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## FTC Substantially Changes HSR Form

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### Final Rule Eliminated Some Aspects of Proposed Rule, but the New Form Substantially Broadens the Categories of Required Information for Transactions Requiring Premerger Filings Under the HSR Act

Yesterday afternoon, the Federal Trade Commission issued a Final Rule (available [here](#)) revising the requirements of the Hart-Scott-Rodino pre-merger notification form and accompanying instructions. Absent judicial intervention, the Final Rule will take effect 90 days after publication in the Federal Register. This will likely mean an effective date in mid-January 2025. In a separate statement issued last night, the Antitrust Division of the U.S. Department of Justice expressed its “concurrence” with the Final Rule. Sullivan & Cromwell LLP will publish more detailed guidance in due course, but below are the key aspects of the Final Rule.

A notable change in the Final Rule is that the scope of information required as part of an HSR filing will vary somewhat based on the nature of the transaction. The Final Rule establishes three categories of transactions:

1. A category of “select 801.30 transactions” – *i.e.*, 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* and will *not acquire control* of the target or board representation rights.
  - Estimated by the FTC to be 8% of future HSR filings.
  - Estimated by the FTC to require 10 additional hours to complete for acquired persons, compared to the current HSR form.
2. Transactions with “no reportable competitive overlaps (e.g., where an investment fund is buying or selling a portfolio company with no NAICS or competitive overlap or supply relationship).”
  - Estimated by the FTC to be 47% of future HSR filings.

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3. Transactions “where the parties report at least one NAICS code overlap or have an existing overlap or supply relationship,” which will now be known as “overlap filings.”
  - Estimated by the FTC to be 45% of future HSR filings.
  - Estimated by the FTC to require 121 additional hours to complete for acquiring persons, compared to the current HSR form.

Although the FTC scaled back some of the changes to the HSR form that it originally proposed in June 2023, the new HSR form still will impose significant new burdens on parties subject to the HSR Act – particularly parties to the estimated 92% of all HSR-reportable transactions that will not qualify as “select” Rule 801.30 transactions.

### Key aspects of the new HSR form:

- 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).”
- In addition to documents prepared by or for officers and directors, the parties must submit all studies, surveys, analyses, and reports prepared by or for the “supervisory deal team lead” 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 supervisory deal team lead is defined as the “individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.” (The Final Rule does not require the submission of drafts of documents.)
- The parties also must 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 or the CEO that “analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target.”
- In addition to the principal transaction agreement, the parties now will be required 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.”
- Except for select 801.30 transactions, the parties must describe their “principal categories of products and services,” including any “current or known planned product or service.” Moreover, the parties are instructed not to “exchange information for the purpose of answering this item.” But for any self-reported overlapping product or service – so-called “overlap filings,” the parties must provide:
  - Sales revenue, “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.”
  - The top 10 customers within each customer category.
- Filing parties must describe any supply relationships between the buyer and target, including the amount of revenue involved and the top 10 customers *other than* the transaction counterparty.

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- 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, North Korea, any foreign terrorist organization designated by the Secretary of State, or any OFAC specially designated national.
- 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.” (Final Rule at 403.) 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.” (Final Rule at 181–82.)
- All documents accompanying the HSR filing “must be submitted with verbatim English language translations. All verbatim translations must be accurate and complete.” (Final Rule at 403.)
- In conjunction with issuance of the Final Rule, the FTC also announced that, following the Final Rule coming into effect, the FTC will lift the categorical suspension on early termination of the HSR waiting period for some filings made under the HSR Act. The FTC had suspended grants of early termination in February 2021.

Notwithstanding the FTC’s time estimates for certain categories of HSR filings, we believe the new form will significantly increase the time, burden, and expense associated with all transactions reportable under the HSR Act. This burden will impact both first-time filers and serial acquirers. The effects of the new form will become clearer as new HSR filings are submitted during the course of 2025.

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