



# FTC PROPOSES DRAMATIC EXPANSION AND REVISION OF HSR MERGER NOTIFICATION FORM

Client Webinar

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# HSR Form Change: **Overview**

On June 27, FTC, with concurrence from DOJ, announced proposed changes to the Premerger Notification and Report Form

- Substantially increases the number of documents and amount of information to be included with HSR filing
- First major change to HSR form since establishment of program in 1978
- Subject to 60-day comment period, which ends on August 28, 2023
  - Proposed rule could go into effect in 4-6 months
  - Potential for legal challenges to delay implementation of final rule

# HSR Form Change: **HSR Process In Brief**

Hart-Scott-Rodino Act requires notification of certain transactions above a certain size (\$111.4 million as of 2023)

- Notification requires completion of HSR form
- HSR form includes details about the proposed transaction, merging parties, and affected industries
- Parties must also include specified documents with the HSR form, including the operative transaction document, and certain documents that analyze the competitive impact of the transaction
- Required detail is relatively light compared to other jurisdictions such as the EU

## HSR Form Change: **HSR Process In Brief (cont'd)**

- Merging parties may not close transaction until the end of 30-day statutory waiting period (or 15 days for cash tender offers and certain transactions pursuant to bankruptcy)
- DOJ and FTC use this period to investigate whether transaction presents competitive questions that merit further inquiry
- At the end of waiting period, agencies can either:
  - Close their investigation
  - Ask for more time through a “pull and refile” request, or
  - Issue a Second Request (a very broad subpoena for documents and data)

# HSR Form Change: **Summary of Changes**

The proposed form changes would require the provision of new or additional information and documents with the HSR form, including:

- Transaction terms and rationale
- Additional strategic and transaction-related documents
- Narrative descriptions about the transaction and the competitive landscape
- Key investors/stakeholders in acquiror and target
- Information regarding labor markets and employees



# HSR Form Change: **What's Not Changing**

Other key features of the HSR regime remain the same:

- Statutory waiting periods of 15 or 30 days continue to apply
- HSR filings and attachments continue to be confidential and exempt from Freedom of Information Act requests
- HSR size-of-transaction/size-of-person filing thresholds applicable as of 2023 are unchanged
- Early termination remains suspended

## Key Change: Draft Item 4 Documents

### Current requirements:

- Production of *final* versions of item 4 documents
  - Item 4 includes studies, analyses, and reports prepared for an officer/director to analyze the transaction with respect to shares, competition, markets, etc.

### New requirements:

- Production of non-privileged *draft* and final documents if they meet item 4 requirements
- Expands the scope to include deal team lead/supervisor(s) in addition to officers and directors



**Key Change:**  
**Competitive  
Landscape  
Narratives and  
Anticipated  
Future Revenues**

Current requirements:

- NAICS/NAPCS codes and associated revenues for most recent year

New requirements:

- NAICS codes for products or services under development that would create an overlap within the next two years
- Narrative descriptions of:
  - Competitive landscape for overlaps (including sales data and top 10 customer information)
  - Supply chain for overlap products

## Key Change: Production of Business Plans

### Current requirements:

- Merging parties must produce business plans only if they qualify as item 4 materials (i.e., documents analyzing the transaction with respect to competition or shares, etc.)

### New requirements:

- Production of ordinary course strategic plans if they discuss competition in overlaps and were shared with senior executives, regardless of whether they analyze the proposed transaction
- Goes back to one year before HSR filing

## Key Change: Details of Prior Acquisitions

### Current requirements:

- Identification of prior, overlapping transactions meeting certain size thresholds and completed in the last five years
- Applies only to acquiring person

### New requirements:

- Identification of all prior acquisitions in the overlap areas, regardless of size, and regardless of whether the transaction was HSR-reportable, for the last ten years
- Applies both to acquiror and target

## **Key Change:** **Transaction Details**

### Current requirements:

- Basic description of transaction
- Transaction size

### New requirements:

- A transaction diagram
- Projected closing timeline
- Identification of other jurisdictions reviewing the transaction

# Key Change: Details of Organizational Structure

## Current requirements:

- Minimal beyond identifying ultimate parent entity, acquiring entity, subsidiaries, certain minority holdings and minority shareholders

## New requirements:

- Funds and MLPs must provide organizational charts showing all affiliates and associates
- Merging parties must also identify any entities that can “influence” the transaction, including creditors, directors, and board observers
- For Directors and Board Observers, parties must disclose all other boards on which the individual serves or served within the past two years as a officer, director, or board observer

## **Key Change:** **Labor Market and Employee Classification Information**

Current requirements:

- None

New requirements:

- Occupational categories for employees and geographic locations for five largest employee categories
- Identification of all workplace safety/labor law violations in the last five years (e.g., OSHA, NLRB, etc.)

## Key Change: Miscellaneous

### New requirements:

- Implementation of a document hold until HSR waiting period expires
- Disclosure of defense contracts
- Identification of messaging/communications systems used by filing entity
- Disclosure of subsidies from certain foreign entities and governments “of concern” (such as China, Russia, Iran, etc.)



## HSR Form Change: **Potential Ramifications**

- Potentially much longer timeframes to prepare HSR filings
  - Standard ten-day period may no longer be tenable
  - Suitable timing to prepare HSR filing may vary by transaction
- Significantly increased cost and effort to prepare HSR filings
  - FTC estimates that the time required to prepare an HSR filing would increase from about 37 hours to 144 hours
  - Ultimate effects may be transaction- and fact-specific

## HSR Form Change: **Potential Ramifications (cont'd)**

- Greater uncertainty around timing for regulatory clearance
  - In theory, provision of more information upfront could permit agencies to clear more transactions during initial 30-day waiting period
  - However, more information with HSR form may simply lead to more questions from staff and increase the number of “pull and refiles” and Second Requests
- Higher antitrust risk generally
  - Additional information included with HSR filing may lead to closer and more prolonged antitrust scrutiny of proposed transaction
  - Potential investigation of antitrust issues wholly unrelated to proposed transaction

# HSR Form Change: **Best Practices**

- Review and update as appropriate existing document creation/retention guidance with the HSR form changes in mind
- Routinize antitrust and compliance training for deal teams, including on document creation
- Audit current strategic plans for problematic language/discussions
- Consider involving in-house or external antitrust counsel to review ordinary course documents and draft item 4 material subject to new HSR requirements if strategic M&A is being planned

## HSR Form Change: **Best Practices (cont'd)**

- Review and update standard due diligence lists to account for new HSR information (e.g., expanded requests for labor law violations)
- For repeat filers, consider developing and maintaining a central repository of HSR-relevant information and documents (e.g., quarterly business reports, lists of past acquisitions)

# HSR Form Change: **Commonly Asked Questions**

- **Question:** Can I still file HSR on a letter of intent under the proposed rules?
- **Answer:** Yes. But merging parties would still need to complete the rest of the HSR form and submit a draft agreement or term sheet that describes the proposed transaction in detail.

# HSR Form Change: **Commonly Asked Questions**

- **Question:** How might the proposed HSR rules affect the timing to file HSR post-signing?
- **Answer:** We expect a significant increase from prevailing 5- and 10-business day standards, but this depends on the substance of the final rule. There will be ways to optimize the filing process to moderate the potential increase in these timeframes.

# HSR Form Change: **Commonly Asked Questions**

- **Question:** How might the proposed HSR rules affect negotiation of Outside Dates?
- **Answer:** Suitable outside dates may become much more difficult to predict in some circumstances. If the proposed rules are adopted, FTC/DOJ could have more leeway to “bounce” a filing they deem incomplete or inaccurate, making it more difficult to judge when regulatory waiting periods are expected to be complete.



# HSR Form Change: **Commonly Asked Questions**

- **Question:** How will the proposed HSR rules affect “hell or high water” and other regulatory efforts covenants?
- **Answer:** It will be transaction- and party-specific.

# HSR Form Change: **Commonly Asked Questions**

- **Question:** What kind of customer information would need to be provided under the proposed rule changes?
- **Answer:** If there is a competitive overlap, both acquiror and target would need to provide an individual's name, title, phone number, and email for their top 10 customers by units and revenues.

# Questions and Final Thoughts

- Questions?
- Thoughts?

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