

FTC Invites Public Comments on Proposed Changes to HSR Rules

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Updated from the November 9, 2020 Alert

UPDATE: The [Notice of Proposed Rulemaking \(NPRM\)](#) and [Advanced Notice of Public Rulemaking \(ANPRM\)](#) were published on December 1, 2020. Comments on the NPRM and the ANPRM must be received on or before February 1, 2021.

The Federal Trade Commission (FTC) hosted three public [Question and Answer sessions](#) as part of its ongoing HSR Rulemaking initiative. The Q&A sessions addressed the sweeping changes to the Hart-Scott-Rodino Act (HSR) rules proposed by the FTC, with the concurrence of the Antitrust Division of the U.S. Department of Justice (DOJ), in a Notice of Proposed Rulemaking and the additional changes contemplated by an Advanced Notice of Public Rulemaking that was also put forth by the FTC and the DOJ.

THE NOTICE OF PROPOSED RULEMAKING

The [Notice of Proposed Rulemaking \(NPRM\)](#) proposes two significant amendments to the HSR rules, which would expand the reporting requirements for certain transactions and exempt other transactions from the obligation to file.

- First, the FTC proposes changing the definition of “person” to include HSR associates. This proposed change will result in certain acquisitions which are not currently HSR-reportable becoming reportable (especially those involving investment entities).
- Second, the FTC proposed adding a new HSR *de minimis* exemption that would apply to acquisitions of 10 percent or less of a company’s voting shares so long as the acquiring person does not currently have a “competitively significant relationship” with the company. The FTC’s proposed approach to assessing “competitively significant relationships,” however significantly limits the number of transactions that could actually qualify for this exemption.

It is worth noting that the NPRM was approved by the FTC on a 3-2 party-line vote. Commissioners [Chopra](#) and [Slaughter](#) both voted against the NPRM and released dissenting statements.

On November 9, 2020, FTC staff answered questions related to the proposed change to the definition of “person” and the types of information about associates that would be required by the proposed rule changes in the NPRM. A video recording of this Q&A session is available [here](#).

On November 10, 2020, FTC staff answered questions about the proposed expansion of the *de minimis* exemption for acquisitions of 10 percent or less. A video recording of this Q&A session is available [here](#).

THE ADVANCED NOTICE OF PUBLIC RULEMAKING

The [Advanced Notice of Public Rulemaking \(ANPRM\)](#) seeks to gather information on seven additional topics that the FTC will use to help determine if future amendments to the premerger notification program should be proposed. The agency is reviewing potentially making changes to how the size-of-transaction is calculated for analysis of reporting obligations; treatment of real estate investment trusts; treatment of “non-corporate” entities such as limited partnerships and limited liability companies; potential additional exemptions relating to minority or *de minimis* acquisitions; treatment of non-voting interests; devices for avoidance; and changes to the filing process. The agency is in the early stages of reviewing potential changes in these areas, and any changes to the HSR rules in response to the information gathered by the ANPRM are not expected to be proposed for some time.

Unlike the NPRM, the FTC unanimously approved publication of the ANPRM.

Both the NPRM and ANPRM contain proposed or potential rule changes that could have a significant impact on financial investors in particular, such as the requirement to examine other funds under management when determining HSR filing obligations, the competitive effect of an investor holding small minority positions in issuers that operate competing lines of businesses, whether passive investor exemption should be rethought, and whether the acquisition of convertible voting securities or the use of board observers should be reportable events.

On November 16, 2020, FTC staff answered questions related to the ANPRM. A video recording of this Q&A session is available [here](#).

PUBLIC COMMENTS

The public is welcome to provide comments on either of the proposed amendments identified in the NPRM and any of the topics covered by the ANPRM, or on any sub-topic within them. Public comments must be received on or before February 1, 2021.

If you have any questions or would like to participate in the Public Comment process, please contact [Austin A.B. Ownbey](#) or your Foley Hoag attorney.

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