

Antitrust/Competition

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What the New HSR Filing Requirements Mean for Your Future Reportable Deals

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On October 10, 2024, the Federal Trade Commission (FTC) released the final revised rules governing premerger notification filings under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act. The new HSR filing requirements will become effective 90 days after they are published in the *Federal Register*, which is expected in the coming days, and means they will likely become effective in late January 2025. Although the new HSR filing requirements do not affect which transactions require HSR filings and do not change the HSR thresholds or filing fees (both of which are adjusted annually), they constitute the first major revision and expansion of the information and documents required to be submitted since the original HSR rules were adopted in 1978.

The new HSR filing requirements will add complexity to filings and impose a greater burden on the vast majority of parties in HSR reportable transactions. The heaviest burden, though, will fall on buyers (especially private equity buyers) that participate (or that have portfolio companies that participate) in the same market as the target, as either (1) a direct competitor to the target or (2) in a supply relationship with the target or its competitors. The lightest additional burden will be for certain acquisitions on the open market that do not result in control of the issuer or the ability to serve as, appoint, veto, or approve members of the issuer's board of directors.

As you are contemplating the timing for HSR reportable mergers and acquisitions planned for early 2025 and thereafter, below are several key changes and considerations to keep in mind.

Practical Implications of the Key Changes in the New HSR Filing Requirements:

For parties contemplating an HSR reportable transaction in the near term, it may be advantageous to speed up the deal process so the parties can submit their HSR filings before the new HSR filing requirements go into effect in January 2025, even if they will just be filing on a letter of intent (LOI).

As (or before) new HSR-reportable transactions kick off, buyers and sellers should:

(1) Designate one individual as the "Supervisory Deal Team Lead," who will be "[t]he individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer." This change in the new HSR filing requirements is important as it creates a new requirement to submit documents from the Supervisory Deal Team Lead *in addition to* documents from officers and directors (or individuals exercising similar functions for unincorporated entities), though in some instances, the Supervisory Deal Team Lead might be an officer or director.

(2) Be cautious when creating and distributing any written documents (including emails). In addition to the competitive analysis documents related to the transaction that have been required to be submitted in HSR filings since the adoption of the HSR Act (so called "Item 4(c)/(d) documents"), the new HSR filing requirements require the submission of certain documents regularly prepared in the ordinary course of business that analyze any markets or products that overlap between the parties if they were provided to the CEO or board of directors of the acquiring entity or target and/or the CEO or board of directors of other entities above or below the acquiring entity and target. This change means that even draft plans and reports provided to the CEO and/or board of directors will likely need to be submitted as part of an HSR filing.

In addition, the new HSR rules require submission of certain draft documents that were shared with **any** board member, and not just with the full board of directors, as the current rules require.

(3) Consult antitrust counsel early in the deal process about potential competitive overlap(s) between the parties, the preparation of documents, antitrust risks, and the additional information that will need to be disclosed in the HSR filing.

- While parties will still need to note if they have an overlap on any six-digit North American Industrial Classification System (NAICS) code(s), under the new HSR filing requirements, parties will also have to “describe each of the principal categories of products and services (as reflected in documents created in the ordinary course of business)” of the buyer and target, respectively, regardless of whether there is an overlap. The buyer will also have to “list and briefly describe each of the current or known planned products or services of the acquiring person that **competes with (or could compete with)** a current or known planned product or service of the target.” The target will have to provide the same overlap information based on its understanding of the buyer’s business.
- Under the new HSR filing requirements, parties must disclose and provide details about any supply (or vertical) relationships between the parties or between one party and the other party’s competitors.
- The buyer and the target should each have their own concise descriptions of their respective business, products, and/or services, which should be the only descriptions used in all documents. Using a consistent definition throughout all documents will help eliminate the need to explain any inconsistencies later and streamline responding to several sections of the new HSR forms.
- The new HSR filing requirements specifically state that the parties “**should not** exchange information for the purpose of answering” the items regarding overlaps and supply relationships. Under the existing HSR rules, there are no such prohibitions regarding what the parties can or cannot share to prepare their respective HSR filings.
- Parties also will be required to “identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees.” Each party must also explain if the transaction rationale is different for the entity making the acquisition (in the case of the buyer) or being acquired (in the case of the target) compared to its ultimate parent entity. As with the product descriptions, parties should use a consistent transaction rationale in all documents (including emails) to avoid having to explain inconsistencies in their HSR filings.

(4) Gather internal documents related to company structure, leadership, and minority investors. Gathering documents and information early on will be particularly important for private equity funds with various limited partnerships and portfolio companies. If a limited partnership is making an acquisition, it will be required to disclose its “(a) general partner, regardless of the percentage it holds, and (b) limited partners that (i) currently hold, or will hold as a result of the transaction, 5% or more but less than 50% of the non-corporate interests of the covered entity, and (ii) have or will have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities, of any covered entity, or of the general partner or management company of a covered entity.” “Covered entities” will include certain entities above and below the entity making the acquisition. Buyers will also have to provide the names of all current (and in some cases, prior) officers and directors (or individuals exercising similar functions in unincorporated entities) of all entities within the buyer that have a competitive overlap or supply overlap with the target or the target’s competitors. To help expedite the filing preparation process, funds should ensure that their existing ownership and organizational structure chart(s) are accurate and up to date.

Other Takeaways:

- **Factor in additional time for the entire HSR filing process and waiting period.** There will be a steep learning curve for parties, counsel, and the government once the new HSR filing requirements become effective, so parties should allow for a significant amount of extra time in their deal timelines during, at least, the first half of 2025.
 - Rather than include hard deadlines for the parties to submit their HSR filings in purchase agreements or LOIs, parties should consider using more flexible language, such as “as soon as reasonably practicable” to allow adequate time for preparing and submitting HSR filings.

- Parties should also build in time for a delay of the start of the HSR waiting period for HSR filings that are initially rejected (or “bounced”) by the FTC due to technical errors or omissions, which may take a few days to correct before they are accepted by the FTC.
- The FTC acknowledged that it will take parties significantly longer to prepare and submit HSR filings under the new HSR filing requirements, and it found “that the average number of additional hours required to prepare an HSR filing with the changes outlined in the final rule is 68 hours, with an average low of 10 hours for select 801.30 transaction¹ filings by the acquired person and an average high of 121 hours for filings from [the] acquiring person in a transaction with overlaps or supply relationships.”
- **Consider whether you should request Early Termination:** The FTC has said that once the new HSR filing requirements take effect, it will begin granting Early Termination again for transactions that clearly do not affect competition. It remains to be seen how often Early Termination will be granted, but parties should remember that the fact of the grant of Early Termination and the identity of the parties will be announced publicly.
- **Determine whether you should provide additional information about the transaction in your LOI.** Parties will still be able to submit HSR filings based on an LOI under the new HSR filing requirements, but parties will be required to provide detailed information about the proposed transaction if such information is not already contained in the LOI. If the LOI itself does not contain (1) the identity of the parties; (2) the structure of the transaction; (3) the scope of what is being acquired; (4) the calculation of the purchase price; (5) an estimated closing timeline; (6) employee retention policies, including with respect to key personnel; (7) post-closing governance; and (8) transaction expenses or other material terms, parties may need to draft and submit a separate document explaining these terms and/or provide a copy of the draft purchase agreement.
- **There probably is not a higher likelihood of receiving a second request based on the new HSR filing requirements.** Under the new filing requirements, parties are likely to submit meaningfully more information to the FTC and the U.S. Department of Justice, Antitrust Division (DOJ), but we do not anticipate that such additional information will lead to an uptick in the number of second requests issued to parties, which have historically been issued in roughly 2 to 3 percent of transactions. However, the new HSR filing requirements may lead to the FTC and DOJ asking more follow-up questions during the HSR waiting period, as to both compliance with the new requirements and on substantive antitrust concerns.

If you have any questions about the new HSR filing requirements, please contact our Antitrust/Competition team or your usual Lowenstein Sandler contact.

¹ Transactions under Rule 801.30 are tender offers and acquisitions of voting securities and non-corporate interests from third parties (i.e. not negotiated transactions).

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