenues within those codes separately by operating business or unit, estimating revenues for each business unit within one of five ranges (less than \$10 million; \$10 million to \$100 million; \$100 million to \$1 billion; or \$1 billion or more).<sup>50</sup> Although the Final Rule notes that “[h]aving knowledgeable business personnel select the appropriate NAICS codes that best describe the filer’s business lines” is typically the best way to select NAICS codes, the Final Rule declines to require any particular methodology.<sup>51</sup>

**Prior Acquisitions.** When the buyer and target both report revenue in an overlapping NAICS code, the current HSR Form requires the buyer to identify other acquisitions within the last five years of (i) entities that reported revenue in that same NAICS code and had net sales or assets of \$10 million or more in the year before the acquisition or (ii) assets deriving revenues in that same NAICS code and valued at \$90 million or more. The Final Rule expands to the target this requirement to report prior acquisitions; requires treating acquisitions of all or substantially all the assets of an operating business as an “acquisition” for this purpose; and broadens the requirement to include not just prior acquisitions of assets or entities that reported revenue in the same NAICS code but also those that provide products or services identified as overlaps with the transaction counterparty.<sup>52</sup>

**National Security Information.** Implementing 15 U.S.C. § 18b, the Final Rule requires filing parties to state whether they have “received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern,” which through incorporation by reference to other federal statutes means, among other things: China, Russia, Iran, or North Korea; any entity that is “owned by, controlled by, or subject to the jurisdiction or direction of a government of” any of the foregoing nations; any foreign terrorist organization designated by the Secretary of State; or any OFAC specially designated national.<sup>53</sup> The FTC declined to adopt any de minimis threshold for what might qualify as a “subsidy,” and as such responding to this portion of the HSR Form could require substantial effort by some filers.<sup>54</sup> Additionally, except for select 801.30 transactions, the Final Rule requires filers to report pending or awarded contracts with the U.S. Department of Defense or intelligence agencies that involve an industry or a product or service overlap with the transaction counterparty and that are valued at \$100 million or more.<sup>55</sup>

**Identification of International Filings.** The HSR Form currently allows, but does not require, filers to identify other jurisdictions in which premerger notifications may be required. The Final Rule now requires the buyer to state, based on its knowledge or belief at the time of filing, whether “a non U.S. antitrust or competition authority has been or will be notified of the transaction,” and, if so, the name of “each such authority” and whether “(1) a merger notification has been filed, (2) a merger notification is being prepared for filing, or (3) the parties have a good faith belief that a merger notification will be made, along with the dates of the filing or planned filing.”<sup>56</sup> The new HSR Form also allows both parties to voluntarily waive the HSR confidentiality requirements in advance to permit the enforcement agencies to discuss the transaction with non-U.S. competition authorities.<sup>57</sup>

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## II. OTHER ANNOUNCEMENTS

**Early Termination.** In the FTC press release issued to announce the Final Rule, the FTC announced that it will lift its categorical suspension on early termination of HSR filings when the Final Rule goes into effect.<sup>58</sup> That suspension has been in effect since February 2021, when the FTC announced that it was working with the Antitrust Division of the U.S. Department of Justice to review the early termination procedures during the transition to the new administration and in response to an unprecedented volume of HSR submissions in the aftermath of the COVID-19 pandemic.<sup>59</sup> The FTC’s recent announcement states that the Final Rule will provide the enforcement agencies with the information necessary to inform the procedures used to grant early terminations.

**FTC Portal for Receipt of Transaction-Specific Comments.** The FTC also announced the launch of a [new online portal](#) that allows stakeholders and members of the public to submit comments on specific proposed transactions that may be under review by the FTC and how they might impact competition.

**Pull-and-Refile Requirements.** Finally, the Final Rule also introduced minor changes to the process for withdrawing and refiling an HSR submission without the payment of an additional filing fee. The pull-and-refile process is sometimes done to restart the initial HSR waiting period, giving the agencies an additional 15 or 30 days, depending on the transaction type, to conduct an initial investigation without issuing a Second Request. When refiling, a party must currently conduct a refresh search for documents responsive to Item 4 of the HSR Form. The Final Rule eliminates the requirement to provide updated financial information currently required by Items 4(a) and (b), but continues to require a refresh of Item 4(c) and 4(d) documents, along with a new requirement to submit any updated transaction agreements and updated information about subsidies required under the new rules.<sup>60</sup>

### III. IMPLICATIONS

The FTC Commissioners voted unanimously to adopt the Final Rule, and the two Republican Commissioners submitted concurring statements describing the intense negotiations and modifications to the NPRM that were required to obtain their support.<sup>61</sup> The Final Rule eliminates several of the more onerous aspects of the June 2023 NPRM, including the proposal for filers to include detailed information about labor markets and the proposal to require drafts of all Item 4(c) and 4(d) materials.<sup>62</sup> But the Final Rule's changes to the HSR Form are still quite substantial, and the burden on companies of complying with the new requirements will vary significantly based on a number of factors. A few general takeaways bear mentioning.

***New Requirements Will Significantly Increase the Time, Burden, and Expense of HSR Filings.*** The Final Rule acknowledges that its new requirements will increase the time needed to prepare an HSR filing for all filers. Given the differing reporting requirements for different types of filers, the additional burden will vary substantially: The FTC estimates that the additional time required will range from a low of 10 additional hours on average for targets in selection 801.30 transactions, to a high of 121 additional hours on average for buyers in a transaction involving overlapping business lines or parties in a supply relationship.<sup>63</sup> Because these figures are averages, the actual time required for some filers to complete a submission under the new HSR Form will likely be much higher—particularly for large multinationals with diverse business lines and private equity funds with many portfolio companies. As a result, the standard contractual timelines for completing and filing an HSR submission (commonly within 10 business days of the transaction signing under the current form) may need to be revisited. In light of these significant burdens, it is possible that private litigants may challenge the Final Rule under the Administrative Procedure Act<sup>64</sup>; any such challenge could (at a minimum) delay the Final Rule's effective date.

***Ordinary Course Documents May Later Be Reviewed by the Agencies in a Future HSR Filing.*** In light of the Final Rule's requirement to submit regularly prepared documents provided to the CEO and drafts of documents given to individual board members, companies should be cognizant that a much broader range of materials will be subject to regulators' scrutiny as part of a future HSR filing.

***The HSR Form's Expanded Scope Is Reflective of the Current Pro-Enforcement Era.*** In the last year, the agencies have issued a number of new guidelines and rules that have the potential to substantially alter the U.S. landscape for antitrust enforcement, beginning with the release of the 2023 Merger Guidelines last December,<sup>65</sup> and including the FTC's attempted ban on noncompete agreements in April<sup>66</sup> (which has since been [set aside by a federal court](#)). These developments reflect the current administration's more aggressive stance on competition regulation, but may also signal a deeper shift towards increased agency scrutiny and more robust antitrust enforcement. The launch of the FTC's new online portal for members of the public to

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comment on proposed transactions also may suggest an openness to embracing new legal and factual theories for assessing mergers' effect on competition.

***Changes Reflect the FTC's Growing Focus on Private Equity, Vertical Acquisitions, Serial Acquirers, and Nascent Competition.*** Many aspects of the Final Rule appear driven by the agencies' expressed intentions to push into newer areas of competition enforcement. For instance, the background section of the Final Rule indicates that many of the new information requirements were motivated by the agencies' desire to more closely examine (i) the role of private equity investors in M&A transactions,<sup>67</sup> (ii) the potential foreclosure effects of non-horizontal mergers,<sup>68</sup> (iii) the use of mergers to stifle innovation or eliminate nascent competitive threats,<sup>69</sup> and (iv) the effect of roll-up acquisitions on consolidation in certain industries.<sup>70</sup> In this way, the Final Rule is a continuation of other agency efforts to push the envelope with new legal theories, such as the agencies' launch of a joint public inquiry—along with the Department of Health and Human Services—into the role of private equity and other corporate involvement in healthcare transactions.<sup>71</sup>

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ENDNOTES

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- 1 On the same day that the Final Rule was issued, the Antitrust Division announced its concurrence with the changes to the HSR Form. See U.S. Dep't of Justice, *Justice Department Concurs with Federal Trade Commission's Changes to Premerger Notification Form Used in Merger Review* (Oct. 10, 2024), <https://www.justice.gov/opa/pr/justice-department-concurs-federal-trade-commissions-changes-premerger-notification-form>.
- 2 Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178 (June 29, 2023).
- 3 Final Rule at 379–80.
- 4 Final Rule at 201–02.
- 5 Final Rule at 380.
- 6 Final Rule at 164.
- 7 Final Rule at 149, 156.
- 8 See Final Rule at 151.
- 9 Final Rule at 380.
- 10 Final Rule at 152, 156.
- 11 Final Rule at 380.
- 12 Final Rule at 149–50.
- 13 Final Rule at 150, 154.
- 14 Final Rule at 204.
- 15 HSR Form Acquiring Person Instructions at 9; HSR Form Acquired Person Instructions at 7.
- 16 Final Rule at 283.
- 17 NPRM, 88 Fed. Reg. at 42,194.
- 18 Final Rule at 147.
- 19 Final Rule at 273 (emphasis added).
- 20 HSR Form Acquiring Person Instructions at 9; HSR Form Acquired Person Instructions at 7.
- 21 Final Rule at 289–90.
- 22 Final Rule at 403.
- 23 Final Rule at 181–82.
- 24 Final Rule at 403.
- 25 Final Rule at 308.
- 26 HSR Form Acquiring Person Instructions at 8; HSR Form Acquired Person Instructions at 7.
- 27 Final Rule at 260.
- 28 Final Rule at 262.
- 29 Final Rule at 255–56.
- 30 HSR Form Acquiring Person Instructions at 9; HSR Form Acquired Person Instructions at 8.
- 31 Final Rule at 319.

ENDNOTES (CONTINUED)

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- 32 Final Rule at 320.
- 33 HSR Form Acquiring Person Instructions at 10; HSR Form Acquired Person Instructions at 8.
- 34 NPRM, 88 Fed. Reg. at 42,196, 42,214.
- 35 Final Rule at 324–25.
- 36 HSR Form Acquiring Person Instructions at 10; HSR Form Acquired Person Instructions at 8–9.
- 37 Final Rule at 322; HSR Form Acquiring Person Instructions at 9; HSR Form Acquired Person Instructions at 8.
- 38 Final Rule at 23–31.
- 39 Final Rule at 213; HSR Form Acquiring Person Instructions at 4.
- 40 Final Rule at 212.
- 41 Final Rule at 228–230; HSR Form Acquiring Person Instructions at 5.
- 42 Final Rule at 232.
- 43 Final Rule at 233–35.
- 44 Final Rule at 345.
- 45 Final Rule at 237–38.
- 46 Final Rule at 264.
- 47 Final Rule at 248–49.
- 48 Final Rule at 249.
- 49 15 U.S.C. § 19.
- 50 Final Rule at 338–40.
- 51 Final Rule at 339–40.
- 52 Final Rule at 347–50.
- 53 Final Rule at 399; HSR Form Acquiring Person Instructions at 15; HSR Form Acquired Person Instructions at 13.
- 54 The Final Rule notes, however, that a de minimis threshold might be appropriate and that the FTC may revisit the idea of including a threshold in the future. Final Rule at 355–56.
- 55 Final Rule at 358–61.
- 56 HSR Form Acquiring Person Instructions at 7.
- 57 Final Rule at 154.
- 58 Fed. Trade Comm’n, *FTC Finalizes Changes to Premerger Notification Form* (Oct. 10, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form>.
- 59 Fed. Trade Comm’n, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), available at <https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination>.
- 60 Final Rule at 192–94.

ENDNOTES (CONTINUED)

- 61 See Statement of Commissioner Melissa Holyoak (Oct. 10, 2024) (stating that the “significant modifications” to the NPRM, along with the lifting of the early termination suspension, drove her vote to approve the Final Rule), *available at* [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-hsr-rule-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf); Concurring Statement of Commissioner Andrew N. Ferguson (Oct. 10, 2024), *available at* [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-final-hsr-rule-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-final-hsr-rule-statement.pdf).
- 62 See NPRM, 88 Fed. Reg. at 42,194, 42,197–98.
- 63 Final Rule at 379–80.
- 64 5 U.S.C. §§ 551 *et seq.*
- 65 U.S. Dep’t of Justice, *Justice Department and Federal Trade Commission Release 2023 Merger Guidelines* (Dec. 18, 2023), *available at* <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines>.
- 66 Fed. Trade Comm’n, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024), *available at* <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.
- 67 Final Rule at 23–27.
- 68 Final Rule at 38–44.
- 69 Final rule at 44–57.
- 70 Final Rule at 57–65.
- 71 U.S. Dep’t of Justice, *Justice Department, Federal Trade Commission and Department of Health and Human Services Issue Request for Public Input as Part of Inquiry into Impacts of Corporate Ownership Trend in Health Care* (Mar. 5, 2024), *available at* <https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-department-health-and-human-services-issue>.

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