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Kirkland Alert

New HSR Rules Are Effective February 10, 2025

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The new rules ("New Rules") for filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") were published in the Federal Register on November 12, 2024, making them effective on February 10, 2025. Unless the effective date is delayed due to the change in presidential administration[1] or a successful legal challenge, parties filing under the HSR Act on or after this date will be required to provide substantially more information and documents with their HSR notifications.

Filers should anticipate that providing such additional content will significantly increase the time and related costs to prepare each HSR form for submission. The Federal Trade Commission ("FTC") estimates that the new requirements will add an average of 68-121 hours to current filing preparation time. We believe this estimate underestimates the number of hours required given that "any single member of the board" receiving a document makes it a potentially responsive document, essentially bringing "drafts" back into scope. Coupled with the additional requirements outlined below, we expect significantly longer preparation times for clients with many portfolio companies or business segments.

The FTC believes that the New Rules will lead to a more efficient, thorough, and detailed review process, allowing it and its sister antitrust enforcement agency, the Antitrust Division of the Department of Justice, to better allocate resources among the increasing number of reportable transactions. The FTC's view is that by receiving more information up front, agency staff will need less time to complete their competitive effects analysis and, as a result, some filers may benefit from a shortened initial waiting period and the reinstated "early termination" program.

Below we describe some of the key changes resulting from the New Rules.

Major Changes to HSR-Related Document Collection and Production

Verbiage — There is new terminology for HSR-related documents. For nearly 50 years, under the current HSR rules, parties have submitted deal-related documents, referred to as Item 4(c) documents, if: (1) they were prepared by or for (or are in the files of) any officer(s) or director(s) (or their equivalent, including investment committees at private equity firms) (hereinafter, "Officers or Directors") (2) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets ("Competitive Aspects"). The New Rules now refer to these documents as "Competition Documents." Parties also have been required to produce certain deal-related documents, known as 4(d) documents, that discuss synergies or efficiencies, or constitute confidential information memoranda, that were prepared by or for (or are in the files of) Officers or Directors. Under the New Rules, these items fall under the broader category of "Transaction-Related Documents" (which includes Competition Documents).

Custodians — More people will need to be searched for responsive documents. Under the New Rules, the search for Competition Documents has expanded to include not only documents created by or for Officers or Directors, but also those documents created by or for a Supervisory Deal Team Lead ("SDTL"). The New Rules define the SDTL as the individual primarily responsible for overseeing the strategic assessment of the deal, and who does not otherwise hold the title of Officer or Director. In the situation where the only individuals supervising the strategic assessment of the deal are already either an Officer or Director, filers can state that this is the case and identify an Officer or Director as the SDTL.

Drafts — Significantly more drafts will need to be included with the initial filing. Currently, parties need to produce only the final or most recent versions of responsive documents with their HSR filings. The one exception is that any draft of a responsive document that went to the *entire* board of directors (*or its equivalent*), or a committee of the board, must be produced as the "final" version. Once the New Rules go into effect, any responsive document received by *any single* board member (*or its equivalent*, which includes members of the *investment committee* at private equity firms) must be produced with the HSR filing. This is a significant departure from the FTC's previous informal guidance.

Examples of individuals whose draft documents will be captured by the New Rules include:

- Deal team members who will sit on the board of the newly acquired company. It is common for deal teams to include individuals that the acquiror plans to have appointed to the acquired company's board.
- The chief executive officer ("CEO") if that individual sits on the board of directors.
- Deal team members who are directors of any subsidiary of the ultimate parent entity ("UPE") of the buyer or seller. Under the New Rules, simply copying any person who is also a director of any entity within the control chain will cause all drafts, including all drafting process emails back and forth among the deal team and advisors, to be responsive as "final" documents, even though they are far from final and burdensome to produce.
- Deal team members who are also members of the investment committee at private equity firms.

The practical impact for private equity firms is that any *draft* document in the files of any *single* member of the investment committee or any *single* person who is anticipated to be a member of the board of directors of the target company, including the buyer holding companies above the target after closing, will need to be produced. (For add-on transactions, this includes draft documents in the files of any *single* member of the existing portfolio company's board of directors.)

Ordinary Course — New to the requirements, ordinary course plans and reports must be produced when there is an overlap. If a filer believes there is an overlap, it must produce (1) *all* plans and reports (including special reports) that address competitive aspects of the overlapping areas that are provided to any board of directors (or its equivalent) within that filing person; and (2) all *regularly prepared* plans and reports (excluding special reports and reports prepared more frequently than quarterly) that address competitive aspects of the overlapping areas that are provided to the CEO of any overlapping entity. This requirement applies to responsive documents prepared or modified within a year of the date of the HSR filing.

Note, as discussed further below, ordinary course documents will also need to be gathered to prepare an Overlap Description.

Parties Will Have to Provide Brief Narratives

Transaction Rationales — Parties will be required to explain the transaction rationale and any discrepancies that appear in the submitted documents. The New Rules require the filing parties to describe all strategic rationales for the transaction that were discussed or contemplated by any of the party's Officers, Directors or employees. The FTC's examples of rationales include: (i) competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other party; (ii) expansion into new markets; (iii) hiring the seller's employees; (iv) obtaining certain intellectual property; and (v) integrating certain assets into new or existing businesses.

Parties must cite to all produced document(s) that reference(s) each rationale and explain any discrepancies among the rationale(s) stated in the narrative description and those that appear in the documents that are submitted with the filing.

Providing early transaction rationale documents may be unsettling to many parties, especially as transaction rationales may change during the diligence process as parties explore the deal's benefits. Consequently, it is important that the parties document the evolution of those rationales as more information is gathered so that the prevailing rationale is clear to the agencies.

Overlaps — Parties will be required to disclose and describe any overlaps in their goods or services. The New Rules require that the parties provide a general overview of their businesses ("Overlap Description"). The Overlap Description has two components.

First, both the acquiring person and the target must describe their respective principal categories of products and services as reflected in ordinary course documents, regardless of whether any overlap exists.

Second, the acquiring person must list current or known planned products or services that overlap with those of the target, and vice versa. For each overlap, both filers must also provide sales revenues and the top ten customers by category. Information need only be provided for the most recent fiscal year. The form instructions state that the acquiring person and acquired person should not exchange information for the purpose of responding to this item.

It will take some filers, particularly buyers with many portfolio companies or business segments, a great deal of time and resources to gather and provide this information. While the FTC acknowledges this burden, its position is that this information is crucial to its analysis, while critics highlight this information is likely only relevant to the

relatively small number of deals (approximately 2% per the 2023 FTC Annual Report) that would otherwise already receive Voluntary Access Letters or Second Requests.

Supply Relationships — Parties will be required to disclose and describe any actual or potential supply relationships. The New Rules require filers to supply information about the supply and purchasing relationships ("Supply/Purchasing Descriptions") between the acquiring person (and all entities within it) and the target. Here, the FTC is trying to learn whether rivals may be dependent upon the merged firm for key inputs post-merger. The New Rules necessitate not only identifying each party's sale or purchase of inputs to one another, but also each party's sale or purchase of inputs to or from another entity that competes with the counterparty. For each such input, the filer must identify the top ten customers, provide revenue information and describe each relationship. Although this requirement is limited to, among other things, inputs with at least $10 million in revenue (including internal sales) in the most recent fiscal year, it will be a heavy burden to compile and identify this information for large organizations or those with many portfolio companies. As with the Overlap Description, the FTC states that the acquiring person and acquired person should not exchange information for the purpose of answering this item.

Both Sides Must Reveal More Information About Ownership Structures, Prior Acquisitions, and Acquiring UPEs Must Reveal Overlapping Board Ties

Structure and Ownership — The New Rules require filers to disclose more information about their structure and ownership than ever before. The acquiring person must describe the ownership structure of the acquiring entity from the UPE down to the buyer. If the acquiring person is a master limited partnership or a fund, it must provide an ownership structure chart and its associates if such a chart exists.

Under the current rules, the acquiring person (i.e., the UPE of the acquiring entity), the acquiring entity, and the acquired entity are required to list their respective (i) controlled entities; and (ii) minority shareholders (those who hold 5%-49% interests). Currently, limited partnerships only need to report the general partner and do not need to disclose the limited partners. Under the New Rules, the acquiring entity must disclose all 5% or more minority holders for each entity between, and including, it and the acquiring person. The acquired entity must also identify its minority holder(s) or any minority holder(s) of those entities it directly or indirectly controls if that minority holder will roll into the new acquiring entity. Limited partners with managerial rights

must now be identified by name as well as the general partner (except for the acquired entity's filing if the relevant limited partner(s) is not rolling into the new entity).

Previous Acquisitions — More previous acquisitions must be disclosed. In a transaction where the parties have overlapping NAICS codes, acquiring persons have always had to list any acquisition made in the past five years that had greater than $1 million in U.S. revenue under the same overlapping NAICS code. The New Rules now require both parties (including the target) to list prior acquisitions of U.S. or foreign entities or assets with sales in or into the U.S. that derived *any* revenue in any overlapping six-digit NAICS code, and any product or service identified in the Overlap Description. Further, this information (which consists of the date of the acquisition, consideration, the overlapping product or service, etc.) must be provided for all prior acquisitions for each target entity or assets that comprise a business, that had annual net sales or total assets greater than $10 million in the previous year regardless of whether it was the present owner who made those acquisitions. Additionally, the final rule now requires a five-year lookback regardless of if the overlapping entity was actually held by the acquiring/acquired Person for the full five-year lookback, which parties may not be able to certify to the completeness of this response.

Interlocking Directorates — Buyers with overlaps or supply relationships must disclose external or internal overlapping board ties. Where an Officer or Director sits on a board of an entity that generates revenue in any of the same industries (as defined by NAICS codes or the Overlap Description) as the target, the New Rules require the acquiring person to list their identities and that of the entity if that Officer or Director also sits on the board of either of the below:

- an entity listed in the Overlap Description or as a supplier in the Supply Information Description (including a three month look back at prior Officers or Directors); or
- the acquiring person or the acquiring entity, or any entity between them (including any new entities formed for the transaction and their prospective appointees).

Filing parties should be aware that disclosing shared Officers and Directors of merging competing entities or unrelated but competitive entities is likely to increase scrutiny of the proposed transaction, specifically under Section 8 of the Clayton Act which prohibits interlocking directorates among competing companies above certain financial thresholds.

Specific Types of Deals Will Have Additional Requirements:

LOIs — Parties wishing to file on a letter of intent ("LOI") may need to provide additional information. Parties will no longer be permitted to file on a bare bone non-definitive LOI that lacks information on salient aspects of the transaction. If the executed agreement is not the definitive agreement, the New Rules require parties to submit a dated document that provides "sufficient detail" about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, term sheet, or the most recent draft agreement. The FTC has indicated that a document including only the identification of the acquiring and acquired person/entities and a purchase price range will no longer be sufficient under the New Rules. Going forward, such documents should include "some combination" of the following terms (which the FTC noted is not an "exhaustive list"): the (1) parties' identification; (2) transaction structure; (3) scope of the acquisition; (4) purchase price calculation; (5) estimated closing timeline; (6) employee retention policies; (7) post-closing governance; or (8) transaction expenses or other material terms.

Foreign Subsidies — Those receiving subsidies from foreign entities or governments of concern. Filing parties will need to disclose (i) whether they have received a subsidy from any "foreign entity or government of concern" within two years prior to filing (or a commitment to provide a subsidy in the future); (ii) products produced in whole or in part in a "covered country" that are subject to countervailing duties; and (iii) whether any of the products disclosed above are the subject of a current investigation for countervailing duties in any jurisdiction.

What qualifies as a foreign entity or government of concern is governed by various statutes that may be amended. Covered nations currently include the Democratic People's Republic of North Korea; the People's Republic of China; the Russian Federation; and the Islamic Republic of Iran.

Defense or Intelligence — Those with defense or intelligence contracts. Parties with overlaps involving a 6-digit NAICS industry code, or a product or service described in the Overlap Description or the Supply Relationships Description, will have to identify pending requests for proposals and agreements with the U.S. Department of Defense or any member of the U.S. intelligence community that implicate any of these overlap areas. This only applies to pending requests for proposals and agreements valued at $100 million or more.

How to Prepare

Early Preparation. Entities have time to prepare between now and the New Rules' effective date of February 10, 2025. We advise frequent filers, particularly acquiring parties, to consider gathering information now on their portfolio companies and business entities and set up periodic update reporting. Such information should include ongoing lists of all entities' Officers' and Directors' external board seats; revenue by NAICS codes and by business unit or company; geographic information by NAICS code; and entity-by-entity information such as products and services, supplier and purchasing information and top ten customer lists by product or service. The HSR team at Kirkland has experience in setting up annual update procedures and are available to answer your questions and guide your teams to prepare for the New Rules both now and after February 10, 2025.

Look for Future Clarifications. In response to this sweeping recalibration of administrative rules, the FTC has indicated that it will update its posted filing guidance and provide additional clarifications as practitioners bring ambiguities to their attention. For example, look for possible additional guidance on the meaning of "drafts," which, contrary to the FTC's intent in removing the proposed "all drafts" language from the New Rules, not only will impose an incredibly high burden on filers, but also on the agencies in receiving and reviewing large numbers of repetitive documents. Updates can be found on Kirkland's New Rules Site where you may also subscribe for updates.

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1. Former Presidents Obama, Trump and Biden all issued freezes on federal regulations that had not yet gone into effect shortly following their inauguration. As he did in 2017, President-Elect Trump might issue a similar freeze following his inauguration on January 20, 2025, further delaying implementation of the New Rules by at least 60 days. *See* Reince Priebus, Memorandum for the Heads of Executive Departments and Agencies (January 20, 2017), https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-heads-executive-departments-agencies/.↩

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Suggested Reading

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