

# DoD Issues Guidance on Pre-Merger Filings for Defense-Related M&A Transactions

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**PRACTICES** Government Contracts Transactions, Antitrust and Competition, Mergers and Acquisitions, Regulatory Compliance, Government and Public Policy, Government Contracts

On Feb. 2, 2026, the Department of Defense (DoD) issued guidance on its website regarding DoD review of mergers and acquisitions under Section 857 of the Fiscal Year 2024 National Defense Authorization Act, identifying a non-exhaustive list of the types of transactions that may require DoD review.<sup>1</sup>

Section 857 provides that “parties to a proposed merger or acquisition that *will require a review by [DoD]* who are required to file the notification and provide supplementary information to the Department of Justice or the Federal Trade Commission under section 7A of the Clayton Act” must “concurrently provide such information to [DoD] during the waiting period under section 7A of the Clayton Act.” (Emphasis added, internal citations omitted). Over the past two years, DoD has regularly emailed parties to proposed mergers or acquisitions that have submitted pre-transaction filings to the Federal Trade Commission (FTC) and Department of Justice (DOJ)—that is, Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) filings— and requested copies of the pre-transaction filings. DoD’s requests generally cite Section 857 and suggest that compliance is mandatory.

Section 857, however, does not “require a review” by DoD of proposed mergers or acquisitions, nor does any other law, regulation or DoD policy or directive. For example, DoD’s Office of Global Investment and Economic Security, part of the Office of Industrial Base Policy, reviews some transactions according to criteria set forth in an internal DoD issuance, [Directive 5000.62](#).<sup>2</sup> But even that internal directive does not identify when DoD reviews are required.

Apparently recognizing that industry may need guidance on when a merger or acquisition will require a review by DoD, DoD’s Global Investment and Economic Security Office M&A Team has now published “Criteria and Instructions for Parties to M&A Transactions to Notify the Department of War,” i.e., DoD. The guidance states:

The below criteria are not exhaustive of all M&A transactions that may require [DoD] review per section 857 of the National Defense Authorization Act for Fiscal Year 2024.

1. **Defense Directed Business:** Either party currently, has a history of, or intends to contract with the DoW or perform as a subcontractor on a DoW contract.

2. **Critical Technologies:** The M&A transaction involves one of the six critical technologies vital to U.S. national security.

- Applied Artificial Intelligence
- Biomanufacturing
- Contested Logistics Technologies
- Quantum and Battlefield Information Dominance

- Scaled Hypersonics
- Scaled Directed Energy

3. **Defense Industrial Base Sector:** The M&A transaction involves aspects of the Department of Homeland Security's Defense Industrial Base critical infrastructure sector.

4. **Intellectual Property:** One or more of the parties have patents, trademarks, copyright protections, or trade secrets in the above critical technologies or critical infrastructure.

The guidance directs parties to M&A transactions that meet "one or more of the above criteria" to send an email to the DoD M&A Division: (1) stating "that the party is contemplating or engaging in an M&A transaction that may require premerger review" and (2) confirming "whether the party submitted the Notification and Report form to the DOJ and/or FTC." The agency "will respond within one business day with instructions for submission of the Notification and Report form and additional materials to the [DoD] through secure channels." Note that the guidance suggests advance notice may be appropriate, asserting that a party "must" inform DoD whether "the party is *contemplating or engaging* in an M&A transaction . . . ." Section 857, however, on its face only requires a party to "concurrently provide . . . information to [DoD] during the waiting period . . . ."

The guidance also provides the option for parties who are "unsure whether a transaction meets the criteria" to contact the DoD M&A Division.

## Conclusion

It appears DoD anticipates its review of HSR filings may be necessary whenever any party to a merger or acquisition transaction participates in, or intends to participate in, the defense market—or when the transaction involves enumerated critical technologies, critical infrastructure, or associated intellectual property. Parties to such transactions are on notice that DoD expects to be provided copies of HSR filings and would prefer to receive advance notice that such a transaction is contemplated.

The guidance provides helpful clarity on DoD's expectations, even if not necessarily mandated by law. Meeting DoD's expectations may help expedite deal timing by allowing parties to involve DoD at an early stage and provide the agency with the information it needs to determine whether to weigh in on a transaction.

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<sup>1</sup> U.S. Dep't of Defense, IBR-GIES Mergers & Acquisitions, <https://www.businessdefense.gov/ibr/gies/ma/index.html> (last accessed Feb. 5, 2026).

<sup>2</sup> U.S. Dep't of Defense, Directive 5000.62, Review of Mergers, Acquisitions, Joint Ventures, Investments, and Strategic Alliances of Major Defense Suppliers on National Security and Public Interest (Feb. 27, 2017), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/500062p.pdf>.