



# Revisions to HSR Premerger Notification Rules

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# Overview

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## Overview of Final Rule

**On October 10, 2024, the FTC announced significant revisions to the HSR premerger notification requirements.**

- The rule is a scaled-back version of the proposed rule submitted for public comment in June 2023.
- Commission approved the rule **unanimously**, in a 5-0 vote.
- The rule will likely go into effect in **mid-January 2025**—90 days after the FTC’s publication of the final rule in the Federal Register.
- The rule **changes the content of the filing information and documents submitted**; it does not change who must file or the method for filing.

# Key Changes: What You Need To Know

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## Increased Scope of 4(c) and 4(d) Documents

The rule expands the types of documents that must be submitted with filings.

- Mandatory inclusion of some ordinary course business documents.
  - **Ordinary course periodic reports** that discuss competition or market share for overlap products and which were shared with the CEO or board.
  - **Limitations: overlapping products only**, i.e., products or services that are sold or known to be in development by both the acquiring and acquired parties, and **only applies to documents created in the year prior to filing**.
- **Documents created by the supervisory deal team lead**, a single individual with primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer

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## What are Supervisory Deal Team Leads?

- **Functional role, defined by practice and not by job title:** The one person overseeing the strategic assessment of the transaction
- Identification of Supervisory Deal Team Lead and 4(c) documents are required for **almost all filings**, not only those with overlaps.
  - B-Side filers in Select 801.30 transactions will be exempt from identifying and providing 4(c) documents for supervisory deal team leads

# Transaction / Competitive Overlap Narratives

The rule requires **enhanced disclosure requirements, including for current or potential overlaps.**

- All filing parties will be required to provide narratives on the following:
  - Summary of current or known planned overlaps (not applicable to Select 801.30 transactions);
  - Transaction rationale;
  - Narrative and geographic details on NAICS code overlaps; and
  - Top 10 customers (with unit and sales) for last year in each overlap product and for each customer category.
- Acquirers must also provide detailed narratives describing the transaction, including:
  - Relevant antitrust jurisdictions outside the U.S. where a filing is expected; and
  - Any pre-existing deal structure diagrams.



## What Counts as an “Overlap” in the updated rule?

The rule refers back to language in the draft proposed rule in 2023 which explicitly discusses overlap narratives as **horizontal overlaps**:

- Generally, products that serve as substitutes for the same theoretical customer base
  - Current or known planned product or service that competes with (or could compete with) a current or known planned product of the other filer
  - If ordinary course documents characterize the other party as a competitor for any products, the Agencies will consider these products as overlaps
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- NAICS codes alone **are not sufficient** indicators of competition
    - FTC notes that overlap narratives are designed to provide more context where NAICS codes alone might be over- or underinclusive
  - Filers can (but are not required to) **list other competitors** besides the parties as part of their descriptive response to provide context on the competitive landscape.

## Officer / Director Outside Affiliations

The rule requires details about the affiliations of officers and directors, particularly those in the same industry as the target company, enhancing scrutiny over potential board interlocks.

- **Identification of board and corporate affiliations** held by officers and directors where there may be competitive overlaps (non-profit religious or political organizations are exempt).
- **Brief lookback period**, requiring additional inclusion of affiliations that ended within the **three months** preceding the filing.

This requirement demonstrates the FTC's **increased regulatory focus and heightened emphasis on improper coordination of officers and directors** under Section 1 of the Sherman Act and **prohibited interlocks** under Section 8 of the Clayton Act.

## Prior Acquisitions

The rule imposes expanded reporting obligations about the parties' prior acquisitions.

- Both acquirers and, now, acquired parties are **required to report prior acquisitions from the past five years.**
  - Expands the scope of asset acquisitions that are required to be reported to closer align with the existing reporting requirement for share deals.
  - De minimis exception for acquisitions of entities with total assets and annual net sales of less than \$10 million.
  - Limited to NAICS code overlaps with the other filing party

The change aligns with the FTC's increased **scrutiny of roll-up strategies**, reflecting an amplified interest in the consolidation activities of serial acquirers.

## Vertical Supplier Relationships

The rule requires disclosure of vertical supplier relationships.

- Filers must identify any **supplier relationships between the acquiring and acquired parties**, as well as with **known competitors to either party**.
  - De minimis exception for relationships with lines of business of less than \$10 million in revenue.
- Companies are required to **provide a brief description of the products or services involved in the supplier relationship**, along with **associated revenues from the most recent fiscal year**.

# Other Notable Changes

## Targeted Disclosure of Minority Holdings

- Filers must now list only minority holdings that have competitive overlaps with the transaction; providing a comprehensive list of all minority holdings is no longer sufficient.

## Filing on a Letter of Intent

- Submissions made under a letter of intent (prior to finalizing an agreement) must include documents detailing the transaction structure, scope of acquisition, purchase price calculations, estimated closing timeline, employee retention policies, post-closing governance, and any material transaction expenses.

## Foreign Subsidies and Defense/Intelligence Contracts

- Filers must identify and describe certain subsidies from foreign entities or governments of concern.
- Filers must also identify products produced in countries of concern subject to countervailing duties.
- Parties must also identify proposals and awarded contracts with the U.S. Department of Defense and Intelligence community for overlaps (\$100 million or more).

# What Was Not Added?

## Draft 4(c)/4(d) Document Requirement

- No requirement for filers to submit draft 4(c) / 4(d) drafts.
- Note that all versions sent to board members count as final.

## Labor Market Information

- No requirement to include labor market information in HSR filings, limiting the data required from companies regarding employment impacts.

## Litigation Hold Obligations

- Proposed litigation hold obligations at the filing stage were not incorporated.

## Additional Documents/Narratives

- Deal timeline; and
- Organization charts.

# Navigating the Landscape: Takeaways For Filing Parties

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# Allocate Additional Time for Filings

## Increased Document and Transaction/Industry Information

- Expanded requests necessitate input from informed business team members.
- Particularly important for transactions with many overlapping products and services.
- Traditional 5 – 15-day windows to file post-signing may not be practical in cases with overlaps, absent proactive preparation pre-signing.

## Serial Filers and Complex Entities Can Prepare Early

- Identifying and preparing key HSR industry information can be done with business team members, alongside M&A strategic planning.
- Businesses can work with counsel to track industries/NAICS codes by entity, minority holdings, and officer/director outside affiliations.



# Anticipate Increased Scrutiny

## Agencies will look for document and narrative consistency

- With new requirements to describe overlaps and industries involved in the transaction, filers will need to make sure narratives are consistent with 4(c) documents.
- Narratives can serve as context for unclear/imprecise 4(c) wording.

## More avenues for early questions

- Director affiliations – potential interlocks;
- Minority holdings – potential additional avenues of competitive overlap; and
- Supply relationships – vertical competition issues.
- **Identify any issues early with counsel to develop advocacy strategy.**

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# Carefully Consider Deal Team Documents

## Mindful Document Creation

- While draft 4(c) documents are not required as a rule, any that go to a director will be considered a distinct final document.
- Drafts and other related documents will likely be produced in a Second Request.
- Having legal departments or antitrust counsel review draft documents, especially those created by or for the deal team, officers, or the board, will help mitigate risks of documents being inaccurate or subject to misinterpretation at the filing stage.
- Identify key documents and information for HSR forms (e.g., minority holdings, outside affiliations, entities within the company responsible for overlapping products).
- Early counsel engagement can streamline processes and save time pre-transaction.

# Engage Antitrust Counsel Early

## Counsel can identify risk and prepare advocacy strategy early

- HSR filings can now serve as vehicles for explaining potential overlaps and transaction rationale.
- Filings will also make apparent potential board interlocks, vertical issues, or minority holding overlaps.
- Identifying risk early can help in assessing regulatory approval timing, costs, and risk-mitigation covenants in transaction agreements.

## Preparatory Steps if Deal Talks are Underway

- ✓ Compile information that is likely to be needed for all HSR filings
  - ✓ Add to due diligence checklist any information needed from transaction partner to prepare filing, including for early assessment of any overlaps and surrounding competitive landscape
  - ✓ Identify supervisory deal team lead and provide counseling regarding the categories of documents that will be part of the filing
  - ✓ Coordinate with transaction and HSR counsel to assess transaction risk profile and progress early substantive analysis
- **Even if a deal is not currently contemplated, consider refreshing antitrust training**

# MCLE Certificate Information

- Approved for 1.0 hour of General/PP credit.
- CLE credit form must be submitted by Wednesday, October 23.
- Form Link: [https://gibsondunn.qualtrics.com/jfe/form/SV\\_9WtaES3Yz2gjUjk](https://gibsondunn.qualtrics.com/jfe/form/SV_9WtaES3Yz2gjUjk)
- Most participants should anticipate receiving their certificate of attendance in four to eight weeks following the webcast.
- **Please direct all questions regarding MCLE to [CLE@gibsondunn.com](mailto:CLE@gibsondunn.com).**

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