

Merger Notification Update



By **Bilal Sayyed**
Counsel | Antitrust

This article covers a range of FTC and DOJ merger-related updates of interest to readers of *Quorum*.

District Court Vacates FTC's 2024 Rule Expanding HSR Form Requirements; Notifying Parties May Use "Old Form" for Filings

The district court for the Eastern District of Texas has vacated the Federal Trade Commission's [2024 Rule](#) expanding the information and documentary materials required to complete the Hart-Scott-Rodino Act's ("HSR Act") Premerger Notification and Report Form. *Chamber of Commerce of the United States v. Federal Trade Commission*, 2026 U.S. Dist. LEXIS 29274 (E.D. Tx., Feb. 12, 2026).

The FTC filed a notice of appeal, and upon request of the FTC, the 5th Circuit Court of Appeals issued an administrative stay of the decision. *Chamber of Commerce of the United States v. Federal Trade Commission*, Unpublished Order, Case No. 26-40094 (5th Cir., Feb 19, 2026). However, on March 19, the 5th Circuit lifted its stay and the district court decision has now taken effect. *Chamber of Commerce of the United States v. Federal Trade Commission*, Unpublished Order, Case No. 26-40094 (5th Cir., Mar. 19, 2026).

Filing parties can now use the previous filing form, in effect prior to February 10, 2025, for HSR filings. The Premerger Notification Office has indicated that parties may, on a voluntary basis, use the "new" filing form.

The Chamber of Commerce of the United States, the Business Roundtable, the American Investment Council and the Longview (Texas) Chamber of Commerce ("Plaintiffs") [challenged](#) the adoption of the 2024 Rule as unlawful under the Administrative Procedure Act. The Plaintiffs' alleged the 2024 Rule exceeded the FTC's authority to promulgate rules under the HSR Act because it was not "necessary and appropriate," and was "arbitrary and capricious" because the FTC failed to show the 2024 Rules benefits exceeded its costs, and failed to explain why less burdensome alternatives were rejected.

The district court largely agreed with the Plaintiffs' position. The district court concluded that the HSR Act requires that the benefits of the 2024 rule "reasonably" outweigh its costs.

Here, the Rule failed to satisfy that requirement because the benefits of the Rule were "illusory" or unsubstantiated, with the Commission failing to show that the new requirements would prevent any illegal mergers not already prevented by the filing requirements in force prior to the adoption of 2024 Rule.

Further, the Commission's conclusion that the new filing requirements would save time in distinguishing mergers that did raise concern from those that did not, was "conclusory, lack[ed] specifics, and is unsubstantiated" as well as "underwhelming," given how few mergers raise competitive concerns and the imposition of the new filing requirements on all mergers.

For the same reasons, the district court concluded that the 2024 Rule was arbitrary and capricious. And, "the FTC's failure to apply reasoned decision-making" provided an independent basis to hold the 2024 Rule unlawful, and to set it aside.

The district court stayed its ruling to allow the FTC to seek emergency relief from the 5th Circuit Court of Appeals. Upon the FTC's request, the 5th Circuit initially granted an administrative stay of the district court's ruling without additional comment, but that stay has now been lifted. The FTC has appealed the district court opinion, but whether the FTC will continue its appeal is an open question.

New Guidance on M&A Transactions that Require Submission of HSR Filings to Department of Defense

The Department of Defense (DOD) "is responsible for ensuring our nation's security." It plays a significant role in the FTC's and DOJ's review of mergers within the defense industry because of its "unique position to assess the impact of potential defense industry consolidation" on that mission. See [Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry](#) (2016); DOD Directive 5000.62, [Review of Mergers, Acquisitions, Joint Ventures, Investments, and Strategic Alliances of Major Defense Suppliers on National Security and Public Interest](#) (February 27, 2017).

Historically, the DOJ and FTC alerted the DOD to relevant mergers under antitrust review. However, an October 2023 study by the Government Accountability Office noted that only about 10% of M&A transactions affecting the defense industry were subject to an antitrust review. See U.S. Government Accountability Office, [Defense Industrial Base: DOD Needs Better Insight into Risks from Mergers and Acquisitions](#) (Oct. 2023). Congress quickly responded to this report by requiring parties to defense related transactions to give notice of the transaction to DOD.

Section 857 of the [National Defense Authorization Act for Fiscal Year 2024](#) (NDAA) requires "parties to a proposed merger or acquisition that [requires a Hart-Scott-Rodino filing and] will require a review by the Department of Defense" to each provide a copy of their HSR filing to the DOD concurrently with their submission to the FTC and Department of Justice. The NDAA did not provide guidance on what transactions required a review by the DOD, and, in practice, parties submitted filings to DOD upon request of DOD.

New guidance from DOD's Office of Global Investment and Economic Security provides a **non-exhaustive** list of transactions that require DOD review:

1. **Defense Directed Business:** Either party currently, has a history of, or intends to contract with DOD or perform as a subcontractor on a DOD contract.
2. **Critical Technologies:** Transactions involving six critical technologies vital to U.S. national security:
 - Applied AI;
 - Biomanufacturing;
 - Contested logistics technologies;
 - Quantum and battlefield information dominance;
 - Scaled hypersonics; and,
 - Scaled directed energy.
3. **Defense Industrial Base Sector:** Transactions involving the Department of Homeland Security's Defense Industrial Base critical infrastructure sector.
4. **Intellectual Property:** Parties with patents, trademarks, copyright protections, or trade secrets in the above critical technologies or critical infrastructure.

While the new guidance provides some clarity on what transactions may require submission of a copy of an HSR filing to DOD, the list is both incomplete and potentially captures a very broad set of transactions. It is incomplete because it is a non-exhaustive set of transactions. It may be very broad because what constitutes a "defense directed business" a "Department of Homeland Security's Defense Industrial Base critical infrastructure sector" is potentially quite extensive. Neither term is defined in the guidance.

However, the [Critical Infrastructures Protection Act of 2001](#) (part of the USA Patriot Act) provides a definition of critical infrastructure: “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”

[Presidential Policy Directive 21](#) (Critical Infrastructure Security and Resilience) identifies sixteen (16) critical infrastructure sectors, including ten (10) within the responsibility of the Department of Homeland Security.

The new guidance stresses that compliance with the filing requirement is mandatory. Parties and their counsel may seek guidance from the DOD’s M&A Division on whether a transaction requires submission of a copy of the HSR filings to DOD.

California Adopts State Antitrust Premerger Notification Filing Requirement

Effective January 1, 2027, [California’s Uniform Antitrust Premerger Notification Act](#) (the “Act”) requires that any person that files a Hart-Scott-Rodino (“HSR”) Act Notification and Report Form (“HSR Form”) with the FTC and the DOJ must also submit an electronic copy of the HSR Form to the California State Attorney General (“Attorney General”) if it meets either of two jurisdictional tests.

The Act allows the Attorney General to require payment of a modest filing fee with the filing, and adopts significant penalties for non-compliance. The Act is in addition to, and does not supersede, existing pre-merger filing requirements for transactions involving [health care entities](#) and [retail drug firms](#).

The filing with the Attorney General does not initiate a waiting period or otherwise suspend closing of the notified transaction. The Act does not grant the Attorney General authority to issue a Request for Additional Information (a “Second Request”) but the Attorney General can use existing investigatory tools to require the production of documents and data and to compel testimony from any person that is a party to a transaction or any relevant third party.

The Act sets forth two alternative jurisdictional tests that trigger the state notice requirement for persons subject to the HSR Act’s filing requirements:

1. the person has its principal place of business in the State of California; or,
2. the person (or a person that it controls directly or indirectly) had annual net sales in the State of California of the goods or services involved in the transaction of at least 20% of the [prevailing HSR Act’s filing threshold](#).

“Principal place of business” is not defined by the Act. It is not necessarily the state of incorporation or registration but in corporate law generally refers to the place where the corporation’s highest level officers direct, control and coordinate the corporation’s activities.

If the person has its principal place of business in the State of California, the filing person must provide its **HSR Filing** to the Attorney General within one business day of its filing with the FTC and DOJ. The Attorney General may impose a filing fee of \$1,000 for notification under this jurisdictional test.

If the person **does not** have its principal place of business in the State of California, but meets the alternative jurisdictional threshold, the filing person must provide its **HSR Form** to the Attorney General within one business day of filing with the FTC and DOJ, but is not required to include the documentary attachments required by an HSR Filing.

However, the Attorney General has the authority to require such persons to provide the HSR Filing within seven (7) days of a request. The Attorney General may impose a filing fee of \$500 for notification under this jurisdictional test, and an additional \$500 fee if it requests the documentary attachments to the HSR Form.

The HSR Form, the HSR Filing, the fact of a notifiable transaction, and the notice to the Attorney General are confidential and not subject to public release under California's Freedom of Information Act. With a protective order, the HSR Form and HSR Filing may be used in an administrative or judicial proceeding related to the transaction.

The Act allows the Attorney General to share an HSR Form, or HSR Filing, with any Attorney General of a state that has adopted the same or similar state premerger notification filing requirement, and contains similar confidentiality requirements. The Act does not allow for sharing with any competition agencies or other law enforcement agencies outside the United States; merging parties may grant such rights, however.

Any person that fails to comply with the state's notification requirement is subject to civil penalties of up to \$25,000 per day, for each day out of compliance. The California Attorney General must first provide written notice of a failure to comply, and provide three business days to cure non-compliance.

California is the third state, after Washington and Colorado, to adopt a broad-based state premerger notification filing requirement. For additional information on Washington's state filing requirements, see [Washington State Adopts First Broad State Antitrust Premerger Notification Act and Filing Requirement](#), in the May 2025 *Quorum*. For additional information on Colorado's state filing requirements, see [Colorado and Washington State Antitrust Premerger Notification Filing Requirements Are in Effect](#), in the September 2025 *Quorum*.

Other states – Hawaii, Indiana, Nevada, New York, Utah and West Virginia – and the District of Columbia are currently considering, or have recently considered, adopting a state-specific version of the [Uniform Antitrust Pre-Merger Notification Act](#).

Many states have adopted premerger notification statutes for healthcare transactions; for more information, and for a longer discussion of state legislative interest in adopting state-specific pre-merger notification statutes, see [Washington State Adopts First Broad State Antitrust Premerger Notification Act and Filing Requirement](#), in the May 2025 *Quorum*.

Counsel Bilal Sayyed Joins ABA Podcast to Discuss Prior Approvals in Merger Consent Settlements

Corporate and Antitrust Counsel Bilal Sayyed was interviewed on the ABA Antitrust Section's [Our Curious Amalgam](#) podcast about the use of **prior approval** requirements in merger consent orders, their effect on the merging parties' future acquisition efforts, and whether the Trump Administration antitrust leadership has adopted different policies than the previous administration.

Bilal had [previously written](#) about the Trump Administration's movement away from including prior approval requirements in merger settlements in the [July 2025 Quorum](#), but the podcast describes how the Administration's position has evolved into a case-by-case approach to the proper use of such provisions.