

Revamped HSR: What to Expect When You're Expecting To Make a Deal

Beginning February 10, 2025, all transactions subject to review pursuant to the Hart-Scott-Rodino (HSR) Act must comply with a new rule (Rule) promulgated by the Federal Trade Commission (FTC) that significantly expands the filing requirements for both acquiring and acquired parties. These changes mark the most significant amendments to the HSR process in decades, and, as a result, all companies that may need to prepare a filing in the future should be aware of these changes in order to avoid a potential delay in closing.

HSR 101 – When Do I File HSR?

An HSR filing is required in transactions that meet two tests:

- **Size of Transaction:** The acquisition price must exceed \$126.4M for 2025 (adjusted annually).
- **Size of Person** (applicable to deals valued at less than \$505.8M): The ultimate parent entity (UPE) of the two parties must have annual net sales or total assets of at least \$252.9M and \$25.3M, respectively (both adjusted annually).

Both tests require detailed analysis to determine the extent to which any exemptions may apply.

The Rule – What Should I Know and How Do I Prepare?

Revisions to the HSR Form and Instructions are significant and require a thorough review by commercial parties that may be required to file HSR for a transaction. The following items warrant specific consideration for parties that may be considering an acquisition or sale in the future.

Filing HSR Pursuant to Letter of Intent (LOI)

Filing parties may continue to file pursuant to an LOI rather than a definitive agreement, but the Rule requires that the LOI must include at least the following details: (i) structure of transaction; (ii) scope of acquisition; (iii) calculation of purchase price; (iv) estimated closing timeline; (v) employee retention policies; (vi) post-closing governance; and (vii) transaction expenses or other material terms. If the LOI initially signed by the parties does not provide this information, the parties must execute a second document specifying these terms.

Practice Note: The most common reason parties file pursuant to an LOI is that the optimal time between signing the definitive agreement and closing is less than the HSR 30-day waiting period. When considering this option, parties should be sure to include the required information in the LOI to avoid a delay in the commencement of the 30-day waiting period.

Draft Documents to Any Board Member Must Be Produced

Filing parties must produce documents that discuss, in relation to the transaction, issues such as competition, competitors, market shares, market definition, and potential for sales growth, or expansion (Competition Topics). Previously, only the final version of such documents was required unless a draft was submitted to the entire board of directors (or similar body). Under the Rule, however, any such document, whether final or a draft, sent to **any** member of the board must be produced. This is a very significant change because many companies include executives (such as the CEO) on the board.

Practice Note: Filing parties should be aware that drafts sent to the CEO or other executives who are on the board must be included in the HSR filing and should therefore prepare and retain such



Jonathan M. Grossman

**Co-Chair,
Antitrust**

jgrossman@cozen.com
Phone: (202) 912-4866
Fax: (202) 861-1905



Matthew J. Howell

Associate

mhowell@cozen.com
Phone: (202) 912-4879
Fax: (202) 499-2451

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documents with this in mind. Information related to Competition Topics should be complete and factual and should not be exaggerated. This is particularly important to keep in mind with respect to the Confidential Information Presentation or similar document that is often drafted in an overly favorable way in order to “sell” the transaction. Parties should also consider whether to refrain from providing early drafts of documents that discuss Competition Topics to executives who are on the board in order to limit the volume of these materials that must be produced.

Additional Information Regarding Officers & Directors (Acquiring Party Only)

For **all entities** within the acquiring corporate parent, the acquiring party must provide a list of officers and directors who serve in similar roles **with other corporate entities** that either (i) generate revenue in an “overlapping” industry with the acquired party or (ii) have a supply relationship with the acquired party.

Practice Note: This provision aims to identify “interlocking directorates” that may be prohibited by Section 7 of the Clayton Act. Determining the overlapping roles of board members and officers of the acquiring party and assessing the overlaps may be time-consuming. We therefore recommend that a party that expects to engage in acquisition transactions maintain a list of all outside board and officer positions held by board members and officers.

Focus on Private Equity

The new HSR Form includes a number of requirements specifically designed to capture additional information from private equity entities including: (i) the acquiring party must provide DBA/street names of investment groups or funds; (ii) both parties must provide more detail on minority investors; and (iii) greater disclosure of limited partners and limited partnerships that will hold a minority interest in the acquiring party post-transaction and possess certain rights related to the board of any entity affiliated with the acquiring party.

Practice Note: Given the recent focus on private equity by the FTC and DOJ, and the new level of detail required by the HSR Form, transaction parties should maintain complete information relating to its minority holders and the roles of any limited partners with respect to the boards (or equivalent) within the acquiring party’s corporate structure.

Key Issues for Deals with Competitive Overlaps or Supply Relationships

Previously, parties would be deemed to “competitively overlap” based purely on revenue classifications pursuant to the North American Industry Classification System (NAICS). In the new HSR Form, parties are further required to prepare a narrative describing any overlapping products between the parties and/or supply relationships between the parties or between one party and a competitor of the other party. When a supply relationship exists, the parties must provide a description of the relationship or agreement and a list of top suppliers/customers. Where a competitive overlap occurs, parties must:

- Provide annual sales for all overlapping products and services, descriptions of customer categories, and top 10 lists of customers in each category.
- Provide, in addition to “transaction-related documents,” certain documents created in the **ordinary course** that are shared with either the CEO or board of any entity involved in the transaction and that discuss competition, competitors, etc. related to products supplied or under development by either party. At the CEO level, parties must produce these documents if prepared at quarterly, semiannual, or annual intervals.

Practice Note: In light of both the broad nature of NAICS codes and the new narrative requirements, transaction parties should be mindful of additional document and data collection that may be necessary in transactions where an overlap is not readily apparent. For instance, certain NAICS codes are very broad (e.g., “software publishers”) and may, therefore include both the acquiring and acquired parties, even though they serve entirely different customers. As a result, entities that may not actually compete could find themselves in a position of “overlapping” for HSR purposes and, therefore, need significant time to identify and review all relevant documents to proceed with an HSR filing.

Parties should also be cognizant that these **ordinary course** materials provided to the CEO (i.e., quarterly earnings read-outs or strategic plans) could, at some point, be subject to production to the FTC/DOJ in the context of an HSR filing. As a result, individuals preparing these documents should be careful to provide complete and accurate information and avoid exaggerations and shorthand that may later be misconstrued by an antitrust enforcer.

Early Termination is Back

Also effective on February 10, the FTC and DOJ reactivated the “early termination program,” which had been suspended since 2021. Parties may once again request early termination of the 30-day waiting period, which the agencies may grant on a case-by-case basis.

The issues highlighted above, along with many other changes, will make future HSR filings significantly more complex than those filed previously. The practical impact of the Rule, however, may be mitigated by understanding the Rule and instituting best practices so that filings (and, more importantly, closings) are not delayed.

Please do not hesitate to reach out to [Jonathan Grossman](#) or [Matt Howell](#) with any questions about the Rule or HSR filings generally.
