

Clients & Friends Alert

New HSR Premerger Notification Filing Requirements Are in Effect: Likely to Add Substantial Time and Cost to the HSR Filing Process & Usher in a European “Negotiation And File” Approach to Merger Review

February 10, 2025

Effective today, February 10, 2025, the information and documentary materials (“filing requirements”) necessary to complete the Hart-Scott-Rodino Antitrust Improvements Act Notification for Certain Mergers and Acquisitions (“Form”) have been significantly expanded. The new filing requirements fall most heavily on transactions that combine current or future competitors, or where the parties to the transaction have a significant supply relationship. For such transactions, it may be necessary to ***anticipate a 3–5 week process to submit an HSR Form and receive confirmation that the filing is in compliance with the new filing requirements.*** And, in a significant change to long-standing practice, parties to a negotiated transaction may ***no longer file on a “bare-bones” letter of intent.***

The new Form’s filing requirements may also substantially change the merger review and negotiation process, frontloading discussion and “admissions” with respect to market definition and the transaction’s potential competitive effects. By significantly expanding on the information and documents required for the Form, the Federal Trade Commission and Department of Justice may intend to force merging parties towards a more European-style approach to merger review: pre-filing negotiation of compliance with the Form’s new information and documentary requirements, and early settlement discussions as an alternative to the 4–12 month fact-finding process associated with very broad “Second Request” compliance and negotiation of a possible settlement.

The new filing requirements expand the reporting requirements for all transactions, but the burdens do not fall equally on filing parties, with acquired persons having fewer new filing requirements than acquiring persons. The Commission has also taken steps to minimize or limit the increased burden for certain categories of transactions, with transactions more likely to raise competitive concerns having greater information and document requirements:

- **Select 801.30 Transactions:** Parties to transactions that: (i) **do not** (a) confer control¹ of an entity or (b) grant (or contemplate granting) the right to serve as, appoint, veto, or approve board members (or members of a similar body) of any entity within the acquired person (or the general partner or management company of any entity within the acquired person) and (ii) **are** acquisitions of shares from a party other than the issuer of the shares, ***have only limited new filing requirements***.
- **No Overlap / No Supply Relationship Transactions:** Parties to transactions that **are not the combination** of: (i) present or future competitors; or (ii) firms with an existing significant supply relationship, have significant new filing requirements.
- **Overlap / Supply Relationship Transactions:** Parties to transactions that **are the combination** of: (i) present or future competitors; or (ii) firms with an existing significant supply relationship, have substantial new filing requirements.

Not all new requirements apply to each type of transaction and each party to a transaction.

The new and modified document requests include:

- Expansion of the existing “Item 4(c)” document request to include all “studies, surveys, analyses, and reports” prepared by or for the ***Supervisory Deal Team Lead***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.”
- Requirement that the filing parties produce “all regularly prepared plans and reports” that analyze “market shares, competition, competitors, or markets” for overlap products (including products known to be in development by the target) that were provided to the Chief Executive Officer or Board of Directors within one year of the date of the HSR filing³;
- Corporate organization chart, if it exists;

¹ The Rules implementing the HSR Act define control as: (i) in the case of a corporate entity, holding 50% or more of the outstanding voting securities of the issuer (where those voting securities have the present right to vote for the board of directors of the issuer); (ii) in the case of an unincorporated entity, having the right to 50% or more of the profits of the entity, or having the right in the event of dissolution to 50% or more of the assets of the entity; or (iii) having the present contractual power to designate (a) 50% or more of the directors of a for-profit or not-for-profit corporation, or (b) 50% or more of the trustees in the case of trusts that are irrevocable and/or in which the settlor does not retain a reversionary interest. 16 C.F.R. § 801.1(b).

² The Supervisory Deal Team Lead is “the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not others qualify as a director or officer.” General Instructions and Information, Antitrust Improvements Act Notification for Certain Mergers and Acquisitions at 1.

³ Id. at 9.

- Agreements negotiated as part of the transaction, including agreements not to compete (or solicit), and certain other agreements between the parties not associated with the transaction;
- A transaction diagram, if it exists;
- Translation of documents (or information) that are in a language other than English;
- Narrowing of what constitutes a “draft” document for purposes of identifying “final” documents to be produced with the filing.

The new and modified information requests include identification of:

- limited partners, where such person (i) currently holds (or will hold as a result of the transaction) 5% or more, but less than 50% of the non-corporate interests of the limited partnership, **and** (ii) has, or will have, the right to serve as, nominate, appoint, veto, or approve board members (or individuals with similar responsibilities), of any entity within the filing person, or of the general partner or management company of any entity within the filing person;
- officers and directors who also serve as an officer or director of another entity that derives revenue in the same NAICS code as the target;
- overlapping products or services, and sales data (or data measuring use) and customer information for each overlapping product or service;
- significant supply, licensing, and purchase relationships between the parties, or with competitors to the parties, including sales and purchase data, and identification of top customers or suppliers;
- acquisitions, within five years prior to the date of HSR filing, of 50% or more of the voting securities or non-corporate interests (or all or substantially all of the assets) of an entity that, prior to its acquisition, earned revenue in one or more “overlap” products;
- broader minority ownership interests than previously required;
- broader geographic market information than was previously required (for certain transactions);
- subsidies from foreign entities or “governments of concern”;
- existing or pending defense and intelligence contracts; and
- whether the transaction will be notified to non-U.S. competition agencies.

The new narrative requirements include identification of:

- strategic rationale for the transaction;
- “principal categories of products and services” of the filing person, including products known to be in development and that compete with the products or services of the other filing person;
- supply and purchase relationships between the parties to the transaction and to businesses that compete with one or both filing persons; and
- ownership structure of the filing person.

Summary Chart of New Filing Requirements By Transaction Type and Filing Person

	Select 801.30		No Overlap / No Supply Relationship Transaction		Overlap / Supply Relationship Transaction	
	Acquiring Person	Acquired Person	Acquiring Person	Acquired Person	Acquiring Person	Acquired Person
Translation of Documents	✓	✓	✓	✓	✓	✓
Identification of Additional Minority Interest Holders	✓	✓	✓	✓	✓	✓
Organization of Controlled Entities	✗	✗	✓	✓	✓	✓
Description of Ownership Structures	✓	✗	✓	✗	✓	✗
Organizational Chart (if one exists)	✓	✗	✓	✗	✓	✗
Identification of Certain Officers and Directors	✓	✗	✓	✗	✓	✗
Description of Business of the Acquiring Person	✓	✗	✓	✗	✓	✗
Transactions Subject to International Antitrust Notification	✓	✗	✓	✗	✓	✗
Transaction Rationale	✗	✗	✓	✓	✓	✓
Transaction Diagram (if one exists)	✗	✗	✓	✗	✓	✗
Competition Documents from Supervisory Deal Team Lead	✓	✗	✓	✓	✓	✓
Plans and Reports	✗	✗	✗	✗	✓	✓
Transaction Agreements	✗	✗	✓	✓	✓	✓
Other Agreements Between the Parties	✓	✗	✓	✗	✓	✓
Overlap Description	✗	✗	✓	✓	✓	✓
Supply Relationships Description	✗	✗	✗	✗	✓	✓
Geographic Market Information	✓	✓	✗	✗	✓	✓

Minority-Held Entity Identification to Overlaps	✓	✓	✗	✗	✓	✓
Prior Acquisitions	✓	✓	✗	✗	✓	✓
Subsidies from Foreign Entities or Governments of Concern	✓	✓	✓	✓	✓	✓
Defense or Intelligence Contracts	✗	✗	✗	✗	✓	✓

Commentary

For many transactions—approximately 50%, based on prior filing statistics—the new information and document requirements will require a substantial or significant increase in the time and effort necessary to prepare an HSR filing. To help minimize the impact, parties can collect, maintain, and update certain information—such as minority ownership positions, geographic locations of operations, officer and board positions, relevant contracts and subsidy information, prior acquisitions, and ordinary course plans and reports—on a regular basis or substantially earlier in the transaction negotiation process.

The most significant items to manage are likely to be the collection and review of documents that analyze, or that relate to the analysis of, the competitive impact of the transaction. The new filing requirements are a significant expansion of the previous policy that such documents, to be included in the filing, be prepared by or for an officer or director of the filing person. The new filing requirements include a new, additional, category of documents—documents (including emails) that analyze, or that relate to the analysis of, the competitive impact of the transaction that may have been produced by or for a significantly lower-ranking employee—the Supervisory Deal Team Lead—of the filing person.

The new narrative responses may also slow the preparation, certification and submission of the Form. Filing parties may find that agency staff disagree with the parties' identification and description of their products, including overlap products (or services).

Although the narrative description of products (or services) is not, on its face, a market definition exercise, it will likely devolve to that. Market definition is often the most important factor in an antitrust analysis. The requirement to define overlap products looks very much like an effort by the agencies to “lock-in” a market definition at the start of the merger review period, not after an investigation. Disagreements on the description of products (or services) may, at times, lead the agency staff to reject the parties' merger notification filing as non-compliant.

For transactions that may raise competitive concerns, the notification process may begin to look substantially more like the process in Europe, where “second-phase” investigations are often accompanied by settlements worked out in the “filing-phase” discussions. Transactions where the parties have a horizontal overlap or where they have a significant supply/purchase relationship with

each other or with competitors to the other, are likely to be significantly harder to get on file quickly, and may also be more likely to be challenged because of admissions in the parties' filing document.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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