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Practice Update

FTC Finalizes Long-Awaited Final Rule With Significant Changes to HSR Act Filings

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Key Takeaways

1. Although the Final Rule includes less extensive changes than those originally proposed, these changes will significantly increase the cost and the time required to prepare filings.

> *NOTE:* The FTC estimates that on average the changes will increase the time required to prepare an HSR filing by 68 hours and in some cases may increase the time by 121 additional hours.

2. The Final Rule imposes a number of new requirements on filing parties, including:

> (1) collecting and providing competitive analysis documents from a broader scope of custodians and "ordinary course" documents related to competition;
>
> (2) submitting descriptive information about the parties' products, services, competitive overlaps, and supplier-customer relationships;
>
> (3) providing the strategic rationale for the transaction;

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(4) submitting detailed ownership and shareholder structure;

(5) attaching detailed descriptions of the transaction agreement and certain other draft agreements;

(6) providing greater details about past acquisitions; and

(7) identifying foreign merger control filings.

3. The Final Rule does not change the analysis or exemptions governing whether or not a filing is required.

4. The Final Rule changes will not become effective until mid-January, at the earliest, and transactions that file an HSR before the effective date will still be covered by the existing rules regardless of the closing date.

Summary

Last week, the Federal Trade Commission (FTC) voted unanimously to **issue a Final Rule** implementing substantial changes to the premerger notification process for the Hart-Scott-Rodino (HSR) Act. At the same time, the Antitrust Division of the Department of Justice (DOJ) also issued a **press release** concurring with the FTC's changes. Although the changes required by the Final Rule are less extensive than those originally proposed more than a year ago in the **Notice of Proposed Rulemaking** (NPRM), the Final Rule will significantly increase both the cost and the time required to prepare HSR filings. In order to estimate the extent of that increase, the FTC surveyed 15 current FTC and DOJ attorneys who have recent experience preparing HSR filings in private practice.

NOTE: Based on the survey, the FTC estimates that on average the changes from the Final Rule will increase the time required to prepare an

HSR filing by 68 hours, ranging from a low of 10 hours for "select 801.30 transaction filings" to as much as 121 additional hours for filings from acquiring persons in a transaction with overlaps or supply relationships.

Absent judicial intervention, or the Final Rule being withdrawn for some other reason, the changes will go into effect in mid-January 2025.

NOTE: In a bit of good news, however, the FTC announced it will reinstate the early termination program and it will once again be possible for transactions to clear the HSR hurdle in less than 30 days. Early termination will only be available for transactions that file an HSR after the Final Rule becomes effective.

Importantly, the Final Rule also left a few things unchanged, including the following aspects of the current HSR Rules:

1. The Final Rule changes do not alter the statutory mandates for the types of transactions that must be reported (i.e., those subject to certain size-of-person and size-of-transaction tests) under the HSR Act, or the available exemptions;
2. The Final Rule does not change the applicable waiting periods (i.e., typically 30 days for the initial review), and the filing fees remain the same; and
3. Under the Final Rule, the HSR filing, and all accompanying materials submitted with it, will continue to be confidential and exempt from the Freedom of Information Act.

Overview of Significant Changes

Akerman LLP will be publishing more detailed guidance as the effective date approaches, but below are the key changes.

I. Additional Document Requirements

The Final Rule significantly expands the scope of the competitive analysis documents that must be submitted pursuant to items 4(c) and 4(d). In addition to the existing requirement that the parties must submit all documents, studies, surveys, analyses, and reports prepared by or for officers and directors that evaluate the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets, the Final Rule requires the parties to also submit all similar documents prepared by or for the "supervisory deal team lead."

> *NOTE:* The "supervisory deal team lead" 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."

The parties also must submit all plans and reports (*even ordinary course documents*) prepared within one year of the filing date that were provided to the Board of Directors or the CEO 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." This new requirement means that documents that were not prepared for purposes of analyzing this transaction, and may have been prepared without consulting antitrust counsel, will need to be included in the HSR filing.

> *NOTE:* As a result, it will be critical that buyers and sellers carefully manage not only how deal teams and outside advisors create transaction-specific documents but also how competitive analysis documents are created in *the ordinary course of business*, as these categories of documents will no longer be shielded from submission with HSR filings.

> *NOTE:* To avoid creating unnecessary competition concerns with future transactions,

antitrust counsel should be consulted when creating any documents discussing competition that will be presented to the board of directors or the CEO, regardless of whether or not the documents are related to potential transactions.

The Final Rule also requires that all foreign language documents accompanying the HSR filing "must be submitted with verbatim English language translations" and that the translations must be accurate and complete.

Fortunately, the Final Rule does not require the submission of drafts of documents, which was a requirement that was included in the originally proposed changes but was dropped in response to public comments.

II. Broader Scope of Information Required for HSR Form

The most significant changes to the regulations require that additional categories of descriptive information be submitted. These changes will be a significant source of the increases in costs and time associated with preparing HSR filings, particularly for acquirors. And companies will likely need to conduct a more rigorous antitrust analysis as part of their filings to avoid creating unnecessary competition concerns.

The additional information will be used as a screen to *identify* transaction that merit closer scrutiny, but the requests will also force companies to make initial determinations on topics like market definition and competitive overlaps that will be used against the parties if the agency issues a "Second Request." For serial acquirers, descriptions of markets, products, and overlaps will need to be carefully crafted with an eye to how they might affect the antitrust scrutiny on future deals.

The Final Rule requires filing parties to describe their "principal categories of products and services,"

including any "current or known planned product or service," and requires the parties to affirmatively identify any products or services where the merging parties *compete* with one another. The Final Rule also requires filing parties to describe any existing or potential purchase or supply relationships, including a description of "each product, service or asset (including data) that the filer sold, licensed or otherwise supplied to the other party or to any other business that, to the filer's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or service that competes with the other party's products or services." The parties are also required to detail the amount of revenue involved and the top 10 customers *other than* the transaction counterparty.

> *NOTE:* Critically, this request contains a statement that parties should not exchange information for purposes of responding to the overlap or supply relationships descriptions. This is notable, as parties typically coordinate on the identification of NAICS codes and this request may implicate additional clean room requirements.

For any self-reported overlapping product or service, the parties must also provide:

- 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.
- A "description of all categories of customers" of the product or service or, 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 date

that the product or service is expected to be sold or otherwise commercially launched."

- The top 10 customers within each customer category.

III. Strategic Rationale for Transaction

The Final Rule requires the preparation of a more descriptive transaction structure along with an explanation of the various entities involved in the transaction. The parties will now be required to "identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees" along with "each document produced in the filing that confirms or discusses the stated rationale(s)." Parties will also have to provide citations to the specific page(s) of the document that discuss the stated rationale(s).

IV. Detailed Information Regarding Ownership and Entity Structure

Under the Final Rule, parties will now be required to list all officers and directors of (i) the entity that is party to the deal; (ii) all of that entity's direct and indirect subsidiaries; and (iii) all of that entity's direct and indirect parents.

> *NOTE:* Significantly, limited partnerships will have a new requirement to identify minority partners holding at least a 5 percent stake. Under the current rules, general partnerships are only required to identify their general partners and the limited partners are allowed to remain anonymous in the filing.

In addition, if a fund or master limited partnership is the ultimate parent entity (UPE), a company must file any existing organizational chart that shows the relationship of any entities that are affiliates or associates. However, if no such organizational chart exists, there is no obligation to create one.

V. Agreements Required for Submission

Under the Final Rule, parties that submit a filing based on an executed term sheet or letter of intent, rather than a definitive agreement, must also include a dated document (either the term sheet, the letter of intent, or a separate 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." Although filers will be allowed to continue to file on the basis of preliminary agreements — such as an indication of interest, a letter of intent, or an agreement in principle — the Agencies contend that a "small but significant minority" of the filings currently made on the basis of such preliminary agreements do not contain enough detail to enable them to conduct an accurate analysis of whether the proposed deal violates the antitrust laws.

> *NOTE:* The Final Rule is intended to force parties to wait until the scope of the transaction has been sufficiently determined and significant due diligence has been undertaken.

For filings that include a definitive agreement, under the Final Rule, in addition to the principal transaction agreement, the parties now will be required to submit all other transaction-related agreements "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."

VI. Prior Transactions

The Final Rule includes several changes designed to target "serial acquirers" — firms that engage in several strategic acquisitions in the same industry or "roll up" smaller competitors in the same or adjacent markets. Parties will now be required to report all prior acquisitions they have made within the same lines of business; the *de minimis* exemptions under the current rules have been eliminated; and both acquiring and acquired entities must provide information on certain acquisitions that closed within the previous five years, whereas previously this information was only required of the acquiring entities.

VII. Foreign Subsidies and Filings

Pursuant to a Congressional mandate passed in 2022, the Final Rule requires filing parties to state whether they have "received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern," which, through incorporation by reference to other federal statutes, means, among other things: China, Russia, Iran, North Korea, any foreign terrorist organization designated by the Secretary of State, or any OFAC specially designated national. The definition of "subsidy" is quite broad, including tax credits and government purchases, and may require parties to expand their due diligence into subsidy issues ahead of an HSR filing. Parties will also be required to disclose a party's bids and awarded contracts in response to requests for proposals from the Department of Defense or other members of the U.S. intelligence community.

In addition, it will no longer be voluntary to disclose whether or not the parties are filing premerger notifications in foreign jurisdictions. The acquiring party will now be required to disclose, based on their knowledge at the time of filing, what other jurisdictions to which the parties have filed or will be submitting competition notifications.

VIII. Select 801.30 Transactions

One area in which the Final Rule actually reduces the burden of filing is a newly created category of filings to be known as "select 801.30 transactions," for which the costs of filing will be lessened and the parties will have minimal reporting requirements. These transactions include acquisitions made on the open market, via tender offers, through the exercise of warrants or options, or through the conversion of non-voting securities. Specifically, "select 801.30 transactions" are defined as those transactions that do not result in the acquisition of control, to which § 801.30 applies, and where there is no agreement or contemplated agreement between any entity within the acquiring and acquired person.

For select 801.30 transactions, filers are excused from the following information requirements:

- Transaction Rationale
- Transaction Diagram
- Plans and Reports
- Transaction Agreements
- Overlap Description
- Supply Relationships Description
- Defense and Intelligence Contracts

IX. Public Comments

The FTC also announced the launch of **a new online portal** that invites and makes it easier for the public to submit information and complaints on proposed transactions. The open invitation for comments from various stakeholders, such as consumers, workers, or competitors, signals the FTC's intention to analyze other "blind spots" missed by traditional HSR review, such as impacts on the labor market and concerns from other advocates. The online portal requires the public to identify the specific transactions or companies that the public is seeking to provide comments on.

NOTE: The FTC will continue to maintain the confidentiality of the HSR filings because the portal does not identify the transactions that are before the FTC for review or disclose any other confidential information. However, if third parties are aware of a pending or potential transaction, this portal will make it much easier for them to submit their complaints and concerns about the competitive impact of the transaction directly to the FTC.

Increased Time

The crucial takeaway from all of these changes is that the antitrust regulators will expect significantly more information and details from merging parties to determine whether a transaction is lawful under the antitrust laws. As mentioned above, the FTC estimates that the HSR preparation time under the Final Rule will increase by an average of 68 hours and up to approximately 121 hours, depending on the scope and nature of the transaction. Fortunately for parties, the FTC abandoned or substantially modified a number of its original proposals — most notably by scuttling a proposal that would have required filing parties submit all drafts of competitive analysis documents, as well as onerous requirements designed to evaluate competitive impacts on labor markets.

NOTE: However, notwithstanding the FTC's time estimates for HSR filings, we believe the Final Rule will significantly increase the time, burden, and expense associated with all transactions reportable under the HSR Act. This burden will impact both first-time filers and serial acquirers. The effects of the Final Rule will become clearer as new HSR filings are submitted during the course of 2025.

Conclusion

Clients will need to build sufficient time into their transaction timeline to account for the significantly longer time it will take to gather information not

always maintained in the ordinary course of business but that will be required to prepare the HSR filing under the proposed changes. The parties will need to agree on realistic time periods post-signing of a definitive agreement to complete an HSR filing (instead of the typical 5 to 10 business days). Serial filers will also need to consider involving antitrust legal counsel in the creation of competitive analysis documents in the ordinary course of business to avoid these documents raising competition concerns in future transactions.

The Final Rule significantly expands the scope of disclosures regarding prior acquisitions and will impose significant new record-keeping requirements, especially for private equity sponsors and holding companies, to track historical information.

The changes will require parties to expend significantly more time and resources on preparing for HSR filings and to consider the competitive impact long before a definitive agreement is executed. While this will require parties to incur significantly more legal fees before consummation of a transaction is certain, it will save time and avoid delays post-execution.
