

Publications

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The Long Awaited HSR Form and Rules Are Here, and They're not as Burdensome as Feared

In June 2023, the FTC and DOJ (the “Agencies”) proposed a new rule that would significantly change the form and instructions for premerger notifications under the Hart-Scott-Rodino Act (“New HSR Form”). That proposal hinted that the New HSR Form would require significantly more detailed information and expand the amount and types of documents included with the filing. In fact, according to the FTC’s own estimate, the average time to complete an HSR filing would increase from 37 to 144 hours per filing. (See previous e-alert.)

After many suggestions that the issuance of the final rule was imminent, it is finally here. On initial review, it appears to be less burdensome than the Agencies’ initial proposal. The FTC estimates that the time to prepare a filing under the new rules could average 68 hours, which is nearly double the time it takes to prepare the current filing, but not as burdensome as originally estimated.

These new HSR requirements will be effective 90 days after being published in the Federal Register, which is expected to happen in the next few days. So, starting in early January 2025, parties must use the New HSR Form. Of course, the New HSR Form may be challenged in court, just as the FTC’s non-compete ban was challenged and ultimately enjoined from taking effect.

What’s Changed?

These are the biggest changes in the HSR process:

- A filer must identify any of their products or services that compete with the products or services of the other filer.
- Each party must describe its rationale for the transaction.
- The parties must disclose whether there are any existing contracts between the parties, like non-compete, non-solicitation, or licensing agreements.
- The parties will have to disclose more information about their minority shareholders, officers, and directors.
- Competition documents, formerly “4c” documents, must be submitted if prepared by or for officers, directors, or “supervisory deal team leads.”

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- In addition to documents about the deal, the parties will be required to produce some ordinary-course documents, which the FTC describes as “high-level business plans related to competition.”
- The seller no longer has to provide certain information that is duplicative of information from the buyer.
- In an effort to detect serial and roll-up acquisitions, the new HSR form will require more information about prior acquisitions.
- More information about the ownership structure of the buyer will need to be disclosed. It will no longer be sufficient to just disclose the ultimate parent entity and the acquiring entity. Private equity funds or limited partnerships will have to produce an organization chart, if one exists.
- The parties must submit a diagram of the transaction if one exists.
- Information related to subsidies from foreign entities or governments of concern, and to defense or intelligence contracts must be disclosed.

In their final rule, the Agencies also said that requests for early termination of the HSR waiting period will be considered once again when the new rules are effective. This would reverse the FTC’s decision in March 2020 to “temporarily” stop granting early terminations.

What Hasn’t Changed?

The Agencies entirely abandoned several requirements that were initially considered in the proposed rules, including:

- No organizational charts need to be created for an HSR filing.
- No information about employees needs to be submitted.
- Parties will not have to disclose information about prior acquisitions more than 5 years ago.
- And, fortunately, drafts of submitted documents do not need to be included in the filing.

What Does This Mean to My Organization?

The new HSR filing will take longer to prepare. Currently, a straightforward HSR filing can take 5 to 15 days to put together. A new filing could take weeks, or longer, particularly if the transaction is complex or involves overlapping products or services. Accordingly, the timelines for completing an HSR filing and closing a transaction must account for this new burden.

Parties need to plan for the new HSR filings well in advance. Parties need to engage antitrust counsel to start planning for an HSR filing at the very beginning of the deal process. From the inception, parties should identify the rationale for the deal and think carefully about the competitive effects the deal may have, not just on customers, but also on suppliers, employees and others who may be impacted by the transaction. Given the broader obligation to produce more documents, parties should be especially mindful of how ordinary course documents describe the transaction, how existing market analyses describe competition and markets related to the transaction, and how the parties will collect and retain all these documents.

Polsinelli’s Antitrust team will keep you updated on any further developments. Please contact us with any questions about the HSR process.