

FTC and DOJ Launch Joint Public Inquiry Into HSR Act Premerger Notification Requirements, Signaling Potential New Rulemaking

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On March 25, 2026, the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ” and, collectively, the “Agencies”) jointly announced that they are “considering engaging in a new rulemaking process” to make “necessary updates” to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR” or “HSR Act”) premerger notification process.¹ The announcement follows a February 2026 ruling by a federal judge in the Eastern District of Texas vacating the overhauled HSR Form (the “Updated Form”) that had been in effect since February 2025,² and the Fifth Circuit’s subsequent denial of the FTC’s emergency stay motion.³

¹ Fed. Trade Comm’n, *Federal Trade Commission and Department of Justice Seek Public Comment on the Premerger Notification and Report Form* (Mar. 25, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/03/federal-trade-commission-department-justice-seek-public-comment-premerger-notification-report-form>.

² We discussed this decision in our February 12, 2026 Client Alert, titled *Texas District Court Vacates New HSR Rules*, available at <https://www.willkie.com/-/media/files/publications/2026/02/texas-district-court-vacates-new-hsr-rules.pdf>.

³ We discussed the Fifth Circuit’s denial of the stay motion in our recent March 20, 2026 Client Alert, titled *Fifth Circuit Denies FTC’s Stay Motion, Vacating Revised HSR Form and Rules, Effective Immediately*, available at: <https://www.willkie.com/-/media/files/publications/2026/03/fifth-circuit-denies-ftcs-stay-motion-vacating-revised-hsr-form-and-rules-effective-immediately.pdf>.

The Agencies have since reverted to accepting filings on the significantly less burdensome legacy form, though filers may also voluntarily use the Updated Form. In an accompanying Request for Information (“RFI”), the Agencies have opened a public comment period to evaluate whether the Updated Form achieved its core goals of improving detection of potentially anticompetitive deals and enabling earlier Second Request determinations, reaffirming the FTC’s longstanding position that the legacy form—largely unchanged for nearly five decades—“was insufficient to review modern mergers and acquisitions.”⁴ Public comments must be received by **May 26, 2026**, at 11:59 PM EDT.

Importantly, the RFI goes beyond soliciting feedback on the Updated Form and identifies new areas where the Agencies believe additional modifications may be needed in light of “developments affecting the HSR review process that have emerged over the past year.” Each of these areas is discussed below.

1. **CFIUS Compliance and Sovereign Wealth Fund Disclosures.** The RFI raises the prospect of requiring HSR filers to report on their compliance with the Committee on Foreign Investment in the United States (“CFIUS”) regime, including obligations under Section 721 of the Defense Production Act of 1950. The Agencies are also weighing whether to mandate more granular disclosures regarding the affiliation between sovereign wealth funds and their respective sovereign sponsors.⁵
2. **Transactions Involving Suppliers to the Department of War.** The Updated Form required disclosure of certain Department of War (“DOW”) contracts only where a horizontal competitive overlap existed between the merging parties. The Agencies are now contemplating a substantially broader requirement covering filers’ contractual relationships with, and direct and indirect sales to, the U.S. government regardless of any horizontal overlap, in order to “facilitate closer and more efficient coordination between the Agencies and DOW, and to ensure a competitive defense supply chain.” The Agencies are also considering requesting voluntary waivers of the HSR disclosure exemption to permit the sharing of transaction-related information with DOW upon request.⁶
3. **Scope of the Solely-for-the-Purpose-of-Investment Exemption.** The HSR Act exempts acquisitions of up to 10% of an issuer’s outstanding voting securities made “solely for the purpose of investment.” Citing recent enforcement actions testing the boundaries of this exemption, the Agencies are weighing whether to codify the principle that the exemption is unavailable “when the acquiror uses its ownership of voting securities to influence a corporation’s competitive decision-making, including the corporation’s policies that may affect prices, quality, or output.” The RFI also asks commenters to address how often investors take significant stakes in the same entity through different investment vehicles and the impact of such practices on premerger review.⁷
4. **Nontraditional Transaction Structures.** The Agencies report “an uptick in business transactions that parties are not reporting to the Agencies under the HSR Act, yet which have the practical effect of

⁴ Fed. Trade Comm’n, *Request for Public Comment Regarding Making Improvements to the Premerger Notification and Report Form* (Mar. 25, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/2026_03_25-HSR-RFI.pdf.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

eliminating a market participant.” Structures of concern include IP licensing arrangements paired with “acquihires” or “reverse acquihires” that leave the target nominally intact but strip it of competitive viability, as well as convertible securities used to effectuate transactions at or above the HSR threshold without triggering a filing—by the time conversion occurs and reporting is required, the competitive harm may already have materialized. The Agencies are evaluating whether regulatory changes are needed to address these and other “novel transaction forms.”⁸

5. **Structural Transaction Modifications and Remedy Proposals.** The RFI highlights the Agencies’ concern with merging parties that propose remedies—including divestitures and other structural concessions—at advanced stages of review or after enforcement litigation has commenced. The Agencies’ Second Request authority is calibrated to the originally notified transaction, and no mechanism currently exists to extend the waiting period for a materially restructured deal. Post-litigation restructurings may also force federal courts to adjudicate a “litigate the fix” scenario that was never itself subject to HSR reporting. The Agencies are therefore exploring whether such late-breaking proposals should trigger new or supplemental filing requirements.⁹
6. **Single-Family Housing Acquisitions.** Citing President Trump’s Executive Order 14376, which directed the Agencies to scrutinize “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 are assessing whether the current HSR framework adequately captures such transactions. The RFI asks whether the real estate exemptions under Sections 802.2 and 802.5 remain justified, and whether the exemption for real estate investment trusts (“REITs”) warrants reconsideration given the increasingly operational role that many REITs now play.¹⁰

Use of Artificial Intelligence in HSR Submissions

The RFI also solicits input on the costs of requiring filers to disclose their use of artificial intelligence or generative AI tools in preparing HSR submissions, including in identifying and selecting responsive documents. The Agencies further ask whether AI-powered tools have offset the incremental compliance burden imposed by the Updated Form relative to its predecessor.¹¹

General Areas of Inquiry

The RFI also poses broader questions, asking commenters to identify Updated Form requirements that are beneficial to premerger review as well as those that impose disproportionate burdens relative to their probative value.¹² The Agencies seek input on whether safe harbors or materiality thresholds could reduce compliance

⁸ *Id.* at 2-3.

⁹ *Id.* at 3.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 8.

¹² *Id.*

complexity without compromising access to necessary information, and on how to minimize the burden of any new requirements on small businesses.¹³

Implications and Next Steps

Comments may be submitted through the docket on regulations.gov. The Agencies have encouraged a broad range of stakeholders—including consumers, legal practitioners, industry representatives, workers, businesses, startups, potential market entrants, investors, and academics—to participate in the comment process.

The breadth of the RFI signals that the Agencies intend to reshape the HSR premerger notification process regardless of how the Fifth Circuit resolves the pending appeal. Active acquirers, private equity sponsors, and institutional investors should evaluate whether to participate in the comment process. The Agencies' focus on nontraditional deal structures, the investment-only exemption, sovereign wealth fund scrutiny, and late-stage remedy proposals have the potential to materially affect how transactions are structured and filed.

Notably, unlike the prior rulemaking cycle—in which the FTC proceeded directly to a formal Notice of Proposed Rulemaking (“NPRM”) in June 2023—the current RFI represents a preliminary, pre-rulemaking step that will likely be followed by a separate NPRM with its own comment period before any final rule is adopted. Given this multistage trajectory, it may be years before any new rules take effect, but the RFI offers stakeholders an early and important opportunity to shape the Agencies' approach.

The members of our antitrust and merger control team are available to assist in preparing and submitting comments in response to the RFI. We will continue monitoring these developments and are able to provide additional guidance.

¹³ *Id.* at 5.

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