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New HSR Premerger Notification Requirements: Implications for Private Equity Clients

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The Federal Trade Commission (FTC) and the Department of Justice (DOJ) recently announced significant changes to the Hart-Scott-Rodino (HSR) premerger notification rules – including changes to the HSR form and associated instructions. Although the new HSR rules are softened from what was initially proposed by the FTC in June 2023 and do not alter the filing thresholds nor change the substantive merger review process, the updates will increase the time and cost required to prepare the HSR filing and will require private equity (PE) firms to disclose more details about their ownership structures and other investments.

Understanding the changes

The revised HSR rules are anticipated to take effect in early 2025. Some of the most notable changes that may impact PE transactions include:

- New disclosure requirements targeting PE – including disclosure of information about minority shareholders, certain limited partners and other entities apart from the ultimate parent entity (including production of an organizational chart that shows the relationships between a sponsor's affiliates and associates, if one exists, and requiring the disclosure of "street names" of funds or investment groups).
- Reporting relevant prior acquisitions that the parties entered during the preceding five years.
- Including narrative descriptions of competitive overlaps, supply relationships, deal rationale and ownership structure of the acquiring firm.
- Broader production of "business documents," including deal-related documents that analyze competition from the "supervisory deal team lead" (in addition to officers and directors as previously required), as well as regularly prepared reports provided to the CEO that analyze competition in any overlap during the last year and any similar reports that were produced to the board.

Impact on private equity

Disclosure of ownership and supply relationships

The updated HSR rules follow the current regulatory trend toward increased scrutiny of PE transactions. The rules may have a disproportionate burden on PE buyers, who typically have larger networks of investors, affiliates and suppliers to report, as well as overlapping members on various boards. For example, limited partnerships must now disclose limited partners with management rights, in addition to their general partner. Additionally, instead of only identifying the ultimate parent entity and the acquiring entity, intermediary entities and their relevant general and limited partners must be disclosed. The new rules also require the disclosure of "doing business as" or "street names" of investors related to master limited partnerships, funds or investment groups to enable regulators' ability to research the holdings of an investment group.

Increased scrutiny of roll-ups

The new HSR rules also reflect the antitrust authorities' increased focus on roll-up transactions, where firms buy and combine a number of smaller companies in a series of transactions to form a larger group. For years, the FTC has struggled with how to address roll-ups escaping antitrust scrutiny when the companies acquired do not cross the minimum filing threshold for merger review. The new requirement that filers provide a description of current or known products or services that compete or could compete with the other party, as well as products either party sold or purchased from the other party, will result in these types of transactions being more easily identified. Even if a previous transaction does not meet the thresholds to require disclosure under HSR rules, the

description of competitive overlaps and supply relationships could cause the reviewing agency to further investigate a transaction and learn about the parties' previous transactions.

Increased time and costs

For PE clients, the changes could impact deal structure and timing. In particular, the time required to complete the HSR filing will vary more significantly by deal than it did under the prior HSR requirements. PE firms will need to consider such variability when assessing deal timing and structure. According to the agencies, the new HSR rules will increase the time required for a filer to prepare an HSR filing by 68 hours on average – with an increase of 10 hours for the simplest filings and an increase of 121 hours or more in transactions involving competitive overlaps or supply relationships.

Early termination

One positive development for PE firms is that, with the new filing requirements, the agencies now expect to have sufficient information to better determine whether a transaction may require a closer look to assess the potential competitive effects up front. Thus, they are re-implementing early termination, which allows the agencies to clear transactions that do not present any potential concern prior to the expiration of the 30-day waiting period.

Planning for delays/increased timing between signing and closing

Today, parties often require that the HSR filing be made within five to 10 days of deal signing. For simple transactions with no overlaps, the additional time to draft the HSR filing under the new HSR rules should be minimal (i.e., a day or two). However, for more complex transactions or those with competitive overlaps (or supply relationships), additional time between signing and filing the HSR should be contemplated. In such circumstances, parties may consider allowing for the HSR to be filed "as soon as reasonably practical" after signing – as is often done for foreign filings – or, if including a requirement to file within some number of days, allowing for the HSR filing date to be extended upon mutual agreement by outside counsel. Parties also may consider making the HSR filing based on a letter of intent or term sheet to save time if there are not other time-gating matters to deal with in the transaction.

Important insights

- **Document creation:** The new HSR rules will require the production of additional documents, including more information on competitive overlaps and supply relationships. Ensure that all deal team members and document drafters, including those relevant individuals at portfolio companies, are aware of the HSR document production requirements.
- **Additional legal costs and time:** The time required to complete the HSR filing may vary more significantly by deal than it did previously. Parties should be prepared for this to now take anywhere from 10 hours to upwards of 120 hours of additional time, depending on the particulars of the transaction.
- **Early termination:** The FTC will resume granting "early terminations" of HSR filings once the new rules go into effect.
- **Filing on a letter of intent:** With the upcoming changes, PE firms may consider filing on a letter of intent or term sheet prior to the implementation of the new HSR rules if the parties intend to complete a transaction but the deal signing and the filing of the HSR could slip past the HSR implementation date (e.g., early 2025). Doing so could allow the merging parties to file under the current less onerous HSR requirements while they finalize the transaction documents.

Additional resources

To help companies navigate the changes to the HSR rules, please see our full client alert, which includes the following additional resources:

- An FAQ addressing possible queries related to the final rule.
- An appendix with a table summarizing the changes to the rules, along with implications for filing parties.

Cooley private equity associate Rebecca Wainstein also contributed to this alert.

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