U.S. Chamber of Commerce

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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")

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[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, not 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.

[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]

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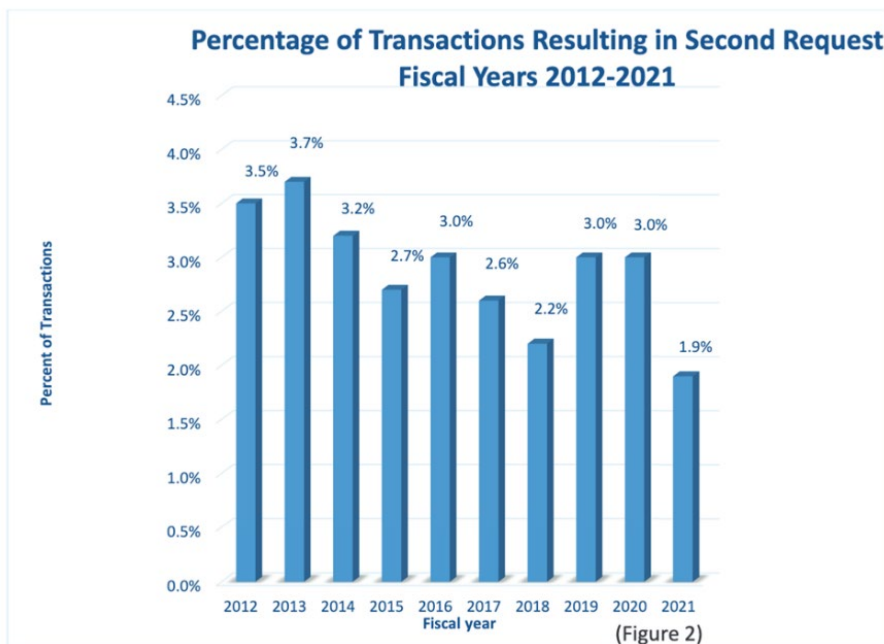
[25] Hart-Scott-Rodino Annual Report Fiscal Year 2021, Appendix A, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.
[26] *Id.;* Steven C. Salop & Logan Billman, *Merger Enforcement Statistics: 2001-2020*, GEORGETOWN UNI. L. CTR. (2022), at Table 3, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3493&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

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[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

[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'

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[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

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[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

[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

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[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

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[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]

[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]

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[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

[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

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[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

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[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

[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

The US Antitrust Agencies' NPRM re

Additional Information Requirements for HSR Filings

REPORT OF PROFESSOR S.P. KOTHARI

September 26, 2023

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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.)

[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

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[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

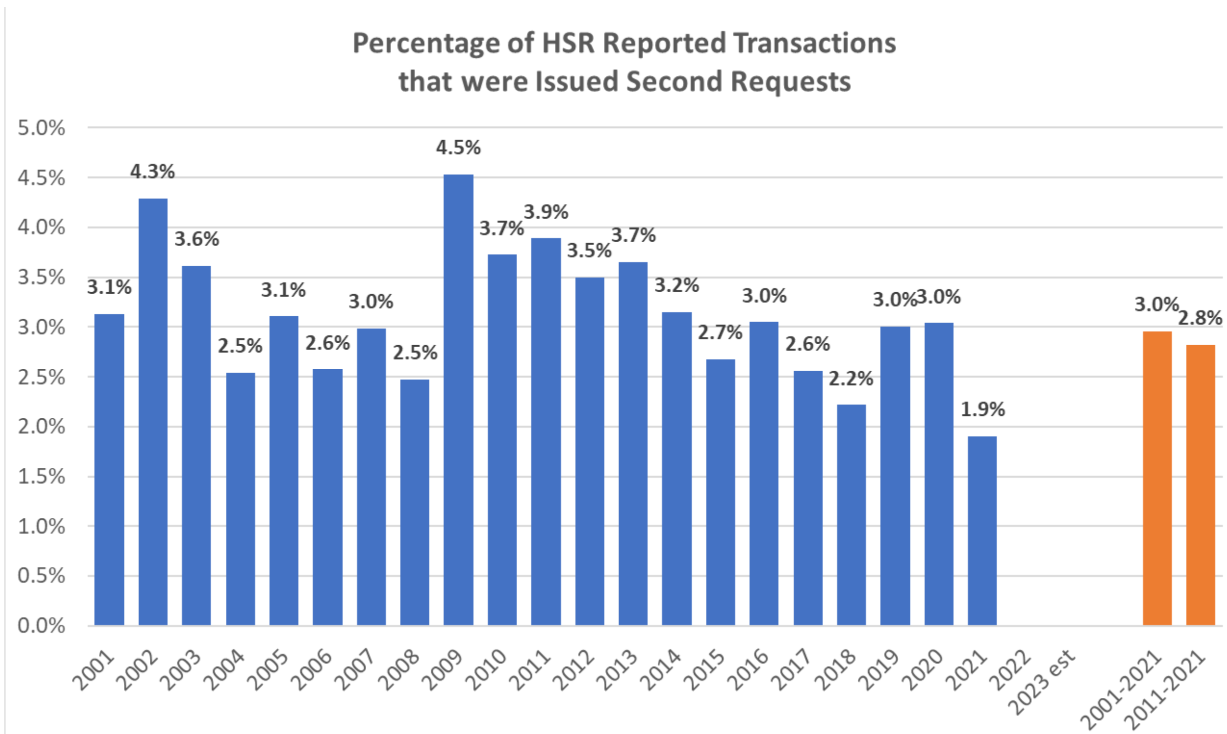
A. Most Transactions Do Not Raise Sufficient Concern to Request Additional Information Beyond the Current HSR Filing

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



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.

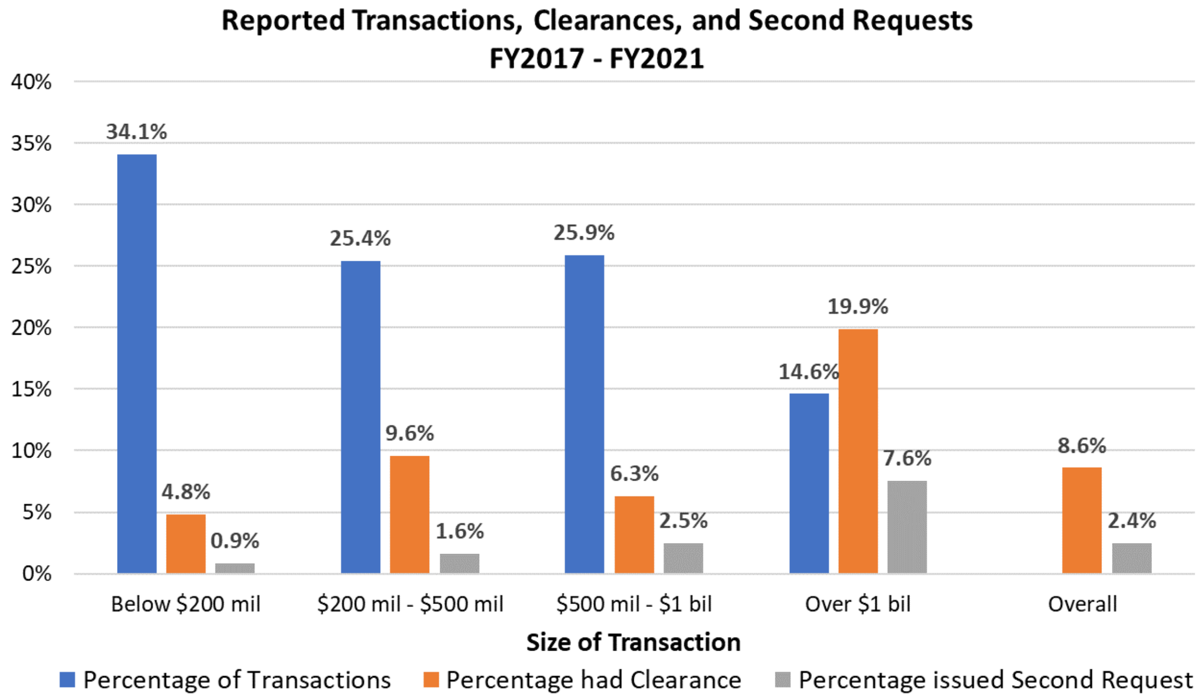
[14] Clearance was sought in 950 of the total 11,043 transactions. Hart-Scott-Rodino Annual Reports Fiscal Years 2017 to 2021.

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.

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[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

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[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

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[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.

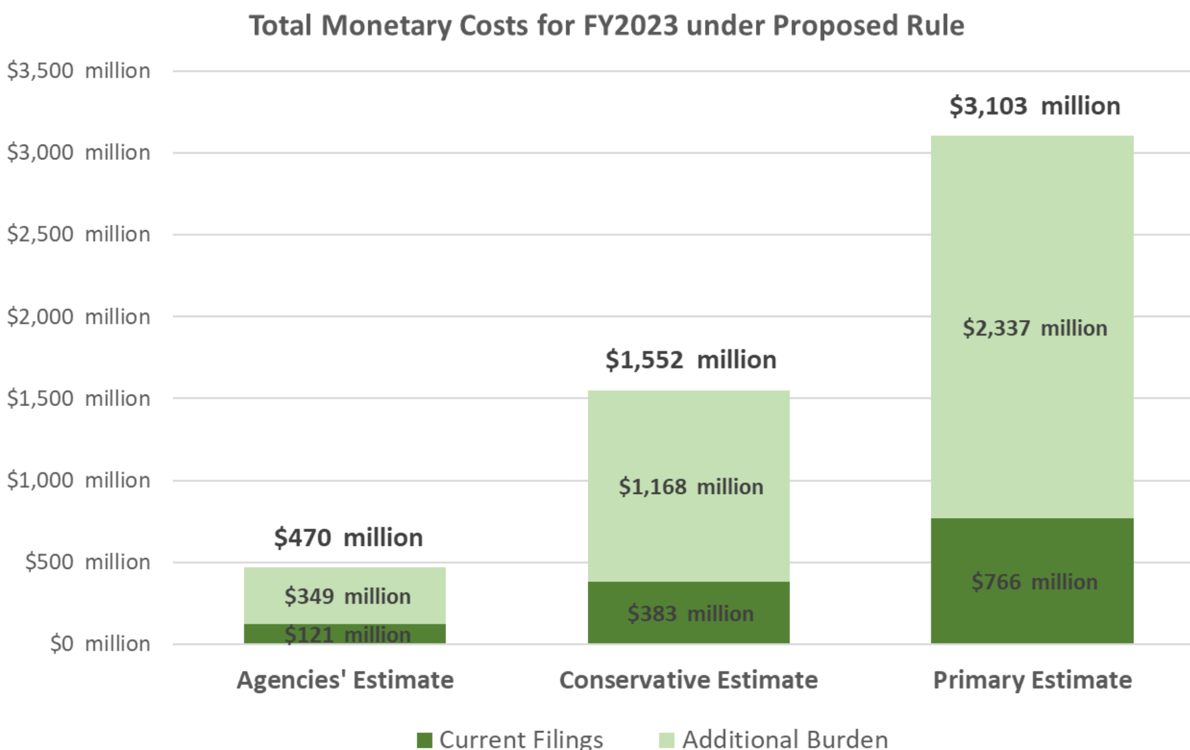
52. These estimates reflect the costs to just one average filing. As noted earlier, the Agencies estimate there will be 7,096 relevant filings in Fiscal 2023. This includes filings from each of the acquirer and acquired entity so that the 7,096 filings reflect 3,548 transactions. If each of the 7,096 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

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[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

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