

Changes to Reporting Requirements for US Defense Transactions

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The National Defense Authorization Act was revised in December to state that parties to an HSR-reportable transaction that “will require a review by the Department of Defense who are required to file the notification and provide supplementary information to the Department of Justice or the Federal Trade Commission . . . shall concurrently provide such information to the Department of Defense during the waiting period . . .” This revision is intended to assist the Department of Defense (DOD) identify transactions that threaten to harm competition in the defense industrial base. But it is unclear which transactions “will require a review” by DOD and thus invoke the notice requirement, because there is currently no mandatory trigger for DOD review of transactions.

Instead, the DOD’s Industrial Base Policy M&A Office has discretionary authority to assess transactions involving “major defense suppliers,” defined under DOD Directive 5000.62 as, “any prime contractor or subcontractor that the Secretary of Defense, the Deputy Secretary of Defense, the USD(AT&L), or the DASD(MIBP) designates as a main source of supply.” In addition, there are certain classes of contractors considered major defense suppliers without the need for specific designation. There is additional ambiguity around whether notice is required for all HSR-reportable transactions or only those where “supplementary information” has been required to be submitted to the antitrust agencies. In other words, based on the language of the statute, it is arguable that the triggering event for DOD notice is not the HSR filing but instead the opening of an investigation and the provision of information during the waiting period to supplement the HSR filing.

Neither the Premerger Notification Office nor DOD have issued official guidance on how to interpret this language or the mechanics of how such notice would be made. Parties engaged in transactions connected to the defense industry should consult experienced antitrust counsel to assess reporting requirements.

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