

## United States: Federal Trade Commission Finalizes Amendments to the HSR Filing Process

### In brief

The Commissioners of the Federal Trade Commission ("FTC") have voted unanimously to issue a final rule<sup>1</sup> developed by both the Antitrust Division of the U.S. Department of Justice ("DOJ") and the FTC (collectively, the "Agencies"), updating the Premerger Notification Rules (the "Rules") that implement the Hart Scott Rodino Antitrust Improvement Act (the "HSR Act"), including substantial changes to the HSR Form.

The much-anticipated final changes to the HSR Rules and Form, which received significant criticism and pushback after publication in June 2023, represent a significant step back from the more sweeping overhaul initially proposed. Nevertheless, the final rule would materially increase parties' HSR compliance burden.

As reflected in the statements from the Commissioners accompanying the release of the final rule, substantial changes to the proposed rule were made to address concerns raised in hundreds of public comments and in acknowledgment of the possible legal challenges to the final rule. The changes seemingly were necessary to accommodate the views of the FTC's two Republican Commissioners, neither of whom participated in formulating the changes initially proposed.

The final rule will not be implemented until 90 days after publication in the Federal Register (likely in or around January 2025), which provides time for the public to prepare for the new filing requirements. Any legal challenges to the final rule likewise may affect the effective date. Separately the FTC noted that additional guidance on compliance with the new requirements will be forthcoming. We will monitor and share news on the FTC's guidance and track any legal challenges to the final rule as well.

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### Key takeaways

- The Agencies estimate that the changes to the HSR notification process will add an average of 68 hours to preparation time for an HSR filing (with an estimated range of between 10 to 121 additional hours of preparation time depending on the complexity of the filing). This average and range likely underestimate the time that will be required for more complicated filings. The final rule introduces several detailed requests for information and documents, contributing to this significantly increased burden. These include:
  - Additional information regarding the parties, including identification of officers and directors from the acquiring person of entities in overlapping industries and disclosures regarding any limited partners that also have management rights.
  - Detailed information regarding the form of the transaction, including a description of the transaction rationale (including identification of supporting documents) and provision of a transaction diagram.
  - Mandatory disclosure of other international antitrust filings, which is sought voluntarily in the current HSR Form.

<sup>1</sup> Available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p110014hsrfinalrule.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf).

- Factual description of competitive overlaps, including key information on products and services that are pending development and have yet to generate revenues.
- Factual description of customer categories including identification of top customers, although individual contact information and sales figures will not be required.
- Expansion of the scope for Item 4(c) and (d) requests to include documents provided to the supervisory deal team lead (one individual) and business plans or reports prepared in the ordinary course of business that have been provided to the Board of Directors or the Chief Executive Officer that discuss market shares, competition, competitors, or markets of overlap products and were created within one year of the date of filing.
- Disclosure of vertical relationships requiring filers to identify themselves as either a supplier or customer with the other merging party or its competitors.
- The final rule also includes certain changes intended to ease the burden on filing parties, including, the creation of reduced reporting requirements for certain acquisitions of voting securities from third parties, and the elimination of certain information requests for transactions meeting new de minimis thresholds.
- Once the final rule goes into effect, the FTC will also reinstate the early termination program, which allows the Agencies to expedite a grant of HSR clearance, should the parties request it.

## In depth

Commissioner Holyoak issued a statement<sup>2</sup> in conjunction with the announcement of the final rule that emphasizes "the dramatic differences between th[e] Final Rule and the proposed rule set forth in the [Notice of Proposed Rulemaking,] NPRM."

Commissioner Holyoak notes that of the 29 proposals in the NPRM, ten were rejected entirely, and of the remaining 19 proposals, the final rule includes only two that were not modified. A summary of the rejections and modifications from her statement are set forth in the table below.

**Table: Rejected and Select Modified NPRM Proposals**

NPRM Provision	Results in Final Rule
Labor Market/Employee Information	Proposal rejected
Drafts of Transaction-Related Documents	Proposal rejected
Organizational Chart of Authors and Recipients	Proposal rejected
Other Types of Interest Holders that May Exert Influence	Proposal rejected
Expand Current Item 4(d)(iii) to Include Financial Projections to Synergies and Efficiencies	Proposal rejected
Deal Timeline	Proposal rejected
Provision of Geolocation Information	Proposal rejected
Identification of Messaging Systems	Proposal rejected
Litigation Hold Certification Language	Proposal rejected

<sup>2</sup> Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules* (Oct. 10, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-hsr-rule-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf).

NPRM Provision	Results in Final Rule
Identification of F/K/A Names	Proposal rejected
Prior Acquisitions	Modified – among others, retain the five-year lookback and \$10 million sales/assets threshold that existed in prior iterations of the HSR rules.
Other Agreements Between the Parties	Modified – among others, filers are not required to produce or describe agreements between the parties; instead, they must only, via checkbox, identify types of agreements between them, if any.
Officers, Directors, and Board Observers	Modified – among others, (1) exclude reporting on board observers; (2) limit to acquiring person only; and (3) limit to officers/directors of entities in overlap industries.
4(c) Documents by/for Supervisory Deal Team Lead(s)	Modified – limit to only apply to one individual (not the plural "leads" like in the NPRM) supervisory deal team lead.
Supply Relationships	Modified – among others, (1) require only "brief" descriptions rather than a narrative; (2) exclude "Select 801.30 Transactions"; and (3) limit description to a business assessment rather than an antitrust analysis.
Ordinary Course Documents (Periodic Plans and Reports)	Modified – among others, limit to exclude "Section 801.30 Transactions" and limited to only require documents provided to Chief Executive Officers.
Identification of Limited Partners	Modified – among others, limit disclosure requirements for limited partners who do not have management rights.
Description of Entity Structures and Organizational Chart for Funds and Master Limited Partnerships	Modified – among others, eliminate requirement to create an organizational chart.
Transaction Diagram	Modified – among others, exclude "Section 801.30 Transactions" and only necessary if diagrams previously existed (i.e., no need to create diagrams).
Mandatory Identification of Foreign Jurisdiction Reporting by Both Parties	Modified – limit to acquiring person.
Requiring a Draft Agreement or Term Sheet and Transaction Specific Agreements for Filings on Non-Definitive Agreements	Modified – clarify scope and provide more details about the information required.
Transaction Rationale	Modified – among others, exclude "Section 801.30 Transactions."
Voluntary Waivers for State AGs and International Enforcers	Modified – allow filers to voluntarily check two separate boxes that would permit certain disclosures.
Defense or Intelligence Contracts	Modified – among others, limit to contracts generating \$100 million or more of revenue and only if there is an overlap or supply relationship.
Document Log Requirements	Modified – among others, limit requirement to identify authors to certain and limited circumstances.
Adjustments to NAICS Revenue Reporting	Modified to limit scope.

The full impact of even these modified rule changes only will become clear as the FTC implements and enforces the final rule. Regardless, parties should be prepared to commit a substantial amount of additional time and resources to complete the HSR Form and comply with the HSR Act.

## Conclusion

We will continue to digest the guidance issued by the FTC on the final rule, and will continue to share that guidance. In the interim, we recommend that companies expecting to file HSR notifications in 2025:

- Allocate longer periods to comply with the HSR filing requirements in their transaction agreements.
- Revise internal protocols on the data and documents needed to comply with the HSR Act.
- Engage counsel early in the diligence process to limit potential HSR compliance challenges.

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