

FTC Issues Final HSR Rules

On October 10, 2024, the Federal Trade Commission (“FTC”), with the concurrence of the Assistant Attorney General of the Department of Justice, Antitrust Division (“DOJ”) (the FTC and DOJ together, the “Agencies”), issued the final version of the new Hart-Scott-Rodino (“HSR”) rules (the “HSR Rules”),¹ which modify the initial proposed rules released on June 27, 2023 (the “Proposed Rules”),² discussed in our July 20, 2023 memo.³ The stated purpose of the new rules is to provide the Agencies with “specific categories of information and documents . . . not required by the current Rules, but [that] would be highly probative to the initial antitrust screening of a transaction during the initial waiting period.”⁴

The HSR Rules will come into effect 90 days after their publication in the federal register, which we expect to happen in the coming days, resulting in an effective date likely in mid-January 2025 (though possibly later). The Agencies also announced that grants of early termination (which have been suspended since February 2021) will resume for no-issue HSR filings, concurrent with the HSR Rules coming into effect.

The HSR Rules narrow the Proposed Rules considerably, but still represent a significant expansion of the current filing requirements and are expected to require substantial additional time and effort from filers. This note summarizes the HSR Rules, including notable changes from the current and Proposed Rules, and their implications for filing parties.

INTRODUCTION

The FTC, with the concurrence of the DOJ, issued the final version of the HSR Rules on October 10, 2024. The rules passed 5-0 in a bipartisan vote.

Notable changes from the current rules include:

- requiring the production of Item 4(c) and 4(d) documents provided to the “supervisory deal team lead” (whereas under the current rules, the production requirements are limited to responsive documents in the files of officers and directors);
- for transactions involving overlapping products or services, requiring the production of certain ordinary course documents provided to the CEO and the board of directors related to competition in overlap areas (whereas under the current rules, the production requirements are limited to documents relating to the transaction at issue);
- requiring written descriptions of the transaction rationale and competitive overlaps and/or supply relationships between the merging parties; and
- requiring certain information on officers and directors of the acquiring party, additional information on minority interest holders, information on customer and supply relationships and information on certain foreign entity subsidiaries.

Notably, the FTC announced that, in conjunction with the HSR Rules, the Agencies will be reinstating the “early termination” process, whereby the HSR waiting period for transactions that clearly pose no issues can be terminated before the 30 calendar day waiting period runs its course. Early termination has been “temporarily” suspended since February 2021.

In addition, the FTC announced the creation of an online portal where market participants, interested parties and the general public will now be able to submit comments on proposed transactions.

PROPOSED RULES

On June 27, 2023, the FTC, with the concurrence of the DOJ, announced proposed changes to the HSR rules to reorganize the information required to be included with an HSR filing and add information to the filing. The Proposed Rules were expansive, and included onerous document production requirements, as well as requirements to submit substantial information about the parties’ workforce,

prior acquisitions, interest holders and board observers, among various other requirements.

The Proposed Rules were met with substantial criticism for the burden they would have imposed.⁵ The new rules respond to some but not all those criticisms, and in certain places scale back the requirements under the Proposed Rules, as described below.

THE HSR RULES

As previewed by the Agencies, the HSR Rules have been narrowed significantly as compared to the Proposed Rules. For example, the HSR Rules do *not* require the following items that the Proposed Rules would have required: (i) a timeline of key dates for the transaction; (ii) creation of organizational charts even where not prepared in the normal course; (iii) significantly more information on investors (though the new rules do expand the information required on certain interest holders as described below); (iv) draft transaction analyses; (v) information on employees; (vi) information on board observers, creditors and holders of non-voting securities; (vii) geolocation information; (viii) significantly more information on prior transactions; and (ix) information on the parties’ messaging systems and document preservation policies.⁶

Notwithstanding these curtailments of the Proposed Rules, however, the HSR Rules significantly expand the current HSR filing requirements and can be expected to add significant burden and expense to the preparation of most HSR filings. We discuss below the key changes in the HSR Rules and their timing implications.

Additional Documents

The HSR Rules require parties to submit certain categories of documents and information relating to document submissions that are not required under the current rules. These requirements are as follows:

“SUPERVISORY DEAL TEAM LEAD”

Under the current HSR form, documents submitted pursuant to Items 4(c) and 4(d) are limited to certain transaction-related materials prepared by or for officers or directors. The HSR Rules expand this requirement to such documents if prepared by or for a “supervisory deal team lead”, meaning “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 Agencies explain that the definition “focuses on the one person who oversees the strategic assessment of the transaction”.⁷ The Agencies have also clarified that if the *only* individual supervising the strategic assessment of the deal is an officer or director, filing parties can state as such and satisfy this requirement by producing responsive files from that individual.⁸

ORDINARY COURSE DOCUMENTS

Under the HSR Rules, merging parties are required to produce ordinary course business documents, prepared within one year of filing, related to any products/services offered by both parties to the transaction (*i.e.*, product/service overlaps) to the extent such documents were provided to the CEO or board of directors and contain information on market shares, competition, etc. This is a significant curtailment of the *Proposed Rules*, which would have required a more substantial search and production; however, even in its reduced form, this requirement represents a major change in scope from the *current* rules—which generally do not require the submission of ordinary course documents—and will impose additional burden on merging parties submitting HSR filings in transactions involving existing or known future overlapping products/services.

For documents submitted to the CEO of an entity involved in the transaction, the HSR Rules provide that the reports must be regularly prepared, meaning at regular intervals, *e.g.*, annual, “semi-annually” (two reports or plans each year) or quarterly. Specially prepared reports (those prepared for specific purposes) or reports prepared more frequently (daily, monthly, weekly) for a CEO need not be submitted. The same limitation does not apply to board documents, however (*i.e.*, all responsive documents shown to the board must be produced, even if not regularly prepared).

“Brief” Descriptions

The HSR Rules require “brief” descriptions of the following topics: (i) the transaction rationale (required from the buyer only); (ii) any supply relationships with the counterparty and its competitors; (iii) current or known planned (pipeline) products or services (the rules allow the filing party to limit pipeline disclosures to those referenced in produced documents); (iv) any areas of overlap

between the parties’ products or pipeline products referenced in the product descriptions; (v) where overlaps are identified, the categories of customers of each party’s overlapping products or services (but the rules do not require information on sales to those customers); and (vi) the ownership structure of the acquiring party, along with structure charts to the extent they were already prepared for other purposes (no requirement to create them if not).

For the overlap and supply relationship descriptions, the instructions state that each party should respond based on information known to that party in the normal course of the party’s business or through normal due diligence; the parties should not exchange information to provide a response (*e.g.*, no exchange of sensitive pipeline details if the only reason for doing so is to provide a description). The instructions go on to note that, as a result, it is possible and compliant for the parties not to identify the same products and services in the overlap descriptions. The Agencies further note that they are unlikely to “bounce” a filing for incomplete descriptions unless there is information submitted with the filing that contradicts the descriptions and there is no explanatory note.

These “description” requirements are significantly dialed back from the Proposed Rules, which would have required substantial narrative descriptions, similar to those required by other jurisdictions (*e.g.*, EU and UK). Nonetheless, these changes will likely add significant time to the HSR preparation process.

Additional Categories of Information

MINORITY HOLDINGS

The HSR Rules modify the current rules on disclosure of the filing party’s minority holdings, in particular by:

- eliminating the option (available under the current rules) to list all minority holdings rather than just those that derive revenue in the same industries as the other filing party (according to the Agencies, allowing parties to list all holdings has hindered the Agencies’ ability to focus on those minority holdings that may matter to their assessment); and
- requiring filers to provide the “doing business as” name of the listed entities, if known.

MINORITY INTEREST HOLDERS

The HSR Rules modify the required disclosures of holders of minority interests in the filing parties. Under the current rules, filing parties are required to identify minority holders of 5% or more but less than 50% of the ultimate parent entity (“UPE”) of the buyer and same for the target; moreover, filing parties that are limited partnerships are required to disclose only their general partner, not any limited partner interest holder. The HSR Rules change these requirements by:

- requiring the disclosure of minority holders of 5% or more of certain intermediary entities in the ownership structure of the buyer (*e.g.*, shell entities sitting between the acquiring UPE and acquisition vehicle);
- requiring the disclosure of minority holders (5% or more) of limited partnerships, but only to the extent that the minority limited partner has certain management rights; and
- limiting the target’s disclosures to minority holders that will continue to be invested in the target or will acquire an interest in any entity within the buyer (*e.g.*, roll-over shareholders) post-closing.

PRIOR ACQUISITIONS

Under the current rules, only the buyer has to list prior acquisitions, and it only has to list any if (among other conditions) the prior acquisition earned revenue in the same revenue codes reported by the target. The HSR Rules extend this required disclosure to the target and expand it by requiring disclosures where the prior acquisition was of an entity or assets that provided products or services described in the overlap description referenced above.

IDENTIFICATION OF ORDINARY COURSE CONTRACTS WITH THE TARGET

The HSR Rules require the buyer to indicate, by checking boxes that will be added to the HSR form, whether it has existing contracts with the target in certain broad categories such as leases, licensing agreements, master service agreements, operating agreements or supply agreements, or any noncompete or non-solicitation agreements. The HSR Rules do *not*, however, require the production of those agreements.

OTHER REQUIRED INFORMATION

In addition, the HSR Rules:

- require a list of controlled entities by operating company or business;
- require the buyer to indicate any other entities for which officers and directors serve as an officer or director, to the extent such entities operate in the same revenue codes or industries as the target;
- make certain changes to revenue code reporting requirements, such as requiring the identification of the specific entity that derives revenues from each revenue code and requiring the parties to report revenues in ranges rather than precise amounts;
- requiring the buyer to produce any pre-existing transaction diagram (not required if not already pre-existing);
- requiring the reporting of certain contracts with defense or intelligence agencies above a *de minimis* value threshold (\$100 million);
- requiring disclosures by the filing parties regarding the receipt of certain foreign subsidies; and
- mandating that the buyer identify any other jurisdictions in which the parties have submitted or plan to submit a competition filing (whereas under the current rules, such information is requested but on a voluntary basis), and providing a voluntary waiver check box to waive confidentiality with respect to coordination by the U.S. Agencies and any reviewing foreign agencies or state attorneys general.

Other Notable Changes

Other notable changes include:

- prohibiting filings based on basic letters of intent or indications of interest without additional details on (such as a draft agreement containing) the terms and scope of the transaction, in particular 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;

- requiring updates to certain information upon a “pull and refile”; and
- exempting certain “non-consensual” transactions (“Select 801.30 Transactions”), such as certain open market acquisitions of voting securities and the exercising of options under executive compensation arrangements, from the full scope of the new filing requirements (*e.g.*, no requirement of an overlap description for such filings).

IMPLICATIONS FOR MERGING PARTIES

Filings submitted prior to the effective date should be made under the current HSR rules. Once effective, the HSR Rules will significantly increase the HSR filing burden on merging parties and meaningfully increase the time required to prepare filings. The Agencies anticipate that filings will require, on average, an additional 68 hours to prepare (above and beyond the Agencies’ 37-hour estimate under the current regime). In actuality, merging parties may find that the additional time to prepare filings is significantly greater than the Agencies’ estimates, particularly for first-time filers. Accordingly, in many cases, it likely will be prudent for merging parties to begin preparing HSR filings well in advance of signing.

Additionally, for some transactions, the changes may necessitate extending the HSR timeline in merger agreements well beyond the timeframe parties are

accustomed to using under the current rules (*e.g.*, five to ten business days from signing). Preparing HSR filings early and collecting all necessary information to make a complete response will be of vital importance, particularly in the early days under the new rules.

Additionally, as the HSR Rules will provide the Agencies with some documents and information typically obtained through voluntary or second requests, there may be a shift in approach to advocacy during the initial waiting period (and potentially prior to filing), at least for certain transactions. Merging parties should discuss these implications, and their obligations under the new rules, with antitrust counsel.

CONCLUSION

The HSR Rules represent the largest change to the HSR form in decades and, even in their now-revised form, will significantly increase the burden on parties to mergers that require HSR filings.

Further, as the HSR Rules were passed with bipartisan support, there is a good possibility that they will remain in effect for the foreseeable future, as opposed to being withdrawn upon a change of administration, should that occur. At this time, parties should anticipate that the rules are here to stay.

1 Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 10, 2024) (“*Final Rule*”), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.

2 Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed Reg. 124 (June 29, 2023) (“*Proposed Rules*”), <https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements>.

3 *New Merger Guidelines and Recent Merger-Related FTC and DOJ Announcements*, Cravath, Swaine & Moore (July 20, 2023) (“*Prior Memo*”), <https://www.cravath.com/a/web/5ogProAXRw2Yvz4W9DKW8w/81CWuS/new-merger-guidelines-and-recent-merger-related-ftc-and-doj-announcements.pdf>.

4 *Final Rule*, at 5.

5 See, *e.g.*, Mahira Dayal & Justin Wise, Dealmakers Hail Easing of New Antitrust Review Rule for Mergers, Bloomberg Law (Apr. 12, 2024), <https://news.bloomberglaw.com/business-and-practice/dealmakers-hail-easing-of-new-antitrust-review-rule-for-mergers>.

6 See *Prior Memo*.

7 *Final Rule*, at 204.

8 *Final Rule*, at 205.

NEW YORK

Christine A. Varney
+1-212-474-1140
cvarney@cravath.com

Margaret T. Segall
+1-212-474-1231
msegall@cravath.com

Michael J. Zaken
+1-212-474-1888
mzaken@cravath.com

Jesse M. Weiss
+1-212-474-1421
jweiss@cravath.com

Nicole M. Peles
+1-212-474-1624
npeles@cravath.com

Michael B. Singer
+1-212-474-1974
msinger@cravath.com

WASHINGTON, D.C.

Noah Joshua Phillips
+1-202-869-7740
nphillips@cravath.com

CRAVATH, SWAINE & MOORE LLP**NEW YORK**

Two Manhattan West
375 Ninth Avenue
New York, NY 10001
+1-212-474-1000

LONDON

CityPoint
One Ropemaker Street
London EC2Y 9HR
+44-20-7453-1000

WASHINGTON, D.C.

1601 K Street NW
Washington, D.C. 20006-1682
+1-202-869-7700

cravath.com

This publication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It should not be relied upon as legal advice as facts and circumstances may vary. The sharing of this information will not establish a client relationship with the recipient unless Cravath is or has been formally engaged to provide legal services.

© 2024 Cravath, Swaine & Moore LLP.
All rights reserved.