

# Final HSR Rules: Major Changes Ahead for Premerger Filings

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October 17, 2024

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On October 10, 2024, the Federal Trade Commission (FTC) unanimously approved sweeping changes to the premerger filings required under the Hart-Scott-Rodino (HSR) Act.

While the final rules differ significantly from the Notice of Proposed Rulemaking (NPRM) the FTC issued on June 27, 2023, the changes will nonetheless require a **dramatic increase in the information and documents to be submitted with most HSR filings**, leading to a corresponding increase in the time, burden and expense of preparing these filings.

As a result, filing parties may wish to begin collecting and maintaining some of the required information on a regular basis, and will need to build **an additional two to four weeks (or more) into deal timelines** to account for the significant incremental work that will be required.

The issuance of the final rules represents a central pillar of the Biden administration's effort to strengthen merger enforcement, along with the revised Merger Guidelines that were issued on December 18, 2023.

Whether the reams of additional information the rules require from filing parties ultimately result in a more efficient and effective premerger regime remains to be seen, particularly given the budgetary constraints the FTC and Department of Justice (DOJ) face, and the timing constraints that the HSR Act imposes on their review.

The final rules will be effective 90 days after their publication in the Federal Register, which will likely take place in the coming days. As a result, HSR filings will need to **comply with the new rules beginning in mid- to late January 2025**.

In announcing the rule changes, the FTC also disclosed — in a development sure to be welcomed by filing parties — that the categorical ban on grants of early termination of the initial waiting period imposed in early 2021 will be lifted when these changes go into effect.

## A New Normal

While the final rules build on the DNA of the current HSR regime, it nonetheless represents a fundamental shift in the nature and scope of that regime. As a result, transacting parties must rethink their approach to HSR compliance and where HSR preparations fit into deal timelines.

For example, many repeat filers will likely find it advisable to **collect, maintain and update on an ongoing basis** much of the nontransaction-specific information required by the new rule, such as that regarding:

- Which operating entities derive revenues in each NAICS code that the filer reports.
- Minority shareholders.
- Whether officers or directors act as directors for other companies.
- Foreign subsidy information.

Companies contemplating strategic transactions will also need to be aware that business plans discussing competition and markets that are submitted to the CEO or the board may now need to also be submitted with HSR filings, and thus should be drafted accordingly.

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Even with this advance effort, the significant amount of new transaction-specific information that will now be required means HSR preparations must begin earlier in the transaction timeline.

Currently, parties typically agree to submit their respective filings within one to two weeks of signing and often begin HSR preparations only at signing or a few days before. Even for the most straightforward transactions with no horizontal overlaps or vertical relationships, this timing is no longer realistic.

If parties wish to continue submitting HSR filings within one to two weeks of signing, HSR preparations will likely need to begin no later than four to six weeks before signing, or even earlier for large, strategic transactions with numerous overlaps and/or vertical relationships.

The final rules bring into much clearer focus the new shape of the HSR premerger regime to which companies will need to conform. The rules are unlikely to be overturned in court — a fate that looms over the FTC’s [proposed ban on noncompete agreements](#). Even the FTC’s two Republican commissioners, who joined in approving the final rules, emphasized the FTC’s authority to engage in rulemaking related to the HSR Act.

Even so, pockets of uncertainty with potentially significant implications remain. The rules’ requirement that parties self-identify competitive overlaps or vertical relationships introduces an element of subjectivity that heretofore has been largely absent from HSR filings. It is unclear how much deference the FTC and DOJ will give to the parties’ views on these issues.

While the rules seek to assure filers in numerous places that they need only respond in good faith and with a reasonable amount of detail, it sends a somewhat contradictory message in other places, such as a suggestion that agency staff may restart the HSR waiting period if a party’s narrative description of competitive overlaps or vertical relationships is contradicted by one or more documents included with its submission.

The FTC has said it will deliver additional guidance on the final rules’ new requirements before they become effective in 2025, so these and other concerns and uncertainties may be resolved in the coming months. We will provide updates as they become available.

## What Has Changed?

The NPRM proposed a large number of changes to the HSR form and instructions. These included:

- Relatively minor changes building on existing requirements (e.g., requiring parties to organize identified subsidiaries by operating business).

- Dramatic expansions of existing requirements (e.g., requiring the submission of all drafts of Item 4(c) and 4(d) documents).
- Entirely new requirements (e.g., narratives regarding horizontal overlaps and vertical relationships).

The final rules scale back many of these changes. While some of the most controversial changes, such as that regarding drafts of Item 4(c) and 4(d) documents, have been abandoned or scaled back significantly, the changes nonetheless constitute a fundamental shift in both the scope and nature of the HSR form. They transform what had been a relatively narrow, technical and objective notice filing into a much broader, substantive and subjective submission.

We detail below the key changes introduced by the final rules and how they differ from what was proposed in the NPRM. The changes are grouped under several broad categories of information regarding:

- The parties.
- The transaction.
- Competitive overlaps and vertical relationships.

We also highlight the final rules’ attempts to reduce the information required for certain parties and certain transaction types.

## Information Regarding the Parties

The NPRM proposed substantially expanding the nontransaction-specific information that filers must submit relating to the parties.

Significant changes in this category that **the final rules retain** include requirements to:

- Identify all minority shareholders, including limited partners, holding more than 5% of the acquiring entity, any entity that controls or is controlled by the acquiring entity, or any entity that has been or will be created for completing the transaction (though filers may exclude limited partners that have no management or governance rights). This change will have the largest impact on private equity buyers and consortiums that to date have only been required to identify general partners of limited partners (LPs) and not specific LPs.
- Organize the list of controlled subsidiaries a filer is required to provide by operating business, and provide “doing business as” names for each such subsidiary if different than its legal name.
- Identify any “subsidiaries,” as defined in the Tariff Act, the filers received in the last two years from “foreign entities of concern” and “governments (and their agencies) of foreign countries” that are countries of concern, as well as any products that filers produce in a country of concern that are the subjects of

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countervailing duties or a countervailing duty investigation in any jurisdiction.

Significant changes in this category that **the final rules adopt with considerable modifications** include requirements to:

- Provide a description of the acquiring entity's ownership structure, but provide organizational charts only if they already exist.
- Identify current officers and directors and those who have served as such within the past three months of certain buyer-controlled entities, only when such individuals also serve as officers or directors of another entity that derives revenue in one or more NAICS industry codes being reported by the target, or of another entity that has operations in the same industry as the target. This requirement will potentially be used by the agencies to examine possible competitive "interlocks" between competitors, a flash-point for the antitrust agencies in the Biden administration and a topic that has been the subject of multiple enforcement actions in HSR reviews and outside the HSR process.
- Report whether the filers have existing or pending defense or intelligence procurement contracts, but only those with a minimum value of \$100 million (compared to \$10 million in the NPRM) and only those involving a product or service where there is a horizontal or vertical relationship between the parties.

**The final rules abandoned** requirements to:

- For the acquiring entity and any entity it controls or is controlled by, identify individuals or entities that (i) provide credit exceeding 10% of the entity's value, (ii) hold options, warrants or nonvoting securities exceeding 10% of the entity's value, and (iii) have agreements to manage entities related to the transaction.
- Identify all communications systems and messaging applications used by the acquiring or acquired companies that could be used to store or transmit information relating to the business operations, and certify that the filer has taken steps to prevent the destruction of documents and information relevant to the transaction.

## Information Regarding the Transaction

The NPRM proposed substantially expanding the information that filers must submit relating to the transaction.

Significant changes in this category that **the final rules retain** include requirements to:

- Describe the strategic rationale for the transaction and identify which documents submitted with the filing, if any, support the rationale.

- Submit documents currently required under Items 4(c) and 4(d) that were prepared by or for the filer's "supervisory deal team lead," even if such individual is not an officer or director. The final rules define "supervisory deal team lead" as the "individual who has primary responsibility for supervising the strategic assessment of the deal" and clarify that, if this individual is an officer or director, no additional custodians need be searched.
- Produce all agreements relating to the transaction, including noncompete and nonsolicitation agreements and all exhibits and schedules, even if both parties are not signatories. If a definitive agreement has not been executed, a draft agreement or term sheet must be submitted that contains sufficient detail about the scope of the transaction.
- Include English translations of all non-English documents submitted with a filing.
- Identify jurisdictions outside the United States where the parties have notified the transaction or intend to do so.

Significant changes in this category that **the final rules adopt with considerable modifications** include requirements to:

- Submit a diagram of the deal structure, but only if one already exists.
- Rather than produce every nontransaction-related agreement between the parties, only identify where certain types of agreements between the buyer and the target (not the seller, if different) exist.

**The final rules abandoned** requirements to:

- Submit all drafts of documents currently required to be submitted under Items 4(c) and 4(d) (though the final rule slightly expands the existing rule requiring submission of drafts presented to the board of directors to now also require submission of drafts presented to any single member of the board of directors or equivalent, such as a private equity investment committee).
- Submit an organizational chart of authors and recipients of documents submitted with the HSR filing.
- Provide a narrative timeline of key dates and conditions for closing.

## Information Regarding Competitive Overlaps and Vertical Relationships

The NPRM proposed substantially expanding the information that filers must submit relating to overlaps and other relationships between the parties, including narrative responses as well as data and document submissions that bring the HSR filing closer to the more burdensome filings required by the European Commission and other international jurisdictions.

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Significant changes in this category that **the final rules retain** include requirements to:

- Identify which specific entity derives revenue in each NAICS code reported.
- Submit narratives describing the principal categories of products and services offered by each party, identifying any horizontal overlaps between current or planned products or services of the parties, and identifying any product or service the parties have procured from or sold to each other or the other's competitors.
- For each such overlap or vertical product or service, the filing company must also provide data about sales or purchases and top customers/suppliers (though the requirement to supply contact information has been eliminated).
- Submit any ordinary course document discussing competition, competitors, markets or market shares with respect to any product supplied or under development by both parties, if such reports were shared with the board of directors of the party in the past year.

Significant changes in this category that **the final rules adopt with considerable modifications** include requirements to:

- Supply additional detailed geographic information about the parties' overlapping operations, including franchisees' locations and additional industry codes requiring "street-level" reporting. Parties are no longer required to supply geolocation data.
- Identify prior acquisitions by both the buyer and the target involving overlapping NAICS codes or products identified in the parties' overlap narratives, but only from the past five years (rather than the past 10 years, as proposed in the NPRM). This requirement retains an exclusion proposed to be eliminated by the NPRM for acquisitions of entities with annual sales or total assets less than \$10 million (though parties may no longer exclude asset acquisitions valued below the size-of-transaction threshold at the time of acquisition if the assets constituted substantially all the assets of a business).
- Submit ordinary course regularly prepared reports discussing competition, competitors, markets or market shares with respect to any product supplied or under development by both parties, if such reports were shared with the CEO of the party in the past year. (The NPRM had proposed requiring submission of documents shared with the CEO's direct reports as well.)

**The final rules abandoned** requirements to:

- Submit information about employees including: (i) the five largest categories of workers based on their occupational categories as defined by the Bureau of Labor Statistics; (ii) the five largest Standard Occupational Classification codes in which both parties employ workers; (iii) overlapping geographical commuting zones; and (iv) any penalties incurred by, or findings by U.S. labor agencies against, the acquiring or acquired entities in the five years prior to filing.
- Identify NAICS codes for products or services not yet generating revenue if such products or services would overlap with current or future products of the other party.

## Limited Responses Required for Certain Parties/Transactions

The current form does not require the same information from all parties in all transactions. Some information, such as that related to prior acquisitions and associates, need only be provided by the acquiring person and only related to overlapping NAICS codes. The final rules retain and expand this approach.

For example, the narrative responses regarding horizontal overlaps and vertical relationships, as well as other information regarding prior acquisitions, ordinary course reports and geographic presence, are only required if such overlaps or relationships exist. In addition, even where such overlaps or relationships exist, the final rules relieve the seller/target of the obligation to provide certain information, such as business descriptions, organizational charts, transaction diagrams and other agreements between the parties.

Lastly, the final rules create a special category of "**Select 801.30 Transactions**" for which certain items are not required. These transactions are defined as those where:

- The buyer will not gain control of the seller or target.
- There is no written agreement between the buyer and the seller or target (such as open market purchases).
- The buyer does not and will not have any rights related to appointment of board members (or their equivalent).

For these transactions, the parties are not required to submit information related to defense or intelligence contracts, overlap or supply relationships narratives, ordinary course reports, or transaction rationale narratives.