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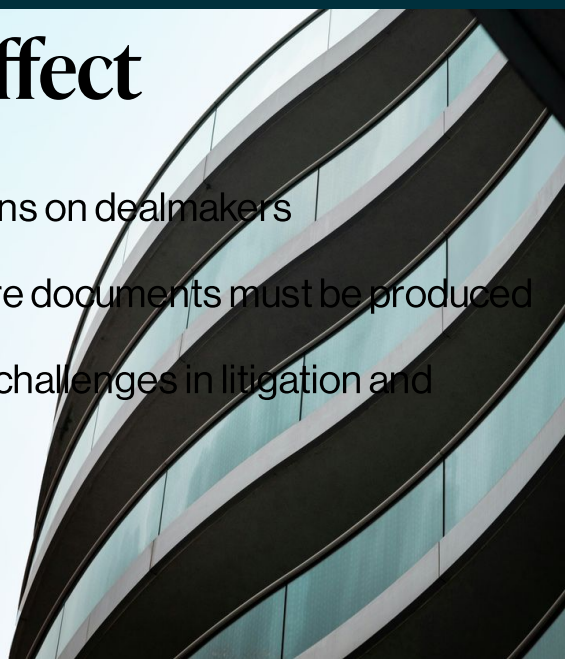
HSR Overhaul Goes Into Effect



- Expansive new requirements impose higher burdens on dealmakers
- More time will be needed to prepare filings and more documents must be produced
- Uncertainty remains on future of new rules, amidst challenges in litigation and potentially in Congress

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February 10, 2025

In a significant milestone for antitrust merger practice and after considerable uncertainty, new HSR rules came into effect today, February 10, 2025. Companies engaged in M&A now face higher burdens in preparing filings, leading to increased cost and potential delays, particularly as dealmakers and the agencies adapt to the "new normal."

According to the Federal Trade Commission's Premerger Notification Office (PNO), any HSR filing submitted after 5pm ET on February 7th must now use the new HSR Form and Instructions. Parties who submitted their filings before that time, but must later withdraw and refile, can still do so using the old Form.

New Requirements. As outlined in our prior client alert, under the new rules parties to notifiable transactions with any competitive impact, no matter how minor, now face increased burdens with several new requirements.

- Every filing must include a description of the transaction rationale, as well as disclosures of foreign subsidies and defense contracts.
- Filers with horizontal overlaps or vertical supply relationships must provide narrative descriptions of their products and overlaps, identify top customers and suppliers, and identify any contracts between the parties.

- The new rules also significantly expand document disclosure requirements – requiring production of both (a) more deal-related documents (documents provided to a Supervisory Deal Team Lead and documents provided to a single director), and (b) documents not related to the deal (ordinary-course business plans and reports about overlapping products and services that were provided to the Board or CEO in the prior year).

- Companies must also provide broader lists of minority interest holders and officers and directors within their broader corporate groups.

- Although the rules exempt from some of these requirements a category of transactions not resulting in a change of control or board composition, the more burdensome requirements are expected to apply to over 90% of filings.

Guidance from FTC. Over the past six weeks, the PNO has released guidance intended to provide clarity on the type and breadth of information companies will be required to submit. Some practical takeaways for filing parties based on this guidance:

- Companies should expect a longer preparation time for HSR filings, depending on the transaction type. Parties with business overlaps or pre-existing vertical relationships will have more extensive reporting obligations and should expect to set aside several weeks to prepare the filing. This is important for companies to keep in mind when negotiating antitrust efforts provisions in M&A contracts that impose specific timing obligations for completing the HSR filing.

- Business overlaps include areas of "potential" and "nascent" competition – products and services where the parties could compete, as well as early-stage products and services that do not yet earn revenue. And overlaps must be reported on a worldwide basis, not just in the U.S.

- Filings for negotiated transactions must provide a definitive agreement, a preliminary agreement with key terms, or other document that outlines the scope of the deal, such as a draft agreement or term sheet. Given the requirement for definitive terms, parties should expect to be further along in the negotiation process than in the past to be able to file an HSR notification.

- Companies must also designate a Supervisory Deal Team Lead – one individual who has primary responsibility for supervising the strategic assessment of the deal, and who would typically not be a director or officer. Like officers and directors, documents shared with this individual are considered responsive if they address competition topics and are related to the transaction.

- A draft of a responsive transaction-related document must be submitted if shared with any single member of the board of directors (or equivalent for non-corporate entities). This is a major change from prior practice where drafts were only required if shared with the entire board.

- Parties should also be prepared to explain in their filings any inconsistencies across submitted documents. For example, parties will need to explain any inconsistent transaction rationales in their submitted documents.

- Companies outside the U.S. should be aware that they must provide an English translation for any non-English documents. Previously, parties only had to submit pre-existing English translations, with no affirmative obligation to provide translations.

Despite the PNO guidance, there are likely to be growing pains in the first few months under the new system as the kinks in the new rules get worked out. Some of the guidance also remains quite broad and lacks clarity regarding the exact scope of information required. We expect that further guidance will be forthcoming in the next few weeks or months as the first filings under the new rules begin to roll in.

Uncertainty on Future of New Rules. It remains unclear whether the rules will remain in effect in their current form in the long term. In October 2024, before the shift in power in Washington, the FTC voted unanimously to adopt the new HSR rules (including current Republican FTC Chair Andrew Ferguson and Commissioner Melissa Holyoak), but challenges to the rules have since emerged in litigation and congressional review. It is possible that judicial review or a congressional action will reverse the implementation of the new rules.

A U.S. Chamber of Commerce-led coalition filed a lawsuit in the Eastern District of Texas on January 10 challenging the rules as "arbitrary and capricious" under the Administrative Procedure Act. That case is still pending but could be tough for the FTC. The case has been assigned to a Trump-appointed District Judge, Jeremy D. Kernodle.

On February 5, 2025, a staffer from the office of Congressman Scott Fitzgerald (R-WI), Chairman of the Judiciary Subcommittee on the Administrative State, Regulatory Reform, and Antitrust, also indicated that the House is exploring a potential action to block the rules under the Congressional Review Act (CRA). The CRA contains a look-back provision that could allow Congress to block the rules even though they already have gone into effect. While Rep. Fitzgerald himself has not recently spoken on the issue, in October 2024 he voiced support for the final rules, lauding intervention by Commissioners Ferguson and Holyoak and stating that "[t]he final product, *which I support*, demonstrates the importance of having Republican Commissioners at the FTC[.]" (emphasis added). As a result, it is unclear how aggressive Rep. Fitzgerald might be in pursuing this path under the CRA.

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