

Managing Document Submissions Under the FTC and DOJ's Proposed HSR Filing Requirements

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On June 27, 2023, the Federal Trade Commission and the Department of Justice announced the release of a Notice of Proposed Rulemaking ("Proposed Rule") that included significant changes to the Premerger Notification and Report Form and Instructions, which define the information required for pre-merger filings under the Hart-Scott-Rodino (HSR) Act.¹

The Proposed Rule would bring substantial change to the HSR filing process, in particular to the types and volume of documents that parties to a merger transaction would be required to submit. The FTC has repeatedly explained that the Proposed Rule is intended to address the fact that the documentary information currently provided in HSR filings has simply proven insufficient for the FTC or DOJ to properly evaluate the potential competitive impact of mergers:

For all these reasons, the Commission believes that the information currently collected by the Form is insufficient for the Agencies to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers. In the Agencies' experience, the current Form does not provide their staff with complete information, including information about the transaction; the filers' business operations and those of any related entities; the premerger relationship between the acquiring person and the acquired entity; individuals or entities that may have influence over the operation of the relevant business lines; the full range of potential competitive implications of the transaction, including effects on workers; and prior acquisitions.²

It is clear that the Proposed Rule would impose added burdens on parties preparing HSR filings. Less clear is whether parties would need to adopt new approaches to locating and identifying company documents in order to file in an accurate and timely manner under the Proposed Rule. This article analyzes the significance of the document submission requirements in the Proposed Rule, along with how and when parties may want to update their methodologies and processes to comply with future changes.

¹ Press Release, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>; see also Notice of proposed rulemaking: Premerger Notification; Reporting and Waiting Period Requirements (June 29, 2023), <https://www.federalregister.gov/d/2023-13511/>.

² Proposed Rule at 42180; see also Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, FTC File No. P23930 (June 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf.

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Current Requirements for Document Submissions in HSR Filings

Parties making HSR filings currently submit two types of documents. Item 4(c) of the Premerger Notification and Report Form requires parties to submit “studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.”³ The scope of Item 4(c) is well-defined and relatively narrow, requiring only final, non-draft versions of responsive documents and excluding most categories of ordinary course documents.⁴

Item 4(d) requires the submission of documents provided to officers or directors (or their functional equivalent) and prepared for the purpose of analyzing the acquisition, such as (i) Confidential Information Memoranda related to the transaction, (ii) studies or analyses prepared by third party advisors (such as banker’s books or pitch decks) that analyze “market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets,” and (iii) documents that evaluate or analyze synergies or efficiencies for the purpose of analyzing the transaction.⁵ As with Item 4(c), Item 4(d) has specific limitations on scope, including the exclusion of draft documents, limitations on non-transaction specific documents, and a one-year lookback period for Items 4(d)(i) and 4(d)(ii).⁶

The Proposed Rule’s changes would substantially broaden the scope of document submissions required by a party making an HSR filing.

Traditionally, parties have been able to comply with these requirements through targeted identification and collection efforts, rarely necessitating a comprehensive forensic methodology involving centralized data collection and review. As these requests pertain to a limited, easily identifiable group of employees, a confined date range, and a clear category of responsive documents, antitrust counsel can work directly with the applicable employees to determine if they possess relevant materials. This collaboration often involves employees identifying a broad set of potentially responsive materials, with counsel subsequently narrowing down the list of truly responsive documents. Since the number of documents is typically limited, there is rarely a need to engage IT departments to conduct centralized collections of an employee’s email or files—self-search methods are usually more than sufficient and the resource requirements for antitrust counsel are fairly minimal. Even when provided an overly broad set of materials, reviewing and deciding which documents to submit as part of the HSR filing remains a manageable task.

In summary, although the current document identification process for Items 4(c) and 4(d) might be a tedious process for a small number of employees and attorneys, it is generally manageable and does not necessitate large-scale, technical solutions like those required to respond to a Civil Investigative Demand (CID) or Second Request.

Proposed New Requirements for Document Submissions in HSR Filings

The Proposed Rule’s changes would substantially broaden the scope of document submissions required by a party making an HSR filing. In particular, three sections of the Proposed Rule require

³ Fed. Trade Comm’n Antitrust Improvement Act Notification and Report Form for Certain Mergers and Acquisitions (“Notification and Report Form”), Instructions, Item 4(c), https://www.ftc.gov/system/files/ftc_gov/pdf/HSRFormInstructions02.27.23.pdf.

⁴ Fed. Trade Comm’n, Item 4(c) Tip Sheet (Nov. 28, 2016), <https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf>.

⁵ Notification and Report Form, Instructions, Item 4(d).

⁶ Fed. Trade Comm’n, PNO Guidance on Item 4(d), <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d>.

documents that may be broadly distributed among multiple locations, employees, and systems, increasing the complexity and time involved in identifying the required information.

Transaction-Related Documents: Expansion of Items 4(c) and 4(d). The Transaction-Related Documents section in the Proposed Rule is similar to the existing Items 4(c) and 4(d), with a few notable expansions in scope. The information covered by Items 4(d)(i) (relating to Confidential Information memoranda) and 4(d)(ii) (relating to analyses prepared by third party advisors) would essentially stay the same, while the following proposed sub-sections would add new obligations for filing parties:

- *Documents Prepared by or for Supervisory Deal Team Leads:* This section would cover the same categories of documents currently required by Item 4(c) but expand the scope of individuals to whom the item applies by including “Supervisory Deal Team Leads,” defined as “the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue,” in addition to Officers and Directors.⁷ The FTC reasons that, “based on documents submitted in response to Second Requests, . . . individuals other than officers and directors are often the authors or recipients of documents that are otherwise responsive to Item 4(c) of the Form.” By including supervisory deal team leads as functional custodians, the FTC believes it will capture relevant materials that would otherwise not be submitted.⁸ In providing guidance on the identification of supervisory deal team leads, the Commission notes that “[a]ny such individual(s) might be the leader(s) of an investment committee, tasked with heading the analysis of mergers and acquisitions, or otherwise given supervisory capacity over the flow of information and documents related to transaction.”⁹ This definition is broad and not particularly well defined, especially the “supervisory capacity over the flow of information” language, which can potentially cover a wide range of individuals on a given transaction.
- *Synergies and Efficiencies:* This section would largely mirror the existing Item 4(d)(iii), but would clarify that forward-looking analyses of synergies or efficiencies are also responsive. The Proposed Rule specifically notes that forward-looking assessments are critical in “markets in which competition occurs via ongoing innovative efforts,”¹⁰ a topic that has been a substantive focus of the antitrust agencies in recent years.¹¹
- *Drafts:* For all transaction-related documents, the Proposed Rule seeks to expand the scope of required documents to include draft versions that are provided to an officer, director, or supervisory deal team lead.¹² This is a significant change from the agencies’ longstanding practice of requiring only final versions of these documents, unless no final version exists. The Proposed Rule notes that draft documents produced in response to Second Requests often yield valuable information about the transaction that is often removed from subsequent

⁷ Proposed Rule at 42194.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2021—Protecting Nascent Competition: Visa and Plaid Abandon Anticompetitive Merger, <https://www.justice.gov/atr/division-operations/division-update-spring-2021/protecting-nascent-competition-visa-and-plaid-abandon-anticompetitive-merger>; Press Release, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies>.

¹² Proposed Rule at 42194.

final versions, perhaps even with the purpose of omitting “candid assessments” of factors relevant to competition.¹³ This change alone has the potential to dramatically increase the number of documents submitted in HSR filings.¹⁴

Periodic Plans and Reports: The Addition of Ordinary Course Documents. In addition to expanding the scope of documents required by Items 4(c) and 4(d), the Proposed Rule would add an entirely new category of information required for submission in HSR filings, covering “certain plans and reports created in the ordinary course of business and not prepared solely for the purpose of evaluating the proposed transaction. . . .”¹⁵

Specifically, the Proposed Rule would require the submission of quarterly or semi-annual plans or reports created within the past year that discuss market shares, competition, competitors, or markets relating to products or services offered by both parties which are provided to the Chief Executive Officer (CEO), the CEO’s direct reports, or the Board of Directors.¹⁶ The stated rationale in the Proposed Rule is that “[p]eriodic plans and reports created in the ordinary course of a company’s business often contain detailed assessments of core business segments, markets, competitors, other acquisition targets, and projections about future competitive dynamics—insights that have direct bearing on the Agencies’ antitrust assessment of the transaction in the initial waiting period.”¹⁷

It is unclear if this proposed category would require production of draft versions of these documents. Regardless, the inclusion of ordinary course business documents which are not specifically related to the proposed transaction at issue has the potential to greatly increase the time and difficulty of identifying required documents.

Other Agreements Between Parties. In addition to requiring all agreements relating to the transaction, the Proposed Rule would require production of any other agreements between the parties that are currently in effect or that have been in effect within one year of the HSR filing—regardless of contract type.¹⁸ For transactions involving large corporations with intertwined business relationships and multiple divisions and/or subsidiaries, it may be challenging to even identify and locate all covered agreements, much less collect, review, and produce them.

Impact of Complying With New Requirements

Time & Accuracy. The proposed changes described above, particularly those expanding the number of in-scope employees or adding new categories of responsive documents, would result in a substantial increase in the volume of documents submitted with HSR filings. This is especially true for larger companies, which are more likely to produce a higher number of ordinary course documents covered by the Proposed Rule’s new Periodic Plans and Reports section, and which may maintain these documents with numerous employees and across multiple data collection sources.

¹³ *Id.*

¹⁴ While the Proposed Rule includes an alternative proposal, in which filing parties would continue to produce only final versions of documents but be required to subsequently produce the draft versions within 48 hours upon request from agency staff, this would offer little relief. If parties were to have any hope of complying with the subsequent 48-hour turnaround time, they would still need to collect and identify these drafts at the initial identification and review stage, which is the most time-consuming step in the process.

¹⁵ Proposed Rule at 42195.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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The increased volume of required documents should be largely manageable for filing parties, in terms of the time required to review and prepare the additional documents for submission. In comparison to a Second Request, for example, the number of documents produced as part of an HSR filing will still be relatively miniscule. Once a set of potentially responsive documents has been identified, reviewing the documents to confirm their responsiveness, as well as preparing them for submission and providing any additional required information, should not materially impact overall filing timelines, although it may increase the resources and attendant costs required to do so.

The more significant impact of the proposed changes will likely stem from the heightened difficulty parties will face in accurately identifying and collecting all required documents within a compressed timeframe. As previously noted, most filing parties currently rely on targeted self-collections to identify responsive documents from a small number of employees, who collaborate with antitrust counsel to pinpoint potentially responsive documents within their files. Due to the limited number and, more importantly, the relatively narrow responsiveness criteria for Item 4(c) and 4(d) documents, most parties can follow this process to confidently identify all required documents.

With the expanded scope and broader range of responsive categories outlined in the Proposed Rule, parties will, at a minimum, need to expend more time and resources to identify required documents. Even then, parties may find it difficult to identify a complete set of potentially responsive documents using current methods—especially with respect to drafts and ordinary course documents. Final versions of transaction-related documents are often limited in number and maintained in a well-organized or easily searchable fashion within a custodian's files or email inbox. In contrast, ordinary course documents, especially in draft form, may be less organized, poorly labeled, and scattered across extended time periods. This lack of organization makes it more challenging for employees to self-identify all relevant documents. Consequently, antitrust counsel may not feel confident that a self-collection process will capture all necessary materials.

If these concerns arise, parties may find it necessary to initiate a more formalized eDiscovery process involving data collection for in-scope employees through a centralized corporate infrastructure, followed by the application of search and review methodologies similar to the process performed in response to a Second Request. While a formal eDiscovery approach may produce more fulsome and accurate results in response to the Proposed Rule's expanded requirements, it would likely also delay filing timelines.

To perform a formalized data collection process, companies would need to first engage an eDiscovery provider (or work with outside counsel with requisite capabilities and systems). Those without an existing vendor relationship would need to vet options, agree to terms and billing rates, and complete required security assessments. While this may not create excessive delays in the context of a typical litigation or investigation, where there is often enough advance warning and runway to complete these steps, it could be disproportionately time-consuming in the scenario of an HSR filing. Following this set-up period, companies would also need to ensure they are able to quickly collect, process, and review the data and not waste valuable time determining next steps.

Cost. In addition to timing concerns, the Proposed Rule's expanded document requirements will impose new costs on each transaction as a result of (i) the increased time required of counsel or company employees, and (ii) the potential costs of external providers. For larger transactions, this may end up being a minor sum compared to the transaction value or external advisor costs, and it may seem especially inconsequential if a Second Request is anticipated.¹⁹ However, for

¹⁹ The added eDiscovery costs themselves would be relatively small compared to those involved in a full-blown investigation given the relatively modest total volume of data.

transactions that are modest in size or unlikely to pose competitive concerns, these added costs may be a particularly tough pill to swallow.

Potential Strategies for Antitrust Counsel

Understanding the challenges presented by the Proposed Rule's requirements, there are several strategies antitrust counsel could adopt to lessen the burden on their clients and reduce potential delays or bottlenecks if these changes are eventually adopted.

[P]ortable artificial intelligence models can be trained and developed over time to target the required categories, even without the benefit of exemplar documents.

- Leveraging a combination of employee knowledge and technological developments to more quickly identify potentially responsive materials. As discussed above, employees will often be able to identify at least a portion of the required documents within their own files. The difficulty, given the expanded requirements, may be in locating all required materials through self-collection alone. However, there are several tools that can use a limited set of documents as a starting point to very effectively find earlier draft versions, similar document types, and substantively similar content. If following a more centralized eDiscovery process, antitrust counsel should seek to leverage these tools as much as possible to ensure a fulsome collection effort.
- Expanding on this first concept, portable artificial intelligence models can be trained and developed over time to target the required categories, even without the benefit of exemplar documents. Since the responsiveness criteria will be the same for each filing, models can be developed that identify the requested documents even across very different data populations. These models do not need to be company-specific either, meaning a law firm or forensic consultant can develop and refine a model across multiple clients to great effect.²⁰
- Companies that engage in frequent transactions requiring HSR filings may find it beneficial to implement an organizational structure to maintain the required information. The Periodic Plans and Reports section, for example, covers ordinary course documents that may be more difficult to locate after-the-fact, but are probably discrete and limited in number such that employees could categorize and file the required information at the time of creation. Moreover, this information is not deal-specific and can be used across HSR filings for multiple transactions for a given company. This process can be as simple as creating shared document repositories and training appropriate personnel on their use. While additional searches may still be needed when preparing the HSR filing, this can give parties a substantial head-start.
- Lastly, many of these tasks can be planned for and even initiated in advance. For example, where undertaking a centralized collection and review process, companies can work with antitrust counsel or an external provider to plan for the collection and search of employee data, and work to resolve issues relating to scope, contractual terms, or IT access, allowing them to move quickly when collections must be completed. While parties must of course work around confidentiality concerns during the pre-signing stage, there are several steps that can still be completed when an HSR filing is imminent.

²⁰ Note that portable AI models do not need to retain or reveal company-specific confidential information (nor would the specifics of the algorithm be accessible to individuals at a later filing party). Instead, the model would leverage the general, non-company-specific characteristics or indicators for responsive documents in order to identify the same topics in subsequent data sets.

Conclusion

The Proposed Rule represents a significant expansion in the types and volume of documents that parties would be required to submit as part of HSR filings. Most importantly, the complexity of identifying these documents may increase considerably, with the broad and potentially nebulous nature of the new rules requiring parties to both increase resources and modify their methodologies. Given the expansive scope of the new requirements, parties should anticipate longer timelines for HSR filings and consider proactively adopting new approaches to satisfy document submission requirements. ●