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Top Five Merger Agreement Considerations in Light of the New HSR Rules

The new Hart-Scott-Rodino ("HSR") Act rules[1] took effect on February 10, 2025 and fundamentally changed the HSR filing process. While there are ongoing legal challenges to the new rules, both in court and in Congress, the new rules are currently in effect and transacting parties need to take them into account when negotiating merger agreements. Specifically, parties should (1) consider how the new rules will impact HSR filing deadlines, (2) strengthen cooperation covenants to address who will lead HSR strategy and require pre-filing, privileged, exchange of draft HSR filings and documents, (3) analyze the impact of the new disclosure requirements before agreeing on antitrust risk-shifting covenants, (4) consider whether carveouts to confidentiality covenants are needed to allow parties to contact their customers prior to potential antitrust agency inquiries, and (5) ensure that LOI and term sheet filings sufficiently describe the material terms of the contemplated transaction.

1) Anticipate Longer Periods to File HSR

The new HSR rules require merging parties to provide a lot more information, which in many cases will increase the time needed to prepare the HSR filings. The market standard deadline in merger agreements for parties to submit HSR filings has been 10 to 15 business days, but it has been possible, with advance preparation, to file shortly after signing in some circumstances. While the new HSR rules create additional requirements for all filings, it should still be feasible to finalize filings within 10 to 15 business days for transactions without overlaps or customer/supplier relationships. However, for transactions with overlaps or customer/supplier relationships, merging parties (especially the buyer) may negotiate for longer deadlines, of 25 or more business days, or less specific deadlines such as "as soon as reasonably practicable." The extra time may be needed, for example, to collect ordinary course documents discussing overlapping products from the CEO and the Board, to prepare narrative descriptions of overlaps and supply relationships (and to devise a strategy for framing the descriptions in a way that does not undermine future advocacy), and to identify various sets of top customers. We note that with the agencies reinstating early termination, the delay in preparation may not significantly impact overall deal timing for some transactions.

2) Strengthening Cooperation Covenants

Parties should consider updating the standard cooperation language in merger agreements to account for the new, more expansive, HSR disclosure

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requirements. The new rules require submission of more transaction-related documents (including certain drafts), ordinary course of business plans and reports, narrative descriptions of the merging parties' overlapping products, customer-supplier relationships, and the transaction rationale, among other disclosures. Merging parties should consider including specific obligations in connection with some or all of these new disclosure requirements in the cooperation covenants, and specify how disagreements between the parties with respect to these disclosures will be resolved.

For example, merging parties may disagree as to how to describe overlaps. In a deal involving differentiated products in the same industry, a seller exiting the business may want to take a view (if supported by their documents) that the transaction does not involve overlaps and thus the narrative requirements do not apply. On the other hand, a buyer who may be contemplating future add-ons may oppose framing the overlaps too narrowly. The description of customer/supplier relationships is another area where merging parties may have differing views, including whether their customers or suppliers are competitors of the other party. To avoid post-signing disputes, the parties should consider making it clear in the merger agreement who ultimately controls antitrust strategy, including with respect to preparation of HSR filings.

Parties should also consider explicitly requiring the sharing of draft HSR filings and accompanying documents, on a privileged, outside counsel only basis, before the filings are submitted. Understanding the content of the documents will help counsel confirm that their positions on whether the transaction involves overlaps or customer/supplier relationships are not undermined by the documents and to prepare for any post-filing questions.[2] In addition, the seller will want to be aware of the buyer's interlock disclosures (the new rules' requirement to identify the buyer's officers and directors who also serve in officer or director roles at other companies in the target's industry), as those disclosures may raise questions from the agencies that could create deal delays.

3) More Visibility Before Agreeing on Antitrust Risk-Shifting Covenants

With so much additional information being provided to the antitrust agencies upfront, including (for some transactions) ordinary course of business plans and reports and narrative descriptions of product overlaps and customer/supplier relationships, the agencies are likely to have more questions about the deal. Because of the increased likelihood that strategic deals will receive questions from the agencies, merging parties should consider gathering more information from their counterparties before determining how to allocate antitrust risk. Including provisions in term sheets and letters of intent that require antitrust counsel to exchange HSR documents pre-signing could increase parties' visibility into potential antitrust risk when negotiating regulatory efforts covenants.

4) HSR Carveouts in Confidentiality Covenants

Filers in transactions involving product overlaps and customer/supplier relationships will now be required to disclose the identity of their top customers. Under the old HSR regime, customer information was only provided to the agencies during a preliminary investigation or a Second Request, often after the parties have had the opportunity to describe to customers the benefits of the transaction. Given the new requirement to provide this information upfront, parties should consider negotiating confidentiality covenants that will enable them to give customers disclosed in the HSR filing advance notice of potential antitrust inquiries. It is particularly important for the parties to align on the customer outreach strategy in transactions that may raise antitrust questions and where the HSR filings will be submitted prior to the public announcement of the deal.

5) More Comprehensive Letters of Intent and Term Sheets

The new rules still permit HSR filings on the basis of a letter of intent or term sheet, but now require that the filing documents sufficiently describe the terms of the contemplated transaction. Deal terms that the agencies will want to see in LOIs and term sheets include description of the structure of the transaction, scope of what's being acquired, calculation of the purchase price, estimated closing timeline, employee retention policies, post-closing governance, transaction expenses, and "other material terms," although the rules do not specify what combination of these terms is sufficient. The new rules also require that LOI and term sheet filings include an affidavit from an officer or director of each filing party, under penalty of perjury, that the submitted documents provide sufficient detail about the scope of the entire transaction that the parties intend to consummate, which puts emphasis on ensuring that all material terms negotiated among the parties are disclosed.

For filings where the LOI or term sheet does not sufficiently describe the terms of the contemplated transaction, the filing parties may be required to submit drafts of the definitive agreement. When applicable, this requirement may create complexity and disagreement as to which turn of the drafts (i.e., the seller's or the buyer's) should be submitted. To avoid such disputes, parties considering filing on a LOI or term sheet should seek to ensure that those documents sufficiently and fully describe the material terms of the proposed transaction.

In conclusion, more generally, we note that given the additional time and burden of the new HSR filings, merging parties should consider commencing HSR preparation earlier in the deal process, and frequent filers will be well served to work with counsel to maintain larger repositories of HSR-related information that can be leveraged when new filing obligations arise. The expanded requirements for competition documents and explanations of the deal rationale and competitive and customer-supplier relationships between the parties to a transaction puts a premium on thoughtful document management; parties should seek to ensure that their transaction-related documents and ordinary course of business plans and reports accurately reflect the markets and competitive dynamics. Private equity sponsors should be mindful that the rules include new disclosure requirements of their firm's organizational structure, limited partners, and the buyer fund's and its portfolio companies' officers and directors who also serve as an officer or director at other companies (outside the fund or the private firm) that operate in the same industry as the target. The last requirement may be particularly relevant to operating partners, who are often retained by sponsors due to their industry expertise to help steer portfolio companies.

FOOTNOTES

[1] For a description of the new rules, see Fried Frank Antitrust and Competition Law Alerts, FTC Overhauls HSR Filings Process (October 15, 2024), https://www.friedfrank.com/news-and-insights/ftc-overhauls-hsr-filing-process-12071.

[2] It is important to limit such disclosures to outside counsel, as the materials may contain competitively sensitive information, and because the new HSR instructions provide that the buyer and the seller should not exchange information for the purpose of answering the overlap and supply descriptions items.