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## FTC and DOJ Announce Final Rulemaking for Overhaul of HSR Premerger Notification Filings and Reinstate Early Termination

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This week, the Federal Trade Commission (“FTC” or “Commission”) [announced](#) – with [concurrence](#) from the Department of Justice (“DOJ”) – changes to the Hart-Scott-Rodino (“HSR”) premerger notification form that will increase the burden on merging parties by requiring a much broader swath of company documents related to the transaction and detailed information about the companies’ businesses, ownership structure, and acquisition history. Although the Commission scaled back some of the more burdensome and onerous requirements from the [June 2023 proposed rulemaking](#), these changes will nonetheless result in significantly more time, cost, and burden to parties with reportable transactions in the U.S. The Commission’s likely conservative estimate is that it will now take an average of 105 hours to prepare an HSR filing—*almost tripling* the estimated average under the previous rules.

Unless challenged, the final rule will become effective 90 days after publication in the Federal Register (which has not yet been scheduled). Once the final rule comes into effect, the FTC will lift its [temporary suspension](#) on granting early termination of the HSR waiting period (announced in February 2021), which will reinstate the Agencies’ discretion to permit certain transactions to close before the full 30-day statutory waiting period (or 15-day period for certain transactions). However, whether the FTC will resume a similar pace of granting early termination as existed prior to the temporary suspension (78% of requests granted in fiscal year 2019 and 76% in fiscal year 2020) remains to be seen.

### Agency Rationale and Background for the Rule Change

The FTC first implemented the HSR rules in 1978, and there have been only incremental changes to the information required to complete the HSR form since then. The FTC proposed an overhaul of the HSR reporting requirements in 2023 to address what it framed as deficiencies in the current reporting requirements, which made it difficult for the Agencies to assess properly the potential competitive impact of a transaction in light of changes in corporate structures and deal-making, as well as how businesses compete today. The Agencies believe that the reporting requirements in the final rule will improve their ability to determine which deals require more in-depth investigation, including Second Requests, as well as clear deals that do not present antitrust issues.

## Summary of Major Changes

Below is a summary of the most significant changes that will come into effect with the final rule.

- **Expanded Scope of Certain “Transaction-Related Documents” (e.g., Current Item 4(c))** – The scope of responsive “Transaction-Related Documents” (currently known as “Item 4(c)” documents) that must be submitted with the HSR form will be expanded to include those prepared by or for the “supervisory deal team lead.” In response to comments about the vagueness of the definition of “supervisory deal team lead” the FTC adopts a new definition for this role 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.*” [Emphasis added.]
- **Submission of Certain “Plans and Reports” (e.g., Certain Ordinary Course of Business Documents)** – Filing parties will be required to submit certain “regularly prepared plans and reports” that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person that is also produced, sold, or known to be under development by the target (as identified elsewhere in the filing). The FTC limited the final scope of this requirement to include only documents provided to the CEO of the filing person or any entity included within it (rather than the CEO, certain of the CEO’s direct reports, and the Board of Directors).
- **Identification of Overlaps and Supply Relationships** – Filing parties will be required to submit “brief” narrative descriptions of their principal categories of products, services, and related sales of inputs or purchases of supplies. Parties will also be required to describe current or known planned products or services that compete, or could compete with the other party (*i.e.*, horizontal overlaps), as well as products or services provided to the other party, or that are used as inputs into products or services to compete with the other party (*i.e.*, vertical overlaps). While identification of top ten customers and suppliers is required, unlike the proposed rule, contact information for those customers and suppliers will not be required.
- **Additional Transaction Information** – Filing parties will be required to identify and explain the strategic rationale for the transaction, and identify documents produced in the filing that confirm or discuss that rationale. Further, acquiring persons need to submit transaction steps charts to the extent they exist. The final rule reflects some scaling back of the proposed rule, which would have required production of documents discussing the stated transaction rationale, as well as diagrams of the transaction structure, and a description of the transaction timeline and conditions to closing.
- **Identification of Officers and Directors to Assist the Agencies in Identifying Others Who May Exert Competitive Influence and Interlock Issues** – Acquiring persons must list all current officers and directors (or in the case of unincorporated entities, individuals exercising similar functions), and those who served in one of these positions within the three months before filing that also serve as an officer or director of another entity that derives revenue in the same NAICS code(s) as the target (and identify that other entity). This requirement is limited to the acquiring entities and entities within the acquiring person responsible for the development, marketing, or sale of products or services identified as overlaps or supply relationships elsewhere in the form. This final requirement, compared to the proposed rule, excludes board observers, is limited to the acquiring person, and limited to only overlapping entities and the acquiring entity.
- **Expanded Disclosures of 5% or Greater Minority Interest Holders** – Filing parties that are limited partnerships will be required to disclose general partners and limited partners with at least 5% or greater, but less than 50%, interest and that have or will have the right to serve as, nominate, appoint, veto, or approve board members (or individuals with similar responsibilities) for certain entities. Currently, limited partnerships are simply required to disclose the general partner.

- **Expanded Disclosures of Prior Transactions** – Both the acquiring person and the acquired entity will be required to report for the past five years certain prior acquisitions of voting securities, non-corporate interests, or assets that derived revenues in the prior year in an identified six-digit NAICS code overlap, or provided or produced a competitive overlap product or service as described elsewhere in the form. The proposed rule would have required prior acquisitions going back ten years for both the acquiring person and acquired entity.
- **Revised Revenue Reporting by NAICS Code** – Multiple changes will be implemented to the revenue reporting requirements, including requiring only the reporting of revenue ranges by six-digit NAICS code (eliminating the requirements to report revenues derived from manufacturing activities by ten-digit NAICS code and report precise revenue figures). Unlike the proposed rule, reporting of NAICS codes for pipeline and pre-revenue products will not be required (although a description of known planned products or services that compete or could compete with the other party will be required elsewhere in the form).
- **Additional Requirements for Filings Not Made Pursuant to a Definitive Agreement** – Parties that have not executed a definitive transaction agreement and are filing on a preliminary agreement (such as a letter of intent or indication of interest) will be required to submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate (such as an agreement in principle, term sheet, or most recent draft agreement). The additional dated document should include some combination of the following terms: identity of the parties; the structure of the transaction; the scope of the target; calculation of the purchase price; estimated closing timeline; employee retention policies; post-closing governance; and transaction expenses or other material terms. This guidance clarifies the proposed rulemaking.
- **Identification of Information Relating to Foreign Subsidiaries and Defense Contracts** – As required by the Merger Filing Fee Modernization Act of 2022, filing parties will be required to disclose subsidiaries received from countries or entities that are strategic or economic threats to the United States. Filing parties will also be required to report any contracts with defense or intelligence agencies valued at \$100 million or more if they are or will be a source of revenue or involve any identified six-digit NAICS code overlaps or overlapping products or services identified elsewhere on the form.
- **Other Agreements between the Acquiring Person and Target** – Acquiring persons will be required to indicate whether they have or had within one year of filing any contractual agreement(s) with the target, and indicate the type(s) of agreement(s). While acquiring persons will need to undertake a collection of this information, unlike the proposed rulemaking, they will not be required to supply the underlying agreement(s).

While still expected to meaningfully increase the burden on filing parties, the final rulemaking is not as wide in scope as the proposed rulemaking released by the FTC in June 2023. The FTC modified many of the 2023 proposals in an effort to decrease the scope and burden associated with compliance in response to some of the over 700 public comments received as well as pushback from FTC Commissioners Holyoak and Ferguson. In some instances, the Commission abandoned several proposals in their entirety, including the proposed submission of:

- Labor market and employee information;
- Drafts of transaction-related documents;
- Other types of interest holders that may exert influence (e.g., creditors; holders of non-voting securities; board members, board observers, or holders of the right to appoint or nominate a board member or observer; etc.);
- Financial projections related to synergies and efficiencies;

- Deal timeline;
- Geolocation information (e.g., longitude and latitude information for certain market overlaps);
- Identification of internal messaging systems;
- Language certifying implementation of document holds; and
- Identification of “formerly known as” names for entities within the filing person.

### “IF/THEN” Format

In recognition that not all information is relevant or necessary for all reported transactions, the FTC employs what it refers to as an “IF/THEN” format to exclude certain information requirements if parties provide a negative response to other information requirements. For example, several of the information requirements do not require a response if the filer indicates that there is no reported overlap or supply relationship between the transaction parties. Filing parties do not need to respond to the following requirements if they do not report an overlap or supply relationship: “plans and reports”; geographic market information; certain minority held entities; prior acquisitions; and defense or intelligence contracts.

Further, the FTC also significantly curtailed the requirements of targets in so-called “select 801.30 transactions.” Transactions subject to 16 CFR § 801.30 are typically non-consensual transactions, such as open market purchases of publicly traded stock or tender offers. Where there is no agreement between the parties, the acquiring person is required to send notice to the acquired person indicating that the acquiring person will be submitting an HSR filing and the acquired person may also need to file – which may be the first time the target is learning of the transaction. Upon receipt of that notice, the acquired person is required to file within 15 calendar days (10 calendar days for cash tender offers) after the acquiring person has filed. This means, the acquired person, which may be an infrequent HSR filer, would have had approximately two weeks or less to engage counsel and prepare an HSR filing that the June 2023 Notice of Proposed Rulemaking estimated could take up to 259 hours. In response to these concerns, for transactions that meet the definition of “select 801.30 transactions,” filing persons will not be required to provide information related to the organization of controlled entities, the transaction rationale, transaction diagram, plans and reports, overlap description, supply relationship description, and defense or intelligence contracts. Additionally, targets are excepted from providing competition documents from supervisory deal team leads.

### New Online Portal for Public Comment on Proposed Transactions

The Commission also introduced a new online portal for the general public to directly submit comments on proposed transactions that may be under review by the FTC. The [portal](#) is already live and available for comments on “specific transactions and how they may affect competition” from potentially impacted parties (which the FTC notes may include “consumers, workers, suppliers, rivals, business partners, advocacy organizations, professional and trade associations, local, state, and federal elected officials, academics, and others”). The portal is for capturing information only and internal use by the Agencies, and is not searchable by the public.

## Implications of the Rule Changes

While the final rule does not impact which transactions are reportable or who has reporting requirements under the HSR Act, the final rule will meaningfully increase the time, burden, and cost of completing transactions that are reportable. While the Agencies believe the rule changes will make their merger reviews more efficient, filing parties cannot exclude the possibility that it will take FTC and DOJ staff longer to review the additional required information and documents (at least as staff acclimates to the new requirements). This may impact deal considerations, including deal financing, transaction end dates, interim operating covenants, antitrust risk-shifting provisions, employee and customer retention, among other issues. Parties and their counsel will need significantly more time to prepare filings, and will need to begin filing preparation much earlier in the transaction planning process than they do today.

Further, like the FTC's rulemaking on non-compete clauses, some [parties may challenge](#) the issuance of the final rule, and the final rule is subject to review under the Congressional Review Act, pursuant to which the next Congress could issue a joint resolution of disapproval to invalidate the rule (subject to potential veto by the President). As a result, the effective date of the final rule could potentially be extended further if a court stays the rule pending a constitutional or procedural challenge.

In advance of the final rule becoming effective, the FTC's Premerger Notification Office will provide future compliance guidance on its website.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Antitrust practice group, please speak to your regular contact at Weil or to an author listed below:

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