

November 14, 2024

## New HSR Rules, and Impact of Change in Administration

As noted in our previous [alert](#), the Federal Trade Commission (“FTC” or “Commission”) with the concurrence of the Department of Justice (“DOJ”) announced final HSR rules that will meaningfully expand the disclosure requirements for filing persons, and require significantly more time to prepare filings. The new rules were published in the Federal Register on November 12, 2024, with an effective date of **February 10, 2025 (the “Effective Date”)**.

With the recent election results, potential filing parties may be asking what impact – if any – the change in administration might have on the implementation of these rules. We advise that filing parties continue to prepare for the HSR changes under the assumption the rules will become effective for all filings submitted on or after the Effective Date. Below are some FAQs regarding expectations and explaining why we think delay or rescission is unlikely.

- 1. *What if I file before the Effective Date, but my deal closes after the Effective Date?*** Only filings made on or after the Effective Date will need to conform to the new rules. However, one uncertainty is how “pull and refiles” will be treated. For example, if parties file before the Effective Date, but the waiting period – and thus the pull and refile – happens after the Effective Date, do they need to comply with the new form? We expect the FTC to issue guidance addressing this situation ahead of the Effective Date.
- 2. *How long will it take to prepare a filing?*** The FTC estimates (probably conservatively), that preparation of an HSR filing will take, on average, triple the amount of hours it takes today. Practically, until we develop precedential materials for repeat filers, we expect HSR notifications will take roughly three to five weeks to prepare and will require significant client engagement. Given the increased time needed to prepare filings, and because some of the requirements are conditional on other items (like whether there is an overlap between the parties), parties will need to begin HSR preparation early in the deal planning process. Also, while parties get accustomed to the new regime, deal agreements should revert to a “promptly as practicable” deadline for submission of HSR filings (rather than a set number of days).

3. **Post-inauguration, could the FTC simply revoke the rule?** Yes, but not “simply.” To revoke the rule, the Commission would need to vote to rescind the rule, and then use the notice and comment process to make the change. (This is also true of any amendments to the rule.) The notice and comment process would require notice in the Federal Register of the proposal to repeal the rules (including an explanation as to why), and a comment period to allow the public to comment on the proposal. Following the comment period, the FTC could vote to issue a final rule repealing the rulemaking.

The FTC periodically undertakes a systematic review of its rules, and has [rescinded rulemakings previously](#) – exclusively in the consumer protection field (e.g., deceptive or misleading practices). However, we think that revocation of this rulemaking in the short- to medium-term is very unlikely for the following reasons.

- The final rulemaking was approved by the Commission by a 5-0 vote after a bi-partisan effort among the Commissioners to address comments about the potential burdens of the original proposed rule. Further, the Republican Commissioners noted that the rulemaking was “consistent with the Agencies’ statutory grant of authority, but will also close certain informational gaps that affect the agencies’ ability to conduct effective premerger screening.”<sup>1</sup> An about-face by the Republican Commissioners that voted in favor of the rulemaking would be inconsistent with their separate statements acknowledging the need for the rules and the Commission’s attempts to better balance the burdens against the FTC’s and DOJ’s lawful authority.
  - Chair Lina Khan’s term technically expired on September 26, 2024. However, she can remain as Chair until the change of administration, at which time, a Republican will be appointed as Acting Chair. Chair Khan has not announced her plans for leaving or staying at the FTC as a Commissioner. However, even if she were to leave the FTC, only four (of five) Commissioners will remain – two Republicans and two Democrats – likely leading to two-two stalemates for which the Commission would take no action.
  - Even in a hypothetical scenario where the FTC moves to rescind most of the rulemaking, the rules regarding information about subsidies from foreign entities and governments of concern and countervailing duties will likely survive as they were mandated by Congress in the Merger Filing Fee Modernization Act of 2022.
4. **What can Congress do?** The Congressional Review Act (“CRA”) requires the FTC to submit the final rulemaking to Congress and the Government Accountability Office prior to the rules taking effect. (As of November 14, 2024, the FTC has not submitted the rulemaking to either, although, we would expect this to occur soon.) Upon receipt of a final rule, any Member of either the House of Representatives or the Senate may submit a joint resolution disapproving the rule. Similar to passing a piece of legislation, submitting a joint resolution of disapproval must pass the House and Senate and be signed by the President, enacted over the President’s veto, or become law without the President’s signature. If a joint resolution of disapproval is enacted, it invalidates the entire rule, and the FTC cannot enact a substantially similar rule in the future.

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<sup>1</sup> Statement of Commissioner Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules Commission File No. P239300, October 10, 2024, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-hsr-rule-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf); Concurring Statement of Commissioner Andrew N. Ferguson In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803 Matter Number P239300, October 10, 2024, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-final-hsr-rule-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-final-hsr-rule-statement.pdf).

Because the rules will be submitted to Congress so late in the current legislative session, the next Congress will have the opportunity to review the rules beginning on the 15th day of session in the Senate and the 15th legislative day in the House. They then have 60 continuous in-session days (in the Senate) or legislative days (in the House) to review the rules. (Please note that 60 days for this purpose is, in practice, more than 60 days.) Had the FTC submitted the rulemaking to Congress before mid-May of 2024, the current Congress would have had the opportunity to review the rule, and it would not have been subject to review by the new administration.

Members of Congress have introduced over 200 joint resolutions of disapproval for more than 125 rules since the CRA's enactment in 1996, but has only successfully overturned about 19 rules (16 rules promulgated in the Obama administration, and three rules promulgated by the first Trump administration).<sup>2</sup> However, it is unclear how high of a priority this will be for the next administration.

5. ***Can the new administration issue an Executive Order or take action to freeze the pending changes?*** This would raise challenging procedural questions given the independence of the FTC (over which the Executive Branch technically has no purview). It is common for a new administration of a different political party than the prior administration to issue a memorandum requesting (but not mandating) a “regulatory freeze pending review” that, in part, delays the effective date of any rules published in the Federal Register, but not yet effective. For at least the past three administrations, this memorandum has been addressed to the “Heads of Executive Departments and Agencies”<sup>3</sup> – which excludes independent agencies like the FTC. We would expect a second Trump administration to issue a similar memorandum, but cannot rule out taking a different or more aggressive approach.
6. ***Could someone sue to challenge the rulemaking?*** Yes, but filing a complaint will not immediately pause implementation of the rules (although a Plaintiff could seek a stay or preliminary injunction in the interim). As of November 14, 2024, no such lawsuits have been filed, and the ultimate probability of success is unclear.
7. ***Will the FTC’s Premerger Notification Office (“PNO”) provide additional guidance as to how to interpret the new rules?*** Yes. On November 12, 2024, the PNO [advised](#) that it will post a detailed overview of the changes on its [website](#), as well as invite practitioners to submit questions of broad applicability, and PNO staff will respond and post answers on the website. The PNO further noted that it will be updating other form-related guidance and tips “as quickly as practical.”

**Bottom line: we expect the new rules to take effect on February 10, 2025.** We believe it is highly unlikely the FTC will revoke the rule, and while a joint resolution of disapproval under the CRA is possible, we do not think it is likely given other priorities the new administration is expected to have. We are happy to discuss further the specific requirements and impacts on deals that the new rulemaking will have. We expect the FTC to issue additional guidance regarding the application of the rules over the next month or two, and will keep clients apprised of any meaningful updates.

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<sup>2</sup> See <https://www.ncsl.org/state-federal/congressional-review-act-overview-and-tracking>.

<sup>3</sup> See e.g., <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>, <https://www.federalregister.gov/documents/2017/01/24/2017-01766/memorandum-for-the-heads-of-executive-departments-and-agencies-regulatory-freeze-pending-review>.

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