September 27, 2023

VIA ELECTRONIC SUBMISSION

April Tabor
Secretary of the Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

**Re: 16 CFR Parts 801-803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300**

Dear Ms. Tabor:

The American Investment Council (AIC) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) issued by the Federal Trade Commission (FTC), in collaboration with the Antitrust Division of the U.S. Department of Justice (DOJ), proposing amendments to the premerger notification rules under the Hart-Scott-Rodino (HSR) Act.[1] AIC submits this letter on behalf of our membership, which includes private equity and private credit firms.[2] We strongly oppose the Agencies' self-proclaimed "large-scale reorganization" and "comprehensive redesign" of the premerger notification form,[3] and urge the Agencies to withdraw it.

The private equity industry is a pillar of the modern American economy, a catalyst of competition and innovation, and a critical partner to small business. In 2022, the industry was responsible for approximately 6.5% of the U.S. GDP.[4] It employed 12 million workers earning $1 trillion in wages and benefits across every American community, rural and urban.[5] The capital and financing it provided helped companies increase productivity, grow, hire, build, innovate, and, ultimately, compete against entrenched incumbents.[6] In 2022, 85% of these businesses had fewer

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

2 For purposes of this letter, we generally use the term "private equity" to encompass private equity funds, private credit funds, and other private investment vehicles.

3 88 Fed. Reg. at 42,180.

4 *See* Ernst & Young, *Economic Contribution of the US Private Equity Sector in 2022* 5 (April 2023), https://www.investmentcouncil.org/wp-content/uploads/2023/04/EY-AIC-PE-economic-contribution-report-FINAL-04-20-2023.pdf.

5 *Id.*

6 Greg Brown, Robert Harris & Shawn Munday, *Capital Structure and Leverage in Private Equity Buyouts*, 33 J. Applied Corporate Finance 42, 52 (2021); Joshua Cox & Bronwyn Bailey, *Private Equity Investment and Local Employment Growth: A County-Level Analysis*, 22 J. Alternative Investments 42 (Winter 2022), https://www.pm-research.com/content/iijaltinv/22/3/42; Jakob Wilhelmus & William Lee, *Private Equity IPOs: Generating Faster Job Growth and More Investment*, Milken Institute (2019), bit.ly/3LyKysk; Cesare Fracassi, Alessandro Previtero & Albert Sheen, *Barbarians at the Store? Private Equity, Products, and Consumers*, 77 J. Finance 1439 (2022);

than 500 employees.[7] Many were emerging technology companies at the cutting edge in critical areas like cybersecurity and life sciences.[8] As a result of the industry's success, over 89% of U.S. public pensions serving 34 million public sector workers and retirees have enjoyed returns that far outperformed other asset classes.[9]

The proposed rule would disrupt all of this. Mergers and acquisitions are, of course, a necessary precursor to the private equity industry's creation of value. The necessary credit and capital for businesses to compete, scale, and innovate are provided in connection with deals. But even the possibility of a future deal encourages founders and early-stage investors to take risks. Because the Agencies' proposed rule will make it far more costly to consummate such deals, it will deter productive activity, dampen the incentives for businesses and investors, and divert billions of dollars of otherwise productive capital into compliance costs. It will therefore hinder innovation and slow the growth of the American economy, to the detriment of the very consumers whom the antitrust laws are intended to benefit.

The rule is not only harmful, but also runs afoul of both the HSR Act and the Administrative Procedure Act (APA). First, the Agencies lack statutory authority to demand virtually all of the new information they propose to require. The HSR Act's text, structure, history, and purpose make clear that the Agencies' power to demand information in an initial notification—which *every* covered filing party must submit—is limited. The Agencies may only demand information that is "necessary and appropriate" to screen whether the transaction at issue is one of the very few reportable transactions that poses a possible competitive concern. The Agencies may not require information merely because it may be relevant to the legality of the transaction at issue; that is what the second request is for. Nor may they demand information unrelated to whether the transaction will itself violate the antitrust laws. The HSR Act's framers imposed these limits to prevent the Agencies from doing exactly what they propose to do now: using the required premerger filing as an opportunity to obtain a laundry list of information, while ignoring the huge costs that demanding such extensive productions for *every* reportable transaction will impose on the nation's businesses and economy.

In addition, the rule as proposed is arbitrary and capricious under the APA. By stating in the HSR Act that the Agencies may only demand information that is "necessary and appropriate," Congress required that the information's collection must pass cost-benefit scrutiny. But the Agencies have not conducted any meaningful cost-benefit analysis to justify demanding any of the new information covered by the proposed rule. The proposed changes will impose substantial new

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Shai Bernstein & Albert Sheen, *The Operational Consequences of Private Equity Buyouts: Evidence from the Restaurant Industry*, 29 Rev. Financial Studies 2387 (2016).

7 Ernst & Young, *supra* n.4, at 9.

8 *See* American Investment Council, *Financing American Innovation: Private Equity's Role in the Innovation Economy* 6 (Feb. 2022), https://www.investmentcouncil.org/wp-content/uploads/2022/02/aic_tech_investments_final.pdf; American Investment Council, *Improving Medical Technologies: Private Equity's Role in Life Sciences* 2 (Mar. 2022), https://www.investmentcouncil.org/wp-content/uploads/2022/04/aic-life-sciences-report2-1.pdf.

9 *See* American Investment Council, *2022 Public Pension Study* 2 (July 2022), https://www.investmentcouncil.org/wp-content/uploads/2022/07/22AIC002_2022-Report_SA-2226.pdf; Hal S. Scott & John Gulliver, *Expanding Opportunities for Investors and Retirees: Private Equity* 13 (Nov. 2018) (citing numerous studies that "consistently find that private equity buyout funds outperform public market alternatives . . . *net* of fees"), https://ssrn.com/abstract=3661572.

burdens on 100% of transactions, despite the fact that over 90% of transactions present no antitrust concerns and, in fact, often *improve* competition. While the Agencies appear to recognize some of this burden, they drastically understate the magnitude while providing no quantification of any estimated benefit. Any reasonable analysis would show that the former far outstrips the latter, rendering the rule as proposed fundamentally irrational.

Critically, the Agencies have never explained and cannot explain why the premerger process that has been in place since the HSR Act was first enacted—where filing parties initially submit a relatively minimal amount of information, and face a more demanding second request process only where warranted—requires the sort of wholesale reimagining the Agencies are proposing. That reinvention is contrary to clear congressional intent, will impose enormous costs on business, disincentivize private investment, and prevent the consummation of many valuable transactions that present no competitive threat whatsoever. All of this will harm U.S. capital markets and depress the long-term growth of the U.S. economy, while providing very little, if any, antitrust-enforcement benefit. The Agencies should withdraw the proposed rule.

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## I. THE PROPOSED RULE EXCEEDS THE AGENCIES' STATUTORY AUTHORITY.

### A. The HSR Act Imposes Three Clear Limitations on the Agencies' Authority to Require Information in the Initial Premerger Notification.

The HSR Act authorizes the FTC, with the concurrence of the Assistant Attorney General for the Antitrust Division of the DOJ, to specify the content of the premerger notification form required by the Act:

> documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws.[10]

That provision imposes three important limitations on the type of information that the Agencies may require filing parties to provide. First, the information must be "necessary" to enable the Agencies to conduct the initial screening to assess whether a transaction may violate the antitrust laws and thus require further scrutiny. The Agencies are not entitled to all information that could theoretically be relevant or useful to making a final decision on behalf of the government. Second**,** requiring the information must be "appropriate," which is not the case if the requirement imposes significant costs on filing parties but does little to "enable" the Agencies' initial assessment of the "proposed acquisition." Third, the information requested by the Agencies must concern whether the specific transaction being proposed ("such acquisition") will itself violate the antitrust laws. The Agencies are not entitled to utilize the pre-merger notification mechanism to probe other potential antitrust issues involving the filing party or the relevant industry.

#### 1. The Agencies are only entitled to information "necessary" for their initial screen.

As the Senate Report for the HSR Act explains, Congress created the premerger notification program to solve the "midnight merger" problem, and give the Agencies a chance to decide whether to initiate enforcement actions against transactions they might otherwise have known nothing about before it is too late to "unscramble" them.[11] That program "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,"[12] and was intended to "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[13]

Congress struck that balance with a two-step scheme. First, under Section 18a(d), filing parties involved in a reportable transaction must provide a "notification" to the Agencies—not an application, petition, or request. In that initial notification, the Agencies may require the parties

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[10] 15 U.S.C. § 18a(d)(1).

[11] 122 Cong. Rec. H8139 (daily ed. Aug. 2, 1976) (statement of Rep. Rodino).

[12] S. Rep. No. 94-803, at 65 (1976).

[13] *Id.* at 66.

to provide certain information about the transaction, but it must be information that is "necessary and appropriate to enable" the Agencies to preliminarily assess whether a proposed acquisition may be unlawful and therefore requires further scrutiny. For such transactions, the Agencies may then issue a so-called "second request" under Section 18a(e). That second-request information need only be "relevant to the proposed acquisition."[14]

The upshot from the statutory text and design is clear: for the initial "notification," Congress limited the Agencies to requesting what they need to have to perform an initial screen of the transaction. The Agencies generally have only thirty days to perform this screen before a merger may go through, so it is inevitably abbreviated and preliminary. If this screen leads to a concern that a transaction may in fact violate the antitrust laws, such that additional "paperwork" or further "delays" are warranted, the Agencies may then issue a second request and seek a much broader array of information. This two-step structure, with the first-step authority constrained to the information that is truly "necessary," avoids pointlessly burdening the vast majority of reportable transactions—many of which are investments amounting to a *de minimis* percentage of the total voting shares of the acquired entity—that pose no anticompetitive concerns. It also ensures that "the Antitrust Division and the FTC efficiently allocate their finite resources to those transactions that *truly* warrant antitrust scrutiny."[15]

**2. The information must be "appropriate," meaning that the costs of collecting it must not significantly outweigh the benefits of doing so**.

Congress's use of the phrase "necessary and appropriate" also ensures that the information the Agencies demand in the initial notification does not unduly burden the filing parties by imposing a much higher cost than it returns in benefit to the Agencies. The Supreme Court has held that "the phrase 'appropriate and necessary' requires at least some attention to cost" where it is used as "an instruction to an administrative agency." *Michigan* v. *EPA*, 576 U.S. 743, 752-53 (2015). The Court also explained that, as a matter of ordinary meaning, "[n]o regulation is 'appropriate' if it does significantly more harm than good."[16] By using that language in the HSR Act, Congress prohibited the Agencies from demanding information that will be significantly more costly for filing parties to produce than it will be beneficial to the Agencies' evaluation of the transaction. Confirming as much, Congress retained the phrase "necessary and appropriate" in the HSR Act—and even added the same phrase to a separate part of the Act relating to a different authority to require information—when it amended the Act in 2022, seven years after *Michigan*.[17] Congress is presumed to have "legislated against the backdrop of [pertinent] case law."[18]

The rest of Section 18a confirms Congress's paramount goal of avoiding unnecessary burdens on businesses. Notably, as part of the second-request provisions, Congress required that

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[14] 15 U.S.C. § 18a(e).

[15] 146 Cong. Rec. 24253 (Oct. 25, 2000) (statement of Sen. Hatch) (discussing the 2000 amendments to the HSR Act).

[16] 576 U.S. at 752.

[17] *See* 15 U.S.C. § 18b.

[18] *EPA* v. *Mink*, 410 U.S. 73, 89 (1973) (construing the Freedom of Information Act in light of pertinent caselaw on deliberative process privilege and *in camera* review procedures).

the Agencies appoint a disinterested official to "hear any petition" by request from a recipient arguing that the second request "is unduly burdensome."[19] If Congress was that concerned with the burden of the second request on businesses, it follows that Congress did not intend the initial HSR notification to be unduly burdensome.

The legislative history confirms as much. The sponsors of the 2000 amendments adding this provision to the HSR Act stated that their purpose was to "achieve a more effective and efficient merger review process by eliminating unnecessary burden, costly duplication and undue delay,"[20] and "to ensure that business is not faced with unduly burdensome or overbroad requests for information."[21] As noted above, the 1976 Congress similarly intended to avoid "plac[ing] too much of a burden on commerce."[22] To that end, Congress rejected an earlier version of the bill that would have imposed an automatic temporary restraining order on all reportable transactions, recognizing the "severe disincentive to mergers generally" that would have resulted.[23] Indeed, Congress expected that even second requests "must be reasonable," and suggested that "a request for data that could not be compiled or reduced to writing in a relatively short period of time"—*i.e.*, would be costly to produce—"might well be unreasonable."[24] Second requests, in fact, were expected to "request[] the very data that is *already available to the merging parties*, and has already been assembled and analyzed by them."[25]

**3. The Agencies may only request information specific to whether the proposed acquisition itself is unlawful.**

Finally, Section 18a(d) makes clear that the Agencies may only request information that is "relevant to *a proposed acquisition*," to "determine whether *such acquisition* may, if consummated, violate the antitrust laws."[26] On its face, the statute focuses on whether the "proposed acquisition" itself will "violate the antitrust laws." That is consistent with the narrow purpose of the Act: to provide "a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation,"[27] not to provide the Agencies another tool to assist in their enforcement of antitrust laws in general. Tellingly, in the NPRM, the Agencies contend that the changes they propose are "necessary and appropriate *in order for the Agencies to vigorously enforce the nation's antitrust laws*."[28] This is not the statutory test.

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19 15 U.S.C. § 18a(e)(1)(B)(i).

20 146 Cong. Rec. 24253 (Oct. 25, 2000) (statement of Sen. Hatch).

21 146 Cong. Rec. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl).

22 Andrew G. Howell, *Why Premerger Review Needed Reform—And Still Does*, 43 Wm. & Mary L. Rev. 1703, 1716 (2002).

23 S. Rep. No. 94-803, at 213.

24 122 Cong. Rec. 30,877 (1976) (statement of Rep. Rodino).

25 *Id.* (emphasis added).

26 15 U.S.C. § 18a(d)(1) (emphasis added).

27 S. Rep. No. 94-803, at 7.

28 88 Fed. Reg. at 42,180 (emphasis added).

### B. The Proposed Rule Contravenes These Limits.

Taken as a whole, the Agencies' proposed "comprehensive redesign"[29] of the HSR regime transgresses the critical limitations set out above.

First, as a general matter, the Agencies are not abiding by the limitation that the information they request be "necessary" to an initial assessment of the transaction. The Agencies nowhere recognize that limit in the NPRM. To the contrary, by drastically expanding the scope of information required at the initial notification stage, the proposed rule collapses the statutory distinction between the initial notification stage and the more exacting second-request mechanism.

Second, the costs of collecting the additional information significantly outweigh any potential benefits and are therefore not "appropriate." In their proposal and corresponding justification, the Agencies largely ignore the significant costs that such changes will impose on filing parties. In particular, nearly all of the additional burden will be borne by 92% of transactions that so plainly do not pose any antitrust concerns that they are cleared without *any* agency inquiry.[30]

Third, the Agencies are improperly attempting to use the HSR reporting mechanism as a way to collect information about potential antitrust concerns beyond whether the specific transaction at issue may violate the antitrust laws. If the Agencies need additional information related to markets and industries to facilitate their enforcement of antitrust laws in broader contexts, the Agencies are authorized by Section 6(b) of the FTC Act to request such information from market participants. Should the Agencies have concerns about, for instance, interlocking directorates or board observers' ability to influence business decisions that may have anticompetitive effects, the Agencies have many investigative tools at their disposal, prior to and independent of the enactment of the HSR Act.[31] The Agencies also have the authority to issue

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29 *Id*.

30 Data from Fiscal Year 2021 (the most recent published by the Agencies that breaks down their investigations) show that out of 3,520 HSR filings, the Agencies initiated about 300 preliminary investigations (an investigative phase that the Agencies may initiate to determine whether the transaction raises issues substantial enough to warrant a second request), issued 65 second requests, and challenged (or obtained abandonment) of 32 transactions. In other words, nearly 92% of all HSR filings were cleared without any agency inquiry at all, and over 98% of all HSR filings were cleared without a second request. *See* FTC, 2021 HSR Annual Report. Of the total 31,530 HSR filings from 2001 to 2020, only 969 (3.1%) received second requests. *See* Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 Antitrust L. J. 1, 9 (2023). Additionally, the Agencies provided for the early termination of the initial notification period from 2015 to 2020. During those years, approximately 75% of filings requested early termination, and 77% of those requests were granted. *See* FTC, 2015-2020 HSR Annual Reports. The Agencies placed the early termination mechanism on permanent hiatus in 2021, citing "the confluence of a historically unprecedented volume of filings during a leadership transition amid a pandemic." FTC, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

31 For instance, the FTC has investigative authority under the FTC Act to "prosecute any inquiry necessary to its duties in any part of the United States," 15 U.S.C. § 43, and is authorized "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions . . . Federal credit unions . . . and common carriers . . . ." *id.* § 46(a).

civil investigative demands to investigate labor restraints or patterns of conduct that may constitute monopolization, none of which has any bearing on whether a specific transaction violates Section 7 of the Clayton Act.

Most of the proposed information requirements run afoul of at least one, if not several, of the above limitations on the Agencies' statutory authority. We discuss each in turn below.

### 1. Identification of communications and messaging systems.

The Agencies propose to require all filing parties to "[l]ist all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations."[32]

This information is plainly not "necessary" for the Agencies' assessment of whether a specific transaction needs further investigation. A filing party's communication or messaging systems have no bearing on the competitive impact of a proposed transaction. According to the NPRM, the Agencies believe "it is important for the parties to understand that their preservation and retention obligations apply to [communications and messaging systems] as well."[33] The Agencies are concerned that many parties "do not appear to fully understand and/or comply with document preservation obligations for these new modalities."[34] In other words, the Agencies are using this requirement as a means of impressing on filing parties that they must retain documents in case the Agencies choose to seek further information. The Agencies have no authority to request information as a way of making a point.

Additionally, this requirement will be significantly more costly than beneficial and therefore not "appropriate." It will take significant time and effort from both counsel and relevant individuals to "identify and list *all* communications systems or messaging applications on *any* device" that "*could* be used to store or transmit information or documents related to its business operations."[35] All of that effort is in return for no plausible benefit to the Agencies' initial assessment of the transaction. Disclosing the relevant communications systems has no conceivable connection to whether, at the initial-screening stage, the specific transaction raises competitive concerns.

### 2. Information related to labor market concentration.

As part of their new requirement for "Labor Markets Information," the Agencies propose to require filing parties to provide (i) "the aggregate number of employees of the acquiring person or acquired entity (as appropriate) for each of the 5 largest occupational categories (as categorized by the first six digits of the relevant SOC [Standard Occupational Classification] classifications"; and (ii) "the five largest 6-digit SOC codes in which both parties (the acquiring person and the acquired entity) employ workers" and, "[f]or each overlapping 6-digit SOC code," the

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[32] 88 Fed. Reg. at 42,217.

[33] *Id.* at 42,205.

[34] *Id.*

[35] *Id.* (emphases added).

corresponding "ERS [Economic Research Service] commuting zone" and "aggregate number of classified employees in each ERS commuting zone."[36]

The Agencies cannot show that the information related to potential labor market effects is "necessary" for their review of a proposed acquisition. To our knowledge, no court to date has condemned a merger because of its anticompetitive effects in labor markets under Section 7 of the Clayton Act. This information is therefore not necessary for the Agencies' initial screen. In support of this new requirement, the Agencies offer only two citations. Neither provides any insight into how the requested information would be necessary.[37] In essence, the Agencies are treating labor as a new special input category and imposing onerous requirements that are not necessary for the assessment of a single transaction.

The collection of this new information will also not be "appropriate" because it will be significantly more costly than beneficial. The Agencies propose to create an entirely new section of the HSR form requiring information that has never been provided. Businesses and their counsel will have to become familiar with the SOC categories, determine the relevant SOC code for each of their employees, and determine each employee's "ERS-defined commuting zones," which will require significant time and expense. Classifying each employee by SOC category and ERS commuting zone will be especially burdensome for private equity firms with a large number of relevant portfolio companies, and the costs of doing so will likely be borne by the portfolio companies directly.

On the other hand, this information hardly aids the Agencies in their review of a proposed transaction. The five largest overlapping SOC categories between the two parties are likely to be functions that exist in all types of businesses (*e.g.*, legal, human resources, and accounting). Overlaps of this kind would presumably be entirely irrelevant when the parties are not in the same industry. Moreover, for many non-manufacturing companies, SOC codes for many common jobs—manager, software programmer, etc.—will give only a generic description of job function that will be of little use. In addition, the option of remote work available to many employees has significantly reduced the relevance of geography in terms of labor market competition.

### 3. Violations of federal labor and worker-safety laws.

In keeping with the Agencies' recent statements suggesting that they plan to scrutinize mergers for labor-market issues,[38] the Agencies propose to require all filing parties to "[i]dentify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB,

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[36] *Id.* at 42,215.

[37] One citation is to a consent decree in which the underlying complaint did not even charge labor market violations. The other is to a suit against book publishers where the alleged concentration is not in the market for services for employees of the publishers but rather in the market for authors. *See id.* at 42,197 nn.47-48.

[38] *See, e.g.*, FTC, *Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices* (July 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers.

or OSHA matters," and "[f]or each identified penalty or finding, provide (1) the decision or issuance date, (2) the case number, (3) the JD number (for NLRB only), and (4) a description of the penalty and/or finding."[39]

Even assuming, contrary to the above analysis, that some labor market-related information might be necessary to the initial screen of a transaction, the Agencies certainly cannot show that they need to be aware of "any penalties or findings that were issued against the acquiring person or acquired entity by [DOL, OSHA, and NLRB] during the five-year period before the filing."[40] There is simply no connection between the existence of such findings or penalties and the anticompetitive possibility of a proposed transaction—let alone such a strong connection that such information would be significant for an initial assessment of the transaction at issue. The Agencies speculate that such penalties or findings "may be indicative of a concentrated labor market where workers do not have the ability to easily find another job."[41] But they cite nothing for that proposition, and we are aware of no case law or empirical basis for such a claim. It is also dubious as a theoretical matter: even if a labor market were concentrated, as long as it is not a pure monopsony, the Agencies do not explain why employees could not switch to a competitor in response to violations of employment or labor laws.

The collection of this new information will also not be "appropriate." The Agencies recognize that this requirement will impose a "burden on filers to search through" their files going back five years.[42] Filing parties will also have to draft "a description of the penalty and/or finding,"[43] which they likely will not have created in the ordinary course of business and which will practically require the assistance of outside counsel. The Agencies propose to impose these costs in return for the most speculative of benefits: the mere possibility that penalties might correlate with labor-market concentration.

#### 4. **Certification of document retention**.

The Agencies propose amending the language of the certification to "require affirmation that the filing person has taken the necessary steps to prevent the destruction of documents and information related to the transaction."[44]

Per Section 18a(d), the Agencies have authority to require that the notification be in a certain "form." But under the statute, that "form" must still be "necessary and appropriate to enable" the initial screen, as discussed above. It may be necessary and appropriate to require that filing parties certify that the information in their initial notification is accurate; otherwise, the entire premerger program could be easily circumvented. But document retention is plainly not "necessary" for the Agencies' initial screen. After all, whether the filing parties have in place a document retention policy has no bearing on the information the Agencies will receive as part of their initial screen. The Agencies themselves acknowledge that they are imposing this requirement

[39] 88 Fed. Reg. at 42,215.

[40] *Id.* at 42,198.

[41] *Id*.

[42] *Id.*

[43] *Id.* at 42,215.

[44] *Id.* at 42,206.

with the second request in mind. In other words, the requirement is designed to serve a process that is distinct from the initial screen. The Agencies say that the certification is designed to ensure that documents are not destroyed just in case the Agencies might decide to issue a second request. That has nothing to do with the initial evaluation. Like the Agencies' requirement that filing parties identify communications and messaging systems (discussed *supra* at Part I.B.1), a certification regarding the implementation of a document retention policy has no relevance to the screening of a transaction for antitrust concerns.

The proposed amendment to the certification exceeds the Agencies' statutory authority for a separate reason: the Agencies have no statutory power to impose what is essentially a litigation-style "document hold" requirement. The HSR Act does not require every filing party for every HSR-reportable transaction to retain documents and information, or authorize the Agencies to impose one. Had Congress considered such a tool necessary to solve the midnight-merger problem, they could have provided it.

Moreover, the document-retention requirement is also not "appropriate" because it will impose significant costs on businesses to implement and oversee, especially when the requirement will apply to all employees of the filing person and extend to materials that have no probative value for the Agencies' competition assessment. Those costs will be especially significant for private equity firms, because employees of many different affiliated entities may have "documents and information related to the transaction" that they must apparently retain. To the extent the document-retention obligation extends to portfolio companies, private equity firms are not engaged in or responsible for such day-to-day operations. Again, then, portfolio companies may bear a significant proportion of the costs of the Agencies' proposal.

#### 5. Drafts of item 4(c)/(d) documents provided to officer, director, or supervisory deal team lead.

The Agencies propose requiring all filing parties to provide, "[f]or each responsive Transaction-Related Document . . . drafts of the document that were sent to an officer, director, or supervisory deal team lead(s)."[45] The Agencies cannot show that *all* drafts of *all* transaction-related documents are "necessary" in order for them to make an initial assessment of potential antitrust concerns. By definition, a "draft" is not the most comprehensive or most accurate version of a document, and it is doubtful that previous versions would offer the Agencies any additional insight into the competitive effects of a proposed transaction that cannot be sufficiently gleaned from the final version. Even courts typically find draft documents to be less probative in merger challenges.[46] The NPRM, without any support, cryptically claims that "drafts often reveal additional information about [a] transaction that would have been important to the Agencies' review during the initial waiting period."[47] Even if some draft documents might have some relevance, the Agencies fail to explain why requiring *every single one of these drafts* in the initial

[45] *Id.* at 42,214.

[46] *See, e.g.*, *United States* v. *AT&T Inc.*, 310 F. Supp. 3d 161, 208 (D.D.C. 2018) (finding the "probative value" of statements in draft documents that the government relied on for its antitrust challenges to be "minimal" when these statements were "contained in a preliminary draft and were subsequently removed or changed").

[47] 88 Fed. Reg. at 42,194.

filing is necessary to decide whether to even proceed to a second request. As justification, the Agencies merely point to the fact that they "routinely ask for and receive draft documents in response to Second Requests,"[48] which highlights the Agencies' fundamental misunderstanding of the statutory text and purpose. The statutory scheme of the HSR Act envisions the exchange of significant, probative information during the second request process. Just because the Agencies have previously received drafts during the second request phase and found them useful does not mean that it is *necessary* that the Agencies have such information when they are reviewing the initial filing.

The costs of this requirement also significantly outweigh any benefits, rendering the requirement not "appropriate." Requiring draft documents will massively expand the volume of documents the filing parties must retain, compile, and review for responsiveness and privilege. When preparing the initial notification, filing parties will now have to employ professionals to both review a far larger set of documents for responsiveness, and then perform a privilege analysis on the responsive documents. In other words, for every reportable transaction, filing parties will have to spin up what is effectively a litigation-style discovery process. Under the current regime, these significant costs are usually only imposed on parties during the rare second request phase, for transactions that by definition cross at least some threshold of competitive concern. In spite of these costs, the Agencies fail to substantiate any benefits of this proposed requirement, other than their nonspecific claim that drafts "have been important to the Agencies' review" in the past.

### 6. Disclosure of officers, directors, and board observers.

The Agencies propose to require the disclosure, "[f]or each entity within the acquiring person or acquired entity (as applicable) . . . all current officers, directors, and board observers . . . (or in the case of unincorporated entities, individuals exercising similar functions), as well as those who have served in the position within the past 2 years."[49] The Agencies additionally propose to require the disclosure of "all individuals who will or are likely to serve as an officer, director, or board observer of an entity within the acquiring person as a result of or as contemplated by the transaction."[50] For "each officer, director and board observer identified," the filer must "list all other entities for which the individual serves, or has served within the last two years, as an officer, director, or board observer."[51]

This requirement exceeds the Agencies' authority, and as such, is not necessary or appropriate for the initial screen, because it does not pertain to whether the specific proposed acquisition will *itself* violate the antitrust laws. The Agencies' concern is with Section 8 of the Clayton Act, which prohibits interlocking directorates. But Section 8 is directed toward *persons*, not *acquisitions*.[52] Although an acquisition can lead to a board interlock, it is not the acquisition itself that violates Section 8 (as with Section 7). Accordingly, the Agencies have no authority to use the HSR process to enforce Section 8. That makes sense, because interlocking directorates do

48 *Id*.

49 *Id.* at 42,212.

50 *Id.*

51 *Id.*

52 15 U.S.C. § 19(a)(1).

not pose the unscrambling problem that motivated the creation of the premerger notification program in the first place. The appropriate remedy for a Section 8 violation is to have the offending officer or director resign, which can be achieved just as easily post-transaction as pre-transaction. Indeed, Section 8 expressly provides for a grace period to allow for resignations if an interlock develops after a director's appointment to a Board, including as a result of a transaction.[53]

Moreover, even assuming that the Agencies could inquire into Section 8 as part of their HSR review, much of the information they propose to require is not necessary for the initial screen of those filing parties that are not organized as corporations. The text of Section 8 and Supreme Court precedent[54] make clear that it applies only to "corporations," and does not extend to interlocking interests in other kinds of business forms, such as limited partnerships. Indeed, the Agencies themselves acknowledge in a footnote that "Section 8 does not technically apply to unincorporated entities."[55] In the same footnote, the Agencies claim that "information sharing and coordination can still raise concerns under Section 1 of the Sherman Act."[56] But Section 1, like Section 8, is focused on "persons," and does not present the sort of remedial problem that the premerger review program exists to solve.[57]

Likewise, the Agencies have no authority to use the HSR Act to police the role of board observers. As the Agencies themselves again admit, "[b]oard observers are not subject to the Section 8 ban on interlocking directorates."[58] Yet the Agencies do not point to any other statutory text that would support their requesting this information. Instead, the Agencies argue that "having [board observer] information available during the initial waiting period would permit the Agencies to take steps to minimize the sharing of information prior to consummation,"[59] which does not suggest that such information would be necessary for the Agencies' initial screening of the proposed acquisition.

Even assuming that it is "necessary" for Agencies to learn about "existing" and "potential" interlocking directorates, the Agencies provide no explanation why it would be necessary for them to learn of "prior" interlocks in order to assess a specific transaction. Even if the Agencies may have reasons to be concerned about a *current* interlock and any potential influence the interlocking director may assert over the two companies, any such concern would be moot once the interlock ceased to exist. Learning about the relevant director's prior positions, which they by definition no longer hold, in no way aids the Agencies' assessment of the competitive effects of a proposed transaction. The Agencies have therefore articulated no basis for requiring this information going back "two years prior to filing."[60]

This proposed requirement is also not "appropriate" because its costs significantly outweigh its benefits. Collecting information going two years back on *all* officers, directors, and

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[53] *Id.* § 19(b).

[54] *Bankamerica Corp.* v. *United States*, 462 U.S. 122 (1983).

[55] 88 Fed. Reg. at 42,189 n.34.

[56] *Id.*

[57] *See* 15 U.S.C. § 1.

[58] 88 Fed. Reg. at 42,190.

[59] *Id.*

[60] *Id.* at 42,189.

board observers (and "individuals exercising similar functions") of "*all entities* within the acquiring person and acquired entity" and *all* "other entities for which these individuals" currently or previously served in such roles would be enormously burdensome. This is particularly true for acquiring or acquired persons with complex structures. For private equity firms, the requirement would extend to unrelated portfolio companies that are controlled by the same fund, even if such portfolio companies are in completely different sectors and geographies. And for a large public company with hundreds of subsidiaries, it would necessitate the disclosure of officers and directors of every single one of its subsidiaries, whose activities may not have any overlap with the acquired entity.

#### 7. **Disclosure of all acquisitions within the past 10 years with overlapping NAICS codes or a vertical relationship.**

The Agencies propose to require, for prior acquisitions that "(i) derived revenue in an identified 6-digit NAICS [North America Industry Classification System] industry code overlap or (ii) provided or produced a competitive overlap product or service as described in the Horizontal Overlap Narrative," the disclosure of "all such acquisitions of entities or assets made within the 10 years prior to filing" that meet certain thresholds.[61]

The Agencies' request for this information is grounded in their desire to "better identify during the initial waiting period transactions that may, on their own *or as part of a pattern of serial acquisitions*, violate the antitrust laws."[62] This appears to be a reference to the Agencies' newly adopted position that "a firm that engages in an anticompetitive pattern or strategy of multiple small acquisitions . . . may violate Section 7, *even if no single acquisition on its own* would do so."[63] That interpretation of Section 7 finds no support in any judicial decision. The pertinent part of Section 7 states that "[n]o person engaged in commerce or in any activity affecting commerce shall acquire . . . the whole or any part of the assets of another person . . . where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[64] The statutory text makes clear that the Agencies are not permitted to use Section 7 to challenge serial acquisitions.

Even setting aside the Agencies' novel and expansive interpretation of Section 7, the Agencies' authority under the *HSR Act* is still transaction-specific—the Agencies may only seek information to determine whether the "proposed acquisition" itself may "violate the antitrust laws." Accordingly, the Agencies may not use HSR filings to determine whether a firm has "engage[d] in an anticompetitive pattern" of serial transactions unless the single proposed acquisition on its own would do so.[65] Nor may they use the HSR review process as a tool for

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[61] *Id.* at 42,217.

[62] *Id.* at 42,203 (emphasis added).

[63] FTC & DOJ, Draft Merger Guidelines 22 (2023) (emphasis added).

[64] 15 U.S.C. § 18.

[65] Moreover, as the Agencies acknowledge, they have abundant resources at their disposal for monitoring transactions, even non-reportable transactions. *See* Note by the United States, "Start-ups, killer acquisitions and merger control," OECD DAF/COMP/WD (2020)23 (June 11, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)23/en/pdf.

retroactively reviewing transactions that they would like to now reconsider challenging—including transactions below or outside the previous reporting thresholds and/or timelines.

The FTC has stated that it believes Section 5 of the FTC Act may be used to challenge "a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws."[66] Even if that is right, Section 5 is irrelevant to HSR Act review. The statute requires that information be related to whether a transaction may "violate the antitrust laws," which is specifically defined to exclude Section 5.[67]

Moreover, it is obviously not necessary for a preliminary competitive assessment that the Agencies have information on *all* prior acquisitions in overlapping industries, for the past 10 years, from both parties, regardless of the size of the target company. Simply put, the Agencies do not need 10 years of historical data to conduct an initial screen of a *single*, *current* transaction. If an acquirer is engaged in a pattern of serial acquisitions that presents current anticompetitive concerns, surely the Agencies can detect that using data within the last 5 years—as is required to be provided under the current regime. The Agencies argue that "ten years would . . . provide for a better framework to allow the Agencies to engage in a more detailed consideration."[68] But as discussed, the initial screen is not the time for that "more detailed consideration." If the Agencies see a potential pattern from transactions within the last 5 years, they can then issue a second request.

Against this lack of benefit, the Agencies' proposal would impose serious new costs and is therefore not "appropriate." The burden on filing parties to identify and describe relevant prior acquisitions would more than double, because the Agencies have both doubled the relevant period (from five to ten years) and removed the current *de minimis* thresholds for disclosure. Even assuming that companies have comprehensive records of their past transactions going back a decade, as the Agencies assume, compiling this information will be costly. And in practice, it will likely take significant additional effort to comply because institutional knowledge may have been lost if, for example, a company has switched accounting or recordkeeping systems or had turnover in leadership.

### 8. Disclosure of minority investors and creditors.

The Agencies propose to require the disclosure of "other types of interest holders that may exert influence," including individuals or entities that, in relation to the acquiring entity, "(i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction."[69]

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[66] FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* 12, 14 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[67] *See* 15 U.S.C. § 12(a).

[68] 88 Fed. Reg. at 42,203.

[69] *Id.* at 42,189.

This information is not necessary to examining the anticompetitive effects of any proposed transaction, including those involving a private equity fund or other limited partner investment models. The HSR Act exempts from filing the "acquisition[] of . . . obligations which are not voting securities."[70] Congress explained that it exempted transactions that in its view "pose no anticompetitive threats under Section 7, or are already subject to advance antitrust review."[71] Acquisitions of non-voting securities are not "already subject to advance antitrust review" as some other exempt transactions are (*e.g.*, certain bank mergers), so Congress must have concluded that the purchase of non-voting securities "pose[s] no anticompetitive threat[]."[72] Moreover, even assuming that some minority holders might have competitive significance (contrary to Congress's conclusion otherwise), requiring lists of hundreds, if not thousands, of minority investors, especially across an extensive and diffuse organization, would have little if any utility for the Agencies' initial screen. The Agencies would have no way of discerning the signal from the noise.

In particular, private equity funds are typically structured as limited partnerships, with limited partners—*i.e.*, investors—having no control over investment decisions. The Agencies have never required disclosure of such passive investors. The Agencies state cryptically that they "now believe[] it is inappropriate to make generalizations regarding the role of investors in limited partnership structures."[73] But they do not explain why that would be inappropriate; it is a true and accurate "generalization" that private equity fund investors have no control over investment decisions and have no control or influence over the decisions of a portfolio company. There is accordingly no antitrust-related reason to learn the identities of such investors at any stage of the HSR process, let alone the initial screening stage. The Agencies appear to be interested in atypical limited partnership arrangements in which the limited partner may have a more active role in the entity, such as board seats or board approval rights.[74] But they do not explain why they must learn about *all* LPs, regardless of whether they are active or passive, in order to screen for potentially problematic active investors.

The same point applies to creditors, which similarly do not control investment decisions. Tellingly, the Agencies do not cite a single judicial or agency precedent finding that a creditor had any bearing on the competitive effect of a particular transaction. Nor do they cite any empirical or theoretical basis to worry about it. The Agencies therefore cannot credibly assert that mandating the disclosure of minority investors and creditors will provide them with information necessary to decide whether a specific proposed acquisition deserves further scrutiny. The Agencies' only justification is to claim, without citation, that "some credit arrangements permit the creditor to exercise rights and influence similar to those of equity holders."[75] Even if that is true, that does not make it necessary to learn about *all* creditors above a certain loan size.

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70 15 U.S.C. § 18a(c).

71 H.R. Rep. 94-1373, at 6 (1976).

72 *Id.*

73 88 Fed. Reg. at 42,188.

74 *Id.* n.29 (citing enforcement action involving LPs that together owned approximately 34% of the acquiring limited partnership entity and held, or controlled, six out of seven board seats of the controlling management LLC).

75 *Id.* at 42,189.

The Agencies' proposal will also be quite costly, as it would represent a massive expansion of requested information regarding minority investors—moving from minority holders of the ultimate parent entity (UPE) but excluding limited partners and creditors, to minority holders of the UPE and any entity that controls or is controlled by the acquiring entity including limited partners and certain creditors. That information is often not known or settled at the time of filing. Compiling it will require significant time and effort for many kinds of transactions, possibly delaying filing and thus their consummation, in return for little if any benefit to the initial screening for antitrust concerns. Mandating that information is therefore not appropriate. The Agencies themselves recognize that their proposal "may require *significant* additional information from investment entities such as funds and master limited partnerships."[76]

### 9. List of all related entities and all names under which such entities do business or have done business within the last three years.

The Agencies propose requiring the identification of all entities that are "included within the acquiring person, or acquired entity," including "all names under which the entities do business or have done business within the past 3 years," organized by operating company.[77]

As with the requirement of disclosure of minority investors and creditors, the Agencies do not need to know the relationships between and among all related entities for its initial review of the HSR filing. The majority of the covered entities will likely have no overlapping activities with the acquired company, and thus learning about them adds no value to the Agencies' initial screen. In addition, the names under which such entities have done business two or three years ago simply has no bearing on the Agencies' initial substantive analysis of the *present* effects of the transaction. The Agencies offer no explanation for why they need such information; the three-year period is arbitrary.

Moreover, the collection of this information will be significantly more costly than beneficial and therefore not appropriate. The filing parties are unlikely to have available a comprehensive and detailed list of all such relevant entities, and, any information on such entities might not be in a readily aggregated form. For private equity vehicles with large fund structures and many entities "within" the acquiring person, the request will be especially burdensome and, again, sweep in mostly if not entirely entities that have no relevance to the instant transaction.

### 10. For transactions where a fund or master limited partnership is the UPE, organizational charts showing relationship of all affiliates and associates.

In addition to the list of related entities, the Agencies also propose to require, "for transactions where a fund or master limited partnership is the UPE," an "organizational chart sufficient to identify and show the relationship of *all entities that are affiliates or associates*."[78] This information is also not necessary for the Agencies' initial screen. In particular, to the extent

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[76] *Id*. at 42,188.

[77] *Id.* at 42,211.

[78] *Id.* (emphasis added).

the organizational chart shows entities that have no product overlaps with the acquired company (which will likely comprise the vast majority), the chart offers no information of any antitrust relevance. It therefore cannot aid the Agencies determination of whether to issue a second request. The Agencies say that they need to understand "the relevant entities and individuals involved in the transaction."[79] But as drafted, the proposed requirement goes far beyond that contemplated goal. Given the expansive definition of "associate,"[80] the requirement would sweep in a number of persons and entities whose relationships to the transaction raise no competitive concern—*e.g.*, when the entities have different shareholders than the acquiring fund, or when these entities do not have any overlapping activities.

As with the list of all related entities, this requirement would be significantly more costly than beneficial. The filing parties are unlikely to have a comprehensive and detailed organizational chart in this form, and this information is often not available at the time of filing. The compilation of this information is likely to require significant efforts and expense, thereby delaying the filing timeline and the transaction timeline. Meanwhile, the result of all this effort will be a chart filled with tiny boxes that is of no use to anyone.

#### 11. Organizational charts identifying the authors of all submitted documents.

The Agencies plainly do not need to know the identity and position of authors of all submitted documents to determine whether further investigation into the transaction is warranted. Knowing who drafted a particular document and his or her role within the filing party does not help the Agencies' initial screen of a proposed transaction, since it is the information contained in the document itself that will inform that determination. The NPRM says this requirement would "help contextualize reporting relationships" and "allow the Agencies to more quickly assess which documents contain high-level assessments from key employees."[81] But drafters of documents often receive information from all channels within the same entity. There is no reason why the Agencies *need* "context[]" on "reporting relationships" at the initial evaluation stage. Knowing whether a document was drafted by a "key employee" or some other kind of employee will never make the difference between issuing a second request or not. Even if that is wrong, moreover, the Agencies already collect the name, title, and affiliation of authors of Item 4 documents.

The collection of this information would also be inappropriate as it will be significantly more costly than beneficial. The filing parties are unlikely to have a comprehensive and detailed organizational chart in this form, and compiling it is likely to require significant effort and expense. Moreover, authors of certain documents may not even be employees of the filing entity, which adds additional difficulties for filing parties in presenting a complete and accurate response.

79 *Id.* at 42,192.

80 *See* 16 CFR § 801.1(d).

81 88 Fed. Reg. at 42,195.

### 12. Other categories of information that are not readily available to filing parties.

Finally, many of the new information requirements the Agencies propose are not "appropriate" for the additional reason that they would force filing parties to create information and/or documents that are not readily available. As discussed above, Congress did not expect filing parties, *even at the second request stage*, to have to provide data "that could not be compiled or reduced to writing in a relatively short period of time," and believed that requiring such information "might well be unreasonable." [82] As Congressman Rodino explained in the Conference Report for the bill, even with the second request, "the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them."[83] If Congress did not envision that the Agencies could request information that is not readily available to filing parties as part of a second request, it surely could not have intended to give the Agencies that authority in the initial notification stage.

In addition to the requirements already addressed above, the following requirements the Agencies propose to add would force filing parties to produce information not readily available or already in existence as a result of the acquisition process:

- "Competition analysis" describing filing parties' (including their related entities') businesses and any "potential future horizontal overlaps and supply relationships" between them.[84]

- A list of all NAICS codes for "products or services under development by the acquiring person that would overlap with the products or services of the acquired entity(s) or assets," *i.e.*, overlapping pipeline products.[85]

- A "narrative that would identify and explain each strategic rationale for the transaction."[86]

- A narrative explaining the supply relationships between the filing parties in the last two fiscal years, including information on sales and top 10 customers.[87]

- Translation of all submitted foreign-language documents.[88]

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[82] 122 Cong. Rec. 30,877 (1976) (statement of Rep. Rodino).

[83] *Id.*

[84] 88 Fed. Reg. at 42,196.

[85] *Id.* at 42,215.

[86] *Id.* at 42,191.

[87] *Id.*

[88] *Id.* at 42,182.

## II. THE RULE AS PROPOSED IS ARBITRARY AND CAPRICIOUS UNDER THE ADMINISTRATIVE PROCEDURE ACT.

In addition to exceeding the Agencies' statutory authority under the HSR Act, the rule as proposed violates the APA's prohibition on arbitrary and capricious agency action.

As an initial matter, the Agencies "failed to consider an important aspect of the problem"[89] because, as discussed above, they have not considered the key statutory factors: whether the information they propose to request is necessary and appropriate to their initial evaluation of the proposed transaction. But the proposed rule, if adopted, would be arbitrary and capricious for a number of other reasons. First, the Agencies have not sufficiently explained their basis for proposing to fundamentally overhaul the longstanding HSR framework. Second, the Agencies have failed to conduct a meaningful cost-benefit analysis, as required by the text of the HSR Act. Finally, the rule will be far more costly than beneficial and is arbitrary and capricious for that reason alone.

### A. The Rule Is Arbitrary and Capricious Because the Agencies Have Not Provided A Reasoned Explanation for Their Drastic Departure from Longstanding Policy.

The rule as proposed is arbitrary and capricious because the Agencies have not sufficiently explained why they must undertake what they admit is a "comprehensive redesign" and "large-scale reorganization of the information required in an HSR filing," unprecedented in size and scope "since the implementation of the Act and Rules in the late 1970s."[90] When an agency changes its position, it "must show that there are good reasons for the new policy."[91] Particularly when departing from a "longstanding polic[y]," the agency must give a "reasoned explanation . . . for disregarding facts and circumstances that underlay" the prior policy.[92] In other words, "an agency proposing a policy change will need to engage with the[] . . . 'facts and circumstances' that had been viewed as justifying a different legal view and course of action."[93]

The Agencies thus need to provide a "reasoned explanation" that would justify such "large-scale" changes. That is particularly true in light of the HSR Act's requirement that the information requested be "necessary." If the Agencies have concluded that they *need* significantly more information to "enable" them to perform an initial screening, then the Agencies should be able to cite significant limitations in the current framework that constrain their ability to perform an initial review. But the Agencies do not claim they face such difficulties. Indeed, the Agencies do not point to a single acquisition that they would have sought to block if the initial HSR notification had contained the information they now propose to require.

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89 *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.")

90 88 Fed. Reg. at 42,181.

91 *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

92 *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 222 (2016) (internal quotation marks omitted).

93 W. Buzbee, *Agency Statutory Abnegation In the Deregulatory Playbook*, 68 Duke L.J. 1509, 1553 (2019).

Moreover, agencies must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[94] Such reliance interests are at play here. The American business community—and in particular, investment-driven enterprises such as private equity—have relied on the longstanding balance between disclosure and burdens that Congress struck in the 1970s. Businesses and investors have "negotiated and structured [deals] against this background understanding."[95] Deal practices, negotiations, and timelines have been built around the current regime. And "[r]equiring" firms and investors "to adapt to the [Agencies'] new position could necessitate systematic, significant changes."[96] The APA requires that agencies take these considerations into account.

The Agencies have not done so. As justification for the proposed rule, the Agencies primarily claim that they "are responding to evidence that the U.S. economy is becoming increasingly concentrated overall."[97] But even if that highly contested assertion is true,[98] and even if such increased concentration is (implausibly) the result of the agencies' failure to challenge certain mergers after HSR review,[99] the Agencies have not explained why those failures were caused by their lack of certain information during the initial thirty-day window.

Next, the Agencies contend that the proposed changes "would improve the efficiency and effectiveness of [the] initial review by providing the information the agencies need to identify during the initial 30-day waiting period any transaction that may pose competition concerns," and "potentially narrow the scope of any investigation or reduce the need to conduct a more in-depth investigation of the proposed transaction."[100] This explanation does not make sense. Of course requesting more information at the initial review stage would reduce the amount of information

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94 *Encino Motorcars*, 579 U.S. at 221-22 (internal quotation marks omitted).

95 *Id.* (finding that a failure to consider the disruption to these relationships rendered the challenged regulation arbitrary and capricious).

96 *Id.*

97 88 Fed. Reg. at 42,179.

98 The Agencies' dire depiction of the economy contrasts with the one painted by the White House, which recently touted that the economy has "added more than 13 million jobs," "there were more than 10 million applications for new small businesses filed in 2021 and 2022," that "America has seen the strongest growth since the pandemic of any leading economy in the world," that there are currently "record lows in unemployment," that "the share of working-age Americans in the workforce hasn't been higher in 20 years." The White House, *Bidenomics Is Working: The President's Plan Grows the Economy from the Middle Out and Bottom Up—Not the Top Down* (June 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/28/bidenomics-is-working-the-presidents-plan-grows-the-economy-from-the-middle-out-and-bottom-up-not-the-top-down/.

99 The Agencies cite four academic articles for the proposition that "*many* markets suffer from a lack of robust competition." *See* 88 Fed. Reg. at 42,179 n.9 (emphasis added). Three of them concern one kind of market: the hospital market, which is *sui generis* in any event. The fourth states that Robert Bork "was surely right that most horizontal mergers have no meaningful negative impact on competition," and concludes only that "prices can increase following mergers leaving only three or four major market participants." Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers* 24*,* 57 J. L. & Econ. S67 (2014). Those types of classic oligopoly mergers are not the kind of acquisitions the Agencies are focused on in this NPRM, or that it needs the additional proposed information to catch.

100 88 Fed. Reg. at 42,178.

needed at the second request stage. But that is not an "efficiency" even for transactions that go to a second request—it is simply changing the timing of when the information is submitted. And it is certainly not an "efficiency" for the roughly 98% of transactions that, based on historical data, never receive a second request, but now must provide much more information to the Agencies.

The Agencies also claim that, "as compared to [current HSR initial notification requirements], most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis, including details about the transaction's structure and rationale, horizontal overlaps, vertical and other relationships, and more detailed sales data."[101] But this overlooks that the main foreign premerger clearance regimes to which the Agencies are likely referring are significantly different from the U.S. regime. Foreign regulators in these bodies are making *the approval determination for the transaction*, with limited if any judicial review on the back end. For instance, the EU merger review process contemplates a thorough and comprehensive premerger review, including a pre-notification period and discussions with the authority throughout the process. The HSR Act, by contrast, is not a pre-approval statute. Even if the Agencies determine that a proposed transaction violates the antitrust laws, they must go to court and convince a federal district judge that they are correct.

The comparison is inapt in several other ways. First, foreign regulators are also endowed with much broader authority by the relevant legislative texts.[102] Second, the filing thresholds in many foreign jurisdictions are significantly higher.[103] As a result, each year, a much greater number of transactions meet the HSR thresholds, compared with the EU thresholds. In 2021, the European Commission received 401 filings.[104] By comparison, 3,520 HSR filings were made in 2021.[105] Third, many foreign jurisdictions also provide a much less burdensome alternative (short forms) for obviously non-problematic transactions. For instance, the European Commission has

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101 *Id.* at 42,180, 42,180.

102 For instance, in the United Kingdom, the Enterprise Act (2002) gives the Competition and Markets Authority (CMA) authority to "obtain[], compil[e], and keep[] under review information about matters relating to the carrying out of its functions," which are "to be carried out with a view to (among other things) ensuring that the CMA has sufficient information to take informed decisions and to carry out its other functions effectively." Enterprise Act, Part 1, Section 5. There is no caveat that such information should be necessary or appropriate or should in any way be limited.

103 To trigger a filing requirement in the EU, the parties must (i) have a combined worldwide turnover exceeding EUR 5 billion (approx. USD 5.265 billion) and (ii) each have EU turnover exceeding EUR 250 million (approx. USD 263.25 million), unless (iii) each party has more than 2/3 of its EU turnover in one and the same EU Member State. Moreover, in the EU, only "concentrations" (acquisitions of "control") as defined in the EU Merger Regulation are notifiable, whereas the HSR regime has no comparable qualitative threshold, and acquisitions of even a minority interest can trigger the filing requirement.

104 *See* European Union, *Annual Report on Competition Policy Developments in the European Union* 18 (Oct. 6, 2022) ("The Commission adopted 396 merger decisions. . . . Three notified transactions were abandoned by the parties and withdrawn in Phase II. . . . The Commission accepted to examine two transactions following a referral pursuant to Article 22 of [the EU Merger Regulation]."), https://one.oecd.org/document/DAF/COMP/AR(2022)39/en/pdf.

105 *See* FTC, 2021 HSR Annual Report.

progressively simplified the merger review process since its creation in 1989[106] with an aim to reduce the workload and costs for filing parties for certain types of transactions that are not likely to raise antitrust concerns. The European Commission's 2023 Simplification Package, in particular, will (i) expand the categories of transactions that can benefit from the simplified procedure (which already account for more than 77% of all filings each year since 2018[107]), as well as introduce a more simplified Short Form CO (the form used for transactions reviewed under the simplified procedure), where questions requiring narrative responses will be changed into primarily "tick-box" options and tables. The Agencies, by contrast, propose in the NPRM to move in the opposite direction.

Indeed, the Agencies entirely ignore the likely impact on U.S. capital markets of imposing significant new burdens on innocuous acquisitions when other major jurisdictions are removing such burdens.[108] Failing to "consider an important aspect of the problem" renders an agency's rule arbitrary and capricious.[109] In light of Congress's clear desire to avoid unnecessary harms to the economy as part of premerger review, the effects of such review on the competitiveness of U.S. capital markets surely rises to the level of "important."

Finally, to the extent the Agencies justify amendments to the HSR notification form on the ground that filing parties are not fully complying with their obligations under the *current* form,[110] that explanation is also irrational. The fact that some entities have not complied with their obligations under the current regime does not justify demanding a greater amount of information from all filing parties.

### B. The Rule Is Arbitrary and Capricious Due to the Lack of A Meaningful Cost-Benefit Analysis.

As discussed *supra* at Part I.A.2, by using the phrase "necessary and appropriate" in the HSR Act, Congress specifically required the Agencies to compare costs to benefits in determining what information to require in the initial premerger notification form. In *Michigan* v. *EPA*, the Supreme Court held that the phrase "appropriate and necessary" "*plainly* subsumes consideration

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106 These include the 2000 Simplification Package, the 2013 Simplification Package, and 2023 Simplification Package. *See* European Comm'n, *Simplification of Merger Control Procedures*, https://competition-policy.ec.europa.eu/mergers/publications/simplification-merger-control-procedures_en.

107 *See* European Comm'n, *EC Impact Assessment* 9 (Apr. 20, 2023), https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2023)80&lang=en.

108 *See, e.g.*, Commission Implementing Regulation (EU) 2013/914 (simplifying and expediting the review of transactions involving non-controlling minority shareholdings).

109 *State Farm*, 463 U.S. at 43.

110 *See* 88 Fed. Reg. at 42,206 ("In recent years, the Agencies have observed an increasing number of instances where, in the course of an investigation or later litigation challenging the transaction, the filing parties disclaim or modify statements or information submitted as part of the Form, notwithstanding numerous federal laws that prescribe criminal penalties for submitting false information to the government, including as part of an HSR Filing."); DOJ, *Deputy Assistant Attorney General Andrew Forman of the Antitrust Division Delivers Remarks to the ABA M&A Committee at the Business Law Section Annual Meeting* (Sept. 17, 2022) ("Recent experience suggests some companies may not be living up to their HSR obligations."), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-antitrust-division-delivers-remarks-aba.

of cost."[111] As the Court explained, that result follows from both the plain meaning of the word "appropriate"—since "[n]o regulation is 'appropriate' if it does significantly more harm than good"[112]—and from the inherent nature of reasoned regulation.[113] "Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[114]

The Agencies here, however, have not conducted any true analysis or comparison of the costs and benefits of the proposed rule evaluated as a whole. The Agencies' only consideration of the costs of the rule in the NPRM is the discussion, within the analysis required by the Paperwork Reduction Act, of the "estimated net increase" in attorney and executive hours needed to complete all the additional paperwork required by the rule.[115] However, the Agencies never provide an analysis of the benefits of the proposed rule, or an assessment showing that the resulting benefits would outweigh the costs of the proposed rule (even as calculated under the Agencies' extremely narrow definition of "costs"). The lack of any comparison, standing alone, renders the rule arbitrary and capricious.[116]

### C. The Rule Is Arbitrary And Capricious Because Its Costs Far Outweigh Its Benefits.

In any event, any serious comparison would show that the costs of the Agencies' proposed rule will far outstrip its benefits. The Agencies estimate only the direct compliance costs and ignore the myriad other costs that their proposed rule will have on businesses and the economy. But even that blinkered assessment of compliance costs is unreasonably low. And any benefit to the Agencies' ability to enforce the antitrust laws, and thus to the public, is likely to be relatively small.

#### 1. The Agencies' cost analysis is seriously flawed.

*Direct Compliance Costs.* The Agencies estimate the additional costs of compliance of the proposed rule to be $350 million, but the methodology they use to arrive at that number is deeply flawed. The FTC claims to have "canvassed" an undisclosed number of its own staff members (who are then called "experts") who "previously prepared HSR filings while in private practice" to provide an estimate of the additional hours it would take to prepare the new notification form.[117] Other than the conclusory statement that these "experts" had "considerable experience," the Agencies provide no evidence that these staff members had been in private practice in recent years,

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111 576 U.S. at 756.

112 *Id.* at 752.

113 *Id.*

114 *Id.*

115 88 Fed. Reg. at 42,208.

116 *See Bus. Roundtable* v. *SEC,* 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (rebuking agency for "inconsistently and opportunistically framed the costs and benefits of the rule," "fail[ing] adequately to quantify the certain costs or [explaining] why those costs could not be quantified," and "neglect[ing] to support its predictive judgments").

117 88 Fed. Reg. at 42,207-42,208.

or were familiar with the structure of some of the more recent types of investment vehicles utilized by filing parties—particularly those affiliated with private equity. More fundamentally, as an economic analysis by Professor S.P. Kothari[118] points out, these staffers' prior experience obviously gives them no insight into what it will take to assemble *new* kinds of information that the Agencies did not previously require.[119] Professor Kothari's analysis points out "many" other "notable deficiencies," including the lack of any formal survey process, the failure to disclose the size or characteristics of the "expert" sample, and the likelihood of bias from respondents (Agency staff) who are predisposed to finding this information necessary.[120] In short, this is not a serious or unbiased cost analysis.

In reality, the costs of the proposed rule will be much higher. For all these proposed changes as a whole, the Agencies estimate $350 million of additional costs a year.[121] In arriving at that figure, Agencies assume an average hourly rate of $460 for "executive and attorney compensation," without any supporting empirical data.[122] Professor Kothari's report finds this figure to be far too low, including because providing the additional requested information will require expertise not currently needed for existing disclosures.[123] Based on a survey of attorneys with significant experience in HSR filing preparation, Professor Kothari's analysis estimates the average rate for outside counsel to be $936 per hour.[124] His report also estimates that the total additional costs associated with HSR filing preparation under the new rule would be $437,314 on average per filing,[125] nearly seven times the Agencies' estimate of $66,240.[126] Using the Agencies' estimated 7,096 relevant filings in 2023,[127] this would translate to over *$2.3 billion* in additional costs imposed by the rule. And even that may be too low. Our members' experience with the second request process, which is useful as a rough proxy given how much information the Agencies now propose to require in the initial form, suggests that costs may run even higher.

Moreover, as discussed *supra* at Part I.B, many of the new categories of required information are significantly more costly than beneficial even evaluated on their own. For example, the requirement that filing parties certify their document retention policies would force filing parties to put in place entirely new systems and processes and even hire external vendors to

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118 Professor Kothari is currently a professor at the MIT Sloan School of Management. In his prior role, he served as Chief Economist and Director of the Division of Economic and Risk Analysis at the U.S. Securities and Exchange Commission.

119 *See* S.P. Kothari, *The US Antitrust Agencies' NPRM re Additional Information Requirements for HSR Filings*, ¶ 34 (Sept. 26, 2023) (Kothari Report). Professor Kothari's report may be found as an attachment to the comment letter filed by the U.S. Chamber of Commerce regarding the proposed rule, available at https://www.regulations.gov/document/FTC-2023-0040-0001.

120 *Id.* ¶ 34 & n.23.

121 88 Fed. Reg. at 42,208.

122 *Id.*

123 Kothari Report, ¶ 38.

124 *Id.* at ¶ 44.

125 *Id.* at ¶ 49.

126 88 Fed. Reg. at 42,208.

127 *Id*.

maintain them. That will impose significant costs while returning no benefit in helping the Agencies assess which proposed transactions may be unlawful. In addition, many of the new requirements proposed by the Agencies will require filing parties to compile, maintain, and update information that is not currently available in an aggregated form or is difficult to confirm. This includes information related to labor market concentration, disclosure of officers, directors and board observers, disclosure of minority investors and creditors, and organizational charts identifying the authors of all submitted documents. As explained above, most if not all of this information is of zero or very little use to the Agencies once the proper scope of their authority is understood.

The Agencies also ignore that, even if they have accurately predicted costs for a well-functioning system, there will necessarily be significant additional costs as the Agencies hash out the practicalities of actually enforcing the many ambiguous new rules they propose. For example, it is unclear who is covered by the newly created position of the "supervisory deal team lead,"[128] what is meant by "persons with 'similar functions'" as board observers for unincorporated entities,[129] and who and what must be included in the numerous new organizational charts.[130] All these ambiguities create significant uncertainty for filing parties and increase the risk that their notifications will be rejected. According to Professor Kothari's report, studies show that "a one standard deviation increase in regulatory policy uncertainty is associated with a 6.6% decrease in aggregate M&A deal value and a 3.9% decrease in the number of transactions" over the course of a year.[131] To try to reduce this uncertainty, in practice filing parties may seek "pre-notification" in the form of pre-filing discussions or negotiations with the Agencies before formal submission. That will come with its own costs on both the Agencies and filing parties.

*Indirect Costs.* Even as the Agencies have seriously underestimated the direct compliance costs that the rule as proposed will impose, they appear to have entirely ignored every other kind of cost. That again flies in the face of the Supreme Court's decision in *Michigan*, which explained that the concept of "'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost."[132] Such "disadvantage[s]" that will be created if the proposed rule is adopted include:

- The additional costs to the Agencies themselves in reviewing a substantial volume of information that has a low likelihood of being useful[133];

- The significant opportunity cost of money that is spent on complying with the new obligations imposed by the rule, which otherwise would have been put to much more productive uses, especially where one of the filing parties is a vehicle

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128 *Id.* at 42,193.

129 *Id.* at 42,189.

130 *Id.* at 42192, 42,195.

131 *See* Kothari Report, ¶ 55.

132 576 U.S. at 752.

133 According to Professor Kothari's report, the additional information is likely to require over 177,000 additional hours of review by Agency staff, which is equivalent to "roughly 100 full-time attorneys working on nothing but initial filings." *See* Kothari Report, ¶ 51.

designed to be used for investment in growing enterprises. This cost is especially salient for compliance expenses incurred for transactions that obviously pose no competitive threat.

- The anticompetitive impact of imposing a relatively greater compliance burden on smaller firms compared to larger firms. Mergers and acquisitions involving smaller firms are not only less likely to be anticompetitive than larger deals, but also offer the additional competitive benefit of improving smaller firms' ability to take on incumbents.[134] But smaller firms are more likely to be deterred from a given transaction in light of higher compliance costs than larger firms, because they can less easily afford it. Thus, in imposing the same compliance burden on all transactions regardless of deal size or size of the parties involved, the proposed Rule is likely to *decrease* effective competition. Congress recently recognized this dynamic when it enacted the Merger Filing Fee Modernization Act of 2022, which *reduced* the filing fee for transactions resulting in voting securities plus assets of up to $500 million while raising it for larger deals.[135] As one legislator explained, this change was designed to "enhance fairness by incentivizing mergers between small and medium-sized enterprises while simultaneously disincentivizing monopolization from larger corporations."[136] Following this logic, the proposed rule will likely have the opposite effect the Agencies intend.

- The welfare loss from transactions that never happen or are significantly reshaped as a result of the increased timeline from agreement to regulatory clarity;

- The welfare loss from transactions that never happen or are significantly reshaped as a result of concerns about leaks given expanded preservation and labor-data requirements, as well as the requirement to provide contact information for certain third parties such as suppliers and customers[137];

- The welfare loss resulting from the disincentive to investment, particularly by private equity, created by the new onerous reporting and disclosure requirements, *e.g.*, decreased investment in small businesses, renewable energy, health care, etc.[138];

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[134] *See supra* n.6.

[135] *See* Consolidated Appropriations Act of 2023, Division GG—Merger Filing Fee Modernization, Pub. L. No. 117-328, 136 Stat. 4459 (2022).

[136] 168 Cong. Rec. H82634 (daily ed. Sept. 29, 2022) (statement of Rep. Jackson Lee); *see id.* ("Allowing [small businesses] to thrive without the extra pressures of merger fees is integral to safeguarding the economic freedoms these businesses need in order to grow and compete against large corporations.").

[137] 88 Fed. Reg. 42,214-42,215.

[138] As an illustrative example, consider a private equity fund that invests in a growth company and submits an HSR filing at the time. Several years later, the fund makes an additional investment in the target company, increasing its holding by only a small amount while remaining a minority investor. If the target company's valuation is large enough, the parties will be required to make an additional HSR filing, even though this additional investment

- The reduced returns to investors such as pension funds, who are investing on behalf of schoolteachers, first-responders, and other public servants who depend on pension returns for their retirements; and

- The negative impact on the long-term U.S. economic growth, including negative impact on pro-competitive entrepreneurial and innovative activities. For example, as Professor Kothari's analysis explains, "often entrepreneurs and innovators develop the company itself as the product to be sold" in an acquisition, rather than a business that will continue to grow or eventually be taken public.[139] To the extent the proposed Rule makes the exit option more difficult, expensive, and uncertain, it may disincentivize the formation of such businesses in the first place.

The Agencies also have not considered additional costs resulting from the additional delays in the transaction timeline that will result from the rule as proposed, including

- Parties' loss of ability to file based on a letter of intent[140];

- The requirement of a detailed diagram of deal structure, which may not be set in stone even after signing; and

- The need to disclose minority investors and debt holders, which is often in flux at the time that filing parties would typically submit. (For instance, the identities of limited partners to participate in syndication typically will evolve throughout the transaction.)

Many of these costs will be felt disproportionately by AIC's members in light of their reliance on privacy-conscious investors for capital, the importance of flexibility and speed to their ability to make profitable and growth-maximizing investments, and the overall importance to their business model of a robust, welcoming environment for acquisitions.[141]

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causes no change to the competitive landscape. Because the current HSR premerger notification form is not unduly burdensome to prepare, the need to file again likely will not prevent the transaction from occurring. But if the filing requires the significant amount of new disclosure the Agencies propose to mandate, especially for private equity, the target company is likely to decline the additional investment and be forced to seek capital elsewhere.

[139] Kothari Report, ¶ 28.

[140] The Agencies propose to require filings for transactions without definitive agreements to include a term sheet or draft agreement that "describes with specify the scope of the transaction." 88 Fed. Reg. at 42,206. As a result, most if not all transactions that currently could be filed on the basis of a letter of intent would not be able to be filed until the structure of the transaction becomes much clearer at a later point.

[141] While the proposed rule never mentions "private equity" outside of one title in one citation, 88 Fed. Reg. at 42,202 n.57, FTC Chair Lina Khan and the Commission as a whole have displayed animosity toward private equity funds. For instance, at a Senate confirmation hearing in April 2021, Ms. Khan said she would investigate whether private equity firms contribute to "extractive business models." Chris Cumming, *Antitrust Regulators Fix Their Sights on Private Equity*, Wall Street J. (Sept. 30, 2017), https://www.wsj.com/articles/antitrust-regulators-fix-their-sights-on-private-equity-11632999600. In June 2022, Ms. Khan again vowed to "take a muscular approach" to regulating private equity deals, warning "life and death consequences." Stefania Palma, *Lina Khan Vows 'Muscular' US Antitrust Approach on Private Equity Deals*, Financial Times (June 9, 2022), https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797. Officials at DOJ have made similar

### 2. Even assuming that the Agencies' absurdly low cost estimates are correct, the costs will outweigh the benefits.

Even assuming that the Agencies' estimation of costs is accurate, the costs are still very likely to outweigh any benefits. After all, the costs will be imposed on *all* filing parties for *all* reportable transactions, the vast majority of which do not pose any anticompetitive issues. Thus, for the vast bulk of transactions (upwards of 90 percent), the Agencies will have imposed significant direct and indirect costs in exchange for a benefit that is certain to be zero.

Importantly, for most if not all of transactions that do pose a potential concern, the Agencies would clearly have been able to obtain all of the newly required information with a second request. For the proposed rule to achieve additional benefits, it must enable the Agencies to sniff out potentially anticompetitive transactions that would not be the subject of a second request in the current regime. The Agencies have not seriously attempted to show that. They have not pointed to *a single consummated transaction* that they now believe they would have challenged had they possessed the information they now seek to collect. Professor Kothari's report states that he is not aware of any such transactions.[142]

Nor is it likely that any benefit to enforcement, if it exists, would exceed even the Agencies' very conservative cost estimates. For one thing, the main constraint on the Agencies' enforcement decisions does not seem to be their lack of information, but their own resource limitations. According to a recent study, for years, the Agencies have been forced to engage in "a type of triage process" due to budget constraints, targeting only a limited number of proposed transactions for second requests.[143] Professor Kothari's report reaches the same conclusion.[144] There is no reason to think that receiving additional information will meaningfully increase the Agencies' enforcement activity, when the Agencies are already struggling to review and analyze the current quantities they require.[145] Indeed, there are good reasons to think that the massive quantities of additional information will make the Agencies' per-transaction review even more cumbersome.

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remarks. For example, AAG Kanter has stated that private equity's "business model" is "designed to hollow out or roll up an industry and essentially cash out." Stefania Palma, *Crackdown on Buyout Deals Coming, Warns Top US Antitrust Enforcer*, Financial Times, (May 19, 2022) https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1; *see also* DOJ, *Deputy Assistant Attorney General Andrew Forman Delivers Keynote at the ABA's Antitrust in Healthcare Conference* (June 3, 2022) ("[P]rivate equity firms can be fundamentally different than other market participants . . . . To the extent that private equity transactions and conduct are focused on short-term gains and aggressive cost-cutting in the health care space, they can lead to disastrous patient outcomes."), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust. This proposed rule is a thinly veiled attempt to burden private equity firms and dissuade them from engaging in mergers. The FTC's views have no basis in the case law: it identifies no court decision justifying its sweeping animus toward private equity.

[142] Kothari Report, ¶ 6 ("[W]e 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.").

[143] *See* Billman & Salop, *supra* n.30, at 9.

[144] *See* Kothari Report, ¶¶ 24, 51-52.

[145] To be sure, the Agencies' funding has been increased in recent years, but only in response to their recent statements to Congress that more money was required to keep up with a historic increase in the pace of M&A activity. The Agencies asked for and received an increase in the filing fees in 2022. In supporting that increase, Commissioner Rebecca Kelly Slaughter, joined by Chair Lina M. Khan, stated: "We continue to strongly support efforts in

Moreover, a back-of-the-envelope calculation using previously published statistics and analysis from the Agencies suggests it is doubtful that the proposed rule will generate even $350 million per year in benefits to match the Agencies' own estimates of cost. From 2000 to 2020, the Agencies prevented or induced changes to roughly 32 transactions per year, including transactions that were abandoned or restructured after a second request or complaint, challenges resolved by consent decrees, challenges resolved by post-complaint settlements, and governmental victories at trial.[146] The Agencies have previously estimated the benefits to consumers of those enforcement actions. For example, the FTC estimated that, in 1998 and 1999, it saved consumers $36-40 million per thwarted or modified transaction, whereas DOJ put its own estimates at $51-71 million per transaction.[147] Adjusted for inflation, those estimates provide a range of benefit of $65 to $120 million per transaction today.

Taking these numbers at face value, the Agencies must block or modify between three to five additional reported transactions per year just to match their own significantly understated estimate of the compliance costs of their proposed changes. Even that is doubtful given the Agencies' self-professed budget constraints. Moreover, using the more accurate cost estimate of $2.3 billion, the Agencies would have to block between 18 and 33 additional transactions a year—nearly doubling their typical performance.

But in all likelihood, the numbers are worse still for the Agencies. For instance, the "$65 million to $120 million benefit per-transaction" figure is likely significantly higher than the benefits per transaction that may be expected from the new rule. After all, that estimation reflects

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Congress . . . to increase merger filing fees for large transactions . . . to ensure that they keep pace with the ongoing merger wave and growth of the U.S. economy more broadly." *See* Concurring Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan Regarding the 2022 Revised Clayton Act Thresholds, Fed. Trade Comm'n (Jan. 24, 2022). Similarly, AAG Kanter stated explicitly in Senate testimony that "the availability of more filing fees" under "the pending Merger Fee Modernization Act," "if appropriated, *simply helps us keep up with corporate mergers*." *See* AAG Jonathan Kanter, Testimony Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights (Sept. 20, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

[146] *See* Billman & Salop, *supra* n.30, at 9.

[147] *See* P. Nelson & S. Sun, *Consumer Savings From Merger Enforcement: A Review Of The Antitrust Agencies' Estimates*, Antitrust Law Journal 69, no. 3 (2002); DOJ, Multijurisdictional Mergers: Rationalizing the Merger Review Process through Targeted Reform, https://www.justice.gov/sites/default/files/atr/legacy/2006/06/01/chapter3.PDF; FTC, 1998-1999 HSR Annual Reports, https://www.ftc.gov/reports/21st-report-fy-1998#N_19_; https://www.ftc.gov/sites/default/files/documents/reports_annual/22nd-report-fy-1999/hsrreport1999_0.pdf.

According to these reports, the FTC estimated $1.2 billion in consumer savings in Fiscal Year 1999 as a result of successfully challenging 30 transactions after issuing 45 second requests. It is not clear which, if any, of the 15 other transactions were abandoned by the parties. Based on the Billman & Salop historical data (which found that, from 2000-2020, 28% of transactions that received second requests went through unaffected), we can assume that of the 45 second requests, 12 (28% of 45) were consummated without change, which means that 33 of the 45 were not. $1.2 billion divided by 33 transactions equals $36 million in consumer savings per transaction. Following the same approach, DOJ estimated $4.094 billion in consumer savings in Fiscal Year 1998, divided by 57 transactions presumably not cleared (including 51 the agency said it challenged), which is $71 million per transaction. DOJ estimated $2.551 billion in consumer savings in Fiscal Year 1999, divided by 50 transactions presumably not cleared (including the 47 the agency said it challenged), which is $51 million per transaction.

the Agencies' prevention of the most significant anticompetitive transactions, which in theory averted the most significant consumer harms. The additional transactions that would be caught by the Agencies under the new rule are unlikely to be as harmful to consumers—if they were, the Agencies would have detected them without the additional information they propose to collect.

## III. THE RULE AS PROPOSED VIOLATES THE REGULATORY FLEXIBILITY ACT.

The RFA mandates that an agency consider the effects that a proposed and final rule will have on "small entit[ies]," including "small business."[148] The Act provides two means by which an agency may do so. First, the agency may conduct a robust initial and final "regulatory flexibility analysis."[149] Under this analysis, an agency must provide descriptions of and, where applicable, estimates of the number of impacted small businesses under the rule.[150] The agency also must consider "significant alternatives" to the rule, which entails examining considerations like "differing compliance or reporting requirements," "simplifi[ed]" "compliance and reporting requirements," and "exemption[s] from coverage" for small business.[151] Second, the agency may "certif[y] that the rule will not, if promulgated, have a significant economic impact on a substantial number" of small businesses.[152] Certification is not toothless. Certification must still be based on a "factual basis," which must be more than a mere "cursory statement."[153] And the requirements of the RFA factor into "arbitrary-and-capricious review" under the APA.[154]

Here, the Agencies appear to have opted for the second option, certifying "that the regulatory action will not have a significant economic impact" on small business.[155] The Agencies base their certification on the "size of the transactions necessary to invoke an HSR Filing" ($111.4 million), and argue that "none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect" small businesses.[156] This certification is improper in at least two ways. First, the Agencies rely on an improper definition of "small business." Second, the Agencies overlook the fact that the proposed expansion of required information under the rule

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[148] 5 U.S.C. § 601 *et seq.*

[149] *See id.* §§ 603, 604.

[150] *Id.* §§ 603(b)(3), 604(a)(4).

[151] *Id.* § 603(c)(1)-(2), (4); *see also id.* § 604(a)(6).

[152] *Id.* § 605(b).

[153] *Centro Legal de la Raza* v. *Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 973-74 (N.D. Cal. 2021) (finding that "Plaintiffs ha[d] raised serious questions as to whether the agency complied with the RFA" by certifying no impact "in light of the scope of the Rule and the numerous significant changes to longstanding procedures . . . coupled with the many comments from organizations stating that they would suffer significant deleterious economic impacts as a result of the Rule").

[154] *See National Tel. Co-op Ass'n* v. *FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("[T]he APA together with the Regulatory Flexibility Act require that a rule's impact on small businesses be reasonable and reasonably explained. A regulatory flexibility analysis is, for APA purposes, part of an agency's explanation for its rule.").

[155] 88 Fed. Reg. at 42,208.

[156] *Id.*

will have economic effects on small businesses in ways other than by imposing direct premerger filing requirements on such businesses.

### A. The Agencies Use An Improper Definition of "Small Business."

The Agencies' certification is deficient because they did not consider the proper definitions for various small businesses, as prescribed by the Administrator of the Small Business Administration. Under the RFA, "the term 'small business' has the same meaning as the term 'small business concern' under . . . the Small Business Act."[157] The latter Act authorizes the Small Business Administrator to "specify detailed definitions or standards by which a business concern may be determined to be a small business concern."[158] The Administrator has published detailed sets of "Small Business Size Standards" for NAICS-code industries based on "number of employees" or "annual receipts in millions of dollars."[159] Courts have treated these size standards as determinative, and found that an agency violates the RFA by failing to consider such definitions in certifying that a rule will not affect small business.[160]

Here, the Agencies did not consider any definitions provided by the Small Business Administrator when cursorily certifying that the rule "will not have a significant economic impact on a substantial number" of small businesses.[161] Instead, they merely relied on the blanket rationale that the rule will not impact small businesses because of the "size of transactions necessary to invoke an HSR Filing."[162] That is not necessarily true in light of the way small businesses are defined. For example, according to the FTC's most recent HSR report, in Fiscal Year 2021, the Agencies received 127 HSR filings involving "Insurance Carriers and Related Activities," and 426 filings involving "Professional, Scientific, and Technical Services."[163] The Small Business Administrator has defined small businesses within these categories as businesses with fewer than 1,500 and 1,000 employees, respectively, or businesses with annual receipts up to $47 million.[164] Depending on the valuation multiples involved, it is likely that many qualifying small businesses in these categories engage in reportable transactions each year. Regardless, because the Agencies ignored the appropriate definition thresholds, they could not have properly

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[157] 5 U.S.C. § 601(3).

[158] *Id.* § 632(2)(A).

[159] 13 C.F.R. § 121.201.

[160] *See, e.g.*, *Nw. Min. Ass'n* v. *Babbitt*, 5 F. Supp. 2d 9, 14-15 (D.D.C. 1998).

[161] 88 Fed. Reg. at 42,208.

[162] *Id.*

[163] FTC, 2021 HSR Annual Report, Table XI.

[164] 13 C.F.R. § 121.201 ("Subsector 524—Insurance Carriers and Related Activities"); *id.* ("Subsector 541—Professional, Scientific and Technical Services"). The Administrator has defined insurers in the "Direct Property and Casualty" field with 1,500 or fewer employees as small businesses, and defined various other small businesses under "Insurance Carriers and Related Activities" by their annual receipts up to $47 million per year. The Administrator has also defined a number of small businesses under the "Professional, Scientific, and Technical Services" category, including businesses involved in "Research and Technology in Nanotechnology" with 1,000 or fewer employees, and various other businesses with annual receipts up to $47 million.

judged the impact of the rule on small businesses. Courts have set aside rules under the APA for this exact error.[165]

The Agencies' blanket certification that the rule will not impact small businesses also ignores Congress's understanding of small businesses in America. As part of the Consolidated Appropriations Act of 2023, Congress amended the HSR Act for the first time since 2000. As relevant here, Congress enacted the Merger Filing Fee Modernization Act, which reduced the filing fee by $25,000 for transactions resulting in voting securities plus assets of $500 million. According to the Senate sponsors, a main impetus behind the Act was to "lower[] the [HSR] burden on small and medium-sized businesses."[166] Another member of the House of Representatives explained that "[a]llowing [small businesses] to thrive without the extra pressures of merger fees is integral to safeguarding the economic freedoms these businesses need in order to grow and compete against large corporations."[167] Thus, in decreasing the HSR filing fees for transactions less than $500 million, Congress made a clear judgment that such transactions could involve small businesses. The Agencies' blanket certification that the rule will not significantly impact small businesses does not comport with Congress's current understanding of small business.

### B. The Expansion Of Information Reporting Requirements Will Affect Small Businesses Beyond The Content Of The HSR Filing Itself.

Aside from using an improper definition of "small business," the Agencies also overlook the fact (as the agencies do in their analysis of the cost of the rule, *see supra* Part II.B) that the proposed expansion of the required information under the rule will have effects on small businesses beyond the content of the pre-merger filing. For example, small businesses that have private-equity investment will have information disclosed if the investing company is later involved in an acquisition that exceeds the HSR filing threshold. *See supra* Part I.B. More significantly, the Agencies have not considered the serious possibility that the increased information requirements will, on the margin, lead to less investment by private equity in small businesses. Indeed, private equity firms may seek to avoid smaller deals that could end up delaying or hindering the success of bigger deals. This chilling of investment could have significant impacts on small businesses that, under the RFA, the Agencies must consider and address.

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The proposed rule is untenable. As a whole and in nearly all of its particulars, it would exceed the Agencies' statutory authority and violate the APA's prohibition on arbitrary and capricious decision-making many times over. If adopted, the rule will indiscriminately impose billions of dollars of compliance costs on American businesses each year. It will also have a dire impact on capital formation, innovation, competition, and growth. Congress deliberately designed the HSR premerger review program to avoid these costs. Yet the Agencies seem prepared to inflict them, all in return for very little if any enforcement benefit and without a serious analysis of the consequences. The Agencies should abandon this fundamental and ill-conceived reimagining of

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165 *See Nw. Min. Ass'n*, 5 F. Supp. 2d at 14-15.

166 Office of U.S. Sen. Amy Klobuchar, *Klobuchar, Grassley Bill to Provide Antitrust Enforcers Additional Resources Passes Senate* (June 8, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/6/klobuchar-grassley-bill-to-provide-antitrust-enforcers-additional-resources-passes-senate.

167 168 Cong. Rec. H82634 (daily ed. Sept. 29, 2022) (statement of Rep. Lee).

the HSR process. AIC stands ready to answer any questions and would be pleased to engage with the Agencies on any of the issues discussed.

Respectfully submitted,

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