

Insights

FTC ANNOUNCES NEW PREMERGER NOTIFICATION FORM

A NEW FRONTIER FOR MERGING PARTIES IN 2025

Oct 21, 2024

SUMMARY

On October 10, 2024, the Federal Trade Commission (“FTC”), with the concurrence of the Antitrust Division of the Department of Justice, (the “DOJ”, and together, the “Agencies”) voted unanimously to adopt new premerger notification rules (the “Final Rule”) that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). The Agencies had previously announced proposed amendments on June 27, 2023, which we covered in a previous insight. The Final Rule reflects numerous changes made during a lengthy review and comment period, including a thorough revamping of the Premerger Notification and Report Form (the “New Form”) that parties are each required to complete if their transaction is reportable under the HSR Act.

As it stands today, the HSR Act requires parties to reportable transactions to include in their HSR filings certain information about the parties themselves and their proposed transaction, and to wait a specified period (usually 30 days) before consummating their deal. While the Agencies ultimately scaled back some of the more burdensome aspects of their initial proposal, the Final Rule substantially increases the amount of information parties will need to provide in their HSR filings. In particular, the Final Rule broadens the scope and type of the parties’ documents that are to be submitted with the filings. In the words of the FTC’s press release, the Final Rule “implements changes that will improve the ability of the [Agencies] to detect illegal mergers and acquisitions prior to consummation,” and in so doing it aligns the HSR Act filing process more closely with the theories of antitrust harm reflected in the Agencies’ recently issued 2023 Merger Guidelines, which we covered in a previous insight. The Final Rule will go into effect 90 days after publication in the Federal Register, which we anticipate being sometime in mid-January 2025.

SEVEN KEY CHANGES IN THE NEW FORM

ENTITY STRUCTURE

The New Form requires substantially more information relating to the structure and ownership of the Ultimate Parent Entity of each party, including detailed information on certain minority interest holders (with more information generally required from the “Acquiring Person” side of the transaction), as well as additional information relating to entities within both the Acquiring and Acquired Persons.

For Acquiring Persons, the New Form also requires a written description of the ownership structure, organizational charts if they exist, and disclosure of the names of officers and directors (or persons with similar functions) of certain controlled or associated entities that have any overlapping business or supply relationship with the Acquired Person.

TRANSACTION DESCRIPTION

The New Form requires substantial additional information describing the transaction, including a more comprehensive description of the way the transaction is structured, a “transaction rationale” narrative, and a transaction diagram (if one exists). The New Form also now requires the disclosure of any ex-U.S. antitrust filings associated with the transaction. Previously, this was a voluntary requirement.

DOCUMENTS FOR SUBMISSION

- **Business Documents:** What have long been known to practitioners as “Item 4 documents” will now be called “Business Documents.” Documents prepared by the “supervisory deal team lead” in connection with the transaction and pertaining to competition-related topics, whether or not shared with officers or directors, must now be provided (currently only such documents prepared by or for officers and directors must be submitted).
- **Business Plans:** In addition to the transaction-specific documents, filing parties will now be required to submit regularly prepared high-level business plans or similar documents created within the year prior to the filing that were provided to certain high-level executives or the board of directors of the filing party and that pertain to products or services that overlap with the other party. Note that these documents must be provided even if the documents do not specifically relate to the transaction or are not used for purposes of evaluating or analyzing the transaction.
- **Agreements:** The New Form also requires that the parties describe any contractual agreements between them that were effective within one year of the filing (e.g., leases, licensing, supply, or non-solicitation agreements), even if unrelated to the transaction.

COMPETITION DESCRIPTION

The New Form requires each filer to provide narratives describing their principal categories of products or services and current and planned products or services that compete (or could compete)

with the products or services of the other party to the transaction. This is a new requirement. Additionally, filers must now provide detailed information on the products or services that overlap, including (1) sales data, (2) categories of customers, (3) top ten customers overall, and (4) top ten customers for each overlapping product or service.

SUPPLY RELATIONSHIPS

The New Form requires information describing any supply relationship between the parties and between one party and any competitor of the other party, as well as related sales and customer information. This is another new requirement.

REVENUE AND OVERLAPS

In addition to state-level geographic overlap information by NAICS code, the New Form will require disclosures relating to overlapping products or services, including revenue ranges. Overlap information must also be disclosed by both parties for any minority-held entity and for any prior acquisitions.

VOLUNTARY WAIVER

The New Form includes a voluntary waiver to permit sharing of information submitted in the HSR review process with state attorneys general and international competition authorities. This has been previously only requested where a deal was under review by international or state authorities that requested access, not for all HSR filings preemptively.

NOTABLE PROCEDURAL CHANGES

SEPARATE FORMS & LOWER BURDEN ON THE ACQUIRED PERSON

For the first time, the Acquiring Person and the Acquired Person will have different forms to complete. The Acquired Person's form does not require submission of some categories of documents and information required by the Acquiring Person's form.

EARLY TERMINATION RETURNS

Once the Final Rule is in effect, the FTC will lift the temporary suspension of early termination that has been in place since 2021. Early termination allows parties to a reportable transaction to request that the HSR Act waiting period be terminated before the expiration of the statutory period.

PULL AND REFILE

In the event parties wish to withdraw and resubmit their filings to extend the period for the Agencies to review it, they may still do so but are no longer required to provide updated financial statements.

However, to the extent they were updated since the original filing, the following other documents must now be included in the re-file, including:

- Agreements related to the transaction,
- Business documents (as discussed above), and
- Information about subsidiaries from foreign entities or governments of concern.

WHAT WAS OMITTED FROM THE PROPOSED RULE?

Some aspects of the Proposed Rule were not adopted in the Final Rule, including:

- Information showing the deal timeline and identifying deal team personnel;
- disclosure of information regarding the parties' employees to allow the Agencies to evaluate the potential effect of the transaction on labor markets;
- disclosure of certain additional transaction documents, including multiple drafts of agreements; and
- requirement that filers identify communication and messaging systems used by the parties.

WHEN WILL THE FINAL RULE GO INTO EFFECT?

As noted above, the Final Rule goes into effect 90 days after publication in the Federal Register, which is expected in the coming days. Therefore, we anticipate that parties considering a transaction any time after mid-January 2025 will be subject to the Final Rule.

BONUS: NEW TOOL FOR INFORMATION GATHERING

In announcing the New Form, the FTC also introduced a new online portal for market participants, stakeholders, and the general public to directly submit comments on proposed transactions that may be under review by the FTC. While the content of HSR Filings is non-public, the FTC is introducing a way for those who have learned of a pending transaction to proactively reach out and identify any concerns. As of this writing, the DOJ has not yet signed on to this new tool, and we are happy to consult with clients to discuss this difference.

TAKEAWAYS

The Final Rule creates massive changes to the premerger process. Businesses contemplating a potentially reportable acquisition in 2025 must prepare accordingly. Here are a few guiding principles as we enter this new frontier:

ENGAGE WITH ANTITRUST COUNSEL EARLY AND OFTEN

The expanded scope of required information means that transacting parties should connect with antitrust counsel as early as possible in the deal planning process. Antitrust counsel can provide valuable advice on the terms of the agreement that documents the proposed transaction—covering timing issues, information exchange to facilitate the filing, and antitrust risk-shifting clauses. Antitrust counsel will also provide guidance on what each party will be required to submit and the likely questions the Agencies may raise. The FTC explicitly acknowledges that the New Rule means transacting parties should expect the time and resources required to prepare HSR Filings to significantly increase—they estimate an additional **68** hours of preparation time, per filing—particularly for private equity firms and larger corporate organizations.

EDUCATING BUSINESS AND DEAL PERSONNEL

Given that the Final Rule requires the submission of documents prepared by or for the supervisory deal team lead, relevant individuals need to understand the HSR Act filing process and potential implications of their work product. In addition, because the New Form requires disclosure of “regularly prepared plans and reports” that were (1) provided to the CEO or board members, (2) relate to competition (including market shares, competitors, markets, etc.), and (3) were created or modified within one year of filing, it is important for personnel preparing those plans and reports to be aware that they may be submitted to the Agencies in connection with a future transaction. Given the one-year look-back for such documents, we recommend educating relevant business teams on these new requirements as soon as possible.

BOARD MEMBER CONSIDERATIONS

The Final Rule clarified that drafts of any responsive documents that were shared with any board member are responsive and must be submitted. Individual board members should be made aware of this requirement.

TIMING IN AGREEMENTS

It is common for parties to provide that HSR Filings must be made within 5-10 business days of agreement signing. Particularly for the first HSR Filing made using the New Form, parties should allow for much more time to prepare and submit the filings or use an “as soon as reasonably practicable” approach, which is already commonly used for international antitrust filings.

Our antitrust team will be engaged with the Agencies and the antitrust bar and will be closely tracking how these changes affect the merger review process. As explained above, the Final Rule substantially increases the information-gathering burden on parties required to file under the HSR Act and could have a meaningful impact on deal timetables as parties negotiate their deals and work towards signing and closing. We are ready to guide clients through these changes to the rules

and to the New Form, and to help manage the additional burdens the Final Rule imposes on filing parties.

RELATED PRACTICE AREAS

- Antitrust

MEET THE TEAM



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