

CLIENT ALERT

# FTC Finalizes Substantial Overhaul of HSR Pre-Merger Notification Requirements

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### Changes To Take Effect in Mid-January 2025 — Existing Requirements Continue to Apply to Q4 Filings

On October 10, 2024, the Federal Trade Commission issued its long-awaited Final Rule (FTC press release and link to the Final Rule is available [here](#)) substantially revising the Hart-Scott-Rodino notification form, and related instructions. The Final Rule will become effective 90 days after publication in the Federal Register, likely resulting in an effective date in mid-January 2025. All five FTC Commissioners voted in favor of the Final Rule, and the Antitrust Division of the U.S. Department announced its concurrence with the Final Rule.

In good news for deal makers, the Final Rule is *significantly* less burdensome than the Proposed Rule published in June 2023, which generated intense criticism from the business community. Access to the proposed rule making, as well as to an associated prior Willkie client alert, is available [here](#) and [here](#). Nonetheless, the Final Rule will still **substantially** expand the categories of data, documents, and narrative descriptions required for an HSR filing, which will increase the associated time, expense, and burden on filing parties.

The 460-page Final Rule comprehensively details the features of the new HSR regime. This client alert highlights some of the Final Rule's more significant changes. As we continue to analyze the Final Rule, Willkie will update clients on key considerations for complying with the Final Rule.

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### Key Features of the New Rule

#### *Narrative descriptions for the competitive analysis*

The New HSR Rules will require the parties to supply (for the first time, and in an effort to align more closely with typical merger control filings outside of the U.S.) “brief” narratives describing: (a) the transaction rationale (to provide the Agencies “with a starting place to understand the motivation behind the transaction”), (b) the parties’ horizontal overlaps, including with respect to products or services not yet on market, and still in development, and (c) the existing supply relationships between the parties (subject to a \$10 million minimum threshold).

#### *Top 10 customers and suppliers*

For each horizontal overlap, the parties will be required to identify categories of customers, and list their top 10 customers (though without contact information, in a notable scale back from the original proposed rules). Similarly, the parties will be required to supply their top 10 customers (or top 10 suppliers) with respect to vertical relationships.

#### *Enhanced “business documents” and “competition documents” requests*

The obligation to supply so called “4(c)” and “4(d)” documents will be significantly enlarged: (a) the scope of the covered custodians for “Item 4” transaction-specific documents (prepared to evaluate the proposed transaction and discussing the competitive landscape) will now include the “supervisory deal team lead,” i.e., the individual with primary responsibility for supervising the strategic assessment of the deal, even if such person does not qualify as a director or officer, and (b) the document production obligation will include certain ordinary course business plans and reports prepared within the last year, related to competition, and provided to the CEO or Board of Directors. Importantly, in a significant scale back from the initial proposals, the document production obligation will not be expanded to include superseded drafts of transaction-specific documents.

#### *Additional information about the parties, their officers and directors*

The New HSR Rules will require the additional disclosure of 5% or greater minority holders of all entities within the acquiring person silo (not just of the “ultimate parent entity” and the purchaser entity). The acquiring person will also need to provide a description of its ownership structure as well as organizational charts (if they exist). With respect to limited partnerships included as part of the acquiring person, the filing person will be required to disclose limited partners that have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities (rather than just disclosure of its general partner as required by the current rules). Limited partners of entities on the sell side that will have such management rights of an entity included within the acquiring person upon closing of the notified transaction will also need to be disclosed.

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While the additional requirements regarding officers and directors have been materially scaled back as compared to the original proposal, the New HSR Rule will require the acquiring person to identify officers and directors of the entities involved in the overlap if such officer or director also serves as an officer or director of another entity active in the same industry as the target.

### *Other increased burdens on the filing parties*

Among other additional burdensome requirements, the New HSR Rules will require that foreign language documents be submitted with a verbatim translation, which can increase costs substantially for cross-border transactions, and will impose a heightened obligation to detail the transaction agreement when the parties do not file on a definitive documentation. Under current rules, parties may file on the basis of just a skeletal nonbinding and nonspecific term sheet.

### *Relationship with other jurisdictions*

The parties will need to identify any non-U.S. jurisdiction that is, or will be, conducting a competition review (which disclosure is “voluntary” under the current rules), and the form will provide a voluntary “waiver check-box” that, if checked, will permit the U.S. agencies to confer with other agencies on a more transparent basis.

### *National security concerns*

The New HSR Rules will require the filing parties to disclose subsidies from certain “foreign entities or governments of concern,” most notably China, in compliance with the 2023 Merger Filing Fee Modernization Act.<sup>1</sup> The parties will also be required to disclose certain defense and intelligence contracts.

## **Some Benefits of the New HSR Rules and Final Comments**

Notably, a number of particularly onerous requirements will not apply to a defined category of “select 801.30 transactions”, which include certain “unilateral” acquisitions, such as open market purchases in which the buyer will not acquire control, and executive compensation transactions.

After more than three years of a “temporary” moratorium on the availability of “early termination,” the New HSR Rules will reinstate the ability for parties to request and receive grants of “early termination” in light of the far greater scope of information to be supplied upon initial submission.

The FTC recognizes that the New HSR Rules “will result in incrementally higher direct costs for all filers”; indeed, they predict that the New HSR Rule will *increase* the time required to prepare an HSR Filing by 68 hours on average, and up to 121 hours for transaction with overlaps or supply relationships. Filing parties should consider front-loading the preparation

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<sup>1</sup> <https://www.willkie.com/-/media/files/publications/2023/ftcreviseshsrthresholdsfilingfeesandsection8thresh.pdf>

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of the HSR filing to permit earlier filings. Willkie's team of HSR attorneys are well-situated to assist clients with navigating these significant changes and are happy to discuss how to best manage the transition to the New HSR Rules.

Finally, while certain organizations have previously indicated they may bring legal challenges, which could delay the effective date, given the unanimous FTC vote and the elimination of many of the more onerous and legally suspect requirements of the June 2023 proposal, it is unclear if there will be challenges that would delay the effective date.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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