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Legal Sidebar

Recent Developments in Hart-Scott-Rodino Merger Review

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The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) requires parties to mergers and acquisitions that exceed certain size thresholds to file a notification with the Department of Justice (DOJ) and Federal Trade Commission (FTC) and abide by a waiting period before closing their deals. The purpose of this requirement is to give the DOJ and FTC the opportunity to decide whether to challenge deals while the merging parties remain separate entities, potentially avoiding harms that result from the consummation of anticompetitive transactions and the complications that may accompany the unwinding of completed mergers.

In recent years, the DOJ and FTC have sought to update the HSR reporting requirements. In 2024, the FTC, with the concurrence of the DOJ, adopted a final rule expanding the types of information that merging parties must include in their HSR notifications. A federal district court vacated that rule in February 2026, holding that it exceeds the FTC's authority under the HSR Act and constitutes arbitrary and capricious action that violates the Administrative Procedure Act (APA). While the FTC has appealed that decision, the antitrust agencies have also requested public comment on other possible changes to the HSR reporting requirements. In the request, the FTC indicates that it is considering engaging in a new rulemaking process to modify the HSR requirements "[r]egardless of the outcome of the pending appeal."

This Legal Sidebar discusses the litigation over the FTC's 2024 changes to the HSR regime, the FTC's request for comments on other possible HSR changes, and the topic of HSR reform more generally.

Background

Section 7 of the Clayton Antitrust Act prohibits mergers or acquisitions that may "substantially . . . lessen competition, or . . . tend to create a monopoly." The DOJ and FTC (the Agencies) have largely overlapping jurisdiction to enforce this prohibition. Congress intended the Clayton Act's prohibition of anticompetitive mergers "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

The law did not, however, originally require merging parties to notify the government of proposed mergers before they closed. The absence of such a requirement allowed companies to consummate transactions that raised antitrust concerns before the Agencies could review them and consider their

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competitive effects. Antitrust enforcers thus urged Congress to establish a premerger notification regime, arguing that the consummation of anticompetitive deals resulted in interim harm to consumers and required the Agencies to engage in protracted litigation. Advocates of such a regime also contended that unwinding consummated transactions could be expensive and impractical, likening that effort to "trying to unscramble an omelet."

Congress ultimately heeded these calls, enacting the HSR Act in 1976. The statute imposes premerger notification requirements on parties who are planning transactions that exceed prescribed thresholds. Those thresholds involve the size of a deal and, in some cases, the size of the parties involved in a deal. The thresholds are updated annually based on a statutory formula. FTC analysis suggests that HSR-reportable transactions constitute around 15-20% of overall deal activity in the United States.

If a transaction meets the HSR thresholds, the required notification must be submitted to both the DOJ and FTC. All parties to a reportable deal must submit certain information set out in the HSR form. The Agencies then review the submissions to determine whether further investigation is warranted and which agency will conduct any investigation. The Agencies generally cannot publicly disclose HSR filings.

The HSR Act establishes a waiting period (usually 30 days) in which the parties may not close the transaction. The reviewing agency may allow the waiting period to expire or, on request, grant early termination. The agency may also request further information from the parties by issuing a "Second Request," which extends the waiting period for a certain period (usually another 30 days) after the parties substantially comply with that request. The parties and the agency may agree to extend this period.

If an investigation raises concerns that the proposed merger violates the Clayton Act, the reviewing agency may attempt to reach a negotiated settlement agreement with the parties to resolve the concerns or may seek to block the transaction. Both the DOJ and FTC have authority to request that a federal court preliminarily enjoin a proposed merger.

A transaction that the Agencies do not attempt to block is not immunized from future Clayton Act scrutiny. While rare, the Agencies may challenge consummated mergers, including those that did not meet the HSR reporting thresholds.

The 2024 HSR Rule

The HSR Act provides that the FTC shall, with the concurrence of the DOJ

> require that the [premerger] notification . . . be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [FTC and DOJ] to determine whether such acquisition may, if consummated, violate the antitrust laws.

In June 2023, the FTC issued a notice of proposed rulemaking (NPRM) involving changes to the HSR rules and premerger notification form, with the concurrence of the DOJ. In a statement, former FTC Chair Lina Khan framed the proposal as the first "top-to-bottom review" of the form since the passage of the HSR Act.

The proposed changes included a range of new disclosure requirements, including disclosures regarding the structure and rationale of proposed transactions, details regarding past acquisitions by the parties, information regarding the parties' employees, and draft transaction documents. The FTC estimated that preparing an HSR filing would take an average of 144 hours under the proposed revisions, an increase from 37 hours under the existing form.

In October 2024, the FTC issued a final rule implementing substantially modified versions of the proposed changes. In the final rule, the FTC dropped several proposed reporting requirements, including those concerning employee classifications and draft transaction documents. It modified others to

minimize costs to filers and third parties. The FTC estimated that the average number of hours required to prepare an HSR filing under the final rule would be 68 hours.

Commissioners Andrew Ferguson and Melissa Holyoak, who joined the FTC after the June 2023 NPRM, criticized the original proposals, but voted for the final rule. In doing so, Commissioners Ferguson and Holyoak credited "intense negotiations" among the commissioners for producing "dramatic differences" between the final rule and the original proposal. They also cheered an agreement to resume consideration of requests for early termination once the final rule entered into effect, ending a suspension of early termination that was implemented in February 2021.

Former Chair Khan, in a statement joined by former Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, acknowledged that certain proposals were "pare[d] back" in the final rule, but described the rule as "a generational upgrade that will sharpen the antitrust agencies' investigations and allow us to more effectively protect against mergers that may substantially lessen competition or tend to create a monopoly." The statement placed particular emphasis on the following disclosures required by the revised HSR form:

- disclosures regarding entities and individuals that would have the ability to influence a combined company's decision-making post-merger (a requirement intended to shed light on "complex and opaque entities, including private equity and minority holders");
- information regarding supply relationships (a requirement intended to give the Agencies greater insight into potentially problematic vertical mergers);
- information about products and services under development that are not yet generating revenues (a requirement intended to help the Agencies police mergers that may threaten future competition); and
- disclosures regarding certain acquisitions of the merging parties within the previous five years (a requirement intended to help the Agencies assess whether a proposed transaction is part of a "roll-up" strategy in which a private equity firm or other investor acquires many small competitors in the same or adjacent markets).

The final rule took effect on February 10, 2025. Ferguson, now the Chair of the FTC, endorsed the new form and rules, while noting his prior objections to aspects of the final rule and the potential for future adjustments.

The District Court's Decision

In January 2025, several business groups filed a lawsuit challenging the FTC's 2024 HSR amendments in the U.S. District Court for the Eastern District of Texas. The plaintiffs argued that the 2024 amendments were not "necessary and appropriate" within the meaning of the HSR Act because their costs substantially outweighed their benefits. The plaintiffs also alleged that the 2024 amendments constituted arbitrary and capricious action that violated the APA for similar reasons and because the FTC failed to give a reasoned explanation for rejecting less burdensome alternatives.

The plaintiffs and the FTC ultimately filed cross-motions for summary judgment. In February 2026, the district court granted the plaintiffs' motion for summary judgment and denied the FTC's cross-motion, concluding that the 2024 HSR amendments exceeded the FTC's authority under the HSR Act and violated the APA.

In holding that the 2024 HSR amendments exceeded the FTC's authority under the HSR Act, the district court agreed with the plaintiffs that the phrase "necessary and appropriate" in the HSR Act required the FTC to establish that the benefits of the amendments reasonably outweighed the costs. The court then determined that the FTC had not made this showing. On the cost side of the ledger, the court noted that

the Office of Management and Budget estimated that compliance with the 2024 amendments would result in approximately $139.3 million of additional annual fees paid by merging parties for "executive and attorney compensation." The FTC identified two main categories of alleged benefits: detecting additional harmful mergers and saving agency resources. The court deemed both of these asserted benefits "illusory or, at least, unsubstantiated."

With respect to the detection of illegal mergers, the court found that the FTC had not shown that the 2024 amendments would prevent any illegal mergers not already prevented by preexisting HSR requirements. In rejecting this justification, the court explained that the FTC had not identified a single illegal merger in the 46-year history of the previous HSR form that the amended form would have prevented.

The court was likewise unpersuaded by the FTC's argument that the 2024 amendments would save the agency time and resources by allowing the FTC to more quickly conclude investigations and issue more targeted Second Requests. This justification failed, the court determined, because 92% of HSR-reported deals do not prompt any investigation or additional requests from the antitrust agencies. As a result, the court explained, the 2024 amendments impose costs on all HSR filers to produce benefits for at most 8% of reportable transactions. The court also deemed the proffered benefits in those 8% of cases "unclear," indicating that the FTC had not specified or substantiated "how exactly the [2024 amendments] . . . will save time and resources."

Based on the above analysis, the court held that the 2024 amendments exceeded the FTC's authority under the HSR Act because the agency failed to establish that their benefits reasonably outweighed their costs.

The court proceeded to consider the plaintiffs' APA arguments. Ultimately, the court concluded that the 2024 HSR amendments violated the APA's prohibition of arbitrary and capricious agency action for two reasons. First, the court relied largely on its earlier analysis in finding that the benefits of the amendments did not justify the costs. Second, the court concluded that the FTC failed to consider less burdensome alternatives to the amendments, such as voluntary submissions and more targeted Second Requests.

The FTC has appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit. On March 19, 2026, the Fifth Circuit denied the FTC's motion to stay the vacatur of the rule pending the appeal. As of the publication date of this Legal Sidebar, the Agencies are accepting filings using the previous version of the HSR form and instructions. The Agencies have indicated, however, that they will continue to accept filings using the updated form reflecting the 2024 amendments.

March 2026 Request for Information

On March 25, 2026, the Agencies launched a joint public inquiry requesting public comments on the effectiveness of the updated HSR form during the time in which it was in effect. The Agencies also indicated that they are evaluating "whether additional modifications to the [HSR] Form may be warranted to address certain topics based on developments affecting the HSR review process that have emerged over the past year." Those topics include

- whether to request that filers provide information regarding their compliance with legal obligations relating to the Committee on Foreign Investment in the United States, and whether the current HSR form captures sufficient information on sovereign wealth funds and the sovereigns with which they are affiliated;
- whether to request information from filers regarding their contracts with, or direct and indirect sales to, the United States, regardless of whether there is currently a horizontal competitive overlap between the merging firms;

- whether to make explicit that an HSR exemption for certain acquisitions of voting securities "solely for the purpose of investment" does not apply when the acquiror uses its ownership of voting securities to influence a corporation's competitive decision-making (an exemption that has been invoked in recent litigation challenging the conduct of large asset managers);
- whether changes to the HSR form and the HSR regulations are appropriate to address "acquihires" (acquisitions whose principal motivation is the acquisition of a target's employees, as opposed to its assets), "reverse acquihires" (transactions in which one company hires another firm's key employees and licenses its intellectual property but does not formally acquire the firm), certain sales/purchases of non-exclusive intellectual property licenses, and other novel transaction forms;
- whether, and under what circumstances, remedy proposals from merging parties that are offered late in the HSR review process should be subject to new or supplemental HSR filing requirements; and
- whether changes to the HSR regulations are warranted to carry out President Trump's directive in Executive Order 14376 to "review substantial acquisitions, including series of acquisitions, by large institutional investors of single-family homes in local single-family housing markets for anti-competitive effects."

The Agencies indicated that they will consider engaging in a new rulemaking process regardless of the outcome of the litigation over the 2024 final HSR rule.

Considerations for Congress

Congress has broad authority to shape the HSR regime. Congress could, for instance, amend the HSR Act to require merging parties to provide the Agencies with certain categories of information. The Merger Filing Fee Modernization Act of 2022, which required HSR filers to report any subsidies from a "foreign entity of concern," offers the most recent example of such a measure. Alternatively, Congress could prohibit the Agencies from requiring merging parties to report certain categories of information.

Several bills that would have expanded HSR reporting requirements have been introduced in recent Congresses.

In the 119th Congress, S. 1796, the Housing Acquisitions Review and Transparency (HART) Act, would provide that all acquisitions of residential property by any person within a single calendar year shall be deemed to be a single acquisition for purposes of the HSR reporting thresholds. S. 3904, the American Homeownership Act, includes a similar requirement.

In the 118th Congress, S. 4412, the Stopping Threats to Our Prices from Bad Mergers (STOP Bad Mergers) Act, would have amended the HSR Act to require merging parties to report various information that may be relevant to the labor-market effects of proposed transactions. If a party to a reportable merger is subject to a collective bargaining agreement, the bill would have given the affected labor organization the right to provide the Agencies with information relevant to an evaluation of the proposed transaction.

In the 117th Congress, the Prohibiting Anticompetitive Mergers Act of 2022 (S. 3847 and H.R. 7101) would have required HSR filers to report a variety of additional categories of information, in addition to extending the initial HSR waiting period (for deals other than tender offers) from 30 days to 120 days. In announcing the 2024 HSR amendments, former FTC Chair Khan advocated legislation extending the HSR waiting period. She contended that the 30-day waiting period was adopted in an era when the Agencies received substantially fewer and substantially less complex HSR filings.

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