Antitrust MonTHly

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HSR Reset: Old Form Reinstated, DOD Role Expands

The Old HSR Form is Back (For Now)

In our February 2026 edition of *Antitrust MonTHly*, we covered a significant decision from a Texas federal district court striking down the FTC's overhauled Hart-Scott-Rodino ("HSR") premerger notification form ("Form"). That decision created uncertainty among dealmakers and practitioners about the fate of the new Form. Some of that uncertainty has now been resolved by the Fifth Circuit and the FTC.

Specifically, the Fifth Circuit declined to stay the district court's ruling, prompting the FTC to announce that parties may comply with HSR requirements using the prior version of the Form while the agency considers a new rulemaking process.

HSR Litigation Update

On February 12, 2026, the U.S. District Court for the Eastern District of Texas granted summary judgment to the U.S. Chamber of Commerce and other business groups, vacating in full the FTC's 2024 rule that had significantly expanded the informational and documentary requirements for HSR filings.

The court held that the FTC exceeded its statutory authority under the HSR Act by failing to demonstrate that the new requirements were "necessary and appropriate." It further found the rulemaking arbitrary and capricious under the Administrative Procedure Act due to the agency's failure to conduct an adequate cost-benefit analysis to justify the substantial additional burdens imposed on filing parties.

The district court stayed its order for seven days to allow the FTC to seek emergency appellate relief. The FTC did so, and the Fifth Circuit temporarily extended the stay while considering the request. After expedited briefing, however, the Fifth Circuit denied the FTC's motion for a stay pending appeal. As a result, the district court's order took effect immediately, and the pre-February 2025 HSR regime was reinstated. The FTC's appeal remains pending.

FTC Confirms Reversion to Old HSR Form and Considers New Rulemaking

On the same day the Fifth Circuit denied a stay, the FTC announced it would be "accepting HSR filings using the Form and Instructions that were in place before the February 10, 2025, effective date of the new rule."[1] Although filers may still use the new Form voluntarily, the FTC has restored the prior form, instructions, tip sheets, and related guidance on its website. The earlier version is notably less burdensome, requiring less information and fewer documents.

Despite the setback, the FTC has stated that it "continues to believe that the prior, nearly 50-year-old form is insufficient to review modern mergers and acquisitions" and is "considering engaging in a new rulemaking process."[2]

[1] Premerger Notification Program, Special Highlights, *available at* https://www.ftc.gov/enforcement/premerger-notification-program.

[2] Federal Trade Commission and Department of Justice Seek Public Comment on the Premerger Notification and Report Form, *available at* https://www.ftc.gov/news-events/news/press-releases/2026/03/federal-trade-commission-department-justice-seek-public-comment-premerger-notification-report-form.

On March 25, 2026, the FTC and the DOJ's Antitrust Division jointly issued a request for information (RFI) inviting public comment on the implementation and effects of the 2025 HSR rule changes, and whether those changes achieved their purpose of enabling faster and more efficient review without imposing undue burdens on filers.[3] Comments are due May 26, 2026.

The RFI highlighted several areas of interest that could be addressed in future rulemaking, including:

- requiring filers to disclose CFIUS (Committee on Foreign Investment in the United States) filings related to the transaction;
- providing additional information on sovereign wealth fund involvement;
- expanded disclosures regarding defense-related contracts;
- subjecting certain non-traditional transaction structures, such as "acquihires" and non-exclusive intellectual property licenses, to HSR reporting;
- clarification of the investment-only exemption; and
- subjecting structural remedies proposed during merger investigations or litigation to supplemental HSR reporting.

Practical Implications and Next Steps

A decision from the Fifth Circuit is unlikely before late 2026. In the interim, the practical landscape for HSR filers is as follows:

- Companies filing HSR notifications should use the pre-2025 form, which is substantially less burdensome.
    - The court's ruling does not affect HSR thresholds, reportability analyses, statutory waiting periods, voluntary information requests, or Second Request practice.
- Even under the old form, the FTC and DOJ retain broad authority to request additional information during the statutory waiting period through voluntary access letters and, where warranted, Second Requests.
    - Some of the information previously required at the filing stage may now be requested on a more targeted, transaction-specific basis.
- Companies engaged in M&A activity should consider participating in the agencies' public comment process, which may influence future rulemaking.
- Parties should continue to monitor the FTC's guidance and the Fifth Circuit proceedings. We will provide updates as developments occur.

Mandatory Submission HSR Filings to the Department of Defense

Section 857 of the National Defense Authorization Act for Fiscal Year 2024 requires parties to a proposed merger or acquisition that is reportable under the HSR Act to submit their HSR filings (and any "supplementary information" provided to FTC and DOJ) to the Department of Defense (DOD) if the proposed transaction "will require a review by the Department of Defense."[4] There is no further definition or explanation of when such a DOD review would be required, but DOD has published a *non-exhaustive* list of criteria for transactions that *may* require such review:[5]

1. **Defense Directed Business:** Either party currently, has a history of, or intends to contract with DOD or to perform as a subcontractor on a DOD contract.

2. **Critical Technologies:** The transaction involves one of six critical technologies vital to U.S. national security, such as applied artificial intelligence, biomanufacturing, contested logistics technologies, quantum and battlefield information dominance, scaled hypersonics, or scaled directed energy.

[3] Request for Public Comment Regarding Making Improvements to the Premerger Notification and Report Form, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/2026.03.25-HSR-RFI.pdf.

[4] Department of War Filings, *available at* https://www.ftc.gov/enforcement/premerger-notification-program/department-of-war-filings.

[5] IBR-GIES – Mergers & Acquisitions, *available at* https://www.businessdefense.gov/ibr/gies/ma/index.html.

3. **Defense Industrial Base Sector:** The transaction involves aspects of the Department of Homeland Security's Defense Industrial Base critical infrastructure sector.
4. **Intellectual Property:** One or more parties hold patents, trademarks, copyrights, or trade secrets in the above critical technologies or critical infrastructure.

Parties to transactions that meet one or more of the above criteria must notify DOD by email that a transaction may require premerger review and confirm whether their HSR filing has been submitted to the FTC and DOJ. This marks a shift from prior practice, where DOD participation was common but formal submission requirements did not exist.

Perhaps most importantly, the lack of clarity about whether a deal requires DOD review and the "non-exhaustive" criteria identified by DOD creates uncertainty and practical and legal implications for deal parties.

Compliance Uncertainty. Because DOD's published criteria are "non-exhaustive," *i.e.,* are not the only bases on which DOD may require notification, parties cannot rely on a simple checklist to determine whether they must file. A transaction that does not squarely fall within any of the four stated categories could still be subject to the notification requirement.

Increased Burden on Filing Parties. The policy change shifted the compliance burden from the government (which previously would request filings on an as-needed basis) to the deal parties. The non-exhaustive nature of the criteria amplifies this burden because parties must exercise independent judgment about whether other aspects of their transaction could implicate DOD interests. And the policy encourages over-inclusion because the risk of not satisfying a notification of obligations is likely not as significant as the cost of a preliminary DOD inquiry.

A Wider Net for DOD Review. The "non-exhaustive" criteria are broad and capture any party that currently, has previously, or merely intends to contract with DOD. And given that the criteria are not exhaustive, DOD's interest may extend beyond the expansive categories delineated, potentially sweeping in transactions that FTC or DOJ historically would not have referred to DOD.

Longer Deal Timelines. Because FTC and DOJ generally do not close their HSR reviews while the DOD is still evaluating a transaction, this broader scope of DOD review may lead to extended review times and increased transaction costs. Parties whose transactions fall near the margins of the criteria face the added risk that failing to notify DOD proactively could trigger retroactive scrutiny or a DOD request for filings, further complicating deal timing.

Given these uncertainties, parties should carefully assess whether their transactions fall within, or near, the DOD's identified categories. In close cases, proactive engagement with DOD may help mitigate the risk of delays or subsequent information requests.

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