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The New HSR Form

On October 10, 2024, the Federal Trade Commission (“FTC”) voted unanimously to adopt the final rule¹ for the new Hart-Scott-Rodino (“HSR”) Act Form and Instructions, with the concurrence of the Department of Justice (“DOJ”).² As anticipated, the new rule entails the most significant revamp of the HSR Form in the nearly 50-year history of the HSR Act, which has significant, long-term implications for all clients planning M&A going forward.

The new HSR Form will become effective 90 days after its publication in the Federal Register. Publication is anticipated to occur next week (October 14-18). Thus, parties can expect the new HSR filing requirements to apply to any transaction filed in late-January 2025 or thereafter. It is possible that the new rule will be challenged in court and potentially stayed pending a decision. However, companies contemplating reportable transactions that would be filed following implementation should begin preparing for these new requirements.

¹ Press Release, Fed. Trade Comm’n, *FTC Finalizes Changes to Premerger Notification Form* (Oct. 10, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form>; Fed. Trade Comm’n, 16 C.F.R. Pts. 801 & 803, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf

² Press Release, Dept. of Just., *Justice Department Concurs with Federal Trade Commission’s Changes to Premerger Notification Form Used in Merger Review* (Oct. 10, 2024), <https://www.justice.gov/opa/pr/justice-department-concurs-federal-trade-commissions-changes-premerger-notification-form>.

In addition, the FTC is introducing an [online portal](#) for the general public to directly submit comments on proposed transactions that may fall under agency review. This web portal will allow greater third-party engagement during the review process.

Key New Requirements for Filing Parties

Below are some of the major changes set forth in the new rule:

Category	Final Rule
Expansion of Transaction-Related Document Disclosures and New Ordinary Course Business Document Disclosures	<p>Document disclosure requirements (previously referred to as “Item 4(c) and 4(d) documents”) have been significantly expanded with new requirements, including:</p> <ul style="list-style-type: none"> • In addition to officers and directors, certain transaction documents must be produced from a “supervisory deal team lead” (who might not be an officer or director). • Additional documents related to high-level business plans on competition must be produced, even if the documents do not specifically relate to the transaction. • Buyer must identify existing contracts with the seller, such as leases, license agreements, operating agreements, supply agreements, or non-solicitation agreements, even if the contracts do not specifically relate to the transaction.
Competition / Overlaps	<p>Parties will be required to describe the business lines of each filer and identify (i) products and services where they compete (including for products or services in development) and (ii) supply relationships between the merging firms (including products sold to the other party’s competitors) with the following information for each falling under (i) and (ii):</p> <ul style="list-style-type: none"> • The product or service’s global sales for the most recent year. • A description of all categories of customers of the target that purchase or use the product or service. • The top 10 customers globally in the most recent year and the top 10 customers globally for each customer category. • Narrative descriptions of products, services, or assets.
Disclosures of LPs, Subsidiaries and Officer/Director Information	<ul style="list-style-type: none"> • New requirement to disclose certain information regarding 5% or greater limited partners that have certain management rights (such as the right to appoint members to the board). • New requirement to disclose certain officer and director information. • New requirement to disclose information on any subsidiaries received from certain foreign governments or entities.
Prior Acquisitions	<p>Target now also required to provide certain prior acquisition information historically required only of the buyer.</p>

Category	Final Rule
801.30 Transactions	<p>Due to a low risk of associated antitrust violations, select 801.30 transactions (acquisitions of voting securities from third parties) are excused from, <i>inter alia</i>, the following information requirements:</p> <ul style="list-style-type: none"> • Transaction rationale; • Plans and reports; • Transaction agreements; • Overlap description; and • Supply relationships description.
Fund and LP Organizational Structure	<p>In transactions where a fund or master limited partnership is the ultimate parent entity, the acquiring person will be required to provide any existing organizational charts showing the relationship of any entities that are affiliates or associates.</p>
Defense and Intelligence Contracts	<p>Except for certain 801.30 transactions, parties will be required to identify pending proposals and active contracts with the US Department of Defense or any member of the US intelligence community where the contracts:</p> <ul style="list-style-type: none"> • Are or will be the source of revenues in any identified NAICS code overlap; or • Involve or will involve an overlapping product or service identified in the new overlap description or supply relationships description sections of the Form.
Interlocks	<p>The acquiring person will be required to list, for all entities within the acquiring person responsible for the development, marketing, or sale of products or services identified as overlaps or supply relationships in the Form:</p> <ul style="list-style-type: none"> • All current officers and directors and those who served in such positions within three months before filing, that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target. <p>The acquiring entity will be required to list, for (i) all entities it directly or indirectly controls, (ii) entities that directly or indirectly control the acquiring entity, and (iii) entities within the acquiring person that have been or will be created as a result of the transaction:</p> <ul style="list-style-type: none"> • All current officers and directors, as well as those likely to serve in one of those positions, that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target. • If identities of prospective officers or directors are unknown, a description of those with the authority to select them must be provided. <p>For unincorporated entities, the acquiring person or entity should list individuals exercising functions similar to those of an officer or director.</p>

What Is Not Included in the Final Rule

As [discussed in our prior June 2023 alert](#), the agencies had earlier released a proposed rule for public comment. Approximately 700 comments were submitted during the public notice and comment period. The final rule announced on October 10, 2024, does not include some of the most far-reaching proposals found in the proposed rule. The following elements in the proposed rule are **not** included as part of the final rule:

- Drafts of item 4(c)/(d) documents;
- Information about employees and labor markets;
- Information about board observers;
- Information about prior acquisitions involving entities (i) with less than \$10m in sales or revenues, or (ii) consummated more than 5 years prior;
- A timeline of key dates for closing the proposed transaction;
- The creation of organization charts for the purpose of filing a notification;
- Certain information about other interest holders; or
- Information about document preservation and messaging systems.

Early Termination Suspension Lifted

The FTC also announced that it plans to lift the temporary suspension of “early termination” following implementation of the final rule. The HSR Act allows parties to a reportable transaction to request that the HSR waiting period be terminated before the expiration of the statutory period. On February 4, 2021, however, the FTC, with the support of the DOJ announced the temporary suspension of early termination. Granting early termination is discretionary for the agencies. As a result, it is not yet clear whether the lifting of the suspension will change the agencies’ practice. Indeed, Chair Khan’s statement on the final rule “question[ed] the wisdom of using agency resources on a discretionary function [i.e., early termination],” noting that the additional information captured by the new Form will enable the Commission to better determine the “subset of deals [that] may receive it and under what circumstances.”³

What Companies Can Do to Prepare

The Milbank team is continuing to analyze and interpret the new rule and how it will impact parties going forward. The FTC and DOJ have indicated that they will provide future compliance guidance in advance of the final rule’s pending effective date, likely within the next few weeks.

While the new HSR Form will impose additional burdens on filing parties, companies can take the following practical steps to prepare:

- Parties should anticipate a significant increase in the time required to prepare HSR Filings. Parties will need to allocate sufficient time for filing preparation and should consider extending inside and outside dates accordingly;
- Revise HSR deadlines in antitrust covenants to account for potential delays resulting from compliance with the new rules; and
- Create or maintain an annual compliance program and central file of non-transaction specific information and documents to be updated regularly, e.g., information on revenue codes, subsidiaries, etc.

³ Statement of Chair Lina M. Khan Joined by Comm’r Rebecca Kelly Slaughter & Comm’r Alvaro Bedoya Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules Comm’n File No. P239300 and Regarding the FY2023 HSR Ann. Rep. to Cong. Comm’n File No. P859910, at 5 (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/khan-slaughter-bedoya-statement-regarding-final-premerger-notification-form-hsr-rules-fy2023-hsr-annual-report-to-congress.pdf.

Companies should consult with Milbank antitrust counsel if they have questions about the new HSR form, process, and timing, or if they would like input on how to structure their policies and procedures going forward to ensure that they are best positioned to comply with these changes. Milbank's Antitrust Group will also be hosting roundtables with clients and stakeholders from a range of industries to discuss and collectively brainstorm additional solutions to minimize the new filing burdens. Please reach out if you are interested in joining these discussions.

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