AMERICAN BAR ASSOCIATION
Antitrust Law Section

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5550
antitrust@americanbar.org
www.ambar.org/antitrust

September 13, 2023

REQUEST FOR BLANKET AUTHORITY

FROM: Fiona A. Schaeffer, Chair, Antitrust Law Section

SUBJECT: Comments to the Federal Trade Commission's Proposed Amendments to the Premerger Notification Rules

OBJECTION DEADLINE: Wednesday, September 27, 2023, 3:00 p.m. CT

SUBMISSION DATE: Wednesday, September 27, 2023, 3:30 p.m. CT

The Antitrust Law Section of the American Bar Association respectfully propose to submit these comments to the Federal Trade Commission's Proposed Amendments to the Premerger Notification Rules.

This subject matter is within the primary jurisdiction and expertise of the Antitrust Law and International Law Sections. The Sections Council adopted the position in the enclosed comments on September 11, 2023.

There is no material interest in the subject matter of this request for blanket authority on the part of any member of the Section committee that initiated the proposal or of the Section Council that approved the submission of the request by reason of specific employment or representation of clients.

cc: Palmer G. Vance, Chair, ABA House of Delegates
Marvin S.C. Dang, ABA Secretary
Holly Cook, Associate Executive Director, ABA Governmental Affairs Office
R. Larson Frisby, Associate Director, ABA Governmental Affairs Office
Alpha M. Brady, Executive Director
Kim R. Jessum, Chair, Section Officers Conference
Janae Leflore, Chief Governance Officer
All Section and Division Chairs and Staff Directors

Attachment

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Via Website: https://www.regulations.gov/document/FTC-2023-0040-0126

SUBJECT: Antitrust Law Section Comments on the Federal Trade Commission's Proposed Amendments to the Premerger Notification Rules

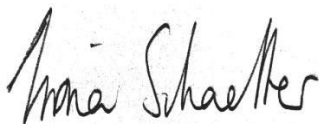
Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law Section, we respectfully submit these comments in response to the Federal Trade Commission's Proposed Amendments to the Premerger Notification Rules.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION ON THE FEDERAL TRADE COMMISSION'S PROPOSED AMENDMENTS TO THE PREMERGER NOTIFICATION RULES

September 13, 2023

The views stated herein are presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association.

I. Introduction[1]

The American Bar Association's Section of Antitrust Law ("Section") appreciates this opportunity to comment on the proposed revisions to the premerger notification and report form ("Form") pursuant to the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976 (the "HSR Act").[2] The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. The Section's members have extensive experience in filings under the HSR Act; indeed, we believe that the overwhelming majority of premerger notification filings are made by members of the Section. The Section hopes these comments will be useful to the Federal Trade Commission ("FTC" or the "Commission") and the Antitrust Division of the Department of Justice ("DOJ"; together with FTC, the "Agencies") as they finalize the new Form.

The Section appreciates the Agencies' view that the current HSR Form does not provide sufficient information to determine whether further review of a notified transaction's potential effect on competition is necessary. The Section acknowledges that some of the proposed information collections will be useful in that respect. However, other proposed changes appear to require information only marginally helpful while imposing significant cost and timing burdens, especially as to those transactions that do not present any competitive concerns. The Agencies appear to recognize some of the burdens, but the NPRM suggests that the Agencies may not appreciate the full scope of the burdens that would be imposed by these revisions.

[1] Please note that any capitalized terms used throughout and not defined herein have the meaning ascribed to them in the Notice of Proposed Rulemaking (88 Fed. Reg. 42178) or the rules promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (16 C.F.R. Parts 801, 802, and 803).

[2] Throughout this comment, the Section refers to the preamble to the proposed amendments to 16 CFR Parts 801 and 803 (88 Fed. Reg. 42178, 42178-42209) as the "NPRM," and the proposed amendments to 16 CFR Parts 801 and 803 (88 Fed. Reg. 42178, 42209-42218) as the "Proposed Rule".

Historically, relatively few mergers warrant a Second Request—somewhere between 1 percent and 4 percent of HSR filings for the past ten years.[3] Imposing substantial additional costs on all HSR filings—including those for transactions that pose no competitive risk—is not an efficient allocation of resources, even accounting for concerns of potential under-enforcement. As further detailed below, the Section therefore urges the Agencies to consider how to best balance the need to determine whether further investigation is warranted against the burdens to filing parties. Beyond the specific suggestions noted below for how to decrease the burden or enhance the quality, utility, and clarity of the information collected, the Section recommends that the Agencies develop criteria for identifying mergers that facially pose no threat to subject those transactions to a separate, streamlined review process.

II. Executive Summary

The HSR Act was enacted in part to permit pre-consummation review of "very large mergers" that, if consummated, may substantially lessen competition, and avoid the proverbial scrambling—and then unscrambling—of the eggs. However, in enacting the HSR Act, Congress was careful to not impose "undue and unnecessary burden on business."[4] Congress charged the FTC, with the concurrence of DOJ, with promulgating rules under the HSR Act to collect "such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws."[5] In discharging its rulemaking authority, the FTC acknowledged in its 1977 HSR Proposed Rulemaking that the focus of the information to be required with a Form is that which "is necessary to a determination whether to issue a request for additional information."[6]

However, several requests included in the Proposed Rule are overbroad for the majority of HSR filings, which historically have not prompted any further investigation by the Agencies. Several of the proposed requirements introduce an undue burden compared to the utility of information to be received or because they are redundant compared to other requirements (e.g., requirements related to: entities within the acquiring person and acquired entity; organizational charts; other types of interest holders that may exert influence; officers, directors, board observers; transaction diagram; other agreements between the parties; competition analysis; labor markets; identification of communications and messaging systems; implied document preservation obligations). Certain proposals introduce un-defined or subjective requirements that will introduce uncertainty among filing parties as to the parameters of their compliance obligations (e.g., requirements related to: transaction-related documents; periodic plans and reports, organizational chart of authors and recipients). Certain required information may not be known at the time of filing, or until immediately prior to closing, again introducing uncertainty among filing parties as to their compliance obligations. Further, the Proposed Rule introduces unique and significant burdens to acquired persons in transactions subject to 16 C.F.R. § 801.30.

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[3] Hart-Scott-Rodino Annual Report Fiscal Year 2021, Exhibit A, Table II, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.
[4] S. Rep. No. 94-803 at 66.
[5] 15 U.S.C. § 18A(d)(1).
[6] 42 Fed. Reg. 39,040 (Aug. 1, 1977) at 39,042 (emphasis added).

Although the Agencies' estimates for purposes of the Paperwork Reduction Act anticipate a significant increase in the number of hours needed to complete a filing, the Section believes the Agencies' estimates understate the burden of the Proposed Rule on filing parties—most of which are unlikely to be notifying transactions that warrant any further investigation.

The Section acknowledges that some of the proposed information collections will be useful for the Agencies in reviewing HSR-reportable transactions to determine whether further investigation is merited. In response to the significant time and cost burdens that the Section believes the Proposed Rule will present, the Section makes specific suggestions for how to reduce the burden on filing parties while further enhancing the quality, utility, and clarity of the information to be collected. Further, the Section respectfully suggests that the Commission issue concurrent guidance upon implementation of the final rules, engage in presentations to antitrust practitioners to explain how to properly comply with the Proposed Rule (as it did with the 2011 rule changes), and resume publication of informal interpretations on the FTC's website to provide additional transparency.

III. The Proposed Information and Document Requests Are Overbroad for the Majority of HSR Filings

The FTC specifically invites comments on whether the proposed collection of information is necessary for the proper performance of the functions of the agency. While the Section acknowledges that some of the proposed requirements for additional information and documents will support the Agencies' review of HSR filings, several of the proposals are overbroad for the vast majority of transactions.

A. HSR Act Compels Balancing of What Is "Necessary and Appropriate" to Determine whether to Issue a Second Request against Initial Burden of Reporting

The HSR Act was enacted in part to create "a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated."[7] The utility of something like a premerger notification regime was informed in part by the DOJ's experience challenging El Paso Natural Gas Co.'s consummated acquisition of Pacific Northwest Pipeline Corp.[8] After seven years of litigation, the Supreme Court ordered a divestiture,[9] which then took an additional ten years (for a total of 17 years) to effect—burdening the resources of both the courts and the DOJ. The DOJ and the FTC had authority under the Clayton Act and FTC Act to seek to enjoin impending mergers before their consummation, and carried the burden of proof to demonstrate a reasonable probability that the agency would prevail on the merits that a merger may substantially lessen competition or tend to create a monopoly. However, the Agencies lacked access to information regarding transactions as well as some means (such as a waiting period) to compel parties to provide the necessary information to determine first, whether a

[7] S. Rep. No. 94-803 at 61.
[8] *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).
[9] *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

proposed transaction potentially warranted challenge, and then to ultimately meet their burden for any challenge.[10]

The Senate Committee on the Judiciary's report accompanying the HSR Act noted the care it took to not impose "undue and unnecessary burden on business" that might result, for example, from requiring every merger to be subject to the reporting requirements of the HSR Act.[11] The Committee further noted that it believed that the HSR Act "represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays" in part by adopting a number of amendments and exemptions to the final HSR Act, and that the provisions "will neither deter nor impede consummation of the vast majority of mergers and acquisitions."[12]

The HSR Act is *not* an approval statute but, as noted above, is a mechanism for determining whether further investigation is necessary (via a request for additional information or documentary material known as a "Second Request")—at which point additional information may be collected and a determination made whether to challenge the transaction. For transactions subject to the HSR Act, a Second Request is one opportunity (in addition to trial discovery) for the Agencies to gather additional information necessary and appropriate to assessing whether to challenge a transaction.

Echoing the HSR Act's authorization of the FTC, with the concurrence of the DOJ, to "require that the notification required under subsection (a) [of the HSR Act] be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws,"[13] the FTC clarified in its 1977 HSR Proposed Rulemaking that "[t]he information requested by the proposed form ***is necessary to a determination whether to issue a request for additional information***, and what information to request at that time."[14] The FTC further noted that "[t]he legislative history suggests that Congress did not intend these reports to be vehicles to amass an economic data base for generalized research."[15]

Several of the proposals outlined in the NPRM introduce requirements for all filing parties to produce additional information and documents, without regard to potential competitive effects of the notified transaction. The Section is concerned that introducing such requirements for all reportable transactions may impose considerable burdens for filers in connection with transactions that are unlikely to raise sufficient competitive concerns to warrant issuing a Second Request. While some of the changes contemplated in the Proposed Rule may be reasonable on a wider basis, other proposed changes may only be appropriate for a smaller subset of transactions since historically only a small percentage of transactions have led to Second Requests, even accounting for concerns of potential under-enforcement.

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[10] See H. Rep. No. 94-1373 at 7-8.
[11] S. Rep. No. 94-803 at 66.
[12] S. Rep. No. 94-803 at 66.
[13] 15 U.S.C. § 18A(d)(1).
[14] 42 Fed. Reg. 39,040 (Aug. 1, 1977) at 39,042 (emphasis added).
[15] 42 Fed. Reg. 39,040 (Aug. 1, 1977) at 39,042.

To avoid imposing excessive burdens on parties to transactions that are not likely to result in competitive harm, the Section believes that the Commission should continue to consider identifying those transactions that could be subject to a less burdensome, streamlined review, and reserve more burdensome demands for a Second Request.

B. The Agencies Do Not Engage in Further Review of Most HSR Filings Today

Most HSR filings submitted do not result in additional review—whether through voluntary withdrawal and refile, Second Requests, or challenges. For example, in FY2021, clearance for either the FTC or DOJ to commence an investigation was granted in approximately 7.9 percent of HSR filings—which implies that less than 10 percent of all filings raise significant competitive concerns.[16] Further, Second Requests have been issued in 1.9 percent to 3.7 percent of transactions during 2012-2021 (or a 10-year average of less than 3 percent of filings per year).[17] Finally, in FY2020, which was the last full fiscal year before the Agencies halted the grant of early termination in the initial waiting period, early termination was granted in approximately 76 percent of all transactions in which early termination was requested.

The statistics show that, even accounting for concerns of potential under-enforcement, historically the majority of reportable transactions did not require the full waiting period, with early termination grants being at the Agencies' sole discretion, and the overwhelming majority of reportable transactions did not elicit a clearance request from the FTC or DOJ to initiate an investigation, let alone the issuance of a Second Request. This is not surprising, as the statutory threshold is based on a bright line transaction value test (and, where applicable, a size of persons test) rather than being based on competitive overlap, vertical relationships, or other indicia of potential concern under the antitrust laws. Accepting the premises that the statutory thresholds are at best a crude screening tool and that the Agencies' concern regarding the sufficiency of the current HSR form is legitimate, the Agencies should focus on quickly identifying the small proportion of reportable transactions that may raise competitive concerns that warrant a Second Request.

These historical statistics undermine the Proposed Rule's estimate that, based on NAICS code overlaps, the percentage of filings with "overlaps" is 45 percent. Overlaps based on NAICS codes may create many "false positives" because of the breadth of certain NAICS codes (e.g., 523910 Miscellaneous Intermediation) (as well as some "false negatives" because of the subjective nature and imprecision of some NAICS codes in the current economy). The estimate of transactions with horizontal overlaps seems overbroad compared to the percentage of transactions cleared to either FTC or DOJ for additional investigation (less than 10 percent in FY2021)—which suggests that the Proposed Rule will have a much broader impact to filings unlikely to have any competitive concerns.

[16] Hart-Scott-Rodino Annual Report Fiscal Year 2021, Exhibit A, Table II, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.
[17] Hart-Scott-Rodino Annual Report Fiscal Year 2021, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

Congress understood that the notification requirements of the HSR Act would not apply to every proposed transaction; instead the HSR Act imposed the notification burden on what Congress thought were the most economically significant transactions.[18] While the Proposed Rule does not (and cannot) alter the statutory thresholds of the HSR Act, some aspects of the proposal seem contrary to Congress' decision to not unduly burden those HSR-reportable transactions that may not raise significant enough concerns to warrant a Second Request.

Without further changes to pare back the Proposed Rule, many filers may be unable to provide complete responses and, as a result, may need to provide statements of non-compliance pursuant to 16 CFR § 803.3 due to the challenges associated with complying with the Proposed Rule's more open-ended and less-defined information requirements (compared to the brighter-line requirements of the current process). Not only do such responses seem counterproductive to the Agencies' goals to obtain more effective submissions, but such responses also risk devolving into a long pre-filing interaction with Agency staff (similar to other ex-U.S. jurisdictions) to not reject a filing and ultimately start the waiting period.

IV. Not All of the Information Will Have Practical Utility for Purposes of Determining whether to Issue a Second Request, and More Narrow Tailoring of Proposed Requirements Will Better Balance Burden against Practical Utility

The FTC specifically invites comments on whether the proposed collection will have practical utility in the proper performance of its functions, as well as ways to enhance the quality, utility, and clarity of the information to be collected and decrease the burden on filing parties. As described below, the Proposed Rule would introduce several information and document requirements that (A) are overly burdensome and of limited practical utility for determining whether to issue a Second Request, (B) lack definition and are subjective in nature, (C) solicit information that may not be readily available or finalized until shortly before closing, or (D) impose unique and disproportionate burdens on some Acquired Persons. For some proposals, the Section includes suggestions for enhancing the quality, utility, and clarity of the proposed requirements, or ways to decrease the burden on filing parties.

Overly burdensome (e.g., labor market information) or subjective obligations with which filing parties may not be able to comply or that filing parties may not fully understand under the proposed rules (e.g., introduction of the undefined term "supervisory deal team lead(s)") increase the risk of inadvertent deficiencies, and thus the risk of restarting the waiting period or incurring civil penalties (for consummated transactions). These deficiencies may not impact the reviewing Agencies' ultimate decision to issue a Second Request—especially for the majority of HSR-reportable transactions that do not present competitive concerns—but may nonetheless lead to unanticipated delays. As the Proposed Rule acknowledges, the FTC's Premerger Notification Office "staff must review each HSR Filing to ensure it complies with the HSR Rules."[19] Given the breadth and subjective nature of several of the proposals, filing parties may experience less certainty as to whether they have fully complied, resulting in more filing "bounces" based on technical (rather than substantive) deficiencies. The Proposed Rule also acknowledges how certain of the proposed requirements "could overwhelm the Agencies and undermine the goal of

[18] *See* S. Rep. No. 94-803 at 67.
[19] 88 Fed. Reg. 42,178 (Jun. 29, 2023) at 42,179.

effective and efficient screening for transactions that require an in-depth investigation,"[20] which may introduce the potential for increased requests for acquiring persons to "pull and refile" to provide the Agencies with additional time to process such filings, and/or issuance of "technical" Second Requests due to Agency staff being unable to complete their review within either the initial or second waiting period (if the acquiring person conducts a pull and refile).

A. Burden Associated with Certain Requirements Would Outweigh Their Usefulness in Assessing Whether a Second Request Is Warranted

Below we have highlighted several proposed requirements that introduce significant burden to filing parties and which likely have little utility in determining whether to investigate a proposed transaction further. The proposed revisions to the Form are addressed below in the order in which they appear in the Proposed Rule.

1. Entities within the Acquiring Person and Acquired Entity

The Proposed Rule would require that in addition to listing the name, city, state/country, and zip code of entities within the acquiring person or acquired entity, filing parties list all names under which the entities do business or have done business within the past three years. This requirement is not limited in any way, for example, to entities that either overlap or have a supplier relationship with the other party. Maintaining and disclosing this information in every filing is overly burdensome compared to the utility it will have for the Agencies' in determining whether to investigate a transaction further.

2. Organizational Charts

The Proposed Rule would require an ultimate parent entity that is a fund or a master limited partnership to provide an organizational chart sufficient to identify and show the relationship of all entities that are affiliates or associates (as defined by the HSR Rules). Such organizational charts sufficient to identify all entities that are affiliates or associates may not exist in the ordinary course of an acquiring fund's or acquiring master limited partnership's business. Further, the analysis of which entities are associates is complex and may not be readily synthesized to the format of an organizational chart. The Proposed Rule requests a narrative response describing the ownership structure of the acquiring entity, and entities and associates with investments in other entities that overlap with the acquired entity is already requested elsewhere in the Form. Further, information regarding vertical relationships between the parties is also requested elsewhere in the Proposed Rule. However, requiring organizational charts is not limited in any way, for example, to overlapping entities, and is superfluous to other requirements of the form and burdensome compared to the utility it may have for the Agencies in determining whether to issue a Second Request.

[20] 88 Fed. Reg. 42,178 (Jun. 29, 2023) at 42,195.

3. Other Types of Interest Holders That May Exert Influence, Officers, Directors, and Board Observers

The proposed requirements to identify certain "other interest holders that may exert material influence on the management or operations of the acquiring person," including certain information related to persons or entities that do the following with respect to the acquiring entity and any entities that control, or are controlled by the acquiring entity: (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. Some of this information, such as credit relationships, equity holders, or other governance rights, may not be available at the time of filing leaving filing parties susceptible to claims of noncompliance. Further, it is unclear how the Agencies will use this information to assess whether an interest holder that may exert influence presents a potential anticompetitive effect since the Agencies will not readily have information regarding potential overlaps, vertical, or other market relationships between that interest holder and the acquired entity. Ultimately the burden of collecting this information may be disproportionate to the value the Agencies will receive from what will likely be an incomplete picture.

The Proposed Rule also would require identification of the officers, directors, or board observers within the two years prior to filing are very subjective and difficult to gather, especially from non-employee directors, again leaving filing parties susceptible to claims of noncompliance. While acknowledging the Agencies' rationale that there may be relationships beyond the minority holder relationships (as required in the current Form) that are potentially of competitive significance, receiving lists of dozens, if not hundreds, of officers, directors, and board observers, especially across larger or more diffuse organizations with many subsidiaries (including a two year lookback period that may not be feasible to comply with in many instances) to screen for the possibility of current interlocking directorate violations under Clayton Act § 8 could impose substantial burdens and provide little practical utility. Further, there is no limitation for officer positions or directorships in connection with charitable or not-for-profit organizations that would have no bearing on a competitive analysis. For example, if an officer, director, or board observer of an entity within the acquiring person also serves as an officer of a local little league team, or as a director on the board of a local arts organization, these positions would need to be listed, further complicating complete collection of the proposed required information.

4. Transaction Diagram

The Commission proposes that filing persons provide a diagram of the deal structure along with a corresponding chart with the relevant entities and individuals involved in the transaction. While it would not be a burden to produce a final chart if one has been agreed to by the filing parties during diligence, where such a diagram and chart were not created or finalized during transaction diligence the Agencies could still benefit from the most recent draft at the time of filing HSR, even if it does not reflect all of the entities or minority ownership levels that may ultimately exist at closing.

Many times these charts are drafted by outside tax advisors to show the pre-transaction reorganization needed to achieve the desired tax structure and benefits. Very rarely, if ever, are they drafted to achieve antitrust or competition objectives. Where all or a majority of the

outstanding equity of a target is being acquired by an acquiring person, many details of the pre-merger reorganization will be irrelevant to the antitrust assessment of the acquisition. In these transactions less detailed diagrams should provide the agencies with the desired information.

5. Other Agreements between the Parties

Under the Proposed Rule, all parties would be required to provide all other non-transaction-related agreements between the acquiring and acquired person—including both current agreements as well as those that expired, have terminated, or were canceled within one year of the filing. This creates a burden on all filing parties—regardless of potential competitive issues raised by a proposed transaction—to gather and disclose agreements related to ordinary course of business commercial arrangements. In many instances, parties may have trouble locating original versions and all amendments of all license, supplier, non-competition, non-solicitation, purchase, distribution, franchise and other agreements between them.

In light of the proposed requirements for the Horizontal and Supplier Relationship narratives to describe, in part, pre-existing relationships between the parties, this requirement further burdens all filing parties with providing additional documentation for information that can be more efficiently elicited from other parts of the filing, such as the Horizontal Overlaps and Supply Relationships narratives, in which the Commission could receive the desired information from a plain English summary of the key terms of such agreements. This streamlined reporting, which would be subject to accuracy certification, may be more helpful to agencies, and easier to review. Further, the Commission could get the most relevant information by excluding de minimis agreements and only requiring "Material Other Agreements" such as:

- agreements with any buyer subsidiary valued in excess of [x% of entity revenues];
- agreements within the buyer or target business unit valued in excess of [x% of entity revenues].

6. Competition Analysis—Requirements of Customer and Supplier Contacts Necessitates Early Disclosure of Transactions

The Section appreciates how the proposed Competition Analysis may inform the Agencies' review of proposed transactions. However, requiring customer and supplier identification and contact information with the initial filing risks non-public transactions effectively becoming public before the parties may be prepared to address questions from customers and suppliers. Parties may need to disclose potential transactions to certain employees to obtain the appropriate contact information before they are prepared to make an internal announcement. There may be legitimate business justifications for not disclosing a potential transaction internally or to commercial partners at the time of filing, but requiring such contact information practically necessitates such disclosures to maintain employee and commercial relations.

Requiring this information for *all* filings, as anticipated by the Proposed Rule, would force even those filers reporting competitively anodyne transactions to incur any costs associated with such disclosures. Because most reportable transactions do not raise competitive concerns, such a provision would provide zero offsetting benefit to the Agencies for the vast majority of transactions. Even when there is a benefit to the Agencies from having that information, the size of that benefit is likely minimal. Currently, the Agencies routinely request customer information

as part of a Voluntary Request for those transactions that raise potential competitive concerns. Upon receipt of such a request, filing parties are highly incented to provide this information quickly—because the Agencies are unlikely to close their investigation without it—and may agree to a "pull and refile" to allow the Agencies more time to investigate to avoid a costly Second Request. Thus, this provision would impose a costly disclosure obligation on all reportable transactions to allow the Agencies to have access to customer contact information, at most, a few weeks sooner than they might otherwise have it for the small number of transactions that would raise potential competitive concerns.

7. Labor Markets

Within the proposed Competition Analysis section, the Commission would adopt a new Labor Markets section requiring the acquiring person and acquired entity to provide information about their employees to screen for potential labor market effects arising from the transaction. Information required in this proposed section includes:

- Largest Employee Classifications—identify each side's five largest categories of workers organized by the Bureau of Labor Statistics' 6-digit Standard Occupational Classification system ("SOC") codes and provide the total employee count for each code;[21]
- Geographic Market Information—identify the five largest SOC codes in which both parties employ workers and then provide USDA Economic Research Service ("ERS") Commuting Zones for all workers in each overlapping SOC code; and
- Worker and Workplace Safety Information—identify details relating to penalties or findings issued against each side by 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 as well as any pending WHD, NLRB, or OSHA matters.

The burden associated with responding to the proposed Labor Markets section is substantial. Other portions of the Competition Analysis section only impose a meaningful burden when transactions might have some competitive significance (e.g., when there are horizontal overlaps or vertical relationships between the parties). However, the Labor Markets section is required for every filing, regardless of the transaction's potential competitive impact. Applying some other limiting principle to this proposed potentially would reduce the burden for the majority of filings. Unlike other filing requirements applicable to every filing, such as current Item 5 revenue data based on the filing person's most recent fiscal year, there is no fixed reporting period for the Labor Market section, so parties cannot prepare this information in advance.

The Largest Employee Classification portion is limited to each side's five largest categories (though note that each side would need to assign an SOC classification to every single employee

[21] The 2018 Standard Occupational Classification system is a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 867 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 459 broad occupations, 98 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together (*see* https://www.bls.gov/SOC/).

in any event due to the Geographic Market Information requirement discussed in the next paragraph), but organizations may not be able to identify their five largest employee groups efficiently as many do not track such information in the regular course of business, and many will need to aggregate across multiple divisions in order to identify the headcount and relevant SOC classification. For example, when a large, diversified organization—whether a publicly traded company with many subsidiaries or a private equity fund with multiple portfolio companies—is the filing person, it will need to classify essentially all of the employees in each operational division, subsidiary, or portfolio company in order to determine the five largest categories of employees in aggregate and provide an employee count for every classification. The end result will likely be the identification of overlaps within SOC codes and commuting zones for positions that exist in nearly all organizations, such as:

- 13-1071 Human Resources Specialists
- 13-2051 Financial and Investment Analysts
- 23-1011 Lawyers
- 15-1212 Information Security Analysts
- 13-1161 Market Research Analysts and Marketing Specialists
- 43-6014 Secretaries and Administrative Assistants, Except Legal, Medical, and Executive
- 13-2011 Accountants and Auditors

The Geographic Market Information for overlapping employee classifications is more burdensome. In order to identify the five largest SOC classifications that overlap between the parties, for essentially every transaction, each side would need to classify *all* employees within the organization before they could ascertain the five largest overlapping groups (if they exist) even if each overlap relates to a small number of employees since there is no de minimis threshold. This would be a massive undertaking and made more difficult by the fact that most of the zones are counties, which are not included in employee postal addresses. Every filing person will need to categorize every one of its employees for the Geographic Market Information section. With the prevalence of remote working, the use of ERS commuting zones have significantly reduced the effectiveness in identifying overlaps because the zones are based on the worker's home address. Because many of these "back of house" functions can be performed from anywhere, identifying a geographic market based on commuter zones for a handful of workers will not assist the agencies in screening for labor market issues related to the transaction. With remote working becoming more and more common, it is also questionable whether identifying such commuting zones reveals meaningful information.

The proposed Worker and Workplace Safety section would impose a massive burden on filing persons (not limited to the acquired entity in the case of a selling filing person) by effectively requiring filers to maintain a database of penalties, findings, and pending matters with the WHD, NLRB, or OSHA covering the last five years. Like the SOC classification reporting, there is no fixed period to report (e.g., prior fiscal year), so filing persons would need to constantly update the information. Further, adjusting the information for ongoing transactions, such as the sale of a business unit, would require identifying all relevant entries associated with just that part of the filing person, every time an acquisition occurs. The Agencies' rationale for adding this section appears to be that a history of labor law violations in a firm could indicate "a concentrated labor

market where workers do not have the ability to easily find another job."[22] However, there is no support for this correlation. It may also be true that a prevalence of complaints may reflect a more organized labor group (who are more inclined to report potential violations) that may have more bargaining power than non-unionized employees. Regardless, the Proposed Rule would require this information for every filing regardless of any actual or substantive labor or product market overlaps.

The Agencies have not historically used these metrics to investigate potential labor issues. Before implementing additional information requirements for the HSR filing process, the Section believes it would be valuable to engage in further study regarding the kind of information that would be most helpful to the agencies when trying to identify potential labor market issues.

8. Identification of Communications and Messaging Systems

The Proposed Rule would require that filers identify and list all communications systems or messaging applications on any device used by the party "that could be used to" store or transmit information or documents related to business operations. This proposed requirement is overly broad and will not assist the Agencies in screening for anticompetitive transactions at the filing stage because the information has no relationship to the filers' commercial activities.

The Commission believes that the filers will have this information readily available and identification of these systems will impose minimal burden. However, the burden on filing persons in gathering this information may not be that minimal. Because there is no limitation to the requirement, large or diffuse organizations may have hundreds of communications systems that would require identification, but are unknown and/or unused by the filing person's employees who are involved in preparing the HSR filing. For example, a large organization with many operational divisions or subsidiaries may not have familiarity with all communications systems used across the entire organization. In some cases, a complying with such a provision would require that a distant manager investigate the communications systems of dozens of unique or autonomous divisions or entities. This would include researching the communications activity of employees at every level and interviewing employees to assess the use of communications systems not sanctioned or known by their employer on any employer-issued device, because such system "could be used to" store or transmit relevant information, whether or not the employee or employer is even aware of such system. As this requirement applies to all filing persons at the initial filing stage, the parties will incur a substantial burden, regardless of the competitive significance of the transaction, when attempting to comply with the proposed requirement. The unintended end result of this broad requirement could be the over identification of all potential messenger and communication systems that could be used to store or transit relevant information, even if they are not actually used for such purpose or by that person.

In the NPRM the Commission states that this information is needed at the filing stage because (1) company employees more frequently use messaging apps and chat technologies as alternatives to traditional forms of communication like email, and (2) companies do not understand that their preservation and retention obligations apply to these forms of communication. However this information is not relevant to which documents must be produced

[22] 88 Fed. Reg. 42178, 42198.

with an HSR filing, nor does it inform whether a notified transaction warrants further investigation.

The Section recognizes the value of identifying communications systems at later stages of the HSR process, such as when discussing how to comply with the document production portion of a Second Request. Because this information does not assist the agencies in screening whether to issue a Second Request and could impose significant burdens on filers, the Section proposes eliminating this requirement at the time of filing and instead addressing these issues at a later stage of the HSR process. If the Agencies are concerned about companies understanding their preservation obligations, the Section suggests amplifying the proposed language to be included in the Instructions to the Form to serve as a reminder, rather than imposing onerous requirements on every filing party.[23]

9. Certification Implies Premature Document Retention Obligations

The Proposed Rule also proposes to require an HSR filer to certify that it "has taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period." This requirement would appear to apply without regard to whether a proposed transaction raises competitive issues that might result in the issuance of a Second Request or litigation. This raises a concern of over-breadth. In addition, this new requirement raises a question as to when such retention obligations begin—*i.e.*, is it upon the filing of the HSR form, when a reportable transaction is signed and announced, at the time the parties conclude that the transaction will require an HSR filing, or when a potentially reportable transaction first arises. Document preservation measures also generally must be implemented by identifying a set of relevant custodians whose files will be preserved. In many transactions, that will be an expanding set of individuals over the course of time. Moreover, preservation efforts require action by information technology teams—and potentially outside vendors—which would mean that knowledge about the pendency of a highly sensitive transaction would be shared outside the core transaction team.

The Commission proposes amending the language of the certification that filing persons must submit to include affirmation that the filing person has taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction as of the day of the initial filing. The Section acknowledges that the Agencies' investigative efforts may be hampered by the inappropriate deletion or destruction of materials responsive to a Second Request, but the Proposed Rule imposes an immense burden on filing parties for the vast majority of transactions going through the HSR filing process. A legal document hold does not simply encompass the suspension of auto-delete policies, as discussed in the NPRM. They are difficult and expensive to implement with precision, and typically extend to individuals, databases, communication systems, and materials beyond the scope of the transaction. This proposed legal hold would apply to every filing person submitting an HSR filing despite the fact that the vast majority of those transactions are unlikely to be the subject of an investigation.

[23] The Agencies propose including language in the Instructions to the HSR Form to remind filing persons "that there are criminal penalties under other federal statutes that prohibit [practices] aimed at frustrating or impeding the legitimate functions of government departments or agencies." 88 Fed. Reg. 42178, 42206.

The burden of such a legal hold increases exponentially when considering the breadth of its scope in terms of materials covered, personnel subject to the hold and the duration. First, the proposed certification language refers to documents "related to the transaction," but the certification's language could be interpreted to imply an obligation to preserve any documents that could be solicited by a Second Request.[24] Second Requests routinely require multitudes of ordinary course of business documents unrelated to any specific transaction. Millions of documents could be subject to the legal hold on every transaction that requires an HSR filing regardless of the existence of any competitive impact. Second, the legal hold is not limited to specific custodians or a specific duration like in a document production for a Second Request. Therefore all employees of the filing person would be affected, including those with materials related to the transaction that may have no value for investigation purposes and personnel who may not yet be aware of the transaction.

Potential criminal liability weighs against any attempt at mitigating the burden of this requirement by implementing a tailored legal hold. The Agencies also propose including language in the Instructions to the HSR Form to remind filing persons "that there are criminal penalties under other federal statutes that prohibit [practices] aimed at frustrating or impeding the legitimate functions of government departments or agencies."[25] The NPRM cautions that filing persons can be subject to criminal penalties when they disclaim or modify statements submitted with the HSR Form.[26] This arguably includes the statement to be added to the certification where the filing person must affirm they have taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction. This presents the unwarranted risk that the agencies could conclude, that the filing person's efforts to implement the legal hold fell short of the affirmation submitted with the filing and pursue criminal penalties.

The Section acknowledges that deletion or destruction of information during the initial 30-day waiting period could "undermine [the reviewing agency's] ability to conduct a full in-depth investigation pursuant to the Act to determine if the transaction is likely to violate Section 7 of the Clayton Act or any other antitrust law and to seek to prevent its consummation."[27] However, the FTC did not address the significant burden the legal hold language in the certificate imposes on every HSR filer vis-à-vis the purported risk of document destruction in a merger investigation. The added reminder about the criminal penalties under federal statues should act as a deterrent for any deceptive practices aimed at frustrating or impeding the legitimate functions of the agency. Therefore, the Agencies should balance the significant burden and cost the legal hold will impose on every HSR filer against the potential benefit of preserving information that

[24] The additional language reads: "I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. 18a, require the submission of additional information or documentary material relevant to the proposed transaction. I have taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period." 88 Fed. Reg. 42178, 42218.
[25] 88 Fed. Reg. 42178, 42206.
[26] 88 Fed. Reg. 42178, 42206. ("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.")
[27] 88 Fed. Reg. 42178, 42206.

could arguably be lost during the initial 30-day waiting period in a very small percentage of reportable deals that receive a Second Request. To that end, the Section suggests to delay the requirement of a legal hold to the time at which a Second Request is issued, or Agency Staff has notified the parties that a Second Request is imminent.

B. Un-Defined or Subjective Requirements for "Business Documents" Increases Risk of Asymmetric Submissions or Technical Non-Compliance

The burden of subjective, less-bright-line requirements should be weighed against the Agencies' need for such information during the initial 30 days and the risk exposure and lack of certainty to filing parties regarding compliance with the HSR Rules. Detailed below are several proposed requirements that will likely introduce uncertainty among parties as to whether they have properly met their obligations.

1. Transaction-Related Documents

The Proposed Rule proposes to expand the scope of "Business Documents" to be included with any HSR filing—and to require document preservation measures without regard to the likelihood of any particular transaction resulting in litigation. Apart from cost considerations of a legal hold notice discussed above, the Section also is concerned that these expanded requirements will result in inadvertent filing deficiencies and uncertainty.

a) Supervisory Deal Team Lead(s)

Under current rules, Item 4(c) and 4(d) documents include those prepared "by or for" officers or directors of the parties. The "officers" and "directors" of a filing party are well defined under current HSR rules and interpretations and are generally a finite and objectively definable set of individuals. The Proposed Rule proposes to expand the scope of responsive Business Documents to also include those prepared by or for "supervisory deal team lead(s)." Unlike officers and directors, the identity of such lead(s) may be quite unclear as it would vary across transactions and even over the course of a single transaction.

The introduction of this new category of potential custodians ("supervisory deal team lead(s)") will add a layer of complexity and subjectivity to the collection of Transaction-Related Documents (as that term is defined in the Proposed Rule). "Supervisory deal team lead(s)" is not a defined term and the FTC leaves the determination of such individual(s) to the filing person. This determination inherently will be subjective, and in some cases, there may not be an identifiable team lead(s), or multiple team lead(s) heading different work streams or functional areas. The NPRM's sole example of a supervisory deal team lead is a leader or individual serving on the investment committee, which the FTC has previously opined are "officer" or "director" equivalents. If the concern is properly identifying the "officer" or "director" equivalents of a non-corporate entity, the FTC could consider issuing guidance on the parameters of such roles. Conversely, if the Agencies are concerned that certain documents are not being submitted currently because they do not reach an officer, director, or in the case of a non-corporate entity, individuals exercising similar functions, an example or definition that clarifies this position would be instructive. Instead, the Proposed Rule introduces a new concept that is

susceptible to varying interpretations and varying degrees of submission (whether over- or under-inclusion) by filing parties.

b) Drafts

The Proposed Rule requires submission of drafts of Transaction-Related Documents submitted with the HSR filing. Capturing every draft of a Transaction-Related Document that were sent to an officer, director, or supervisory deal team lead will be overly burdensome, and may require the use of expensive e-discovery or forensic collection tools. Also, depending on whether collaborative document creation tools are used, it may be difficult to identify and capture every draft. Further, the drafts may not be useful to the extent they are not factually accurate. This excessive burden will apply to every transaction regardless of potential competitive effects.

The FTC recognizes that this proposal creates an additional burden (and the potential for agency staff to be overwhelmed by large document submissions), and seeks comments on an alternative proposal that parties only need to provide drafts within 48 hours of a request from agency staff. However, this alternative proposal does not in fact mitigate the burden imposed by this requirement. The burden primarily resides in the collection, and less so in the production of the drafts—and parties may need more than 48 hours to ensure a thorough collection of the drafts and review those documents for potential legal privilege claims. In other words, even with this alternative proposal in place, parties would need to have already collected the drafts, and thus would have already incurred the burden associated with compliance of this instruction.

2. Periodic Plans and Reports

The Agencies also propose to expand the scope of responsive Business Documents to submit "Periodic Plans and Reports"—*i.e.*, all documents prepared in the ordinary course of business submitted to the Chief Executive Officer ("CEO"), direct reports to the CEO, and boards of directors for every entity within a filing Person that discuss markets, market shares, competitors and competition for overlapping products or services. The Proposed Rule notes such documents "often" are collected "as part of diligence for a potential transaction."[28] Contrary to the FTC's assumption in the NPRM, companies do not "often collect a targeted set of ordinary course documents that do not need to be submitted as part of an HSR Filing"[29]—and even if parties collect some sample of these documents, these collections are typically not exhaustive and would be unlikely to be fully compliant with the proposed requirement.

Although the documents disclosed in connection with transaction due diligence often could be identified based on whether such documents were placed in a transaction "data room," the proposal is not limited to diligence-related documents. Rather it is proposed to extend to any semi-annual or quarterly "plans and reports" shared with CEO, their direct reports, or the board of directors of any entity within a filing party and that discuss competitive issues relating to "any product or service that is provided by both the acquiring person and the acquired entity." Unmoored by reference to a proposed transaction or to documents shared during the course of

[28] 88 Fed. Reg. 42178, 42195.
[29] 88 Fed. Reg. 42178, 42195.

transaction diligence, the Section believes that the expanded requirements will generate substantial uncertainty as to what documents must be included in an HSR filing.

The proposed requirement to submit "Periodic Plans and Reports" is overbroad, especially in light of the proposed Horizontal Overlap and Supplier Relationship Narratives. As the Agencies note, this can lead to extremely large document submissions that not only burden the filers but will be counterproductive in allowing the Agencies to meet their stated goals of efficiency and effectiveness. Depending on the size and structure of the organization, ensuring compliance with this proposed requirement may require forensic document collection efforts that parties more typically employ in connection with compliance with a Second Request—requiring significant additional time and expense. Further, because the proposed requirement may extend to entities not otherwise involved in the transaction, parties may need to disclose a potential transaction before it would have otherwise planned.

The Agencies' proposed modification to this new requirement (a narrowing of the applicable custodians) while helpful in theory opens up more potential problems in practice. Absent specific guidance about which individuals certain required documents need to have been shared with, it will ultimately be the subjective determination of each filing party. This not only makes compliance difficult it may lead to different amounts of information being supplied by different parties within even the same transaction depending on their interpretation of the proposed rule. Also, narrowing the relevant custodians will not be a one size fits all determination as different filers have different corporate structures and individuals with the same titles may have very different functional roles at different corporations.

3. Organizational Chart of Authors and Recipients

Requiring organizational charts for authors and recipients of business documents submitted with an HSR filing would present several challenges. The Commission states that the chart would help contextualize reporting relationships, as well as the authors' relative seniority in order for the agencies to more "quickly assess which documents contain high-level assessments from key employees." The parties may not maintain employee organizational charts that contextualize the relationships and relative seniority of authors and recipients of business documents in the ordinary course of business. Or if they do, such charts may not be regularly updated. Also, for certain types of filing persons, such as private equity funds, the individuals may not technically be employed by an entity within the filing Person, introducing additional complications regarding certification of the veracity and completeness of the submitted filing (as it relates to the organizational charts).

Generating up-to-date employee organizational charts for authors of responsive documents solely for the purposes of filing would present the further challenge of requiring the parties to determine which employees to include, in addition to the authors of responsive documents, and how to organize them in a manner that contextualizes their role in the current transaction. The definition of officer already limits responsive documents to those prepared by or for an officer whose role is identified in the charter or by-laws, or who is appointed by the board of directors—while the proposed inclusion of documents prepared by or for "supervisory deal team lead(s)" muddies this distinction.

HSR filings currently require name(s) and title(s) of non-third-party author(s) of Item 4(c) and 4(d) documents today. While the Section appreciates how this information may provide some context for the preparation of certain documents, requiring organizational charts of authors and recipients (and indicating whose files were searched) adds burden to filing parties while not being additive to the Agencies' consideration of whether to issue a Second Request. In addition to the concerns regarding production of organizational charts detailed immediately above, parties may claim privilege on information regarding whose files were searched. For those parties that waive any claim of privilege on this information and provide it with their filing, there may be a risk that the Agencies delay the start of the waiting period because they consider a search to be incomplete.

Beyond excluding Transaction-Related Documents prepared by or for "supervisory deal team lead(s)," an alternative to providing an organizational chart that would provide the information sought by the agencies would be to identify the person who supervised the drafting, and the person to whom that drafter directly reports (if applicable).

C. Certain Information May Not Be Known at the Time of Filing, but May Not Materially Impact Assessment of Whether to Issue a Second Request

The Section also suggests that the Agencies clarify expected obligations to update information that may not exist (or exist in final form) at the time of filing—and balance any such requirements against what information is necessary to determine whether a notified transaction warrants a Second Request.

Certain transaction details are often not fully determined at the time of signing a definitive agreement or at the time of the HSR filing submission, but also may not be necessary to determine whether to issue a Second Request. While the Proposed Rule would not eliminate the possibility of parties filing on the basis of a term sheet, the Section seeks clarity on what level of information would constitute "sufficient detail" as required by the Proposed Rule, including what types of terms that may still be subject to negotiations would render a term sheet as an insufficient basis to submit an HSR filing.

Certain information requested by the Proposed Rule is often subject to changes and revisions up until the time of closing, and is unlikely to impact the core of the transaction (i.e., A acquiring B), for example:

- Transaction Structures (that are usually driven by non-competition related concerns such as tax implications);
- Ownership structure may not be fully settled, or may change prior to closing—including co-investment, or equity syndication that may not be solicited until after the parties have a signed agreement, or third party investors who have not made elections regarding co-investment or rollover;
- Lenders/Creditors whose financing role does not create a separate HSR-reportable event;
- Officers/Directors/Board Observers (which may in part be dependent on co-investors that invest in the transaction); or

- Finalized, executed agreement.

Requiring such types of transaction details to be fully determined at the time of filing will likely cause undue delays although the information may be unlikely to impact the Agencies' review of the transaction. As such, these proposed requirements risk unnecessarily increasing the overall timing to close a transaction especially in instances where parties intend to file on the basis of a letter of intent.

D. Unique Burdens to Acquired Persons in Transactions Subject to 16 C.F.R. § 801.30

The Proposed Rule's revisions to the HSR process would create unique burdens for filings required under 16 CFR § 801.30. Section 801.30 modifies the HSR filing process for what are frequently non-consensual transactions such as open market purchases of publicly traded stock or tender offers.[30] Where there is no agreement between the parties, the acquiring person is required to send notice to the acquired person indicating that the acquiring person will be submitting an HSR filing and the acquired person may also need to file. Unlike more common HSR filings where both parties have to file to start the waiting period, the waiting period for 801.30 transactions begins when the acquiring person is on file.

In many of these transactions, the acquiring person only has access to publicly available information about the acquired person. The proposed changes would require the acquiring person to provide information based on the acquired person's business activities which may not be available. For example, the acquiring person may not have knowledge of the acquired person's pipeline products or service (needed to complete the Horizontal Overlap Narrative) or supply relationships with the acquiring person's competitors (needed to complete the Supply Relationship Narrative). The Proposed Rule does not provide a solution for the lack of information in 801.30 scenarios, and absent special consideration for 801.30 filings, the acquiring person may not be able to submit a complete HSR filing and timely start the HSR waiting period.

Acquired persons often learn about 801.30 transactions for the first time when receiving notice of their filing obligation from the acquiring person. Upon receipt of that notice, the acquired person is required to file within 15 calendar days (10 calendar days for cash tender offers) after the acquiring person has filed. This means, the acquired person, which may be an infrequent HSR filer, would have approximately two weeks or less to engage counsel and prepare an HSR filing that the NPRM estimates could take up to 259 hours. Absent substantial changes to the proposed rules, acquired persons in 801.30 transactions will be at risk of violating the HSR Act through no fault of their own.

To keep the proposed changes from having a detrimental effect on 801.30 transactions, the Section suggests limiting the information required in the initial filings based on each filing person's personal knowledge, limiting the majority of the information required by the proposed

[30] Filings required under Section 801.30 include transactions related to open market purchases of voting securities, minority acquisitions of voting securities or non-corporate interests from third parties, tender offers, secondary acquisitions, conversions, and exercises of options and warrants.

rules to transactions likely to have some competitive impact, and truncating the acquired person's 801.30 filing by shifting the requirement to provide significant amounts of additional information, if needed, to a post-filing stage.

V. The Agencies' Estimates Understate the Burden of the Proposed Collection of Information

A. Significant Increase According to FTC's Own Estimates

The Agencies estimate that the Form—as it exists now—takes on average 37 hours to complete in advance of an HSR filing. Based on a canvas of current Agency staff, the Commission's Paperwork Reduction Act analysis estimates that the proposed changes would require an additional 12 to 222 hours—i.e., an increase of 30 percent to 600 percent—for a possible total of up to 259 hours. However, we have no context for what the median might be for filings to better understand whether the low and high ends are outliers or the anticipated typical experience.

Even accepting the Commission's estimated average of 107 additional hours to prepare HSR filings as correct (rather than an underestimate), the magnitude of the changes will involve a significant increase in the legal expenses that filing parties typically incur for HSR filings. While some of the proposed requirements are solely aimed at transactions with competitive impacts, the baseline increase in burden across all transaction types (most of which historically have not warranted further investigation beyond the initial 30-day waiting period) is not in line with a practical balancing of burden to filers and benefit for the Agencies. This across-the-board increase in added costs to prepare a filing neutralizes the effect of the lower filing fees for certain transactions implemented as a result of the 2022 Merger Fee Modernization Act.

B. Cost Assumptions May Not Fully Account for Burden

Although the Commission's Paperwork Reduction Act analysis anticipate a material increase in time needed to complete the new Form, the Section is concerned that these estimates may understate the filing burdens arising from the proposed rule changes. First, while hourly rates applicable to attorney and executive time will vary across law firms and companies, the Section believes that the Commission's estimate of $460 per hour may underestimate the blended hourly rate applicable to most HSR filings, particularly given attorney billing rates and that such filings often require senior executive participation.

Second, the Section is concerned that the NPRM is not accurate in anticipating that the proposed amendments will result in "either minimal or no additional capital or other non-labor costs" because HSR filers "generally have or obtain necessary equipment for other business purposes." For example, the proposed changes to the scope of documents that would need to be collected and reviewed as possible Business Documents—i.e., the requirement to produce drafts, to produce ordinary-course documents, and to search the files of additional custodians—may transform a routine HSR filing into a more extensive e-discovery effort requiring additional vendor fees and expenses. The proposed document preservation requirements will impose additional costs including for the vast majority of HSR-reportable transactions for which there is no reasonable expectation of litigation.

Further, in the Paperwork Reduction Act analysis's burden estimates, the burden associated with certain information is assumed to be static in nature or consistent across deals. However, this may not be true for certain information that is either transaction-specific—e.g., officer and directors for newly created entities as part of the transaction—or organizational information that may be subject to change—e.g., organizational structures, personnel, officers or directors for newly acquired entities, to name a few. As a result, the burden may be under-estimated because information is presumed to remain constant over time.

C. Any Obligations to Update Information Increases Potential Burdens (and Is Not Contemplated in the Burden Estimates)

The NPRM states that the Agencies would benefit from "more complete" information regarding the transaction, including the structure, ownership, and governance of any entities yet-to-be-created. However, the NPRM does not address the expectations or obligations of the filing parties to update information that may not be fully settled at the time of filing, or may change after filing, but prior to closing. There are time and financial burdens and costs associated with tracking information that may not have been available at the time of filing but may become available at a later date—even immediately prior to closing. To the extent the Agencies expect, or will obligate the filing parties to update information that was not available at the time of filing, or to which minor changes may occur, the burden for such information collection should also be included in these estimates.

VI. Additional Suggestions that May Further Enhance the Quality, Utility, and Clarity of the Information to Be Collected, and Decrease the Burden on Filing Parties

A. Limit Certain Information Requirements to Just Overlapping Entities

While some information may assist the Commission in their mission without regard to whether the parties operations overlap in a NAICS industry and whether there are any "Material Other Agreements", some of the proposed requirements could be limited with respect to transactions that do not present any overlaps or Material Other Agreements without diminishing the quality of information received by the Agencies.

1. "Doing Business As" and "Formerly Known As" Names

The requirement to provide three years of "doing business as" and "formerly known as" names may be difficult for filing parties if they do not maintain such records. While recent changes may provide information that the Agencies find helpful, parties are not likely to have this historical information readily available and will need to recreate the information for the HSR filing. This information is not likely to be relevant for the Agencies' review of transactions unless the entities who use other names are the ones who generate revenue that results in a NAICS overlap, or they are parties to Material Other Agreements.

2. Transaction Diagrams

The Commission's proposed requirement that the parties' submit a diagram of the transaction, including a chart explaining the relationship between all entities and/or natural persons involved

in the transaction would be unnecessary if there are no apparent competitive impacts. In such transactions, limiting the scope of the required diagram to only the ultimate parent entities, acquiring / acquired entities would allow the Commission to understand the structure of the transaction without imposing the unnecessary burden of including all entities involved in the transaction.

3. Officers, Directors, and Board Observers

The Commission proposes the identification of the officers, directors, or board observers (or individuals exercising similar functions for non-corporate entities) of *all* entities within the acquiring person and acquired entity, as well as the identification of other entities for which those individuals currently serve, or within the two years prior to filing had served, in such a role. A more targeted request that would serve to provide much of the information desired by the Commission would be for the acquiring person and acquired entity to identify any officer, director, observer (or individuals exercising similar functions for non-corporate entities) of the acquiring person who is expected to be an officer, director, observer (or individuals exercising similar functions for non-corporate entities) of the acquired entity.

4. Labor Market Information

Where filing parties operate in different industries and/or have different geographic footprints, they are unlikely to employ workers from the same labor market. Restricting the Commission's proposed requirement for labor market information to only those transactions involving parties with operations in the same NAICS industries and the same geographic area would reduce the burden on filing parties and the reviewing agency.

The Commission proposes requiring filing parties to classify their workers—limited to their five largest categories of employees—based using the Bureau of Labor Statistics' SOC system. Where a proposed transaction involves no apparent competitive impacts, requiring this information is unlikely to assist the Agencies in their review. Moreover, using 6-digit SOC classifications as a screening tool is likely to be unhelpful where a transaction involves parties with no operational overlaps or other relationships potentially impacting competition. As an example, the SOC code for Retail Salespersons covers all employees who sell merchandise, "such as furniture, motor vehicles, appliances, or apparel to consumers." The proposed acquisition of a clothing retailer by a private equity firm that also owns an automobile dealer may therefore imply that the acquisition presents labor market concerns when none exist.

As the Proposed Rule asserts, the location of work is an independent dimension of a labor market. Limiting the proposed requirement that the parties identify overlapping ERS-defined commuting zones, and the total number of employees within each zone, to only those entities operating in overlapping NAICS industries would allow the Agencies to assess both whether they are likely to employ workers within the same labor market, and whether ERS-defined commuting zones are relevant to their labor market assessment at all. As suggested above, additional study of this issue may yield more tailored methods for capturing information that is more meaningful to the Agencies' competition analysis (and less burdensome for the parties).

5. Prior Acquisitions

The Commission proposes extending the time frame to report on prior acquisitions from 5 to 10 years. It is often difficult for parties to obtain information from a target's prior owners after an acquisition, and often records are merged or misplaced in merger integration. One way to reduce burden on filers is to clarify that prior acquisitions only need to be reported from the time in which the current ultimate parent entity controlled the acquiring or acquired entity.

B. Active Engagement and Additional Guidance Would Be Helpful to Filing Parties and Enhance the Agencies' Utility of the Information Received

Issuing concurrent Agency guidance upon the implementation of the final rules would be helpful to filing parties. This guidance can take multiple forms—e.g., active engagement with or presentations to the antitrust bar regarding expectations for compliance with the new rules (especially how to avoid "bounced" filings), frequently asked questions, resuming publication of informal interpretations on the FTC's website. For example, when the 2011 rule changes were implemented (most notably, the introduction of the "associates" concept), the FTC's Premerger Notification Office proactively presented to members of various bar associations. These presentations helped to provide the Premerger Notification Office staff's perspective on the 2011 rule changes and to share some of their evolving informal interpretations regarding the new rules and the form changes. Such presentations ostensibly also enhanced the quality and utility of the information the Agencies received by ensuring closer compliance with the rules.

VII. Conclusion

In conclusion, the Section believes that as currently drafted certain aspects of the Proposed Rule introduces a burden to all filing parties that is disproportionate to the Agencies' need for that information to determine whether to investigate a notified transactions further, as well as the relatively low number of filings that historically have warranted further investigation. The FTC should reconsider how to appropriately balance their legitimate investigatory needs without unduly burdening the majority of filing parties that are not notifying transactions likely to raise competitive concerns.