

New Year, New HSR: FTC Finalizes More Burdensome Updated HSR Form and Announces Return of Early Termination in 2025

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Yesterday, the U.S. Federal Trade Commission unanimously adopted final changes to the premerger notification form required by the Hart-Scott-Rodino (HSR) Act, effective 90 days after publication in the Federal Register, i.e., no earlier than January 8, 2025. The Department of Justice's Antitrust Division promptly concurred. The new form will require filers to produce more documents and information than ever before as part of the initial HSR filing. This is the most significant change to the HSR form since it was first adopted in 1978 and the additional burdens for merging parties will be substantial. Nonetheless, the new form represents a compromise born from "intense negotiations" between the Commission's Democratic majority and Republican minority and steps back from a number of the most burdensome proposals included in the draft HSR form announced last year when the Commission lacked Republican commissioners.^[1] This post summarizes the most important changes to the form that HSR filers will need to prepare for next year, as well as the onerous proposed changes left on the cutting room floor that filers will avoid.

Not to be lost in the shuffle, the FTC also announced that after the new HSR form becomes effective, it will lift its "temporary" suspension of early termination, which has been in effect since February 2021, and had paused the ability for companies to receive early termination of the waiting period to obtain approval of certain mergers. This policy change will help expedite transactions that present little to no competitive impact by once again allowing the typical 30-day HSR waiting period to be cut short when the FTC's review is complete.

Finally, the FTC also announced a new online portal for the public and other interested parties to submit comments related to transactions under review.

KEY UPDATES TO THE HSR FORM

The new HSR form requires filers to disclose more documents and significantly more information, including new categories of information. In addition to the usual disclosures concerning direct competition between the acquirer and the target, parties will need to provide information about other FTC and DOJ enforcement priorities, including potential competition between the parties, vertical transactions, private equity acquisitions, roll-up strategies, and interlocking directorates (i.e., officers and directors serving at competing companies). Notable changes include, but are not limited to, the addition of the following disclosure requirements:

EXPANDED DOCUMENT REQUESTS

- Ordinary course business plans and reports prepared in the last year related to competition and market shares and provided to CEOs or Boards of Directors
- Transaction documents provided to the deal supervisory deal team lead discussing competition and market shares

COMPETITION ANALYSIS

- Narratives describing the transaction rationale
- Narratives describing horizontal overlaps, including of planned products
- Narratives describing supply relationships between the parties
- Identification of top customers or suppliers when the acquirer and target compete or have a supply relationship
- More detailed location data for certain industry overlaps
- Identification of existing agreements between the parties, including licensing agreements, operating agreements, supply agreements, and noncompete or non-solicitation agreements
- Identification of each non-U.S. antitrust authority where the transaction will be notified

INFORMATION ABOUT THE ULTIMATE PARENT AND CONTROLLED ENTITIES

- Descriptions of filers' business lines and acquirers' ownership and organizational structure, including filers' organizational chart (if any)
- Disclosure of acquirer's officers and directors who serve as officers or directors for other entities in the same industry as the target company
- For limited partnerships, identification of limited partners with certain board rights

INFORMATION RELATED TO NATIONAL SECURITY CONCERNS

- Information about subsidies received from foreign entities of concern
- Information about countervailing duties on products produced in a covered nation
- Information of significant defense contracts in industries where the acquirer and target compete or have a supply relationship

COMPROMISE ON THE NEW HSR FORM DROPPED EVEN MORE BURDENSOME PROPOSALS

In June 2023, the FTC issued a Notice of Proposed Rulemaking (NPRM) that proposed “sweeping changes to the U.S. merger review process.” That proposal had prompted widespread concerns about the burden of compliance and, in welcome news for merging parties, the final rule moderated those requirements. According to Commissioner Ferguson, it “dramatically curtails the NPRM’s wild overreach.”

The final HSR form dropped or modified many of the NPRM proposals. In fact, only two of the NPRM’s main proposals “were adopted without modification: the requirements to translate foreign-language documents and to report subsidies from foreign entities of concern, which was mandated by the Merger Filing Fee Modernization Act of 2022.”

Onerous proposals that were dropped from the June 2023 draft HSR form include:

- Production of drafts (not just final versions) of transaction-related documents, such as draft Confidential Information Memorandum and deal documents evaluating competition
- Identifying all prior acquisitions (not limited to entities with more than \$10 million in sales or revenues as in the current and new form) in the last 10 years (compared to 5 years in the current and new form)

- Detailed labor market data
- Longitude and latitude data for locations of certain competitive overlaps
- Information about steps taken to preserve documents or use of messaging systems
- Information about board observers
- Disclosure of all minority limited partner investors, even those without management rights

Notably, elimination of a proposed requirement to identify prior acquisitions under \$10 million will significantly ease HSR preparation for transactions involving parties engaged in “roll-up” transactions, which have been a focus of the FTC and DOJ. This is somewhat offset, however, by the new requirement retained by the new form that the target must report prior acquisitions in the last five years. In short, the new form will help the FTC and DOJ focus on roll-up acquisitions, but the additional burden on filers is not as high as originally proposed.

THE FTC SAYS THAT THE EVOLVING M&A LANDSCAPE DROVE THE NEED FOR COLLECTING MORE INFORMATION IN THE HSR FORM

According to the FTC, the proposed changes are geared toward enhancing regulators’ ability to identify anticompetitive concerns and evaluate market dynamics in the modern economy. According to Commissioner Andrew Ferguson, the current HSR form was not designed for the complexity of modern mergers, which were “rare in 1978,” when the HSR rules were first promulgated, and does not ask for certain information important to the agencies review, such as vertical relationships between the acquirer and target. The Commission explained that the current form makes it difficult to “identify existing business relationships that might be affected by the acquisition” and to determine which business entity will be making management decisions post-closing. The FTC contends that the additional information required by the new form will enable the FTC and Department of Justice to better identify concerning transactions within the 30-day HSR waiting period.^[2] This bipartisan sentiment led to the negotiation of a more moderate approach than what was initially outlined in the draft HSR form revealed in June 2023 for public comment when only three Democratic Commissioners were installed. The final rule garnered unanimous, bipartisan support from the five FTC Commissioners, indicating that this change will likely survive the change in administration no matter who wins the upcoming Presidential election.

HOW MERGING PARTIES CAN PREPARE FOR THE NEW HSR FORM

Companies involved in mergers and acquisitions should recognize that the new HSR form will require more time to complete given the increase in information to be collected and disclosed. Ensuring that sufficient time is available to prepare the filing will be critical. The FTC estimates that the average number of **additional hours** required to prepare the updated HSR filing range from 68 to 140 hours, depending on complexity and the filer’s role in the transaction.^[3] For time-sensitive transactions requiring an HSR filing, parties should consider front-loading the preparation of the HSR filing to permit earlier filings. The companies should also consider changes to the antitrust provisions of their deal documents, if necessary, to account for the additional time necessary to prepare an HSR filing. Notably, HSR filings will still be permitted based on letters of intent, enabling parties to advance the HSR review while the deal is being finalized.

Winston & Strawn attorneys frequently prepare HSR filings and advocate for merger approval before the FTC, DOJ, and other regulators, making them well-positioned to advise on the new HSR rules and prepare filings required to be filed after the new form becomes effective.

[1] Fed. Trade Comm’n, Concurring Statement of Commissioner Andrew N. Ferguson In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803 Matter Number P239300 (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-final-hsr-rule-statement.pdf, at 1.

[2] Fed. Trade Comm’n, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 3, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf (“Final Rule”), at 16–17, 87–91.

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