

# New Merger Review Process: How to Prepare for Your Next Filing

## Corporate News: A Legal Update

By Katherine Hampel on February 21, 2025

The Hart-Scott-Rodino (HSR) Act is a federal law that requires parties to a future business sale transaction to disclose certain information to determine that the transaction does not violate antitrust laws and harm competition if consummated.

As part of the required disclosure, each party is required to prepare and submit an HSR Form for the Department of Justice (DOJ) and Federal Trade Commission (FTC) to conduct a risk assessment prior to approval.

The agencies recently released updated HSR Forms for the acquiring person and the acquired person that contain new and updated required information fields. The requirements are in effect as of February 10, 2025.

The new HSR Form generally imposes different reporting obligations on existing business and supply relationships between the parties, additional categories of acquisitions, and greater detail required on the filing parties.

Importantly, it **does not** change the standard for what transactions must be reported to the agencies. Filers should be aware of the following information requests imposed by the new form.

### Transaction Information and Document Requirements

#### TRANSACTION AGREEMENTS

While most HSR filings include the submission of the definitive transaction agreement, parties were previously allowed to submit a letter of intent or similar documentation in the absence of a final definitive agreement at the time of filing.

Parties are no longer allowed to submit the HSR Form with only an indication of interest, letter of intent, or agreement in principle that does not lay out the key terms of the transaction. If the parties do not have a definitive agreement at the time of filing, they can submit a dated document that provides detail to the agencies on the parties' identities, transaction structure and scope, purchase price with transaction expenses, employee retention, and closing timeline.

## TRANSACTION RATIONALE

Each party must now provide a brief description of the strategic rationale(s) for entering into the transaction and indicate which documents included in the HSR filing confirm or discuss the rationale(s). If there is inconsistency between the parties' stated rationale, each should address this in their own description. If a diagram of the deal structure exists, the acquiring person is also required to include it in their submission.

## TRANSACTION-RELATED DOCUMENTS FROM THE SUPERVISORY DEAL TEAM LEAD.

If the individual who has primary responsibility for supervising the strategic assessment of the deal (and who does not otherwise qualify as a director or officer of either filer) has prepared documents that discuss the potential acquisition with respect to market shares, competition, competitors, markets, and the potential for sales growth or expansion, those documents now need to be included as part of the submission.

The HSR Act has always required these types of documents that were prepared *by the filing parties* to be submitted, but now the requirement extends to those also prepared by the supervisory deal team lead.

## TRANSACTION-RELATED DRAFT DOCUMENTS SHARED WITH A BOARD MEMBER

Documents that were previously required to be included in the filing because they were shared with the board of directors of the filing entities must now also be submitted if they were shared with just a *single* board member.

If the single board member has access to transaction-related documents via a collaborative drafting tool or platform (e.g., Microsoft Teams, Google Docs, Dropbox), all documents prepared in that tool or platform may be required to submit to comply with the new requirements. Only *transaction-related documents*—not those prepared in the ordinary course of business—need to be submitted with the filing.

## Reporting of Minority Interest Holders, Officers, and Directors

The new HSR Form requires filers to provide new information about their minority interest holders in addition to previously-required information. The acquiring person is now required to disclose the minority shareholders of:

- the acquiring entity,
- entities that control or are controlled by the acquiring entity, and
- entities that have been or will be created to effectuate the transaction.

The acquired person is now required to disclose minority shareholders, *though only if such minority shareholders will continue to hold such an interest after the transaction is contemplated*, of:

- the acquired entity and
- any entity controlled by the acquired entity.

### Competition Descriptions: Overlap and Supply Relationships

The parties to an acquisition are required to provide a brief description of the principal categories of products and services they offer. These are intended to be descriptive responses, not extensive legal analysis.

#### OVERLAP DESCRIPTION

If the parties are aware that they offer products or services that compete or could compete, each filer is required to list and describe those products or services. For each overlapping product or service, information relating to sales for the most recent year and the categories and top customers who purchase or use the competing product or service must be provided.

#### SUPPLY RELATIONSHIP DESCRIPTION

If the acquiring party purchases or sells products or services to the target, or if the target purchases or sells products to the acquiring party, that supplying filer is required to list and describe those products and services that represent \$10 million or more in revenue in its most recent year, as well as the filer's top customers or suppliers of the product.

#### Business Documents – Plans and Reports

If the parties submit an Overlap or Supply Relationships description as provided above, they must be accompanied by high-level strategic documents prepared within one year of the filing that analyze the market and competition. The parties are only required to submit these documents that were prepared in the ordinary course of business, not with an eye to analyzing the transaction.

All acquiring person filers are also required to identify whether they have any existing agreements with the target and what type of relationship exists.

#### Author Information

If there is an existing relationship between the filing parties, filers must provide additional information about the authors of the documents submitted in the filing, including their names and titles.

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## Select 801.30 Transactions

A new category of transactions, labeled “select 801.30 transactions,” have minimal reporting requirements. They are generally categorized as tender offers and acquisitions of voting securities and non-corporate interests from third parties that *do not result* in the acquisition of control of a party and where there is *no agreement or contemplated agreement between the parties*.

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