Published on *The National Law Review* https://natlawreview.com

New Premerger Notification Regime to Fundamentally Change M&A Strategy

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On October 10, 2024, the Federal Trade Commission (FTC) voted 5-0 to issue new final rules (Rules) governing the US premerger notification filing process. These Rules – the first major overhaul to the Hart-Scott-Rodino (HSR) filing form in the nearly 50-year history of the HSR Act – will fundamentally alter the premerger notification process. While the Rules omit some of the more extreme aspects proposed in the 2023 draft rules, such as the need to provide draft documents and labor data, they impose substantially more burdens on filing parties than the current filing regime. The changes will have wide-ranging implications for all parties required to notify transactions under the HSR Act.

In Depth

The overall process will be more burdensome and time-consuming to complete. The Rules not only require significantly more information, data, and documents as part of the initial filing, but they also require merging parties to evaluate and present written descriptions on transaction rationale, competitive overlaps, and/or vertical relationships with the initial filing. This will force merging parties to address substantive antitrust issues earlier in the process, even for those transactions that might raise marginal antitrust issues. Importantly, with the initial HSR filing, the FTC and US Department of Justice (collectively, the Agencies) will now receive ordinary course planning documents and more transaction documents – materials that they currently seek via a Second Request or voluntary access letter. Thus, some of the work that previously was deferred and only done if the Agencies investigated now needs to be done up front to have a compliant and compelling filing.

While changes associated with the Rules will be most significant for transactions that may raise horizonal, vertical, or potential competition issues, changes will also be felt in any transaction subject to HSR reporting.[1] Companies that are active in mergers and acquisitions (M&A) should start work now to update their standby information for the premerger notification process to alleviate some of the burden when the Rules take effect.

The Agencies' stated rationale for these changes is to facilitate a more comprehensive and accurate antitrust assessment at the early stages of a transaction. As a result, the Agencies have agreed to reinstate discretionary grants of early termination, which facilitate a transaction closing prior to the expiry of the full waiting period.

The Rules will likely go into effect and apply to transactions filed in mid-January 2025 (90 days after the notice is published in the *Federal Register*). Below, we explore the most notable changes to the HSR filing requirements and implications for companies engaged in transactions subject to the HSR Act.

CHANGES IMPACT THE SUBSTANTIVE REVIEW OF MANY TRANSACTIONS

Some changes in the Rules are updates to existing requirements; others are brand new. These new obligations will significantly impact both the filing process and broader M&A planning and strategy. The most significant substantive changes require (i) written descriptions of the transaction rationale and of any product overlaps or vertical relationships, with accompanying sales and customer data, and (ii) the submission of more transaction-related documents, as well as certain ordinary course materials regarding overlapping products. Collectively, these changes will require additional work to formulate and submit antitrust arguments for any transaction involving a horizontal overlap or plausible vertical theory. Contrary to current practice in many deals, substance will now need to be addressed in the filing.

Written Descriptions

The Agencies believe up-front narrative responses will give them a more complete basis to assess a transaction's potential competitive effects and to decide whether to investigate a deal further.

- **Transaction Rationale:** Filing persons must provide a description that identifies and explains each strategic rationale considered at any point for the transaction and identify documents submitted with the HSR filing that support the submitted rationale(s).
- **Competition Analysis:** Filing persons must describe their general business lines, including product or service lines of all related entities, and current and potential future horizontal overlaps and supply relationships between the filing parties. For each overlapping product or service, the filer must provide sales information, a description of categories of customers, and a list of the top 10 customers for each category. For supply relationships, the acquiring entity must provide information about sales to or purchases from the target or any business that competes with the target, as well as the top 10 customers or suppliers, with a description of

the contract or terms of sale.

Parties Must Submit More Documents to the Agencies With Their Filings

Filers will now have to submit ordinary course planning documents related to overlapping products, as well as more extensive transaction-related documents. This new requirement will enable the Agencies to obtain a company's most sensitive business documents at the outset of their investigation, even if a transaction does not raise substantive concerns.

- **Submission of Certain Ordinary Course and Strategic Documents:** The Rules require filing persons to submit high-level business documents that were not created in contemplation of or preparation for the transaction but that touch on competitive issues for any overlapping product or service.
    - **Reports Provided to the CEO:** Parties must provide all annual, semiannual, or quarterly plans and reports prepared or modified within one year of the date of filing that were provided to the CEO, which analyze market shares, competition, competitors, or markets for any current or future overlap product or service.
    - **Reports Provided to the Board:** The same types of competition documents provided to the Board within the past year also need to be provided, regardless of the timing or cadence of presentation. Although the Rules eliminated the initial proposal to include all drafts of transaction documents, the Rules contemplate that certain drafts shared with a member of the Board may need to be produced in some circumstances.
- **Transaction Documents From a Non-Officer Transaction Lead:** The Rules expand the range and volume of transaction-related documents required. Today, parties submit only final documents (or the most recent draft if not final) prepared by or for a party's officers or directors, evaluating the transaction with respect to markets, market shares, competition, competitors, potential for sales growth or expansion, or synergies (known as Item 4 documents). The new Rules define these documents the same but now require the filer to collect them from a "supervisory deal team lead" in addition to officers and directors. 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 an officer or director." Providing documents from a lower-level employee who is involved in the daily back and forth of a transaction has the potential to increase the volume of materials to be searched and produced.

ADDITIONAL CHANGES TO REPORTING REQUIREMENTS WILL INCREASE FILING BURDENS

Below, we highlight other key changes to the HSR reporting requirements. While these changes are unlikely to impact the substantive review of most filings, they will create additional procedural burdens and require new workstreams for HSR filers.

- **Filing on Letters of Intent Have Additional Requirements:** The Rules will continue to allow merging parties to file on the basis of preliminary agreements (*e.g.*, indication of interest, letter of intent, or agreement in principle) but will require that the documents include a detailed description of the transaction's key terms, including "some combination of" 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. If this information is not included in the preliminary agreement, parties will need to submit a dated document such as a term sheet or draft definitive agreement with these details.

- **Activities of Officers and Directors:** The Agencies will now receive more information related to situations in which the officers and directors of entities the HSR filer controls serve in a similar role on another firm active in the same industry as the target. Specifically, the acquiring person must identify all persons who serve as officers or directors of (i) all entities within the acquiring person that operate in the same industry as the target or (ii) the acquiring entity or any entities it controls or that control it, including those persons likely to take on such a role as a result of the transaction at issue, and who, in the case of both (i) and (ii) above also serve as an officer or director of another entity outside of the acquiror's organization that operates in the same industry as the target (excluding charitable and not-for-profit entities).
- **Prior Acquisitions:** The Rules now require both the acquiring person and the target to report prior acquisitions in overlapping areas that occurred within five years of the filing, purportedly to allow the Agencies to consider the competitive effects of a transaction in the context of other acquisitions (*e.g.*, roll up strategies). There is a $10 million *de minimis* threshold for relevant prior acquisitions.
- **Minority Interest Holders:** In a change likely to impact private equity funds, the Rules now require reporting of minority interest holders anywhere in an acquiring entity's corporate chain. The acquiring person needs to identify minority interest holders (5% or more but less than 50%) not only of the acquiring entity (as is the case currently) but also of entities directly or indirectly controlled by the acquiring entity or that directly or indirectly control the acquiring entity. If the interest holder is a limited partner, that person will need to be identified if they have the right to influence the Board of the entity in which they hold an interest, such as by having the right to appoint or nominate a member. Previously, filers only needed to list the general partner of a limited partnership.
- **Geographic Information:** The Rules updated the list of North American Industry Classification System (NAICS) codes for which location information need only be reported at the state level and NAICS codes for which street-level information is required. The Rules add a requirement to list locations where franchisees generate revenue in overlapping NAICS codes that require street-level location information.
- **Streamlined Approach to Reporting Revenues:** The Rules reduce the compliance burden by (i) eliminating the requirement to report the precise amount of revenue to each NAICS code, instead simply requiring an estimation into one of five buckets and (ii) eliminating the need to further break down manufacturing revenues into 10-digit NAPCS codes. The Rules, however, add a requirement for filing parties to indicate which of its operating entities derive revenues in each NAICS code.
- **Defense and Intelligence Community Procurement Contracts:** The Rules add a requirement to report existing or pending contracts with the US Department of Defense or the intelligence community where the contract is valued at $100 million or more and involves a product or service identified in the narrative description of the overlapping or supply relationships. For such contracts, filers must provide identifying information. Filings must also indicate if responsive classified information has been omitted from the HSR form.
- **Foreign Subsidies:** The Agencies believe the existence of subsidies from certain foreign countries (*e.g.*, China, Russia, North Korea, or Iran) or entities can influence incentives or distort the competitive process. The new Rules seek to gather information related to those foreign financial relationships.
- **Minor Changes to Pull and Refile Process:** Where an acquiring person pulls and refiles an HSR filing, the Rules will require them to submit newly created transaction related documents, updated transaction agreements, and updated information about foreign subsidies.

PRACTICAL IMPLICATIONS OF HSR RULE CHANGES ON M&A STRATEGY AND ANTITRUST CLEARANCE

The Rules do much more than change the HSR form: They will fundamentally change business and M&A strategy. Here's how companies should adapt:

- **Early Antitrust Assessment Is Critical.** The Rules make early antitrust analysis critical for nearly all HSR-reportable transactions. It will no longer be sufficient to make an HSR filing and figure the substance out later.

Further, while the FTC states that the new transaction and competitive analysis descriptions should be brief and can be prepared by business personnel, the descriptions will play an important role in determining whether the Agencies initiate a merger investigation and will be critical to parties' success once an investigation has been opened. These descriptions are the first opportunity to dissuade the Agencies from investigating a transaction, or to narrow the issues that will be investigated. For transactions involving horizontal or vertical overlaps, the stakes will be especially high, since the filers' initial positions are likely to be pressure tested throughout the investigation process. All this means that the descriptions parties submit must be correct and must be consistent with internal business documents. Getting it right means investigating and exploring the facts on the ground and fashioning measured, well-considered substantive descriptions with the assistance of antitrust counsel.

- **Document Creation Discipline Is Key.** It is more important than ever for companies to pay attention to document creation. The Rules will require transacting parties to submit more documents, sometimes from employees with lower seniority levels, than in the past. That gives the Agencies more opportunities to find substantive concerns with a transaction that warrant further investigation. To limit this risk, companies should introduce or enhance antitrust training regarding document creation. This training should reach the kinds of employees likely to create (i) the ordinary course strategic and business planning documents and (ii) the expanded universe of transaction-related documents called for by the Rules. Substantively, training should help employees understand how the Agencies may interpret what they draft and share. Companies that anticipate a reportable deal should identify potential "supervisory deal team leads" and put them in contact with the legal team to evaluate and develop deal-specific themes early in the transaction evaluation process. These personnel should be well trained to coordinate closely with legal counsel throughout the deal process.

Personnel involved in ordinary course business reporting to executives and the Board should coordinate closely with the legal team and provide the legal team with an opportunity to review and advise on draft documents. Under some circumstances, companies may want to conduct periodic audits of documents to evaluate current document creation practices and to provide targeted feedback. Strategic documents about product or service lines, markets, or competition should be accurate and based on actual data or facts. And less is more: Authors should learn to minimize any content that could be misconstrued in a way that could be harmful for competition reviews (*e.g.*, descriptions of overly narrow product and geographic market definitions, exaggerated barriers to entry, or diminished importance of categories of competitors). Additionally, companies active in M&A should avoid creating acquisition pipeline documents that discuss multiple transactions in the same document. Companies may also want to evaluate the scope of strategy and business planning documents that are provided to their Board, as these documents now may need to be produced with the initial filing.

- **HSR Process Will Begin Well in Advance of Signing a Definitive Agreement.** The new HSR form will take substantial additional time to prepare. Competent filers will address substantive issues earlier in the process to craft key themes for required narrative descriptions addressing deal rationales, relationships between the transacting parties, and competition analyses. For frequent HSR filers, being prepared to make speedy filings will mean creating more off-the-shelf items for use in future HSR filings. Many parties already do this with revenue and subsidiary information and could maintain efficiency by expanding their preparation efforts to cover information about principal product and service lines, officers and directors, past transactions, foreign subsidies, and defense-industry contracts.
- **Transaction Agreements Should Provide Filing Flexibility.** Going forward, transaction agreements must be built to accommodate a more time-consuming HSR process, including newly time-consuming information requests, the need to make strategic determinations regarding the competition and overlap analysis, and coordination with counterparty counsel. For transactions being explored or negotiated in the fall of 2024, parties may want to include "provisional" terms to cover deals in which a filing date can be set if it is filed under the current rules, along with a more flexible standard should the filing occur under the new Rules.
- **The Rules Could Impact Substantive Agency Review.** While the Rules are procedural and not designed to change substantive antitrust law, they could impact the likelihood that a given transaction will be subjected to an extended review through the issuance of a Second Request. It is possible that some transactions will not elicit a lengthy review if the written descriptions and documents convincingly explain that the transaction will not harm competition. It is also possible that other transactions, which may not have attracted a substantive review under the old rules, may attract more interest if not properly described in the initial HSR filing.

In sum, the Rules usher in a new world. They change the HSR process, implicating more information and more people than in the past. These changes, in turn, change the way merging parties must approach antitrust issues in their deals.

Endnotes

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[1] A small category of transactions, such as open-market acquisitions of less than controlling stakes and executive compensation transactions, will not have to comply with some of the more onerous Rules.

Marisa E. Poncia contributed to this article.

National Law Review, Volume XIV, Number 291

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change-ma-strategy