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CLIENT ALERT

Preparing for the New HSR Rules: Are You Ready?

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Substantial Changes in Filing Requirements Currently Set for February 10

On October 10, 2024, the Federal Trade Commission (the "FTC") issued its Final Rule substantially revising the Hart-Scott-Rodino ("HSR") notification form and related instructions. The Final Rule is slated to take effect on February 10, 2025. As discussed in our first Client Alert (available here), the Final Rule will significantly expand the categories of data, documents, and narrative descriptions needed for an HSR filing, thereby increasing the associated time, expense, and burden on filing parties.

While there is still a chance that the Final Rule may be delayed (a) as part of the Trump Administration's issuance of a regulatory freeze[1] or (b) by the U.S. Chamber of Commerce's lawsuit,[2] we currently expect these changes to take effect on schedule. This Client Alert reiterates the most significant features of the Final Rule and identifies key considerations for private equity firms.

1. ***Competitive analysis*.** The Final Rule will require narrative descriptions of: (a) the transaction rationale, (b) the parties' horizontal overlaps (with respect to both current and in-development products) and (c) supply relationships between the parties, or between a party and the other party's competitors.

2. ***Top 10 customers and suppliers*.** If the parties' products overlap, each party must (a) list its top 10 customers overall, (b) identify each of its customer categories and (c) list its top 10 customers in each such category. If the parties have a vertical relationship, they must supply their top 10 customers (or top 10 suppliers) and a summary of any existing supply or licensing arrangement.

3. ***Enhanced "business documents" and "competition documents" requirements*.** Deal parties must disclose more documents with their HSR filings: (a) documents concerning the transaction rationale and competitive landscape ("Item 4" documents) now must be collected from the "supervisory deal team lead"—i.e., the individual with primary responsibility for supervising the strategic assessment of the deal—in addition to officers and directors; and (b) parties must disclose certain ordinary course business plans and reports concerning competition prepared within the last year and provided to the CEO or Board of Directors. This includes both "final" versions of such documents and "drafts" received by any individual board member in his or her capacity as a board member.

4. ***Additional information about the parties, their officers and directors.*** The Final Rule mandates disclosure of minority holders (defined as holding a 5% or greater stake) of all entities within the acquiring person silo (not just of the "ultimate parent entity" and the purchaser entity). The acquiring person must also describe its ownership structure and provide any existing organizational charts. For limited partnerships included as part of the acquiring person, the filing person must disclose any 5% limited partners with the right to serve as, nominate, appoint, veto, approve board members or have similar responsibilities *with respect to any entity within the acquiring person silo, or of the general partner or management company of any such entity*. On the sell-side, the filing person will need to disclose 5% limited partners that will have such management rights of an entity included within the acquiring person upon closing of the notified transaction. Additionally, the Final Rule will require the acquiring person to identify any officer or director

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1 President Trump issued a memorandum addressed to the executive departments and agencies ordering an immediate freeze on the proposal or issuance of any new regulations, pending review and approval by the Trump administration, subject to certain exceptions. With respect to rules that have been published in the Federal Register but have not yet taken effect—such as the FTC's Final Rule—the memorandum instructs executive departments and agencies to *consider* postponing the rules' effective dates for 60 days from January 20, 2025. The regulatory freeze memorandum is available here.

2 *See* Complaint, Chamber of Commerce of the United States of America, et al. v. Fed. Trade Comm'n, No. 6:25-cv-00009, at 51-66 (E.D. Tex. Jan. 10, 2025), available here.

(including individuals exercising similar functions in the case of unincorporated entities) who also serves as an officer or director of another entity in the same industry as the target.

Anticipated Impact on Private Equity

A number of the Final Rule's features appear targeted at private equity and/or will have a notable impact on private equity filers. Accordingly, private equity professionals should plan for the following:

1. ***Prior Acquisition Disclosure.*** The requirement to disclose certain prior acquisitions will be expanded to the acquired person, highlighting the antitrust agencies' focus on roll-up acquisition strategies.

2. ***Ownership Information Disclosures.*** Given the additional required minority holder disclosure discussed above, private equity sponsors will need to be mindful of any strategic or veto rights granted to co-investors and, in the case of certain anchor or strategic fund investors, any bespoke arrangements or rights granted to such anchor investors. While purely passive limited partner investments in a private equity fund without such strategic or veto rights will not be disclosed, private equity sponsors pursuing continuation fund transactions in particular will want to carefully consider any required disclosure with respect to lead investors in such transactions, who are often greater than 5% and negotiate certain protective rights with respect to the acquired portfolio. Consistency in information provided will be important to sponsors as the antitrust agencies will be expected to review new submissions against information previously provided in HSR filings.

3. ***Interlocks.*** The Final Rule's requirement to identify and disclose certain information about its officers and directors that may have similar roles in companies active in the same industry as the target should encourage private equity sponsors to anticipate, evaluate, and mitigate (with potentially the need for information firewalls) potential Section 8 interlocking directorate issues[3] as well as improper information-sharing between entities active in the same space.

4. ***Increased Demands on Portfolio Reporting.*** The requirement to report top customer and supplier and overlap sales data will require private equity firms to capture additional information from existing portfolio companies on a regular basis. Sponsors should consider proactively incorporating these metrics into any regular portfolio monitoring and data collection processes. In most instances, however, the scope of this additional disclosure will remain limited to the portfolio companies controlled by the particular filing fund or vehicle, as the Final Rule will not increase the reporting of "associate" overlaps.

5. ***Potential Practical Limitations of Filing on an LOI.*** While the practice of filing HSR based on a non-binding letter of intent ("LOI") has long been a tactical tool to help accelerate timelines to closing, the Final Rule places substantial additional criteria on what must be included that may be difficult to meet at an LOI

[3] Section 8 of the Clayton Act prohibits, subject to certain de minimis exceptions, persons from being an officer or director at competing corporations due to the risk of anticompetitive effects.

stage. Parties filing on the basis of an LOI (or other non-definitive agreements) will be required to submit a document that includes sufficient detail about the scope of the entire transaction, including, but not limited to, the identity of the parties, the structure of the transaction, the scope of what is being acquired, a calculation of the purchase price, an estimated closing timeline, employee retention policies, post-closing governance, and transaction expenses.

6. ***Elongated Preparation Timelines.*** The increased reporting burden will lead to longer preparation time for HSR filings. This is likely to impact closing timelines absent proactive and robust pre-signing data collection.

7. ***Return of Early Termination.*** After more than three years of a "temporary" moratorium, the Final Rule will reinstate the ability for parties to request and receive grants of "early termination," which will allow the antitrust agencies to clear transactions that do not pose any legitimate competitive concerns ahead of the typical 30-day waiting period. This positive development may help mitigate, to some extent, the anticipated elongated preparation timelines for firms that choose to seek early termination. Like the previous early termination practice, if and when early termination is granted, there will be limited public disclosure on the FTC website and in the Federal Register of the grant (i.e., limited to the identification of the parties).

8. ***Risk Factors in Fundraisings.*** Given the anticipated impact on private equity, sponsors should evaluate their existing disclosures to fund investors and consider updating risk factors to reflect the anticipated impact of the Final Rule on a fund's investment activities.

Conclusion

Those currently party to a potential transaction or contemplating a transaction should be prepared for an HSR filing subject to the Final Rule. Further, filing parties should consider front-loading the preparation of their HSR filing, including early collection of information and documents that will need to be filed, coordinating with antitrust counsel on preparation of narrative competitive descriptions, and negotiating deal terms that reflect the substantial additional time required to prepare an HSR filing. Willkie's HSR team is well-situated to assist clients with navigating these significant changes and we are happy to discuss how to best manage the transition to the Final Rule.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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