Paul, Weiss

Client Memorandum

April 13, 2026

FTC and DOJ Seek Public Comment on HSR Form and Scope of Longstanding Exemptions

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On March 25, 2026, the Federal Trade Commission and the Department of Justice Antitrust Division (together, the "Agencies") issued a joint Request for Information ("RFI") seeking public comment on the effectiveness of the revised Hart-Scott-Rodino ("HSR") Premerger Notification and Report Form ("2025 Form"), which was made effective on February 10, 2025, but vacated by a federal district court in February 2026. Regardless of the outcome of the pending appeal over the 2025 Form, the Agencies are considering a new rulemaking to modify the vacated 2025 Form and potentially eliminate or reduce the scope of several longstanding HSR exemptions. Several items in the RFI stand out as having potentially significant consequences for non-US investors and parties engaged in real estate, defense and technology investments and minority acquisitions.

Key Takeaways

The RFI suggests that the Agencies are pursuing a two-track strategy in the next HSR rulemaking: seeking to reduce burdens for clearly non-problematic transactions while simultaneously expanding the reach of the HSR regime to capture a wider universe of transactions and more granular information. The RFI is intended to inform the Agencies' consideration of a possible new rulemaking, which could take at least nine months to become effective. Some key takeaways are as follows:

- **Increased HSR disclosure cost and burden.** Several of the proposals—CFIUS- and sovereign wealth-related disclosures, Department of War ("DOW") contracting information and AI-use disclosures—would layer additional compliance requirements.
- **More transactions subject to HSR filing.** The potential re-examination of the passive investment exemption, real estate and REIT exemptions, and the potential capture of traditionally non-reportable transactions (such as acquihires and convertible security transactions) could result in a significant increase in the number of HSR-reportable transactions. This translates directly into more burden, time and expenses for parties.
- **Strategic implications for deal structuring.** If the Agencies move forward with rules addressing "non-traditional" transaction structures, parties will need to carefully evaluate whether certain deal structures could trigger HSR filing requirements—including so-called "acquihires/reverse acquihires," convertible financings, licensing arrangements and other instruments commonly used in technology, venture capital and private equity transactions.

Background

After over a year in the making, the significantly expanded 2025 Form took effect on February 10, 2025. On February 12, 2026, a federal district court in the Eastern District of Texas vacated the 2025 Form, and on March 19, 2026, the Fifth Circuit denied the FTC's motion for a stay pending appeal. As a result, the Agencies are currently accepting filings under the prior, pre-2025 Form. On March 25, the Agencies jointly launched the RFI and the FTC stated that it "continues to believe that the information

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required by the prior, nearly 50-year-old form was insufficient to review modern mergers and acquisitions" and is "considering engaging in a new rulemaking process" irrespective of the outcome of the appeal.

Key RFI Proposals and Client Implications

- **Expanded Scope of the HSR Form: CFIUS, Foreign-Government, Sovereign Wealth Fund Disclosures**

The Agencies are considering whether to require filers to disclose information regarding their compliance with the Committee on Foreign Investment in the United States ("CFIUS") regime, including compliance with Section 721 of the Defense Production Act of 1950 and any CFIUS mitigation terms. The Agencies are also evaluating whether the current Form adequately captures the relationship between sovereign wealth funds and their affiliated sovereigns, and whether additional information should be required.

This proposal could effectively add a CFIUS and foreign investment compliance requirement onto the HSR process. For non-U.S. parties—including private equity sponsors backed by significant foreign limited partners, sovereign wealth funds and portfolio companies with foreign government-affiliated investors—this proposal could materially increase both the cost and complexity of HSR filings. Parties would potentially need to coordinate their CFIUS and HSR analyses simultaneously, and the HSR filing could become a vehicle through which the Agencies identify transactions that may warrant CFIUS review, including transactions that are subject to only voluntary CFIUS filing requirements.

- **Expanded Disclosures for Department of War Contracts**

The Agencies are contemplating whether to require filers to disclose information about their contracts with, or direct and indirect sales to, DOW, regardless of whether there is currently a horizontal competitive overlap between the merging firms. This represents a notable expansion of the vacated 2025 Form, which required DOW-related disclosures only where there was a horizontal overlap. For defense contractors and companies in adjacent supply chains, this proposal would increase disclosure burdens on all HSR-reportable deals regardless of the antitrust risks associated with the transactions.

- **Review of the Scope of the Investment-Only Exemption**

The agencies are considering whether to make explicit that the passive investor exemption "does not apply 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 how often investors are "taking significant stakes in the same entity using different investment vehicles," and what impact this has on effective premerger review.

The passive investor exemption is one of the most widely used exemptions in the investment community. This exemption allows investors to acquire a less than 10% stake in companies, without an HSR filing. For institutional investors, asset managers and private equity firms, any narrowing of this exemption could increase the number of HSR-reportable transactions, imposing substantial filing fees, legal costs and transaction timing delays on transactions that were previously exempt.

- **Closing the Gap on Non-Traditional Transaction Structures: Acquihires and Convertible Securities**

The Agencies are evaluating whether to capture "non-traditional transaction structures" that are currently not reportable under the HSR Act but that "have the practical effect of eliminating a market participant." Specific structures called out in the RFI include: (1) "acquihires" and "reverse acquihires," including non-exclusive licensing agreements that leave the acquired entity intact but not competitively viable; and (2) purchase or sale of convertible securities that allow parties to consummate transactions meeting or exceeding reporting thresholds without triggering HSR filing obligations.

For technology companies, venture capital and private equity investors, and parties that frequently use convertible instruments (including convertible notes and SAFEs), this could result in a material increase in filing obligations, additional deal costs and greater scrutiny and timing delay of novel deal structures. Companies that have historically relied on the structuring flexibility of convertible instruments and talent acquisitions would need to reassess their transaction strategies.

- **Potential Elimination or Narrowing of Real Estate and REIT Exemptions**

The RFI asks whether the longstanding real estate exemptions and REIT exemptions of the HSR rules should be removed entirely or re-evaluated. These exemptions have historically reflected the view that real estate acquisitions are "unlikely to violate the antitrust laws." The Agencies now question whether this assumption remains valid, in part because of President Trump's January 2026 executive order directing the Agencies to "review substantial acquisitions, including series of acquisitions, by large institutional investors of single-family homes in local single-family housing markets for anti-competitive effects."

Removal of the real estate exemptions would have a sweeping impact on the real estate industry. Real estate funds, developers, institutional investors and REITs could face a dramatic increase in HSR-reportable transactions. For large institutional investors that engage in high-volume real estate acquisitions—particularly those purchasing single-family homes at scale—the cost and administrative burden could be substantial.

- **Structural Transaction Modifications and Late-Stage Remedies**

The RFI raises the prospect of requiring new or supplemental HSR filings when parties propose structural modifications to a transaction—including divestitures or other remedies—during a Second Request investigation or after the Agencies have commenced enforcement litigation. The Agencies note that late-proposed remedies may "significantly alter the competitive analysis of the transaction as originally proposed" and that the Agencies currently lack "a mechanism for extending the waiting period in order to obtain documents and information sufficient to evaluate the altered transaction or divestiture."

If adopted, this proposal would effectively create a new filing trigger for remedy proposals, potentially requiring parties to submit detailed information about divested and retained assets, standalone viability analyses, transition service arrangements and proposed divestiture buyers. This could significantly complicate and slow down the negotiation of consent decrees and fix-it-first remedies, and may discourage parties from proactively offering remedies to resolve agency concerns—an outcome the Agencies themselves acknowledge. Parties would also be required to pay additional HSR filing fees, which are currently as high as $2.46 million for transactions valued at or greater than $5.869 billion.

Submission Deadline

Comments must be submitted by **May 26, 2026, at 11:59 p.m. ET** via **Regulations.gov**. Submissions will be posted publicly. The comments period represents a meaningful opportunity for affected parties to shape the outcome. Given the breadth of the RFI and the Agencies' express invitation for data on costs and burdens, well-supported comments could influence which proposals advance and in what form.

We are closely monitoring these developments and are available to assist clients in assessing the potential impact of these proposals and, where appropriate, preparing comments for submission to the Agencies.

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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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