

Practice Update

Preparing for an HSR Filing in the Ordinary Course of Business

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Earlier this year, the Federal Trade Commission (FTC), with concurrence from the Antitrust Division of the Department of Justice (DOJ), issued a Final Rule implementing substantial changes to the pre-merger notification process for the Hart-Scott-Rodino (HSR) Act. Effective February 10, 2025, all transactions subject to HSR must comply with the new, significantly expanded pre-merger notification requirements. Companies engaged in M&A now face an increased burden when preparing an HSR filing, leading to increased costs and potential delays.

The HSR Act requires entities contemplating mergers or acquisitions of voting securities, non-corporate interests, or assets that meet or exceed certain monetary thresholds to file pre-merger notification forms with the FTC and the DOJ and to wait a designated period of time (typically 30 days) before consummating the contemplated transaction. As a result, any additional time spent preparing an HSR filing means an increase in the amount of time it takes to get from signing to closing.

To minimize this additional delay and to simplify the process of preparing a potential HSR filing, we recommend collecting and maintaining the information described below in the ordinary course of business and even before a potential transaction is being considered.

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Routinely collecting and maintaining this information will minimize the burden and delay of collecting information when a transaction is pending and time is of the essence.

Minority Shareholders or Interest Holders

- For HSR purposes, we are only concerned with voting shares and can disregard non-voting ownership interests.
- It is recommended to maintain a capitalization table for all potential covered entities that will allow for a determination of the minority interests based on voting rights when preparing an HSR filing.
 - “Covered entities” include the entities making the acquisition or being acquired, any entity that is directly or indirectly controlled by those entities (i.e. all subsidiaries), and any entity that directly or indirectly controls those entities (i.e. all parents).

Officers and Directors

- When preparing an HSR filing, the acquiror will be required to identify all current officers and directors that are also an officer or director of another entity in the same line of business as the target.
- It is recommended to maintain a comprehensive list of all officers and directors as well as any other entity of which they are also an officer or director; however, this list does not need to include any entity that does not generate any revenue or any nonprofit entity organized for a religious or political purpose.

Annual Reports and NAICS Codes

- If a list of NAICS codes and an allocation of revenues based on those NAICS codes are already maintained, it is recommended to update the list and allocation each year when the annual

financials are prepared and after any acquisition or divestiture.

Plans and Reports

- Retain all regularly prepared plans and reports provided to the Chief Executive Officer of any entity at any level that analyze market shares, competition, competitors, or markets, regardless of who prepared the plans or reports.
- Retain all plans and reports provided to the Board of Directors (or any group serving a similar purpose) of any entity at any level that analyze market shares, competition, competitors, or markets, regardless of who prepared the plans or reports.

NOTE: It is good practice to have all of the plans and reports described above reviewed by antitrust counsel prior to providing them to the CEO or the Board. Once the plans or reports are provided to the CEO or the Board, there will likely be no way to avoid producing them to the FTC and the DOJ when an HSR filing is required.

Competitors, Customers, and Suppliers

- It is recommended that any list or comparison of competitors should include at least four competitors or should include a disclaimer that makes it clear that the competitors are examples and are not intended to be a comprehensive list of competitors.
- When preparing an HSR filing for a transaction that involves competitors, the filing parties will be required to provide their top 10 customers. It is helpful to have an updated list of complete names and contact information for these top 10 customers.
- Similarly, when preparing an HSR filing for a transaction that involves entities at different points of the same supply chain, the filing parties will be required to provide their top 10 customers and/or top 10 suppliers. It is helpful to have an

updated list of complete names and contact information for these top 10 customers and customers.

Prior Acquisitions

- When preparing an HSR filing for a transaction, if a filing party has previously made an acquisition in the same line of business as the other filing party, then they will be required to provide information regarding that previous acquisition. It is recommended to retain the former HQ address, transaction type, and consummation date for all previous acquisitions.

Following these recommendations will significantly decrease the amount of time necessary to prepare an HSR filing and allow a transaction to get to closing sooner. However, there is also transaction-specific information that will be necessary to complete the HSR filing. Once a specific transaction has been proposed and it is determined that an HSR filing is required, additional information will be requested, but the documents and information described above will provide much of the relevant information and significantly speed up the process of preparing an HSR filing.

If you have any questions regarding these recommendations or anything else regarding the HSR Act, please feel free to contact Austin A.B. Ownbey at Austin.Ownbey@Akerman.com or 202.824.1734 or Eve Gentry at Evelina.Gentry@Akerman.com or 310.954.7654.

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