



GLOBAL CORPORATE M&A

NAVIGATING THE NEW HSR ACT: IMPLICATIONS FOR M&A TRANSACTIONS

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ANNOUNCER

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ANDREW NOREUIL

In this podcast, we will focus on the recent changes to the Hart-Scott-Rodino Act and their impact on M&A transactions, and we'll provide our insights into navigating the new antitrust landscape in the United States. My name is Andrew Noreuil, and I'm pleased to serve as the moderator for this podcast. I'm a mergers and acquisitions partner with Mayer Brown. My practice focuses on mergers and acquisitions in corporate governance matters. Joining me today is my colleague, Gail Levine, co-leader of Mayer Brown's Global Antitrust & Competition Practice. Today, Gail and I will be covering several topics. We'll be discussing the significant amendments to the HSR premerger notification process, including the expanded information requirements and their implications for HSR filings.

We will also be talking about how the new rules will affect deal-planning, including the additional documentation and narrative descriptions that will be required for HSR filings, as well as issues related to the increased compliance costs and time requirements that will be associated with these new rules. Finally, we'll discuss how the new rules will influence the timing of takeovers in other HSR reportable transactions. So, I will now turn it over to Gail to get us started.

GAIL LEVINE

Thanks, Andrew. I'm delighted to be joining you on this podcast to talk about the new HSR regime that is going to be taking effect soon. The first thing to know about the new HSR regime, the new merger review regime in the United States, is the day it starts. The effective date of the new rules is February 10th, 2025.

February 10th, 2025, If you're thinking about doing a deal now, and if you're in a position to make your HSR filing before that date, you'll be able to take advantage of the current rules. If you make your filing on February 11th, you'll be operating under the new rules.

Andrew, with that in mind, what advice are you giving clients now in terms of thinking about that deadline and getting their papers in order in advance of that date?

ANDREW NOREUIL

Well, one thing that comes to mind, Gail, is that currently an HSR filing can be made on just a letter of intent. And that's pretty easy and really only requires the price to be stated by the parties to calculate the filing fee and a good-faith intent to do a deal. And these kinds of letter of intent filings are most commonly done when timing on finishing the definitive documents is being delayed and parties want to perhaps do a simultaneous sign and close because they want to have HSR cleared right before signing. Now the agencies hate the LOIs and after the effective date of the new rules, filing on an LOI will be quite a bit more difficult. The HSR filing will require additional information that will need to be agreed by the parties and set forth in the LOI, including certain examples given in the new rules like the identity of the parties, the structure of the transaction, the scope of what's being acquired, calculation of the purchase price, estimated closing timeline, and employee retention policies, including with respect to key personnel, post-closing governance, transaction expenses and other material items. So that's quite a bit of effort and will probably make filing on LOI as a practical matter not a good idea because at that point most parties will probably have simply agreed their final definitive documents. But for right now if you have a deal that's maybe getting close to being ready to go but might not be signed up by that February 9th effective date, you might file on a simple letter of intent. But as Gail mentioned, going forward after that date, using LOI will be subject to new rules and so it be much more difficult to do that.

GAIL LEVINE

We should talk about what the new rules require, Andrew. One of the things to think about in terms of the new rules are the greater amount of time and greater amount of resources you're going to need to meet the demands of the new HSR regime. The new HSR regime is going to call for the production of more documents. More documents means more time, not just for your outside council, but for in-house council, who has to go and get, gather, produce all of those documents. That's an additional time, it's additional resources. It's also going to, the new HSR regime is also going to take more time and resources because you'll have to respond to what I call the sort of essay-question section of the new HSR form. The new HSR form is going to require at least three kind of essay questions: an overlap description, a supply relationship description, and a strategic rationale description. Let me just walk through each of those quickly and then I want to turn it over to you, for some thoughts on process here. The overlap description, it requires, the new form is going to require you to describe any overlaps based on the documents that have been created in the ordinary course of business, plus sales figures for those overlapping areas from the most recent year, plus a description of your customers by category. Think retailer, distributor, government, local account, a category of customers. Plus the top 10 customers by dollar value in the recent year and the top 10 customers in each customer category. No small feat. It's going to take time and some attention to detail and some considerable resources to get that job done.

That's only one of the three descriptor questions. The second one is the supply relationship description. We'll have to disclose what product, service, asset, that includes data by the way, that you sold to the other party in the most recent year. And disclosing what you sold to someone else who used your input to compete with the other party. Ditto for any product or service or asset, including data, that you incorporate as an input that you bought from the other party or from someone else that competes with the other party. The idea here, of course, is that the agencies are looking for information about vertical relationships and any potential harm to vertical competition in connection with the deal.

Thirdly, you're going to have to give a description of a strategic rationale, basically explaining to the agencies why you're doing this deal. It has to be based on rationales discussed or complemented by the filing party's officers or directors or employees. It has to identify documents produced with the filing that references the rationales. All of this is a long way of saying that there's going to be a lot of time and a lot of resource and a lot of attention to doing a careful and thorough job to answer these kinds of questions. And that means we're going to have to give some process considerations greater thought. Andrew, do you want to speak to that?

ANDREW NOREUIL

Absolutely, Gail, because these are big changes you're talking about here, and I think there's going to require a great deal of time more to do and prepare an HSR filing. And I'm talking more time measured in weeks, not days. And the days are going to be, by the way, a lot busier for everyone, because as you've discussed, there's going to be a lot more detailed, bespoke preparation of descriptive narrative and materials that will have to be put in with the filing.

In addition, if timing is critical, which it usually is in a deal, parties are going to have to begin working on their filings before announcement of the transaction. Now, they'll have to do more analysis earlier in the process and consider how the analysis of the competition issue is going to impact the HSR filing. Of course, I don't expect all parties want to pay for this kind of work if their deal is not yet signed. And that might just be a realization then that they're going to have to push their expected timing on their filing date out if they don't begin the work before the announcement of the transaction.

And of course, all of this is going to be more expensive given the amount of time and effort that's gonna be required by not just the company, but their outside consultants, advisors, and most notably lawyers. Now zooming in here a bit, I think these changes really affect clean deals and the preparation process for those. The deals where there are no competition issues, that is. For deals that already have a lot of competition concerns, I think the parties are already assuming a long antitrust process and they tend to prepare for a real long slog. But for deals without issues, there's just a lot of new disclosure required under these new rules. And this could affect timing for closing, as getting through the HSR waiting period might be the long-polled attempt for the closing, particularly for a deal in an industry where regulatory approvals are not going to be required. The new filing requirements put pressure also on tender offer acquisitions. Acquiring a public company through a tender offer followed by a merger has become a typical way to acquire a company and deals that don't require regulatory approval and where the deals don't have antitrust concerns. And so I think one of the benefits we always note for clients of doing a cash tender offer is that the HSR waiting period is only 15 days instead of 30 days, which would be for a

merger. Under the SEC rules, tender offers are required to be open for a minimum of 20 business days. But if the conditions are satisfied at the expiration of that time, the offer can close and the merger to squeeze out the remaining shareholders can be done immediately thereafter. And so this certainly demonstrates the importance of being able to get the HSR filing in so that that 15-day HSR waiting period can run and expire during the 20 business day tender offer period. So you can close your deal as soon as possible.

And obviously there's less pressure on the timing of an HSR filing for a merger where a meeting's going to be held. But because the key benefit of a tender offer is the speed with which it can close, it's critical to make sure the timing of the HSR filing doesn't hold up to closing.

GAIL LEVINE

And know that those timing concerns have to be front of mind, Andrew, early on. Like think during the negotiations of the underlying deal agreement, right? While that is being negotiated, typically today, that agreement will say something like, HSR filing to be made five to 10 business days after signing. As you've pointed out, Andrew, I don't think that's going to be a sensible provision going forward. I suspect we're going to see a lot more provisions that require something like the HSR filing shall be made as soon as reasonably practical after signing.

That's something you see in foreign filings. I wonder whether you're going to start seeing it here in the United States going forward. You could even imagine a provision that says, let's agree we're going to file in X number of days, but we can get an extension of that time if we need it.

ANDREW NOREUIL

Right, I agree, Gail. The hard deadlines are probably going to have to be softened, like you said, because I think people, particularly as this process starts, aren't going to know how quickly they're going to be able to get their filing done, and it may be more work than they expect. So no one wants to blow a deadline. I think there certainly would be a soft out if people are going to put in some kind of deadline in a number of days. But alternatively, as you point out, I think it'll probably move the way that these other jurisdictions have just given the vagaries of pulling together those filings and making them on time and parties will agree to do it as promptly as practicable when they can get it done. I guess the good news is, and all of this maybe, if there is some, can diverge from this a little bit, that early termination is back and it might require more to make an HSR filing now but the moratorium on not granting ET is over and it's not exactly clear how quickly after filing that parties will be able to expect ET going forward. So we'll just have to see what the experiences are when the grants of ET resume. But I think it's also important for people to remember that notices of ET grants are publicly available by the FTC. So if the deal parties want their deal to be confidential, they're still going to have to file and not request ET and wait for the expiration of the applicable waiting period.

Now, Gail, one thing, since we're talking about waiting periods a bit, is I wonder what you think about the possibility that the agencies start bouncing HSR filings or that we start to move to maybe more of an EU system where the filing's not complete and the waiting period clock doesn't start until the regulator says that it should start?

GAIL LEVINE

Yeah, I think there's a lot more concern about bouncing of HSR filings now than under this new regime than there has been under the old regime for a long time. Under the old regime, or I should say the current regime, it wasn't really a problem because we all know what the rules are. We who make HSR filings all the time are quite familiar with the rules. know what the PNO, the premerger notification office, needs to see. We make sure we get them what we need to get them. And that means the 30-day waiting period clock starts when we file. Under the new regime, there's a little bit more of a question mark there. And a lot of practitioners have raised concerns about this. In the new regime, for one thing, you'll have to describe all of the current and potential future horizontal overlaps and supply relationships like we discussed earlier in this podcast. Well, suppose you identify a certain area of horizontal overlap. Of course the bad news there is that the agencies will probably hold you to that. But the worst news of course is that it relates to the bouncing question. Suppose the agencies believe that your analysis of the horizontal overlap is directly contradicted by other information you submitted with your HSR filing. Staff has the ability at that case to request more information from you to explain what they see as contradictions and that the agency has said could restart the waiting period. That means your 30-day clock is suspended until the agency believes that you've fully complied with and satisfied the HSR filing when it's going to start again. Our advice here, know your business, know your markets before you make your HSR filing. And that's not a five-business-day enterprise, Andrew, as we've been discussing all along. We need to make sure we are very familiar with what the business is and what the market looks like and make sure we're describing it in ways that are fully transparent, fully accurate, and that leave what latitude is necessary to be able to satisfy the agency going forward.

ANDREW NOREUIL

Right, and I can see to your point. I mean, the fact that the final rule expressly raises a specter here of a reason or grounds for which they could restart the clock certainly may be indicative of where the agency's heads are on this and what they're expecting as to the quality of these filings and being able to question the quality of these filings, particularly if, in some cases, as you mentioned, the descriptions are directly contradicted by other materials submitted. And maybe, I guess that's a good segue into the documentation that needs to be submitted with a filing. Do you want to talk about that, Gail?

GAIL LEVINE

Yeah, and I think the big message here, Andrew, is mind your document, your antitrust document hygiene, right? More documents are going to be going to the antitrust agencies and deal review. And knowing that in advance is, you know, is a way of being able to plan for that now. So let me give you some examples of the kind of documents that will be going to the agencies in the post-February 10th regime.

Let's start with documents from the supervisory team lead. The FTC is requiring the submission of certain documents that go not just to officers and directors as in the past, but to supervisory deal team leads. Think the person who's got the main responsibility for supervising the sort of strategic assessment of the deal.

So what does that mean? It means the supervisory team deal lead is essentially going to be a new custodian. You might want to just keep that in mind early on as you get ready for your deal. Likewise, certain ordinary course documents, non-deal specific documents, are going to get produced. For one, all regularly prepared business plans or reports, things that analyze market share, competition, competitors, or markets related to anything that overlaps between the buyer and the seller. If those documents were provided to the CEO within the last year, the FTC and the DOJ, those documents need to be produced with your HSR filing. Ditto for plans or reports that some of only analyzed market shares or competition, competitors or markets that were prepared or modified within the past year. If they went to the board of directors, those documents also may have to be turned over as part of your HSR filing. Also, drafts that go to even one board member, think a 4D document, for example, that went to even one board member has to be produced in the HSR filing.

ANDREW NOREUIL

I just want to talk about some of those things, Gail, because there is quite a bit there, and quite a bit that's new.

So I think by adding the supervisory deal team lead to start with, to this list of document custodians, there's just another category of communications that needs to be considered from the start of the deal. So first, from the outset, I think you need to identify the person that is the supervisory deal team lead. And we know who the directors and officers are when we think about documents we should be keeping an eye on as they are disclosed and the communications are made. But it's a little more amorphous and parties are going to have to, I think, figure out who is the designated supervisory deal team lead from the beginning so that they can keep an eye on and think about the documents that are going to that person. And we would expect the supervisory deal team lead will receive more of the 4C4D responsive documents than even directors and officers, just given the fact that they'll be day-to-day more involved with the deal. So I think we have to remember to have antitrust counsel review those documents as they're being generated for purposes of submitting those documents with the HSR filing.

So with respect to the ordinary course documents delivered to the CEO that are subject to the one-year look-back, I think that is something that really needs to be considered because the one-year look-back and catch documents that express views on markets or industries for competitive overlaps that perhaps the author did not even contemplate being responsive for an HSR filing for the transaction.

This really becomes a bit of a corporate governance point. So I think you need to make sure a competition lawyer at the company reviews these kinds of documents just in the ordinary course of preparing them before they are sent on to the CEO to ensure that if a future filing is made that there wouldn't be something in there that would perhaps cause the agencies to have some trouble with the filing. With respect to documents that are given to even one director, again, there's a bit of a governance issue to think about here. If you have a strategy committee and perhaps before material go to the board, you're gonna go to the chairperson of that committee. That's another example, I think, of just being mindful of the process point here, making sure competition reviews those because again, even if it's a draft and even if it does turn out to be substantially changed before it goes to the board, it would still need to be submitted with the HSR filing.

GAIL LEVINE

I agree with that, Andrew. And just one sort of minor process point to your last point about the draft documents that went to a single board member. You know, the FTC takes the position that that's not a change. The FTC says that that was always the case, but that there was confusion on this point. Some thought the draft didn't need to be produced unless it went to the whole board. The FTC and its statement of basis and purpose when it launched these new rules just took a moment to clarify that that's not what the FTC's position was.

The end result though, Andrew, is exactly as you said. A document that goes even to one, a draft that goes to even one board member, that's otherwise part of an HSR filing needs to be produced in the HSR file.

ANDREW NOREUIL

Okay, well let's move on to maybe just a couple more of what I'll call specialized topics here as we focus on some particular points in this new release. It does create a new category of transactions called Select 80130 Transactions where there's less disclosure required, which is something to be a little thankful for here because we've been talking about additional and heightened levels of disclosure. There are certain transactions for which there are certain disclosure requirements that are exempt. So these are transactions that don't result in the acquisition of control and where there's not an agreement or contemplated agreement between the acquired person and the acquiring person. So a good example of a select 80130 transaction is an open market purchase of stock that could exceed the reporting threshold and trigger an HSR filing, but where the buyer is not acquiring control of the target and there's no other ties between the parties. This is a common tactic that shareholder activists use, particularly to acquire a tolled in a large cap company. The benefit of being a select 80130 transactions is that there's less required disclosure for the parties because certain categories of disclosure are excluded, including with respect to some of things we've talked about already, the supplier relationships, product and service overlaps, and the transaction rationale. I do want to point out that the select 80130 transactions include more than just open-market purchases and can also cover the exercise of warrants and options and conversions of non-voting securities and even tender offers for securities. With respect to tender offers in particular, however, a typical acquisition of a public company via a tender offer, such as a tender offer followed by a medium-form merger, as we've already discussed, that would not be a select 80130 transaction, as that type of transaction requires an agreement between the parties and the buyer is acquiring control of the public company.

Now Gail, these rules actually show a focus on private equity. Do you want to talk to us a little bit about the things that you've seen and hear that will be of interest to private equity buyers?

GAIL LEVINE

I think in the new administration there'll be a shift of focus of prosecutorial emphasis. We may not see in the new administration the same kind of rhetoric around P.E. that we saw in the Biden administration. It's possible that we'll see a change there. But even if that's true, I think it can't be gainsaid that the new administration and administrations that follow, assuming these new rules stay intact, will have new tools

that they can use to gain more insight on private equity deals. And I think you, Andrew, are ready to walk us through the most important of those new tools that the FTC has granted the antitrust enforcement agencies.

ANDREW NOREUIL

Yes, of course. In this final rules release, the Commission noted that acquiring company structures over the years have become more complex. And in particular, the regulators have noticed that private equity transactions have over time gotten more complicated with the use of limited partnership structures and multiple intermediate entities between the acquiring company and the ultimate parent entity. So the new requirements are going to require disclosure of certain holders of minority ownership positions and minority holders for this purpose are holders of at least 5% but less than 50% of a voting stock or a non-corporate interest in an entity. And other new rules, acquiring person has to report certain information for those holders including their names and ownership percentages. And again, these are minority holders of the acquiring entity and any entity that directly or indirectly controls or is controlled by the acquiring entity. So this effectively requires disclosure of the minority holders of any the entities up and down the ownership chain for the acquiring entity. And that includes also at the top, the ultimate parent entity.

Each of these entities up and down the chain are referred to as covered entities. And so there's actually a separate treatment for limited partnerships under the rules. Let me start with a covered entity that's not a limited partnership. Disclosure is required for each person that holds at least 5%, but less than 50% of the voting securities after corporation or non-corporate interest. But if it's a covered entity that's a limited partnership, the disclosure is required for the general partner, regardless of his ownership percentage, and limited partners that have 5%, but less than 50% of an interest in a limited partnership, and also have the right to serve as or designate or veto board members of any covered entity or the general partner or the management company of the covered entity. So these new rules will require planning in some cases and consent to disclose for parties that are in these transactions with minority interest, particularly for private equity funds.

And finally, the regulators have for some time now focused on the potential harm to competition from certain buyers deploying roll-up strategies. And these strategies have particularly been used by private equity buyers to build regional businesses and discrete industries. The new rules are going to require more information from both parties regarding certain prior acquisitions. So the regulators can better assess potential competitive harm posed by serial acquisitions, even acquisitions that were not reportable under the HSR rules.

Okay, well, we've come to the end of our podcast. Thank you, Gail, for joining me today and providing a thoughtful analysis and insights. And thank you to our listeners for tuning in to this podcast. If you have any questions about this podcast or the subjects we discussed, please send them to Patty Holland at pholland@mayerbrown.com. Patty will forward your questions to the appropriate presenter for a response. Contact information is also available on the Mayer Brown website. Thank you for listening.

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