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New HSR Rules Significantly Increase Filing Burden

On October 10, the Federal Trade Commission (FTC) issued its long-awaited final rule implementing changes to the rules, forms and instructions for filings under the Hart-Scott-Rodino (HSR) Act. These rules will take effect 90 days after their publication in the Federal Register—likely by mid-January 2025.

The original proposed rule generated widespread opposition, with some support, due to concerns over the substantial burdens it would have placed on filing parties. In its news release, the FTC explained that the revised final rule reflects the need to address "changes in corporate structure and deal-making, as well as market realities in the ways businesses compete, that have created or exposed information gaps that prevent the agencies from conducting a thorough antitrust assessment of transactions subject to mandatory premerger review." This rationale is evident in the new rule, which aims to fill these gaps by requiring more information from private equity and investment firms, additional documents prepared in the ordinary course of business and narrative descriptions of the commercial relationships between parties.

Although the final rule scales back some of the more burdensome provisions initially proposed by the FTC last year, it still increases filing obligations. For example, the FTC did not adopt a controversial proposal requiring submission of drafts of so-called Item 4(c) documents—transaction-related documents that analyze competition-related issues such as markets and market shares—a requirement which would have significantly increased the time and expense required to collect and review potentially responsive documents. That proposal was *not* adopted. Similarly, the final rule dropped a proposal to require detailed labor-related disclosures, such as employee classification information.

Despite these revisions, the new rule imposes more onerous obligations for filing parties than the current rule. Below are key new obligations:

- **Ordinary Course Documents:** In addition to documents prepared to evaluate the deal, filing parties must submit business documents prepared in the ordinary course of operations, such as strategic plans, which are often only requested voluntarily during preliminary merger investigations.
- **Overlapping Products/Services:** Filing parties must provide a brief description of their respective businesses and provide a list of products or services that compete with those of the other party, including sales volumes and lists of top customers.
- **Commercial Relationship:** Parties must disclose products or services sold by the buyer to the target or the target's competitors, along with associated sales volumes and top-customer lists. This section requires production of relevant supply and licensing agreements between the parties, as well as identification of other commercial relationships, such as leases or service agreements between the parties.
- **Entity Structure:** Parties must outline their ownership structures and submit organizational charts if they exist. They also must identify limited partners with management rights, as well as officers or directors responsible for sales or marketing of overlapping products or services.

These examples represent only a sampling of the new requirements. According to the FTC's own estimates, preparing an HSR filing under the revised rule will take an additional 68 hours on average, for a total of more than 100 hours per filing under the new rule. Although the final rule is less onerous than the proposed rule, it increases the burden of filing by a significant margin.

With the new requirements taking effect in early 2025, companies contemplating mergers or acquisitions should evaluate their compliance policies now and implement strategies to manage the additional time and expense required under the revised HSR filing process.

FOR MORE INFORMATION

For more information, please contact:

Mark R. Butscha, Jr.
216.566.5897
Mark.Butscha@ThompsonHine.com

Thomas F. Zych
216.566.5605
Tom.Zych@ThompsonHine.com