

# FTC Publishes Final Revisions to HSR Rules: A New Era of Regulatory Burden

By Michael A Nemeroff; Jason W. Reese; Brian K. McCalmon and Gregory G. Wrobel

October 24, 2024

On October 10, 2024, the Federal Trade Commission (“FTC”) released final revisions of the rules that govern filings under the Hart-Scott-Rodino (“HSR”) Antitrust Improvements Act of 1976, as amended (the “Final Rules”). The Final Rules will take effect 90 days after they are ultimately published in the *Federal Register*.

The FTC scaled back or eliminated several categories of information currently required in HSR forms, but expanded others and added several new categories of information and data. The FTC estimates that completing the revised form will require an additional 68 hours of work per filing. In many cases, it will be much higher than that given the increased regulatory burden and information requests.

## 1. Major changes in content of HSR forms.

The FTC added several new requirements for information. Among the most significant are the following:

- Explain the strategic rationale for the proposed transaction.
- Identify additional minority interest holders, and make additional disclosures with respect to funds, investment groups, and similar entities.
- Submit a diagram of the transaction (if one exists) and explain all relationships between the entities involved.
- Provide detailed information and descriptions related to overlaps and supply arrangements within the United States between the parties.
- Provide English translations of all foreign-language documents.
- Require separate forms (with different information) for acquiring and acquired parties, and require information about prior acquisitions by acquired parties.

A number of these new requirements could add a significant burden to the filing parties, and some may have implications for companies’ ordinary course of business activities.

## 2. Requirement of specific transaction terms: filing only on a general letter of intent (“LOI”) or other preliminary agreement no longer permitted unless key terms are described.

The Final Rules no longer permit HSR forms (which trigger the initial waiting period) based only on an executed but non-binding preliminary LOI or basic term sheet if such document does not describe the transaction with specificity. Currently, parties may file on any signed document, no matter how sparse, that simply evidences a good-faith intent to consummate a transaction. Under the Final Rules, where the parties file on a “preliminary agreement” like an LOI, it must 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.” If it does not, the parties must also submit an additional, dated document (such as a draft agreement or detailed term sheet) that describes the agreement with the requisite specificity.

This new requirement will largely eliminate filing on a basic non-binding LOI where there are not advanced drafts of a purchase agreement or a detailed term sheet already negotiated between the parties.

### **3. Expanded scope for Item 4(c)/(d) documents to include the identified deal team lead and certain business plans prepared in the ordinary course of business.**

The scope of documents responsive to Items 4(c) and 4(d) of the HSR form will be expanded. Currently, these items require the filing person to submit pertinent documents that were prepared by or for officers or directors (or similar individuals for non-corporate entities). The revised rules cover pertinent documents prepared by or for an identified “supervisory deal team lead,” defined as the non-director/officer individual with “primary responsibility” for supervising the strategic assessment of the deal.

Notably, the Final Rules omit a requirement in the initial proposal that drafts of responsive documents must always be submitted. This would have imposed extraordinarily burdensome obligations on deal teams, as draft documents currently must be submitted only if they were shared with the entire board of directors or similar body. Under the Final Rules, drafts must be submitted if shared with *any* member of the board.

The revised rules also require submission of certain business plans and reports that analyze market shares, competition, competitors, or markets relating to any product or service sold by the other party. Currently, the filing person is not required to submit its own documents that were prepared in the ordinary course of business (although such documents are commonly requested when the DOJ or FTC opens an initial investigation and requests the voluntary production of documents). In response to comments, however, the Final Rules limit the reporting requirement to those quarterly, semi-annual, or annual plans and reports that were provided to the CEO within one year of the filing date, and any responsive reports (even those not regularly prepared) provided to the board within one year of the filing date.

Going forward, companies should consider this new filing requirement when drafting and distributing ordinary course documents that discuss competition topics, and carefully review characterizations of business segments, markets, competitors and other pertinent topics, recognizing that such documents may have to be submitted to the government with a future HSR filing.

### **4. Requirement for top customer/supplier information.**

Filing parties will now be required to list their top 10 customers for overlapping products, and the top 10 customers and suppliers for products supplied to or purchased from the other party to the transaction. Currently, the agencies request customer and supplier information only in a preliminary investigation opened during the initial 30-day waiting period (when compliance with the request is voluntary), or as part of a formal “Second Request” near the end of the waiting period.

Although the Final Rules decline to adopt an earlier proposal to provide contact information for these customers and suppliers, this new requirement may nonetheless require parties to consider notifying top customers and suppliers that they have been identified in the HSR form. For non-publicly disclosed transactions, disclosure of the potential transaction to such customers and suppliers may need to occur earlier than the parties typically would disclose a proposed transaction.

### **5. Impact on timeline for work on HSR filings.**

As a result of the dramatic increase in information required, filing parties will likely need to begin work on HSR forms earlier in the transaction process. They may also need to develop and implement well before closing communication plans with key constituencies such as customers, suppliers and employees due to the regulatory process, and to assist in mitigating relationship issues and market rumors.

If you have any questions about this article, please contact Michael A. Nemeroff at [mnemeroff@vedderprice.com](mailto:mnemeroff@vedderprice.com), Jason W. Reese at [jreese@vedderprice.com](mailto:jreese@vedderprice.com), Brian K. McCalmon at [bmccalmon@vedderprice.com](mailto:bmccalmon@vedderprice.com), Gregory G. Wrobel at [gwrobel@vedderprice.com](mailto:gwrobel@vedderprice.com), or any other Vedder Price attorney with whom you have worked.

[vedderprice.com](http://vedderprice.com)