

When Will the HSR Rules Be Effective?

A photograph of a modern building's curved glass facade, showing multiple stories with dark window frames and light-colored glass panels, set against a clear blue sky.

3 MIN READ

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The HSR Rules have now been published in the Federal Register, which puts them on track to be effective on February 10, 2025. But with the upcoming change in administration, could there be further delays?

Following a curiously long period after the announcement of the new HSR rules on October 10, the new HSR Rules and Statement of Basis and Purpose (the long explanatory document accompanying the formal rule changes) were published in the [Federal Register](#) on November 11. This kicks off a 90-day period before the Rules are finally effective: February 10. But will the new rules actually come into effect in February?

Unless you were on a silent retreat last week, you may have heard that we will have a change of administration in January. With the previous three transitions between Democrat and Republican leadership - Bush to Obama, Obama to Trump, and Trump to Biden - the White House has issued a regulatory freeze. The January 20, 2017, [White House Memorandum for the Heads of Executive Departments and Agencies](#) from then-Chief of Staff Reince Priebus directed executive departments and agencies to put on hold new regulations “to ensure that the President’s appointees or designees have the opportunity to review any new or pending regulations.” With respect to regulations that had already been published in the OFR but have not taken effect, the Memorandum directs that executive departments and agencies “temporarily postpone their effective date for 60 days from the date of this memorandum ... for

the purpose of reviewing questions of fact, law, and policy they raise.” The memorandum goes on to request that “where appropriate,” agencies “consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period,” and further “consider potentially proposing further notice-and-comment rulemaking.”

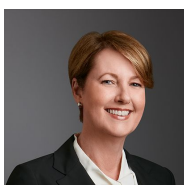
While the Federal Trade Commission is an independent agency, it could arguably be hard to resist a Presidential request. But, agencies don’t always follow such directives. In 2021, following a similar request for a regulatory freeze from the incoming Biden administration, the Securities and Exchange Commission did not freeze its pending Regulation Crowdfunding rulemaking. The rulemaking had been finalized in November 2020, published in the OFR, and was due to become effective on March 15. The top Republican on the House Financial Services Committee, Rep. Patrick McHenry, publicly urged the SEC to resist political pressure to delay the implementation of the new rule, saying that to do so would undermine the SEC’s “status and structure” as an independent agency. The SEC did not freeze the rule and it came into effect on schedule on March 15.

While the HSR changes represent a complete overhaul of the HSR filing rules, and will lead to significantly more work for filing parties, the HSR rulemaking was in the end a bipartisan proposal, endorsed by the two Republican commissioners. For example, while Commissioner Ferguson noted that while it was not “the rule I would have written if the decision were mine alone,” he would have preferred “deeper cuts” from the original proposals, it was “the product of reasoned decisionmaking” and “necessary and appropriate.” Similarly, Commissioner Holyoake said that the rule “does not align exactly with my preferences,” but also endorsed the final version after it had been considerably scaled back. Both Commissioners expressed the need to see how the changes play out in practice so that the operation of the provision and the reality of the burden on filing parties can be assessed and if necessary changes made.

Senator Ted Cruz also weighed in on the FTC’s work pending the transition yesterday with a letter to Chair Khan requesting that the FTC “immediately stop all work on outstanding rules, regulations, and guidance and focus only on matters that are uncontroversial and would be approved unanimously by all Commissioners.” The HSR rules were passed unanimously, so it appears would not fall under Senator Cruz’ exhortation.

On balance, it is hard to see why the HSR Rules would be delayed, particularly given the buy-in by the Republican commissioners. The FTC staff clearly believes that the new HSR Rules are a reality, and are preparing for day 1 with blog posts and upcoming open meetings. Merger filers should get ready now for big changes.

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