The M&A LAWYER

November/December 2024 ▪ Volume 28 ▪ Issue 10

# DOJ AND FTC RELEASE FINAL RULE EXPANDING HSR PREMERGER FILING REQUIREMENTS

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The Federal Trade Commission ("FTC") unanimously issued a final rule expanding the requirements of premerger filings under the Hart-Scott-Rodino Antitrust Improvements ("HSR") Act of 1976. The HSR Act requires parties to certain mergers and acquisitions to make premerger notification filings with the U.S. Department of Justice ("DOJ") and FTC, and to observe statutory waiting periods, prior to consummating their transaction. The final rule is a compromise that pares back many administrative burdens in the FTC's June 2023 draft rule.[1]

Although the final rule scaled back several of the initial proposed requirements, it still: (i) introduces novel obligations to address substantive antitrust issues in HSR filings; and (ii) requires submission of additional data and documents compared to the current HSR form. The final rule takes effect on February 10, 2025 (90 days after it was published in the Federal Register). Therefore, parties expecting to file on or after February 10, 2025, will need to file under the new rules.

Most HSR filings will take more time to prepare, which dealmakers should reflect in transaction covenants. Dealmakers also need to consider the effect of substantive disclosure obligations on risk of a DOJ or FTC investigation. It is not all bad news, however: The Commission also announced it would lift its February 2021 suspension of HSR waiting period "early terminations" for deals without antitrust concerns.

## Substantive Antitrust Issues

The most significant change is the obligation to identify certain substantive antitrust issues in the HSR filing, including a "brief" description of horizontal overlaps and vertical supply relationships. Certain acquisitions unlikely to involve overlaps and deals involving products or services generating less than $10 million in revenue are excepted from this obligation.

**Product Descriptions and Horizontal Overlaps**. The final rule requires merging par-

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ties to describe the "principal categories" of products and services they offer, "as reflected in documents created in the ordinary course of business" of the company. Parties also must list and describe current or known planned products or services that compete or "could compete" with the other party to the transaction if those products or services are mentioned in the documents submitted with the filing.

For each competitive or potentially competitive product or service, parties are required to provide the sales (in dollars) for the most recent year. The rule also requires parties to provide a description of all categories of customers that purchase or use the product or service and the top 10 customers (as measured in dollars) in the most recent year for each overlap product or service and each category identified.

**Non-Horizontal (or Supply) Relationships**. The final rule also requires parties to list products, services, or assets that are sold, licensed, or otherwise supplied to the other party or any other business that competes with the other party. These disclosures also require information about sales to the other party or any competitors and the top 10 customers for these products.

**Strategic Rationale**. The final rule requires each party to explain the strategic rationale for the transaction and identify any documents included in the filing that confirm or discuss the rationale.

### New Document, Data, and Information Disclosures

The most significant disclosure obligation for many companies will be submission of regularly prepared business plans provided to the company's CEO "that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by" the other party to the transaction. This obligation is limited to documents prepared or modified within one year of the filing.

The final rule adds a requirement to submit so-called 4(c) and 4(d) documents, which analyze the transaction with respect to competition issues if those documents are prepared by or for the supervisory deal team lead.

Additional submission obligations are listed below:

- Translations for all foreign language documents.
- "Doing business as" (or "d/b/a") names for entities at the time of filing.
- Organize legal entities by operating business.
- Describe the business operations of the acquiring entity.
- Transaction diagram (if one exists).
- All exhibits and schedules to the transaction agreement.

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- Pending awarded procurement contracts with the Department of Defense or any member of the U.S. intelligence community (defined by statute) valued at $100 million or more (if an overlap exists).
- Identify merger control filings outside the United States (now mandatory rather than voluntary).
- Disclose (via checkbox) the existence of licensing arrangements, non-competes, and non-solicits between the parties.
- Identify officers and directors of the acquiring person in overlap industries and certain limited partners with management rights.
- Identify other entities for which identified officers and directors serve as an officer or director.
- Disclose more information about minority investments.
- Identify subsidies from any "foreign entity or government of concern."

**HSR Filings Based on a Letter of Intent.** The HSR regulations require parties to submit an affidavit attesting they have executed a contract, letter of intent ("LOI"), or agreement in principle, and have the good-faith intent to complete the transaction. Historically, a simple nonbinding LOI sufficed.

The new rules still permit merging parties to file even if they have not executed a definitive agreement but only if the merging parties provide more detail about the transaction compared to the existing requirement. The new HSR rules will require a dated document that describes some combination of the parties' identities, the transaction's structure, the scope of the acquisition, the calculation of the purchase price, an estimated closing timeline, employee retention policies, post-closing governance, and transaction expenses or other material terms.

## Upcoming Developments to Watch

In a November 12, 2024, blog post, the FTC acknowledged that the upcoming changes to the HSR form and instructions will involve adjustments for practitioners. In recognition of the changes, the agency stated that the Premerger Notification Office ("PNO") will soon provide a detailed overview of the new requirements and will then invite practitioners to submit any questions. PNO staff will post answers to any questions on the FTC's website. The blog post also noted that the PNO plans to update other HSR form-related guidance and tips, including instructions on how to submit the newly required materials.

## Five Key Takeaways

1. Most HSR filings can be prepared within about two weeks, and many within a week. Filings under the new rules will take longer to prepare; however, the burden will not be as significant for deals with no overlap or no vertical relationships. Deals involving numerous or complex overlaps or vertical relationships may require much more time and effort to explain. The FTC estimates its rule will increase the number of hours to prepare HSR filings by 84% on average and by more than 225% for complex deals.
2. The HSR rule will take effect on February 10, 2025, meaning that companies should begin planning now. The new HSR Form calls for detailed information, perhaps in a format the merging parties may not ordinarily maintain.
3. Dealmakers should consider the effect of the rule on deal timing in the transaction covenants. Companies may need more time to produce information for the HSR filings, particularly if certain employees who keep information responsive to the expanded filing obligations are not "under the tent."
4. With additional information on horizontal overlaps and vertical relationships, the agencies may open more preliminary investigations to determine if they require further inquiry. In some cases, upfront information might help DOJ and FTC come to quick conclusions that no issues exist. However, in

other cases, faced with additional upfront information to sort through, enforcers may require more time to reach a conclusion about a given transaction.

5. In recent years, unanimity has been infrequent at the FTC. The Republican commissioners supported the new HSR rule because the Commission rejected some of the most burdensome obligations in the draft rule. Lifting the ban on early termination, in place since February 2021, will likely allow many deals with no substantive issues to close more quickly.

*The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.*

**ENDNOTES:**

[1]The Commission eliminated some of the more onerous requirements, including production of certain drafts of documents analyzing the deal, labor market information, and certain ordinary course documents.

# CHARTER'S SUPERMAJORITY VOTE REQUIREMENT FOR AMENDMENTS IS INAPPLICABLE IN THE CONTEXT OF A REINCORPORATION TO NEVADA—*GUNDERSON V. TRADE DESK*

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In *Gunderson v. The Trade Desk, Inc.*,[1] the Delaware Court of Chancery held that only a majority stockholder vote was required to approve the proposed reincorporation of The Trade Desk, Inc. (the "Company") from Delaware to Nevada through a corporate conversion (the "Conversion"). The court held that, although Article X of the Company's charter (the "Charter") required a supermajority vote for amendment or repeal of the Charter, and although the Conversion as a substantive matter would result in amendment or repeal of the Charter, Article X was inapplicable because the language as drafted did not state that the Supermajority Vote requirement applied to amendment or repeal of the Charter *as a result of a conversion*.

## Key Points

- **Critical drafting point for charter amendment provisions**. The decision reiterates the precise guidance provided in previous cases for corporate drafters when they seek to extend a protective supermajority (or other special) vote requirement for amendment or repeal of a charter that is effected through a corporate transaction such as a merger, consolidation, or conversion. For the vote requirement to extend to charter amendment or repeal in such cases, the charter amendment provision must explicitly state that the vote requirement applies to amendment or repeal of the charter *whether by merger, consolidation, conversion, or otherwise*. (We note that the decision bodes well for Tesla, Inc. in the pending litigation challenging its majority stockholder vote on its reincorporation to Texas pursuant to a conversion, as Tesla's amendment charter provision was similar to Trade Desk's.)