January 13, 2025

Business Groups File Suit Seeking to Set Aside New HSR Rules

- Business groups led by the U.S. Chamber of Commerce brought an action in federal court in Texas seeking to set aside and enjoin enforcement of the new rules governing premerger notification under the HSR Act.
- The rules are set to go into effect on February 10, 2025, but it is possible that this date could be postponed by intervening events related to the lawsuit. We expect more clarity about the effective date in the days and weeks ahead.

On January 10, 2025, the U.S. Chamber of Commerce, Business Roundtable, American Investment Council and a local chamber of commerce filed a complaint challenging the new Hart-Scott-Rodino (HSR) rules governing premerger notification. Plaintiffs allege that the new rules violate the Administrative Procedure Act (APA) and are asking the court to set them aside and enjoin their enforcement. The complaint was filed in the U.S. District Court for the Eastern District of Texas, Tyler Division, and names as defendants the Federal Trade Commission (FTC) and the outgoing FTC chair in her official capacity.

The new rules were published in the *Federal Register* on November 12, 2024, with an effective date of February 10, 2025. If they become effective in their current form, the rules would significantly increase the burden of premerger notification requirements on deal parties. Those involved in deals expected to sign on or after the effective date have been operating under the assumption that they will have to meet the new requirements. However, the lawsuit raises the possibility that the new rules—or at least some parts of them—never go into effect. In addition to challenging the rule as a whole, the complaint challenges specific requirements, including requirements for disclosure of officers and directors, submission of a substantive antitrust analysis, production of drafts of documents "shared with any member of the board of directors (or similar body)," production of certain ordinary-course plans and reports provided to the CEO or board of directors, submission of information about "existing or potential purchase or supply relationships between the filing persons," and submission of information on sales and customers outside the United States.

The APA offers two potential ways to postpone the effective date of the rule pending judicial review: (1) "when an agency finds that justice so requires, it may postpone the effective date of action taken by it"; or (2) "to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." As of this publication, plaintiffs have not requested interim relief from the court. However, on January 20 (or shortly thereafter), Commissioner Andrew Ferguson is expected to be designated as chairman of the FTC by the next President, and this may vest him with authority to postpone the effective date of the rule if he finds that "justice so requires" it. A postponement would also be consistent with the "regulatory freeze" anticipated at the beginning of the next administration.

Asserted Violations of the Administration Procedure Act

According to the complaint, the new HSR rules "should be set aside under the APA" for several reasons, including that they exceed the FTC's rulemaking authority under the HSR Act and that several of the FTC's actions were arbitrary and capricious, including its determination that the benefits of the new rules as a whole and of several specific new requirements outweigh their costs, its explanation that the deficiencies of the current regime justify the unprecedented expansion of regulation, and its

rejection of less burdensome alternatives and existing tools for obtaining information such voluntary access letters as second requests.

The FTC Lacks Authority to Issue the New Rule
The complaint asserts that the HSR Act authorizes the FTC only to require the information and documents that are "necessary and appropriate" to determine whether a transaction may, if consummated, violate the antitrust laws. Specifically, the complaint challenges the FTC's authority to collect director and officer information for assessing potential Clayton Act Section 8 interlocking directorates because under the HSR Act the FTC "may only request information that is 'relevant to a proposed acquisition'" rather than to enforce Section 8.

Additionally, the complaint challenges the FTC's authority to require descriptions of transaction rationales and competitive and supply relationships on the basis that "[t]he text, structure, and purposes of the HSR Act make clear that the statute does not permit the FTC to require substantive legal analysis as part of the 'information' that must be submitted in the 'premerger notification,'" noting that "[w]hen drafting the HSR Act, Congress considered and specifically rejected a more intrusive premerger clearance or approval regime, like those that have since been adopted in other jurisdictions such as the European Union."

The FTC's Rulemaking was Arbitrary and Capricious
The complaint asserts that the FTC is limited "to requiring information that will not impose a higher cost to compile and produce than it reasonably returns in benefit to the antitrust agencies or the public" and further that "the FTC never concluded that the benefits of the Rule actually outweigh its costs." The complaint notes that the FTC itself estimates that the rules will more than quadruple the amount of time and expense it takes to prepare the form, and even that assessment is "far too low." It alleges that the new rules taken together as well as many of the specific new requirements fail any reasonable cost-benefit test. For example, the complaint alleges that requirement to file any transaction-related documents, even mere drafts, shared with any member of the board of any entity within the filing person would be "enormously burdensome" and would outweigh any benefit of the requirement. Thus, according to the complaint, the rulemaking process was arbitrary and capricious.

The plaintiffs also assert that the FTC's rulemaking process was arbitrary and capricious because the FTC did not provide hard evidence of the inadequacy of the existing HSR rules, nor did it adequately justify departing from the long-standing and, in the FTC's own words, "successful" program of 45 years. According to the complaint, "[m]ost striking, despite being challenged to do so by many commenters" is that "the Final Rule never identifies a single transaction that the FTC now thinks it might have stopped, or at least investigated further, with the new information the Rule adds to the premerger notification form."

The complaint also alleges that, "[t]he Final Rule does not reasonably explain why the blunt instrument of the Rule is preferable to a far more targeted, less burdensome approach: simply increasing the FTC and DOJ's use of their myriad other tools for collecting the information and documents they purportedly need" to the extent, after an initial screen, they determine a proposed transaction warrants further investigation. Given that 85% of the HSR reportable transactions get "nothing but a cursory glance" and only "around two percent of all deals even get what's known as a Second Request," all the "flood of new information and documents" will do, is slow down the agencies' analysis rather than improve on an "excellent track record."

The plaintiffs also note the detrimental impact the new rule will have on businesses and the broader economy. Beyond the direct compliance costs the new rules will impose on both large businesses and smaller companies and entrepreneurs, the Complaint flagged the indirect cost of significantly extending and delaying reportable deal's timelines, increasing financing and confidentiality risks and diverting valuable resources to compliance activities rather than value creation.

Key Takeaway
For the time being, parties who anticipate signing deals after February 10 should presume that they will be subject to all of the new, more onerous filing requirements. The complaint was filed one month before the current effective date of February 10, 2025. Final adjudication on the merits is highly unlikely to occur before that date. However, the lawsuit introduces the possibility

that the effective date of some or all of the new rules could be postponed pending review by judicial or administrative action. But unless and until then, parties should be prepared to operate under the new rules.

The judicial route to postponement by preliminary injunction would require a motion by the plaintiffs and could take the better part of a month to reach a decision, depending in part on the briefing schedule set by the court. The court could issue a temporary restraining order much sooner, assuming one is requested and the relevant factors are met. The administrative route to postponement, if available, could be much quicker, potentially giving parties notice on January 20 or shortly thereafter that they will not have to comply with the new rules during the pendency of the litigation. A "regulatory freeze" on January 20 could also cause a delay of the effective date of the rules. We will continue to monitor developments and update accordingly.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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