

U.S. antitrust agencies adopt significant changes to HSR filings

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The U.S. Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) have overhauled the Hart-Scott-Rodino (HSR) premerger notification form to obtain additional information from M&A transaction parties, which the agencies say is necessary to determine which deals require an in-depth antitrust investigation. The new requirements front-load into the HSR filing certain information and materials that have traditionally been requested on a voluntary basis during the initial 30-day waiting period for some strategic transactions. Although the final rule omits several changes [initially proposed](#) by the agencies, it represents the most sweeping revision to the HSR process in over 45 years.

The revised HSR form will become effective on **February 10, 2025**, but U.S. businesses, prospective investors and acquirers should begin to prepare for the new requirements now.

What you need to know

- An HSR filing will require significantly more information and detail concerning a proposed transaction, including additional disclosure of the ownership structure and minority investors, the parties' strategic rationale for the transaction, certain documents prepared in the ordinary course of the parties' businesses, and sales and customer information for competing products, services and supply relationships.
- The final rule eliminated some of the more onerous changes initially proposed by the agencies, such as requiring document drafts, disclosing labour-related data, and extending the time period to identify prior acquisitions of competing businesses from five to ten years.
- Parties to mergers and acquisitions should anticipate that preparation of the new HSR form will take significantly more time and consider reasonable timeframes for filing to account for these changes.

Revisions to HSR filings

The HSR Act requires parties to certain M&A transactions to notify the U.S. antitrust agencies of such transactions and undergo a 30-day waiting period before closing their deal. This pre-closing notification permits the agencies, in appropriate circumstances, to suspend a transaction pending an investigation to determine whether it could substantially lessen competition or potentially create a monopoly.

In 2023, the agencies proposed extensive changes to HSR filings with an eye towards receiving more detailed information and disclosures to, in their view, properly adhere to U.S. antitrust laws that preserve and promote competition. Following the receipt of numerous public comments, FTC commissioners unanimously approved the final rule changes and the DOJ announced its concurrence with the revisions. According to the FTC, the new HSR requirements respond to changes in corporate structure and deal-making, and reflect market realities in the ways businesses compete, which can create or expose information gaps that prevent the agencies from conducting a thorough antitrust assessment of transactions subject to mandatory premerger review.

Key reforms included in the final rule will now require filers to provide:

- a description of the business lines of each filer to reveal existing areas of competition between the merging firms (including for products or services that are in development and supply relationships);
- disclosure of investors in the buyer, including those with management rights; and
- additional transaction documents from the supervisor of each merging party's deal team, as well as a small set of high-level business plans related to competition.

The final rule does not include several changes described in the proposed rule. Parties will not be required to provide drafts of submitted documents except in limited circumstances, labour and employee information, geolocation data relating to geographic markets, a timeline of key dates for closing the proposed transaction, nor will they be required to identify prior acquisitions of competing businesses over an extended period dating back 10 years.

Competitive overlaps and supply relationships

The HSR form will now require filers to provide more detailed information pertaining to areas where the parties compete. For Canadians, several of the new HSR requirements will be familiar as they are similar to details that have long been part of premerger submissions to the Competition Bureau.

In addition to supplying a strategic rationale for the transaction, each buy-side and sell-side party will be obliged to identify product and service lines in which the parties compete or could compete. For each area of competition, the parties must supply annual sales, categories of their customers (e.g., retailer, distributor, broker, government) and their top ten customers by sales and category of customer.

The parties are further required to provide a description, annual sales, and customers or suppliers (as the case may be) of each product, service, or asset they have sold, licensed, or otherwise supplied that is used by the other party or competing parties, as well as each product, service or asset incorporated as an input into products used by the other party or its competitors.

Notably, the parties are cautioned that they should not exchange information for the purpose of responding to these items of the new HSR form.

Additional information disclosures

HSR filings will now require disclosures regarding the organizational structure and ownership of the buyer, including a description of the ownership structure and existing organizational charts. Limited partnerships affiliated with the parties must identify each minority limited partner with an interest of at least 5%, and any limited partner that has—or will have the right to—serve as, nominate, appoint, veto, or approve board members or individuals with similar responsibilities to the buyer or certain affiliates.

Buyers will be required to disclose the names and positions of their directors and officers that serve as directors or officers of other entities deriving revenue from the same industry as the target. Such information is intended to provide the antitrust agencies with information to assess interlocking directorates under Section 8 of the Clayton Act and identify other potential anticompetitive relationships.

Reflecting the U.S. antitrust agencies' concern with roll-up strategies, targets will, for the first time, have to provide information on prior acquisitions during the past five years that involved competing products or services.

Providing more documents

Historically, the HSR form has required parties to provide a relatively circumscribed set of documents concerning the proposed transaction that addresses markets, competitors, synergies and the like. So-called Item 4(c) and 4(d) documents were limited to documents prepared by or for the parties' directors or officers (or individuals with similar responsibilities).

The revised HSR form introduces two new categories of documents that must be submitted with the HSR form. First, documents previously captured by Items 4(c) and 4(d) must also include materials prepared by or for each party's "supervisory deal team lead"—that is, 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.

Second, parties will now be required to provide plans and reports prepared or modified within the past year that were provided to the party's CEO or board of directors in the ordinary course, if such documents analyze market shares, competition, competitors, or markets pertaining to any competing product or service of the buyer and the target. Because such materials are not limited to those prepared in connection with the transaction, parties will be obliged to conduct more extensive searches for required documents.

Early termination is back

Since the outset of the COVID19 pandemic, the U.S. antitrust agencies have suspended early termination of the 30-day waiting period for transactions that did not present material concerns. Even as the pandemic subsided, the agencies publicly expressed that they had insufficient resources to evaluate voluminous filings in less than a month's time.

A benefit of requiring parties to supply the agencies with more information about proposed transactions is that they will now reinstate the availability of early termination in appropriate circumstances, such as when the parties plainly do not compete with each other.

Planning ahead

Parties considering transactions with a U.S. nexus should anticipate that they will need more time to gather documentation and information for required HSR filings. The antitrust agencies estimate that the new HSR form will take two to three times longer than the current form. Moreover, firms currently contemplating M&A deals should already begin to implement processes to identify supervisory deal team leads and collect ordinary course documents that address competing products and services.

Transaction parties will also need to consider antitrust issues earlier in the process given the strategic, sales and supply information that must now be disclosed in the HSR form.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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