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# New HSR Act Notification Requirements Will Impose Significantly Greater Burden on Filers

## Private Equity Buyers Are Likely to Have the Highest Burden

On October 10, 2024, in a highly anticipated move that was over a year in the making, the Federal Trade Commission (FTC) issued [changes to rules](#) under the Hart-Scott-Rodino (HSR) Act that will overhaul premerger notification filing requirements, substantially increasing the burden, time and expense required to complete HSR notifications. Parties will likely be required to comply with the new requirements beginning in mid-January 2025 (90 days after the rules are published in the *Federal Register*). Notably, once the changes become effective, the FTC will end its “temporary” [suspension of early termination](#) after almost four years.

The FTC estimates that on average the new rules will require 68 additional hours to prepare a filing, and add \$139.3 million in annual labor costs for executives and attorneys. Further, the FTC notes that transactions with complex party or deal structures, those involving entities with many overlapping business operations or existing business relationships in the supply chain, or where the parties have a history of acquisitions in the same business lines, are likely to result in the highest increase in cost, and estimates up to 121 additional hours to prepare HSR filings for these types of transactions. We think those figures significantly underestimate the actual costs to parties, especially for private equity and investment firms with large portfolios of managed investments (nearly 40% of HSR reportable deals in 2022 involved a fund or limited partnership, according to the FTC).

### Why the significant changes?

According to the FTC, the changes “will improve the ability of the FTC and Antitrust Division of the U.S. Department of Justice (DOJ) to detect illegal mergers and acquisitions prior to consummation” and are meant to address “changes in corporate structure and deal-making, as well as market realities in the ways businesses compete.” The new HSR rules seek incremental information to be provided in initial HSR filings about:

- The corporate and control structure of the buyer and target, to determine who has the ability to influence corporate decision-making post-closing (focusing in particular on private investment, including private equity firms and minority co-investors).
- The risk that parties who are not direct competitors may have the ability to limit products or services that their actual competitors use (a “foreclosure” issue).
- Innovation, nascent competition and future market entry, particularly in sectors that rely on technology, such as pharmaceutical, medical devices and digital markets.

- So-called “roll-up” or serial acquisition strategies where firms engage in a series of strategic acquisitions in the same or adjacent markets and which the FTC says have “been particularly prevalent in healthcare markets involving private equity buyers” and in “technology markets.”

## What are the most significant new requirements?

### Transaction Rationale, Overlap Descriptions and Supply Relationships

- *Strategic rationale.* Both parties must submit narrative strategic rationales for the transaction, with references to the transaction documents evidencing those rationales.
- *Competitor relationships.* Without exchanging information between the parties, they must describe principal categories of current or known planned products or services that compete (or could compete) with a current or known planned product or service of the other party. For each such product, sales figures, descriptions of all categories of customers and top 10 customers for each customer category must be provided.
- *Supplier relationships.* Without exchanging information between the parties, they must describe each product service or asset (including data) in the most recent year (which represented at least \$10M in revenues including internal transfers) that had been (or could have been) (1) sold, licensed or supplied to or (2) incorporated as an input and purchased, licensed or otherwise obtained from the other party (or its competitors). For each such product, service or asset, the party must provide sales to/from the other party and its competitors, descriptions of all categories of customers, and top 10 customers/suppliers and descriptions for associated purchase/supply/licensing agreements.

### Ownership Structure, Minority Shareholders and Limited Partners

- Acquiring persons must provide a description of the ownership structure of the acquiring entity and, for transactions where a fund or master limited partnership is the acquiring ultimate parent entity, to the extent they already exist, organizational charts sufficient to identify and show the relationship of all the entities that are affiliates or associates.
- The acquiring person must report all 5% or greater shareholders of all entities within its HSR control chain – i.e., (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity and (4) any entity within the acquiring person that has been or will be created as a result of the transaction (each a “covered entity”). If a covered entity is a limited partnership, which is common in private equity structures, filers will only identify the general partner and 5%+ limited partners with certain strategic and veto rights (including the right to serve as, nominate, appoint, veto or approve board members, or individuals with similar responsibilities).
- The acquired person must identify all 5% or greater roll-over shareholders of the target.

### Interlocking Officers/Directors

Acquiring persons must provide information about officers and directors of both (1) entities within the acquiring person responsible for development, marketing or sales of overlapping products or services, or those with identified supply relationships and (2) entities the acquiring entity directly or indirectly controls, entities that directly or indirectly control the acquiring entity and new entities that have or will be created as a result of the transaction, in each case, that also serve as a director or officer of another entity with the same North American Industry Classification System (NAICS) code or operating in the same industry as the target.

For entities in category (1), there is a short lookback period: filers will have to report officers and directors serving within three months prior to the HSR Filing. For entities in category (2), there is no lookback requirement; however, filers must consider individuals who have not yet officially taken the relevant position, which are common among PE buyers.

### Expanded Transaction-Related Documents

- Parties must submit more types of transaction-related documents (i.e., previously known as item 4 documents) than are currently required.
  - Specifically, parties must submit documents prepared by or for the “supervisory deal team lead” (i.e., a single person who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer).
  - While the new rules do not require parties to provide all drafts of responsive transaction-related competitive analyses, for directors, all versions of competitive analyses—even if provided only to a *single director*—will now have to be produced as “final” (any such document provided to the entire board is already considered “final”).
- Transaction diagrams must be provided (if they exist).
- Parties must provide full translations of all foreign-language documents produced.

### Ordinary Course CEO and Board Plans and Reports—Market-Related Documents That Are Not Transaction-Specific

Parties must provide all regularly prepared plans and reports prepared within the last year provided to the CEO (e.g., annual, semi-annual or quarterly business plans) and all documents provided to the Board of Directors of the acquiring entity, or any entity that it controls or is controlled by, that analyze competition-related topics pertaining to any products or services identified in the Overlap Description.

### Non-Transaction-Related Agreements

The buyer must identify whether any entity within the acquiring person has, or had within one year of filing, any contractual agreements with the target (such as licensing agreements, supply agreements, non-competition or non-solicitation agreements, purchase agreements, distribution agreements or franchise agreements), and indicate via “checkbox” which agreement types.

### Additional Information

- *Foreign subsidies.* Both parties must:
  - Identify and describe, upon information and belief, certain subsidies (or commitment) received or anticipated to be received from a foreign entity or government of concern.
  - Provide information about products that are produced in a country that is a covered nation under the Infrastructure Investment and Jobs Act, and are subject to countervailing duties in any jurisdiction or the subject of an investigation by any jurisdiction for potential countervailing duties.
- *Defense/intelligence contracts.* Both parties must:
  - Identify certain existing or pending defense or intelligence procurement contracts.
  - Provide identifying information about the award and relevant U.S. Department of Defense or intelligence community personnel.
- *Foreign merger control filings.* Buyer must identify the jurisdictions where it has filed or is preparing to file competition notifications, as well as a list of the jurisdictions where it has a good faith belief it will file.

- *Prior acquisitions.* Target must report certain acquisitions in the last five years if related to a business overlap between the transaction parties (buyers have this obligation under existing HSR rules, but targets did not previously have to disclose prior acquisitions).

### **Filings Based on Letters of Intent (LOI) Require More Deal Terms**

To discourage “premature” filings that purportedly disadvantage the agencies’ ability to review transactions, LOI filings (which often allow the parties, in particular PE buyers, to simultaneously sign and close the transactions) will now require key material transaction terms, including parties, structure, the scope of target, purchase price, estimated closing timeline, employee retention policies, post-closing governance and other material terms.

### **What is the practical guidance for parties planning transactions?**

We anticipate that all parties, in particular highly acquisitive PE buyers, will spend significantly longer time and greater effort in completing HSR forms. To avoid undue delay to closing timing, parties should consider proactively taking the following practical actions.

- Expand data collection and record-keeping efforts to gather, prepare and regularly update (annually—or more frequently—and periodically after each acquisition) information and documents sought by the HSR rules. Some examples include:
  - other board/officer positions of all directors and officers;
  - information on minority equity holders and limited partners and any strategic or veto rights;
  - NAICS codes and U.S. revenues info for all controlled entities;
  - annual, semi-annual and quarterly CEO plans and reports;
  - all plans and reports provided to a board of directors;
  - U.S. revenues and business descriptions of main categories of products, services of all entities within its HSR control chain, along with associated sales figures and top 10 customers and suppliers; and
  - acquisition history for the last five years.
- When contemplating a potential deal, it is crucial to engage antitrust/HSR attorneys at the onset to:
  - Understand the identity of the acquiring entity and the implications for HSR reporting.
  - Assess antitrust risk, analyze actual or potential horizontal and vertical overlaps and draft competition and overlap narratives. (This is important even for deals without apparent antitrust risk because parties could have a NAICS code “overlap” or potential customer/supplier relationship over small amounts of revenues. Such “overlap” would result in significant additional disclosures.)
  - Designate and educate the supervisory deal team lead early in the process.
  - Review and advise on drafting transaction-related documents such as investment committee or board decks, documents to any board members, documents describing transaction rationales.
- Parties should also coordinate closely with their deal counsel and negotiate terms in deal documents that reflect the additional time it will take to prepare an HSR notification.

Parties should also keep in mind the following:

- With the heightened burden of filing on an LOI, the parties will have less flexibility to start the 30-day waiting period early and have a simultaneous “sign and close,” which has been common in PE deals.
- More “subjective” requirements in the new HSR form, such as overlap descriptions, could lead to more “bouncing” of the filings by the government and further delaying transactions.
- The new HSR rules, like the [non-compete rules](#), may be challenged in court. We will closely monitor any such developments.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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