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FTC Issues Final Rule Overhauling and Increasing the Burden of HSR Filings

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11/8/24 UPDATE: *The FTC just announced that the new rule will be published in the Federal Register on November 12, 2024, and will become effective 90 days later, February 10, 2025.*

After what is described as "intense negotiations" among the commissioners, the Federal Trade Commission (FTC) has unanimously approved a substantial overhaul to the rules governing the documents and information that must be submitted as part of the parties' premerger notification filings under the Hart-Scott-Rodino Antitrust Improvements (HSR) Act. The FTC asserts that the changes are necessary to allow the agencies to "keep pace" with "the realities of how businesses compete today" and provide them with the information needed to detect transactions that may harm competition.

Although the HSR Final Rule dropped or modified a number of the items sought in the June 2023 proposed rule, it will still require a great deal more time, effort, and information than the current rules. Indeed, the FTC itself found:

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 high of 121 hours for [purchaser] filings … in a transaction with overlaps or supply relationships.

Based on our experience, these estimates appear low. The lead time necessary to prepare a filing will increase dramatically to two or more weeks. Many filers, particularly large companies with a wide array of products or services, and private equity groups, will face a particularly acute burden under the new filing rules.

The FTC also announced that after the Final Rule becomes effective, it will lift its categorical suspension on early termination of filings made under the HSR Act. The agencies anticipate that the additional documents and information provided by the Final Rule will facilitate their antitrust assessments and help inform the processes and procedures used to grant early termination.

Summary of Key Aspects of the Final Rule:

- For HSR filings made based on an executed letter of intent or term sheet, instead of a definitive agreement,
  - Parties must submit a document that includes “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.”
  - An affidavit accompanying the filing “attest[ing] that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has also been submitted.”

- Provision of regularly prepared ordinary course plans and reports that “analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target,” that were “prepared or modified within one year of the filing date” and were shared with the CEO or board of directors (or their equivalent).
- Parties must describe their “principal categories of products and services,” including any “current or known planned product or service.” The parties are instructed not to “exchange information for the purpose of answering this item.” But for any self-reported overlapping product or service — so-called “overlap filings,” the parties must provide:
  - Top 10 customers overall and by product or service category;
  - Sales revenue, “projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric” used to measure performance;
  - Description of all categories of customers of the product or service; and
  - If the product or service is still in development, “the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed” and the anticipated launch date.

This information is not required for executive compensation transactions and open market purchases or equity purchases from holders other than the target that will not confer control of the target or board representation rights (“select 801.30 transactions”).

- Parties must describe all transaction rationales, including cross-referencing them with the transaction-related documents submitted with the filing (with the exception of select 801.30 transactions).
- In addition to transaction-related documents prepared by or for officers and directors, the parties must submit all studies, surveys, analyses, and reports evaluating the proposed transaction regarding market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, prepared by or for the “supervisory deal team lead.”
  - The Final Rule defines supervisory deal team lead 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.”
- Parties will be required to submit accurate and complete verbatim translation of foreign-language documents.
- Submission of all documents governing the transaction, “including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements.”
- Parties must describe any supply relationships between the purchaser and target, including the amount of revenue involved and the top 10 customers other than the transaction counterparty and note if the purchaser and target have any non-solicitation, non-compete, leases, licensing agreements, master service agreements, operating agreements and supply agreements.
- Reporting of defense or intelligence contacts with a value equal to or greater than $100 million (1) pending proposals submitted to the U.S. Department of Defense or any member of the U.S. intelligence community, and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community.
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Parties must report if they have “received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern,” meaning China, Russia, Iran, North Korea, any foreign terrorist organization designated by the Secretary of State, or OFAC specially designated national.

The new burdens imposed by the Final Rule are substantial. It is worth noting, however, some of the most significant changes from the 2023 proposed rule were not carried over to the Final Rule. These are set forth below.

Final Rule’s Key Changes Compared to the 2023 Proposed Rule:

- Eliminates the requirement that merging parties provide all drafts of transaction-related “document[s] that were sent to an officer, director, or supervisory deal team lead(s).”
- Abandons mandates that merging parties (1) classify their employees by job category codes from the U.S. Bureau of Labor Statistics, (2) classify their employees by the U.S. Department of Agriculture’s ERS commuting zones, and (3) identify any penalties or findings issued against the filing person by the U.S. Department of Labor’s Wage and Hour Division, the NLRB, or OSHA.
- Revises the definition of “supervisory deal team lead” to limit it to a single individual, eliminating the need to review multiple employees’ files for transaction-related or Item 4 documents.
- Limits disclosure requirements for limited partners without management rights.
- Removes demands for filers to create some new documents, such as deal timelines and organization charts, though still seeks such information to the extent it exists in the ordinary course of the filer’s business.
- Shortens lookback periods for certain requests, including identification of directors and prior acquisitions.
- Eliminates requirement that filers identify and list all communications systems or messaging applications on any device used by the filing person that could be used to store or transmit information or documents related to its business operations.

The impact of the Final Rule will become clearer as HSR filings are made under the new regime and the FTC’s Premerger Notification Office starts to engage with the new format and the substantial volume of additional documents and information provided.

The antitrust teams at Troutman Pepper and Locke Lord will be working with and further analyzing the Final Rule and closely monitoring the rollout. Please reach out to your contacts at the firm for additional information and with your questions.

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