

Implications of New HSR Rules

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Dramatic Changes to HSR Rules Will Make HSR Filings More Burdensome

On October 10, the FTC and DOJ adopted new HSR rules, which were approved unanimously

- ▶ New rules will come into effect 90 days after publication in Federal Register; no sooner than January 20, 2025
- ▶ Possible that new rules will be challenged in court, but if a case is filed and how it plays out is uncertain; no case yet filed
- ▶ The new rules do not alter the statutory mandates for the types and sizes of transactions that must be reported
- ▶ Given some uncertainty in the rules, we expect additional guidance / informal interpretations to be provided
- ▶ See our [webinar](#) for more details

The new rules will substantially increase the preparation required to make HSR filings, including requiring:

- ▶ Narrative description of the deal rationale, vertical relationships, competitive overlaps, and other topics
- ▶ Many more deal documents about competition (from a wider set of people)
- ▶ Key ordinary course documents provided to CEO or Board (e.g., market studies, banker pitch books, IC decks, etc.)
- ▶ Much more information on topics tangential to competition analysis, some of it hard to assemble, such as details on prior deals, minority holders, and other roles of officers and directors
- ▶ Note: The scope of the filing obligations for a particular transaction depends on whether there are competitive overlaps or supply relationships between transaction parties

Under the new rules, filings will take potentially weeks longer to prepare, likely extending signing to closing timelines

- ▶ FTC estimates time required to prepare each filing to increase significantly (up to 121 additional hours). For large private equity firms, this estimate is likely conservative
- ▶ Accordingly, today's common 10 Business Day "Rule" between signing and filing will have to change, even with advance planning

**New rules are not as burdensome as proposed, but they still substantially increase administrative burdens and filing costs, and will likely extend sign-to-close periods.
Be prepared for new rules to take effect in January**

Notable HSR Rules Changes (1/2)

	Current Rules	New Rules
Document Requirements (Item 4 Documents)		
Whose Documents	Officers and Directors or those exercising similar functions – typically managing directors and principals	Officers and Directors + Deal Team Lead (an individual who has primary responsibility for supervising the strategic assessment of the deal, that is not an officer or director, if one exists)
Which Documents	Transaction-Related “for the purpose of evaluating or analyzing the acquisition”	<p>Current Transaction-Related Documents + Ordinary Course Competition Documents Shared With CEO or the Board</p> <ul style="list-style-type: none"> ▶ Discuss market shares, competition, competitors, or markets of any overlapping product / service ▶ Shared with CEO or the Board; dated within one year of filing
Drafts	<p>No Drafts Required</p> <ul style="list-style-type: none"> ▶ Draft only required if sent to the full Board ▶ If no final version, only the most recent draft required 	<p>Drafts to a Single Board Member Required</p> <ul style="list-style-type: none"> ▶ Drafts if provided to a single Board member or similar body must be submitted ▶ This could mean all emails sent to any director / IC member could become responsive

* Not a comprehensive list of all changes

Notable HSR Rules Changes (2/2)

	Current Rules	New Rules
Competitive Overlap & Supply Relationships Descriptions		
Competition Description	No Description Required	<p>Description of Competing Products and Supply Relationships Required</p> <ul style="list-style-type: none"> ▶ In horizontal overlap transactions or transactions with supply relationships (estimated by FTC to be 45% of filings), required description of the overlap / supply products including provision of product breakdown by top ten customers and attributable revenue
Prior Acquisitions		
Prior Acquisitions	Limited to Buyer Transactions in Overlapping NAICS Codes Only	<p>All Transactions from Prior Five Years</p> <ul style="list-style-type: none"> ▶ Overlap can either be identified through NAICS overlap or through above referenced description of competing products, no revenue / asset thresholds and now required for Seller
Investors and Governance		
Minority Shareholders	<p>Limited Disclosure of Minority Holders</p> <ul style="list-style-type: none"> ▶ 5%+ holders of certain Buyer entities ▶ Limited partnerships must only identify GP 	<p>Increased Disclosure of LPs and 5%+ Holders</p> <ul style="list-style-type: none"> ▶ Required disclosure of entity ownership throughout the entire structure ▶ For PE funds, disclosure of 5%+ LPs with management rights, such as the right to appoint members to the Board
Officers and Directors	No Disclosure Requirement	<p>Disclosure of Officers and Directors Required</p> <ul style="list-style-type: none"> ▶ Identification of other officer / director roles for all officer and director slates of subsidiaries and PE portfolio companies

* Not a comprehensive list of all changes

Best Practices for New HSR Rules

Implementing best practices is especially important for deals where product / service overlaps or supply relationships require additional disclosures

Document Dissemination & Review

- ▶ Documents should be as close to final before going to the investment committee / or any single director-level individual
 - Be extremely aware of who is copied on emails
- ▶ Consider sending documents to antitrust counsel before sending to any IC / director-level individual

Document / Info Collection

- ▶ Create document storage and organization plans for anything that could become a responsive document, including ordinary course materials
 - Ensure that no draft documents are included on shared drive that members of the Board or the investment committee have access to in order to prevent draft documents from becoming “final” and responsive under the new rules
- ▶ Establish unique deal identifiers to use in the creation of structures, labels and naming conventions
- ▶ Create defined deal file repositories; keep track of additions to such repositories
- ▶ Prepare a written list of deal team members
 - Take steps to identify who will be the Supervisory Deal Team Lead at the outset
- ▶ Coordinate with IT and counsel to prepare and execute an efficient collection plan
- ▶ Update records of officer and director slates for all subsidiaries and portfolio companies, including the other officer / director roles

Internal Communications

- ▶ Communicate new requirements and good writing principles to all team members within broader scope of Transaction-Related Document collection
 - ▶ Remind deal team of good file management practices and refresh obligations
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Other Changes to the HSR Process

Short form LOIs are no longer sufficient to start the HSR waiting period

- ▶ A filing will still require an executed agreement but, if that agreement does not describe with specificity the scope of the transaction, filers must also submit an additional document, such as a term sheet or draft definitive agreement, that contains “sufficient details” about the transaction
- ▶ “Sufficient details” include 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
 - **Note:** these examples are meant to be illustrative and not exhaustive

The Agencies will resume granting Early Termination

- ▶ While the policy was suspended in February 2021, the new rules also announced the return of Early Termination of the HSR waiting period
 - Early Termination likely will be limited to select transactions without overlap and, as always, be entirely within the Agencies’ discretion

FTC and DOJ introduced an online portal for the general public to directly submit comments on proposed transactions

- ▶ Increases prospects for proactive customer / supplier engagement regarding subject transactions