



Oct 29, 2024

Categories:

[Publications](#)

Authors:

[Brad S. Keeton](#)

FTC Announces Final Rule on HSR Premerger Notifications: Overview of Changes and Impact on M&A Costs and Timelines

Nearly 16 months after announcing proposed changes to the rules governing premerger notifications under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR), the Federal Trade Commission (FTC) has finally announced a final rule that will significantly modify the HSR premerger notification process. While the final rule is less sweeping than originally proposed last year, FTC estimates that the time required to prepare a single HSR filing could increase by as much as 121 hours. The final rule will take effect 90 days after it is published in the Federal Register, and parties should expect an effective date in mid- to late-January 2025. In addition to examining the most consequential changes, this article addresses strategies for deal teams looking to minimize additional time and expense in future HSR filings under the new regime.

Frost Brown Todd will also be hosting a webinar on this topic on November 12 at 12:00 p.m. ET. [Learn more and register here.](#)

Enforcement Agencies' General Rationale for the New HSR Rules

The U.S. antitrust enforcement agencies, FTC and the Antitrust Division of the Department of Justice, engaged in this rulemaking process to bring the HSR process more in line with the current economic reality, including a higher degree of vertical integration in the supply chain and integration with companies that provide ancillary services. According to the agencies, the current HSR rules do not sufficiently account for these more complex and interconnected corporate structures and an increasing number of deals with both horizontal and vertical components.

The final rule also reflects two current enforcement priorities—enhanced focus on vertical integration and monitoring

serial acquisitions and industry roll-up strategies.^[1] In this vein, transactions will largely be analyzed in the context of three categories: (1) “select” section 801.30 transactions that have a low risk of anticompetitive effects; (2) transactions with vertical integration or overlaps that have a medium risk of anticompetitive effects; and (3) transactions involving horizontal competitors and overlaps that have a high risk of anticompetitive effects.

Under the new regime, the agencies will require, at the time of filing, detailed competition-related information and documentation that was previously requested only when deemed necessary for the agencies to complete their analysis. For certain transactions with legitimate competitive impacts, this may allow the agencies to complete their analysis more efficiently by having that data upfront. For many other transactions, however, the increased burden will be unnecessary because they so lack in antitrust concerns that the agencies do not **need** that additional data at all and likely would not have asked for it under the current rules.

Ministerial Changes

The final rule contains several ministerial changes either necessary to implement the more substantive changes or believed by the agencies to make the filing process more efficient. This section will address the five most significant of those ministerial changes. First, Sections 803.2, 803.5, and 803.10 are amended to memorialize that electronic filing of HSR submissions is required, that paper HSR filings are no longer permitted, and that FTC will roll out a new e-filing platform to replace Kiteworks before the final rule takes effect.

Second, Section 803.2 is amended to reflect that the acquiring parties and acquired parties will now use different forms for their respective filings. Because acquiring parties are required to disclose substantially more information than acquired parties, the new forms only solicit information that must be submitted by each respective side.

Third, Section 803.5 is amended to require that HSR filings be made on an executed agreement that describes in sufficient detail the scope of the transaction. If the signed agreement does not contain

such specificity, then an additional dated document like a term sheet or draft definitive agreement must also be submitted. Generally, nonbinding letters of intent containing general deal terms will no longer be acceptable alone. The new instructions indicate that an agreement describing the transaction in “sufficient detail” will contain 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, post-closing governance, and transaction expenses or other material terms. The agencies’ rationale for this change is that too many HSR filings were made prematurely, before key deal terms were finalized and post-close activity was better understood.

Fourth, Section 803.8 is amended to require that all responsive foreign language documents be accompanied by “accurate and complete” English translations that can be readily understood and are materially accurate and complete. Under the current rules, foreign language documents do not have to be translated into English solely for purposes of an HSR filing. While ministerial in nature, this change could have significant impacts on time and expense for filers, especially with transactions involving multiple foreign ultimate parent entities.

Fifth, the agencies will no longer require reporting of 10-digit North American Classification System (NAPCS) codes. Historically, industry information and revenues were reported using both NAPCS and North American Industry Classification System (NAICS) codes. When the new rules take effect, parties will report that information using only NAICS codes.

Sixth, the moratorium on requesting early termination of the waiting period will be lifted.

Material Changes

Supervisory deal team lead: Currently, documents responsive to Item 4(c) of the HSR form must be submitted only if they were prepared by or for officers or directors. The final rule expands this requirement to include documents prepared by or for the

“supervisory deal team lead,” 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 a director or officer.”

Identity of company personnel: For transactions where there are competitive overlaps or supply relationships, the filing party will be required to identify—by name, title, and company—individuals within the acquiring or acquired person who supervised the preparation of documents prepared by third parties, or for whom the document was prepared. For example, if a document prepared by an investment bank must be produced with an HSR filing, not only the author of the document must be identified, but also the person(s) within the company who supervised its preparation and the identity of all persons within the company for whom that document was prepared.

Non-compliance: The final rule specifies that if a filer is unable to answer fully any question on the HSR form, it must disclose all available information and provide a statement for why it cannot fully comply with the question. Where exact answers cannot be provided, best estimates will be permitted (so long as the source or basis of the estimate is provided).

Minority shareholders or interest holders: The final rule expands Item 6(b) by requiring disclosure of the following information:

- The current “doing business as” (DBA)/street name of all minority investors (holders of 5% or more but less than 50%) that are related to master limited partnerships, funds, or investment groups so that the agencies can use public resources to gather additional information.
- All minority investors (1) in the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for purposes of, effectuating the transaction. This change reflects that many acquiring persons have complex structures and many entities between the ultimate parent entity and the acquiring entity,

which may not be wholly owned but are related, and therefore could make or influence competitively important decisions post-acquisition.

- Minority holders of the general partner and limited partners that have certain rights related to the board of directors of entities related to the acquiring entity, allowing the agencies to identify limited partners who hold interests in the acquiring person acting as vehicles for investor groups to manage, direct, or influence the portfolio companies in which they invest.

Entities within the acquiring person and acquired entity: Filers must organize controlled entities at the time of filing by operating business, and for each operating business, identify the current DBA/street name.

Acquiring person ownership structure: Acquiring persons must provide a detailed narrative description of the ownership structure of the acquiring entity and, for fund and master limited partnership ultimate parent entities, an organizational chart sufficient to identify and show the relationship of all the entities that are affiliates or associates. This will provide the agencies with nuance about ownership structures that may not be clear from a simple list of minority holders.

Identification of officers and directors of acquiring person: Filers are required to identify all officers, directors, and board observers for entities within the acquiring person who also serve as an officer or director of an entity that derives revenue in the same NAICS code, or is in the same industry, as the acquired entity at the time of filing that either (1) have responsibility for the development, marketing, or sale of products or services that are reported overlaps or supply relationships; or (2) directly or indirectly control or are controlled by the acquiring entity. For the first category, there is a three-month lookback period. For the second, there is no lookback period, but filers must disclose individuals who have not yet officially taken relevant positions but who are expected to do so post-filing. The agencies believe this information is necessary to identify transactions that may violate antitrust laws because the acquiring person and the target have existing business

relationships, including through shared individuals or entities.

Business operations of the acquiring person: The acquiring person must describe the business operations within the acquiring person. An entity-by-entity description is not expected, but rather a general overall description of the business operations of all relevant entities so that the agencies may better understanding the potential competitive implications of the transaction where the scope of the acquiring person's holdings is not publicly available.

Transactions subject to international antitrust notification: The final rule mandates that the acquiring person disclose all jurisdictions where antitrust or competition-related filings are required, including jurisdictions where filings have already been made and where it has a good faith belief that a filing will be required. Currently, this disclosure is optional, and the agencies believe that as more transactions have international implications, it is important for reviewing staff to know which foreign jurisdictions may also be evaluating the transaction, especially in cases where the agencies coordinate with foreign jurisdictions.

Transaction rationale: Both sides to most transactions must describe all strategic rationales for the transaction. Specifically, the agencies want information on competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other party, expansion into new markets, acqui-hires, obtaining intellectual property, or integrating assets into new or existing products, services, or offerings. The agencies believe this information is necessary to help them understand which strategies are predominant and also provides context when reviewing other supporting data and documents.

Transaction diagram: The acquiring person must submit a diagram of the deal structure if one exists. Such a diagram does not have to be created for the HSR filing if it does not exist, although it is recommended.

Plans and reports prepared in the ordinary course of business: The final rule requires for most transactions the submission of periodic plans and reports that discuss market shares, competition,

competitors, or markets of any product or service that is provided by both the acquiring person and the acquired entity. This requirement applies even to plans and reports that were not prepared specifically for the transaction at issue if they were shared with a chief executive officer of any entity involved in the transaction or submitted to the board of directors. These are limited to documents that already exist and are dated within one year of filing. The agencies' rationale is that such plans and reports prepared in the ordinary course often contain detailed assessments of core business segments, markets, competitors, other acquisition targets, and projections about future competitive dynamics, all of which have direct bearing on the agencies' review of the transaction.

Transaction-specific agreements: The final rule requires submission of all documents that constitute the agreement between the acquiring person(s) and the acquired person(s), inclusive of things like schedules and exhibits related to the transaction, regardless of whether both parties to the transaction are signatories. This category includes non-competition and non-solicitation agreements, and other agreements negotiated with key employees, suppliers, or customers in conjunction with the transaction. It is limited to agreements that will be in effect on and after closing and specifically excludes things like clean team agreements.

Other agreements between the parties: The acquiring person must indicate whether there are any agreements with the target in effect at the time of filing or within the year prior to the date of filing, and if so, indicate the type of agreement. Unless responsive to another rule, however, the agreements do not have to be provided with the HSR filing but may be requested by the agencies during the review period or if a Second Request is issued. Understanding the scope of any existing contractual relationships between the parties will materially assist the agencies' review by revealing any business interactions that may affect premerger competition.

Competition descriptions: The final rule requires filers to provide narrative responses addressing two categories of information: competitive overlap and supply relationships. These narrative

responses provide significantly more competition-related information for both horizontal and vertical merger activity that was, historically, reserved for Second Requests.

- **Overlap description:** Filers are required to provide a narrative overview of principal categories of current products and services and information on whether the filer competes with the other party for those products and services. The narrative's description of current product and service categories must be consistent with how those business lines are referred to in the company's day-to-day operations, and identify any documents submitted that support this. To the extent any document submitted with the filing references planned or future products or services, then the same information must be provided for those products and services. For each overlapping product or service, the filer is required to provide sales and customer information for the most recent fiscal year. Customer information must include a description of all categories of customers, general contact information for the top 10 customers based on units and sales, for the last year, and the top 10 customers in each customer category.
- **Supply relationships description:** Filers are required to provide information about existing or potential purchase or supply relationships between the filing parties for all products, services, and assets that represented at least \$10 million in revenue, inclusive of internal transfers within the filing person, in the most recent fiscal year. The description must include each product, service, or asset (including data) that the filing party sold, licensed, or otherwise supplied to the other party or to any business (identified by name) that uses its product, service, or asset and competes with the other filing party's products or services.

Revenues and overlaps: The final rule makes several changes to how revenues and overlaps are reported to the agencies:

- **NAICS codes:** The final rule eliminates the requirement that precise revenue amounts for each NAICS code be reported,

and now permits reporting revenues in one of five ranges. It also requires that revenues are reported on a descriptive basis through engagement with individuals familiar with the business operations of each operating company. If more than one NAICS code would be appropriate, the description must provide additional information on why multiple codes are applicable. NAICS information must now be reported separately by each operating entity.

- **Controlled entity geographic overlaps:** The acquiring person must identify the entities within its own person that have operations in the same NAICS code as the acquired entity, and vice versa. It further requires identification of DBAs/street names used within the last three years by entities with U.S. operations in overlapping NAICS codes. It also updates the list of NAICS codes for which locations need to be identified at the state level and those for which street-level information is required. Filers must also list locations where franchisees of the acquiring or acquired person generate revenue in overlapping NAICS codes that require street-level reporting.
- **Minority-held entity ownerships:** The final rule requires the identification of holdings of the acquiring person, its associates, or the acquired entity that are greater than 5% but less than 50% if such holdings derive revenue in any of the same NAICS codes or industries as the other party. The DBAs of such entities must also be disclosed, if known. Finally, the current option to simply list **all** minority-held ownerships has been eliminated.
- **Prior acquisitions:** The final rule eliminates the current \$1 million revenue threshold for overlapping NAICS codes. Instead, both the acquiring person and acquired entity must now disclose prior transactions within the past five years that were valued at more than \$10 million and that involve the same overlapping NAICS codes or industries as the transaction at issue. Prior acquisitions of assets or entities that also provide competing products or services listed in the overlap description must likewise be disclosed, and prior acquisitions of substantially all the assets of a business will be treated in the same manner as prior acquisitions of voting

securities or non-corporate interests. The agencies believe that expanding this section will better allow them to identify serial acquisitions and industry roll-up strategies.

Subsidies from foreign entities or governments of concern: The final rule requires the disclosure of subsidies received from foreign entities or governments of concern, which will be defined in a new subsection (r) to Section 801.1.

Department of Defense and Intelligence Community contracts: The final rule requires disclosure of information regarding U.S. Department of Defense and Intelligence Community contracts of \$100 million or greater involving overlapping products or services (or those disclosed in the supply relationships section).

Optional waiver of confidentiality: Filers will now have the option to voluntarily waive certain confidentiality protections of the HSR rules to allow the agencies to share submitted materials with non-U.S. jurisdictions or state enforcers, which could facilitate faster review.

Key Takeaways

This article does not address every change and impact of FTC's final rule, but those discussed herein demonstrate that HSR filers will be required to disclose significantly more competitively sensitive information, data, documentation, and narrative descriptions than are required under the current rules. For more straightforward deals involving parties without horizontal relationships and minimal vertical relationships, these changes may only modestly increase the burden on the filers. Yet, for deals involving competitive overlaps, significant vertical relationships, complex corporate structures, substantial private equity investment, or foreign ultimate parent entities, the additional burden may be immense.

Companies and outside counsel will need to take this into account—especially the expanded Item 4(c) and 4(d) requirements, data on competitive overlaps and supply relationships, and information on minority investment—in evaluating reasonable deal timelines. More than ever, deal teams need to involve competition counsel as early in the process as possible to ensure that the HSR

process does not derail transaction timelines, and transaction parties must begin to gather responsive information at the outset. Further, until both outside counsel and the agencies become more comfortable with the new procedures, parties should expect unanticipated delays in the HSR process and plan accordingly.

If you have questions regarding the impact of these changes on future M&A deals, we encourage you to register for our Nov. 12 webinar. You can learn more and [sign up here](#).

[\[1\]](#) Earlier this year, FTC and DOJ issued a joint request for information soliciting input from the public on serial acquisitions and industry roll-up strategies.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.