

D.C. Circuit Upholds FTC Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry

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In November of 2013, the Federal Trade Commission (“FTC”) [promulgated a rule](#) that required a Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”) filing when a transaction resulted in the transfer of “all commercially significant rights” to a pharmaceutical patent. Previously, no HSR filing was required if the licensor retained certain rights, such as the right to manufacture solely for the licensee. The FTC’s new rule reflected its conclusion that for purpose of evaluating the impact on competition of the transfer of pharmaceutical patent rights, the critical focus should be on whether the licensee received the right to direct all sales of and marketing efforts for the licensed product. On June 9, 2015, a [D.C. Circuit panel](#) held that the agency had acted within the scope of its authority in promulgating a rule which applied only to a particular industry. The court further held that the FTC had not acted in an “arbitrary and capricious” manner as had been alleged by the Pharmaceutical Research and Manufacturers of America (“PhRMA”) in its challenge to the new rule.

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