

FTC Adopts Major Changes to HSR Merger Notification Form

Effective mid-January 2025, the FTC's new HSR notification process will significantly increase the burden and cost of filing M&A notifications under the HSR Act.

On October 10, 2024, the US Federal Trade Commission (FTC) approved new requirements for reporting qualifying M&A transactions to the FTC and US Department of Justice (DOJ) under the Hart-Scott-Rodino (HSR) Act (the HSR rules). The new HSR rules significantly expand the amount of information parties must submit to the FTC and DOJ to file under the HSR Act as compared to the decades-old HSR notification form.

The new HSR rules, which are expected to take effect in mid-January 2025,¹ follow a draft version of the rules the FTC released on July 27, 2023 (the 2023 Draft). The FTC implemented several proposed changes after a lengthy public comment period. While the FTC's changes are significant, they are narrower than those originally proposed in the 2023 Draft. The key rule changes are outlined below.

Once the new HSR rules become effective, parties to HSR-reportable deals will need to budget substantially more time to prepare their HSR filings than under the old rules, and should prepare for additional burden to gather the required information. In light of these changes, parties negotiating HSR-reportable deals going forward should consider how the new HSR rules will impact their ability to meet particular filing timelines and negotiate accordingly.

On a more positive note, the FTC will lift its three-year-long suspension on early termination of filings. The FTC will once again exercise its discretion to shorten the 30-day waiting period for transactions that it concludes raise no substantive issues.

Key Changes Under the New HSR Notification Process

The changes within the new HSR rules that most significantly impact the timing, complexity, and cost of filing HSR include the following:

- **New forms:** While originally the agencies were expected to eliminate the use of an actual form for the HSR filings and move to an e-filing platform, the new rules instead create two revised versions of the HSR form — one specific to filers filing as acquiring persons and one for filers filing as acquired persons.

- **Agreement requirement refined:** The new rules now require that when parties file on the basis of a preliminary agreement such as an indication of interest or letter of intent, they will need to 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. Bare bones letters of intent lacking such terms will no longer be acceptable. If such a preliminary agreement does not provide sufficient detail about the transaction, filers must provide an additional document that sufficiently describes the transaction.
- **Changes for “select” 801.30 transactions:** Under the existing regime, HSR filings are required for transactions involving the acquisition of voting securities from a third party (rather than directly from the acquired person), such as in the case of some tender offers or open market purchases. The new rules carve out some exceptions for the data to be provided for “select” 801.30 transactions, which are defined as 801.30 transactions that do not result in the acquisition of control by the acquiror and no agreement or contemplated agreement exists between the parties. These transactions will still require notification, but if they are “select,” filers will not be required to respond to certain items under the new rules.
- **Expanded document requirements:** The current HSR notification process requires that a filing party search for documents created by or for officers or directors that analyze the proposed transaction and its impact on sales, growth, customers, and competition, among other topics. The new HSR filing process expands the filing person’s document search obligation to include documents created by or for “supervisory deal team leads,” which 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.” This could significantly enhance a party’s search and production obligations by bringing in the files of one lower-level person, typically a member of the internal corporate development team.

In addition, the new HSR rules will require a filing party to submit certain ordinary-course business documents unrelated to the transaction and drafted within one year of the HSR filing. These documents specifically include semi-annual and quarterly plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both of the parties to the deal, if those documents were shared with the chief executive officers of any entities involved in the transaction, or with their boards of directors. Substantive business documents of this nature historically were requested only if the FTC or DOJ initiated an investigation into a deal.

- **New narrative descriptions and customer information:** The previous HSR form only required that a filing party provide a basic description of the transaction. Under the new HSR rules, each filing party must briefly describe (i) its business operations or a description of the operating businesses (not an entity-by-entity description); (ii) the strategic rationales for the transaction; (iii) the principal categories of products and services (current and planned) sold by the filing person, including whether any such products and services compete with the other filing person, and if so, how; and (iv) supply relationships between the filing persons, if any. Filing parties must cite documents supporting these descriptions.

In addition, the acquiring person must also provide a diagram of the deal structure. In certain scenarios involving overlaps or supply relationships between the filing parties, the acquiring person must provide additional data, including top-10 supplier and customer information.

- **Expanded company information:**

- **Minority holders:** Under the current system, certain information regarding minority holders of voting securities or LLC interests of the acquiring Ultimate Parent Entity (UPE), acquiring entity, and of the acquired entity are required. If those entities are limited partnerships, only identification of the general partner entity is required. Under the new rules, for acquiring persons, filers must provide the “doing business as” or “street name” of minority investors that are related to master limited partnerships, funds, or investment groups.

In addition, filers must now identify certain minority holders (5%–50%) of entities between the acquiring UPE and acquiring entity, which today are not disclosed. For limited partnerships, filers only need to identify (in addition to the general partner) limited partners that have or will have more than 5% but less than 50% of the limited partnership interests and possess certain board nomination and/or management rights.

- **Ownership structure:** Acquiring persons will now be required to provide a description of the ownership structure of the acquiring entity and, for fund or limited partnership UPEs, an organizational chart to the extent that such charts have already been created for any other purpose (there is no requirement to create an organizational chart specifically for a HSR filing).
 - **Identifying officers and directors:** Acquiring persons will need to identify officers and directors for the three months prior to the HSR filing for entities within the acquiring person that are responsible for developing, marketing, or selling products or services with reported overlaps between the parties identified in the “Overlap Description” or supply relationships identified in the “Supply Relationships Description” sections of the HSR form.
- **Other agreements:** The parties will now have to disclose whether certain other agreements exist between them (but will not need to produce copies of such documents as part of the initial filing).
 - **New disclosures involving foreign subsidies and defense or intelligence contracts:** Pursuant to the Merger Fee Modernization Act of 2022, both parties will now have to identify and describe certain subsidies that are received or are anticipated to be received from a foreign entity or government of concern. Both parties must also identify and provide information on products produced in certain countries of concern that are subject to countervailing duties as well as any of its products, to its knowledge or belief, that are produced in whole or in part in such countries that are the subject of an investigation for potential countervailing duties. Filing parties are also asked to identify pending proposals and awarded contracts with the US Department of Defense or intelligence community, valued at \$100 million or more, that involve specific industry code overlaps or overlapping products/ services.
 - **Global filings:** Acquiring persons must now identify any foreign filing requirements. This information was previously voluntary. In addition, filers are given the option in the new HSR forms to waive confidentiality as to both state attorneys general and to non-US competition authorities.
 - **Mandatory translation requirement:** The new HSR process, contrary to past practice, now requires filers to translate all filed documents into the English language.
 - **NAICS code organization:** The updated HSR filing still requires that North American Industry Classification System (NAICS) codes be used. However, the updated process adds the requirement

that filing parties specifically identify the portfolio companies or internal businesses deriving revenue in the identified NAICS codes.

- **Elimination of NAPCS code requirement:** Not all the FTC's changes to the new HSR notification process have been expansionary. North American Product Classification System (NAPCS) codes, required under the old HSR notification process, have been wholly eliminated from the updated HSR notification process.
- **New online portal:** The FTC has also created an online portal that will allow third parties to submit comments on proposed transactions they believe may be under review by the FTC. However, the proposed online portal for filing HSR notices has been tabled until further notice; the current electronic process of filing HSR notices with regulators remains the same.

Key Differences Between the 2023 Draft and the New HSR Notification Process

As previously mentioned, the FTC released a draft version of the new HSR rules in July 2023. This draft was far more stringent than what the FTC released as final. Specifically, the new HSR rules do not require filing parties to:

- provide a “deal timeline” containing key dates and conditions for closing;
- create organization charts solely for the purpose of filing a notification;
- create or provide organizational charts for authors and recipients;
- submit drafts of all filed “Item 4” or transactional documents;
- provide financial projections and similar documents as a part of “Item 4(d)”;
- provide “formerly known as” (“f/k/a”) information for relevant entities;
- identify prior acquisitions involving entities with less than \$10 million in sales or revenues, or consummated more than 5 years prior to filing;
- provide information beyond what is required in the new HSR rules about other interest holders that may exert influence over a company, including board observers;
- provide geolocation information for certain operation locations;
- provide multiple classes of labor market-related information, including information about employees, their contracts, and locations; and
- provide information about steps taken to preserve documents (i.e., “document holds”) or company usage of messaging systems;

Practical Considerations Under the New HSR Notification Process

Given the significant amount of additional information requested under the new HSR notification process, filing an HSR notification will be a complex process requiring materially more time and resources.

However, filing parties can take some practical steps now to minimize the burden:

- **Budgeting more time to file:** The current HSR notification process is sufficiently straightforward such that filings can often be made within five to 10 business days after signing. Such timelines are unrealistic under the new HSR notification process, and filing parties should budget time accordingly. We estimate that filing parties will need a minimum of three to five weeks.
- **Diligently tracking documents:** As discussed previously, one of the most impactful changes to the new HSR notification process is an expanded universe of relevant documents, including certain types of ordinary-course documents. Filing parties should consider implementing document-tracking systems during the pendency of the deal process to minimize filing errors caused by missed documents and costs associated with running ad hoc searches for relevant documents. Filing parties should consider starting to gather responsive documents in anticipation of deal signing, rather than waiting until after signing, to expedite the process.
- **Carefully negotiating HSR-related obligations:** Given the expanded scope of the new HSR rules, more items are now left to the filing parties' professional judgment and discretion. To prevent unexpected divergences between the filing parties' notifications, carefully negotiating HSR-related aspects of deal documents, including cooperation obligations, is of renewed importance.
- **Identifying transaction rationales and preparing for overlaps:** Contrary to historical practice, the new HSR rules now facilitate an opening for transaction advocacy from the filing parties upfront as part of the HSR filing form. To respond to these requests in a timely manner, filing parties should work to clearly articulate the transaction rationale from the outset. This is especially true for transactions involving overlaps. There is now a new section on the updated HSR form specifically for overlap areas, representing an advocacy opportunity for filing parties. This call for more information on issues that are core to the antitrust clearance process, and the advocacy opportunity it represents, will put a premium on involving antitrust counsel as early as possible in strategic transactions that present overlaps.
- **Maintaining up-to-date company information:** The updated HSR notification process now includes multiple requests for filing party information, such as organizational charts, board member disclosures,² investor information, and more. For companies that frequently engage in M&A transactions, maintaining up-to-date copies of such information that can be quickly referenced will reduce time required to finalize and submit filings.

Conclusion

This Client Alert highlights some of the key changes under the new HSR Act rules. However, there are additional modifications to the current process that may impact compliance efforts.

We anticipate that clients will need to invest significantly more time, effort, and resources to navigate these changes effectively, and we recommend consulting with outside counsel to ensure a thorough understanding and implementation of the new requirements.

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Endnotes

- ¹ The FTC's new HSR rules will take effect 90 days after publication in the Federal Register, absent delay. Until then, the existing rules will remain in effect.
- ² The board member disclosures carry certain risks for filing parties due to enhanced Regulatory Section 8 enforcement in recent years. To learn more, see our Client Alert [Enforcement of "Interlocking Directorates" Accelerates With DOJ-Announced Resignations and FTC Consent Agreement](#).