IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF UNDISPUTED MATERIAL FACTS 2

A. The HSR Act 2

B. The Premerger Regime From 1978-2024 3

C. The FTC Rulemaking 5

STANDARD OF REVIEW 8

ARGUMENT 8

I. THE LONGVIEW CHAMBER HAS STANDING TO CHALLENGE THE RULE 8

II. THE HSR RULE EXCEEDS THE FTC'S STATUTORY AUTHORITY 11

A. The Rule Misinterpreted The Scope Of The FTC's Authority To Determine The Content Of The HSR Form 12

B. At A Minimum, Several New Requirements Exceed The FTC's Authority 17

III. THE HSR RULE IS THE RESULT OF ARBITRARY DECISIONMAKING 19

A. The FTC Failed To Show That The Rule's Benefits Are Worth The Immense New Costs Imposed On Every HSR Filer 20

1. The FTC unreasonably understated the costs of the Rule 20

2. The FTC unreasonably overstated the benefits of the Rule 23

B. The FTC Gave No Reasoned Explanation For Rejecting Less Burdensome Alternatives 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Arcia v. *Florida Sec'y of State*,
772 F.3d 1335 (11th Cir. 2014) 9

Babbitt v. *United Farm Workers Nat'l Union*,
442 U.S. 289 (1979).....9

Chamber of Com. of U.S. v. *CFPB*,
691 F. Supp. 3d 730 (E.D. Tex. 2023).....10

Chamber of Com. of U.S. v. *SEC*,
85 F.4th 760 (5th Cir. 2023) 20, 24, 25

Citizens to Preserve Overton Park, Inc. v. *Volpe*,
401 U.S. 402 (1971).....12

Clapper v. *Amnesty Int'l USA*,
568 U.S. 398 (2013).....9

Consumers' Rsch. v. *CSPC*,
592 F. Supp. 3d 568 (E.D. Tex. 2022).....10

Crawford v. *Hinds Cnty. Bd. of Supervisors*,
1 F.4th 371 (5th Cir. 2021) 9, 11

El Paso Elec. Co. v. *FERC*,
76 F.4th 352 (5th Cir. 2023) 25

Farmers Union Cent. Exch., Inc. v. *FERC*,
734 F.2d 1486 (D.C. Cir. 1984).....27

FCC v. *Fox Television Stations, Inc.*,
556 U.S. 502 (2009).....26

Florida Gas Transmission Co. v. *FERC*,
876 F.2d 42 (5th Cir. 1989) 20

Frame v. *City of Arlington*,
657 F.3d 215 (5th Cir. 2011) 9

Girling Health Care, Inc. v. *Shalala*,
85 F.3d 211 (5th Cir. 1996) 8

Hunt v. *Washington State Apple Advert. Comm'n*,
432 U.S. 333 (1977) 8

Illumina Inc. v. *FTC*,
88 F.4th 1036 (5th Cir. 2023) 19

Jibril v. *Mayorkas*,
20 F.4th 804 (D.C. Cir. 2021) 10

Louisiana ex rel. Landry v. *Biden*,
64 F.4th 674 (5th Cir. 2023) 20

Loper Bright Enterprises v. *Raimondo*,
603 U.S. 369 (2024) 15

Lorillard v. *Pons*,
434 U.S. 575 (1978) 15

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 10, 11

McCardell v. *HUD*,
794 F.3d 510 (5th Cir. 2015) 11

Mexican Gulf Fishing Company v. *U.S. Department of Commerce*,
60 F.4th 956 (5th Cir. 2023) 13, 16

Michigan v. *EPA*,
576 U.S. 743 (2015) 13, 16

Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 24, 25

National Grain & Feed Ass'n v. *OSHA*,
866 F.2d 717 (5th Cir. 1988) 13

National Infusion Ctr. Ass'n v. *Becerra*,
116 F.4th 488 (5th Cir. 2024) 10

In re Navy Chaplaincy,
697 F.3d 1171 (D.C. Cir. 2012) 11

Stringer v. *Whitley*,
942 F.3d 715 (5th Cir. 2019) 9, 11

United Mine Workers of Am. v. *Dole*,
870 F.3d 662 (D.C. Cir. 1989) 12

STATUTES

5 U.S.C. § 706 8

15 U.S.C. § 18a ..... *passim*

15 U.S.C. § 19 ..... 17, 18

15 U.S.C. § 57b-1 28

Pub. L. No. 117-328, 136 Stat. 4459 (2022). 15

Pub. L. No. 106-553, 114 Stat. 2762 (2000) 5, 30

REGULATIONS

Revised Jurisdictional Thresholds for Section 7A of the Clayton Act,
90 Fed. Reg. 7,697 (Jan. 22, 2025) 2

Premerger Notification; Reporting and Waiting Period Requirements,
89 Fed. Reg. 89,216 (Nov. 12, 2024) ..... *passim*

Premerger Notification; Reporting and Waiting Period Requirements,
88 Fed. Reg. 42,178 (June 29, 2023) ..... *passim*

Premerger Notification; Reporting and Waiting Period Requirements,
43 Fed. Reg. 33,450 (July 31, 1978) 3

OTHER AUTHORITIES

H.R. Rep. No. 94-1373 (1976) 2, 5, 19, 24

S. Rep. No. 94-803 (1976) ..... *passim*

122 Cong. Rec. 68 (1976) (statement of Sen. Byrd) 19

146 Cong. Rec. 24253 (2000) (statement of Sen. Hatch) 5

Antitrust Modernization Comm'n, Report and Recommendations (Apr. 2007) 4

Billman & Salop, *Merger Enforcement Statistics: 2001-2020*,
85 Antitrust L.J. 1 (2023) 4

FTC, HSR Report, Annual Report to Congress for Fiscal Year 1977. 15

FTC and DOJ, HSR Report, Annual Report to Congress for Fiscal Year 2001 4

FTC and DOJ, HSR Report, Annual Report to Congress for Fiscal Year 2021 27

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INTRODUCTION

This case concerns the FTC's decision to completely overhaul a federal merger-review process that has worked well for half a century—for no apparent good reason. The Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 requires thousands of parties to mergers and acquisitions each year to file a "premerger notification" (the HSR Form, or Form) with the FTC and Department of Justice. 15 U.S.C. § 18a. Congress envisioned that the HSR Form would facilitate the detection of "illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays." S. Rep. No. 94-803, at 65 (1976). Consistent with that mandate, for 50 years, the Form has required essentially the same limited information and documents: enough for the reviewing agency to determine whether to investigate further, but not so much that the burden of completing the Form would significantly "impede consummation of the vast majority of mergers and acquisitions" that are obviously lawful at a glance. *Id.* at 66. By all accounts, that version of the Form did its job. Just ask the FTC, which as recently as August 2024 proclaimed that the Form "ha[d] been a success" and "ha[d] minimized the number of post-merger challenges the enforcement agencies have had to pursue." FTC, What is the Premerger Notification Program? An Overview 2 (Mar. 2009) (2009 FTC Guide), Ex. 19.[1]

Two months after deleting that language, the FTC adopted a new rule that completely rewrites the HSR Form by massively expanding the amount of material parties must provide, including roughly 20 brand new categories of documents or information. *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024) (Rule). By the FTC's own lowball estimate, the Rule's changes will *more than quadruple* the average time and expense of preparing an HSR filing for thousands of transactions each year. With such an

[1] Exhibit numbers refer to exhibits to the Declaration of Judson O. Littleton, attached to this Motion as Exhibit E.

enormous expansion, one would expect that the prior version of the HSR Form suffered from serious defects. But the FTC has no evidence of any such deficiencies. In fact, the FTC has never identified a *single* transaction that it claims to have missed due to gaps in the HSR Form over the previous decades. Yet the agency chose to drastically increase the filing burden on *all* HSR-reportable transactions, the vast majority of which indisputably pose zero antitrust risk. That tradeoff is not only irrational, but inconsistent with the limits Congress placed on the FTC's authority. Because the Rule exceeds the FTC's statutory authority and reflects arbitrary and capricious decisionmaking several times over, this Court should enter judgment setting it aside.

STATEMENT OF THE ISSUES

1. Whether the Rule exceeds the FTC's statutory authority under the HSR Act.

2. Whether the Rule is arbitrary and capricious in violation of the APA.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The HSR Act

Congress enacted the HSR Act in 1976 to put a stop to "'midnight' mergers," in which companies would merge quickly and in secret before antitrust agencies could even learn about—let alone analyze and then move to block—the transaction. See H.R. Rep. No. 94-1373, at 11 (1976); S. Rep. No. 94-803, at 64-65. The Act imposes a mandatory notification and 30-day waiting period before any merger, acquisition, or similar transaction of a certain size may be finalized. 15 U.S.C. § 18a. For covered transactions, the buyer and (in almost all cases) the seller must each file a "premerger notification" with the FTC and DOJ. *Id.* Today, most deals valued at more than $126.4 million (adjusted annually, *id.* § 18a(a)(2)) must be reported. *See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, 90 Fed. Reg. 7,697, 7,697 (Jan. 22, 2025). Several thousand transactions surpass that threshold each year. *See* 89 Fed. Reg. at 89,219.

To "balanc[e]" the "need to detect and prevent illegal mergers and acquisitions prior to consummation" with the imperative to avoid "unduly burdening business[es] with unnecessary paperwork or delays," S. Rep. No. 94-803, at 65, Congress divided the HSR process into two steps: the initial screen and the "Second Request." The initial screen relies on the "premerger notification" that parties to every reportable transaction must file. 15 U.S.C. § 18a(a). The Act authorizes the FTC to specify the "documentary material and information" that must be submitted in that "notification." *Id.* § 18a(d)(1). But Congress placed limits on what the agency may demand as part of the screen: only "such documentary material and information . . . as is necessary and appropriate to enable the [FTC and DOJ] to determine whether [the proposed] acquisition may, if consummated, violate the antitrust laws." *Id.* Then, if an agency determines during the 30-day waiting period that a particular transaction requires further scrutiny, it may issue a much broader Second Request to the parties. *Id.* § 18a(e). That two-step design ensures that only the handful of transactions that pose a potential antitrust concern are subjected to the more intrusive Second Request process, not the 97% of transactions that sail through.

B. The Premerger Regime From 1978-2024

The FTC published the first version of the HSR Form in 1978. *See Premerger Notification; Reporting and Waiting Period Requirements*, 43 Fed. Reg. 33,450, 33,519 (July 31, 1978). That original Form required a substantial amount of information about the filing party and proposed transaction at issue, including (i) various internal documents about the transaction; (ii) information about the assets or securities to be acquired; (iii) revenues broken down by industry, product class, and product; (iv) geographic areas in which the filer earned revenue in the same industry category as the other party; and (v) other information relevant to the competitive effects of the transaction, such as supply relationships between the parties. *See id.* at 33,520. The FTC explained that these

requests were not "intended to elicit all potentially relevant information," but only those materials necessary for its "initial evaluation of the potential anticompetitive impact of" the transaction. *Id.*

That already robust version of the HSR Form remained in effect with only minor tweaks for the next 46 years. 89 Fed. Reg. at 89,257. That is because the Form enabled the antitrust agencies to reliably identify *ex ante* transactions that raised antitrust concerns. *See* Am. Compl. ¶¶ 52-58 (collecting statements to that effect). In 2007, a bipartisan expert commission unanimously concluded that "the existing pre-merger review system under the HSR Act [was] achieving its intended objectives," including by "ensur[ing] that the agencies [were] aware of nearly every transaction that ha[d] potential to cause competitive harm." Antitrust Modernization Comm'n, Report and Recommendations 152, 158 (2007), Ex. 15. The FTC and DOJ repeatedly agreed, explaining that the HSR Form had been "highly effective" in "giving the government the opportunity to investigate and challenge mergers." FTC and DOJ, HSR Report, Annual Report to Congress for Fiscal Year 2001 at 28 (2001 HSR Report), Ex. 17; *see* Am. Compl. ¶¶ 55-59. Decades of enforcement data prove that consensus. From 2001 to 2020, only about 3% of HSR-reportable transactions triggered a Second Request. *See* Billman & Salop, *Merger Enforcement Statistics: 2001-2020*, 85 Antitrust L.J. 1, 10 (2023). And there were remarkably few false negatives—that is, transactions that did not receive a Second Request that the agencies later sought to unwind. One law-firm commenter put that number at just seven of the nearly 40,000 reported transactions this millennium. Foley Lardner Comment at 2-3 (Sept. 21, 2023), Ex. 9.

Reflecting its already substantial demands, the prior Form also "prompted expressions of concern from the business and legal communities that the program may [have been] overreaching," imposing excessive burdens both on individual filers and the overall economy. 2001 HSR Report at 28, *see* Am. Compl. ¶¶ 63-66 (collecting such statements). Completing the Form would often

take hundreds of hours of attorney and executive time, cost hundreds of thousands of dollars, and extend deal timelines by several weeks. *See* Foley Lardner Comment at 3; Am. Compl. ¶ 63. Congress never intended such costs to fall on thousands of mergers, almost all plainly lawful. The 1976 Congress had expected the Act to cover only "the largest 150 mergers annually," and had recognized that if filing "requirements were imposed on every merger, the resulting added reporting burdens might more than offset" the statute's upside, H.R. Rep. No. 94-1373, at 11; *see* S. Rep. No. 94-803, at 66 (agreeing that requiring filings for thousands of mergers annually would "impose an undue and unnecessary burden on business"). To address these unanticipated costs and "provide[] significant regulatory and financial relief for business," 146 Cong. Rec. 24253 (2000) (statement of Sen. Hatch), Congress amended the Act in 2000. Those amendments raised the dollar thresholds for filing and indexed them to economic growth. Pub. L. No. 106-553, § 630, 114 Stat. 2762 (2000). They also added protections for filers who receive a Second Request, requiring the agencies to "hear any petition" arguing that aspects of such a Request are "unreasonably cumulative, unduly burdensome, or duplicative." 15 U.S.C. § 18a(e)(1)(B)(i).

C. The FTC Rulemaking

The Proposed Rule. In June 2023, the FTC issued a notice of proposed rulemaking (NPRM) announcing its intent to launch a "comprehensive redesign of the premerger notification process." *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42,178, 42,180 (June 29, 2023). The FTC proposed to drastically expand the HSR Form, adding—by the FTC's count—34 "new requirements and categories of information." *Id.* at 42,185-42,186. *See* Am. Compl. ¶ 77 (full list of proposed new requirements).

The Outcry. Unsurprisingly, hundreds of commenters from the business community and antitrust bar urged the FTC to withdraw the NPRM or at least rewrite it. Many argued that the NPRM exceeded the FTC's statutory authority to require only information that is "necessary and

appropriate" for the initial antitrust screen. Commenters also reiterated that "[e]xisting HSR reporting requirements appropriately balance the need for antitrust review and the benefits of economic activity." National Retail Federation Comment at 2 (Sept. 27, 2023), Ex. 12. And they noted that the FTC had not justified imposing massive new burdens on *every* HSR-reportable transaction. Indeed, as commenters pointed out, the NPRM did not point to a single deal that the FTC believed it or DOJ had missed due to gaps in the longstanding Form. Commenters also explained that the FTC's estimate of the costs of the proposed revolution in HSR practice—conducted by simply asking its own staff—was far too low. *See, e.g.*, U.S. Chamber of Commerce Comment at 1-2 (Sept. 27, 2023), Ex. 5. Plaintiff U.S. Chamber commissioned its own survey of antitrust practitioners, which predicted an annual cost of over $2.3 *billion*, "even before consideration of indirect costs" caused by "dissuad[ing] potential transactions from occurring." S.P. Kothari, The US Antitrust Agencies' NPRM re Additional Information Requirements for HSR Filings (Kothari Report) ¶¶ 43, 52, 55 (Sept. 26, 2023), Ex. 6.

The Final Rule. On October 10, 2024, the FTC finalized its revisions to the HSR Form. 89 Fed. Reg. at 89,394. Although the FTC pared back some of the most egregious proposals, it retained many of the most burdensome. The FTC candidly described the rule as "reset[ting] the baseline requirements for all filers," noting—with studied understatement—that its "incremental costs" would be "more material" than prior HSR rulemakings, "which frequently *reduced* the burdens associated with submitting an HSR Form." *Id.* at 89,257, 89,260 (emphasis added).

The Rule creates three new categories of reportable transactions, subjecting each tier to increasingly burdensome requirements. The first category, "select 801.30 transactions," are "transactions that do not result in the acquisition of control," such as certain executive-compensation arrangements. 89 Fed. Reg. at 89,278. Those transactions are subject to only a "few

of the new . . . requirements," *id.* at 89,261, but will make up only 8% or so of reportable transactions. *Id.* at 89,333. The second category includes transactions that are neither select 801.30 transactions nor "overlap transactions," discussed next. *Id.* at 89,263-89,264. The Rule exempts filers in this category from some but not all of the new requirements. *Id.* at 89,264. The FTC estimated that this category will include 47% of transactions. *Id.* at 89,333. The third category, "overlap transactions," includes the remaining 45%, in which the filing parties have identified any competitive overlap or supply relationship between the buyer and seller or their affiliates. 89 Fed. Reg. at 89,263, 89,376. Deals in this category face the heaviest filing burden.

Depending on how one counts, the FTC retained with some modifications roughly 20 of the 34 new information and document mandates proposed in the NPRM. *See* 89 Fed. Reg. at 89,264. The Rule requires, for example, that every HSR filer submit (i) a narrative describing the rationale for the transaction; (ii) certain plans and reports produced in the ordinary course of business and shared with a CEO or any board member; (iii) drafts of all transaction-related documents that were shared with any board member; (iv) a description of all products or services that overlap with the other party; (v) a description of the filer's relationships with certain suppliers; and (vi) for the buyer, information regarding certain officers and directors at the filing entity and at certain subsidiaries. Each of these new requirements makes sweeping and onerous demands for information and documents.[2] *See* Am. Compl. ¶¶ 99-114 (detailing final requirements).

[2] As just one illustrative example, the new "supply relationships description" requirement instructs the filer to describe "each product, service, or asset" that the filer has "sold, licensed, or otherwise supplied" at over $10 million in revenue in the last year to either the other party or to "any other business" that "uses" those products or services "to compete with" the other party's "products or services, or as an input for a product or service that competes or is intended to compete with" the other party's "products or services." 89 Fed. Reg. at 89,372, 89,387. For each such product or service, the filer must provide: (i) "the sales (in dollars)"; (ii) the "top 10 customers"; and (iii) a description of those ten arrangements. *Id.* at 89,372, 89,387-89,388. The filer must then

The Rule also explains that the FTC had conducted "a new survey of Agency staff" and revised its cost estimates. 89 Fed. Reg. at 89,332. The FTC had estimated that the longstanding prior version of the Form had taken 37 hours on average to complete. 88 Fed. Reg. at 42,208. According to the Rule, the new version would now on average take 105 hours, nearly triple the burden of the prior Form. *Id.* at 89,332. Worse yet, the average filing in the overlap-transaction category—which covers nearly half of all filings—would now take 158 hours, more than *four times* the prior burden. *Id.* The Rule itself thus estimates that the new Form more than quadruples the burden on half of all filings and thus thousands of transactions every year. As discussed below, even that eye-popping figure is at best an extremely conservative estimate.

STANDARD OF REVIEW

Challenges to final agency action under the APA are generally resolved on summary judgment. *See Girling Health Care, Inc.* v. *Shalala*, 85 F.3d 211, 214-215 (5th Cir. 1996). The APA requires that a court "hold unlawful and set aside agency action" that is "not in accordance with law" or represents "arbitrary [and] capricious" decisionmaking. 5 U.S.C. § 706(2).

ARGUMENT

I. THE LONGVIEW CHAMBER HAS STANDING TO CHALLENGE THE RULE.

As amply demonstrated by the attached declarations, all Plaintiffs have Article III standing to challenge the Rule under the three-prong test for associational standing established by *Hunt* v. *Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). *See* Declaration of Sean Heather, Ex. A; Declaration of Elizabeth Dougherty, Ex. B; Declaration of Rebekah Goshorn

provide the reverse: a description of all products, services, or assets that the filer uses as an input and has obtained from (i) the other party or (ii) any other business that competes with the other party. *Id.* at 89,372, 89,388. Again, for each such product, the filer must provide: (i) the "purchased amount (in dollars)"; (ii) "the top 10 suppliers"; and (iii) "a description of" each purchasing agreement. *Id.* And that is all for just *one* of the 20 new additions to the HSR Form.

Jurata, Ex. C; Declaration of Kelly Hall, Ex. D. In its motion to dismiss or transfer, the FTC has contested the Article III standing of only Plaintiff Longview Chamber. *See* Dkt. 30. The FTC principally argues that the Longview Chamber has not sufficiently alleged that at least one of its members would "have standing to sue in [its] own right," as required under the first *Hunt* prong. *See* Dkt. 30 at 12-19. The FTC claims that the Longview Chamber cannot establish standing unless it identifies a member that is "presently engaged in an HSR-reportable transaction," *id.* at 15, or at least about to enter into a "certain, imminent transaction," *id.* at 17.

As Plaintiffs have explained, that argument is legally wrong. *See* Dkt. 35 at 16-25 (opposition to motion to dismiss). "For a threatened future injury"—here, application of the Rule to a Longview Chamber member that submits an HSR Form—"to satisfy the imminence requirement" for standing, "there must be at least a 'substantial risk' that the injury will occur." *Stringer* v. *Whitley*, 942 F.3d 715, 721 (5th Cir. 2019). It does not defeat standing if a plaintiff "cannot say with certainty when, precisely," the injury will take place, as "'imminence' is an 'elastic concept' that can accommodate that uncertainty." *Crawford* v. *Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371, 376 (5th Cir. 2021) (finding imminence where injury was "fairly likely" to occur in the future). The critical question is not whether the plaintiff has provided a precise date on which the harm will occur, but whether the "alleged injury is . . . too speculative" to justify the exercise of federal jurisdiction. *See Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013) ("substantial risk" does not require that the threatened injury be "literally certain").[3]

[3] *See also Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (requiring that the plaintiff "demonstrate a realistic danger of sustaining a direct injury"); *Frame* v. *City of Arlington*, 657 F.3d 215, 235 (5th Cir. 2011) ("a sufficiently high degree of likelihood"); *Arcia* v. *Florida Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) ("a realistic probability").

Here, there is nothing speculative about whether multiple members of the Longview Chamber will be harmed by the Rule in the near future. For starters, the declaration of Kelly Hall, President and CEO of the Longview Chamber, identifies two members who directly state that they have "concrete plans" to engage in HSR-reportable transactions and offer a "specification of *when* [that] will be." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Member C is a "private capital firm" that "expects to enter into several HSR-reportable transactions in the next 12 months" and "at least one by the end of 2025." Hall Decl. ¶ 9. Member A similarly "intends to engage in at least one more HSR reportable transaction this year" in addition to the "at least one" such transaction this year in which it has already engaged. *Id.* ¶ 7.[4] Injury within the next five months is plenty imminent for purposes of Article III. *See National Infusion Ctr. Ass'n* v. *Becerra*, 116 F.4th 488, 498 n.7 (5th Cir. 2024) (finding standing based on likelihood of injury during "first four years of the [challenged] program"); *Jibril* v. *Mayorkas*, 20 F.4th 804, 814 (D.C. Cir. 2021) (same for injury "within the next year or two").

In addition, the fact that multiple Longview Chamber members "habitually engag[e] in the regulated conduct at issue" itself "demonstrates the concrete plans necessary to establish an injury in fact." *Consumers' Rsch.* v. *CSPC*, 592 F. Supp. 3d 568, 578 (E.D. Tex. 2022), *rev'd on other grounds*, 91 F.4th 342 (5th Cir. 2024). In other words, Longview Chamber members have "demonstrate[d] a substantial risk" that they will be subject to the new HSR Form because they

[4] Ms. Hall's declaration does not name these members or provide exact figures because the members asked her "not to reveal their identities and to avoid providing unnecessary details that could be used to identify them." Hall Decl. ¶ 6; *see Chamber of Com. of U.S.* v. *CFPB*, 691 F. Supp. 3d 730, 738-739 (E.D. Tex. 2023) (holding that plaintiffs may establish injury to members using "pseudonyms"). As Ms. Hall explains, the members "are concerned that being identified in this suit could result in additional and unwarranted regulatory scrutiny" from the federal government and that any disclosure or public awareness of their "near- and medium-term plans to engage in HSR-reportable activity could" harm their businesses. Hall Decl. ¶ 6.

(i) have entered reportable transactions "in the past" and (ii) "intend[] to take [such] action again." *Stringer*, 942 F.3d at 722. Members A, D, and E all "often" or "regularly engage[] in M&A activity" and "plan[] to continue to engage in HSR-reportable transactions in the foreseeable future." Hall Decl. ¶¶ 7, 10-11. Member B "has engaged in more than 25 HSR-reportable transactions" in the last 10 years and "plans to continue" at that level. *Id.* ¶ 8. Similarly, Member C "has engaged in 19 HSR-reportable transactions" in the last five years and "plans to continue . . . in a similar level." *Id.* ¶ 9. Each member's established track record corroborates its present intention to enter into HSR-reportable transactions in the near future, making "[t]he prospect of future injury . . . significantly less speculative." *In re Navy Chaplaincy*, 697 F.3d 1171, 1176-1177 (D.C. Cir. 2012); *see McCardell* v. *HUD*, 794 F.3d 510, 520-521 (5th Cir. 2015) (finding imminence where plaintiffs' theory of harm involved "no unfounded assumptions"); *see, e.g.*, *Crawford*, 1 F.4th at 376 (finding plaintiff had established "substantial risk of being called for jury duty" because he had been called four times over seven-year period).

In sum, the facts adduced in the Hall Declaration plainly establish imminence as a matter of law, and the FTC cannot controvert those facts and create any genuine issue of material fact regarding whether at least one individual member of the Longview Chamber would have standing to challenge the Rule. *See Lujan*, 504 U.S. at 561.

II. THE HSR RULE EXCEEDS THE FTC'S STATUTORY AUTHORITY.

The FTC's complete overhaul of the longstanding HSR Form goes well beyond the agency's statutory authority to design the content of the Form. Most fundamentally, the HSR Act forbids the FTC from demanding materials that would impose substantially more costs on filing parties to compile and produce than are justified by any benefit to the antitrust agencies' initial evaluation of the transaction. The FTC, however, rejected that limitation on its authority and never performed the required cost-benefit analysis. That legal error dooms the entire Rule. And even if

it did not, several of the Rule's new requirements also contravene separate, distinct statutory limitations on the FTC's authority.

A. The Rule Misinterpreted The Scope Of The FTC's Authority To Determine The Content Of The HSR Form.

1. Under the HSR Act, the FTC may require in the initial "premerger notification" only "such documentary material and information relevant to a proposed acquisition *as is necessary and appropriate* to enable the [agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1) (emphasis added). In the Rule, the FTC squarely rejected commenters' arguments that "Congress intended the words 'necessary and appropriate' to require a cost-benefit analysis in this context." 89 Fed. Reg. at 89,236. The agency argued that "[h]ad Congress intended to require the Commission to consider costs and benefits, it could easily have done so." *Id.* Instead, the agency maintained that the statute's "necessary and appropriate" language has a *broadening* effect on the FTC's authority, providing the agency additional "flexibility" in the information and documents it may require. *Id.*

That position misunderstands the FTC's authority to design the HSR Form. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-416 (1971) (agency's failure to "properly construe [its own] authority" renders the resulting regulation unlawful); *United Mine Workers of Am.* v. *Dole*, 870 F.3d 662, 673 (D.C. Cir. 1989) (finding regulation unlawful because "the Secretary simply failed to take account of [a] statutory limitation on her authority"). The HSR Act's "necessary and appropriate" language does not broaden but rather *constrains* the FTC's authority, prohibiting it from demanding certain documents or information from all HSR filers if doing so would impose significant costs while doing comparatively little to enable the agency to determine whether to issue a Second Request.

That construction follows from the Supreme Court's decision in *Michigan* v. *EPA*, which concerned a statute authorizing EPA to issue certain rules "only if . . . [it] finds regulation 'appropriate and necessary.'" 576 U.S. 743, 752 (2015). Like the FTC here, EPA "chose to read [that language] to mean that cost makes no difference to the initial decision to regulate." *Id.* at 751. The Court found that in doing so, EPA had "strayed far beyond [its] bounds" and "interpreted [its authority] unreasonably." *Id.* at 751, 760. The Court explained that the phrase "appropriate and necessary" "plainly subsumes consideration of cost," as "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.* at 752, 756.

Several years later, in *Mexican Gulf Fishing Company* v. *U.S. Department of Commerce*, the Fifth Circuit considered a federal rule requiring charter-boat owners to install GPS monitoring systems at their own expense. 60 F.4th 956, 961 (5th Cir. 2023). The government argued that the rule was permitted by a statute authorizing "management measures" "necessary and appropriate for the conservation and management of the fishery." *Id.* at 965 (citation omitted). Citing *Michigan*, the court easily rejected that argument and found that the agency had failed to "operate within the bounds of reasonable interpretation." *Id.* at 966. The court "stress[ed] that the adjectives *necessary* and *appropriate* limit the authorization" to regulate, and "at a minimum require[] that [the rule's] benefits reasonably outweigh its costs." *Id.* at 965; *see National Grain & Feed Ass'n* v. *OSHA*, 866 F.2d 717, 733 (5th Cir. 1988) ("reasonably necessary or appropriate" standard requires a "specie of cost-benefit justification," such that the "expected costs of" the regulation are "reasonably related to the expected benefits"). That is equally true here: the FTC may require information and documents in the initial HSR Form only if the benefits for the agency's threshold screen for antitrust concerns "reasonably outweigh [the] costs" to the filing parties of compiling and submitting those materials. *Mexican Gulf*, 60 F.4th at 965.

The structure and purpose of the HSR Act confirm that interpretation. The buyer and seller for virtually *all* HSR-reportable transactions must file the initial "premerger notification." 15 U.S.C. § 18a. The antitrust agencies have at most 30 days to screen several thousand such transactions, 15 U.S.C. § 18a(b)(1), so their review is inevitably abbreviated and preliminary. Only if that review reveals a potential concern may the agencies issue a Second Request, which permits them to demand a broader universe of documents and information: instead of materials that are "necessary and appropriate" to the agency's initial screen, the agency may seek materials that are "relevant to the proposed acquisition." *See* 15 U.S.C. § 18a(e)(1)(A). The obvious inference is that Congress intended the "necessary and appropriate" language to meaningfully limit what the FTC may demand in the initial Form, ensuring that the greatest compliance costs fall only on those transactions for which the agency has already identified red flags that warrant further review. That is how Congress ensured that the Act "neither deter[s] nor impede[s] consummation of the vast majority of mergers and acquisitions." S. Rep. No. 94-803, at 66. And if more were needed, Congress later required the FTC and DOJ to "hear any petition" from any recipient of a Second Request arguing that the Request is "unduly burdensome." 15 U.S.C. § 18a(e)(1)(B)(i). If Congress was that concerned about unduly burdensome *Second Requests*, it follows *a fortiori* that Congress was particularly concerned about "undue" costs associated with the initial HSR Form, which every HSR filer must complete.

The actions of both Congress and the FTC since the HSR Act's enactment also confirm that the statute requires the FTC to expressly justify making the HSR Form more burdensome on all filers in terms of benefits to the initial screen. In 1977, the FTC explained that the Act required it to "strike what is often a difficult balance between the need of the enforcement agencies" for information "and the cost to the persons who must provide such information." FTC, HSR Report,

Annual Report to Congress for Fiscal Year 1977, at 3, Ex. 16. That initial view of the agency's statutory authority is persuasive, as it was "issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 386 (2024); *see* 2001 HSR Report at 29 (recognizing FTC's obligation to "make [the Form] as minimally burdensome as possible without compromising the agencies' ability to investigate and interdict proposed transactions"). Congress then retained the key "necessary and appropriate" language when it amended the HSR Act in 2000, and again in 2022, *see* Pub. L. No. 117-328, Div. GG § 202, 136 Stat. 4459 (2022)—well after the Supreme Court's decision in *Michigan* v. *EPA* explained that the phrase "necessary and appropriate" requires a cost-benefit analysis. Congress is presumed to have been "aware of" and "adopt[ed]" such a "judicial interpretation" when it "re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

2. To be sure, despite disavowing any statutory obligation to do so, the FTC still claimed to have "considered . . . the costs and the benefits of the final rule." 89 Fed. Reg. at 89,236. But the FTC never determined, prior to creating any of the Rule's 20 new categories of information and documents, that obtaining the newly mandated materials would be helpful enough to the decision to issue a Second Request that they *were worth the additional burden* on thousands of annual HSR filers. Instead, the FTC simply decreed that it desired those 20 new categories, then explained that it had made some tweaks to "minimiz[e] the cost and burden of producing such materials as much as practicable." *Id.* at 89,237; *see, e.g.*, *id.* at 89,217 (FTC "modified its proposals to *minimize where possible the costs* to filers and third parties") (emphasis added); *see also* Am. Compl. ¶ 133 (citing similar language elsewhere in the Rule).

Seeking to "reduce the cost and delay" associated with a new Form category, 89 Fed. Reg. at 89,273, is not the same thing as deciding to create that new category in the first place only after

determining that its benefits outweigh the costs. Congress's instruction that the FTC may demand only "such documentary material and information . . . as is necessary and appropriate," 15 U.S.C. § 18a(d)(1), constrains the agency's "initial decision to regulate." *Michigan*, 576 U.S. at 751; *see Mexican Gulf*, 60 F.4th at 965 ("the rule is authorized . . . *only if* it is necessary and appropriate") (emphasis added). The Act thus requires the FTC to refrain from demanding new information from all HSR filers unless that information is useful enough to the agency's initial screen that it is worth the additional cost for all filers. If the FTC's version of considering costs were correct, it could in theory add an unlimited number of new categories of information and documents to the HSR Form, then adjust them "where practicable" to lower their costs. That would undermine Congress's intent by providing no real constraint on the scope of the Form.

Take the Rule's new mandate that the buyer in all HSR-reportable transactions must identify all officers and directors of both the buyer and any of its subsidiaries who hold a similar role at (i) the seller company; (ii) any of the seller's subsidiaries; or (iii) any other entities "that are in the same industry as the [seller]." 89 Fed. Reg. at 89,294. As many commenters pointed out, requiring filing parties to compile such "lists of dozens, if not hundreds," of officers and directors, "especially across larger or more diffuse organizations with many subsidiaries," will not only "impose substantial burdens," but also "provide little practical utility" for the reviewing agency's decision whether to issue a Second Request for the proposed transaction. *E.g.*, American Bar Association Comment at 8 (Sept. 13, 2023), Ex. 3. In response to those comments, the Rule stated that the FTC had tweaked the officers-and-directors requirement to "reduce the cost of reporting as much as practicable." 89 Fed. Reg. at 89,298. But nowhere did the FTC apply the required analysis: a determination that these significant costs, which will fall on every HSR-

reportable transaction, can be justified in light of the marginal (if any) use in deciding whether there is a need to further investigate the transaction before it is allowed to close.[5]

B. At A Minimum, Several New Requirements Exceed The FTC's Authority.

Certain of the Rule's new information and document requirements also exceed the FTC's statutory authority for other reasons.

1. First, the Rule's mandate that the buyer in many transactions must identify certain "officers and directors" exceeds the FTC's authority in the HSR Act. The Rule asserts that the FTC may demand this information to enable the antitrust agencies to screen for potential violations of Section 8 of the Clayton Act. 89 Fed. Reg. at 89,295; *see* 15 U.S.C. § 19. Section 8 prohibits so-called "interlocking directorates and officers," stating that "[n]o person shall, at the same time, serve as a director or officer in any two corporations" that have a competitive relationship. 15 U.S.C. § 19(a)(1). But Section 8 is irrelevant to premerger review under the HSR Act, so the FTC cannot point to Section 8 concerns to justify any request in the initial HSR Form. The Act authorizes the FTC to require "information relevant to a proposed *acquisition*" in order "to determine whether such *acquisition* may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1) (emphasis added). Information about officers and directors of related companies is not information relevant to the legality of the "acquisition." Although an acquisition can lead to a

[5] Further examples are discussed at paragraphs 170-181 of the Amended Complaint. As just one, the Rule newly mandates that all filers collect, analyze, and submit "*all* regularly prepared plans and reports that were provided" to the CEO or Board of Directors of the filer (or the CEO or board of any entity the filer controls or is controlled by) within one year of filing, if those documents "analyze market shares, competition, competitors, or markets pertaining to any product or service" that the other party "also produced, sold," or is "known to be" developing. 89 Fed. Reg. at 89,371, 89,386 (emphasis added). Given the wide variety of potentially responsive documents, commenters pointed out that this requirement will require filers to use "forensic discovery tools." *Id.* at 89,304. The Rule never stated that the benefits of requiring such effort from thousands of HSR filers each year will be worth the enormous associated costs. Nor could it, since under the prior Form, the antitrust agencies already received "all" internal documents prepared for officers and directors "for the purpose of evaluating or analyzing the acquisition." 88 Fed. Reg. at 42,194.

prohibited board or officer interlock, such an interlock does not cause the "acquisition" itself to "violate the antitrust laws." 15 U.S.C. § 18a(d)(1). If a transaction would result in an unlawful interlocking directorate, the answer is not to prevent the acquisition; it is to have the offending officer or director resign. Indeed, Section 8 expressly provides for a grace period of one year to allow for resignations if an interlock develops, including as the result of a transaction. 15 U.S.C. § 19(b). Potential interlocking directorates do not pose the "unscramble the egg" problem that motivated Congress to create the premerger notification process in the first place.

Seeking a foothold other than Section 8, the Rule briefly argues that information about officer and director relationships would "assist the Agencies" in policing what is known as gun-jumping: "improperly shar[ing] confidential information or integrat[ing]" the merging firms during the 30-day waiting period. 89 Fed. Reg. at 89,295. But that does not work either. Such gun-jumping would be a procedural violation of the HSR Act itself; it has nothing to do with whether the "proposed acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1). The FTC may use other investigative powers to police gun-jumping, but it cannot use the HSR Form to do so.

2. The Rule also exceeds the FTC's authority by obligating filers to provide substantive legal analysis. In particular, filers must provide a "transaction rationale" that "explain[s] each strategic rationale for the transaction discussed or contemplated"; an "overlap description" of how any of their "current or known planned products or services" "compete[] with (or could compete with)" those of the other party; and a "supply relationships description" of how their products might compete with those of the other party. 89 Fed. Reg. at 89,370-89,372.

Nothing in the HSR Act authorizes the FTC to demand this kind of substantive legal analysis. The Act refers to the premerger form as a "notification." 15 U.S.C. § 18a(d)(1). Had

Congress intended filers to provide legal analysis or advocacy—as occurs in pre-approval regimes in other jurisdictions, such as the European Union—it would have described the required HSR filing as an "application," "petition," "request," or the like. Instead, Congress intentionally decided *not* to create such a regime. It considered a proposal that would have granted the FTC the power to temporarily restrain any merger subject to the notification requirement, and then shifted the burden of proof to the merging parties to convince a court that the merger was unlikely to violate the antitrust laws. *See* 122 Cong. Rec. 68 (1976) (statement of Sen. Byrd). But Congress rejected that design to avoid the "severe disincentive to mergers generally" that would have followed. S. Rep. No. 94-803, at 213. As the House Report explained, the Act did not "ease in any way the traditional burden of proof that must be borne by the government" in a merger challenge, H.R. Rep. No. 94-1373, at 8; it is merely an advance "notification" of the deal.

Requiring substantive legal analysis impermissibly recreates core aspects of that rejected pre-approval regime. For example, the "overlap description" and "supply relationships description" require parties to take positions on the definition of the relevant market and the current and potential competitiveness of their products. But those are key points that the *antitrust agencies* must establish to successfully challenge a transaction. *Illumina Inc.* v. *FTC*, 88 F.4th 1036, 1048-1051 (5th Cir. 2023). Likewise, disputes over the "transaction rationale"—that is, whether the parties have an eye toward harming competition—are often central to litigation. Requiring such statements in the HSR Form, when they "go to the core of what the agencies must prove if they sought to challenge a transaction," effectively shifts the burden of proof and "goes far beyond the statutory scope of the HSR Act." Wachtell Lipton Comment at 15 (Sept. 26, 2023), Ex. 14.

III. THE HSR RULE IS THE RESULT OF ARBITRARY DECISIONMAKING.

Even if the FTC acted within its statutory authority in adopting the Rule, it is arbitrary and capricious for two separate reasons. First, the Rule both drastically underestimates the costs of

adding 20 novel requirements to the HSR Form and fails to substantiate the existence of any "genuine problem"—let alone a problem of commensurate degree—with the prior version of the HSR Form. *Chamber of Com. of U.S.* v. *SEC*, 85 F.4th 760, 778 (5th Cir. 2023). Second, even if there had been a significant problem, the Rule contains no "reasoned explanation" for the FTC's rejection of more targeted, less burdensome solutions. *Florida Gas Transmission Co.* v. *FERC*, 876 F.2d 42, 45 (5th Cir. 1989).

A. The FTC Failed To Show That The Rule's Benefits Are Worth The Immense New Costs Imposed On Every HSR Filer.

1. The FTC unreasonably understated the costs of the Rule.

a. *Direct Costs*. To start, the Rule's efforts to assess the increased compliance costs could only generously be described as half-hearted. *See Louisiana ex rel. Landry* v. *Biden*, 64 F.4th 674, 678 n.10 (5th Cir. 2023) (holding that "serious flaw" in cost-benefit analysis "render[s] [a] rule unreasonable"). All the FTC did was conduct a survey *of its own staff*. *See* 89 Fed. Reg. at 89,332. The staff estimated that, as a result of the new HSR Form, the average time to complete the filing would triple, from 37 hours to 105 hours. *Id.* at 89,332-89,333. That average is pulled down by the less burdensome categories of "select 801.30" transactions and mergers where the parties, their subsidiaries, and their suppliers have no industry overlap whatsoever. For the other half of HSR-reportable transactions—the thousands each year with at least *some* kind of market or supplier overlap—the FTC itself estimates that average preparation time will increase to 158 hours per filer, a more than *four-fold* increase from the longstanding Form. *Id.* at 89,332.

Even that is surely an underestimate. Again, whereas the FTC's projection relied on surveying its own staff, the U.S. Chamber conducted an exhaustive survey of antitrust practitioners in connection with the Chamber's comments on the NPRM. Those practitioners estimated the NPRM would have added 241 hours for the average transaction, well over twice the FTC's

estimate of 107 hours for the NPRM. *See* U.S. Chamber Practitioner Survey at 2-3, Ex. 7; Kothari Report ¶ 45; 88 Fed. Reg. at 42,208. Remarkably, the Rule concedes that the Chamber's estimate of the NPRM's impact is more accurate than that of the FTC staff, which had "underestimated the time and expense associated with the proposed rule." 89 Fed. Reg. at 89,331.

Nevertheless, the FTC claims to have used an "improve[d] . . . methodology"—essentially, this time the agency had surveyed staff who had not worked on drafting the Rule—which provided an estimate for the final version of the Rule that the FTC claimed was "generally consistent with" that of the surveyed practitioners. 89 Fed. Reg. at 89,332-89,333. But while the Chamber's survey had found that the NPRM's changes would have added an estimated 241 hours for the average transaction, the Rule projected an average increase of just 68 hours. Although the Rule cut back to some degree on the NPRM, the differences cannot explain that massive gap. *See* Am. Compl. ¶ 151. Tacitly conceding as much, the Rule tries to explain the delta by claiming that the U.S. Chamber survey "may have included costs related to advocacy about whether a transaction violates an antitrust law, rather than only costs related to collection and submission of information required by the [HSR] Form" itself. 89 Fed. Reg. at 89,333. That is wrong: The (public) survey asked respondents to estimate only the time "spen[t] preparing a submission for a transaction as part of an initial filing." Chamber Survey at 3.

b. *Indirect Costs*. The FTC's cost projection, moreover, considers only the direct compliance costs of the Rule. But the Rule has substantial indirect costs as well. *See Michigan*, 576 U.S. at 752 ("'[C]ost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost."). By substantially increasing the costs associated with any given HSR-reportable transaction, the Rule "dissuade[s] potential transactions from occurring," imposing a significant drag on "innovation and entrepreneurial activity." Kothari Report ¶ 55.

Moreover, preparing all of the newly required materials will "very likely add significantly . . . to a company's filing preparation time, which would have the effect of extending closing dates." Business Roundtable (BRT) Comment at 5 (Sept. 27, 2023), Ex. 4; *see* Chamber Survey at 3 (estimating that the NPRM would have caused the average preparation time to *triple* from 10 days to 32 days). Extending deal timelines "represent[s] a significant cost increase" of its own. National Association of Manufacturers Comment at 4 (Sept. 27, 2023), Ex. 11. Most importantly, additional delays can "threaten the underlying economics of the deal itself." *Id.*; In-House Competition Lawyers Association (ICLA) Comment at 10 (Sept. 27, 2023), Ex. 10. Delays "have an outsized effect on smaller businesses," which are generally reliant on private capital raised through the very transactions burdened by the Rule. National Venture Capital Association Comment at 8 (Sept. 27, 2023), Ex. 13; *see* Dechert LLP Comment at 14 (Sept. 25, 2023), Ex. 8. And even if delays do not blow up a deal, they increase the risk that the agreement will "becom[e] public against the parties' wishes," which can cause significant harm to the underlying negotiations and the parties' commercial and employee relationships. BRT Comment at 14-15.

The Rule says almost nothing about any of this, reflecting the FTC's failure to grapple with the serious impacts of its drastic expansion of the HSR Form. Without addressing the above comments, the FTC merely expressed skepticism that "delays" of a few weeks to deal timelines "can influence pending mergers." 89 Fed. Reg. at 89,257. And the agency simply asserted that it did not expect a "significant impact on overall M&A activity" from "any delays and incremental costs associated with an HSR Filing," since "[d]eal volumes fluctuate . . . from year to year" due to many unrelated "economic factors." *Id.* That is a total non-sequitur. Of course variations in macroeconomic conditions affect the amount of M&A activity. The relevant question is the impact the Rule will have on such activity *holding all else equal*. The Rule offers no explanation, let

alone a reasoned one, why commenters from across the business community and antitrust bar were wrong that the impact would in fact be significant.

Indeed, the Rule strongly hints at one reason for discounting its harmful effects on both HSR filers and the larger HSR-transaction ecosystem: the FTC's newfound skepticism that "M&A activity is beneficial to the economy" in the first place. *Id.* at 89,258 (arguing that the Kothari Report lacked persuasive "empirical evidence about the benefits of M&A"). That sentiment conflicts with the core goal of the HSR Act, which Congress designed to avoid "deter[ring] . . . the vast majority of mergers and acquisitions." S. Rep. No. 94-803, at 66 (emphasis added).

2. The FTC unreasonably overstated the benefits of the Rule.

As against the Rule's substantial costs, the FTC came nowhere close to pointing to commensurate benefits for the 30-day screen of reported transactions. The Rule identifies three categories of putative benefits: (i) prevention of more unlawful mergers; (ii) savings in "time and resources" at the antitrust agencies; and (iii) decreased "burdens and costs for the parties and third parties who respond to staff inquiries" about certain transactions during the initial HSR waiting period. *Id.* at 89,251-89,253. But none of these claimed benefits withstands rudimentary scrutiny.

a. *Detecting And Preventing More Unlawful Mergers*. The FTC's main justification is that the revised HSR Form will allow it to detect and prevent more unlawful mergers. 89 Fed. Reg. at 89,251-89,252. That would surely be a benefit, but there is no reason to think the Rule will provide it. To establish that the new Form would facilitate detection of more harmful mergers, the FTC had to show that the original version of the HSR Form had meaningful gaps. After all, if the prior version was already enabling the antitrust agencies to detect and prevent nearly all potentially harmful transactions, the Rule's massive expansion of the Form logically could not improve on that record. Put another way, absent a "genuine problem" with the longstanding HSR

Form, any "purported benefits" of the Rule's revisions would not be "adequately substantiated." *Chamber of Commerce*, 85 F.4th at 777 (finding rule arbitrary and capricious for that reason).

The FTC entirely failed to show any such "genuine problem." Despite challenges from the many commenters who explained that the prior Form worked exceptionally well, the FTC never identified a single past HSR-reported merger with anticompetitive effects that either antitrust agency missed at the time but would have detected with the new version of the HSR Form. That silence is telling. Again, commenters on the NPRM identified only *seven* HSR-reportable transactions since the year 2000—out of nearly 40,000—that were challenged by the antitrust agencies after the waiting period had expired. Foley Lardner Comment at 2-3. Even assuming there were 50 such deals over the past quarter-century, it is irrational to quadruple the burden on thousands of HSR-reportable transactions every year in exchange for that meager benefit. *See* H.R. Rep. No. 94-1373, at 11 (recognizing that "illegal mergers m[ight] still be consummated").

The Rule offers no good explanation for its failure to substantiate the problem it is purportedly designed to solve. The FTC merely claimed that it was not "practical" for the agency to spend time identifying missed harmful transactions, because that would "require a redirection of resources to investigate consummated mergers and away from resources devoted to premerger review." 89 Fed. Reg. at 89,219 n.14. As an initial matter, the APA requires agencies to "justif[y]" a proposed "change[] in current policy" in "the rulemaking record," regardless of the "expenditures and other costs" of doing so. *Motor Vehicle Manufacturers Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). More fundamentally, the Rule undermines its own justification: if there were in fact serious problems with the prior Form, no "resources" should have been needed to uncover concrete evidence—it should have been staring the FTC in the face. At a minimum, the FTC could have said *something* about commenters' assertion that only seven

post-waiting period challenges have been brought against HSR-reported transactions in the past 25 years, but it did not. The agency was not permitted to simply "ignore already existing data it did not want to consider." *Chamber of Commerce*, 85 F.4th at 776.

The Rule claims that the "relatively low number of challenges to consummated mergers" does not prove that the 50-year HSR Form was working, since it could reflect the fact that the antitrust agencies have "limited resources" and "frequent[ly] lack . . . information about the effects of consummated mergers." 89 Fed. Reg. at 89,239. That point also cuts the other way. If the agencies are seriously resource-constrained, then it is hard to understand how a massive expansion in the amount of documentary material they receive from every HSR-reportable transaction will improve antitrust enforcement at all. The Rule candidly admits that the agencies are *already* "forced to make difficult triage decisions *and forgo potentially worthy investigations*" because their "headcount[s] remain[] well below what is needed." 89 Fed. Reg. at 89,246 (emphasis added). At a minimum, the FTC needed to explain why it makes sense to demand a mountain of additional information that it may never even review. A huge front-end cost with little or no back-end benefit is the definition of arbitrary decisionmaking. It is difficult to avoid the conclusion that the FTC simply does not mind—or even welcomes—the spillover harms on lawful M&A activity.

Lacking any hard data or excuse for its absence, the Rule falls back on the FTC's "experience collecting and reviewing data and documents," which it claims has revealed "information deficiencies" in the longstanding Form. 89 Fed. Reg. at 89,217. But such bare invocations of expertise are insufficient if they "run[] counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. Courts also discount claims that are "at unexplained odds with" the agency's views as "of yesterday." *El Paso Elec. Co.* v. *FERC*, 76 F.4th 352, 364 (5th Cir. 2023). Here that principle applies almost literally. Until as recently as August 2024, the FTC's own online

guide to the HSR program declared that the "Program ha[d] been a success," and "ha[d] minimized the number of post-merger challenges the enforcement agencies have had to pursue." 2009 FTC Guide at 2. And that echoed similar statements going back decades. *See supra*, pp. 1, 4.

Given those pronouncements, the FTC must point to concrete evidence to "show that there are good reasons for the new policy" beyond its unsubstantiated say-so. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The closest it could come up with was a discussion of "several factors" that supposedly "make today's economic reality more challenging for conducting a premerger assessment with the limited information required by the current rules." 89 Fed. Reg. at 89,216. But most of these "changing commercial realities" are not factual changes in "economic reality" at all. *Id.* at 89,216, 89,220. Rather, the Rule simply marches through various theories of antitrust harm that it admits have been extant for "many years." *Id.* at 89,231 (scrutiny of threats to nascent competition); *see, e.g.*, *id.* at 89,229 (vertical foreclosure); *id.* at 89,234 ("Serial acquisition strategies have been subject to antitrust scrutiny for over 100 years"); *see also* Am. Compl. ¶¶ 195-197. But as the Rule acknowledges, the FTC and DOJ have often sought to block transactions based on such theories, *id.* at 89,229-89,234, and there is no apparent reason why those theories are more difficult to apply today than they were several years or decades ago.

b. *Saving Agency Time.* Next, the FTC claimed that the Rule would benefit the public by reducing agency "staff hours spent collecting additional information" needed to screen a proposed transaction in the initial 30-day window. 89 Fed. Reg. at 89,253-89,254. That rationale too falls apart under scrutiny. The agency admitted in the NPRM that the vast majority of the "staff hours spent collecting additional information" are spent only after "one Agency has granted clearance to the other to conduct an initial investigation of the transaction." 88 Fed. Reg. at 42,196; *see* ICLA Comment at 23. But such "clearance" occurs for only a small fraction of transactions.

In 2021, for example, only 8% of transactions were cleared. FTC and DOJ, HSR Report, Annual Report to Congress for Fiscal Year 2021 at T1, Ex. 18. Again, the overwhelming majority of HSR-reportable transactions are obviously lawful at a glance. The Rule thus indiscriminately demands enormous amounts of additional information from *all* filers to supposedly reduce the time the agencies need to spend asking for such information from a small minority—all of whom, under the old regime, were subjected to that burden precisely because the initial screen provided reason for possible concern. That is utterly irrational and contrary to the basic design of the HSR Act.

c. *Saving Third-Party Time.* Finally, the Rule claims a similar efficiency benefit in the form of time savings for customers, competitors, and other third parties, whom agency staff occasionally contact to learn more information about a proposed transaction. 89 Fed. Reg. at 89,253. This supposed "benefit" suffers from the same core irrationality: such outreach occurs only after clearance. Indeed, the irrationality is even more pronounced in this context because third parties' responses to such requests are typically voluntary. Presumably a competitor or customer of a filing party will spend time providing information to an antitrust agency only if that third party thinks doing so is in its interest. There is thus no reason to treat that engagement as a cost to those third parties that the Rule somehow alleviates.

B. The FTC Gave No Reasoned Explanation For Rejecting Less Burdensome Alternatives.

Even if the FTC had shown real gaps in the HSR Form, the Rule would still be unlawful because it does not reasonably explain why the blunderbuss solution of massively expanding the Form for all filers is preferable to the obvious alternative: making greater use of the agencies' more targeted tools. The FTC thus failed to discharge its APA obligation to "consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Farmers Union Cent. Exch., Inc.* v. *FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984).

1. The FTC and DOJ have many ways of acquiring more information about a proposed transaction if they deem it necessary during their initial 30-day review. As mentioned, the agencies can contact customers and competitors of the filers, who are particularly incentivized to share relevant information if they have concerns. The agencies also commonly send "voluntary access letters" to filers, requesting "information that may assist" them to "quickly and efficiently evaluate[] whether the proposed transaction raises competitive concerns." *See* FTC, *Guidance for Voluntary Submission of Documents During the Initial Waiting Period*, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents (last visited July 30, 2025), Ex. 20. Filing parties have strong incentives to comply with these requests to avoid a possible burdensome Second Request. *See* Am. Compl. ¶ 210 (collecting comments from antitrust practitioners explaining those incentives). For even stronger medicine, both agencies may issue a compulsory civil investigative demand (CID). *See* 15 U.S.C. § 57b-1 (FTC); *id.* § 1312(a) (DOJ). Finally, if either agency needs more than the 30-day waiting period to gather or analyze this additional information, it can suggest that the parties "pull and refile" their HSR Forms to restart the clock. The pull-and-refile maneuver is "so common, and understood to be in the parties' benefit," BRT Comment at 9, that between 2018 and 2022, "parties withdrew their HSR filing and refiled in a total of 546 transactions," 89 Fed. Reg. at 89,244.

2. Commenters urged the FTC to expand the antitrust agencies' use of these more targeted, transaction-specific tools instead of broadly burdening all HSR filers. The agency offered three responses in the Rule, each of which is irrational, contrary to the evidence, or both.

First, the FTC argued that the agencies cannot accurately determine which transactions warrant such targeted follow-up unless they receive the newly required information and documents in every initial HSR filing. 89 Fed. Reg. at 89,247, 89,249. But again, the FTC has nothing to

substantiate the claim that problematic transactions are flying under its radar. If such transactions really have been slipping past the agencies, they should have at least *one* example. But as a former antitrust official explained almost 30 years ago—even before the internet—it is simply not "plausible that any truly significant transaction will escape detection in these days of intense media scrutiny and strategic complaints by competitors. . . . Indeed, if a transaction completely escapes media attention and generates no competitor or customer complaints, one might ask why it deserves the attention of federal enforcement officials." Sims & Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice*, 65 Antitrust L.J. 865, 892 (1997).

Second, although the FTC acknowledged that filers have an incentive to comply with voluntary access letters and pull-and-refile requests, it contended that filers are also incentivized "to prioritize the collection and submission of information suggesting that there is no competitive problem, rather than supplying the necessary information in an objective and neutral manner." 89 Fed. Reg. at 89,244. That concern surely is overstated given the high number of obviously lawful transactions. But regardless, it applies equally to responses to the HSR Form itself, and thus offers no reason to favor using the Form over voluntary access letters or CIDs.

Finally, the Rule argues that "requiring voluntary submissions from even more filers . . . would impose unnecessary burden and delay on filings that are not currently flagged for follow up." 89 Fed. Reg. 89,249. That argument makes no sense. The Rule at least triples the mandatory filing burden on virtually *all* reportable transactions and quadruples it on almost half—the vast majority of which will never be "flagged for follow up" regardless. It is irrational to impose that indiscriminate burden to spare something like 8% of transactions from a voluntary request, especially when such requests are "typically much narrower and less burdensome" than the requirements added by the Rule. Wachtell Comment at 13.

3. Although the tools just discussed allow the agencies to further investigate transactions during the initial HSR waiting period, commenters noted another obvious alternative for obtaining more information about transactions: Second Requests. To that point, the Rule explained that the FTC preferred to expand the initial HSR Form because "issuing more Second Requests [would be] an extremely costly alternative." 89 Fed. Reg. at 89,247. The FTC was presumably comparing the cost of responding to a Second Request to the cost of completing its revised version of the HSR Form. But the actual tradeoff is between (i) imposing an additional burden on a handful of potentially problematic transactions and (ii) massively increasing the filing burden on thousands of obviously harmless transactions. Even using the FTC's own cost estimates, the agencies could nearly double the amount of Second Requests they have historically issued at the same aggregate cost that the Rule inflicts on all transactions. *See* Am. Compl. ¶ 214. And those dollars would have been spent entirely in connection with transactions that have been flagged for specific reasons, rather than being spread indiscriminately across every HSR-reportable deal. That approach is plainly much more consistent with the legislative design.[6]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment and set aside the Rule.

[6] Moreover, the Rule inexplicably assumes that Second Requests must be "extremely costly" because that is the way the FTC has long conducted them. *See* 89 Fed. Reg. at 89,247. But that is not a given. The Rule purports to be the culmination of a "comprehensive redesign of the premerger notification process," 88 Fed. Reg. at 42,180, and that project could surely have involved examining the agencies' Second Request procedures to reduce some costs at least some of the time. Indeed, the FTC was arguably under a Congressional command to do so per the 2000 amendments to the HSR Act. *See* Pub. L. No. 106-553 § 630(c) (instructing FTC to "implement reforms . . . in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process").

August 1, 2025

Respectfully submitted,

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* *Pro hac vice*

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

DECLARATION OF SEAN HEATHER, SENIOR VICE PRESIDENT, INTERNATIONAL REGULATORY AFFAIRS & ANTITRUST, U.S. CHAMBER OF COMMERCE

Pursuant to 28 U.S.C. § 1746, I, Sean Heather, hereby declare as follows:

1. I am Senior Vice President for International Regulatory Affairs and Antitrust at the U.S. Chamber of Commerce. In that capacity, among other things, I oversee the U.S. Chamber's antitrust policy on behalf of its members. My business address is 1615 H Street, NW, Washington, DC 20062.

2. I am over 18 years old. This Declaration is based upon my personal knowledge and belief and/or upon my review of business records of the U.S. Chamber. If called as a witness, I could and would testify competently thereto.

3. The U.S. Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country, including the Eastern District of Texas.

4. The U.S. Chamber's mission is to advocate for policies that will help businesses create jobs and grow the national economy. As part of advancing that mission, the U.S. Chamber seeks to ensure that the federal antitrust laws promote healthy competition without imposing unnecessary regulatory burdens that divert productive capital into compliance costs and harm American companies' ability to grow, create jobs, and innovate, including by entering into value-creating, pro-competitive mergers and acquisitions. As economists have shown empirically, a vibrant and free market for M&A activity helps direct assets to higher valued uses and is thus vital for a healthy and dynamic economy. By the same token, overzealous and unnecessary antitrust enforcement and regulation can create

the sorts of harms to competition and to consumers that the antitrust laws are designed to prevent.

5. An important function of the U.S. Chamber is to represent the interests of its members and advance its view of public policy before Congress, the Executive Branch, and the courts. The U.S. Chamber regularly challenges agency actions, including rulemakings, that in its view will interfere with those goals. *See, e.g.*, *Chamber of Commerce* v. *EPA*, No. 24-1051 (D.C. Cir. 2024); *Ryan LLC* v. *FTC*, No. 24-10951 (5th Cir. 2024); *Chamber of Commerce* v. *SEC*, No. 23-5409 (6th Cir. 2024); *Chamber of Commerce* v. *U.S. Dep't of Labor*, No. 5:17-cv-00009 (W.D. Okla. 2024); *Chamber of Commerce* v. *EPA*, No. 3:23-cv-00007 (E.D. Ky. 2023).

6. On November 12, 2024, the Federal Trade Commission adopted a rule that amends the premerger notification form required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 U.S.C. § 18a. *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. at 89,216 (Nov. 12, 2024). The Rule massively expands the amount of documentary material and information that must be included in the initial premerger notification form for all HSR-reportable transactions. Even under the agency's conservative estimate, the Rule's changes to the notification form will more than quadruple the average time and expense of preparing an HSR filing.

7. As Senior Vice President for International Regulatory Affairs and Antitrust at the U.S. Chamber, I have worked with many U.S. Chamber members to understand how the new HSR Form will affect our members. Unsurprisingly, the U.S. Chamber has many members that regularly enter into merger, acquisition, or other transactions that meet or exceed the size thresholds for filing a premerger notification form under the HSR Act and thus will be subject to the requirements of the Rule, including members for which frequent

M&A activity is a regular and consistent feature of their business model. Consistent with their past levels of deal activity, members of the U.S. Chamber plan to engage in HSR-reportable transactions in the forthcoming months. Indeed, U.S. Chamber members have already engaged in HSR-reportable transactions this year that were subject to the Rule's requirements. These members have been or will be subject to the requirements of the Rule, and thus have incurred or will incur the substantially increased burden and expense necessary to complete the revised HSR notification form.

8. Information about our members' HSR-reportable activity is highly sensitive. Public disclosure of members' near- and medium-term plans to engage in HSR-reportable activity could have a significant impact on the members' businesses, on potential transactions they are considering, and in some cases on public securities markets. Moreover, our members deal frequently with federal regulators, including the FTC in the context of HSR review, and are concerned that being identified in this suit could result in greater regulatory scrutiny. Accordingly, our members have asked me not to reveal their identities and to avoid providing unnecessary details that could be used to identify them. Nevertheless, certain members have authorized disclosure of the following information to demonstrate that they will enter into HSR-reportable transactions and thus be harmed by the Rule.

9. Member A is a healthcare company with over 2,300 employees in Texas. Member A regularly engages in M&A transactions, including HSR-reportable transactions, as part of its business model. Over the past 10 years, Member A has engaged in more than 25 HSR-reportable transactions as well as other transactions below the HSR reporting threshold. Consistent with its business model and historic level of activity, Member A plans to continue to engage in HSR-reportable transactions in the foreseeable future.

10. Member B is a transportation company with over 10,000 employees in Texas. Member B has engaged in several HSR-reportable transactions, as part of its business model, over the last 10 years. Consistent with its business model and historic level of activity, Member B plans to continue to engage in HSR-reportable transactions in the foreseeable future.

11. Member C is a large company with significant operations in Texas and often engages in HSR-reportable transactions. Consistent with its historic level of activity, Member C plans to continue to engage in HSR-reportable transactions in the foreseeable future.

12. These and other U.S. Chamber members are harmed by the Rule, and that harm would be redressed by an order vacating the Rule and/or enjoining the FTC from requiring parties to HSR-reportable transactions to comply with it. The FTC's massive expansion of the information and material required in the premerger notification form, which both the buyer and seller in virtually every HSR-reportable transaction must file, will make it far more costly for U.S. Chamber members to consummate such deals. The FTC itself estimates that the average time for all filers to complete the revised premerger notification form will nearly triple, from 37 hours to complete the existing form to 105 hours to complete the new form. 89 Fed. Reg. at 89,332. For half of all reportable transactions, the FTC estimates that the time for the buyer to complete the form will increase to 158 hours, a 427% increase over the status quo. *Id*. When U.S. Chamber members enter into HSR-reportable transactions, they will experience these increased costs as a result of being subject to the Rule.

13. On behalf of the U.S. Chamber, I filed a comment letter during the rulemaking strongly opposing the FTC's proposed revisions to the HSR Form and urging the agency to withdraw the Rule. *See* U.S. Chamber Comment (Sept. 27, 2023),

https://www.regulations.gov/comment/FTC-2023-0040-0684. In that comment letter, I attached a study of the NPRM conducted by Professor S.P. Kothari of MIT, whom the Chamber engaged to analyze the NPRM. The U.S. Chamber also conducted a survey of 70 antitrust practitioners to solicit their views of the NPRM and to better understand its costs. Incorporating the results of that survey, Professor Kothari concluded that the FTC's NPRM underestimated the *average* additional cost of the proposed rule to filing parties by a factor of seven. In other words, the average HSR filing would be seven times more expensive for the filing parties to complete than the FTC was estimating. And many filings would of course be far more time-consuming and expensive than the average.

14. In the Final Rule, the FTC admitted that Professor Kothari's cost estimates were more accurate than the agency's estimates in the NPRM. 89 Fed. Reg. at 89,331. The FTC claimed to have improved its methodology and argued that its new estimates of the cost of the Final Rule are "generally consistent with" the results of the U.S. Chamber's practitioner survey and the Kothari Report. *Id.* at 89,332-89,333. Based on my conversations with U.S. Chamber members and antitrust practitioners, I do not agree with that statement. The FTC may no longer be off by a factor of seven, but its cost estimates are still far too low. In any case, even the FTC concluded that the Final Rule triples the costs of completing the HSR Form for the average transaction and quadruples it for so-called "overlap" transactions, which are half of all HSR-reported transactions. Even those (understated) impacts remain massive increases in direct compliance costs that are attributable to the Rule.

15. Beyond these direct compliance costs, the Rule inflicts significant indirect costs on U.S. Chamber members who enter into, or are even considering entering into, HSR-reportable transactions. For example, the need to collect, review, analyze, and prepare the

additional information required by the Rule will significantly extend and delay deal timelines. Such delays may hamper the transacting parties' ability to obtain financing, increase the risk that news of a non-public deal will leak, and generally impede if not prevent consummation of the transaction. The Rule also imposes a significant opportunity cost to businesses, which must divert valuable director, officer, and employee time to preparing the premerger notification form instead of running the company. The Rule will therefore likely deprive certain U.S. Chamber members of the additional resources, talent, efficiencies, and economies of scale that are gained through productive M&A activity. As a result, the Rule will also limit the ability of certain U.S. Chamber members to bring new and better products to more consumers and more markets.

16. In light of the above harmful effects of the Rule, and based on consultation with the members of the U.S. Chamber, the Chamber directly advances its mission and the interests of its members by bringing this lawsuit to challenge the Rule.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 30, 2025, at 1615 H Street, NW, Washington, DC 20062.



Sean Heather

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

DECLARATION OF ELIZABETH DOUGHERTY,
GENERAL COUNSEL AND CORPORATE SECRETARY,
BUSINESS ROUNDTABLE

Pursuant to 28 U.S.C. § 1746, I, Elizabeth Dougherty, hereby declare as follows:

1. I am the General Counsel and Corporate Secretary at Business Roundtable. Business Roundtable is a non-profit association comprised of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. Business Roundtable is headquartered in Washington D.C.

2. I am over 18 years old. This Declaration is based upon my personal knowledge and belief and/or upon my review of business records of Business Roundtable. If called as a witness, I could and would testify competently thereto.

3. Since 1972, Business Roundtable has worked to promote a thriving U.S. economy that creates economic opportunity for all Americans. Business Roundtable's members work closely with policymakers to advance sound economic policies, including policies related to federal antitrust law. To support that work, Business Roundtable engages in public advocacy and litigation on legal and policy issues relating to competition. One area of Business Roundtable's focus has been the Federal Trade Commission's proposed and now final rule massively expanding the amount of documentary material and information that must be included in the initial premerger notification form for all HSR-reportable transactions. Even under the agency's conservative estimate, the Rule's changes to the notification form will more than quadruple the average time and expense of preparing an HSR filing. Business Roundtable filed a comment letter during the rulemaking stage opposing the rule and urging the agency to withdraw it. Business Roundtable Comment (Sept. 27, 2023), https://www.regulations.gov/comment/FTC-2023-0040-0718.

4. Many Business Roundtable members are CEOs of companies that regularly enter into merger, acquisition, or other transactions that meet or exceed the size thresholds

for filing a premerger notification form under the HSR Act and thus will be subject to the requirements of the Rule, including members for which frequent M&A activity is a regular and consistent feature of their business model. Consistent with their past levels of deal activity, member companies of Business Roundtable plan to engage in HSR-reportable transactions in the forthcoming months. Indeed, Business Roundtable members' companies have already engaged in HSR-reportable transactions this year that were subject to the Rule's requirements. These members have been or will be subject to the requirements of the Rule, and thus have incurred or will incur the substantially increased burden and expense necessary to complete the revised HSR notification form.

5. Information about our members' HSR-reportable activity is highly sensitive. Public disclosure of members' near- and medium-term plans to engage in HSR-reportable activity could have a significant impact on the members' businesses, on potential transactions they are considering, and in some cases on public securities markets. Moreover, many of our members deal frequently with federal regulators, including the FTC in the context of HSR review, and are concerned that being identified in this suit could result in additional and unwarranted regulatory scrutiny. Accordingly, our members have asked me not to reveal their identities and to avoid providing unnecessary details that could be used to identify them, which I understand is not required under applicable law. Nevertheless, certain members have authorized disclosure of the following information to demonstrate that they will enter into HSR-reportable transactions and thus be harmed by the Rule.

6. Member A is a healthcare company that regularly engages in M&A transactions, including HSR-reportable transactions, as part of its business model. Since 2015, Member A has engaged in more than 25 HSR-reportable transactions. Consistent with

its business model and historic level of activity, Member A plans to continue to engage in HSR-reportable transactions in the foreseeable future.

7. Member B is a transportation company with over 10,000 employees in Texas. Member B has engaged in several HSR-reportable transactions, as part of its business model, over the last 10 years. Consistent with its business model and historic level of activity, Member B plans to continue to engage in HSR-reportable transactions in the foreseeable future.

8. Member C is a company in the financial sector that regularly engages in M&A activity as part of its business model and plans to engage in at least one HSR-reportable transaction in the foreseeable future. Member C is therefore directly regulated and harmed by the Rule. In addition, Member C regularly provides lending and other services in connection with HSR-reportable transactions and plans to continue to do so. Because the Rule dramatically increases the costs associated with HSR-reportable transactions, Member C expects that the Rule will affect its business by deterring M&A activity that would otherwise have taken place, affecting the market for Member C's services and causing transactions for which Member C could have provided those services not to be consummated.

9. These and other Business Roundtable members are harmed by the Rule, and that harm would be redressed by an order vacating the Rule and/or enjoining the FTC from requiring parties to HSR-reportable transactions to comply with it. The FTC's massive expansion of the information and material required in the premerger notification form, which both the buyer and seller in virtually every HSR-reportable transaction must file, will make it far more costly for Business Roundtable members' companies to consummate such

deals. The FTC itself estimates that the average time for all filers to complete the revised premerger notification form will nearly triple, from 37 hours to complete the existing form to 105 hours to complete the new form. 89 Fed. Reg. at 89,332. For half of all reportable transactions, the FTC estimates that the time for the buyer to complete the form will increase to 158 hours, a 427% increase over the status quo. *Id*. When Business Roundtable members' companies enter into HSR-reportable transactions, they will experience these increased costs as a result of being subject to the Rule.

10. Beyond these direct compliance costs, the Rule inflicts significant indirect costs on Business Roundtable members who enter into, or are even considering entering into, HSR-reportable transactions. For example, the need to collect, review, analyze, and prepare the additional information required by the Rule will significantly extend and delay deal timelines. Such delays may hamper the transacting parties' ability to obtain financing, increase the risk that news of a non-public deal will leak, and generally impede if not prevent consummation of the transaction. By imposing all of these new direct and indirect costs, the Rule is likely to prevent consummation of at least some HSR-reportable transactions that Business Roundtable members' companies would otherwise have entered.

11. In light of the above effects of the Rule, and based on consultation with the members of Business Roundtable, Business Roundtable directly advances its mission and the interests of our members by bringing this lawsuit to challenge the Rule.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 28, 2025, in Washington, D.C.



Elizabeth Dougherty

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

DECLARATION OF REBEKAH GOSHORN JURATA,
GENERAL COUNSEL FOR PLAINTIFF
AMERICAN INVESTMENT COUNCIL

Pursuant to 28 U.S.C. § 1746, I, R. G. Iwata, hereby declare as follows:

1. I am the General Counsel of the American Investment Council (AIC). My business address is 815 Connecticut Ave NW Suite 620, Washington, DC 20006.

2. I am over 18 years old. This Declaration is based upon my personal knowledge and belief and/or upon my review of business records of AIC. If called as a witness, I could and would testify competently thereto.

3. AIC is a 501(c)(6) nonprofit association of private equity and private credit firms. AIC is the premier trade association for the private investment industry. AIC's mission is to develop and provide information about the private investment industry and its contribution to the long-term growth of the U.S. economy and retirement security of American workers. As part of its mission, AIC advocates on behalf of its members and the overall private investment industry before Congress, the Executive Branch, and the courts, to ensure the best possible regulatory environment for the industry to continue successfully investing in and across America.

4. Private equity firms invest capital in companies that are perceived to have growth potential and then work with those companies to expand or grow the business. The capital is contributed by large institutional investors and organized into funds. The fund managers will typically use the capital in those funds to buy companies, work with them for a period of three to seven years to improve their operations and profitability, and then take the companies public or sell them at a higher valuation, returning the profits to investors. Because buying and selling companies is inherent in the private equity model, private equity firms are frequent participants in merger-and-acquisition (M&A) transactions.

5. Many of the country's leading private equity firms are members of AIC. Our members have offices and portfolio companies in every state in America. In Texas alone, there are hundreds of private equity firms and over 1,000 private equity-backed companies, including companies operating in the Eastern District of Texas.

6. Investment from AIC's member firms fuels thousands of small businesses that are the lifeblood of local communities. In 2024, 85% of all private equity investments went to small businesses with fewer than 500 employees. That capital, financing, and expertise helps companies of all shapes and sizes develop new and better goods and service, increase productivity, hire new employees, improve their operations, and ultimately, compete more effectively with entrenched incumbents. And the returns flow to the 34 million public sector workers and retirees whose pensions are invested in private equity vehicles.

7. On November 12, 2024, the Federal Trade Commission adopted a rule that amends the premerger notification form required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 U.S.C. § 18a. *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. at 89,216 (Nov. 12, 2024). The Rule massively expands the amount of documentary material and information that must be included in the initial premerger notification form for all HSR-reportable M&A transactions. Even under the agency's conservative estimate, the Rule's changes to the notification form will more than quadruple the average time and expense of preparing an HSR filing.

8. The Rule will have a direct and acute impact on AIC's membership. As noted above, M&A is a necessary component and consistent feature of the private equity business model. Such transactions are the way that private equity firms generally provide capital and financing to their portfolio companies, and are a common mechanism by which firms exit successful investments to realize returns for their investors. According to public data, from 2011 to 2024, there were over 83,000 acquisitions involving private equity firms. Over 24,000 of those were deals valued at over $100 million and thus above the applicable HSR reporting threshold, which is adjusted every year for inflation and crossed the $100 million threshold only in 2022. In the most recent year, 2024, there were over 8,000 acquisitions involving private equity firms and over 1,500 private equity exits. Over 2,300 acquisitions were valued at over $100 million; the HSR reporting threshold was $119.5 million.

9. Consistent with these figures and given their business models, virtually all of AIC's private equity firm members regularly enter into merger, acquisition, or other transactions that meet or exceed the size thresholds for filing a premerger notification form under the HSR Act. Thus, virtually all of AIC's private equity firm members routinely file the HSR premerger notification form. Indeed, many of AIC's members have already engaged in HSR-reportable transactions this year that were subject to the Rule's requirements. AIC's members are thus subject to the requirements of the Rule, and have consequently incurred or will incur the substantially increased burden and expense necessary to complete the revised HSR notification form.

10. Indeed, it is entirely unsurprising that the Rule so substantially impacts AIC's membership because the Rule expressly targets the private equity industry. In the

Rule, the FTC claims that one of the major reasons for its complete redesign of the HSR Form is the fact that "[p]rivate equity has accounted for an increasing share of all merger activity over time," leading to a "recent estimate[]" that "private equity deal-making [now] account[s] for 40% or more of domestic M&A activity." 89 Fed. Reg. at 89223 & n.48. The Rule also points to "private equity buyers" to justify the HSR Form's new focus on serial acquisitions, 89 Fed. Reg. at 89,234, its new requirement that filers must provide additional information about minority interest holders and related entities, 89 Fed. Reg. at 89,288, and other requirements. In fact, the phrase "private equity" appears in the Rule no fewer than 44 separate times. Again, the Rule's consistent focus on the private-investment industry make sense, since few if any sectors of the economy are more directly and concretely affected by a regulation that drastically increases the costs associated with M&A activity.

11. Information about our members' HSR-reportable activity is highly sensitive. Public disclosure of members' near- and medium-term plans to engage in HSR-reportable activity could have a significant impact on the members' businesses, on potential transactions they are considering, and in some cases on public securities markets. Moreover, our members deal frequently with federal regulators, including the FTC in the context of HSR review, and are concerned that being identified in this suit could result in additional and unwarranted regulatory scrutiny. Accordingly, our members have asked me not to reveal their identities and to avoid providing unnecessary details that could be used to identify them, which I understand is not required under applicable law.

12. Nevertheless, one member has authorized disclosure of the following information to demonstrate that they will enter into HSR-reportable transactions and thus

be harmed by the Rule, as a representative example. Member A is a firm that engages in regular M&A activity as part of its business model. Since 2020, Member A has engaged in over 15 HSR-reportable transactions. Going forward, Member A plans to continue to engage in a similar level of HSR-reportable activity and expects to enter into several HSR-reportable transactions in the next 12 months.

13. Given the nature of their business, virtually all of AIC's private equity members could demonstrate that the Rule harms them in the same or similar ways as Member A. That harm would be redressed by an order vacating the Rule and/or enjoining the FTC from requiring parties to HSR-reportable transactions to comply with it. The FTC's massive expansion of the information and material required in the premerger notification form, which both the buyer and seller in virtually every HSR-reportable transaction must file, will make it far more costly for AIC members to consummate such deals. The FTC itself estimates that the average time for all filers to complete the revised premerger notification form will nearly triple, from 37 hours to complete the existing form to 105 hours to complete the new form. 89 Fed. Reg. at 89,332. For half of all reportable transactions, the FTC estimates that the time for the buyer to complete the form will increase to 158 hours, a 427% increase over the status quo. *Id.* When AIC members enter into HSR-reportable transactions, they will experience these increased costs as a result of being subject to the Rule.

14. Beyond these direct compliance costs, the Rule inflicts significant indirect costs on AIC members who enter into, or are even considering entering into, HSR-reportable transactions. For example, the need to collect, review, analyze, and prepare the

additional information required by the Rule will significantly extend and delay deal timelines. Such delays may hamper the transacting parties' ability to obtain financing, increase the risk that news of a non-public deal will leak, and generally impede if not prevent consummation of the transaction. By imposing all of these new direct and indirect costs, the Rule is likely to prevent consummation of at least some HSR-reportable transactions that AIC members would otherwise have entered.

15. In light of the above effects of the Rule, and based on consultation with the members of AIC, AIC directly advances its mission and the interests of our members by bringing this lawsuit to challenge the Rule. Indeed, AIC filed a comment letter strongly opposing the FTC's proposed revisions to the HSR Form during the rulemaking and urged the agency to withdraw the Rule. *See* AIC Comment (Sept. 27, 2023), https://www.regulations.gov/comment/FTC-2023-0040-0705.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 30, 2025, at 815 Connecticut Ave NW Suite 620, Washington, DC 20006.

Rebekah Goshorn Jurata

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

DECLARATION OF KELLY HALL, PRESIDENT AND CEO OF PLAINTIFF LONGVIEW CHAMBER OF COMMERCE

Pursuant to 28 U.S.C. § 1746, I, Kelly Hall, hereby declare as follows:

1. I am the President and CEO of the Longview Chamber of Commerce. In that capacity, I oversee all of the Longview Chamber's operations. My business address is 410 N Center Street, Longview, TX 75601.

2. I am over 18 years old. This Declaration is based upon my personal knowledge and belief and/or upon my review of business records of the Longview Chamber. If called as a witness, I could and would testify competently thereto.

3. The Longview Chamber of Commerce represents over 1,000 businesses and professional organizations. We routinely advocate in federal courts on matters of competition, free markets, and antitrust enforcement, including filing lawsuits challenging anti-business laws and regulatory actions. The Longview Chamber's mission is to advocate for policies that promote economic development and job creation both in the Longview Trade Area, which includes Gregg County and 11 surrounding counties, and in the interconnected economic region, which includes the Dallas, Houston, and Shreveport metropolitan areas. To further its mission and the interests of its members, the Longview Chamber regularly files litigation challenging harmful and misguided federal regulations. *See, e.g.*, *Ryan LLC* v. *FTC*, No. 24-10951 (5th Cir. 2024); *Minnesota Telecom Alliance* v. *FCC*, No. 24-1179 (8th Cir. 2024); *Longview Chamber of Commerce* v. *CFPB*, No. 24-915 (D.D.C. 2024); *Longview Chamber of Commerce* v. *OSHA*, No. 24-271 (E.D. Tex. 2024); *Longview Chamber of Commerce* v. *NLRB*, No. 24-40331 (E.D. Tex. 2024).

4. On November 12, 2024, the Federal Trade Commission adopted a rule that amends the premerger notification form required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 U.S.C. § 18a. *Premerger Notification; Reporting and*

Waiting Period Requirements, 89 Fed. Reg. at 89,216 (Nov. 12, 2024). The Final Rule massively expands the amount of documentary material and information that must be included in the initial premerger notification form for all HSR-reportable transactions. Even under the agency's conservative estimate, the Rule's changes to the notification form will more than quadruple the average time and expense of preparing many HSR filings.

5. The Longview Chamber has members that regularly enter into merger, acquisition, or other transactions that meet or exceed the size thresholds for filing a premerger notification form under the HSR Act, including members for which M&A activity is a regular and consistent feature of their business model. Longview Chamber members have already engaged in HSR-reportable transactions this year. In addition, consistent with their past levels of deal activity, members of the Longview Chamber also plan to engage in HSR-reportable transactions in the forthcoming months. These members have been or will be subject to the requirements of the Rule, and thus have incurred or will incur the substantially increased burden and expense necessary to complete the revised HSR notification form.

6. Information about our members' HSR-reportable activity is highly sensitive. Public disclosure of members' near- and medium-term plans to engage in HSR-reportable activity could have a significant impact on the members' businesses, on potential transactions they are considering, and in some cases on public securities markets. Moreover, many of our members deal frequently with federal regulators, including the FTC in the context of HSR review, and are concerned that being identified in this suit could result in additional and unwarranted regulatory scrutiny. Accordingly, our members have asked me not to reveal their identities and to avoid providing unnecessary details that could be used

to identify them, which I understand is not required under applicable law. Nevertheless, certain members have authorized disclosure of the following information to demonstrate that they will enter into HSR-reportable transactions and thus be harmed by the Rule.

7. Member A engages in M&A activity as part of its business model. Member A has engaged in multiple HSR-reportable transactions over the past ten years, including transactions involving companies with a presence in the Longview Trade Area and the surrounding economic region. Indeed, Member A has already engaged in at least one HSR-reportable transaction this year. Member A plans to continue to engage in a similar level of HSR-reportable activity going forward and intends to engage in at least one more HSR reportable transaction this year.

8. Member B is a global telecom company with over 2,000 employees and 2,000,000 customers in Texas. Member B regularly engages in M&A transactions, including HSR-reportable transactions, as part of its business model. Since 2015, Member B has engaged in more than 25 HSR-reportable transactions as well as many other transactions below the HSR reporting threshold. Consistent with its business model and historic level of activity, Member B plans to continue to engage in HSR-reportable transactions in the foreseeable future.

9. Member C is a private capital firm with an office in Dallas. Member C has at least 10 portfolio companies with a presence in Texas as well as subsidiaries of several other companies; together these companies provide over 2,400 jobs in Texas. Member C has looked at over 1,200 opportunities in Texas in the past 5 years. A number of these portfolio companies operate in the Longview Chamber's larger economic region. Member C engages in regular M&A activity as part of its business model. Since January 2020, Member C has

engaged in 19 HSR-reportable transactions, along with a number of other M&A transactions that did not meet the reporting threshold. Going forward, Member C plans to continue to engage in a similar level of HSR-reportable activity and expects to enter into several HSR-reportable transactions in the next 12 months, including at least one by the end of 2025.

10. Member D is a large company with significant operations in Texas and often engages in HSR-reportable transactions. Consistent with its historic level of activity, Member D plans to continue to engage in HSR-reportable transactions in the foreseeable future.

11. Member E is a company in the financial sector that has a number of business locations in Texas and provides services to companies with a presence in the Longview Trade Area and the surrounding economic region. Member E regularly engages in M&A activity as part of its business model and plans to engage in at least one HSR-reportable transaction in the foreseeable future. Member E is therefore directly regulated and harmed by the Rule. In addition, Member E regularly provides lending and other services in connection with HSR-reportable transactions and plans to continue to do so. Because the Rule dramatically increases the costs associated with HSR-reportable transactions, Member E expects that the Rule will affect its business by deterring M&A activity that would otherwise have taken place, affecting the market for Member E's services and causing transactions for which Member E could have provided those services not to be consummated.

12. Members A and E were members of the Longview Chamber prior to the filing of the original complaint in this action. Members B, C, and D joined the Longview Chamber prior to the filing of the operative amended complaint.

13. These and other Longview Chamber members are harmed by the Rule, and that harm would be redressed by an order vacating the Rule and/or enjoining the FTC from requiring parties to HSR-reportable transactions to comply with it. The FTC's massive expansion of the information and material required in the premerger notification form, which both the buyer and seller in virtually every HSR-reportable transaction must file, will make it far more costly for Longview Chamber members to consummate such deals. The FTC itself estimates that the average time for all filers to complete the revised premerger notification form will nearly triple, from 37 hours to complete the existing form to 105 hours to complete the new form. 89 Fed. Reg. at 89,332. For half of all reportable transactions, the FTC estimates that the time for the buyer to complete the form will increase to 158 hours, a 427% increase over the status quo. *Id*. When Longview Chamber members enter into HSR-reportable transactions, they will experience these increased costs as a result of being subject to the Rule.

14. Beyond these direct compliance costs, the Rule inflicts significant indirect costs on Longview Chamber members who enter into, or are even considering entering into, HSR-reportable transactions. For example, the need to collect, review, analyze, and prepare the additional information required by the Rule will significantly extend and delay deal timelines. Such delays may hamper the transacting parties' ability to obtain financing, increase the risk that news of a non-public deal will leak, and generally impede if not prevent consummation of the transaction. The Rule also imposes a significant opportunity cost to businesses, which must divert valuable director, officer, and employee time to preparing the premerger notification form instead of running the company. The Rule will therefore likely deprive certain Longview Chamber members of the additional resources, talent, efficiencies,

and economies of scale that are gained through productive M&A activity. As a result, the Rule will also limit the ability of certain Longview Chamber members to bring new and better products to more consumers and more markets.

15. The FTC's expansion of the premerger notification form will harm the communities that make up the Longview Trade Area and interconnected economic region. Larger businesses utilize M&A to unlock efficiencies, enhance innovation, and expand operations. Smaller companies, entrepreneurs, and early-stage investors benefit from opportunities for capital formation, liquidity, and growth, as well as the possibility of a future exit. By facilitating the continued growth and development of all kinds of businesses, pro-competitive mergers and acquisitions benefit not only the relevant companies involved in the deal, but also their employees, their investors, their local communities, and ultimately the American consumers whom the antitrust laws are designed to protect. The Rule will delay and prevent lawful HSR-reportable transactions, depriving the Longview Trade Area and interconnected economic region of the benefits of these pro-competitive mergers.

16. In light of the above effects of the Rule, and based on consultation with the members of the Longview Chamber, the Longview Chamber directly advances its mission and the interests of our members by bringing this lawsuit to challenge the Rule. As mentioned above, the Longview Chamber's mission is to promote economic development and job creation both in the Longview Trade Area and the larger, interconnected economic region. The Longview Chamber fulfills that mission by taking action to ensure that businesses large and small are fully able to compete, grow, create jobs, and innovate through deals that do not pose competitive concern. Such actions help our members to better serve our communities. The Longview Chamber also directly advances the interests of its

members by taking action to decrease the direct and indirect costs imposed on our members by local, state, and federal regulations—especially where, as with the Rule, those costs are disproportionate to any regulatory benefit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on July 29, 2025, at 410 N Center St., Longview, TX 75601.



Kelly R. Hall

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

DECLARATION OF JUDSON O. LITTLETON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I, Judson O. Littleton, hereby declare as follows:

1. I am a partner at Sullivan & Cromwell LLP and counsel for Plaintiffs in the above-captioned action. I respectfully submit this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. Attached to this Declaration as Exhibits 1 through 20 are true and correct copies of the following documents (excerpted where indicated):

Exhibit 1	Final Rule, *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024).
Exhibit 2	Notice of Proposed Rulemaking, *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42,178 (June 29, 2023).
Exhibit 3	Comment American Bar Association on Notice of Proposed Rulemaking (Sept. 13, 2023) (excerpts).
Exhibit 4	Comment of Business Roundtable on Notice of Proposed Rulemaking (Sept. 27, 2023).
Exhibit 5	Comment of U.S. Chamber of Commerce on Notice of Proposed Rulemaking (Sept. 27, 2023).
Exhibit 6	S.P. Kothari, The US Antitrust Agencies' NPRM re Additional Information Requirements for HSR Filings (Sept. 26, 2023) (submitted with U.S. Chamber of Commerce Comment).
Exhibit 7	U.S. Chamber HSR/Merger Guides Practitioner Survey (Sept. 19, 2023) (submitted with U.S. Chamber of Commerce Comment).
Exhibit 8	Comment of Dechert LLP on Notice of Proposed Rulemaking (Sept. 25, 2023) (excerpts).
Exhibit 9	Comment of Foley Lardner LLP on Notice of Proposed Rulemaking (Sept. 21, 2023) (excerpts).
Exhibit 10	Comment of In-House Competition Lawyers Association on Notice of Proposed Rulemaking (Sept. 27, 2023) (excerpts).
Exhibit 11	Comment of National Association of Manufacturers on Notice of Proposed Rulemaking (Sept. 27, 2023) (excerpts).
Exhibit 12	Comment of National Retail Federation on Notice of Proposed Rulemaking (Sept. 27, 2023) (excerpts).
Exhibit 13	Comment of National Venture Capital Association on Notice of Proposed Rulemaking (Sept. 27, 2023).

Exhibit 14	Comment of Wachtell, Lipton, Rosen, & Katz on Notice of Proposed Rulemaking (Sept. 26, 2023) (excerpts).
Exhibit 15	Antitrust Modernization Commission, Report and Recommendations (Apr. 2007) (excerpts).
Exhibit 16	Federal Trade Commission, HSR Report, Annual Report to Congress for Fiscal Year 1977.
Exhibit 17	Federal Trade Commission and Department of Justice, HSR Report, Annual Report to Congress for Fiscal Year 2001 (excerpts).
Exhibit 18	Federal Trade Commission and Department of Justice, HSR Report, Annual Report to Congress for Fiscal Year 2021 (excerpts).
Exhibit 19	Federal Trade Commission, What is the Premerger Notification Program? An Overview (Mar. 2009).
Exhibit 20	Federal Trade Commission, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, *available at* https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents (last visited July 30, 2025).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 2025.

/s/ Judson O. Littleton
Judson O. Littleton

Exhibit 1

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission''), with the concurrence of the Assistant Attorney General, Antitrust Division, Department of Justice (''Assistant Attorney General'' or ''Antitrust Division'') (together the ''Agencies''), is issuing this final rule and Statement of Basis and Purpose (''SBP'') to amend the Premerger Notification Rules (the ''Rules'') that implement the Hart-Scott-Rodino Antitrust Improvement Act (''the HSR Act'' or ''HSR''), including the Premerger Notification and Report Form for Certain Mergers and Acquisitions (''Form'') and Instructions to the Notification and Report Form for Certain Mergers and Acquisitions (''Instructions''). The final rule requires parties to transactions that are reportable under the HSR Act to provide documentary material and information that are necessary and appropriate for the Agencies to efficiently and effectively conduct an initial assessment to determine whether the transaction may violate the antitrust laws and whether to issue a Request for Additional Information (''Second Request'') as provided by the HSR Act. In addition, the final rule implements certain requirements of the Merger Filing Fee Modernization Act of 2022 (''Merger Modernization Act'') and ministerial changes to the Rules as well as the necessary amendments to the Instructions to effect the final changes.

DATES: This rule is effective on February 10, 2025.

FOR FURTHER INFORMATION CONTACT: Robert Jones, Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024, or by telephone at (202) 326–3100.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Commission is amending and reorganizing the documentary material and information requirements for premerger notification required by the HSR Act, 15 U.S.C. 18a, (''notification'' or ''HSR Filing'' or ''Filing'') to improve the efficiency and effectiveness of premerger review and to implement changes mandated by the Merger Modernization Act, 15 U.S.C. 18b. The Act and the Rules require parties to certain mergers and acquisitions to submit a notification to the Agencies and to wait a short period of time before consummating the reported transaction. The reporting and waiting period requirements of the HSR Act are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws, including section 7 of the Clayton Act, 15 U.S.C. 18, if consummated and, when appropriate, to take appropriate law enforcement action prior to consummation to prevent a violation of the antitrust laws.

To advance the Clayton Act's goal of preventing undue consolidation or stopping it in its incipiency,[1] Congress passed the HSR Act to require mandatory premerger notification of some acquisitions. In particular, it charged the Agencies with reviewing the details of those proposed transactions in advance of consummation. The Agencies rely on information submitted in an HSR Filing to conduct a premerger antitrust risk assessment and to identify those transactions that require additional investigation to determine if they may harm competition, and thus violate the antitrust laws if consummated. The HSR Act requires that the parties not consummate their planned transaction while the Agencies conduct this assessment until the expiration of the statutory waiting period, which for most transactions is 30 days (15 days in the case of a cash tender offer or certain bankruptcy sales). During that short period of time, referred to as the initial waiting period, the Agencies review the information submitted in the parties' HSR Filings to identify those transactions that require a closer look, including through the collection of additional information from the acquiring and acquired persons or from third parties. If either agency determines during the initial waiting period to conduct an in-depth investigation of the transaction, section 7A(e) of the Clayton Act, 15 U.S.C. 18a(e), authorizes the Agencies to request additional information or documents from each party, which is referred to as a Second Request.[2] Issuing Second Requests extends the waiting period under the HSR Act for another 30 days (ten days in the case of a cash tender offer or certain bankruptcy sales) after the parties have substantially complied with the Second Requests. During this second waiting period, if the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in Federal district court to prohibit consummation of the transaction.

The Commission has administered the HSR Act's premerger notification program for over forty-five years, issuing an initial set of HSR Rules that took effect on September 5, 1978.[3] Since then, it has regularly updated these rules, with the concurrence of the Assistant Attorney General, pursuant to its mandate under 15 U.S.C. 18a(d), to require a premerger notification for each reportable acquisition that contains documentary material and information necessary and appropriate to enable the Agencies to determine whether the transaction is one that may violate the antitrust laws and proceed to an in-depth investigation through the issuance of Second Requests. In this rulemaking, the Commission is responding to several factors that make today's economic reality more challenging for conducting a premerger assessment with the limited information required by the current rules. Simply put, the economy of 2024 is different than it was in 1978 or 2000 and, in the Agencies' experience, the HSR Form has not kept pace with the realities of how businesses compete today. There is a higher degree of interconnectivity of businesses along the supply chain as well as with other companies that provide ancillary services. The focus of competitive interaction is not as obvious when companies that supply goods or services also generate revenues from other sources, such as data sales, and when even businesses in traditional sectors such as manufacturing generate significant revenues from the sale of associated services. The changing nature of competition makes it more difficult for the Agencies to identify existing business relationships that might be affected by the acquisition, including through non-price effects such as innovation competition, and that are not

[1] *See, e.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318 n.32 (1962).

[2] The FTC and DOJ share responsibility to enforce the antitrust laws and have established a protocol to clear the investigation of a transaction to one agency to avoid confusion and conserve public resources. The agency that receives clearance conducts the investigation and determines whether to issue Second Requests.

[3] The Commission commenced notice-and-comment rulemaking soon after the passage of the HSR Act and made extensive revisions to its proposed rules before issuing a final rule nearly two years later. *See* 41 FR 55488 (Dec. 20, 1976), 42 FR 39040 (Aug. 1, 1977), 43 FR 33450 (July 31, 1978), 43 FR 34443 (Aug. 4, 1978), 43 FR 36053 (Aug. 15, 1978). *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Second Hart-Scott-Rodino Annual Report (FY 1978).

apparent from simply focusing on sales in output markets. In addition, changes in mergers and acquisition (''M&A'') activity, corporate structures, and investment strategies have rendered the current Form's focus on traditional corporate structures outdated, and often the Agencies are unable to determine which entities or individuals will be making competitive decisions post-merger.

These profound changes that have occurred over time have created or exposed significant gaps in the information generated for premerger review under the current HSR Rules. These gaps curtail the Agencies' ability to efficiently and effectively detect transactions that may violate the antitrust laws. To fill in these gaps and to directly respond to the passage of the Merger Modernization Act, the Commission relied on its experience and expertise to identify specific information that is necessary and appropriate to conduct effective premerger screening.

To initiate this rulemaking, the Agencies conducted a comprehensive review of the premerger notification process, relied on their experience collecting and reviewing data and documents during antitrust investigations, and considered the cumulative effects of changes in deal structure, investment strategies, and the competitive dynamics of the modern economy explained in more detail below. From this review, the Commission identified several information deficiencies in the current HSR Filing that prevent the Agencies from efficiently and effectively conducting a premerger assessment of reportable transactions to identify which ones may violate the antitrust laws. The Agencies compared documentary material and information they have received over the years during in-depth merger investigations with the information collected in HSR Filings and assessed whether having certain types of documentary material and information at the beginning of an investigation would have changed the Agencies' decision whether and how to investigate reportable transactions. These specific categories of information and documents, which are readily available to the merging parties, are not required by the current Rules, but would be highly probative to the initial antitrust screening of a transaction during the initial waiting period and thus are necessary and appropriate for that review. The information identified and required by this final rule will enable the Agencies to detect transactions that may violate the law in light of modern commercial realities and in furtherance of the statutory mandate to arrest trends toward concentration in their incipiency. The final rule also will allow the Agencies to identify potentially unlawful transactions more quickly and with greater accuracy, narrowing the scope of their investigations in some cases, and in others, reducing the need to conduct a more burdensome in-depth investigation by issuing Second Requests.

In June 2023, the Commission proposed amendments to address the information deficiencies under the existing HSR Rules in a Notice of Proposed Rulemaking (''NPRM'').[4] The Commission received approximately 721 comments.[5] The majority of commenters were individuals who expressed general support for the rulemaking or for more vigorous antitrust enforcement more broadly. Others opposed certain aspects of the proposed rule and some questioned the Commission's authority to make any adjustments. After careful consideration of the comments and as discussed in more detail below, the Commission has substantially narrowed the information requirements proposed in the NPRM. In the final rule, the Commission is not adopting several proposed requirements outright, including those related to:

- a timeline of key dates for closing the proposed transaction;
- creating organization charts for the purpose of filing a notification;
- information about other interest holders;
- drafts of submitted documents;
- information about employees;
- information about board observers;
- geolocation information;
- prior acquisitions involving entities with less than $10 million in sales or revenues, or consummated more than 5 years prior to filing; and
- information about steps taken to preserve documents or use of messaging systems.

For other proposals, the Commission has substantially modified its proposals to minimize where possible the costs to filers and third parties, yet still provide the Agencies with information that is necessary and appropriate for effective and efficient premerger review. Overall, these modifications significantly reduce the effort required to comply with the final rule as compared to the proposed rule and include:

- Creating a new category of ''select 801.30 transactions'' for which the cost of complying with the information requirements has been limited because of the low risk that the transaction may violate the antitrust laws;
- Eliminating several document requirements to reduce costs;
- Limiting some requirements to materials that already exist;
- Excusing the seller[6] from certain information requests if it would be duplicative of information received from the buyer;
- Limiting some requirements to cover only recent information;
- Providing definitions or clarifications to reduce uncertainty and improve filer compliance;
- Creating *de minimis* exceptions to reduce the costs of generating information that has little economic impact; and
- Making the provision of certain information contingent on the identification of a significant business relationship between the filing persons that is critical to assessing whether the transaction may violate the antitrust laws.

As modified, the final rule introduces necessary and appropriate updates to HSR information requirements to allow the Agencies to understand the reported transaction and conduct an initial antitrust assessment within the statutory timeframe and does so in a manner that aligns the associated costs with the likelihood that the transaction is one that presents antitrust risk. With more complete information that is targeted to disclose existing business relationships between the parties, the Agencies can determine whether and how to deploy their resources to further investigate potentially anticompetitive acquisitions prior to consummation. The final rule will also provide transparency for those contemplating a reportable transaction by describing the information the

[4] On June 29, 2023, the Commission published a Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (June 29, 2023) (hereinafter NPRM). On August 10, 2023, the Commission extended the comment period to receive public comments through September 27, 2023. 88 FR 54256. The comments on the NPRM (Doc. No. FTC–2023–0040) are available at *https://www.regulations.gov/docket/FTC-2023-0040/comments*.

[5] The Commission does not rely on any particular individual comment submission for its findings, but rather provides here (and throughout this final rule) examples of comments that were illustrative of themes that spanned many comments. The Commission's findings are based on consideration of the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise and experience in identifying mergers that violate the antitrust laws.

[6] References to ''seller'' throughout refer to the acquired person, as defined in 16 CFR 801.2, regardless of whether or not the acquired person is actually a party to the transaction.

Agencies rely on to conduct their initial assessment of whether a transaction may violate the antitrust laws. The amendments will also reduce the current burden on third parties (such as customers and competitors of the merging parties) on whom the Agencies often rely to fill in many of the information gaps during the initial review period because of inadequacies in the current Rules.

With this rulemaking the Commission has closely tailored the burden of complying with the HSR Act to align as much as practicable with the risks of a law violation presented by the particular transaction. This alignment is consistent with the statutory purpose of premerger review, which is for the Agencies to determine which reported transactions may violate the antitrust laws during the brief period provided by the Act for an initial antitrust assessment. As a result, the final rule achieves the benefits associated with mandatory premerger review with an overall burden that is reasonable and consistent with the legislative purpose of the HSR Act.

II. Background

A. Premerger Review and the Implications for Merger Enforcement

Section 7 of the Clayton Act is, by its terms, forward-looking and predictive, focused on acquisitions whose effect ''may be substantially to lessen competition, or to tend to create a monopoly.'' [7] To better effectuate the Clayton Act's goal of preventing undue consolidation or stopping it in its incipiency, Congress passed the HSR Act to require mandatory premerger notification of some acquisitions, and charged the Agencies with reviewing the details of those proposed transactions in advance of consummation to determine whether they may violate the antitrust laws. In doing so, Congress fundamentally changed the way the Agencies enforce the nation's antitrust laws to prevent harmful consolidation.[8]

Congress specifically charged that the Commission engage in rulemaking to require information in the HSR Filing that is necessary and appropriate to detect acquisitions that may violate the antitrust laws. Section 18a(d)(1) of the HSR Act states that the Commission, by rule and in accordance with the Administrative Procedures Act, shall require that the notification contain such documentary material and information to determine whether the acquisition may, if consummated, violate the antitrust laws.[9] Relying on this explicit rulemaking authority, the Commission has adjusted those requirements over time to carry out the purposes of the Act.

In passing the HSR Act, Congress imposed mandatory premerger review only for certain large transactions, in part to ''improve and modernize antitrust investigation and enforcement mechanisms,'' [10] ''ease burdens on the courts by forestalling interminable post-consummation divestiture trials . . . [, and] advance the legitimate interests of the business community in planning and predictability.'' [11] The robust legislative history of the HSR Act makes plain that premerger review should focus on the likelihood that a reported transaction may violate the antitrust laws and that the Commission shall collect information to make that determination prior to consummation.[12] Consistent with Congressional mandate, the Agencies rely on notifications under the HSR Act to target their enforcement efforts to their best use in preventing undue consolidation by seeking to prohibit the consummation of acquisitions that violate the antitrust laws.

To focus the Agencies' screening and potential enforcement efforts on the mergers that are most likely to harm competition and consumers, Congress required notice in advance for the largest mergers and tasked the Agencies with conducting an assessment of the risk that the proposed acquisition may violate the antitrust laws. To perform this task, the Agencies must review thousands of filings each year and identify which ones should be targeted for an intensive investigation of their potential to violate the antitrust laws. This is a fact-intensive endeavor that requires a deep understanding of precedent and economic analysis. The Agencies employ lawyers, economists, technologists, accountants, and support staff to conduct premerger analyses of reported transactions in order to perform this critical task on behalf of the American public.

Nonetheless, transactions reported under the HSR Act are a small fraction of the total number of mergers and acquisitions that occur each year in the United States. Relying on commercial data on M&A activity and data from the Agencies' annual HSR reports, Table 1 shows that during the five-year period of FY 2018 to 2022, HSR filings represented a small percentage of overall deal activity in the United States, on average 16.5 percent a year.[13]

[7] 15 U.S.C. 18. *See Brown Shoe* v. *United States,* 370 U.S. 294, 317–18 (1962) (Congress provided authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency and assure courts had the power to brake the process of concentration at its outset and before it gathered momentum).

[8] *See* Peter W. Rodino, Jr., Statement on the 25th Anniversary of Hart-Scott-Rodino (2001), *https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-news-archive/statement-peter-w-rodino* (''Hart-Scott-Rodino was intended to give the anti-trust agencies two things: critical information about a proposed merger and time to analyze that information and prepare a case, if necessary. From what I hear, the legislation absolutely has transformed merger enforcement. Competition, as well as the consumer, has benefitted.'').

[9] 15 U.S.C. 18a(d)(1).

[10] S. Rep. No. 94–803, at 1 (1976).

[11] H.R. Rep. No. 94–1373, at 11 (1976). The HSR Act applies to acquisitions that met the statutory thresholds whether they are properly styled ''mergers'' and even if they do not result in a change of control. The terms ''mergers,'' ''acquisitions,'' and ''transactions'' are used interchangeably to refer to transactions for which an HSR filing is required.

[12] 15 U.S.C. 18a(d)(1).

[13] Using different commercially available data, the U.S. Government Accountability Office recently estimated that HSR filings during this same time frame averaged 15 percent of overall M&A activity. *See* U.S. Gov't Accountability Office, Defense Industrial Base: DOD Needs Better Insight into Risks from Mergers and Acquisitions 8 Fig. 1 (Oct. 2023) (GAO–24–106129), *https://www.gao.gov/assets/d24106129.pdf* (using Bloomberg data).

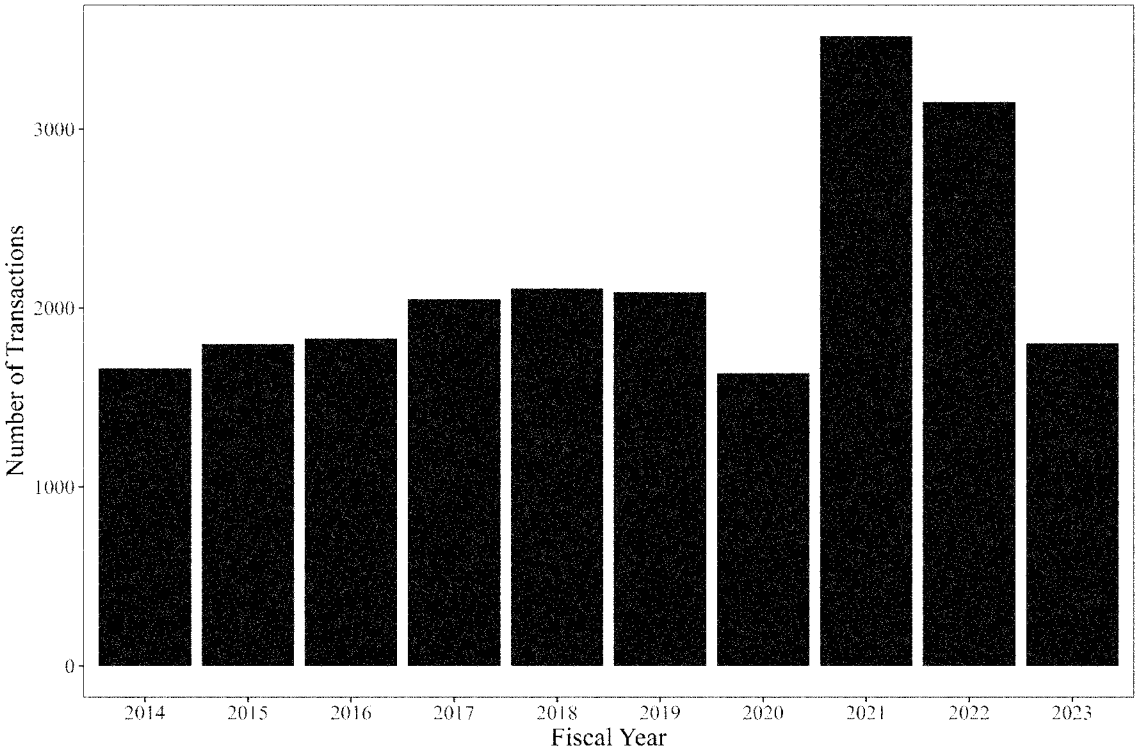
Table 1: M&A Transactions 2018 - 2022

	2018	2019	2020	2021	2022	Average
Total Number of Transactions[a]	13,366	13,696	12,828	19,099	15,734	**14,945**
Number of Reported Transactions[b]	2,111	2,089	1,637	3,520	3,152	**2,502**
Percentage	15.8%	15.3%	12.8%	18.4%	20.0%	**16.5%**

[a] Source: MergerStat Fact Set Review: M&A Announcements.
[b] Source: HSR Annual Reports for Fiscal Years 2018 - 2022, Figure 1.

While the Agencies investigate and ultimately seek to block only a small subset of reportable mergers each year, the challenges of administering mandatory premerger review have expanded and accelerated over time due to the changes in the nature of M&A activity discussed in detail below.

Figure 1: HSR Merger Transactions Reported Fiscal Years 2014 - 2023



As depicted in Figure 1, there was a recent spike in HSR-reportable transactions: in FY 2021, the Agencies reviewed HSR Filings for 3,520 transactions, over twice the number of the prior year's filings. In FY 2022, the Agencies reviewed 3,152 transactions. Although the pace of HSR Filings has recently moderated somewhat, the recent period of intense merger activity highlighted significant inefficiencies and deficiencies in current notification requirements that must be addressed so that the Agencies can direct their scarce resources to prevent those acquisitions most likely to cause widespread harm.[14]

The Commission is mindful of recent economic research that underscores the importance of adequate detection for effective merger enforcement. For instance, researchers posit that some firms appear to be employing strategies to avoid antitrust scrutiny of their anticompetitive deals, deliberately negotiating and structuring their deals to avoid premerger review (so-called

[14] Contrary to suggestions from some commenters, it is not practical for the Agencies to identify specific illegal transactions that they "missed" during their premerger review, nor is the Commission required to establish that as a predicate for invoking its statutory rulemaking authority under the HSR Act. *See Pharm. Rsch. & Mfrs. Am.* v. *FTC,* 790 F.3d 198, 199, 206 (D.C. Cir. 2015) (hereinafter *PhRMA*). Doing so would require a redirection of resources to investigate consummated mergers and away from resources devoted to premerger review. Instead, it is imperative that the Agencies ensure that they have the right information to address deficiencies that have emerged to undermine premerger review as an effective tool for detecting which transactions may violate the nation's antitrust laws.

stealth acquisitions),[15] or identifying acquisition targets at a nascent stage to buy them before they are valuable enough to require premerger review, sometimes solely for the purpose of preempting future competition (so-called ''killer acquisitions'').[16] One researcher concludes that merger enforcement falls by about 90 percent when transactions are not subject to premerger review.[17] Because most mergers are not subjected to premerger review, these strategies have contributed to a rise in aggregate concentration by stimulating mergers between competitors, with attendant negative effects on markups, private investment, and the share of output going toward profits.[18]

These studies support Congress' determination that premerger review is essential to effective enforcement of the antitrust laws and that without effective premerger review, there is inadequate detection of mergers that violate the law and cause harm.[19] While the Agencies can and do challenge acquisitions that are not reported under the HSR Act as well as consummated reported mergers that have caused harm, unwinding an illegal merger post-consummation still requires a significant investment of time and resources, and results in significant harm to market participants until unwound.[20] Even after the Agency succeeds in establishing a law violation, it may be difficult or impossible to restore the premerger state of competition, especially if the parties have commingled, sold, or closed assets, shared confidential information, or terminated key employees.[21] Moreover, the decision to pursue these time-consuming investigations involves opportunity costs, pitting the costs and benefits of challenging a consummated merger against devoting those enforcement resources to investigations into other potential antitrust violations, including investigations that may arise from HSR Filings.

To fulfill the Agencies' mandate to conduct quick yet effective premerger review of reported transactions, the Commission must make the best use of the tools Congress gave the Agencies to detect and prevent harmful acquisitions, including by requiring that the notification contain the documents and information that are necessary and appropriate for screening reportable mergers prior to consummation. Because premerger review is critically important to effective merger enforcement, the information contained in an HSR Filing must be fit for the purpose of determining whether a reported transaction may violate the antitrust laws in light of current market realities. Having the information necessary to make that assessment allows the Agencies to decide when and how to expend public resources to investigate and potentially challenge mergers. The final rule will enable the Agencies to engage in efficient and effective detection of illegal mergers that are subject to the HSR Act and thus is a reasonable exercise of the Commission's rulemaking authority under the HSR Act.

B. The Need for the Final Rule

The purpose of this rulemaking is to modernize the premerger review process in light of changing market dynamics, making adjustments that are necessary and appropriate to allow the Agencies to detect and prevent illegal mergers prior to consummation. The final rule also makes the process more efficient for filers, third parties, and the Agencies, shifting some of the burden of information collection and reporting to the merging parties (and away from third parties) and requiring the information needed for a preliminary antitrust assessment to be contained in the HSR Filing so that the Agencies have the full statutory review period to assess and confirm the information. Overall, the final rule addresses significant information gaps and asymmetries that have grown over time and undermined the Agencies' ability to conduct premerger review. In addition, this rulemaking implements requirements Congress imposed by passing the Merger Modernization Act, which broadened the scope of information the Agencies must collect as part of premerger review, including by requiring the collection of information about subsidies from foreign entities and governments of concern.

Due to changing commercial realities referenced above, the existing requirements for an HSR Filing leave significant gaps in the information available to the Agencies for conducting this assessment. Many of these gaps can be filled by information that the filing parties already have and often use in their own assessment of the transaction. Certain deficiencies in the existing reporting requirements prevent the Agencies from spotting problem areas that would justify a more in-depth investigation or, alternatively, from readily obtaining the facts needed to conclude that the transaction does not merit in-depth review prior to consummation. The rulemaking addresses these problems as well.

Based on the Agencies' extensive experience reviewing HSR Filings, transactions that present certain attributes are more likely to violate the antitrust laws and deserve further investigation. For instance, a merger of two firms that compete (or will soon compete) to provide goods or services to

[15] John Kepler et al., ''Stealth Acquisitions and Product Market Competition,'' 78 J. Fin. 2837 (2023); John M. Barrios & Thomas G. Wollmann, ''A New Era of Midnight Mergers: Antitrust Risk and Investor Disclosures'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 29655, Jan. 2022), *https://www.nber.org/papers/w29655*; *see also* Colleen Cunningham et al., ''Killer acquisitions,'' 129 J. Political Econ. 649, 653 (2021) (killer acquisitions of overlapping targets bunch just below HSR threshold while there is no such pattern for non-overlapping acquisitions).

[16] Cunningham et al., *supra* note 15, at 653.

[17] *See* Comment of Thomas Wollmann, Doc. No. FTC–2023–0040–0680 at 1 n.2 (citing to Thomas G. Wollmann, ''Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,'' 1 a.m. Econ. Rev.: Insights 77–94 (2019) and Thomas G. Wollman, ''How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274, 2021)).

[18] Thomas G. Wollmann, ''Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,'' 1 a.m. Econ. Rev.: Insights 77–78 (2019) (hereinafter ''Stealth Consolidation'').

[19] *See id.* at 77 (post-2000, enforcement against newly exempt transactions dropped to nearly zero while mergers between competitors rose sharply, reflecting an endogenous response to reduced premerger scrutiny).

[20] In a recent example, the Commission ordered the unwinding of an illegal merger three years and two months after consummation. In December 2020, the Commission approved Otto Bock's divestiture of the assets of Freedom Innovations to another company to resurrect competition in the market for microprocessor prosthetic knees. *In re Otto Bock HealthCare N. Am., Inc.,* No. 9378 (F.T.C. Dec. 1, 2020). The Commission's effort to unwind Polypore's illegal acquisition of rival battery separator manufacturer Microporous required five years, during which an Eleventh Circuit decision upheld the Commission's divestiture order. *See* Press Release, Fed. Trade Comm'n, ''FTC Approves Polypore International's Application to Sell Microporous to Seven Mile Capital Partners; Sale Will Unwind Illegal 2008 Acquisition'' (Dec. 18, 2013), *https://www.ftc.gov/news-events/news/press-releases/2013/12/ftc-approves-polypore-internationals-application-sell-microporous-seven-mile-capital-partners-sale. See also* Debbie Feinstein, ''Un-consummated merger,'' Fed. Trade Comm'n Competition Matters blog (Dec. 18, 2013), *https://www.ftc.gov/enforcement/competition-matters/2013/12/un-consummated-merger.*

[21] Fed. Trade Comm'n, The FTC's Merger Remedies 2006–2012, 18–19 (2017) (report of the Bureaus of Competition and Economics) (less than one-quarter of consummated merger remedies successfully restored competition), *https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.*

the same set of customers, or a merger involving a manufacturer and its main distributor that also distributes the products of competing manufacturers, may warrant closer scrutiny. On the other hand, if the Agencies can determine from review of an HSR Filing that a transaction does not present such attributes, the Agencies can more quickly and confidently determine that the transaction does not require a more in-depth review and may proceed to consummation.[22] However, the Agencies cannot make these determinations with confidence in the initial 15- or 30-day waiting period when the HSR Filings lack sufficient information about relevant premerger competitive relationships between the parties. By requiring the submission of such information, the final rule enables effective Agency decision-making during the initial 15- or 30-day waiting period.[23] The intention of the final rule is to make it possible for the Agencies to identify the most concerning transactions for more in-depth review, including through the issuance of Second Requests, and also to more quickly and confidently complete the review of those transactions that do not merit additional investigation and can proceed to closing at the end of the statutory waiting period.

The consequences of inadequate detection are revealed in a recent analysis of hospital mergers that were reported to the Agencies for premerger review co-authored by two economists from the Commission's Bureau of Economics.[24] The paper examined a set of consummated hospital mergers and measured the effect of each merger on prices. The study concluded that mergers not reportable under the HSR Act did not result in larger price increases than reportable mergers. In contrast, the authors found different outcomes among mergers that were subject to premerger review based on how much review the transaction received. Of the mergers reported to the Agencies, the largest average percentage price increase occurred for those mergers that received early termination of the initial waiting period. This suggests that the HSR Filings failed to provide sufficient information to trigger additional investigations that could have blocked these harmful mergers before they were consummated; instead, the filings resulted in early termination of the waiting period. While the study was not designed to test the impact of this rulemaking, the study supports the Commission's belief that there are information deficiencies with the current HSR Rules that prevent the Agencies from identifying mergers that may violate the antitrust laws.[25]

Hundreds of individuals submitted public comments to describe their own experiences in the aftermath of mergers and urge the antitrust agencies to do more to prevent the harmful effects of consolidation, including collecting more information in the HSR Filing. Examples of supportive comments from these individuals include the following:

- I was an employee at a mobile gaming company. . . . We went through acquisition after acquisition, to finally end up in a subsidiary of a big gaming multinational company. . . . There was a hiring freeze, there were layoffs in another subsidiary we had been affiliated with and then a month ago they cancelled our project and laid off all California employees. . . . Before the final acquisition, our company had 2 profitable games and was developing a third. After the acquisition there were harsh [Key Performance Indicators] for the new game and investment was cut back. Had our company been able to resist the wave of subsequent acquisitions, it is likely we would still be employed in a profitable and vibrant company that was able to compete on the marketplace.[26]
- I am a General Partner at a small Venture Capital firm. I support this proposal as I believe it will lead to increased transparency which benefits us all. . . . We are facing an oligopoly/monopoly crisis in this country/the world and it's important we strive for real competition. I believe this proposal will provide the government more information with which it can make sure our industries thrive.[27]
- As a retired person, I have noticed prices going up much more where a small group of suppliers have most of the market share. I see companies using near-monopoly power to stop employees from having unions. The only way the antitrust laws can be adequately enforced, is to insist that anyone proposing a merger provide full accurate information on what they are doing.[28]
- I work as a cybersecurity engineer. Leaving aside the economic concerns of monopolies, I want to bring up the security concerns of allowing unchecked mergers. Haphazard, rushed mergers increase the security risk across companies, as the engineering teams must stitch together the environments for disparate organizations quickly. . . . I look forward to these reporting requirements and I hope they cause companies to slow down and think of the knock-on effects of the mergers beyond the influx of cash and increased market power.[29]
- As an investor and financial advisor, I approve of the changes requiring more disclosure about the nature of mergers. The impacts of industry consolidation are important. . . . A thorough understanding of the purpose of mergers should help ensure that deals are not anti-competitive.[30]
- As a retired CPA and former business professor, I support these proposed changes to the HSR form. The government needs the additional information and greater clarity in order to carry out its responsibility to oversee and evaluate proposed mergers and acquisitions with a view to protecting

[22] Until 2020, the Agencies routinely granted early termination of the initial waiting period for certain transactions that did not warrant further action pursuant to 15 U.S.C. 18a(b)(2). In March 2020, in order to transition filers to an e-filing system that permitted the Agencies to continue to process filings during the COVID–19 pandemic, the Agencies temporarily suspended the discretionary granting of early termination. In February 2021, the Agencies once again suspended the granting of early termination in response to an unprecedented volume of transactions. *See* Press Release, Fed. Trade Comm'n, ''FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination'' (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination*.

[23] The HSR Act provides for a shortened 15-day initial waiting period for reportable acquisitions by means of a cash tender offer or acquisitions subject to certain Federal bankruptcy provisions. 15 U.S.C. 18a(b)(1)(B); 11 U.S.C. 363(b)(2), as amended (1994). For these transactions, the second waiting period is also shorter, 10 days (as compared to 30 days for most transactions) after appropriate certification of substantial compliance with the Second Request. 15 U.S.C. 18a(e)(2). For convenience, this rulemaking refers to the standard 30-day initial waiting period that applies to most transactions even though the Agencies have even less time to review information provided in the HSR Filing for cash tender or certain bankruptcy transactions.

[24] Keith Brand et al., ''In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016,'' 66 J. L. Econ. 639 (2023).

[25] One commenter suggests that this study proves the opposite and provides evidence that the current HSR Form provides Agency staff with sufficient information to identify potentially anticompetitive mergers. *See* Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 14 n.32. The Commission disagrees with this assessment of the results. Indeed, in their study, the authors suggested that their results should encourage further study of the process of granting early termination to better illuminate why mergers that receive truncated review had higher price effects than those that received a preliminary review but not a Second Request. *See* Brand et al., *supra* note 24, at 663–64.

[26] Anonymous Comment, Doc. No. FTC–2023–0040–0134.

[27] Anonymous Comment, Doc. No. FTC–2023–0040–0203.

[28] Comment of Joan Friedman, Doc. No. FTC–2023–0040–0237.

[29] Comment of Cybersecurity Engineer, Doc. No. FTC–2023–0040–0238.

[30] Comment of Joseph Cook, Doc. No. FTC–2023–0040–0244.

the common good and promoting competition within and across industries.[31]

• Capitalism can only work with a robust system of competition, and we are lo[]sing that at an ever-increasing rate. I am in an agricultural business. There is virtually no competition for the dollars I spend, and an equal lack of competition for what I produce. This is stunningly true when looked at over the 40 years I have been in business.[32]

• Businesses certainly have a right to pursue mergers and acquisitions as a means of improving their market positions, but the public also has a right to know the ''five W's'' driving these decisions: Who is funding the HSR Action; What are the specifics of the proposed action; When are the HSR Actions taking place; Where are the affected communities/localities; and Why are the stakeholders pursuing the HSR Action (or, what is their business goal)? Another key piece of information that the public has a right to know, is WHO will be affected by the proposed merger or acquisition? The issues at stake here are National Security, fair market competition, supply chain disruptions, and negative impacts on labor markets. . . . I hope the FTC sticks to their plan and implements these common-sense and much needed reporting requirements.[33]

• I am a 25-year veteran in an industry (publishing) that has seen both jobs and innovation suffer due to unchecked consolidation by large players. It is very possible some of this consolidation might have been prevented, or at least steered in a direction that encouraged innovation and growth, if regulators had this kind of information available beforehand.[34]

• I am a private, sole-practitioner entrepreneur with a vested interest in a diversified economic ecology that supports and sustains vibrant, fair competition. . . . From my perspective, the requirements for getting approval for large mergers should include gathering enough information about the companies involved that the FTC can make a best and rational assessment of the effects of the maneuver on the industries, labor markets, consumer pricing, industry trends, trading markets, etc, that they (mergers) will potentially affect.[35]

On the other hand, several commenters stated that the Agencies have not provided any evidence that current information requirements are insufficient, or identified transactions they did not challenge due to shortcomings in the current premerger review process. One commenter suggested that if the Commission intends to expand the information requirements for the HSR Filing, it should lay a stronger legal and evidentiary foundation that would justify its need for the additional information. Another commenter urged the Commission to consider how best to balance the need to determine whether further investigation is warranted against the burden to filing parties.

In response to the comments and to explain further the need for this rulemaking, the Commission discusses below the gaps that exist in current HSR information requirements relating directly to potential violations of the antitrust laws, and identifies the new information requirements in the final rule that will provide a factual basis for the Agencies to determine whether to conduct a more searching review of a transaction based on these concerns. The gaps described below are intended to be illustrative and not exhaustive.

1. Disclosure of Entities and Individuals Within the Acquiring Person

In reviewing a transaction filed under the HSR Act, the Agencies must quickly understand the scope and nature of the buyer's business and business relationships to determine whether the acquisition may harm competition and thus violate the antitrust laws,[36] which include section 7 of the Clayton Act. The scope of section 7 is broad: it prohibits any acquisition whose effect may be substantially to lessen competition or to tend to create a monopoly, including those that result in a small ownership stake.[37] In many acquisitions, the buyer gains control of the acquired entities or assets and directs the decision-making at the combined firm post-merger. In addition, if the buyer has a complex corporate or governance structure, an acquisition can bring together individuals or investors within the buyer that control or influence decision-making at a competitively significant business, such as a competitor of the target[38] of the filed-for transaction.[39] Indeed, holdings of entities within the acquiring person that do not result in control under the HSR Rules nevertheless can result in the ability to influence competitively important decisions of the acquiring entity, and thus affect the analysis of whether the acquisition of the target may harm competition.[40]

The HSR Act states that, unless exempt, no person shall acquire, directly or indirectly, any voting securities or assets of any other person without first filing a notification with the Agencies and waiting for the statutory period to expire.[41] The HSR Rules require notification of the transaction from the entity that, pursuant to the Rules, controls the buyer (or seller), which the Commission has defined as the Ultimate Parent Entity or ''UPE.''[42] But to determine

[31] Comment of Sue Ravenscroft, Doc. No. FTC–2023–0040–0259.

[32] Comment of Jeffrey Bender, Doc. No. FTC–2023–0040–0267.

[33] Comment of Thomas Newman, Doc. No. FTC–2023–0040–0325.

[34] Anonymous Comment, Doc. No. FTC–2023–0040–0332.

[35] Comment of Marla McFadin, Doc. No. FTC–2023–0040–0377.

[36] 15 U.S.C. 12(a).

[37] 15 U.S.C. 18. *See United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 592 (1957) (any acquisition is within the reach of section 7 whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or the creation of a monopoly in any line of commerce).

[38] To aid the clarity of the Form and Instructions, the Commission defines ''target'' in the Instructions to include all entities and assets to be acquired by the acquiring person from the acquired person in the reported transaction. *See* section VI.A.1.h.

[39] *See, e.g., In re Red Ventures Holdco, LP,* No. C–4627 (F.T.C. Nov. 2, 2017) (complaint) (overlapping limited partnership holdings violated section 7); *In re TC Group, L.L.C.,* No. C–4183 (F.T.C. Mar. 16, 2006) (complaint) (acquisition involving minority stake giving two private equity investors seats on the boards of competitors); *In re Dan L. Duncan,* No. C–4173 (F.T.C. Aug. 18, 2006) (complaint) (acquisition combined general partners of competing energy storage companies under common control). Competition concerns about partial stakes can arise between horizontal competitors; *United States* v. *Dairy Farmers of Am.,* 426 F.3d 850, 860 (6th Cir. 2005), or a supply relationship, *du Pont,* 353 U.S. at 602–604 (23% interest in General Motors, a key supplier, and a shared board member). Section 7 does not apply to buyers making an acquisition solely for the purpose of investment when the buyer does not intend to use its position to bring about or attempt to bring about a substantial lessening of competition. *United States* v. *Tracinda Inv. Corp.,* 477 F. Supp. 1093, 1100 (C.D. Cal. 1979).

[40] *See du Pont,* 353 U.S. at 607 n.36 (finding the influence of du Pont's 23% stock interest to be greater, due to diffusion of remaining shares); *Denver & Rio Grande W. R.R. Co.* v. *United States,* 387 U.S. 485, 504 (1967) (identifying section 7 concerns with a 20% investment). *See also Dairy Farmers of Am., Inc.,* 426 F.3d at 862 (no voting interest but leverage via its position as financier to control or influence competitor's decisions).

[41] 15 U.S.C. 18a(a). Congress rejected a proposal to limit covered acquisitions to those made by corporations, using the term ''person'' instead because the anticompetitive nature of a merger is not dependent upon the legal form of the acquiring entity. 122 Cong. Rec. 30876 (1976).

[42] One of the many initial challenges that the Commission faced in implementing the HSR Act was how to define ''control'' for the purposes of determining reportability of transactions. The Commission immediately understood that no set percentage of ownership dictated whether an individual or entity had functional control of or significant influence over a company, which is

whether the transaction may violate the antitrust laws, the Agencies need to understand the nature of the buyer's holdings pre- and post-merger, as well as the identities of others who have holdings in the buyer and thus may have influence, including possible veto power, over the buyer's decision-making, since that ability affects the evaluation of the competitive effects of the acquisition of the target. Increasingly, this includes individuals and entities with significant management rights that give them a ''seat at the table'' when the buyer is making competitively important decisions.

Today, the mechanisms of influence are not limited to equity stakes; the ability to influence corporate decision-making arises from a variety of interests beyond voting rights.[43] It may arise from sharing key decision-makers, such as executives or members of their respective boards of directors, or from a combination of a significant minority stake and rights to appoint or nominate members of the board.[44] The power of key decision-makers of one competitor to place members on the board of another competitor or veto financial decisions can result in substantial influence over the buyer, and thus the target after the transaction is consummated, rendering an acquisition of a related target potentially illegal under section 7.[45] A merger might also violate the law if it gives individuals and entities of one competitor access to officers, directors, or employees of another competitor.[46] Similarly, the existence of subsidies, among other means, may subject the buyer to additional pressures from individuals or entities not directly a party to the reportable transaction.[47] Beyond voting rights, these interest holders can have similar influence as holders of minority and non-corporate interests.

a. Trends in Private Investment

Understanding the operations of the buyer has become more challenging due to vast changes in M&A activity since the promulgation of the HSR Rules in 1978. One notable recent trend in M&A activity is that the role of private investors, including private equity, has become more pronounced.[48] In the Agencies' experience, these private investors often utilize complicated structures of ownership and managerial control. They also frequently take either majority or minority stakes in many different operating companies (which may have competitively significant relationships) and can exercise significant influence over management and strategic decision-making. In particular, the percentage of equity interest is often not a good indicator of the extent to which investors can direct the strategic decisions of the business.[49] Investors can participate in the management of companies by serving on the company's board, selecting or monitoring the management team, having veto rights, acting as sounding boards for CEOs, or stepping into management roles themselves.[50]

When these private investors take active positions in a wide variety of companies, such holdings can create direct links between competitors or other competitively relevant firms, such as critical suppliers or distributors. Economic research has shown that transactions that lead to cross-ownership of horizontal competitors or other firms in a competitively significant business relationship can create similar incentives and cause similar anticompetitive effects as a full merger.[51] But when these relationships are not well known or easy to identify, the risk that anticompetitive harm from an unlawful acquisition will go

critical to the analysis of the competitive effects of a transaction. In 1976, the Commission originally proposed that ''control'' would include not only ownership of 50% or more of the voting securities of an entity, but also the power to influence through a minority stake. 41 FR 55488, 55490 (Dec. 20, 1976). Commenters objected to such a subjective test for control. *See* 42 FR 39040, 39043 (Aug. 1, 1977). So, the Commission proposed to include the contractual power to designate a majority of the directors or trustees of an entity. *Id.* This proposal was also criticized for being overly broad and subjective. In the end, in setting up the premerger notification program, the Commission adopted the simple 50% or more threshold for control to give prospective filers certainty as to their reporting obligations. But in doing so, the Commission did not dismiss the significance of understanding who has actual or working control of the filing parties. 43 FR 33450, 33457–58 (July 31, 1978). This definition limited the number of transactions subject to the filing requirements of the HSR Act, but the Commission did not minimize the importance of examining who may have significant influence over the acquiring person while assessing antitrust risk arising from the transaction.

[43] Gabriel V. Rauterberg, ''The Separation of Voting and Control: The Role of Contract in Corporate Governance,'' 38 Yale J. Reg. 1124, 1148–54 (2021) (documenting trend of public companies being subject to stockholder agreements that provide various species of control rights to favored investors); Jill E. Fisch, ''Stealth Governance: Shareholder Agreements and Private Ordering,'' 99 Wash. U. L. Rev. 913, 930–33, 946–53 (2021) (discussing similar trend in private companies).

[44] *E.g., United States* v. *U.S. West, Inc.,* No. 96–002529, 1997 WL 269482 (D.D.C. Feb. 28, 1997) (acquired firm had 20% stake plus board seats in a competitor of acquiring firm).

[45] *E.g., United States* v. *Univision Commc'ns., Inc.,* No. 1:03–cv–00758, 2003 WL 23192527 (D.D.C. Dec. 22, 2003) (buyer held substantial equity stake plus ability to influence certain strategic decisions through issuance of equity or debt or veto of future acquisitions). *See also Dairy Farmers of Am.,* 426 F.3d at 862 (buyer had influence due to role as financier, so that acquired firm is ''locked in'' to a relationship with the buyer, which could lead to anticompetitive effects).

[46] *E.g., In re Time Warner Inc.,* No. C–3709 (F.T.C. Sept. 12, 1996) (analysis to aid public comment) (walling off two individuals and one entity to prevent them from influencing officer, directors, and employees of competitor and its day-to-day operations).

[47] As discussed elsewhere, Congress has directed the Commission to require the reporting of subsidies received from foreign countries or foreign entities of concern due to concerns that these entanglements can distort the competitive process by enabling the subsidized firm to submit a bid higher than other firms in the market, or otherwise change the incentives of the firm in ways that undermine competition following an acquisition. Merger Filing Fee Modernization Act of 2022, 15 U.S.C. 18b. Congress also enacted the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) over certain non-controlling investments and real estate transactions involving foreign persons that may be a threat to national security. Public Law 115–232, 132 Stat. 2173, Title XVII, Subtitle A (2018). For certain foreign investments in U.S. businesses operating critical technologies or infrastructure, or that collect sensitive personal data of U.S. citizens, FIRRMA regulations require notification of non-controlling investments, direct or indirect, that afford the foreign investor (1) access to material non-public technical information; (2) membership or observer rights on the board directors (or similar) or the right to nominate an individual to that board; or (3) any involvement, other than through voting of shares, in substantive decision-making of the U.S. business. 31 CFR 800.211. Such relationships are deemed a non-controlling interest in a U.S. business that afford a foreign investor access to information or involvement in substantive decision-making. *See* 85 FR 3112 (Jan. 17, 2020).

[48] Elisabeth de Fontenay, ''The Deregulation of Private Capital and the Decline of the Public Company,'' 68 Hastings L. J. 445, 447 (2017). Private equity has accounted for an increasing share of all merger activity over time, although private equity activity is highly cyclical. *See* Michael Mauboussin & Dan Callahan, ''Public to Private Equity in the United States: A Long-Term Look,'' Morgan Stanley Inv. Mgmt., Counterpoint Global Insights 1 (Aug. 2, 2020), *https://www.morganstanley.com/im/publication/insights/articles/articles_publictoprivateequityintheusalongtermlook_us.pdf*. Recent estimates suggest that private equity firms managed about 20% of U.S. corporate equity and that private equity deal-making has accounted for 40% or more of domestic M&A activity. Rogé Karma, ''The Secretive Industry Devouring the U.S. Economy,'' Atlantic (Oct. 30, 2023). *See also* Steven A. Cohen, et al., ''Private Equity in 2023—A Year (Not) to Remember,'' Harv. L. Sch. Forum on Corp. Governance (Jan. 13, 2024), *https://corpgov.law.harvard.edu/2024/01/13/private-equity-in-2023-a-year-not-to-remember/* (private equity deal volume declined in 2023 and increasingly focused on smaller deals and minority investments).

[49] *See generally* Bob Zider, ''How Venture Capital Works,'' Harv. Bus. Rev. (Nov.-Dec. 1998), *https://hbr.org/1998/11/how-venture-capital-works*; Thomas Hellman, ''The allocation of control rights in venture capital contracts,'' 29 RAND J. Econ. 57 (1998).

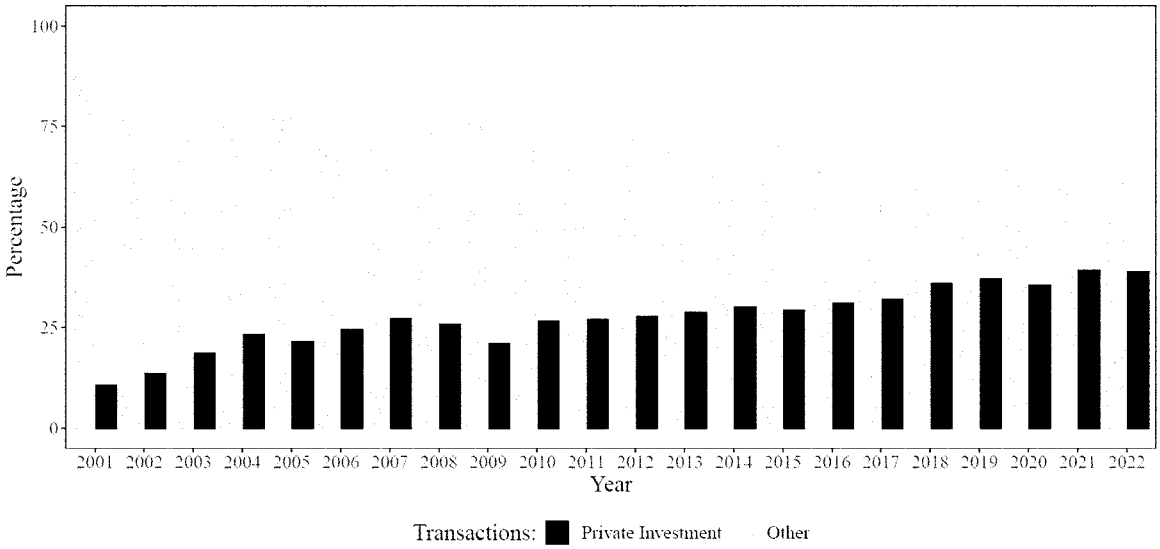
[50] *See, e.g.,* Sec. Exch. Comm'n, ''Private Equity Funds,'' *Investor.gov* (last visited Sept. 10, 2024), *https://www.investor.gov/introduction-investing/investing-basics/investment-products/private-investment-funds/private-equity*.

[51] Timothy Bresnahan & Steven C. Salop, ''Quantifying the competitive effects of production joint ventures,'' 4 Int'l J. Indus. Org. 155 (1986).

undetected is greatly increased.[52] This includes the risk of collusive [53] or coordinated behavior,[54] or the risk that cross-ownership of the combined firm will lead to foreclosure of rivals.[55]

The increasing role of private capital is reflected in the shifting mix of reportable transactions. Using data from the Agencies' Annual HSR Reports for the past 20 years, Figure 2 shows that the number of transactions for which the name of the Ultimate Parent Entity of the acquiring person included ''fund'' or some variation of ''L.P.'' has increased from approximately ten percent to nearly 40 percent of all reportable transactions.[56] The acquiring person for these transactions can be shell companies that have been created by an investment group in order to make a particular acquisition, or an entity that owns a variety of other operating entities (often referred to as ''portfolio companies''). In either scenario, the entity is part of the structure of a larger investment company or group.

Figure 2: Acquisitions Involving Funds and Limited Partnerships



Note: Private Investment refers to the percentage of HSR Reportable Transactions with "Fund" or variation of "L.P." in the name of the UPE of the acquiring person.

Since the beginning of the premerger program, the Commission has required filers to report certain entities that hold minority interests in the filing parties to alert the Agencies to situations in which the potential antitrust impact of the reported transaction does not result solely or directly from the acquisition, but may arise from direct or indirect shareholder relationships between the parties to the transaction.[57] As explained in the NPRM, reporting requirements regarding the identification of certain minority holders of the filing persons have been adjusted over time to reflect market realities, including changes in investment activity and the growing role of these intermediaries.[58] Nonetheless, changes in the investment landscape discussed above have created meaningful gaps in the reporting requirements for a growing number and type of minority holders that have the ability to influence competitive decision-making and to harm competition via acquisitions that violate the antitrust laws.

b. Corporate Structure Changes

Several commenters supported the need for additional information that would identify entities holding minority

[52] Daniel P. O'Brien & Steven C. Salop, ''Competitive Effects of Partial Ownership: Financial Interest and Corporate Control,'' 67 Antitrust L. J. 559, 570 (1999) (overview of the complex corporate financial and governance structures of modern corporations, including different types of shareholding and the relationships to the boards of directors).

[53] Robert J. Reynolds & Bruce R. Snapp, ''The competitive effects of partial equity interests and joint ventures,'' 4 Int'l J. Indus. Org. 141 (1986); David Flath, ''When is it rational for firms to acquire silent interests in rivals?,'' 9 Int'l J. Indus. Org. 573 (1991); David Reitman, ''Partial Ownership Arrangements and the Potential for Collusion,'' 42 J. Indus. Econ. 313 (1994); Sandro Shelegia & Yossi Spiegel, ''Bertrand competition when firms hold passive ownership stakes in one another,'' 114 Econ. Letters 136 (2012).

[54] Rune Stenbacka & Geert Van Moer, ''Cross ownership and divestment incentives,'' 201 Econ. Letters 109748 (2021).

[55] Nadav Levy et al., ''Partial Vertical Integration, Ownership Structure, and Foreclosure,'' 10 a.m. Econ. J.: Microeconomics 132 (2018).

[56] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2010 appendix A (FY 2010) (reporting Adjusted Transactions in which a Second Request could have been issued from years 2001–2010); Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2013 appendix A (FY 2013) (reporting Adjusted Transactions in which a Second Request could have been issued from years 2004–2013); Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2022 appendix A (FY 2022) (reporting Adjusted Transactions in which a Second Request could have been issued from years 2013–2022). *See also* Fed. Trade Comm'n Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *https://www.ftc.gov/policy/reports/annual-competition-reports* (collecting reports). The Total Number of Adjusted Transactions omits from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, *e.g.,* filing for one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to § 801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[57] 43 FR 33450, 33531 (July 31, 1978).

[58] NPRM at 42188.

positions. One commenter stated that investors have shifted strategies since the 1980s, when portfolios consisted of unrelated companies and investors mainly focused on optimizing capital structures and improving corporate governance.[59] Another commenter stated that without a full picture of the entire corporate structure of the merging parties, it can be difficult or impossible to untangle or understand the potential anticompetitive impacts of a transaction. Several commenters supported the need to adjust information requirements to have a broader view that reflects how firms are organized today. One commenter supported the collection of more comprehensive information related to the merging entities, arguing that a more holistic and systems-level approach would examine the networks of firms involved in a market, which could expose companies that can operate as bottlenecks or supply key resources to other market participants. A group of State antitrust enforcers supported the collection of more information related to corporate control or the degree of financial interest so the Agencies can quickly assess how the resulting ownership structure may change the parties' incentives to compete, enhance the acquirer's ability to influence decision-making through changes in voting interests or governance rights, or facilitate the sharing of competitively sensitive information between rivals.

Another development that has caused the Commission to reassess its rules is that the particular corporate structure of an entity is now less indicative of its market behavior, and thus distinctions made on that basis may no longer be sound. The decision to form as a corporation, limited liability company, or limited partnership is often influenced more by risk, liability, and tax considerations than by the entity's business operations. Now more than ever, distinctions made based on corporate form have little impact on an assessment of whether and how firms compete. Moreover, corporate governance literature highlights the changing nature of decision-making within even standard organizational structures, such as corporations. Corporate law provides sufficient flexibility to alter traditional roles, including the rights of shareholders and the scope of director liability, by contract[60] or through modification of bylaws or certificates of incorporation.[61] The rise of shareholder agreements—private contracts by and among shareholders—has affected who has the ability to direct decisions of the company, separating voting and control, especially for those given veto rights via contract.[62] These forms of 'stealth governance' have implications for how decisions are made within the firm, making it difficult for investors to know who is exercising control within the company.[63]

After careful consideration of these points and others raised by commenters, the Commission has determined that the requirements of the current Form and Instructions have not kept pace with market realities and the accompanying changes in ownership structures. In light of these shifts in corporate formation and governance, the current requirements do not provide the Agencies with sufficient information that allow them to understand how decisions are made at the respective companies, let alone whether the acquiring person may have competitively relevant premerger entanglements with the target's industry and minority holders that may have significant rights to direct the acquiring entity's actions.

To keep pace with prior changes in corporate form, the Commission has adjusted the disclosure requirements for minority investors over time and in light of its experience reviewing thousands of filings each year, balancing the need to surface competitively relevant relationships without burdening filers to provide information that would not change the Agencies' premerger screening decisions. Under the current rules, it has become increasingly difficult to screen transactions because deal structures often have minority investors with significant rights that are not disclosed. See Figures 4 through 8 below, section VI.D.1.d.ii. This includes situations where an investor group is, for practical purposes, making the acquisition (or otherwise significantly involved), but the HSR Filing does not alert the Agencies to their role in the acquisition. These relationships are not currently disclosed if the minority investment is not in the UPE or acquiring entity, but rather in an entity (often a shell entity) that sits between these two in the structure of the acquiring person. Even if the minority investment is made in the UPE, if the UPE is an LP, only the name of the general partner is disclosed. For situations where the current information on the HSR Filing is unrelated to the public-facing name of the entity that controls the acquiring person, the HSR Filing does not alert the Agencies to the premerger relationships that exist solely due to that investor's relationship with and role in the buyer.[64]

To close this information gap, the Commission has determined that the Agencies need additional information about entities in between the UPE and the acquiring entity. If any of these entities or individuals has a minority stake or other rights that give them the ability to influence decision-making post-merger, then they are functionally ''in the deal'' and their existing business relationships are relevant to a thorough premerger antitrust assessment of the transaction. As explained in more detail in section VI.D.1.d.ii.a., this information was required of all corporate entities within the acquiring person prior to a rule change in 2011 that limited the requirement in order to exclude entities not related to the transaction. However, as transaction structures have become more complex, application of the 2011 change has eliminated the requirement to provide information about minority entities that are related to the acquiring entity. The final rule addresses this gap in information so that the Agencies can identify existing relationships among individuals and entities that have interests in (1) the acquiring entity (and any entities it controls or are controlled by it) and (2) other entities within the UPE that have competitive relationships

[59] *See also* Aslihan Asil et al., ''Misaligned Measures of Control: Private Equity's Antitrust Loophole,'' 18 Va. L. & Bus. Rev. 51 (2023). Asil et al. argue that the complicated structure of ownership in the typical private equity acquisition may make some anticompetitive deals technically non-reportable under the HSR act, because the investment structure under-represents the proportion of control actually conferred by the transaction. *Id.* at 53.

[60] *See* Jill E. Fisch, ''Governance by Contract: The Implications for Corporate Bylaws,'' 106 Cal. L. Rev. 373, 379 (2018).

[61] Megan Wischmeier Shaner, ''Interpreting Organizational 'Contracts' and the Private Ordering of Public Company Governance,'' 60 Wm. & Mary L. Rev. 985, 988 (2019) (the charter and bylaws of public corporations are being used as tools for restructuring key aspects of corporate governance).

[62] Rauterberg, *supra* note 43.

[63] Jill E. Fisch, ''Stealth Governance: Shareholder Agreements and Private Ordering,'' 99 Wash. U. L. Rev. 913, 947 (2021) (One investor's capacity to monitor may be limited by an agreement to support director candidates chosen by another investor, or an ownership structure that appears to involve shared power may be undermined by the contractual formation of a control group).

[64] For example, a fund that operates as Alpha Capital Partners could create an entity named 123ABC, LP to effectuate an acquisition. 123ABC, LP could be its own UPE because Alpha Fund I and Alpha Fund II each hold 49.9% of the 123ABC, LP, with the general partner, 123ABC GP, LP, holding 0.2%. Currently, the Form only requires 123ABC, LP to disclose that 123ABC GP, LP is its general partner. The issue is compounded if Alpha Capital Partners is co-investing with Beta Capital Partners and 123ABC, LP is held 49.9% by Alpha and 49.9% by Beta (or if Beta invests in an entity that is not the UPE or acquiring entity). Disclosure of these relationships are not currently required.

with the target. These minority holders are competitively relevant because they may have the ability to influence decision-making and operations of the target post-merger [65] but it is difficult for the Agencies to detect these relationships based on information available the current Form.

As discussed below in section VI.D.1.d. and VI.D.3.c., the final rule requires additional information for Minority Shareholders or Interest Holders as well as Officers and Directors from the acquiring person. Information about other individuals or entities holding a minority position or rights to serve or appoint members of the governing board will fill an existing gap that has created a blind spot for the Agencies that prevents a thorough premerger screening, especially for transactions involving complex corporate structures and investment vehicles. This information is most relevant from the entity that will be making decisions post-consummation, and so the final rule does not seek this information from the seller, other than the identification of minority interest holders that will ''roll over'' their investments post-consummation.[66] This information is necessary to identify additional areas of competitive concern created by minority stakeholders or other influential decision-makers (*i.e.,* officers and directors) that may have a relationship with entities related to the target of the acquisition.

However, in light of concerns raised by commenters about the burden and relevancy of providing this information with respect to limited partners, the Commission has modified these requirements to focus only on those limited partners that also have management rights, such as the right to appoint members to the board. Moreover, the final rule does not adopt certain proposed requirements to identify board observers, or creditors, holders of non-voting securities, or entities with management agreements. The Commission has determined not to require this information at this time but will continue to monitor market activity as it implements the final rule.

Similarly, new document requirements contained in the final rule are aimed at providing a more in-depth understanding of the motivation and purpose of the transaction, and how the combined company will be operated post-consummation. In particular, additional transaction-related documents will provide a more complete picture of the buyer's reason for pursuing the transaction, and for companies with complex investment structures, these documents may reveal whether there are other individuals or entities who will be participating in competitive decisions post-merger. The final rule also requires a small set of business plans and reports shared at the highest level of management that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity. Together, these documents may reveal whether there are significant investors in either party that also have investments in businesses that compete with the target or if there are any other planned investments in competitively relevant businesses, such as competitors or suppliers, that would impact the Agencies' assessment of whether the transaction may violate the antitrust laws.

2. Identifying Potential Labor Market Effects

The Clayton Act's prohibition on acquisitions that may substantially lessen competition or tend to create a monopoly applies to acquisitions that have these effects on competition to purchase inputs that firms use to produce goods and services just as it does to acquisitions that threaten competition in downstream markets for goods and services themselves,[67] and the antitrust laws protect competition in markets for labor services.[68] As evidence of decreasing competition for labor continues to mount,[69] the Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets and have stepped up efforts to identify and investigate potential labor market effects arising from reportable transactions. The Agencies have challenged a few transactions that may result in labor market harms,[70] and consent agreements have included provisions that stop the use of certain non-compete clauses that limit the ability of potential market entrants to hire key employees.[71]

As stated in the NPRM, current notification requirements under the HSR Act do not require any specific information about employees. And yet virtually every firm competes for labor in at least one labor market and, more commonly, in multiple labor markets, and transactions that involve two firms

[65] *See United States* v. *Dairy Farmers of Am., Inc.,* 426 F.3d 850, 860 (6th Cir. 2005) (district court erred in focusing on control which ignored the possibility that there may be a mechanism that causes anticompetitive behavior other than control, such as leveraging position as financier).

[66] In many transactions, the acquired firm ceases to exist post-consummation. Even when some entity continues to generate revenues, possibly in competition with some aspects of the buyer's business, the Commission has determined to collect additional information about entities within the UPE only from the acquiring person at this time.

[67] *See United States* v. *Bertlesmann SE & Co.,* 646 F.Supp.3d 1 (D.D.C. 2022) (violation of section 7 where merger likely to substantially lessen competition in market for publishing rights to anticipated top-selling books due to harm to targeted sellers—authors of top-selling books); *Boardman* v. *Pac. Seafood Grp.,* 822 F.3d 1011, 1022 (9th Cir. 2016) (acquisition may violate section 7 by substantially lessening competition in multiple seafood input markets). *See also Mandeville Island Farms, Inc.,* v. *Am. Crystal Sugar Co.,* 334 U.S. 219, 235–36 (1948) (antitrust laws protects not just consumers, purchasers, competitors or sellers but all victims of illegal practices); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312, 321–22 (2007); *United States* v. *Syufy Enterprises,* 903 F.2d 659, 663 n.4 (9th Cir. 1990); *In re Grifols, S.A.,* No. C–4654 (F.T.C. Aug. 1, 2018) (order requiring divestitures to prevent monopsony in three local markets for the collection of plasma).

[68] *NCAA* v. *Alston,* 594 U.S. 69, 86–87 (2021) (plaintiff student-athletes need not show harm in seller-side market as well as buyer-side labor market); *Anderson* v. *Shipowners Ass'n of the Pac. Coast,* 272 U.S. 359, 365 (1926) (Sherman Act protects competition for labor).

[69] *See e.g.,* Anna Stansbury & Lawrence H. Summers, ''The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), *https://www.nber.org/papers/w27193*; Orley Ashenfelter et al., ''Labor Market Monopsony,'' 28 J. Lab. Econ. 203 (2010); V. Bhaskar et al., ''Oligopsony and Monopsonistic Competition in Labor Markets,'' 16 J. Econ. Perspectives 155 (2002); William M. Boal & Michael R. Ransom, ''Monopsony in the Labor Market,'' 35 J. Econ. Lit. 86 (1997); Alan B. Krueger, Luncheon Address at Kansas City Federal Reserve Bank, Reflections on Dwindling Worker Bargaining Power and Monetary Policy (Aug. 24, 2018), *https://www.kansascityfed.org/documents/6984/Lunch_JH2018.pdf*; Brianna L. Alderman et al., ''Monopsony, wage discrimination, and public policy,'' 61 Econ. Inquiry 572 (2022); David Berger et al., ''Labor Market Power,'' 112 a.m. Econ. Rev. 1147 (2022); Chen Yeh at al., ''Monopsony in the US Labor Market,'' 112 a.m. Econ. Rev. 2099 (2022); José Azar et al., ''Labor Market Concentration,'' 57 J. Hum. Resources S167 (2022).

[70] Press Release, Fed. Trade Comm'n, ''FTC Challenges Kroger's Acquisition of Albertsons'' (Feb. 26, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons*; *United States* v. *Anthem* et al., 1:16–cv–01493 ¶ 71 (D.D.C. filed July 21, 2016) (complaint); *United States* v. *Aetna, et al.,* 3–99–CV 1398 ¶ 27 (N.D. Tex. filed June 21, 1999) (complaint). *See also* Concurring Statement of Commissioner Slaughter and Chair Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England 1–2 (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf* (recommending including a count in the complaint that the proposed merger would have violated section 7 of the Clayton Act in a relevant labor market).

[71] Press Release, Fed. Trade Comm'n, ''FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics'' (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis.*

that purchase labor from the same labor market(s) may substantially lessen competition between employers for labor services. Merging parties may compete in the same labor market even when they do not compete in the same product market.

The Commission received hundreds of comments from individuals, many of whom are in the entertainment industry, who supported the need for the Agencies to conduct a robust search for potential labor market effects before the acquisition is consummated. Several dozen recounted the effects that prior mergers have had on them. Examples of comments supportive of reviewing transactions for labor market effects include the following:

- I'm a working TV writer at the beginning of my career. I'm afraid for the future—the consolidation of the media companies in this town and their vertical integration has made things so much harder and less competitive, even in the time that I've been in LA and worked within the system. Now that there are so few ''shops'' in town, salaries are depressed and it's become incredibly difficult to not only demand fair pay, but treatment as well. They know that they don't have to negotiate or budge on whatever terms they set because there are increasingly few alternatives to them.[72]
- My background includes Strategy consulting for major transnational Mergers. I think the new rules are very good as they demand greater clarity from the firms before the transaction starts. I have seen a lot of waste and backtracking as executives struggle between their ego and the analytics that do not tell them the story that they want about why the transaction will succeed. And the new labor and financing provisions offer much needed transparency—layoffs are a knee jerk habit and are not really helpful for the firm or the industry.[73]
- Please collect data on labor markets. I've been affected by the monopolies in the entertainment industry and likely will lose my livelihood as well as that of my staff due to unchecked mergers within the next month. After starting a successful business 23 years ago, it's heartbreaking to lose it and will be costly to our economy as more and more of us lose our businesses due to these unchecked mergers and the power they wield to save them money.[74]
- I work in a small accounting firm and I have seen the effects of mergers on consumer satisfaction and worker wellbeing personally. . . . [M]any of the job-searching or hiring firms we'd contract with to seek additional workers are worried about raising the ire of the large firm in the region, as it comprises so much of their client base now[.] . . . As a result, we're forced to go with larger, national firms for hiring, and become part of the problem of sectoral concentration.[75]
- As a lifelong union member I also believe the requirement for detailing merger effects on workers and unions to be a vital necessity. Those of us outside the C suites, boardrooms and stockholder meetings are stakeholders too, and our livelihoods and well being should be considerations.[76]
- I personally know many folks in entertainment (writers, crew, actors, etc.) who have had such a difficult time surviving in Hollywood that they've simply had to quit or move home. And, frankly, folks who specifically represent cultures that are least visible in society are often the first to go—because they don't necessarily have the resources or didn't face as many obstacles as other artists. It's a terrible cycle, magnified greatly by vertical mergers.[77]

Numerous commenters, including State antitrust enforcers and members of Congress, expressed general support for an increasing focus on labor market competition in merger analysis and requiring additional labor market information in the Form to screen for such issues. Some commenters highlighted potential efficiencies in the merger review process from providing the Agencies with labor market information in the earlier stages of review, including a more uniform process that could result in the termination of more merger reviews within the 30-day waiting period and a more efficient use of Agency resources where no labor market issues exist.

The Commission disagrees with a commenter who stated that the analysis under the Clayton Act requires consideration of competition issues, but not labor. Antitrust law, including the Clayton Act, has always been concerned with workers and labor markets.[78] As noted by the State antitrust enforcers, in the congressional debates on the Clayton Act in 1914, legislators expressed concerns regarding the monopsonist's power to dictate to its labor the wage it will pay for the only commodity labor has to sell.[79] As recently as 2021, a unanimous Supreme Court in *NCAA* v. *Alston* affirmed that the antitrust laws are designed to prevent harm to competition in labor markets.[80] As noted in the concurring opinion: ''Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.'' [81] And there is bipartisan agreement among current Federal enforcers and their predecessors that the Agencies are empowered to enforce the Clayton Act to prevent competitive harms in labor markets caused by mergers.[82] Moreover, recent empirical work demonstrates the impact that mergers have on competition in labor markets.[83]

One commenter stated that requiring merging parties to provide labor and employment information is at odds with the consumer welfare standard. This is not correct. Judge Easterbrook, writing for the Seventh Circuit, recently rejected an employer's argument that restrictions on the movement of employees could be justified because it expanded the output of consumer products: ''One problem with this approach is that it treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right; it

[72] Anonymous Comment, Doc. No. FTC–2023–0040–0511.

[73] Comment of Punya Upadhyaya, Doc. No. FTC–2023–0040–0283.

[74] Comment of Karen Wood, Doc. No. FTC–2023–0040–0271.

[75] Comment of John Kurpierz, Doc. No. FTC–2023–0040–0462.

[76] Comment of Chas McClelland, Doc. No. FTC–2023–0040–0273.

[77] Comment of Alice Stanley, Doc. No. FTC–2023–0040–0508.

[78] *Anderson* v. *Shipowners Ass'n of the Pac. Coast,* 272 U.S. 359, 365 (1926).

[79] Comment of State Atty's Gen., Doc. No. FTC–2023–0040–0695 at 21 n.123 (citing 51 Cong. Rec. 9184 (1914) (statement of Rep. Guy Helvering)). *See also* 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman asserting trusts command the price of labor).

[80] *NCAA* v. *Alston,* 594 U.S. 69 (2021). The Agencies' approach to evaluating the potential labor market effects of mergers is set forth in the Merger Guidelines. U.S. Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.10 (2023).

[81] *Alston,* 594 U.S. at 109–110 (Kavanaugh, J., concurring).

[82] *See generally* FTC Chairman Joseph J. Simons, Prepared Keynote Address at American University Washington College of Law Conference on Themes of Professor Jonathan Baker's New Book, *The Antitrust Paradigm: Restoring a Competitive Economy* 9 (Mar. 8, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1515179/simons_-_jon_baker_speech_3-8-19.pdf;* Assistant Attorney General Makan Delrahim, Remarks at the Public Workshop on Competition in Labor Markets 3 (Sept. 23, 2019), *https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.*

[83] *See* Elena Prager & Matt Schmitt, ''Employer Consolidation and Wages: Evidence from Hospitals,'' 111 a.m. Econ. Rev. 397 (2021); David Arnold, ''Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes'' (Working Paper, Oct. 27, 2019), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476369.*

is equivalent to saying that antitrust is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise.'' [84] There is a clear consensus that the consumer welfare standard is sufficiently flexible to encompass antitrust enforcement to prevent competitive harms to labor markets.[85] Because section 7 reaches these concerns, it is appropriate for the Agencies to collect information to determine if the transaction may violate the antitrust laws by substantially lessening competition in any market for labor. The fact that the Commission has not previously required this information to be reported in HSR filings does not mean that the information is not necessary and appropriate to enable the Agencies to determine whether an acquisition, if consummated, may violate the antitrust laws. While not every negative impact on workers reflects a harm to competition, growing evidence about the potential for mergers to cause harm in input markets for labor in violation of the antitrust laws shows that the Agencies have a sound basis to review transactions for potential competitive impacts on labor markets.

As discussed below in section VI.I.3., the final rule does not require filers to submit specific information about their employees as suggested in the proposed rule. Instead, the Agencies will rely on other information and documentary materials required in the final rule to conduct a preliminary assessment of whether the transaction may violate the antitrust laws with respect to any affected labor market. The Agencies have been gaining experience analyzing information about employees during ongoing merger reviews and other investigations of conduct that may harm competition for workers, and the Commission relies on this experience to determine which documents and information have been most useful in identifying those transactions that warrant an in-depth review of potential labor market effects through the issuance of Second Requests.

As discussed below in section VI.I.3., the Commission will rely on information contained in the new Overlap and Supply Relationships Descriptions, as well as additional documents required by the final rule to conduct a preliminary assessment of potential labor market effects. In the Agencies' experience, those transactions that are flagged for closer review due to concerns about effects in output markets may also require a closer look at potential impacts in input markets, including labor markets. Because the final rule will allow the Agencies to conduct a more robust screening for potential effects in output markets, it will also permit more robust screening for potential effects in input markets, including those related to labor services. In addition, the final rule requires the submission of certain plans and reports shared at the highest level of management that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity. These documents may also indicate whether the parties view themselves as employing similar categories of employees or competing for certain types of labor services. As a result, the final rule will enhance the Agencies' ability to conduct a premerger assessment to determine if the transaction may violate the antitrust laws with respect to competition for labor. Although the Commission has determined not to require specific information about workers or workplace safety information in the HSR Filing at this time, as the Agencies acquire more experience with conducting competition analyses of labor markets, the Commission may revisit the issue in future rulemakings.

3. Identifying Acquisitions That Create a Risk of Foreclosure

Mergers between firms that are not direct competitors can still violate the antitrust laws. As stated in the NPRM, an acquisition may violate the law if it creates opportunities for post-merger foreclosure of rivals arising from vertical or non-horizontal relationships.[86] The nature and scope of potential non-horizontal competitive concerns can often be complex and unique. To fully account for all the ways in which a proposed transaction may violate the antitrust laws, the Agencies need information to determine whether there are any existing or emerging business relationships between the merging parties that would allow the merged firm to limit access to products or services that its rivals use to compete, referred to as ''foreclosure.'' [87] Current information requirements in the Rules do not reveal these existing relationships, which are well known to the parties. Even more than in horizontal mergers, which require an assessment of whether the merger may eliminate existing competition between rivals whose products are viewed as substitutes, non-horizontal concerns arise from distinct facts and industry structure that are not readily available to the Agencies from other sources.

Various commenters, including members of Congress, supported new information requirements targeting non-horizontal competitive issues. A comment from State antitrust enforcers underscored the concern about foreclosure, noting that because mergers may change the firms' incentives or ability to disadvantage or eliminate rivals at one or more levels of their supply chains, one of the anticompetitive harms that may result from a merger—particularly non-horizontal mergers—is the risk of foreclosure. The comments from a farmer-led advocacy organization warned that dominant firms have expanded across product markets—primarily through product-extension and conglomerate mergers—to insulate against cross-industry competition or to develop product-tying and other capacities for entrenchment and exclusion.

Other commenters maintained that vertical merger challenges are uncommon and that antitrust precedent does not sufficiently support non-horizontal theories of competitive harm to warrant the new information requirements. For example, commenters stated that the Agencies challenge very few vertical transactions, and the courts generally have not been receptive to those challenges. One commenter stated that an assessment of potential future competitors goes well beyond what is typically relevant because non-horizontal theories of harm are rare under section 7. The same commenter reasoned that when challenging a vertical merger the antitrust agency must prove that one party has substantial market power and that information regarding the vendor-vendee relationship is not required to assess this threshold question. A tech industry trade association stated that

[84] *Deslandes* v. *McDonald's USA, LLC,* 81 F.4th 699, 703–04 (7th Cir. 2023).

[85] *See* Herbert Hovenkamp, ''Is Antitrust's Consumer Welfare Principle Imperiled?,'' 45 J. Corp. L. 65, 78 (2019) (injury that results from the exercise of monopsony power is technically similar to the injury caused by monopoly; in both cases the defendant reduces output); Delrahim, *supra* note 82, at 3–4 (consumer welfare standard is flexible enough to take into account harm to competition that is localized in an upstream labor market, not just a downstream product market); FTC Commissioner Christine S. Wilson, Keynote Address: Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get 7 (Feb. 15, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf* (consumer welfare standard does address possible monopsony concerns, and the agencies apply the consumer welfare standard to labor markets).

[86] NPRM at 42179.

[87] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1055 (5th Cir. 2023) (violation of section 7 where merger will result in the potential foreclosure of key input by the sole supplier). *See also Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972).

most vertical mergers promote competition, so filers should not need to answer detailed questions about vertical relationships.

While in the past non-horizontal challenges were less common than those involving direct competitors, in recent years the Agencies have brought a significant number of non-horizontal merger enforcement actions that have resulted in merger abandonment and ordered divestitures,[88] and other mergers were abandoned or restructured prior to legal action.[89] The Commission also disagrees that potential harm from foreclosure is uncommon or does not warrant robust scrutiny. Empirical economic studies of vertical mergers find no basis to assume that they are either procompetitive or anticompetitive in general. Instead, each transaction must be examined on its facts and in the context of the markets served by the merging parties. A review of twenty-nine recent studies of vertical integration reports that fourteen studies found some evidence of competitive harm, while fourteen found some evidence of benefits.[90] The same review also evaluated two frequently cited surveys of vertical integration and found that the subjects and methods used limit any conclusions that can be drawn for antitrust policy purposes.[91]

The Agencies have an obligation to screen transactions for non-horizontal effects, including the risk of post-merger foreclosure, because the law clearly requires it. In 1950, Congress amended section 7 of the Clayton Act to expressly reach non-horizontal transactions to combat ''the rising tide of economic concentration . . . [providing] authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.'' [92] The Supreme Court subsequently set forth frameworks for analyzing vertical [93] and other non-horizontal [94] mergers to address concerns about foreclosure.[95] Relying on these precedents, the Agencies bring enforcement actions against transactions that create a risk that the merger will create a firm that may limit access to products or services rivals use to compete.[96] Several of these enforcement actions resulted in the parties abandoning their merger plans in the face of litigation. Just recently, the U.S. Court of Appeals for the Fifth Circuit upheld the Commission's finding that Complaint Counsel carried their initial burden of showing that Illumina's acquisition of Grail was likely to substantially lessen competition in the U.S. market for research and development of multi-cancer early detection tests and that Illumina failed to establish cognizable efficiencies.[97] The decision is significant for its application of vertical theories of harm, as well as its inclusion of products in the relevant market based on precommercial activity.

In the Agencies' experience, it can be difficult to detect whether current or potential rivals of one merging party are dependent on the other merging party for a key product, service, or route to market necessary to compete. The Agencies currently do not receive sufficient information in the HSR Filing to identify candidate ''related products'' nor to assess the degree to which rivals may be dependent on the related product.[98] Accordingly, the Agencies are not well positioned to conduct a robust initial screen for this significant mechanism of competitive harm. Being able to quickly assess whether the transaction presents a risk of foreclosure would permit the Agencies to target their investigative resources most efficiently on those transactions that are most likely to raise this competitive concern.

As discussed in more detail below, the Commission has determined that information that reveals existing supply relationships between the merging parties or their rivals is necessary to fully account for the potential that the transaction may create a firm that could limit rivals' access to key products or services they need to compete in violation of the antitrust laws. The Commission previously required information about vendor-vendee relationships, but eliminated this requirement when the reported information did not provide a sufficient basis for that analysis such that the benefit to the Agencies did not outweigh the burden of providing it.[99] The Supply Relationships Description in the final rule requires information that is specifically targeted to identifying whether rivals may be dependent on the merged firm for key inputs post-merger. Thus, the information is more relevant to the Agencies' screening for such risks than prior vendor-vendee information.

Additionally, the final rule also contains new document requirements that are intended to reveal any existing or future non-horizontal business relationships that could give rise to risks from foreclosure of rivals. For example, the buyer must indicate whether it has existing contracts with the seller in broad categories that are relevant to an initial antitrust assessment, such as leases, licensing agreements, master service agreements, operating agreements or supply agreements, or

[88] *Illumina,* 88 F.4th at 1048, 1059; *FTC* v. *Tempur Sealy Int'l, Inc.,* 4:24–cv–02508 (S.D. Tex. filed July 2, 2024) (complaint); *In re Lockheed Martin Corp.,* No. 9405 (F.T.C. Jan. 25, 2022) (complaint alleging merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corp.,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint alleging merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned). For a compilation of the Agencies' enforcement actions involving vertical mergers, see Steven C. Salop & Daniel P. Culley, ''Vertical Merger Enforcement Actions: 1994–April 2020'' (Geo. L. Faculty Pub. & Other Works No. 1529, 2020), *https://scholarship.law.georgetown.edu/facpub/1529/* (reporting 66 vertical matters over 26 years).

[89] *See, e.g.,* Press Release, U.S. Dep't of Justice, ''Antitrust AAG Kanter Statement After Adobe and Figma Abandon Merger'' (Dec. 18, 2023), *https://www.justice.gov/opa/pr/antitrust-aag-kanter-statement-after-adobe-and-figma-abandon-merger*; Cat Zakrzewski, ''Amazon ends $1.7B iRobot acquisition in rare victory for tech regulators,'' Wash. Post (Jan. 29, 2024), *https://www.washingtonpost.com/technology/2024/01/29/amazon-irobot-antitrust-europe/*.

[90] Marissa Beck & Fiona Scott Morton, ''Evaluating the Evidence on Vertical Mergers,'' 59 Rev. Indus. Org. 273, 274 (2021) (explaining many of the studies reviewed were not designed to assess the net effect of vertical integration on welfare).

[91] *Id.*

[92] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317 (1962); Celler-Kefauver Antimerger Act of 1950, Pub. L. 81–899, 64 Stat. 1125 (1950).

[93] *Brown Shoe,* 370 U.S. 294 (vertical merger violated section 7); *see also Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972) (same).

[94] *See FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 577–578 (1967) (product-extension merger violated section 7). *See also Fruehauf Corp.* v. *FTC,* 603 F.2d 345 (2d Cir. 1979); *U.S. Steel Corp.* v. *FTC,* 426 F.2d 592, 599 (6th Cir. 1970).

[95] The Agencies' analyses of how vertical and other non-horizontal transactions may harm competition are set forth in detail in the recently revised Merger Guidelines. U.S. Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 5 (2023).

[96] *See, e.g., FTC* v. *Tempur Sealy Int'l, Inc.,* 4:24–cv–02508 (S.D. Tex. filed July 2, 2024) (complaint); *In re Amgen, Inc,* No. 9414 (F.T.C. Dec. 13, 2023) (consent order settling charges that the acquisition would enable Amgen to leverage its large portfolio of drugs to pressure insurance companies and PBMs into favoring Horizon's monopoly products or disadvantaging rivals); *In re Lockheed Martin Corp.,* No. 9405 (F.T.C. Jan. 25, 2022) (complaint alleging merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corp.,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint alleging merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned); *In re Microsoft Corp.,* No. 9412 (F.T.C. Dec. 8, 2022) (complaint).

[97] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1048, 1059 (5th Cir. 2023) (remanding to Commission to consider whether supply agreement offered to rivals sufficiently mitigated merger's effect). *See also United States* v. *AT&T, Inc.,* 916 F.3d 1029, 1045 (D.C. Cir. 2019) (vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation).

[98] *See* U.S. Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.5 (2023).

[99] NPRM at 42196–97.

any noncompete or non-solicitation agreements that might be affecting current levels of competition. Filers with an existing business relationship also will submit one year's worth of plans and reports provided to a Chief Executive Officer or the Board of Directors that analyze markets and competition pertaining to any product or service both parties supply (including products or services in development). Based on the Agencies' experience, these types of high-level business documents can reveal whether and how the parties interact in the market today to understand how the merger may affect market conditions more broadly, including any risk of foreclosure that could harm other market participants as well as competition overall. Finally, the expanded set of transaction-related documents ensure that the Agencies receive key documents that have been collected for the purposes of the deal but have not yet been shared with the board of directors. In the Agencies' experience, when there is an existing non-horizontal business relationship between the parties, these documents often reference that relationship and how it might be affected by the transaction, including whether the parties believe that there are synergies or efficiencies that may be gained.

4. Identifying Potential Law Violations Involving Innovation Effects, Future Market Entry, or Nascent Competitive Threats

In markets where concentration is already great or trending in that direction, a merger may be illegal if it eliminates ongoing innovation efforts or the possibility that entry or expansion by one or both firms would have resulted in new or increased competition.[100] Relatedly, the acquisition of a firm that represents a nascent competitive threat—namely, a firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise spur more robust competition in the future—may violate the antitrust laws.[101] Concerns that a transaction may violate the antitrust laws by reducing innovation efforts [102] or eliminating a future competitor [103] are core to section 7's purpose to arrest the anticompetitive effects of market power in their incipiency. Established incumbents may seek to acquire a potential entrant or a nascent competitive threat in order to eliminate beneficial future competition, especially at critical junctures when the acquired firm is poised to introduce a disruptive product.[104]

As noted in the NPRM, there has been tremendous growth in sectors of the economy that rely on technology, such as pharmaceutical, medical device, and digital markets. Given the dynamic nature of these markets and the importance of acquisition strategies to success as well as market growth and penetration, mergers and acquisitions in these markets present a unique challenge for the Agencies. In particular, the Agencies must closely examine mergers in these and other rapidly evolving markets to account for the possibility that the merger may violate the antitrust laws by eliminating a nascent competitor or potential entrant, including the acquisition's effects on ongoing innovation competition.[105]

Competition policy debates in Congress have increasingly focused on markets that lack sufficient competition, especially in critical technology sectors.[106] Concerns about the role of certain dominant companies have caused the Agencies to deploy additional resources to counter the economic power of these firms, including through costly and resource-intensive monopolization suits, some of which focus on the harmful effects of their prior acquisitions.[107] Both Agencies have hired technologists and other experts to build their in-house capacity to keep pace with developments in dynamic markets that are reliant on emerging technology.[108] The Agencies have also invested in better understanding how dominant firms can use strategic acquisitions as part of an interrelated course of monopolistic conduct. For example, the Agencies have brought challenges alleging that firms have engaged in ''buy-or-bury'' strategies against actual or potential rivals.[109] The Agencies have also alleged that firms have attempted to buy or exercise control of adjacent products or services that might be used to steer customers to their other products or exclude competing platforms.[110] These strategies can be very hard to detect because merger activity in these sectors increasingly involves firms in business lines that currently may not be related in a clearly horizontal or vertical way. Without information that identifies products in development and the firms' assessments of where potential competitive threats are likely to emerge in the future, the Agencies have no basis to identify whether a transaction may eliminate ongoing innovation competition, a potential entrant, or a nascent competitive threat.[111]

When transactions involve firms whose premerger relationship is not yet well established in the marketplace and is occurring outside the public eye through ongoing product development efforts, the Agencies cannot rely on the reporting of current overlapping revenues to spot transactions that may

[100] *United States* v. *Marine Bancorp, Inc.,* 418 U.S. 602, 630 (1974).

[101] *See FTC* v. *Procter & Gamble,* 386 U.S. 568, 577–78 (1967). *See also United States* v. *El Paso Nat. Gas Co.,* 376 U.S. 651 (1964); *Polypore Int'l* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012) (acquisitions that eliminate competitive threats violate section 7). Like the Clayton Act, the Sherman Act bars a firm from gaining or maintaining a monopoly position through anticompetitive conduct, including acquisitions that exclude nascent or potential threats to its dominance. *See, e.g., United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966) (acquisitions are among the types of conduct that may violate the Sherman Act). Acquisitions by monopolists of nascent competitive threats violate section 2 of the Sherman Act because they are reasonably capable of contributing significantly to the defendant's monopoly power. *United States* v. *Microsoft Corp.,* 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (Sherman Act does not allow monopolists free reign to squash nascent, albeit unproven, competitors at will).

[102] For a discussion of how mergers may violate section 7 by eliminating on-going innovation competition, see Note by the United States to the OECD, The Role of Innovation in Enforcement Cases (Dec. 5, 2023) (DAF/COMP/WD(2023)84), *https://one.oecd.org/document/DAF/COMP/WD(2023)84/en/pdf.*

[103] *See United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526, 561–62 (1973) (Marshall, J, concurring). *See also United States* v. *Continental Can Co.,* 378 U.S. 441, 465 (1964) (fact that merging parties were not direct competitors for all end uses at the time of the merger may actually enhance the long-run tendency of the merger to lessen competition).

[104] *See United States* v. *Visa Inc.,* No. 3:20–cv–07810 (N.D. Cal. Nov. 5, 2020) (complaint) (transaction abandoned and case dismissed) and Assoc. Attorney General Vanita Gupta, Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium (Sept. 14, 2021), *https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-georgetown-law-s-15th-annual. See also supra* note 15 (collecting studies).

[105] *FTC* v. *PPG Indus., Inc.,* 798 F.2d 1500, 1505–06 (D.C. Cir. 1986) (Bork, J.).

[106] Majority Staff of H.R. Subcomm. on Antitrust, Com. & Admin L. of the Comm. On the Judiciary, 116th Cong., Majority Staff Rep. & Recommendations, Investigation of Competition in Digital Mkts. 38 (2020), *https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf* (hereinafter ''Investigation of Competition in Digital Markets'').

[107] *FTC* v. *Facebook, Inc.,* 581 F. Supp. 3d 34, 40–42 (D.D.C. 2022); *United States* v. *Google LLC,* No. 1:23–cv–00108 at 31–35, 65–68 (E.D. Va. filed Jan. 24, 2023) (complaint); *United States* v. *Live Nation Entertainment, Inc.,* No. 1:24–cv–03973 (S.D.N.Y. filed May 23, 2024); *see also Klein* v. *Meta Platforms, Inc.,* No. 3:20–cv–8570 (N.D. Cal. filed Dec. 3, 2020).

[108] *See* Note by the United States to the OECD, Theories of Harm for Digital Mergers (June 16, 2023) (DAF/COMP/WD(2023)50), *https://one.oecd.org/document/DAF/COMP/WD(2023)50/en/pdf.*

[109] *FTC* v. *Facebook, Inc.,* 581 F. Supp. 3d at 54.

[110] *United States* v. *Microsoft Corp.,* 253 F.3d 34, 73–74 (D.C. Cir. 2001).

[111] *See United States* v. *Google LLC,* No. 20–cv–3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024). (loss of nascent competitors is a clear anticompetitive effect).

eliminate areas of emerging or potential competition.[112] The Agencies need a reliable factual basis for identifying transactions that create this risk, which is not provided in the current Form. For instance, the Agencies need information about products in development that are not currently generating revenues, but that the filer expects will soon. Because legal precedent makes clear that a merger that substantially lessens competition for innovation or research and development violates the law,[113] the Agencies need information that will identify areas of pre-revenue investments and competition. The Agencies also need information that reveals the rationale for the transaction, including whether the acquired firm is considered a nascent competitive threat, and documents that reflect each firm's horizon-scanning for potential acquisition targets. This information is known only to the parties and is relevant to an initial assessment of whether the transaction may violate the antitrust laws by eliminating a potential entrant or nascent competitive threat.

Failure to account for the merger's potential impact on ongoing innovation competition can have meaningful implications. Consumers and businesses reap enormous benefits from the efficiency and convenience brought about by significant innovations. According to Nobel Prize winner Robert Solow: ''Technological progress, very broadly defined to include improvements in the human factor, was necessary to allow long-run growth in real wages and the standard of living.'' [114] Courts, academic literature and commenters confirm the importance of innovation to growth in the economy and as a source of dynamism that can shake loose entrenched incumbents.[115] Acquisitions of innovator firms may also deny the public the benefits of those investments in innovation, including any future competition those investments may have unleashed, if the acquirer does not make use of the discoveries [116] or is able to crowd out nascent competitors by foreclosing access to a key input.[117] The stakes are also high for innovators: startups may find fewer investors and lower acquisition prices in sectors where the expectation is that incumbents will ultimately identify and acquire any promising innovation.[118]

Comments from State antitrust enforcers supported proposals seeking materials and information regarding potential or nascent entrants. However, other commenters stated that the HSR Filing is not an appropriate vehicle for advancing novel legal theories such as nascent competition or research and development competition, and any related revisions should be postponed until those theories are better established in case law.

The Commission disagrees with commenters who suggested that concerns about innovation competition, potential entrants, and nascent threats are not well-grounded in existing law and economic learning. The importance of scrutinizing mergers for potential effects on innovation is well-documented.[119] Economic evidence supports current legal precedent. Research demonstrates a growing phenomenon of dominant firms—buoyed by acquisitions—taking over industries.[120] This is particularly true in the tech industry, where the markets in which digital platforms compete share several characteristics that tend toward a single dominant firm.[121] Sustained high economic profits suggest that dominant firms in these concentrated sectors possess substantial and durable market power.[122] In addition, insufficient competition and entry result in harms to investment and innovation.[123] For these reasons, economic research supports the current legal framework, and reflects the need to carefully scrutinize proposed transactions involving a dominant incumbent or monopolist seeking to acquire a nascent threat or adjacent complement that could someday challenge the incumbent's position.[124]

Going back many years, the Agencies have successfully challenged several mergers that would have eliminated a potential entrant or nascent competitive threat. These enforcement actions include the acquisition of a pipeline firm or product that, once launched, would compete directly with the incumbent merging party,[125] as well as the acquisition of a firm with products already on the market that, although small, was poised to add features or capabilities in the future that could render it a closer and more formidable competitor than it is today.[126] Other transactions challenged by the Agencies involved the acquisition of a firm whose current market share understated its future competitive significance because it did not account for new innovations, business strategies, or other factors.[127] Mergers that impact future competition between products or services that have not yet been developed can also violate the antitrust laws.[128]

[112] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1049–51 (5th Cir. 2023) (antitrust markets not limited to products that exist but may include those that are anticipated or expected or encompass research, development and commercialization of products in development); *FTC* v. *PPG Indus., Inc.,* 798 F.2d, 1500, 1504 (D.C. Cir. 1986) (merging firms competed in evolving high technology market at the request-for-proposal stage of product development).

[113] *See United States* v. *Anthem, Inc.,* 855 F.3d 345, 361 (D.C. Cir. 2017) (threat to innovation alone is anticompetitive effect from acquisition); *Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1051 (5th Cir. 2023) (''Antitrust law does not countenance such a cramped view of competition, particularly in a research-and-development market.'').

[114] Robert Solow, ''Growth Theory and After,'' 78 Am. Econ. Rev. 307, 313 (1988).

[115] *See* Giulio Federico et al., ''Antitrust and Innovation: Welcoming and Protecting Disruption,'' 20 Innovation Pol'y & Econ. 125, 128–29 (2020); C. Scott Hemphill & Tim Wu, ''Nascent Competitors,'' 168 U. Pa. L. Rev. 1879, 1886 (2020).

[116] *See* Hemphill & Wu, *supra* note 115, at 1893. *See also* Mark Lemley & Andrew McCreary, ''Exit Strategy,'' 101 B.U. L. Rev. 1 (2020).

[117] *See Illumina* v. *FTC,* 88 F.4th at 1053.

[118] Sai Krishna Kamepalli et al., ''Kill Zone'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27146, May 2020 rev. June 2022), *https://www.nber.org/papers/w27146.*

[119] *See generally* Carl Shapiro, ''Competition and Innovation: Did Arrow Hit the Bull's Eye?,'' in The Rate and Direction of Econ. Activity Revisited 389–400 (Josh Lerner & Scott Stern eds., 2012).

[120] Carl Shapiro, ''Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets,'' 33 J. Econ. Perspectives 69 (2019).

[121] Stigler Comm. On Digital Platforms, Final Report 7–8 (2019), *https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms-committee-report-stigler-center.pdf* (explaining network effects, returns increasing with scale, low marginal costs, high returns on amassing user data, and low distribution costs underlie trend toward monopoly).

[122] Shapiro, *supra* note 120, at 70.

[123] Stigler Comm. On Digital Platforms, *supra* note 121, at 31.

[124] Cunningham et al., *supra* note 15 (presenting empirical evidence that pipeline drug program is less likely to be developed when acquired by firm with overlapping existing product with significant market power); Stigler Comm. On Digital Platforms, *supra* note 121, at 81, 88; Shapiro, *supra* note 120, at 75; Michael L. Katz, ''Big Tech mergers: Innovation, competition for the market, and the acquisition of emerging competitors,'' 54 Info. Econ. & Policy 100883 (2021).

[125] *See, e.g., In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint) (transaction abandoned); *United States* v. *Visa Inc.,* No. 3:20–cv–07810 (N.D. Cal. Nov. 5, 2020) (transaction abandoned); *FTC* v. *Mallinckrodt ARD Inc. (f/k/a Questcor Pharms., Inc.),* No. 1:17–cv–120 (D.D.C. Jan. 30, 2017) (consent decree ordered license and $100 million equitable monetary relief); *United States* v. *Westinghouse Air Brake Techs. Corp.,* No.1:16–cv–02147 (D.D.C. Oct. 26, 2016) (consent decree ordered divestiture); *In re Thoratec Corp.,* No. 9339 (F.T.C. July 28, 2009) (transaction abandoned); *In re Inverness Med. Innovations, Inc.,* No. C–4244 (F.T.C. Dec. 23, 2008) (Commission order requiring divestiture and other conditions).

[126] *FTC* v. *PPG Indus., Inc.,* 798 F.2d 1500, 1505–06 (D.C. Cir. 1986) (Bork, J.). *See also In re Illumina, Inc.,* No. 9387 (F.T.C. Dec. 17, 2019) (complaint) (transaction abandoned).

[127] *United States* v. *Novelis, Inc.,* No. 1:19–cv–02033 (N.D. Ohio Aug. 26, 2020) (arbitration-ordered divestiture); *In re The Procter & Gamble Co.,* No. 9400 (F.T.C. Dec. 8, 2020) (complaint) (transaction abandoned); *In re CDK Global, Inc.,* No. 9382 (F.T.C. Mar. 19, 2018) (complaint) (transaction abandoned).

[128] *See, e.g., PPG Indus., Inc.,* 798 F.2d at 1505–06. *See also United States* v. *Bayer AG,* No. 1:18–

Continued

A number of commenters opposed changes contained in the proposed rule over concerns that they would disproportionally impact small innovation companies and startups, which rely on venture capital and acquisitions to sustain their business model. One commenter stated that preventing such exit strategies would make it difficult for startups to obtain early-stage funding, reducing both the number and vitality of these innovative firms. Several cautioned the Commission to avoid increasing the burden and risk associated with the acquisition of startups, which they stated would damage the dynamic U.S. tech innovation system. Another stated that acquisitions that increase concentration can still be procompetitive and drive dynamic efficiency.

As the discussion above clearly demonstrates, acquisitions involving nascent or potential competitors as well as those that impact innovation competition may violate the antitrust laws. The Commission disagrees with commenters that contend that these types of acquisitions should be subjected to a more permissive standard or that the Agencies are singling them out for closer scrutiny. The Agencies routinely review acquisitions of and by innovative companies and apply the same legal standard to those mergers as any other acquisition. When the Agencies challenge these mergers, they are held to the same liability requirements necessary to establish a violation of section 7. However, as discussed above, there is a gap in the current information requirements that undermines the Agencies' ability to determine whether a transaction would eliminate nascent or future competition. To detect those types of acquisitions and to assess whether they violate the antitrust laws, the Agencies need information regarding these forms of ongoing or emerging competition, even if some commenters disagree with the law as applied by the courts in this area.

The Commission acknowledges that the sale of a business to an incumbent may represent a valuable exit strategy for startups. But when such exits are effectuated by a dominant firm to absorb a future or emerging competitor, the overall effect may be to reduce innovation and violate the law.[129] In fact, antitrust enforcement can drive innovation and growth by ensuring that market outcomes are determined through competition rather than left to the decisions of a dominant incumbent who can on its own determine the fate of innovative companies and the future of competition. The history of U.S. antitrust enforcement contains many examples of how government action was required to unleash the forces of competition and innovation, creating new opportunities for investments and startups.[130] Recent research suggests that existing firms may be acquiring innovative capacity not for the purpose of advancing those discoveries but rather to shelve those discoveries, leading to a reduction in innovative output and eliminating an independent source of future competition.[131] Two individual commenters shared their experiences with acquisitions that have had that effect:

- I work in the software industry and despite the constant talk of ''innovation,'' I have seen many mergers that eliminate new product development. Mergers/acquisitions often consist of a company acquiring a product and immediately discontinuing either the acquired product or their own competing product. Most engineers I know want to develop new products and many mergers stop this from happening.[132]
- I work in the tech industry for a large technology firm. It's disgusting that our philosophy is now to buy other companies and never grow organic products because it is too hard. There's no innovation anymore it is simply make enough money to buy out the actual innovators in an industry. Any new startup is now faced with a massive hill to climb as getting VC money is paramount, but then the moment you do well your VC's will just sell to the highest bidder. This is stagnating tech, and you won't see the effects for some years down the road when 5 tech companies are left in this country. We need tighter oversight on mergers . . . .[133]

In light of all these considerations, the Commission believes this rulemaking strikes the right balance that permits the Agencies to evaluate transactions for their potential effects on innovation while not standing in the way of acquisitions and other investments that do not present antitrust risks that need to be addressed prior to consummation. The critical task for the Agencies is to identify which transactions may substantially lessen competition or tend to create a monopoly, prior to consummation and before the possibility of future competition is snuffed out.[134] The Commission is not subjecting acquisitions of startups or innovative firms to heightened scrutiny, as some commenters suggest. Rather, the Agencies are modernizing premerger requirements in light of the changes in M&A activity for all transactions that must be reported under the HSR Act, including those involving innovative firms.[135] However, the final rule has been adjusted to lessen the burden on the targets of acquisitions generally. Moreover, many of the new requirements focus on increasing visibility into complex entities and therefore would not be applicable to the relatively straightforward structures of many startup companies.

The Commission notes that many acquisitions of startups and small innovator firms are not reportable and thus are not subject to antitrust scrutiny prior to consummation. In September 2021, the Commission released its findings from an inquiry into past acquisitions by the largest technology platforms that did not require reporting under the HSR Act.[136] Launched in

cv–01241 (D.D.C. Feb. 8, 2019) (consent decree ordered divestiture); Press Release, U.S. Dep't of Justice, ''Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy'' (Apr. 27, 2015), *https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department*; *In re Nielsen Holdings N.V.,* No. C–4439 (F.T.C. Feb. 28, 2014) (Commission order requiring divestiture).

[129] *See* Lemley & McCreary, *supra* note 116 (exit by acquisition leads to concentration in the tech industry and short-circuits the development of truly disruptive new technologies that have historically displaced incumbents in innovative industries).

[130] *See* Giovanna Massarotto, ''Driving Innovation with Antitrust,'' Promarket (Apr. 10, 2024) *https://www.promarket.org/2024/04/10/driving-innovation-with-antitrust/*.

[131] *See* Cunningham et al., *supra* note 15. *See also* Florian Szücs, ''M&A and R&D: Asymmetric Effects on acquirers and targets?'' 43 Rsch. Pol'y 1264 (2014); Carmine Ornaghi, ''Mergers and innovation in big pharma,'' 27 Int'l J. Indus. Org. 70 (2009); Justus Haucap et al., ''How mergers affect innovation: Theory and evidence,'' 63 Int'l J. Indus. Org. 283 (2019) (showing a reduction in innovation competition post-merger).

[132] Comment of Darryl Pretto, Doc. No. FTC–2023–0040–0434.

[133] Anonymous Comment, Doc. No. FTC–2023–0040–0600.

[134] *See* Cristina Caffarra et al., '''How Tech Rolls:' Potential Competition and 'Reverse' Killer Acquisitions,'' 2 CPI Antitrust Chron. 13, 15 (May 2020).

[135] According to a recent study, investment in U.S. startups continues to grow each year, reaching a combined deal value of $165.8 billion for 12,235 such deals in 2020. *See* Gary Dushnitsky & D. Daniel Sokol, ''Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments That Fund It,'' 24 Vand. J. Ent. & Tech. L. 255, 271 Table 1 (2022). The authors note that a case-by-case analysis of particular deals allows for a more nuanced approach to address particular potentially problematic deals in such settings. *Id.* at 277–78. *See also* D. Daniel Sokol, ''Merger Law for Biotech and Killer Acquisitions,'' 72 Fla. L. Rev. Forum 1, 8 (2020) (explaining that innovation effect is fact-dependent).

[136] *See* Press Release, Fed. Trade Comm'n, ''FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies'' (Sept. 15, 2021), *https://www.ftc.gov/*

February 2020, this inquiry analyzed the terms, scope, structure, and purpose of exempted transactions by five large technology companies: Alphabet, Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft Corp. The study covered ten years of acquisitions (from January 1, 2010 to December 31, 2019) and found that the companies collectively made 819 acquisitions that were not reported under the HSR Act.[137] None of these acquisitions was filed under HSR, although many of them were concentrated in just a few categories of technology, such as mobility, application software, and internet content and commerce.[138]

This study provided other insights into these companies' practices and acquisition strategies, including how they structured acquisitions and how these acquisitions fit into the companies' overall business strategies.[139] For instance, not only were many of the acquisitions ''small'' in deal value (*i.e.,* under the various HSR reporting thresholds), they were also ''young,'' with nearly 40 percent of the acquisitions involving target firms that were less than five years old.[140] Most of the acquisitions involved the buyer taking control of the acquired assets or entity, although there were also a significant number of investments that resulted in the large company holding a minority interest in the target firm.[141] Moreover, over three-quarters of the transactions included non-compete clauses for founders and key employees of the acquired entities, with relatively small variation in the percentage of transactions with non-compete clauses across the five respondents. [142] Together, these findings indicate that during the study period, these five companies acquired many small, nascent firms operating in related business lines and their founders and other key employees agreed to refrain from continuing their own efforts to innovate outside the company for some period of time. While the study focused on transactions that were not reportable under the HSR Act, the information collected from these tech companies provided the Commission with insight into information that is available to parties in all types of acquisitions but that is not required by the current Form and Instructions.

In light of the benefits to the public from preventing mergers that violate the antitrust laws by reducing innovation competition or eliminating a potential entrant or nascent threat, the Commission has determined that the Agencies need certain additional information with the HSR Filing to conduct an initial antitrust assessment prior to consummation. In the Agencies' experience, it is necessary to obtain this type of information directly from the filing parties because typically their plans regarding future products or business lines are not public.

Several new information requirements in the final rule are aimed at providing the Agencies with sufficient information to determine if the transaction is likely to raise concerns about potential, emerging, or nascent competition. For instance, the new Overlap Description and Supply Relationships Description directly address the scope of existing and emerging competition between the parties. In particular, the Overlap Description requires filers to identify their own products and services, including those that are pre-revenue, that compete with the products and services of the other party that are known to the filer.[143] This information will provide a basis for the Agencies to know that there are areas of emerging and direct competition beyond existing products or services, including important ongoing innovation competition. The Overlap Description also requires filers to produce measurement information for products or services not yet generating revenue, or those whose performance is not measured by revenue, such as projected revenue, estimated volume, or any other applicable performance metric. This change recognizes the importance of capturing the competitive significance of nascent or emerging products and services.

The final rule also requires the buyer to indicate whether there are any existing contracts between the parties, including non-compete, non-solicitation, or licensing agreements, which would alert the Agencies to any limits on future competition that are created by these agreements, especially when the buyer is not acquiring all of the acquired entity. The existence of non-compete or non-solicitation agreements can be especially useful in revealing that the parties consider themselves to be 'in competition' with one another, now or in the future, such that there is value in contracting away the ability to compete for or solicit business or workers. In addition, the Supply Relationships Description requires information for products, services, or assets (including data) that the other party or any other business uses or could use to compete. This forward-looking assessment, based on each filer's business experience, would reveal whether there are future uses of either party's products that could give rise to concerns about non-horizontal effects from the transaction. The inclusion of data as a potentially key asset is purposeful, given the competitive significance of data access for effective competition in so many modern markets.[144]

Similarly, new document requirements contained in the final rule are aimed at revealing each firm's assessment of market conditions and horizon-scanning for competitive threats. For instance, the final rule requires a broader search for documents that evaluate or analyze the transaction to include not only those provided to board members but also to the person who has primary responsibility for supervising the deal. These documents, along with certain ordinary course plans and reports shared at the highest level of management described above and in section VI.G.2., will reveal additional information about how each filer views the competitive landscape more broadly, including in ways that may impact current or future competition. Together, these documents may signal whether either party has identified emerging threats to competition—from the other party or from firms not involved in the transaction—that would impact the Agencies' assessment of whether the transaction may violate the antitrust laws.

As discussed above in section II.B.1., new information contained in the

news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.

[137] *See* Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study 10–11 Fig. 1 (2021), *https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf* (hereinafter ''Non-HSR Reported Acquisitions''). Data supplied by commenter Engine confirms that the vast majority of startup acquisitions are valued below $50 million, meaning that they are rarely reported to the Agencies in advance. *See* Comment of Engine, Doc. No. FTC–2023–0040–0681, appendix B at 16.

[138] Non-HSR Reported Acquisitions, *supra* note 137, at 27–35.

[139] Other competition enforcement agencies around the world conducted similar studies involving acquisitions of digital platform companies. *Id.* at 2 n.6.

[140] *Id.* at 23–26.

[141] *Id.* at 15.

[142] *Id.* at 21–22.

[143] As explained in section VI.I., the parties should not exchange information for the purpose of responding to the Competition Descriptions.

[144] *See FTC* v. *IQVIA Holdings Inc.,* No. 1:23 Civ. 06188 (S.D.N.Y. Dec. 29, 2023) (order granting preliminary injunction on horizontal theories of harm without addressing FTC allegations that the acquisition would allow IQVIA to foreclose other industry participants from accessing its data as a key input for healthcare professional programmatic advertising).

Minority Shareholders or Interest Holders and Officers and Directors sections will provide a basis for the Agencies to identify any existing or potential management relationships between the acquiring person and target, including through entities or individuals who can influence decision-making of the acquiring person post-merger. These relationships can be especially concerning if used to gain access to non-public information about future plans or investments in products-in-development when those same individuals also have interests in competitively relevant businesses.

Finally, the final rule collects additional information about the acquisition rationale of the buyer to assist the Agencies in understanding the purpose of the transaction. For example, the final rule requires the buyer to describe any rationale for the transaction and to indicate any document submitted with the HSR Filing that confirms or discusses that rationale. These answers will provide context for the Agencies' initial antitrust assessment through a deeper understanding of what purpose the buyer has for engaging in a transaction that is large enough to require premerger review. In addition, the final rule for the first time requires the seller to report prior acquisitions in the same or related lines of business, which would provide a basis for the Agencies to better assess whether the transaction implicates emerging, nascent, or potential competition, especially through the combined effects of roll-up or serial acquisition strategies or ''killer'' acquisitions in which assets were purchased but not used as a means of eliminating a competitor.

5. Disclosing Roll-Up or Serial Acquisition Strategies

Another trend in M&A activity has been the rise of serial acquirers, firms that engage in strategic acquisitions in the same industry, often ''rolling up'' many small competitors in the same or adjacent markets to establish a large, sometimes dominant, position.[145] Serial acquisition strategies have been subject to antitrust scrutiny for over 100 years.[146] In the seminal merger case, *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), the Supreme Court noted that both the buyer and the seller had previously acquired many other independent banks,[147] driving a trend toward concentration that rendered their merger suspect.[148] Given the popularity and prevalence of these serial acquisition strategies in recent years, especially in healthcare and technology markets, this trend has attracted the attention of academics and policymakers alike.[149] A pattern or strategy of buying up smaller competitors or firms in the same or related lines of business can lead to harm of the same magnitude and type as mergers of larger or established firms, but serial acquisitions are less likely to attract the attention of enforcers until the strategy is identified. A series of small acquisitions can lead to consolidation within an industry, often without ever triggering the obligation to report these acquisitions under the HSR Act. This strategy has been particularly prevalent in healthcare markets involving private equity buyers.[150]

Often the Agencies are not able to detect these strategies until it is too late, after the serial acquirer has established a dominant position and is able to exercise market power to the detriment of market participants. For instance, in September 2023, the FTC charged U.S. Anesthesia Partners, a for-profit corporation, with a multi-year anticompetitive scheme to consolidate anesthesia practices in Texas.[151] This lawsuit, which is pending in Federal court in Texas, alleges that the company acquired over a dozen anesthesiology practices in Texas to eliminate competition and create a single dominant provider with the power to demand higher prices.

The Commission is aware of the impact of serial acquisitions based on its experience with the dialysis industry, which is an area in which economic research has documented adverse effects from serial acquisitions. Throughout the 2000s, the Commission reviewed a series of large acquisitions by DaVita, the largest U.S. provider of life-sustaining treatments for end stage renal disease patients. In 2006, in conjunction with DaVita's $3.1 billion acquisition of rival Gambro Healthcare, Inc., the Commission required DaVita to divest 69 dialysis clinics in 35 markets across the United States to resolve charges that the acquisition violated section 7. In 2011, DaVita sought to acquire rival DSI for $689 million, and the Commission required divestitures to preserve competition for dialysis services in 22 local markets. Then in 2017, the Commission ordered DaVita to divest seven clinics in New Jersey and Dallas to proceed with its $358 million acquisition of Renal Ventures. During roughly the same period, the Commission also reviewed a series of acquisitions by Fresenius, the other leading U.S. provider of dialysis services, and required significant divestitures to maintain competition.[152]

Notwithstanding these enforcement actions, the dialysis industry has experienced growing concentration, mostly as a result of acquisitions that were not reportable under the HSR Act. According to one 2020 study, there were more than 1,200 acquisitions of independent dialysis facilities over a 12-year period, resulting in DaVita and Fresenius operating more than 60 percent of all clinics nationwide.[153] The study concluded that these changes in

[145] NPRM at 42202 n.62 (citing Gerry Hansell et al., ''Lessons from Successful Serial Acquirers: Unlocking Acquisitive Growth,'' Boston Consulting Grp. (Oct. 1, 2014), *https://www.bcg.com/publications/2014/mergers-acquisitions-unlocking-acquisitive-growth*); ''Stealth Consolidation,'' *supra* note 18.

[146] *See, e.g., United States* v. *Grinnell Corp.,* 384 U.S. 563, 576, 578, 580 (1966); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 31–42 (1911); *United States* v. *Am. Tobacco Co.,* 221 U.S. 106, 157–60 (1911). *See also* Note by the United States to the OECD, Serial Acquisitions and Industry Roll-ups (Dec. 6, 2023) (DAF/COMP/WD(2023)99), *https://one.oecd.org/document/DAF/COMP/WD(2023)99/en/pdf* (discussing the history and roots of antitrust enforcement against anticompetitive serial acquisitions). Serial acquisition strategies may also violate section 2 of the Sherman Act when a firm with monopoly power relies on acquisitions, among other conduct, to acquire or maintain its monopoly. *See Credit Bureau Reps., Inc.* v. *Retail Credit Co.,* 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd,* 476 F.2d 989 (5th Cir. 1973); *United States* v. *Jerrold Elecs. Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960).

[147] *See United States* v. *Phila. Nat'l Bank,* 374 U.S. 321, 331 (1963) (PNB previously acquired nine independent banks while Girard acquired six).

[148] *Id.* at 367 (evidence of several remaining competitors insufficient to rebut inherently anticompetitive tendencies of high post-merger market shares, in light of strong trend toward mergers, including those of the defendants).

[149] *See* Investigation of Competition in Digital Markets, *supra* note 106, at 24–25.

[150] Richard M. Scheffler et al., Am. Antitrust Inst., ''Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk'' 8–16 (May 18, 2021), *https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf.* The Commission recently hosted a public workshop to discuss the growing body of economic research examining the role of private equity investment in health care markets. Fed. Trade Comm'n, Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care (Mar. 5, 2024), *https://www.ftc.gov/news-events/events/2024/03/private-capital-public-impact-ftc-workshop-private-equity-health-care.*

[151] *FTC* v. *U.S. Anesthesia Partners, Inc.,* No. 4:23cv3560 (S.D. Tex. Sept. 21, 2023) (complaint).

[152] *See In re Fresenius AG,* No. C–4159 (F.T.C. July 5, 2006) (decision and order requiring divestiture of ninety-one clinics and financial interests in twelve more); *In re Am. Renal Assocs. Inc.,* No. C–4202 (F.T.C. Oct. 23, 2007) (consent order terminating purchase agreement for five clinics and closure of three additional clinics); *In re Fresenius Med. Care AG,* No. C–4348 (F.T.C. May 25, 2012) (decision and order requiring divestiture of sixty dialysis clinics).

[153] Paul J. Eliason et al., ''How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry,'' 135 Q. J. Econ. 221, 222 (2020) (from 1990 to 2020, the share of independent dialysis facilities fell from 86% to 21%).

ownership resulted in higher prices, lower levels of service, and worse outcomes for patients.[154] One commenter stated that, based on his research, merger enforcement against reportable acquisitions prevented illegal consolidation 95 percent of the time, while the many non-reportable acquisitions of dialysis clinics were blocked only 5 percent of the time. He contended that these 'stealth' acquisitions accounted for much of the increase in within-market concentration.[155]

In light of the failure of prior interventions to stem the adverse consequences of roll-up acquisitions in this industry, when DaVita in 2022 sought to buy 18 clinics in a non-HSR-reportable transaction, the Commission unanimously voted to require DaVita not only to divest three clinics but also to obtain prior Commission approval before buying any new ownership interest in dialysis clinics in Utah.[156] The Commission determined that imposing a prior approval obligation was appropriate in light of the company's history of attempting anticompetitive transactions that do not trigger a notification under the HSR Act.[157]

The Commission has also imposed prior notice or prior approval provisions on another serial acquirer, JAB Consumer Partners, a private equity firm that has made several significant acquisitions in the emergency and specialty veterinary services markets across the United States. JAB is the parent company of two large veterinary clinic chains, Compassion-First Pet Hospitals and National Veterinary Associates Inc., that have been built through a series of acquisitions. In 2020, Compassion-First bought NVA for $5 billion, and the Commission required JAB to divest clinics in three local markets.[158] In June 2022, Compassion-First/NVA acquired Sage Veterinary Partners for $1.1 billion, and the Commission required divestitures in three additional local markets.[159] The Commission also determined that, in light of JAB's ongoing acquisition strategy, it would require prior approval and prior notice requirements on JAB's future acquisitions of specialty and emergency veterinary clinics.[160] Later in 2022, when JAB also sought to acquire another veterinary chain with significant competitive overlap in four geographic markets, the Commission again required divestitures and prior approval requirements in the affected local markets for emergency and specialty veterinary services markets.[161]

But resorting to imposing prior approval obligations after an industry has already experienced significant concentration due to roll-up strategies is suboptimal. A central purpose of the HSR Act is to allow the Agencies to arrest trends toward concentration through effective premerger review. For any reportable transaction under the HSR Act, the Agencies have an obligation to determine whether the transaction is one of a series of acquisitions that could lead to harm in the affected markets. Information about each party's prior acquisitions will provide a basis for the Agencies to assess this risk to competition during their initial antitrust assessment for any reportable transaction.

Several commenters supported the need for more information related to prior acquisitions, including a group of State antitrust enforcers. One commenter noted that the private equity industry pioneered and perfected the serial 'roll-up' acquisitions that were too small to attract antitrust agency attention but nonetheless amassed considerable market power over time. The same commenter pointed out that private equity firms use these add-on buyout deals to purchase multiple competitors of an existing portfolio company or expand their geographic reach to create a much bigger player in an industry—and that this strategy can in aggregate substantially lessen competition or tend to create a monopoly. Another commenter raised similar concerns that the business strategy of making a series of small acquisitions—whether an intentional tactic to avoid regulatory scrutiny or not—has become concerningly common in recent decades and led to many consolidated industries. An individual commenter shared their experience with the broader impact of rollup acquisitions on local communities:

- As the wife of a small business owner and member of a community, I'm dismayed at seeing how many small local and regional businesses have disappeared after becoming the target of mergers and rollups. Those businesses—funeral homes, hospice care, newspapers, hardware stores, coffee shops, veterinarians—were [] an important part of the community. Now it is nearly impossible to start local businesses in those sectors and turn any sort of profit while competing with PE backed rollups.[162]

Other commenters stated that the proposed changes are unnecessary because they lack sufficient justification, are out of step with their view of case law and market realities, and do not seem to have a strong factual basis. One commenter stated that the proposal to expand the lookback period for prior acquisitions would invite the Agencies to scrutinize long-consummated deals, including those that the HSR Act were never intended to capture. Some raised concerns that the proposed changes will substantially increase the burden of reporting on prior acquisitions beyond what is currently required for the HSR Form. Another stated that the costs of the proposed changes regarding prior acquisitions far outweigh the potential benefit that information about immaterial prior transactions could provide to the evaluation of the transaction. One commenter stated that requiring disclosure of non-reported transactions will reduce investments in startups.

The Commission has determined that, to detect whether serial or roll-up acquisition strategies have changed the market dynamics such that the transaction under review could have widespread harmful effects that will be hard to undo, the Agencies need additional information about prior acquisitions, including from the acquired firm. Knowing each party's record of prior acquisitions in the same business lines will allow the Agencies to understand the long-term competitive strategy for the transaction at issue, including whether it is one in a series of prior or planned acquisitions in the same industry and whether the

[154] *Id.* at 223.

[155] *See* Comment of Thomas Wollmann, Doc. No. FTC–2023–0040–0680 at 1 n.2 (citing to Thomas G. Wollmann, ''Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,'' 1 a.m. Econ. Rev.: Insights 77–94 (2019) and Thomas G. Wollman, ''How to Get Away with Merger: Stealth Consolidation and Its Effects on US Healthcare'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274, May 2020 rev. Mar. 2024), *https://www.nber.org/papers/w27274*).

[156] *In re DaVita Inc.,* No. C–4677 (F.T.C. Oct. 25, 2021) (decision).

[157] *See* Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.*

[158] *In re Agnaten SE,* No. C–4707 (F.T.C. Apr. 9, 2020) (decision and order).

[159] *In re JAB Consumer Partners SCA SICAR,* No. C–4766 (F.T.C. Aug. 2, 2022) (decision and order).

[160] The Commission's order requires JAB to obtain prior Commission approval before acquiring a specialty or emergency veterinary clinic within twenty-five miles of any JAB clinic in California or Texas, and prior notice to the Commission thirty days prior to a similar acquisition anywhere in the United States that is not required to be reported under the HSR Act. *Id.* (decision and order).

[161] *In re JAB Consumer Partners SCA SICAR,* No. C–4770 (F.T.C. Oct. 10, 2022) (decision and final order).

[162] Comment of Nora Johnson, Doc. No. FTC–2023–0040–0618.

transaction is a merger of ''consolidators.'' The additional information would also permit the Agencies to better identify transactions whose effects should not be viewed in isolation but rather as a pattern of consolidation.[163]

The Commission has always required information about prior acquisitions in the HSR Filing to help identify strategies aimed at gaining market share through acquisitions rather than internal expansion or more vigorous competition, and the Commission disagrees that it is outside its rulemaking authority under the HSR Act to require filers (including the target) to report prior acquisitions in the same or related business lines even if they were not previously reported to the Agencies for premerger review. The final rule contains modest expansions of this long-standing requirement, to better account for the increased number of firms engaged in roll-up strategies. Nonetheless, the final rule does not contain certain expansions suggested in the proposed rule, such as eliminating the $10 million exception or expanding the lookback period from 5 to 10 years in response to comments that providing this level of information about prior acquisitions would be costly and burdensome. The modest expansion of this information requirement should provide the Agencies with a more complete record of consolidation in the relevant business lines that has been driven by the merging parties in order to identify when a reported transaction is the latest in a series of acquisitions, and thus one that may violate the antitrust laws.

As noted elsewhere, the Agencies remain committed to identifying consummated mergers that have resulted in harm and to take steps to unwind them as resources permit. But regardless of the legality or reportability of any particular prior acquisition, the fact that it occurred and involved the same business lines under review is directly relevant to whether the reported transaction may violate the antitrust laws, including through a series of mergers that ''convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply.'' [164] For these reasons, the Commission has determined there is a need to collect information about prior acquisitions from the seller as well as the buyer. The cost of complying with this requirement should be minimal except in instances where the seller has made many acquisitions in the same or related business lines, in which case the information may prove highly relevant to Agency review.

Other new requirements in the final rule will also help the Agencies identify these roll-up strategies. In particular, the Overlap Description will provide an alternative basis for identifying product or service market overlaps for which prior acquisitions should be reported. Information about the buyer's acquisition rationale will reveal the purpose of the transaction, including whether is it part of a strategy of pursuing transactions in similar business lines. The new requirement to submit a small set of business plans and reports shared with the highest levels of management that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity may reveal whether there are other acquisition targets identified by either the acquiring or acquired person.

III. Statutory Authority and Economic Analysis

The HSR Act directs the Commission, with the concurrence of the Assistant Attorney General and consistent with the purposes of the Act, to issue rules requiring the submission of documentary material and information relevant to a proposed acquisition as is ''necessary and appropriate to enable [the Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [165] The HSR Act was enacted to assist the Agencies in enforcing other provisions of the Clayton Act, and to give the FTC and the Department of Justice a tool—premerger notification—to identify problematic mergers and acquisitions before they are consummated and a short period of time to complete their analysis.[166] The statute grants the Commission explicit authority to require the submission of documents and information the Agencies determine are necessary and appropriate to identify proposed acquisitions that may result in an antitrust violation.[167]

In the administrative law context, the Supreme Court has held that Congress' use of terms such as ''appropriate'' or ''reasonable'' in a statute authorizing agency rulemaking gives the agency ''flexibility'' to regulate.[168] As the Supreme Court has explained, ''[o]ne does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, 'appropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'' [169] The phrase ''leaves agencies with flexibility,'' although ''an agency may not entirely fail to consider an important aspect of the problem.'' [170] In at least some contexts, courts have held that ''necessary and appropriate'' requires consideration of a rule's costs and benefits.[171]

The Commission is not convinced that Congress intended the words ''necessary and appropriate'' to require a cost-benefit analysis in this context. Had Congress intended to require the Commission to consider costs and benefits, it could easily have done so.[172] Instead, it gave the Commission broad authority to establish requirements it deems necessary and appropriate for determining whether a proposed acquisition may violate the antitrust laws during premerger review, and even gave the Commission express authority to define statutory terms. Nonetheless, in the particular circumstances of this rule, the Commission has considered the reasonableness of requiring additional information in the HSR Filing in light of the statutory scheme established by Congress to more effectively prevent undue consolidation that violates the antitrust laws, including the costs and the benefits of the final rule. The Commission has evaluated, on the one hand, the benefits to the Agencies, the parties, third parties and the public in making premerger review more efficient and effective by obtaining information necessary to properly assess the competitive effects of proposed acquisitions; and on the other hand, the need to reduce unnecessary burden, costs, and delay on filers and the transactions they hope to pursue in a manner consistent with the

[163] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 334 (1962).

[164] *Id.* (quoting S. Rep. 81–1775, at 5 (1950) and citing H.R. No. Rep. 81–1191, at 8 (1949)).

[165] 15 U.S.C. 18a(d)(1).

[166] *PhRMA,* 790 F.3d at 199, 206.

[167] *Id.* at 199, 201, 205.

[168] *Loper Bright Enterprises* v. *Raimondo,* 144 S.Ct. 2244 (2024).

[169] *Michigan* v. *EPA,* 576 U.S. 743, 752 (2015) (citation and internal quotation marks omitted).

[170] *Id.* (citation and internal quotation marks omitted).

[171] *See id.; Mex. Gulf Fishing Co.* v. *U.S. Dep't of Commerce,* 60 F.4th 956, 965 (5th Cir. 2023) (finding that the necessary and appropriate standard at a minimum requires that a rule's benefits reasonably outweigh its costs).

[172] *See Chamber of Com* v. *Sec. Exch. Comm'n.,* 412 F.3d 133, 142 (D.C. Cir. 2005) (statute requires SEC to consider whether rule will promote efficiency, competition, and capital formation which requires a consideration of the costs of the conditions imposed by the rule).

mandatory premerger notification regime of the HSR Act.

In determining what information is necessary and appropriate to determine whether a reported transaction merits the issuance of Second Requests, the Commission also draws on the Agencies' decades of experience reviewing filings and responding to informal requests for guidance.[173] This operational experience informs the Commission's assessment of the existing rules' shortcomings and supports its decision that it is necessary and appropriate—and consistent with the text and purpose of the HSR Act—for the Agencies to require the merging parties to provide sufficient information to enable the Agencies to conduct a preliminary assessment of the risk that the filed-for transaction may violate the antitrust laws, particularly where some information is available only from the parties.

After careful consideration of the public comments as well as the costs and benefits of the proposed changes, the Commission has determined to adopt a modified version of the information requirements proposed in the NPRM. As modified, the final rule will facilitate the provision of relevant documentary materials and information that allow the Agencies to assess whether a proposed acquisition may violate the law within the statutory period available for their initial review while minimizing the cost and burden of producing such materials as much as practicable.

The following analysis considers the potential economic effects that may result from the final rule consistent with the Commission's statutory power to obtain information necessary and appropriate to conduct an effective premerger review, including the benefits and costs to market participants. In conducting this assessment, the Commission has identified existing costs to filers, the Agencies, and third parties that could be avoided by adjusting the information requirements for HSR Filings. Avoiding such costs would generate benefits for filers, the Agencies, and third parties in addition to broader public benefits of effective premerger screening to identify potentially unlawful mergers prior to consummation.

The Commission believes that the final rule will improve the efficiency of the premerger review process and help the Agencies identify transactions that may violate the antitrust laws along all parameters of potential harm, but not all of these benefits can be quantified. Wherever possible, the Commission quantifies the likely economic effects of its final rule. However, some economic effects are inherently less conducive to sound quantification either due to the lack of reliable data or the lack of a well-established economic methodology that would provide estimates or ranges of costs. For example, producing quantitative estimates of certain costs and benefits would require numerous assumptions to generate a behavioral forecast of how parties contemplating an acquisition and other affected third parties would respond to the rule, and how those behavioral responses would in turn affect the overall cost of compliance and the merger review process. In addition, some factors determining certain economic effects of the rule are transaction-, firm- and industry-specific and thus inherently difficult to quantify. Even if it were possible to calculate a range of potential quantitative estimates for these effects, the range would be so wide as to not be informative about the magnitude of the associated benefits or costs. Where sound economic methodology is not available to measure particular benefits or costs, the Commission addresses those qualitatively.[174] In sum, to show the connection between the facts found and the agency's decision, the Commission provides, where feasible and appropriate, a quantified estimate of the economic effects of the final rule, and a qualitative description of the benefits and costs.

A. Statutory Authority and Congressional Intent

The HSR Act provides that the Commission ''shall require'' that premerger notifications be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Agencies to determine whether such acquisition may, if consummated, violate the antitrust laws.[175] Thus, the HSR Act explicitly requires the Commission, with the concurrence of the Assistant Attorney General, to determine what types of documents and information are required to conduct an initial assessment of antitrust risk. Mandatory premerger review strengthens merger enforcement by giving the Agencies a fair and reasonable opportunity to detect and investigate large mergers before consummation.[176] The ability to spot ''problem areas'' during the initial screen is the key feature of the HSR Act that converts merger enforcement from ineffective ex-post litigation to expeditious and effective premerger proceedings.[177]

To that end, Congress passed the HSR Act to provide the Agencies with advance notice of planned acquisitions and an opportunity to challenge such acquisitions as unlawful prior to consummation. The overall intent was to avoid lengthy, costly post-consummation enforcement that is ineffective at preventing undue concentration and permits an illegal acquisition to cause harm until unwound:

> The problem this bill cures is startlingly simple, but it goes to the very foundations of our merger law. Under present law, companies need not give advance notification of a planned merger to the Federal Trade Commission and the Department of Justice. But if the merger is later judged to be anticompetitive, and divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.[178]

[173] *See PhRMA,* 790 F.3d at 210 (the Commission may provide the factual predicate for a finding through its cumulative experience and resulting expertise).

[174] *See Chamber of Com* v. *Sec. Exch. Comm'n.,* 85 F.4th 760, 768 (5th Cir. 2023) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). *See also id.* at 773–74 (explaining that securities law provisions providing rulemaking authority do not require the agency to conduct a quantitative inquiry to ascertain the economic effects of a rule, that the agency could instead rely on a qualitative assessment of the rule's economic implications, and that the agency can determine the analysis that most effectively reflects the economic consequences of its rule) (citation omitted); *All. For Fair Bd. Recruitment* v. *Sec. Exch. Comm'n.,* 85 F.4th 226, 263 (5th Cir. 2023) (agency's analysis of unquantifiable benefits sufficiently supports a rule as long as it provides an adequate explanation for its determination, and agency need not support its analysis with hard data where it reasonably relied on intangible benefits that were difficult to quantify) (citations omitted); *Mex. Gulf Fishing.,* 60 F.4th at 965–66 (a necessary-and-appropriate condition does not require applying a strict cost-benefit analysis but simply a showing that expected benefits are reasonably related to anticipated costs) (citations omitted).

[175] 15 U.S.C. 18a(d)(1).

[176] H.R. Rep. No. 94–1373, at 5 (1976).

[177] *Id.* at 10–11 (chief virtue of the Act is to help eliminate endless post-merger proceedings and replace them with far more expeditious and effective premerger review generating considerable savings; if the initial notification form reveals 'problem areas,' the government can request additional data during the initial 30-day period).

[178] 122 Cong. Rec. 25051 (1976) (remarks of Rep. Rodino). Premerger review was not the only tool given the Agencies to rectify the inadequacy of post-consummation merger enforcement. In 1973, Congress amended the FTC Act to authorize the Commission to seek injunctions in Federal court in recognition of the inadequacy of post-consummation divestitures. *See FTC* v. *H.J. Heinz Co.,* 246 F.3d 708, 726 (D.C. Cir. 2001) (Section 13(b) of the FTC Act reflects congressional recognition that divestiture is an inadequate and unsatisfactory remedy in a merger case, citing 119 Cong. Rec. 36612 (1973)). The inability of the

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As noted by the Antitrust Modernization Commission (AMC)—a special body commissioned by Congress in 2002 to conduct a comprehensive review and make recommendations for revisions to U.S. antitrust laws—the HSR Act addressed the defects of post-consummation merger enforcement, which ''could neither fully compensate society for the interim loss of competition, nor fully restore a competitive market structure, particularly if the companies had already integrated their productive assets, or 'scrambled the eggs.' '' [179] Congress also intended to avoid deterring or impeding the consummation of the vast majority of acquisitions and therefore fashioned a regime that reflected ''a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays.'' [180]

The Agencies have administered the premerger notification program required by the HSR Act for more than 45 years, and the Commission has engaged in numerous rulemakings to change the information requirements for premerger notification in response to changes in market realities. Although many commenters object in whole or in part to the proposals contained in the NPRM, several conceded that some updates to the Rules are reasonable or justified by increasingly complex markets. Others commended the Commission for undertaking a periodic review of its rules. Even so, some argue that the Commission lacks the authority to make any changes to its current process that would increase the burden or delay HSR-reportable transactions, asserting that Congress intended to reduce costs and delay and to focus the Agencies' scrutiny on only the largest corporate transactions. The Commission disagrees with certain commenters that the Commission lacks the authority to adjust information requirements over time to make premerger review efficient and effective for the purpose of detecting potentially illegal mergers in light of changing market conditions.

Given the number of comments that assert that the proposed rule violated the intent of the HSR Act, the Commission responds first to these broad objections. The Commission also responds to assertions that it has failed to properly weigh the benefits and costs of changing the notification requirements in light of the statutory premerger scheme.

As an initial matter, the Commission disagrees that avoiding potential cost or delay to those involved in dealmaking is the primary focus of the HSR Act. The legislative history and plain text of the HSR Act make clear that the goal of establishing a premerger review regime was not to minimize the number of transactions that are reviewed by the Agencies or to reduce the delay for reported transactions below the statutory obligations.[181] In fact, it is clear that Congress explicitly contemplated that a mandatory premerger notification regime would impose burdens on merging parties. Prior to the passage of the HSR Act, parties were free to merge without providing any notification and without any delay, which led to concerns that the Agencies were practically unable to block or unwind illegal transactions.[182] Congress determined that new and meaningful requirements were necessary to achieve the overarching Congressional goal of promoting vigorous and effective enforcement of the antitrust laws:

> Amended Section 7 has failed to achieve its objectives—not because of its substantive standards, but because of the lack of an effective mechanism to detect and prevent illegal mergers prior to consummation. . . . The Committee believes that [premerger notification] represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays . . . Complex mergers or acquisitions of the kind encompassed within this subsection generally require a great deal of prior planning, and this provision will provide the Government appropriate opportunity to evaluate the legality of significant business behavior at the most propitious moment for all parties, with the least possible disaccommodation.[183]

When setting up the premerger notification program, the Commission rejected assertions that the term ''notification'' implies only a minimal burden for the initial HSR Filing. Some commenters at the time maintained that the initial notification should do little more than inform the Agencies of the participants to the transaction, the projected date of consummation, and other noncontroversial and generally uninformative data, leaving a fuller information demand to the Second Request. The Commission disagreed that the HSR Act should be read this way, stating that this position is contrary to the statutory text and fundamentally misconceives the amount of information necessary to make even a tentative determination whether a transaction may violate the antitrust laws.[184] The Commission explained that the HSR Filing should contain information necessary and appropriate for an effective premerger notification program.[185] The Commission reasoned that requiring perfunctory information in the HSR Filing would not fulfill the statutory provision and would result in more Second Requests that would extend the average waiting period under the HSR Act.[186] Then and now, to fulfill the purpose of premerger review, there must be sufficient information provided in an HSR Filing to determine whether to issue Second Requests and what information those requests would seek. Consistent with Congress' expectations that HSR Filings would consist of data and documents reasonably available to filing companies, such as the information and documents they relied

Commission to obtain injunctive relief sooner to prevent widespread harm from mergers was a widely acknowledged shortcoming of its agency design. *See, e.g., FTC* v. *Dean Foods Co.,* 384 U.S. 597, 606 n.5 (1966) (experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture).

[179] Antitrust Modernization Comm'n, Rep. & Recommendations 155 & n.21 (2007), *https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm* (citing H.R. Rep. No. 94–1373 at 7–11) (hereinafter ''AMC Report''). The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. 107–273, 116 Stat. 1856, Div. C., Title I, Subtitle D (2002). The AMC was charged with examining whether there was a need to modernize the antitrust laws and to identify and study related issues; to solicit views; and to evaluate proposals for change. The AMC provided its Report and Recommendations to Congress and the President on April 2, 2007, and was terminated on May 31, 2007, having completed its statutory duties.

[180] S. Rep. No. 94–803, at 65 (1976).

[181] Efforts to require premerger notification date back to 1908. Leading up to the passage of the HSR Act, the Commission regularly urged Congress to pass legislation that would require advance notice for acquisitions. For a short time, the Commission relied on its authority under section 6 of the FTC Act to require merging parties to file special reports 60 days prior to consummation in certain industries, such as food distribution and cement. None of these programs required the parties to stay their merger plans. After passage of the HSR Act, the Commission discontinued reliance on special reports for prior notice of pending mergers. *See* Kelly Signs, ''Milestones in FTC History: HSR Act launches effective premerger review,'' Fed. Trade Comm'n Competition Matters blog (Mar. 16, 2015), *https://www.ftc.gov/enforcement/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective-premerger-review.*

[182] *See* S. Rep. No. 94–803, at 64 (1976).

[183] *Id.* at 63–66. *See also id.* at 9–10.

[184] 43 FR 33450, 33519–20 (July 31, 1978).

[185] *Id.* The Commission also rejected suggestions that it make certain burdensome requests optional for the parties, finding that such an approach would undermine the usefulness of the second request mechanism, hinder the Agencies in their efforts to carry out their congressionally mandated review, and be administratively unworkable. *Id.* at 33520.

[186] *Id.* at 33520. *See also* 42 FR 39040, 39043 (Aug. 1, 1977).

on when contemplating the deal,[187] the final rule seeks information that is readily available to the parties to fill information gaps that the Agencies have identified in the current HSR Form.

As discussed above, information reported in the current HSR Form is not sufficient due to differences in corporate structure and investment activity as well as profound changes in economic activity. In this rulemaking, the Commission is responding to these changes and how they have affected the Agencies' ability to conduct premerger screening in light of today's market realities. The Agencies need information to be able to spot all types of potential harm and the Commission has determined that the information requirements contained in the final rule are necessary and appropriate to conduct effective and efficient premerger screening and avoid even greater costs associated with collecting additional information through issuing more Second Requests. Without sufficient information available in the HSR Filing on the first day of the statutory review period, the Agencies cannot fulfill their mandate to identify and prevent illegal mergers or avoid potentially costly and protracted investigations.

Several commenters suggested that because Congress recently authorized the collection of additional information relating to foreign subsidies, that is the only information the Commission has the authority to collect.[188] The Commission disagrees that in passing this new requirement, Congress intended to repeal or in any way limit the Commission's statutory authority under 15 U.S.C. 18a(d) to impose other reporting requirements that are necessary and appropriate to determine whether the transaction may violate the antitrust laws. Indeed, the Commission is relying on its section 18a(d) authority to require the submission of information related to foreign subsidies in the final rule. The other changes contained in the final rule are a reasonable exercise of the Commission's rulemaking authority to require information that is necessary and appropriate for detecting problematic mergers during the initial waiting period of the HSR Act. The final rule updates the premerger notification regime based on the Agencies' experience in reviewing thousands of HSR Filings each year and in light of observable changes in market dynamics, contemporary investor behavior, investment arrangements, and acquisition strategies, as discussed in section II.B. above.

Some commenters suggested that the Commission lacks authority to make changes to the notification requirements because doing so increases the likelihood that the Agencies will subject more transactions to close scrutiny or seek to block them as illegal, and that this increased scrutiny will disincentivize dealmaking. This line of argument is contrary to the purpose of the HSR Act and the final rule.

Congress passed the HSR Act to create an effective mechanism to detect, deter, and prevent large transactions that violate the antitrust laws. The inadequacy of current notification requirements may encourage parties to enter into unlawful transactions due to the low risk of premerger detection.[189] One commenter supporting the need for change noted that the gaps created by the existing HSR Form and Instructions make it possible for anticompetitive mergers to go through unnoticed. Parties considering a merger are aware of this, so under the current system, parties are likely more willing to consider or attempt a merger that would be more obviously unlawful under a more rigorous disclosure regime. To the extent that one effect of the final rule would deter unlawful dealmaking, that effect is clearly consistent with Congress' intent that mandatory premerger review more effectively prevent illegal mergers.[190] Filing parties cannot claim an interest in inadequate detection or in avoiding an in-depth antitrust investigation that may lead to a court injunction blocking the merger because these concerns directly contravene U.S. law. Based on statutory text and clear Congressional intent, the Commission must ensure that HSR notification requirements enable the Agencies to detect the potential for harm before the harm occurs; that is the purpose of premerger review. When the Agencies' ability to detect the violation is compromised by inadequate disclosures in the HSR Filing, the Commission must use the authority expressly conferred by Congress to adjust the Agencies' detection tools to fulfill the purpose of premerger review.

Other commentors suggested that the Agencies' infrequent challenges to consummated mergers, including those reported but not challenged prior to consummation, are proof that the Agencies are not ''missing deals'' that cause harm. But given the significant effort required to unwind completed mergers, the frequent lack of information about the effects of consummated mergers, and the limited resources the Agencies have available to devote to all types of merger enforcement, in addition to their other statutory responsibilities,[191] the relatively low number of challenges to consummated mergers does not indicate that the current information requirements for premerger screening are sufficient to detect illegal deals. The Agencies must make difficult decisions about how to use their resources to address consummated mergers that may be causing real and ongoing harm while also working to fulfill their obligations to conduct a robust premerger screening of reported transactions. The critical task of screening reported transactions for antitrust risks can be especially challenging during times of peak M&A activity. See Figure 1.

According to one commenter whose members have been directly affected by consolidation in the retail food sector, third parties sometimes alert the Agencies to competitive issues, but that may not occur until after the waiting period has expired or the deal has been consummated. This commenter noted that these untimely scenarios are exactly the opposite of the HSR Act's legislative intent and force the Agencies and courts into a precarious position to preserve competition or obtain effective remedies. Congress certainly did not provide immunity for reported mergers that are not challenged prior to consummation (as most jurisdictions do) [192] so it is not a binary choice for the

[187] 122 Cong. Rec. 30877 (1976) (remarks of Rep. Rodino).

[188] *See* Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459 (2022).

[189] *See* ''Stealth Consolidation,'' *supra* note 18.

[190] *See* S. Rep. No. 94–803, at 65 n.28 (the purposes underlying enactment of section 7 of the Clayton Act could have been accomplished if premerger notification had been enacted when originally proposed, and that if it had the economy would be less concentrated.).

[191] In addition to merger enforcement, both Agencies investigate and challenge anticompetitive conduct that may violate the antitrust laws. The Antitrust Division has sole responsibility to prosecute criminal violations of the antitrust laws, while the Commission has authority under section 5 of the FTC Act (15 U.S.C. 45) to challenge unfair methods of competition beyond the scope of the Sherman or Clayton Acts. In addition, the Commission's budget supports its consumer protection work, which is devoted to stopping unfair or deceptive acts or practices that violate the FTC Act as well as enforcement of more than 80 other statutes. *See generally* Fed. Trade Comm'n, ''Legal Library: Statutes,'' *https://www.ftc.gov/legal-library/browse/statutes.*

[192] *See* The Merger Control Review Preface, x (Ilene Knable Gotts, ed., 14th ed., 2023) (in most jurisdictions, a transaction that is not notified is not subject to review or challenge by the competition authority), *https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.28469.24.pdf.* Canada recently extended its lookback period from one year to three years for non-notified transactions but left unchanged the one-year limitation to challenge notified transactions. *See* Competition Bureau Canada, ''Guide to the June 2024 amendments to

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Agencies to ''act or stand down'' on a reported merger. But once a merger is consummated (whether reported in advance or not), the Agencies face decisions about the significant costs of mounting a merger challenge to unwind the deal as well as the opportunity costs of doing so. Given the limited resources the Agencies have to devote to merger enforcement, the Agencies will often focus on enforcement of reported mergers due to these opportunity costs.[193]

The legislative record leading to the HSR Act is replete with references to the costs, delays, and ineffectiveness of relying on post-consummation enforcement to interdict mergers that may cause harm in their incipiency.[194] In the Agencies' experience, unwinding illegal consummated mergers continues to be a costly exercise, and there remain significant delays in obtaining effective relief through unwinding. A merged firm has strong incentives to delay the outcome, and Commission orders requiring divestiture of acquired assets are often appealed, further deferring relief.[195] Moreover, smaller or seemingly inconsequential acquisitions can later be revealed as potentially illegal exclusionary conduct when they are used by firms with dominant market positions to maintain or extend a monopoly in violation of section 2.[196] There are enormous costs and delays associated with prosecuting section 2 cases involving the largest companies in the world to unwind harmful acquisitions.[197]

In mandating government review of acquisitions prior to consummation, Congress intended for the Agencies to avoid these types of protracted antitrust cases when possible. Instead, Congress envisioned that merger enforcement would occur mostly through a system of premerger review, even at the cost of requiring premerger review for many mergers that may not ultimately warrant an in-depth investigation let alone a challenge in court.[198] The Commission has determined that imposing some limited additional upfront costs on filers so that they submit sufficient information to allow the Agencies to conduct the mandatory initial antitrust review fulfills the Agencies' statutory responsibilities and should be weighed against the benefit of avoiding large expensive antitrust actions required to unwind illegal acquisitions that were not detected at the screening phase. Importantly, the final rule imposes fewer information requirements on transactions that are reportable but have low antitrust risk while seeking the most information from those transactions most likely to require in-depth review at the screening phase. Otherwise, the consequences of poor detection are improperly shifted to those harmed by illegal consummated mergers—which is plainly at odds with the purpose of the HSR Act.

The benefits of stopping an illegal merger before it happens can be significant, especially for those who would bear the consequences of harm induced by the merger. The chart below collects estimates of avoided harm due to likely price changes for affected products or services in cases litigated by the Agencies and accepted by Federal courts as a basis for enjoining illegal mergers in recent years.

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the Competition Act'' (June 25, 2024), *https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-june-2024-amendments-competition-act*.

[193] *See* Zarek Brot-Goldberg, et al., ''Is There Too Little Antitrust Enforcement in the US Hospital Sector?'' (U. Chi., Becker Friedman Inst. for Econ. Working Paper No. 2024–59, May 2024) (forthcoming, Am. Econ. Rev.: Insights), *https://bfi.uchicago.edu/working-paper/is-there-too-little-antitrust-enforcement-in-the-us-hospital-sector/* (FTC is intervening in the most anticompetitive transactions but not preventing a significant number of hospital mergers that nonetheless cause harm).

[194] *See* H.R. Rep. No. 94–1373, at 7–10 (1976).

[195] *See, e.g., Illumina, Inc.* v. *FTC,* 88 F.4th 1036 (5th Cir. 2023); *ProMedica Health Sys., Inc.* v. *FTC,* 749 F.3d 559 (6th Cir. 2014), *cert. denied,* 575 U.S. 996 (2015); *Polypore Int'l, Inc.* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012).

[196] *See supra* note 107 (collecting cases).

[197] The Commission filed its monopolization complaint against Facebook (now Meta) on December 9, 2020, and was joined by a coalition of forty-six States, the District of Columbia and Guam. *See* Press Release, Fed. Trade Comm'n, ''FTC Sues Facebook for Illegal Monopolization'' (Dec. 9, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.* The FTC is seeking a permanent injunction that would, among other things, require the divestiture of previously acquired assets. As of September 27, 2024, the parties have concluded pretrial discovery; a trial date has not been set.

[198] The Agencies can and do challenge reportable mergers after the expiration of the waiting period. *See, e.g., Chi. Bridge & Iron Co. N.V.* v. *FTC,* 534 F.3d 410 (5th Cir. 2008); *United States.* v. *Parker Hannifin Corp.,* No. 17–cv–01354 (D. Del. Sept. 26, 2017) (complaint). *See also* Note by the United States to the OECD, Investigations of Consummated and Non-Notifiable Mergers (Feb. 25, 2014) (DAF/COMP/WP3/WD(2014)23), *https://one.oecd.org/document/DAF/COMP/WP3/WD(2014)23/En/pdf* (discussing Agencies' challenges of consummated mergers); Menesh S. Patel, ''Merger Breakups,'' 2020 Wisc. L. Rev. 975, 990 (2020) (observing that, since 2001, the Agencies have challenged at least four mergers that previously underwent HSR review). Because of the confidentiality protections afforded HSR filings, market participants are often not aware of the merger or the timing of the expiration of the statutory waiting periods. *See* Comment of Strategic Org. Ctr., Doc. No. FTC–2023–0040–0708 at 3 (urging public notice of the date of HSR filings and the identity of the filers so that interested and affected parties can contact the Agencies during the initial review period). Many investigations of consummated mergers, including reported but not challenged transactions, are initiated after market participants reach out to the Agencies about the observed effects of the merger.

Table 2: Estimates of Harm in Blocked Mergers

Case	Estimate of Harm
U.S. v. JetBlue/Spirit Airlines	$1 billion per year[a]
FTC v. IQVIA/PMI	Post-merger price increase of 7.4%[b]
U.S. v. Bertelsmann SE & Co.	Post-merger decreases in advances range from 4% to 11.5%[c]
FTC v. Hackensack	$31 million per year[d]
FTC v. Peabody Energy	$1 billion over 10 years[e]
FTC v. Wilhelmsen	$14.4 million to $23 million per year[f]
FTC v. Sanford	$16 million to $27 million per year[g]

[a] United States v. JetBlue Airways Corp., No. 1:23-cv-10511 (Dec. 16, 2024) (Findings of Fact and Conclusions of Law) and Plaintiff's Post-Trial Brief at 18-19 (Dec. 13, 2023) (Proposed Acquisition Is Conservatively Projected to Cause Nearly $1 Billion of Harm Each Year to American Consumers in the Relevant Markets).
[b] FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188 at 81-82 (S.D.N.Y. Jan. 8, 2024) (Op. & Order).
[c] United States v. Bertelsmann SE & Co., No. 1:21-cv-2886 at 54 (D.D.C. Nov. 7, 2022) (Mem. Op.).
[d] FTC v. Hackensack Meridian Health, Inc., No. 2:20-cv-18140 at 48-49 & n.26 (D.N.J. Aug. 4, 2021), aff'd, 30 F.4th 160, 174 (3d Cir. 2022).
[e] FTC v. Peabody Energy Corp. 492 F. Supp.3d 865, 906 (E.D. Mo. 2020).
[f] FTC v. Wilh. Wilhemsen Holding ASA, 341 F. Supp.3d 27, 65 (D.D.C. 2018).
[g] FTC v. Sanford Health, No. 1:17-cv-00133 at 28, 2017 WL 10810016 at *13 (D. N.D. Dec. 15, 2017) (Mem. Decision), aff'd, 926 F.3d 959, (8th Cir. 2019).

In addition to merger-induced price effects, which can vary widely due to differences in the economic size of the relevant markets affected by the merger, there can also be harm to customers from the loss of non-price competition. For example, the court found that JetBlue's anticipated reconfiguration of Spirit's aircraft would result in a decrease in the number of seats available on JetBlue flights of more than 6,100,000 per year.[199] These types of effects reduce output and result in a welfare loss due to the exercise of market power. In a vertical merger context, the Fifth Circuit affirmed the Commission's findings that Illumina's acquisition of Grail lessened competition via a different mechanism: the potential foreclosure of a key input by the sole supplier would lead to chilled investment by firms reliant on those inputs for their own competitive success.[200]

Moreover, merger retrospectives document merger-induced effects such as increased prices and decreased product quality or availability across a range of industries.[201] Given the significant economic costs imposed on market participants harmed by an illegal consummated merger, the Agencies will continue to challenge consummated mergers when practical and as resources permit. But relying on post-consummation merger enforcement to correct for information deficiencies in the HSR Form is contrary to Congressional intent that premerger review be used to stop illegal mergers before they occur.

1. Congress Determined Which Acquisitions Must Bear the Costs Associated With Premerger Review

Congress determined that the burden of premerger review should apply, regardless of antitrust risk, to a small subset of mergers where that burden would not be so great in comparison to the size of the deal and the size of the parties involved. Because the final rule does not require reporting for any additional transactions, it maintains the balance struck by Congress that only some mergers be subject to mandatory premerger review.

Congress incorporated several features in the HSR Act to lessen the burden on dealmaking, especially for small business and small transactions.[202] For instance, the HSR Act as first passed in 1976 contained three specific requirements that determined reportability for a planned transaction: the acquiring person is engaged in interstate commerce (the commerce test); one of the parties was worth at least $10 million and the other worth at

[199] *United States* v. *JetBlue Airways Corp.,* No. 1:23–cv–10511 at 43 (D. Mass., Jan. 16, 2024) (Findings of Fact and Conclusions of Law).

[200] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1055 (5th Cir. 2023).

[201] *See generally* Vivek Bhattacharya et al., ''Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 31123, Apr. 2023, rev. June 2024), *https://www.nber.org/papers/w31123* (studying fifty mergers in the consumer-packaged goods industry and finding that, on average, these mergers raised prices by 1.5 percent and decreased quantities sold by 2.3 percent); Daniel Hosken et al., ''Do Retail Mergers Affect Competition? Evidence from Grocery Retailing,'' 27 J. Econ. & Mgmt. Strategy 3 (2018) (finding that the majority of grocery mergers in highly concentrated markets resulted in price increases of more than 2 percent); John E. Kwoka, Jr., Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy 110–11 (2014) (providing a meta-analysis of retrospective literature, finding that more than 80 percent of mergers resulted in price increases and the mean price increase was 5.88 percent across all studied transactions); Orley C. Ashenfelter et al., ''Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers,'' 57 J. L. & Econ. S67 (2014) (reviewing prior retrospectives and concluding that mergers in oligopolistic markets can result in economically meaningful price increases, as 36 of 49 studies surveyed found evidence of merger-induced price increases); Leemore Dafny et al., ''Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry,'' 102 a.m. Econ. Rev. 1161 (2012) (examining healthcare mergers and finding the mean increase in local market HHI during the studied period raised premiums by roughly 7 percent); Orley Ashenfelter & Daniel Hosken, ''The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin,'' 53 J. L. & Econ. 417 (2010) (examining a set of mergers that were unchallenged by the government and finding that the majority resulted in a significant increase in consumer prices in the short run); Thomas Koch & Shawn W. Ulrick, ''Price Effects of a Merger: Evidence from a Physicians' Market,'' 59 Econ. Inquiry 790 (2021) (concluding that a merger of orthopedic physicians' practices increased prices to some payors by ten to twenty percent while prices in nearby areas not affected by the merger remained unchanged); Zack Cooper et al., ''The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured,'' 134 Q. J. Econ. 51 (2019) (examining 366 hospital mergers and finding that prices increased by over six percent when merging hospitals were geographically close); Prager & Schmitt, *supra* note 83 (examining hospital mergers and finding reduced wage growth when merger significantly increases concentration).

[202] The Senate version of the premerger notification bill would have given the Commission authority to require reporting from additional ''small'' mergers, but the House bill and the final law did not include this provision. 122 Cong. Rec. 30877 (1976).

least $100 million (the size-of-person test); and as a result of the transaction, the acquiring person would hold at least 15 percent or $15 million of the acquired entity (the size-of-transaction test). These thresholds were adopted in response to concerns that requiring reporting for all mergers would unduly affect capital markets.[203] The size-of-person test was seen as especially important to limit the impact of premerger reporting on small businesses:

> Approximately the largest 700 U.S. companies meet the $100 million jurisdictional requirement. Although $100 million companies account for roughly 40 percent of mergers and acquisitions, Title V's *dual* requirement of (i) a $100 million acquiring company, and (ii) a $10 million acquired company would have required such 30-day notification, over the past 5 years, in less than 100 acquisitions per annum. With this limitation, the Committee sought to include within the ambit of the premerger notification provision primarily those mergers or acquisitions that were most likely to have a substantial effect on competition. That is not to say that smaller mergers may not run afoul of the Clayton Act. To include the bulk of the approximately 3,000 mergers that would have occurred annually in the course of the past several years would, however, in the Committee's judgement, impose an undue and unnecessary burden on business.[204]

Together, these criteria were designed to focus mandatory premerger review on the largest transactions and limit the number of transactions that would have to be reported to the Agencies. See Table 1 (on average 16.5% of mergers reported during FY 2018 to FY 2022).

During the 1990s, several years of intense M&A activity drove merger filings ever higher, so that by FY 2000, the Agencies reviewed over 4,900 reported transactions.[205] This dramatic increase in HSR filings led to calls for Congress to amend the HSR Act to reduce its broad sweep, and to especially address its impact on small businesses. In response, Congress made several changes in 2000 to reduce the number of transactions subject to reporting: (1) increased the size-of-transaction threshold from $15 million to $50 million and required the Commission, starting in 2005, to adjust the thresholds in the HSR Act annually based on changes in the gross national product; (2) eliminated the 15 percent size-of-transaction threshold, making $50 million (as adjusted) an absolute floor; and (3) eliminated the size-of-person test for larger transactions, making transactions valued in excess of $200 million (as adjusted) reportable without regard to the size of the parties.[206] Today, as a result of these adjustments and with annual indexing, HSR filings are required for only a small fraction of overall merger activity in the United States. See Table 1.

Many commenters pointed out that the Congress that enacted the HSR Act envisioned the Agencies reviewing only 150 of the largest mergers.[207] In 1976 when the HSR Act was passed, 150 mergers represented approximately 12.8 percent of M&A deal volume, given that there were 1,171 completed acquisitions in 1976.[208] Overall, the burden imposed on M&A activity by the HSR Act is not that different today than in 1976. See Table 1 (HSR reportable mergers on average 16.5 percent of M&A from FY 2018 to 2022). At the same time, the size of the U.S. economy has grown exponentially: in 1976, the seasonally adjusted U.S. Gross Domestic Product was $1.934 trillion; today it is over $28 trillion.[209] From these figures, it appears that M&A activity, and the economy in general, has not been affected by the obligations imposed on those pursuing certain large acquisitions to submit to mandatory premerger review.

Moreover, Congress enacted several explicit statutory exemptions to reduce the burden of reporting,[210] and also authorized the Commission to issue rules exempting persons and acquisitions that it deemed at the time as posing little to no antitrust risk, which eliminated the burden of reporting for many additional transactions.[211] The Commission has also faithfully implemented Congress' mandate to annually index the HSR thresholds, which keeps premerger review limited to those acquisitions Congress wants the Agencies to review prior to consummation.[212]

Some commenters noted that the current process is inefficient because of the over-inclusiveness of HSR reporting standards. They pointed out that of all reported transactions, the Agencies issue Second Requests in only 2 to 3 percent per year, suggesting that this is a reason for the Commission to keep the status quo and not adopt any adjustments to current information requirements.

The Commission believes that the low percentage of transactions that have received Second Requests is not a reliable indicator that the Agencies have achieved the goals of mandatory premerger review or that the current

[203] *See* S. Rep. No. 94–803, at 65–66 (1976).

[204] *Id.* at 66.

[205] Fed. Trade Comm'n & U.S. Dep't of Justice, Annual Report to Congress Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976 1 (Twenty-Third Report) (FY 2000).

[206] Public Law 106–553, 114 Stat. 2762 (2000) (codified at 15 U.S.C. 18a(a)). *See also* 146 Cong. Rec. S11872 (daily ed. Dec. 15, 2000) (statement of Sen. Kohl) (exempting small transactions from premerger review will significantly lessen regulatory burdens and expenses imposed on small businesses). This legislation also provided the Agencies more time to review materials submitted in response to a Second Request, extending the second waiting period under the HSR Act from 20 to 30 days after substantial compliance. *See* 15 U.S.C. 18a(e)(1)(A). *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Annual Report to Congress Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Twenty-Fifth Report) appendix A (FY 2002) (from FY 2000 to 2002, reported transactions dropped from 4,926 to 1,187).

[207] The prediction of 150 mergers turned out to be unrealistic from the start. In just the first three months of the premerger program, the Agencies received notifications for 292 transactions, nearly double the expected amount. *See* Fed. Trade Comm'n, Second Annual Report to Congress pursuant to Section 201 of Hart-Scott-Rodino Antitrust Improvements Act of 1976 3 (FY 1978). In the first full year of the HSR program, the Agencies received filings for 814 transactions. Fed. Trade Comm'n, Third Annual Report to Congress pursuant to Section 201 of Hart-Scott-Rodino Antitrust Improvements Act of 1976 3 n.4 (FY 1979). The Commission moved quickly to amend the HSR Rules to exempt additional types of transactions to further reduce the burden of the premerger reporting program. 44 FR 66781 (Nov. 21, 1979). *See also* David A. Balto, ''Antitrust Enforcement in the Clinton Administration,'' 9 Cornell J. L. & Pub. Pol'y 61, 119–20 (1999) (discussing two early HSR exemptions which resulted in approximately 20% and 10% reductions in filings).

[208] *See* Fed. Trade Comm'n, Statistical Report on Mergers and Acquisitions 25 Table 10 (1978), *https://www.ftc.gov/system/files/documents/reports/statistical-report-mergers-acquisitions-1978/statistical_report_on_mergers_aug1980.pdf*. This number does not include partial acquisitions which did not confer control on the buyer.

[209] U.S. Bureau Econ. Analysis, Gross Domestic Product (updated Aug. 29, 2024) (retrieved from FRED, Fed. Reserve Bank of St. Louis), *https://fred.stlouisfed.org/series/GDP*.

[210] *See* 15 U.S.C. 18a(c) and 16 CFR part 802.

[211] *See* 15 U.S.C. 18a(d)(2)(B) and 16 CFR part 802. Several commenters urge the Commission to engage in rulemaking to exempt additional transactions from HSR filing obligations. These suggestions are outside the scope of this rulemaking. Due to deficiencies in the information currently collected in the Form, as explained elsewhere in this document, the Commission is not able to identify any additional types of transactions that could be exempted at this time. Until the Commission has sufficient information to provide a reasonable basis to exempt additional categories of transactions from HSR reporting requirements, the Commission is not in a position to reduce the total number of reported transactions. As discussed in section VI.A.1.f., the Commission is excusing certain types of transactions (select 801.30 transactions) from many requirements of the final rule and has modified the proposed rule in many places to apply only where certain conditions have been met.

[212] To the extent that commenters suggest that the NPRM expands reporting requirements for additional transactions, they are wrong. Nor would changing the information requirements of the HSR Filing affect the obligations of public companies to comply with disclosure requirements of the Securities and Exchange Commission (''SEC''). *See* Comment of Am. Sec. Ass'n, Doc. No. FTC–2023–0040–0682 at 2.

process is efficient in identifying problematic transactions and effective in deterring illegal mergers. As discussed above in section II.B., the Commission has identified significant deficiencies in the information provided in the HSR Filing that prevent the Agencies from assessing the potential harm presented by reportable transactions. In light of these deficiencies, the number of mergers investigated through the issuance of Second Requests is not instructive on whether the Agencies are fulfilling their duty to the American public to screen large mergers in advance of consummation. The Agencies must continue to review reportable transactions to determine which ones warrant the issuance of Second Requests regardless of, and despite, fluctuations in the overall number of filings.

2. Delays Associated With Premerger Review Depend on Antitrust Risk

Congress also determined how much delay would be associated with those transactions subject to mandatory premerger review, and this rulemaking attempts to adjust the information required for premerger screening in light of legislative intent to avoid delays for any deal other than those with the highest antitrust risk. The main statutory feature of the HSR Act is the suspensory waiting period, which requires that the parties not consummate the proposed acquisition until the prescribed waiting period has expired. For all transactions, the statute limits that delay by keeping the waiting period short: 30 days for most transactions and 15 days for those most at risk of not happening at all due to delay, such as cash tenders and acquisitions of assets out of bankruptcy. Congress determined to hold up cash tender offers and the purchase of assets in bankruptcy only briefly due to heightened concerns over timing. For cash tender offers, which do not require consent of the target and can sometimes be actively opposed by the target, Congress shortened the suspensory waiting period to 15 days to balance premerger notice with the intent of the securities laws, specifically the Williams Act, so as not to ''tip the balance'' in favor of the incumbent management of the target firm.[213] Similarly, for acquisitions of assets subject to bankruptcy proceedings, Congress understood that time is of the essence to prevent liquidation of productive assets and applied the shortened 15-day initial waiting period to these transactions as well. Congress thus recognized that a particular subset of transactions require especially speedy review.

At the same time, Congress provided that the Agencies can extend the waiting period for any type of reportable acquisition by requiring the submission of additional information or documentary material in response to a Second Request. The decision to issue Second Requests has significant consequences for the transaction because if that happens, the parties cannot consummate the transaction until 30 days after each party has substantially complied with the Second Requests.[214]

The Commission disagrees that the final rule entails any delay beyond that which was expressly contemplated in the HSR Act. First, the final rule does not extend the statutory waiting periods, which are established by Congress.[215] Second, Congress made clear that the initial waiting period will commence once the Agencies have received a completed Form, or a partially completed Form with a specific statement of the reasons for partial non-compliance.[216] Third, Congress directed the Commission to devise and maintain a mandatory notification program that would give the Agencies the information that is necessary and appropriate to conduct an initial antitrust assessment during the initial 15- or 30-day waiting period.

That said, the Commission does not question the need, when appropriate, to minimize delay for notified transactions, especially for non-problematic deals. In fact, the Commission believes that the final rule may shorten the overall waiting period for a significant number of transactions and perhaps even reduce the overall number of delayed transactions. As discussed above, Congress determined that 30 days was the appropriate delay for the majority of reportable transactions (other than cash tenders and acquisitions in bankruptcy), regardless of their size or economic impact. It is a feature of the HSR Act that an open market stock purchase by an individual can be subject to the same 30-day initial waiting period as a multi-billion-dollar merger of competitors operating in multiple local markets throughout the country. Yet these two transactions present very different antitrust risks.

In order to quickly dispense with those transactions that present low risk of a law violation so as to focus on those with moderate to high risk, the Agencies need more information in the HSR Filing. Any time and effort the Agencies must spend collecting necessary information that is not contained in the HSR Filing is time and effort taken away from quickly determining which deals do not warrant an in-depth investigation. Especially as it relates to cash tender acquisitions—which are among some of the largest deals reviewed by the Agencies over the years and yet are subject to a 15-day initial waiting period—the short time given for the initial antitrust assessment severely strains the Agencies' limited resources, especially during periods of intense M&A activity. See Figure 1. But the statutory time limit is absolute and if the Agencies do not issue Second Requests before the end of the initial waiting period, the parties are free to consummate the transaction.[217] This is as Congress intended, but Congress also gave the Commission the authority to determine the necessary and appropriate information that must be included in HSR Filings to make the

[213] 122 Cong. Rec. 30877 (1976) (listing a number of defensive actions the target could take to undermine the offer if it had enough time, effectively denying shareholders of the target firm the choice to accept the offer).

[214] The Agency that issued the Second Requests can grant early termination of the waiting period, permitting the parties to consummate their proposed acquisition, or a Federal court may extend the waiting period if the Agency applies for preliminary relief and the court finds that the party has not substantially complied with the information requirements of the HSR Act. 15 U.S.C. 18a(g)(2).

[215] As discussed in section V.D. below, if the parties have not executed a definitive agreement, the final rule requires that they submit a document with the HSR Filing that contains sufficient details of the transaction they intend to consummate. This may be the executed preliminary agreement, or the agreement may be supplemented by one additional dated document, such as a term sheet or the latest draft agreement. While this new requirement may cause some filers to delay notification compared to the current rules, the Commission believes this change is necessary and the delay is appropriate to avoid wasting the Agencies' time and attention on deals that may never occur or are too hypothetical or lacking material details to assess.

[216] 122 Cong. Rec. 30876 (1976). The Commission does not dispute that the HSR Act allows for substantial compliance with its requirements. In response to such arguments, the sponsors dropped the ''automatic stay'' provisions and adopted a requirement that filers ''substantially comply'' with the Second Request so that arguments that the parties had not fully complied could not hold up the deal. Under 15 U.S.C. 18a(g)(2), a district court may extend the statutory waiting periods of the HSR Act if filers fail to substantially comply with the requirements of the HSR Act.

[217] As part of the 2000 amendments to the HSR Act, Congress made plain that if the end of the waiting period falls on a Saturday, Sunday, or legal public holiday, then the waiting period is extended to the next day that is not one of those days. 15 U.S.C. 18a(k). This change was necessary to eliminate gamesmanship by parties who timed their compliance so that the waiting period ended on a weekend or holiday, effectively shortening the waiting period to the previous business day. 146 Cong. Rec. S11872 (daily ed. Dec. 15, 2000) (statement of Sen. Kohl).

statutory scheme work—not for the purpose of minimizing delay but for the purpose of enforcing the antitrust laws for the benefit of the public. That is the problem this rulemaking addresses: by adjusting the amount of information available to the Agencies on the first day of the waiting period, the final rule makes possible quick but thorough premerger review for all reportable transactions.

For many years, and mainly due to the lack of sufficient information contained in HSR Filings, many filers and practitioners have become accustomed to artificially lengthened waiting periods. In 2013, the Commission issued a rule that formalized a previously informal process that offers filers the option to withdraw and refile their filings without paying an additional filing fee. The option to withdraw-and-refile was intended to benefit both the parties and the Agencies by providing an additional 15- or 30-day waiting period for the Agencies to review the transaction without issuing Second Requests while seeking additional relevant information on a voluntary basis from the merging parties or from third parties.[218]

As shown in Table 3 below, the option to withdraw-and-refile has been used with some frequency by filers to give the Agencies more time to conduct an initial premerger assessment. Based on the Agencies' review of their HSR-related investigations during the five-year period of FY 2018 to 2022, parties withdrew their HSR filing and refiled in a total of 546 transactions. In the majority of these extended investigations, the Agencies determined not to issue a Second Request: nearly two-thirds of the time, opting to withdraw and refile resulted in the transaction closing at the end of the initial waiting period, thereby avoiding the cost and burden of a Second Request investigation. That is, once the filing parties submitted information beyond what was submitted with the HSR Form, the investigating Agency was able to determine that the transaction did not warrant Second Requests.

Table 3: Withdrawn & Refiled Transactions Fiscal Years 2018 – 2022

	5 Year Total
Transactions	546
Transactions Not Issued Second Request	365
Percentage Not Issued Second Request	67%

While the parties can rely on the option to withdraw and refile as an ad hoc tactic to avoid the issuance of Second Requests, the Agencies' experience illustrates in a very tangible way the inefficiencies associated with the current HSR Form. Over the five years sampled, an average of 73 transactions each year (546 in total) were delayed by an additional 30 days and filers were burdened by having to submit additional materials on a voluntary basis even though the investigation did not lead to the issuance of Second Requests. These delays impose costs on the parties and the Agencies, as well as third parties contacted during the extended initial review period.

Moreover, getting more time to review the transaction does not address the information deficiencies outlined above and addressed by the final rule. While serving as an existing work-around to give the Agencies more time to collect additional information not contained in the HSR Filing, the option to withdraw-and-refile is a poor substitute for having the necessary information submitted with the HSR Filing for several reasons. First, the current information requirements leave important gaps, as detailed above in section II.B., leading staff to flag filings for no-action when in fact they may warrant a closer review.[219] In practical terms, the HSR Filing must contain sufficient information from the filers to allow the Agencies to spot transactions that may warrant follow up. Merely adding time on the clock does not fill the information gaps identified above.

Second, withdraw-and-refile is optional for filers and thus is not a tool the Agencies can rely on to collect more information when needed. While parties may decide to delay their transaction to lower the chances of receiving a Second Request, in many instances the parties do not withdraw and refile precisely because they fully expect to receive Second Requests. When the parties do withdraw and refile, the Agencies spend considerable time waiting for answers to key questions; in any event, having more time is not the same as having the information needed to conduct an initial antitrust assessment. The Agencies' experience is that these voluntary submissions are often late or incomplete. When the information arrives near the end of the extended waiting period, there is often not enough time to review and verify the information. As a result, investigations that are extended through a withdrawal and refile are costly in time and effort for both Agency staff and the parties: extra time does not always translate to collecting the right information to make the initial determination whether the transaction should be fully investigated through the issuance of Second Requests.

Finally and most importantly, a filer's submission of any additional information beyond what is required for an HSR Filing is voluntary. Given that the Agencies have no ability to demand compliance with voluntary requests, there is an overwhelming incentive for filers to prioritize the collection and submission of information suggesting that there is no competitive problem, rather than supplying the necessary information in an objective and neutral manner. Thus, while the agency may receive additional relevant information on a voluntary basis, it remains extremely challenging for the Agencies to both review and verify this information in whatever short period of time is available to decide whether to issue Second Requests.

Expending so many resources on withdraw-and-refile investigations is

[218] 78 FR 10574, 10576 (Feb. 14, 2013).

[219] *See supra* note 24 (citing research finding that consummated hospital mergers that received early termination resulted in the largest average percentage price increase).

inefficient both for the parties and the Agencies and is a source of undue delays for many deals every year, because having more time is not a substitute for having sufficient and reliable information provided on a mandatory basis on the first day of the waiting period. The Commission believes that requiring more information in the HSR Filing through a final rule that is focused on surfacing competition problem areas will reduce the need for extended withdraw-and-refile investigations for a significant number of transactions that do not require Second Requests.

Expanding the information that filers are required to provide upfront has certain benefits for filers and gives full effect to the purpose of a very short initial waiting period: because the information will be available to the Agencies on the first day of the initial waiting period, this will reduce delays for deals that do not receive Second Requests but nonetheless are delayed because staff must collect information from third parties or public sources, including when the parties withdraw and refile their HSR Filing. In addition, having this information upfront may allow Agency staff to narrow the areas of focus to only those business lines that require further investigation.[220] Based on the Commission's experience, the additional information will allow the Agencies to significantly reduce burdens on filing parties in many circumstances.

Moreover, the additional information required by the final rule addresses the fundamental information asymmetry that currently exists between what the parties know about their business and what information they are required to reveal to the Agencies in the HSR Filing. Shifting the burden of information collection from the Agencies to the filing parties minimizes the burden on Agency staff to collect basic business information about the filers from other sources, such as their customers or other market participants, or from public sources, which may not surface key confidential business information known only to the parties. It also minimizes the burden on those third parties. This basic business information is relevant to the Agencies' antitrust assessment and often comes in late in the initial waiting period close to when the Agencies need to determine whether to issue Second Requests.

Moreover, certain information is most readily and reliably available from the parties to the transaction. Although Agency staff collect relevant information from other sources including third parties during the initial waiting period, the benefit of getting this information from the filing parties is that it is likely more accurate and up-to-date and therefore more reliable for the purpose of quickly conducting a premerger assessment of antitrust risk. Obtaining basic business information about the operations of the filing parties secondhand from third parties and public sources is no substitute for getting that information directly from the parties themselves. The parties will have the most reliable and relevant information necessary to conduct a preliminary assessment of the transaction during the initial waiting period.

Having reliable and accurate information directly from the entity most likely to have it reduces overall information-collection costs and delays. That is just good government, according to some members of Congress: ''Requiring transacting parties to provide regulators with the information necessary to examine a proposed merger is a commonsense way to save taxpayer dollars and enable antitrust enforcers to fulfill their congressional mandate and protect consumers, the economy, and national security.'' [221]

To further reduce delays for transactions that pose little or no antitrust risk based on information contained in the HSR Filing, the statute also provides the Agencies with the discretion to grant an early termination of the initial waiting period, reducing the statutory 15- or 30-day delay to something less.[222] For many years, the Agencies routinely granted early termination to those filers that requested it.[223] Contrary to the assertions of some commenters, the Commission reviews the information provided in *every* filing (typically two filings per transaction) [224] to ensure compliance with the requirements of the HSR Act and to conduct a preliminary assessment of antitrust risk. The decision to grant discretionary termination of the waiting period prior to the statutory deadline is the result of staff review of the information contained in the HSR Filing, a determination that takes time, knowledge of the HSR Rules, and often additional research from public sources to ensure that there is little to no risk that the transaction requires additional investigation prior to consummation. There is also the additional time spent coordinating both Agencies' conclusions as well as processing the granting of early termination through publication in the **Federal Register**.[225]

Prioritizing staff resources to reduce delays through early termination over the identification of problematic deals became impractical during the latest surge in HSR-reportable transactions, beginning in the fall of 2020 when the Agencies were faced with an unprecedented increase in merger filings.[226] As reflected in Figure 1 above, the number of HSR-reportable transactions spiked in FY 2021, resulting in more than twice the number of filings as compared to the prior year. Given the time and effort required to collect additional information during the initial waiting period—information that is not contained in the current Form but that bears directly on whether the Agencies should conduct a more in-depth investigation or grant early termination—the Agencies temporarily suspended the granting of early termination, first briefly in order to adjust to the challenges of processing premerger filings during the COVID–19 pandemic, and then again due to a surge in merger filings.[227]

As an additional measure, the Commission determined that it would

[220] As discussed elsewhere, the Commission did not consider any ''burden'' associated with better detection of illegal mergers. Identifying additional transactions for investigation and possible challenge is a benefit of effective and efficient premerger review.

[221] Comment of Sen. Elizabeth Warren et al., Doc. No. FTC–2023–0040–0711 at 5.

[222] 15 U.S.C. 18a(b)(2).

[223] Not all parties request early termination; whether to request early termination is solely at the discretion of the filing parties. Because the Agencies are required to make public grants of early termination through publication in the **Federal Register**, some filers may prefer not to have their acquisitions made public in this way.

[224] As reflected in appendix A of the Annual HSR Reports, the Agencies typically receive two filings for each transaction, one from the acquiring person and one from the acquired person. In FY 2022, the Agencies reviewed 6,288 filings for 3,152 reported transactions. Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Report, Fiscal Year 2022 appendix A (FY 2022).

[225] Commission staff take seriously the statutory obligation not to disclose information about an HSR Filing. Because the granting of early termination requires public notice in the **Federal Register** and is often the first indication that a proposed acquisition is in the works, staff must take great care to avoid mistakes when processing these requests.

[226] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix B (FY 2021) (reporting monthly HSR filings for FY 2012 to FY 2021). *See* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020, Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021) (''FY 2020 HSR Statement''), *https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf.*

[227] *See* Press Release, Fed. Trade Comm'n, ''FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination'' (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

provide notice to filers whose deals could not be adequately screened during the initial waiting period, warning them that although the waiting period had expired, the transaction remains subject to antitrust challenge under section 7.[228] In the Commission's view, these pre-consummation warning letters are consistent with the legislative intent that lack of agency action prior to the expiration of the initial 15- or 30-day waiting period does not bar the Agencies (or other enforcers of the Clayton Act such as States or private parties) from later challenging the notified transaction. That is, premerger review provides the Agencies with the opportunity to investigate and challenge suspect transactions as violative of section 7; it does not require nor allow the Agencies to determine that the merger does not or would never violate section 7.

These recent adjustments to the Agencies' premerger review process reflect the burdens on Agency staff to triage filings during the very limited statutory period allowed for the initial review, which underscores the need for additional information at the outset of the initial waiting period. Even for those transactions in which the parties give the Agencies additional time by withdrawing and refiling their notification, relying on voluntary submissions has not been sufficient to overcome the lack of relevant information needed to conduct a robust screening for a significant number of deals.

As several commentators noted, it is appropriate that the Agencies, who have the responsibility to identify which transactions should be challenged, address the significant information asymmetry between the parties and the Agencies by collecting more information from the parties upfront. The Commission agrees. The Commission has determined that the information deficiencies of the current reporting requirements are imposing undue delay on those transactions that the Agencies determine do not require intervention prior to consummation. The final rule addresses these inefficiencies by shifting more of the costs of information acquisition to the merging parties, both because they are the most reliable and ready sources for that information and to reduce the costs and delays associated with information acquisition from other sources, including third parties. The Commission believes that the final rule represents a reasonable adjustment to the information requirements for premerger notification that will reduce the number of transactions that are delayed beyond the initial review period.

3. The Purpose of the HSR Form Versus Second Requests

Several commenters asserted that if the Agencies need more information, they should issue more Second Requests as an alternative to issuing this final rule, because that is the mechanism Congress gave the agencies to collect more information. Commenters also compared the requirements of the proposed rule to those contained in a Second Request, asserting that this rulemaking would inappropriately convert the HSR Filing into the equivalent of a Second Request in terms of scope and burden. As discussed below, the Commission disagrees with these commenters. Congress gave the Agencies a mandate to collect information that is necessary and appropriate in the HSR Filing to determine whether the reported transaction may violate the antitrust laws, which would justify the burden (on both the parties and the Agency) associated with issuing Second Requests. The purpose of requiring an HSR Filing is to give the Agencies time and information to conduct mandatory premerger screening. The purpose of issuing Second Requests is to conduct an in-depth review of other information and documentary materials that would allow the Agency to determine whether to challenge the transaction prior to consummation. The Commission has concluded that the final rule more appropriately reflects the purpose of the statutory scheme, which requires the information from all filers that is necessary for premerger screening but requires extensive information in response to a Second Request (which today, often represents millions of documents and terabytes of data) only from those filers whose transactions warrant an in-depth antitrust investigation. Thus the final rule is a reasonable exercise of the Commission's rulemaking authority to address the information deficiencies identified in section II.B. rather than rely on the extraordinarily costly alternative of using Second Requests to address those deficiencies.

Commenters point to research that indicates there is a high probability that a transaction will be challenged if the Agencies issue Second Requests and suggest that this means that Second Requests are the most reliable tool for the Agencies to identify potentially harmful deals. But a close read of the study cited by commenters reveals that there are reasons to question the conclusions commenters have drawn from the low number or high through-rates of Second Requests. Billman and Salop examined the Agencies' enforcement record and calculated that for those transactions that receive a Second Request, 28 percent are cleared as proposed.[229] Billman and Salop also report that the percentage of Second Request investigations has fallen over time, from about 3.49 percent in 2001 to 2.92 percent in 2020. These figures are consistent with information reported by the Agencies in annual HSR Reports.[230] In their report, Billman and Salop contend that the reason behind the falling number of Second Requests is limited agency resources, not diminishing antitrust risk due to mergers:

> The agencies issue so few second requests because they have been budget constrained during this entire period. Under these circumstances, the agencies must engage in a type of triage process. Being limited in the number of second requests they can issue and cases that they can afford to litigate in court, the agencies target only the limited number of most problematical looking mergers for second requests. Not surprisingly, they generally discover evidence of potential anticompetitive effects. And not surprisingly, the firms generally consider the validity of the concerns, and most are then willing to accept a consent decree or abandon the transaction. Indeed about 26% (*i.e.,* 254/969) of the firms that receive second requests choose to abandon the transaction even *before* a complaint is issued.[231]

The Commission is well aware of the challenges of fulfilling its mission to prevent harmful mergers with existing resources. Fully resourcing the Commission's competition mission—especially merger review—has been an ongoing challenge. For instance, the Commission's headcount remains well below what is needed in light of the volume and complexity of proposed deals. Over the past ten years, the absolute number of HSR filings has nearly doubled, while the number of FTC employees assigned to competition work has remained nearly flat. As a result, the Commission has been forced to make difficult triage decisions and forgo potentially worthy investigations.[232] Moreover, funding

[228] *See* FY 2020 HSR Statement, *supra* note 226.

[229] Logan Billman & Steven C. Salop, ''Merger Enforcement Statistics: 2001–2020,'' 85 Antitrust L. J. 1, 6 (2023).

[230] *See* appendix A of HSR Annual Reports, available at Fed. Trade Comm'n, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 56.

[231] Billman & Salop, *supra* note 229, at 7.

[232] *See* Statement of Chair Lina M. Khan, joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the FY 2022 HSR Annual Report to Congress (Dec. 21,

levels for the antitrust agencies has not kept pace with the impressive growth of the U.S. economy: according to one report, from 2010 to 2019, U.S. GDP increased 37 percent but appropriations for the Antitrust Division and the FTC increased only 3 percent.[233]

Commenters who supported expanded information requirements suggested that limited resources justify this rulemaking, while those opposed claimed that resource limitations are the real source of underenforcement of the antitrust laws, a problem that will not be solved by adding burdensome new information requirements. Whatever the funding levels, the Agencies must deploy their resources to be good stewards of public funds and make resource allocation decisions to pursue their mutual mission to enforce the antitrust laws for the benefit of the public. The Commission has concluded that regardless of resource levels, it is critical to the task of detecting illegal mergers that the HSR Filing contain sufficient information for an effective premerger antitrust assessment of the transaction rather than relying on issuing more Second Requests to compensate for information deficiencies in the HSR Filing.

The Commission has determined there are several reasons why issuing more Second Requests is not a reasonable alternative to address the information gaps discussed in section II.B. above. First, without the additional information required by the final rule, the Agencies would continue to struggle to uncover key facts necessary to determine whether to issue Second Requests for reported transactions that warrant in-depth review. The Agencies are currently making these assessments and relying on Second Requests when necessary, but they are doing so knowing that there are deficiencies in the information currently collected on the HSR Form, resulting in significant extra effort to generate sufficient information to make that determination prior to the expiration of the initial waiting period. In light of the deficiencies in the information currently collected that are discussed in section II.B., the Commission has determined that the status quo does not permit the Agencies to fulfill their statutory mandate to identify those transactions that warrant the issuance of Second Requests.

Second, issuing more Second Requests is an extremely costly alternative to the final rule. The costs, burdens, and delay associated with Second Requests—for both the parties and the Agencies—are well documented. In 2000, Congress amended the HSR Act to provide for an optional internal review process for Second Request recipients to object to the breadth and cost of complying with those requests [234] and requiring the Agencies to conduct ''an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.'' [235] Yet despite Agency reforms to reduce burdens and costs, [236] the AMC noted the widespread belief that complying with a Second Request imposed significant costs. The AMC cited a survey conducted by the Antitrust Section of the American Bar Association which reported that, on average, investigations during the second waiting period took seven months and resulted in median compliance costs of $3.3 million.[237] A more recent survey conducted in 2014 by the Mergers & Acquisitions Committee of the ABA reported that average cost of compliance with a Second Request was $4.3 million among respondents.[238] Another study shows that Second Requests impose significant delays and risks, even for deals that are ultimately not challenged by the Agencies, increasing the time required for premerger review from an average of 98 days (3.3 months) for acquisitions that do not receive a Second Requests to 237 days (7.9 months) from announcement to closing.[239]

The Commission has determined that the final rule is a better regulatory alternative than issuing more Second Requests because the final rule provides the Agencies with the information necessary for an efficient and effective premerger assessment and to determine which reportable transactions warrant the issuance of Second Requests. The Commission considers the costs that would be associated with issuing more Second Requests as an alternative to the final rule to be unnecessary and unjustified. By relying on only the information contained in current HSR requirements and issuing more Second Requests, the Agencies would be imposing these significant costs on deals that are even more ''on the margin'' than the ones that are currently identified for a Second Request investigation. Issuing more Second Requests without adjusting the information in the HSR Filing would most likely result in significant costs for additional transactions and undue delay for even more deals that are not ultimately challenged in court.

More importantly, without addressing the information deficiencies outlined in section II.B., the Agencies would miss certain transactions that warrant further review. For these transactions, which are currently not subject to Second Requests, the costs of complying with the additional information requests for the HSR Filing are justified by the enhanced ability of the Agencies to detect the potential for the transaction to violate the antitrust laws. In other words, the final rule makes it more likely that the transactions that present the most significant risk violating the antitrust laws, and therefore most clearly warrant the costs and delays associated with an in-depth investigation, are those that will receive Second Requests.

As an added benefit, the additional information contained in the HSR Filing will allow the Agencies to focus their investigation on those aspects of the transaction that create antitrust risk, and

2023). *https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofChairKhanJoinedbyComm%27rSlaughterandComm%27rBedoyareFY2022HSRAnnualReport.pdf.*

[233] Michael Kades, ''The state of U.S. federal antitrust enforcement,'' Wash. Ctr. Equitable Growth 22–23 & Fig. 12 (Sept. 17, 2019), *https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true.*

[234] 15 U.S.C. 18a(e)(1)(B).

[235] *Id.* sec. 18a(e)(1)(B)(iii).

[236] *See* Prepared Statement of the Fed. Trade Comm'n Before the Comm. on the Judiciary, Subcomm. on Antitrust, Competition, and Small Bus. and Consumer Rights, United States Senate Concerning An Overview of Fed. Trade Comm'n Antitrust Activities 3 (Sept. 19, 2002), *https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-overview-enforcement-antitrust-laws/020919overviewtestimony.pdf.* In 2002, the Commission's Bureau of Competition issued Guidelines on Merger Investigations, which eliminated some of the more onerous requirements of compliance. *See* Debbie Feinstein, ''A fine balance: toward efficient merger review,'' Fed. Trade Comm'n Competition Matters blog (Aug. 4, 2015), *https://www.ftc.gov/enforcement/competition-matters/2015/08/fine-balance-toward-efficient-merger-review.*

[237] AMC Report, *supra* note 179, at 163. The AMC noted that the survey's value was limited due to reliance on a non-scientific, self-selected sample of only twenty-three responses, and that the median values for most measures of cost were much lower than the means, suggesting the average values were influenced by a few very high observations. *Id.*

[238] Peter Boberg & Andrew Dick, ''Findings from the Second Request Compliance Burden Survey,'' Vol. XIV No. 3 Threshold: Newsletter of the Mergers & Acquisitions Comm. 26, 37 (Summer 2014) (A.B.A. Antitrust L. Sec.). In about one-third of these investigations, parties had withdrawn and refiled their notification, indicating that the strategy was not always effective in avoiding a Second Request. This is consistent with the Commission's assessment of withdraw and refile data, reflected in Table 3 *supra.*

[239] Jana Fidrmuc et al., ''Antitrust merger review costs and acquirer lobbying,'' 51 J. Corp. Fin. 72, 73 (2018).

minimize ''overly broad'' Second Requests, which can also impose unnecessary costs and delays. Specifically, the final rule provides the Agencies with the information that is necessary to make the critical decision whether and how to burden the filers and the Agencies with the costs and delays associated with an in-depth investigation of the reported transaction.

Indeed, one goal of this rulemaking is to reduce the number of Second Request investigations that do not lead to an enforcement action. Imposing substantial costs in addition to undue delay on transactions that are unlikely to face a court challenge is the wrong response to the information deficiencies outlined in section II.B. The Commission has determined that imposing minimal additional costs on all filers to properly conduct premerger screening will likely reduce the number of transactions that receive a Second Request but do not face a court challenge, a very significant benefit to filers. The Commission expects that, on balance, the final rule will reduce the number of unnecessary or overly broad Second Requests and that this outcome is consistent with the statutory scheme created by Congress.

Much of the increased cost of a Second Request investigation (for both the parties and the Agencies) is due to the increasing complexity of merger litigation, and including the costs associated with post-complaint discovery. Federal judges overseeing merger trials routinely remark on the scope and effort of proving and refuting the facts needed to assess whether a proposed transaction violates the antitrust laws.[240] The Agencies' costs in litigating these cases have also increased significantly in recent years, especially the cost of hiring outside experts to support the litigation.[241] To a large extent, the scope and burden of a Second Request is driven by the growing need for data and other evidence required to make an informed decision whether to devote scarce resources to a particular case in light of the likelihood that the agency can establish liability under section 7 of the Clayton Act.

Of the commenters objecting to the proposed rule, some argued that the final rule would collapse the distinction between the notification form and a Second Request. The Second Request is the Congressionally mandated tool for the collection of additional information to determine whether to challenge the transaction prior to consummation. The Commission states that it is not its intention in any way to require in the initial notification all the information that may be necessary to determine whether to file a complaint alleging an antitrust violation. Instead, the final rule ensures that the Agencies have the information necessary to identify those transactions that require the issuance of Second Requests, a decision that must be made prior to the expiration of the statutory waiting period. The Commission disagrees that the final rule requires anything near the amount of data and documents sought in Second Requests, which are tailored for each recipient. For example, the Commission's Model Second Request requires the submission of all documents related to pricing for any relevant product for the last three years [242] and the Department of Justice's Model Second Request requires the submission of each database or data set containing a range of information about the relevant product.[243] That level of detail and analysis is not required by the final rule and is not warranted in an HSR Filing. In the final rule, the Commission has identified the information that the Agencies need to conduct a preliminary screen for antitrust risks. A Second Request represents a whole different level of detail and analysis, one much more aligned with determining whether there are facts sufficient to establish to a court that the merger may substantially lessen competition or tend to create a monopoly.

As discussed in section III.A., the Commission believes that it is consistent with the statutory premerger regime to collect certain critical information directly from those involved in the transaction and to have that information available on the first day of the initial waiting period. The Commission believes that it is well within its statutory authority to require minimally sufficient information in the HSR Filing that is necessary and appropriate to screen each reported transaction for antitrust risk without resorting to issuing more Second Requests to require information that is not currently submitted with the HSR Form.

Moreover, the Commission believes that Second Requests should continue to be reserved for those transactions more likely to violate the antitrust laws and to result in measurable harm if not blocked prior to consummation. Issuing more Second Requests as a remedy for deficient HSR Filings imposes opportunity costs on the Agencies, diverting resources that could be used to address other potential violations of the antitrust laws. Moreover, as discussed above, one potential benefit of the final rule is that it may reduce the number of Second Requests or limit their scope. Issuing more Second Requests runs counter to that goal and would also impose significant additional costs on the Agencies, the filing parties, and third parties. In the words of one commenter: ''These proposed changes exemplify good government. They would save regulators valuable time and resources in evaluating merger proposals, making the agency's processes more efficient.'' [244]

In sum, in adopting this final rule, the Commission believes that it has identified the specific additional information that, in the Agencies' experience, is most relevant to determining whether to issue Second Requests or narrow their scope. Moreover, as detailed below in sections IV. through VI., the Commission has made significant modifications in the final rule to better balance the need for additional relevant information while avoiding undue delay and cost where the likely benefit to the Agencies is low, especially for those deals that they can quickly determine are not likely to violate the antitrust laws. The Commission believes that the final rule, as modified, would better address the information deficiencies outlined above as compared to other available regulatory options such as relying on more Second Requests.

The Commission has also considered whether to rely on the expanded use of voluntary supplemental submissions from the parties, including as part of a pull-and-refile investigation, as an alternative to the final rule. See section III.A.2. But this alternative does not address the information deficiencies that this rulemaking has identified with

[240] *See, e.g., FTC* v. *Peabody Energy Corp.,* 492 F. Supp. 3d 865, 874 (E.D. Mo. 2020); *FTC* v. *Staples, Inc.,* 190 F. Supp. 3d 100, 110 (D.D.C. 2016); *FTC* v. *Sysco Corp.,* 113 F. Supp. 3d 1, 15 (D.D.C. 2015); *United States* v. *JetBlue Airways Corp.,* cv–23–10511 (D. Mass. Jan. 16, 2024).

[241] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n to Rep. Thomas P. Tiffany 5–6 (Nov. 3, 2023) *https://www.ftc.gov/system/files/ftc_gov/pdf/2023.11.3_chair_khan_letter_to_rep._tiffany_re_merger_challenges.pdf* (citing expert witness costs related to merger enforcement in Federal court).

[242] *See* Fed. Trade Comm'n, Bureau of Competition, Model Second Request Specifications 8 (rev. Jan. 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024.pdf.*

[243] U.S. Dep't of Justice, Model Second Request, Specification 2, *https://www.justice.gov/atr/file/706636/dl.*

[244] Comment of SEIU, Doc. No. FTC–2023–0040–0699 at 2.

the current information requirements. Without the collection of information related to the antitrust risks identified in section II.B., the Agencies lack a basis to identify the need for additional voluntary submissions from the parties. The Agencies are already relying on supplemental submissions from a large number of filers, often resulting in the parties withdrawing and refiling their notification. See Table 3. Routinely requiring voluntary submissions from even more filers as an alternative to obtaining needed information in the HSR Filing would impose unnecessary burden and delay on filings that are not currently flagged for follow up.

Based on the Agencies' experience of conducting premerger review for over four decades, the Commission identified the additional data and documents that, if submitted with the HSR Filing, would reduce delays and burdens associated with information-gathering during the initial waiting period and satisfy the Agencies' mandate to conduct a premerger assessment of each reported transaction. To that end, the final rule targets information that is likely already available to filers, such as documents related to the transaction, as well as historical data and documents about their business, including ordinary course business plans and reports. The final rule marries descriptive responses with documents submitted with the HSR Filing, providing the Agencies with a holistic view of the operations of each party, including any existing business relationships that would be affected by the transaction. Overall, the final rule aligns the information requirements of the HSR Filing with the Agencies' task of identifying transactions that may violate the antitrust laws. For many of the new requirements, parties only have to respond if they identify an existing business relationship (*e.g.,* one party is the other party's competitor or supplier). Based on the Agencies' experience, parties in most cases do their own assessment of the antitrust risk associated with the planned transaction before submitting an HSR Filing and will therefore already have relevant information about any existing business relationship. In short, the Commission has calibrated the HSR Filing's reporting requirements so that the filing contains sufficient information for the Agencies to determine whether the transaction is one that is likely to raise antitrust concerns. The Commission believes that the final rule is well within the authority given to it by Congress to implement a notification scheme that minimizes costs and delays associated with mandatory premerger review and yet generates the benefits of preventing illegal mergers prior to consummation.

B. Major Questions Doctrine

Two commenters suggested that the proposed rule implicates the major questions doctrine.[245] The Commission disagrees. According to the Supreme Court, the major questions doctrine is implicated in ''extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'' [246]

This rulemaking does not involve a major question as the Supreme Court has used that term. The final rule merely updates the disclosure requirements for acquisitions that already are required to submit to mandatory premerger notification. As reflected in Table 1, transactions reported under the HSR Act constitute only a fraction of the total number of mergers and acquisitions that occur each year in the United States. Congress has determined that most acquisitions should not be subject to premerger review, and this rule does not impact them.

Considerations of history and breadth also demonstrate that the final rule does not involve a major question. The breadth of the Commission's authority here ''fits neatly within the language of the statute. . . .'' and is well established.[247] The Commission has clear congressional authorization to issue rules and a long history of exercising its authority to promulgate HSR Rules under section 18a(d). The Commission has made both substantive and ministerial amendments to the rules dozens of times to improve the program's effectiveness and to adjust the reporting requirements to keep pace with market realities.[248] Requiring

[245] One commenter also argues that the Commission's rule runs afoul of the non-delegation doctrine. The Commission disagrees. First, the Commission's rule has no bearing on the authority Congress delegated to the Commission when it passed the HSR Act. Second, Congress' delegation of rulemaking authority to the Commission does not run afoul of the non-delegation doctrine. The non-delegation doctrine is based on the Supreme Court's interpretation of Article I, Section 1 of the Constitution, which vests all legislative powers in Congress. The Court has interpreted this clause to mean that Congress cannot delegate its legislative power to another branch of government without supplying an intelligible principle. *See J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394, 409 (1928); *Gundy* v. *United States,* 139 S. Ct. 2116, 2129 (2019). Congress provided several intelligible principles in the HSR Act to guide the Commission's exercise of authority. For instance, it directed the Commission to require notification in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Agencies to determine whether the acquisition may, if consummated, violate the antitrust laws. Congress also stated that the Commission may define terms and exempt classes of persons, acquisitions, transfers, or transactions not likely to violate the antitrust laws from the reporting requirements.

[246] *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022) (cleaned up); *see also Biden* v. *Nebraska,* 143 S. Ct. 2355, 2372 (2023).

[247] *Biden* v. *Missouri,* 595 U.S. 87, 93 (2022).

[248] *See* 43 FR 33450 (July 31, 1978) (publishing final rules for premerger notification); 44 FR 66781 (Nov. 21, 1979) (increasing minimum dollar value exemption contained in 16 CFR 802.20); 45 FR 14205 (Mar. 5, 1980) (replacing requirement that certain revenue data for the year 1972 be provided in the Notification and Report Form with a requirement that comparable data be provided for the year 1977); 48 FR 34427 (July 29, 1983) (amending premerger notification rules to clarify and improve the effectiveness of the rules and of the Form and reduce the burden of filing notification); 50 FR 46633 (Nov. 12, 1985) (revising Form at 16 CFR part 803 appendix); 51 FR 10368 (Mar. 26, 1986) (same); 52 FR 7066 (Mar. 6, 1987) (amending rules to reduce cost of complying with the rules and to improve the program's effectiveness); 52 FR 20058 (May 29, 1987) (amending definition of the term ''control'' as it applies to partnerships and other entities that do not have outstanding voting securities); 54 FR 21425 (May 18, 1989) (interim rule codifying practices that make public administrative grants of early termination of the waiting period through means other than publication in the **Federal Register**); 55 FR 31371 (Aug. 2, 1990) (revising revenue reporting); 60 FR 40704 (Aug. 9, 1995) (same); 61 FR 13666 (Mar. 28, 1996) (defining or creating exemptions to filing); 63 FR 34592 (June 25, 1998) (exempting divestitures pursuant to consent agreements); 66 FR 8680 (Feb. 1, 2001) (interim rule implementing changes to the HSR Act); 66 FR 23561 (May 9, 2001) (interim rule revising revenue reporting); 66 FR 35541 (July 6, 2001) (implementing May 9, 2001 interim rule with slight changes); 67 FR 11898 (Mar. 18, 2002) (amending certain exemptions); 67 FR 11904 (Mar. 18, 2002) (clarifying); 68 FR 2425 (Jan. 17, 2003) (same); 70 FR 4988 (Jan. 31, 2005) (amending the premerger notification rules to reflect adjustment and publication of reporting thresholds required by the 2000 amendments to section 7A of the Clayton Act, 15 U.S.C. 18a); 70 FR 11502 (Mar. 8, 2005) (amending rules to address treatment of corporations, partnerships, limited liability companies and other types of non-corporate entities and the application of certain exemptions); 70 FR 73369 (Dec. 12, 2005) (amending Form and Instructions to relieve some of the burden of complying with Items 4(a) and (b) and specifying that notifications in certain types of transactions expire after eighteen months if a second request remains outstanding); 70 FR 77312 (Dec. 30, 2005) (requiring that 2002 revenue data, identified by the 2002 NAICS, be provided in response to certain items on the Form); 71 FR 35995 (June 23, 2006) (allowing submission of notification and report forms electronically via the internet); 76 FR 42471 (July 19, 2011) (implementing changes to streamline the Form, adding Items 4(d), 6(c)(ii) and 7(d) to capture additional information that would significantly assist the Agencies in their initial review, addressing omissions from 2005 rulemaking involving unincorporated entities); 78 FR 41293 (July 10, 2013) (setting forth the procedure for voluntarily withdrawing an HSR filing, establishing when an HSR filing will be automatically withdrawn if a filing publicly announcing the termination of a transaction is made with the SEC, and setting forth the procedure for resubmitting a filing after a withdrawal without incurring an

Continued

information necessary and appropriate to determine whether a transaction, if consummated, may violate the antitrust laws is certainly a ''tool'' in the Commission's ''toolbox,'' given the Commission's history of taking action against anticompetitive mergers.[249] Since 1977, the Commission and the Antitrust Division of the Department of Justice have published an annual report outlining their efforts to protect competition by identifying and investigating mergers and acquisitions that may violate the antitrust laws.[250] These reports demonstrate that premerger notification and merger enforcement is an area that falls squarely within the Commission's ''wheelhouse.''[251]

Even if the final rule could be characterized as implicating a major question, the HSR Act provides ''clear congressional authorization'' for the rule.[252] Congress spoke clearly when it granted the Commission authority to determine the form and content of premerger notifications as necessary and appropriate to enable the Agencies to determine whether a proposed acquisition may, if consummated, violate the antitrust laws,[253] and the final rule falls squarely within that delegation of authority. The Commission is asking filers to provide information necessary to evaluate whether a transaction may violate the antitrust laws. This information is missing from the current filings, and it is appropriate that filers, who are in the best position to report basic information about their own businesses, provide that information. The rule updates are necessary and appropriate for the Commission to accomplish the goals Congress set out for it: effective premerger review as a tool to prevent illegal mergers prior to consummation and fully enforce the antitrust laws' proscription against undue concentration. And just recently, Congress increased the requirements of the premerger notification program by requiring the Commission to collect information about foreign subsidies in order to use this data as part of the Agencies' premerger review.[254] Congress has left it to the Commission to ''fill up the details'' based on the many clear principles articulated in the HSR Act [255] and in furtherance of sound and effective enforcement of the U.S. antitrust laws. Accordingly, even if the major questions doctrine applies, the Commission's authority to issue the final rule is clear.

C. Benefits and Costs of the Final Rule

The final rule is intended to address existing information deficiencies in the current HSR Rules so the Agencies can identify transactions that may violate the antitrust laws during the short period of mandatory premerger review provided in the HSR Act. The Commission has determined that the status quo is insufficient because it leaves information gaps that prevent the Agencies from efficient and effective premerger screening to identify which transactions require in-depth review. The final rule also addresses significant information asymmetries between the parties and the Agencies by shifting more of the costs of information acquisition to the parties, who are most familiar with their business operations and structure and who are pursuing the transaction under review. The Commission has considered alternatives to the final rule that would rely on other regulatory options, including the Short Form Alternative discussed in section III.E., and has determined that those alternatives offer different tradeoffs between benefits and costs. The Commission believes that the final rule has the best balance of benefits and costs within the statutory scheme of the HSR Act because it imposes less delay and is less costly than issuing more Second Requests, and it imposes less delay and provides more certainty regarding the completeness of the information than relying on more extensive voluntary submissions of information. Moreover, the final rule is superior to the short form alternative, an option suggested by commenters and discussed below in section III.E., because the Commission lacks a basis at this time to identify a set of transactions that should be eligible for short form treatment using the current information requirements. Most importantly, none of the other alternatives close the information gaps identified in section II.B. to permit the Agencies to effectively and appropriately identify a subset of filings for which Second Requests are warranted and to make critical resource decisions, preventing the Agencies from fulfilling their mandate to conduct a premerger antitrust assessment of reported transactions.

Given that the final rule is the best of the available alternatives, the Commission now addresses comments on whether it is a reasonable exercise of the Commission's statutory authority to adopt the final rule to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws in fulfillment of their premerger review obligations under the HSR Act.

1. Benefits

The Commission has determined that, due to evolving commercial realities, the current information requirements for the HSR Form and Instructions are not delivering the benefits of mandatory premerger review as contemplated by Congress. As discussed in section II.B., changes in M&A activity, corporate structures, and investment strategies have exposed significant information gaps that undermine the Agencies' ability to efficiently and effectively identify transactions that may violate the antitrust laws during the initial 30-day waiting period based on information contained in the current HSR Form. As a result, the Agencies lack sufficient information about the parties and transaction to conduct an initial antitrust assessment for all types of potential harm that could occur due to the merger. Moreover, these changes have amplified information asymmetries between what the parties know about their business activities and how the Agencies collect the information necessary to decide whether to issue Second Requests. The Commission has determined that to realize the benefit of detecting illegal mergers prior to

additional filing fee); 78 FR 68705 (Nov. 15, 2013) (defining and applying the concepts of ''all commercially significant rights,'' ''limited manufacturing rights,'' and ''co-rights'' in determining whether the rights transferred with regard to a patent or a part of a patent in the pharmaceutical industry constitute a potentially reportable asset acquisition under the Act); 81 FR 60257 (Sept. 1, 2016) (allowing DVD submissions and clarifying the Instructions to the Form); 82 FR 3212 (July 12, 2017) (amending the Form); 83 FR 32768 (July 16, 2018) (amending rules for clarity, allowing use of email, and updating Instructions); 84 FR 30595 (June 27, 2019) (requiring use of 10-digit codes based upon the North American Product Classification System in place of the 10-digit codes based upon the North American Industry Classification System); 88 FR 5748 (Jan. 30, 2023) (amending the Rules to conform to the new filing fee tiers enacted by the Merger Filing Fee Modernization Act of 2022, 15 U.S.C. 18b); 89 FR 7609 (Feb. 5, 2024) (amending Parts 801 and 803 of the Rules to make ministerial changes required to reflect the annual adjustment of the filing fee thresholds and amounts required by 2022 Amendments).

[249] *West Virginia* v. *EPA,* 597 U.S. at 730.

[250] *See* Fed. Trade Comm'n Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 56 (collecting reports).

[251] *Biden* v. *Nebraska,* 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring).

[252] *West Virginia* v. *EPA,* 597 U.S. at 723–24.

[253] 15 U.S.C. 18a(d)(1).

[254] *See* Merger Filing Fee Modernization Act of 2022, 15 U.S.C. 18b (requiring the Commission to promulgate a rule requiring HSR filings to include information on subsidies received from certain foreign governments or entities that are identified as foreign entities of concern).

[255] *Gundy* v. *United States,* 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman* v. *Southard,* 23 U.S. 1, 31, 43 (1825)).

consummation through mandatory premerger review, the Agencies need more information relevant to the antitrust risk of reportable acquisitions in the HSR Filing.

The Commission has considered the extent to which the final rule furthers the Congressional goal of preventing illegal mergers prior to consummation through mandatory premerger review. The benefit of having sufficient information in the HSR Filing to screen for all types of antitrust risks derives from several sources:

(1) the non-consummation of harmful mergers that otherwise would not have been caught during premerger screening, whose harm continues unless and until the merger is unwound and competition in the affected market is restored, if it can be restored at all;

(2) the reallocation of staff hours from attempting to collect additional necessary information from the parties on a voluntary basis and reduced uncertainty that delay and insufficiency create for resource allocation decisions;

(3) the reallocation of staff hours from collecting additional necessary information from third parties regarding the parties' business operations;

(4) the reduction in burden required for third parties to respond to the Agencies' outreach to provide information known to the filing parties, but not currently required by the Form;

(5) improvements in premerger screening through

(i) more accurate identification of transactions requiring in-depth review;

(ii) the reduction in the number of HSR Filings withdrawn and refiled for the purpose of allowing Agency staff to collect and review more information from the parties;

(iii) reduction in delays associated with HSR Filings, including those that are withdrawn and refiled but do not receive Second Requests;

(iv) the narrowing of issues required to properly focus any in-depth review, including through the issuance of more targeted and less burdensome Second Requests;

(v) the reduction in the number of Second Request investigations that do not ultimately result in enforcement or voluntary restructuring; and

(6) a more efficient allocation of resources devoted to merger enforcement, including by avoiding expensive and time-consuming litigation to unwind consummated mergers that cause harm but were not identified under the current rules.

Consistent with Congressional intent, all of these benefits accrue to the American public in the form of reductions in the harmful effects of illegal consummated mergers, including price increases or reductions in output, reductions in quality and innovative activity, lower wages, and other effects, and more effective use of public resources devoted to antitrust enforcement. Other market participants that would otherwise be harmed by an illegal merger also benefit from improved detection that leads to enforcement that prevents or neutralizes the harm from that merger.

Many of these benefits cannot be quantified, or quantification cannot be done with a high degree of reliability. Where the Commission is unable to estimate a benefit quantitively, it provides a qualitative description of the benefit using the best available methods,[256] and in light of the purpose of mandatory premerger review. Based on its experience gathered over decades of premerger review of transactions reported under the HSR Act, the Commission considered the following benefits that would derive from the final rule as compared to the status quo.

a. Detecting Additional Harmful Mergers

Section 7 of the Clayton Act prohibits an acquisition where the effect of such acquisition may be to substantially lessen competition or to tend to create a monopoly. Acquisitions that have these effects deprive the public of the benefits of competition, which include lower prices, improved wages and working conditions, higher quality and resiliency in the supply chain, and more innovation and choice, among other benefits. section 7 of the Clayton Act was designed to arrest anticompetitive tendencies in their incipiency,[257] and mandatory premerger review gives the Agencies time and information to assess whether a reported transaction may violate the antitrust laws and seek to block it in Federal court prior to consummation. While it is difficult to calculate with precision the likely ill effects of an acquisition before it happens, Table 2 above contains estimates of potential harm from mergers in cases that were litigated by the Agencies in recent years, representing a range of outcomes from mergers that were not consummated as a result of premerger review and a subsequent Agency enforcement action. For any particular illegal merger, the potential for harm may be small or large and depends on many factors, including the size of the companies involved, the geographic scope of their operations, the number of customers they serve, and the value of their products. Many of the benefits of competition that may be lost due to a merger are more difficult to quantify, such as the loss of innovation competition or degradation in the quality of products or services offered. Thus, the magnitude of the anticompetitive effect of any particular merger that would have occurred but for the Agencies' intervention is imprecise at best and does not capture the full impact of the loss of dynamic and beneficial competition now and in the future.

In connection with their enforcement and reporting mandates, the Agencies also provide public estimates of the average consumer savings resulting from antitrust enforcement, including mergers that the Agencies challenge in an enforcement action (which include negotiated settlements requiring divestitures or transactions that are restructured prior to consummation). These estimates are contained in each agency's budget justification submitted to Congress.[258] Table 4 below summarizes the Agencies' estimates of harms to consumers and other market participants that would have occurred in the affected markets but for the agency's antitrust enforcement action. These savings reflect all civil antitrust enforcement activities, which include merger enforcement.

[256] *See generally* Anthony E. Boardman et al., Cost-Benefit Analysis: Concepts and Practice 44 (5th ed. 2018); Office of Management and Budget, Circular A–4 at 5 (Nov. 9, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.*

[257] *See, e.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318 nn.32–33 (1962); *see also United States* v. *AT&T, Inc.,* 916 F.3d 1029, 1032 (D.C. Cir. 2019); *Saint Alphonsus Med. Ctr.-Nampa* v. *St. Luke's,* 778 F.3d 775, 783 (9th Cir 2015); *Polypore Int'l., Inc.* v. *FTC,* 686 F.3d 1208, 1213–14 (11th Cir. 2012); *FTC* v. *IQVIA Holdings Inc.,* No. 1:23 Civ. 06188 (S.D.N.Y. Dec. 29, 2023).

[258] The Agencies provide annual budget justifications to Congress which contain these estimates. *See* Fed. Trade Comm'n, ''Budget, Performance, and Financial Reporting,'' *https://www.ftc.gov/about-ftc/budget-strategy/budget-performance-financial-reporting* (collecting reports) and U.S. Dep't of Justice, ''Budget and Performance,'' *https://www.justice.gov/doj/budget-and-performance* (collecting reports).

Table 4: Annual Estimated Consumer Savings from Antitrust Enforcement (Millions of Dollars)

Fiscal Year	FTC	DOJ	Total
2014	1,419	3,378	4,797
2015	3,400	3,387	6,787
2016	3,610	2,271	5,881
2017	3,710	1,408	5,118
2018	3,760	928	4,688
2019	4,860	3,939	8,799
2020	2,681	712	3,279
2021	2,840	1,567	4,407
2022	3,190	529	3,719
2023	3,290	1,822	5,112
		Average Annual Savings	**5,259**

The Agencies' estimates of consumer savings in Table 4 are calculated based on the relevant product and geographic markets that were alleged (or would have been alleged) in either a litigation or settlement complaint. However, sometimes litigation or settlements do not address the full scope of the Agencies' competitive concerns. Due to various reasons (resource constraints, investigative efficiency, litigation strategy, etc.), a complaint may, for example, exclude certain markets of concern or theories of harm. When such a merger is blocked or abandoned in its entirety, any expected harm is avoided in all implicated markets and for all theories of harm. In those cases, limiting the calculations to just those markets and theories that would have appeared in a filed complaint further understates the full scope of consumer benefit.[259] These calculations also do not include less quantifiable harms that are avoided through antitrust enforcement, such as reduced innovation or quality.

The Commission believes that the enhanced ability of the Agencies to detect illegal mergers under the final rule will result in similar benefits to additional consumers and other market participants that would have been affected by an illegal merger but for the enhanced detection made possible by the final rule. In addition to these benefits, the final rule permits the Agencies to fulfill their statutory mandate to conduct premerger review for the purpose of preventing illegal mergers prior to consummation, which is a key competition policy directive that undergirds our nation's reliance on open and competitive markets to drive innovation and economic growth.

b. Avoidable Costs and Delays Arising From Insufficient Information on the HSR Form

To understand the inefficiencies created by inadequate information in the current HSR Filing, the Agencies conducted a review of the effort required to collect additional information beyond what is contained in the HSR Filing for investigations that did not result in an enforcement action.[260] The Agencies examined all HSR Filings in FY 2021, when they received 7,002 HSR Filings for an associated 3,520 transactions.[261] The Agencies identified those transactions for which either Agency opened an investigation that did not result in (1) an action brought in Federal court to block the transaction, (2) a negotiated settlement with divestitures, or (3) the transaction being abandoned or restructured as a result of one agency's antitrust investigation.[262] On the basis of this review, the Agencies determined that they conducted 100 investigations in FY 2021 for which they collected information from non-public sources but that did not result in an enforcement action, referred to here as ''no-action investigations.'' [263] Investigational costs associated with these no-action investigations are one product of inefficiencies created by insufficient information in the HSR Filing because they create unnecessary burdens for the parties, the Agencies, and third parties that could be avoided if the HSR Filing contained sufficient information to determine that the transaction is not one that requires challenge via litigation prior to consummation. In addition to the benefits of improved detection outlined above, these benefits represent opportunity costs for Agency staff (who would spend their time on other tasks if not collecting necessary information for transactions that do not warrant enforcement action prior to

[259] Most calculations seek to use quantification tools that align theories of harm being pursued, but not all theories are associated with readily available tools. Thus, for some merger wins, the Agencies' estimates of consumer savings will not reflect the full scope of theories due to the challenges of quantification. This is most relevant for coordinated effects; when a merger raises both unilateral and coordinated effects concerns, the calculations put forward will often reflect only the unilateral concerns (due to the greater availability of unilateral merger simulation tools) but not a robust estimation of additional harm arising from the threat of increased coordination.

[260] The Agencies selected FY 2021 for this effort because of the large number of reportable transactions that year, 3,520, which provided for a robust data set. The Agencies have no basis to believe that the mergers that occurred in that year were different in any material way from the mergers that occurred in other years and so consider them to be representative of HSR-reportable merger activity in general.

[261] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix A (FY 2021). As appendix A n.1 notes, there are typically two filings for each transaction, one from the acquiring person and one from the acquired person.

[262] These criteria are the ones used by the Agencies to report publicly on their merger enforcement activities.

[263] In FY 2021, the Agencies took action against 32 transactions. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix A (FY 2021) at 2. The Agencies provide data on HSR reportable mergers on a fiscal year basis, but enforcement decisions may occur in a fiscal year after the transaction was first reported. As a result, the number of enforcement actions reported in the annual HSR reports are not necessarily related to the transactions that are reported for that fiscal year. For this exercise, the Agencies tracked the outcomes of transactions that were reported to the Agencies in FY 2021 but decisions about those transactions may have occurred in the following fiscal year.

consummation), as well as burdens and costs for the parties and third parties who respond to staff inquiries designed to collect the information necessary to conduct a premerger assessment of a reported transaction.

In the 100 no-action investigations, staff contacted at least one third party, with an average number of 18 third-party interviews per investigation. Each of these interviews required significant time from these third parties to identify the knowledgeable personnel in the related business operations, and prepare for questions in advance of talking to Agency staff. While some third parties rely on in-house counsel to help prepare for these interviews, some retain outside legal counsel who have experience with antitrust investigations. The Commission lacks a reliable methodology to calculate or estimate the costs borne by third parties to provide necessary information relevant to the Agencies' initial antitrust assessment. The Commission believes that it is appropriate to shift some of this information-gathering burden to the merging parties and away from other market participants—including customers who may suffer harm if the merger is consummated—who currently absorb this burden due to deficiencies in the existing HSR Form. The final rule realigns the burden of providing necessary information toward the parties themselves and away from other third-party companies, including smaller entities who are saddled with unexpected compliance and legal costs solely because they operate in the same or adjacent business lines as the merging parties. As a result, the Commission anticipates a reduction in third parties' costs from adopting the final rule.

Moreover, given the effort that is required to obtain this information from third parties, there is often a delay in collecting critical business facts until late in the initial waiting period, near the time when a decision must be made about issuing Second Requests. As discussed above, additional information from the parties and third parties that is submitted on a voluntary basis often arrives late in the review period. These delays contribute to additional avoidable costs through the issuance of Second Requests that might have been avoided or that were not tailored to areas of competitive concern due to insufficient information in the HSR Filing.[264]

One source of delay is the parties' voluntary decision to withdraw and refile their HSR Filing. In 53 of the 100 no-action investigations, the parties voluntarily withdrew and refiled their HSR Filings, which restarted the initial waiting period and gave Agency staff additional time to conduct the review. As discussed above, the Commission believes that most of the investigations in which the parties withdraw and refile their HSR Filings are the result of the parties' concern that the Agency may issue Second Requests when they are not warranted or that the Agency will issue a Second Request that is too broad. As Table 3 shows, when the parties withdrew and refiled, they avoided Second Requests nearly 70 percent of the time in the period FY 2018 through FY 2022. For the remaining 30 percent, the additional time allowed the parties to engage in additional advocacy to avoid or potentially narrow any Second Requests. For withdraw and refile transactions that avoid Second Requests altogether, there is unnecessary delay and uncertainty that could be avoided if the information required to make a no-action decision was provided sooner, including with the HSR Filing.

But for transactions that receive Second Requests, the delay can be substantial; seventeen of the 100 no-action investigations referenced above involved a Second Request. The decision to issue Second Requests, which requires approval from Agency leaders,[265] has significant consequences. As discussed in section III.A.3., the costs and delays associated with Second Requests are substantial, and for any no-action Second Request investigation, those burdens may be avoided if sufficient information were available at an earlier time in the investigation, including in the HSR Filing. For the Agencies, there are significant consequences as well. A Second Request investigation requires a team of lawyers, economists, and support staff. The broader the scope of the investigation (*e.g.,* covering many different products or many different geographic areas), the more staff must be assigned. As a result, avoiding unnecessary or unfocused Second Requests would provide a benefit to the parties, the Agencies, and any third parties contacted during the investigation.

Based on this experience, the Commission believes that the final rule will provide a substantial benefit to the Agencies, the parties, and third parties by reducing the number of Second Requests issued or narrowing the scope of any Second Request. A more efficient process that better identifies transactions that do not require additional investigation benefits parties as well.

Many commenters asserted that the Commission failed to take into account the increased burden on staff of reviewing additional information in HSR Filings. Several stated that given the purportedly huge volume of materials generated by the new requirements, especially the expanded document demands, Agency staff would be overwhelmed, thereby undermining effective screening even for deals they could evaluate with current information requirements. One commenter estimates that the proposed rule would result in over 177,000 additional staff hours (100 full-time attorneys) needed to review the information contained in the revised HSR Filing. On the other hand, other commenters asserted that the proposed changes would modernize the premerger process to better account for the evolving complexities of today's mergers and address potential shortcomings of past merger review that have become clearer in retrospect.

Based on its own experience and in light of the significant reductions contained in the final rule as compared to the proposed rule, the Commission believes that the additional information required by the final rule would result in an overall reduction in the number of staff hours spent collecting additional information from all sources, including the parties, as well as a reduction in associated burdens of reviewing and processing that information. For example, while Agency staff may need to review the transaction documents and additional information submitted with an HSR Filing, they would spend less time on more costly and time-consuming tasks such as conducting independent research or outreach to third parties, preparing voluntary information requests, reviewing additional information submitted by the parties, drafting Second Requests, reviewing voluminous submissions from the parties in response to those requests, and preparing internal reports and memoranda for review by managers. The Commission also acknowledges that it may incur minimal additional administrative and support system costs associated with the revised HSR Form,

[264] For any investigation that results in Second Requests, staff spends a significant amount of time during the initial 30-day waiting period trying to identify the areas of a potential antitrust violation. Both Agencies make public their Model Second Requests. *See supra* notes 242–43. Starting from these models, staff customize each request by identifying areas of existing competition and modifying the terms to fit the particular industry dynamics, products and services, or geographic reach.

[265] For the Commission, the Chair issues the Second Requests; for the Antitrust Division, that determination is made by the Assistant Attorney General. 15 U.S.C. 18a(c)(1)(A).

such as technology costs to process and host additional documents and filings. Overall, however, the work of Agency staff will be more efficient and effective as they will be able to more readily and accurately identify those transactions that pose a risk that they may violate the antitrust laws.

In sum, under the existing HSR reporting requirements, inadequate information in the HSR Filing leads to significant time and effort for Agency staff, third parties, and merging parties even for transactions that do not warrant a legal challenge. These costs (and associated delays) represent an opportunity for the Agencies to realize benefits from the enhanced information requirements contained in the final rule by (1) streamlining the Agencies' internal processes and resources devoted to merger review; (2) reducing costly delays for certain parties whose deals are eventually consummated; and (3) reducing the burden on third parties to collect information for premerger screening. By requiring more of the information to be collected upfront from the parties as part of the HSR Filing, the final rule will reduce some of the costs and effort currently associated with premerger review for transactions that the Agencies ultimately determine do not require enforcement action.

The Commission acknowledges that for some filings, Agency staff will still engage in some of these activities to verify the information in the HSR Filing and reach out to stakeholders who may be affected by the transaction. However, the Agencies will not need to spend as much time and resources to acquire the basic business information about the parties and the transaction that is needed to evaluate the antitrust risk, because more of that basic information will now be contained in the HSR Filing. The reduction in those information-acquisition costs will allow resources to be redeployed to other critical tasks of the Agencies, such as investigating other mergers (including consummated mergers) or other antitrust violations. In addition, any reduction in the costs and burdens imposed on third parties during no-action investigations is a direct benefit of the final rule.

2. Costs

The Commission anticipates that the incremental costs attributable to the final rule will primarily fall on individuals and companies who must make HSR Filings because they are a party to a reportable transaction. The final rule may have effects on other individuals or companies who are considering a reportable transaction but do not eventually pursue one, although these costs will be indirect and hard to quantify. This indirect effect does not include those potential deal partners who decide not to pursue an unlawful transaction because the final rule decreases the likelihood that it will go undetected. That is, any improvement in the Agencies' ability to detect potentially illegal mergers is a benefit of the final rule and cannot reasonably be viewed as imposing unnecessary or unreasonable costs on parties contemplating a reportable transaction. The final rule may also impose additional costs on the Agencies to ensure compliance and review additional information contained in the HSR Filing, although these costs will be more than offset by other reductions in costs, as discussed above.

For those individuals and companies that must submit an HSR filing, the burden of complying with the final rule will primarily consist of the additional cost of completing and submitting an HSR Filing to the Agencies. This includes internal costs (for employees tasked with collecting and reviewing relevant information as well as in-house compliance attorneys and other non-legal support staff) and external costs (including outside experts hired to assist in preparing the HSR Filing such as counsel expert in HSR rules or other tasks that filers chose to outsource to a third-party service provider). The majority of filers hire experienced attorneys who are familiar with current HSR Rules. The Commission expects that filers will continue to do so and that those professionals (and other legal and technical support staff) will require some additional time to prepare filings.[266] Current requirements also require knowledgeable personnel from the filing entity to collect and prepare data and documents for the Filing, and the Commission expects that these individuals will expend some additional time and effort to comply with the final rule.

The Commission anticipates that the final rule will result in incrementally higher direct costs for all filers.[267] As discussed above, some of these information acquisition costs are currently borne by third parties and the Agencies and will now be borne directly by the filers themselves. Incremental direct costs associated with the final rule will be borne primarily by those UPEs (and the entities they control) that must submit an HSR Filing, though some portion of the costs may be borne by officers or directors of entities within the acquiring person that will have to provide information to the acquiring person related to other entities for which they serve as officers and directors to complete the HSR Filing.[268] Direct costs vary depending on a number of factors that are different for each reportable transaction: the type of interest being acquired; the complexity of the transaction; the complexity of the UPE and its related entities and investors; the scope and number of existing business relationships between the merging parties; whether the filer is the acquiring or the acquired person; and the size and scope of each filer's business operations. Generally, costs are lower for simple transactions (such as for open market purchases of stock or conversion of stock options), for acquisitions of non-controlling stakes, and for acquisitions of control where the merging parties do not have an existing business relationship. Costs are highest for strategic acquisitions of a competitor or of a key supplier or customer where the Agencies must engage in a thorough review and are more likely to engage in an in-depth investigation including through the issuance of Second Requests. The key variable that is likely to determine the monetary impact of the final rule on any particular filer is the level of the antitrust risk associated with the reported transaction. The Commission believes that this outcome is consistent with the legislative intent in imposing mandatory premerger review as a means of preventing illegal mergers prior to consummation.

The Commission expects that the incremental increase in costs associated with the final rule will be most significant for the first HSR Filing prepared by a given filer because there will be costs associated with becoming familiar with the new reporting Form and Instructions and to gather the required information about the filer's operations. In addition, the Commission believes that some filers (or their counsel) will find it efficient to

[266] The Agencies receive a small number of filings from companies or individuals who do not hire attorneys to prepare their HSR Form.

[267] As compared to the current rules, the proposed rule contained modifications that eliminated certain information requirements that the Commission has determined no longer provide a benefit for premerger screening. These reductions in burden are incorporated in the final rule and are reflected in the analysis of incremental costs associated with the final rule.

[268] Sometimes, the parties will allocate the costs associated with premerger review between them by contract. These provisions are typical for strategic acquisitions where the parties expect some level of antitrust scrutiny and often require the acquiring party to compensate the acquired party for costs related to the HSR Filing as part of the purchase price. In conducting its cost assessment, the Commission has assumed that each filer is responsible for its own costs.

automate some portion of the reporting process, which will increase the burden of the first filing. For any subsequent HSR filing related to another acquisition, these repeat filers will incur lower costs because some of this prior work will not be necessary to the extent that they made investments to put processes in place to maintain or automate the collection of relevant business information. In other words, any estimated incremental costs are expected to decline over time.

Nothing in this rulemaking affects the filing fees for making an HSR Filing, which are mandated by Congress and adjusted by the Commission annually.[269] While the final rule does not alter these HSR-related costs, recent congressional changes in these fees use an approach that takes into account the size of the reportable transaction and the size of the parties involved. Last year, Congress revised the schedule of HSR filing fees, creating a new fee structure with five tiers, which increased fees for some transactions while reducing them for others.[270] Specifically, the new fee structure lowered fees for some mergers valued under $500 million and increased fees for transactions valued at $1 billion and more. Prior to this law, HSR filing fees had a three-tier structure, with thresholds adjusted every year. The purpose of creating a new five-tier fee structure was two-fold: to provide the Agencies with additional resources to review mergers and enforce the antitrust laws, and to better reflect that reviews of larger mergers generally consume more Agency resources.[271] Effective February 28, 2023, the Commission implemented the new fee levels, and on March 6, 2024, the Commission published the adjusted fees for 2024.[272]

Table 5: HSR Filing Fees

HSR Fees Effective February 23, 2022		HSR Fees Effective March 6, 2024	
Size of Transaction	Fee	Size of Transaction	Fee
		$119.5 million to $173.3 million	$30,000
$101 million to $202 million	$45,000	$173.3 million to $536.5 million	$105,000
		$536.5 million to $1.073 billion	$260,000
$202 million to $1.0098 billion	$125,000	$1.073 billion to $2.146 billion	$415,000
		$2.146 billion to $5.365 billion	$830,000
$1.0098 billion or greater	$280,000	$5.365 billion or greater	$2,335,000

The Commission has identified significant deficiencies in existing information requirements, and those gaps are hindering the Agencies' ability to obtain key facts needed for an initial assessment of whether the transaction may violate the antitrust laws and to determine whether to issue a Second Request. See section II.B. Congress authorized the Commission to issue rules to collect information that is necessary and appropriate for the Agencies to conduct premerger review within the statutory time frame. The final rule requires filers to gather information relevant for screening the transaction and results in relatively higher costs for those reported transactions that are more likely to pose competition issues, including transactions with complex party or deal structures, or transactions involving two entities with many overlapping business operations or existing business relationships in the supply chain, or transactions in which the parties have a history of acquisitions in the same business lines. This is consistent with the HSR Act's focus on the largest transactions, which are often the most complex, and the overall intent to reduce cost and delay for reportable transactions other than those that may violate the antitrust laws.

As discussed in more detail in section V.D., the Commission believes that most filers will not experience delays because the final rule requires collection of business information that should be readily available or collected as part of each filer's due diligence efforts related to the transaction. Filers who would prefer to submit a letter of intent or other preliminary agreement that is no longer compliant with the final rule may need to come to an agreement on more details of the planned-for transaction. But the Commission has determined that this represents less than 10 percent of current filers, meaning that most parties are already coming to agreement on the key terms that are required by the final rule even if their transaction documents are referred to as a letter of intent.

a. Calculation of Direct Costs

To estimate the potential increase in direct costs for filers attributable to the changes in the final rule, the Commission calculated the average compliance burden by conducting a survey of experienced HSR attorneys who now work for the Agencies. See section VIII. That survey revealed a range of estimated costs for each new information requirement in the final rule. These estimates include the amount of additional time required from a variety of knowledgeable individuals, including, for example, HSR specialists at law firms hired to prepare the Filing as well as individuals associated with the UPE who collect and verify the business information and responsive documents, as well as costs associated with any outside vendors hired to complete the HSR Filing, such as data vendors.

As explained in section VIII., the Commission estimates that the amendments contained in the final rule would increase the time required for a filer to prepare an HSR Filing, on average, 68 hours, resulting in

[269] Each year, the thresholds that determine reportability under the HSR Act are adjusted based on changes in the gross national product, 15 U.S.C. 18a note, while filing fees are adjusted in line with the Consumer Price Index, Public Law 117–328, 136 Stat. 5967–68, Div. GG, Title I, sec. 101.

[270] Public Law 117–328, 136 Stat. 5967, Div. GG, Title I.

[271] H.R. Rep. No. 117–493 pt. 1, at 3–5 (2022).

[272] *See* Fed. Trade Comm'n, ''New HSR thresholds and filing fees for 2024,'' Fed. Trade Comm'n Competition Matters blog (Feb. 5, 2024), *https://www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024*.

additional costs of approximately $39,644 per filing on average.[273] The Commission believes that this level of direct costs is small in relation to other merger costs. Indeed, these total costs are small in relation to the value of the deals that must be reported under the Act. The current minimum size for a reportable transaction is $119.5 million; as outlined in section VIII, for FY 2023, the Commission estimates that the total direct costs associated with the final rule would have been only slightly more than the value of a single reportable transaction. Moreover, the Commission believes that these direct costs may be overstated and should decline over time as parties and their lawyers become more familiar with the requirements of the final rule. Finally, these direct costs do not take account of the substantial benefits to the Agencies, the parties, and third parties generated from a more efficient premerger review process that shifts some of the burden of information collection and reporting away from third parties to merging parties and allows the Agencies to obtain critical business facts earlier in the initial waiting period, which in turn helps mitigate avoidable costs associated with Second Requests that might have been avoided or that were not tailored to areas of competitive concern due to insufficient information in the HSR Filing.

In addition, the costs associated with completing an HSR Filing are often minimal compared to other fees associated with mergers and acquisitions. Based on publicly available data, the 20 largest M&A transactions during 2021 and 2022 ranged in size from $1.44 billion to over $70 billion, with average deal size of $10.6 billion.[274] Using the current Congressionally mandated HSR filing fees associated with deals of this size, the average HSR filing fee for these transactions would be $1,198,500, ranging from $415,000 to $2,335,000. For 18 of these deals, the fees paid by the target to financial advisors are available from public sources. These fees varied considerably, ranging from $800,000 to $96 million. In 14 out of these 18 cases, the fees paid by the targets to just their financial advisors were more than ten times the estimate by one commenter of the average total cost per filing for completing the HSR Form ($437,314) [275] and in five cases, fees to financial advisors were more than 100 times of that estimate. In any of these cases, financial adviser fees are several multiples of the estimated average new costs associated with the final rule of $79,288 per transaction ($39,644 + $39,644) based on the Commission's estimates. See section VIII. These advisor fees are instructive in demonstrating that HSR filing fees and HSR-related transaction costs for most transactions do not comprise a significant share of total transaction costs and therefore would have minimal impact on costs of dealmaking across the economy.[276]

Another survey of middle-market investment bankers, brokers and other advisors reports that merger advisory fees for deals valued up to $150 million come in the form of retainers, monthly or hourly charges, or success fees, which are paid if the deal closes.[277] For deals in the $100 to $150 million range, namely those most likely to be reportable under the HSR Act, success fees paid to financial advisors represented 1 to 2 percent of deal value, or $1,500,000 to $3,000,000 for a $150 million deal. As with higher valued transactions, the other merger-related costs for transactions on the lower end of HSR reportability dwarf the costs associated with the final rule.

One commenter commissioned a report (''the Kothari Report'') that projected that the direct cost of the proposed changes may be nearly seven times greater than the Commission estimated for the proposed rule, after accounting for both direct monetary costs and further costs to the economy.[278] The Kothari Report critiqued the Commission's methodology of calculating direct costs in the NPRM's PRA analysis in several respects. The Commission considered these comments and those of other commenters and, as discussed in section VIII, made adjustments to its cost estimate methodology for the final rule.

As a result, the Commission disagrees that the final rule will impose the level of costs presented in the Kothari Report for several reasons. First, the Commission made significant modifications to all aspects of the proposed rule in response to concerns raised in this report and in other comments. As a result, the estimates contained in the Kothari Report reflect costs for a very different rule, one that the Commission has determined not to adopt. The Kothari Report relied on a survey of experienced practitioners and so did the Commission. The survey of practitioners relied on in the Kothari Report estimated that the proposed rule would require an additional 242 hours of time from outside counsel and internal personnel. While the Commission's estimate was much lower, that comparison is no longer relevant because the Commission is not adopting the rule it proposed. Instead, the Commission is adopting a rule that is substantially more modest in scope, one that aligns compliance costs as much as practicable with the risk that reported transaction is one that requires a closer look.

Moreover, even if the Commission's estimate of the economic impact of the proposed rule was flawed, the Commission made improvements to the methodology it used to estimate the additional effort that will be required of filers to comply with the final rule. As discussed in section VIII, the Commission has accounted for the same costs in its own estimates, such as the time required from outside counsel, in-house counsel, and business personnel as well as costs associated with other services such as data vendors. The Commission believes that its estimates of the economic impact of the final rule are reliable and sufficient for it to determine that the final rule is a reasonable exercise of its rulemaking authority even if it imposes modest costs on overall dealmaking and in light of the benefits of the final rule for efficient and effective detection of illegal mergers via mandatory premerger review.

Much of the difference between the Commission's estimate and the one contained in the Kothari Report is attributable to the higher hourly rate applied to the required hours, which the Kothari Report suggests is more likely

[273] As further described in section VIII, the Commission estimates the range at 10 to 121 additional hours, or approximately an additional $5,830 to $70,500 per filing, with the highest costs borne by the acquiring person in a transaction with overlapping products or supply relationships in the target's industry.

[274] *See* ''Deal Analytics,'' Bloomberg L. (last viewed Apr. 3, 2024) (Prologis Inc.'s June 13, 2022 acquisition of Duke Realty Corp. (advisor fees over $135M); Thermo Fisher's Apr. 15, 2021 purchase of PPD Inc. (advisor fees over $70M); sale of Twitter Apr. 25, 2022 (advisor fees over $50M)). *See also* Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 20–21 & Fig. 3.

[275] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684.

[276] In conjunction with the passage of the Merger Modernization Act, the Congressional Budget Office estimated the budgetary impact of changing merger filing fees for transactions reported under the HSR Act. CBO estimated that the bill H.R. 3843 (which reflected fee levels that were eventually enacted) would increase HSR filing fees by $1.4 billion over the 2023–2027 period. Cong. Budget Office, Cost Estimate, H.R. 3843, Merger Filing Fee Modernization Act of 2021 3 (Sept. 27, 2022), *https://www.cbo.gov/publication/58527*. CBO estimated that the aggregate cost of the private-sector mandate would be about $325 million in each of the first five years. *Id.*

[277] Firmex, M&A Fee Guide 22/23 (N. Am. ed., 2022–23).

[278] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 21. Professor Kothari's report is attached as an annex to this comment. *See id.* at 54–85 (hereinafter ''Kothari Report'').

$936 per hour, and a category of ''other'' costs that is nearly one-third of the total projected costs. The Commission believes that its estimates of incremental costs associated with the final rule are more consistent with the range of filings and filers based on its experience receiving thousands of filings every year and the merger investigations conducted by the Agencies. See section VIII. The Commission has no basis to inflate the overall costs associated with the final rule beyond what was estimated by those with experience filling out HSR Forms for a variety of filers and transactions. As with prior rulemakings, if the Commission determines that certain requirements in the final rule are not generating a benefit to the Agencies' preliminary antitrust assessment in light of the associated costs, the Commission can consider adjusting those requirements in future rulemakings.

The Commission acknowledges that the incremental costs associated with this rulemaking are more material than its prior rulemakings, which frequently reduced the burdens associated with submitting an HSR Form. In fact, the current Form is very similar to the original 1978 version in its scope and content. But the cumulative effect of the economy-wide changes described in section I. have seriously undermined the Agencies' ability to engage in extensive fact-gathering to compensate for deficiencies in the HSR Form. The effort required by the Agencies to conduct premerger review in today's economy threatens to render the process ineffective for its specific purpose—detecting and preventing illegal mergers before they cause harm that cannot be undone. The status quo does not allow the Agencies to quickly identify which transactions may violate the antitrust laws, causing them to spend too much time on ones that likely do not while at the same time lacking sufficient information to identify ones that do. With this rulemaking, the Commission is updating the Agencies' tools for detecting illegal mergers during premerger review to match the size and complexity of reportable transactions, restoring rigor and efficiency to the task of premerger review.

The Commission disagrees with other assertions made in the Kothari Report or finds them unpersuasive and not entitled to significant weight. The report focuses on the small number of transactions that receive a Second Request and ignores the benefits to filers from the Agencies reviewing and dispensing with non-problematic transactions with greater efficiency and assurance than before. The Kothari Report also ignores the benefits to the public from the Agencies' ability to more effectively identify and investigate potentially problematic transactions based on the availability of better initial information about potential competitive harms. The Commission discusses these and other benefits of the final rule in section III.C.1.

b. Other Costs Not Attributable to the Final Rule

Commenters raised concerns that the proposed rule would lead to other costs for those seeking to engage in M&A activity. The Kothari Report predicted that the proposed rule would so increase the costs of M&A that it would reduce the number of mergers, including ones that would be beneficial for consumers, innovation, investors, and the economy. Other commenters similarly argued that the Commission's objective is to stop all mergers by making them too costly to pursue. The Commission disavows any intention to stop all mergers by imposing unreasonable costs on those that are subject to premerger review and disagrees that the final rule will have this effect. Moreover, the commenters provided only speculation that the proposed rule would deter or delay some deals merely by increasing the costs associated with making an HSR Filing as compared to other factors that more directly affect M&A activity, such as interest rates. In the absence of actual data from commenters, the Commission must make a predictive judgment based on the evidence available to it.[279] As noted in section III.C.1., the evidence available to the Commission indicates that the Agencies' antitrust enforcement saves consumers and other market participants billions of dollars a year, and in light of known information deficiencies outlined in section II.B., there are strong indications that closing known information gaps will allow the Agencies to better identify additional transactions that may also violate the antitrust laws if consummated. The final rule does not impose new incremental costs that could plausibly deter beneficial or competitively benign acquisitions, particularly after the additional revisions narrowing the requirements in the final rule are taken into account.

Relatedly, other commenters raised arguments about additional macro impacts of expanding information requirements for HSR Filings, such as concerns about the impact on institutional investors, including retail investors, by indirectly impacting the performance of investment portfolios. Some said they were concerned generally about the chilling effect on M&A. Others raised concerns that changing the status quo would create market uncertainty, citing increased market, labor, and operational volatility. Several of these commenters raised specific concerns that acquisitions in their particular sector were typically not challenged or even reviewed closely by the Agencies. Concerns about disproportionate impact for certain sectors or types of filers are addressed in section III.D. below.

The Kothari Report states that delays caused by the additional time that will be required to prepare a HSR filing could kill deals and lead parties to abandon transactions. It also stated that delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff, and that delay would lead to lost economic efficiencies that are realized through mergers. For these propositions, the Kothari Report cites an advisory committee report by the U.S. Department of Justice issued in 2000. While that committee report explains how delays can influence pending mergers, the cited portion is discussing international jurisdictions that do not impose strict timelines or which have prolonged agency investigations into mergers [280]—this rule does not contemplate either. In addition, as discussed above, the final rule will allow the Agencies to reduce the number of Second Requests or narrow their scope, significantly reducing delays in many instances.

Moreover, the Commission disagrees that any delays and incremental costs associated with an HSR Filing could have a significant impact on overall M&A activity. Deal volumes fluctuate, often substantially, from year to year, and these fluctuations are reflected in the number of HSR Filings received by the Agencies. But these fluctuations are attributable to many economic factors,

[279] *See, e.g., Huawei Techs. U.S., Inc.* v. *FCC,* 2 F.4th 421, 454 (5th Cir. 2021) (''Huawei does not object to specific cost calculations such as these but to the agency's failure to consider additional, difficult-to-measure costs about which the FCC lacked hard data, such as 'the broader economic costs of depriving Americans of access to Huawei's market-leading technology.' The agency's decision to base its analysis instead on the replacement cost estimates before it does not render its analysis unreasonable.''); *FCC* v. *Prometheus Radio Project,* 592 U.S. 414, 427 (2021) (''The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. . . . In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.'').

[280] Int'l Competition Pol'y Advisory Comm., Final Report to the Attorney General and Assistant Attorney General for Antitrust Ch. 3 (2000), *https://www.justice.gov/atr/final-report.*

including the cost of capital. Research relied on by one commenter provides evidence that a major driver of uncertainty in M&A activity generally is stock market volatility.[281] This is consistent with the Agencies' experience. Figure 1 reflects the volatility of HSR-reportable transactions, and the Commission believes that much of this volatility is attributable to changes in interest rates and other macro factors that drive M&A activity generally, unrelated to premerger review or the specific information collected in an HSR Filing.

The Kothari Report also asserted that M&A activity is beneficial to the economy, and that any potential delay or chilling of acquisitions due to the final rule would lead to significant loss of value creation. But the evidence cited to support these concerns is inapposite. For instance, a paper cited for support that acquired plants become more productive points to credit spreads and aggregate market valuation as being major drivers for merger activity.[282] Similarly, another source relied on a stylized, theoretical model of mergers that does not provide any empirical evidence about the benefits of M&A, applying the theoretical model to a situation where there is no M&A at all to calculate the benefits of M&A.[283] There is no reason to believe that the final rule will significantly chill M&A activity. Furthermore, in the model, the author finds that preventing a small fraction of deals over $1 billion has little effect on aggregate efficiency, and that due to the inefficiencies in the M&A market, a policy of blocking a fixed number of deals regardless of antitrust concerns can improve aggregate outcomes. Thus, the paper actually demonstrates that preventing some deals can improve economic performance. The paper does not provide a basis for the Commission to conclude that changes of the magnitude contained in the final rule threaten economic efficiencies gained through M&A activity generally.

Another paper cited in the Kothari Report, which purports to support the proposition that any discouragement of pending mergers results in significant value loss, is not on point.[284] First, this final rule is not intended to and should not discourage mergers—the final rule merely requires companies who are already submitting HSR Filings to submit more information with their filings. In the paper's survey of past empirical assessments of mergers, it highlights evidence that mergers that create market power yield no better performance, and sometimes worse. That assessment is wholly consistent with the Commission's efforts in this final rule: to collect information that better allows Agency staff to identify potentially anticompetitive mergers. The Kothari Report mischaracterizes this study as supporting the value of all mergers. In fact, the author concludes that mergers are not universally accretive in value, stating: ''[T]he buyer in M&A transactions must prepare to be disappointed. It is also true that most transactions are associated with results that are hardly consistent with optimistic expectations. Synergies, efficiencies, and value-creating growth seem hard to obtain. It is in this sense that deal doers' reach exceeds their grasp.'' [285] Last, it should be noted the study is dated 2002, and the latest mergers it analyzes are from 1999, whereas the Commission crafted this final rule to address changes it has observed in more recent transactions that reflect current dealmaking dynamics discussed in section II.B.

Indeed, one goal of this rulemaking is to ensure that any benefits from M&A are realized as quickly as possible and that the costs of anticompetitive mergers do not materialize. The Commission acknowledges that there are benefits generated from M&A activity generally, and that those benefits flow broadly throughout the economy. But the Agencies are not tasked with determining whether an acquisition is ''beneficial'' in any sense. The challenge given to the Agencies by Congress is to distinguish which acquisitions, among the many thousands they review each year, may violate U.S. antitrust law. For this task, they need certain facts that would reveal potential antitrust risks. For instance, event studies may indicate that M&A can result in significant value creation, but these outcomes may be the result of genuine synergies or they can also occur due to the anticompetitive creation of market power.[286] This highlights the very purpose of mandatory premerger review: to subject a certain number of larger acquisitions to a quick and thorough antitrust review prior to consummation solely for the purpose of identifying the few that need in-depth investigations. Throughout the history of the HSR Act, the Agencies have investigated just a small fraction of deals through the issuance of Second Requests. The Commission believes that the final rule will render premerger review more effective and efficient in identifying those mergers that may lead to anticompetitive harm, and that the small incremental costs and delays associated with the final rule are necessary and appropriate and consistent with the scheme established by Congress.

Moreover, to the extent these concerns arise from a belief that disclosure of additional relevant information to the Agencies will mean that a reported transaction is more likely to be challenged or investigated, that outcome fulfills the purpose of premerger review. As discussed above, to the extent that the HSR Act itself requires reporting for a large number of transactions that may never violate the antitrust laws, that has always been a feature of HSR premerger notification. Congress recently reaffirmed that particular tradeoff by imposing new disclosure requirements for foreign subsidies on all filers while not adjusting existing filing obligations.

In light of these considerations, the Commission does not believe that the final rule will have an undue effect on dealmaking, including by discouraging transactions that have little or no antitrust risk. The expected costs of this final rule are very small relative to the overall value of reportable transactions, the level of M&A activity in the United States, and the size of the overall economy. The benefits of the final rule are expected to be proportional to reductions in the errors in detection of illegal mergers that this final rule addresses.

Each year, the Agencies review reported transactions with an aggregate dollar value of nearly $2 trillion, on average.[287] Yet this is just a fraction of the level of M&A activity in the United States: as reflected in Table 1, over 80 percent of mergers completed in the United States are not reported to the Agencies. The costs associated with the

[281] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 (Kothari Report ¶ 57 n.46, citing Vineet Bhagwat et al., ''The Real Effects of Uncertainty on Merger Activity,'' 29 Rev. Fin. Studies 3000–34 (2016)).

[282] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 (Kothari Report at 24 n.47, citing Vojislav Maksimovic et al., ''Private and Public Merger Waves,'' 68 J. Fin. 2177–2217 (2013).

[283] *Id.* (Kothari Report at 25 n.49, citing Joel M. David, ''The Aggregate Implications of Mergers and Acquisition,'' 88 Rev. Econ. Studies 1796–18 (2021)).

[284] *Id.* (Kothari Report at 26 n.52, citing Robert F. Bruner, ''Does M&A Pay? A Survey of Evidence for the Decision-Maker,'' J. Applied Fin. 48–68 (Spring/Summer 2002)).

[285] *See* Bruner, *supra* note 284, at 65.

[286] W. Kip Viscusi et al., Economics of Regulation and Antitrust 217–18 (5th ed. 2018) (horizonal mergers raise the possibility of creating market power and the possibility of achieving socially beneficial cost savings).

[287] *See* HSR Annual Reports for FY 2014 through 2023, available at Fed. Trade Comm'n, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 56.

final rule are very small in comparison to the U.S. economy, which was valued at nearly $28 trillion in 4Q 2023.[288] Any improvement in the Agencies' ability to detect illegal mergers prior to consummation will lead to benefits that will help reduce antitrust harm from illegal mergers and improve the efficiency and effectiveness of premerger review. The greater the improvement in detection and in avoiding the costs and burdens of acquiring information from sources other than the parties, the greater the benefits. The Commission expects that the costs from the final rule will be so small in relation to the total value of reported transactions, to the level of U.S. M&A activity in general, or to the U.S. economy that there will be negligible indirect effects, if any, on dealmaking, innovation, investments, and growth.

Nonetheless, the Commission has narrowed its proposals so that the final rule limits the incremental costs for filers as much as practicable while still generating additional information that is critical for the initial antitrust assessment in light of changes in market realities and information gaps outlined in section II.B. The need to modernize premerger review to adjust to market changes is compelling, and the Commission is acting within its statutory mandate to determine what information is required to conduct premerger screening that is appropriate in the modern economy.

The Kothari Report also commented that there is additional uncertainty for potential filers arising from the Agencies turning away from the decades of practice under the current rules. Any change brings with it some level of uncertainty and will require adjustment by all those involved. As with other adjustments to the HSR rules in the past, the Commission's PNO staff will be providing guidance and assistance to filers who have questions about the final rule. But the Commission believes that the uncertainty related to the new rule is a short-term issue that will be resolved after the final rule goes into effect. The commenters are overstating the effect of uncertainty on the economy. Not only are these concerns temporary; they ignore the greater benefits of a more efficient premerger review process that may result in a *faster* resolution of some deals, including by reducing the number of Second Requests and narrowing others. The goal of this rulemaking is to provide sufficient information so that the Agencies can quickly and confidently distinguish those transactions that present little or no risk that they may violate the antitrust laws, and identify those transactions that require a more searching investigation. As discussed above, the Commission believes that the final rule will reduce the delays that are attributable to information deficiencies.

Moreover, the Commission disagrees that the final rule will lead to greater uncertainty about the outcome of the Agencies' premerger review. This rulemaking does not (and cannot) affect the ultimate determination of whether a transaction violates the antitrust laws. A Federal court will make that determination for any transaction that the Agencies or others seek to block prior to consummation under prevailing legal standards.[289] Any ''uncertainty'' about the eventual outcome of premerger review is directly related to whether the merger violates the antitrust laws and whether the Agencies are able to detect that risk when conducting a premerger assessment. Premerger review is simply the tool Congress gave to the Agencies to detect those mergers that may violate the law so that the Agencies can take steps to prevent their consummation. On the margin, the Commission believes that the final rule will reduce uncertainty about the outcome by providing more transparency to the parties (and the public) about the information the Agencies rely on to make their assessment that a transaction may violate the antitrust laws. To the extent that the commenters are concerned that disclosing more information reveals a risk to competition that the current rules do not, that additional ''uncertainty'' is a benefit of the final rule as a result of improved detection and possibly greater deterrence achieved through more effective premerger review.

It is not feasible to design premerger review requirements to only apply to those mergers that will be found to violate the antitrust laws, because there are too many variables that weigh in that outcome. Establishing that a merger may substantially lessen competition or tend to create a monopoly is highly fact-dependent exercise. The final rule represents a reasonable reflection of the Congressional policy to screen those mergers in advance to discover the few that may cause lasting harm throughout the economy and that should be blocked prior to consummation. The Commission has determined that the current HSR reporting requirements are not sufficient for the critical task of premerger review in light of changes in the economy and in M&A activity.[290]

Some commenters argued that the proposed rule's expansion of reporting requirements would negatively impact investments in biotech innovation, or deny startups or other innovative companies an exit strategy. Others asserted that the acquisition of a small company by a larger one can create efficiencies by bringing together two entities that specialize in activities in which they have a comparative advantage or provide assistance necessary to bring discoveries to market. One study cited by a commenter estimates that it costs approximately $2.6 billion to develop and bring a new drug to market.[291] Another commenter noted that startups operate on tight budgets and that exits, most often facilitated by an acquisition, provide liquidity, enable capital flows through the startup ecosystem, and give startups incentives to innovate. The Commission recognizes these possible benefits and does not seek to deny them to small companies or others, nor does it believe that the HSR reporting requirements in this final rule will have any of these negative effects on the opportunities for small or startup companies to exit via lawful acquisitions. As noted in section II.B.4., many acquisitions of startups and small innovator firms are not reportable. For those acquisitions that Congress has determined are large enough to be reportable, the long-term benefits, both monetary and non-monetary, well outweigh the incremental costs associated with the final rule. Not surprisingly, acquisitions of this type (and others) declined in 2023 due to higher interest rates. Nonetheless, the Commission does not believe that small companies are so short-sighted that they will forgo benefits of a negotiated exit acquisition where the expected benefits dwarf HSR filing costs.

Moreover, the Commission cannot ignore that certain acquisitions may also reduce innovation and harm

[288] U.S. Bureau Econ. Analysis, Gross Domestic Product (updated Aug. 29, 2024) (Q2 2024 $28,652,337,000,000) (retrieved from FRED, Fed. Reserve Bank of St. Louis), *https://fred.stlouisfed.org/series/GDP.*

[289] In the Agencies' experience, when faced with an imminent or pending legal challenge to the legality of the transaction, many parties chose to abandon their merger plans rather than incur the additional legal costs associated with defending an injunction action in Federal court. This decision is solely in the discretion of the parties and reflects their assessment of litigation risks.

[290] As discussed in section III.E., other countries have adopted other procedures to review proposed and consummated mergers.

[291] Comment of Biotech. Innovation Org., Doc. No. FTC–2023–0040–0706 at 7 n.16 (citing Joanna Shepherd, ''Consolidation and Innovation in the Pharmaceutical Industry: The Role of Mergers and Acquisitions in the Current Innovation Ecosystem,'' 21 J. Health Care L. & Pol'y 1, 16 (2018)).

competition in violation of the antitrust laws, particularly when dominant firms use acquisitions to acquire nascent threats. One commenter acknowledged that an environment where a few large companies dominate is undesirable, and another noted that smaller companies have flexibility, the ability to pivot in response to new evidence, and a willingness to accept risk that is rare in larger firms. While acquisitions of small firms by large firms can be beneficial, when they substantially lessen competition or tend to create a monopoly, they can be detrimental to innovation and growth. For these reasons, and as discussed in section II.A., Congress tasked the Agencies with carrying out premerger review. The Agencies would be remiss if they did not fulfill that task by ensuring that the HSR reporting requirements are attuned to the risk that large firms are buying up smaller firms in order to eliminate nascent and potential threats. For any negotiated exit acquisition that must be reported under the HSR Act, the incremental costs imposed by the final rule are justified by the benefit to the Agencies and the public of assessing the risk that the acquisition may violate the antitrust laws.

To be clear, not all exit partners are denied to small firms due to antitrust scrutiny; it is only those whose acquisition would violate the antitrust laws. For instance, when a large incumbent seeks to acquire a smaller company that constitutes a nascent threat or an actual or potential competitor, the Agencies may challenge that merger. But in the Agencies' experience, a startup firm deemed valuable by a dominant incumbent also enjoys other exit options. For example, the Commission recently challenged the proposed acquisition of a license to an innovative, early-phase candidate drug treatment for Pompe disease by the company with the only FDA-approved treatments for the disease.[292] The parties abandoned the transaction after the Commission authorized a lawsuit to block the deal; within five months the innovator company had found an alternative partner, negotiated a new agreement, completed antitrust review, and closed the deal. Moreover, the terms of the new deal appear largely equivalent to what the innovator had negotiated with the incumbent.[293] In other words, if the acquisition of a startup by a dominant incumbent carries a risk that the Agencies may determine that the transaction is one that may violate the antitrust laws, it is likely that there are other buyers that do not create those risks and any of those buyers present a viable exit strategy via acquisition.

The Commission disagrees with the suggestion that incremental changes in the information requirements for HSR Filings could have a chilling effect in sectors that are especially acquisitive. One commenter stated that in 2022 alone, 16,464 U.S.-based VC-backed companies received $240.9 billion in funding, yet when these transactions were reportable they were rarely investigated. Unless the new information requirements in the final rule reveal that a reported transaction may violate the antitrust laws, the Commission expects M&A activity in these sectors to continue to be subject to other economic forces that will determine their viability or profitability.[294] Similarly, claims that an industry or sector is ''unconcentrated'' are unavailing. The Agencies must conduct a fact-specific, case-by-case assessment of market dynamics to determine whether any particular relevant market affected by the merger is concentrated, and that assessment is typically left to an in-depth investigation after the issuance of Second Requests. Although the Agencies routinely decline to investigate transactions where there are many remaining competitors post-merger, this is a decision made after assessing relevant facts about the transaction including those contained in the HSR Filing, and is not based on an advance determination that certain sectors are ''unconcentrated.''

The Commission has taken into account the additional costs imposed on small and innovative companies, as well as those that operate in sectors where the Agencies have historically not engaged in merger enforcement. As discussed in section II.B.5., the emergence of strategic buyers engaged in serial acquisition strategies raises the possibility that some sectors that were not concentrated in the past are becoming more concentrated, especially through transactions that are not subject to premerger review. Thus, the Agencies should not rely on assumptions about historical levels of concentration when conducting premerger review of a reportable transaction in those sectors. By requiring information about prior acquisitions of both the buyer and target, the Agencies are given better information about the current competitive landscape so that they can make more accurate assessments about the potential effect of the filed-for transaction.

To the extent possible, the Commission has imposed as few additional requirements as is practicable in light of the benefits derived from more effective premerger review. If, based on experience of collecting new information, the Commission finds that some requirements generate less-than-expected benefits to the Agencies, it can eliminate those requirements in future rulemakings. In many prior rulemakings, the Commission adjusted its rules to reduce the burden on filers after experience revealed that the information did not provide the hoped-for benefit to the Agencies sufficient to justify the costs to filers of providing the information.[295]

3. Adjustments Made to the Final Rule To Align Costs With Antitrust Risk

Since establishing a premerger notification program pursuant to the HSR Act, the Agencies have relied on information contained in HSR Filings to conduct their initial premerger review. However, in light of the information gaps identified in section II.B., the Commission has determined that the current requirements are not sufficient for that task and determined to reset the baseline requirements for all filers to fill these information gaps. As a result, the final rule eliminates some requirements that are contained in the current Form, and requires each filers to submit some

[292] *In re Sanofi Corp.*, No. 9422 (F.T.C. Dec. 11, 2023) (complaint alleging Sanofi's proposed acquisition of an exclusive license to Maze Therapeutics' pipeline Pompe therapy would have eliminated nascent threat to Sanofi's monopoly) (transaction abandoned).

[293] *Compare* Press Release, Maze Therapeutics, ''Maze Therapeutics Announces Exclusive Worldwide License Agreement with Sanofi for MZE001, an Oral Substrate Reduction Therapy for the Treatment of Pompe Disease'' 1–2 (May 1, 2023), *https://mazetx.com/wp-content/uploads/2023/04/Maze-Therapeutics-Press-release-MZE001-license-Final-.pdf* (proposed license included $150 million upfront cash and equity investment, the possibility of another $600 million in development, regulatory, and commercial milestone payments, plus further royalties), *with* Press Release, Shionogi & Co., ''Shionogi & Co., Ltd. and Maze Therapeutics, Inc. Announce Exclusive Worldwide License Agreement for MZE001, a Novel Therapeutic Candidate for the Treatment of Pompe Disease'' 1 (May 10, 2024), *https://mazetx.com/wp-content/uploads/2024/05/CONFIDENTIAL_Project-Magenta-Press-Release_Final-FINAL.pdf* ($150 million upfront fee, plus development, regulatory, and commercial milestones, plus further royalties).

[294] *See, e.g.,* Press Release, Nat'l Venture Cap. Ass'n, ''NVCA 2024 Yearbook: Charting the New Path Forward for Venture Capital'' (Apr. 9, 2024) (noting that the U.S. venture capital investment ecosystem is still the envy of the world.), *https://nvca.org/press_releases/nvca-2024-yearbook-charting-the-new-path-forward-for-venture-capital/.*

[295] *See, e.g.,* 76 FR 42741 (July 19, 2011) (elimination of requirement to provide Base Year in Item 5); 81 FR 60257 (Sept. 1, 2016) (elimination of requirement to explain valuation of the transaction).

information that is not currently required or certify that the request does not apply to its operations.

After careful consideration of the comments that identified aspects of the proposed rule that would be a source of significant costs for filers if adopted, the Commission made significant modifications to the final rule as compared to the proposed rule. In several instances, the Commission determined that the costs of a particular proposed requirement outweighed the benefits and chose not to adopt those provisions as part of the final rule. For other proposals and where possible, the Commission has tailored each information request contained in the final rule to reduce the cost of compliance for filers yet generate the information that is necessary and appropriate for the Agencies to conduct a premerger assessment of the transaction. See sections IV to VI. Overall, the final rule balances the cost of collecting additional information in the HSR Filing in light of the benefits of obtaining additional information that is relevant to the Agencies' premerger antitrust risk assessment, and aligns those costs in proportion to the antitrust risk associated with the transaction under review. As a result, the final rule is a reasonable exercise of the Commission's authority to require information that is necessary and appropriate to determine whether an acquisition may, if consummated, violate the antitrust laws. The additional information required by the final rule will close information gaps described in section II.B. and address information asymmetries by shifting the burden of collecting necessary information about the transaction and the business of the filers from the Agencies and third parties to filers.

To make these modifications to align costs and benefits, the Commission relied on the following tools and approaches it has used when exercising its HSR rulemaking authority over the last forty-six years and consistent with the statutory scheme. In addition to the features of the HSR Act described in section III.A. above that treat different filers differently (*e.g.,* requiring notification from acquirers but not the acquired person for cash tender offers in order to start the waiting period and exempting certain types of acquisitions entirely), the Commission has administered HSR reporting requirements over the years in a flexible way to minimize the burden on each filer and each type of transaction as much as practicable. Thus, contrary to the assertions of several commenters, the reporting requirements of the HSR Act have never been a ''one-size-fits-all'' reporting scheme because different filers face different burdens for complying with applicable reporting requirements. Rather, the HSR Form and Instructions have relied and will continue to rely on an IF/THEN format that excuses certain filers from information requirements based on answers provided to other requirements. For instance, several current information requirements need only be answered if the filer reports that it generates revenues in the same NAICS [296] code as the other party to the transaction. The final rule expands the existing IF/THEN format as the primary means of mitigating the costs of reporting certain new information in a way that, as much as practicable, aligns the information with the antitrust risk associated with the transaction, resulting in higher costs for those transactions most likely to require close scrutiny by the Agencies to determine if they may violate the antitrust laws.

As summarized above in section I. and explained in further detail in section VI., the Commission has also eliminated several information and document requirements and reduced the scope of many others as compared to the proposed rule to align the cost of reporting to the antitrust risk associated with each transaction. First, the Commission has eliminated in toto the proposals that would have imposed significant costs as compared to the benefits, such as those requiring filers to provide employee information, geolocation information, the identity of other interest holders or board observers, or draft versions of submitted documents. Second, the Commission created a new category of filings, select 801.30 transactions, for which the costs of complying with the final rule will be minimal as compared to current requirements. Next, the final rule imposes relatively fewer new reporting requirements on acquired persons, reducing their costs as compared to the acquiring person, which is the party pursuing the transaction that requires HSR reporting, and will operate the acquired interests post-consummation. The Commission has also reduced the burden on filers by limiting the lookback periods for several categories of information and created de minimis exclusions where appropriate. Finally, the Commission will continue to allow filers to rely on good faith estimates or answer in the negative to confirm that certain information does not exist. For instance, for a transaction in which there are no existing overlaps or supply relationships responsive to the final rule, filers can indicate that there are no such overlaps or relationships, although there may be costs for the filer associated with verifying that response.

The Commission also relies on definitions and clarifications to reduce or eliminate filing obligations or to reduce uncertainty regarding compliance. For instance, the Act applies to a wide variety of acquisitions; as a result, the Commission has provided definitions and guidance over the years to maximize compliance. Sometimes this results in certain transactions not being reported or reducing reporting requirements for certain types of transactions. The final rule contains several new definitions that are intended to reduce uncertainty and costs, and improve compliance.

Select 801.30 Transactions

As part of the Commission's effort to reduce the cost of the final rule, the Commission has created a new category of transactions, defined as ''select 801.30 transactions,'' that will have minimal reporting requirements, including a few of the new information requirements required by the final rule. Where the Commission has not excused requirements, it believes that the burden of compliance will be low because parties to select 801.30 transactions generally have less complex internal structures, do not hold significant stakes in similar companies, and have not generated the types of documentation the Form and Instructions generally require. As a result, the Commission expects that responses to the remaining requirements for these types of transactions will generally be short, and may just confirm that the parties do not have responsive material. However, for those transactions in which select 801.30 filers incur additional costs from complying with the final rule, there will be a benefit to the Agencies in learning about potential competitive issues that are not revealed by the current information requirements, especially the new information related to other entities between the UPE and acquiring or acquired person.

For select 801.30 transactions, filers are excused from the following information requirements:

i. Transaction Rationale
ii. Transaction Diagram
iii. Plans and Reports
iv. Transaction Agreements
v. Overlap Description

[296] The North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. *See* U.S. Census Bureau, North American Industry Classification System (rev. Sept. 10, 2024), *https://www.census.gov/naics/.*

vi. Supply Relationships Description
vii. Defense and Intelligence Contracts

Additionally, even where select 801.30 transactions are not expressly excused from responding, there are many items for which the Commission believes the response will be ''none'' because of the nature of the transaction or of the parties.

Less Information From the Acquired Person

The final rule also seeks to reduce costs by tailoring information requests to each party's role in the transaction. Because the buyer (the acquiring person) will have a larger stake in or control of the target (the acquired entity or assets), and often will be operating the assets or business acquired post-consummation, more information is needed from acquiring persons than acquired persons. The acquiring person is more likely to have certain types of information relevant to the Agencies' enforcement analysis, such as the transaction's structure, information about other minority holders who might have managerial control or influence, and overlapping officers and directors who could affect competitive decision-making after consummation. This approach reflects the more limited time the seller has had to consider the implications of the planned transaction, and to a lesser extent, the seller's less-honed strategic assessments of competitive opportunities. In addition, for certain information, such as a transaction diagram, the Agencies only need one response, and it is appropriate to place the cost of providing this information on the acquiring person and not require the acquired person to provide duplicative information.

Consistent with these considerations, the final rule excuses the acquired person from certain additional information requirements that apply to acquiring persons. In the final rule, acquired persons are excused from the following requirements:

i. Minority Shareholders, other than those that will roll over to the acquiring person
ii. Ownership Structure Description and Chart
iii. Reporting of Officers and Directors
iv. Identification of International Antitrust Notification
v. Transaction Diagram
vi. Identification of Other Agreements Between the Parties

Balanced against these reductions in burden, the final rule does require the acquired person to report prior acquisitions for the first time, for the reasons explained in sections II.B.5. and VI.J.4.

IF/THEN Format

Certain information requirements of the final rule are only applicable to filers who provide a positive response to other information requirements. That is, the final rule reflects an IF/THEN format by requiring some information only if filers have provided other information first. For example, many information requirements do not require a response if the filer indicates that there is no reported overlap or supply relationship between the merging parties. This is a main feature of the current HSR Form, and the Commission expands that approach in the final rule to closely align the information requirements with the risk of a law violation the transaction presents, resulting in an IF/THEN format that adjusts the cost of complying based on the existing competitive relationship of the parties to the transaction.

Importantly, information that is critical to identifying competitive overlaps or areas of premerger competition justifies a higher cost of collection and reporting.[297] Examples include reporting revenues for identified overlaps by geographic location so that the Agencies have some basis to screen overlapping products for local market impacts.[298] Even if there is some additional cost associated with collecting this information, a notification form that does not contain such information would be unreliable for detecting the risk that the transaction would cause harm to competition at the State or local level. Limiting the requirement to provide certain information only if both parties generate revenues in the same or similar business lines (as reflected in overlapping NAICS code reporting or the descriptive responses) or only if the parties operate in the same areas of the country is a powerful limitation aimed at generating information that bears directly on the question whether the transaction involves direct competitors. For any transaction that does not have these overlaps, there is no burden associated with answering questions that depend on the reporting of such overlaps other than certifying that such overlaps do not exist. In the final rule, the following information requirements are dependent on the identification of an existing overlap or a supply relationship:

i. Overlap Description
ii. Supply Relationships Description
iii. Officers and Directors (acquiring person only)
iv. Plans and Reports
v. Prior Acquisitions
vi. State and Street-Level Reporting of Geographic Market Information
vii. Author information for submitted documents
viii. Defense and Intelligence Contracts

Limited Lookback Periods

The Commission also relies on limited lookback periods to collect the most recent and reliable information and data related to the risk of a law violation. For example, filers are only required to submit the most recent annual reports and annual audit reports. This type of limitation is intended to focus on more recent economic activity and reduce the cost associated with collecting potentially less probative or out-of-date historical data. As discussed below in section VI., the Commission has reduced the lookback periods for some information requirements as compared to the proposed rule to reduce compliance costs and focus the information requirements on the most recent and probative data needed for premerger screening. In other places, the Commission has identified a fixed reporting period to limit the information filers must gather to prepare the HSR Filing and provide certainty for filers about what is required. For example, as compared to the proposed rule, the final rule contains shortened lookback periods for the following information:

i. Overlap Description
ii. Supply Relationships Description
iii. Officers and Directors
iv. Transaction Rationale
v. Minority Shareholders
vi. Prior Acquisitions

[297] In the initial rulemaking implementing the HSR premerger program, the Commission proposed to require the reporting of revenues by Standard Industry Classifications (SIC) codes. Many commenters complained about the costs associated with providing this information. But the Agencies needed to establish some system for reporting overlaps. This provides an early example of the Commission determining that, where the information is essential to enforcement of the antitrust laws, the costs associated with collecting and reporting that information is justified by the benefits in light of other available options.

[298] The Agencies rely on analytical tools to identify an area of effective competition, often by defining a relevant antitrust market. A relevant antitrust market comprises both product (or service) and geographic elements. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines 4.3 (2023) (describing the information and analysis used by the Agencies to define markets for the purpose of antitrust analysis). For screening purposes, the Agencies may conclude that the parties to the transaction do not serve the same set(s) of local customers if there is reliable information in the HSR Filing that indicates that they generate revenues in different locales even if they supply the same product or service.

De Minimis Exclusions

The Commission also relies on de minimis exclusions to excuse the reporting of otherwise relevant information that might be costly to collect. De minimis exclusions can sometimes require extra effort by filers, because filers must evaluate whether the information is above or below the de minimis threshold. In the Commission's experience, it can sometimes take less time for filers to collect and report all responsive information than to report less information after conducting the assessment required to eliminate de minimis amounts. In deciding whether to add de minimis exclusions, the Commission carefully weighed the additional costs for filers to determine what information falls below the de minimis thresholds and can therefore be excluded, as compared to the costs of collecting all responsive information. The final rule contains new de minimis exclusions for certain information in the following requirements:

i. Supply Relationships Description
ii. Prior Acquisitions
iii. Defense and Intelligence Contracts

Voluntary Information

Finally, one new information request is not strictly required by the final rule, but filers may provide it on a voluntary basis. As part of the HSR Form, filers may agree to waive the confidentiality protections of the HSR Act to permit the Agencies to share HSR materials with other enforcers in order to facilitate cooperation during any investigation of the transaction. Such a waiver would be beneficial for the Agencies, and the filer may want to provide it as a way to limit the need to produce multiple or duplicative data sets and documents to other enforcers that are investigating the transaction, thereby reducing its overall regulatory compliance costs. Filers may view this as a benefit and therefore may grant a waiver even though their HSR Filing would be compliant with the final rule without it.

Non-Compliance Statement

In addition to these limits, the Act allows for incomplete answers with a statement of the reasons for non-compliance, and the Commission has the discretion to permit filers to rely on good faith estimates or no answer at all. If the filer is unable to answer any question fully, it must provide the information that is available and provide a statement of reasons for non-compliance as required by § 803.3, which is intended to reduce disagreements between filers and PNO staff.[299] Where exact answers cannot be given, filers are allowed to enter best estimates, while indicating the source or basis of the estimate, and marking the information with the notation ''est'' to any item where data are estimated. Finally, filers already routinely indicate under the current rules that certain required information is not applicable given the type of transaction being reported, and filers will continue to be able to do so under the final rule.

Summary of Requirements Based on Transaction Type

In the final rule, the Commission has employed all of these techniques to align the cost of complying with the final rule in light of the benefit to the Agencies, filers, and the public of the Agencies having the information on the first day of the statutory review period to conduct their preliminary antitrust assessment. The chart below summarizes the different information requirements of the final rule for the acquiring person and the acquired person for three distinct types of transactions: (1) select 801.30 transactions, (2) those transactions that will have no NAICS or described overlaps or supply relationships; and (3) transactions that report a NAICS or a described overlap, or a supply relationship, which includes transactions with significant pre-merger competitive interaction between the filers (for example a company acquiring one of its principal competitors or suppliers).[300] The chart indicates which type of filer will not provide this information because it is not required by the final rule. As depicted in this chart, the final rule creates different information requirements for different types of filers and different types of transactions, resulting in a range of costs associated with filing that are directly proportional to the complexity of the deal, corporate structure, and most importantly the risk of law violation.

[299] The submission of the statement of reasons for noncompliance is not intended to be a substitute for compliance with the notification obligation but it serves two salutary purposes: (1) reducing disagreement between the Agencies and the filer, and (2) providing a basis for any civil penalty proceeding that may be brought under 15 U.S.C. 18a(g)(1). *See* 122 Cong. Rec. 29342 (1976); *see also* 43 FR, 33450, 33508–09 (July 31, 1978).

[300] These three scenarios were used to calculate costs for the Paperwork Reduction Analysis, discussed below in section VIII.

Figure 3: Applicability of Significant Updated and New Information Requirements By Filer and Transaction Type

	Select 801.30		No Overlap / No Supply Relationship Transaction		Overlap / Supply Relationship Transaction	
	A-Side	B-Side	A-Side	B-Side	A-Side	B-Side
Translations						
Changes to Identification of Additional Minority Interest Holders						
Organization of Controlled Entities	■	■				
Description of Ownership Structure		■		■		■
Organizational Chart (if exists)		■		■		■
Identification of Certain Officers and Directors		■		■		■
Description of Business of the Acquiring Person		■		■		■
Transactions Subject to International Antitrust Notification		■		■		■
Transaction Rationale	■	■				
Transaction Diagram (if one exists)	■	■		■		■
Competition Documents from Supervisory Deal Team Lead		■				
Plans and Reports	■	■	■	■		
Transaction Agreements	■	■				
Other Agreements Between the Parties		■		■		■
Overlap Description	■	■				
Supply Relationships Description	■	■	■	■		
Geographic Market Information (new organization, street-level reporting, and reporting of francisees)			■	■		
Limiting Minority-Held Entity Identification to Overlaps			■	■		
Prior Acquisitions			■	■		
Subsidies from Foreign Entities or Governments of Concern						
Defense or Intelligence Contracts	■	■	■	■		

D. Disproportionate Impact on Certain Sectors

Here the Commission addresses arguments that the final rule would have a disproportionate impact on certain sectors as part of its consideration of how the benefits and costs associated with the final rule are distributed among various groups.[301]

Small Businesses

Several commenters are concerned about the additional costs associated with the final rule for small businesses who are parties to a reportable transaction, stating that the proposed rule would disproportionally affect small businesses because they would be less equipped than larger businesses to cover the additional costs. Commenters said that these additional costs would not only deprive small businesses of funds that are needed for operations or innovation, they might also slow or deter dealmaking involving small businesses altogether. On the other hand, an individual commenter explained that the proposed rule would help small businesses who have been affected by mergers.

The Commission addresses concerns about undue costs throughout this final rule, making many adjustments to limit the costs of complying for those filers who do not have complex corporate structures or extensive business lines, including small businesses. In section IX., the Commission certifies that the final rule will not have a significant economic impact on a substantial number of small entities as that term is defined by the Small Business Administration (''SBA''). HSR reporting requirements apply to very few small businesses. Congress adjusted the statute in 2000 to require annual indexing of reporting thresholds so as to minimize the effect of inflation that would otherwise require more reporting for small businesses and small transactions, and nothing in the final rule changes which acquisitions are subject to premerger review. See section III.A.1.

In fact, the Commission believes that many small entities will benefit from the final rule. As noted by one commenter, the goal of antitrust enforcement is to strike the right balance: too little enforcement could allow some companies to gain an unfair advantage, while too much enforcement risks driving up compliance costs and undermining legitimate efforts to compete. The Supreme Court has explained that Congress designed section 7 of the Clayton Act to ''prevent economic concentration in the American economy by keeping a large number of small competitors in business,'' [302] and to retain '' 'local control' over industry and the protection of small businesses.'' [303] As a result, a merger of two small companies that allows the combined entity to compete more effectively with larger rivals may be unlikely to violate the antitrust laws. In contrast, the legislative history of the Clayton Act reveals Congress was very much concerned with, and sought to prevent, acquisitions involving large companies buying smaller or up-and-coming rivals that would otherwise cease to be independent businesses.[304] By making possible more effective and efficient premerger review of HSR-reportable transactions, the final rule will facilitate effective enforcement of the antitrust laws, which in turn will preserve opportunities for small businesses to thrive in markets that are not dominated by much larger competitors.

In passing the HSR Act, Congress made plain that it was not interested in burdening mergers between two small companies with premerger review, since small businesses generally do not present the same risks of anticompetitive effects as do larger businesses. To that end, the HSR Act specifically exempts certain smaller companies from its reach. But it is not possible to say that all transactions involving small businesses carry little or no antitrust risk, whether they are

[301] *See generally* Boardman et al, *supra* note 256, at 506; Executive Order 12866 directs agencies when designing regulation to ''consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.'' E.O. 12866 Sec. 1(b)(5) (1993).

[302] *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 275–76 (1966) (also noting that undue concentration drives small businesses out of the market).

[303] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 316 (1962).

[304] *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 281 (1964).

reported or not. When they are required to be reported, the Agencies are obligated to conduct a premerger assessment. Therefore, it is appropriate for the Agencies to receive information from even small businesses that are a party to a reportable transaction to determine whether those transactions may violate the antitrust laws.

Based on the Commission's experience, deals of any size can present significant antitrust risk. The American Antitrust Institute analyzed historical data about HSR filings from 1985 to 2020 and prepared a chart that reflects the percentage of Second Request investigations to transactions by deal value.[305] This data shows that while transactions valued at under $100 million rarely receive Second Requests, a not insignificant number of transactions in the $100 to $150 million range do. This confirms the Agencies' experience that although many deals that are subject to an in-depth investigation involve large companies, especially on the buyer side, it is not possible to ignore that some transactions that involve small businesses also violate the antitrust laws.[306] And of course, the Agencies are also attentive to small-value acquisitions that cause harm even if they were not subject to premerger review and seek to unwind them as resources and precedents allow.[307]

As modified, however, the final rule imposes lower costs on transactions involving independent small businesses, as they typically involve fewer business lines and less complex corporate structures. Typically, the larger the company, the more extensive and complex its business lines. Many of the changes in the final rule are designed to allow the Agencies to quickly understand complicated entities and the businesses that they have connections to. These changes generally will not impact small business. Further, where possible, the final rule imposes less burden on sellers (the acquired person), which tend to be smaller in size than buyers.[308] In effect, the final rule imposes costs on filers that are commensurate with the antitrust risk presented by the transaction: those with low risks (*e.g.,* simple corporate structures, few lines of business or no preexisting commercial relationship with the other party) have the lowest costs. Wherever practicable, the Commission took into account the burden across smaller businesses who may engage in competitively benign transactions and has adjusted the final rule in several significant ways to mitigate this burden. For example, the Commission has excluded select 801.30 transactions from certain requirements, eliminated other proposed requirements, and modified other proposed requirements as described throughout this final rule. The Commission believes that this approach, which is focused on antitrust risk and not necessarily business size, nonetheless minimizes the costs for small businesses involved in transactions subject to mandatory premerger review consistent with the statutory scheme.

Startups

A number of commenters expressed the view that the requirements of the proposed rule would deter innovation by denying startup firms an exit path; they observed that many startups plan for eventual acquisition, and this strategy drives investment that allows the firm to grow. Commenters stated that any change to the status quo will upset this balance. Others observed that acquisitions by large, established firms play a crucial role as an exit strategy for startups securing venture capital, which is an important source of funding in many sectors, including tech. Some of the same commenters, however, acknowledged the valuable role startups play by challenging established incumbents. Various commenters made nonspecific objections to increased burdens imposed upon startups by the proposals in the proposed rule.

Startup companies are not unique to particular industries but represent an important business model throughout the U.S. economy. For any transaction that does not present facts indicating it may violate the antitrust laws—including those involving startups—the minimal additional burden of disclosing more information is justified by the Agencies' need to conduct a thorough review in light of the information gaps discussed in section II.B. Where those facts are absent, there should be no additional delay or additional risk of detection for those transactions. Given the small incremental costs associated with the final rule relative to other M&A costs and the potential magnitude of returns from an exit sale of a successful startup, HSR compliance costs would not plausibly factor into the *ex ante* investment decision. To the extent that the final rule requires additional disclosures regarding the business lines of startups, that burden is not different from those imposed on established businesses in the same sector. Moreover, the Commission has no basis to excuse startup companies from complying with the final rule; it is not the case that they always or mostly present no antitrust risk. See sections II.B.4. and III.C.2.

Private Equity and Other Types of Investments

The Commission received several comments from groups representing investors raising concerns about the burden of gathering the information for the proposed rule as well as the burden of having to disclose the new information. One commenter asserted that certain proposed requirements would be particularly onerous for transactions involving private equity and venture capital, such as the expanded lookback period, information regarding limited partnerships, more information about prior acquisitions, the identities of past and present members of boards of directors, and disclosure of the buyer's prior acquisitions. Another commenter said that the burden of the information requirements would affect the efficiency of transactions and introduce more uncertainty and risk into the deal process, which would adversely impact returns for investors. Another noted that the burden of the proposed information requirements would, among other effects, make capital markets less efficient, resulting in a significant impact on its members and the thousands of pensioned workers, retirees, universities, and other investors who rely upon them. The Commission discusses these concerns elsewhere and has concluded that the incremental costs associated with the

[305] *See* Diana L. Moss, Am. Antitrust Inst., ''What Does the Billion-Dollar Deal Mean for Stronger Merger Enforcement?'' 3 Fig. 2 (Sept. 20, 2022), *https://www.antitrustinstitute.org/wp-content/uploads/2022/09/AAI_Billion-Dollar-Mergers_9.20.22.pdf.*

[306] *See, e.g., United States* v. *Neenah Enterprises, Inc.,* No. 1:21–cv–02701 (D.D.C. Oct. 14, 2021) (complaint) ($110 million asset purchase); *In re Global Partners LP,* No. C–4755 (F.T.C. Mar. 2, 2022) (decision and final order) ($151 million acquisition); *In re ANI Pharmaceuticals, Inc.,* No. C–4754 (F.T.C. Jan. 12, 2022) (decision and final order) ($210 million acquisition); *United States* v. *Grupo Verzatec S.A. de C.V.,* No. 1:22–cv–01401 (N.D. Ill. Mar. 17, 2022) (complaint) ($360 million acquisition). Note that the value of the transaction is considered by some filers to be confidential information and is not always disclosed in public filings. *See FTC* v. *IQVIA Holdings Inc.,* No. 1:23-civ-06188 (S.D.N.Y. Dec. 29, 2023); *In re Lifespan Corp.,* No. C–9406 (F.T.C. Feb. 17, 2022) (complaint).

1 *See, e.g., In re The Golub Corp.,* No. C–4753 (F.T.C. Jan. 20, 2022) (decision and final order) (divestiture of 12 supermarkets); *United States* v. *B.S.A. S.A.,* No. 1:21–cv–02976 (D.D.C. Mar. 15, 2022) (divesture of two business lines).

[307] *See, e.g., Polypore Int'l, Inc.* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012); *In re Otto Bock HealthCare N. Am., Inc.,* No. 9378 (F.T.C. Dec. 1, 2020).

[308] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2022, Tables VI through IX (FY 2022).

final rule are small relative to the value of the transaction and the costs of other merger-related fees. As noted throughout this final rule, the Commission has taken many steps to reduce the burden on all types of filers as compared to the proposed rule, including investors.

The same commenter who mentioned the effect on capital markets also noted that the HSR-reportable transactions in which its members engage often do not pose competitive risk. These are transactions in which the acquiring persons are investment groups, trusts, or other financial vehicles or are providing securities, commodities contracts, and other financial investments or related advice. According to this commenter, its members rarely, if ever, have horizontal or even vertical relationships with the issuers whose securities they acquire. Rather, the kinds of HSR-reportable transactions in which its members engage are not mergers or acquisitions but the acquisition of minority positions, for instance, when concentrated funds make large purchases due to sizeable investor inflows, when benchmark-relative funds make large purchases due to index rebalancing, or when managers shift portfolios into highly liquid names in anticipation of redemptions or in connection with wind-downs.

This and other comments generally reflect three different types of concerns: potential burdens for investors that must make HSR filings, potential burdens for minority investors in entities that have to make HSR filings (but have no HSR filing obligation themselves), and potential burdens related not to filing out the Form, but to potential enforcement actions to block the transaction that may arise from the Agencies having more complete information. The Commission addresses each below.

As a starting point, the Commission emphasizes that the final rule does not change who must file [309] and the HSR Act and Rules exempt passive investments of 10% or less,[310] or 15% or less for institutional investors.[311] The final rule does not alter the analysis regarding passive investments and therefore the final rule has no impact on investors who hold passive investments [312] unless these investors acquire more of a company than these significant ''investment only'' exemptions permit and are, as a result, required to report their investments for premerger review. As a result, many of the types of investors discussed in the comments will not have HSR filing obligations for their transactions, and thus would not be required to fill out the Form that is the subject of the final rule.

Some investors will have filing obligations either because they will hold a stake that provides them with the ability to direct or influence the management of the company in which they are investing (*i.e.,* above the 10% and 15% exemptions), or because they do not intend to be merely passive investors. In these instances, the Act treats them as any other acquiring person and the Agencies use the Form to screen for potential competitive effects. Until now, though, the Agencies have received less information about transactions where private equity and other types of investors are involved because the current Form does not require sufficient information to explain the often complex structures and relationships between different entities that are within the acquiring or acquired person. The final rule intends to close these information gaps and focuses on information that should be within the records of the acquiring or acquired person.

Further, the Commission acknowledges that investors can have different motivations in making acquisitions. Some do not seek to control or influence the companies in which they invest, but rather only seek a desired rate of return. In contrast, others seek positions with significant management rights or stakes that result in control of or influence in the target business. The Commission has sought to tailor the requirements of the final rule to illuminate those factors that could give rise to competitive concerns while minimizing additional costs for those investors that do not seek to participate in or influence decision-making of entities related to the acquiring entity or other entities within the buyer that are in the same industry as the target. As a result, the Commission has made significant changes as compared to the proposed rule, declining to adopt many of the proposed changes and significantly tailoring others. The Commission has also introduced the concept of select 801.30 transactions, which it anticipates will capture the transactions of many investors that do not seek to influence, direct, or manage the companies in which they invest. *See* section VI.A.1.f. The Commission has relieved such transactions from many of the new requirements, which it anticipates will mitigate the potential burden of providing information for many investors who do have to file.

As to investors that do not have HSR filing obligations but hold minority interests in entities that do, the final rule does require additional information about some minority investors if those investments are in entities controlled by the acquiring person that are either related to the transaction or operate in the same industry as the target. However, as described in section VI.D.2.a., the burden of providing this information rests on the acquiring person, not on those minority investors. Their presence as an investor should be known to the filer because the filer controls the entity, and when revealed in the HSR Filing, will provide information that will assist the Agencies in determining whether those investors also hold interests or have relationships with entities related to the target.

Additionally, the Commission modified the proposed rule to scale back requirements that would have broadly required disclosure of the limited partners of certain entities. As discussed below, the Commission has limited the final rule to require identification of only those limited partners that have certain rights related to the board of directors or a similar body. When required, this information is limited to providing the legal and business name of the minority investor, its address, and the percentage the investor holds in the entity controlled by the acquiring person. In most instances, the Commission believes this information should be available in the records of the acquiring person. When it is not, the Commission has explained that the acquiring person can note that the information is not available and why. The final rule does not create an obligation for the acquiring person to request this information from its minority investors. Therefore, the final rule imposes no burden on such minority investors in filling out the revised Form. Investors that do not have HSR Act filing obligations, but hold minority interests in entities that do, will not have any new obligations to either make filings or provide information for the filings of entities in which they have minority holdings.

Several commenters raised concerns that the additional information requirements for funds, especially those managed by activist investors, would

[309] One commenter suggests that the proposed rule would result in an increase in filings among investors. Comment of TIAA, Doc. No. FTC–2023–0040–0691 at 3. The Commission disagrees.

[310] 15 U.S.C. 18a(c)(9); 16 CFR 802.9.

[311] 15 U.S.C. 18a(c)(11); 16 CFR 802.64.

[312] Some commenters discussed shareholder engagement encouraged by the SEC. *See, e.g.,* Comment of Managed Funds Ass'n, Doc. No. FTC–2023–0040–0651 at 8. The Commission notes that the SEC is a different agency with a different law enforcement mission.

have a detrimental impact on these investors as a result of the disclosure of the information itself. They pointed to the disclosure of the interests and rights of limited partners as creating disincentives for shareholder engagement or as undue interference in the market for corporate control. Another commenter stated that disclosure requirements may deter investments in private equity firms, potentially reducing the flow of capital to small- and medium-sized businesses.

The final rule does not target information specific to any type of investor. But if an investor holds a small but significant stake (five percent or more) or plays a role in the acquiring person's decision-making, the Commission believes that disclosure of these interests is justified by the Agencies' need to know about such investments to conduct premerger screening. As discussed in section II.B.1. and section VI.D.1.d.ii, there have been significant changes in the number and breadth of investment companies managing portfolios that include investments in companies with competitively significant relationships. Due to these changes and others, the Commission has determined that the Agencies need more information about minority holders between the UPE and the acquiring person, as well as information about those who serve as officers and directors and who will be involved in decision-making after the transaction is consummated. Many commenters specifically objected to providing any information about limited partners, noting that the existence of significant management rights such as board seats or board approval rights, is ''atypical.'' The final rule has been modified to require disclosure only of these types of limited partner situations, which should mitigate these concerns.

Another commenter said that having to disclose the required information would deter investment in in certain types of investment vehicles because of the exposure of proprietary contractual information and Personally Identifiable Information (PII) about every facet of the M&A process. This commenter noted, for instance, that the requirement to provide a term sheet or draft agreement reflecting sufficient detail about the proposed transaction when filing on the basis of a Preliminary Agreement would expose details about transactions that could undermine competition in the industry and harm returns to LPs. In addition, this commenter stated that the requirement for PE firms to submit a narrative describing the justification for certain transactions would impinge on the proprietary information that PE firms exchange with target companies and their consultants.

As noted above and elsewhere, the Commission has made significant changes as compared to the proposed rule, and the changes in this final rule should address many of this commenter's concerns. That said, the Commission believes the commenter has overread the Commission's intent. The purpose of the final rule is to provide the Agencies with more information on those factors that could give rise to competitive concerns, not to expose every facet of the M&A process or investor strategy. The required information does not require social security numbers, addresses or other sensitive PII. Moreover, the final rule requires the disclosure of additional information to the Agencies, not to the public or third parties, and the confidentiality of the information provided to the Agencies as part of the HSR filings process is protected by statute, specifically 15 U.S.C. 18a(h).

Finally, as described in section VI, the final rule will provide the Agencies with more transparency into what the acquiring person holds and whether any person or entity that has influence over the acquiring person is also involved in the business of the target. Specifically, the Commission has not limited the information required about the acquiring person even in the case of select 801.30 transactions. As stated in the NPRM and throughout this final rule, the Commission believes this information is critical to the Agencies' initial review and the benefit for robust premerger screening justifies the burden of disclosing the information because it may identify an existing business relationship between the acquiring person and target (via common investors or shared managers) that are otherwise not revealed in the HSR Filing.

The Commission disagrees with comments that identify increased transparency about the filed-for transaction itself (and not the specific burden of collecting and providing the information) as a cognizable burden associated with the final rule. The purpose of the final rule is to require information that allows the Agencies to accomplish the task assigned to them by Congress: to determine whether the acquisition subject to the Act, if consummated, may violate the antitrust laws. Suggestions that increased transparency would endanger certain filed-for transactions implicitly indicate that the current Rules have led to under-enforcement of the antitrust laws. Any burden related to deal uncertainty that might arise from increased transparency is not a burden related to compliance with the HSR Act and the final rule, but rather is tied to whether the transaction itself may violate the antitrust laws.

Biopharmaceuticals

Two commenters from the biopharmaceutical sector suggested that several requirements of the proposed rule would disproportionately burden biopharmaceutical firms and transactions. They pointed to the burden of identifying information related to products in early stages of clinical development, and stated that, because the Commission's 2013 rule specific to pharmaceutical license agreements increased the universe of reportable transactions, any expansion of the Form disproportionately burdens the pharmaceutical sector. One additionally objected to providing information about employees, and the other asserted disproportionate impact from providing information regarding additional prior acquisitions because of the number of acquisitions in this sector, and from disclosing officers and directors due to biotech firms' dependence ''on a small cadre of qualified directors and officers.'' Both commenters claimed the changes to the HSR Form and Instructions will prolong the time required for HSR filing preparation and agency review, resulting in delayed transactions.

The final rule does not target any information that is unique to biopharmaceutical companies, and the Commission disagrees that the additional information that would be sought from these companies is not relevant. Where the final rule requires additional information from biopharmaceutical companies, the cost of supplying that information is justified by the benefit to the Agencies in having a more complete understanding of the companies' existing business operations and their business strategy, including prior acquisitions involving the same business lines. For instance, many biotech and pharmaceutical companies invest in extensive R&D pipelines, and the Agencies need information about products in development to determine if the companies are current competitors for innovation in a particular space to meet a particular need, or if one or both merging parties are potential competitors for any existing products.[313] As the commenters

[313] *See In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint alleging Sanofi's proposed acquisition of an exclusive license to Maze Therapeutics' pipeline Pompe therapy would have eliminated nascent threat to Sanofi's monopoly) (transaction abandoned); *FTC* v. *Mallinckrodt ARD Inc. (f/k/a Questcor Pharms., Inc.),* No. 1:17–cv–120

Continued

acknowledged, mergers, acquisitions, and exclusive licenses are particularly prevalent in the pharmaceutical sector, where the business model for new drug development centers around such transactions. Similarly, the comparatively higher number of transactions occurring in this sector can be expected to trigger a higher number of HSR Filings and could require filers to disclose a greater number of prior acquisitions. Even if biopharmaceutical companies have to report more prior acquisitions, this disclosure is also justified because it is relevant to determining whether there is a pattern of serial acquisitions. The fact that sharing of officers and directors is more common among companies in this sector means there is a greater need for the Agencies to screen for related competitive problems.[314]

On the other hand, other information requirements have been modified to reduce the costs for all types of filers, including those in the biopharmaceutical sectors. For instance, the Commission declined to adopt new information requirements related to employees, which commenters asserted could impose significant costs on those in the biopharmaceutical as well as other sectors. Overall, the impact of the final rule is proportional to the number and characteristics of transactions that occur in any given sector of the economy (including biopharmaceuticals). To the extent that the revised Rules will result in delayed transaction closings, the potential impact of incremental delay is outweighed by the Agencies' statutory mandate to examine each transaction for the potential for that it may violate the antitrust laws. In other instances, the additional information may actually reduce delay by permitting the Agencies to avoid issuing a Second Request or issuing Second Requests that are more tailored to the potential for competitive harm than would have been issued under the existing reporting requirements.

In sum, the Commission has determined that the burden imposed on this sector by the final rule is proportionate to the market realities and complexities of these companies and the likelihood that any transaction may require more in-depth antitrust review.

Hospitals

A national organization representing hospitals and several State hospital associations stated that the proposed rule would have a negative and wholly unnecessary impact on hospitals and health systems. They asserted that the additional information required by the proposed rule would not generate actionable information with respect to hospital mergers. They objected to specific requirements, stating that reporting prior acquisitions has no relevance in the context of hospital mergers, or that it is inconceivable that a hospital-related merger could plausibly harm competition in any labor market without also presenting at least some competitive risk in a downstream market.

The Commission responds that the final rule does not target any information that is unique to hospitals and health systems, and disagrees that the additional information, when sought from hospitals, is not relevant. For example, the commenters' suggestion that the Agencies not screen for hospital labor competition issues is inconsistent with growing empirical evidence of competitive harm to labor markets from consolidation generally and from hospital mergers in particular.[315] Moreover, as discussed above, an empirical assessment of the price effects of consummated hospital mergers reveals that there are meaningful information gaps in the current requirements that led the Commission to grant early termination of the waiting period for hospital mergers that caused significant price increases.[316]

As discussed, the final rule will exclude non-profit entities organized for religious or political purposes from the specific requirement to produce information disclosing officers, directors, and members. This carve-out will likely encompass some healthcare organizations, including certain religious-affiliated hospitals or other provider groups. While these entities will not be required to provide such information as a matter of course in the HSR Filing, it can nonetheless be relevant in any in-depth investigation of the transaction and may be sought from the parties at a later date.

Given the Commission's significant expertise and interest in preventing hospital mergers that may violate the antitrust laws, the final rule is appropriately focused on transactions that are most likely to present antitrust risk. The Agencies have determined the information sought by the final rule will close the information gaps that now exist with regard to hospital and other healthcare acquisitions. Moreover, because many hospital mergers are not reportable under the HSR Act, several States have enacted premerger notification laws for certain healthcare acquisitions, including those involving hospitals, to prevent consolidation that may affect their citizens directly. In light of all this evidence of a need for robust screening in this critical sector, there is no basis to excuse hospitals or health systems from any of the new requirements of the final rule beyond the modifications that reduce costs on filers overall, including on hospitals.

E. Regulatory Alternatives Considered

In addition to considering the costs and benefits of the final rule as compared to the status quo, the Commission considered other alternatives suggested by commenters.[317] The first alternative is to not finalize any modification to the current HSR Form and Instructions and to issue more Second Requests when the HSR Filing is insufficient to determine whether the proposed acquisition may violate the antitrust laws. Relatedly, commenters suggested that the Commission maintain current reporting requirements and make more extensive use of voluntary submissions from the parties post-filing. These alternatives are discussed above in section III.A.3. Another alternative suggested by commenters is for the Commission to create two separate sets of information requirements, one for acquisitions that present a low risk of a law violation and therefore require less reporting (a ''short form'') that would continue to report the information required by current HSR rules and a second form for acquisitions that cannot be considered low risk and that would contain all of the new information requirements in the final

(D.D.C. Jan. 25, 2017) (complaint alleging Questcor's acquisition of rights to pipeline competing drug eliminated nascent threat and protected its monopoly ACTH drug H.P. Acthar Gel) (consent decree ordered license and $100 million equitable monetary relief); *In re Thoratec Corp.,* No. 9339 (F.T.C. July 28, 2009) (complaint alleging Thoratec's proposed acquisition of HeartWare eliminated pipeline threat to Thoratec's left ventricular assist device monopoly) (transaction abandoned).

[314] Mark A. Lemley et al., ''Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards'' (Stan. L. & Econ. Olin Working Paper No. 578, 2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4253144.*

[315] Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan, *supra* note 70, at 2 n.1; *In re Lifespan Corp.,* No. 9406 (F.T.C. Feb. 17, 2022) (complaint).

[316] *See supra* note 24 and related text.

[317] Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulations and an explanation of why the planned regulatory action is preferable to the potential alternatives. E.O. 12866 sec. 6(a)(3)(C) (1993). As an independent agency, the Commission is not subject to the requirements of this executive order but nonetheless used the principles outlined there to explain why the Agencies' chosen regulatory action is preferable to potential alternatives.

rule. Here the Commission discusses the relative merits of adopting this alternative over the final rule.

Several commenters suggested that the Commission consider creating two separate sets of information requirements for notification, stating that this approach is used by other jurisdictions to alleviate some costs and delays associated with merger notification under their laws. They asserted that it would be suitable for effective and efficient premerger review under U.S. law.

As discussed above, the HSR Form is not ''one size fits all'' and the costs of making an HSR Filing are unique for each transaction. In this rulemaking, the Commission is publishing, for the first time, separate Forms for the acquiring person and the acquired person. The final rule has materially different requirements for each filing person, and providing separate Forms allows for clearer instructions (avoiding terminology in the proposed rule such as ''the acquired person or acquired entity (as applicable)''). The Commission expects that having two separate forms for each side of the transaction will improve compliance and reduce errors for filers.

Moreover, while not styled as a ''short'' or ''long'' form, the final rule reflects the Commission's consideration of each requirement and makes clear where there is a need for the information for each type of transaction. In particular, the IF/THEN structure of the information requirements results in some filers responding to only a few information requirements. As a result, in practice, there are ''shorter'' and ''longer'' versions of the forms depending on the type of filer and the type of transaction under review. The Commission determined that this approach better reflected the varying information requirements the Agencies need in order to effectively and efficiently analyze the broad spectrum of filers and transactions.

Most importantly, in its review of past filings, the Commission found no set of objective criteria that would appropriately sort transactions into one or more discrete categories for the development of a single short form. Rather, the final rule adopts new information requirements but imposes them differently to reflect each filer's role in the transaction (acquirer versus acquired) and the relative antitrust risk associated with the proposed transaction. Filers with the highest information and document requirements are acquirers pursuing the acquisition of a firm with whom they have extensive existing business relationships or offer products or services in the same industries that must be assessed prior to consummation.

For one category of transactions, select 801.30 transactions (described in section VI.A.1.f.), the Commission has determined that the Agencies need minimal additional information such that the final rule should impose fewer new requirements. The Commission believes that the few new information requirements for select 801.30 transaction are justified in order to ensure that the Agencies conduct a premerger assessment to determine that even these transactions do not present risk of a law violation. Similarly, the Commission determined that other characteristics justify a different and lighter burden, such as whether the filing person is the buyer or the seller in the transaction. Finally, many requirements are tied to the acquiring and acquired person operating in the same industry or having a business relationship. These questions would be inapplicable to many filers, particularly activist, institutional, and retail investors, which typically do not have controlling stakes in operating companies or do not focus on a particular industry. As a result, the costs of complying with the final rule are tailored to the risk of a law violation associated with each transaction in a way that is similar to, but more flexible than, the ''short form'' alternative. The size and complexity of each party to the transaction, as well as the size and scope of their respective business, vary widely across filings. As discussed in section II.B., there are specific risks to competition that the current information requirements do not disclose, making the final rule a better alternative to achieve robust premerger screening even for select 801.30 transactions as compared to a short form alternative.

In addition, the short form alternative is likely to create uncertainty for filers that do not qualify for short form treatment but whose deals would suddenly be viewed as ''not low risk.'' Having a bifurcated system that targets some transactions as ''low risk'' is not consistent with the statutory premerger scheme Congress created when it determined that reporting would be required based on deal value regardless of the risk of a law violation, with additional authority for the Commission to exempt transactions that it has determined to present little to no antitrust risk. At this time, the Commission does not have a basis to conclude that the existing requirements continue to be sufficient for any category of transactions.

The Commission believes that broadening the use of the HSR Form's existing IF/THEN format so that the final rule aligns the cost of complying with the associated antitrust risks of the transaction is the most appropriate way to implement the premerger notification scheme established by Congress. Congress has determined which transactions are subject to premerger review, relying on deal value to determine reportability. This criterion provides administrative clarity and predictability for businesses. Some jurisdictions use market share or revenue (''turnover'') thresholds to determine reporting or eligibility for short form treatment. But in doing so, these regimes also typically depend on the competition authorities to provide extensive guidance to business, often prior to formal notification, regarding the proper definition of markets. This may require an in-depth analysis of the potential markets at issue and can delay formal notification.[318] Congress has chosen to rely on an objective and administrable system of reportability based on deal value and revenues for filers. Adopting a different standard for determining eligibility for short form treatment would require the Commission to engage in a separate and challenging rulemaking to seek public comment on what types of thresholds should be adopted that would be consistent with the premerger scheme Congress adopted in the HSR Act. At this time, the Commission has determined that one category of filings, select 801.30 transactions, will have minimal additional information requirements as compared to the current HSR Form and has made other modifications in the final rule to reduce the costs for other types of filers and transactions as well.

Although the short form alternative would save some filers additional direct costs associated with making an HSR, the Commission chose to adopt the final rule with modifications designed to reduce the cost of filing as much as possible for all types of filings, including those transactions that might be eligible for short form treatment. The Commission believes that this approach reflects, to the extent practicable, the antitrust risks associated with a variety

[318] Relying on market share thresholds presents many challenges, and several jurisdictions have replaced them with thresholds that are easier to administer. In the early 2000s, approximately half of the jurisdictions with merger control had subjective notification thresholds such as market share but by 2010 more than forty percent of these jurisdictions had replaced their subjective thresholds with objective, sales- or assets-based thresholds.

of filings, not just ones that could be eligible for short form treatment. A final rule that reasonably balances the benefits to Agencies' premerger review with the costs imposed on filers and others is a reasonable exercise of the Commission's rulemaking authority under the HSR Act and is consistent with the overall mandatory premerger review scheme established by Congress. The Commission believes that the final rule, with its tailored modifications based on the Agencies' experience in reviewing thousands of transactions, will result in minimal additional costs for certain filers and is preferable to adopting and maintaining a short form.

Final Instructions and Changes From the Proposed Rule

IV. Part 801

A. Sections 801.1(d)(2): Ministerial Changes To Reflect Reorganization of Form and Instructions

While the Commission will continue to use the same mechanism for electronic filing, it has re-organized the Form and Instructions, as discussed below in section VI. As a result, several ministerial changes must be made to § 801.1(d)(2). This section, which defines ''Associate'' and provides examples, currently refers to item numbers used in the current Form and Instructions. The Commission adopts revisions that align with the Form and Instructions as adopted in this final rule.

Specifically, the definition of ''Associate'' and the related examples refer to Items 6(c)(i), 6(c)(2), and 7. This information is now required by the Minority-Held Entity Overlaps and Controlled Entity Geographic Overlaps sections, which replace the previous item numbers. The Commission, accordingly, modifies the Rule to reflect these changes.

B. Section 801.1(r): Definitions of ''Foreign Entity or Government of Concern'' and ''Subsidy''

On December 29, 2022, the President signed into law the Consolidated Appropriations Act, 2023, which included amendments to the HSR Act in the Merger Modernization Act. 15 U.S.C. 18b. The Merger Modernization Act required the Commission, with concurrence of the Assistant Attorney General, and in consultation with Chairperson of the Committee on Foreign Investment in the United States, the Secretary of Commerce, the Chair of the United States International Trade Commission, the United States Trade Representative, and heads of other appropriate agencies (''Relevant Agencies''), to promulgate a rule to require persons making an HSR Filing to disclose subsidies received from countries or entities that are strategic or economic threats to the United States.

After conducting its own internal diligence to draft a rule and in consultation with the Relevant Agencies on this topic, the Commission proposed amending § 801.1 to add proposed paragraphs (r)(1) and (2), which define ''foreign entity or government of concern'' and ''subsidy,'' respectively.

The Commission received no objections to the proposed definitions and received input that they appear to be a reasonable implementation of the Merger Modernization Act. As such, the Commission adopts these definitions as proposed.

V. Part 803

A. Sections 803.2, 803.5, and 803.10: Adoption of Electronic Filing

The Commission proposed amending §§ 803.2(e) and (f); 803.5(a)(1) [319] and (3) and (b); and 803.10(c)(1)(i) and (ii) to eliminate references to paper and DVD filings and delivery to physical offices. The Commission has been successfully accepting filings electronically since March 17, 2020, as a result of the COVID–19 pandemic and resulting closures of Federal office buildings during the COVID emergency. The Commission received only one comment on this proposed change: One commenter noted that electronic filing is generally preferable and less burdensome to filing by paper or DVD. The Commission received no negative comments on the elimination of paper and DVD filings. The Commission adopts this change as proposed, though, as explained below, § 803.2(e) and (f) have been redesignated as (d) and (e), respectively.

Separately, the Commission noted in the NPRM that the Agencies were developing a new e-filing platform that would eventually replace the current mechanism for electronic filing. The same commenter stated that before seeking to impose an e-filing requirement on all parties, the FTC should provide further details regarding the proposed user interface; the ability for users to collaborate on a single filing; the ability of users to save, review, and edit; and how filing persons will receive complete copies of filings as submitted. At this time, no change has been made to the method for accepting filings. While the Form and Instructions have been updated, filers will continue to use the platform that has been in use since March 2020. The Commission continues to develop a new interface for electronic filing and will, at the appropriate time, issue a rulemaking that provides instructions and access to the new e-filing platform in advance of its effective date.

B. Sections 803.2(b), (c), and (e); 803.9(c); and 803.12(c): Ministerial Changes To Reflect Reorganization of Form and Instructions and Clarification of Time Zone

As discussed above in section IV.B., several ministerial changes must be made to the Rules to reflect the new organization of the Form and Instructions. Existing §§ 803.2(b), (c), and (e), and 803.9(c) all currently refer to item numbers used in the current Form and Instructions. The Commission adopts revisions that align the references in the Rules with the headings in the Form and Instructions as adopted in this final rule.

Additionally, existing § 803.2(b) of the Rules currently explains what information needs to be provided by the acquiring and acquired person for Items 5–8 of the current Form. As described below, the Commission adopts separate instructions for the acquiring and acquired person, making existing § 803.2(b) unnecessary. For this reason, existing § 803.2(b) is being removed, and existing § 803.2(c)–(f) are being redesignated as § 803.2(b)–(e), respectively. Further, existing § 803.2(c) and (e) have references to the current Form numbering and are being updated.[320] Similar ministerial changes are being made to §§ 803.9(c) and 803.12(c). Finally the references to time in, redesignated § 803.2(d) have been updated to specify Eastern Time, consistent with other provisions of the Rules and with longstanding practice.

C. Section 803.2: Requiring Separate Forms for Acquiring and Acquired Persons

The Commission proposed amending § 803.2(a) and deleting § 803.2(b)(1)(v) so that filing persons that are both the acquiring and acquired person are

[319] In making this change, the Commission also takes the opportunity to correct the capitalization of ''act'' to lower case to be consistent with the definitions and other usage of the term in the Rules.

[320] For purposes of consistency and clarity, the Commission is also making a ministerial change to § 803.2 to explain that documents must be provided by 5 p.m. Eastern Time. Because electronic filing permits parties to submit documents from different time zones, they will need clarity as to which time zone the Commission is referencing in the rules. The Commission notes that § 803.10 already specifies that Eastern Time should be used when determining the expiration of the waiting period as well as the date of receipt of filings and it has long been the practice of the Commission to use Eastern Time in applying this rule.

required to submit separate Forms in each capacity. The Commission proposed this change because, in its experience, filers that opt to combine the information on a single Form often do not include everything that is required and would be reported if they filed on separate Forms. Such combined filings are also very confusing for the Agencies to review. In contrast, when filers choose to submit two separate Forms for such transactions, the filings provide all the required information and in a much clearer format that allows the Agencies to quickly understand how the transaction might change the operation of the acquiring person post-acquisition.

The Commission received only one comment on this proposal, which expressed support and noted that it will enhance the understanding of the entire transaction. The Commission adopts the change as proposed but replaces the word ''should'' with ''shall.''

D. Section 803.5(b): Requiring Detailed Letters of Intent, Draft Agreements, or Term Sheets

The Commission proposed amending § 803.5(b) to require filers who have not executed a definitive transaction agreement to submit a draft agreement or term sheet describing the transaction that is the subject of the HSR Filing with sufficient detail to permit accurate analysis.[321] The Commission received numerous comments on this proposal focused on the increased burden and delay for filing parties. The Commission has adopted the proposal in the final rule with modifications that respond to these concerns.

Although filers can currently file on the basis of preliminary agreements, such as an indication of interest, letter of intent, or agreement in principle (''Preliminary Agreements''), in the Commission's experience, a small but significant minority (approximately 10%) of filings made on the basis of Preliminary Agreements do not contain enough information to permit the Agencies to conduct an accurate determination of whether the contemplated acquisition may violate the antitrust laws if consummated.[322] In addition, such filings may be made prior to significant negotiations or due diligence and can be so lacking in specifics that they could force the Agencies to expend resources on transactions too uncertain to merit review.

As discussed below, the Commission has determined that it is necessary to assure that filings are not made prematurely—before the scope of the transaction has been sufficiently determined and before the parties have engaged in enough diligence such that consummation is not merely hypothetical—and in contravention to the purpose of requiring an affidavit stating that there is a good faith intent to consummate the transaction. However, the final rule will not specifically require term sheets or draft agreements for all transactions where a definitive agreement has not been executed. Rather, the Commission will continue to require filers to submit an executed agreement but, if that agreement does not describe with specificity the scope of the transaction that the parties intend to consummate, filers must also submit an additional dated document, such as a term sheet or draft definitive agreement, that does contain sufficient details about the transaction that the parties intend to consummate. This dated document can also take other forms; the title of the document is not determinative.

One commenter sought clarity on what level of information would constitute sufficient detail as required by the proposed rule, including what types of terms that may still be subject to negotiations would render a term sheet as an insufficient basis to submit an HSR filing. The Commission agrees that the additional clarity suggested by the commenter would be helpful in reducing uncertainty. The Commission revises the Instructions accordingly, as noted in section VI.H.1., to describe what would be sufficient. The Instructions state that the transaction agreement or supplemental document should contain some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms. The Commission notes that these examples are meant to be illustrative and not exhaustive. In contrast, indications of interest or other agreements that merely indicate that the parties will commence negotiations or begin diligence will not be sufficient.[323]

Using the criteria adopted in the final rule, the Commission analyzed all filings that contained Preliminary Agreements submitted in FY 2021 to determine how many transactions would be impacted by the final rule.[324] Of the transactions that were submitted on the basis of a letter of intent, term sheet, or similar document that was not a definitive agreement, less than 10% did not provide the Commission with a sufficient level of detail to assess the transaction. From this data, the Commission believes that filing parties typically reach agreement on key terms prior to filing, and there would be no additional cost to them to comply with the final rule. Of those that do not reach such agreement prior to filing, the Commission believes that antitrust review is not warranted until such time as the parties have resolved key aspects of the transaction, such as those described above, because the transaction may never be consummated, or key terms may change in ways that would affect the Agencies' initial review.

The Commission believes the transaction agreement requirements of the final rule represents a middle ground between a merely conceptual deal and a ''ready to close'' deal. The Agencies need to know the key terms of the transaction to determine whether it may violate the antitrust laws if consummated. Given the short period of time given to the Agencies to make that determination, it is necessary for the transaction to be one that is likely to close. The Commission acknowledges that even with this modification, the final rule may not permit some parties to make an HSR Filing as early in their deal process as is currently permitted. However, parties will be able to file after they have agreed to material terms of the transaction even if a final agreement has

[321] NPRM at 42182.

[322] Some commenters assert that documents such as letters of intent and preliminary agreements give the agencies enough information to identify those transactions that require further scrutiny. Based on its experience over forty-five years of reviewing merger filings that include these Preliminary Agreements, the Commission disagrees that they always provide sufficient information, especially when filings are made prematurely, prior to any significant due diligence.

[323] Here is an example of the type of terms contained in agreements that have been filed with an HSR Form and conformed to existing requirements, but will no longer be accepted without filing an additional document that provides the key terms of the agreement once the final rule is effective: This letter agreement confirms the good faith intention of Alpha (''Purchaser''), to consummate the acquisition of Target, a corporation, from Beta (''Seller''), for in excess of $119.5 million and less than $235 million, subject to the terms of a definitive agreement to be negotiated and executed by them with respect to such acquisition and the satisfaction of conditions to be set forth therein. This letter agreement is non-binding and subject to satisfactory completion of due diligence, mutually acceptable definitive documentation to be negotiated between Purchaser and Seller. Purchaser will pay all filing fees in connection with all filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations thereunder.

[324] The Commission reviewed transactions filed during FY 2021 due to the large number of filings received by the Agencies during that fiscal year, which made for a robust data sample. *See supra* note 260.

not been executed. The Commission notes that for many filings that do not contain an executed agreement today, the parties continue to negotiate final terms. The Commission expects that after the final rule, parties that have come to an agreement on key terms but have not yet signed a definitive agreement will continue to work to an executed agreement while the Agencies are conducting their antitrust review.

The transaction agreement requirements of the final rule are necessary to address a real shortcoming of allowing notification on Preliminary Agreements. As noted above, currently, some parties submit a ''letter of intent'' that substantively only states that the two parties have the good faith intent to consummate a transaction. Some documents are labeled an ''expression of interest'' in a future transaction that is similarly not specific. In the Agencies' experience, such filings are often made prior to any significant due diligence has begun and do not demonstrate that the parties have considered or agreed to key terms that would be required for consummation. Such filings require staff to dedicate time to collect facts and make an initial determination of potential illegality for a transaction that may never occur or without a sufficient basis to know the full scope of what the parties may agree to in the future. As noted in the original Statement of Basis and Purpose from 1978, because of the time and resource constraints upon the agency staff, the Agencies should not expend resources to review transactions so lacking in specifics that they could be considered merely hypothetical.[325]

The Commission has considered the additional effort required to review transactions that are filed with Preliminary Agreements and has determined that permitting filings on barebones agreements lacking sufficient details about key terms is contrary to the overall intent of the HSR Act. When a filing is made, triggering the initial waiting period, staff must start their review of the transaction and decide whether to issue Second Requests within the applicable statutory waiting period (15 or 30 days). If key terms of the transaction have not yet been established, staff may not have sufficient information to determine the potential antitrust risks. Further, if the parties have not yet begun robust negotiations or due diligence, the filing will not contain documents that provide business assessments of the transaction because such assessments have not been made. If the parties have not yet analyzed the impact of the transaction, it is not appropriate for the Agencies to begin such an assessment. This is particularly true if such assessments or negotiations lead the parties to abandon the transaction. In those cases, the Agencies will have needlessly spent scarce resources and may have burdened third parties investigating the transaction. Even if the parties do not abandon their transaction and the reviewing agency issues Second Requests, these investigations are often unnecessarily slowed down by the uncertainty surrounding the deal terms. The Commission understands that filers are anxious to get their HSR review completed so that it does not delay consummation of the transaction. But putting the burden on the Agencies to conduct antitrust assessments prematurely based on Preliminary Agreements that lack specificity undermines the purposes of the HSR Act. In addition, allowing notifications on mere expressions of interest in a future transaction creates opportunities to file as early as possible knowing that early filings put the Agencies at a disadvantage in conducting a thorough review.

Commenters raised concerns that the delay associated with negotiating additional deal terms would cause filers not to pursue beneficial transactions. One commenter claimed that as time is often of the essence in mergers, the result would be a significant chill on mergers. Another commenter contended that the proposal would deter investment in private equity and would increase costs that would likely be passed down to limited partners. Another commenter claimed that the Agencies failed to consider additional costs resulting from the additional delays in the transaction timeline.

The Commission disagrees that requiring more detail about transactions filed on Preliminary Agreements will chill M&A activity generally or for any particular type of investment. First, based on the Commission's review of filings detailed above, most reported transactions already meet the requirements adopted in the final rule. For those that do not, the Commission has identified a specific need for more detail to ensure that the reported transaction is likely to occur so that it is ripe for antitrust review. In addition, Congress identified those transactions where time is of the essence—namely, those that will be accomplished through a cash tender offer—and provided for a very short 15-day initial waiting period. For these transactions, the acquiring person does not need to file any agreement; it merely attests that its intention to make the tender offer has been publicly announced.[326] For other transactions, the Agencies need some basis to know that the reported transaction is one that is likely to occur so that they do not begin an antitrust assessment before fully understanding how the transaction will likely change the premerger market dynamics. In the Commission's experience, when parties cannot reach agreement on a few key terms within their desired timeline to consummate the transaction, that is an indication that the deal is one that is not likely to close or is likely to close on terms that are very different from the ones in the Preliminary Agreements. Finally, while the parties have an interest in starting the 30-day review period as soon as possible so that it does not unnecessarily delay their deal, the Commission has an obligation to review the transaction to determine whether it may violate the antitrust laws, and cannot effectively do so prematurely. The Commission believes that any delay associated with filers complying with the transaction agreement requirements of the final rule is necessary and justified by the benefits to the Agencies and the public in avoiding premature review of reported transactions.

Separate from the concerns about delay, one commenter expressed concerns that, as drafted in the NPRM, the Instruction arguably requires the production of the most recent draft agreement, even if a term sheet was also provided. The final rule requires filers to analyze the executed agreement to determine whether it provides sufficient detail about the transaction. If that document does not, then filers must provide one additional dated document that does sufficiently describe the transaction. The same commenter also questioned the value to the Agencies of receiving the most recent draft agreement, which they state is often slanted to reflect the views of the most recent party to circulate a draft and thus is not necessarily representative of what the definitive agreement will ultimately become. If the most recent draft agreement does not reflect the key terms of the transaction, then some other document, such as a term sheet, should be submitted. Otherwise, as described above, the filing may be premature. Further, the Commission acknowledges that certain provisions of a draft agreement that are not strictly necessary to understanding the antitrust implications of a transaction may change, sometimes substantially, and that the final definitive agreement is the most probative. However, the Commission believes that not permitting

[325] 43 FR 33450, 33511 (July 31, 1978).

[326] 16 CFR 803.5(a)(2).

filing until a definitive agreement has been reached is not necessary and could impose too great a cost due to the associated delays. The Agencies have extensive experience with reviewing draft agreements and find that even they can be probative. So long as the draft agreement and the associated executed agreement comply with the transaction agreement requirements of the final rule, the Commission will accept a supplemental document that is in draft form.

The same commenter suggested revising proposed § 803.5 to change ''will be consummated'' to ''the parties intend to consummate.'' The Commission agrees that this change in wording better captures the requirement for the parties to attest to their good faith intention to proceed with the transaction based on the submitted document and will add the phrase ''the parties intend to consummate'' to § 803.5. The Commission notes, however, that in order to satisfy the Act, parties must file and observe the waiting period for the transaction that will be consummated. Therefore, if there are material changes to the transaction after filing, the parties must continue to notify the Agencies so that they can determine whether an amended or new filing may be required. The Commission thus adopts the proposed requirement to submit a draft agreement or term sheet with the clarifications noted above.

In sum, the Commission has determined that changes to § 803.5 contained in the final rule are necessary and appropriate to prevent the Agencies from reviewing transactions for which the merging parties have not yet reached agreement on key terms. For premerger review to be timely and effective, the Agencies need some assurance that the transaction is likely to occur and that the scope of the transaction is revealed in the transaction documents submitted with the HSR Filing. The Commission has modified the final rule as compared to the proposal for this requirement to reduce the cost and delay for filers as much as practicable.

E. Section 803.8: Translation of Documents

The Commission proposed amending § 803.8 to require submission of English-language translations for all foreign-language documents submitted with the notification. Under § 803.8(a), filers currently do not need to translate these materials for the initial filing, and English-language outlines, summaries, extracts, or verbatim translations need only be provided if they already exist. Section 803.8(b), in contrast, requires that all foreign-language documents responsive to a Second Request be provided with English translations. The Commission proposed combining § 803.8(a) and (b) so that proposed § 803.8 would therefore be one paragraph requiring that verbatim English translations be provided with all foreign-language materials submitted as part of an HSR Filing or in response to a Second Request. The Commission adopts this proposed change with a revision to reduce potential confusion.

As explained in the proposed rule, when the Agencies receive key documents, such as the transaction agreements, relevant financial analyses or transaction-related assessments required by Item 4(c) with no translation at all or with unhelpful English-language outlines, summaries, or extracts, the Agencies are at a significant disadvantage during the very short period provided for initial review. The Commission received several comments on this proposal, principally regarding the burden and overall need for the proposed translation requirement. One commenter supported the proposed change, noting that with the help of modern software the cost of producing English translations should not be burdensome. The Commission agrees. As stated in the proposed rule, the Commission believes that translation tools available to the parties have become more abundant and these tools provide many options for translation that should significantly reduce the cost of providing translations. Moreover, it is important that the parties themselves provide translations because they created the documents at issue. The parties should ensure that translations are faithful to the original documents, a task that the Agencies are unable to complete, as they do not have the context or background to the transaction or companies that would be necessary to identify material errors. The Commission wants to avoid disputes over translations of these complex business documents that the parties have not reviewed.

The Commission notes that not requiring English-language translations from all entities, including foreign entities, under the current rule puts the Agencies at a disadvantage when reviewing HSR Filings with only foreign-language documents. This also creates an advantage for non-U.S. firms (whose materials are most likely to be in a foreign language). If key documents are not translated, the Agencies cannot give the transaction the same level of rigorous review and scrutiny as they do for transactions where all of the documents can be reviewed starting on the first day of the waiting period. Translation requires time that should not be taken from the short period available to the Agencies for the initial review. Time spent translating documents reduces the time available for more critical tasks, such as assessing the antitrust risk of filed transactions.

To understand the potential costs associated with requiring submitted documents to be translated, the Commission examined all HSR filings submitted in FY 2021.[327] Of the 7,002 HSR Filings that year, only 40 contained documents submitted in a language other than English and did not provide a translation. This represents fewer than 0.6 percent of filings that year. While the cost of providing translations may increase the cost of making an HSR Filing for these particular filers, the overall impact of this requirement is limited.

Beyond the issue of increased cost, some comments questioned the need to include translations with HSR Filings, especially for transactions that do not raise competitive concerns. The Commission disagrees that translations of submitted documents are not necessary for the Agencies to complete their analysis or that they are useless to the Agencies. The foreign-language versions of the documents are required by the Rules because they are responsive to specific information requests. As stated in the NPRM, the Agencies receive HSR Filings that contain only foreign-language versions of key materials, such as the transaction agreements submitted in response to current Item 3(b) of the Form, the relevant financials submitted in response to current Item 4(b), and the documents submitted in response to current Items 4(c) and 4(d) of the Form. These are the very documents that allow the Agencies to conduct a preliminary review of HSR Filings for compliance with filing requirements and to determine whether the transaction may violate the antitrust laws. Other filers submit these same types of documents in a form that staff can quickly review. Not being able to review these key materials on the first day of the waiting period puts the Agencies at a material disadvantage during their initial review.

After carefully considering the objections in the comments, the Commission continues to believe requiring translations of foreign-

[327] As noted above in footnote 260, the Agencies selected FY 2021 for this effort because of the large number of reportable transactions that year, 3,520, which provided for a robust data set. For these transactions, there were 7,002 filings, roughly two per transaction. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix B (FY 2021).

language documents with HSR Filings is necessary and appropriate for the Agencies' premerger assessment, and notes that such translations may be especially important for those transactions that report foreign subsidies.[328] Despite the cost to filing parties, translations permit staff to review transactions and determine whether they require further investigation on the basis of the materials contained in the HSR Filing. With this cost in mind, the Commission invited commenters to suggest other alternatives that might achieve the Commission's goal of being able to understand and assess foreign-language documents while lessening the cost for filing parties and received a range of potential modifications to the proposal. One commented suggested that the requirement to provide verbatim translations should be limited to only final documents, not draft versions. As noted in section VI.G.1.b., the Commission has not adopted the proposal to require drafts, so no translations will be required for such documents in connection with the submission of the Form.

Commenters also proposed requiring only general summaries in English in lieu of verbatim translations, or permitting a filing party to produce a better-quality translation within a reasonable time period if the Agencies request them. The Commission acknowledges these suggestions but does not believe either presents a viable alternative to the version of § 803.8 contained in the final rule. General summaries do not provide the Agencies with a complete, detailed picture of the transaction. The Agencies' preliminary analysis of transactions often relies upon a nuanced and thorough reading of documentary attachments, and general summaries may not include facts or descriptions that the Agencies find relevant. The ability to require a better-quality translation within a reasonable time period after the submission of the HSR Filing will mean the Agencies must depend on filing parties to respond; this would likely delay Agency review within the already time-constrained initial waiting period. The time saved by the parties in preparing a summary in lieu of a translation is outweighed by the benefit to the Agencies of having a version of the underlying document available at the beginning of the waiting period.

Given the importance of having translations of key documents, the Commission adopts the proposed changes to § 803.8 but deletes the reference to ''understandable.'' The Commission believes this word is superfluous when used in conjunction with ''accurate and complete'' and may introduce confusion. Section 803.8 does not require any particular method of translation but specifies that, whatever translation method the parties choose, all verbatim translations must be readily understood, materially accurate, and complete. One commenter suggested revising the instructions to state explicitly that the submission of machine translations is acceptable. The Commission declines to state this explicitly and notes that in complying with the requirement to provide translations, parties must certify that translations are materially accurate even if they do not identify how they were created.

In sum, the Commission has determined that the translation requirement contained in the final rule is necessary and appropriate to enable the Agencies to quickly review submitted documents with English translations that have been certified as accurate.

F. Section 803.10: Commencement of Waiting Periods

The Commission proposed amending § 803.10(c)(1)(i) to clarify that filings made electronically are to be credited as received by the Agencies on the date filed if: (i) the electronic submission is complete by 5 p.m. Eastern Time; and (ii) such date is not a Saturday, Sunday, legal public holiday (as defined in 5 U.S.C. 6103(a)), or the observed date of such legal public holiday. This change codifies the current policy, and no comments were received. The Commission adopts this change as proposed.

G. Section 803.12: Information To Be Updated With Refiling

The Commission proposed amending § 803.12(c) to specify what updates would be required to the acquiring person's filing if the acquiring person chose to withdraw its HSR Filing and refile it. This procedure for voluntary withdrawal and refiling permits the acquiring person to restart the initial waiting period, providing the Agencies an additional 15 or 30 days (depending on the transaction type) to review the transaction without issuing a Second Request, as long as certain conditions are met. Currently, the rules require updates to Items 4(a), 4(b), 4(c), and 4(d). The NPRM proposed changes to § 803.12(c) including: eliminating the requirement to provide updated financials, currently required by Items 4(a) and (b); requiring updated Transaction-Related Documents with the updated HSR Filing; requiring updated transaction agreements; and requiring updated information about subsidies from Foreign Entities of Concern. The Commission adopts the proposed change with modifications to reflect ministerial changes to the names of sections of the Form.

The Commission received one comment on this proposal that noted that the proposal would impose a significant additional burden on the merging parties by requiring them to conduct a new search for Transaction-Related Documents with an expanded set of custodians. According to this commenter, it would also discourage the parties' use of pulling and refiling, and divert agency resources away from the review of other reported transactions.

Parties who withdraw and refile under § 803.12(c) must already search for new documents responsive to current Items 4(c) and 4(d). The basic requirement to search for new Transaction-Related Documents remains largely the same with the addition of only a single new custodian (the supervisory deal team lead, as defined) and a clarification that versions sent to any member of the board of directors (or similar body for non-corporate entities) are responsive and should not be treated as draft documents. The search required is a limited one, reaching back at most to the 15 or 30 days since the original filing was made. The Commission notes that these newly created documents and updated agreements are material to the Agencies' evaluation of the transaction and the determination of whether to issue a Second Request. Additionally, a change in information about subsidies may also be material and, until the Agencies have more experience with receiving this information, as required by Congress, parties must also provide updates to this item. The Commission therefore adopts the proposal with changes made to the names of the sections in the Form and Instructions.

VI. Part 803 Appendix A and Appendix B

Below, the Commission describes the changes to the appendices to Part 803, the Form and the Instructions. As discussed in section V.A., the Commission will continue to use the same electronic filing mechanism that has been in place since March 2020. Therefore, the Commission now provides a Form which will be available on the FTC's website in Microsoft Word format to collect the information required by the Instructions. Additionally, as discussed in section V.B., separate forms will be required for

[328] NPRM at 42182–83.

parties that are filing both as acquiring and acquired persons for related transactions. As a result, and to aid parties in understanding which provisions are applicable to acquiring persons and which are applicable to acquired persons, the Commission has now provided separate Instructions and Forms for acquiring and acquired persons. This change has also allowed the Commission to simplify the language of some of the instructions, such as by defining ''target'' to include all acquired entities or assets and eliminating use of phrases such as ''acquiring person or acquired entity as appropriate'' that were included in the draft instructions. Other ministerial changes to aid readability of the Instructions are also noted below.

For ease of reference, the Commission includes the following materials regarding the adopted Instructions and Form:

- An outline of the organization of the Form and Instructions,
- A chart that identifies proposed new locations of the current Items of the Form and Instructions, including whether substantive changes are adopted, and
- A chart of the new categories of required information.

These materials appear immediately below.

Instructions Outline

- General Instructions and Information
- Fee Information
- General Information
- Ultimate Parent Entity Information
  - UPE Details
  - Acquiring Person or Acquired Entity Structure
  - Additional Acquiring Person Information (Acquiring Person Only)
- Transaction Information
  - Parties
  - Transaction Details
  - Transaction Description
  - Additional Transaction Information
  - Joint Ventures (Acquiring Person Only)
  - Business Documents
  - Agreements (Acquiring Person Only)
- Competition Descriptions
  - Overlap Description
  - Supply Relationships Description
- Revenues and Overlaps
  - NAICS Codes
  - Controlled Entity Geographic Overlaps
  - Minority-Held Entity Overlaps
  - Prior Acquisitions
- Additional Information
  - Subsidies from Foreign Entities or Governments of Concern
  - Defense or Intelligence Contracts
  - Voluntary Waivers
- Certification
- Affidavits

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Cross Reference Between Current Form and Final Rule:

Current Form Item	New Location	Substantive Changes?
Fee Information	Fee Information	No
Corrective Filing	General Information	No
Cash Tender Offer	General Information	No
Bankruptcy	General Information	No
Early Termination	General Information	No
Foreign Jurisdictions	Transaction Information/Transactions Subject to International Antitrust Notification	Yes
Item 1(a)	Ultimate Parent Entity Information/UPE Details	No
Item 1(b)	Separate Forms will Identify Acquiring and Acquired Person, No Combined Form	No
Item 1(c)	Ultimate Parent Entity Information/UPE Details	No
Item 1(d)	Ultimate Parent Entity Information/UPE Details	No
Item 1(e)	Ultimate Parent Entity Information/UPE Details	No
Item 1(f)	Transaction Information/Parties	No
Item 1(g)	Ultimate Parent Entity Information/UPE Details	No
Item 1(h)	Ultimate Parent Entity Information/UPE Details	Yes
Item 2(a)	Transaction Information/Parties, Transaction Description	No
Item 2(b)	Transaction Information/Transaction Details	No
Item 2(c)	Transaction Information/Transaction Details (Acquiring Person Only)	No
Item 2(d)	Transaction Information/Transaction Details	No
Item 3(a) (Entities)	Transaction Information/Parties	No
Item 3(a) (Description)	Transaction Information/Transaction Description	Yes
Item 3(b)	Transaction Information/Agreements	Yes
Item 4(a)	Ultimate Parent Entity Information/UPE Details, Acquiring Person or Acquired Entity Structure	Yes (Natural Persons)
Item 4(b)	Ultimate Parent Entity Information/UPE Details, Acquiring Person or Acquired Entity Structure	Yes (Natural Persons)
Item 4(c)	Transaction Information/Business Documents	Yes
Item 4(d)	Transaction Information/Business Documents	No
Item 5(a)	Revenue and Overlaps/NAICS Codes	Yes
Item 5(b)	Transaction Information/Joint Ventures (Acquiring Person Only)	Yes
Item 6(a)	Ultimate Parent Entity Information/Acquiring Person or Acquired Entity Structure	Yes
Item 6(b)	Ultimate Parent Entity Information/UPE Details	Yes
Item 6(c)(i)	Revenue and Overlaps/Minority-Held Entity Overlaps	Yes
Item 6(c)(ii)	Revenue and Overlaps/Minority-Held Entity Overlaps (Acquiring Person Only)	Yes
Item 7(a)-(d)	Revenue and Overlaps/Controlled Entity Geographic Overlaps	Yes
Item 8(a)	Revenue and Overlaps/Prior Acquisitions	Yes

New Requirements and Categories of Information:

New Sections	Location
New Definitions	General Instructions and Information
Translations	General Instructions and Information
Identification of Additional Minority Interest Holders	Ultimate Parent Entity Information/UPE Details
Organization of Controlled Entities	Ultimate Parent Entity Information/Acquiring Person or Acquired Entity Structure
Identification of d/b/a	Passim
Description of Ownership Structure of the Acquiring Entities	Ultimate Parent Entity Information/Additional Acquiring Person Information (Acquiring Person Only)
Organizational Chart for Funds and Master Limited Partnerships (If One Exists)	Ultimate Parent Entity Information/Additional Acquiring Person Information (Acquiring Person Only)
Identification of Certain Officers and Directors	Ultimate Parent Entity Information/Additional Acquiring Person Information (Acquiring Person Only)
Description of the Business of the Acquiring Person	Transaction Information/Transaction Description (Acquiring Person Only)
Identification of Related Transactions	Transaction Information/Transaction Description
Mandatory Disclosure of International Antitrust Notification	Transaction Information/Transaction Description (Acquiring Person Only)
Transaction Rationale	Transaction Information/Additional Transaction Information
Diagram of the Transaction (If One Exists)	Transaction Information/Additional Transaction Information (Acquiring Person Only)
Production of Certain Documents of the Supervisory Deal Team Lead	Transaction Information/Business Documents
Production of Certain Plans and Reports	Transaction Information/Business Documents
Expansion of Transaction Agreements to be Produced	Transaction Information/Agreements
Identification of Other Agreements Between the Parties	Transaction Information/Agreements (Acquiring Person Only)
Description of Overlaps	Competition Descriptions/Overlap Description
Description of Supply Relationships	Competition Descriptions/Supply Relationship Description
Identification of Franchisees with Revenue Overlaps	Revenue and Overlaps/Controlled Entity Geographic Overlaps
Identification of Additional Prior Acquisitions	Revenue and Overlaps/Prior Acquisitions
Disclosure of Subsidies from Foreign Entities or Governments of Concern	Additional Information
Identification of Certain Defense or Intelligence Contracts	Additional Information
Voluntary Waivers for International Competition Authorities	Additional Information
Voluntary Waivers for State Attorneys General	Additional Information
Statement of Penalties for False Statements	Certification

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A. General Instructions and Information

The Commission proposed creating a General Instructions and Information section within the proposed Instructions that largely parallels the General section of the current Instructions but is significantly reorganized and includes a ministerial change to clarify what information is found on the PNO website. Within the proposed General Instructions and Information section, the Commission proposed substantive changes to the following sections: Definitions, Identification of the Filing Person, Responses, and Translations. As discussed below, the Commission adopts some of the changes as proposed, adopts others with modification, and does not adopt others. In addition, in order to effectuate separate, tailored Forms and Instructions for the acquiring and acquired person, and to enhance clarity, the Commission adopts certain ministerial changes discussed below.

1. Definitions and Explanation of Terms

a. Economic Research Service's Commuting Zones

The Commission proposed adding a definition for Economic Research Service's Commuting Zones to facilitate responses to proposed requirements related to labor markets. The Commission received several comments on the Economic Research Service's Commuting Zones, and all cited the burden of this proposal. Many noted that the U.S. Department of Agriculture

has not updated these metrics since 2012, which makes them unreliable as a basis for determining the geographic scope of labor markets. As the Commission is not adopting the information requirements for employees in the final rule (see section VI.I.3.), the Commission does not adopt this definition.

b. Fee Information

The Commission adopts a ministerial change related to this item. As a result of the new fee structure mandated by Congress in the Merger Modernization Act, the fee information description now refers to the adjusted fees and fee tiers.

c. North American Product Classification System Data

The Commission proposed eliminating the reporting of 10-digit North American Product Classification System (''NAPCS'') based codes, and, as a result, proposed deleting the NAPCS definition from the proposed Instructions. The Commission received one comment on the elimination of the NAPCS definition; the comment supported the proposed streamlining of manufacturing revenue reporting. The Commission adopts this change as proposed. See section VI.J.1. for further discussion on the elimination of NAPCS-based codes.

d. Notification Thresholds

The Commission adopts a ministerial change related to this item. Currently, the section entitled ''Thresholds'' discusses filing fee and notification thresholds as a single item. With the fee changes that were enacted in the Merger Modernization Act, these are now separate thresholds. As discussed in section VI.A.1.b., ''Fee Information'' discusses the fee tiers. The definition of ''Notification Thresholds'' now discusses only the notification thresholds that are defined in § 801.1(h).

e. Standard Occupational Classification

The Commission proposed adding a definition for Standard Occupational Classification (''SOC'') codes to facilitate responses to proposed requirements related to labor markets. As the Commission is not adopting information requirements for employees in the final rule that would require reporting on this basis (see section VI.I.3.), the Instructions do not contain a definition for SOC codes.

f. Select 801.30 Transactions

As discussed in section III.C., the Commission received many comments that objected to the burden of the new requirements as proposed. Among the objections were claims that the proposed requirements reached transactions that typically were not investigated by the Agencies, that the burden of the new requirements could slow the pace of some transactions and deter others, and that the burden would fall not just on acquiring persons but on target companies that did not initiate or consent to the transaction. One commenter urged the Commission to exempt from HSR reporting requirements certain transactions that the Agencies rarely challenge, including acquisitions of voting securities that do not transfer control of the target company. The Commission acknowledges these comments, and while it disagrees that there is any category of transaction for which all of the adopted proposals should not apply, it does agree that exempting certain transactions from some of the new requirements will not inhibit the Agencies' ability to understand the transaction and determine that it warrants further investigation. To that end, the Commission limits the amount of information required for the notification of certain transactions subject to § 801.30 that also meet specific conditions.

Section 801.30(a), first promulgated by the Commission in the original rules, defines certain types of transactions in which the consent of the acquired person may not be required.[329] These transactions include acquisitions made on the open market, via tender offers, through the exercise of warrants or options, or through the conversion of non-voting securities. The involvement of the acquired person varies across these transactions. In some instances, such as an investor acquiring voting securities on the open market, the acquired person does not have to agree to the transaction and may not even have knowledge of it. In others, the acquiring and acquired person both assent to the deal. For example, some transactions are effectuated by a tender offer or the acquisition of purchases on the open market or from third parties—making § 801.30 applicable—but are also subject to an agreement between the acquiring and acquired person.

When the agreement of the acquired person is not required in a transaction, the Commission believes that certain requirements of the final rule are unlikely to provide information necessary to determine whether that transaction may violate the antitrust laws. Several commenters agreed that in such transactions the target in particular would not be able to provide the new information required in the final rule in the short time they have to make their filing. Further, in such transactions, the acquired person may not know that it has a filing obligation until the acquiring person has filed and will have limited time to prepare its filing. For this select set of transactions, the Commission has determined that it is not necessary to collect certain information, particularly in light of the costs that would be imposed on these types of filings which often carry low antitrust risk. Therefore, the Commission, adapting suggestions from the comments, introduces and defines the term ''select 801.30 transactions.'' Select 801.30 transactions are those transactions that do not result in the acquisition of control to which § 801.30 applies and where there is no agreement or contemplated agreement between any entity within the acquiring and acquired person. An example of a select 801.30 transaction includes an acquisition of voting securities on the open market via a national exchange by an investor that has no other ties to the issuer and which acquisition does not result in the acquisition of control. Additionally, select 801.30 transactions include acquisitions resulting from a traditional executive compensation arrangement where the executive exercises contractual benefits pursuant to a compensation package to acquire voting securities and nothing more.

In addition to excluding transactions in which there is an agreement between the acquiring and acquired person, the definition of ''select 801.30 transactions'' excludes transactions that would result in the acquiring person obtaining control, as defined by the Rules, of the acquired entity or where the acquiring person has obtained or will obtain certain rights related to the board of directors, general partner, or management company of an entity within the acquired person. These excluded transactions are likely to require a more thorough review for potential antitrust risk, and therefore it is necessary and appropriate for the Agencies to receive some additional information related to them as contemplated in this rulemaking. The Commission uses the term ''select 801.30 transaction'' throughout the discussion below, and transactions that meet the definition will not be required to respond to certain items as part of the Commission's efforts to limit costs to filing parties in response to the comments. See Figure 3.

[329] 16 CFR 801.30(a); *see also* 43 FR 33450, 33483 (July 31, 1978).

g. Supervisory Deal Team Lead

As discussed in section VI.G.1, the Commission proposed that, in addition to requiring documents prepared by or for officers and directors in response to current Item 4(c), filing persons must also submit transaction-related documents prepared by or for supervisory deal team lead(s). This proposal targeted documents authored by or for the person who functionally led the deal team even if not an officer or director. In the Agencies' experience with Second Request responses, these documents often include information that would have been highly relevant to the Agencies' analysis of the transaction during the initial waiting period to determine whether Second Requests should issue and what additional information they should seek. The Commission adopts this definition to limit the proposal to a single individual and provide clarity regarding identification of the appropriate individual.

The proposed rule noted that the identification of any supervisory deal team lead would not be based upon title alone and that this addition would require the filing person to determine the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue. A supervisory deal team lead need not have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in communicating with the individuals, such as officers or directors, who have the authority to authorize the transaction. In the proposal, any such individual(s) might be the leader(s) of an investment committee, tasked with heading the analysis of mergers and acquisitions, or otherwise given supervisory capacity over the flow of information and documents related to transaction.

The Commission received many comments on its proposal to require current 4(c) documents from the supervisory deal team lead(s). Several comments noted that the proposed Instructions do not offer a definition of supervisory deal team lead(s) and that the proposed rule's description of the term was vague, ambiguous, and subjective, leaving filers uncertain which individuals must be searched in addition to officers and directors. One comment stated that the term was neither defined nor self-explanatory, and the proposal's descriptions of what constitutes a supervisory deal team lead(s) offers two separate standards. Yet another comment noted that the description could potentially describe a company's entire corporate development team.

Concerns about the meaning of the term ''supervisory deal team lead'' led a number of commenters to propose a definition. One commenter suggested limiting supervisory deal team lead to the senior most member of the corporate development deal team responsible for driving the strategic vision and assessment of the deal, who would not otherwise qualify as an officer or director. Another commenter suggested it should be the most senior member of a filing party's deal team responsible for the company's strategic vision and who otherwise would not qualify as a director or officer. Also, another commenter offered that supervisory deal team lead(s) should be expressly defined to mean the individual with primary responsibility for supervising the assessment of the transaction, and that it should only be one person.

The Commission acknowledges that a definition of supervisory deal team lead in the Instructions would help filers accurately identify the appropriate individual to be searched for responsive materials. The Commission notes that many of the comments' proposed definitions provided useful contours to help define the term. As discussed above, certain commenters suggested a definition that the relevant individual have responsibility for business strategy associated with the transaction under review. The Commission agrees that centering the definition on the ''primary responsibility'' for the strategic assessment of the deal will help identify the correct individual.

The Commission also agrees that the definition should focus on one supervisory deal team lead to mitigate any confusion or uncertainty raised in the comments about having two or three supervisory deal team leads. As discussed in section VI.G.1., several commenters also raised concerns with the burden associated with collecting documents from additional custodians, particularly if multiple individuals fulfilled that role.

The Commission therefore adopts a new definition for ''supervisory deal team lead'' as the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer. This definition focuses on the one person who oversees the strategic assessment of the transaction and it should mitigate the concerns of some commenters that the term is so vague that it might introduce uncertainty as to when the initial HSR waiting period begins. These commenters explained their concern that Agency staff may become aware of another employee who would better constitute a supervisory deal team lead than the individual selected by the filer and reject the filing. In response to comments that requiring filers to select a supervisory deal team lead will allow the Commission to reject filings, the Agencies will continue to rely on filers to certify to their good faith belief in completing and certifying to the accuracy of the filing, and the Agencies will continue to rely on that good faith. In the situation where the only individuals supervising the strategic assessment of the deal are already either an officer or director, filers can state that this is the case and identify an officer or director as the supervisory deal team lead.

h. Target

For additional clarity in the instructions, the Commission introduces and defines the term ''Target'' as a ministerial change. The target includes all entities and assets to be acquired by the acquiring person from the acquired person and eliminates the need to use the inadvertently confusing phrase ''the acquired entity(s) or assets'' throughout the Instructions. The Commission notes, however, that the Instructions do continue to use ''acquired entity(s)'' in certain instances where a question may not be relevant to the acquisition of assets.

i. Year

As part of the Commission's effort to add more clarity to the Instructions, the Commission makes a ministerial change to the definition of ''most recent year'' found in the definition of ''year'' to make clear that the ''most recent year'' is the most recently completed calendar or fiscal year. This is the current intent of the definition and consistent with the guidance that has been given informally and with how filing persons complete the form and provide information.

2. Filing as an Acquiring and Acquired Person

As discussed in section V.C., the Commission adopts the proposed changes to § 803.2 such that filing persons will be required to submit separate forms when filing as an acquiring and acquired person. Additionally, the Commission has created separate, tailored Forms and Instructions for the Acquiring and Acquired Person. Since filers will choose the appropriate Form for the filing, the Commission adopts the ministerial change to eliminate the question, currently Item 1(c), asking the

filing person to identify whether the filing is being made as an acquiring or acquired person.

3. Responses

In the new Responses section, the Commission proposed setting out the specifics of how filers would provide the information responsive to the proposed new questions. The revisions included eliminating instructions regarding filings made on paper or DVD, see above at section IV.A; the Commission adopts these changes as proposed. The proposed responses section also described the information that filing persons would need to provide in a log of responsive documents and descriptive responses to be submitted with an HSR Filing. This information would have generally been the same as the information currently required for documents submitted in response to Items 4(c) and 4(d) of the current Form, with two proposed expansions. The first would have required the filing person to identify the request(s) to which the document would be responsive. The second would have required the identification of the individual within the acquiring or acquired person who supervised the preparation of documents prepared by third parties, or for whom the document was prepared. The Commission adopts the proposal with modifications to reflect the layout of the Form and to reduce the burden for transactions that do not have either a NAICS overlap, see section VI.J., or overlap or supply relationship identified in the Competition Descriptions, see section VI. I.

The Commission received two comments regarding the new Responses section, both of which focused on the proposed requirement for filing persons to provide the name, title, and company of the individuals within the filing person who supervised the preparation of third-party documents or for whom the documents were prepared. One commenter expressed concern that the proposal could put certain fund employees at risk of violating their nondisclosure agreements with target companies. Another commenter noted that there is minimal if any value to the Agencies having this information for every single reportable transaction, but collecting and filing a comprehensive list of all the people who may have supervised the creation of these documents will require many hours of work.

The Commission acknowledges the cost but disagrees that this information is not valuable or informative. In the Agencies' experience, knowing the authors of documents assists in the evaluation of the documents as well as any subsequent investigation by providing context regarding who was involved in the preparation of the document. Currently, the Agencies do not receive this context for documents prepared by third parties. Therefore, for documents prepared by third parties, such as consultants or bankers, the Commission adopts the proposal for the filing person to identify the individual or individuals who supervised the production of such documents, or for whom the document was prepared. This information will not be required for documents that were provided to the parties without solicitation, or for documents provided to the acquiring or acquired person by the other party.

As part of the Commission's overall effort to reduce the burden on filing parties, the Commission has revised the proposal to only require authors (or the individuals that supervise the creation of documents) for filings in which there are NAICS overlaps, or overlaps or supply relationships identified in the Competition Descriptions. For those transactions where such an overlap or supply relationship has been identified, filers will be required to provide the same author information as is currently required for documents responsive to Items 4(c) and 4(d), as well as the individuals within the filing person who supervised the preparation of third-party documents or for whom the documents were prepared. The Commission notes that these third-party documents are already required. The additional information is related to the identification of the individuals within the acquiring or acquired person, so no new non-disclosure risks should result from the requirement. Finally, because the Form requires identification of the file name for each document submitted, the ''Responses'' section does not require a document log. A privilege log will still be required.

4. Translations

As noted in section V.E., the Commission amends § 803.8 to require the filing person to submit English translations of all foreign-language documents. The Instructions also reflect this change.

5. Non-Compliance

While the Commission does not make any changes to the explanation of ''non-compliance,'' it does emphasize that if the filer is unable to answer any question fully, it is required to provide the information that is available and provide a statement of reasons for non-compliance consistent with § 803.3 and as permitted by the HSR Act.[330] Further, where exact answers cannot be given, filers are allowed to enter best estimates, while indicating the source or basis of the estimate and marking the information with the notation ''est'' for any item where data are estimated. The Commission routinely accepts filings and commences waiting periods for filings that avail themselves of this procedure. For example, publicly traded filers are often unable to identify with certainty their minority shareholders, and instead provide information that has been filed with the SEC. The Commission did not propose any changes to this Instruction and does not change it now.

B. Fee Information

Although the Commission proposed moving the filing fee information to the Transaction Information section of the proposed Instructions, in the final Form and Instructions, filing fee information will instead be collected in its own section. The Form also includes new areas for filing persons to indicate whether the fee is being paid by more than one entity, and if so, how much each entity will pay. Additionally, the Commission adopts a ministerial change to eliminate the need to provide Taxpayer Identification or Social Security Numbers and the name of the institution, such as the bank, from which the fee will be paid. The Commission has determined that it no longer needs this information to identify filing fees, and parties therefore no longer need to provide it.

C. General Information

The General Information section of the Form and Instructions requires filing persons to indicate whether the transaction is a post-consummation filing, cash tender offer, or bankruptcy, and whether early termination of the transaction is requested—information that is currently collected on the first page of the Form. The Commission did not propose and does not adopt any material changes to these items.

D. Ultimate Parent Entity Information

1. UPE Details

The UPE Details section of the Form and Instructions requires information about the UPE of the acquiring or acquired person, including contact information, financial documents, and information about certain minority shareholders or interest holders. Much of this information is currently required by Items 1, 4(a) and (b), and 6(b). The Commission proposed (1) requiring

[330] 15 U.S.C. 18a(b)(1)(A)(ii).

contact information for the individual to whom Second Requests should be sent; (2) clarifying the instructions related to the provision of financial documents for natural person UPEs; (3) requiring filers to stipulate that the appropriate size of person threshold is met, if applicable; (4) identifying additional minority holders of entities within the acquiring person; and (5) reducing the types of minority holders of the acquired entity that must be reported. As discussed below, the Commission adopts some of these proposals without change and some with modification.

a. Contact Information

The Commission proposed that all filers, not just foreign filers, must identify the individual to whom Second Requests should be addressed. The Commission received no comments on this change and adopts it as proposed.

b. Annual Report and Audit Reports of the UPEs

This section requires information currently required by Items 4(a) and 4(b) as it pertains to the UPE of the acquiring or acquired person. Annual and audit reports of other entities within the acquiring and acquired person are required by the Acquiring and Acquired Person Structure section, as discussed in section VI.D.2.b. The Commission proposed clarifying the current instructions regarding which annual reports and audit reports are required from natural person UPEs. The Commission makes no change to the instruction that natural person UPEs should not produce any personal balance sheets or tax returns. Since natural persons should not provide personal financial information, no information should be provided in the UPE section. The Commission did not propose and does not make any change to the annual or audit reports required of the UPE of the acquiring or acquired person.

The Commission did propose clarifications regarding what other annual and audit reports entities within the same person as natural person UPEs must provide. This proposed clarification is discussed in section VI.D.2.b.

c. Size of Person Stipulation

The Commission proposed adding an item on the Form that would allow filers to stipulate that the size of person test is met (at the appropriate dollar amount) or indicate that the size of person test is not applicable. The Commission received no comments on this change and adopts it as proposed.

d. Minority Shareholders or Interest Holders

The Commission proposed a Minority Shareholders or Interest Holders section to require identification of minority interest holders of certain entities within the acquiring person and the acquired entities. Currently, Item 6(b) requires acquiring persons to identify minority holders of 5% or more but less than 50% of the acquiring entity and the UPE of the acquiring person (or, for natural person UPEs, the highest-level entities they control). Acquired persons are required to report such minority holders of the acquired entity. For UPEs of the acquiring person, acquiring entities, and acquired entities that are limited partnerships, only disclosure of the general partner is currently required.

The Commission proposed several changes to require additional information about the identity of minority holders, as well as identification of additional minority interest holders by the acquiring person, but potentially fewer by the acquired person. First, the Commission proposed requiring disclosure of the ''doing business as'' or ''street name'' of minority investors that are related to a master limited partnership, fund, investment group, or similar entity. Second, the Commission proposed to expand the entities for which the acquiring person must identify certain minority interest holders to include entities related to the acquiring entity. Third, the Commission proposed requiring the identification of certain minority holders of limited partnerships, rather than just the general partner. Finally, the Commission proposed limiting the minority interest holders that acquired persons would need to identify. The Commission adopts the first two proposals without change but modifies the limited partners that need to be identified, as discussed below.

(i) Provision of ''Doing Business As'' or ''Street Names''

First, the Commission proposed that the acquiring person provide the doing business as or ''street name'' of minority investors that are related to master limited partnerships, funds, or investment groups. The Commission did not receive comments on this specific proposal but did receive comments to similar proposed requirements in other areas of the Instructions. Objections in these other sections generally focused on the lookback period and the burden of searching for all names that were potentially used by a business. In this section, the Commission did not propose a lookback period, but instead proposed requiring only the current name of the related master limited partnership, fund, investment group, or similar entity.

The Commission continues to believe that this information should not be costly for filers. In many cases, communication between the acquiring person and the investor will include this information. For example, though the minority investor may be RANDOMNAME, LLC, the acquiring person regularly communicates with INVESTMENT GROUP and sends information related to the investment in care of that business. However, if this information is not known to the acquiring person, it can so note in a statement of non-compliance.

The task of screening transactions for potential competitive effects is stymied when filers provide only legal names, which are often unrelated to the name by which the public knows the business. Knowing the d/b/a or street name of the entities involved in the transaction allows staff to use public resources to gather additional information, for example through internet searches or look-ups using commercial services relied on by the Agencies to provide industry data. Because of the value to the screening process, the Commission adopts this requirement as proposed.

(ii) Identification of Additional Minority Investors in the Acquiring Person

The Commission next proposed two changes that could increase the number of minority investors the acquiring person would need to identify: First, it proposed that the acquiring person be required to report holders of 5% or more but less than 50% of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction. Second, it proposed that filing persons report holders of 5% or more but less than 50% of limited partnerships, in addition to the general partner.[331]

Comments on these two proposed changes were similar and often intertwined. One commenter urged the Agencies to collect the proposed new information and stated that the ownership structure resulting from the

[331] This change also relieved natural person UPEs from the obligation to identify minority shareholders of all top-level entities, instead only requiring identification for entities related to the transaction.

transaction may change the parties' incentives to compete, enhance the acquirer's ability to influence decision making through changes in voting interests or governance rights, or facilitate the sharing of competitively sensitive information between rivals. Two others also supported the proposal, with each noting the various potential anticompetitive impacts of minority interests. Specifically, one commenter stated that these new requirements would address complex corporate structures, which may obscure potentially significant relationships. The other commenter also supported providing more information about shareholders, particularly since the current Form and Instructions can treat portfolio companies of private equity funds as independent from each other and their management companies.

Broadly, critics of these proposed changes expressed concerns about the burden of collecting the requested information. Additional criticisms included objections to the five percent threshold for identification, with commenters stating that the interests of such minority investors may be wholly unrelated to the notified transaction, or less likely to result in a substantial lessening of competition. Concerns were also raised about confidentiality and disclosure, noting the Commission's prior consideration of the fact that the identity and investment level of limited partners is often highly confidential when it decided in 2011 not to require disclosure of limited partners. Commenters further speculated that requirements to disclose the identity of additional minority investors could create a chilling effect on fundraising and deals. Finally, commenters stated that such a decrease in fundraising and deal volume could affect smaller businesses, pension plans, endowments, charitable foundations, and activist investors, among others. Each of these objections is discussed below.

(a) Identification of Minority Holders of Additional Entities

Regarding the first proposal to expand the entities for which minority holders must be identified, the Commission notes that until 2011 acquiring persons were required to report minority holders of 5% or more for all corporate entities within the acquiring person that had assets of $10 million or greater. As part of the 2011 rulemaking, the Commission determined that this broad requirement, which could reach entities within the acquiring person that had no nexus to the reported transaction, was not essential to an initial review of the transaction.[332] Through this change, the Commission expanded the requirement to include identification of minority holders of non-corporate entities, but it limited the obligation for the acquiring person to the identification of minority holders of only the acquiring UPE and the acquiring entity. As a result, the Agencies receive information about what entities have a ''seat at the table'' in the case of very simple corporate structures where the acquiring person UPE directly controls the acquiring entity without any intermediary entities, or where intermediary entities are wholly owned by the acquiring person, without the acquiring person providing information about entities unrelated to the transaction.

Since 2011, however, the Commission has learned through experience that many acquiring persons have more complex structures that include many entities between the UPE and acquiring entity that are not wholly owned but that are related to the acquiring entity. For example, ''A'' plans to acquire a target and will bring in ''B'' as a co-investor. The UPE of ''A'' creates (or already has) a number of intermediary entities within its person to effectuate the transaction. ''B'' does not invest in either the UPE of ''A'' or the entity that will make the acquisition, but rather in one of these intermediary entities. Currently, as illustrated in Figures 4 and 5a, when ''A'' makes its filing, it is not required to disclose the co-investment of ''B'' so long as the investment is below 50%. The current focus on just the UPE and the acquiring entity deprives the Agencies of key information about individuals and entities that may have influence, or even management or operational oversight, over entities related to the transaction and could make or influence competitively important decisions post-acquisition.

[332] 75 FR 57110, 57118 (Sept. 17, 2010); 76 FR 42471, 42472 (July 19, 2011).

Figure 4: Current Rules Only Requires Disclosure of Minority Holders (or General Partner) of A

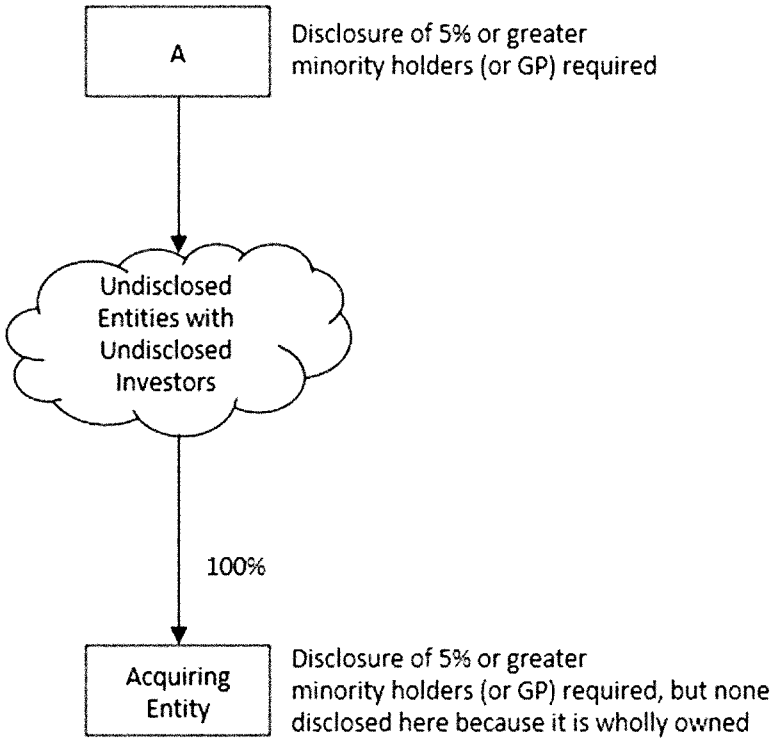
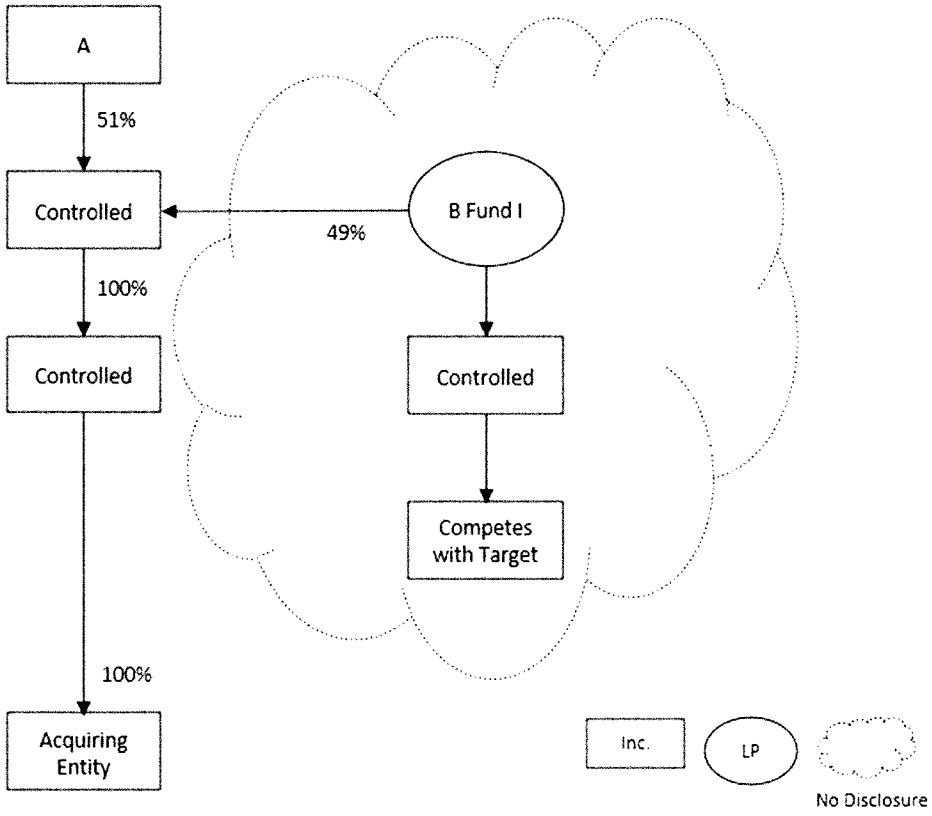
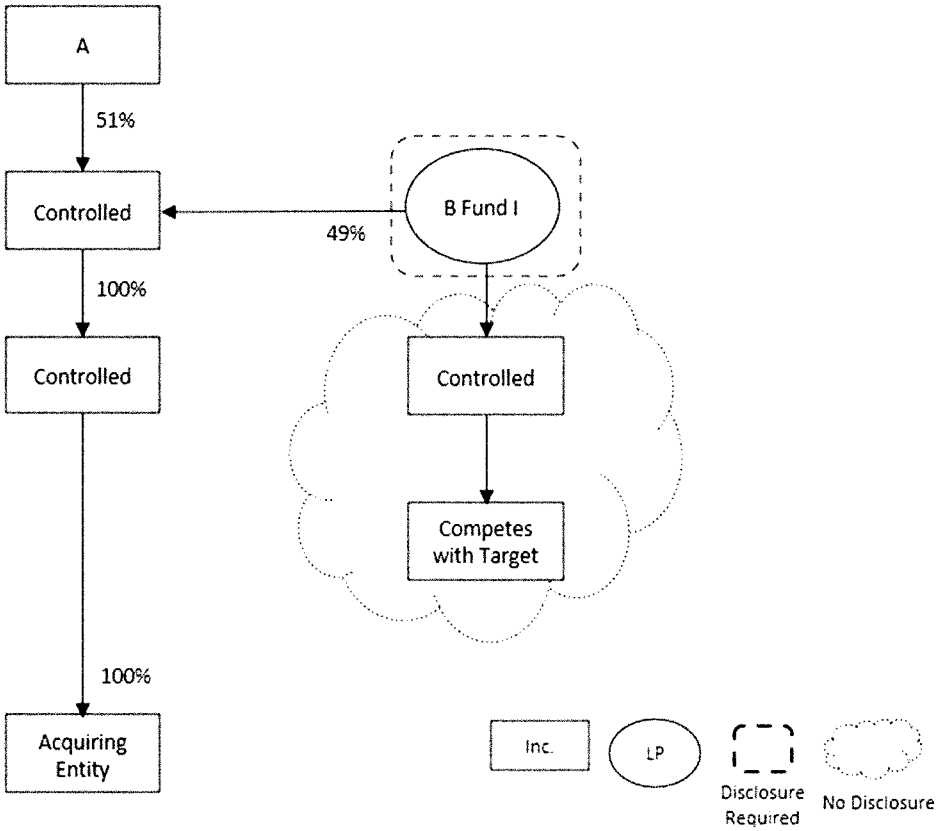


Figure 5a: Current Rules Do Not Require Disclosure of B Fund as a Co-Investor in the Acquisition; No Ability for Agencies to Know to Research B Fund's Other Holdings



As discussed in section II.B.1., and illustrated in Figure 5a, individuals or entities that have significant rights or holdings in entities related to the acquiring entity may also take active positions in or exert control over competitively significant businesses, including competitors, and the disclosure of these relationships could surface antitrust risks that require the Agencies' attention during the initial antitrust review. Because information that reveals whether there are existing investment relationships between the acquiring person and the target is necessary and appropriate for the Agencies' initial antitrust review, the Commission adopts this change as proposed. As a result, as shown in Figure 5b, the Agencies will receive the information necessary to determine whether the acquisition of the target by the acquiring entity may violate the antitrust laws.

Figure 5b: Final Rules Require Disclosure of B Fund; Agencies Know to Research B Fund's Other Holdings



In objecting to these proposals, commenters stated that identification of these additional minority holders would be burdensome. The Commission notes that, rather than merely reviving an expansive requirement to disclose all the minority investors of entities within the acquiring person, it proposed a more tailored instruction to require disclosure only of the entities related to the transaction. Given this limitation and the information gaps caused by vast changes to the M&A landscape discussed in section II.B.1., the Commission believes that the identification of the minority holders of the entities that are related to the transaction is necessary and appropriate and should be contained in an HSR Filing. Further, if the acquiring person does not have knowledge of the identity of the minority investors, it can so indicate and explain, just as acquiring persons currently do when the minority investors of the UPE or acquiring entity are unknown.[333] For example, acquiring persons that have publicly traded UPEs routinely note that they do not have information about minority holders beyond what is reported to the SEC.

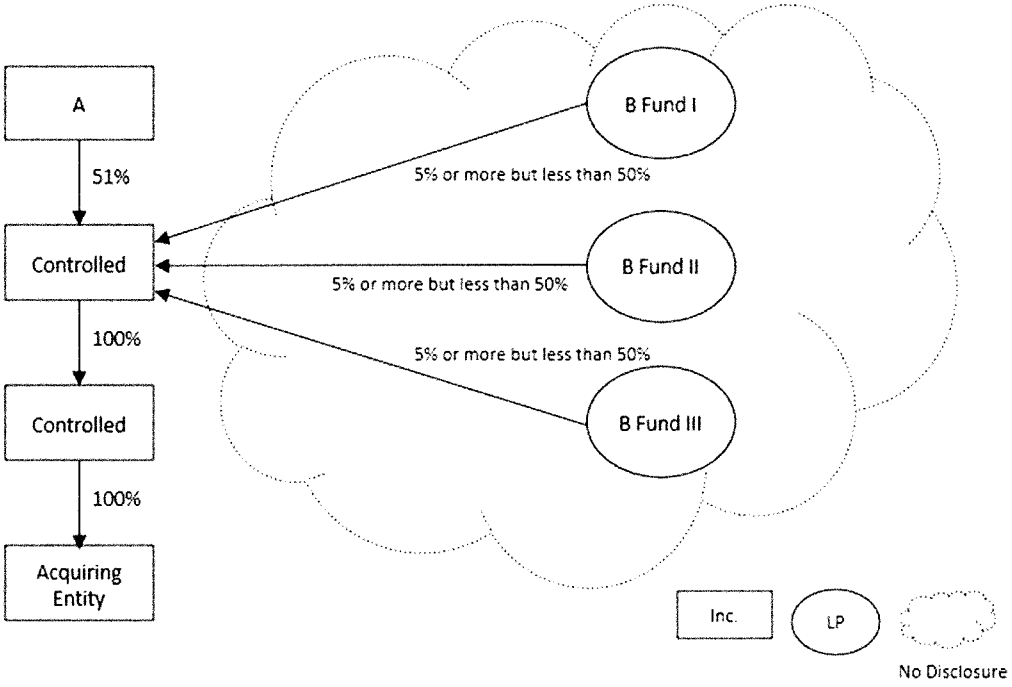
One commentor stated that the ''direct or indirect'' and ''control or controlled by'' language was broad and would require substantial time and resources to navigate. The Commission disagrees and notes that this requirement does not require a broad analysis of various theories of control but rather requires a determination of ''control'' as defined by § 801.1(b). The proposed instruction stated that the controlling relationship can be either direct or indirect to make clear that the requirement was not limited to entities just one level above or below the acquiring entity. For example, in a common scenario involving multiple shell entities, the acquiring UPE controls an intermediary entity that controls an intermediary entity that controls the acquiring entity, as shown in Figure 6a below. The Instructions contained in the final rule require disclosure of minority holders of five percent or more of each of those intermediary entities, subject to the limitations on disclosure of limited partners discussed below in section VI.D.1d.ii., as shown in Figure 6b. Control is a long-standing concept in the Rules, and the determination of control in this context is consistent with control determinations that filers need to make for a variety of items currently included in the Form and Instructions.

The Commission received suggestions to change the existing five percent threshold but declines to adopt this change. Because of the complexity of investment structures, minority investors with even low equity stakes can have formal rights to direct or influence the strategic decisions of the company, informal channels to exert influence, or the right to obtain sensitive business information about the entity in which they are invested. Further, as illustrated in Figures 6a and 6b, investment groups may be broken up

[333] See also the discussion of non-compliance in section VI.A.5.

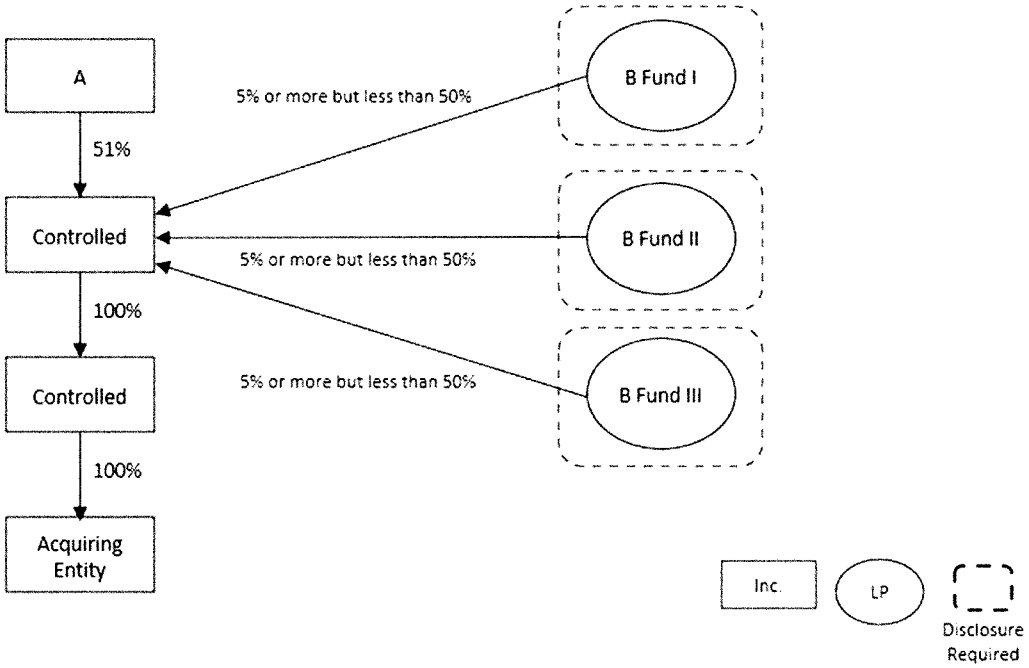
across multiple entities that are, for HSR purposes, separate persons.[334] These types of organizations can take active positions in multiple companies in the same or related industry, a trend that the Commission and commenters have observed. As a result, the Agencies need to know who these investors are in order to determine whether the acquiring person has connections to the target's business that could have competitive effects.

Figure 6a: A Single Investment Group May Divide Its Investment; Current Rules Do Not Require Disclosure if Investments Are Not Made in A or Acquiring Entity



[334] In 2020, the Commission proposed changing the HSR Rules to require aggregation of such interests when determining whether a filing must be made. 85 FR 77053 (Dec. 1, 2020). The Commission has not adopted any of those proposals. This more modest proposal to identify minority shareholders does not create any new obligations to file but does provide the Agencies with the identity of funds and other investors that hold, or will hold, interests in entities related to the acquiring entity through multiple HSR persons, allowing for further investigation as warranted.

Figure 6b: Final Rules Require Disclosure Regardless of the Entity In Which B Fund Invests



The Commission disagrees with the commenters' assertions that this information is not necessary to assess the competitive effects of the filed for transaction and is beyond the authority of the Commission. As discussed in section II.B.1., that analysis requires the Agencies to understand the scope of the acquiring person's involvement in the business of the target. Minority holders of entities within the acquiring person that are related to the acquiring entity may have the ability to influence decision-making of the acquiring entity and target post-acquisition. Therefore, they are functionally ''in the deal'' and their existing business relationships are relevant to a thorough antitrust analysis of the transaction. The increasing complexity of corporate structures and investment vehicles has increased the number of transactions with these types of minority interest holders, and the Commission has determined that the Agencies need to update the information requirements to keep pace with these changes.

The Commission finds the additional critiques of the proposal unpersuasive as well. The Commission addresses arguments about chilling deal volume and investment levels in section III.C.2. above. As to commenters opposing this particular change to the Instructions, the Commission is unaware of any evidence that fundraising or deal volume was negatively affected during the period prior to 2011 when HSR rules required broader disclosure of minority investors, nor that such activity increased when the requirement was dropped. Given the many other factors that influence the level of investment and M&A activity generally, the Commission believes it is unlikely that the disclosure of minority holdings in parties involved in reportable transactions has any measurable effect on dealmaking or investment levels.

Further, commenters objecting to the Agencies' need for identification of additional minority interest holders also offered contradictory critiques, with some stating that the Commission did not identify transactions where the minority interest holders were relevant to the competition analysis, and others stating the fact that the Commission offered two examples demonstrated that the current Form and Instructions provided the Agencies with sufficient information. First, cases cited in the NPRM provide examples of enforcement actions brought by the Agencies on various legal theories and fact patterns and do not necessarily reflect cases that were discovered through the HSR process. Second, the need for this information is obvious and its relevance plain: the Agencies need to know who will be making decisions for the combined entity post-acquisition. For example, the hypotheticals discussed above demonstrate that existing information gaps in the current Form leave the Agencies without enough information to even know to ask additional questions about additional individuals and entities within ''A.'' In the hypotheticals above, ''B'' could hold up to a 49.9% stake in an entity related to the transaction and functionally jointly control the acquiring entity along with ''A.'' Or ''B'' could hold only 5% but have ancillary rights or outsized influence over the operations of the acquiring entity (and thus the target after consummation). Or ''B'' could be its own person for HSR purposes, but one of several related entities that each has a minority interest that, when aggregated, account for a significant, or even majority, stake in the acquiring entity. In any of these scenarios, as well as many others, the identity of the minority interest holder would be critical to understanding the competitive implications of the transaction. Though the filing requirement falls on ''A,'' ''B'' has a seat at the table, and the Agencies must be able to investigate whether ''B'' has ties

to the business of the target. If the Agencies are not alerted to the existence of ''B'' on the Form, there is no ability to screen for potential issues that arise from ''B's'' involvement in both the acquiring entity and, upon consummation, the target.

Regarding concerns about privacy, the Commission notes that the contents of HSR filings are confidential.[335] Unlike requirements for disclosure made by private parties or government rules promulgated to require public disclosure, information included in HSR filings is protected by statute. Additionally, disclosure of minority investors, other than limited partners, which are discussed below, is already required by the current Form. The proposal to require identification of additional minority investors, including some limited partners, is an incremental expansion of what is currently required (and for corporate entities, less than what was required under the HSR Rules from 1978 to 2011). Additionally, the Agencies often require disclosure of an even broader group of minority investors, including limited partners, in response to a Second Request, as discussed in more detail below. The proposed requirements, therefore, did not introduce any new privacy concerns, and commenters did not offer any evidence that the current disclosure rules have created any substantive issues related to privacy.

The Commission further notes that the proposed requirements do not require the acquiring person to ask the minority investors for any information. Therefore, completion of the Form itself should impose no burden on the minority investors themselves. Only if the identity of the minority investor reveals a competitively relevant connection and an investigation is opened would the investor potentially have any cost. These costs are not imposed by the information requirements of Form and Instructions but rather by a potential investigation or enforcement action for a violation of the antitrust laws. Disclosure of an existing business or financial relationship in an entity that is engaging in an HSR-reportable transaction is not an improper burden and allows the Agencies to fulfill their statutory mandate to scrutinize every filing to determine whether it may violate the antitrust laws.

(b) Identification of Limited Partners

In addition to increasing the number of entities for which minority shareholders would need to be identified, the Commission also proposed requiring the identification of minority investors of limited partnerships that held 5% or more, in addition to the general partner. Filing persons are currently only required to identify the general partners of limited partnerships, but not limited partners, regardless of the percentage held. After considering the comments received regarding this proposal, the Commission adopts a modified requirement to identify only the general partner and limited partners that have certain rights related to the board of directors (or similar bodies) of entities related to the acquiring entity.

The current requirement to identify only the general partner of limited partnerships, and not its minority investors, was based on the understanding that limited partners had no control over the operations of the fund or portfolio companies.[336] As discussed above and in section II.B.1., the operations and investments of limited partnerships and limited partners cannot be easily generalized. Though some argue that limited partners may have limited influence over investment or operational decisions, this is not universally true. Limited partnerships often file for acquisition of control of entities. Investment groups, which utilize limited partnerships, often make investments in specific industries, leaving open the possibility that there is a competitive relationship between these investments and the target of the filed-for transaction.

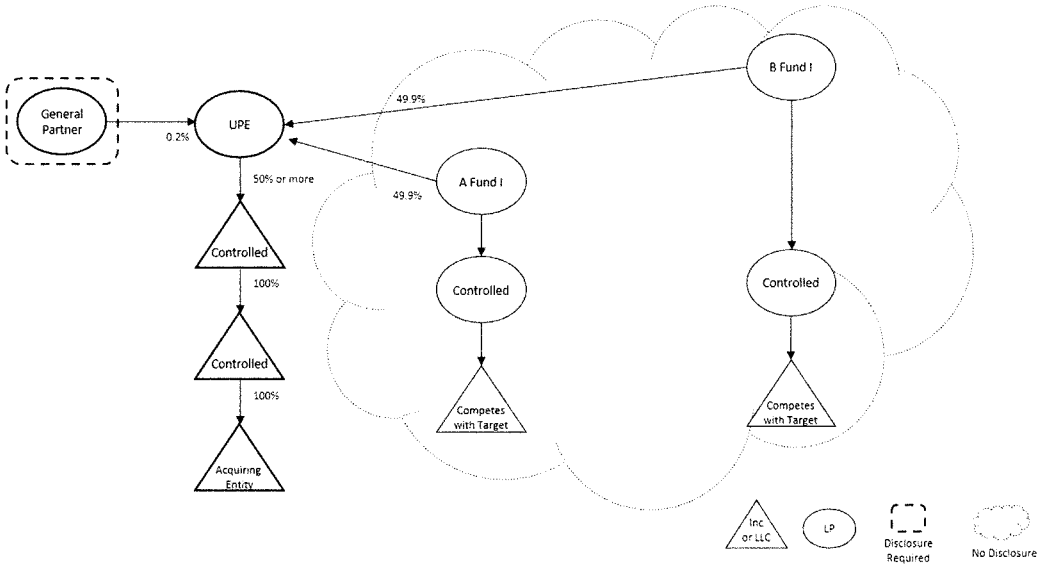
Further, the Commission has learned through its work that limited partnerships are not exclusively used as vehicles for diffuse groups of passive investors to invest their capital. Instead, some limited partnerships function as aggregation vehicles that allow private equity or other investor groups to direct the strategic business decisions of the portfolio companies in which they invest. The decision to organize as a limited partnership rather than an LLC or incorporated entity may be driven not by how the entity will function in the marketplace but by other factors, such as tax and liability.

The scenario in Figure 7a illustrates how the current Form and Instructions' lack of information about limited partnerships can affect a preliminary antitrust assessment. ''A'' and ''B'' form a new limited partnership that will be an acquiring person. ''A'' and ''B'' will each hold 49.9% of this entity and will have rights related to the board (or similar bodies) of entities related to the transaction. The remaining 0.2% will be held by the general partner. Pursuant to the current Instructions, this newly formed acquiring person would not be required to provide any information other than the name and address of its general partner when making a filing for a reportable transaction.

[335] 15 U.S.C. 18a(h).

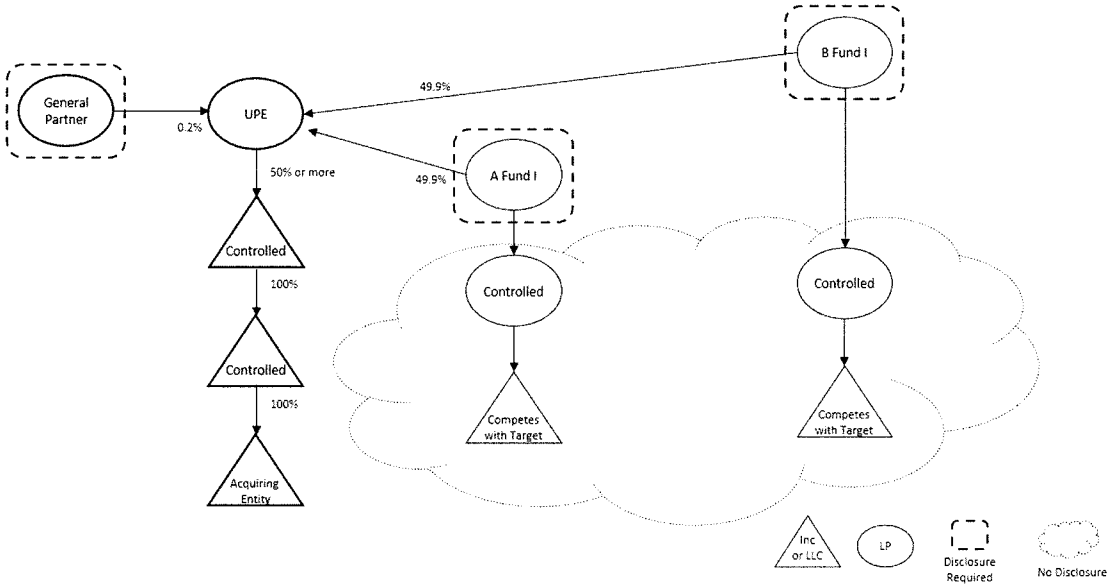
[336] 75 FR 57110, 57118 (Sept. 17, 2010) (proposed rule), *adopted* 76 FR 42471 (July 19, 2011).

Figure 7a: Current Rules Only Require UPE to Disclose Name and Address of Its General Partner; No Disclosure that A and B are Functional Buyers of Target



Compounding the difficulty in understanding the scope of the acquiring person's relationships, A Investment Group and B Investment Group may have used a code name for the transaction, such as ''Project Alpha,'' and also used that code name to name the newly created entity. In this scenario, the Agencies could receive a filing from Alpha Fund, L.P., that only discloses that it has a general partner, Alpha GP, L.P. There is no requirement that Alpha Fund, L.P. disclose that A Investment Group and B Investment Group each hold nearly 50% and will effectively co-own and manage the target after consummation. A Fund I or B Fund I could be head-to-head competitors of the target (or control competitors of the target) or have some other competitively significant relationship with the target. But the current Form would not make the Agencies aware of their significant stake in Alpha Fund, L.P. As shown in Figure 7b, the final rules address this by requiring the identification of A Fund I and B Fund I (and their affiliations with A Investment Group and B Investment Group, if known to UPE), allowing the Agencies to research whether the transaction may violate the antitrust laws.

Figure 7b: Final Rules Require UPE to Disclose Name and Address of Its General Partner and the Investment of A Fund I and B Fund I; Agencies Know to Research Holdings of A and B

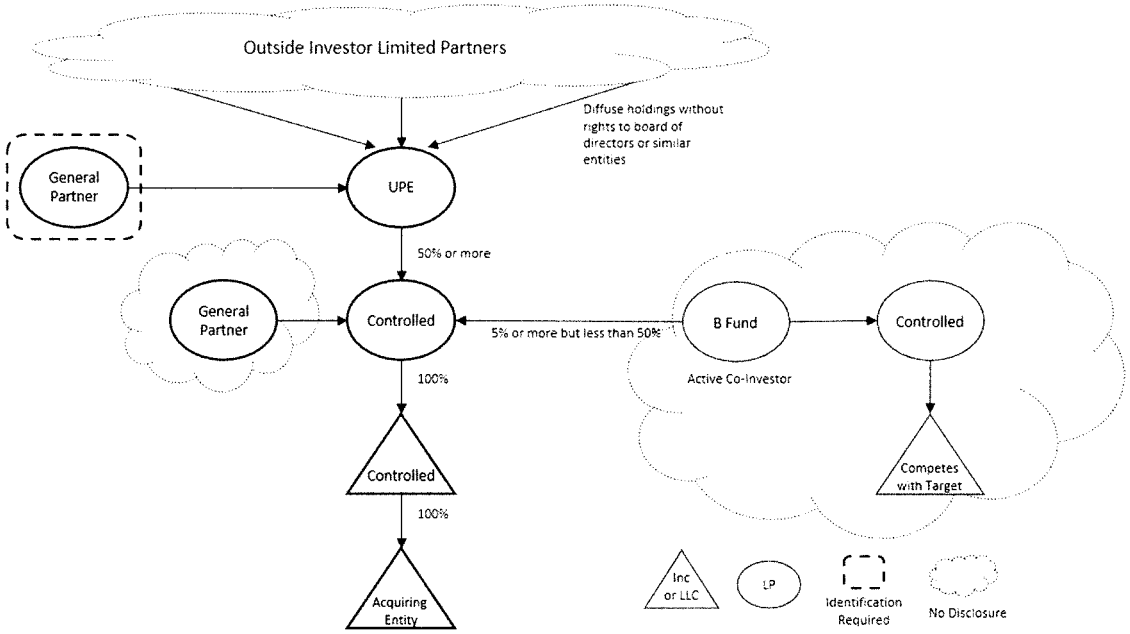


The Commission notes, as did one commenter, that in some instances the Agencies may receive some disclosure through the reporting of associate overlaps in current Items 6(c)(ii) or 7(b)(ii) and 7(d). However, many

investment groups are set up such that the associate definition, which focuses on entities, does not apply, even though the same individuals may be managing multiple funds. The Commission considered changing the definition of associates but determined that, at this time, it would be less complex and less burdensome on filers to merely require the identification of certain limited partners, which the Commission believes will allow the Agencies to use other sources to conduct a preliminary assessment of the competitive implication of these minority holders. If this proves to be insufficient, the Commission may revisit the requirements in future rulemakings.

Despite the need for identification of some limited partners, the Commission understands that there are still many limited partners who are essentially ''silent'' investors that do not participate in management decisions. They hold only financial interests for the purpose of earning a return on their investment and do not hold additional rights or participate in the governance or business operations of the limited partnership or the investments of the limited partnership. Therefore, the Commission adopts an incremental change for the identification of limited partners, implementing in part the suggestion of one commenter to require only limited partners that have certain rights related to the board of directors or similar bodies of entities related to the acquiring entity.[337] The hypothetical in Figure 8a shows a structure where the UPE of the acquiring person is a limited partnership in which its limited partners do not have any rights related to the board of directors or similar bodies of any of the UPE, Acquiring Entity, or either of the two Controlled entities between them. Additionally, UPE controls a limited partnership in which B Fund, an active co-investor for the transaction, has made its investment. Currently, UPE is only required to disclose its general partner.

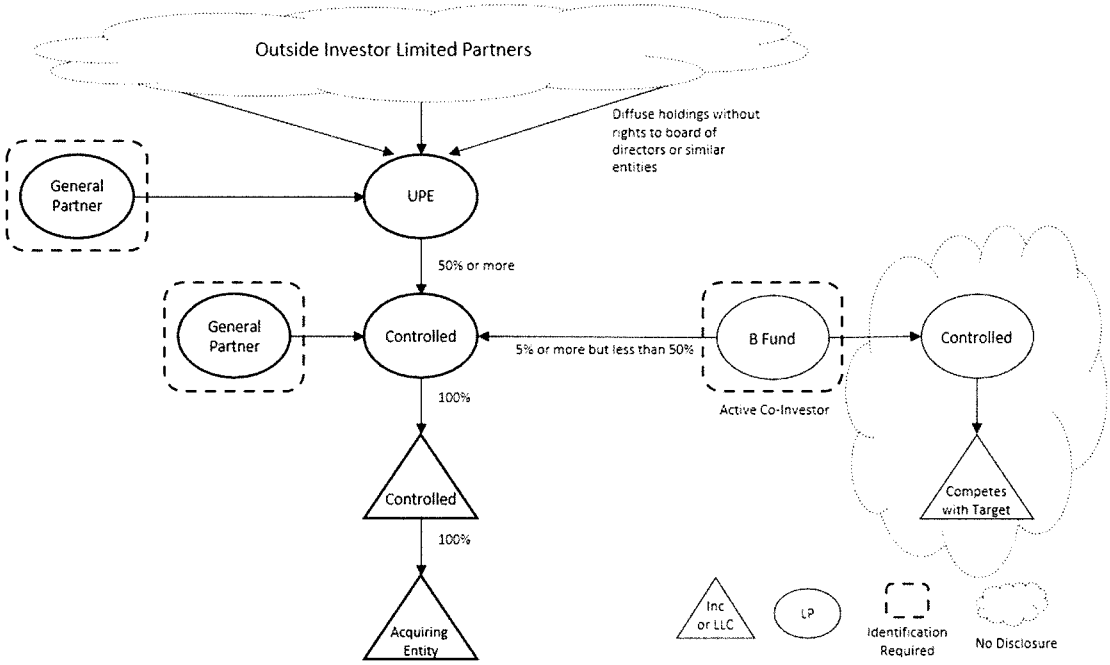
Figure 8a: Current Rules Only Require UPE to Disclose the Name and Address of Its General Partner



As shown in Figure 8b, the final rules would not require the disclosure of the ''Outside Investor Limited Partners'' because none has any rights to the board or similar body of an entity related to the acquiring entity. In contrast, UPE would need to disclose that B Fund is a limited partner of the Controlled entity as well as the general partners of UPE and Controlled LP.

[337] Comment of Dechert, Doc. No. FTC–2023–0040–0659 at 11 (commenting that it is not clear why a broad requirement to disclose all limited partners who hold interests of five percent or more is necessary to identify a potential competitive concern irrespective of such limited partners' ability or inability to participate in the management or control of the applicable fund, general partner, or acquired business).

Figure 8b: Final Rules Require UPE to Disclose General Partners and its Active Co-Investor (B Fund) But Not Passive Limited Partners or the Holdings of B Fund



In the Commission's experience, competitive concerns that arise from limited partners holding interests in the acquiring person most frequently stem from those limited partnerships that act as vehicles for investor groups to manage, direct, or influence the portfolio companies in which they invest. The Commission has determined that it is not necessary to know the names of limited partners that do not also have certain management rights and the final rule does not require disclosure of their minority interests.

The Commission expects that this modification will address concerns of commenters that disclosing limited partners would require investment firms to renegotiate agreements with limited partners. As discussed above, there is no restriction on the Agencies' ability to require disclosure of the identity of limited partners today during an in-depth investigation of the transaction. As a result, limited partners should be aware that their holdings may be relevant to an antitrust review of any transaction involving one of their investments. Indeed, the Commission has brought enforcement actions against acquisitions involving minority holdings of limited partners in competing businesses.[338] As the agencies charged with enforcing the antitrust laws, the Agencies have the authority to investigate the commercial dealings of limited partners for potential law violations regardless of any private agreements that promise non-disclosure. Therefore, any deficiency in agreements to permit disclosure to government agencies already exists. Further, if disclosure is the source of the Agencies' being made aware of a potential competitive concern with the transaction, any cost to the limited partner related to the completion and submission of the HSR Filing is justified because the information is necessary to determine whether the transaction may violate the antitrust laws. Nonetheless, the Commission has modified the requirement to reduce the type of limited partners that must be disclosed, focusing only on those with the ability to participate in management or control. On this basis, filers can exclude limited partners who serve as passive investors, who are essentially the customers of private investment firms, according to one commenter. To the extent that these limited partners do not participate in the management of the filing person, they need not be disclosed as a minority holder.

[338] *See, e.g., In re Red Ventures Holdco, LP,* No. C–4627 (F.T.C. Nov. 3, 2017) (overlapping limited partnership holdings violated section 7); *In re TC Group, L.L.C.,* No. C–4183 (F.T.C. Mar. 16, 2006) (acquisition involving minority stake giving two private equity investors seats on the boards of competitors).

(iii) Limiting Requirements for Acquired Persons

Finally, the Commission proposed limiting the reporting requirements for the acquired person. Currently, the acquired person must identify the name and headquarters address of all holders of 5% or more but less than 50% of the acquired entity, along with the percentage held. If the acquired entity is a limited partnership, only identification of the general partner and its headquarters address is required. The Commission proposed limiting this requirement to minority holders of the acquired entity that would hold an interest after that consummation or would receive an interest in another entity within the acquiring person as a result of the transaction. However, the proposed requirements to identify certain limited partners also applied to the acquired person, if the minority investors will stay with the target post-acquisition. The Commission adopts this proposal with modification.

The proposed limitation to identify only minority interest holders of the target that will remain invested after consummation is intended to reduce the cost of complying with the final rule for the acquired person. The Commission has determined that the identity of any minority interest holder of the target that will cease to be involved with the target or acquiring person post consummation has limited relevance to understanding who could influence decision-making of the business post-

acquisition. The Commission adopts this portion of the proposed rule. It modifies the proposed instruction to reflect the modification it adopts for the identification of limited partners, as described above. Thus, the final rule will require the acquired person to only identify minority holders of 5% or more if such holder will continue to be invested in the target or will acquire an interest in an entity within the acquiring person. If the target is a limited partnership, only limited partners (1) that hold 5% or more in the acquiring entity, (2) will continue to hold an interest in the acquired entity, or acquire an interest in the acquiring person, after the transaction is consummated, and (3) will have that have certain rights related to the board of directors or similar bodies of entities related to the acquiring entity will need to be identified. If the acquired person does not have this information, it can so note in an endnote.

The Commission also notes that one commenter focused on the requirement to identify roll-over investors, stating it would be a new burden that would discourage continued post-transaction investment. The Commission disagrees with this assessment. Currently, the acquired person already must identify all 5%–49.9% holders of the acquired entity, including roll-over investors. Further, the Commission once again notes that the amount of information required is limited; only the name of the minority interest holder (and the name of the master limited partnership, fund, or investment group, if applicable), its headquarters address, the name of the acquired entity it holds an interest in, and the percentage held must be disclosed.

2. Acquiring Person and Acquired Entity Structure

The Acquiring and Acquired Person Structure sections of the Form and Instructions require the reporting of information currently required by Items 1(f), 4(a) and (b), and Item 6(a). The Commission proposed that filing parties provide more information about the structure of the acquiring person and acquired entity, as well as the names under which they do business. The Commission also proposed a clarification regarding annual reports and audit reports of natural person UPEs. As discussed below, the Commission adopts some of these proposals without change and some with modification.

a. Entities Within the Acquiring Person and Acquired Entity

This section contains information currently required by Items 1(f) and 6(a) of the current Form. The Commission proposed requiring filing persons to organize the list of controlled entities by operating company or business, and, for each such operating company or business, the Commission proposed that filers identify the name(s) by which the company or business does business, as well as any name(s) by which it formerly did business within the three years prior to filing. The Commission adopts the proposal with modification.

The Commission received several comments opposed to this proposal. One commenter stated that the Agencies do not need to know the relationships between and among all related entities for its initial review of the HSR filing. The commenter asserted that the majority of covered entities will likely have no overlapping activities with the acquired company, and thus learning about them adds no value to the Agencies' initial screen. The Commission disagrees that the Agencies do not need this information and that it adds no value to the initial screen. This is the very information that allows the Agencies to understand what businesses are involved in the reported transaction.

The Commission does, however, make several modifications to these proposals that should reduce the cost of providing this information. The Commission adopts the proposal to require DBA names but does not adopt the proposal to adopt ''formerly known as'' (FKA) names. One commenter noted the difficulty of providing ''doing business as'' names for filing parties that do not maintain such records, but the Commission believes these DBA names will be of great value to the Agencies in the initial waiting period. Businesses create (or change) DBA names for a variety of reasons and may be required to register these names with State or local authorities. One commenter objected to the three-year period, and, as part of its overall efforts to reduce costs associated with an HSR Filing, the Commission eliminates this lookback so that filing parties must only provide this information as it stands at the time of filing.

Another commenter recommended that for executive compensation transactions the filing persons be permitted to dispense with the requirement to report ''doing business as'' names, assuming certain conditions are met. They stated that these transactions are unlikely to generate meaningful antitrust issues but that requiring prior business names will add materially to the burden on the acquired side without a corresponding benefit. The Commission agrees and as part of its overall effort to reduce cost, adopts the modification to allow both filing parties in select 801.30 transactions (which include those related to executive compensation) to provide this information as kept in the ordinary course without DBA names.

Finally, one commenter noted that the proposed rule appears to use the terms ''operating business,'' ''operating entity,'' and ''operating company'' interchangeably. The commenter requested clarification of the definitions or adoption of one term for consistency. The Commission agrees that using these three terms interchangeably is confusing and thus adopts ''operating business'' to capture entities that comprise distinct operations. Under this modification, filing parties need to organize their response by operating business(es) whether they are corporations, non-corporate entities, or assets that function as an operating business.

In sum, the Commission adopts modifications that require filing persons, except for those in select 801.30 transactions, to organize controlled entities at the time of filing by operating business and, for each such operating business, identify the name(s) by which the operating business does business. For example, a fund must organize its response by portfolio company(s), and a conglomerate must organize its response by business(es).

b. Annual Report and Audit Reports

Information for this section is currently required by Items 4(a) and (b). The Commission proposed clarifying the current instructions regarding which annual reports and audit reports are required from natural person UPEs. Currently, natural person UPEs, in lieu of personal financial documents, must produce financial documents for the highest-level entity(s) within their person. In addition, natural person UPEs must produce the same additional reports that non-natural person UPEs must produce: for acquiring persons, the reports of the acquiring entity(s) and any entity controlled by the acquiring person whose dollar revenues contribute to an NAICS overlap; and for acquired persons, the reports of the acquired entity(s). The Commission proposed new language to make this requirement clearer and the Commission adopts this change with modification.

The Commission received one comment that supported the proposal. Another commenter suggested two

revisions to the proposed Instructions. This commenter first suggested that for natural person UPEs who filed as acquired persons, the instructions should only require the most recent annual reports for the highest-level entity the Natural Person controls that includes the assets or entities being sold. Second, as a general matter, the commenter stated that persons filing notification should not be required to provide annual reports for entities that have less than $10 million in total assets, unless that entity's revenues contribute to a competitive overlap between the parties.

In considering the two suggested revisions in this comment, the Commission agrees that it is sufficient for the UPE of the acquired person to provide financial reports for only the highest-level entities that control the acquired entity, as appropriate, in lieu of providing personal financial documents. The Commission also has determined that this limitation is appropriate for acquiring persons with natural person UPEs as well. Therefore, the Commission adopts this suggestion, and natural persons, in lieu of providing personal financial statements, will need only provide financial reports for the highest-level entities that control the acquiring entity or acquired entity, as appropriate. The financial information for these highest-level entities should be provided in this section and not the UPE Details section, as discussed in section VI.D.1.

The Commission declines to adopt the suggestion that persons filing notification should not be required to provide annual reports for entities that have less than $10 million in total assets, unless that entity's revenues contribute to a NAICS overlap or any overlap identified in the Overlap Description. ''The person filing notification'' is a defined term for the purpose of the Instructions and is limited to the UPE. Therefore, other than for natural persons, the proposed Instructions only require reports from the UPE and, for the acquiring person, acquiring entity(s) and entities that contribute to a NAICS overlap, and for the acquired person, the acquired entity(s), which is consistent with the current requirement. The Commission finds these reports valuable, regardless of whether those entities have $10 million in assets.

3. Additional Acquiring Person Information

The Commission proposed requiring additional information about the acquiring and acquired person. These proposals included a description of the ownership structure of the acquiring person and acquiring entity as well as an organizational chart if the acquiring person UPE is a master limited partnership or fund, information about other types of interest holders that may exert influence over the acquiring person, and the identification of officers, directors, and board observers of the acquiring person and acquired entity. As discussed below, the Commission adopts some of the items as proposed, adopts some of the proposals as modified, and does not adopt others.

a. Ownership Structure

The Commission proposed that acquiring persons provide a description of the ownership structure of the acquiring entity and, for fund or master limited partnership UPEs, an organizational chart sufficient to identify and show the relationship of all the entities that are affiliates or associates. The Commission also proposed that acquired persons describe the ownership structure of the acquired entity.

The Commission did not receive any comments regarding the requirement to provide a description of the acquiring and acquired entities' ownership structure. The Commission believes that such descriptions will provide information and nuance about ownership structures that may not be clear from a simple list of minority holders. Moreover, descriptive responses allow filers to offer clarification about the structure, including whether the ownership structure is subject to change between filing and consummation of the transaction. As a result, the Commission adopts this item as proposed for the acquiring person. However, this information is less relevant from the acquired entity. As part of its efforts to reduce the cost related to filing where possible, the Commission does not adopt the proposal for the acquired person.

As for the proposed requirement for the acquiring person to provide organizational charts, commenters noted that organizational charts are not always kept in the ordinary course of business, and structures may be so complex that they cannot be synthesized into a chart. The Commission acknowledges that there may be some cost associated with creating organizational charts just for the purpose of making an HSR Filing and modifies this item to require charts that show the relationship of entities that are affiliates or associates if such charts exist, even if they were created for other purposes. The Commission declines to adopt the suggestion to limit this requirement to transactions where there is an identified NAICS or product or service overlap. These charts are necessary for staff to understand the totality of the transaction, including the role of key decision makers and their responsibilities relative to the business lines under review.

The complex structure of investment entities is not adequately captured by the current Form, and there is often no other source for Agencies to learn of these relationships. Information about the acquiring entity's ownership structure is therefore necessary and appropriate for the Agencies to evaluate the transaction at issue. The Commission has modified the proposal to limit the reporting costs by requiring only the acquiring person to provide a description of its ownership structure and to provide organizational charts only if they exist.

b. Other Types of Interest Holders That May Exert Influence

The Commission proposed an Other Types of Interest Holders that May Exert Influence section that would have required the acquiring person to identify certain individuals or entities, beyond those with the minority interests discussed above, that may have material influence on the acquiring entity and entities related to it. These included certain individuals or entities that (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. As discussed below, while understanding these relationships can be very important in assessing the competitive effects of certain transactions, the Commission has elected not to adopt proposals (i), (ii), and (iv) at this time. As discussed in section VI.D.3.c., the Commission adopts with modification the proposal to require identification of officers and directors, which incorporates some of proposal (iii).

The Commission received several comments in support of the proposed change to disclose other types of interest holders. One commenter stated that disclosure of these interest holders would be helpful to close a loophole when the filing parties may have influence or joint profit maximizing incentives with rivals. Another commenter noted that the information would also enable the Agencies to assess conflicts of interest or the potential for inappropriate sharing of competitively sensitive information. Other comments highlighted the

importance of identifying situations in which a single creditor to competing firms could have an incentive to facilitate their coordination or collusion as well as situations in which a private lender may assert control or an investor may have a dual role as private provider of leveraged loans to finance buyouts.

The Commission also received several comments opposed to these proposed changes. Critics noted that some of this information may not be available at the time of filing or would be burdensome to collect and report. Others questioned the utility of the information. Another commenter noted that it will not be readily apparent whether identified entities or individuals have overlaps, supply, or other relationships relevant to the target.

In regards to identifying certain creditors, commenters stated that in the vast majority of credit arrangements, the creditor's rights and financial incentives are distinctly different than those of equity holders and that many creditors are unable to control investment decisions. In addition, one commenter observed that these disclosure requirements could impede access to credit, which would seriously impact private equity as its deals frequently rely on third-party financing. Several commenters also expressed concern about the burden of identifying and describing complex credit arrangements, particularly for infrequent filers.

Regarding the proposed requirement related to non-voting securities, options, or warrants, one commenter questioned the necessity of the information to examine the anticompetitive effects of any proposed transaction, noting that, in exempting acquisitions of non-voting securities from filing, Congress must have concluded, based on the legislative history, that such acquisitions pose no anticompetitive threat. No specific comments were received with respect to the proposed requirement to identify individuals or entities that have agreements to manage entities related to the transaction.

The Commission disagrees with assertions that information about individuals or entities that can influence the acquiring person through mechanisms such as credit relationships, non-voting interests, or management contracts is not relevant to the assessment of the competitive effects of a reported transaction. Further, the Commission notes that the HSR Act specifically defines voting securities as securities which at present or upon conversion entitle the holder the right to vote for the board of directors.[339]

[339] 15 U.S.C. 18a(b)(3)(A).

Nevertheless, the Commission acknowledges that the mechanisms of influence or managerial control are often bespoke and vary from entity to entity. The proposed rule was intended to sweep broadly but in a manner that was straightforward and relatively uncomplicated for filers to navigate. The comments raised issues that warrant further consideration. Given the other proposals that the Commission does adopt, particularly identification of additional minority interest holders, information about officers and directors of entities related to the acquiring entity, and the collection of additional documents, the Commission has decided not to adopt the proposals related to credit relationships, non-voting securities, and management agreements at this time. If these additional requirements still leave significant gaps in information that impede the Agencies' ability to screen for transactions that warrant additional investigation, the Commission may revisit these proposals in future rulemakings.

c. Officers and Directors

The Commission proposed adding a section that would have required the identification of the officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity. Further, the proposal required for those individuals, the identity of other entities for which those individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions). After consideration of the comments and in light of the varied roles that religious or political non-profit organizations can play, the Commission has determined to narrow this requirement to (1) eliminate reporting related to board observers; (2) limit reporting to certain entities within the acquiring person (including officers and directors of the acquired entity who will continue to hold one of these positions post-consummation, if the acquiring person has filed for the acquisition of control); (3) only require identification of officers or directors that serve in those roles at the target or entities that are in the same industry as the target; and (4) exempt any non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce, as described below.

Several commenters wrote in support of the proposal, recognizing the value to the Agencies' understanding of the ownership and management structure of companies involved in the transaction. One commenter stated that common board members at intermediate levels of ownership can influence competition directly. Another commenter also noted that private equity minority investment interests can confer rights to appoint board members or allow board observers that create anticompetitive opportunities to exert coordinated market power. This comment further explained that some entities place the same person on several boards to coordinate business strategies across those entities even where they hold only minority positions. The Commission agrees that, due to the influential impact that officers and directors can have on competitive decision-making of entities within the acquiring person, this information is relevant to the Agencies' initial antitrust assessment of the acquiring person's acquisition of interests in the target. The same commenter recommended that the Commission require disclosure of board membership information for any prior acquisitions identified in the HSR Filing. Because this requirement has been designed to identify potential competitive concerns between acquiring person and target at the time of filing and going forward, the Commission declines to expand the final rule to require this historical information.

However, the majority of the comments related to this proposal suggested significant modifications, either by eliminating the requirement in its entirety or acknowledging the relevance of the information but urging revisions to more narrowly tailor the requirements to achieve the Agencies' objectives. Critics across both of these groups raised some common issues.

Some commenters questioned the Commission's authority to require information on common officers and directors in an HSR Filing to enforce section 8 of the Clayton Act, pointing to the absence of any reference to section 8 or interlocking directorates in the HSR Act or in the Commission's original Statement of Basis and Purpose issued with the final HSR rules in 1978. A law firm commenter stated that legislative statements support that Congress disavowed any intention that premerger notification be used to allow the accumulation of information on businesses for general enforcement purposes, and the commenter asserted that the HSR Act is concerned only with potential violations of section 7. Another commenter wrote that even if it was appropriate to enforce section 8 using the HSR Act process, the

proposed instructions went beyond the text of section 8 by requiring information about unincorporated entities as well as historical information.

Additionally, several commenters questioned the Commission's legal basis for the requirement to report officers and directors. For example, one commenter stated that this requirement had no bearing on the antitrust analysis of transactions under section 7 and that the NPRM does not provide evidence that the Agencies have missed anticompetitive interlocks due to lack of information in HSR Forms. One commenter stated that the NPRM does not identify any cases where a court stated that this information has relevance for review under section 7 of the Clayton Act.

The Commission disagrees that the identity of officers and directors is immaterial to an analysis of whether an acquisition may violate section 7. As described in sections II.B.1 and VI.D.1.d.ii, and elsewhere, the structures of entities have become more complex, allowing for the levers of influence and managerial control to be distributed through a variety of mechanisms beyond controlling equity stakes, or even minority equity stakes. The important role of board members in particular has been recognized in court cases and the focus of consent decrees to resolve competitive issues.[340]

Further, contrary to assertions that the HSR Act limits the Agencies to evaluating whether a notified transaction may violate ''Section 7,'' the HSR Act explicitly directs the Agencies to promulgate rules necessary and appropriate to determine whether a notified acquisition may, if consummated, violate the ''antitrust laws.'' [341] The HSR Act amended the Clayton Act, and the term ''antitrust laws'' is defined in the Clayton Act to include the Sherman Act and the Clayton Act, including section 8's prohibition on interlocking directorates.[342] As discussed in the NPRM, when the Agencies do become aware of existing or potential interlocks created by a reported transaction, they typically seek to remediate them consistent with the Agencies' enforcement authority and before consummation of the transaction. Counter to suggestions that the proposal sought to create a ''dossier'' on the filing parties for general enforcement purposes, this information is relevant to enforcing the antitrust laws with respect to the transaction under review.

Moreover, while a notified transaction could create a violation of section 8 as described in the NPRM, the same competitive concerns that underpin section 8 are also relevant to whether a transaction would violate section 7. In fact, as highlighted by some commenters, section 8 does not necessarily cover all officer and director relationships that may give rise to competition issues. But that does not mean that these relationships are benign or that they do not create the same opportunities or incentives to coordinate competitive decision-making, for example, if the CEO or director of the acquiring entity serves as a member of the board of a rival of the target. In this scenario, section 8's thresholds for strict liability may not capture this relationship, but it would be relevant to analysis under section 7, particularly in nascent markets where one of the entities involved does not meet the minimum sales trigger for application of section 8.[343] That risk alone is relevant to the Agencies' assessment of whether the transaction is likely to substantially lessen competition or tend to create a monopoly in violation of section 7, regardless of whether the interlock is of the type that violates section 8. It is in part because the Agencies cannot rely on section 8 compliance to capture all relationships that create interlocks between entities with competitive relationships that the Commission proposed the new section.[344]

Currently, the Agencies cannot screen for these relationships unless they are mentioned in the transaction documents submitted with the HSR Filing, and often they are not. This information is often not publicly available from any source other than the filers. As explained in the NPRM, information on the identity of officers and directors will help the Agencies identify potential anticompetitive harms that may arise from the proposed transaction.

Additionally, identification of these individuals will assist the Agencies in determining whether the filers have had an opportunity to improperly share confidential information or integrate their businesses before the HSR Act's waiting period expires. For the Agencies to conduct a thorough premerger review, the business operations of the two filing entities must maintain their premerger competitive status quo until the HSR waiting period expires. When the Agencies are aware that there are common officers and directors, they may investigate whether there are on-going communications or interactions affecting the premerger competitive status quo, for example, by interfering with the other filer's competitive decision-making or placing executives from one entity into management positions at the other.[345] The Commission believes that information about these relationships is relevant to ensuring that the parties are complying with the requirements of the HSR Act to hold their operations separate and continue to compete until the expiration of the waiting period. This is true regardless of the antitrust risk presented by the transaction or the possibility that these relationships are improper interlocks; parties must wait until the waiting period has expired to begin integrating operations. Violations of the

[340] *See, e.g., In re Red Ventures Holdco, LP,* No. C–4627 (F.T.C. Nov. 2, 2017) (complaint) (overlapping limited partnership holdings that provided board seats violated section 7); *In re TC Group, L.L.C.,* No. C–4183 (F.T.C. Mar. 16, 2006) (complaint) (acquisition involving minority stake giving two private equity investors seats on the boards of competitors); *In re Time Warner Inc.,* No. C–3709 (F.T.C. Sept. 12, 1996) (analysis to aid public comment) (walling off two individuals and one entity to prevent them from influencing officer, directors, and employees of competitor and its day-to-day operations). *See also* cases cited in section II.B.1.

[341] *See* 15 U.S.C. 18a(d)(1).

[342] *See* 15 U.S.C. 12.

[343] Section 8 of the Clayton Act, 15 U.S.C. 19, prohibits, with certain exceptions, one person from serving as an officer or director of two competing corporations if two thresholds are met. Competitor corporations are covered by section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000 with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000. In accordance with section 8(a)(5), the Commission adjusts these thresholds annually based on changes in gross national product. The thresholds in effect for 2024 are $48,559,000 and $4,855,900 respectively. 89 FR 3926 (Jan. 22, 2024).

[344] Commenter International Bar Association notes that beginning in September 2023, the European Union requires merging parties to provide information on any current interlocking directorships, and that Brazil requires similar information for both fast-track and regular notifications. *See* Comment of Int'l Bar Ass'n, Doc. No. FTC–2023–0040–0687 at 16–17. While this is not a basis for the final rule, the Commission notes that this information is relevant to competition issues examined in other jurisdictions.

[345] The Agencies' concern about premature coordination between merging firms, referred to as ''gun jumping,'' dates back many decades, and they have brought enforcement actions for violations of the HSR Act, as well as other antitrust laws that prohibit competitors from acting jointly prior to consummation of any acquisition. *See also* Note by the United States to the OECD, Suspensory Effects of Merger Notifications and Gun Jumping (Nov. 27, 2018) (DAF/COMP/WD(2018)94), *https://www.ftc.gov/system/files/attachments/us-submissions-fjun-2010-present-other-international-competition-fora/gun-jumping_united_states.pdf.* For a discussion of cases prior to 1995, see Mary Lou Steptoe, Acting Dir., Bureau of Competition, Fed. Trade Comm'n, Prepared Remarks Before A.B.A. Sec. Antitrust L. Spring Meeting, 1994 WL 642386 (Apr. 7, 1994).

stay provisions of the HSR Act are subject to civil penalties.[346]

Two commenters objected to requiring board observer information as outside the scope of section 8 and not related to the Agencies' antitrust assessment of the transaction. The Commission is aware that board observers do not have the same rights and duties as officers or directors. Comments submitted in response to the Commission's December 2020 Advance Notice of Proposed Rulemaking stated that individuals serving as board observers typically receive the same information as the board of directors but there may be ways to exclude them from reviewing privileged or competitively sensitive information. Consequently, the Commission views the risks of sharing competitively sensitive information or changing competitive decision making via board observers to be lower than the risk present with officers and directors. As a result, the Commission agrees that the need for information about board observers is not as great at this time for the purpose of the Agencies' premerger risk assessment, and the final rule does not require filers to identify individuals who have these rights.

In addition to comments related to the authority [347] and purpose of the proposed rule, several commenters raised concerns about the burden of collecting this information, especially historical information about individuals no longer serving in one of these roles, noting that it has little relevance and would be burdensome to collect. One commenter suggested that the requested information on officers and directors be limited to any positions they currently serve or expect to serve in the future. Another comment agreed, noting that current and expected future overlaps are relevant for assessing interlocking directorships and coordinated effects, but that detailed and historic information across all entities of the company has minimal relevance to the antitrust assessment of a particular transaction. Citing practical concerns, another comment noted that there should be no requirement to collect post-departure information from former personnel.

Other commenters stated that the burden of collecting any information about officers and directors was not justified by the benefit to the Agencies' review of any reported transaction. Some cited the higher burden of this requirement for large companies. For instance, one commenter noted that, in some instances, the individuals that would be identified would not be relevant to the Agencies' premerger review because, for small subsidiaries within a large entity's corporate structure, an officer might be someone who merely drew up the paperwork forming the entity whose role would not be relevant to the Agencies' antitrust assessment. Another suggested limiting this requirement to certain revenue thresholds or entities with overlaps or other relationships.

Additional commenters objected to having to report information regarding any individual's board membership or other association. They raised concern that this requirement could sweep in memberships with religious, political, or other non-commercial groups. One commenter stated that some of these individuals do not want to share information about their membership in certain organizations. The Commission has no intention of forcing disclosure in the HSR Filing of any officers or members of the governing board of non-commercial entities, or other non-profit entities with a religious or political purpose. The Form and Instructions that are part of this final rule counsel filers not to report any individual's role as a director, officer, or member of a non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce. Filers who would otherwise be required to report these affiliations are excused from such reporting.

In response to the comments and to better tailor this requirement to the purpose of premerger review, the Commission has further decided to limit this requirement in several ways. First, the Commission has eliminated the requirement to identify officers or directors of acquired entities; the requirements of the final rule related to reporting information for officers and directors will apply to the acquiring person only. Second, the Commission limits the entities within the acquiring person to entities that (1) have responsibility for the development, marketing, or sale of products or services that are reported overlaps identified in the Overlap Description or supply relationships identified in the Supply Relationships Description or (2) directly or indirectly control or are controlled by the acquiring entity. If any of these entities is a non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce, no reporting is required for individuals serving as officers or directors. Third, the Commission has limited the lookback periods contained in the proposed rule. For entities in category (1), filers will report officers and directors serving within three months prior to the HSR Filing. For category (2), there is no requirement to lookback to any individual who is no longer serving as an officer or director at the time of the HSR Filing but filers must consider individuals who have not yet officially taken the relevant positions. Fourth, the acquiring person will only be required to report the names of officers and directors of these entities if those individuals also serve as an officer or director of an entity that derives revenue in the same NAICS code (or is in the same industry) as the target at the time of filing and the name of such other entities. This will result in a list of only those individuals with the relevant connection.

As noted elsewhere, the Commission has carefully evaluated each of the requirements of the proposed rule in light of the comments and adjusted the final rule to calibrate information requirements to antitrust risk, burden, and importance to the Agencies' ability to screen for transactions that may violate the antitrust laws. On balance, the Commission has determined that an analysis of the board of the target entities is less probative in analyzing the potential effects of the transaction than is an analysis of certain entities within the acquiring person. Many filings are for acquisitions of control, and therefore the officers or directors of the target often change upon consummation. For those transactions where control is not being acquired, the acquired person may not be a party to the transaction, making the burden of collecting the information in the period of time between when it receives the required notice letter and when its filing is required higher than that of the acquiring person, which generally controls the timing of its filing. As a result, the Commission has not adopted the proposal for the acquired person.

For the acquiring person, as discussed elsewhere, due to the competitive significance of entities with products or services in development that have not

[346] 15 U.S.C. 18a(g)(1). *See, e.g., United States* v. *Legends Hospitality Parent Holdings, LLC,* No. 1:24–cv–5927 (S.D.N.Y. filed Aug. 5, 2024) (seeking civil penalties for obtaining beneficial ownership of acquired person prior to expiration of HSR waiting period); *United States* v. *Duke Energy Corp.,* No. 17–cv–00116 (D.D.C. Apr. 7, 2017); *United States* v. *Input/Output, Inc.,* No. 1:99–cv–00912 (D.D.C. May 13, 1999).

[347] Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC–2020–0086–0015 at 10 (board observers generally receive the same information that a director would except when there are conflict-of-interest issues or when the information concerns competitively sensitive topics); Comment of Comput. & Commc'ns Indus. Ass'n, Doc. No. FTC–2020–0086–0002 at 11 (board observers are usually entitled to the same information as board directors although companies have more leeway to exclude observers from privileged or competitively sensitive information).

yet generated any revenue, the Commission declines to adopt a de minimis revenue requirement for this information but agrees that information related to officers and directors is most relevant to the antitrust assessment when the companies have an existing business relationship or are related to the entity making the acquisition. Thus, the Commission modifies this proposal to look only at those entities within the acquiring person that are responsible for the development, marketing, or sale of the products or services identified in the Overlap Description or the Supply Relationships Description, or directly or indirectly control or are controlled by the acquiring entity. This modification addresses commenters' concern about potentially needing to report information on many officers and directors, especially across larger or more diffuse organizations with many subsidiaries irrespective of antitrust risk. So modified, this requirement would focus the Agencies' inquiry on those entities that would be most likely to have a competitively important relationship with the target post-consummation.

The Commission believes that limiting this information requirement to those entities for which the acquiring person and the target have reported overlaps or supply relationships in the same sector as well as the entities that are related to the acquiring entity provides information the Agencies need for premerger screening. As modified, this requirement properly targets the information that reveals any antitrust risk that common officers and directors could act to undermine competition during the waiting period or post-consummation. The Commission acknowledges that there may be other such relationships involving the parties to the transaction that may be relevant to the competition assessment under section 7 or that present section 8 concerns but agrees that the Agencies can continue to collect this information only for those transactions that are flagged for closer review. While the final rule may impose a higher cost to large companies with many competitively relevant business lines, the Commission believes that the benefit to the Agencies is necessary and proportionate: it is more difficult for the Agencies to discover on their own all the individuals who serve in these key roles at different levels of larger companies when those companies have many business lines related to the target.

The Commission has also considered comments related to the proposed lookback period, and, in light of these concerns and to minimize the cost of collecting historical information about officers and directors, the Commission has modified this requirement to shorten the lookback period to three months before the filing date. The Commission believes providing information about individuals who served in one of these positions recently, but not at the time of the filing, is sufficient to identify those individuals who would have been in a position to share competitively sensitive information during a due diligence or negotiation phase for the transaction. It will also serve as a disincentive for these individuals to step down temporarily to avoid disclosure on the HSR Form.

Once the relevant entities and individuals have been identified (and excepting any non-profit entities organized for religious or political purposes), the acquiring person must determine whether those individuals also serve as an officer or director (or in the case of unincorporated entities, roles that serve similar functions) of another entity that derives revenue in the same NAICS codes as the target. If NAICS codes are unavailable, reporting should be based upon the industry overlaps, to the knowledge and belief of the acquiring person or the officer or director. Only if an individual serves in such capacity does the acquiring person need to provide the name of that individual, along with the name of the entity within the acquiring person they serve as an officer or director, their title at that entity, and the name of the other entity for which they serve as an officer or director (and excepting any non-profit entity organized for religious or political purposes). The Commission believes that these limitations will allow the Agencies to have information about key affiliations with other businesses in competitive overlap relationships while limiting the burden on filing parties and their officers and directors.

Finally, commenters representing the pharmaceutical industry voiced concerns about the applicability and effects of the proposed instruction on reportable transactions in the pharmaceutical and biomedical sectors. For example, one pointed out that biotech firms generally rely on a small cadre of qualified directors and officers who have the appropriate business background and stated that disclosure of these positions in an HSR Filing would discourage highly sought-after experts and specialists from accepting biotech leadership roles. Another explained that many pharmaceutical transactions that trigger HSR Filings involve only the acquisition of exclusive licenses, where the parties remain as independent firms post-transaction. This commenter also objected to reporting this information for acquisitions of companies with no sales.

The Commission is aware, from its own experience and from research done by others,[348] that there are individuals who serve on the boards of multiple life science companies. The final rule does not impose a disproportionate obligation for companies operating in this sector; these individuals are obligated to comply with the antitrust laws regarding interlocks as much as individuals serving in other sectors. The Commission does not agree that there is a unique risk that disclosure of recent, current, or future leadership positions will limit the number of talented and qualified individuals who are available to serve as officers or directors in the biopharma or life sciences sector beyond whatever limits the antitrust laws impose. Many sectors prefer knowledgeable professionals with distinct credentials and experience to serve as board members. Moreover, the cost of reporting these relationships is directly related to the number of reportable transactions that occur each year in this sector and the number of existing or potential relationships. The Commission does not believe that HSR reporting requirements will improperly deter qualified individuals from serving on the boards of these or any other companies.

The Commission believes that the modifications made to the final rule will ensure that the Agencies receive the information about recent, current, and future officers and directors that may create opportunities for anticompetitive harm under any antitrust law, including section 7 of the Clayton Act, section 1 of the Sherman Act, or the HSR Act itself. The Commission disagrees that the instruction will newly create a chilling effect on lawful and procompetitive activity or board membership. When individuals agree to serve as board members, they take on fiduciary responsibilities that statutory and common law require. Separate from any HSR requirements, these fiduciary duties require directors to, inter alia, act in the best interest of the organization and to ensure that the organization follows applicable laws.[349] Courts have found that directors may breach their duty of loyalty if they do not make a good faith effort to provide adequate

[348] *See* Lemley, *supra* note 316.

[349] Jeremy S. Piccini, ''Director Liability, the Duty of Oversight, and the Need to Investigate,'' Bus. L. Today 1 (Feb./Mar. 2011).

oversight and monitoring.[350] A merger or acquisition that requires reporting under the HSR Act is not an insignificant occurrence. When an organization to which an individual owes a fiduciary duty is involved in a reportable transaction, it is reasonable to expect those individuals to exercise their duties of care and loyalty by participating in compliance activities. Moreover, individuals who serve on boards must comply with the prohibitions in the antitrust laws that relate to interlocks and should be aware of how their role in a senior leadership position is relevant to the Agencies' assessment of proposed transactions. These risks exist without regard to the disclosure of their board position in an HSR Filing. Given the responsibilities that board members already carry, the Commission believes that the reporting requirement is reasonable and appropriate, particularly when balanced against the increased transparency and value it provides to the Agencies' premerger antitrust analysis.

In sum, the Commission has determined that the reporting requirements for UPEs contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws because the acquiring person and the target have existing business relationships, including through shared individuals or entities, that must be considered as part of that assessment, and that these requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

E. Transaction Information

This section of the Form and Instructions reorganizes, clarifies, and expands the information required in the initial portion of the current Form as well as in Items 2, 3, and 5. The Commission proposed new sections to facilitate the reorganization, clarification, and expansion of these items and received comments on certain portions of the Transaction Information section. As discussed below, the Commission adopts some of these proposals without change and some with modifications.

1. Parties

This section requires the information currently mandated by Item 3(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

2. Transaction Details

This section requires the information currently mandated by Items 2(b), 2(c) and 2(d). The Commission did not propose and does not adopt any material changes to the information required by these items. The Commission notes that the requirement to indicate the notification threshold in Item 2(c) is not applicable to the acquired person and is therefore excluded from the Form and Instructions for the acquired person. The Commission did not propose and does not adopt any material changes to the information required by this item.

3. Transaction Description

This section requires the information currently mandated by Items 2(a) and Item 3(a). The Commission did not propose and does not adopt any material changes to information required by these items. The Commission also proposed requiring the acquiring person to describe the business operations of all the entities within the acquiring person, which it adopts with modification, as discussed below.

a. Business of the Acquiring Person

The Commission proposed requiring the acquiring person to briefly describe the business operations of all entities within the acquiring person to provide a clear overview of all aspects of the acquiring person's pre-transaction business. The Commission adopts the proposal with modification.

The Commission received two comments expressing general support for the proposal, with one noting that the change is essential to ensuring that the Agencies can meet the statutory deadline. One law firm commenter was critical of the burden that the proposal would impose, stating that companies may have several dozen subsidiaries and written descriptions as to each of the respective business operations is not information readily maintained in the ordinary course of business and could be incredibly burdensome to collate.

The Commission adopts a clarified version of this requirement. The proposal was intended to require a short description of the operating businesses within the acquiring person, not an entity-by-entity description. The Commission understands that a single operating business may comprise multiple entities, such as shell entities or separate entities for each location of the business. Therefore, the Commission amends the requirement to remove ''of all entities within'' to make clear that the acquiring person does not need to describe its operations on an entity-by-entity basis.

Understanding the business of the acquiring person is necessary to understanding the potential competitive implications of the transaction. Investment groups often control multiple portfolio companies across many lines of business. Similarly, some corporations also have multiple and varied operations. These other operations may be related to the operations of the target, even if they do not directly overlap with it. Therefore, particularly for acquiring persons with complex structures or many businesses, knowing just the business of the acquiring entity is not sufficient for the Agencies to evaluate the impact of the acquiring person merging with or acquiring an interest in the target. The scope of the acquiring person's holdings is often not publicly available, necessitating the Agencies receiving the information from the acquiring person itself.

b. Business of the Target

This section requires the information currently required by Item 3(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

c. Non-Reportable UPEs

This section requires the listing of non-reportable UPEs, which is currently required by Item 2(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

d. Transaction Description

This section requires the information currently mandated by Item 3(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

e. Related Transactions

This section requires filing persons to identify related transactions, and the Commission proposed a list of common circumstances in which multiple filings are required to guide filing parties in their responses. Although Item 3(a) of the current Form asks parties to indicate whether there are additional filings related to the transaction, filers sometimes overlook this requirement. The Commission received three comments in support of the proposed changes, with one of these commenters

[350] *See Marchand* v. *Barnhill,* 212 A.3d 805, 824 (Del. 2019) (reversing dismissal of stockholder's claims that directors breached their duty of loyalty by failing to establish a reasonable system of controls and reporting regarding food safety in connection with listeria outbreak); *In re Boeing Co. Derivative Litig.,* No. CV 2019–0907–MTZ, 2021 WL 4059934, at *33 (Del. Ch. Sept. 7, 2021) (finding that plaintiffs stated a claim that board breached its duty of oversight by failing to establish a reporting system for airplane safety).

noting that they appear to be reasonably designed to provide potentially helpful clarification. The Commission adopts this requirement as proposed.

f. Transactions Subject to International Antitrust Notification

The Commission proposed creating a Transactions Subject to International Antitrust Notification section that would require parties to identify the jurisdictions where each filing person has already filed or is preparing notifications to be filed as well as a list of the jurisdictions where it has a good faith belief it will file. The Commission adopts this requirement as proposed, but only for the acquiring person.

Although the Form currently asks filing parties to voluntarily identify other jurisdictions in which filings will be made, most filers do not disclose the information even though more and more transactions are subject to review in multiple jurisdictions around the world. As noted in the NPRM, in order to fully benefit from inter-agency consultations, the Agencies need to know as early as possible which foreign jurisdictions may also be evaluating a proposed transaction.

The Commission received two comments in opposition to this proposal. One commenter expressed concern about the effects of inter-agency consultations, and another recommended maintaining the status quo where filers voluntarily identify other jurisdictions where the transaction will trigger premerger notification under the laws of that jurisdiction. Both stated that the proposal would only impact international companies, which might be forced to speculate about potential foreign filings. The Commission acknowledges that the proposed requirement will have a greater impact on companies with operations outside the United States. But the Commission disagrees that it is asking parties to speculate about potential foreign filings; however, it has determined that it is sufficient for the information to be provided only by the acquiring person. As stated in the NPRM, the text of the proposed rule provides flexibility for parties who, at the time of the HSR Filing, may not have yet identified all the other jurisdictions where they will file. Indeed, the final rule specifies that filing parties can respond based on their good faith belief, which provides filing parties with the ability to respond based on their knowledge at the time of filing. Otherwise, the requirement asks for facts that are already known: the jurisdictions where the party has already filed and the ones for which it is preparing a filing. The Form also affords parties the option to voluntarily make certain waivers related to other jurisdictions, as discussed in section VI.K.3. Accordingly, knowing which other jurisdictions are reviewing the transaction can expedite the waiver process if the parties intend to provide a waiver after filing.

Given the importance of knowing which foreign jurisdictions may also be evaluating a proposed transaction and the benefits to the Agencies and the parties of early case-specific cooperation facilitated by waivers, the Commission adopts this necessary change as proposed for the acquiring person. However, because filing parties often coordinate their notification to other jurisdictions and in order to further reduce the burden on acquired persons, the Commission does not adopt the change for acquired persons because it is sufficient to obtain this information from only one filing party.

4. Additional Transaction Information

a. Transaction Rationale

The Commission proposed that the acquiring and acquired person be required to describe all strategic rationales for the transaction. These rationales would include those related to, for example, competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other reporting person, expansion into new markets, hiring the sellers' employees (so-called acqui-hires), obtaining certain intellectual property, or integrating certain assets into new or existing products, services, or offerings. The Commission also proposed that the filing person identify which documents submitted with the HSR Filing support the rationale(s) described in the narrative. The Commission adopts the requirement as proposed but does not require the information from select 801.30 transactions.

The Commission received several comments supporting disclosure of transaction rationales. Individual commenters described the changes as common-sense requirements and noted the need to ensure each party in the transaction explains the reasoning from their perspective. One commenter stated that mergers may be beneficial to an acquiring company for anticompetitive reasons that might not be immediately apparent from a surface-level analysis of market shares and concentration in a particular market, and that requiring a firm to submit its justification for the strategic wisdom of a particular transaction would help diminish the role of guesswork in the Agencies' review of a proposed merger.

Commenters opposing disclosure of transaction rationales focused on the evolving nature of the information, which may very well differ across the various personalities and business roles that span an organization and which in some instances may be only discovered in the course of post-signing diligence. The Commission understands that there may be many goals for the transactions and that different perspectives within the filing person may be difficult to resolve. But that is precisely the problem that this requirement is intended to resolve. The Agencies are not in a position to understand which rationales are predominant nor choose among different rationales presented in the other materials submitted with the notification, such as transaction-related documents, without additional context. That is why the Commission believes that requiring filers to point to documents or other materials in the HSR Filing that support the stated rationale would help resolve any uncertainty about which rationale (or rationales) may predominate. The Commission also understands that rationales may change throughout the diligence process. The parties are not required to wait to file their notification until they have settled on a single or predominant rationale.

Others described the request as unfair because in the past the merging parties' strategic rationale for the transaction has only been revealed after the Agencies have sued to block a deal. The Commission disagrees that the parties lack rationales for the transaction until they are before a court defending a lawsuit, or that it is unfair to require them to state each strategic rationale for the transaction known at the time of making an HSR Filing. Indeed, each filer may have different reasons for entering into the transaction. Whatever the reasons for agreeing to the transaction, that is the information the Agencies seek. Knowing why each party sees the transaction as beneficial is highly relevant to the initial antitrust assessment and may cause the Agencies to determine, relying on the documentary support for that rationale, that the transaction does or does not warrant additional investigation.

In addition, commenters noted that a description of transaction rationales would be burdensome to generate and duplicative of other materials submitted in the HSR Filing, particularly documents responsive to current Item 4. The Commission acknowledges that there is some cost to filers to provide a description of strategic rationales but

disagrees that it is duplicative. There is no current requirement that the parties describe the rationale for the transaction, and for many transactions, there are no documents or other information submitted with the HSR Filing that reference a rationale. For these filings, the Agencies do not know what benefits either party hopes to achieve through the transaction. Alternatively, where there are many different rationales discussed in submitted materials, the Agencies lack the context to know which ones predominate or reflect the views of the organization. Requiring each filer to describe each strategic rationale for the transaction provides the Agencies with a starting place to understand the motivation behind the transaction without having to make judgments about which ones are still under consideration. Given the Agencies' experience with asking this question during the initial waiting period or reviewing other white papers that the parties voluntarily provide, the Commission believes that the cost of supplying a transaction rationale will be minimal and, in any event, is necessary for the Agencies to determine whether the transaction may violate the antitrust laws. Filers are invited (but not required) to copy and paste text or provide a summary from documents produced with the HSR Filing and reference the specific portions of those documents where the discussion of that rationale exists. However, if documents provide inconsistent rationales, filers should address these inconsistencies. The Commission believes that relying on statements contained in documents submitted with the HSR Filing will reduce the burden of preparing the filer's description of rationales for the transaction.

One commenter requested clarification as to whether the proposal contemplates a single consistent response submitted by all parties notifying the same transaction (in the context of a simple acquisition, buyer and seller) or whether it contemplates that each notifying party submits a separate narrative, noting that the motivations of buyers and sellers may diverge. The Instructions clarify that each filing party is required to submit a description of its strategic rationales because it is important to have such a description from both sides of a given transaction.

Another commenter suggested that to reduce burden the Commission should only require the acquiring person to submit its transaction rationale, reasoning that the acquiring person's strategy is the most competitively relevant and that the seller's rationale for a transaction is often no more than obtaining cash to distribute to investors or to use for unrelated business purposes. The same commenter suggested that the instruction be limited to requiring a brief description of the primary strategic rationale for the transaction. For the reasons outlined above, the Commission declines to adopt these suggestions but notes that a brief description of the transaction rationale is sufficient so long as it is accurate and does not conflict without explanation with stated rationales in documents submitted with the HSR Filing.

b. Transaction Diagram

The Commission proposed a new requirement that filing persons provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction. The Commission adopts this proposal with modification.

The Commission received many comments in support of this proposal, all of which noted the value of such materials to the Agencies as they work quickly to assess the transaction. One commenter stated that without a diagram of all the entities and their relationships it can be hard to understand what's going on. Another highlighted that the proposed requirement would leverage documentation that often already exists. Noting that transaction diagrams can sometimes be incomplete or inaccurate, a law firm commenter suggested that this proposed instruction be modified to require the submission of the most recent diagram of the transaction, but only to the extent that such a diagram already exists and is not materially inaccurate. Finally, two commenters expressed general support for the proposal.

Three commenters opposed the proposal on the grounds that it would unnecessarily increase the burden on filing parties. One commenter stated that these materials are often not maintained in the ordinary course of business or created in the course of a deal negotiation. Another noted that deal structure may not be ''set in stone'' even after signing. In addition, another commenter pointed out that, besides burdening the parties, the proposal would increase the burden on Agency staff reviewing the information, adding that the additional information is not likely to be any more informative to the Agencies than the information already required under the current HSR Form.

Two commenters proposed modifications in light of the fact that many times these charts are drafted by outside tax advisors to show the pre-transaction reorganization needed to achieve the desired tax structure and benefits and that the charts sometimes include detailed tax advice that is protected by the attorney-client privilege or otherwise commercially sensitive. A law firm commenter suggested modifying the instructions to permit parties to redact, omit, or simplify any diagram, to exclude information that relates solely to tax considerations. Another commenter noted that where the details of the pre-transaction reorganization are irrelevant to the antitrust assessment of the transaction, such as where all or a majority of the outstanding equity of a target is being acquired, less detailed diagrams should provide the agencies with the desired information.

The Commission acknowledges the cost of having to create both a diagram along with a corresponding chart explaining the relevant entities and individuals involved in the transaction. Although such information would be materially useful to the Agencies, the Commission adjusts the proposal to require only the acquiring person in non-select 801.30 transactions to provide a diagram of the deal structure and only if one exists. That is, filers are not required to create a diagram or a chart solely for the purposes of submitting an HSR Filing. The Commission believes that such a diagram would be useful even if prepared for other purposes. With regard to privileged materials, HSR Rules already accommodate withholding certain material based on a claim of attorney-client privilege; if such a claim is made with respect to transaction diagrams, the filer can follow those requirements.

In sum, the Commission has determined that the transaction information requirements contained in the final rule are necessary and appropriate to enable the Agencies to fully understand the scope of the transaction being considered and to identify those that may violate the antitrust laws, and that the requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

F. Joint Ventures

This section requires information currently mandated by Item 5(b) of the Form. As discussed in section VI.J.1.f, the Commission adopts the proposal to eliminate the use of 10-digit NAPCS codes, including in this section. The

Commission did not propose and does not adopt any other material changes to the information required by this item. The Commission notes that no acquired person filings are required for joint ventures, so this section is not included in the Form or Instructions for acquired persons.

G. Business Documents

The Commission proposed a Business Documents section that would require the submission of documents currently required by Items 4(c) and 4(d) of the Form as well as additional categories of documents. Specifically, the Commission proposed expanding the current requirement found in Item 4(c) to the ''supervisory deal team lead(s);'' altering the language of current Item 4(d)(ii); requiring the production of certain ordinary course documents; requiring drafts of Transaction Related Documents; and requiring an organizational chart of authors and recipients. As discussed below, the Commission adopts some of these requirements with modification and does not adopt others.

As noted in the proposed rule, the Agencies compared documents they have received over the years in response to Second Requests with those submitted in the HSR Filing and assessed whether having certain types of documents at the beginning of the waiting period would have changed the Agencies' determination of whether and how to move into an in-depth investigation of the transaction. As a result of this review, the Commission identified documents that are not required by the current Form but would have been highly probative to the initial antitrust assessment of the transaction during the initial waiting period.

1. Transaction-Related Documents

a. Competition Documents

In the proposed rule, the Commission proposed expanding the documents currently required by Item 4(c) of the Form, which are prepared by or for officers and directors for the purpose of evaluating or analyzing the transaction. Since the beginning of the premerger notification program, these transaction-related documents have been a key screening tool for the Agencies to determine whether the transaction may violate the antitrust laws because they discuss the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. The Commission proposed requiring the filing person to submit such documents prepared by or for supervisors of the team of individuals working to complete the transaction, which the Commission referred to as the supervisory deal team lead(s).

In response to comments that the proposal was not clear about whom the Commission intends for filers to search for responsive documents and information in addition to officers and directors, the Commission has introduced a definition of supervisory deal team lead and limited the term to just one person. As discussed in section VI.A.1.g., the Commission believes these changes will provide clarity for filing parties. The Commission now turns to comments that were not directed at the definition of supervisory deal team lead but concerning the requirement to submit documents prepared by or for someone other than officers and directors.

The Commission received one comment from State antitrust enforcers supporting the proposal, but other commenters expressed concerns about the costs associated with identifying, collecting, and producing documents from the supervisory deal team lead. Certain commenters stated that expanding 4(c) to include documents to and from supervisory deal team lead(s) would create a significant burden to filers that is not justified by any benefit to the Agencies. One commenter said that adding documents from these individuals would not likely generate material that would allow staff to better assess the need for Second Requests.

The Commission disagrees that adding documents prepared by or for the senior leader of the deal team would not likely generate additional key documents to help staff better assess whether to issue Second Requests. Since the beginning of the premerger notification program, 4(c) documents have been a principal source of information that allows the Agencies to identify those transactions that may violate the antitrust laws and that require a more in-depth review through the issuance of Second Requests. Based on documents submitted in response to Second Requests, it is the Agencies' experience that someone other than an officer or director is often in charge of the deal team and this person typically has additional documents that would be responsive to 4(c), but the documents have not been transmitted to an officer or director at the time of the HSR Filing. This is even more likely to be true when the HSR Filing occurs before due diligence is complete or a final agreement is executed. Requiring the submission of transaction-related documents prepared by or for the supervisory deal team lead would result in the Agencies receiving additional probative documents that speak directly to whether the transaction may or may not violate the antitrust laws even if the document has not been shared with an officer or director prior to filing the notification. Based on the Agencies' experience, the analysis of the transaction's competitive implications contained in these documents is extremely probative.

Certain commenters explained that the addition of the supervisory deal team lead to the existing officer and director custodians, combined with the other new document requirements, would require filers to submit a significantly larger volume of documents. One commenter estimated that adding documents from the supervisory deal team lead(s) as well as draft documents as proposed in the NPRM may increase the number of documents submitted with each filing by tenfold or greater. Another comment pointed out that adding supervisory deal team lead(s) to Item 4(c) could also add a burden related to internal document preservation and retention. The comments did not provide specific estimates of how many additional documents or pages of materials adding a supervisory deal team lead may generate, however.

As discussed throughout this final rule, the Commission has taken steps to lessen the costs identified by commenters. After careful consideration of the comments, the Commission has modified this proposal to reduce the cost associated with requiring 4(c) documents by limiting new custodians to be searched to a single individual, the supervisory deal team lead. This modest expansion of custodians by one individual is necessary because documents responsive to Item 4(c) are some of the most relevant material that staff receives, and based on the Agencies' experience there are also probative documents containing 4(c) content generated by and for the supervisory deal team lead that, if submitted with the HSR Filing, would allow staff to better gauge the competitive implications of the transaction—as understood by the filing person—and conduct a more informed, efficient screening analysis.

Another concern articulated by a small number of commenters was that documents created by or for the supervisory deal team lead may convey information that does not reflect the actual assessment of the proposed merger at senior levels. As one commenter explained, the Agencies may draw conclusions that do not actually

align with the documents provided to or sent by the personnel that can make final decisions for an entity, such as officers and directors. The Commission acknowledges this concern but believes that the exclusion of these documents from HSR Filings is often technical and simply a matter of timing. HSR Rules do not require filers to complete due diligence or sign an executed agreement before filing a notification. Even the modification discussed in section V.D. which requires filing parties to have agreed to key terms of the transaction still allows parties to file prior to the completion of all diligence and negotiation. In the Agencies' experience, staff often receives these 4(c)-type documents in response to a Second Request and finds that the reason they were not submitted with the filing was that they had not been shared with any officer or director at the time of the HSR Filing but were eventually shared with them. Even if such documents were never shared with an officer or director, any document that is responsive to 4(c) and was only shared with the supervisory deal team lead—the person who has primary responsibility for supervising the strategic assessment of the deal—is still highly probative of whether the transaction is likely to violate the antitrust laws.

The Commission believes that by limiting this requirement to the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer, it has been tailored to provide a benefit to the Agencies with minimal cost to filers. In the situation where the only individuals supervising the strategic assessment of the deal are already either an officer or director, this requirement will not require searching for responsive documents from anyone new. As discussed above, to the extent that the supervisory deal team lead has responsive documents, it is just often a matter of timing that the document is not submitted with the HSR Filing. Rather than requiring parties to complete their due diligence and provide all responsive transaction assessments provided to key decision makers prior to filing, the Commission has determined that also requiring documents provided to the supervisory deal team lead is the most direct way to obtain these highly relevant assessments of the transaction with the HSR Filing. The cost associated with searching one additional individual for these documents is necessary and appropriate given their importance to the Agencies in quickly identifying those transactions that warrant a closer look. Thus, the Commission adopts this proposal as modified in the final rule.

b. Drafts

The Commission proposed requiring drafts of responsive transaction-related documents if that draft document was provided to an officer, director, or supervisory deal team lead(s). The Commission does not adopt the proposal at this time.

As explained in the NPRM, filers are currently required to submit draft versions of documents responsive to Items 4(c) or 4(d) only if there is no final version or if the draft was sent to the board of directors. Under this guidance, if a not-final version of a document is sent to the board of directors, it ceases to be a ''draft'' and must be submitted, even if a final version is also submitted. Based on the Agencies' experience with receiving other drafts of documents during a Second Request investigation, in some cases prior draft versions have been edited to remove candid assessments of factors relevant to competition prior to circulation to officers or directors.

The Commission received numerous comments on this proposal, raising four principal issues: (1) the burden of producing draft transaction-related documents is not justified by the benefit to the Agencies; (2) such drafts do not reflect sufficient deliberation to be probative of antitrust risk; (3) the term ''drafts'' is not defined in the NPRM and has no common meaning; and (4) requiring the production of drafts would chill internal discussions related to the strategic assessment of the transaction. These concerns are discussed in turn.

First, some commenters emphasized the burden of producing drafts, noting that filing parties will need assistance from counsel and may have to use e-discovery or forensic collection tools to capture all drafts. Requiring drafts, one commenter stated, would significantly increase the volume of documents produced; another commenter noted that it is not uncommon for the authors of these documents to prepare many discrete drafts as part of the drafting process. Some commenters underscored that Agency staff would also face the challenge of reviewing these additional documents. Another commenter pointed out that the proposal would disproportionately affect smaller businesses, which may not have staff lawyers or the ability to incur hundreds of thousands of dollars in legal fees.

In addition, some commenters expressed doubt regarding the probative value of drafts. Drafts may be duplicative, they noted, and often include boilerplate language that may not be accurate as well as incomplete thoughts, dummy slides, and placeholders. One commenter observed that the Agencies do not typically request drafts during the initial waiting period, and that it is exceedingly rare for Agency staff to use a draft document as a deposition exhibit or in any subsequent litigation.

Commenters also sought guidance from the Agencies regarding what constitutes a ''draft'' transaction-related document. In the context of a shared document platform, where several contributors may be working on a document simultaneously, one commenter asked if each saved iteration would be considered a draft that must be produced. Another commenter asked whether a document is considered to be ''submitted'' to an officer, director, or supervisory deal team lead if that individual simply has access to the document via a collaborative drafting tool. As a result of such vagueness, commenters noted, merging parties will face the enormous practical challenge of preserving all versions of documents, even at highly preliminary, incomplete stages. Moreover, such vagueness will lead to arbitrary and capricious enforcement of the requirement to submit drafts if Agency staff later discovers a draft document that they believe should have been submitted with the HSR Filing, according to one commenter.

Finally, some commenters raised concerns about the implications for internal deliberation during the drafting process. One commenter stated that the proposed requirement would chill open discussion ''for fear of creating documents that do not reflect the final thoughts of the company.'' Another commenter warned that it might cause some risk-averse businesses to remove officers, directors, and supervisory deal team leads from the document-drafting process.

Although several commenters recommended eliminating the proposed requirement entirely, the Commission did receive a few suggestions for ways to narrow the proposal. One suggestion was to limit drafts to specific types of documents identified by the Agencies as likely to contain probative information. Another commenter suggested requiring filers to submit the first draft, the last draft, and the final document. Alternatively, one commenter proposed that only the initial draft version submitted to an officer, director, or supervisory deal team lead be produced. None of the commenters supported the alternative proposed in the NPRM, which would require filing parties to

withhold drafts and submit them within 48 hours only if requested to do so by the Agencies.

Having carefully considered the comments, the Commission has decided not to adopt the proposed change to require draft documents at this time.

However, in light of concerns that the Agencies are receiving documents edited to remove candid assessments of the transaction and market competition, the Commission modifies its informal guidance regarding drafts that were shared with the board of directors or similar body. Currently, a document, even in draft form, that is shared with the board of directors (or similar) is responsive and no longer considered a ''draft.'' This distinction is based on the belief that if a document is shared with the board of directors, it is sufficiently reliable to be submitted with the HSR Filing. However, this guidance has sometimes been limited to require that the document be shared with the entire board. The Commission now clarifies that any Transaction Related Document (currently referred to as 4(c) and 4(d) documents) that was shared with any member of the board of directors (or similar body) is responsive and should not be considered a draft; rather, it should be treated as a final version and submitted with the HSR Filing as a Competition Document.

As explained in the NPRM, draft versions of responsive documents can contain highly relevant, probative, or candid statements about the transaction's competitive impact not reflected in the final version of the document, and in some cases, it appears that the final document has been edited to remove candid assessments of factors relevant to competition prior to circulation to officers or directors. The Agencies' experience is buttressed by multiple commenters, who similarly acknowledged that 'sanitizing' these documents in anticipation of antitrust investigation by the Agencies is a legitimate concern. The Commission believes that modifying its informal guidance, as well as obtaining additional documents and information as outlined in this final rule, including those shared with the supervisory deal team lead, will help ensure that the documents the Agencies review contain factual, accurate assessments of the strategic and competitive implications of the transaction.

c. Confidential Information Memoranda

This section requires information currently collected in by Item 4(d)(i) of the current Instructions. The Commission did not propose and does not adopt any material changes to the information required by this item.

d. Third-Party Studies, Surveys, Analyses, and Reports

This section requires information currently required by Item 4(d)(ii) of the current Instructions. The Commission did not propose and does not adopt any material changes to this item.

e. Synergies and Efficiencies

The Commission proposed a Synergies and Efficiencies section to collect the information currently required by Item 4(d)(iii) of the Instructions, with a proposed modification to clarify that forward-looking analyses are responsive. Although one comment expressed general support, some objected to the proposed modification, noting that it would expose firms' proprietary information. More generally, another commenter expressed concern that the burden of identifying the documents that relate to potential synergies or efficiencies would increase greatly if expanded to include supervisory deal team lead(s) and drafts, because synergy analyses in particular can generate a large number of drafts.

In light of the comments and to reduce the overall cost of the final rule as compared to the benefit this information would provide to the Agencies, the Commission does not adopt the proposed modification. However, the Commission declines to repeal the requirement to provide documents that reflect expected synergies and efficiencies, as the Agencies find these analyses to be relevant to understanding any such expected benefits of the transaction. Parties often provide more information about potential efficiencies than is strictly required by the Rules if they want the Agencies to consider such information during their initial review. Thus, the current language in the Instructions regarding synergies and efficiencies remains in effect as part of the final rule.

2. Plans and Reports

The Commission proposed requiring filers to submit two sets of plans and reports not created specifically for analyzing the filed-for transaction. First, it proposed requiring the submission of periodic plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity, if those documents were shared with a chief executive officer of an entity involved in the transaction, or with certain individuals who report directly to such a CEO. Second, the Commission proposed requiring the submission of all plans and reports submitted to the board of directors (or, in the case of unincorporated entities, individuals exercising those functions) that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity. The NPRM called for all such plans and reports that went to the board, not merely those prepared on a periodic basis, because it is the Commission's experience that any report sent to the board reflects market intelligence that is important to the top decision-makers. As proposed, the Commission limited this document requirement to those materials prepared or modified within one year of the filing date of the notification. The Commission adopts the proposal with modifications explained below.

As explained in the NPRM, plans and reports prepared in the ordinary course often contain detailed assessments of core business segments, markets, competitors, other acquisition targets, and projections about future competitive dynamics—insights that have direct bearing on the Agencies' antitrust assessment of the transaction in the initial waiting period. Staff at the Agencies frequently request these documents voluntarily from filing parties early in their review to better understand and analyze the relevant markets at issue.

The Commission received several comments on these proposals. Some comments stated that the proposed requirement was overly broad and would create a significant burden for filers without commensurate benefit to the Agencies. In particular, for example, some comments said that this requirement would mean that filing company personnel must identify, collect, and produce responsive material from several individuals who are not currently searched for documents or materials submitted with an HSR Filing. These comments disagreed with the NPRM's statement that companies frequently collect these documents as part of the due diligence process for transactions. In addition, one commenter stated that, even if such documents were collected, the collection process would not occur in a systematic way to ensure compliance with HSR requirements. In order to effectively collect and produce responsive material, some comments contended that filers would need to use e-discovery and other forensic discovery tools, which are expensive and add

additional time. Certain comments explained it would be counterproductive and burdensome for the Agencies' staff to review and assess the significant volume of documents this new request will likely yield.

The Commission acknowledges that this proposal would have increased the costs for certain filers and has tailored the final rule to minimize these costs. For instance, commenters suggested that there would be additional costs to collect these types of documents, such as interviewing additional personnel, collecting additional documents for production, and having those documents reviewed by counsel, among other tasks. In response to these concerns, the Commission notes the revised requirement is very targeted: it applies only to documents that already exist and are dated within one year of filing, and that discuss overlapping products and services. But in response to concerns that a search for even this limited set of documents could require forensic document technology or other investments in discovery tools, the Commission modifies this requirement to limit the business executives whose files need be searched, dropping the need to collect and produce documents from any person who reports directly to the relevant CEO. As a result, this requirement will not require documents from any new custodians. With this modification, the Commission believes that the number of responsive documents will be reduced so that the burden on the parties to submit and the burden on staff to review these documents will be manageable.

The Commission believes that limiting responsive plans and reports to those shared with the CEOs and with the Boards of Directors of the entities involved in the transaction will still provide the Agencies with sufficient context necessary to determine whether the transaction is likely to violate the antitrust laws. Importantly, these individuals are often involved in preparing the HSR Filing and are the same individuals who are searched for other responsive documents, such as Competition Documents. From the Agencies' experience, those that report directly to the CEO typically collect and retain the types of reports that contain important and relevant business facts so that documents provided to the CEO contain important market analyses and facts that are highly relevant to the Agencies' initial antitrust assessment. They can be especially important for determining the scope of any investigation, potentially narrowing the areas of inquiry or identifying areas of emerging competition that are not otherwise discussed or described in documents generated in connection with evaluating the reported transaction.

The Commission has determined that at this time, requiring reports provided to lower-level executives who report to the CEO, as proposed in the NPRM, would add cost for filers, even those with known overlapping business lines who may expect that the Agencies will be taking a close look at the documents submitted with the HSR Filing.[351] The Commission is also mindful of the burden to the Agencies of receiving HSR Filings with many additional documents that must be reviewed during the initial waiting period. The Commission believes that getting ordinary course plans and reports from the Board of Directors and CEOs should be sufficient to provide staff with highly relevant information with important market context for other submitted documents and information, including the Overlap Description, without overwhelming the current level of staffing devoted to premerger review.

In addition to limiting the people who must provide plans and reports, the Commission has also determined that these documents are not required for select 801.30 transactions. As discussed above, select 801.30 transactions are those where the Commission believes that certain requirements of the final rule are unlikely to provide information necessary to determine whether that transaction may violate the antitrust laws. Not requiring plans and reports for HSR Filings of select 801.30 transactions is another way the Commission is lessening cost based on the lower likelihood that the transaction may violate the antitrust laws.

Other commenters mentioned that responsive plans and reports are unlikely to contain only information about the specific products or services offered by the other filers and this requirement would thus sweep in irrelevant information. One such comment noted that the material received would contain much irrelevant material that would lack sufficient probative value. The Commission disagrees that requiring the plans and reports at issue will generate irrelevant documents. Based on the Agencies' experience, plans and reports, taken as a whole, are highly relevant to staff's analysis of the nature and scope of product or service markets, geographic markets, competitors and competitive dynamics in the industry, new or potential entrants that could mitigate competition concerns, among other key considerations that could determine whether the transaction may violate the antitrust laws. Documents that were created in the ordinary course of business and not solely for the purpose of evaluating the transaction frequently contain important discussions about development efforts for non-commercial products or services or explain competitive dynamics in a broader way that would reveal ways that the transaction could impact non-horizontal competition. In addition, they may identify potential entrants or emerging threats, or discuss other potential acquisition targets. In the Agencies' experience, such plans and reports provide market facts and long-range assessments that bear directly on whether the transaction is one that may violate the antitrust laws in ways described in section II.B.4. Staff has routinely requested that filers provide these documents on a voluntary basis during preliminary-phase investigations, however, because of the voluntary nature of the request there is no requirement that filers produce all or even any of these materials.

Moreover, the modifications the Commission has made to the final rule ensure that the plans and reports are relevant to understanding the nature and extent of existing competition between the merging parties. The only filers who must provide these documents are those involved in transactions in which both parties provide the same types of products or services or that are known to be under development. The Commission acknowledges that these plans are also important to investigate competitive effects in transactions involving supply relationships but has limited this request in the interest of administrability, efficiency, and reducing cost. Transactions between two entities that currently compete (or have pre-revenue products in development that will result in direct

[351] In the final rule, the Commission adopts the suggestion of one commenter to limit plans and reports to those provided to the CEO but declines to seek another round of public comment before finalizing this requirement as modified. Another commenter suggested that the Commission only require these documents that were provided to the board and not to the CEOs. The Commission declines to adopt this suggestion because it believes that excluding CEOs would prevent the Agencies from having the type of relevant information that is routinely provided to senior leaders related to markets with overlapping products and services. Based on its cumulative experience in collecting these types of documents during merger investigations, the Commission has determined that it is necessary and appropriate to collect a limited set of plans and reports that were provided to the highest level of decision-makers, including the CEOs, because they contain important context for conducting the Agencies' initial antitrust assessment of the transaction.

competition soon) typically warrant a close look during the initial waiting period. For these transactions, filers need provide only the plans and reports that discuss market shares, competition, competitors, or markets for those overlapping lines of business created within a year of filing. This is exactly the kind of information the Agencies rely on to determine whether to investigate a transaction during the initial waiting period because it provides key information about the competitive landscape at issue in the transaction. While the Commission acknowledges there may be select portions of these responsive documents that do not contain relevant information, it is often the case that responsive documents contain non-responsive portions. Therefore, the Commission adopts this requirement with a clarification that the relevant products and services are those that both the acquiring person and target produce, sell, or are known to be developing.

One commenter explained that this requirement means filers must self-assess the products and services in which they overlap, and filers may disagree on the existence or degree of the overlap. The Commission agrees that this requirement requires a self-assessment by each party and does not expect that the products and services that are identified in the Overlap Description by each filer will always align, since the acquired person may not have complete information about all the products and services that the acquiring person offers or is developing. The Commission expects that the acquiring person, through its normal diligence of the target, will have a more fulsome understanding of the target's products and services, including those under development. However, as discussed in section VI.I.1., filers should not exchange information with each other when responding to the Overlap Description and each filer may refer to any submitted business document that supports the analysis of overlaps contained in the Overlap Description. In this way, the Commission expects that the analysis of markets reflected in the submitted plans and reports will be reflected in each party's assessment of overlaps contained in the Overlap Description. As is currently the case with a filer's identification of overlapping NAICS codes and for the new requirement to provide an Overlap Description, the Commission will rely on the good faith of the filer to provide accurate information.

Another commenter explained that ordinary course documents not prepared for the transaction are arguably outside the HSR statutory mandate because the Commission had previously declined to adopt a proposal to include such ordinary course documents. The Commission's 1976 proposal had contemplated filers providing, among other items, copies of studies, surveys, analyses, and/or reports prepared by or for the company in the three years before filing, which contain information regarding market shares, competition, competitors, markets and more in relation to any product or service currently made or sold by the other filing party. The Commission states that merely because it declined to require the submission of ordinary course documents with the HSR Filing in the past does not mean it lacks the authority to do so now. The Commission believed that it had the statutory authority to require ordinary course documents in 1976 when it first set up the premerger review program but determined that excluding these types of documents was unlikely to impede effective premerger review.

The Commission believes that it is now necessary and appropriate to require such documents to be submitted with the HSR Filing. As discussed in section II.B., many aspects of the economy, deal structure, and technology have changed dramatically since Congress passed the HSR Act. Based on their experience, the Agencies know that ordinary course documents often contain important horizon-scanning discussions, including market intelligence about other competitors in the market or emerging competitive threats, and that these high-level plans and reports provide important information about the competitive dynamics that may be affected by the transaction. Indeed, these documents often identify other competitors, including their strengths and weaknesses, and this information is highly probative of the competitive assessment of the transaction. Moreover, with the practical limitation to collect and submit only documents that were shared at the highest levels of management—those provided to the CEO or the Board of Directors—the Commission believes the final rule carefully balances the burden of this requirement (for the parties and the Agencies) in light of their clear relevance to the antitrust assessment of the transaction.

One comment noted that requiring plans and reports would be inconsistent with international jurisdictions' merger control regimes. However, the Commission does not find the issue of varying international jurisdictions' document requirements for government merger review dispositive. Each jurisdiction establishes, for itself, the information needed for the particulars of their laws, economies, and priorities. The Commission relies on its own experience in enforcing the U.S. antitrust laws, in light of binding precedent, to assess the most relevant and probative information to determine whether an acquisition may violate those laws. Based on its own experience and expertise in enforcing the U.S. antitrust laws, the Commission has determined that due to the changes in corporate structure and market dynamics described in section II.B., it is now necessary and appropriate to collect a limited set of plans and reports with the HSR Filing.

A smaller set of comments stated that the terms used in the new proposed requirements were vague and unclear. For example, one comment said that the proposed instructions do not provide a clear definition of ''semi-annual and quarterly'' or ''plans and reports,'' which creates uncertainty and compliance risks for filers. Another comment said that the expanded requirements will create uncertainty because they do not directly reference the transaction under review or documents shared during the due diligence process, which would lead filers to make subjective determinations as to which materials are responsive.

The Commission disagrees that there is uncertainty or ambiguity about what is responsive. As stated in the NPRM, regularly prepared plans and reports are high-level strategic business documents created not in contemplation of the transaction but in the ordinary course of business within one year of filing and that are prepared at regular intervals. Responsive plans and reports will discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity, if those documents were shared with a CEO of an entity involved in the transaction, or of any entity it controls or is controlled by. Targeting documents that discuss market shares, competition, competitors, or markets tracks similar language in Item 4(c) of the current HSR Form, which in the Commission's experience is familiar to many filers and uses phrases that are known to businesspeople. The NPRM references to semi-annual and quarterly rely on standard terms that are routinely used in document requests sent to filers and third parties by the Agencies during their investigations. In the interest of clarity, however, the Commission notes that regularly prepared documents

include those that are produced at regular intervals, such as ''annual'' (once a year), ''semi-annually'' (two reports or plans each year), and ''quarterly'' (once every quarter or every three months). To help resolve any remaining uncertainty, the Commission clarifies that regularly prepared plans and reports are those that are prepared by the filers in the ordinary course and at regular intervals and does not include special reports prepared for a specific purpose. Filers should submit one year's worth of annual, semi-annual, or quarterly plans or reports provided to a CEO but do not need to submit plans or reports that are produced more frequently, such as monthly or weekly. The Commission clarifies that filers should submit all plans and reports provided to the Board of Directors and not only those that are regularly prepared. These documents, which were shared at the highest level of decision-making, may include special reports if they contain responsive material.

Yet other commenters were concerned that requiring plans and reports would raise confidentiality concerns, forcing filers to disclose potential transactions to employees before they are ready to do so. As modified, this requirement alone would not lead other personnel to become aware of the transaction prematurely. The Commission believes that plans and reports can be obtained from these CEOs and Board members in a way that does not necessitate divulging the transaction to other executives and businesspeople who do not otherwise know about the pending transaction. Finally, the Commission notes that plans and reports are also not required in filings for select 801.30 transactions.

Certain comments that opposed the requirement to submit plans and reports also offered suggested modifications. One of these comments recommended that the Commission tailor the requirements to clarify that it is limited only to the filing party's products and services in the United States and that filers need only produce documents, or portions thereof, that discuss specifically identified subject matter. Certain comments agreed that the Commission should allow filers to redact non-responsive materials from these documents. The Commission declines to adopt these suggestions because it finds that allowing filers to redact non-privileged information or information related solely to matters outside the United States on the basis of relevance would introduce too much uncertainty into the value of these documents, leaving Agency staff with incomplete, piecemeal material. Agency staff is experienced with reviewing documents that contain relevant as well as non-relevant content and the Commission believes it is important for documents be produced as they were shared with the relevant decision-makers, properly redacted for privilege only.

The Commission also considered alternatives proposed by commenters. One commenter explained that the Agencies could request filers to submit these documents on a voluntary basis, because those requests are narrowly tailored and have historically followed initial substantive discussions between filers and Agency staff. When used in combination with withdrawing and refiling, this process would provide the Agencies, the commenter said, with at least 30 days to review and analyze strategic plans before issuing Second Requests. The Commission disagrees that it is sufficient to continue to obtain plans and reports on a voluntary basis after staff has identified that they are needed because there is no obligation for filers to comply, substantially or minimally, with such a request for information prior to the expiration of the initial waiting period. In the Agencies' experience, even when parties are asked to provide these documents on a voluntary basis, they are often do not provide them prior to the end of the first review period (either 30 or 15 days) and often choose to pull and refile their notification in order to submit these and other materials that were requested on a voluntary basis. Moreover, in the Agencies' experience, these particular documents contain important information that is currently missing from the HSR Filing that would identify the transaction as one that requires a closer look.

Another comment suggested that Agencies could get these documents using Second Requests as they do now. While either Agency can obtain these documents through the issuance of Second Requests, the Commission believes that the probative value of these documents makes them necessary for staff's initial screening assessment, both because they can identify different areas of antitrust risk, including for areas of future competition, and because they may contain additional information about the business lines of interest that may alleviate the need to issue Second Requests or narrow their scope. As discussed above, because issuing Second Requests is time- and resource-intensive for both the parties and the investigating agency, is it not a substitute for having additional information in the HSR Filing that minimizes the need to issue Second Requests at all. Having additional relevant and targeted information on the front-end benefits both the Agencies and the parties because it allows the Agencies to focus on the most concerning transactions, and allows parties to avoid Second Requests when they are not warranted, and thereby avoid unnecessary expense and delay.

Finally, certain comments discussed earlier also suggested not adopting the proposed requirement at all. In light of the Agencies' experience with the probative value of high-level ordinary course documents and their belief that having them would provide necessary context to other material submitted with an HSR Filing, the Commission declines to dismiss the requirement altogether. The Commission believes this final rule, as modified, reflects a reasonable balancing of the importance of these documents to a premerger assessment and the burden of requiring them for any transaction where filers have overlapping business lines. The Commission has in considered the specific concerns raised by comments and tailored the requirement to preserve the important benefit to the Agencies while mitigating the cost to filers (and to the Agencies).

3. Organizational Chart of Authors

As the final part of its Business Documents section, the Commission proposed requiring an organizational chart(s) that would reflect the position(s) within the filing person's organization held by identified authors and, for privileged documents, recipients of each document submitted with the HSR Filing. The Commission also proposed requiring the filer to identify the individuals searched for responsive documents. The Commission does not adopt this proposal.

The Commission received several comments opposing this proposed instruction, with commenters noting that many companies do not maintain these types of organizational charts in the ordinary course of business, and to the extent they do, such charts are often incomplete or inaccurate. According to one commenter, such charts would need to be prepared solely for the purpose of the HSR Filing, which would be time-consuming. Other commenters pointed out that authors of certain documents may not even be employees of the filing entity, thereby complicating the certification of the filing.

In addition, multiple commenters questioned the Agencies' need for organizational charts to determine whether to issue a Second Request. As one commenter noted, it is unclear why organizational charts will assist staff in

assessing whether a particular transaction merits further review as opposed to their value for identifying potential custodians for a potential Second Request.

As to the proposed requirement to identify the individuals searched for responsive documents, one commenter stated that parties may claim privilege on information regarding whose files were searched. Another commenter observed that, for the majority of HSR filings, documents are identified through targeted self-collection, directed and overseen by legal counsel, rather than running Second Request-style searches through custodial files. The same commenter cautioned that the proposed disclosure requirement would disincentivize companies to err on the side of over-collection so as not to raise a red flag to the Agencies or suggest that the persons searched should be custodians in a Second Request.

Finally, as an alternative to providing an organizational chart, one commenter suggested requiring parties to identify the person who supervised the drafting and the person to whom that drafter directly reports.

After considering the comments and weighing the benefit to the Agencies during the initial waiting period in light of the cost of complying, the Commission does not adopt this proposal. As discussed in section VI.A.3., elsewhere the final rule requires filers to identify authors of documents if the filer has identified a NAICS overlap, product or service overlaps in the Overlap Description, or a supply relationship in the Supply Relationships Description. The Commission has determined that author information is not relevant for all filers and that limiting author information in this way provides sufficient benefit to the Agencies while reducing the cost for filings without such relationships.

In sum, the Commission has determined that the requirements to submit business documents contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws and to provide important information about each party's view of market realities and that these requirements, as modified, have been tailored to reduce the cost of submitting responsive documents as much as practicable.

H. Agreements

The Commission proposed an Agreements and Timeline section to require filing persons to provide a term sheet or draft agreement that reflects sufficient detail about the proposed transaction to demonstrate the transaction is more than hypothetical, if a definitive agreement has not been executed. In addition, the Commission proposed additional changes to require the submission of the entirety of all agreements related to the transaction and a new requirement to submit other agreements between the filing persons that are not related to the transaction, as well as a timetable for the transaction. As discussed below, the Commission adopts some proposals with modification and does not adopt the requirement to submit a timeline.

1. Transaction-Specific Agreements

The Commission proposed requiring filing persons to produce all documents that constitute the agreement between the acquiring person(s) and the person(s) whose assets, voting securities, or non-corporate interests are to be acquired, inclusive of schedules, exhibits, and the like, that relate to the transaction, regardless of whether both parties to the transaction are signatories. Further, consistent with the proposed changes to § 803.5, the Commission proposed requiring the most recent draft agreement or term sheet, if filers were not submitting a definitive agreement. The Commission adopts the requirements with modification.

Currently, only the production of certain schedules is required, although many filers do provide schedules regardless. As noted in the NPRM, in the Commission's experience, the structure of transactions has become increasingly complex, often comprising not only multiple agreements between the filing persons but also agreements with third parties. Understanding the entirety of the transaction, including but not limited to non-competition and non-solicitation agreements and other agreements negotiated with key employees, suppliers, or customers in conjunction with the transaction, is crucial to determining the totality of the transaction and assessing during the initial waiting period the transaction's potential competitive impact.

The Commission received one comment in support of this proposal. The State antitrust enforcers wrote in support of the request for non-competition agreements, noting that non-compete clauses that bind employees post-employment prevent new businesses from emerging and stifle entrepreneurship and innovation. One commenter opposed the proposal, noting that this requirement will significantly increase the burdens for filers and recommended requiring that notifying parties provide a descriptive index of such agreements from which investigating staffs could identify specific agreements that they require (with translations if needed). Another commenter expressed the concern that, as written, the proposed instruction would capture clean-team agreements, used by merging parties to reduce the antitrust risk associated with exchanging competitively sensitive information, as well as confidentiality agreements that include similar antitrust safeguards, and that in doing so this proposal might have unintended effects. The commenter cautioned that in response some parties might forgo using clean-team agreements entirely, on the thinking that including a clean-team agreement in the HSR filing would signal a larger competitive concern than actually exists.

The Commission finds that having the complete set of documents that will govern the transaction is necessary to understand the potential effects of ''the transaction.'' Therefore, it does not adopt suggestions to provide an index in lieu of the actual documents that constitute the agreement. In the Commission's experience, voluntary production of documents can delay the review of transactions within the initial waiting period. The Commission does limit the requirement to those agreements that will be in effect on and after closing, with the intention of excluding agreements such as clean team agreements. The Commission also adopts the clarification, discussed in section V.D., that the requirement relates to the transaction that the parties intend to consummate.

The Commission also proposed requiring that, if there is no definitive executed agreement, the filing parties provide a copy of the most recent draft agreement or term sheet that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate. As discussed in section V.D., the Commission is modifying the proposed instructions in response to certain comments that requested clarification. One commenter sought clarity on what constitutes ''sufficient detail'' about the scope of the transaction, noting that certain transaction details are often not fully determined at the time of signing a definitive agreement or filing HSR, but also may not be necessary to determine whether to issue Second Requests. The same commenter cautioned that the proposed requirement will likely cause undue delays and risk unnecessarily increasing the overall timing to close a transaction especially in instances where parties intend to file on the basis of a letter of intent.

To address this concern, the Commission has revised the Instructions to describe what would be sufficient:

> some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

The Commission notes that these examples are meant to be illustrative and not exhaustive.

2. Other Agreements Between the Parties

The Commission proposed requiring filing persons to submit all agreements between any entity within the acquiring person and any entity within the acquired person in effect at the time of filing or within the year prior to the date of filing. The Commission adopts the proposal with a significant modification to reduce the burden that would have been associated with producing copies of these agreements with the HSR Filing.

As explained in the NPRM, understanding the scope of any existing contractual relationships between the filers, such as an existing customer-supplier relationship, would materially assist the Agencies' review by revealing any business interactions or relationships that exist prior to the transaction and that may be affecting premerger competition, which is material to assessing how the transaction may affect post-acquisition competition.

The Commission received two comments in support of the proposed requirement. The State antitrust enforcers noted that it would shed light on any licensing or supply agreements, as well as any non-compete agreements, between the parties. A union commenter also supported the request and suggested expanding it for certain non-compete and non-solicitation agreements. The commenter noted that the filing parties might have such agreements related to the products, but these agreements might be with third parties and not between the filing persons. In addition, the same commenter suggested requiring parties to submit copies of collective bargaining agreements, at least with any common unions.

Several commenters, however, objected to the burden the proposed requirement would impose, particularly in industries where companies rely heavily on agreements with other industry participants to do business. One commenter noted that broadband and telecommunications providers routinely have myriad agreements with each other, covering a wide range of aspects of the services they offer. The commenter stated that many, if not most, of these agreements have little potential to create competition concerns, and in fact many are pro-competitive. Another commenter stated that, in the wireless communications industry, some pairs of wireless carriers might have up to 1,000 agreements to which they are both parties.

A few commenters recommended modifications of the proposed instruction to reduce the burden. One commenter suggested relying on the Competition Descriptions or excluding de minimis agreements and only requiring ''Material Other Agreements,'' which would be defined as exceeding in value some percentage of entity revenues. Another commenter recommended only requiring the production of three categories of pre-existing contracts between the acquiring person and the acquired entity or assets: (i) noncompete agreements in effect within one year of filing, (ii) non-solicitation agreements in effect within one year of filing, and (iii) supply or license agreements that generated annual revenue of $10 million or more within one year of filing. The commenter also suggested clarifying that purchase orders do not need to be produced, nor do contracts that have expired or terminated before the filing date. A third commenter also recommended limiting the requirement to contracts that are material in terms of dollar value. In addition, the commenter proposed that notifying parties be permitted to exclude standard-form agreements that they use with numerous other counterparties.

In light of the comments, the Commission has made significant modifications to this proposal. First, the Commission has determined that only one party need provide this information; in accordance with its general approach, the Commission has determined to require only the acquiring person to indicate if there are existing agreements between the parties. Second, the acquiring person will not be required to provide the agreements, but rather only to answer whether any such contractual agreements exist and, if so, to indicate via checkbox which types. The Commission has identified specific types of agreements that reflect a significant business relationship that is relevant to the premerger assessment: agreements with non-compete or non-solicitation terms; leases, licensing agreements, master service agreements, operating agreements, or supply agreements. If the there are other types of agreements, the acquiring person should indicate ''other.'' The Commission clarifies that these are agreements that the parties have with one another and which may affect the antitrust assessment of the reported transaction.[352] Third, the Commission has limited the requirement to those agreements that are between the acquiring person and the target, rather than the acquired person. This is the specific relationship that is of interest to the Agencies for the premerger assessment and should limit the information to those agreements most relevant to that analysis. These limitations should provide the Agencies with sufficient information to screen for transactions that may require further review due to existing contractual obligations, while relieving much of the cost associated with the requirement.

3. Timeline

The Commission proposed that filing persons provide a narrative timeline of key dates and conditions for closing. After careful consideration of concerns raised by commenters, the Commission does not adopt this proposal.

In the NPRM, the Commission reasoned that, just as it is critical for the Agencies to understand the totality of the transaction during the initial waiting period, it is critical to understand the timing of key milestones and the conditions to closing, which are often complex and not easily understood from the transaction documents themselves. The Commission suggested that this basic information would help the Agencies understand key deal milestones and better manage the timing and focus of the investigation during the initial waiting period.

The Commission received a few comments expressing general support for the proposal; however, one commenter raised concerns regarding the burden, noting that the proposed

[352] For example, a non-compete or non-solicitation agreement between two otherwise independent companies is indicative that the parties may have a competitively significant relationship, and in certain situations, may violate the antitrust laws. *See, e.g., United States* v. *Brown,* 936 F.2d 1042 (9th Cir. 1991). In a merger context, non-compete restrictions can implicate post-merger competition in ways that violate the antitrust laws. *See, e.g., In re ARKO Corp.,* No. C–4773 (F.T.C. Aug. 9, 2022) (final decision and order); *In re DTE Energy Co.,* No. C–4691 (F.T.C. Nov. 24, 2021) (decision and final order). Other agreements between the parties, including those related to distribution or licensing, can limit competition post-merger in ways that may violate section 7, including by increasing the risk of foreclosure. *See, e.g., FTC* v. *Tempur Sealy Int'l, Inc.,* 4:24–cv–02508 (S.D. Tex. filed July 2, 2024) (complaint) (alleging that buyer attempted to use existing distribution relationship to exclude rival mattress brands premerger).

requirement is broader and more onerous than the interrogatory that staff routinely requires during in-depth investigations. The same commenter suggested that this instruction be limited to requiring a brief description of the timetable for the transaction and a brief description of any termination fees, break-up fees, ticking fees, or similar arrangements.

After considering the comments and weighing the benefit to the Agencies of requiring a deal timeline in light of the cost of compliance presented by commenters, the Commission is not adopting this proposal. Even though the Agencies would benefit from knowing the timeline for the transaction to help manage their time and investigative resources during the initial waiting period, the Commission does not adopt the proposed change to require one. In the Agencies' experience, these timelines can change throughout the course of an investigation, although not typically within the initial waiting period. The decision not to require a timeline is one of the ways in which the Commission aims to lessen cost on all filers of preparing an HSR Filing and staff can continue to ask for (or parties can choose to provide) this relevant information when warranted.

In sum, the Commission has determined that the requirements for the transaction agreement and information about other types of agreements between the parties contained in the final rule are necessary and appropriate to enable the Agencies to understand the scope of the transaction as well as any existing business relationship that might be affected by the transaction and that these requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

I. Competition Descriptions

The Commission proposed a new Competition Analysis section in the Instructions to require filers to provide three categories of narrative responses: (1) an Overlap Narrative, (2) a Supply Relationships Narrative, and (3) Information related to Labor Markets. As proposed, filers would provide, among other things, a description of their basic business lines as well as product and service information for all related entities; identify current and potential future overlaps and supply relationships between the filing persons; and provide information about their employees and what services these employees provide in areas where both parties employ the same types of workers. As noted in the NPRM, this information would supply crucial information about existing and future competitive relationships between the filing parties, which is the starting point for any assessment of whether the transaction may violate the antitrust laws.

As discussed in detail below, in the final rule the Commission does not adopt requirements related to Labor Market Information, and adopts requirements to submit an Overlap Description and a Supply Relationships Description with significant modifications. On the Form, this section is now labeled Competition Descriptions.

The Commission received several comments that supported the introduction of narrative responses. One commenter strongly supported the collection of information in narrative form related to products, services, workers, supply and distribution relationships, licensing, and industry and geographic overlaps, believing that this information is necessary to help the Agencies evaluate the effects of an acquisition more thoroughly and efficiently, and identify potential threats to competition. Another commenter suggested that pre-acquisition disclosure of vertical linkages is necessary for antitrust agencies to effectively assess the potential anticompetitive impact of these non-horizontal acquisitions. Another noted that, while HSR rules have always required parties to identify downstream products and revenues by NAICS and NAPCS codes, they have never required the disclosure of any information at all about input markets, including those for labor. It stated that this lack of information leaves initial filing screeners at a loss to spot these competition issues and potential violations, and further noted that this omission forces investigatory staff scrambling to ask companies to volunteer such critical input market information. The same commenter stated that the proposed rule would help narrow this information asymmetry and empower the Agencies to clearly identify impact in both output and input markets.

The Commission also received several comments that objected to the collection of this information in narrative form. In general, comments asserted that expansive narrative requirements are arbitrary and capricious because they would change HSR notification from an objective task to a subjective task, creating delays, disputes, and uncertainty with no countervailing benefit especially for those deals where no antitrust issues are present. For a number of reasons discussed in detail below, the Commission disagrees, but has nonetheless modified these requirements as appropriate to tailor them to their relevance in determining whether the transaction may violate the antitrust laws and warrant a Second Request.

Experience With Narratives

The Agencies have extensive experience reviewing narrative responses to requests for voluntary submissions from the filing parties during the initial waiting period (and to other types of investigative demands where responses can be compelled) and are aware of the effort required to produce them. From this experience, the Commission knows that when the parties submit this information on a voluntary basis during the initial waiting period—and it is complete and timely—narratives that discuss existing business relationships between the parties are critically important to determining whether there is a need to issue a Second Request. In the Agencies' experience, voluntary narrative responses are especially helpful in focusing any potential Second Request on the areas of competition most in need of in-depth review but just as often can lead staff to conclude that no Second Request is necessary. As discussed above in section III.A.2., when the Agencies engage with the parties during a withdraw-and-refile investigation, which typically involves the submission of some narrative responses from the parties, the transaction is more likely to proceed without the need for a Second Request.

But voluntary narrative responses often come late in the initial waiting period and are frequently incomplete. More importantly, staff only asks for additional information on a voluntary basis when it has determined, on the basis of other information contained in the HSR Filing, that the transaction may alter existing competitive conditions in a way that may violate the antitrust laws but that more information is needed. As discussed in section II.B., the current information requirements do not surface the facts that would flag transactions for certain types of violations, and for those filings staff has no basis to know that additional information is needed. Where there are deficiencies in the initial information requirements, resorting to collecting information on a voluntary basis does not cure the deficiency because staff will not know that relevant facts exist to flag the transaction for follow up.

The Commission believes that requiring additional information with the HSR Filing that would reliably reveal any existing business relationships between the filers is

necessary and appropriate to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws. Because the information called for in the Competition Descriptions is provided directly by the parties to the transaction and is reflective of each filer's business operations, it is highly probative and reliable for the purpose of conducting a quick and thorough premerger assessment of existing and future business relationships between them. The information collected on the current Form does not reveal these relationships, yet these are the relationships that are foundational to flagging whether the transaction is one that warrants a closer look. As discussed in sections II.B.3. and 4., the need is especially great for information related to potential non-horizontal concerns because there is currently no information that specifically identifies existing supply relationships. Information about existing supply relationships will fill critical information gap in the current Form and provide a factual basis for the Agencies to screen for potential non-horizontal impacts during the initial waiting period.

Nonetheless, to make clear that the Commission does not require the parties to submit an antitrust analysis akin to a ''white paper,'' or hire counsel or experts simply to create narratives for the purpose of an HSR Filing, the Commission eschews the use of the term ''narratives'' and instead adopts the term ''description'' to better reflect the type of answer that is required. Filers should rely on business personnel to describe the products and services they offer (or that are under development) using terms and language that is natural in the marketplace. Given the breadth and tone of the objections to the proposed narratives, the Commission believes that commenters misunderstood what is sought. The Commission intends to collect factual information about overlaps and supply relationships via a written answer (as opposed to documents or data) but is not seeking opinions or arguments about what those facts should imply. While in other contexts a narrative response may contain opinions, tell a story, or take a position, the final rule does not require any of that from filers. Instead, filers should collect and report the type of information it provides to customers, suppliers, investors, or the public for purposes other than an antitrust analysis—to simply describe the products or services it offers for sale. This is the type of basic business description required by the final rule, and the Commission adopts with terms Overlap Description and Supply Relationships Description to address concerns that the final rule requires something other than that. Moreover, the Instructions ask filers to provide a brief description in an attempt to discourage lengthy responses or unnecessary commentary beyond what is strictly required. [353]

The Overlap Description is a key reform and is motivated by the Commission's experience over time with relying on NAICS codes to identify areas of horizontal competition. Based on its experience reviewing narrative responses submitted on a voluntary basis during the initial waiting period, the Commission has identified problems with relying exclusively on NAICS code overlaps as the basis for screening whether the merging parties are current competitors. While NAICS codes are well suited for reporting in some sectors, the Commission agrees that NAICS codes can be both overinclusive and underinclusive in reflecting whether the parties offer competing products or services to any set of customers. As discussed in section II.B.4., when it comes to certain sectors of the economy that are undergoing technological change or growth, including through the introduction of novel products or services, NAICS codes are especially unhelpful, and have not been updated to reflect current market offerings.

The mismatch between existing NAICS codes and market realities can be most acute in new sectors of the economy, for which there are not many codes. For instance, NAICS code 518210 is for companies that provide computing infrastructure, data processing, web hosting, and related services, which covers businesses as diverse as those providing data entry services, cloud storage services and cryptocurrency mining.[354] Included in this six-digit NAICS code are a whole array of businesses offering complex and evolving products, some of which may compete for the same customers but some of which surely do not. Adding further complexity, the Census Bureau provides cross-references to fourteen other NAICS codes with related business lines. This single category is very broad, potentially reflecting ''competition'' between the parties that does not exist in the marketplace. As a result, each filer in a transaction may report revenues in 518210 reflecting an ''overlap'' in their respective business lines, when in reality they offer very different products or service.

These cross-references create a different but equally vexing problem. For instance, NAICS code 541511 is for companies that offer custom computer programming services to meet the needs of a particular customer while NAICS code 513210 is for companies primarily engaged in software publishing. Here, a company that provides both standard and custom solutions may report revenues only in 513210 even if some of the companies it competes with would only report revenues in 541511, reflecting its focus on custom products. Overall, companies select their own NAICS codes for revenue reporting, introducing discretion into the use of this ''objective'' system of classification, which was established for a purpose other than identifying companies that offer competing products or services. As a result, companies that may regularly compete against one another may not identify any overlapping NAICS codes.

Despite these shortcomings, the Commission will continue to rely on NAICS code reporting for revenues and the identification of overlaps to give filers some common system of reference and because the identification of horizontal overlaps is a key screening step in the Agencies' initial antitrust assessment. But new sectors have emerged over the years and NAICS codes have not been refined or updated. Accordingly, the Commission has determined that receiving overlap information in description provided by the filer is necessary and appropriate to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws. The Agencies may also use the Overlap Description to conclude that the parties are not current or future rivals because the exercise provides filers with an opportunity to correct any ''false positives'' that result from inaccurate reporting of NAICS revenue overlaps. As a result, the Overlap Description may contain a factual basis for the Agencies to determine, solely on the basis of information contained in the HSR Filing, that the transaction is not likely

[353] A significant number of filers who report NAICS overlaps initiate contact with the Agencies to provide supplemental information (often in the form of white papers) that supplies context for how they view competition, regardless of NAICS reporting. In the Agencies' experience, these presentations often contain descriptions of the parties' respective business operations as well conclusions that the parties would like the Agencies to reach to dismiss concerns about the transaction. The former is now required by the final rule while the latter is not.

[354] *See* U.S. Census Bureau, North American Industry Classification System, 51280 Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services (rev. Sept. 10, 2024), *https://www.census.gov/naics/?input=518210&year=2022&details=518210*.

to violate the antitrust laws at that time. In the Overlap Description, a filer can make clear that further investigation is unnecessary. Allowing the agencies to reach these conclusions at the outset is more efficient than having the parties provide the information at a later stage or requiring the Agencies to discover this information indirectly through document requests.

As the Commission acknowledged in the NPRM, the cost to filers to create these descriptions could be significant, especially for transactions involving close competitors with multiple overlapping product or service lines or those who operate in the same supply chain. But identifying those transactions that present broad and complex competition issues is a critical first step for the Agencies, and information from these descriptions is highly relevant to flagging the transaction as one that may violate the antitrust laws. Thus, the cost of providing these descriptions is proportional to the likelihood that the transaction is one that warrants a close look: the more extensive the existing competitive relationship between the parties, the more relevant these relationships are in identifying the transaction as one that warrants further investigation. It is also possible that these descriptions will provide important context for other information contained in the HSR Filing that would allow the Agencies to narrow any potential investigation to those areas of important existing or future competitive interaction, or to conclude that the transaction is not one that is likely to violate the antitrust laws. Thus, the descriptions are necessary and appropriate for the Agencies to assess the potential for anticompetitive impacts, including some indication of their scope. This information will also permit the Agencies to manage their resources appropriately, increasing overall efficiency. For example, if the Overlap Description identifies hundreds of products or services, the Agencies can devote sufficient staff resources to reviewing those areas of overlap to determine whether any rise to the level of requiring a Second Request investigation. On the other hand, if the notification identifies no areas of overlap, the Agencies may be able to quickly determine whether there are other materials in the filing that would nonetheless raise concerns about the competitive impact of the transaction.

It is appropriate for the filers to bear the burden of providing basic business information that they possess. It is unreasonable and inefficient to require the Agencies, who do not possess basic information about the filers' businesses, to expend resources gathering the information from outside sources, or to require the Agencies to issue a separate request for this critical information which only delays the review process and in turn the filers' ability to consummate transactions. Yet the status quo requires the Agencies to obtain basic business facts that are needed to evaluate transactions through voluntary requests to the parties or Second Requests. As one commenter noted, the Federal Rules of Civil Procedure encourage Federal courts to order civil discovery based on the obvious principle that the person already in possession of the information is in the best position to provide it, and properly so.[355] This principle is apt here.

The Commission also believes that parties will be able to reduce the cost of creating descriptions by drafting them during the period of due diligence when the companies are learning more about their respective business operations. Discovering the extent of existing business operations is key to the diligence process, and companies often create descriptions of their operations as part of the process.[356]

The Commission has made every effort to calibrate its need for the requested information and the availability of that information from the parties or from others, including the cost to filers associated with collecting information and creating the descriptive responses. For this reason, as discussed below, the Commission has decided to significantly modify certain aspects of the proposed descriptions, for instance when the information is duplicative of other information in the notification or when the information is available from a source other than the parties. In taking this approach, the Commission rejects alternatives suggested by commenters to reduce the cost by excusing transactions below a certain value or without a NAICS overlap, because it has found no basis for doing so. In the Agencies' experience, deal value is not a reliable indicator of the potential for antitrust harm,[357] especially when the transaction involves multiple business lines or when competition occurs in local markets.[358] Instead, the Commission has determined to excuse select 801.30 transactions from the requirement to provide Competition Descriptions. As discussed in section VI.A.1.f., these transactions rarely involve entities with existing competitive relationships and do not confer control, and thus the Commission has determined not to require these filers to provide descriptions of any existing business relationships, should they exist.

The Commission now turns to a discussion of both the general and specific objections to the Competition Descriptions requirements.

General Objections to the Competition Descriptions

Several commenters questioned the general utility of these requirements. One commenter suggested that burdening all filers with these descriptive requirements is not particularly well targeted to identifying acquisition-related antitrust concerns. Another stated that the information called for is duplicative of documentary materials that are now also required. Two other commenters suggested that the Commission continue to ask for this information on a voluntary basis and only for deals that have been flagged for closer review.

The Commission disagrees that the information required by the Competition Descriptions would be of little use or contain repetitive information. Requiring filers to provide a description of their existing competitive relationships is a key reform of the final rule to make the premerger review process more effective and efficient. Such descriptions should contain a factual summary of the parties' existing business relationships, which is critical information for identifying those transactions that require a closer look. This is information that is known to filers and bears directly on whether the transaction may violate the antitrust laws. The Commission has determined

[355] Fed. R. Civ. P. 26(b)(1) advisory committee note (2015) (identifying information asymmetry as a justification for placing a heavier burden on the party who has the information).

[356] When establishing the premerger regime, the Commission acknowledged that requiring information in the notification may actually reduce the cost associated with compiling it. 42 FR 39040, 39043 (Aug. 1, 1977).

[357] *See, e.g., United States* v. *Neenah Enterprises, Inc.,* No. 1:21–cv–02701 (D.D.C. Oct. 14, 2021) (complaint) ($110 million asset purchase); *In re Global Partners LP,* No. C–4755 (F.T.C. Mar. 2, 2022) (decision and final order) ($151 million acquisition); *In re ANI Pharmaceuticals, Inc.,* No. C–4754 (F.T.C. Jan. 12, 2022) (decision and final order) ($210 million acquisition); *United States* v. *Grupo Verzatec S.A. de C.V.,* No. 1:22–cv–01401 (N.D. Ill. Mar. 17, 2022) (complaint) ($360 million acquisition). Note that the value of the transaction is considered by some filers to be confidential information and is not always disclosed in public filings. *See FTC* v. *IQVIA Holdings Inc.,* No. 1:23–civ–06188 (S.D.N.Y. Dec. 29, 2023); *In re Lifespan Corp.,* No. C–9406 (F.T.C. Feb. 17, 2022) (complaint).

[358] *See, e.g., In re The Golub Corp.,* No. C–4753 (F.T.C. Jan. 20, 2022) (decision and final order) (divestiture of 12 supermarkets); *United States* v. *B.S.A. S.A.,* No. 1:21–cv–02976 (D.D.C. Mar. 15, 2022) (divesture of two business lines).

that it is necessary to require this descriptive information from filers because other information in the HSR Filing is not sufficient to screen transactions for all types of potential harm, and, as discussed above, staff cannot rely solely on voluntary collection of this information to flag the transaction for a closer review.

Moreover, as discussed elsewhere, the Commission intends to rely on information in the Competition Descriptions as the basis for determining whether the filer also has to provide other information required by the final rule. The Commission has determined that, for many additional information requirements, these descriptions (in addition to the NAICS code overlap reporting) will determine the scope of most of the other information requirements in the HSR Filing. It is appropriate for the Commission to condition additional information requests on the identification of an existing business relationship as the most effective way to calibrate the cost of reporting the antitrust risk associated with each transaction. In order to reduce the cost for filers whose transactions raise little to no antitrust risk, it is necessary that all filers go through the exercise of determining whether they are in a horizontal or supply relationship with the other party. Those filers who do not have such relationships will so indicate by responding ''none'' and will be relieved of the obligation to respond to other questions that are conditional on an affirmative response. Relying on this conditional response format is a key feature of the final rule to ensure that filers who do not have an existing business relationship with the other party (*e.g.,* as a competitor or supplier) have a lower cost associated with submitting an HSR Filing.

One commenter stated that because these descriptions are not prepared in the ordinary course, they cannot be required to be submitted with the notification. Further, this commenter stated that Congress only intended the Commission to collect information and documentary materials reasonably available to the reporting companies, suggesting that anything not kept in the ordinary course of business runs afoul of Congressional intent. The Commission disagrees with the commenter's reading of both the statute and the legislative history. The rulemaking provision in 15 U.S.C. 18a(d) contains no ordinary course limitation. To the contrary, it states that HSR filings shall be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws. The commenter quotes the Commission's 1977 Notice of Proposed Rulemaking for the premerger notification rules when making this assertion, but in that notice, the Commission did not state that information reasonably available was limited to ordinary course documents.[359] Further, the Competition Narratives as adopted do not require any information that is not kept in the ordinary course of business of the acquiring or acquired person. These descriptions require parties to gather and present this information in a format that will permit the Agencies to understand their lines of business, areas in which the parties offer similar products and services, and relationships in the relevant supply chains.

The Commission also disagrees that businesses do not develop an understanding of their business operations in comparison to those of the other merging party ''in the ordinary course.'' In the Agencies' experience, businesses routinely conduct competitive assessments in which they compare their operations to those of others. These internal assessments of other market participants are often done long before any specific assessment of a particular transaction and may be contained in documents such as plans and reports. In the specific context of a proposed transaction, parties (especially those that are publicly traded) conduct due diligence assessments of prospective targets. These comparative assessments may be done specifically for the purpose of analyzing the filed-for transaction, and the Commission considers those to be in the ordinary course of acquisition planning. The descriptions required by the final rule would summarize these types of assessments and reflect their underlying business facts. In the Commission's view, this is exactly the type of materials the House conferees intended would be submitted with the notification: ''the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.''[360]

Compliance Concerns

Some comments expressed concern that the descriptions would create HSR Act compliance issues, noting that, because the descriptions require subjective judgments, the Agencies have no objective standards or precedent against which compliance or substantial compliance could be judged. One commenter suggested that each of the descriptions may generate disagreements between the Agencies and the merging parties regarding the accuracy or completeness of the information provided, leading the Agencies to retroactively declare a notification to be incomplete and restarting the initial waiting period. One commenter stated that the descriptive responses will require extensive iterative discussions with PNO to determine compliance, which will delay the start of the waiting period. Others asserted that the Commission could deem a descriptive answer to be incomplete simply because staff disagrees with the assessment, or that the Agencies may be tempted to second-guess or nitpick the parties' responses, leading to uncertainty about deal timelines.

As discussed above, the Agencies have decades of experience with reviewing descriptive responses, including those submitted on a voluntary basis during the initial waiting period and in response to Second Requests. In fact, staff routinely seeks this information as the first supplement to the information contained in the HSR Filing for any transaction that is identified as requiring a closer look. But the current practice of permitting parties to submit descriptive responses on a voluntary basis while the waiting period is underway has encouraged parties to submit incomplete responses or submit them at a time when staff is unable to verify the information before it must make a determination whether to issue Second Requests. Any deficiency in a voluntary descriptive response prevents staff from being able to quickly determine whether the Agency should issue a Second Request to require a more complete narrative answer.

The Commission believes that requiring Competition Descriptions to be submitted with the HSR Filing provides the proper incentive for filers to submit a complete and accurate response, one that is certified by the responsible executive who signs the notification and that is available at a time when the information can be reviewed and assessed by staff. The certification allows the Commission to accept filings containing descriptive responses and to start the waiting period. If, upon reviewing the notification, staff determines that the

[359] 42 FR 39040, 39043 (Aug. 1, 1977).

[360] 122 Cong. Rec. 30877 (1976) (remarks of Rep. Rodino).

descriptive responses are directly contradicted by other information submitted with the notification, staff may request supplementary information to explain the contradictions, which could require a restarting of the waiting period. If the notification contains no such materials that call into question the reliability of the descriptions, any supplementary submissions to clarify or correct them would likely not require a restarting of the waiting period under the Act.

Other comments raised compliance concerns related to who must help prepare the information. Some comments stated that the descriptive responses will require filers to hire expensive antitrust counsel, and possibly an expert economist, to draft the descriptions prior to filing. According to one commenter, filing parties will be forced to engage antitrust counsel, economists, and other professional class consultants on every deal, regardless of its impact on competition. Another commenter suggested that hiring consultants to draft narratives may be prohibitive for some parties that may be most in need of a merger or affiliation. One comment noted that, as a practical matter, the only people who are eligible to certify the notification often lack personal knowledge necessary to opine about things like the relevant product market definition or the competitive effects of a transaction. The Commission disagrees that filers need to hire outside personnel, who do not know the filer's business operations and would need to be given the very information that the Competition Descriptions call for in order to draft them. As noted in the NPRM, those who author the descriptive responses should be the individuals who best know the business of the filing person. The Commission reiterates that the Competition Descriptions should be based on a businessperson's understanding of the filer's business operations and consistent with other business documents and materials submitted with the HSR Filing.

Other comments raised a related point, stating that the type of detailed, competitively sensitive information necessary to draft these narratives is often deliberately kept away from the business executives, which would require certain filing parties to employ antitrust safeguards to collect information without sharing confidential business information with or about one another. Several commenters asserted that providing customer contact information, including identifying specific individuals for Agency outreach, would create significant uncertainty and further increase the risk that confidential acquisition plans would be known more widely, or increase the risk of insider trading.[361]

As discussed in the section below, the Commission agrees that it is important to reduce the need to share information about the transaction more broadly than is necessary to complete an HSR Filing, but rejects the idea that companies are unfamiliar with managing these risks or that the rule would significantly increase them. Also, complying with securities laws to prevent insider trading in public shares is an obligation of every publicly traded company, and the rule does not increase the risk that those with knowledge of the deal will violate those laws. Nonetheless, in response to these concerns, as discussed below, the Commission has determined to modify certain requirements for the Competition Descriptions in order to reduce the need for filers to share information outside of the company, for instance with customers or suppliers. The Commission agrees that the process required to collect information for the notification should not require information-sharing beyond what is absolutely necessary. Specifically, the Commission has added to the instruction a statement that the parties should not exchange information for the purpose of responding to the Overlap or Supply Relationships Descriptions. The acquiring and acquired persons should each respond on the basis of information known to them in the ordinary course of their business or through normal transaction diligence. The Commission understands that, unlike the NAICS overlap identification, the filings may not identify the same products and services in the Competition Descriptions. This may require those contemplating a transaction to plan for limits on the flow of information about the deal, including ''clean teams'' and data rooms with limited access, but the Commission believes filers have experience with managing these risks and employ protections to prevent the sharing of information or disclosing knowledge of the deal beyond these limits. The Commission has determined that the requirement to prepare descriptive responses does not increase the risk that those protections will be breached or that filers will be required to change their approach to comply with the final rule. To the extent that this process reveals existing business relationships of which either or both parties were not aware, this is an appropriate outcome of requiring this analysis to be done prior to filing.

Another group of comments raised compliance concerns related to taking an affirmative position on specific elements of an antitrust violation, such as the definition of relevant markets and any competitive effects, impermissibly shifting the burden of proving such elements of an antitrust violation to the parties. For instance, one commenter read the rule as not requiring filers to define a relevant market or provide market shares but nonetheless objected that filers lack the benefit of established competition law principles to guide the scope of their responses. Others suggested that the Commission adopt the practice of the European Union and other regimes and make available written decisions about market definitions.

As stated in the NPRM, the Commission does not intend for the Competition Descriptions to contain an assessment of relevant markets or reference any ''market.'' The Commission understands that the determination of a relevant antitrust market is a fact-bound process that is the result of extensive information gathering, including from third parties (who may be other participants in the ''market''). Information contained in the notification has never been, and never could be, sufficient to determine whether a relevant antitrust market exists in which the transaction could potentially cause harm. Rather, the Commission intends the identification of competing products or supply relationships to be a statement of business fact, not a conclusion that there is a relevant antitrust market that comprises an area of effective competition.[362] The Agencies recently

[361] Commenter American Securities Association states that certain aspects of the proposed rule would require public companies to announce and file details with the SEC about signed deals, ''creating additional hurdles that will test investor confidence.'' Comment of Am. Sec. Ass'n, Doc. No. FTC–2023–0040–0682 at 2. Because the final rule does not change who is required to file notification under the Act, there are no new obligations to disclose transactions nor to make statements to the SEC. To the extent that this comment is based on a concern that the Agencies may flag additional deals as requiring Second Requests because they may determine that a particular transaction may violate the antitrust laws, that is the intention of the final rule and well within the Commission's authority under the Act, regardless of filers' obligations to make statements required by the securities laws.

[362] A party responding to an interrogatory under Rule 33 of the Federal Rules of Civil Procedure ''must furnish information that is available to it and that can be given without undue labor and expense,'' and a party must ''provide relevant facts reasonably available to it but should not be required to enter upon independent research in order to

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released updated Merger Guidelines that contain a detailed discussion of how and why the Agencies undertake the exercise of defining markets.[363] Thus, the Commission disagrees that filers are unable to understand how information about whether and to what extent the merging parties are direct competitors factors into the Agencies' initial antitrust assessment.

Comparison to Other Jurisdictions

Some comments suggested that the Commission is improperly attempting to model the U.S. premerger notification regimes on those in other jurisdictions. The Commission rejects this suggestion. The purpose of this rulemaking is to maintain a premerger notification regime that fulfills the Agencies' congressional mandate to vigorously enforce the U.S. antitrust laws and prevent undue concentration in its incipiency. As the Commission noted in the NPRM, many other jurisdictions rely on submissions from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.[364] The Commission expects that the burden on filers (or their counsel) with experience drafting these submissions for other jurisdictions will be comparatively low because of their familiarity with such drafting. This does not mean that the Commission is relying on the experience of other jurisdictions in enforcing their laws. Rather, the Commission is simply noting that the prevalence of descriptive requirements among other competition enforcers supports its belief that, for some filers, preparing descriptive responses is not a new exercise or overly burdensome. The Commission further notes that other businesses might be familiar with preparing a business plan or conducting a market research and competitive analyses, which would contain much of the same information as is required by the narratives.[365]

One commenter stated that pharmaceutical transactions are not acquisitions of other companies but instead involve exclusive licenses, which are not reportable in other jurisdictions. As a result, according to this commenter, the descriptive requirements introduce an entirely new and significant burden that will fall disproportionately on parties to pharmaceutical transactions. The Commission disagrees that there will be a measurably different impact on pharmaceutical companies. As discussed above, the requirement to submit Competition Descriptions is not dependent on having prepared similar materials for other jurisdictions, and there are many kinds of transactions that are not reportable in other jurisdictions for which the parties will now be required to submit a descriptive response. In addition, the Commission has no reason to exempt pharmaceutical licensing deals from any requirements of the Act because these transactions, like other reportable transactions, can raise antitrust concerns.[366] As the D.C. Circuit found when it upheld the Commission's authority to require the reporting of pharmaceutical licensing transactions, the Act does not prevent the Commission from adopting rules of general applicability and the Commission can rely on its experience in reviewing HSR Filings to adjust the HSR rules.[367] Certain sectors have more reportable transactions, but the Commission is not imposing different requirements on any sector. Nor should it remove information reporting requirements for those sectors where there are more reportable transactions merely because more companies in those sectors are involved in reportable transactions. Moreover, the Commission believes that complying with the Competition Description requirements for transactions involving licensing agreements will be less costly than for other types of transactions because those transactions are fairly limited in purpose as they relate to uses for the licensed technology.

After careful consideration of the comments raising general objections to requiring descriptions of existing business operations of the merging parties, the Commission has determined to require Competition Descriptions in the final rule due to the benefit they would provide to the Agencies. These responses will provide the Agencies with key information that is necessary to determine whether an acquisition, if consummated, may violate the antitrust laws. It is appropriate for filers to provide this information because they are in the best position to do so. Competition Descriptions will allow the Agencies to conduct a fact-based assessment of the antitrust risks posed by each transaction, rather than expend time and resources issuing voluntary access letters and Second Requests for information that bears directly on the determination that further investigation is warranted. Nonetheless, in light of the concerns expressed by commenters, the Commission has made significant modifications to these requirements to better calibrate the information that would be most beneficial to the Agencies while reducing the cost as much as practical, including excusing select 801.30 transactions from these requirements.

1. Overlap Description

The Commission proposed a new Overlap Narrative section that would require each filing person to provide an overview of its principal categories of products or services (current and planned) as well as information on whether it currently competes with the other filing person. The Commission further proposed that each filing person would describe its current and planned principal categories of products and services in a way that those business lines are referred to in the company's day-to-day operations, and identify any documents submitted with the HSR Filing that support information contained in the narrative. For each identified overlapping product or service, the Commission proposed that the filing person would also provide sales, customer information (including contacts), a description of any licensing arrangements, and a description of any non-compete or non-solicitation agreements applicable to the employees or business units related to the product or service.[368]

The Commission received numerous comments on this requirement. As one commenter noted, the Commission's original proposal in 1977 would have required a filer to identify its top five most significant competitors for overlapping operations. The Commission did not adopt this proposal, as well as other proposals, not because they were improper, as suggested by this commenter, but because the Commission determined at the time that it was important to reduce

acquire information merely to answer interrogatories.'' *Lynn* v. *Monarch Recovery Mgmt., Inc.,* 285 FRD. 350, 357 (D. Md. 2012) (citation and internal quotations omitted). Filers should take a similar approach to providing business facts here.

[363] *See* Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 4.3 (2023).

[364] NPRM at 42180.

[365] The Small Business Administration provides guidance for how to conduct market research and find a competitive advantage, including links to free government databases and resources to help with that assessment. *See* U.S. Small Bus. Admin, ''SBA Business Guide, Market research and competitive analysis'' (last updated May 31, 2024), *https://www.sba.gov/business-guide/plan-your-business/market-research-competitive-analysis#id-use-market-research-to-find-customers.*

[366] *See, e.g., In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint) (transaction abandoned); *FTC* v. *Mallinckrodt ARD Inc. (f/k/a Questcor Pharms., Inc.),* No. 1:17–cv–120 (D.D.C. Jan. 30, 2017) (stipulated order for permanent injunction and equitable monetary relief).

[367] *PhRMA,* 790 F.3d at 201.

[368] NPRM at 42196.

the overall burden of complying with notification requirements,[369] which were unfamiliar to the M&A business community at that time. After forty-five years of experience with reviewing thousands of transactions each year, the Agencies are now well aware of the importance of understanding who the parties view as their competitors, especially if that group includes the other merging party, because it is relevant to whether the transaction may violate the antitrust laws.[370] The need for this self-identification of competitors has grown over time as NAICS codes and other information do not always provide a consistent and reliable benchmark for filers, resulting in over- or under-reporting of competitive overlaps. In this rule, filers are merely required to describe each of the principal categories of products and services they offer, and list and describe each product or service that they both provide to the market. The Commission believes that in light of the shortcomings of other more objective reference points, it is necessary to require filers to identify whether they offer products or service that compete with the other filing party.

Several comments pointed to the burden of providing an Overlap Description for all filings. For instance, one commenter stated that the proposal lacks a relevance test or de minimis threshold so that companies will be required to delve deep into complex corporate structures to identify individual products and services offered by their subsidiaries. Another raised concerns that providing a detailed analysis of competitive dynamics in each of these theoretical segments, particularly in transactions that are occurring in manifestly competitive environments, is wasteful and unduly burdensome.

As discussed above, in light of concerns about the cost this requirement places on all filers, the Commission has modified its proposal in several ways to reduce the cost on filer. First, it has decided to limit the requirement to report planned or future products to those referenced in another document submitted with the HSR Filing. The Commission has also eliminated the requirement to provide an estimate of how much of the product or service each customer category purchased or used monthly for the last fiscal year. And rather than require reporting for the two most recent fiscal years, the Commission has limited reporting to the most recent fiscal year. In addition, the Commission has decided not to require sales information in units—only dollars. It has also eliminated the requirement to provide individual contact information for customers. Additionally, the Commission has eliminated the requirement to describe licensing agreements and non-compete or non-solicitation agreements in this section. These changes are discussed in greater detail in the sections that follow. Finally, the Commission has decided not to require Overlap Descriptions for select 801.30 transactions. In the Commission's experience, these filings almost never report overlaps on the basis of NAICS codes and there is no reason to think that requiring this class of filers to provide a descriptive confirmation would provide a benefit to the Agencies that would enhance premerger screening of this particular set of transactions.

At this time, the Commission lacks a basis to excuse other categories of filings either on the basis of complexity of the filer's corporate structure or the general robustness of competition in the markets in which the filers compete. In fact, complex corporate structures can make it much harder for the Agencies to discover competing lines of business from any source other than the filers. When information in the HSR Filing is inconclusive, staff often must try to discover these existing relationships based on imperfect information from public sources, the parties' submitted documents, and other sources of market information, such as third parties. Requiring filers to provide a description of any overlap is a much more direct, efficient, and reliable way to get this critical information because it will be coming from the parties. If the parties are aware of other companies that also provide products or services that compete, they can (but are not required to) provide that information as part of their descriptive response. If this requirement creates a significant cost to filers, it is due to their significant pre-acquisition business relationships, meaning that the effort to provide the description is directly proportional to the risk that the transaction may violate the antitrust laws.

After careful consideration of the comments, the Commission has made significant modifications to the Overlap Description to reduce the cost to filers while also providing a factual basis for identifying whether the filing parties are actual or potential competitors. This information will improve Agency decision-making during the initial waiting period. Modifications reflected in the final rule are discussed below.

a. Identification of Current or Future Overlaps

The Commission proposed that each filing person provide a brief overview of its principal categories of products and services (current and planned) as well as information on whether it currently competes with the other filing person. As noted in the NPRM and discussed above, such information is core to the Agencies' substantive antitrust analysis during the initial waiting period and is not readily accessible from sources other than the filers themselves.[371] A comment from State antitrust enforcers supported the requirement for additional information about present and potential horizonal competitive overlaps, noting that State antitrust enforcers are particularly concerned with acquisitions of potential or nascent competitors and the protection of rivalrous innovation. As fellow enforcers of the Federal antitrust laws, they noted that most research and development (''R&D'') pipelines are known only to the companies and that disclosing current or known plans, including R&D efforts, up front would ensure effective deal reviews. They noted that, at times, deals that appear benign may mask significant anticompetitive effects lurking below the surface. Sophisticated incumbent companies have a greater incentive and more developed means to detect industry developments—and a correspondingly far-reaching ability to curb competition in ways that harm consumers.

As discussed in section II.B.4., the Agencies currently lack a sufficient basis from information in the notification to determine if the transaction is likely to violate the antitrust laws by eliminating on-going innovation competition, a potential competitor, or a nascent competitive threat that has yet to make sales. Without information that indicates there are known areas of competition based on expected revenues, this will continue to be a blind spot that results in less-than-optimal enforcement on this basis. Because these areas of potential or emerging competition are typically not well-known to others uninvolved in the transaction, the Agencies do not have a source for this information other than the filing parties.

The need for information related to planned products and services is especially important for transactions in which one (or both) filers already have

[369] *See* 42 FR 39040, 39043 (Aug. 1, 1977).

[370] *See, e.g., Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1049 (5th Cir. 2023); *FTC* v. *Whole Foods Market, Inc.,* 548 F.3d 1028, 1045 (D.C. Cir. 2008) (Tatel, J., concurring in judgment).

[371] NPRM at 42196.

a dominant position and the other party has planned products that could soon be introduced to the market to provide some level of competition to the dominant player. According to the State antitrust enforcers, acquisitions of potential or nascent entrants may empower already dominant incumbents to discontinue either the target firm's or its own innovation, thereby eliminating existing and future competition between the merging parties and information supplied by the Overlap Description is critical for the Agencies to analyze acquisitions affecting potential competition or present rivalrous innovation.

Other commenters object to the requirement to identify overlaps based on planned products or services under development by the other party. One pointed out that many companies have a pipeline of product ideas that may or may not result in an actual product sold to customers. Others indicated that in the pharmaceutical and biotechnical sectors, this information would be speculative at best for many ongoing R&D initiatives. The Commission acknowledges that the assessment of when a planned product or service will start generating revenues is likely imprecise, and that products in development often do not meet important deadlines for commercial release. But the Commission disagrees that companies with extensive R&D pipelines are unfamiliar with these drawbacks or that imprecision prevents them from having target launch dates based on their best information. In the Agencies' experience, companies with ongoing product development efforts routinely adjust expected timelines to commercialization based on new information. In particular, as part of preparing for the transaction, many of these companies prepare an assessment of the target's products, including products in development. Products in development can compete with other products in various stages of commercialization, forming the basis for antitrust liability in certain circumstances.[372]

Nonetheless, to provide an objective reference point that would determine whether a filer would need to include a product in development as part of its descriptive response, the Commission modifies this requirement to limit the reporting of current or known planned products or services to those that are reflected in documents submitted with the filing. This limitation should serve to reduce the cost and increase the certainty that the planned product or service is likely to be introduced. In particular, plans and reports provided to the CEOs and Boards of Directors and submitted with the HSR Filing would likely provide a solid reference point for filers to determine if the planned product is sufficiently likely to meet targets for commercial introduction because it is discussed in these high-level reports shared with key decision-makers.

In addition to the objections discussed above, several commenters objected to the specific requirements of identifying overlaps or customers based on sales information, which might include sales generated in markets outside the United States. One commenter stated that the requirement to provide historical information should be limited to sales and customers from U.S. operations and should be further limited to sales information based solely on sales by dollars, not additionally by units. The Commission declines to limit the Overlap Description to U.S. sales information. Many transactions every year involve industries whose companies compete on a global basis such that the relevant antitrust markets in which they compete are broader than the United States or involve facilities or customers that are located outside the United States.[373] Having this information is critical to the Agencies' assessment during the initial waiting period.

The Commission agrees with the other modification suggested by one commenter to limit this requirement by reporting revenues only based on sales by dollars and not also by units. As the commenter notes, in many service sectors such as healthcare or professional services, the concept of ''units'' is arbitrary and estimates would be both burdensome and unreliable. The Commission believes that it is less costly for filers to rely on only one measure of sales and that reporting by other measures in addition to sales often does not lead to different results. Thus, the Commission does not adopt the requirement to report sales based on units in addition to dollars and limits the reporting of sales and customer information only to dollar sales.

To further reduce the cost of collecting data to support the Overlap Description, the final rule requires the reporting of sales data only for the most recent fiscal year, down from the last two years as proposed. This limitation parallels other reporting requirements that are similarly limited to the most recent fiscal year.

The commenter also suggested that, in order to prevent the sharing of information between existing competitors that would inadvertently increase the risk of anticompetitive coordination, the information required by the Overlap Description be limited to information within the knowledge, information, or belief of the person filing. The Commission confirms that filers should prepare the Overlap Description based on the knowledge and belief of the filing person.

b. Customer Information

The Commission proposed that, for each principal category of products and services and each overlapping product or service, filers (a) describe all categories of customers, including an estimate of monthly sales or purchases in each category; (b) contact information (including the individual's names, title, phone, and email) for the top 10 customers (based on units and sales) for the last year, and the top 10 customers in each customer category.

Some individual commenters supported this proposal, urging the Agencies to take steps to better understand the impact of acquisitions on those most affected by them, including customers. Other comments raised concerns about the type and amount of information collected about customers, as well as the risks associated with identifying them in an HSR Filing, including providing individual contact information. One commenter asserted that the Agencies' stated intention to contact customers during the initial waiting period raises serious confidentiality concerns and places a transaction at considerable risk. Another commented that there may be legitimate business justifications for not disclosing a potential transaction internally or to commercial partners at the time of filing, and requiring specific contact information practically necessitates such disclosures to maintain employee and customer relations. According to another commenter, for the vast majority of transactions, customer information is not required to make an assessment that the transaction requires Second Requests, and thus the Agencies should

[372] *See, e.g., Illumina* v. *FTC,* 88 F.4th at 1050.

[373] *See, e.g., Polypore Int'l, Inc.* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012); *FTC* v. *Wilh. Wilhelmsen Holding ASA,* 341 F. Supp. 3d 27 (D.D.C. 2018); *FTC* v. *Tronox Ltd.,* 332 F.Supp.3d 187 (D.D.C. 2018); *In re Nvidia Corp.,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint); *United States* v. *ZF Friedrichshafen A.G.,* No. 1:20–cv–00182 (D.D.C. Jan. 23, 2020) (complaint); *United States* v. *United Techs. Corp.,* No 1:18–cv–02279 (D.D.C. Oct. 1, 2018) (complaint); *United States* v. *Novelis, Inc.,* No. 1:19–cv–02033 (N.D. Ohio Sept. 4, 2019) (complaint); *In re Corpus Christi Polymers LLC,* No. C–4672 (F.T.C. Feb. 20, 2019) (decision and final order): *In re Quaker Chem. Corp.,* No. C–4681 (F.T.C. Sept. 9, 2019) (decision and final order).

continue to ask for customer contact information on a voluntary basis only when it may be necessary.

After considering these comments and others, the Commission modifies the amount of information required in the Overlap Description related to customers but has determined that some information related to customers is important for the initial antitrust assessment of the transaction. The Agencies will continue to reach out to customers in order to get their input and reactions to reportable transactions as time and resources allow during the initial waiting period regardless of whether they are referenced in the notification. Contacting customers to learn about the business lines of the filing parties is often the very first thing staff does to begin the investigation of a potentially problematic transaction. As discussed in section III.C.1., the Agencies routinely contact many customers of the filing parties, often without the filing parties' knowledge, during the course of an investigation, especially if the initial waiting period is prolonged by a withdrawal and refile.

There is nothing improper about the Agencies' contacts with third parties to learn facts about the industry or the operations of the filing parties. The HSR Act contains strict limits on the disclosure of information submitted or collected during an investigation,[374] and unauthorized disclosure carries criminal penalties.[375] At all times during the investigation, Agency staff comply with these requirements. For example, when contacting customers or other market participants, Agency staff may disclose that the agency is conducting a nonpublic investigation of the proposed transaction, but Agency staff will not disclose any information contained in an HSR Filing without a waiver.

Although collecting more information from filers in the HSR Filing should reduce the Agencies' reliance on contacting third parties to learn basic business facts about the merging parties, conducting outreach with third parties is an essential task of premerger screening to ensure that the Agencies' antitrust assessment fully considers any potential impact of the transaction on other market participants.[376] Because transactions may not have been publicly disclosed, it is imperative that the Agencies initiate contact with third parties and not wait for them to reach out. The Agencies routinely conduct public research to learn about customers for potential outreach, regardless of whether the filing parties have provided their contact information. Moreover, customer information is typically in the agency's first request to filers to submit additional information on a voluntary basis during the initial waiting period. At times, filers have anticipated this voluntary request and provide this information quickly, sometimes the same day. However, this is not universally true and any delay in obtaining this information about top customers is inefficient and undermines the Agencies' ability to conduct third-party outreach. While the Agencies may be able, on their own, to identify some customers of the filing parties, it is important that such third-party outreach also include those customers most affected by the transaction, that is, those customers who are most reliant on the filing parties to conduct their own business.

Nonetheless, in light of concerns about identifying particular individuals as customer contacts, the Commission does not adopt that requirement as proposed. Instead, the Commission modifies the requirement so that filers must identify customers by company name without providing contact information for any individual employed by the company. The Commission believes that company contact information has value even without knowing the name or title of the individual at the customer business that is most knowledgeable about the existing business relationship with the filer. Moreover, knowing which companies are top customers provides important context to determining whether any particular customer may be affected by the elimination of competition between the parties and is additional information beyond knowing what the overlapping product or service is.

To further reduce the cost of providing information related to customers, the Commission has modified this requirement so that filers do not have to estimate monthly purchases or sales by customer category as proposed. Filers will be required to describe all categories of customers without providing specific sales or purchase estimates by category. Simply describing categories of customers will enable the Agencies to determine if there are unique end-uses for the product, possibly reflecting some degree of non-uniform demand that would indicate limits on substitutability across different customers. Qualitative descriptions of customer categories are sufficient for the Agencies to determine, at a preliminary stage, whether demand is segmented, a fact that is important for gauging potential competitive effects of the transaction. Relatedly, this additional information may help eliminate or reduce antitrust concerns if the parties serve very different customers or customer categories.

With these significant modifications, the Commission adopts the requirement that filers providing an Overlap Description also include some information about customers for those products or services.

c. Descriptions of Agreements With the Other Filing Party

The Commission proposed that as part of the Overlap Description, for each overlap product or service identified, filers would provide a description of certain competitively significant agreements between the filing parties, such as licensing arrangements and any non-compete or non-solicitation agreements applicable to employees or business units related to the product or service.[377]

One commenter supported the collection of information related to existing agreements between the filing parties because it may be relevant to an assessment of whether something short of a full merger may be sufficient to enable the parties to realize the potential procompetitive benefits of a transaction without potential competitive harm. No commenter specifically objected to this particular requirement of the Overlap Description. However, in light of objections to the overall cost of the final rule, the Commission does not adopt this proposal at this time. Instead, the Commission believes that the requirement, discussed in section VI.I.1, to indicate via check boxes whether certain types of agreements exist between the acquiring person and target will alert the Agencies to transactions that may require further investigation.

2. Supply Relationships Description

The Commission proposed to require each filing person to provide information about existing or potential purchase or supply relationships between the filing persons. This description would require filers to describe each product, service or asset (including data) that the filer sold, licensed or otherwise supplied, to the other party or to any other business that, to the filer's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or

[374] 15 U.S.C. 18a(h).

[375] *See* 18 U.S.C. 1905, 15 U.S.C. 50.

[376] Some commenters believe that the Agencies have been insufficiently attentive in the past to those most affected by harmful consolidation.

[377] NPRM at 42196.

service that competes with the other party's products or services.[378] Similar information is required for purchases from the other party. According to the NPRM, this information would allow the Agencies to identify whether the transaction would create opportunities for post-acquisition foreclosure of rivals arising from vertical or diagonal relationships.[379] As discussed in section II.B.3., current information requirements do not provide a factual basis to alert the Agencies that there is an existing supply relationship that might require a closer look to determine whether the transaction is likely to violate the antitrust laws.

As noted in the NPRM, in the past the Commission had required filers to provide similar information about vertical vendor-vendee relationships, but the requirement was eliminated in 2001; since that time, filers have provided no specific information related to existing vertical or other supply relationships. Several commenters objected to including this information again, noting that vertical concerns will not be a feature of most transactions, and information related to these issues is more appropriate for a Second Request once the Agencies have determined that the transaction genuinely raises vertical foreclosure concerns. One commenter stated that information about sales to and purchases from non-transacting parties has limited, if any, relevance to the transaction and is thus outside the scope of the Act. Another noted that concerns about unwinding already-consummated transactions that motivated the Act are not present in non-horizontal transactions, and urged the Agencies to exempt purely non-horizontal transactions from the reporting requirements of the Act on that basis.

Other commenters supported the reintroduction of the requirement to report information related to key supply relationships, suggesting that descriptive responses should provide a more accurate and complete basis for screening transactions. One commenter commended the Commission for recognizing the need to request information about input markets and noted the historical lack of such information has resulted in an information asymmetry between the Agencies and filing parties. Others identified industry-specific concerns related to non-horizontal implications of acquisitions. One commenter cited the example of the seed industry, commenting that to understand market power in that industry the Agencies must have information regarding the unique supply, distribution, and licensing dynamics that are present. Another commenter discussed the proposal's impact on private equity firms, claiming it is common for firms to have portfolios that include upstream and downstream segments, a structure that can incentivize preferential treatment between portfolio companies in ways that disadvantage rivals.

State antitrust enforcers also supported the need to better understand any supply relationships, including through the collection of information regarding data assets. They explained that the merger of two firms' complementary data sets can create, augment, and maintain market power. As antitrust enforcers, they stated that they also seek to understand how the target's data can be combined with the buyer's, and whether the combined data can be used to leverage power into further applications. To fully account for the potential that the combination of the buyer's and seller's data could be leveraged into additional applications, the State antitrust enforcers recommended the Commission consider whether these requests should be expanded beyond the related purchases and related sales narrative.

After considering the concerns raised by commenters on both sides, the Commission has determined that the final rule will require, once again, the submission of information related to supply relationships. Contrary to assertions that the Agencies rarely challenge, and even more rarely prevail against, non-horizontal acquisitions, the Agencies have blocked several non-horizontal mergers since 2021 and have another challenge pending review.[380] The Commission specifically rejects the suggestion that the final rule exempt non-horizontal mergers from the reporting requirements of the Act. Such an exemption would abrogate the Agencies' direct Congressional mandate not to ignore mergers that do not involve horizontal competitors. With the 1950 amendments to the Clayton Act, Congress made clear that section 7 applies not only to mergers between actual competitors but also to vertical and conglomerate mergers.[381]

The Commission observes that mergers that create a risk of non-horizontal concerns are more varied in their effects, with the over-arching concern being the risk that the transaction provides the merged firm with the ability and incentive to foreclose rivals. According to controlling precedent, there are myriad ways in which the merged firm could engage in foreclosing behavior, such as by making late deliveries or subtly reducing the level of support services.[382] In light of that variety of potential mechanisms, it is important to have some basis to assess whether the transaction creates a risk that the merged firm may limit access to products or services that its rivals use to compete.[383]

Some commenters questioned whether, as a practical matter, filers will be able to gather the information required by the Supply Relationships Description. For instance, one commenter stated that providing this information would require filers to create a new tool for tracking related sales and purchases, while another noted that, especially for retailers who are often ''price takers,'' there may be no need internally for conducting this type of analysis, meaning it would be undertaken solely to comply with the Act for reporting transactions. Two other commenters stated that this narrative is duplicative of document requests and thus should be eliminated.

The Commission disagrees that the new Supply Relationships Description requires special reporting tools or is duplicative of document requests. In the Agencies' experience, documents submitted with the HSR Filing often do not contain references to key suppliers or purchasers, or the documents do not

[378] *Id.* at 42196–97.

[379] *See* Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.5 (2023).

[380] *See* Press Release, Fed. Trade Comm'n, ''Statement Regarding Illumina's Decision to Divest Grail'' (Dec. 18, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-illuminas-decision-divest-grail*; *In re Lockheed Martin Corp.,* No. 9405 (F.T.C. Jan. 25, 2022) (complaint alleging merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corporation,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint alleging merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned); *In re Microsoft Corp.,* No. 9412 (F.T.C. Dec. 8, 2022) (complaint). *See also FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 577 (1967) (whether classified as horizontal, vertical, conglomerate or other, all mergers tested by the same standard under section 7).

[381] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317 (1962) (explaining that by the deletion of the acquiring-acquired language in the original statutory text, Congress hoped to make plain that section 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country). *See also* H.R. Rep. No. 1191, at 11 (1949).

[382] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1053 (5th Cir. 2023).

[383] *See* Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.5 (2023).

provide sufficient context to understand whether the merged firm will have the ability to foreclose key inputs in violation of the antitrust laws. Nor does the Commission agree that companies are unaware that they are in an existing supply relationship or that there would be no records for a company to determine that it has purchases from or sales to another company. As with the Overlap Description, requiring filers to provide a brief description of any sales or purchase relationship is a much more direct, efficient, and reliable way to get this critical information because it will be coming from the parties and does not require staff to interpret references in documents to these types of relationships. Even given the expansion of document requirements in the final rule, this specific information that describes an existing business relationship in the same supply chain is unlikely to be revealed in transaction-specific documents or those generated in the ordinary course. This is especially true because the Supply Relationships Description requires each filer to identify whether it supplies not just the other party but a different company that competes with the other party.

Two commenters urged the Commission to narrow the scope of the required information by adopting a limitation for de minimis levels of related sales or related purchases, for example by restricting requirements to those related sales or purchases generating over $10 million in U.S. revenue in the past fiscal year. One commenter noted that the pre-2001 reporting for vendor-vendee information was limited to transactions between the parties and to purchases or sales over $1 million, and stressed the need for the Agencies to establish a similar objective criteria to guide filers and avoid reporting thousands of routine or competitively benign purchases. Another commenter questioned the need for the Commission to revive a request that it deemed insufficient as a screen for potential non-horizontal relationships.

After careful consideration of these comments, and in light of the Commission's intention to reduce cost wherever practical, the Commission has made several modifications to the Supply Relationships Description. As with the Overlap Description, the Commission declines to exclude information related to sales outside the United States. Here too, such an exclusion is not justified for the significant number of transactions for which sales occur outside the United States and yet the transaction has sufficient nexus to the United States to require reporting. Nonetheless, the Commission has determined that the rule should include a de minimis exclusion to reduce the cost of collecting information related to competitively insignificant sales or purchases. The final rule excludes reporting unless the product, service, or asset (including data) represented at least $10 million in revenue. In order to ensure that the de minimis exclusion does not cause filers to underrepresent their own production or capacity to supply the market, the de minimis amount is inclusive of internal transfers within the filing person. That means that when applying the de minimis exclusion, the filer should include the value of the product that it supplies to itself because that reflects the filer's ability to meet the demand for the product. For example, if the acquiring firm sells Product X to the target, when calculating the total revenue for Product X to determine whether Product X represents at least $10 million in revenue, the filer must include its own consumption of Product X and sales of Product X to anyone else. If all of the filer's sales (including internal sales) of Product X represent less than $10 million in revenue, the filer does not need to respond to the Supply Relationships Description for sales of Product X.

As with the Overlap Description, several commenters objected to the Supply Relationships Description on the grounds that it is subjective and burdensome and that it would require premature disclosure of the deal or improperly shift the burden of proving an antitrust violation from the Agencies to the filing parties. Accordingly, the Commission has determined to make similar modifications to the Supply Relationships Description as it did for the Overlap Description, in order to reduce the cost of reporting. Specifically, the final rule limits the reporting period to the most recent fiscal year and requires reporting for sales only in dollars, not also in units. It also eliminates the requirement for contact information for individuals at customers or suppliers, requiring only the identity of the company to limit the risk of inadvertent disclosure. With these modifications, the Supply Relationships Description will provide a factual basis to determine whether the transaction requires a closer look to assess the risk of foreclosure, while minimizing the cost as much as practicable.

3. Labor Markets Information

The Commission proposed creating a new Labor Markets Information section within the Instructions that would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction. As noted in the NPRM, the Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets.[384] Yet, as noted in section II.B.2., the Agencies' HSR Form does not collect information from filers about their employees or the type of work that their employees do that would allow the Agencies to identify the parties as competitors for certain labor services, raising challenges for the effective enforcement of section 7 to protect competition that benefits workers.[385]

Within the Labor Markets section, the Commission proposed requiring each filing person to (1) provide the aggregate number of employees for each of the five largest 6-digit Standard Occupational Classification (SOC) codes; (2) identify the top five largest 6-digit SOC codes in which both parties employ workers, and for each of these SOCs, list the overlapping ERS-defined commuting zones and the total number of employees within each commuting zone; and (3) identify any penalties or findings that were issued against the acquiring person or acquired entity by the DOL's Wage and Hour Division, NLRB, or OSHA during the five-year period before the filing.[386]

The Commission received many comments focused on the labor market proposals. Several commenters, including hundreds of individual commenters, supported the Agencies' attention to the potential for merger-induced harm in labor markets and the requirement that parties submit information about their employees for premerger screening. Supportive commenters stated that filers have sophisticated legal and accounting personnel and systems to minimize the burden on the companies of collecting and reporting employee information. Other commenters asserted that requesting labor market information in the earlier stages of merger review would lead to a more efficient and uniform process that could result in the Agencies' termination of the HSR waiting period prior to the end of the initial 15 or 30 days in a greater number of mergers where no labor market issues exist.

[384] NPRM at 42197.
[385] 15 U.S.C. 18.
[386] NPRM at 42197–42198.

Other commenters, including law firms, private equity and venture capital groups, and industry groups, raised broad objections to the Commission's proposal to collect labor market information in the HSR Form. These organizations argued that the effort required by the Labor Markets section would be significant and would greatly increase costs for companies wishing to engage in reportable transactions. Moreover, they argued that this increased burden was not justified by the utility of the employee information required by the proposed rule for antitrust screening. Some commenters stated that the increased burden of complying with these reporting requirements would have a chilling effect on transactions.

In light of the comments, as well as the Agencies' recent experience in identifying and investigating transactions that may harm competition for workers, the Commission has determined not to require specific information about employees at this time. After considering several options to collect worker information that would be specific enough to allow the Agencies to screen for potential labor market effects without unduly burdening filers, the Commission has determined that the Agencies will rely on other information required by the final rule to identify transactions that require an in-depth investigation for potential labor market effects. This includes the new Competition Descriptions, which together will provide the Agencies with a better understanding of the premerger competition between the merging parties. The Commission believes that this information is likely to reveal those transactions where the filers are likely to compete for workers that do the same or similar types of jobs because they supply similar or related products or services. In addition, the new document requirements, including plans and reports and additional transaction-related documents, should reveal whether the parties view themselves as competing for labor services. From these documents, as well as a description of the rationale for the transaction from the buyer, the HSR Filing should reveal whether the buyer anticipates any impact on workers or labor costs as a result of the transaction.

The Commission acknowledges the need to obtain detailed information about employees for some transactions during the merger review process and will continue to consider whether it is appropriate, on a case-by-case basis, to require the production of such information in a Second Request.

a. Worker and Workplace Safety Information

The Commission proposed to create a Worker and Workplace Safety Information section that would require filing persons to identify any penalties or findings that were issued against the acquiring person or acquired entity by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration during the five-year period before the filing. Several commenters supported the inclusion of the Worker and Workplace Safety Information, noting that the information could prove indicative of a concentrated labor market and market power. One commenter stated that it had previously alleged that repeated and widespread labor law violations constituted direct evidence of labor market dominance that could be relevant to merger analysis. Others noted that this information is often known to the filers and may be indicative of a concentrated labor market.

Some commenters urged the Commission not to require the submission information about past workplace violations due to the lack of a clear nexus between labor law violations and merger analysis. Other commenters stated that labor law violations may be tied to issues that are irrelevant to market power, such as the presence of an organized labor group that is more inclined to report potential violations, and the requirement should be limited to the industries where violations are more prevalent. Some stated that the existence of labor law violations was government data that was already available to the Agencies without placing the obligation on parties to report such violations.

The Commission acknowledges that information regarding some of these violations may be publicly available or otherwise available to the Agencies. The U.S. Department of Labor and the National Labor Relations Board maintain public accessible databases containing labor enforcement case information on their respective websites.[387] In addition, the Agencies have each established Memoranda of Understanding (MOUs) with the Department of Labor and the National Labor Relations Board that would allow for the Agencies to obtain relevant non-public information regarding labor law violations.[388] Accordingly, when the Agencies identify potential harms to labor market competition through information contained in the HSR Filing or through other means, they can seek information on labor violations from publicly available sources, from the Department of Labor and the National Labor Relations Board under their respective MOUs, and when appropriate, from the filers on a voluntary basis or in response to Second Requests. Because this information may be available to the Agencies through means that would not require filers to provide this information in the HSR Filing, the Commission does not adopt the requirement for filers to submit information on worker and workplace safety, and it is not required by the final rule.

b. Requests To Expand Requirements for Information Related to Labor Markets

Some commenters encouraged the Commission to request more information about employees, including the merging companies' histories of labor law violations dating back ten years rather than only five years; information about their remote, temporary, or contract workers; and the merging companies' union avoidance activities and expenditures. Certain commenters encouraged the Agencies to consider the role of unions and collective bargaining to accurately assess employer market or monopsony power. In particular, commenters suggested that the Agencies could collect the following information to animate such an analysis: (1) a list of unions at controlled entities, associates, and franchisee/cooperatives; (2) copies of collective bargaining agreements, at least with any common unions; and (3) a narrative describing any opposition to

[387] *See* U.S. Dep't of Labor, ''Enforcement Data,'' *https://enforcedata.dol.gov/Enfdata/search.php*; Nat'l Labor Relations Bd., ''Case Search,'' *https://www.nlrb.gov/search/case.*

[388] *See* Press Release, Fed. Trade Comm'n, ''FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices'' (Sept. 21, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices*; Press Release, Fed. Trade Comm'n, ''Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices'' (July 19, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers*; Press Release, U.S. Dep't of Justice, ''Justice Department and National Labor Relations Board Announce Partnership to Protect Workers'' (July 26, 2022), *https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers*; Press Release, U.S. Dep't of Justice, ''Departments of Justice and Labor Strengthen Partnership to Protect Workers'' (Mar. 10, 2022), *https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.*

efforts to unionize, including union avoidance activities and expenditures. The Commission acknowledges the utility of collecting this information for some transactions during the merger review process but does not believe that this information is necessary for all filings at the screening stage. As a result, the Commission has not included requirements for this information in the final rule but will continue to consider whether it is appropriate, on a case-by-case basis, to request such information during the investigation of the transaction.

In sum, the Commission has determined that the requirements of the final rule to provide descriptions of areas of competitive interaction between the parties are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws and that the requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

J. Revenues and Overlaps

The Commission proposed a Revenues and Overlaps section to collect information currently required by Items 5(a), 6(c), 7, and 8, subject to proposed modifications. The Commission proposed substantive changes to the reporting of revenue by NAICS code, how NAICS overlaps of controlled entities are reported, which minority-held entities must be reported, and which prior acquisitions must be reported. As discussed below, the Commission adopts some of the changes as proposed, adopts others with modifications, and does not adopt others.

1. NAICS Codes

In the NPRM, the Commission proposed several changes related to revenue reporting. One of the changes was ministerial in nature—adopting the 2022 version of the NAICS codes. This proposal received no comments, and the Commission adopts it as proposed.

The Commission proposed other, non-ministerial changes to revenue reporting that reflect a substantively different approach to revenue information by: (1) eliminating the requirement that filing persons provide the precise amount of revenue attributed to each NAICS code and instead report revenues within ranges; (2) reporting NAICS codes on a descriptive basis through engagement with individuals familiar with the business operations of each operating company and providing additional information if more than one code would be appropriate; (3) requiring acquiring persons and acquired entities with more than one operating company or unit to identify which entity(s) derives revenue in each code; (4) requiring acquiring and acquired persons to report NAICS codes for certain pipeline or pre-revenue products; (5) clarifying that the acquired person must report the NAICS codes relevant to the acquired entity(s) at the time of closing; and (6) eliminating the requirement for filing persons engaged in manufacturing to provide revenue by NAPCS-based codes. As discussed below the Commission adopts some of these changes, adopts a modified version of others, and does not adopt certain of these proposed changes.

a. Reporting Revenues in Ranges

The Commission received several comments in support of the proposal to eliminate the requirement that filing persons provide the precise amount of revenue attributed to each NAICS code and instead report revenues within one of five ranges. One commenter stated that the introduction of levels proposed in the NPRM will simplify compliance with the NAICS allocation requirement. Two other commenters expressed general support for the proposed set of reorganized revenue information. The Commission did not receive any comments opposed to this change and adopts it as proposed.

b. Reporting Revenues on a Descriptive Basis

Regarding the proposal to report NAICS codes on a descriptive basis through engagement with individuals familiar with the business operations of each operating company and provide additional information if more than one code would be appropriate, two commenters objected on the grounds that it would be overly burdensome. One commenter noted that many NAICS codes are broad and disconnected from the modern economy, making it difficult to determine whether a particular code applies. The other commenter objected to the proposal to list all the codes that describe the products or services offered, explaining that it would be extremely difficult to comply with when relying on personnel at various operating companies that have varying familiarity with the NAICS system. The same commenter noted that if the Agencies are concerned about missing potential overlaps, the Overlap Description is a more effective way to address that concern.

The Commission acknowledges the concerns about cost and adopts this proposal with modifications. As noted in the proposed rule, in the Commission's experience, reliance on financial records often results in under-reporting or reporting revenues in codes that may not actually be descriptive of the products or services provided. Having knowledgeable business personnel select the appropriate NAICS codes that best describe the filer's business lines is the best way to ensure that the NAICS code revenues contained in the HSR Filing reflect the full range of products and services offered from a business perspective. However, the Commission will not require a particular methodology to collect NAICS codes and notes that the intent of this change is to have filers report codes that descriptively represent their revenues, and not need to rely on how they are captured in financial systems.

c. Identifying Entities That Derive Revenues in Each Code

Two commenters objected to the proposed requirement to report NAICS information separately by operating entity. Each of the commenters asserted that this additional requirement would likely create significant new burdens, in particular for larger companies with numerous subsidiaries. While this type of reporting may be more difficult for those with numerous subsidiaries, these are exactly the filings for which the Agencies cannot determine which entities generate revenues that are related to those of the other party. When parties report revenues by entity, the Agencies can quickly home in on which business lines are competitively relevant. The Commission notes that some filers already provide revenues in this way and it is extremely useful to the Agencies when they do. Although the Commission acknowledges that this proposal may be more difficult for some filers, it is necessary for the Agencies to have at the outset a clear picture of how revenues are generated within the filing person. The Commission adopts this change as proposed.

d. Reporting Revenues for Pre-Revenue Products or Services

The Commission received several comments regarding the proposal to require acquiring and acquired persons to report NAICS codes for certain pipeline or pre-revenue products. A group of State antitrust enforcers supported the proposal, noting that they are particularly concerned with acquisitions of potential or nascent competitors and the protection of rivalrous innovation. Critics of the proposed requirement expressed concerns about compliance. One commenter pointed out that the Commission did not provide a clear standard for what ''under development''

means or what information the acquiring person must have to ''know'' about the target's product pipeline. Other commenters noted that classifying pre-revenue products or products under development is inherently speculative and that the NAICS classifications sometimes lag changes in technology and business.

The Commission acknowledges the potential challenges in complying with this change and believes it is sufficient for the Agencies to rely on the Competition Descriptions section for information related to pre-revenue products or services. In the Overlap Description, filers are required to list and briefly describe each current or known planned products or services that compete or could compete with those of the other party. As a result, similar information related to potential NAICS code revenues would be largely duplicative. Given the Commission's interest in reducing the cost of complying with the final rule where the additional information provides little benefit to the Agencies, the Commission does not adopt this proposal.

e. Overlap Reporting Revenues as of Time of Closing

Regarding the proposal to clarify that the acquired person must report the NAICS codes relevant to the acquired entity(s) at the time of closing, the Commission did not receive any comments. The Commission adopts this item as proposed.

f. Eliminating Reporting by NAPCS Codes

Regarding the proposal to eliminate the requirement for filing persons engaged in manufacturing to provide revenue by NAPCS-based code, the Commission did not receive any comments. The Commission adopts this item as proposed.

2. Controlled Entity Geographic Overlaps

Information about the geographic areas related to overlapping products and services is currently required by Item 7. The Commission proposed modifying these requirements to: (i) add a requirement to provide the name(s) by which entities have done business within the last three years, (ii) require the filing person to identify the overlapping entity within its own person, rather than the other filing person, (iii) update the NAICS codes that require geographic reporting at the street address level, (iv) require the identification of locations of franchisees for certain NAICS codes, and (v) add a requirement to provide geolocation data. As discussed below, the Commission adopts the some of the proposals as proposed, some with modification, and does not adopt others.

a. NAICS Overlaps of Controlled Entities

The Commission proposed several changes to the information concerning NAICS overlaps of controlled entities. First, the Commission proposed requiring the acquiring person to identify the entity(s) within its own person that has operations in the same NAICS code as the acquired entity(s), and the acquired person to identify the entity(s) within the acquired entity(s) that has operations in the same NAICS codes as the acquiring person. Second, it proposed requiring the identification of ''doing business as'' or ''formerly known as'' names used within the last three years by entities with U.S. operations in overlapping NAICS codes. Finally, the Commission proposed that filing persons be required to identify the entity(s) that have U.S. operations in the overlapping NAICS code(s).

Regarding the proposal to require the identification of ''doing business as'' or ''formerly known as'' names used within the last three years by entities with U.S. operations in overlapping NAICS codes, the Commission received two comments. One commenter expressed support for the proposal, noting that information regarding how private equity portfolio companies are commonly known in the marketplace is necessary for the Agencies to assess potential anticompetitive overlaps. Another commenter, however, stated that the new requirement may be difficult for filing parties to meet if they do not maintain such records, meaning they would need to recreate the information for the HSR filing. The same commenter questioned the value of the information for entities beyond those that either (i) generate revenue that results in a NAICS overlap or (ii) are parties to Material Other Agreements.

The Commission believes ''doing business as'' names will be of great value to the Agencies in the initial waiting period and thus adopts the proposal to require filing parties to identify names by which entities do business at the time of filing. However, as part of its overall efforts to lessen costs, the Commission does not adopt the proposal to require ''formerly known as'' names.

Regarding the proposal to have each filing person only report entities within its own person that derive revenue in the overlapping NAICS codes, the Commission did not receive any comments. The Commission adopts this change as proposed.

Finally, regarding the proposal to require filing persons to identify the entity(s) that have U.S. operations in the overlapping NAICS codes, the Commission did not receive any comments. The Commission adopts this change as proposed.

In addition, one commenter suggested that the Commission require identification of overlaps at the 3-digit, rather than 6-digit level, stating that 6-digit NAICS codes are too narrow. While the Commission agrees that some 6-digit NAICS codes are too narrow to identify products or services that effectively compete in the market, it also finds that other codes are overly broad. Further, identification of overlaps also triggers the reporting of additional information, including geographic information, identification of authors of documents, production of certain annual reports, information about certain officers and directors, identification of certain prior acquisitions, and certain defense and intelligence contracts. Thus, the Commission declines to adopt this suggestion but notes that this final rule includes a Competition Descriptions section, as discussed in section VI.I, to address the shortcomings of revenue reporting by NAICS codes.

b. Geographic Market Information

The Commission proposed two changes related to geographic markets. First, the Commission proposed updating the list of NAICS codes for which locations need only be identified at the State level and NAICS codes for which street-level information would be required. These adjustments reflect the Commission's periodic review of which NAICS codes need more granular street, city, and State address information, and which NAICS codes need only be reported at the State level. Information about where each filer generates revenues is important to determining whether the parties sell or supply products or services in the same local markets. Geographic market information often provides a factual basis for the Agencies to conclude that the merging parties do not sell the same products in the same local areas. Keeping this information up-to-date allows the Agencies to rely on geographic market information to conclude that the transaction does not warrant the issuance of Second Requests.

The Commission received two comments regarding this requirement, one in support of it and one opposed. The supportive comment emphasized the need for street-level information in

the agriculture industry, where the relevant markets for evaluating competition tend to be local and regional due to the perishable nature of agricultural products. The Commission agrees that street-level information is key in local and regional markets and articulated this as the basis for the expansion of the requirement in the NPRM.

The comment in opposition to the proposal stated that it would impose additional costs on filing parties given the wide range of industries for which street-level information would be required. The Commission acknowledges the cost, but for the reasons discussed above, believes that street-level geographic information is necessary to the Agencies' ability to conduct appropriate premerger screening of transactions that are most likely to affect competition at a local level. The Commission adopts this change as proposed.

The Commission also proposed requiring filers to list locations where franchisees of the acquiring or acquired person (as appropriate) generate revenue in overlapping NAICS codes that require street-level reporting. The Commission did not receive any comments on this change and adopts it as proposed.

c. Geolocation

The Commission also proposed requiring filers to report latitude and longitude information for street addresses. The Commission received comments both in support and in opposition to this requirement. The supportive comment stated that many companies already keep lists of latitude/longitude waypoints, while the comment opposed stated that exceedingly few businesses maintain geolocation data in the ordinary course of business.

As helpful as this information would be to the Agencies, especially during the initial waiting period when the Agencies need to determine whether there are any geographic markets in which the parties compete, in its overall effort to reduce costs to filing parties, the Commission does not adopt this proposal. Agency staff can continue to pursue sources for this information when necessary and as time permits during the initial waiting period.

3. Minority-Held Entity Overlaps

The Commission proposed creating a Minority-Held Overlaps section to collect information related to minority holdings that is currently required by Item 6(c). Item 6(c) requires the identification of holdings of the acquiring person and its associates or the acquired entity (as appropriate) of greater than 5% but less than 50% if such holdings derive revenue in any of the same 6-digit NAICS codes (or industries) as the other party. In the NPRM, the Commission proposed eliminating the option to list all the minority-held entities, rather than just those that are in overlapping NAICS codes or industries. The Commission also proposed requiring filers to provide the names by which the listed entities do business, if known. The Commission adopts these changes as proposed.

Regarding the proposal to eliminate the option to list all minority-held entities, the Commission received three comments, one comment in support of the proposed change and two comments opposed to it. The supporter of the proposal stated that it is critical to understand a company's minority holdings, which may allow it to exercise a level of competitive control in a market. One commenter questioned the probative value of information about minority interests generally but did not address this specific proposal. Another commenter expressed concern that the proposal could lead to greater scrutiny of ''growth equity'' firms that primarily take minority stakes in companies, and asserted that it could have a chilling effect on certain investments.

The Commission addresses concerns that increased transparency may lead to more enforcement actions in section III.C.1. and states that the identification of overlapping minority holdings is a key reform of the final rule because where these relationships exist, the Agencies should scrutinize them as part of their premerger review. The Commission also emphasizes that filers are currently required to identify overlapping minority holdings. However, the current Instructions allow filers to identify all minority holdings rather than only those that overlap. The Commission has found that lists not limited to the overlapping entities hinder efficient screening for transactions that may require further investigation, resulting in extra effort even when it would not be required if the overlaps were known as well as not surfacing transactions that do have such overlaps. In contrast, when filers submit a list of only those minority-held entities that derive revenue in the same NAICS code, or are in the same industry as the other party, the Agencies can quickly focus in on holdings that could create a competitive concern. Additionally, as minority interest holders, the filers are in a better position than the Agencies to identify which, if any, of their holdings operate in the same space as the other party. Given the importance of this information to the Agencies, the Commission adopts this change as proposed.

Regarding the proposal to require filers to provide the names by which the listed entities do business, if known, one commenter supported the proposal while another stated that it may be difficult for filing parties to comply with if they do not maintain such records. As discussed in sections VI.D.1.d.(i) and (iii) and VI.D.2.a., the legal names of entities are not always directly related to the name by which the entity is known to the marketplace. Knowing the public-facing names of entities facilitates efficient review of transactions by the Agencies because those names may be better known to other market participants. For investors of 5% or more, the Commission believes this information should be readily available to filers. However, if this information is not known, a statement of non-compliance can be submitted with the filing, as discussed in section VI.A.5. Accordingly, the Commission adopts this requirement as proposed.

In sum, the Commission has determined that the reporting requirements for revenues and overlaps contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws in any line of commerce or section of the country and that the requirement, as modified, has been tailored to reduce the cost of reporting as much as practicable.

4. Prior Acquisitions

The Commission proposed creating a Prior Acquisitions section within the Instructions to collect information required by Item 8 of the current Form, as well as additional information. First, the Commission proposed requiring both the acquiring person and the acquired entity to provide information about prior acquisitions, expanding the current requirement that is limited to the acquiring person. Second, the Commission proposed extending the time frame to report prior acquisitions from five years to ten years. Third, the Commission proposed eliminating the dollar threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than $10 million in the year prior to the acquisition. Fourth, the Commission proposed treating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests. The Commission also proposed requiring

filers to report whether all or substantially all of the acquired voting securities, non-corporate interests, or assets are still held at the time of filing. As discussed below the Commission declines to adopt several of these proposals and modifies others.

As noted in the NPRM, information about prior acquisitions has always been important for the Agencies, allowing them to identify strategies to gain market share through acquisitions rather than internal expansion or more vigorous competition. Filers have been required to provide information about prior acquisitions from the beginning of the premerger notification program. As discussed in section II.B.5., the Commission believes that additional information about prior acquisitions will reveal roll-up or serial acquisition strategies that have become increasingly prevalent in certain sectors as well as among certain investors and acquirors, and that have been an effective strategy for increasing concentration. A history of prior acquisitions in the same sector can provide an independent basis for the Agencies to take a closer look at the filed-for transaction to ensure that merger enforcement takes place at a time when it can be effective in preventing undue levels of market concentration.

Several comments provided general support for the Commission's efforts to expand this item. According to a group of State antitrust enforcers, details about a filing entity's prior acquisitions are vital for evaluating mergers and industry concentration trends. They contend that, in an era of so-called ''stealth acquisitions,'' premerger tools used by antitrust enforcers require sharpening. Another commenter also expressed this concern, observing a rise in serial acquisition strategies that are potentially aimed at sidestepping regulatory scrutiny.

Other commenters provided research supporting the proposed expansion of information about prior acquisitions. One commenter offered that his research supports claims made in the NPRM that prior acquisitions have important consequences for competition. He explained that even minor deals can produce major changes in market structure, firm behavior, and consumer welfare. Other commenters described their research or experience with roll-up acquisitions that have occurred in various sectors of the economy, explaining that more expansive disclosures of prior acquisitions will allow the Agencies to better identify serial acquisitions and their potentially anticompetitive effects.

But several comments raised broad objections to the Commission's proposal to collect additional information on prior acquisitions. Several comments broadly asserted that the burden of providing this additional information about prior acquisitions would be too high. One commenter asserted that expanding the information required would create a chilling effect that could discourage acquisitions of startups, as many potential acquirers of startups are likely to have made several small acquisitions in the technology sector. Similarly, some comments explained that the expansion of information related to prior acquisitions would have particular impact on specific industries or financial sectors, including pharmaceuticals, technology, agriculture, and private equity. Other commenters said that providing more complete information about prior acquisitions would reduce investments in startup companies. Finally, certain comments suggested that the proposed changes would adversely affect venture capital and funding acquisitions.

The Commission has addressed some of these general concerns in section III.C., as well as more detailed concerns about the cost to complete this requirement, below. It believes that many of these broad concerns are either not directly relevant to this rulemaking or otherwise in tension with historical reporting practice.[389] Nonetheless, the Commission has determined not to adopt most of the expansions contained in the proposed rule, including the extension of the lookback period from five to ten years or the elimination of the $10 million exception. Instead, the Commission adopts modest adjustments to the current requirements and extends the reporting requirement to prior acquisitions of the target. The adopted adjustments contained in the final rule include: (1) the elimination of the $1 million threshold for revenue when determining which overlapping NAICS codes are relevant; (2) the requirement to include prior acquisitions of assets or entities that also provide competing products or services listed in the filing person's Overlap Description; and (3) the proposal to treat prior acquisitions of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests.

[389] The Commission previously required information about prior acquisitions for a full ten years. The Commission is not aware of any evidence, and commenters did not point to any, of any noticeable impact on the level of startup activity or venture capital funding during that period.

This information related to prior acquisitions will better reflect current market dynamics in the very lines of business that will be the focus of the Agencies' premerger assessment. The final rule does not require reporting on all prior acquisitions, only those in in business lines which the parties have identified as areas of overlapping current or future competition, either on the basis of NAICS code reporting or in the Overlap Description. This limitation focuses the required information on the specific antitrust risk that one or both parties have a pattern or strategy of rolling up competitors. It also alerts the agencies to potential changes in the competitive environment that may not be publicly available, which is valuable information in assessing whether or not the filed for transaction may violate the antitrust laws. In addition, parties are required to report only those acquisitions of U.S. entities or assets and foreign entities or assets with U.S. sales, thus targeting acquisitions that are likely to affect local markets within the United States. With these limitations, information collected about prior acquisitions is properly focused on the antitrust risk that the merging parties are pursuing a roll up strategy that is harming or could harm competition in the United States in violation of the antitrust laws.

As discussed in section II.B.5., the antitrust laws have always applied to anticompetitive serial acquisitions. In light of the increased use of these strategies and evidence of their harmful effects in certain sectors, there is a clear benefit to antitrust enforcement from disclosing prior acquisitions that may reveal a pattern or strategy of rolling up competitors in violation of the antitrust laws. This risk can be especially acute when the transaction involves a merger between 'consolidators,' with both firms having many prior acquisitions in the same lines of business. The final rule is properly tailored to focus on the risk that the transaction is part of such a strategy. Information about prior acquisitions need only be submitted for business lines that the parties have identified as areas of current or future competition. Moreover, any burden imposed by the additional reporting requirements would be limited. Based on the Agencies' experience, information about prior acquisitions is well-known to companies that are parties to an acquisition agreement, as this information is often collected as part of the due diligence process for the pending transaction. Other companies, even relatively small companies, routinely provide this information to the

Agencies in response to a Second Request.

The Commission acknowledges that this requirement imposes a new obligation on acquired companies but believes this information is necessary and appropriate for the Agencies to conduct their premerger review. Information about prior acquisitions is specifically targeted to uncover prior acquisitions where the parties have existing or emerging overlaps; if the acquired person completed many acquisitions over the past five years in these overlapping business lines, that information would be highly relevant to assessing the transaction's likely effect on future competition in those overlap sectors. Moreover, serial acquisition strategies may be going on simultaneously in a particular business line, and the acquired person's history would reveal whether the acquiring person is acquiring a firm that was also pursuing such a strategy.

The benefit to the Agencies from collecting this information from both parties is directly related to the number of prior acquisitions in the same business lines: the more acquisitions recorded during the prior five years, the more relevant is the information about them. Both the acquiring person and the acquired entity can and do make acquisitions that have an impact on the relevant competitive landscape. In addition, requiring this information from both filers may help deter acquisition strategies whereby a target buys several related companies that fall under the HSR thresholds and then the acquiring person purchases the target; the current rule does not reveal this history of prior acquisitions in the same business lines. Being able to clearly understand this history from the time a filing is made assists the Agencies in identifying a potential pattern of acquisitions in a particular industry that has contributed to a trend toward concentration or vertical integration that affects the competitive dynamics for the parties to the transaction, as well as the commercial realities of post-merger competition. One commenter suggested that parties report prior acquisitions only from the point in time when the current UPE acquired control of the acquiring or acquired entity, but this would limit the Agencies' ability to fully understand patterns and current competition. Thus, the Commission declines to further limit the requirement in this way.

The Commission also proposed expanding the time frame for reporting prior acquisitions from five to ten years to allow the Agencies to have a more complete understanding of how past acquisitions in the affected business lines affect the competitive landscape of the current transaction under review. Even though the Commission has required ten years of prior acquisition information on the HSR Form in the past, commenters questioned the expansion of the requirement now. Some comments focused on the added burden, noting that individuals who have institutional knowledge of past acquisitions may no longer be employed by the filing entity. Another comment pointed out that the Commission previously recognized that a ten-year lookback period was unduly burdensome when it reduced the information request from ten years to five years in 1987. The Commission acknowledges the cost associated with reporting many prior acquisitions, and after careful consideration of the comments, has determined not to require reporting for prior acquisitions occurring more than 5 years prior to filing.

But the Commission disagrees that concerns about roll-up strategies are not well-grounded in antitrust law. As discussed in section II.B.5., U.S. antitrust law clearly addresses concerns about the acquisition or maintenance of market power through serial acquisitions. As stated above, it is precisely this information that allows the Agencies to fairly measure the competitive landscape and on-going trends toward concentration in certain business lines, making the information relevant to the Agencies' initial antitrust assessment of the transaction. The Commission also disagrees that the HSR Act does not permit the Agencies to use section 7 of the Clayton Act to challenge serial acquisitions. Section 7 clearly prohibits acquisitions that were preceded by a series of acquisitions that rendered the market(s) under review concentrated,[390] and it is not improper for the Commission to require the reporting of prior acquisitions to better detect a pattern of acquisitions that may also violate other antitrust statutes, such as section 2 of the Sherman Act or section 5 of the FTC Act. Although the Commission agrees that the information submitted with the HSR Form must be used to examine the potential competitive impact of the filed-for transaction, it disagrees that the scope of section 7 is so limited as to prevent the Agencies (or other enforcers of the Federal antitrust laws) from alleging harm that derives from a cumulation of similar acquisitions in the same market.[391]

The Commission also proposed eliminating the $10 million threshold for identifying prior acquisitions and received several comments on this point. One comment urged the Commission to keep the existing limitation that requires reporting only those acquisitions of more than $10 million in total assets and annual net sales in the year prior to the acquisition as a way to eliminate the burden of reporting a large number of extremely small transactions that are competitively insignificant. One comment suggested maintaining the current $10 million threshold for prior acquisitions but exempting certain, specified NAICS codes related to emerging technology sectors from the threshold.

Yet another commenter suggested the Commission broaden its proposed rule to include prior acquisitions based on three-digit NAICS codes, rather than relying on six-digit NAICS code overlaps, which the commenter found to be often too narrow or imprecisely defined. The Commission acknowledges that three-digit NAICS codes would include more prior acquisitions and present a broader picture of the competitive landscape. But because prior acquisitions also include products or services described in the Overlap Description, which in some instances may encompass a broader set of acquisitions than reliance on NAICS codes alone, the Commission declines to use three-digit NAICS codes as the standard.

In sum, the Commission has determined that the reporting requirements for prior acquisitions contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions in which the merging parties are engaged in a pattern or strategy of roll-up acquisitions and that the requirement, as modified, has been tailored to reduce the cost of reporting as much as practicable.

K. Additional Information

1. Subsidies From Foreign Entities or Governments of Concern

While the Commission did not receive any comments objecting to the proposed new defined terms ''foreign entity or

[390] *See United States* v. *Phila. Nat'l Bank,* 374 U.S. at 367. *See also Credit Bureau Reps., Inc.,* v. *Retail Credit Co.,* 358 F. Supp. 780, 794 (S.D. Tex. 1971), aff'd, 476 F.2d 989 (5th Cir. 1973).

[391] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 334 (1962) (citing S. Rep. No. 81–1775, at 5 (1950) and H.R. Rep. No. 81–1191, at 8 (1949)). In particular, S. Rep. No. 81–1775, at 5 noted that where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which only a few large concerns supply the market.

government of concern'' and ''subsidy'' discussed in section IV.B., it did receive several comments about the reporting requirements included in the proposed Instructions. One commenter objected that the Committee on Foreign Investment in the US (''CFIUS'') already is tasked with the review of certain transactions involving foreign investment in the United States and that requiring information about foreign subsidiaries in the HSR form would add to the burden of notifying parties (and the Agencies) without providing concurrent value for the substantive antitrust analysis. In response to this comment, the Commission notes that it must defer to Congress in implementing the requirement to report information about foreign subsidies in the HSR Form.

Another commenter suggested introducing a de minimis threshold so that the reporting obligation is limited to only those subsidiaries from foreign governments and entities of sufficiently large amounts to potentially distort the competitive process in markets in the United States in which the merging parties compete. Citing the EU Foreign Subsidies Regulation as an example, this commenter claimed that such a threshold would save merging parties the burden of compiling small subsidy amounts that could not be expected to result in competition concerns. The Commission acknowledges that a de minimis requirement may indeed make sense as part of the information required, but Congress did not provide for a de minimis threshold, and the Commission does not yet have sufficient data to make that determination or establish an amount at this time. Once the Agencies have begun to receive information about foreign subsidies, the Commission can revisit this issue, if warranted.

Finally, a comment from a senator and a representative noted that information about the financing activities of merging parties would also be useful in addressing a host of national security challenges and encouraged the Agencies to share such information with other governmental bodies, including Congressional committees. The Commission agrees the Agencies should facilitate this kind of information sharing to the extent permitted by current law, regulations, guidelines, and practices governing information sharing within the Federal government.

2. Defense or Intelligence Contracts

The Commission proposed creating a Defense or Intelligence Contracts section that would require filing persons to report information related to certain contracts with defense or intelligence agencies to speed up outreach to those agencies related to the reported transaction. As proposed, both the acquiring and acquired person would have been required to identify whether they have existing or pending procurement contracts with the Department of Defense (''DoD'') or Intelligence Community (''IC''), as defined by 10 U.S.C. 101(a)(6) and 50 U.S.C. 3003(4), valued at $10 million or more, and provide identifying information about the award and relevant DoD or IC personnel. The Commission reasoned that for filings from companies that supply DoD or IC with products or services, this information would greatly enhance the Agencies' ability during the initial waiting period to identify and contact appropriate stakeholders within DoD or IC to seek their input as customers that might be impacted by the proposed transaction and to speak to knowledgeable experts about the products or services provided to the government by the parties. As discussed below and in response to concerns raised in public comments, the Commission adopts the proposal with modification.

The Commission received several comments on this proposal. One commenter stated that the Commission provides limited explanation of its authority or justification for this proposed requirement and that it does not explain its focus on these agencies. The Commission responds that it proposed special reporting requirements for the defense and intelligence agencies because they are often the only customer for products and services offered by defense companies, and a thorough review of these transactions is a priority for the Agencies. Products and services sold to DoD or the IC are often unique and not sold to any other customer. As noted in the NPRM, the Agencies regularly review filings from companies that supply the DoD or the IC with products or services, and it is important for them to be able to quickly contact DoD and IC staff to collect key insights and information to prevent mergers that may have an anticompetitive impact. A recent study by the General Accountability Office highlights the importance of DoD's input to the Agencies regarding potential competition risks to the defense industrial base and DoD programs.[392] The Agencies have relied on interactions with DoD personnel, and to a lesser extent IC personnel, to investigate and challenge defense mergers over the years. Without information about specific DoD or IC contracts or knowledge of which unit handles that contract, the Agencies often face difficulty and delay in identifying appropriate relevant personnel or stakeholders with knowledge of the contracts, programs, or products or services at issue.

Any delay in identifying the right DoD or IC personnel with deep knowledge of complex and highly sensitive programs hinders the Agencies' ability to identify and fully assess competition issues in the reported transaction that would impact DoD or IC programs or budget. The Commission has determined that to be fully proactive about these concerns, and to seek DoD or IC input at an early stage of the inquiry, parties with certain pending or current DoD or IC contracts need to provide that information with their notification. Although the Agencies are also attentive to any merger that may affect purchases by other parts of the government, these transactions involve products and services that are also sold to commercial customers and can be investigated using our standard approach.

Beyond this comment on the general focus of the requirement, commenters addressed three primary areas of concern: vagueness, confidentiality, and the burden of compliance. First, commenters expressed concern about the lack of clarity in the proposed rule, for instance pointing out that neither the NPRM nor the cited statutes define what constitutes a ''pending'' procurement contract. This commenter suggested that, to avoid this ambiguity, the new rule should apply only to active procurement contracts, not pending contracts. The Commission agrees there is a need to clarify which contracts should be reported and modifies the Final Rule to require reporting for (1) pending proposals submitted to the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. 101(a)(6) or 50 U.S.C. 3003(4), and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. 101(a)(6) or 50 U.S.C. 3003(4). The Commission declines to limit the reporting requirement to active contracts only. Submission of a proposal indicates that the filer is a competitor, regardless of

[392] *See* U.S. Gov't Accountability Office, Defense Industrial Base: DOD Needs Better Insight into Risks from Mergers and Acquisitions 28 (Oct. 2023) (GAO–24–106129).

whether it is ultimately awarded the contract. The Commission believes that these changes address some of the ambiguities raised by commenters.

According to one commenter, it is not clear what method of valuation should be used to determine if a contract is valued at $10 million or more, particularly for open-ended supply contracts. First, as discussed below, the Commission increases the threshold to $100 million. Second, the Commission clarifies that filers should use the maximum estimated quantity or value in their proposed or awarded prices to determine the estimated value of the contract. Otherwise, filers should use reasonable judgment in determining how to value their contracts and may explain the method of valuation used.

With respect to confidentiality concerns, one commenter stated that it is not clear how a company may provide this information without violating Federal laws and regulations restricting the dissemination of such sensitive information. Commenters proposed suggestions to avoid such conflicts. For instance, one suggested that the proposed instruction should be clarified to exclude any contracts that are classified or otherwise subject to a government-imposed duty of confidentiality. Another recommended that the Agencies consider the appropriateness and potential applicability of a national security exception to certain requirements within this proposed rule.

As an initial matter, the Commission notes that there is nothing in the HSR Act that overrides the protections due classified information, and the Commission specifically intends to not require the submission of classified information. To alleviate concerns about the sensitivity of the information related to these contracts, the Commission revises the Instructions to expressly state that parties should not include classified information but that they should note when responsive information is withheld on that basis. The Commission believes that this modification addresses the concerns raised in the comments and preserves protections for classified information. The Commission declines to adopt the proposal to exclude any contracts that are classified or otherwise subject to a government-imposed duty of confidentiality. The fact that the parties have submitted a proposal in response to a request from DoD or the IC or have an existing contract is not classified information. Such an exclusion is overbroad and would not allow the Agencies the benefit of reviewing non-classified information related to these pending proposals or active contracts. The Commission believes that the revision stating that parties should not include classified information in their submissions addresses this issue. For the same reason, the Commission declines to adopt the proposal to create a national security exception to the rule. The confidentiality provisions of the Act provide sufficient protection for any confidential but unclassified information about these documents. The Commission additionally notes that many of the products and services the Agencies investigate have similar national security implications even if they involve customers other than DoD or the IC.

As to the burden of complying with this requirement, one commenter noted that the requested information is often not maintained in the ordinary course of business, nor is it created in the course of a deal negotiation, and that due to confidentiality concerns, these data are often not centrally maintained and may not be known, even among senior leadership. To limit the burden, one commenter recommended that the requested information be limited to those DoD or IC contracts with a primary NAICS code for which the filing parties have identified NAICS overlaps or that the Agencies obtain this information from the Federal Procurement Data System.

To reduce the cost of complying with this request, and in light of the general concern that classified materials are not widely known or shared, the Commission makes two significant modifications to limit the scope of this requirement. In line with the proposal above, the Commission limits the set of responsive contracts to those involving a 6-digit NAICS industry code overlap or a product or service described in the Overlap Description or the Supply Relationships Description. The Agencies' need for information about pending or active DoD or IC contracts is directly related to the specific antitrust risks associated with the transaction, and limiting this information in this way targets the most relevant contracts, if they exist. In addition, in response to concerns that the $10 million de minimis level will require reporting for purchases by DoD or the IC of mundane products and services, rather than critical defense purchases, the Commission has determined to increase the de minimis threshold for these contracts from $10 million to $100 million. The Commission believes that this is the appropriate threshold for limiting this request to products that are uniquely sold to the DoD or the IC. The Commission declines to make any modification in response to the suggestion that the Agencies get this information from the Federal Procurement Data System. It is not feasible for the Agencies to rely on discovering critical DoD or IC proposals or contracts from this database for the purpose of identifying key personnel at those agencies and obtaining information about complex products and services during the initial waiting period. This information is known by the parties and easy to verify, especially with the limitation that the contracts be worth more than $100 million annually. Contracts or commitments of this size are likely subject to close monitoring.

In addition, to further reduce the burden of this requirement, the Commission excuses select 801.30 transactions from reporting information related to DoD or IC proposals or contracts. These transactions do not involve an agreement between the parties.

Finally, two commenters noted a typographical error in the proposed Instructions: the reference to 50 U.S.C. 3033(4) should refer to 50 U.S.C. 3003(4). The Commission revises the instructions to correct the typographical error noted by the commenters.

In sum, the Commission has determined that the reporting requirements for pending proposals and active contracts with DoD or the IC contained in the final rule are necessary to provide the Agencies with the ability to identify transactions in which the merging parties are providing critical products or services to the government and to quickly reach out to those agencies for their input. The requirement, as modified, has been appropriately tailored to reduce the cost of reporting as much as practicable.

3. Voluntary Waivers

The Commission proposed amending the Instructions to allow filing persons to waive the confidentiality provision contained in the Act, 15 U.S.C. 18a(h), for any non-U.S. competition authorities or State Attorneys General they identify. As stated in the NPRM, allowing filers to waive the confidentiality protections in the HSR Filing would provide an efficient mechanism for filers to consent to limited waivers of confidentiality at the outset of any agency review to facilitate early cooperation among competition enforcers. The proposed voluntary waivers would allow the Agencies to disclose the existence of an HSR Filing and the information contained in the HSR Filing, but only for those non-U.S. competition authorities or State Attorneys General identified by the filing person. The

Commission also proposed modifying the language that would inform filers about potential disclosures based on the waivers to track the language of the Act more closely. As discussed below, the Commission adopts this proposed change with modifications.

The Commission received three comments addressing this proposal. A group of State Attorneys General, who would be the recipients of HSR-related information if filers granted access on a voluntary basis, encouraged the Commission to consider three changes. First, they proposed requiring filing persons to identify the relevant States where the parties do business, regardless of whether they opt to provide waivers or check the box. Second, they encouraged the Agencies to, by default, disclose to the public the fact of filing and the expiration date of the waiting period. They argued that nothing in the HSR Act requires that the fact of filing and the waiting period be kept confidential and that this information should not be treated as such. The comment urged the Agencies to exercise their authority to disclose this information to the public or to the States. They recommended that to avoid disclosure, the parties should have to provide a basis for keeping the fact and timing of the filing confidential. If the Agencies adopted the second proposal, they also encouraged the Agencies to include a check box to allow parties to waive confidentiality of the information and documents filed with the notification so that these materials could be shared with affected States. Third, if the Agencies chose not to adopt the above recommendation regarding public disclosure, the State antitrust enforcers suggested disaggregating the check box into two separate boxes, one to allow disclosure of the fact of filing and the associated waiting period and another to allow sharing of the information and documents in the filing with affected State Attorneys General. They stated that disaggregating the check box increases the likelihood that States at least receive notification of the transaction.

The Agencies have historically not publicly disclosed or provided to the States or international enforcers information regarding HSR filings, including the fact that a filing was made and the waiting period, in the absence of a waiver from the parties. Without weighing on the merits of the States' legal arguments regarding the scope of the HSR Act's confidentiality protections, the Commission at this time believes it is appropriate to maintain its prior practice. The Commission does adopt the States' suggestion to disaggregate the waiver check boxes, which would allow for greater flexibility in providing the Agencies consent to disclose and provide filers with the option to disclose some information but not all information contained in the HSR Filing.[393] The waiver would apply only to those non-U.S. competition authorities or State Attorneys General selected by the filing person. The Commission declines to adopt the proposal by the State antitrust enforcers to require parties to identify the relevant States where they do business, regardless of whether they waive confidentiality. The Commission will likely receive much of this information through the new requirements contained in the final rule.

The Commission received two other comments on this proposal. One commenter expressed concern about confidential information becoming publicly known once it is shared more widely due to the increased risk of leaks. On this point, the Commission notes that these waivers are voluntary. The parties can decide not to waive confidentiality if they have concerns about confidentiality. Further, the Agencies take seriously the confidentiality requirements of the Act and require law enforcement colleagues to abide by these protections. In the many decades of case cooperation pursuant to voluntary waivers, these protections have worked to prevent improper disclosures. The Commission believes that concerns about an increased risk of leaking due to the option to waive confidentiality at the time of filing are unfounded.

Finally, according to one commenter, the proposed rule appears to contemplate a single check box that does not permit notifying parties to communicate their willingness to waive confidentiality as to some international competition authorities but not as to others. The Commission notes that this commenter misunderstands the requirement and clarifies that the voluntary waiver will only apply to those jurisdictions that the party affirmatively indicates in the HSR Filing. In addition, failure to check either box or indication of only a few jurisdictions for waivers does not prevent the parties from providing these waivers or adding jurisdictions later. The inclusion of these waiver options in the Form is simply meant to serve as an efficient mechanism for filers to provide their clear consent at the outset even if only on a limited basis.

The Commission did not receive any comments regarding the proposal to modify the language informing filers about potential disclosures based on the waivers to track the language of the Act more closely. Thus, the Commission adopts this change as proposed.

In sum, the Commission has determined that offering the option for parties to waive the confidentiality provisions of the Act to allow for the sharing of HSR materials with non-U.S. jurisdictions or State enforcers in the final rule will provide a benefit to the Agencies in facilitating case cooperation at an early stage in the Agencies' assessment of antitrust risk. The option, as modified, has been tailored to provide a clear choice for filers who wish to facilitate the sharing of information by providing a waiver.

4. Identification of Communications and Messaging Systems

In conjunction with the proposed requirement that filing persons certify they have taken steps to prevent destruction of relevant information, as discussed in section VI.L., the Commission also proposed that filers identify and list all communications systems or messaging applications on any device used by the filing person that could be used to store or transmit information or documents related to its business operations. The Commission does not adopt this proposal.

In the proposed rule, the Commission reasoned that, as companies have increasingly been relying on new forms of communication to do business and make key operational decisions, these communications systems have become an important part of the Agencies' investigations. In the Agencies' experience, these systems contain highly relevant information on the transaction itself, as well as on topics that are critical for the Agencies' assessment of the transaction such as competition, competitors, markets, customers, and industry characteristics. Nevertheless, many parties do not appear to fully understand or comply with document preservation obligations for these new modalities.

The Commission received several comments on this proposal, mainly regarding the burden of the request and its utility in screening for anticompetitive transactions during the initial waiting period. Multiple commenters expressed doubt about the Commission's assertion that this

[393] The Commission's implementation of this suggestion differs from the text proposed by the States. The Commission does not adopt the States' suggestion, with respect to the fact of filing and the waiting period, that, in order to prevent disclosure, the parties be required to affirmatively check a box and provide a basis for keeping the information confidential.

information is readily available to the filing person and that identifying these systems would impose minimal burden. One association of antitrust practitioners noted that because there is no limitation on the requirement, large or diffuse organizations may have hundreds of communications systems that would require identification but are unknown or unused by the filing person's employees who are involved in preparing the HSR filing. One commenter also flagged the inevitable complications caused by, for example, special IT systems, legacy IT systems, and individual employees who do not follow corporate IT policies. According to another, the process of gathering this information often requires the expertise of counsel and entails interviews of key employees as well as a careful review of company practices and policies. As a result, this commenter stated that the burdens associated with the additional requirements would fall more harshly on small companies that are not equipped to navigate the regulatory process. In addition, comments also objected that the information requested would not assist the Agencies in determining whether to issue a Second Request. They noted that the identification of these systems is best reserved for the transactions that are investigated as is the Commission's current practice when issuing Second Requests.

After carefully considering these comments, and as part of its overall effort to reduce burden on filing parties, the Commission does not adopt this proposal. The Commission notes, however, that the Agencies have taken steps to update their guidance related to obligations to preserve ephemeral messages and similar communications systems, and have provided language in the Model Second Request to reflect document production and retention obligations for these communication systems.[394] Based on this guidance, companies that take steps to preserve information related to these communications systems may reduce the likelihood that they will face consequences for non-compliance with a Second Request.

L. Certification

Each HSR Filing is accompanied by a notarized certification, signed by the person preparing or supervising the preparation of the filing. The person signing the certification attests to the veracity of the information submitted in the filing. The Commission proposed amending this certification to require filers to affirm that they have taken the steps necessary to prevent the destruction of documents and information relevant to the transaction. The Commission also proposed adding language to the Instructions to remind filers that criminal statutes prohibit practices that impede or frustrate functions of government agencies, such as submitting false information. This proposal would require most HSR filers to establish new document retention policies or revise existing policies prior to filing. As explained in the NPRM, the deletion of information or documents that could be called for in a Second Request could lead to a loss of information critical to the Agency's ability to conduct an in-depth investigation.

The Commission received approximately ten comments on this proposal. Some commenters noted that the proposed rule would expand document preservation beyond current law, which obligates parties to preserve documents and information related to an ongoing or anticipated government investigation [395] or if they have a reasonable anticipation of litigation.[396] Commenters noted that very few filers have an obligation to preserve information about the transaction since they are not yet under investigation and do not have a reasonable anticipation of litigation.

Commenters also described the burden, particularly the cost, associated with document preservation obligations. Several commenters explained that litigation holds are expensive and difficult to design and implement, especially concerning the breadth of documents and information that would be subject to a hold. One commenter noted that a document hold does not simply encompass the suspension of auto-delete policies, can be difficult and expensive to implement with precision, and typically extends to individuals, databases, communication systems, and materials beyond the scope of the transaction. Another pointed out that data is expensive to store and that filers would be required to retain documents that cover large components of their day-to-day operations. According to one commenter, at the time of filing, the notifying party may not know enough about what issues will be of interest to the Agencies to identify a set of custodians who are likely to have information related to the proposed transaction.

After carefully considering the comments, the Commission has determined not to adopt this proposal. The Commission notes that, under current law, when litigation is reasonably foreseeable, parties have an obligation to preserve documents relating to the proposed transaction. This obligation could arise before or after HSR filing. In addition, it is a Federal crime for any person to knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated Federal investigation.[397]

The Commission also received a few comments on the addition of language reminding the filer of potential criminal liability under other Federal statutes that prohibit various deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies. Commenters raised general concerns about how this language could alter how filers prepared their notification. One commenter stated that when read together with the requirement to preserve documents, the reminder of criminal penalties would prevent filers from instituting a tailored legal hold. Another stated that it seems to suggest that filers should fully expect a harsh and punitive response to filing errors. Commenters primarily noted that the added language merely restated existing law. Given that the proposed certification on criminal liability does not increase the burden or cost of filing and may have a benefit of putting some unaware filers on notice of possible criminal penalties, the Commission adopts this proposal as a simple restatement of existing penalties.

[394] *See* Press Release, U.S. Dep't of Justice, ''Justice Department and FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging'' (Jan. 26, 2024), *https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations. See also* Fed. Trade Comm'n, ''Slack, Google Chats, and other Collaborative Messaging Platforms Have Always Been and Will Continue to be Subject to Document Requests,'' Fed. Trade Comm'n Competition Matters blog (Jan. 26, 2024), *https://www.ftc.gov/enforcement/competition-matters/2024/01/slack-google-chats-other-collaborative-messaging-platforms-have-always-been-will-continue-be-subject.*

[395] Federal law provides serious criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated Federal investigation. *See, e.g.,* 18 U.S.C. 1519.

[396] *Zubulake* v. *UBS Warburg LLC,* 220 FRD. 212, 218 (S.D.N.Y. 2003) (holding that once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents).

[397] *See* 18 U.S.C. 1519.

M. Affidavit

As discussed in section V.D., the Commission proposed requiring filings for transactions without definitive agreements to include a term sheet or draft agreement that describes with specificity the scope of the transaction that would be consummated. In conjunction with that proposal, the Commission also proposed that parties making such filings attest in their affidavit that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle.

As described above, the Commission modified the proposal and has made a conforming change to this section of the Instructions as part of the final rule.

VII. Severability

In the NPRM, the Commission noted that § 803.90 contains a separability (or severability) provision such that, if any provision of the Rules (including the Form) or the application of any such provision to any person or circumstance is held invalid, the other provisions of the Rules and their application to other persons or circumstances shall be unaffected.

The Commission did not propose any changes to the severability provision in § 803.90 and does not adopt any changes. However, as it did in the NPRM, the Commission confirms its intent that, if a court were to invalidate any provision, any part of any provision, or any application of the final rule, the remainder of the final rule would remain in effect to the greatest extent possible. The Commission's general view is that each substantive requirement of the final rule is severable from each of the others. The Agencies need the information requested by the final rule for the reasons discussed above. Each requirement in the final rule serves an important, related, but distinct purpose and provides a distinct benefit separate from, and in addition to, the benefit provided by other requirements. However, if a court finds that certain provisions are invalid, the following analysis applies.

The Commission notes that some reporting requirements are contingent upon filers reporting overlapping products or services in (1) the Overlap Description; (2) the Supply Relationships Description; and (3) the same NAICS codes. The severability of these reporting requirements are as follows:

Officers and Directors

If product or service overlaps are identified in the Overlap Description or Supply Relationships Description, the final rule requires the acquiring person to list officers and directors (or in the case of unincorporated entities, individuals exercising similar functions), and those who have served in the position within the past three months for each entity within the acquiring person responsible for the development, marketing, or sale of products or services that are identified as overlaps and who have also served in these roles with the target. The Commission does not view this requirement as severable from the Overlap or Supply Relationships Descriptions. However, the Commission's view is that the two other reporting requirements regarding Officers and Directors are severable and would remain if the Overlap or Supply Relationships Descriptions are held invalid. These are the requirements to (1) list all individuals likely to serve as, nominate, or appoint an officer or director of the acquiring entity (and the accompanying requirements); and (2) for each officer and director identified, list all other entities operating in commercial activities in the same NAICS codes reported by the target for which the individual currently serves as an officer or director. The Agencies need the information in the first requirement for the reasons discussed above in sections II.B.1. and VI.D.3.c., and this first requirement would not be affected by invalidation of the Overlap or Supply Relationships Descriptions. With respect to the second requirement, the Commission has long required reporting of NAICS code information, and the reporting of NAICS code information stands independent of, and can operate separately from, the Overlap or Supply Relationships Descriptions. The changes the Commission has finalized here are modest and do not significantly alter the existing requirement to report certain NAICS code information. Accordingly, the Commission believes that the requirement to report certain officer and director information in any identified NAICS code overlap would stand even if either (1) the Overlap or Supply Relationships Descriptions were held invalid, or (2) any of the final rule's changes regarding NAICS code reporting were invalidated.

Prior Acquisitions

Filers (both acquired and acquiring persons) are required to report certain information regarding prior acquisitions that (1) derived revenue in an identified NAICS code overlap or (2) provided or produced an overlap product or service as described in the Overlap Description. If the Overlap Description is invalidated, the Commission does not view the second part of the Prior Acquisitions reporting requirement as severable from that reporting requirement. However, the first requirement regarding derived revenue in an identified NAICS code overlap would remain in place, for the same reasons discussed previously in connection with the severability of the Officers and Directors requirement.

Defense or Intelligence Contracts

Filers are required to identify (1) proposals submitted to the U.S. Department of Defense or any member of the U.S. intelligence community, and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, valued at $100 million or more, that (A) are or will be the source of revenues in any identified NAICS code overlap or (B) involve or will involve an overlapping product or service identified in the Overlap Description or the Supply Relationships Description. If the Overlap or Supply Relationships Descriptions are invalidated, the Commission does not view the portion of the Defense or Intelligence Contracts reporting requirement referring to the Overlap or the Supply Relationships Descriptions as severable from those reporting requirements. However, the portion requiring the reporting of certain information in any identified NAICS code overlap would remain in place, for the same reasons discussed previously in connection with the severability of the Officers and Directors requirement.

Annual Reports and Audit Reports for Acquiring Entities

The final rule requires the acquiring entities whose revenues contribute to a NAICS code overlap or any overlap identified in the Overlap Description to provide the most recent annual report or audit report and CIK number if annual reports are filed with the SEC. If the Overlap Description is invalidated, the Commission does not view the portion of the Annual Reports and Audit Reports requirement referring to the Overlap Description as severable from the requirement to provide an Overlap Description. However, the portion requiring annual reports or audit reports relating to NAICS code overlap would stand, for the same reasons discussed previously in connection with the

severability of the Officers and Directors requirement.

Author Information for Business Documents

For Business Documents, if (1) a NAICS code overlap has been identified, (2) an overlap within the Overlap Description has been identified, or (3) a supply relationship within the Supply Relationships Description has been identified, filers must provide certain information about the author of the documents. If the Overlap or Supply Relationships Descriptions are invalidated, the Commission does not view the portions of the Author Information requirement referring to those descriptions as severable from the Overlap and Supply Relationships Descriptions requirements. However, the portion requiring the reporting of author information if a NAICS ode overlap has been identified would stand, for the same reasons discussed previously in connection with the severability of the Officers and Directors requirement.

The Commission views all remaining provisions, parts of provisions, and applications of the final rule not specifically identified as non-severable above to be severable. These reporting requirements would have been adopted individually regardless of whether the other reporting requirements were adopted and could function effectively without the other provisions. If a reviewing court were to stay or invalidate any reporting requirement (or part or application thereof) not identified as non-severable above, the Commission states its intent to have adopted the remainder of the final rule.

VIII. Paperwork Reduction Act

On June 29, 2023, the Commission published its intention to submit the proposed rule and the associated Supporting Statement to OMB for review under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.*[398] The Commission emphasized that some of the proposed changes were intended to reduce the burden of filing [399] and that other proposed changes offered clarifications to the current rules and were unlikely to change the burden on filers.[400] Further, the Commission highlighted proposed changes that would require a filer to collect and report information kept in the filer's ordinary course of business records, minimizing the burden of new collection requirements.[401] The Commission noted that many of the proposed changes would increase the burden on all filers; [402] the Commission also noted that some of the proposed changes would significantly increase the burden on only certain filers.[403]

In conducting the PRA analysis for the proposed rule, in order to estimate the projected change in burden due to the proposed changes and to provide a baseline for public comment, PNO staff consulted current Agency staff attorneys who had previously prepared HSR filings for clients while in private practice. These experienced attorneys provided estimates of how many hours the proposed changes would require, depending on the complexity of the filing at issue. To estimate an average number of additional hours, the Commission conservatively assumed that 45% of HSR filings would be highly complex and 55% would be less complex. The Commission next multiplied the average estimate of additional hours per filing (107 hours) by the 7,096 non-index HSR filings that the Commission projected it would receive in FY 2023.[404] Finally, the Commission multiplied the total hours by an estimate of the hourly rate for executive and attorney compensation ($460/hour).

The Commission received numerous public comments referencing the NPRM's PRA burden analysis. One commenter supported the analysis, noting that the increase in the estimated time required to prepare an HSR filing is ''inconsequential,'' even ''trivial'' considering that these reporting requirements only apply to transactions valued at more than the reporting threshold. This commenter further asserted that it is appropriate to shift costs from the Agencies to the merging parties.

Some commenters, however, criticized the Commission's analysis for significantly underestimating the extent of the burden, and many raised concerns about the methodology employed by the Commission to calculate such burden. For instance, they raised concerns that the estimates are not based on empirical data or discussions with current practitioners; and that the Commission's methodology is non-verifiable, and thus not subject to empirical validation. They also argued that Agency staff's prior experience in preparing HSR filings is not relevant given the wholly different and new information requested under the proposed rule. One commenter called the Commission's approach biased and inaccurate, stating that there is no indication that Agency staff relied on any data when trying to create an estimate based on memories from past private practice. Additionally, several commenters also criticized the Commission's explanation of its PRA analysis. With respect to the survey of Agency staff, one commenter stated that the Commission failed to provide basic information, such as the number of staff surveyed, who these staff are, their level of experience in preparing HSR filings, when they last prepared HSR filings, and the results of the survey. Another commenter stated that it had no context for what the median might be for filings to better understand whether the low and high ends are outliers or the anticipated typical experience.

The Commission carefully reviewed the comments asserting that its analysis underestimated the extent of the cost and delay that would be imposed if the Commission adopted the proposed rule. The Commission was persuaded by commenters who asserted that the PRA analysis in the NPRM underestimated the time and expense associated with the proposed rule. To address commenters' concerns and recognizing the changes from the proposal discussed above in section II, the estimates are revised as reflected below.

As outlined in section I and discussed more fully in sections IV to VI above, the Commission has not adopted certain requirements in the proposed rule in an effort to reduce compliance costs, and has also modified other proposed requirements in a manner that reduces the burden in certain respects. Specifically, the Commission is not adopting proposals that would have required a timeline of key dates for closing the proposed transaction; organization charts; certain information about other interest holders; drafts of

[398] 88 FR 42178, 42207–08 (June 29, 2023).

[399] *Id.* at 42,207 (*e.g.,* the proposal to report NAICS codes in ranges rather than by specific dollar amount).

[400] *Id.* (*e.g.,* the proposal to eliminate references to paper and DVD filings).

[401] *Id.* (*e.g.,* the proposal to require the reporting of minority investors in additional entities related to the filed transaction).

[402] *Id.* (*e.g.,* the proposal to require narratives regarding transaction rationale).

[403] *Id.* (*e.g.,* filers whose businesses have existing horizontal, non-horizontal, or labor market overlaps or relationships).

[404] In January 2023, the Commission requested a three-year extension of its PRA clearance for information collection requirements related to the existing HSR rules, which was approved by OMB on February 23, 2023, through February 28, 2026 (OMB Control Number 3084–0005). *See* 88 FR 3413, 3414 (Jan. 19, 2023). At that time, FTC staff projected an average of 7,096 non-index filings per year for fiscal years 2023–2025. This estimate of 7,096 non-index filings was based on the fact that the FTC received 6,518 non-index filings in fiscal year 2022 and had experienced an average annual increase in filings of 4.3% in the pre-COVID fiscal years 2017–2019. Actual non-index filings in FY 2023 totaled 3,515. *See* Fed. Trade Comm'n & Dep't Just., Hart-Scott-Rodino Annual Report, Fiscal Year 2023 appendix A (FY 2023).

submitted documents; information about employees; information about board observers; geolocation information; prior acquisitions involving entities with less than $10 million in sales or revenues or consummated more than 5 years prior to filing; and information about steps taken to preserve documents or use of messaging systems. These items were frequently cited by commenters as unduly burdensome. While this information is relevant to the Agencies' premerger assessment, the Commission has determined it can forgo requiring this information at this time. The Commission also has modified, in some instances substantially, many other proposed information requirements, which will reduce the burden on filers to collect and report this information. As a result, the information requirements contained in the final rule are significantly less burdensome than those reflected in the proposed rule, and the costs imposed on filers are thus reduced as compared to the proposed rule.

Before finalizing the changes adopted in the final rule, the Commission undertook a new survey of Agency staff that responds to comments critiquing the estimate in the NPRM and implemented several improvements to its methodology, as explained below. The Commission believes that in light of these improvements, the estimates of the incremental costs associated with the final rule are reliable and consistent with survey techniques used by others to calculate the burden of filling out a form.[405]

The new survey included 15 current FTC and DOJ attorneys who have recent experience preparing HSR filings in private practice. The Commission asked each survey participant to estimate, based on their own experience with preparing HSR Filings, the incremental change in hours that would be required to respond to each of the new and updated items in the final rule. They were also asked to estimate how much time would be saved by no longer having to provide information for current requirements that are not included in the final rule. The survey participants were provided with (1) the current HSR Form and Instructions; (2) the HSR Form and Instructions for both acquiring and acquired persons for the final rule; (3) a spreadsheet listing each of the new, updated, and eliminated items for three categories of transactions; and (4) instructions regarding how to input their responses.

The survey participants provided estimates for the amount of time required to collect and submit information responsive to each of the new and updated items in the final rule, separately for acquiring and acquired persons, and separately for three types of HSR-reportable transactions that reflect varying levels of complexity and antitrust risk: (1) the new category of select 801.30 transactions; (2) transactions with no reportable competitive overlaps (*e.g.,* where an investment fund is buying or selling a portfolio company with no NAICS or competitive overlap or supply relationship); and (3) transactions where the parties report at least one NAICS code overlap or have an existing overlap or supply relationship (referred to below as ''overlap'' filings). They were asked to estimate the incremental change in costs of complying with each new and adjusted information requirement contained in the final rule in each of the categories and for each type of filer. Also, for each item, the survey participants were asked to indicate what percentage of the additional time required would be time spent by company personnel as compared to a law firm hired to prepare the HSR Filing or any third parties that would need to be hired to complete the HSR Form (*e.g.,* data vendors).

In generating their estimates, the survey participants were asked to consider all time spent to complete the HSR Form,[406] including time spent reviewing the HSR Instructions; generating and compiling the materials necessary for collection; acquiring, installing, and utilizing any necessary technology or systems; and completing and reviewing the collected information, among other tasks. They were also asked to consider whether filers would need to incur additional costs not necessarily measured in hours, *e.g.,* the costs associated with new IT investments, long-lived facilities or equipment, related one-time expenditures, and other non-labor expenditures, such as attorney training or general HSR resources.

The Commission took several steps to increase the reliability of its survey. First, to reduce sampling bias as much as possible, the Commission relied on Agency staff who have not been involved in this rulemaking and thus have no more familiarity with the changes to the HSR Form and Instructions than an attorney in private practice would have. As exclusion criteria, the Commission did not survey any staff from the FTC's Premerger Notification Office, nor any staff at either Agency who were part of the core team responsible for drafting the final rule.

Second, the survey participants were asked to provide details about their experience preparing HSR filings in private practice, both in terms of how many years they were in private practice and the number and types of transactions involved. Collectively, the survey participants had experience with each of the three types of HSR-reportable transactions described above. Based on the information provided, the survey participants with the most experience tended to generate a lower estimated number of hours than the average.

The Commission believes that, with these controls, the individuals who provided estimates for the PRA burden assessment had sufficient experience with the current HSR reporting requirements and enough understanding of the HSR Rules and practice to make their estimates of incremental costs reliable.

Based on the survey responses, the Commission finds that the average number of additional hours required to prepare an HSR filing with the changes outlined in the final rule is 68 hours, with an average low of 10 hours for select 801.30 transaction filings by the acquired person and an average high of 121 hours for filings from acquiring person in a transaction with overlaps or supply relationships. As noted, however, the estimate varies significantly based the type of filings, with filings that are more likely to raise antitrust risk requiring higher hours.

To calculate the average number of additional hours, the averages of the estimates provided by respondents were calculated separately for each change for both the acquiring and acquired person within each category of transaction. These averages were then summed by category of transaction and then divided by two to provide category-specific estimated averages for an individual filer to comply with all changes. The overall average estimate for an

[405] This same survey technique, asking experienced HSR practitioners to estimate the time required to comply with the new information requirements in addition to other costs, was used in the Kothari Report, discussed below.

[406] The Commission notes that parties to acquisitions, whether HSR-reportable or not, may hire antitrust counsel to assess whether the transaction would violate any of the antitrust laws. This is a different task from evaluating whether a transaction requires notification pursuant to the HSR Act, and if so, how to comply with the Form and Instructions. The final rule does not require any information from attorneys or any other advisors to assess the antitrust risk of the transaction. As a result, any cost related to the assessment of the potential for a substantive antitrust risk, rather than compliance with the information requirements of the Form and Instructions, are not costs attributable to the final rule and are not included in this PRA analysis.

individual filer was calculated as a weighted average of these category-specific estimates for an average filer, using as weights the Agencies' estimate of the fraction of filings that fall into each of the three categories. Specifically, the Commission estimates that 8 percent of filings will meet the definition of a select 801.30 transaction,[407] 45 percent will have a NAICS code overlap or an overlap or supply relationship identified in the Competition Descriptions section, and 47 percent of filings will have no overlaps or supply relationship.

One commenter commissioned a report (the Kothari Report, referenced in section III.C.2.) to estimate the additional monetary costs of the proposed rule and relied on a survey of company and private counsel to estimate the time required to comply with the new requirements of the proposed rule as compared to the current rules.[408] From the responses to this survey, the Kothari Report estimated that the proposed rule as published in the NPRM would have added 101.6 hours of internal personnel time and 140.3 hours of outside counsel time above the current requirements for a total incremental increase of 241.9 hours. Although this estimate is substantially higher than the estimate based on the Commission's new survey, the Kothari Report estimated costs for the proposed rule, and may have included costs related to advocacy about whether a transaction violates an antitrust law, rather than only costs related to collection and submission of information required by the Form and Instruction, as indicated by its inclusion of costs of economic experts. In contrast, the Commission has estimated the additional time attributable to the less burdensome requirements of the final rule and has included in its estimates only that time that is required to complete an HSR Filing that is fully compliant with the Act and the Rules. Given the significant modifications from the proposed rule to the final rule that lessen the estimated burden, the Commission finds the results of its new survey to be generally consistent with the survey relied on in the Kothari Report.

Several commenters also questioned the hourly rate that the Commission relied on to calculate the estimated cost of compliance. One commenter stated that the Commission's estimate of $460 per hour may underestimate the blended hourly rate applicable to most HSR filings, particularly given attorney billing rates and that such filings often require senior executive participation. Another noted that the rate is below the nationwide average hourly rate for M&A attorneys. Others objected to the lack of support for the previously assumed hourly wage and description of how the Commission calculated the assumed hourly wage. One commenter suggested that a more realistic average rate for outside counsel is $936 per hour; however, no law firm that submitted comments specified a different hourly rate that should be applied.

The Commission has carefully reviewed and considered the comments submitted regarding the hourly rate and has determined to apply a blended hourly rate of $583. To reach this number, the Commission consulted additional resources regarding the rates for outside counsel and in-house personnel. In an effort to make as few assumptions as possible, the Commission used current data from reliable, publicly available sources. Although the actual rates charged by HSR practitioners (and attorneys generally) are not typically publicly available (and no commenter provided actual rates), the Commission reviewed public media and industry reports to determine a range of approximate values that would realistically reflect the costs to prepare an HSR filing.

The ELM Solutions 2023 Real Rate Report published by Wolters Kluwer reports data regarding the 2023 hourly rates charged by corporate M&A attorneys.[409] According to the report, at firms with more than 1,000 lawyers, the nationwide mean rate charged by partners in 2023 was $1,254 per hour and the nationwide mean rate charged by associates in 2023 was $781 per hour. At firms with 501 to 1,000 lawyers, the nationwide mean rate charged by partners was $1,213 per hour and for associates it was $801 per hour. At firms with 201 to 500 lawyers, the nationwide mean rates were $786 per hour for partners and $519 per hour for associates.

The Commission notes that HSR filings are not typically prepared exclusively by M&A law firm partners or exclusively by M&A associate attorneys. As a result, relying on one mean rate or the other would be inappropriate. The WK 2023 Real Rate Report indicates that with regard to corporate M&A matters from 2020–2023 that resulted in 40–100 total billed hours, approximately 45% of the hours billed were at the partner hourly rate, and approximately 49% of the hours billed were at the associate hourly rate.[410] The report further notes that approximately 7% of the hours billed were at a lower paralegal hourly rate.[411]

The Commission further notes that HSR filings are not prepared exclusively by the largest law firms, nor is it necessary for filers to engage such counsel. To account for filings prepared by small to mid-sized firms, the Commission calculated blended rates for both partners and associates by weighting the nationwide mean rates for firms with more than 1,000 lawyers (67%) and firms with 201 to 500 lawyers (33%). Applying the billing percentages in the WK 2023 Real Rate Report to those blended rates, the Commission calculated a blended rate for outside counsel of approximately $878 per hour.

To generate an overall blended rate, the Commission also accounted for the cost of client time spent preparing the filing, which could include a range of employees depending on the type of business and may include in-house counsel. The Commission has factored in an hourly rate for in-house personnel of approximately $140 per hour, which reflects current wage data reported by the Bureau of Labor Statistics.[412] Additionally, the Commission believes that 60% of the time required to prepare

[407] Estimated based upon a review of HSR Filings from fiscal years 2018 through 2022.

[408] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684. The Kothari Report reflects the results of a survey of antitrust practitioners conducted by the Chamber of Commerce seeking input on the proposed rule as well as the Agencies' draft merger guidelines. *See* U.S. Chamber of Com., ''U.S. Chamber HSR/Merger Guides Practitioner Survey'' (Sept. 19, 2023), *https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process.* The Kothari Report was prepared by Professor S.J. Kothari and is appended to its comment at 54–85.

[409] Wolters Kluwer's ELM Solutions, 2023 Real Rate Report (2023). *See also* Ctr. Ethics & L. Prof. at Geo. L. & Thomson Reuters Inst. 2024 Report on the State of the US Legal Market 11–12 (Jan. 8, 2024) (discussing rise in law firm worked rates over the past five years as well as the counterinfluence of billing realization practices); Andrew Maloney, ''Where Are Partner Billing Rates Surging the Most in Big Law?,'' Am. L. (May 24, 2023) (noting a 2023 median hourly rate for M&A partners of $955 per hour).

[410] Wolters Kluwer's ELM Solutions, *supra* note 410, at 214.

[411] Instead of separately estimating a paralegal hourly rate, the Commission conservatively estimated that the remaining 7% assigned to paralegals in the WK 2023 Real Rate Report would be work performed at the associate's hourly rate.

[412] This assumed hourly rate is based on the median wage for lawyers, which according to the Bureau of Labor Statistics was $70.08 in 2023. See *https://www.bls.gov/ooh/legal/lawyers.htm.* The Commission doubles this number to reflect the lost productivity of the worker. The Commission notes that a company's top executives may also participate in preparing or reviewing the filing; however, since the median wage for top executives was $49.92 in 2023, to be conservative the Commission values top executive time at the same rate as lawyer time. *See https://www.bls.gov/ooh/management/top-executives.htm.*

the HSR filing is time spent by outside counsel and 40% is time spent by the client. These percentages are supported by survey results from Agency staff and are also consistent with the survey results in the Kothari Report. By weighting the hourly rates for outside counsel and in-house personnel accordingly, the Commission calculates an overall blended rate of $583 per hour. This adjusted hourly rate generally reflects publicly available information; however, it does not reflect real-world factors that would likely drive down the overall cost of preparing an HSR filing under the final rule (*e.g.,* client-negotiated rates, discounts, write-offs, alternative fee agreements, and work shifted to paralegals and other support staff at substantially lower rates).

Multiple commenters cited to the Kothari Report as providing a better estimate of the additional costs of the proposed changes and concluding that the true cost of the proposed rule may be many times greater than the NPRM suggested. But the Commission has accounted for many of the same costs in its own estimates, such as the time required from outside counsel, in-house counsel, and business personnel. Much of the difference in estimates is attributable to the higher hourly rate applied to the required hours, which the Kothari Report suggests is more likely $936 per hour, and a category of ''other'' costs that is nearly one-third of the total projected costs.[413] These additional costs are attributable to ''other external costs'' that include economic consultants, investment bankers, and data vendors.

The Commission does not believe that there will be this level of additional costs outside of internal personnel and outside counsel. In particular, completing the new requirements contained in the final rule should not require the services of economic consultants or investment bankers. As described above, the Form and Instructions require information from the parties' own records. The Commission specifically is not seeking an analysis or post-hoc rationales developed by external parties. As for data vendors and similar services for the collection and production of the required information, in its new survey of Agency staff, the Commission asked the survey participants to indicate for each item the percentage of time that should be allocated to third parties that they did not otherwise attribute to time spent by outside counsel. Only a few of the survey participants indicated any need for third-party involvement—and even for those few, they estimated only a small percentage of time for a limited set of items (*e.g.,* for translations). As a result, there is no basis to further adjust the Commission's estimates to account for ''other'' external costs.

Commenters also objected that the Commission failed to consider the indirect costs to the economy that would result when parties are discouraged from pursuing clearly nonproblematic deals. The PRA does not require the Commission to consider potential indirect costs to the economy presented by the changes described in the proposed rule. Under the PRA, the term ''burden'' means time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency, including the resources expended for (A) reviewing instructions; (B) acquiring, installing, and utilizing technology and systems; (C) adjusting the existing ways to comply with any previously applicable instructions and requirements; (D) searching data sources; (E) completing and reviewing the collection of information; and (F) transmitting, or otherwise disclosing the information.[414] Comments related to indirect costs attributable to the final rule are discussed in section III.C.

Despite these points of disagreement, the Commission notes that its estimate for the increase in the average number of hours required to prepare an HSR filing is generally consistent with the estimates put forth by commenters, including in the Kothari Report, which were based on the proposed rule but not the final rule. The Commission believes that the differences in projected total costs are mainly attributable to (1) the significant modifications that were made to the final rule as compared to the proposed rule; (2) the difference in the hourly rates ($583 versus $936); (3) a category of ''other'' costs that unduly increased total costs by one-third; and (4) use of projected filings for FY 2023 (7,096), which the Commission now replaces in its calculation with the actual number of filings for FY 2023 (3,515). The Commission's PRA assessment for the final rule addresses concerns raised by the commenters related to the methodology used in the NPRM.

Net Effect

The changes outlined in the final rule only affect non-index filings which, for FY 2023, totaled 3,515. As described above, the Commission estimates that the amendments to the HSR Rules and Notification and Report Form contained in the final rule could increase the time required to prepare responses for non-index filings, with an estimated average increase of 68 hours per filing. Thus, the annual estimated additional hours burden is 239,020 (3,515 non-index filings multiplied by 68 additional hours per filing). Applying the revised estimated hours, 239,020, to the updated hourly rate of $583 for executive and attorney compensation yields approximately $139.3 million in total additional annual costs for a year with that number of filings. The additional per filing cost is estimated at $39,644 (68 hours multiplied by $583 per hour). However, the Commission believes that this PRA cost estimate may overestimate the actual PRA burden. For a variety of reasons, costs for any particular transaction are likely to be different from these estimates. The final rule will result in higher costs for those transactions that present the most antitrust risk, and the PRA estimates do not take account of the substantial benefits to the Agencies, the parties, and third parties generated from a more efficient premerger review process that shifts some of the burden of information collection and reporting away from third parties to the merging parties and allows the Agencies to obtain critical business facts earlier in the initial waiting period, which in turn helps mitigate avoidable costs associated with Second Requests that might have been avoided or that were not tailored to areas of competitive concern due to insufficient information in the HSR Filing. In addition, the annual costs associated with the final rule will be directly related to the number of reportable transactions. See section III.C. Finally, any estimated additional hours burden is expected to decline over time as filers become more familiar with the HSR Form and Instructions.

The amendments are expected to impose either minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes.

[413] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 74–75 (other costs estimated at $102,917, added to external costs of $234,259 for a total of $313,828, with other costs 33% of total).

[414] 44 U.S.C. 3502(2); *see also* 5 CFR 1320.3(b) (defining burden); U.S. General Services Administration & Office of Management and Budget, ''A Guide to the Paperwork Reduction Act: Estimating Burden,'' *https://pra.digital.gov/burden/* .

The Commission believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of Federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Instructions.

Basis for OMB Assessment

Finally, one commenter stated that the proposed rule provides an insufficient basis for the Office of Management and Budget (OMB) to conduct the informed and accurate assessment required by the PRA. The OMB typically defers its substantive review until the final rule stage and did not provide substantive feedback on the NPRM. However, the Commission disagrees with the commenter and believes that it has provided a sufficient basis for OMB to conduct an informed and accurate PRA assessment. Based on comments it received, the Commission narrowed the information requirements in the final rule, conducted a new survey to estimate costs, and revised its PRA analysis accordingly. The Commission believes that its revised assessment provides a sufficient basis for OMB review under the PRA.

IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 through 612, requires that an agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on ''small entities,'' unless the agency certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[415] Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

The Commission finds that the final rule will not affect a substantial number of small entities, because small entities will be affected only when they are party to a transaction that exceeds the HSR Act thresholds, and less than 0.02% of the nation's small entities file premerger notifications in any given year. Furthermore, the economic impact on the very few small entities that are required to file is not significant, because smaller businesses generally have fewer employees, generate fewer documents related to a transaction, and are involved in less complex transactions, all of which will minimize their costs of complying with the final rule. Further, these costs will generally account for a small fraction (less than 0.5%) of the value of the transaction. This document serves as the required notice of this certification to the SBA's Chief Counsel for Advocacy.[416]

The Commission also certified in the NPRM that the changes in the proposed rule would not, if adopted, have a significant economic impact on a substantial number of small entities. Commenters objected to the Commission's reliance on this certification and stated that the Commission failed to use the proper definition of small business or to discuss the proposed rule's impact on them.[417] The Commission responds by providing an assessment of how many small businesses are subject to the reporting requirements of the HSR Act and therefore would be impacted by the final rule. The Commission also notes that the final rule does not change which entities (including which small entities) are required to submit HSR Filings.

Under the RFA, ''small entities'' are defined as small businesses, not-for-profit organizations that are independently owned and operated and not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[418] The term ''small business'' has the same meaning as the term ''small business concern'' under section 3 of the Small Business Act, meaning that it must be independently owned and operated and not dominant in its field of operation.[419] The Small Business Act permits the Small Business Administration (SBA) to specify size standards by which a business may be determined to be a ''small business concern.''[420] The SBA publishes these standards at 13 CFR 121.201.

To determine whether a regulatory action will impact a ''substantial number'' of small entities, SBA Guidance encourages agencies to examine the number of small businesses affected by a given rule relative to the total number of small businesses in the regulated industry. The regulated industry may include the ''entire universe of small businesses'' where a rule's reach is economy wide.[421] That is the case here, as the HSR Rules apply broadly to the entire economy, and all persons involved in reportable transactions are required to file an HSR Form, irrespective of industry.

The SBA estimates that, as of March 2023, there were approximately 33.2 million small businesses in the United States.[422] As explained below, due to the filing thresholds Congress established in the HSR Act, the small businesses that would have to report a transaction under the HSR Act represent a tiny fraction of this number. Even under the counterfactual and extreme assumption that all of 6,288 HSR filings received in FY2022 were made by small businesses,[423] less than 0.02% (6,288 divided by 33.2 million) of all small businesses would need to file an HSR Form. Such a de minimis number of small businesses does not qualify as a ''substantial number'' of small entities under the SBA's Guidance.[424] In an abundance of caution, however, as detailed below, the Commission analyzed a randomized sample of the filings received in FY2022 and further estimates that the final rule will apply to less than 0.0007% of small businesses. Therefore, the final rule will

[415] 5 U.S.C. 605(b).

[416] *Id.*

[417] One commentor suggested that the increased information requirements will, on the margin, lead to less investment by private equity in small businesses. Such indirect effects are not the proper subject of RFA analyses. *See, e.g., Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 868 (D.C. Cir. 2001) (rejecting the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities).

[418] 5 U.S.C. 601.

[419] *See id.* at 601(3) (cross-referencing 15 U.S.C. 632).

[420] 15 U.S.C. 632(a)(2)(A). The Commission does not expect that the final rule will impact other types of ''small entities'' (not-for-profit organizations that are independently owned and operated and not dominant in their fields and governmental jurisdictions with populations of less than 50,000). In the Agencies' experience, governmental jurisdictions are typically not parties to transactions that would be subject to the HSR Act. As a result, the Commission has focused its analysis on small businesses as defined by the SBA.

[421] U.S. Small Bus. Admin., Office of Advocacy, ''How to Comply with the Regulatory Flexibility Act'' 21 (Aug. 31, 2017), *https://advocacy.sba.gov/2017/08/31/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/* (''Depending on the rule, the substantiality of the number of small businesses affected should be determined on an industry-specific basis and/or on the number of small businesses overall. For example, the Internal Revenue Service, when changing the tax deposit rules, would examine the entire universe of small businesses to see how many would be affected.'').

[422] U.S. Small Bus. Admin., Office of Advocacy, ''Frequently Asked Questions'' (Mar. 2023), *https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.*

[423] Federal Trade Commission, Hart-Scott-Rodino Annual Report Fiscal Year 2022, appendix A.

[424] U.S. Small Bus. Admin., Office of Advocacy, *supra* note 424, at 21 (''The interpretation of the term 'substantial number' is not likely to be five small firms in an industry with more than 1,000 small firms.'').

not apply to a substantial number of small businesses.

The SBA regulations define ''small business'' primarily based on firm revenue or total number of employees, depending on the industry.[425] For industries where the SBA uses revenue to define ''small business,'' the revenue thresholds vary from $2.25 million to $47 million. In other industries, the SBA definition of small is based upon the number of employees. These thresholds range from 100 to 1,500 employees. Finally, certain finance-related industries are defined as small if they have less than $850 million in assets. Each NAICS code has a corresponding SBA threshold to determine whether a business generating revenue in that code is ''small.'' [426] In addition to these thresholds, businesses must also be independently owned and operated and not dominant in their fields on a national basis and satisfy additional criteria to be considered ''small.'' [427] The calculation of the size of a business must also give present effect to agreements to mergers and acquisitions, including agreements in principle.[428]

To estimate how many small entities so defined might be required to make an HSR filing, the Commission analyzed a randomly selected, statistically significant 10% sample of the filings submitted in FY 2022. Of that sample, the Commission first eliminated filings made by individuals in their individual capacity, and not as the ultimate parent entity of a business, such as for filings resulting from executive compensation. Second, the Commission used NAICS code information and financials reported by the acquiring or acquired person to determine if they qualified as a small business by revenue or assets, as applicable. For NAICS codes with thresholds based upon the number of employees, the Commission used public information or documents submitted by the filing parties to determine if they qualified as a small business based on the number of employees. For transactions in which the acquiring person filed for control of the acquired entities, the Commission analyzed the acquiring person and acquired entities after giving effect to the change of control.[429] Additionally, because a small business must be independently owned and operated, all filings where an investment group was the ultimate parent entity of the acquiring or acquired person were coded as not small businesses. The Commission does not have information sufficient to determine whether other filers are independently owned and operated, but where the Commission lacked sufficient information to exclude a business on this basis, they were counted as a small business even if they may not truly qualify as one. As a result, the estimates below are likely over-inclusive; that is, it is likely that fewer filers were small than were coded as small in the sample.

Table 6: Estimated Number of Small Business HSR Filers in Fiscal Year 2022

Estimated # of	FY 2022 (Sample x 10)	As % of Small Businesses*	As % of M&A Parties**	As % of # of HSR Filings***
Small Buyers that May Remain Small After Consummation of the Transaction	40	0.00012%	0.13%	0.64%
Small Targets that May Remain Small After Consummation of the Transaction	180	0.00054%	0.57%	2.86%
Total # of Filers That May Remain Small After Consummation of the Transaction	220	0.00066%	0.70%	3.50%

* Small Businesses in 2022 = 33,200,000

** M&A Parties in 2022 = 31,468 (15,734 x 2)

*** Number of Filings FY2022 = 6,288

As shown above in Table 6,[430] the Commission estimates that in FY 2022, it received up to 220 filings from businesses that meet the definition of small (22 found in the 10% sample). Of these, approximately 180 (18 found in the 10% sample) were the targets of the transaction, and 40 (4 found in the 10% sample) were the buyers. As a result, the Commission estimates than less than 0.0007% of small businesses will be affected by the final rule.[431]

This is consistent with the structure of the HSR Act, which focuses on larger mergers, as defined by dollar value.[432] The framework of the Act established three tests that together serve to limit the applicability of the Act for small businesses: (1) the Commerce Test; (2) the Size of the Transaction Test; and (3) the Size of the Person Test.[433]

[425] 13 CFR 121.201.

[426] *Id.*

[427] 15 U.S.C. 632.

[428] 13 CFR 121.103(d)(1).

[429] The Commission notes that filers must attest (1) to their good faith intent to consummate a transaction, and (2) in all transactions to which 16 CFR 801.30 does not apply, that a contract, agreement in principle or letter of intent to merge or acquire has been executed. *See* 16 CFR 803.5.

[430] *See* Table 1 (showing 15,734 acquisitions in 2022).

[431] Though the SBA regulations give effect to agreements, including agreements in principle, when determining size, the Commission also analyzed whether the sample of filers might meet the thresholds if agreements resulting in a change of control were not considered. Here too, the Commission finds that the final rule does not affect a substantial number of small entities. It estimates that in FY2022 approximately 850 filers may have met the definition of small if the effect of agreements is not considered, representing less than 0.003% of small businesses in the United States, approximately 2.70% of the estimated number of M&A parties, and 13.52% of FY 2022 HSR filers.

[432] The Commission now provides this information to give context about the reach of the Act and does not rely upon any of the HSR reporting thresholds in this certification, since it has conducted an analysis of the filing parties using the SBA's definitions of small, as described above. Therefore, the Commission does not address comments related to the RFA analysis provided in the NPRM that drew different conclusions from the statutory thresholds.

[433] 15 U.S.C. 18a(a).

Table 7: Current HSR Form Filing Thresholds

	Size of Transaction (SOT) (as adjusted, as of March 6, 2024)		
	SOT ≤ $119.5 M	$119.5 M > SOT ≤ $478 M	SOT > $478 M
HSR Filing required?	No	No, unless the Size of Person Test is met.	Yes

The Commerce Test is met if either party is engaged in commerce or any activity affecting commerce.

Under the Size of the Transaction Test, no filing is required if the transaction is valued at $119.5 million [434] or less. Transactions valued between $119.5 million and $478 million only must be reported if the acquiring and acquired person also meet the Size of the Person Test. Transactions valued at more than $478 million are reportable regardless of the Size of the Person Test.

Where the Size of the Person Test applies, premerger notification is required only if (1) the acquiring person has total assets or annual net sales of $23.9 million (2024 adjusted value) and the acquired person has total assets or annual net sales of $239 million (2024 adjusted value); or (2) the acquiring person has total assets or annual net sales of $239 million (2024 adjusted value) and the acquired person has total assets (or, if it is ''engaged in manufacturing,'' annual net sales) of $23.9 million (2024 adjusted value). If these size thresholds are not met, no filing is required. For example, in 2024, if the size of a transaction were $475 million and the acquiring person had $1 billion in assets and revenue, but the acquired person was not engaged in manufacturing and had $220 million in revenue but only $20 million in assets, no filing would be required.

The final rule also will not have a significant economic impact on small entities that are required to file. An HSR filing is not an ongoing cost for small businesses. Instead, the costs are incurred only when a small business is a party to a reportable transaction. Therefore, the Commission does not expect that the costs of complying with the final rule will cause a significant impact on affected small businesses.

For the less than 0.0007% of American businesses that will remain small after engaging in an HSR reportable transaction, the impact will be minimal. Even in a case of a complex transaction between two small businesses where the size of the transaction was at the threshold (currently $119.5 million), the Commission estimates that the additional cost imposed by the final rule would be approximately 0.12% of the value of the transaction.[435] For the majority of transactions involving small businesses, actual costs are likely much lower and would represent an even smaller percentage of the proceeds from the transaction. For example, based upon the Commission's review of the sample of FY 2022 transactions, in some transactions involving a presumptively small business, the size of transaction value exceeded $1 billion, resulting in the additional cost of the final rule representing less than 0.015% of the transaction value for even a complex transaction.[436]

Finally, the Commission has no reason to believe that the final rule will have a significant economic impact on any entity, let alone entities that have assets or revenues substantial enough to meet the HSR Act's reporting thresholds but that nevertheless qualify as small businesses. As detailed in the final rule, the Commission estimates that the changes would result in approximately 10 to 121 additional hours per filing, depending on the complexity of the filing at issue. In the Commission's experience, smaller businesses have fewer lines of business and fewer employees, generate fewer documents related to a transaction and maintain fewer ordinary course documents, and are involved in less complex transactions, all of which will minimize their costs of responding to the document requests contained within the final rule, to the extent their compliance is even triggered under the HSR Act's thresholds.

Accordingly, the Commission hereby certifies that the final rule will not have a significant impact on a substantial number of small entities.

X. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects

16 CFR Parts 801

Antitrust.

16 CFR Part 803

Antitrust, Fees, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801 and 803 as set forth below:

PART 801—COVERAGE RULES

■ 1. The authority citation for part 801 is revised as follows:

Authority: 15 U.S.C. 18a(d); 15 U.S.C. 18b.

■ 2. Amend § 801.1 by revising examples 1, 4, 5, and 6 in paragraph (d)(2) and by adding paragraph (r) to read as follows:

§ 801.1 Definitions

* * * * *

(d) * * *

(2) * * *

Examples: 1. ABC Investment Group has organized a number of investment partnerships. Each of the partnerships is its own ultimate parent, but ABC makes the investment decisions for all of the partnerships. One of the partnerships intends to make a reportable acquisition. For purposes of the Notification and Report Form, each of the other investment partnerships, and

[434] When Congress passed the HSR Act, it created minimum dollar thresholds for mandatory premerger reporting. In 2000, Congress amended the HSR Act to require an annual adjustment of these thresholds based on the change in gross national product. As a result, reportability under the Act changes from year to year as the statutory thresholds adjust. The most recent adjustment became effective March 6, 2024.

[435] Estimated cost for acquiring and acquired persons combined in transactions with overlaps using highest average cost (242 hours × $583) divided by the $119,500,000 threshold.

[436] Estimated cost for acquiring and acquired persons combined in transactions with overlaps using highest average cost (242 hours × $583) divided by $1,000,000,000.

ABC Investment Group itself, are associates of the partnership that is the acquiring person. In the Minority-Held Entity Overlaps section of the Notification and Report Form, the acquiring person will disclose any of its 5 percent or greater minority holdings that generate revenues in any of the same NAICS codes as the acquired entity(s) in the reportable transaction. In this same section, the acquiring person would also report any 5 percent or greater minority holdings of its associates in the acquired entity(s) and in any entities that generate revenues in any of the same NAICS codes as the acquired entity(s). In the Controlled Entity Geographic Overlaps section of the Notification and Report Form, the acquiring person will indicate whether there are any NAICS code overlaps between the acquired entity(s) in the reportable transaction, on the one hand, and the acquiring person and all of its associates, on the other.

* * * * *

4. CORP1 controls GP1 and GP2, the sole general partners of private equity funds LP1 and LP2 respectively. LP1 controls GP3, the sole general partner of MLP1, a newly formed master limited partnership which is its own ultimate parent entity. LP2 controls GP4, the sole general partner of MLP2, another master limited partnership that is its own ultimate parent entity and which owns and operates a natural gas pipeline. In addition, GP4 holds 25 percent of the voting securities of CORP2, which also owns and operates a natural gas pipeline.

MLP1 is acquiring 100 percent of the membership interests of LLC1, also the owner and operator of a natural gas pipeline. MLP2, CORP2 and LLC1 all derive revenues in the same NAICS code (Pipeline Transportation of Natural Gas). All of the entities under common investment management of CORP1, including GP4 and MLP2, are associates of MLP1, the acquiring person.

In the Controlled Entity Geographic Overlaps section of the Notification and Report Form, MLP1 would identify MLP2 as an associate that has an overlap in pipeline transportation of natural gas with LLC1, the acquired person. Because GP4 does not control CORP2 it would not be listed in this section, however, GP4 would be listed in the Minority-Held Entity Overlaps section of the Notification and Report Form as an associate that holds 25 percent of the voting securities of CORP2. In this example, even though there is no direct overlap between the acquiring person (MLP1) and the acquired person (LLC1), there is an overlap reported for an associate (MLP2) of the acquiring person in the Controlled Entity Geographic Overlaps section of the Notification and Report Form.

5. LLC is the investment manager for and ultimate parent entity of general partnerships GP1 and GP2. GP1 is the general partner of LP1, a limited partnership that holds 30 percent of the voting securities of CORP1. GP2 is the general partner of LP2, which holds 55 percent of the voting securities of CORP1. GP2 also directly holds 2 percent of the voting securities of CORP1. LP1 is acquiring 100 percent of the voting securities of CORP2. CORP1 and CORP2 both derive revenues in the same NAICS code (Industrial Gas Manufacturing).

All the entities under common investment management of the managing entity LLC, including GP1, GP2, LP2 and CORP1 are associates of LP1. In Minority-Held Entity Overlaps section of the Notification and Report Form, LP1 would report its own holding of 30 percent of the voting securities of CORP1. It would not report the 55 percent holding of LP2 in Minority-Held Entity Overlaps section of the Notification and Report Form because it is greater than 50 percent. It also would not report GP2's 2 percent holding because it is less than 5 percent. In the Controlled Entity Geographic Overlaps section, LP1 would identify both LP2 and CORP1 as associates that derive revenues in the same NAICS code as CORP2.

6. LLC is the investment manager for GP1 and GP2 which are the general partners of limited partnerships LP1 and LP2, respectively. LLC holds no equity interests in either general partnership but manages their investments and the investments of the limited partnerships by contract. LP1 is newly formed and its own ultimate parent entity. It plans to acquire 100 percent of the voting securities of CORP1, which derives revenues in the NAICS code for Consumer Lending. LP2 controls CORP2, which derives revenues in the same NAICS code. All of the entities under the common management of LLC, including LP2 and CORP2, are associates of LP1. For purposes of the Controlled Entity Geographic Overlaps section of the Notification and Report Form, LP1 would report LP2 and CORP2 as associates that derive revenues in the NAICS code that overlaps with CORP1. Even though the investment manager (LLC) holds no equity interest in GP1 or GP2, the contractual arrangement with them makes them associates of LP1 through common management.

* * * * *

(r)(1) *Foreign entity or government of concern.* The term *foreign entity or government of concern* means:

(i) An entity that is a foreign entity of concern as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)); or

(ii) A government, or an agency thereof, of a foreign country that is a covered nation as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)(C)).

(2) *Subsidy.* The term *subsidy* has the meaning given to the term in part IV of title VII of the Tariff Act of 1930 (19 U.S.C. 1677(5)(B)).

PART 803—TRANSMITTAL RULES

■ 3. The authority citation for part 803 is revised to read as follows:

Authority: 15 U.S.C. 18a(d); 15 U.S.C. 18b.

■ 4. Amend § 803.2 by:
■ a. Revising paragraph (a);
■ b. Removing paragraph (b) and the undesignated example following paragraph (b);
■ c. Redesignating paragraphs (c), (d), (e), and (f) as paragraphs (b), (c), (d), and (e), respectively; and
■ d. Revising newly redesignated paragraphs (b), (d), and (e). The revisions read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

(a)(1) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however,* That notwithstanding §§ 801.1(c)(2) and 801.2 of this chapter, only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example 1 to paragraph (a)(1). Jane Doe, her husband, and minor child collectively hold more than 50 percent of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the ''ultimate parent entity'' of a ''person'' composed to herself (or her husband or minor child) and F; see § 801.1(a)(3), (b), and (c)(2) of of this chapter. If corporation F is to

acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband, and minor child collectively.

(2) Persons that are both acquiring and acquired persons shall submit separate forms, one as the acquiring person and one as the acquired person, following the appropriate instructions for each.

(b) In response to the Revenue and Overlaps section of the Notification and Report Form, information need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the requirements of the act.

* * * * *

(d) For annual reports and audit reports required by the Notification and Report Form, a person filing the notification may, instead of submitting a document, provide a cite to an operative internet address directly linking to the document, if the linked document is complete and payment is not required to access the document. If an internet address becomes inoperative during the waiting period, or the document is otherwise rendered inaccessible or incomplete, upon notification by the Commission or Assistant Attorney General, the parties must make the document available to the agencies by either referencing an operative internet address where the complete document may be accessed or by providing electronic copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. Eastern Time on the next regular business day. Failure to make the document available, by the internet or by providing electronic copies, by 5 p.m. Eastern Time on the next regular business day, will result in notice of a deficient filing pursuant to § 803.10(c)(2).

(e) Filings must comply with all format requirements set forth at the Premerger Notification Office pages at *https://www.ftc.gov*. The use of any format not specified as acceptable, or any other failure to comply with the applicable format requirements, shall render the entire filing deficient within the meaning of § 803.10(c)(2).

■ 5. Amend § 803.5 by redesignating the paragraph (a)(1) heading as the paragraph (a) heading and republishing it and revising paragraphs (a)(1) introductory text, (a)(3), and (b) to read as follows:

§ 803.5 Affidavits required.

(a) *Section 801.30 acquisitions.* (1) For acquisitions to which § 801.30 of this chapter applies, the notification required by the act from each acquiring person shall contain an affidavit attesting that the issuer or unincorporated entity whose voting securities or non-corporate interests are to be acquired has received written notice delivered to an officer (or a person exercising similar functions in the case of an entity without officers) by email, certified or registered mail, wire, or hand delivery, at its principal executive offices, of:

* * * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 of this chapter does not apply, the notification required by the act shall contain an affidavit attesting that a contract, agreement in principle, or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction. If the executed agreement is not the definitive agreement, the affidavit must attest that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has also been submitted.

■ 6. Revise § 803.8 to read as follows:

§ 803.8 Foreign language documents.

Documentary materials or information in a foreign language required to be submitted at the time of filing a Notification and Report Form and in response to a request for additional information or documentary material must be submitted with verbatim English language translations. All verbatim translations must be accurate and complete.

■ 7. Amend § 803.9 by revising paragraph (c) to read as follows:

§ 803.9 Filing fee.

* * * * *

(c) For a reportable transaction in which the acquiring entity has two ultimate parent entities, both ultimate parent entities are acquiring persons; however, if the responses for both ultimate parent entities would be the same for the NAICS Codes section of the Notification and Report Form, only one filing fee is required in connection with the transaction.

* * * * *

■ 8. Amend § 803.10 by revising paragraphs (c)(1)(i) and (ii) and redesignating the example following paragraph (c)(1)(ii) as Example 1 to paragraph (c)(1).

The revisions read as follows:

§ 803.10 Running of time.

* * * * *

(c) * * *

(1) * * *

(i) The date of receipt shall be the date of electronic submission if such date is not a Saturday, Sunday, a legal public holiday (as defined in 5 U.S.C. 6103(a)), or a legal public holiday's observed date, and the submission is completed by 5 p.m. Eastern Time. In the event electronic submission is unavailable, the FTC and DOJ may designate procedures for the submission of the filing. Notification of the alternate delivery procedures will normally be made through a press release and, if possible, on the *https://www.ftc.gov* website.

(ii) Delivery effected after 5 p.m. Eastern Time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next following business day. If submission of all required filings is not effected on the same date, the date of receipt shall be the latest of the dates on which submission is effected.

* * * * *

■ 9. Amend § 803.12 by revising paragraph (c)(1)(iii) to read as follows:

§ 803.12 Withdraw and refile notification.

* * * * *

(c) * * *

(1) * * *

(iii) The resubmitted notification is recertified, and the submission, as it relates to Transaction-Specific Agreements, Transaction-Related Documents, and Subsidies from Foreign Entities of Concern sections of the Notification and Report Form, is updated to the date of the resubmission;

* * * * *

■ 10. Revise appendices A and B to part 803 to read as follows:

Appendix A to Part 803—*Notification and Report Form for Certain Mergers and Acquisitions*

BILLING CODE 6750–01–P

16 C.F.R. Part 803 – Appendix

Notification and Report Form for Certain Mergers and Acquisitions

Acquiring Person

FEE INFORMATION

Total Filing Fee: Select Filing Fee. **Paid By:** ☐ Acquiring Person ☐ Acquired Person ☐ Both

Name of Payer	Amount Paid	Check Number	EWT Institution & Confirmation Number

GENERAL INFORMATION

Post-Consummation Filing? ☐ Yes ☐ No
Cash Tender Offer? ☐ Yes ☐ No
Bankruptcy? ☐ Yes ☐ No

Do you request early termination of the waiting period? ☐ Yes ☐ No
(Grants of early termination are published in the Federal Register and on the FTC website.)

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► **UPE Details**

Name: _____

Headquarters Address: _____ **Address Line 2:** _____

City: _____ **State:** _____ **Zip Code:** _____ **Country:** _____

Website: _____

Entity Type: The UPE of the acquiring person is a(n)?
☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other (Specify): _____

FILING MADE ON BEHALF OF THE UPE	Name and address of filing notification entity, if different than UPE (Name, Address, City, State, Zip Code, and Country)
☐ Not Applicable. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a). ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.	

	PRIMARY HSR REPORT CONTACT	SECONDARY HSR REPORT CONTACT	SECOND REQUEST CONTACT
Name:			
Firm/Company:			
Address:			
City, State, Zip Code:			
Country:			
Telephone Number:			
E-Mail Address:			

Name of Acquiring Person UPE: **Date:**

UPE Annual Reports and Financial Information

Central Index Key (CIK) Number	
Annual/Audit Report Document # or Link	
Date of Annual/Audit Report	

Does the person filing notification stipulate that the acquiring person meets the size of person test? See 15 U.S.C. § 18a(a).

☐ Yes, the lower size of person test ☐ Yes, the higher size of person test ☐ N/A

Minority Shareholders or Interest Holders ☐ None

Entity	Minority Holder & D/B/A Name	HQ Address	Percent Held

► Acquiring Person Structure

Entities Within the Acquiring Person

Company or Operating Business d/b/a Name(s):

Entity Name	City	State	Zip Code	Country

Company or Operating Business d/b/a Name(s):

Entity Name	City	State	Zip Code	Country

Company or Operating Business d/b/a Name(s):

Entity Name	City	State	Zip Code	Country

Annual Reports and Audit Reports

Acquiring Entity or Overlapping Entity	Central Index Key (CIK) Number	Annual/Audit Report File Name or Link	Date of Annual/Audit Report

Name of Acquiring Person UPE:	Date:

► Additional Acquiring Person Information

OWNERSHIP STRUCTURE

Description of the ownership structure of the acquiring entity	
Document # of organizational chart for fund or MLP (or N/A)	

OFFICERS AND DIRECTORS

Name of Entity Within Acquiring Person	Name of Officer or Director	Title	List of Other Entities

TRANSACTION INFORMATION

► Parties

ACQUIRING UPE(S)	ACQUIRED UPE(S)
Name:	Name:
Address:	Address:
Address Line 2:	Address Line 2:
City, State, Zip Code:	City, State, Zip Code:
Country:	Country:
Website:	Website:
ACQUIRING ENTITY(IES) – *(Tab to add additional "Acquiring Entity" entries.)*	**TARGET** – *(Tab to add additional "Target" entries.)*
Name:	Name:
Address:	Address:
Address Line 2:	Address Line 2:
City, State, Zip Code:	City, State, Zip Code:
Country:	Country:
Website:	Website:

► Transaction Details Is this transaction subject to § 801.30? ☐ Yes, Specify Type(s) ☐ No

TRANSACTION TYPE

Check all that apply:

☐ Acquisition of voting securities
☐ Acquisition of non-corporate interests
☐ Acquisition of assets
☐ Merger (see § 801.2)
☐ Consolidation (see § 801.2)
☐ Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50)
☐ Acquisition subject to § 801.31
☐ Secondary acquisition subject to § 801.4
☐ Acquisition subject to § 801.2(e)
☐ Other, specify _____

Name of Acquiring Person UPE: **Date:**

ACQUISITION DETAILS

Percentage of voting securities already held %	Percentage of non-corporate interests already held %		
Value of voting securities already held ($MM) $	Value of non-corporate interests already held ($MM) $		
Total percentage of voting securities to be held as a result of the acquisition %	Total percentage of non-corporate to be held as a result of the acquisition %		
Total value of voting securities to be held as a result of the acquisition ($MM) $	Total value of non-corporate securities to be held as a result of the acquisition ($MM) $	Total value of assets to be held as a result of the acquisition ($MM) $	**Aggregate total value ($MM)** **$ 0.00**

NOTIFICATION THRESHOLD

☐ $50 million (as adjusted) ☐ $100 million (as adjusted) ☐ $500 million (as adjusted) ☐ 25% ☐ 50% ☐ N/A

► Transaction Description

BUSINESS OF THE ACQUIRING PERSON	
BUSINESS OF THE TARGET	
NON-REPORTABLE UPE(S)	
TRANSACTION DESCRIPTION	

RELATED TRANSACTIONS

Does the transaction that is the subject of this filing have related filings? ☐ Yes ☐ No ☐ Unknown

If the transaction has related filings, indicate whether the related filing(s) (choose all that apply):

☐ Is a principal transaction that triggers one or more shareholder backside transactions
☐ Is a shareholder backside transaction
☐ Has more than one acquiring UPE
☐ Has more than one acquired UPE
☐ Has more than one reportable step
☐ Is a joint venture
☐ Is a consolidation
☐ Is an exchange of assets
☐ Has one or more filings in the alternative
☐ Other, explain:_____

Party Names or Transaction Numbers for Related Transactions:

► Transactions Subject to International Antitrust Notification

Has (or will) a non-U.S. antitrust or competition authority been (or be) notified of the transaction? ☐ No ☐ Yes (provide details below)

Jurisdiction	Date Notified

Name of Acquiring Person UPE: **Date:**

► Additional Transaction Information

TRANSACTION RATIONALE ☐ Not applicable, select 801.30 transaction	
DOCUMENT NUMBERS RELATED TO TRANSACTION RATIONALE	
DOCUMENT # FOR TRANSACTION DIAGRAM ☐ Not applicable, select 801.30 transaction	

► Joint Ventures

Complete only if acquisition is the formation of a joint venture corporation or unincorporated entity ☐ Not Applicable

CONTRIBUTIONS TO BE MADE	
DESCRIPTION OF CONSIDERATION	
DESCRIPTION OF THE BUSINESS OF THE JOINT VENTURE	

JOINT VENTURE NAICS CODES

6-Digit Code	Code Description

► Business Documents

TRANSACTION RELATED DOCUMENTS

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

PLANS AND REPORTS ☐ Not Applicable, Select 801.30 Transaction

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

Privilege Log Document # _____

Name of Acquiring Person UPE: Date:

► Agreements

TRANSACTION-SPECIFIC AGREEMENTS ☐ Not Applicable, 801.30 or Bankruptcy

Document #	Document Title

OTHER AGREEMENTS BETWEEN THE ACQUIRING PERSON AND TARGET

Does the acquiring person have (or within one year of filing, had) any agreements with the target?

☐ No ☐ Yes (provide details below)

Has Type of Agreement		Type
☐ Yes	☐ No	Agreement with non-compete or non-solicitation terms between the acquiring person and target
☐ Yes	☐ No	Lease
☐ Yes	☐ No	Licensing Agreement
☐ Yes	☐ No	Master Service Agreement
☐ Yes	☐ No	Operating Agreement
☐ Yes	☐ No	Supply Agreement
☐ Yes	☐ No	Other

COMPETITION DESCRIPTIONS

☐ Not Applicable, Select 801.30 Transaction

► Overlap Description

Briefly describe the acquiring person's principal categories of products or services.

List and briefly describe current and known planned products or services that compete (or could compete) with the target. (See Instructions)

Name of Acquiring Person UPE: Date:

Competing Product or Service Details ☐ None

Product or Service: Sales ($):
Categories of Customers:
Top 10 Customers Overall:
Top 10 Customers by Category:

Product or Service: Sales ($):
Categories of Customers:
Top 10 Customers Overall:
Top 10 Customers by Category:

Product or Service: Sales ($):
Categories of Customers:
Top 10 Customers Overall:
Top 10 Customers by Category:

► Supply Relationships Description

RELATED SALES

List and briefly describe the acquiring person's products, services, or assets that are supplied to the target or a business that competes with the target. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset: Sales to Target ($):
Sales to Target's Competitors ($):
Top 10 Customers:
Description of Supply or Licensing Agreement:

Product, Service, or Asset: Sales to Target ($):
Sales to Target's Competitors ($):
Top 10 Customers:
Description of Supply or Licensing Agreement:

Product, Service, or Asset: Sales to Target ($):
Sales to Target's Competitors ($):
Top 10 Customers:
Description of Supply or Licensing Agreement:

Name of Acquiring Person UPE: Date:

RELATED PURCHASES

List and briefly describe the products, services, or assets that are purchased by the acquiring person from the target or a business that competes with the target. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	Purchases from Target ($): Purchases from Target's Competitors ($): Top 10 Suppliers: Description of Purchase or Licensing Agreement:
Product, Service, or Asset:	Purchases from Target ($): Purchases from Target's Competitors ($): Top 10 Suppliers: Description of Purchase or Licensing Agreement:
Product, Service, or Asset:	Purchases from Target ($): Purchases from Target's Competitors ($): Top 10 Suppliers: Description of Purchase or Licensing Agreement:

REVENUE AND OVERLAPS

Does the acquiring person have US revenue? ☐ Yes ☐ No, explain: _____

► NAICS Codes

6-Digit Code	Code Description	Operating Business	Revenue Range				Overlap
			<$10MM	$10MM - $100MM	$100MM - $1B	>$1B	
							☐
							☐
							☐
							☐
							☐

► Controlled Entity Geographic Overlaps

STATE LEVEL REPORTING ☐ None

NAICS Code	Code Description	Operating Business and D/B/A Name(s)	Person or Associate?	States and Total Number

Name of Acquiring Person UPE: Date:

STREET LEVEL REPORTING ☐ None

NAICS Code and Description:

Operating Business and D/B/A Name(s)	Person or Associate	State	County	ZIP Code	Street Address

NAICS Code and Description:

Operating Business and D/B/A Name(s)	Person or Associate	State	County	ZIP Code	Street Address

NAICS Code and Description:

Operating Business and D/B/A Name(s)	Person or Associate	State	County	Zip Code	Street Address

► Minority-Held Entity Overlaps

☐ None

Entity Held and D/B/A Name(s)	Percentage Held	Held By	Person or Associate?	NAICS Code or Industry Overlap with Target

► Prior Acquisitions

☐ None

Overlapping 6-Digit NAICS Code and Description or Overlap Product or Service Description	Acquired Entity and Former HQ Address	Transaction Type	Consummation Date

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

SUBSIDIES ☐ None ☐ Yes (provide details below)

Entity or Government	Description

Name of Acquiring Person UPE: **Date:**

COUNTERVAILING DUTIES IMPOSED ☐ None ☐ Yes (provide details below)

Product	Duty Imposed	Jurisdiction

COUNTERVAILING DUTY INVESTIGATIONS ☐ None ☐ Yes (provide details below)

Product	Jurisdiction Conducting Investigation

► **Defense or Intelligence Contracts**

☐ None ☐ Not Applicable, Select 801.30 Transaction

Entity Within Acquiring Person	Contracting Office	Contracting Office ID	Award ID	NAICS Codes

► **Voluntary Waivers**

INTERNATIONAL COMPETITION AUTHORITIES (VOLUNTARY)

The acquiring person agrees to waive the disclosure exemption in the HSR Act for the following competition authorities: ☐ None

1. _____ 4. _____
2. _____ 5. _____
3. _____ 6. _____

STATE ATTORNEYS GENERAL (VOLUNTARY)

The acquiring person agrees to waive the disclosure exemption in the HSR Act for the following states: ☐ None

State	Permit Disclosure of	
	Fact of Notification and Waiting Period	Information and Documents
	☐	☐
	☐	☐
	☐	☐

► **End Notes**

☐ None

Number	Note

Name of Acquiring Person UPE: **Date:**

CERTIFICATION

Penalties for False Statements

Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

Certification

This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

Name (Please Print or Type)	**Title**
Signature	**Date**

☐ **Sworn under penalty of perjury**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature	**Executed Date**

☐ **Notarized**

Subscribed and sworn to before me at the: Seal:

_____

City of: _____

State of: _____

This _____ day of _____ the year _____

Signature: _____

My commission expires: _____

Name of Acquiring Person UPE: **Date:**

16 C.F.R. Part 803 – Appendix **NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS**	Approved by OMB 3084-0005

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person that, by reason of a merger, consolidation, or acquisition, is subject to § 7A of the Clayton Act, 15 U.S.C. § 18a, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The rules may be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. § 18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. § 18a. The maximum daily civil penalty amount is listed in 16 C.F.R. § 1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated at 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th St. SW
Washington, DC 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consumption of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. § 1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

16 C.F.R. Part 803 – Appendix

Notification and Report Form for Certain Mergers and Acquisitions

Acquired Person

FEE INFORMATION

Total Filing Fee: Select Filing Fee. **Paid By:** ☐ Acquiring Person ☐ Acquired Person ☐ Both

Name of Payer	Amount Paid	Check Number	EWT Institution & Confirmation Number

GENERAL INFORMATION

Post-Consummation Filing? ☐ Yes ☐ No
Cash Tender Offer? ☐ Yes ☐ No
Bankruptcy? ☐ Yes ☐ No

Do you request early termination of the waiting period? ☐ Yes ☐ No
(Grants of early termination are published in the Federal Register and on the FTC website.)

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► UPE Details

Name: _____

Headquarters Address: _____ **Address Line 2:** _____

City: _____ **State:** _____ **Zip Code:** _____ **Country:** _____

Website: _____

Entity Type: The UPE of the acquired person is a(n)?

☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other (Specify): _____

FILING MADE ON BEHALF OF THE UPE	Name and address of filing notification entity, if different than UPE (Name, Address, City, State, Zip Code, and Country)
☐ Not Applicable. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a). ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.	

	PRIMARY HSR REPORT CONTACT	SECONDARY HSR REPORT CONTACT	SECOND REQUEST CONTACT
Name:			
Firm/Company:			
Address:			
City, State, Zip Code:			
Country:			
Telephone Number:			
E-Mail Address:			

Name of Acquired Person UPE: **Date:**

UPE Annual Reports and Financial Information

Central Index Key (CIK) Number

Annual/Audit Report Document # or Link

Date of Annual/Audit Report

Does the person filing notification stipulate that the acquired person meets the size of person test? See 15 U.S.C. § 18a(a).

☐ Yes, the lower size of person test ☐ Yes, the higher size of person test ☐ N/A

Minority Shareholders or Interest Holders ☐ None

Entity	Minority Holder & D/B/A Name	HQ Address	Percent Held

► Acquired Entity Structure

Entities Within the Acquired Entity(ies)

Company or Operating Business d/b/a Name(s):

Entity Name	City	State	Zip Code	Country

Company or Operating Business d/b/a Name(s):

Entity Name	City	State	Zip Code	Country

Company or Operating Business d/b/a Name(s):

Entity Name	City	State	Zip Code	Country

Annual Reports and Audit Reports

Acquired Entity	Central Index Key (CIK) Number	Annual/Audit Report File Name or Link	Date of Annual/Audit Report

Name of Acquired Person UPE: **Date:**

TRANSACTION INFORMATION

► Parties

ACQUIRING UPE(S)	**ACQUIRED UPE(S)**
Name:	**Name:**
Address:	**Address:**
Address Line 2:	**Address Line 2:**
City, State, Zip Code:	**City, State, Zip Code:**
Country:	**Country:**
Website:	**Website:**
ACQUIRING ENTITY(IES) – *(Tab to add additional "Acquiring Entity" entries.)*	**TARGET(S)** – *(Tab to add additional "Target" entries.)*
Name:	**Name:**
Address:	**Address:**
Address Line 2:	**Address Line 2:**
City, State, Zip Code:	**City, State, Zip Code:**
Country:	**Country:**
Website:	**Website:**

► Transaction Details

Is this transaction subject to § 801.30? ☐ Yes, Specify Type(s) _____ ☐ No

TRANSACTION TYPE

Check all that apply:

☐ Acquisition of voting securities
☐ Acquisition of non-corporate interests
☐ Acquisition of assets
☐ Merger (see § 801.2)
☐ Consolidation (see § 801.2)
☐ Acquisition subject to § 801.31
☐ Secondary acquisition subject to § 801.4
☐ Acquisition subject to § 801.2(e)
☐ Other, specify _____

ACQUISITION DETAILS

Percentage of voting securities already held %	Percentage of non-corporate interests already held %		
Value of voting securities already held ($MM) $	Value of non-corporate interests already held ($MM) $		
Total percentage of voting securities to be held as a result of the acquisition %	Total percentage of non-corporate to be held as a result of the acquisition %		
Total value of voting securities to be held as a result of the acquisition ($MM) $	Total value of non-corporate securities to be held as a result of the acquisition ($MM) $	Total value of assets to be held as a result of the acquisition ($MM) $	**Aggregate total value ($MM)** **$ 0.00**

Name of Acquired Person UPE: **Date:**

► Transaction Description

Business of the Target
Non-Reportable UPE(s)
Transaction Description

Related Transactions

Does the transaction that is the subject of this filing have related filings? ☐ Yes ☐ No ☐ Unknown

If the transaction has related filings, indicate whether the related filing(s) (choose all that apply):

☐ Is a principal transaction that triggers one or more shareholder backside transactions
☐ Is a shareholder backside transaction
☐ Has more than one acquiring UPE
☐ Has more than one acquired UPE
☐ Has more than one reportable step
☐ Is a joint venture
☐ Is a consolidation
☐ Is an exchange of assets
☐ Has one or more filings in the alternative
☐ Other, explain:_____

Party Names or Transaction Numbers for Related Transactions:

► Additional Transaction Information

Transaction Rationale ☐ Not applicable, select 801.30 transaction	
Document Numbers Related to Transaction Rationale	

► Business Documents

Transaction Related Documents

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

Plans and Reports ☐ Not Applicable, Select 801.30 Transaction

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

Privilege Log Document # _____

Name of Acquired Person UPE: Date:

► Agreements

TRANSACTION-SPECIFIC AGREEMENTS ☐ Not Applicable, 801.30 or Bankruptcy

Document #	Document Title

COMPETITION DESCRIPTIONS

☐ Not Applicable, Select 801.30 Transaction

► Overlap Description

Briefly describe the target's principal categories of products or services.

List and briefly describe current and known planned products or services that compete (or could compete) with the acquiring person. (See Instructions)

Name of Acquired Person UPE: Date:

Competing Product or Service ☐ None

Product or Service:	Sales ($):
	Categories of Customers:
	Top 10 Customers Overall:
	Top 10 Customers by Category:
Product or Service:	Sales ($):
	Categories of Customers:
	Top 10 Customers Overall:
	Top 10 Customers by Category:
Product or Service:	Sales ($):
	Categories of Customers:
	Top 10 Customers Overall:
	Top 10 Customers by Category:

► Supply Relationships Description

RELATED SALES

List and briefly describe the target's products, services, or assets that are supplied to the acquiring person or a business that competes with acquiring person. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	Sales to Target ($):
	Sales to Target's Competitors ($):
	Top 10 Customers:
	Description of Supply or Licensing Agreement:
Product, Service, or Asset:	Sales to Acquiring Person ($):
	Sales to Acquiring Person's Competitors ($):
	Top 10 Customers:
	Description of Supply or Licensing Agreement:
Product, Service, or Asset:	Sales to Acquiring Person ($):
	Sales to Acquiring Person's Competitors ($):
	Top 10 Customers:
	Description of Supply or Licensing Agreement:

Name of Acquired Person UPE: Date:

RELATED PURCHASES

List and briefly describe the products, services, or assets that are purchased by the target from the acquiring person or a business that competes with the acquiring person. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	Purchases from Acquiring Person ($): Purchases from Acquiring Person's Competitors ($): Top 10 Suppliers: Description of Purchase or Licensing Agreement:
Product, Service, or Asset:	Purchases from Acquiring Person ($): Purchases from Acquiring Person's Competitors ($): Top 10 Suppliers: Description of Purchase or Licensing Agreement:
Product, Service, or Asset:	Purchases from Acquiring Person ($): Purchases from Acquiring Person's Competitors ($): Top 10 Suppliers: Description of Purchase or Licensing Agreement:

REVENUE AND OVERLAPS

Does the target have US revenue? ☐ Yes ☐ No, explain: _____

► NAICS Codes

6-Digit Code	Code Description	Operating Business	Revenue Range				Overlap
			<$10MM	$10MM - $100MM	$100MM - $1B	>$1B	
							☐
							☐
							☐
							☐
							☐

► Controlled Entity Geographic Overlaps

STATE LEVEL REPORTING ☐ None

NAICS Code	Code Description	Operating Business and D/B/A Name(s)	States and Total Number

Name of Acquired Person UPE: Date:

STREET LEVEL REPORTING ☐ None

NAICS Code and Description:

Operating Business and D/B/A Name(s)	State	County	ZIP Code	Street Address

NAICS Code and Description:

Operating Business and D/B/A Name(s)	State	County	ZIP Code	Street Address

NAICS Code and Description:

Operating Business and D/B/A Name(s)	State	County	ZIP Code	Street Address

► Minority-Held Entity Overlaps

☐ None

Entity Held and D/B/A Name(s)	Percentage Held	Held By	NAICS Code or Industry Overlap with Acquiring Person

► Prior Acquisitions

☐ None

Overlapping 6-Digit NAICS Code and Description or Overlap Product or Service Description	Acquired Entity and Former HQ Address	Transaction Type	Consummation Date

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

SUBSIDIES ☐ None ☐ Yes (provide details below)

Entity or Government	Description

Name of Acquired Person UPE: **Date:**

COUNTERVAILING DUTIES IMPOSED ☐ None ☐ Yes (provide details below)

Product	Duty Imposed	Jurisdiction

COUNTERVAILING DUTY INVESTIGATIONS ☐ None ☐ Yes (provide details below)

Product	Jurisdiction Conducting Investigation

► Defense or Intelligence Contracts

☐ None ☐ Not Applicable, Select 801.30 Transaction

Entity Within Target	DOD/IC Contracting Office	Contracting Office ID	Award ID	NAICS Codes

► Voluntary Waivers

INTERNATIONAL COMPETITION AUTHORITIES (VOLUNTARY)

The acquired person agrees to waive the disclosure exemption in the HSR Act for the following competition authorities: ☐ None

1. _____ 4. _____
2. _____ 5. _____
3. _____ 6. _____

STATE ATTORNEYS GENERAL (VOLUNTARY)

The acquired person agrees to waive the disclosure exemption in the HSR Act for the following states: ☐ None

State	Permit Disclosure of	
	Fact of Notification and Waiting Period	Information and Documents
	☐	☐
	☐	☐
	☐	☐

► End Notes

☐ None

Number	Note

Name of Acquired Person UPE: **Date:**

CERTIFICATION

PENALTIES FOR FALSE STATEMENTS

Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION

This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

Name (Please Print or Type)	**Title**
Signature	**Date**

☐ **Sworn under penalty of perjury**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature	**Executed Date**

☐ **Notarized**

Subscribed and sworn to before me at the: Seal:

_____

City of: _____

State of: _____

This _____ day of _____ the year _____

Signature: _____

My commission expires: _____

Name of Acquired Person UPE: **Date:**

16 C.F.R. Part 803 – Appendix NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS	Approved by OMB 3084-0005

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person that, by reason of a merger, consolidation, or acquisition, is subject to § 7A of the Clayton Act, 15 U.S.C. § 18a, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The rules may be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. § 18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. § 18a. The maximum daily civil penalty amount is listed in 16 C.F.R. § 1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated at 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th St. SW
Washington, DC 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. § 1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

Appendix B to Part 803—Instructions to the Notification and Report Form for Certain Mergers and Acquisitions

Antitrust Improvements Act
Notification for Certain Mergers and Acquisitions **Acquiring Person Instructions**

GENERAL INSTRUCTIONS AND INFORMATION

These instructions specify the information that must be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). Submitted materials must be provided to the Federal Trade Commission ("FTC") and to the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies").

► Information

The central office for information and assistance concerning the Rules is:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024
Phone: (202) 326-3100
E-mail: HSRhelp@ftc.gov for Rules questions
Premerger@ftc.gov for filing information

Copies of these Instructions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), the Rules, FTC final rules (including their Statements of Basis and Purpose) published in the Federal Register, as well as information to assist in submitting the required information are available at the FTC's Premerger Notification Office ("PNO") website.

► Definitions and Explanation of Terms

Unless otherwise indicated, the definitions provided in the Rules apply to these Instructions.

Dollar Values
All financial information should be expressed in millions of dollars rounded to the nearest hundred thousand.

Fee Information
The filing fee is based on the aggregate total value of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition. Filing fee tiers are adjusted annually pursuant to 15 U.S.C. § 18a note, based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). Filing fees increase annually by the percentage increase, if any, in the consumer price index ("CPI") over the CPI for the fiscal year ending September 30, 2022, pursuant to 15 U.S.C. § 18a note. For current fee information, see the PNO website.

North American Industry Classification System (NAICS) Data
When reporting information by 6-digit NAICS code, refer to the North American Industry Classification System - United States, 2022, published by the Executive Office of the President, Office of Management and Budget, available at https://www.census.gov/naics/. This website also provides guidance in choosing the proper code(s).

Notification Thresholds
Notification thresholds are adjusted annually based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). See § 801.1(h). The current threshold values can be found at Current Thresholds.

Person Filing and Filing Person
The terms "person filing" or "filing person" mean the ultimate parent entity ("UPE"). See § 801.1(a)(3). The terms are used herein interchangeably.

Select 801.30 Transaction
A transaction to which § 801.30 applies **and** where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions.

Supervisory Deal Team Lead
The individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.

Target
The target includes all entities and assets to be acquired by the acquiring person from the acquired person in the reported transaction.

Year
All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recently completed calendar or fiscal year for which the requested information is available.

► Filing

If the UPE is both an acquiring and acquired person, separate filings must be submitted, one as the acquiring person and one as the acquired person, following the appropriate instructions for each. See § 803.2(a)(2).

Filings should be submitted electronically consistent with the instructions on the PNO website. If the electronic submission platform is unavailable, the Agencies may announce sites for delivery through the media and, if possible, at the PNO website.

► Responses

Documents, including the Form, should be produced as (1) a searchable PDF from which text can be copied or (2) an Excel file.

For Business Documents (see below), check the box to indicate whether any part of the document is privileged and then provide the document number, title, and estimated date. If the acquiring person has identified (1) a NAICS overlap, (2) an overlap within the Overlap Description, or (3) a supply relationship within the Supply Relationships Description, also provide the following:

1. Author(s) (and job title(s)) for documents created by the acquiring person; or
2. Recipient(s) or supervisor(s) (and job title(s)) of documents created by third parties as part of an engagement with the acquiring person.

If a group of people prepared the document, list all the authors and their titles, identifying the principal authors. Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. Similarly, if the acquiring person engaged a third party to prepare a document, provide the name of the third party, and the name, title, and company name for the individual within the acquiring person who supervised the creation of the document, or for whom the document was prepared. For materials received from a third party that was not engaged by the acquiring person, only the name of the third party is required.

If the acquiring person submits documents in addition to what is required, such documents should be identified as "Voluntary". See § 803.1(b).

Submit only one copy of identical responsive documents.

► Privilege

See § 803.3(d). For privileged documents, the filing person must also provide the following in a log:

1. The privilege type (redacted or withheld);
2. The privilege claim;
3. Addressee(s) and all recipients, with company name and title, of the original and any copies;
4. Subject matter;
5. Document's present location; and
6. Who has control over it.

If a privileged document was circulated to a group, such as the board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested.

If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

► **Translations**

Materials or information in a language other than English must be translated into English, with the English translation attached to the original version. See § 803.8.

► **Non-Compliance**

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

► **Limited Response**

Information need not be supplied regarding assets, voting securities, or non-corporate interests currently being acquired when their acquisition is exempt under the Act or Rules. See § 803.2(c).

FEE INFORMATION

Total Expected Filing Fee
Indicate the value of the total required fee for the transaction.

Parties Paying the Fee
Indicate which filing person(s) is paying the filing fee and, if applicable, whether the fee is being paid by multiple entities. For each entity within the acquiring person paying a portion of the fee, provide the name of the payer, the amount paid, the payment method, and the Electronic Wire Transfer (EWT) confirmation number or check number.

Note on Paying by EWT
In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the PNO website on the Filing Fee Information page.

Note on Paying by Check
The FTC strongly discourages check payments because handling a physical check will create a delay in processing the Form. However, if an EWT cannot be arranged, the FTC will accept a check, sent to Financial Operations. Cashiers' or certified checks are preferred. Make the check payable to the Federal Trade Commission and deliver to:

Federal Trade Commission
Financial Operations Division
600 Pennsylvania Ave, Drop H-790
Washington, DC 20580

Please note that the waiting period may be delayed until the fee has been confirmed.

GENERAL INFORMATION

Special Filing Types
Indicate whether the filing is a post-consummation filing, or whether the transaction is a cash tender offer or bankruptcy that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

Early Termination
Indicate whether the acquiring person requests early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18a(b)(2), and on the PNO website. Note that if either person in any transaction requests early termination, it may be granted and published.

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► UPE Details

Name
Provide the name, headquarters address, and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE of the acquiring person. See § 801.1(a)(3).

Entity Type
Specify whether the UPE is a corporation, unincorporated entity, natural person, or other entity type (specify). See § 801.1.

Filing Made on Behalf of the UPE
If the filing is being made on behalf of the UPE by another entity within the acquiring person authorized by the UPE to file the notification on its behalf pursuant to § 803.2(a) or filed pursuant to § 803.4 on behalf of a foreign person, provide the name and mailing address of the entity filing the notification on behalf of the UPE.

Contact Information
Provide the name, firm/company name, address, telephone number, and e-mail address of two individuals (primary and secondary) to contact regarding the filing. See § 803.20(b)(2)(ii).

Additionally, provide the name, firm/company name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. See § 803.20(b)(2).

UPE Annual Reports and Financial Information

- **Central Index Key**
  If the UPE of the acquiring person files annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission (SEC), provide the Central Index Key (CIK) number.

- **Annual Reports and Audit Reports**
  Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquiring person.

  Natural person UPEs should not provide personal balance sheets or tax returns. Natural person UPEs should leave this section blank and instead provide the most recent reports for the highest-level entity(ies) that controls the acquiring entity under "UPE Structure."

  The person filing notification may incorporate a document responsive to this item by reference to an internet address directly linking to the document. See § 803.2(e).

- **Date of Report(s)**
  Provide the date of the most recent annual report(s) and/or audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquiring person.

- **Size of Person**
  If applicable, indicate whether the person filing notification stipulates that the acquiring person meets either the higher or lower size of person test. See 15 U.S.C. § 18a(a), § 801.11.

Minority Shareholders or Interest Holders
This section requires the acquiring person to report the name, headquarters mailing address, and approximate percentage held by certain minority holders of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction (each a "covered entity").

If a covered entity is not a limited partnership, provide the required information for each individual or entity that currently holds, or will hold as a result of the transaction, 5% or more but less than 50% of the voting securities or non-corporate interests of any covered entity, starting with the UPE.

If a covered entity is a limited partnership, provide the required information for its (a) general partner, regardless of the percentage it holds, and (b) limited partners that (i) currently hold, or will hold as a result of the transaction, 5% or more but less than 50% of the non-corporate interests of the covered entity, and (ii) have or will have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities, of any covered entity, or of the general partner or management company of a covered entity.

If a minority holder is related to a master limited partnership, fund, investment group, or similar entity that does business under a common name, the d/b/a or "street name" of such group should also be listed, if known to the acquiring person.

If the identity of minority investors or percentages to be held of a covered entity is not finalized at the time of filing, provide good faith estimates and explain in an endnote.

► Acquiring Person Structure

Entities Within the Acquiring Person
List the name, city, state, zip code, and country of all U.S. entities, and all foreign entities that have sales in or into the United States, that are included within the acquiring person. Entities with total assets of less than $10 million may be omitted. Alternatively, the acquiring person may report all entities within it. The acquiring person must also list all names under which the entities do business (e.g., d/b/a names).

The list of entities should be organized by operating company or operating business ("top-level entity"), if applicable. Filings for select 801.30 transactions need not include d/b/a names and the list of entities can be organized as kept in the ordinary course of business.

Annual Reports and Audit Reports
For the acquiring entity(ies) and any entity controlled by the acquiring person whose revenues contribute to a NAICS overlap or any overlap identified in the Overlap Description, provide the CIK number(s) if annual reports (Form 10-K or Form 20-F) are filed with the SEC, and the most recent annual or audit report(s).

Natural person UPEs must also provide the most recent annual report or audit report and CIK number for the highest-level entity that controls the acquiring entity.

► Additional Acquiring Person Information

Ownership Structure
Describe the ownership structure of the acquiring entity.

For transactions where a fund or master limited partnership is the UPE, provide any existing organizational chart that shows the relationship of any entities that are affiliates or associates. If such an organizational chart does not exist, there is no requirement to create one.

Officers and Directors
For all entities within the acquiring person responsible for the development, marketing, or sale of products or services that are identified as overlaps within the Overlap Description or as supply relationships within the Supply Relationships Description:

- List all current officers and directors (or in the case of unincorporated entities, individuals exercising similar functions) and those who have served in one of these positions within the three months before filing that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target. For each, provide the name of all such entities. If NAICS codes are unavailable, list all such entities that have operations in the same industry, based on the knowledge or belief of the acquiring person or the identified individual.

For the acquiring entity, entities the acquiring entity directly or indirectly controls, entities that directly or indirectly control the acquiring entity, and entities within the acquiring person that have been or will be created as a result of or as contemplated by the transaction:

- List all current officers and directors (or in the case of unincorporated entities, individuals exercising similar functions) as well as those who are likely to serve in one of these positions that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target. For each, provide the name of all such entities. If NAICS codes are unavailable, list all such entities that have operations in the same industry, based on the knowledge or belief of the acquiring person or the identified individual. If the identities of the prospective officers or directors are unknown, briefly describe in an endnote who will have the authority to select them.

No filer is required to disclose any individual's role as an officer, director, or member of any non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce. Organize the response by entity and include entities that are not yet created but are expected to be created as a result of or as contemplated by the transaction.

TRANSACTION INFORMATION

► Parties

List the name and mailing address of each acquiring and acquired person and each acquiring and acquired entity. Do not list entities controlled by an acquired entity.

Acquiring UPE
Provide the name, headquarters address, and website of the acquiring person.

Acquiring Entity(ies)
If an entity other than the acquiring UPE is making the acquisition, provide the name, mailing address, and website of that entity.

Acquired UPE
Provide the name, headquarters address, and website of the acquired person.

Target(s)
If the assets, voting securities, or non-corporate interests of an entity other than the acquired UPE are being acquired, provide the name, mailing address, and website of that entity.

► Transaction Details

801.30 Transaction
Indicate whether the transaction is subject to § 801.30 and if so, what type(s), including select 801.30.

Transaction Type
Indicate whether the transaction is any of the following (select all that apply):

- Acquisition of voting securities;
- Acquisition of non-corporate interests;
- Acquisition of assets;
- Merger (see § 801.2);
- Consolidation (see § 801.2);
- Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50);
- Acquisition subject to § 801.31;
- Secondary acquisition subject to § 801.4;
- Acquisition subject to § 801.2(e); or
- Other (specify)

Acquisition Details
Provide the requested information for the value and percentage of assets, voting securities, and non-corporate interests to be acquired. If a combination of assets, voting securities, and/or non-corporate interests is being acquired and allocation is not possible, note such information in an endnote.

For determining the percentage of voting securities, evaluate total voting power per § 801.12. For determining the percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

To complete this item:

- State the percentage of voting securities already held by the acquiring person. See § 801.12.
- State the value of voting securities already held by the acquiring person. See § 801.10.
- State the total percentage of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.12.
- State the total value of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the percentage of non-corporate interests already held by the acquiring person. See § 801.1(b)(1)(ii).
- State the value of non-corporate interests already held by the acquiring person. See § 801.10.
- State the total percentage of non-corporate interests to be held by the acquiring person as a result of the acquisition. See §§ 801.10 and 801.1(b)(1)(ii).
- State the total value of non-corporate interests to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total value of assets to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the aggregate total value of assets, voting securities, and non-corporate interests of the acquired person to be held by the acquiring person as a result of the acquisition. See §§ 801.10, 801.12, 801.13 and 801.14.

Notification Threshold
This item should only be completed when voting securities are being acquired. If more than voting securities are being acquired, respond to this item only regarding voting securities. Indicate the highest applicable threshold for which notification is being filed. See § 801.1(h).

- $50 million (as adjusted);
- $100 million (as adjusted);
- $500 million (as adjusted);
- 25% (if the value of voting securities to be held is greater than $1 billion, as adjusted);
- 50%; or
- N/A.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

► Transaction Description

Business of the Acquiring Person
Describe the business operation(s) of the acquiring person.

Business of the Target
Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise an operating business.

Non-Reportable UPE(s)
Provide the names of any UPE that does not have a reporting obligation.

Transaction Description
Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are being acquired. Indicate what consideration will be received by each person and the scheduled consummation date of the transaction. Also identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

If any attached transaction documents use code names to refer to the parties, provide an index identifying the code names.

Related Transactions
If the transaction that is the subject of this filing has related filings, indicate whether the related filing(s) (choose all that apply):

- Is a principal transaction that triggers one or more shareholder backside transactions;
- Is a shareholder backside transaction;
- Has more than one acquiring UPE;
- Has more than one acquired UPE;
- Has more than one reportable step;
- Is a joint venture;
- Is a consolidation;
- Is an exchange of assets;
- Has one or more filings in the alternative; or
- Has other circumstances that require more than one filing and if so, explain.

Provide all additional details regarding the related filings(s), including party names and transaction numbers, necessary to identify and connect all related filings.

► Transactions Subject to International Antitrust Notification

Indicate whether, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the transaction.

If yes, list the name of each such authority. Identify, to the knowledge or belief of the filing person at the time of filing, any jurisdiction where (1) a merger notification has been filed, (2) a merger notification is being prepared for filing, or (3) the parties have a good faith belief that a merger notification will be made, along with the dates of the filing or planned filing.

► **Additional Transaction Information**

Transaction Rationale

Except for select 801.30 transactions, identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees. If the rationale of acquiring entity is different from the UPE, submit an explanation for each. Identify each document produced in the filing that confirms or discusses the stated rationale(s). If documents produced in the filing are referenced, identify the specific page(s) that discusses the stated rationale(s).

Transaction Diagram

Except for select 801.30 transactions, submit a diagram of the transaction, if one exists. If such a diagram does not exist, there is no requirement to create one.

► **Joint Ventures**

Complete only if the acquisition is the formation of a joint venture corporation or unincorporated entity. See §§ 801.40 and 801.50.

Contributions

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Consideration

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Business Description

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

NAICS Codes

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues.

► **Business Documents**

Transaction-Related Documents

- **Competition Documents**
  Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead.

- **Confidential Information Memoranda**
  Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or of the acquiring entity(s) that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists. Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Third-Party Studies, Surveys, Analyses, and Reports**
  Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors ("third-party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring person or of the acquiring entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Synergies and Efficiencies**
  Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

Plans and Reports
Except for select 801.30 transactions, provide all regularly prepared plans and reports that were provided to the Chief Executive Officer (CEO) of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Except for select 801.30 transactions, provide all plans and reports that were provided to the Board of Directors of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

► Agreements

Transaction-Specific Agreements
Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements.

Documents that constitute the agreement(s) (e.g., Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version.

If the executed agreement is not the definitive agreement, submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, or term sheet, or the most recent draft agreement. See § 803.5. Such document should include information regarding some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. § 363(b) do not require an executed agreement. For bankruptcies, provide the order from the bankruptcy court.

Other Agreements Between the Acquiring Person and Target
Indicate whether the acquiring person has, or had within one year of filing, any contractual agreement(s) with the target. If so, indicate which type(s). If an agreement has terms that apply to more than one category, indicate each category that applies.

COMPETITION DESCRIPTIONS

This section is not applicable to select 801.30 transactions.

► Overlap Description

Briefly describe each of the principal categories of products and services (as reflected in documents created in the ordinary course of business) of the acquiring person.

In addition, list and briefly describe each of the current or known planned products or services of the acquiring person that competes with (or could compete with) a current or known planned product or service of the target, based on documents created in the ordinary course of business. Current or known planned products or services include those that the acquiring person or target researches, develops, manufactures, produces, sells, offers, provides, supplies, or distributes. Known planned products or services may be limited to those referenced in any submitted Business Document and should reflect the acquiring person's existing knowledge of the target's business. The acquiring and acquired person should not exchange information for the purpose of answering this item.

For each such product or service listed, provide:

1. The sales (in dollars) for the most recent year. For those products or services not generating revenue or whose performance is not measured by revenue in the ordinary course of business, provide projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric by which the acquiring person measures performance (e.g., daily users, new signups).

2. A description of all categories of customers of the acquiring person that purchase or use the product or service (e.g., retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional). If no customers have yet used the product or service, provide the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched.

3. The top 10 customers in the most recent year (as measured in dollars), and the top 10 customers for each customer category identified.

► Supply Relationships Description

Related Sales

List and briefly describe each product, service, or asset (including data) that the acquiring person has sold, licensed, or otherwise supplied, and which represented at least $10 million in revenue (including internal transfers) in the most recent year (1) to the target, or (2) to any other business that, to the acquiring person's knowledge or belief, uses the acquiring person's product, service, or asset to compete with the target's products or services, or as an input for a product or service that competes or is intended to compete with the target's products or services. Responses to this item should reflect the acquiring person's existing knowledge of the target's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The sales (in dollars) to (1) the target and (2) any other business that, to the acquiring person's knowledge or belief, uses the acquiring person's product, service, or asset to compete with the target's products or services, or as an input for a product or service that competes or is intended to compete with the target's products or services.

2. The top 10 customers (as measured in dollars) of the acquiring person that use the acquiring person's product, service, or asset to compete with the target's products or services, or as an input for a product or service that competes or is intended to compete with the target's products or services. For each such customer, describe the acquiring person's supply or licensing agreement (or other comparable terms of supply).

Related Purchases

List and briefly describe each product, service, or asset (including data) that the acquiring person incorporates as an input into any product or service and that the acquiring person has purchased, licensed, or otherwise obtained, and which represented at least $10 million in revenue (including internal transfers), in the most recent year (1) from the target or (2) from any other business that, to the acquiring person's knowledge or belief, competes with the target to provide a substantially similar product, service, or asset. Responses to this item should reflect the acquired person's existing knowledge of the acquiring person's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The purchased amount (in dollars) for (1) the target and (2) any other business that, to the acquiring person's knowledge or belief, competes with the target to provide a substantially similar product, service, or asset.

2. The top 10 suppliers (as measured in dollars) for the associated input product, service, or asset, and a description of the acquiring person's purchase or licensing agreement (or other comparable terms of purchase).

REVENUES AND OVERLAPS

► NAICS Codes

This item requests information regarding the industry categories for the acquiring person's products and services that derived revenue in the most recent year.

No Revenue
If there is no revenue to report, explain why.

NAICS Codes Describing U.S. Operations with Estimates of Revenue
Identify all 6-digit NAICS industry codes that describe the U.S. operations of the acquiring person, inclusive of all entities included within the acquiring person at the time the filing is made.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating business(es) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more but less than $1 billion; or $1 billion or more.

Identify each 6-digit NAICS industry code in which both the acquiring person and target derive revenue by checking the overlap box.

For products and services that derived revenue in the most recent year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the target derived revenue from U.S. operations.

► Controlled Entity Geographic Overlaps

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate of the acquiring person (see § 801.1(d)(2)), derived any amount of dollar revenues in the most recent year from operations:

1. In industries within any 6-digit NAICS industry code in which the target also derived any amount of dollar revenues in the most recent year; or
2. In which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the target is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

NAICS Overlaps of Controlled Entities
List each overlapping NAICS code and description. For each, list the name of each operating business within the acquiring person or associate of the acquiring person that has U.S. operations in the same NAICS code as the target and the name(s) under which the operating business does business, whether the listed entity is controlled by the acquiring person or an associate of the acquiring person, and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code in ascending order.

Geographic Market Information
For each identified overlapping NAICS code, provide geographic information, as described below. Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Except in the case of those NAICS industries in the sectors, subsectors, and codes that require street-address level reporting, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

- **State-Level Reporting**
  - Manufacturing Industries
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the acquiring person or associate of the acquiring person are sold without a significant change in their form (whether they are sold by the acquiring person or associate of the acquiring person or by others to whom such products have been sold or resold).

    31** through 33**** Manufacturing**, *except:*

3115**	Dairy Product Manufacturing
311611	Animal (except Poultry) Slaughtering
311613	Rendering and Meat Byproduct Processing
311615	Poultry Processing
31181*	Bread and Bakery Product Manufacturing
321***	Wood Product Manufacturing
32221*	Paperboard Container Manufacturing
324***	Petroleum and Coal Products Manufacturing
3251**	Basic Chemical Manufacturing

325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing

- Wholesale Trade
For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the customers of the acquiring person or associate of the acquiring person are located.

42** **Wholesale Trade**, *except*:
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers

- Insurance Carriers
For the 6-digit NAICS code within the industry subsector listed below, list the state(s) in which the acquiring person or associate of the acquiring person is licensed to write insurance.

5241 **Insurance Carriers**

- Other NAICS Sectors
For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the acquiring person or associate of the acquiring person conducts such operations.

11** **Agriculture, Forestry, Fishing, and Hunting**, *except*:
113*** Forestry and Logging

21** **Mining, Quarrying, and Oil and Gas Extraction**, *except*:
2123** Nonmetallic Mineral Mining and Quarrying

2213 **Water, Sewage, and Other Systems**

23** **Construction**

44912* **Home Furnishing Retailers**
4492** **Electronics and Appliance Retailers**

48** and 49**** Transportation and Warehousing**, *except*:
493*** Warehousing and Storage

51** **Information**, *except*:
512*** Motion Picture and Sound Recording Industries

5222** **Nondepository Credit Intermediation**
523*** **Securities, Commodity Contracts, and Other Financial Investments and Related Activities**
5242** **Agencies, Brokerages, and Other Insurance Related Activities**
525*** **Funds, Trusts, and Other Financial Vehicles**

531*** Real Estate
533*** Lessors of Nonfinancial Intangible Assets (Except Copyrighted Works)

54**** Professional, Scientific and Technical Services, *except*:
54138* Testing Laboratories and Services
54194* Veterinary Services

55**** Management of Companies and Enterprises

561*** Administrative and Support Services

61**** Educational Services

71**** Arts, Entertainment, and Recreation, *except*:
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps
8114** Personal and Household Goods Repair and Maintenance
813*** Religious, Grantmaking, Civic, Professional, and Similar Organizations
814*** Private Households

- Street-Level Reporting
For each 6-digit NAICS code within the industry sector, subsector, or code listed below, provide the street address, arranged by state, zip code, county and city or town of each establishment from which dollar revenues were derived (either directly by the acquiring person or associate of the acquiring person or by a franchisee) in the most recent year.

113*** Forestry and Logging
2123** Nonmetallic Mineral Mining and Quarrying

22**** Utilities, *except*:
2213** Water, Sewage and Other Systems

3115** Dairy Product Manufacturing
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing
321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
3251** Basic Chemical Manufacturing
325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers

4247** **Petroleum and Petroleum Products Merchant Wholesalers**
4248** **Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers**
42491* **Farm Supplies Merchant Wholesalers**
42495* **Paint, Varnish, and Supplies Merchant Wholesalers**

44** and 45**** Retail Trade**, *except:*
44912* Home Furnishings Retailers
4492** Electronics and Appliance Retailers

493*** **Warehousing and Storage**
512*** **Motion Picture and Sound Recording Industries**
521*** **Monetary Authorities-Central Bank**
5221** **Depository Credit Intermediation**
5223** **Activities Related to Credit Intermediation**
532*** **Rental and Leasing Services**
54138* **Testing Laboratories and Services**
54194* **Veterinary Services**
562*** **Waste Management and Remediation Services**
62**** **Health Care and Social Assistance**
7132** **Gambling Industries**
71394* **Fitness and Recreational Sports Centers**

72**** **Accommodation and Food Services**, *except:*
7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps

811*** **Repair and Maintenance**, except
8114** Personal and Household Goods Repair and Maintenance

812*** **Personal and Laundry Services**

► Minority-Held Entity Overlaps

This section requires the disclosure of holdings of the acquiring person and its associates (see § 801.1(d)(2)) of 5% or more but less than 50% of certain entities that derive dollar revenues in any 6-digit NAICS code reported by the target. If NAICS codes are unavailable, holdings in entities that have operations in the same industry as the target, based on the knowledge or belief of the filing person, should be listed. Holdings in those entities that have total assets of less than $10 million may be omitted.

Minority Holdings of Acquiring Person and Its Associates
If the acquiring person holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS code(s) reported by the target, list the name of such entity and d/b/a names (if known), the percentage held, the entity within the acquiring person that holds the minority interests, and the overlapping 6-digit NAICS code(s) or industry(ies).

Additionally, based on the knowledge or belief of the acquiring person, for each associate of the acquiring person holding:
1. 5% or more but less than 50% of the voting securities or non-corporate interests of an acquired entity; and/or
2. 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the target also derived dollar revenues in the most recent year,

list the name of such entity and d/b/a names (if known), percentage held, the associate of the acquiring person that holds the minority interests, and the overlapping 6-digit NAICS code(s) or industry(ies).

Responses should be organized alphabetically by the name of the entity in which minority interests are held.
The acquiring person may rely on its regularly prepared financials that list its investments, and those of its associates that list their investments, provided the financials are no more than three months old.

► Prior Acquisitions

This item pertains only to prior acquisitions of U.S. entities or assets and foreign entities or assets with sales in or into the U.S. by the acquiring person that in the most recent year (1) derived revenue in an identified 6-digit NAICS industry code overlap, **or** (2) provided or produced a competitive overlap product or service as described in the Overlap Description.

For each such overlap, list all acquisitions of entities or assets deriving dollar revenues in an overlapping 6-digit NAICS industry code or overlapping product or service made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer, 50% or more of non-corporate interests of an unincorporated entity, or all or substantially all the assets of an operating business if the entity or business had annual net sales or total assets greater than $10 million in the year prior to the acquisition and any acquisitions of assets that did not constitute all or substantially all of an operating business valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

1. the overlapping 6-digit NAICS code(s) (by number and description) identified above in which the acquired entity or assets derived dollar revenues, or the competitive overlap product(s) or service(s) in the Overlap Description;
2. the name of the entity from which the assets, voting securities, or non-corporate interests were acquired;
3. the headquarters address of that entity prior to the acquisition;
4. whether assets, voting securities, or non-corporate interests were acquired; and
5. the consummation date of the acquisition.

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

Indicate whether, to the knowledge or belief of the filing person, within the two years prior to filing, the acquiring person has received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern (see § 801.1(r)). If yes, list each entity or government from which such subsidy was received (or which has made the commitment) and provide a brief description of the subsidy.

Indicate whether, for products the acquiring person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is subject to countervailing duties imposed by any jurisdiction. If yes, list each product, the countervailing duty imposed, and the jurisdiction that imposed the duty.

Indicate whether, to the knowledge or belief of the filing person, for products the acquiring person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is the subject of a current investigation for countervailing duties in any jurisdiction. If yes, list each product and the jurisdiction conducting the investigation.

► Defense or Intelligence Contracts

Except for select 801.30 transactions, identify (1) pending requests for proposals from the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4) for which the acquiring person has submitted a proposal and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4) valued at $100 million or more if such pending requests for proposals or such awarded procurement contracts (a) are or will be the source of revenues in any identified 6-digit NAICS industry code overlap; or (b) involve or will involve an overlap product or service as described in the Overlap Description or the Supply Relationships Description. Limit the response to the acquiring entity and any entity within the acquiring person that directly or indirectly controls the acquiring entity. Include (1) the name of the entity within the filing person (2) the contracting office, as defined by 48 C.F.R. § 2.101(b); (3) the Contracting Office ID; (4) the Award ID; and (5) the NAICS code(s), if any, listed in the System for Award Management database. Do not include classified information but note that responsive information was withheld on that basis.

► Voluntary Waivers

- **HSR Confidentiality Waiver for International Competition Authorities (VOLUNTARY)**
  Indicate whether the acquiring person agrees to waive the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h), to permit the DOJ and FTC to disclose to non-U.S. competition authority/authorities listed by the filing person (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquiring person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquiring person should list the jurisdictions to which the waiver applies. This item is voluntary.

- **HSR Confidentiality Waiver for State Attorneys General (VOLUNTARY)**
  Indicate whether the acquiring person agrees to waive any part of the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h). If yes, list the applicable State Attorneys General and whether the acquiring person permits the DOJ and FTC to disclose (1) the fact that a notification was filed and the waiting period associated with the notification, (2) information and documents filed with the notification, or (3) both (1) and (2). This waiver will not cover materials provided in response to a request for additional information

issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquiring person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquiring person should list the jurisdictions to which the waiver applies. This item is voluntary.

CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. The Form includes the following language:

Penalties for False Statements
Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION
This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

AFFIDAVITS

Affidavit(s) required by § 803.5 must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring person, the affidavit must still attest to the good faith intent of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that an agreement to merge or acquire has been executed, and if the executed agreement is not the definitive agreement, that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has been submitted. The affidavit(s) must further attest to the good faith intention of the person filing notification to complete the transaction. See § 803.5(b).

In § 801.30 transactions, the affidavit (submitted only by the acquiring person) must attest:

1. That the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;
2. In the case of a tender offer, that the intention to make the tender offer has been publicly announced; and
3. The good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are also required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

1. The identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;
2. The specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;
3. The fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;
4. The anticipated date of receipt of such notification by the Agencies; and
5. The fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. See § 803.5(a).

PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

DISCLOSURE NOTICE

Public reporting burden for this report is estimated to average 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

Antitrust Improvements Act
Notification for Certain Mergers and Acquisitions

Acquired Person Instructions

GENERAL INSTRUCTIONS AND INFORMATION

These instructions specify the information that must be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). Submitted materials must be provided to the Federal Trade Commission ("FTC") and to the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies").

► Information

The central office for information and assistance concerning the Rules is:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024
Phone: (202) 326-3100
E-mail: HSRhelp@ftc.gov for Rules questions
Premerger@ftc.gov for filing information

Copies of these Instructions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), the Rules, FTC final rules (including their Statements of Basis and Purpose) published in the Federal Register, as well as information to assist in submitting the required information are available at the FTC's Premerger Notification Office ("PNO") website.

► Definitions and Explanation of Terms

Unless otherwise indicated, the definitions provided in the Rules apply to these Instructions.

Dollar Values
All financial information should be expressed in millions of dollars rounded to the nearest hundred thousand.

Fee Information
The filing fee is based on the aggregate total value of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition. Filing fee tiers are adjusted annually pursuant to 15 U.S.C. § 18a note, based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). Filing fees increase annually by the percentage increase, if any, in the consumer price index ("CPI") over the CPI for the fiscal year ending September 30, 2022, pursuant to 15 U.S.C. § 18a note. For current fee information, see the PNO website.

North American Industry Classification System (NAICS) Data
When reporting information by 6-digit NAICS code, refer to the North American Industry Classification System - United States, 2022, published by the Executive Office of the President, Office of Management and Budget, available at https://www.census.gov/naics/. This website also provides guidance in choosing the proper code(s).

Notification Thresholds
Notification thresholds are adjusted annually based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). See § 801.1(h). The current threshold values can be found at Current Thresholds.

Person Filing and Filing Person
The terms "person filing" or "filing person" mean the ultimate parent entity ("UPE"). See § 801.1(a)(3). The terms are used herein interchangeably.

Select 801.30 Transaction
A transaction to which § 801.30 applies **and** where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions.

Supervisory Deal Team Lead
The individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.

Target
The target includes all entities and assets to be acquired by the acquiring person from the acquired person in the reported transaction.

Year
All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recently completed calendar or fiscal year for which the requested information is available.

► Filing

If the UPE is both an acquiring and acquired person, separate filings must be submitted, one as the acquiring person and one as the acquired person, following the appropriate instructions for each. See § 803.2(a)(2).

Filings should be submitted electronically consistent with the instructions on the PNO website. If the electronic submission platform is unavailable, the Agencies may announce sites for delivery through the media and, if possible, at the PNO website.

► Responses

Documents, including the Form, should be produced as (1) a searchable PDF format from which text can be copied or (2) an Excel file.

For Business Documents (see below), check the box to indicate whether any part of the document is privileged and then provide the document number, title, and estimated date. If the acquired person has identified (1) a NAICS overlap, (2) an overlap within the Overlap Description, or (3) a supply relationship within the Supply Relationships Description, also provide the following:

1. Author(s) (and job title(s)) for documents created by the acquired person; or
2. Recipient(s) or supervisor(s) (and job title(s)) of documents created by third parties as part of an engagement with the acquired person.

If a group of people prepared the document, list all the authors and their titles, identifying the principal authors. Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. Similarly, if the acquired person engaged a third party to prepare a document, provide the name of the third party, and the name, title, and company name for the individual within the acquired person who supervised the creation of the document, or for whom the document was prepared. For materials received from a third party that was not engaged by the acquired person, only the name of the third party is required.

If the acquired person submits documents in addition to what is required, such documents should be identified as "Voluntary". See § 803.1(b).

Submit only one copy of identical responsive documents.

► Privilege

See § 803.3(d). For privileged documents, the filing person must also provide the following in a log:

1. The privilege type (redacted or withheld);
2. The privilege claim;
3. Addressee(s) and all recipients, with company name and title, of the original and any copies;
4. Subject matter;
5. Document's present location; and
6. Who has control over it.

If a privileged document was circulated to a group, such as the board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested.

If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

► **Translations**

Materials or information in a language other than English must be translated into English, with the English translation attached to the original version. See § 803.8.

► **Non-Compliance**

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

► **Limited Response**

Information need not be supplied regarding assets, voting securities, or non-corporate interests currently being acquired when their acquisition is exempt under the Act or Rules. See § 803.2(c).

FEE INFORMATION

Total Expected Filing Fee
Indicate the value of the total required fee for the transaction.

Parties Paying the Fee
Indicate which filing person(s) is paying the filing fee and, if applicable, whether the fee is being paid by multiple entities. For each entity within the acquired person paying a portion of the fee, provide the name of the payer, the amount paid, the payment method, and the Electronic Wire Transfer (EWT) confirmation number or check number.

Note on Paying by EWT
In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the PNO website on the Filing Fee Information page.

Note on Paying by Check
The FTC strongly discourages check payments because handling a physical check will create a delay in processing the Form. However, if an EWT cannot be arranged, the FTC will accept a check, sent to Financial Operations. Cashiers' or certified checks are preferred. Make the check payable to the Federal Trade Commission and deliver to:

Federal Trade Commission
Financial Operations Division
600 Pennsylvania Ave, Drop H-790
Washington, DC 20580

Please note that the waiting period may be delayed until the fee has been confirmed.

GENERAL INFORMATION

Special Filing Types
Indicate whether the filing is a post-consummation filing, or whether the transaction is a cash tender offer or bankruptcy that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

Early Termination
Indicate whether the acquired person requests early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18a(b)(2), and on the PNO website. Note that if either person in any transaction requests early termination, it may be granted and published.

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► UPE Details

Name
Provide the name, headquarters address, and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE of the acquired person. See § 801.1(a)(3).

Entity Type
Specify whether the UPE is a corporation, unincorporated entity, natural person, or other entity type (specify). See § 801.1.

Filing Made on Behalf of the UPE
If the filing is being made on behalf of the UPE by another entity within the acquired person authorized by the UPE to file the notification on its behalf pursuant to § 803.2(a) or filed pursuant to § 803.4 on behalf of a foreign person, provide the name and mailing address of the entity filing the notification on behalf of the UPE.

Contact Information
Provide the name, firm/company name, address, telephone number, and e-mail address of two individuals (primary and secondary) to contact regarding the filing. See § 803.20(b)(2)(ii).

Additionally, provide the name, firm/company name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. See § 803.20(b)(2).

UPE Annual Reports and Financial Information

- **Central Index Key**
  If the UPE of the acquired person files annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission (SEC), provide the Central Index Key (CIK) number.

- **Annual Reports and Audit Reports**
  Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquired person.

  Natural person UPEs should not provide personal balance sheets or tax returns. Natural person UPEs should leave this section blank and instead provide the most recent reports for the highest-level entity(ies) that controls the target under "UPE Structure."

  The person filing notification may incorporate a document responsive to this item by reference to an internet address directly linking to the document. See § 803.2(e).

- **Date of Report(s)**
  Provide the date of the most recent annual report(s) and/or audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquired person.

- **Size of Person**
  If applicable, indicate whether the person filing notification stipulates that the acquired person meets either the higher or lower size of person test. See 15 U.S.C. § 18a(a), § 801.11.

Minority Shareholders or Interest Holders
This section requires the acquired person to report the name, headquarters mailing address, and approximate percentage held by certain minority holders of (1) the acquired entity and (2) any entity directly or indirectly controlled by the acquired entity, but only if such minority holder will continue to hold an interest (whether voting securities or non-corporate interests) in such entity(ies) or will acquire an interest in any entity within the acquiring person as a result of the transaction.

If the acquired entity or an entity directly or indirectly controlled by the acquired entity is not a limited partnership, provide the required information for each individual or entity that currently holds 5% or more but less than 50% of the voting securities or non-corporate interests of any such entity, starting with the acquired entity.

If the acquired entity or an entity directly or indirectly controlled by the acquired entity is a limited partnership, provide the required information for its (a) its general partner, regardless of the percentage it holds, and (b) its limited partners that (i) currently hold 5% or more

but less than 50% of the non-corporate interests of such limited partnership and (ii) have or will have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities, of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction (each a "covered entity"), or of the general partner or management company of a covered entity.

► Acquired Entity Structure

If the acquisition includes only assets that do not comprise substantially all the assets of an operating business, the acquired person should not complete the questions in this section. Otherwise, the acquired person must complete these questions for the portion of the transaction related to the voting securities, non-corporate interests, and assets that comprise substantially all the assets of an operating business.

Acquired Entity(ies)
List the name, city, state, zip code, and country of the acquired entity(ies) and all U.S. entities, and all foreign entities that have sales in or into the United States that are included within the acquired entity. Entities with total assets of less than $10 million may be omitted. Alternatively, the acquired entity may report all entities within it. Also list all names under which the entities do business (e.g., d/b/a names).

The list of entities should be organized by operating company or operating business ("top-level entity"), if applicable. Filings for select 801.30 transactions need not include d/b/a names and the list of entities can be organized as kept in the ordinary course of business.

Annual Reports and Audit Reports
Provide the CIK number(s), if the acquired entity(ies) file(s) annual reports (Form 10-K or Form 20-F) with the SEC, and the most recent annual or audit report(s) of the acquired entity(ies).

Natural person UPEs must also provide the most recent annual report or audit report and CIK number for the highest-level entity that controls the acquired entity.

TRANSACTION INFORMATION

► Parties

List the name and mailing address of each acquiring and acquired person and each acquiring and acquired entity. Do not list entities controlled by an acquired entity.

Acquiring UPE
Provide the name, headquarters address, and website of the acquiring person.

Acquiring Entity(ies)
If an entity other than the acquiring UPE is making the acquisition, provide the name, mailing address, and website of that entity.

Acquired UPE
Provide the name, headquarters address, and website of the acquired person.

Target(s)
If the assets, voting securities, or non-corporate interests of an entity other than the acquired UPE are being acquired, provide the name, mailing address, and website of that entity.

► Transaction Details

801.30 Transaction
Indicate whether the transaction is subject to § 801.30 and if so, what type(s), including select 801.30.

Transaction Type
Indicate whether the transaction is any of the following (select all that apply):

- Acquisition of voting securities;
- Acquisition of non-corporate interests;
- Acquisition of assets;
- Merger (see § 801.2);
- Consolidation (see § 801.2);

- Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50);
- Acquisition subject to § 801.31;
- Secondary acquisition subject to § 801.4;
- Acquisition subject to § 801.2(e); or
- Other (specify)

Acquisition Details
Provide the requested information for the value and percentage of assets, voting securities, and non-corporate interests to be acquired. If a combination of assets, voting securities, and/or non-corporate interests is being acquired and allocation is not possible, note such information in an endnote.

For determining the percentage of voting securities, evaluate total voting power per § 801.12. For determining the percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

To complete this item:
- State the percentage of voting securities already held by the acquiring person. See § 801.12.
- State the value of voting securities already held by the acquiring person. See § 801.10.
- State the total percentage of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.12.
- State the total value of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the percentage of non-corporate interests already held by the acquiring person. See § 801.1(b)(1)(ii).
- State the value of non-corporate interests already held by the acquiring person. See § 801.10.
- State the total percentage of non-corporate interests to be held by the acquiring person as a result of the acquisition. See §§ 801.10 and 801.1(b)(1)(ii).
- State the total value of non-corporate interests to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total value of assets to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the aggregate total value of assets, voting securities, and non-corporate interests of the acquired person to be held by the acquiring person as a result of the acquisition. See §§ 801.10, 801.12, 801.13 and 801.14.

► Transaction Description

Business of the Target
Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise an operating business.

Non-Reportable UPE(s)
Provide the names of any UPE that does not have a reporting obligation.

Transaction Description
Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are being acquired. Indicate what consideration will be received by each person and the scheduled consummation date of the transaction. Also identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

If any attached transaction documents use code names to refer to the parties, provide an index identifying the code names.

Related Transactions
If the transaction that is the subject of this filing has related filings, indicate whether the related filing(s) (choose all that apply):
- Is a principal transaction that triggers one or more shareholder backside transactions;
- Is a shareholder backside transaction;
- Has more than one acquiring UPE;
- Has more than one acquired UPE;
- Has more than one reportable step;
- Is a joint venture;
- Is a consolidation;
- Is an exchange of assets;
- Has one or more filings in the alternative; or
- Has other circumstances that require more than one filing and if so, explain.

Provide all additional details regarding the related filings(s), including party names and transaction numbers, necessary to identify and connect all related filings.

► **Additional Transaction Information**

Transaction Rationale

Except for select 801.30 transactions, identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees. If the rationale of the target is different from the UPE, submit an explanation for each. Identify each document produced in the filing that confirms or discusses the stated rationale(s). If documents produced in the filing are referenced, identify the specific page(s) that discusses the stated rationale(s).

► **Business Documents**

Transaction-Related Documents

- **Competition Documents**
  Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead.

- **Confidential Information Memoranda**
  Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquired person or of the target that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists.
  Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Third-Party Studies, Surveys, Analyses, and Reports**
  Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors ("third-party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquired person or of the target for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Synergies and Efficiencies**
  Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

Plans and Reports

Except for select 801.30 transactions, provide all regularly prepared plans and reports that were provided to the Chief Executive Officer (CEO) of the target or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the target also produced, sold, or known to be under development by the acquiring person, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Except for select 801.30 transactions, provide all plans and reports that were provided to the Board of Directors of the target or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the target also produced, sold, or known to be under development by the acquiring person, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

► **Agreements**

Transaction-Specific Agreements

Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements.

Documents that constitute the agreement(s) (e.g., Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version.

If the executed agreement is not the definitive agreement, submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, or term sheet, or the most recent draft agreement. See § 803.5. Such document should include information regarding some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. § 363(b) do not require an executed agreement. For bankruptcies, provide the order from the bankruptcy court.

COMPETITION DESCRIPTIONS

This section is not applicable to select 801.30 transactions.

► Overlap Description

Briefly describe each of the principal categories of products and services (as reflected in documents created in the ordinary course of business) of the target.

In addition, list and briefly describe each of the current or known planned products or services of the target that competes with (or could compete with) a current or known planned product or service of the acquiring person, based on documents created in the ordinary course of business. Current or known planned products or services include those that the acquiring person or target researches, develops, manufactures, produces, sells, offers, provides, supplies, or distributes. Known planned products or services may be limited to those referenced in any submitted Business Document and should reflect the acquired person's existing knowledge of the acquiring person's business. The acquiring and acquired person should not exchange information for the purpose of answering this item.

For each such product or service listed, provide:

1. The sales (in dollars) for the most recent year. For those products or services not generating revenue or whose performance is not measured by revenue in the ordinary course of business, provide projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric by which the target measures performance (e.g., daily users, new signups).
2. A description of all categories of customers of the target that purchase or use the product or service (e.g., retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional). If no customers have yet used the product or service, provide the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched.
3. The top 10 customers in the most recent year (as measured in dollars), and the top 10 customers for each customer category identified.

► Supply Relationships Description

Related Sales

List and briefly describe each product, service, or asset (including data) that the target has sold, licensed, or otherwise supplied, and which represented at least $10 million in revenue (including internal transfers) in the most recent year (1) to the acquiring person, or (2) to any other business that, to the acquired person's knowledge or belief, uses the target's product, service, or asset to compete with the acquiring person's products or services, or as an input for a product or service that competes or is intended to compete with the acquiring person's products or services. Responses to this item should reflect the acquired person's existing knowledge of the acquiring person's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The sales (in dollars) to (1) the acquiring person and (2) any other business that, to the acquired person's knowledge or belief, uses the target's product, service, or asset to compete with the acquiring person's products or services, or as an input for a product or service that competes or is intended to compete with the acquiring person's products or services.

2. The top 10 customers (as measured in dollars) of the target that use the target's product, service, or asset to compete with the acquiring person's products or services, or as an input for a product or service that competes or is intended to compete with the acquiring person's products or services. For each such customer, describe the target's supply or licensing agreement (or other comparable terms of supply).

Related Purchases
List and briefly describe each product, service, or asset (including data) that the target incorporates as an input into any product or service and that the target has purchased, licensed, or otherwise obtained and which represented at least $10 million in revenue (including internal transfers), in the most recent year (1) from the acquiring person or (2) from any other business that, to the acquired person's knowledge or belief, competes with acquiring person to provide a substantially similar product, service, or asset. Responses to this item should reflect the acquired person's existing knowledge of the acquiring person's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The purchased amount (in dollars) for (1) the acquiring person and (2) any other business that, to the acquired person's knowledge or belief, competes with the acquiring person to provide a substantially similar product, service, or asset.
2. The top 10 suppliers (as measured in dollars) for the associated input product, service, or asset, and a description of the target's purchase or licensing agreement (or other comparable terms of purchase).

REVENUES AND OVERLAPS

► NAICS Codes

This item requests information regarding the industry categories for the target's products and services that derived revenue in the most recent year.

No Revenue
If there is no revenue to report, explain why.

NAICS Codes Describing U.S. Operations with Estimates of Revenue
Identify all 6-digit NAICS industry codes that describe the U.S. operations of the target, inclusive of all entities and assets anticipated to be included within the target at the time the transaction will be consummated.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating business(es) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more, but less than $1 billion; or $1 billion or more.

Identify each 6-digit NAICS industry code in which both the acquiring person and target derive revenue by checking the overlap box.

For products and services that derived revenue in the most recent year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the acquiring person derived revenue from U.S. operations.

► Controlled Entity Geographic Overlaps

If, to the knowledge or belief of the person filing notification, the target, derived any amount of dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquiring person also derived any amount of dollar revenues in the most recent year, then for each such 6-digit NAICS industry code follow the instructions below for this section.

NAICS Overlaps of Controlled Entities
List each overlapping NAICS code and description. For each, list the name of each operating business within the target that has U.S. operations in the same NAICS code as the acquiring person and the name(s) under which the operating business does business, and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code in ascending order.

Geographic Market Information
For each identified overlapping NAICS code, provide geographic information, as described below. Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Except in the case of those NAICS industries in the sectors, subsectors, and codes that require street-address level reporting, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

- **State-Level Reporting**
  - Manufacturing Industries
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the target are sold without a significant change in their form (whether they are sold by the target or by others to whom such products have been sold or resold).

    31** through 33**** Manufacturing**, *except*:
    3115** Dairy Product Manufacturing
    311611 Animal (except Poultry) Slaughtering
    311613 Rendering and Meat Byproduct Processing
    311615 Poultry Processing
    31181* Bread and Bakery Product Manufacturing
    321*** Wood Product Manufacturing
    32221* Paperboard Container Manufacturing
    324*** Petroleum and Coal Products Manufacturing
    3251** Basic Chemical Manufacturing
    325521 Plastics Materials and Resin Manufacturing
    3271** Clay Product and Refractory Manufacturing
    3272** Glass and Glass Product Manufacturing
    3273** Cement and Concrete Product Manufacturing

  - Wholesale Trade
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the customers of target are located.

    42** Wholesale Trade**, *except*:
    42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
    42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
    42344* Other Commercial Equipment Merchant Wholesalers
    42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
    42346* Ophthalmic Goods Merchant Wholesalers
    42349* Other Professional Equipment and Supplies Merchant Wholesalers
    4239** Miscellaneous Durable Goods Merchant Wholesalers
    4241** Paper and Paper Product Merchant Wholesalers
    4242** Drug and Druggists' Sundries Merchant Wholesalers
    42441* General Line Grocery Merchant Wholesalers
    42442* Packaged Frozen Food Merchant Wholesalers
    42451* Grain and Field Bean Merchant Wholesalers
    42452* Livestock Merchant Wholesalers
    4247** Petroleum and Petroleum Products Merchant Wholesalers
    4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
    42491* Farm Supplies Merchant Wholesalers
    42495* Paint, Varnish, and Supplies Merchant Wholesalers

  - Insurance Carriers
    For the 6-digit NAICS code within the industry subsector listed below, list the state(s) in which the target is licensed to write insurance.

    5241 Insurance Carriers**

  - Other NAICS Sectors
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the target conducts such operations.

    11** Agriculture, Forestry, Fishing, and Hunting**, *except*:
    113*** Forestry and Logging

21** Mining, Quarrying, and Oil and Gas Extraction, *except:*
2123** Nonmetallic Mineral Mining and Quarrying

2213 Water, Sewage, and Other Systems**

23** Construction**

44912* Home Furnishing Retailers
4492 Electronics and Appliance Retailers**

48** and 49**** Transportation and Warehousing**, *except:*
493*** Warehousing and Storage

51** Information**, *except:*
512*** Motion Picture and Sound Recording Industries

5222 Nondepository Credit Intermediation**
523* Securities, Commodity Contracts, and Other Financial Investments and Related Activities**
5242 Agencies, Brokerages, and Other Insurance Related Activities**
525* Funds, Trusts, and Other Financial Vehicles**
531* Real Estate**
533* Lessors of Nonfinancial Intangible Assets (Except Copyrighted Works)**

54** Professional, Scientific and Technical Services**, *except:*
54138* Testing Laboratories and Services
54194* Veterinary Services

55** Management of Companies and Enterprises**

561* Administrative and Support Services**

61** Educational Services**

71** Arts, Entertainment, and Recreation**, *except:*
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

7212 RV (Recreational Vehicle) Parks and Recreational Camps**
7213 Rooming and Boarding Houses, Dormitories, and Workers' Camps**
8114 Personal and Household Goods Repair and Maintenance**
813* Religious, Grantmaking, Civic, Professional, and Similar Organizations**
814* Private Households**

- **Street-Level Reporting**
  For each 6-digit NAICS code within the industry sector, subsector, or code listed below, provide the street address, arranged by state, zip code, county, and city or town, of each establishment from which dollar revenues were derived (either directly by the target or by a franchisee) in the most recent year.

113* Forestry and Logging**
2123 Nonmetallic Mineral Mining and Quarrying**

22** Utilities**, *except:*
2213** Water, Sewage and Other Systems

3115 Dairy Product Manufacturing**
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing

321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
3251** Basic Chemical Manufacturing
325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers

44**** and 45**** Retail Trade, *except:*
44912* Home Furnishings Retailers
4492** Electronics and Appliance Retailers

493*** Warehousing and Storage
512*** Motion Picture and Sound Recording Industries
521*** Monetary Authorities-Central Bank
5221** Depository Credit Intermediation
5223** Activities Related to Credit Intermediation
532*** Rental and Leasing Services
54138* Testing Laboratories and Services
54194* Veterinary Services
562*** Waste Management and Remediation Services
62**** Health Care and Social Assistance
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

72**** Accommodation and Food Services, *except:*
7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps

811*** Repair and Maintenance, except
8114** Personal and Household Goods Repair and Maintenance

812*** Personal and Laundry Services

► **Minority-Held Entity Overlaps**

This section requires the disclosure of holdings of the target of 5% or more but less than 50% of certain entities that derive dollar revenues in any 6-digit NAICS code reported by the acquiring person. If NAICS codes are unavailable, holdings in entities that have operations in the same industry as the acquiring person, based on the knowledge or belief of the filing person, should be listed. Holdings in those entities that have total assets of less than $10 million may be omitted.

Minority Holdings of the Target

If the target holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS code(s) reported by the acquiring person, list the name of such entity and d/b/a names (if known), the percentage held, the entity within the target that holds the minority interests, and the overlapping 6-digit NAICS code(s) or industry(ies).

Responses should be organized alphabetically by the name of the entity in which minority interests are held.

► Prior Acquisitions

This item should be completed for the target and pertains only to prior acquisitions of U.S. entities or assets and foreign entities or assets with sales in or into the U.S. that in the most recent year (1) derived revenue in an identified 6-digit NAICS industry code overlap, or (2) provided or produced a competitive overlap product or service as described in the Overlap Description.

For each such overlap, list all acquisitions of entities or assets deriving dollar revenues in an overlapping 6-digit NAICS industry code or overlapping product or service made by the target in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer, 50% or more of non-corporate interests of an unincorporated entity, or all or substantially all the assets of an operating business if the entity or business had annual net sales or total assets greater than $10 million in the year prior to the acquisition and any acquisitions of assets that did not constitute all or substantially all of an operating business valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

1. the overlapping 6-digit NAICS code(s) (by number and description) identified above in which the acquired entity or assets derived dollar revenues, or the competitive overlap product(s) or service(s) in the Overlap Description;
2. the name of the entity from which the assets, voting securities, or non-corporate interests were acquired;
3. the headquarters address of that entity prior to the acquisition;
4. whether assets, voting securities, or non-corporate interests were acquired; and
5. the consummation date of the acquisition.

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

Indicate whether, to the knowledge or belief of the filing person, within the two years prior to filing, the acquired person has received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern (see § 801.1(r)). If yes, list each entity or government from which such subsidy was received (or which has made the commitment) and provide a brief description of the subsidy.

Indicate whether, for products the acquired person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is subject to countervailing duties imposed by any jurisdiction. If yes, list each product, the countervailing duty imposed, and the jurisdiction that imposed the duty.

Indicate whether, to the knowledge or belief of the filing person, for products the acquired person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is the subject of a current investigation for countervailing duties in any jurisdiction. If yes, list each product and the jurisdiction conducting the investigation.

► Defense or Intelligence Contracts

Except for select 801.30 transactions, identify (1) pending requests for proposals from the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4) for which the target has submitted a proposal and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4); valued at $100 million or more if such pending requests for proposals or such awarded procurement contracts (a) are or will be the source of revenues in any identified 6-digit NAICS industry code overlap; or (b) involve or will involve an overlap product or service as described in the Overlap Description or the Supply Relationships Description. Limit the response to the target. Include (1) the name of the entity within the filing person; (2) the contracting office, as defined by 48 C.F.R. § 2.101(b); (3) the Contracting Office ID; (4) the Award ID; and (5) the NAICS code(s), if any, listed in the System for Award Management database. Do not include classified information but note that responsive information was withheld on that basis.

► Voluntary Waivers

- **HSR Confidentiality Waiver for International Competition Authorities (VOLUNTARY)**
  Indicate whether the acquired person agrees to waive the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h), to permit the DOJ and FTC to disclose to non-U.S. competition authority/authorities listed by the filing person (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquired person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquired person should list the jurisdictions to which the waiver applies. This item is voluntary.

- **HSR Confidentiality Waiver for State Attorneys General (VOLUNTARY)**
  Indicate whether the acquired person agrees to waive any part of the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h). If yes, list the applicable State Attorneys General and whether the acquired person permits the DOJ and FTC to disclose (1) the fact that a notification was filed and the waiting period associated with the notification, (2) information and documents filed with the notification, or (3) both (1) and (2). This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquired person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquired person should list the jurisdictions to which the waiver applies. This item is voluntary

CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. The Form includes the following language:

Penalties for False Statements
Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION
This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

AFFIDAVITS

Affidavit(s) required by § 803.5 must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquired person, the affidavit must still attest to the good faith intent of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that an agreement to merge or acquire has been executed, and if the executed agreement is not the definitive agreement, that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has been submitted. The affidavit(s) must further attest to the good faith intention of the person filing notification to complete the transaction. See § 803.5(b).

In § 801.30 transactions, the acquired person is not required to submit an affidavit.

PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

DISCLOSURE NOTICE

Public reporting burden for this report is estimated to average 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

BILLING CODE 6750–01–C

By the direction of the Commission.

April J. Tabor,

Secretary.

Note: The following statements will not appear in the Code of Federal Regulations.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya

The Federal Trade Commission, with the collaboration and concurrence of the Assistant Attorney General of the Department of Justice's Antitrust Division, has voted unanimously to issue a Final Rule to amend the Hart-Scott-Rodino (''HSR'') Form and Instructions. This marks the first time in 46 years that the agencies have undertaken a top-to-bottom review of the form (''HSR Form'') that businesses must fill out when pursuing an acquisition that must be notified in accordance with the HSR Act.[1] Alongside this Final Rule, the

[1] Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form.*

Commission voted to submit to Congress its FY2023 Annual Report regarding the Federal Trade Commission and Department of Justice's administration of the HSR Act. This Annual Report highlights the agencies' work investigating and challenging illegal mergers.[2]

Much has changed in the 48 years since the HSR Act was passed. Changes in the economy, corporate structure, and investment strategies have reshaped how businesses compete in today's marketplace. The number of transactions reported to the agencies surged during fiscal years 2021 and 2022 and remains high.[3] And deal valuations have soared. In FY2019, only 13.3% of transactions reported to the agencies exceeded $1 billion.[4] Those high-value transactions now represent nearly a quarter (24%) of all transactions that come before the agencies.[5] Transactions have also become increasingly complex in both structure and potential competitive impact.[6]

The HSR Form, meanwhile, has largely stayed the same. Against the backdrop of vast changes in the structure of business associations and corporate transactions, the information currently collected by the HSR Form is insufficient for our teams to determine, in the initial 30 days provided by the HSR Act, whether a proposed deal may violate the antitrust laws and hence warrant an in-depth investigation. The antitrust agencies are put in the position of expending significant time and effort to develop even a basic understanding of key facts. They must often rely on information provided in third-party interviews that can be challenging to obtain in 30 days. Much of the key information, moreover, is known only to the firms proposing the merger, such as the breadth of their business operations, including any existing relationship with the other party, the deal rationale, and the structure of each relevant entity. Seeking this information on a voluntary basis can leave critical gaps that allow unlawful deals to go undetected.

By reflecting modern day commercial realities, the HSR Form updates in the Final Rule will provide the antitrust agencies with information that is more probative as to whether a proposed deal risks violating the antitrust laws. Several aspects of the Final Rule bear particular mention:

- *Shed light on complex and opaque entities, including private equity and minority holders.* The existing HSR Form did not require information about the entities between the ultimate parent entity and the acquiring entity. Nor did it allow the agencies to determine whether the acquiring person may have competitively relevant premerger entanglements with the target's industry or whether minority holders have significant rights to direct the acquiring entity's actions. To close this gap, the Final Rule requires parties to provide information about the entities and individuals involved in the deal that will have the ability to influence decision-making post-merger.
- *Report vertical and other non-horizontal relationships.* The existing HSR Form failed to provide agencies with meaningful information about non-horizontal relationships. After a decades-long focus primarily on mergers between direct competitors, the antitrust agencies in recent years have reinvigorated merger enforcement against non-horizontal deals that violate the antitrust laws. Since 2021, the FTC has brought six enforcement actions against mergers involving a vertical combination—more than the total number of vertical cases pursued in the last decade overall.[7] The FTC's efforts have already resulted in the government's first litigated victory against a vertical merger in over 50 years.[8] As we continue building on this work, ensuring that the agencies receive information on non-horizontal components of deals is vital. Accordingly, the Final Rule requires filers to report supply relationships to reveal whether the transaction may undermine competition, including through limiting rivals' access to key products or services they need to compete. The Final Rule also contains new document requirements that are intended to reveal any existing or future non-horizontal business relationships that could give rise to competitive risks.
- *Reveal areas of future competition and emerging rivals.* As section 7 instructs us to arrest anticompetitive tendencies in their incipiency, the agencies must scrutinize acquisitions that may eliminate emerging rivals or threaten competition in lines of products that are still in development.[9] The existing HSR form has been particularly ill-suited to this task, as it gives no insight into merging parties' ongoing product development efforts or pipeline projects that could implicate future areas of competition. The Final Rule fixes this problem by requesting key information about products and services under development that are not yet generating revenues. In recent years the FTC pursued an enforcement action involving a pipeline product still in early-stage development, as well as successfully litigated a case involving the market for research and development.[10] The new HSR Form will further bolster these efforts.
- *Identify a greater range of prior acquisitions.* Another notable trend has been the rise of serial acquirers, firms that engage in numerous strategic acquisitions in the same industry and sometimes ''roll up'' many small competitors in the same or adjacent

[2] Press Release, Fed. Trade Comm'n, FTC, DOJ Issue Fiscal Year 2023 Hart-Scott-Rodino Notification Report and Announce Corrected Fiscal Year 2022 Report (Oct. 10, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-doj-issue-fiscal-year-2023-hsr-report-and-announce-corrected-2022-report.* On July 1, 2024, the Commission and DOJ Antitrust Division submitted to Congress a summary of this Report.

[3] Fed. Trade Comm'n & Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2023 (2024) [hereinafter *FY23 Report*] at 20.

[4] Fed. Trade Comm'n & Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2019 (2020) at Ex. A, Table I, *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.*

[5] FY2023 Report at Ex. A, Table I.

[6] *See* Remarks by Chair Lina M. Khan, Private Capital, Public Impact Workshop on Private Equity in Healthcare (March 5, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.05-chair-khan-remarks-at-the-private-capital-public-impact-workshop-on-private-equity-in-healthcare.pdf*; Statement of Chair Lina M. Khan Joined by Comm'r Rebecca Kelly Slaughter & Comm'r Alvaro Bedoya in the Matter of EQT Corporation (Aug. 16, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya-4.*

[7] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036 (5th Cir. 2023); *FTC* v. *IQVIA et al,* 710 F.Supp.3d 329 (S.D.N.Y. 2024); *FTC* v. *Tempur Sealy Intern'l, Inc.,* 4:24–cv–02508 (S.D. Tex. July 2, 2024); *In re Lockheed Martin Corp.,* Docket No. 9405 (2022), *https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0052-lockheedaerojet-matter* (alleging that the merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corp.,* Docket No. 9404 (2021), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter* (alleging that the merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned); *In re Intercontinental Exchange, Inc. & Black Knight, Inc.,* Docket No. 9413, *https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0142-intercontinental-exchange-incblack-knight-inc-matter* (2023).

[8] *Illumina, Inc.,* 88 F.4th 1036.

[9] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1049–51 (2023) (stating that antitrust markets are not limited to products that exist but may include those that are anticipated or expected or encompass research, development and commercialization of products in development); *FTC* v. *PPG Indus., Inc.,* 798 F.2d 1500, 1504 (D.C. Cir. 1986) (noting that merging firms competed in evolving high technology market at the request-for-proposal stage of product development).

[10] *In re Sanofi/Maze Therapeutics,* Docket No. 9422 (2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2310091-sanofimaze-therapeutics-inc-matter; Illumina, Inc.,* 88 F.4th 1036.

markets. This strategy can consolidate a market through a series of smaller deals that fly below the radar of antitrust enforcers. Private equity firms and other investors have deployed roll-up strategies across a range of industries, from healthcare to housing—with potentially major ramifications for the public.[11] Indeed, the FTC's lawsuit against U.S. Anesthesia Partners charges the entity with acquiring over a dozen anesthesiology providers across Texas in the span of eight years, a reduction in competition that cost consumers and businesses tens of millions of dollars.[12] The Commission's investigations into acquisitions of veterinary clinics have also revealed roll-up plays.[13] To understand whether a proposed transaction is part of an anticompetitive roll-up scheme, the agencies need insight into what prior acquisitions the entity has made within the same lines of business. While the existing Form required some reporting of these acquisitions, the Final Rule provides a more complete picture of the merging parties' overarching acquisition strategies by requiring that both entities provide information on certain prior acquisitions that closed within the previous five years.

The notice of proposed rulemaking included a requirement that would have aided the agencies' assessment of whether the proposed deal would risk threatening competition in labor markets. This proposal fit within a wider effort at the agencies to correct for antitrust enforcers' decades-long neglect of promoting fair competition in labor markets. As Commissioner Bedoya rightly notes, when antitrust enforcers did pay attention to workers, it usually involved weaponizing antitrust against them.[14] This disposition had no basis in the law—and, as Commissioner Bedoya notes, directly contravenes the goals Congress sought to advance in passing the antitrust laws. No antitrust law gives primacy to some market participants over others or states that some are entitled to greater protection from unlawful monopolization or mergers; to the contrary, the Clayton Act prohibits mergers that may substantially lessen competition ''in any line of commerce.'' [15] I am pleased that in recent years the FTC has reoriented towards a more faithful application of the law, including—for the first time in our 110-year history—through challenging a transaction on the grounds that it risks undermining competition in labor markets.[16]

While the Final Rule pares back some of the labor market requirements, I believe that the information required by other provisions of the Final Rule will position the agencies to identify transactions that threaten competition in labor markets. In particular, the newly-mandated information on overlap and supply relationship descriptions, as well as new high-level business and transaction-related documents, will enable the agencies to identify whether a proposed deal risks undermining competition for workers. And partnerships with the National Labor Relations Board and the Department of Labor will allow the FTC to continue deepening its expertise in how competition works in labor markets.[17]

The FTC also announced today that, following the Final Rule coming into effect, we will lift the categorical suspension on early termination of filings made under the HSR Act. When the antitrust agencies grant early termination, merging parties can consummate their deal without waiting for the full 30-day period ordinarily required under the law. The Commission initially suspended early termination due to a historic volume of filings amidst the COVID–19 pandemic.[18] But a revisiting of the FTC's early termination policy was overdue. Data reveal that permissively granting early termination led to the consummation of some deals that resulted in significant harm.[19] Moreover, the law makes clear that the granting of early termination is purely a discretionary function.[20] Merging

[11] *See, e.g.,* Richard M. Scheffler et al., Am. Antitrust Inst., Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk 8–16 (2021), *https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf*; Atul Gupta, et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes* (Becker Friedman Inst., Working Paper No. 2021–20, 2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537612.* The Commission recently hosted a public workshop to discuss the growing body of economic research examining the role of private equity investment in health care markets. Fed. Trade Comm'n, Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care (Mar. 5, 2024), *https://www.ftc.gov/news-events/events/2024/03/private-capital-public-impact-ftc-workshop-private-equity-health-care.*

[12] Complaint, *FTC* v. *U.S. Anesthesia Partners, Inc., et al.,* No. 4:23–cv–03560 (S.D. Tex. Sept. 21, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2010031-us-anesthesia-partners-inc-ftc-v.*

[13] *In re JAB Consumer Partners, et al.,* Docket Nos. C–4766 & C–4770 (2022), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2110140-jab-consumer-partnersnational-veterinary-associatessage-veterinary-partners-matter.*

[14] Statement of Comm'r Alvaro M. Bedoya Joined by Comm'r Rebecca Kelly Slaughter & Chair Lina M. Khan in the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule (Oct. 10, 2024).

[15] 15 U.S.C. 18. See also, Statement of Comm'r Alvaro M. Bedoya, *id.*

[16] Press Release, Fed. Trade Comm'n, FTC Challenges Kroger's Acquisition of Albertsons (Feb. 26, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons*; *see also,* Statement of Comm'r Rebecca Kelly Slaughter & Chair Lina M. Khan Regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England Health System* (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.*

[17] Press Release, Fed. Trade Comm'n, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices*, Press Release, Fed. Trade Comm'n, FTC, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers.*

[18] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination,'' Federal Trade Commission (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

[19] *See* Premerger Notification; Reporting and Waiting Period Requirements, 16 CFR parts 801, 803 (2024) at 17 (The consequences of inadequate detection are revealed in a recent analysis of hospital mergers that were reported to the Agencies for premerger review co-authored by two economists from the Commission's Bureau of Economics. Keith Brand et al., ''In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016,'' 66 J. L. Econ. 639 (2023). The paper examined a set of consummated hospital mergers and measured the effect of each merger on prices. The study concluded that mergers not reportable under the HSR Act did not result in larger price increases than reportable mergers. In contrast, the authors found different outcomes among mergers that were subject to premerger review based on how much review the transaction received. Of the mergers reported to the Agencies, the largest average percentage price increase occurred for those mergers that received early termination of the initial waiting period. This suggests that the HSR Filings failed to provide sufficient information to trigger additional investigations that could have blocked these harmful mergers before they were consummated; instead, the filings resulted in early termination of the waiting period. While the study was not designed to test the impact of this rulemaking, the study supports the Commission's belief that there are information deficiencies with the current HSR Rules that prevent the Agencies from identifying mergers that may violate the antitrust laws.'').

[20] Both the Clayton Act and the HSR Act provide for an exception to the waiting period by empowering the FTC and DOJ to grant early terminations ''in their discretion.''16 CFR 803.11(c) (HSR Act: ''The Federal Trade Commission and the Assistant Attorney General may, in their discretion, terminate a waiting period upon the written request of any person filing notification or . . . sua sponte.''); 15 U.S.C.A. 18a(2) (Clayton Act: ''The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the **Federal Register**

parties are not entitled to early termination, and I question the wisdom of using agency resources on a discretionary function while resource constraints impede our ability to fully execute on our mandatory functions. Because the Final Rule will provide the agencies with additional information necessary to probe the competitive risk that a transaction may pose, we will be better positioned to determine the right set of policies and procedures around early termination, including which subset of deals may receive it and under what circumstances.

The new HSR Form marks a generational upgrade that will sharpen the antitrust agencies' investigations and allow us to more effectively protect against mergers that may substantially lessen competition or tend to create a monopoly. But it is not the only part of the HSR regime that requires upgrading. As I've noted in past years, the HSR Act must be modernized for today's economy.[21] In particular, the statutory timelines laid out in the HSR Act have not kept pace with the surge in deal volume, the complexity of transactions, and the increased burden associated with proving in court a violation of section 7. The HSR Act gives the agencies 30 days to determine whether a deal warrants close investigation, and then another 30 days after parties certify they have ''substantially complied'' with the inquiry. These timelines were set in an era when document productions were measured in the number of boxes and not the number of terabytes—and when lawmakers expected the agencies would receive around 150 merger notifications per year, rather than 150 notifications per month (as the agencies now routinely receive).[22] While the new HSR Form will bolster the antitrust agencies' ability to adequately screen proposed deals during the initial waiting period, Congress should revisit HSR and appropriately extend these timelines to match today's realities.[23]

Faithfully discharging the Commission's statutory obligations also requires adequate funding. The HSR Annual Report summarizes the agencies' merger enforcement work over FY2023.[24] During that period the FTC's work resulted in challenges to 15 transactions that risked threatening competition.[25] Ten of these challenges resulted in parties abandoning the transactions, nearly double the average annual number of abandonments from the preceding 10 years. Our efforts to keep building on this efficacy, however, will run into major resource constraints. The FTC's enacted budget for fiscal year 2024 represented a one percent reduction from the previous year. Alongside a statutorily mandated five percent pay raise and higher non-pay costs resulting from inflation, the result of this reduction has been significantly fewer resources to support the FTC's mission. While our teams work diligently to faithfully enforce the antitrust laws, resource constraints have meant the FTC has been forced to make difficult triage decisions and forgo meritorious investigations—likely resulting in the public bearing the cost of illegal mergers. Additional resources would better equip the Commission to fully pursue its mandate and protect the public.

Finally, the FTC today is launching a new online portal so that members of the public can directly submit comments on mergers that may threaten competition.[26] This portal is part of the FTC's broader work to ensure we are opening our doors to hear from people across the country on issues of public concern.[27] Whether the antitrust agencies do or do not take action against a merger can be of enormous consequence—determining how much people pay for essential goods and services, how much workers earn on a job, whether independent businesses can keep serving their communities, whether an entrepreneur can bring a breakthrough innovation to market, and whether our supply chains are brittle or resilient. Ensuring the antitrust agencies are positioned to make these high-stakes decision with a full understanding of what may follow from a merger is vital. Well-resourced businesses know how best to inform the agencies' investigations, but one shouldn't need to hire a lawyer to provide public enforcers with relevant information on a merger. This new portal will allow the FTC to systematize the regular gathering of public input on mergers and continue broadening the types of expertise and experience that inform our work.

The Final Rule, HSR Report, and new merger portal reflect tremendous work by teams across the FTC, in particular from the Premerger Notification Office, the Office of Policy and Coordination, and the Office of Policy Planning, as well as from throughout the Bureau of

a notice that neither intends to take any action within such period with respect to such acquisition.'').

[21] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the FY2022 HSR Annual Report to Congress (Dec. 21, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya-5*.

[22] *See id.*

[23] Presently, FTC staff are routinely at the mercy of merging parties granting extensions of the statutory deadline so that staff has the necessary time to review the transaction. But it should not be merging parties that get to determine the amount of time FTC staff has to review mergers and do the work required by law.

[24] Commissioners Holyoak and Ferguson dissent from the issuance of the HSR Annual Report. In particular, Commissioner Holyoak disagrees with the longstanding practice to count abandonments and deals where parties were not required to make an HSR filing. Dissenting Statement of Commissioner Melissa Holyoak, Hart-Scott-Rodino Annual Report, Fiscal Year 2023 (Oct. 10, 2024) at 2. For over a decade, the Report has been clear that it includes certain non-HSR reportable matters. FY23 Report at n.28 (''The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.''); *see also Fed. Trade Comm'n, FY 2010 Hart Scott Rodino Annual Report* (2011) at n.18. A proposed merger may be anticompetitive even if it falls below the threshold that would require an HSR filing. As a result, FTC staff may raise concerns regarding certain transactions even where such a filing has not been made. Those matters are part of the FTC's merger enforcement work and including them faithfully represents the Commission's work to Congress. The HSR Annual Report also states plainly that it references certain deals where ''the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation,'' *id.* at 2, and Commissioner Holyoak does not identify any inconsistency or explain any insufficiency in how the numbers are tabulated here versus how the Commission has historically done so. Commissioner Ferguson notes in his dissent that the precise timing of HSR reports is not mandated by Congress and has varied in past years, but neglects to mention that timing under prior administrations also varied significantly. Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the FY2023 HSR Annual Report to Congress (Oct. 10, 2024) at 1–2. *See, e.g.,* Fed. Trade Comm'n, Annual Competition Reports (last visited Oct. 9. 2024), *https://www.ftc.gov/policy/reports/annual-competition-reports* (for example, the FY19 Annual HSR Report was released in July of 2020, the FY18 Annual HSR Report was released Sept 2019, the FY17 Annual HSR Report was released Apr. 11, 2018, the FY16 Annual HSR Report was released Oct. 4, 2017. Strangely, Commissioner Ferguson also suggests that the decision to issue this year's report in October is part of some political scheme related to giving the Democratic ticket an advantage in the forthcoming presidential election. I am unaware of any reports, research, or evidence suggesting that the HSR Report has any bearing on voting patterns or electoral outcomes.

[25] One transaction challenged in FY2023 remains in litigation.

[26] *See* Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form*.

[27] When the FTC in recent years has invited public input, we have received thousands—and sometimes tens of thousands—of comments, including on issues relating to merger enforcement. *See, e.g.,* Public Docket FTC–2023–0043, Draft Merger Guidelines for Public Comment, *Regulations.gov* (Jul. 19, 2023); Public Docket FTC–2024–0028, FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy, *Regulations.gov* (May 23, 2024).

Competition, the Office of General Counsel, and the Bureau of Economics. I am grateful to this team for their diligent efforts, as well as to the FTC's partners at DOJ for their collaboration, and to my fellow Commissioners for their thoughtful engagement.

Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter

My colleagues Commissioners Ferguson and Holyoak write at some length in support of the Commission's decision not to adopt, at this time, a set of proposed requests for employment information (''the labor screen'') that was included in the original notice of proposed rulemaking.[1] Rather than litigating the merits of the labor screen, I write to respond to one of the ideas underlying my colleagues' arguments against it.

The Sherman Act was passed in 1890; the Clayton Act and the Federal Trade Commission Acts were passed in 1914, creating this Commission and empowering it to enforce this newly expanded set of antitrust laws.[2] Yet it was only in 2021 that a Federal antitrust enforcer first stopped a merger because of its impact on competition in the labor market.[3]

My colleagues cite the absence of such merger challenges as a key reason for dropping the labor screen. Both stress the extensive efforts the antitrust agencies have expended to identify such mergers.[4] They argue that, if enforcers have been working for years to identify mergers that harm competition in labor markets and have not brought more challenges, how can we justify requesting additional data to identify those mergers? In fact, Commissioner Holyoak seems to imply that labor monopsony is rare, going so far as to say that the labor screen ''was a solution in search of a nonexistent problem.'' [5]

History tells a different story. While my colleagues suggest that the absence of labor-based merger challenges exists ''not for a lack of trying,'' [6] a review of the first hundred years of that history finds dreadfully little trying. Indeed, most of the history of antitrust enforcement has been marked by a clear aversion to protecting labor market competition. This arguably has only been reversed in the last decade.

The historical record reveals several reasons for the lack of labor-based merger challenges, none of which suggest that labor monopsony is rare. The first would be early antitrust enforcers' overt hostility to labor organizing specifically and labor organizations more generally—a position that put them in sharp opposition to the legislators who created American antitrust law.

From the first Senate debates over passage of the law that would come to bear his name, Senator John Sherman made clear he was concerned with combinations of companies that could unilaterally set the price of labor. In denouncing the ''trust,'' he explained that:

> ''The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests. . . It dictates the terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is more dangerous than any heretofore invented. . .'' [7]

He wasn't the only legislator who was concerned with labor. The debates in 1890 as well as 1914 were defined by an overriding concern that the laws being considered would be misused to stop labor organizing. Thus, the Sherman Act was amended not once but twice to avoid such a result, ultimately being rewritten nearly in its entirety; sections 6 and 20 of the Clayton Act were enacted for the same reason 24 years later.[8]

Early antitrust enforcers ignored this legislative intent, as did the courts hearing challenges brought under the laws. Prosecutors instead turned the Sherman Act into what Professor Hovenkamp termed a ''savage weapon'' against labor, [9] using it to break the strikes of longshoremen in New Orleans and hungry Pullman Palace Car workers in Illinois.[10] The labor protections in the Clayton Act arguably fared worse. Despite the law's clear prohibition against the use of antitrust laws against labor organizing, courts in the 1920s used it to stop 2,100 strikes.[11]

In short, for the first four decades of their existence, the antitrust laws were used as a cudgel against organized labor, not a tool to detect and block mergers that risked harming labor markets. While the law was there to allow for a challenge to a merger based on its impact on labor market competition,[12] the idea that the DOJ or FTC of that era would try to block such mergers finds no basis in reality.

In his treatise exploring the absence of antitrust enforcement targeted at labor markets, Professor Posner presents two other reasons for the lack of labor-based merger challenges, both of which post-date the heyday of the labor injunction in the first half of the 20th century.[13] He argues that, starting in the 1960s, legal scholars began to prevail upon law enforcers to target antitrust enforcement on conduct and combinations that raised the prices on products and services sold to the public—that is, ''consumer welfare.'' More interestingly, he explains that until very recently, most economists assumed labor markets were more or less competitive, and labor market power—the power of employers to set wages below a competitive level—was thus not an important problem for society.[14]

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[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178, 42197 (June 29, 2023) (to be codified at 16 CFR pts. 801, 803).

[2] 15 U.S.C. 1–38; 15 U.S.C. 12–27; 15 U.S.C. 41–58.

[3] *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1, 1 (D.D.C. 2022).

[4] Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules,* at 9; Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule,* at 11.

[5] Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules,* at 9.

[6] *Id.; see also* Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule,* at 11 (''It is not for a lack of effort.'').

[7] 21 Cong. Rec. 2457 (Mar. 21, 1890) (remarks of Sen. John Sherman of Ohio).

[8] *See* Alvaro M. Bedoya & Bryce Tuttle, ''*Aiming at Dollars, Not Men*'': *Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law,*'' 85 Antitrust L.J. 805, 809–812 (2024).

[9] Herbert Hovenkamp, *Labor Conspiracies in American Law,* 1880–1930, 66 Tex. L. Rev. 919, 928 (1988).

[10] *See* Bedoya & Tuttle, *supra* note 8, at 811–812; *see also U.S.* v. *Workingmen's Amalgamated Council of New Orleans,* 54 F. 994, 996 (E.D. La. 1893); Melvin I. Urofsky, *Pullman Strike,* Encyc. Britannica (Sept. 2, 2022), *https://www.britannica.com/event/Pullman-Strike.*

[11] *See* William E. Forbath, *Law and the Shaping of the American Labor Movement* 158 (1991).

[12] In 1926, in line with Senator Sherman's intent, the Supreme Court held that antitrust law could be used affirmatively to protect competition in labor markets, allowing a group of sailors to sue shipowners for wage-fixing. *Anderson* v. *Shipowners Ass'n of the Pac. Coast,* 272 U.S. 359, 365 (1926).

[13] *See generally* Eric A. Posner, *How Antitrust Failed Workers* (2021).

[14] *See id* at 4. Professor Posner cites a popular economics textbook from 2005 which declared that ''[m]ost labor economists believe there are few monopsonized labor markets in the United States.'' *Id. citing* Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 108 (2005). *See also* David Card, *Who Set Your Wage?* American Economic Review at 1075 (2022) (''the time has come to recognize that many—or even most—firms have some wage-setting power. Such a shift was made with respect to firm's price-setting power many decades ago[. . .] In the past few years we may have reached a tipping point for a similar transition in labor economics, driven by the combination of new (or at least post-1930) theoretical perspectives, newly available data sources, and accumulating evidence on several

That understanding of labor markets has begun to unravel. New research suggests that the fewer companies in a community competing for workers, the lower the wages.[15] Research also suggests that mergers, specifically, help companies keep wages low.[16] This appears to be a common problem in American society. Professor Posner found it plausible that in many labor markets, workers receive thousands of dollars less than the competitive rate.[17] Two years ago, the Treasury Department estimated that as a result of current employer market concentration as well as how time consuming it is to find, interview for, and accept a job, Americans likely lose out on the equivalent of eight weeks of pay every year. In other words, in a perfectly competitive labor market—in a world where we can easily switch jobs to one of any number of firms, most of us would be about two to four paychecks richer.[18] Few people may know about ''labor monopsony,'' but anyone on a budget knows what they'd do with that money.

In short, my colleagues seem to say that labor monopsony is not a problem even though we've only just started to look for that problem. Then, they wave away tools to help find that problem because we haven't found it yet.[19]

All of this said, a key barrier to any merger challenge, including labor-based challenges, is a lack of time. The changes voted out today will help FTC staff quickly find and focus on the mergers that hurt competition in any market, including labor markets. For this and many other reasons, I am proud to support them.

different fronts.''); *id.* at 1086 (''By insisting that 'markets set wages,' labor economists ceded the field, and had very little to say about questions like the design of online labor markets, or the effects of no-solicitation or no-poaching agreements—other than that they should not matter[. . .] One of the most exciting developments in the field today is the evidence of labor economists taking questions about wage setting seriously[. . .] I also expect this work to lead to some rethinking on policies such as minimum wages, the regulation of trade unions, and anti-Trust'').

[15] See, *e.g.,* Efraim Benmelech, et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages,* 57. J. of Hum. Res. S200, S203 (Supplement) (2022).

[16] See Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals,* 111 Am. Econ. Rev. 397, 397 (2021); Benmelech, supra note 3, at S200 (''instrumenting concentration with merger activity shows that increased concentration decreases wages''); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (unpublished) (Oct. 29, 2021) (''M&As that increase local labor market concentration have negative impacts on worker earnings with the largest impacts in already concentrated markets.''), *available at https://sites.google.com/site/davidhallarnold/research.*

[17] *See* Posner, *supra* note 13, at 28.

[18] The report's review of academic studies ''places the decrease in wages at roughly 20 percent relative to the level in a fully competitive market.'' This is a middle estimate from an estimated range of $0.15 to $0.25 cents of lost wages on every dollar. The ''eight weeks of pay'' figure applies the lower bound of that estimate ($0.15, or 15%) to 52 weeks of pay. *See* U.S. Dep't of Treasury, *The State of Labor Market Competition,* at ii (2022) (''20 percent''); *id.* at 24–25 (''15–25 cents on the dollar'').

[19] Commissioner Holyoak states that ''[t]he agencies have never made a standalone labor challenge to an acquisition,'' and Commissioner Ferguson states that the agencies have never made a challenge ''based on labor market theories that could have been identified by the proposed requirements.'' Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules,* at 9–10; Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule,* at 11. I evaluate this new era quite differently. In 2021, our colleagues at the Antitrust Division successfully blocked a proposed merger between two of the nation's largest book publishers based on a labor theory that the elimination of competition between the merging publishers likely would have negatively impacted the advances paid to authors for their work. *See United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1 (D.D.C. 2022). What's more, in addition to Commission staff's challenge of the Kroger/Albertson's merger in part on a labor theory, FTC staff just last month submitted a comment urging the Indiana Department of Health to deny an application that seeks to combine Union Hospital and Terre Haute Regional Hospital, in part because, in staff's view, the proposed merger would likely depress wage growth for hospital employees and exacerbate challenges with recruiting and retaining healthcare professionals. *See* Complaint, *FTC* v. *Kroger Co., and Albertsons Co.,* (D. Or. Feb. 26, 2024); Federal Trade Commission Staff Submission to Indiana Health Department Regarding the Certificate of Public Advantage Application of Union Health and Terra Haute Regional Hospital at 54–63 (Sept. 5, 2024). The Commission unanimously authorized staff to file the comment. Press Release, Fed. Trade Comm'n, *FTC Staff Opposes Proposed Indiana Hospital Merger* (Sept. 5, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-staff-opposes-proposed-indiana-hospital-merger.* Additionally, in 2018, under Republican leadership, the Commission alleged that Grifols S.A.'s proposed acquisition of Biotest U.S. Corporation would likely have enabled the combined firm to decrease fees paid to blood plasma donors and required Grifols to divest certain assets as a condition of the acquisition. *See* Complaint, *In the Matter of Grifols S.A. and Grifols Shared Services North America, Inc.* (Aug. 1, 2018). Finally, I note that prior to my arrival at the Commission, Chair Khan and Commissioner Slaughter sounded the alarm on labor concerns in the abandoned merger between Lifespan Corporation and Care New England Health System stating that, in addition to allegations contained in staff's complaint, they would have also supported an allegation on labor grounds. See Concurring Statement of Comm'r Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England Health System*, Fed. Trade Comm'n (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespancne_redacted.pdf.*

Statement of Commissioner Melissa Holyoak

I. Introduction

The Commission issued its notice of proposed rulemaking for the Premerger Notification, Reporting and Waiting Period Requirements which implements the Hart-Scott-Rodino Antitrust Improvements Act (''NPRM'') on June 29, 2023.[1] The contents of the NPRM were harrowing and generated (justifiably) substantial outcry from many commentors. Many of the contemplated filing requirements, if implemented, would have been beyond the Commission's legal authority, arbitrary and capricious, unjustifiably burdensome, and just plain bad policy.[2]

The Commission worked together on the monumental task of modifying the NPRM into the Final Rule,[3] ensuring the Final Rule does not suffer from the many legitimate criticisms raised by the commentors. The Final Rule modifies many provisions in the NPRM while taking great care to avoid unduly burdening merging parties or chilling the many procompetitive transactions that happen each year. To be clear, this Final Rule does not align exactly with my preferences. But I have worked to curb the excesses of the NPRM in meaningful ways that would not have happened absent my support. These significant modifications resulted in a Final Rule that is not only consistent with the agencies' statutory grant of authority but will also close certain informational gaps that affect the agencies' ability to conduct effective premerger screening.

Commissioner Ferguson, in section III of his statement, describes in detail the

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (proposed Jun. 29, 2023) (to be codified at 16 CFR parts 801 and 803) (hereinafter NPRM).

[2] Out of the gate, the NPRM made broad assertions about increasing concentration as a justification for the unprecedented and wide-sweeping proposed changes. NPRM, *supra* note 1, at 42179. The concentration literature upon which it relied, *id.* at 42179 n.7, however, has been heavily criticized and debunked. *See, e.g.,* Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions,* 33 J. Econ. Perspectives 23 (2019); Carl Shapiro, *Antitrust in a Time of Populism,* 61 Int'l J. Indus. Org. 714 (2018); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, Antitrust Magazine, Fall 2018. Most notably, the literature cited by the NPRM does not use well-defined antitrust markets in its assessment or conclusions. Further, even if increasing concentration had been a reality, it only has a limited role in analyzing competitive effects. *See infra* note 57.

[3] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 3, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf* (hereinafter Final Rule).

benefits of certain provisions that the Commission included in the Final Rule. These provisions that he describes fill information gaps in the agencies' current ability to fulfill their missions under the HSR Act. I agree with Commissioner's Fergusson's assessments and applaud the Commission's efforts to include these new requests in the Final Rule.

Simultaneous with today's issuance of the Final Rule, the Commission has also announced that it will lift its suspension of early termination when the Final Rule takes full effect. The suspension itself has been in place for more than three-and-a-half years, even though the suspension was supposed to be ''temporary'' and ''brief.'' [4] I have been baffled by this unjustified delay and disappointed that it took the promulgation of this Final Rule to lift the suspension of early termination. One of the virtues of the Final Rule is that certain provisions will allow staff to more quickly identify which mergers should receive early termination, a significant benefit to both staff and merging parties. So I guess late is better than never.

For the remainder of my statement, I write to demonstrate the dramatic differences between this Final Rule and the proposed rule set forth in the NPRM, and also to elaborate on some of the changes, in addition to lifting the early termination suspension, that drove my decision to vote in favor of the Final Rule. My overview of the Final Rule is not a substitute to the text of the Final Rule or the analysis in the Statement of Basis and Purpose (''SBP''),[5] both of which should be consulted by all filers.

Of the twenty-nine primary proposals in the NPRM, ten were rejected entirely, including, among others, the request for labor information, the obligation to produce draft transaction documents, and the requirements to create organizational charts. Of the remaining nineteen proposals, the Final Rule includes just two without modification; we have made meaningful changes to the other seventeen requirements.

TABLE 1—REJECTED PROPOSALS

NPRM provision	Results in final rule
Labor Market/Employee Information	Proposal rejected.
Drafts of Transaction-Related Documents	Proposal rejected.
Organizational Chart of Authors and Recipients	Proposal rejected.
Other Types of Interest Holders that May Exert Influence	Proposal rejected.
Expand Current 4(d)(iii) to Include Financial Projections to Synergies and Efficiencies	Proposal rejected.
Deal Timeline	Proposal rejected.
Provision of Geolocation Information	Proposal rejected.
Identification of Messaging Systems	Proposal rejected.
Litigation Hold Certification Language	Proposal rejected.
Identification of F/K/A Names	Proposal rejected.

For example, the prior acquisition proposal that called for ten years of prior acquisitions without any size threshold was reversed in the Final Rule to request only five years of acquisitions, and reinstated the $10 million threshold—returning to the time period adopted in 1987 [6] and dollar threshold that had existed since the original rules in 1978.[7] The NPRM proposal that would have required the filers to identify and produce all agreements between the merging parties has been modified significantly in the Final Rule to simply require the filers to check boxes to indicate whether they have a few types of agreements between them—nothing has to be produced or described. The Final Rule similarly modifies the NPRM's overlap and supply ''narratives'' to require only ''brief'' descriptions instead. And, among other revisions, the Final Rule's overlap and supply descriptions requirement makes clear that antitrust analysis is not required.

Further, many of the modifications exempt ''Select 801.30 Transactions'' from having to report certain information required by the Final Rule. Select 801.30 Transactions are acquisitions of third parties' voting securities where the acquirer does not gain control, no agreements between the acquiring and acquired person govern the transaction, and the acquiror does not have the ability to appoint or serve on a board.[8] The Final Rule likewise exempts transactions where there is no horizontal overlap or supply relationship from certain information requirements, and sets a *de minimis* threshold to exclude the requirement to describe supply relationships where the sale or purchase of the product, service, or asset represents less than $10 million in revenue in the most recent year. Table 2 highlights some of the main modifications that have been made in the Final Rule (again, this list is not exhaustive and does not substitute for the text of the Final Rule).

[4] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

[5] Fed. Trade Comm'n, 16 CFR parts 801 and 803, Premerger Notification; Reporting and Waiting Period Requirements, Statement of Basis and Purpose (Oct. 3, 2024) (hereinafter SBP).

[6] 52 FR 7066 at 7078 (Mar. 6, 1987) (''[The Commission] believes that this change can be made without harming the agencies' ability to conduct a thorough antitrust review since an account of the acquiring person's acquisitions over the past five years will give adequate notice of possible trends toward concentration.'').

[7] 43 FR 33450 at 33534 (July 31, 1978) (''The item permits the omission of prior transactions that did not involve the acquisition of more than 50 percent of the voting securities or assets of a person with preacquisition sales or assets of $10 million, since smaller acquisitions are likely to be less significant from an antitrust standpoint.''). Unlike prior iterations of the rules, the Final Rule does require the acquired entity to also identify prior acquisitions and clarified that an acquisition of ''all or substantially all'' of the assets of a business must be reported.

[8] The Final Rule defines Select 801.30 Transactions as ''[a] transaction to which § 801.30 applies and where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions.'' 16 CFR part 803, appendix B at 1.

TABLE 2—SELECT MODIFIED NPRM PROPOSALS

NPRM provision	Select modification in final rule
Prior Acquisitions [9]	Among others, retain the five-year lookback and $10 million sales/assets threshold that existed in prior iterations of the HSR rules.
Other Agreements Between the Parties [10]	Among others, filers are not required to produce or describe agreements between the parties; instead, they must only, via checkbox, identify types of agreements between them, if any.
Officers, Directors, and Board Observers [11]	Among others, (1) exclude reporting on board observers; (2) limit to acquiring person only; (4) limit to officers/directors of entities in overlap industries as described by the text of the Final Rule.
4(c) Documents by/for Supervisory Deal Team Lead(s) [12]	Limit to only apply to *one* individual (*not* the plural "leads" like in the NPRM) supervisory deal team lead, as defined in the text of the Final Rule.
Supply Relationships [13]	Among others, (1) require only "brief" descriptions rather than a narrative; (2) exclude "Select 801.30 Transactions"; (3) impose a *de minimis* threshold and (4) limit descriptions to a business assessment rather than an antitrust analysis (*see* SBP).
Overlap Products and Services [14]	Among others, (1) require only "brief" descriptions rather than a narrative; (2) exclude "Select 801.30 Transactions"; and (3) limit description to a business assessment rather than an antitrust analysis (*see* SBP).
Ordinary Course Documents (Periodic Plans and Reports) [15]	Among others, limit to exclude "Select 801.30 Transactions" and limited to only require documents provided to Chief Executive Officers.
Identification of Limited Partners [16]	Among others, limit disclosure requirements for limited partners who do not have management rights.
Description of Entity Structures and Organizational Chart for Funds and MLPs [17].	Among others, eliminate requirement to create an organizational chart.
Transaction Diagram [18]	Among others, exclude "Select 801.30 Transactions" and only necessary if diagrams previously existed (*i.e.,* no need to create diagrams).
Mandatory Identification of Foreign Jurisdiction Reporting by Both Parties [19].	Limit to acquiring person.
Requiring a draft agreement or term sheet and transaction specific agreements for filings on non-definitive agreements [20].	Clarify scope and provide more details about the information required.
Transaction Rationale [21]	Among others, exclude "Select 801.30 Transactions."
Voluntary Waivers for State AGs and International Enforcers [22]	Allow filers to voluntarily check two separate boxes that would permit certain disclosures.
Defense or Intelligence Contracts [23]	Among others, limit to contracts generating $100 million or more of revenue and only if there is an Overlap or Supply Relationship.
Document Log Requirements [24]	Among others, limit requirement to identify authors to certain and limited circumstances.
Adjustments to NAICS revenue reporting [25]	Modified to limit scope.

Notably, only two of the main proposals in the NPRM were adopted without modification: the requirements to translate foreign-language documents and to report subsidies from foreign entities of concern, which was mandated by the Merger Filing Fee Modernization Act of 2022.[26] All other proposals were rejected or significantly modified. Taken together, the dramatic revisions to the proposed rule set forth in the NPRM result in a Final Rule that I can support. The decisions made to scale back the proposed requirements in the NPRM will limit burden, aligns the Final Rule with the Commission's legal authority under the HSR Act, and is tailored to address information gaps that have hampered the agencies' premerger review.[27]

Sections II through IV of my statement explain why three proposals in the NPRM were especially problematic to me, and why their elimination or substantial revision was critical to my vote on this Final Rule: (II) Labor Market/Employee Information, (III) Drafts of Transaction-Related Documents, and (IV) Ten Years of Prior Acquisitions Without any Size Thresholds. To be clear, by focusing on these three proposals I do not mean to diminish the importance of the other changes reflected in the Final Rule. Each of the many revisions that scaled back the proposed requirements in the NPRM contributed to my vote to issue the Final Rule. Finally, I discuss in section V some additional considerations that led me to support the Final Rule, including important limitations in the Final Rule that ensure

[9] *See* Final Rule, *supra* note 3, Acquiring Person Instructions, at 14–15.
[10] *See id.* at 9.
[11] *See id.* at 5.
[12] *See id.* at 1.
[13] *See id.* at 10.
[14] *See id.* at 9–10.
[15] *See id.* at 9.
[16] *See id.* at 4–5.
[17] *See id.* at 5.
[18] *See id.* at 8.
[19] *Compare id.* at 7 (requiring disclosure for acquiring person) with Final Rule, *supra* note 3, Acquired Person Instructions (not requiring disclosure of transactions subject to international antitrust notification).
[20] *See* Final Rule, *supra* note 3, Acquiring Person Instructions, at 9.
[21] *See id.* at 8.
[22] *See id.* at 15–16.
[23] *See id.* at 15.
[24] *See id.* at 2.
[25] *See id.* at 10–11.
[26] *See* 15 U.S.C. 18b (requiring the Commission to promulgate a rule requiring HSR filings to include information on subsidies received from certain foreign governments or entities that are identified as foreign entities of concern); Consolidated Appropriations Act, 2023, Public Law 117–328 (2023) (reflecting the appropriations bill that included the Merger Filing Fee Modernization Act of 2022).
[27] The incremental burden estimated in the NPRM decreased from 107 hours to only 68 hours in the Final Rule, a result that was critical to my decision. NPRM, *supra* note 1, at 42208 (reporting 107 incremental hours); SBP, *supra* note 3, at section VIII, 386 of 406 (reporting 68 incremental hours).

the Final Rule will not result in fishing expeditions.

Before proceeding, I want to discuss the Commission's authority to issue today's Final Rule, an issue that is critical to me as a Commissioner.[28] The HSR Act obligates the Commission, ''with the concurrence of the Assistant Attorney General,'' to issue rules that require information to be submitted in HSR filings that will ''be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [29] While this mandate affords some discretion to the Commission, this discretion is not unbounded. Critically, Congress did not give the Commission authority to promulgate rules to gather information generally, or to merely heap burden upon merging parties in an effort to dissuade acquisitions. Rather, the Act explains that the purpose of HSR filings, and the rules determining the content of filings, is for the agencies ''to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [30] Many proposals in the NPRM—including the three discussed below—have been rejected or substantially modified to ensure the Final Rule includes only new requirements that are consistent with the text and structure of the HSR Act.

II. Labor Market Information

The NPRM contained many problematic proposals. Chief among them was its proposal to collect information from filers about labor markets.[31] As proposed, filers would report three different types of information related to labor:

- ''Largest Employee Classifications[:] Provide the aggregate number of employees . . . for each of the five largest occupational categories'' based upon 6-digit SOC classifications; [32]
- ''Geographic Market Information for Each Overlapping Employee Classification[:] Indicate the five largest 6-digit SOC codes in which both parties . . . employ workers [and also provide] each ERS commuting zone in which both parties employ workers with the 6-digit classification and provide the aggregate number of classified employees in each ERS commuting zone; and'' [33]
- ''Worker and Workplace Safety Information[:] Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters.'' [34]

All three of these requirements (''Labor Proposal'') were completely rejected in the Final Rule. Chair Khan asserts in her statement that ''the Final Rule pares back some of the labor market requirements.'' [35] Despite this confusing statement, the text of the Final Rule makes clear that all (not ''some'') of the labor requirements have been fully removed (not ''pare[d] back''). And for good reason. Despite repeated and extensive efforts to make harm in labor markets a standard component of merger enforcement, no evidence exists to justify including the Labor Proposal in the Final Rule. Accordingly, the Labor Proposal was rightfully excluded from the Final Rule and, absent new evidence, has no place in any future rulemaking that the Commission may contemplate.

To be sure, a merger may theoretically create anticompetitive effects in a relevant labor market.[36] A post-merger entity might, for example, be able to lower wages for workers when the merger eliminates a critical employment option for workers. Such a scenario is more likely when the merger involves specialized workers who may have fewer comparable alternatives than less skilled workers.[37] Theory aside, the Labor Proposal would have asked for information generally unhelpful for determining whether an acquisition violates the antitrust laws.

First, the ''worker and workplace safety information'' would have provided no measurable benefit to the agency in its initial determination of whether the proposed merger violates the antitrust laws. To support burdening all filers with providing this information, the NPRM asserted that ''[i]f a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job.'' [38] No evidence, empirical or otherwise, was presented to support this assertion. And I am not aware of any supportive literature and have never seen a court opinion that suggests such evidence indicates competitive harm from a merger under section 7 of the Clayton Act (or any other antitrust violation under the Sherman Act or otherwise). Instead, this proposal seems like an overt way to harass firms with any workplace failure under the guise of an antitrust investigation. As the Supreme Court observed, ''[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the [F]ederal antitrust laws; those laws do not create a [F]ederal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.' '' [39] We simply do not have authority under the HSR Act to require filers to submit information about workplace safety.

Second, the proposed request for Standard Occupational Classification (''SOC'') codes would have been of—at most—limited value because SOC codes by themselves are not sufficient to define a relevant labor market for antitrust purposes.[40] Phrased differently, they are not tethered to the hypothetical monopolist test which has been applied by the agencies and courts in various iterations of the merger guidelines for decades.[41] Depending on the merger, SOC codes may be too broad

[28] *See, e.g.,* Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule,* Matter Number P201200 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.*

[29] 15 U.S.C. 18a(d).

[30] *Id.* (emphasis added).

[31] NPRM, *supra* note 1, at 42197.

[32] *Id.* at 42215. SOC codes are ''Standard Occupational Classification'' codes used by the Bureau of Labor Statistics of the Department of Labor. *See id.* at 42210.

[33] *Id.* at 42215.

[34] *Id.* Filers also had to provide, ''[f]or each identified penalty or finding . . . (1) the decision or issuance date, (2) the case number, (3) the JD number (for NLRB only), and (4) a description of the penalty and/or finding.'' *Id.*

[35] Statement of Chair Lina M. Khan, Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300, and Regarding the FY2023 HSR Annual Report to Congress Commission File No. P859910 at 5–6 (Oct. 3, 2024) (hereinafter Statement of Chair Khan).

[36] Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets,* 94 Ind. L.J. 1031, 1032 (2019).

[37] *Id.* at 1038.

[38] NPRM, *supra* note 1, at 42198.

[39] *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 225 (1993) (quoting *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945)); *cf. Rambus Inc.* v. *FTC,* 522 F.3d 456, 464 (D.C. Cir. 2008) (''Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim. 'Even an act of pure malice by one business competitor against another does not, without more, state a claim under the [F]ederal antitrust laws,' without proof of 'a dangerous probability that [the defendant] would monopolize a particular market.' '' (alteration in original) (quoting *Brooke Grp.,* 509 U.S. at 225)).

[40] *See Comment of U.S. Chamber of Com.,* Doc. No. FTC–2023–0040–0684 at 34 (hereinafter *U.S. Chamber Comment*) (''The data sought by the proposed rules defines labor markets imprecisely at best.'').

[41] *See Fed. Trade Comm'n* v. *Advoc. Health Care Network,* 841 F.3d 460, 468–70 (7th Cir. 2016) (using the hypothetical monopolist test to inform market definition); *Fed. Trade Comm'n* v. *Hackensack Meridian Health, Inc.,* 30 F.4th 160, 167 (3d Cir. 2022) (similar).

to accurately assess labor competition,[42] limiting their predictive value for assessing competitive harm. The NPRM itself appeared to acknowledge the limited value of SOC codes: ''[t]he use of [SOC] codes as a screening tool is not intended to endorse their use for any other purpose, such as defining a relevant labor market.'' [43] In fact, just a few examples demonstrate the limited value SOC codes would provide to the Commission:

> Attorneys working across diverse areas of expertise are broken down into attorneys (23–1011 Lawyers) and . . . well, attorneys, although there is a separate category for Judges, Magistrate Judges, and Magistrates (23–1023), who are likely lawyers, too. To paraphrase Shakespeare (or a character in ''Henry VI, Part 2''), let's kill all the widgets.
>
> To the best of my recollection, the agencies tend to slice the professional salami a little thinner than that when hiring staff.
>
> Physicians fare a little better, although 10 categories of specialist physicians, plus ''family medicine physicians'' and ''physicians, all other'' leave out some specialties (like, say, surgery and ophthalmology) and make no room for subspecialties, which might be of interest if you're hiring a cardiothoracic surgeon to do a quad bypass or an orthopedic surgeon to do a hip replacement (or both, but you care which surgeon does which procedure).[44]

Third, the agencies have not relied upon the Economic Research Service (''ERS'') commuting zones to allege a relevant labor market,[45] and based upon this limited experience, they cannot be considered sufficiently applicable to require all filers to provide the ERS data proposed by the NPRM. Further, the NPRM proposal on ERS commuting zones relied upon data from 2000—yes, 24-year-old data—even though more recent iterations are available.[46] And newer data confirm that the older data fail to reflect current market realities, including the widespread transition to telework.[47] Given that there is no evidence that forcing all filers to provide the proposed labor market information would assist the agencies in determining whether the filed-for acquisition violates the antitrust laws, the Commission lacks authority to request the information under the HSR Act.

Even if one were to assume that the agencies had the authority to request the proposed labor market information, it was nonetheless properly excluded from the Final Rule because it was a solution in search of a nonexistent problem. The agencies have never brought a standalone labor challenge to an acquisition.[48] And this is not for lack of trying. Officials at the Commission,[49] Department of Justice,[50] and State enforcers [51] have stated their desire to focus on harms to the labor market, especially in mergers, since at least 2018, but the expended resources so far have been to no avail.

Granted, the Commission has included tagalong labor claims in addition to traditional theories of harm.[52] And, in a press release, the Commission has taken credit for protecting against harms in the labor market even though the actual complaint being announced by the press release did not allege harm in a labor market.[53] But these few and obscure outliers do not justify the widespread proposal to include labor market information in the Final Rule, especially information (*e.g.,* SOC codes) that has never been used in any of the agencies' filings (litigated or otherwise).

Moreover, the NPRM did not identify any economics literature that justified the request for labor information.[54] As explained by Albrecht *et al.:*

> [D]espite growing interest in the use of antitrust law to address labor monopsony, such efforts are not supported by empirical and theoretical foundations sufficient to bear the weight of these galvanized efforts . . . .
>
> Empirical data concerning the magnitude and impact of labor monopsonies is

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[42] *E.g.,* Jose Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data,* 66 Labor Econ. 101886, 5 (2020). (''[T]he 6-digit SOC is too broad of a market according to the [small significant non-transitory reduction in wage test].'').

[43] NPRM, *supra* note 1, at 42197; *see Comment of International Center for Law & Economics,* Doc. No. FTC–2023–0040–698 at 15 (''Given the systematic misfit between the proposed 'Labor Markets' section and any actual labor markets, given the agencies lack of experience in analyzing the local labor-market effects of proposed mergers, and given the hard questions of when or under what conditions such labor-market effects might be both material and unlikely to covary with product-market effects, we suggest that the screening utility of the new information remains unclear.'').

[44] Daniel J. Gilman, *Antitrust at the Agencies Roundup: Kill all the Widgets Edition,* Truth on the Market (Aug. 4, 2023), *https://truthonthemarket.com/2023/08/04/antitrust-at-the-agencies-roundup-kill-all-the-widgets-edition/* (ellipses in original).

[45] The Commission did not use SOC codes or ERS commuting zones in their complaint allegations that reference concerns in labor markets in its recent litigations. *See* Compl., *In re Tapestry, Inc., & Capri Holdings Ltd.,* No. 9429 (F.T.C. Apr. 22, 2024); *see* Compl., *In re The Kroger Co. & Albertsons Cos., Inc.,* No. D–9428 (F.T.C. Feb. 26, 2024). And the DOJ did not rely upon ERS commuting zones in *United States* v. *Bertelsmann SE & Co. KGaA See* Compl., *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1 (D.D.C. 2022); see also *infra* note 48 (explaining why *Bertelsmann* is not properly considered a case about harm in a labor market, but rather a monopsony input case).

[46] *Comment of Wachtell, Lipton, Rosen & Katz,* Doc. No. FTC–2023–0040–0670 at 8.

[47] *Id.*

[48] Some have considered *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1, 1 (D.D.C. 2022) to be a labor-market case. I disagree. On balance, this was more of a traditional monopsony input case. *Id.* The primary concern was whether there would be sufficient outlets for best-selling books. *Id.* I am also unaware of merger challenges by private parties where the plaintiffs alleged harm in a labor market. *See* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power,* 132 Harv. L. Rev. 536, 571 (2018) (''[W]e [have not] found a reported case in which a court found that a merger resulted in illegal labor market concentration.''). The Commission, as reflected in the SBP, also classifies *Bertelsmann* as an input monopsony case. SBP, *supra* note 5, at section II.B.2, 32 of 406.

[49] *See* Testimony of Fed. Trade Comm'n Chair Joseph Simons, US Congress, *Oversight of the Enforcement of the Antitrust Laws,* Senate Judiciary Committee, 2018, available at *https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws* (staff instructed to ''look for potential effects on the labor market with every merger they review'').

[50] Assistant Attorney General Makan Delrahim, Remarks at the Public Workshop on Competition in Labor Markets 3 (Sept. 23, 2019), *https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition* (''With respect to mergers, the Division also has challenged transactions where the merged firm would likely have the ability to depress reimbursement rates to physicians, including the Anthem/Cigna merger challenge.''); *Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets* (Oct. 29, 2019), available at *https://www.justice.gov/opa/speech/counsel-assistant-attorney-general-antitrust-division-doha-mekki-testifies-house* (''[L]abor competition issues are a high priority for Assistant Attorney General Delrahim and for the Antitrust Division. We have devoted significant resources to enforcement and advocacy in this area recently.''); *id.* (''The Division has also been busy developing and implementing screens to help agency staff detect mergers that are likely to create or enhance monopsony power in labor markets. Over the last 18 months, the Division has developed important new specifications for Second Requests and Civil Investigative Demands to determine whether a transaction will create or enhance labor monopsony. Moreover, the Division has leveraged improved search and review technology to identify labor competition concerns in merger and non-merger investigations.'').

[51] Testimony of Rahul Rao before Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, U.S. Hours of Rep. (Oct. 29, 2019), available at *https://www.govinfo.gov/content/pkg/CHRG-116hhrg45126/html/CHRG-116hhrg45126.htm.* (''Labor is an input, and it is a critical input. It's one that directly affects people's lives in that, when there's a monopoly power, the effect is increase in prices for consumers. When there is monopsony power of a dominant buyer, it decreases wages for workers.'').

[52] *See* Compl., *In re The Kroger Company and Albertsons Companies, Inc.,* No. D–9428 (F.T.C. Feb. 26, 2024).

[53] *See* Press Release, Fed. Trade Comm'n, *FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm* (Jul. 2, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm* (stating that ''[t]his deal isn't about creating efficiencies; it's about crippling the competition, which . . . could lead to layoffs for good paying American manufacturing jobs in nearly a dozen States,'' even though nothing in the complaint suggests any harm in the labor markets); *see also* Compl. *In re* Tapestry, Inc., and Capri Holdings Limited, No. 9429 (F.T.C. Apr. 22, 2024) (discussing labor issues but not alleging violations of the law based upon harm in labor markets).

[54] *See* NPRM, *supra* note 1, at 42197–98.

inconsistent. Evidence on the extent of labor-market power is mixed, with studies reaching divergent conclusions depending on the data, methodology, and markets analyzed.[55]

The NPRM also asserted that alleged increases in concentration justified its proposals, including its proposal for labor information.[56] While concentration levels may have a role in antitrust enforcement (*e.g.,* merger presumptions), general and imprecise observations of increased concentration are a slender reed upon which to base such a significant expansion of HSR authority.[57] These limitations also apply in the labor context. ''Many factors other than concentration can affect wages, such as differences in firm productivity, local labor-market conditions (*e.g.,* urban vs. rural), and institutional factors like unionization rates.'' [58] Further, as explained by Berry *et al.:*

> A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structure-conduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. [S]tudies like this may provide some interesting descriptions of concentration and wages but are not ultimately informative about whether monopsony power has grown and is depressing wages.[59]

In short, the economic literature does not provide any conclusive evidence on the viability or likelihood of merger harms in labor markets that would justify the NPRM's proposals regarding labor information.

Finally, the Commission's HSR rulemaking authority does not extend to heaping burdens upon merging parties as a fishing expedition in the hopes of developing new merger enforcement theories. Instead, if labor market concerns exist, then the Commission should conduct merger retrospectives or utilize its 6(b) authority to investigate the issue. The Commission has done neither, and it cannot rely on the need for general information gathering as a basis for demanding that all merging parties provide this information.

And no doubt, the NPRM's proposal would have come with a substantial and unjustifiable burden upon filers and also the agencies. First, firms do not typically maintain SOC codes in the ordinary course of business.[60] Investing in the expertise to generate and report the codes would have required substantial resources.[61] And smaller businesses who make filings infrequently will be particularly disadvantaged compared to frequent filers. Second, the agencies' staff would have borne the burden of this additional information. Staff have limited experience working with SOC codes, and utilizing the data would have required aid from already extremely overtaxed economist staffers. But shifting resources has an opportunity cost, particularly when Congress has flatlined our budget, significantly limiting staff's capacity to take on new work.[62] Thus it is unclear how the Commission would have found resources to utilize the information. This substantial, unjustified burden to filers and the agencies made it impossible for me to support any rule that included the Labor Proposal.

As a final comment on the Labor Proposal, I recognize that excising it from the Final Rule may not have been the desired outcome for some of my colleagues on the Commission.[63] I

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[55] Brian C. Albrecht et al., Labor Monopsony and Antitrust Enforcement: A Cautionary Tale, ICLE White Paper No. 2024–05–01 at 1 (2024); *see also* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power,* 132 Harv. L. Rev. 536 (2018) (''[W]e have not found a reported case in which a court found that a merger resulted in illegal labor market concentration.''). I also note that a variety of articles sometimes cited to support increased antitrust scrutiny in labor markets fail to justify imposing a request for labor information in HSR filings—nor does the literature necessarily support broader enforcement of antitrust laws in labor markets. *See* Anna Stansbury & Lawrence H. Summers, ''The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy'' at 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), *https://www.nber.org/papers/w27193* (identifying decreased ability to unionize, *not* monopsony power, as the source of declining labor share of income); David Berger et al., *Labor Market Power,* 112 Am. Econ. Rev. 1147 (2022) (at 1 in SSRN version) (''[We] conclude that changes in labor market concentration are unlikely to have contributed to the declining labor share in the United States.''); Chen Yeh at al., *Monopsony in the US Labor Market,* 112 Am. Econ. Rev. 2099, 2099 (2022) (''[T]he growing gap between worker pay and productivity might be more about technological change than about employers' bargaining power—a very different issue than the monopsony problem that antitrust law could (potentially) address.''); *id.* (''[T]he correlation between markdowns and employment concentration is quite modest, both cross-sectionally (across local labor markets) and in the aggregate over time.''); *id.* at 2125 (''[A]t least within manufacturing—cross-sectional and temporal variation in local employment concentration may not necessarily reflect variation in employer market power as measured by markdowns.''); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* at 2 (Oct. 29, 2021) (''The evidence . . . does not support the conclusion that lack of antitrust scrutiny for labor markets has been a major contributor to labor market trends such as the falling labor share or stagnant wage growth. Most mergers do not generate large shifts in concentration and I find no evidence that the number of anticompetitive mergers in labor markets has been increasing over time.''); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals,* 111 Am. Econ. Rev. 397, 397 (2021) (''For unskilled workers, we do not find evidence of differences in wage growth post-merger, irrespective of the change in employer concentration induced by the merger.'').

[56] NPRM, *supra* note 1, at 42179 (''This concentration may reflect decreased competition, which can result in higher prices for consumers, decreased innovation, reduction in output, and *lower wages for workers.*'' (emphasis added))

[57] *See* Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets,* 33 J. Econ. Persp. 69, 75–76 (2019) (increased concentration ''does not prove that competition in that market has declined.''); Carl Shapiro, *Antitrust in a Time of Populism,* 61 Int'l J. Indus. Org. 714, 722–23 (2018) (''Sheer size and market power are just not the same thing.''); Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 268 (4th ed. 2005) (''[P]erhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct.''); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy,* 12 Geo. Mason L. Rev. 1, 10 (2003) (''The [structural] paradigm was overturned because its empirical support evaporated.''); Fiona Scott Morton, *Modern U.S. Antitrust Theory and Evidence Amid Rising Concerns of Market Power and Its Effects,* Wash. Ctr. for Equitable Growth at 24 (May 29, 2019) (''[I]t is widely understood that either vigorous competition could cause concentration to increase or increased concentration could reduce competition.''); Cristina Caffarra & Serge Moresi, *Issues and Significance Beyond U.S. Enforcement,* Mlex Magazine, Apr.–June 2010, at 41, 42–43 (''Most economists would agree that market shares and the HHI often are poor indicators of market power.''); Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics,* 101 Boston Univ. L. Rev. 489 (2021) (''The pursuit of business concentration or bigness for its own sake will injure consumers far more than it benefits small business, the intended beneficiaries.''); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets,* 99 J. Pol. Econ. 977, 978 (1991) (''[O]nce a market has between three and five firms, the next entrant has little effect on competitive conduct . . . . These data show that prices fall when the second and third firms enter and then level off.''); Albrecht et al, *supra* note 55 at 17 n.76 (providing additional supporting citations).

[58] Albrecht et al., *supra* note 55 at 17.

[59] *Id.* at 18 (quoting Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization,* 33 J. Econ. Persp. 44, 57 (2019)).

[60] *See, e.g., Comment of Wachtell, Lipton, Rosen & Katz,* Doc. No. FTC–2023–0040–0670 at 8.

[61] Comment of *American Bar Association's Antitrust Law Section,* Doc. No. FTC–2023–0040–0723 at 10–12.

[62] Given current budgetary constraints at the Commission and reduced hiring, this is unlikely to change either. Fed. Trade Comm'n, *FTC Appropriation and Full-Time Equivalent (FTE) History,* available at *https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation* (demonstrating that the FTC budget went down from 2023 to 2024); Caroline Nihill, *FTC Modernization, Enforcement Efforts Jeopardized by Cuts, Officials Say,* FedScoop (Jul. 10, 2024) (''Commissioner Rebecca Slaughter noted that proposed fiscal year 2025 budget cuts would result in the agency passing 'up important investigations and enforcement matters' in addition to considering furloughs and workforce reductions.''); *see also* Statement of Chair Khan, *supra* note 35, at 5–6.

[63] *See* Statement of Chair Khan, *supra* note 35, at 3–4; *see generally* Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter,

nonetheless commend them for agreeing to this unanimous outcome, and I am equally pleased that the Chair rescinded the most recent Memorandum of Understanding Related to Antitrust Review of Labor Issues in Merger Investigations.[64] These efforts reflect an evolution in thinking by the Commission toward evidence over rhetoric.[65]

III. Drafts of Transaction-Related Documents

Historically, filers have not been required to provide drafts of transaction-related documents with their filings.[66] The production and review of drafts typically occurs during a full-phase investigation, usually after the reviewing agency issues a second request.[67] The NPRM proposed abandoning this practice and requiring that drafts of responsive documents be produced as well.[68] The NPRM explained that requiring the production of drafts would allow staff to have ''documents that reflect pre-transaction assessments of business realities, as opposed to 'sanitized' versions.'' [69] Many commentors on the NPRM opposed this requirement.[70] The Commission ultimately rejected this proposal, which was critical to my vote.

Simply put, the likely burden of producing drafts would have outweighed any perceived benefit. Depending upon the practice of the individuals drafting the documents, and how many people are involved in preparing different sections of the documents, there may be ''dozens or even hundreds of iterative drafts.'' [71] No question, filings would be much larger under the proposal.[72] Forensic collections, that is a full collection of an individual's emails or documents, are incredibly burdensome. They not only require resources from a technical team to collect the materials; they also require time from the individual businesspeople and then, in most cases, counsel, to review the collected materials, identify responsive documents, conduct privilege reviews, prepare more expansive privilege logs, and prepare the documents for production. The status quo for HSR filings, where generally only final versions are produced, typically does not require a forensic collection. But if all drafts became a requirement for all transactions, then forensic collections, with all their costs, would become standard practice for almost all HSR filings.[73] The use of online collaborative workspaces further complicates the issue—and adds burden—because when multiple parties simultaneously revise the same document, it becomes difficult to know which versions constitute drafts.[74]

To defend the proposal, the NPRM argued drafts are more likely to contain a ''smoking gun.'' [75] As evidence to support this claim, the NPRM observed the drafts produced during a second request have more salacious content.[76] But receiving all drafts amounts to building a haystack around a needle. Even if some drafts contain some interesting content, that content does not support the NPRM's proposed expansive production obligations for two reasons. First, earlier drafts of transaction documents sometimes contain information that may not have been finalized, may occasionally reflect incorrect assumptions, and in some situations may be based on iterations of the transaction that were not part of the final, executed agreement.[77] Not every change to a draft document is nefarious. Many of the drafts, compared to the final version, would consist of minor or inconsequential edits, excessive repetition, or incomplete thoughts that will require much effort for staff to review.[78] The dramatic increase in the number of documents associated with each filing would have been sufficiently onerous that staff would be simply unable to scrutinize the differences among drafts as they triage dozens of filings each week.

Second, for each of the alleged ''smoking gun'' drafts identified in a second request by staff, other information contained in the HSR filings already prompted the staff to issue a second request. Phrased differently, the agencies already had enough information, without the drafts, to decide to issue a second request in each of those cases. And beyond bald assertions, the NPRM did not provide any evidence demonstrating the drafts would have made a difference in the decision whether to issue a second request.

In summary, the extensive burden resulting from the production and review by staff of drafts would have outweighed any benefits of the requirement. I struggle to imagine any circumstance in which all draft documents would become a ''necessary and appropriate'' input for the agencies' initial review of proposed mergers, and therefore believe the inclusion of this requirement in any future revision would exceed the Commission's rulemaking authority. I would not have supported a Final Rule that required drafts and am heartened by the removal of this provision.

IV. Prior Acquisitions

The NPRM proposed radical changes to the prior acquisition request in the 2011 Rule. The proposed changes included: (1) expanding the lookback period for reporting prior acquisitions from five years to ten years; (2) eliminating the prior *de minimis* exception that required reporting only for prior acquisitions that ''had annual net sales or total assets greater than $10 million''; (3) requiring the acquired entity to also report prior acquisitions; and (4) requiring that acquisitions of substantially all of the assets of a business be treated the same as acquisitions of securities or non-corporate interests.[79] My vote was conditioned on the Commission eliminating the first two of these proposed changes. I write to explain why I believe it was proper to remove those requirements from the Final Rule

Regarding Amendments to the Hart-Scott-Rodino Rules and Premerger Notification Form and Instructions (Oct. 10, 2024).

[64] Press Release, Fed. Trade Comm'n, FTC, DOJ Partner with Labor Agencies to Enhance Antitrust Review of Labor Issues in Merger Investigations (Aug. 28, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-doj-partner-labor-agencies-enhance-antitrust-review-labor-issues-merger-investigations* (discussing Chair Khan's unilateral decision to enter a memorandum of understanding with the Department of Labor, National Labor Relations Board, and the Department of Justice); Press Release, Fed. Trade Comm'n, Statement on Memorandum of Understanding Related to Antitrust Review of Labor Issues in Merger Investigations (Sep. 27, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/09/statement-memorandum-understanding-related-antitrust-review-labor-issues-merger-investigations* (rescinding the same memorandum of understanding).

[65] Chair Khan and Commissioner Bedoya each write to express continued support for the now jettisoned Labor Proposal. I respect their enthusiasm for the idea. But between the decision to reject the Labor Proposal and rescind the memorandum of understanding, the public should rely more on revealed versus expressed preferences.

[66] NPRM, *supra* note 1, at 42194. One exception has been when a draft was sent to the board of directors. *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See, e.g., U.S. Chamber Comment, supra* note 40, at 21–22.

[71] Comment of Foley & Lardner LLP, Doc. No. FTC–2023–0040–0653 at 11 (hereinafter *Foley Comment*).

[72] *Id.* (''The proposed instruction could potentially increase the size of at least some HSR filings by a factor of ten or twenty.'').

[73] *U.S. Chamber Comment, supra* note 40, at 21–22.

[74] *Id.*

[75] NPRM, *supra* note 1, at 42194.

[76] *Id.*

[77] *See Comment of Wachtell, Lipton, Rosen & Katz,* Doc. No. FTC–2023–0040–0670 at 11–12; *Foley Comment, supra* note 71, at 11–13.

[78] *Id.* at 12.

[79] NPRM, *supra* note 1, at 42203.

and why the Commission should not revisit these proposals in future revisions to the HSR rules.

Prior acquisitions may, in limited circumstances, be relevant to analyzing the filed-for transaction, but consideration of these prior transactions comes with risk of government overreach. A prior acquisition may be relevant to analyzing a filed-for transaction when the competitive effects of the prior acquisition have not yet manifested. For example, if a firm acquired a rival and integration was ongoing or existing contractual terms prevent the effects of the merger from being fully realized, a prior acquisition may help the agencies better understand the dynamics and competitive effects of the filed-for transaction. Once firms have completed integration, realized efficiencies, and implemented any strategies they plan to orchestrate, prior acquisitions provide almost no value [80] to the agencies as they assess the competitive conditions surrounding the filed-for transaction because at that juncture, the condition of the current market will reflect the effects of past transactions.[81]

For the last thirty-seven years, the Commission has determined that five years of prior acquisitions, with a threshold based upon the sales and assets of the entity that was acquired, was justifiable.[82] I do not seek to relitigate thirty-seven years of precedent. The question is whether the rulemaking record contained sufficient evidence to justify the request to reach ten years of prior acquisitions without any size threshold. I conclude that it did not.

The HSR Act limits the information that can be required under the Commission's HSR Rules to ''documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [83] Based upon this text, HSR Rules can seek only the information the agencies need to screen for potential violations of the antitrust laws arising from consummation of the filed-for transaction.[84]

Since 1987, the Commission has required only five years of prior acquisitions.[85] Despite the Commission making no efforts to change this rule for thirty-seven years, the NPRM contended that it needed the additional five years of prior acquisitions ''because the current five-year requirement for prior acquisitions is often insufficient to meaningfully identify patterns of serial acquisitions or a trend toward concentration or vertical integration.'' [86] Further, the NPRM alleged that ''changes to the economy and the varied acquisition strategies of filing parties'' justified ''a more detailed consideration of how numerous past acquisitions, including those in related sectors, affect the competitive landscape of the current transaction under review.'' [87] The Supreme Court has explained that when an agency ''depart[s] from a prior policy,'' ''the agency must show that there are good reasons for the new policy.'' [88] And ''a more detailed justification'' is required when an agency's ''new policy rests upon factual findings that contradict those which underlay its prior policy.'' [89] Beyond bald and conclusory assertions, however, neither the NPRM nor the rulemaking record presented ''good reasons'' that justified the production of ten years of prior acquisitions, let alone ''a more detailed justification'' that is required in this circumstance.[90]

Insofar as the NPRM's proposal required the production of information in order to investigate past transactions—*i.e.,* not the filed-for transaction—under theories of serial acquisitions or otherwise,[91] the Commission lacks the authority to gather that information via an HSR filing. Because neither the NPRM nor the rulemaking record provided evidence that ten years would be relevant to analyzing the effects of the filed-for transaction, the NPRM's proposal did nothing more than attempt an end-run around the HSR Act's reportability requirements.[92] Congress already specified which transactions must be reported to the agencies, and the Commission cannot gather information that does not help the agencies analyze the filed-for transaction.[93] Sensibly, the Final Rule does not adopt the proposed changes to the lookback period. In the SBP for the Final Rule, the Commission explains that the information required for prior acquisitions is limited to what the agencies need to analyze the anticompetitive effects of the filed-for transaction.[94]

The proposed removal of the $10 million threshold also suffered deficiencies. The $10 million threshold has been the threshold for prior acquisitions since the original HSR

[80] As one exception, the agencies have considered the ability to realize efficiencies in past transactions as evidence of the likelihood of achieving efficiencies in the current transaction. But even that information becomes stale and loses probative value at some point.

[81] Dan O'Brien, *The 2023 Merger Guidelines: A Giant Leap in the Wrong Direction,* Consumer Technology Association (Jun. 2024) (''[T]he acquisition history is irrelevant to the current merger except to the extent it provides information about the current merger's likely competitive effects.''); *see also Brown Shoe Co.* v. *United States,* 370 U.S. 294, 332 (1962) (''[T]he statute prohibits a given merger only if the effect of that merger may be substantially to lessen competition.'').

[82] NPRM, *supra* note 1, at 42203.

[83] 15 U.S.C. 18a(d)(1).

[84] *Id.*

[85] Premerger Notification; Reporting and Waiting Period Requirements, 50 FR 38742, 38769 (Sep. 24, 1985) (to be codified at 16 CFR parts 801, 802, and 803).

[86] NPRM, *supra* note 1, at 42203.

[87] *Id.*

[88] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (Scalia, J.).

[89] *Id.; see also id.* at 537 (Kennedy, J., concurring) (''Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.'').

[90] *Id.* at 515. In 1987, when the Commission adopted the rule that required filers to report five years of prior acquisitions, it explained that ''[t]he Commission believes that this change can be made without adversely affecting the agencies' ability to conduct a thorough antitrust review. The Commission believes than an accurate account of the acquiring person's acquisitions over the past five years will adequately put it on notice of possible trends toward concentration in the affected industry.'' Premerger Notification; Reporting and Waiting Period Requirements, 50 FR 38742, 38769 (Sep. 24, 1985) (to be codified at 16 CFR parts 801, 802, and 803). The simple conclusory statements in the NPRM do not qualify as ''a more detailed justification,'' which is necessary here because the Commission now contradicts its previous factual finding that five years was adequate for review.

[91] *See* NPRM, *supra* note 1, at 42203.

[92] The HSR Act identifies which transactions must be reported—*i.e.,* filed—based upon three tests: the commerce test, size of transaction test, and the size of person test. 15 U.S.C. 18a(a); *see also* Fed. Trade Comm'n, *Steps for Determining Whether an HSR Filing is Required* (last visited Oct. 4, 2024), *https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing.*

[93] Under the Administrative Procedure Act, a court reviewing an agency rule can declare it ''unlawful and set aside agency actions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'' 5 U.S.C. 706 (Under the Administrative Procedure Act, a court reviewing an agency rule can deem it ''unlawful and set aside agency actions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right''). ''[N]o matter how important, conspicuous, and controversial the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.'' *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000).

[94] *See* SBP, *supra* note 5, at section II.B.5, 61 of 406 (explaining focus is on reportable transaction).

Rules in 1978.[95] But the NPRM disregarded this forty-six-year history where the threshold, despite inflation, has been the same. To justify abandoning the threshold, the NPRM pointed to ''the Commission's technology acquisition study [that] revealed that between 39.3% and 47.9% of transactions were for target entities that were less than five years old at the time of their acquisition.'' [96] It then stated, without citation, ''[g]iven the relative nascency of these acquired companies, the Commission believes that excluding prior acquisitions of firms that have not yet had the chance to achieve $10 million in net sales or assets does not provide a comprehensive picture of each filer's acquisition strategy.'' [97] Nothing cited by the NPRM suggests that just because an acquisition target is less than five years old, that its sales will be below $10 million. Moreover, nothing in the NPRM explained why the age of targets in ''technology acquisitions'' would be relevant to the whole economy, and yet the proposed rule would have applied universally. Indeed, neither the NPRM nor the rulemaking record presented evidence to justify this dramatic expansion, and without evidence, there is no justification to impose such a requirement on filers.

The NPRM's proposal to double the time period and to remove the $10 million threshold would have added substantial burden to filing parties. The NPRM appeared content with the burden because it provided an expanded ability to analyze non-reportable prior acquisitions, including under theories of serial acquisitions.[98] But as explained, this benefit contravenes the Commission's rulemaking authority. Because the Final Rule must be limited to the Commission's authority, the focus must also be limited to how it assists the agencies' assessment of the filed-for transaction during the initial waiting period. As explained above, the NPRM's prior acquisition expansion would have provided almost nothing that would help the agencies to assess filed-for transactions.

[95] Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450 at 33534 (July 31, 1978).

[96] NPRM, *supra* note 1, at 42203.

[97] *Id.*

[98] The NPRM sought to right the wrongs of the so-called 40 years of failed antitrust enforcement. *See* Exec. Order No. 14,036, Executive Order on Promoting Competition in the American Economy; *see* NPRM, *supra* note 1, at 42203.

V. Additional Considerations

The changes implemented by the Final Rule request information to analyze only the filed-for transaction. The changes are not to authorize the agencies to engage in general fishing expeditions to analyze non-reportable transactions or other allegedly problematic conduct divorced from the effects of the filed-for transaction. The same could not be said for some of the proposals in the NPRM, and those concerns have been rectified in the Final Rule. I understand potential filers may be skeptical that the information gathered in HSR filings may be collected with an eye toward other purposes. In the Final Rule, each of these provisions is now modified to collect only information that is necessary and appropriate to analyze the filed-for transaction.[99]

The Final Rule requires filers to produce new information about officers and directors within the ''stack'' of companies. The ultimate rule differs substantially from the NPRM's proposal.[100] Among the key changes, the request only applies to acquiring persons; filers no longer have to provide information about board observers; and the request is limited to only those entities who generate revenue in the same NAICS codes as the target. This information, like all the information requested by the Final Rule, is designed to help staff better analyze the filed-for transaction. The SBP provides a detailed description of why this requested information helps obtain that goal.[101] The purpose of this revision is not a general fishing expedition; it is to illuminate complicated and overlapping management structures that may impact the competitive effects of the filed-for transaction.

The additional information about minority shareholders and limited partners has also raised concern. The Final Rule again reflects key changes to the proposals in the NPRM. In particular, the final version eliminates the requirement to create an organization chart and eliminates the requirement to disclose limited partners that do not also have management rights. The complicated nature of this request, especially as included in the NPRM, raised confusion and concern of the Commission's purpose for this request. The SBP goes to great lengths to describe—and illustrate via helpful diagrams—why this information will be important to analyzing the filed-for transactions. The purpose is not to pursue or launch general investigations into theories of harm based upon fringe concepts such as common ownership.[102] Nor do I believe it would be possible to construct such theories based upon the information required by the Final Rule. My vote in support of the Final Rule reflects my understanding and belief this information will help the agencies to more quickly understand the competitive dynamics of a filed-for transaction, and nothing more.

[99] To be clear, if a filing demonstrates anticompetitive conduct, such as price fixing, it can prompt another investigation.

[100] *See* app. A.

[101] SBP, *supra* note 5, at section VI.D.3.c., 241–254 of 406.

VI. Conclusion

The Final Rule has been scaled back dramatically from the NPRM. And rightly so. I voted in favor of the Final Rule because of the revisions and outright removal of certain proposals in the NPRM. As modified, I believe the Final Rule is consistent with that statutory grant of authority and will help staff analyze the filed-for transaction and protect consumers without unduly burdening the filing parties.

On a going forward basis, the Commission can and should carefully scrutinize the effect of the Final Rule on our enforcement efforts and on the burden it imposes upon filing parties and the agencies' staff. A thoughtful retrospective will allow the Commission to modify the Final Rule, if necessary, in a principled and evidence-based fashion.

Concurring Statement of Commissioner Andrew N. Ferguson

Today, the Commission updates the Hart-Scott-Rodino Act (''HSR'' or ''the Act'')[1] notification form requirements. It concurrently announces that, after an over three-and-a-half-year wait, it will lift its categorical ''temporary suspension'' of early terminations once the Final Rule goes into effect.[2] Unlike

[102] *See, e.g.,* Einer Elhauge, *Horizontal Shareholding,* 129 Harv. L.R. 1267 (2016). Though beyond the scope of this statement, I do note that no court has endorsed such a theory of harm and it has faced scrutiny in the literature. *See* Matthew Backus, Christopher Conlon & Michael Sinkinson, *The Common Ownership Hypothesis: Theory and Evidence,* Brookings Econ Studies (Jan. 2019), *https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf*; Keith Glovers & Douglas H. Ginsburg, *Common Sense About Common Ownership,* 2018 Concurrences Rev. 28 (Fall 2018); Thomas A. Lambert & Michael E. Sykuta, *Calm Down About Common Ownership, Regulation (F*all 2018).

[1] 15 U.S.C. 18a.

[2] Press Release, FTC, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-*

Continued

the Commission's recent, doomed effort to ban noncompete agreements,[3] Congress undoubtedly gave us authority to promulgate rules governing HSR notification requirements.[4]

The notice of proposed rulemaking (''NPRM'') that launched today's rulemaking would have abused that authority by imposing onerous, unlawful requirements that could not have survived judicial review.[5] But the NPRM also proposed some important, lawful updates to the HSR instructions. Mergers have become increasingly complex since we first adopted an HSR rule nearly five decades ago. The current HSR instructions do not adequately address forms of business association that were rare in 1978. And long experience implementing HSR has taught the Commission which information is most important to fulfilling Congress's mandate to conduct premerger review. The current HSR instructions did not always ensure that the Commission and the Antitrust Division (together, the ''Antitrust Agencies'') had the information they needed to fulfill Congress's intention.

The NPRM, however, was a nonstarter. My colleagues and I engaged in intense negotiations to separate the lawful wheat from the lawless chaff. Today's Final Rule,[6] and the lifting of the early-termination ban, are the culmination of those negotiations. Were I the lone decision maker, the rule I would have written would be different from today's Final Rule. But it is a lawful improvement over the status quo. And although not required for the Final Rule's lawfulness, the Commission wisely accompanies the Final Rule with a lifting of the ban on early termination. I therefore concur in its promulgation.

I. Congress passed HSR in 1976, adding section 7A to the Clayton Antitrust Act of 1914.[7] It requires merging firms to notify the Antitrust Agencies before consummating large mergers, and forbids them from consummating the merger until some period after notifying the Antitrust Agencies. The purpose of this premerger notify-and-wait requirement was to give the Antitrust Agencies the opportunity to investigate mergers and sue to block them. Premerger review dispenses with ''interminable post-consummation divestiture trials . . . [and] advance[s] the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion.'' [8]

Obviously, the Antitrust Agencies need information about the proposed transactions to review them. Congress therefore provided that firms seeking to merge must ''file notification pursuant to rules under subsection (d)(1)'' of the Act.[9] Subsection (d), titled ''Commission rules,'' in turn commands the Commission to, ''by rule,'' ''require that [a merging party's] notification . . . contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [Antitrust Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [10] The Commission may also ''prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.'' [11] ''Taken together, these statutory provisions give the FTC . . . great discretion . . . to promulgate rules to facilitate Government identification of mergers and acquisitions likely to violate [F]ederal antitrust laws before the mergers and acquisitions are consummated.'' [12]

The Commission has regularly deployed the rulemaking power Congress conferred on it in the Act. The Commission published its first final HSR rule two years after Congress passed the Act.[13] In the intervening decades, the Commission has made dozens of changes to the HSR form and instructions.[14] Some changes expanded the scope of information requested.[15] Others narrowed it.[16] Only one faced judicial review. In 2013, an industry association challenged a Commission rulemaking that required parties to file HSR notifications when they transferred most, but not all, of their pharmaceutical patent rights. The D.C. Circuit held that the rule was a proper exercise of the Commission's rulemaking authority and reflected reasoned decision-making.[17] The revised HSR rule survived and took effect, as have many HSR form changes beforehand and afterwards.

II. The Administrative Procedure Act (''APA'')[18] governs our HSR rulemakings.[19] ''The APA 'sets forth the procedures by which [F]ederal agencies are accountable to the public and their actions are reviewed by courts.' '' [20] First, the Rule must be promulgated in ''observance of procedure required by law.'' [21] For a rule like the Final Rule, section 4 of the APA[22] is the ''procedure required by law,'' and it ''prescribes a three-step procedure.'' [23] ''First, the agency must issue a 'general notice of proposed rulemaking,' ordinarily by publication in the **Federal Register**.'' [24] We published the NPRM for the Final Rule on June 29, 2023.[25] ''Second, if 'notice is required,' the agency must give 'interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.' '' [26] We received approximately 721 comments during the 90-day comment period.[27] ''Third, when

temporarily-suspend-discretionary-practice-early-termination.

[3] See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf*; *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).

[4] See *Pharm. Rsch. & Mfrs. of Am.* v. *FTC,* 790 F.3d 198, 208 (D.C. Cir. 2015) (hereinafter ''*PhRMA*'') (''There is no doubt that the Commission's action was taken pursuant to express delegations of authority. The Act grants the FTC the authority to act by rulemaking.'' (citing 15 U.S.C. 18a)).

[5] FTC, Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (June 29, 2023) (hereinafter ''NPRM'').

[6] FTC, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 10, 2024) (hereinafter ''Final Rule''), *https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.*

[7] 15 U.S.C. 18a(a); see also *PhRMA,* 790 F.3d at 199.

[8] H.R. Rep. No. 94–1373, at 11 (1976).

[9] 15 U.S.C. 18a(a).

[10] 15 U.S.C. 18a(d)(1). If the initial notification reveals a potential competitive problem, the Antitrust Agencies may seek additional information, which delays the proposed transaction until the merging parties have complied. See 15 U.S.C. 18a(e).

[11] 15 U.S.C. 18a(d)(2).

[12] *PhRMA,* 790 F.3d at 205.

[13] See 43 FR 33450 (July 31, 1978) (publishing final rules for premerger notification).

[14] See FTC, 16 CFR parts 801 and 803, Premerger Notification; Reporting and Waiting Period Requirements, Statement of Basis and Purpose, 107, n.248 (Oct. 10, 2024) (hereinafter ''SBP''), *https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.*

[15] E.g., 76 FR 42471 (July 19, 2011) (adding Items 4(d), 6(c)(ii) and 7(d) to capture additional information).

[16] E.g., 70 FR 73369 (Dec. 12, 2005) (amending Form and Instructions to reduce the burden of complying with Items 4(a) and (b)).

[17] *PhRMA,* 790 F.3d at, 209–12.

[18] 5 U.S.C. 551 *et seq.*

[19] *PhRMA,* 790 F.3d at 209.

[20] *Dep't of Homeland Security* v. *Regents of the Univ. of Cal.,* 591 U.S. 1, 16 (2020) (quoting *Franklin* v. *Massachusetts,* 505 U.S. 788, 796 (1992)).

[21] 5 U.S.C. 706(2)(D).

[22] *Id.* section 553.

[23] *Perez* v. *Mortgage Bankers Ass'n,* 572 U.S. 92, 96 (2015).

[24] *Ibid.* (quoting 5 U.S.C. 553(b) (cleaned up)).

[25] NPRM, *supra* note 5.

[26] *Perez,* 572 U.S. at 96 (quoting 5 U.S.C. 553(c) (cleaned up)).

[27] SBP, *supra* note 14, at 6, n.4; Press Release, FTC, FTC and DOJ Extend Public Comment Period by 30 Days on Proposed Changes to HSR Form (Aug. 4, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-doj-extend-public-*

the agency promulgates the final rule, it must include in the rule's text a 'concise general statement of its basis and purpose.' '' [28] With today's Final Rule the Commission includes a statement of basis and purpose that thoroughly explains its reasoning for each of the changes contained in the Final Rule. The Commission has therefore satisfied the APA's procedural requirements.[29]

APA section 10's standard of judicial review also imposes substantive limits on the exercise of our authority under HSR. The APA requires courts to ''hold unlawful and set aside agency action'' that is ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law''; ''contrary to constitutional right, power, privilege, or immunity''; or ''in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'' [30] The APA standard generally requires an agency to show two things. First, that it has a lawful grant of authority from Congress to issue the rule [31]—that is, that Congress enacted a statute conferring on the agency power to issue the rule,[32] and that the statute is consistent with the Constitution.[33] Second, that the agency has exercised that grant of authority in a lawful way.[34]

To be sure, the Commission recently has been all too happy to issue rules without valid grants of authority from Congress.[35] But today's Final Rule is plainly authorized by a valid grant of authority from Congress. HSR commands the Commission to issue rules governing the form and contents of premerger-notification filings as it determines are ''necessary and appropriate to enable [the Antitrust Agencies] to determine whether'' mergers ''may, if consummated, violate the antitrust laws.'' [36] Congress further authorized us to ''prescribe such other rules as may be necessary and appropriate to carry out the purposes of'' the Act.[37] The text of HSR therefore unambiguously commands the agency to issue rules of the type we today issue.[38] And I am not aware of any serious arguments that this grant of discretion to prescribe the procedures by which firms notify the Commission of a pending merger—distinct from the power to adjudicate merger challenges[39]—violates the Constitution. We therefore have statutory and constitutional authority to issue the Final Rule.[40]

The question, then, is whether the Commission has lawfully exercised the power Congress unambiguously conferred on it. As a general matter, an agency lawfully exercises power conferred on it by ''engag[ing] in reasoned decisionmaking,'' which requires that the ''agency['s] action . . . rest[ ] 'on a consideration of the relevant factors.' '' [41] We must ''examine the relevant data and articulate a satisfactory explanation for [our] action including a 'rational connection between the facts found and the choice made.' '' [42] This ''standard is deferential'' to the agency's policy choices, so long as ''the agency has acted within a zone of reasonableness and . . . reasonably considered the relevant issues and reasonably explained the decision.'' [43]

Importantly, this standard does not change because we are amending an existing rule. The APA does not require that ''agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.'' [44] ''The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'' [45] When an agency revises an existing regulation, reasoned decision-making ''would ordinarily demand that it display awareness that it *is* changing its position,'' and it must show ''that there

comment-period-30-days-proposed-changes-hsr-form.

[28] *Perez,* 572 U.S. at 96 (quoting 5 U.S.C. 553(c) (cleaned up)).

[29] See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 591 U.S. 657, 685–86 (2020) (explaining that an agency satisfies the procedural requirements of the APA so long as it complies with the ''objective criteria'' of notice, opportunity to comment, and a concise general statement of basis and purpose).

[30] 5 U.S.C. 706(2)(A), (B), (C).

[31] *NFIB* v. *Dep't of Labor,* 595 U.S. 109, 117 (2022) (per curiam) (''Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.'').

[32] *FEC* v. *Cruz,* 596 U.S. 289, 301 (2022) (''An agency, after all, 'literally has no power to act' . . . unless and until Congress authorizes it to do so by statute.'' (quoting *La. Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 374 (1986))).

[33] *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000) (''[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a *valid* grant of authority from Congress.'' (cleaned up) (emphasis added)).

[34] *Allentown Mack Sales & Serv., Inc.* v. *NLRB,* 522 U.S. 359, 374 (1998) (''Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.'').

[35] See *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).

[36] 15 U.S.C. 18a(d)(1).

[37] *Id.* section 18a(d)(2)(C).

[38] *PhRMA,* 790 F.3d at 208 (''There is no doubt that the Commission's action was taken pursuant to express delegations of authority.'').

[39] See, *e.g.,* Compl. ¶¶ 45, 55–59, 72–76, *The Kroger Co.* v. *FTC,* No. 1:24–cv–438 (S.D. Ohio Aug. 19, 2024), ECF No. 1 (challenging constitutionality of FTC administrative proceedings as a violation of Article III of the Constitution).

[40] When the judiciary last reviewed one of our HSR rules, it deferred to our interpretation of various undefined terms of the Act under the doctrine announced in *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1983). See *PhRMA,* 790 F.3d at 204 (''[W]e apply the familiar *Chevron* framework . . .''). The Supreme Court has since overruled *Chevron,* correctly interpreting the APA to require the judiciary to resolve statutory ambiguities without deferring to administrative agencies' views on how to resolve those ambiguities. See *Loper Bright Enter.* v. *Raimondo,* 144 S. Ct. 2244, 2261 (2024) (''On the contrary, by directing courts to 'interpret constitutional and statutory provisions' without differentiating between the two, [the APA] makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus remains the responsibility of the court to decide whether the law means what the agency says.'' (cleaned up)). The Court in *Loper Bright* held, however, that ''[i]n a case involving an agency, . . . the statute's meaning may well be that the agency is authorized to exercise a degree of discretion.'' *Id.* at 2263. The Court gave as examples statutes that delegate ''to an agency the authority to give meaning to a particular statutory term,'' and ''[o]thers'' that ''empower an agency to 'fill up the details' of a statutory scheme, or to regulate subject to the limits imposed by a particular term or phrase that 'leave the agencies with flexibility,' such as 'appropriate' or 'reasonable.' '' *Ibid.* (quoting *Wayman* v. *Southard,* 23 U.S. (10 Wheat.) 1, 43 (1825), and *Michigan* v. *EPA,* 576 U.S. 743, 752 (2015)). HSR expressly authorizes the Commission to promulgate rules ''defin[ing] the terms used in'' the Act, and to issue all rules that are ''necessary and appropriate to carry[ing] out the purposes of'' the Act. 15 U.S.C. 18a(d)(2)(A), (C); see also *id.* 18a(d)(1) (authorizing the Commission to issue rules that are ''necessary and appropriate to enable the [Antitrust Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws''). HSR thus appears to be the sort of discretion-conferring statute that the *Loper Bright* Court suggested may require some modicum of judicial deference to agency decision making. My vote in favor of the Final Rule, however, does not depend on the Commission receiving any judicial deference. I conclude that the Final Rule properly interprets and implements HSR.

[41] *Michigan,* 576 U.S. at 750 (quoting *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983)); see also *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 591 U.S. 1, 16 (2020) (The APA ''requires agencies to engage in reasoned decision-making, and directs that agency actions be set aside if they are arbitrary and capricious.'' (cleaned up)).

[42] *State Farm,* 463 U.S. at 43 (quoting *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 246 (1962)).

[43] *FCC* v. *Prometheus Radio Project,* 592 U.S. 414, 423 (2021); see also *Dep't of Commerce* v. *New York,* 588 U.S. 752, 773 (2019) (Courts ''may not substitute [their] judgment for that of the [agency], but instead must confine [them]selves to ensuring that [the agency] remained within the bounds of reasoned decisionmaking.'' (cleaned up)); *Garland* v. *Ming Dai,* 593 U.S. 357, 369 (2021) (''[A] reviewing court must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.''' (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974)).

[44] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514 (2009) (Scalia, J.).

[45] *Id.* at 515.

are good reasons for the new policy.'' [46] But the APA does not require that the agency show that ''the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.'' [47]

The Final Rule is not perfect, nor is it the rule I would have written if the decision were mine alone. But I believe that it addresses important shortcomings in the current HSR rule, and that it is ''necessary and appropriate'' to enable the Antitrust Agencies to determine whether proposed mergers may violate the antitrust laws.[48]

III. I turn now to the specific provisions of the Final Rule to address whether they are ''necessary and appropriate'' to executing the premerger-review provisions of HSR.[49]

A. The Final Rule requires the disclosure of some information not currently required by the old HSR rule. That information is ''necessary and appropriate'' to the execution of our premerger-review mandate under the Act, and the burdens the disclosure requirements impose on merging firms are justified by the requirements of effective premerger review.

Mergers and acquisitions have become increasingly complex since 1978. The Antitrust Agencies review a large number of deals involving corporate structures that were rare when we adopted our first HSR rule. For example, twenty years ago, only ten percent of acquiring firms were funds or limited partnerships; now, that figure is close to forty percent.[50] Such firms may be shell companies that disclose little public information about their holdings or operations, and, in many cases, have no other assets. But these deals can still present competitive problems through the acquiring person's relationships with other entities. Minority investors, including limited partners, might pull the strings for the acquiring person. And those minority investors might also control entities that compete with the transaction target, creating potential antitrust concerns.[51] The current rule does not require disclosure of investors in entities between the parent company and the acquiring person, nor does it require disclosure of any limited partners, even if they have management rights for the acquiring person. The Final Rule addresses this shortcoming. It requires disclosure of investors that own at least a five percent share in certain entities related to the acquiring person; if those entities are limited partnerships, filers must disclose limited partners that have certain management rights, such as a board seat. But unlike the NPRM, the Final Rule sensibly does not require disclosure of limited partner investors without any management rights.[52] The Final Rule's minority investor disclosures are a reasonable way to address what the Antitrust Agencies fairly determined was a shortcoming of the previous rule, and are necessary and appropriate to determining the competitive effects of a transaction involving limited partnerships or complex corporate structures.[53]

The Final Rule also requires merging firms to disclose information about their potential vertical relationships—that is, whether the two merging firms currently interact with each other at different levels of the supply chain.[54] HSR rules long required disclosure of information about vertical relationships, but a 2001 amendment to the HSR rules removed that requirement.[55] Since 2001, however, the Antitrust Agencies under the leadership of both parties have increased their scrutiny of, and rate of enforcement actions against, vertical mergers. During the Trump Administration, the Antitrust Division litigated the first vertical merger challenge in decades.[56] The Antitrust Agencies released the 2020 Vertical Merger Guidelines, the first major revision to agency guidance on vertical mergers since 1984.[57] The Commission released its 2020 Commentary on Vertical Merger Enforcement, which demonstrated the breadth of Commission investigations and consent agreements involving vertical transactions.[58] And the Commission investigated Illumina's proposed acquisition of Grail, which ultimately led to a successful 2023 Fifth Circuit opinion that effectively blocked the vertical transaction.[59] These efforts continue today. I recently joined a unanimous Commission vote authorizing a complaint to challenge a vertical merger between America's leading mattress supplier and its leading mattress retailer.[60]

Since 2001, however, the Antitrust Agencies have had to rely on limited acquisition-related documents and publicly available information to identify potential vertical-competition concerns. Not every competitive issue shows up in transaction documents or is apparent to Commission staff without experience in the industry. As a result, some anticompetitive transactions have likely slipped through the cracks. The Final Rule will also provide the Antitrust Agencies with other information that they can use to quickly identify (or rule out) potential vertical-competition problems. The new Supply Relationships Description requires filers to identify whether they supply, or are supplied by, the other merging party or its competitors.[61] The buyer must also now indicate whether it has certain types of existing contracts with the seller.[62] This information is ''necessary and appropriate'' to carrying out Congress's command that the Antitrust Agencies review mergers—including vertical mergers—to determine whether they violate the antitrust laws.[63]

The Final Rule requires the disclosure of additional information that will facilitate effective premerger review. Filers must now provide some regularly prepared plans and reports that analyze market shares or competition.[64] Such information, particularly market-share

[46] *Ibid.*

[47] *Ibid* (emphasis in original).

[48] 15 U.S.C. 18a(d)(1).

[49] 15 U.S.C. 18a(d)(1).

[50] See SBP, *supra* note 5, at 25.

[51] See *id.* at 225–27 (''some limited partnerships function as aggregation vehicles that allow private equity or other investor groups to direct the strategic business decisions of the portfolio companies in which they invest.'').

[52] See FTC, 16 CFR part 803—appendix B, Notification for Certain Mergers and Acquisitions: Acquiring Person Instructions, 4–5 (Oct. 10, 2024) (hereinafter ''Acquiring Person Instructions''); SBP at 226–27.

[53] See SBP at 28–31; 15 U.S.C. 18a(d)(1).

[54] FTC, 16 CFR part 803—appendix A, Notification and Report Form for Certain Mergers and Acquisitions: Acquiring Person, 6–7 (Oct. 10, 2024) (hereinafter ''Acquiring Person Form'') (requesting ''other agreements between the acquiring person and target'' and the ''supply relationship description'').

[55] See SBP at 327 (describing past requests for information on vendor-vendee relationships); 66 FR 8680 (Feb. 1, 2001) (HSR rule amendment removing that request).

[56] See *United States* v. *AT&T Inc.,* 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018) (''the Antitrust Division apparently has not tried a vertical merger case to decision in four decades''), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

[57] Press Release, FTC, FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.*

[58] Press Release, FTC, FTC Issues Commentary on Vertical Merger Enforcement (Dec. 22, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-commentary-vertical-merger-enforcement.*

[59] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036 (5th Cir. 2023).

[60] Press Release, FTC, FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm, (July 2, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm.*

[61] See Acquiring Person Instructions at 10.

[62] See Acquiring Person Form at 6.

[63] 15 U.S.C. 18a(d)(1).

[64] See Acquiring Person Instructions at 9.

data, often is not available publicly, nor does it always appear in transaction documents. But market-share data are critical to antitrust enforcement. The Supreme Court many decades ago concluded that mergers of competitors constituting thirty percent or more of the relevant market presumptively violate the Clayton Act.[65] And one of the leading metrics for assessing the competitive effects of a transaction is the Herfindahl-Hirschman Index (HHI),[66] which uses market shares to assess the level of concentration in the relevant market, and the change in concentration that the merger would create.[67] Market-share data therefore are not only ''necessary and appropriate to . . . determin[ing] whether [an] acquisition may, if consummated, violate the antitrust laws.'' [68] They are vital to our enforcement mandate. Requiring the provision of these data also promotes efficiency. If the market shares of the two firms are small, the Antitrust Agencies may swiftly conclude that little further investigation is needed—and, thanks to the concurrent lifting of the unfortunate ban on early termination, may also facilitate the grant of early termination in appropriate cases once the Final Rule becomes effective. And the cost of compliance is modest; parties must collect only documents provided, within the past year, to individuals already subject to other document requests.

In addition, the Overlap Description will require filers to identify whether they compete with the other merging party.[69] Under the current form, parties identify overlaps only through Census Bureau NAICS revenue codes.[70] These codes can be painfully vague or overinclusive, particularly for new sectors. For example, NAICS code 518210 covers ''companies that provide computing infrastructure, data processing, web hosting, and related services'' such as ''data entry services, cloud storage services and cryptocurrency mining.'' [71] Despite a NAICS overlap, many firms within this broad category undoubtedly do not compete. Many other NAICS codes present similar concerns, flagging overlaps where none truly exist. Misleading or overbroad NAICS code overlaps may lead to unnecessary investigations. The Overlap Description will mitigate this problem by permitting filers to explain misleading NAICS code overlaps up front.[72]

Improving the type of information the Commission receives in an HSR notification is likely to improve the merger-review process for many merging parties. If Commission staff believes that a proposed merger merits investigation beyond the initial HSR filing and publicly available information, it must formally open an investigation and obtain clearance for that investigation from the Antitrust Division. Most such investigations show that the transaction poses little risk of competitive harm and are closed without a second request for additional information.[73] Once the investigation is begun, however, the Antitrust Agencies can fall victim to bureaucratic inertia. We, like all law-enforcement agencies, have limited resources. Commencing an investigation and obtaining clearance eats up some of those resources. Commission leadership may therefore resist recommendations to close an investigation quickly even if the early stages of the investigation demonstrate that the merger presents no competitive concerns. Additionally, even investigations that do not lead to a second request can still involve significant cost and delay for merging parties.[74] The information required by the Final Rule will mitigate the risk of false positives. It can reveal that a merger presents no competitive threat at all, and the Commission can avoid crawling down rabbit holes in unnecessary investigations.

Third parties will benefit, too. Commission staff regularly requests voluntary interviews with the merging parties' customers, suppliers, and competitors following an HSR filing. These third parties often cooperate, at the cost of their senior executives' time and legal fees paid to outside lawyers. As these third parties explain the industry and competitive landscape, the lack of any competitive issues can quickly become apparent. By providing the Antitrust Agencies with greater information upfront, the Final Rule can remove the need to burden third parties with such fruitless engagement.

B. The Final Rule must be considered in light of another decision the Commission announces today: the lifting of the suspension on early termination. ''Early termination'' describes the Commission practice of informing merging parties that the Commission is terminating its investigation into the merger before the conclusion of the statutory waiting period, thereby freeing them to consummate the merger immediately. The benefits of early termination are obvious. It reduces financing costs associated with the delay inherent in premerger review, and it allows companies and consumers to realize the benefits of procompetitive mergers more quickly.

Until 2021, Commission staff routinely granted early termination of the initial HSR review period for acquisitions that obviously presented no competitive issues.[75] In February 2021, however, the then-Acting Chairwoman announced a ''temporary suspension'' of early termination due to ''the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic.'' [76] The Antitrust Agencies announced that they ''anticipate[d] the suspension [to] be brief.'' [77]

The ''confluence'' has been over for some time. The pandemic long ago subsided. We have had a permanent Chair since June 2021. And merger filings have slowed to about half the

[65] See *United States* v. *Phila. Nat'l Bank,* 374 U.S. 321, 363–65 (1963) (''Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.'').

[66] *ProMedica Health Sys., Inc.* v. *FTC,* 749 F.3d 559, 568 (6th Cir. 2014) (''Agencies typically use the Herfindahl-Hirschman Index (HHI) to measure market concentration.'').

[67] See *FTC* v. *H.J. Heinz Co.,* 246 F.3d 708, 716 (D.C. Cir. 2001) (''Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.'').

[68] 15 U.S.C. 18a(d)(1).

[69] See Acquiring Person Form at 6.

[70] See SBP at 301. Federal statistical agencies use the North American Industry Classification System to classify businesses. See *id.* at 147, n.296 (citing U.S. Census Bureau, North American Industry Classification System (rev. Sept. 10, 2024), *https://www.census.gov/naics/*).

[71] *Id.* at 300.

[72] See *id.* at 301.

[73] In Fiscal Year 2023, the Commission received clearance to investigate 124 transactions but only issued second requests for additional information for 26 transactions. See FTC and DOJ, HSR Annual Report Fiscal Year 2023, at Exhibit A, Table 1, *https://www.ftc.gov/policy/reports/annual-competition-reports.*

[74] *See* SBP at 89 (''[A]n average of 73 transactions each year . . . were delayed by an additional 30 days and filers were burdened by having to submit additional materials on a voluntary basis even though the investigation did not lead to the issuance of Second Requests. These delays impose costs on the parties and the Agencies, as well as third parties contacted during the extended initial review period.'').

[75] *See id.* at 16, n.22, 95; *see also* Statement of Comm'r Noah J. Phillips and Comm'r Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations, at 2 (Feb. 4, 2021), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-commissions-indefinite.*

[76] Press Release, FTC, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

[77] *Ibid.*

number we saw in 2021 and 2022.[78] Nevertheless, the ''temporary suspension'' persisted. The Final Rule recognizes that this persistence is no longer tenable: ''if the Agencies can determine from review of an HSR Filing that a transaction does not present [competitive concerns], the Agencies can more quickly and confidently determine that the transaction does not require a more in-depth review and may proceed to consummation.'' [79]

Indeed, maintaining the ban would have been absurd in light of the Final Rule's explicit recognition that many transactions pose no competitive risks. Specifically, the Final Rule takes a tailored approach to identify and reduce compliance costs for transactions with lower risks of harm. The Final Rule creates a new category—''select 801.30 transactions''—for acquisitions that almost never present competitive concerns, such as executive compensation agreements. For these deals, filers are excused from many new requirements, including descriptions and some document requests.[80] The Final Rule also recognizes when enough is enough. It tailors the burdens of acquiring and acquired persons, rather than requiring both sides of a transaction to provide the same information. Accordingly, it significantly pares back the requests for acquired persons.[81] Finally, the Final Rule also employs a conditional-request format—a series of if/then queries—to omit certain requirements for acquisitions that do not involve an overlap or vertical relationship.[82] Again, the burden is reduced commensurate with the lower risk of harm.

I am pleased that today the Commission announces that it will lift the categorical ban on early termination and restore this important feature of the merger-review process once the Final Rule becomes effective. It should have happened earlier. I have objected before to the majority's tendency to use our HSR authority to accomplish political objectives.[83] An indefinite ban on early termination was just more of the same. Maintaining the ban after the Final Rule's effective date would have undermined the efficiencies that justify the new information that the Final Rule requires. I am glad it is gone.

IV. The Final Rule must stand on its own feet. An arbitrary-and-capricious rule is not lawful merely because it is better than a bad NPRM. And the NPRM with which the Commission launched today's Final Rule was about as bad as it gets. It was indefensible bureaucratic overreach and could not have survived judicial review. It drew no distinctions between merger filings that presented little risk of competitive harm—such as executive compensation agreements—and those that raised potentially serious concerns. Instead, the NPRM applied the same blunderbuss approach to every filing. To make matters worse, the NPRM proposed a deluge of new onerous requirements the benefits of which could never have justified the burdens imposed on merging parties. In fact, several would have added little or no value to the Antitrust Agencies at all during their brief window to identify transactions that warrant further investigation. Had today's Final Rule been identical to the NPRM, I would not have voted for it.

Although today's Final Rule is a logical outgrowth of the NPRM,[84] it dramatically curtails the NPRM's wild overreach. That curtailment unsurprisingly followed the arrival of Republican Commissioners. A Final Rule identical to the NPRM would have been little more than a procedural auxiliary to the majority's general suspicion of mergers and acquisitions.[85] I would not have voted for it. The changes adopted after the arrival of Republicans to the Commission, however, rescued the Final Rule from the NPRM's lawlessness. The Final Rule, unlike the NPRM, is a reasoned decision about what is ''necessary and appropriate'' to carrying out Congress's premerger-review mandate. It also reasonably addresses shortcomings in the old HSR rule. It therefore satisfies the requirements of both the HSR and APA. None of this was true about the NPRM.

Although the Final Rule's lawfulness does not turn on how much better it is than the NPRM, the changes from the unlawful NPRM demonstrate that the Final Rule is in fact the product of reasoned decision-making, which required us to respond to valid objections about the NPRM's many problems.[86] The most important climbdown from the NPRM is the abandonment of the proposed Labor Markets section.[87] This section would have forced merging parties to classify their employees by job category codes from the U.S. Bureau of Labor Statistics,[88] even though few companies use such codes in the ordinary course of business. And it would have required filers to classify their employees by the U.S. Department of Agriculture's ERS commuting zones, even though companies do not use them in the ordinary course of business and these zones have not been updated since 2000 and are unreliable. The new burden would have been massive, and commenters understandably objected vociferously.[89]

Beyond the major burden and methodological problems, the NPRM's

[78] *See* FTC and DOJ, HSR Annual Report Fiscal Year 2023, at Appendix A (showing 7,002, 6,288 and 3,515 HSR filings for 2021, 2022, and 2023, respectively), *https://www.ftc.gov/policy/reports/annual-competition-reports.*

[79] SBP at 16.

[80] *See id.* at 150–51.

[81] *See id.* at 152.

[82] *See id.* at 152–54.

[83] *See* Dissenting Statement of Comm'r Andrew N. Ferguson, *In the Matter of Chevron Corp. and Hess Corp.,* FTC Matter No. 2410008, at 6 (Sept. 30, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/chevron-hess-ferguson-statement_0930.pdf;* Joint Dissenting Statement of Comm'r Melissa Holyoak and Comm'r Andrew N. Ferguson, *In re ExxonMobil Corp.,* FTC Matter No. 2410004 (May 1, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf.*

[84] *Mock* v. *Garland,* 75 F.4th 563, 583 (5th Cir. 2023) (''After the required NPRM is published in the **Federal Register**, with either the terms or substance of the proposed rule or a description of the subjects and issues involved, the final rule the agency adopts must be a logical outgrowth of the rule proposed.'' (cleaned up)); *Env't Integrity Project* v. *EPA,* 425 F.3d 992, 996 (D.C. Cir. 2005) (''Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former.''); see also *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 160 (2007) (''The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a logical outgrowth of the rule proposed.'' (cleaned up)).

[85] See *infra* pp. 11–14; Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, at 7–19 (Oct. 10, 2024).

[86] See, *e.g., Perez,* 575 U.S. at 96 (''An agency must consider and respond to significant comments received during the period for public comment.''); *Chamber of Commerce of the U.S.* v. *SEC,* 85 F.4th 760, 774 (5th Cir. 2023) (An agency must ''consider all relevant factors raised by the public comments and provide a response to significant points within. Comments the agency must respond to include those that can be thought to challenge a fundamental premise underlying the proposed agency decision or include points that if true and adopted would require a change in an agency's proposed rule.'' (cleaned up)); *Bloomberg L.P.* v. *SEC,* 45 F.4th 462, 476–77 (D.C. Cir. 2022) (''[A]n agency must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision. Indeed, the requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result and respond to relevant and significant public comments. In sum, an agency's response to public comments must be sufficient to enable the courts to see what major issues of policy were ventilated and why the agency reacted to them as it did.'' (cleaned up)).

[87] For a fulsome accounting of the economic and legal errors that infected the Labor Markets instruction, see Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, at 7–13 (Oct. 10, 2024).

[88] NPRM, 88 FR at 42197.

[89] *See, e.g.,* Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC–2023–0040–0723 at 10–12; Comment of Wachtell, Lipton, Rosen & Katz, Doc. No. FTC–2023–0040–0670 at 6–10; Comment of Dechert LLP, FTC–2023–0040–0659 at 3–5.

Labor Markets instructions were a clear abuse of Congress's mandate that the Commission require only information ''necessary and appropriate'' to identify transactions that ''violate the antitrust laws.'' [90] In the nearly half century since Congress passed HSR, the Antitrust Agencies have never successfully challenged any transactions based on labor market theories that could have been identified by the proposed requirements.[91] Until recently, the Antitrust Agencies had never even tried.[92] It is not for a lack of effort. For years, the Commission and Antitrust Division looked for viable labor market theories when investigating transactions that present other competition concerns. The lack of any success lays bare that the Commission never could have justified the immense cost of requiring every single filer to provide extensive labor-related information. Fortunately, my colleagues on the Commission agreed to jettison the Labor Markets section that likely would have doomed the Final Rule.[93]

The Final Rule also eliminates the NPRM's requirement that merging parties provide all drafts of transaction-related ''document[s] that were sent to an officer, director, or supervisory deal team lead(s).'' [94] Commenters rightly pointed out that this requirement would have imposed an undue burden on merging parties,[95] with the American Bar Association noting that this provision could have forced filers to use e-discovery tools to capture every draft.[96] The cost of this information demand is high. But the value to the Antitrust Agencies would have been low. Commission staff would have struggled to comb through a dozen versions of the same document. And insofar as the goal was to catch merging parties giving honest appraisals about the anticompetitive effects of mergers, I doubt demanding drafts would have succeeded. Knowing that such drafts would have to be produced, parties would just create methods to avoid exposing their honest thoughts in documents that are guaranteed to wind up in the hands of enforcers. Demanding drafts of documents in every transaction would have likely increased the expense of merging—of great benefit to antitrust lawyers—without giving the Antitrust Agencies the sort of ''hot docs'' for which they were hoping. The Final Rule appropriately eliminated this requirement for every transaction. The Commission can obtain drafts under the only circumstances it would ever need them—when it opens investigations into those few mergers that the HSR filings reveal present a genuine risk of anticompetitive effects.

Similarly, the Final Rule curtailed several of the NPRM's other burdensome requirements for merging parties to produce documents. It revises the definition of ''supervisory deal team lead'' to limit it to a single individual, eliminating the need to review multiple employees' files to fulfill this request for transaction-related documents.[97] The Final Rule also removes the NPRM's demand for ordinary course plans and reports that were shared with senior executives but not the CEO. Commenters rightfully noted that this would have forced filers to search the files of additional custodians, greatly increasing the burden on merging parties.[98] Instead, the Final Rule limits the request to certain plans and reports directly provided to the CEO or board of directors.[99] Lastly, the Final Rule no longer forces merging parties to produce all agreements between them. The NPRM's requirement to produce every single agreement between the parties would have been burdensome and expensive, but likely would have shed little light on the potential competitive effects of the merger. Some agreements between merging parties might shed light on competitive effects, but the vast majority would tell us nothing. The Final Rule acknowledges this mismatch of costs and benefits, and instead requires parties to note only whether they have particular types of agreements.[100]

The Final Rule makes many additional changes to the abusive NPRM. It makes clear that filers do not need to disclose any individual's role in a ''non-profit entity organized for a religious or political purpose.'' [101] This exception is important. Requiring a Catholic hospital, for example, to disclose its membership rolls merely because it wishes to make a reportable acquisition, without regard to the competitive effects of that acquisition, would raise serious First Amendment concerns.[102] The Final Rule also creates

[90] 15 U.S.C. 18a(d)(1).

[91] The NPRM identified two successful merger challenges with purported labor theories. See NPRM, 88 FR at 42197, n.47. The first, the Antitrust Division's challenge to Penguin Random House's acquisition of Simon & Schuster, did not involve harm to employees of the merging firms. Instead, the alleged harm was in the market for ''publishing rights to anticipated top-selling books.'' *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1, 12 (D.D.C. 2022). The second, the Commission's challenge to Lifespan Corporation's acquisition of Care New England, did not include a labor market count in the complaint. See Compl., *In the Matter of Lifespan Corp. and Care New England Health Sys.,* FTC Matter No. 2110031 (Feb. 17, 2022). Commissioner Bedoya identifies another purported merger challenge based on a labor theory, specifically ''decrease[d] fees paid to blood plasma donors.'' Statement of Comm'r Alvaro M. Bedoya, In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule, File No. P239300, at n.20 (Oct. 10, 2024) (''Statement of Comm'r Bedoya''). But, like the Antitrust Division's *Bertelsmann* challenge, the complaint did not allege harm to the merging parties' employees and therefore could not have been identified by the NPRM's proposed demands for employee information. See Compl., *In the Matter of Grifols S.A. and Grifols Shared Services North America, Inc.,* FTC Matter No. 1810081 (Aug. 1, 2018).

[92] Given the pendency of litigation within the Commission's administrative tribunal, I withhold comment on the strength of the Commission's labor market theory in its challenge to The Kroger Company's acquisition of Albertsons Companies, Inc.

[93] Commissioner Bedoya defends the NPRM's Labor Markets section, reasoning that because the antitrust laws apply to the labor markets, the Commission should screen every single merger subject to HSR for potential labor-competition problems. Statement of Comm'r Bedoya, *supra* n.89, at 2, 4. I do not disagree that the antitrust laws apply to labor markets. But that fact would not have made lawful a rule that was identical to the NPRM. Under ordinary principles of administrative law, the Commission would have to ''examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.'' *State Farm,* 463 U.S. at 43 (cleaned up). That means the Commission would need enough evidence of labor-competition problems in mergers to establish that the labor-markets instruction's onerous costs were reasonable. The evidence marshalled by Commissioner Bedoya—a couple papers and a book—comes nowhere near to clearing that bar. Statement of Comm'r Bedoya at 3. The majority made the same mistake in the Noncompete Rule by relying on sparse social-science research to justify massive regulatory burdens. See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200, at 37–45 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf* (''The handful of academic papers cited in the Final Rule cannot justify its incredible reach and relying on them to prohibit noncompete agreements categorically is a clear error of judgment.'' (cleaned up)); *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954, at *13–14 (N.D. Tex. Aug. 20, 2024) (finding the Noncompete Rule arbitrary and capricious because ''[t]he record does not support the Rule.''). Making that mistake here would have been a ''clear error of judgment'' requiring vacatur under the APA. *Huawei Technologies USA, Inc.* v. *FCC,* 2 F.4th 421, 434 (5th Cir. 2021) (cleaned up).

[94] NPRM, 88 FR at 42214.

[95] SBP at 270–71.

[96] Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC–2023–0040–0723 at 15–16.

[97] *See* SBP at 203–05.

[98] E.g., Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 22, 24.

[99] *See id.* at 274–77.

[100] *See id.* at 291–93.

[101] *See* Acquiring Person Instructions at 5.

[102] *See, e.g., Americans for Prosperity Found.* v. *Bonta,* 594 U.S. 595, 606 (2021) (''This Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.' Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by

Continued

de minimis exclusions, which remove the need for filers to note tiny prior acquisitions, supply relationships, and defense contracts that could not plausibly move the competitive needle.[103] The Final Rule shortens lookback periods for many requests, including prior acquisitions, which limits the burdens associated with digging through dated company records.[104] It removes demands for filers to create some new documents, such as deal timelines and organization charts.[105] And the Final Rule includes other important, burden-reducing changes from the indefensible NPRM, all of which help tailor the Final Rule to only those things that are necessary and appropriate to carry out the requirements of HSR.[106]

I still would prefer a deeper cut. For example, I would not have included the transaction rationale requirement.[107] Our requests for transaction-related documents already cover the same ground, in the parties' own words. I expect most transaction rationales will be heavily lawyered essays designed to ensure that the rationale matches these transaction documents. Indeed, I cannot imagine any lawyer worth his or her salt ever permitting the rationale to depart meaningfully from other parts of the notification. I therefore doubt that the rationales will provide any valuable information that we could not glean elsewhere. Perhaps in some cases parties may use the transaction rationale to explain why a merger that appears suspect at first blush presents no competitive problems. But on the whole, I doubt the transaction rationale will benefit the Antitrust Agencies in the mine run of cases, and I would not impose the burden on every filer.

This example highlights an important consideration the Commission must bear in mind for the future. If post-promulgation experience teaches us that some parts of the rule are not working well, we can and should get rid of them in subsequent rulemakings. We have done that in the past.[108] If, for example, my prediction about the value of the transaction rationale proves correct, we can and should jettison it. The same is true of all provisions of the Final Rule. Although we have satisfied the APA's requirement that the Final Rule be the product of reasoned decision making about what is necessary and appropriate to carry the Act into execution, experience almost certainly will reveal that the Final Rule can be improved. The Commission should abandon whatever parts of the Final Rule do not work.

Considered as a whole, however, the additional information sought in the Final Rule is ''necessary and appropriate'' for the Antitrust Agencies to identify transactions that may violate the antitrust laws.[109] Its benefits are many, and, by comparison, the added burdens are reasonable.

Because the Final Rule represents the Commission's reasoned decision about what is necessary and appropriate to carry into execution the requirements of HSR, and because I believe it lawfully addresses shortcomings in the current HSR rule, I concur in its promulgation.

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the majority.'" (quoting *Roberts* v. *U.S. Jaycees,* 468 U.S. 609, 622 (1984)); *id.* at 608 (forbidding mandatory disclosure of donor rolls unless the disclosure requirement is narrowly tailored to vindicate an important government interest); *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 462–63 (1958) (holding that mandatory disclosure of membership rolls without a sufficient justification violates the First Amendment).

[103] *See* SBP at 153–54.

[104] *See id.* at 151–52.

[105] *See id.* at 6, 293–95.

[106] *See id.* at 6–8, 147–56.

[107] *See* SBP at 253–56.

[108] E.g., 70 FR 73369 (Dec. 12, 2005) (amending Form and Instructions to reduce the burden of complying with Items 4(a) and (b)); SBP at 107, n.248 (summarizing numerous changes to HSR Rule since 1978).

[109] 15 U.S.C. 18a(d)(1).

Exhibit 2

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to Section 7A(d) of the Clayton Act, the Federal Trade Commission (''FTC'' or ''Commission'') is proposing amendments to the premerger notification rules (''the Rules'') that implement the Hart-Scott-Rodino Antitrust Improvements Act (''the Act'' or ''HSR'') and to the Premerger Notification and Report Form (the ''Form'') and Instructions (''Instructions''). These proposed changes would result in a redesign of the premerger notification process through both a reorganization of the information currently required and the addition of new information and document requirements. In addition, these changes would implement the Merger Filing Fee Modernization Act of 2022. The proposed amendments would involve changes to both the Rules and the Instructions, and the Commission proposes explanatory and ministerial changes to the Rules as well as necessary amendments to the Instructions to effect the proposed changes.

DATES: Comments must be received on or before August 28, 2023.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment. File your comment online at *https://www.regulations.gov/* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert Jones, Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024, or by telephone at (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Overview

The Act and Rules currently require the parties to certain mergers and acquisitions to submit premerger notification filings (''HSR Filings'') to the Commission and to the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') (collectively, ''the Agencies''), and to wait a short period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. 18, if consummated and, when appropriate, to seek an injunction in federal court in order to enjoin anticompetitive acquisitions prior to consummation.

Section 7A(d)(1) of the Clayton Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Clayton Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act, exempt classes of transactions that are not likely to violate the antitrust laws, and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

In this notice of proposed rulemaking (''NPRM''), the Commission proposes amending the Rules (Part 801 and Part 803 and its appendices), the Form, and the Instructions to reorganize the information currently required with an HSR Filing and to require additional information critical to the Agencies' initial review. These changes would improve the efficiency and effectiveness of that initial review by providing the information the Agencies need to identify during the initial 30-day waiting period any transaction that may pose competition concerns and potentially narrow the scope of any investigation or reduce the need to conduct a more in-depth investigation of the proposed transaction. These amendments also incorporate the changes to implement the collection of information mandated by the Merger Filing Fee Modernization Act of 2022 (''2022 Amendments'') contained within the Consolidated Appropriations Act, 2023 (Pub. L. 117–328, 136 Stat. 4459) to Section 7(a) of the Clayton Act, 15 U.S.C. 18a. Finally, the Commission proposes explanatory and ministerial changes to the Rules as well as necessary amendments to the Instructions to effect the proposed changes.

Background

The premerger notification program is designed to provide the Commission and the Assistant Attorney General with the information and documentary material necessary and appropriate for an initial evaluation of the potential anticompetitive impact of transactions. The HSR premerger notification program is an essential tool for effective and efficient merger enforcement because it enables the Agencies to investigate acquisitions that may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act and to challenge them before they are consummated and the businesses of the two companies are ''scrambled'' or integrated such that effective post-merger relief is much more difficult. Congress intended that premerger review would ''strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated.'' [1] Premerger notification and review, including a mandatory waiting period during which they cannot consummate the transaction, gives the Agencies the procedural tools necessary to seek to prevent mergers in court before they cause harm or the operations of the firms become so integrated that the premerger state of competition cannot be restored.

The HSR Act and Rules specify that transactions subject to the HSR Act cannot be consummated until 30 days for most transactions (cash tender offers and certain types of bankruptcies observe a 15-day waiting period) [2] after the parties submit an HSR Filing to the Agencies. These statutory deadlines for conducting an initial review are extraordinarily short, and the Agencies must work quickly to determine whether to take steps to prevent the consummation of potentially anticompetitive transactions. During the initial waiting period, the FTC's

[1] H.R. Rep. No. 94–1373 at 5 (1976).

[2] 15 U.S.C. 18a(b)(1)(B); 11 U.S.C. 363(b)(2).

Premerger Notification Office (''PNO'') staff must review each HSR Filing to ensure it complies with the HSR Rules. Staff at both Agencies initially review the information and documents for substantive antitrust concerns, identify and assess the relevant facts, conduct a preliminary antitrust analysis, form preliminary recommendations regarding the investigation's direction, and communicate those recommendations within each Agency. As staff formulate recommendations, they must also initiate clearance from the other agency for those transactions that merit collection of additional information to avoid any duplication of effort and ensure that only one agency investigates the transaction. Senior leadership at the investigating agency must review staff's recommendations and determine whether to issue a Request for Additional Information (''Second Request''),[3] which starts the second phase of the agency's merger investigation. If there are other jurisdictions investigating, Agency staff coordinate with relevant state Attorneys General or international counterparts. All of this must happen during the initial waiting period, which is typically 30 days.

Given the large number of HSR Filings submitted each year, the Agencies must use their resources efficiently and effectively to focus primarily on transactions that may harm competition. Information submitted as part of the HSR premerger notification process is a key starting point, and the information contained in the HSR Filing should be sufficient to allow the Agencies to conduct a thorough but quick evaluation of whether the proposed transaction is one that requires more in-depth investigation through the issuance of Second Requests.

However, after a comprehensive review of the premerger notification process and based on the Agencies' experience conducting in-depth investigations of challenged mergers, the Commission believes that the information currently reported in an HSR Filing is insufficient. In fact, the challenges of premerger review have expanded considerably over time as result of several factors. First, there has been tremendous growth in sectors of the economy that rely on technology and digital platforms to conduct business and, given the dynamic nature of these markets and the importance of acquisition strategies to success and market growth, mergers and acquisitions in these sectors present a unique challenge for the Agencies.[4] In these sectors, some transactions involve firms whose premerger relationship is not clearly horizontal or vertical; rather, merger activity in these sectors increasingly involves firms in related business lines where the Agencies must closely examine the potential for direct competition in the future.

In addition, the very nature of HSR-reportable transactions has become more complex over time. Transaction structures have evolved to include not only the Ultimate Parent Entity (UPE) and its acquiring entity,[5] but also other entities within the acquiring person. For instance, there can be numerous entities between the UPE and acquiring entity, and other investors can have a stake in any one of these entities. As a result, these investors could have a direct role in effectuating the transaction. Individuals or entities other than the those directly involved in the transaction may be able to exert influence over the transaction as well. The existence of subsidies or loans, among other means, may subject the buyer to additional pressures from individuals or entities not directly a party to the reportable transaction. Indeed, the use of board observers has become a more frequent way for outside players to gain direct access to company strategy. Each of these factors can affect a transaction's impact on the competitive landscape.

Consistent with this concern, the Commission's NPRM also proposes changes to implement the collection of information about certain subsidies, as mandated by the 2022 Amendments. Congress determined that foreign subsidies can distort the competitive process or otherwise change the incentives of the firm in ways that undermine competition following an acquisition and are particularly problematic when provided by entities or countries that are strategic or economic threats to the United States.[6] The proposed changes require filing parties to provide information about subsidies received from foreign entities of concern, as discussed in more detail below.

Another factor that has an impact on the complexity of premerger review is that consistent with the law and binding judicial precedent, the Agencies have stepped up efforts to review transactions for *all* their potential competitive impacts. The Agencies are responding to evidence that the U.S. economy is becoming increasingly concentrated overall.[7] This concentration may reflect decreased competition, which can result in higher prices for consumers, decreased innovation, reduction in output, and lower wages for workers. For example, economists have estimated that workers' share of national income has fallen sharply since 2000, such that the workers' share of income today is now 6 to 8 percentage points below the 1980 level.[8] These findings reveal that despite the Agencies' efforts to prevent market consolidation through merger enforcement, many markets suffer from a lack of robust competition and mergers continue to cause harm.[9] As President Biden noted in his Executive Order on Promoting Competition, industry consolidation and weakened competition ''deny Americans the benefits of an open economy,'' with ''workers, farmers, small businesses, and consumers paying the price.'' [10]

[3] 15 U.S.C. 18a(e).

[4] *See, e.g.,* Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms 23–24 (2021).

[5] 16 CFR 801.1(a).

[6] Title II of the Merger Filing Fee Modernization Act of 2022, Public Law 117–329, Div. GG, sec. 201(a)(1) at 3826, 136 Stat. 4459. Congress pointed to remarks of former Commissioner Noah Phillips that ''one area where antitrust needs to reckon with the strategic interests of other nations is when we scrutinize mergers or conduct involving state-owned entities . . . companies that are controlled, by varying degrees, by the state . . . [and] often are a government tool for implementing industrial policies or to protect national security.'' *Id.* at sec. 201(a)(5).

[7] *See, e.g.,* Council of Econ. Advisers Issue Brief, Benefits of Competition and Indicators of Market Power at 4 (Apr. 2016), *https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf* (noting change in revenue share earned by the 50 largest firms in each sector); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms,* 135 Q.J. Econ. 645 (2020) (finding that the top 4 firms in the top sectors of the economy became steadily and significantly more concentrated); Thomas Philippon, *Causes, Consequences, and Policy Responses to Market Concentration,* in *Aspen Economic Strategy Group, Maintaining the Strength of American Capitalism* (2019) (reviewing literature on concentration in the U.S. economy).

[8] *See, e.g.,* Gene M. Grossman and Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share,* 14:1 Ann. Rev. Econ. 93–124 (2022).

[9] *See, e.g.,* Keith Brand, Chris Garmon, Ted Rosenbaum, *In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016,* (forthcoming in J.L. Econ.); Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured,* 134 Q.J. Econ. 51 (2019); Gautam Gowrisankaran, Aviv Nevo, and Robert Town, *Mergers When Prices are Negotiated: Evidence from the Hospital Industry,* 105 Am. Econ. Rev. 172 (2015); Orley Ashenfelter, Daniel Hosken, and Matthew C. Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers,* 57 J.L. & Econ. S67 (2014).

[10] Exec. Order No. 14,036, 86 FR 36,987 (July 14, 2021). *See also* The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-onpromoting-competition-in-the-american-*

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Each year, many of the transactions that are investigated by the Agencies are also investigated by another jurisdiction under their laws and procedures and this adds to the complexity of premerger review. Moreover, the Agencies' experience gained while cooperating with international competition agencies that are conducting their own merger investigation reveals that better information can help address the increased complexity of premerger review and improve its efficiency. As compared to the Form, most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis, including details about the transaction's structure and rationale, horizontal overlaps, vertical and other relationships, and more detailed sales data. Importantly, many other jurisdictions rely on narrative responses from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.

For all these reasons, the Commission believes that the information currently collected by the Form is insufficient for the Agencies to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers. In the Agencies' experience, the current Form does not provide their staff with complete information, including information about the transaction; the filers' business operations and those of any related entities; the premerger relationship between the acquiring person and the acquired entity; individuals or entities that may have influence over the operation of the relevant business lines; the full range of potential competitive implications of the transaction, including effects on workers; and prior acquisitions.

To supplement the shortcomings of HSR Filings, Agency staff must often rely on voluntary cooperation from third parties—customers and competitors of the merging parties—during the initial waiting period to learn basic information about the parties' business dealings and the markets in which they compete. In addition, staff needs to conduct independent research using publicly available information to supplement the modest amount of material submitted with the HSR Filing. Neither of these is reliable as a substitute for information provided by the parties themselves and certified as a complete response. Moreover, the additional effort required to discover basic business information about the parties to the transaction and their premerger relationship is inefficient and can result in both too few in-depth investigations when the information collected does not uncover a significant premerger competitive relationship as well as in-depth investigations that are either too broad or too narrow due to the insufficient detail about those relationships that is currently provided in HSR Filings. The information collected by the parties for their own premerger assessment of the transaction is paramount for the Agencies' antitrust assessment and should be collected and submitted with the initial filing.[11] The Commission therefore proposes additional questions and document requests to provide the Agencies with the information necessary to facilitate their initial review, as discussed further in this NPRM.

At the same time, it has become clear to the Commission that certain required information currently submitted in the Form to aid the Agencies' review is not as helpful as originally intended. For instance, as a general screening tool, reporting revenue by specific dollar amounts for specific industry codes, as defined by the North America Industry Classification System (''NAICS''), does not materially assist the Agencies in their initial review. Reporting revenue ranges for the NAICS codes, would sufficiently convey which lines of business of the filing person generate the most revenue. In addition, the requirement to report manufacturing revenues at a granular level has become less helpful to the Agencies during their initial review as a result of changes made by the United States Census Bureau (''Census'') to one of its revenue classification systems. Finally, the Commission believes that the identification of minority investors in target entities, other than those that will ''roll over'' their investments post-consummation, is of limited use. The Commission therefore proposes deleting these requirements, as discussed in further detail below.

The Commission anticipates that the proposed reorganization and collection of additional information in HSR Filings would greatly enhance the Agencies' ability to complete the review of a reportable transaction in a short period of time, and that they are necessary and appropriate in order for the Agencies to vigorously enforce the nation's antitrust laws. The changes would improve the efficiency and effectiveness of the Agencies' initial review process and reduce the need to rely on the voluntary submission of additional information by the parties and third-party industry sources during the initial waiting period.

Finally, the Commission notes that since the implementation of the Act and Rules in the late 1970s, there has never been a large-scale reorganization of the information required in an HSR Filing. As a result, the Commission is proposing a comprehensive redesign of the premerger notification process through both a reorganization of the information currently required and the addition of new information requirements. As the Agencies are currently working to complete an electronic filing (''e-filing'') platform, the exact structure of the redesign is unclear at this time. The Commission believes that the development and roll-out of an e-filing platform will mark a significant improvement in the submission and processing of HSR Filings, with benefits for both filers and the Agencies. Thus, in this NPRM, the Commission is providing an overview of the proposed reorganization of the information currently required and the proposed new information requirements. The exact form of the redesign and how filers will submit this information will be more clearly laid out in any Final Rule after the Commission reviews all comments to this NPRM.

Proposed Changes to the Rules

I. Proposed Changes to Part 801

A. Section 801.1: Proposed Definitions of ''Foreign Entity or Government of Concern'' and ''Subsidy''

On December 29, 2022, the President signed into law the Consolidated Appropriations Act, 2023, which included amendments to the HSR Act in t2022 Amendments. Public Law 117–328, 136 Stat. 4459. Congress found that foreign subsidies, particularly those from ''countries or entities that constitute a strategic or economic threat

economy/ (noting that ''Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.'').

[11] ''The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.'' 122 Cong. Rec. H30877 (Sept. 16, 1976) (remarks of Rep. Rodino).

to United States interests,'' [12] ''can distort the competitive process by enabling the subsidized firm to submit a bid higher than other firms in the market, or otherwise change the incentives of the firm in ways that undermine competition'' [13] post-merger. The 2022 Amendments require the Commission, with concurrence of the Assistant Attorney General, and in consultation with Chairperson of the Committee on Foreign Investment in the United States, the Secretary of Commerce, the Chair of the United States International Trade Commission, the United States Trade Representative, and heads of other appropriate agencies (''Relevant Agencies''), to promulgate a rule to require persons making an HSR Filing to disclose subsidies received from countries or entities that are strategic or economic threats to the United States. Congress identified those threats as ''foreign entities of concern'' as defined in section 40207 of the Infrastructure and Jobs Act, 42 U.S.C. 18741(a), and required the Commission to collect information about subsidies from these entities as part of HSR Filings.

After conducting its own internal diligence to draft a rule and in consultation with the Relevant Agencies on this topic, the Commission proposes amending § 801.1 to add proposed paragraphs (r)(1) and (2), which define ''foreign entity or government of concern'' and ''subsidy,'' respectively.

1. Section 801.1(r)(1) Foreign Entity or Government of Concern

In the 2022 Amendments, Congress found that foreign subsidies are particularly problematic when granted by countries or entities that constitute a strategic or economic threat to U.S. interests. To identify such subsidies, the Commission proposes new rule § 801.1(r)(1). This proposed rule defines, in proposed subsection (i), subsidies that would have to be disclosed, per Congress' mandate, if received from a ''foreign entity of concern'' as the term is defined in section 40207 of the Infrastructure Investment and Jobs Act (''IIJ Act''), 42 U.S.C. 18741(a). The Commission therefore proposes adopting this definition in § 801.1(r)(1)(i).

The Commission recognizes, however, that the definition of a ''foreign entity of concern'' in the IIJ Act does not explicitly include foreign governments or government agencies. To the extent that HSR filers have received any subsidy directly from the government of a country designated by 42 U.S.C. 18741(a)(5)(C), the Commission believes that including these subsidies would be consistent with Congress' mandate to capture information regarding subsidies when granted by entities posing a strategic and economic threat to the United States. Indeed, the Agencies' understanding of the subsidies' competitive significance would be incomplete without including subsidies granted by foreign governments or government agencies of foreign countries that are covered nations under 42 U.S.C. 18741(a)(5)(C). Therefore, the Commission proposes requiring persons making an HSR Filing to report subsidies received from governments (and their agencies) of foreign countries that are covered nations under 42 U.S.C. 18741(a)(5)(C) in proposed § 801.1(r)(1)(ii).

Finally, the Commission proposes that proposed §§ 801.1(r)(1)(i) and (ii) retain the references to the respective sections of the IIJ Act rather than incorporating the current text of these sections to assure that the proposed rule remains consistent with any subsequent amendments to these sections within the IIJ Act.

2. Section 801.1(r)(2) Subsidy

The 2022 Amendments found that ''[f]oreign subsidies, which can take the form of direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control, can distort the competitive process.'' [14] Thus, the 2022 Amendments require the Commission to collect information about such subsidies to enable the Agencies to determine whether the transaction, if consummated, would violate the antitrust laws. But the statute does not define the term ''subsidy'' and its specific definition has, in fact, been heavily debated and negotiated in both U.S. legislation and international treaties in other contexts. The Commission is mindful of the relevant caselaw and expertise of other U.S. agencies that have developed over decades and, after consultation with the Relevant Agencies on this topic, the Commission proposes the adoption of the definition of subsidies in Title VII of the Tariff Act of 1930 (''Tariff Act''), 19 U.S.C. 1677(5)(B).

The Tariff Act definition of ''subsidy'' is consistent with the definition in the World Trade Organization's Agreement on Subsidies and Countervailing Measures (''SCM''), to which the United States is a party.[15] The Commission believes that because this definition is found both in U.S. law and in the SCM, both U.S. and foreign filing parties, or the law firms that represent them, should be familiar with and able to apply. The Commission also believes this definition is consistent with the Congressional mandate in the 2022 Amendments.

The Commission thus proposes adopting this definition in § 801.1(r)(2) and that the proposed rule retain the reference to the Tariff Act definition rather than incorporating the current text of that section to assure that the proposed rule remains consistent with any subsequent amendments to the Tariff Act.

The incorporation of this proposed change into the Instructions is discussed below at III.E.1.

II. Proposed Changes to Part 803

A. Sections 803.2, 803.5, and 803.10: Adoption of Electronic Filing

The Commission proposes amending §§ 803.2(e) and (f); 803.5(a)(1), (3), and (b); and 803.10(c)(1)(i) and (ii) to eliminate references to paper and DVD filings to physical offices. In March 2020, the COVID–19 pandemic and resulting closures of federal office buildings prevented the Commission and Assistant Attorney General from physically accepting HSR Filings, as had been the practice since the original adoption of the Rules in 1978. As a result, on March 17, 2020, the Agencies began accepting filings electronically.[16] Given the success of that system, the Commission proposes amending the Rules as noted above to adopt electronic filing and eliminate references to paper and DVD filings. This change benefits both the Agencies and filing parties by reducing reliance on the delivery and acceptance of paper filings or DVDs.

B. Section 803.2: Requiring Separate Forms for Acquiring and Acquired Persons

The Commission proposes amending § 803.2(a) and deleting § 803.2(b)(1)(v) so that filing persons that are both the acquiring and acquired person are required to make separate filings. Currently, the Rules, Instructions, and Form permit filers that are both an acquiring and an acquired person in a transaction to file only one Form. This

[12] Title II of the Merger Filing Fee Modernization Act of 2022, Public Law 117–329, Div. GG, sec. 201(a)(2) at 3826, 136 Stat. 4459.

[13] *Id.* at sec. 201(a)(1).

[14] *Id.*

[15] 19 U.S.C. 3511(d)(12).

[16] Press Release, Fed. Trade Comm'n, Premerger Notification Office Implements Temporary e-Filing System (March 13, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/03/premerger-notification-office-implements-temporary-e-filing-system.*

scenario arises most commonly when a seller will receive voting securities of the buyer as consideration for the sale of the target. In such transactions, both the acquisition of the target by the buyer and the acquisition of the buyer's voting securities by the seller may be reportable. Thus, the buyer and seller can each be an acquiring and an acquired person.

Although the Rules permit filers to use one Form for the two transactions in these cases, § 803.2(b)(1)(v) requires that separate responses be provided for Items 5 through 8, one set of responses as the acquiring person and one set as the acquired person. In the Commission's experience, filers that opt to combine the information on a single Form often do not include everything that is required, and these filings are, in fact, very confusing for the Agencies to review. In contrast, when filers choose to submit two separate Forms for such transactions, these filings provide all the required information and in a much clearer format. The Commission thus proposes amending § 803.2(a) and deleting § 803.2(b)(1)(v) to require acquiring persons and acquired persons to submit separate HSR Filings, one as the acquiring person and one as an acquired person, in instances where filers qualify as both. This proposed approach would make the Agencies' initial review much easier by more clearly separating information related to the acquiring person from the acquired person. No new information would be required, and technology allows parties to save copies of filings to reduce the need to input repetitive information.

C. Section 803.5(b): Requiring Draft Agreements or Term Sheets

The Commission proposes amending § 803.5(b) to require filers who have not executed a definitive transaction agreement before making an HSR Filing to submit a draft agreement or term sheet that describes with sufficient detail the scope of the entire transaction that will be consummated after observing the waiting period required by the Act. Section 803.5(b) currently allows filers in any non-§ 801.30 acquisition to file on the basis of ''a contract, agreement in principle or letter of intent to merge or acquire [that] has been executed'' and an affidavit attesting to that execution as well as the good faith intention to complete the transaction. In permitting parties to file before the signing of a definitive agreement, the Commission has relied on the assumption that the filings would ''contain sufficiently definitive information about the transaction to permit accurate analysis.'' [17] In the Commission's experience, however, filings submitted on the basis of bare preliminary agreements, such as an indication of interest, non-binding letter of intent, or agreement in principle (''Preliminary Agreements''), typically do not meet this standard.

Often, Preliminary Agreements reflect only very early discussions between the parties, and since there is currently no obligation to file a draft or final agreement once the HSR Filing is submitted, the Agencies must spend time during the initial waiting period simply trying to discover the scope and timing of the transaction. Moreover, given the preliminary nature of such a filing, the parties have often not yet undertaken a robust analysis of the transaction and therefore have drafted few, if any, documents responsive to Items 4(c) or 4(d) of the current Form. Permitting parties to submit an HSR Filing prior to a complete substantive analysis of the transaction, and at times even before the parties have done diligence on rationales or justifications for the transaction, puts the Agencies at a distinct disadvantage during the initial waiting period in determining what the transaction is and whether it may violate the antitrust laws if consummated.

Additionally, HSR Filings made during the early phases of negotiations may be too uncertain to merit review. The original Statement of Basis and Purpose from 1978 (''1978 SBP'') provides clear guidance that ''[b]ecause of the time and resource constraints upon the agency staffs,'' the Agencies should not expend resources to review transactions so lacking in specifics that they could be considered merely ''hypothetical.'' [18] Yet allowing for the submission of a filing on the basis of a Preliminary Agreement often triggers the use of limited resources for hypothetical transactions, first to discover the full range of potential viable transactions, and then to assess the competitive impact of those potential iterations.

The Commission therefore proposes amending § 803.5(b) to eliminate the ability to submit an HSR Filing on any Preliminary Agreement without providing a term sheet or draft agreement that reflects sufficient detail about the proposed transaction to allow the Agencies to understand the scope of the transaction and to confirm that the transaction is more than hypothetical. The Commission also proposes a corresponding change to the Instructions, as noted at III.C.6. Because detailed term sheets or draft agreements are often prepared in the ordinary course of deal negotiations, the Commission does not expect this change would impose a significant burden on filing parties. However, the Commission recognizes that eliminating the parties' ability to make filings prior to the negotiation of such documents may change the timing of filing and would likely result in more robust filings that would take additional time to prepare. On balance, the Commission believes that this proposed change is consistent with the original intent of the Rules to prevent expending scarce Agency resources on hypothetical transactions and would allow the Agencies to focus on transactions definitive enough to permit accurate analysis.

D. Section 803.8: Translation of Documents

The Commission proposes amending § 803.8 to require submission of English-language translations for all foreign-language documents submitted with the initial HSR Filing. Section 803.8(a) currently provides that parties need not translate foreign-language materials submitted with the initial filing, and that English-language outlines, summaries, extracts, or verbatim translations need only be provided if they already exist. Section 803.8(b), in contrast, has required since 1983 that all foreign-language documents responsive to a Second Request be provided with English translations.[19]

In the Commission's experience since the early 1980s when Rule 803.8 was first adopted, it is no longer enough to require translations of only those foreign-language documents submitted in response to Second Requests because today's HSR Filings quite frequently contain foreign-language materials. These materials typically include key documents, such as the transaction agreements submitted in response to current Item 3(b) of the Form, the relevant financials submitted in response to current Item 4(b), and the documents submitted in response to current Items 4(c) and 4(d) of the Form. Parties often submit foreign-language materials in their HSR Filings with no translation at all or with only rough English-language outlines, summaries, or extracts, which may not accurately and fully convey the contents of the foreign-language document. As a result, the Agencies must either obtain their

[17] 43 FR 33450, 33511 (July 31, 1978).

[18] *Id.* at 33510–511.

[19] The Commission proposed mandatory translation in 1981, 46 FR 38710 (July 29, 1981), and issued a final rule in 1983, 48 FR 34427 (July 29, 1983).

own translations of these documents or miss out on potentially critical information, leaving the Agencies at a disadvantage during their initial review. Given the wide variety of foreign languages the Agencies typically see, it would be very costly for the Agencies to retain translation services for each filing that may contain some foreign-language material. Further, obtaining translations adds significant delay within the already time-constrained initial waiting period and would not allow for filing parties to review the translations for errors. These translations may be especially important for those transactions that report foreign subsidies.

To address this issue, the Commission proposes combining §§ 803.8(a) and 803.8(b). Proposed § 803.8 would therefore be one paragraph requiring that verbatim English translations be provided with all foreign-language materials submitted as part of an HSR Filing or in response to a Second Request. For either an initial HSR Filing or in response to a Second Request, both the original document and the English translation would need to be submitted. Proposed § 803.8 would not require any particular method of translation but would specify that, whatever translation method the parties choose, all verbatim translations must be understandable, accurate, and complete. This proposed change would also be reflected in the Instructions, as specified below in III.A.4.

Although the Commission noted in its 1983 final rulemaking that requiring translations created a burden for filing parties,[20] the Commission now believes that translation tools available to the parties have become more abundant and that these tools provide many options for translation that should significantly reduce the burden of providing translations. Translations of foreign-language documents would greatly benefit the Agencies in allowing staff to know the content of responsive documents submitted in a foreign language. The Commission invites comment on whether there are categories of documents identified in this NPRM that would present a significant burden to translate and what other alternatives might achieve the Commission's goal of being able to understand and assess foreign-language documents while creating less burden for filing parties.

[20] 48 FR 34427, 34440 (July 29, 1983).

E. Section 803.10: Commencement of Waiting Periods

The Commission proposes amending § 803.10(c)(1)(i) to clarify when filings made electronically are to be credited as received by the Agencies. Specifically, the Commission proposes amending this rule to clarify that compliant filings will be credited as received on the date filed if: (i) the electronic submission is complete by 5:00 p.m. Eastern Time; and (ii) such date is not a Saturday, Sunday, legal public holiday (as defined in 5 U.S.C. 6103(a)), or the observed date of such legal public holidays.

These clarifications are consistent with current and historical practices. Of course, historically, the Rules did not need to specify this information, since the receipt of physical filings (either on paper or DVD) required the offices of the Assistant Attorney General and Commission to be open. But because electronic filing platforms can allow submission of filings even when Agency staff is not available to receive the filings, the proposed amendments make clear that filings are only credited as received during regular business hours on regular business days. These proposed changes would provide clarity and thus benefit both filing parties and the Agencies.

F. Section 803.12: Information To Be Updated With Refiling

The Commission proposes amending § 803.12(c) to specify which responses to the items in the proposed Instructions would need to be updated if the acquiring person chooses to withdraw its HSR Filing and refile it (an ''Updated HSR Filing''). The procedure for voluntary withdrawal and refiling permits the acquiring person to restart the initial waiting period, so long as no material changes have been made to the transaction, to provide the Agencies an additional 15 or 30 days (depending on the transaction type) to review the transaction without issuing a Second Request. If the Updated HSR Filing is received within two business days of withdrawal, no new fee is required, but filers currently must provide a new affidavit and certification and update current Item 4 of the Form to provide the Agencies with more recent information that is likely relevant to the continued review.

The Commission proposes eliminating the requirement to provide updated financials, currently required by Item 4(a) and (b), in the Updated HSR Filing. The Commission's experience has shown that, given that the withdraw and refile procedure is completed within approximately one month of the original filing, the financial documents required by Item 4(a) and (b) are rarely changed and therefore updating them is not essential in this phase of its investigation.

The Commission proposes requiring updated Transaction-Related Documents with the Updated HSR Filing, which, as discussed below in III.D.1.a., would comprise the current Item 4(c) and (d) documents subject to proposed modifications of the custodians and clarifications. Documents responsive to current Item 4(c) and (d) typically reflect the most relevant thinking of key individuals with knowledge of the transaction within the acquiring person and are required as part of an Updated HSR Filing. Therefore, the Commission believes these documents are essential to the Agencies' initial antitrust assessment of the transaction.

The Commission also proposes adding two new requirements for the Updated HSR Filing: updated transaction agreements and updated information about subsidies from Foreign Entities of Concern. Though the voluntary withdrawal and refiling process is only available if the transaction is materially the same, the Commission believes that the Agencies would benefit from having a complete understanding of all aspects of the status of and rationale for the transaction, including any changes that have occurred since the day the HSR Filing was submitted. Therefore, the Commission proposes requiring that the Updated HSR Filing include the latest version of the transaction agreements, including the most recent drafts, if a final version has not been executed. The Commission believes this proposed requirement would not impose a substantial burden, since this would be a limited set of documents that should be readily available to the acquiring person.

The Commission also proposes requiring that the Updated HSR Filing include updated information regarding Subsidies from Foreign Entities or Governments of Concern, which is discussed below at III.E.1. The Commission believes that most updated HSR Filings would reflect no new information related to subsidies given the short period of time since the original HSR Filing. However, if new information about subsidies from foreign entities of concern were to become available, the Commission believes that it would be consistent with Congressional intent for the Agencies to have access to this information.

Proposed Changes to the Instructions

III. Part 803 Appendix A and Appendix B

As mentioned above, the Agencies are developing an e-filing platform through which filers would submit information required by the HSR Rules via an online portal. As a result, this NPRM does not contain a new draft Form. Instead, this NPRM presents the information requirements as Instructions for collecting and submitting documents and information required by the HSR Rules. The proposed Instructions reorganize the information to reflect the planned layout of the e-filing platform in development, which would be described in any final rule. Prior to the implementation of the e-filing platform, the proposed Instructions contemplate filers would submit the proposed requests for information and narratives via uploads in a standard format such as PDF and Excel.

The proposed changes to the information that filing parties would be required to provide are detailed below. The Commission recognizes that, in total, these proposed changes would be significant and impose additional burden on some filing parties. Some proposed changes ask for additional information or documents that the Commission believes are in the possession of the filing persons in a form that could be readily uploaded into the e-filing platform. Other proposed changes would require filing parties to compile or generate the requested information specifically for the HSR Filing, such as items requesting narrative responses, which would involve additional effort. As explained below, the Commission has determined that the additional burden associated with these proposed changes is justified because the requested documentary material and information is necessary and appropriate for effective and efficient review of HSR Filings to determine within the initial waiting period whether the transaction may, if consummated, violate the antitrust laws.[21]

Based on the Agencies' experience conducting merger investigations, and as discussed above, the Commission believes that the limited information currently available to the Agencies in the HSR Filing is no longer sufficient to conduct an effective initial screening of the transaction for all types of competitive harm that may result from the transaction. The proposed set of reorganized revenue information, additional documents, and narrative responses would create a much more complete, accurate, and robust basis on which to screen the transaction for the various potential competitive effects, including those that arise from non-horizontal transactions or combinations involving competing employers. These proposals would also provide a more reliable and robust set of information to determine when the transaction does not warrant an in-depth investigation, which often requires a substantial investment of time and resources for both the investigating agency and the merging parties. Based on the Agencies' experience in reviewing and challenging illegal mergers, the proposals target the information that is most relevant and readily available to filing persons and would require it to be presented in a coherent and organized way that will facilitate quick antitrust review by the Agencies during the initial waiting period. But the Commission welcomes comments on the burden associated with and the appropriate balance of having to provide information in the form of revenues, documents, and narratives as part of the proposed changes in this NPRM and invites alternative proposals that meet the objectives described below.

At their core, the proposed changes are motivated by the fundamental purpose of the HSR Act, which is to allow the Agencies, within a short period of time to review the information submitted with the Filing and identify potentially problematic transactions prior to consummation, and, where appropriate, initiate an in-depth review by issuing Second Requests. The fact that the Agencies must conduct their evaluation in an initial waiting period of 15 or 30 days, depending on the transaction type, means that the Agencies must have enough information to consider a wide range of potential effects on competition on an expedited basis. Based on the cumulative learning of the Commission and Assistant Attorney General over the course of decades of investigations, the Commission proposes requiring new information and narratives to address particular areas where the Agencies have found specific deficiencies in the type of information currently required by the Form. In addition, this NPRM would implement changes required by the 2022 Amendments, which are consistent with the need for sufficient information to screen for all types of competitive concerns.

Despite the added burden for filing persons, on balance, the Commission believes that the benefit to the Agencies' merger review would be significant and would help address information asymmetries between Agency staff and the filing persons in the initial waiting period. The Agencies expend substantial resources during the initial waiting period to discover and confirm basic business information about the filing persons, information that is well-known to them but not to Agency staff and is not available from any other source. These information asymmetries have become more acute as deals and companies have become more complex. In the Commission's experience, the inefficiency created by information asymmetries can overwhelm the initial review process, especially when the volume of HSR reportable transactions is high.[22] The proposed changes would also benefit filing persons where information contained in an HSR Filing would demonstrate to the Agencies that the transaction at issue does not need further investigation. Indeed, both the Agencies and filing persons have an interest in ensuring that HSR Filings are robust enough for the Agencies to quickly identify transactions that do not require further investigation during the initial waiting period. It is the Commission's aim to be cognizant of all such interests in proposing the substantial changes contained in this NPRM.

For ease of reference, the Commission includes the following materials regarding the proposed changes in this NPRM:

- An outline of the reorganization contemplated in the proposed Instructions,
- A chart that identifies proposed new locations of the current Items of the Form including whether substantive changes are proposed, and
- A chart of proposed new categories of required information.

These materials appear immediately below.

Proposed Instructions Outline

- General Instructions and Information
- Ultimate Parent Entity Information
  - UPE Details
  - Organization Structure
- Transaction Information
  - Parties
  - Filing Fee
  - Transaction Details

[21] 15 U.S.C. 18a(d).

[22] The Agencies experienced a surge in HSR reportable transactions during 2021 and 2022. For instance, FY 2021 HSR reportable transactions were double those of FY 2020 (1,637 versus 3,520), and in FY 2022, reportable HSR transactions remained high, at over 3,200. The pace and volume of HSR filings (generally two filings per transaction) during that time (in addition to on-going merger investigations) required the Agencies to adjust their HSR review process, including suspending the granting of requests for early termination of the waiting period.

- Transaction Description
- Joint Ventures
- Agreements and Timeline

- Competition and Overlaps
  - Business Documents
  - Competition Analysis
  - NAICS Codes
  - Controlled-Entity Overlaps
  - Minority-Held Entity Overlaps
  - Prior Acquisitions
- Additional Information
  - Subsidies from Foreign Entities or Governments of Concern
  - Defense or Intelligence Contracts
  - Identification of Communications and Messaging Systems
  - Other Jurisdictions
- Certification
- Affidavits

CROSS REFERENCE BETWEEN CURRENT FORM AND PROPOSED INSTRUCTIONS

Current form item	New location	Substantive changes?
Fee Information	Transaction Information/Filing Fee	No.
Corrective Filing	Transaction Information/Transaction Details	No.
Cash Tender Offer	Transaction Information/Transaction Details	No.
Bankruptcy	Transaction Information/Transaction Details	No.
Foreign Jurisdictions	Additional Information/Other Jurisdictions	Yes.
Early Termination	Transaction Information/Transaction Description	No.
Item 1(a)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(b)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(c)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(d)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(e)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(f)	Ultimate Parent Entity Information/Organization Structure	Yes.
Item 1(g)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(h)	Ultimate Parent Entity Information/UPE Details	Yes.
Item 2(a)	Transaction Information/Parties	No.
Item 2(b)	Transaction Information/Transaction Details	No.
Item 2(c)	Transaction Information/Transaction Details	No.
Item 2(d)	Transaction Information/Transaction Details	No.
Item 3(a) (Entities)	Transaction Information/Parties	No.
Item 3(a) (Description)	Transaction Information/Transaction Description	Yes.
Item 3(b)	Transaction Information/Agreements and Timeline	Yes.
Item 4(a)	Ultimate Parent Entity Information/UPE Details	No.
Item 4(b)	UPE Information/UPE Details	No.
Item 4(c)	Competition and Overlaps/Business Documents	Yes.
Item 4(d)	Competition and Overlaps/Business Documents	Yes.
Item 5(a)	Competition and Overlaps/NAICS Codes	Yes.
Item 5(b)	Transaction Information/Joint Ventures	Yes.
Item 6(a)	Ultimate Parent Entity Information/Organization Structure	Yes.
Item 6(b)	Ultimate Parent Entity Information/Organization Structure	Yes.
Item 6(c)(i)	Competition and Overlaps/Minority-Held Entity Overlaps	Yes.
Item 6(c)(ii)	Competition and Overlaps/Minority-Held Entity Overlaps	Yes.
Item 7(a)–(d)	Competition and Overlaps/Controlled-Entity Overlaps	Yes.
Item 8(a)	Competition and Overlaps/Prior Acquisitions	Yes.

PROPOSED NEW REQUIREMENTS AND CATEGORIES OF INFORMATION

Proposed new sections	Location
New Definitions	General Instructions and Information.
Document Log	General Instructions and Information.
Translations	General Instructions and Information.
Organization of Controlled Entities	Ultimate Parent Entity Information/Organization Structure.
Identification of d/b/a or f/k/a names	Passim.
Identification of Additional Minority Interest Holders	Ultimate Parent Entity Information/Organization Structure.
Narrative Describing Ownership Structure of the Acquiring and Acquired Entities	Ultimate Parent Entity Information/Organization Structure.
Organizational Chart for Funds and Master Limited Partnerships	Ultimate Parent Entity Information/Organization Structure.
Identification of Other Types of Interest Holders that May Exert Influence	Ultimate Parent Entity Information/Organization Structure.
Identification of Officers and Directors	Ultimate Parent Entity Information/Organization Structure.
Description of Acquiring Person	Ultimate Parent Entity Information/Transaction Details.
Narrative Describing Transaction Rationale	Ultimate Parent Entity Information/Transaction Details.
Diagram of the Transaction	Ultimate Parent Entity Information/Transaction Details.
Identification of Related Transactions	Ultimate Parent Entity Information/Transaction Details.
Expansion of Transaction Agreements to be Produced	Ultimate Parent Entity Information/Agreements and Timeline.
Production of other Agreements between the Acquiring and Acquired Persons	Ultimate Parent Entity Information/Agreements and Timeline.
Provision of a Transaction Timeline	Ultimate Parent Entity Information/Agreements and Timeline.
Production of Certain Documents of the Supervisory Deal Team Lead(s)	Competition and Overlaps/Business Documents.
Production of Certain Strategic Plans	Competition and Overlaps/Business Documents.
Production of Certain Drafts	Competition and Overlaps/Business Documents.
Organizational Chart of Authors and Certain Recipients of Documents	Competition and Overlaps/Business Documents.
Narrative Describing Horizontal Overlaps	Competition and Overlaps/Competition Analysis.
Narrative Describing Supply Relationships	Competition and Overlaps/Competition Analysis.
Narrative Describing Labor Markets	Competition and Overlaps/Competition Analysis.

PROPOSED NEW REQUIREMENTS AND CATEGORIES OF INFORMATION—Continued

Proposed new sections	Location
Identification of Minority Held Entities with Revenue Overlaps	Competition and Overlaps/Minority-Held Entity Overlaps.
Provision of Geolocation for Certain Locations of Operations	Competition and Overlaps/Controlled-Entity Overlaps.
Identification of Additional Prior Acquisitions	Competition and Overlaps/Prior Acquisitions.
Disclosure of Subsidies from Foreign Entities or Governments of Concern	Additional Information.
Identification of Certain Defense or Intelligence Contracts	Additional Information.
Identification of Communications and Messaging Systems	Additional Information.
Mandatory Disclosure of Foreign Filings	Additional Information.
Voluntary Waivers for International Competition Authorities	Additional Information.
Voluntary Waivers for State Attorneys General	Additional Information.
Statement of Penalties for False Statements	Certification.
Prevention of Destruction of Documents	Certification.

The following discussion of the proposed changes in this NPRM tracks the Proposed Instructions Outline above, explaining which information requirements are materially the same as those currently included in the Form and Instructions, which the Commission proposes changing, and which are proposed new categories of required information.

Throughout the proposed Instructions, references to paper and DVDs have been eliminated, as discussed in II.A. above.

A. General Instructions and Information

The Commission proposes creating a General Instructions and Information section within the proposed Instructions that would largely parallel the General section of the current Instructions but would be significantly reorganized. Within the proposed General Instructions and Information section, the Commission proposes substantive changes to the following sections: Filing Person, Definitions, Responses, and Translations, as detailed below.

1. Definitions and Explanation of Terms

The Commission proposes creating two new definitions and deleting an existing definition within the proposed Instructions.

a. Economic Research Service's (ERS's) Commuting Zones (CZ)

The Commission proposes adding a definition for Economic Research Service's Commuting Zones. As discussed below at III.D.2.c., the Commission proposes new questions that would require the submission of information about the filing person's employees to aid the Agencies' evaluation of the potential impact of proposed transactions on labor markets. These proposed questions would require data to be submitted using the Department of Agriculture's Economic Research Service Commuting Zones for the year 2000. These codes are available at *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.*

b. North American Product Classification System (NAPCS) Data

The Commission proposes eliminating the reporting of 10-digit North American Product Classification System (''NAPCS'') based codes, as discussed in more detail below at III.D.3. Thus, the Commission proposes deleting the NAPCS definition from the proposed Instructions.

c. Standard Occupational Classification

The Commission proposes adding a definition for Standard Occupational Classification. As discussed below at III.D.2.c., the Commission proposes new questions that would require the submission of information about the filing person's employees to aid the Agencies' evaluation of the impact of proposed transactions on competition for workers in labor markets. The proposed definition of Standard Occupational Classification (''SOC'') would require filers to submit data by the first six digits of the relevant code, as published by the United States Bureau of Labor Statistics, available at *https://www.bls.gov/soc/2018/#classification.*

2. Filing

As discussed above at II.B., the Commission proposes amending § 803.2 and deleting § 803.2(b)(1)(v) to require filing persons to submit separate forms when filing as an acquiring and acquired person. The proposed Instructions would also reflect this proposed change.

3. Responses

The Commission proposes replacing the current Responses section with a new Responses section that would provide details on how to provide the information responsive to the proposed new questions. This would include eliminating instructions that are specific to filings made on paper or DVD, see above at II.A. The proposed revised Responses section would also describe the information that filing persons would need to provide in a log of responsive documents and narrative responses to be submitted with an HSR Filing. This information would generally be the same as the information currently required for documents submitted in response to Items 4(c) and 4(d) of the current Form, with two proposed expansions.

First, the Commission proposes requiring the filing person to identify the request(s) to which the document would be responsive. Though the proposed Instructions do not include item numbers at this time, indented and bolded headings in the proposed Instructions should each be considered a separate request. The Commission routinely requires this type of referencing for document submissions pursuant to compulsory process, including in response to a Second Request, and it is extraordinarily helpful in quickly identifying materials responsive to a specific request. This proposed requirement would allow the Agencies to understand the content of filings more quickly by providing a cross-reference between information and documents, facilitating a more efficient review.

Second, the Commission proposes modifying the requirements for identification of authors of documents prepared by third parties. For documents prepared by third parties at the request of a filing person, such as market studies, quality of earnings analyses, confidential information memoranda, management presentations, or board presentations, the Commission proposes that, in addition to providing the name of the third party that prepared the document, the filing person would be required to provide the name, title, and company of the individual within the filing person who supervised the preparation of the document or for whom the document

was prepared. Understanding who, within the filing person, was responsible for overseeing or receiving the work of outside consultants would materially assist the Agencies in identifying key decision-makers for the transaction. In the case of documents that were not commissioned by the filing person, such as subscription market reports, unsolicited banker's books, or documents received from the other filing person, the Commission proposes that the filing person would only be required to list the document title and name of the third party that prepared the document.

These proposed changes would allow the Agencies to quickly assess which documents were key to the decision to pursue the transaction and who within the filing person coordinated the assessment that resulted in that decision.

4. Translations

As noted above at II.D., the Commission proposes amending § 803.8 to require the filing person to submit English translations of all foreign-language documents. The proposed Instructions would also reflect this change.

B. Ultimate Parent Entity Information

The Commission proposes the creation of an Ultimate Parent Entity (UPE) Information section within the proposed Instructions. Currently, information about the structure of the acquiring and acquiring persons is required in various sections of the Form: Item 1 contains basic contact information; Item 2 identifies the ultimate parent entities; Item 3 identifies the acquiring and acquired entities; and Item 6 identifies certain controlled and minority-held entities, as well as certain minority holders of the filing person. The Commission proposes the reorganization, clarification, and expansion of these items to require additional information about the acquiring person and acquired entity(s) in order for the Agencies to receive a more complete picture of the scope of the operations of each, and to identify points of contact for questions about the HSR Filing or potential Second Requests, as well as key interest holders. These proposed changes, discussed below, would fall within the following proposed categories: UPE Details and Organization Structure.

1. UPE Details

The proposed UPE Details section within the proposed Instructions would contain most of the information currently required in Item 1 of the Form. The Commission proposes adding a new Size of Person Stipulation item that would allow the filing person to stipulate that the size of person test is met, when applicable, making it easier for staff to determine that the size of person test is met and streamlining the review process as a result.

The Commission also proposes clarifying which financials are required from acquiring persons who are natural persons. As a result of feedback from filers over the years, the Commission is aware that this item causes confusion. The proposed language in the Instructions would make it clear that natural persons who are acquiring persons must include the annual reports and/or annual audit reports of (1) the acquiring entity(s) and any entity controlled by the natural person whose dollar revenues contribute to a NAICS overlap, and (2) the highest-level entity(s) the natural person controls. It is the intent of the Commission that the Instructions require this information from natural persons, and the proposed change would make that intent clear.

Finally, the Commission proposes requiring all filing persons to identify the person to whom Second Requests should be addressed. Current Item 1(g) requires the identification of two individuals to contact regarding the HSR Filing, and current Item 1(h) requires the identification of an individual located within the United States for the limited purpose of receiving a notice of a Second Request. But the Instructions currently limit application of Item 1(h) to filings made by foreign persons, so for U.S. filers, Second Requests are sent to the person identified in Item 1(g). The Commission now understands that U.S. filing persons sometimes have separate points of contact to answer questions regarding the HSR Filing as compared to questions regarding the receipt of Second Requests. Therefore, the Commission proposes requiring all filing persons to separately provide contacts for questions related to the HSR Filing and Second Requests.

These proposed changes would provide clarity for filing persons, and the Agencies would benefit from receiving more precise information about the UPE.

2. Organization Structure

The proposed Organization Structure section within the proposed Instructions would expand the required information about how the UPE is organized and the identity of other individuals and entities that may have influence over business decisions or access to confidential business information. The proposal would require the identification of entities within the acquiring person or acquired entity, minority shareholders, and other non-controlling entities, and create new requirements to identify certain other interest holders that may exert influence, as well as officers, directors, and board observers.

a. Entities Within the Acquiring Person and Acquired Entity

The proposed Entities Within the Acquiring Person and Acquired Entity section would contain information currently required by Items 1(f) and 6(a) of the Form. Item 1(f) requires the identification of the acquiring entity(s) or acquired entity(s) (as appropriate). Item 6(a) requires the acquiring person to list all entities it controls with total assets of $10 million or more (though foreign entities with no sales into the United States may be omitted). The acquired person currently has the same obligation, but the scope is limited to the acquired entity(s); the acquired person is not required to provide information about entities that are not part of the transaction. The Commission proposes requiring additional information about the reported entities within the filing persons.

First, the Commission proposes requiring filing persons to organize the list of controlled entities by operating company or business. As filing persons have become more complex, an alphabetically or geographically organized list of the controlled entities, which is currently permitted by Item 6(a) of the Form, often does not provide the Agencies with a sufficient overview of the scope of the businesses that the acquiring person and acquired entity(s) control. Some filers currently organize the list of entities held by the acquiring person or acquired entity by operating company, and in the Commission's experience, this is a much more useful way to present the information. Understanding which companies are part of an operating group or portfolio company would allow staff to identify the actual market participants from among all legal entities. The Commission thus proposes requiring that lists of controlled entities be submitted in this manner to aid the Agencies' review during the initial waiting period.

Second, for each such operating company or business, the Commission proposes that filers identify the name(s) by which the company or business does business, as well as any name(s) by which it formerly did business within the three years prior to filing. While it remains important for the Agencies to receive legal entity names, these names

are often unrelated to the names used in the marketplace and may be unfamiliar to industry participants. Being able to connect the legal names to the ''doing business as'' and ''formerly known as'' names would greatly assist the Agencies in understanding the scope of the operations of the acquiring person and acquired entity and allow the identification of other public information about the entity during the initial waiting period.

b. Minority Shareholders and Other Non-Controlling Entities

The proposed Minority Shareholders and Other Non-Controlling Entities section would contain information currently required by Item 6(b) of the Form, which requires identification of holders of 5% or more, but less than 50%, of the acquiring UPE and acquiring entity by the acquiring person, and of the acquired entity(s) by the acquired person. In order to provide the Agencies with a more complete understanding of the individuals or entities that have significant investments in the filing persons, the Commission proposes amending the current Item 6(b) requirements and expanding them to require the identification of additional minority interest holders.[23]

The identification of certain minority holders of the filing persons has been required since the first iteration of the Form in 1978, though the level of detail that has been required has changed over time.[24] Prior to 2011, Item 6(b) only required the identification of holders of minority interests in voting securities. In 2011, Item 6(b) was amended to require the identification of holders of 5% or more but less than 50% of unincorporated entities.[25] The Commission, however, made an exception for limited partnerships and only required the identification of the general partner. At that time, the Commission understood that limited partners had no control over the operations of the fund or portfolio companies and therefore did not see them as essential to the Agencies' initial review.[26] Since that time, the Commission has come to understand that the Agencies would benefit from more complete information about all minority holders of the filing parties, including the identification of limited partners. As a result, the Commission proposes collecting information about minority holders of all entities within the acquiring person that are related to the transaction and requiring the identification of certain limited partners.

The current limitation on providing minority holder information for only the acquiring ultimate parent entity and acquiring entity often prevents the identification of key interest holders. For example, co-investors often do not invest at the UPE or acquiring entity level but may hold a 5% or greater interest in an entity that is in between the UPE and the acquiring entity in the ownership structure. In particular, when funds make acquisitions, it can be the case that more than one fund may be substantively involved in the acquisition, using a variety of corporate or unincorporated entity types. The identification of not only the controlling person but also significant minority investors can be an important component of the Agencies' evaluation of the potential competitive effects of the transaction during the initial waiting period,[27] and obtaining a broader picture of relevant minority investments, where they exist, would aid the Agencies in their assessment of the nature of competitive decision-making within the relevant entity.

In the case of limited partnerships, Item 6(b) currently does not require the identification of limited partners, even if they hold 5% or more. At the time this item was adopted, the Commission understood that limited partners had no control over the operations of the fund or portfolio companies and therefore did not see them as essential to the Agencies' initial review.[28] However, after more than a decade, the Commission now believes that it is inappropriate to make generalizations regarding the role of investors in limited partnership structures. Identification of limited partners can provide valuable information about co-investors and lead to the identification of potentially problematic overlapping investments resulting from the transaction that could violate Section 7.[29] Thus, it is important that the Agencies know the identities of limited partners to understand the transaction in its entirety and to uncover investment relationships that may have competitive significance.

Accordingly, for the acquiring person, the Commission proposes the reporting of certain minority holders of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction. For entities affiliated with a master limited partnership, fund, or investment group, the ''doing business as'' or ''street name'' of that group would also be required.

Under these proposals, minority holders that would have to be reported would include all entities or individuals, including limited partners, that hold 5% or more of the voting securities or non-corporate interests of one of the identified entities. To be clear, the Commission proposes requiring limited partnerships to identify all holders of 5% or more, but less than 50%, to harmonize the requirement for limited partnerships with the requirements for limited liability companies and corporations. The requirement to identify the general partner of a limited partnerships would remain the same.

The Commission acknowledges that these proposed requirements may require significant additional information from investment entities, such as funds and master limited partnerships, for which organizational structures are often more complex. But the Commission believes that the disparate treatment of LLCs as compared to limited partnerships is no longer appropriate. Further, the complexity of these organizational structures makes it all the more important that the filing person provide this information with the HSR Filing. The complex structure of investment entities is not adequately captured by the current Form, and there is often no other source for Agencies to learn of these relationships. Though the introduction of the definition of ''associate'' in 2011[30] provides the Agencies with some valuable information with which to identify competitively significant relationships that exist through related holdings, it does not provide enough detail about all of the potential players involved in the structure of the acquiring person. As a result, the Commission believes that the

[23] The acquisition of a minority position may be reportable under the Act, and failure to make an HSR Filing and observe the waiting period may result in significant civil penalties. 15 U.S.C. 18a(g).

[24] *See* 43 FR 33450 (July 31, 1978); 52 FR 7066 (Mar. 6, 1987); 76 FR 42471 (July 19, 2011).

[25] 76 FR 42471 (July 19, 2011).

[26] Proposed Rules, 75 FR 57110, 57118 (Sept. 17, 2010), adopted in 2011, 76 FR 42471 (July 19, 2011).

[27] 43 FR 33450, 33531 (July 31, 1978).

[28] Proposed Rules, 75 FR 57110, 57118 (Sept. 17, 2010), adopted in 2011, 76 FR 42471 (July 19, 2011).

[29] *See, e.g.,* In re Red Ventures Holdco and Bankrate, FTC Dkt. C–4627 (Nov. 3, 2017) (enforcement action involving overlapping limited partnership holdings); *United States* v. *Dairy Farmers of Am.,* 426 F. 3d 850 (6th Cir. 2005) (DFA stakes in competitors Flav-O-Rich and Southern Belle violated Section 7).

[30] 76 FR 42471 (July 19, 2011).

proposed identification of all minority investors of 5% or more in entities related to the transaction would allow the Agencies to more quickly identify potential competitive issues related to these holdings during the initial waiting period.

To reduce the additional burden associated with these proposed changes, the Commission proposes limiting the information about minority holders collected from the acquired person. Currently, the acquired person must list certain minority interest holders of the acquired entity(s), but this requirement does not distinguish between minority holders that will be cashed out as a result of the transaction, and those that will continue investment after the transaction. On balance, the Commission believes that identifying only the minority holders that would continue to have an interest in the acquired entity(s), directly or indirectly, would provide the most relevant information to the Agencies during the initial waiting period. Therefore, the Commission proposes that the acquired person only be required to identify minority holders of the acquired entity(s) that will continue to hold interest in the acquired entity(s) or will acquire interests in any entity within the acquiring person as a result of the transaction. The Commission recognizes that in certain transactions to which § 801.30 applies, the acquired person might not have this information. In such cases, it would be permissible for the acquired person to indicate that the information is unknown.

c. Other Types of Interest Holders That May Exert Influence

The proposed Other Types of Interest Holders that May Exert Influence section would require the identification of entities or individuals that may have material influence on the management or operations of the acquiring person beyond those with the minority interests discussed above. Because these other interest holders retain the ability to influence decision-making by the acquiring person after the transaction, it is important for the Agencies to know about these relationships during the initial waiting period.

The Commission has long recognized the potential influence of minority holders and the possibility that they may seek to change competitive decisions of the target firm.[31] In the 1978 SBP, the Commission explained that competitors, customers, or suppliers holding a significant interest in one of the parties can raise antitrust concerns.[32] As originally conceived, minority holdings reported in Item 6 were designed to alert the Agencies to situations in which the potential antitrust impact of the transaction does not result solely or directly from the transaction itself, but may arise from direct or indirect shareholder relationships between the parties to the transaction.[33]

As entity structures have evolved and become more complex, the Commission now believes that relationships beyond those created by holding voting securities or non-corporate interests can give rise to similar and significant competitive concerns. For instance, some credit arrangements permit the creditor to exercise rights and influence similar to those of equity holders. Additionally, some equity interests that do not provide rights to vote for the board of directors can, nevertheless, provide rights to vote on or influence business practices of the company, including investments in future product or service lines. Further, contractual arrangements allowing individuals or entities to nominate directors or board observers have proliferated. In addition, some entities outsource the management of operations to third parties that do not beneficially own interests in the company. Each of these relationships can be relevant to understanding the transaction and its potential competitive effects. Without information about these relationships, the Agencies cannot easily identify those transactions where these relationships exist and may affect the competitive dynamics before and after the transaction.

As a result, the Commission proposes that the acquiring person identify certain individuals (other than employees of the acquiring person) or entities that, in relation to the acquiring entity or any entity it directly or indirectly controls or is controlled by, (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. Credit relationships would be limited to creditors that have, or would have, in conjunction with or result of the transaction, provided credit totaling 10% or more of the value of the entity in question. Holders of non-voting securities, warrants, or options would be limited to those the value of which equals or exceeds 10% of the entity or could be converted to 10% or more of the voting securities or non-corporate interests of the company.

The Commission recognizes that the compilation of this information would add to the burden of preparing an HSR Filing for an acquiring person with a complicated investment structure, but it is important that the HSR Filing contain this information because individuals or entities that fall into any of the four categories described above can have a material influence on the operations or strategy of the acquiring person. As with minority investors, these relationships can affect the competition analysis of the transaction, and the proposed identification of these individuals or entities would allow the Agencies to know the identity of those in a position to influence post-merger competition decisions.

d. Officers, Directors, and Board Observers

The proposed Officers, Directors, and Board Observers section would require the identification of the officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity, as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions). This information would allow the Agencies to know of existing, prior, or potential interlocking directorates and to assess the competitive implications of such relationships under both Sections 7 and 8 of the Clayton Act.[34]

Section 8 of the Clayton Act generally prohibits a person from serving as an officer or director of competing corporations, subject to certain categorical and de minimis exceptions. This section of the Clayton Act aims to prevent information sharing and coordination between competitors through a per se ban that prohibits the same individual from serving as an

[31] *See United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 568 (1957) (du Pont's 23% stake in General Motors violated Section 7 by giving it an advantage over other suppliers and thereby resulting in a substantial lessening of competition). In considering the proper remedy, the Supreme Court found that divestiture of only voting rights was insufficient due to the on-going ''special relationship'' could still result in competitive harm. *United States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 332 (1961).

[32] 43 FR 33450, 33531–32 (July 31, 1978).

[33] *Id.* at 33531.

[34] Although Section 8 does not technically apply to unincorporated entities, information sharing and coordination can still raise concerns under Section 1 of the Sherman Act.

officer or director of two competing firms.[35]

In the Agencies' experience, many acquiring persons have board members who also serve on the boards of other companies. As a result, the Agencies often investigate existing board relationships as well as potential interlocks that would result from the transaction as part of its initial review. Section 8 bars interlocks that arise through rights to appoint board members to a competitor[36] or officers or directors serving on the boards of competing companies. Investment entities that acquire board seats across a diverse portfolio of companies may be particularly likely to encounter Section 8 compliance issues via a merger or acquisition.[37]

Currently, filers are not required to disclose the identity of the members of their boards of directors, and this makes it difficult for the Agencies to complete their assessment of potential Section 8 issues during the initial waiting period. Having information about potential interlocking directorates in the HSR Filing would allow the Agencies to take steps to prevent the sharing of board-level confidential information much more quickly. This information is also relevant to the competition analysis of the transaction, as well as concerns about potential gun-jumping, which may violate the Act or Section 1 of the Sherman Act.[38] This is particularly important given that post-merger enforcement of Section 8's *per se* ban can be ineffective after the individual has been privy to the confidential business information of two competitors: Section 8 provides a one-year grace period to remedy an illegal interlock that arises after the individual is elected or chosen to be an officer or director.[39] Moreover, Section 8 does not provide for civil penalties or other monetary relief, only injunctions barring the individual from serving on the two boards.

Information about board observers can also be relevant to the Agencies' analysis of the proposed transaction. Board observers are not subject to the Section 8 ban on interlocking directorates, and yet may have access to the same materials that are shared with officers and directors. In December 2020, the Commission issued an advance notice of proposed rulemaking (''ANPRM'') that, among other things, sought to gather information about sources of influence on corporate decision-making outside the scope of voting securities.[40] The Commission noted the possibility that there are ways to gain influence over a company other than through the acquisition of voting rights, for instance through board observers, and pointed to the increasing use of board observers as part of the governance structure. Because the acquisition of rights to be a board observer is not a reportable event under the HSR Act, the Commission sought information about whether having rights as a board observer provides opportunities to influence an issuer's business decisions.[41]

The Commission received two comments in response to the ANPRM that discuss the role of board observers, and each comment indicated that individuals serving as board observers typically receive the same information as the board of directors, although there may be ways to exclude them from reviewing privileged or competitively sensitive information.[42] In the Commission's experience, board observers have become more prevalent and could be privy to the same information as members of the board. For that reason, information about who these individuals are and whether they also serve as officers, directors, or board observers with other companies is important for understanding other sources of influence on the company's competitive decision-making and whether such individuals could share information between competitors. The Commission believes that having this information available during the initial waiting period would permit the Agencies to take steps to minimize the sharing of information prior to consummation.

The Commission thus proposes that filing persons provide information about the officers, directors, and board observers (or in the case of unincorporated entities, individuals exercising similar functions) of the acquired entity(s) and entities within acquiring person(s), as applicable, for the prior two years, and for each individual, identify any other companies for which those individuals would serve or have served during the prior two years as officers, directors, or board observers. The Commission also proposes requiring the same information for the prospective officers, directors, or board observers of the acquired and acquiring entities after the transaction, as well as for any officers, directors, or board observers of new entities created as a result of the transaction (and, in each case, for unincorporated entities, individuals serving those functions). If it would be impossible to identify the specific officers, directors, and board observers, filers should describe who would have the authority to choose them. Information received through these proposals would help the Agencies identify individuals with the ability to participate in or influence competitively relevant decision-making related to the filing persons or with access to confidential business information, allowing the Agencies to engage in more effective enforcement of the antitrust laws. The Commission believes that this information should be known to or readily accessible by the filing parties, and in some cases already

[35] Like Section 7, Section 8 was designed to ''nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.'' *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

[36] *See, e.g.,* Complaint, *United States* v. *CommScope Inc.,* 1:07–cv–2200 (D.D.C.) (Dec. 6, 2007) *https://www.justice.gov/atr/case-document/complaint-69* (alleging violations of Sections 7 and 8 where buyer also acquired rights to appoint members to the board of its competitor). See also Press Release, U.S. Dep't of Just., Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates, (Jul. 14, 2016). The Department of Justice has announced its intent to reinvigorate Section 8 enforcement, after seven directors resigned from corporate board positions. See Press Release, U.S. Dep't of Just., Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), *https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.*

[37] The Agencies also consider whether the acquiring person would be expanding into the business of the other company that shared a board member such that the two companies would have competing sales in excess of the de minimis amounts permitted by Section 8.

[38] Any sharing of competitive information between or among competitors, including during the pendency of merger review, that results in competitive harm may be a violation of Section 1 of the Sherman Act, or Section 5 of the FTC Act. Complaint, *United States* v. *Gemstar,* cv 1:03–00198 (D.D.C. 2003), *https://www.justice.gov/atr/case-document/complaint-108;* Complaint, In re Insilco Corp., No. C–3783 (F.T.C. 1998), *https://www.ftc.gov/sites/default/files/documents/cases/1998/01/insilcocmp.pdf.*

[39] 15 U.S.C. 19(b).

[40] 85 FR 77042 (Dec. 1, 2020).

[41] ''At the very least, board observers gain insight into an issuer's strategic decision-making, which is not only useful to the investor sponsoring the board observer, but may also be useful to competitors in the market, especially when those board observers also serve as officers or directors of a competitor. Companies likely benefit from interacting with board observers because company management can obtain additional investor insight without having to alter the composition or voting balance on the board.'' *Id.* at 77050.

[42] *See* Am. Bar. Ass'n, Comment on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules ANPRM, 10–11 (Feb. 1, 2021), *https://www.regulations.gov/comment/FTC-2020-0086-0015;* Comput. & Commc'n Indus. Ass'n, Comment on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules ANPRM, 11 (Jan. 26, 2021), *https://www.regulations.gov/comment/FTC-2020-0086-0002.*

collected as part of an incorporated entity's antitrust compliance program.

C. Transaction Information

The Commission proposes the creation of a Transaction Information section within the proposed Instructions. Currently, information about the transaction is required in several sections of the Form: the initial portion of the current Form requires information about the filing fee and whether early termination of the waiting period is requested; Item 2(a) requires identification of the ultimate parent entities of the acquiring and acquired persons; Item 2(b) identifies the type of transaction; Item 2(c) identifies the § 801.1(h) threshold that will be crossed; Item 2(d) seeks information about the percentage and value of the voting securities, non-corporate interests, and/or assets to be required; Item 3(a) asks for identification of the acquiring and acquired persons and entities, as well as a description of the transaction; Item 3(b) requires the listing and attaching of the most recent transaction agreement, or letter of intent; and Item 5(b) requires information about joint ventures and formations. The Commission proposes the reorganization, clarification, and expansion of these items to require information that will aid the Agencies in understanding the totality of the transaction during the initial waiting period. These proposed changes, discussed below, would require information about the transaction to be reported in the following proposed categories: Parties, Filing Fee, Transaction Details, and Transaction Description.

1. Parties

The proposed Parties section within the proposed Instructions would require the identification of the acquiring and acquired persons and the acquiring and acquired entities. This information is currently collected in Item 3(a) of the Form, and the Commission is not proposing any material changes to this requirement.

2. Filing Fee

The proposed Filing Fee section within the proposed Instructions would require identification of the total filing fee required for the transaction and information about the payment, including identification of the paying entity and the Electronic Wire Transfer confirmation number.[43] This information is currently collected in the Fee Information section of the Form, and the Commission is not proposing any material changes to this requirement.

3. Transaction Details

The proposed Transaction Details section within the proposed Instructions would require the same information currently required by Items 2(b)–2(d) of the Form that detail whether the transaction involves the acquisition of voting securities, non-corporate interests or assets, and the approximate value of each, as well as whether a notification threshold is crossed. The Commission is not proposing any material changes to these requirements.

4. Transaction Description

The Commission proposes creating a Transaction Description section within the proposed Instructions to reorganize information currently required in the Transaction Description portion of Item 3(a) of the Form, and to expand the required information, as described below.

a. Business of the Acquiring Person

The Commission proposes requiring the acquiring person to describe its business operations. Currently, Item 3(a) of the Form requires filing persons to briefly describe the transaction, including whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Filers must also describe the business operation being acquired or what the assets being acquired comprise.[44] Although this information helps the Agencies understand what is proposed to be acquired, it does not provide any insight into the full range of business operations or other entities involved in the transaction on the part of the acquiring person. In the Commission's experience, understanding the scope of the acquiring person's business operations is critically important to determining whether the transaction poses any potential competition concern. Although this information is well known to the acquiring person, it is often not easily or quickly collected and confirmed from public sources during the initial waiting period.

As a result, the Commission proposes requiring the acquiring person to briefly describe the business operations of all entities within the acquiring person to provide a clear overview of all aspects of the acquiring person's pre-transaction business to facilitate the Agencies' antitrust review during the initial waiting period. Many businesses have pre-prepared descriptions of their operations for use in press releases, marketing materials, and investor materials. Unlike the requirement to describe the entities or assets to be acquired, which would apply to both the acquiring and acquired person, the requirement to describe business operations would be limited to the acquiring person.

b. Business of the Acquired Entity

As noted above, Item 3(a) of the Form requires filing parties to briefly describe the transaction, including whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Filing persons must also describe the business operation being acquired or what the assets being acquired comprise. The Commission is not proposing any material changes to this requirement.

c. Non-Reportable UPE(s)

Item 2(a) of the Form currently requires the identification of any UPE that is not required to file, and the Commission is not proposing any material changes to this requirement.

d. Transaction Description

Item 3(a) of the Form currently requires a brief description of the transaction. The Commission is not proposing any material changes to this requirement.

e. Transaction Rationale

The Commission proposes adding a new requirement that filing persons provide a narrative that would identify and explain each strategic rationale for the transaction. As helpful as the documents responsive to current Items 4(c) and 4(d) of the Form can be, they do not always convey each filing person's cumulative views on the rationale(s) for the transaction. Indeed, such documents (when they are submitted and when they discuss rationales) often contain differing, and at times conflicting or mutually exclusive, statements regarding the transaction depending on when they were prepared or by whom. For example, different members of the deal team might have different perspectives on the potential motivations for the transaction at different times, and the submitted documents do not resolve the filing person's ultimate thinking regarding the topic. Since documents responsive to Items 4(c) and 4(d) do not consistently provide an overview of the rationale(s) for the transaction, it would be of immense value for the Agencies to have during the initial waiting period a

[43] If electronic wire transfers are not available to the filing party, the Instructions would continue to provide instructions for paying by check.

[44] 81 FR 60257 (Sept. 1, 2016).

statement that discusses each the strategic rationale(s) from the perspective of each filing person.

The Commission thus proposes that the acquiring and acquired person be required to submit a narrative describing all strategic rationales for the transaction, including, for example, those related to competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other reporting person, expansion into new markets, hiring the sellers' employees (so-called acqui-hires), obtaining certain intellectual property, or integrating certain assets into new or existing products, services or offerings. The Commission also proposes that the filing person identify which documents submitted with the HSR Filing support the rationale(s) described in the narrative. This proposed requirement would help ensure that the provided narrative is grounded in the filers' ordinary-course documents and not mere advocacy designed to portray a favorable view of the transaction. Moreover, any cited documents that support the narrative would also provide additional context for the Agencies as they assess the parties' stated rationale(s) in relation to any potential competitive consequences of the transaction. Understanding the business reason(s) for pursuing the transaction can materially affect the course and direction of the Agencies' antitrust review during the initial waiting period.

f. Transaction Diagram

The Commission proposes a new requirement that the filing persons provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction. The brief narrative currently required in Item 3(a) of the Form does not require filers to explain all the relevant entities or identify steps involved in the transaction and their sequence. As a result, the Agencies frequently request a more detailed account of these steps during the initial waiting period, but these submissions are voluntary, not uniform in their detail, and often lack important aspects of the transaction that may bear on the competitive analysis and the determination of whether the transaction warrants in-depth review. In the Commission's experience, particularly in the case of complex or multi-step transactions, diagrams are generally more helpful than simple narratives in conveying the relationships of the relevant entities and the deal structure.

The Commission's proposal that filing persons submit a diagram of the deal structure along with a corresponding chart explaining the entities involved in the transaction would further assist the Agencies' conceptualization of the transaction and save considerable time in obtaining basic information about the entities involved and how the transaction would affect the operations of those entities. Such diagrams are often prepared by companies in the ordinary course of business for other purposes, such as for transaction diligence requirements.

g. Related Transactions

While Item 3(a) of the current Form asks parties to indicate whether there are additional filings related to the transaction, filers sometimes overlook this requirement. The proposed Instructions would clarify that filing persons must identify related transactions. The proposed Instructions would also provide a list of common circumstances in which multiple filings are required to guide filing parties in their responses. These proposed changes would provide clarity for both filing persons and the Agencies.

h. Early Termination

The proposed Early Termination section would ask whether the filing party requests early termination of the waiting period. This question is currently asked on page one of the Form, and the Commission is not proposing any material changes to this requirement.

5. Joint Ventures

The proposed Joint Ventures section within the proposed Instructions would require information about transactions structured as a joint venture or formation pursuant to §§ 801.40 or 801.50. This information is currently collected in Item 5(b) of the Form and requires information about the contributions each person will make to the entity, what consideration will be received, the business in which the new entity will engage, and an allocation of revenue to industry codes. As discussed in section III.A.1.b. above and III.D.3. below, the Commission is proposing eliminating the use of 10-digit NAPCS codes. Therefore, the Commission proposes also eliminating the requirement to identify the NAPCS codes in which the joint venture will derive revenue. The Commission is not proposing any other material changes to this requirement.

6. Agreements and Timeline

The proposed Agreements and Timeline section within the proposed Instructions would require filing persons to provide a term sheet or draft agreement that reflects sufficient detail about the proposed transaction to demonstrate the transaction is more than hypothetical, if a definitive agreement has not been executed, as described above in the proposed amendments to § 803.5(b) at II.C. In addition, the Commission proposes additional changes regarding which agreements must be submitted. These proposed changes, discussed below, include a requirement to submit the entirety of all agreements related to the transaction and a new requirement to submit other agreements between the filing persons that are not related to the transaction, as well as a timetable for the transaction.

a. Transaction-Specific Agreements

The Commission proposes requiring that all transaction-specific agreements be submitted with HSR Filings. Currently, Item 3(b) of the Form requires the submission of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities, or non-corporate interests are to be acquired, as well as agreements not to compete and other agreements between the parties. The production of schedules to agreements is not currently required, unless the schedules contain agreements.[45] In the Commission's experience, the structure of transactions has become increasingly complex, often comprising not only multiple agreements between the filing persons but agreements with third parties. Understanding the entirety of the transaction, including but not limited to non-competition and non-solicitation agreements and other agreements negotiated with key employees, suppliers, or customers in conjunction with the transaction, is crucial to determining the totality of the transaction and assessing during the initial waiting period the transaction's potential competitive impact. Moreover, schedules increasingly include descriptions of key terms and provisions.

The Commission thus proposes requiring filing persons to produce all agreements, inclusive of schedules, exhibits, and the like, that relate to the transaction, regardless of whether both parties to the transaction are signatories. It is the Commission's understanding

[45] 16 CFR 803 Appendix Notification and Report Form Instructions at page V.

that these documents are collected and are typically included in materials necessary for closing. Having a complete set of transaction-related agreements would provide the Agencies with a more complete understanding of the transaction under review.

b. Other Agreements Between the Parties

The Commission also proposes requiring filing persons to submit all agreements between any entity within the acquiring person and any entity within the acquired person in effect at the time of filing or within the year prior to the date of filing. Understanding the scope of any existing contractual relationships between the filers would materially assist the Agencies' review by revealing any business interactions or relationships that exist prior to the transaction and that may be affecting premerger competition. These might include licensing agreements, supply agreements, non-competition or non-solicitation agreements, purchase agreements, distribution agreements, or franchise agreements, among others. Understanding the full extent of the filing parties' existing contractual relationships would allow the Agencies to identify those relationships that contribute to the premerger competitive dynamics, which is material to assessing how the transaction may affect post-merger competition.

c. Timeline

The Commission also proposes that filing persons provide a narrative timeline of key dates and conditions for closing. Just as it is critical for the Agencies to understand the totality of the transaction during the initial waiting period, it is also critical to understand the timing of key milestones and the conditions to closing, which are often complex and not easily understood from the transaction documents themselves. The Agencies often cannot confirm basic deadlines for the transaction from the transaction documents and in those cases, the Agencies expend a great deal of time and effort to confirm with filers key dates, including the timing of pre-closing conditions, during the initial waiting period. Understanding deal timing is critical to each Agency's decisions regarding how to manage its merger workload on a priority basis, focusing available resources on those deals whose closing dates are imminent. This basic information about the timing of the transaction is not adequately captured in the current Form, and, to the extent the filing person knows at the time of the HSR Filing and can readily provide it, this information would help the Agencies understand key deal milestones and better manage the timing and focus of the investigation during the initial waiting period.

D. Competition and Overlaps

The Commission proposes creating a Competition and Overlaps section within the proposed Instructions. This section would collect, in one place, information that reveals any existing business relationships between the filing persons that requires the Agencies to take a closer look to determine whether the transaction warrants an in-depth investigation, which is the primary purpose of premerger notification and review. Information collected in this section would include information and documents currently collected in several parts of the Form: in Items 4(c) and 4(d), which require the production of certain documents created in conjunction with the evaluation of the transaction; Item 5(a), which requires the allocation of revenue from U.S. operations to industry and product codes; Item 6(c), which identifies certain minority-held entities of the filer; Item 7, which provides information about industries in which the acquiring person and acquired entity both participate; and Item 8, which requires the identification of certain prior acquisitions made by the acquiring person. The Commission proposes expanding and reorganizing the information and requiring additional documents that would bear directly on the premerger competitive relationship between the filing persons. The proposed Competition and Overlaps section would provide a new source of relevant information related to horizontal overlaps, as well as new information about supply relationships and employees, which would enable to Agencies to quickly identify and assess the potential impact of the transaction across many dimensions of competition. These proposed changes, discussed below, would be organized in the following proposed categories: Business Documents, Competition Analysis, NAICS Codes, Controlled-Entity Overlaps, Minority-Held Entity Overlaps, and Prior Acquisitions.

1. Business Documents

The proposed Business Documents section within the proposed Instructions would require the submission of documents currently required by Items 4(c) and 4(d) of the Form and additional categories of documents. The Commission's proposal for requiring additional documents is informed by a comparison of documents submitted by filing persons with the HSR Filing and those submitted during the Agencies' in-depth investigations that are not required by the current Form but would have been highly probative to the initial antitrust assessment of the transaction during the initial waiting period. The specific types of proposed business documents are discussed below.

a. Transaction-Related Documents

The proposed Transaction-Related Documents section would comprise the same types of documents currently required by Item 4(c) of the Form, which the Commission proposes to expand to include documents prepared by or for the supervisory deal team leads, and Item 4(d), which the Commission proposes to clarify without material changes. The Commission also proposes requiring the submission of certain previous draft versions of these documents.

i. Documents Prepared by or for Officers, Directors, or Supervisory Deal Team Lead(s)

In the proposed Documents Prepared by or for Officers, Directors, or the Supervisory Deal Team Lead section, the Commission proposes expanding the scope of requested documents evaluating the transaction by adding a requirement to submit such documents prepared by or for the supervisory deal team lead(s). Currently, Item 4(c) requires filing persons to provide all studies, surveys, reports, plans, and analyses prepared by or for officers or directors to evaluate the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into products or geographic markets. These transaction-specific assessments of competition, past and future, provide the Agencies with invaluable insights into each party's view of how the transaction could change the competitive landscape and, most importantly, narrow the inquiry to particular markets and companies that each party believes to be its competitors. Since the beginning of the premerger notification program, 4(c) documents have been a key screening tool for the Agencies to identify those transactions that require more than a cursory review during the initial waiting period. The proposed section would retain the same definition of transaction-related documents to be submitted but add the supervisory deal team lead(s) to the list of individuals to whom this item would apply.

In some companies, an officer may lead the day-to-day activities of the deal team and would be considered the supervisory deal team lead, resulting in

no change to the documents currently required as part of Item 4(c) of the Form. But someone other than an officer or director often functionally leads the deal team. In the Commission's experience, in those cases, responses to current Item 4(c) often do not contain documents with sufficient information about the filing person's analysis of the competitive implications of the transaction to enable the Agencies to identify potentially problematic transactions. In fact, based on documents submitted in response to Second Requests, it is the Agencies' experience that individuals other than officers and directors are often the authors or recipients of documents that are otherwise responsive to Item 4(c) of the Form but are not required to be submitted with the HSR Filing because they were not prepared by or for an officer or director. These documents, typically in the possession of the supervisory deal team lead(s), often include information that would have been crucial to the Agencies' analysis of the transaction during the initial waiting period.

The Commission thus proposes that in addition to requiring documents prepared by or for officer and directors, filing persons must also submit these transaction-related documents prepared by or for supervisory deal team lead(s). Identification of any supervisory deal team lead would not be based upon title alone. The Commission proposes that the filing person determine the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue. A supervisory deal team lead need not have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in communicating with the individuals, such as officers or directors, that have the authority to authorize the transaction. Any such individual(s) might be the leader(s) of an investment committee, tasked with heading the analysis of mergers and acquisitions, or otherwise given supervisory capacity over the flow of information and documents related to transaction.

The Commission believes this proposal strikes a balance between the interests of the Agencies and those of filing persons in requesting additional documents responsive to Item 4(c) of the Form. Requiring filing persons to include materials prepared by and for supervisory deal team lead(s) would allow the Agencies to receive additional key materials relevant to the analysis of the transaction without requiring information from all deal team members, in light of the opportunity to obtain additional documents through the issuance of Second Requests.

ii. Confidential Information Memoranda

The proposed Confidential Information Memoranda section would collect the information currently required by Item 4(d)(i) of the Form. The Commission is not proposing any material changes to this requirement.

iii. Studies, Surveys, Analyses, and Reports

The proposed Studies, Surveys, Analyses, and Reports section would collect the information currently required by Item 4(d)(ii) of the Form. The Commission is not proposing any material changes to this requirement.

iv. Synergies and Efficiencies

The proposed Synergies and Efficiencies section would collect the information currently required by Item 4(d)(iii) of the Form, and the Commission proposes to clarify that forward-looking analyses are responsive. Currently, Item 4(d)(iii) asks for all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. The Commission proposes to specifically include a reference to models and financial projections to make clear that filers should submit forward-looking assessments of synergies or efficiencies. This information is especially important for screening the competitive impact of products or services not yet generating revenue but projected to do so. As before, financial models without stated assumptions would not need to be provided. For many transactions, especially those involving markets in which competition occurs via on-going innovative efforts, these forward-looking assessments will materially benefit the Agencies' identification of transactions that warrant in-depth review.

v. Drafts

Along with expanding the required Transaction-Related Documents as described above, the Commission also proposes requiring the submission of drafts responsive to these requests. It has been a long-standing position of the Commission's PNO that the submission of draft versions of documents responsive to Item 4(c) or 4(d) is not required unless there is no final version, in which case the most recent draft has been required, or unless a draft was sent to the board of directors. Under this guidance, if a draft version of a document is sent to the Board, it ceases to be a ''draft'' and must be submitted, even if a final version is also submitted. As a result, the Commission has not typically received many draft documents as part of HSR filings.

The Agencies routinely ask for and receive draft documents in response to Second Requests and, in the Agencies' experience, these drafts often reveal additional information about the transaction that would have been important to the Agencies' review during the initial waiting period, such as references to specific product markets or competitors that were removed in subsequent versions. In addition, these drafts can contain highly relevant, probative, or candid statements about the competitive impact not reflected in the final version of the document. In some cases, it appears that the draft documents have been edited to remove candid assessments of factors relevant to competition prior to circulation to officers or directors. In others, the dates of the documents suggest that otherwise responsive drafts were not finalized or shared with officers or directors until after making an HSR Filing.

The Commission therefore proposes clarifying in the Instructions that drafts of responsive transaction-related documents must be submitted if that document was provided to an officer, director, or supervisory deal team lead(s). This proposed change would ensure that the Agencies have access to documents that reflect pre-transaction assessments of business realities, as opposed to ''sanitized'' versions, to aid in their analysis during the initial waiting period. The addition of the supervisory deal team leader(s) to this requirement should capture draft materials important to managing the transaction but avoid the burden of having to submit prior versions that were not reviewed by senior managers or decision-makers. As stated elsewhere in this NPRM, the Commission aims to strike a balance between the Agencies' need to obtain material information about the transaction and the burden on filing parties, so the scope of this request is limited so as not to require filing parties to search numerous company personnel beyond officers, directors, and supervisory deal team lead(s).

The Commission recognizes that requiring draft transaction-related documents creates an additional burden for filing parties to collect and submit more documents to the Commission with their HSR filings and that, to some

degree, previous versions of submitted documents may contain repetitive information. Moreover, HSR filings that contain large document submissions could overwhelm the Agencies and undermine the goal of effective and efficient screening for transactions that require an in-depth investigation. For this reason, the Commission seeks comment on a potential alternate approach in which filing parties collect draft Transaction-Related Documents as part of preparing HSR filings but do not submit these documents until and unless agency staff reviewing the transaction requests the draft documents during the initial waiting period. In the event that agency staff requests the draft documents, the filing person would be required to submit them within 48 hours in order to retain the initial waiting period. The Commission invites comment on whether this alternative approach would reduce the burden for the parties and the Agencies compared with submitting all versions with the HSR Filing as described above, whether there are logistical issues with providing the collected draft documents within 48 hours, and the estimated volume of drafts collected.

b. Periodic Plans and Reports

The proposed Periodic Plans and Reports section would require filing persons to submit certain high-level strategic business documents that were not created in contemplation of the transaction but still contain information relevant to the antitrust analysis. As a result of decades of experience, the Agencies are aware that, as part of diligence for a potential transaction, companies often collect a targeted set of ordinary course documents that do not need to be submitted as part of an HSR Filing. Such documents typically include strategic plans and documents that are useful to those negotiating or evaluating the transaction because they discuss general market dynamics, competitors, or other potential mergers and acquisitions. The Commission understands that these documents are collected to provide key transaction decision-makers with the company's internal assessment of commercial realities of the premerger marketplace.

The Commission therefore proposes requiring certain plans and reports created in the ordinary course of business and not prepared solely for the purpose of evaluating the proposed transaction to be submitted as part of the HSR Filing. Periodic plans and reports created in the ordinary course of a company's business often contain detailed assessments of core business segments, markets, competitors, other acquisition targets, and projections about future competitive dynamics—insights that have direct bearing on the Agencies' antitrust assessment of the transaction in the initial waiting period. The Commission proposes requiring the submission of semi-annual and quarterly plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity, if those documents were shared with a chief executive of an entity involved in the transaction, or with certain individuals who report directly to a chief executive. The Commission also proposes requiring the submission of all plans and reports submitted to the board of directors (or, in the case of unincorporated entities, individuals exercising those functions) that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity.

These proposed new document requirements would be limited in certain specific ways to minimize the overall number of documents submitted with the HSR Filing. First, the new Periodic Plans and Reports section would not require documents that analyze ''the potential for sales growth or expansion into product or geographic markets'' as is required by current Item 4(c). Additionally documents responsive to this item would be limited to those prepared or modified within one year of the date of the HSR Filing. The Commission believes that the submission of a limited set of ordinary course business documents that were not prepared specifically to evaluate the transaction but discuss premerger and future competitive dynamics and strategies broadly would provide valuable insight and context for the transaction-related documents submitted with the HSR Filing. These ordinary course business documents are routinely submitted during in-depth investigations in response to Second Requests and routinely contain unique information about the state of premerger competition, which if available during the initial review period would help the Agencies determine if an in-depth review is warranted and if so, its proper scope.

The Commission is aware that this new requirement has the potential to result in the submission of a large number of documents for complex or large transactions. The Commission is also aware of the potential impact on the filing persons and on the Agencies of large document submissions. The Commission seeks to balance these interests and invites comment on how or whether narrowing the set of custodians for periodic reports and plans, or any other proposed limits, would still generate information about the premerger state of competition that is not specific to the transaction while reducing any burden on filers and the Agencies.

Finally, the Commission notes that filing persons should not exchange additional information with respect to planned products or services to provide a response to this proposed requirement but should respond instead on the basis of regular diligence and the knowledge or belief of the filing person. The Commission recognizes that an acquired person would have limited information about the acquiring person's operations, including products under development, and the Commission does not intend these proposed changes to encourage additional information sharing of this type of information.

c. Organizational Chart of Authors

As the final part of its proposed Business Documents section, the Commission proposes requiring filing persons to identify the authors of all responsive documents submitted with the HSR Filing and to provide additional information about each individual. Given the short period of time for review during the initial waiting period, it is crucial for the Agencies to have a clear understanding of how authors of key documents fit into the organization or entities of each filing person to determine the importance and perspective of the responsive documents submitted with the HSR Filing and to identify key employees within the organizations. Thus, the Commission proposes requiring an organizational chart(s) that would reflect the position(s) within the filing person's organization held by identified authors, and for privileged documents, the recipients of each document submitted with the HSR Filing. The Commission also proposes requiring the filer to identify the individuals searched for responsive documents. It would be sufficient to indicate by notation on the organization chart(s) which individuals were searched.

Providing a chart will help contextualize reporting relationships, as well as the relative seniority, of the authors and recipients and allow the Agencies to more quickly assess which documents contain high-level assessments from key employees. The benefit of being able to identify important decision-makers within the filing person and having context for key documents would allow the Agencies to

quickly assess the probative value of the documents

2. Competition Analysis

The Commission proposes creating a new Competition Analysis section within the proposed Instructions. This proposed section would create new requirements for filing persons to provide narratives that would, among other things, describe their basic business lines and provide product or service information for all related entities; identify current and potential future horizontal overlaps and supply relationships between the filing persons; and provide information about their employees and what services these employees provide. These proposed narrative requests would provide the Agencies with crucial information about current and future competitive relationships between the filing parties, including whether they compete to hire employees, which is information that is not required by the current Form.

a. Horizontal Overlap Narrative

The Commission proposes creating a new Horizontal Overlap Narrative section that would require each filing person to provide an overview of its principal categories of products and services (current and planned) as well as information on whether it currently competes with the other filing person. Such information is core to the Agencies' substantive antitrust analysis during the initial waiting period and is not readily accessible from sources other than the filers themselves. In drafting the Horizontal Overlap Narrative, each filing person would describe its current and planned principal categories of products and services in the way that those business lines are referred to in the company's day-to-day operations so that the Agencies could more readily understand the information in the context of current market realities. If any of the submitted documents support the information contained in the narrative, the filing person would also identify such documents.

The products or services offered by the filing persons that currently or potentially compete with each other are often referred to by antitrust professionals as ''horizontal overlaps.'' The identification and assessment of such horizontal overlaps is an essential starting point for the Agencies' substantive review of any transaction to determine whether it has the potential to violate the antitrust laws. As discussed elsewhere, NAICS code reporting can result in underreporting of horizontal overlaps, and not every HSR Filing contains 4(c) documents that could potentially reveal overlaps not identified by NAICS code reporting. In such cases, the HSR Filing does not contain basic screening information that the Agencies need to determine whether the transaction merits closer scrutiny during the initial waiting period. Premerger notification is intended to allow the Agencies to scrutinize any transaction that eliminates competition between existing or potential competitors, and it is important for every HSR Filing to identify any existing or potential horizontal overlap created by the transaction.

As a result, the Commission proposes that within the Horizontal Overlap Narrative, each filing person would be required to list each current or known planned product or service that competes with (or could compete with) a current or known planned product of the other filer. For each such overlapping product or service, the filing person would provide sales, customer information (including contacts), a description of any licensing arrangements, and any non-compete or non-solicitation agreements applicable to employees or business units related to the product or service.

The proposed requirement for this information about each filing person's market presence in overlapping products or services would enable the Agencies to quickly identify and assess the significance of the filers' respective businesses both in relative and absolute terms. Proposed customer information would enable the Agencies to understand the customer base of the overlapping businesses and to promptly conduct, at the beginning of the initial waiting period, further industry research with customers likely to be affected by the transaction or those who are particularly knowledgeable about the parties' business operations, relevant industry dynamics, and other market participants. Contacting customers to confirm basic market dynamics is a key step in the antitrust analysis conducted by Agency staff during the initial waiting period, and the parties are frequently asked to provide this information on a voluntary basis once one Agency has granted clearance to the other to conduct an initial investigation of the transaction. However, since this information is not compulsory, the Agencies do not always receive it in a timely fashion during the initial waiting period, hampering the ability of the Agencies to use that period to effectively screen for transactions that merit the issuance of Second Requests.

The proposed requirement to describe any licensing, non-compete, or non-solicitation agreements involving the overlapping products or services would enable the Agencies to assess specific categories of existing contracts that are likely to affect how the transaction will impact competition for those products or services. These existing relationships bear on premerger market conditions and may reflect that the filers already view themselves as competitors (in the case of non-compete or non-solicitation agreements) or as key trading partners (in the case of licensing agreements).

The Commission acknowledges the burden drafting the proposed Horizontal Overlap Narrative could create for some filers, especially for transactions involving close competitors with multiple overlapping product or service lines. But identifying those transactions that present broad and complex competition issues is a critical first step for the Agencies. Once identified, the Agencies must then properly manage their review, first determining which markets could be impacted by the transaction and then deciding which of those necessitate in-depth review. On balance, this proposed requirement would significantly improve the information available to the Agencies to identify any existing or potential horizontal overlap to assess the competitive implications of a transaction during the initial waiting period. The Commission notes that in the Agencies' experience, companies who are horizontal competitors prior to the transaction frequently assess the antitrust risk associated with the transaction prior to making an HSR Filing, and therefore the information required by this proposal may already be available, in whole or part, to include with the HSR Filing. Although the Agencies have not previously required this type of narrative to be submitted as part of the Form, other jurisdictions have required such narratives for many years.

b. Supply Relationships Narrative

The Commission proposes creating a Supply Relationships Narrative section that would require each filing person to provide information about existing or potential vertical, or supply, relationships between the filing persons. A prior version of the Form required similar information about vertical vendor-vendee relationships, but the requirement was eliminated in 2001 because the type of information collected did not prove useful enough to the Agencies as a screen for potential non-horizontal relationships to justify

the burden of providing it at that time.[46] Based on the Agencies' experience investigating vertical mergers in the intervening decades, the Commission believes that the current proposal would provide sufficiently robust information to allow the Agencies to identify vertical and other non-horizontal issues, including those presented by diagonal mergers. Non-horizontal relationships can be hard to detect in certain sectors where supply chains are not well defined, for instance in the provision of services rather than physical products. The Agencies have an interest in knowing whether a transaction in which the filing persons operate in related markets would result in any change in market structure or incentives that might affect post-merger competition. Early identification of potential non-horizontal competitive issues is critical to determining whether further investigation is needed, as structural changes in these relationships require additional fact development to determine the nature and scope of potential non-horizontal competitive concerns, which can often be complex and unique. These issues are difficult to discern from the information currently required by the Form, and filing parties are in a unique position to identify existing or future non-horizontal business relationships between them.

The Commission thus proposes to collect, in a narrative response, information for related sales and purchases between the filing persons or with other companies that use the filing person's products, services, or assets to compete with the other filing person. Filing persons would report sales to the other filing person and to any other business that, to the best of the filing person's knowledge, uses its product, service, or asset as an input for a product or service that competes or is intended to compete with the other filing person's products or services. Filing persons would also provide information (including contact information and a description of the supply agreement) for other customers that use the product, service, or asset to compete with other filing person. Filing persons would provide similar information for purchases made from the other filing person and from any other business that, to the best of the filing person's knowledge, competes with the other filing party to provide a substantially similar product, service, or asset. This information would allow the Agencies to identify whether the transaction would create opportunities for post-merger foreclosure of rivals arising from vertical or diagonal relationships.

The Commission acknowledges that this will increase the burden on filers whose transaction involves existing supply relationships or who supply or purchase from companies that compete with the other filing party. But the Commission believes that requiring filing parties to provide a narrative that reveals existing and potential supply relationships between the acquiring person and acquired entity is important for the Agencies because it would allow them to quickly identify those transactions that raise concerns about non-horizontal competitive effects.

c. Labor Markets Information

The Commission proposes creating a new Labor Markets section that would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction. The Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets and have stepped up efforts to identify and investigate potential labor market effects arising from reportable transactions. Transactions have been challenged on the basis that consummation would result in labor market harms,[47] and consent agreements have included provisions that stop the use of certain non-compete clauses that limit the ability of potential market entrants to hire key employees.[48]

In transactions that involve two firms that purchase labor from the same labor market(s), the Agencies consider whether the transaction may substantially lessen competition for buyers of labor services. Every firm competes for labor in at least one labor market and, more commonly, in multiple labor markets. Companies that compete in the same product market may also compete in the same labor market. Employers, however, may compete in the same labor market even when they do not compete in the same product or input market.

Yet the Form does not collect any information about employees that would allow the Agencies to conduct an initial screening for potential labor market effects, which has materially hampered their ability to protect employees from the harmful effects of mergers. To identify whether the filing persons compete to employ the same types of workers in a particular geographic area, the Commission proposes requiring certain information concerning each filing person's workers before the transaction and any plans that would affect workers post-consummation. This proposed section would identify potential labor market overlaps and allow the Agencies to engage with the filers on potential labor market issues during the initial waiting period.

i. Largest Employee Classifications

The Commission proposes creating a Largest Employee Classifications section that would serve as a screening tool based on the SOC system, developed by the Bureau of Labor Statistics, which classifies workers into occupational categories. Labor markets have two dimensions: the type or features of work performed, and the location of the work. Because describing every relevant feature of each job would be burdensome for parties, the Commission proposes requiring filing persons to classify their workers into occupational categories based on the SOC system, a widely used system for reporting worker statistics. While SOC categories do not always provide exact comparisons, SOC codes would nevertheless provide the Agencies with an objective classification standard which can be used as an initial screen for potential labor market overlaps. The use of these codes as a screening tool is not intended to endorse their use for any other purpose, such as defining a relevant labor market. To implement this proposed screening

[46] The Form originally required information about any vendor-vendee relationship between the reporting parties regarding manufactured product during the most recent year; this information was intended to help the Agencies identify supply relationships that could give rise to concerns about foreclosure or other competitive consequences of vertical integration. The Commission eliminated this requirement in 2001 because it was not effective in identifying vertical issues, not because vertical acquisitions present no potential competitive risks. 66 FR 8680, 8686–87 (Feb. 1, 2001). Since 2001, the Form has not collected specific information related to vertical relationships.

[47] Press Release, U.S. Dep't of Just., Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster, (Nov. 2, 2021), *https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon. See also* Concurring Statement of Commissioner Slaughter and Chair Khan regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England,* at 1–2 (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf* (recommending including a count in the complaint that the proposed merger would have violated Section 7 of the Clayton Act in a relevant labor market).

[48] Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis.*

tool, the Commission proposes requiring filers to list their five largest categories of workers by the relevant 6-digit SOC classification and to provide the total number of employees for each 6-digit code identified.

ii. Geographic Market Information for Each Overlapping Employee Classification

The Commission proposes creating a Geographic Market Information for Each Overlapping Employee Classification section that would serve as a screen for the geographic component of labor markets based on the United States Department of Agriculture's ERS system. The ERS commuting zones were designed to delineate local economies based on where people live and work.[49] Filers would be required to identify the top five largest 6-digit SOC codes in which both parties employ workers. This should provide enough information for the Agencies to use SOC classifications as an initial proxy for labor issues while balancing the burden on filers by limiting the request to their five largest categories of workers. Also, for each of the five largest SOC codes in which both parties employ workers, this section would require filing persons to list the overlapping ERS-defined commuting zone(s) from which the employees commute and the total number of employees within each commuting zone. This proposed requirement would be limited to overlapping geographies, expressed as commuting zones, to capture sufficient information to identify potential labor market concerns without requiring filing parties to provide a complete list of all commuting zones in which they have workers.

This information would represent a material improvement in the data available to the Agencies during the initial waiting period. By relying on existing metrics that are familiar to U.S. companies and by limiting the request to the top five SOC classifications, the Commission's intent is to minimize the burden on filers. Nonetheless, the Commission seeks comment on whether this information would be difficult or costly to collect, and any alternative means by which the Commission could screen HSR Filings for potential labor market overlaps, for example by collecting information on the number and types of workers employed at each of the filing person's facilities.

[49] *See* U.S. Dep't of Agric., ERS Commuting Zones and Labor Market Areas, *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/*.

iii. Worker and Workplace Safety Information

The Commission proposes creating a Worker and Workplace Safety Information section that would require filing persons to identify any penalties or findings that were issued against the acquiring person or acquired entity by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration during the five-year period before the filing. If a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job. The proposed five-year period limitation would capture the most relevant information for analysis during the initial waiting period while lessening the burden on filers to search through older files. This information is not always publicly available but is known to the filers and is relevant to identifying potential labor market effects.

3. NAICS Codes

The Commission proposes creating a NAICS section within the proposed Instructions. This section proposes changes to certain information currently required by Item 5(a) of the Form, which now asks filing persons to submit information regarding dollar revenues and lines of commerce with respect to operations conducted within the United States during the most recently completed fiscal year. This includes products manufactured in the United States, regardless of where they are sold, products manufactured outside the United States but sold into the United States or through a U.S. entity, and products or services derived from U.S. operations, whether sold to a U.S. or foreign customer.

The current version of Item 5 of the Form requires the reporting of revenue by industry and product codes developed by Census to track economic activity in the United States. Over the years, the Commission has revised Item 5 as it sought to balance the need to receive filing persons' revenue information with the burden on filers to provide that revenue information.[50] As part of the redesign of the premerger notification process contemplated in this NPRM, the Agencies reviewed the totality of revenue information currently required in Item 5(a) to determine which information is especially valuable, which is due for an update, and which is not sufficiently reliable or needed to conduct a robust initial assessment of reported transactions. As a result, the Commission now believes that it can further revise revenue reporting requirements to make reported revenue information more informative for the Agencies and less burdensome for filing parties. The Commission thus proposes a substantively different approach to revenue information through six proposed changes. The Commission also proposes a ministerial change to adopt the 2022 version of the NAICS codes, which are the most recent released by Census. Through these proposed changes, the Commission would expand and clarify the industry and product codes that filing persons would have to report, as well as limit the requirements on how revenue must be reported.

First, the Commission proposes eliminating the requirement that filing persons provide the precise amount of revenue attributed to each NAICS code. The Commission intends for the proposed change to streamline revenue reporting for filers and result in figures that would be just as useful to the Agencies for identifying important business lines of each person. It is the Commission's understanding that many businesses do not maintain detailed revenue information by NAICS code in the ordinary course of business and generating this information can require great effort. In fact, even obtaining estimates of revenue to the nearest $100,000, as is currently required, can still be burdensome for filers. The Commission therefore proposes that filing persons would only need to estimate revenue at five levels: pre-revenue (for certain products and services, as described below); less than $10 million; between $10 million and $100 million; between $100 million and $1 billion; and more than $1 billion. The Commission anticipates these ranges would provide the Agencies with an important overview of the magnitude of revenue generated by particular products and services, an important factor in the analysis of transactions during the initial waiting period, while at the same time reducing the burden of reporting revenues for filers. The Commission welcomes comments on

[50] *See* 43 FR 33450, 33520 (July 31, 1978) (revenue reporting based upon Standard Industrial Classification codes of the U.S. Bureau of the Census); 66 FR 35541 (July 6, 2001) (amending the Form and Instructions to report revenue by North American Industry Classification System codes of the U.S. Bureau of the Census); 76 FR 42471 (July 19, 2011) (elimination of the requirement to report ''base year'' data); 84 FR 30595 (June 27, 2019) (amending the Form and Instructions to report manufacturing revenue by North American Product Classification System-based codes of the U.S. Bureau of the Census).

the proposed ranges, as well as other potential ways to capture the relative magnitude of the business of the acquiring person or acquired entity attributable to each NAICS code.

Second, the Commission proposes that NAICS codes be reported on a descriptive basis, encompassing all U.S. operations. Revenue reporting in Item 5(a) currently relies on the filing persons' ordinary course financial records. In the Commission's experience, reliance on these financial records often results in under-reporting or reporting in codes that may not actually be descriptive of the products or services provided. To address this issue, the Commission proposes requiring individuals familiar with the business operations of each operating company (or subdivision) to review the available NAICS codes to select the codes that would best describe the full line of products and services related to U.S. operations, regardless of whether the company tracks revenue by such codes in the ordinary course of business or relies on them for other reporting requirements. The Commission intends for this change to shift the collection of NAICS codes from how a company records revenue to align more closely with the full range of products and services offered. Because the Commission proposes to eliminate the requirement to specifically quantify the amount of revenue attributable to the codes, as described above, the Commission does not anticipate that this change will substantially increase the burden of collecting the information. Further, codes related to non-manufacturing activities estimated to have generated less than $1 million in the last fiscal year would not need to be listed, unless they overlap with a code reported by the other filing person.

Additionally, the Commission recognizes that some NAICS codes are imprecise, which can result in two filing persons engaged in similar businesses using different NAICS codes. Therefore, the Commission proposes that if more than one code might be appropriate, the filing persons would be required to list all the codes that describe the products or services offered and use end notes as needed to clarify selections and any potential overlap where the same revenues are reported in more than one NAICS code. This would assist the Agencies in understanding the businesses of the filing persons during the initial waiting period and address some of the shortcomings of NAICS code reporting.

Third, the Commission proposes changing how NAICS codes should be organized. Currently, filing persons must aggregate revenue across all entities within the acquiring person or acquired entity. But often the acquiring person or acquired entity comprises multiple operating companies or units, which may be engaged in multiple lines of business. For example, large companies can contain multiple operating units or subsidiaries that do business under separate brands and offer diverse products or services. Similarly, funds that file as acquiring persons may control many different operating companies. The Commission thus proposes to require acquiring persons and acquired entities with more than one operating company or unit to identify which entity(s) derives revenue in each code. This proposed requirement would facilitate efficient review and quickly identify the operating company(s) that may or may not be relevant to the antitrust analysis. From this information, the Agencies could quickly identify which entity within the filing person has competing or related business activities with the other filing party.

Fourth, the Commission proposes requiring the reporting of certain NAICS codes for certain pipeline or pre-revenue products. Currently, filers are not required to provide information about products or services that did not derive revenue in the last fiscal year. Yet these pre-revenue or early revenue activities are often core to the transaction rationale and essential to understanding the potential competitive impact of the transaction during the initial waiting period. This information is known to the filing person and is not available from other sources, as it is typically highly sensitive. As a result, the Commission proposes adding a requirement for acquiring and acquired persons to report NAICS codes for certain pipeline or pre-revenue products. The acquiring person would be required to identify any NAICS codes for products and services under development if those codes would overlap with the codes for current or known pipeline products or services of the acquired entity(s). The acquired person would identify the NAICS codes that would apply to the products or services of the acquired entity(s) that are under development or pre-revenue and anticipated to have annual revenue totaling more than $1 million within the following two years. The Commission believes the benefit to the Agencies would be substantial and anticipates that the burden associated with the collection of these codes would be minimal, as identification of these products and services would likely be completed during ordinary diligence. The Commission understands that the acquired person may have limited knowledge about the planned or under-development products of the acquiring person and does not intend the filing persons to divulge this information for the purpose of making an HSR Filing.

Fifth, the proposed NAICS code section would clarify that the acquired person must report the NAICS codes relevant to the acquired entity(s) at the time of closing. While most filers currently report in this manner, others have asserted that when an acquired entity is merely a shell at the time of the HSR Filing due to anticipated pre-consummation reorganization, no NAICS codes are required. This is not the intent of the revenue reporting requirements in the current Form, and the Commission proposes clarifying this issue by requiring NAICS reporting that reflects the operations of the acquired entity(s) upon consummation. This would provide clarity and make NAICS code reporting more reliable for both filing persons and the Agencies.

Finally, the Commission proposes eliminating the requirement for filing persons engaged in manufacturing to provide revenue by NAPCS-based codes. The requirement to allocate revenue to product codes dates from the promulgation of the Rules in 1978 and has been updated to reflect various product code formats implemented by Census over the years. The most recent Census industry code format is the 6-digit NAICS format.[51] Initially, Census also created 10-digit NAICS-based codes to provide more detail about the products within the 6-digit NAICS industry codes, and these were adopted by the Commission for use in HSR Filings in 2001.[52] In 2018, Census discontinued the use and updating of 10-digit NAICS-based codes in favor of 10-digit NAPCS-based codes. As a result, in 2019, the Commission amended the Form and Instructions to require use of the NAPCS-based codes for manufactured products.[53]

However, these new NAPCS-based codes have been less useful for the Agencies' analysis than the discontinued 10-digit NAICS-based codes and have created significant confusion for both filers and the Agencies. The NAICS-based system provided 6, 8, and 10-digit codes, with the description of the products becoming more precise as the number of

[51] NAICS Codes were first published in 1997 and first used in the HSR Form in 2001. *See* 66 FR 23561 (May 9, 2001).

[52] 66 FR 35541 (July 6, 2001).

[53] 84 FR 30595 (June 27, 2019).

digits in the code increased. But the 10-digit NAPCS-based codes created by Census correspond to a combination of former 8-digit and 10-digit NAICS-based manufactured product codes. As a result, some parties inadvertently report revenue using a NAPCS code that corresponds to an 8-digit NAICS code. When this happens, the Agencies lack the more granular and descriptive nature of the NAPCS-based codes that correlate to the former 10-digit NAICS-based code that would allow the Agencies to more accurately identify mergers of companies that produce similar types of products. Additionally, when one filing party uses a NAPCS-based code that corresponds to an 8-digit NAICS-based code and the other filing person uses a NAPCS-based code that corresponds to a 10-digit NAICS-based code, the filing may not properly capture codes in which both parties report revenues. This could result in filings that should report revenue overlap code(s) but do not, limiting the Agencies' ability to rely on the codes to conduct an initial screen for competitive overlaps.

Because the proposed Horizontal Overlap section of the proposed Instructions would require the identification of overlapping products or services, as discussed in III.D.2., the Commission believes that additional identification of products by NAPCS code would no longer be necessary. The elimination of NAPCS-based revenue reporting would lessen the burden on filers to collect and report these figures, which have become less useful to the Agencies as a tool for identifying horizontal overlaps.

4. Controlled-Entity Overlaps

The Commission proposes creating a Controlled-Entity Overlaps section within the proposed Instructions. This section would continue to require the submission of information currently required by Item 7 of the Form, such as the identification of certain entities within the filing person that derive revenue in the same NAICS codes as the other filing person and geographic information regarding the operations and sales of such entities, but the Commission proposes certain changes to what information would be collected and reported. As explained below, specific information related to entities controlled by the filing person is critical to the Agencies' initial antitrust review as it serves as the primary tool for identifying horizonal overlaps between the parties to the transaction and their controlled entities, especially for transactions involving a UPE with complex corporate structures and multiple entities under its control. Compared to the current HSR Form, this proposed section would: (i) add a requirement to provide the name(s) by which entities have done business within the last three years, (ii) require the filing person to identify the overlapping entity within its own person, rather than the other filing person, (iii) update the NAICS codes that require geographic reporting at the street address level, (iv) require the identification of locations of franchisees for certain NAICS codes, and (v) add a requirement to provide geolocation data.

a. NAICS Overlaps of Controlled Entities

The Commission proposes that the new Controlled-Entity Overlaps section include the information currently required by Item 7(a), which requires the identification of the overlapping NAICS codes for the acquiring person (or an associate) and acquired entity, and Item 7(b), which requires the identification of the entities that derived revenue in overlapping NAICS codes within the UPE of the other filing person and, for the acquiring person, its associates. The Commission understands that filing persons often do not identify for the other filing person the entities that report in overlapping NAICS codes. Therefore, the Commission believes that it would be less of a burden for each filing person to only report entities within its own person that derive revenue in the overlapping NAICS codes. The Commission thus proposes requiring the acquiring person to identify the entity(s) within its own person that has operations in the same NAICS code as the acquired entity(s), and for the acquired person to identify the entity(s) within the acquired entity(s) that has operations in the same NAICS codes as the acquiring person. This proposed change would refine NAICS code reporting to provide the Agencies with a reliable source for identifying whether any entity within each filing person generates revenues in the same or related codes. As this information, unlike the current information required by Item 7(b), is known to the filing parties, the Commission anticipates that the burden of responding to this request will be diminished.

The Commission proposes two additional changes to the current requirements of Item 7(b). First, the Commission proposes requiring the identification of ''doing business as'' or ''formerly known as'' names used within the last three years by entities with U.S. operations in overlapping NAICS codes. This information would allow the Agencies to more efficiently collect information about the overlapping entities in publicly available resources during the initial waiting period by connecting each entity with any name by which it is known to other market participants. This information is known to filers and limited to a three-year look back period.

In addition, the Commission proposes that filing persons be required to identify the entity(s) that have U.S. operations in the overlapping NAICS code(s). For acquiring persons, this would include entities controlled by associates that have U.S. operations in a NAICS code in which the acquired entity(s) report. Currently some filers voluntarily match the overlapping NAICS codes to the entities within the acquiring person (or its associates) or acquired entity. In the Commission's experience, this information aids the Agencies in quickly identifying the entities within the filing person that may be relevant to the competitive analysis during the initial waiting period.

b. Geographic Market Information

The Commission proposes creating a Geographic Market Information section to collect the information currently required by Items 7(c) and 7(d) of the Form, which require, for each overlapping NAICS code, the identification of geographic markets where the entities controlled by the acquiring person (and its associates) and the acquired entity(s) do business. The Commission proposes to modify these requirements by updating the NAICS industries in which street-level reporting is required, requiring geolocation information for these addresses, and requiring the reporting of franchisees' locations.

The Commission periodically reviews which NAICS codes require more granular street, city, and state address information and which NAICS codes need only be reported at the state level.[54] Recognizing the burden that providing the street-level address for each location of an entity can require, the Commission differentiates between (1) NAICS industry codes that either do not tend to involve small local or regional markets or involve local markets but nonetheless can adequately be reviewed if the parties specify only the state in which revenue is derived, and (2) those which do tend to involve local markets for which knowing the areas served by each filing person is important to identify locations where

[54] *See, e.g.,* 75 FR 57110 (Sept. 17, 2010), adopted by 76 FR 42471 (July 19, 2011).

both parties compete for sales (*i.e.,* geographic overlaps). As part of this proposed rulemaking, the Agencies have reviewed the list of NAICS industries for which such street-level information is required and have adjusted the list of sectors which, based on their experience, require more granular geographic information than state-level information. The Commission thus proposes updating the list of NAICS codes for which locations need only be identified at the state level and NAICS codes for which street-level information would be required.

The Commission proposes removing the Nondepository Credit Intermediation NAICS codes (codes beginning with 5222) from the list of codes for which street-level information is required. In the Agencies' experience, these industries tend not to be locally focused. Therefore, for these codes, the Commission proposes requiring filing persons to list only the states within which they conduct operations, rather than street address as is now required. This proposal should reduce the burden on those filing persons who report sales in these NAICS codes.

The Commission proposes that filers be required to provide street-level reporting for the following additional codes (codes with asterisks indicate that all NAICS codes that begin with the preceding numbers are included).

113*** Forestry and Logging
2211** Electric Power Generation, Transmission and Distribution
2212** Natural Gas Distribution
3115** Dairy Product Manufacturing
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing
321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
325110 Petrochemical Manufacturing
325130 Synthetic Dye and Pigment Manufacturing
325180 Other Basic Inorganic Chemical Manufacturing
325193 Ethyl Alcohol Manufacturing
325194 Cyclic Crude, Intermediate, and Gum and Wood Chemical Manufacturing
325199 All Other Basic Organic Chemical Manufacturing
325211 Plastics Material and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
327310 Cement Manufacturing
327390 Other Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drugs and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers
44911* Furniture Retailers
493*** Warehousing and Storage
54138* Testing Laboratories and Services
54194* Veterinary Services
562*** Waste Management and Remediation Services
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

These are codes that represent industries in which the Agencies often determine that competition occurs on a local or regional basis. For those codes that represent regional competition, the Commission believes that there would be few individual addresses that would need to be provided, and therefore the burden would not be significantly higher than reporting the overlaps at the state level. The Commission acknowledges that for those industries where competition occurs on a very localized level, for example where customers travel to the company's location to purchase goods or services, providing street-level revenue information can be challenging. However, because businesses often face different competitors in each of these markets, the Agencies have learned that businesses often track sales at the local level in the ordinary course of business for these sectors. Knowing where within a state the filer's facilities are located is an important screening tool for the Agencies to quickly identify existing and potential geographic overlaps, and that benefit justifies requiring street-level reporting for these NAICS codes. Providing the Agencies with information to screen for geographic overlaps during the initial waiting period also benefits filing persons by reducing need to issue Second Requests to determine if there are such overlaps.

The Commission recognizes that providing the street address of tens, hundreds, or, in certain cases, thousands of locations can impose a burden on filers. Therefore, the Agencies have reviewed the NAICS codes closely to identify only those codes for which the Agencies would most benefit from street-level information. For these transactions that require more than a cursory review, attempts to collect this information from the parties during the initial waiting period slows down the review and delays the decision on whether an in-depth investigation of the transaction is needed. Further, the Commission believes that such information should be available in an accessible manner for most businesses that have a large number of facilities. Nonetheless, the Commission welcomes comments that identify, with rationales, NAICS codes that should either be added to or deleted from the list of codes for which state-level information is required.

The Commission also proposes requiring filers to report latitude and longitude information for street addresses so that the Agencies can easily and quickly use that information to populate mapping software and create maps to better identify possible geographic overlaps between the acquiring person and the acquired entity. Street addresses alone can be inadequate or inaccurate for isolating the exact location of facilities. Converting street addresses to coordinates is difficult due to abbreviations such as BLVD or ST, and street addresses often lack important information, such as South or North, or contain errors, such as mislabeling a Street address for an Avenue. Latitude and longitude information is unique, which reduces the likelihood of errors. Any errors in generating maps displaying the locations of the relevant facilities may affect screening for local markets, resulting in over- or under-identification of geographic overlaps. Since filing persons are familiar with the location of their own establishments, the Commission believes that they would be in best position to validate the accuracy of the locations through more precise latitude and longitude reporting.

The Commission also proposes requiring filers to list locations where franchisees of the acquiring or acquired person (as appropriate) generate revenue

in overlapping NAICS codes that require street-level reporting. Currently, there is no information submitted with the Form that allows the Agencies to begin this analysis for companies that do business through franchisees. Yet all company locations at issue in the transaction that generate revenues, both directly and indirectly through franchisees, must be accounted for when the Agencies analyze the existence and extent of competition between the filing persons. These proposed changes would provide the Agencies with all company locations to begin assessing geographic overlaps during the initial waiting period. Because franchisors must approve the location of franchisee operations and get regular sales reports from those operations, the Commission believes filers with these relationships will have this information about their franchisees.

5. Minority-Held Entity Overlaps

The Commission proposes creating a Minority-Held Entity Overlaps section within the proposed Instructions that would amend certain information that is currently required by Item 6(c) of the Form. Item 6(c) currently requires filing persons to list all of the entities in which the acquiring person and associates of the acquiring person, or the acquired entity (as appropriate), holds a minority interest of 5% or more. As originally proposed by the Commission in 2010, this item was intended to focus on only those minority-held investments that provide products or services that report in the same NAICS code as the other filing person, but in the final version of the rule, in order to limit burden, the Commission permitted filers to list all minority-held companies rather than limiting the list to those that created a NAICS code overlap.[55] However, in the Agencies' experience with information collected in Item 6(c), permitting parties to list all minority-held companies instead of only those that are in the same line of business or NAICS code has hindered the Agencies' ability to determine which entities may be relevant to the competitive analysis of the transaction during the initial waiting period. Unlike the filing persons, which have likely done diligence on the companies in which they invest, the Agencies have no basis to determine from the entire list of minority-held companies which ones have competitively significant relationships with the other filing person as this information is not available from any other source.

The Commission thus proposes eliminating the option to list all the minority-held entities of the acquiring person and its associates or acquired entity (as appropriate) and proposes once again to require identification of those that, to the filing person's knowledge or belief, would derive revenue in the same NAICS codes or have operations in the same industry as the other filing person. The Commission also proposes requiring filers to provide the names by which the listed entities do business. As noted above, the d/b/a or f/k/a names of the businesses are especially helpful to the Agencies in conducting additional research about the entities using public or third-party sources. These proposed changes would significantly assist the Agencies in determining which minority-held entities may be relevant to the competitive analysis of the transaction during the initial waiting period. In the Agencies' experience, there has been an increase in the number and type of companies in which the acquiring person and acquired entity have minority investments, and where they exist, understanding the business lines of these related companies can be important for determining any significant premerger competitive relationship between the filing persons that may be affected by the transaction. This is especially true where the important competitive relationship is not at the UPE level but arises from within the corporate structure or holdings of the filing persons. While the Commission recognizes that investors have more limited information regarding entities in which only a minority interest is held, the proposed Instructions would continue to permit filing persons to rely on their knowledge or belief. The Commission believes that filers have done some level of diligence to determine the business lines prior to investing in these entities, and should have some basis to identify overlaps.

6. Prior Acquisitions

The Commission proposes creating a Prior Acquisitions section within the proposed Instructions that would include the information currently required by Item 8 of the Form, as well as additional information. At present, Item 8 requires the acquiring person to identify all NAICS codes in which the acquiring person derived $1 million or more in revenue and the acquired entity(s) or assets also derived $1 million or more. For such codes, the acquiring person is required to report acquisitions made within the five years prior to filing that (i) resulted in control of entities that had net sales or total assets of greater than $10 million in the year prior to acquisition, or (ii) was an acquisition of assets valued at or above the statutory size-of-transaction threshold. The Commission proposes expanding the scope of prior acquisitions that would be identified and making the requirement applicable to the acquired entity as well.

Information about prior acquisitions has always been important for the Agencies, allowing them to identify strategies to gain market share through acquisitions rather than internal expansion or more vigorous competition. Filers have been required to provide information about prior acquisitions from the beginning of the premerger notification program.[56] This information can be especially important in sectors where acquisitions are typically not HSR-reportable but nonetheless can cause competitive harm and alter the market dynamics for the reported transaction.[57] The Agencies have taken steps to address concerns about acquisition strategies that premerger review does not routinely capture. For instance, when the Commission identifies a company that has violated Section 7 and is engaging in a strategy of rolling up competitors, if it is likely that future acquisitions may not require an HSR Filing, the Commission may order the firm to provide prior notice or obtain prior approval for any future non-reportable acquisition.[58]

As the minimum threshold for making an HSR Filing has been adjusted over time (in accord with changes in gross national product)[59] from $50 million to its current $111 million, many acquisitions do not require premerger

[55] 75 FR 57110 (Sept. 17, 2010), adopted by 76 FR 42471 (July 19, 2011).

[56] 43 FR 33450, 33534 (July 31, 1978).

[57] *See* Press Release, Fed. Trade Comm'n, FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics (June 29, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics.*

[58] *See* Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis;* Press Release, Fed. Trade Comm'n, FTC Orders the Divestiture of Hundreds of Retail Stores Following 7-Eleven, Inc.'s Anticompetitive $21 Billion Acquisition of the Speedway Retail Fuel Chain (June 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-orders-divestiture-hundreds-retail-stores-following-7-eleven-incs-anticompetitive-21-billion.*

[59] Section 7A(a)(2) of the Act requires the FTC to revise thresholds annually based on the change in gross national product, in accordance with 15 U.S.C. 19(a)(5).

notification, especially in certain sectors.[60] A recent Commission study revealed that five of the largest technology companies in the United States completed 819 acquisitions that were not reported to the Agencies over a ten-year period from 2010–2019.[61] The Commission has thus identified a need to know more during the initial waiting period about prior acquisitions that may raise concerns about the filings parties' acquisition or roll-up strategies.[62]

Acquisitions of small companies can cause harm, including in sectors where competition occurs on a local level. When the Agencies determine that a firm is violating Section 7 through a pattern of serial acquisitions that fuels consolidation by eliminating local competitors, they can seek to prevent future violations but this is often insufficient to prevent widespread harm.[63] A pattern of serial acquisitions may also affect competition among innovative firms by consolidating innovation efforts into the hands of market leaders or other firms attempting to control the pace or direction of innovation.[64] A history of acquisitions in the same or related business lines may be especially important information where market boundaries are fluid and firms engage in a significant number of nonreportable transactions. This is potentially true of both the acquiring person and the acquired entity. The Agencies endeavor to identify such strategies [65] but need more robust tools for identifying firms that are engaging in a strategy of consolidation through transactions that may violate Section 7.

Thus, the Commission proposes several changes to expand the requirements for information related to prior acquisitions beyond what is currently required by Item 8. First, the Commission proposes requiring both the acquiring person and the acquired entity to provide information about prior acquisitions. The purpose of collecting information on all prior acquisitions by both filers is to assist the Agencies in identifying a potential pattern of acquisitions in a particular industry that has contributed to a trend toward concentration or vertical integration that affects the competitive dynamics for the parties to the transaction, as well as the commercial realities of post-merger competition.[66]

Second, the Commission proposes extending the time frame to report on prior acquisitions from five to ten years because the current five-year requirement for prior acquisitions is often insufficient to meaningfully identify patterns of serial acquisitions or a trend toward concentration or vertical integration. In 1987, the Agencies changed the reporting time period from ten years to five years.[67] At the time, it was thought five years reporting of past acquisitions would be sufficient to put the Agencies on notice of possible trends towards consolidation in the affected industries.[68] But based on decades of experience since then, along with changes to the economy and the varied acquisition strategies of filing parties, the Commission believes ten years would once again provide for a better framework to allow the Agencies to engage in a more detailed consideration of how numerous past acquisitions, including those in related sectors, affect the competitive landscape of the current transaction under review.

Third, the Commission proposes eliminating the threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than $10 million in the year prior to the acquisition. Limiting the reporting requirement to acquisitions of entities with annual net sales or total assets over $10 million may not capture acquisitions of new entrants or other nascent competitors that, despite not yet having widespread commercial success, nonetheless are poised to affect competition among existing firms or disrupt market dynamics. In fact, the Commission's technology acquisition study revealed that between 39.3% and 47.9% of transactions were for target entities that were less than five years old at the time of their acquisition.[69] Given the relative nascency of these acquired companies, the Commission believes that excluding prior acquisitions of firms that have not yet had the chance to gain commercial traction to achieve $10 million in net sales or assets does not provide a comprehensive picture of each filer's acquisition strategy. Learning more about the existence and patterns of these additional past acquisitions by both the acquiring person and the acquired entity, including acquisitions of companies that had not yet generated revenue, would help the Agencies better identify during the initial waiting period transactions that may, on their own or as part of a pattern of serial acquisitions, violate the antitrust laws.

Fourth, the Commission proposes treating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests. Currently, Item 8 provides separate thresholds for acquisitions of control of entities and acquisitions of assets. This distinction, however, does not recognize that some asset transactions functionally reflect the acquisition of substantially all of the assets of an entity as opposed to the acquisition of a distinct asset such as a manufacturing plant or an exclusive license. Thus, the current rule treats acquisitions of an entity or business differently depending on the form of the agreement. The proposed Instructions would continue to require that the acquisition of a distinct asset be reported only if the then-in-place size-of-transaction threshold was exceeded, but they would also require that a prior acquisition involving substantially all of the assets be reported in the same manner as prior acquisitions involving

[60] *See e.g.,* Thomas Wollmann, *How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare* (Nat'l Bureau of Econ. Rsch., Working Paper 27274, 2021); Thomas Wollmann, Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act, 1 Am, Econ, Rev,: Insights 77, (2019).

[61] Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms 10–11 (2021).

[62] *See, e.g.,* Gerry Hansell, Decker Walker, and Jens Kengelbach, ''Lessons from Successful Serial Acquirers: Unlocking Acquisitive Growth,'' Boston Consulting Group (Oct. 1, 2014), *https://www.bcg.com/publications/2014/mergers-acquisitions-unlocking-acquisitive-growth;* Thomas Wollmann, Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act, 1 Am, Econ, Rev,: Insights 77, (2019).

[63] Paul J. Eliason et al., *How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry,* 135 Q. J. ECON. 221, 235 (2020). *See* Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita Inc's Future Mergers Follow Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis. See also* Martin Gaynor, Kate Ho, and Robert J Town, *The industrial organization of health-care markets,* J. of Econ. Literature, 53(2):235–284 (2015); Cory Capps, David Dranove, and Christopher Ody, ''Physician Practice Consolidation Driven By Small Acquisitions, So Antitrust Agencies Have Few Tools To Intervene,'' Health Affairs (Sept. 1, 2017), *https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0054.*

[64] Colleen Cunningham, Florian Ederer, and Song Ma, *Killer Acquisitions,* 129 J. of Pol. Econ., 649–702 (2021), *https://ssrn.com/abstract=3241707.*

[65] *See e.g.,* Note by the United States, *Start-ups, killer acquisitions and merger control,* OECD DAF/COMP/WD (2020)23 (June 11, 2020), *https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.*

[66] 43 FR 33534 (July 31, 1978).

[67] 50 FR 38742, 38768 (Sept. 24, 1985).

[68] *Id.*

[69] Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms 26 (2021). Note this percentage range could also be different (*i.e.,* lower or higher) as target entities in 13.4% of the transactions did not have founding dates located in the three databases.

voting securities or non-corporate interests.

While the Commission expects that the expanded reporting requirements of past acquisitions would create additional burden for filing parties, the proposed Instructions would continue to limit the reporting to only acquisitions in industries for which the filers have reported horizontal overlaps, as identified by overlapping NAICS codes or in the filer's Horizontal Overlaps Narrative. This limitation still provides the Agencies with sufficient information to identify transactions that may further a trend toward concentration or patterns of acquisitions that may, alone or in combination, substantially lessen competition. Moreover, given the difficulties in determining the value of small or nascent companies, the Commission believes it would be less burdensome for filers to report all acquisitions rather than expend additional time in assessing their value in terms of net sales or assets. The Commission invites comment on ways to limit the burden and exclude de minimis acquisitions of no competitive significance while still capturing acquisitions of entities worth less than $10 million and allowing the Agencies to conduct a robust screening for acquisition strategies that further consolidation trends.

E. Additional Information

1. Subsidies From Foreign Entities or Governments of Concern

As discussed in I.A. above, the 2022 Amendments direct the Commission, with the concurrence of the Assistant Attorney General, and in consultation with the Relevant Agencies, to require persons making an HSR Filing to disclose information about foreign subsidies from countries or entities that threaten U.S. strategic or economic interests. Along with the proposed definitions discussed above, the Commission proposes changes to the Instructions to implement this mandate from Congress.

The Commission proposes creating a Subsidies from Foreign Entities or Governments of Concern section within the proposed Instructions. This proposed section would include three questions. The first proposed question would track the requirements and stated purpose of the 2022 Amendments by requiring the acquiring and acquired person (as appropriate) to identify and describe certain subsidies, as defined by proposed § 801.1(r)(2), received or that are anticipated to be received by any entity within its person from a foreign entity or government of concern, as defined by proposed § 801.1(r)(1). Given the complexity of subsidies, the Commission proposes stating that the question should be answered upon the knowledge or belief of the filing person. This would relieve the filing person of the obligation to conduct a complex legal analysis. The filing person, however, must conduct good faith diligence.

In proposing this question, the Commission believes it is also consistent with Congressional intent to create reasonable limits to the required information on subsidies to benefit both the Agencies and filing parties. The Commission's proposed two-year limitation would identify the subsidies most likely to affect the Agencies' competitive analysis of a proposed transaction because those subsidies are most likely to affect current or future conduct of the parties. The Commission believes that this practical qualifier, coupled with the use of an existing definition of ''subsidy,'' as discussed in I.A.2. above, would provide the Agencies with the most pertinent information for the analysis of proposed transactions, while reasonably limiting the information required from filing parties. The Commission seeks comment on the temporal limitation for subsidies, as well as whether a de minimis value should be set, and if so, what administrable levels might be appropriate.

The Commission believes that requiring information on countervailing duties [70] would be extremely useful in providing a complete picture of the potential impact of subsidies per Congress's mandate and screening for subsidies that bear on whether the transaction may violate the antitrust laws. Thus, the Commission's second proposed question would require the acquiring or acquired person (as appropriate) to identify any of its products produced in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are subject to countervailing duties in any jurisdiction. The Commission would also ask the filing party to list the countervailing duty imposed and the jurisdiction that imposed the duty. Such information about the countervailing duties and relevant products would help the Agencies determine in their initial analysis of a transaction whether subsidies from foreign entities or governments of concern might affect some aspect of competition in the future. The Commission believes that information about countervailing duties imposed by the United States should be readily available to filers because the Department of Commerce issues fact sheets that contain an overview of final subsidy findings and are available on its ''recent case announcements'' web page (*https://www.trade.gov/case-announcements-archives* (case announcements for the prior year)) and on the International Trade Commission's website (*https://legacy.trade.gov/enforcement/operations/scope/index.asp* (older determinations)), and that information about countervailing duties imposed by other jurisdictions should be readily available to filing persons from similar sources as well.

The Commission's third proposed question would require the acquiring or acquired person (as appropriate) to identify, to its knowledge or belief, any of its products produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are the subject of an investigation by any jurisdiction for potential countervailing duties. The Commission would also ask the filing person to list the jurisdiction conducting the investigation. Such information would help the Agencies identify products that may be subject to active subsidies and assist the Agencies in their assessment of the subsidies' impact on competition. It is the Commission's understanding, however, that the investigating agencies do not always inform all producers or market participants of an investigation; thus, the Commission proposes limiting the scope of this third question to the filing person's knowledge or belief. The Commission believes that limiting this reporting requirement to the knowledge or belief of the filing person would provide filers with enough flexibility to respond to the question and certify the HSR Filing without having to confirm with various relevant agencies that no such investigation exists.

The Congressional mandate to collect information about foreign subsidies is consistent with the Agencies' desire to better understand whether there are significant ties to individuals or entities that may affect the Agencies' assessment of the potential competitive risks associated with the transaction. For instance, a foreign government or entity

[70] Countervailing duties are duties intended to offset the price effect of significant foreign government subsidies on a product or good. In the United States, the International Trade Administration of the Department of Commerce investigates whether imported products are subject to significant foreign government subsidies. The amount of the subsidies that the foreign producer receives from its government is the basis for the rate by which the subsidy is offset, or ''countervailed,'' through higher import duties enforced by U.S. Customs and Border Protection. *See, e.g.,* Int'l Trade Admin., *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

could have a financial relationship that gives it the ability to sway the filing person to make different choices in the marketplace than it would without the subsidy. As discussed in III.B., Agencies would benefit from more complete information about individuals and entities, including governments, that have the ability to control or influence competitive decision making. The Commission believes that, taken together, information about minority holdings, individuals with influence, officers, directors, and board observers, as well as information about foreign subsidies may reveal significant constraints on the competitiveness of the affected company that should be taken into account during the Agencies' initial review.

2. Defense or Intelligence Contracts

The Commission proposes creating a Defense or Intelligence Contracts section within the proposed Instructions that would require filing persons to report certain contracts with defense or intelligence agencies. The Agencies regularly review filings from companies that supply the Department of Defense (''DoD'') or the intelligence community (''IC'') with products or services. During the initial waiting period, it is important for the Agency to quickly contact DoD and IC staff to collect key insights and information to prevent mergers that may have an anticompetitive impact on taxpayers through purchases made through DoD and IC programs. Yet without information about specific DoD or IC contracts or knowledge of which unit handles that contract, the Agencies often face difficulty and delay in identifying appropriate relevant personnel or stakeholders with knowledge of the contracts, programs, or products or services at issue. Such delays hinder the identification and evaluation of competition issues that would impact DoD or IC programs or budget during the initial waiting period.

The Commission thus proposes adding a requirement that both the acquiring and acquired person identify whether they have existing or pending defense or intelligence procurement contracts, as defined by 10 U.S.C. 101(a)(6) and 50 U.S.C. 3033(4), valued at $10 million or more, and provide identifying information about the award and relevant DoD or IC personnel. For filings from companies that supply DoD or the IC with products or services, this information would greatly enhance the Agencies' ability to identify and contact appropriate stakeholders within DoD or IC to seek their input as customers that might be impacted by the proposed transaction. This information is well known to the companies that do business with these government entities.

3. Identification of Communications and Messaging Systems

In conjunction with the proposed requirement that filing persons certify they have taken steps to prevent destruction of relevant information, as discussed in III.F. below, the Commission also proposes that filers identify and list all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations. Companies have increasingly been relying on new forms of communication—beyond email and other traditional document formats—to engage in business discussions and make key operational decisions. These systems can encompass internal chat technologies (such as so-called ephemeral messaging) or document management systems, including where content exchanged between the individuals is automatically deleted.

In the Agencies' experience, these communications systems contain highly relevant information on the transaction itself, as well as on topics that are critical for the Agencies' assessment of the transaction such as competition, competitors, markets, customers, and industry characteristics. Company employees' more frequent use of these communications systems and messaging applications, particularly in lieu of other traditional forms of communication such as email, has meant that these systems and applications have become an important part of Agencies' investigations. Moreover, to the extent that these communications systems are being used to evade document retention and preservation requirements that exist for more traditional forms of communication, the Commission believes it is important for the parties to understand that their preservation and retention obligations apply to these systems as well. As yet, many parties do not appear to fully understand and/or comply with document preservation obligations for these new modalities. For these reasons, the Agencies would greatly benefit from having a complete and transparent picture of the filer's applicable communication systems at the filing stage. The Commission further believes that this information is readily available to the filing person and that identifying these systems in use by the company with the HSR Filing would impose minimal burden.

4. Other Jurisdictions

The Commission proposes creating a new Other Jurisdictions section within the proposed Instructions. This section proposes to amend the requirements concerning antitrust filings outside of the United States and add a voluntary waivers section to allow for the sharing of HSR information with other enforcers.

a. Transactions Subject to International Antitrust Notification

The Commission proposes creating a Transactions Subject to International Antitrust Notification section that would require the identification of other jurisdictions that may be conducting a competition review. Currently, page one of the Form asks filing persons to voluntarily identify other jurisdictions where the transaction will trigger premerger notification under the laws of that jurisdiction. The Commission first proposed collecting information about filing in other jurisdictions in 1994, when it proposed a mandatory requirement.[71] In 1999, the Commission noted that it was still considering the proposals included in its 1994 proposed rulemaking.[72] The Commission then proposed a voluntary requirement in 2001[73] and the final rule was adopted in 2003.[74] The Commission now proposes making the disclosure of international filing obligations a mandatory requirement.

Since 2001, and certainly since 1994, merger enforcement by other competition authorities has become more robust as more jurisdictions have adopted competition laws that impose mandatory or voluntary premerger notification requirements. At the same time, a larger percentage of HSR-reportable transactions now involve companies with international reach. As a result, more transactions are likely to be subject to review in multiple jurisdictions around the world. Even though the number of transactions subject to premerger notifications in multiple jurisdictions has increased over the years, most filers do not voluntarily disclose on the Form that their transactions will be subject to non-U.S. notification requirements.

For many years, the Agencies have cooperated with numerous competition authorities on cases of common concern to help identify issues of common interest, gain a better understanding of relevant facts, and achieve, where possible, consistent or, at a minimum,

[71] 59 FR 30545, 30547 (June 14, 1994).
[72] 64 FR 1203 (Jan. 8, 1999).
[73] 66 FR 8680, 8684 (Feb. 1, 2001).
[74] 68 FR 2425, 2429 (Jan. 17, 2003).

non-conflicting outcomes. In order to fully benefit from inter-agency consultations, the Agencies need to know which foreign jurisdictions may also be evaluating the proposed transaction as early as possible. The delay associated with confirming whether there will be reviews or investigations by other competition authorities undermines effective cooperation during the initial waiting period, when sharing expertise and knowledge with other competition enforcers would be especially helpful in identifying which transactions need more in-depth review. Moreover, review by other jurisdictions can often affect the timing, pace, or ability to close the transaction, especially for jurisdictions that also require suspension of the transaction until the competition review is completed.

The Commission thus proposes a mandatory requirement to identify the jurisdictions where each filing person has already filed or is preparing notifications to be filed as well as a list of the jurisdictions where it has a good faith belief it will file. The Commission believes that upon execution of a definitive agreement, filers often know the jurisdictions where competition filings will be made. However, to account for the possibility that, at the time of the HSR Filing, parties may not have yet identified all the other jurisdictions where they will file, the proposed rule provides flexibility by stating that parties should respond based on their ''good faith belief.''

b. Voluntary Waivers for International Competition Authorities and State Attorneys General

The Commission proposes the creation of a voluntary waivers check box within an Other Jurisdictions section to allow filing persons to indicate that they agree to waive the confidentiality provisions of the Act, 15 U.S.C. 18a(h), for any jurisdiction identified by the filing person. As discussed above, transactions are often reviewed by non-U.S. competition authorities, or by one or more State Attorneys General. But the Act's confidentiality provision contains limits on disclosing material collected as part of the Agencies' HSR review of the transaction. As a result, merging parties and third parties waive statutory confidentiality protections so that the investigating Agency can share certain limited information with foreign or state competition authority counterparts, enabling the Agency to make more informed, consistent decisions, and investigate the transaction more effectively, often expediting review.[75]

The Commission proposes amending the Instructions to allow filing persons to waive the confidentiality provision contained in the Act, 15 U.S.C. 18a(h), for any non-U.S. competition authorities or State Attorneys General they identify. Allowing filers to waive the confidentiality protections in the HSR Filing would provide an efficient mechanism for filers to consent to limited waivers of confidentiality at the outset to facilitate early cooperation among competition enforcers. The proposed voluntary waiver would allow the Agencies to disclose the existence of an HSR Filing and the information contained in the HSR filing, but only for those ex-U.S. competition authorities or State Attorneys General selected by the filing person. The Commission also proposes modifying the language that would inform filers about potential disclosures based on the waivers to track the language of the Act more closely. The waivers would be optional for the parties, but the Commission expects that some filers will benefit from providing these limited waivers of confidentiality.

F. Certification

The Commission proposes amending the language of the certification that filing persons must submit with HSR Filings to require affirmation that the filing person has taken the necessary steps to prevent the destruction of documents and information related to the transaction. When parties submit premerger notification filings, this triggers a Congressionally mandated initial phase investigation regarding the potential competitive effects of the proposed transaction. When making an HSR Filing, filers should be aware that the Agencies may, prior to the expiration of the initial waiting period, issue Second Requests to further investigate the proposed transaction.[76] If issued, a Second Request requires the recipient to produce documents and information relevant to the transaction. If, as part of a filing person's ordinary course business operations, relevant information is deleted or destroyed during the initial waiting period, this could lead to a loss of information that may be critical to the investigating Agency and undermine its ability to conduct a full in-depth investigation pursuant to the Act to determine if the transaction is likely to violate Section 7 or any other antitrust law and to seek to prevent its consummation. Therefore, the Commission proposes adding to the certification an acknowledgement that the Agencies may require the submission of additional information or documents in response to a Second Request and a confirmation that the officer, director, or other individual described in § 803.6, as appropriate, has taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period. Such steps could include, for example, the suspension of auto-delete policies in place at any entity within the filing person.

The Commission also proposes the addition of language in the Instructions that would serve to remind filers that there are criminal penalties under other federal statutes that prohibit various deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies. In recent years, the Agencies have observed an increasing number of instances where, in the course of an investigation or later litigation challenging the transaction, the filing parties disclaim or modify statements or information submitted as part of the Form, notwithstanding numerous federal laws that prescribe criminal penalties for submitting false information to the government, including as part of an HSR Filing. While the Commission's proposed language does not intend to change any existing obligation to comply with other laws, it would provide notice to filers that the Commission takes those obligations seriously and may refer filers who do not comply with those obligations for potential criminal proceedings. The Commission does not expect this proposed reminder, which does not require any additional information or obligation, to result in additional burden for filing persons.

G. Affidavit

As discussed in the proposed changes to § 803.5(b) above at II.C., the Commission proposes requiring filings for transactions without definitive agreements to include a term sheet or draft agreement that describes with specificity the scope of the transaction that would be consummated. As a result, the Commission proposes that

[75] The Agencies have developed a model waiver of confidentiality for use in civil matters involving non-U.S. competition agencies that has been in use for 10 years. Similarly, the Agencies have developed a protocol for coordination in merger investigations with State Attorneys General. *See* Fed. Trade Comm'n, *https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust-investigations* and *https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations.*

[76] 15 U.S.C. 18a(e); 16 CFR 803.20.

parties making such filings attest in their affidavit that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle.

Severability

Section 803.90 provides that, if any provision of the Rules (including the Form) or the application of any such provision to any person or circumstances is held invalid, the other provisions of the Rules and their application to other persons or circumstances shall be unaffected. This severability (or separability) provision would apply to any modifications of the HSR Filing requirements that the Commission adopts as final after issuing this NPRM and considering the public comments received. If a regulatory provision is severable, and one part of the provision is invalidated by a court, the court may allow the other parts of the provision to remain in effect.[77] When analyzing whether a provision is severable, courts consider both (a) the agency's intent and (b) whether severing the invalid parts of the provision would impair the function of the remaining parts.[78] The Commission is not proposing any changes to the separability provision in § 803.90 but is confirming its intent that, if a court were to invalidate any of the HSR requirements, including any modifications that the Commission finalizes at the end of the rulemaking proceeding, the other requirements would remain in effect.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record. *See* 16 CFR 1.26(b)(5).

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.,* federal Agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. The term ''collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). The current rule contains various provisions that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within OMB regulations implementing the PRA. 44 U.S.C. chapter 35. The existing information collection requirements in the HSR Rules and Form have been reviewed and approved by OMB (OMB Control No. 3084–0005). The current clearance expires on February 28, 2026. Because the rule amendments proposed in this NPRM would change existing reporting requirements, the Commission will submit this notice of proposed rulemaking and the associated Supporting Statement to OMB for review under the PRA.

Increased Time Collecting Data for and Preparing an HSR Filing

The proposed amendments are primarily changes to the information reported on the Notification and Report Form and do not affect the reportability of a transaction. Thus, the same number of filings projected for fiscal year 2023 in the most recent Supporting Statement submitted to OMB and also appearing in the associated **Federal Register** publication [79] will be used for these burden hour calculations.

Some of the proposed changes are intended to reduce the burden of filing. The Commission anticipates that the proposals to report NAICS codes in ranges rather than by specific dollar amount would reduce the burden on almost all filers. Additionally, the proposed change to eliminate the requirement for filers that derive revenue from manufacturing operations to report NAPCS code revenues is also anticipated to reduce the burden for those filers. Finally, the Commission also proposes to limit the reporting of minority investors of the acquired entity.

Some of the proposed changes offer clarifications to the current rules and are unlikely to change the burden on filers. These include the proposed changes to eliminate references to paper and DVD filings (§§ 803.2, 803.5, and 803.10) and to specifically discuss the commencement of the waiting period (§ 803.10).

Certain proposed changes would require the acquiring person to collect and report information that the Commission believes is held in the acquiring person's ordinary course of business records. These include proposed requirements for the acquiring person to describe its own business(es); report minority investors in additional entities related to the transaction; disclose relationships with individuals or entities that provide credit, hold non-voting securities, have the right to appoint board observers, or have management agreements with entities related to the transaction; and to identify members of boards of directors. Once collected, the Commission anticipates that the burden associated with some of these proposals will lessen for subsequent filings by the same acquiring person, as the information would only need to be updated.

Many of the proposed changes would increase the burden on all filers. These include new document collection requirements to produce transaction-related documents from supervisory deal team members; business documents that relate to competition topics but were not produced specifically for the transaction; drafts of responsive documents; other agreements between the acquiring and acquired persons, and to log the request to which documents are responsive. Additionally, the proposed requirements to provide narratives regarding transaction rationale, diagrams of the transaction, and organizational charts for custodians of documents would be applicable to all filers.

Some of the proposed changes would significantly increase the burden on only certain filers. These include those filers whose businesses have existing horizontal, non-horizontal, or labor market overlaps or relationships, with the largest burden falling on filers whose transaction involves many such relationships; transactions that involve a large number of foreign language documents; filing persons or transactions that have a complex structure; transactions that are filed on letters of intent or agreements in principle; and filing persons that receive subsidies from foreign entities of concern.

PNO staff canvassed current Agency staff who had previously prepared HSR filings while in private practice to estimate the projected change in burden due to the proposed amendments to the Instructions. All have considerable experience with the HSR rules and with preparing HSR Filings for the types of transactions that are most likely to be affected by the proposed changes.

These experts were asked to estimate the incremental increase in time to prepare HSR Filings, for both the company and its outside counsel, taking into account that transactions range in complexity—from relatively simple transactions with no overlaps and few

[77] *See, e.g., Davis Cnty. Solid Waste Mgmt.* v. *EPA,* 108 F.3d 1454, 1459 (D.C. Cir. 1997).

[78] *Id.* at 1460.

[79] 88 FR 3413, 3414 (Jan. 19, 2023).

documents (such as ones only involving executive compensation or other stock purchases by an individual), to moderately complex transactions (such as a fund buying or selling a portfolio company with limited overlaps) to very complex (for example, a strategic acquisition by a large company that sells many overlapping products in competition with the seller). The ranges from canvassed officials estimated that the proposed changes would result in approximately 12 to 222 additional hours per filing, depending on the complexity of the filing at issue. In the past five years, approximately 45% of filings had reported overlaps. To estimate an average number of additional hours, the Commission conservatively assumes that 45% of the filings may require an additional 222 hours to prepare and 55% may require an additional 12 hours to prepare. Thus, the Commission estimates an average of 107 additional hours (rounded to the nearest hour) will be allocated to non-index filings.[80] Added to the current estimate 37 hours,[81] the total estimated hours would be 144 per filing.

Net Effect

The proposed Rule and Notification and Report Form changes only affect non-index filings[82] which, for FY 2023, the FTC projects will total 7,096. As described above, the Commission estimates that he amendments to the HSR Rules and Notification and Report Form would increase the time required to prepare responses for non-index filings, with an estimated net increase of 107 hours per filing. Thus, the total estimated additional hours burden is 759,272 (7,096 non-indexed filing × 107 hours/each).

Applying the revised estimated hours, 759,272, to the previous assumed hourly wage of $460 for executive and attorney compensation, yields approximately $350,000,000 in labor costs. The amendments are expected to impose either minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Instructions.

Request for Comments

The Commission invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of these information collections on respondents.

Comments on the proposed reporting requirements subject to PRA review by OMB should additionally be submitted to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. The *reginfo.gov* web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small entities, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR Filing, the premerger notification rules rarely, if ever, affect small entities.[83] The 2000 amendments to the Act exempted all transactions valued at $50 million or less, with subsequent automatic adjustments to take account of changes in Gross National Product resulting in a current threshold of $111 million. Further, none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities. Accordingly, the Commission certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Invitation To Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 28, 2023. Write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov/* website.

Because of the agency's security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through *https://www.regulations.gov/.* To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580. If possible, please submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the publicly accessible website, *https://www.regulations.gov/,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or

[80] Clayton Act section 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the FTC and the Assistant Attorney General. Thus, parties must submit copies of these ''index'' filings, but completing the task requires significantly less time than non-exempt transactions that require ''non-index'' filings. The proposed changes would not require any additional information from indexed filings.

[81] 88 FR 3413, 3414 (Jan. 19, 2023).

[82] Id.

[83] *See* 13 CFR part 121 (regulations defining small business size).

any commercial or financial information which . . . is privileged or confidential,''—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c). The written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(b). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *https://www.regulations.gov/*—as legally required by FTC Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), 16 CFR 4.9(c), and the General Counsel grants that request.

Visit the Commission's website, *www.ftc.gov,* to read this publication and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 28, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see https://www.ftc.gov/site-information/privacy-policy*.

List of Subjects in 16 CFR Parts 801 and 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes amending 16 CFR parts 801 and 803 as set forth below:

PART 801—COVERAGE RULES

■ 1. The authority citation for part 801 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 2. Amend § 801.1 by adding paragraph (r) to read as follows:

§ 801.1 Definitions

* * * * *

(r)(1) *Foreign entity or government of concern.* The term *foreign entity or government of concern* means: (i) An entity that is a foreign entity of concern as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)); or

(ii) A government, or an agency thereof, of a foreign country that is a covered nation as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)(C)).

(2) *Subsidy.* The term *subsidy* has the meaning given the term in Part IV of Title VII of the Tariff Act of 1930 (19 U.S.C. 1677(5)(B)).

PART 803—TRANSMITTAL RULES

■ 3. The authority citation for part 803 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 4. Amend § 803.2 by:
■ a. Redesignating paragraph (a) as (a)(1) and adding paragraph (a)(2);
■ b. Removing paragraph (b)(1)(v); and
■ c. Revising paragraphs (e) and (f). The revisions and additions read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

(a)(1) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however,* That notwithstanding §§ 801.1(c)(2) and 801.2 *of this chapter,* only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example:

Jane Doe, her husband, and minor child collectively hold more than 50 percent of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the ''ultimate parent entity'' of a ''person'' composed to herself (or her husband or minor child) and F; see paragraphs (a)(3), (b) and (c)(2) of § 801.1 *of this chapter.* If corporation F is to acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband, and minor child collectively.

(2) Persons that are both acquiring and acquired persons should submit separate forms, one as the acquiring person and one as the acquired person, following the appropriate instructions for each.

* * * * *

(e) For documents required by item 4(b) of the Notification and Report Form, a person filing the notification may, instead of submitting a document, provide a cite to an operative internet address directly linking to the document, if the linked document is complete and payment is not required to access the document. If an internet address becomes inoperative during the waiting period, or the document is otherwise rendered inaccessible or incomplete, upon notification by the Commission or Assistant Attorney General, the parties must make the document available to the agencies by either referencing an operative internet address where the complete document may be accessed or by providing electronic copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. on the next regular business day. Failure to make the document available, by the internet or by providing electronic copies, by 5 p.m. on the next regular business day, will result in notice of a deficient filing pursuant to § 803.10(c)(2).

(f) Filings must comply with all format requirements set forth at the Premerger Notification Office pages at *https://www.ftc.gov.* The use of any format not specified as acceptable, or any other failure to comply with the applicable format requirements, shall render the entire filing deficient within the meaning of § 803.10(c)(2).

■ 5. Amend § 803.5 by revising paragraphs (a)(1), (3) and (b) to read as follows:

§ 803.5 Affidavits required.

(a)(1) *Section 801.30 acquisitions.* For acquisitions to which § 801.30 of this chapter applies, the notification required by the act from each acquiring person shall contain an affidavit attesting that the issuer or unincorporated entity whose voting securities or non-corporate interests are to be acquired has received written notice delivered to an officer (or a person exercising similar functions in the case of an entity without officers) by email, certified or registered mail, wire, or hand delivery, at its principal executive offices, of:

* * * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 of

this chapter does not apply, the notification required by the act shall contain an affidavit attesting that a contract, agreement in principle, or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction. If a definitive agreement is not provided, the affidavit must attest that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle.

■ 6. Revise § 803.8 to read as follows:

§ 803.8 Foreign language documents.

Documentary materials or information in a foreign language required to be submitted at the time of filing a Notification and Report Form and in response to a request for additional information or documentary material must be submitted with verbatim English language translations. All verbatim translations must be understandable, accurate, and complete.

■ 7. Amend § 803.10 by revising paragraphs (c)(1)(i) and (ii) to read as follows:

§ 803.10 Running of time.

* * * * *

(c)(1)(i) The date of receipt shall be the date of electronic submission if such date is not a Saturday, Sunday, a legal public holiday (as defined in 5 U.S.C. 6103(a)), or a legal public holiday's observed date, and the submission is completed by 5:00 p.m. eastern time. In the event electronic submission is unavailable, the FTC and DOJ may designate procedures for the submission of the filing. Notification of the alternate delivery procedures will normally be made through a press release and, if possible, on the *https://www.ftc.gov* website.

(ii) Delivery effected after 5 p.m. eastern time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next following business day. If submission of all required filings is not effected on the same date, the date of receipt shall be the latest of the dates on which submission is effected.

* * * * *

■ 8. Amend § 803.12 by revising paragraph (c)(1)(iii) to read as follows:

§ 803.12 Withdraw and refile notification.

* * * * *

(c) * * *

(1) * * * (iii) The resubmitted notification is recertified, and the submission, as it relates to Transaction-specific Agreements (including the latest drafts, if definitive agreements have not been signed), Transaction-Related Documents (including Documents Prepared by or for Officers, Directors or Supervisory Deal Team Leads; Confidential Information Memorandum; Studies, Surveys, Analyses, and Reports; Synergies and Efficiencies) and Subsidies from Foreign Entities of Concern in the Instructions, is updated to the date of the resubmission;

* * * * *

■ 9. Revise Appendices A and B to part 803 to read as follows:

[INSERT GENERAL INSTRUCTIONS AND INFORMATION]

Antitrust Improvements Act Notification for Certain Mergers and Acquisitions

General Instructions And Information

These instructions specify the information that must be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR parts 801–803 (''the Rules''). Submitted materials must be provided to the Federal Trade Commission (''FTC'') and to the Antitrust Division of the Department of Justice (''DOJ'') (together, ''the Agencies'').

Information

The central office for information and assistance concerning the Rules is: Premerger Notification Office Federal Trade Commission, Room #5301, 400 7th Street SW, Washington, DC 20024, Phone: (202) 326–3100, Email: *HSRhelp@ftc.gov* for rules questions, *Premerger@ftc.gov* for filing information.

Copies of these Instructions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (''the Act''), the Rules, **Federal Register** publications issuing the Rules and Rule amendments (''Statements of Basis and Purpose''), as well as information to assist in submitting the required information are available at the FTC's Premerger Notification Office (''PNO'') *website.*

Definitions and Explanation of Terms

Unless otherwise indicated, the definitions provided in the Rules apply to these Instructions.

Dollar Values

All financial information should be expressed in millions of dollars rounded to the nearest hundred thousand.

Economic Research Service's Commuting Zones

When submitting information by the Economic Research Service's (''ERS's'') Commuting Zones (''CZ''), refer to the U.S. Department of Agriculture's Economic Research Service Commuting Zones for the year 2000, available at *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.*

Fee Information

The filing fee is based on the aggregate total value of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition. Filing fee tiers are adjusted annually pursuant to 15 U.S.C. 18a(a)(note) based on the change in gross national product, in accordance with 15 U.S.C. 19(a)(5). For each fiscal year commencing after September 30, 2023, filing fees will increase by the percentage increase, if any, in the consumer price index (''CPI'') over the CPI for the fiscal year ending September 30, 2022, pursuant to 15 U.S.C. 18a(a)(note). For current thresholds and fee information, see the *PNO website.*

North American Industry Classification System (NAICS) Data

When reporting information by 6-digit NAICS code, refer to the North American Industry Classification System—United States, 2022, published by the Executive Office of the President, Office of Management and Budget, available at *https://www.census.gov/naics/.* This website also provides guidance in choosing the proper code(s).

Person Filing and Filing Person

The terms ''person filing'' or ''filing person'' mean the ultimate parent entity (''UPE''). See § 801.1(a)(3). The terms are used herein interchangeably.

Standard Occupational Classification

When reporting information by 6-digit Standard Occupational Classification (''SOC'') code, refer to the 2018 SOC System, available at *https://www.bls.gov/soc/2018/#classification.*

Thresholds

Notification thresholds are adjusted annually based on the change in gross national product, in accordance with 15 U.S.C. 19(a)(5). See § 801.1(h). The current threshold values can be found at *Current Filing Thresholds.*

Year

All references to ''year'' refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to ''most recent year'' mean the most recent calendar or fiscal year for which the requested information is available.

Filing

If the UPE is both an acquiring and acquired person, separate filings must be submitted, one as the acquiring person and one as the acquired person, following the appropriate instructions for each. See § 803.2(a)(2).

Filings should be submitted electronically consistent with the instructions on the PNO website. If the electronic submission platform is unavailable, the Agencies may announce sites for delivery through the media and, if possible, at the PNO website.

Responses

Items that require the submission of documents or narrative responses should be produced in (1) searchable PDF format from which text can be copied or (2) Excel formats.

All documents should be logged in an Excel File. The log should list all responsive

documents, regardless of whether the document is redacted or withheld for privilege. For each document, indicate:

1. The document number;
2. Request(s) to which the document is responsive;
3. Title;
4. Date;
5. Authors and job titles; and
6. Whether the document is privileged.

Indented and bolded headings in these Instructions should each be considered a separate request.

If a group of people prepared the document, list all the authors and their titles, identifying the principal authors. Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. If the filing person engaged a third party to prepare a document, provide the name of the third party, and the name, title, and company name for the individual within the filing person who supervised the creation of the document, or for whom the document was prepared. For materials received from a third party that was not engaged by the filing person, only the name of the third party is required.

If parties submit documents in addition to what is required, such documents should be identified as ''Voluntary''. See § 803.1(b).

Submit only one copy of identical responsive documents.

For each narrative response, indicate the document number for each document that supports the narrative and the request to which the narrative is responsive.

Privilege

For privileged documents, the filing person must also provide the following in the Responses log:

1. The privilege type (redacted or withheld);
2. The privilege claim;
3. Addressee(s) and all recipients, with company name and title, of the original and any copies;
4. Subject matter;
5. Document's present location; and
6. Who has control over it.

If a privileged document was circulated to a group, such as the board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested.

If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

Translations

Materials or information in a foreign language must be translated into English, with the English translation attached to the foreign language version. See § 803.8.

Non-Compliance

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation ''est.'' to any item where data are estimated.

Limited Response

Information need not be supplied regarding assets, voting securities, or non-corporate interests currently being acquired when their acquisition is exempt under the Act or Rules. See § 803.2(c).

Ultimate Parent Entity Information

UPE Details

Name

Provide the name, headquarters address, and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE. See § 801.1(a)(3).

Entity Type

Specify whether the UPE is a corporation, unincorporated entity, natural person, or other entity type (specify). See § 801.1.

Acquiring or Acquired Person

Indicate whether the filing is being made as an acquiring or acquired person.

Filing Made on Behalf of the UPE

If the filing is being made on behalf of the UPE by another entity within the same person that is authorized by the UPE to file the notification on its behalf pursuant to § 803.2(a), or filed pursuant to § 803.4 on behalf of a foreign person, provide the name and mailing address of the entity filing the notification on behalf of the UPE.

Contact Information

Provide the name and title, firm name, address, telephone number, and email address of two individuals (primary and secondary) to contact regarding the filing. See § 803.20(b)(2)(ii).

Second Request Contact Information

Provide the name, firm name, address, telephone number, and email address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. See § 803.20(b)(2).

Annual Reports and Financial Information

Central Index Key

Provide the names of all entities within the person filing the notification, including the UPE, that file annual reports (Form 10–K or Form 20–F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

Annual Reports and Audit Reports

Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification.

The acquiring person should also provide the most recent reports of the acquiring entity(s) and any entity controlled by the acquiring person whose revenues contribute to a NAICS overlap or any overlap identified in the Horizontal Overlap Narrative.

The acquired person should also provide the most recent reports of the acquired entity(s).

Natural person UPEs should not provide personal balance sheets or tax returns. Natural person UPEs should instead provide the most recent reports for the highest-level entity(s) they control.

The person filing notification may incorporate a document responsive to this item by reference to an internet address directly linking to the document. See § 803.2(e).

Size of Person

If applicable, indicate whether the UPE stipulates that it meets the size of person test. See 15 U.S.C. 18a(a).

Organization Structure

If the acquisition includes only assets that do not comprise substantially all the assets of an operating unit, the acquired person should not complete the questions in this section. Otherwise, the acquired person must complete these questions for the portion of the transaction related to the voting securities, non-corporate interests, and assets that comprise substantially all the assets of an operating unit.

Entities Within the Acquiring Person and Acquired Entity

List the name, city, state/country, and zip code of all U.S. entities, and all foreign entities that have sales in or into the United States, that are included within the acquiring person, or acquired entity (as appropriate). Entities with total assets of less than $10 million may be omitted. Alternatively, the acquiring person or acquired entity (as appropriate) may report all entities within it. Also list all names under which the entities do business or have done business within the past 3 years (*e.g.,* d/b/a or f/k/a names).

The list of entities should be organized by operating company or operating business/unit (''top-level entity''), if applicable.

Minority Shareholders and Other Non-Controlling Entities

Acquiring Person

Provide a narrative response describing the ownership structure of the acquiring entity.

For transactions where a fund or master limited partnership is the UPE, also provide an organizational chart sufficient to identify and show the relationship of all entities that are affiliates or associates. See § 801.1(d).

Additionally, list the name, headquarters mailing address, and approximate percentage of holdings for any individual or entity that currently holds, or will hold as a result of the transaction, 5% or more but less than 50% of the voting securities or non-corporate interests of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction. Entities related

to master limited partnerships, funds, investment groups, or similar entities that do business under a common name should also have the d/b/a or ''street name'' of such group listed.

For limited partnerships, the general partner(s), regardless of percentage held, should also be listed.

If the identity of minority investors or percentage to be held is not finalized at time of filing, provide good faith estimates and explain.

Acquired Person

Provide a narrative response, describing the ownership structure of the acquired entity(s).

Additionally, list the name, headquarters mailing address, and approximate percentage held for any holders of 5% or more but less than 50% of (1) the acquired entity(s), and (2) any entity within the acquired entity(s), but only if such holder will continue to hold an interest (whether voting securities or non-corporate interests) in such entity(s), or will acquire an interest in any entity within the acquiring person as a result of the transaction.

For limited partnerships, the general partner(s), regardless of percentage held, should also be listed.

Other Types of Interest Holders That May Exert Influence

For the Acquiring Person Only: Identify every entity and individual (other than those employed by the acquiring person or an entity it controls) that, upon consummation or as a result of agreements related to consummation:

1. Provides, has provided (and still is a creditor), or will provide credit to the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity. Do not list individuals or entities if the amount of credit they have provided or will provide is less than 10% of the value of that entity;

2. Holds non-voting securities (including options or warrants) of the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity, where such non-voting securities are valued at more than 10% of that entity;

3. Is a board member or board observer or has the right to nominate or appoint a board member or board observer of the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity; or

4. Has an agreement to manage the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity.

For every individual or entity identified, provide the name, contact information, the percent of voting securities or non-corporate interests owned (if any), and a description of the relevant relationship(s) above.

Officers, Directors, and Board Observers

For each entity within the acquiring person or acquired entity (as applicable), list by entity all current officers, directors, and board observers (or in the case of unincorporated entities, individuals exercising similar functions), as well as those who have served in the position within the past 2 years.

Additionally, list all individuals who will or are likely to serve as an officer, director, or board observer of an entity within the acquiring person as a result of or as contemplated by the transaction. Organize the response by entity and include entities that are not yet created but are expected to be created as a result of or as contemplated by the transaction. If the identities of the prospective officers, directors, and board observers are unknown, briefly describe who will have the authority to select them.

For each officer, director and board observer identified, list all other entities for which the individual serves, or has served within the last two years, as an officer, director, or board observer.

Transaction Information

Parties

List the name and mailing address of each acquiring and acquired person, and acquiring and acquired entity, whether or not required to file a notification. Do not list entities controlled by an acquired entity.

Acquiring UPE

Provide the name, headquarters address, and website (if one exists) of the acquiring person.

Acquiring Entity

If an entity other than the acquiring UPE is making the acquisition, provide the name, mailing address, and website of that entity.

Acquired UPE

Provide the name, headquarters address, and website (if one exists) of the acquired person.

Acquired Entity

If the assets, voting securities, or non-corporate interests of an entity other than the acquired UPE are being acquired, provide the name, mailing address, and website of that entity.

Filing Fee

Total Expected Filing Fee

Indicate the value of the total required fee for the transaction.

Parties Paying the Fee

Indicate which filing party(s) is paying the filing fee and, if applicable, whether the portion of the fee being paid by the filer is being paid by multiple entities associated with the filer. For each entity paying a portion of the fee, provide the name of payer, the amount paid, the payment method, and the Electronic Wire Transfer (EWT) confirmation number or check number.

Note on Paying by EWT: In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the PNO website on the *Filing Fee Information page.*

Note on Paying by Check: The FTC strongly discourages check payments. However, if an EWT cannot be arranged, the FTC will accept a check, sent to Financial Operations. Cashiers' or certified checks are preferred. Make the check payable to the Federal Trade Commission and deliver to: Federal Trade Commission, Financial Operations Division, 600 Pennsylvania Ave., Drop H–790, Washington, DC 20580.

Please note that the waiting period may be delayed until the fee has been confirmed.

Transaction Details

801.30 Transaction:

Indicate whether the transaction is subject to § 801.30.

Transaction Type

Indicate whether the transaction is a(n):

- Acquisition of voting securities;
- Acquisition of non-corporate interests;
- Acquisition of assets;
- Merger (see § 801.2);
- Consolidation (see § 801.2);
- Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50);
- Bankruptcy that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. 363);
- Cash Tender Offer;
- Acquisition subject to § 801.31;
- Secondary acquisition subject to § 801.4;
- Acquisition subject to § 801.2(e); and/or
- Acquisition consummated in violation of the HSR Act.

Acquisition Details

Provide the requested information for the value and percentage of assets, voting securities, and non-corporate interests to be acquired. If a combination of assets, voting securities, and/or non-corporate interests are being acquired and allocation is not possible, note such information in an endnote.

For determining percentage of voting securities, evaluate total voting power per § 801.12.

For determining percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

- State the value of voting securities already held by the acquiring person. See § 801.10.
- State the percentage of voting securities already held by the acquiring person. See § 801.12.
- State the total value of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total percentage of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.12.
- State the value of non-corporate interests already held by the acquiring person. See § 801.10.
- State the percentage of non-corporate interests already held by the acquiring person. See § 801.1(b)(1)(ii).
- State the total value of non-corporate interests to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total percentage of non-corporate interests to be held by the acquiring person as a result of the acquisition. See §§ 801.10 and 801.1(b)(1)(ii).
- State the value of assets to be held by the acquiring person as a result of the acquisition. See § 801.10.

• State the aggregate total value of assets, voting securities, and non-corporate interests of the acquired person to be held by the acquiring person as a result of the acquisition. See §§ 801.10, 801.12, 801.13 and 801.14.

Notification Threshold

This item should only be completed by the acquiring person when voting securities are being acquired. If more than voting securities are being acquired, respond to this item only regarding voting securities. Indicate the highest applicable threshold for which notification is being filed. See § 801.1(h).

• $50 million (as adjusted);
• $100 million (as adjusted);
• $500 million (as adjusted);
• 25% (if the value of voting securities to be held is greater than $1 billion, as adjusted);
• 50%;
• N/A.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

Transaction Description

Business of the Acquiring Person

Acquiring Person Only: Describe the business operation(s) of all entities within the acquiring person.

Business of the Acquired Entity

Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise a business operation.

Non-Reportable UPE(s)

Provide the names of any non-reportable UPE(s).

Transaction Description

Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Indicate what consideration will be received by each party and the scheduled consummation date of the transaction. Also identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

If any attached transaction documents use code names to refer to the parties, provide an index identifying the codes.

Transaction Rationale

Identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person, or any of its officers, directors, or employees. If the acquiring entity is different from the UPE, submit an explanation for each entity. Identify each document produced in the filing that confirms or discusses the stated rationale(s).

Transaction Diagram

Submit a diagram of the transaction and provide a chart explaining the relationship between all entities and/or natural persons involved in the transaction.

Related Transactions

Indicate whether the transaction that is the subject of this filing has related filings because the transaction:

• Is a principal transaction that triggers one or more shareholder backside transactions;
• Is a shareholder backside transaction;
• Has more than one acquiring UPE;
• Has more than one acquired UPE;
• Has more than one reportable step;
• Is a joint venture;
• Is a consolidation;
• Is an exchange of assets; or
• Has other circumstance that requires more than one filing.

Provide additional details regarding the related transaction(s), such as party names and transaction numbers.

Early Termination

Indicate whether the filing person requests early termination. Notification of each grant of early termination will be published in the **Federal Register**, as required by 15 U.S.C. 18a(b)(2), and on the PNO website. Note that if either party in any transaction requests early termination, it may be granted and published.

Joint Ventures

See §§ 801.40 and 801.50.

Contributions

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Consideration

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Business Description

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

NAICS Codes

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues.

Agreements and Timeline

Transaction-Specific Agreements

Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction.

Documents that constitute the agreement(s) (*e.g.,* Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version. If there is no definitive executed agreement, provide a copy of the most recent draft agreement or term sheet that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate. See § 803.5.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. 363(b) do not require an executed agreement. For bankruptcies, provide the order from the bankruptcy court.

Other Agreements Between the Parties

Provide all other agreements between the acquiring and acquired person, including but not limited to, non-compete or non-solicitation agreements, supply agreements, or licensing agreements including current agreements and those that expired, have terminated, or were canceled within one year of the filing.

Timeline

Provide a detailed timetable for the transaction, including when the signatories intend to consummate the transaction, or implement all closing conditions, integration, affiliation, or other purchase agreements, and any other important deadlines for closing or terminating the merger agreement. Identify all provisions in the agreement that govern the extension of these deadlines and explain the conditions for extending deadlines and how long they may be extended. Also, if applicable, provide a description of any fee or other consideration paid or to be paid at key dates of the transaction or upon closing, including but not limited to termination fees, break fees, ticking fees, and any other arrangement intended to serve in lieu of a break fee.

Competition and Overlaps

Business Documents

Transaction-Related Documents

Documents Prepared by or for Officers, Directors, or Supervisory Deal Team Lead(s)

Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead(s) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead(s).

Confidential Information Memoranda

Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or

director(s) of the buyer meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists.

Documents responsive to this item are limited to those produced within one year before the date of filing.

Studies, Surveys, Analyses, and Reports

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third party advisors (''third party advisors'') for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement.

Documents responsive to this item are limited to those produced within one year before the date of filing.

Synergies and Efficiencies

Provide all studies, surveys, analyses, models, and reports evaluating or analyzing synergies, financial projections, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

Drafts

For each responsive Transaction-Related Document, provide drafts of the document that were sent to an officer, director, or supervisory deal team lead(s).

Periodic Plans and Reports

Provide all semi-annual or quarterly plans and reports that were provided to the Chief Executive Officer (CEO) of the acquiring or acquired entity (as appropriate) and any entity that it controls or is controlled by and individuals who report directly to each such CEO (but excluding individuals responsible solely for environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues) that analyze market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party (acquiring person or acquired entity as appropriate). Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Provide all plans and reports (including semi-annual or quarterly) that were provided to the Board of Directors of the acquiring or acquired entity (as appropriate) and any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party (acquiring person or acquired entity as appropriate). Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Organizational Chart of Authors and Recipients

Provide an organizational chart(s) that identifies the position(s) held by authors, and for privileged documents, recipients, of all business documents submitted. Filing persons should indicate on the organizational chart(s) the individuals whose files were searched for documents responsive to these Instructions.

Competition Analysis

Horizontal Overlap Narrative

Describe each of the principal categories of products and services (as defined in the day-to-day operations) of the acquiring person or acquired entity (as applicable).

In addition, list and describe each of the current or known planned products or services of the acquiring person or acquired entity (as appropriate) that competes with (or could compete with) a current or known planned product or service of the other party (acquiring person or acquired entity as appropriate). Current or known planned products or services include those that the acquiring person or acquired entity researches, develops, manufactures, produces, sells, offers, provides, supplies, or distributes. For each such product or service listed, provide:

1. The sales (in units and dollars) for each of the past two fiscal years. For those products or services not generating revenue or whose performance is not measured by revenue in the ordinary course of business, provide projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric by which the acquiring person or acquired entity (as appropriate) measures performance (*e.g.,* daily users, new signups).

2. A description of all categories of customers of the acquiring person or acquired entity (as appropriate) that purchase or use the product or service (*e.g.,* retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional), and an estimate of how much of the product or service each customer category purchased or used monthly for the last fiscal year. If no customers have yet used the product or service, provide the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched.

3. Contact information (including individual's name, title, phone, and email) for the acquiring person's or acquired entity's (as appropriate) top 10 customers in the last fiscal year (as measured in both units and dollars), and the top 10 customers for each customer category identified.

4. A description of any licensing arrangements.

5. A description, including duration, of any non-compete or non-solicitation agreement applicable to employees or business units related to the product or service.

Supply Relationships Narrative

Related Sales: List and describe each product, service, or asset (including data) that the acquiring person or acquired entity (as applicable) has sold, licensed, or otherwise supplied in the last two fiscal years (1) to the other party (acquiring person or acquired entity as appropriate), or (2) to any other business that, to the filing person's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or service that competes or is intended to compete with the other party's products or services.

For each product, service, or asset listed, provide:

1. The sales (in units and dollars and any other appropriate measure) for each of the past two fiscal years, separately to (1) the other party (acquiring person or acquired entity as appropriate) and (2) any other business that, to the filing person's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or service that competes or is intended to compete with the other party's products or services.

2. The top 10 customers (as measured in both units and dollars) of the acquiring person or acquired entity (as appropriate) that use the acquiring person's or acquired entity's (as appropriate) product, service, or asset to compete with the other party's (acquiring person or acquired entity as appropriate) products or services, or as an input for a product or service that competes or is intended to compete with the other party's products or services. For each such customer, provide contact information (including title, phone, and email) and a description of the acquiring person's or acquired entity's (as appropriate) supply or licensing agreement (or other comparable terms of supply).

Related Purchases: List and describe each product, service, or asset (including data) that the acquiring person or acquired entity (as appropriate) incorporates as an input into any product or service and that the acquiring person or acquired entity (as appropriate) has purchased, licensed, or otherwise obtained in the last two years (1) from the other party (acquiring person or acquired entity as appropriate) or (2) from any other business that, to the filing person's knowledge or belief, competes with the other party to provide a substantially similar product, service, or asset.

For each product, service, or asset listed, provide:

1. The purchased amount (in units and dollars and any other appropriate measure) for each of the last two fiscal years, separately for (1) the other party and (2) any other business that, to the filing person's

knowledge or belief, competes with the other party to provide a substantially similar product, service, or asset.

2. The top 10 suppliers (as measured in both units and dollars) for the associated input product, service, or asset, with contact information (including title, phone, and email) and a description of the acquiring person's or acquired entity's (as appropriate) purchase or licensing agreement (or other comparable terms of purchase).

Labor Markets Information

This section requests information about the largest categories of workers employed by the acquiring person or acquired entity (as appropriate) and the geographic area(s) where these employees work.

Largest Employee Classifications

Provide the aggregate number of employees of the acquiring person or acquired entity (as appropriate) for each of the five largest occupational categories (as categorized by the first six digits of the relevant SOC classifications).

Geographic Market Information for Each Overlapping Employee Classification

Indicate the five largest 6-digit SOC codes in which both parties (the acquiring person and the acquired entity) employ workers. For each overlapping 6-digit SOC code, list each ERS commuting zone in which both parties employ workers with the 6-digit classification and provide the aggregate number of classified employees in each ERS commuting zone.

Worker and Workplace Safety Information

Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters.

For each identified penalty or finding, provide (1) the decision or issuance date, (2) the case number, (3) the JD number (for NLRB only), and (4) a description of the penalty and/or finding.

NAICS Codes

This item requests information regarding the industry categories of the acquiring person or acquired entity(s) or assets (as appropriate) of products and services that derived revenue in the last fiscal year, as well as for products or services in development that would create overlaps with the other party (acquiring person or acquired entity as appropriate).

NAICS Codes Describing U.S. Operations With Estimates of Revenue

Acquiring Person

Identify all 6-digit NAICS industry codes that describe the U.S. operations of the acquiring person, inclusive of all entities included within the acquiring person at the time the filing is made.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating entity(s) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more but less than $1 billion; or $1 billion or more. Identify each 6-digit NAICS code in which both the acquiring person and acquired entity(s) or assets derive revenue.

For products and services that derived revenue in the most recent fiscal year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the acquired entity(s) or assets derived revenue from U.S. operations.

Acquiring persons should also list all NAICS codes for products or services under development by the acquiring person that would overlap with the products or services of the acquired entity(s) or assets, inclusive of products or services that are known to be under development by the acquired entity(s) or assets. NAICS codes that reflect only these pipeline products or services should be identified as ''pre-revenue.''

If more than one NAICS code describes the same operations of the acquiring person, list each code, and provide an estimate of revenue, as described above. End notes may be used to clarify the selection of codes or potential overlaps.

Acquired Person

Identify all 6-digit NAICS industry codes that describe the U.S. operations of the acquired entity(s) or assets, inclusive of all entities and assets anticipated to be included within the acquired entity(s) or assets at the time the transaction will be consummated.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating entity(s) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more, but less than $1 billion; or $1 billion or more. Identify each 6-digit NAICS code in which both the acquiring person and acquired entity(s) or assets derive revenue.

For products and services that derived revenue in the most recent fiscal year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the acquiring person derived revenue from U.S. operations.

Acquired persons should also list all NAICS codes for products or services under development by the acquired entity(s) or assets and expected to have annual revenue greater than $1 million within two years. NAICS codes that reflect only these pipeline products or services should be identified as ''pre-revenue.''

If more than one NAICS code describes the same operations of the acquired entity(s) or assets, list each code, and provide an estimate of revenue, as described above. End notes may be used to clarify the selection of codes or potential overlaps.

No Revenue

If there is no revenue to report, explain why.

Controlled-Entity Overlaps

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see § 801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues in the most recent year from operations:

1. In industries within any 6-digit NAICS industry code in which any acquired entity also derived any amount of dollar revenues in the most recent year; or

2. In which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

If the acquiring person reports an associate overlap only, the acquired person does not need to respond to this section.

NAICS Overlaps of Controlled Entities

Acquiring Person

List the name of each entity within the acquiring person or associate of the acquiring person, that has U.S, operations in the same code as an acquired entity or assets. For each such entity, list the name(s) by which the entity does or has within the last 3 years done business, whether the listed entity is controlled by the filing person or an associate of the filing person, the overlapping NAICS code(s), NAICS description(s), and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code.

Acquired Person

List the name of each entity within the acquired entity that has U.S. operations in the same code as the acquiring person. For each such entity, list the name(s) by which the entity does or has within the last 3 years done business, the overlapping NAICS code(s), NAICS description(s), and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code.

Geographic Market Information

For each identified overlapping NAICS code, provide geographic information, as described below. Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Except in the case of those NAICS industries in the sectors, subsectors, and codes that require street-address level reporting, the person filing notification may respond with the word ''national'' if business is conducted in all 50 states.

State-Level Reporting

Manufacturing Industries

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit

NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold).

31**** through 33**** Manufacturing, *except:*
- 3115** Dairy Product Manufacturing
- 311611 Animal (except Poultry) Slaughtering
- 311613 Rendering and Meat Byproduct Processing
- 311615 Poultry Processing
- 31181* Bread and Bakery Product Manufacturing
- 321*** Wood Product Manufacturing
- 32221* Paperboard Container Manufacturing
- 324*** Petroleum and Coal Products Manufacturing
- 3251** Basic Chemical Manufacturing
- 325521 Plastics Materials and Resin Manufacturing
- 3271** Clay Product and Refractory Manufacturing
- 3272** Glass and Glass Product Manufacturing
- 3273** Cement and Concrete Product Manufacturing

Wholesale Trade

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

42**** Wholesale Trade, *except:*
- 42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
- 42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
- 42344* Other Commercial Equipment Merchant Wholesalers
- 42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
- 42346* Ophthalmic Goods Merchant Wholesalers
- 42349* Other Professional Equipment and Supplies Merchant Wholesalers
- 4239** Miscellaneous Durable Goods Merchant Wholesalers
- 4241** Paper and Paper Product Merchant Wholesalers
- 4242** Drug and Druggists' Sundries Merchant Wholesalers
- 42441* General Line Grocery Merchant Wholesalers
- 42442* Packaged Frozen Food Merchant Wholesalers
- 42451* Grain and Field Bean Merchant Wholesalers
- 42452* Livestock Merchant Wholesalers
- 4247** Petroleum and Petroleum Products Merchant Wholesalers
- 4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
- 42491* Farm Supplies Merchant Wholesalers
- 42495* Paint, Varnish, and Supplies Merchant Wholesalers

Insurance Carriers

For the 6-digit NAICS code within the industry subsector listed below, list the state(s) in which the person filing notification is licensed to write insurance.

5241** Insurance Carriers

Other NAICS Sectors

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

11**** Agriculture, Forestry, Fishing, and Hunting, *except:*
- 113*** Forestry and Logging

21**** Mining, Quarrying, and Oil and Gas Extraction, *except:*
- 2123** Nonmetallic Mineral Mining and Quarrying

2213** Water, Sewage, and Other Systems
23**** Construction
44912* Home Furnishing Retailers
4492** Electronics and Appliance Retailers
48**** and 49**** Transportation and Warehousing, *except:*
- 493*** Warehousing and Storage

51**** Information, *except:*
- 512*** Motion Picture and Sound Recording Industries

5222** Nondepository Credit Intermediation
523*** Securities, Commodity Contracts, and Other Financial Investments and Related Activities
5242** Agencies, Brokerages, and Other Insurance Related Activities
525*** Funds, Trusts, and Other Financial Vehicles
531*** Real Estate
533*** Lessors of Nonfinancial Intangible Assets (Except Copyrighted Works)
54**** Professional, Scientific and Technical Services, *except:*
- 54138* Testing Laboratories and Services
- 54194* Veterinary Services

55**** Management of Companies and Enterprises
561*** Administrative and Support Services
61**** Educational Services
71**** Arts, Entertainment, and Recreation, *except:*
- 7132** Gambling Industries
- 71394* Fitness and Recreational Sports Centers

7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps
8114** Personal and Household Goods Repair and Maintenance
813*** Religious, Grantmaking, Civic, Professional, and Similar Organizations
814*** Private Households

Street-Level Reporting

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, provide the street address, arranged by state, county and city or town, and latitude and longitude (each in degrees up to at least five decimal places) of each establishment from which dollar revenues were derived (either directly or by a franchisee) in the most recent year by the person filing notification.

113*** Forestry and Logging
2123** Nonmetallic Mineral Mining and Quarrying
22**** Utilities, *except:*
- 2213** Water, Sewage and Other Systems

3115** Dairy Product Manufacturing
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing
321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
3251** Basic Chemical Manufacturing
325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers
44**** and 45**** Retail Trade, *except:*
- 44912* Home Furnishings Retailers
- 4492** Electronics and Appliance Retailers

493*** Warehousing and Storage
512*** Motion Picture and Sound Recording Industries
521*** Monetary Authorities—Central Bank
5221** Depository Credit Intermediation
5223** Activities Related to Credit Intermediation
532*** Rental and Leasing Services
54138* Testing Laboratories and Services
54194* Veterinary Services
562*** Waste Management and Remediation Services
62**** Health Care and Social Assistance

7132** Gambling Industries
71394* Fitness and Recreational Sports Centers
72**** Accommodation and Food Services, *except:*
7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps
811*** Repair and Maintenance, except
8114** Personal and Household Goods Repair and Maintenance
812*** Personal and Laundry Services

Minority-Held Entity Overlaps

This section requires the disclosure of holdings of 5% or more but less than 50% of certain entities that derive dollar revenues in any 6-digit NAICS code reported by the other person filing notification. Holdings in those entities that have total assets of less than $10 million may be omitted.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the filing person, should be listed. Holdings in those entities that have total assets of less than $10 million may be omitted.

Minority Holdings of Acquiring Person and Its Associates

If the acquiring person holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS code(s) reported by the acquired entity(s) or assets, provide such 6-digit NAICS code(s), the entity within the acquiring person that holds the minority interests, the name and d/b/a names (if known) of the minority held-entity, and percentage of voting securities or non-corporate interests held.

Additionally, based on the knowledge or belief of the acquiring person, for each associate (see § 801.1(d)(2)) of the acquiring person holding:

1. 5% or more but less than 50% of the voting securities or non-corporate interests of an acquired entity; and/or

2. 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year,

list the associate, the name and d/b/a names (if known) of the minority-held entity, and percentage of voting securities or non-corporate interests held.

Responses should be organized alphabetically by the name of the entity in which minority interests are held.

The acquiring person may rely on its regularly prepared financials that list its investments, and those of its associates that list their investments, provided the financials are no more than three months old.

Minority Holdings of the Acquired Entity

If an acquired entity holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code(s) reported by the acquiring person, provide such 6-digit NAICS code(s), the entity within the acquired entity that holds the minority interests, the name and d/b/a names (if known) of the minority-held entity, and percentage of voting securities or non-corporate interests held.

Responses should be organized alphabetically by the name of the entity in which minority interests are held.

Prior Acquisitions

This item should be completed for the acquiring person and the acquired entity, and pertains only to prior acquisitions of U.S. entities or assets and foreign entities or assets with sales in or into the U.S. that (i) derived revenue in an identified 6-digit NAICS industry code overlap *or* (ii) provided or produced a competitive overlap product or service as described in the Horizontal Overlap Narrative.

Identify all such acquisitions of entities or assets made within the ten years prior to filing in which (i) 50% or more of the voting securities of an issuer, (ii) 50% or more of non-corporate interests of an unincorporated entity, or (iii) all or substantially all the assets of an operating unit were acquired. Additionally, identify all such acquisitions of assets that did not constitute all or substantially all of an operating unit but were valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

1. the 6-digit NAICS code(s) (by number and description) identified above in which the acquired entity derived dollar revenues, or the competitive overlap product(s) or service(s) provided;

2. the name of the entity from which the voting securities, non-corporate interests, or assets were acquired;

3. the headquarters address of that entity prior to the acquisition;

4. whether voting securities, non-corporate interests, or assets were acquired;

5. the consummation date of the acquisition; and

6. whether all or substantially all of the acquired voting securities, non-corporate interests, or assets are still held at the time of filing.

Additional Information

Subsidies From Foreign Entities or Governments of Concern

To the knowledge or belief of the filing person, within the two years prior to filing, has the acquiring or acquired person (as appropriate) received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern (see § 801.1(r))? If yes, list each entity or government from which such subsidy was received and provide a brief description of the subsidy.

For products the acquiring or acquired person (as appropriate) produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C), is any product subject to countervailing duties imposed by any jurisdiction? If yes, list each product, the countervailing duty imposed, and the jurisdiction that imposed the duty.

To the knowledge or belief of the filing person, for products the acquiring or acquired person (as appropriate) produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C), is any product the subject of a current investigation for countervailing duties in any jurisdiction? If yes, list each product and the jurisdiction conducting the investigation.

Defense or Intelligence Contracts

Identify pending or active procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. 101(a)(6) or 50 U.S.C. 3033(4) valued at $10 million or more. The acquiring person should limit its response to the acquiring entity and any entity within the acquiring person that directly or indirectly controls the acquiring entity. The acquired person should limit its response to the acquired entity(s) and/or assets. Include (1) the name of the entity within the filing person (2) the contracting office, as defined by 48 CFR 2.101(b); (3) the Contracting Office ID; (5) the Award ID; (5) and the NAICS code(s), if any, listed in the System for Award Management database.

Identification of Communications and Messaging Systems

List all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations.

Other Jurisdictions

Transactions Subject to International Antitrust Notification

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the transaction, list the name of each such authority. Identify, to the knowledge or belief of the filing person at the time of filing, any jurisdiction where (1) a merger notification has been filed, (2) a merger notification is being prepared for filing, or (3) the parties have a good faith belief that a merger notification will be made, along with the dates of the filing or planned filing.

HSR Confidentiality Waiver for International Competition Authorities (VOLUNTARY)

Indicate whether the filing person agrees to waive the disclosure exemption contained in the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h) to permit the DOJ and FTC to disclose to non-U.S. competition authority/authorities listed by the filing person below (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. 18a(e) and does not preclude the filing person from providing a full waiver as provided for under *FTC and DOJ practice as*

reflected in the Model Waiver. The filing person should list the jurisdictions to which the waiver applies. This item is voluntary.

HSR Confidentiality Waiver for State Attorneys General (VOLUNTARY)

Indicate whether the filing person agrees to waive the disclosure exemption contained in the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h) to permit the DOJ and FTC to disclose to State Attorneys General listed by the filing person below (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. 18a(e) and does not preclude the filing person from providing a full waiver as provided for under *FTC and DOJ practice as reflected in the Model Waiver.* The filing person should list the jurisdictions to which the waiver applies. This item is voluntary.

Certification

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. 1746 relating to unsworn declarations under penalty of perjury.

Penalties for False Statements

Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, *e.g.,* Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, *e.g.,* Sections 371, 1001, and 1505 of Title 18, United States Code).

Certification

This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. 18a, require the submission of additional information or documentary material relevant to the proposed transaction. I have taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period.

Affidavits

Affidavit(s) required by § 803.5 must be notarized or use the language found in 28 U.S.C. 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring or acquired person, the affidavit must still attest to the good faith of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that a definitive agreement to merge or acquire has been executed, or if a definitive agreement has not been executed, that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted. The affidavit(s) must further attest to the good faith intention of the person filing notification to complete the transaction. (See § 803.5(b)).

In § 801.30 transactions, the affidavit (submitted only by the acquiring person) must attest:

1. That the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;

2. In the case of a tender offer, that the intention to make the tender offer has been publicly announced; and

3. The good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are also required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

1. The identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;

2. The specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;

3. The fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;

4. The anticipated date of receipt of such notification by the Agencies; and

5. The fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. (See § 803.5(a)).

Privacy Act Statement

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 CFR 1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

Disclosure Notice

Public reporting burden for this report is estimated to vary from 20 to 382 hours per response, with an average of 144 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office, Federal Trade Commission, Room #5301, 400 7th Street SW, Washington, DC 20024

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084–0005, appears within the Notification and Report Form and these Instructions.

By the direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–13511 Filed 6–28–23; 8:45 am]

BILLING CODE 6750–01–P

Exhibit 3

COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION ON THE FEDERAL TRADE COMMISSION'S PROPOSED AMENDMENTS TO THE PREMERGER NOTIFICATION RULES

September 13, 2023

The views stated herein are presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association.

I. Introduction[1]

The American Bar Association's Section of Antitrust Law ("Section") appreciates this opportunity to comment on the proposed revisions to the premerger notification and report form ("Form") pursuant to the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976 (the "HSR Act").[2] The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. The Section's members have extensive experience in filings under the HSR Act; indeed, we believe that the overwhelming majority of premerger notification filings are made by members of the Section. The Section hopes these comments will be useful to the Federal Trade Commission ("FTC" or the "Commission") and the Antitrust Division of the Department of Justice ("DOJ"; together with FTC, the "Agencies") as they finalize the new Form.

The Section appreciates the Agencies' view that the current HSR Form does not provide sufficient information to determine whether further review of a notified transaction's potential effect on competition is necessary. The Section acknowledges that some of the proposed information collections will be useful in that respect. However, other proposed changes appear to require information only marginally helpful while imposing significant cost and timing burdens, especially as to those transactions that do not present any competitive concerns. The Agencies appear to recognize some of the burdens, but the NPRM suggests that the Agencies may not appreciate the full scope of the burdens that would be imposed by these revisions.

[1] Please note that any capitalized terms used throughout and not defined herein have the meaning ascribed to them in the Notice of Proposed Rulemaking (88 Fed. Reg. 42178) or the rules promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (16 C.F.R. Parts 801, 802, and 803).

[2] Throughout this comment, the Section refers to the preamble to the proposed amendments to 16 CFR Parts 801 and 803 (88 Fed. Reg. 42178, 42178-42209) as the "NPRM," and the proposed amendments to 16 CFR Parts 801 and 803 (88 Fed. Reg. 42178, 42209-42218) as the "Proposed Rule".

effective and efficient screening for transactions that require an in-depth investigation,"[20] which may introduce the potential for increased requests for acquiring persons to "pull and refile" to provide the Agencies with additional time to process such filings, and/or issuance of "technical" Second Requests due to Agency staff being unable to complete their review within either the initial or second waiting period (if the acquiring person conducts a pull and refile).

A. Burden Associated with Certain Requirements Would Outweigh Their Usefulness in Assessing Whether a Second Request Is Warranted

Below we have highlighted several proposed requirements that introduce significant burden to filing parties and which likely have little utility in determining whether to investigate a proposed transaction further. The proposed revisions to the Form are addressed below in the order in which they appear in the Proposed Rule.

1. Entities within the Acquiring Person and Acquired Entity

The Proposed Rule would require that in addition to listing the name, city, state/country, and zip code of entities within the acquiring person or acquired entity, filing parties list all names under which the entities do business or have done business within the past three years. This requirement is not limited in any way, for example, to entities that either overlap or have a supplier relationship with the other party. Maintaining and disclosing this information in every filing is overly burdensome compared to the utility it will have for the Agencies' in determining whether to investigate a transaction further.

2. Organizational Charts

The Proposed Rule would require an ultimate parent entity that is a fund or a master limited partnership to provide an organizational chart sufficient to identify and show the relationship of all entities that are affiliates or associates (as defined by the HSR Rules). Such organizational charts sufficient to identify all entities that are affiliates or associates may not exist in the ordinary course of an acquiring fund's or acquiring master limited partnership's business. Further, the analysis of which entities are associates is complex and may not be readily synthesized to the format of an organizational chart. The Proposed Rule requests a narrative response describing the ownership structure of the acquiring entity, and entities and associates with investments in other entities that overlap with the acquired entity is already requested elsewhere in the Form. Further, information regarding vertical relationships between the parties is also requested elsewhere in the Proposed Rule. However, requiring organizational charts is not limited in any way, for example, to overlapping entities, and is superfluous to other requirements of the form and burdensome compared to the utility it may have for the Agencies in determining whether to issue a Second Request.

[20] 88 Fed. Reg. 42,178 (Jun. 29, 2023) at 42,195.

3. Other Types of Interest Holders That May Exert Influence, Officers, Directors, and Board Observers

The proposed requirements to identify certain "other interest holders that may exert material influence on the management or operations of the acquiring person," including certain information related to persons or entities that do the following with respect to the acquiring entity and any entities that control, or are controlled by the acquiring entity: (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. Some of this information, such as credit relationships, equity holders, or other governance rights, may not be available at the time of filing leaving filing parties susceptible to claims of noncompliance. Further, it is unclear how the Agencies will use this information to assess whether an interest holder that may exert influence presents a potential anticompetitive effect since the Agencies will not readily have information regarding potential overlaps, vertical, or other market relationships between that interest holder and the acquired entity. Ultimately the burden of collecting this information may be disproportionate to the value the Agencies will receive from what will likely be an incomplete picture.

The Proposed Rule also would require identification of the officers, directors, or board observers within the two years prior to filing are very subjective and difficult to gather, especially from non-employee directors, again leaving filing parties susceptible to claims of noncompliance. While acknowledging the Agencies' rationale that there may be relationships beyond the minority holder relationships (as required in the current Form) that are potentially of competitive significance, receiving lists of dozens, if not hundreds, of officers, directors, and board observers, especially across larger or more diffuse organizations with many subsidiaries (including a two year lookback period that may not be feasible to comply with in many instances) to screen for the possibility of current interlocking directorate violations under Clayton Act § 8 could impose substantial burdens and provide little practical utility. Further, there is no limitation for officer positions or directorships in connection with charitable or not-for-profit organizations that would have no bearing on a competitive analysis. For example, if an officer, director, or board observer of an entity within the acquiring person also serves as an officer of a local little league team, or as a director on the board of a local arts organization, these positions would need to be listed, further complicating complete collection of the proposed required information.

4. Transaction Diagram

The Commission proposes that filing persons provide a diagram of the deal structure along with a corresponding chart with the relevant entities and individuals involved in the transaction. While it would not be a burden to produce a final chart if one has been agreed to by the filing parties during diligence, where such a diagram and chart were not created or finalized during transaction diligence the Agencies could still benefit from the most recent draft at the time of filing HSR, even if it does not reflect all of the entities or minority ownership levels that may ultimately exist at closing.

Many times these charts are drafted by outside tax advisors to show the pre-transaction reorganization needed to achieve the desired tax structure and benefits. Very rarely, if ever, are they drafted to achieve antitrust or competition objectives. Where all or a majority of the

Exhibit 4

BR Business Roundtable

1000 Maine Avenue, SW, STE 500
Washington, DC 20024
202.872.1260
brt.org

September 27, 2023

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Request for Comment on Notice of Proposed Rulemaking to Amend Premerger Notification Rules Implementing the HSR Act
Docket No. FTC-2023-0040

Business Roundtable is an association of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. Business Roundtable CEOs lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. GDP. The organization's mission is to promote a thriving U.S. economy and expanded opportunities for all Americans through sound public policies. With the aim of advancing that goal, we are pleased to submit these comments in response to the Federal Trade Commission's (FTC's) Notice of Proposed Rulemaking (NPRM) to amend the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act or the Act).[1]

Business Roundtable is concerned that the amendments add immense burdens to business and are designed to chill M&A activity generally, rather than to provide the FTC and Antitrust Division of the Department of Justice (together, "the Agencies") with the notice necessary to determine which transactions to investigate before closing. These amendments are not properly targeted in scope—they both exceed the statutory mandate of a "notification" scheme and fail to provide minimum justifications for imposing burdens required under both the Paperwork Reduction Act and the Administrative Procedure Act. The result would greatly increase the regulatory burden on transactions that are competitively neutral or beneficial, and would thus have the counterproductive effect of harming competition, the U.S. economy, and American workers. The regulation would be so burdensome as to exceed the balance that Congress struck in the scheme it created with the HSR Act, where notification may be followed by a request for additional information ("second request") in cases that warrant investigation.

[1] Press Release, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review. The docket is available at https://www.regulations.gov/document/FTC-2023-0040-0001. The Federal Register notice, from which we quote is at 88 Fed. Reg. 42178 (June 29, 2023), available at https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

Because the vast majority of transactions notified to the Agencies are competitively neutral or procompetitive[2], there is no question that the rulemaking would have an enormous chilling effect on beneficial economic activity. As a result, the burden is very high for the government to justify its need for the additional information required by the amended rules. This is a burden the FTC cannot meet because the existing scheme (or something much closer to it) provides the government with sufficient opportunity to identify and investigate potentially anticompetitive deals. The government should make only the amendments that are necessary to put the government on notice of the nature of a transaction. The statute allows for litigation-like discovery only once the Agencies make an affirmative request about a transaction that has been notified to it, which ensures that large burdens arise only for the transactions that the Agencies have determined may raise some likelihood of violating the antitrust laws.

This comment proceeds in three parts. ***First***, it sets out the legal requirements that the FTC must meet when promulgating amendments to the HSR rules and how the proposal falls short. This part shows how the amendments fail to accomplish any valid purpose under the antitrust laws that a significantly less burdensome scheme (including the existing scheme) could not achieve. ***Second***, it corrects the FTC's underestimate of burden, including with specific examples of provisions that are especially problematic. ***And third***, it discusses the broader costs to the U.S. economy of the proposed scheme, and how alternative approaches would minimize these costs.

I. The Proposal Is at Odds with Congress's Intent to Minimize Burden on Transactions that Do Not Raise Competitive Concerns.

Agencies may not promulgate rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[3] or "in excess of statutory [] authority."[4] The proposed amendments would both (1) exceed the authority that Congress granted to the Agencies in promulgating rules about how companies should notify the government under the HSR Act, and (2) impose unjustified regulatory burden in violation of the Paperwork Reduction Act and the prohibition on arbitrary and capricious rulemaking. We proceed by discussing each set of requirements, and then turn to discussing how the proposed amendments burden M&A transactions without justification.

a. Intent of the HSR Act

[2] Of the 3,520 transactions reported in fiscal year 2021, the FTC and DOJ sought additional information in only 65 of them, less than 2% of reported transactions. Under this proposed rulemaking, 98% of the transactions that raised no competitive issues worth even investigating (no less challenging) would have been subject to extremely burdensome information requests appropriate only for the small percentage of deals that may raise competitive concerns.

[3] 5 U.S.C. §706(2)(A).

[4] *Id.* at §706(2)(C).

Congress struck a careful balance between burden and need in the HSR Act. The Act gives the Agencies an opportunity to detect and challenge problematic mergers before they are consummated, on the one hand, while minimizing the burden that might chill mergers, on the other. The FTC's proposed amendments would destroy that balance, and therefore exceed the authority that Congress granted the FTC to promulgate rules to create a notification form.

First, the text of the statute (15 U.S.C. §18a) makes clear that the purpose of the initial HSR filing is to provide the government with "notification"; subsection (i)(2) explicitly clarifies that the notification scheme is not a substitute for issuing requests under the Antitrust Civil Process Act. Subsection (d)(1) allows the FTC (with the concurrence of the Assistant Attorney General) to promulgate rules to specify how the "notification" is made, including which "documentary material and information" is "necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated violate the antitrust laws."

The explicit limitation to collect only what is "necessary and appropriate" is at odds with the interpretation that the Agencies may collect any material that might merely be helpful to an enforcement action. Furthermore, the scheme was designed to ensure that the Agencies would err on the side of asking for less as part of the initial "notification." This is clear from Congress including a fallback: if the "notification" does not contain enough information in an individual case, then subsection (e) allows the Agencies to issue a request for additional information, without any prejudice to their review time. Once the Agencies receive that additional information, they have a full 30 days to review the transaction (the same amount of time they have with the notification materials, if those materials were sufficient on their own).[5] The most recent amendment to the statute reinforces Congress's concern with overburden and delay. In 2000, Congress added a requirement that the Agencies reform their merger review practices to ensure that they "eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process."[6]

The mandate to minimize burden is also apparent in the legislative history and from the scholarly writing at the time the HSR Act was passed.[7] The Senate Report on the bill as it came out of committee indicated "The Committee believes that [the Act] represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to

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[5] Note that in the original HSR Act of 1976, the waiting period was only 20 days after compliance with the request for additional information. See Pub. L. No. 94–435, 90 Stat. 1383. An amendment in 2000 extended the post-compliance waiting period to 30 days while at the same time creating an internal appeals procedure to ensure that requests for additional information were not "unreasonably cumulative, unduly burdensome, or duplicative." *See* District of Columbia Appropriations Act, 2001, Pub. L. No. 106–553, 114 Stat. 2762.

[6] 15 U.S.C. §18a(e)(1)(B) (2000).

[7] For a review of the legislative procedure leading to passage of the Act, *see* Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679 (1977).

consummation without unduly burdening business with unnecessary paperwork or delays."[8] The Committee's goal was to "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[9] First, Congress expected the HSR Act to apply to only about 150 of the largest transactions each year.[10] Representative Rodino, one of the sponsors of the bill, also explained that even the "request for additional information" was not expected to create any significant burden or time delay because it was intended to capture only the documents and data that a company "already assembled" in the ordinary course of planning to do an M&A deal.[11]

Joe Sims, who was Deputy Assistant Attorney General in the Antitrust Division at the time the Act passed and while the implementing regulations were authored, has written about his experience of having been "deeply involved with the negotiations and deliberations on HSR, both on the Hill and within the Ford Administration."[12] According to Sims, Congress's objective in 1976 was "advance notice to the agencies and production of a minimal amount of easily retrievable information for a small number of large mergers."[13]

Indeed, the Agencies understood Congress to be directing them to minimize the cost of compliance when the Act passed, and again when the Act was amended in 2000 to add the explicit instruction on reducing burden. The Agencies' first HSR report, which recounts efforts to promulgate implementing rules, explains that "the drafting of regulations implementing the Act involves the attempt to strike what is often a difficult balance between the need of the enforcement agencies for 'such documentary material and information relevant to a proposed

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[8] S. REP. NO. 94-803, at 65 (1976).

[9] *Id.* at 65-66.

[10] H.R. Rep. No. 94-1373, at 11 (1976) (requirements intended to apply only to "the very largest corporate mergers-about the 150 largest out of the thousands that take place every year").

[11] 122 CONG. REC. H10,293 (daily ed. Sept. 16, 1976) (remarks of Rep. Rodino) ("[P]lainly, Government requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government. But lengthy delays and extended searches should consequently be rare. It was, after all, the prospect of protracted delays of many months – which might effectively "kill" most mergers – which led to the deletion, by the Senate and the House Monopolies Subcommittee, of the "automatic stay" provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination would clearly constitute a misinterpretation of this bill. In Sum, a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable. In these cases, a failure to comply with such unreasonable portions of a request would not constitute a failure to 'substantially comply' with the bill's requirements.").

[12] Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 29 J. REPRINTS ANTITRUST L. & ECON. 389 (2000).

[13] *Id.*

acquisition as is necessary and appropriate to enable [them] to determine whether such acquisitions may, if consummated, violate the antitrust laws,' and the cost to the persons who must provide such information."[14] The HSR report from 2001 explained "[t]he agencies are continuing their ongoing review of the HSR program in order to make it as minimally burdensome as possible without compromising the agencies' ability to investigate and interdict proposed transactions that may substantially lessen competition."[15]

Reading the text and history of the HSR Act together, it is clear that any implementing rule would exceed the statutory authority that Congress granted to the Agencies if it would, as this proposal does, transform the premerger "notification" form into a full-blown investigative demand that far exceeds the data that "has already been assembled and analyzed by [the merging parties]."[16] The FTC admits that the increased burden will go far beyond that limitation by "requir[ing] filing parties to compile or generate the requested information specifically for the HSR Filing."[17] The obligation to collect ordinary course documents that would not necessarily be presented to deal decisionmakers also raises questions about recordkeeping obligations, which are themselves a significant burden not contemplated in the NPRM.

Additionally, requests for information are not reasonable if they would materially delay a transaction beyond the 30 days that Congress was willing to pause transactions for agency consideration. As we will explain below, the proposed amendments would very likely add significantly more than 30 days to a company's filing preparation time, which would have the effect of extending closing dates by an order of magnitude. It cannot be within the Agencies' discretion to more than double the delay that Congress imposed on a transaction without any particularized concern that the transaction warrants investigation. Moreover, the greatly expanded scope and subjective nature of information called for by the amendments would threaten to undermine Congress's design by providing vast scope for the agencies to reject filings as deficient and increase effective waiting periods even further outside of the statutory framework.

In sum, the FTC is not free to ignore the mandate it has long understood as inherent to the scheme: it must keep regulatory burdens demands to those that are "necessary and

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[14] FED. TRADE COMM'N, HSR REPORT, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1977 (1977), https://www.ftc.gov/system/files/documents/reports/1st-report-fy-1977/1annrpt1977.pdf

[15] FED. TRADE COMM'N, HSR REPORT, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2001 (2001), https://www.ftc.gov/sites/default/files/documents/reports/annual-report-congress-regarding-operation-hart-scott-rodino-premerger-notification-program/hsrarfy2001.pdf.

[16] 122 CONG. REC. H10,293 (daily ed. Sept. 16, 1976), supra n.11.

[17] *See* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42184 (proposed June 23, 2023). See also *id.* at 42207 (describing that only "[c]ertain proposed changes" will require "the acquiring person to collect and report information that the Commission believes is held in the acquiring person's ordinary course of business records").

appropriate"[18], including by distinguishing those mergers that warrant more extensive review, and excepting those that do not. Congress believed it was passing legislation to subject about 150 of the most impactful mergers per year to suspensory review with the HSR Act, and that "most" would not receive additional requests for information at all; so a new regulation that would subject more than 3,000 transactions[19] annually to an information-gathering exercise that "could not be compiled or reduced to writing in a relatively short time" would be out of step with Congress's intent by several orders of magnitude.[20]

b. Limitations in the Paperwork Reduction Act and the Administrative Procedure Act

In addition to the limits placed on the FTC's authority to pause mergers for lengthy and burdensome data collection as part of premerger "notification" in the HSR Act itself, the FTC's authority is cabined by the Paperwork Reduction Act and the APA's prohibition on arbitrary and capricious agency action.

The Paperwork Reduction Act (PRA) instructs the Director of the Office of Management and Budget to "minimize the federal information collection burden," including when fulfilling the duty of reviewing and approving agency actions like the proposed amendments here.[21] The PRA

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[18] 15 U.S.C. §18(a)(d)(1).

[19] In 2021, the most recent year for which statistics are available, the Premerger Notification Office received filings for 3,520 merger transactions. *See* FED. TRADE COMM'N, HSR REPORT, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2021 (2021), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

[20] Where an administrative agency vastly exceeds the role that Congress likely had in mind, there are constitutional concerns as well, including principles raised under the "major questions doctrine" and the "nondelegation doctrine." We note these concerns for the record, but focus in this comment on explaining how the proposed amendments are needlessly burdensome. The decision to impose such burden would demonstrate that the agency had both usurped the authority to make "the basic and consequential tradeoffs. . . that Congress would likely have intended for itself," West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022) (citing W. Eskridge, *Interpreting Law: A Primer on How To Read Statutes and the Constitution* 288 (2016) ("Even if Congress has delegated an agency general rule-making or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions.")), and had failed to follow an "intelligible principle" when Congress limited the agency's information request to that which is "necessary and appropriate." *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); Gundy v. United States, 139 S. Ct. 2116 (2019).

[21] 44 U.S.C. §3504(c). Under the PRA, the term "burden" means "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency, including the resources expended for—

(A) reviewing instructions;

(B) acquiring, installing, and utilizing technology and systems;

(C) adjusting the existing ways to comply with any previously applicable instructions and requirements;

(D) searching data sources;

also requires agencies promulgating an information request to designate a Chief Information Officer that will review it and provide "a specific, objectively supported estimate of burden."[22] The agency must also certify that "each" collection of information is "necessary for the proper performance of the functions of the agency"; "is not unnecessarily duplicative of information otherwise reasonably accessible to the agency"; and "reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency."[23] There is a special provision to ensure that the agency exempts small businesses as appropriate, or reduces their burden commensurate with their size.[24]

The decision to require unnecessary information from the public would also be arbitrary and capricious under the APA. Arbitrary-and-capricious review requires that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[25] When, as here, the "justification" for a significant new burden on the public is that it is "necessary" for the government to fulfill its mission to review whether certain transactions violate the antitrust laws[26], then the agency should both accurately measure the burden, and also explain which transactions it would have been able to identify and challenge with the new rule that it could not under the existing rule.

Without considering the ways in which the existing rule was in fact deficient in practice, it is impossible for the FTC to judge whether the added burden will make any difference in the Agencies' enforcement mission. It is also impossible for commenters to explain how a less burdensome approach would address the situations where the Agencies believe they could

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(E) completing and reviewing the collection of information; and

(F) transmitting, or otherwise disclosing the information."

44 U.S.C. §3502.

[22] 44 U.S.C. §3506(c)(1)(A).

[23] 44 U.S.C. §3506(c)(2).

[24] *Id.* Small business is defined by the Small Business Administration and varies by industry, but a "General Medical and Surgical Hospital" and a "Software Publisher," as two examples, would both be considered small businesses if they had average annual revenues of $47,000,000 or less. *See* 5 U.S.C. §601; 13 CFR §121.105 (2005); Size Standards Tool, SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/size-standards/index.html (last visited 09/27/2023).

[25] Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016) (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).

[26] The FTC states that the added burden is justified because it "is necessary and appropriate for effective and efficient review of HSR Filings to determine within the initial waiting period whether the transaction may, if consummated, violate the antitrust laws." Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42194. It also offers the vague statement: "Despite the added burden for filing persons, on balance, the Commission believes that the benefits to the Agencies' merger review would be significant and would help address information asymmetries between Agency staff and the filing person in the initial waiting period." *Id.* at 42184.

have obtained a better result. Moreover, if the FTC never considers, in a specific way, the magnitude of benefit to the enforcement mission, then it will never make an informed decision whether the vast burden was "justified" by the magnitude of the benefit. The FTC is also required to articulate the magnitude of the benefit because it will allow a reviewing court to judge whether the agency used an appropriate methodology and was engaging in rational decision-making about whether the tradeoff between benefit and burden was an acceptable one.[27] The NPRM explains the FTC's methodology in determining the burden of the rule, but it offers no similar explanation of how to think about the expected benefits.

c. There Is No Evidence of Benefit to Justify the Extra Burden

The obvious alternative to the NPRM is for the Agencies to use their second request authority to collect the same information (when it is necessary) for any transaction that raises a particularized concern.[28] The Agencies already have a process for noting that a transaction raises a particularized concern: they assign the transaction to one of the Agencies through a "clearance" process and the designated agency opens a preliminary investigation. Approximately 15% of filed transactions in the period from 2001-2020 were subject to a preliminary investigation.[29] Limiting burdensome requests to this group of transactions would yield all the benefits of the information that the FTC anticipates, but without a large portion of the costs. The FTC has not explained why this approach, or another approach that quickly identifies transactions that raise competitive concerns and limits the information request to them, would not fulfill its purposes. In general, the NPRM is unclear about what the FTC's purposes are.

The NPRM explains that there is much to do in the first 30-day waiting period[30], and suggests that the new information could help the Agencies formulate better, more targeted second

[27] City of Portland v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses"); Owner–Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 206 (D.C. Cir. 2007) (vacating regulatory provisions because the cost-benefit analysis supporting them was based on an unexplained methodology).

[28] The Agencies could also pass a rule adopting a "short form" process, similar to the one in Europe, to exempt transactions from the burdensome information collection as an initial matter. We discuss that possibility in more detail below.

[29] Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L. J. 1, 10-11 (2023), available at https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publications/antitrust/journal/85/1/merger-enforcement-statistics-2001-2020.pdf.

[30] *See* Premerger Notification; Reporting and Waiting period Requirements, 88 Fed. Reg. 42179 (proposed June 29, 2023).

requests.[31] However, that is exactly what the "voluntary access letter" (VAL) process has been used for[32], and it is in the parties' interest to cooperate with those VAL requests to the extent that they will lead to more targeted second requests. The NPRM claims that the VAL process could be improved upon because parties do not have to comply with it, and because it takes staff resources and time to collect the information.[33] However, it seems unlikely that sending the parties who have already been designated for a preliminary investigation a largely pre-formulated request uses more than a *de minimis* amount of staff time. And in any event, the NPRM proposal would use significantly more staff time just to review the voluminous HSR filings for completeness, even in transactions where a preliminary investigation is not necessary.

In particular, the Agencies have pointed to no transactions where they would have drafted their second request differently if they were in possession of the information at issue. That is likely because, when there was room to negotiate the parameters of a second request, the Agencies had at their disposal the sort of information that would be helpful to them, pursuant to the VAL process during the initial 30-day waiting period. This process of parties cooperating with the Agencies prior to receiving a second request is so common, and understood to be in the parties' benefit, that many transactions "pull and refile" in order to continue the beneficial engagement for longer than the 30-day waiting period, prior to receiving a second request.[34] Once again, though this engagement takes staff time, it would take far less time than the staff engagement with the voluminous and indiscriminate information required by the proposed HSR filing.

The NPRM suggests another rationale: that the contemplated information would help the Agencies identify problematic transactions that they missed, and which closed (either because a preliminary investigation was never opened at all, or because the preliminary investigation during the first 30-day waiting period with the existing HSR notification led the Agencies to

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[31] *Id*. at 42180 (Current system results in "in-depth investigations that are either too broad or too narrow due to the insufficient detail about [the parties and their premerger relationship] that is currently provided in HSR filings.").

[32] *Id. See also* DEPT. OF JUSTICE, ANTITRUST DIVISION, MODEL VOLUNTARY REQUEST LETTER (Nov. 2018), https://www.justice.gov/atr/page/file/1111331/download (visited Sept. 26, 2023).

[33] *Id.* (indicating that the amendments would "greatly enhance the Agencies' ability to complete the review of a reportable transaction in a short period of time . . . [and without] the need to rely on the voluntary submission of additional information by the parties and third-party industry sources during the initial waiting period."). Note that nothing in proposal would (or could) change the Agencies' posture with respect to third-party industry sources. Additionally, as discussed below, the Agencies have not pointed to evidence of that they have been unable to complete accurate substantive review in the statutorily required short period of time that they have, with the current version of the HSR filing.

[34] A survey by the American Bar Association, Antitrust Section, found that one-third of second requests were preceded by pulling and refiling. *See* Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, 14 THE THRESHOLD 26 (2014), available at https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf.

believe, erroneously, that there were no competitive concerns worthy of a second request).[35] Again, the FTC has offered no specific examples.[36] Given that every "missed" anticompetitive transaction would be quite easy to identify—the negative effects on competition would be apparent in the real world, and there would presumably be complainants who were harmed, and could testify to the effects—the FTC's failure to identify any such transactions must mean that there were none attributable to the failure to open a preliminary investigation or obtain sufficient information to decide whether to issue a second request.[37] Indeed, the agencies can and do investigate and challenge transactions that are below the HSR reportability thresholds entirely.

The vast resources available to investigators, including the wealth of online materials that were not easily available when the HSR Act was passed (i.e., trade publications, SEC filings and shareholder presentations, and consumer- or trade partner-facing websites), nearly ensures that staff do not need the proposed additional information to decide with accuracy whether to open a preliminary investigation, engage in the VAL process, talk to market participants, and ultimately to issue a second request or take an enforcement action. Indeed, due to the explosion in access to information since 1976, Agency staff members are probably far more informed than Congress ever envisioned was possible without a significant information request.

Indeed, it is clear that the Agencies already have sufficient tools to gather information on a wide variety of their antitrust theories because they have recently brought several cases

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[35] *See* 88 Fed. Reg. 42179-80 (explaining "The Agencies have stepped up efforts to review transactions for *all* their potential competitive impacts," and justifying the proposed changes as "necessary and appropriate in order for the Agencies to vigorously enforce the nation's antitrust laws").

[36] The NPRM indicates that "sectors of the economy that rely on technology and digital platforms to conduct business" might rely more on M&A to grow, and cites an FTC study of non-reportable acquisitions by select tech companies, but that study is inapposite: it did not involve the types of transactions that would be covered by the proposed rule, and it did not identify any transactions in the tech sector that raised concerns under the antitrust laws. 88 Fed. Reg. 42179 & n.4. This vague conclusory statement provides no justification for why the changing composition of the economy requires vastly more burdensome HSR filings than Congress and the Agencies anticipated when the Act was passed.

[37] One place to look for instances where the Agencies may claim that they "missed" a merger is by looking to their consummated merger challenges. The high-profile cases from the past few years (Facebook/Instagram, Facebook/WhatsApp, Google/DoubleClick) were not "missed" at the HSR stage – they were thoroughly investigated and the Agencies decided not to challenge them at the time of consummation. *See* Complaint, *United States v. Google LLC*, Case No. 23-cv-00108, Dkt. No. 1 at 33 (E.D. Va. Jan. 24, 2023); Memorandum Opinion, *FTC v. Facebook, Inc.*, Case No. 20-cv-3590, Dkt. No. 90 at 32 (D.D.C. Jan. 11, 2022). The relevant history of other consummated merger cases is not immediately apparent in the public record (i.e., whether they were below reporting thresholds or whether they were subject to investigation before close), but there were 44 such challenges in the period from 2001 to 2020. *See* Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. 1, 6 (2023) available at https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publications/antitrust/journal/85/1/merger-enforcement-statistics-2001-2020.pdf. If the Agencies believe that any of these 44 are examples of "missing" problematic mergers due to the current HSR scheme, then they should explain the circumstances of those cases.

challenging mergers under theories that did not correspond to a specific instruction or request in the initial HSR filing. For instance, the Agencies have brought cases claiming harms to labor markets[38] and vertical theories of harm[39]—they were able to identify and gather information relevant to those theories despite the HSR form having no specific requirement that parties provide information in those areas.

To the extent that the FTC is pursuing these amendments to get additional time to review information from the merging parties, that is an unacceptable justification.[40] It is probably true that the Agencies could see a "benefit" to their enforcement efforts on those transactions that they ultimately challenge if they were to start the whole review process with a trove of information that is akin to litigation discovery and could then spend the entire pendency of the second request compliance period and the 30-day review period following that to build a case using that information. However, that scheme is obviously outside of Congress's statutory design. Not only is it vastly overinclusive for deals that never would have been challenged and not designed to distinguish such deals, but Congress was willing to delay transactions by only 30 days for case preparation when the Agencies had in hand the sort of information that would allow them to judge whether or not a transaction would violate the antitrust laws. Though it is possible the Agencies could, in some sense, "benefit" from more time, Congress struck a different balance.

What is more, even if you could debate whether there is any cognizable benefit to the Agencies of receiving additional information for some subset of potentially problematic transactions, there is no question that there is zero benefit to the Agencies from getting additional information in the vast majority of transactions where there are no competitive concerns. The Agency heads have repeatedly made it clear that the overwhelming majority of filed transactions do not, and should not, receive "so much as a phone call" from the Agencies.[41]

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[38] See *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster*, DEPT. OF JUSTICE (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

[39] See United States v. AT&T, Inc., Case No. 18-5214, (D.C. Cir.) (2019); United States v. UnitedHealth Group, Inc., Case No. 1:22-cv-0481 (D.D.C.) (2022); In re Illumina, Docket No. 9401 (F.T.C. 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalorder.pdf; In re Nvidia/Arm, Docket No. 9404 (F.T.C. 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/D09404%20-%20COMMISSION%20ORDER%20DISMISSING%20COMPLAINT.pdf; Fed. Trade Comm'n v. Meta Platforms, Inc., Case No. 5:22-cv-04325-EJD (N.D. Cal. 2022), Fed. Trade Comm'n v. Microsoft, Case No. 23-cv-02880-JSC (N.D. Cal. 2023).

[40] It is unclear if the FTC intends this effect when it explains that the changes will help it "vigorously enforce the nation's antitrust laws," Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42180.

[41] Jonathan Kanter, Ass't Att'y Gen., Dept. of Justice, Remarks at the Georgetown Enforcement Symposium (Sept. 19, 2023), notes on extemporaneous remarks on file. *See also* The Economic Club of New York, *FTC Chair Lina M. Khan | Ensuring a Fair and Transparent Marketplace*, YOUTUBE (July 24, 2013) https://www.youtube.com/watch?v=X7u3JwSfHZY ("Again, 98 percent of deals [are] going through without even a second question. It's really an issue on the margins . . . .").

This conclusion is crystal clear from the data: over the 20 year period from 2001 to 2020, there were 31,530 transactions notified to the Agencies pursuant to the HSR Act.[42] Of these, 4,850 (15.4%) were "cleared" to an agency for further review under a preliminary investigation.[43] That means that in 84.6% of transactions filed in the 20 year period, it was unlikely that the Agencies would have found any reason to utilize the extra information filed—the attorney resources needed to consider that information would have been deployed elsewhere on higher priority cases. Moreover, this trend toward fewer matters with any investigation at all is increasing as more deals above the filing threshold are notified each year.[44] Additionally, Agency officials have recently been trumpeting that their enforcement efforts (far from being stymied by the current notification form) are causing the trend to accelerate. As AAG Jonathan Kanter recently put it, "We continue to see thousands of mergers per year. The difference now is that fewer deals present violations of the law."[45] If that is the case, then the justification for increasing burden on all filed deals has never been lower.

The data is also illustrative that the Agencies are already "overcollecting" information to a fairly substantial degree when they do open a preliminary investigation and assign staff to consider that information. When the staff used the VAL process or other information gathering techniques in the preliminary investigation phase, they found that a burdensome second request was not warranted 80.0% of the time—that is, only 969 of the 4,850 preliminary investigations received a full-blown litigation-like request.[46] And that is not because the Agencies are so resource-strapped that they are issuing second requests only when it is crystal clear there is a competitive concern. When the Agencies issued a second request during this time period, the investigation led them to conclude that the transaction raised competitive concerns most of the time, but 274 of these 969 second request transactions had no further action (28.3%).[47] This number roughly represents the rate at which the Agencies have "overcollected" under the current HSR scheme—28.3% of burdensome information requests go

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[42] Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L. J. 1, 10-11 (2023), available at https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publications/antitrust/journal/85/1/merger-enforcement-statistics-2001-2020.pdf.

[43] *Id.*

[44] *See* Fed. Trade Comm'n & Dept. of Justice, HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2021 (2021), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

[45] Remarks of AAG Jonathan Kanter, Georgetown Enforcement Symposium (Sept. 19, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrusthttps://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust.

[46] Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L. J. 1, 10-11 (2023), available at https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/publications/antitrust/journal/85/1/merger-enforcement-statistics-2001-2020.pdf.

[47] *Id.*

to companies whose deal is procompetitive or competitively neutral. Moreover, if the Agencies think they are undercollecting, they can use the current scheme to issue more second requests, including second requests that include information sought by the proposed HSR changes. Despite all of this, the Agencies' plan to upend this entire scheme and issue highly burdensome requests on all transactions, around 96.9%[48] of which would not have warranted a second request under the current scheme, is arbitrary and capricious, and at odds with Congress's intent.

II. The FTC Has Underestimated the Burden of Complying with the Proposed Rule

Though the proposed amendments are not justified even under the FTC's calculation of burden in the NPRM, that calculation of burden is materially flawed. Given the significant complexity added by the proposed amendments, the FTC has underestimated the time and cost required to comply with the regulation.

First, the methodology for calculating burden—"PNO staff canvassed current Agency staff who had previously prepared HSR filings while in private practice to estimate the projected change in burden due to the proposed amendments to the Instructions"[49]—is biased and inaccurate. There is no indication that Agency staff relied on any data when trying to create an estimate based on memories from past private practice. Additionally, the amount of burden from document requests is increasing all the time as methods of communication proliferate, and more sources of communication must be searched. So, relying on staff whose only experience is in the past is likely to systematically undercount the burden. Additionally, the relevant experience is not "preparing an HSR filing," but complying with a VAL or a second request. Many of the amendments require narrative responses, document searches, and compilations of data that are much more comparable to those experiences.

Second, expressing the added burden in hours alone is flawed because part of what the HSR Act requires is minimizing the overall delay of transactions. A significant portion of the length of preparing a VAL response or a second request is the time it takes to schedule meetings in advance, or to find and coordinate stakeholders at a company, in conjunction with their ordinary course responsibilities. There is significant "lost time" in coordinating that is not reflected in billable hours. The burden (in terms of time) would be more accurately counted by a number of weeks that it would take to coordinate an effort to obtain information from inside a company, prepare it in the format required, and get confirmation of its accuracy.

It would likely delay a transaction an average of 2-3 months to collect the new information, even assuming multiple people work simultaneously to shepherd different aspects of the project (i.e., billing hours at once). This estimate is consistent with practitioner surveys that

[48] Out of 31, 530 transactions, there were 969 second requests, which is equivalent to 3.1%.

[49] *See* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed Reg. 42207 (Proposed June 23, 2023).

have gathered information about second request response times. Two surveys, in 2013 and 2007, show the median length of time spent complying with a second request was 5.9 months and 7 months, respectively.[50] These median lengths are appropriately analogous because they involved investigations where some of the companies were not required to fully comply with the second request, and so the actual production of information was likely commensurate with the proposed changes.

The prior practitioner surveys on second request compliance also show significant deficiencies in the FTC's cost estimate: the median cost for both sides of a transaction complying was $4.3 million, with a range from $2 to 9 million (all in 2013 dollars). Importantly, compliance costs in those surveys included items the FTC failed to count in the cost: electronic review, data processing, and economist fees. Those estimates may even be low because they did not include the company's labor to assist outside advisors in preparation, which is a cost the FTC acknowledges should be included. Even still, this estimate of compliance costs from actual experience dwarfs the FTC's estimate of $49,324 per filing (or $98,647 per transaction, assuming the typical two filings per transaction), which is based only on a too-low estimate of hours, multiplied by a too-low "executive and attorney compensation" rate.[51] The $4.3 million per transaction is a much closer estimate to reality than the FTC's because it looks at actual expenditures in roughly analogous situations.

In addition to these overall problems and methodology issues, there are various specific costs, concerns, and complexities that the FTC's NPRM does not account for:

- There are significant costs associated with delaying a deal that will not ultimately be blocked, including the cost of securing financing over a longer period of time, and the cost of uncertainty to employees and business partners.

- Not all transactions that are notified pursuant to the HSR Act are publicly announced, and there are significant risks of an otherwise non-public deal becoming public from the requirement to submit customer and supplier contact information. Many companies maintain confidential relationships with customers and/or suppliers, so submitting their information would require disclosing the situation and risking the deal becoming public against the parties' wishes, and in tension with the design of the confidentiality provisions in the HSR

[50] *See* Peter Boberg & Andrew Dick, *Findings from the Second Request Compliance Burden Survey*, 14 THE THRESHOLD 26, 27 (2014), https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf.

[51] *See* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42208. One specific flaw to draw the Agencies' attention to is the hourly compensation number. We think the hourly rate that the FTC used—$460—likely does not account for the average billing rate of an expert antitrust attorney. Given the multiple complex issues going to substantive questions of antitrust law, companies will need to hire specialized antitrust counsel to comply with the proposed notification form. Even experienced associates that are part of specialized antitrust practices typically bill at rates at least twice as high as that estimate.

Act. Deals becoming public can hamper business planning when business partners want to delay signing contracts to see the outcome of the proposed transaction.

- The requirement to provide narratives for transaction rationale, horizontal overlaps, and supply relationships is duplicative of the document productions the proposal would also require. Moreover, summarizing the content of the documents is a subjective exercise that could give the Agencies grounds to declare a filing incomplete (see related concern below).

- The opportunity-cost to businesses of using employees for information requests, and to draft or review narrative responses is higher than the employee's hourly rate. It is also unclear that the FTC's methodology of asking for Agency staff's experience in private practice even attempted to account for company employees' time dedicated to the collection and production process that would be required.

- Unlike with similar requests made as part of a second request or VAL, companies have no ability to consult with staff at the Agencies to get clarity on the most useful presentation of data or information, resulting in wasted effort and higher cost as compared to similar second requests. Additionally, there is no internal petition process to reduce "unduly burdensome" aspects of the filing, as contemplated in 15 U.S.C. § 18a(e)(1)(B)

- Unlike with similar requests made as part of the second request process, there is no allowance for a company to "substantially" but not "fully" comply with the HSR notification. This means the Agencies will be able to penalize companies for minor perceived failures and subject them to lengthy back-and-forth negotiations to come into compliance. This will also lead to companies over-collecting out of risk aversion when submitting initially (driving up burden and cost), and the Agencies will have more power to delay transactions, compounding the problems listed above.

- Though there may be economies of scale (or experience) with some of the categories of information request, small companies will not experience those economies, and as a result the burden will be especially high on them.

For some specific requests, the cost of providing the information far exceeds any benefit because the Agencies could not reasonably rely on the information to make substantive determinations under the antitrust laws. For instance:

- The requirement to provide drafts of documents is extremely burdensome: modern word processing and productivity software can automatically save and store hundreds

or thousands of drafts with very little difference in content, which differences may never be sent to any decisionmakers for consideration. The NPRM is unclear on whether such automatically stored versions are "drafts" that must be produced.[52] Even when changes are circulated for consideration, they often have no relevance to the subject matter sought under current Item 4(c) and (d) requirements (e.g., they could reflect changes in deal financing). Producing drafts also requires making legally complex and time-consuming judgment calls about which edits reflect privileged advice. This process will require the use of costly e-discovery tools and privilege logs that have not typically been used at the HSR stage. Despite all these new costs, drafts have limited probative value because they can reflect inaccurate information that the company would not act on. Sorting out the differences between drafts, or which draft is operative will require substantial Agency time that is very unlikely to assist in determining the competitive consequences of the transaction.

- The requirement to provide numerous new categories of documents such as periodic plans, reports, and contracts (as well as authors and job titles) imposes a significant new burden because many companies do not store documents in central locations from which they can easily be collected. Collecting this information requires company and counsel resources to locate the knowledgeable employees (who usually are not involved in transaction planning), to interview document custodians to try to reconstruct author information, and to cross-check other possible sources to ensure that the files are complete. These documents have limited probative value (and may be outside the scope of the HSR statute) because, by the FTC's own definition, they are unrelated to the transaction.

- The cost of requiring parties to submit Item 4(c) and (d) documents prepared by or for "supervisory deal team leads" far outweighs any potential benefit. The Agencies are already receiving materials that are prepared by or for officers or directors, who are the ultimate decisionmakers with respect to a transaction. The documents of consequence to understand the transaction are those being prepared by or for officers and directors, who render decisions that reflect the company's position and plans. Documents prepared by deal team leads, but which did not make it in front of officers or directors, are unlikely to reflect the most accurate information or conclusions that guide a company's actions. Finally, the definition of the term "supervisory deal team leads" is ambiguous which will create compliance risk because companies will be forced to make difficult judgment calls as to whether an employee has had sufficient involvement in a transaction to qualify as a "supervisory deal team lead."[53]

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[52] Any lack of clarity of this kind increases business uncertainty, the likely need for specialized counsel, and the risk of Agency staff extending the time for review by declaring a filing non-compliant.

[53] Again, any lack of clarity of this kind increases business uncertainty, the likely need for specialized counsel, and the risk of Agency staff extending the time for review by declaring a filing non-compliant.

- The requirement to provide labor market data tracked to the USDA's "commuting zones and labor market areas" and the Bureau of Labor Statistics' "standard occupational classification" is extremely burdensome because companies do not typically keep HR data consistent with this format. Additionally, the data is not probative because (1) the commuting zones tool was last updated in 2012 and is identified by the USDA as "discontinued"; (2) companies do not think about their hiring pool (and competitors in the hiring process) according to these distinctions in the ordinary course, so they are unlikely to reveal anything about competitive conditions; and (3) courts have not used SOC codes or commuting zones as a proxy to measure substantive or geographic dimensions of competition for labor.

- The requirement to provide 5 years of data about penalties incurred from the DOL, NLRB, and OSHA would be extremely burdensome because companies do not typically keep aggregated data in this format. Additionally, this is government data that is available to the FTC, so asking for it does not comport with the requirements of the Paperwork Reduction Act. Additionally, the data is not probative because neither the Agencies nor courts have ever used it to prove market power in labor markets. Nor could the Agencies use the data to investigate the potentially "anticompetitive, unfair, and deceptive" labor practices of a company more generally.[54] Doing so would exceed the statutory authority of the HSR Act, which allows the Agencies to collect only information that is "relevant to a proposed acquisition" and which is necessary to determine whether "such acquisition" would violate the antitrust laws.[55]

III. Alternative Approaches Would Lessen Burden Substantially, in Line with Policy Goals that Are Important to the U.S. Economy

The consequence of the proposed amendments will be to place a regulatory tax on all M&A activity, which will disproportionately affect procompetitive and competitively neutral deals as well as small businesses. That is because the small portion of transactions that raise competitive concerns are already burdened with onerous information requests under the current system, and often price those regulatory delays and costs into their deals. Although some of the proposals in the NPRM request information that goes beyond information requested in a typical Second Request, this rule would not materially change the amount of information that those transactions produce to the Agencies. Procompetitive and competitively neutral deals, on the other hand, will feel the full effects of the time-and-cost tax. This tax is also regressive: smaller businesses, including startups looking to exit by acquisition,

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[54] The FTC's recent memorandum of understanding with the Department of Labor suggests a broader investigative mission along these lines. *See* Press Release, Fed. Trade Comm'n, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices.

[55] 15 U.S.C. §18a(d)(1).

are less likely to be equipped with legal teams and resources to handle this sort of information request. The regulatory transaction costs will also represent a larger portion of their deal values, meaning that they will be more likely to lose out on strategic deals or sales that reward their innovation and entrepreneurship.

This unnecessary threat to M&A activity is extremely concerning. As Business Roundtable has explained in several recent comments to the antitrust Agencies, M&A activity is an enormous engine of economic growth in the United States, benefiting businesses of all sizes and their customers.[56] U.S. companies are most competitive when they can exercise the free ability to put assets to their highest and best use, including to achieve economies of scale and other benefits of concentration; this tool is especially important for keeping U.S.-based companies competitive on the global stage with state-sponsored firms based in other parts of the world. M&A is also essential for a dynamic economy: new uses and combinations of assets, as well as innovative breakthroughs, constantly renew the intensity of competition to improve offerings to consumers. For example, a merger of established companies often creates benefits by allowing assets or products to be used together in ways that would have been hard to achieve through arm's-length contracts.[57] Also, the possibility of being acquired is an important incentive for innovative startup companies and the firms that financially support them (e.g., venture capital and private equity).[58] Empirical research has shown that reducing the likelihood

[56] Indeed, it is an axiom of industrial organization that the combination of complements into a single firm structure creates value for consumers. R.H. Coase, *The Nature of the Firm*, 4 ECONOMETRICA 386 (1937). *See also* Fed. Trade Comm'n, Conglomerate Effects of Mergers, OECD Competition Committee Meeting (June 4, 2020) contribution by the United States, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf ("Mergers are one means by which firms can improve their ability to compete. It would be illogical, then, to prohibit mergers because they facilitate efficiency or innovation in production. Unless a merger creates or enhances market power or facilitates its exercise through the elimination of competition—in which case it is prohibited under Section 7—it will not harm, and more likely will benefit, consumers."); Competition Enforcement and Regulatory Alternatives – Note by the United States, OECD Competition Committee Meeting (June 7, 2021), ("Mergers may also generate efficiencies that produce non-price benefits, such as improved quality, enhanced service, new products, or stronger incentives and ability to engage in, or increase, innovative efforts. The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any market.").

[57] Courts have recognized this foundational principle. FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) ("a merger's primary benefit to the economy is its potential to generate efficiencies"); St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 789 (9th Cir. 2015) ("a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products"); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014) (same).

[58] *See* NVCA Yearbook, National Venture Capital Association (2020), https://nvca.org/wp-content/uploads/2021/03/NVCA-2021-Yearbook.pdf (the most common form of payout for entrepreneurs is acquisition, not IPO: from 2010 to 2020, the average annual ratio of acquisitions to IPOs for VC-backed companies was approximately 13:1); Amicus Curiae Brief of Pharmaceutical Research and Manufacturers of American, FTC v. Amgen Inc., Case No. 23-cv-3053, Dkt No. 143 Ex. A, at 1 (Aug. 25, 2023) ("[M]uch pharmaceutical innovation has been driven by startups and smaller companies. Though those small entities have been incubators for the

of M&A transactions, as this regulatory tax would, will tend to stifle innovative efforts, especially of small companies.[59] In order to maintain the dynamism that is central to a competitive economy, then, the Agencies should rethink this proposed rule that would chill mergers across the board.

The Agencies themselves have been strong proponents that competition authorities around the world should avoid unnecessary burdens in merger review. As part of the International Competition Network ("ICN"), the FTC and DOJ published the Recommended Practices for Merger Notification and Review in order to better harmonize approaches across jurisdictions. There, the Agencies supported important principles that would be violated by this rule: "Because most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process."[60] Additionally, "[i]nitial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns."[61] In addition to reducing unnecessary burden, "[m]erger reviews should be completed within a reasonable period of time" and that reasonable period should reflect "the competition issues raised."[62] The Agencies have made filings to the same effect with the OECD, where they have recognized the need to minimize regulatory burden from merger review[63], and that smaller firms are more likely to be deterred by regulatory burden than larger firms[64].

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discovery of innovative medicines, testing and development requires enormous financial resources that they may lack. The investment necessary to complete the development of those medicines and make them available to the patients who need them requires the involvement of established larger manufacturers. And without the prospect of acquisition to enable those larger manufacturers to complete the development of such medicines—and to permit those who financed early-stage development to recoup their own investments—innovation would be curtailed.")

[59] GORDON M. PHILLIPS & ALEXEI ZHDANOV, R&D AND THE INCENTIVES FROM MERGER AND ACQUISITION ACTIVITY, THE REVIEW OF FINANCIAL STUDIES (2012) (confirms the hypothesis that the "[p]ossibility of being acquired induces innovations efforts by large and small firms, but especially by the small firms").

[60] *Recommended Practices for Merger Notification and Review*, ICN, 15, https://www.ftc.gov/system/files/attachments/merger-workshop-competition-authorities-caribbean/rec-practices-merger-notification.pdf.

[61] *Id.*

[62] *Id.*

[63] Fed. Trade Comm'n & Dept. of Justice, Contribution from the United States, *Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies* 6-7, n.24 (Feb. 3, 2011), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1102crossbordermergercontrol.pdf (setting out the goal to "reduce burdens on merging parties").

[64] Fed. Trade Comm'n & Dept. of Justice, Contribution from the United Statse, *Challenges/Obstacles Faced By Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition* (Feb. 5, 2004), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2000-2009/2004-

The ICN Recommended Practices set out alternatives that would be preferrable to the proposed amendments, because they would allow for some tailoring of the burdensome information requests to follow a transaction's potential for anticompetitive consequences. This includes a "short form" regime like the one used in Europe. The ICN describes the recommended parameters:

> Alternative notification formats – different initial notification formats varying with the likely complexity of competitive analysis of the transaction; examples include: (a) advance ruling certificates, which enable the merging parties to use a simplified advance procedure instead of a formal notification; and (b) short and long form notification options, enabling the merging parties to elect to submit abbreviated information in transactions that do not present material competitive concerns.[65]

The Agencies have not demonstrated a need for additional information as compared to the current HSR scheme that already provides them litigation-like discovery whenever they decide a transaction warrants a second request. But, if the FTC does plan to promulgate a final rule that increases the information requested with the notification form, it must lessen the burden on procompetitive and competitively neutral transactions, which it is in the regular habit of expeditiously identifying. Minimizing the burden on these transactions will be procompetitive overall: it will ensure assets go to their highest and best use, instead of being mired in transaction costs, and it will promote innovation by reducing the obstacles to entrepreneurs receiving an appropriate return on substantial investment when they are acquired into firms that can leverage their work to improve offerings to customers. This is a win for consumers and business alike.

IV. Conclusion

The FTC's proposal is contrary to Congressional intent behind the HSR Act and violates the Paperwork Reduction Act and the Administrative Procedure Act. It would impose a substantial new tax on M&A transactions, the majority of which raise no competitive concerns, and without any justification. Business Roundtable urges the FTC to leave the HSR notification form unchanged (except as required by new legislation), or to require only minimal changes to provide basic information that companies could provide without legal counsel, judgment calls,

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challenges_obstacles_faced_by_competition.pdf ("The resources committed to understanding a regulatory system and navigating its requirements are a tax that larger firms—especially incumbents with significant experience in the industry—can bear with lesser strain than smaller firms or new entrants. As the number and complexity of regulatory requirements that an entrepreneur must satisfy grows, the costs associated with entry also grow.")

[65] *Recommended Practices for Merger Notification and Review*, ICN, 16, https://www.ftc.gov/system/files/attachments/merger-workshop-competition-authorities-caribbean/rec-practices-merger-notification.pdf.

new document collection burdens, or significant other work. If the FTC does persist in pursuing significantly more information in the HSR notification form, then we urge it to (1) ensure all information requested is "relevant to a proposed acquisition" and "necessary and appropriate" to determine whether it violates the antitrust laws; and (2) differentiate transactions that raise no competitive concerns and provide a short form option or other way of reducing burdens appropriately.

Business Roundtable appreciates the opportunity to provide input during this process. If you have any additional questions or would like to discuss these comments further, please contact Liz Dougherty, General Counsel and Corporate Secretary of Business Roundtable, at [redacted]

Exhibit 5

U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

September 27, 2023

April Tabor, Secretary
Federal Trade Commission
Office of the Secretary,
600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H),
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Premerger Notification; Reporting and Waiting Period Requirements (Matter No. P239300)

Dear Ms. Tabor:

The U.S. Chamber of Commerce ("the Chamber") and its members appreciate the opportunity to comment on the Federal Trade Commission's ("FTC" or "the Commission") proposed changes to the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") Premerger Notification and Report Form (the "Form") and its associated instructions ("Instructions").

Introduction and Summary of Comments

FTC Chair Lina Khan was recently asked about the benefits of allowing the free movement of capital through mergers and acquisitions and a "perception" that the FTC has become overtly hostile to merger activity.[1] She responded:

> Just to put things in context, any given year the antitrust agencies get anywhere between 1,500 and 3,000 merger filings. Of that number, 98 percent go through without even second questions being asked by the agencies so around two percent of all deals even get what's known as a Second Request, which is, you know, a set of questions so that we can do a deeper investigation. And an even smaller fraction ultimately results in a legal challenge—so vast majority of deals still going through. . . . Again, 98 percent of deals [are] going through without even a second question. It's really an issue on the margins . . . .[2]

We agree with Chair Khan's assessment that antitrust concerns are raised at the thin margin of M&A activity. Yet, notwithstanding this fact that only a small fraction of reportable transactions raise competition concerns, through its Notice of Proposed Rulemaking ("NPRM")

[1] Lina M. Kahn, "Remarks of FTC Chair Lina M. Khan, Economic Club of New York," Interview by Peter Orszag (July 24, 2023), available at https://www.youtube.com/watch?v=X7u3JwSfHZY.
[2] *Id.*

the FTC is proposing a "comprehensive redesign of the premerger notification process"[3] that would impose alarming new costs and burdens on *all* reportable transactions—including the 98 percent of deals Chair Khan has conceded do not merit "even a second question" by staff at the FTC and the Department of Justice's Antitrust Division ("DOJ") (collectively, "the Agencies").[4]

The Chamber and its members have significant concerns regarding the unjustified new burdens these proposed changes would impose on the vast number of transactions that fail to raise even a specter of anticompetitive harm. In response to the NPRM, the Chamber engaged Professor Kothari to analyze the burdens the proposed changes would impose on filing parties. That analysis is attached to these comments. In evaluating the burden, he considered a recent survey conducted by the Chamber of antitrust practitioners regarding the NPRM's proposed changes, as well as the revised merger guidelines recently proposed by the Agencies.[5] Those survey responses overwhelmingly indicate that the FTC has vastly underestimated the burdens associated with the NPRM.

While some specific changes may be reasonably calibrated to achieve the federal antitrust agencies' legitimate enforcement objectives, overall, this radically re-imagined HSR regime represents an unwarranted transformation of the current HSR notification framework.

The following is a summary of the Chamber's concerns with the NPRM. Each of these items is discussed in more depth in the Discussion section below:

I. Certain changes in the NPRM, such as the addition of information about subsidies granted by certain foreign governments and the addition of a size-of-person stipulation, appear to be a reasonable exercise of the FTC's authority to adopt necessary and appropriate changes to improve enforcement efficiency within the current HSR framework.

II. Overall the NPRM is a vast overreach based on flawed, erroneous and unsubstantiated assumptions.

A. There is no basis for concluding (and none has been offered) that the Agencies are systematically "missing" anticompetitive transactions due to a deficiency in the requirements and scope of the current HSR Forms.

- With few exceptions (e.g., with respect to subsidies from foreign entities of concern), the current HSR Form requests sufficient information for the Agencies to determine which transactions may require deeper scrutiny.

[3] Premerger Notification; Reporting and Waiting Period Requirements, A Proposed Rule by the Federal Trade Commission (June 29, 2023) ("NPRM"), at 42180.
[4] Remarks of Lina M. Khan, Economic Club of New York (July 24, 2023).
[5] See U.S. Chamber of Commerce, HSR/Merger Guides Practiioner Survey (Sept. 19, 2003), https://www.uschamber.com/assets/documents/20230919-U.S.-Chamber-Antitrust-Survey.pdf

- Many already existing tools sufficiently enable the Agencies to review and challenge those very few transactions "at the margin" that actually raise antitrust concern. These include voluntary requests for information, requests for additional information and documentary materials ("Second Requests"), Civil Investigative Demands, "pulling and refiling" the HSR Form, timing agreements, and party engagement practices that have developed over time.

- Only about two percent of reported transactions are subject to Second Requests, and the FTC has pointedly not demonstrated that this statistic represents underenforcement.

B. Vibrant M&A helps to direct assets to higher valued uses and, thus, along with a reasonably balanced regulatory policy that targets only the small number of deals that raise legitimate antitrust concern, has contributed to a healthy and dynamic economy. The NPRM severely undermines this approach in an attempt to chill merger activity. Rather than serve as a tool to identify transactions with heightened antitrust risk, the HSR Form will be transformed into a far more significant regulatory tax on low-risk transactions. This will undoubtedly deter many lower profile deals that are the lifeblood of the economy.

- Although many elements of the NPRM appear aimed at discouraging Private Equity investments, there is simply no basis to conclude that PE deals, which often provide smaller, innovative companies with vital access to capital, are inherently anticompetitive, or even more anticompetitive than strategic acquisitions.

C. The FTC attempts to justify the expansion of information in the HSR by pointing to merger filing requirements in international jurisdictions, but foreign filing regimes that require substantial information up front to obtain approval are fundamentally different from the HSR regime put in place by Congress and thus do not serve as an appropriate model for the HSR Form and other aspects of the premerger notification process in the United States.

- The universe of reportable transactions in the EU is significantly smaller than the number of transactions required to be reported under the HSR Act. Moreover, although still inherently more burdensome than the current HSR process, the EU and other foreign filing regimes—unlike the NPRM—offer a "short form" option for transactions posing minimal risk to competition. And the EU is moving in the opposite direction of the NPRM. In fact, recent changes in the EU expand the types of cases

eligible for the short form procedure.[6] The new rules under the EUMR also reflect an effort to *reduce* the amount of information required in all types of reportable transactions, not just the short form cases. And the new Form CO was revised in an effort to reduce the amount of work involved in preparing the notification.[7]

- Legal systems outside the U.S. also do not offer the same due process guarantees as the U.S. and competition authorities are empowered to approve or disapprove transactions; the FTC and DOJ are not so empowered.

- Congress chose a fundamentally different approach to premerger review than that adopted by ex-U.S. regimes; the FTC lacks the authority to change that approach through a NPRM.

D. The NPRM dramatically underestimates the burden and costs that would result from the proposed changes. Although the NPRM estimates a staggering 400% increase in time to complete the average filing, the results of the Chamber's above-mentioned survey reveal an even more troubling degree of burden on filing parties, suggesting that the true cost of compliance with the proposed changes could be 5 times greater than the Agencies' estimates.

III. The NPRM is not necessary or appropriate for identifying those few transactions that merit significant scrutiny.

A. The proposed changes would impose extraordinary costs on all filers with speculative, if any, benefit to sound antitrust enforcement.

- Many categories of requests, while being costly and burdensome to collect, would provide little probative information for an initial screen, particularly given their application to all reportable transactions.

- Additionally, the proposed director and officer information requirements are disruptive to businesses and unrelated to FTC/DOJ's evaluation of mergers. The proposed rules would require the identification of every officer, director or board observer of all entities within the acquiring party and acquired entity, as well as the identification of other entities for which those individuals currently serve, or in the past two years have served as an officer, director or board observer. This requirement goes

[6] *See* Eur. Comm'n, "Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings" (April 20,2023), *available at* https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)2401&lang=en.
[7] *See* Eur. Comm'm, "Commission Implementing Regulation (EU) /... implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004 (April 20, 2023), *available at* https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)2400&lang=en.

beyond the bounds of merger control—from the FTC's guide to public comments, it appears this requirement is largely or possibly entirely about identifying potential Section 8 interlocking directorate issues. While the FTC argues that this information would provide the Agencies with insight into existing, prior or potential interlocking directorates to better assess their implications under Sections 7 and 8 of the Clayton Act, the proposed requirements would be unduly burdensome, have no bearing on the substantive analysis of transactions under Section 7, and would place companies in the uncomfortable position of requiring each of their directors, officers and board observers to disclose current and historical information that is otherwise irrelevant to assessing the proposed transaction under review.

B. Transforming every HSR filing into a mini-Second Request will neither increase efficiency, improve proper merger enforcement, nor reduce the burden on the Agencies or their staff.

- To the contrary, the deluge of documents and data called for by the NPRM, coupled with increased pre-filing interaction with the Agencies necessitated by adding open-ended and subjective requests, will arguably make it *more* likely that staff at the Agencies will "miss" truly anti-competitive transactions.

- Incredibly, the NPRM does not even acknowledge, let alone, explain how DOJ and FTC staff will grapple with the increased volume of materials without significant increases to the budgets and staffing levels of the Agencies—neither of which can occur without Congressional action.

- Additionally, the NPRM introduces uncertainty when it seeks to expand the scope of requested documents related to items 4(c) and 4(d) by adding a requirement that parties submit materials prepared by or for the supervisory deal team lead(s). As drafted, the NPRM does not clearly delineate which individual(s) would constitute a "supervisory deal team lead." Instead, the NPRM broadly describes this category to consists of the "individual or individuals who functionally lead or coordinate the day-to-day processes for the transaction at issue."[8] Without further clarity, such as definition could capture a company's entire corporate development team regardless of the titles or roles held by the team's members. The Chamber suggests clarifying that a "supervisory deal team lead" includes only the senior most member of the Corporate Development deal team responsible for driving the strategic vision and

[8] NPRM at 42194.

assessment of the deal, and who would not otherwise qualify as an Item 4(c) director or officer.

- Further, the NPRM would require filing parties to submit "draft" versions of any document that is responsive to Item 4(c) or 4(d) only if such drafts were provided to an officer, director, or supervisory deal team lead. While the FTC's rationale for wanting to review draft documents as opposed to only final versions is understandable, for companies that rely on collaborative, cloud-based software to create, share and edit documents, this proposal imposes significant burden and creates unnecessary confusion. In particular, the NPRM does not provide any guidance concerning what constitutes a "draft." As a result, in the context of a shared document, the NPRM's requirements could potentially capture hundreds of draft versions of the same item. Collecting all these versions would be unduly burdensome to produce at the initial filing stage as well as useless to the Agencies during the initial waiting period. Alternatively, the Chamber proposes that the FTC amend the NPRM to require only that the initial draft version of a 4(c) or 4(d) document submitted to an officer, director or supervisory team be produced. Under this approach, filers would not be expected to share incremental redlines between drafts.

IV. Through its overreach, the NPRM would likely damage investment and capital flows, harming the U.S. economy, including workers and consumers.

A. The proposed changes would impose a stiff regulatory tax on all reported transactions, whether or not they raise legitimate antitrust concern. Of particular concern is the proposal that 4(c) documents include draft documents that are sent. In the typical internal evaluation of a transaction, many individuals may comment on a draft deal document or propose edits that do not reflect the final thoughts or analyses of the company, but rather a single individual's ideas. Requiring draft documents would stifle businesses' ability to openly debate plans, priorities and strategies, chilling open business discussion for fear of creating documents that do not reflect the final thoughts of the company.

B. The NPRM's proposed ten-year look back at all prior transactions would raise the cost of all reportable transactions *and* the costs associated with transactions deemed by Congress to be too small to warrant HSR notification.

C. The NPRM would likely inject significant new delay and uncertainty into the market.

- Given the subjective nature of many of the new requests and the language of the Certification form that officers must sign, many filers will feel compelled to seek assurance, prior to filing, that the Agencies will accept the sufficiency of their filing.

- For similar reasons, absent explicit authorization, many filers will be reluctant to indicate that a question does not apply to a transaction without blessing from the Agencies. These dynamics would effectively turn an administrative act—filing the HSR Form—into a complex regulatory process in and of itself, as is the case in other jurisdictions and serve as a backdoor means of extending the statutory 30-day waiting period under the HSR Act.

D. At the margin—and it could be a very large margin—the NPRM will be a drag on the economy by discouraging transactions that raise no genuine competition concerns and transactions that may even increase competition and efficiency to the benefit of consumers and workers.

V. The NPRM is inconsistent with Congress' intent and expectation that the HSR Act would impose limited burden on most transactions.

A. In enacting the HSR Act, Congress assured the public that the law would not unreasonably impede the market for corporate control; for the last 45 years, until now, that principle has been accepted by the Agencies and guided the promulgation of HSR regulations.

B. Congress recently considered the type of information collected with the HSR Form and focused its direction to the FTC on only a narrow category of information related to subsidies from foreign entities of control; the NPRM far exceeds anything contemplated by Congress.

C. The proposals conflict with the Williams Act timing conditions for cash tender offers.

VI. The NPRM violates the law.

A. It far exceeds the FTC's authority to adopt regulations that are "necessary and appropriate . . . to determine whether [an] acquisition may, if consummated, violate the antitrust laws."[9]

B. It would so radically transform the current HSR regulatory framework as to raise a question under the major questions doctrine; and

[9] HSR Act, 15 U.S.C. §18a(d)(1).

C. It fails to satisfy the FTC's obligations under the Paperwork Reduction Act.

For all the foregoing reasons, the Chamber urges the Commission to withdraw or substantially revise the NPRM to better align with its legal authority and to ensure that its and the DOJ's efforts to enforce the antitrust laws promote competition and the free market, rather than harm and undermine it.

Discussion

The current HSR Form, while already imposing a non-negligible cost and burden on filing parties, strikes a reasonable balance between burden on the parties and the enforcement needs of the Agencies—a balance that is consistent with Congressional intent and the Agencies' legal authority. This balance helps guard against overly burdening capital markets and low-risk transactions while allowing Agency staff to focus scarce government resources on those limited number of transactions that raise actual potential concern. Until now, it has broadly been accepted that the system was working as intended.

According to Commissioners Khan, Slaughter and Bedoya, the NPRM's sweeping overhaul is appropriate because though "[m]uch has changed in the 45 years since the HSR Act was passed," the HSR Form "has largely stayed the same."[10] The reality is, however, that the Form, and the HSR process more generally, has changed in significant ways since 1976. But in contrast to the NPRM, the most significant changes have been driven by Congress through the legislative process. Most significantly, Congress has adjusted the filing thresholds to reduce the universe of reportable transactions, imposed filing fees, and, most recently, required submission of information on foreign subsidies.

At the same time, limiting the focus to the Form itself ignores how the merger notification process has evolved over time, including ways the Agencies have developed and refined various review practices. For example, the introduction of voluntary access letters ("VALs"), the development of the "pull-and-refile" option, and the institutionalization of timing agreements have improved the FTC and DOJ's ability to efficiently identify and scrutinize the very small number of transactions that raise legitimate questions.

The drafters of the HSR Act appreciated the inevitability of economic growth and change, and they were attuned to the delicate balance of regulation and the necessity of providing space for businesses to realize their fullest potential. The enviable vibrancy and dynamism of our economy is attributable in part to competition policies that, until now, have avoided steps that could discourage the free flow of capital absent a genuine threat to competition. It is, thus, <u>not</u> at all self-evident how changes in the economy over the last 45

[10] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules Commission File No. P239300 (June 27, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf.

years justify a dramatic change to that policy approach and the regulatory balance struck by the current HSR Form.

I. Certain Proposed Changes Appear to be a Reasonable Exercise of the FTC's Prerogative to Propose Necessary and Appropriate Changes to Improve Enforcement Efficiency

The Chamber recognizes the necessity and appropriateness of certain specific proposed changes in the NPRM. For example, Congress recently amended the HSR Act to direct the FTC to require filers to disclose subsidies received from entities designated as "Foreign Entities of Concern."[11] The portion of the NPRM proposing to add a Subsidies from Foreign Entities or Governments Concern section to the Instructions, including the Commission's "proposed two-year limitation," is reasonable and consistent with Congressional intent.[12]

Other changes appear to be reasonably designed to reduce the burden of filing, eliminate requirements that the Agencies have identified as less helpful than originally intended, provide potentially helpful clarification, or make interactions with the Agencies more efficient and less costly:

- Changes to Section 803.2 requiring the submission of separate forms where, based on the structure of a transaction, an entity is both an acquired and acquiring person;[13]
- Adding a Size of Person stipulation;[14]
- Clarifying what financial documents are required to be submitted by acquiring persons who are natural persons;[15]
- Eliminating the requirement to report manufacturing revenues at a granular level pursuant to existing Item 5(a);[16]
- Limiting information required to be reported by the acquired person pursuant to existing Item 6(b);[17] and
- Revising Item 3(a) to provide guidance on what are related transactions.[18]

The foregoing proposed changes appear to be consistent with striking a reasonable balance between providing the Agencies with information they need to perform a preliminarily

[11] Merger Filing Fee Modernization Act of 2022, Pub. L. 117-328, 136 Stat. 4459 (2022), Div. GG.
[12] NPRM at 42204.
[13] *Id.*
[14] *Id.* at 42187.
[15] *Id.*
[16] *Id.* at 42199.
[17] *Id.* at 42188.
[18] *Id.* at 42192.

assessment of the potential competitive implications of a transaction and the burden imposed on all reporting parties.

The NPRM also proposes changes to Sections 803.2, 803.5 and 803.10 that seem likely to promote efficiency and reduce unnecessary burden on filing parties and the Agencies. [19] Specifically, the FTC proposes "eliminat[ing] references to paper and DVD filings to physical offices" and adding an electronic filing requirement instead.[20] While electronic filing is generally preferable and less burdensome to filing by paper or DVD, the Chamber notes that the platform is still under construction.[21] As a result, before commenting on this proposal, filing parties still need additional information about the logistics of the "redesign[ed]" electronic filing system. Before seeking to impose an e-filing requirement on all parties, the FTC should provide further details regarding the proposed user interface; the ability for users to collaborate on a single filing; the ability of users to save, review, and edit; and how filing persons will receive complete copies of filings as submitted.

II. Other Proposed Changes, which Would Radically Change the HSR Regulatory Framework, Rest on Flawed, Erroneous, and Unsubstantiated Assumptions.

Besides the handful of non-controversial changes just cited, the NPRM represents a radical and unwarranted transformation of the HSR process. Turning every filing into a mini-Second Request response would radically change the regulatory balance currently in place, imposing enormous burdens on all filers, not just those handful that the Agencies have identified as potentially concerning from a competition perspective.

To justify such costly and sweeping changes to the filing process, the FTC must demonstrate that the additional information requested by the NPRM is necessary for the Agencies to obtain to enable staff to conduct an initial determination of a transaction's potential threat to competition.[22] The FTC cannot meet this obligation with flawed, erroneous, and unsubstantiated assumptions:

- The NPRM and subsequent statements by FTC Commissioners have implied that the Agencies believe they are "missing" anticompetitive transactions due to knowledge gaps that could have been avoided if staff had access to the information demanded by the NPRM.[23] However, the FTC has not provided *any* support for this proposition.

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[19] *Id.* at 42181.
[20] *Id.*
[21] *Id.* at 42180 ("As the Agencies are currently working to complete an electronic filing (''e-filing'') platform, the exact structure of the redesign is unclear at this time").
[22] As described further in subsequent sections, it is doubtful that the FTC has the legal authority to initiate such changes absent additional legislation.
[23] *See, e.g.*, Lina M. Kahn, "Remarks of FTC Chair Lina M. Khan, Economic Club of New York;" Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya

- In some places, the NPRM goes even further by suggesting that some filers are actively concealing or obfuscating relevant information.[24] If true (although no examples or statistics are cited), this would be a legitimate concern for which some regulatory response would be appropriate. But the Commission's proposed response imposes undue burdens on all filers for the supposed misdeeds of a few. There are more reasonably-tailored solutions to perceived problems of gamesmanship.

- Similarly, the Commission's evident suspicion of M&A activity, particularly if private equity is involved in a deal, is unmoored from fact and logic. There is broad agreement that the vast majority of reportable transactions do not pose a real threat to competition. The FTC has provided no evidence that merger activity in today's economy should be viewed with heightened skepticism. Given the integral role M&A plays in the modern economy, the NPRM must demonstrate that the benefits of expanding the HSR Form outweigh the costs to filers and the broader economy. It does not.

- The FTC's reliance on foreign filing regimes, both for inspiration and as evidence that the burden of the NPRM will be slight, is profoundly misplaced. The FTC fails to acknowledge the fundamental differences between foreign filing regimes and the HSR system, and that the identified "efficiencies" are only relevant to a small subset of filers.

- Finally, the FTC, relying on questionable data and unsupported analysis, drastically underestimates the costs and burden the NPRM would impose on filers *and the Agencies*.

A. There is no basis to conclude that the Agencies are systematically missing anticompetitive transactions due to deficiencies in the HSR Form.

There is no basis for concluding that the FTC and DOJ have systematically "missed" anticompetitive transactions—and the NPRM provides none. Absent such a showing, there is simply no way to justify such a dramatic expansion in the information filers must provide the Agencies as part of the premerger notification process.

The Agencies' own statistics show that most transactions are not problematic and require no further review beyond the current HSR filing. From 2012 to 2021, out of 18,873 transactions reported, only 518 received a Second Request based on information provided in

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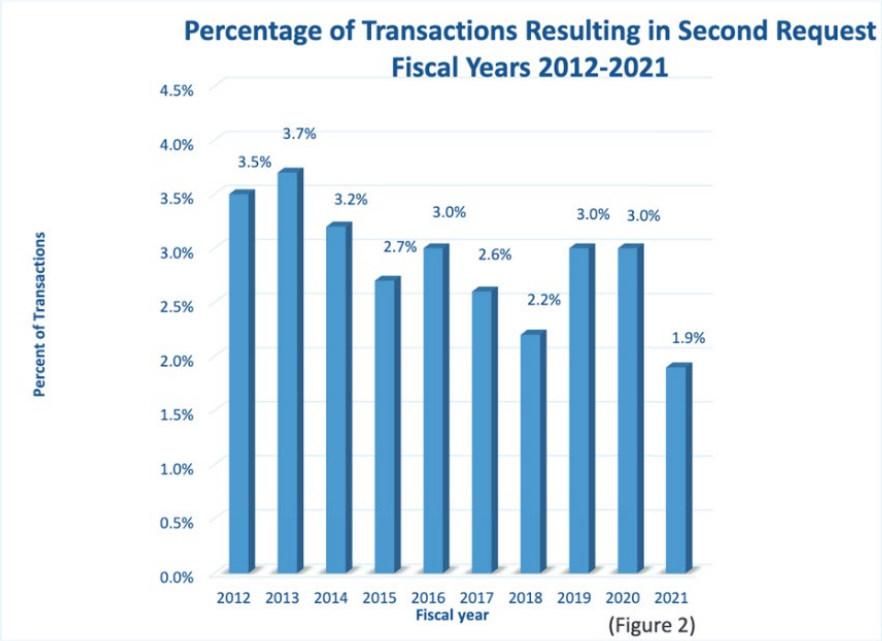
Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules (June 27, 2023), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf. "[T]he information currently collected by the HSR form is insufficient for our teams to determine, in the initial 30 days, whether a proposed deal may violate the antitrust laws," and relying on "third-party interviews and materials . . . can leave key gaps."

[24] NPRM at 42194; 42199.

the HSR Form or in submissions voluntarily provided by the parties and by third parties in response to VALs and other FTC requests.[25] Of these, 53 resulted in a challenge, and 132 were abandoned by the parties in response to a likely challenge, with an additional 25 abandoned after a complaint was filed.[26] During that same period, until the FTC suspended the practice of granting early termination requests in 2021,[27] the Agencies had granted more than 9,500 requests for early termination of the 30-day waiting period based on information provided in the HSR Form.

Even with a more aggressive enforcement posture, in 2021, one of the Agencies requested clearance to open an initial investigation of fewer than eight percent of all reported transactions, which demonstrates that the Agencies were able to identify a greater proportion of potentially problematic transactions using only information provided on the current HSR Form. Staff found no need for even a preliminary investigation in over 92 percent of reported transactions.[28] These statistics, reflecting enforcement decisions across three presidential administrations, are consistent with Chair Khan's recent assurance that 98 percent of transactions raise no antitrust issue.[29]

[25] Hart-Scott-Rodino Annual Report Fiscal Year 2021, Appendix A, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.
[26] *Id.;* Steven C. Salop & Logan Billman, *Merger Enforcement Statistics: 2001-2020*, GEORGETOWN UNI. L. CTR. (2022), at Table 3, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3493&context=facpub.
[27] Press Release, FTC, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), available at https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.
[28] Hart-Scott-Rodino Annual Report Fiscal Year 2021, Exhibit A, Table II, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.
[29] Lina M. Kahn, "Remarks of FTC Chair Lina M. Khan, Economic Club of New York," Interview by Peter Orszag (July 24, 2023), available at https://www.youtube.com/watch?v=X7u3JwSfHZY.



(Figure 2)

The NPRM has failed to identify a single transaction that it believes was systematically "missed" because of a deficiency in the requirements or scope of the current HSR Form or because it had insufficient time during the initial waiting period. If the Agencies were "missing" transactions because of a lack of information provided through the current HSR Form, one would expect more frequent challenges to transactions where the waiting period was allowed to expire. Further, each of the recently challenged consummated transactions was fully investigated following notification using the current HSR Form. The original decisions not to challenge those transactions appear to have been a function of enforcement priorities and prosecutorial discretion during previous Administrations of both parties, rather than the fault of the current HSR Form. There is no reason to believe the Agencies would have made different enforcement decisions had the proposed rules been in effect.

The Agencies have developed several efficient ways of utilizing the initial waiting period to identify those very few transactions that warrant further investigation without imposing a significant regulatory tax on *all* transactions. For example, the Agencies have used VALs to request the voluntary submission of information and documents during the initial HSR waiting period. The DOJ states on its website that these VALs "allow the Division to quickly assess the likelihood of anticompetitive harm from the transaction."[30] The FTC admits on its website that it uses VALs to request the same types of documents and data the agencies now propose to require in an HSR filing.[31] Indeed, filing parties have significant incentives to respond quickly and

[30] *Frequently Asked Questions Voluntary Requests and Timing Agreements*, DEP'T. OF JUSTICE ANTITRUST DIVISION (Updated Nov. 2018), https://www.justice.gov/atr/page/file/1111331/download.
[31] *Guidance for Voluntary Submission of Documents During the Initial Waiting Period*, Federal Trade Comm'n, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents.

completely to a VAL to address staff questions and potentially obviate the need for or limit the scope of any Second Request.

In addition, filing parties and their counsel can typically anticipate if a transaction will raise significant competitive concerns at the Agencies. Increasingly, filing parties may voluntarily make presentations to the Agencies, and/or pull and refile an HSR filing to "reset the clock" for an additional 30 days to provide Agency staff with any additional information and time to conduct their preliminary investigations. Given the enormous delay and costs associated with Second Requests, parties are typically eager to cooperate fully with the Agencies during the preliminary investigation, lest the Agencies be forced to issue a Second Request to obtain additional information for staff to complete their review of a proposed transaction. Moreover, even when the Agencies do issue a Second Request, parties can address many staff questions and concerns through active engagement before and during the waiting period, which can often result in narrower, less burdensome Second Requests. For the Agencies, engaging in this iterative process before, and even after, issuing a Second Request is also beneficial, as it can make the process of reviewing transactions and assessing their potential impact on competition significantly more efficient.

Thus, from the perspective of both the parties and the Agencies, targeted use of a VAL is far more efficient and less burdensome than requiring *all* filers to provide, in the first instance, all the information called for by the NPRM. It also allows the Agencies to focus their attention and resources on those deals that may truly raise anticompetitive concerns, rather than being forced to sift through and review volumes of information for every single HSR filing. The Agencies have not explained why the current approach, which operates with far less burden on all involved, is not working, let alone why it should be replaced with one that may exponentially increase the amount of FTC and DOJ staff time spent reviewing materials associated with low-risk transactions.

Although the NPRM asserts that supposed increasing concentration in the U.S. economy "*may* reflect decreased competition" that has occurred despite the Agencies' merger enforcement efforts, it has not offered a scintilla of evidence to support this assertion or that the "problem" is an insufficient HSR Form. In fact, one of the academic sources cited by the NPRM concludes, based on an analysis of post-merger pricing data, that "it seems that the agencies were successful (on average) in identifying in the preliminary phase of the investigation which mergers were most likely to be anticompetitive—and issued Second Requests in those cases."[32] In other words, to the extent the Agencies have failed to block anticompetitive merger activity, it is not because "holes" in the Form resulted in staff having insufficient information to identify which transactions merited closer scrutiny.

[32] Keith Brand, Chris Garmon, Ted Rosenbaum, *In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016* (Feb. 24, 2023) (forthcoming in J.L. Econ.), at 31, available at SSRN: https://ssrn.com/abstract=4236952. Mr. Brand and Mr. Rosenbaum both currently work at the FTC's Bureau of Competition.

In fact, contrary to the FTC's sky-is-falling narrative, studies show that industrial concentration has been declining, rather than increasing, since 2017.[33] Moreover, as the Agencies surely appreciate, market concentration, which is the focus of antitrust merger control, is different from industrial concentration, and, even then, the data show industrial concentration has been declining.[34]

The NPRM's assertion that labor's share of national income has fallen sharply since 2000 is similarly unavailing. The very article cited by the FTC for this assertion itself undermines reliance on this assertion, noting the difficulty of measuring "labor share" and concluding that the explanation for any such decline is "elusive."[35] There are many factors potentially contributing to a decline, including increased globalization and the rise of China and the changing composition of the work force. Additionally, the authors specifically contradict the NPRM's assertion that concentration has increased due to suboptimal antitrust enforcement. In addition to noting that an increase in concentration in particular industries "could easily reflect" technological developments, they cite data indicating that concentration in markets as defined for antitrust purposes is trending *downward*. Nothing in the article even vaguely supports sweeping changes to the HSR framework or the burdensome new labor-related reporting requirements the changes would impose.

B. Vibrant M&A is critical to a healthy and competitive U.S. economy and Private Equity Plays a Key Role in this merger activity.

The dynamism of the American free market economy has long been the envy of the world and continues to be the magnet that attracts talent and ideas from across the globe. Key to this success is the ability of capital to flow freely and efficiently to higher valued assets in response to consumer demand.

M&A is crucial to a fast-paced economy. It enables successful businesses to acquire market access, intellectual property, good will, and countless other valuable assets quickly—in service of competition—to deliver desirable products to American consumers. Contrary to the claims of some, as discussed above, the U.S. economy is not overly concentrated, particularly compared to foreign economies. Vibrant M&A activity, far from being anticompetitive, demonstrates the dynamism and robustness of competition in the United States today.

Private Equity ("PE") plays a pivotal role in the U.S. economy, encouraging M&A activity by providing vital access to capital, and allowing companies the ability to weather economic

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[33] B. Kulick and A. Card, *Industrial Concentration in the United States: 2002-2017* (Mar. 2022), NERA Economic Consulting, available at https://www.nera.com/content/dam/nera/publications/2022/2022.03_CoC%20NERA%20Report_FINAL.pdf.

[34] *See, id.* at 5; 14-17; 23 ("[W]e find that the most recent data indicate that, overall, industrial concentration has been declining rather than increasing and that the economy was no more concentrated in 2017 than it was in 2002 . . .").

[35] *See*, *e.g.*, Gene M. Grossman and Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share*, 14:1 Ann. Rev. Econ. 93-124 (2022) at 22.

downturns.[36] Despite this fact, the NPRM directly targets PE transactions through its proposed changes, which would require substantial amounts of information on minority investors, including information on minority holders of *all entities* that directly or indirectly control or are controlled by the acquiring entity, with no exceptions for limited partners.[37] It would also require the disclosure of all stakeholders that may "exert influence" over the entities, such as creditors, board observers, or non-voting security holders of the acquiring entity.[38] Additionally, the NPRM would also introduce burdensome requirements to identify all transactions in the last 10 years where the acquired entity sold products in identified areas of overlap, regardless of the size of the transaction.[39] These proposals are a blatant attempt to raise the costs of, or ultimately discourage, PE deals, even though there is no basis for concluding that PE acquisitions are inherently more anticompetitive or less efficient than strategic acquisitions. The FTC, certainly, has not provided any evidence from which one can draw such a conclusion. In fact, except in the uncommon circumstance where a PE portfolio company has an overlap with the target, PE deals are unlikely to trigger concerns under the substantive antitrust laws.

The drafters of the HSR Act took care to ensure that the premerger notification process would not "unduly burden . . . business with unnecessary paperwork and delays," and aimed to develop a merger notification regime that would "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[40] The NPRM has utterly ignored this concern.

C. Foreign filing regimes are fundamentally different from the premerger notification process established by the HSR Act.

The FTC attempts to justify the dramatic increase in burden on filing parties by stating, first, that "many of the transactions that are investigated by the Agencies are also investigated by another jurisdiction" and, second, that most "international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis."[41]

With respect to the first point, besides offering no support for its assertion that "many" transactions investigated by the Agencies are also investigated by another jurisdiction, a more relevant question is how many transactions *notified* under the HSR Act are also required to be notified in another jurisdiction. We suspect that the answer to that question is "very few." Certain transactions, like those for exclusive patent licenses which have U.S. notification requirements, do not require notification outside the U.S.[42] The fact that some small number of parties may also be required to provide some of the information the NPRM proposes to collect

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[36] Makan Delrahim, *Antitrust Attacks on Private Equity Hurt Consumers*, WALL STREET J. (July 31, 2022), https://www.wsj.com/articles/antitrust-attacks-on-private-equity-hurt-consumers-lina-khan-ftc-recession-competition-management-expertise-capital-11659271442.
[37] NPRM at 42212.
[38] *Id.*
[39] NPRM at 42203.
[40] S. REP. No. 94-803, pt. 1, at 65-66 (1976).
[41] NPRM at 42180.
[42] Premerger Notification; Reporting and Waiting Period Requirements, 78 Fed. Reg. 68705 (Nov. 15, 2013).

in filings in other jurisdictions offers no comfort for the vast number of transactions that do not require merger control filings outside the United States.

Nor is the second point availing. Foreign merger control regimes that require substantial information up front for all reportable transactions are fundamentally different from the HSR regime put in place by Congress and do not serve as an appropriate model for several reasons.

For example, a comparison to filing-form requirements outside the U.S. fails to consider that the universe of notifiable transactions required to be notified in most other jurisdictions is significantly smaller than in the United States. For example, despite receiving more filings than average, the European Commission received only 405 merger notifications in 2021[43] compared to 3,520 in the U.S.[44] Germany, the country with the second-most reported filings, still received fewer than a third of the total filings received by the Agencies in 2021.[45] Even if all of the EU filings were also filed in the US, which is not the case, the percentage of double filings is very low.

Foreign regimes, such as the EU, have much higher thresholds than the HSR, which reduces the number of filing parties each year. The EU also allows certain merging parties to notify their transaction via a simplified merger notification (a "short form"), which allows filing parties to provide a less comprehensive filing in instances where the transaction raises little risk of an anticompetitive effect.[46] The NPRM proposes no such short form filing, despite the International Competition Network recommending that all competition enforcement authorities allow for an abbreviated form in their notification systems.[47] Additionally, the EU is actually moving in the opposite direction of the NPRM. In fact, recent changes in the EU expand the types of cases eligible for the short form procedure.[48] The new rules under the EUMR also reflect an effort to *reduce* the amount of information required in all types of reportable

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[43] *See* Eur. Comm'n "statistics on Merger Cases" (March 5, 2021) https://competition-policy.ec.europa.eu/mergers/statistics_en

[44] Hart-Scott-Rodino Annual Report Fiscal Year 2021, Exhibit A, Table I, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf. *Note:* White & Case statistics represent the calendar year 2021, while the FTC statistics are reported for fiscal year 2021.

[45] *Global Antitrust Merger StatPak*, WHITE & CASE LLP (as of July 18, 2023), https://www.whitecase.com/publications/insight/antitrust-merger-statpak-global#:~:text=HSR%20premerger%20notification%20filings%20in,in%20March%20and%20April%202023.

[46] *See* Eur. Comm'n, "Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04)" (April 20, 2023), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R0914&qid=1683710227250. It is worth noting that while the NPRM seeks to expand the information required in an HSR filing, the EC's simplification measure, passed in 2023, aims to *reduce* the burdens on filing-parties for unproblematic transactions. *See also*, Alex Bagley, *Lawyers welcome "major reform" of EU's simplified merger regime*, GLOB. COMPETITION REV. (Apr. 20, 2023), available at https://globalcompetitionreview.com/article/lawyers-welcome-major-reform-of-eus-simplified-merger-regime.

[47] "In order for merging parties to anticipate the review time frame, jurisdictions should make eligibility criteria for abbreviated initial review periods publicly available." ICN, *Recommended Practices for Merger Notification and Review Procedures Working Group Comments* (May 2017) at 11, https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/MWG_NPRecPractices2018.pdf

[48] *See* Eur. Comm'n, "Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings" (April 20, 2023), *available at* https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)2401&lang=en.

transactions, not just the short form cases. And the new Form CO was revised in an effort to reduce the amount of work involved in preparing the notification.[49]

While an unnamed official authorized to speak on behalf of the Agency has said that filing parties will be able to select "not applicable" for filing requirements that do not apply to their transaction, there is no current guidance on when or how parties will be able to utilize this option, and under what circumstances the Agencies will allow filing parties to do so.[50] The Chamber welcomes the addition of an option for parties to select "not applicable" for filing requirements and urges the Agencies to provide clear instructions on when and how parties may be able to utilize this option.

Absent explicit guidance to that effect, parties are not likely to report "not applicable" for a particular response because doing so could imperil their filing by providing an opportunity for the Agencies to reject their submission on completeness grounds. If rejected, the 30-day clock would restart, or, if the parties close, they will face a daily fine. Consequently, there will be significant pressure, at least initially, for parties to engage with the Agencies to get their approval on any potential "not applicable" response to the expanded HSR Form. In any event, on the face of the NPRM, it seems unlikely that the most burdensome data and information requirements would be subject to any kind of "opt out," and any effort to secure Agency approval for such a response will require time and effort well beyond the current Form's demands.

Comparisons to foreign filing requirements also fail to consider the fundamentally different approach to merger review applied in those jurisdictions. For instance, despite the use of a short form, the EU process still frontloads the burden of the merger review process much more significantly than the current process in the United States. Historically, the Agencies have avoided this approach, recognizing that only a small fraction of reportable transactions merit the level of invasive scrutiny associated with a Second Request. Thus, until the NPRM, the Agencies—as Congress intended—have implemented a system that ratchets up the burden on filing parties commensurate with a transaction's perceived antitrust risk. Evidently, as demonstrated by the decision to develop an even more abbreviated process for certain filers, the EU has recognized the need to further minimize the burden inherent in the front-loaded approach.

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[49] *See* Eur Comm'n, "Commission Implementing Regulation (EU) /... implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004" (April 20, 2023), *available at* https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)2400&lang=en.

[50] Ilana Kowarski, *Comment: US seeking more information in merger notifications partly to ease regulators' work*, MLEX (July 28, 2023), (https://content.mlex.com/#/content/1489126/comment-us-seeking-more-information-in-merger-notifications-partly-to-ease-regulators-work?referrer=email_instantcontentset&paddleid=201&paddleaois=2000;2003).

Foreign legal systems also may not have the same fundamental due process protections as exist in the United States.[51] Often, foreign competition authorities are empowered with the authority to approve or disapprove transactions, subject to judicial review after the fact.[52] The opposite is true in the United States. If the Agencies believe a transaction is anticompetitive, they must prove their case in federal court, which will determine whether or not the parties are permitted to close their transaction.[53] In some cases, foreign competition authorities are required to provide a reasoned explanation for their decisions *not to challenge* a proposed transaction,[54] while the FTC and DOJ need only justify their decisions to oppose a transaction.

Moreover, the HSR Act, unlike the EU's process, has no estoppel or finality benefit, meaning that the Agencies are free to challenge a deal at any point after the HSR waiting period closes. The Agencies frequently remind parties of this fact with so-called "close-at-your-peril" letters." Third parties with antitrust standing (including States) can also file suit to challenge a deal regardless of the outcome of the Agencies' decision at the conclusion of the HSR process.

To that end, it is also important to note that the increased burdens imposed by the NPRM will not take place in a vacuum. Several states have adopted, or are considering legislation, that would require parties to produce all HSR materials to state-level officials.[55] These changes will necessarily result in state antitrust enforcers becoming more involved in the HSR process as it unfolds in real time. When paired with the NPRM, these state laws will likely magnify the burdens associated with the expanded form, especially if the NPRM prompts filers

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[51] *See* U.S. Chamber of Commerce, *International Competition Policy Expert Group Report and Recommendations* (March 2017) https://www.uschamber.com/regulations/international-competition-policy-expert-group-report-and-recommendations, *see also* Prepared Statement of the Federal Trade Commission Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, on "International Antitrust Enforcement: China and Beyond" (June 7, 2016).

[52] *See* Council of the Eur. Union, "Council Regulation No. 1/2023, 2003 O.J. (L 1)" (Dec. 16,2002), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001. In the EU, EC decisions and procedural determinations are subject to judicial review by the General Court and by the Court of Justice if the parties choose to appeal. *See* Eur. Comm'n, "*Competition: Merger control procedures"* (July 2013), available at https://competition-policy.ec.europa.eu/system/files/2021-02/merger_control_procedures_en.pdf.

[53] Although the FTC may choose to challenge a transaction through an administrative proceeding, the Commission usually seeks to obtain a court order enjoining the transaction from closing during the pendency of that proceeding and it often abandons its challenge if it has failed to obtain a court-ordered injunction. DOJ has no administrative proceeding; its sole route to challenge a transaction is through the courts. Additionally, when DOJ does challenge a transaction in court, it routinely insists on an additional new round of discovery under the Federal Rules of Civil Procedure on top of the information obtained as part of the Second Request.

[54] For example, the United Kingdom's Competition and Markets Authority ("CMA") issues final reports on transactions, even when it does not believe the transaction will result in a substantial lessening of competition. By contrast, the U.S. antitrust agencies do not typically publish such closing memos.

[55] The Uniform Law Commission is considering a proposal that would recommend each state seek production of all premerger filings. The most recent draft of ULC recommendations has proposed the "Antitrust Pre-Merger Notification Act," which would create a "mechanism for AGs to receive access to HSR filings at the same time as the federal agencies . . . . Under the Act, [parties completing the Form] must provide their HSR filing (both the basic form and the additional documentary material) to the AG contemporaneously with their federal filing." See draft Antitrust Pre-Merger Notification Act, Uniform Law Commission (June, 29, 2023).

[55] NPRM 42180.

to engage in lengthy pre-filing interaction with the Agencies *and* interested state attorneys general.

Additionally, economies outside the U.S. are less dynamic overall, with weaker capital flows and less M&A. The Agencies should take care when looking for inspiration abroad, lest they make the mistake of adopting a foreign enforcement practice likely to unnecessarily stifle M&A and the broader economy. Congress chose a fundamentally different approach to premerger notification and review than those adopted by foreign regimes. Consequently, it is up to Congress—not the FTC—to decide to make such a fundamental change in a nearly half-century long approach to pre-merger filings.

As explained further below, while other countries have chosen to strike the balance in a different way, Congress wanted the Agencies to enforce the antitrust laws in the premerger context without overly burdening companies and the economy. The Agencies cannot circumvent the legislative process through rulemaking, particularly with proposals that are so contrary to the legislative intent of the HSR Act.

D. The NPRM dramatically underestimates compliance costs.

The HSR Form envisioned by the NPRM will be a windfall for the antitrust bar. The sprawling, open-ended nature of some of the requests, many of which have little or no relevance to a given transaction, will necessitate increased pre-filing interaction. Regardless of the transaction's risk profile, filers will need the assistance of experienced antitrust counsel when drafting narrative responses and completing the rest of the enlarged HSR Form. Thus, for transactions where there is a low probability of a Second Request, the increased burden imposed by the NPRM will be especially significant—and particularly unjustified.

According to the FTC's estimates, parties currently spend an average of 37 hours completing an HSR filing.[56] By their own overly conservative estimation, the Agencies now essentially seek to quadruple the burden for all transactions, estimating that the average filing would take 144 hours to complete under the proposed changes.[57] This corresponds to the equivalent of more than two-and-a-half weeks of additional effort by a full-time worker simply to prepare the form—a burden that will hit large and small businesses alike.

Despite predicting a nearly 400% increase in the hours needed to complete the HSR filing, the Commission concludes that the NPRM's proposed changes represent a minimal burden for most filers. The FTC's basis for this conclusion is wholly unsupported. Notably, the FTC fails to provide an explanation of the Commission's methodology in determining the average preparation time. The NPRM notes only that it relied on the estimations of staff who "previously prepared HSR filings in private practice."[58] Beyond stating that staff took "into

[56] *Id.* at 42208.
[57] *Id.*
[58] *Id.* at 42207.

account that transactions range in complexity"[59] when providing estimates, the NPRM provides little insight into how staff evaluated the differences in impact across deals.

The Chamber conducted a survey of 70 antitrust practitioners that asked them questions about the proposed revisions to the HSR Form. The survey was conducted from mid-August through early September 2023.[60] Nearly 80% of those surveyed had been involved with more than 50 merger transactions in their career, with 60% of those surveyed having been involved in more than 100 deals. It is also worth noting that nearly 40% of those surveyed had previously worked at one or both of the Agencies.

Overall, practitioners soundly rejected the utility of the NPRM's proposed changes to the HSR Form. The Chamber also commissioned Professor Kothari, an outside expert, to conduct further analysis of the proposed rule and the findings point out myriad shortcomings with the cost-benefit analysis contained in the NPRM. Professor Kothari's report, which is attached to these comments, also used the Chamber's survey data to better estimate the costs of the proposed form. The Professor's projections suggest that the true cost of the proposed changes may be nearly five times greater than the NPRM suggests. For example, as discussed in his assessment, the NPRM focuses on only the aggregate estimated cost to filing parties and the receiving Agencies, but completely fails to consider the indirect costs to the economy that will surely result when parties are discouraged from pursuing clearly nonproblematic deals because of the incredible time and monetary burdens the NPRM's proposed changes would impose on all transactions. Additionally, the NPRM fails to identify, let alone quantify, any economic benefits to filing parties, the Agencies, or the overall economy that would be capable of offsetting the costs the NPRM's proposals would impose.

Given the breadth of deals, the differing nature of the companies involved in filings, their record keeping and document policies, and the varying structures of the organizations, the NPRM's estimates almost certainly severely underestimate the time burden that many filing parties would incur. Several elements in the NPRM, in particular, are certain to increase legal fees and other costs significantly, as well as to increase the burden on filing company personnel to identify, collect and produce responsive materials. In addition, these elements will increase the burden on Agency staff reviewing the information, and the additional information is not likely to be any more informative to the Agencies than the information already required under the current HSR Form. To cite a few notable examples, the NPRM proposes:

- **Requiring filers to provide final and *draft* versions of Item 4 documents prepared for officers, directors, and "supervisory deal team leads," as opposed to only final versions or those prepared by or for officers or directors**.[61] Such a requirement will likely force companies to forensically search for, and retain, all

[59] *Id.*
[60] See U.S. Chamber of Commerce, HSR/Merger Guides Practitioner Survey (Sept. 19, 2003), available at https://www.uschamber.com/assets/documents/20230919-U.S.-Chamber-Antitrust-Survey.pdf.
[61] *Id.* at 42193-42194.

versions of documents, whether they indicate the fully formed opinions of the filing company or gained the approval of senior management. The instructions do not provide a clear definition of who qualifies as a supervisory deal team lead or of what a draft is, resulting in subjective assessments and uncertainty for filing parties. Moreover, this proposal fails to account for the fact that many companies make use of modern, online collaboration tools that enable multiple users to edit and comment on the same document, often at the same time, to enhance efficiency. Typically, each individual change is not saved in these systems. The NPRM put companies at risk of inadvertently failing to save drafts simply by using the functionality of the most modern collaboration tools.

- **Requiring filers to provide ordinary course, periodic plans and reports as Item 4 documents**.[62] Such a requirement will likely force companies to conduct a forensic search for all documents prepared by or for a CEO, and for effectively all of the CEO's direct reports.[63] Further, these documents are not transaction-related, and the entire set of documents identified in the proposal are unlikely to be collected during the diligence process. The instructions do not provide a clear definition of "semi-annual and quarterly" or "plans and reports," resulting in uncertainty and compliance risks for filing parties.

- **Requiring filers to provide a narrative description of all strategic rationales for the transaction, with citations to documents in the filing that support the responses**.[64] At present, the burden of drafting narrative responses regarding a proposed transaction is limited to filers responding to a Second Request. Low-risk filers, in contrast, are currently spared the extensive legal fees associated with drafting such narratives. By forcing all filers to submit narratives in the first instance, and to prepare and submit documents not normally created in the ordinary course, the FTC is essentially imposing a significant new transaction tax.

- **Requiring filers to provide narrative descriptions of the "current and future competitive relationships between the filing parties," including "horizontal overlaps and supply relationships between the filing persons."**[65] Completing the proposed Competition Analysis section, regardless of the transaction's risk profile from a competition perspective, will require earlier and more extensive engagement with antitrust counsel. And in some instances, again regardless of

[62] *Id.* at 42195.
[63] The exclusion of certain direct reports to the CEO is unlikely to limit the universe of potential Item 4 custodians because the reality is that very few direct reports to a CEO are *solely* responsible "for environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues." The Chamber is unaware of an organization structure that typically has an individual solely responsible for pensions or solely responsible for OSHA issues reporting directly to the CEO. Even if the Agencies expanded the qualifier to exclude direct reports "primarily" responsible for these subjects, this could exclude, at most, one individual who may have responsibility over all "human resources, pensions, benefits, ERISA, or OSHA issues." *Id.* at 42214.
[64] *Id.* at 42191.
[65] *Id.* at 42196.

the risk profile, filers may also need to retain economic experts and other consultants in order to adequately describe the parties' relationships.

- **Requiring filing companies to submit several individual and entity organization charts not kept in the ordinary course of business.**[66] The FTC proposes that, if they do not already exist, filers be required to create custom organizational charts showing "the position(s) within the filing person's organization held by identified authors, and for privileged documents, the recipients of each document submitted with the HSR Filing."[67] The NPRM would also require the filing parties to use the chart to identify the individuals searched for responsive documents.[68] Additionally, the NPRM would require filing parties to submit a diagram of the deal structure " along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction."[69] Finally, for transactions where a fund or master limited partnership is the ultimate parent entity, the filing companies would have to "identify and show the relationship of all entities that are affiliates or associates."[70] While such a request may be understandable in the context of a Second Request, for the vast majority of reportable transactions, the FTC will derive little benefit from receiving such information.

- **Requiring the suspension at the time of an HSR filing of any auto-delete policies in place for an entire entity within a filing person.**[71] This requirement raises confidentiality concerns and possibly requires conduct that could violate the securities laws governing the treatment of material, nonpublic information if a party must coordinate with a broad group of personnel to ensure information is preserved before the transaction at issue has been announced. This concern arises both for deals that have not been made public, as well as for deals that have not been announced to all employees across a company. Additionally, the Commission does not acknowledge, let alone estimate, the potential expense or resources required by companies to retain documents outside of the ordinary company policies. Imposing this requirement on top of existing retention obligations, such as the duty to retain documents when litigation is anticipated, is unnecessary and unwarranted.

- **Requiring the identification of communications systems and messaging applications on any device used or that could be used to store or transmit information or documents related to its business operations**.[72] The Commission "believes that this information is readily available to the filing

[66] *Id.* at 42195.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 42192; 42213.
[70] *Id.* at 42211.
[71] *Id.* at 42206.
[72] *Id*. at 42205.

person and that identifying these systems in use by the company with the HSR Filing would impose minimal burden."[73] This belief is wrong. Identification of communications and messaging systems could potentially require companies to conduct surveys and interviews with individual employees to comply with such a requirement. Further, the definition of what qualifies as one of these communications and messaging systems needs to be articulated more clearly.

- **Requiring filers to submit all other agreements between the parties and their affiliates.** The Commission fails to appreciate the large number and types of ordinary-course agreements that two parties to a transaction may have, completely unrelated to the transaction at issue. These may include purely commercial agreements, agreements in irrelevant lines of commerce, agreements involving non-US businesses, and other types. For conglomerates and multi-nationals, this burden is all the greater since copies of such agreements may be stored in different procurement and contract-management systems (or paper files) housed in different business units and even other countries.

- **Requiring filers to submit Periodic Plans and Reports not considered in the instant transaction**. The NPRM requires submission of "semi-annual or quarterly plans submitted to senior management and all "plans and reports" submitted to the Board of Directors discussing competition-related issues in *any* line of business where the two parties compete—including business units entirely unrelated to the transaction. For companies that compete in multiple lines of business, this will require collection of reams of irrelevant information. And for transactions involving a specific asset between parties who operate in a single sector, this could require collection of virtually all Board updates.

- **Requiring filers filing on a letter of intent to submit additional documents that would introduce increased burden and delay.**[74] The NPRM would require parties filing on an "executed letter of intent or agreement in principle" to additionally "attest in their affidavit" that they have submitted "a term sheet or draft agreement that describes with specificity the scope of [the proposed transaction]." The NNPRM offers no evidence that such filers do not already provide sufficient information for the Agencies to complete an initial antitrust review. This proposal would introduce unnecessary inefficiencies and would chill especially time-sensitive transactions.

- **Requiring filing companies to provide full English-language translations for all foreign-language documents produced in connection with an HSR filing**.[75] This will dramatically increase the time and expense required to complete the filing

[73] *Id.*
[74] NPRM at 42206-07.
[75] *Id.* at 42182.

when a foreign entity is involved in a transaction. For transactions that raise no concerns, filers will be forced to incur these costs to translate documents that are not necessary for the Agencies to complete their analysis and may not even be fully reviewed by Agency staff.

Beyond noting that translation tools are "more abundant" today,[76] the NPRM provides no estimation of the potential time or costs for filing parties to provide such translations, nor does the FTC address or consider the potential risks that parties would incur were they to rely on economical "translation tools," as the FTC suggests, rather than professional translation services.[77]

Collectively, these and other proposed changes to the HSR Form will impose substantial new costs on all transactions, whether or not they present a significant potential risk to competition.

III. The NPRM Would Impose Extraordinary Costs with Only Speculative, if any, Benefits to the Agencies.

Agency leadership frequently notes that staff are stretched thin and "outmatched" by private parties.[78] And yet, the FTC is now proposing new requirements that will result in a deluge of new information and documents. Worse yet, the overwhelming majority of the new material received by the Agencies under the NPRM would relate to deals that do not require any additional scrutiny. In effect, the NPRM would require parties to reportable transactions to create "haystacks" of data, information, and documents, which the Agencies will now have to search to discover the same "needles" they now find under the much simpler, less burdensome pre-merger regime.

The NPRM also suggests that front-loading the HSR process will make merger review more "efficient," but no evidence is cited to support this contention. Given the length of time it typically takes the Agencies to evaluate the information collected during a Second Request, it is unclear how the Agencies plan to collect and evaluate all the new information demanded by the NPRM within the 30-day review window proscribed by the HSR Act. With respect to DOJ and

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[76] *Id.* at 42183.
[77] *Id.*
[78] *See, e.g.*, Testimony of the Federal Trade Commission Before the House Committee on Appropriations Subcommittee on Financial Services and General Government, United States House of Representative at 2-3 (April 27, 2023), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/p210100houseappropriationstestimonyfy2024.pdf. "Despite this increase, an FTE level of 1,380 is still approximately just 80% of what it was at the beginning of 1980, while the nation's GDP has increased six-fold since then. Demands on the Commission continue to grow as we review corporate mergers, conduct more complex and expensive litigation, receive consumer complaints, try to stay abreast of transformative technological and market changes, and respond to burgeoning requests for research and investigation of various economic sectors. These factors have underscored both the importance of our work and the critical need for additional resources."

FTC staff, common sense suggests that the NPRM will have the opposite impact than what the NPRM predicts.

Finally, the NPRM is infused with suggestions that parties are "gaming" the HSR process by intentionally hiding information or miscoding revenue. The only cited basis for these suggestions is that the Commission sometimes feels it discovers more fulsome information in the course of a Second Request. The NPRM offers no specifics, and the Chamber is unaware of any enforcement action by the Agencies against parties who willfully concealed information. Even assuming such situations occur, there are more narrowly tailored remedies to address them than imposing further up-front burdens on all filers.

A. The Proposed Revisions would request information unnecessary for an initial review of a transaction's potential competition concerns.

Given the significant costs already imposed on filers seeking to comply with the current HSR Form, the NPRM's plans to expand it are inappropriate, especially considering that Chair Khan herself has acknowledged that only a small fraction of reportable transactions raise antitrust concerns.[79] In fact, the FTC's frank acknowledgement of the limited probative value of the additional information that would be provided by the expanded Form suggests that, if implemented, the NPRM's demands may amount to a violation of due process by creating an unjustified and significant additional burden upon filers.

Many of the new requirements in the NPRM are wholly inconsistent with the HSR Act's directive that the FTC require filers to provide only "such documentary material and information . . . as is *necessary* and *appropriate*" for the Agencies "to determine whether such acquisition may, if consummated, violate the antitrust laws."[80] For example, the NPRM would require parties to gather, review, and produce data, documents, and information without any connection to the transaction being notified, such as draft documents not ultimately relied upon by the decision-makers at the filing entity, supplier relationships with no connection to the notified transaction, and irrelevant data concerning agreements with employees, commuting zones, and labor category codes so broad as to be entirely useless to any form of factual analysis. The amount of information sought by the Form, and the burden to collect it, are not at all proportional to the utility of the information to the Agencies.

Below are some of notable examples of information demands that would provide little or no probative information for an initial review of the transaction, particularly given their applicability to *all* reportable deals:

Substantial expansion of Item 4 documents. The NPRM would substantially expand the category of documents responsive to current Item 4 to include draft documents, as well as final documents "prepared by or for the supervisory deal team lead(s)."[81] With the expansion of

[79] Remarks of Lina M. Khan, Economic Club of New York (July 24, 2023).
[80] 15 US.C. §18a (d)(1).
[81] NPRM at 42193.

Item 4 document custodians and the inclusion of draft documents, the number of documents submitted with each filing may increase tenfold or greater.[82] As noted in Section II. D, companies will incur significant time and costs to ensure all of these "draft" Item 4 documents are identified, collected, logged, and submitted with the filing. However, the Agencies do not provide any support that they are missing anticompetitive transactions because they do not currently receive drafts, and it is unclear how this deluge of documents will help the agencies identify the small percentage of transactions that may raise concerns. Indeed, Staff will need to sift through tens if not hundreds more documents for every single deal on the off chance that a draft contains "non-sanitized" language—which may very well be hyperbolic or inaccurate given its later removal—that indicates to Staff a transaction may be problematic when Staff would have otherwise not intervened.

At the same time, the FTC separately explains that a transaction rationale narrative is necessary because "[a]s helpful as the documents responsive to current Items 4(c) and 4(d) of the Form can be, they do not always convey each filing person's cumulative views on the rationale(s) for the transaction."[83] The FTC explains that "such documents (when they are submitted and when they discuss rationales) often contain differing, and at times conflicting or mutually exclusive, statements regarding the transaction depending on when they were prepared or by whom."[84] But this disconnect between Item 4 documents and the filing parties' "cumulative views" regarding the transaction is likely to be even greater if parties also produce draft documents and documents prepared by or for "supervisory deal team leads," all of which may never actually be shared with an entity's officers or directors. The balance currently struck by Item 4(c) appropriately focuses the Agencies' resources on reviewing the final documents actually considered by senior management, not the input of every junior staffer whose work was revised, updated, corrected, or jettisoned before a document reached the actual decisionmakers.

As the FTC acknowledges, the "Agencies routinely ask for and receive" draft documents and those involving "supervisory deal team leads" via Second Requests, and they can continue to do so for deals that require further investigation.[85] For most transactions, there are no competitive concerns, and so the burden for the parties to identify, collect, log, and submit these greatly expanded Item 4 documents (and the burden on Staff to review the onslaught of documents) through the initial HSR filing greatly outweighs any perceived benefits.

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[82] The NPRM does not provide a definition for what constitutes a separate "draft" that must be provided. Is a separate draft each version of the document as determined by version numbers in a document management system? Is a new "draft" created each time any user makes a single modification regardless of how minor to the document? Is it something else? This lack of clarity may create questions as to what needs to be collected and submitted and whether an Item 4 submission is complete, which in turn will likely lead to increased involvement by outside counsel and even greater costs.

[83] NPRM at 42191

[84] *Id.*

[85] *Id.* at 42194.

The NPRM would also include an expansion of the category of documents responsive to current Item 4, which would require filing persons to submit certain high-level strategic business documents that were not created in contemplation of the transaction. Documents created in contemplation of the transaction provide the most probative information for the Agencies to assess the potential impact of the transaction. The Agencies have the ability to request ordinary course strategic business documents through the VAL process or through a Second Request. As discussed above, the vast majority of reportable transactions do not require more.

The NPRM's alternative proposal to have parties only submit drafts within 48 hours, if requested, does not alleviate the burden and cost of gathering those additional materials, nor does it reduce the risk that the expanded universe of Item 4 documents will lead to inaccurate assessments.

Periodic Plans and Reports. In addition to the significant expansion of Item 4 documents, the NPRM would also require filers to identify and provide certain periodic plans and reports provided to the Board, CEO, and other leaders. These reports would not be limited to those "created in contemplation of the transaction" but would require the disclosure of ordinary course documents that "analyze market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party."[86] The identification and submission of these documents will add even more time and costs to the filing process. Moreover, ordinary course plans and reports provided to the Board or company leaders are unlikely to contain *only* information about the specific product(s) or service(s) offered by the other party. Especially for large multinational companies or other entities that offer a variety of products or services, such documents likely include information on a range of topics and business lines that are wholly unrelated to the transaction. Moreover, this irrelevant information may be highly sensitive – financial forecasts, personnel matters, operational strategies. The FTC states that these documents are often submitted in Second Requests, but it does not explain that the Agencies are missing anticompetitive transactions because these reports and plans are not part of the initial HSR filing.[87] Most deals do not raise competitive concerns – even those with horizontal overlaps.[88] For deals that do not raise concerns, the Agencies should not have unfettered access to a party's highly sensitive information that is unrelated to the transaction.

The Chamber believes that these reports and plans should not be required as part of the initial HSR filing as the burden and sensitivity of the information outweigh any perceived benefits. However, if this instruction remains, then filers should be permitted to redact

[86] *Id.* at 42195, 42214.
[87] *Id.* at 42195.
[88] The FTC explains that 45% of deals report overlaps, but Second Requests are only issued in 2% of transactions. *Id.* at 42208; Lina M. Kahn, "Remarks of FTC Chair Lina M. Khan, Economic Club of New York," Interview by Peter Orszag (July 24, 2023), available at https://www.youtube.com/watch?v=X7u3JwSfHZY.

information that is unrelated to the transaction (in addition to privileged information) as is currently the practice with board minutes.[89]

Narratives. The NPRM would require the filing parties to take on the burden of preparing several narratives describing "horizontal" overlaps, the ownership structures of the acquiring and acquired entities, the transaction rationale, supply relationships, and labor markets. Identification and compilation of this information will require a level of antitrust analysis for even deals that raise no antitrust concerns. And given the subjective[90] nature of these requests, filers will likely need to incur the burden of hiring experienced antitrust counsel to negotiate with Agency staff so that the filers and the Agencies can come to an agreement concerning what kind of response will satisfy the new HSR Form's demands. The requirement to prepare new materials for the Form that are not kept in the ordinary course runs afoul of Congressional intent.[91]

The NPRM seeks to justify this radical expansion of the Form by arguing that similar narratives are required in other jurisdictions.[92] Congressional intent, however, cannot be evaded by such an argument. This argument also ignores the fact that, in a given year, only a fraction of filers seek approval in foreign jurisdictions.

The requested narratives open the door to disagreement and protracted negotiation with the Agencies. Unlike the current Form's requests, which are focused on seeking objective, factual responses, the NPRM would require filers to make judgments about matters such as all competitive relationships (horizontal and vertical) of the filing parties.[93] How often will the Agencies be satisfied with the filers' self-assessment of the relevant markets and their competitors? Is it contemplated that filers would need to iterate draft filings over a period of potentially months, as is the practice in the EU and China? Given these uncertainties and the language required in the Certification under 16 CFR 803.6, filers will feel the need to involve antitrust counsel more often and at much deeper levels, even for deals that clearly raise no antitrust concerns, just to improve the likelihood that the narratives are drafted to the Agencies'

[89] *See, e.g.*, Checklist for Submitting an HSR Filing, available at Checklist for Submitting an HSR Filing | Federal Trade Commission (ftc.gov); Informal Interpretation 2105006, available at 2105006 Informal Interpretation | Federal Trade Commission (ftc.gov).

[90] The NPRM would require filers to describe aspects of markets relevant to their proposed transaction as either "horizontal" or "vertical." Meanwhile, AAG Kanter himself has questioned whether those distinctions are even reflective of contemporary market circumstances, noting that the dichotomy is "formalistic" and "not everything neatly presents always as vertical or horizontal." *See* Remarks of Jonathan Kanter, "Competition Policy, Corporate Concentration & Freedom of Thought: Approaching the Draft Merger Guidelines," The Federalist society (July 20, 2023), https://fedsoc.org/events/national-press-club-event.

[91] "Congress also intended that the reports would consist of data and documents reasonably available to reporting companies." 42 Fed. Reg. 39,040 (Aug. 1, 1977) at 39,043.

[92] NPRM at 42180.

[93] NPRM at 42193.

liking. This new paradigm surely will be a boon to antitrust lawyers, but otherwise will function as an additional tax across the national economy.

Prior Acquisitions. The NPRM would require that parties provide information on *all* prior acquisitions "in which (i) 50% or more of the voting securities of an issuer, (ii) 50% or more of non-corporate interests of an unincorporated entity, or (iii) all or substantially all the assets of an operating unit were acquired" (including those that fell below the HSR reporting thresholds) over the past 10 years and would apply this requirement to both buyer and seller.[94] This doubles the look-back period currently requested by the Form and dispenses with the current criteria used to limit the scope of the look-back period to transactions above certain minimum thresholds. These changes would require filing parties to collect information about and report a large volume of immaterial transactions (including stock or asset purchases of a de minimis dollar value) over the last decade.

The NPRM seeks to justify this incredibly burdensome demand by arguing it would help the Agencies assess concentration and trends toward consolidation.[95] However, if a company has a market share the Agencies believe provides a basis for closer scrutiny, the information provided under the current Form is already sufficient for the Agencies to make that determination. While transactions are always subject to an enforcement action if the Agencies determine, through investigation, that there may be anticompetitive conduct occurring, the NPRM's look-back expansion, if adopted, would invite the Agencies to scrutinize long-ago consummated deals, including non-reportable deals that the Act's notification requirements were never intended to capture. This would expose established businesses to uncertainty every time they seek to complete an efficient transaction and would likely chill acquisition plays and the related venture capital sector crucial to highly innovative and dynamic industries. The NPRM is silent regarding any of these impacts, but the changes are clearly designed to have a chilling effect, particularly on private equity firms. Unfortunately, the NPRM does not appreciate how much damage to the broader economy such punitive measures would have. We believe the effort that would be required to track this historical information far outweighs the potential benefit that information about immaterial prior acquisitions could bring to the DOJ/FTC's evaluation of a merger. As such, we would propose removing the 10-year time frame extension from the proposed rules regarding "Prior Acquisitions" and keeping intact the existing monetary thresholds for listing prior acquisitions.

Supply Relationships. The NPRM would seek substantial information concerning the vertical relationships of the filing parties. These new requests present a significant burden and are not necessary at the early stage of premerger notification filings; rather, such requests are more appropriate for a Second Request once the Agencies have determined that the transaction

[94] NPRM at 42217.
[95] NPRM at 42203.

in question genuinely raises vertical foreclosure concerns, for example.[96] In addition, if the parties to a transaction have an existing supply relationship, their Item 4(c) and 4(d) documents would very likely note that fact. Under the new request, parties will incur increased filing expenses as they involve expert lawyers and economists to prepare this information, information which requires the parties to characterize the nature of their business relationships with other parties. For the vast majority of filers, vertical concerns will not be a feature of their transactions, but all parties nonetheless will face increased burdens to ensure appropriate compliance with these new questions.

Minority Interests. The NPRM would require extensive information on minority shareholders of any entities that control or are controlled by the acquiring entity, if they hold over 5% or the voting securities or non-corporate interests, removing the exception for limited partners. This could in many cases require information on minority investors whose interests are wholly unrelated to the notified transaction. Gathering such information would present a substantial burden, particularly on PE firms with multiple portfolio companies, which would require an extensive search of all investors across companies, regardless of their involvement in the transaction.

In addition to increasing the cost-related burden of HSR compliance for PE firms, the requirement to disclose limited partners will significantly impact deal volume and fundraising for such firms. For example, many limited partnerships (LPs) are required by agreement to remain passive, so their disclosure would not further the Agencies' analysis but may leave LPs uninterested in investments that would potentially require disclosure of their involvement. The risk that LPs would refrain from investing to avoid disclosure in potential HSR filings is unwarranted given the total lack of probative value provided by information about their identity.

While the Chamber appreciates that the Commission has attempted to minimize burden by only requiring information on those minority investors that will continue to hold an interest in the acquired entity, this proposed limitation is insufficient when there is no clear connection between the minority investors of portfolio companies and a specific transaction. Simply put, such information is not relevant to an antitrust evaluation for most deals and the materials submitted with the current HSR Form suffice to indicate when there is need for the Agencies to issue a VAL or Second Request to seek such information.

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[96] *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 755c (online ed. May 2023). There is no presumption in the law that vertical deals of any description threaten to reduce competition. Indeed, they are often procompetitive. *Id.* ("Vertical integration is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets.") Even now, the Agencies challenge very few vertical transactions, and the courts generally have not been receptive to those challenges.

Officers, Directors, and Board Members. The NPRM would require parties to provide information on officers, directors, and board representatives; again, the burden to gather this information is likely significant relative to its limited probative weight. The NPRM would require filers to obtain and report information plainly irrelevant to the filing party, such as all other boards that a board member or observer serves or *has served* on in the last two years.[97] If the Agencies have particularized concern about how the composition of a company's board or its corporate officers impact competition in markets relevant to a transaction under review, a VAL offers the appropriate tools for seeking such information. Aside from the disproportionate burden of this proposed request, the Agencies also lack the authorization under the HSR Act to seek this information as part of the HSR Form. Information concerning corporate officers primarily concerns enforcement under Section 8 of the Clayton Act,[98] as opposed to enforcement of Section 7,[99] which is the only provision of the Clayton Act the Agencies may enforce through the HSR Form's information requests.

The requirement to collect information on directors and officers will be especially burdensome on companies that do business abroad via foreign affiliates that make no sales in or into the US. For a large multinational, this could require collection of information on dozens or hundreds of individuals associated with affiliates operating outside of US markets and in countries where there is no per se ban on interlocks.

Moreover, to the extent obtaining particularized information regarding a filer's officers and board members is necessary for the Agencies to complete its initial assessment of a transaction's potential to threaten competition, there is no compelling argument for requiring filers to also provide this information regarding board members, observers, and individuals with rights to nominate a board member or observe for *other* entities, regardless of whether that entity directly or indirectly controls, or is controlled by, the acquiring party. And (as discussed

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[97] In one paragraph of the Supplementary Information, the NPRM requires that the parties "identify any other *companies* for which those individuals would serve or have served." NPRM at 42190 (emphasis added). In a different paragraph in the Supplementary Information as well as the Instructions, the NPRM informs filers to provide a list of the "other *entities*" that the individual has served. *Id.* at 422189, 42212 (emphasis added). If this requirement remains, then the FTC should clarify which types of "companies" or "entities" should be listed. The definition of "entity" under the HSR Regulations is broad and includes "any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club." 16 C.F.R. 801.1(a)(2). As such, this proposed Instruction could be interpreted to require the provision of information regarding affiliations with non-commercial entities and/or with entities joined by the officer, director, or board member for personal reasons (*e.g.*, the board of a religious organization, the board of a local fundraising organization, the board of a performing arts club, etc.), but this type of information should be excluded because it is personally invasive and has no probative value under the antitrust laws.

[98] Section 8 prohibits directors and officers from serving simultaneously on the boards of competitors, subject to limited exceptions.

[99] Section 7 prohibits acquisitions of stock and assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The HSR Act was adopted to provide the Agencies time to seek information concerning the likelihood that a proposed transaction would "substantially lessen competition" in violation of Section 7 of the Clayton Act. Aside from Section 7, no other section of the Clayton Act is referenced by the HSR Act.

above), the NPRM offers no evidence that the Agencies have systematically missed anticompetitive interlocks because the parties did not report extensive officer- and director-related information in their HSR Forms. When the FTC successfully reached a consent order with Quantum Energy Partners and EQT Corporation to prevent an interlocking directorate arrangement,[100] such data was of course not reported on the HSR Form, nor would it have been useful if it had been. Finally, to the extent the NPRM requires this information to be current as of the date of each filing, the Agencies provide no compelling argument for requiring this information to be gathered at the time of each filing rather than on annual basis, as is required for revenue breakdowns by NAICS codes under Item 5.

For multinational companies, the proposed requirement to provide information for "each entity within the acquiring person" is particularly onerous.[101] Large global companies may have hundreds of subsidiaries across the world, each of which has "officers" to satisfy local legal requirements. Most of these sister subsidiaries and their officers will not be involved in the deal, the acquiring entity, or the newly acquired entity. They sell unrelated products and/or in unrelated countries, and they have no influence or decision-making authority over the acquiring person or entity. The collection of this information for unrelated entities will impose significant time and cost burdens on the acquirer and will flood Staff with a list of hundreds or thousands of irrelevant names that will not help in analyzing whether the transaction raises antitrust concerns. The limited or likely nonexistent probative value is greatly outweighed by the burden to filing parties (and the Agencies' own Staff).

Organizational Charts for Individuals. The NPRM would require filing parties to submit organizational charts for individuals who are (i) authors of Item 4 documents, (ii) recipients of privileged documents, and (iii) individuals searched for responsive documents.[102] The proposal to submit organizational charts for multiple individuals is unnecessary, burdensome, and in certain instances privileged. For authors of Item 4 documents, the NPRM would require an organizational chart that "would reflect the position(s) within the filing person's organization held by identified" yet filing persons are already required to supply each author's title in the Item 4 index; the org chart of Item 4 authors will offer no additional information or benefit for the agencies. Further, the agencies claim to want organizational charts "to determine the importance and perspective of the responsive documents submitted with the HSR Filing" but Item 4 documents, by their own definition, are necessarily the most important documents within an organization. The requirement to identify recipients of privileged documents is unnecessary as well: the agencies do not separately justify the need for this request, and the information included in a filing persons statement of reasons for noncompliance already

[100] Press Release, FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Aug. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.
[101] NPRM at 42212.
[102] *Id.* at 42195.

provides the agencies enough information to challenge any privilege claim. Finally, the requirement for filing parties to identify individuals searched for responsive documents is a request for information that many filing parties would claim is privileged, particularly given that the Agencies are requiring a litigation hold with HSR filings that puts filing parties in a litigation posture.

Labor Data. The NPRM provides no evidence to establish why it is necessary and appropriate for the Form to seek the requested labor data at the outset rather than for the Agencies to seek targeted information on labor-related questions under a VAL or Second Request in transactions where labor markets are possibly relevant. This unjustified increase in filing burden demands an explanation given the irrelevance of this information to most filings. For example, certain categories of transactions such as an acquisition of a license, or of an officer's vesting of stock valued at over $111.4 million are unlikely to raise any labor issues at all.

Additionally, the NPRM fails to explain how the requested information would even help the Agencies to determine whether there is harm to competition in particular labor markets. As Judge Easterbrook (joined by Judge Wood) recently noted, "[t]he mobility of workers—both from one employer to another and from one neighborhood to another" means that labor markets must be broadly defined, both in terms of economic sector and geography. *Deslandes v. McDonald's USA, LLC*, No. 22-cv-2333, 2023 WL 5496957, at *1 (7th Cir. Aug. 25, 2023) ("People entering the labor market can choose where to go—and [a single type of business is] one of many options").

The data sought by the proposed rules defines labor markets imprecisely at best. For example, the NPRM's plan to have parties submit standard occupational classification ("SOC") codes—which are very broad—is not supported by any argument as to how that information would provide an adequate screen for the type of work employees actually perform,[103] and thus the NPRM does not indicate how that data would help the Agencies assess whether a notified transaction raises competition concerns, let alone merits a Second Request.

Similarly, the NPRM offers no explanation for how the Agencies believe requesting commuter zone data—another wholly new request under the NPRM—is adequate or even useful for assessing the geographic dimension of a labor market. In addition to the absence of any explanation of how such data is necessary and appropriate, the utility of such data appears to be dubious at best in many industries, considering the contemporary prevalence of remote work. For markets where remote working is common, employers are not constrained by

[103] *See, e.g.*, the SOCs for technology focused job roles. Options for such occupations include "Computer Programmer," "Software Developer," and "Software Quality Assurance Analysts and Testers." How are tech companies engaged in a transaction expected to assess potential overlaps with the relevant SOC terms that are potentially vastly over and under inclusive? For a more detailed analysis of the limited utility associated with reliance on SOCs, see Daniel J. Gilman, "Antitrust at the Agencies Roundup: Kill All the Widgets Edition," (August 4, 2023), https://truthonthemarket.com/.

commutes when they compete for talent. At the very least, these details suggest the NPRM is overbroad when it seeks such information from *all* filing parties. By failing to account for the contemporary availability of remote work, the NPRM also seems out of touch with today's business realities, contrary to the supposed objective of the NPRM to align the Form and Instructions with the "modern economy."

If labor information about workers' ability to have potential employers compete for their skills and services in the relevant market or industry is probative to the Agencies' assessment of a transaction, the burden of any related requests is more appropriate as part of a VAL or Second Request. And (as discussed above), the NPRM offers no evidence that the Agencies have systematically missed anticompetitive effects on labor because the parties did not report extensive employee-related data in the HSR Form. When the DOJ successfully blocked proposed Penguin Random House/Simon & Schuster merger on a labor theory, such data was not reported on the HSR Form, nor would it have been useful if it had.[104]

The NPRM's citation to *FTC and State of Rhode Island v. Lifespan Corporation and Care New England* also fails to support the proposal's sweeping information requests concerning labor-related market information. The FTC's complaint in Lifespan/Care New England did not even include allegations concerning any alleged labor market; rather, the concurring statements of Commissioners Khan and Slaughter simply indicated they would have supported such claims, but their statement redacts the analysis the Commissioners argue they believed would have supported such a claim.[105] The statement thus has no value as a supporting document for the NPRM's proposals; without being able to assess the analysis prepared by FTC staff, the commenting public cannot respond to the merits of the citation.

"Workers' share of national income"[106] and other labor issues, such as workplace safety, also lie far outside the FTC's competence or statutory mission and are irrelevant to a merger analysis. Depending on the industry, this request could be highly burdensome and the NPRM presents no reasoning to establish a correlation between the industries for which collection of this information will be most burdensome and those industries that will exhibit potential antitrust concerns to justify such a burden. For example, more labor-intensive industries may have a higher volume of OSHA issues than large technology businesses. Moreover, the NPRM's speculation about a correlation between employer monopsony power and OSHA violations has

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[104] *United States v. Bertelsmann SE & Co. KGaA*, No. 21-cv-2886, 2022 WL 16949715 (D.D.C. Nov. 15, 2022). It is also important to note that the DOJ's challenge to this transaction focused on the deal's ability to enhance monopsony power in a nationwide market for publishing rights from leading authors, not a localized labor market based on SOC codes or a commuting zone-based market definition limited only to a specific geographic area.

[105] *See* Concurring Statement of Commissioner Slaughter and Chair Khan regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England, at 1–2 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf. "In addition to supporting the allegations of competitive harm in these markets, we write separately to note that we also would have supported an allegation that the effect of the proposed transaction may be to substantially lessen competition in a relevant labor market in violation of the Clayton Act. Staff's analysis found that [redacted]."

[106] NPRM at 42179.

no grounding in case law or even academic literature but is rather a purely theoretical, experimental metric the FTC is seeking to impose for the first time. In fact, at least one analysis has found that OSHA violations are more prevalent in unconcentrated industries.[107] The absence of proven utility for such data, not to mention the potential for it to raise flags in innocuous transactions while missing them in others that may indeed warrant closer scrutiny, indicates the burden of this request simply cannot be justified. If the dynamics of the relevant labor market(s) are driving a transaction under review, the documents currently requested under the Form are an adequate tool for the Agencies to identify a need for closer scrutiny of labor-related issues.

The NPRM also is silent on how current the requested labor market information must be. To the extent the NPRM suggests the labor market information needs to be updated for each filing, there is no compelling argument for requiring such labor-related information be gathered at the time of each filing rather than on an annual basis, as is required for revenue breakdowns by NAICS codes under Item 5.

Finally, even if the agencies could show that some mergers may lead to harm in specialized job markets in local areas, such as potentially in the case of certain healthcare and hospital mergers, it would be more efficient and appropriate to limit labor data requests in merger filings to the specific types of localized employment and industries where competitive harm may be plausible, rather than using merger filings to conduct research projects or fishing expeditions to study hypothetical effects in every possible labor market or industry.[108]

Information regarding non-parties. The NPRM would require the acquiring party to disclose a range of details about individuals not employed by the acquiring party or by an entity it directly or indirectly controls, including providers of credit, holders of non-voting securities, options and warrants, and entities that have nomination rights for board members or board observers.[109] The FTC minimizes the burden of collecting this information by focusing solely on repeat filers, theorizing that "[o]nce collected, . . . the burden associated with some of these proposals will lessen for subsequent filings by the same acquiring person, as the information would only need to be updated."[110] This prediction completely ignores the impact on one-off and infrequent filers and the fact that updating information may involve the same amount of work as compiling it in the first place where creditors and holders of non-voting securities, options and warrants change over time. Moreover, this new requirement is at odds with the

[107] Justin Hurwitz, A Bad Merger of Process and Substance: Changing the Merger Guidelines and Premerger Review Form, NETWORK L. REV. (Sept. 11, 2023), available at: https://www.networklawreview.org/hurwitz-mergerguidelines/ ("[T]he relevance of information such as OSHA complaints to antitrust considerations—not even merger-related considerations—is dubious: the majority of OSHA complaints are found in largely unconcentrated, construction-related and similar industries.").

[108] Indeed, the legislative history of the HSR Act indicates Congress did not intend for information collected through HSR filings to serve as an "economic database for generalized research." Rather, the information provided by filers of the Form is only supposed to assist the Agencies with "evaluating the legality of particular transactions." See 42 Fed. Reg. 39040 (Aug. 1, 1977) at 39042-43.

[109] NPRM at 42211-12.

[110] *Id.* at 422207.

balance that Congress struck in adopting Section 8. Though obviously concerned about the influence that outside parties might have on a company, Congress ultimately adopted a bright-line prohibition focused only on director and officer interlocks.

Customer contact information. In addition to the narratives described above, the NPRM would require contact information for customers and supply relationships. For the vast majority of HSR reportable transactions, this information is not required for the Agencies to determine whether a transaction may be anticompetitive and requires a Second Request. Requiring this information in the HSR Filing effectively requires filing parties to make transactions public, at least to entities whose identities are disclosed in those lists, thereby increasing the risk of leaks to the public. Often, there are legitimate business reasons not to make a transaction public at the time of filing. For those transactions where contact information may be necessary for the Agencies' competition assessment, the Agencies can use the VAL process to obtain the information.

Communications and messaging systems. The identification of communications and messaging systems would likely impose a heavy burden on filers and the information is not relevant in any way to the Agencies' assessment of whether a transaction may be anticompetitive.

B. Transforming every HSR filing into a mini-Second Request will not increase efficiency, nor reduce the burden on the Agencies or their staff.

As discussed in greater detail below, the drafters of the HSR Act intended the Form and Instructions to impose no greater burden on filing parties than was necessary to facilitate the Agencies' timely and accurate screening of a proposed transaction's impact on competition.[111] Despite claims by the Agencies that the proposed changes to the HSR Form will provide for more "effective, efficient merger review,"[112] there is no evidence that the NPRM will make premerger review more efficient, and indeed, experience with the current Form indicates the opposite. As it stands now, 98 percent of all filings are permitted to close without receiving a Second Request. Of the two percent of notified transactions that do receive a Second Request, only half will face an eventual challenge by one of the Agencies. This certainly does not indicate a need for drastic expansion of the HSR Form, nor does it suggest that drastically altering the Form will make the Agencies more efficient in their efforts to process premerger filings. In fact, when announcing suspension of the practice of early termination of the HSR waiting period, the Agencies themselves noted that the move was being taken in part due to "the unprecedented volume of HSR filings" that staff was having to process.[113]

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[111] *See* Section VI, *infra*.
[112] Press Release, "FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review," Fed. Trade Comm'n, (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review?utm_source=govdelivery.
[113] Press Release, "FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination," Fed. Trade Comm'n, (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

Clearly, under present conditions, the Agencies do not have the capacity to review all the information the NPRM seeks to request. Without drastic expansion of the Agencies and the Premerger Notification Office ("PNO"), there simply will not be sufficient personnel to process HSR filings and render timely and sound assessments of the materials received from filing parties. This raises the prospect that the deluge of filed materials could make it *more likely* that a genuinely concerning transaction will be overlooked by the Agencies.

The breadth of questions in the proposed HSR Form that require subjective interpretation will further increase burden on the parties and the Agencies and increase the time for reviewing all mergers. For example, before they can even submit their fillings and receive assignment to either the FTC or DOJ, parties may have to negotiate with the PNO regarding which questions are relevant to their transaction and which questions can be responded to within a reasonable period of time in light of logistical issues, such as whether the requested information is even in the possession, custody, or control of filing parties. Parties will have to engage further with PNO and Agency staff about their narrative responses to ensure they are sufficient in the Agencies' view or risk their filing being bounced because the transaction will not be able to receive assignment to one of the Agencies until such details are sorted, the substantive staffs of both Agencies will likely have to be involved in the pre-filing interactions because the "subjective" descriptions will have to satisfy the eventual investigating staffs, not the staff of the PNO. Clearly, therefore, far from making the HSR review process more efficient, the NPRM would introduce new *inefficiencies* for filers and the Agencies alike.

Both the subjective nature of the much of the NPRM's new requirements and the unavoidable fact that filers will need to rely extensively on third parties to gather the NPRM's demanded information are especially concerning considering the NPRM would require that the signatory of the Form certify, under the penalty of perjury, that all contents in the filing are "true, correct and complete to the best of" the signatory's knowledge.[114] Filers of any government form are of course always on notice of an obligation to complete the form truthfully to the best of their ability; however, the NPRM's proposal seems to be seeking to impose a heightened level of liability for potential non-compliance with the Form—something normally only reserved for the Second Request atmosphere where particularized concern has been raised concerning a potential transaction. The NPRM provides no justification for applying such a standard to *all* HSR filings in the first instance. Demanding such a certification from HSR signatories is unreasonable and opens them up to unacceptable degrees of liability when, under the NPRM's proposed questions, signers of the Form would be asked to certify highly technical analyses concerning economics and antitrust law. Indeed, how can a non-lawyer or non-economist signatory ever certify to the best of her knowledge that a proposed market definition, for example, is true, correct, and complete? Even among practicing lawyers and economists, such definitions can be in dispute.

If the lawyers and economists at the Agencies happen to disagree with the signatory's offered market definition, may the Agencies bring an action for perjury against the signatory? For example, the Agencies often adopt narrow market definitions when identifying a market

[114] NPRM at 42218.

relevant to a proposed transaction.[115] What if the parties view the market differently or simply do not notice a niche submarket the Agencies happen to identify? Additionally, under the NPRM's proposed certification standard, at what point must the Agencies decide whether they accept the answers underlying the certification? Will the Agencies have the authority under the NPRM's certification to determine months after the filing that they disagree with the parties, allowing them to bounce the filing and to force the parties to start over? Given the certification and the highly subjective and complex nature of the narratives the NPRM would require filers to submit, how prejudicial will a party's initial understanding of the competitive dynamics described in the narratives be against potential revisions if the party's understanding of the market(s) evolves in the context of a potential challenge? Once certified, will filers have any freedom to amend their initial descriptions as submitted in the narratives? Finally, what if the Agencies determine a mistake or omission was made by one of the many third parties necessarily relied upon by the filer to gather information required by the Form? Would such a scenario be grounds for a fine against the filer or a bounce of the full filing? Without clarification and fundamental revision, the certification demanded by the NPRM raises significant questions that indicate the proposed requirement is highly inappropriate.

IV. The Proposed Rules Are Improperly Vague

The proposed rules are extremely vague concerning multiple critical details, some of which have already been described. Such vagueness will sap the resources of filing parties and the Agencies to work out clarifications, will put filers at risk of inadvertent violations, and will subject the Form and Instructions themselves to potential court challenge. A few notable examples of the NPRM's unacceptably vague provisions include:

- Transaction Description: Filers must identify "each strategic rationale for the transaction discussed or contemplated" by the filing person, its officers, directors, or employees. Beyond the impossibility of identifying everything that its staff "discussed," it is unclear what standard filers should use to assess whether any of the identified individuals "contemplated" a particular rationale.

- Supervisory Deal Team Lead: The NPRM would require parties to submit documents prepared by or for "supervisory deal team lead(s)." Nowhere in the NPRM is "supervisory deal team lead" clearly defined. Instead, the NPRM offers only a broad description— "individuals who functionally lead or coordinate the day-to-day processes for the transaction at issue."[116] Such a description could potentially describe a company's entire development team.

[115] *See FTC et al. v. Sysco Corporation et al.* (D.D.C 2015). In this merger challenge, the FTC successfully offered a market definition for "broadline distribution services" that indicated concentrated, local markets based on a definition that excluded other methods of food distribution. The parties, in contrast, argued they competed with a much broader array of diversified food distributors.
[116] NPRM at 42194.

- NAICS Codes: The NPRM would require filers to identify all codes that "describe" the products or services at issue. Many codes are so broad and disconnected from the modern economy that it is sometimes difficult to determine whether a particular code applies.

- Pipeline or Pre-Revenue Products: The NPRM requests NAICS codes for the acquiror's products "under development" that would overlap with products "known to be under development" by the acquired person. There is no clear standard provided for what "under development" means or what/how much information the acquiring person must have to "know" about the target's product pipeline.

- Defense Contracts: The rules would require reporting on defense contracts "valued at $10 million or more," but it is unclear what method of valuation is to be used, particularly for open-ended supply contracts.

V. The Proposal Would Damage Investment and Capital Flows.

The free flow of capital is crucial to the American economy's ability to maximize value for consumers and workers by yielding the most innovative products and ensuring the efficient use of limited resources. Businesses and consumers make rational choices to maximize their well-being and the free market functions best when companies can generally acquire and sell assets to improve their efficiency and offerings as they compete head on with others to secure a profitable consumer base. Sound antitrust policy aims to protect the environment for such a free market by policing conduct, such as monopolization, that seeks profit while trying to avoid such a process of merit-based competition. The NPRM, however, intends to go well beyond a limited law enforcement approach and would impose a burden on the free flow of capital so significant that it would thwart the natural functions of a healthy free market, subsequently throwing the mechanisms that allow businesses to respond to supply and demand out of alignment, all to the grave detriment of both entrepreneurs and consumers.

A. The proposal would hinder investment in startups.

As Congress drafted the HSR Act, it was acutely aware of the potential for the premerger notification process to frustrate the beneficial operations of the free market. One iteration of the Act would have imposed an automatic temporary restraining order on transactions subject to the premerger filing requirement.[117] This provision, however, was stripped from the legislation following DOJ testimony predicting that imposing an automatic stay would "operate as a severe disincentive to mergers generally."[118]

[117] 122 CONG. REC. 17268 (1976) (statement of Sen. Byrd).
[118] S. REP. No. 94-803, pt. 2, at 213 (1976).

What Congress quickly came to understand when drafting the HSR Act, the Agencies seem to have forgotten today. Merger activity is not presumptively illegal under the antitrust laws, nor has Congress directed the Agencies to proceed from the presumption that transactions above the notification threshold set by the HSR Act are likely anticompetitive.[119]

Just as the NPRM has failed to appreciate the significance of the increased burden it would cause, the FTC is either oblivious to—or perhaps hopes to facilitate—the negative impact on capital investment and dealmaking overall that would result from the NPRM's adoption. Multiple elements of the NPRM would have a chilling effect on acquisitions that raise no genuine competitive concerns, hindering the free flow of capital and slowing economic growth without enhancing competition.

The far-reaching and extensive look-back period (applied both to buyer and seller), for example, could discourage venture capital investment in startups.[120] A prominent portion of the start-up community relies on fundraising for novel ideas based on acquisition plays. Often, innovative and exciting ideas (especially in technology and healthcare/pharmaceuticals) may offer great promise but present scaling challenges that would threaten to leave them without access to capital investment. However, many financial backers of such projects recognize that such an asset may be attractive to an established platform that may see value in integrating the startup's innovation into its larger suite of offerings. Many startups raise money because of such a paradigm—the value proposition to investors is that the startup will be acquired. However, with the NPRM's proposed look-back period, and the FTC's apparent confidence that it can reliably identify nascent competitors in dynamic markets, large companies could be hesitant to purchase scrappy startups and the investors who fund them in their early days will begin to apply different risk profiles to such investments. Such a lookback could also discourage PE firms from taking risks on smaller acquisitions. PE firms can provide critical access to credit, but increasing the burdens of the HSR Form could lead them to become much more selective in their acquisitions, thereby depriving startups of crucial access to capital. This would kill innovation, harm consumers and workers, and undermine Congressional efforts to facilitate access for small businesses to opportunity and capital.

B. The likely delays the NPRM would cause increase the perilousness of the already fragile pre-closing period.

The increased burden caused by the NPRM's additional information requests will not only increase the costs for the filing parties, but it will also extend the time required for parties to make initial filings after definitive agreements are reached. Consequently, it is reasonable to

[119] Indeed, as noted further below, the legislative history clearly indicates that the opposite.

[120] Ravi Sinha, Brendan Rudolph & Alex Vasaly, "Merger Enforcement Considerations: Implications for Venture Capital Markets and Innovation," American Bar Association, Antitrust Law Section, (June 30, 2023), https://www.americanbar.org/groups/antitrust_law/resources/magazine/2023-june/merger-enforcement-considerations/. "Foreclosing or reducing the likelihood of certain M&A exits, all else equal, would disincentivize VCs and other early-stage investors from backing future startups. This would make it more difficult for future startups to gain necessary early-stage funding, which in turn could lower employment at (and the number of) startup firms, thereby generally stifling future innovation."

expect that the NPRM will significantly increase the time between signing and closing. If the effect of the NPRM's changes is to create the need for pre-filing interaction with the Agencies, the delay would be even greater. With each new increase in the period before signing and closing comes the introduction of increased risk that the deal in question will not close.

Even if the additional time imposed by the NPRM does not undermine a transaction, the extended time between contract execution and closing would still delay the ability of the transacting parties to realize the increased revenue and efficiencies of the merged firm they are seeking to form. The costs of delay can be significant, especially when parties raise capital to execute an acquisition and must carry the interest associated with any such financing strategies while their deal is left languishing in limbo as regulatory clearance alone stands in the way of closing. Even under the current Form and Instructions, in times of high interest rates, the costs associated with the financial strategies often used to execute an acquisition may lead parties to abandon transactions that do not receive timely approval from the Agencies.

As noted above, the NPRM would require parties to collect and review information not previously relevant to dealmaking, as well as create detailed narrative responses. At the same time, the NPRM offers no guidance as to what may constitute a filing deficiency in relation to the various new requirements, nor does it address what updates must be provided concerning non-material changes that may occur after filing the HSR Form. "Material" is also nowhere defined in the NPRM. In defending the NPRM, the FTC official "who asked not to be named but who was authorized to speak on behalf of the agency," said it will be "possible for merging parties with simple transactions that don't have any antitrust issues to respond 'non-applicable' when asked questions that don't apply to their situations."[121] But the NPRM is silent about this possibility and many filers will be reluctant to omit such responses without assurances from the Agencies. Furthermore, it strikes the Chamber as an exercise in bad governance for an FTC spokesperson to propose that parties will be permitted to take an action that is nowhere specified in the NPRM, meanwhile, as had been noted, certification of a response deemed incomplete could significant ramifications for filers. The suggestion of a "non-applicable" option seems to be a persuasive strategy the Commission is employing to alleviate concerns about the NPRM's drastic proposals, but if such an option is going to be available to filers, it should have been spelled out in the NPRM submitted to the public for review. That being said, with greater clarity of the rules concerning the use of a possible "non-applicable" box, the Chamber would welcome such an option because it would ostensibly reduce burdensome and unnecessary reporting requirements.

All these uncertainties speak to the potential for delays to accumulate while parties simply attempt to make the initial premerger filing before any clock has even started to run for the review. As Jack Sidorov—the DOJ's former primary expert on premerger notification law, procedures, and policies under the Act—has noted, the NPRM "raises the risk that forms will be

[121] Ilana Kowarski, *Comment: US seeking more information in merger notifications partly to ease regulators' work*, MLex, Jul. 28, 2023, (https://content.mlex.com/#/content/1489126/comment-us-seeking-more-information-in-merger-notifications-partly-to-ease-regulators-work?referrer=email_instantcontentset&paddleid=201&paddleaois=2000;2003).

marked incomplete, postponing the start of the pre-merger waiting period and creating a bottleneck in the deal review process."[122] Currently, it typically takes filing parties anywhere from one to four weeks, or more, to prepare and submit a compliant HSR Form, while the prefiling period in the European Union can run for six months or more. Such potentially drawn-out pre-closing periods impose enormous risk profiles on deals where they may not have existed previously and may result in significant damage to transaction valuations, all to the detriment of shareholders, consumers, and workers.

VI. The NPRM Would Violate the Congressional Intent of the Hart-Scott-Rodino Act.

A. Congress intended for the Act's scope and burden to be limited.

The HSR Act, it bears repeating, is not an approval statute.[123] When it adopted the Act, Congress did not intend for the FTC to sign off on all proposed deals; instead, the HSR Form and Instructions were intended to create a tool to assist the Agencies in their efforts to determine if a particular deal warranted closer antitrust scrutiny. As the FTC itself explained during the rulemaking process for the current Form, "[t]he information requested by the proposed Form is necessary to a determination whether to issue a request for additional information, and what information to request at that time."[124] The burden of compliance was to be imposed on only the most economically significant transactions, and care was taken not to impose "undue and unnecessary burden on business."[125] Indeed, the lawmakers who drafted and adopted the Act recognized that if its requirements "were imposed on every merger, the resulting added reporting burdens might more than offset" the enforcement benefits.[126]

According to Rep. Peter W. Rodino (D-NJ), one of the HSR Act's principal sponsors, the premerger notification requirement would capture only "[g]iant corporations," and "the terms of the bill are such that it will reach only about the largest 150 mergers a year."[127] While the reach was intended to be limited, Representative Rodino also stressed the burden of the request itself would not demand from filing parties anything other than documents that were normally prepared in the ordinary course of their businesses; even Second Requests would only seek "the very data that is already available to the merging parties and has already been assembled and analyzed by" the parties.[128] Senators who supported the legislation also

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[122] *Id.* Comments of Jack Sidorov.
[123] Congress understood that the notification requirements of the HSR Act would not capture every proposed transaction; instead, the HSR Act imposed the notification burden on what Congress thought were the most economically significant transactions. *See* S. Rep. No. 94-1284 at 67.
[124] The FTC further noted that "[t]he legislative history suggests that Congress did not intend these reports to be vehicles to amass an economic data base for generalized research[.]" *See* 42 Fed. Reg. 39,040 (Aug. 1, 1977) at 39,042.
[125] S. Rep. No. 94-803 at 66. The Senate noted that it believed the HSR Act "represent[ed] a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays," in part because the final HSR Act adopted provisions and exemptions, leading those who voted for its passage to feel that it struck the right balance and "w[ould] neither deter nor impede consummation of the vast majority of mergers and acquisitions." *See* S. Rep. No. 94-1284 at 66.
[126] H.R. REP. No. 94-1373, at 11 (1976).
[127] 121 CONG REC. 8143 (1975); 122 CONG. REC. 25052 (1976).
[128] 122 CONG. REC. 30,876–77 (1976) (remarks of Rep. Rodino).

believed the HSR Act would not "unduly burden business with unnecessary paperwork and delays," as well as "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[129]

Contrary to Congress's clear intent, the proposed changes call for a dramatic increase in the amount of complex information required of filing parties, while also leaving certain broad requests loosely defined. For example, the NPRM calls for all documents analyzing the acquisition prepared for or by "Supervisory Deal Team Leads,"[130] but does not clearly define what constitutes such a team lead. The NPRM notes that such leads need not "have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in communicating with the individuals, such as officers or directors, that have the authority to authorize the transaction."[131] Such obscure guidance leaves considerable room for interpretation as to which individuals at the company constitute a "Supervisory Deal Team Lead," and could significantly broaden the scope of individuals whose documents would need to be retained, reviewed, and collected. This uncertainty would create substantial risk for inadvertent deficiencies, as the Agencies have the discretion to make sweeping determinations over which employees qualify for the designation, leaving room for them to declare a filing deficient if it later claims that additional individuals should have received the designation. Without clear guidance, filing parties are subject to the second guessing of the Agencies over their determinations, with little recourse if the Agencies deem the filing the deficient, despite a party's best efforts to gather the necessary information.

Potentially even more in conflict with Congress's original vision for the HSR Act is the Agencies' ability to seek fines from the filing parties for noncompliance, even if such noncompliance is inadvertent and relatively minor. Given the subjective and open-ended nature of many of the proposed changes, there is likely to be serious confusion among filing parties concerning their obligations, including what level of detail the Agencies expect filers to provide for certain responses. If such confusion leads to a party's filing being deemed inadequate in some way, however, it could be subject to civil penalties, which today are over $50,000 per day for each violation. Those who drafted the HSR Act to improve Agency enforcement without "unduly burdening business with unnecessary paperwork and delays" would hardly approve of such significant financial penalties for the kind of inadvertent filing deficiencies that are likely to occur in the face of the NPRM's many new and inadequately defined requests.

Equally out of step with any imaginable version of the what the drafters of the HSR Act intended is the FTC's proposed changes to the Form's certification language—which the NPRM acknowledges serves no legal purpose other than as a "reminder" to filers that the FTC "may refer filers who do not comply . . . for potential criminal proceedings."[132] This proposal appears to suggest that filers should fully expect a harsh and punitive response to filing errors. To

[129] S. REP No. 94-803 at 65-66 (1976).
[130] NPRM at 42213.
[131] *Id.*
[132] *Id.* at 42206.

buttress this section, the NPRM makes vague reference to a supposed uptick of instances in which "filing parties disclaim or modify statements or information submitted as part of the Form" once the Agencies launch an investigation or sue to block the transaction, but the FTC does not cite any specific examples in which this has occurred, indicate whether the modifications were material, or suggest that the Agencies had any reason to believe that the parties intended to deceive the Agencies.

Both the increased breadth and subjectivity introduced to the HSR Form by the NPRM's proposals raise significant concerns that the HSR process will devolve into months long back-and-forth with Agency staff, akin to the process in some foreign jurisdictions and thoroughly misaligned with Congressional intent. Given the broad discretion to determine whether a filing is compliant, there is also a risk that the Agencies could use stalling tactics to delay commencement of the 30-day waiting period required by the HSR Act. Such discretion clearly allows for potential abuse if the Agencies can continuously reject filings in order to expand the waiting period and gain more investigative time before having to issue a Second Request.

B. Congress has repeatedly sought to limit the scope and burden of the premerger notification process.

Congress originally considered and rejected a provision of the HSR Act that would have empowered the FTC to promulgate rules that could have been used to adjust the notification requirement thresholds down to capture smaller transactions, concluding instead that "the coverage of [HSR] should be decided by Congress."[133] Congress has not wavered from this position, acting only intermittently to make modifications to its provisions focused on the filing threshold,[134] filing fees,[135] and the recent instruction to the FTC to include questions concerning information on subsidies received from certain foreign governments or entities deemed by Congress to be strategic or economic threats to the United States.

In the 47 years since the HSR Act's initial passage, Congress has not once indicated the HSR Form reflected the wrong presumptions concerning antitrust enforcement or failed to capture deals that should have received scrutiny. To the contrary, in 2000, Congress moved the filing threshold upwards after determining that too many businesses were required to report their proposed deals.[136] The 2000 reforms came after legislation in 1990 imposed the first filing

[133] 122 CONG. REC. 30877 (1976).
[134] The 21st Century Acquisition Reform and Improvement Act, Department of Commerce, Justice, State, and the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108–111 (2000) (codified as amended at 15 U.S.C. §§ 18a & 18a note), the 2000 HSR Amendments substantially increased the size-of-transaction filing threshold, from $15 million to $50 million. provided that all thresholds would be adjusted annually for changes in Gross National Product (GNP) beginning in 2005, AMC at 157-58.
[135] Merger Filing Fee Modernization Act of 2021. Senate Bill S. 228 (amendment to the HSR Act).
[136] The 2000 changes to the filing thresholds, partially adjusting for inflation since 1976, reduced the number of notifications by approximately 50 percent. See AMC at 152 and U.S. Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2000, at tbl.II (2001) [hereinafter DOJ/FTC FY2000 HSR Report] (reporting that 47.3 percent of reported transactions were valued at less than $50 million). All filing thresholds are adjusted annually in accordance with changes in the Gross National Product (GNP).

fees required under the HSR Act. As part of the 2000 legislation, Congress also directed both the FTC and DOJ to conduct one-time internal reviews of the HSR Form process, "implement reforms . . . in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay;" the legislation also required the Agencies to report back to Congress on their findings and efforts to improve efficiency.[137] Commenting on the 2000 bill, Senator Orrin Hatch (R-UT) noted the reforms would provide "regulatory and financial relief for companies" and would "ensure that the Antitrust Division and the FTC efficiently allocate[d] their finite resources to those transactions that truly deserve antitrust scrutiny."[138]

In its 2007 Report and Recommendations to Congress, the Antitrust Modernization Commission, a bipartisan group of expert practitioners and academics assembled pursuant to Congress's Antitrust Modernization Commission Act of 2001, also concluded that "the existing pre-merger review system under the HSR Act is achieving its intended objectives of providing a more effective means for challenging mergers raising competitive concerns before their consummation and protecting consumers from anticompetitive effects," noting that there was "no need for comprehensive reform."[139] The Commission's close study of the HSR pre-merger review system ultimately concluded that "systemic change or major modifications" were not necessary.[140]

The message from Congress over the life of the HSR Form and Instructions is clear. When Congress drafted the Act, as when it has reformed it, the efforts were focused on limiting the burden of its requirements and ensuring its demands seek only the information the Agencies actually require to be able to conduct informed antitrust assessments, and nothing more.

C. The proposals conflict with the Williams Act's timing conditions for cash tender offers.

The information-collection demands of the NPRM conflict with certain securities laws and regulations. In particular, the NPRM conflicts with the Williams Act,[141] which seeks to balance the interests of a target's shareholders with those of the acquiror by providing a framework for cash tender offers. Because cash tender offers are often hostile, a target understandably may not want to make an HSR filing if doing so would start the waiting period. Appreciating this feature of cash tender offers, Congress drafted the Act to stipulate that for such deals, the HSR waiting period begins with the filing of the HSR Form by the acquiring

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[137] Report of the Antitrust Modernization Committee ("AMC") at 158. The Committee noted that "[o]ne significant change [adopted after the review] required the agencies to designate a senior official to hear appeals from merging parties regarding the burden of second requests."

[138] 145 CONG. REC. S13974 (1999) (statement of Sen. Hatch).

[139] AMC at 158.

[140] *Id.*

[141] The Williams Act refers to 1968 amendments to the Securities Exchange Act of 1934 regarding tender offers. *See* 16 C.F.R. § 801.30(2) (The acquired person shall file the notification required by the act, in accordance with these rules, no later than 5 p.m. Eastern Time on the 15th (or, in the case of cash tender offers, the 10th) calendar day following the date of receipt, as defined by § 803.10(a), by the Federal Trade Commission and Assistant Attorney General of the notification filed by the acquiring person. Should the 15th (or, in the case of cash tender offers, the 10th) calendar day fall on a weekend day or federal holiday, the notification shall be filed no later than 5 p.m. Eastern Time on the next following business day").

company and the waiting period is to last for fifteen rather than thirty days.[142] As Representative Rodino himself explained, efforts to delay agency approval of a transaction would "give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a state with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management."[143] Furthermore, as Representative Rodino explained, the longer a target can delay a deal by withholding its HSR filing, "the more the target's stock may be bid up in the market, making the offer more costly – and less successful."[144] The drafters of the HSR Act did not want it to facilitate any such gamesmanship.

Changes to the HSR Form and Instructions that result in delays to the approval of cash tender offers may therefore infringe upon the balance of interests Congress intended to accomplish with the Williams Act and with the timing provisions directly established in the HSR Act. Specifically, the NPRM would require the buyer to describe details about the target that would require the target's cooperation—something not likely available in the context of a hostile acquisition offer. The conflict here is one that the FTC simply must address before implementing any changes to the HSR Form and Instructions.

D. The proposal conflicts with the Regulatory Flexibility Act

In 1980, Congress adopted the Regulatory Flexibility Act ("RFA") to improve the balance of federal regulation and the needs and capabilities of small businesses.[145] Under the RFA, Congress established that "when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[146] Chief among such efforts is a requirement that regulatory burden be applied proportionately to the resources of the burdened parties. The RFA's statutory findings note that "failure to recognize differences in the scale and resources of regulated entities" adversely "affect[s] competition in the marketplace, discourage[s] innovation and restrict[s] improvements in productivity," while also creating "entry barriers in many industries and discourage[ing] potential entrepreneurs from introducing beneficial products."[147] The RFA additionally notes that "treating all regulated businesses, organizations, and governmental jurisdictions as

[142] 15 U.S.C. § 18a(b)(1) ("The waiting period required under subsection (a) shall (A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General . . . of (i) the completed notification required under subsection (a), or (ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and (B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).").
[143] 122 Cong. Rec. H102904 (Sept. 16, 1976) (statement of Rep. Rodino); *See* also 43 Fed. Reg. 33,450 (Jul. 31, 1978) at 33484.
[144] *Id.*
[145] RFA, Pub L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§601–12). The RFA was amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No 104-121, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, and the Small Business Jobs Act of 2010, Pub. L. No. 111-240.
[146] RFA, Pub. L. No. 96-354, 94 Stat. 1164, §2.
[147] *Id.*

equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with . . . legislative intent."[148]

The NPRM would clearly violate the RFA by failing to account for the application of increased filing demands across *all* parties that must file the HSR Act, especially considering the FTC has admitted that only two percent of notified transactions even present the prospect of antitrust concern. At a minimum, the RFA requires that the FTC consider a short form for the many smaller businesses engaged in transactions that only just clear the threshold requiring HSR notification. Not only does the NPRM fail to apply regulatory burden proportionately under the RFA, comments from AAG Kanter suggest the Agencies anticipate that larger, frequent filers of the HSR form will experience a lower burden under the NPRM than smaller first-time filers that do not already have their M&A conduct on file with the Agencies.[149] There are many reasons to believe such a presumption is flawed considering the significant volume of information that frequent filers will not be able to recycle; indeed, many of the most burdensome changes proposed by the NPRM would require work product prepared specifically for the HSR filing. Nonetheless, AAG Kanter's comments demonstrate how significantly the NPRM strays in spirit from the objectives of the RFA.

VI. The Proposed Rule Changes Violate the Law.

A. The proposed changes far exceed what is necessary and appropriate for the Agencies to fulfill their statutory duty under the HSR Act.

The HSR Act provides that the notification required by the Act "be in such form and contain such documentary material and information relevant to a proposed acquisition *as is necessary and appropriate* to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws."[150]

As explained above, the NPRM in its current form far exceeds what can reasonably be deemed necessary and appropriate for the Agencies to identify the very small percentage of

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[148] *Id.*

[149] As AAG Kanter has noted, the proposed Form would "actually [be] quite burdensome" for an initial filer, but as parties make more filings they will be able to recycle past submissions to the Agencies. See Khushita Vasant and Chris May, "Old HSR merger filing form created 'strain,' 'inefficiency' at US DOJ, FTC, Kanter says," MLex.com (Aug. 3, 2023, https://content.mlex.com/#/content/1490301/old-hsr-merger-filing-form-created-strain-inefficiency-at-us-doj-ftc-kanter-says?referrer=email_instantcontentset&paddleid=201&paddleaois=2000;2003. In fact, the NPRM estimates its burdens by factoring "indexed" vs. "non-indexed" considerations into its assessment for the time required to make a filing under the proposals. See NPRM at 42208.

[150] 15 U.S.C. §18a(d) ("The Federal Trade Commission, with the concurrence of the Assistant Attorney General . . . (1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and (2) may (A) define the terms used in this section; (B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and (C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.").

notifiable transactions that genuinely raise competitive concern. The NPRM does not even attempt to show how the substantial additional burden it intends to impose on the vast majority of lawful transactions is necessary to increase the effectiveness of merger enforcement. The NPRM fails to establish that current practices have resulted in systematic under-detection of potentially problematic transactions, fails to explain how specific burdensome information is necessary to identify whether a transaction raises genuine antitrust concern warranting further investigation, and fails to consider how the HSR Form could be improved without imposing undue burden on the ninety-eight percent of transactions that merit no extensive investigation. Instead, given the insufficient factual basis underlying the NPRM, the proposed rules appear to be an arbitrary or capricious imposition of a regulatory tax on and impediment to competitively benign and beneficial transactions. Therefore, were the NPRM to be enacted as written, it would likely violate the Administrative Procedures Act (APA).[151] If challenged under the APA, a court would assess whether the final rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[152] To conduct this assessment, a court will consider whether the Commission "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[153] Given the wholly unjustified burden the NPRM would impose and the clear indications from Congress over the last four and a half decades that indicate a contrary vision for the HSR Act's intended economic impact, the NPRM's proposed changes to the HSR Form and Instructions would likely run afoul of the APA.

B. Major Questions Doctrine

The legislative history of the HSR Act clearly establishes that Congress did not authorize the FTC to use its "necessary and appropriate" authority to impose the kind of regulatory burden envisioned by the NPRM. To the contrary, as explained above, Congress wished to limit the burden of compliance with the HSR Form to the transactions most likely to warrant antitrust scrutiny, and even for parties required to make a filing, the burden was intended to be limited to information required by the Agencies to conduct an initial screen for antitrust concerns. In the time since the HSR Form and Instructions were first implemented in 1978, Congress has not identified any need to adopt fundamental alternations to them; indeed, Congress at various

[151] 5 U.S.C. § 706. The APA was enacted amid concern that the growth of the administrative state would continue without limitation. The Statute was enacted in 1946 to standardize the administrative rulemaking process and to establish federal court oversight of all agency actions. *See* Final Report of Attorney General's Committee on Administrative Procedure (1941), available at http://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/pdfdownload/1941introduction.pdf; *see also* George Shepard, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557 (1996).

[152] See 5 U.S.C. § 706, Scope of Review. If enacted and challenged as abuse of regulatory authority, the APA explains that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

[153] *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 658 (2007).

times has acted to *reduce* the Form's burden.[154] Congress's consistent attempts to limit the burden faced by filing parties demonstrates how out of step the NPRM is with Congressional intent. The fundamental changes the NPRM seeks to impose—and their likely economic impact—have no "clear congressional authorization" and are, therefore, without a basis in law.

As previously noted, the NPRM would require filers to provide new information concerning officers, directors, and advisory boards. The Agencies are seeking such information to facilitate enforcement of Section 8 of the Clayton Act.[155] However, Congress did not intend for the HSR Act to serve as a Section 8 enforcement tool; rather, the legislative history clearly indicates the HSR Form and Instructions were implemented to improve the Agencies' abilities to enforce Section 7 of the Clayton Act (and, relatedly, Sections 1 and 2 of the Sherman Act).[156] The HSR Form is not a tool available to the Agencies for general enforcement of the antitrust laws, but is rather focused on a screening process to help the Agencies determine which notified deals merit closer scrutiny under Section 7's prohibition against transactions that would tend to substantially lessen competition. The NPRM's effort to have the HSR Form seek information on board composition is one of the proposal's many demands that would exceed what is necessary and appropriate for the Agencies to gather under the HSR Act.

When an administrative agency seeks to exercise authority in a manner that promises to have the kind of substantial economic impact the NPRM would cause, the agency must be able to identify clear authorization from Congress. Therefore, aside from its efforts to enforce a statutory provision not authorized by the HSR Act, the NPRM's significant regulatory burden and the delays to all notified transactions that would result signal an attempt by the FTC to exercise authority it does not have.

The authority to set the holistic reach of the premerger notification requirements remains a power of Congress; however, the NPRM would usurp that power. For example, the NPRM's above-noted plans to expand the reach of the Form's requests related to previous, unreportable transactions would significantly expand the breadth and depth of the Act's burden. As previously noted, the proposed changes demand a record of "all" transactions during the 10 years prior to a notified transaction, with no value limitation.[157] Therefore, not only does the NPRM diverge from Congress's original intent to limit the burden of the HSR Form

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[154] As Senator Hatch noted, the 2000 reforms were implemented to provide "regulatory and financial relief for companies." 145 CONG. REC. S13974 (1999).

[155] NPRM at 42189-90.

[156] The HSR Act was adopted to provide the Agencies time to seek information concerning the likelihood that a proposed transaction would "substantially lessen competition" in violation of Section 7 of the Clayton Act. Aside from Section 7, no other section of the Clayton Act is referenced by the HSR Act. Nothing in the Congressional Record indicates the HSR Act's drafters envisioned that it would serve as a tool to enforce Section 8, nor does the NPRM provide any citation to support the argument that changes to the HSR Form purportedly designed to advance enforcement of Section 8 are a necessary and appropriate exercise of rulemaking authority under the Act.

[157] NPRM at 42204. "[T]he Commission believes it would be less burdensome for filers to report all acquisitions rather than expend additional time in assessing their value in terms of net sales or assets;" "The Commission proposes expanding the scope of prior acquisitions that would be identified and making the requirement applicable to the acquired entity as well."

to the transactions most likely to rase antitrust concern, it also encroaches upon Congress's exclusive legislative power.

The Supreme Court has repeatedly noted that an administrative agency's "assertions of 'extravagant statutory power over the national economy'" may only derive from "clear congressional authorization."[158] The implications of the NPRM for the national economy thus raise "major questions" of economic significance that only Congress may answer.[159] Without clear Congressional authorization otherwise, the Supreme Court has held courts must presume Congress has not chosen to delegate such significant power.[160] Since the HSR Act does not authorize the FTC to impose the kind of unjustified burden and subsequent economic impact that would occur were the NPRM to become a final rule, a court challenge to the rule's legality seems likely to succeed.

C. The NPRM Fails to Satisfy Paperwork Reduction Act Requirements

The Paperwork Reduction Act ("PRA") was adopted to manage and reduce the total paperwork burden the federal government imposes on private businesses and citizens.[161] Approval by the Office of Management and Budget ("OMB") is predicated on a government agency's need for the information to be collected and the total burden imposed on the entities required to maintain and submit information and the agency that processes the information.[162] The OMB assesses the total burden of the collection against its usefulness to the requesting agency to ensure the burden is balanced with the "practical utility" of the information to be collected.

The NPRM provides an insufficient basis for the OMB to conduct the informed and accurate assessment required by the PRA. In the first instance, while conceding that many of the proposed changes would increase the burden on all filers, the NPRM has wholly failed to demonstrate that the additional burden is necessary or appropriate or that the FTC has made a serious effort to strike an appropriate balance between burden and utility. Indeed, the FTC has failed to demonstrate in any serious way that the NPRM will improve the ability of the Agencies to identify problematic mergers. The NPRM thus fails to articulate any measurable benefits beyond flimsy speculations against which the OMB may assess the substantial increase in burden the NPRM would impose across the economy and the Agencies.

Second, the NPRM's estimate of the additional time and costs that would be imposed is woefully inadequate. The FTC purports to have relied on an informal survey of FTC staff who had previously prepared HSR filings while in private practice to evaluate the NPRM's potential

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[158] *See W. Virginia v. Env't Prot. Agency*, 142 U.S. 2587, 2609 (2022).
[159] *Id.* The Supreme Court applies the major questions doctrine when "agencies [are] asserting highly consequential power beyond what Congress could reasonably be understood to have granted."
[160] *See Id.* at 2607, quoting *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419. "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"
[161] The Paperwork Reduction Act of 1980, 94 Stat. 2815 (1980), Pub. L. No. 96-511 (codified as amended at 44 U.S.C. §§3501–21.).
[162] 44 U.S.C. §3502(3); 5 C.F.R. §1320.3(c).

burden. The NPRM provides no information about how many FTC staff were surveyed, the number, size, or types of transactions they handled, their level of access to or familiarity with relevant information, or the methodology they employed to estimate the additional burden likely to be imposed. Notably, before issuing the NPRM, the FTC evidently did not consult with antitrust practitioners—except those currently employed by the Agencies.

In addition, while the NPRM estimates that "only" 45 percent of filings involve companies with horizontal overlaps that would give rise to "significantly" increased burden, it fails to recognize that the proposed changes are not restricted only to transactions involving horizontal overlaps, but also to vertical and "diagonal" mergers. The NPRM's calculation with respect to 55 percent of transactions is thus likely too low even given the rest of the FTC's approach.

For purposes of the PRA, the NPRM's burden estimations are not credible or useful due to other flaws, including:

- A failure to provide a breakdown of the burden associated with producing additional information for each specific change;
- A failure to account for the increased burden placed on acquisition targets (in particular the requirement that under the NPRM they would also have to prepare vast reporting on previous acquisitions);
- A failure to adequately account for the personnel costs and time associated with the efforts businesses will have to go through to gather the NPRM's requested documents and information that are not kept in the ordinary course of business;
- A failure to adequately account for the legal and other expert fees that filers are likely to incur when preparing the NPRM's newly requested narrative responses and handling the necessary privilege reviews and related logging efforts required to comply with the NPRM's expanded documentary requests;
- A failure to account for the increased vendor fees that parties will incur to implement and administer the vast document holds that will be necessary to gather and maintain (and, in certain cases, translate) the universe of files potentially responsive to the Form's demands;
- A failure to quantify the additional time and expense the NPRM would impose on parties filing on a letter of intent by requiring that they also submit draft agreements or term sheets for the notified transaction;[163] and
- Failure to anticipate the NPRM's impact on the Agencies. As noted above, the NPRM does not acknowledge or account for the impact of likely organizational

[163] NPRM at 42206-07.

changes, the required increased staffing, or even the potential demands for additional resources placed on Congress that the Agencies may make while seeking to implement the NPRM's new reporting regime.

Conclusion

For all foregoing reasons, the Chamber recommends that the Commission withdraw the NPRM or engage in a thorough revision of its proposals before issuing a new proposed rule for public comment.

Sincerely,



Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce

Attached: Annex Professor Kothari Analysis

Exhibit 6

The US Antitrust Agencies' NPRM re

Additional Information Requirements for HSR Filings

REPORT OF PROFESSOR S.P. KOTHARI

September 26, 2023

Table of Contents

I. Executive Summary 1

II. Qualifications As An Expert 2

III. The Proposed Rule Will Have The Effect Of Expanding And Front-Loading Information Sought From The Parties Which Will Likely Delay And/Or Discourage HSR Filings 3

A. The Motivation for the Proposed Rule Is Not Connected to the Evidence 3

B. The Additional Information Requirements 5

C. Costs, Burden, and Uncertainty of Narrative Information 6

IV. The Vast Majority Of Reported Transactions Do Not Raise Competitive Concerns That Warrant Submission Of The Additional Information 8

A. Most Transactions Do Not Raise Sufficient Concern to Request Additional Information Beyond the Current HSR Filing 8

B. Most Transactions Do Not Raise Questions Sufficient For Even A Preliminary Investigation 9

C. Small Transactions Are Numerous and Have Low Likelihood of Raising Competitive Concerns 10

D. Agencies Are Unlikely to Review the Additional Information Under the Proposed Rule 12

V. The Proposal To Seek Additional Information From Both Parties May Be Unduly Burdensome, Especially For Smaller Target Firms 13

VI. The Agencies Significantly Underestimate The Additional Monetary Cost To Parties 14

A. The Agencies' Estimate 14

B. Estimated Additional Monetary Costs 17

1. Costs of Outside Counsel 18

2. Costs of Internal Personnel 19

3. Other External Costs 19

4. Total Additional Monetary Costs and Filing Burden 20

5. Agency Costs to Review Additional Information 22

C. Costs to the Economy Exceed the Direct Monetary Costs 23

1. Burdens to Private Equity Investors 26

2. Officers, Directors, and Board Observers 28

3. Disclosure of Limited Partners 29

VII. Conclusion 29

I. EXECUTIVE SUMMARY

1. On June 27, 2023, the FTC and DOJ announced a Notice for Proposed Rulemaking (NPRM) regarding changes to the Hart-Scott-Rodino (HSR) form.[1] The NPRM proposes to expand radically the information that merging parties have to submit at the time of HSR filing. The vast majority of mergers that are notified to the Antitrust Agencies do not involve competitive concerns and are allowed to proceed without even a preliminary investigation. Yet the proposed rule, if enacted, would require every single HSR notification to be accompanied with the additional information, to be separately submitted by each merging party. The direct monetary cost of the additional burdens on merging parties could reach $1 to $2 billion or more. The Agencies also do not consider indirect costs, such as the potential negative impact of the additional monetary burden, potential delays, and uncertainty on the level of value-creating M&A activity.

2. The FTC purports to provide an estimate of the additional costs to parties for providing this information. The FTC's estimates are based on outdated and biased or unsupported figures and grossly underestimate the likely actual cost of complying. A survey of antitrust practitioners and company counsel indicates that the actual cost is likely to be between four and five times the FTC's estimate. This would be in addition to the non-pecuniary costs of delay that will be created by having to gather and provide the information as well as to engage with the Agencies pre-HSR to ensure that the filing will not be deemed deficient. The proposal would have an especially disproportionate effect on small transactions which typically involve companies that do not have the resources to comply with the proposed information burden.

3. Remarkably, the Agencies offer no evidence that these types of additional information would enable them to identify competitively problematic transactions that they might somehow have missed in the past. The Agencies also do not have the

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178, available at https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

manpower to review this additional information within the 30-day statutory time limit for deciding whether a merger warrants a Second Request. The rule, if enacted, would institutionalize the gathering of a vast amount of information at the time of HSR filing with little purpose. Nevertheless, the new information would require dozens of new Agency staff just to read the submissions.

4. Mergers and acquisitions lead to the allocation of economic resources to their most efficient use and thus serve as an important engine of economic growth. The FTC's proposal would have the effect of deterring or significantly raising the cost of merger activity. The proposed rule would thus have the ultimate effect of acting as a clog on economic growth without serving any beneficial purpose for merger enforcement.

II. QUALIFICATIONS AS AN EXPERT

5. I specialize in the areas of accounting, economics, and finance as they relate to business analysis, valuation, financial disclosures, and compensation, among other areas. I have senior executive experience in government, academia, and industry, with expertise in strategic and policy issues, securities regulation, auditing, and corporate governance. I have been on the faculty of the Massachusetts Institute of Technology ("MIT") Sloan School of Management since 1999. I currently hold the Gordon Y. Billard Professorship of Accounting and Finance. In addition to my faculty duties, I have also held the positions of Deputy Dean, Faculty Director of the MIT-India Program, and Head of the Department of Economics, Finance, and Accounting at MIT. From 2018 to 2019, while at MIT, I co-chaired the Board of Governors of Asia School of Business, Kuala Lumpur.

6. My most recent experience outside academia was at the U.S. Securities and Exchange Commission as the Chief Economist and Director of the Division of Economic and Risk Analysis. In this role, I led 160 economists and data scientists focused on U.S. securities regulation, domestic and international prudential regulation, and data analytics. During 2008 and 2009, I was the global head of equity research for Barclays Global Investors (acquired by BlackRock) and spearheaded the firm's active equity quant research for a $100 billion portfolio and a team of 50 PhDs globally.

III. THE PROPOSED RULE WILL HAVE THE EFFECT OF EXPANDING AND FRONT-LOADING INFORMATION SOUGHT FROM THE PARTIES WHICH WILL LIKELY DELAY AND/OR DISCOURAGE HSR FILINGS

A. The Motivation for the Proposed Rule Is Not Connected to the Evidence

7. The primary motivation offered by the Agencies for proposing changes to the HSR notification form is that there has been significant growth in sectors of the economy that rely on "technology and digital platforms" to conduct business.[2] The Agencies state that in these sectors, relationships between the merging parties are sometimes neither horizontal, nor vertical, as they operate in adjacent spaces. Such mergers can allegedly lead to a lessening of "potential competition" that could have stemmed from the likelihood that one party could have entered the space of the other in the future but for the merger.

8. To the extent that the Agencies seek to use the additional information to identify problematic mergers that they feel they may have missed, the Agencies do not report having undertaken any kind of retrospective studies that identified how many, or which, mergers slipped through the cracks because of the alleged deficiencies of the HSR form. To our knowledge, in recent years the Agencies have challenged several mergers after they were consummated. However, we are not aware of any additional mergers that would have been blocked by the Agencies before consummation had the Proposed Rule been part of the HSR requirement. Some of the mergers that the Agencies ultimately challenged were non-reportable and the Agencies learned about them only after they were consummated.[3] The extent of information involved in an HSR filing is moot for these mergers. (Filing thresholds are set by Congress each year.)

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[2] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42179.

[3] Examples include FTC and State of Idaho v. St. Luke's Health Sys., Ltd., 1:12-cv-00560-BLW-REB (D. Id. filed March 13, 2013), available at https://www.ftc.gov/opa/2013/03/stluke.shtm; U.S. v. Bazaarvoice, Inc., C13-0133 (N.D. Cal., filed Jan. 10, 2013), available at https://www.justice.gov/atr/public/press_releases/2013/291185.htm; U.S. and State of New York v. Twin America LLC, 12 CV 8989 (S.D.N.Y., filed Dec. 11, 2012), available at https://www.justice.gov/atr/public/press_releases/2012/290136.htm; In the Matter of Polypore International, Inc., Docket No. 9327 (Complaint issued Sept. 10, 2008), available at https://www.ftc.gov/enforcement/cases-andproceedings/cases/2013/12/polypore-international-inc-corporation-matter.

9. The second type of mergers that the Agencies are seeking to unwind after consummation is the group of mergers that were notified to the Agencies, received lengthy investigations including the issuance of Second Requests, and initially unchallenged.[4] For these second category of mergers, the proposed additional information sought at the time of filing was requested and reviewed by the Agencies during the course of the investigations. In other words, the second category of mergers did not fall through the cracks but were identified as raising potential concerns and thoroughly investigated anyway, regardless of what information may not have been available at the time of HSR filing.

10. Similarly, to the extent that the Agencies may believe that certain industries have gotten "over-concentrated" as a result of mergers and acquisition activity, the Agencies have not reported the nature of such industries or explained which mergers have caused them to get over-concentrated. (The merger guidelines identify market concentration using the Herfindahl-Hirschman Index.)

11. While the scope of additional information listed in the NPRM would be burdensome for any merger that triggers an HSR filing, they are particularly burdensome for two types of transactions. The first type are transactions involving private equity or financial firms. The additional information pertinent to such transactions that are proposed to be sought includes information such as limited partnerships, roll-up of prior acquisitions, and identities of members of boards of directors, past and present. The second type are acquisitions involving large technology firms that rely on acquisitions of smaller innovative firms to add features to their product/service offerings to consumers. For such acquisitions, the burden is associated with information that will allow the Agencies to review an acquisition in the broader context of all prior acquisitions made by the buyer.

[4] A prominent example is the acquisition of Instagram by Facebook (Meta), and the acquisition of WhatsApp by Facebook (Meta). See First Amended Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission, plaintiff v. Facebook, Defendant (available at https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf).

B. The Additional Information Requirements

12. The Proposed Rule seeks several additional types of new information beyond the existing HSR filing. These include the following, although there are many other new information requirements.

- Expansion of required regular course of business documents like Strategic and Marketing Plans.[5] Notably, this includes draft versions of these and other transaction-related documents.[6]

- List of minority shareholders of both the buyer and target firms.[7] This includes information on investment funds' limited partners with more than 5% and less than 50% interest in the fund or acquiring entity (whereas previously limited partners were not required to be disclosed).[8]

- All prior acquisitions of both the buyer and target firms for the past 10 years without the prior reporting threshold of $10 million annual net sales or net assets.[9]

- All director, officer, or board observer positions over the two years prior to filing of any individual who is a director, officer or board observer in the acquiring entities, acquired entities, or is expected to be a director, officer or board observer of the post-merger firm.[10]

- The Agencies propose adding a section to the filing requiring a competitive analysis of each party.[11] This would include separate narrative descriptions of any horizontal overlaps, vertical supply relationships, and labor markets

[5] See e.g., proposed "Periodic Plans and Reports" section. Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42195.

[6] See e.g., proposed "Periodic Plans and Reports" section. Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42194.

[7] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42188.

[8] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42188.

[9] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42203.

[10] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42189-42190.

[11] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42196-198.

information such as skill types of employees, where they live, and other occupational safety information with respect to both current and planned future products of both the buyer and target.

- Notably, each of the additional information requirements would now be imposed on both the buyer and target firms.

C. Costs, Burden, and Uncertainty of Narrative Information

13. The horizontal and vertical narratives requirement frontloads analysis and information that is typically provided by the Parties after the issuance of a Second Request. [12] The practice of requesting the information at a later stage of an investigation reflects decades of practical experience of the Agencies relating to the timeliness and necessity of information, which makes the investigative process efficient for both the Agencies and the Parties. Parties have a great incentive to provide Agencies with sufficient information promptly to avoid regulatory delay and the issuance of a Second Request. The requirement that such information be provided at the time of filing HSR upends a time-tested process.

14. Under the current merger review process, once an HSR is filed, the Agencies take what is referred to as a "quick look" to assess whether the merger warrants the opening of a preliminary investigation. As is described later, over 90 percent of HSR filings do not lead to a preliminary investigation. If an Agency does open a preliminary investigation, it sometimes reaches out to inform the Parties. A few things take place during the initial 30-day waiting period. In some cases, the Agency issues a voluntary access letter ("VAL") which asks for some additional information from the Parties, as for example, most recent strategic plans, list of top 20 customers during the last 3 years, and win/loss data if customers of the Parties make their purchase decisions through competitive bidding. The Parties, at their own discretion, sometimes make a presentation that walks the Agencies through the transaction rationale and broad arguments as to why there is no risk of anti-competitive effects from the proposed transaction. Sometimes, if there is not enough time to undertake

[12] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42196-198.

these activities, the Parties voluntarily "pull and refile" the HSR to give an extra 30 days to the Agency to complete its preliminary investigation.

15. If the Agency, after completing its preliminary investigation, believes that the merger poses competitive risks, then it issues a Second Request. As explained later, this occurs in just 3 percent of HSR filings. The Second Request asks for, among other things, each Party's organization chart, detailed data on sales, costs, and any competitive intelligence maintained by the Parties in the regular course of their business. While the Parties comply with the Second Request, or shortly afterwards, the Parties engage the Agencies with economic analysis as to why any horizontal overlap or vertical relationships should not create anti-competitive effects. This involves rigorous market definition, identification of market participants, and rigorous analysis of why the merger might create efficiencies that are otherwise not attainable.

16. The horizontal overlap and vertical supply relationship narratives that the FTC proposes be filed at the time of the HSR filing would require all of the post Second Request effort to be undertaken at the outset – for all mergers, most of which do not raise concern sufficient during the "quick look" for even a preliminary investigation and, thus, not even lead to the issuance of a Second Request. These analyses involve significant amounts of time of Parties' business executives who provide the necessary information, and that of the Parties' outside counsel and economists. The additional information requirements will not only create costs that are borne by all Parties even in cases where no further investigation would have occurred, but they also delay the filing of HSRs. The additional information requirements also will create the risk that the Parties' narratives – prepared in haste and without knowing where the Agencies will ultimately focus their investigative efforts – might inadvertently provide information that is of no value to the Agencies.

17. Taken together, the proposed changes requiring additional information create costs, burdens, and uncertainty that will likely delay or discourage transactions that would have been made under the current system.

IV. THE VAST MAJORITY OF REPORTED TRANSACTIONS DO NOT RAISE COMPETITIVE CONCERNS THAT WARRANT SUBMISSION OF THE ADDITIONAL INFORMATION

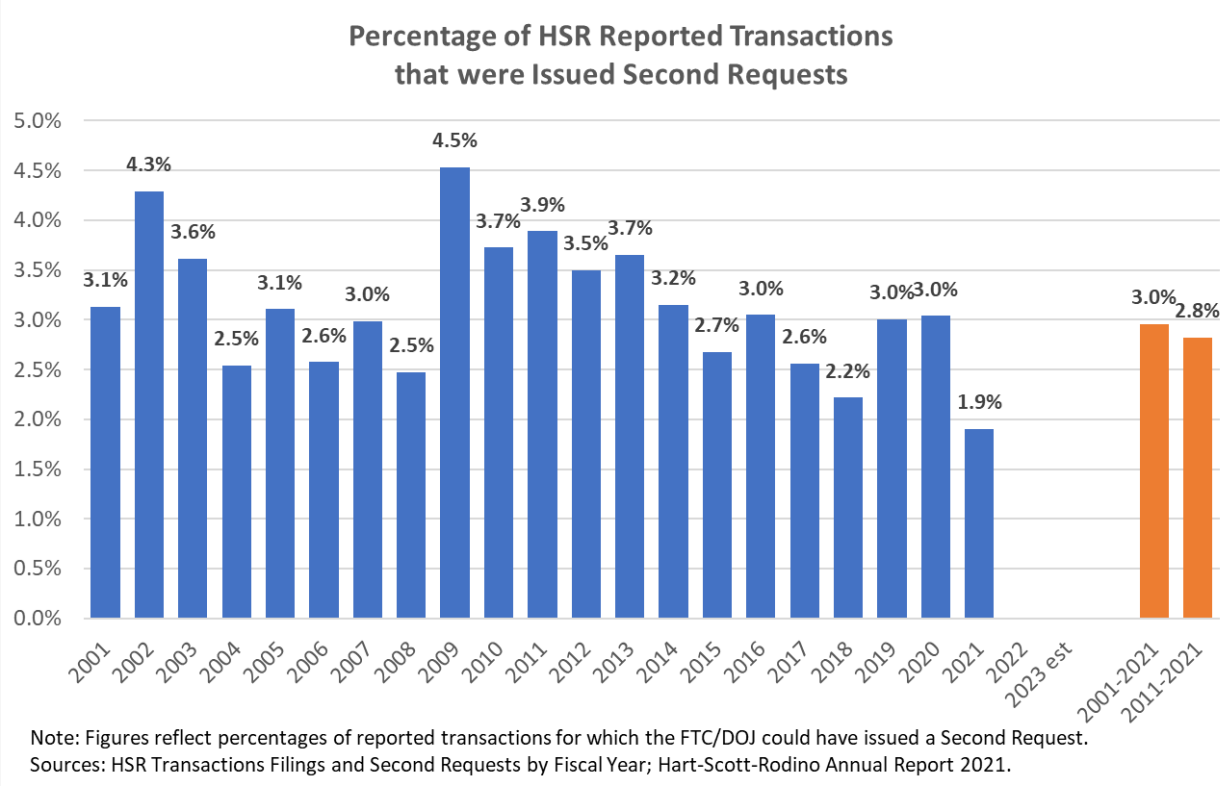
A. Most Transactions Do Not Raise Sufficient Concern to Request Additional Information Beyond the Current HSR Filing

18. Each year, the agencies receive over two thousand HSR filings for reportable transactions, yet only a very small number of these filings raise questions sufficient for the agencies to issue a Second Request for further information. During the 21 years 2001 to 2021, roughly 35,000 transactions were reported averaging roughly 1,700 per year.[13] That number has risen somewhat in more recent years and has averaged over 2,200 during 2017 to 2021.

19. Yet, few of these HSR filings have raised sufficient concern to warrant the issuance of a Second Request. In fact, such concerns are rare. Across the tens of thousands of filings 2001 through 2021, the agencies have issued a Second Request in just over 1,000 transactions, or about 3 percent of the HSR filings; the remainder did not raise any competitive concerns to warrant even a rudimentary scrutiny. As shown in Figure 1, the portion of HSR filings that received a Second Request has varied over time. Yet they show no systemic change from remaining highly infrequent and rare each year. The average for the past decade roughly matches that of the entire two-decade period.

[13] These figures reflect the 97 percent of reported transactions for which the FTC or DOJ could have issued a Second Request. Some other transactions might be incomplete, abandoned, or otherwise not satisfy the criteria where a Second Request could be issued. See HSR Transactions Filings and Second Requests by Fiscal Year, available at https://www.ftc.gov/policy-notices/open-government/data-sets; and Hart-Scott-Rodino Annual Report 2021, https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2021.

Figure 1



Note: Figures reflect percentages of reported transactions for which the FTC/DOJ could have issued a Second Request.
Sources: HSR Transactions Filings and Second Requests by Fiscal Year; Hart-Scott-Rodino Annual Report 2021.

B. Most Transactions Do Not Raise Questions Sufficient For Even A Preliminary Investigation

20. When HSR filings are received, the antitrust agencies use an internal process called "clearance" to determine whether the FTC or DOJ will conduct a preliminary investigation to review the submitted information. An agency seeks clearance for a specific transaction when staff raises questions sufficiently serious to warrant a preliminary investigation.

21. Clearance is rare. During fiscal 2017 to 2021, clearance was sought in less than 8 percent of transactions.[14] In most cases, the agencies showed no interest in even a preliminary investigation of the information submitted in the HSR filing.

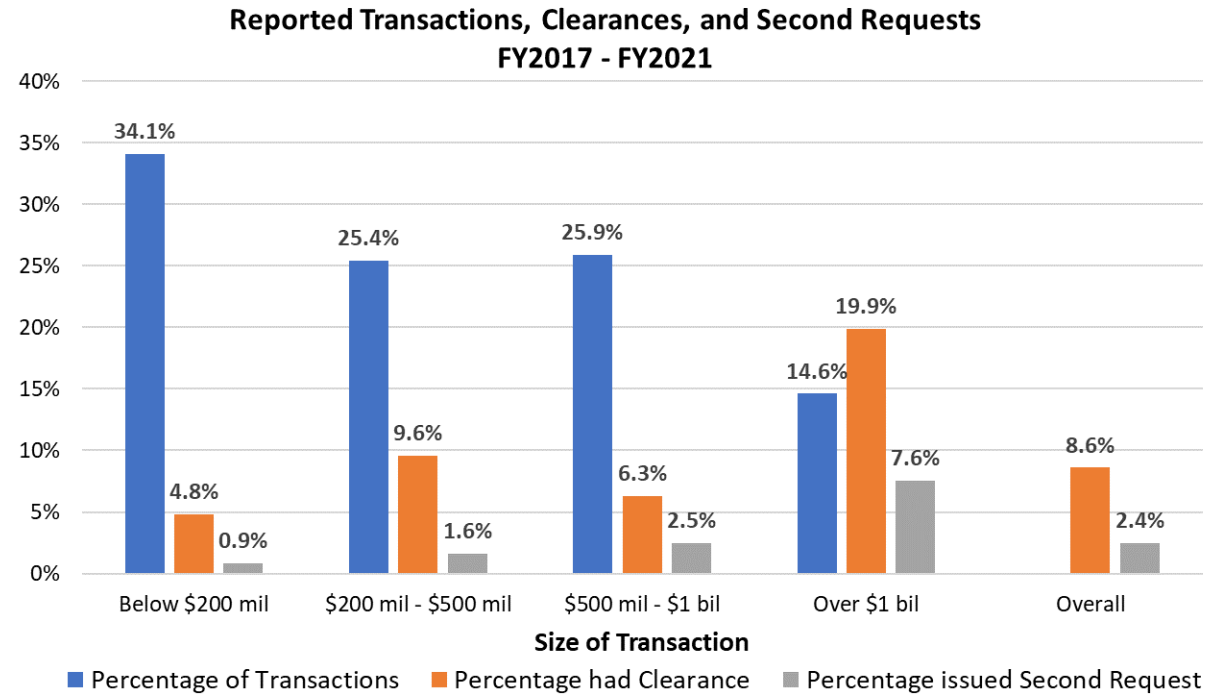
[14] Clearance was sought in 950 of the total 11,043 transactions. Hart-Scott-Rodino Annual Reports Fiscal Years 2017 to 2021.

C. Small Transactions Are Numerous and Have Low Likelihood of Raising Competitive Concerns

22. While knowing that just 3 percent of transactions receive a Second Request already seems low, this figure still overstates the likelihood of competitive concerns for the majority of transactions. This is because the likelihood of a competitive concern is not the same for all transactions. Such concerns are very uncommon for small and even midsize transactions. Yet, these transactions account for the majority of all reported transactions. These transactions are less likely to raise concerns sufficient for clearance for a preliminary investigation and also are less likely to still raise competitive concerns even after such investigation to be issued a Second Request.

23. As shown in Figure 2, between 2017 and 2021, over one third of reported transactions were valued under $200 million. Less than 5 percent of these transactions sparked concerns for clearance and only 0.9 percent of these smaller transactions were issued a Second Request.

Figure 2



Note: Figures are based on the 11,043 transactions reported for FY2017 through FY2021.
Sources: Hart-Scott-Rodino Annual Reports Fiscal Years 2017 to 2021.

24. Even midsized transactions are less likely to raise competitive concerns. Midsize transactions valued between $200 million and $1 billion accounted for over half of all reported transactions yet received clearance for preliminary investigation in less than 8 percent of transactions and were issued a Second Request in less than 2.5 percent of cases. Only large transactions valued above $1 billion were more likely to be issued a Second Request.

25. Given that the vast majority of transactions have not raised concerns to warrant a preliminary investigation let alone a Second Request, most of the costs associated with the additional burdens of the Proposed Rule are potentially little more than wasted activity.

D. Agencies Are Unlikely to Review the Additional Information Under the Proposed Rule

26. Currently, the Agencies do not conduct even a preliminary investigation of the information already provided in the vast majority of HSR filings.[15] They do not have the resources to conduct preliminary investigations on all of the average 2,200 HSR filings received each year 2017 to 2021. [16] This will not improve with additional information.

27. The agencies have limited staff to review transaction filings and many of the staff are already tasked with duties other than review of filings. The FTC has roughly 380 attorneys, economists, and support staff in its Bureau of Competition and Bureau of Economics.[17] The DOJ Antitrust Division has 412 attorneys.[18] Many of these are support staff, research and policy staff, or senior management so that far less than the 792 total staff are available for review of initial filings. If this limited staff is increasingly dedicated to the review of extensive new information, the agencies will necessarily reduce support for investigation of the 3 percent of transactions that warrant such investigation.

28. Instead of leading to further deeper initial review of HSR filings, the additional information burden for all HSR filings will likely end up in the warehousing of information by the Agencies that are neither necessary for the Agencies to undertake their enforcement duty, nor likely to ever be reviewed. Thus, the Agencies' mission of enforcing the competition laws is unlikely to be better served by seeking this additional information at the time of HSR filings.

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[15] As noted before, the agencies sought clearance for a preliminary investigation in less than 8 percent of transactions during fiscal years 2017 to 2021. See Hart-Scott-Rodino Annual Reports Fiscal Years 2017 to 2021.

[16] Fiscal year 2021 had over 3,400 filings. To the extent this may indicate an upward trend in filings, the agencies are not even prepared to review the extensive new information requested by the Proposed Rule imposed on all transactions.

[17] This includes 300 lawyers and support staff at the Bureau of Competition and 80 PhD-holding economists at the Bureau of Economics. See Bureau of Competition, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition; and Careers in the FTC Bureau of Economics, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/careers-ftc-bureau-economics.

[18] This reflects the FY2022 budgeted positions. See FY 2023 Budget Summary, https://www.justice.gov/file/1489426/download.

V. THE PROPOSAL TO SEEK ADDITIONAL INFORMATION FROM BOTH PARTIES MAY BE UNDULY BURDENSOME, ESPECIALLY FOR SMALLER TARGET FIRMS

29. Small target firms are likely to be most greatly burdened by the proposed changes. They tend to have fewer available resources to assemble information, yet the same new information requirements as far larger firms. The additional compliance burden could be very significant relative to the value of many small target firms or to investment funds involved in smaller transactions.

30. Being able to sell to a Buyer that can commercialize the product or services developed by a start-up is an important source of entrepreneurial motivation. In fact, selling can move a business toward its long-term goals and allows a smooth transition to a new phase after current ownership leaves, whether this involves re-imagining business direction or leadership or pivoting to meet new challenges. Often entrepreneurs and innovators develop the company itself as the product to be sold and becomes their time and investment exit strategy. It is estimated that as few as one in thirty companies are developed for IPO rather than for acquisition.[19]

31. A significant proportion of HSR filings involve the acquisition of small firms (say, tech start-ups) that lack the resources necessary to comply with the additional information proposed to be sought by the Agencies. As shown in Figure 2, over one third of HSR filings are for transactions valued below $200 million. These firms could be an order of magnitude smaller than the large transactions. Yet, the burden under the Proposed Rule is likely not an order of magnitude smaller.

32. The burdensome proposed filing requirements will ultimately discourage innovative activity that is undertaken by small firms and consequently reduce the pace of economic growth in the United States.

[19] Why Founders Are Afraid to Talk About Exit Strategies, Harvard Business Review, August 18, 2022, https://hbr.org/2022/08/why-founders-are-afraid-to-talk-about-exit-strategies.

VI. THE AGENCIES SIGNIFICANTLY UNDERESTIMATE THE ADDITIONAL MONETARY COST TO PARTIES

33. The NPRM presents the Agencies' estimates for time and cost burdens for filers that are substantially understated and exclude many areas of costs. In particular, the Agencies have only provided incomplete estimates of costs associated with the Parties' information burden. The Agencies have not included estimates of the additional costs to the Agencies in their own work and decision-making from receiving and reviewing information that has a low likelihood of being useful. Moreover, the Agencies have not accounted for the opportunity costs that the extensive review of the additional information would place on the Agencies' potentially justified review of transactions that are more likely to result in a Second Request.

34. The Proposed Rule will likely impose billions of dollars of additional monetary costs each year. In addition to those costs, the Proposed Rule will likely discourage pro-competitive entrepreneurial and innovative activity. These costs are not accounted for in the Agencies' analysis of the Proposed Rule.

A. The Agencies' Estimate

35. The Agencies' estimate of the monetary burden on the Parties is based on a simple calculation of (a) estimated additional hours of preparation time multiplied by (b) the assumed hourly cost of personnel that would undertake the collection and production of such information. Based on canvassing Agency staff that have previously prepared an HSR filing in private practice, the Agencies estimate that the current filings require approximately 37 hours to complete including internal personnel and outside counsel.[20] The Agencies then estimate that the proposed changes to initial filings would increase the requirement by an average 107 hours for a total of 144 hours.

36. The additional hours estimate was prepared by the FTC Premerger Notification Office (PNO).[21] The NPRM describes that the PNO canvassed current Agency staff

[20] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42208.

[21] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42208.

who had previously worked in private practice collecting data for initial filings. The NPRM does not describe a formal survey process or scientific approach for these estimates.[22] There is no assurance that respondent Agency attorneys had prior practice experience that is representative of the entire population of transactions that will be affected by the Proposed Rule. There are many notable deficiencies not limited to the following.[23] There is no assurance of sample size validity and indeed that sample size is not disclosed. There is no assurance that respondents' private practice experience is either recent or relevant. By definition, respondents' prior experience does not include assembly of the new types of information anticipated by the Proposed Rule. Finally, the NPRM does not account for the potential bias of respondents, who now wish to see this information but are not the ones responsible for providing it.

37. The additional hours estimate relies on arbitrary and speculative assumptions that cannot be called "conservative." Notably, as the NPRM describes, HSR filings can range in complexity from relatively simple transactions currently requiring few documents in the filing to more complex ones involving large transactions, many products, or other complex interactions.[24] The NPO canvass found that the Proposed Rule could add between 12 additional hours for so-called simple transactions to 222 hours for a more complex one.[25] Given this wide range, the NPRM uses an

[22] While the current NPRM does not disclose how the PNO arrived at its estimate of the additional hours the Proposed Rule would require, the estimate that current filings require approximately 37 hours to complete is likely from a very limited sample. Twelve years ago in July 2011, the FTC reported in a prior NPRM that the PNO "canvassed eight practitioners from the private bar" to arrive at an estimate of 37 hours to complete an HSR filing. See Premerger Notification; Reporting and Waiting Period Requirements, 76 FR 4 at 42479

[23] The PNO's sampling method is known as "convenience sampling" (i.e., sample selected based on being readily available, rather than being representative of the relevant population). The Reference Manual on Scientific Evidence cautions that "special precautions" are required to reduce the likelihood of bias in convenience samples that quantitative values from such samples should be viewed as "rough indicators" rather than precise quantitative estimates. Shari Seidman Diamon, "Reference Guide on Survey Research," *Reference Manual on Scientific Evidence, Third Edition*, The National Academies Press, 2011, 361-423.

[24] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42207-208.

[25] It is not clear whether the 12 hour and 222 hour estimates are each statistical averages, or represent the range within the responses obtained by the NPO's canvass. For a convenience sample such the NPO's canvass, the Reference Guide on Survey Research cautions that a wide interval in sample data "may be a useful indication of the limited value of the estimate." Shari Seidman Diamon, "Reference Guide on Survey Research," *Reference Manual on Scientific Evidence, Third Edition*, The National Academies Press, 2011, 361-423 at 383.

assumption based on filings made under the current rules. The NPRM assumes that, because 45 percent of current filings have no reported overlaps, 45 percent of filings under the Proposed Rule would have only the lower 12-hour additional hours requirement. The remaining 55 percent or filings are assumed to be more complex and require 222 hours of additional filing burden. Taken together, the range of additional hours and the proportions of transactions assumed simple or more complex result in an average calculated additional number of hours per filing of 107 hours.[26]

38. There is no empirical basis for these assumptions. Among other things, it simply assumes that what makes a transaction "complex" under the current rules would apply to the Proposed Rule. Yet, the proportion of transactions that are moderately to highly complex would likely rise given the many new types of information that must be gathered and analyzed for an initial filing.

39. The Agencies forecast that the 107 hours of additional time burden from the Proposed Rule will result in 759,000 total additional hours devoted by filers in Fiscal 2023, assuming an expected 7,096 relevant filings that year.[27] Since the Proposed Rule has filing requirements from both the acquiring and acquired entities, the expected 7,096 filings is effectively double the expected number of transactions. Notwithstanding the methodological deficiencies that lead to substantial understatement, the Agencies' estimates reflect nearly 1 million more hours of filing burdens each year on U.S. transactions.

40. The Agencies calculate the monetary cost of the additional filing hours by assuming a $460 hourly cost of attorney time.[28] This figure lacks empirical or other basis and is far from a reasonable estimate of the actual costs that would be incurred. The FTC first assumed the $460 rate in its 2013 proposed rule, without any supporting research

[26] This reflects the weighted average where 45 percent of transactions are assumed simple and require 12 additional hours, while the remaining 55 percent of transactions are more complex and require 222 hours. Specifically, 107 hours equals 45% times 12 hours plus 55% times 222 hours.

[27] The Agencies expect the Proposed Rule to affect non-index filings, of which they expect 7,096 in Fiscal 2023. Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42208.

[28] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42208.

or data.[29] For the 2023 Proposed Rule, the Agencies did not update the rate for inflation or other factors that would cause the rate to change. Based on adjusting for inflation alone, the $460 per hour cost should be adjusted upward by over 30 percent.[30] There is reason to believe that the relevant legal costs would have grown faster than inflation, so a 30% increase in the hourly rate due to price inflation alone is likely to significantly underestimate the relevant increase in hourly rates.[31] Further, to the extent some of the additional information requires expertise or qualifications not currently needed for existing disclosures (e.g., additional time by senior executives or consultants and economists), there is further reason to assume the relevant rate is significantly higher than $460 per hour.

41. Even assuming the Agencies' hourly rate and additional filing time, the additional hours devoted by filers in Fiscal 2023 would cost them almost $350 million.[32] Even taking the Agencies' figures, the Proposed Rule would result in hundreds of millions of dollars in additional costs. Since these costs are borne across all transactions, they are predominantly borne by the vast majority of transactions that had little to no likelihood of raising competitive concerns and not the few transactions that would subsequently be issued a Second Request even under the current rules.

B. Estimated Additional Monetary Costs

42. The Proposed Rule requires far more information and many new types of information not previously requested from either party. Gathering and providing the additional information is likely to involve several types of professionals including the Parties' attorneys, company executives, and outside vendors such as data search and

[29] See Premerger Notification; Reporting and Waiting Period Requirements, 78 FR 68705 at 68712.

[30] The Consumer Price Index, a measure of the buying power of past and present dollars, increased 30.6 percent from 2013 to the second quarter of 2023. See Consumer Price Index, 1913-, Minneapolis Federal Reserve, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1913-.

[31] Survey data from legal recruiting firm Major, Lindsey & Africa estimate average law firm partner compensation grew over 56% from 2013 to 2021 (based on 2014 and 2022 surveys). Additional data on "big law" associated compensation shows first-year associate compensation grew 38% from 2013 to 2022 while eighth-year associate compensation grew 56%. Sources: Major, Lindsey & Africa LLC Partner Compensate Surveys 2014 and 2022; https://www.biglawinvestor.com/biglaw-salary-scale/.

[32] This reflects $460 per hour times 107 additional hours per filing times 7,096 expected relevant filings in Fiscal 2023, which totals $349,265,120.

production companies. The Agencies' estimates do not account for all of these professionals needing to contribute.

43. During mid-August to early-September 2023, the United States Chamber of Commerce conducted a survey to provide a more comprehensive and reliable estimate of the additional costs associated with the Proposed Rule beyond the costs of the current rules.[33] Survey respondents were in-house and external counsel that have typically worked on dozens of proposed transactions over their careers.[34] Over one-third of respondents previously worked at the DOJ or FTC in a capacity involved with merger review. The survey asked respondents the amounts of time and costs to prepare information to submit as part of an initial transaction filing under the current rules and the Proposed Rule.

44. The survey identified several sources of additional costs associated with filings under the proposed Rule. These include outside counsel, internal personnel, and other external costs. The survey additionally asked for estimates of the additional costs borne by the Agencies for the time required to review the newly expanded filings.

1. Costs of Outside Counsel

45. The time and cost of outside counsel is included in the Agencies' estimates but are substantially understated. Survey respondents estimate that outside counsel currently spends an average of 54.3 hours per transaction preparing and submitting information for an initial filing. Filing under the Proposed Rule is expected to add 140.3 hours so that the average time to outside counsel time would rise to 194.6 hours. The additional hours are needed not only because the Proposed Rule asks for a greater volume of information, but it also asks for narrative descriptions of the parties and products.

46. Outside counsel can be costly especially as the filings become more expansive. Respondents estimate that the average billable hour for outside counsel is $936 per

[33] See U.S. Chamber HSR/Merger Guides Practitioner Survey, September 19, 2023, available at https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process.

[34] The average respondent has worked on over 80 proposed transactions during work in one of the agencies or working outside.

hour. This value may be on the low side given the time commitment of some senior counsel on the back-and-forth and drafting of narrative parts of the new information requirements. Moreover, higher hourly rates for outside counsel will be particularly the case for acquirers and targets who lack relevant in-house legal staff. Thus, the survey's results suggest that the additional outside counsel cost of filing under the Proposed Rule would average roughly $131,342. [35]

2. **Costs of Internal Personnel**

47. Internal personnel are ultimately the source of the information in the filing. Typically, executives, senior managers, in-house counsel, and sometimes company founders take on the roles of point persons for assembling the required information. They must take time from the duties that operate the business to attend interviews with counsel, assemble information, and iterate on how the filing is prepared. Survey respondents estimate that the current filing requires 30.4 hours of time from internal personnel. This would rise by 101.6 hours to 131.9 hours under the proposed Rule.

48. It is difficult to estimate the value of the lost time used in assembling the transaction filing. The cost of lost time is not simply a wage rate. The company incurs an opportunity cost of lost time from its executives as business decisions are not being made. To be conservative, if internal personnel time were valued at the same rate as outside counsel, the additional cost of filing under the Proposed Rule would average approximately $95,055.[36]

3. **Other External Costs**

49. Transaction filings often incur other external costs beyond the outside counsel. In addition to outside counsel, these external costs could include economic consultants, investment bankers, and data vendors.[37] The additional information under the proposed Rule includes many areas requiring specialized consultants and executives. These contributors to the company's filing may cost much more than those assisting

[35] This reflects the 140.3 additional hours times $936 per hour.

[36] This reflects the 101.6 additional hours times $936 per hour.

[37] Survey respondents were not asked to break out the additional external costs by category.

in the current, simpler filing requirements. Survey respondents estimate that these external costs currently can total $79,569 on an average filing. After excluding the outside counsel costs that are separately provided by the survey, the other external costs for a filing average $28,744.[38]

50. Respondents estimate that the additional information requirements of the Proposed Rule would raise external costs by $234,259 to $313,828 on an average filing. Excluding outside counsel costs, the additional external costs per filing would be $102,917.[39]

4. Total Additional Monetary Costs and Filing Burden

51. Each of the types of filing costs identified in the survey exceed the estimates provided the Agencies and the total is over six times their estimates. Figure 3 summarizes the estimates of filing costs provided by the Agencies and the survey respondents. The Agencies estimate the total filing cost under the Proposed Rule would be $66,240. The survey results show that the actual average cost would be $437,314, nearly seven times the Agencies' estimate. Both the Agencies and the survey find that the proposed Rule will increase filing costs to roughly four times their current levels.

[38] Based on the survey results, the average current outside counsel cost per filing is $50,825 reflecting 54.3 hours at an average $936 per hour. The other external costs of $28,744 are the $79,569 total external cost minus the $50,825 for outside counsel.

[39] The calculation is similar to that for the current external cost of filing. Based on the survey results, the average additional outside counsel cost per filing is $132,292 reflecting 141.3 additional hours at an average $936 per hour. The additional other external costs of $88,843 are the $221,136 additional total external costs minus the $132,292 additional cost for outside counsel.

Figure 3

Monetary Costs Associated with Transaction Filing

		Current Filings [a]	Additional Burden [b]	Proposed Rule [c]=[a]+[b]	Ratio Proposed to Current [d]=[c]/[a]
Agencies' Estimate per Filing	[1]	$ 17,020	$ 49,220	$ 66,240	3.9
Survey Results per Filing					
Internal Personnel	[2]	$ 28,431	$ 95,055	$ 123,486	4.3
External Outside Counsel	[3]	$ 50,825	$ 131,342	$ 182,167	3.6
External Other Costs (e.g., consultants)	[4]	$ 28,744	$ 102,917	$ 131,661	4.6
Total Costs per Filing	[5]=[2]+[3]+[4]	$ 108,001	$ 329,314	$ 437,314	4.0
Ratio of Survey Results to Agencies' Est.	[6]=[5]/[1]	6.3	6.7	6.6	
Expected Total Relevant Filings in FY2023	[7]	7,096			
Estimated Total Costs for FY2023					
Agencies' Estimate	[8]=[1]x[7]	$ 121 million	$ 349 million	$ 470 million	
Conservative Estimate	[9]=[5]x[7]/2	$ 383 million	$ 1,168 million	$ 1,552 million	
Primary Estimate	[10]=[5]x[7]	$ 766 million	$ 2,337 million	$ 3,103 million	

Sources: NPRM, 88 FR 42178 at 42208; and U.S. Chamber of Commerce survey.

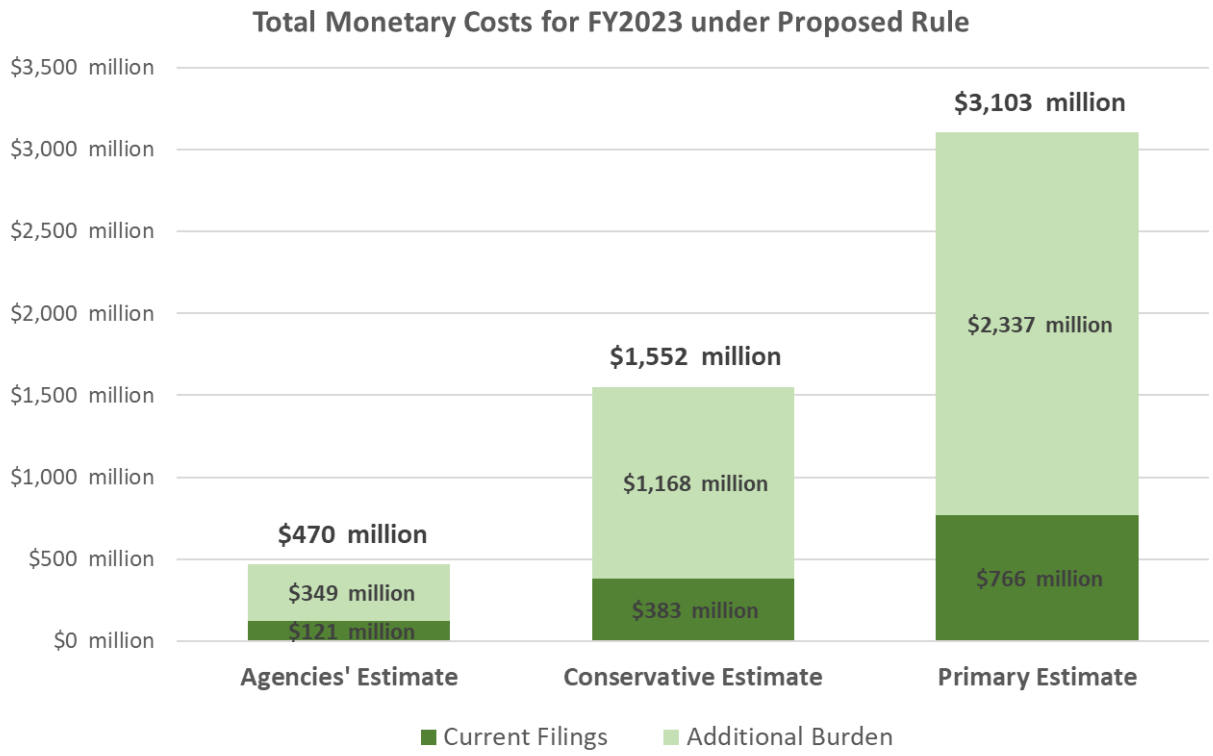
52. These estimates reflect the costs to just one average filing. As noted earlier, the Agencies estimate there will be 7,096 relevant filings in Fiscal 2023. This includes filings from each of the acquirer and acquired entity so that the 7,096 filings reflect 3,548 transactions. If each of the 7,096 filings results in the estimated $329,314 additional cost, the additional costs associated with the Proposed Rule would cost filers in Fiscal 2023 over $2.3 billion.[40] It is possible the acquired entity filing may entail a lower average cost, for example, due to sharing of information gathering between the acquiring and acquired entities. Even if one were to be overly conservative by ignoring the burden on the acquired entity, the 3,548 transactions would still result in the Proposed Rule costing filers in Fiscal 2023 almost $1.2 billion.[41] Figure 4 provides a comparison of the Agencies' estimates of the total monetary costs and the estimates based on the U.S. Chamber's survey of practitioners. The total monetary costs expected by practitioners far exceed the

[40] This reflects $329,314 in additional cost per filing, as shown in Figure 3, times 7,096 expected relevant filings in Fiscal 2023, which totals $2,336,810,381.

[41] This reflects $329,314 in additional cost per filing, as shown in Figure 3, times 3,548 expected transactions in Fiscal 2023, which totals $1,168,405,190.

additional costs estimated by the Agencies, even before consideration of indirect costs discussed elsewhere in this report. The vast majority of these costs would be borne by transactions that had little to no likelihood of raising competitive concerns and not the few transactions that would subsequently be issued a Second Request even under the current rules.

Figure 4



5. Agency Costs to Review Additional Information

53. The Proposed Rule does not include estimates of the costs to the Agencies themselves to review the new information. Survey respondents with prior Agency experience involved with merger review estimate that the Proposed Rule would result in an additional 24.9 hours of Agency staff effort to review each filing. Given the expected 7,096 relevant filings in Fiscal 2023, the additional time would result in over 177,000

additional hours for staff. This is equivalent to roughly 100 full-time attorneys working on nothing but initial filings.[42]

54. The Agencies are unlikely to have 100 idle attorneys available for dedicated review of initial filings. The DOJ and FTC have fewer than 800 attorney and economist staff in total. The Proposed Rule would require one-eighth of all activity at the Agencies to be devoted to reviewing the additional information. Of course, as noted earlier, the Agencies may be unlikely to actually review the additional information in the majority of cases. If so, the costs on the Agencies would be lower but the cost burden on filing parties would be no lower for preparation of expanded filings the Agencies may not intend to review (i.e., there would be substantial cost to filers with no possible benefit to the Agencies if they do not even review the information).

C. Costs to the Economy Exceed the Direct Monetary Costs

55. The analysis of the costs and benefits of the Proposed Rule has focused on the monetary burden. However, one must also consider the broader costs on innovation and entrepreneurial activity. The expectation that any transaction would entail greater cost and uncertainty can lead business to rethink potential transactions. When once a transaction would have been beneficial, it would now be fraught with risk and costs. The filing cost analysis ignores that the Proposed Rule's additional burdens to the economy dissuade potential transactions from occurring.

56. The additional information burden of the Proposed Rule will result in longer times preparing the more complex filings ultimately delaying transactions. The monetary cost analysis ignores the cost of added regulatory approval delay to the firms in the transaction. For example, the parties must delay the realization of business synergies and improvements. The delay is not only from added filing preparation but also the evaluation period after filing. Currently, there is a 30-day statutory requirement, but the additional data burdens may lead to more extensions beyond the initial 30 days

[42] This assumes the average Agency attorney reviews filings for roughly 1,800 hours per year.

than there otherwise would be. Delays could kill deals and lead parties to abandon transactions.[43]

57. The Proposed Rule will result in increased uncertainty in several ways. An advisory committee to the DOJ has identified that regulatory delays such as additional filing requirements create uncertainty because "delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff."[44] Moreover, there is additional uncertainty for potential filers arising from the Agencies turning away from the decades of practice under the current rules. Regulatory uncertainty arising from new burdens imposed by the Proposed Rule can have substantial impact on the level of merger and acquisitions activity. For example, a 2018 paper published in the Journal of Financial Economics found that a one standard deviation increase in regulatory policy uncertainty is associated with a 6.6 percent decrease in aggregate M&A deal value and a 3.9 percent decrease in the number of transactions during the next 12 months.[45] Other academic papers have found similar results.[46] Of course, the effects may be greater if they are longer lasting. The Proposed Rule is not just a temporary increase in uncertainty.

58. Mergers and acquisitions have been shown to improve efficiency and contribute significantly to economic output. For example, using the plant-level data, a 2013 paper published in the Journal of Finance shows that acquired plants gain in productivity more than the non-acquired plants.[47] The gain in productivity is higher

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[43] For example, a DOJ-created advisory committee reported that "Mergers are almost always time sensitive; delays may prove fatal to a transaction…" See International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust, 2000, Chapter 3, https://www.justice.gov/atr/final-report

[44] See International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust, 2000, Chapter 3, https://www.justice.gov/atr/final-report

[45] Bonaime, A, Gulen, H., and Ion, M. Does policy uncertainty affect mergers and acquisitions? Journal of Financial Economics, 129(3), September 2018, 531-558.

[46] For example, a 2016 paper in the Review of Financial Studies found a strong negative link between various measures of uncertainty and M&A deal activity. One key source of this uncertainty arises from market changes occurring during delays in consummating the transaction. V. Bhagwat et al., The real effects of uncertainty on merger activity, Review of Financial Studies, 29(11), 2016, 3000-3034.

[47] Maksimovic, V., Phillips, G., & Yang, L. "Private and public merger waves." *The Journal of Finance*, 2013, 68(5), 2177-2217.

when there are more frequent M&A transactions and when the buyer's valuation is high. Similarly, research analyzing changing ownership of U.S. power plants found that acquisitions reallocate assets to more productive uses (high productivity firms buy under-performing assets from low productivity firms and then make the acquired assets more productive after acquisition).[48] Another 2021 paper published in the Review of Economic Studies shows that the mergers and acquisitions contribute 14% to the overall output of the economy and 4% to the overall consumption in the economy.[49] This contribution is driven by the reallocation of resources and new entrepreneurship.

59. Mergers and acquisitions have also been shown to incentivize R&D spending and innovation. For example, a 2013 paper published in the Review of Financial Studies shows that successful innovation makes smaller firms attractive acquisition targets.[50] Thus, potential M&A activity provides incentives to small firms to invest in R&D and innovate more when they know they can later sell out to larger firms.

60. Another study published by the US Chamber of Commerce and NERA Economic Consulting found no evidence that merger activity leads to reduced innovative activity.[51] In fact, the study found a strong positive and statistically significant relationship where mergers cause, to a great extent, subsequent increased R&D expenditure and patent applications.

61. Given the importance of M&A activity to the economy, potential delay and discouragement of acquisition transactions caused by the combination of increased monetary compliance as well as indirect costs (such as opportunity costs of

[48] Mert Demirer, Ömer Karaduman, "Do Mergers and Acquisitions Improve Efficiency: Evidence from Power Plants." Working paper, January 13, 2022.

[49] David, J. M. "The aggregate implications of mergers and acquisitions." *The Review of Economic Studies*, 2021, 88(4), 1796-1830.

[50] Phillips, G. M., & Zhdanov, A. "R&D and the incentives from merger and acquisition activity." *The Review of Financial Studies*, 2013, 26(1), 34-78.

[51] Kulick, R, & Card, A. "Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications." NERA Economic Consulting and U.S. Chamber of Commerce, February 2023, available at https://www.uschamber.com/finance/antitrust/mergers-industries-and-innovation-evidence-from-r-d-expenditure-and-patent-applications.

executives' time, potential transaction delay, and additional regulatory uncertainty) would, to the extent M&A activity were curtailed at the margin, adversely affect innovation, entrepreneurship, and the economy in general. Event studies of acquisition announcements have shown that acquisitions result in statistically significant increases in the combined market value of the acquirer and target.[52] Thus, any discouragement of transactions would lead to a significant loss of value creation.

62. Even where M&A activity is not curtailed, potential delay may have significant economic costs. Given that many transactions are pursued for the purposes of realization of efficiencies or productivity improvements, any delays would lead to some lost post-acquisition gains. For example, if an acquisition were expected to result in post-closing cost savings of $12 million per year, a one-month delay would result in the loss of $1 million in costs that could have been avoided.

63. The Agencies do not present any analysis of countervailing benefits to competition from the Proposed Rule. As noted elsewhere, the Agencies do not present evidence that the current filing fails to screen transactions where competitive concerns should be raised. They thus have not provided a systematic rationale for why a more extensive information burden should be imposed on all transactions to result in the same challenges otherwise captured by the current VAL and Second Request procedure.

1. Burdens to Private Equity Investors

64. The US private equity (PE) sector provides economic benefits to the US economy both directly and indirectly through backing businesses. In 2022, the US PE sector directly generated $1.7 trillion of US Gross Domestic Product ("GDP"), which is about 6.5% of the total US GDP. The sector directly employed 12 million workers paying them $1 trillion in wages and benefits in 2022. The US PE sector provided indirect benefits to the US economy through backing mostly small businesses. In 2022, PE-backed small businesses employed a total of 1.4 million workers in the US.

[52] Robert F. Bruner, "Does M&A Pay? A Survey of Evidence for the Decision-Maker," *Journal of Applied Finance*, Spring/Summer 2002, 48-68.

These workers earned $135 billion in wages and benefits and generated a total of $240 billion of US GDP in 2022.[53]

65. PE investment helps in increasing competition in the marketplace and improve consumer welfare. For example, PE often acquires carveouts (non-core assets of a company which are under-utilized and/or must be divested in order for other mergers to be approved by regulators). PE investments in carveouts often create independent companies with new management, and steps in to fund and grow the carveout.[54] Funding the carveouts has resulted in creation of over 4,000 new companies and an investment of over $700 billion over the past decade.[55]

66. Another example is add-on acquisitions which can create significant efficiency gains in cost-intensive industries. Evidence suggests that such strategies are concentrated in more fragmented and competitive industries such as insurance where more than 400,000 brokers and agencies compete. As a result, it is less likely that consolidation will lead to anticompetitive effects in those industries. In those add-on acquisitions, the PE investments lower costs and improves the operations of the portfolio company which benefits all stakeholders including consumers.[56] The add-on acquisitions, in particular, will suffer from informational burden under the additional information requests given the volume of smaller transactions (many of which might previously have been below the reporting threshold) for such a PE strategy.

67. The reallocation of resources via PE investment has been shown to improve innovation. One study using the data for 19 industries in 52 countries shows that PE investment improves productivity, employment, and capital expenditures of competing public firms in the same industry.[57] Another study using data from PE

[53] Ernst and Young, Economic contribution of the US private equity sector in 2022, Prepared for the American Investment Council, April 2023.

[54] AIC and Pitchbook "Diamonds in the Rough. How PE breathes new life into unloved businesses," September 2022.

[55] AIC and Pitchbook "Diamonds in the Rough. How PE breathes new life into unloved businesses," September 2022.

[56] AIC and Pitchbook, "Building Competition. How buy-and-build helps the American economy," February 2023.

[57] Aldatmaz, S., & Brown, G. W. (2020). Private equity in the global economy: Evidence on industry spillovers. Journal of Corporate Finance, 60, 101524.

backed leveraged buyouts in UK shows that PE investment increases innovative output (measured by patents) after the deal.[58]

68. Venture capital (VC) is a form of PE. Unlike PE in general, VC tends to invest in smaller companies and entrepreneurs at an earlier stage in development. Such companies are often not yet profitable or have established sales. VC investors can help small companies minimize risk and avoid the mistakes of many startups. The VC investors often actively lend experience and help these small companies find opportunities.

69. Certain of the additional information requirements in the proposed rulemaking will be particularly burdensome to PE and VC firms, as described below. The additional burdens may discourage some PE and VC activity. This may be particularly the case for funds with larger portfolios of smaller targets, general partners managing multiple investment funds, or newly emerging funds with limited back-office infrastructure to track and manage the additional information disclosure requirements. To the extent that smaller, emerging investment managers are disproportionately burdened by the expanded disclosure requirements, competition within the fund management industry may be negatively impacted. If smaller fund managers are more likely to forego transactions, larger fund managers will have less competition for its investment choices and would be able to attract capital from investors more easily with any diminished capability for smaller or emerging managers to compete.

2. Officers, Directors, and Board Observers

70. The NPRM proposes that all proposed officers, directors, and board observers would be required to disclose all other entities for which each individual had served as an officer, director, or board observer within two years of filing.[59] The Agencies justify this request for purposes of knowing existing, prior, or potential interlocking directorates. Such information is likely to be a significant burden to PE and VC

[58] Amess, K., Stiebale, J., & Wright, M. (2016). The impact of private equity on firms′ patenting activity. European Economic Review, 86, 147-160.

[59] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42189.

managers, whose members often serve as directors on many firms within the investment firm's portfolio, and whose board memberships may change rapidly with changes in a fund's portfolio holdings.

3. **Disclosure of Limited Partners**

71. The NPRM proposes to require disclosure of limited partners with between 5% and 50% interest in funds making reportable acquisitions.[60] The Agencies' justification for this requirement is that "after more than a decade, the Commission now believes it is inappropriate to make generalizations regarding the role of investors in limited partnerships structures" (where, previously, it was understood that limited partners had no control over operations of a fund or its portfolio companies). Further, the Agencies argue limited partner information "can provide valuable information about co-investors and lead to identification of potentially problematic overlapping investments resulting from the transaction that could violate Section 7."

72. Notably, the Agencies do not argue that limited partners exercise any control over operations of the fund or its portfolio companies, and arguably by definition, limited partners are precluded from exercising any operational control. This information requirement will be burdensome to funds which may have significant confidentiality agreements in place with investors, and where the potential of such disclosures may discourage certain investors from making investments that would lead to exceeding the 5% reporting threshold, thus making fundraising more difficult. Furthermore, the Agencies have not demonstrated that there has been any failure to identify "potentially problematic overlapping investments" through Second Requests or other means of obtaining information after an initial filing.

VII. CONCLUSION

73. The Proposed Rule will lead to substantial additional direct monetary costs for HSR filers that could total over $2 billion. These additional costs will be borne by all filers, not just the very small fraction the Agencies identify each year for further investigation. The Proposed Rule will also lead to further costs to the economy

[60] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 at 42188.

beyond the direct monetary costs, including burdens on innovation and entrepreneurial activity as well as additional costs on the Agencies themselves to review the new information. The benefits to consumers are likely to be limited due to the small percentage of filings that progress to a preliminary investigation, let alone those that ultimately result in an enforcement action. The Agencies have not demonstrated there will be benefits to consumers in excess of the additional direct monetary and other economic burdens imposed.



S.P. Kothari

September 26, 2023

Exhibit 7

U.S. Chamber of Commerce

U.S. Chamber HSR/Merger Guides Practitioner Survey

Background Questions

1) Are you involved in submitting proposed transactions as an

(a) in-house counsel -41%

(b) external counsel -58%

(c) economist or other professional -1%

2) Are you a former FTC or DOJ official having worked at either agency in a capacity where you were involved in merger reviews?

Yes -36%
No - 64%

If yes, please identify whether you served as a...(indicate all that apply).

(a) staff lawyer, -44%

(b) mid-level manager, such as section chief, assistant director, or deputy assistant director, -36%

(c) senior manager, such as a deputy director, director, or above -20%

If yes, please identify whether your service coincided with the following presidential administrations...(indicate all that apply).

(1) George H. W. Bush; 7%

(2) Bill Clinton; 33%

(3) George W. Bush; 53%

(4) Barack Obama; 67%

(5) Donald Trump; 33%

(6) Joe Biden; 20%

3) Over your career how many proposed transactions have you been in some capacity involved in?

(a) 1-10 -3%
(b) 11-50 -19%
(c) 51-100 -19%
(d) more than 100 -59%

HSR Proposed Rule

4) As you answer the below questions about time and cost to an HSR filing, what size transaction are you generally thinking about?

Smaller transaction, less than $500 million – 30%
Medium Sized Transaction, between $500 million and $2 billion –51%
Larger deals, more than $2 billion -19%

5) For the current form: How many hours, on average, do a company's internal personnel presently spend preparing information to submit a transaction as part of its initial filing?

Average 30.4 hours

6) For the current form: *How many* ***hours,*** *on average, do merging parties* ***outside counsel*** *presently spend preparing a submission for a transaction as part of an initial filing?*

Average 54.3 hours

7) For the current form: *How much does it* ***cost*** *a company, on average, to prepare information to submit a transaction as part of its initial filing in terms of external costs, such as attorney fees and economic consulting fees?*

Average $79,569

8) For the current form: *How many days, on average, does it take a company to prepare information to submit a transaction as part of its initial filing?*

Average 10.7 days

With respect to transactions that would be submitted for review under the proposed revised HSR form, and in your best estimation,

9) How many hours, on average, would a company's internal personnel spend preparing information to submit a transaction as part of its initial filing?

Average 131.9 hours

10) How many hours, on average, would merging parties' outside counsel spend preparing a submission for a transaction as part of an initial filing?

Average 194.6hours

11) How much would it cost a company, on average, to prepare information to submit a transaction as part of its initial filing in terms of external costs, such as attorney fees and economic consulting?

Average $313,828

12) How many days, on average, would it take a company to prepare information to submit a transaction as part of its initial filing?

Average 32.7 days

13) How much is the average billable hour for outside counsel paid to prepare a filing?

Average $936

14) Do you believe deficiencies in the current HSR form are in fact allowing competitively problematic deals above the HSR threshold to escape antitrust review?

Yes – 12%
No - 88%

> ***If yes, what changes to the current HSR form would help identify such deals?***
>
> Support expressed for more information gathered where there are overlaps

15) Do you expect because of the proposed changes to the form that even the most basic transaction will now require the hiring of antitrust expertise?

Yes – 99%
No – 1%

16) How would you say the new form will impact the timeliness of the merger process?

Timeliness Highly Improved -0%
Timeliness Improve - 0%
No Change - 4.4%
Timeliness Decreased – 7.4%
Timeliness Adversely Impacted – 88.2%

17) Do you believe the Antitrust Division of the Department of Justice and the Federal Trade Commission effectively use voluntary access letters to collect additional information outside of issuing a formal second request?

Yes – 90%
No – 10%

> ***Please elaborate on your response***

Lots of praise for the role VALs play. Some criticism that they are overused or don't seek information that is that useful. Also views that they are used to craft second request.

18) Under the proposed form, are you concerned about the agencies potentially "bouncing" a filing and having to engage in a lengthy EU-style iterative process to "perfect" filings?

Yes - 96%
No - 4%

19) Please add any additional comments you may have regarding the proposed form.

- Agencies seem to think the parties have information that is not readily available.
- Many of the changes seem to be directed at private equity, minority or passive investments, without clear evidence to support concerns.
- Changes are subjective on information sought, ripe for abuse
- If there is a problem, why are the agencies not challenging consummate deals
- Massively excessive/unnecessary
- Need iterative approach, overcorrection on the part of the agencies
- Chill M&A, try to move the US to preapproval like Europe in contravention to HSR Act
- Creates lots of uncertainty to file, unable to make a complete, perfect filing
- Prolong HSR process

Effect of the **New Form** on the **Agency** Review

This portion only completed by those with agency experience

20) With the current form, how many hours, on average, do agency staff spend reviewing information submitted by transacting parties as part of their initial filing (in your best estimation)?

Average 10.9 hours

21) With the proposed form, how many hours, on average, would agency staff spend reviewing information submitted by transacting parties as part of their initial filing (in your best estimation)?

Average 35.9 hours

22) If the proposed form were adopted, and at the current staffing levels, would the agencies have the capability of completing their initial review within the statutory time frame?

Yes - 30%
No - 70%

If no:

If the current staffing levels remain the same, how long would the statutory time frame have to be extended to allow agencies to complete their initial review?

An additional roughly 60 days

Alternately, if the statutory time frame remains the same, how much would agency staffing levels have to increase to allow the agencies to complete their review within the allotted time? (Please express your answer as a percentage increase of staff dedicated to the task of reviewing incoming merger notifications).

Average answer roughly doubling staff

23) On balance, do you support the proposed new form?

Yes – 3%
No – 97%

Merger Guidelines

24) In your view, do the proposed guidelines accurately reflect the current state of antitrust law?

Strongly Agree – 0%
Agree – 4.8%
Neither agree nor disagree – 8.1%
Disagree – 37.1%
Strongly disagree – 50%

25) In your view, do the proposed guidelines appropriately rely upon economic analysis?

Grounded in Sound Economic Analysis - 0%
Mostly Aligned with Economic Analysis – 1.6%
Moderate Integration of Economic Analysis – 14.5%
Partially Divorced from Economic Analysis – 43.5%
Divorced from Economic Analysis – 40.3%

26) Thinking about this draft guidance in relationship to the past guidance, how are these proposed guidelines likely to guide companies and practitioners in determining how to structure and whether to proceed with transactions?

More Effective Guidance – 0%
Slightly Improved Guidance – 11.6%
Similar Guidance – 13%
Some Decrease in Guidance Quality – 29%
Significant Departure from Previous Guidance – 46.4%

27) In your view, how will the proposed guidelines be interpreted by the courts?

Likely to Reject or Ignore – 26.1%
Limited Relevance – 49.3%
Moderate Influence – 18.8%
Noticeable Impact – 4.3%
Strong Influence – 1.4%

28) How likely are you to agree with the following statement:

> ***In the United States over the past 40 years under previous administration, antitrust has been well insulated from political agendas.***
>
> Strongly Agree – 17.6%
> Agree – 52.9%
> Neutral – 17.6%
> Disagree – 10.3%
> Strongly Disagree – 1.5%
>
> ***The proposed guidance is another example of an increasingly politicized approach to antitrust enforcement.***
>
> Strongly Agree – 53.6%
> Agree – 31.9%
> Neutral – 7.2%
> Disagree – 5.8%
> Strongly Disagree – 1.4%

29) In your view, if implemented, the proposed guidelines would likely do which of the following:

Better promote the interests of consumers, investment, innovation and economic growth by effectively weeding out problematic mergers. -7%

Reduce the focus on the consumer, inject uncertainty into merger policy, and increase the role of government in deciding the fate of mergers, including those that present no serious threat to competition. -93%

30) Please add any written comments you may have regarding to the proposed guidelines.

Only a small handful of responses were provided. Responses were in opposition to the guidelines, the dated cases that are cited, pointing out the courts have already rejected them in the cases that have been brought, and observations that the guidelines reflect what the current leadership at DOJ/FTC want to believe.

31) Finally, with respect to both the proposed form and the proposed revised merger guidelines, do you believe that they represent a political agenda to chill <u>all</u> merger activity?

Yes – 81%
No – 19%

Exhibit 8

Dechert LLP Comments:

Proposed Amendments to the Premerger Notification Rules under the HSR Act

16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules
Project No. P239300

September 25, 2023

Dechert LLP

TABLE OF CONTENTS

Introduction 1

I. Several Proposals Exceed the Agencies' Authority or Lack a Sufficient Basis under the HSR Act 1

A. Officers, Directors, and Board Observers 1

B. Labor Markets Information 3

II. The Expanded Document Requirements Are Excessive and Vague 5

A. Supervisory Deal Team Leads 5

B. Draft Documents 6

C. Certification 7

III. New Disclosure Requirements Would Chill Private Capital Markets, Harming Small Businesses, Workers, and Consumers 8

A. Identification of Limited Partners 9

B. Increased Disclosure of Other Minority Holders 11

C. Privacy Concerns for Fund Investors 12

D. The Burdens of Additional Information Gathering Will Fall Disproportionately On Private Investment Firms 13

E. Impact on Small Businesses, Workers, and Consumers 13

Conclusion 15

Introduction

Dechert LLP submits these comments to the proposed rulemaking on Hart-Scott-Rodino ("HSR") premerger notification changes, announced by the U.S. Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, the "agencies") on June 27, 2023.[1] The views expressed herein are those of Dechert based on our experience representing a broad range of clients; however, these comments are not being submitted on behalf of any company or organization.

Dechert commends the agencies on their efforts to modernize the HSR filing process. However, we believe that some of the proposals exceed the agencies' authority to implement rules pursuant to the HSR Act to assess the competitive impact of reported transactions. Furthermore, many of the proposals in the Notice of Proposed Rulemaking create significant additional burdens for all filers, including parties to transactions that pose no harm to competition. Certain of the current proposals are too vague, overbroad, or lacking in probative value. Finally, the proposals—particularly those that appear targeted at private investment firms—are likely to chill private investment across the board, potentially harming small businesses, workers, and consumers.

I. Several Proposals Exceed the Agencies' Authority or Lack a Sufficient Basis under the HSR Act

The agencies are seeking to add substantial reporting requirements to the HSR form that exceed the agencies' authority under the HSR Act and/or lack a sufficient basis under the Act. These new obligations relate to board interlocks and labor issues that exceed the scope of the HSR Act. With these proposed requirements, the agencies seek information that goes not to whether a transaction may violate Section 7 – the proper focus under the HSR Act – but rather to whether the merging companies may be in violation of the antitrust laws more generally for conduct separate from the reported transaction.

A. Officers, Directors, and Board Observers

The proposed rules include a new requirement for merging companies to identify all current officers, directors, and board observers for each entity within the acquiring person and the acquired entity, as well as those who have served in the applicable position within the past two years.[2] This proposal also applies to individuals exercising similar functions in unincorporated entities.[3] In addition, for each officer, director, and board observer identified, the merging companies are required to identify all other entities for which the individual serves, or has served within the last two years, as an officer, director, or board observer.[4]

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[1] Fed. Trade Comm'n, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review* (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[2] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42212 (June 29, 2023).

[3] *Id.*

[4] *Id.*

D. The Burdens of Additional Information Gathering Will Fall Disproportionately On Private Investment Firms

Many of the additional burdens that would be imposed on filing parties across the board if the agencies' proposals are adopted will only be compounded when the filer holds interests in many companies across a variety of industries, as is often case when the acquiring person is a financial sponsor like a private investment fund. Because of the nature of their business, such filers must rely on personnel at the companies they invest in to gather the required information. The addition of new information requirements that apply to all companies within an acquiring person – such as detailed director and officer information going back two years, or labor markets data as discussed above– not only imposes significant additional burden and costs on such filers but are overbroad and unnecessary to the analysis of the competitive impact of the transactions at hand.

Take, for example, the proposal that each filing party provide an exhaustive list of alternative NAICS codes that could apply to each product or service offered, even when there is no overlap. This proposed requirement will be extremely difficult to comply with when relying on personnel at various operating companies that have varying familiarity with the NAICS system. The agencies are underestimating the additional burdens implicated by such changes in the aggregate. Moreover, there are more efficient ways of gathering information that would be relevant to the competitive analysis of the notified transaction. For example, if the concern is that the agencies are missing potential overlaps because parties are selecting different codes for competing products, that concern can be more effectively addressed in the new Horizontal Overlap Narrative that the agencies propose to require.

Here again it is key to remember that the proposed rules would impose broad disclosure requirements regardless of whether the requested information is relevant to any specific antitrust concern. This imposes substantial and unwarranted new costs on private investment firms with broader investment portfolios that are likely to raise fewer antitrust concerns. These up-front costs are likely to discourage investment by private investment firms in smaller businesses with less upside potential, and they also may make private investment firms that raise no potential competition concerns appear less favorable as buyers than strategic buyers that can more quickly collect the information required to complete an HSR filing.

E. Impact on Small Businesses, Workers, and Consumers

The proposed rules for heightened disclosure of limited partner and minority holder interests purport to be evenhanded. The agencies' proposal depicts the changes as just an effort "to harmonize the requirement for limited partnerships with the requirements for limited liability companies and corporations."[61] But the proposed rules fail to consider how expansive disclosure requirements will handicap the smaller private investment firms that cannot guarantee their investors' privacy as compared with big public companies and large investment firms where individual investors are less likely to cross the five percent threshold requiring disclosure. The proposed rules also fail to address the significantly higher burdens that would be imposed on private investment firms than other businesses by broad new disclosure requirements across the

[61] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42188.

board. These changes will impact the ability of smaller private investment firms to raise funding which, in turn, will have a negative impact on small businesses, workers, and consumers.

To understand the impact of these changes, it is first necessary to understand the role that private capital markets play in support of small businesses.[62] Of course, all businesses require capital to sustain and grow their operations.[63] Yet small businesses and large businesses obtain capital in different ways. At a high level, "small businesses generally only have access to private equity and debt markets, whereas large businesses have access to public markets."[64] This distinction is key. Public companies can raise capital from public securities offerings; by contrast, small businesses obtain external finance "almost exclusively" from private markets.[65] Public companies similarly have access to bank or commercial lending, whereas "bank or commercial finance company lending would typically not be available to small businesses until they achieve a level of production where their balance sheets reflect substantial tangible business assets that might be pledged as collateral, such as accounts receivable, inventory, and equipment."[66] Private capital markets can be key to helping these small businesses survive and thrive until they have matured to the point where public capital markets and commercial finance options are available. Chilling private capital markets will make it more difficult for small businesses to keep their doors open.

It is also important to understand what is at stake. Small businesses collectively contribute much to the modern economy. In brief: "Small businesses are an essential part of the American economy, and core to the financial security of our middle class. There are 56 million workers employed at firms with fewer than 50 employees, representing 45 percent of all private-sector jobs in the first quarter of 2022."[67] Small businesses are even more critical in rural counties, where they operate 84.8 percent of establishments and account for 54.3 percent of employment.[68] The funding that private investment firms are able to provide can allow companies to grow organically by acquiring new equipment, investing in new technologies, or hiring more employees. In some cases, private investment firms may ensure continuity for

---

[62] The precise definition of small business may vary by industry. *See generally* U.S. Small Business Admin., *Table of Size Standards* (Mar. 17, 2023) (providing small business definitions by NAICS code based on firm revenue and employment ranging from $1 million to over $40 million and 100 to 1,500 employees), https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.

[63] Michael J. McManus, *Dissecting Access to Capital*, U.S. Small Business Admin. (Sep. 2017), https://advocacy.sba.gov/wp-content/uploads/2019/06/Capital_Access_Fact_Sheet_FINAL.pdf.

[64] Allen N. Berger & Gregory F. Udell, *The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle*, 22 J. OF BANKING & FIN. 613, 626 (1998).

[65] *Id.*

[66] *Id.* at 623-24.

[67] White House, *Investing in America Means Investing in America's Small Businesses* (May 1, 2023), https://www.whitehouse.gov/cea/written-materials/2023/05/01/investing-in-small-businesses/.

[68] Daniel Wilmoth, Ph.D., *Small Business Facts: Small Business in Rural Areas*, U.S. Small Business Admin. (Aug. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/08/Fact-Sheet-Small-Business-in-Rural-Areas-508c.pdf.

founder-led businesses. Private investment firms can be a vital lifeline to keeping these businesses operating.

Consumers benefit from private capital markets as well. Private investment firms contribute to the growth of smaller businesses, delivering more competition that benefits consumers. In addition, private capital markets are more willing to invest capital in so-called "[h]igh risk-high growth" startups and businesses with high upfront development costs that drive innovation that benefits consumers and drives further competition.[69]

Private investment firms can be particularly impactful in helping put small businesses on an even playing field with larger public companies. "Unlike publicly traded firms," one recent study notes, "private firms cannot generally issue equity to raise capital needed to finance investment and may become financially constrained when they reach their debt capacities."[70] That study found "consistent evidence of a large and rapid increase in sales growth after private firm buyouts," explaining that "relaxing financing constraints and facilitating growth are an important source of value creation in private firm buyouts."[71] In other words, by providing a capital bridge to small businesses, private investment firms enable small businesses to catch up to big businesses benefiting from better access to capital.

The agencies should keep in mind these benefits from private capital markets when considering imposing any heightened disclosure requirements for limited partners and minority holders. Small businesses already find it difficult enough to obtain necessary capital today. Pushing privacy-conscious investors to public companies or larger investment firms does not serve the interests of small businesses or their workers, nor does it further the competition and innovation that ultimately benefits consumers.

Conclusion

We hope that the agencies will thoughtfully consider the concerns raised in these comments. In our view, many of the agencies' proposals require significant refinement for the HSR process to function as intended rather than become a veritable minefield in the eyes of even the most well-intentioned filing parties. As the agencies recognize, "[i]nformation submitted as part of the HSR premerger notification process is a key starting point, and the information contained in the HSR Filing should be sufficient to allow the agencies to conduct a thorough but quick evaluation of whether the proposed transaction is one that requires more in-depth investigation through the issuance of Second Requests."[72] The level of proposed disclosure is unnecessary for carrying out the purposes of the HSR Act.

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[69] Berger & Udell, *supra* note 64 at 615, 622-24.

[70] Jonathan B. Cohn, Edith S. Hotchkiss, & Erin M. Towery, *Sources of Value Creation in Private Equity Buyouts of Private Firms*, REV. OF FIN. 257, 283 (2022)

[71] *Id.* at 259.

[72] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42179.

Exhibit 9

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VIA ELECTRONIC FILING

September 21, 2023

April J. Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave NW
Suite CC-5610 (Annex C)
Washington DC 20580

Re: **16 C.F.R. Parts 801-803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300**

Dear Secretary Tabor:

Foley & Lardner LLP ("Foley & Lardner" or "we") is pleased to submit the following comments to the Federal Trade Commission (the "Commission" and, together with the Department of Justice Antitrust Division, the "Agencies'") regarding the proposed revisions to the Hart-Scott-Rodino ("HSR") Coverage, Exemption, and Transmittal Rules, Project No. P239300 (the "Proposed Rulemaking"), published in the *Federal Register* on June 29, 2023 (the "NPRM").[1]

Foley & Lardner is a law firm with over 1,000 attorneys across four countries, including 22 offices in the United States. In May 2023, *The American Lawyer* reported Foley & Lardner to be the 47th largest law firm in the United States based on revenue. Among many other services, Foley & Lardner's Antitrust & Competition practice group routinely prepares premerger notification filings for clients under the HSR Act. We also regularly represent clients in Agency reviews of mergers and acquisitions, both during initial thirty-day HSR waiting periods as well as in more fulsome, "Second Request" investigations. Our clients have included public and private companies, nonprofits, insurance carriers, startups, natural persons, trusts, family offices, and private equity funds, both foreign and domestic. We have particular focuses on the manufacturing, healthcare, life sciences, innovative technology, and energy sectors.

We begin with some general observations about the HSR Act before we turn to our specific comments on the Proposed Rulemaking. For the Agencies' benefit, our specific comments follow the order of the "Proposed Instructions Outline" sections of the NPRM and the subsections within.[2] Finally, these comments are solely our own. No client has engaged or compensated us to

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178 (June 29, 2023).

[2] 88 Fed. Reg. at 42,184-86.

prepare these comments, and the views expressed herein do not necessarily reflect those of our clients.

1. Opening Comments

We appreciate that the Agencies are undertaking a comprehensive review of the HSR Act's premerger filing requirements. There is no doubt that the HSR system can be improved, and we are grateful that the Proposed Rulemaking finds ways to reduce certain filing burdens, most notably by streamlining the revenue reporting requirements.

Before we turn to our specific comments, we offer three observations about the HSR premerger notification process generally. First, the current HSR system does an exceptionally good job of providing the Agencies the information they need to screen for potentially anticompetitive mergers. The NPRM does not identify a single transaction whose competitive effects the Agencies may have ever missed due to any shortcomings in the current HSR system. This is not surprising, because false negatives under the current HSR system are exceedingly rare. Dating back to 2000, we are aware of only seven HSR-reportable transactions the Agencies have challenged after the expiration of the waiting period.[3] In four of those seven transactions, notwithstanding the expiration of the HSR waiting period, the Agencies successfully identified potential competitive issues and opened an investigation before the acquisition closed.[4] In the fifth transaction, the buyer's HSR form allegedly omitted required documents and thus was deficient, prompting a $4 million civil penalty.[5] In the sixth transaction—a merger between hospitals located seven miles from each other—the geographic overlap would have been self-evident from the HSR filing, but then-prevailing economic theory predicted no competitive effects. Finally, in the seventh case, two large merging parties had a $20 million overlap that may have slipped through the HSR cracks. Therefore, dating back to 2000, we are aware of only a single instance where a requirement to provide additional information in the HSR filing might conceivably have made a difference to the

[3] The transactions that we are aware of are *Facebook/Instagram*, *Facebook/WhatsApp*, *Chicago Bridge & Iron/Pitt-Des Moines*, *Deere/Precision Planting*, *Hearst/Medi-Span*, *Evanston Northwestern/ENH Medical*, and *Parker-Hannifin/CLARCOR*.

[4] In *Facebook/Instagram*, the Commission conducted a Second Request, but ultimately allowed the transaction to close. In *Facebook/WhatsApp*, the Commission reportedly conducted a preliminary investigation, leading to a warning letter from the Bureau of Consumer Protection. In *Chicago Bridge & Iron/Pitt-Des Moines*, the Commission opened its investigation approximately one week after the expiration of the HSR waiting period, before the transaction had closed. And in *Deere/Precision Planting*, the Department of Justice challenged the transaction before it had closed, and the parties ultimately abandoned the transaction.

[5] In *Hearst/Medi-Span*, the acquiring entity allegedly failed to submit relevant Item 4(c) documents and subsequently provided an amended HSR filing to include the required documents. The acquiring person agreed to pay a civil penalty of $4 million and ultimately divested the acquired business and paid $19 million in disgorgement.

Agencies. But there have been 39,962 Second Request-eligible HSR filings made since FY2000.[6] Thus, by our count, the current HSR system's "false negative" rate is just 0.0025%.

Second, for all its success in giving the Agencies an effective screen, the overwhelming majority of transactions subject to HSR review pose no competitive issues whatsoever. In FY2021, the most recent year for which data is publicly available, the Agencies received HSR filings for 3,413 Second Request-eligible transactions.[7] Out of these, the Agencies issued Second Requests in 65—a rate of 1.9%. Over a longer timespan, covering the ten-year period from FY2012 through FY2021, the Agencies received a total of 18,873 Second Request-eligible HSR filings, and issued Second Requests in 518 of them—a rate of 2.7%.[8] Thus, as Chair Khan put it in a recent interview, "we're really talking about a very, very, very, *very* small slice of overall deal activity that ends up being affected by merger investigations and merger enforcement."[9] Also notably, out of these same 18,873 Second Request-eligible HSR filings from FY2012-FY2021, the Agencies granted "early termination" in 9,682 of them—a rate of 51%, which undoubtedly would have been higher but for the current moratorium on early termination grants. In short, any effort the Agencies undertake to reform the HSR reporting requirements must recognize the reality that the overwhelming majority (over 97%) of HSR-reportable transactions are determined not to warrant an in-depth investigation, and that a majority (at least 51%) are so plainly nonproblematic that the Agencies can clear them on cursory review.

Third, some parts of the current HSR form can be very burdensome to address. These filings sometimes take *hundreds* of hours to prepare. But with some hard work and the assistance of experienced HSR counsel, the current HSR form can generally be completed without jeopardizing the timing or success of the transaction. This is important, because a large number of HSR filings are made by relatively small companies. Companies with as little as $22.3 million in total assets can be required to make HSR filings.[10] HSR filings are routinely made by companies in bankruptcy,[11] by nonprofits,[12] and by myriad companies with limited budgets and a need to close their deal quickly. HSR filings can even be required in transactions like open-market purchases, where the acquired

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[6] The historical numbers provided in these comments are taken from "Appendix A" to the Agencies' *Hart-Scott-Rodino Annual Reports* to Congress for Fiscal Years 2021, 2011, and 2002.

[7] A "Second Request-eligible" HSR filing means an HSR filing where an Agency is authorized to request additional information. For example, HSR filings for transactions that were subsequently found to be non-reportable are excluded from this category.

[8] This rate has been remarkably consistent over time. Measured back to FY2000, the Agencies have received a total of 39,692 Second Request-eligible HSR filings, but have issued Second Requests in 1,139 of them—a rate of 2.9%.

[9] *See* "FTC chair Lina Khan discusses need for regulations on big business," CBS NEWS (July 27, 2003), at 6:30, *available at* https://www.youtube.com/watch?v=8R9H7Pf6bKI.

[10] *See* 15 U.S.C. § 18a(a)(2)(B); Revised Jurisdictional Thresholds, 88 Fed. Reg. 5,004 (Jan. 26, 2023).

[11] *See generally* 11 U.S.C. § 363(b)(2).

[12] *See generally* 16 C.F.R. § 801.2(f)(3).

side may otherwise have no involvement in the transaction, may not benefit from the transaction, and only learns of its obligation to file HSR upon being notified by the buyer.[13] All of these companies need the HSR process to be timely, efficient, and achievable without unnecessarily bringing large numbers of people "under the tent" for an important, nonpublic deal.[14]

In sum, where the current HSR system falls short is not in its 0.0025% rate of false negatives, but in its 97% rate of false positives—the overwhelming majority of HSR-reportable transactions that are either competitively harmless or affirmatively procompetitive, but nevertheless are burdened by HSR's costs. We respectfully submit that the Agencies should focus any HSR reform efforts on reducing these false positives. One such area on which to focus is the Agencies' invitation to "exempt, from the requirements of [the HSR Act], classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws."[15] The Agencies also should resume the heretofore longstanding practice of granting early termination for transactions the Agencies determine to be nonproblematic.[16]

Instead, the NPRM proposes to expand the burdens of all HSR filings by a factor of almost four (in the Commission's estimate, which we consider low). Therefore, while we see the potential value of some elements of the Proposed Rulemaking, there are many parts that would significantly increase the complexity, expense, and burden of HSR filings, requiring information that no reasonable company maintains in the ordinary course of business, and which in some respects may exceed the burdens required to comply with a Second Request, potentially undermining the speed and confidentiality of important deals. All in an effort to make "more effective [and] efficient"[17] a program that already works 99.9975% of the time.

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[13] *See generally* 16 C.F.R. §§ 801.30 & 803.5(a).

[14] In the case of publicly traded companies, risks of insider trading or deal rumors heighten these concerns about bringing individuals "under the tent" about a potential transaction.

[15] 15 U.S.C. § 18a(d)(2)(B). The Statement of Chair Khan, joined by Commissioners Slaughter and Bedoya, regarding the Proposed Rulemaking comments that "[t]he House Report for the HSR Act estimated that the statute would 'requir[e] advance notice' for approximately 'the largest 150 mergers annually.' Today, the agencies often receive more than 150 filings per month." *Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules*, Commission File No. P239300 (June 27, 2023).

[16] *See generally* 15 U.S.C. § 18a(b)(2). On February 4, 2021, the Agencies announced a "temporary suspension" of the practice of granting early termination for HSR waiting periods. *See* Press Release, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021). The press release cited three factors to justify the suspension—the "transition to the new Administration," the "unprecedented volume of HSR filings for the start of a fiscal year," and the "pandemic"—and stated that the suspension was anticipated to be "brief." It is now over two-and-a-half years later, and all three factors cited in the press release have long ago subsided.

[17] Fed. Trade Comm'n, Press Release, "FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review" (June 27, 2023).

Exhibit 10



IN-HOUSE COMPETITION LAWYERS ASSOCIATION

COMMENT TO FEDERAL TRADE COMMISSION

CONCERNING PROPOSED REVISIONS TO HART SCOTT RODINO ACT

PREMERGER NOTIFICATION FORM AND ASSOCIATED INSTRUCTIONS

September 27, 2023

I. Introduction

The In-House Competition Lawyers Association ("ICLA") appreciates this opportunity to share its views with the Federal Trade Commission ("FTC") and the Antitrust Division of the Justice Department ("Division").[1] ICLA is an informal association of in-house competition lawyers with more than 500 members across the globe. The Association does not represent companies but is made up of individuals who are in-house experts in competition law. This paper represents the position of ICLA and does not necessarily represent the views of each of its individual members or of their employers.

As specialist counsel in antitrust and competition law for companies with global operations, ICLA members have direct experience in merger control proceedings in jurisdictions across the world. Just as the FTC notes in its Notice of Proposed

[1] The FTC and the Division are referred to collectively in this Comment as "the Agencies".

Rulemaking[2] (the "NPRM") that the reforms the Commission proposes are informed by its perception of the relative informational requirements imposed by the current HSR form and instructions and merger notification forms required in other jurisdictions,[3] ICLA's Comment is informed by the experiences of its members with merger control regimes and processes around the world, including the European Union, the United Kingdom, Canada, Japan, Korea, China, Brazil, and India.

For ICLA members, the impact of the changes proposed in the NPRM will be substantial. ICLA members are directly involved in the collection and review of data and documents submitted to enforcement agencies today when the companies that employ them notify proposed mergers and other notifiable transactions. Perhaps more than any other group of individuals, ICLA's members will shoulder the significant new burdens regarding the collection and review of data and documents, the preparation of narrative responses, and the other additional requirements that the NPRM contemplates. We note in this regard that an HSR filing is only one of what may be a dozen or more competition notifications that ICLA members must prepare for a particular transaction, and that when our companies engage in transactions that require

[2] The NPRM is available at www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf (reviewed September 18, 2023). As the NPRM was not paginated, a paginated version (with page numbers and section headings inserted) is attached to this Comment for ease of reference.

[3] E.g., NPRM at 8:

> As compared to the Form, most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis, including details about the transaction's structure and rationale, horizontal overlaps, vertical and other relationships, and more detailed sales data. Importantly, many other jurisdictions rely on narrative responses from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.

HSR filings, we must also submit numerous notifications required under other regulatory regimes, including foreign direct investment.

II. General Comments

ICLA welcomes the efforts made in the NPRM to modernize the HSR notification process. Both the long-overdue effort to introduce electronic filing of the HSR form and attachments and the changes to relieve some of the burden of allocating revenue information into often imprecise and overlapping North American Industrial Classification System ("NAICS") codes[4] are welcome developments. We commend the Commission for taking a fresh look at the more archaic aspects of the current form and instructions, as well as the needlessly difficult process of submitting hard-copy notifications.

However, ICLA is concerned with other aspects of the reforms proposed in the NPRM. Those unprecedented changes will create extraordinary compliance burdens for each of the thousands of transactions that result in HSR notifications, including the overwhelming majority that do not raise competition concerns that merit investigation by the US Agencies. In this regard, we note that, according to the Agencies most recent report on HSR enforcement, in no year in the period from 2012 through 2021 did more than 3.7 percent of notified transactions result in the issuance of a Second Request. [5]

[4] NPRM at 71 (Section III.D.3).

[5] Antitrust Division and Federal Trade Commission, 2021 Hart-Scott-Rodino Annual Report at 5 (https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf) (reviewed September 20, 2023) (hereinafter "*2021 HSR Report*") (reviewed September 20, 2023).

Only 7.9 percent of all reported transactions even resulted in one or the other Agency seeking clearance.[6]

If adopted, the changes to the HSR Form and Instructions set out in the NPRM will require the diversion of significant company resources. We encourage the drafters of the NPRM to consider carefully whether the hundreds or thousands of hours of additional time company management and counsel will need to spend to assemble and review the categories of documents that the NPRM would require notifying parties to submit is justified in the context of the great majority of HSR notifications that do not raise competition concerns. We note as well that, based on our experience, the additional resources that will be required are far in excess of what the FTC projects in the NPRM.[7] In a global economy that requires companies to do business through complex corporate structures, we fear that the additional burden resulting from the envisaged notification obligations will exceed the benefits to the merger review process of providing investigating staffs with additional information on which to base the initial decision as to whether a notified transaction merits further investigation.

In addition to the huge increase in management and counsel time, compliance with the additional requirements to collect and produce documents and information, and to prepare narrative responses, will necessarily cause notifying parties to increase their already significant spending on external counsel, who will be needed to assist with

[6] 2021 HSR Report at Exhibit A, Table II. We appreciate that one response the Agencies might have is that if the Agencies had the benefit of more information from notifying parties, they might seek clearance to review more notified transactions. But even if one were to assume that the historical percentage of transactions as to which either agency seeks clearance is *half* of what an optimal rate would be, that would still mean that approximately 84 percent of reported transactions would be cleared without either Agency engaging in any substantive investigation.

[7] NPRM at 103-104.

the increased demands of creating the merger notification form and the voluminous attachments contemplated by the NPRM. The proposed changes are also very likely to delay merger notifications significantly, possibly by several months. This will delay the time when consumers can begin to enjoy the benefits to pricing and innovation of the great majority of notified transactions that the Agencies decline to investigate after reviewing the parties' filings.

We would also encourage the Agencies to consider the time and expense that they will incur in reviewing the additional materials notifying parties would be required to submit. We recognize the demands on the time of agency personnel, and note that our experience suggests that staffs may find it difficult to review the volume of materials they receive today within the initial waiting period. Requiring the production of additional materials that investigating staff are unable to review as they decide what transactions merit further investigation benefits neither notifying parties or the cause of more effective merger enforcement.

ICLA members appreciate that initial merger notification under the current HSR notification regime imposes fewer burdens on notifying parties than the initial notifications in, for example, the EU or UK. However, the NPRM's theme of emulating the requirements imposed on merging parties in jurisdictions outside the US reveals a selective focus on the volume of information required by the initial notification form while ignoring other equally significant differences between the notification regimes in the US, EU, UK, and other jurisdictions. We discuss several of these differences below.

(a) *Volume of Notifications.* The NPRM ignores key differences between the structure of merger review in the US and merger review in the EU and elsewhere. The US has generally used thresholds for when notifications are required that have resulted in more notifications than are submitted under other merger control regimes. For

example, in federal fiscal years (October 1-September 30) of the years 2017 to 2021, the number of transactions reported under HSR were: [8]

Year	2017	2018	2019	2020	2021
Transactions	2,052	2,111	2.089	1,637	3,520

By contrast, in the same period (calendar years 2017-2021), the number of cases notified to DG-Competition ("DG-Comp") in a calendar year never exceeded 414.[9] The NPRM proposes to institute a more EU-like notification regime, with significantly increased burdens relative to what information merging parties need to provide. Indeed, in a number of respects the additional information that the NPRM would require go beyond similar requirements in the EU or UK.[10] But in the US, the increased burdens the NPRM would impose would apply to each submitter of each one the much larger number of merger notifications that the relatively modest HSR thresholds generate.

[8] *2021 HSR Report* at 2 (Figure 1).

[9] https://competition-policy.ec.europa.eu/mergers/statistics_en (reviewed September 18, 2023). The figures are as follows: 2017 – 380 cases; 2018 – 414 cases; 2019 – 382 cases; 2020 – 361 cases; 2021 – 405 cases.

In 2021 the gross domestic product of the EU was $16.64 trillion (https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU), versus $23.32 trillion for the US (https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US). Thus, in 2021, the US economy was 40.1 percent larger than the EU economy, but the US Agencies received 769 percent more merger notifications than DG-Comp did (3520 vs. 405).

[10] To pick one example, there is nothing in the current EU or UK merger notification regimes that requires notifying parties to disclose information about their workplace safety records. *Cf.* NPRM at 69-70 (Section III.D.2.c.iii.).

(b) *Simplified Procedures.* We also note that the significant burden associated with a full merger notification in the EU is substantially mitigated by the existence of a simplified procedure that includes an abbreviated notification form.[11] The availability of a simplified procedure calibrates the quality and quantity of information the agencies require to assess mergers with certain characteristics (which renders those transactions unlikely to be problematic). In 2021, of the 405 notifications submitted to DG-Comp, 309 (76.3 percent) were submitted using the simplified procedure. Similar "fast track" merger reviews exist in Brazil and China.[12]

The NPRM, by contrast, contemplates a one-size-fits-all approach that would expose the great majority of notifying parties to disproportionate and unnecessary burdens. Each of the several thousand transactions notified in a typical year will require at least two merger notifications (from each of the parties to the transaction) that complies with the burdensome requirements contemplated by the NPRM.

(c) *Pre-notification Consultations.* Another significant difference between the merger notification regime under HSR and the EU or UK is that parties notifying transactions in the EU or UK typically engage in extensive pre-notification discussions with the merger staffs at DG-Comp or the Competition and Markets Authority ("CMA") before they submit their merger notifications. In the experience of ICLA members, those discussions can extend for months before the final notification is submitted where

[11] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, Regulation(2013/C 366/04) (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214(02) (reviewed September 18, 2023).

[12] Brazil: CADE Resolution 33/22 (https://www.in.gov.br/web/dou/-/resolucao-cade-n-33-de-14-de-abril-de-2022-394063356); China: Yong Bai and Dayu Man, *Merger Control in China, A Practical Guide.* Thompson Reuters Practical Law (May 23, 2023) at 10-11 (https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/06/merger_control_in_china_a_practical_guide%20_june2023.pdf) (reviewed September 18, 2023).

the agencies believe that the notified transaction may raise competition concerns. Pre-notification consultations often include the submission of serial drafts of notification forms containing the various narrative responses required, for example, in a Form CO that the FTC wishes to emulate.[13] The pre-notification process can also lead investigating staffs to require more detail in some areas of a merger notification and less detail in others, which helps conserve agency resources by allowing staffs to focus in on areas of greatest interest. The NPRM, by contrast, seems to contemplate that every notifying party will respond completely to every one of the burdensome information requests it contains.

Pre-notification consultation for particular cases is a feature that is absent today from the HSR merger review process. Indeed, in the context of the inter-agency clearance process the Antitrust Division and FTC use to decide among themselves which will take the lead in reviewing a newly notified transaction, notifying parties do not know which agency will be reviewing their transaction until *after* they have made their HSR filings and the 30-day review clock begins to run.[14] In any event, the introduction of such pre-notification phase would require the Agencies to greatly expand their staffs hire hundreds of additional based on the current volume of notifications they receive each year.

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[13] NPRM at 8 ("Importantly, many other jurisdictions rely on narrative responses from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.").

[14] *Cf.* Antitrust Division Manual (5th edition 2018; https://www.justice.gov/sites/default/files/atr/legacy/2015/05/13/atrdivman.pdf) at III-10 and III-11 (requiring FTC clearance before the Antitrust Division can begin an investigation.

(d) *Market Definition Precedent.* In the European Union, for example, DG-Comp's practice of publishing detailed opinions at the end of merger cases has resulted in a body of agency guidance regarding market definitions in specific industries that helps ICLA members and the external counsel they instruct prepare narrative responses to questions in the EU's merger notification forms regarding market definition. Because the US Agencies rarely issue guidance on market definition issues raised by specific transactions they review, notifying parties will not have the benefit of the agencies' thoughts on industry market definition as they respond, for example, to the NPRM's requirement that notifying parties provide a narrative describing horizontal overlaps.[15]

(e) *Remedies for Non-compliance.* A final difference relates to the remedial structure for perceived violations of notification requirements under Hart Scott Rodino versus the remedial structure under merger notification regimes outside the US. The NPRM will move US merger notification from a system where merging parties provide a smaller amount of objectively verifiable information to a system where merging parties provide a far larger amount of information that is more subjective, in particular the various narrative responses regarding the business of the acquiring party,[16] business

[15] NPRM at 62-65 (Section III.D.2.a).

[16] NPRM at 45-46 (Section III.C.4.a)

of the acquired entity,[17] description of the transaction,[18] rationale for the transaction,[19] horizontal overlaps,[20] and supplier relationships.[21]

Each one of the narratives the NPRM contemplates may generate disagreements between agency personnel and the merging parties regarding the accuracy or completeness of the information provided. At present, a powerful remedial tool the agencies have is to retroactively declare a notification to be incomplete and to reject it, effectively restarting the clock on the merger review. For deals with financing contingencies that need to be satisfied in a limited time period, the delay caused by rejecting a filing can cause a transaction to fail or require re-negotiation that may impact the parties' shareholders and employees.[22] In other jurisdictions where notification regimes today involve the merging parties responding to questions that call for narratives, the agencies sometimes "stop the clock" on their time-bound reviews in the first phase of the merger review process until merging parties provide required information.[23] Such a "day for day" delay provides a much more proportional remedy

[17] NPRM at 46 (Section III.C.4.b)

[18] NPRM at 46-47 (Section III.C.4.d)

[19] NPRM at 47-48 (Section III.C.4.e)

[20] NPRM at 62-65 (Section III.D.2.a)

[21] NPRM at 65-66 (Section III.D.2.b)

[22] For a recent example of a renegotiation unfavorable to a seller driven by delays in deal approval, see Paul Sawers, "Amazon Lowers iRobot Purchase Price by 15% Amid Regulatory Delays, TechCrunch (July 25, 2023) (https://techcrunch.com/2023/07/25/amazon-lowers-its-irobot-purchase-price-by-15-amid-regulatory-scrutiny) (reviewed September 18, 2023).

[23] European Union Merger Regulation (January 29, 2004), Article 10(4) (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139); UK CMA, A Quick Guide to UK Merger Assessment (March 18, 2021) at § 2.6 (noting CMA's authority to "stop the clock" on merger reviews where information the agency has requested remains outstanding.

for perceived non-compliance. Unfortunately, it is not a remedy the US agencies are free to use in a system where the time frames for merger review are prescribed by statute.[24]

The requirements in the notification form are an important aspect of a merger control regime, but what the form requires from merging parties cannot be isolated from other aspects of the regime. The NPRM seeks to graft a significant expansion of the information that the HSR notification form seeks onto the existing US review process, characterized by low thresholds (and numerous notifications), infrequent pre-notification consultations, and a remedial structure that is limited to the remedy of rejecting notifications, which is disproportionate to the kinds of disagreements between staff and notifying parties that may arise from the proposal to increase reliance on narrative answers. We respectfully suggest that the FTC take a more measured approach to improve the current HSR notification form in a way that is consistent with other aspects of US merger control.

III. Specific Comments

In the remainder of the comment, we address specific aspects of the NPRM and discuss potential concerns they raise. Where appropriate, we suggest alternatives.

(a) Translation Requirements (Section II.D). The NPRM will significantly expand the scope of internal documents that notifying parties provide. Two provisions of the NPRM, in particular, will drive this expansion. The first is the requirement to

[24] 15 USC §18a(b)(1)(B) (initial 30-day waiting period); 15 USC §18a(e)(2) (waiting period in the event a request for additional information issues).

"semi-annual and quarterly plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and the acquired entity"[46] is helpful, it will require notifying parties to self-assess what products and services overlap, an issue as to which the views of the notifying parties and the views of agency staff sometimes diverge.

(m) Organization Charts (Section III.D.1.c): As with other proposed requirements set out in the NPRM, the proposal to require notifying parties to submit organization charts would impose on all notifying parties a requirement that today typically is first communicated in an access letter issued by Agency staff in the small percentage of notified transactions that prompts an investigation,[47] or in preparation for the negotiation of a custodial search group for the production of documents in response to a second request. It is unclear why organization charts will assist investigating staffs to reach an initial view as to whether a particular notified transaction merits further review, as distinct from identifying potential custodians and understanding reporting relationships between them.

(n) Horizontal Overlap Narrative and Supply Relationships Narrative (Sections III.D.2.a and III.D.2.b): As noted previously (see page 10), the addition of these two required narratives and several others contemplated in the NPRM will change the nature of the HSR notification from a document that seeks objective data to one that requires notifying parties to describe subjectively aspects of their businesses and the transaction. Particularly given the absence of (indeed, impossibility of) extensive pre-notification consultations between the merging parties and agency staff of the kind that

[46] *NPRM at 59.*

[47] See *FTC Access Letter Description*, *supra* n. 39.

is common in the European Union and the UK, we fear that disagreements may emerge between notifying parties and staff as to whether particular narratives are accurate and complete. This will be especially true in what may be the several years between when the changes contemplated in the NPRM are first implemented and when a sufficient body of informal agency guidance and experience of notifying parties and their advisors leads to expertise in the private bar regarding how to prepare the various narratives to the satisfaction of the Agencies. It will be difficult for companies like those that employ ICLA members, which may notify reportable transactions once every few years, to build internal expertise in preparing the required narrative.

We also note that much of the information that the NPRM proposes must be included in the Horizontal Overlap Narrative, for example "sales [and] customer information (including contacts)"[48] is information that today is typically sought in an access letter that staff may issue during the initial review period.[49] Requiring customer contact information, which is not always readily available within companies, for every merger notification, including the great majority that do not result in any substantive investigation, will impose a significant new burden on notifying parties.

We agree with the statement in the NPRM that "[c]ontacting customers to confirm basic market dynamics is a key step in the antitrust analysis conducted by Agency staff during the initial waiting period."[50] Our experience with transactions that the Agencies choose to investigate confirms that notifying parties "are frequently asked to provide this information on a voluntary basis once one Agency has granted

[48] NPRM at 63.

[49] See *FTC Access Letter Description*, *supra* n. 39.

[50] NPRM at 63.

clearance to the other to conduct an initial investigation of the transaction."[51] But the fact that the Agencies often seek information at the start of their investigations is not a reason to mandate that every notifying party undertake the significant time and expense associated with collecting that information and including it in a narrative response. This is particularly true given the wide net that the HSR notification regime casts (see page 6, above) and the numerous transactions that require notifications but do not lead to any substantive investigation.

(o) Labor Markets Information (Section II.D.2.c): As with other new requirements to provide information contemplated in the NPRM, the requirement to provide extensive information about employment will impose significant new burdens that may not be justified by any improvement in the effectiveness of merger enforcement. We note, first, that the requirement to classify workers by SOC[52] is imposed regardless of whether the merging parties in fact employ workers in the same geographic areas in the United States. For example, SOC and ERS information would be required in a merger between electric utilities that employ line repair personnel in different regions of the country, or geographically distant hospital chains that employ nurses in different metropolitan areas. Perhaps a better approach would be to ask notifying parties to identify locations where they have significant numbers of employees and only require additional information where there are geographic overlaps.

[51] NPRM at 64.

[52] NPRM at 68.

Exhibit 11

NATIONAL ASSOCIATION OF Manufacturers

Charles Crain

Vice President,
Domestic Policy

September 27, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC–5610 (Annex H)
Washington, DC 20580

Re: 16 CFR Parts 801-803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300

To whom it may concern:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") (the "Agencies") on the proposed amendments to the pre-merger notification rules (the "Rules") that implement the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act.[1]

The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM is the largest U.S. manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states. The HSR Rules have a significant impact on manufacturers in the United States. Transactions that undergo antitrust review by the Agencies—including mergers and acquisitions as well as certain capital investments and licensing arrangements—are critical to the growth of manufacturing businesses across the country.

Unfortunately, the proposed amendments to the HSR Rules would stifle job-creating growth in the manufacturing industry without any corresponding benefit to the Agencies, merging parties, or the public. The new and unduly burdensome information and processes required by the amendments represent a major overhaul of established, well-understood standards that have been relied upon by businesses and regulators for more than 45 years. If adopted, the proposal would dramatically increase the information that merging entities would be required to provide to the Agencies before consummating a transaction, including for the vast majority of transactions that pose no antitrust issues and that may increase competition. Manufacturers will experience substantial cost increases as a result, with hundreds of millions of dollars or more being diverted toward lawyers and consultants and away from manufacturing growth. Further, potential transactions will be significantly delayed if the amendments are adopted as proposed, postponing the opportunities and job-creating investments that these transactions can create.

The NAM is concerned that the proposed amendments will not enable the Agencies to better identify and investigate potentially anticompetitive transactions, but rather will delay and disincentivize *all* business combinations in the manufacturing sector. Such an approach ignores the many benefits that mergers and acquisitions ("M&A") create for manufacturers of all sizes, and the NAM is disappointed that the Agencies appear to be taking steps to limit growth and innovation in U.S. manufacturing. Pro-growth, pro-competitive transactions in manufacturing set the stage for business

[1] *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178 (29 June 2023). RIN 3084-AB46; *available at* https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf.

efficiencies, enhanced product offerings, and reduced costs for customers. Healthy M&A activity in the industry also aids company formation and capital raising earlier in a business's life cycle, as entrepreneurs and early-stage investors often depend on M&A for an exit opportunity. Conversely, limiting business combinations by enforcing the one-size-fits-all standards contemplated by the proposed rule could disincentivize early-stage innovation; the breadth of the proposal could also implicate collaborations and licensing arrangements that are similarly important to innovative businesses.

The NAM respectfully encourages the Agencies to reconsider the approach to pre-merger review embodied in the proposed rule. The proposed amendments appear to establish a presumption that M&A activity is inherently dubious, and they would treat all reportable transactions as deserving of an extensive degree of disclosure and scrutiny far in excess of any actual competitive risks they pose. Rather than seek to stifle business combinations across the board, and the associated opportunities for efficiency, growth, and job creation throughout the manufacturing industry, the Agencies should instead focus their attention on particular transactions that actually pose a threat of competitive harm to American consumers. Limiting new regulatory burdens on the thousands of transactions that pose no threat to consumers will protect businesses' ability to grow and drive economic expansion in the United States.

Manufacturers thus encourage the Agencies to withdraw the proposed amendments. At a minimum, any amendments adopted must be more narrowly tailored than the current proposal. The NAM urges the Agencies to appropriately calibrate the HSR Rules to enable pre-merger review to identify transactions with a greater risk of anticompetitive effects without subjecting pro-consumer transactions to significant costs and delay.

I. The proposed amendments will dramatically increase costs on manufacturers, effectively imposing a transaction tax on all potential deals.

In the proposal, the Agencies estimate that the new requirements will increase the time needed to complete an HSR filing by, on average, 107 hours. More complex transactions—which the Agencies recognize account for nearly half of all filings—could see an increase of as much as 222 hours, according to the proposal. Using the Agencies' estimate of 37 hours to complete a filing under the current rules, the proposed amendments represent a four- to seven-fold increase in the time necessary to prepare an HSR filing. And these estimates likely understate the increased burden associated with the proposed changes.

Adding hundreds of hours of work to the filing process will impose a *de facto* tax on each transaction. The expansive nature of the proposed rule and the ambiguity and complexity inherent in many of its provisions will ensure that significant funds are diverted from company growth. And companies are likely to spend far more time on each deal than the conservative estimates made by the Agencies. Indeed, the Agencies' estimates likely understate both the time it takes to comply with the current HSR requirements as well as the time necessary to comply with the proposed amendments, given that the methodology for determining these estimates appears to have been an informal survey of Agency staff. What is clear is that the new transaction tax will apply to every single reportable deal, no matter its size, the market positions of the merging parties, or the likelihood that it would merit additional scrutiny from the Agencies.

In practice, the proposed amendments represent a fundamental overhaul of the HSR filing process, completely upending the norms and practices with which all American companies are familiar. Merging parties, as well as the Agencies themselves, are well-acquainted with the current Rules and what information and procedures are required to satisfy them. But the novel regime being proposed would lead to regulatory uncertainty and result in time and cost increases far in excess of the 222-hour ceiling estimated by the Agencies.

Many of the proposed requirements, discussed in more detail below, represent structural changes to the information necessary for HSR review, such as the expanded document production requirements, the new obligations to provide competition and strategic narratives about a deal, the mandate related to affiliated entities' officers and directors, and the extension of antitrust review to include labor and employment policy goals. The information required by these significant changes to the HSR Form far exceeds what is currently necessary for most of the Agencies' in-depth antitrust investigations, yet it would be required in merging entities' *initial* filings. These requirements will reshape the pre-merger filing process and expand the boundaries of pre-merger review while increasing the cost and time burdens associated with the HSR process accordingly, without uncovering much if any information relevant to the Agencies' competition analysis.

Other provisions in the proposal will necessitate hours and hours of non-substantive recordkeeping, processes, certifications, and verifications. For example, tracking down every officer, board member, or board observer for every subsidiary corporation within a merging entity, which for manufacturers can reach hundreds of individuals, serves no rational substantive purpose. Similarly, companies will be required to identify on a routine basis the name, title, and company of any internal staff members who receive or supervise the preparation of certain third-party documents. There is minimal if any value to the Agencies having this information for every single reportable transaction (and if and when it might have value, the Agencies could simply request it), but collecting and filing a comprehensive list of all the people who may have "supervised" the creation of these documents will require many hours of work.

Overall, the breadth and depth of the proposed amendments will make every reportable transaction similarly costly and burdensome as the limited number of transactions that, under the current Rules, involve some form of follow-up or additional scrutiny from the Agencies. These additional costs will not actually help to expedite transaction review (the purported justification for the proposal); the deluge of irrelevant information required by the proposed amendments will likely do the opposite. Indeed, the Agencies' estimates of the burdens associated with the proposal likely significantly understate its time and cost burden on merging parties. Once an HSR filing is made, this extensive burden will shift to the Agencies, raising the possibility of further delays.

The proposal seeks to align U.S. pre-merger review with requirements in the E.U., but the European Commission receives roughly 10% of the merger filings that the FTC and the Antitrust Division of the DOJ must process. Further, the E.U. allows transactions with limited horizontal overlap or low market share to use a "short form," which is notably not permitted under the one-size-fits-all amendments proposed by the Agencies. Importing E.U.-style merger review to the U.S. is simply not practical for the Agencies or for businesses in the United States.

The NAM respectfully encourages the Agencies not to impose what is effectively a transaction tax on all potential mergers and acquisitions in the manufacturing industry. Further, manufacturers urge the Agencies to reconsider the economic analysis underpinning the proposed rule in order to better reflect the significant delays, and associated cost increases, attributable to the proposal. Armed with more realistic estimates of the rule's time and cost burdens, the NAM encourages the Agencies to rescind or significantly rework the proposed amendments to the HSR Rules.

II. The proposed amendments will add significant complexity to the HSR filing process, ultimately delaying or disincentivizing transactions that are critical to manufacturing growth.

M&A activity allows companies of all sizes to evolve and grow, leading to downstream effects that benefit all Americans, including job creation, investment in research and development, and economies of scale and scope that produce lower prices and create greater choice for consumers.

The economic efficiencies driven by successful business combinations allow companies to innovate for the future.

This is true for manufacturers of all sizes. Large companies often seek acquisition targets to expand into new markets or make their supply chain more efficient. These business combinations can expand product offerings for consumers and reduce prices due to increased efficiency. Small businesses benefit from growth opportunities associated with business combinations, and M&A allows their early-stage investors an exit opportunity—ultimately supporting capital formation at all stages of a company's life cycle, including for entrepreneurs and start-ups. The availability of late-stage capital via M&A attracts early-stage funding and ensures that innovators can raise the capital necessary for next-generation breakthroughs.

The NAM is disappointed that the Agencies have adopted an adversarial stance toward merger activity in the manufacturing industry. Manufacturers strongly support robust enforcement of antitrust law to prevent anticompetitive deals that could harm consumers. However, the proposed amendments will make it more difficult for companies to combine efficiently, as increasing the price of consummating a transaction by definition decreases the value of a deal. The NAM is concerned that the Agencies may be utilizing the HSR Rules, which were authorized by Congress to help the Agencies investigate potentially anticompetitive deals, to chill merger activity writ large. The effect of the amendments will be that business combinations will be more costly and difficult, either delaying transactions or halting them altogether.

Critically, the proposed rule is not appropriately calibrated to the anticompetitive risk of the thousands of deals to which it will apply. At present, approximately 2% of proposed reportable transactions receive a Second Request indicating that the deal may pose some anticompetitive concerns and thus require enhanced scrutiny from the Agencies.[2] In 2021, there were only 65 Second Requests across the 3,520 HSR filings the Agencies received.[3] But under the proposed rule, 100% of HSR transactions will face enhanced filing burdens at the initial filing stage, requiring significant additional work on the part of all merging parties. This approach will do little to protect consumers, as the Agencies already have the ability to flag transactions that may harm consumers, and they exercise such discretion only in the limited instances where there is a plausible antitrust theory of harm. And the new information required under the proposal, while difficult and costly to collect, will not provide much if any useful insight as to a transaction's competitive effect—particularly for transactions where it is apparent from the materials already collected by the Agencies under the current standards that the transaction is unlikely to raise any anticompetitive concerns. Instead, the proposed rule's complicated and burdensome requirements will increase costs for merging entities and significantly delay, or even disincentivize, deals that could benefit consumers, workers, and the U.S. economy.

As noted, the proposal estimates that, on average, preparing an HSR filing under the proposed amendments will take quadruple the time currently required. And for more complex transactions, which the proposal estimates account for nearly half of all HSR filings, the process to gather and prepare all the information required under the amendments will take *seven times* as long as it does currently. Such a dramatic expansion in filing requirements represents a significant change in the pre-merger process. Even using the Agencies' conservative estimates of time increases, filings will be delayed by weeks or months. These delays represent a significant cost increase for merging entities; in addition, putting all reportable deals on hold for weeks on end could threaten the underlying economics of the deal itself—resulting in regulatory overreach chilling competitively

[2] *FTC, DOJ Issue Fiscal Year 2021 Hart Scott Rodino Premerger Notification Report* (10 February 2023). Federal Trade Commission. *Available at* https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-doj-issue-fiscal-year-2021-hart-scott-rodino-premerger-notification-report.

[3] *Ibid.*

neutral and pro-competitive deals. Critically, these delays are in service of collecting information that is not necessary for the Agencies to understand the competitive impact of a potential transaction, particularly given the extensive information already required to be provided under the current HSR Rules and the Agencies' existing ability to request further information.

Further delays are likely beyond what is contemplated by the proposed rule. First, as noted, it is likely that the Agencies' estimates understate the true burden of the proposal. The invasive and complicated nature of many of the new requirements, when applied to companies' complex organizational structures, will likely lead to delays (and associated cost increases) in excess of the Agencies' expectations. For example, new requirements related to Item 4 responsive documents, officers, directors, and board observers of the merging entities' subsidiaries, agreements between the merging parties and their subsidiaries, and horizontal and vertical industry overlaps will necessitate broad and deep investigations that are more difficult and time-consuming than the proposed rule acknowledges. Further, the NAM is concerned that the Agencies' methodology in determining the proposal's impact on timing appears to have consisted solely of an informal "canvas" of Agency staff rather than a more rigorous examination of the new processes and procedures required by the amendments.

Additionally, the breadth, complexity, and opacity of the new requirements raise the possibility that the Agencies will deem merging parties' filings to be incomplete once filed, even when the parties engage in good faith and make a reasonable effort to comply with the HSR Rules. Such a determination would prevent the 30-day review clock from starting, leading to an indeterminate period of back-and-forth between the filers and the Agencies before the filings are deemed to be satisfactorily complete. Such delays are not reflected in the proposed rule's time estimates, but present a significant risk to merging parties—both in terms of the additional costs and time needed to satisfy the new requirements, and the potential that a deal languishes indefinitely waiting for the Agencies to start the 30-day clock.

In short, the burdens under the proposed rule will be substantial. And it is not likely that the new information required under the amendments will provide new useful insights into the competitive impact of a potential transaction: under the current standards, the Agencies can and do request information necessary for their review. The proposed rule notes that the Agencies already find it difficult to process the HSR filings they receive; it is likely that the deluge of new information and documents required by the proposal will make timely pre-merger review even more difficult. Additionally, the disclosures required are in many cases either duplicative of information already required to be filed or disconnected from the actual competitive impacts of a deal—in either case, the costly and burdensome process undertaken by merging parties will not result in useful information for the Agencies' review process.

The Agencies can already access all the information they need for pre-merger review by engaging with merging parties on a voluntary basis during the waiting period or by utilizing the Second Request process. There is simply no need for such a complex and comprehensive overhaul of the HSR Rules.

The NAM is concerned that the proposed amendments to the HSR Rules would chill business combinations that otherwise would benefit growth and job creation in the manufacturing industry—and thus harm manufacturers' ability to provide increased choice and innovative new products to consumers. Accordingly, manufacturers respectfully encourage the Agencies to withdraw, or at a minimum significantly narrow, the proposed rule.

Exhibit 12



September 27, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex H)
Washington, DC 20580

Re: National Retail Federation Comments to Notice of Proposed Rulemaking Regarding HSR Act Reporting: 16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300

Dear Sir or Madam:

The National Retail Federation (the "NRF") offers the following comments on the Federal Trade Commission's Notice of Proposed Rulemaking regarding Premerger Notification; Reporting and Waiting Period Requirements published on June 27, 2023 (the "NPRM").

I. Introduction

The NRF has represented retail businesses for over a century. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs, accounting for 52 million working Americans. Throughout its history, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

The retail industry is intensely competitive. Included among the members of the NRF are large international companies, small, locally owned businesses, and everything in between. They rise or fall based on their ability to make products available to US consumers at low prices. Many are investing significantly in improving their products and their ability to deliver those products as quickly and inexpensively as possible. Across the board, the goal is to meet the needs and desires of customers in order to grow their businesses.

Because of the competitiveness of the retail space, the NRF's members face consistent pressure to drive down costs, improve efficiency, and deliver better and more innovative products to their customers. In this environment, small changes to a business's cost structure or its ability to execute on its strategic objectives can result in substantial negative consequences: lost business, damaged reputation, loss of investor confidence, and inhibition of future opportunities, to name a few. This environment depends on appropriate enforcement of antitrust law to maintain the right balance. Too little enforcement could allow some companies to gain an unfair advantage to the detriment of others. Too much enforcement risks driving up compliance costs and hindering legitimate efforts to compete.

For many NRF members, one of the primary places where they deal with antitrust law directly is in the context of merger and acquisition activity that requires notification under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act").[1] For these companies, transactions are often an ongoing, critical

[1] 15 U.S.C. § 18a.

component of remaining competitive. Many of these deals are procompetitive or competitively neutral. For example, they might be a means of expanding into a new geography or being able to offer customers a complementary product or service. On the other hand, a transaction might be a means of divesting a business outside of a company's core strategic focus to another party that will be able to breathe in new life and enhance the business's competitiveness. While it is always important to ensure that antitrust laws prevent significant anticompetitive transactions, most transactions in the retail sector (and elsewhere) are not anticompetitive, and over-enforcement or unduly burdensome reporting requirements would significantly delay or prevent activity that would benefit NRF members and their customers. Ensuring a proper balance between regulatory oversight and the time and expense of regulatory compliance is critical to the ongoing health of this critical component of US commerce.

With these principles in mind, the NRF is concerned that the NPRM would result in a burdensome reframing of antitrust premerger notification in the United States. To wit, the NPRM seeks to impose substantial additional costs on merging parties, in terms of both time and money. Because the existing HSR Act notification process has been effective at preserving competition, and because the burdens under the NPRM would disproportionately disadvantage many of NRF's members, the NRF urges the FTC to reconsider its course and avoid substantial deviation from the current premerger notification program that more proportionately allows for antitrust enforcement.

II. Existing HSR reporting requirements appropriately balance the need for antitrust review and the benefits of economic activity

HSR is a notice statute. It strikes a balance between providing the government with information to enforce the antitrust laws properly and avoiding undue burdens on legitimate merger and acquisition activity. The Act was not intended to require careful government scrutiny of *each and* every transaction. As Congress recognized in 1976, and as the FTC has consistently understood since then, such an approach would unnecessarily weigh down the economy while simultaneously requiring enormous commitments of time and resources by agency staff.

This Congressionally designed balancing is evident in the structure of the HSR Act itself. While the antitrust laws apply to all transactions, irrespective of size, the HSR Act only requires mandatory notification of transactions meeting certain thresholds. It also provides a mechanism that allows the government to grant "early termination" of the mandatory waiting period where competitive effects are clearly unlikely. The reason is clear – there is an intent to balance the burden placed on deal activity against the likelihood that a given transaction may result in anticompetitive consequences. And worth noting is the fact that, in striking that balance, the US system is already far more conservative than many of its international counterparts. The US receives mandatory notices of many times more transactions that those reviewed in other major jurisdictions – a point addressed in more detail below.

Furthermore, the HSR Act's intention to appropriately balance interests between business and enforcement is evident from the enumeration of various exemptions from notification requirements. These exemptions recognize that some transactions are less likely to impact competition than others, and therefore codify a balancing that excludes notification requirements where anticompetitive effects are unlikely, such as where an acquisition is taking place in the ordinary course of business or acquisitions made solely for the purpose of investment.[2] Moreover, Congress invited the FTC to promulgate additional regulations exempting transaction that are "not likely to violate the antitrust laws."[3] This invitation, focused on "likelihood," demonstrates a key principle that HSR Act implementation should be carefully calibrated to be no broader than necessary to permit effective enforcement.

The proposed regulations entirely upend this balance. Specifically, the proposed rules are contrary to the language and purpose behind the HSR Act and boast of no legitimate justification. As described below, the proposed rules in the NPRM would result in hundreds of hours of additional work for every

[2] *See* 15 U.S.C. § 18a(c).
[3] 15 U.S.C. § 18a(d)(2)(B).

transaction, even by the FTC's own calculations. The scope of the potential impact is immense. In 2021, the most recent year that the FTC and DOJ have published figures, the DOJ and FTC reviewed 3,520 transactions (receiving 7,002 filings).[4] The NPRM estimates that the burden of the additional requirements will be an average of 107 hours per filing, meaning that the additional economic cost on the private sector, had these regulations been in effect in 2021, would have been roughly 750,000 hours. This calculation does not take into account the heightened burden on DOJ and FTC staff who must review the additional information. It also does not account for any chilling effect that these additional burdens may have on merger and acquisition activity more generally.

The significant increase in burden proposed by the NPRM is not based on any demonstrable failing of the existing system to appropriately identify anticompetitive transactions. Rather, the reporting requirements currently in place already act as a very broad screening mechanism. This is evident in the fact that of the transactions notified in Fiscal Year 2021, the FTC and DOJ opened preliminary investigations in only 7.9%, and only 1.9% resulted in a second request.[5] In other words, 98% of the transactions reviewed by the FTC and DOJ in the most recent fiscal year did not trigger a need for deep scrutiny.

The NPRM suggests that anticompetitive mergers are going undetected, and that requiring additional disclosures will allow staff to identify and act against these deals. If this were the case, one would expect to see the FTC and DOJ bringing a significant number of merger challenges following the closing of these transactions, when they begin to produce anticompetitive consequences. However, such "post-consummation" challenges remain extremely uncommon. One study looking at merger enforcement from 2001 to 2020 identified only 46 post-consummation challenges over this period – averaging 2-3 per year.[6] Many of these deals were not subject to HSR reporting, including because they fell below the statutory size thresholds. This strongly suggests that, at least for reported transactions, there is no obvious shortcoming in the information provided by filing parties that is resulting in approval of problematic transactions.

The NRF recognizes the value of the HSR Act and the importance of preventing anticompetitive mergers. Historically, the HSR Act has struck the right balance between providing for review and avoiding unnecessary impediments to economic activity. Any amendments to the implementing regulations that would substantially alter the balance are unnecessary and will have a significant negative impact on NRF's members.

III. The NPRM is arbitrary and capricious because it imposes burdens that vastly outweigh any potential benefit to the antitrust review process

While the NPRM as a whole sets forth an unnecessary rewriting of the HSR Act notification process, several of the changes are particularly problematic in terms of their scope and burden. One of the primary problems with the NPRM is that it applies broad obligations on filing parties without regard to whether those obligations are likely to serve any benefit to the FTC and DOJ in identifying problematic transactions. Indeed, there is no attempt in the NPRM to limit increased obligations to particular types of transactions or lessen burdens where anticompetitive effects would be facially implausible. In addition, there does not appear to be any attempt in the NPRM to limit additional requests based on the balancing of burden and potential benefit. These factors leave the NPRM open to challenge as arbitrary and capricious.

(A) Lack of a "Short Form" or Abbreviated Filing Would Impose Unreasonable Costs on Most Transactions

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[4] Federal Trade Commission and Department of Justice, Hart-Scott-Rodino Annual Report for Fiscal Year 2021, Appendix A.

[5] *Id.*

[6] Logan Billman and Steven C. Salop, Merger Enforcement Statistics: 2001-2020, available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3493&context=facpub.

Exhibit 13

NATIONAL VENTURE CAPITAL ASSOCIATION'S COMMENTS TO THE FEDERAL TRADE COMMISSION'S NOTICE OF PROPOSED RULEMAKING

Premerger Notification; Reporting and Waiting Period Requirements

Submitted to the Federal Trade Commission

September 27, 2023

Cooley LLP
1299 Pennsylvania Ave., Ste. 700
Washington, D.C. 20004

On behalf of National Venture Capital Association

I. Introduction

The National Venture Capital Association ("NVCA") appreciates the opportunity to present our views to the Federal Trade Commission ("FTC") in response to the FTC's Notice of Proposed Rulemaking ("Notice of Proposed Rulemaking" or "Notice"), published June 29, 2023.[1]

NVCA is the nonprofit trade association that supports the U.S. venture capital ("VC") community in fermenting the formation and growth of emerging, innovative companies and continuing to advance the U.S.'s stature as the best place in the world for entrepreneurs to launch a high-growth company. NVCA convenes VC investors, entrepreneurs, and industry partners to shape public policy priorities, to develop new industry initiatives, and to provide premier research. These comments reflect significant input from our members.

NVCA serves hundreds of VC members as they take on significant risk investing in emerging companies, many of which do not succeed, and supporting the nation's entrepreneurial talent in turning ideas and basic research into products and services that have transformed the world. NVCA members invest across various capital stages (i.e., from seed to growth equity) and in critical areas of our economy, such as life sciences and cutting-edge high-tech industries like information technology, blockchain, and cybersecurity. Two relatively recent examples of companies that have been backed by venture capital are Moderna, which developed an FDA approved COVID-19 vaccine, and Zoom, which enabled video communication during the pandemic.

Venture capitalists ("VCs") build companies that would not otherwise have access to capital through traditional financing (e.g., bank loan). In its simplest form the company begins as just an entrepreneur with an idea expressed as a business plan. In other situations, VCs provide capital to growth stage companies. In both situations, the investment is high risk. In 2022 alone, 16,464 U.S.-based VC-backed companies received $240.9 billion in funding. These investments are essentially illiquid, do not bear any financial return unless the companies can successfully exit through an IPO or an M&A event, and many never provide any return if the company fails.

Importantly, venture investing creates millions of jobs – fueling employment opportunities for Americans across the U.S. economy. VCs make high-risk, long-term equity investments into innovative young companies to help them expand workforces, conduct critical research and build out new facilities, among other long-term value growth activities. More information about NVCA and its members can be found on NVCA's website here.

NVCA and its members have a significant interest in the subject matter of the Notice. While NVCA very much appreciates the FTC's efforts to update and improve the HSR Rules and Regulations (the "Rules"), NVCA has a strong conviction that certain aspects of the proposed amendments, if implemented, would have a material, negative impact on the venture capital ecosystem, including reducing the competitiveness of U.S. entrepreneurs, and hindering the ability of U.S. startup companies to attract venture capital. Negative impact on the venture

[1] Fed. Trade Comm'n, Notice of Proposed Rulemaking, 88 Fed. Reg. 42,178 (June 29, 2023), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

ecosystem would certainly have a material, negative impact on the U.S. economy, including the labor market.

We respectfully urge the FTC to be mindful of the important role of VC in the U.S. before implementing changes to the Rules that would have such damaging consequences, especially when it is unclear that changes to the Rules, at least as applied to VCs, would yield any benefit to the agencies' initial review of reportable transactions. NVCA is particularly concerned that the proposed amendments would result in minimal, if any, improvement to the FTC's ability to carry out its mission under the HSR Act, particularly as applied to VCs.

NVCA and its legal counsel, Cooley LLP, stand ready to assist the FTC in the FTC's further assessment of these issues and potential means of mitigating negative consequences that we discuss below.

II. FTC's Proposed Changes to the Premerger Notification Requirements Will Vastly Increase Time, Cost and Burden to Invest in Start-Up Companies, Making It Harder for Such Companies to Obtain the Funding They Need, Without Any Meaningful Benefits to the Agencies' Initial Competitive Analysis of VC Financings

The FTC's Notice proposes to substantially increase the amount of information parties notifying a transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") would need to gather and provide to the FTC and the Department of Justice ("DOJ"). As currently drafted, the FTC's proposal effectively requires transacting parties to produce documents and information that today are only required if the agencies issue a Second Request for Additional Information ("Second Request"), in matters that "require a more in-depth investigation."[2] According to information published by the FTC, Second Requests are issued in only about 2% to 3% of all transactions notified, indicating that a relatively low percentage of notified transactions actually require a more in-depth investigation.[3]

Indeed, historically, the FTC and DOJ have granted "early termination" in approximately 80% of those transactions requesting it and approximately 60% of all notified transactions,[4] indicating that the vast majority of notified transactions do not raise competitive concerns – although NVCA understands that the early termination program is currently suspended. To NVCA's knowledge, HSR filings submitted by VCs were often granted early termination, as those VC filings plainly did not present antitrust concerns.

The FTC's proposed additional information includes, but is not limited to, numerous categories of information such as:

- Details about investment vehicles, corporate relationships and the structure of entities involved;

[2] Notice at 42,178.
[3] U.S. Fed. Trade Comm'n and U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2021 at 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.
[4] *Id.* at Appendix A.

- A more extensive disclosure of minority holdings, including limited partners in partnerships and minority holders of any entities within the control chain of the acquiring entity;

- A more extensive production of transaction-related documents (including drafts) and ordinary course business documents (e.g., describing market conditions) collected from a broad range of individuals at each notifying party;

- Details regarding previous acquisitions (including transactions that were not required to be notified to the agencies under the HSR Act);

- Identification of all officers, directors and board observers of the acquiring person and acquired entity to assist the agencies in identifying interlocking directorates;

- Information to assess the potential impact of the transaction on labor markets, including questions about the merging parties' employees and the services employees perform; and

- Identification of penalties or findings issued against the filer by the Department of Labor, National Labor Relations Board or the Occupational Safety and Health Administration ("OSHA") during the previous five years.

We explain below why this proposal would result in tangible harms to capital markets for venture-backed companies in the U.S. by increasing the time and cost for VCs to invest in such companies, without any offsetting benefit to the FTC and DOJ. NVCA further notes that there are alternative approaches that address these issues without many of the significant downsides identified below.

A. The Role of VC Funding in the Start-Up Ecosystem

Start-up companies and other small businesses are an economic backbone of this country—their role in job growth and innovation is well documented. In particular, smaller companies are well-positioned to pursue disruptive innovations and be open to the risks associated with experimentation. Startups are also critical not only to economic growth, but also job creation – the Federal Reserve Bank of Richmond for example, cites a paper finding that more than 15 percent of aggregate job creation is attributable to startups alone.[5]

VCs' focus on providing critical capital across various capital stages to innovative companies through minority investments. VCs also leverage their expertise to provide valuable strategic direction, such as with respect to hiring, human resources, marketing, enterprise sales, and raising additional funds to maximize chances of success for the companies in which they invest. While VCs frequently do continue to acquire shares in the companies they fund through multiple financing rounds, this is typically to demonstrate support for the company and provide much-needed capital, and virtually never is to build up equity with the ultimate goal of acquiring the company. VCs typically exit the investment once the business has advanced beyond its early growth phase, such as upon an acquisition, post-IPO, or—in many cases—at bankruptcy. NVCA

[5] Chen Yeh, Economic Brief No. 23-06 Why Are Startups Important for the Economy?, Federal Reserve Bank of Richmond (Feb. 2023), https://www.richmondfed.org/publications/research/economic_brief/2023/eb_23-06.

estimates that most VCs exit their investments holding an approximate 15% - 25% stake in a company, and rarely hold a stake of 50% or more. Furthermore, start-ups are inherently a risky business – according to NVCA's estimates, more than 90% of startups ultimately fail.[6] Few public or private entities outside of VCs, with their large and diversified revenue streams, have the capability and willingness to assume the risk of betting on numerous early-stage growth companies in the face of such large failure rates.

VC funding therefore plays a critical role in providing the financing needed for start-ups to continue pursuing innovative ideas, and has proven to be incredibly successful. Research suggests that venture capital-backed companies account for 41% of total US market capitalization and 62% of US public companies' R&D spending.[7]

The recent capital markets environment has been particularly challenging for startups, with high inflation, rising interest rates, and an unstable labor market all being contributing factors.[8] As a result, NVCA has observed deal activity drop by a significant margin in 2022 compared to 2021.[9] Speedy and certain access to VC funding has therefore become more important to startups now more than ever.

B. The Current Information Required in the Premerger Notification Form Is Sufficient to Assess Whether Venture Financings Potentially Violate the Antitrust Laws

Minority investments by VCs are inherently procompetitive because they enable new companies to develop innovative products that benefit consumers and disrupt the competitive landscape. Notably, the legislative history of the Clayton Act "reflects an underlying policy of broad support for investment through stock purchases, when such purchases are not part of an effort to control or influence management of the firm," as well as efforts to "minimize the impact of merger review on capital markets."[10]

Despite the focus of the antitrust laws on acquisitions aimed at controlling or influencing the managing of the acquired firm and not mere venture financings, many such financings still trigger a technical obligation to file a report under the HSR Act because they meet the relevant "size of transaction" and "size of persons" thresholds. While financing rounds supporting the growth of innovative startups were never the intended focus, the burden imposed by the current premerger notification form is relatively manageable. The FTC's proposed additional information burden would significantly delay or in some cases prohibit the completion of these

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[6] Jeff Farrah, Restrictions on acquisitions would stifle the US startup ecosystem, not rein in big tech, nvca.org (May 19, 2021), https://nvca.org/restrictions-on-acquisitions-would-stifle-the-us-startup-ecosystem-not-rein-in-big-tech/.
[7] Will Gornall, Iyla A. Strebulaev, The Economic Impact of Venture Capital: Evidence from Public Companies (June 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681841.
[8] NVCA, NVCA 2023 Yearbook: U.S. ViC. Fundraising Reaches new Heights Amid Industry Challenges (Mar. 22, 2023), https://nvca.org/press_releases/nvca-2023-yearbook-u-s-vc-fundraising-reaches-new-heights-amid-industry-challenges/.
[9] *Id.*
[10] Hearing on Common Ownership by institutional investors and its impact on competition – Note by the United States, Directorate for Financial and Enterprise Affairs Competition Committee (Dec. 6, 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf.

financing rounds, counterproductively throwing sand in the gears of our nation's innovation engine.

C. The Proposed Changes Would Vastly Increase the "HSR Tax" on VCs, Resulting in Reduced Investment in U.S. Emerging, Venture-Backed Companies, Fewer Jobs and Less Innovation

Under Section (d) of the HSR Act, the FTC is limited to requiring the production of information that is "relevant to a proposed acquisition as is necessary and appropriate . . . to determine whether such acquisition may, if consummated, violate the antitrust laws."[11] As former FTC Commissioner Noah J. Phillips correctly observed elsewhere, obligations under the HSR Act are "not supposed to be a tax" or a "monitoring system for equity investments generally." Rather, it should only "effectuate its purpose: helping the Agencies spot transactions likely to violate the antitrust laws, so that [the FTC and DOJ] can stop or remedy them prophylactically."[12]

The proposed Notice implies that the various changes would not impose a "substantial burden" on filing parties. But the new rules would, in fact, substantially increase the burden and make it more challenging for our nation's most innovative young companies to raise capital in a timely manner, especially in light of the fact that such financings almost never raise even a remote possibility of competitive concern. This would be contrary to one of the stated goals of the FTC by the FTC Chair, which is to "promot[e] fair competition. An essential part of that is ensuring that small businesses and entrepreneurs have a fair shot in the marketplace."[13]

For one, the proposed amendments would delay access to critical capital from VCs to early-stage growth companies, and others at various stages of their life-cycle, that often desperately need it as quickly as possible.VC financings for early-stage growth companies typically move very quickly (so-called "venture speed"). In the context of early-stage growth companies, financings are often critical inflection points and can be life-or-death events for the company that make the difference between making payroll or not. In these situations, the investment can (and needs to) come together in a matter of days. Delays of even a day or two can cause significant issues, and delays of several weeks can result in a business failing.

NVCA estimates that 3-6 weeks is a normal window from execution of the term sheet to closing. This timeline often compresses over time—financings in later rounds and at higher valuations (i.e., the ones more likely to exceed the size of transaction threshold) can go from term sheet to closing in less than a week, and typically close in less than 3 weeks. But, by the FTC's own estimates, the proposed rulemaking would result in up to 200 additional hours to prepare the requisite filings at an added cost of $200-400k per transaction.[14] In other words, at a time when startups face a historically challenging liquidity environment, the new rules would add a month

[11] 15 U.S.C. § 18a(d)(1).
[12] Statement of Commissioner Noah Joshua Phillips, Hart-Scott-Rodino Act Premerger Notification Notice of Proposed Rulemaking & Advanced Notice of Proposed Rulemaking, Matter No. P110014 at 2 (Sept. 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1580699/p110014hsrrulesphillipsstatement_0.pdf.
[13] Remarks of Chair Lina M. Khan as Prepared for Delivery, Small Business Majority Event on Non-Compete Agreements at 1 (Apr. 13, 2023) (emphasis added), https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-small-business-majority-event-non-compete-agreements.
[14] Notably, this number is disputed by independent analysts as a gross underestimate of the time and cost that will actually be incurred by filers.

of delay or more to acquisition closing timelines and significant additional expense to prepare and file the new forms, even for VC financings that do not remotely pose any substantive antitrust concerns.

Even in less dire circumstances, delays can result in anticompetitive effects. VC financings involve the company selling a piece of itself (equity in return for capital), and for obvious reasons company founders and early-stage investors seek to retain as much ownership as possible. Thus, companies typically do not raise money just in case they need it in the future—they raise it because they need it imminently and often for a specific purpose (e.g., an R&D project or covering payroll). Given this dynamic, increased burdens on the ability for early-stage growth companies to raise and access capital on a timely basis can challenge growth plans, such as new hiring, expanding into new product lines, research and development, launching clinical trials, etc. The increased disclosure burden will in particular cause the greatest pain for the smallest transactions, where the higher costs will represent a larger share of the deal value and may disincentivize the investment from the start.

D. Given the Limited Competitive Concerns Arising from VC Financings, the Additional Information Required by the FTC's Proposal is Unnecessary and Would Substantially Increase Time, Cost and Burden on VCs and Venture-Backed Companies for Virtually No Offsetting Benefit to the Agencies

Although the FTC cites various reasons for seeking substantial additional information from filing parties, it is not clear how certain information will assist the agencies in assessing the competitive effects of a transaction. Just one example is the request for filers to classify all their employees based on the Standard Occupational Classification system categories, provide information on the distribution of employees across commuting zones, and offer details regarding the filer's history of OSHA complaints, none of which clearly relate to how a proposed transaction may raise competitive concerns. These requests are burdensome because the information sought is not something companies keep in the ordinary course of business and will take substantial time to compile for the notification. Thus, the collection and provision of this information does not appear "necessary and appropriate . . . to determine whether such acquisition may, if consummated, violate the antitrust laws."[15] For those reasons, it is also unclear what the FTC and DOJ staff will actually do with that information if they receive it, as the information does not fit into the competitive effects framework set out in the agencies' current or proposed Merger Guidelines.

Likewise, the collection and provision of all drafts of documents responsive to Item 4 can provide little or no incremental value to the competitive analysis, and yet will require substantial time and costs by parties attempting to comply with this requirement. The agencies' apparent concern is that earlier drafts could potentially provide more probative comments that are omitted in the final version of a document. However, it is more likely that earlier drafts include inaccuracies removed in subsequent iterations, and it is unclear how the agencies–who based on comments from the FTC Chair are already overwhelmed in efforts to review the volume of filings currently received–will be able to process in the HSR waiting period the additional volume of documents required to comply with this new request. Thus, the time and cost imposed

[15] 15 U.S.C. § 18a(d)(1).

on filers to comply with this request, and the time and cost imposed on the agencies to review these documents, does not appear commensurate to any benefit the government may receive through the receipt of such documents.

The FTC Chair argues that "many of the updates in the proposal are consistent with data already collected by antitrust authorities around the world."[16] But those jurisdictions typically have different thresholds that, as a result, impose filing requirements on only a small number of transactions that are more likely to raise competitive concerns. The European Commission, for example, receives only about 10% of the number of filings made in the US every year. In the US, there were 3,250 HSR notifications submitted in FY2021, all of which would be subject to the increased costs and burdens associated with the proposed changes. Imposing higher informational requirements on all US notified transactions than other jurisdictions impose on fewer transactions (and those more likely to raise competitive concerns) is no less than an admission that the requirements will substantially increase cost and time burden on transactions less likely to raise competitive concerns.

III. The FTC's Concerns Can Be Addressed Through Other, Less Burdensome Alternatives for VC Investments

To the extent that the FTC has concerns about the competitive effects of a particular VC financing, it already has ample tools available to seek additional information. As recognized by the Notice, the FTC can always seek such information from the parties on a voluntary basis. The FTC alleges that "the Agencies do not always receive it in a timely fashion during the initial waiting period, hampering the ability of the Agencies to use that period to effectively screen for transactions that merit the issuance of Second Requests."[17] However, the Notice fails to recognize that the agencies can always (and have successfully done so in the past) encourage the prompt provision of voluntary information in order to avoid the issuance of a Second Request. Parties frequently decide to "pull and refile" to provide the agencies additional time to review any voluntary information they receive in order to avoid the issuance of a Second Request. And ultimately, the agencies retain the ability to issue Second Requests compelling the provision of additional information under Section (e) of the HSR Act.[18]

Also, as discussed in Section II.B above, VC financings do not typically pose even a remote possibility of competitive concerns. Therefore, to the extent the FTC believes this information is required to assess the competitive effects of other types of transactions, we respectfully suggest that the FTC consider limitations that would apply to exempt VC financings from the proposed amendments.

To the extent that the FTC still feels the need to compel additional information short of a Second Request, other jurisdictions also often allow submission of a "short form filing" for transactions that meet the statutory thresholds but do not raise substantive concerns. The short form filing is

[16] Comm'r Lina M. Khan, FTC Chair Lina Khan on Proposed Amendments to Premerger Notification Form and Hart-Scott-Rodino Rules, clsbluesky.law.columbia.edu (June 30, 2023), https://clsbluesky.law.columbia.edu/2023/06/30/ftc-chair-lina-khan-on-proposed-amendments-to-premerger-notification-form-and-hart-scott-rodino-rules/.
[17] Notice at 42,196.
[18] 15 U.S.C. 18a(e)(1)(A).

intended to determine quickly, usually within 25 days, whether the proposed transaction raises any serious competition concerns that merit a more in-depth investigation. The FTC can consider reviewing the information gathered by these short form filings to determine to what extent the FTC and DOJ do not collect such information and determine whether it would be reasonable for the agencies to collect similar information.

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Ultimately, NVCA asserts it is important to understand that the U.S. venture capital industry is fuel for startups that challenge incumbents, create more jobs and benefit American consumers. New company formation is what has caused the U.S. economy to be the most dynamic in the world. It is critical that all policymakers, including the FTC and DOJ, enable investment in new technologies and companies so that the U.S. can retain its global leadership position.

In summary, the imposition of an increasingly costly and time-consuming notification process will have a chilling effect on VCs investments, and a chilling effect on the businesses in which they invest. Notably, the rulemaking suggests that it will take up to 200 additional hours to prepare the filings with an added cost of $200,000 to $400,000 per transaction. While large established businesses can potentially bear such an increased financial and administrative burden, this will have an outsized effect on smaller businesses with more limited resources.

If VC-backed companies must allocate substantial human resources to navigate the regulatory landscape, those personnel are diverted from focusing on the company's core operations and strategic planning. This burden, time and effort could otherwise be spent on activities that drive growth and innovation.

Similarly, the increased costs will strain VC-backed companies that typically operate at a loss. The costs associated with compliance, such as legal fees and administrative costs, will divert capital from productive investments such as research and development, hiring, and infrastructure upgrades that are critical for startups and small businesses. Such additional costs could even compel such companies to establish themselves offshore, in countries with more favorable regulatory environments. This would, of course, result in an obvious loss to the United States of jobs and tax revenue, as well as the loss of potential investment and economic growth.

To NVCA's knowledge, we are unaware of any HSR filing submitted on behalf of a VC that has resulted in a Second Request investigation or enforcement action by the FTC or DOJ. Not one. To that end, we welcome the FTC's continued dialog to help us understand how VC investments raise antitrust concerns that warrant this increased burden.

NVCA appreciates the opportunity to provide these comments, and the FTC's time and attention to consideration of our views, and looks forward to further engagement on this and other topics.

Exhibit 14

SUBMISSION

OF

WACHTELL, LIPTON, ROSEN & KATZ

TO THE

FEDERAL TRADE COMMISSION

AS TO

REQUEST FOR COMMENT ON 16 CFR PARTS 801-803—HART-SCOTT-RODINO COVERAGE, EXEMPTION, AND TRANSMITTAL RULES [PROJECT NO. P239300]

September 26, 2023

COMMENT TO
THE FEDERAL TRADE COMMISSION
ON PROPOSED AMENDMENTS TO
THE HART-SCOTT-RODINO ACT

On behalf of Wachtell, Lipton, Rosen & Katz, we respectfully submit this Comment in response to the Federal Trade Commission's June 29, 2023 Notice of Proposed Rulemaking (the "2023 NPRM")[1] and related proposed changes to the Premerger Notification and Report Form (the "HSR Form").

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), is a discrete statute designed to give the antitrust agencies—*i.e.*, the Commission and the Antitrust Division of the U.S. Department of Justice—pre-closing notification of certain transactions in support of the agencies' mission to enforce Section 7 of the Clayton Act ("Section 7"). The HSR Act did not amend the substance of Section 7, nor did it change the antitrust agencies' burden of proof under Section 7.

The HSR Form is intended to alert the agencies of the proposed transaction and to provide the agencies with information that is "necessary and appropriate" to identifying those transactions which may violate Section 7, while balancing the cost and burden on pro-competitive transactions. For transactions that warrant additional scrutiny or where more information is needed, the HSR Act authorizes the agencies to request additional documentary material and information (a "Second Request").

The 2023 NPRM and proposed changes and additions to the HSR Form, if promulgated, would expand the antitrust agencies' powers beyond the statutory confines of the HSR Act as delimited by Congress. Certain proposed changes have no relation to the proposed transaction or its potential impact on competition. Others seek information in pursuit of theories of harm under Section 7 with limited, if any, legal support, and shift the evidentiary burden to filing parties to demonstrate and document a *lack* of any competitive concern. And none are sufficiently justified in view of the immense cost and delay these proposed changes would impose on filing parties. We submit that such changes are outside the Commission's statutory authority under the HSR Act.

We respectfully request that the Commission consider this Comment and tailor any changes or additions to the HSR Form consistent with its statutory mandate.

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023).

I. The Commission's rulemaking authority under the HSR Act is limited.

The Commission's rulemaking authority with respect to the HSR Form is limited by the terms of the HSR Act. Such rulemaking must be "consistent with the purposes" of the HSR Act and the information requested on the HSR Form must be "relevant to a proposed acquisition" and must be "necessary and appropriate" to evaluating whether the notified transaction may violate Section 7.[2]

The purpose of the HSR Act is "to amend the federal anti-merger law, Section 7 of the Clayton Antitrust Act (15 U.S.C. §18) by establishing premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions."[3] The Act is thus procedural and does not substantively expand the antitrust laws.[4] The HSR Act also does not change the agencies' burden of proof under Section 7 to show, by a preponderance of the evidence, that a proposed transaction is likely to substantially lessen competition or tend to create a monopoly in violation of Section 7.[5]

Congress made clear that the purpose of the HSR Act was *not* to provide the agencies with an investigatory tool to suss out other non-transaction related antitrust violations: It is "not the committee's intention that these new antitrust tools be *misused* by allowing the accumulation of 'dossiers' on businesses for general enforcement purposes."[6] Instead, the HSR Act was concerned only with the potential for acquisitions to violate Section 7.[7]

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[2] The Clayton Act, 15 U.S.C. §18a(d) (emphases added).

[3] H.R. REP. NO. 94-1373, at 5 (1976). Section 7 makes illegal those acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

[4] *See* 2023 NPRM at 42178 (describing the HSR Form as a procedural tool); Mergers and Acquisitions; Proposed Rulemaking, 41 Fed. Reg. 55488, 55488 (Dec. 20, 1976) ("The amendment to the Clayton Act does not change the standards to be used in determining the legality of mergers and acquisitions."); H.R. REP. NO. 94-1373, at 6 (1976) (The HSR Act "in no way alters the substantive legal standard of Section 7 [of the Clayton Act]: That statute's longstanding prohibitions against acquisitions that may substantially lessen competition or tend to create a monopoly, remain unaffected by this measure. . . ."); 122 CONG. REC. 17,261 (1976) (statement of Sen. Bellmon) (The HSR Act "is intended to aid antitrust enforcement against illegal mergers. It would not change rules of legality, but it would change procedures."); 122 CONG. REC. 25,050 (1976) (statement of Rep. McClory) ("The bill simply establishes a procedure through which the Government is notified in advance of mergers between companies of certain sizes . . . . This bill does not change the substance of the merger law at all"); 122 CONG. REC. 16,938 (1976) (statement of Sen. Kennedy) ("Title V amends the Clayton Act to provide for a . . . notification to the antitrust authorities prior to consummation of very large mergers and acquisitions. . . . The title does not change the substantive standards by which the legality of mergers is judged.").

[5] *See supra* note 4. *See*, *e.g.*, *United States* v. *Sungard Data Sys.*, 172 F. Supp. 2d 172, 180 (D.D.C. 2001) (describing agency's burden of proof under Section 7); *United States* v. *H.R. Block*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011) (same).

[6] 122 CONG. REC. 25055 (1976) (emphasis added).

[7] *See supra* note 3; *see also* H.R. REP. NO. 94-1373, at 11 (1976) (statement of Rep. Rodino) (The purpose of the HSR Act is to provide the antitrust agencies with "advance notice, together with specific economic data on the merger."); *id*. (stating intent of the HSR Act was to give the agencies an opportunity to conduct an "expeditious and effective premerger proceeding[]," thus avoiding the "burdensome divestiture trials" that had historically accompanied Section 7 enforcement actions).

Congress also recognized that the HSR Act would impose costs and burdens on filing parties and significantly limited the scope of the HSR Act in view of these concerns.[8] The HSR Act was limited to transactions of a certain size, reaching only the largest mergers "*most likely* to 'substantially lessen competition'"[9] and excluded others that "pose no anticompetitive threats under Section 7."[10] Congress recognized that "smaller, illegal mergers may still be consummated, despite passage of this bill,"[11] and balancing the competing policy considerations, chose not to reach these mergers so as not to chill the many procompetitive transactions that would otherwise be affected.

Congress also limited the information that the Commission could request on the HSR Form to only that which is "necessary and appropriate."[12] The terms "necessary" and "appropriate" do not give the agencies free rein to define the scope of their statutory powers.[13] Rather, the Commission must show that the "benefits" of a rule "reasonably outweigh its costs."[14] This analysis is further informed by the rest of the HSR Act's statutory text.[15] Importantly, the HSR Act provides that at the end of an initial waiting period, the agencies may "require the

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[8] *See* H.R. REP. NO. 94-1373, at 10 (1976) (noting that the "costs and burdens" imposed by the reporting requirements should not "offset the decrease in burdensome divestiture trials."); 122 CONG. REC. 25,055 (1976) (expressing desire to limit the burden on "beneficial, procompetitive mergers."); 122 CONG. REC. 28,422 (1976) (statement of Sen. Hruska) ("Federal Trade Commission Chairman Engman . . . said: 'If we had to conduct full investigation of all mergers exceeding the $100 million assets or sales test that is contained in the bill, the fruits of our efforts might not be worth the cost.'").

[9] H.R. REP. NO. 94-1373, at 11 (1976) ("History, Background, and Need") (emphasis added).

[10] H.R. REP. NO. 94-1373, at 5 (1976) ("Summary of Reported Bill"). *See* 15 U.S.C. § 18a(c) (exempting, *inter alia*, (1) acquisitions of goods or realty made in the ordinary course of business; (2) acquisitions of bonds, mortgages, deeds of trust or other obligations which are not voting securities; and (3) acquisitions of less than 10 percent of the outstanding voting securities of an issuer solely for the purposes of investment).

[11] H.R. REP. NO. 94-1373, at 11 (1976) ("History, Background, and Need"). *See also id.* (statement by Rep. Rodino) ("[T]he terms of the bill are such that it will reach only about the largest 150 mergers a year."). In 2000, and consistent with this original concern, Congress amended the HSR Act to increase the monetary threshold over which transactions are notifiable. Congress anticipated that the increase would reduce the number of mergers subject to the HSR Act by "approximately 50 percent." H.R. Rep. No. 106-1005, at 198 (2000).

[12] 15 U.S.C. § 18a(d).

[13] *See New York Stock Exch.* v. *SEC*, 962 F.3d 541, 555-56 (D.C.C. 2020) (noting that the SEC's authority to implement regulations necessary or appropriate in furtherance of the Exchange Act "does not empower the agency to pursue rulemaking that is not otherwise authorized" and that the SEC had no "authority to promulgate a 'one-off' regulation like Rule 610T that imposes significant, costly and disparate regulatory requirements merely to secure information that may or may not indicate to the SEC whether there is a problem worthy of regulation. If agencies were allowed to regulate in this way, absent delegated authority from Congress, the ramifications would be extraordinary.").

[14] *Mexican Gulf Fishing Co.* v. *U.S. Dep't of Commerce*, 60 F.4th 956, 965 (5th Cir. 2023) (citing *Nat'l Grain & Feed Assn.* v. *OSHA*, 866 F.2d 717, 733 (5th Cir. 1988) (demanding cost-benefit analysis for rulemaking limited by standard of "reasonably necessary or appropriate" and concluding that final rule issued by the National Marine Fisheries Service that required charter boat owners to install a GPS device at a cost of $3,000, with an additional $40 to $75 per month in service fees, outweighed the agency's justification noting that the agency "fails to connect the GPS-tracking requirement with any legitimate conservation purpose."); *see also Michigan* v. *EPA*, 576 U.S. 743, 759 (2015) ("The Agency must consider cost – including, most importantly, cost of compliance – before deciding whether regulation is appropriate and necessary.").

[15] 15 U.S.C. § 18a(d) ("consistent with the purposes of this section"). *Cf. Alabama Ass'n of Realtors* v. *Dept. of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (concluding that broad grant of authority must be read in context of other statutory language limiting administrative powers to regulate activity that directly, not indirectly, related to statutory mandate).

submission of additional information or documentary material relevant to the proposed acquisition,"[16] *i.e.*, a Second Request. As the Commission has previously and correctly noted, the HSR Act does not contemplate the HSR Form eliciting "*all* potentially relevant information relating to an acquisition," because "[r]elevant information not specifically requested by any of the items on the form may be obtained . . . by means of a request for additional information."[17] This bifurcated structure is critical as the vast majority of transactions do not raise issues or concerns under Section 7: over the last five fiscal years for which the Commission has provided data, the agencies have issued Second Requests in only *2.4 percent* of filings.[18] By the same token, from fiscal years 2017 to 2020, the agencies issued early termination of the HSR waiting period *over 75 percent* of the time a request for early termination was made.[19]

Finally, the HSR Act and the accompanying rules and regulations contemplate that filing parties can file an HSR Form on as little as 10-days' notice,[20] which necessarily limits the type and breadth of information that the Commission can demand of parties on the HSR Form. This time frame is consistent with Congress's expectation that "'in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them.'"[21]

As discussed in greater detail below, the 2023 NPRM is different in scale, scope and kind to any prior changes to the HSR Form and is inconsistent with the HSR Act's text and purpose.

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[16] 15 U.S.C. § 18a(e)(1).

[17] Premerger Notification; Reporting and Waiting-Period Requirements, 43 Fed. Reg. 33450, 33520 (July 31, 1978) (emphasis added); *see also* H.R. REP. NO. 94-1373, at 11 (1976) ("History, Background, and Need") (HSR Form is intended to aid the agency in quickly identifying "problem areas."); Notification and Report Form for Certain Mergers and Acquisitions Under the Antitrust Improvements Act, 55 Fed. Reg. 31372 (Aug. 2, 1990) ("The Form is not intended to elicit all potentially relevant information relating to an acquisition. Completion of the Form by all parties required to file ordinarily will permit both agencies to determine whether the waiting period should be allowed to expire or be terminated upon request, or whether a request for additional information should be made."); Notification and Report Form for Certain Mergers and Acquisitions Under the Antitrust Improvements Act, 60 Fed. Reg. 40704 (Aug 9, 1995) (same); Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. 77312 (Dec. 30, 2005) ("The Form is not designed to elicit all potentially relevant information relating to a transaction; rather, the information requested assists the Commission and the Assistant Attorney General in determining whether to open an investigation or, alternatively, whether to grant a request for early termination of the waiting period or to allow the waiting period to expire if no such request has been made.").

[18] *See* Lina Khan, Chair, FTC & Jonathan Kanter, Assistant Atty. Gen. , DOJ Antitrust Div., Hart-Scott-Rodino Annual Report Fiscal Year 2021, at Appendix A, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf (the "2021 Annual Report") (270 Second Requests out of 11,043 filings for which a Second Request could be issued).

[19] 2021 Annual Report at Appendix A (4,358 early terminations granted out of 5,692 requests for early termination). In 2021, the agencies announced that the premerger notification office would no longer grant early termination. *See* Press Release, FTC, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination. These fiscal year data have thus not been included.

[20] In the context of tender offers and other acquisitions of voting securities from third parties, the HSR Act provides that the initial waiting period under the HSR Act begins on the date the acquiring person submits its HSR Form. 15 U.S.C. § 18a(b)(A)(ii). The acquiring person must notify the acquired party that it has submitted an HSR Form, and the acquired person must submit its own HSR From within only 15 days. 16 C.F.R. § 801.30(b)(2); *see also* 15 U.S.C. § 18a(A). For cash tender offers that time period is even shorter—the acquired party must file its HSR Form in only 10 days. 16 C.F.R. § 801.30(b)(2).

[21] 2023 NPRM at 42180 n.11 (quoting 122 CONG. REC. H30877 (Sept. 16, 1976) (remarks of Rep. Rodino)).

II. The 2023 NPRM, if promulgated, is an impermissible exercise of the Commission's rulemaking authority under the HSR Act.

Under the APA, federal courts have the authority to review final agency action.[22] The starting point for analysis under the APA is always the relevant enabling statute.[23] The Supreme Court is clear: "Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[24]

The HSR Act is a discrete, procedural statute and the HSR Form thereunder can require only that information which is "consistent with the purposes" of the Act, "relevant" to a notifiable transaction, and "necessary and appropriate" to assess whether such transaction violates Section 7.[25] When, as here, Congress's intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[26]

Courts must also set aside final agency action that is found to be "arbitrary, capricious, an abuse of direction, or otherwise not in accordance with law."[27] Agencies must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[28] "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the project, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[29]

As discussed in greater detail below, many of the proposed changes, if promulgated, would exceed the Commission's statutory authority under the HSR Act. Moreover, the Commission provides thin justification for these proposed changes, stating that macroeconomic trends demand more aggressive and broader antitrust enforcement. But that is not a valid justification in support of HSR rulemaking.

We discuss each of these deficiencies in detail below.

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[22] 5 U.S.C. § 706.
[23] *See Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).
[24] *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022) (internal citations omitted).
[25] 15 U.S.C. § §18a(d).
[26] *Chevron*, 467 U.S. at 842-43.
[27] 5 U.S.C. § 706(2). *See Judalang* v. *Holder*, 565 U.S. 42, 52 n.7 (2011) (noting *Chevron* "step two" and arbitrary and capricious review under the Administrative Procedures Act is often "the same"). If the Supreme Court overrules *Chevron*, *see Loper Bright Enterprises* v. *Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (U.S. 2023), the statutory analysis as articulated in this Comment is broadly applicable to the 2023 NPRM as the proposed changes are, *inter alia*, not "necessary and appropriate."
[28] *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983); *see also Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 213 (2016) ("One basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions.").
[29] *Motor Vehicle Mfrs Ass'n*, 463 U.S. at 43.

filing party would be required to submit as a "draft." In a Second Request, these nuances are discussed between the party and agency staff and tailored to the specific scenario, sometimes over the course of several weeks, including sometimes lengthy discussions with the parties' information technology teams. Such bespoke discussions, however, are not feasible for *every* reportable transaction. Thus the overly broad proposed requirement would make it nearly impossible for filing parties to comply with certainty and would provide the agencies a potential avenue to impermissibly extend the statutory waiting period. Any documentary requirement included in the HSR Form must provide clear, objective standards that allow filing parties to comply with certainty.

(b) Periodic Plans and Reports

The 2023 NPRM also calls for the provision of "certain high-level strategic business documents that were not created in contemplation of the transaction," including semi-annual or quarterly plans and reports that were provided to the chief executive, "certain individuals who report directly to a chief executive," or the Board of Directors of a filing party, "that analyze market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party" that were created or modified "within one year of the [HSR] filing."[56]

Ordinary course documents, by definition, are not prepared in relation to the transaction under review and thus are arguably outside the scope of the statutory mandate as they do not relate to the "proposed acquisition."[57]

The Commission fails to provide a fact-based explanation for why ordinary course documents *not* used to evaluate or analyze the transaction are necessary and appropriate for their initial analysis under the HSR Act. The 2023 NPRM simply states, without support, that such ordinary course documents "are useful to those negotiating or evaluating the transaction" because they "provide key transaction decision-makers with the company's internal assessment of commercial realities of the premerger marketplace."[58] Yet the existing HSR Form already requires filing parties to provide documents specifically used by key decisionmakers for analyzing the transaction, which *includes* any ordinary course documents used or relied upon by officers or directors in evaluating the transaction. The Commission fails to explain what additional information these other ordinary course documents—which were *not* used by key decisionmakers in connection with the transaction—would provide about the transaction that is necessary to the agencies' review such to warrant the heavy burden this request would impose on filing parties in every transaction.

Under the current framework, the agencies have ample opportunity to obtain ordinary course documents as part of their investigation if they determine such information is necessary. The 2023 NPRM acknowledges these documents are "routinely submitted" in a Second Request, underscoring the agencies' ability to receive these types of documents in transactions that are

[56] 2023 NPRM at 42195, 42214.
[57] 15 U.S.C. §18a(d). Notably, the Commission's inaugural proposed rulemaking in 1976 included a request for historical documents, but nonetheless still limited those document requests to those that related to the transaction. Mergers and Acquisitions; Proposed Rulemaking, 41 Fed. Reg. 55488, 55497 (Dec. 20, 1976).
[58] 2023 NPRM at 42195.

more likely to raise Section 7 issues.[59] The agencies may also request, and often receive, ordinary course documents on a voluntary basis during the initial waiting period, a long-established practice that has facilitated the efficient processing of transactions.[60] Those targeted voluntary requests are often focused on particular overlaps and are typically much narrower and less burdensome—in terms of both search scope and the type of documents requested—than the proposed requirement. In view of this long-standing agency practice of issuing voluntary requests, the Commission has failed to provide an adequate justification for why it must now impose this burdensome document request for all filing parties.

The Commission also underestimates the burden that this request would place on both filing parties and the agencies. The 2023 NPRM implies, without supporting evidence, that this requirement will be easy for a filing party to comply with because "as part of diligence for a potential transaction [such documents are] often collect[ed]."[61] In our experience, that is not the case for most transactions that require an HSR filing. Gathering these documents would add significant additional time needed to prepare the HSR Form—well beyond the 10 to 15 days contemplated by Congress—and likely contain information largely irrelevant to the agencies' analysis of whether a transaction is likely to violate Section 7.

The Commission recognizes that the broad scope of the proposed requirement would likely generate a significant number of documents,[62] many of which would not be relevant to the antitrust agencies' Section 7 mandate. In addition to the burden on the filers, the deluge of documents has the potential to frustrate the antitrust agencies' ability to quickly screen transactions to determine which ones warrant an in-depth investigation.[63] That *every* transaction will be required to provide this information, even though the vast majority do not pose competitive issues, creates inefficiencies for the antitrust agencies and is contrary to Congress's intent that "the premerger data sought by the Government can be compiled rapidly."[64]

The 2023 NPRM seeks comment on whether limitations on custodians or otherwise would still generate information about the state of competition that is "not specific to the transaction" while reducing the burden on filing parties. While we disagree that the additional documentary requirement is necessary or appropriate under the HSR Act, to the extent that it is retained in the Commission's final rules, the Commission should tailor the requirements to clarify that it is limited only to the filing party's products and services in the United States and that filing parties need produce only documents, or portions thereof, that discuss specifically identified subject matter (*e.g.*, "market shares, competition, or competitors"). A limitation to Board materials, excluding documents created for the chief executive officer and her direct reports, would also lessen the burden on filing parties, while also providing the Commission an opportunity to review certain ordinary course documents discussing products which may be at issue. Even with such tailoring, however, we do not believe such a requirement is relevant to the Commission's

[59] 2023 NPRM at 42195.
[60] Filing parties have strong incentives to comply with voluntary requests promptly in order to avoid a Second Request.
[61] 2023 NPRM at 42195.
[62] *See* 2023 NPRM at 42195 (acknowledging that this process "has the potential to result in the submission of a large number of documents").
[63] 2023 NPRM at 42195.
[64] 122 CONG. REC. 30,876 (1976) (statement of Rep. Rodino).

analysis of a notified transaction and thus is still overly burdensome relative to the limited benefit it would provide the antitrust agencies.

3. Narratives

The 2023 NPRM includes proposed changes that will require filing parties to provide detailed narratives on horizontal overlaps and supply relationships that effectively amount to a requirement that filing parties provide a complete competitive assessment of the proposed transaction. Such a far reaching request goes well beyond the scope of the HSR Act and impermissibly attempts to shift the burden of proof under Section 7 from the agencies to the filing parties. The proposed requirements also require information and detail that most filing parties could not reasonably compile in 10 or 15 days, as contemplated by the structure of the HSR Act.[65] Moreover, the highly subjective nature of the proposed narrative requirements would make it nearly impossible for filing parties to have certainty that their HSR filing is complete. As the Commission notes in the 2023 NPRM, during the initial waiting period, the FTC's Premerger Notification Office staff ("PNO Staff") "must review each HSR filing to ensure it complies with the HSR Rules."[66] As written in the 2023 NPRM, the narrative requirements would likely take significant PNO Staff resources to determine whether transacting parties complied and could require multiple iterations before the PNO Staff were satisfied that a filing is complete. Such subjectivity would provide the Commission an avenue to extend its review of a transaction beyond the statutory waiting period mandated by Congress.

(a) Horizontal Overlap

The 2023 NPRM proposes to require that filing parties list "each current or known planned product or service that competes with (or could compete with) a current or known planned product of the other filer."[67] Such an exercise goes to the core of the substantive antitrust analysis and is often a critical component of what the agencies must prove when seeking to challenge a transaction under Section 7.[68] As an initial matter, whether certain products and services compete with each other requires defining the relevant market—both at the product level and the geographic level.[69] Parties in antitrust litigation, including merger challenges, often disagree as to the appropriate market definition and even whether certain products compete with each other. The relevant product market—and whether the merging parties' products compete in said market—is often outcome determinative in Section 7 merger challenges.[70] Whether two products *could* compete is an even more highly fact intensive and complicated question that the agencies must prove when seeking to challenge a merger under Section 7.[71]

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[65] *See supra* discussion notes 20-21.
[66] 2023 NPRM at 42178-79.
[67] 2023 NPRM at 42190.
[68] *See*, *e.g.*, *United States* v. *Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.D.C. 1990); DOJ & FTC, Horizontal Merger Guidelines (Aug. 19, 2010).
[69] *See, e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336 (1962); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 618 (1974).
[70] *See, e.g.*, *United States* v. *United States Sugar Corp.*, 73 F.4th 197 at 204-06 (3rd Cir. 2023); *FTC* v. *Staples, Inc.*, 970 F. Supp 1066, 1073 (D.D.C. 1997).
[71] *See*, *e.g.*, *FTC* v. Meta *Platforms*, 2023 WL 2346238, at *22-25; *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 534-36 (1973).

Here, the Commission proposes to require that transacting parties make affirmative statements regarding market definition and the current and potential competitiveness of their respective product portfolios at the outset. This proposed requirement abrogates the Commission's responsibilities by pushing the burden on the parties—the antitrust agencies have the burden of proposing "the proper relevant market" when seeking to challenge a potential transaction, the parties do not bear that burden.[72] Requiring certified statements by filing parties at the outset of an investigation that go to the core of what the agencies must prove if they sought to challenge a transaction goes far beyond the statutory scope of the HSR Act.[73]

In addition to identifying competitive overlaps for the agencies, the proposed rule requests extensive information about any potential overlapping product or service including "sales, customer information (including contacts), a description of any licensing arrangements, and any non-compete or non-solicitation agreements applicable to employees or business units related to the product or service."[74] Such information is neither necessary nor appropriate to the agencies' initial assessment of a potential transaction.

As the Commission notes, contacting customers is often a critical investigatory tool, but only after "one Agency has granted clearance to the other to conduct an initial investigation of the transaction."[75] Parties often voluntarily provide such customer information when requested during the initial investigatory phase—when the request is tailored to the specific investigation. Such information, however, is not requested for the vast majority of transactions where the agencies do not open an investigation. Requiring customer contact information for all transactions would impose significant additional burden on the transaction parties and—especially in non-public transactions—raises significant confidentiality concerns as the agencies may not disclose non-public information obtained through the HSR process.[76] The Commission fails to articulate a clear reason why such information would be "necessary and appropriate" for all transactions.

The Commission provides even less rationale for its proposed requirement to "describ[e] any licensing arrangements, and any non-compete or non-solicitation agreements" related to the products or services.[77] Such information is unrelated to the specific proposed acquisition and thus beyond the scope of the HSR Act. The Commission also fails to articulate how such information may be relevant to the Section 7 analysis of whether the effect of a proposed transaction "may be substantially to lessen competition."

While evident that the proposed requirements would place a heavy burden on filing parties, the 2023 NPRM is noticeably light on detail as to what, exactly would be required of the parties to

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[72] *See United States Sugar Corp.*, 73 F.4th at 203-04.
[73] *See West Virginia* v. *EPA*, 142 S. Ct. at 2608-07 ("Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be shaped, at least in some measure, by the nature of the question presented—whether Congress in fact meant to confer the power the agency has asserted.") (internal quotations and citation omitted).
[74] 2023 NPRM at 42196.
[75] 2023 NPRM at 42196.
[76] *See* 15 U.S.C. §18a(h) ("Any information or documentary material filed . . . pursuant to [an HSR filing] shall be exempt from disclosure . . . and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.").
[77] 2023 NPRM at 42196.

provide a compliant response. Such vagueness creates significant ambiguity that will impose additional burden on the PNO Staff reviewing submissions, as well as uncertainty for transacting parties. As noted above, introducing broad narrative requirements with subjective completion standards creates significant risk that the Commission will seek to extend its statutory review period by rejecting filings as incomplete for vague, subjective reasons. At minimum, the Commission needs to provide clear, objective standards for identifying and discussing horizontal overlaps that do not shift to filing parties the agencies' burden of proof under Section 7.

(b) Supply Relationships

The 2023 NPRM also adds a new requirement under the HSR Form that filing parties "provide information about existing or potential vertical, or supply, relationships between the filing persons."[78] As the Commission notes, the antitrust agencies had previously required similar information, but, in 2001, eliminated the requirement. The 2001 Commission determined that such information was not necessary for the agencies to learn about transactions that present vertical concerns. The 2001 Commission also recognized that the vendor-vendee reporting requirement placed a heavy burden on vendees, "particularly large diversified persons that may purchase from other filing persons a wide variety of manufactured products through numerous subsidiaries and divisions," that outweighed its probative value.[79]

The 2023 NPRM provides no reason why its current proposal, which places an even greater burden on filing parties, is now necessary. The pre-2001 HSR Form required filing parties to indicate if they had a vendor-vendee relationship with any other filing party and for the vendee to list the products purchased from the other party (and total amounts) for the most recent year.[80] By contrast, the 2023 NPRM proposes to require not just information about the filing parties' relationship, but also for vendors to provide "information (including contact information and a description of the supply agreement) for other customers that use the product, service or asset to compete with other filing person[s]" and for vendees to provide "similar information for purchases made from the other filing person and any other business that . . . competes with the other filing party to provide substantially similar product, service, or asset."[81] Such information about sales to and purchases from non-transacting parties has limited, if any, relevance to the proposed acquisition and is thus outside the scope of the HSR Act.

Moreover, as with the horizontal overlap narrative, the proposal requires notifying parties to take certified positions about relevant markets and competition that go to the core of what the agencies must prove in a Section 7 merger challenge. The supplier request goes even further in requiring one filing party to make an assessment with respect to the competitors (and potential future competitors) of the other filing party, information that many filing parties would not be in a position to know at the time of filing. Such information also goes well beyond what is typically relevant in a Section 7 merger challenge. Viable non-horizontal theories of harm are notably rare under Section 7.[82] Requiring extensive information on supplier relationships in

[78] 2023 NPRM at 42196.
[79] Premerger Notification; Reporting and Waiting Period Requirements, 66 Fed. Reg. 8680, 8686 (Feb. 1, 2001).
[80] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33450, 35560 (Jul. 31, 1978).
[81] 2023 NPRM at 42197.
[82] *See United States* v. AT&T, Inc., 310 F. Supp. 3d 161, 193-94 (D.D.C. 2018), *aff'd sub nom. United States* v. *AT&T, Inc.,* 916 F.3d 1029 (D.C. Cir. 2019) ("Things are made more difficult still by the lack of modern judicial

every HSR Form turns the notification process into a wide exploratory net for the agencies and goes well beyond what is "necessary and appropriate . . . to determine whether such acquisition may, if consummated, violate the antitrust laws."[83]

Aside from the lack of statutory authority for such a request, the proposed requirements place an enormous burden on filing parties and add significant preparatory time that is not contemplated by the HSR Act. The Commission has utterly failed to articulate a clear reason why such information is necessary and appropriate to determine whether transactions may violate Section 7. At minimum when challenging a vertical merger the antitrust agencies must prove that one party has "substantial market power" in at least "one product or distribution level."[84] The agencies do not need information regarding the vendor-vendee relationship to assess this threshold question, and few transactions involve "substantial market power" such that it would be worth the significant burden the proposed requirement would impose on filing parties, or the agencies effort to review such information in every transaction. For those few instances, the agencies have ample tools to obtain the necessary information for their review, including through voluntary requests during the initial waiting period, the Second Request process, and third-party inquiries and documentary requests.[85]

Like the proposal on horizontal overlaps, the proposed supply narrative lacks detail regarding what objectively measurable information would be required. The 2023 NPRM would require information for two fiscal years, and provides no *de minimis* threshold requirement. The pre-2001 HSR Form by contrast required information for only the most recent year, only for transactions between the filing parties, and only if the product bought or sold generated revenue of $1 million or more.[86] As the 2001 Commission noted when it eliminated the requirement, this discrete vendor-vendee reporting requirement placed significant burden on filing parties. If the Commission determines that vendor-vendee information is necessary—in addition to articulating clear reasons as to why it reached that conclusion—it must provide clear, objective guidance for filing parties similar to what was required pre-2001. Moreover, the Commission cannot require information that would make filing parties conduct the substantive antitrust analysis for the agencies—the burden of proving potential harm under Section 7 remains with the agencies.

4. Officers, Directors, and Board Observers

The 2023 NPRM proposes additions to the HSR Form which would require filing parties to provide specific information regarding officers, directors and board observers, past, present and

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precedent involving vertical merger challenges—a dearth of authority that is unsurprising, considering that the Antitrust Division apparently has not tried a vertical merger case to decision in four decades." (emphasis omitted)).

[83] 15 U.S.C. § 18a(d).

[84] *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981).

[85] *See* David T. Scheffman & Richard S. Higgins, *Vertical Mergers: Theory and Policy*, 12 Geo. Mason L. Rev. 967, 973 (2004) ("Vertical mergers that have a significant potential for being anticompetitive (and unfortunately, many more) will necessarily stimulate complaints by competitors and customers at one or both levels.").

[86] Prior to eliminating the vendor-vendee reporting requirement, the Commission considered raising the *de minimis* threshold to $5 million. *See* Premerger Notification; Reporting and Waiting Period Requirements, 59 Fed. Reg. 30545, 30554 (June 14, 1994) ("[T]he Commission's experience in reviewing filings and investigating proposed transactions in recent years has indicated that acquisitions in which either party makes product purchases from the other party under $5 million rarely, if ever, present risk of vertical foreclosure or increased vertical integration in a given industry.").

future. The Commission reasons that the fact that filing parties are not required to disclose these details in the HSR Form "makes it difficult for the Agencies to complete their assessment of potential Section 8 issues during the initial waiting period."[87] In addition, the Commission "believes that having this information available during the initial waiting period would permit the Agencies to take steps to minimize the sharing of information prior to consummation" in potential violation of Sherman Act Section 1.[88]

These proposed changes fall outside the Commission's statutory mandate. The HSR Act was not intended as a tool to identify prior or future violations of Clayton Act Section 8 or Sherman Act Section 1, but instead a limited tool to assist the agencies in identifying and challenging prior to consummation those transactions most likely to violate Section 7. Moreover, Section 8 of the Clayton Act explicitly provides a one-year grace period where the violation resulted from "any change in the . . . affairs of such corporation from whatever cause," encompassing changes resulting from M&A activity.[89] The proposed addition of the "Officers, Directors, and Board Observers" section to the HSR Form is thus not relevant, necessary or appropriate in view of the Commission's limited statutory mandate.

The 2023 NPRM's request for board information going back two years is particularly irrelevant to the Section 7 analysis and adds significant cost and burden to filing parties. The request requires filing parties to compile a dossier for the agencies on officers, directors and board observers (or in the case of unincorporated entities, individuals exercising similar functions) for the filing person and *all entities* within the filing persons. As a practical matter, this could require filing parties to identify such roles for dozens, or in some cases, hundreds of subsidiaries, including non-operational subsidiaries that nonetheless have boards as a matter of corporate formality. This information may be difficult to identify as it is not always accurately and consistently maintained in the ordinary course of business. In addition, minor changes to these board roles due to employee departures are likely not tracked in the ordinary course such that recounting changes at every point in time over the last two years could be incredibly difficult and time consuming to reconstruct.

B. The proposed changes impose significant additional and unnecessary costs to filing parties inconsistent with the purpose of the HSR Act.

In passing the HSR Act, Congress sought to balance the costs and challenges of post-merger litigation to "unscramble" otherwise combined firms with the costs and burden a premerger notification regime would impose on all filing parties and procompetitive transactions.[90] The 2023 NPRM tips the scales far beyond what Congress could have intended[91] and no subsequent amendments to the HSR Act have indicated a contrary intent or balancing.

The Commission estimates the proposed changes will result in approximately 12 to 222 additional hours per filing, an average of 107 additional hours per filing, and an additional

[87] 2023 NPRM at 42190.
[88] 2023 NPRM at 42190.
[89] 15 U.S.C. § 19(b).
[90] *See supra* discussion notes 8-11.
[91] *See supra* discussion notes 20-21.

approximately $100,000 of labor costs per filing (acquired and acquiring).[92] The Commission further estimates that it currently takes, on average, 37 hours to prepare a filing, meaning that the 2023 NPRM will increase the expected filing time by an average of 290 percent, and, according to the Commission's estimates, by 600 percent for 45 percent of filings.

These estimates are not based on any empirical data or discussions with current practitioners, and we submit that the *actual* current and future costs of complying with the current and proposed HSR regulations, respectively, are and will be much higher than the estimates. The Commission notes that it "canvassed current Agency staff who had previously prepared HSR filings while in private practice to estimate the projected change in burden. . . . All have considerable experience with the HSR rules and with preparing HSR Filings for the types of transactions that are most likely to be affected by the proposed changes."[93] This experience may be relevant in estimating the time it takes to file the HSR Form in its present form, but is of no relevance in determining the added cost and burden of the wholly different and new information requested under the 2023 NPRM. In order to assess the true cost of the NPRM's proposed changes, the Commission must empirically survey the antitrust bar and the merger and acquisition community;[94] that task should be undertaken by the Bureau of Economics and recirculated as a supplement to the NPRM before any rule change is made final.

The 2023 NPRM, for example, requires filing parties to categorize its employees based on SOC categories and commuting zones. This is a completely new filing requirement and no prior experience filing an HSR Form could inform the time necessary to collect and confirm these data. As described in greater detail above, we expect this request will be incredibly burdensome on filing parties and add little value to whether a transaction is likely to substantially lessen competition under current Section 7 law.

The 2023 NPRM also requests that parties provide narrative descriptions of their businesses and of the relevant product and geographic markets. This requirement is similarly novel. The pre-notification processes associated with the international regimes the Commission points to as support for its proposed changes, which do require narrative responses, often take two to three months for simple transactions and substantially longer for complex transactions. This time frame is much longer than the statutory waiting period contemplated under the HSR Act. Moreover, based on our experience working with counsel in Europe, Asia, and elsewhere, such narrative notifications take significantly longer than 49 hours for simple cases and 259 additional hours for complex cases estimated by the Commission. As discussed below, it is notable that these international regimes the Commission references require affirmative *approval* from the reviewing agencies. The HSR Act is a pre-notification regime—it is not necessary, appropriate,

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[92] The Commission estimates that the changes will result in 107 additional hours per filing at an estimated rate of $460/hour, which equates to approximately $50,000 additional cost per filing party. *See* 2023 NPRM at 42208. As a filing typically requires both an acquiring and acquired side filing, the additional cost burden by the Commission's calculation is approximately $100,000.

[93] 2023 NPRM at 42207.

[94] The U.S. Chamber of Commerce conducted a recent survey of 70 antitrust practitioners. Based on that survey, the U.S. Chamber of Commerce estimates that the proposed HSR Form will take on average 327 hours and over 30 days to complete, representing "roughly $2.3 billion in additional [annual] costs borne by transactions that do not raise any anticompetitive concerns." Sean Heather, U.S. Chamber of Commerce, *Antitrust Experts Reject FTC/DOJ Changes to Merger Process* (Sept. 19, 2023), https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process.

or within the statutory bounds of the HSR Act to require filers undergo a notification burden similar to these international pre-approval regimes.

The 2023 NPRM also requires filing parties to submit other novel information that is often not maintained in the ordinary course of business or created in the course of a deal negotiation and therefore adds particular burden and cost to filing parties, including:

- A structure chart of subsidiaries by operating company. Certain companies may maintain this information in the ordinary course of business, but many do not or have limited organizational charts for certain business units. Even when these are maintained in the ordinary course of business, they are generally not up-to-date and it can take significant time and diligence to confirm that the organizational chart reflects the present business organization;

- List of all creditors and holders of non-voting securities for the acquiring person and all entities it controls and for any entity that controls the acquiring entity. Business units can have significant autonomy in obtaining credit or issuing non-voting securities and that information is not generally centrally maintained or tracked by the acquiring person;

- List of each officer, director, and board observer (or individual exercising similar functions) for the last two years for the filing person and each entity within it, as discussed above;

- Description of the acquiring person's business operations and all entities within it. Companies may have several dozen subsidiaries and written descriptions as to each of the respective business operations is not information readily maintained in the ordinary course of business and could be incredibly burdensome to collate;

- Description of all strategic rationales for the transaction. Although filing parties often have a preliminary perspective on a deal's strategic rationale, not all strategic rationales may have been identified or articulated at signing or even shortly after signing. Requiring submission of all strategic rationales under certification that such representations are "true, correct, and complete" presents unique challenges, as often certain rationales or the particularities or details of those rationales are only discovered in the course of additional post-signing diligence;

- Diagram of the transaction structure and steps, together with a chart explaining the entities involved in the transaction;

- Organizational chart of authors for each document produced together with the HSR Form, as well as for each individual whose files were searched for documents. In our experience, many filing parties do not maintain organizational charts in the ordinary course—and such charts rarely, if ever, include directors. Such charts would need to be constructed manually. This would be an exceptionally time-consuming exercise, particularly given that many filing parties have tens of thousands of employees, spread around the world, most of whom would be unrelated to the produced documents and transaction;

- List of and the specific details relating to prior acquisitions from the last 10 years; and[95]

- List of all existing or pending defense or intelligence procurement contracts, including information about the award and relevant government personnel. Due to confidentiality concerns and restrictions, particularly with respect to classified contracts, these data are often not centrally maintained and may not be known, even among senior leadership.

The additional time and cost associated with creating these new materials is not offset by the limited efficiency gains the Commission purports as justification for these requests. To the contrary, overwhelming the agencies' staff with significantly more information and documents for every transaction will likely delay and possibly impede the agencies' ability to quickly "detect [and] investigate larger mergers of questionable legality[.]"[96] The proposed additions and changes in the 2023 NPRM thus fail to rise to the level of "necessary and appropriate" as required by the HSR Act.

C. The Commission provides limited and deficient justification for the proposed changes to the HSR Form.

The 2023 NPRM proposes sweeping changes to an HSR Form that has remained largely unchanged since 1978 and supports the proposed changes with reasons that have questionable statutory bases. The Commission fails to adequately describe how the proposed changes are relevant to the agencies' Section 7 review of the transaction, why such changes are necessary and appropriate—particularly in view of the agencies' ability to issue Second Requests—and how these purported improvements to the review process offset the significant and additional burden that filing parties will bear as a result of the proposed changes. Indeed, the Commission fails to point to a single instance when the lack of certain information now requested under the 2023 NPRM resulted in a failure by the agencies to issue a Second Request or otherwise hampered their ability to enforce Section 7. These failures are fatal to any final rule the Commission may attempt to implement.[97]

We consider the Commission's stated justifications below, none of which is consistent with the HSR Act's mandate.

1. Technology and Digital Platforms

The Commission cites "tremendous growth in sectors of the economy that rely on technology and digital platforms to conduct business," as a justification for the 2023 NPRM, noting that

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[95] The Commission previously acknowledged the additional burden this request placed on filing parties when it reduced the request from ten to five years in 1987 (a decision which this Commission now reverses). *See* Premerger Notification; Reporting and Waiting Period Requirements, 52 Fed. Reg. 7066, 7078 (Mar. 6, 1987) ("This change should significantly reduce the burden of this item because it will cut in half the number of years that parties will have to search for information about prior acquisitions and because it should be easier for companies to identify more recent acquisitions.").

[96] H.R. REP. NO. 94-1373, at 11 (1976).

[97] *See Encino Motorcars*, 579 U.S. at 212 ("Where the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."); *cf. Mexican Gulf Fishing Co.*, 60 F.4th at 974 (concluding final rule was arbitrary and capricious because it failed to provide fair notice, requiring reporting of a different category of data than had been described in the proposed rule).

"mergers and acquisitions in these sectors present a unique challenge for the Agencies." It further notes that "[i]n these sectors, some transactions involve firms whose premerger relationship is not clearly horizontal or vertical; rather merger activity in these sectors increasingly involves firms in related business lines where the Agencies must closely examine the potential for direct competition in the future."[98] The Commission, however, does not specify what information and, in particular, which proposed changes to the HSR Form will aid the agencies in better evaluating these sectors or harm to potential competition from related businesses in these sectors. Nor does the Commission justify why perceived gaps of information with respect to these sectors warrant changes to the HSR Form applicable to *all* filing parties, including the vast majority whose businesses lie outside of these sectors.[99]

Notably, technology and digital platforms and their potential for competitive harm have been discussed at length for over a decade, including in a 2018 Supreme Court decision, *Ohio* v. *American Express*, 200 U.S. 321 (2018), and in more recent Section 7 cases including *United States* v. *Sabre Corp*., 452 F. Supp. 3d 97 (D. Del. 2020) and *Federal Trade Commission* v. *Microsoft Corp*., 2023 WL 4443412 (N.D. Cal. July 10, 2023). None of these cases suggest gaps in the current HSR Form, and the proposed changes to the HSR Form do not appear to address or directly relate to the competition issues presented in these and other technology and digital platform cases.

The HSR Form is also an inappropriate tool to identify potential competition concerns. Congress's directive is clear—the HSR Act and the HSR Form are not intended to capture all transactions that may violate Section 7, but only those most likely to violate Section 7.[100] Given the limited and largely unsuccessful Section 7 jurisprudence relating to potential competition,[101] the Commission fails to articulate why collecting information on related businesses, particularly given the additional burden such requests impose on filing parties, is necessary, appropriate, and consistent with the intent of the HSR Act.

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[98] 2023 NPRM at 42179.

[99] *See* 2021 Annual Report at 6-7 (HSR filings involving targets that derived most of their revenue in information technology sectors represented less than 10 percent of all HSR filings made in fiscal year 2021).

[100] *See supra* discussion notes 8-11.

[101] The potential competition concern as articulated by the Commission—a concern relating to potential for direct competition in the future—has not been recognized by the Supreme Court as a valid basis for a Section 7 violation. *United States.* v. *Marine Bancorporation*, 418 U.S. 602, 624-25 (1974) (The potential-competition doctrine, as recognized by the courts, focuses "on the likely effects of the premerger position of the acquiring firm on the fringe of the target market" and where "the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior. . . . The Court has not previously resolved whether the potential-competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a de novo undertaking or through the acquisition of a small existing entrant"); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 581 (1967) (concluding that the FTC had demonstrated "that the existence of Procter at the edge of the industry exerted considerable influence on the market"). *See also FTC* v. *Meta Platforms Inc.*, 2023 WL 2346238, at *20 (N.D. Cal. Feb. 3, 2023); *FTC* v. *Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (entertaining but ultimately denying the FTC's claim based on its potential entrant doctrine).

To the extent that the Commission's concerns relate to specific sectors of the economy, information requests should apply only to filing parties in such sectors,[102] avoiding the burden and cost on all other industries, and should be limited to only what is necessary and appropriate to assist the Commission in preliminarily identifying those transactions for which issuance of a Second Request is necessary.

2. Other Parties and Transactions

The Commission further reasons that "[t]ransaction structures have evolved to include not only the Ultimate Parent Entity (UPE) and its acquiring entity, but also other entities within the acquiring person. . . . [T]hese investors could have a direct role in effectuating the transaction. . . . Individuals or entities other than . . . those directly involved in the transaction may be able to exert influence over the transaction. . . . The existence of subsidies or loans, among other means, may subject the buyer to additional pressures from individuals or entities not directly a party to the reportable transaction."[103]

To address this alleged gap, the 2023 NPRM proposes a series of changes to assist in identifying any and all persons and entities that may touch a transaction, directly or indirectly.[104] Yet it is unclear, and the Commission fails to describe, how this information will assist the agencies in determining whether the transaction for which a filing is made may violate Section 7.

Information regarding minority interests of filing persons and minority shareholders of filing persons has been collected as part of the HSR Form since its inception in 1978.[105] We are not aware of a single agency challenge to a proposed transaction filed pursuant to the HSR Act where data on minority interests or minority shareholdings ultimately supported a Section 7 challenge where such interest was not itself reportable.[106]

The 2023 NPRM expands the existing filing requirement to even more attenuated relationships and interests (*e.g.*, limited partners, creditors, acquirers of non-voting securities) that are even

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[102] *See Pharm. Research & Mfrs. of America* v. *FTC*, 790 F.3d 198 (D.C. Cir. 2015) (upholding lower court decision that the FTC may issue rulemaking pursuant to the HSR Act that targets a particular industry over trade association's challenge of FTC final rulemaking).

[103] 2023 NPRM at 42179.

[104] The 2023 NPRM add several new sections to capture these relationships including the "Identification of Additional Minority Interest Holders," "Narrative Describing Ownership Structure of the Acquiring and Acquired Entities," "Organizational Chart for Funds and Master Limited Partnerships," and "Identification of Other Types of Interest Holders that May Exert Influence." *See* 2023 NPRM at 42185.

[105] Premerger Notification; Reporting and Waiting-Period Requirements, 43 Fed. Reg. 33450, 33531-32 (July 31, 1978).

[106] The 2023 NPRM cites *United States* v. *E.I. du Pont*, 353 U.S. 586 (1957) for the proposition that minority holders may attempt to change the competitive decisions of a target firm. In that case, du Pont had acquired a 23 percent equity interest in General Motors—well in excess of the five percent threshold in the HSR Form—for $49 million— – which, had the investment been made in 1978, would have rendered it an HSR reportable transaction. *Id*. at 602. *Cf*. Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053, 77058 (Dec. 1, 2020) ("Except for a few instances when a shareholder backside acquisition of 10% or less of an issuer's voting securities was linked to a larger transaction that presented competitive concerns, the Commission has not sought to block any acquisition of 10% or less of an issuer's voting securities.") (citing *In the Matter of Time Warner*, 123 F.T.C. 171 (Feb. 3, 1997) available at https://www.ftc.gov/sites/default/files/documents/cases/1997/02/c3709.do.pdf).

less likely to result in a substantial lessening of competition. The proposed changes seek information regarding transactions Congress *explicitly exempted* from the scope of the HSR Act because they "pose no anticompetitive threats under Section 7," including acquisitions of debt, non-voting securities, and passive equity interests.[107]

With respect to limited partners, the Commission stated in a 2011 rulemaking that limited partners had no control over the operation of the fund or portfolio companies and that their identities therefore were not necessary to the agencies' initial review.[108] The 2023 NPRM acknowledges this reversal, but simply notes that "[s]ince that time, the Commission has come to understand that the Agencies would benefit from more complete information about all minority holders of the filing parties," and that "it is important that the Agencies know the identities of limited partners . . . to uncover investment relationships that may have competitive significance."[109] The Commission, however, fails to articulate what new information has come to light to justify the reversal, why five percent is the relevant threshold for reportability, and how this information will ultimately aid the agencies in evaluating whether a transaction is likely to violate Section 7.

Given such information provides little to no probative value in determining whether a proposed transaction violates Section 7, the 2023 NPRM additions requiring disclosure of these potentially interested parties are neither necessary nor appropriate and do not outweigh the substantial burden such additions would place on filing parties.[110]

3. Enforcement Policy

The Commission further justifies the proposed changes to the HSR Form by noting:

> Another factor that has an impact on the complexity of premerger review is that consistent with the law and binding judicial precedent, the Agencies have stepped up efforts to review transactions for all their potential competitive impacts. The Agencies are responding to evidence that the U.S. economy is becoming increasingly concentrated overall.[111]

The Commission's effort to step up antitrust enforcement and review transactions for all their potential competitive impacts does not change the Commission's statutory mandate under the

[107] H.R. REP. NO. 94-1373, at 5 (1976) ("Summary of Reported Bill").
[108] Premerger Notification; Reporting and Waiting Period Requirements, 75 Fed. Reg. 57110, 57118 (Sept. 17, 2010), adopted in 2011 by Premerger Notification; Reporting and Waiting Period Requirements, 76 Fed. Reg. 42471 (July 19, 2011).
[109] 2023 NPRM at 42188.
[110] *Cf.* Premerger Notification; Reporting and Waiting-Period Requirements, 52 Fed. Reg. 7095, 7097 (Mar. 6, 1987) ("Since the Commission is not aware of any transaction to date that violated the antitrust laws but was not reported under the premerger notification program because the acquisition vehicle was not a controlled entity, it seems inappropriate to employ an approach that is likely to require notifications for a host of competitively insignificant transactions.").
[111] 2023 NPRM at 42179.

HSR Act. As the Supreme Court recently articulated, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends."[112]

The HSR Act is not a substantive statute; it did not, does not, and cannot change the legal standard under Section 7.[113] Nor does the HSR Act give the agencies carte blanche to search for violations of any law; the Act demands that any inquiry relate to whether a notified transaction violates Section 7.[114]

4. International Agencies

The Commission specifically cites how other *non-U.S.* regimes operate as a justification for why the HSR Form must change. Specifically, the Commission refers to international jurisdictions that:

> ask filers to provide significantly more information that their staff considers relevant to the competition analysis, including details about the transaction's structure and rationale, horizontal overlaps, vertical and other relationships, and more detailed sales data. Importantly, many other jurisdictions rely on narrative responses from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.[115]

This is inapt as other regimes operate under a completely different statutory scheme and mandate that is unrelated to the Commission's authority under the HSR Act. Premerger filings with the European Commission, for example, are required only in change-of-control transactions or where certain strategic governance rights are obtained. As a result, the European Commission typically reviews around 300 transactions a year[116] compared to the over 3,000 transactions reviewed annually pursuant to the HSR Act.[117]

Most critically, the EU's statutory scheme is an approval regime, not a premerger notification regime. Once a transaction has been approved by the European Commission, it is immune from further Commission scrutiny or challenge. In contrast, transactions that have been cleared by the U.S. antitrust agencies under the HSR Act remain subject to potential future scrutiny and challenge under Section 7. The European Commission also has the ability to unilaterally suspend or prohibit transactions without needing to obtain an injunction from a court.[118] By contrast, U.S. antitrust agencies do not have the ability to preliminarily enjoin a transaction. Congress considered, and firmly rejected, legislation that would have allowed the antitrust agencies to obtain an automatic stay of a transaction without any proof or offer of proof that the

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[112] *Alabama Ass'n of Realtors* v. *Dept of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).
[113] *See supra* discussion note 4.
[114] *See supra* discussion notes 6-7.
[115] 2023 NPRM at 42180.
[116] Fact Sheet, Euro. Comm'n, *Competition: Merger Control Procedures* (July 2013), https://competition-policy.ec.europa.eu/system/files/2021-02/merger_control_procedures_en.pdf.
[117] 2023 NPRM at 42184 n.22.
[118] Council Regulation 139/2004 of Jan. 20, 2004, *Control of Concentrations Between Undertakings*, 2004 O.J. (L 24/1) 34, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139.

transaction violates Section 7, noting that "[s]uch arbitrary and absolute enforcement agency power to stop and kill business transactions which are not inherently unlawful is at war with the most fundamental traditions of our jurisprudence."[119] The 2023 NPRM's attempt to replicate the more searching premerger approval regimes in other jurisdictions ignores these critical facts.

* * *

We thank the Commission for considering these comments. Please do not hesitate to contact Christina Ma, Katharine Haigh or Emily Samra at Wachtell, Lipton, Rosen & Katz [redacted] if you have any questions.

Respectfully submitted,

Wachtell, Lipton, Rosen & Katz

[119] 122 CONG. REC. 16911, 16928-39 (1976) (discussing amendment 1724 deleting provisions that would have allowed the antitrust agencies to obtain an automatic stay of transactions pursuant to an earlier version of the HSR Act); *id*. at 16930 ("Title V would vest in the Justice Department and the FTC an unjustifiable and destructive regulatory authority and veto over the process of capital allocation."); *id*. ("I believe that we are setting a precedent here if we enact this title that would be infinitely dangerous in allocating to appointed officials the ability to interfere and halt any private transaction without any reference without any real obligation to establish that the transaction would result in a breach of the law."); 122 CONG. REC. 17268-73 (1976) (proposed compromise, amendment no. 1701 to H.R. 8532, which included deletion of automatic stay provisions); *id*. at 17,571 (Amendment No. 1701 to H.R. 8532 was voted on and agreed to).

Exhibit 15



ANTITRUST MODERNIZATION COMMISSION

REPORT AND RECOMMENDATIONS

APRIL 2007

Deborah A. Garza *Chair*
Jonathan R. Yarowsky *Vice-Chair*
Bobby R. Burchfield
W. Stephen Cannon
Dennis W. Carlton
Makan Delrahim
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April 2, 2007

To the President and the Congress of the United States:

Three years ago, as authorized by statute, this Commission undertook a comprehensive review of U.S. antitrust law to determine whether it should be modernized. It is our pleasure to present the results of that effort, the enclosed Report and Recommendations of the Antitrust Modernization Commission ("Report").

This Report is the product of a truly bipartisan effort. The members of the Commission were appointed by the President and the respective majority and minority Leadership of the House of Representatives and Senate with the goal of ensuring "fair and equitable representation of various points of view in the Commission."[1] In fact, the Commissioners represented a diversity of viewpoints, which were fully and forcefully expressed during many hours of hearings and thoughtful deliberation. As one Commissioner has said, the Commission's recommendations were "fashioned on the anvil of rigorous discussion and debate." The Commission also endeavored at every turn to obtain a diversity of views from the public. In the end, the Commission was able to reach a remarkable degree of consensus on a number of important principles and recommendations.

First, the Report is fundamentally an endorsement of free-market principles. These principles have driven the success of the U.S. economy and will continue to fuel the investment and innovation that are essential to ensuring our continued welfare. They remain as applicable today as they ever have been. Free trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare.

Second, the Report judges the state of the U.S. antitrust laws as "sound." Certainly, there are ways in which antitrust enforcement can be improved. The Report identifies several. A few Commissioners have greater concerns about aspects of current enforcement, as expressed in their separate statements. On balance, however, the Commission believes that

[1] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

U.S. antitrust enforcement has achieved an appropriate focus on (1) fostering innovation, (2) promoting competition and consumer welfare, rather than protecting competitors, and (3) aggressively punishing criminal cartel activity, while more carefully assessing other conduct that may offer substantial benefits. The laws are sufficiently flexible as written, moreover, to allow for their continued "modernization" as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies.

Third, the Commission does not believe that new or different rules are needed to address so-called "new economy" issues. Consistent application of the principles and focus noted above will ensure that the antitrust laws remain relevant in today's environment and tomorrow's as well. The same applies to different rules for different industries. The Commission respectfully submits that such differential treatment is unnecessary, whether in the form of immunities, exemptions, or special industry-specific standards.

That does not mean the Commission sees no room for improvement. To the contrary, the Commission makes several recommendations for change. A few of these recommendations call for bold action by Congress that likely will require considerable further debate. We look forward to that debate.

The following summarizes some of the more significant changes the Commission recommends.[2]

Substantive Antitrust Standards (Mergers and Monopoly)

The Commission does not recommend legislative change to the Sherman Act or to Section 7 of the Clayton Act. There is a general consensus that, while there may be disagreement about specific enforcement decisions, the basic legal standards that govern the conduct of firms under those laws are sound.

The Commission nevertheless makes several recommendations in the area of merger enforcement. The purpose of these recommendations is to ensure that policy is appropriately sensitive to the needs of companies to innovate and compete while continuing to protect the interests of U.S. consumers. In particular, the Commission urges that substantial weight be given to evidence demonstrating a merger will achieve efficiencies, including innovation-relat-

[2] Although many recommendations garnered unanimous or nearly unanimous support, not all Commissioners fully agreed with all recommendations. Differences are identified in the text of the Report and in some instances are discussed in separate Commissioner statements. Recommendations with the support of at least seven Commissioners are reported as recommendations of the Commission. With respect to 96 percent of the recommendations, at least nine Commissioners agreed in whole or in part with the recommendations. Approximately 57 percent of the recommendations were unanimous.

ed efficiencies. The Commission also recommends that the federal enforcement agencies continue to examine the basis for, and efficacy of, merger enforcement policy. We urge the agencies to further study the economic foundations for merger enforcement policy, including the relationship between market performance and market concentration and other factors. We also recommend increased retrospective study of the effects of decisions to challenge or not challenge specific transactions. Such empirical evidence, although difficult to gather, is critical to an informed and effective merger policy.

With respect to monopoly conduct, the Commission believes U.S. courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies are generally not improper, even for a "dominant" firm and even where competitors may lose. However, there is a need for greater clarity and improvement to standards in two areas: (1) the offering of bundled discounts or rebates, and (2) unilateral refusals to deal with rivals in the same market. Clarity will be best achieved in the courts, rather than through legislation. The Commission recommends a specific standard for the courts to apply in determining whether bundled discounts or rebates violate antitrust law.

Repeal of the Robinson-Patman Act

The Commission recommends that Congress finally repeal the Robinson-Patman Act (RPA). This law, enacted in 1936, appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit. Continued existence of the RPA also makes it difficult for the United States to advocate against the adoption and use of similar laws against U.S. companies operating in other jurisdictions. Small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.

Patents and Antitrust

Patent protection and the antitrust laws are generally complementary. Both are designed to promote innovation that benefits consumer welfare. In addition, a patent does not necessarily confer market power. Nevertheless, problems in the application of either patent or antitrust law can actually deter innovation and unreasonably restrain trade. Many of the Commission's recommendations relating to the Sherman Act address the antitrust side of the balance. On the patent side, the Commission urges Congress to give serious consideration to recent recommendations by the Federal Trade Commission (FTC) and National

Academy of Sciences designed to improve the quality of the patent process and patents. The Commission also recommends that the joint negotiation of license terms within standard-setting bodies ordinarily should be treated under a rule of reason standard, which considers both potential benefits of such joint negotiation to avoid "hold up" and the possibility that such joint negotiation might suppress innovation.

Improving the Enforcement Process

To be effective, any enforcement regime must be clear, fairly administered, and not unreasonably burdensome. Several of the Commission's recommendations are designed to improve current processes to better meet these goals.

Eliminate Inefficiencies Resulting from Dual Federal Enforcement. Except in the area of criminal enforcement (which is the responsibility of the Justice Department), federal antitrust law is enforced by both the Justice Department (DOJ) and the FTC. Both agencies, for example, are equally authorized to review mergers under the Hart-Scott-Rodino Act (HSR Act), which essentially requires all mergers valued at above $59.7 million to be notified to the agencies and suspended until the expiration or termination of certain waiting periods. The Commission does not believe it would be feasible or wise to eliminate the antitrust enforcement role of either agency at this time. However, we make a number of recommendations designed to eliminate inconsistencies and problems that may result from dual enforcement.

Merger Clearance. The agencies have done a good job minimizing problems that can result from dual enforcement. But there is room for improvement that can only be achieved with the help of Congress. At the time of her confirmation, the current head of the FTC was asked to agree not to pursue a global merger clearance agreement between the agencies. The Commission calls on the appropriate congressional committees to revisit that position and authorize the DOJ and the FTC to implement a new merger clearance agreement based on the principles of the 2002 clearance agreement between the agencies. It is bad government for mergers to be delayed by turf battles between the agencies. Such battles undermine confidence in government, damage agency staff morale, and potentially delay the realization of significant merger efficiencies without good reason. The Commission recommends that Congress revise the HSR Act to require the DOJ and the FTC to resolve all clearance requests under the HSR Act within a short period of time after the parties report their transaction.

The Commission also recommends changes to ensure that mergers are treated the same no matter which agency reviews them. Specifically, the Commission recommends that Congress amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR Act merger cases. The Commission further recommends that the FTC

adopt a policy that when it seeks to block a merger in federal court, it will seek both preliminary and permanent relief in a combined proceeding where possible.

Improve the HSR Act Pre-Merger Review Process. The DOJ and FTC should continue to pursue reforms to their internal review processes that will reduce unnecessary burden and delay. The Commission also makes a number of specific recommendations designed to reduce the burden of HSR merger reviews and increase the transparency of government enforcement. For example, the Commission recommends that the agencies update their Merger Guidelines to explain how they evaluate non-horizontal mergers as well as a proposed merger's potential impact on innovation competition. The Commission also recommends that the agencies issue statements explaining why they have declined to take enforcement action with respect to transactions raising potentially significant competitive concerns.

Improve Coordination Between State and Federal Enforcement. State and federal enforcement can be strong complements in achieving optimal enforcement. But the existence of fifty independent state enforcers on top of two federal agencies can, at times, also result in uncertainty, conflict, and burden. The Commission encourages state and federal enforcers to coordinate their activities to seek to avoid subjecting businesses to multiple, and potentially conflicting, proceedings. We make a number of specific recommendations in this regard. In addition, the Commission believes States should continue to focus their efforts primarily on matters involving localized conduct or competitive effects. In addition, state and federal agencies should work to harmonize their substantive enforcement standards, particularly with respect to mergers.

De-link Agency Funding and HSR Act Filing Fees. HSR Act filing fees are used to fund DOJ and FTC antitrust enforcement activity. These fees are a tax on mergers, the vast majority of which are not anticompetitive. They do not accurately reflect costs to the government of reviewing a given filing, nor do they confer a benefit on notifying parties. But they set a precedent for other countries with merger control regimes. In the past, moreover, dips in merger activity (and filing fees) have threatened to affect the level of appropriations available for critical agency activities. The Commission recommends that Congress de-link agency funding from HSR Act filing fee revenues.

Private Litigation

Uniquely in the United States, private litigation has been a key part of antitrust enforcement. Under current rules, private plaintiffs are entitled to recover three times their actual damages, plus attorneys' fees. Defendants are jointly and severally liable for alleged conspiracies. There is no right of contribution among defendants. There is also only a limited right of claim reduction when one or more defendants settle. The combined effect of these

rules is that one defendant can be liable for nearly all of the damages caused by an antitrust conspiracy. Defendants thus face significant pressure to settle antitrust claims of questionable merit simply to avoid the potential for excessive liability. While the rules can maximize deterrence and encourage the resolution of claims through quick settlement, they can also overdeter conduct that may not be anticompetitive.

The Commission recommends no change to the fundamental remedial scheme of the antitrust laws: the treble damage remedy and plaintiffs' ability to recover attorneys' fees. On balance, the current scheme appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensates victims. However, the Commission recommends that Congress enact legislation that would permit non-settling defendants to obtain a more equitable reduction of the judgment against them and allow for contribution among non-settling defendants.

Indirect and Direct Purchaser Litigation. There are different rules at the federal level and among the states as to whether both direct purchasers of price-fixed goods or services and indirect purchasers may sue to recover damages. Under federal law, only direct purchasers can sue (this is commonly known as the rule of *Illinois Brick*). Defendants cannot argue that direct purchasers have "passed on" any amount of the overcharge to indirect purchasers (this is commonly known as the rule of *Hanover Shoe*). In thirty-six states and the District of Columbia, however, indirect purchasers can sue under state law providing that *Illinois Brick* does not apply to state court actions.

As a result, there is typically a morass of litigation in various state and federal courts relating to a single alleged conspiracy. Injured parties are treated differently depending on where they reside and defendants are subject to suit in multiple jurisdictions. In addition, federal *Illinois Brick/Hanover Shoe* policy provides a "windfall" to purchasers who have passed on an overcharge, while depriving any recovery at all to purchasers who actually bear the overcharge. Such a system that compensates the uninjured and denies recovery to the injured seems fundamentally unfair. The Class Action Fairness Act may ameliorate some of the administrative issues caused by conflicting federal and state rules by facilitating the removal of state actions to a single federal court for pre-trial proceedings. However, that Act applies only to pre-trial proceedings and does nothing to address the fairness issues associated with current federal policy. The Commission believes it is time to enact comprehensive legislation reforming the law in this area.

The Commission recommends that Congress overrule the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to recover for their injuries. Other aspects of the Commission's recommendation are designed to ensure that damages would not exceed the overcharges (trebled) paid by direct purchasers, that the full adjudication of such claims occurs in a single federal

forum, and that current class action standards would continue to apply to the certification of direct purchasers regardless of differences in the degree to which overcharges may have been passed on to indirect purchasers.

Criminal Penalties

There is a strong consensus worldwide favoring vigorous enforcement against cartels. Cartels offer no benefit to society and invariably harm consumers. Sentencing and fines under the Sherman Act are generally determined by the courts based on guidance in the Sentencing Guidelines issued by the U.S. Sentencing Commission. The Sentencing Guidelines employ a proxy of harm from cartels based on twenty percent of the volume of commerce affected. This twenty percent proxy is based on an assumed average overcharge of ten percent, which is doubled to account for dead-weight loss to society. The Commission recommends that the Sentencing Commission evaluate whether it remains reasonable to assume an overcharge of ten percent (*i.e.*, whether it should it be higher or lower) and the difficulty of proving actual gain or loss in lieu of using a proxy. It also recommends that the Sentencing Guidelines be amended to make explicit that the twenty percent proxy may be rebutted by proof by a preponderance of evidence that the actual amount of overcharge was higher or lower where a difference is material.

International Antitrust

The United States was once the only major country actively enforcing a comprehensive set of antitrust laws. Today, more than 100 countries have adopted competition laws. On the one hand, this development has helped the United States in its fight to stamp out international cartels. It has also benefited world trade by opening up markets to competition. On the other hand, the proliferation of competition authorities has increased the risk of burden, inconsistency, and even conflict. There is some concern about the potential effect on U.S.-based companies of differences in the way that other countries treat so-called dominant firm behavior and the exploitation of rights in intellectual property.

The Commission recommends a number of steps to address these concerns. First, "as a matter of priority" the DOJ and the FTC should study and report to Congress on the possibility of developing a centralized international pre-merger notification system that would ease the burden of companies engaged in cross-border transactions. Second, the DOJ and the FTC should seek procedural and substantive convergence around the world on sound principles of competition law. Third, the United States should pursue bilateral and multilateral cooperation agreements with more of its trading partners. These agreements should explicitly recognize that conflicting antitrust enforcement can impede global trade, investment, and

consumer welfare. They should also promote comity by providing for the exercise of deference where appropriate, the harmonization of remedies, consultation and cooperation, and benchmarking reviews. Fourth, the DOJ and the FTC should be provided with direct budgetary authority to provide antitrust technical assistance to other countries for the purpose of enhancing convergence and cooperation.

Cooperation from other countries can be essential to punishing international cartels that exact hundreds of millions of dollars from U.S. consumers. But the United States has had limited success in entering Antitrust Mutual Assistance Agreements (AMAAs) with other countries. Many believe this is because U.S. law appears to require that those nations agree to allow the United States to use confidential information obtained under such agreements for non-antitrust enforcement purposes. The Commission recommends that Congress amend the International Antitrust Enforcement Assistance Act to clarify that it does not require such a commitment as the cost of entering into an AMAA.

Finally, the Commission recommends that, as a general principle, purchases made outside the United States from sellers outside the United States should not give rise to a cause of action in U.S. courts. The Commission was split as to whether this principle should be codified through amendment to the Foreign Trade Antitrust Improvements Act.

Immunities and Exemptions

Free-market competition is the foundation of our economy, and the antitrust laws stand as a bulwark to protect free-market competition. Nevertheless, we have identified thirty statutory immunities from the antitrust laws. The Commission is skeptical about the value and basis for many, if not most or all, of these immunities. Many are vestiges of earlier antitrust enforcement policies that were deemed to be insufficiently sensitive to the benefits of certain types of conduct. Others are fairly characterized as special interest legislation that sacrifices general consumer welfare for the benefit of a few. Congress is currently considering the repeal of several immunities, including those covering the business of insurance and international shipping conferences. The Commission strongly encourages such review.

The Commission believes that statutory immunity from the antitrust laws should be disfavored. Immunities should rarely (if ever) be granted and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition. The Commission recommends a framework for such a review and recommends that Congress consult with the DOJ and FTC about the likely competitive effects of existing and proposed immunities. In those rare instances in which Congress does grant an immunity, the Commission recommends (1) that the immunity be as limited in scope as

possible to accomplish the intended objective, (2) that it include a sunset provision pursuant to which the immunity would terminate at the end of a specified period unless renewed, and (3) that the FTC, in consultation with the DOJ, report to Congress on the effects of the immunity before any vote on renewal.

The judicial state action doctrine immunizes private action undertaken pursuant to a clearly articulated state policy deliberately intended to displace competition. In addition, the state must provide sufficient "active supervision" to ensure that conduct is truly a manifestation of state policy rather than private interests. A recent report by the FTC staff raises concern that courts have been applying the doctrine without sufficient care to ensure that private anticompetitive conduct has actually been authorized by the state pursuant to a clear policy to displace competition. The Commission agrees that courts should adhere more closely to Supreme Court state action precedents. It recommends that the doctrine should *not* apply where the effects of conduct are not predominantly intrastate. In addition, the doctrine should equally apply to governmental entities when they act as participants in the marketplace.

Regulated Industries

During the early part of the 20th century, several industries—including electricity, natural gas, telecommunications, and transportation—were thought to be natural monopolies or at risk of "excessive competition." Since then, however, technological advancement and changed economic precepts have led to substantial deregulation. The unleashing of competition in these industries has greatly increased efficiency and provided substantial benefits to consumers. The Commission believes the trend toward deregulation should continue.

Antitrust enforcement is an important counterpart to deregulation. Where government regulation does exist, the antitrust laws should continue to apply to the maximum extent consistent with the regulatory regime. Ideally, statutes should clearly state whether, and to what extent, Congress intended to displace the antitrust laws, if at all. The courts, of course, should interpret antitrust "savings clauses" to give full effect to congressional intent that the antitrust laws continue to apply. Where there is no antitrust savings clause, the courts should imply immunity from the antitrust laws only where there is a clear repugnancy between those laws and the regulatory scheme.

The filed-rate doctrine prohibits private treble damage actions alleging that industry rates approved by a regulator resulted from unlawful collusion. Today, however, few filed rates are actually reviewed by regulators for their reasonableness. In 1986, the Supreme Court opined that a number of factors appeared to undermine the continued validity of the filed-

rate doctrine,[3] but concluded that it was for Congress to make that determination. The Commission believes it is time for Congress to reevaluate the filed-rate doctrine and consider overruling it where a regulator no longer specifically reviews and approves proposed rates agreed to among an industry.

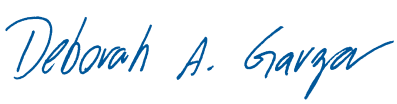
The DOJ and FTC review mergers pursuant to the HSR Act, applying the same standards across all industries. In several industries, however, the DOJ and the FTC share merger review authority with a regulatory agency that reviews the merger under a "public interest" standard. Review by two different government agencies can impose substantial and duplicative costs. It can also lead to conflict. The Commission recommends that the DOJ or the FTC should have full antitrust merger enforcement authority with respect to regulated industries. In addition, Congress should review whether separate review under a public interest standard is needed to protect particular interests that cannot be adequately protected under application of an antitrust standard.

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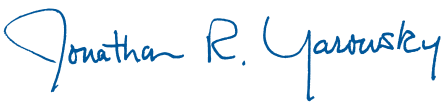
The federal antitrust laws are more than 115 years old. Although the free-market principles on which they stand remain a rock-solid foundation, the world, our economy, and our understanding of how markets work have changed substantially. For that reason, we believe it was a wise decision to authorize this Commission to assess those laws and whether the policies developed to enforce them are serving the nation well.

The almost constitutional generality of the central provisions of the antitrust laws has provided the needed flexibility to adjust to new developments. In this sense, "antitrust modernization" has occurred continuously. But, even so, the interplay of statutes, enforcement activity, and court decisions has suggested a substantial number of areas that the Commission believes can be improved.

The issues the Commission examined are complex. Reasonable minds can, and likely will, differ on many of the Commission's findings and recommendations. But we hope this Report will prompt an important national conversation on those recommendations that will result in the adoption of many, if not all, of them.



Deborah A. Garza
Chair



Jonathan R. Yarowsky
Vice-Chair

[3] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423–24 (1986).

Chapter II.B
The Hart-Scott-Rodino Act Pre-Merger Review Process

1. INTRODUCTION

The passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) marked one of the most significant changes to federal merger enforcement since enactment of the Clayton Act in 1914.[1] Before enactment of the HSR Act, it was more difficult for the agencies to investigate and challenge mergers before they had been consummated. Even when these lawsuits were successful, it was difficult to fashion relief that was effective in eliminating the anticompetitive effects that resulted from the merger. Effective relief proved especially challenging in cases brought after the merger had been consummated, because in most instances it would require recreating a company, or significant parts of one, to replace the competitor that the merger had eliminated.

Under the HSR Act, parties to mergers subject to the Act must file a notification form with the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The parties may not complete their transaction until the expiration of a thirty-day waiting period, which permits the FTC or the DOJ to investigate whether the transaction may substantially lessen competition in violation of Section 7 of the Clayton Act.[2] The investigating agency may extend the waiting period in order to conduct a more detailed investigation by issuing a request for additional information, commonly called a "second request." The second request requires the parties to supply detailed information regarding the transaction and its possible competitive effects. The parties must also observe a second thirty-day waiting period after fulfilling this request, during which the agency must decide whether to challenge the transaction in court.[3]

Under this system, the agencies are able to challenge mergers before they are consummated, and seek injunctions blocking the merger, partial divestitures that would adequately address the competitive concerns, or other appropriate relief. Since Fiscal Year 2001 (FY2001), the FTC and the DOJ have blocked or obtained relief in nearly 165 mergers that they concluded would harm competition and consumers, or approximately 1.8 percent of all transactions notified pursuant to the HSR Act during that period.[4]

Although the HSR Act is widely recognized as having made merger enforcement far more effective, some concern has been expressed over costs it imposes. First, some believe that the second request process has become unduly expensive and burdensome, both in the cost of providing requested information and in the length of time for resolution. Second, some believe that the HSR reporting requirements cover a significant number of transactions that

pose no competitive problems, imposing unnecessary costs, including preparing the filing, filing fees, and a thirty-day delay in completing the transaction.

Both the coverage and cost of complying with the HSR Act have grown beyond that originally expected by Congress. The reach of the Act was limited in recognition that, if its requirements "were imposed on every merger, the resulting added reporting burdens might more than offset" the enforcement benefits.[5] At the time the Act was passed, Congress expected that only about 150 very large transactions would be reported each year.[6] Instead, there have been nearly 1000 filings annually since the program began, reaching a high of 4749 in 2000.[7] Congress's recent changes to the filing thresholds, partially adjusting for inflation since 1976, reduced the number of notifications by approximately 50 percent.[8] Many of the transactions notified are quickly assessed as not likely to lessen competition substantially. For example, in FY2006, of the 1746 transactions notified, the government granted early terminations for 1098 (62.9 percent), extensively investigated only 45 (2.6 percent), and ultimately brought only 29 HSR Act enforcement actions (1.7 percent).[9] This broad coverage, however, ensures that the agencies are aware of nearly every transaction that has the potential to cause competitive harm.

Congress also assumed that the burden and cost of supplying documents and information in response to second requests would be modest and not time-consuming, as the responsive information would largely be contained in materials that the parties had already assembled.[10] Since 1976, however, merger analysis has become more complex, as the agencies have moved away from concentration thresholds in favor of a more flexible analysis that aims toward greater accuracy. As a result, today a second request can impose sizable burdens, including expenditures of several million dollars for attorneys' fees and production of tens of millions of pages of documents and tens of gigabytes of electronic data. One estimate places the current cost of responding to a second request investigation at between $5 million and $10 million.[11] The time needed for review of a transaction and receipt of approval from the agency now can be six months or longer.[12] The agencies maintain that they need this time and volume of information to accurately assess a merger's likely effects; others are skeptical.

Since 1990, acquiring parties must pay filing fees in connection with their notification. These fees, which range up to $280,000 for the largest transactions, supply a substantial part of the funding for the FTC and the Antitrust Division of the Department of Justice. Since 1996, at least 79 percent of the Antitrust Division's budget has been funded with filing fee revenue; for FY2000–FY2003, filing fee revenue fully funded the Antitrust Division's budget.[13] Between 32 and 59 percent of the FTC's appropriations, which also support its consumer protection mission, have come from filing fees each year since FY2001.[14]

The United States is one of approximately seventy jurisdictions, including the European Union and Canada, with a merger review system.[15] Most of these jurisdictions also require parties to notify transactions and observe waiting periods before closing to provide enforcers

an opportunity to challenge the proposed merger before consummation.[16] Each jurisdiction that requires a filing imposes costs on a proposed transaction. Nonetheless, a recent broad survey concluded that the external costs to the merging parties subject to a second request investigation in the United States (including payments for attorneys, economists, and document production) were at least double that of any other jurisdiction.[17]

In light of the concerns about the burdens imposed by the HSR Act, the Commission studied the HSR Act pre-merger notification system as a whole, paying specific attention to pre-merger filing requirements, the second request process employed by the FTC and the DOJ, the costs the current system imposes, and the benefits of more effective merger enforcement that the HSR Act brings.

Based on its study of the issues, the Commission makes the following recommendations.

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.*

28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.†

29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

* Commissioners Garza, Kempf, and Warden do not join this recommendation.

† Commissioners Carlton and Jacobson do not join this recommendation.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.*

31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.†

31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.

31d. The agencies should reduce the burden of translating foreign-language documents.

31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.

* Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

† Commissioners Burchfield, Cannon, Carlton, Litvack, and Yarowsky do not join this recommendation.

2. BACKGROUND

A. The Purpose and Mechanics of the Hart-Scott-Rodino Act

Prior to enactment of the HSR Act, the U.S. government had limited ability to stop an anti-competitive merger. To the extent the government had notice of a transaction, it had limited practical ability to obtain sufficient information to challenge it prior to its consummation.[18] Post-merger challenges, moreover, could take years—five to six on average.[19] As a result, even where the government ultimately prevailed, it was often unable to obtain effective relief.[20] It could neither fully compensate society for the interim loss of competition, nor fully restore a competitive market structure, particularly if the companies had already integrated their productive assets, or "scrambled the eggs."[21]

Congress addressed these issues by enacting the HSR Act. The stated purpose of the Act was "to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they [were] consummated."[22] Under the HSR Act, before consummating certain mergers and acquisitions, parties must file a notification with both the DOJ and the FTC.[23]

The HSR Act applies to transactions that exceed certain size-of-company and size-of-transaction thresholds and that have a significant nexus to U.S. commerce.[24] Currently, to be subject to the HSR Act, one of the acquired or acquiring persons must have at least $119.6 million in annual net sales or total assets, and the other must have at least $12 million in annual net sales or total assets.[25] The value of the transaction must be greater than $59.8 million.[26] The acquiring person must pay a filing fee, which depends on the value of the transaction and ranges from $45,000 to $280,000.[27] All filing thresholds are adjusted annually in accordance with changes in the Gross National Product (GNP).[28]

The HSR Act filing provides certain basic information about the transaction and the companies (for example, their affiliates, major shareholders, revenues, and the industries and geographic areas in which the operate, by North American Industry Classification System code (NAICS codes)), and includes documents prepared by or for directors or board-appointed officers of the companies in connection with the transaction that address competitive issues.[29] The parties are not required to provide any additional information about the extent to which they do or do not compete or the transaction's potential impact on competition.

After filing, the parties must observe a thirty-day waiting period (fifteen days for cash tender offers) to allow the government time to make an initial determination as to whether to allow the transaction to proceed or to conduct a more extensive investigation.[30] The initial thirty-day waiting period may be terminated early if the parties so request and the government determines there are no material competitive issues, or may simply be allowed to expire.[31] In either case, the parties may then close their transaction. Alternatively, the government can extend the waiting period by issuing a request for additional information, which has come to be called a "second request." [32] If a second request is issued, the par-

ties may not close their transaction until thirty days (ten days for cash tender offers) after they both have "substantially complied" with the second request.[33] During that second thirty-day period the government must decide whether to allow the transaction to close, seek to block it in court, or negotiate to place conditions on it that resolve competitive concerns.

B. Actual Practice

For the vast majority of transactions, the agencies grant early termination of the initial thirty-day waiting period or simply permit the waiting period to expire without conducting any formal investigation. For example, of the 1746 transactions notified in FY2006, 62.9 percent received early termination.[34] Only 2.6 percent of these transaction received second requests.[35] As Table A shows, these figures have been consistent from year to year.

Table A: HSR Act Enforcement Activity

	2001	2002	2003	2004	2005	2006
Transactions Reported	2237	1142	968	1377	1610	1746
Clearance not Sought or Investigation Closed During Initial Waiting Period	2167	1093	933	1342	1560	1702
Early Termination Granted	1603	793	606	943	997	1098
Second Request Issued	70	49	35	35	50	45
HSR Act Merger Enforcement Actions	42	28	33	17	16	29
Non-HSR Act Merger Enforcement Actions	13	5	3	5	2	3

Notes: HSR Act Merger Enforcement Actions: Enforcement actions are reported by the fiscal year in which the action was brought, regardless of when the investigation that led to the action was opened. FTC enforcement actions include Part II consents made public for comment, FTC authorization to file motions for preliminary or permanent injunction, FTC issuance of Part III complaints, and transactions that were abandoned or withdrawn for antitrust concerns that arose during the course of investigations. DOJ enforcement actions include complaints filed (whether litigated or settled), transactions that were abandoned or subject to a fix-it-first remedy, and certain bank divestitures pursuant to regulatory orders. Figures do not include merger enforcement actions in which the court found in favor of defendants (1 in 2002; 2 in 2004).

Non-HSR Merger Enforcement Actions: Both the DOJ and the FTC also bring enforcement actions challenging mergers that are not reportable under the HSR Act. For example, the DOJ has brought enforcement actions in banking mergers that are not reportable. Both agencies have brought actions in mergers that were below the reporting thresholds.

Source: FTC/DOJ Data Submission, at chart D.[40]

If one of the agencies decides that the transaction may raise material competitive concerns, it seeks clearance from the other agency to investigate.[36] In that event, the agency may request that the parties voluntarily provide additional information. The only way under the HSR Act that the government can prevent the parties from closing their transaction after

thirty days is to issue a "second request."[37] However, in order to provide the government with additional time for investigation without the issuance of a second request, an informal practice has developed by which parties voluntarily withdraw their HSR filing and re-file it to start another thirty-day waiting period.[38] (Withdrawing does not guarantee that a second request will not issue.) Although the Commission understands from anecdotal evidence that increasing use has been made of this "pull and re-file" strategy to extend the initial thirty-day waiting period,[39] neither the FTC nor the DOJ has systematically tracked the number of transactions for which this has been done.

Issuing a second request enables the government to conduct a further examination of the competitive effects of a proposed transaction based on information and documents provided by the merging parties, their competitors, and customers. In addition to seeking the voluntary provision of information by competitors and customers, the agencies have the ability to compel information through the use of a subpoena or civil investigative demand. The agencies also have the ability to compel testimony from the merging parties and others through depositions (in the case of the DOJ) or investigational hearings (in the case of the FTC).[41] In this sense, the second request process resembles discovery in civil litigation, although it is not supervised by a court or governed by the Federal Rules of Civil Procedure.

The parties may not close their transaction until they both have substantially complied with the second request.[42] An officer of each company is required to certify substantial compliance.[43] If the government disputes substantial compliance, it has the option to go to court to enjoin the transaction until substantial compliance has been achieved.[44] In the history of the HSR Act, there have been only three occasions on which the FTC voted to authorize the filing of a complaint and motion seeking such an injunction.[45] Otherwise, the parties and government generally informally resolve their differences. The 2000 HSR Amendments, discussed below, required the FTC and the DOJ to establish formal internal processes for resolving such disputes, which they have adopted.[46]

If the agency determines that the effect of the transaction may be substantially to lessen competition, the agency can challenge the transaction in court.[47] Before seeking an injunction in court, however, the investigating agency may negotiate with the merging parties to reach a consent decree that obligates the merging parties to divest assets or agree to other relief that resolves the agency's concerns about the merger's competitive effects.

C. Recent Reforms by Congress and the Agencies

In 2000 Congress enacted the 21st Century Acquisition Reform and Improvement Act (2000 HSR Amendments) to address concerns about the growing scope and burden of the HSR Act.[48] These amendments had two principal components.

First, the 2000 HSR Amendments substantially increased the size-of-transaction filing threshold, from $15 million to $50 million. This amendment had the effect of reducing the number of transactions for which filings were required by about half.[49] The amendments also

provided that all thresholds would be adjusted annually for changes in Gross National Product (GNP) beginning in 2005.[50]

Second, the 2000 HSR Amendments made several changes regarding the second-request process. One significant change required the agencies to designate a senior official to hear appeals from merging parties regarding the burden of second requests.[51] The amendments also directed both agencies to conduct one-time internal reviews of the HSR Act process, "implement reforms . . . in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay," and report back to Congress within 180 days.[52] Both the FTC and the DOJ reported to Congress in 2001, describing their reviews of the second request process and reforms they implemented.[53]

Both the FTC and the DOJ have continued to reform their pre-merger review processes. Each announced further reforms in 2006.[54]

3. RECOMMENDATIONS AND FINDINGS

Overall, the existing pre-merger review system under the HSR Act is achieving its intended objectives of providing a more effective means for challenging mergers raising competitive concerns before their consummation and protecting consumers from anticompetitive effects.[55] Although efforts must continue to reduce the cost and burden the system imposes on merging parties, there is no need for comprehensive reform.[56]

The costs the HSR Act imposes are not insignificant; while very small relative to the total value of the transactions reviewed, their magnitude remains of concern to many. First, the current notification system imposes costs—filing fees and a thirty-day waiting period—on a large number of merging parties whose transactions do not pose competitive problems. Second, the second-request process imposes very large, and in some cases unnecessary, burdens on parties to provide information to the agencies.

Effective prevention of anticompetitive mergers is an important policy objective. Nonetheless, mergers are often beneficial to consumers and businesses, offering procompetitive efficiencies that will benefit both.[57] Imposing unnecessary burdens on such transactions wastes resources and may, in the extreme case, inhibit beneficial conduct. The pre-merger review process should aim to strike a balance that enables effective merger enforcement while avoiding the imposition of excessive costs on the parties and the economy.

Based on its assessment of the operation of the HSR pre-merger review system, the Commission does not recommend systemic change or major modifications. Although the system is not perfect, alternative approaches do not appear to be more suitable and would impose their own sets of costs. For example, the Commission does not recommend adoption of a markedly different approach, such as that used in the European Union or Canada.[58] Indeed, there was minimal call for the Commission to recommend such alternatives.[59]

Rather, comments generally focused on reducing the burdens imposed by making modifications to the current process.

The Commission considered a variety of possible reforms to the current HSR system. First, the Commission considered changes to the initial filing process. As explained below, the Commission does not recommend any changes to the filing thresholds. The Commission does recommend that agency funding no longer be linked to filing fees. Second, the Commission considered numerous possible reforms to the second request process. Overall, it concludes that the second request process can impose sizable burdens on merging parties in terms of expense and delay that should be reduced wherever possible. It commends the agencies for the various reforms they have adopted to reduce second request burdens, and urges them to take steps to reduce those burdens further as well as implement mechanisms to measure burdens and track progress. The Commission recommends several specific reforms for the agencies to evaluate and, if appropriate, refine and implement.[60]

A. Pre-Merger Filing Requirements

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.*

Although the number of transactions reviewed has increased over time (largely due to the fact that the dollar thresholds remained constant while the dollar value of merger activity increased markedly),[61] the increase in the filing thresholds in 2000 significantly reduced the number of covered transactions.[62] If the $50 million size-of-transaction threshold had been in place for FY2000 (the last full year under the original thresholds), only 2502 transactions would have been reported in that year, rather than the 4749 actually notified, representing a decrease of 47 percent.[63] The 2000 HSR Amendments thus significantly addressed concerns that the HSR Act thresholds were "too low and capture[d] too many lawful transactions."[64]

Even with this significant reduction in coverage, and annual adjustments to accommodate GNP growth, it is clear that the vast majority of transactions reported raise no competitive issues.[65] This is particularly true for smaller transactions, which are less likely to be subject to challenge, or even extensive review, than transactions with large dollar values. Over the past five years, as Table B shows, the FTC or the DOJ issued a second request in 1.3

* Commissioners Garza, Kempf, and Warden do not join this recommendation. They believe that the filing thresholds should be increased in light of the significant number of transactions at the lower end of the thresholds that receive early termination and the few such transactions that either receive a second request or are subject to an enforcement action by the agencies.

percent of transactions valued between $50 million and $100 million, as compared with 11.1 percent of transactions over $1 billion. Similarly, they brought enforcement actions in less than 1 percent of mergers valued below $100 million, but 7.7 percent of mergers worth over $1 billion. Nevertheless, small transactions regularly account for a fair percentage of investigative activity. Between FY2002 and FY2006, 31 of the 214 second requests issued by the agencies (14.5 percent) were related to mergers valued between $50 million and $100 million.[66]

Table B: Second Requests and Enforcement Actions by Size of Transaction
FY2002–2006

	Second Requests		Enforcement Actions	
Transaction Size	Number	Percent	Number	Percent
$50M–$100M	31	1.3%	14	0.4%
$100M–$150M	20	1.9%	12	1.1%
$150M–$200M	19	2.9%	9	1.4%
$200M–$300M	19	2.4%	10	1.3%
$300M–$500M	18	2.4%	14	1.9%
$500M–$1000M	37	6.4%	22	3.8%
Over $1000M	70	11.1%	49	7.7%
Total	214	3.1%	130	1.9%

Notes: "Enforcement actions" are defined in same manner as described in Table A, and do not include enforcement actions brought against mergers that were not reportable under the HSR Act.

"Percent" is the percentage of all transactions notified within each size range that resulted in a second request or an enforcement action.

Source: FTC/DOJ Data Submission, charts E1–E3.

The FTC's and the DOJ's enforcement efforts suggest that relatively small transactions can pose competitive problems, and that the pre-merger filing requirements facilitate review of these transactions. The recent adjustments to the thresholds adopted by Congress in 2000 reduced the number of filings considerably, and the evidence has not persuaded the Commission that further increases are currently warranted.[67] The Commission believes that the provisions for regular adjustments to the thresholds for increases in GNP should remain in place.

Although no change to the thresholds is currently recommended, Congress should continue to monitor the operation of the system, and periodically reevaluate whether it should

adjust the size-of-transaction threshold to ensure that the number of smaller transactions actually reviewed and challenged by the agencies justifies the filing burdens imposed on those transactions.

28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.*

Revenues the antitrust agencies receive from HSR Act filing fees are evenly divided and credited to the appropriations for the Antitrust Division of the DOJ and the FTC.[68] As a result, filing fees significantly reduce the amounts that Congress appropriates from general revenues to fund the agencies' enforcement programs.[69] Indeed, in some recent years, the Antitrust Division has been funded entirely from filing-fee revenue.[70] Prior to FY 1990, there were no filing fees; Congress instituted a $20,000 filing fee in 1990 and began to fund both agencies' operations in part with the fee receipts. Congress increased the filing fees in the 2000 HSR Amendments, with fees ranging from $45,000 to $280,000, depending on the size of the transaction.[71] Congress enacted this increase largely to offset the reduction in fee receipts resulting from increasing the size-of-transaction threshold and thereby preserve agency funding.[72]

The agencies should be funded fully from general revenues, and should not have their funding linked to HSR filing fees.[73] The existing linkage has at least the potential to expose funding of other agency enforcement efforts—including criminal and civil non-merger efforts—to the risk that merger activity (and therefore filing fee revenues) will fall.[74] Furthermore, merging parties should not have to shoulder the burden of paying a large portion of the cost of antitrust enforcement generally.[75] Indeed, the fees Congress has imposed effectively tax mergers, the vast majority of which are procompetitive or competitively neutral.[76] Other countries may follow this example and use fees to finance various activities.[77] Moreover, because a large majority of filings impose negligible review costs on the agencies, filing fees do not accurately reflect the burden imposed on the government by a given filing.[78]

* Commissioners Carlton and Jacobson do not join this recommendation.

Commissioner Carlton believes that filing fees are equivalent to a user fee that is appropriately linked to agency funding.

Commissioner Jacobson believes that funding from HSR Act filing fees lessens the politics associated with funding the nation's antitrust function. Without the significant revenues from HSR filing fees, the agencies will be increasingly vulnerable to political pressures to appease various constituencies to ensure they get the funds they need.

This recommendation is not a call for reduced antitrust enforcement or reduced funding for the antitrust agencies. The Commission recognizes the importance of antitrust enforcement to promoting consumer welfare, efficiency, and innovation. It urges Congress to fund the antitrust agencies solely from general revenues.[79]

B. The Second Request Process

29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

A second request is the principal formal mechanism through which the agencies can obtain the information they need to perform a detailed assessment of a proposed merger's likely impact on competition. The second request process must provide the agencies with sufficient information in a timely fashion to enable them to determine whether to challenge an anticompetitive merger in court. The challenge facing the agencies is implementing an approach that strikes an appropriate balance between the likely benefit of requested information to their review and the cost it will impose on the merging parties. While additional information may potentially be helpful to an investigation, requests should be limited to avoid situations in which "the cost of supplying much of the information . . . is disproportionate to its probative value."[80]

The second request process can impose immense burdens on parties, both in terms of delaying transactions and forcing parties to expend significant resources to supply requested information. Indeed, commenters and witnesses uniformly expressed concern over the excessive cost and delay associated with the second request process.[81] The American Bar Association Section of Antitrust Law (ABA Antitrust Section) reported a "consensus in the private bar that second requests are unduly burdensome."[82] Furthermore, the 2000 Report of the International Competition Policy Advisory Committee (ICPAC) observed that "[m]any business groups and practitioners . . . perceive the second request process to be 'unduly burdensome.'"[83] Agency witnesses agreed as well that decreasing the burdens imposed by second requests is an important goal.[84] Indeed, reviewing a response to a second request imposes considerable burdens on the government;[85] FTC Chairman Deborah Platt Majoras has expressly stated that recent reforms at the FTC are intended to reduce the costs faced by parties *and* the agencies.[86]

The burdens of second requests are high and increasing.[87] The cost of responding to a typical second request includes outside counsel fees, payments for processing electronic

documents and photocopying, and economists' fees.[88] Indirect costs, such as employee time and opportunity cost, are difficult to quantify but are nonetheless very significant.[89] The ABA Antitrust Section cited reports that compliance with a second request typically takes six months and costs $5 million, while the reviews in more complex investigations can take eighteen months and cost the merging parties up to $20 million.[90]

Most of the Commission's evidence on burden, however, is anecdotal. The primary empirical study available to the Commission at the outset of its work was performed by PricewaterhouseCoopers in June 2003 under the sponsorship of the American Bar Association and the International Bar Association.[91] PricewaterhouseCoopers collected information on sixty-two transactions requiring multijurisdictional filing and reviews.[92] The sample thus focused on large international transactions subject to review by multiple jurisdictions.[93] The study found a "relatively small, regressive tax on mergers" and "significant delays in the multi-jurisdictional merger review process."[94] The study also found that the U.S. second request process is by far the most costly in the world, imposing twice the external costs (including payments for attorneys, economists, and document productions) than do second-phase investigations in the European Union.[95]

To supplement this information, the Commission sought data on the burden imposed by second requests from the public. No individual firms or companies provided data on burdens they had experienced. Although companies did not provide information directly to the Commission about the burden imposed by second requests, the ABA Antitrust Section provided the Commission with the aggregated results of a survey it conducted on burdens.[96] The figures for the delays and burdens imposed by second requests obtained through the survey are generally consistent with other anecdotal evidence, as shown in Table C. For example, on average, second request investigations took seven months and resulted in median compliance costs of $3.3 million. In addition, the median values for these data illustrate some of the specific burdens involved in complying with second requests: electronic document production of 583,000 pages of email and 555,000 pages of other documents; 275 pages of interrogatory responses; 13 gigabytes of electronic data; $2.4 million in fees for attorneys; and $300,000 in fees for economists. However, the survey's value is limited by the fact that it is based on a non-scientific, self-selected sample of only twenty-three total responses, and only a subset of these included information on each specific question. Moreover, the median values of most measures of burden were much lower than the means, suggesting that the average (*i.e.*, mean) values may be influenced by a few very high observations.

Table C: Burdens Imposed by Second Requests

Measure of Burden *(number of responses providing numerical data)*	Mean Value	Median Value
Length of investigation, in months (from HSR Act filing to close or agency action) (22)	7	7
Number of custodians searched (23)	126	94
Pages of e-mail produced (7)	1,566,867	582,913
Pages of electronic documents produced (other than e-mail) (6)	5,411,437	554,870
Pages of documents produced in hard copy (20)	1,515,662	544,516
Pages of interrogatory responses produced (18)	872	275
Electronic data produced in response to the interrogatories (in gigabytes) (6)	20	13
Total costs of compliance with second request (18)	$5,194,196	$3,300,000
Cost of economists (fees) (9)	$1,116,349	$300,000
Cost of attorneys/paralegals (fees) (13)	$4,361,604	$2,424,803
Costs of duplication/reproduction of documents and information (13)	$714,047	$100,787

Source: Letter from Joseph Angland to the Antitrust Modernization Commission Re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007).

The Commission also sought data on second request burden from the agencies. The agencies do not systematically track the number of documents or the amount of data produced by parties in response to second requests.[97] However, they do track the length of second request investigations. For both agencies, the length of second request investigations averaged about six months from the opening of the investigation in FY2005.[98] The length of investigations resulting in no enforcement action decreased significantly between FY2000 and FY2005, dropping from 312 days to 168 days for the FTC, and from 184 days to 163 days for the DOJ.[99] Investigations resulting in enforcement actions generally took longer—208 days for the FTC and 260 days for the DOJ in FY2005—and the length of these investigations decreased for the FTC but not the DOJ over the same period.[100]

It appears clear from the evidence available to the Commission that the second request process imposes significant costs on the merging parties in a substantial number of cases. However, the Commission is concerned that the lack of reliable quantitative information on the extent and nature of the problem may inhibit the ability of the agencies and Congress to identify and implement improvements, and recommends efforts to improve data collection below.

There are a number of reasons for the sizable costs imposed by second requests in some merger investigations. Merger investigations pose considerable challenges for the agencies. The issues are complex, and decisions must be made on a tight time frame. The second request must be issued early in the investigation and is the agencies' only opportunity to obtain documents and data, other than by consent of the parties, prior to challenging the merger in court.[101] Moreover, merging parties have no incentive voluntarily to provide the agencies with information that would suggest the transaction might be anticompetitive. Accordingly, the agencies cannot simply rely on the parties to provide all significant information and instead must actively seek the information they need. As a result, cooperation by the parties in meeting the agencies' needs is likely to be important to reducing the burdens imposed by second requests.[102]

The agencies' need for information to assess the impact of a merger has expanded as antitrust analysis has evolved over the past thirty years from a reliance on structural presumptions that mergers that increased concentration above certain thresholds were unlawful, to a more complex and fact- and data-intensive analysis.[103] The agencies must consider a variety of complex issues, including entry barriers and efficiencies. Moreover, the agencies increasingly rely on econometric assessments in evaluating mergers, and direct analysis of likely competitive impacts.[104]

The problem of increasingly extensive production requirements has been compounded by an "explosion" in the number of documents retained by companies in electronic format in recent years.[105] Some commentators have reported a ten-fold increase in the volume of documents collected per employee due to electronic documents.[106] As a result, the "search and production of electronic files has become the most expensive and burdensome part of most second request productions."[107] The agencies' need for increased production of data has also increased costs, especially because firms retain more data due to technological advances.[108] Data production costs are further increased by the need to re-process data for an agency—for example, to produce the information in a particular common format.[109] The agencies' review efforts are also negatively affected by these developments, because the production of massive amounts of data and documents also make it more difficult for staff to find and review relevant data.[110]

Unfortunately, agencies may face internal pressures that discourage staff from limiting the scope of second requests and may restrict the systematic reforms they adopt.[111] The agencies are generally reluctant to forgo the possibility of obtaining relevant information, even where it may not improve their ability to assess the competitive impact of the merger. As one witness observed, from the agency staff perspective, "[i]t is easy to take the view that more is better when it comes to obtaining information," since limitations "pose risks . . . without, from the government's perspective, much apparent downside."[112] For example, a large percentage of email that is responsive to a second request typically comes from lower-level employees, and arguably is not likely to produce insights regarding competitive

effects beyond information also stored centrally or available in management files.[113] Moreover, such evidence may provide relatively little useful information on the market and economic characteristics most relevant to merger assessment. The agencies' use of the second request process to obtain evidence to support seeking a preliminary injunction can exacerbate this tendency towards over-inclusiveness.[114] This, however, is counter to the intended purpose of the HSR Act process, which aims to provide the agency only with the information they need to determine whether to bring a court challenge.[115] The agencies may later obtain further discovery—governed by a district court and the rules of civil procedure—if the agency brings a challenge in court.

There are limited formal constraints on the agencies' tendencies to seek more information, due to the largely regulatory nature of the HSR Act process.[116] The parties' need to obtain the fastest possible resolution makes it extremely unlikely that they will request that a court review agency decisions regarding second request breadth or compliance.[117] The delay, uncertainty, and potential bar that a challenge would cause leads the parties to meet almost any agency demand in order to avoid going to court. Although the agencies have created formal internal checks, as required by the 2000 HSR Amendments, some commenters and witnesses questioned the efficacy of these internal review mechanisms.[118] The limited set of overall constraints has led some critics to assert that the agencies may use the second request "to essentially create the automatic stay of a transaction" and to "create a whole new discovery mechanism, unconstrained by the Federal Rules."[119]

Over the last several years, the agencies have engaged in various initiatives to reduce the burdens imposed by HSR Act review.[120] Both agencies adopted a number of specific reforms during 2006 (including limitations on the number of employees whose files must be searched for a second request, discussed more fully below).[121] Some of these reforms appear to have had modest success in reducing the length of second request investigations—in investigations in which no enforcement action was brought the length has decreased markedly over the past five years.[122] The 2006 reforms occurred too recently to have yet had a measurable effect.

The Commission commends the agencies for undertaking reforms, and for their continuing efforts, in collaboration with the antitrust bar, business community, and public, to reduce the burdens resulting from HSR Act review and second requests. The Commission encourages both agencies to fulfill their commitment to conduct an "ongoing assessment of the HSR Act program to increase accessibility, promote transparency, and reduce the burden on the filing parties without compromising the agencies' ability to investigate and interdict transactions that may substantially lessen competition."[123] Overall, the Commission shares FTC Chairman Majoras's view that the FTC's most recent reforms should be "the start rather than the end."[124]

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

There is little question that second requests have the potential to impose significant costs on the merging parties. The evidence of those costs is largely anecdotal, however, with little systematic quantitative information on the burdens second requests impose. The agencies are in the best position to collect such information. For example, the agencies could compile information about the volume of data and documents (or electronic "bytes") the parties produce in each investigation.[125] Information about the overall length of investigations, and the number of investigational hearings or depositions taken,[126] are valuable but do not provide a complete pictures of the burden involved in an investigation.

The absence of reliable data about investigational burdens makes it difficult to evaluate accurately the actual burdens imposed by HSR Act investigations. Such data could be used to confirm the anecdotal evidence that costs are high, or might show that the limited evidence overstates the typical burden. Equally important, comprehensive data provide a baseline by which to measure improvements through process reforms introduced by the agencies or to help identify "best practices" in merger review.[127] (In addition, data relevant to other aspects of the HSR Act process, such as information regarding delays from clearance decisions, would also help identify areas where delays and costs could be most effectively reduced.[128]) Finally, systematic data collection would assist congressional committees in exercising their oversight responsibilities regarding merger enforcement under the HSR Act by the FTC and the DOJ.

The agencies should improve and increase their systematic collection of data relating to the length, costs, and burdens of their investigations under the HSR Act. The agencies should collaborate on developing consistent measures and definitions to ensure that the data applicable to each agency are comparable, so that data can be aggregated or compared to see whether one agency has developed a more effective approach for reducing burdens. The Commission believes the development of improved data collection systems will not unduly burden the FTC and the DOJ. On the contrary, once institutionalized, the collection of such information is likely to become a routine part of each investigation that takes minimal additional time to compile. The benefits it can bring, however, to improved understanding of the costs and burdens of the HSR Act and areas for further reform are likely to be substantial.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

The Commission has identified several additional ways to streamline the second request process. The Commission recommends one specific reform to the second request process, and identifies four additional specific areas in which it recommends that the agencies evaluate current practices to determine whether further improvements can be made. These potential reforms recognize the need to maintain an appropriate balance between the burdens imposed by second requests and the need of the agencies to review a merger adequately. Overall, the reforms offered for the agencies' consideration could help reduce burdens on parties without materially impairing the ability of the agencies to determine whether a merger will cause anticompetitive effects. Other than with respect to the specific reform, the Commission has described the contours of these reforms in general terms, leaving it to the agencies to determine the best method of implementation in light of their substantial experience.[129] (To the extent these reforms require legislative change, the Commission recommends that Congress enact any legislation necessary for the agencies to implement these proposed reforms.)

The Commission's identification of these five possible reforms is not intended to be exhaustive. On the contrary, there are likely numerous other ways in which the agencies could reduce the costs and burdens of second requests. The Commission, however, leaves it to the agencies, and their collective expertise, to identify areas for further reducing costs and how best to implement appropriate reforms.

1. Recommended Specific Reform

31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.*

One of the principal sources of burden from a second request is the volume of electronic and paper documents that must be searched and produced. This burden is related to the number of custodians whose files must be searched for responsive information.[130] Several witnesses and commenters before the Commission suggested that custodian limits could

* Commissioners Burchfield, Carlton, and Garza to not join this recommendation.

Commissioner Carlton does not join this recommendation because he would not eliminate the provisions in the agencies' existing custodial limits that require the parties to enter into timing agreements or other scheduling conditions.

significantly reduce unnecessary burden in second requests without prejudice to the government's ability to obtain material information.[131] Indeed, limiting the number of persons subject to search in a second request is consistent with discovery limits imposed by procedural rules governing civil litigation.[132]

Recognizing these principles, the FTC and the DOJ recently adopted custodian search limits, capping the number of employees whose files must be searched for a second request to thirty to thirty-five for the DOJ and thirty-five for the FTC, subject to certain exceptions.[133] These limits do not vary depending on the size of the transaction,[134] and may be exceeded upon authorization by senior agency personnel.[135] Both agencies require that the parties provide documents and personnel to assist the agencies in determining which employees files should be searched, and do not extend the limits to company or "central" files.[136] Moreover, to obtain the benefit of these limits, the parties must agree to certain provisions extending the length of the investigation.[137] The FTC requires that the parties agree to delay certifying substantial compliance until thirty days after producing the required materials (or to a "rolling production"), and agree to a joint scheduling order containing at least a sixty-day discovery period in the event of a court challenge.[138] The DOJ requires that parties enter into a "Process and Timing Agreement" that, among other things, affords sufficient time for post-complaint discovery in the event of litigation, indicating that "four to six months is generally necessary."[139]

The Commission endorses the concept of custodian limits but recommends several modifications. Under the Commission's approach: (1) merging companies could opt into presumptive custodian-search limits at the time they file the HSR Act notification; (2) companies opting in would provide detailed organization charts with the HSR Act filing and commit to make company representatives immediately available to discuss them; (3) the limit on the number of custodians would vary based on the size of the transaction; and (4) the presumptive limit could be exceeded for cause with the agreement of the merging companies or with the approval of the Assistant Attorney General or FTC Chairman, as appropriate. (The complete description is set forth in Annex A.) The Commission's approach would not require the merging companies to commit to an extension of the statutory time periods of the HSR Act or any other timing agreements as a condition of limiting the number of custodians, as the current FTC and DOJ limits require.

Filing Option and Organizational Charts. The parties could choose to have the limits apply by checking a box on the HSR form, rather than when the second request issues, as under the existing agency approaches.[140] The parties would also be required to provide complete and accurate organizational charts at the time of the initial HSR filing, and to make a responsible officer available to explain the charts. This will allow the agency to begin its inquiry immediately. In addition, by making the election at the filing stage, the parties will provide the agencies with an indication that they believe the agencies may scrutinize the transaction.

Sliding Scale Limits. The agencies would establish limits on the number of custodians to be searched based on the size of the transaction, with the limits ranging between fifteen and thirty-five employees. A single limit has the potential to impose a proportionately larger burden on small transactions than on large transactions. Furthermore, the cost savings a sliding scale affords to smaller transactions should outweigh any increased complexity of such an approach.[141] Moreover, to the extent that lower limits would prevent thorough investigations, the agency could exceed the limits in appropriate cases.

Case-by-Case Increases in Limits. An agency may need to increase the number of custodians to search in some investigations to enable staff to conduct an adequate investigation (for example, when there are numerous product or geographic markets).[142] Accordingly, under the Commission's proposed approach, agency staff may seek to exceed the custodian limit where they deem it necessary to conduct an adequate investigation. They may do this either by obtaining the consent of the parties or by seeking certification from the Assistant Attorney General or Chairman of the FTC of his or her good-faith belief that the additional materials are needed. Because such exceptions should be granted sparingly, the Commission recommends that only the head of the investigating agency be permitted to make the formal certification of the need to expand the search.

No Agreement on Time Limits. The Commission's proposal does not include a provision requiring the parties to agree to a thirty-day extension of the second thirty-day waiting period after certifying substantial compliance, a stipulated period for post-complaint discovery, or other scheduling requirements, as both the current FTC and DOJ approaches do. Requiring the parties to agree to extensions of the waiting period is unnecessary and effectively amounts to an administrative amendment of the second thirty-day waiting period established by Congress. The thirty-day waiting period, in conjunction with the investigation period, should be adequate time for the agencies to decide whether to challenge a merger and to prepare a filing for a preliminary injunction; if it is not, the agencies should seek statutory change in Congress. Furthermore, parties should not be required to stipulate to a discovery schedule in order to avail themselves of the custodian limit. If the agencies challenge a transaction in court, the district court in its sound discretion can be relied upon to provide a sufficient period for any additional discovery the agencies need.

2. Additional Areas for Possible Reform

The Commission also identifies four specific areas in which further reform may be appropriate. The first two concern the transparency of the agencies' review process, particularly their economic and competitive analyses. The second two are areas in which the costs imposed by the second request may be particularly large relative to their benefits. The Commission recommends that the agencies examine how they could make further improvements in these areas, and take action as appropriate.

31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.*

The Commission understands that the agencies' staffs frequently discuss their competitive concerns and possible second request modifications with the parties shortly after the second request.[143] Based on comments submitted to the Commission, it appears that this may not occur in all cases or such discussions may not always fully reflect an agency's competitive concerns.[144] Such explanations can facilitate substantive discussions between the parties and agencies, as well as enable the parties to make better assessments of the information that would be most useful to the agencies. Furthermore, a systematic requirement to provide such an explanation may impose discipline on the second request itself, by clarifying the areas in which information is needed. The Commission therefore recommends that the agencies institutionalize this practice by specifically committing to provide information to merging parties regarding the agencies' competitive concerns shortly after issuing a second request.

31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.

The Commission understands that the agencies currently promote discussions between agency economists and the parties' economists as part of their efforts to ensure transparency and promote efficient merger review.[145] Several witnesses and commenters before the Commission advised that there should be greater transparency concerning the government's economic analysis. Merging companies are often limited in their ability to evaluate and critique the economic models being developed by agency economists, for example, because of concerns regarding the confidentiality of third-party information.[146] In addition, agency staff may be reluctant to reveal their preliminary analysis if the government may have to litigate with the parties.[147]

Current merger analysis relies heavily on econometric analysis and is highly sensitive to the assumptions, techniques, and data used. Specifying, testing, and refining econometric models to reflect actual industry circumstances are best served if the agencies' economists and the parties' economists can discuss alternative modeling approaches and economet-

* Commissioners Burchfield, Cannon, Carlton, Litvack, and Yarowsky do not join this recommendation.

ric testing.[148] Particularly given the reality that most merger challenges are not litigated, the search for the right resolution would be facilitated by open discussion. The Commission accordingly recommends that the agencies devise additional means through which the agency's economists can have frank and open discussions with the merging parties of the economic analysis being used.

31d. The agencies should reduce the burden of translating foreign-language documents.

The burden of translating into English foreign-language documents submitted in response to a second request can be particularly onerous in some transactions.[149] This burden should not be imposed on parties except where the documents are likely to be relevant to evaluating the competitive concerns, and even then only to the extent necessary to conduct an adequate investigation.[150] Although the agencies often limit translation requirements to certain key foreign-language documents, the standard second request contains no such limits and requires translation of all documents.[151] The Commission therefore recommends that the agencies consider institutionalizing reforms to limit the burden of translating documents. For example, it may be possible to require summaries of documents rather than full translations,[152] or to limit translation mandates to documents of "key corporate decision makers" and those relating to businesses or product lines most relevant to the competitive concern.[153]

31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.

Requests for data that are not kept in the ordinary course of business can be extraordinarily burdensome, since supplying such data may require the parties to incur great expense in engaging experts and information technology personnel.[154] The Commission recognizes the agencies have taken steps to reduce the burden of data requests, including efforts to understand the types of data the parties keep and the formats in which it is kept.[155] The Commission recommends that the agencies give further attention to taking steps, including formalizing policies, to reduce the burden imposed by requests for data that is not kept in the normal course of business by the parties (or which is kept in a form different from that requested).

ANNEX A

HSR ACT CUSTODIAN SEARCH LIMIT

1. The HSR Act Report Form will be modified to include a box labeled "Optional custodian limitation for potential additional request for information." If the notifying party checks this box, the procedures set forth below will apply. If, however, the box is not checked, any additional request for information may proceed without the limitations set forth below, consistent with current practice.

2. A party electing the custodian limitation option must (1) provide or create, and submit with the form, complete and accurate organization charts (or equivalent materials that allow staff to identify the party's employees and their positions), and (2) provide the name, and make available for interview, a responsible officer to explain the organization charts, the roles of the listed personnel, and the location of company records. The officer designated should be the senior person within the organization most familiar with these issues. If necessary, more than one such person should be made available.

3. If the notifying party has complied with paragraph 2 above, then, depending on the dollar size of the transaction, the reviewing agency will be limited to requiring a search of documents in the files of fifteen employees (at the low end) to thirty-five employees (at the high end).

4. If the agency staff believe that the files of custodians in excess of the numbers set forth in paragraph 3 are required to pursue their investigation, staff should first notify the affected party of the total number custodians whose files it seeks and request the party's consent. If consent is not provided within two business days, staff may seek materials from additional custodians only upon the personal approval and certification of a good faith belief that the additional materials are needed by, as the case may be, the Chair (or Acting Chair) of the Federal Trade Commission or the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Antitrust Division of the Department of Justice.

Notes

[1] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

[2] 15 U.S.C. § 18a(b).

[3] *Id.* § 18a(e).

[4] *See* Part 2.B of this Section, Table A. In addition, the agencies blocked or obtained relief in thirty-one mergers that were not reportable under the HSR Act. *See id.*

[5] H.R. REP. NO. 94-1373, at 11 (1976).

[6] Representative Rodino estimated that the HSR Act "will reach only about the largest 150 mergers a year." 122 CONG. REC. 25,052 (1976) (remarks of Rep. Rodino); *see also* H.R. REP. NO. 94-1373, at 11.

[7] *See* Part 2.B of this Section, Table A; Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2005, at app. A (2006) [hereinafter DOJ/FTC FY2005 HSR Report]; Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1997, at app. A (1998); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1988, at app. A (1989).

[8] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2000, at tbl.II (2001) [hereinafter DOJ/FTC FY2000 HSR Report] (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

[9] *See* Part 2.B of this Section, Table A.

[10] 122 CONG. REC. 30,876–77 (1976) (remarks of Rep. Rodino) (second requests would call for "the very data that is already available to the merging parties and has already been assembled and analyzed by" the parties).

[11] Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing, at 4 (Nov. 17, 2005) [hereinafter Sunshine & Wales Statement].

[12] *Id.* (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); Merger Streamlining Group, Public Comments Submitted to AMC, at 6 (Feb. 6, 2006) [hereinafter Merger Streamlining Group Comments] (reporting that the second request process often takes half a year); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Hart-Scott-Rodino Second Request Process, at 4 (Dec. 7, 2005) [hereinafter ABA Comments re HSR].

[13] Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[14] Data on FTC Appropriations (on file with AMC).

[15] James R. Atwood, Statement at AMC International Antitrust Hearing, at 3 (Feb. 15, 2006) (estimating that "approximately 70 [countries] provide for merger pre-notification and/or review"); International Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review, at 4 (Nov. 2004), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf (estimating that about 75 jurisdictions have merger review laws).

[16] Randolph W. Tritell, Ass't Dir. for Int'l Antitrust, Federal Trade Comm'n, Int'l Aspects of U.S. Merger Review Policy, ABA International Section Lunch Program, at 2 (Feb. 28, 2001), *available at* http://www.ftc.gov/bc/international/docs/tritell_intaspectsmergreview.pdf.

[17] PricewaterhouseCoopers, *A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews*, at 42 (July 2003) [hereinafter PwC Survey]; *id.* at 18 (defining costs covered in survey); Merger Streamlining Group Comments, at 6 (citing PwC Survey).

[18] *See* S. REP. NO. 94-803, at 61 (1976) ("Presently, the Government can stop few illegal mergers before they take place."); *see also* H. REP. NO. 94-1373, at 8 (the absence of pre-closing notification requirements "meant that many large and illegal mergers have been successfully consummated in recent years, before the government had any realistic chance to challenge them"); William J. Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 828–29 (1997) [hereinafter Baer, *Reflections on 20 Years of Merger Enforcement*].

[19] *See* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 52 (1969) [hereinafter Elzinga, *Antimerger Law*]; Baer, *Reflections on 20 Years of Merger Enforcement*, at 828–31.

[20] *See* Elzinga, *Antimerger Law*, at 47–54; S. REP. NO. 94-803, at 61. In one extreme case, a 1955 acquisition involving companies engaged in printing color comic supplements for newspapers was challenged by the DOJ in 1960. After the trial court dismissed the complaint in 1970, the Supreme Court held that the acquisition violated Section 7 and ordered the trial court to fashion relief in 1971. The trial court ordered divestiture in 1973, but by that time no interested buyer could be found. *See* United States v. Greater Buffalo Press, Inc., 327 F. Supp. 305 (W.D.N.Y. 1970) (dismissing complaint), *rev'd*, 402 U.S. 549 (1971), *on remand to* 1973 WL 833 (W.D.N.Y.) (ordering divestiture).

[21] *See* H.R. REP. NO. 94-1373, at 7–11.

[22] S. REP. NO. 94-803, at 61.

[23] A summary describing the main aspects of the program relevant to the Commission's study may be found in AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 388–96 (6th ed. 2007). For a more detailed discussion of the merger review process, see AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW 22–31 (3d ed. 2006) [hereinafter ABA, MERGER REVIEW PROCESS].

[24] 15 U.S.C. § 18a(a).

[25] *Id.*; 72 Fed. Reg. 2693 (Jan. 22, 2007) (setting new filing thresholds based on change in GNP).

[26] 15 U.S.C. § 18a(a); 72 Fed. Reg. 2693 (Jan. 22, 2007).

[27] Act of Dec. 21, 2000, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111. These fee thresholds are also adjusted for changes in GNP. *See* 72 Fed. Reg. 2693 (Jan. 22, 2007) ($45,000 for transactions valued at less than $119.6 million; $125,000 for transactions valued between $119.6 million and $597.9 million; and $280,000 for transactions valued at $579.9 million or more).

[28] 15 U.S.C. § 18a(a)(2).

[29] 16 C.F.R. § 803, app. (2006), Notification and Report Form for Certain Mergers and Acquisitions.

[30] 15 U.S.C. § 18a(b)(1)(B).

[31] *Id.* § 18a(b)(2).

[32] *Id.* § 18a(e).

[33] *Id.* § 18a(e)(2). In the case of a cash tender offer, only the acquiring party is required to certify substantial compliance. *Id.*

[34] *See* Table A.

[35] *Id.*

[36] *See* Chapter II.A of this Report regarding the merger clearance process.

[37] 15 U.S.C. § 18a(e)(2); *see also* ABA, MERGER REVIEW PROCESS, at 136–42.

[38] The FTC Premerger Notification Office has an informal policy under which the acquiring party can avoid paying a second filing fee and producing certain other additional information with the filing if re-filing is completed within two days. *See generally* ABA, MERGER REVIEW PROCESS, at 141.

[39] *See* Cecile Kohrs Lindell, *Companies are Trying to Beat the Antitrust Clock*, DAILY DEAL (Feb. 6, 2007) (reporting that companies are more frequently opting to pull and re-file their HSR notifications, and describing two recent examples).

[40] Letter from Marion Bruno and J. Robert Kramer II to Andrew Heimert re AMC Data Request (Nov. 22, 2006, revised Feb. 8, 2007 & Mar. 7, 2007) [hereinafter FTC/DOJ Data Submission] chart D.

[41] Federal Trade Comm'n's Rules of Practice, 16 C.F.R. § 2.8 (2006); Order No. 753–77, 42 Fed. Reg. 56,730 (Oct. 28, 1977).

[42] 15 U.S.C. § 18a(e)(2).

[43] 16 C.F.R. § 803.6 (2006).

[44] 15 U.S.C. § 18a(g)(2).

[45] *See* FTC v. Blockbuster, Inc., Civ. No. 1:05CV00463 (D.D.C. 2005); FTC v. McCormick & Co., 1988 WL 43791, at *1 (D.D.C. Apr. 26, 1988); FTC v. Dana Corp., No. CA-3-81-0003-H (N.D. Tex. 1981).

[46] 15 U.S.C. § 18a(e)(B)(i).

[47] *Id.* § 18.

[48] Department of Commerce, Justice, State, and the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111 (2000) (codified as amended at 15 U.S.C. §§ 18a & 18a note).

[49] *See* DOJ/FTC FY2000 HSR REPORT, at tbl.II (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

[50] 15 U.S.C. § 18a(a)(2). Adjustments were first made in FY2005 and are now made annually.

[51] *Id.* § 18a(e)(1)(B)(i) ("The assistant attorney general and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person. . . ."). It also increased the second waiting period from twenty to thirty days. *Id.* § 18a(e)(2).

[52] *Id.* § 18a(e)(1)(B)(iii)-(v).

[53] Federal Trade Comm'n, Report to Congress Regarding Merger Review Procedures (June 19, 2001), *available at* http://www.ftc.gov/os/2001/06/hsrreport.htm [hereinafter FTC Report to Congress re Merger Review Procedures]; Dep't of Justice, Antitrust Div., Report to Congress Regarding Merger Review Procedures (June 19, 2001), *available at* http://www.usdoj.gov/atr/public/guidelines/8550.pdf.

[54] Deborah Platt Majoras, Reforms to the Merger Review Process (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf [hereinafter FTC 2006 Merger Process Reforms]; Deborah Platt Majoras, Statement at AMC Barnett/Majoras Hearing, at 11 (Mar. 21, 2006) [hereinafter Majoras Statement] (summarizing reforms); Dep't. of Justice, Antitrust Div., Background Information on the 2006 Amendments to the Merger Review Process Initiative (Dec. 14, 2006) [hereinafter DOJ Background on 2006 Merger Process Initiative Amendments], *available at* www.usdoj.gov/atr/public/220241.htm; Dep't. of Justice, Antitrust Div., Merger Review Process Initiative (revised, Dec. 14, 2006) [hereinafter DOJ Revised Merger Process Initiative], *available at* www.usdoj.gov/atr/public/220237.htm.

[55] *See* J. Robert Kramer II, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) [Kramer Statement] (before the HSR Act, the DOJ could not effectively detect and challenge anticompetitive mergers; pre-merger review effectively protects consumers from anticompetitive mergers); Baer, *Reflections on 20 Years of Merger Enforcement*, at 834.

[56] *See, e.g.*, Merger Enforcement Transcript at 203 (Whitener) (Nov. 17, 2005) ("[I]n the main, it's a system that works well."); *id.* at 201 (Kramer) (HSR process is "successful from any global view"); Wayne D. Collins, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) (HSR Act provides "an adequate statutory framework for merger review," and the U.S. agencies "have done many things very well, [though] there is significant room for further improvement"); U.S. Chamber of Commerce, Public Comments Submitted to AMC (Nov. 8, 2005), at 14–15 [hereinafter U.S. Chamber of Commerce Comments] (prais-

ing agencies for reducing the number of second requests); *see also* INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 139 n.127 (2000) [hereinafter ICPAC REPORT] (observing that "business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is 'fundamentally sound'").

[57] *See, e.g.*, Thomas O. Barnett, Statement at AMC Barnett/Majoras Hearing, at 7 (Mar. 21, 2006) [hereinafter Barnett Statement] (mergers can "generate procompetitive benefits, such as lower costs and increased innovation"); Susan A. Creighton, Statement at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005) [hereinafter Creighton Statement] (merger review process may impose costs on transactions that are largely or wholly beneficial to consumers). *See generally* Chapter I.B of this Report regarding substantive merger law.

[58] *See, e.g.*, Merger Enforcement Trans. at 234–35 (Whitener) (arguing against adopting the European approach to merger review in the United States); Merger Enforcement Trans at 235–36 (Wales) (arguing that U.S. system relies more on "objective facts"); ABA Comments re HSR, at 13 (declining to recommend adoption of a "Form CO-like submission").

[59] *See, e.g.*, International Chamber of Commerce, Public Comments Submitted to AMC, at 2 (Sept. 5, 2005) [hereinafter ICC Comments] (commending the E.U. and Canadian approaches to structuring the second request review period); Merger Streamlining Group Comments, at 8–10 (noting that second phase investigations in Canada and the European Union imposes fewer burdens on parties and suggesting reforms analogous to features of those systems).

[60] *See generally* Majoras Statement, at 10 ("[t]he agencies can implement such flexible revisions readily through changes to their internal procedures" while "crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges"); Barnett/Majoras Transcript at 24 (Barnett) (Mar. 21, 2006) (merger review process reform is "an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress."); Barnett Statement, at 7–9.

[61] *See* ICPAC REPORT, at 127 (stating that, as of 2000, HSR filings had "increased significantly since the HSR Act was enacted" due to increased merger activity and the failure to adjust the thresholds).

[62] *See* Table A; U.S. Chamber of Commerce Comments, at 13 (the "upward revision in the filing threshold has dramatically reduced the number of filings").

[63] *See* DOJ/FTC FY2000 HSR Report, at tbl.II (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

[64] ICPAC REPORT, at 126 (emphasis omitted).

[65] U.S. Chamber of Commerce Comments, at 13.

[66] *See* Table B.

[67] *See* ICC Comments, at 2; ABA Comments re HSR, at 14. One commenter did suggest that action be taken to reduce the number of filings further. U.S. Chamber of Commerce Comments, at 13.

[68] *See* Pub. L. No. 101-162, § 605, 103 Stat. 988, 1031 (1989) ("Fees collected for [HSR filings] shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division.'") (codified as amended by Pub. L. No. 101-302, Title II, 104 Stat. 213, 217 (1990) at 15 U.S.C. § 18a note).

[69] Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm; Data on FTC Appropriations (on file with AMC).

[70] Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[71] Act of Dec. 21, 2000, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111. Congress also raised the filing fee, in 1994, to $45,000 per transaction. Act of Aug. 26, 1994, Pub. L. No. 103-317, Title I, 108 Stat. 1724, 1739.

[72] 146 CONG. REC. S10921 (daily ed. Oct. 10, 2000) (statement of Sen. Leahy) ("the appropriations to these agencies usually corresponds to the level of the fees collected," and the "bill authorizes the collection of sufficient fees to be revenue neutral"); 146 CONG. REC. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl) ("In order to assure that this reform is revenue neutral [for the agencies], we have worked with the Appropriations Committee to ensure that this bill raises the filing fees for the largest transactions.").

[73] Sunshine & Wales Statement, at 10; Business Roundtable, Public Comments Submitted to AMC, at 15 (Nov. 5, 2005) [hereinafter Business Roundtable Comments]; U.S. Chamber of Commerce Comments, at 16; ICC Comments, at 2.

[74] ICPAC REPORT, at 129; *Antitrust Enforcement Agencies: The Bureau of Competition of the Federal Trade Commission and the Antitrust Division of the Department of Justice, Hearing Before the Committee on the Judiciary House of Representatives*, 106th Cong. 209 (2000) (prepared statement of Jim Rill, Co-Chair, International Competition Policy Advisory Committee) [hereinafter Rill/ICPAC Statement].

[75] *See* 146 CONG. REC. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl) ("Of course, in a perfect world, we wouldn't finance the Antitrust Division and the FTC on the backs of these filing fees.").

[76] U.S. Chamber of Commerce Comments, at 16 ("As presently structured and applied, the fees represent nothing less than a tax imposed on parties that are forced to comply with the Hart-Scott-Rodino pre-merger scheme . . . ."); PwC Survey, at 4.

[77] *See* Business Roundtable Comments, at 15.

[78] U.S. Chamber of Commerce Comments, at 13 ("These [HSR] fees bear no relationship to the costs incurred in reviewing the average filing (since the vast majority of filings are cleared without any substantive review) and cannot be justified as a reasonable user charge."); Sunshine & Wales Statement, at 10.

[79] *See* ICPAC REPORT, at 129 ("[F]iling fees should be delinked from funding for the agencies, but . . . any efforts to do so must occur in an environment where sufficient funds are assured from other sources."); Rill/ICPAC Statement, at 209.

[80] William Blumenthal, *Overenforcement in the Hart-Scott-Rodino Second Request Process*, in MALCOLM B. COATE & ANDREW N. KLEIT, THE ECONOMICS OF THE ANTITRUST PROCESS 26 (2003) [hereinafter Blumenthal, *Overenforcement in the HSR Second Request Process*]; *see also* Mark D. Whitener, Statement at AMC Merger Enforcement Hearing, at 3 (Nov. 17, 2005) [hereinafter Whitener Statement] ("The cost, delay and disruption to business operations associated with a typical second request are disproportionate to the benefits to the government's enforcement mission, and they are increasing.").

[81] *See, e.g.*, Business Roundtable Comments, at 11; ICC Comments, at 11 (many ICC members have reported that overly broad second requests are being issued); ABA Comments re HSR, at 3; Whitener Statement, at 6 ("Second request responses have transmogrified into even more massive efforts that typically entail several million dollars in direct costs, and result in the collection, review and production of not hundreds but thousands of boxes of documents (or their electronic equivalent) as well as complex and costly data responses."); U.S. Chamber of Commerce Comments, at 14 ("The incredible burden of responding to Second Requests is well-known to any firm that has survived the ordeal. It is not unusual for companies caught up in the process to produce millions of documents and spend similar amounts in order to comply with agency demands."); Sunshine & Wales Statement, at 2.

[82] ABA Comments re HSR, at 3.

[83] ICPAC REPORT, at 138 (footnote omitted).

[84] Majoras Statement, at 10–13; Barnett Statement, at 7–8; Kramer Statement, at 2; Creighton Statement, at 1–2.

[85] *See* Merger Enforcement Trans. at 285 (Kramer); id. (Creighton).

[86] *See* Majoras Statement, at 10 (reforms will reduce costs to parties and agencies).

[87] *See, e.g.*, Whitener Statement, at 5 ("From the merging parties' perspective, the costs of complying with a second request in terms of time, money and disruption are enormous. . . . The delays alone, to say nothing of the costs, usually are enough to make litigation infeasible."); ICC Comments, at 1, 4 ("the cost, burden . . . involved in HSR review appear to have increased dramatically" and the second request process is "unduly burdensome") (quoting ICPAC REPORT, at 137); ABA Comments re HSR, at 1–2 (despite prior reform efforts, "the expense and burden of second request compliance has steadily increased and is becoming untenable"); Business Roundtable Comments, at 11 ("The issuance of a Second Request dramatically increases the cost, delay, and burden for both the agencies and the parties. . . . Second Requests are overbroad and require parties to produce an extraordinary amount of documents and data, far beyond the scope of information that is 'readily available.'").

[88] *See, e.g.*, ABA Comments re HSR, at 9 (stating that parties that must comply with second requests "incur a variety of very substantial costs," including lawyers, economists, computer/data processing vendors, copy vendors, the opportunity costs of employee time, and the cost of delay in consummating the transaction.); Sunshine & Wales Statement, at 4.

[89] *See* ABA Merger Comments re HSR, at 9; PwC Survey, at 5.

[90] ABA Comments re HSR, at 4 (citing Cecile Kohrs Lindell, *Majoras Hopes to Streamline Reviews*, Daily Deal (May 11, 2005)); *see also* Sunshine & Wales Statement, at 4 (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); *cf.* Barnett Statement, at attachment 5 (citing average duration of approximately four months for matters that the DOJ does not challenge in court).

[91] PwC Survey, at 4.

[92] *Id.* at 12–13.

[93] *Id.* at 44.

[94] *Id.* at 42.

[95] *Id.*

[96] Letter from Joseph Angland to the Antitrust Modernization Commission Re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007) [hereinafter Angland Letter].

[97] FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 2).

[98] *Id.* at charts H1–H2.

[99] *Id.*

[100] *Id.*; *see also* Barnett Statement, at 8–9, attachments 4–5 (reporting reductions in the length of second request investigations and the percentage of initial investigations resulting in second requests).

[101] *See* American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2001*, at 29–30.

[102] *See* Deborah Platt Majoras, FTC Chairman, Reflections on My First Year, Remarks Before the 2005 ABA Annual Meeting, at 10 (Aug. 6, 2005) ("[I]f we do not have a reasonable level of assurance that parties are dealing in good faith, new rules and process reforms will be, I fear, dead-on-arrival."); *see also* Whitener Statement, at 11–12; Merger Enforcement Trans. at 224–25 (Creighton) ("[C]ooperation by the parties really is indispensable for us to be able to engage in any kind of meaningful reduction in the number of custodians searched.").

[103] FTC 2006 Merger Process Reforms, at 2, 6; Majoras Statement, at 10; Creighton Statement, at 2–3 (emphasizing the impact of "increasing sophistication of substantive merger analysis" and "increasing use of data-dependant economic analysis"); International Bar Association, Public Comments Submitted

to AMC Regarding Merger Enforcement, at 25 (Oct. 26, 2005) [hereinafter IBA Comments] ("U.S. merger review has come a long way and now involves detailed and sophisticated microeconomic analysis of a merger's likely impact on prices and markets.").

[104] *See, e.g.*, Whitener Statement, at 6 (agencies and courts "rely more heavily on econometric analysis of business data").

[105] *See, e.g.*, Creighton Statement, at 2 (due to increased use of electronic storage, "the number of documents that need to be searched and produced has grown exponentially"); FTC 2006 Merger Process Reforms, at 2 ("advances in technology—from the copy machine to e-mail—have resulted in companies' producing and retaining substantially more documents"); Kramer Statement, at 9 (the proliferation of electronic documents makes second request reform "more urgent").

[106] Scott Sher & Daryl Teshima, *e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations*, ANTITRUST SOURCE, at 1 (Nov. 2005), *available at* www.wsgr.com/PDFSearch/sher1105.pdf [hereinafter Sher & Teshima, *e-Normous*] ("The volume of electronic documents . . . is overwhelming and increasing at a rate that puts Moore's Law to shame.").

[107] American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 42 [hereinafter ABA, *The State of Federal Antitrust Enforcement—2004*].

[108] *See* Whitener Statement, at 6 (agencies and courts "rely more heavily on econometric analysis of business data," and companies in turn collect more data that the agencies can request); IBA Comments re Merger Enforcement, at 25 (noting an increase in the need for data and the sources of data).

[109] *See* ABA Comments re HSR, at 2 (The cost and length of time required to comply is primarily due to volume of (primarily electronic) documents and data being produced pursuant to second requests. Corporations store and retain more, and the agencies more regularly require the manipulation and production of such data.); Sher & Teshima, *e-Normous*, at 8.

[110] Merger Enforcement Trans. at 285 (Kramer); *id.* (Creighton).

[111] *See* Blumenthal, *Overenforcement in the HSR Second Request Process*, at 23–24.

[112] *See* Whitener Statement, at 4–5; *see also* ABA, *State of Federal Antitrust Enforcement—2004*, at 41 (efforts to "discover[] every conceivable, potentially relevant fact" can "result[] in the type of massive, overbroad and unduly burdensome requests that are issued too often").

[113] *See* Sher & Teshima, *e-Normous*, at 12.

[114] IBA Comments re Merger Enforcement, at 30 (arguing that "[t]he Agencies' desire to collect all the evidence that may be required in litigation . . . increases the cost of the Second Request Process").

[115] *See* Sunshine & Wales Statement, at 2 (HSR was intended to give the agencies "the time and the basic information needed to determine whether to institute a merger enforcement action in federal court").

[116] *See generally* Sunshine & Wales Statement, at 1; William J. Kolasky & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 889–93 (1997) [hereinafter Kolasky & Lowe, *Merger Review Process*].

[117] *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 868–69 (1997) [hereinafter Sims & Herman, *Effect of Twenty Years of Hart-Scott-Rodino*]; Sunshine & Wales Statement, at 1; Kolasky & Lowe, *Merger Review Process*, at 893 (time-sensitive nature of transactions generally leads parties to avoid litigation "wherever possible").

[118] *See, e.g.*, Business Roundtable Comments, at 14 ("The internal appeals process at both agencies has proved to be useless."); ABA Comments re HSR, at 11 (in five years "the agencies have not, and, perhaps, cannot, create a credible internal second request appeals process"); Whitener Statement, at 13.

[119] Sims & Herman, *Effect of Twenty Years of Hart-Scott-Rodino*, at 881. The authors contend that the agencies disregarded the clear intent of the HSR Act when they decreed that "[a]nything less than a complete response is not substantial compliance" and that the waiting period does not run until the agencies deter-

mine substantial compliance. *Id.* at 881 & n.58 (quoting Federal Trade Comm'n, Statement of Basis and Purpose, 43 Fed. Reg. 33,450, 33,508, 33,550 (July 31, 1978) (internal quotations omitted)).

[120] For descriptions of specific initiatives, see Kramer Statement, at 7–15 (describing various initiatives taken by DOJ over the past ten years); Barnett Statement, at 8–9 (focusing on the Division's 2001 Merger Review Process initiative); Majoras Statement, at 10; Barnett/Majoras Trans. at 11–12 (Majoras); ABA Comments re HSR, at 5.

[121] The agencies also adopted several other reforms that help reduce burdens, but that are not addressed by the Commission in this Report. FTC 2006 Merger Process Reforms, at 19–30; DOJ Background on 2006 Merger Process Initiative Amendments, at 13–15.

[122] FTC/DOJ Data Submission, at Charts H1–H2.

[123] DOJ/FTC FY2005 HSR Report, at 17–18; DOJ Background on 2006 Merger Process Initiative Amendments, at 1 (the "amendments are part of the Division's ongoing effort to reduce merger review burdens while preserving its ability to conduct thorough investigations and successfully challenge anticompetitive transactions.").

[124] Majoras Statement, at 12.

[125] FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 2).

[126] *Id.* at charts I1–I3.

[127] For example, the agencies do not currently track which types of employees are most likely to be the source of documents that prove most useful in investigations. FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 3).

[128] *See* Chapter II.A of this Report regarding dual federal enforcement, which describes the limited data on length of delays resulting from clearance disputes.

[129] *See* Majoras Statement, at 10 ("The agencies can implement such flexible revisions readily through changes to their internal procedures" while "crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges"); Barnett/Majoras Hearing Trans. at 24 (Barnett) (merger review process reform is "an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress."); Barnett Statement, at 7–9.

[130] ABA Comments re HSR, at 10 ("[L]imiting the number of custodians is probably one of the most effective ways to reduce the burden of compliance."); FTC 2006 Merger Process Reforms, at 12 (noting "the strong relationship between search group size and investigation cost"); Merger Enforcement Trans. at 224 (Creighton) ("[T]wo of the really key variables . . . are the time period and, even more importantly, the number of custodians that we review."); Whitener Statement, at 8 ("The number of people who are subject to the search is critical . . . ."); ABA, *State of Federal Antitrust Enforcement—2004*, at 42; *see also* Angland Letter, at chart 1 (comparing the total cost of compliance and the number of custodians searched).

[131] Whitener Statement, at 9–10; ABA Comments re HSR, at 10; FTC 2006 Merger Process Reforms, at 12.

[132] IBA Comments, at 28.

[133] *See, e.g.*, FTC 2006 Merger Process Reforms, at 9 (referring to a presumption of searching thirty-five custodians); DOJ Background on 2006 Merger Process Initiative Amendments, at 9 (referring to thirty-custodian cap on searches).

[134] FTC 2006 Merger Process Reforms, at 12–13.

[135] *Id.* at 13 (limit may be exceeded if authorized by the Director of the Bureau of Competition); DOJ Background on 2006 Merger Process Initiative Amendments, at 9 (limit may be exceeded if authorized by the Section Chief responsible for the investigation).

[136] FTC 2006 Merger Process Reforms, at 9–10, 13–14, 17–18; DOJ Background on 2006 Merger Process Initiative Amendments, at 10–12.

[137] FTC 2006 Merger Process Reforms, at 10, 15–19; DOJ Background on 2006 Merger Process Initiative Amendments, at 11.

[138] FTC 2006 Merger Process Reforms, at 10, 15–19.

[139] DOJ Background on 2006 Merger Process Initiative Amendments, at 11; DOJ Revised Merger Process Initiative, at 7.

[140] The agencies could retain their existing custodial limit programs for instances in which the parties do not elect this option using the HSR Act notification form.

[141] *But see* FTC 2006 Merger Process Reforms, at 12 (the FTC considered but rejected "establishing a range of presumptive custodial limits" tied to the size of the transaction, due to the "complexity of such an approach").

[142] *See* FTC 2006 Merger Process Reforms, at 13; DOJ Background on 2006 Merger Process Initiative Amendments, at 12.

[143] *See, e.g.*, DOJ Revised Merger Process Initiative, at 2–3 (stating that "[e]arly substantive consultations are strongly encouraged . . . . [for] both the Division and the parties to present their preliminary views on the transactions," including identification of all "critical or potentially dispositive issues"); FTC Report to Congress re Merger Review Procedures (generally within five days of issuing a second request, FTC staff will invite the parties "to discuss the second request and the competitive issues raised by the proposed transaction, to the extent then known").

[144] *See, e.g.*, ICC Comments, at 4 (at the beginning of a second stage review, the reviewing agency should give the parties, orally or in writing, "a short but clear statement of the competitive concerns that cause the agency to undertake further investigation"); Business Roundtable Comments, at 14; IBA Comments re Merger Enforcement, at 29.

[145] *See, e.g.*, DOJ Revised Merger Process Initiative, at 3–5; Federal Trade Comm'n, Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations, at 1–2, *available at* www.ftc.gov/be/ftcbebp.pdf.

[146] *See* Merger Enforcement Trans. at 278–79 (Creighton) (data sharing raises substantial difficulties); *see also id.* at 66, 74–75 (Willig) (discussing problems of data confidentiality in related context).

[147] *See* Merger Enforcement Trans. at 152–53 (Rule) (recounting instance in which the agency economists declined to reveal their models due to the possibility of litigation); *cf. id.* at 153 (Heyer) (noting that such events may occur but that cooperation is usually good).

[148] Two witnesses considered allowing staff to discuss the specifications of the models (and resulting estimates) with the parties' economists, but not the underlying data. Merger Enforcement Trans. at 277–79 (Kramer, Collins); *id.* at 151–52 (Heyer) (describing efforts to share data with parties).

[149] ICC Comments, at 6; Business Roundtable Comments, at 12; *see also* ICPAC REPORT, at 141–42; Letter from Roxanne C. Busey to Joseph Simons re Merger Review Process, at 17 (Aug. 6, 2002) (translation requirements can be "extremely expensive" and "potentially cripple a transaction in terms of time and expense").

[150] *See* Busey Letter, at 17–18 (suggesting an approach to balance the costs and benefits of requiring transaction of non-English documents).

[151] ABA, MERGER REVIEW PROCESS, at 171; *id.* at app. 19, at 19-18 (Model Second Request); Casey R. Triggs, *Effectively Negotiating the Scope of Second Requests*, 13 ANTITRUST, Summer 1999, at 36, 39.

[152] *See* ICC Comments, at 6 (encouraging the Commission to explore how the practice of providing summaries of documents, and limiting production of full translations, can reduce the burden on the parties).

[153] *See* Business Roundtable Comments, at 13–14.

[154] *See, e.g.*, ABA Comments re HSR, at 4 (providing data in a different format from that maintained by the company in the ordinary course of business can be especially burdensome, difficult, time consuming, and expensive); U.S. Chamber of Commerce Comments, at 15 (recommending a reduction in the "number and scope of interrogatory requests calling for the submission of financial/economic data not kept in the ordinary course of business"); Business Roundtable Comments, at 13 ("[r]equests for econometric data not kept in the ordinary course of business should not be standard" but rather determined by agency management).

[155] *See, e.g.*, FTC 2006 Merger Process Reforms, at 22–23 (providing for improved communication regarding data needs and negotiation of data requests, including an opportunity for parties to meet with senior management about a request).

Exhibit 16

(1)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Honorable James O. Eastland
President Pro Tempore
United States Senate
2241 Dirksen Office Building
Washington, D.C. 20510

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
2211 Rayburn House Office Building
Washington, D.C. 20515

Gentlemen:

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, added a new § 7A to the Clayton Act, 15 U.S.C. § 18A (hereinafter referred to as "the Act"). Subsection (j) of the Act provides as follows:

> Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the first annual report to the Congress mandated by subsection (j) of the Act.

The Act creates a mechanism under which persons of specified size or larger, who intend to make stock or asset acquisitions of specified size or larger, must report their intentions to the Antitrust Division of the Department of Justice and to the Federal Trade Commission and must thereafter wait a prescribed period of time before consummating the transaction. That waiting period may be extended by either enforcement agency by means of a request for additional information. The Act contains eleven specific types of exemptions, along with a grant of rulemaking authority to the Federal Trade Commission to define any terms used in the Act, to create additional exemptions, and generally to carry out the purposes of the Act.

The Act provides for expedited consideration by a federal district court in the event that either agency seeks a preliminary injunction to prevent consummation of a proposed acquisition. It also contains penalty and enforcement provisions, a requirement that information filed by reporting persons be kept confidential, provisions clarifying the relationship between the Act and other substantive and procedural aspects of traditional antitrust law, and the requirement of an annual report.

The Act was signed by the President on September 30, 1976. On December 15, 1976, the Federal Trade Commission, with the informal concurrence of the Assistant Attorney General in charge of the Antitrust Division, issued proposed rules and a proposed Notification and Report Form for public comment; the proposed rulemaking was published in the Federal Register of December 20, 1976 (see attachment I). The thirty-day comment period was extended by the Commission on January 12, 1977, and expired on February 18, 1977. Approximately 130 comments were received in response to those proposed rules and form.

Because of the extensiveness of public comment, it became clear to the Commission that some substantial revisions would have to be made in the proposed rules. On July 25, 1977, the Commission approved revised proposed rules and a revised proposed Notification and Report Form and determined that additional public comment thereon would be desirable. The revised proposed rules and form were published in the Federal Register of August 1, 1977 (see attachment II), and a thirty-day comment period began on that date. */ In response to numerous requests for additional time for comment, the Commission on August 23, 1977, extended the comment period by thirty days, through September 30, 1977. A total of 116 comments were received during the second comment period.

The process of preparing rules to implement the Act has been time consuming for several reasons. First, the Act covers all types of acquisitions of assets or of voting securities -- acquisitions by corporations, partnerships and natural persons, acquisitions directly from the owner or issuer, acquisitions of voting securities from third parties or in the open market, acquisitions by means of tender offer or negotiated sale, acquisitions by or from foreign parties,

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*/ At the time of publication, the Commission staff also made available a side-by-side comparison of the revised proposed rules with those originally proposed (see attachment III).

acquisitions by affiliates, and others. Each of these, and many others, have their own peculiar factual settings, of which the rules must take account.

Second, there are a large variety of other situations where the extent and type of notification appropriate under the Act is affected by the existence of other statutes and other regulatory systems. Some of these underlie particular exemptions appearing in subsection (c) of the Act. Others may suggest the advisability of creating additional exemptions by rule.

Third, the infinite variety of existing business practices and forms of organization may in some cases permit or require variations in reporting obligations, depending upon the likelihood that certain types of acquisitions may raise anticompetitive problems, the extent to which certain types of acquisitions occur in the ordinary course of business of one or more of the parties, and the relationship between the parties to the transaction.

Finally, the drafting of regulations implementing the Act involves the attempt to strike what is often a difficult balance between the need of the enforcement agencies for "such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable [them] to determine whether such acquisitions may, if consummated, violate the antitrust laws," */ and the cost to the persons who must provide such information. The process of gathering sufficient information to determine where this balance may be struck has been a sizeable task.

At the present time, the staffs of the Commission and of the Antitrust Division are working on revisions of the rules and form. Following conditional approval of the rules and form by the Commission and conditional concurrence by the Assistant Attorney General in charge of the Antitrust Division, the form will be submitted to the General Accounting Office for consideration under the Federal Reports Act, 44 U.S.C. § 3502. While that review, which must be completed within 45 days, is pending, the staff will complete preparation

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*/ § 7A(d)(1).

of a final statement of basis and purpose. Thereafter, the Commission will formally promulgate the rules and form and submit them to the Assistant Attorney General for concurrence. After concurrence has been obtained, the final rules and form will be published in the Federal Register, along with a statement of basis and purpose. Under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, the rules may become effective no sooner than thirty days after publication. */

Throughout preparation of both sets of proposed rules and during preparation of final rules, the staffs of the Commission and of the Antitrust Division have worked closely together. Staff-level procedures are being developed for coordinating the administration of the premerger notification program by the two agencies, including clearance mechanisms, continual exchange of information concerning the status of pending notifications, interpretations of the rules and proposals for modification of any reporting requirements, and any enforcement actions which may need to be instituted.

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*/ Section 202 of the Antitrust Improvements Act of 1976 specified that Section 201, containing new § 7A of the Clayton Act, would become effective 150 days after enactment, i.e., February 27, 1977. (The rulemaking provisions contained in subsection (d) of § 7A became effective upon enactment.) Because final rules could not be promulgated prior to the effective date of the Act, the Commission on January 27, 1977, with the concurrence of the Assistant Attorney General, promulgated a Transitional Rule, which was published in the Federal Register of February 2, 1977 (see attachment IV). The Transitional Rule created an exemption for all transactions consummated prior to the effective date of the final rules and specified the manner in which the final rules would be implemented during the first thirty days following the effective date of the rules.

Because the final rules have not become effective as of this date, the Commission cannot now provide a full assessment of the Act, or of the related rules, as contemplated by subsection (j). The Commission expects to be able, on the basis of experience administering the premerger notification program, to provide a more comprehensive and detailed assessment of these matters in its second annual report.

The Assistant Attorney General in charge of the Antitrust Division has indicated his concurrence with this annual report.

By direction of the Commission.

(Mr.) Carol M. Thomas
Secretary

Exhibit 17





Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

Annual Report to Congress
Fiscal Year 2001

Pursuant to Subsection (j) of Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Twenty-Fourth Report)

Timothy J. Muris
Chairman
Federal Trade Commission

Charles A. James
Assistant Attorney General
Antitrust Division

In *Metso Oyi/Svedala Industri AB*,[60] the complaint alleged that the proposed $1.6 billion acquisition by Metso of Svedala would lessen competition globally in the research, development, manufacture, and sale of four separate rock processing equipment markets: cone crushers, jaw crushers, primary gyratory crushers and grinding mills. According to the complaint, Metso and Svedala are the two largest suppliers of rock processing equipment in the world. Under the order, Metso was required to divest its global primary gyratory crusher and grinding mill businesses and Svedala was required to divest its global jaw crusher and cone crusher businesses.

ONGOING REASSESSMENT OF THE EFFECTS OF THE PREMERGER NOTIFICATION PROGRAM

The Commission continually reviews the impact of the premerger notification program on the business community and antitrust enforcement. Although a complete assessment is not possible in this limited report, a few observations can be made.

As indicated in past annual reports, the HSR program ensures that virtually all significant mergers or acquisitions that affect American consumers in the United States will be reviewed by the antitrust agencies prior to consummation. The agencies generally have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief. As a result, the HSR Act is doing what Congress intended, giving the government the opportunity to investigate and challenge mergers that are likely to harm consumers *before* injury can arise. Prior to the premerger notification program, businesses could, and frequently did, consummate transactions that raised significant antitrust concerns before the antitrust agencies had the opportunity to adequately consider their competitive effects. The enforcement agencies were forced to pursue lengthy post-acquisition litigation, during the course of which harm from the consummated transaction continued (and afterwards as well, where achievement of effective post-acquisition relief was not practicable). Because the premerger notification program requires reporting before consummation, this problem has been significantly reduced.

Although highly effective, the HSR program historically prompted expressions of concern from the business and legal communities that the program may be overreaching, that the reporting thresholds (which had not been adjusted since enactment of the HSR Act in 1976) may be too low, and that the process may cause delay. The enactment and the implementation of HSR Reform legislation during fiscal year 2001 has significantly lessened the burden on business by increasing the reporting thresholds substantially.

In addition, the enforcement agencies continue to seek ways to speed up the review process and reduce burdens for companies. This year, the agencies continued to implement new procedures and initiatives to improve the handling of second requests. The agencies are continuing their ongoing

[60] Metso Oyi/Svedala Industri AB, Docket No. C-4024 (issued October 23, 2001).

review of the HSR program in order to make it as minimally burdensome as possible without compromising the agencies' ability to investigate and interdict proposed transactions that may substantially lessen competition.

Exhibit 18



Federal Trade Commission
Bureau of Competition



Department of Justice
Antitrust Division

Hart-Scott-Rodino Annual Report

Fiscal Year 2021

October 1, 2020 through September 30, 2021

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Forty-Fourth Annual Report)

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TABLE I
FISCAL YEAR 2021[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	48	1.4%	0	1	0.0%	2.1%	2.1%	0	0	0.0%	0.0%	0.0%
100M - 150M	433	12.7%	19	5	4.4%	1.2%	5.5%	4	1	0.9%	0.2%	1.2%
150M - 200M	538	15.8%	13	13	2.4%	2.4%	4.8%	1	2	0.2%	0.4%	0.6%
200M - 300M	373	10.9%	17	8	4.6%	2.1%	6.7%	2	2	0.5%	0.5%	1.1%
300M - 500M	458	13.4%	23	12	5.0%	2.6%	7.6%	6	2	1.3%	0.4%	1.7%
500M - 1000M	985	28.9%	45	29	4.6%	2.9%	7.5%	13	5	1.3%	0.5%	1.8%
Over 1000M	578	16.9%	47	38	8.1%	6.6%	14.7%	16	11	2.8%	1.9%	4.7%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

Exhibit 19



Hart-Scott-Rodino
Premerger Notification Program

Introductory Guide I

What is the Premerger Notification Program?
An Overview

Revised March 2009

AN OVERVIEW

Guide I is the first in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It is intended to provide a general overview of the Premerger Notification Program (the "Program") and to help the reader in determining which types of business transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"). *Guide I* describes the basic reportability requirements and how the program works. It also provides a list of alternative information sources to assist you in deciding whether or not you need to file. This Guide will introduce you to certain terminology and concepts regarding the Act and the Premerger Notification Rules (the "Rules"), 16 C.F.R. Parts 801, 802 and 803. Additional information can be obtained on the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr.

Other Guides in this series provide more detailed information. Guide II explains in greater detail certain terms used in the Act and the Rules, and analyzes a hypothetical transaction to determine whether it is reportable and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you not only consult the Act, the Rules, and the other Guides in this series, but also the additional material referenced in Section XII of this Guide. If you have specific questions not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (the "enforcement agencies") before consummating the proposed acquisition. The parties must wait a specific period of time while the enforcement agencies review the proposed transaction. The Program became effective September 5, 1978, after final promulgation of the Rules.[1]

The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. In the past, the enforcement agencies found that it is often impossible to restore competition fully once a merger takes place. Furthermore, any attempt to reestablish competition after the fact is usually very costly for the parties and the public. Prior review under the Program enables the Federal Trade Commission ("FTC" or the "Commission") and the Department of Justice ("DOJ") to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.

In general, the Act requires that certain proposed acquisitions of voting securities, non-corporate interests ("NCI") or assets be reported to the FTC and the DOJ prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period.

Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from the parties to a reported transaction (a "second request"). A second request extends the waiting period for a specified period, usually 30 days (ten days in the case of a cash tender offer or a bankruptcy sale), after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the submitted information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

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[1] The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

The Program has been a success. Compliance with the Act's notification requirements has been excellent, and has minimized the number of post-merger challenges the enforcement agencies have had to pursue. In addition, although the agencies retain the power to challenge mergers post-consummation, and will do so under appropriate circumstances, the fact that they rarely do has led many members of the private bar to view the Program as a helpful tool in advising their clients about particular acquisition proposals.

The Rules, which govern compliance with the Program, are necessarily technical and complex. We have prepared Guide I to introduce some of the Program's specially defined terms and concepts. This should assist you in determining if proposed business transactions are subject to the requirements of the Program.

II. DETERMINING REPORTABILITY

The Act requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the enforcement agencies and wait a specific period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the Act, the Rules, and formal and informal staff interpretations.

As a general matter, the Act and the Rules require both acquiring and acquired persons to file notifications under the Program if all of the following conditions are met:

1. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $200 million (as adjusted)[2], regardless of the sales or assets of the acquiring and acquired persons[3]; or

2. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less; and

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[2] The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (n) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year.

[3] *See* § 7A(a)(2) of the Act.

3. One person has sales or assets of at least $100 million (as adjusted); and

4. The other person has sales or assets of at least $10 million (as adjusted).

A. Size of Transaction Test

The first step is to determine what voting securities, NCI, assets, or combination thereof are being transferred in the proposed transaction. Then you must determine the value of the voting securities, NCI, and/or assets as well as the percentage of voting securities and NCI that will be "held as a result of the acquisition." Calculating what will be held as a result of the acquisition (referred to as the "size of the transaction") is complicated and requires the application of several rules, including Rules 801.10, 801.12, 801.13, 801.14 and 801.15. Generally, the securities and/or NCI held as a result of the transaction include those that will be acquired in the proposed transaction, as well as any voting securities and/or NCI of the acquired person, or entities within the acquired person, that the acquiring person already holds. Assets held as a result of the acquisition include those that will be acquired in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13.[4]

If the value of the voting securities, NCI, assets or combination thereof exceeds $200 million (as adjusted) and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the parties must look to the size of person test.

B. Acquiring and Acquired Persons/Acquired Entity

The first step in determining the size of person is to identify the "acquiring person" and "acquired person." "Person" is defined in Rules 801.1(a)(1) and is the "ultimate parent entity" or "UPE" of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.[5] The "acquired entity" is the specific entity whose assets, NCI or voting securities are being acquired. The acquired entity may also be its own UPE or it may be an entity within the acquired person.

Thus, in an asset acquisition, the acquiring person is the UPE of the buyer, and the acquired person is the UPE of the seller. The acquired entity is the entity whose assets are being acquired. In a voting securities acquisition, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose securities are being bought, and the acquired entity is the

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[4] The Rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

[5] *See* "control" under 801.1(b).

issuer of the securities being purchased. In an acquisition of NCI, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose NCI are being bought, and the acquired entity is the entity whose NCI are being acquired. Oftentimes the acquired person and acquired entity are the same.

In many voting securities acquisitions, the acquiring person proposes to buy voting securities from minority shareholders of the acquired entity, rather than from the entity itself (tender offers are an example of this type of transaction). These transactions are subject to Rule 801.30, which imposes a reporting obligation on the acquiring person and on the acquired person, despite the fact that the acquired person may have no knowledge of the proposed purchase of its outstanding securities.[6] For this reason, the Rules also require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of the shares to ensure the acquired person knows about its reporting obligation.[7]

C. Size of Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the Act's minimum size criteria. This "size of person" test generally measures a company based on the person's last regularly prepared annual statement of income and expenses and its last regularly prepared balance sheet.[8] The size of a person includes not only the entity that is making the acquisition or whose assets or securities are being acquired, but also the UPE and any other entities the UPE controls.[9]

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the size of person test is met, and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

D. Notification Thresholds

An acquisition that will result in a buyer holding more than $50 million (as adjusted) worth of the voting securities of another issuer crosses the first of five staggered "notification thresholds."[9] The rules identify four additional thresholds: voting securities valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted); voting securities valued at $500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than $1 billion (as adjusted);

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[6] *See* Rule 801.1; Rule 801.30.

[7] *See* Rule 803.5.

[8] *See* Rule 801.11.

[9] *See* Rule 801.1(a)(1).

and 50 percent of the voting securities of an issuer if valued at greater than $50 million (as adjusted).

The thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional voting shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing.[10] If within that year the person reaches the stated threshold (or any lower threshold), it may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period.[11] For example, if you file to acquire $100 million (as adjusted) of the voting securities of Company B and cross that threshold within one year, you would be able to continue to acquire voting securities of Company B for a total of five years without having to file again so long as your total holding of Company B's voting securities did not exceed either $500 million (as adjusted) or 50 percent, *i.e.*, additional notification thresholds. Once an acquiring person holds 50 percent or more of the voting securities of an issuer, all subsequent acquisitions of securities of that issuer are exempt.[12]

These notification thresholds apply only to acquisitions of voting securities. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value.

E. Exempt Transactions

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Act and the Rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite meeting the threshold criteria.[13] For example, certain acquisitions of assets in the ordinary course of a person's business are exempted, including new goods and current supplies (*e.g.*, an airline purchases new jets from a manufacturer, or a supermarket purchases its inventory from a wholesale distributor).[14] The acquisition of certain types of real property also would not require notification. These include certain new and used facilities, not being acquired with a business, unproductive real property (*e.g.*, raw land), office and residential buildings, hotels (excluding hotel casinos), certain recreational land, agricultural land and retail rental space and warehouses.[15] In addition, the acquisition of foreign assets would be exempt where the sales in or

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[10] *See* Rule 803.7.

[11] *See* Rule 802.21.

[12] *See* § 7A(c)(3) of the Act, 15 U.S.C. § 18a(c)(3).

[13] *See* § 7A(c) of the Act, 15 U.S.C. § 18a(c), and Part 802 of the Rules, 16 C.F.R. Part 802.

[14] *See* Rules 802.1(b) and 802.1(c).

[15] *See* Rules 802.2(c) - (h).

into the U.S. attributable to those assets were $50 million (as adjusted) or less.[16] Once it has been determined that a particular transaction is reportable, each party must submit its notification to the FTC and the DOJ. In addition, each acquiring person must pay a filing fee to the FTC for each transaction that it reports (with a few exceptions, *see* IV below).

III. THE FORM

The Notification and Report Form ("the Form") solicits information that the enforcement agencies use to help evaluate the antitrust implications of the proposed transaction. Copies of the Form, Instructions, and Style Sheet are available from the PNO, (202) 326-3100, as well as the FTC website at http://www.ftc.gov/bc/hsr.

A. Information Reported

In general, a filing party is required to identify the persons involved and the structure of the transaction. The reporting person also must provide certain documents such as balance sheets and other financial data, as well as copies of certain documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction.

The Form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product North American Industry Classification System ("NAICS") codes,[17] and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business. Acquiring persons must also describe certain previous acquisitions in the last five years of companies or assets engaged in businesses in any of the overlapping codes identified. Please note that an acquiring person must complete the Form for all of its operations; an acquired person, on the other hand, must limit its response in Items 5 through 7 to the business or businesses being sold and does not need to answer Item 8.[18] In addition, the acquired person does not need to respond to Item 6 in a pure asset transaction.

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[16] *See* Rules 802.50 and 802.51.

[17] For information concerning NAICS codes *see* the *North American Industry Classification System, 2002*, published by the Executive Office of the President, Office of Management and Budget and available from the National Technical Information Service, 5285 Port Royal Road, Springfield VA 22161 (Order Number PB 2002-101430) or online at http://www.ntis.gov/search/product.aspx?ABBR=PB2002101430; and The *2002 Economic Census Numerical List of Manufactured and Mineral Products* published by Bureau of the Census, available from the Government Printing Office or online at http://www.census.gov/prod/ec02/02numlist/m31r-nl.pdf. Information regarding NAICS also is available at the Bureau of the Census website at http://www.census.gov/epcd/www/naics.html.

[18] *See* 803.2(b).

B. Contact Person

The parties are required to identify an individual (listed in Item 1(g) of the Form) who is a representative of the reporting person and is familiar with the content of the Form. This contact person is, in most cases, either counsel for the party or an officer of the company. This person must be available during the waiting period.

C. Certification and Affidavits

Rule 803.5 describes the affidavit that must accompany certain Forms. In transactions where the acquiring person is purchasing voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit. The acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations.[19] In all other transactions, each of the acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed and that each person has a good faith intention of completing the proposed transaction. These required statements govern when the parties may make a premerger notification filing. The affidavit is intended to assure that the enforcement agencies will not be presented with hypothetical transactions for review.[20]

Rule 803.6 provides that the Form must be certified and the rule specifies who must make the certification.[21] One of the primary purposes of the certification is to preserve the evidentiary value of the filing. It also is intended to place responsibility on an individual to ensure that information reported is true, correct, and complete. Both the certification and the affidavit must be notarized, or may be signed under penalty of perjury.[22]

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[19] See Rule 803.5(a)(i)(I) through (vi) for the full requirements of such notice. In tender offers, the acquiring person also must affirm that the intention to make the tender offer has been publicly announced. See Rule 803.5(a)(2).

[20] *See* Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510-33511 (1978).

[21] The certification may be signed by a general partner of a partnership; an officer or director of a corporation; or, in the case of a natural person, the natural person or his/her legal representative.

[22] 28 U.S.C. § 1746 allows use of the following statement in lieu of a notary's jurat: "I declare (or certify, verify or state) under penalty of perjury *under the laws of the United States of America* that the foregoing is true and correct. Executed on (date) [and] (Signature)." The italicized text is necessary only if signed outside the territorial United States.

D. Voluntary Information

The rules provide that reporting persons also may submit information that is not required by the Form.[23] If persons voluntarily provide information or documentary material that is helpful to the competitive analysis of the proposed transaction, the enforcement agencies' review of a proposed transaction may be more rapid. However, voluntary submissions do not guarantee a speedy review. Voluntary submissions are included in the confidentiality coverage of the Act and the Rules.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly defined circumstances permitted by the Act.[24] However, in response to inquiries from interested parties who wish to approach the agencies with their views about a transaction, the agencies may confirm which agency is handling the investigation of a publicly announced merger.[25] The fact that a transaction is under investigation also may become apparent if the agencies interview third parties during their investigation.

F. Filing Procedures

The parties should complete and return the original and one copy of the Form, along with one set of documentary attachments, to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. Three copies of the Form, along with one set of documentary attachments, should be sent to the Department of Justice, Antitrust Division, Office of Operations, Premerger Notification Unit, 950 Pennsylvania Avenue, NW, Room 3335, Washington, DC 20530 (for non-USPS deliveries, use zip code 20004).

IV. THE FILING FEE

In connection with the filing of a Form, Congress also mandated the collection of a fee from each acquiring person. The filing fee is based on a three-tiered system that ties the amount paid to the total value of the voting securities, NCI or assets held as a result of the acquisition:[26]

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[23] *See* Rule 803.1(b).

[24] *See* Section 7A(h) of the Act.

[25] A publicly announced merger is one in which a party to the merger has disclosed the existence of the transaction in a press release or in a public filing with a governmental body.

[26] The filing fee thresholds are adjusted annually for changes in the GNP during the previous year. The fees themselves are not adjusted.

VALUE OF VOTING SECURITIES, NCI OR ASSETS TO BE HELD	FEE AMOUNT
greater than $50 million (as adjusted) but less than $100 million (as adjusted)	**$45,000**
$100 million (as adjusted) or greater but less than $500 million (as adjusted)	**$125,000**
$500 million (as adjusted) or greater	**$280,000**

For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the appropriate fee (except in consolidations and in transactions in which there are two acquiring persons that would have exactly the same responses to Item 5 of the Form).[27] In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported.[28]

The filing fee must be paid at the time of filing to "The Federal Trade Commission" by electronic wire transfer, bank cashier's check or certified check. Rule 803.9 contains specific instructions for payment of the filing fee. In addition, information is available at http://www.ftc.gov/bc/hsr/filing2.htm.

V. THE WAITING PERIOD

After filing, the filing parties must then observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days for reportable acquisitions by means of a cash tender offer, as well as acquisitions subject to certain federal bankruptcy provisions, and 30 days for all other types of reportable transactions.[29] The waiting period may be extended by issuance of a request for additional information and documentary material.[30] Any waiting period that would end on a Saturday, Sunday or legal public holiday will expire on the next regular business day.

A. Beginning of the Waiting Period

In most cases, the waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions in which a person buys

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[27] For example, if two separate UPEs jointly control an acquisition vehicle and own no other entities, their Item 5 responses would be identical.

[28] *See* Rule 803.9(a) - (c).

[29] *See* Rule 803.10; 11 U.S.C. § 363(b)(2), as amended (1994).

[30] *See* Section VIII(C), *infra*.

voting securities from persons other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person files a complete Form. In a reportable joint venture formation, the waiting period begins after all acquiring persons required to file submit complete Forms.[31] It is important to note that failure to pay the filing fee or the submission of an incorrect or incomplete filing will delay the start of the waiting period.[32]

B. Early Termination

Any filing person may request that the waiting period be terminated before the statutory period expires. Such a request for "early termination" will be granted only if (1) at least one of the persons specifies it on the Form; (2) all persons have submitted compliant Forms; and (3) both antitrust agencies have completed their review and determined not to take any enforcement action during the waiting period.[33]

The PNO is responsible for informing the parties that early termination has been granted. The Act requires that the FTC publish a notice in the Federal Register of each early termination granted. Moreover, grants of early termination also appear on the FTC's website at http://www.ftc.gov/bc/earlyterm/index.html.

When it's requested, early termination is granted for most transactions. On the average, requests for early termination are granted within two weeks from the beginning of the waiting period. In any particular transaction, however, the time that it takes to grant a request for early termination depends on many factors, including the complexity of the proposed transaction, its potential competitive impact, and the number of filings from other parties that the enforcement agencies must review at the same time.

VI. REVIEW OF THE FORM

Once a Form has been filed, the enforcement agencies begin their review. The FTC is responsible for the administration of the Program. As a result, the PNO determines whether the Form complies with the Act and the Rules.

The Form is assigned to a member of the PNO staff to assess whether the transaction was subject to the reporting requirements and whether the Form was completed accurately. If the filing appears to be deficient, the staff member will notify the contact person as quickly as possible so that errors can be corrected. It is important to correct the errors as soon as possible because the waiting period does not begin to run until the Form is filled out accurately, all required

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[31] The joint venture entity does not file. *See* Rule 802.41.

[32] *See* Rules 803.3 and 803.10(a).

[33] *See* Formal Interpretation 13 issued August 20, 1982.

information and documentary material are supplied and payment of the filing fee is received.[34]

When the PNO determines that the Forms comply with all filing requirements, letters are sent to the parties identifying the beginning and ending of the waiting period, as well as the transaction number assigned to the filing. The conclusion that the parties have complied with the Act and the Rules may be modified later, however, if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Initially, both agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the filings to determine whether the acquiring and acquired firms are competitors, or are related in any other way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included on the Form but also on publicly available information. The individuals analyzing the Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be harmful.

If, after preliminary review, either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction. Other than members of the PNO, no one at either agency will initiate contact with any of the persons or any third parties until it has been decided which agency will be responsible for investigating the proposed transaction.[35] This clearance procedure is designed to minimize the duplication of effort and the confusion that could result if both agencies contacted individual persons at different times about the same matter. The clearance decision is made pursuant to an agreement that divides the antitrust work between the two agencies.

Of course, any interested person, including either of the parties, is free to present information to either or both agencies at any time. However, if the clearance decision has not yet been resolved, the person must make a presentation, or provide written information or documents, to both agencies. If you are representing a party that wishes to make a presentation, or provide written information or documents, you may inform the PNO of that fact; the PNO will let staff attorneys at both agencies who are reviewing the matter know that persons wish to come in and make a presentation, or provide written information or documents.

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[34] For transactions in which a person buys voting securities from someone other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person submits a complete and accurate Form. An incorrect or incomplete Form from the acquired person will not stop the running of the waiting period. However, the acquired person still is obligated to correct any deficiencies in its filing.

[35] Staff at either agency may initiate contact with a person prior to the resolution of which agency will handle the matter by first notifying the other agency and offering the other agency the opportunity to participate.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all persons to the transaction to submit additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a "second request."[36] As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products or services in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. A model second request has been produced jointly by the FTC and DOJ for internal use by their attorneys and is contained in *Guide III*. Because every transaction is unique, however, the model second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs are encouraged to discuss the possibility of narrowing the request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and other available material. At this point, the investigative team may not have access to specific information about the structure of the company or its products and services. By meeting with staff, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents and other information. If second request modification issues cannot be resolved through discussion with staff, the agencies also have adopted a formal internal appeals process that centralizes in one decision maker in each agency the review of issues relating to the scope of and compliance with second requests.[37]

The enforcement agency issuing the second request may have determined that certain data sought in the request can resolve one or more issues critical to the investigation. In such a situation, the agency's staff may suggest use of the informal "quick look" procedure. Under the quick look, the staff will request the parties to first submit documents and other information, which specifically address the critical issues (*e.g.,* product market definition or ease of entry). If the submitted information resolves the staff's concerns in these areas, the waiting period will be terminated on a *sua sponte* basis and the parties will not have to expend the time and cost of responding to the full second request. Of course, if the submitted information does not resolve the staff's concerns on determinative issues, then the parties will need to respond to the full

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[36] *See* Rule 803.20(a)(1) for the identities of persons and individuals that are subject to such request.

[37] *See* 66 Fed. Reg. 8721-8722, February 1, 2001.

second request.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 30 days (or in the case of a cash tender offer or certain bankruptcy filings,[38] 10 days) after both parties are deemed to have complied with the second request (or in the case of a tender offer and bankruptcy, until after the acquiring person has complied).[39] During this time, the attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain information.

The second request must be issued by the enforcement agency before the waiting period expires. If the waiting period expires and the agencies have not issued a second request to any person to the transaction, then the parties are free to consummate the transaction. The fact that the agencies do not issue second requests does not preclude them from initiating an enforcement action at a later time.[40] All of the agencies' other investigative tools are available to them in such investigations.[41]

IX. AGENCY ACTION

After analyzing all of the information available to them, the investigative staff will make a recommendation to either the Commission or the Assistant Attorney General (depending on which agency has clearance).

A. No Further Action

If the staff finds no reason to believe competition will be reduced substantially in any market, it will recommend no further action. Assuming that the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at that time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.

B. Seeking Injunctive Relief

If the investigative staff believes that the transaction is likely to be anticompetitive, it may recommend that the agency initiate injunction proceedings in U.S. district court to halt the

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[38] See 11 U.S.C. § 363(b), as amended (1994).

[39] *See* § 7A(e) of the Act.

[40] *See* § 7(A)(i)(1) of the Act.

[41] *See* § 7(A)(i)(2) of the Act.

acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the FTC is required to file an administrative complaint within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction.[42] The administrative complaint initiates the FTC's administrative proceeding that will decide the legality of the transaction. If it is a DOJ case, the legality of the transaction is litigated entirely in district court.

C. Settlements

During an investigation, the investigative staff may, if appropriate, discuss terms of settlement with the parties. The staff of the FTC is permitted to negotiate a proposed settlement with the parties; however, it must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final. A proposed settlement negotiated by DOJ staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you consummate a reportable transaction without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to $16,000 a day for each day the person is in violation of the Act. The enforcement agencies may also obtain other relief to remedy violations of the Act, such as an order requiring the person to divest assets or voting securities acquired in violation of the Act.[43]

B. Reporting Omissions

If you have completed a transaction in violation of the Act, it is important to bring the matter to the attention of the PNO and to file a notification as soon as possible. Even a late filing provides information to the enforcement agencies that assists them in conducting antitrust screening of transactions and antitrust investigations. The parties should include a letter with the notification from an officer or director of the company explaining why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future. The letter should be addressed to the Deputy Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

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[42] FTC Act Section 13(b).

[43] *See* § 7A(g) of the Act, as amended by the Debt Collection Improvements Act of 1996, Pub. L. No. 104134 (Apr. 26, 1996); 61 Fed. Reg. 54548 (Oct. 21, 1996); 61 Fed. Reg. 55840 (Oct. 29, 1996).

Washington DC 20580.

C. Deliberate Avoidance

The Rules specifically provide that structuring a transaction to avoid the Act does not alter notification obligations if the substance of the transaction is reportable.[44] For example, the agencies will seek penalties where the parties split a transaction into separate parts that are each valued below the current filing threshold in order to avoid reporting the transaction, but the fair market value of the assets being acquired is actually above the threshold.[45]

XI. OTHER GUIDES IN THIS SERIES

Guide I is the first in a series of guides prepared by the PNO. Others include:

Guide II: *To File Or Not To File -- When You Must File a Premerger Notification Report Form*, which explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported.

Guide III: *A Model Request for Additional Information and Documentary Material (Second Request)*, which contains materials designed for the attorneys of the antitrust enforcement agencies in preparing requests for additional information. It is included in this series to provide an example of what you might expect if either enforcement agency issues a second request.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the Act and Rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the Act and the Rules themselves. To determine premerger notification requirements, you should consult:

1. Section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and amended by Pub. L. No. 106-553, 114 Stat. 2762.

2. The Premerger Notification Rules, 16 C.F.R. Parts 801 – 803. (2008).

3. The Statement of Basis and Purpose for the Rules, 43 Fed. Reg. 33450 (July 31, 1978); 48 Fed. Reg. 34428 (July 29, 1983); 52 Fed. Reg. 7066

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[44] *See* Rule 801.90.

[45] *See, e.g., United States v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996).

(March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 61 Fed. Reg. 13666 (March 28, 1996); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35541 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003); 70 Fed. Reg. 4987 (January 31, 2005); 70 Fed. Reg. 11502 (March 8, 2005); 70 Fed. Reg. 73369 (December 12, 2005); 71 Fed. Reg. 35995 (June 23, 2006).

4. The formal interpretations issued pursuant to the Rules, compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475.

It is advisable to check the Federal Register for more recent Rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides. For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see http://www.ftc.gov/bc/hsr/basispurp.shtm. For other HSR-related rulemakings, see http://www.ftc.gov/bc/hsr/rulemaking.shtm. Amendments and formal interpretations, as well as the other material referenced above, are available on the Premerger Notification Office website at http://www.ftc.gov/bc/hsr.

There are also non-governmental publications that, while not officially endorsed by the FTC, contain useful compilations of materials relevant to the Program:

1. Commerce Clearing House's *Trade Regulation Reporter* reprints the Act, the Rules, the Form, and the Formal Interpretations.

2. The American Bar Association's Section of Antitrust Law publishes a *Premerger Notification Practice Manual (2007 Edition)* that provides a collection of informal interpretations of the PNO.

3. A loose-leaf treatise by Axinn, Fogg, Stoll and Prager, *Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act* (published by Law Journal SeminarsPress), explains requirements of the Form, the Rules, and the Act, and includes a discussion of the legislative history of the Act.

Finally, if you have questions about the program or a particular transaction not answered by the Commission's HSR website, the staff of the PNO is available to assist you. The PNO answers thousands of inquiries each year and is prepared to provide prompt informal advice concerning the potential reportability of a transaction and completion of the Form. For general questions, contact the PNO at (202) 326-3100.

Exhibit 20

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Guidance for Voluntary Submission of Documents During the Initial Waiting Period

Providing information early in the initial 30-day waiting period increases the likelihood that staff will be able to focus its investigation and resolve outstanding questions about the transaction during its preliminary investigation. In order that parties may effectively use the initial waiting period, counsel should be prepared to discuss staff's most likely concerns and voluntarily provide documents and information that may assist staff in quickly and efficiently evaluating whether the proposed transaction raises competitive concerns.

The list below is provided to help parties understand the type of documents and information that are useful to Bureau of Competition staff analyzing proposed transactions filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). Staff generally has requested these documents and information in a "voluntary request letter" or "access letter" during the initial waiting period and prior to any issuance by the Commission of a Request for Additional Information ("Second Request"). Our experience has been that it takes time to obtain these documents and information, which delays staff's investigation. Parties may expedite the review process by compiling these documents and information in anticipation of staff's request. Although it is not required, the parties to the transaction are encouraged to submit some or all of these documents and information with their HSR Act filing or soon thereafter. The parties are also encouraged to submit any other information not contained on the list below that they believe could assist staff in assessing the proposed merger and the markets involved.

This list is not exhaustive and, prior to the end of the initial waiting period, staff may request that the parties voluntarily submit additional documents and information. The following list does not supercede or replace the requirements of the HSR Act and rules or the HSR Act form. It is possible

that some of the documents requested in this list are the same documents required under the HSR Act form, e.g., documents responsive to Item 4(c) of the form.

1. Organization Chart
2. Strategic Plans for the past three years
3. Marketing Plans for the past three years
4. List of products manufactured and sold
5. List of products in development
6. List of top 10 customers with contact information (for overlap products)
7. List of competitors with contact information (for overlap products)
8. Market share information (for overlap products)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity,

Defendants.

Case No. 6:25-cv-00009-JDK

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiffs' Motion for Summary Judgment. Having considered the Motion and the record in this case, the Court is of the opinion that the Motion should be GRANTED. Therefore, it is:

ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that the Rule, *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024), is VACATED; and

IT IS FURTHER ORDERED that Defendants, their servants, agents, and employees; and all persons in active concert or participation them, are permanently enjoined from enforcing the Rule in any respect.

IT IS SO ORDERED.